

CLE SEMINAR

Investigating, Preparing, and Executing Your Cooperator Crosses: Using Social Media, Rule 17(c) Subpoenas, and Cell Phone Data

Hosted at:

Federal Public Defender's Office

Speaker:

Kasha K. Castillo, Supervisory Attorney - Trial Team Leader from the
Federal Defenders of San Diego, Inc.

Portland, Oregon

Live on January 16, 2019

12:00pm to 1:00pm

Eugene, Oregon

Via video conference on January 16, 2019

12:00pm to 1:00pm

Medford, Oregon

Via video conference on January 16, 2019

12:00pm to 1:00pm

Investigating, Preparing, and Executing Your Cooperator Crosses: Using Social Media, Rule 17(c) Subpoenas, and Cell Phone Data to Destroy the Snitch in Your Case

Kasha K. Castillo
Supervisory Attorney - Trial Team Leader
University of San Diego School of Law, J.D.
University of Portland, B.A.

Kasha Castillo first joined Federal Defenders in 2000. Prior to coming to the office, she worked in San Diego for a private firm doing criminal defense work at both the state and federal court levels. While still in law school, Kasha had learned of Federal Defenders' extensive trial practice training program. She ultimately decided to join the San Diego Federal Defender team because of her desire to become an excellent criminal defense trial attorney.

Kasha has been intensely involved in training and mentoring new attorneys through her work on the "New Attorney Training Committee;" molding and inspiring new generations of public defenders through her work on the "Intern Committee;" and, most recently, keeping our CJA panel attorneys up-to-date on changes in federal law and procedure through her work on the "CJA Seminar Committee." Kasha's extensive committee work also regularly requires her to participate as a lecturer on a variety of topics, ranging from substantive criminal law to trial skills and practice.

Kasha became a Supervisory Attorney/Trial Team Leader in 2004. She now oversees a team of seven trial attorneys, assisting them in all aspects of their district court practice. Additionally, she continues to maintain a significant district court caseload that permits her to litigate a wide array of cases through the motions and trial stages.

**I GOT 99
PROBLEMS
BUT A
SNITCH
AIN'T ONE**



Kasha Castillo
Supervising Trial Attorney
Federal Defenders of San Diego

Making the Snitch Not Your Problem

- What We Should Demand from Prosecutors
- What We Can Get Ourselves
- What We Have to Litigate
- What to do With the Stuff you Get

What Should We Demand



Rule 16 Giglio/Brady Material

Reports of Investigation -- including "Trial Prep"

Criminal history: state/federal/arrests

Plea agreement/letters from gov't, text messages to & from agents, PSIs.

Any benefits offered by gov't-- including immigration benefits, S-visas, U-visas, parole letters, quashing subpoenas

Grand Jury Testimony if there is arguably any "inconsistency"

Presentence Reports

We conclude that the district court's failure to review the PSRs of government witnesses requires remand of Garcia's convictions to determine whether those PSRs contained any material exculpatory or impeachment information and, if they do, whether failure to provide it was harmless error

United States v. Garcia, 562 F.3d 947, 950 (8th Cir. 2009)

Presentence Report

A PSI may be discoverable under the Jencks Act if the PSI contains a "defendant's version" of the facts and the PSI is in the hands of the prosecutor.

United States v. Ventura, 132 F.3d 44 (10th Cir. 1997) (although limiting disclosure to en camera review by the court).

“Soft Words of Hope”

Representations that are vague and open-ended, not considered a “promise” mandating disclosure

“Soft words of hope” are more damaging than explicit promise in writing

“Soft Words of Hope”

Whenever a government agent makes a representation to a cooperating witness that he knows or reasonably should know could create a subjective expectation of leniency – must be disclosed

Helps us “because it’s the right thing to do”
Or so we can help you “help yourself.”

