

## REPRESENTATION IN MULTI-DEFENDANT CASES

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*“[C]onspiracy, that darling of the modern prosecutor’s nursery.”*

-- Learned Hand  
*Harrison v. United States*,  
7 F.2d 259, 263 (2d Cir. 1925)

### I. Severance

- A. Rule 8. Joinder of Offenses and of Defendants
  - 1. Rule 8(a) Joinder of Offenses
    - (a) Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
      - a. Rule 8(a) is concerned with joinder of offenses committed by single defendant.
      - b. Rule 8(a) is concerned with 3 circumstances under which government may join offenses against a defendant:
        - (1) offenses are of same or similar character
          - (a) *United States v. Edgar*, 82 F.3d 499, 503 (1st Cir. 1996) (making false statements and mail fraud).
          - (b) *United States v. Furman*, 31 F.3d 1034, 1036 (10th Cir. 1994) (bank fraud, misapplication of bank funds, & making false statements).
          - (c) *United States v. Fortenberry*, 919 F.2d 923, 926 (5th Cir. 1990) (transportation of undeclared firearms on commercial airliner & possession of unregistered firearm).
          - (d) *United States v. L’Allier*, 838 F.2d 234, 241 (7th Cir. 1988) (armed robbery).
          - (e) *United States v. Lewis*, 626 F.2d 940, 944-45 (D.C. Cir. 1980) (possession, possession with intent to distribute, & distribution of drugs).

- (f) *United States v. Werner*, 620 F.2d 922, 926 (2d Cir. 1980) (theft of foreign currency & Hobbs Act violation).
  - (g) *United States v. Harris*, 635 F.2d 526, 527 (6th Cir. 1980) (joinder of mail offenses).
  - (h) *United States v. Koen*, 982 F.2d 1101, 1110 (7th Cir. 1992) (embezzlement, mail fraud & arson).
  - (i) *United States v. Coleman*, 22 F.3d 126, 134 (7th Cir. 1994) (small gun & sawed-off shotgun).
  - (j) *United States v. Bronco*, 597 F.2d 1300, 1301 (9th Cir. 1979) (conspiracy to sell counterfeit money, possession and passing of counterfeit money).
  - (k) *United States v. Tillman*, 470 F.2d 142, 143 (3d Cir. 1972) (sale of cocaine & sale of heroin)
- (2) offenses are based on same act or transaction
- (a) *United States v. Pietras*, 501 F.2d 182, 185 (8th Cir. 1974) (armed robbery, kidnapping, & possession of an unregistered firearm).
- (3) offenses are based on two or more acts or transactions connected together or constituting parts of common scheme or plan
- (a) *United States v. Ciprian*, 23 F.3d 1189, 1193-94 (7th Cir. 1994) (offenses arising out of racketeering).
  - (b) *United States v. Bowen*, 946 F.2d 734, 737 (10th Cir. 1991) (making false statements & misapplication of bank funds).
  - (c) *United States v. DeBordez*, 741 F.2d 182, 184 (8th Cir. 1984) (offenses involving bank robberies).
  - (d) *United States v. Rainier*, 670 F.2d 702, 708-09 (7th Cir. 1982) (Travel Act & perjury).
  - (e) *United States v. Eades*, 615 F.2d 617, 624 (4th Cir. 1980) (entry onto military base w/intent to commit theft & two assault charges).
  - (f) *United States v. Armstrong*, 621 F.2d 951, 953-54 (9th Cir. 1980) (bank robberies).
  - (g) *United States v. Jordan*, 602 F.2d 171, 172 (8th Cir. 1979) (possession of stolen mail)

2. Rule 8(b) Joinder of Defendants

(b) Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more

counts together or separately and all of the defendants need not be charged in each count.

a. Joinder is proper only if all offenses arose out of same series of transactions.

(1) *United States v. Williams*, 10 F.3d 1070, 1079-80 (4th Cir. 1993).

(2) *United States v. Dekle*, 768 F.2d 1257, 1261-62 (11th Cir. 1985).

(3) *United States v. Ford*, 632 F.2d 1354, 1371 (9th Cir. 1980), *overruled on other grounds by United States v. De Bright*, 730 F.2d 1255, 1259 (9th Cir. 1984).

(4) *United States v. Satterfield*, 548 F.2d 1341, 1344 (9th Cir. 1977).

b. Offenses charged in single indictment are severable if (1) they are not part of the same act or transaction or (2) they are not part of the scheme or plan.

(1) *United States v. Sarkisian*, 197 F.3d 966, 975 (9th Cir. 1999) (car theft and extortion charges not logically connected).

(2) *United States v. Moser*, 123 F.3d 813, 827-828 (5th Cir. 1997).

(3) *United States v. Duzac*, 622 F.2d 911, 913 (5th Cir. 1980).

(4) *United States v. Forrest*, 623 F.2d 1107, 1114-15 (5th Cir. 1980).

(5) *United States v. Park*, 531 F.2d 754, 761 (5th Cir. 1976).

3. Generally, courts treat Rules 8(a) and 8(b) as mutually exclusive. Wright, et. al, 1A Fed. Prac. & Proc. Crim.3d § 143 (2003). Accordingly,

a. 8(a) applies only to offenses against a single defendant

b. 8(b) applies when more than one defendant is charged

(1) eliminates joinder of offenses of same or similar character

c. However, some courts have stated that 8(a) applies, even in multi-defendant cases, when defendants challenge *joinder of offenses* and not joinder of defendants. *See, e.g.,*

(1) *United States v. Frost*, 125 F.3d 346, 389 (6th Cir. 1997) (but holding that the outcome would be the same under either 8(a) or 8(b)).

(2) *United States v. Southwest Bus Sales, Inc.*, 20 F.3d 1449, 1454 (8th Cir. 1994).

(3) *United States v. Eufrazio*, 935 F.2d 553, 570 n.20 (3d Cir. 1991) (same approach as taken in *Frost*).

4. Prejudice
    - a. Defendant must show that misjoinder resulted in “actual prejudice.” *United States v. Sarkisian*, 197 F.3d 966, 976-77 (9th Cir. 1999); *United States v. Lane*, 474 U.S. 438, 446 (1986).
    - c. *But see United States v. Mackins*, 315 F.3d 399, 412 (4th Cir. 2003), *cert. denied by Mackins v. United States*, 123 S.Ct. 2099 (2003), (placing burden on prosecution by “revers[ing] unless the misjoinder resulted in no ‘actual prejudice’ to the defendants”).
  5. Preservation
    - a. No need to renew Rule 8 motion for misjoinder at close of evidence because Rule 8 motions present questions of law
    - b. In this way Rule 8 motions are different from Rule 14 motions which must be renewed
    - c. *United States v. Terry*, 911 F.2d 272, 276 (9th Cir. 1990).
- B. Rule 14. Relief from Prejudicial Joinder
- If it appears that a defendant or the government (!) is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to court for inspection in camera any statements or confessions made by the defendants to which the government intends to introduce in evidence at trial.
1. Prejudice from Joinder of Defendants
    - a. Defendant must show that prejudice outweighs interests of judicial economy & efficiency
      - (1) Primary concern is whether jury will be able to segregate evidence applicable to each defendant and follow in limine instructions as they apply to each defendant
      - (2) District court’s discretion over severance motions is extremely wide
      - (3) *United States v. Sarkisian*, 197 F.3d 966, 978 (9th Cir. 1999); *United States v. Vaccaro*, 816 F.2d 443, 448 (9th Cir. 1987), *abrogated on other grounds by Huddleston v. United States*, 485 U.S. 681, 685 n.2 (1988).
    - b. On appeal defendant must show that district court abused its discretion in denying severance
      - (1) The prejudice must be so great that it denied defendant’s right to a fair trial
        - (a) *United States v. Saleme*, 152 F.3d 88, 115 (2d Cir. 1998)
        - (b) *United States v. Wellington*, 754 F.2d 1457, 1466 (9th Cir. 1985)

