

**U.S. Immigration and Customs Enforcement
Homeland Security Investigations Training**

**HSI Academy
Legal Division**



Post-Arrest Obligations

Student Guide

2105110

HSI Special Agent Training

6th Edition (2018)

ENFORCEMENT LAW COURSE

Post-Arrest Obligations

INTRODUCTION

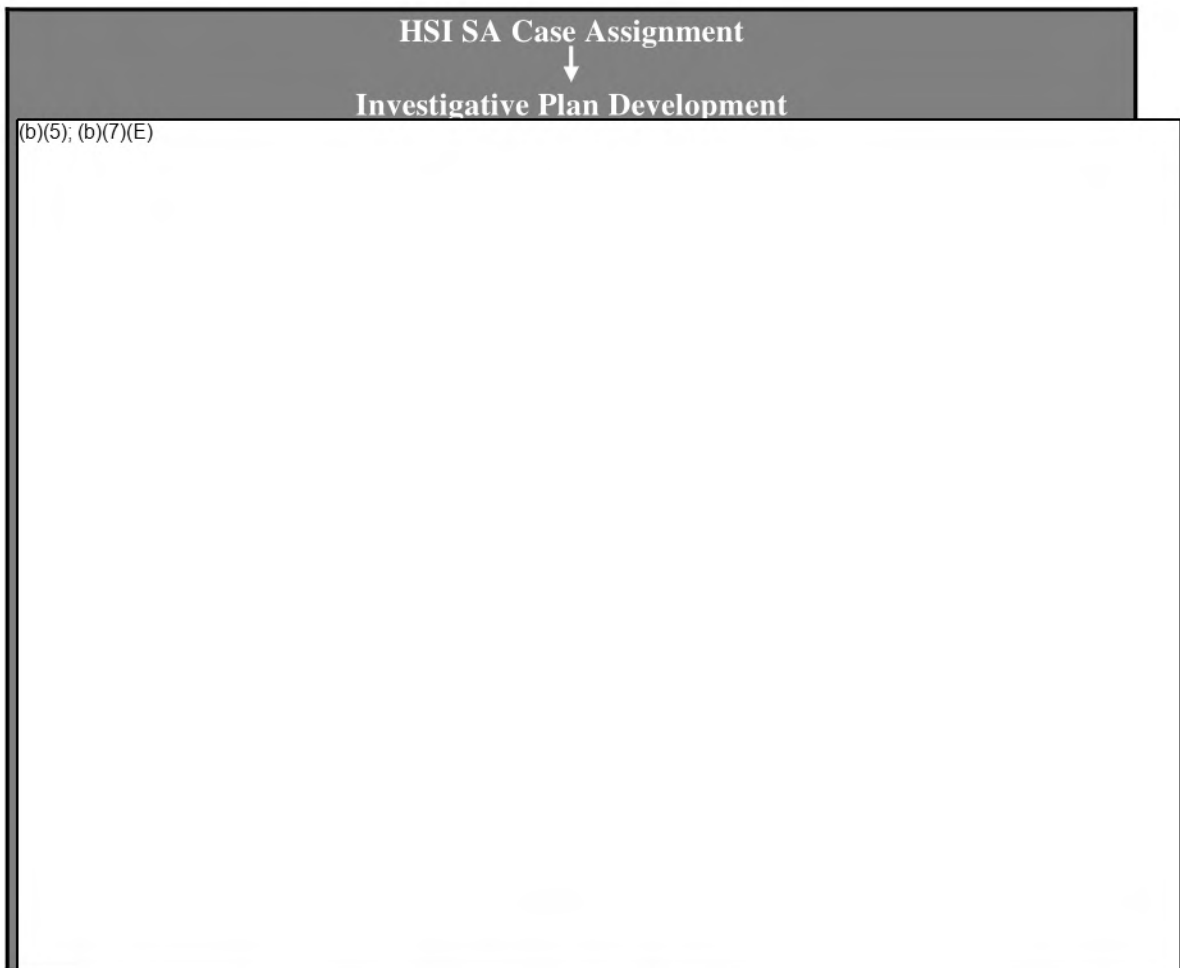
I. Motivation

A critical component of your job is arresting individuals who have committed crimes. However, your job does not end at the arrest. In addition to detaining the person, you must also complete several required steps after the arrest. If steps are omitted, the government cannot fully prosecute the subject, and your work will have been in vain.

