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# PUBLIC DEFENDER REPORTER

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## CHAIN OF CUSTODY AND THE IDENTIFICATION OF REAL EVIDENCE

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Authentication or identification of real evidence refers to the requirement of proving that the evidence is what it purports to be. McCormick wrote: "When real evidence is offered an adequate foundation for admission will require testimony first that the object offered is *the* object which was involved in the incident, and further that the condition of the object is substantially unchanged." C. McCormick, *Evidence* 527 (2d ed. 1972). Federal Evidence Rule 901 (a) codifies this requirement: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." See also Ohio R. Evid. 901(A) (identical to Fed. R. Evid. 901 (a)).

There are two principal methods of proving the identity of real evidence: first, establishing that the evidence is "readily identifiable," and second, establishing a "chain of custody." Each of these methods is discussed below. As a preliminary matter, however, it is necessary to define the term "real evidence." As used in this article, that term describes tangible evidence that is historically connected with the charged offense, as distinguished from evidence, such as a model, which is merely illustrative. See C. McCormick, *Evidence* 527-28 (2d ed. 1972). For example, a murder weapon found at the scene is real evidence. If the prosecution wanted to introduce the weapon at trial, it would have to authenticate the weapon, either by establishing a chain of custody or by proving that it is readily identifiable. If, however, the murder weapon was unavailable and the prosecution wanted to show the jury what the weapon looked like, a similar weapon could be used for illustrative purposes. This weapon need not be authenticated, although the prosecution would have to establish that the illustrative weapon was substantially similar to the murder weapon in order to establish its probative value. Even if this condition is satisfied, the trial court might exclude the

exhibit if its probative value was substantially outweighed by the danger of unfair prejudice or misleading the jury. Fed. R. Evid. 403.

### READILY IDENTIFIABLE EVIDENCE

An item of evidence can be identified directly by a witness with personal knowledge who recognizes the item. McCormick refers to such items as "unique and readily identifiable." C. McCormick, *Evidence* 527 (2d ed. 1972). If an object is readily identifiable, there is often no need to establish a chain of custody. As one court has noted: "If an exhibit is directly identified by a witness as the object which is involved in the case, then that direct identification is sufficient. Such is the case with many objects which have special identifying characteristics, such as a number or mark, or are made to have such identifying characteristics by special marks." *State v. Conley*, 32 Ohio App. 2d 54, 59, 288 N.E.2d 296, 300 (1971). See also *U.S. v. Phillips*, 640 F.2d 87, 94 (7th Cir. 1981); *U.S. v. LePera*, 443 F.2d 810, 813 (9th Cir.), cert. denied, 404 U.S. 958 (1971) ("Counterfeit notes . . . printed from a single plate, are unique and identifiable without proof of chain of custody."); *U.S. v. Blue*, 440 F.2d 300, 303 (7th Cir.), cert. denied, 404 U.S. 836 (1971) ("The chain of custody is not relevant when a witness identifies the object as the actual object about which he has testified.").

Federal Rule 901 recognizes this method of identification. Rule 901(b)(4), entitled, "Distinctive characteristics and the like," provides that "[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" is sufficient authentication of an item of evidence. See *U.S. v. Georgalis*, 631 F.2d 1199, 1206 (5th Cir. 1980).

This method of identification is merely an application of the first-hand knowledge and opinion rules--an opinion of a lay witness based on personal observation. See Fed. R. Evid. 602 and 701.

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The witness' uncertainty in identifying the object affects the weight, not the admissibility, of the evidence. For example, the Ninth Circuit has written:

[A]lthough the trial record reveals the identification of the ax made by Papse may not have been entirely free from doubt, the witness did state that he was "pretty sure" this was the weapon Johnson had used against him, that he saw the ax in Johnson's hand, and that he was personally familiar with this particular ax because he had used it in the past. Based on Papse's testimony, a reasonable juror could have found that his ax was the weapon allegedly used in the assault. Papse's ability or inability to specify particular identifying features of the ax, as well as the evidence of the ax's alleged changed condition, should then go to the question of weight to be accorded this evidence, which is precisely what the trial court ruled. In other words, although the jury remained free to reject the government's assertion that this ax had been used in the assault, the requirements for admissibility specified in Rule 901(a) had been met. U.S. v. Johnson, 637 F.2d 1224, 1247-48 (9th Cir. 1980).