- (c) *United States v. Escalante*, 637 F.2d 1197, 1201 (9th Cir. 1980)
  - (d) *United States v. Mariscal*, 939 F.2d 884, 885 (9th Cir. 1991)
  - (e) *United States v. Douglass*, 780 F.2d 1472, 1478 (9th Cir. 1986)
  - (g) *United States v. Sarkisian*, No. 98-10241 (9<sup>th</sup> Cir. 12/3/99)
- c. Prejudice can result from trying unconnected offenses when there are multiple defendants
- (1) *United States v. Donaway*, 447 F.2d 940, 943 (9th Cir. 1971)
- d. *Bruton* prejudice
- (1) Co-defendant's confession implicates a defendant. The non-confessing defendant has right to exclude the confession, to a redacted confession, or to severance. Introduction of non-redacted confession violates the non-confessing defendant's sixth amendment confrontation right
    - (a) *Bruton v. United States*, 391 U.S. 123, 124 (1968)
    - (b) *Tennessee v. Street*, 471 U.S. 409, 412-418 (1985) (The Confrontation Clause is not violated when an accomplice's confession is introduced solely for rebuttal purposes)
    - (c) *Cruz v. New York*, 481 U.S. 186 (1987) (S. Ct. held that when a non-testifying co-defendant's confession incriminating the defendant is not directly admissible against the defendant, then the Confrontation Clause bars its admission at their joint trial even if the jury is instructed not to consider it against the defendant and even if the defendant's own confession is admitted against him)
    - (d) *Lee v. Illinois*, 476 U.S. 530 (1986) (Co-defendants' confessions in murder were consistent in some respects but not identical in all materials respects. The confessions, therefore, did not "interlock" and were presumptively unreliable. Introduction of the confessions at a joint bench trial violated the Confrontation Clause)
    - (e) *Gray v. Maryland*, 118 S. Ct. 1151 (1998) (*Bruton* rule extends to redacted confessions in which name of defendant is replaced with obvious indication of deletion, such as blank space, word "deleted" or similar symbol)

- (f) *Lilly v. Virginia*, 144 L.Ed. 2d 117 (1999) recognized the importance of confrontation, and so renewed the emphasis on reliability and trustworthiness as a prerequisite for hearsay admission. Court bars use of non-testifying co-defendant confessions under an admission theory of being against penal interests. Confrontation trumps this hearsay exception as residual trustworthiness. *Cf. United States v. Boone*, 229 F.3d 1231 (9<sup>th</sup> Cir. 2000) (hearsay allowed because no police custody and statements made to third party); *United States v. Tocco*, 200 F.3d 401 (6<sup>th</sup> Cir. 2000) (same); *United States v. Papajohn*, 212 F.3d 1112 (8<sup>th</sup> Cir. 2000) (defendant not arrested for crime).
- (g) *Toolate v. Borg*, 828 F.2d 571, 572-73 (9<sup>th</sup> Cir. 1987)
- (h) *United States v. Sherlock*, 865 F.2d 1069, 1079-81 (9<sup>th</sup> Cir.), *amended*, 962 F.2d 1349 (9<sup>th</sup> Cir. 1989) (Two defendants, Sherlock and Charley, were tried jointly. Charley gave statements implicating Sherlock. A government investigator testified about Charley's statement implicating Sherlock. Sherlock's lawyer was able to impeach Charley (apparently during the government investigator's testimony) with Charley's prior assault conviction. District court cautioned the jury after the investigator's testimony. Jury instructions, given before closings, repeated the post-testimony caution. Prosecutor emphasized in closing that Charley's statement implicating Sherlock buttressed the government case against Sherlock. The Ninth Circuit found that the case violated fundamental conceptions of justice and fair play. The joint trial was so manifestly prejudicial that the district court abused its discretion in denying the severance motion.)
- (I) *United States v. Edwards*, 159 F.3d 1117, 1124-25 (8<sup>th</sup> Cir. 1998) (extensive editing and replace provisions insuff.); *United States v. Walker*, 148 F.3d 518 (5<sup>th</sup> Cir. 1998)).
- (j) *Bruton* subject to harmless error analysis, *United States v. Gillam*, 167 F.3d 1273 (9<sup>th</sup> Cir. 1999)

- (k) *United States v. Sauza-Martinez*, 217 F.3d 754 (9<sup>th</sup> Cir. July 6, 2000) (where co-defendant's prejudicial hearsay statements against another are admitted for impeachment purposes, court must give limiting instructions).
- e. Inconsistent Defense Prejudice
- (1) *Zafiro v. United States*, 506 U.S. 534 (1993)
    - (a) Court expresses a preference for joint trials.
    - (b) Mutually antagonistic defenses are not prejudicial per se. 113 S. Ct. at 938.
    - (c) Severance of properly joined defendant is proper only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendant or would prevent the jury from making a reliable judgment about guilt or innocence. 113 S. Ct. at 938.
    - (d) Court affirmed the Seventh Circuit's affirmance of the district court's denial of severance motions brought by each of four co-defendants all of whom claimed that they had no knowledge about the drugs the police found and two of whom testified about their ignorance.
    - (e) *See generally United States v. Mayfield*, 189 F.3d 895 (9th Cir. 1999) (defendant entitled to severance when co-defendant acts as second prosecutor with a mutually exclusive defense); *United States v. Gillam*, 167 F.3d 1273 (9th Cir. 1999) (opening argument without more does not create a mutually antagonistic defense); *United States v. Cruz, et al.*, 127 F.3d 791 (9th Cir. 1997), *overruled on other grounds by United States v. Jimenez-Recio*, 537 U.S. 270 (2003) (defendant is entitled to severance for mutually antagonistic defenses only if core of defense is so irreconcilable with co-defendant's defense as to preclude acquittal).
  - (2) *State v. Kinkade*, 140 Ariz. 91, 680 P.2d 801 (1984)
    - (a) Cited with approval by Justice Stevens in his concurrence in *Zafiro*.
    - (b) Severance is proper only when defenses are mutually exclusive. Defenses are mutually exclusive when the core of evidence offered by one defendant requires the jury to disbelieve the core of evidence offered on behalf of a co-defendant.

