Chapter 7

Selecting and Drafting Motions: Strategic and Practical Considerations

§ 7.01 THE IMPORTANCE OF MOTIONS PRACTICE; THE OBJECTIVES TO BE SOUGHT

Pretrial motions practice is crucial to effective defense work. Successful litigation of motions can win the case – either by producing outright dismissal of the Petition (for example, when the defense prevails on a motion challenging the legal sufficiency of the Petition or the jurisdiction of the court) or by excluding evidence that the prosecution needs in order to win the case at trial (for example, when the defense prevails on a motion to suppress tangible evidence, incriminatory statements, or identification testimony).

Even when the defense loses a motion, there are often net benefits to litigating it. Motions practice serves as a highly effective discovery technique. The prosecutor's written and oral responses to a defense motion may provide defense counsel with information about the prosecution's case that it would not otherwise be able to obtain before trial. Evidentiary hearings on motions provide invaluable opportunities to ferret out such information in detail and also to pin down prosecution witnesses on the record, developing transcripts that can be used at trial to impeach the witnesses with prior inconsistent statements.

The defense also gains other fringe benefits from motions practice. The judge's ruling on the motion may provide a fertile source of reversible error on appeal. In cases in which a guilty plea is under consideration but counsel is not sure about the strength of the government's case, an evidentiary hearing on a motion to suppress can provide a preview of the prosecution's evidence that will enable counsel to evaluate realistically the wisdom of taking the offered plea. Or if counsel has concluded that a plea is wise but the client is unconvinced, the client's observation of the prosecution's witnesses at an evidentiary suppression hearing may change the client's mind and enable him or her to reach the right decision. In instances in which police conduct is particularly reprehensible, the unpleasant prospect of its exposure at a motions hearing may occasionally persuade the prosecutor to drop the charges or may give the defense considerable leverage in plea bargaining. Hearings on motions, whether they are evidentiary hearings or oral arguments, may also strengthen the attorney-client relationship and lead the client to place greater trust in the attorney's advice generally, since the client sees the attorney fighting for him or her in court.

§ 7.02 THE MOTIONS THAT COUNSEL SHOULD CONSIDER

Counsel will need to make a decision early in the case about what motions to file. In most jurisdictions a local statute or court rule establishes a deadline (usually 15 days or 30 days after arraignment) for filing motions. See § 7.05 *infra.*

Counsel should begin by examining the Petition to determine whether it suffers from deficiencies that render it subject to a motion to dismiss. See §§ 17.03, 17.05-17.07 *infra.* Other grounds for dismissing the Petition that counsel should consider are jurisdictional defects (see § 17.04 *infra*) and double jeopardy (see § 17.08 *infra*). If the charges in the Petition are based on more than one incident, counsel should consider a motion to sever counts (see §§ 18.01-18.05 *infra*), and if the client is charged jointly with one or more co-respondents, counsel should consider a motion for severance of respondents (see §§ 18.07-18.10 *infra*). In rare cases motions for consolidation of charges or respondents may be advisable. See §§ 18.06, 18.11 *infra.*

On the basis of counsel's interviews with the client (see Chapter 5 *supra*), informal discovery obtained from the prosecution (see Chapter 9 *infra*) or at the probable-cause hearing (see §§ 4.29, 4.32 *supra*), and independent defense investigation (see Chapter 8 *infra*), counsel should determine whether the prosecution's case is likely to include any tangible evidence obtained by searches or seizures, any confessions or incriminating admissions by the respondent, or any identification testimony. If so, counsel should evaluate the potential of a motion to suppress evidence under the doctrines summarized in Chapters 23 (tangible evidence), 24 (confessions and admissions), and 25 (identifications). Counsel should take into account that some judges may be irritated by being put to the extra work of conducting suppression proceedings and may reflect their irritation at disposition if the motion is denied and the respondent is convicted, particularly when in hindsight they regard the motion as having been frivolous. In federal practice, the circuits are split on the question whether the defendant's filing of a suppression motion justifies the prosecution's refusal to request a sentencing reduction otherwise available under the Sentencing Guidelines to defendants who plead guilty. *See United States v. Longoria*, 958 F.3d 372, 376 (5th Cir. 2020) (citing the conflicting decisions).

If the informal discovery process has proven inadequate and the prosecutor has refused to turn over information that the defense requires, counsel should file motions for discovery. See § 9.07 *infra.* Counsel should also consider motions for sanctions if counsel learns that evidence has been destroyed (see §§ 9.09(b)(6), (7) *infra*) or that the prosecutor has told witnesses not to talk with counsel or defense investigators (see § 8.13 *infra*).

If the client has a limited prior record and appears to be doing well in school, counsel should consider seeking diversion of the case. See Chapter 19 *infra*.

Counsel then should give thought to the trial forum. If there are reasons to believe that the respondent would not receive a fair trial in the jurisdiction in which the case is presently pending, counsel can file a motion for a change of venue. See §§ 20.01-20.03 *infra.* If there are reasons to believe that the judge presiding over the case may not be impartial, counsel can file a motion for recusal. See §§ 20.04-20.05 *infra.*

If counsel is practicing in a State that allows jury trials in juvenile cases, s/he will want to consider motions to challenge aspects of juror selection. See § 21.03 *infra.*

Depending upon the defense theory of the case (see § 6.02 *supra*), counsel may need to retain expert consultants or witnesses or an investigator. If so, and if the client is indigent, counsel will have to file a motion for state funds. See § 11.03 *infra.*

Developments during the pretrial stage may necessitate motions addressed to the timing of pretrial proceedings and trial. It may become strategically desirable to advance the date of pretrial hearings, the trial, or both (see § 15.01 *infra*), or counsel may want to file a motion for a continuance in order to gain more time for investigation and preparation (see § 15.02 *infra*). If the prosecution seeks a continuance, counsel may respond with a motion to dismiss for want of prosecution (see § 15.03 *infra*) or on grounds of denial of a speedy trial (see § 15.04 *infra*) or both.