II. Review of the Past

Post-arrest obligations are rooted in Due Process when deprived of life, liberty, or property (we covered this a couple of lessons back). These rules explain the government's fundamental fairness obligation concerning a criminal defendant within the criminal justice system.

III. Advance Organizer of Main Ideas



IV. Agenda

We will examine legal issues that arise post-arrest, as well as, during the pretrial phase of the prosecution. We will also look at the defendant’s Sixth Amendment rights (counsel and confrontation). Finally, you will be given questions and scenarios related to your post-arrest obligations. I will provide demonstrations and examples throughout the lesson. The practice exercise at the end of the lesson is like the test questions on your legal exam.

V. Objectives

Terminal Performance Objective – Given a law enforcement scenario with the arrest of a subject, determine and explain the post-arrest obligations; in accordance with the Sixth Amendment, Federal Rules of Criminal Procedure 4 and 5, and Section and Title 18 of the U.S. Code.

EPO	OBJECTIVE
1	Explain post-arrest obligations that arise immediately after arrest.
2	Describe the SA’s obligations associated with matters pretrial.
3	Describe the criminal defendant’s Sixth Amendment right to counsel.
4	Explain the SA’s obligations associated with pretrial depositions, witnesses, and the Confrontation Clause.

INSTRUCTION

I. Explain post-arrest obligations that arise immediately after arrest (EPO 1).

A. Post–Arrest Procedure (*See Post Arrest Flow Chart at SDR PA-1.*)

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

B. Pre-Arrest and Arrest

1. Complaint [AO 91] – *See sample complaint at SDR PA-2.*
2. Arrest Warrant [AO 442] with Affidavit of Probable Cause – *See sample arrest warrant at SDR PA-3.*
3. USMJ will issue; (b)(5); (b)(7)(E)
4. Execution – (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)
5. After executing the warrant, it must be returned to the issuing magistrate.
6. Arrest without an arrest warrant – **If an arrest was made without first obtaining an arrest warrant,** (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

7. DNA sample collection – On April 18, 2012, HSI issued memorandum guidance that HSI personnel will now be responsible for collecting DNA samples from subjects taken into custody on criminal charges. *See SDR PA-4 HSI Implementation of DNA Sample Collection, April 18, 2012.*

C. Prompt Presentment – FRCrimP Rule 5(a) requires that law enforcement take the arrestee, **without unnecessary delay**, before a magistrate for the initial appearance. As a practical matter this will be addressed with the Assistant United States Attorney (AUSA) prior to arrest. *See SDR PA-5 Prompt Presentment Flow Chart.*

1. FRCrimP Rule 5(d) – USMJ advises defendant of criminal complaint; defendant’s right to counsel; pretrial release options; right to a preliminary hearing; **right to remain silent; and, right to consult with counsel.** **Note:** (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

2. Prompt presentment of juveniles – Juveniles charged with federal crimes (18 U.S.C. §§ 5031-5042) – The juvenile must be taken before a magistrate judge **“forthwith,”** which means as soon as possible. In no event can the juvenile be detained for longer than is **reasonably necessary to bring him before a magistrate judge.** **Note:**

(b)(5); (b)(7)(E)

a.

(b)(5); (b)(7)(E)

b.

c.

d.

