

# I. Evidentiary Burdens and Other Evidentiary Issues in a Criminal Case

## A. Preliminary Hearing (“Probable Cause Hearing”)

### 1. Finding and Evidentiary Rules

Pursuant to Fed.R.Crim.P. 5.1, if Defendant not charged by indictment may elect to have a hearing at which Magistrate Judge must determine whether there is probable cause to believe Defendant committed an offense. Defendant may cross-examine witnesses and may introduce evidence. Illegally obtained evidence is admissible.

## B. Detention

### 1. Burden of Proof and Release as Default

18 U.S.C. § 3142(b) mandates pretrial release on personal recognizance or unsecured appearance bond unless the court determines by “clear and convincing evidence” that “such release will not reasonably assure” the person’s appearance or “will endanger the safety of any other person or the community.”

### 2. Rebuttable Presumption

There is a rebuttable presumption that for certain kinds of cases, no condition or combination of conditions will ensure the Defendant’s appearance and the safety of others and the community.

#### a. Rebuttable Presumption that no condition or combination of conditions will assure the safety of others or the community when:

##### (1) *The Defendant has been convicted of:*

(a) a crime of violence; (b) an offense with statutory maximum of life imprisonment or death; (c) a drug offense with 10 year or more mandatory minimum; or (d) any third felony offense if Defendant has at least two priors qualifying as one of the first three

##### (2) **AND:**

The offense of conviction described above in (1) was committed while the Defendant was on release pending trial

##### (3) **AND:**

Not more than five years has elapsed since the later of the date of conviction or release from imprisonment.

#### b. Rebuttable Presumption that no condition or combination of conditions will assure appearance and the safety of others or the community when:

##### (1) *The Defendant is Charged with Having:*

Committed a drug offense with 10 year or more mandatory minimum or an offense under 18 U.S.C.

§ 924(c) (carrying or using a firearm in the commission of a felony);

(2) **AND**

The court finds there is probable cause to believe the Defendant committed the offense he is charged with.

**c. Effect of Presumption**

Has been held not to shift burden of proof from the government to the Defendant. Instead, it shifts the burden of production to the Defendant i.e. if the presumption applies, Defendant has burden to produce some credible evidence that he is not a flight risk or a danger to others or the community.

**3. Applicability of Evidence Rules**

**a. Exemption**

Fed.R.Evid. 1101(d)(3) exempts bail hearings from applicability of Federal Rules of Evidence. Also, 18 U.S.C. § 3142(f) provides that the Federal Rules of Evidence do not apply at detention hearings.

**b. Hearsay Rules**

Courts may rely on hearsay evidence at detention hearing.

**c. Evidence by Proffer**

18 U.S.C. § 3142(f) provides that “the [charged] person shall be afforded an opportunity to . . . present information by proffer or otherwise.” Although the statute does not authorize the government to present evidence by proffer, most judges permit it to do so also. Defense counsel may proffer the testimony of the Defendant.

**c. Trial**

**1. Burden of Proof**

**a. Elements of Offense**

Government has the burden of proving each of the elements of the offense charged “beyond a reasonable doubt.” Fifth Circuit Pattern Criminal Jury Instruction 1.05 defines proof “beyond a reasonable doubt” as follows: “A “reasonable doubt” is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.”

**b. Defenses:**

The burden of proof depends upon the particular defense asserted. Some examples are as follows:

(1) **Insanity:**

Under 18 U.S.C. § 17(a), insanity is an affirmative defense to prosecution under all federal statutes. The Defendant has the burden of proving insanity by clear and convincing evidence.

(2) ***Entrapment:***

To raise an entrapment defense, the Defendant has the initial burden of producing some evidence of the government's inducement and his or her own lack of predisposition. Once the Defendant has met his burden of production, the government must prove beyond a reasonable doubt that the Defendant committed the crime, not because of inducement by the government, but because of his own predisposition. Entrapment is normally a jury question and a Defendant need not admit the elements of the offense to obtain an entrapment instruction.

