The BACK BENCHER

Central District of Illinois Federal Defenders

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DEFENDER'S MESSAGE

The practice of federal criminal defense law is an increasingly specialized area of the law, and this is even truer for federal criminal appellate practice. Unless you are one of the lucky few who practices regularly in the Seventh Circuit Court of Appeals, it can be a daunting task to have a working knowledge of the Federal Rules of Appellate Procedure, Criminal Procedure, and Evidence; the Circuit Rules; and, of course, the substantive federal law. For the lawyer who only occasionally litigates cases on appeal, the opportunities for mistakes are great and the penalties for them can sometimes be severe. *See e.g.*, *United States v. White*, 472 F.3d 458 (7th Cir. 2006) (entering a rule to show cause why appellate counsel should not be fined $1,000 for failure to include required documents in the appendix).

Unlike the typical panel attorney who must practice in a number of different areas and forums, my office has a number of lawyers who practice exclusively in the Seventh Circuit Court of Appeals. Indeed, since agreeing in 1999 to accept appointments from the Seventh Circuit in cases where trial counsel has withdrawn on appeal, my Appellate Division staff and I have litigated over 650 cases in the Seventh Circuit Court of Appeals. In that time, we have encountered nearly every procedural and substantive issue that can arise in a case on appeal. To help lawyers who do not have the luxury of limiting their practice to the Seventh Circuit, but nevertheless find themselves in this forum occasionally, our office is conducting a seminar on appellate advocacy in Peoria, Illinois on Friday, March 23, 2007. Our seminar is your chance to benefit from our experience.

The seminar will cover a wide range of topics useful to both the trial and appellate lawyer. Included among the topics are: preserving issues for appeal; an update on recent decisions of the Seventh Circuit; the "ins and outs" of filing *Anders* briefs; a panel discussion of issues common to litigating appeals; and a question and answer session. We will also have a "nuts and bolts" presentation on the procedural aspects of litigating a case in the Seventh Circuit, which will address the format of briefs, what does and does not go into the appendix, and all of the rules which often trip up appellate lawyers in the Seventh Circuit. The seminar will also give you an opportunity to gain 3.75 hours toward your Illinois MCLE requirements, including .75 hours of professional responsibility credit. As always, the seminar is free to panel attorneys. For more details about the seminar, please see the seminar agenda and registration form attached to the back of this issue of *The Back Bencher*.

Seminar attendees will receive as a handout an extensive handbook covering every aspect of litigating a criminal appeal in the Seventh Circuit. My staff and I have put a considerable amount of time and effort into this handbook, putting our combined experience into one easy-to-use reference. This handbook covers topics including: initiating an appeal; gathering and reviewing documents; research and writing; the rules governing briefs; oral argument, post-opinion filings; motions practice; and communicating with clients--to name but a few of the topics. Accompanying the handbook is an extensive appendix which will have sample motions, briefs, and other documents. This handbook will be of great value to the experienced and novice appellate practitioner alike.

All panel attorneys in the Seventh Circuit are invited to attend this seminar, and I would like to extend a special invitation to the panel attorneys in the Southern District of Illinois. Having served as Acting Federal Public Defender in your district for over a year, I have a special interest in the Southern District Office and have maintained a close connection with Phil Kavanaugh, as well as the panel attorneys in the Southern District of Illinois. As part of the continuing cooperation between our districts, I hope that some of you from the Southern District will be able to make the trip to Peoria for the seminar.

Appearing before the Seventh Circuit Court of Appeals can be an intimidating experience, but also an exciting one. Arguing in the well of the Seventh Circuit's courtroom and holding your own with some of the most respected jurists in the country is a unique and rewarding experience for any lawyer. It is my hope that our seminar and handbook will enhance your ability to continue your fight for your clients in the appellate court.

Sincerely yours,

Richard H. Parsons
Federal Public Defender
Central District of Illinois

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CHURCHILLIANA

"Those whose minds are attracted or compelled to rigid and symmetrical systems of government should remember that logic, like science, must be the servant and not the master of man. Human beings and human societies are not structures that are built or machines that are forged. They are plants that grow and must be treated as such."

-Winston Churchill

Dictum Du Jour

"True evil has a face you know and a voice you trust."

-Anonymous

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Parsons' Official Rule of Golf #36: Ball Hit Under Undue Pressure

A player is entitled to relief when anxiety-producing conditions exist, as follows:

1. If a player hits his ball into an adjacent fairway, and players on that hole require him to make his next shot under their observation before they continue their play of that hole, and he then mis-hits his ball, he may either play it again from the place where it comes to rest without assessing a stroke, or he may wait until those players have vacated the fairway, then return to the approximate spot where his ball originally lay, place it in an equally favorable lie, and replay the stroke.

2. If a player is playing through another group of players on any hole, or has been waved up to hit on a par-three hole by a playing group that then stands aside on the edge of the green and watches, and he proceeds to grossly misplay the hole, his score shall be reduced to whatever score he honestly believes and forcefully asserts that he would have achieved had he not been subjected to stressful conditions of play.

3. If a player is obliged to hit a shot on any hole where the groundskeepers are operating grass-cutting machinery, tending to greens or bunkers, repairing or

reseeding damaged turf, or are otherwise engaged in grooming the course, and that player makes an unsatisfactory shot, he may replay it once without assessing a stroke, regardless of whether he mis-hit his original ball as a result of his nervous concern for the well-being of the course maintenance personnel or his morbid fear of their ridicule.

--Henry Beard, *The Official Rules of Bad Golf* (2006)

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[Editor's Note: We've all heard the phrase, "She read me the Riot Act," or something similar. If you're like me, you may have wondered just what exactly the "Riot Act" is and what it says. Well, wonder no longer.]

The British Riot Act: "Our Sovereign Lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the Act made in the first year of King George the First for preventing tumults and riotous assemblies. God Save the King."

Under the Riot Act of 1714, once a magistrate had read this passage within the hearing of a crowd greater than twelve, the 'rioters' had one hour to disperse before their presence ceased to be a misdemeanor and became a felony, ultimately punishable by death. The wording had to be read exactly as written, since at least one conviction was overturned because "*God Save the King*" had been left out. The Riot Act was repealed in 1973.

-Ben Schott, *Schott's Original Miscellany* (2003)

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Flynn staggered home very late after another evening out with his drinking buddy, Paddy. He took off his shoes to avoid waking his wife, Mary.

He tiptoed as quietly as he could toward the stairs leading to their upstairs bedroom, but misjudged the bottom step. As he caught himself by grabbing the banister, his body swung around and he landed heavily on his rump. A whiskey bottle in each back pocket broke and made the landing especially painful.

Managing not to yell, Flynn sprung up, pulled down his pants, and looked in the hall mirror to see that his butt cheeks were cut and bleeding. He managed to quietly find a full box of Band-Aids and began putting a Band-Aid as best he could on each place he saw blood. He then hid the now almost empty Band-Aid box and shuffled and stumbled his way to bed.

In the morning, Flynn woke up with searing pain in both his head and his butt, and Mary staring at him from across the room. She said, "You were drunk again last night, weren't you?" Flynn said, "Why do you say such a mean thing?"

"Well," said Mary, "it could be the open front door. It could be the broken glass at the bottom of the stairs. It could be the drops of blood trailing through the house. It could be your bloodshot eyes, but mostly ... it's all of those Band-Aids stuck on the hall mirror!"

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[Editor's Note: I've heard this song many times, but only recently did I find the words, thanks to *Schott's Original Miscellany* by Ben Schott.]

Hail to the Chief we have chosen for the nation,
Hail to the Chief! We salute him, one and all.
Hail to the Chief, as we pledge cooperation
In proud fulfillment of a great, noble call.
Yours is the aim to make this grand country grander,
This you will do, That's our strong, firm belief.
Hail to the one we selected as commander,
Hail to the President! Hail to the Chief!

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"To be empirical is to be guided by experience, not by sophists, charlatans, priests, and demagogues."

-William Mayer, *On Being Empirical*

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"Pity is no stranger to hell. Hell brims over with self-pity. The case of the vulgar damned, outside the precincts of the enameled green, *verde smalto*, where congregate the biblical and intellectual elite, is clear-cut. They wail and gnash their teeth as they suffer the ghoulish punishments devised by supreme wisdom, *somma sapienza*, working hand in hand with primal love, *primo amore*. Sometimes they feel they have been entrapped: if only one had forborne from giving that last bit of evil counsel or had repented earlier, eternity would not be filled with the same unbearable pain, guaranteed to augment when, after the Last Judgment, the flesh shall be rejoined with the spirit."

--Dante's *Inferno*, per Louis Begley's *Wartime Lies*

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"A jury convicted Henry Renken of bank robbery (and using a firearm while committing the robbery) after concluding that he had held up the North Side Community Bank in Gurnee, Illinois, and relieved it of over $18,000 in cash before making his getaway on, of all things, a bicycle. As he fled, the college-educated Renken (he earned a bachelor's degree in biology from Ripon College in Ripon, Wisconsin, in 1976) proclaimed, 'You can thank President Bush and the economy for this.'"

--*United States v. Renken*, ___ F.3d ___ (7th Cir. 2007; No. 05-2838).

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"These rules make clear that the principle enunciated in an 1807 case cited to us by the defendant that 'authentication must not rest upon probability,' *United States v. Burr*, 25 Fed. Cases 27, 28 (Cir. Ct. D. Va. 1807), is no longer the law, even if it was said by Chief Justice Marshall in the treason trial of Aaron Burr."

-- *United States v. Hampton*, 464 F.3d 687 (7th Cir. 2006; No. 05-3591).

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"[Rule 65(d)] is an old rule, easy to understand and easy to follow; that it should be ignored repeatedly by both the judge and counsel in large-stakes commercial litigation is unfathomable . . . Gobs of judicial (and law-firm) time have been squandered by the combination of sloppy drafting, repeated violations of Rule 65(d), and inattention to all sources of subject-matter jurisdiction. If these lawyers were physicians, their patients would be dead."

--*Blue Cross & Blue Shield v. American Express Co.*, 467 F.3d 634 (7th Cir. 2006; No. 05-4004).

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"Filipiak also contends that the district judge did not consider her 'pro-social lifestyle' (whatever in the world that means) in fashioning her sentence."

--*United States v. Filipiak*, 466 F.3d 582 (7th Cir. 2006; No. 05-4572).

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"In early 2002, steep taxes imposed by various levels of government in Illinois resulted in a levy of 92 cents per pack for consumer purchases of cigarettes in Chicago. At the same time, cigarettes sold in Indiana were taxed at a mere 15.5 cents per pack. An entrepreneur with a car and a willing buyer in Chicago could make a pretty penny, especially if coupons could be used to keep a lid on operating expenses. But arbitrage in this context is called tobacco diversion, and it is illegal. Daryl Harper appeals his convictions and sentence for taking part in such a scheme. [Footnote]: In a two-part episode of *Seinfeld*, Kramer and Newman devised a similar scheme to capitalize on Michigan's higher deposit for soda bottles and cans by using a postal truck to transport recyclables gathered in New York for return in Michigan. Alas, the plan was foiled by a fanatical auto mechanic in possession of Jerry's car and JFK's golf clubs. *Seinfeld: The Bottle Deposit: Parts 1 & 2* (NBC television broadcast May 2, 1996)."

--*United States v. Harper*, 463 F.3d 663 (7th Cir. 2006; No. 05-3807).

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"One might join a golf club because it had a nice dining room and swimming pool, yet never play golf. And one might join a gang to feel like a big shot or to obtain immunity from being beaten up by gang members, without participating in the gang's criminal activities."

--*United States v. Avila*, 465 F.3d 796 (7th Cir. 2006; No. 05-18994).

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"As we said at oral argument, we leave open the possibility that a one-day sentence of imprisonment might be justifiable for a defendant who rivals Robin Hood; but Repking, a millionaire who stole for himself and his friends, is not that defendant."

--*United States v. Repking*, 467 F.3d 1091 (7th Cir. 2006; No. 06-1410).

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"Benjamin Franklin said it in 1789: 'In this world, nothing can be said to be certain except death and taxes.' Glen Murphy, a chiropractor from the posh Waukesha County (Wisconsin) suburb of Elm Grove, didn't agree with the taxes part of Franklin's statement. Inappropriately acting on that belief earned Murphy an indictment for filing false income tax returns (seven counts) and willfully not filing at all (three counts)."

--*United States v. Murphy*, 469 F.3d 1130 (7th Cir. 2006; No. 06-1309).

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"But the lawyers have wasted our time as well as their own and (depending on the fee arrangements) their clients' money. We have been plagued by the carelessness of a number of the lawyers practicing before the courts of the circuit with regard to the required contents of jurisdictional statements in diversity cases. It is time, as we noted in *BondPro*, that this malpractice stopped. We direct the parties to show cause within 10 days why counsel should not be sanctioned for violating Rule 28(a)(1) and mistaking the requirements of diversity jurisdiction. We ask them to consider specifically the appropriateness, as a sanction, of their being compelled to attend a continuing legal education class in federal jurisdiction. Are we being fusspots and nitpickers in trying (so far with limited success) to enforce rules designed to ensure that federal courts do not exceed the limits that the Constitution and federal statutes impose on their jurisdiction? Does it really matter if federal courts decide on the merits cases that they are not actually authorized to decide? The sky will not fall if federal courts occasionally stray outside the proper bounds. But the fact that limits on subject-matter jurisdiction are not waivable or forfeitable–that federal courts are required to police their jurisdiction--imposes a duty of care that we are not at liberty to shirk. And since we are not investigative bodies, we need and must assure compliance with procedures designed to compel parties to federal litigation to assist us in keeping within bounds. Hence Rule 28 and hence the responsibility of lawyers who practice in the federal courts, even if only occasionally, to familiarize themselves with the principles of federal jurisdiction. It would be delightful, but irresponsible in the extreme, for us to ignore the limits on our jurisdiction, forget the rules intended to prevent us from ignoring those limits, direct the Clerk of the court to tear out the parties' jurisdictional statements before distributing the briefs to us, and jump directly to the merits of any case that the parties would like to litigate in federal court."

--*Smoot v. Mazda Motors*, 469 F.3d 675 (7th Cir. 2006; No. 05-4577).

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"Stripped naked in a small prison cell with nothing except a toilet; forced to sleep on a concrete floor or slab; denied any human contact; fed nothing but 'nutri-loaf'; and given just a modicum of toilet paper--four squares--only a few times. Although this might sound like a stay at a Soviet gulag in the 1930s, it is, according to claims in this case, Wisconsin in 2002. Whether these conditions are, as a matter of law, only 'uncomfortable, but not unconstitutional' as the State contends, is the issue we consider in this case."

-- *Gillis v. Litscher*, 468 F.3d 488 (7th Cir. 2006; No. 06-2099).

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"Many years ago, I ran into a criminal defense lawyer--the sort of Damon Runyonish character who has gone the way of the dodo bird--who had just lost a highly publicized case. I began to commiserate with him, but he stopped me and, beaming said, 'Don't be silly. I have just taken my first step toward a successful appeal.'"

--"How to Tell a Judge He Screwed Up," 32 NO 4 *Litigation* 49 (written by Judge Robert W. Gettleman)

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"The conditions at LaGrou's cold storage warehouse at 2101 Pershing Road in Chicago were enough to turn even the most enthusiastic meat-loving carnivore into a vegetarian. . . . Although LaGrou usually noted product damage on outgoing bills of lading to customers, LaGrou did not tell its customers the damage was caused by rodents. Instead, LaGrou's practice was to tell the customer that the product had been thrown out because of warehouse damage, such as from torn boxes or forklift mishaps. LaGrou employees started writing 'MM' (short for 'Mickey Mouse') on outgoing bills of lading to differentiate the rodent damage from other warehouse-related damage. Upon discovering that LaGrou employees were using the 'MM' notation for rodent-damaged product, Stewart instructed them to stop doing so because he did not want customers asking what 'MM' meant."

--*United States v. LaGrou*, 466 F.3d 585 (7th Cir. 2006; No. 05-3361).

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"The fig leaf of respectability providing the motive behind this law is that it is necessary to prevent voter fraud--a person showing up at the polls pretending to be someone else. But where is the evidence of that kind of voter fraud in the record? Voting fraud is a crime (punishable by up to 3 years in prison and a fine of up to $10,000 in Indiana) and, at oral argument, the defenders of this law candidly acknowledged that no one--in the history of Indiana--had ever been charged with violating

that law . . . If that's the case, where is the justification for this law? Is it wise to use a sledgehammer to hit either a real or imaginary fly on a glass coffee table? I think not."

--*Crawford v. Marion County Election Board*, ___ F.3d ___ (7th Cir. 2007; No. 06-2218).

[Editor's Note: Charles Sevilla is an old friend of mine, but I did not know when I first met him years ago at an NACDL meeting that he was the author of the Wilkes *series of books due to his use of a* nom de plume, *Winston Schoonover. Many thanks to Mr. Sevilla for allowing us to reprint his stories here. I hope our readers enjoy his work as much as I do.*

You can read more Wilkes*-related stories in old issues of* The Champion *magazine, as well as in three full-length books published by Ballentine novels, entitled* "Wilkesworld", "Wilkes on Trial", *and* "Wilkes: His Life and Crimes"*, from which the following two Chapters are from. Last month we reprinted Chapters 1 and 2, and we are continuing the series now with Chapters 3 and 4.*

We will continue with successive Chapters of "Wilkes: His Life and Crimes" *in future editions of* "The Back Bencher."

WILKES: His Life and Crimes

A Novel by: Winston Schoonover

- 3 -
Akbar

You have put me in here [in jail] like a cub, but I will come out roaring like a lion, and I will make all hell howl!

- Carrie Nation

This riot is the fault of criminal defense lawyers who clog the courts with their motions, delay trials, and keep their own clients in the Tombs.

- Manhattan's District Attorney (1970)

Friday, October 2, 1970, was the unluckiest day of my life. To get thrown into the Tombs for contempt of court was bad enough, but precisely on the date the inmates of that dark dungeon elected to riot was ridiculous! What a predicament: Wilkes and I were now holed up on the Tombs' twelfth floor along with eighteen guards (the hostages) and two hundred raging barbarians.

The inmates were absolutely out of their minds: crazed with anger from the wretched conditions of the Tombs; insane with glee that they were now free of their tiny cells and oppressive guards. It was an explosive mix of emotions. But it was also apparent they were filled with the fright and excitement that comes when the mob forcibly takes over from all-powerful authority which everyone knows will soon regain the upper hand. Just like it did back in August. In eight motherf****n' hours!

No matter. The barbarians trashed the place: they threw burning debris out the windows, which I am told looked like slender firefalls to the constant crowd of free people who stood at night in the streets below. The brutes on the twelfth floor bellowed riot rhetoric to folks in the streets - "Kill the pigs!" and "We want the mayor." They cussed; they screamed and fought with each other; they scared the hell out of me.

Akbar

Not that I blamed them. Anger and violence were natural results of stacking men like cordwood in a cesspool. You don't do that to people and expect gratitude and loyalty in return. But Wilkes and I were revulsed at the meanness of the riot. We looked at the captive guards and saw the fear etched deep in their faces. The inmates taunted them with constant threats of castration and death. We knew it was necessary to quickly make known to these uncaged maniacs just which side we were on.

It took Wilkes about thirty seconds to strip off his suit, put on a Yassir Arafat head covering (made from his torn shirt) and sunglasses (taken from a guard), and announce himself as "Akbar, revolutionary lawyer, leader of the oppressed in the everlasting battle against the capitalist avaricious plunderers."

I quickly followed suit. The idea of joining up with these rioting lunatics was no matter of principle; it was a question of survival. Call it hostage syndrome, discretion, or cowardice, since we still seemed to have a choice in the matter of our fate (unlike the guards), it was really just a matter of natural selection. Our chances were much better if we had some voice in the direction of the madness.

Adopting revolutionary identities was a necessary move. Better not let anyone know who we were so we could

have deniability in the riot's aftermath. The PLO headgear and sunglasses would help serve that end by changing our ethnicity while simultaneously generating an air of mystery and connectedness with the barbarians.

First Night

As Akbar and Amadan (my moniker for the riot), Wilkes and I tried to look fierce and authoritative. Luckily, Wilkes's client, Johnny Wad, and J. J. Jefferson, my cell mate for all of ten minutes before we were sprung in the first moments of the revolt, threw their fate in with ours and became our public relations men, soft-selling us to anyone who would listen as "motherf****n' comrades in the common cause of our liberty."

"These boys is da real thing," said J. J. To those few who were not sacking and pillaging. "They is radical motherf****n' lawyers in here for revolutionary crimes. Just like us. Called their judge is a f***ing stooge, a capitalist viper, a hanging racist. They is here 'cause they told the motherf****n' truth!"

This was only a few miles from the truth, but close enough under the circumstances. Johnny Wad added, "Yeah, man, Akbar here done me good. He told the motherf****n' greasy pig judge to stick his gavel where the sun don't shine."

There was too much madness going on for any of the barbarians to care about two PLO pinko lawyers. Our two front men didn't get us much of a following, but they did keep us from being put under "revolutionary arrest" and thrown in with the guards. We were tolerated as a couple of oddball off-white curiosities amid the black and brown group madness.

All Night Long

By Friday evening, the movie auditorium had become the revolution's command headquarters. Leaders of the three major gang factions, the Panthers, Muslims, and Young Lords, were doing what came naturally - arguing and brawling over who would lead and what to do. There was no one in control and little prospect of any one group or person taking it.

Worse, no one was even coming close to talking realistically about what had to be done. The best that could be done was to reason with the Man, state the case for better conditions, get promises of improvement and amnesty for the rioters, and return the hostages unharmed. In other words, give up.

None of these ideas entered the inmate discussions - which were more like yelling contests - that first night. Instead, they ranted about forcing Commissioner of Corrections George McGrath to personally drive them all to Kennedy International and give them a million bucks, a pilot, a plane, and free passage to Algeria.

One realistic black said he'd settle for a Big Mac for dinner every night instead and was jeered by the Puerto Ricans as an Uncle Tom. That set off a tag team fistfight between the Lords and Panthers.

A Muslim said it would be just fine if out of this riot they got a right to jail-supplied toothpaste and soap and regular showers. Tombs policy was, you buy your own. Curses and hisses were the mob's response to this reasonable goal.

A Puerto Rican Young Lord said they should make it clear that they meant business and kill a guard every day until Mayor Lindsay personally came to the Tombs and gave in to all their demands.

A loud shout of "Right on!" came from the mob.

A Panther screamed that they should demand more dope for the infirmary as supplies had already been depleted during the rush at the outset of the riot.

"Right on!" again.

These were the only areas of agreement that first tumultuous, frightening night. The barbarians argued over everything. Who should talk. Who should represent them with the Man. Who they would negotiate with. For most of the night, there was no single discussion. Instead, multiple screaming harangues and fights made it impossible to follow any single train of thought. Reason took the night off.

On and on the arguing went all night long. Wilkes, J.J., Johnny Wad, and I just sat quietly in a corner and watched. It was far too volatile a crowd even to attempt to influence at this point. "Better to let the loons exhaust themselves in their rhetoric. It won't accomplish a thing. Wait until they are desperate for direction," said Wilkes. "Then it will be time for Akbar."

I had a feeling as my friend spoke these words that the right time for Akbar would be when the barbarians were back in their cells. With this happy thought in mind, I fell asleep. The last words I heard that horrible first night were those of the most vocal Panther: "We gonna spill da blood of them dried-up cracker guards till the pigs runnin' this sh*thole drowns in it."

Saturday, October 3, 1970

The next morning I awakened to the roar, "We want the mayor. We want the commissioner." I got up. The auditorium was nearly empty of barbarians, and Wilkes, J.J., and Johnny Wad were nowhere to be seen. I slipped out to the cell block area of the twelfth floor and saw most of the men shouting out the shattered, barred windows for Mayor Lindsay and Commissioner McGrath. I was surprised to hear a retort every bit as loud from the people in the street. "All power to the Tombs Two Hundred," they chanted. I noticed the Tombs was ringed below by a thin blue line of well-armed police listening to the shouting choruses in silence.

After about an hour of shouting, the barbarians grew hoarse. They were also noticeable fatigued from their all-night caucus and irritable because there was nothing left on the floor to burn or break or shoot up. Most sauntered back to the auditorium to listen to more insanity from the stand-up comics who posed as the leaders of these lunatics. When I got there, the barbarians were arguing over the impending police invasion.

"The white devils will be here in no time to rescue the pigs," said one. "We got to do it." He didn't elaborate on what "it" entailed.

"We gotta have a plan. We need our warriors to take sniper positions for the attack," said another.

"And shoot with what?" asked an intelligent one. "Our di**s?"

