LEGAL HANDBOOK
FOR
SPECIAL AGENTS

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LHBSAIN - LEGAL HANDBOOK FOR SPECIAL AGENTS INTRODUCTION

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SECTION 0. FOREWORD AND INSTRUCTIONS FOR USING THIS HANDBOOK

**EffDte: 04/28/1978 MCRT#: 0 Div: D9 Cav: SecCls:

0-1 FOREWORD AND INSTRUCTIONS FOR USING THIS HANDBOOK

The Legal Handbook for Special Agents is not intended to be a treatise on the law. Rather, it is designed as a compilation of basic principles of constitutional and criminal procedural law in those areas of greatest concern to the Agent-Investigator. It is written in understandable language and incorporates, where possible, applicable Bureau policy.

This handbook was prepared by the|Office of the General Counsel|based on Supreme Court decisions or, in those areas where the Supreme Court has not addressed a particular legal issue, on an analysis of lower Federal court decisions. The main body of the handbook contains the general rules in effect for each area of the law discussed. Appendix 4 at the end of the handbook contains information on selected Federal circuit courts of appeals cases that are in conflict, in whole or in part, with the general rule. Therefore, in using the handbook, Agent-Investigators are required to scan Appendix 4 for any special rules in effect in their circuit, in addition to locating the general rule in the main body of the handbook. Appendix 4 is broken down by section (Search and Seizure, Probable Cause, Confessions, etc.); therefore, Special Agents need not review the entire Appendix each time the handbook is used.

Local policies and practices of U.S. Magistrates

and U.S. Attorneys often vary from district to district. Any such local rules, not contrary to stated Bureau policy, should be deemed supplementary to instructions contained in this handbook.

The handbook will be revised from time to time as the law and Bureau policy change. It has been prepared in a handy size and form, and Special Agents are encouraged to have it available in the course of an investigation.

**EffDte: 09/09/1994 MCRT#: 281 Div: D9 Cav: SecCls:

********** END OF REPORT **********
SENSITIVE

SECTION 1. PROBABLE CAUSE

**EffDte: 04/28/1978 MCRT#: 0 Div: D9 Cav: SecCls:

1-1 DEFINITION

(1) Probable cause is a reasonable belief based on available facts and circumstances, and the logical inferences that can be drawn from them. It is determined by the totality of the facts and circumstances, as viewed from the perspective of a reasonable law enforcement officer.

(2) The probable cause standard is one of probability, not certainty; thus, it is significantly lower than the "proof beyond a reasonable doubt" standard necessary to support a criminal conviction.

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1-2 RELEVANT INFORMATION

Any relevant, reliable, legally obtained information may be used to establish probable cause, even though that same information may be excluded from trial by a rule of evidence. For example, probable cause may be based in whole or in part on hearsay (second hand) information even though the rules of evidence generally exclude hearsay evidence from a trial. Likewise, a defendant's prior criminal record may be relevant to the issue of probable cause even though that same information may not be admissible to prove his/her guilt at trial.

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1-3 APPLICATION OF THE STANDARD

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1-3.1 General

Probable cause is the level of proof required by the Fourth Amendment to support the issuance of warrants to arrest or to search and by statute to obtain a court order to intercept communications. It is also the Fourth Amendment standard for WARRANTLESS ARRESTS, and for CERTAIN WARRANTLESS SEARCHES--e.g., emergency searches for evidence, the vehicle exception, etc.

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1-3.2 |Probable Cause to Arrest

The constitutional validity of every arrest, whether made with or without a warrant, depends upon the existence of PROBABLE CAUSE AT THE MOMENT THE ARREST IS MADE. Evidence obtained subsequent to the arrest cannot be used retrospectively to justify the arrest. An arrest by warrant ensures that a magistrate judge or a grand jury has predetermined the existence of probable cause. A warrantless arrest is valid if a federal offense--felony or misdemeanor--is committed in the presence of Agents, or, if the arresting Agents have probable cause to believe that a federal felony was committed by the person being arrested.|

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1-3.3 |Probable Cause to Search

When probable cause is required to justify a search--e.g., search warrant, emergency search, or the vehicle exception--the available facts and circumstances must support the conclusion that a crime has been committed, that items sought are connected with that crime (or are persons for whose arrest there is probable cause, or who are being unlawfully restrained), and that the described items or persons are presently located or soon to be located at a particularly described place.|

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1-4 |SOURCES|OF FACTS

|Facts to establish probable cause may be based on firsthand perceptions of an Agent, or they may be obtained from secondhand sources (hearsay).|

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1-4.1 |Firsthand Knowledge

Firsthand knowledge consists of information obtained directly through the senses--i.e., sight, hearing, smell, or touch.|

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1-4.2 |Hearsay

Information of which the Agent does not have personal knowledge is hearsay. Although probable cause may be based in whole or in part on hearsay, Agents should carefully evaluate such information to ensure that it is given proper weight. In evaluating hearsay information, Agents should consider the CREDIBILITY OF THE SOURCE as well as the RELIABILITY OF THE INFORMATION PROVIDED.

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1-4.2.1 Credibility of the Source

(1) Knowledge of the source - In everyday experience, either consciously or subconsciously, we make judgments regarding the credibility of individuals who provide information to us. Whether we know the person, how well we know them, and what we know about them--these are common factors we rely upon in judging credibility.

(2) Corroboration of facts - Credibility of any source can be bolstered if we already know, or can establish independently, that a substantial portion of the information is true.

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1-4.2.2 Reliability of the Information

The most credible of sources may provide information that is unreliable. Thus, in assessing the reliability of the information, it is important to ascertain the basis of it. In other words, how does the source know? How was the information acquired? If Agents know how the source obtained the information, it is possible to assess its reliability. For example, if the source obtained it firsthand, it is more reliable than if it was obtained through hearsay. If the Agents do not know how the source obtained the information, a high degree of detail in the information provided can support an inference that the information is reliable. In the absence of knowledge of the basis for the source's information, independent corroboration can support a reasonable belief in the information's reliability.

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1-4.3 Logical Inferences

In addition to information acquired through firsthand perceptions or hearsay, Agents may draw logical inferences from that

information. For example, Agents may receive reliable information that an individual is engaged in illegal distribution of cocaine. Although the information makes no reference to other items of evidentiary value, the Agents may logically infer that one who engages in that kind of criminal activity will also possess related items such as packaging materials, large amounts of cash, records that would identify names of sources and customers, etc. Such inferences can be included in the probable cause statement to support the issuance of a search warrant for all of the relevant items named.

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1-5 COMMUNICATING THE FACTS

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1-5.1 General

If Agents apply for a warrant to arrest or to search, they must communicate the underlying facts to support the issuance of the warrant (probable cause) to a magistrate judge who has the authority to issue the warrant. If Agents make warrantless arrests or conduct warrantless searches requiring probable cause, the obligation to communicate the probable cause underlying the action will arise thereafter. For example, following a warrantless arrest, Rule 5 of the Federal Rules of Criminal Procedure (FED.R.CRIM.P.) requires that the arrestee be taken to the nearest available magistrate judge without unnecessary delay, and that a Complaint be filed. A Complaint is defined as "a written statement of the essential facts constituting the offense charged." If Agents conduct a warrantless search where probable cause is the legal prerequisite--e.g., the Vehicle Exception--it is most likely that their assessment of probable cause will be subsequently challenged by the defendant during a suppression hearing. The important point is that whether obtaining warrants, or justifying warrantless actions requiring probable cause, Agents must be prepared to communicate the facts supporting their determination that probable cause existed to support the action taken.

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1-5.2 Constitutional Requirements for Issuance of Warrants

The Fourth Amendment explicitly mandates that "no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In addition, the U.S. Supreme Court has held that the Fourth Amendment implicitly requires that a warrant be issued by "a neutral, detached magistrate."

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1-5.3 Procedural Requirements for Issuance of Warrants

(1) Arrest Warrants - In addition to the constitutional requirements for warrants, the Federal Rules of Criminal Procedure (FED.R.CRIM.P.) set forth certain rules governing issuance of arrest warrants.

(a) The Complaint - Rule 3 defines a Complaint as "a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a magistrate judge." The Administrative Office of the United States Courts has provided Form A.O. 91 ("Criminal Complaint") for assistance in preparing a complaint.

(b) Rule 4(a), FED.R.CRIM.P., provides that if the Complaint establishes probable cause to believe that an offense has been committed and that the defendant committed it, a warrant for the arrest of the defendant shall issue to any officer authorized to execute it. The finding of probable cause may be based upon hearsay evidence in whole or in part. FBI Agents are authorized by federal statute, Title 18, USC, Section 3052, to execute arrest warrants.

(2) Search Warrants - In addition to the constitutional rules governing the issuance of warrants, the FED.R.CRIM.P. set forth certain requirements for issuance of search warrants.

(a) Application and Affidavit for Search Warrant - The Administrative Office of the United States Courts has provided Form A.O. 106 ("Application and Affidavit for Search Warrant") to facilitate application for search warrants.

(b) Rule 41, FED.R.CRIM.P., provides that a warrant shall issue only on an affidavit sworn before a federal or state magistrate judge and establishing the grounds for issuing the

warrant. If circumstances make it reasonable to dispense with a written affidavit, a federal magistrate judge may issue a warrant upon sworn oral testimony communicated by telephone.

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1-5.4 The Probable Cause Statement

(1) General - Whether preparing an affidavit for a search warrant or a complaint for an arrest warrant, the purpose is the same: To communicate the relevant information to the magistrate judge in an understandable way. Based upon the information provided, the magistrate judge must make an independent determination that probable cause exists to support the issuance of the warrant. In the same manner that Agents assess the value and weight of information by evaluating the credibility of the source and the reliability of the information, a magistrate judge will assess the information and make a probable cause determination.

(2) The "Four-Corners" Rule - The Agent's responsibility is to ensure that all of the appropriate information is included in the probable cause statement. Information known to the Agent but not included in the affidavit cannot be considered by the magistrate judge in the probable cause determination.

(3) In addition to relating all of the relevant facts necessary to support a finding of probable cause, the affidavit should also attribute the facts to their sources and indicate the time when the Agent and the sources obtained the information.

(4) Credibility of the Source - Information should be communicated to the magistrate judge which shows that the source should be believed.

(a) Named Source - When the source of the information is named in the affidavit, the source's credibility is presumed.

(b) Unnamed Source - When the source is not named, Agents should, whenever possible, provide information to the magistrate judge that is relevant to the source's credibility.

1. Good Citizen/Law Enforcement Officer - The credibility of a good citizen or a law enforcement officer is presumed. Thus, if a source is a good citizen in the community or a law enforcement officer, that information should be set forth in the affidavit so that the magistrate judge can draw the appropriate inferences regarding the source's credibility.

2. Criminal Informant - The credibility of one who is involved in criminal activity is not presumed; it must be

established. Consequently, it will be necessary to provide some basis for establishing that credibility. Relevant factors can be prior instances when the source provided reliable information (track record), or corroboration through independent investigation of a substantial portion of the information provided by the source.

3. Anonymous Tips - Information from an anonymous source can also be considered by a magistrate judge in determining the existence of probable cause. The degree of detail in the source's information, or corroboration of the information through independent investigation, will assist the magistrate judge in evaluating the credibility of the source.

(5) Reliability of the Information - The most credible source may unwittingly provide unreliable information. A magistrate judge must be able to evaluate the reliability of the information. Disclosing to the magistrate judge how information was obtained is highly relevant. If a source obtained the information firsthand, that is sufficient to establish its reliability. If that is not the case, or if the manner in which the information was acquired cannot be disclosed without endangering a confidential source, one or both of the following factors can help to establish the reliability of the information:

(a) Independent Corroboration - Independent corroboration of some of the facts provided by a source can bolster the trustworthiness of the information as a whole. Corroboration may take the form of confirming most of the facts supplied by a source, or by disclosing the subject's prior history of the kind of criminal activity at issue, such as noting a prior arrest or conviction record.

(b) Degree of Details - The U.S. Supreme Court has recognized that the greater the degree of details provided by a source, the greater is the inference that the information is reliable.

(6) The inability to satisfy either part of the two-pronged standard described above--i.e., credibility of source or reliability of information--does not foreclose a finding of probable cause. The ultimate test is whether the totality of information is sufficient to support a reasonable belief that a particular person committed a particular crime, or that particular items of evidence are located at a particular place. For example, if an informant's credibility cannot be established directly, the fact that the informant has previously proved to be a credible source can be considered by the magistrate judge in finding probable cause. Likewise, if an informant's basis of knowledge is not disclosed, but the information provided is highly detailed, a magistrate judge may conclude that the informant has a reliable basis for the information. Independent corroboration of the informant's information can bolster the belief in both the credibility of the source and the reliability of the information.

(7) One of the most critical challenges for an Agent is

providing sufficient information to a magistrate judge to establish probable cause without disclosing the identity of a confidential source. The following paragraphs illustrate how this may be accomplished:

"On December 15th, 1998, a confidential informant furnished information to me. This informant has given me information on six prior occasions within the past year which has resulted in the recovery of property stolen from the United States Government as well as property stolen from an interstate shipment. The information has resulted in the arrest of two individuals. Further details as to the past information provided by this informant would furnish clues as to his/her identity. The identity of this informant should be kept confidential because disclosure would endanger his/her life and impair his/her future usefulness to law enforcement. The informant told me that the following information is based upon his/her personal observations and knowledge: Within the past week, the informant has observed items marked Property of the United States' in a warehouse at 1435 Old Triangle Road, Triangle, Virginia. During the time of these observations, fifteen or twenty persons were present in the warehouse and several others arrived and departed. A man called Shorty,' believed to be the owner of the warehouse, was also present. Shorty is further described ... etc."

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1-6 REVIEW AND APPROVAL OF COMPLAINTS AND AFFIDAVITS

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1-6.1 Review by Field Office Chief Division Counsel (CDC)

Where possible and practicable, an Agent should review the facts of probable cause with the Chief Division Counsel, Associate Division Counsel (ADC), or FBI Legal Advisor before presenting the matter to the United States Attorney (USA) or Assistant United States Attorney (AUSA).

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1-6.2 Bureau Policy - USA/AUSA Approval

It is FBI policy that an Agent seeking an arrest or search warrant must obtain prior authority from the USA or AUSA before filing a Complaint or Affidavit for Search Warrant with the magistrate judge.

If the USA/AUSA recommends any additions, deletions, or other changes in the probable cause statement, such changes should be made before filing with the magistrate judge.

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1-6.3 Final Review and Filing

A copy of every Complaint and Affidavit for Search Warrant filed by an Agent is to be obtained for filing as a serial in the case file. Before such documents are placed in the case file, they are to be reviewed and initialed by the CDC, ADC or FBI Legal Advisor. The purpose of this review is to enable the field office to maintain control over the quality of Complaints and Affidavits prepared by Agents. Efforts to obtain warrants, whether or not successful, should be reported to the CDC, and a record thereof placed in the case file.

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1-7 PREPARATION GUIDELINES FOR PROBABLE CAUSE STATEMENT

The validity of a warrant may be jeopardized by careless mistakes in the preparation of the supporting affidavit. The following may help to avoid mistakes:

(1) USE SIMPLE, CONCISE LANGUAGE. The purpose of an affidavit is to communicate information to a magistrate judge. Using stilted, archaic language is detrimental to that purpose.

(2) AVOID POLICE JARGON. Words and phrases peculiar to the law enforcement profession may not be clearly understood by a magistrate judge.

(3) AVOID EXTRANEOUS INFORMATION. While it is important to include all of the information relevant to probable cause, it is equally important to avoid the clutter of irrelevant information. An affidavit is a probable cause statement, it is not an investigative report.

(4) USE SEPARATE, NUMBERED PARAGRAPHS. A separate, numbered paragraph for each source of information is an effective organizational technique.

(5) WHEN, WHO, FROM WHOM, HOW, AND WHAT. For each source of information, the affidavit should indicate whenever possible WHEN information was received, WHO received or acquired it, FROM WHOM (if hearsay) it was received, HOW the source acquired it, and WHAT the information is. It is recognized that this formula will not fit all circumstances. However, using it as a guide will minimize the risk

that important information will be omitted.

(6) AVOID CONCLUSORY STATEMENTS. Your responsibility is to communicate the facts. The magistrate judge's responsibility is to reach the appropriate conclusions based on those facts. For example, it is not appropriate to include in an affidavit such statements as: "Based on the foregoing, I have probable cause to believe...."

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SECTION 2. AFFIDAVITS AND COMPLAINTS

**EffDte: 04/28/1978 MCRT#: 0 Div: D9 Cav: SecCls:

2-1 |BACKGROUND|

This entire section was deleted. Provisions in former section 2 relating to probable cause were relocated to section 1, while provisions relating to the drafting of search warrants and arrest warrants were moved to sections addressing search and seizure. Furthermore, the text of those provisions was reworded in order to eliminate redundant sections.|

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SECTION 3. ARREST

**EffDte: 04/28/1978 MCRT#: 0 Div: D9 Cav: SecCls:

3-1 ISSUANCE OF ARREST WARRANTS

(1) Complaints: When a federal prosecution is initiated by a complaint, Rule 4, FED.R.CRIM.P., provides that jurisdiction over the defendant can be obtained by either a warrant or a summons. The rule states that a warrant shall issue for the arrest of the defendant if, based on either the complaint or an affidavit or affidavits filed with the complaint, there is probable cause to believe that an offense has been committed and that the defendant has committed it. The issuance of a summons for the appearance of the defendant requires the same showing. A complaint is defined in Rule 3, FED.R.CRIM.P., as "a written statement of the essential facts constituting the offense charged. It must be under oath and before a magistrate." Thus, federal law requires that probable cause for an arrest warrant be presented in documentary form under oath.

(2) Who May Issue an Arrest Warrant: Title 18, USC, Section 3041, confers the power to issue arrest warrants for any offense against the United States upon any justice or judge of the United States, or any U.S. magistrate. In addition, any chancellor, judge of a supreme court, chief or first judge of common pleas, mayor of a city, justice of the peace or other magistrate, of any state where the offender may be found can issue such warrants. Copies of warrants issued under this authority are returned to the court of the United States that has cognizance of the offense. Constitutionally, the requirement is that the issuing authority be neutral and detached and that he/she has the capability of deciding probable cause.

(3) Jurisdiction: Federal rules do not limit the application for an arrest warrant to any specified district. Usually, application for such a warrant will be made in the district where the offense was committed but that is not mandatory. Thus an arrest warrant may be issued by any of the designated magistrates in the place where the offender is found. While federal law makes provisions for a large class of magistrates to issue arrest warrants, the subject matter for which such a warrant shall issue is limited to federal offenses.

(4) Description of the Person to be Arrested: Rule 4(c)(1), FED.R.CRIM.P., states that an arrest warrant shall contain the name of the defendant or, if his/her name is unknown, any name or description by which he/she can be identified with reasonable certainty. The rule does not require the determination of the accused's true name. It is sufficient if the Agent develops facts which lead to a reasonable belief that a particular individual is the offender, and that may do no more than provide a distinguishing physical description or tell the particular circumstances in which

he/she will be found.

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3-2 CRIMINAL LIABILITY-ESCAPE

An Agent who either voluntarily or negligently permits the escape of a prisoner in Agent's custody by virtue of process issued under the laws of the United States by any court, judge, or magistrate, is guilty of a Federal criminal violation (Title 18, USC, Section 755).

**EffDte: 11/10/1988 MCRT#: 0 Div: D9 Cav: SecCls:

3-3 ARREST WITH WARRANT

**EffDte: 11/10/1988 MCRT#: 0 Div: D9 Cav: SecCls:

3-3.1 Policy

Wherever possible, prosecution should be authorized by the USA, and a warrant issued prior to an arrest. In addition, a search warrant is to be obtained before entry to third party premises for the purpose of arrest, in the absence of consent or exigent circumstances. SACs may authorize Agents to execute arrest warrants. In extraordinary circumstances, prior FBIHQ authorization should be obtained. For example, where the arrest may have a significant impact on an investigation in another field office, or where the arrest is likely to cause wide publicity due to the identity or status of the arrestee, FBIHQ should be notified and prior approval obtained before arrest.

**EffDte: 11/10/1988 MCRT#: 0 Div: D9 Cav: SecCls:

3-3.2 Prompt Execution

While there is no time limit on the execution of arrest warrants (unlike search warrants), as a general rule, the arrest should be made without prolonged delay.

**EffDte: 11/10/1988 MCRT#: 0 Div: D9 Cav: SecCls:

3-3.3 Joint Arrests (See MIOG, Part 2, 11-2.1.2(2).)

FBI Agents are authorized to serve all arrest warrants issued in cases over which the FBI has investigative jurisdiction. |The|Special Agent in Charge (SAC) may authorize joint arrests with state and local authorities, U.S. Marshals, or other federal law enforcement agencies. Special concern should be given to the utilization, or at least the alerting, of local authorities in instances where it may logically be anticipated that resistance could be forthcoming from the subject(s) or members of the community. Although the time of notification to local authorities concerning arrests made within their jurisdiction by FBI Agents is left to the discretion of the SACs, concern must be given to the sensitivity of local law enforcement agencies to know what is transpiring in their jurisdictions. The FBI must respect their responsibility to the people of their communities.

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3-3.4 Possession and Display of Warrant (See MIOG, Part II, 11-2.1.2(3).)

An Agent need not have the warrant in possession at the time of arrest, but upon request, |Agent|shall show the warrant to the defendant as soon as possible. If the Agent does not have the warrant in possession at the time of arrest, |Agent|shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. Where time will permit and the successful arrest of the subject will in no way be jeopardized, the arresting Agent should have the warrant of arrest in possession in order that the same may be exhibited to the subject upon request.

**EffDte: 05/28/1980 MCRT#: 0 Div: D9 Cav: SecCls:

3-3.5 Service of Summons (See MIOG, Part II, 11-2.1.3.)

Summonses should not be served by Agents without prior authorization of FBIHQ.

**EffDte: 05/28/1980 MCRT#: 0 Div: D9 Cav: SecCls:

3-4 ARREST WITHOUT WARRANT

**EffDte: 05/28/1980 MCRT#: 0 Div: D9 Cav: SecCls:

3-4.1 Policy

Where possible, SAC authority should be obtained before making warrantless arrests. |Agents are authorized to make warrantless arrests for any federal crime (felony or misdemeanor) committed in their presence.| Authority for warrantless felony|arrests|extends to crimes not committed in the presence of Agents, if they have probable cause to believe the person to be arrested has|committed a federal felony.| Use of the warrantless arrest authority should be limited to those instances in which sound judgment indicates the obtaining of a warrant would unduly burden the investigation or substantially increase the potential for danger or escape. |(See LHBSA, 3-4.3, for nonfederal arrest authority.)|

**EffDte: 01/30/1997 MCRT#: 583 Div: D9 Cav: SecCls:

3-4.2 Notification to U.S. Attorney

Where a warrantless arrest has been made, the USA should be contacted immediately for authorization of prosecution.

**EffDte: 05/28/1980 MCRT#: 0 Div: D9 Cav: SecCls:

3-4.3 Nonfederal Crimes (See|LHBSA, 3-4.1, and Section 9.)

(1) There is no federal statutory authority for FBI Agents to intervene in nonfederal (state) crimes. However, based upon guidance provided by the Department of Justice, it is the policy of the FBI to permit certain types of nonfederal arrests when exigent circumstances exist.

(2) As a general rule, arrests for state crimes should be made by an Agent where a serious offense (felony or violent misdemeanor) has been committed in his or her presence and the immediate intervention and assistance of that Agent are necessary to prevent escape, serious bodily injury, or destruction of property.

(3) Agents are also encouraged to arrest a person who is the subject of an FBI inquiry that has been initiated in accordance with the Attorney General guidelines when a state or local arrest warrant for that person is known to be outstanding and the person is encountered during an investigation and would otherwise escape. Similarly, an FBI Agent working in concert with state or local law enforcement officers who request assistance in the apprehension of a nonfederal fugitive encountered during the course of a federal investigation should provide the requested assistance when reasonable under the circumstances.

(4) In some states, legislative authority exists for intervention by a federal Agent in certain types of state crimes as a peace officer rather than as a private citizen. Deputization as a

state peace officer is another means which allows a federal officer to make arrests for state offenses with the authority and immunities of a law enforcement officer of the state or one of its subdivisions. Of greater significance in terms of potential personal liability, however, is the issue of whether intervention by an Agent in a particular nonfederal crime falls within the scope of employment. Agents who intervene in serious nonfederal crimes committed in their presence or who arrest a state fugitive under the circumstances previously described will normally be considered to be within the scope of employment. While a determination as to legal representation must depend on the facts and circumstances of each case, the Department of Justice, as a general rule, will provide legal representation to Agents who act in accordance with this policy.

(5) It is important to note that the Department of Justice has indicated that efforts to enforce minor infractions of the law--such as shoplifting or traffic violations--are not generally considered within the scope of employment. Accordingly, civil actions against federal personnel concerning acts which fall outside the scope of employment will not be removed to federal courts, and defendant employees in such cases will not be eligible for legal representation provided for by the Department of Justice. An Agent's status with respect to civil liability in such cases will depend on a particular state's law, which may require an employee to defend himself/herself as an ordinary citizen.

**EffDte: 01/30/1997 MCRT#: 583 Div: D9 Cav: SecCls:

3-4.4 Adherence to FBI Policy

Where instructions are received from the USA or USA's assistant for arrest and detention of a subject in any manner contrary to FBI rules and regulations, such instructions are not to be complied with in absence of FBIHQ authority. On receipt of such instructions, FBIHQ should be promptly advised.

**EffDte: 06/19/1992 MCRT#: 0 Div: D9 Cav: SecCls:

3-5 PROMPT APPEARANCE BEFORE MAGISTRATE (See 7-16 and MIOG, Part I, 88-5.2; Part II, 2-7.1, 2-11.4.1 and 11-1.4.)