Counsel should also consider whether there are grounds for a motion to disqualify the prosecutor. Possible grounds include the prosecuting attorney's personal bias against the respondent (*e.g., State v. Gonzales*, 2005-NMSC-025, 138 N.M. 271, 119 P.3d 151 (2005)); the prosecuting attorney's personal embroilment in the case (*e.g.*, *Packer v. Superior Court*, 60 Cal. 4th 695, 711-12, 339 P.3d 329, 340-41, 181 Cal. Rptr. 3d 41, 55 (2014) ("We disagree . . . with the lower court rulings that no evidentiary hearing was warranted concerning the . . . substantial issue of whether the prosecutor had become so personally involved in the case """"as to render it unlikely that [petitioner] will receive fair treatment during all portions of the criminal proceedings."""" . . . In the Court of Appeal's view, petitioner 'presented no direct evidence that the prosecutor had any role in . . . [the conduct of three individuals – including two of the prosecuting attorney's adult children – who had been acquaintances of the defendant and were potential mitigation witnesses but who refused to cooperate with the defense or evaded contacts attempted by the defense] or the prosecution investigator's conduct [of allegedly discouraging those witnesses from assisting the defense]' or that the prosecutor's actions were motivated by a personal grievance against petitioner. The Court of Appeal acknowledged that the trial court 'could have reasonably inferred that the prosecutor was upset with [petitioner] and was grinding that personal axe by tampering with witnesses and taking positions in pretrial litigation unhelpful to the defense.' . . . ¶ . . . An evidentiary hearing . . . [is required in order to] address questions concerning whether the defense had manufactured a conflict, questions concerning defense discovery tactics, the prosecutor's pretrial conduct, the effect – if any – of . . . [the prosecuting attorney's] role as a prosecutor upon his children's potential penalty phase testimony, and the gravity of the prosecutor's conflict – if any – as it related to the fairness of petitioner's trial."); the prosecuting attorney's identity as the victim of the offense charged (*e.g.*, *In re Ligon*, 408 S.W.3d 888 (Tex. App. 2013)), or other conflict of interest (*e.g.*, *People v. Zimmer*, 51 N.Y.2d 390, 414 N.E.2d 705, 434 N.Y.S.2d 206 (1980)); the respondent's need to call the prosecuting attorney as a material witness in support of the theory of the defense (*e.g.*, *United States v. Prantil*, 764 F.2d 548 (9th Cir. 1985)); the prosecuting attorney's previous representation of the respondent during which the attorney had the opportunity to learn information bearing on the current charges or a defense to them (*e.g.*, *State ex rel. Burns v. Richards*, 248 S.W.3d 603 (Mo. 2008) (holding disqualification appropriate despite the absence of any affirmative showing that such information was actually learned)), and, in some jurisdictions, the "appearance of

impropriety" arising from prior interactions between the prosecuting attorney and the respondent (*see*, *e.g.*, *People v. County Court, City and County of Denver,* 854 P.2d 1341 (Colo. App. 1992)). In appropriate cases, disqualification may extend to the entire prosecuting office. *E.g.*, *id.; State v. Gonzales*, *supra*; *State v. Marner, Judge*, 251 Ariz. 198, 199, 487 P.3d 631, 632 (2021) ("We hold that, in the interests of fairness to the defendant and public confidence in the judicial system, a trial court has broad discretion to vicariously disqualify a prosecutor's office based on an appearance of impropriety"); *State v. Nickels*, 7 Wash. App. 2d 491, 492, 434 P.3d 535, 537-38 (2019) ("[t]he standard set by the Washington Supreme Court is that when an elected prosecutor has previously represented a criminally accused person in a case that is the same, or substantially the same, as the one currently pending prosecution, the entire prosecutor's office should ordinarily be disqualified from further participation"); *People v. Dekraai,* 5 Cal. App.5th 1110, 210 Cal. Rptr. 3d 523 (2016) (affirming a trial court order disqualifying the entire prosecutor's office at the penalty phase of a capital case after finding that that office had a conflict of interest arising from its involvement with the sheriff's department in a number of improper practices in the defendant's case and others, including placing confidential informants in the jail cells of individuals awaiting trial in an effort to obtain incriminating statements and, at the hearing on defendant's motion, failing to disclose records revealing these practices); *People v. Doyle*, 159 Mich. App. 632, 406 N.W.2d 893 (1987), *relief expanded on rehearing*, 161 Mich. App. 743, 411 N.W.2d 730 (1987); *compare People v. Solis*, 2022 CO 53, 523 P.3d 427, 433 (Colo. 2022) (reversing a trial judge's ruling that the entire prosecutor's office was disqualified where one member of the prosecutor's staff had previously represented the defendant as a public defender, the Colorado Supreme Court states that "to determine if disqualification is necessary . . . we look to whether confidential information from . . . [the single disqualified prosecutor's] prior representation of . . . [the defendant] 'has been and can continue to be adequately screened'" and answers that question in the affirmative on the record of the case at bar); *United States v. Williams*, 68 F.4th 564 (9th Cir. 2023) ("'The doctrine of separation of powers requires judicial respect for the independence of the prosecutor.' . . . '[A]bsent a violation of . . . the Constitution, a [federal] statute, or a procedural rule,'. . . we do not dictate to the Executive branch who will serve as its prosecutors. . . . We run an even greater risk of offending separation-of-powers principles when disqualifying an entire office of Executive branch attorneys. Such sweeping interference is seldom warranted. Indeed, every circuit court that has reviewed an officewide disqualification has reversed." *Id*. at 571-72. "Before disqualifying an entire U.S. Attorney's Office, a district court must make specific factual findings that show that the office's continued representation would result in a clear legal or ethical violation. Because the record does not reveal pervasive misconduct or a blanket conflict here, we reverse the disqualification order." *Id*. at 574.).

§ 7.03 DECIDING WHETHER TO RAISE AN ISSUE IN A PRETRIAL MOTION OR AT TRIAL

Local practice may give the defense the option of raising certain defenses and contentions either by pretrial motion or at trial. Counsel should consider the following reasons for and against litigating a motion prior to trial.