With that, another fight started. A Muslim bit a Panther. Two Panthers clubbed a Young Lord. Two Lords beaned a Muslim. The whole assembly was on the verge of exploding in cannibal violence.

Wilkes - Akbar to the barbarians - stood in the center of the auditorium's stage atop a chair, his arms folded before him and his head turning slowly from one side to the other. With shades on his unshaven face, his PLO turban, and his long naked upper torso glistening with sweat, he was an impressive sight.

In a booming voice, he said eight little words which bought him the mob's attention: "IT IS A GOOD MOTHER F****N' DAY TO DIE!"

J.J., Johnny Wade, and I figured this was the move we had been waiting for and shouted for the crazies to listen to Akbar. "Listen to the dude, man," we said. "He's cool. He can get us motherf****rs together! He's right on!"

Whether out of exhaustion, desperation, or apathy, most of the barbarians shut up. Maybe it was the pure shock of hearing someone welcome death as if it were a long lost friend. Maybe most were just waiting for one of the gangs to kill this audacious Arab. Whatever the reason, they let Wilkes speak. As he began, I thought that this speech had better be good or we were in big trouble.

"Yes," said Akbar, "it is a good day to die if you want to end your motherf****n' life in this capitalist sh*thole for absolutely nothing. Right now, out in the so-called free world, the bourgeois vultures are looking forward to your extermination. We are just so many rats to the grandees who run this motherf****ng country. Right now you're doing precisely what they want. You're acting like stupid animals instead of revolutionaries. Just what the capitalist gangsters and their lackeys expect of you!"

Wilkes was shouting at the top of his lungs from the top of the chair. He was gesticulating wildly with his arms as if punching imaginary capitalists would impress this jury of his peers.

"Fools!" he continued. "You are giving them a glorious pretext to raid the place and kill us all to save the guards. All in the name of motherf****n' Western civilization!"

The mob was listening. I heard only a few rumbles of "Who the f**k is this motherf****n' camel jockey?" and the like, but most seemed to like the radical crap they were hearing.

Akbar continued. "You want to play puppet for the racist motherf****ng white devils out there? They're ready to pull your strings. They're drooling to kill us all! And we'll die for what? For the Man! To justify toilets like this! To show the motherf****n' world that we're subhuman sewage only fit to be stuffed into the garbage can! To give the Man's motherf****n' lackeys an excuse to make the motherf****n' conditions here even motherf****n' worse! Is that why we took over this motherf****n' sh*thole? Is it?"

True Believers

A group of blacks shouted, "No!"

God, I thought. Wilkes was on a roll. He got in more motherf****n's in one sentence than I'd ever heard before. And the mob was diggin it. It was just like when Wilkes gave a great closing jury argument: What charisma! What electricity! What baloney!

The Young Lords closed in around Wilkes. One said, "*Hombre, digame!*"

Wilkes went on with his political harangue for another hour. It was a magnificent performance. Just like closing jury argument - you rant and rave, you ooze sincerity and dedication for your client's cause, and while you may not believe a word of what you're saying, it's unimportant. What counts is that the audience believes. These raging barbarians believed.

When Akbar ended, he had a following sufficiently large to get a few things decided. Akbar made negotiations with the outside the first priority. We would parlay the guards for amnesty and guarantees of better conditions. We would negotiate only with the mayor or the commissioner, with designated representatives of the press present to play honest broker.

Wilkes suggested a troika lead the prisoner negotiating team and be composed of one Panther, one Muslim, and a Young Lord. He and his assistant, Amadan - me - would serve only as counselors to the barbarian triumvirate.

Sunday, October 4, 1970

By Sunday morning, a meeting was set up with the commissioner and reporters in the Tombs. We learned over the radio of other riots in two jails in Queens and another in Brooklyn. Mayor Lindsay announced no new prisoners were to be sent to jail, but he was almost immediately overruled by - what else? - a motherf****ng judge. I wondered if it was Blugeot.

It was good that the mayor was willing to give such a sign of good faith even if some black-robed bastard, without the good sense to refrain from pouring gas on an out-of-control fire, thought it perfectly okay to send more inmates into a rioting jail.

Our first meeting with Commissioner McGrath and the reporters was a disaster. McGrath only offered the expected - not to raid the place if we would immediately give up and turn over the guards. He said he agreed the jail conditions and trial delays were outrageous and promised his and the mayor's good offices to do all they could to improve things. That was all.

In other words, if we gave up, we would be prosecuted for insurrection and end up spending more time in the Tombs under even worse conditions. The old-timers said these same promises had been made to end the August riot. Not one thing had been done to make good on them.

The troika leaders were not happy. They mumbled to the commissioner about the many injustices that occurred every day in the miserable dungeon. As they got worked up, their expressions of disgust turned angry. One of them, the Panther, looked at Wilkes and said, "Akbar will give you our response." The three inmates stared at my friend.

Akbar Speaks

This was what you call a delicate situation. Wilkes had to convince two very different audiences with his words: he had to appease our three barbarian brothers - this would require Akbar at his phoney, radical best. On the other hand, he had to make sure he kept his identity from the commissioner and reporters. The WASP fascist lackeys in the bar don't care for jail riot leaders. Neither do prosecutors. So with turban and shades in place, Wilkes stood half-naked, stinking, and sweaty.

"It is a good day to die," he said quietly, and immediately sat down and said nothing. The commissioner's jaw hit his chest. The reporters did a double take. The troika smiled.

After a minute of uneasy silence, Akbar said, "You offer the same words given last August when our brothers last rose in the Tombs. We listened then to your promises and believed. But things got worse here in hell. Your words are worth less than the breath it takes to say them, and we who have no mouth must scream."

Wilkes sounded like a Sioux chief addressing the Long-Knives about their lousy record on treaty commitments. He leaned forward and got eyeball-to-eyeball with the commissioner.

"Give us your solemn word before these reporters that there will be no reprisals and no prosecutions. Give us the mayor's written promise to act on the conditions of this toilet you call a jail. Pressure the courts to give reasonable bail and speedy trials. Give us these requests, and as Allah is my God, we will give you all you want in peace."

The commissioner shook his head negatively.

"Then it is a good day to die," said Wilkes. He got up and walked out of the room, followed by the troika and myself. As I left, I turned, put my hand to my turban, and said, "We who are about to die salute you." I heard the commissioner ask as I walked away, "When the hell did we get PLO in the Tombs?"

Wins

The rest of Sunday was spent watching TV to learn what the city planned on doing to us. We were pessimistic after the negotiating session, but our spirits rose when we were told that the mayor would personally address us at 9:30 p.m. on the all-news station WINS. Maybe he'd be reasonable. I prayed he'd give in to our modest demands and end the riot without the storm troopers charging in like a panzer division.

When the time came, we were all in the auditorium listening to the loud radios and hoping. The other news that day hadn't been good. On Saturday the entire Wichita State football team was killed in a plane crash. This day, news of Janis Joplin's suicide filled broadcast after broadcast. But what really got us down was the news about the Kent State massacre. A commission revealed the truth about the Ohio National Guard's murderous attack on unarmed college kids. That news hit close to home.

At 9:30 p.m. the mayor came on the air. Here's what he said: "This is Mayor Lindsay speaking to the men in the Tombs. You have thirty minutes to give up and release the guards unharmed or I will be forced to set into motion another course of action. You know what I mean."

That was it. Short and sweet. No giving in. No compromise. No nothing. Give it up or they're coming in. The barbarians looked to Akbar for guidance. Wilkes rose once more to address them. This time - for the only time I can remember during the riot - the whole place went quiet.

"Comrades! Brothers! Allah be with you! It still is a good motherf****n' day to die!" Wilkes smiled bravely. I did, too. I knew what kind of day it was - a day to get the hell out of there.

Akbar continued, "Our struggle is at hand! To hell with the motherf****n' mayor! Allah will protect us! Victory is ours! We have only to define it! I have a plan."

The Raids

At 11:30 p.m. the Tombs was retaken peaceably without force and without casualty. All of the hostage guards were released unharmed.

Within hours, however, the city battalions attacked the three other rioting jails using tear gas and billy clubs. Many inmates were savagely beaten. Only the Tombs avoided a violent end to its rebellion, and for that the city and the barbarians owe a great debt to Akbar.

The plan Akbar offered to the barbarians after the Lindsay ultimatum was his "Thermopylae strategy." He said he would send four inmates, like the few Spartans of ancient Greece, to Guard below in a glorious, bloody battle to the end. When the cops eventually killed the chosen four martyrs and reached the twelfth floor, a peaceful surrender would follow. The deaths of the four martyrs - and however many cops they could take with them - would send the message to the city: "We ain't gonna take this motherf****ng sh*t no more."

With the courage to match his convictions, Akbar said that he would be "one of the lucky four martyrs who would see Allah in heaven that day." The others would be his able public relations men, Amadan, J.J. Jefferson, and Johnny Wad.

The barbarians loved the idea. Somebody else volunteering to be killed sounded great to them. We were carried to the elevators on the shoulders of the screaming savages. They cheered our courage and our sacrifice. Akbar, still turbaned and wearing shades and no shirt, rode above the sea of black and brown arms triumphant. In front of the elevators, the barbarians let us down, and while we waited to descend, they let out a roar, "Akbar! Akbar! Akbar! Akbar!"

As soon as the elevator doors closed, separating the four of us from the bellowing barbarians, Wilkes punched the button for the eleventh floor and revised the heroic Thermopylae strategy: "We'll get back in our cells, lock the doors, and put on our street clothes. When the cops come, we play dumb. We've been on the ninth floor the whole weekend. No riot for us."

And so we did. We stopped at the eleventh and tenth and finally the ninth floor to tell the barbarian lookouts of Akbar's plan to die in glorious martyrdom. They were told to go up to the twelfth floor with the others and wait for the surrender. This done, we went back to our cells on the ninth floor, the lowest one held by the rioters, and put on our suits. I never thought I'd appreciate putting on a tie as much as I did that night.

The scheme worked better than expected. Wilkes and I were not only not suspected, but the warden was apologetic. I thought he was worried about the lawsuit we might file for being put into such a mess. After all, we were just two wacky criminal defense lawyers who stumbled into the Tombs on a fluke and a bad sense of timing. They let us bail out before the police interrogations of rioters on the twelfth floor even began.

In the weeks that followed, the media reported an

intense hunt by the police for "a PLO-type terrorist known as Akbar who led the Tombs insurrection from the beginning to end preaching communism and murder, yet who mysteriously disappeared while on a suicide mission to fight the invading police.

- 4 -

CRIBBER CRAWLEY

O that I were as great
As is my grief, or lesser than my name!
Or that I could forget what I have been,
Or not remember what I must be now!
- Richard II, Act 3, Scene 3

There was no longer the slightest doubt in my mind that intimidation was the key to winning.
- Robert Ringer

Just one week after our release from the Tombs, the morning mail brought bad news. The Bar Association for the State of New York wrote:

> Dear Mr. Wilkes,
> We have received a complaint alleging that on October 2, 1970, you were held in contempt by the Honorable Justice Joseph P. Blugeot as a result of your statement to him that he was, to wit, "a racist honky motherf***er."
>
> We are informed that this profanity was stated on two occasions to the judge during the sentencing proceedings against a criminal named John Wadkins, alias "Johnny Wad."
>
> Whereas these vulgar remarks are clearly contumacious, defamatory in the extreme, and an outrage to human decency, the Bar has determined it appropriate to hold a special expedited hearing to determine what discipline, if any, is appropriate under these circumstances.
>
> The hearing has been scheduled for November 1, 1970, in the Bar offices in New York City. You have a right to appear with counsel and present evidence.

Wilkes was in court arguing motions in a particularly nasty rape case when the letter arrived. I decided there was not a minute to waste, what with the speed with which the bar hearing was approaching. I marched straight to the criminal courts building.

Wilkes had been in fine spirits that morning prior to leaving for court. Fresh out of the Tombs and busy doing what he loved best, defending the damned, he was as high as I had seen him in a long time. "Everyone should lead a prison riot," he had said to me that morning. "It's positively intoxicating."

Outlandish

I walked into the courtroom and found Wilkes in the middle of a heated argument with the prosecutor, Miles Landish. The DA was attempting to convince the court to order the defendant in this rape case to give a sperm sample. If he refused, Landish wanted the court to get the sample "by any means necessary."

"We need the sample for several reasons," said the chubby prosecutor. "First, it will shed light on the inevitable impotency defense which Mr. Wilkes likes to use in these cases. Second, with the sperm sample, our forensic people can do wonders in determining whether his blood type matches the evidence left at the scene of the rape."

Wilkes was amused by Landish's motion. "You have a fertile imagination. And just how do you propose to get this sample, sir?"

"By court order, of course."

"Ridiculous!" said my friend. "The judge can't point to my client and say, 'Let there be sperm!' There are sill laws about our precious bodily fluids."

The two attorneys, ignoring the judge, continued talking directly to each other. Miles Landish said to my friend, "All your client has to do is what he does every night in his cell and put the results in a jar for us."

The judge evidently thought this was a great idea and interjected, "Offhand, Mr. Wilkes, that's the way I see it being done."

Holy Juices

My friend's amusement disappeared from his face. This was getting serious. The state had plenty of evidence to prosecute this case, he thought. He was damned if his own client would give them even more while he was defending. The bodily juices were to be protected at all costs.

Wilkes turned to his client. They huddled and whispered rapidly back and forth. After a few minutes, Wilkes turned to the bench and addressed the judge. "My client informs me that he is a devout Catholic and

that what you propose is forbidden by canon and biblical law - remember, Your Honor, Genesis, chapter thirty-eight, verse ten, where for spilling his seed on the ground, God slew poor old seed-spilling Onan. Any order compelling a sperm specimen will violate the First Amendment to the United States Constitution. It would be an outrageous violation of this man's freedom of religion.

"If you like, Your Honor, we can get the bishop in here to discuss this with you this afternoon. I am sure the church would be interested in any such order and would intercede amicus curiae."

Wilkes's eyes caught mine during this excellent speech. "Oh, I see my associate Mr. Schoonover is in the courtroom," he said. "Ill just ask him to call the bishop-"

The judge instantly put up a hand and said, "No, that won't be necessary."

"I have a solution," piped Miles Landish. "My office will hire a urologist to conduct a rectal prostate massage so that we can get what we need without any action required of the defendant."

A What!

"A what!" said Wilkes's client. "A rectal what?" Wilkes's client didn't understand much of what was being said, but he understood that word, all right.

"A simple, gentle massage of your prostate gland," said Landish. "It'll give us what we want without your assistance."

"Ain't that still gonna spill my seeds all over the place?" asked Wilkes's client to everyone.

There was a moment of silence as all of the principals pondered this weighty question. Then Wilkes spoke up. "Your Honor, this is an improper use of New York's long-arm statute."

Wilkes's worried client looked to him and grabbed his arm, "Ain't nobody sticking his arm up my butt!"

The judge looked to Wilkes. "Do you have any other legal, as opposed to religious, objections to this procedure?"

"Clean-hands doctrine," said my friend. Wilkes detected that the judge was teetering on the brink of granting this grotesque motion to capture our client's bodily juices. He knew there was only one thing to sway the judge our way, and that one thing had nothing to do with law, morality, religion, common sense, or our client's bodily integrity. It had to with ink - bad ink.

A Call to Rome?

Wilkes said, "I must insist, if the court is seriously considering granting this motion, that I be allowed to fully brief the free exercise of religion and right of privacy issues. Further, I do want the opportunity to consult the archdiocese so that I might as forcefully as possible present the religious underpinnings of my client's rights. So if the court would set this down for a hearing date, I will be able to produce not only a brief, but representatives of the church, perhaps from Rome and the Holy Father himself, to address the court on the gravity of this violation of religious principle."

You could see the wheels spin as the judge pondered the ramifications of such an order. He knew damn well my friend would make good on his threat to drag the church - and worse, the press - into his courtroom to make Hizoner look like an anti-Catholic pervert. The paper boys would have a field day.

The next two words the judge uttered were slow and difficult in coming. They were said softly so as to be almost inaudible, and his milky face crimsoned as he spoke the words that would keep our client's sperm in its rightful place: "Motion denied."

Contradiction: Judicial Neutrality

Trial attorneys know the feeling when you enter a courtroom to face a judge more biased against your client than your adversary. It's no fun appearing in front of judges who preside like smiling coroners - with toxic sweetness! - over the death of your client's rights. Before such judges, the merits of the case are largely irrelevant to the outcome. If the defense is to win, it will not be because of the righteousness of the case. In the sperm case, Wilkes won, as he often did, through intimidation.

It was such an unbiased and clear-thinking panel Wilkes encountered when he entered the hearing room of the New York City Bar Association to face his disciplinary hearing for calling Judge Blugeot a "racist honky mother****r." Hearing officers for bar matters are volunteer lawyers who take on these assignments to better position themselves for advancement to the bench or, failing that, to jockey for a well-exposed spot in the hierarchy of the various local, state, or national bar associations.

Typically, bar discipline officials are WASP lawyers from the big downtown firms who have never set foot in

a courtroom and are totally oblivious to the pressures of a real law practice which so often gets real lawyers in trouble.

Wilkes knew in advance what kind of hearing panel we would be facing. After all, he had been here before. So he prepared for the hearing as if he were a defendant in a murder trial. In a way, it was a capital case - Wilkes's legal practice was hanging in the balance.

Bar Preparation

Here's what we were prepared to present the panel to defend Wilkes's license. We reviewed all the sentencing records of Judge Joseph P. Blugeot and hired a mathematician to analyze the data. Reviewing cases involving similar facts and circumstances, the mathematician, using regression analysis, demonstrated that blacks fared far worse than whites in Blugeot's sentencing and that race was the only variable that explained the difference.

Next, our investigator, Uriah Condo, discovered that Blugeot currently belonged to an exclusive New York City "whites only" club. Condo found a couple of disloyal club members who were willing to testify to the judge's frequent unflattering comments about minority groups.

Best of all, Condo also found a former Mrs. Judge Blugeot! She told him that Blugeot was deeply racist and often castigated her with racial slurs during their brief, stormy marriage.

We also hired an elderly forensic jargonologist, Professor Henry Bluefnozel, a semantics expert from Columbia who spent his career studying ghetto language and who could explain the middle-aged meanings of the three little naughty words that triggered this disciplinary hearing. To make his point, the professor prepared large posters with each of the offensive words painted in large letters. Underneath each was the intended meaning of the word translated from ghettoese.

Into the hearing room we marched, a small army of lawyers, mathematicians, investigators, and the old semanticist, Henry Bluefnozel, with his huge signs under each arm.

Crawley III

The presiding hearing officer, Malcolm Crawley, III, a silk-stocking lawyer from a Wall Street firm that specialized in municipal bond law, began the festivities. "We are gathered here to consider the serious charges against one John Wilkes of the New York bar. The charges are in two counts. First, that Mr. Wilkes did, by the foulest vulgarity, impugn the integrity of an honorable member of the bench. Count two stems from his repeating the outrageous insult of the court.

"In this regard, we have received a certified transcript of the sentencing hearing in *State v. Johnny Wadkins, alias Johnny Wad*. This evidence appears to this panel irrefutable proof of misconduct warranting discipline, and therefore we ask you, Mr. Wilkes, if you have any comments in this regard before we turn to the matter of the appropriate discipline."

The two flunkies on either side of Crawley nodded in agreement. Before Wilkes rose to address the kangaroo tribunal, he whispered to me, "I think I know this jerk-off. But from where?"

I shrugged my shoulders. "Maybe from your last disciplinary hearing," I suggested.

Wilkes stood and looked at his accusers. They had mentally already passed that familiar evidentiary point of no return where the judicial eyes glaze over - they had sufficient evidence to convict. They had their man.

Defense Case

"Hopefully, my innocence will be a factor which will be relevant to more than just the sentence in this matter," said my friend. "If the transcript is the extent of the evidence against me, then I wish to begin my case."

Crawley looked puzzled. He turned to his two equally baffled colleagues on either side, but they had no words to guide him. "What could you possibly say in defense of this outrageous comment?"

Wilkes said, "First of all, the transcript reveals that the court ordered me to repeat a statement made in private to me by my client. I was merely the involuntary conduit of my client's communication. How can this be contemptuous if I was ordered to repeat the comment by the court?"

"Is that your defense? Entrapment?" cracked Crawley. He was ready to rule without hearing more. "That being the alleged defense which is reflected in this transcript, we are now prepared to - "

"Not so fast!" said Wilkes. "I also have witnesses. I shall now call the former Mrs. Judge Joseph P. Blugeot to the stand."

As the former Mrs. Blugeot approached the witness stand, Crawley asked Wilkes, "What is your offer of proof? What could she say to shed any light on your statement to the court?"

Wilkes responded: "Let me put it to you this way. We have conclusive evidence that Blugeot is a bigoted judge who discriminates against minority defendants. We have done a mathematical study of his sentencing practices to present the court demonstrating this fact. Mrs. Blugeot will corroborate it through her own close association with the judge."

Irrelevant!

Crawley interrupted. "Absolutely irrelevant! You will not be permitted to continue your defamation of Judge Blugeot in this proceeding. If you were sincere about this bigotry matter, you would have made these charges in the appropriate forum. You cannot justify calling the judge a 'honky racist mother****r' by such alleged evidence."

With these words, Crawley shot down two-thirds of our defense. Only Professor Bluefnozel remained. "Well, if truth is no defense," said Wilkes, "I call to the stand Professor Henry Bluefnozel."

"For what?" snapped Crawley. His concept of rawhide justice did not contemplate confusing pristine issues with the ambiguity of the facts.

"Since the disputed words were not my own, but those of a young ghetto youth, Professor Bluefnozel, a respected forensic jargonologist, will help this court by explaining the meaning of the words which were meant to be transmitted only to me and were relayed to the court at the judge's insistence."

As Wilkes spoke, the tall, shaggy-haired Professor Bluefnozel ambled forward with his huge signs. Crawley looked at the first sign, which said:

HONKY

(Caucasoid)

"The professor will demonstrate that the words, while perhaps vulgar to a middle-class white, were simply the truth's stark characterization as seen by a nineteen-year-old black ghetto youth who had just ben sentenced to a year in jail for possessing one marijuana cigarette."

As Wilkes spoke, the professor revealed the second sign, which said:

RACIST

(Bigot)

Crawley couldn't help but comment on the visual arts display being given by the professor. "Well, we've seen two of the signs already. I can't wait for the professor to tell us what the word 'mother****r' means."

At that, Professor Bluefnozel revealed his third sign, which had the nasty twelve-letter word on it and his definition underneath, which read:

MOTHERF*R**

(Jacka*s)

"Actually, the definition of mother****r," said the kindly professor, depends entirely on the context in which it is spoken. In rare circumstances, it could actually mean mother****r."

Crawley huddled briefly with his two toadies and then announced that this evidence, too, was totally irrelevant and did not in any way undermine the offensive nature of the comments uttered at the sentencing hearing. With that, Crawley eliminated our entire defense. There was only one thing Wilkes could do to stop this juggernaut.

"I ask for a recess," he said.

Crawley looked at him sternly. "We have only been going fifteen minutes, Mr. Wilkes. Why do you wish a recess?"

When my friend needed time, he always had a good reason to present. On this occasion, the actual reason was that we had absolutely no defense left, and it was time to regroup and think of one. He then explained:

"Nature calls."

Crawley adjourned the proceedings for ten minutes.

Recess

Wilkes and I went to the nearest bathroom to confer on what to do.

"Looks like we've had it," I offered, as if to cushion the inevitable. "This is a railroad."

"A bullet train," said Wilkes. "Who is that guy? I know I know him from somewhere."

Wilkes began lifting a toilet lid with his toe and letting it fall and bounce back on the porcelain. He was lost in thought. When Uriah Condo came in to tell us it was time to go back, Wilkes was still within himself.

As we reached the bathroom door, he grabbed my arm and said coldly, "I remember." With that he was out the door.

Wilkes quickly marched back into the hearing room and, with a loud voice, began his summation. He aimed his eyes and words solely on Crawley.

Cribber

"You have denied me the right to present evidence. I have only my words left to reason with you now. I am going to tell you a story which may seem strange and out of place, but if you hear me out, its meaning will become clear.

"This is a story about a college student who was a cheat. During his academic career, he devised dozens of ways to dishonestly pass his tests. I will tell you how he did it on one occasion. This person, who was known as 'The Cribber,' came into an economics exam as he did all his tests, totally unprepared. He opened one of his blue books, and instead of answering the exam question in it, he wrote a long, sad letter home to his parents. Into another booklet the Cribber copied the five questions on the exam. When the time was up, he turned in the blue book with the letter home in it, ran out of the class, and made for the library, where he checked out books on economics to help him answer the questions.

"Naturally, with this aid, he was able to answer them magnificently. The Cribber then put the answers in an envelope and mailed them home to Mom 'n' Dad.