*Accord* U.S. v. Drumright, 534 F.2d 1383, 1385 (10th Cir.), *cert. denied*, 429 U.S. 960 (1976); U.S. v. Capocci, 433 F.2d 155, 157 (1st Cir. 1970); U.S. v. Rizzo, 418 F.2d 71, 81 (7th Cir. 1969), *cert. denied*, 397 U.S. 967 (1970); Howland v. State, 51 Wis. 2d 162, 186 N.W. 2d 319, 323 (1971) ("The witness' lack of certitude as to whether the objects offered are the ones he saw on a prior occasion goes to the weight the jury should give to the evidence, but lack of certitude does not preclude admissibility.").

### Examples

Numerous examples of readily identifiable objects are found in the cases. First, any item imprinted with a serial number may be identified by that number. Firearms often fall within this category, *e.g.*, Jackson v. State, 241 Ark. 850, 854, 410 S.W.2d 766, 769 (1967); People v. Soto, 35 Ill. App. 3d 166, 170, 341 N.E.2d 107, 110 (1975); State v. Kroeplin, 266 N.W.2d 537, 540 (N.D. 1978), as does currency, *e.g.*, Calderon v. U.S., 269 F.2d 416, 419 (10th Cir. 1959); State v. Conley, 32 Ohio App. 2d 54, 60, 288 N.E.2d 296, 300-01 (1971).

Second, an object that contains the initials or markings of a police officer or other person may be readily identifiable. Examples include:

**Firearms:** U.S. v. Madril, 445 F.2d 827, 828 (9th Cir. 1971), *vacated*, 404 U.S. 1010 (1972) (pistol); Dixon v. State, 243 Ind. 654, 656-57, 189 N.E.2d 715, 716 (1963) (shotgun).

**Bullets:** Duke v. State, 257 Ala. 339, 344-45, 58 So.2d 769 (1952); Sims v. State, 243 Ga. 83, 85, 252 S.E.2d 501, 503 (1979).

**Currency:** U.S. v. Capocci, 433 F.2d 155, 157 (1st Cir. 1970) (counterfeit bill); U.S. v. Bourassa, 411 F.2d 69, 72-73 (10th Cir.), *cert. denied*, 396 U.S. 915 (1969) (coin).

**Laboratory Slides:** Gass v. U.S., 416 F.2d 767, 770 (D.C. Cir. 1969); Wheeler v. U.S., 211 F.2d 19, 22-23 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 1019 (1954).

*See also* O'Quinn v. U.S., 411 F.2d 78, 80 (10th Cir. 1969) (jar); People v. Horace, 186 Cal. App. 2d 560, 562, 9 Cal. Rptr. 43, 44 (1960) (crowbar); People v.

Sansone, 42 Ill. App. 3d 512, 514, 356 N.E.2d 101, 103 (1976) (stolen record albums); Johnson v. State, 267 Ind. 415, 420-21, 370 N.E.2d 892, 894-95 (1977) (knife); State v. Coleman, 441 S.W.2d 46, 51 (Mo. 1969) (box, watch, and bolt); State v. Ball, 1 Ohio App. 2d 297, 302, 204 N.E.2d 557, 560-61 (1964) (catheter).

Police manuals on crime scene searches and evidence collection recommend this practice. *See* Federal Bureau of Investigation, Handbook of Forensic Science 98 (rev. ed. 1979); C. O'Hara, Fundamentals of Criminal Investigation 70-71 (5th ed. 1980).