§ 7.03(a) Reasons for Litigating an Issue by Pretrial Motion

Election of the pretrial motion forum ordinarily results in an earlier adjudication of the issues raised. This may be important not only when success on the issues will require dismissal of the entire prosecution, so that termination of the case in the respondent's favor is expedited, but also when success on the issues will weaken the prosecution's litigating posture or morale and thereby increase the defense's leverage in plea bargaining. Conversely, when there is substantial likelihood that the defense will lose the issues no matter when they are presented, they may be more effective bargaining counters if mentioned to the prosecutor during plea negotiations as contentions that the defense intends to raise at trial rather than being raised and definitively lost prior to the negotiation.

A major reason to opt for the pretrial motion forum exists whenever defense motions may produce discovery of the prosecution's case that can be used to guide defense investigation and improve defense trial preparation (see, *e.g.*, § 8.13 *supra*; §§ 7.07, 22.02, 22.04(b) *infra*) or provide an opportunity to cross-examine prosecution witnesses and get them committed on record to statements which will curb their trial testimony or be usable to impeach it (see §§ 7.07, 22.02, 22.04(c) *infra*).

A factor that is particularly pertinent to the choice between raising an evidentiary challenge by pretrial motion *in limine* or at trial is whether the issue is so complicated – legally or factually, or both – that counsel's chance of prevailing will be improved by briefing it and by giving the judge the time to reflect on the issue at length and perhaps even to write an opinion. *See, e.g., People v. Mackin*, 14 Misc.3d 994, 995-98, 828 N.Y.S.2d 863, 864-66 (N.Y. Cty. Ct., St. Lawrence Cty. 2007) (trial judge's opinion granting the defense's 'motion *in limine* for an order precluding' the prosecution 'from using at trial a statement given by the defendant to the Unemployment Insurance Department of the State, . . . [which] contains significant admissions with respect to defendant's alleged conduct,' and which the court finds to come within a statutory privilege established by a state labor law statute); *People v. Kross*, 191 Misc.2d 714, 715-17, 744 N.Y.S.2d 834, 835-37 (N.Y. Sup. Ct., Queens Cty. 2002) (trial judge's opinion granting the defense's motion *in limine* to exclude other-crimes evidence on the ground that it rests upon an eyewitness identification procedure that the prosecution failed to disclose to the defense in pretrial discovery).

If interlocutory appellate review of adverse rulings on pretrial motions is available (see § 26.01 *infra*), the motions procedure will give counsel a chance to obtain appellate remedies for errors that, as a practical matter, are uncorrectable after verdict.

Depending upon the idiosyncrasies of local practice, there may be various other benefits to litigating certain issues by pretrial motion. In jurisdictions in which motions scheduled in advance of the trial date are heard by a motions judge rather than the trial judge, counsel can use the choice of forum to select the more favorable judge. In such jurisdictions, litigating issues before a judge other than the trial judge also avoids the risk that the trial judge will hear evidence

during the motions hearing that is inadmissible at trial but may unconsciously affect the judge's trial verdict. In jurisdictions that permit juries in juvenile trials, the pretrial motion procedure minimizes the risk of lengthy sidebar proceedings or proceedings in the jury's absence that will bore or irritate the jurors; it also reduces the risk that prejudicial material exposed in these proceedings will be leaked to the jury.

If counsel is seeking dismissal on a legal issue that is both technical and close, litigating it in a pretrial motion forum rather than at trial may also improve the defense's chances of prevailing. Judges are understandably reluctant to dismiss a case on a narrow legal point after the parties have prepared and all of the witnesses have appeared for trial.

§ 7.03(b) Reasons for Litigating an Issue at Trial Rather Than in a Pretrial Motions Forum

On the other hand, there may be considerable advantages to postponing the presentation of certain defenses and contentions until after trial has begun. Some defense contentions will be more compelling in the context of the case as it develops at trial than in isolation as they appear on pretrial motion. Also, there may be circumstances under which a defect in the prosecution can be cured if the respondent brings it to the attention of the court and prosecutor before trial but cannot be cured after the trial has begun. *See*, *e.g.*, *United States v. Muresanu*, 951 F.3d 833 (7th Cir. 2020) (the indictment charged the defendant with attempting to commit aggravated identity theft; substantive federal law does not make criminal an attempt to commit this particular crime; the defendant did not challenge the indictment before trial but moved for an acquittal after the government rested its case; the trial judge then deleted the attempt language from the jury instructions and charged the jury on the elements of the completed crime; on appeal, the resulting conviction was reversed because of *Stirone* error).

A consideration militating strongly in favor of delaying various issues until trial is that this plan of action can prevent the prosecutor from ever obtaining appellate review of a ruling favorable to the defense. Local practice may permit prosecutorial appeals (or petitions for prerogative writs) following pretrial rulings but not following rulings made in the course of trial. *See*, *e.g.*, 18 U.S.C. § 3731; *United States v. Park*, 938 F.3d 354 (D.C. Cir. 2019); *Commonwealth v. Surina*, 438 Pa. Super. 333, 652 A.2d 400 (1995). Moreover, the beginning of trial marks the point at which jeopardy attaches for purposes of the federal constitutional guarantee against double jeopardy. See § 17.08(b) *infra.* Rulings in favor of the respondent prior to that point may be appealed by the prosecution to the extent permitted by local practice (*see*, *e.g.*, *Serfass v. United States,* 420 U.S. 377 (1975); *United States v. Miller*, 61 F.4th 426 (4th Cir. 2023); *United States v. Rundo*, 990 F.3d 709 (9th Cir. 2021); *United States v. Gissantaner*, 990 F.3d 457 (6th Cir. 2021)), whereas rulings in favor of the respondent after that point may not be appealed if either: (A) they are tantamount to an acquittal, or (B) they result in an acquittal. Probably also they cannot be appealed if they result in the termination of the trial without a general verdict or finding of guilty, other than upon the respondent's own motion – such as, for example, when the charges are dismissed by the court *sua sponte* or at the instance of the

prosecution following a trial ruling in favor of the respondent upon a motion or objection that does not affirmatively request dismissal or a mistrial – at least in the absence of "a manifest necessity" for terminating the trial. See §§ 17.08(c), 17.08(e) *infra.* Although the law in this area is tortuous and confused, the bottom line is that serious, often insurmountable practical, statutory, and constitutional difficulties impede prosecutorial appeals from midtrial rulings in the respondent's favor, whereas pretrial (or posttrial) rulings of identical purport can be readily appealed by the prosecutor.