"That night he received the expected phone call: "Hello, Cribber? This is Professor Klorowitz .... Uh .... er, I must report something very strange in your exam booklet ... It appears to be, of all things, a letter home to your parents."

"With feigned horror, the Cribber cried to the prof that he'd made a horrible error. He mistakenly mailed his folks his exam and turned the letter home in to the professor! The professor, dubious at this, asked for his parents' phone number. He called and instructed the puzzled parents to meet him and 'The Cribber' at the post office, where they could release the as yet undelivered letter to the professor.

"And of course, it worked, because the Cribber had indeed mailed the exam book to his folks after his visit to the library. The Cribber received a great grade in the class, as he did in all his classes.

Moral

"Today the Cribber is a successful professional man who has undoubtedly made his way in life the same way he did in college. And what is the moral of this story, you ask?"

Actually, no one was asking Wilkes anything at the time. The two flunkies on Crawley's right and left were looking at Wilkes as if he'd lost his marbles. Disbarment was a cinch now for them. Crawley, however, was shaken. His face was beet-red, and he looked like he was about to disappear behind the bench.

Wilkes continued, "The moral is, you never know who you're dealing with. You never know what things a person's done until someone takes the time to investigate and expose a person's crimes. Only mercy met with mercy can wash the sins of the past away."

With that, Wilkes sat down. Everyone was stunned by this odd and apparently irrelevant summation. My friend noted the puzzlement on my face and whispered in my ear, "That son of a bi**h is Cribber Crawley! I went to school with the bastard twenty-five years ago!"

Decision

When Wilkes sat down, Crawley appeared visibly relieved. His tone changed, too. Now he wasn't the contemptuous ass looking to set the land-speed record for the quickest disbarment hearing on record. He brought the kangaroo court to an end: "Thank you for your presentation, Mr. Wilkes. You have given us something to ponder here, and we'll have to think on it long and hard. The issue of the attorney-client privilege is certainly one for us to consider quite seriously. I believe we understand your response to Judge Blugeot was to a court order. Thank you very much."

Crawley's two sidekicks' facial expressions did not change. They still looked like they were listening to a demented person - except now they were looking at Crawley.

He adjourned the hearing, telling us the panel would take the matter under submission and send its decision to us. We walked back to the office and wondered if Crawley's instinct for self-preservation was stronger than the evidence against Wilkes.

We did not have to wait long for the answer. Three days later I came into Wilkes's office, and while looking on my friend's cluttered desk, my eyes snapped to a letter from the Bar Association. I turned the letter around and read it. The crucial part said:

> After thorough investigation and a hearing on the matter, we have found that Mr. Wilkes's statement was the unfortunate relaying to the court of a private communication from his client intended only for his ears. We find no contumacious intent in its accurate transmission upon court order. Complaint dismissed.

I expressed my mild surprise to Wilkes that his not so subtle extortionate threat to go public on Crawley's dishonorable character had worked. "He must have a lot to hide," I said.

"Yes, indeed," said Wilkes. "We all do. And I thank God for it!"

- To Be Continued -

ALAN ELLIS

FEDERAL SENTENCING PRACTICE TIPS
EFFECTS OF *UNITED STATES v. BOOKER*, ET *AL*

By Alan Ellis, Esq.

This article first appeared in Verdict Magazine, *January 2007, and we appreciate Mr. Ellis allowing us to reproduce it here.*

On January 12, 2005, the Supreme Court handed down its decision in the consolidated cases of *United States v. Booker* and *United States v. Fanfan. Booker* has two majority opinions - an opinion by Justice Stevens, which holds that the Federal Sentencing Guidelines, as interpreted in *Blakely v. Washington,* violate the Sixth Amendment, and one by Justice Breyer, which remedies that violation by striking language from the Sentencing Reform Act (SRA) that made the guidelines mandatory. Because the guidelines are now advisory, in cases sentenced after *Booker,* they are simply one factor among several that sentencing courts must consider in fashioning a sentence.

Courts will still be required to "consider" the guideline range, as well as any bases for departure from that range, but they will no longer be required to impose sentence within that range - even where there is no basis to "depart." Under 18 U.S.C. § 3553(a), the key requirement is that the sentence in each case be "sufficient, but not greater than necessary":

(A) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
(B) To afford adequate deterrence to criminal conduct;
(C) To protect the public from further crimes of the defendant; and
(D) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Practice Tips for Preparation for Sentencing

Statistics issued by the federal government indicate that approximately 94% of all indicted federal criminal defendants plead guilty. Seventy-five percent of those who proceed to trial are convicted. Accordingly, there is a 97% likelihood that a federal criminal defendant will face sentencing. Thus, for most federal criminal defendants "How much time am I going to do?" and "Where am I going to do it?" are of key concern. In an effort to obtain the lowest possible sentence to be served at the best possible facility under terms and conditions that will facilitate release at the earliest possible opportunity, I have found the following tips invaluable:

● When you meet with the probation officer, find out what his or her "dictation date" is. That is the date by which he or she must dictate the first draft of the PSI (Presentence Investigation Report). Remember that probation officers often have a proprietary interest in their original draft PSI, and getting them to change it through making objections is often very difficult. Hence, you want the best draft PSI you can get, so you don't have to file that many objections.

● Accompany your client to his or her meetings with the probation officer during the preparation stage of PSI. Probation officers are often overburdened, so have your client complete and bring the forms and documents the probation officer needs with him or her to the initial interview. If you have any cases supporting your position regarding anticipated disputed issues in the

guidelines, bring the cases with you and highlight the relevant sections. Remember, probation officers are not lawyer~ and sometimes have a difficult time with memoranda of law. Highlighted cases are more helpful to them.

● When possible, it is extremely helpful to get the probation officer and the assistant U.S. attorney (AUSA) to accept what you believe is your client's offense behavior, his or her role in the offense, and any grounds for downward departure or variance before the dictation. This simply means getting them to agree that your position is not unreasonable. "If the law is against you, argue the facts. If the facts are against you, argue the law. If both the law and the facts are against you, take the probation officer and the prosecutor out to lunch."

● File a presentence memorandum five to seven days prior to sentencing. Statistics show that in 80% of cases, judges decide what sentence they will impose before they take the bench. This is called a "tentative sentence." Unless you can put on a tremendous dog-and-pony show at sentencing, it is likely that your client will receive that sentence. Consequently, if you can provide the judge a solid presentence memorandum with character letters, community-service reports, mental-health evaluations, treatment reports *before* he or she has crystallized his or her thoughts on the case, your sentencing memorandum may go a long way toward determining your client's sentence. At the beginning of your sentencing memorandum, propose a sentence that you believe is "sufficient but not greater than necessary," to meet the purposes of sentencing under 18 U.S.C. § 3553(a)(2) and then go on to explain why.

● Answer the "why" questions. The most important two questions that you can answer for the sentencing judge are: "Why did your client do what he did?" and "Why, if I take a chance on him, won't he do it again?"

● Often, when clients cooperate with the government in compliance with 18 U.S.C. § 3553(a) the government refuses to file a *5K1.1* motion for downward departure based on substantial assistance. Faced with this unpleasant situation, seek a downward departure based on "super/extraordinary acceptance of responsibility." If you spell out to the judge the cooperation the client has provided, even though it may not be all the government had hoped for, it might persuade the judge, many of whom are opposed to the government's unilateral power to control departures for cooperation, to depart downward as much as if the government had filed a *5K1.1* motion. Now, *post-Booker,* the judge can impose a below-the-advisory guideline (not mandatory minimum sentence) on his or her own without a government motion for cooperation.

● After *Booker*, cooperation will remain an important way for defendants to earn lower sentences, but in cases without mandatory minimums, it will not be as critical for plea agreements to include a government promise to file a § *5K1.1* motion. A court may now impose a below-the guidelines sentence based on a defendant's cooperation even without a government motion. In a case with a mandatory minimum it will still be important to lock in a government's obligation to file a motion pursuant to 18 U.S.C. § 3553(e).

● If your client is a cooperating witness, accompany him or her to any debriefings in case there's a later dispute as to what the client said. Also, your presence will often facilitate the discussions, particularly if you've debriefed and prepped your client in advance. Object to the Presentence Investigation Report if it does not include all information relevant to Section 3553(a) purposes and factors.

● You might want to seek a lateral departure or variance that requires your client to serve the same amount of time as called for by the guidelines, but addresses the conditions of confinement rather than seeking less time. For example, if the guidelines call for a 21- month sentence, ask the judge to impose a sentence of seven months of incarceration, followed by supervised release with a special condition that the client serve seven months in the correctional component of a community corrections center (CCC), considered the most onerous unit in a halfway house, followed by seven months of supervised release with home confinement and an appropriate amount of community service and if necessary and appropriate - treatment. Not only does this add up to the same 21 months that the client would normally serve, but it actually requires him or her to serve more time since the client will not get any good conduct time on the seven months nor on the community corrections-center and home-confinement portion of the sentence. Indeed, he or she will serve the entire 21 months as opposed to less than 18 months with good conduct time credit. It doesn't reduce the amount of time to be served; it only alters the conditions of confinement.

In appropriate circumstances, considering that the Zones in the guidelines are now also advisory, urge the court to impose a higher split sentence than previously allowable under Zone C of the guidelines. For example, if the guidelines call for a 15-21-month range and you believe that a non-guideline sentence is appropriate, ask the sentencing judge to impose a sentence of eight months followed by supervised release with a special condition of seven months of home confinement. Moreover, if the opportunity presents itself, argue for probation or time served followed by supervised release with a special

condition of eight months in a CCC (halfway house) followed by seven months of home confinement plus community service, and treatment, if necessary.

Pre-Plea PSI's

● When a defendant enters a guilty plea, absent a binding stipulation as to his or her guidelines, the client has no idea what the range will be and what sentence will be received within, below or above it. Consequently, more and more sentencing authorities are recognizing the need for a pre-plea PSI and even a settlement conference before a magistrate or judge unrelated to the case in order to get a third party's view as to the base offense level, and whether there will be upward or downward adjustments or departures. It's also helpful, in some cases, to see what the magistrate or judge would recommend if he or she were the sentencing judge. In short, if you request and are granted a pre-plea PSI, and/or a sentence conference, your client will have a pretty good idea as to what he or she faces at sentencing and can then make a realistic, intelligent and voluntary decision as to whether to enter a guilty plea.

● Often one criminal history point or less does not alter the Criminal History Category (CHC) into which a defendant falls. It may nevertheless be important to object to a PSI's addition of a criminal history point and then to appeal a district court's denial of that objection even where the inclusion of the point does not affect the client's CHC. While normally the addition of a criminal history point which does not affect the sentencing range would be considered "harmless error," that is not always the case. In *United States v. Vargas*, 230 F3d 328 (7th Cir. 2000), the Seventh Circuit remanded for resentencing based on a seemingly inconsequential criminal history point, because the erroneous inclusion of this point "might have affected" the district court's denial of the defendant's motion for downward departure based on the defendant's contention that his criminal history category significantly over-represented the seriousness of his criminal history. *See* U.S.S.G § 4A1.3.

● *Booker* offers new opportunities to defendants who entered into *pre-Booker* plea agreements which preclude their seeking downward departures. Such defendants can seek non-guideline sentences or "variances" based on factors that would not previously have justified departures. In some cases, they may even be able to argue for lower sentences based on factors which may previously have justified departures.

● After *Booker*, a non-binding plea agreement which stipulates to the guideline calculation may still be helpful with a judge who has a strong inclination to follow the now-advisory guidelines. Plea agreements under Rule l1(c)(I)(C) which lock in a particular sentence or cap a sentence may now become more common as a way to restore some of the certainty to sentencing that was taken away by *Booker*.

● After *Booker*, the government has less leverage to force a defendant to waive the right to appeal or the right to seek a downward departure or a variance. The defense should now agree to such waivers only when the government gives it something substantial in exchange.

Be Creative

● Let judges be judges. *United States v. Koon*, 518 U.S. 81 (1996) altered the ground rules for downward departure giving defense lawyers and judges more latitude. Be creative. Don't limit yourself to downward departures identified in the guidelines themselves. Think of things that make your case unusual. Remember that not only must your offender have been an unusual offender, but if the offense behavior is unusual in and of itself specifically, less serious than envisioned by the guidelines, this is a good ground for an "unusual" or "atypical" case as defined by *Koon:* one that is outside of the heartland of the guidelines justifying a downward departure.

● Despite the new availability of non-guideline variances, don't shy away from departures. Judges are encouraging each other to depart rather than grant a non-departure leading to a below-the-guidelines sentence to avoid a legislative *Booker* fix. One that I like to use in appropriate cases is that the defendant has suffered enough (loss of job, wife left him, prosecution has caused an extended illness, etc.) and since one of the purposes of sentencing pursuant to 18 U.S.C. § 3553(a)(2)(A) is "to provide just punishment," you can argue that he's been sufficiently punished so far.

Using the *"Post-Booker"* Manual

● The Sentencing Commission has prepared a "post-*Booker"* manual for judges, probation officers and attorneys. The Commission advises judges to give "substantial weight" to the advisory guidelines. However, if the judge indicates that he is giving "substantial weight" to the sentencing guidelines, defense counsel should object on the ground that such a sentencing practice would make the guidelines as binding as they were before *Booker*, thus violating both the Sixth and Eighth Amendment and the interpretation of Section 3553 adopted by the remedial majority in *Booker*. In the alternative, defense counsel can argue that since the *"weighted"* approach in effect makes the guidelines binding, thereby triggering the Sixth

Amendment, a court may use this approach to enhance a sentence only if it relies solely on facts proven to a jury beyond a reasonable doubt or admitted by the defendant or that it finds by proof beyond a reasonable doubt or, at least, by clear and convincing evidence. Even in cases in which a court has not indicated that it will not give "substantial weight" to the guidelines, defense counsel should argue that the judge must base all guideline adjustments on facts proven beyond a reasonable doubt or, in the alternative, by clear and convincing evidence.

● Use 18 U.S.C. § 3553(a) factors as a guide to structuring your sentencing memorandum, but keep in mind that you are no longer bound by the Sentencing Guidelines. Where the facts support a traditional guidelines departure, argue for it. But when they don't, use the factors listed in 18 U.S.C. § 3553(a) to argue for a non-guideline sentence below the range. Remind the court that the guidelines are only *one* of seven equally important factors it must consider in determining a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing set forth in § 3553(a)(2).

● Pre-*Booker*, the Guidelines prohibited a court from relying on certain offender characteristics for downward departures. *See* U.S.S.G. §§ 5H1.4 (drug and alcohol abuse), and 5H1.12 (lack of youthful guidance or a disadvantaged upbringing). Courts were also prohibited from relying on other factors, except in extraordinary circumstances. *See* U.S.S.G. §§ 5Hl.l (age), 5H1.2 (education and vocational skills); 5H1.3 (mental and emotional conditions), 5H1.4 (physical condition and appearance), 5H1.5 (employment record),5H1.6 (family ties and responsibilities) and 5H1.11 (charitable acts). Now that the guidelines are no longer mandatory, these limitations no longer restrict a court from imposing a sentence below the guideline range. Remember, not only does 18 U.S.C. § 3553(a)(I) *require* a court to "consider ... the history and circumstances of the defendant," but § 3661 provides that "no limitation shall be placed on the information concerning the background, character and conduct of the defendant which a court may receive and consider for the purposes of imposing an appropriate sentence."

● If you think your client is crazy, guess what? He may be crazy. Consider having him evaluated by a mental-health professional, such as a psychiatrist, psychologist, or social worker. If there is evidence of head trauma, particularly head trauma which left your client unconscious, have him evaluated by a neuropsychologist, a mental-health professional who specializes in brain injury. While a mental disorder may not rise to the level that would justify a diminished capacity downward departure under U.S.S.G. § 5K2.13, the mental disorder still may be grounds for a lower sentence, either through a departure for extraordinary mental or emotional problems as suggested by U.S.S.G. § 5H1.3, or after taking into account the factors listed in 18 U.S.C. § 3553(a) as a variance or a below-the-guidelines sentence.

● While a single mitigating factor may not warrant a downward departure or a post-*Booker* "variance" or below-the-now-advisory-guideline sentence, a combination of these factors, taken together, may persuade the court otherwise. Even if you don't get a downward departure or variance, these mitigating factors can often help in getting a sentence at the low end of the guideline range. This is particularly important when the offense level and/or the criminal-history score render advisory high guidelines.

● Departures based on the fact that the guidelines overstate the seriousness of the offense have been recognized by at least two cases, *United States v. Restrepo*, 936 F.2d 661 (2d Cir. 1991); *United States v. Alba*, 933 F.3d 1117 (2d Cir. 1991); and *United States v. Lara*, 47 F.3d. 60 (2d Cir. 1994), all of which support the position of awarding a defendant a departure below the four-level downward adjustment for a minimal role in the offense.

● Remember the "safety valve" (18 U.S.C. §§ 3553(f) and U.S.S.G. § 5C1.2). The safety valve is a mechanism for first-time, non-violent, low-level drug traffickers to receive a sentence below the mandatory minimum statutory sentence otherwise only available to more serious offenders who can earn a below the mandatory minimum by cooperating against other offenders. Low level dealers, couriers or workers often do not have any information on other offenders - unlike their bosses. Congress, passed 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2, concerned because of the miscarriage of justice resulting when "big fish" cooperated against their co-defendants, suppliers and customers, while the "little fish" worker, paid a small sum of money to transport drugs from Point A to Point B, or to unload shipments of smuggled drugs, usually had no such information to provide.

Under appropriate circumstances, without the necessity of the government filing a § 5K1.1 motion, a defendant may receive a sentence below the mandatory minimum. Also, if the defendant meets the criteria for the safety valve and his or her offense level is determined to be 26 or greater, it is decreased by two levels. U.S.S.G. § 2D1.1(b)(4).

● After *Booker*, district courts must still state reasons for the sentences they impose. 18 U.S.C. § 3553(c). *See United States v. Webb*, 403 F.3d 373, 385 n. 8 (6th Cir.

2005). When that sentence is outside the guideline range, § 3553(c)(2) still requires the court to provide a written explanation in the Judgment and Commitment Order of why the sentence is outside the guideline range. When you argue for a sentence below the guideline range, prepare a written statement of reasons that the judge can adopt. Should the government appeal, a well-reasoned justification for the sentence can help ensure that it will meet the new test for "reasonableness."

● *Booker* has almost returned sentencing to pre-guideline days in which arguments that humanize a defendant and mitigate guilt can produce a sentence as low as probation (unless probation is precluded by law or unless a mandatory minimum applies). An important difference between pre-guideline sentencing and post-*Booker* sentencing is that a judge now must "consider" a list of seven factors (only one of which is the advisory guideline range) before imposing a sentence that is "sufficient but not greater than necessary" to achieve the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2).

● Section 3553(a) requires a court to fashion a sentence which is "sufficient, but not greater than necessary" to achieve the goals of sentencing - one of which is to provide a defendant with the rehabilitation he needs (§ 3553(a)(2)(D)). At the same time, 18 U.S.C. § 3582(a) requires the court to "recognize that imprisonment is *not* an appropriate means of promoting correction or rehabilitation." *(Emphasis added.)* After *Booker*, it will therefore be possible, in some cases, to argue that these two requirements support a sentence without any term of imprisonment so as to meet a defendant's need for educational, vocational or medical services as part of his rehabilitation.

● Consider hiring a mitigation specialist. We have one in our firm, who is a forensic licensed clinical social worker. Mitigation specialists, or sentencing advocates as they are often called, develop individualized sentencing plans for attorneys whose clients face conviction and the prospect of incarceration. The individualized sentencing plans are used by defense attorneys to offer alternatives to lengthy incarceration to prosecutors during plea negotiations, to probation officers, during the pre-sentence phase, and to courts at sentencing. Typically, the focus of their sentencing proposals is on substance abuse and/or mental-health treatment, victim restitution, community service, and avoidance of future misconduct. By helping judges understand the clients' life story, they help the attorney argue, often successfully, for alternatives to lengthy incarceration.

Recommendations for Location of Confinement

● Some judges don't like to recommend particular places of confinement at sentencing. Their reasons include, but are not limited to, the fact that they don't believe they are "correctional experts" who are able to determine where a client should serve his or her sentence, and they often get letters from the Bureau of Prisons (BOP) advising them that their recommendations cannot be honored in a particular case.

● Generally, the reason behind the letters is that the judge has recommended a facility incompatible with the defendant's security level. As to their lack of knowledge of "correctional practices," however, a lawyer is only asking a judge to recommend a facility if the defendant qualifies based on his or her security level. In fact, Program Statement 5100.07 from the Bureau of Prisons indicates that the Bureau welcomes a sentencing judge's recommendation and will do what it can to accommodate it. Indeed, Bureau statistics show that in an overwhelming majority of the cases in which the defendant qualifies for a particular recommended institution, the court's recommendation is honored.

● Without a recommendation, your client may not wind up in the facility for which he or she qualifies (as close to his or her home as possible) due to prison overcrowding. Should there be only one slot open at a prison and there are two defendants who want that placement, the one with the judicial recommendation is more likely to get it, and where both defendants have recommendations, the one whose judge has stated reasons for the recommendation will generally get it. It may help to get a copy of the Bureau's Program Statement 5100.07 and show the page that deals with judicial recommendations to the court.

● A year-and-a-day sentence results in an inmate serving significantly less time - approximately 46 days less than a 12-month sentence because the 12-month sentence does not provide for good-conduct time.

● An inmate is not entitled to credit for time served on pre-trial release under home confinement or even in a halfway house as a condition of bond.

● Certain considerations termed Public Safety Factors by the BOP - *e.g.*, deportable alien, high level/ high-volume drug trafficking, conviction of sexual offenses including child pornography, sentence length of more than ten years, and others - will preclude camp placement despite an inmate being otherwise qualified for federal-prison-camp placement. The Bureau of Prisons looks to the Presentence Investigation Report to determine the applicability of a particular Public Safety

Factor.

● Generally, deportable aliens are not eligible for federal-prison-camp placement. However, a non-U.S. citizen may still be eligible for a federal prison camp if he meets the following criteria: (1) documented and/or independently verified history of stable employment in the U.S. for at least three years immediately prior to incarceration; (2) verified history of domicile in the U.S. for five or more consecutive years; and (3) verified strong family ties (only the immediate family) in the United States (BOP Program Statement 5100.07, Ch. 7). The information must be verified in the Presentence Investigation Report. The Bureau of Prisons currently has a limited pilot program for placing some female alien inmates in a minimum-security camp setting, following careful review on a case-by-case basis. The success or failure of the pilot program will likely determine the future feasibility for placing more alien females in camps.

● 18 U.S.C. § 3624(c) defines that a prisoner can spend the last 10% of his sentence, not to exceed six months, in community placement, *i.e.*,halfway house or home confinement. 18 U.S.C. § 3621(b), however, gives the BOP virtually unlimited discretion in placement decisions. RDAP inmates are eligible for a full six-month community placement. (See Chapter 12.)

Credit Not Given for Concurrent Sentences

● A growing number of inmates are losing substantial credit toward their federal sentences because the BOP is narrowly interpreting 18 U.S.C. § 3585(b), which governs credit for prior custody, to prohibit "double credit" on concurrent sentences imposed by different jurisdictions. Under BOP policy, any time credited toward another sentence cannot be credited toward a federal sentence, even if the state sentence resulted from related conduct and even if the judge, whether state or federal, ordered the sentences to run concurrently (BOP Program Statement 5880.28). Thus, the BOP's interpretation of 18 U.S.C. § 3585(b) sometimes converts a concurrent sentence into a consecutive sentence regardless of the Judgment and Commitment Order. There are, however, ways to get around this. See, for example, U.S.S.G. § 5G1.3 and downward departures.

● The interpretation between state and federal sentences has always been a vexing issue. For a discussion of state versus federal custody and service of multiple sentences contact David Beneman, Esq., Maine CJA Resource Counsel, at PO Box 465, Portland, Maine, 04112, Beneman@maine.rr.com,for his excellent article on the subject.

● The Bureau of Prisons can tell you if your client has been designated, but they will not tell you to what facility. If he has been designated, the U.S. Marshal for the district in which he was sentenced and the Pretrial Services in the district where he is being supervised can tell you the location. Once you've found out where he's been designated, check with that institution to make sure that they have his "paperwork," particularly the PSI. If he's a self-surrender, when he gets there, they will put him in the special housing unit (SHU) of the adjacent main institution if there is one or in a local county jail until they receive this document.