If, however, the relevance of an exhibit depends on its subsequent analysis, identifying it by police initials may be insufficient. The initials suffice to establish that the exhibit in court was the item seized by the police, but a chain of custody may be needed to establish that the item seized was the item analyzed at the crime laboratory. For example, in Novak v. District of Columbia, 160 F.2d 588, 589 (D.C. Cir. 1947), a bottle containing a urine sample was initialed by the arresting officer, but no evidence was offered to show that the same bottle was the one analyzed for alcoholic content. Similarly, if the condition of an object, not merely its identity, is relevant, a chain of custody may be required to establish that the condition of the object had not been altered during police custody. This is especially true with respect to specimens, such as blood samples, that are susceptible to contamination or deterioration.

Third, an item of evidence may possess distinctive natural characteristics which may make it readily identifiable. For example, in U.S. v. Bridle, 443 F.2d 443 (8th Cir.), *cert. denied*, 404 U.S. 942 (1971), the prosecution introduced evidence that a button top found at the scene of a burglary came from the defendant's coat. The police officer described the button as follows: "It had a picture of a whale on the front of it. It was leather . . . And it had a sticky substance on the back, as though it might have been stuck to something. . . . [I]t was a dark brown in color. Had a whale or fish on it. The tail was up in the air. Split. And I believe it was the left eye of the animal that was up." *Id.* at 448. The Eighth Circuit held this identification sufficient: "Given the uniqueness of the buttons on Bridle's coat, we think this identification evidence established that [the] exhibit . . . was the button top found at the scene of the burglary." *Id.* at 449. Thus, the issue is whether the distinctive characteristics are sufficient to make it unlikely that another object would have the same characteristics. *See also* U.S. v. Reed, 392 F.2d 865, 867 (7th Cir.) ("very unusual looking hat"), *cert. denied*, 393 U.S. 984 (1968); Reyes v. U.S., 383 F.2d 734, 734 (9th Cir. 1967) (hold-up note "was unique and readily identifiable"); Pinkey v. U.S., 363 F.2d 696, 698 (D.C. Cir. 1966) (knife identified by eyewitnesses after providing accurate description); Jenkins v. U.S., 361 F.2d 615, 619 n.6 (10th Cir. 1966) (coin of unusual thickness).

## CHAIN OF CUSTODY

A chain of custody is required if an object is not readily identifiable or its relevance depends on its condition or subsequent analysis.

### Length of the Chain of Custody

Several issues have arisen concerning the "length" of the chain of custody, that is, when it commences and when it ends. The Indiana courts have taken the position that the chain of custody does not commence until government agents take possession of the object: "The chain-of-custody foundation is not required . . . for periods before the evidence comes into the possession of law enforcement personnel." *Williams v. State*, 269 Ind. 265, 269-70, 379 N.E.2d 981, 984 (1978). This rule is based on the theory that "the State cannot be charged with the responsibility of accounting for the custody of the exhibit" when it is not in their possession, *Zupp v. State*, 258 Ind. 625, 629, 283 N.E.2d 540, 543 (1972), and has been applied in two different types of cases. The first type involves cases in which a third party had possession of the item prior to the time it was turned over to the police. *Zupp v. State*, 258 Ind. 625, 629-30, 283 N.E.2d 540, 543 (1972); *Love v. State*, 383 N.E.2d 382, 384 (Ind. App. 1978). The second type involves cases in which the item was not discovered at the crime scene until sometime after the commission of the crime. *Williams v. State*, 269 Ind. 265, 269-70, 379 N.E.2d 981, 984 (1978) (three-hour delay); *Thorn-ton v. State*, 268 Ind. 456, 459-60, 376 N.E.2d 492, 494 (1978).

The Indiana position misconceives the purpose of the chain of custody requirement. The rule is not designed to hold the police accountable, but rather, to insure the relevancy of the evidence. See *Bean v. U.S.*, 533 F. Supp. 567, 578 (D. Colo. 1980) ("The general purpose of requiring a chain of custody to be established is to insure that the evidence being offered is what the proponent claims it to be."). If the relevance of the object depends on its use in a crime, the offering party must establish, through a chain of custody or otherwise, a connection between that object and the crime. For example, in *U.S. v. White*, 569 F.2d 263 (5th Cir.), *cert. denied*, 439 U.S. 848 (1978), the court noted: "This is not a routine chain of custody situation in which the chain is broken between seizure of the evidence from the accused and a subsequent trial. Rather, the alleged break occurred before the government came into possession of the heroin." *Id.* at 266. After citing the rule in the "typical chain of custody cases," the court wrote: "We apply the same rule in the instant case." *Id.*