Note:

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

Note:

(b)(5); (b)(7)(E)

- D. Post-arrest statement in compliance with the 18 U.S.C. § 3501(c)
1. 18 U.S.C. § 3501(c) – A confession made by a person while under arrest or other detention in the custody of any law enforcement agency shall not render the confession inadmissible solely due to delay in presentment if such confession:
 - a. Is given voluntarily; and,
 - b. The weight given the confession is left to the jury; and,
 - c. If such confession was given within **six hours** immediately following arrest or other detention (unless, the delay in presentment is found to be reasonable considering the means of transportation and the distance to be traveled to the nearest magistrate).
- Note:** This provision is frequently referred to as the **six-hour rule**.
2. **Corley Test** – Statements (even in compliance with *Miranda*) are subject to suppression as a violation of the Prompt Presentment Rule, if the statement is taken more than six hours after arrest and the taking of that statement unreasonably and/or unnecessarily delays presentment.
 - a. Statements made within six hours of arrest are lawful (unless it is deemed involuntary or a violation of the Rules of Evidence).
 - b. Statements made beyond six hours of arrest and before presentment are lawful if the delay in presentment was not unreasonable or unnecessary.

Example:	(b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)	

E. 48 Hour Rule

1. Arrest made without a warrant – The Fourth Amendment requires that a prompt judicial probable cause determination be made before a neutral and detached magistrate. *Gerstein Rule*.
2. “Prompt” in this context has been determined to be within 48 hours of the criminal arrest (absent extraordinary circumstances). *McLaughlin Rule*.

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

Example:	(b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)	

(b)(5); (b)(7)(E)

F. Post-arrest consular notification for foreign nationals

1. Vienna Convention on Consular Relations (“VCCR” or “Vienna Convention”), ratified by the United States on October 22, 1969, requires law enforcement officials who have arrested a foreign national to so inform the consular post of the arrestee’s home country, and to allow consular officials to visit and consult with the arrestee. *See SDR PA-7 Consular Notification of Detained or Arrested Foreign Nationals, ICE Directive Number 7-3.0, February 13, 2006.*
2. The following steps should be followed when a foreign national is arrested *or* subjected to a lengthy detention:

- a. (b)(5); (b)(7)(E)
- b.

Example of Statement to Foreign National

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

Mandatory Notification Countries and Jurisdictions – 8 C.F.R. Part 236.1(e)

Algeria	Guyana	Saint Lucia
Antigua and Barbuda	Hong Kong ²	Saint Vincent and the Grenadines
Armenia	Hungary	Seychelles
Azerbaijan	Jamaica	Sierra Leone
Bahamas, The	Kazakhstan	Singapore
Barbados	Kiribati	Slovak Republic
Belarus	Kuwait	Tajikistan
Belize	Kyrgyzstan	Tanzania
Brunei	Malaysia	Tonga
Bulgaria	Malta	Trinidad and Tobago
China ¹	Mauritius	Tunisia
Costa Rica	Moldova	Turkmenistan
Cyprus	Mongolia	Tuvalu
Czech Republic	Nigeria	Ukraine
Dominica	Philippines	United Kingdom ³
Fiji	Poland (non-permanent residents only)	U.S.S.R. ⁴
Gambia, The	Romania	Uzbekistan
Georgia	Russian Federation	Zambia
Ghana	Saint Kitts and Nevis	Zimbabwe
Grenada		

¹ Notification is not mandatory in the case of persons who carry “Republic of China” passports issued by Taiwan. Such persons should be informed without delay that the nearest office of the Taipei Economic and Cultural Representative Office (“TECRO”), the unofficial entity representing Taiwan’s interests in the United States, can be notified at their request.

² Hong Kong reverted to Chinese sovereignty on July 1, 1997, and is now officially referred to as the Hong Kong Special Administrative Region, or “SAR.” Under paragraph 3(f)(2) of the March 25, 1997, U.S.-China Agreement on the Maintenance of the U.S. Consulate General in the Hong Kong Special Administrative Region, U.S. officials are required to notify Chinese officials of the arrest or detention of the bearers of Hong Kong passports in the same manner as is required for bearers of Chinese passports— i.e., immediately, and in any event within four days of the arrest or detention.

³ British dependencies also covered by this agreement are Anguilla, British Virgin Islands, Bermuda, Montserrat, and the Turks and Caicos Islands. Their residents carry British passports.