- (3) Such defenses may suggest to the jury that they infer guilt from a co-defendant's silence
  - (4) *United States v. Harwood*, 998 F.2d 91 (2d Cir. 1993)
  - (5) *Deluna v. United States*, 308 F.2d 140, 143-43 (5th Cir. 1962) (it is an attorney's duty to his client to comment on the co-defendant's failure to testify, which would violate the non-testifying defendant's fifth amendment right against comments on silence)
  - (6) *United States v. De Le Cruz-Bellinger*, 422 F.2d 723, 727 (9th Cir. 1970) (no per se rule of severance, defendant must demonstrate probable prejudice in presentation of his defense and show that defense would have benefitted by commenting on co-defendant's refusal to testify)
  - (7) *United States v. Benz*, 740 F.2d 903 (11th Cir. 1984)
  - (8) *United States v. Tootick*, 952 F.2d 1078, 1081 (9th Cir. 1991) (defendants were prejudiced by mutually exclusive defenses when each defendant maintained that the other committed the assaults alone. Jury was unable to assess each defendant's innocence on individual and independent basis)
- f. Inability to call co-defendant as witness prejudice
- (1) *United States v. Gaitan-Acevedo*, 148 F.3d 577, 588 (6th Cir. 1998)
  - (2) *United States v. Echeles*, 352 F.2d 892, 895 (7th Cir. 1965) (when a joint trial prevents a defendant from calling a co-defendant as a witness to provide exculpatory testimony, because the co-defendant to be called will exercise his or her fifth amendment privilege, district court should grant a severance to allow the co-defendant's exculpatory testimony to be introduced at a separate trial)
  - (3) *United States v. Gay*, 567 F.2d 916, 918 (9th Cir. 1978)
  - (4) *United States v. Hernandez-Berceda*, 572 F.2d 680, 682 (9th Cir. 1978)
  - (5) Defendant must show
    - (a) that he would call co-defendant in separate trial
    - (b) that co-defendant would in fact testify
    - (c) that this testimony would be substantially exculpatory
    - (d) *United States v. Mariscal*, 939 F.2d 844, 885-86 (9th Cir. 1991)
    - (e) *United States v. Leichtman*, 742 F.2d 598, 605 (11th Cir. 1984)

- (f) *United States v. Vigil*, 561 F.2d 1316, 1317 (9th Cir. 1977)
  - (g) *United States v. Cruz*, 536 F.2d 1264, 1268 (9th Cir. 1976)
  - (h) *United States v. Wood*, 550 F.2d 435, 438 (9th Cir. 1976)
  - (i) *United States v. Tham*, 948 F.2d 1107, 1112 (9th Cir. 1991), *amended*, 960 F.2d 1391 (9th Cir. 1991) (suggests that the exculpating co-defendant's trial should be held first when the only reason for severance is to facilitate the co-defendant's testimony. Otherwise, severance would not accomplish its purpose.)
- g. Speedy Trial Issues
- (1) Right to Speedy Trial for Severance. *United States v. Messer*, 197 F.3d 330, 336 (9<sup>th</sup> Cir. 1999). Defendant's Speedy Trial rights violated when court continued trial until co-defendant became available when government had decided to try co-defendant on other charges in another venue.
    - (a) *But see United States v. Mejia*, 82 F.3d 1032 (11th Cir. 1996) (grant for one defendant's request for extension of time for filing further motions (to which no co-defendant objected) excluded that time as to all defendants for purposes of Speedy Trial Act).
2. Prejudice from joinder of offenses
- a. Defendant may become embarrassed or confounded in presenting separate defenses
    - (1) *Cross v. United States*, 335 F.2d 987, 991 (D.C. Cir. 1964) (defendant wanted to testify in defense of one count but not concerning another count)
  - b. Jury may rely on evidence of one crime to infer a criminal disposition and find guilt
    - (1) *United States v. McCarter*, 316 F.3d 536, 540-41 (5th Cir. 2002) (lack of evidence supporting felon-in-possession counts and circumstances surrounding government's addition of those counts led to conclusion that government added counts solely to buttress case).
    - (2) *United States v. Holloway*, 1 F.3d 307, 312 (5th Cir. 1993) (misjoinder of remote weapons charge with robbery charge unfairly influenced jury).
    - (3) *United States v. Dockery*, 955 F.2d 50, 53-55 (D.C. Cir. 1992) (denial of severance was abuse of discretion where

- government charged defendant with felon-in-possession offense & drug offense, refused defendant's stipulation regarding prior conviction, & insisted on proof of that conviction).
- (2) *United States v. Lewis*, 787 F.2d 1318, 1321-22 (9th Cir. 1986), *modified*, 798 F.2d 1250 (9th Cir. 1989) (admission of other crimes in one count prejudiced defendant on other joint count when evidence was weak on second charge).
- c. Jury may cumulate evidence of various crimes
- (1) *United States v. Massa*, 740 F.2d 629, 644 (8th Cir. 1985) (jury's inability to compartmentalize evidence).
  - (2) *United States v. Reed*, 658 F.2d 624, 629 (8th Cir. 1981) (same).
3. Timing
- a. Must be brought before trial - Fed. R. Crim. P. 12(b)(5)
  - b. Must be renewed at close of evidence other wise waived
    - (1) *United States v. Mathison*, 157 F.3d 541 (8th Cir. 1998).
    - (2) *United States v. Davis*, 932 F.2d 752, 762 (9th Cir. 1991).
    - (3) *United States v. Restrepo*, 930 F.2d 705, 711 (9th Cir. 1991).
    - (4) *United States v. Free*, 841 F.2d 321, 324 (9th Cir. 1988).
    - (5) *United States v. Plache*, 913 F.2d 1375, 1378-79 (9th Cir. 1990) (motion pretrial, early in trial, and at close of government's case in chief ineffective to preclude waiver because defendant failed to renew the motion at the close of all of the evidence).
    - (6) *United States v. Feliz-Gutierrez*, 940 F.2d 1200, 1208 (9th Cir. 1991) (no waiver despite failure to renew severance motion at close of all of the evidence because defendant had diligently pursued. However, defendant had sought relief under both Rule 8 and Rule 14, so it is not clear whether this case would be precedent when only Rule 14 relief is sought).
4. Prosecutor's unjustifiably inconsistent position at co-defendants' separate trials violate due process
- a. *Thompson v. Calderon*, 120 F.3d 1045, 1058 (9<sup>th</sup> Cir. 1997) (en banc), *rev'd on other grounds*, 523 U.S. 538 (1998).
  - b. *Smith v. Goose*, 205 F.3d 1045 (8<sup>th</sup> Cir. 2000).
  - c. *See generally* Kenneth M. Miller, *Combating the Prosecutor's Improper Utilization of Inconsistent Theories*, *The Champion* (June 2002).