§ 7.03(c) Casting the Issue in the Form of a Pretrial Motion When the Pretrial Forum Is Preferable

If, after weighing the competing considerations, counsel concludes that they favor motions litigation, counsel should employ any applicable pretrial motion procedure provided by statute or court rule. If neither statutes nor rules authorize any such procedures, counsel will have to be resourceful in inventing them. In a number of jurisdictions, for example, courts will entertain common-law motions *in limine* seeking pretrial rulings on:

(i) issues of law whose disposition importantly affects defense trial strategy (such as the admissibility of evidence that the prosecution is expected to offer to impeach the respondent if the respondent elects to testify), *e.g., People v. Patrick,* 233 Ill. 2d 62, 73, 908 N.E.2d 1, 7, 330 Ill. Dec. 149, 155 (2009) ("We conclude that a trial court's failure to rule on a motion in limine on the admissibility of prior convictions when it has sufficient information to make a ruling constitutes an abuse of discretion."); *State v. Lamb*, 321 N.C. 633, 365 S.E.2d 600 (1988); *State v. Lariviere*, 527 A.2d 648 (R.I. 1987); *compare New Jersey v. Portash,* 440 U.S. 450 (1979), *with Luce v. United States*, 469 U.S. 38 (1984);

(ii) the admissibility of prosecution evidence when its preclusion "'renders the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed,'" *City of Defiance v. Kretz*, 60 Ohio St. 3d 1, 4, 573 N.E.2d 32, 35 (1991); *cf. People v. Smith*, 248 Ill. App. 3d 351, 617 N.E.2d 837, 187 Ill. Dec. 380 (1993);

(iii) the admissibility of prosecution evidence which, if mentioned in the prosecutor's opening statement or proffered at trial, may prejudice the respondent despite an eventual ruling by the trial judge sustaining a defense objection to the evidence, *e.g.*, *United States v. Jones*, 930 F.3d 366 (5th Cir. 2019); *United States v. Wells*, 879 F.3d 900, 914-18 (9th Cir. 2017); *United States v. Shelley*, 405 F.3d 1195, 1201 (11th Cir. 2005); *United States v. Mejia-Alarcon*, 995 F.2d 982 (10th Cir. 1993); *People v. Johnson*, 215 Ill. App. 3d 713, 575 N.E.2d 1247, 159 Ill. Dec. 187 (1991); *Gasaway v. State,* 249 Ind. 241, 231 N.E.2d 513 (1967); *State v. Nakamitsu*, 138 Hawai'i 51, 375 P.3d 1289 (Table) (Hawai'i App. 2016), *ruling on other issues aff'd,* 140 Hawai'i 157, 398 P.3d 746 (2017); *State v. Rushton*,

260 Or. App. 765, 320 P.3d 672 (2014); *Commonwealth v. Padilla*, 2007 PA Super 130, 923 A.2d 1189 (Pa. Super. 2007); *State v. Latham,* 30 Wash. App. 776, 638 P.2d 592, 594-95 (1982), *aff'd,* 100 Wash. 2d 59, 667 P.2d 56 (1983); *State v. Gaston*, 192 Wash. App. 1032, 2016 WL 398317 (2016); *cf. State v. Hoffman*, 321 Or. App. 330, 515 P.3d 912 (2022);

(iv) the permissibility of particular prosecution arguments in opening or closing (*e.g.*, *State v. Martinez*, 319 Conn. 712, 728-31, 127 A.3d 164, 173-75 (2015); *Carruthers v. State*, 272 Ga. 306, 528 S.E.2d 217 (2000); Michael D. Cicchini, *Combatting Prosecutor Misconduct in Closing Arguments*, 70 OKLA. L. REV. 887 (2018));

(v) the admissibility of defense evidence (*United States v. Dingwall*, 6 F.4th 744 (7th Cir. 2021) (evidence of battered woman syndrome and PTSD in support of a defense of duress)); or

(vi) issues of law whose disposition renders the presentation of certain defense evidence unnecessary or irrelevant, *e.g., Lewis v. United States,* 445 U.S. 55 (1980). *See* Stephen H. Peskin, *Innovative Pre-Trial Motions in Criminal Defense,* 1 AM. J. TRIAL ADVOCACY 35, 64-73 (1977), and authorities collected; *Luce v. United States,* 469 U.S. at 41 n.4 (dictum).

(The latter two kinds of motions *in limine* are particularly useful when defense counsel expects to lose the motion at the trial level but wishes to preserve the legal issue for appeal and when the defense evidence in question is difficult or costly to gather or present or is inconsistent with alternative defense trial strategies or may be less persuasive factually than is the legal claim for its admissibility.)

In some jurisdictions, an unsuccessful motion *in limine* seeking to exclude items of prosecution evidence suffices to preserve for appeal the question whether that evidence is admissible. *See*, *e.g.*, *State v. Johnson*, 2009 S.D. 67, 771 N.W.2d 360 (S.D. 2009), applying S.D. CODIFIED LAWS § 19-19-103(b); *Commonwealth v. Stokes*, 2013 PA Super 272, 78 A.3d 644 (Pa. Super. 2013), applying PA. RULE EVID. 103(a)(1), (b); *State v. Banks*, 271 S.W.3d 90, 170 (Tenn. 2008) ("'A party who files an unsuccessful motion in limine need not renew the motion when the evidence is introduced as long as the trial court "clearly and definitively" overruled the motion in limine when it was made. . . . If, however, the trial court has not "clearly and definitively" acted on the motion, the moving party must renew the motion contemporaneously with the introduction of the objectionable evidence. Failure to renew the motion will preclude the moving party from taking issue on appeal with the admission of the evidence.'"). In other jurisdictions, counsel must renew his or her objections when the evidence is offered at trial in order to obtain appellate review of its admissibility. *See*, *e.g.*, *People v. Maciel*, 57 Cal. 4th 482, 528-29, 304 P.3d 983, 1020-21, 160 Cal. Rptr. 3d 305, 349-50 (2013); *State v. Anthony*, 271 N.C. App. 749, 845 S.E.2d 452 (2020); *State v. Benedict*, 2022-Ohio-3600, 198 N.E.3d 979 (Ohio App. 2022). In still other