“Hope” Includes

- Inducement made by government to counsel for the witness is *Giglio*. See *Campbell v. Reed*, 594 F.2d 4, 6 (4th Cir. 1979) (finding *Giglio* violation when state made promise of non-prosecution to accomplice’s lawyer, and lawyer merely told witness that “everything would be all right”)
- “Everything will be all right” if witness cooperated. *Campbell v. Reed*, 594 F.2d 4, 6 (4th Cir. 1979)

“Hope” Includes

- A promise to jailhouse snitch “cooperation will be made known” to the judge. *Patillo v. State*, 368 S.E.2d 493, 498 (Ga. 1988), cert. denied, 488 U.S. 948 (1988).
- Prosecutor’s statement that he would take the “cooperation into consideration” at sentencing; *Commonwealth v. Hill*, 739 N.E.2d 670, 680 (Mass. 2000);

What Can We Get Ourselves

- Transcripts/guilty plea forms/police reports
- Personal interview? It could happen
- Attend any court hearing Snitch/Complaining witness has
- Accurant Reports
- DMV records

Conviction Records

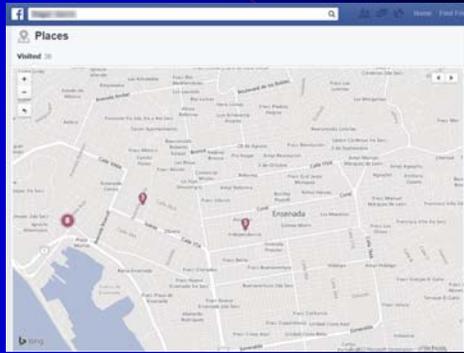
40. According to the defendant, he suffered a DUI conviction in 2010. The incident resulted from a night of drinking with a friend. [redacted] recalls drinking approximately seven or eight beers prior to driving home. After his arrest, the defendant recalls providing a breath test sample of .14% Blood Alcohol Concentration (BAC).

Defendant has failed to present sufficient grounds to show that it would be in the interest of justice for the court to grant:
 Early termination of probation.
 The petition despite the conviction during probation.
 BAC (.14%) was extremely high indicative of an alcohol problem. This
 IT IS HEREBY ORDERED THAT: \$718 have to be addressed in any renewed petition.
 Misdemeanor: Defendant pay a court cost of \$60.00 to the court. Forfeith Due PD 06-18-14 If not paid by the date of the report, will be referred to the court's contracted collection agency to pursue collection of the unpaid balance.

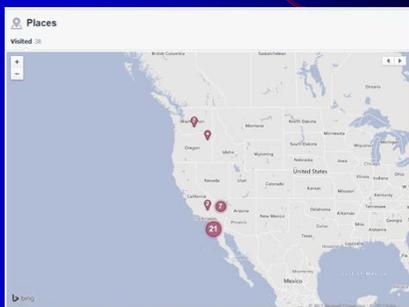
The Power of Social Media



Facebook Can Show Us Where Pictures Were Taken



Facebook Can Give Us the Dates of Those Photos



How Do We Get It?

- All Public Sites
- Client is “friends”
- Someone else is “friends”
- Maybe request production

How We Don't Get it

- You can't be “friends”
- Your investigator can't be “friends”
- You can't subpoena it

The Power of 17(c)



Impeachment material need not be subpoenaed for advance production because its relevance depends upon the government's decision to call the witness

United States v. Nixon, 473 U.S. 683 (1974);
United States v. Fields, 663 F.2d 880 (9th Cir. 1981)

The Use of 17(c) is Encouraged

- Complicated Cases (not a very high threshold)
- Where it is known with certainty the witness will testify
- Allow a more orderly trial

United States v. LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988); *United States v. King*, 194 F.R.D. 569, 574 (E.D. Va. 2000)

What Can We Subpoena?

- Credit Reports
- Sealed filings and/or Other Law Suits: did the "victim" file a civil suit?
- Divorce records: ex-spouses should be interviewed
- Insurance Records
- Records under other names (Aliases)
- Downloads of Snitch's cell phones
- Access to private locations

AND MORE . . .