- C. Misjoinder Because of Duplicitous Counts
  - 1. There must be a separate count for each offense; it violates double jeopardy principles and due process to charge more than one offense in a single count.
    - a. *United States v. Droms*, 566 F.2d 361, 363 n. 1 (2d Cir. 1977)
    - b. *Reno v. United States*, 317 F.2d 499, 502 (5th Cir. 1963)
  - 2. Challenge duplicitous counts by a pretrial motion to compel the government to choose the charge on which it will proceed.
    - a. *United States v. Aguilar*, 756 F.2d 1418, 1423 (9th Cir. 1985)
    - b. *Thomas v. United States*, 418 F.2d 567, 568 (5th Cir. 1969)
- II. Co-Conspirators' Statements
  - A. Discovery of Co-Conspiracy and Co-defendant Statements
    - 1. *Brady* obligates government to disclose exculpatory statements.
    - 2. Defense counsel should obtain non-exculpatory (to counsel's client) co-defendants' statements from their attorneys. The court has discretion to order production of these statements if *Jencks* does not apply.
      - a. *United States v. Disson*, 612 F.2d 1035, 1037-38 (7th Cir. 1980)
      - b. *United States v. McMillen*, 489 F.2d 229, 231 (7th Cir. 1972); *but see United States v. Bronk*, 604 F. Supp. 743, 746 (W.D. Wis. 1985) (noting that 1974 amendment that limited courts role in discovery superseded *McMillen*, since under that rule, "there is '[no] right of access to the prosecutor's files in order to search for impeachment material' (citing *United States v. Navarro*, 737 F.2d 625, 630 (7th Cir. 1984)).
    - 3. Co-conspirator statements that the government will introduce at trial will be attributed to defendant. In accordance with this rule, these statements were previously discoverable as defendant's statement.
      - a. *See*
        - (1) Fed. R. Evid. 801(d)(2)(E)
        - (2) *United States v. Thevis*, 84 F.R.D. 47, 55-56 (N.D. Ga. 1979).
        - (3) *Dennis v. United States*, 384 U.S. 855, 873 (1966).
        - (4) *United States v. Mays*, 460 F. Supp. 573, 581 (E.D. Tex. 1978).
        - (5) *United States v. Agnello*, 367 F. Supp. 444, 448 (E.D.N.Y. 1973).
      - b. There is now strong precedent holding the opposite: that these statements are not discoverable as defendant's. *See*
        - (1) *United States v. William-Davis*, 90 F.3d 490, 513 (D.C. Cir. 1996) (rejecting discoverability of co-conspirators' statements under Rule 16(a)(1)(A), Fed. R. Evid. 801(d)(2)(E) notwithstanding).

- (2) *United States v. Orr*, 825 F.2d 1537, 1541 (11th Cir. 1987) (same).
    - (3) *United States v. Roberts*, 811 F.2d 257, 258 (4th Cir. 1987) (same).
    - (4) *United States v. Cooper*, 2003 WL 22208488, \_\_F. Supp. 2d \_\_ (D. Kans. 8/21/03) (same).
  - 4. Even where the statements are discoverable as defendant's, the Jencks Act overrides the government's obligation to produce co-conspirator statements if that co-conspirator will testify at trial for the government.
    - a. *United States v. Mills*, 641 F.2d 786, 789-90 (9th Cir. 1981)
    - b. *United States v. Percevault*, 490 F.2d 126, 131 (2d Cir. 1974)
  - 5. Counsel should request a pretrial hearing on the admissibility of co-conspirators' statements because they may be outside the conspiracy's scope or excludable under Fed. R. Evid. 403.
  - 6. Counsel should request a pretrial hearing to determine if the government can prove that a conspiracy exists and that the alleged co-conspirator statements are admissible.
  - 7. Limiting instruction for impeachment purposes. *United States v. Sauza-Martinez*, 217 F.3d 754, 759-760 (9<sup>th</sup> Cir. 2000).
- B. Confrontation Right Can Bar Hearsay Exceptions.
  - 1. Constitutional right to confrontation can call into question co-defendant statements and coconspirator statements offered under other exceptions (such as being against penal interests or residual trustworthiness). *Lilly v. Virginia*, 144 L.Ed. 2d 117 (1999).

### III. Joint Defense Issues

- A. Conspiracy
  - 1. General
    - a. 18 U.S.C. § 371 prohibits two or more from conspiring to defraud the United States or to commit any offense against the United States. These two forms of conspiracy are different.
      - (1) Conspiracy to commit any offense means conspiracy to commit a recognized federal crime
        - (a) Requires proof of an intent to commit the underlying substantive offense
          - i) *United States v. Feola*, 420 U.S. 671, 686 (1975).
          - ii) *United States v. Martinez*, 806 F.2d 945, 946, 948 (9th Cir. 1986).
        - (b) Government may allege that the conspiracy existed to violate more than one substantive offense

- i) Jury need only find that the conspiracy existed to commit only one of the alleged substantive offenses.
      - a) *United States v. Smith*, 891 F.2d 703, 709 (9th Cir. 1989), *amended*, 906 F.2d 385 (9th Cir. 1990)
    - ii) Jury should receive a particularized unanimity instruction telling it that it must be unanimous concerning the substantive offense that it finds to be the conspiracy's object.
      - a) *United States v. Castro*, 887 F.2d 988, 993 (9th Cir. 1989)
      - b) *United States v. Quicksey*, 525 F.2d 337, 341 (4th Cir. 1975)
- (2) Conspiracy to defraud is a conspiracy to impede, impair, obstruct or interfere with some lawful government function.
  - (a) Requires proof of an agreement to interfere with some lawful government function regardless whether such interference is itself a separate substantive criminal offense.
    - i) *United States v. Shoup*, 608 F.2d 950, 959 (3d Cir. 1979)
  - (b) Conspiracy to defraud can reach loss of integrity of United States and its agencies and programs as well as pecuniary or property loss
    - i) *United States v. Clark*, 139 F.3d 485, 489 (5<sup>th</sup> Cir. 1998).
    - ii) *United States v. Goldberg*, 105 F.3d 770, 773 (1<sup>st</sup> Cir. 1997).
    - iii) *United States v. Ballistrea*, 101 F.3d 827, 832 (2d Cir. 1996).
    - iv) *United States v. Lane*, 765 F.2d 1376, 1379 (9th Cir. 1985)
  - (c) *United States v. Cueto*, 151 F.3d 620, 635 (7th Cir. 1998) (intent, as well as agreement, may be inferred from circumstantial evidence concerning the relationship of the parties, their overt acts, and the totality of their conduct)
  - (d) *Dennis v. United States*, 384 U.S. 855, 861 (1966)
  - (e) *Haas v. Henkel*, 216 U.S. 462, 479-80 (1910)

- 2. Elements
  - a. Agreement

- (1) If the government cannot prove an agreement between two or more persons, there is no conspiracy regardless of the defendant's criminal intent.
    - (a) *United States v. Rubio-Villareal*, 927 F.2d 1495, 1499 (9th Cir. 1991), *aff'd en banc*, 967 F.2d 294 (9th Cir. 1992) (en banc)
    - (b) *United States v. Recio*, 537 U.S. 270 (2003) (conspiracy does not automatically terminate simply because the government, unbeknownst to some conspirators, defeated the object of the conspiracy).
  - (2) If the only person with whom the defendant conspires is a government agent, then there is no conspiracy.
    - (a) *United States v. Chapman*, 2003 WL 22227573, — F.3d —(8<sup>th</sup> Cir. 5/14/03)
    - (b) *United States v. Nelson-Rodriguez*, 319 F.3d 12, 39 (1<sup>st</sup> Cir. 2003).
    - (c) *United States v. Reyes*, 239 F.3d 722, 738 (5<sup>th</sup> Cir. 2001).
    - (d) *United States v. Escobar de Bright*, 742 F.2d 1196, 1196-99 (9th Cir. 1984)
  - (3) The government can allege that some conspirators are unknown to the grand jury. If the indictment alleges unknown conspirators, the acquittal of all named conspirators but the defendant does not require reversal of the defendant's conspiracy conviction for failure to prove an agreement between two or more persons.
  - (4) Impossibility is not a defense.
    - (a) *United States v. Recio*, 537 U.S. 270 (2003) (conspiracy does not automatically terminate simply because the government, unbeknownst to some conspirators, defeated the object of the conspiracy).
- b. Knowing Participation
- (1) Generally theories of defense revolve around whether the government can prove that the defendant knowingly joined a conspiracy rather than whether the conspiracy existed. Often amorphous evidence of knowing participation will suffice to sustain a conviction.
    - (a) *United States v. Mares*, 940 F.2d 455, 458-60 (9th Cir. 1991) (evidence that the defendant engaged in "counter-surveillance" before drug transaction sufficient to prove knowing participation), *but see Yossunthorn*, 167 F.3d 1267 (9<sup>th</sup> Cir. 1999).