Except as provided below, whether the arrest is made with or without a warrant, the person arrested must be taken before the nearest available federal magistrate without unnecessary delay. If a federal magistrate is not available, the person arrested may be brought before a state or local judicial officer authorized by Title 18, USC, Section 3041. That procedure need not be followed if the

person is arrested under a warrant issued upon a complaint that charges only a violation of Title 18, USC, Section 1073 (UFAP), the arrested person is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest, and the government attorney in the originating district moves promptly for the dismissal of the UFAP complaint. (The Department of Justice Criminal Division has advised FBIHQ that it is not necessary to wait until the UFAP warrant has actually been dismissed before releasing the subject to state or local authorities, but it is important that efficient procedures be implemented and followed to make sure that UFAP warrants are promptly dismissed after notification of an arrest is given.) If the arrest was without warrant, a complaint is to be filed, setting forth the facts of probable cause when the arrestee is brought before the magistrate. A personal, telephone, or electronic presentation of the complaint setting forth probable cause for the magistrate must occur within 48 hours following a warrantless arrest if the arrestee is detained and an initial appearance cannot be held within that 48-hour period. Proceedings before the magistrate will be carried out in accordance with Rule 5, Federal Rules of Criminal Procedure.

**EffDte: 05/10/1996 MCRT#: 538 Div: D9 Cav: SecCls:

3-5.1 Effect of Unnecessary Delay

Incriminating statements obtained during a period of unnecessary delay after arrest and prior to the initial appearance before a magistrate are subject to exclusion.

**EffDte: 06/19/1992 MCRT#: 0 Div: D9 Cav: SecCls:

3-5.2 Definition of Unnecessary Delay

Title 18, USC, Section 3501, provides that a confession, otherwise voluntary, obtained within six hours following arrest or detention, is admissible in evidence. Delay of more than six hours may invalidate an incriminating statement obtained after the six hours have elapsed. However, the statute provides that the six-hour limitation shall not apply where delay in bringing the arrestee before a magistrate is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest magistrate.

**EffDte: 06/19/1992 MCRT#: 0 Div: D9 Cav: SecCls:

3-5.3 Booking Procedure

Following arrest, the person in custody should be brought to the nearest FBI office for fingerprinting, photographing, and interview, where appropriate. Police departments or sheriffs' offices may be used for this purpose where FBI facilities are not available. This "booking" process generally should not exceed six hours, measured from the time of arrest to the time of arrival before the magistrate.

**EffDte: 06/19/1992 MCRT#: 0 Div: D9 Cav: SecCls:

3-5.4 Necessary Delay

If the delay in bringing an arrested person before the magistrate is greater than six hours, the government has the burden of proving the delay was not unreasonable, if a confession obtained after six hours is to be admissible. |Factors which could contribute to a reasonable delay are the means of transportation and the distance to be traveled to the nearest available magistrate.|

**EffDte: 01/30/1997 MCRT#: 583 Div: D9 Cav: SecCls:

3-6 USE OF FORCE|(See MIOG, Part 2, 11-1.1.)|

**EffDte: 12/28/2001 MCRT#: 1164 Div: D9 Cav: SecCls:

3-6.1 Identification

A person to be arrested should be aware of the intention of the arresting Agent to deprive him/her of his/her liberty by legal authority. Therefore, it is the responsibility of the arresting Agent to identify himself/herself, before effecting the arrest, in a clear, audible voice, as a Special Agent of the FBI.

**EffDte: 06/19/1992 MCRT#: 0 Div: D9 Cav: SecCls:

3-6.2 Physical Force

Agents are permitted to use that amount of physical force reasonable and necessary to impose custody and overcome all resistance, and to ensure the safety of the arresting Agents, the arrestee, and others in the vicinity of the arrest.

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

3-6.3 Restraining Devices

Temporary restraining devices, such as handcuffs, shackles, and belts, may be used to|secure|a person arrested. Use of such devices is lawful and proper. Agents are expected to employ sound judgment in the use of these devices, and to resolve any doubt in favor of their use. (See MIOG, Part II, Section 11-1.5.)

**EffDte: 01/30/1997 MCRT#: 583 Div: D9 Cav: SecCls:

3-6.4 FBI Deadly Force Policy - Instructional Outline
(See LHBSA,|Part 1,|4-2.5 and MIOG, Part 2, 11-5, 12-2.1,|12-10.4.1 (2),|and MAOP, Part 1, 1-4.)

(1) INTRODUCTION: This outline provides guidance to FBI Agents in the use of deadly force. The following general principles are to govern application of the FBI's deadly force policy:

(a) The policy is not to be construed to require Agents to assume unreasonable risks. In assessing the need to use deadly force, the paramount consideration should always be the safety of the Agents and the public.

(b) The reasonableness of an Agent's decision to use deadly force under this policy must be viewed from the perspective of the Agent on the scene--who may often be forced to make split-second decisions in circumstances that are tense, uncertain, and rapidly evolving--and without the advantage of 20/20 hindsight.

(2) POLICY TEXT:

(a) Defense of Life - Agents may use deadly force only when necessary, that is, when the Agents have probable cause to believe that the subject of such force poses an imminent danger of death or serious physical injury to the Agents or other persons.

(b) Fleeing Subject - Deadly force may be used to prevent the escape of a fleeing subject if there is probable cause to believe:

1. the subject has committed a felony involving the infliction or threatened infliction of serious physical injury or death, and

2. the subject's escape would pose an imminent danger of death or serious physical injury to the Agents or other persons.

(c) Verbal Warnings - If feasible, and if to do so would not increase the danger to the Agent or others, a verbal warning to submit to the authority of the Agent shall be given prior to the use of deadly force.

(d) Warning Shots - No warning shots are to be fired by Agents.

(e) Vehicles - Weapons may not be fired solely to disable moving vehicles. Weapons may be fired at the driver or other occupant of a moving motor vehicle only when the Agents have probable cause to believe that the subject poses an imminent danger of death or serious physical injury to the Agents or others, and the use of deadly force does not create a danger to the public that outweighs the likely benefits of its use.

(3) DEFINITIONS

(a) Deadly Force: Force that is likely to cause death or serious physical injury.

(b) Necessity: In evaluating the necessity to use deadly force, two factors are relevant: 1) The presence of an imminent danger to the Agents or others; and 2) The absence of safe alternatives to the use of deadly force. Deadly force is never permissible under this policy when the sole purpose is to prevent the escape of a suspect.

1. Imminent Danger: "Imminent" does not mean "immediate" or "instantaneous," but that an action is pending. Thus, a subject may pose an imminent danger even if he/she is not at that very moment pointing a weapon at the Agent. For example, imminent danger may exist if Agents have probable cause to believe any of the following:

a. The subject possesses a weapon, or is attempting to gain access to a weapon, under circumstances indicating an intention to use it against the Agents or others; or,

b. The subject is armed and running to gain the tactical advantage of cover; or,

c. A subject with the capability of inflicting death or serious physical injury--or otherwise incapacitating Agents--without a deadly weapon, is demonstrating an intention to do so; or

d. The subject is attempting to escape from the vicinity of a violent confrontation in which he/she inflicted or attempted the infliction of death or serious physical injury.

2. Absence of a safe alternative: Agents are not required to use or consider alternatives that increase danger to themselves or to others. If a safe alternative to the use of deadly force is likely to achieve the purpose of averting an imminent danger, deadly force is not necessary. Among the factors affecting the ability of Agents to SAFELY seize a suspect, the following are

relevant:

a. Response to commands - Verbal warnings prior to using deadly force are required when feasible--i.e., when to do so would not significantly increase the danger to Agents or others. While compliance with Agents' commands may make the use of deadly force unnecessary, ignoring such commands may present Agents with no safe option.

b. Availability of cover - Availability of cover provides a tactical advantage. An armed suspect attempting to gain a position of cover may necessitate the use of deadly force; conversely, an Agent in a position of cover may gain additional time to assess the need to use deadly force without incurring significant additional risks.

c. Time constraints - The inherent disadvantages posed by the issue of action/reaction, coupled with the lack of a reliable means of causing an instantaneous halt to a threatening action, impose significant constraints on the time-frame in which Agents must assess the nature and imminence of a threat.

(4) APPLICATION OF DEADLY FORCE

(a) When the decision is made to use deadly force, Agents may continue its application until the subject surrenders or no longer poses an imminent danger.

(b) When deadly force is permissible under this policy, attempts to shoot to cause minor injury are unrealistic and can prove dangerous to Agents and others because they are unlikely to achieve the intended purpose of bringing an imminent danger to a timely halt.

(c) Even when deadly force is permissible, Agents should assess whether its use creates a danger to third parties that outweighs the likely benefits of its use.

**EffDte: 05/06/2002 MCRT#: 1192 Div: D9 Cav: SecCls:

3-7 |MANNER OF ENTRY (See 5-2.1 and MIOG, Part 2, 11-2.1.5.)|

(1) |Title 18, USC, Section 3109 requires Agents to "knock and announce" their identity, authority, purpose and demand to enter before entry is made to execute a search warrant. This principle applies prior to making forcible entry to arrest as well. Agents making forcible entry should adhere to the policy and procedures set forth in section 5-2.2.2, entitled "Manner of Entry."|

(2) |Suspect's Premises - in order to enter lawfully a

suspect's premises to arrest, Agents must obtain consent to enter, an emergency ("hot pursuit") justifying a warrantless entry must exist, or the Agents must obtain an arrest warrant and have probable cause that the suspect is in the premises. For establishing whether it is the suspect's premises, it should be noted that an apartment, or a hotel, motel, or boardinghouse room becomes the principal residence of the person renting or leasing such premises. Thus, entry to arrest the suspect would constitute entry into the suspect's premises if it is the hotel, motel or other room he/she is renting. Similarly, if the suspect is not named on the lease or rental agreement, the premises may still be regarded as the suspect's premises if the suspect occupies the premises jointly with another. For example, a hotel room shared by the suspect with another but where the suspect is not named on the hotel register is to be treated as the suspect's premises.

(3) Third Party Premises - in order to enter lawfully a third party's premises in order to arrest a defendant, Agents must have consent to enter, or an emergency ("hot pursuit") justifying a warrantless entry must exist, or the Agents must obtain a search warrant particularly describing the person to be arrested and the premises to be entered. For the purpose of such an entry, third party premises should be construed to be any private premises which are not the principal residence of the person to be arrested. For example, a search warrant would be necessary in circumstances where the person to be arrested is an overnight guest, casual visitor, or temporary caller at the premises of the third party. The entry to arrest, whether with an arrest warrant, search warrant, or exigent circumstances, must be based on facts amounting to probable cause to believe the suspect to be arrested is within the described premises. (See MIOG, Part 1, 42-4.2.1 and Part 2, 21-13.4.)

(4) Exigent Circumstances - examples of exigent circumstances which might justify entry to premises to make a warrantless arrest or an entry into third party premises without a search warrant are a reasonable belief that the subject will flee before a warrant is obtained, a substantial likelihood that the subject will dispose of evidence before a warrant is obtained, and an increased danger to Agents or others as a result of the delay to obtain a warrant.

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

3-8 SEARCH INCIDENTAL TO ARREST
See Section 5-6 of this handbook (Search Incidental to Arrest).

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

3-9 MEDICAL ATTENTION FOR ARRESTEES (See MIOG, Part 2, 11-1.2 and 11-2.3.2.)

When any person in Bureau custody complains of sickness or ill health, or where such a condition is reasonably apparent to Agents present, arrangements should be made to afford such persons medical attention without delay.

**EffDte: 12/28/2001 MCRT#: 1164 Div: D9 Cav: SecCls:

3-10 FOREIGN NATIONALS (See MIOG, Part II, 11-2.3.3.)

In every case in which a foreign national is arrested by the FBI, Agents are to inform the foreign national that his/her consul will be advised of his/her arrest unless he/she does not wish such notification to be given. If the foreign national does not wish to have his/her consul notified, the Agents are to also inform him/her if there is a treaty in force between the United States and his/her country which requires such notification, consul must be notified regardless of his/her wishes, and that any necessary notification to his/her consul will be made by the USA. In all arrests by the FBI of foreign nationals (including those where the foreign national has stated that he/she does not wish his/her consul to be notified), the FBI field office shall inform the nearest USA of the arrest and of the arrested person's wishes regarding consular notification.

**EffDte: 03/31/1983 MCRT#: 0 Div: D9 Cav: SecCls:

3-11 ARRESTS IN FOREIGN COUNTRIES (See MIOG, Part II, 11-2.3.3, 23-4.4, and 23-8.2.)

Agents have no jurisdiction in foreign countries, hence, cannot exercise the power of arrest, search, or seizure in such places. Agents are not to be present at the scene of arrests by foreign authorities, participate in or be present during searches incidental to such arrest, accompany foreign officials transporting prisoners, or participate in interviews of prisoners except at their places of incarceration and in the presence of foreign authorities. Agents are not to participate in any unauthorized or unlawful actions even though invited to do so by a cooperating foreign officer.

**EffDte: 03/31/1983 MCRT#: 0 Div: D9 Cav: SecCls:

3-12 DIPLOMATIC IMMUNITY (See 5-11.)

Diplomatic representatives of foreign governments in the United States are exempt from arrest by all officers, federal or state. Agents may not enter the office or dwelling of these representatives for the purpose of making an arrest, search, or

seizure.

(1) Territorial Immunity - Territorial immunity applies to all embassies, legations, and consulates, and consequently, no Agent of the Bureau should attempt to enter any embassy, legation, or consulate for the purpose of making any arrest, search, or seizure. This territorial immunity extends to both the offices and residences of ambassadors and ministers, but only to the office of a consul and not to official's residence.

(2) Personal Immunity - Personal immunity applies to ambassadors and ministers, members of their staffs and domestic servants, and the immediate family members of diplomatic officers. It similarly applies to the immediate family members of the administrative and technical staff of a diplomatic mission. Consequently, no Agent should attempt to cause the arrest or detention of any person included in these classifications. The personal immunity applies to the staffs, domestic servants and immediate family members, irrespective of their citizenship. It will be noted that personal immunity is not granted ordinarily to consuls from arrest on misdemeanor charges. In the event the arrest of a consul is contemplated, FBIHQ should be immediately notified by telephone or electronic communication before any action is taken in order that an appropriate check may be made with the State Department to determine whether the consul involved has any special immunity.

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

3-13 NEWS MEDIA MEMBERS (See MAOP, Part II, 5-7.1 and MIOG, Part II, 7-3.)

Prior authority of the Attorney General is required before an Agent may seek an arrest warrant for a member of the news media who is suspected of an offense committed in the course of, or arising out of, the coverage or investigation of a news story, or while engaged in the performance of official duties as a member of the news media. In emergency circumstances, a news media representative may be arrested without prior authority but subsequent justification must be furnished to the Attorney General and the Department of Justice, Director of Public Information. Requests for authority of the Attorney General to seek an arrest warrant for a news media representative are to be handled by the USA.

**EffDte: 05/28/1980 MCRT#: 0 Div: D9 Cav: SecCls:

3-14 ARMED FORCES PERSONNEL

The Uniform Code of Military Justice authorizes any commanding officer exercising general court-martial jurisdiction to

surrender military personnel under|officer's|command to civil authority when charged with civil offenses. The request for surrender must be accompanied by:

(1) A copy of the indictment, presentment, information, or warrant;

(2) Sufficient information to identify the person sought as the person who allegedly committed the offense;

(3) A statement of the maximum sentence which may be imposed upon conviction. Receipts for persons surrendered to civil prosecution are not to be signed by FBI personnel. Such forms are to be executed by the U.S. Attorney.

**EffDte: 05/28/1980 MCRT#: 0 Div: D9 Cav: SecCls:

3-15 SERVICE OF SUBPOENAS

|To seek judicial remedies in the event that a person fails to comply with a subpoena, Agents should ensure that the subpoena is properly served by delivering a copy of the subpoena to the person named in the subpoena.|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

3-16 ARREST OF JUVENILES (See MIOG, Part 2,|4-1.1.)|

**EffDte: 10/09/2001 MCRT#: 1159 Div: D9 Cav: SecCls:

3-16.1 Definition (See MIOG, Part II, Section 4-2.1.)

A juvenile is a person who has not attained his/her 18th birthday at the time of arrest. |An act of juvenile delinquency is the violation of Title 18, USC, Section 922(x) or a federal law which would have been a crime, if committed by an adult, by a person who has not attained his/her 18th birthday.| For|the|purpose of juvenile delinquency proceedings and disposition following an adjudication of delinquency, a juvenile is a person who has not attained his/her 21st birthday.

**EffDte: 10/15/1997 MCRT#: 719 Div: D9 Cav: SecCls:

3-16.2 Postarrest Procedures

The standard prearrest procedures applicable to adults

(discussion with United States Attorney, filing of complaint, issuance of warrant) also govern arrests of juveniles. After arrest, however, the|Federal|Juvenile Delinquency|Act|requires strict compliance with the following procedures:

(1) Advice of Rights - The arresting Agent should immediately advise the arrested juvenile of his/her "legal rights" in language comprehensible to the juvenile. The rights found on the standard Form FD-395 meet this requirement. However, inasmuch as no interrogation will be conducted (See Section 3-16.2(5)), it is not necessary to obtain a waiver from the juvenile at this time. (See MIOG, Part 2, Section 4-2.2.1.)

(2) Notification to U.S. Attorney and Juvenile's Parents - The arresting Agent must immediately notify the USA and the juvenile's parents, guardian, or custodian, of such custody. The parents, guardian, or custodian must also be notified of the juvenile's rights and the nature of the alleged offense. (See MIOG, Part 2, Section 4-2.2.2.)

(3) Initial Appearance Before Magistrate - Agents must take the arrested juvenile before a magistrate forthwith. The magistrate must release the juvenile to his/her parents or guardian (or other responsible party) unless he/she determines that detention is necessary to secure the juvenile's timely appearance before the court, or to ensure the juvenile's safety or that of others. This determination can be made only after a hearing at which the juvenile is represented by counsel. (See MIOG, Part 2, Section 4-2.2.6.)

(4) Record of Notification and Appearance - Since proof of timely notification to parents and prompt appearance before the magistrate is essential, Agents are required to prepare FD-302(s) recording the following facts:

(a) That the juvenile was advised of his/her rights;

(b) That the USA was notified;

(c) That the parents, guardian, or custodian, was notified; and

(d) That the juvenile was taken before a magistrate.

(See MIOG, Part 2, Sections 4-2.2.2 and 4-2.2.6.)

(5) Interrogation and Interviews - A juvenile is not to be interrogated for a confession or admission of his/her own guilt, or even an exculpatory statement between the time of his/her arrest for a federal offense and his/her initial appearance before the magistrate who advised him/her of his/her rights. Information volunteered by the arrested juvenile concerning his/her own guilt should be recorded in the Agent's notes for use in subsequent proceedings, and clarifying questions may be asked as necessary to make certain what the juvenile

intends to say. The volunteered statement may be reduced to writing if such action does not involve any delay in the juvenile's appearance before the magistrate. The juvenile may, however, be questioned concerning the guilt of someone else if such questioning does not cause any delay in bringing him/her before the magistrate. These requirements apply only from and after an arrest of juvenile, as defined by federal law for a federal offense. They do not apply when the juvenile is still a suspect for a federal offense under arrest by state or local officers on a state or local charge. (See (1).) (See MIOG, Part 2, Section 4-2.2.5.)

(6) Fingerprinting and Photographing - Agents are not to fingerprint or photograph a juvenile unless he/she is to be prosecuted as an adult. Because usually it will not be known at the time of arrest whether the arrestee will be prosecuted as an adult or handled as a juvenile offender, Agents are not to fingerprint or photograph a juvenile without consent of the judge. The law requires, however, that following the adjudication of delinquency by the court where the juvenile has been found guilty of an offense which, if committed by an adult, would be a felony that is a crime of violence or a violation of Title 21 USC, Section 841 (manufacturing, distributing, dispensing of a controlled substance or possession with the intent to do same), Section 955 (possession of controlled substances on board vessels arriving in or departing the United States) or Section 959 (manufacture or distribution of controlled substances for purpose of unlawful importation), fingerprinting and photographing of the individual shall take place. Following such a finding of delinquency, Agents should coordinate the fingerprinting and photographing with the U.S. Marshals Service. (See 6-4.8 and MIOG, Part 2, Sections 4-2.2.3 and 14-8.1.4.)

(7) Press Releases - Agents are prohibited from making public either the name or picture of the arrested juvenile. A press release concerning the arrest of a juvenile is permissible if carefully worded to contain no identifying information. (See MIOG, Part 2, Section 4-2.2.4, and MAOP, Part 2, Section 5-2.1 (3).)

**EffDte: 05/01/2000 MCRT#: 994 Div: D9 Cav: SecCls:

SECTION 4. INVESTIGATIVE DETENTION

**EffDte: 04/28/1978 MCRT#: 0 Div: D9 Cav: SecCls:

4-1 IN GENERAL

(1) Investigative detentions (stops) and protective searches (frisks) represent two separate and distinct procedures available to Agents when investigating suspicious circumstances (e.g., possible bank robbery suspect) or detaining for identification purposes (e.g., fugitive apprehension). Each procedure must have its own independent justification based on facts known to the Agents. The investigative detention is a seizure and the protective frisk is a search. Thus, each must meet the constitutional standard of reasonableness set forth in the Fourth Amendment. These procedures cannot be used on mere suspicion or possible hunch but must be justified by articulable facts supporting a reasonable suspicion that a person is involved in criminal activity and may be armed and pose a threat to the Agent or other individuals.

(2) A seizure takes place only when an Agent, by means of physical force or show of authority, restrains a citizen's liberty. This rule is based on objective characteristics as to whether a reasonable person would believe someone talking to an Agent is free to walk away. Circumstances to consider include the threatening presence of several Agents, the display of a weapon, some physical touching, or the use of language or tone of voice suggesting a command rather than a voluntary request. Questions related to one's identity or a request for identification do not, by themselves, constitute a seizure. This activity is an Agent-citizen contact, implicitly consensual, even when the citizen is not told he or she is free to leave. Identification interviews do not require reasonable suspicion and can be a useful means to identify people present at a location where Agents are executing a warrant. These interviews should be momentary and cease as soon as reasonable identification is ascertained.

**EffDte: 05/01/1985 MCRT#: 0 Div: D9 Cav: SecCls:

4-2 DETENTION

**EffDte: 05/01/1985 MCRT#: 0 Div: D9 Cav: SecCls:

4-2.1 Justification

The legality of a full custody arrest depends upon whether the arresting Agent has facts sufficient to constitute probable cause;

that is, facts of such quality and quantity to justify a reasonable belief that the arrested person has committed a crime (probability that a crime has been committed). Where the Agent has a lesser quantity of facts which supports only a reasonable suspicion that a crime may have been committed and a particular person may have been involved (possibility that a crime has been committed), Agent may still take action. Agent is justified in temporarily detaining the suspect and making reasonable inquiry to determine if in fact a crime has been committed. A particularized reasonable suspicion of criminal activity also justifies the investigative stop of a motor vehicle for the purpose of questioning its occupants. Agent's inquiries should be conducted in such a manner as to uncover additional facts regarding the suspected criminal activity. Such additional facts may be sufficient to meet the test of probable cause and justify an immediate arrest.

**EffDte: 05/01/1985 MCRT#: 0 Div: D9 Cav: SecCls:

4-2.2 Release of Suspect

The Agent may detain the suspect for a reasonable time and must release the suspect if additional facts are not developed supporting probable cause to arrest. The investigative detention concept includes not only suspicious situations involving violent crimes but also investigation of possessory and "white-collar" crimes.

**EffDte: 05/01/1985 MCRT#: 0 Div: D9 Cav: SecCls:

4-2.3 Duration of Detention

An Agent may detain a suspect for a reasonable period of time or until the suspicions of the Agent are dispelled, whichever comes first. What constitutes a reasonable period of time is a flexible concept requiring assessment of a variety of factors, such as the suspect's cooperation, the nature of the criminal activity being investigated, and whether the Agent pursued a diligent course of investigation thus avoiding unnecessary delay. For example, whether the suspect is answering logical questions such as who he/she is and what he/she is doing may be considered when determining whether a detention should be extended. An Agent should diligently pursue logical investigation and avoid unnecessarily extending the length of time of the detention. For example, bringing a witness to the site of the detention to identify the detainee in order to quickly clarify the situation is permissible. Finally, it is recognized that some types of criminal activity cannot be sufficiently investigated in the amount of time other types of illegal activity may be investigated.

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

4-2.4 Site of Detention (See 5-2.2.18 (3).)

Although an investigative detention represents a substantial denial of one's freedom of movement, it should not approach the same degree of full custody exercised when an individual is placed under arrest. One of the principal factors considered in deciding whether an arrest rather than a stop has in fact occurred is the detention site. Most detentions occur on the street and involve the stopping of a pedestrian or a motorist. Such detentions are constitutionally permissible provided the degree of force and length of detention are reasonable under the circumstances. Likewise, detention in private places when the Agent is lawfully present will create no problem provided the Fourth Amendment reasonableness standard is met. Problems arise when the initial detention site is changed without justification. It should be remembered that any exercise of detention authority should be accomplished with a minimum of intrusion. Thus, moving a detained person should be avoided unless there is good reason for doing so. The creation of a traffic hazard or potential for hostile crowd reaction are justifiable reasons for taking the person detained to another locale. Moving a suspect a short distance to afford better lighting, or to allow the Agent to use his/her car radio are also permissible; however, transporting a suspect against his/her will to a field office and detaining him/her there is a more serious intrusion. The inherent coercion present in transporting and detaining a suspect in such an environment makes this practice tantamount to arrest. Such a procedure can be used only when it can be clearly shown that the suspect voluntarily accompanied the Agents or that probable cause to arrest existed. As a general rule, Agents have the authority to detain anyone present at a location, be it a private residence or business establishment open to the public. The primary purpose for this detention is to ensure the Agents' safety during the execution of the warrant. A second reason is to ensure the presence of the occupants to whom possession of evidence or contraband found during the search may be attributed.