jurisdictions, a motion *in limine* sometimes does and sometimes does not suffice to ground an appeal. *See*, *e.g.*, *United States v. Mejia-Alarcon*, 995 F.2d 982, 986 (10th Cir. 1993) ("A pretrial motion *in limine* to exclude evidence will not always preserve an objection for appellate review. . . . However, a motion *in limine* may preserve an objection when the issue (1) is fairly presented to the district court, (2) is the type of issue that can be finally decided in a pretrial hearing, and (3) is ruled upon without equivocation by the trial judge."); *and cf*. *State v. Madison*, 290 Or. 573, 624 P.2d 599 (1981). The federal Circuits are split on the issue. *Compare United States v. Finnell,* 276 Fed. Appx. 450, 76 Fed. R. Evid. Serv. 460 (6th Cir. 2008), *with United States v. Mays*, 424 Fed. Appx. 830 (11th Cir. 2011). When renewal is or may be required, counsel should request leave to approach the bench and should make the objection at sidebar, out of the hearing of the jury.

§ 7.04 CHOOSING BETWEEN ORAL AND WRITTEN MOTIONS

When local practice gives the defense the option to make pretrial motions orally or in writing, it is ordinarily better to make them in writing. Written motions assure that both the relief sought by the defense and the grounds upon which it is sought are preserved in the record, whereas oral motions entail the risk that counsel may omit to make (or the court reporter may fail to hear) significant points. Many state appellate courts will not entertain claims of error unless the record shows that the specific legal contention sought to be raised on appeal was presented to the trial court; and federal constitutional contentions must ordinarily be made in state trial courts with explicit reference to the provision of the Constitution on which counsel relies in order to support subsequent Supreme Court review (see § 39.02(a) *infra*) and to avoid the danger that the federal claim will be held to have been waived for purposes of postconviction federal habeas corpus (see § 39.03(b) *infra*). If, for any reason, a motion *is* made orally, counsel should be sure that a stenographer or reporter is present. Similarly, a stenographer or reporter should be present when the judge rules orally on any matter.

§ 7.05 TIMELY FILING OF THE MOTION: METHODS FOR EXTENDING THE FILING DEADLINE AND FOR OBTAINING RELIEF FROM FORFEITURES ENTAILED AS A CONSEQUENCE OF UNTIMELY FILING

In most jurisdictions the applicable state statute or court rule specifies a certain time period within which all motions must be filed. The deadline usually is either 15 days or 30 days after arraignment. Counsel must pay careful attention to the deadline; failure to meet it will almost always result in the court refusing to entertain the motion.

If counsel finds that s/he will be unable to file a motion on time (because, for example, counsel cannot obtain discovery from the prosecutor within the specified time period or because counsel's heavy trial schedule precludes the preparation and timely filing of the motion), counsel will need to take one of the following measures to protect the client's rights: (i) at arraignment, request that the court extend the normal period for filing motions; (ii) on or before the deadline, file a motion for an extension of time (commonly called an "EOT") for filing a particular motion

or all defense motions, as the situation warrants; (iii) if the impediment is a lack of necessary factual information resulting from insufficient discovery or investigation, file the motion on time but in an incomplete or even skeletal form, and explain in the body of the motion that the supporting facts will be supplemented at a later time after discovery or investigation has been completed; (iv) secure a firm commitment from a trustworthy prosecutor that s/he will consent to (or will not oppose) defense counsel's filing of the motion *nunc pro tunc* after the expiration of the normal filing period.

It cannot be emphasized too strongly that defense attorneys must not rely on longstanding local customs of permitting late filing of motions without prior leave of court. All too many defense attorneys have found, to their dismay, that theirs was the first case in which the customary informality and relaxed filing procedure was suddenly abrogated.

In the event that counsel does encounter the unfortunate situation in which s/he missed a filing deadline without prior leave or prosecutorial assent, all is not necessarily lost. Depending upon the facts of the case, counsel may be able to argue that the usual procedural requirement of timely filing is unenforceable or should be waived for one or more of the following reasons:

1. The state procedural rule establishing the deadline was not "'firmly established and regularly followed' by the time as of which it is to be applied." *Ford v. Georgia*, 498 U.S. 411, 424 (1991). *See also James v. Kentucky*, 466 U.S. 341 (1984).

2. Prior to the expiration of the filing period, the defense did not know, and could not reasonably have known, the facts that provide the basis for filing a motion. *Gouled v. United States,* 255 U.S. 298, 305 (1921); *United States v. Johnson,* 713 F.2d 633, 649 (11th Cir. 1983) (defense lacked knowledge of facts because prosecutor failed to provide adequate discovery); *DiPaola v. Riddle,* 581 F.2d 1111, 1113-14 (4th Cir. 1978) (circumstances of the incident prevented the defendant from knowing of the illegal aspects of the police officers' actions, and therefore the defendant could not have told counsel); *In re Anthony S.*, 162 A.D.2d 325, 557 N.Y.S.2d 11 (N.Y. App. Div., 1st Dep't 1990) (Family Court abused its discretion by denying leave to late-file a suppression motion which counsel was unable to file prior to trial because counsel was appointed to the case only four days before trial and the client's detention status impeded access to the client); *and see Murray v. Carrier,* 477 U.S. 478, 488 (1986) (dictum). This doctrine would also justify the waiver of the timeliness requirement if the client's inability to communicate effectively with counsel (because of, for example, the client's particularly young age or educational deficits) prevented counsel from learning the relevant facts from the client in time to meet the filing deadline.

3. Prior to the expiration of the filing period, the defense did not know, and could not reasonably have known, of the legal basis for the motion because the caselaw

giving rise to such a motion had not yet been decided. *Reed v. Ross,* 468 U.S. 1, 16 (1984); *see Murray v. Carrier,* 477 U.S. at 488 (dictum).