⁴ Although the U.S.S.R. no longer exists, some nationals of its successor states may still be traveling on its passports. Mandatory notification should be given to consular officers for all nationals of such states, including those traveling on old U.S.S.R. passports. The successor states are listed separately above.

e. If the nation appears on this list, then:

- 1) (b)(5); (b)(7)(E)
- 2)

Example of Statement When Consular Notification is Mandatory

(b)(5); (b)(7)(E)

- f. (b)(5); (b)(7)(E)
- g.

Demonstration

(b)(5); (b)(6); (b)(7)(C); (b)(7)(E)



II. Describe the SA’s obligations associated with matters pretrial. (EPO 2)

- A. The Fifth Amendment states that “[N]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury...”
 - 1. Preliminary hearing – According to Rule 5.1 of the FRCrimP a preliminary hearing must be held unless the defendant:
 - a. Waives the preliminary hearing.
 - b. Is indicted by grand jury.
 - c. The government files a criminal *information* under FRCrimP Rule 7(b), which requires prosecution by indictment unless the defendant consents to be prosecuted by information.
 - d. The government files a criminal *information* charging the defendant with a misdemeanor.

Note: (b)(5); (b)(7)(E)
 (b)(5); (b)(7)(E)

2. Grand jury – FRCrimP Rule 6 outlines the rules governing grand jury proceedings. For our purposes, the grand jury is responsible for issuing an *indictment*. In the end, the information and the indictment are two means to the same end. (See, FRCrimP Rule 7). See *Sample Subpoena to Testify Before Grand Jury at SDR PA-10*.

Note: (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

- B. Arraignment – According to FRCrimP Rule 10, the arraignment must be conducted in open court and must:
 1. Provide the defendant with a copy of the indictment or information.
 2. Read the indictment or information to the defendant.
 3. Ask the defendant to plead to the indictment or information.

Note: (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

- C. Pretrial motions (FRCrimP Rule 12)
 1. Motion to Suppress Evidence
 2. Motion to Sever Charges or Defendants
 3. Motion for Discovery

- D. Pretrial discovery (FRCrimP Rule 16)

(b)(5); (b)(7)(E)

1. **Brady and Rule 16 FRCrimP** – In *Brady v. Maryland*, the Court ruled that the suppression by the prosecution of evidence favorable to an accused upon request *violates due process* where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Rule 16 – Government must permit the defendant to inspect, copy or photograph:

- 1) All statements of the defendant
- 2) A defendant's prior criminal record, if any, and
- 3) books, papers, documents, data, photographs, tangible objects, buildings, or places and
 - (a) the item is material to preparing the defense
 - (b) the government intends to use the item in its case-in-chief
 - (c) the item was obtained from or belongs to the defendant
- 4) Reports of physical or mental examination or any scientific test or experiment if
 - (a) the item is within the government's possession, custody, or control
 - (b) the AUSA knows or should know it exists
 - (c) the item is material to preparing the defense or the government intends to use the item in its case-in-chief
- 5) Written summary of expert witnesses the government intends to call during its case-in-chief

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

Continuing duty to disclose: Once a defendant has requested discovery, the government has a continuing duty to provide the information requested, even if it is not found until after the original request. For example: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

Defense disclosure: Since the defense has no obligation to prove innocence, very little discovery will be provided by the defense to the prosecution. Some exceptions include the notice of an alibi or insanity defense.

2. **Giglio material** – The government must disclose any information that bears adversely on the credibility or bias of a **government witness** (including SA's). See *SDR PA-11 ICE Giglio Policy, June 28, 2018*. Example: (b)(5); (b)(7)(E)
- (b)(5); (b)(7)(E)

a. **Giglio procedure** – (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

b. **Employment complications** – (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

3. **Henthorn Rule** – Henthorn’s attorney asked the prosecution “to produce the personnel files of **all law enforcement witnesses** whom it intends to call at the trial ... for evidence of perjury or other like dishonesty for impeachment purposes.” If the prosecution is uncertain about the materiality of information within its possession, it may submit the information to the trial court for an in-camera inspection and evaluation.