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

4-2.5 Use of Force (See 3-6.4 and MIOG, Part 2, 12-2.1, |12-10.4.1 (2),|and MAOP, Part 1, 1-4 (4).)

(1) In order to effect a stop and enforce a period of brief detention, an Agent may employ that degree of reasonable force found necessary under the circumstances, short of deadly force. Use of deadly force is not permitted to enforce a temporary detention. However, this does not mean an Agent cannot defend himself/herself when, in the course of attempting to make a stop, the Agent or another person is placed in imminent danger of death or serious bodily harm, and deadly force is thus consistent with the FBI's deadly force policy.

(2) Reasonable force during the temporary detention may

include, for example, the displaying of a weapon by the Agent under circumstances justifying a reasonable suspicion on the Agent's part that his/her life may be in danger. Thus, an Agent would be justified in drawing his/her weapon when detaining a bank robbery suspect when the Agent has a reasonable suspicion that the suspect is currently armed.

(3) Handcuffs should not be used as a normal procedure in maintaining a temporary detention; however, such restraints are reasonable under special circumstances and will not automatically convert the detention into an arrest. For example, attempts by a suspect to turn and flee or a suspect's refusal to comply with commands to keep his/her hands in view of the Agent might justify the use of handcuffs during the detention period.

**EffDte: 05/06/2002 MCRT#: 1192 Div: D9 Cav: SecCls:

4-2.6 Interrogation and Advice of Rights

As a general rule, a stop and detention is not such a significant deprivation of freedom as to constitute custody, as that term is commonly understood. Persons temporarily detained for brief questioning by Agents who lack probable cause to make an arrest need not be warned of their rights against compulsory self-incrimination and to counsel until such time as the point of arrest has been reached or the questioning has ceased to be brief and casual and becomes sustained and coercive.

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4-2.7 |Deleted|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

4-3 |LIMITED SEARCH FOR WEAPONS|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

4-3.1 |Authority to Conduct a Limited Search for Weapons|

(1) |A limited search is permitted for weapons only, provided the following factors are present:

(a) there has been a lawful investigative stop;

(b) there is reasonable suspicion that the person detained may be armed;

(c) the Agent identifies himself/herself and if the situation permits, makes reasonable inquiries; and

(d) the Agent's suspicions have not been dispelled.

(2) In justifying the decision to conduct a limited search for weapons, Agents may consider such factors as:

(a) the type of crime involved;

(b) the reputation of the person detained;

(c) the time and place of the stop;

(d) a sudden movement, and

(e) a bulge in the suspect's clothing.

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4-3.2 Permissible Scope of a Limited Search for Weapons

(1) General Rule: In conducting a limited search for weapons, Agents' actions must not only be justified at their inception but also be reasonable in scope. Generally, a limited search for weapons should begin with a pat-down of the detainee's outer clothing. Further intrusions into areas, such as an unlocked briefcase or a purse, would be reasonable if the Agent was unable to determine from the outside whether there was a weapon within. An exception would be when the Agents have specific information (firsthand information, a reliable tip, etc.) regarding the location of a weapon. In that instance, they may retrieve the weapon directly without first searching the suspect's outer clothing. In other words, the degree of intrusion that is permitted is that which is necessary to protect the Agent against possible harm.

(2) Vehicles: When detaining the driver or occupants of a vehicle, if the Agent reasonably suspects that the detainee may be armed, the Agent may conduct a limited search of the interior passenger compartment of the vehicle, including unlocked containers, in order to locate weapons.

(3) Packages and Containers: A limited search of unlocked packages and containers in the possession of the suspect is justified if the Agent has reasonable suspicion the suspect is armed, provided the container's design and size permits easy access to a possible weapon. Generally, a limited search for weapons in a container or package should begin with a pat-down of the outer surface. To go beyond merely squeezing or feeling the outside of a container for a weapon and conduct a more serious intrusion by

visually checking the interior of the container or package, Agents should consider the ease to which the suspect would have access into the container or package.|

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**EffDte: 01/30/1997 MCRT#: 583 Div: D9 Cav: SecCls:

4-4 OTHER APPLICATION OF DETENTION AUTHORITY

**EffDte: 10/20/1983 MCRT#: 0 Div: D9 Cav: SecCls:

4-4.1 Material Witnesses

|(1)| Title 18, USC, Section 3149, provides that if the testimony of a person is material in any criminal proceeding, and if there is probable cause to believe it would be impracticable to secure the witness' presence by subpoena, a Federal judge or magistrate may detain the witness or impose conditions of release (e.g., bail bond). The statute has been interpreted as permitting the courts to issue material witness arrest warrants without first having issued a subpoena, provided probable cause exists that the witness' testimony is material and there is a reasonable belief|he/she|will flee or fail to appear.

|(2)| Where an Agent is unable to secure a material witness warrant, yet has reason to believe the witness will leave the scene without identifying|himself/herself, he/she|may detain for only so long as it takes to contact the U.S. Attorney or a Federal judge or magistrate. Authorization for further detention or possible arrest should be obtained only from a judicial officer.

**EffDte: 10/20/1983 MCRT#: 0 Div: D9 Cav: SecCls:

4-4.2 Personal Property

(1) Most investigative detentions involve persons suspected of committing crimes. The use of this procedure, however, has also been expanded to include detention of objects where the facts known to the Agent are insufficient to justify probable cause for a

search warrant, yet support a reasonable suspicion that the object contains contraband or other evidence of criminal activity. In such a situation, the Agent may detain a package, box, trunk, or suitcase temporarily while attempting to secure additional facts justifying a search warrant.

(2) |An Agent may detain property for a reasonable period of time or until his or her suspicions are dispelled, whichever comes first. During this time, the privacy of the package and its contents must not be disturbed. As with the detention of a person, the reasonableness of the length of detention is a flexible concept. The reasonableness of the length of the detention of the personal property depends on the nature of the property, the container in which it is located, the person from whom it was taken, and the circumstances of the detention. Since a person relinquishes any possessory interest in personal property given over to a third party, an extended detention of such property when reasonable suspicion exists that it contains evidence or contraband, even one lasting several hours, may be reasonable. For example, a package deposited for shipment by postal authorities may be detained for several hours. On the other hand, where the property is seized directly from the possessor, such as where a suitcase is taken from an airline passenger, and the detention interferes with the possessor's freedom to proceed on his/her journey as well as the possessory interest in the property, the duration of the detention must be brief.|

(3) |Deleted|

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SECTION 5. SEARCH AND SEIZURE

**EffDte: 04/28/1978 MCRT#: 0 Div: D9 Cav: SecCls:

5-1 IN GENERAL (See 8-3.2 and MIOG, Part 1, Section 91-9, Part 2, Sections 11-1.3.1 (6) and 11-4.5.2.)

(1) By the terms of the Fourth Amendment, a search for or seizure of evidence must be reasonable. Under the Fourth Amendment, all searches must be reasonable at their inception and reasonable in their execution. Whether a search meets Fourth Amendment standards will depend on the justification for the search and the scope of the search conducted. In all cases, Agents must be prepared to articulate the basis for the search and the manner in which it was conducted.

(2) The right of privacy is a personal right, not a property concept. It safeguards whatever an individual reasonably expects to be private. The protection normally includes persons, residences, vehicles, other personal property, private conversations, private papers and records.

(3) The Supreme Court has determined that there is no reasonable expectation of privacy in certain areas or information. As a result, government intrusions into those areas do not constitute a search and, thus, do not have to meet the requirements of the Fourth Amendment. These areas include:

(a) open fields;

(b) prison cells;

(c) public access areas;

(d) vehicle identification numbers.

(4) The Supreme Court has determined that certain governmental practices do not involve an intrusion into a reasonable expectation of privacy and, therefore, do not amount to a search. Consequently, these practices do not require compliance with the Fourth Amendment. These practices include:

(a) aerial surveillance conducted from navigable airspace;

(b) field test of suspected controlled substance;

(c) odor detection.

(5) If a reasonable expectation of privacy is terminated, subsequent governmental intrusion into the area does not constitute a search under the Fourth Amendment. A reasonable expectation of

privacy may be terminated by:

(a) lawful government action frustrating the expectation of privacy, such as U.S. Customs or Postal authorities opening packages in compliance with the laws governing their actions;

(b) private party actions that frustrate the expectation of privacy by revealing the contents of a package or area; or

(c) an individual taking steps to voluntarily relinquish the expectation of privacy, such as abandoning property or setting trash at the edge of the curtilage or beyond for collection.

(6) When there is doubt regarding the existence of a reasonable expectation of privacy, it should be assumed that such an expectation exists and Agents' actions should comply with the Fourth Amendment requirements.

**EffDte: 12/28/2001 MCRT#: 1164 Div: D9 Cav: SecCls:

5-2 SEARCH UNDER SEARCH WARRANT

**EffDte: 05/30/1991 MCRT#: 0 Div: D9 Cav: SecCls:

5-2.1 |Acquisition of Warrant: Rule 41 of the FED.R.CRIM.P. and Policy (See MIOG, Part 2, 10-18.3.)|

(1) Since the authority of a warrant is the best assurance that a search will be deemed reasonable by the courts, it is the policy of the FBI to obtain a search warrant before conducting a search for evidence, or in some circumstances, for a person. See Section 3-7. The policy is subject to the following exceptions:

(a) Search incidental to arrest;

(b) Search by consent;

(c) A search under emergency or exigent circumstances;

(d) A search under the vehicle exception;

(e) An inventory.

(2) |Definition of Affidavit and Search Warrant Upon Oral Testimony: Rule 41, FED.R.CRIM.P., provides that a search warrant shall issue only on an affidavit sworn before a federal magistrate or state judge and establishing the grounds for issuing the warrant. If circumstances make it reasonable to dispense with a written affidavit,

a federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone. The procedures for obtaining a search warrant upon oral testimony are set forth in Rule 41(c)(2) and are contained in the appendix to this handbook. Prior to obtaining a search warrant, Agents should consult with the Office of the U.S. Attorney. A copy of the affidavit filed before the magistrate is to be retained as a serial in the case file.

(3) Who May Apply: The federal rule requires that the request for a search warrant be made by a federal law enforcement officer or by an attorney for the government.

(4) Who May Issue: Title 18, USC, Section 3102, incorporates by reference Rule 41(a), FED.R.CRIM.P, which grants power to issue search warrants to a judge of the United States or of a state, commonwealth, or territorial court of record or by a United States magistrate. Thus Rule 41(a) authorizes only certain judicial officers to issue search warrants. Constitutionally, the requirement is that the issuing authority be neutral and detached and that he/she have the capability of deciding probable cause.

(5) Jurisdiction:

(a) General Rule: Federal rules provide that a search warrant may be issued by a federal magistrate judge or judge of a state commonwealth or territory court of record within the district wherein the property or person to be searched is located.

(b) Exceptions: The authority to issue search warrants extends to situations where probable cause is established to show the item(s) or person(s) named in the warrant is presently located in another district but will be located within the magistrate's or judge's district at the time the warrant is executed. A federal magistrate judge is also empowered to issue a search warrant for property or a person(s) upon a finding of probable cause to believe that the item(s) or person(s) named in the warrant are within the district at the time the warrant is issued, but might move outside the district before the warrant may be executed. In such a case, a search warrant issued by a federal magistrate judge would be valid, even if executed in another district.

(c) State, Commonwealth, and Territory Judges: Other courts that are authorized to issue search warrants under the Federal Rules are bound by the same limitations. Thus, if the judge is empowered to act for the state at large, he/she may issue warrants valid anywhere in the state. But, if the state judge's commission is limited to less than state-wide jurisdiction, his/her warrants will be valid only to the extent of his/her actual jurisdiction.

(6) Justification for Seizure:

(a) Rule 41(b), FED.R.CRIM.P. provides that a warrant may be issued under this rule to search for and seize:

1. Property that constitutes evidence of the commission of a criminal offense; or

2. Property that is contraband, the fruits of crime, or things otherwise criminally possessed; or

3. Property designed or intended for use or which is or has been used as the means of committing a criminal offense; or

4. Persons for whose arrest there is probable cause or who are unlawfully restrained.

(b) Where property to be seized constitutes "mere evidence," a connection must be shown between the items sought and the criminal behavior. Broadening the grounds for which a search warrant will issue to include evidence does not relax the prohibition against general exploratory searches. The standard of particularity remains intact. Probable cause is examined in terms of reason to believe that a specific item of evidence sought will aid in a particular apprehension or conviction.

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5-2.1.1 Acquisition of Warrant - Particularity Requirement

In addition to the statutory requirements, a warrant must also comply with the Fourth Amendment particularity requirement.

(1) Description of Place to be Searched: The Fourth Amendment requires that the place to be searched be described with particularity. The general rule is that the description should be of sufficient particularity so that if an Agent with no knowledge of the case were assigned to execute the search warrant, he/she would have no difficulty in identifying and locating the person, place, or thing to be searched.

(a) Dwelling - The complete address and a brief description of its outer appearance should be included. A phrase which makes clear the search is to encompass the entire structure should be included, and where appropriate, a description of surrounding grounds and other related buildings and improvements, such as storage sheds and detached garages. For example, the description might be as follows:

> "The premises at 1418 Cedar Drive, Dumfries, Virginia; further described as a single-story dwelling house, Georgian brick exterior, white shutters, and a grey roof, and all rooms, attic, basement, and other parts therein, and the

surrounding grounds and any garage, storage rooms, and out buildings of any kind located thereon."

In giving a street address, it is important to specify "North," "South," "East," or "West," if that is part of the address. Also, the "Street," "Place," or "Drive," as the case may be, should be shown.

(b) Apartment - An apartment unit, not the entire apartment building should be particularly described, unless probable cause dictates otherwise. The apartment number or letter must be included, where possible. If such a designation is not available, the location of the apartment within the building must be otherwise definitively shown. For example, "1324 Graham Park Road, Dumfries, Virginia, Apartment No. 1-A, further described as an apartment unit within a two-story, multiunit apartment house, white brick structure bearing the name Lynn House Apartments,' and all rooms, attics, and other parts within Apartment No. 1-A, and all garages, trash containers, and storage areas designated for the use of Apartment No. 1-A."

(c) Store or Business - The address, name of the business and brief description of its outer appearance should be stated. For example:

"The premises known as Joe's Coffee Shop,' located at 1314 Jefferson Davis Highway, Triangle, Virginia, a coffee shop in a single-story commercial building, with the word Joes' appearing in large black letters on the front window, and all rooms, dining areas, service areas, kitchens, pantries, stoves, refrigerators, restrooms and other parts within the business, including an office located in the rear of the premises, and any storage rooms, storage areas, trash areas and trash containers attached or unattached."

(d) Vehicles - As a general rule, the color, make, model and license number of the vehicle to be searched is sufficient to constitute an adequate description. For example: "a red, 1999 Ford Explorer, sport model, bearing VA license CFU 527." If the license number of the vehicle is unknown, details of its appearance, so as to distinguish it from other vehicles, should be included. Examples of such distinguishing characteristics would be: a broken right headlight, a dented right fender, or a distinctive decal.

(e) Persons - The description of a person should include his or her name, sex, race, age, height, weight, hair color, and eye color, as well as distinguishing tattoos or marks. If the search of the person is being conducted in conjunction with the search of premises, the Agent should include in the description his/her belief that the person will be located within the described premises.

(f) Places Where Address is Unknown - If no address is known or the location is not marked with an address, a specific description will be especially important. The description should be sufficiently detailed to avoid mistaking the place to be searched. In this regard, the use of photographs and diagrams as a supplement to a written description should be considered. For example, "a small wooden dilapidated red barn located on the west side of Jefferson Davis Highway, approximately 1.7 miles south of Aquia Road in Stafford County, Virginia, as shown on the attached color photograph marked Exhibit #1, and all rooms, lofts, storage areas, and the surrounding grounds."

(2) Description of Property or Person to be Seized - The Fourth Amendment forbids a general exploratory warrant. Thus, property to be seized under a warrant should be identified as clearly and distinctly as possible. As a general matter, if the property is contraband, the possession of which is unlawful, it does not have to be described in great detail; however, if it is noncontraband, then greater detail is required.

(a) If the property lends itself to ready identification by physical description and serial number, both of which are reasonably available to the Agent, then this information should be included in the affidavit. In other cases, the property should be identified by brand name, and a specific quantity, will serve to distinguish the property sought. For example, "That the affiant has reason to believe, and does believe, that there is now being concealed certain property, namely: a large number, believed to be 3,000 Hamilton Beach electric blenders, which electric blenders were part of an interstate shipment from Baltimore, Maryland, to Richmond, Virginia." In this manner, bank robbery loot could be sufficiently described by reference to the total amount or the approximate number of bills of each denomination taken. Precise descriptive data, such as complete, individual serial numbers, may be impossible or impractical to furnish.

(b) One area in which particularity of description is essential concerns property that draws upon both First and Fourth Amendment protections. Search warrants directed at the seizure of books, papers must describe the particular items taken. An effort to authorize the seizure of "obscene material," for example, fails because such a warrant leaves to the discretion of the executing Agent the determination as to what is and what is not "obscene." When the material sought enjoys the added protection of the free speech and free press provisions of the First Amendment, the clearest identification possible is required.

(c) Where the object of the search is a person to be arrested within third party premises, such person must be described with particularity. The name of the individual is usually sufficient. If the true name is not known, an alias or physical description will suffice.

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5-2.2 |Execution

In addition to possessing a lawfully acquired warrant, Agents must adhere to statutory and constitutional requirements during the execution of a warrant.|

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5-2.2.1 Time|of Execution

(1) General Rule: Rule 41(c)(1) FED.R.CRIM.P., provides "The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." The rule also defines "daytime" to mean the hours from 6:00 a.m. to 10:00 p.m., according to local time.

(2) Nighttime Execution: Before a valid nighttime (10:00 p.m. to 6:00 a.m.) search under a warrant can be made, two requirements must be satisfied. Failure to comply with either of the requirements below will make a nighttime search warrant invalid, and thus any evidence seized during such search may be subject to suppression. The two requirements are as follows:

(a) In the search warrant (Form A.O. 93), the magistrate must specifically indicate on the warrant itself that he/she is authorizing a nighttime search. The magistrate does this by selecting the option on the form which provides for service at any time in the day or night and crossing out the other option, which provides daytime service. Additionally, it has been held that a magistrate writing on the search warrant: "Authorized for Nighttime Service" and signing the search warrant is sufficient to constitute authority for nighttime execution.

(b) Rule 41 also requires that the supporting affidavit specify reasons amounting to a showing of good cause for nighttime execution. Therefore, care must be exercised in justifying any search planned for the period 10:00 p.m. to 6:00 a.m. The rule does not expressly require a separate statement as to good cause for executing the search warrant in the nighttime. The affidavit read as a whole may be used to determine whether in fact such cause exists. A statement in the affidavit requesting nighttime service should be broad enough to include all the information contained in the affidavit. For example, "Your affiant requests that this search warrant be approved for service at any time of the day or night, based on all the information contained in this affidavit." Absent an abuse of discretion, the magistrate's finding of good cause for nighttime

service should not be disturbed by a reviewing court. Whether good cause exists will depend on the facts of each case. Language in the affidavit can strengthen the showing of good cause. For example, the affidavit could specify that the stolen property will be removed between the hours of 10:00 p.m. and 6:00 a.m. and not merely "in the nighttime."

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5-2.2.2 Manner of Entry (See 5-6.2 and MIOG, Part 2, 11-2.1.5.)

Title 18, USC, Section 3109, requires Agents to "knock and announce" their identity, authority and purpose and demand to enter before entry is made to execute a search warrant. This is also considered part of the "reasonableness" requirement of the Fourth Amendment for searches. The announcement need only be given by one Agent and need not be lengthy or elaborate but should be conveyed in a manner that the person behind the door knows what is taking place. A loud announcement is essential; where communication is anticipated to be difficult, electronic devices designed to amplify the voice should be used. The following statement should suffice: "F-B-I - we have a warrant to search your residence - open the door." (The same rules apply with respect to entries into premises to make an arrest. See Section 3-7.) The "knock and announce" requirement need not be complied with where the Agent executing the warrant has a reasonable suspicion of any one or more of the following:

(1) to "knock and announce" would cause the Agent and/or another to be placed in imminent peril of bodily harm;

(2) to "knock and announce" would be a useless or futile gesture as the persons within the premises already know of the Agent's identity, authority, and purpose;

(3) to "knock and announce" would cause the evidence sought under the warrant to be destroyed or removed; or

(4) to "knock and announce" would permit the escape of a person the Agent seeks to arrest.

Use of fraud, deceit, or misrepresentation to obtain entry into constitutionally protected premises does not violate Title 18, USC, Section 3109 inasmuch as entry is made without the use of force. Nevertheless, such a practice is generally unnecessary and should be avoided unless extraordinary circumstances are present. The use of trickery or deception by an Agent to get an outside door open, before announcement of the Agent's identity, authority, and purpose, is permissible.

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5-2.2.3 |Moved to 5-2.2.2|

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5-2.2.4 |Reasonableness of Force (See MIOG, Part 2, 11-2.1.5.)|

The manner of entry to conduct a search must be reasonable. The reasonableness of the entry will depend upon the response of the person against whom the search is directed. If the person complies with the entry demand, the Agents may peaceably enter and conduct the search. If the person refuses to comply, an immediate forcible entry should be made. The force used should be sufficient to allow Agents to promptly and safely gain access to the premises but no more. Ordinarily this would allow for the breaking open of a door and/or window. Devices such as pry bars, axes, and battering rams may be used for the purpose of making immediate forcible entries. If the person behind the door remains silent or responds ambiguously to the demand, Agents must wait a reasonable amount of time before making a forcible entry. Examples of ambiguous responses are: "I'm getting dressed" or "Take it easy" or "What's the rush." A reasonable time depends on the circumstances, particularly on the object of the search. What may be reasonable with respect to stolen typewriters may not be reasonable where gambling records on flash paper or water-soluble paper are sought. As a general practice, Agents should document the amount of time that lapses between the demand for entry and the forcible entry itself. Agents are under no obligation to argue or negotiate with a person whose property is to be searched. Nor should they display credentials through peepholes, slide copies of the warrant under the door, or otherwise delay the execution of the warrant beyond the procedure described above.|

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5-2.2.5 |Controlling the Premises (See 5-2.2.18 (3).)|

After having made entry, Agents should take whatever reasonable steps are necessary to protect themselves. They may control the movements of persons found inside the premises and may conduct a limited search of people for weapons if the Agent has a reasonable suspicion that they are armed. While executing a search warrant on premises, Agents have authority to detain occupants while the search is being conducted. Agents may conduct a limited search of persons for weapons only if Agents have a reasonable suspicion that the person searched is armed. Restraining devices may only be used when to do so is reasonable under the circumstances. Title 18, USC, Section 2231 makes it a felony to assault, resist, oppose, prevent, impede, intimidate or interfere with an Agent attempting to execute a search warrant. Hence, a person may not obstruct the execution of a warrant and can be immediately arrested for doing so. A violation may

be shown even though the person does not use force or violence. As a general rule, Agents should exercise this authority with restraint. Offensive or abusive language should not be interpreted as resistance or opposition. Agents who arrest under this statute should be prepared to prove some overt act was preformed in an effort to defeat the purpose of the warrant. Threats with a weapon or acts denying access of an Agent to a place to be searched are examples of such overt acts. Destruction or removal of evidence sought under the warrant is a separate criminal violation (Title 18, USC, Section 2232) as is any forcible attempt to rescue property already seized by the searching Agents (Title 18, USC, Section 2233).

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5-2.2.6 Scope of Search (Formerly 5-2.2.5 and 5-2.2.7)

Once entry is lawfully gained and the premises secured, the search may extend to all places within the premises where the evidence or person sought could logically be concealed. Such places may include personal property found on the premises described, such as duffel bags, suitcases, and automobiles. The scope of the search, therefore, is directly related to and is controlled by the objective of the search. Agents are under no obligation to begin or end the search at any particular place within the premises. The search warrant does not permit searches of persons found within the premises for evidence unless such persons are particularly described in the warrant or an exception to the warrant requirement exists. The search warrant is not a license to destroy property or harass individuals. It does allow, under limited circumstances, highly intrusive searches which will disrupt or damage property if it is reasonable to believe that the items listed in the warrant are located there. Thus, it may be reasonable, for example, to pull up a floor, tear down a wall or dig up a garden. If it is anticipated that the search will include such action, Agents should consider including this in the warrant affidavit.

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5-2.2.7 Plain View Doctrine (Formerly 5-2.2.8)

Where Agents are lawfully present, such as during the execution of a search warrant or when acting consistent with one of the recognized exceptions to the warrant requirement, and they observe an items(s) which they have probable cause to believe is evidence or contraband, they may lawfully seize that item(s). To validate a plain view seizure, the Agent must therefore be in a lawful position to observe the item(s) and it must be immediately apparent to the Agent that the item(s) are evidence or contraband. The plain view doctrine is not an exception to the warrant requirement and does not authorize

Agents to enter constitutionally protected premises to seize the item(s). The plain view doctrine simply gives Agents the authority to seize an item(s) in plain view when acting consistent with a warrant or an exception. The plain view doctrine will not justify a warrantless entry to a person's premises where the plain sight observation occurs from a place beyond the area protected by the Fourth Amendment (the premises), nor will it permit the seizure of evidence from a place within a premises where the Agent has no right to be, even though the Agent is lawfully on the premises. For example, if during the arrest of a subject in his/her premises, an Agent seizes contraband during a lawful search incident to arrest, the Agent may not expand the scope of the search simply because he or she is lawfully on the premises.