- (2) Generally the government is allowed to prove both the agreement and the defendants' knowing participation in the agreement through circumstantial evidence and available inferences, particularly in drug cases.
- (a) *United States v. Pemberton*, 853 F.2d 730, 733 (9th Cir. 1988)
  - (b) *United States v. Baxter*, 492 F.2d 150, 163 (9th Cir. 1973)
- (3) Absent evidence the defendant acted to further the conspiracy, sympathy or approval of the conspiracy is insufficient for conviction.
- (a) *Roberts v. United States*, 416 F.2d 1216, 1220-21 (5th Cir. 1969)
  - (b) *United States v. Purin*, 486 F.2d 1363, 1369 (2d Cir. 1973) (voluntary participation in acts with alleged co-conspirators and general knowledge of conspirators' intention is insufficient to show knowing participation in the conspiracy)
  - (c) *United States v. Gallishaw*, 428 F.2d 760, 763 (2d Cir. 1970)
  - (d) *United States v. Estrada-Macias*, 218 F.3d 1064, 1066 (9<sup>th</sup> Cir. 2000) (evidence of knowledge but not participation is insufficient)
- (4) Knowledge of the conspiracy, failure to inform authorities of conspiratorial activity, desire to see the conspiracy succeed, or presence at the scene of the substantive offense are insufficient to prove knowing participation.
- (a) *United States v. Gordon*, 580 F.2d 827, 835 (5th Cir. 1978)
  - (b) *United States v. Cloughessy*, 572 F.2d 190, 191 (9th Cir. 1977)
  - (c) *United States v. Basurto*, 497 F.2d 781, 793 (9th Cir. 1974)
  - (d) *United States v. Bostic*, 480 F.2d 965, 968-69 (6th Cir. 1973)
  - (e) *United States v. Sanchez-Mata*, 925 F.2d 1166, 1167-68 (9th Cir. 1991) (knowledge that drugs are present, without more, insufficient to prove knowing participation in conspiracy to distribute drugs)
  - (f) *United States v. Astride-Macias*, 218 F.3d 1064, 1066 (9<sup>th</sup> Cir. 2000) (evidence of knowledge but not participation is insufficient)

- c. Overt Act
    - (1) Most conspiracy statutes, including 18 U.S.C. § 371 require proof that one of the conspirators committed an overt act alleged in the indictment
    - (2) Drug conspiracies under 21 U.S.C. § 846 do not require proof that any conspirator committed an overt act
      - (a) *United States v. Shabani*, 513 U.S. 10 (1994). See generally Kevin Heller, *Whatever Happened to Proof Beyond a Reasonable Doubt? Of Drug Conspiracies, Overt Acts, and United States v. Shabani*, 49 Stan. L. Rev. 111 (1996).
      - (b) *United States v. Yossunthorn*, 167 F.3d 1267 (9<sup>th</sup> Cir. 1999) (“attempt” to possess with intent to distribute requires proof of a substantial step toward completion; surveillance of parking lot insufficient).
      - (c) See also *Salinas v. United States*, 522 U.S. 52, 63 (1997) (RICO statute does not include overt or specific act requirement).
  - d. *Apprendi* elements. *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000); *United States v. Nordby*, 225 F.3d 1053 (9<sup>th</sup> Cir. 2000), overruled by *United States v. Buckland*, 289 F.3d 558 (9<sup>th</sup> Cir. 2002) (en banc) (finding 18 U.S.C. § 841 not violative of due process because requirements that drug type and quantity be charged in indictment, submitted to jury, subject to the FRE, and proved beyond a reasonable doubt were consistent with congressional intent). *Apprendi* requires allegations of specific elements of the conspiracy, such as drug quantities. See generally Jon Sands and Steve Kalar, *An Apprendi Primer: On the Virtues of a Doubting Thomas*, *The Champion*, Oct. 2000.
3. Pinkerton-Vicarious Liability
- a. If one of the conspirators commits a substantive crime in furtherance of the conspiracy and this crime was “reasonably foreseeable, each conspirator can be vicariously convicted of this substantive offense as if he or she committed it or aided and abetted it.
    - (1) *Pinkerton v. United States*, 328 U.S. 640, 645 (1946)
    - (2) *United States v. Cantone*, 426 F.2d 902, 904 (2d Cir. 1970)
    - (3) *United States v. Alvarez*, 755 F.2d 830, 834-35 (11<sup>th</sup> Cir. 1985) (minor participant may be guilty of the conspiracy but not vicariously liable for substantive crimes)
    - (4) *United States v. Montgomery*, 150 F.3d 983, 996-997 (9<sup>th</sup> Cir. 1998) (reasonable foreseeability instruction need not be included in jury instruction)

- (5) *United States v. Henson*, 123 F.3d 1226, (9th Cir. 1997) (a conspirator who joins a pre-existing conspiracy is bound by all that has gone on before in the conspiracy), *disapproved of on other grounds by United States v. Foster*, 165 F.3d 689, 692 n.5 (9th Cir. 1999).
  - (6) *United States v. Yossunthorn*, 167 F.3d 1267 (9th Cir. 1998) (counter-surveillance actions are not a substantial step amounting to a conspiracy to attempt to possess and distribute drugs)
4. Venue
- a. Lies in any district where an overt act was performed or through which a conspirator passed to accomplish an overt act.
    - (1) *United States v. Cabrales*, 524 U.S. 1, 7 (1998).
    - (2) *United States v. Williams*, 536 F.2d 810, 812 (9th Cir. 1976).
5. Aiding a conspiracy
- a. In case law that defies logic and sense, defendants have been convicted of aiding and abetting a conspiracy by aiding or abetting acts in furtherance of the conspiracy. That is, the aiding and abetting acts other than the agreement itself.
    - (1) *United States v. Savinovich*, 845 F.2d 834, 838 (9th Cir. 1988)
    - (2) *United States v. Galiffa*, 734 F.2d 306, 309-10 (7th Cir. 1984)
6. Defenses
- a. Mere Presence
    - (1) Failure of proof on element of knowing participation.
      - (a) *United States v. Astride-Macias*, 218 F.3d 1064, 1066 (9th Cir. 2000) (awareness of conspiracy but not participation); *United States v. Melchor-Lopez*, 627 F.2d 886, 891 (9th Cir. 1980)
  - b. Withdrawal
    - (1) If the conspiracy statute requires an overt act, a defendant who joins but withdraws before an overt act is committed is immunized from liability for the conspiracy
      - (a) *United States v. Monroe*, 552 F.2d 860, 864 (9th Cir. 1977)
      - (b) *United States v. Heathington*, 545 F.2d 972, 973 (5th Cir. 1977)
    - (2) Defendants who withdraw after an overt act are guilty of the conspiracy but not vicariously liable for substantive offenses committed after the withdrawal