4. Prosecutorial interference or some other external factor beyond counsel's control prevented counsel from filing the motion in a timely fashion. *Amadeo v. Zant,* 486 U.S. 214 (1988); *see also Banks v. Dretke*, 540 U.S. 668, 691-98 (2004); *Strickler v. Greene*, 527 U.S. 263, 283-90 (1999); *Murray v. Carrier,* 477 U.S. at 488 (dictum).

5. Counsel reasonably relied on a longstanding local practice under which late-filing was always permitted. *See Spencer v. Kemp,* 781 F.2d 1458, 1470-71 (11th Cir. 1986).

6. Regardless of whether there was or was not good cause for counsel's procedural default, filing of the motion *nunc pro tunc* should be permitted because, at this stage, there will be no prejudice to the prosecution or to the administration of justice if the defense is permitted to file the motion, whereas preclusion of the motion may well result in a later finding of ineffectiveness of counsel (*see Kimmelman v. Morrison,* 477 U.S. 365 (1986); *see, e.g.*, *Grumbley v. Burt*, 591 Fed. Appx. 488, 499-501 (6th Cir. 2015); *Tice v. Johnson*, 647 F.3d 87, 106-08 (4th Cir. 2011); *Thomas v. Varner*, 428 F.3d 491, 499-504 (3d Cir. 2005); *People v. Ferguson*, 114 A.D.2d 226, 228-31, 498 N.Y.S.2d 800, 801-03 (N.Y. App. Div., 1st Dep't 1986)) and a retrial that will be costly both to the parties and to the administration of justice.

The foregoing arguments may result in the court's agreeing to entertain the motion on the merits despite its lateness. If the court does not do so, counsel will have to put on the record any facts that bring the case within one of the six enumerated principles or could otherwise be viewed as excusing counsel's procedural default, so as to lay the groundwork for an appeal contending that the trial judge abused his or her discretion in holding the motion procedurally barred. Counsel should not expect to prevail on many such appeals. The watchword here is to be *very* careful not to miss motions deadlines.

§ 7.06 THE FORM OF THE MOTION; THE NEED FOR AFFIDAVITS

Requirements regarding the form of the motion vary considerably among jurisdictions, and counsel will need to check the applicable statutes and court rules as well as local practice and custom in his or her particular court. In some jurisdictions law and facts are combined in a single pleading; in other jurisdictions the motion is limited to factual averments and may or must be accompanied by a separate memorandum of points and authorities setting forth the law.

Some jurisdictions require the attachment of affidavits or affirmations. Often, this requirement can be satisfied by an affirmation of counsel, setting forth all the facts that s/he has a

good-faith basis for believing to be true. Depending upon local rules, counsel may or may not have to specifically identify the sources of each of the facts which s/he is affirming and may or may not have to state that any facts of which she has no personal knowledge are asserted "on information and belief." In those jurisdictions in which counsel is required to attach affidavits by the witnesses themselves, counsel should keep these affidavits as cursory as possible to avoid giving the prosecutor material with which to impeach the witness at an evidentiary hearing on the motion or at trial.

§ 7.07 DECIDING WHETHER TO SEEK AN EVIDENTIARY HEARING FOR CLAIMS THAT CAN BE PROVEN WITH AFFIDAVITS ALONE

When counsel's position on a motion depends upon the establishment of facts that are not already in the record, counsel should decide whether to request an evidentiary hearing of the motion or to file supporting factual affidavits with the motion. Of course, local practice may compel one of these procedures or the other for certain motions. In the case of motions to suppress evidence, for example, the defense is ordinarily required to prove the facts by oral testimony and authenticated documents at an evidentiary hearing and may also be required to make a factual proffer or to file affidavits as a threshold matter in order to establish his or her entitlement to a hearing. See § 7.06 *supra;* § 7.08 *infra.*

On the other hand, in many jurisdictions, counsel will have the option of proceeding by affidavit or seeking an evidentiary hearing on motions such as a motion for a continuance to procure the attendance of a defense witness, or a motion to dismiss the charging paper because prosecutorial delay has violated the respondent's right to a speedy trial, or a motion for change of venue on the ground of prejudicial publicity, or a motion for sanctions against the prosecution for concealing or destroying potential defense evidence or harassing defense witnesses or instructing prosecution witnesses to refuse to talk to the defense. When local practice leaves the option to the movant, counsel should consider the following factors in making the choice:

(a) the relative persuasiveness of the factual showings that can be made, respectively, by affidavit and by live testimony;

(b) the opportunities that an evidentiary hearing may give the defense for pretrial discovery of the prosecution's case and for locking potential prosecution witnesses into impeachable positions by cross-examination;

(c) the opportunities that an evidentiary hearing may give the prosecution for pretrial discovery of the respondent's case and for locking defense witnesses into impeachable positions by cross-examination;

(d) the delay of the trial that may be necessitated by a pretrial evidentiary hearing; and

(e) in courts in which "long" or evidentiary pretrial motions are heard by a different

judge from "short" or on-the-papers motions, the judge who will be most favorable to the defense.

§ 7.08 DRAFTING THE MOTION SO AS TO GAIN RELIEF WITHOUT UNDULY DISCLOSING THE DEFENSE CASE

In drafting written motions that will have to come on for an evidentiary hearing – which will usually include all motions to suppress evidence – counsel should be careful to avoid unnecessary disclosure of either the facts or law that s/he intends to rely upon at the hearing. If a motion gives the prosecutor unnecessary advance notice of the points on which counsel intends to cross-examine prosecution witnesses, the prosecutor can coach those witnesses to avoid traps and undermine defense strategies. For example, if a suppression motion sets out in detail the police conduct that counsel is challenging, the police officers (who are, by nature, deeply interested in sustaining their arrests, searches, and confessions) are likely to conform their testimony to fit whatever theories validate their conduct. In addition, undue disclosure of counsel's factual and legal theories will give the prosecutor the time and opportunity to gather rebuttal witnesses and adjust the prosecution's proof.

Thus the best practice in drafting evidentiary motions is (a) to state the relief wanted with great clarity, (b) to state the source of law relied on (statute, rule of criminal procedure, state constitutional provision, federal constitutional provision, leading precedent (*e.g.*, "*Miranda v. Arizona*"), or whatever) specifically, but (c) to disclose as little as possible of the legal theory and the factual matter that will be presented in support of the motion. If counsel thinks it desirable to clarify the defense's factual and legal contentions for the court, this can best be done by a brief filed and served at the close of the evidentiary hearing.