4. **Jencks Rule** – The government must disclose any statements or reports made by a government witness (including SA’s) relating to the subject of that person’s testimony at trial.

Note: (b)(5); (b)(7)(E)
(b)(5); (b)(7)(E)

5. **ICE Policy** – Electronic messaging may not be used for substantive communications because these communications are often not as complete as formal investigative reports. Additionally, informal opinions may not appropriately reflect the position of the agency or provide a complete picture of the situation, and could potentially hinder prosecutorial efforts. Thus, while substantive communications must occur by an ROI, an ROI may still be transmitted to United States Attorney's offices electronically. Electronic messaging may still be used to communicate efficiently

concerning non-substantive matters, such as scheduling a witness interview or making travel arrangements. However, employees must use caution when communicating about such non-substantive matters not to permit the discussions to turn to matters of substance.

Substantive electronic messages that are potentially subject to disclosure must be preserved for production and review by the attorney prosecuting the case, as he or she will make the final determination as to what constitutes discoverable material under Jencks or the Federal Rule. Adequate preservation includes ensuring that email statements stored in electronic and /or paper files are easily retrievable upon demand.

See SDR PA-12 The Use of Electronic Messaging and Investigative Reports, June 17, 2009.

Demonstration	(b)(5); (b)(7)(E)	
(b)(5); (b)(7)(E)		

III. Describe the criminal defendant’s Sixth Amendment Right to Counsel (EPO 3).

- A. The Sixth Amendment, in part, states that “[I]n all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense.” This provision guarantees that the conviction of the accused will be the product of an adversary process, rather than the *ex parte* investigation and determination by the prosecutor.
- B. When the right to counsel starts (what the law calls "attaches")
 - 1. The right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him.

2. One does not become an accused for right to counsel purposes simply because he has been detained by government authorities who contemplate filing criminal charges against him.
3. On the other hand, once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all **“critical” stages** of the criminal proceedings and if police deliberately elicit incriminating statements from him in the absence of a lawyer, the right will have been denied.
4. The **“critical” stage** has been interpreted by the Court to start at the time of formal charging, preliminary hearing, indictment, information, or arraignment. (See Right to Counsel Analysis chart below.)

C. The right to counsel is offense specific.

Texas v. Cobb, 532 U.S. 162 (2001): Raymond Cobb, a 17-year-old accused of burglarizing a home, waived his *Miranda* rights and admitted to the burglary while denying any knowledge of the whereabouts of a mother and her 16-month-old daughter who had occupied the home at the time of the burglary. Cobb was later indicted on the burglary charge that fixed his Sixth Amendment right to counsel. While free on bond Cobb confessed to his father that he had murdered the mother during the burglary and buried alive the daughter with her mother. After being reported to the police by his father, Cobb was arrested on murder charges, waived his *Miranda* rights, confessed and was convicted of the murders. On appeal, the defense argued that Cobb’s Sixth Amendment right to counsel precluded any attempts by the police to deliberately elicit information from Cobb about the “factually related” murders. The Supreme Court held, however, that even though the murders were closely related to the burglary, the burglary and murder offenses required different elements of proof and thus were separate offenses. Since Cobb’s Sixth Amendment rights were specific to the burglary charges, Cobb had no right to the presence of his previously appointed counsel during the interrogation concerning the murder charges, and his confession was admissible.

D. The right to counsel may be waived by a defendant and the defendant may do so whether represented by counsel or not.

Note: (b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

E. Right to Counsel Analysis Chart

Right to Counsel Analysis
(b)(5); (b)(7)(E)

Demonstration
(b)(5); (b)(7)(E)

IV. Explain the SA’s obligations associated with pretrial depositions, witnesses, and the Confrontation Clause. (EPO 4)

- A. Confrontation – The Confrontation Clause of the Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.” The Sixth Amendment protects the right of a criminal defendant to confront the prosecution’s witnesses for the purpose of challenging their testimony.