- (a) *Levine v. United States*, 383 U.S. 265, 266 (1966)
- (3) Proof of withdrawal requires acts inconsistent with conspiratorial objective and communication to co-conspirators of the intention to withdraw.
  - (a) *United States v. U.S. Gypsum Co.*, 550 F.2d 115, 141 (3d Cir. 1977), *aff'd* 438 U.S. 422 (1978)
- (4) Even where withdrawal is not an available defense to conspiracy, because no overt act is necessary, withdrawal can be a bar to prosecution or conviction if it took the defendant's participation outside the limitations period.
  - (a) *United States v. Grimmett*, 150 F.3d 958 (8th Cir. 1998)
- c. Multiple conspiracies proved, but single conspiracy alleged in indictment--variance between indictment and proof
  - (1) Conspiracy types
    - (a) *Kotteakos v. United States*, 328 U.S. 750 (1946) (government proved multiple conspiracies between spokes and hub but failed to prove the single conspiracy alleged; that is, the conspiracy represented by the rim surrounding the spokes)
    - (b) *United States v. Bruno*, 105 F.2d 921, 922-23 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939) (single conspiracy represented by chain with supplies, middlemen and retailers who knew of each other although they had no contact beyond their level)
  - (2) Courts consider the determination whether a single or multiple conspiracy exists to be a jury question
    - (a) *United States v. Rivera-Santiago*, 872 F.2d 1073, 1079 (1st Cir. 1989)
  - (3) Rule 29 motion for acquittal exists if the government alleges a single conspiracy, proves a multiple conspiracy, and fails to prove venue for the conspiracy in which the defendant participated
    - (a) *United States v. Record*, 873 F.2d 1363, 1366 (10th Cir. 1989) (facts proven which result in statute of limitations having run)
    - (b) *United States v. Borelli*, 336 F.2d 376, 388 (2d Cir. 1964)
  - (4) Other instances of prejudicial variance
    - (a) Co-conspirator statements admitted on basis of charged conspiracy would not have been admissible on proved multiple conspiracy

- (b) Indictment insufficient to allow defendant to anticipate evidence against him or her
  - (c) Indictment so vague that possibility of subsequent prosecution for same offense
  - (d) Defendant was prejudiced by spillover of evidence from one conspiracy to another
    - i) *United States v. Jones*, 880 F.2d 55 (8th Cir. 1989) (no prejudice found)
    - ii) *United States v. Gorge*, 752 F.2d 749, 754 (1st Cir. 1985) (no prejudice found)
- (5) Prejudicial variance found as a matter of law
- (a) *United States v. Jackson*, 696 F.2d 578, 582 (8th Cir. 1982)
  - (b) *United States v. Lindsey*, 602 F.2d 785, 786-87 (7th Cir. 1979)
  - (c) *United States v. Duran*, 189 F.3d 1071 (9<sup>th</sup> Cir. 1999) (prejudicial variance with two conspiracies but harmless).
  - (d) *United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969)
- (6) Prejudicial variance in drug cases
- (a) *United States v. Snider*, 720 F.2d 985, 989-90 (8th Cir. 1985)
  - (b) *United States v. Bertolotti*, 529 F.2d 149, 154-55 (2d Cir. 1975)
  - (c) *United States v. Duran*, 189 F.3d 1021 (9<sup>th</sup> Cir. 1999)
- d. Isolated Buyer and Seller
- (1) Ordinary acts that by definition require two participants are not conspiratorial. Proof only of a buyer-seller relationship is not enough to convict one as a conspirator on drug conspiracy charges.
- (a) *United States v. Rivera-Santiago*, 872 F.2d 1073, 1082 (1st Cir. 1989).
  - (b) *United States v. Douglas*, 818 F.2d 1317, 1321 (7th Cir. 1987)
  - (c) *United States v. DeNoia*, 451 F.2d 979, 981 (2d Cir. 1971)
- e. *Apprendi*. Elements related to conspiracy, such as drug quantity. *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000)
- f. Statute of Limitations
- (1) Defendant's acts fall outside statute of limitations. *United States v. Fuchs*, 218 F.3d 957, 961-62 (9th Cir. 2000).

7. Co-conspirator Statements
  - a. Foundation Requirements - Fed. R. Evid. 801(d)(2)(E)
    - (1) Offering party must prove by preponderance of evidence that conspiracy existed involving declarant and non-offering party
    - (2) Statement must have been in furtherance of the conspiracy
    - (3) Statement must have been made in the course of the conspiracy
    - (4) These three foundational requirements are preliminary questions of fact governed by Fed. R. Evid. 104
      - (a) *Bourjaily v. United States*, 483 U.S. 171, 182-83 (1987)
    - (5) Government need not charge defendant with a conspiracy to invoke Fed. R. Evid. 801 (d)(2)(E)
      - (a) *United States v. Baker*, 98 F.3d 330, 336 (8th Cir. 1996).
      - (b) *United States v. Ortiz*, 966 F.2d 707, 715 (1st Cir. 1992).
      - (c) *United States v. Layton*, 855 F.2d 1388, 1398, *overruled on other grounds by United States v. George*, 960 F.2d 97 (9th Cir. 1992).
      - (b) *Joyner v. United States*, 547 F.2d 1199, 1202 (4th Cir. 1977)
  - b. Existence of a conspiracy
    - (1) The alleged co-conspirator hearsay can be used to prove existence of the conspiracy and the defendant's and declarant's participation in the conspiracy.
      - (a) *Bourjaily*, 483 U.S. at 180
    - (2) District court is to give the alleged co-conspirator hearsay only such weight as its judgment and experience counsel
      - (a) *Bourjaily*, 483 U.S. at 181
  - c. In furtherance of the conspiracy
    - (1) As long as the declarant intended the statement to further the conspiracy, is unnecessary that it actually further the conspiracy.
      - (a) *United States v. Salgado*, 205 F.3d 438, 449-50 (6th Cir. 2001).
      - (b) *United States v. Arias-VillanuevaI*, 998 F.2d 1491, 1502 (9th Cir. 1993).
      - (b) *United States v. Hamilton*, 689 F.2d 1262, 1269-70 (9th Cir. 1982).
    - (2) Must examine statement in context to determine whether declarant intended to further the conspiracy

- (a) *United States v. Darwich*, 337 F.3d 645, 657 (6th Cir. 2003).
  - (b) *United States v. Godinez*, 110 F.3d 448, 454 (7th Cir. 1997).
  - (c) *United States v. Bibbero*, 749 F.2d 581 (9th Cir. 1984) (statement not in furtherance--only idle conversation)
  - (d) *United States v. Fielding*, 645 F.2d 719, 725 (9th Cir. 1981) (statements to impress undercover officer not in furtherance)
- d. During course of conspiracy
- (1) This period is what is necessary for accomplishment of the conspiracy's main aim
    - (a) *Krulwitch*, 336 U.S. 440, 442 (1949)
  - (2) Once conspiracy's central criminal purpose attained, may not infer subsidiary conspiracy to conceal merely because conspiracy kept secret
    - (a) *Krulwitch*, 336 U.S. at 443-44
  - (3) Termination for any particular defendant occurs when his or her involvement ceases by withdrawal, indictment, or arrest
    - (a) *United States v. Smith*, 623 F.2d 627, 631 (9th Cir. 1980)
    - (b) *But see United States v. Williams*, 548 F.2d 228, 232 (8th Cir. 1977)
- e. Order of proof
- (1) Request pretrial hearing to determine the admissibility of co-conspirator hearsay
    - (a) *United States v. James*, 590 F.2d 575, 579 (5th Cir. 1979) (en banc), *overruled on other grounds by Bourjaily v. United States*, 483 U.S. 171 (1987).
  - (2) Government will attempt to have court admit the co-conspirator hearsay conditionally and allow the government to "connect it up" later. Courts are now leaning towards this procedure rather than a pretrial hearing.
    - (a) *United States v. William*, 837 F.2d 1009, 1014 n.8 (11th Cir. 1988)
    - (b) *United States v. Mobile Materials, Inc.*, 881 F.2d 866, 869 (10th Cir. 1989)