● Many white-collar offenders think that if their sentence is under ten years and they have no prior record, they will automatically go to a federal prison camp. This is not necessarily so. There can be Public Safety Factors (for example, Serious Telephone Abuse or Deportable Alien) or a Management Variable (for example, Greatest Security evidenced by language in the PSI that would indicate that a defendant has off-shore assets and a propensity to travel internationally). Open cases - either state or federal - can also count as a detainer even though no actual detainer has been filed preventing minimum-security camp placement. Any open cases need to be resolved prior to the time that the Presentence Investigation Report is forwarded to the Bureau of Prisons for designation scoring.

● Medical levels of care can also affect a client's designation or placement. *See* "News from the Bureau of Prisons," *Federal Sentencing and Post- Conviction News* (Winter 2006).

You can also contact the National Association of Sentencing Advocates, 514 Tenth Street, NW, Suite 1000, Washington, DC 20004, phone 202-628-0871, fax 202- 628-1091, sentencingproject.org/nasa.

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Alan Ellis is a criminal defense lawyer with offices in San Francisco, Philadelphia, and soon to be opened in Hong Kong. Federal Lawyer *magazine has described him as "one of this country* 50 *pre-eminent criminal defense lawyers.*

The United States Court of Appeals for the Ninth Circuit in a published decision has described him as a "nationally recognized expert in federal criminal sentencing." Mr. Ellis is a Past President of the National Association of Criminal Defense Lawyers.

He is also a contributing editor to the American Bar Association ‘s Criminal Justice *magazine for which he writes a regular quarterly column on federal sentencing.*

He is a sought after lecturer in criminal law education programs and is widely published in the area of federal sentencing, Bureau of Prisons matters, appeals and other post-conviction remedies with more than 90 articles to his credit. Amongst his publications are the highly acclaimed Federal Prison Guidebook, *the* Federal Sentencing Guidebook *and the* Federal Post Conviction Guidebook. *Mr. Ellis also publishes* Federal Sentencing and Post Conviction News. *He has recently authored several articles on the United States Supreme Court's decision in* United States v. Booker *entitled "All About Booker," "Litigating in a Post-Booker World," and "Representing the White Collar Client in a Post-Booker World." In the area of international criminal law, he has recently authored "Americans Arrested Abroad," a companion article to his earlier "Going Home: An Introduction to International Prisoner Transfer Treaties."*

More than one legal commentator has referred to Mr. Ellis as the "go-to guy in America" for federal sentencing if "you're in deep trouble and have deep pockets."

CA7 Case Digest

By: Jonathan Hawley
Appellate Division Chief

APPELLATE PROCEDURE

United States v. White, 472 F.3d 458 (7th Cir. 2006; No. 06-1769). In prosecution for multiple fraud counts, the Court of Appeals entered a rule to show cause why defense counsel should not be fined $1,000 for failure to comply with Federal Rule of Appellate Procedure 30 and Circuit Rule 30. After affirming the defendant's conviction and sentence, the court noted that the defendant's appendix to the brief did not contain a copy of the judgment, the transcript of the district court's rationale concerning the challenged decision, and, instead, contained only five pages of Indiana statutes. Notwithstanding these omissions, defense counsel certified that the appendix complied with the Federal and Circuit Rules. The court stated that the rules are not created for the purpose of imposing frivolous requirements on attorneys who are already busy. Rather, the requirements embodied in the rules go to the heart of the court's decision-making process. Although nothing new, the court has become more insistent "on meticulous compliance with rules sensibly designed to make appellate briefs as valuable an aid to the decisional process as they can be. The court's workload increases dramatically if an appeal is transformed into a scavenger hunt in search of a copy of the judgment below or the transcript page where a challenged decision was explained by the district court. Noting potential remedies for rules violation, including dismissing an appeal, refusing to consider issues no adequately addressed in the appendix, and resubmission of briefs with corrections, the court noted that none of these was appropriate in this case. Rather, as in previous published opinions, the court elected to enter an order directing defense counsel to show cause why he should not be fined $1,000 for failure to follow the rules.

United States v. Fortner, 455 F.3d 752 (7th Cir. 2006; No. 05-4104). In this appeal, the Court of Appeals discouraged parties from filing motions for summary affirmance. The defendant filed a brief arguing that a leader-organizer enhancement was improper and that his sentence was unreasonable. Five days before its brief was due, the government filed a 15-page motion for summary affirmance. The court disapproved of the motion, noting that the strategy employed by the government was that, instead of filing a brief on the due date, the appellee files something else, such as a motion to dismiss or summarily affirm. The goal and often the effect is to obtain a self-help extension of time even though the court would be unlikely to grant an extension if one were requested openly. Here, the government's submission was essentially a brief on the merits, except for the fact that it did not comply with the rules regarding the filing of appellate briefs. By filing the motion, the government wasted the court's resources because now, instead of three judges considering the case, six will--three to consider the motion and three to consider the merits. Moreover, the government could have made the same arguments in a brief and moved to waive oral argument if it felt that argument would be unhelpful. The court stated that motions for summary affirmance should be confined to the following circumstances: 1) where summary disposition if appropriate in an emergency; 2) where the arguments in the opening brief are incomprehensible or completely insubstantial; and 3) where a recent appellate decision directly resolves the appeal. In such cases, the motion should be filed earlier rather than later--not right before the merits brief is due. Because the motion in this case did not fall within one of these categories, the motion was denied.

COMPETENCY

United States v. Andrews, 469 F.3d 1113 (7th Cir. 2006; No. 06-1448). In prosecution for bank robbery, the Court of Appeals outlined the standard for district courts to apply when a defendant claims he is incompetent to stand trial due to amnesia. Although a competency

exam prior to trial concluded that the defendant had a rational and factual understanding of the proceedings against him and he was capable of assisting his counsel with his defense, the defendant argued that his amnesia rendered him incapable of assisting his attorning in preparing his defense. The Court of Appeals concluded that amnesia about the crime does not render a defendant per se incompetent to stand trial. Rather, an amnesiac defendant, like any other defendant, must show that he is unable to satisfy the ordinary competency standard: that is, he must be able to consult with his lawyer with a reasonable degree of rational understanding and have a rational as well as factual understanding of the proceedings against him. Several factors, however, guide a court in applying this standard to an amnesiac defendant, including: (1) Whether the defendant has any ability to participate in his defense; (2) whether the amnesia is temporary or permanent; (3) whether the crime and the defendant's whereabouts at the time of the crime can be constructed without the defendant's testimony; (4) whether access to government files would aid in preparing the defense; and (5) the strength of the government's case against the defendant. Of course, these factors are not intended to be exhaustive or applied in a rote fashion, as the trial judge is in the best position to determine competency. When making this competency evaluation, the district court should use the following procedure. First, a district court should make an initial evaluation regarding whether to order a competency hearing and evaluation pursuant to 18 U.S.C. 4241. If found competent, the trial should proceed. Then, during the course of the trial, the district court should be mindful of the factors listed above. If at any stage during or after the trial, with or without motion by counsel, it becomes apparent that the defendant's amnesia may have rendered him incompetent and jeopardize the fairness of the trial, then the district court again must evaluate the defendant's competency. Applying these factors in the present case, the court concluded that the defendant was competent to stand trial.

COUNSEL

United States v. Murphy, 469 F.3d 1130 (7th Cir. 2006; 06-1309). In prosecution for tax related offenses, the Court of Appeals set forth the standard for district courts to use when considering whether to appoint a defendant counsel based on indigency. Specifically, the burden of proving inadequate financial means lies with the defendant. It is not enough to claim inability to hire a lawyer. The statute (18 U.S.C. 3006A(b)) provides for appropriate inquiry into the veracity of that claim. The inquiry is usually addressed by having a defendant fill out a form financial affidavit. But the Criminal Justice Act requires neither CJA Form 23 nor any other particular method of ascertaining a defendant's financial status. The exact nature of the appropriate inquiry is therefore left to the judge, and the Court of Appeals will not reverse a decision on appointment of counsel unless it is clearly erroneous. Applying these standards to the present case, because the defendant refused to complete a financial affidavit, the district court was correct in denying him the appointment of counsel.

Goodman v. Bertrand, 467 F.3d 1022 (7th Cir. 2006; No. 04-3946). Upon consideration of the petitioner's habeas corpus petition arising from his Wisconsin conviction for armed robbery and being a felon in possession of a firearm, the Court of Appeals held that the defendant's counsel was ineffective. At the petitioner's first trial, an accomplice and the manager of the robbed store both identified the petitioner as the robber. However, the store clerk testified that she did not identify the petitioner as the robber and, in fact, identified someone else in a line-up. After a mistrial was declared due to a hung jury, the defendant was tried again with new counsel. This time, in exchange for the possibility of a reduced sentence, three accomplices testified against the defendant. However, the clerk did not testify, as defense counsel failed to subpoena her, believing that the State would call her as a witness. Additionally, during defense counsel's direct examination of the petitioner, he opened the door to allowing the government to introduce the fact that the defendant had two prior convictions for armed robbery. Likewise, the trial judge allowed two of the cooperating witnesses to testify regarding threats they received in relation to their testimony, but indicated to counsel that the testimony would only be allowed for the limited purpose of showing that they had something to lose as well as something to gain by their testimony. Next, trial counsel failed to object when the prosecution made misleading statements during the examination of a cooperating witness that he wasn't given anything for his testimony, when in fact he hoped to receive a reduced sentence. Given this "catalog" of errors, the court concluded that counsel was ineffective. First, the case centered on the identification of the petitioner as the robber and, crucially, witness credibility. The testimony of the store clerk would have been critical to this issue, but trial counsel failed to call her. Given that all the accomplices had something to gain from their testimony, the testimony of a disinterested witness was all the more crucial. Since counsel's errors directly affected the most critical aspects of the defense, the court granted the defendant's petition for habeas corpus.

Kafo v. United States, 467 F.3d 1063 (7th Cir. 2006; No. 05-3034). Upon consideration of the district court's denial of the petitioner's 2255 petition without an evidentiary hearing, the Court of Appeals vacated the

district court's order and remanded the cause for further consideration. The petitioner claimed that his counsel was ineffective for failing to file a notice of appeal after his conviction and sentencing. However, the defendant's petition was not accompanied by an affidavit nor was it submitted on the form prescribed by the Rules. Given the lack of an affidavit evidencing the fact that the petitioner actually requested that his counsel file the notice of appeal, the district court concluded that the petitioner had presented no evidence that he had done so and, accordingly, the court denied the petition on the merits without a hearing. The court of appeals noted that although a petitioner must meet the rules concerning affidavits and the proper form to make out a 2255 claim, a district court should give a petitioner an opportunity to file a conforming petition before denying it. Here, the Court of Appeals could not say that the district court would have reached the same conclusion on the merits had the petitioner been instructed to amend his pleading to conform to the rules. Thus, the court concluded that the appropriate course was to vacate the judgment of the district court in order to permit that court to afford the petitioner an adequate opportunity to submit a verified version of the amended complaint or supplemental affidavit.

Bethel v. United States, 458 F.3d 711 (7th Cir. 2006; No. 04-4108). Upon appeal of the district court's denial of the petitioner's 2255 petition, the Court of Appeals held that trial counsel was not ineffective. The petitioner pled guilty in the district court, but his attorney failed to advise him that he was a career offender. Because of this error, his attorney advised him that he was facing a sentence of 100 to 125 months, when in fact his career offender status put him in a range of 188 to 235 months. Although agreeing that trial counsel erred in missing the career offender application, the Court noted that the salient question was whether counsel undertook a good-faith effort to determine the applicable facts and estimate the sentence. An inaccurate prediction of a sentence alone is not enough to meet the standard. In the present case, because there was no hearing on the 2255 petition, it was impossible for the court to determine whether such a good-faith effort was made. However, even assuming that such an effort was not made, the defendant could still not prevail. In order to succeed, the petitioner had to establish that absent counsel's error, he would not have pled guilty but would have insisted on going to trial. The mere allegation, however, that the petitioner would have insisted on going to trial is not to sufficient to establish prejudice. Here, at the defendant's change of plea hearing, he repeatedly expressed his desire to plead guilty, notwithstanding the court's admonishments that there was no guarantee what the defendant's sentence would be. Likewise, although the petitioner argued that he would have negotiated a different plea deal for himself than the one he accepted absent the error, the court held that to demonstrate prejudice, the defendant must show that he would not have pled guilty at all and would have insisted on going to trial. Accordingly, the defendant could not establish prejudice in this case.

EVIDENCE

United States v. Jung, ___ F.3d ___ (7th Cir. 2007; No. 05-3718). In prosecution for wire fraud violations, the defendant argued on appeal that the district court erroneously admitted the out-of-court statements of his former attorney under Federal Rule of Evidence 801(d)(2)(D). At trial, the district court admitted several out-of-court statements made by the defendant's attorney to third parties admitting the defendant's guilty. The court found the statements admissible as party admissions under Federal Rule of Evidence 801(d)(2)(D). This rule provides that a statement is not hearsay if the statement is offered against a party and is a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship. An attorney may be the agent of his client for purposes of the Rule. However, the unique nature of the attorney-client relationship demands that a trial court exercise caution in admitting statements that are the product of this relationship. The court has cautioned the government that it should only offer this sort of evidence in rare cases and when absolutely necessary, in order to avoid impairing the attorney/client relationship, chilling full disclosure by a defendant to his lawyer, and deterring defense counsel from vigorous and legitimate advocacy. In the present case, the court held that the district court failed to apply this more exacting standard. The attorney's statements in this case were made more than five years before the criminal investigation into the defendant's activities and were made solely for the purpose of notifying potential victims of problems as part of a strategy to be cooperative. Here, the government achieved the equivalent of having the attorney stand with prosecutors and vouch for his indictment. From a policy perspective, defendants will be chilled from sharing information with their attorneys, defense attorneys will be deterred from vigorous advocacy, and the attorney-client relationship will be impaired if statements of an attorney regarding his client's criminal liability are admissible. Nevertheless, the court found the error to be harmless, given the defendant's own damning admissions and the other overwhelming evidence in the case.

United States v. Al-Shahin, ___ F.3d ___ (7th Cir. 2007; No. 05-2573). In prosecution for mail fraud arising out of the defendant's involvement in a scheme to collect

money from an insurance company for a fraudulent automobile accident, the Court of Appeals held that the district court properly admitted the testimony of the defendant's attorney under the crime-fraud exception to the attorney-client privilege. In order to catch people making fraudulent insurance claims related to faked automobile accidents, the FBI set up a law office and, through a cooperating witness, made it known that the attorney in the office would assist in making false claims to insurance companies. The defendant went to the attorney seeking to use his services in a fraudulent claim, whereupon he was arrested. At trial, the defendant sought to bar the lawyer's testimony based on the attorney-client privilege. The Court of Appeals noted that the crime/fraud exception to the privilege is forfeited if the attorney is assisting his client to commit a crime or a fraud. In order for the exception to defeat the privilege, there must be something to give color to the charge; there must be prima facie evidence that it has some foundation in fact. If such evidence of a crime or fraud exists, then the seal of secrecy is broken and the privilege inapplicable. The standard for prima facie evidence is not whether the evidence supports a verdict but whether it calls for inquiry. In other words, all that was needed in the present case was something to give color to the charge that the defendant engaged in a fraudulent scheme to obtain money for a staged accident from an insurance company, culminating in mail fraud. Here, there were numerous circumstantial facts establishing that the defendant frequently engaged in insurance fraud schemes sufficient to give "color to the charge," thereby defeating the privilege.

United States v. Murray, ___ F.3d ___ (7th Cir. 2007; No. 06-1078). In prosecution for participating in a drug conspiracy in which a gun was used and a death resulted from that use, the court affirmed the district court's exclusion of the defendant's proffered "reverse 404(b)" evidence. The defendant sought to introduce evidence that his two co-conspirators had previously arranged to have someone killed to protect their drug business. He argued that this evidence should have been admitted at trial to evidence proof of a pattern of criminal conduct, showing that the coconspirators, rather than the defendant, arranged the death in the present case. The Court of Appeals noted that although Rule 404(b) is ordinarily invoked by a defendant to prevent propensity evidence from being admitted, occasionally the government rather than the defendant invokes the rule in order to prevent the defendant from using "other crimes" of *another* person to try to shift the blame to that person. In such instances, concern with the poisonous effect on the jury of propensity evidence is minimal. Since the jury is not being asked to judge that other person, the primary evil that may result from admitting such evidence against a defendant--by tainting his character--is not present. Even if the evidence causes the defendant to be acquitted, and the other person is put on trial, *his* guilt or innocence will be determined on the basis of the evidence in his case, and not on the basis of the other crimes he committed. Thus, in the majority of cases, the only serious objection to the evidence is that its probative value is slight, as it may just amount to pointing a finger at someone else who, having a criminal record, *might* have committed the crime the defendant is accused of committing. But, unless the other crime and the present crime are sufficiently alike to make it likely that the same person committed both crimes, so that if the defendant did not commit the other crime he probably did not commit this one, the evidence will flunk Rule 403's test. Given these general principles, the question is whether the present case fits within the proof of a pattern of criminal conduct by a third person. In the present case, the evidence was properly excluded because the defendant failed to prove a pattern. Violence, sometimes resulting in death, is not a distinctive method of resolving disputes over illegal drugs.

United States v. Taylor, 471 F.3d 832 (7th Cir. 2006; No. 05-3819). In prosecution for manufacturing marijuana plants, the Court of Appeals vacated the jury's special verdict finding that the defendant possessed more than 1000 marijuana plants. At trial, two Detectives testified that they and a third detective (who did not testify) counted the plants on the defendant's premises. Although neither of the testifying detectives counted 1000 plants individually, when combined with the count of the third, non-testifying detective, the number was 1,417 plants. Although he did not object at trial, the defendant argued in his post-trial motion that his Sixth Amendment right to confront the witnesses against him was violated when the hearsay statements of the third detectives were relied upon by the testifying officers to reach a number greater than 1000. The Court of Appeals agreed. The testimony of both officers was based on inadmissible hearsay in that their conclusion regarding the total number of plants was predicated on the number of plants counted by the non-testifying officer. By allowing the testimony regarding the total number of plants counted, the district court effectively admitted the out-of-court statements of the other officer to prove the number of plants. Moreover, because the error contravened the protections of the Sixth Amendment's Confrontation Clause, the error was plain. Finally, the court concluded that the error affected the defendant's substantial rights, for without the testimony of the detectives concerning the total number of plants reportedly counted, the pictures and physical evidence of the plants alone are not enough to establish that more than 1000 plants were found at Taylor's home. Accordingly, the court vacated the

jury's special finding and the defendant's sentence, remanding the case to the district court for resentencing.

United States v. Kuzlik, 468 F.3d 972 (7th Cir. 2006; No. 06-1007). In prosecution for mail fraud offenses, the defendant argued that the admission of 404(b) evidence relating to the defendant's financial condition before and during the alleged execution of the fraud scheme was erroneous. The district court ruled that evidence of the defendant's debts, his debt defaults, and his bank account overdrafts during the relevant period was admissible because it showed his motive for engaging in the fraudulent scheme. The defendant argued on appeal that because the seminal issue for the jury was his state of mind, the jury was unable to appreciate the "extremely fine distinction" between propensity and motive. The court ruled that no such confusion existed, especially given that the district judge instructed the jury that the evidence was to be considered only for the purpose of establishing the defendant's motive to commit the crime.

United States v. Hampton, 464 F.3d 687 (7th Cir. 2006; No. 05-3591). In prosecution for ten bank robberies, the Court of Appeals rejected the defendant's challenge to the government's proof that the banks were federally insured. At trial, the government introduced photocopies of the certificates from the FDIC establishing that they were insured. The government also elicited testimony from various bank tellers regarding the insured status of the banks. The district judge admitted the photocopies under Rule 902(1) of the Federal Rules of Evidence, which provides that documents bearing a seal of the United States or one of its officials, agencies, etc., plus a signature purporting to attest or execute the document is "self-authenticating." However, here, the copies were copies of sealed documents rather than the sealed documents themselves. Thus, the rationale of Rule 902(1), according to the Committee Notes, that a seal is difficult to forge is not present here, for a copy of a seal could in fact be easy to copy. Moreover, although Rule 1005 provides that copies of public records are admissible if a witness testifies that he compared the copy with the original and determined the copy to be accurate, the tellers were not clear about whether they had compared the copies introduced as evidence to other copies or the actual originals. Nevertheless, these evidentiary rules are not intended as a "straightjacket." Article X of Federal Rule of Evidence 1003 notes that a duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. Here, between the rival hypotheses--that the copies are genuine, as the government contends, and that they are forgeries, as the defendant contents--the defendant's hypothesis is so improbable that without some evidence to support the hypothesis no reasonable person would accept it. Thus, the documents were properly admitted, although the court did advise the government to in the future get an affidavit from the FDIC confirming the insured status of the robbed bank or by offering testimony by the bank employee who is the actual authorized custodian of the bank's FDIC certificate. Although the government was "sloppy in this case . . . sloppiness is not a ground for reversal of judgment."

United States v. Cunningham, 462 F.3d 708 (7th Cir. 2006; No. 05-1515). In prosecution for various drug related offenses, the Court of Appeals reversed the defendants' convictions due to the introduction of irrelevant evidence concerning the government's authorization procedures for obtaining Title III wiretap authorization. Specifically, over the defendant's objection at trial, a government witness recounted a litany of procedures of the local U.S. Attorney's office, the Office of the Attorney General, and the DEA utilized in seeking court authorization for two telephone wiretaps. In doing so the government's witnesses' testimony suggested to the jury that a panel of senior government lawyers in the Office of the Attorney General in Washington, D.C. and others in law enforcement were of the opinion that there was probable cause to believe the defendants were indeed engaging in criminal activity. The Court of Appeals concluded that the Title III evidence was not relevant in the case. The procedures used and the opinions obtained in gaining authority for use of the wiretaps were wholly unrelated to the defendant's guilt or innocence--and not necessary to be established to prove the case against the defendants. Rather, the obvious purpose of the evidence was to show the jury there were several senior government attorneys and agents who all believed there was probable cause that the defendants were involved in a drug conspiracy, and, indirectly, that they all believed, in their professional judgment, the defendants were in fact committing drug-related crimes. The government witness was improperly vouching for how good the evidence was. In short, "the government piled on needless, unfairly prejudicial evidence that may have affected the jury's judgment, and this error was not harmless." Therefore, the court reversed the defendants' convictions.

United States v. Jones, 455 F.3d 800 (7th Cir. 2006; No. 04-2447). In prosecution for possession with intent to distribute, the Court of Appeals affirmed the admission of 404(b) evidence. At trial, the court allowed the government to introduce into evidence the defendant's prior conviction in 1994 for unlawful delivery of a controlled substance, although the district judge gave a

limiting instruction regarding the evidence. The defendant thereafter testified on his own behalf and denied that any of the crack cocaine found in the apartment where the government claimed he lived had been his. The defendant also admitted he had the prior conviction, but also noted that he had "pretty much" forgotten how to sell drugs since his prior conviction. In affirming the admission of the prior conviction, the court noted that the most obvious justifiable situation in which prior convictions are admissible in drug prosecutions on the issue of intent are in those situations in which the defendant, while admitting possession of the substance, denies the intent to distribute it. In such a context, the matter of intent is placed squarely before the jury, and previous convictions generally are relevant and probative on the issue of intent. Likewise, evidence of earlier drug trafficking convictions also can be relevant and probative when the defendant flatly contests all elements of the charge of possession with intent to distribute. Here too, the issue of intent must be established by the government and evidence of prior convictions for drug trafficking may be helpful. However, despite the general utility of this evidence to establish intent, it is incumbent upon the government to affirmatively show why a particular prior conviction tends to show volition to commit the new crime. In the present case, the evidence was properly admitted because the earlier conviction was relevant and probative on the defendant's intent, given the defendant's denial of his knowledge of the drug trade.

United States v. Ellis, 460 F.3d 920 (7th Cir. 2006; No. 05-3942). In prosecution for being a user of a controlled substance in possession of a firearm in violation of 922(g)(3), the Court of Appeals affirmed the admission of medical records to establish that the defendant was under the influence of drugs at the time he possessed the weapon. After a traffic stop in which a weapon was found in the defendant's car, the arresting officer asked the defendant to go to the hospital to have his blood and urine tested for drugs. After the test, the hospital issued a report, noting that the purpose of the test was for "reasonable suspicion/cause" and done as "requested by the officer." Although admitted at trial as a business record, the defendant argued that according to *Crawford*, the documents consisted of inadmissible hearsay. The defendant argued that most business records are created *prior* to any investigation of criminal activity, but the records in this case should be considered testimonial because they were created under police direction and *during* an investigation for the purpose of determining whether a crime had been committed. Such a difference is, according to *Crawford*, important for delineating between testimonial and nontestimonial evidence. The Court of Appeals, however, rejected this argument and noted that these circumstances do not transform what is otherwise a nontestimonial business record into a testimonial statement implicating the Confrontation Clause. Specifically, there was no indication that the observations embodied in the records were made in anything but the ordinary course of business. Moreover, it does not matter that the observations were made with the knowledge that they might be used for criminal prosecution. When the professionals made the observations in their report, they were not acting as witnesses and were not testifying, but rather simply recording observations which, because they were made in the ordinary course of business, were statements that by their nature were not testimonial.