There is also disagreement over the point at which the chain of custody ends. Some cases seem to suggest that the prosecution must account for the evidence from the time of seizure to the time of trial. *Annot.*, 21 A.L.R. 2d 1216, 1236 (1952). There is some support for this view in the Advisory Committee's Note to Federal Rule 901, where the drafters refer to "establishing narcotics as taken from an accused and accounting for

custody through the period until trial, including laboratory analysis." 56 F.R.D. 183, 333 (1973).

The "length" of the chain of custody depends on the purpose for which the evidence is offered. This point is illustrated by *State v. Conley*, 32 Ohio App. 2d 54, 288 N.E.2d 296 (1971), which involved a prosecution for the illegal sale of LSD. The drugs were purchased with marked bills whose serial numbers had been recorded. The defendant objected to both the admissibility of the bills and the LSD. The court wrote:

To identify a particular item . . . as being part of a pertinent incident in the past usually requires the showing of a continuous chain of custodians up to the material moment. When a chemical analysis is involved . . . the material moment is the moment of analysis, since this provides the basis for the expert testimony and makes that testimony relevant to the case. In the case of many other items, the material moment occurs at the trial. *Id.* at 59-60.

The court went on to hold that the chain of custody for the marked bills ran from the time the bills were marked until the trial, at which time they were identified. The chain of custody for the drugs differed; it ran from the time of seizure to the time of analysis. This approach is correct. The loss or destruction of the drugs after the time of analysis would not affect the relevancy of the expert's testimony concerning the nature of the drugs. See *U.S. v. Sears*, 248 F.2d 377, 378 (7th Cir. 1957) ("[B]ut even if the exhibit had been lost, the undisputed testimony is that the product seized was analyzed by the chemist who found it to be heroin."); *U.S. v. Singer*, 43 F. Supp. 863, 864 (E.D. N.Y. 1942) ("[T]he mere fact that the sample was lost or destroyed, after analysis, does not prevent proof of such analysis, evidence having been offered to identify the sample analyzed . . ."). Moreover, the prosecution is generally not required to introduce real evidence in order to prove its case. See *Chandler v. U.S.*, 318 F.2d 356, 357 (10th Cir. 1963) (whiskey bottles); *Ware v. U.S.*, 259 F.2d 442, 444 (8th Cir. 1958) (heroin); *Foster v. U.S.*, 212 F.2d 249, 250 (D.C. Cir. 1954) (stolen property). The so-called "best evidence" rule applies only to writings, recordings, and photographs. See *C. McCormick, Evidence* 560 (2d ed. 1972); *Fed. R. Evid.* 1002.

In a recent case, however, the Florida Supreme Court ruled "that when a defendant is charged with possession of a controlled substance, that substance, if available, must be introduced into evidence . . ." *G.E.G. v. State*, 417 So.2d 975, 977 (Fla. 1982). In support of this rule, the court wrote:

An absolute rule that a substance may be introduced or not at the discretion of the prosecutor is practically undesirable because of its potential for abuse. For example, such prosecutorial discretion could deliberately or unwittingly be used to confuse defense counsel and thwart the ability to make certain objections, particularly objections to chain of custody. . . .

The state's failure to introduce the substance in evidence against the defendant might put the defendant in the awkward position of introducing it himself should he wish to challenge its authenticity where

there has been testimony of its existence as here. *Id.* at 977-78.