This approach may need to be modified, however, in jurisdictions in which local statutes or court rules require a threshold showing of law and fact in order to get an evidentiary hearing. The key in such jurisdictions is (a) to draft the motion so as to meet the applicable standard just marginally, without revealing any additional facts or law, and (b) to the extent possible, to stick to the facts already known to the prosecution and the legal theories that will be obvious to the prosecutor or that cannot be cured by prosecutorial coaching of witnesses. Thus, for example, if counsel moves to suppress an identification from a photo spread, counsel should cite the state and federal due process clauses, document the proposition that unreliable and unnecessarily suggestive police-staged identification procedures violate due process (see §§ 25.02, 25.03(c) *infra*), and then relate one or more obvious defects in the photo spread (such as, for example, the fact that the respondent is the only child in an array full of adults) without mentioning other less obvious defects and particularly without adverting to defects that can be patched up testimonially by the prosecutor (such as the suggestive writing on the backs of the photographs, which the identifying witness can be coached to say s/he never saw) and without revealing any materials that counsel will use in cross-examining prosecution witnesses (such as the statement the identifying witness gave to a defense investigator, admitting that s/he saw the suggestive writing and also mentioning suggestive comments by the police).

A sufficient reason for sometimes diverging from the general strategy of keeping the legal expositions in defense motions as sparse as possible is that there are some judges who will be impressed by an elaborately reasoned, thoroughly documented legal analysis and will take the motion more seriously, according the defense more latitude at the evidentiary hearing, than they would on a bare-bones motion. They believe that short, boilerplate motions are likely to be nonmeritorious; consequently, they will insist that hearings on such motions be kept to a bare minimum of fact development and will truncate counsel's examinations of witnesses. Experienced juvenile court practitioners in the locality will know which judges are of this bent. Even when drafting a motion which will be heard by one of them, though, counsel should refrain from spelling out its *factual basis* in any greater detail than is necessary to provide a point of entry for counsel's learned legal arguments.

§ 7.09 INVOCATION OF STATE CONSTITUTIONAL PROVISIONS IN THE MOTION

In the years since the Warren Court era, the Supreme Court of the United States has increasingly cut back on the protections that the federal Constitution's Bill of Rights gives criminal defendants, particularly in regard to searches and seizures, interrogations and confessions. Quite a few state supreme courts have reacted by construing the parallel provisions of their state constitutions so as to preserve some of the safeguards eliminated by the United States Supreme Court. *State v. Short*, 851 N.W.2d 474, 486 (Iowa 2014) ("As a result of the United States Supreme Court's retreat in the search and seizure area, there has been a sizeable growth in independent state constitutional law. A survey of jurisdictions in 2007 found that a majority of the state supreme courts have departed from United States Supreme Court precedents in the search and seizure area to some degree.")*;* LaKeith Faulkner & Christopher R. Green, *State-Constitutional Departures from the Supreme Court: The Fourth Amendment*, 89 MISS. L. J. 197 (2020). *See generally* Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1 (1995); Judith S. Kaye, *Dual Constitutionalism In Practice And Principle*, 42 RECORD BAR ASS'N CITY OF NEW YORK 285 (1987); Hans E. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 TEMP. L. REV. 1153 (1992).

State courts are, of course, free to construe state constitutional provisions as providing greater protection for individual rights than the Constitution of the United States, *PruneYard Shopping Center v. Robbins*, 447 U.S.74, 81 (1980); *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001) (per curiam); *New Jersey v. T.L.O.,* 469 U.S. 325, 343 n.10 (1985); *Oregon v. Hass,* 420 U.S. 714, 719 (1975), although they may not drop below the protections afforded by federal constitutional guarantees, *Burgett v. Texas,* 389 U.S. 109, 114 (1967).

In urging state courts to rely on the state constitution to reach a result contrary to a holding of the Supreme Court of the United States, counsel should provide the court with a rationale for interpreting the state constitutional provision more expansively than its federal analogue. Although the state courts need not cite a rationale for resorting to the state constitution, counsel's identification of a rationale may prove decisive in persuading a trial judge – and later the state appellate courts – to adopt state grounds of decision. So:

(1) When dealing with a state constitutional provision whose wording differs from its federal counterpart, or whose history suggests the framers' intent to establish a standard different from the federal constitutional standard, counsel can argue that "well established rules governing judicial construction of constitutional provisions . . . [forbid courts to] . . . presume . . . that the framers of the . . . [state] Constitution chose the . . . [distinctive state] form 'haphazardly,' nor may we assume that they intended that it be accorded any but its ordinary meaning." *People v. Anderson*, 6 Cal. 3d 628, 637, 493 P.2d 880, 886, 100 Cal. Rptr. 152, 158 (1972); *see, e.g., State v. Mefford*, 2022 MT 185, 410 Mont. 146, 153, 517 P.3d 210, 216 (2022) ("Apart from Article II, Section 11 [prohibiting unreasonable searches and seizures], and its federal counterpart, the Montana Constitution provides an express right to individual privacy against government intrusion. Mont. Const. art. II, § 10 . . . [which] states that '[t]he right of individual privacy . . . shall not be infringed without the showing of a compelling state interest.' . . . 'Together, Article II, Sections 10-11, provide a heightened state right to privacy, broader where applicable than the privacy protection provided under the Fourth and Fourteenth Amendments to the United States Constitution.'"); *People v. Parks,* 510 Mich. 225, 987 N.W.2d 161 (2022) (considerations that warrant holding the Michigan Constitution's cruel-or-unusual punishments clause more protective than its federal counterpart include (1) "textual differences between the state and federal Constitutions . . . [:] a bar on punishments that are either cruel *or* unusual is necessarily broader than a bar on punishments that are both cruel *and* unusual" (*id*. at 242, 987 N.W.2d at 170), and (2) "by 1963, the words 'cruel' and 'unusual' had been understood 'for more than half a century to include a prohibition on grossly disproportionate sentences,' indicating that the framers and adopters of the 1963 Constitution had intended a broader view of the state constitutional protection" (*id*.)); *General Contractors, Inc. v. State through Division of Administration, Office of State Purchasing*, 95-2105 (La. 3/8/96), 669 So.2d 1185 (La. 1996); *State v. Glass,* 583 P.2d 872 (Alaska 1978); *State v. Simpson,* 95 Wash. 2d 170, 622 P.2d 1199 (1980). *See* William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201 (2019-20).