United States v. Sebolt, 460 F.3d 910 (7th Cir. 2006; No. 04-2588). In prosecution for using a computer to commit various federal crimes involving child pornography, the Court of Appeals affirmed the defendant's conviction over his argument that unfairly prejudicial evidence was admitted during his trial. First, the Court of Appeals concluded admission of the defendant's prior molestation of a young male relative was relevant under Rule 404(b) to show his motive for posting child porn on the Internet (looking for new victims). However, the court did conclude that the court should not have admitted a pair of boy's underwear into evidence. Specifically, when searching the defendant's room, they found a pair of young boy's underwear under the defendant's bed, which he told the police he used during masturbation. Although the defendant's statement regarding the underwear was admissible, the court should not have actually admitted the underwear into evidence, as the defendant admitted to their possession and use. Thus, there was no probative value in admitting the physical evidence as proof of motive and it's admission was unfairly prejudicial. However, the error was harmless, given the defendant's handwritten confession and a file server log evidencing the defendant's posting of child porn on the Internet.

United States v. Thomas, 453 F.3d 838 (7th Cir. 2006; No. 04-2063). In prosecution for being a felon in possession of a weapon, the Court of Appeals held that the admission of a recorded 911 call did not violate the defendant's right to confrontation. The court noted that the Supreme Court recently provided a working test to distinguish testimonial from nontestimonial statements in the limited context of police interrogations. Specifically, in *Davis v. Washington*, 547 U.S. ___, *7 (U.S. June 19, 2006), the Court held: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet the ongoing emergency. They are testimonial when the circumstances objectively

indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." In the present case, the caller was describing events as they were actually happening and any reasonable listener would know that the caller and the operator were dealing with an ongoing emergency. Moreover, the caller ended the conversation immediately upon the arrival of the police. Given that the call was non-testimonial, the admission of the evidence was evaluated under the old *Ohio v. Roberts* test. Under that test, the call was admissible as a present sense impression and an excited utterance.

United States v. Smith, 454 F.3d 707 (7th Cir. 2006; No. 04-3581). In prosecution for conspiracy to commit narcotics offenses, the Court of Appeals found that the district court erred in limiting the testimony of a cooperating government witness, where the government argued that defense counsel's questions on cross-examination sought information from the witness covered by the attorney-client privilege. Upon cross-examination of the government's witness, defense counsel sought to obtain information about the favorable deal the witness was able to obtain from the government in exchange for his cooperation. The district court, however, limited the questions, after granting the government's objection that the questions related to the witnesses' conversations with his own lawyer which were covered by the attorney-client privilege. The Court of Appeals noted that the privilege belonged solely to the witness and not to the government. Although the government did not act inappropriately in bringing the privilege issue to the court's attention, this was not a proper basis for a government objection to the defense questions. Moreover, the witness did not assert the privilege himself and appeared ready to answer the defense questions without limitation. He had already answered at least one question regarding what his lawyer had told him. However, the court ultimately concluded that the error was harmless, finding that defense counsel thoroughly examined the witness about every aspect of his plea agreement and his motives and biases were fully exposed. The added detail from his conversations with his attorney would not have changed the outcome given the strength of the government's remaining evidence.

GUILTY PLEAS

United States v. Rea-Beltran, 457 F.3d 695 (7th Cir. 2006; No. 04-2305). In prosecution for illegal re-entry, the Court of Appeals vacated the defendant's conviction after a jury trial, where the district court improperly refused to accept the defendant's plea and therefore forced him to trial. The district court originally accepted the defendant's plea and plea agreement. However, at the sentencing hearing, When questioned, the defendant waffled as to whether he actually understood the rights he waived at his change of plea hearing. Based on this discussion, the district court vacated the plea and ordered that the defendant proceed to trial. At numerous other hearings, the defendant attempted to plead guilty, but because the defendant appeared confused about the rights he would waive, the judge refused to accept a plea, finally concluding: "It seems to me that Mr. Rea-Beltran, despite his commentary, would probably, in my opinion, say that whatever proceedings we have today, he won't remember very much or that he didn't understand. And so, consequently, it seems to me that in order to ensure that all of his rights are protected and there is no argument at a later time that he did not knowingly and voluntarily waive his rights, it seems to me we should proceed to trial." At sentencing, the district court enhanced the defendant's sentence for obstruction of justice and denied him acceptance of responsibility. On appeal, the defendant argued that the district court erred in refusing to accept the plea. The Court of Appeals initially noted that most appeals of Rule 11 decisions arise in the reverse context of this case. Typically, a defendant seeks to withdraw his guilty plea by challenging the sufficiency of the factual basis established at the plea colloquy. Here, by contrast, the defendant sought to reinstate his guilty plea, contending that he indeed admitted a factual basis sufficient for the court to accept his plea. From this result, the defendant wishes to salvage his plea agreement with the government, which would have dismissed some charges and resulted in a more favorable sentence. The court held that the district court erred in concluding that a factual basis for the defendant's plea did not exist, because the district court misunderstood what the government had to prove in order to convict the defendant. There was in fact a sufficient factual basis for the defendant's plea. Accordingly, the court vacated the defendant's conviction and remanded the case to the district court with instructions to permit the defendant to offer a guilty plea on the terms originally agreed to by the Government.

United States v. Spilmon, 454 F.3d 657 (7th Cir. 2006: No. 05-3750). In prosecution for defrauding Medicaid, the Court of Appeals rejected the defendant's argument that his plea was coerced due to the government's threat to prosecute his wife if he did not enter into a plea. Specifically, as part of the defendant's plea agreement, the government agreed to dismiss charges against his wife. On appeal, the defendant argued that he knew all along he was innocent but his love for his wife moved him to admit guilt so that his wife would be spared. The court noted that such "package deals" are common in the

federal system, and they are not improper or forbidden. Indeed, it would be in no one's interest if a defendant could not negotiate for leniency for another person. From the defendant's standpoint the purpose of pleading guilty is precisely to obtain a more lenient outcome than he could expect if he went to trial. It is a detail whether the leniency he seeks is purely selfish or encompasses additional persons, provided that the plea is not coerced. Moreover, it could be argued that the decision to sacrifice oneself for another is more likely to be carefully, even agonizingly, considered than to be impulsive. Of course, this is not to deny that a package deal, like any other plea agreement, could be coercive. For example, if the defendant was innocent and the government knew it, it would be coercive for the government to attempt to obtain a plea by threatening to prosecute his wife whom they also knew was innocent. Likewise, it would be coercive to threaten to prosecute the wife if they knew she was innocent, even if the defendant himself was not. But it is not duress to offer someone a benefit you have every right to refuse to confer, in exchange for suitable consideration. That is all that happened here, for there is no suggestion that the government believed either the defendant or the wife to be innocent or that it lacked probable cause to prosecute either of them.

HABEAS CORPUS/2255

Raygoza v. Hulick, ___ F.3d ___ (7th Cir. 2007; No. 05-2340). Upon review of a habeas corpus petition arising from a state court murder conviction after a bench trial, the Court of Appeals found that the defendant received ineffective assistance of counsel. The defendant was charged with a murder in which a number of witnesses identified him as the shooter. However, the defendant had an alibi that he was attending his mother's birthday part 35 miles away from the murder. Nine people were present at the party who could have corroborated the defendant's alibi, but defense counsel did not call any of the witnesses at trial. Rather, he called only the defendant's girlfriend to support the alibi defense. At the post-conviction hearing, seven witnesses testified, all of whom supported the defendant's alibi. Trial counsel also testified at the hearing, giving reasons for why he did not call each of the witnesses. Moreover, counsel revealed that he did almost no investigation into the potential alibi witnesses. The Court of Appeals noted that in a first-degree murder trial, it was almost impossible to see why a lawyer would not at least have investigated the alibi witnesses more thoroughly. Counsel's explanations for his decision not to call any of the seven witnesses new counsel identified were, in the words of the court, "reminiscent of the children's verse 'And then there were none.'" Although each of the witnesses may have had vulnerabilities on cross-examination, counsel did not consider what impact the witnesses would have had cumulatively. Instead, counsel picked off each one and wound up leaving the defendant with no one but his girlfriend to corroborate his account. Having found counsel's conduct to have fallen below professional standards, the court also concluded that the defendant was prejudiced. The trial judge indicated that he was heavily influenced by the lack of a strong alibi defense. Moreover, the only witnesses linking the defendant to the murder were rival gang members. Thus, the testimony of the seven alibi witnesses could very well have influenced the verdict in the case.

Poe v. United States, 468 F.3d 473 (7th Cir. 2006; No. 04-3697). Upon the filing of a 2255 petition outside the 1-year statute of limitations, the Court of Appeals affirmed the district court's decision that the petition was untimely. Two months after the Supreme Court decided *Richardson v. United States*, the petitioner filed a 2241 petition seeking to overturn his CCE conviction. Waiting 14 months to rule on the petition, the district court finally determined that the petitioner should have filed a 2255 petition, and therefore dismissed the petition with leave to file a 2255. However, by this time, the 1-year statute of limitations for filing such a petition had run, and the district court dismissed the petitioner's 2255 petition as untimely. On appeal, the petitioner argued that because his 2241 petition was the functional equivalent of a 2255 petition, the district court should have construed it as a timely 2255 motion. In support, he cited *Carter v. United States*, 312 F.3d 832, 833 (7th Cir. 2002), which held that a postconviction motion that is functionally a section 2255 motion should be treated as such however it is labeled. The Court of Appeals noted, however, that *Carter* refers to this approach to postconviction motions in the context of preventing federal prisoners from circumventing AEDPA's requirement that they obtain permission from the court of appeals before filing a second or successive 2255 motion. The petitioner cites no case and the court could find none that supports a rule requiring a district court to construe equivalent postconviction filings as 2255 motions to help prisoners comply with AEDPA's one-year limitations period. Thus, although noting that had the district court ruled on the petitioner's original 2241 motion "promptly," the petitioner would have had plenty of time to file a 2255 petition, the Court of Appeals nevertheless ruled that there was no way to avoid application of the statute of limitations in this case.

INTERSTATE AGREEMENT ON DETAINERS ACT

United States v. Jones, 454 F.3d 642 (7th Cir. 2006: No. 05-1489). In prosecution for narcotics offenses, the Court of Appeals rejected the defendants argument that the district court erred in not dismissing the indictment according to the Interstate Agreement on Detainers Act. The act provides that when a detainer is lodged against a defendant, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of his request for final disposition to be made of the indictment. At issue in this case was whether the demand must actually be delivered to the prosecuting officer and the appropriate court, or if delivery to a supposed agent is sufficient. The defendant chose to exercise his right to a speedy trial, but his detainer was never delivered to the U.S. Attorney of the district court. After executing the demand, the defendant gave the document to the warden of his holding facility. The warden then forwarded it on to the Marshall's office in the wrong district, who then forwarded it on to the Marshall in the correct district. However, the demand never reached the court or the U.S. Attorney. Relying on agency theory, the defendant argued that delivery occurred when the detainer was received by the Marshall's office in the correct district, for the Marshall was the authorized agent for service. In rejecting this argument, the court noted that the Supreme Court has held that the demand must be actually delivered to the district court and prosecutor of the jurisdiction that lodged the detainer against the defendant for the 180-day clock to start. Thus, this language does not contemplate authorized agents. Although a strict rule, it is one contemplated by the language of the IAD and the Supreme Court.

JURY ISSUES

United States v. Van Sach, 458 F.3d 694 (7th Cir. 2006; No. 2790). In prosecution for being a felon in possession of a weapon, the Court of Appeals rejected the defendant's due process argument, where the district court ordered the defendant (who represented himself at trial) to appear before the jury in leg irons. The court noted that shackling a defendant is an extreme measure, but a trial judge also has the responsibility to the safety of jurors, attorneys, and witnesses in his or her courtroom. Here, although the defendant's *pro se* representation would make the shackles more visible to the jury, his *pro se* representation also gave the defendant more freedom of movement around the courtroom, thereby presenting a greater risk to others. Given the defendant's record of disciplinary actions while in custody, including assaults, and the district judge's careful consideration of the defendant's arguments against shackling, the Court of Appeals concluded that the defendant's right to a fair trial was not denied. This was especially so where, as here, the court questioned the jurors to ensure that the defendant's shackles would not influence their verdict.

OFFENSES/DEFENSES

United States v. Radomski, ___ F.3d ___ (7th Cir. 2007; No. 05-3792). In prosecution for conspiring to sell the illegal drug Ecstasy, the Court of Appeals held that the evidence was insufficient to sustain the jury's verdict. An FBI informant approached an individual (not the defendant) about purchasing Ecstasy. The man agreed to sell the informant 1,000 pills for $8,000 and told him that his friend and supplier would package the drugs so police dogs could not detect them. The two then later met in a restaurant to consummate the deal, whereupon the seller telephoned the defendant and was overheard asking whether he had "packed it nicely." The two then went to the informant's car, where the informant gave the seller the money. The seller then said the drugs were in his friends car in a nearby parking lot, and he would be back with the drugs in a few minutes. He then when to the defendant's truck, whereupon they drove off with the informant's money without delivering any drugs. The next day the police arrested both the seller and the defendant, but a search of the defendant's belongings turned up nothing to indicate drug dealing. The Court of Appeals concluded that the evidence presented to the jury made it no more likely that the defendant conspired from the get-go to defraud the informant, as opposed to actually conspiring to deliver the drugs. Although the informant overheard the seller ask if the defendant "packed it nicely," this was most likely said for the purpose of reassuring the informant. Accordingly, given the evidence presented, the Court of Appeals reversed the defendant's conviction due to insufficient evidence.

United States v. James, 464 F.3d 699 (7th Cir. 2006; No. 05-1411). In prosecution for possession of and carrying a firearm in furtherance of a drug trafficking crime, the court held that the government failed to meet its burden on the "carry" prong of the offense charged. The evidence at trial regarding the guns was thin. One witness testified that the defendant owned four guns. Two shotguns and a pistol were recovered from the home of the defendant, and a second pistol was recovered from a residence the defendant frequented. The latter pistol was found in a shoebox along with a bag of cocaine which had the defendant's fingerprint on it. Although clearly enough to establish the defendant's possession, the court concluded that this evidence was

insufficient to prove the defendant "carried" the firearm. There was literally no evidence that any of the guns had ever been moved or had ever changed location. There was no evidence that the defendant ever carried the guns on his person or in his car while engaged in drug trafficking. The evidence showed only that he stored the guns near drugs. Nevertheless, the court found the error to be harmless, given that sufficient evidence existed to prove the defendant possessed the firearms. The general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, as the defendant's indictment did, the verdict stands if the evidence is sufficient with respect to any one of the acts charged.

United States v. Daniel Groves, 470 F.3d 311 (7th Cir. 2006; No. 05-2902). In prosecution for being a felon in possession of a firearm and ammunition, the Court of appeals reversed the defendant's conviction because the government failed to present sufficient evidence on the interstate commerce element of section 922(g)(1). The firearm which formed the basis of the charge against the defendant was not recovered, and the only witness to the offense conduct could not identify the make, model, or manufacturer of the firearm; he only identified it as a shotgun. To prove the interstate commerce element, the government presented the testimony of an ATF agent. The prosecutor asked him, "Are there any major manufacturers of shotguns in the State of Indiana," to which the agent responded negatively. The Court of Appeals noted that the agent gave no definition of the term "major" and was never asked about minor manufacturers or statistical probabilities that the gun was manufactured outside of Indiana. Without some indication of the meaning of this testimony, without placing it in the context of the gun manufacturing industry, it is simply too vague to support proof of the interstate commerce element. Minor manufacturers could, collectively, manufacture the majority of shotguns produced. Any conclusion drawn from the testimony would be the result of pure speculation as to what the agent meant by "major," and speculation cannot be the basis of proof in the civil context much less the basis for proof beyond a reasonable doubt. In a case such as this, the government should have at a minimum attempted to quantify the percentage of shotguns that are manufactured by major manufacturers versus by individuals or by other minor manufacturers. If the percentages demonstrate that it is highly unlikely that the shotgun was manufactured in Indiana, such testimony could support proof of this element. The Court of Appeals also rejected the government's claim that the evidence was sufficient to establish that the possession of the shotgun *affected* interstate commerce, at least in the aggregate as set forth by the Supreme Court in *Wickard v. Filburn*. The court noted that in *United States v. Lopez*, the Supreme Court explicitly rejected such an aggregation principle when striking down a federal law prohibiting possession of a firearm in a school zone. Specifically, because the law in question had nothing to do with commerce or economic enterprises and it was not an essential part of a larger regulation of economic activity, the Court held that the statute could not be sustained under the cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce, cases such as *Wickard*. The court of appeals concluded that a rationale that could not sustain the statute in *Lopez* cannot be the basis for upholding a conviction under section 922(g).

United States v. De La Cruz, 469 F.3d 1064 (7th Cir. 2006; No. 05-1548). In prosecution for misapplying public funds in violation of 18 U.S.C. 666(a)(1)(A), the Court of Appeals affirmed the defendant's convictions. The defendants, both municipal officials, diverted millions of dollars in public money to provide work on private property (concrete, etc) in order to secure votes in an upcoming election. When the crimes were uncovered, the city ratified the inappropriate work done as a result of the defendants' fraud, in an effort to straighten out the city's finances and pay contractors for work which was wrongly authorized. On appeal, the defendants argued that the City's "ratification" of the work makes it legally impossible for them to be guilty of misapplication of public funds. The court rejected this theory. Although noting that authorization or ratification from those with authority can be an important evidentiary factor in favor of the defense, militating against a finding of intentional misapplication, after-the-fact ratification does not function as a complete defense to prosecution when criminal intent is proven. Here, there was overwhelming evidence of the defendants' intent to commit a crime. Thus, although noting that there may be a case where the consent or authorization of those with authority, combined with a dearth of evidence supporting a criminal intent, results in insufficient evidence to find a defendant guilty under this particular statute, this was not that case.

United States v. Villarreal-Tamayo, 467 F.3d 630 (7th Cir. 2006; No. 05-3514). In prosecution for illegal reentry, the defendant argued that his plea was not knowing and voluntary because he did not admit, nor did the district court find, that he was previously convicted of an aggravated felony, which increased his statutory maximum sentence from two to twenty years. The Court of Appeals, in rejecting this argument, noted that the existence of an "aggravated felony" is not an "element" of the offense to which the defendant must

admit at the plea colloquy. Specifically, the Supreme Court in *Almendarez-Torres* held that section 1326(b)(2) (which contains the enhanced penalty for an aggravated felony) does not define a separate crime, but rather is a penalty provision authorizing an enhanced penalty for violation of section 1326(a); and the Constitution does not require an enhancement based on recidivism to be treated as an element of the underlying offense. Thus, although it would be a good thing to do, the judge was under no obligation to inform the defendant that his prior conviction would be an important sentencing factor. Likewise, the judge was not required during the plea colloquy to make an explicit finding that the defendant was convicted of an aggravated felony. Thus, the defendant's plea was knowing and voluntary notwithstanding the errors alleged.

United States v. Elliott, 467 F.3d 688 (7th Cir. 2006; No. 05-4623). In prosecution for fraud offenses and failing to report to serve a sentence, the Court of Appeals held that the offense of failing to report to serve a sentence is a "continuing offense." After being convicted for fraud offenses, the defendant failed to report to serve his sentence and remained at-large for over 15-years. The defendant argued that the statute of limitations had run on his offense because his offense was "complete" as soon as the appointment for surrender was missed. The court noted that in *United States v. Knorr*, 942 F.2d 1217 (7th Cir. 1991), the court did state that the offense in question was "not a continuing offense." However, the court found that the language in *Knorr* was dictum and it did not cite any authority for the proposition. The court therefore disavowed the language in *Knorr* and held that the offense continues until the defendant turns himself in or is captured.

Santos v. United States, 461 F.3d 886 (7th Cir. 2006; No. 04-4221). Upon the government's appeal from the district court's grant of a 2255 petition, the Court of Appeals refused to overrule its decision in *United States v. Scialabba*, 282 F.3d 475 (7th Cir. 2002), which interpreted the term "proceeds" in the money laundering statute to mean gross, rather than net, income. Although noting that all other circuits to have considered the question have adopted an approach contrary to *Scialabba*, the Court of Appeals nevertheless found that the government had failed to present a compelling reason to overturn the case.

United States v. Rodriquez-Rodriquez, 453 F.3d 458 (7th Cir. 2006; No. 05-4786). In prosecution for illegal re-entry, the Court of Appeals held that venue is proper in any jurisdiction where the defendant is first discovered to be an illegal alien. The defendant was initially arrested in Texas for speeding, and was subsequently extradited to Wisconsin for failing to register as a sex offender. Once in Wisconsin, it was discovered that he had illegally re-entered the country, and he was charged in the Western District of Wisconsin. The defendant argued that venue was only proper in Texas, where he had been initially "found." Although Texas authorities did not know he was an illegal alien, the defendant maintained that the Texas authorities *should* have discovered his status. The Court of Appeals concluded that there is no single jurisdiction which has appropriate venue, but rather 8 U.S.C. 1329 says that a prosecution may be brought at any place in the United States at which the violation may occur or at which the person charged with a violation may be apprehended. The defendant assumed that the crime in question occurs only at the instant of its detection, so that "being found" is equivalent to "being arrested." However, the statutory language suggests that the alien commits the offense wherever he goes. Thus, the court held that "venue may be laid wherever the alien is located in fact, and as often as he is located, whether or not better coordination and diligence would have alerted federal officials to his presence and status earlier and elsewhere.

United States v. Rosby, 454 F.3d 670 (7th Cir. 2006; No. 05-2770). In prosecution for mail fraud, the Court of Appeals held that reliance is not an aspect of the materiality element in mail-fraud prosecutions. The defendants were charged with mail fraud arising out of their attempts to deceive their lenders. Specifically, the defendants were loaned money by the banks based upon the number of units their company began production on. As their sales slipped, the defendants began falsifying the number of units upon which they had started work, eventually leading to a multi-million dollar loss for the lenders once the fraud was discovered. On appeal, the defendants argued that their false representations were not material because, by making prudent inquiries, the lenders could have discovered the fraud. Specifically, at common law, a party cannot close his eyes to a known risk or act with indifference to that risk but must make reasonable attempts at self-protection. Here, some of the lenders' employees had their suspicions yet failed to follow up. The Court of Appeals noted that although at common law both materiality and reliance are essential in private civil suits for damages, reliance is not an ordinary element of federal criminal statutes in dealing with fraud. Indeed, the Supreme Court held in *Neder v. United States*, 527 U.S. 1, 20-25(1999), that the common-law requirements of "justifiable reliance" and "damages" plainly have no place in federal fraud statutes. Accordingly, the court stated that once the Supreme Court excludes reliance as a separate element of the mail-fraud offense, it will not do for appellate judges to roll reliance into materiality; that would add through the back door an element barred from the front.

United States v. Mixon, 457 F.3d 615 (7th Cir. 2006; No. 05-3795). In prosecution for being a felon in possession of ammunition, the Court of Appeals rejected the defendant's argument that because the ammunition was in an antique firearm, he could not be found guilty of the offense. Specifically, an antique firearm is not a "firearm" as defined in the Gun Control Act. It was undisputed that the defendant possessed an antique firearm, and the 9mm rounds the defendant was charged with possessing were loaded into the antique. Thus, the defendant argued that ammunition loaded into what is not a "firearm" cannot be "ammunition" as defined in the Gun Control Act. The Court of Appeals rejected this argument, noting that bullets are "ammunition" if they are designed for use in *any* firearm. If the bullets in question had been designed exclusively for use in an antique revolver, they would not be "ammunition" because by definition the antique revolver is not a "firearm." On the other hand, if bullets were designed for use, not just in an antique revolver, but in other guns manufactured after 1898, then the bullets would be ammunition because they would be designed for use in *any* firearm. Here, although the bullets fit into the antique firearm, they also worked in a modern 9mm firearm, and thus formed a proper basis for prosecution for the offense charged.