- Prison Records
- Work Records
- Medical Records
- School Records
- Social Security Records

Employment Records

Firm	Tx	Name of Firm or Company	Address	Investment Related	Positive Field
007000	12-2008	GENERAL SECURITIES	SAN DIEGO, CA USA	YES	RECEIVED INFORMATION
007000	09-2008	WELLS FINANCIAL SERVICES INC.	LA JOLLA, CA USA	YES	FINANCIAL ADVISOR
007000	02-2008	GENERAL SECURITIES, INC.	SAN DIEGO, CA	YES	NOT PROVIDED
007004	02-2007	PRUDENTIAL SECURITIES INCORPORATED	SAN DIEGO, CA	YES	NOT PROVIDED
117003	09-2004	CHARWELD HEAR & CO. INC.	SAN DIEGO, CA	YES	NOT PROVIDED
007003	11-2003	INVESTICORP	SAN DIEGO, CA	NO	UNEMPLOYED
007003	06-2003	CALIFORNIA STATE UNIVERSITY SAN DIEGO	SAN DIEGO, CA	NO	OTHER - BSA STATEMENT
007003	12-2001	THRIFTY DRUG STORE #7	SAN DIEGO, CA	NO	OTHER - ASSISTANT MAN.
007007	12-2000	SAN DIEGO STATE UNIVERSITY	SAN DIEGO, CA	NO	OTHER - B.S. STATEMENT

Criminal Disclosure

- 14A. (1) Have you ever:
- (a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign, or military court to any felony? Yes No
- (b) been charged with any felony? Yes No

https://www.fico.com/secure/credit/portal/credit_center/active_content.jsp?lang=en-us&cid=175438&cid=40157

D1061-009

If "Yes", please enter details below.

1. HEALTH MANAGEMENT STRATEGIES GROUP, ORA, 4200 KERRY VILLA RD, 4202 SAN DIEGO, CA 92123, FINANCIAL ADVISOR, STARTED 04/2013, FIRM TYPE: NOT PROVIDED, NONE, OTHER

14. Disclosure Questions

(1) THE ANSWER TO ANY OF THE FOLLOWING QUESTIONS IS "YES" UNLESS YOU CHECK ALL OF THE "NO" BOXES IN THE FOLLOWING SECTION ON APPROPRIATE BOXES.

REFER TO THE EXPLANATION OF TERMS SECTION OF FORM 1041 INSTRUCTIONS FOR EXPLANATIONS OF ITALICIZED TERMS.

Criminal Disclosure

14A. (1) Have you ever:

(a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign, or military court to any felony? Yes No

(b) been charged with any felony? Yes No

D1061-009

♥ Jail Calls ♥

SIMONE TALK ABOUT THE KIDS & MOM.

MOM - I THINK THAT DEPENDS ON WHAT THE ATTORNEY TELLS ME, THAT I'M GOING TO BE OUT OF HERE IN ABOUT SIX MONTHS, WITH A PROGRAM. WELL, THERE'S ABOUT THREE MONTHS LEFT UNTIL I GET SENTENCED, WE'LL SEE WHAT HAPPENS THEN...

ALI - YOU'LL SEE THAT EVERYTHING IS GOING TO BE FINE... LET

Make the Government Work

- I.D. issues?? File a motion and ask for a hearing so get witness on cross before trial
- *In limine* motion to exclude “truthfulness” language from plea agreement & from direct examination; no admission of full plea agreement by prosecutor
- May have to litigate 608(b)/609/404(b) issues
- Defense has no obligation give 404(b) notice
 - Fed. R. Evid. 404(b) (“the prosecution, in a criminal case, shall provide reasonable notice”)
 - You can find some reason to admit the evidence: “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or