B. Jury Instructions

- 1. Mere Presence or Association
  - a. Mere participation in single deed with ignorance about scope or fact of a charged conspiracy insufficient to sustain conviction

- (1) *United States v. Brown*, 912 F.2d 1040, 1043 (9th Cir. 1990)
  - b. No inference of guilty from mere presence at scene or proximity to contraband
    - (1) *United States v. Rodriguez*, 761 F.2d 1339, 1441 (9th Cir. 1985)
    - (2) *United States v. Manning*, 618 F.2d 45, 48 (8th Cir. 1980)
    - (3) *United States v. MacDougal-Pena*, 545 F.2d 833 (2d Cir. 1976)
    - (4) *United States v. Astride-Macias*, 218 F.3d 1064, 1066 (9th Cir. 2000) (individual living around defendant's trailer known to manufacture methamphetamine insufficient)
  - c. Business or social association with conspirators does not support inference of guilt
    - (1) *United States v. Xheka*, 704 F.2d 974, 988-89 (7th Cir. 1983)
    - (2) *United States v. Terry*, 702 F.2d 299, 320 (2d Cir. 1983)
    - (3) *Ramirez v. United States*, 363 F.2d 33, 34 (9th Cir. 1966)
- 2. Conspiracy Instructions
  - a. Incomplete Agreement
    - (1) Although an agreement may be inferred from circumstantial evidence no conviction for guilt by association with conspirators.
      - (a) *United States v. Melchor-Lopez*, 627 F.2d 886, 891 (9th Cir. 1980) (evidence that defendant firmly insisted on conditions unacceptable to potential conspirators showed that defendant did not agree to commit crime absent fulfillment of the unacceptable conditions)
  - b. Withdrawal
    - (1) A defendant's participation is presumed to continue unless defendant affirmatively shows evidence of withdrawal, once evidence of withdrawal presented, jury should be instructed that the government must disprove withdrawal beyond a reasonable doubt.
      - (a) *United States v. Read*, 658 F.2d 1225, 1236 (7th Cir. 1981).
      - (b) *But see United States v. Harriston*, 329 F.3d 779, 783-84 (11th Cir. 2003).
  - c. Statute of Limitations
    - (1) Acts found outside a limitation period. *United States v. Fuchs*, 218 F.3d 957, 961 (9th Cir. 2000).

3. *Apprendi* Issues. *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000) ( any fact that increases prescribed maximum sentence must be submitted to jury and proved beyond a reasonable doubt); *see also United States v. Nordby*, 225 F.3d 1053 (9<sup>th</sup> Cir. 2000) (under *Apprendi*, drug quantities that increase statutory maximum must be determined by jury and proven beyond a reasonable doubt), *see note on overruling, supra*. Possible need for special verdict form or interrogatories for specific amounts for which each defendant for same and which jointly responsible. U.S.S.G. § 1B1.3.

#### IV. Cooperating Co-defendants

##### A. Joint Defense Agreements

1. *See* Model Agreement
2. *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965) (when two or more persons who are subject to possible indictment in connection with same transactions make confidential statements to their attorneys, these statements, even though exchanged between attorneys, re within the attorney/client privilege to the extent they concern common issues and are intended to facilitate representation in subsequent proceedings)
3. *United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987) (common interest rule protects communications made when nonparty sharing clients’s interests is present at confidential communication between attorney and client and nonparty need not be a party to the same pending lawsuit to have a common interest with the party seeking to protect the communications under the attorney/client privilege), *withdrawn in part by United States v. Zolin*, 842 F.3d 1135 (9th Cir. 1988).
4. *United States v. McPartlin*, 595 F.2d 1321, 1335 (7th Cir. 1979) (co-defendant’s statements to defendant’s investigator properly excluded as attorney/client privileged information because they were made in confidence to an attorney for co-defendant for a common purpose related to both defenses)
5. Government Responses to Joint Defense Agreements
  - a. Defendant’s lawyer is precluded from cross-examining potential government witnesses because he or she obtained confidential information from the potential government witness through a joint defense agreement. The government’s argument is that the joint defense agreement renders the parties’ lawyers part of a de facto law firm and thus creates conflicts of interest.
  - b. *United States v. Anderson*, 790 F. Supp. 231 (W.D. Wash. 1992) (Anderson waived any potential conflicts resulting from the joint defense agreement)

**V. Conflicting Defenses**

A. See discussion above of *Zafiro v. United States*, 506 U.S. 534 (1993)

**VI. Relevant Conduct Issues - §1B1.3**

- A. Defendants are vicariously liable for the acts of others if
1. the others' acts were within the scope of "jointly undertaken criminal activity"
  2. the others' acts were in furtherance of the "jointly undertaken criminal activity"
  3. the others' acts within the scope of the "jointly undertaken criminal activity" were reasonably foreseeable
- B. Vicarious liability under "relevant conduct" is not coextensive with liability for the entire conspiracy or with possible *Pinkerton* liability in connection with the conspiracy
1. Sentencing Guidelines §1B1.3 (Commentary) (Application Note 2(c)(6) and Application Note 2(c)(7)
- C. Court may approximate drug quantity for sentencing purposes by multiplying an estimated daily or weekly quantity by an applicable period of time provided that the approximation has a reliable basis. *United States v. Paulino*, 996 F.2d 1541 (3<sup>rd</sup> Cir. 1993); *United States v. Walton*, 908 F.2d 1289 (6<sup>th</sup> Cir. 1990); *United States v. Culps*, 300 F.3d 1069 (9<sup>th</sup> Cir. 2002).

**VII. Safety Valve - 18 U.S.C. § 3553 and §5C1.2**

## Model Joint Litigation and Confidentiality Agreement

1. **Scope of Agreement.** This Joint Litigation and Confidentiality Agreement (“Agreement”) pertains to pending or future administrative, civil, or criminal investigation or proceedings by agencies or officers of the United States government concerning (the “Matter”).

2. **Common Interest in Defense and Applicability of Joint Defense Agreement.** The undersigned attorneys and their clients alike, anticipate that the nature of the Matter and the relationship among the clients will present various legal and factual issues common to the clients, thus making essential joint efforts in preparation for defense. The parties to this agreement believe there is a mutuality of interest in some issues that may relate to the common defense of the clients in the Matter. The attorneys joining this Agreement wish to work together on issues common to their clients without waiving applicable rules of privilege and confidentiality vis-a-vis potentially adverse parties.