United States v. Sahakian, 453 F.3d 905 (7th Cir. 2006; No. 05-1642). In prosecution for possession of a weapon in prison, the Court of Appeals rejected the defendant's argument that he was entitled to present a defense based upon the theory of "necessity." The defendant argued that the defense of necessity entitled him to possess the weapon in question because he experienced a real and particularized threat to his life by way of rumors that there was a price on his head. The court noted that a defendant seeking to invoke the defense of necessity in a criminal case must establish that he faced an imminent threat of serious bodily injury or death and that he had no reasonable legal alternatives to avoid the threat. In the prison context, an "imminent threat" should be construed narrowly, and a prisoner must establish that he experienced something more than a "generalized fear of attack by some unknown or unspecified assailant at some unknown time in the future. The threat must be immediate and there must be no reasonable alternative to violating the law." Here, the threat against the defendant was at best a threat of *future* violence against him at some unspecified time, and was therefore not immediate. Moreover, the defendant failed to demonstrate that the possessed weapon would have been any use to him had there been an immediate threat anyway, for the defendant kept the weapon in a body cavity and it took him 15 minutes to remove it when discovered by prison officials. Thus, he could not have retrieved the weapon to counter an immediate threat had there been one.

PROSECUTORIAL MISCONDUCT

United States v. Gilmore, 454 F.3d 725 (7th Cir. 2006; No. 06-2001). In prosecution for various drug related offenses, the Court of Appeals held that the district court properly denied a motion to dismiss based upon double jeopardy grounds. Prior to trial, the government filed a motion *in limine*, seeking permission to reference the fact that one of the defendants was incarcerated at the time of the offense conduct. The government argued that this fact was intricately intertwined with the offense conduct, but the district court denied the motion. However, during opening statement, the government referenced the defendant's incarceration three times.

The defendants then moved for a mistrial, which the district court granted. Then, in an effort to avoid re-trial, the defendants argued that the Double Jeopardy Claude precluded retrial, because the prosecutor's improper statements were done intentionally with the purpose of inducing the defendants to move for a mistrial. The district court, however, found that the prosecutor's misstatements were inadvertent and the court denied the motion to dismiss. The defendants then took an interlocutory appeal, pursuant to the collateral order doctrine. On appeal, the Court of Appeals noted that a defendant who asks for a mistrial cannot ordinarily make a double jeopardy claim upon retrial. However, where the prosecutor engages in misconduct to intentionally induce the defendants to move for a mistrial because the prosecutor believes the case is going badly, the Double Jeopardy Clause will preclude retrial. Here, the district court found that the prosecutor's violation of the court's order was inadvertent. Indeed, even some of the defendant's expressed this belief in the district court. Unless the prosecutor is purposefully trying to abort the trial, his misconduct will not bar retrial. It doesn't matter that he knows he is acting improperly, provided that his aim is to get a conviction. In the present case, there was no evidence to show that the prosecutor was attempting to salvage a trial gone bad, especially given that his misconduct occurred at the very beginning of the trial. Thus, the district court properly denied the motion.

SEARCH AND SEIZURE

United States v. Wilburn, ___ F.3d ___ (7th Cir. 2007; No. 05-4073). In prosecution for being a felon in possession of a firearm, the Court of Appeals affirmed the district court's denial of the defendant's motion to suppress evidence. Police received a tip that the defendant was a felon in possession of a weapon and

had a revoked driver's license. While watching the defendant's residence shared with a girlfriend, they observed the defendant enter a car and begin driving. Officers then stopped and arrested him for driving with a revoked license. With the defendant in the squad car, an officer approached the girlfriend at the residence, informed her of the nature of the investigation, and obtained her consent to search the apartment where they found firearms. The defendant was never asked for consent or questioned about firearms while the search was conducted. The defendant argued that the firearms should be suppressed under the rule announced by the Supreme Court in *Georgia v. Randolph*, ___ U.S. ___, 126 S.Ct. 1515 (2006). *Randolph* holds that police violate the Fourth Amendment when they conduct a search, authorized by a person with apparent authority to consent, over the objection of a physically present potential defendant who shares the premises and declines to offer his consent. In rejecting the defendant's argument, the court noted that the defendant was not "physically present" when the girlfriend consented to the search. Moreover, there is no evidence that the police deliberately removed him from the area to avoid hearing him invoke an objection to the search. Specifically, *Randolph* was decided 2 years after the search in this case, thus eliminating a concern that the police were attempting an end-run around *Randolph's* holding. Moreover, the defendant was validly arrested and lawfully kept in a place where people under arrest are usually held. The police were not obligated to bring the defendant to his girlfriend so he could be a party to the discussion regarding consent, and the firearms were therefore properly allowed into evidence.

United States v. Wen, 471 F.3d 777 (7th Cir. 2006; No. 06-1385). The defendant was found guilty after a jury trial of violating the export-control laws by providing militarily useful technology to China. On appeal, the defendant argued that the district court should have suppressed evidence derived from a wiretap approved under the Foreign Intelligence Surveillance Act. In affirming the district court, the Court of Appeals noted that the exclusionary rule is used to enforce the Constitution, not statutes or regulations. The legislature may elect to apply an exclusionary rule to a statute, as it did when enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968. However, FISA contains no exclusionary provision. Thus, violation of FISA itself will not result in exclusion of evidence, unless there is some independent Constitutional violation warranting exclusion as well. Here, the agents had probable cause to believe that a foreign agent was communicating with his controllers outside our borders, which made the interception reasonable for Constitutional purposes. If, while conducting this surveillance, agents discover evidence of a domestic crime, they may use it to prosecute for that offense, as they did in this case. That the agents may have known that they were likely to hear evidence of domestic crime does not make the interception less reasonable than if they were ignorant of this possibility. Evidence of a domestic crime, acquired during an intercept that is reasonable because it concerns traffic between a foreign state and one of its agents in the United States, may therefore be used in a domestic prosecution whether or not the agents expected to learn about the domestic offense. It is enough that the intercept be adequately justified without regard to the possibility that evidence of domestic offenses will turn up.

United States v. Harris, 464 F.3d 733 (7th Cir. 2006; No. 05-3808). In prosecution for drug offenses, the Court of Appeals held that the defendant was entitled to a *Franks* hearing. A detective filed an affidavit in support of a search warrant which asserted that surveillance was begun on the defendant's residence twenty days before the warrant application. The affiant allegedly observed the defendant and his brother going and coming from the residence. In the 72 hours preceding the application, a CI contacted the officer and reported seeing the defendant and his brother in the home with cocaine for sale. After the warrant was issued, the defendant's home was searched, drugs were found, and he was arrested. The defendant then filed a motion and request for a *Franks* hearing, attacking the credibility of the affiant detective. First, the defendant provided evidence that his brother was incarcerated during the alleged surveillance period and that the defendant himself was not present either, thus undermining the existence of the CI and the detective's observations. After the district court ordered the government to file a supplemental response, the government filed an affidavit which differed substantially from its first, including a statement that the surveillance of the residence occurred more than a week--rather than 72 hours--before the warrant application and the fact that the original tip regarding the defendant came from an anonymous call to the "Dope Hotline." The district court concluded that the detective's omissions both individually and in their cumulative effect suggested an intentional design to create an incorrect or at least misleading impression that the evidence relied upon to obtain the warrant was more current that it actually was. However, the magistrate judge ultimately concluded that the misrepresentations were not material to its probable cause determination. In coming to this conclusion, the magistrate considered new information supporting probable cause presented in the supplemental affidavit. The Court of Appeals held that this was an error. Specifically, to make a substantial preliminary showing of a false statement knowingly and intentionally made, or with reckless

disregard for the truth, the defendant must identify specific portions of the warrant affidavit as intentional or reckless misrepresentations, and the defendant should submit sworn statements of witnesses to substantiate the claim of falsity. A court then considers the affidavit, eliminating any false statements and incorporating omitted material facts, and determines whether probable cause existed. However, considering new information presented in a supplemental filing that supports a finding or probable cause is beyond the trial court's reach. Rather, its consideration of new information omitted from the warrant affidavit is limited to facts that *did not* support a finding of probable cause. Allowing the government to bolster the magistrate's probable cause determination through post-hoc filings does not satisfy the Fourth Amendment concerns addressed in *Franks*. Here, when the correct approach is taken, there was very little evidence supporting probable cause when the misrepresentations are severed from the affidavit. Accordingly, the court concluded that the defendant was entitled to a *Franks* hearing.

United States v. DiModica, 468 F.3d 495 (7th Cir. 2006; No. 05-4164). In prosecution for being a felon in possession of a weapon, the Court of Appeals affirmed the district court's denial of the defendant's motion to suppress. The defendant's wife went to the police with a claim of domestic battery. She then told the police that the defendant was at the residence she shared with him, that he was a convicted felon, and that there were guns on the premises. She gave the officers consent to search the residence and gave them a key. Without an arrest warrant but with probable cause, the officers drove to the defendant's residence. When the defendant came to the door, the officers told the defendant that his wife had been in a car accident. The defendant then led them into his mud room, whereupon they arrested him for domestic battery, removed him to the squad car, and then searched the house. In evaluating this case, the court initially noted that the consent of one who possesses common authority over premises or effects is valid against the absent, non-consenting person with whom that authority is shared. However, here, the defendant was present. In *Georgia v. Randolph*, ___ U.S. ___, 126 S.Ct. 1515 (2006), the Court held that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant. The Seventh Circuit nevertheless concluded that this case was distinguishable from *Randolph*. Here, the defendant and his wife were not standing together at the doorway, with one consenting to the search and the other not. The officers never asked the defendant for permission to search his house, and the defendant never told them that they couldn't do so. Although the defendant argued the police removed the defendant from the entrance of his house for the sake of avoiding a possible objection to the subsequent search, the court found that they legally arrested him on probable cause for domestic abuse. Once he was arrested and removed from the scene, the wife's consent alone was valid and permitted the officers to search the residence.

United States v. Elder, 466 F.3d 1090 (7th Cir. 2006; No. 05-3106). Upon affirming the district court's denial of a motion to suppress, the Court of Appeals, in dictum, expressed reservations about applying the exclusionary rule where an improper warrantless search was nevertheless supported by probable cause. The court stated: "The usual understanding of the [inevitable discovery] doctrine is that the exclusionary rule should not be applied when all the steps required to obtain a valid warrant have been taken before the premature search occurs. If probable cause alone--without putting in train the process of applying for a warrant--were enough to invoke the inevitable-discovery doctrine, that would have the same effect limiting the exclusionary rule to searches conducted without probable cause. Perhaps that would be a good development; the main requirement of the fourth amendment, after all, is that the search be reasonable. The exclusionary rule comes at such a high cost to the administration of the criminal justice system that its application might sensibly be confined to violations of the reasonableness requirement. When a warrant is sure to issue (if sought), the exclusionary 'remedy' is not a remedy, for no legitimate privacy interest has been invaded without good justification, but is instead a substantial punishment of the general public. (Unlike an award of damages, exclusions does *not* punish the wrongdoer.) Allowing the criminal to go free because of an administrative gaffe that does not affect substantial rights seems excessive. But whether to trim the exclusionary rule in this fashion is a decision for the Supreme Court rather than a court of appeals."

United States v. Roche-Martinez, 467 F.3d 591 (7th Cir. 2006; No. 05-4618). In prosecution for illegal re-entry, the Court of Appeals affirmed the district court's denial of the defendant's motion to suppress. After conducting an investigation over several days, police learned that the defendant was living at his mother's home in Chicago. On the day of the defendant's arrest, the police, without a search or arrest warrant, jumped the fence into the backyard and proceeded to the garage where the defendant was living. Because the officers did not have a warrant or permission to be on the premises, the defendant argued that all evidence of his presence in the United States on that day is the fruit of that illegal search and must be excluded. Moreover, he argued that without the evidence of his presence, the

Court must quash his arrest. The Court of Appeals disagreed, noting that the case was governed by *New York v. Harris*, 495 U.S. 14, 18 (1990), in which the Supreme Court held that unlawful entry into the home of a criminal defendant does not make the defendant's subsequent detention unlawful if probable cause existed to arrest the defendant. In *Harris*, the Court declined to apply the exclusionary rule because the rule in *Payton* (prohibiting the police from effecting a warrantless and nonconsenual entry into a suspect's home in order to make a routine felony arrest) was designed to protect the physical integrity of the home; it was not intended to grant criminal suspects protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime. In the present case, the officer's clearly had probable cause to arrest the defendant. Accordingly, although they did not have a warrant or consent to enter the residence, the defendant's subsequent detention was lawful and the district court correctly ruled that the evidence collected during the defendant's detention, *i.e.*, his identity, was admissible and not tainted by the earlier unlawful entry into his mother's residence.

United States v. Lawshea, 461 F.3d 857 (7th Cir. 2006; No. 05-4098). In prosecution for being a felon in possession of a weapon, the Court of Appeals held that release of a K-9 officer upon a fleeing suspect was a reasonable means of effectuating a *Terry* stop. Upon seeing the police officer arrive in his squad car, the defendant began sprinting away. The officer called for the defendant to stop twice, but when the defendant refused, the officer released his dog upon the defendant. The dog subdued the defendant, the attack requiring the defendant to go to the hospital for treatment of his injuries. The defendant argued that the use of the police dog transformed the *Terry* stop into an unconstitutional custodial arrest that required probable cause. The Court of Appeals, however, noted that once police have reasonable suspicion required to justify an investigatory stop, they may use reasonable means to effectuate that stop, and a defendant's own actions in resisting an officer's efforts may be considered when a reviewing court analyzes whether an investigatory stop has transformed into an arrest. Here, had the defendant stopped his flight after the first or second order to stop, the use of the police dog would have been unnecessary. However, the defendant's own actions prompted the release of the dog and, under the circumstances, the release may have been the best alternative use of force to apprehend the fleeing defendant and conduct the *Terry* stop.

United States v. McDonald, 453 F.3d 958 (7th Cir. 2006; No. 05-3761). In prosecution for possession of a weapon by a felon, the Court of Appeals reversed the district court's denial of a motion to suppress. Police found a gun in the defendant's car after they stopped him for using his turn signal while rounding a bend in a street. The Court of Appeals first concluded that it was aware of no Illinois statute making it illegal for a motorist to engage his turn signal but not in fact turn. Moreover, the Court of Appeals held that an officer's mistake of law regarding the basis for a stop cannot support probable cause to conduct a stop. Specifically, the legal justification for a stop must be objectively grounded, and it makes no difference that an officer holds an understandable or "good faith" belief that a law has been broken. Whether the officer's conduct was reasonable under the circumstances in not the proper inquiry, but rather whether a mistake of law, no matter how reasonable or understandable, can provide the objectively reasonable grounds for providing reasonable suspicion or probable cause. The answer is that it cannot. A stop based on a subjective belief that a law has been broken, when no violation has actually occurred, is not objectively reasonable.

SENTENCING

United States v. Chambers, ___ F.3d ___ (7th Cir. 2007; No. 06-2405). In prosecution for being a felon in possession of a firearm, the Court of Appeals affirmed that an Illinois conviction for escape is a crime of violence for purposes of the Armed Career Criminal Act. The defendant's escape convictions consisted of him failing to report on schedule to a penal institution after being convicted of drug possession, robbery, and aggravated battery. Although noting that one might doubt whether failing to report is an offense which presents a "serious potential risk of physical injury to another," the court only recently in *United States v. Golden*, and earlier in *United States v. Bryant*, held that *any* violation of the statute is a crime of violence. The court stated that although a district judge could easily determine if the specific conduct underlying the escape conviction truly posed a risk of physical injury, it was reluctant to overrule a precedent only a few months old which also found support in other circuits. Although deciding to adhere to precedents "for now," the court also stated that it is an embarrassment to the law when judges base decisions of consequence on conjecture, in this case a conjecture as to the possible danger of physical injury posed by criminals who fail to show up to begin serving their sentences or fail to return from furloughs or to halfway houses. Ultimately, the court noted that research is needed to establish whether failures to report or return have properly been categorized as crimes of violence. Given that the available data indicates that the enormous preponderance of prison escapes involve "walk aways," this fact could well compel a conclusion that escape

should be categorized as never being a crime of violence. Before making ths conclusion, however, more data is needed.

United States v. Roberson, ___ F.3d ___ (7th Cir. 2007; No. 06-1121). In prosecution for armed robbery and using a firearm in a crime of violence, the Court of Appeals reversed the defendant's sentence upon the government's appeal. The defendant's minimum guideline sentence for the bank robbery was 46 months and his minimum sentence on the firearm count was a consecutive 84 months. Accordingly, the minimum within-the-range sentence the district judge could have imposed was 130 months. However, the district court imposed an 85 month sentence. In imposing this sentence, the district judge stated, "I find a 130 month sentence unreasonable on the facts of this case and contrary to the purposes of sentencing under 3553. Because I have no power to adjust the 84 month consecutive sentence, I have no alternative but to adjust the 46 month guideline part of the sentence so that the sentence, as a whole, is reasonable." The Court of Appeals held that the district judge is not entitled to override Congress's determination that the gun count should run consecutively to the guideline sentence. *Booker* confers no authority on judges to disregard statutes. The judge should have picked a sentence for the bank robbery without regard for the fact that a gun had been used in it, and then tacked on 84 months. Although it is conceivable that a one-month sentence for bank robbery could be reasonable, it would have to be an extraordinary case. Here, nothing indicated that a below-guideline sentence was proper, especially given that even the district judge referred to the defendant as "something of a one man crime wave." The court went on to hold that a sentencing judge is prohibited from given *any* weight to the aggregate sentence produced when the minimum sentence specified in section 924 is tacked on to the guidelines sentence for the underlying crime. To use the presence of a section 924(c) add-on to reduce the defendant's sentence for the underlying crime would be inconsistent with Congress's determination to fix a minimum sentence for using a firearm in a crime of violence. A district judge is therefore required to determine the proper sentence for the underlying offense entirely independent of the section 924(c) add-on.

United States v. Hankton, 463 F.3d 626 (7th Cir. 2006; No. 03-2345). In prosecution for drug related offenses, the Court of Appeals discussed the role in the district court of the presumption of reasonableness for within-guideline sentences. The defendant argued on appeal that the presumption of reasonableness should not be considered binding on a sentencing court because the presumption only had application as an appellate standard of review--not for imposing sentencing in the district court. In rejecting this argument, the court noted that the presumption that a correctly calculated Guidelines sentence is reasonable not only applies to the appellate standard of reasonableness review, but also serves as a benchmark for trial judges evaluating whether or not a Guidelines sentence is appropriate. It is only when the defendant provides cogent reasons for a non-Guidelines sentence under 18 U.S.C. 3553(a) that a sentencing judge need consider such a sentence.

United States v. Gonzalez, 462 F.3d 754 (7th Cir. 2006; No. 05-2555). In prosecution for drug related offenses, the Court of Appeals discussed the scope of reasonableness review. Sentenced as a career offender, the defendant received a 276 middle-of-the range sentence and argued on appeal that the sentence was unreasonable. The court noted that a 276-month sentence is long, and since it is not a statutory minimum and the sentencing criteria in 18 U.S.C. 3553(a) are vague, the judge would not have been acting unreasonably had he given the defendant a shorter sentence, though this would depend on how much shorter and on the judge's explanation for the sentence. But because the criteria *are* vague, a sentence that is within the guidelines range and thus coincides with the judgment of the Sentencing Commission not only is presumptively reasonable, but will very rarely be upset on appeal. By the same token, a judge who, as he is required to do, deals conscientiously with the defendant's principal arguments for a sentence, below the range, that is based on the statutory criteria will be reversed only in a very exceptional case. Applying these principles in the present case, the facts showed the defendant's case was "routine." The factors that the defendant pointed to as mitigating his guilt were the normal incidents of a career in the illegal drug trade, a career to which the defendant demonstrated a commitment unshaken by the experience of protracted imprisonment. His sentence was therefore reasonable.

United States v. Thornton, 463 F.3d 693 (7th Cir. 2006; No. 05-1465). In prosecution for being a felon in possession of a firearm, the Court of Appeals considered whether a defendant could be sentenced as an armed career criminal when the only evidence of his prior qualifying convictions was contained in the PSR. The defendant argued that a judge must actually have before him or her the actual records of previous convictions and that the PSR's description of the relevant records is always insufficient to support a finding that a defendant is eligible for sentencing under the ACCA. Considering the argument under the plain error standard of review, the court noted that it is not error for a court, when sentencing under the ACCA, to rely on an unchallenged PSR when determining whether the necessary qualifying convictions exist. Even assuming error, the defendant's

substantial rights were not affected, because the defendant could have easily retrieved the records concerning his convictions himself and, assuming the documents failed to establish a qualifying conviction, objected to the PSR's characterization. The court did not, however, indicate whether it would have been appropriate for the court to rely on the PSR had the defendant made a proper objection.

United States v. Dyer, 464 F.3d 741 (7th Cir. 2006; No. 05-4587). In prosecution for possession of pseudoephedrine with intent to manufacture methamphetamine, the Court of Appeals rejected the defendant's argument that this offense was not a controlled substance offense for purposes of the career offender enhancement. The term controlled substance offense as defined by the Guidelines is as follows: an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute or dispense. Although methamphetamine is a controlled substance, the defendant did not possess any. He did possess pseudoephedrine, but it is not a controlled substance. Rather, it is only a listed chemical. Although the defendant's offense therefore does not technically fall within the guideline definition, the application notes to the career offender provision provides that "unlawfully possessing a listed chemical with intent to manufacture a controlled substance is a 'controlled substance offense.'" Thus, the application note brought the defendant's offense within the definition, and he was in fact a career offender.

United States v. Davila-Rodriguez, 468 F.3d 1012 (7th Cir. 2006; No. 06-1596). In this appeal, the Court of Appeals rejected the defendant's challenge to the government's refusal to file a motion which would have given him the third point for acceptance of responsibility for timely notification to the government regarding a plea of guilty. The defendant only pled guilty on the first day of his trial, and the government stated that this was not timely. The district court agreed. Although the defendant argued that the district court was free to grant the additional point even without the government motion, the government argued that it had the sole discretion to make the motion. The Court of Appeals noted that the issue was one which it had not considered given the now advisory nature of the guidelines, but avoided a ruling on the issue by finding that the district court's refusal to grant the reduction disposed of the issue anyway. In discussing the issue, the court noted that Congress amended 3E1.1(b) in the PROTECT Act of 2003 to require that a motion be made by the government stating that the defendant assisted authorities in order to qualify for the one-level reduction. This requirement was added by Congress because the government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial. However, with the guidelines having been made advisory, it is not clear now whether a district court can nevertheless give the additional point without a government motion.

United States v. Repking, 467 F.3d 1091 (7th Cir. 2006; No. 06-1410). In prosecution for bank fraud offenses, the Court of Appeals vacated the defendant's sentence of one day in jail, when his guideline range was 41 to 51 months' imprisonment. The defendant owned a bank and over a period of time committed various frauds to benefit his friend's business. Once caught, he cooperated with investigators and regulators in uncovering his frauds. He also assisted in the prosecution of his friend. Likewise, prior to sentencing, he entered into a settlement agreement with the bank regarding its losses. At sentencing, the government made a 5K motion due to substantial assistance, and recommended a sentence of 24 months. The court granted this motion without comment. Moreover, on the written judgment, the 5K motion was the only basis listed for the non-guideline sentence. However, orally, the district court supported its variance by noting that the defendant had done unspecified "good works," had made restitution, was not a threat to the public, and did not need further rehabilitation or deterrence from committing future crimes. The Court of Appeals found these reasons insufficient to support a 99% variance from the guideline range. First, although substantial assistance may have supported some variance, the district court's failure to give any reasons for going so far below even the government's recommendation was insufficient to support the extent of the variance. Regarding charitable works, it is a disfavored factor under the advisory guidelines. Thus, such works should be somewhat extraordinary to support a variance. Here, there was nothing extraordinary about the defendant's charitable work, especially given that such works were entirely consistent with the bank's business development plan. Finally, regarding the repayment of restitution, it too should be extraordinary to support a variance. Here, the bank originally submitted a loss of over one million dollars. The only information given to the court regarding the defendant's payment of restitution to the bank was that he entered into a "complex and comprehensive" settlement with it. Even assuming he in fact paid everything back, he was required to do so anyway, thus taking the payment outside of something extraordinary. The court concluded by noting that "we leave open the possibility that a one-day sentence of

imprisonment might be justifiable for a defendant who rivals Robin Hood; but [the defendant], a millionaire who stole for himself and his friends, is not that defendant."

United States v. Wagner, 467 F.3d 1085 (7th Cir. 2006; No. 06-1644). In this appeal, the Court of Appeals reiterated that there is no defense of sentencing manipulation in this circuit. A claim of sentencing manipulation is distinct from a claim of sentencing entrapment, which occurs when the government causes a defendant initially predisposed to commit a lesser crime to commit a more serious offense. The doctrine of sentencing manipulation states that a judge cannot use evidence to enhance a defendant's sentence if the government procured the evidence through outrageous conduct solely for the purpose of increasing the defendant's sentence under the Sentencing Guidelines. As the Court stated, "However, there is no defense of sentencing manipulation in this circuit." Rather, it is within the discretion of law enforcement to decide whether delaying the arrest of the suspect will help ensnare co-conspirators, give the law enforcement greater understanding of the nature of the criminal enterprise, or allow the suspect enough "rope to hang himself."