Neither of these reasons seems compelling. First, the trial court has the authority to require the introduction of real evidence if necessary to avoid jury confusion. Thus, it seems questionable whether a blanket rule, in lieu of the present discretionary rule, is required. Second, the principal problem in *G.E.G.* was that the exhibit was marked for identification and referred to at trial without being formally offered or admitted in evidence. Again, it may be doubted whether a blanket rule is necessary to remedy this problem, especially in a bench trial as was the case in *G.E.G.* Third, the reasons supporting the Florida rule--the potential for prosecutorial abuse and the awkward position for objecting defense counsel--would seem to apply to all real evidence, not only to controlled substances. Nevertheless, the Florida rule should not impose any significant burdens on the prosecution. The court recognized an exception for cases in which the evidence is unavailable, and most prosecutors would introduce the drugs in any event for tactical reasons.

Far more important than the Florida rule is the development of case law recognizing a defendant's constitutional right to retest evidence and the concomitant obligation of the prosecution to preserve the evidence for retesting. For example, in *People v. Morgan*, 606 P.2d 1296, 1299-1300 (Colo. 1980), the Colorado Supreme Court upheld the suppression of evidence relating to the defendant's severed fingertip, which was found at the scene of a homicide. The court ruled that the police's failure to preserve the evidence for reexamination violated the due process guarantee. See *also* *State v. Hannah*, 120 Ariz. 1, 2, 583 P.2d 888, 889 (1978); *People v. Taylor*, 54 Ill. App. 3d 454, 457-58, 369 N.E.2d 573, 576 (1977). Thus, although the relevancy of real evidence is not affected by its loss or destruction after laboratory analysis, the recognition of a constitutional right to retest evidence provides a strong incentive for the government to preserve and account for real evidence until the time of trial.

### Links in the Chain of Custody

The links in the chain of custody are those persons who had physical custody of the object. Persons who had access to, but not possession of, the object generally need not be accounted for. As one court has observed: "There is no rule requiring the prosecution to produce as witnesses all persons who were in a position to come into contact with the article sought to be introduced in evidence." *Gallego v. U.S.*, 276 F.2d 914, 917 (9th Cir. 1960). *Accord* *U.S. v. Fletcher*, 487 F.2d 22, 23 (5th Cir. 1973), *cert. denied*, 416 U.S. 958 (1974) (the fact that "fifteen persons had access to the evidence room" went to weight, not admissibility); *Reyes v. U.S.*, 383 F.2d 734, 734 (9th Cir. 1967) ("[T]he Government was under no obligation to produce as witnesses all persons who may have handled exhibit 1.").

Failure to account for the evidence while in the custody of a person with possession may constitute a fatal break in the chain of custody. See *U.S. v. Panczko*, 353 F.2d 676, 679 (7th Cir. 1965), *cert. denied*, 383 U.S. 935 (1966) ("There is no evidence as to where or from whom Lieutenant Remkus got the keys."). Some courts have indicated that all persons who had possession of an exhibit must testify. *People v. Connelly*, 35 N.Y.2d 171, 174, 316 N.E.2d 706, 708, 359 N.Y.S.2d 266, 269 (1974) ("[A]dmissibility generally requires that all those who have handled the item 'identify it and testify to its custody and unchanged condition.'").

Other courts have adopted a more flexible approach: "[P]recision in developing the 'chain of custody' is not an iron-clad requirement, and the fact of a 'missing link does not prevent the admission of real evidence, so long as there is sufficient proof that the evidence is what it purports to be . . . ." *U.S. v. Howard-Arias*, 679 F.2d 363, 366 (4th Cir. 1982). For example, in one case the chief chemist, who had received a sealed envelope of heroin and had turned it over to the examining chemist, did not testify. Nevertheless, the court upheld the admissibility of the evidence because the seal was "unbroken when the latter received it." *U.S. v. Picard*, 464 F.2d 215, 216 n.1 (1st Cir. 1972). *Accord* *U.S. v. Robinson*, 447 F.2d 1215, 1220-21 (D.C. Cir. 1971), *on rehearing*, 471 F.2d 1082, *rev'd on other grounds*, 414 U.S. 218 (1973). In short, "accounting for" all of the links in the chain of custody does not necessarily mean that all the custodians must testify at trial.