LEGAL TOOLS

- Rule 404(b): Prior Act Evidence
 - Standards for defense admission “relaxed”
 - *United States v. McClure*, 546 F.2d 670 (5th Cir. 1977);
 - *United States v. Cohan*, 888 F.2d 770 (11th Cir. 1989)
 - *United States v. Absoumoussallem*, 776 F.2d 906, 911-912 (1984)
- Trial judges have no authority to order you to turn over impeachment material.
 - *United States v. Cerro*, 775 F.2d 908, 915 (7th Cir. 1985)
 - Rule 16/Cal.Pen.Code 1504.3 do not require disclosure of impeachment evidence
- Right to Cross includes attacking credibility, bias, motive, self-interest.
 - *Burr v. Sullivan*, 618 F.2d 583, 586-587 (9th Cir. 1980)
 - *United States v. Payne*, 944 F.2d 1458, 1469 (9th Cir. 1991)
- Rule 608(b): prior acts involving dishonesty:
 - Frauds/use of fake names, deceptions, infidelity
 - See *United States v. Gay*, 967 F.2d 322, 328 (9th Cir. 1992)

Permission to Explore

Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply... It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what fact a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them

Alford v. United States, 282 U.S. 687, 692, 51 S. Ct. 218, 219, 75 L. Ed. 624 (1931)

Bias/Motive

“The exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.”

Davis v. Alaska, 415 U.S. 308, 316 (1974)

Bias/Motive

Where counsel seeks to explore a witness' bias on cross-examination-rather than his character for truthfulness-Rule 608(b) is not controlling.

U.S. v. Ray, 731 F.2d 1361, 1364 (9th Cir.1984) (“Rule 608(b) does not bar introduction of evidence to show that the witness is biased.”)

Bias/Motive

“We cannot overemphasize the importance of allowing full and fair cross-examination of government witnesses whose testimony is important to the outcome of the case.... Full disclosure of all relevant information concerning their past record and activities through cross-examination is indisputably in the interests of justice.”

U.S. v. Brooke, 4 F.3d 1480, 1489 (9th Cir.1993)

This Must Include:

- Sentencing Guidelines Faced Before Cooperation
- Avoided Minimum Mandatories. *United States v. Larson*, 495 F.3d 1094 (2007).
- Dismissed Charges In Exchange for Testimony. *Delaware v. Van Arsdall*, 475 U.S. 673 (1986)
- Grants of Immunity
- Provisions of the Plea Agreements Relating to Rule 35. *United States v. Schoneberg*, 396 F.3d 1036, 1043 (9th Cir. 2005)
- Provisions of the plea agreement establishing AUSA had the sole discretion to determine truthfulness and substantial assistance. *United States v. Schoneberg*, 396 F.3d 1036, 1043 (9th Cir. 2005)

This Must Include:

- Probationary Status. *Davis v. Alaska*, 415 U.S. 308 (1974)
- Implicit Promises of leniency. *McGeshick v. Fiedler*, 3 F.3d 1083 (7th Cir. 1993)(witness testified that he was told that if he cooperated, “maybe things would go easier for him,” although no clear promises were made) – *The Soft Words of Hope*
- Expectations or Hopes of Leniency. *Commonwealth v. Evans*, 512 A.2d 626 (PA. 1986)(court recognized that witness may have testified in favor of prosecution in order to receive favorable treatment in an unrelated crime, even though prosecution had not made any agreements or promised to make any agreements to that effect).

This Must Include

- Fear Of Possible Charges. *Davis*, 415 U.S. at 317 (the witness’s “possible concern that he might be a suspect in [an] investigation” could have motivated him to falsely implicate the defendant was within the scope of cross).
- Inmate Status. *Alford v. U.S.*, 282 U.S. 687 (1931)
- Special Favors/Amenities in Custody. *Chavis v. NC*, 637 F.2d 213 (4th Cir. 1980)

How to Be Persuasive

*i.e.,
how to make the
stuff you get work
for you.*

Know Your Enemy

- 3 Types of Cooperating Witnesses
- Different Obstacles
- Different Biases
- Different Image Goals

The Eye Witness

Charged with unrelated criminal charges, but claims to have witnessed some part of the events in question