(2) When dealing with a state constitutional provision whose wording mirrors the federal constitutional guarantee and whose constitutional history proves of no avail, counsel can:

(a) argue that the U.S. Supreme Court's precedents are unworkably vague (*see, e.g.*, *Commonwealth v. Upton*, 394 Mass. 363, 373, 476 N.E.2d 548, 556 (1985) ("We reject the 'totality of the circumstances' test now espoused by a majority of the United States Supreme Court. That standard is flexible, but is also 'unacceptably shapeless and permissive.' . . . The Federal test lacks the precision that we believe can and should be articulated in stating a test for determining probable cause."); *People v. Griminger*, 71 N.Y.2d 635, 640, 524 N.E.2d 409, 412,

529 N.Y.S.2d 55, 58 (1988) ("[W]e have recognized that the more structured 'bright line' *Aguilar–Spinelli* test better served the highly desirable 'aims of predictability and precision in judicial review of search and seizure cases', and that 'the protection of the individual rights of our citizens are best promoted by applying State constitutional standards.'")), or otherwise dysfunctional (*see, e.g.*, *State v. Pierce*, 136 N.J. 184, 211, 642 A.2d 947, 961 (1994) ("We also perceive that the *Belton* rule, as applied to arrests for traffic offenses, creates an unwarranted incentive for police officers to 'make custodial arrests which they otherwise would not make as a cover for a search which the Fourth Amendment otherwise prohibits'"); *State v. Jacumin*, 778 S.W.2d 430, 436 (Tenn. 1999) ("We agree with the Courts cited above that the principles developed under *Aguilar v. Texas* . . . and *Spinelli v. United States* . . . if not applied hypertechnically, provide a more appropriate structure for probable cause inquiries incident to the issuance of a search warrant than does *Gates*.")),

(b) identify specific aspects of "policy, justice and fundamental fairness" that compel a more protective state constitutional standard. *People v. P.J. Video, Inc.,* 68 N.Y.2d 296, 303, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911 (1986). *See, e.g., State v. Novembrino,* 105 N.J. 95, 146, 519 A.2d 820, 850 (1987) ("the privacy rights of our citizens and the enforcement of our criminal laws . . . [are] matters of 'particular state interest' that afford an appropriate basis for resolving . . . [the] issue on independent state grounds"); *State v. Stoddard,* 206 Conn. 157, 537 A.2d 446 (1988) (declining to follow *Moran v. Burbine,* 475 U.S. 412 (1986), and construing the state constitution as establishing more exacting due process protections for the right to counsel because of Connecticut's history of rigorous enforcement of the right to counsel); *Commonwealth v. Hernandez*, 456 Mass. 528, 532, 924 N.E.2d 709, 712 (2010) (declining to follow *Virginia v. Moore*, 553 U.S. 164 (2008) because "the exclusion of evidence is an appropriate remedy when a defendant is prejudiced by an arrest made without statutory or common-law authority. . . . [Earlier Massachusetts cases] explained that the application of the exclusionary rule is appropriate where it is 'inherent in the purpose of a statute which the government has violated,' and that such a purpose is inherent in 'statutes closely associated with constitutional rights.'"); *State v. Bauder*, 2007 VT 16, 181 Vt. 392, 396, 924 A.2d 38, 42 (2007) ("we have . . . long held that our traditional Vermont values of privacy and individual freedom – embodied in Article 11 [of the state constitution] – may require greater protection than that afforded by the federal Constitution"); *State v. Jones*, 706 P.2d 317, 324 (Alaska 1985) ("In previous cases, we have stated that the state constitutional guarantee against unreasonable searches and seizures is broader in scope than Fourth Amendment guarantees under the United States Constitution. In part, this broader protection results from the more extensive right of privacy guaranteed by Article I, Section 22 of our state constitution."); *State v. Brown,* 356 Ark. 460*,* 467-72, 156 S.W.3d 722, 727-31 (2004) ("our right-to-privacy tradition in Arkansas is "'rich and compelling'" (*id*. at 472, 156 S.W.3d at 731); and/or

(c) cite state constitutional decisions from other States rejecting that ruling of the Supreme Court, commentators' criticisms of the Supreme Court ruling, and analyses in the opinions of the dissenting Supreme Court Justices. *See, e.g., Commonwealth v. Johnson*, 231 A.3d 807, 824-26 (Pa. 2020); *State v. Glenn*, 148 Hawai'i 112, 120, 468 P.3d 126, 134 (2020);

State v. Pierce, 136 N.J. at 200-03, 642 A.2d at 955-57; *State v. Novembrino,* 105 N.J. at 152-56 & nn.35-38, 519 A.2d at 853-56 & nn.35-38; *State v. Cordova*, 1989-NMSC-083, 109 N.M. 211, 217, 784 P.2d 30, 36 (1989); *State v. Brown,* 356 Ark. at 470-72, 156 S.W.3d at 729-31.

In any event, counsel should always invoke parallel state constitutional guarantees when making any federal constitutional claim, even in States whose highest court has adopted the posture that it will construe its Bill of Rights provisions as coextensive with those of the federal Constitution as construed by the United States Supreme Court, and whether the federal precedents are unfavorable, favorable, or nonexistent. If counsel wins a friendly state-court decision based exclusively on federal constitutional grounds, it will be subject to review and reversal by an unfriendly U.S. Supreme Court. *See*, *e.g.*, *Kansas v. Marsh*, 548 U.S. 163 (2006). Were the same ruling based on the state constitution, or on alternative federal and state constitutional grounds, it would be immune against U.S. Supreme Court tampering. *See*, *e.g.*, *Colorado v. Nunez*, 465 U.S. 324 (1984). "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Michigan v. Long,* 463 U.S. 1032, 1041 (1983).