### CONDITION OF EVIDENCE

Frequently, the condition of an object is as important as its identity. Thus, courts have held that "[b]efore a physical object connected with the commission of a crime may properly be admitted in evidence there must be a showing that such object is in substantially the same condition as when the crime was committed." *Gallego v. U.S.*, 276 F.2d 914, 917 (9th Cir. 1960). *Accord* *U.S. v. McKinney*, 631 F.2d 569, 571 (8th Cir. 1980); *U.S. v. Aviles*, 623 F.2d 1192, 1197 (7th Cir. 1980).

Determining what changes are "substantial" depends upon how the changes affect the relevance of the evidence. "Even though the object is not in *exactly* the same condition at trial as at the time in issue--or even if in substantially the same condition--the exhibit may still be admitted if the changes can be explained, and they do not destroy the evidentiary value of the object." Comment, *Preconditions for Admission of Demonstrative Evidence*, 61 Nw.U.L. Rev. 472, 484 (1966). For example, in one case counterfeit bills introduced at trial had apparently changed color due to tests for fingerprints. This change, however, did not affect admissibility. "[N]o change in color could destroy the relevance of the bills to show their counterfeit character from the identity of serial numbers, and their competence as evidence for this purpose is unimpaired by the unexcluded possibility of a

change in color." U.S. v. Skelley, 501 F.2d 447, 451 (7th Cir.), *cert. denied*, 419 U.S. 1051 (1974). See also Davidson v. State, 208 Ga. 834, 836, 69 S.E.2d 757, 759 (1952) (victim's clothing admissible even though washed).

### THE BURDEN AND STANDARD OF PROOF

The burden of proving the chain of custody rests with the party offering the evidence. U.S. v. Santiago, 534 F.2d 768, 770 (7th Cir. 1976). Prior to the adoption of the Federal Rules of Evidence, the courts described the standard of proof in various ways. The most common expression for the standard was that the offering party must establish identity and condition by a "reasonable probability." *E.g.*, U.S. v. Brown, 482 F.2d 1226, 1228 (8th Cir. 1973) ("reasonable probability the article has not been changed in any important respect"); U.S. v. Robinson, 447 F.2d 1215, 1220 (D.C. Cir. 1971), *on rehearing*, 471 F.2d 1082, *rev'd on other grounds*, 414 U.S. 218 (1973); U.S. v. Capocci, 433 F. 2d 155, 157 n. 2 (1st Cir. 1970); Gass v. U.S., 416 F. 2d 767, 770 (D.C. Cir. 1969). Other standards included: State v. Baines, 394 S.W.2d 312, 316 (Mo. 1965), *cert. denied*, 384 U.S. 992 (1966) ("reasonable assurance"); Raskey v. Hulewicz, 185 Neb. 608, 615-16, 177 N.W.2d 744, 749 (1970) (authenticity must be established "unequivocally").

The "reasonable probability" standard would appear to be the equivalent of the preponderance of evidence (more probable than not) standard, and some courts stated the standard in those terms. See State v. Henderson, 337 So.2d 204, 206 (La. 1976); State v. Sears, 298 So.2d 814, 821 (La. 1974). The cases also indicated that the trial court determined whether this standard had been satisfied. See U. S. v. Brown, 482 F.2d 1226, 1228 (8th Cir. 1973); U.S. v. Daughtry, 502 F.2d 1019, 1021-23 (5th Cir. 1974).

In contrast, Federal Rule 901 (a) requires that the offering party introduce "evidence sufficient to support a finding that the matter in question is what its proponent claims." Thus, the trial court does not decide finally or exclusively whether the item has been identified; rather, the court decides only whether sufficient evidence has been introduced from which a reasonable jury could find the evidence identified. In other words, the offering party need only make a "prima facie" showing of authenticity to gain admissibility and the jury decides ultimately whether the evidence has been sufficiently identified. See U.S. v. Goichman, 547 F. 2d 778, 784 (3d Cir. 1976) ("[I]t is the jury who will ultimately determine the authenticity of the evidence, not the court.").

