MOTIONS: A NON-EXHAUSTIVE CHECKLIST

I. AT THE DETENTION HEARING OR FIRST APPEARANCE

- Asserting client's 5th and 6th Amendment rights with respect to the case in court, as well as any other case, *McNeil v. Wisconsin*, 501 U.S. 171 (1991)

- Identification Motions

  - Line-ups
    - Requesting order allowing defense to provide detained client with clothes for line-up
    - Requesting authorization to have intern/investigator present at line-up
    - Seeking order preventing witness(es) to other crimes from viewing client's line-up

  - Preventing a tainted identification
    - Requesting that victim be excluded from pre-trial proceedings.

- Opposing gov't requests for HIV testing, blood/hair/saliva, etc.

- Opposing drug testing, or other "standard" conditions, as a condition of release

- Requesting authorization to photograph client at jail or in cellblock

- Seeking to control press access and/or publicity; seeking to close hearing to public

- Requesting dismissal of complaint or information for undue delay in presentment or arraignment in violation of *Riverside v. McLaughlin*, 500 U.S. 44 (1991), or state law (C.R.S. § 19-2-508 requires hearing within 48 hours).

- Seeking additional time to speak with client and gather information before detention hearing (when appropriate). C.R.S.19-2-508(3)(a)(I.5) (requires probable cause statement and screening materials to be provided promptly to defense counsel).

- Requesting the materials that defense must receive in advance of detention hearing. C.R.S.19-2-508(3)(a)(I.5) (requires probable cause statement and screening materials to be provided promptly to defense counsel).

- Seeking dismissal for failing to give proper notice and for violating the Due Process Clause by making it impossible to prepare properly for detention hearing.

- Opposing psychological, psychosexual or similar evaluation pending trial

- Raising competency issues

- Requesting that the child not be shackled

- Requesting discovery and preservation of evidence
- Requesting in person testimony (about laboratory testing, C.R.S. §16-3-309)

II. CHALLENGES TO THE CHARGING DOCUMENT

Based on:

- Selective prosecution
- Vindictive prosecution
- Immunity/constitutional privilege
- Violation of statute of limitations
- Improper juvenile transfer to adult prosecution
- Insufficient allegations
- Vague allegations
- Unconstitutional statute, *e.g.*, vagueness
- Invalid statute, *e.g.*, improper use of emergency legislation, failure to update statute
- Duplicity (two charges in one count, raises unanimity problem)
- Multiplicity (one crime charged in several counts)
- Failure to allege the essential elements of the charged crime
- Failure to state proper jurisdiction of court in which charge is brought
- Abandonment of prosecution
- Unnecessary delay
- Pre-arrest delay
- Violation of speedy trial
- Double jeopardy, prior conviction or acquittal for the same offense, or no manifest necessity for mistrial
- Child was not 10 or older at the time of the incident (watch for charges that span a range of time that includes a time period when the child was under 10).

III. SUPPRESSION OF EVIDENCE

- Statements: improper seizure (4th Amendment, no PC, no RAS)
- Statements: parent was not present (C.R.S. 19-2-511)
- Statements: *Miranda* (failure to give warning, involuntary waiver, improper re-initiation after assertion)
- Statements: voluntariness (5th Amendment)
- Statements: after right to counsel attaches
- Statements: illegal wiretap (Title III)
- Tangible evidence: illegal search or seizure (4th Amendment, think beyond PC and RAS; was the manner of the search reasonable, *e.g.*, *Schmerber v. California*, 384 U.S. 757 or excessive)
- Tangible evidence: fruit of other statutory or constitutional violation
- Tangible evidence: challenges to warrants
  - Knock and announce
  - *Franks* violation
  - Insufficient particularity
  - Search exceeded scope of warrant
  - Violation of statutory inventory/return requirements
  - Staleness of affidavit
- Identification: improper seizure (4th Amendment)
- Identification: suggestivity (5th Amendment)
- Identification: right to counsel (line-up)
- Identification: unreliability (so unreliable that it is inadmissible as a matter of law)
- Due process challenges based on racial discrimination; *Whren v. United States*, 517 U.S. 806 (1996)
- Seeking to treat defense motions as conceded

IV. INVESTIGATION

- Ex *parte* motions

- Seeking inspection of juvenile or neglect records
    - For your client
    - For witnesses
- Seeking production of arrest photos of individuals other than client

- Seeking access to witness who has been improperly counseled by government not to talk to defense counsel; *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966).

- Seeking preservation of evidence

- Requesting deposition (C.R.C.P. 15)

V. DISCOVERY

- Request 404(b) notice (C.R.E. 404(b))

- Seeking an order compelling production (C.R.C.P 16)

- Seeking exclusion or other sanctions for failure to produce or late production ((C.R.C.P 16)

- Seeking an order compelling production of *Brady* material; *Brady v. Maryland*, 373 U.S. 83 (1963).

- Seeking dismissal, exclusion or other sanctions for failure to produce or late production of *Brady*; (*e.g.*, requests for police personnel files based on evidence of police misconduct)

- Seeking production of prior transcripts of government witness (*i.e.* narcotics expert)

- Seeking production of documents held by police department (e.g. testing results and procedures from police laboratory)

- Seeking production of materials regarding benefits given to a witness in the witness protection program

- Seeking dismissal or other sanctions for loss or destruction of evidence

- Seeking Bill of particulars

    - Can be particularly helpful in assault and destruction of property cases to pin down exactly what the alleged misconduct is. **Note**: you may be able to achieve the same result by obtaining the information through informal discovery, documenting that discovery in a discovery request letter and then putting it on the record as a preliminary matter that the trial is about the specified conduct. If the government tries to switch up or add additional conduct, you can claim a notice problem.