JAILHOUSE SNITCHES

Housed at the same facility with your client

Claims to have overheard “admissions” made by your client

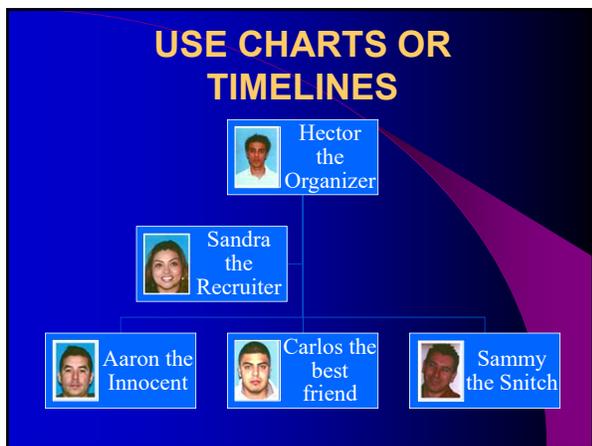
The Co-Actor

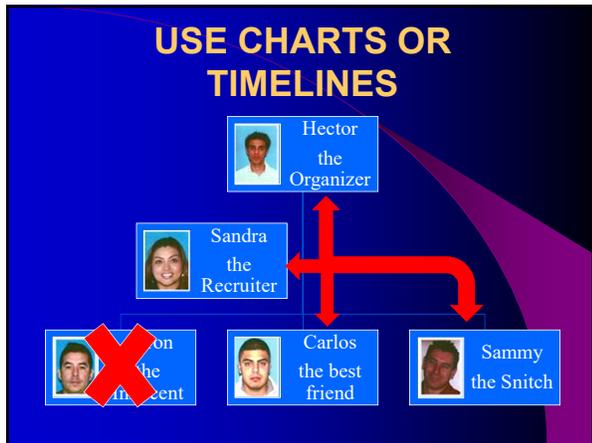


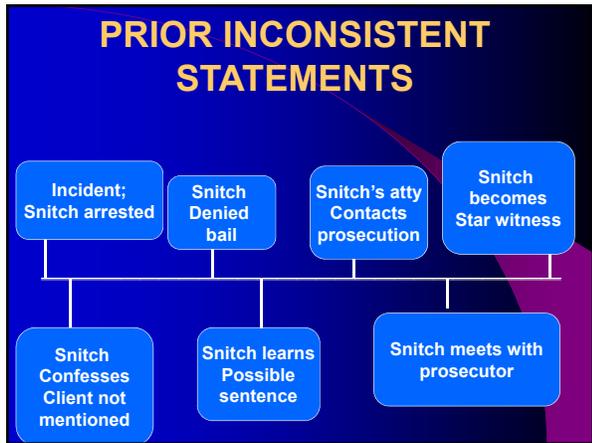
Arguably the most dangerous

Perfect eye witness to the crime and admissions made by your client

Feels really bad about what happened and just wants to tell the “truth”









FREEDOM

LIFE BEFORE THE DEAL

- Arrested
- Removed from your family
- Can't see your children every day
- Can't see your wife
- Limited phone calls
- Limited family visits
- Visits are in a room with other inmates
- No home cooked meals
- Prison food
- Living in a cell
- With no privacy
- Share cell with another person
- Facing 10 year minimum mandatory
- 10 years in prison
- Away from your wife
- Away from your children
- The worst moment of your life

LIFE AFTER THE DEAL

- You get an offer
- A chance to get less than 10 years
- A chance to see your wife again
- A chance to see your children again
- A chance to gain your freedom
- You only need to do one thing

Add Ammunition to Your Arsenal



FEDERAL DEFENDERS OF SAN DIEGO, INC.

May 23, 2017

Re: Request for an interview

Dear Mr. [REDACTED]:

I am the attorney who has been assigned to represent Mr. [REDACTED] in the criminal case pending in federal district court. I know that you were being retained (likely) due to work/litigation/industrial activities occurring back in April 2012. It is also aware that you have not been federal again and/or federal prosecution several times over the past four years since 2012 and have been advised a guilty plea to a criminal conspiracy arising out of those April 2012 events.