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5-2.2.8 Resistance or Interference (Formerly 5-2.2.9)

Title 18, USC, Section 2231, makes it a felony to assault, resist, oppose, prevent, impede, intimidate or interfere with an Agent attempting to execute a search warrant. Hence, a person may not obstruct the execution of a warrant, and can be immediately arrested for doing so. A violation may be shown even though the person resisting does not use force or violence. As a general rule, Agents should exercise this authority with restraint. Offensive or abusive language should not be interpreted as resistance or opposition. Agents who arrest under this statute should be prepared to prove some overt act was performed in an effort to defeat the purpose of the warrant. Threats with a weapon or acts denying access of an Agent to a place to be searched are examples of such overt acts. Destruction or removal of evidence sought under warrant is a separate criminal violation (Title 18, USC, Section 2232), as is any forcible attempt to rescue property already seized by the searching Agent (Title 18, USC, Section 2233).

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5-2.2.9 Moved to 5-2.2.8

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5-2.2.10 Moved to 5-2.2.2

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5-2.2.11 Leaving Warrant and Receipt (See 5-2.2.12 and 5-4.10.)

Agents who have executed a search warrant are to give a copy of the warrant and attached affidavit, where applicable, to the individual whose person, premises, or property is searched whether or not any evidence is seized under the warrant. In addition, a receipt is to be given for any money, documents, or other property seized, whether under authority of the warrant or otherwise. Thus, items seized in plain view or a weapon taken for safety reasons, though not described in the warrant, should be included in the receipt. The receipt is to be in the form of an itemized list of all property taken. Agents should ensure that the description of all items is adequate and accurate. The receipt should be prepared in triplicate. The original will accompany the warrant upon return to the U.S. magistrate. One copy is given to the person searched, the other retained in the case file.

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5-2.2.12 Return

The return of a search warrant is the report to the issuing magistrate that the warrant was executed, and should be made as soon as practicable after execution. A form for return is provided on the reverse side of Form A.O. 93 (Search Warrant). A written inventory of property taken pursuant to the warrant must accompany the warrant upon return. The inventory consists of an itemized list of things seized, and is to be made by the Agent who applied for the warrant, or in|his/her|absence, another Agent conducting the search. The inventory should be prepared in the presence of the person from whom the property was taken, or in|his/her|absence, another credible person. A copy of the receipt for property taken, furnished the person searched (see Section 5-2.2.11, above), may be used as the written inventory by attaching a copy to the warrant at the time of return and so noting in the inventory section of Form A.O. 93.

**EffDte: 08/25/1980 MCRT#: 0 Div: D9 Cav: SecCls:

5-2.2.13 Securing the Premises

Upon conclusion of a search made under warrant, it is the responsibility of the searching Agents to make certain the place searched has been secured. In the absence of a resident, they are to take whatever steps are necessary to render the premises inaccessible to neighbors, vandals, etc. Where a door has been broken upon entry it should be repaired, replaced or boarded up before Agents depart. If a third party, such as a carpenter, is required to secure the premises, an Agent should remain until such work is completed. Premises disrupted by a search should be restored to its condition prior to search insofar as possible. Where it is anticipated that

later claims of harassment will be made by those affected by the search, it is sound practice to photograph the interior of premises before departure. The foregoing policy is designed to protect Agents against later allegations of impropriety or illegality.

**EffDte: 05/01/1985 MCRT#: 0 Div: D9 Cav: SecCls:

5-2.2.14 Damage to Property

Where performance of duty results in damage to private property, such as a broken door, the property owner may be entitled to compensation, even where there was legal justification for the entry and search. Government funds are available for satisfaction of justified claims arising from such damage. In a case where a claim has been filed or is likely to be filed:

(1) The property owner or|his/her|designated representative should be interviewed;

(2) A reliable estimate of repair costs should be obtained;

(3) A minimum compensation figure acceptable to the owner should be determined. FBIHQ should be advised by letter of the above information, together with the SAC's recommendation as to whether the claim should be paid, and if so, the estimate of a reasonable amount. Claims should be handled promptly. Efforts should be made to settle claims on an amicable basis, rather than allow a minor matter to escalate into a major problem.

**EffDte: 05/01/1985 MCRT#: 0 Div: D9 Cav: SecCls:

5-2.2.15 Criminal Liability

An Agent who, maliciously and without probable cause, procures a search warrant is guilty of a criminal offense. In executing a search warrant|he/she|is criminally liable where |he/she|exceeds|his/her|authority or exercises it with unnecessary severity. Any Agent who, maliciously and without probable cause, searches property with a search warrant is likewise guilty of a Federal criminal violation (Title 18, USC, Sections 2234, 2235, 2236).

**EffDte: 05/01/1985 MCRT#: 0 Div: D9 Cav: SecCls:

5-2.2.16 Forfeiture of Property (See|5-8.3|and MIOG.)

Forfeiture is a procedure created by statute, penal in

nature, which fosters an underlying criminal statute by depriving a wrongdoer of property used in a criminal enterprise. Forfeiture is generally disfavored in the law and statutes authorizing forfeiture are strictly construed. Such statutes are primarily aimed at the curtailment of trafficking in narcotics, firearms, and counterfeit money. However, forfeiture may be sought by the Government under other criminal laws, such as the possession of property used in an illegal gambling business. Under Title 18, USC, Section 1955(d), Agents are empowered to seize for forfeiture purposes any property, including money, used in an illegal gambling business. An inventory is to be prepared of the property seized and a receipt given for it at the time of seizure or as soon thereafter as practicable. The property taken is to be held for or turned over to the U.S. Marshal for the district in which the seizure was made when not held as evidence (28 CFR Section 9a.3).

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5-2.2.17 Recovery of Money

Whenever money or other property consisting of numerous items requiring counting is obtained in connection with an FBI investigation, the money or property is to be independently counted by two Agents and their results compared for the purpose of verifying the accuracy of the count and detecting any errors.

**EffDte: 05/01/1985 MCRT#: 0 Div: D9 Cav: SecCls:

5-2.2.18 Freezing Premises Pending Issuance of a Search Warrant

(1) Agents who have probable cause to believe evidence is inside certain premises may encounter the need to secure those premises to prevent the destruction or removal of evidence while a search warrant is being obtained. When such a need arises, Agents should, whenever possible, secure the premises from the outside and refrain from entering the premises until execution of the warrant. If lawful entry has already been obtained, the Agents should assure that there remains no threat to themselves or to the evidence, then leave and secure the premises from the outside.

(2) If no entry to the premises has yet occurred, but Agents have reason to believe entry is necessary to protect themselves or others or to prevent the destruction of the evidence, entry may be made. Upon eliminating the threat to their safety or the evidence, the Agents should then leave and secure the premises from the outside.

(3) There will be instances, however, when Agents who make a justified entry will not be able to leave the premises. The presence of other occupants or residents of the premises who have and

exercise a lawful right to remain may require the Agents to remain inside the premises while the search warrant is obtained. In such a case, the Agents may control the movements of persons found inside the premises consistent with the need for the Agents' continued presence. Agents must, however, exercise reasonableness in their efforts to control those present and attempt to minimize the intrusion. Such restrictions on the movement of persons inside the premises are consistent with instructions contained in Sections 4-2.4 and 5-2.2.5.

(4) Regardless of which method Agents use to secure premises pending issuance of a search warrant, the efforts to obtain the warrant must begin promptly. An unjustified prolonged "freeze" of premises might lead a court to find the seizure of the premises to be unreasonable.

(5) Additionally, if entry is made based on an Agent's reasonable|suspicion|that entry is necessary to prevent harm to Agents or|on probable cause that evidence will be destroyed|and items of evidence or contraband are seen in plain view, Agents should refrain from seizing those items immediately, except where immediate seizure is the only method reasonably available to prevent harm or destruction. Rather, when possible, the items observed in plain view should not be seized until the search warrant is obtained and executed. Certainly, if dangerous instrumentalities are observed, e.g., weapons, explosives, etc., they should be seized or otherwise secured immediately if such action is necessary to assure the safety of the Agents|or|others.

(6) |Deleted|

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5-2.2.19 Searching and Seizing Computers (See MIOG, Part 2, |10-18.3.)|

There is no legal difference in the search and seizure of computers and other document searches. Fourth Amendment principles apply to computer searches as well as to traditional searches. Thus, there is a strong preference for obtaining warrants in order to avoid the judicial scrutiny that will necessarily take place as a result of a warrantless search. However, the key to conducting a search or seizure of a computer is planning. Before preparing a warrant to seize all or part of a computer system and the information it contains, it is critical to determine the computer's role in the offense. The computer may be a tool of the offense (i.e., used to commit the offense) or it may be incidental to the offense, but a repository of evidence. In some cases, the computer may serve both functions at once. Another concern in preparing a search warrant is determining what should actually be searched and/or seized. Probable cause to seize a computer may not necessarily mean there is probable cause to seize the entire computer system and all of the attached

hardware. Each component of a computer system should be given independent consideration. When preparing a warrant, only those components for which there is an articulable independent basis to be searched or seized should be listed. For additional guidance regarding the search and seizure of computers, see "Federal Guidelines For Searching and Seizing Computers," 56 CRIMINAL LAW REPORTER, Page 2023 (1994). Questions should also be directed to the Chief Division Counsel.

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5-3 |INTRODUCTION: EXCEPTIONS TO THE SEARCH WARRANT REQUIREMENT

A warrantless search is presumptively unreasonable. However, there are recognized exceptions to the warrant requirement. While these exceptions authorize Agents to conduct a search consistent with the permissible scope of the exception, due to the preference for a warrant, Bureau policy requires Agents to obtain search warrants when time permits. When conducting a warrantless search, Agents are reminded that the burden is on the government to demonstrate that the exception applied and that the government stayed within the permissible scope of the exception. The exceptions include the following:

Consent
Emergency Searches
Search Incidental to Arrest
The Motor Vehicle Exception
Inventory|

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5-3.1 |Moved to 5-6.1|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

5-3.2 |Moved to 5-6.2|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

5-3.3 |Deleted|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

5-3.4 |Revised and Moved to 5-6.3|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

5-3.5 |Deleted|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

5-3.6 |Deleted|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

5-3.7 |Moved to 5-6.3|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

5-3.8 |Moved to 5-6.4|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

5-3.9 |Moved to 5-6.3|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

5-3.10 |Deleted|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

5-3.11 |Deleted|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

5-3.12 |Deleted|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

5-4 SEARCH BY CONSENT

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5-4.1 Exception to Search Warrant |(See MIOG, Part 2, 10-18.3.)|

Bureau policy requires Agents to obtain search warrants

whenever possible. However, a consent is a relinquishment of Fourth Amendment rights by the consenting party, and thus is reasonable even in the absence of probable cause and where searching Agents cannot particularly describe the materials being sought.

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5-4.2 Consent to Search: Prerequisites

In order to establish valid consent, Agents must be able to establish that the person providing consent had |actual or apparent| authority to do so and the consent was voluntary.

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|5-4.3| Lawful Possession |(Formerly 5-4.2)|

Agents seeking permission to search without a warrant must obtain consent from a person authorized to give it. Only a person in lawful possession may give consent. He/She is the person who currently possesses the premises or personal property. Ownership is not the equivalent of lawful possession where the owner has temporarily yielded his/her right to possess, as in the case of landlord and tenant, or innkeeper and guest. Nor is lawful presence the same as lawful possession. A guest or invitee, lawfully on premises, is generally not authorized to give up rights possessed by his/her host. Agents should make certain that consent is obtained from one in authority. Any doubts as to who possesses the premises or other property should be resolved before proceeding. Agents should carefully question any person present who might be of help in deciding who is authorized to consent. The Supreme Court has held that a valid consent may be obtained from one with "apparent" authority over the property. This assumes that the Agents have made a good faith effort to ascertain who has actual control, and are therefore reasonable in believing that the person from whom consent was obtained had such control.

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|5-4.4| Joint Possession |(Formerly 5-4.3)|

(1) Where two or more persons jointly possess the property, any of the individuals may consent to the search, at least as to those areas or things which are commonly possessed. A joint possessor assumes the risk of disclosure when he/she agrees to share the property with another. Places or items of personal property reserved for the exclusive use of one person may not be searched by

consent of another. Thus, the joint tenant in an apartment may consent to a search of all commonly possessed areas and things within the premises, such as the bathroom, kitchen, linen closet, china cabinet, but may not consent to the search of a bedroom or closet or briefcase possessed exclusively by the other tenant. A consent search should not be undertaken where both joint possessors are present, and one objects to the search. The rules relating to joint possession apply in a wide variety of relationships; e.g., husband and wife, paramours, business partners, confederates in crime.

(2) As a general rule, parents may consent to the search of a family dwelling directed against children residing therein and being supported by the parents. On the other hand, since the Fourth Amendment protection belongs to the parents, children may not relinquish the parents' rights by consenting to a search of the family home directed against them. An employer may be barred from permitting a search of personal property reserved for the exclusive use of an employee. Thus, by terms of an employment contract, an understanding of the parties, or by accepted custom and practice, an employee might acquire a reasonable expectation of privacy in his/her desk or locker or toolbox, and his/her employer would not be empowered to permit a search thereof. The capacity of an employee or agent to permit the search of business premises depends upon the authority given him/her by his/her employer or principal. A Bureau Agent seeking consent to search business premises, in the absence of the resident manager, should obtain consent from the highest ranking official available. While a search warrant is preferred, business records may be searched by consent. Such consent should be obtained from the records' custodian or resident official in charge.

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|5-4.5| Voluntariness |(Formerly 5-4.4)|

The critical issue in any consent search is whether the consent is voluntary; that is, whether it is the result of a free and unconstrained choice. It is the government's burden to prove the consent was not coerced. Agents, therefore, should avoid any actions or statements likely to elicit submission to their authority rather than a free choice. No single criterion is used to determine voluntariness, but rather the sum total of surrounding circumstances --- such considerations as the number of Agents present, the time of search, the manner of request, the display of weapons, the physical or mental condition of the consenter. Formal custody alone will not invalidate a consent. Thus, a person under arrest may give permission to search his/her house, car, or other property. Use of physical force or threats, however, will render a consent involuntary. Likewise, fraud, deceit, or misrepresentation will taint the consent. But a consent to enter, obtained by such means in an undercover operation, is proper.

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5-4.6 Warning of Rights (Formerly 5-4.5)

In order to establish a voluntary consent, the government is not required to prove a warning of Fourth Amendment rights was administered before the consent. Nevertheless, since it is a factor bearing on the voluntariness of consent, Agents |should| inform individuals from whom consent is sought that they have a right to withhold consent. The warning is contained in the standard Consent to Search Form, FD-26.

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|5-4.7| Proof of Consent |(Formerly 5-4.6)|

Consent to search should be obtained in writing, if possible. Form FD-26 is to be used for this purpose. In the event an individual orally consents, but will not sign the form, Agents should make a record of the consent on the FD-26. The form should be completed except for the signature of the consenting party, and Agents should note thereon the fact of consent, preferably in the language of the consenter. The completed FD-26 should be retained in the exhibit envelope of the case file.

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|5-4.8| Limitations on Consent |(Formerly 5-4.7)|

The consenting party controls the conditions of a search. |He/She| may revoke the consent, at which time Agents should terminate the search, or |he/she| may otherwise limit the scope or time of search. Agents must conform to such limitations.

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|5-4.9| Implied Consent |(Formerly 5-4.8)|

Neither silence nor a failure to object can be considered a voluntary consent. Agents should not rely on such conduct or any other ambiguous response as a relinquishment of Fourth Amendment rights. Rather, they should obtain an express consent in writing (FD-26), or where that is not possible, a specific verbal consent.

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|5-4.10 Receipt (Formerly 5-4.9)|

A receipt|(FD-597)|is to be prepared and given to the consenting party for any property seized during a consent search. The receipt is to be in the form of an itemized list, accurately and adequately describing all property taken, prepared in duplicate, one copy for the consenter, the original for the case file. |(See 5-2.2.11.)|

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5-5 EMERGENCY SEARCHES |(See Appendix, 4-1.)|

(1) In general: The law recognizes the authority of Agents to conduct warrantless searches when it is not practicable to obtain a warrant. Agents should be prepared to justify their conduct and demonstrate that they stayed within the permissible scope of the exception.

(2) Prerequisite: A warrantless search is lawful under the following circumstances:

(a) When Agents have reasonable suspicion that there is a threat to life or safety, or

(b) When Agents have probable cause to believe that a dangerous individual after whom they are in hot pursuit will escape or that evidence will be destroyed or removed.

(3) Scope: Agents are permitted to take reasonable and necessary steps to eliminate the emergency. Once the emergency is eliminated, the justification for acting without a warrant is over.

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5-6 |SEARCH INCIDENTAL TO ARREST (See 3-8 and MIOG, Part 2, 11-1.3 through 11-1.3.2.) (Formerly 5-3)|

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5-6.1 Right to Search (Formerly 5-3.1)

Few rules are as firmly embedded in search and seizure law as that which permits a search incidental to arrest with or without arrest warrant. The authority to search following a full custody arrest is an exception to the warrant requirement and allows a full and complete search for weapons or implements of escape, and for

evidence of criminal activity or contraband. The purpose of the search is to protect the arresting Agent, prevent escape, and preserve any evidence in possession of the arrestee. The right to search flows from the fact of arrest. The nature of the crime, whether felony or misdemeanor, violent or nonviolent, has no bearing on the right to search. The imposition of physical custody is the key to any such search. Any search incidental to arrest |should| be made by two or more Agents.

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|5-6.2 Prerequisite: Lawful Arrest (Formerly 5-3.2)

(1) For a search incident to arrest to be lawful the arrest itself must be lawful. The existence of probable cause will suffice to establish a lawful arrest. The best assurance that the arrest and incidental search will survive attack by the defense is to obtain an arrest warrant before imposing custody. As discussed below, entry into premises to arrest may also affect the validity of search incident to arrest.

(2) Entry into Suspect's Premises: In addition to probable cause, Agents must also ensure that any entry into premises is lawful. In the case of entering the defendant's premises to arrest, Agents must have consent to enter, or an emergency ("hot pursuit") must exist, or an arrest warrant must be outstanding and the Agents have probable cause to believe that the defendant is within the premises. Agents are also reminded that prior to making entry to arrest into the subject's premises, Agents are to comply with the requirements set forth in section 5-2.2.2, entitled "Manner of Entry," in order to ensure that the arrest is lawful.|

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|5-6.3 Scope and Timing Requirement (Formerly 5-3.4, 5-3.7, and 5-3.9)

(1) Scope of Search

(a) Person of arrestee and area within the arrestee's immediate control: following a lawful arrest an Agent is entitled in all cases to search the person of the arrestee and the area within the arrestee's immediate control at the time of arrest for weapons, means of escape and evidence of any criminal activity. The search may include any portable personal property in the arrestee's actual possession, such as clothing, purses, briefcases, grocery bags, etc. The area within the arrestee's immediate control is any place from which the person arrested may seize a weapon or destructible evidence. Items of personal property which are accessible to the

arrestee, such as an unlocked desk drawer or unlocked suitcase may be searched. However, absent an emergency, inaccessible or locked items of personal property may not be searched. If there is probable cause to believe they contain evidence, they may be seized, and a search warrant should thereafter be obtained prior to opening.

(b) Vehicles: Following a lawful custodial arrest of the driver or occupant of a vehicle, the interior passenger compartment of the vehicle may be searched, as long as the arrest occurs within or in close proximity to the vehicle and the search occurs substantially contemporaneous to the arrest. The purposes of this search would be to locate weapons, means of escape, and evidence of any criminal activity that could be destroyed and thus, the scope would include unlocked and or otherwise accessible containers such as glove compartments, luggage, bags, clothing, etc. (See 5-7.)

(c) Protective Sweep: Following a lawful arrest within premises, Agents may properly conduct a protective sweep of the areas immediately adjacent to the site of the arrest for the purpose of locating persons that may pose a threat of safety to the Agents or others. In addition, a protective sweep in other areas, beyond those immediately adjacent to the site of the arrest, may be conducted if the Agents possess a reasonable suspicion based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene. Reasonable suspicion must be based on facts known to the Agents such as noises in an attic or the at-large status of a dangerous associate. A protective sweep must be limited to a brief inspection of only those areas within the premises which could conceal a person capable of interfering with the arrest. If an Agent, while conducting the protective sweep, observes evidence in plain view, it may be seized under that doctrine.

(2) Timing: The search of a person incidental to arrest generally should be made at the time and place of arrest by Agents imposing custody. A further more thorough search of a prisoner at the FBI office or some other place to which the arrestee is transported is justified as incidental to arrest. A search of the area immediately surrounding the arrestee should be conducted at the time of or shortly after the arrest, while the person taken into custody is still present. In addition, Agents may automatically make a protective sweep of the areas immediately adjoining the site of the arrest to locate persons and may conduct a protective sweep of other areas based on a reasonable suspicion that the other areas harbor a person that may pose a danger to the Agents or others.

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5-6.4 Inventory of Personal Property (Formerly 5-3.8)

Items of personal property removed from a person who has been arrested and is to be incarcerated should be carefully

inventoried by Agents prior to being stored for safekeeping. A receipt for such property should be prepared and given to the arrestee. This inventory should include the contents of containers such as purses, shoulder bags, suitcases, etc., whether or not the containers are locked or sealed. In the event such containers are locked or sealed great care must be taken to minimize damage to the container or its contents while gaining access. This caretaking function must not be construed as an alternative to a search warrant whenever there is probable cause to believe that evidence or contraband is inside a container. Under those circumstances the container should be secured until a search warrant can be obtained.|

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5-7 |MOTOR VEHICLE EXCEPTION (Formerly 5-7.1)|

A warrantless search of a vehicle is permissible where Agents have probable cause to believe the vehicle contains evidence of a crime and the Agents have lawful access to the vehicle. Since the authority to search is directed against the vehicle, search of the driver and occupants for evidence is not permissible, although a limited search for weapons may be permissible if the Agent has reasonable suspicion the person(s) is armed. The scope of the search of the motor vehicle is the same as with a warrant. Thus, if the probable cause is applicable to the vehicle, the search may extend to any part of the vehicle or containers therein where the evidence sought could reasonably be located. Conversely, if the probable cause is limited to a container located inside a vehicle, the search must be confined to that container. Since the factual predicate for a vehicle exception search is the same probable cause needed to obtain a search warrant, consideration should always be given to the practicability of obtaining a warrant before using the vehicle exception. (See 5-6.3.)|

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5-7.1 |Moved to 5-7|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

5-7.2 |Moved to 5-8.1 and 5-8.2|

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5-7.3 |Moved to 5-8.3|

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5-7.4 |Deleted|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

5-8 | INVENTORY SEARCHES |

In certain situations, Agents may have reason to seize personal property but have no investigatory reason for searching the property. As part of an administrative caretaking function, Agents seizing such property must be concerned about its custody, storage and inventorying the contents of the property. The inventory is a search made reasonable by the lawful possession of the property and adherence to the FBI's policy on conducting inventory searches. This caretaking function is based on the need to protect the property owner's interests while the property is in the custody of the FBI, to protect the FBI and its employees against claims or disputes over lost, stolen or vandalized property and to protect employees from potential danger. An inventory search may not be a ruse for a search for evidence of criminal activity.|

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|5-8.1 Scope of the Inventory Search (Formerly 5-7.2) |

Upon seizing personal property, a prompt thorough search of the contents of the property, whether locked or unlocked, including any containers located therein whether locked or unlocked, should be conducted and an FD-302 prepared showing the results of the inventory. The FD-302 should include, but not be limited to, a description of the property and a description of the valuables secured for safekeeping. In order to facilitate the preparation of the FD-302, form FD-653 (Motor Vehicle Inspection Inventory Record) may be used in connection with seizure of motor vehicles. The FD-302 may simply refer to the FD-653 and be attached thereto. Where practicable, the inventory should be conducted by two persons. Nonevidentiary items of significant value should be removed for safekeeping and afforded adequate security. Contraband or evidence found should be immediately seized and preserved in accordance with existing procedures governing the seizure of physical evidence. A receipt should be given for all items retrieved during the search. (See 5-8.2 below and MIOG, Part 1, Sections 26-2.5, 26-2.7, and 149-3, and MAOP, Part 2, Section 2, re evidence retention.)|

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|5-8.2 Impoundment Inventories (Formerly 5-7.2) |

Vehicles are often seized with no investigatory reason for searching the vehicle and its contents. In such situations, Agents

have a routine administrative caretaking responsibility regarding the custody, storage, and inventorying of the contents of the vehicle. The following procedures should be used whenever Agents impound vehicles:

(1) The U.S. Marshal should be contacted to arrange for storage if no adequate Bureau facilities are available.

(2) A receipt for the vehicle should be prepared at the time of the seizure or as soon thereafter as practicable.

(3) A prompt, thorough inventory of the interior (including trunk and glove box) and any containers therein, whether locked or unlocked, should be conducted and an FD-302 prepared showing the results of the inventory. The FD-302 should include, but not be limited to, the following:

(a) Description of the car (year, color, VIN, license number)

(b) Description of all valuables secured from the vehicle for safekeeping

(c) Listing of all accessories, tools, and unattached parts left in the vehicle

(d) Notation describing the condition of the body and upholstery (specifically naming the damage or deteriorated areas and briefly stating the damage)

(e) Listing of all missing items such as keys, motor, radio, battery, spare tire, etc.

(See 5-8.1 re use of FD-653.)

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5-8.3 Forfeiture of Vehicles (Formerly 5-7.3)

As applied to motor vehicles, a forfeiture statute may authorize the seizure of a vehicle where there is probable cause to believe it is being used, has been used, is intended for use, or was acquired in violation of a statute that permits forfeiture. Agents, for example, may seize an automobile being used in an illegal gambling business under Title 18, USC, Section 1955(d). Where possible, authority of the U.S. Attorney should be obtained prior to any such seizure. Moreover, absent exigent circumstances, a search warrant should be obtained before seizure when such an action is planned or anticipated. A vehicle lawfully seized pursuant to a forfeiture statute may be searched under the warrant authorizing seizure. A receipt should be given for the vehicle seized, and custody turned

over to the U.S. Marshal as soon as practicable (see Section 5-2.2.16).