Whether this treatment of the issue of authenticity was intended to effect a major change in the chain of custody requirement remains unclear. Several Fifth Circuit cases contain broad language that would support such a change. In one case, the court wrote: "[C]hain of custody goes to the weight rather than the admissibility of the evidence, and is thus reserved for the jury." Ballou

v. Henri Studios, Inc., 656 F.2d 1147, 1154 (5th Cir. 1981); *accord* U.S. v. Colatriano, 624 F.2d 686, 689 (5th Cir. 1980). In the same case, however, the court recognized that the trial court decides the threshold requirement of whether there exists a "reasonable probability" that the condition of the object has not been changed. Ballou v. Henri Studios, Inc., 656 F. 2d 1147, 1155 (5th Cir. 1981); U.S. v. Albert, 595 F. 2d 283, 290 (5th Cir.), *cert. denied*, 444 U.S. 963 (1979). Moreover, other federal courts of appeal appear to apply the pre-Rule's "reasonable probability" standard. See U.S. v. Jackson, 649 F.2d 967, 973 (3d Cir.), *cert. denied*, 454 U.S. 1034, (1981); U.S. v. Weeks, 645 F.2d 658, 660 (8th Cir. 1981); U. S. v. Brewer, 630 F.2d 795, 802 (10th Cir. 1980).

### Fungible Objects

As a practical matter, most courts probably apply a stricter standard when the nature of the evidence is "fungible." As one court has commented: "The danger of *tampering, loss, or mistake* with respect to an exhibit is greatest where the exhibit is small and is one which has physical characteristics fungible in nature and similar in form to substances familiar to people in their daily lives." Graham v. State, 253 Ind. 525, 531, 255 N.E.2d 652, 655 (1970). See also U.S. v. Haldeman, 559 F.2d 31, 108 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977) ("There was never any significant risk, as there would be with a fungible piece of real evidence, such as blood samples, that the tape recordings were inadvertently exchanged with other evidence of a similar type."); U.S. v. LePera, 443 F.2d 810, 812-13 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971) ("Narcotic drugs are fungible and, being such, evidence of a continuous chain of possession is often necessary. . . ."); Brewer v. U.S., 353 F.2d 260, 261 (8th Cir. 1965) ("Marijuana is fungible. There is no intrinsic way that one can identify a specimen observed yesterday with the one presented today.").

### The Presumption of Regularity

In satisfying its burden of proof, the prosecution is often aided by the "presumption of regularity."

In the absence of any evidence to the contrary, the trial judge was entitled to assume that this official would not tamper with the sack and can or their contents. Where no evidence indicating otherwise is produced, the presumption of regularity supports the official acts of public officers, and courts presume that they have properly discharged their official duties. Gallego v. U.S., 276 F.2d 914, 917 (9th Cir. 1960).

*Accord* U.S. v. Aviles, 623 F.2d 1192, 1198 (7th Cir. 1980); U.S. v. Nelson, 603 F.2d 42, 48 (8th Cir. 1979).

The presumption of regularity, however, has been criticized.

The presumption of regularity, if it can be dignified as a rule, does not serve as a substitute for evidence when authenticity is, as here, challenged on not insubstantial grounds. At best it may relieve the government of the necessity for offering proof of custody until the integrity of the evidence has been put in issue. U.S. v. Starks, 515 F.2d 112, 122 (3d Cir. 1975).

See also U.S. v. Lampson, 627 F.2d 62, 65 (7th Cir. 1980) ("The Government's burden . . . cannot be diluted by unwarranted presumptions about the evidence it seeks to introduce.").

## PROOF OF CHAIN OF CUSTODY

### Applicability of Rules of Evidence

Before discussing the methods of proving a chain of custody, the issue of determining whether the rules of evidence apply to such proof must be addressed. Federal Rule 104(a) provides that in deciding preliminary questions of admissibility, the trial court "is not bound by the rules of evidence except those with respect to privileges." Accordingly, if the admissibility decision is entrusted exclusively to the trial court, evidence rules would not be applicable and hearsay could be used to establish a chain of custody. See also U.S. v. Matlock, 415 U.S. 164, 172-73 (1974) ("[T]he rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine the admissibility of evidence.")