As part of my work investigating this case and determining the best course of action for Mr. [REDACTED] I would be incredibly grateful if you would afford me the same courtesy you gave to the federal agents and prosecutors specifically. I would welcome the chance to sit down with you at your convenience to talk about the April 2012 events. I am happy to meet you - in the presence of your attorney - at a bar/restaurant, your home or office, my office or at your attorney's office. While it is always your choice whether to meet with me or not, I am sending you this letter courtesy of your attorney since you are presently represented by counsel and I do not wish to communicate directly with you unless you and your attorney afford me that opportunity.

I look forward to hearing from you. Thank you in advance.

Sincerely,
Sarah Charnock
SARAH J. CHARNOCK
Chief Trial Attorney

SJC:m

DEFENDERS
1-800-11987

25 Q. THEM. RIGHT. DO YOU RECALL THAT I ASKED FOR AN
1 OPPORTUNITY TO SPEAK WITH YOU?
4 A. AND I AND MY ATTORNEY FELT THERE WAS ABSOLUTELY NO NEED
5 FOR ME TO TALK TO YOU.
6 Q. SO YOU DIDN'T WANT TO TELL ME THE TRUTH, RIGHT?
9 Q. (MS. CHARLICK) YOU DID NOT WANT TO COOPERATE WITH ME,
10 CORRECT, MR. FEFFERMAN?
11 A. I SAW NO NEED TO COOPERATE WITH YOU.
19 Q. RIGHT. SO WHEN IT BENEFITS YOU YOU ARE ABSOLUTELY GOING
20 TO DO IT, YES?
21 A. WHEN I SIGN AN AGREEMENT, YES, I WILL.
22 Q. AND YOU ARE NOT GOING TO MEET WITH ME BECAUSE IT IS NOT
23 GOING TO DO ANYTHING FOR YOU.
24 A. NO.

Common Snitch Problems

- "I am just here to tell the truth."

The Truth Is Not The Requirement

- You can tell the truth to your wife?
- You can tell the truth to your mama?
- You can tell the truth to god in Church?

- You are required to do something different than that.

“Substantial Assistance”

H. If the United States Attorney's Office decides that defendant has provided substantial assistance, and has fully complied with this plea agreement, it will file a motion for a downward departure under 18 U.S.C. § 3553, ^{and} § 5K1.1 of the Sentencing Guidelines. Defendant

Substantial Assistance?

- Substantial means a lot?
- a whole lot?
- And Assistance means helping out?

- So according to your deal, you have to help THEM out a whole lot?

The truth is:

- let's talk about who decides if you are telling the truth?
- Because it isn't your wife or your mama, right?
- And isn't even God?
- And it sure isn't me?

IT's THEM

All I have to do is "Cooperate"

20 Q. AND IT TURNS OUT THAT COOPERATING WITH THE GOVERNMENT
21 ENTAILS A LITTLE BIT MORE THAN JUST COMING CLEAN, RIGHT?
22 A. I AM NOT SURE WHAT YOU MEAN.
23 Q. WELL, YOU ARE SITTING HERE TESTIFYING, RIGHT?
24 A. THAT WAS PART OF THE, YOU KNOW, I GUESS THE AGREEMENT,
25 THAT I WAS GOING TO HELP THEM.
1 Q. RIGHT. HELP THEM PROSECUTE OTHER PEOPLE, RIGHT?

Asking the Bad Question

CROSS-EXAMINATION

BY MR. ROACH:

Q. Mr. Gettel, let's start where you just left off.
Who is the most important person in this room to your life?
A. Who's the most important person --
Q. Whose opinion matters the most of anybody in this room for the
next twenty years of your life?
A. God.
Q. Well, that's a true statement.

THOMAS JEFFERSON Letter Aug. 19, 1785

He who permits himself to tell a lie once, finds it much easier to do it a second and third time, till at length it becomes habitual; he tells lies without attending to it, and truths without the world's believing him. This falsehood of the tongue leads to that of the heart, and in time depraves all its good dispositions.





The following materials are available upon request:

SAMPLE
APPLICATION FOR ORDER PERMITTING ISSUANCE OF
SUBPOENAS UNDER RULE 17(c)

&

SAMPLE
MODIFIED EXCERPT OF MOTION TO RECONSIDER DENIAL