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|5-9| MARKING EVIDENCE FOR IDENTIFICATION |(Formerly 5-8)|

All articles legally seized as evidence should be carefully marked for identification. These markings should be of such a character as not to injure the evidence itself. They should be made in such a manner as to preclude the possibility of the marks being obliterated. Their character should be such as to make it possible for the person or persons who obtained the evidence to testify at a later date that this particular article was found at a certain place at a certain time. Each mark should be distinctive; therefore, an "x" should never be used. Evidence obtained and placed in containers or cellophane envelopes should be appropriately identified. Detailed notes should be made describing the articles found, the place they were found, the date found, and the person who found them and the identifying mark on each. The original notes should be preserved in the investigative file of the case for use by the Agent when he/she is called upon to testify at the trial. If any of the evidence contains identifying numbers, such as found on guns or lottery tickets, these numbers should be recorded by the Agent finding the article and the original notes preserved.

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5-9.1 |Moved to 5-10.1|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

5-9.2 |Moved to 5-10.2|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

5-9.3 |Moved to 5-10.3|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

|5-10| SEARCHES BY U.S. CUSTOMS SERVICE |(Formerly 5-9)|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

|5-10.1| Authority of Customs Officers |(Formerly 5-9.1)|

Officers of the Customs Service have the right by statute to search without warrant and without placing under arrest aliens or citizens entering the United States. Should a Customs Officer lawfully conducting an investigation for customs purposes request the assistance or presence of an Agent, the presence of such Agent and his/her participation in questioning the individual being searched will not invalidate an otherwise lawful search or seizure. (See Bureau Bulletin #9 dated March 3, 1950.)

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

|5-10.2| Diplomatic Personnel |(Formerly 5-9.2)|

The policy of the FBI with reference to diplomatic or similar official personnel of foreign governments is that Agents will not request or conduct an examination or search of their baggage or other material under their control without first obtaining the permission of the State Department. Such permission may be requested when information is received that an individual assigned to the diplomatic staff of a foreign government is carrying material of importance to the national security of the United States.

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|5-10.3| Non-Diplomatic Personnel |(Formerly 5-9.3)|

The local office of the U.S. Customs Service should be requested to make the search of material of importance to the national security of the United States in the possession of persons who do not have any official status when Agents have a reasonable belief something of value will be ascertained. Agents may be present at such an examination in the capacity of observers only.

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|5-11| DIPLOMATIC IMMUNITY |(Formerly 5-10)|

Agents may not enter the office or dwelling of diplomatic representatives of foreign governments for the purpose of making a search or seizure (see Section 3-12, Diplomatic Immunity).

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5-11.1 |Moved to 5-12.1|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

5-11.2 |Moved to 5-12.2|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

5-11.3 |Moved to 5-12.3|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

|5-12| FIRST AMENDMENT PRIVACY PROTECTION |(Formerly 5-11)|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

|5-12.1| Limitations on Search Authority |(Formerly 5-11.1)|

The Privacy Protection Act of 1980 restricts the authority of FBI Agents to search for and seize evidence in possession of the written and electronic news media. In addition, because of its broad language, the statute affords protection not only to the institutional press (newspapers, magazines, radio, and television), but to others, such as academicians, authors, film makers, and photographers. Specifically, the law makes it unlawful for Agents investigating a criminal offense to search for or seize work product or documentary materials possessed by a person in connection with, or with a purpose of, disseminating a public communication in or affecting interstate or foreign commerce. The clear intent of Congress is to require the government generally to proceed by subpoena to obtain such materials.

(1) Work product materials are those prepared, created, or possessed by a person reasonably believed to have a purpose to disseminate such materials to the public through newspapers, broadcasts, or other public communications. They include opinions, theories, conclusions, and mental impressions. Examples are research notes, drafts, or scripts prepared or possessed by a news reporter or broadcaster with intent to disseminate.

(2) Documentary materials are those upon which information is recorded, possessed by a person in connection with a purpose to publish through a newspaper, book, broadcast, or similar form of public communication. Examples are printed materials, videotapes, motion picture films, photo negatives, and magnetically or electronically recorded cards, tapes, or discs.

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|5-12.2| Exceptions |(Formerly 5-11.2)|

The Act does not prohibit the search for or seizure of either work product materials or documentary materials if there is probable cause to believe the possessor thereof has committed or is committing a crime to which the materials relate (exclusive of a possessory offense). Nor does the Act bar the seizure of either category of materials where there is a reasonable belief that seizure is necessary to prevent death or serious bodily injury.

In addition to the foregoing, documentary materials only may be seized if:

(1) issuance of a subpoena would cause destruction or concealment of the materials; or

(2) the possessor has failed to comply with a court order to produce the materials, and delay caused by further legal proceedings would threaten the interests of justice.

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|5-12.3| Remedies |(Formerly 5-11.3)|

No criminal sanction attaches for violation of the Act. Nor will evidence seized in violation of the Act be excluded in a criminal proceeding. However, a civil cause of action against the United States, providing for liquidated damages, has been created. While Agents cannot be sued individually under the Act, the Attorney General is directed to: (1) cause an administrative inquiry to be held where a violation of the law has occurred; and (2) impose administrative sanctions against the individual Agent, if warranted.

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5-12.4 |Moved to 5-13.4|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

5-12.5 |Moved to 5-13.5|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

5-12.6 |Moved to 5-13.6|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

|5-13| SEARCH FOR DOCUMENTS IN POSSESSION OF THIRD PARTIES

|(Formerly 5-12)|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

|5-13.1| Attorney General Guidelines |(Formerly 5-12.1)|

The Attorney General has issued guidelines, pursuant to Title II, Privacy Protection Act of 1980, which control the method used by Agents in obtaining documentary materials possessed by disinterested third parties. The purpose of the guidelines is to assure that federal officers do not use their search and seizure authority to obtain such evidence unless reliance on a less intrusive alternative means (e.g., subpoena, summons, request) would jeopardize the availability or usefulness of the materials. The guidelines are reproduced in full in MIOG, Part 2, Section 28.

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

|5-13.2| Definitions |(Formerly 5-12.2)|

(1) Disinterested third parties, for purposes of the guidelines, are persons or organizations not reasonably believed to be either suspects in a crime to which the documents relate or individuals related by blood or marriage to such suspects.

(2) Documentary materials are those on which information is recorded and include, in addition to written or printed matter, such things as photos, films, audio or visual tapes, and materials on which information is electronically or magnetically recorded. Documentary materials do not include items which are contraband, fruits and instrumentalities of crime. Therefore, evidence such as demand notes in bank robberies, negotiable securities stolen and transported interstate, and fraudulent applications for federal loans or grants, may be reached by search warrant without offending the guidelines.

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|5-13.3| Exemptions |(Formerly 5-12.3)|

Exempted from the guidelines are the following:

(1) Audits, inspections, etc., undertaken pursuant to federal statute or contract;

(2) Foreign counterintelligence operations under authority of applicable federal law;

(3) Border searches;

(4) Consent searches;

(5) Obtaining abandoned materials or those in possession of persons unknown who cannot be served with a subpoena or presented with a request.

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|5-13.4| Procedures (See MAOP, Part 2, 2-4.4.5 and 2-4.4.17.)
|(Formerly 5-12.4)|

(1) While search warrants are discouraged, the guidelines permit their use where less intrusive means of securing the documentary materials are not available, due to such factors as possible destruction of the evidence or a detrimental delay in an investigation. In those situations, a warrant may be used if the application for the warrant is approved by an attorney for the government (i.e., U.S. Attorney, Assistant U.S. Attorney, certain Department of Justice supervisory officials). In an emergency, where it is not possible to contact one of these individuals, the SAC, or in his/her absence the ASAC, may authorize application for the warrant, so long as the U.S. Attorney (or Departmental official) is notified of the authorization and the justification therefor within 24 hours.

(2) A search warrant should not be used where the materials sought are in the possession of a disinterested third party physician, lawyer, or clergyman, and the materials contain confidential information on patients, clients, or parishioners developed in connection with treatment or counseling, or such materials are likely to be reviewed while executing the warrant. A warrant is permitted, however, under the following conditions:

(a) Use of a less intrusive means would jeopardize the availability or usefulness of the materials sought;

(b) Access to the materials appears to be of substantial importance to the investigation; and

(c) The application for the warrant is recommended by the U.S. Attorney (or appropriate Department of Justice official) and authorized by a Deputy Assistant Attorney General. The request for this authorization should be made in writing and should include the application for the warrant, as well as a brief description of the facts and circumstances supporting the use of the search warrant procedure. In an emergency, the authorization may be obtained from the U.S. Attorney (or appropriate Departmental official), so long as the Deputy Assistant Attorney General is notified of the authorization and justification within 72 hours.

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|5-13.5| Choice of Warrant or Less Intrusive Means |(Formerly 5-12.5)|

In choosing whether to use the search warrant process or alternative less intrusive means, such as subpoenas or summonses, to obtain documents, Agents should consider:

(1) Whether use of the alternative means will give advance notice of the government's interest, with the resulting likelihood of destruction, alteration, or concealment of the documents sought;

(2) Whether the government has an immediate need to obtain the documentary materials.

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|5-13.6| Sanctions |(Formerly 5-12.6)|

Violation of the guidelines requires appropriate disciplinary action by the Agency in which the violator is employed. Exclusion of evidence as a remedy for failure to comply with the guidelines is expressly prohibited.

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SECTION 6. EYEWITNESS IDENTIFICATION

**EffDte: 04/28/1978 MCRT#: 0 Div: D9 Cav: SecCls:

6-1 IN GENERAL

The use of an eyewitness identification technique implicates a variety of constitutional as well as policy considerations. The guidelines which follow have two important purposes: to assure the admissibility and credibility of eyewitness identification testimony and to make certain that all identifications are the product of the honest, independent recollection of the witness.

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6-1.1 Initial Description

The initial description of the subject obtained from the witness should be as detailed as possible. Information obtained should include as many details as possible regarding the physical characteristics and clothing of the suspect. This initial description is an essential part of any subsequent lineup.

**EffDte: 01/30/1997 MCRT#: 583 Div: D9 Cav: SecCls:

6-2 LINEUPS

**EffDte: 10/27/1978 MCRT#: 0 Div: D9 Cav: SecCls:

6-2.1 When Conducted

A lineup should be held only when clearly necessary. Such a case is one in which identification by a witness is a critical factor, and the witness is so unfamiliar with the accused that identification is uncertain. Other significant factors which may be considered by the Agent in making a determination of whether to conduct a lineup are the following:

(1) Other Evidence - If the government possesses a significant amount of other evidence, such as an admission of a codefendant, a confession, or physical evidence, eyewitness identification may be unnecessary and consideration should be given to foregoing a lineup. This is especially true when the eyewitness' recollection is weak.

(2) Unusual Appearance of Suspect - If the suspect's appearance is uncommon or unusual, and difficulty is experienced locating suitable elimination participants, consideration should be given to not holding a lineup.

(3) Prior Knowledge - If the witness is acquainted with the suspect and recognized him/her during the offense, a lineup may be unnecessary.

(4) Inconvenience - If the suspect is in custody a great distance from the witness, a lineup may not be feasible. Consideration should be given to using photographic identification procedures.

(5) Uncooperative Suspect - It may be unwise to hold a lineup if the defendant threatens disruptive tactics. (See 6-2.10, Refusal to Participate.)

(6) Consultation with |Chief Division Counsel| or U.S. Attorney - If there is any uncertainty about the necessity or wisdom of conducting a lineup, the Agent should seek the advice of the |Chief Division Counsel| or USA. The decision to hold a lineup often can be made while reviewing the proof with the USA when seeking authorization for a warrant.

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6-2.2 Notice to U.S. Attorney, Defense Counsel, and |Chief Division Counsel|

Once a lineup has been scheduled, the Agent should immediately advise the USA and defense counsel of the fact, time and place. The |Chief Division Counsel| should be notified and, if possible, attend the lineup.

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6-2.3 Defense Objections to Proposed Lineups

If defense counsel raises objections or in any other manner obstructs the proposed lineup, |defense counsel| should be advised to discuss the matter with the USA.

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6-2.4 Right to Counsel (See 6-2.4.2 (1).)

The legal right to the presence of a lawyer at a lineup exists only if the lineup takes place after an initial appearance before a magistrate or the initiation of formal prosecution by the filing of either an information or the return of an indictment, and the lineup is connected with the offense for which the suspect made an initial appearance or was charged.

**EffDte: 10/09/2001 MCRT#: 1159 Div: D9 Cav: SecCls:

6-2.4.1 Lineups Prior to Arrest or Initiation of Prosecution

If a suspect voluntarily appears in a lineup before initial appearance or initiation of prosecution, or is compelled to appear pursuant to a court order or grand jury subpoena (See 6-2.11, Detention of Suspects for Lineups), he/she shall be informed that he/she may retain counsel for the lineup if he/she wishes, but that he/she has no legal right to counsel and one will not be appointed to represent him/her. The suspect shall be so informed sufficiently in advance of the lineup to enable him/her to secure the services of an attorney at his/her own expense. If the suspect fails to retain counsel, it is not necessary to obtain a waiver or execute Form FD-404, Your Rights at a Lineup. The lineup may be held without the presence of a defense attorney.

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6-2.4.2 Lineups After Arrest or Initiation of Prosecution

(1) Unrelated Offenses - Even after the initiation of criminal charges, a suspect does not have the right to counsel at a lineup relating to other criminal offenses which have not been formally charged to the suspect. For example, if a suspect is arrested and charged with Theft from Interstate Shipment, and subsequently is developed as a bank robbery suspect, he would have no legal right to be represented by counsel at a lineup held for witnesses of the bank robbery. This rule applies whether the suspect is in custody or on bond.

If such a lineup is contemplated, the suspect should be informed well in advance of the lineup that he has no legal right to an attorney at the lineup and one will not be appointed to represent him. If the suspect is already represented by retained or appointed counsel, or desires to hire an attorney, he should be permitted to do so and have the attorney at the lineup to represent him. If the suspect fails or declines to retain counsel, the lineup may proceed without the presence of a lawyer for the suspect. In that event, it is unnecessary to obtain a waiver or execute Form FD-404. (See 6-2.4.)

(2) Same Offense - A suspect has the right to a lawyer

for any lineup in connection with the offense for which he has been arrested or charged. If he cannot afford one, he has the right to have one appointed. No lineup shall be held under this section if the suspect is not represented by counsel or refuses to execute a waiver of counsel pursuant to Section 6-2.5.

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6-2.5 Waiver of Counsel (See 6-2.4.2 (2).)

(1) Lineups After Arrest or Charges - If the defendant has no counsel at the time of the lineup, or his counsel has not appeared, the defendant should be asked if he is willing to appear in the lineup without the benefit of counsel. If he is willing, he should be requested to waiver counsel by signing Form FD-404.

(2) Execution of Form FD-404 - All blanks on Form FD-404 should be completed to show the place of the lineup (city, state), date, and time the form was furnished to the suspect. The form should be signed by the suspect and two witnesses (preferably Special Agents) and the time noted.

(3) Refusal to Sign Form - If the suspect is willing to appear without counsel but will not sign the form, his words should be written in the blank space below the "waiver and consent" paragraph on the form. Witnesses should then sign the form, and the lineup held.

(4) Voluntariness of Waiver - To be valid, the waiver must be voluntary. Agents should not do or say anything which would make the waiver anything other than the product of the suspect's free choice.

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6-2.6 Substitute Counsel

If the suspect is entitled to a lawyer but is not represented by counsel and refuses to waive counsel, the U.S. Attorney should be asked to request the court to appoint counsel for lineup purposes. The lineup should not be conducted if the suspect is not represented by counsel and refuses to execute the waiver.

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6-2.7 Role of Defense Counsel

The proper function of a defense attorney at a lineup is

merely that of an observer. His presence is required to assure intelligent cross-examination of the lineup witnesses later at trial, and to detect anything that might affect the admissibility of testimony about the lineup.

(1) Lawyer's Suggestions - The defense lawyer should be permitted to make suggestions concerning the procedure of the proposed lineup. The Agent should attempt to incorporate any reasonable suggestion which promotes the fairness of the lineup. All suggestions, whether or not adopted, should be noted by the Agent supervising the lineup and included in his FD-302.

(2) Participation During Lineup - The attorney should be instructed not to converse with the lineup participants or witnesses during the lineup. Any attempts to disrupt the lineup should be noted by the Agent on his FD-302. If the attorney for the defendant obstructs the identification, he may be excluded from the lineup room. In the event a defense attorney is excluded, the U.S. Attorney should be contacted before resuming the lineup.

(3) Presence at Moment of Identification - If practicable, the witness should make the identification attempt in the lineup room when the suspects are still visible. Defense counsel should be present and immediately informed if an identification is made. He should not be allowed to communicate with the witness at this time, nor participate in the identification process.

(4) Presence at Postlineup Interview of Witness - The right to counsel does not extend to interviews with lineup witnesses after the conclusion of the lineup. The suspect's lawyer thus should be excluded from the postlineup interviews of lineup witnesses.

(5) Contact with Government Witnesses After Completion of Lineup - The lineup witness may be told that he may speak with the defense attorney if he wishes, but that he is under no legal obligation to do so. The witness' name and address should not be revealed to the defense lawyer without the consent of the witness.

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6-2.8 Suggested Lineup Procedure

All FBI lineups should comply with the procedures discussed below. The primary objectives of these procedures are to eliminate suggestiveness and make certain that nothing is done or said by the Agents to distinguish the suspect from other participants in the lineup. This will assure accurate and reliable identifications.

(1) Number of Participants - At least six (6) persons, including the suspect, should be included.

(2) Physical Similarity - All participants should be of the same race and sex and be similar in physical description.

(3) Persons Known to Witnesses - Persons known to the witnesses should not be used as elimination participants in the lineup.

(4) Position of Suspect - The suspect should not be positioned as to suggest identity. Prior to viewing by witnesses, the suspect should be allowed to change his position if either he or his attorney requests a change.

(5) Conduct of Agents - Agents participating in or observing a lineup should not do or say anything to call the witness' attention to the suspect. Agents should not comment on the validity of an identification made by a lineup witness.

(6) Distinctive Clothing - The lineup suspect may be compelled to wear distinctive clothing. All other participants must wear similar attire or don the suspect's clothing.

(7) Voice Identification - The suspect may be compelled to speak for voice identification if all participants are required to state the same words or phrases. None of the lineup participants, including the suspect, should be required to identify himself individually when being viewed by the witnesses.

(8) Compelled Action - The suspect can be compelled to make certain gestures or assume particular poses. All other lineup participants should be required to do likewise.

(9) Multiple Witnesses - Multiple witnesses should view the lineup separately. If this is not feasible, care should be taken to segregate the witnesses during the lineup so that they are unaware of the reactions of the other witnesses.

(10) Identifications - The witness should be asked to make an identification during the lineup, when the lineup participants are within view of the witness. Multiple witnesses should make identifications out of the presence of other witnesses. In the event of a positive identification, the witness should be asked to execute a signed statement setting forth the reasons which persuaded him to make the identification.

(11) Photograph of Lineup - Frontal and profile photographs of the lineup participants should be taken and preserved in the case file for possible use as evidence in the event the fairness of the lineup is challenged.

(12) Record of Lineup - The Agent in charge of the lineup is to prepare a complete memorandum (FD-302) on how and where the lineup was held. The memorandum should include the names and addresses, jail or otherwise, of all lineup participants. Any

suggestions or objections made by the defense attorney should be noted in the FD-302. Other Agents assisting in the lineup shall prepare FD-302's describing their roles in the lineup.

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6-2.9 Lineups Conducted by Local Authorities

It is recognized that in some instances local facilities and personnel might have to be used to conduct a lineup. In that event, efforts should be taken to assure that the procedures used by the local authorities substantially conform to the procedures outlined above.

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6-2.10 Refusal to Participate

An in-custody suspect has no right to refuse to participate in a lineup. If a suspect refuses to participate or refuses to perform required acts in the lineup (utter certain 3words, perform certain acts), he should be informed that he has no right to refuse. The defendant may be informed that evidence of his refusal might be used against him at his trial. If the suspect continues to refuse, consideration should be given to obtaining a court order to compel participation, or employing photographic identification procedures.

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6-2.11 Detention of Suspects for Lineups (See 6-2.4.1.)

When probable cause for arrest is not present, or when an arrest is not desirable, two possibilities are available to compel the suspect to appear in a lineup:

(1) Court Order - Upon approval of the U.S. Attorney, an affidavit may be filed with the U.S. Magistrate or U.S. District judge seeking an order compelling the suspect to appear at a designated place and time for a lineup. The affidavit should contain facts establishing grounds to believe that a Federal offense has been committed, that there is reason to suspect that the person named or described in the affidavit committed the offense, and the results of the lineup will be of material aid in determining whether the person named in the affidavit committed the offense.

(2) Grand Jury Subpoena - The U.S. Attorney may be

requested to ask the Federal grand jury for a subpoena directing the suspect to appear in a lineup at a designated time and place.

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6-3 SINGLE SUSPECT CONFRONTATIONS

**EffDte: 05/30/1991 MCRT#: 0 Div: D9 Cav: SecCls:

6-3.1 When Permissible

If a suspect is arrested or placed in temporary detention shortly after the commission of an offense, in the general area of the offense, suspect may be confronted singly by witnesses for identification purposes. The phrase "shortly after the commission of an offense," as used in this section, is to be considered two hours unless special circumstances of an individual case warrant an extension, or local practice or court rules require a reduction. In arrest situations, preference should be given to foregoing the single suspect confrontation in favor of a formal lineup. However, if staging a lineup will cause a substantial delay in the identification attempt and thus reduce the reliability of the identification, or is impracticable under the circumstances, the Agents should proceed with the single suspect confrontation.

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6-3.2 Confrontation Procedure

Because single suspect confrontations are inherently suggestive, Agents should take all reasonable steps to assure that confrontations between suspects and eyewitnesses are accomplished as fairly as possible, with a minimum of suggestiveness. Some procedures which may reduce suggestiveness are outlined below. It is recognized that the circumstances surrounding single suspect confrontations will vary. Therefore these procedures are not mandatory, but are offered merely for guidance.

(1) Circumstances of Viewing - Agents may be able to arrange the circumstances of the viewing to reduce suggestiveness. For example, the suspect may be positioned with several Agents, or exchange articles of clothing with the Agents or others.

(2) Informing Witness of Status of Investigation - Agents should avoid telling witnesses about the status of the investigation or the details of the apprehension of the suspect. For example, Agents should not inform the witness of the fact that the suspect was stopped in a stolen car, or that he/she possessed a weapon or fruits

of the crime, or that he/she admitted his/her participation in the offense. The witness merely should be informed that a person who fits the description of the suspect has been detained for investigation.

(3) Questioning Witnesses - Agents should phrase questions of witnesses so as to avoid suggesting that the person stopped has been arrested or is the perpetrator of the crime. For example, "Is this the person?" is preferable to "This is the person, isn't it?"

(4) Commenting on Validity of Identification - Agents should not comment on the validity of an identification made by a witness during a single suspect confrontation.

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6-3.3 Place of Confrontation

(1) After Arrest - If a suspect found in the general vicinity of a crime shortly after its commission is arrested, the confrontation may take place either at the place of arrest, the scene of the crime, or any other appropriate place. The consent of the suspect shall not be required to remove him/her from the arrest site to another location for viewing.

(2) During Temporary Detention - If a person found in the general vicinity of a crime shortly after its commission is placed in temporary detention, the confrontation should take place at the location of the stop. This will require transporting the witnesses to the scene of the detention. Unless special circumstances exist, or the suspect voluntarily consents, the suspect should not be transported to the scene of the crime or to another location for viewing.

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6-3.4 Multiple Witnesses

If there are several witnesses to the crime, consideration should be given to having only one or two confront the suspect. If the suspect is taken into custody, a lineup may be arranged for the witnesses who did not view the suspect in the confrontation.

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6-3.5 Right to Counsel

A suspect who appears in a single suspect confrontation

has no right to be represented by counsel at the confrontation. It is unnecessary for any suspect to execute Form FD-404, Your Rights at a Lineup, prior to appearance in the confrontation.

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6-4 PHOTOGRAPHIC IDENTIFICATION (See MIOG, Part I, 91-8 (8).)

**EffDte: 05/30/1991 MCRT#: 0 Div: D9 Cav: SecCls:

6-4.1 When Conducted |(See LHBSA, Part 1, 6-4.6.)|

(1) Prior to Arrest - Photographic identification techniques are permissible prior to arrest, when the perpetrator of the crime is not in custody, and his/her identity is unknown or he/she cannot be located.

(2) |After an Arrest - Photographic identification techniques may be used, however, Agents should consider whether a lineup is reasonably practicable as the lineup technique is regarded as the most reliable of the eyewitness identification procedures.|

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6-4.2 Suggested Photographic Identification Procedures (See |6-4.6 and|MIOG, Part 2, 7-8.)

The display of photographs should not be impermissibly suggestive. Therefore, except where wholly impracticable, the following procedures should be utilized:

(1) Number of Photographs - The suspect's photo should be in a group of at least five other photos. Investigators may wish to utilize Form FD-747, Photo Spread Folder, to display the photographs.

(2) Similarity of Photographs - There should be a reasonable attempt to use photographs of other persons who resemble the suspect. The photo print itself should not be dissimilar to other prints.

(3) Multiple Displays - Photographic displays should not be repeatedly shown to witnesses who have made identifications unless in furtherance of a legitimate investigative purpose.

(4) Comments by Agents - Agents should not indicate in any manner which photograph is of the suspect. Agents should not comment on the status of the investigation or on the validity of an

identification.

(5) Multiple Witnesses - No witness should view the photographs in circumstances which permit other witnesses to ascertain his/her ability or inability to identify the suspect.