(3) ***Self-Defense***

To obtain the instruction, Defendant has the burden of producing some evidence of his justification in acting. If the Defendant meets the initial burden of production, then government must negate self-defense beyond a reasonable doubt.

2. **Use of Illegally Obtained Evidence**

Use as affirmative evidence of guilt at trial not permitted. It is permissible to use suppressed evidence to impeach Defendant.

**D. Sentencing**

1. **Burden of Proof**

As of today, December 2, 2004, in this Circuit, the government has the burden of proving sentencing factors by a preponderance of the evidence. See *United States v. Millsaps*, 157 F.3d 989, 994-95 (5<sup>th</sup> Cir. 1998). In June, the Supreme Court issued an opinion, *Blakely v. Washington*, 124 S.Ct. 2531 (2004), in which it held that in the context of Washington state's sentencing scheme, sentencing factors must be pled in the indictment and proven to a jury beyond a reasonable doubt. The circuits split over the applicability of *Blakely* to the federal Sentencing Guidelines, with the Fifth Circuit taking the position that it *Blakely* does not apply to federal sentencing. This question is currently under consideration by the Supreme Court and an opinion is imminent. Most commentators believe that the Court will apply the *Blakely* rule to the federal Guidelines.

2. **Use of Illegally Obtained Evidence**

Permissible at Sentencing.

**II. Stipulations**

#### **A. Local Rule**

Northern District of Texas Local Criminal Rule 16.1 requires the pre-marking of exhibits and the exchange of exhibits and filing of witness and exhibit lists at least three days before trial. However, most judges amend this local rule and by scheduling order, set a deadline for the exchange of exhibits and filing of exhibit and witness lists more than three days prior.

#### **B. General Practice**

Most exhibits in federal trial practice are pre-admitted. The Court will normally request (and will always welcome) a joint stipulation of the parties to exhibits to which there is no objection. Parties may stipulate to the admissibility of exhibits for all purposes or may stipulate just to foundation and reserve other objections.

### **III. Impeachment Evidence**

Local rules provide that impeachment evidence need not be premarked, exchanged or included on an exhibit list. Northern District of Texas Local Criminal Rule 16.1.

### **IV. Summary Evidence**

Fed.R.Evid. 1006 permits use of summaries, charts and calculations to summarize voluminous evidence. The Fifth Circuit has held that it is improper to allow a Government witness to summarize trial testimony of other witnesses or to supplement or substitute for closing argument. *United States v. Fullwood*, 342 F.3d 409 (5<sup>th</sup> Cir. 2003).

### **V. Use of Technology**

#### **A. Electronic Courtrooms**

##### **1. Availability**

Two electronic courtrooms are on line in Dallas and one in Fort Worth. These include the courtrooms of Chief Judge Fish, Senior Judge Buchmeyer and Judge Means. Other judges may request and use these three electronic courtrooms.

##### **2. Procedure for use**

Contact the courtroom deputy for your judge. They require attorneys to be trained on the use of the equipment prior to trial.

##### **3. Technology Available**

The electronic courtroom provides presentation equipment. Attorneys must provide their own computers to link up to the system and must run their own presentation software (e.g. PowerPoint or Sanction). Every two jurors share a jury box monitor. There is a monitor at the podium, another in the witness box and attorneys may hook up multiple P.C.s at the counsel table. Equipment includes a DVD and a VCR player and the monitors in the witness box and at the podium are "writeable" with a fingertip.

##### **4. Benefits**

###### **a. Speed/Professionalism of Presentation**

Trial time is significantly shortened. Jurors have better lines of sight.

**b. Other Benefits**

Permits jurors, attorney and judge the ability to review documents or evidence without publishing it to the entire gallery. This is especially useful in cases involving graphic or obscene evidence (e.g. pornography cases).