United States v. Wurzinger, 467 F.3d 649 (7th Cir. 2006; No. 05-3803). In prosecution for conspiracy to manufacture methamphetamine, the Court of Appeals rejected the defendant's argument that his 262-month within-the-range sentence was unreasonable due to the fact that his age and diabetes would most likely cause him to die in prison. The Court of Appeals noted that this type of argument rarely succeeds, especially given that age and health are discouraged factors for departure under the old mandatory guidelines. Moreover, the court carefully weighed the factors in the defendant's case, but concluded that the longer sentence was necessary to prevent the defendant from cooking more meth in the future and as punishment for corrupting his extended family into manufacturing methamphetamine. Nevertheless, the court did at length discuss the "worthy tradition that death in prison is not to be ordered lightly, and the probability that a convict will live out his sentence should certainly give pause to a sentencing court." A sentence of death in prison, according to the court, is notably harsher than a sentence that stops even a short period before. Death is by universal consensus a uniquely traumatic experience, and prison often deprives defendants of the ability to be with their families or to otherwise control the circumstances of death. A sentence that forces this experience on a prisoner is quantitatively more severe than a sentence that does not consume the entirety of a defendant's life, inflicting greater punishment and creating a stronger deterrent effect. Additionally, of course, the physical constraints of a dying illness will incapacitate some defendants as effectively as imprisonment, making such a long sentence unnecessary. Thus, a below-guidelines sentence might have been reasonable in this case had the district court imposed it, but the within-range sentence cannot be said to be unreasonable in light of all the facts in the case.

United States v. Elliott, 467 F.3d 688 (7th Cir. 2006; No. 05-4623). In prosecution for fraud offenses and failing to report to serve a sentence, the Court of Appeals discussed how a court might increase a defendant's sentence based upon how long he remained at large. The court noted that the guideline for failing to report to serve a sentence (U.S.S.G. 2J1.6) does not take into account the duration of the flight from justice. The longer a defendant remains at large, the more the deterrent effect of the defendant's original sentence is reduced. Thus, a law's deterrent and retributive effect can be maintained, in the event of prolonged fugitive status, only by substantial incremental penalties. In the present case, the defendant's within the guideline range sentence of 21 months for his failure to report tacked on to his 60-month sentence for fraud was likely insufficient punishment given the length of his evading capture. Accordingly, because the case was already being remanded due to a guideline calculation error, the court instructed the district court do consider this factor when re-sentencing the defendant.

United States v. Reuter, 463 F.3d 792 (7th Cir. 2006; No. 05-4503). Upon consideration of an *Anders* brief in which the defendant was convicted of conspiracy to distribute drugs, the Court of Appeals disavowed language in prior precedents indicating that a higher burden of proof may be necessary at sentencing when relevant conduct is the dominant factor in establishing the defendant's offense level. Here, the defendant's maximum guidelines sentence for his offense would have been 105 months, but the district court found that the defendant committed a murder in the course of the conspiracy. Thus, his range jumped to 360 to 480 months, with the judge ultimately imposing a sentence of 360 months. The Court of Appeals noted that it had occasionally noted that proof by clear and convincing evidence might be required when a finding will so lengthen the defendant's sentence as to make it a case of the tail wagging the dog (although the court never actually found a case where such a heightened standard should be applied). Given that *Booker* has now made the guidelines advisory, the court concluded that the debate on the potential for a heightened burden of proof had been "rendered academic." With the guidelines no longer binding the sentencing judge, there is no need for courts of appeals to add epicycles to an already complex

set of (merely) advisory guidelines by multiplying standards of proof. A judge might now reasonably conclude that a sentence based almost entirely on evidence that satisfied only the normal civil standard of proof would be unlikely to promote respect for the law or provide just punishment for the offense of conviction. Such a judgment would be a judgment for the sentencing judge to make and the Court of Appeals would uphold it so long as it was reasonable under the circumstances. Therefore, the court concluded that the *Anders* brief was appropriately filed, and dismissed the appeal.

United States v. Gilbert, 464 F.3d 674 (7th Cir. 2006; No. 05-3111). In prosecution for possession of a weapon by a felon, the Court of Appeals held that the Indiana offense of criminal confinement, when that offense involves the removal of another person by fraud, enticement, force, or threat of force, from one place to another is not necessarily a "violent felony" for purposes of the Armed Career Criminal Act. The Indiana criminal confinement statutes defines two separate ways to commit the offense. First, one can confine another person *without that person's consent*. Second, one can remove another person by fraud, enticement, force, or threat of force, from one place to another. In determining whether this offense constituted a "violent felony," the court first considered whether the offense had the attempted, threatened, or actual use of force as an element. Based upon the definition, the court concluded that although use of force was likely the most common means of committing the crime, force was not an essential element of the crime, as the crime could also be accomplished through fraud or enticement. Thus, next looking beyond the face of the conviction, the court looked to documents of conclusive significance with respect to the defendant's case. Those documents showed that the defendant violated the portion of the statute related to moving a person from one place to another, but the documents did not indicate whether such action was done by force or fraud. Thus, the court finally considered whether the offense was categorically one which involved a serious potential risk of physical harm to another. Relying on its prior opinion in *United States v. Hagenow*, 423 F.3d 638 (7th Cir. 2005), which considered the very statute at issue in this case, the court concluded that the offense in question was not a violent felony. Specifically, because the portion of the statute under which the defendant was convicted did not require a lack of consent on the part of the victim, the offense did not necessarily involve a serious potential risk of injury, *e.g.*, a risk that the victim would physically resist. However, the court noted that had the defendant violated the first portion of the statute which *does* have lack of consent as an element, such an offense might be found to be a "violent felony," consistent with the court's decision in *United States v. Wallace*, 326 F.3d 881 (7th Cir. 2003) (finding the Illinois offense of unlawful restraint to be a violent felony). The court did not reach this question because that portion of the statute was not before the court.

United States v. Avila, 465 F.3d 796 (7th Cir. 2006; No. 05-1894). In prosecution for conspiracy to distribute cocaine and marijuana and possession of marijuana with intent do distribute it, the Court of Appeals reversed the district court's relevant conduct determination. The defendant pleaded guilty to the marijuana charge (5-year maximum) in exchange for the government's agreement to dismiss the conspiracy charge (20-year maximum). The defendant's guideline range for the offense of conviction would have been zero to 6 months, except for the PSR's relevant conduct determination that the defendant had cooked crack cocaine and had fired a gun (pushing his sentence to the statutory maximum). Specifically, a search of the defendant's home revealed the marijuana, two hats marked with the Latin King's symbol, and letters written to the defendant by Latin King members. Moreover, although there was no indication of when, there was evidence that the defendant had cooked crack cocaine given to him by one of his co-defendants (a gang member). Finally, there was evidence that the defendant had fired a gun at a member of a gang in retaliation for the murder of his brother by that gang. The court concluded that there were three problems with attributing this conduct to the defendant. First, there was negligible evidence that the Defendant was a member of the Latin Kings. The two hats were found in a home where multiple people lived and the letters to the defendant did not indicate that he was a gang member. Although he clearly had some association with the gang, guilt by association is not a permissible basis for a sentence enhancement. Even if he was a member of the Latin Kings, it does not follow that his cooking cocaine given him by another gang member or his shooting at members of a rival gang were acts done on behalf of the gang, rather than being purely personal. The court had no idea when the cooking occurred; and the defendant had a purely personal motive for shooting at members of another gang who had murdered his brother. And even if he was a member of the gang *and* it was part of his work as a member to cook cocaine, it does not follow that the cooking, let alone the shooting, was part of the same course of conduct, or scheme, or pursuant to the same plan, as selling marijuana. The government confused gang membership with membership in a conspiracy, forgetting that to join a conspiracy is to join an agreement, rather than a group. Here, the evidence showed that the defendant's three acts included in relevant conduct were wholly unrelated to each other. Accordingly, the court vacated the defendant's sentence and remanded for resentencing.

United States v. Lock, 466 F.3d 594 (7th Cir. 2006; No. 06-1423). In prosecution for conspiracy to distribute crack cocaine, the Court of Appeals held the district court erred by including in its criminal history calculation two Milwaukee Municipal Court convictions for "Loitering-Illegal Drug Activity." The Guidelines specifically list the offense of loitering as an offense that should never be counted in a criminal history calculation. The offense under consideration is defined as follows: "Any person who loiters or drives in any public place in a manner and under circumstances manifesting the purpose of inducing, enticing, soliciting or procuring another to engage in illegal drug activity shall forfeit not less than $500 nor more than $5,000 or upon default of payment be imprisoned for not more than 90 days." Thus, the present offense is best characterized as a "loitering-plus" offense, it having the traditional loitering elements plus the "intent" element in addition to the added "intent" element concerning drug activity. Noting that the question was one of first impression in this circuit, the Court of Appeals considered the common sense definition of the offense, cases from other circuits, and Supreme Court precedent. Ultimately, the Court of Appeals concluded that the offenses were not included in the criminal history calculation, finding that logic told the court that similarly named offenses are in fact similar. Moreover, an examination of the specific behaviors targeted by the Milwaukee ordinance fails to refute this basic assumption. Finally, creating different types of anti-loitering ordinances puts citizens on notice of the behavior police are targeting--whether it be drug dealing, solicitation of prostitutes, gang turf wars, or prowling; however, it does not change the fact that the ordinances primarily prohibit loitering.

United States v. Schuster, 467 F.3d 614 (7th Cir. 2006; No. 05-4244). In prosecution for causing damage to a protected computer in violation of 18 U.S.C. 1030(a)(5)(A)(ii), the Court of Appeals concluded that the district court improperly included in the "amount of loss" guideline calculation costs for two victims' meetings with the FBI during the course of the FBI's investigation of the defendant and costs for two victims to testify on behalf of the government at the sentencing hearing. Under U.S.S.G. 2B1.1(b), loss is to be calculated as "the greater of actual loss or intended loss." Application Note 3(A)(v)(III) allows victims to computer-related fraud and similar activity to recover "any reasonable cost." On the other hand, commentary note 3(D)(ii) is explicit in its exclusion from the loss calculation of those costs associated with assisting the government in investigating and prosecuting an offense. Given that allowing victims to recover as "reasonable costs" those costs primarily associated with the assistance of the government would render the commentary's exclusion meaningless, the court concluded that such costs could not be included in the loss calculation. However, because exclusion of these amounts in the loss calculation in the present case would not change the offense level, the error was harmless and did not require a remand.

United States v. Golden, 466 F.3d 612 (7th Cir. 2006; No. 06-1326). In prosecution for being a felon in possession of a weapon, the Court of Appeals affirmed the district court's finding that the defendant was an "armed career criminal" based upon two prior convictions for failure to report to a county jail, these offenses being "violent felonies" as defined by 924(e). The court initially noted that in *United States v. Bryant*, 310 F.3d 550 (7th Cir. 2002), the court characterized the offense of failure to report back to a halfway house as a violent felony and the crime of escape carries with it the possibility of violent confrontation when authorities attempt to apprehend the defendant. Thus, using a categorical approach, escape involves a "serious potential risk of physical injury to another. Under this categorical approach, the court could find no principled distinction between failure to report to county jail and escape. In failing to report to jail, the potential for a violent confrontation arises between the defendant and law enforcement during the attempted capture. Thus, the offense was properly characterized as a "violent felony." Judge Rovner concurred, noting that *Bryant* compelled the result in this case, but also noting that if statistics do not bear out the assumption that persons who fail to report pose a *serious* potential risk of physical harm to others, "we may have to reconsider our approach." Judge Williams dissented, positing that characterizing offenses such as failure to report is too far removed from a common sense definition of a "violent felony," noting that no layman would anticipate that the offense would trigger a recidivist statute that punishes those guilty of committing multiple violent felonies.

United States v. Bullion, 466 F.3d 574 (7th Cir. 2006; No. 06-1523). In prosecution for being a felon in possession of a weapon, the Court of Appeals affirmed as reasonable a 264-month sentence, where the guideline range was 188 to 235 months. Initially noting that there was no presumption of reasonableness in this case because the sentence was outside the range, the court nevertheless concluded that the case was a good candidate for an *Anders* brief. Indeed, the court concluded there was no basis for challenging the exercise of the judge's discretion in this case, because the judge's balance of the mitigating and aggravating circumstances in the case was so far inside the outer bounds of reasonableness. In aggravation, the defendant has an extensive criminal history which involved

numerous violent crimes. In mitigation, the defendant argued that his age (58) and health (diabetes) supported a lower sentence, as the sentence imposed was essentially a life sentence. Regarding age, the court noted that age is not a *per se* mitigating factor. Although true that an elderly and infirm defendant may be harmless and thus impact his need for incarceration, the defendant here was neither elderly nor inform. Moreover, although many elderly persons may be less likely to commit crimes as they age, there was certainly enough violence in the defendant's background to worry about what he might do in his seventies.

United States v. Frith, 461 F.3d 914 (7th Cir. 2006; No. 04-2364). In prosecution for multiple fraud and securities law violations, the defendant was convicted after a jury trial of only two counts. As a securities firm, federal securities law required firms such as that owned by the defendant to keep at least $250,000 in a net capital account and enough in a Special Reserve Account to cover the debts owed to customers. To artificially inflate the dollar amounts in these accounts for several months, the defendant manipulated the books. The defendant was eventually convicted of allowing the two accounts to fall short on one specific day. Upon consideration of the district court's imposition of the payment of restitution as a condition of supervised release, the court held that the district court's discretionary authority to order restitution as such a condition of supervised release for a crime not specifically covered by either 3663 or 3663A is subject to the same rules and procedures that govern all other restitution orders. All restitution orders are limited to: (1) losses caused by the specific conduct that is the basis of the offense of conviction; (2) losses caused by conduct committed during "an offense that involves as an element a scheme, conspiracy, or pattern"; and (3) restitution agreed to in a plea agreement. These limitations are based on the language of the restitution statutes. Relevant conduct is not within the scope of either statute. Here, the district court ordered that the defendant pay restitution as a condition of supervised release for all of the losses incurred due to his relevant conduct, *i.e.*, the offenses for which he was acquitted. The Court of Appeals held that by the plain language of the restitution statutes, the district court exceeded its authority, for the defendant's offenses of conviction did not involve a scheme or plan. Therefore, the restitution order impermissibly encompassed relevant conduct.

United States v. Bennett, 461 F.3d 910 (7th Cir. 2006; No. 05-3709). In prosecution for being a felon in possession of a weapon, the Court of Appeals reversed the district court's 4-level enhancement of the defendant's sentence for possessing a firearm in connection with another felony offense pursuant to U.S.S.G. 2K2.1(b)(5). At the sentencing hearing, a number of witnesses testified regarding events which surrounded the defendant's possession of the firearm. Although some witnesses testified that the defendant struck a victim with the gun, others testified that the defendant only pointed the gun at the victim. The district court explained that he did not know if it mattered whether the defendant struck the victim with the gun or merely pointed it at him. As the judge understood the case, if the gun was only pointed at the victim, it was an aggravated assault. If he used it to strike the victim, it was an aggravated battery. Believing that both offenses were felonies under Illinois law, the district judge declined to make a finding on whether the victim was struck with the gun, and applied the enhancement because the defendant pointed the gun at the victim. On appeal and under the plain error standard of review, the Court of Appeals noted that aggravated assault is not a felony under Illinois law. Rather, the offense in Illinois is only a Class A misdemeanor with a possible term of imprisonment that is less than one year. Accordingly, the offense could not be used to support the enhancement and the district court remanded the case back to the district court for resentencing.

United States v. Peters, 462 F.3d 716 (7th Cir. 2006; No. 05-2554). In prosecution for being a felon in possession of a firearm, the Court of Appeals held that the district court did not violate the principles set forth in *Shephard* when it used the PSR's reference to charging documents in concluding that the defendant's prior convictions were "crimes of violence" for career offender purposes. In determining that the defendant's prior convictions were "crimes of violence," the district court relied on the PSR which referenced the criminal complaints in the prior cases, rather than the actual charging documents. The Court of Appeals held that charging documents are specifically listed within the universe of material the sentencing judge may consider. The court does not need the actual physical charging document, either; a presentence report that recounts the charging document's terms will suffice. Finally, the court noted that the PSR did in fact reference the judgments, and not just the charging documents.

United States v. Jointer, 457 F.3d 682 (7th Cir. 2006; No. 05-4632). In prosecution for drug offenses, the Court of Appeals vacated the defendant's sentence because the district court used a 20:1 crack-to-powder ratio rather than the 100:1 ratio found in the Guidelines. Initially, the Court of Appeals noted that a district court must first calculate the appropriate sentence under the applicable version of the United States Sentencing Guidelines. In doing so, the court must acknowledge, and abide by, the policy choices made by Congress and

by the Sentencing Commission. The court cannot substitute a different ratio for the one Congress has selected. Only after the Guidelines are correctly calculated may a district court consider the 3553(a) factors. At this later stage of the sentencing proceedings, the Sentencing Commission's detailed reports on the crack and cocaine sentencing may have practical utility to a district court's evaluation of the facts and circumstances of the individual case in light of the 3553(a) factors. However, such data cannot alone justify a below-guidelines sentence; the can be considered only "insofar as they are refracted through an individual defendant's case."

United States v. Demaree, 459 F.3d 791 (7th Cir. 2006; No. 05-4213). In this appeal, the Court of Appeals considered whether, the federal sentencing guidelines having been made advisory, a change in the guidelines that expands the guidelines range for a crime is an ex post facto law and so cannot be applied to a defendant who committed his crime before the change. Prior to booker, such changes were held to be ex post facto laws. However, due to the now advisory nature of the guidelines, the Seventh Circuit held that such changes are no longer ex post facto laws. The court concluded that the ex post facto clause should apply only to laws and regulations that bind rather than advise. A rule that a guidelines change cannot be applied retroactively if it would be adverse to the defendant would have in the long run a purely semantic effect. Instead of purporting to apply the new guideline, the judge who wanted to give a sentence based on it would say that in picking a sentence consistent with section 3553(a) he had used the information embodied in the new guideline. For when the Sentencing Commission changes a guideline, it does so for a reason; and since it is a body expert in criminal punishments, its reason is entitled to the serious consideration of the sentencing judge. A judge who said he was persuaded by the insight that informed the new guideline to give a sentence within the range established by it could not be thought to be acting unreasonably. So to the other reasons for rejecting the ex post facto argument is added futility: whenever a law or regulation is advisory, the judge can always say not that he based his sentence on it but that he took the advice implicit in it. A judge is certainly entitled to take advice from the Sentencing Commission.

United States v. Wallace, 458 F.3d 606 (7th Cir. 2006; No. 05-3675). In prosecution for wire fraud, the Court of Appeals reversed the defendant's below-the-Guidelines sentence because the district court failed to adequately explain the deviation. Although the defendant's guideline range was for a sentence of between 24 and 30 months, the district judge imposed as sentence of three years' imprisonment and a $2,000 fine. In reviewing the sentence, the court noted that two things are critical since *Booker*: first, whether the district court's choice of sentence is adequately reasoned in light of the 3553(a) factors; and second, whether the sentence can ultimately be deemed a reasonable one. At each point, the focus is on what the district court did, not on what it might have done. Thus, the procedural inquiry focuses on the actual reasons given, not on whether the sentence could have been supported by a different rationale; the substantive inquiry looks at the sentence imposed, not at the other hypothetical sentences that might have been chosen. Regarding the substantive reasonableness inquiry, the court noted that the term "unreasonable" means "something like lying well outside the boundaries of permissible difference of opinion." Alternatively, a "reasonable" sentence is one of several equally plausible outcomes. A non-Guidelines sentence that rests primarily on factors that are not unique or personal to a particular defendant, but instead reflects attributes common to all defendants will be viewed as inherently suspect. In other words, there is a distinction between individualized and common factors. "Common" factors would include arguments based on general facts such as the crack/cocaine disparity, which applies to every defendant sentenced for offenses to which the guideline applies. In the present case, the district court relied primarily on the actual loss incurred in the case, although the intended loss (which the Guidelines used) called for a longer sentence. In the present case, the district court's explanation for why it chose to ignore this guideline provision was insufficient to explain the radical departure from the Guideline range. Accordingly, the court remanded the case to allow the district court to reevaluate the sentence imposed or provide a more thorough explanation for it.

United States v. Rinaldi, 461 F.3d 922 (7th Cir. 2006; No. 05-4113). In prosecution for mail fraud, the Court of Appeals affirmed the imposition of a fine which was twelve times higher than the that suggested by the Guidelines. The defendant was an orthodontist who submitted fraudulent claims to Medicaid for services not rendered. Prior to trial, the defendant was held in contempt for concealing files and documents under subpoena. Eventually, the defendant entered a plea, although thereafter, he sought to withdraw the plea. Although the Guidelines called for a fine in the range of between $4,000 and $40,000, the district judge chose to impose a fine of $250,000 on each of two counts, for a total of $500,000. On appeal, the defendant argued that this fine was unreasonable. The Court of Appeals noted that because the fine in this case was more than twelve times the Guidelines suggestion, the district court's reasons had to be particularly compelling in this case. It found that they were. Specifically, the district court's

reasons were premised on the magnitude of the defendant's fraud, the difficulty encountered in ascertaining the full extend of the impact--the fault for which lay with the defendant's admitted obstruction of justice--and the possibility that the defendant may have benefitted from that obstruction. The Guidelines range simply did not reflect the degree of harm the defendant had caused. Moreover, the court distinguished the impact of the defendant's crime as one of non-violence and chose not to increase his term of imprisonment, but opted instead to increase the fine; punishing the perpetrator with a correlate of his own crime. Because of this thorough analysis of the nature, circumstances, and seriousness of the offense in consideration of 3553(a), the sentence was not unreasonable.

United States v. Cooper, 461 F.3d 850 (7th Cir. 2006; No. 05-3607). In prosecution for drug related offenses, the Court of Appeals held that the government's filing of an 851 notice of enhancement was proper. The defendant was initially charged in a multi-count indictment. The government filed an 851 notice, and the defendant pled to two of the counts, with the intention of proceeding to trial on the remaining counts. The defendant then received an enhanced sentence on the two counts to which he pled guilty. Meanwhile, on the remaining counts, the government filed a superceding indictment. The defendant proceeded to trial on these counts and was convicted. At sentencing, although the government did not file a second notice of enhancement, the court nevertheless gave the defendant an enhanced sentence. The defendant argued that the government was required to file a second 851 notice before enhancing his sentence on these additional counts. The Court of Appeals disagreed, noting that the plain language of 851 does not require a second notice to be filed under these circumstances. Moreover, the purposes of an 851 notice are (1) to allow the defendant to contest the accuracy of the prior conviction upon which the government relies, and (2) to ensure the defendant has full knowledge of a potential guilty verdict. The single notice filed by the government in this case gave the defendant ample time to challenge the accuracy of the prior convictions, and the defendant was certainly aware of the consequences of the priors, given that he already received an enhanced sentence at the first sentencing hearing. Thus, a single notice was sufficient.

United States v. Matthews, 453 F.3d 830 (7th Cir. 2006; No. 05-1665). In prosecution for being a felon in possession of a weapon, the Court of Appeals held that a prior conviction in Illinois for possession of a dangerous weapon by a felon with intent to use it unlawfully against another is a violent felony for purposes of the ACCA. In Illinois, felons are prohibited from possessing dangerous weapons such as knives if they possess them with intent to use them unlawfully against another person. Although declining to decide whether the offense has as an element the use, attempted use, or threatened use of force against another, the court concluded that such possession always presents a serious potential risk of physical injury to another.

United States v. Logan, 453 F.3d 804 (7th Cir. 2006; No. 05-4722). In this appeal, the court considered whether a state conviction that did not result in a deprivation of civil rights can be a predicate offense under the Armed Career Criminal Act. The ACCA excludes from the definition of "conviction" any offense that "has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored . . . unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." In the present case, the defendant's prior convictions were misdemeanor battery convictions in Wisconsin. Although not felonies in Wisconsin, because the offenses carried three-year statutory maximums, the still could be considered "violent felonies" under the ACCA. However, the defendant argued they were not violent felonies because in Wisconsin, one does not lose his civil rights upon conviction. The Court of Appeals disagreed, noting the ACCA uses the word "restored." Thus, one must lose something before it can be restored. Because the defendant never lost his civil rights, they by definition were never "restored," and his prior convictions were therefore violent felonies as defined by the Act.