(6) Indications of Criminality - Agents should attempt to locate and utilize photographs which do not show indications of criminal misconduct by the individuals depicted in the photographs, and where feasible, use photographs without number boards or other indications of criminality. If mug shots are the only photographs available, it is preferable that the number boards be covered or masked over.

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6-4.3 Retention of Photographs |(See 6-4.6.)|

All photographs shown to any witnesses for the purpose of identifying the suspect, whether or not an identification was made, should be specifically identified and remain under the control of the field office or be otherwise recoverable, so that they will producible, if necessary.

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6-4.4 Written Record of Photographic Identification
|(See 6-4.6.)|

A written record of photographic displays, for the purpose of identifying a suspect, should be made and maintained in the case file. Except where wholly impracticable, the record should include the following:

(1) Record of Photographs - A record should be maintained of all photographs shown to any witnesses for the purpose of identifying a suspect. The record should be maintained whether or not an identification was made.

(2) Identity of Persons Depicted - Identifying information on persons represented in each photograph should be maintained.

(3) Marks or Scratches - The purpose or absence of any marks, scratches, folds, writings, or other notable physical characteristics on the photographs should be recorded.

(4) Date, Time, and Location of Display - The date, time, and location of each photographic display should be recorded.

(5) Identity of Witness - The name and address of the witness to whom the photographs were displayed should be noted.

(6) Identity of Agent - The name of the Agents who observed or participated in the photo display should be recorded.

(7) Statements by Agents - Any statement made by an Agent to the witness in connection with the photographic display, and pertaining to the identification, should be noted.

(8) Details of Identification - If the witness makes a positive identification, he/she should be asked to furnish a signed statement furnishing the details of the identification.

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6-4.5 Right to Counsel

A suspect does not have the right to have |his/her| lawyer present at a photographic display, whether the display is before or after arrest.

**EffDte: 08/27/1982 MCRT#: 0 Div: D9 Cav: SecCls:

6-4.6 Displaying Bank Robbery Surveillance Photographs

(1) Witnesses of Depicted Robbery - Bank Robbery surveillance photographs may be shown singly to, or left with witnesses of, the depicted robbery. Inasmuch as this practice is not suggestive and does not give rise to a likelihood of misidentification, Section 6-4.2 is inapplicable.

(2) Witnesses of Separate Robbery - If robbery surveillance photos are shown to witnesses of a robbery other than the robbery depicted in the photograph, and an identification is being sought, the guidelines set out in Sections 6-4.1, 6-4.2, 6-4.3, and 6-4.4 should be observed. With regard to Section 6-4.2(1), the other photographs in the spread should be surveillance photos taken during other, unrelated robberies.

**EffDte: 08/27/1982 MCRT#: 0 Div: D9 Cav: SecCls:

6-4.7 Release of Photographs to the News Media

|(1)| FBI personnel should take no action to encourage or assist the news media in photographing or televising a defendant or accused person being held or transported in Federal custody.

|(2)| Employees of the FBI should not make available to the media photographs of a defendant unless a law enforcement function is served thereby. The release of a bank camera photo or a photograph of a defendant who is a fugitive from the justice is considered a proper law enforcement function and is permitted under this section.

**EffDte: 08/27/1982 MCRT#: 0 Div: D9 Cav: SecCls:

6-4.8 Photographing Juveniles (See 3-16.2 (6) and MIOG, Part II, Section 4-2.2.3.)

The Juvenile Delinquency Act states that no juvenile who has been arrested shall be photographed unless it is determined |he/she|will be tried as an adult, or the U.S. District judge consents to the photo being taken. This prohibition is applicable to FBI Agents, the U.S. Marshal's office, and any local facility in which a juvenile is incarcerated on Federal charges.

**EffDte: 08/27/1982 MCRT#: 0 Div: D9 Cav: SecCls:

SECTION 7. CONFESSIONS AND INTERROGATIONS

**EffDte: 04/28/1978 MCRT#: 0 Div: D9 Cav: SecCls:

7-1 IN GENERAL (See MIOG, Part 2, Section 7.)

The most important limitations on the admissibility of an accused's incriminating statements are the requirements that they be voluntary; that they be obtained without the government resorting to outrageous behavior; and that they be obtained without violating the accused's right to remain silent or to have a lawyer present.

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

7-2 VOLUNTARINESS

A conviction based on an involuntary statement, without regard to its truth or falsity, is a denial of the accused's right to due process of law. A coerced confession will undermine the legitimacy of a conviction.

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7-2.1 Policy (See MIOG, Part 2, 7-2.1.)

(1) It is the policy of the FBI that no attempt be made to obtain a statement by force, threats, or promises. Whether an accused or suspect will cooperate is left entirely to the individual. If after being advised of his/her rights, an in-custody suspect indicates that he/she wishes to remain silent or that he/she wishes an attorney, all interrogation must cease at that time. Agents are reminded, however, that certain questions, such as standard booking questions and public safety questions, do not amount to interrogation for purposes of Miranda. (See LHBSA, Part 1, 7-4.)

(2) During an interview with a witness, suspect, or subject, Agents should under no circumstances state or imply that public sentiment or hostility exists toward such person. If, during an interview with a witness, suspect, or subject, questions are raised by such persons or if anything transpires which gives reasonable grounds to believe that subsequently such questions or incident may be used by someone in an effort to place an Agent or the FBI in an unfavorable light, an electronic communication regarding such questions or incident should be immediately prepared for the SAC. The SAC is responsible for promptly advising FBIHQ and the USA of such questions or incident and FBIHQ must be promptly informed of all developments.

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7-2.2 |Factors Affecting Voluntariness (Formerly 7-2.3)|

(1) Courts use a "totality of circumstances" test when determining the voluntariness of an accused's statement. Although it is not possible to predict in every case whether a court will find, under all the circumstances presented, that the statement was a product of the accused's free will or a product of coercion, there are predictable factors that a court will examine in making its determination. Those factors include the following:

(a) Notification of charges;

(b) Age, intelligence, and experience of the accused;

(c) Physical condition of the accused;

(d) Physical abuse, threats of abuse, use of weapons, number of officers present;

(e) Threats and psychological pressure;

(f) Privation: food, sleep, medication;

(g) Isolation, incommunicado interrogation;

(h) Duration of questioning;

(i) Trickery, ruse, deception;

(j) Advice of rights; and

(k) Promises of leniency or other inducements.

(2) It must be kept in mind that the above factors are merely illustrative. The presence of any one or more of the factors mentioned above will not necessarily make a statement involuntary.|

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7-2.3 |Moved to 7-2.2|

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7-3 WARNING OF RIGHTS

**EffDte: 04/28/1978 MCRT#: 0 Div: D9 Cav: SecCls:

7-3.1 In General

Prior to custodial interrogation, an accused is entitled to be warned of the right to remain silent and the right to an attorney at this critical stage of the criminal prosecution. Failure to warn renders the product of interrogation (confession or admission) subject to exclusion. Moreover, the government bears the burden of proving that the accused understood and voluntarily waived those rights prior to custodial interrogation.

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7-3.2 Policy (See 7-4.1 (11)(b) and MIOG, Part 1, 173-3 (1).)

(1) FBI policy requires that a person must be advised of the names and official identities of the interviewing Agents, the nature of the inquiry, and must be warned of his/her rights as set forth in Section 7-3.3 before such person is interviewed if the person:

(a) Has been arrested and is in federal or state custody, or custody of a foreign government;

(b) Is significantly restricted in his/her freedom of action to a degree normally associated with a formal arrest;

(c) Whether in custody or not, has been previously arrested or otherwise formally charged and prosecution is pending, when the subject matter of the interview concerns the pending charge, or a closely related offense. (See (3) and (4).)

(2) The above policy requires compliance where the freedom of action of the person questioned is "significantly restricted." This phrase is to be interpreted as meaning something more that a brief, temporary investigative detention. It is intended to apply in situations where no formal arrest has occurred, but the person is restrained in the freedom of movement to the degree associated with formal arrest. This circumstance can arise even in the absence of a formal arrest when, judging the totality of circumstances, a reasonable person in the position of the interviewee would believe that custody exists. For example, detention at gunpoint, use of restraining devices or movement of an interviewee without consent are factors likely to create the reasonable perception that custody has occurred, thus requiring the warning and waiver. However, Agents can lessen the impact of these factors and dispel doubt that might exist in the interviewee's mind regarding his or her custodial status by telling the person that he/she is not under arrest. (See (4).)

(3) The warnings and waiver are required where a person has been previously charged with a crime|by indictment, information or presentment for an initial appearance and is subsequently| interviewed about the pending charge or a|closely|related offense. |An offense is considered closely related to the charged offense when it is essentially the same crime or a lesser included offense. If, however, the crime charged and the offense under investigation each require proof of at least one additional fact, they are not considered closely related. Therefore, a person charged with a burglary who is subsequently released on bond could be interviewed regarding a murder that occurred during that burglary without first being warned of his/her rights and waiving those rights because murder is not a closely related offense to burglary.| (See (4) and (7).)

(4) When the conditions requiring the advice of rights specified in Section 7-3.2 (1) - (3) do not exist, the interviewing Agents are only required to advise a person of their names and official identities and the nature of the inquiry.

(5) The warning and waiver of rights is not required prior to a request for general background information contained in standard booking questions. To fit within this exception, the question must be one that is routinely asked of individuals in FBI custody and there must be a clear administrative, as opposed to investigative, need for the information requested.

(6) The warning and waiver of rights is not required when questions which are reasonably prompted by a concern for public safety are asked. For example, if Agents make an arrest in public shortly after the commission of an armed offense, and need to make an immediate inquiry to determine the location of the weapon, such questions may be asked, even of an in-custody suspect, without first advising the suspect of the warnings contained in Form FD-395. This public safety exception could also apply to other situations where imminent threat(s) to the safety of law enforcement officers or member(s) of the public could be alleviated by questions necessary to neutralize that threat.

(7) The warning and waiver of rights is not required when questions regarding|crimes not closely related to charged|offenses are being asked by a cellmate informant. The informant may be either an inmate placed for that purpose or an undercover law enforcement officer. |A crime that is not closely related to the offense charged| is one that meets the requirement of subsection (3) above. (See MIOG, Part 1,|Section 137.)|

**EffDte: 10/09/2001 MCRT#: 1159 Div: D9 Cav: SecCls:

7-3.3 Form FD-395 (See LHBSA, Part 1, 7-3.2, 7-4.1, 7-15 and Appendix, 2-1.)

The language of the proper warning of rights and the waiver, contained on FBI Form FD-395, is as follows:

YOUR RIGHTS

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions.

You have the right to have a lawyer with you during |the|questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you have the right to stop answering at any time.

I have read this statement of my rights and I understand what my rights are. At this time, I am willing to answer questions without a lawyer present.

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7-3.5 Right to Lawyer; Ability to Pay

No attempt should be made in giving the warning to determine, or distinguish between, those who are unable to pay and those who are. The right to counsel includes the right to have counsel appointed if the accused is unable to pay.

**EffDte: 11/10/1988 MCRT#: 0 Div: D9 Cav: SecCls:

7-4 WAIVER OF RIGHTS|(See LHBSA, 7-2.1 (1).)|

Before a statement can be admitted into evidence, the Government must prove that the suspect fully understood the warnings

and freely decided to answer questions. A suspect who remains silent after receiving warnings has not agreed to be questioned.

**EffDte: 10/25/1993 MCRT#: 159 Div: D9 Cav: SecCls:

7-4.1 Policy |(See 7-3.3.)|

(1) Use of Form FD-395 - Inasmuch as the government will have to meet a "heavy burden" in establishing that an accused knowingly and intelligently waived his/her rights, it is desirable that the subject's acknowledgment of the warnings and his/her waiver be obtained in writing. |The| FD-395 should be used for this purpose. Completion of this form by the suspect provides documentary proof of both the warning and waiver of rights; consequently, the words of the full warning and waiver should not be repeated in the FD-302 reporting the results of the interview. State only the fact that the accused was warned of his/her rights and that he/she waived them, "as shown on an executed warning and waiver form"; this notation should appear immediately before the report's recitation of what the accused said in his/her statement. (See (7).)

|(2)| Refusal to Sign FD-395 - If the accused is willing to waive his/her rights but will not sign Form FD-395, use the blank space on the form to record the language in which he/she indicated his/her willingness to waive (precise quotation if possible) and then execute the form in all respects other than his/her signature. (See also |Appendix, 4-1,| of this manual.) (See (7).)

|(3)| Refusal to Waive - If the accused refuses to waive, or initially waives but at any time thereafter reconsiders and invokes his/her right to remain silent and/or counsel, the interview must be immediately terminated. The words and the fact of refusal should be recorded in the blank space on the FD-395, and the form then executed in all other respects. (See (7).)

|(4)| Recontact After Accused Invokes |Right to Silence|- If an accused invokes his/her right to remain silent, Agents should not attempt a second interview until a significant period of time has elapsed (a two-hour period has been held significant), or the accused requests to be interviewed anew. In either case, Agents should ensure that the accused is provided a "fresh set" of Miranda warnings and waiver before further questioning begins. If the accused again asserts his/her right to remain silent, the right must be honored by immediately terminating the interview. |(See (6) and (7).)|

(5) |Invocation of Right to Counsel - If an accused invokes his/her right to counsel, as long as the accused remains in continuous custody, Agents should not attempt a subsequent interview unless the accused "initiates" it, or unless the accused's counsel is present. In those cases where an accused who has invoked his/her right to counsel initiates a second interview, Agents must ensure that

the accused is advised of and waives his/her Miranda rights before proceeding with the interview. Additionally, it should be recognized that not every statement by an accused will be viewed as initiating a second interview. In order to be viewed as initiating a second interview, a statement by an accused should either be a direct request for such or the words must be capable of reasonable interpretation that he/she desires to be interviewed. Where the words are ambiguous, they should be clarified by the Agents asking if he/she now wants to be interviewed. The words and responses, if any, to such clarifying questions should be made a matter of record. Requests for information or creature comforts and general conversation by an accused should not be viewed as directly indicative of a desire to be interviewed and should not, by themselves, be used to predicate a second interview. (See (6).)

(6) Assertion of Rights Before Officers of Another Jurisdiction - Where an accused is in the custody of officers of another jurisdiction and Agents desire to interrogate the accused, Agents must inquire of such officers whether the accused has asserted his or her right to remain silent and/or the right to counsel. If so, Agents must treat that invocation of rights as if it had been made directly to them, and a second interview will only be allowed where the rules set forth in Section 7-4.1 (4) and (5), supra, are followed. The same procedure applies where Agents seek to question an accused in custody who has been previously the target of an interrogation effort by other Agents.

(7) Request for Legal Representation at a Court Proceeding - If an accused, during the course of an initial appearance or other court proceeding, requests to be represented by legal counsel or accepts the court appointment of counsel, no interview of the accused may take place concerning the charge(s) for which the accused has appeared in court unless:

(a) the accused's counsel is present; or

(b) the accused initiates the contact with the Agents and is expressly advised that he/she has the right to be represented by separate counsel; or

(c) contact is necessary to acquire information critical to life and the presence of counsel will delay or impede the receipt of the needed information; or

(d) the contact has been approved by the United States Attorney's Office or other Department of Justice official based on extenuating circumstances such as defense counsel's involvement in the criminal offense or other serious conflicts of interest.

An accused who has requested legal representation in a court hearing may, however, be interviewed concerning other uncharged offenses. If the accused is in custody, the interview concerning the uncharged offenses must by preceded by a warning

and waiver of Miranda rights. See, Section 7-4.1 (1) - (4).

(8) FD-395; Impossible or Impractical to Use - In any situation in which the written form is impossible or impractical to use, an acknowledgment of rights and a waiver of those rights can be obtained orally from the suspect. If FD-395 is not used, the justification therefor must be set out in the cover pages of the report setting forth the results of the interview. Although the oral warning and waiver need not be given in any particular form, they must conform substantially to the language found in FD-395. The testimony of the Agent that the warning was administered, that the suspect expressly stated his/her willingness to make a statement, and that he/she did not want a lawyer should suffice to carry the government's burden.

(9) Warnings and Waiver; Applicability to Witness - The warning and waiver requirements do not apply to statements obtained from witnesses in criminal investigations. However, in each instance the interview report must clearly indicate that the statement was given freely and voluntarily by the witness.

(10) Warnings and Waiver; Applicability to Civil Matters - The warnings and waiver requirements do not apply to purely civil matters, for which no criminal punishment--fine or imprisonment--is provided, including investigations under the Civil Rights Act of 1964 and the Fair Housing Act of 1968 (Discrimination in Housing). However, the warning should always be given and the waiver obtained in investigations under the Civil Rights Act of 1964 and the Fair Housing Act of 1968 when interference by force or threat of force, interference with a witness, or other obstruction of justice is involved.

(11) Persons Under Local Arrest; Informants - The requirements of warning and waiver apply:

(a) To a person interviewed under local arrest on local charges for possible federal violations;

(b) To an informant being interviewed as a subject or suspect concerning his/her own guilt, when the conditions described in Section 7-3.2 exist.

(12) Obtaining Lawyer for Accused - Agents are not responsible for obtaining counsel for anyone.

(13) Filing of FD-395 - The original FD-395 (signed or unsigned) must be filed in the 1-A envelope (FD-340 and/or FD-340b) of the case file.

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(1) During the course of an investigation, if the USA or an AUSA desires to interview a subject, or if a subject makes |a| request to see and talk to the USA or his/her assistant, Agents should not participate in such interviews unless specifically requested to do so by the |AUSA| and with the authorization of |a supervisor or Chief Division Counsel.|

(2) On occasion, Agents will also be requested |to refrain from recording| the substance of that interview on an FD-302. If |an| AUSA or a Department of Justice attorney should make that request, the Agent should decline to participate in the interview and should not be present when it takes place, in order to avoid being disadvantaged should the Agent be later called to testify regarding the interview. (See MAOP, Part 2, 10-13.3.)

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7-5.1 |Deleted|

**EffDte: 10/09/2001 MCRT#: 1159 Div: D9 Cav: SecCls:

7-6 INTERVIEW UNDER OATH (See 7-12.15 and MIOG, Part I, 46-1.9 (6).)

Agents are authorized to administer oaths only in cases involving misconduct of Government employees and fraud or attempted fraud against the U.S. Government. Under no circumstances should a Bible be used in administering oaths or in conducting any interviews with a witness, suspect, or subject. When more than one Agent is present during an interview under oath and a sworn, signed statement is not taken, the name of the Agent administering the oath must be set out in the document reporting the results of the interview.

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7-7 |DELETED|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

7-8 |RECORDING OF INTERVIEWS (Formerly 7-14) (See 7-9.3.)

(1) Use of electronic recording devices to record the confessions or interviews of witnesses is permissible when authorized by the SAC, or his or her designee. (See MIOG, Part 2, Section 10-10.10.)

(2) When electronically recording confessions or witness interviews, Agents are required to comply with MIOG, Part 2, Section 10-10 (Consensual Monitoring) and Sections 10-9.8, 10-9.8.1, and 10-9.8.2 regarding preservation of original tape recordings and chain of custody.

(3) When electronically recording confessions of custodial subjects, the following guidelines should be observed:

(a) Confessions made during custodial interrogation may be recorded electronically when such recording is approved by the SAC, or his or her designee. If approved by the SAC, or his or her designee, the confession may be recorded in summary form.

(b) When recording a confession, the recording should include an advice and waiver of Miranda rights, as well as a question and answer segment designed to demonstrate that the subject's statements are voluntary and not the product of coercion.

(c) The subject may provide a complete confession in his or her own words. Alternatively, the FBI may obtain a confession using a question and answer format (if necessary, conducted through a translator).

(d) Statements may be recorded surreptitiously if approved by the SAC, or his or her designee. (See MIOG, Part 2, Section 10-10.10.) If a subject is aware of and objects to the use of an electronic recorder, the recorder should be turned off and the subject's objection should be made part of the interrogation log and FD-302. Before approving the surreptitious recording of the statements, SACs are urged to obtain the concurrence of the CDC or the appropriate OGC attorney. In accordance with the Attorney General procedures for consensual monitoring, concurrence of the U.S. Attorney's office responsible for the investigation must also be obtained.

(e) If the interviewing Agent electronically records the whole custodial interrogation session, he or she may determine that a subsequent signed statement is not required. (See 7-12.1.)

(f) Discussions that may transpire between the interviewee and his or her attorney should not be recorded.

(g) The recordings must not be edited or altered, and the original tapes must be sealed in an FD-504a or FD-504b (Chain of Custody - ELSUR Evidence Envelope) and stored in such a manner as to ensure the chain of custody.

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7-9 INTERVIEW LOGS (See MIOG, Part I, 263-5.1 (3).)

**EffDte: 03/16/1987 MCRT#: 0 Div: D9 Cav: SecCls:

7-9.1 When Required

A handwritten interview log shall be maintained in the following cases:

(1) On all interviews in which the warning and waiver are required;

(2) When a subject or suspect is interviewed on FBI premises even though not under arrest.

|(3) Whenever Form FD-644 is utilized in an Office of Professional Responsibility inquiry (see Manual of Administrative Operations and Procedures, Part I, Section 13-6).|

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7-9.2 Retention of Log

The log will be maintained permanently in the 1A section of the appropriate file.

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7-9.3 Contents of Log

The interview log shall include when applicable, but not necessarily be limited to, notations on the following points:

(1) Person interviewed

(2) Identity of Agents conducting the interview

(3) The place

(4) The date

(5) The time of arrest

(6) The place of arrest

(7) Identity of Agents making arrest

(8) Time interview began

(9) Time subject or suspect was informed of his/her rights (unless indicated on FD-395), and when more than |one|Agent was present, the name of the Agent so advising subject or suspect.

(10) Time subject or suspect waived his/her rights (unless indicated on FD-395)

(11) Time interview concluded

(12) Time preparation of statement commenced

(13) Identity of person preparing statement

(14) Time statement completed

(15) Time subject or suspect reviewed statement

(16) Time written statement signed

(17) A record of requests and complaints of subject and the action taken thereon; such as, the time a subject or suspect requests permission to call an attorney, the time he/she made a call to his/her attorney, the time subject or suspect complained of illness, the time and action taken on this complaint, the time subject or suspect requested food, the time and action taken on this request, and the details as to how his/her request was handled.

(18) Time subject advised of his/her opportunity to have summarized version of their statements recorded. (See LHBSA, Part 1, 7-8.)

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7-10 INTERPRETERS

**EffDte: 04/28/1978 MCRT#: 0 Div: D9 Cav: SecCls:

7-10.1 When to Use

Use of an interpreter should be considered for an interview with either a subject or witness when there is doubt of the interviewee's ability to use and understand the English language and the interviewing Agent is not qualified to use the principal language of the interviewee. Confessions may be excluded from Federal court because they are given in English, without an interpreter, by subjects who allege at trial that they did not have a good understanding of the English language. A garbled interview with a Government witness may contribute to the impeachment of that witness at trial.

**EffDte: 04/28/1978 MCRT#: 0 Div: D9 Cav: SecCls:

7-10.2 Qualifications

The interpreter's technical qualifications should be the best available; his function may affect a constitutional right of the person interviewed. The interpreter's general appearance and conduct are also important inasmuch as he may be called to the trial as the principal, or only, witness to what the interviewee said during the interview.

**EffDte: 04/28/1978 MCRT#: 0 Div: D9 Cav: SecCls:

7-11 PLEA BARGAINING

FBI personnel should not participate in plea bargaining, since such negotiations are functions of the USA's Office. The SAC or Agent personnel involved may furnish facts to the USA's Office bearing on the merits of an agreement proposed by the USA as well as an opinion as to whether further investigation would likely strengthen a case under consideration.

**EffDte: 04/28/1978 MCRT#: 0 Div: D9 Cav: SecCls:

7-12 PREPARATION OF SIGNED STATEMENTS (See MAOP, Part II, 10-13.)

**EffDte: 04/28/1978 MCRT#: 0 Div: D9 Cav: SecCls:

7-12.1 In General

Where possible, written statements should be taken in all cases in which any confession or admission of guilt is obtained unless the confession was obtained during an electronically recorded interrogation session. (See LHBSA, Part 1, 7-8 (3)(e).) Written confessions should be prepared in the first person in the language of

the defendant. Where individuals giving signed statements cannot speak or read English, the statement, where possible, should be made in their native language. Agents should not use any language indicating to the subject that|his/her|statement may be used "for"|him/her|in court.

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7-12.2 Joint Statements

Joint statements are not permissible. An individual statement is to be taken for each subject or suspect.

**EffDte: 04/28/1978 MCRT#: 0 Div: D9 Cav: SecCls:

7-12.3 Contents

|The fact that the subject was advised of the identity of the interviewing Agents and the nature of the inquiry shall be shown in the first sentence of a signed statement, or if no statement is taken, in the opening paragraph of the FD-302 reporting the results of the interview. The date and place where the statement is made should be shown, and all relevant details of the offense should be developed, particularly details which may be corroborated by other evidence. The statement should be prepared in a logical manner. A chronological recitation of the facts and events is often a useful approach.|

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7-12.4 Method of Preparation

The statement may be typewritten or in the handwriting of the subject or the interrogating Agent. The statement is not to be prepared in pencil.

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7-12.5 Review

If the statement is typewritten or in the handwriting of any person other than the subject, it should be given to|him/her to| read. Under certain circumstances, it is desirable as well to read the entire statement to the subject. For example, where the subject is unable to read well, or where|he/she|has impaired vision, the reading of the statement aloud will enable Agents to rebut possible

future allegations that the subject did not know what he/she was signing. Each separate page of the statement should be initialed by the subject.

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7-12.6 Changes

If the subject desires the statement changed in any part, he should be requested to make such changes in his own handwriting or to place his initials opposite each correction. These instructions apply only to the period during which the statement is being prepared. Once the person has signed the statement, or in any other manner adopted it as his own, being final and correct, it must not thereafter be changed in the least particular. Any change desired must be made the subject of a separate signed statement which refers back to the first.