Rule 104(b), which governs questions of conditional relevancy, is an exception to Rule 104(a). The Advisory Committee's Note to Federal Rule 901 clearly indicates that Rule 104(b) governs the authenticity issue: "This requirement of showing authenticity or identity falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedures set forth in Rule 104(b)." 56 F.R.D. 183, 333 (1975). Because Rule 104(b) controls, the rules of evidence apply inasmuch as the jury must share in the authenticity decision.

[W]hile the court's power to "consider" inadmissible evidence under Rule 104(a) is clear, the substantive determination which the court is required to make on the issue of authentication is whether *admissible* evidence exists which is sufficient to support a jury finding of authenticity. . . . [O]ur task in ruling on authenticity is limited to determining whether there is *substantial admissible evidence* to support a finding of authentication by the trier of fact. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1220 (E.D. Pa. 1980).

### Methods of Proof

Typically, the chain of custody is established, at least in part, by the testimony of the persons who had possession of the exhibit. These witnesses may refresh their memories by referring to any available documentation. See Fed. R. Evid. 612. The prosecution may also introduce evidence of habit or routine practice to establish the chain of custody; that is, the practice of police departments and laboratory personnel in securing and preserving physical evidence. Federal Rule 406 provides that "[e]vidence of the habit of a person or of the routine practice of an organization . . . is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

In some cases the chain of custody has been established by documentary evidence. The principal

obstacle to this method of proof is the hearsay rule, although several hearsay exceptions may be applicable. For example, courts have held that laboratory slides and labels on specimen bottles fall within the Federal Business Records Act because they had been prepared by hospital personnel in the regular course of business. U.S. v. Duhart, 496 F.2d 941, 944 (9th Cir. 1974), *cert. denied*, 419 U.S. 967 (1974); Gass v. U.S., 416 F.2d 767, 771 (D.C. Cir. 1969).

These cases, however, predated the adoption of the Federal Rules of Evidence. Federal Rule 803(8)(B), which governs the public records exception, specifically excludes "in criminal cases matters observed by police officers and other law enforcement personnel." According to the legislative history, "the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases." S. Rep. No. 1277, 93 Cong., 2d Sess. (1974). Moreover, a number of courts have held that evidence inadmissible under the public records exception may not be admitted under the business records exception, Rule 803(6). See U.S. v. Oates, 560 F.2d 45, 84 (2d Cir. 1977).

Thus, Rule 803(8)(B)'s prohibition against the use of police records presents an important obstacle to the use of documentary evidence in establishing the chain of custody. This issue, however, is not settled. In U.S. v. Coleman, 631 F.2d 908 (D.C. Cir. 1980), the defendant contended that police reports are never admissible on behalf of the prosecutor and thus DEA forms of chemical analysis and loc sealed envelopes containing notations of the date and location of the sale of heroin were inadmissible. The court rejected this argument, holding that the documents were not unreliable on the grounds that they were prepared for the purpose of litigation. Although the court recognized that the forms had "certain indicia of 'police reports,'" it found that the forms and lock-sealed envelopes contained "only skeletal information, and are prepared not solely with an eye towards presentation, but towards preserving a record of the chain of custody." *Id.* at 912.

## REFERENCES

Anderson, *Chain of Custody Requirements in Admissibility of Evidence*, 37 Mont. L. Rev. 144 (1976); Graham, *Relevancy and Exclusion of Relevant Evidence - Real Evidence*, 18 Crim. L. Bull. 2 (1982); Imwinkelried, *The Identification of Original Real Evidence*, 61 Mil. L. Rev. 145 (1973); Michael Adler, *Real Proof*, 5 Vand. L. Rev. 344 (1952); Comment, *Preconditions for Admission of Demonstrative Evidence*, 61 Nw.U.L. Rev. 472 (1966); Annot., 21 A.L.R. 2d 1216 (1952).

The Ohio cases are discussed in P. Giannelli, *Ohio Evidence Manual* §§ 901.03 and 901.05 (1982). See also *State v. Williams*, 2 Ohio App. 3d 289 (1981).