VI. SEVERANCE/IMPROPER JOINDER

- Counts (C.R.C.P. 8 and 14)

- Defendants (C.R.C.P. 8 and 14)

  - *Bruton v. United States*, 391 U.S. 123 (1968)
  - Irreconcilable defenses
  - Disparate evidence/non-mutually admissible evidence
  - Desire to call co-respondent as witness
  - Second prosecutor argument

VII. TRIAL: EXCLUSION OF EVIDENCE

- Seeking exclusion of irrelevant or unfairly prejudicial evidence

- Seeking redaction of statements (*e.g.*, co-respondent's statements)

- Seeking exclusion of other crimes evidence

- Opposing impeachment by prior convictions

- Opposing impeachment of character witnesses

- Opposing introduction of child hearsay evidence

- Challenging witness competency

- Asserting a privilege

- Seeking sanctions for discovery violations

- Seeking exclusion of statements based on *Opper v. United States*, 348 U.S. 84 (1954) as not corroborated by substantial independent evidence tending to establish the trustworthiness of the statements

- Seeking exclusion of inflammatory or cumulative evidence

- Challenging expert testimony (C.R.E. 701 and 702, *People v. Shreck*, 22 P. 3d 68 (Colo. 2001)) and requesting *Shreck* hearing based on unreliability and lack of relevance:

  - Unreliability and lack of scientific basis in general
  - Improper, inadequate methodology/testing in this case
  - Lack of qualifications of the witness
  - Lack of usefulness to the jury
  - Bias, incompetence in this case
  - *Daubert* factors (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993))

- Seeking exclusion of hearsay

VIII. TRIAL: INCLUSION OF EVIDENCE

- Seeking inclusion of evidence that another person did it (*e.g.*, *Winfield v. United States*, 676 A.2d 1 (D.C. 1996))
- Requesting right to do a bias cross-examination
- Seeking to impeach non-testifying hearsay declarant
- Seeking to introduce expert testimony
- Seeking to introduce evidence of battered woman's syndrome/post traumatic stress disorder
- Seeking introduction of polygraph evidence
- Seeking permission to put on novel defenses
- Seeking permission to introduce evidence of bad acts of government witnesses or decedent

IX. TRIAL: PROCEDURAL MATTERS

(THIS SECTION DOES NOT BEGIN TO COVER THE RANGE OF MOTIONS THAT MAY BECOME APPROPRIATE DURING TRIAL.)

- Seeking jury trial (either by right or asking judge to use discretion to provide jury trial)
- Seeking gag orders
- Seeking order allowing detained client to wear street clothes during trial

X. TRIAL

(THIS SECTION DOES NOT BEGIN TO COVER THE RANGE OF MOTIONS THAT MAY ARISE DURING TRIAL.)

- Requesting change in venue due to excessive pretrial publicity
- Seeking recusal of judge
- Motion for a special prosecutor
- Seeking reconsideration of suppression motions based on new information at trial
- For mistrial where government proffer of other crimes evidence not supported by testimony

- To compel production of statements of witness not called by government (*Brady*)
- Collateral estoppel challenges where previous trial resolved issue
- Challenging constitutionality of use of client's testimony from previous trial
- Motion for Judgement of Acquittal

XI. POST TRIAL

- Seeking a new trial (C.R.C.P 33)
- Seeking post-verdict motion for judgment of acquittal
- Seeking correction or reduction of sentence (C.R.C.P. 35)
- Objection to restitution request
- Perfect appeal (notice of appeal and record)

MOTIONS: A SHORT NON-EXHAUSTIVE CHECKLIST

- ☐ Raising pretrial issues (declare right to remain silent, oppose testing, request testing, line up issues, request to photograph client, press/publicity issues, closing courtroom, detention related issues)
- ☐ Opposing shackling
- ☐ Requesting dismissal for problems with arrest and charging (e.g. delay before detention hearing)
- ☐ Raising competency
- ☐ Requesting Discovery
- ☐ Requesting in person testimony (C.R.S. §16-3-309)
- ☐ Demanding preliminary hearing
- ☐ Challenging the charging document (no P/C, unconstitutional or invalid statute, duplicity and multiplicity, failure to allege elements, date issues, SOL, speedy trial…)
- ☐ Suppress statements
- ☐ Suppress tangible evidence
- ☐ Suppress identification
- ☐ Requesting records or information (neglect records, other juvenile case files…)
- ☐ Preservation of evidence issues (seeking preservation of evidence, requesting dismissal for failure to preserve evidence)
- ☐ Discovery motions (seeking discovery, seeking sanctions for discovery and/or Brady violations, seeking bill of particulars, request 404(b) notice…)
- ☐ Severance and Joinder (seeking severance of charges, severance of co defendants…)
- ☐ Endorse witnesses and affirmative defenses
- ☐ Exclude evidence at trial (pursuant to rules of evidence, privilege, hearsay…)
- ☐ Exclude testimony of a witness (challenge witness competency, exclude child hearsay)
- ☐ Exclude proposed expert testimony/request *Shreck* hearing

- ☐ Submit potential jury questionnaire
- ☐ Motion to present evidence at trial (notice of expert testimony, seek to introduce evidence that another person committed the crime…)
- ☐ Motion for discretionary jury trial
- ☐ Procedural trial matters (change of venue, recusal of judge, motion for special prosecutor, order for client to dress out for trial…)
- ☐ Post conviction motions (35(c) to reduce sentence, objection to restitution, motion for a new trial, motion for collateral relief…)