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7-12.7 Adoption and Signature

A person signing a statement adopts it as his own even though he personally did not type or write it. Subjects making signed statements should include in their own handwriting just above the signature a declaration as follows: "I have read the foregoing statement and declare that the same is entirely true." Similar phraseology which expresses this thought is acceptable.

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7-12.8 Refusal to Sign

If the subject will not sign the statement, the fact that he read it or that it was read to him by the Agent and he acknowledged it or admitted the truth of it shall be written on the statement by the Agent and attested to by the Agent's signature and that of another witness.

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7-12.9 Witnesses

The statement should be signed in the presence of the interrogating Agents, or if only one Agent is present, then it should

be signed in the presence of a witness or witnesses in addition to the Agent to whom the statement was made. If only one Agent is present, and no other witnesses are available, a brief explanatory note regarding the circumstances should be included in the cover page accompanying the Agent's report. A witness to a signed statement or confession should sign his full name, together with his title, or if he has no title, his address.

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7-12.10 Furnishing Copy of Statement

Agents should not volunteer to furnish a copy of a confession or signed (or unsigned) statement to subjects or their attorneys. If any such person requests a copy after the case has been formally referred to the USA, the person requesting the copy should be referred to the USA. A case will be considered formally referred to the USA when facts are presented to him and he indicates the likelihood of ultimate prosecution. If the copy is requested prior to formal referral, it should be furnished. If the defendant, prospective defendant, or witness interviewed after formal referral offers to give a confession or signed statement only upon the condition that a copy will be given to him, the statement or confession should be taken and the copy furnished unless the USA can readily be reached for an opinion and advises to the contrary.

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7-12.11 Preservation of Statement and FD-395

The original statement or confession (signed or unsigned) and the FD-395 or other original record of warning and waiver of rights should not be mutilated by punch marks, block stamps, or file numbers but should be retained and preserved in their original condition in the |1A| envelope |(FD-340)| of the |investigative| case file and should not be forwarded to FBIHQ. Where an investigation results in an accumulation of a large number of statements, necessitating their retention in a place other than the |1A| envelope, the statements should be retained as |1C material (FD-192A).| Statements are an integral part of the investigative case file and must not be destroyed without prior FBIHQ authority.

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7-12.12 Delivery to U.S. Attorney

A statement or confession should be delivered at the time

of trial to the USA having jurisdiction over the prosecution when requested or prior to trial where the court has ordered the Government to permit the defendant to inspect, copy, or photograph relevant written or recorded statements or confessions made by the defendant.

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7-12.13 Statements of Witnesses

Generally, the above instructions apply to statements obtained from witnesses. With regard to the warning and waiver requirements in such situations, see Sections 7-3 and 7-4.

**EffDte: 04/28/1978 MCRT#: 0 Div: D9 Cav: SecCls:

7-12.14 Handling and Transmittal

All signed (or unsigned) statements, including those received from subjects, suspects, and witnesses, are to be handled in the manner applicable to documentary evidence and shall be sent registered when transmitted by mail. This rule applies also to Form FD-395 or other original record of any warning and waiver of rights.

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7-12.15 Statements Under Oath

When preparing signed statements which are taken under oath administered by an Agent (see Section 7-6), the sworn statements should open with the following preamble: "I, (name), being duly sworn, hereby make the following free and voluntary statement," etc., continuing with the usual phraseology regarding the official character of the Agent or Agents, and the nature of the inquiry. After the signature of the person giving the statement should appear the following: "Sworn to and subscribed before me on (date) at (place)." This will be followed by the signature of the Agent administering the oath, together with|his/her|official designation, "Special Agent, Federal Bureau of Investigation." The signature of the witness or witnesses should then appear below the signature of the Agent administering the oath. The official title of each witness or, if no title,|his/her|address, should follow|his/her|signature.

**EffDte: 06/29/1981 MCRT#: 0 Div: D9 Cav: SecCls:

7-12.16 Use of Signed Statements at Joint Trials

A written confession in any case involving two or more subjects who may be tried jointly shall be prepared in a manner relating all details of the offense as furnished by the confessor; in addition, it shall contain a paragraph inserted between the introductory statement (showing identity of interviewing Agents and nature of the inquiry) and the opening paragraph of the full details. This paragraph shall contain only those admissions of the confessor which relate solely to his/her|guilt. If the confessor refuses to take the witness stand at a subsequent|joint trial, only that portion of the statement|that|incriminates the confessor would be offered in evidence without prejudice to any rights of the codefendants. |If, however, the confessor takes the witness stand during a joint trial or at|separate trials, the entire statement|would|be|admissible|against the|confessor and all codefendants.| Alternatively, two separate statements can be prepared, one relating all details of the offense as furnished by the confessor, and the other containing only admissions of the confessor which relate solely to his/her guilt.

**EffDte: 01/30/1997 MCRT#: 583 Div: D9 Cav: SecCls:

7-13 RETENTION OF INTERVIEW NOTES (See MAOP, Part II, 10-12, and MIOG, Part II, Section 6-1.4.9.)

In any interview of a subject, suspect, or witness, where preparation of an FD-302 is required, that is, where the results of the interview may become the subject of court testimony, the original handwritten notes of the Agent conducting the questioning are to be retained in the 1A Section of the case file. The retention of notes is required whether the person interviewed is in custody or not.

**EffDte: 06/29/1981 MCRT#: 0 Div: D9 Cav: SecCls:

7-14 |IDENTITY OF INTERVIEWING AGENTS (See MIOG, Part 2, 7-1.) (Formerly 7-17)

Credentials shall be exhibited to all persons interviewed by Special Agents so there will be no doubt concerning the organization with which they are connected. In addition, when interviewing persons in the custody of other authorities, for whom a federal warrant is outstanding, Agents must advise them of the offense charged in the warrant. It is not necessary to explain the charges in detail. The language of the offense contained in the warrant is sufficient.|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

7-15 INTERVIEWS IN FOREIGN COUNTRIES (See MIOG, Part II,

Sections 7, 23-4.4, and 23-8.2 (9).)

Persons interviewed by Agents while in police custody in a foreign country must be given the usual warning of rights under American Federal law as fully as possible. Before conducting an interview with a foreign police officer present, the Agent must determine from the officer whether the standard FBI warning may be given. If the foreign officer has no objection, the standard FBI warning should be given (see Section 7-3.3). If the foreign officer objects, feeling that the FBI warning is not consistent with the law of his/her country and might work unfavorably on prosecution of the subject there, the Agent should request the officer to give the warning as required by the law of his/her country. The wording of this warning, and the time and circumstances of the giving of it, should be recorded. If the Agent is later allowed to take a written statement for FBI purposes only, the Agent should write in it the standard FBI warning.

**EffDte: 03/16/1987 MCRT#: 0 Div: D9 Cav: SecCls:

7-16 APPEARANCE BEFORE U.S. MAGISTRATE

Interviews with persons under arrest must be in a manner that will not unnecessarily delay their appearance before a U.S. Magistrate (see Section 3-5, Prompt Appearance Before Magistrate).

**EffDte: 03/16/1987 MCRT#: 0 Div: D9 Cav: SecCls:

7-17 |MOVED TO 7-14|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

|7-18| REMOVAL OF PRISONER FROM CUSTODY OF U.S. MARSHAL

(1) Removal of a prisoner from the U.S. Marshal's custody for interviews when necessary by Agents requires authority of the SAC, and a certification in writing to the U.S. Marshal that a prisoner awaiting trial cannot properly or conveniently be interviewed at the place of detention, that the public interest requires a temporary removal therefrom, and a request in writing that such prisoner awaiting trial be brought from the place of confinement to the office of the FBI in the same city. In such case, the prisoner must be returned to the place of detention within twenty-four hours after|his/her|removal therefrom. Such interviews should be conducted only when absolutely necessary and every precaution should be exercised in safeguarding such prisoners interviewed in field offices.

(2) When prisoners are removed from the custody of the U.S. Marshal to be transported to some place other than a field office to reenact the scene of a crime or to aid in location of a hideout, etc., prior FBIHQ authority is necessary before making the request of the U.S. Marshal's Office for release of the prisoner.

**EffDte: 06/29/1981 MCRT#: 0 Div: D9 Cav: SecCls:

7-19 PRESENCE OF COUNSEL DURING INTERVIEW (See MIOG, Part 2, Section 7.)

(1) In the event an individual being interviewed in a criminal investigation (including subjects, suspects, and witnesses) is accompanied by an attorney or aide or requests the presence of an attorney or aide, the interview may be conducted, provided that, when possible, the case is reviewed and potential problems are discussed with the CDC prior to the interview. Two Agents should be designated to conduct the interview whenever the presence of an attorney or aide is anticipated.

(2) In the event an individual being interviewed in a security-type case, whether a subject or otherwise, requests that his/her attorney or aide be present, the interview may be continued. When it is anticipated that an attorney or aide will be present during the interview, the interview should be conducted by two Agents when it is logical to do so. In all instances of planned interviews, the SAC has the responsibility and option of deciding when two Agents should handle the interview. Judgment in each case should be based on logical grounds, and considerations such as an Agent's safety or security and the potential for harassment of an Agent, are to be taken into account.

(3) In all instances, however, including investigations with security ramifications, it is permissible to accept any information being volunteered by an individual, whether in the presence of his/her attorney or not.

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

|7-20| PRESENCE OF STENOGRAPHERS |

No interviews are to be conducted in the presence of stenographers employed by subjects without prior FBIHQ approval. No interviews are to be conducted in the presence of other stenographers not employed by the FBI without FBIHQ approval.

**EffDte: 06/29/1981 MCRT#: 0 Div: D9 Cav: SecCls:

|7-21| EVIDENCE OF FEDERAL INCOME TAX VIOLATIONS (See MIOG, |

Part II, 7-6.2 (3).)

If evidence of income tax evasion or other irregularities relating to payment of Federal income taxes is developed as a result of interviewing a person in connection with a criminal investigation, such information should be referred promptly to the local office of the Internal Revenue Service and reported to FBIHQ in a form suitable for dissemination.

**EffDte: 06/29/1981 MCRT#: 0 Div: D9 Cav: SecCls:

|7-22| REQUEST TO SEE JUDGE OR U.S. MARSHAL

In all cases in which an FBI subject is incarcerated either prior to or after arraignment and plea, if the subject makes it known to an Agent during the course of an interview or otherwise |his/her| desire to be brought before the district court judge or to see a U.S. Marshal, immediate steps should be taken by the Agent to advise the USA or U.S. Marshal of the desires of the subject.

**EffDte: 06/29/1981 MCRT#: 0 Div: D9 Cav: SecCls:

|7-23| QUESTIONING ABOUT SIMILAR CRIMES

When interviewing subjects and suspects, consideration should be given to including questions as to the knowledge on the part of the individuals of previous crimes of a type similar to the one currently being investigated, possibly to solve previously unsolved violations.

**EffDte: 06/29/1981 MCRT#: 0 Div: D9 Cav: SecCls:

|7-24| PROTECTING IDENTITY OF INFORMANTS

In the interrogation of subjects and suspects of FBI investigations, Agents should be most meticulous not to disclose directly or indirectly confidential informants or confidential sources of information. Questions or references to papers and files may enable a subject to identify the source of FBI information.

**EffDte: 06/29/1981 MCRT#: 0 Div: D9 Cav: SecCls:

7-25 |DELETED|

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

7-26 REQUEST TO USE TELEPHONE

If, during an interview with a subject, suspect, or person under arrest, prior to an appearance before a U.S. Magistrate, U.S. District Court judge, or other committing magistrate, such person requests permission to telephone an attorney, relative, or friend, the request should be granted unless there is reason to believe that the call would jeopardize a continuing investigation. Where the request involves a toll call or long distance charge, the Agent who has custody of the person may allow the call to be made at FBI expense if in his/her judgment the call is justified. The appearance of a person under arrest before a U.S. Magistrate, U.S. District Court judge, or other committing magistrate should not be delayed solely for the purpose of permitting such person to confer with an attorney, friends, or relatives.

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

7-27 LEGAL ADVICE BY AGENTS (See MIOG, Part 2, 7-2.1.)

Agents are not acting as attorneys for persons interviewed and under no circumstances should legal advice be given or an attempt made to answer legal questions. Agents who are attorneys should not deliberately make known their legal training. If an Agent who is an attorney is questioned regarding his/her legal training, he/she should state that he/she is an attorney but that he/she is not in a position to give legal advice or answer legal questions. Agents should not interview subjects, subsequent to the initial interview, to determine what plea the subject will make on arraignment. If a USA should make such a request, he/she should be informed of FBI instructions.

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

7-28 ADVICE OF CHARGE; LOCAL CUSTODY

On the arrest of a subject, or interview of a subject in custody of other authorities, Agents have the duty of informing the subject of the offense charged in the warrant. It is not necessary to explain the nature of the charges in detail greater than the language of the offense named in the warrant. These instructions do not alter instructions regarding cooperation with USAs and U.S. District Courts in obtaining statements from subjects in noncapital cases who indicate a desire to be brought before the court for the purpose of waiving grand jury indictment under Rule 7(b), Federal Rules of Criminal Procedure (FRCP), or where a subject desires to plead guilty or nolo contendere, waive venue, and be sentenced in the district of arrest under Rule 20, FRCP.

SECTION 8. INFORMANTS AND ENTRAPMENT

**EffDte: 10/27/1981 MCRT#: 0 Div: D9 Cav: SecCls:

8-1 IN GENERAL (See MIOG, Part I, Section 137.)

(1) The use of informants to assist law enforcement officers in the task of enforcing the criminal law has been recognized and approved by the courts for centuries. Because criminals usually work covertly, the government may also employ some guile or misrepresentation when attempting to investigate and apprehend those responsible for criminal conduct. The value of informants is particularly high in investigations of so called "victimless crimes" where complaining witnesses are rare, or in situations in which eyewitnesses are unavailable.

(2) Although informants are private individuals in the sense that they are not commissioned representatives of the government, they are considered agents of the government when performing informant-related tasks. As such, they are subject to the same legal restrictions that govern the conduct of Special Agents. It follows that if the informant's contemplated action would be illegal or unconstitutional if performed by a Special Agent, it is also impermissible if performed by the informant. The material which follows contains a general discussion of the common legal and policy restraints which limit the permissible scope of an informant's activities. In addition, a brief discussion of the law relating to the government's privilege of nondisclosure of its informants' identities is included.

(3) It is noted that this section does not include any of the material contained in the Attorney General's Guidelines on FBI use of informants and confidential sources. These rules, which can be found in MIOG, Part I, Section 137, set out FBI policy regarding informants and confidential sources. They include regulations governing when an informant may be utilized, when an informant may participate in criminal activities, when appropriate authorities must be notified of an informant's unauthorized criminal activity, when a person affiliated with the news media or under an obligation of a legal privilege or confidentiality may be used, when an informant may be permitted to infiltrate an organization, and the circumstances of payment to an informant.

(4) For a discussion of the Bureau rules relating to the administrative handling of informants see MIOG, Part I, Section 137.

**EffDte: 01/30/1997 MCRT#: 583 Div: D9 Cav: SecCls:

8-2 INFORMATION REGARDING LOCAL CRIMES

When an FBI informant provides information concerning planned criminal activity which is not within the investigative jurisdiction of the FBI, the FBI should advise the law enforcement agency having investigative jurisdiction. If the circumstances are such that it is inadvisable to have the informant report directly to the agency having investigative jurisdiction, the FBI, in cooperation with that agency, may continue to operate the informant.

**EffDte: 05/01/1985 MCRT#: 0 Div: D9 Cav: SecCls:

8-3 LEGAL LIMITATIONS

**EffDte: 11/10/1988 MCRT#: 0 Div: D9 Cav: SecCls:

8-3.1 Entry to Premises

Any entry by an informant into premises protected by the Fourth Amendment is illegal if the informant had no authority to enter. For example, a surreptitious entry without the consent of the suspect or another person with lawful possession of the property, would be illegal and taint anything observed or overheard by the informant while inside the premises. Conversely, if an informant is invited into a suspect's residence, even though the invitation is obtained after misrepresenting his/her identity and purpose, the courts uniformly consider his/her presence lawful. The fact that entry is gained by use of a ploy or ruse does not vitiate the suspect's permission to enter. It follows that any incriminating information developed by the informant, whether in the form of a statement made by the suspect, or a physical item observed by the informant, is lawfully developed and can be used by the Government either to establish probable cause for the issuance of a warrant, or as an element of proof at a criminal trial.

**EffDte: 11/10/1988 MCRT#: 0 Div: D9 Cav: SecCls:

8-3.2 Search and Seizure

As noted earlier, informants are considered agents of the law enforcement officers for whom they work and are subject to the same exclusionary rules imposed on the officers or agents who direct them. Thus any evidence obtained or observed by the informant while conducting an unreasonable search and seizure will likely be inadmissible in a criminal prosecution against the party aggrieved by the search. For a discussion of the general rules governing searches and seizures, see Section 5, Search and Seizure.

**EffDte: 11/10/1988 MCRT#: 0 Div: D9 Cav: SecCls:

8-3.3 Contact with Suspects

(1) The use of informants to contact individuals suspected of crime can be very productive. The unwary suspect frequently will confide in the informant and volunteer details of his/her criminal conduct. This information may be valuable as lead material, or may be offered as evidence of guilt either through the testimony of the informer himself/herself, or possibly an Agent who monitored the conversation with a listening device.

(2) There are, however, several limitations on the use of an informer under these circumstances. These limitations are derived from constitutional and ethical considerations, as well as court-imposed restrictions. The following material is intended as a general summary of the law in this area. Guidance should be obtained from the |Chief Division Counsel| prior to using an informant to contact a criminal suspect for evidence of guilt.

(3) For purposes of organization, the discussion of this technique is separated into situations in which the suspect |has not been charged, arrested, or named as a defendant in a law enforcement proceeding and those in which the suspect has been charged, arrested, or named as a defendant in a law enforcement proceeding.|

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8-3.3.1 Suspect not |Charged, Arrested or Named as a Defendant in a Law Enforcement Proceeding|

(1) |Prior to the suspect being charged, arrested or named as a defendant in a law enforcement proceeding, it is permissible for an informant to engage a criminal suspect in conversation and elicit incriminating remarks. As long as the suspect is speaking voluntarily, without compulsion, his/her remarks will be admissible against him/her.|

(2) |If the suspect who is not yet charged, arrested or named as a defendant in a law enforcement proceeding is represented by counsel, the restrictions contained in Section 8-3.4 must be observed.|

**EffDte: 01/30/1997 MCRT#: 583 Div: D9 Cav: SecCls:

8-3.3.2 Suspect Charged, Arrested, or Named as a Defendant in a Law Enforcement Proceeding (See LHBSA, 8-3.3.3, and MIOG, Part 1, |137-13.)|

(1) Informant Contact Regarding Charged or Related Offenses

(a) After the suspect has been indicted or has appeared at his/her initial appearance and has accepted or requested the appointment of counsel, informants may not elicit information about charged or related offenses from the subject unless the information is necessary to preserve a life or safety.

(b) If the suspect is in custody, the use of a cellmate informant to act only as a listening post and report unsolicited or spontaneous statements of the suspect does not violate the law or policy. Because of the difficulty in proving that the cellmate informant did not solicit incriminating statements or stimulate conversation with the suspect to gain incriminating statements, the designed use of a cellmate informant even as a listening post must receive the prior approval of FBIHQ and concurrence of the prosecuting United States Attorney's Office.

(2) Informant Contact Regarding Uncharged, Unrelated Offenses

(a) If the suspect is not represented by counsel on the uncharged, unrelated offenses, it is permissible for an informant to engage the suspect in conversation and elicit incriminating remarks regarding the uncharged, unrelated offense whether the suspect is in custody or not. The contact will not violate the law or policy.

(b) If the suspect is represented by counsel on the uncharged, unrelated offenses, the informant contact must comply with Section 8-3.4.

**EffDte: 01/14/2002 MCRT#: 1177 Div: D9 Cav: SecCls:

8-3.3.3 Wired Informants

(1) The restrictions discussed in 8-3.3.2 are also applicable to informants who are equipped with a concealed radio transmitter or recording device. The courts have held that the use of wired informants to record or transmit conversations with suspects does not violate Title III of the Omnibus Crime Control and Safe Streets Act of 1968, or the Fourth Amendment. Thus prior judicial approval is unnecessary. Agents contemplating their use should see MIOG, Part II, 10-10.3.

(2) Special Agents should understand that if a wired informant records a conversation with an individual who later becomes a criminal defendant, the rules of discovery may allow the defendant to obtain the recording.

**EffDte: 01/30/1997 MCRT#: 583 Div: D9 Cav: SecCls:

8-3.4 Intrusion into Attorney-Client Relationship

When informant contacts are otherwise permissible under Sections 8-3.3.1 and 8-3.3.2 above, the following restrictions must be observed:

(1) The informant may not inquire about information regarding lawful defense strategy or legal arguments of counsel;

(2) The informant must not disparage counsel for the suspect or otherwise seek to induce the person to forego representation or to disregard the advice of the suspect's attorney;

(3) The informant must not otherwise improperly seek to disrupt the relationship between the suspect and counsel;

(4) The informant may not attend or participate in lawful meetings or communications between the suspect and his/her attorney unless requested to do so by the suspect, the attorney, or another person affiliated with the defense and when reasonably necessary for the safety of an individual or the confidentiality of an undercover operation. If the informant attends or participates in such meetings, any information regarding lawful defense strategy or trial preparation imparted to the informant shall not be communicated to attorneys for the government or to law enforcement agents who are directly participating in the ongoing investigation or in the prosecution of pending criminal charges, or used in any other way to the substantial detriment of the subject. Therefore, the informant should be cautioned not to communicate to the Agent any of the details he/she has learned regarding defense strategy or plans, location of evidence, or admissions by the defendant to the attorney regarding the offense charged.

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8-3.5 Entrapment

(1) Entrapment is a defense asserted frequently by defendants in cases in which informants have played an active role. Entrapment is established if the evidence shows the idea or plan for the criminal act originated with the Government, and the Government implanted that idea by various forms of inducement in the mind of an otherwise innocent (not predisposed) person who then commits the alleged crime. In enacting Federal criminal statutes, Congress intended that otherwise innocent persons should not be convicted where they were enticed by the Government into violating the law. If the

evidence in a case establishes that the defendant was predisposed to commit the offense, however, the defense of entrapment will be defeated.

(2) Predisposition in Federal cases can be established by many different types of evidence. Federal courts generally permit the Government to introduce at trial the following types of predisposition evidence as long as it is similar to the crime for which the defendant is currently charged:

(a) Prior convictions.

(b) Prior arrests.

(c) Preoffense criminal activity. For example, the defendant is charged with selling a controlled substance. Prior to the offense charged, he/she sold a similar substance to undercover Agents.

(d) Postoffense criminal activity. For example, the defendant is charged with selling cocaine. A few months later he/she attempts to sell another controlled substance to undercover Agents.

(e) A defendant's response to a Government inducement can also be considered as evidence of predisposition. A defendant's ready and unhesitating acceptance of the Government's offer to commit a crime is substantial evidence that he/she was predisposed to do so.

**EffDte: 05/01/1985 MCRT#: 0 Div: D9 Cav: SecCls:

8-3.6 Governmental Participation

It should be noted that under the entrapment test used in Federal courts, governmental involvement in the criminal activity does not constitute entrapment if the defendant was predisposed to commit the crime. For example, the Supreme Court has held there was no entrapment in a prosecution for manufacturing narcotics, even though an undercover agent supplied a predisposed defendant with an ingredient essential to the manufacturing process. Merely furnishing the opportunity to violate the law does not constitute entrapment. Entrapment lies only when the Government induces a suspect to commit a crime he/she is indisposed to commit.

**EffDte: 05/01/1985 MCRT#: 0 Div: D9 Cav: SecCls:

8-3.6.1 The Due Process Defense

(1) It is clear from the foregoing discussion that proof

of predisposition to commit a crime will bar application of the entrapment defense, notwithstanding some governmental involvement in the criminal activity. However, the courts have held that fundamental fairness will not permit a defendant to be convicted when the conduct of informants or agents was outrageous. This differs from the entrapment defense in that the conduct of the Government, rather than the predisposition of the defendant, determines if the defense is available. As stated in the preceding paragraph, some Government involvement in criminal activity is permissible. But when the involvement is outrageous, and offends common concepts of decency, the courts are prepared to dismiss the charges on Due Process grounds.

(2) Whether an informant's conduct offends fundamental fairness is a question which is resolved on a case-by-case basis. It is, therefore, difficult to predict with certainty if a given factual situation will offend the Due Process standard. Nevertheless, certain activity, by its very nature, lends itself to a Due Process claim.

(3) Some of the factors that courts have considered in deciding whether an informant's conduct violates Due Process are whether the informant, by himself/herself or with Government assistance, instigated crime or simply infiltrated an ongoing criminal enterprise; whether the informant directed or controlled the criminal activities of the criminal enterprise or merely took orders from the criminals involved; and whether the informant supplied the criminal enterprise with a substantial amount of essential resources and technical expertise to enable them to commit the offense. The existence of any one of the above factors in a case would not necessarily result in a court finding that a Due Process violation has occurred. A violation of Due Process is more likely, however, where more of such circumstances are present.

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8-4 DISCLOSURE OF INFORMANT'S IDENTITY

(1) Courts have long recognized the necessity of concealing the identities of informants. This concept is known as the informant privilege. The rationale for the privilege is twofold: to ensure a flow of information about illegal acts to law enforcement officers; and to protect informants from physical harm. The Government's privilege of nondisclosure is not absolute, however, and under certain conditions it must be relinquished in favor of informing the defense of the informant's identity. Agents whose investigative duties require use of informants can expect frequent motions by the defense asking the courts for disclosure orders. Discussed below are the factors commonly considered in connection with such motions.