- B. **Crawford Rule** – Testimonial statements of witnesses absent from trial will be admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine. *See SDR PA-13 Alien Witnesses*. This is based on the defendant’s right to confront his accusers in his criminal trial (Confrontation Clause).

- C. Impact of *Crawford Rule* on SA

- 1. (b)(5); (b)(7)(E)

- 2.

- 3.

- 4.

- 5.

- 6.

(b)(5); (b)(7)(E)

Demonstration:

(b)(5); (b)(7)(E)

(b)(5); (b)(7)(E)

V. Student Practice

(b)(5); (b)(7)(E)

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Withheld pursuant to exemption

(b)(5) ; (b)(7)(E)

of the Freedom of Information and Privacy Act

(b)(5); (b)(7)(E)

CONCLUSION

I. Summary of Main Ideas

- A. A criminal complaint is needed. If an arrest warrant was obtained without a criminal complaint, then one must be promptly prepared and presented to the magistrate after the execution of the arrest warrant.
- B. SAs must promptly present criminal defendants before a magistrate judge.
- C. Foreign nationals should be provided with rights connected to consular notification.
- D. Defendants are entitled to a grand jury or a preliminary hearing. If their case is held over for trial, then they must be arraigned.
- E. Certain information, in the form of discovery, must be made available to the defendant prior to trial.
- F. In a criminal prosecution, the accused has the right to counsel.
- G. A defendant has a right to confront and cross-examine any witness against him.

II. Objectives

Terminal Performance Objective – Given a law enforcement scenario with the arrest of a subject, determine and explain the post-arrest obligations; in accordance with the Sixth Amendment, Federal Rules of Criminal Procedure 4 and 5, and Section and Title 18 of the U.S. Code.

EPO	OBJECTIVE
1	Explain post-arrest obligations that arise immediately after arrest.
2	Describe the SA’s obligations associated with matters pretrial.
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4	Explain the SA’s obligations associated with pretrial depositions, witnesses, and the Confrontation Clause.

III. Motivation

As a Special Agent, your handling of post-arrest obligations is critical to the government’s ability to appropriately prosecute defendants. Without proper care and following of procedures, criminal elements can be released on technicalities.

IV. Integration

This lesson addressed the obligations you must meet after arresting a subject. You have now been exposed to the investigative plan development, evidence collection, and arrest and post-arrest obligations for a case assignment. Next, we

will discuss the Federal Sentencing Guidelines and how the FSG can aid the criminal investigation process.

V. Test or Final Activity

Although you will be tested on your knowledge of post-arrest obligations in the legal examination, your ability to address these obligations will be tested each time you make an arrest.

PA Lesson Student Drive Reference Index

- PA-1 Post Arrest Flow Chart
- PA-2 Sample Criminal Complaint
- PA-3 Sample Arrest Warrant
- PA-4 HSI Implementation of DNA Sample Collection, April 18, 2012
- PA-5 Prompt Presentment Flow Chart
- PA-6 DRO/OI Protocols Handling Unaccompanied Alien Children, 10-1-2007
- PA-7 Consular Notification or Detained or Arrested Foreign Nationals, ICE Directive 7-3.0, 2-13-2006
- PA-8 Questions about Foreign Nationals
- PA-9 Foreign Embassies Contact Information
- PA-10 Sample Subpoena to Testify Before a Grand Jury
- PA-11 ICE Giglio Policy, June 28, 2018.
- PA-12 The Use of Electronic Messaging and Investigative Reports, June 17, 2009
- PA-13 Alien Witnesses and Informants Pending Removal, 5-18-2005
- PA-14 Sample Warrant for the Arrest of a Witness or Material Witness Pending Criminal Case
- PA-15 Sample Order to Detain a Defendant Temporarily Under 18 U.S.C. 3142(d)
- PA-16 Operations Manual ICE Performance Based National Detention Standards Index, 5-17-2011