It is the parties’ intention and understanding that (1) the fact that particular communications have been made between parties to this agreement, (2) the contents of such communications, and (3) any part of memoranda or other work product containing or referring to such communications shall remain confidential and protected from disclosure to any third party (a party not a signatory to this Agreement) by each client’s attorney/client privilege, each attorney’s work-product doctrine immunity from discovery production and the “joint defense doctrine” recognized in such cases as *United States v. McPartlin*, 595 F.2d 1321, 1336-37 (7<sup>th</sup> Cir. 1979); *Hunydee v. United States*, 335 F.2d 183 (9<sup>th</sup> Cir. 1965); and *Continental Oil Company v. United States*, 330 F.2d 347, 349-50 (9<sup>th</sup> Cir. 1964). As indicated in those cases, sharing of information for mutual benefit is not a waiver of applicable privileges or work product rules relating to discovery obligations. In other words, no sharing of information under this joint litigation agreement shall be deemed to be a waiver of any otherwise applicable privilege or rule of production or discovery.

3. **Each Client Understands He or She is Represented by His or Her Own Attorney Only.** Each client-signatory understands and acknowledges that the client is represented exclusively by the client’s own attorney(s) in this matter. While Attorneys representing other client-signatories to this Agreement have a duty to preserve the confidences disclosed to them pursuant to this Agreement, they will not act for any party other than their own clients in this Matter. In other words, each client understands and agrees that this Agreement itself does not and will not create any attorney/client relationship with any other client-signatory’s attorney(s). Each client-signatory expressly acknowledges that attorneys representing other client-signatories to this Agreement owe an uncompromising duty of loyalty to their own, respective client and to no other party.

4. **Agreement to Share Information.** To further the mutual interests of the clients, counsel and their respective clients agree:

- (a) to share and exchange among themselves and their clients, as each counsel deems appropriate given the unique interests and concerns of his or her client, witness statements and interview summaries, memoranda of law, debriefing memoranda, factual summaries, transcript digests, documents, legal strategies, intelligence, confidences, and other secrets for the limited and restricted purpose of assisting counsel in protecting the rights and interest of their respective clients;
- (b) to mark all materials exchanged pursuant to this Agreement with the legend “*Confidential and privileged communication protected pursuant to joint litigation and confidentiality agreement.*”

5. **Agreement Not to Disclose to Third Parties.** Each signatory agrees he or she will not reveal to any third party any information received under this Agreement except as follows:

- (a) A party receiving joint litigation information may communicate that same information to a third party (a party not a signatory to this Agreement) only with the advance written consent of the attorney or party who contributed it to the joint litigation effort.
- (b) A party receiving joint litigation information may communicate that same information to another signatory to this agreement only with advance, explicit oral or written consent of the attorney of party who contributed it to the joint litigation effort.<sup>1</sup>
- (c) A party receiving joint litigation information may communicate that same information pursuant to a compulsion order from a court of competent jurisdiction. Each party agrees that if it receives any summons, subpoena, or similar process, or request to produce information or materials which includes information or material received under this Agreement, it will immediately notify all other parties and provide not less than five days notice before production, to permit other parties to intervene. If five-days

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<sup>1</sup> This paragraph recognizes that certain parties may have greater common interests with some other parties on certain issues. For example, a corporation may have a greater interest in and need for joint litigation communications between its counsel and counsel for its employees than it would have with counsel for other companies participating in this Agreement. Under such circumstances, attorneys for various parties may choose to share information with some but not all parties to the Agreement. In every instance, it is the prerogative of the attorney contributing information to determine, based on his or her assessment of his or her client’s interest, to decide whether or to whom in the agreement information is disclosed. Similarly, this agreement does not preclude the contributing attorney from disclosing his or her own information with anyone.

notice cannot be provided, because of the return date of the process, a party upon which the demand or request is made agrees to bring a motion to stay the proceedings to allow provision of five-days notice to other parties.

6. **Modification of Agreement -- Addition of New Parties.** Modification of this Agreement or addition of other parties as signatories to this Agreement requires that all parties execute a new Agreement.

7. **Sharing of Information Does Not Create Privilege Regarding Facts that are Not Otherwise Privileged.** The parties recognize and agree that facts and other information that are not otherwise privileged from disclosure shall not gain any privilege simply because such facts and other information may be shared in a joint defense communication. Although information may not be privileged, the joint defense and work product privileges do protect against disclosure of (a) the fact that particular joint litigation communications have been made among parties to this Agreement, (b) the contents of such joint litigation communications, and (c) any part of memoranda or other work product containing or referring to such joint litigation communications.

8. **Attorneys' Duty to Zealously Represent Their Own Clients.** The signatories understand and acknowledge that each attorney-signatory to this Agreement has an obligation to zealously represent his or her own client to the exclusion of all other interests. Thus, before the Matter concludes, each attorney may need to, and is free to take action that may be contrary to the interests of other signatories to this Agreement. These actions include, but are not limited to (a) advising a client to cooperate with the government, (b) generating and disclosing evidence or information to the government or third parties (apart from information protected by this Agreement), and (c) cross-examining other client-signatories at trial proceedings, should such client-signatories testify.

9. **No Party to this Agreement Has Agreed to Cooperate or Testify.** Each signatory represents that he or she has not entered into any cooperation arrangement with any agency of the United States government, agreement to testify as a witness on behalf of the federal government, or agreed to serve as an informant on behalf of the federal government with respect to the Matter in any investigation or administrative, civil, or criminal proceedings. This Agreement is not intended to prevent or inhibit any party from entering into cooperation arrangements with the government.

10. **Agreement to Notify of Cooperation Arrangement.** Any signatory that enters into a cooperation agreement with any governmental agency with respect to the Matter shall immediately notify all other signatories of that fact, and immediately withdraw from this Agreement. Upon withdrawal, the cooperating party and his or her attorney shall return all joint defense material to the attorneys who contributed it, including copies or summaries or excerpts of this joint defense material.

11. **Consent to Use Information Exchanged Pursuant to this Agreement.** Any client-signatory who enters into a cooperation arrangement with the government or who testifies in any civil, administrative or criminal proceeding arising from the Matter consents to any other signatory using for defense purposes any information or material contributed by the client or by his or her attorney. This specifically permits use of contributed information or material in cross-examining the witness and permits presentation of the information or material by the defense at any point in the proceedings.

12. **Not an Agreement to Violate Any Law.** This Agreement in no way is intended to encourage or commit any violation of law or unlawful interference with any official proceeding or investigation. Each client-signatory acknowledges the explanation and understanding.

13. **Agreement Fully Explained.** Each attorney-signatory has fully explained the terms of this Agreement and is fully satisfied that the client understands the terms, agrees to abide by them, and that the attorney is authorized by the client to execute this Joint Litigation and Confidentiality Agreement.

14. **Substitution of Parties or Attorneys.** This Agreement shall automatically apply to substitute or associated counsel who may appear on behalf of any client-signatory. This Agreement shall not be subject to abrogation by any heir, assign, or other successor in interest to any party hereto. Nor shall such heir, assign, or successor in interest waive any privilege or doctrine with regard to information shared or among the parties to this Agreement.

15. **Right to Terminate Participation; Termination is Prospective Only.** Each signatory to this Agreement has the right to terminate his or her participation at any time. Termination shall be effective upon tendering written notice to each attorney-signatory and returning to each attorney-signatory the joint defense materials (and all copies, summaries or excerpts) received. Termination of a party's participation under this Agreement shall not operate as a waiver or authorize violation of this Agreement. A terminating party remains bound to maintain the confidentiality of information received under this Agreement.