(2) For the most part, the courts have rejected a fixed rule with respect to disclosure in favor of a balancing test. The public interest in protecting a flow of information about criminal

conduct must be balanced against the individual's right to prepare his/her defense. Diverse holdings often result. Nevertheless, some guidance can be gained by examining the settings in which disclosure motions are made.

**EffDte: 05/01/1985 MCRT#: 0 Div: D9 Cav: SecCls:

8-4.1 Pretrial Hearings

Often a defense motion for disclosure is made for the purpose of attacking, on Fourth Amendment grounds, the Government's case at a pretrial stage, such as a preliminary examination or suppression hearing. In discovering the informant's identity, the defense may hope to use the informant as a witness, and establish that the information he/she furnished did not constitute probable cause for arrest. The majority rule is that there is no constitutional requirement for disclosure when the sole issue is probable cause. Thus, most courts deny defense motions made for that purpose. Because hearsay is admissible on the issue of probable cause (Agents can testify to what the informant said), it is unnecessary to require disclosure for a probable cause hearing. Additionally, the fact that informant information may be used in complaints and affidavits without divulging the identity of the source, militates against requiring disclosure.

**EffDte: 05/01/1985 MCRT#: 0 Div: D9 Cav: SecCls:

8-4.2 Trial

At trial, the issue is guilt or innocence, not probable cause, and thus different considerations bear on the question of disclosure. As a general rule, if the court determines that disclosure would be relevant and helpful to the defense, or essential to a fair determination of the case, it will grant the defendant's motion. Again, the courts weigh the defendant's need to prepare his/her defense against the Government's interest in preserving its informant's anonymity. Many factors go into this determination. Among them are the informant's role in the case, the availability of other witnesses, the substance of the informant's testimony, if called as a witness, and the theory of the defense.

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8-4.2.1 Role of Informant

(1) Generally the courts will not require disclosure if an informant's activities were limited to being a witness to a

criminal transaction. This is especially true if other eyewitnesses are available and there is no substantial conflict in their testimony. Informants should be alerted to note the identities of other witnesses if they are present during a criminal act.

(2) Disclosure probabilities increase when an informant participates in the criminal enterprise. In this regard, some courts have drawn a distinction between cases in which an informant was a full participant in the criminal act, and those in which he/she was involved only in the preliminary stages of the case. For example, if an informant's role was limited to simply introducing Government agents to potential defendants, and setting the stage for subsequent criminal transactions, disclosure frequently is denied, especially if the informant did not actually witness the criminal transaction.

(3) But when an informant is an actual party to an illegal act, disclosure is more likely. Some courts require automatic disclosure (on demand by the defense) when an informant was a participant. But others inquire into the details of the informant's possible testimony before ruling on the motion. (See Section 8-4.2.2 below.)

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8-4.2.2 Substance of Informant's Potential Testimony (See 8-4.2.1 (3).)

When deciding whether disclosure is appropriate, some courts require the defendant to make a factual showing that an informant's possible testimony would be relevant and helpful to the defense. In making this determination, trial judges often conduct in camera (in chambers) examinations of informants or their files. If it is determined that an informant's possible testimony would be of no value to an accused, the motion for disclosure is usually denied. However, if an informant's knowledge would be relevant and helpful to an accused, a judge frequently will order disclosure.

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8-4.2.3 Theory of the Defense

The fact that an informant's knowledge of a crime might be helpful to the accused does not mean disclosure will be automatic. The court must determine if the informant's information will be of assistance to the particular defense asserted by the accused. For example, information which is pertinent to the defense of misidentification might be of little or no value to an entrapment defense.

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8-4.3 Federal Regulations Governing Disclosure

(1) Attorney General Order No. 919-80, which became effective December 4, 1980, and revises 28 C.F.R. 16.21 et seq., sets forth procedures to be followed in response to a demand for disclosure of an informant's identity. The regulations apply to criminal and civil proceedings in either state or Federal court, and are pertinent to cases in which the United States is not a party to the litigation as well as those in which the United States is a party.

(2) In the event of a demand for information which would result in revealing the identity of an informant, Agents should be guided by the regulations set forth in the Order. Refer to MIOG, Part II, Section 6-1 et seq. However, pursuant to 28 C.F.R. 16.26(b), disclosure of information which would identify an informant ordinarily will not be made by any Department official.

(3) If a response to a demand for disclosure is required before instructions from the Department of Justice are received, the trial attorney is to furnish the court a copy of Attorney General Order 919-80 and request a stay of the demand pending receipt of the requested instructions. If the court refuses to stay the demand or rules that the demand must be complied with irrespective of departmental instructions, the Agent or employee upon whom the demand has been made shall, if directed by the responsible Department official, respectfully decline to comply with the demand.

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8-4.4 When the Informant Testifies

(1) Occasionally, either because of the importance of a case or the lack of other proof, the Government may choose to use an informant as a trial witness. If it does, a defendant's right to cross-examination requires that the informant-witness testify using his/her true name and address. There is an exception to this, however. If the prosecution can show that physical harm to the informant or his/her family might result if the informant's true name and address are divulged, the trial judge has authority to permit the informant to testify without divulging identifying data.

(2) Mere conjecture that physical harm might result if the informant identified himself/herself on the witness stand is not sufficient to invoke this exception. A factual basis for the concern must be offered. This usually takes the form of previous threats received by the informant or other individuals associated with the defendant. Agents should record, either in the informant's file or

the substantive case file, the details of any threats received by the informant, members of his/her family, or others associated with the crime under investigation.

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SECTION 9. CIVIL AND CRIMINAL LIABILITY

**EffDte: 05/28/1980 MCRT#: 0 Div: D9 Cav: SecCls:

9-1 IN GENERAL (See 3-4.3 and MIOG, Part 1, Section 197.)

It is the purpose of this section to advise Agents of the potential civil and criminal liability that their actions as FBI employees may generate. The bases of civil liability, the responsibilities for paying money damages, the availability of legal representation, and the rules that are to be followed in the event a civil or criminal action is initiated are set forth below.

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9-2 CLAIMS AGAINST THE GOVERNMENT

**EffDte: 05/30/1991 MCRT#: 0 Div: D9 Cav: SecCls:

9-2.1 Federal Tort Claims Act

(1) Pursuant to the Federal Tort Claims Act (FTCA), Title 28, USC, Section 2671, et seq., claims may be made for money damages against the United States for certain negligent or intentional misconduct committed by employees within the scope of their employment; e.g., claims resulting from the alleged negligent operation of an automobile, or those alleging the intentional torts of assault, battery, false arrest, false imprisonment, malicious prosecution or abuse of process. The FTCA is the exclusive remedy for all such common law tort claims which arise from actions taken by federal employees within the scope of their employment. It is a requirement of the FTCA that an administrative claim for compensation be submitted to the FBI prior to the initiation of a civil action in federal district court. Where appropriate, these claims may be settled by either the FBI or the Civil Division of the Department of Justice (DOJ). (See Manual of Investigative Operations and Guidelines (MIOG), Part 1, Section 120.)

(2) When a claim is made or a suit filed under the FTCA, the government is responsible for any judgment or settlement entered. A judgment in an action brought under the FTCA is a complete bar to any action by the same plaintiff, based on the same subject matter, against the government employee whose acts gave rise to the claim.

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9-2.1.1 Automobile Accidents

The FTCA is the exclusive remedy for claims arising from an employee's negligent operation of a motor vehicle if the employee was acting within the scope of employment. The|determination of scope of employment, as well as the|extent of liability is determined by applying the law of the state|where|the accident occurred.

While the government|may settle|claims arising from an employee's negligent operation of a motor vehicle, FBIHQ|may|require reimbursement from|the employee|for damage to Bureau property in those instances where an employee is determined to have been grossly negligent or is utilizing the motor vehicle|in|other than official business. (See Manual of Administrative Operations and Procedures (MAOP), Part 1, Section 12-2.5.1.)

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9-2.2 Claims|without Regard to Negligence|

Pursuant to Title 31, USC, Section 3724, claims up to $50,000 may be settled under the Director's (or his designee's) authority whenever injury, damage or loss of property occurs as the result of|an act|performed in the line of|duty, without regard to negligence|(e.g., Agents break open a locked door to lawfully execute a warrant, and the claimant is an innocent third party|owner). Where appropriate, these claims are settled by either the Chief Division Counsel (CDC) or FBIHQ.| (See MIOG, Part 1, Section |197-11.1.)|

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9-3 SUITS AGAINST THE EMPLOYEE

**EffDte: 05/30/1991 MCRT#: 0 Div: D9 Cav: SecCls:

9-3.1 |Civil Liability|

(1) Bureau employees may be individually sued in federal district court for allegedly violating rights guaranteed by the United States Constitution. |The majority of these cases arise as "Bivens" suits, from the Supreme Court case which first recognized this cause of action. However, such cases may also be styled under federal civil rights statutes.

Certain federal statutes also authorize civil suits against individuals, including government employees, who violate provisions of the statute. Examples include Title 18, USC, Section 2520, which

provides for the recovery of money damages for the illegal interception of wire or oral communications.|

(2) Among the defenses available to an employee sued |for constitutional or statutory violations|is the assertion of qualified immunity. |The|defense may be established by showing that the employee's conduct did not violate any clearly established rule of constitutional|or statutory|law of which a reasonable person would have been aware at the time the conduct occurred. The assertion of qualified immunity can result in a dismissal of the case before trial, or can provide the basis for|a defense|if the case goes to trial.

|(3) Bureau employees may also be individually sued in state court. If the employee's conduct was within the scope of his/her federal employment, the case may be removed to federal district court, and the United States may be substituted as the proper defendant. (Formerly in 9-3.3)|

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9-3.1.1 |Service of Process (Formerly 9-3.5)

Agents served with a civil summons and complaint, or a civil subpoena, from a state or federal court relating to actions taken within the scope of their employment, or who otherwise learn that they have been named as a defendant in such a case, should immediately notify their supervisor and the CDC. It is essential that the employee advise the CDC of the date of service and the manner of service for transmittal to FBIHQ. Unless specifically authorized to do so, no employee should accept service of process for any other employee.|

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|9-3.1.2 Indemnification

(1) An Agent who suffers an adverse judgment as a result of a lawsuit arising out of actions taken within the scope of his/her employment may request the DOJ to indemnify him/her for any monetary damages awarded.

(2) The determination to indemnify the employee is discretionary with DOJ, and is based on a finding that indemnification is in the interest of the United States.

(3) An employee seeking indemnification must submit a written request, with appropriate documentation including copies of the verdict and judgment, to FBIHQ, Office of the General Counsel.

The request will then be submitted to DOJ, along with the FBI's recommendation. See 28, Code of Federal Regulations (C.F.R.) 50.15(c).|

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9-3.2 |Deleted|

**EffDte: 10/09/2001 MCRT#: 1159 Div: D9 Cav: SecCls:

9-3.3 |Deleted|

**EffDte: 10/09/2001 MCRT#: 1159 Div: D9 Cav: SecCls:

9-3.4 |Moved to 9-5|

**EffDte: 10/09/2001 MCRT#: 1159 Div: D9 Cav: SecCls:

9-3.5 |Revised and Moved to 9-3.1.1|

**EffDte: 10/09/2001 MCRT#: 1159 Div: D9 Cav: SecCls:

9-4 |CRIMINAL LIABILITY

FBI employees can be prosecuted for the violation of state or federal criminal statutes. If criminal proceedings are instituted in state court against an employee for conduct associated with that employee's duties as an FBI employee, the FBI employee may request DOJ representation (see 9-5 infra) and the proceeding may be removed to federal court by DOJ pursuant to Title 28, USC, Section 1442, if there is a colorable federal defense to the criminal charge. In all other instances of criminal prosecution in either state or federal court, employees will be responsible for providing their own legal defense.|

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9-5 |LEGAL REPRESENTATION (See 9-4 and MIOG, Part 1, 197-4.)

(1) A federal employee may be provided representation in civil, criminal and Congressional proceedings in which he/she is sued, subpoenaed, or charged in his/her individual capacity. Such representation may be provided by DOJ, or by private counsel at government expense (as determined by DOJ), when the employee's actions reasonably appear to have been performed within the scope of the employee's employment, and where representation is in the interest of

the United States. See 28 C.F.R. 50.15(c). However, representation generally is not available in federal criminal proceedings.

(2) In order to request legal representation, the employee must submit a written request for DOJ representation, together with all process and pleadings served upon him/her, to his/her CDC. The CDC will forward this material to FBIHQ, Office of the General Counsel, who will submit a statement of findings regarding the employee's scope of employment, and a recommendation regarding representation, to DOJ. DOJ will then determine whether to afford legal representation to the employee.

(3) In the case of a "critical incident," i.e., a shooting or use of force resulting in death or serious bodily injury, an employee may request emergency legal representation. Such representation, if approved by DOJ, is provided by private counsel at government expense in the immediate aftermath of line-of-duty critical incidents. Private counsel will provide personal capacity representation only on a temporary basis while DOJ processes a request for representation in accordance with the above procedure. At the time of the critical incident, if the employee involved requests an attorney, the CDC will immediately contact FBIHQ which will in turn call DOJ. The provision of emergency legal representation is based on a determination of scope of employment, as presented by the facts available at the time of the critical incident. Emergency representation by private counsel will be provided for one week, unless otherwise authorized by DOJ. Thereafter, responsibility for defending the legal interests of the employee will normally be transferred to the United States Attorney's Office, or in the event representation is not authorized, the employee will be responsible for his/her own legal defense.

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9-6 DISCLOSURE OF OFFICIAL FBI INFORMATION
(See MIOG, Part 2, 6-1.1 and 6-1.2.)

(1) Federal statutes and regulations place restrictions on the disclosure of information by FBI employees in state and federal judicial proceedings. See e.g., 28 C.F.R. 16.21 et seq. Before disclosing any information from FBI files or information acquired as a part of the performance of an Agent's official duties, the Agent should obtain approval from the Assistant U.S. Attorney, or other DOJ attorney, in charge of the case or matter. Agents should also consult with their CDC or the Office of the General Counsel, Civil Litigation Unit, if they are asked to provide information in connection with any civil proceeding.

(2) Agents who are contacted by counsel for private parties in civil litigation matters should decline to provide any information regarding the matter and instead should refer inquiries to

the CDC or the Office of the General Counsel. When Agents receive subpoenas or informal requests to provide documents, statements or testimony in connection with a civil litigation matter, they should notify their CDC or the Office of the General Counsel as soon as possible.

(3) Agents should be aware that in the course of civil litigation, they may be required to produce all relevant, non-privileged documents in their possession, custody, or control. This may include the Agent's notes, drafts, copies and other documents which have not been placed in the official FBI file.

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********** END OF REPORT **********
SENSITIVE

APPENDIX 1. FD-26 - CONSENT TO SEARCH

**EffDte: 04/28/1978 MCRT#: 0 Div: D9 Cav: SecCls:

1-1 FD-26 - CONSENT TO SEARCH

FD-26 (Rev. 7-20-94)

DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

CONSENT TO SEARCH

1. I have been asked by Special Agents of the Federal Bureau of Investigation to permit a complete search of:
(Describe the person(s), place(s), or thing(s) to be searched.)

2. I have been advised of my right to refuse consent.

3. I give this permission voluntarily.

4. I authorize these agents to take any items which they determine may be related to their investigation.

_____ _____
Date Signature

Witness _____

This is to certify that on _____ at _____
Special Agents of the Federal Bureau of Investigation, U.S. Department of Justice, conducted a search of _____.
I certify that nothing was removed from my custody by Special Agents of the Federal Bureau of Investigation, U. S. Department of Justice.

(Signed) _____

Witnessed:

_____
Special Agent
Federal Bureau of Investigation
U.S. Department of Justice

_____
Special Agent
Federal Bureau of Investigation
U.S. Department of Justice

**EffDte: 08/25/1994 MCRT#: 298 Div: D9 Cav: SecCls:

SENSITIVE

APPENDIX 2. |FD-395 - ADVICE OF RIGHTS|

**EffDte: 02/28/1997 MCRT#: 640 Div: D9 Cav: SecCls:

2-1 FD-395 - ADVICE OF RIGHTS (See LHBSA, |Part 1, |7-3.3.)

FD-395 (Rev. |11-5-02)|

ADVICE OF RIGHTS

Place _____
Date _____
Time _____

YOUR RIGHTS

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions.

You have the right to have a lawyer with you during |the|questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you have the right to stop answering at any time.

I have read this statement of my rights and I understand what my rights are. At this time, I am willing to answer questions without a lawyer present.

Signed _____

Witness: _____

Witness: _____

Time: _____

**EffDte: 03/26/2003 MCRT#: 1268 Div: D9 Cav: SecCls:

APPENDIX|3|. FD-404 - YOUR RIGHTS AT A LINEUP |

**EffDte: 05/01/1985 MCRT#: 0 Div: D9 Cav: SecCls:

3-1 FD-404 - YOUR RIGHTS AT A LINEUP

FD-404 (Rev.|7-18-88)| |

YOUR RIGHTS AT A LINEUP

Place _____

Date _____

Time _____

You are required to participate in a lineup. At the lineup, you will be obliged to stand in a line with other persons, to speak, to move in a certain manner, and/or to put on or remove certain clothing for the purpose of enabling witnesses to make an identification. You are entitled to have an attorney of your own choosing present. If you cannot afford an attorney but wish to have one present at the lineup, the lineup will be delayed until an attorney has been appointed by a court to represent you. Having an attorney present will help you in the preparation of your defenses to any identification which may be made at the lineup.

However, you may waive your right to have an attorney present at the lineup and consent to participate in the lineup in the absence of an attorney.

WAIVER AND CONSENT

I have (read) (had read to me) this statement of my rights and I understand what my rights are. I am willing to participate in a lineup in the absence of an attorney. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed _____

_____

Witness: _____

Witness: _____

Time: _____

**EffDte: 01/30/1997 MCRT#: 583 Div: D9 Cav: SecCls:

APPENDIX 4. SELECTED FEDERAL CIRCUIT COURTS OF APPEALS CASES THAT ARE IN CONFLICT, IN WHOLE OR IN PART, WITH THE GENERAL RULES SET FORTH IN THIS HANDBOOK

**EffDte: 05/01/1985 MCRT#: 0 Div: D9 Cav: SecCls:

4-1 SELECTED FEDERAL CIRCUIT COURTS OF APPEALS CASES THAT ARE IN CONFLICT, IN WHOLE OR IN PART, WITH THE GENERAL RULES SET FORTH IN THIS HANDBOOK

SECTION 1. - PROBABLE CAUSE (None)

SECTION 2. - AFFIDAVITS AND COMPLAINTS (None)

SECTION 3. - ARRESTS (None)

SECTION 4. - INVESTIGATIVE DETENTION (None)

SECTION 5. - SEARCH AND SEIZURE
Subsection 5-5, Emergency Searches: Second Circuit requires the government to have a "reasonable belief" (not a "reasonable suspicion") that life or safety is in jeopardy before entering private premises under the emergency exception. See Kerman v. City of New York, 261 F.3d 229 (2nd Cir. 2001).

SECTION 6. - EYEWITNESS IDENTIFICATION (None)

SECTION 7. - CONFESSIONS AND INTERROGATIONS
Subsection 7-4.1 (2), Refusal to Sign FD-395
Attention: Ninth Circuit Offices and all offices obtaining confessions that could be used in criminal proceedings in the Ninth Circuit: The Ninth Circuit requires the following in the interrogation of a person who has been advised of his/her Miranda rights as contained on an FD-395, and who has declined to sign the waiver on the FD-395: (1) that the person being interviewed understands those rights and is willing to answer questions; (2) that the person must be clearly informed that the failure to sign the waiver does not prevent the statements made from being used against that person. See, U.S. v. Heldt, 745 F.2d 1275 (9th Cir. 1984).

SECTION 8. - INFORMANTS AND ENTRAPMENT (None)

APPENDIX |5|. FEDERAL JUDICIAL CIRCUITS MAP

**EffDte: 05/01/1985 MCRT#: 0 Div: D9 Cav: SecCls:

5-1 FEDERAL JUDICIAL CIRCUITS MAP

This image is not available in the automated manual.

**EffDte: 05/01/1985 MCRT#: 0 Div: D9 Cav: SecCls:

APPENDIX 6. FORFEITURE AND ABANDONED PROPERTY MATTERS

**EffDte: 02/19/1988 MCRT#: 0 Div: D9 Cav: SecCls:

6-1 FORFEITURE AND ABANDONED PROPERTY MATTERS (SEE FORFEITURE AND ABANDONED PROPERTY MANUAL.)

**EffDte: 02/19/1988 MCRT#: 0 Div: D9 Cav: SecCls:

APPENDIX 7. ETHICAL STANDARDS FOR ATTORNEYS FOR THE GOVERNMENT (TITLE 28, USC, SECTION 530B)

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

7-1 ETHICAL STANDARDS FOR ATTORNEYS FOR THE GOVERNMENT (TITLE 28, USC, SECTION 530B)

On April 19, 1999, Title 28, USC, Section 530B (hereinafter 530B) took effect. Section 530B, often referred to as the McDade Amendment, is entitled "Ethical Standards for Attorneys for the Government" and provides as follows:

> "(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each state where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.
>
> "(b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.
>
> "(c) As used in this section, the term attorney for the Government' includes any attorney described in 77.2(a) of part 77 of Title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40."

Section 530B incorporates the definition of "attorney of the Government" found in 28 C.F.R. 77.2. The General Counsel for the FBI and any attorney employed in the Office of the General Counsel (OGC) are subject to the requirements of this section. The C.F.R. definition explicitly excludes attorneys employed as investigators or other law enforcement agents of the Department of Justice (DOJ) who are not authorized to represent the United States in criminal or civil law enforcement proceedings or to supervise these proceedings. Based upon this language, CDCs and Special Agent attorneys not assigned to the OGC are not subject to Section 530B. However, Special Assistant United States Attorneys (SAUSAs) are included in the definition of "attorney for the Government." Therefore, CDCs who are appointed as SAUSAs will have to comply with Section 530B while performing their duties as SAUSA.

Rules implementing Section 530B are currently being drafted. Questions regarding this section should be directed to the CDC. For further guidance, refer to the April 19, 1999 EC, entitled "DEPARTMENT OF JUSTICE PROPOSED FORMAL INTERIM RULES IMPLEMENTING TITLE 28 U.S.C. SECTION 530B, ETHICAL STANDARDS FOR ATTORNEYS FOR THE GOVERNMENT."

APPENDIX 8. SEARCH WARRANT UPON ORAL TESTIMONY
(FORMERLY LHBSA, PART 1, 2-6)

**EffDte: 07/26/1999 MCRT#: 915 Div: D9 Cav: SecCls:

8-1 Search Warrant Upon Oral Testimony
(Formerly LHBSA, Part 1, 2-6)

Rule 41(c)(2), FED.R.CRIM.P., establishes a procedure for the issuance of a search warrant where the circumstances make it reasonable to dispense with a written affidavit presented in person to a magistrate. The rule provides that a federal magistrate judge may issue a warrant based upon sworn testimony communicated by telephone, radio, or other electronic method of communication. Thus, state judges are not authorized to issue warrants under this rule. Guidelines for such issuance have also been established by the U.S. Magistrates' Committee of the Judicial Conference. Rule 41(c)(2) and the Guidelines specify the following procedures to be followed for issuance of a warrant based upon oral testimony.

(1) Prior to contacting the magistrate, a "duplicate original warrant (A.O. Form 93A) must be prepared by the Agent seeking the warrant. A copy of the duplicate original warrant should be prepared and retained in the case file. Whenever feasible, the probable cause statement should also be prepared and reduced to writing before contacting the magistrate.

(2) Whenever practicable, an AUSA should be included in the telephone conversation.

(3) After the magistrate is informed of the purpose of the call, the magistrate is required to immediately place under oath each person whose testimony forms the basis of the application. While this is the magistrate's responsibility, the Agent must ensure that he/she has been so sworn prior to providing any information. The magistrate is also required to record the conversation by means of a voice recording device or, if unavailable, by means of a stenographic or longhand record.

(4) After being sworn, the need for employing this telephonic procedure is to be established by the Agent seeking the warrant. In demonstrating such need, the following factors are relevant:

(a) The Agent cannot reach the magistrate in his or her office during regular court hours;

(b) The Agent conducting the search is a significant distance from the magistrate;

(c) The factual situation is such that it would be

unreasonable for a substitute Agent, who is located near the magistrate, to present a written affidavit in person to the magistrate in lieu of proceeding telephonically;

(d) The need for a search warrant is such that without the telephonic procedure, a search warrant could not be obtained and there would be a significant risk that evidence would be destroyed or that a fugitive would escape.

(5) The duplicate original warrant must be read verbatim to the magistrate. The magistrate may direct that modifications be made to it.

(6) Probable cause for the search must be established. Where circumstances have allowed for the preparation of a written statement of probable cause, it should be read to the magistrate. The magistrate may ask questions and solicit additional information necessary for a finding of probable cause.

(7) The magistrate will order issuance of the warrant directing the affiant to sign the magistrate's name on the duplicate original warrant. The duplicate original warrant may then be executed.

(8) The magistrate is required to prepare an original warrant and to enter on the face of the warrant the exact time when the warrant was ordered issued. The person who executes the duplicate original warrant is required to enter on the face of the duplicate original warrant the exact time that it is executed. In view of this, the person who will execute the warrant and the magistrate should synchronize their watches.

(9) The magistrate may direct the Agent or USA to prepare a transcript of the telephone conversation where it has been recorded by means of a voice recording device. Where the Agent is directed to do this, the transcript should be promptly prepared and furnished to the magistrate. The magistrate may also wish to have the Agent sign and swear to the veracity of the transcribed conversation.

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********** END OF REPORT **********
SENSITIVE