United States v. Kindle, 453 F.3d 438 (7th Cir. 2006; No. 05-2741). In prosecution for drug related offenses, the Court of Appeals rejected the defendant's argument that he was not a career offender. The defendant argued that his prior conviction for second-degree burglary in Missouri was not a crime of violence because neither the charging papers nor his guilty plea from the conviction state that he burglarized a "dwelling." In the district court, however, defense counsel admitted that the defendant was in fact in a dwelling, although he argued that he had permission to be in the dwelling and that the crime was in essence a theft, rather than a burglary. Moreover, the defendant's plea agreement in the present case agreed that the conviction arose out of a burglary of a residence. Although typically facts gleaned from later sources cannot be used to construe the original conviction, if the later source is the defendant or counsel offering an admission in colloquy to garner leniency in sentencing, the court need not turn a blind eye to facts brought forth by the defendant. Accordingly, these admissions in the district court were sufficient to establish that the prior conviction was a crime of violence.

United States v. Bullock, 454 F.3d 637 (7th Cir. 2006; No. 05-2655). In prosecution for distributing heroin, the Court of Appeals reversed the defendant's 1,200 month sentence due to a guideline error. The defendant was charged with five counts, each carrying a 20-year maximum. The district court imposed the maximum on each count to run consecutively. The Guidelines called for a life sentence, but the government recommended that the court exercise its post-*Booker* discretion to impose a lower sentence of 30 years. The court, rejecting this suggestion, stated, "After considering all the evidence in this case, drug distribution tears into the very fabric of society and results in the death of individuals and destruction of families; and you, Mr. Bullock, have significantly contributed to that." Although noting that it had doubts about the reasonableness of the defendant's sentence, it concluded that its reasonableness analysis was "forestalled" due to an error in calculating the defendant's Guideline range where the district judge improperly included attenuated drug sales as relevant conduct. Accordingly, the district court remanded for reconsideration of the relevant conduct issues, and in doing so, ordered that a new judge be assigned for the remand.

United States v. Blue, 453 F.3d 948 (7th Cir. 2006; No. 05-3717). In prosecution for bank fraud, the Court of Appeals concluded that the defendant's sentence at the low end of the Guidelines was reasonable, notwithstanding that the government recommended a sentence below the Guidelines based on the defendant's cooperation. Although the government recommended a sentence of 80% of the bottom of the range due to cooperation, the court rejected the recommendation, stating that the crime in this case was "serious" and that a sentence below the range would denigrate the seriousness of the offense. The defendant argued that the district court's rationale for rejecting the government's request for a lower sentence was both incomplete and faulty. According to the defendant, the court was required to make findings as to the extent and importance of the help that the defendant provided and must articulate rational reasons for remaining within the Guidelines if it refuses to depart. The Court of Appeals refused to impose this requirement on the district court, and noted that its review was for the overall reasonableness of the sentence imposed. It is not the province of the Court of Appeals to second guess the district court's rationale, but rather to decide whether the district judge imposed the sentence for reasons that are logical and consistent with the factors set forth in section 3553(a). Weighing all the factors in the case, the court could not concluded that the sentence was unreasonable.

United States v. Salazar, 453 F.3d 911 (7th Cir. 2006; No. 05-1673). In prosecution for possession of a weapon by a felon, the Court of Appeals rejected the defendant's argument that the government breached the plea agreement at sentencing. In the plea agreement, the government agreed to recommend the low end of the Guidelines. Although it gave lip service to this recommendation at sentencing, the government also went on at length at sentencing about how the defendant was a bad person, referring to him as "a cold blooded killer." The government sentenced the defendant to the statutory maximum. The court noted that plea agreements work only when both sides adhere to their promises. It is especially important that the government recognize its obligations with respect to guilty pleas. Permitting the government to perform half-heartedly requesting a light sentence while simultaneously arguing forcefully that a defendant is vicious--and failing to explain that its sentencing recommendation is consistent with its characterization of him--does not serve the broader purposes behind plea agreements (such as fairness and efficiency). Although noting that this was a close case, the government did in fact request that the district court impose a low-end sentence and noted its obligation to do so more than once during the sentencing hearing. In fact, the government consistently commented that the low-end of the Guidelines was appropriate. Thus, the facts here were close enough to conclude that the government did not *substantially* violate the terms of its agreement.

United States v. Hewlett, 453 F.3d 876 (7th Cir. 2006; No. 05-2532). In prosecution for narcotics offenses, the Court of Appeals affirmed a below-Guideline sentence as reasonable upon the government's cross-appeal. The defendant faced a statutory mandatory minimum sentence of 20 years and a maximum of life. Applying the guidelines, his sentence would have been life, but the judge imposed the statutory minimum sentence. Rejecting the government's argument that the sentence was unreasonable, the court first noted that the government did not recommend a life sentence, but instead recommended a sentence of 30 years because of the defendant's potential to give back to the community after release from prison. The judge agreed, citing the defendant's "redeeming qualities," his "family history," and his age. The district court also stated that the mandatory minimum term of 20 years "exacts a very substantial measure of punishment" and "sends a chilling message to anyone interested in dealing drugs." Although noting it was a close question, the court concluded that it could not conclude that the sentence imposed was unreasonable. Judge Easterbrook concurred, but noted that 28 U.S.C. 944(h) directs that career offenders like the defendant should be sentenced at or near the statutory maximum for a serious drug offense. Because 20 years was not "at or near" life in

prison, the judge should have sentenced the defendant to a longer sentence. However, because the government did not rely on this statute when making its argument, Judge Easterbrook concluded that the government had forfeited the argument.

Recently Noted Circuit Conflicts

Compiled by: Kent V. Anderson
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Bail Reform Act

United States v. Ingle, 454 F.3d 1082 (10th Cir. 2006).

The Tenth Circuit agreed with the Third, Seventh, Ninth, Eleventh, and D.C. Circuits by holding that 18 U.S.C. §922(g)(1) is not a crime of violence for purposes of the Bail Reform Act. *See*: *United States v. Bowers*, 432 F.3d 518, 524 (3d Cir. 2005); *United States v. Johnson*, 399 F.3d 1297, 1302 (11th Cir. 2005) (*per curiam*); *United States v. Twine*, 344 F.3d 987, 987-88 (9th Cir. 2003) (*per curiam*); *United States v. Lane*, 252 F.3d 905, 906-908 (7th Cir. 2001); *United States v. Singleton*, 182 F.3d 7, 16 (D.C. Cir. 1999). The Court disagreed with the Second Circuit's contrary holding in *United States v. Dillard*, 214 F.3d 88, 104 (2d Cir. 2000).

Offenses

18 U.S.C. §922(o) & 26 U.S.C. §5845(b)

United States v. Carter, 465 F.3d 658 (6th Cir. 2006).

The Sixth Circuit held that a machine gun receiver does not have to have a trigger in order to qualify as a machine gun. In doing so, the court agreed with the majority of circuits that have considered the issue. *See United States v. Williams*, 364 F.3d 556, 558 (4th Cir. 2004); *United States v. Palmieri*, 21 F.3d 1265, 1271 (3d Cir. 1994), vacated and remanded on other grounds, 513 U.S. 957 (1994); *Thompson/Center Arms Co. v. United States*, 924 F.2d 1041, 1046-47 (Fed. Cir. 1991); *United States v. Bradley*, 892 F.2d 634, 636 (7th Cir. 1990). However, the court disagreed with the Tenth Circuit's contrary holding in *United States v. Wonschik*, 353 F.3d 1192 (10th Cir. 2004).

18 U.S.C. §1027

United States v. Cacioppo, 460 F.3d 1012 (8th Cir. 2006).

The Eighth Circuit held that making a false statement under ERISA requires knowledge that the statement is false, not just reckless disregard. The Court also held that concealing material information requires knowledge that the information was required to be disclosed. The Court disagreed with the contrary holdings of the Second and Sixth Circuits. *United States v. Tolkow*, 532 F.2d 853, 858 (2d Cir. 1976) and *United States v. S & Vee Cartage, Co.*, 704 F.2d 914, 918-19 & n.1 (6th Cir. 1983).

18 U.S.C. §1956(a)(1)

Santos v. United States, 461 F.3d 886 (7th Cir. 2006).

The Seventh Circuit reaffirmed its previous holding in *United States v. Scialabba*, 282 F.3d 475 (7th Cir. 2002), that the term "proceeds" in 18 U.S.C. §1956(a)(1) (money laundering to promote illegal activity) means net proceeds, rather than gross proceeds. As a result, the Court affirmed the district court's reversal of Petitioners' convictions for using gross proceeds of their illegal gambling business to support the business by paying winnings. The Court disagreed with contrary holdings of the First, Third, and Eighth Circuits. *See United States v. Iacoboni*, 363 F.3d 1, 4 (1st Cir. 2004) (illegal gambling case holding that payouts to winning bettors were financial transactions involving proceeds for §1956(a)(1) purposes); *United States v. Grasso*, 381 F.3d 160, 167, 169 (3d Cir. 2004), vacated on other grounds at *Grasso v. United States*, 544 U.S. 945, 945-946 (2005) (upholding money laundering convictions that were based upon a fraud scheme's advertising, printing, and mailing expenses); *United States v. Huber*, 404 F.3d 1047, 1058 (8th Cir. 2005) (following *Grasso* without discussion).

Sentencing

18 U.S.C. §924(e)

United States v. Logan, 453 F.3d 804 (7th Cir. 2006).

The Seventh Circuit held that a defendant who never lost his civil rights as a result of a prior conviction is not in the same position as someone who lost his civil rights, but had them restored. The former defendant must be treated the same as a defendant who lost his civil rights and did not have them restored. The Court agreed with the Second Circuit's holding in *McGrath v. United States*, 60 F.3d 1005 (2d Cir. 1995). However, both decisions conflict with the First Circuit's contrary holding in *United States v. Indelicato*, 97 F.3d 627 (1st Cir. 1996).

18 U.S.C. §§3582(a) & 3553(a)(2)(D)

United States v. Manzanilla, 4__ F.3d ___, 2007 U.S. App. LEXIS 2303 (3rd Cir. Feb. 2, 2007).

The Third Circuit held that 18 U.S.C. §3582(a) prohibits a sentencing judge from basing a decision to impose a term of imprisonment or the length of that term on the need for rehabilitation. It held that this does not conflict with 18 U.S.C. §3553(a)(2)(D), which directs courts, when sentencing a defendant, to consider "the need for the sentence imposed" "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." Sentencing courts can still consider the need for rehabilitation when determining conditions of supervised release or probation or recommending a particular Bureau of Prisons facility or program. The Third Circuit's holding agreed with decisions of the Second and Eleventh Circuits. *United States v. Maier*, 975 F.2d 944 (2d Cir. 1992); *United States v. Harris*, 990 F.2d 594 (11th Cir. 1993). It disagreed with the Ninth Circuit's holding that "rehabilitation is no longer a direct goal of sentencing." *United States v. Martin*, 938 F.2d 162 (9th Cir. 1991). The Court also disagreed with holdings of the Eighth and Ninth Circuits that the length of a sentence can be based on the need for rehabilitation once the district court has decided to impose any term of imprisonment. *United States v. Hawk Wing*, 433 F.3d 622 (8th Cir. 2006); *United States v. Duran*, 37 F.3d 557, 561 (9th Cir. 1994).

The Third Circuit concluded:

> that the District Court, despite the best of intentions, violated this statutory command by sentencing Valerie Manzella to 30 months of imprisonment solely because a term of that length was believed necessary to make her eligible for a 500-hour drug treatment program offered by the Bureau of Prisons.

Therefore, the Court reversed Defendant's sentence, which was almost four times the top of the two to eight month Guidelines range.

Guidelines

U.S.S.G. §2D1.1, app. note 12

United States v. Davis, 4__ F.3d ___, 2007 U.S. App. LEXIS 2468 (5th Cir. Jan. 31, 2007).

The Fifth Circuit agreed with the majority of circuits that a Defendant must not only produce evidence of his lack of intent or capability to deliver an agreed upon amount of drugs, but also bears the burden of persuasion on this point. *See United States v. Barnes*, 244 F.3d 172, 177 & n.6 (1st Cir. 2001); *United States v. Muñoz*, 233 F.3d 410, 415 (6th Cir. 2000); *United States v. Wash*, 231 F.3d 366, 373 (7th Cir. 2000); *Brown v. United States* , 169 F.3d 531, 534-35 (8th Cir. 1999); *United States v. Lopez-Montes*, 165 F.3d 730, 731 (9th Cir. 1999). The Court disagreed with the Second Circuit's holding that a defendant only bears the burden of production on this point. *United States v. Hazut*, 140 F.3d 187, 192 (2d Cir. 1998).

U.S.S.G. §3B1.4

United States v. Acosta, 4__ F.3d ___, 2007 U.S. App. LEXIS 2496 (7th Cir. Feb. 5, 2007).

The Seventh Circuit reversed an enhancement for use of a minor because the Defendant did not personally direct, command, encourage, recruit, counsel, intimidate, train, procure, or solicit the minors. The Court agreed with four other circuits which held

> that the enhancement applies only when the defendant by some affirmative act helps to involve the minor in the criminal enterprise. *See United States v. Pojilenko*, 416 F.3d 243, 247 (3d Cir. 2005); *United States v. Suitor*, 253 F.3d 1206, 1210 (10th Cir. 2001); *United States v. Parker*, 241 F.3d 1114, 1120-21 (9th Cir. 2001); *United States v. Butler*, 207 F.3d 839, 849 (6th Cir. 2000).

The Court disagreed with

> three circuits [that] take the position that an enhancement under §3B1.4 is warranted where, although the defendant did not personally engage a minor, he could "reasonably foresee" a co-conspirator's use of a minor. *See United States v. Lewis*, 386 F.3d 475, 479-80 (2d Cir. 2004); *United States v. McClain*, 252 F.3d 1279, 1287-88 (11th Cir. 2001); *United States v. Patrick*, 248 F.3d 11, 27-28 (1st Cir. 2001).

U.S.S.G. §3D1.2

United States v. Vucko, 4__ F.3d ___, 2007 U.S. App. LEXIS 637 (7th Cir. Jan. 12, 2007).

The Seventh Circuit held that grouping is not appropriate when a defendant is convicted of fraud and of failing to report the stolen money on her tax returns. The Court agreed with the First, Third, and Tenth Circuits. *United States v. Martin*, 363 F.3d 25 (1st Cir.

2004); *United States v. Astorri*, 923 F.2d 1052 (3d Cir. 1991); *United States v. Peterson*, 312 F.3d 1300, 1302-04 (10th Cir. 2002). The Court disagreed with the Fifth Circuit's contrary holding in *United States v. Haltom*, 113 F.3d 43 (5th Cir. 1997).

Departures

United States v. Mohamed, 459 F.3d 979 (9th Cir. 2006). *United States v. Jackson*, 467 F.3d 834 (3d Cir. 2006).

The Ninth Circuit has joined the Seventh Circuit in holding that Guidelines departures no longer exist after *Booker*. *See United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005). In contrast, the Third Circuit has now joined the Second, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits in holding that district courts must still decide whether a Guidelines departure is appropriate as part of calculating the advisory Guidelines range before deciding whether to apply a non-Guidelines sentence. *United States v. Selioutsky*, 409 F.3d 114, 118-119 (2d Cir. 2005); *United States v. Jackson*, 467 F.3d at 838-839; *United States v. Moreland*, 437 F.3d 424, 433 (4th Cir. 2006); *United States v. McBride*, 434 F.3d 470, 477 (6th Cir. 2006); *United States v. Hawk Wing*, 433 F.3d 622, 631 (8th Cir. 2006); *United States v. Calzada-Maravillas*, 443 F.3d 1301, 1305 (10th Cir. 2006); *United States v. Crawford*, 407 F.3d 1174, 1178 (11th Cir. 2005). *See also United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006) (recognizing the possibility of a post-*Booker* sentence based on a Guidelines departure).

Booker - reasonableness

United States v. Portillo, 458 F.3d 828 (8th Cir. 2006).

The Eighth Circuit held that a district court can not impose a non-Guidelines sentence based on concerns over the credibility of witnesses after it finds the facts offered true, by a mere preponderance of the evidence. This conflicts with the Tenth Circuit's decision in *United States v. Dazey*, 403 F.3d 1147, 1177 (10th Cir. 2005) ("District courts might reasonably take into consideration the strength of the evidence in support of sentencing enhancements, rather than (as in the pre-*Booker* world) looking solely to whether there was a preponderance of the evidence, and applying Guidelines-specified enhancements accordingly.").

Consecutive or concurrent sentences

United States v. Smith, 472 F.3d 222 (4th Cir. 2006).

The Fourth Circuit held that a district court did not have the authority to make a defendant's sentence consecutive to any yet to be imposed sentences. The Court agreed with similar holdings of the Sixth, Seventh, and Ninth Circuits. *United States v. Quintero*, 157 F.3d 1038, 1039 (6th Cir. 1998); *Romandine v. United States* , 206 F.3d 731, 738 (7th Cir. 2000); *United States v. Clayton*, 927 F.2d 491, 492 (9th Cir. 1991). The Court disagreed with contrary holdings of the Second, Fifth, Eighth, Tenth, and Eleventh Circuits. *Salley v. United States*, 786 F.2d 546, 547 (2d Cir. 1986); *United States v. Brown*, 920 F.2d 1212, 1217 (5th Cir. 1991); *United States v. Mayotte*, 249 F.3d 797, 799 (8th Cir. 2001); *United States v. Williams*, 46 F.3d 57, 58-59 (10th Cir. 1995); *United States v. Andrews*, 330 F.3d 1305, 1307 (11th Cir. 2003).

Appeals

Breach of a Plea Agreement

United States v. Salazar, 453 F.3d 911 (7th Cir. 2006).

In this case, the Seventh Circuit held that the government did not breach its plea agreement to recommend a sentence at the low end of the Guidelines range by arguing that Defendant is a "cold-blooded killer." In the alternative, the Seventh Circuit held that a breach of the plea agreement would not be plain error because Defendant could not show that the district court would have imposed a lower sentence if the government had not breached the agreement. This standard conflicts with decisions from the Fifth and Eleventh Circuits. *United States v. Muñoz*, 408 F.3d 222, 226 (5th Cir. 2005) (noting that "a breach of the plea agreement can constitute plain error without regard to whether the sentencing judge was influenced by the Government's actions."); *United States v. Taylor*, 77 F.3d 368, 371 (11th Cir. 1996) ("Absent some reason in the record for second guessing that government attorney's evaluation of the possible effect of his advocacy, [this Court should be] unwilling to conclude that it had no effect"). The Seventh Circuit's view also conflicts with the Supreme Court's reasons for reversal in *Santobello v. New York*, 404 U.S. 257, 262 (1971).

Rule 35

United States v. McKnight, 448 F.3d 237 (3rd Cir. 2006).

The Third Circuit joined a now 8-1 Circuit majority in holding that a defendant can not appeal the extent of a Rule 35(b) departure. *See*: *United States v. Doe*, 93 F.3d 67, 68 (2nd Cir. 1996); *United States v. Pridgen*,

64 F.3d 147, 150 (4th Cir. 1995); *United States v. Moran*, 325 F.3d 790, 792-794 (6th Cir. 2003); *United States v. McDowell*, 117 F.3d 974, 976-978 (7th Cir. 1997); *United States v. Coppedge*, 135 F.3d 598, 599 (8th Cir. 1998); *United States v. Pedroza*, 355 F.3d 1189, 1190-1191 (9th Cir. 2003); *United States v. McMillan*, 106 F.3d 322, 324 fn. 4 (10th Cir. 1997). *Contra United States v. McAndrews*, 12 F.3d 273, 278 (1st Cir. 1993).

Supreme Court Update October 2006 Term

Compiled by: Johanna Christiansen
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***Ayers v. Belmontes*, 127 S. Ct. 469 (November 13, 2006) (Justice Kennedy).** In the penalty phase of Respondent Belmontes's capital murder trial, he introduced mitigating evidence to show he would lead a constructive life if incarcerated rather than executed. The trial judge provided the jury with an instruction known as "factor (k)" telling the jury to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Belmontes contended that factor (k) barred the jury from considering his forward-looking mitigation evidence in violation of his Eighth Amendment right to present all mitigating evidence in capital sentencing proceedings. The Ninth Circuit reversed his sentence. The Supreme Court reversed the Ninth Circuit, holding that the Court has previously found that factor (k) does not preclude consideration of constitutionally relevant evidence and the proper inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."

***Toledo-Flores v. United States*, 127 S. Ct. 638 (December 5, 2006) (Per Curiam)**. The grant of certiorari in this case was dismissed as improvidently granted. The question originally presented for review was whether the Fifth Circuit erred in holding, in opposition to the Second, Third, Sixth, and Ninth Circuits, that a state felony conviction for simple possession of a controlled substance is a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) and hence an "aggravated felony," under 8 U.S.C. § 1101(a)(43)(B), even though the same crime is a misdemeanor under federal law.

***Carey v. Musladin*, 127 S. Ct. 649 (December 11, 2006) (Justice Thomas).** Respondent Musladin stood trial for murder in California. During the trial, members of the victim's family sat in the front row of the gallery wearing buttons depicting the victim. The trial court denied Musladin's motion to order the family members to remove the buttons. The California Court of Appeal affirmed the trial court's decision. Upon federal habeas corpus review, the Ninth Circuit reversed and remanded finding that the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. The Supreme Court reversed, holding that because the Court had never specifically addressed the issue presented in Musladin's case, the state court could not have unreasonably applied clearly established federal law.

***United States v. Resendiz-Ponce*, 127 S. Ct. 782 (January 9, 2007) (Justice Stevens).** Juan Resendiz-Ponce, a Mexican citizen, was charged with attempting to reenter the United States after having been deported in violation of 8 U.S.C. § 1326(a). The United States appealed the Ninth Circuit's decision holding that the failure to charge an overt act was a fatal flaw in the indictment. The Supreme Court reversed, holding the indictment was not defective. There are two constitutional requirements for an indictment: first, that it contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, that it enables the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense. The indictment in this case met both requirements. The word "attempt" encompasses both the over act and intent elements. Therefore, the indictment alleging attempted illegal reentry need not specifically allege a particular over act or any other "component part" of the offense.

***Burton v. Stewart*, No. 05-9222, 127 S. Ct. 793 (January 9, 2007) (Per Curiam).** The Supreme Court granted certiorari in this case to determine whether *Blakely v. Washington*, 542 U.S. 296 (2004) announced a new rule and, if so, whether it applies retroactively on collateral review. However, the Court did not address this substantive issue because it found that Petitioner Burton failed to comply with the gatekeeping requirements of 28 U.S.C. § 2244(b) because he did not seek or obtain authorization to file a "second or successive" petition in the district court. Therefore, the district court did not have jurisdiction to consider the petition and the Supreme Court was not able to address the merits of the case.

***Cunningham v. California*, 2007 U.S. LEXIS 1324 (January 22, 2007) (Justice Ginsburg).** In this case, the Supreme Court considered the constitutionality of California's determinate sentencing law ("DSL") in the

wake of *Blakely v. Washington* and *United States v. Booker*. The DSL states that criminal offenses are punishable by one of three precise terms of imprisonment: a lower term, a middle term, and an upper term. A sentencing judge is obligated to impose the middle term unless the judge finds, by a preponderance of the evidence that facts in mitigation or aggravation exist to justify either a lower or upper term. The Supreme Court held California's DSL violated the Sixth Amendment because an upper term sentence is mandatory if the judge makes the factual findings in aggravation. In short, this opinion mirrors the *Booker* opinion, without the remedial portion, which is the "ball" the Supreme Court left in California's "court" while strongly hinting a *Booker*-type remedy would suffice to correct the DSL. Although the case is purportedly only concerning California's DSL, it may be considered foreshadowing of two other cases to be considered later this term, *Rita* and *Claiborne* (see below for questions presented), dealing with application of the federal sentencing guidelines in a post-*Booker* world. Notably, the Court stated, "[B]road discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions," and "*Booker*'s remedy for the Federal Guidelines, in short, is not a recipe for rendering our Sixth Amendment case law toothless."

Cases Awaiting Decision - October 2006 Term

***Lawrence v. Florida*, No. 05-8820, cert. granted March 27, 2006, argued October 31, 2006.** There is a split in the circuits about whether the one-year period of limitations is tolled for "[t]he time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment of claim is pending." Where a defendant facing death has pending a United States Supreme Court certiorari petition to review the validity of the state's denial of his claims for state postconviction relief, does the defendant have an application pending which tolls the § 2244(d)(2) statute of limitations? Alternatively, does the confusion around the statute of limitations, as evidenced by the split in the circuits, constitute an "extraordinary circumstance," entitling the diligent defendant to equitable tolling during the time when his claim is being considered by the United States Supreme Court on certiorari? And in the second alternative, do the special circumstance where counsel advising the defendant as to the statute of limitations was registry counsel, a species of state actor, under the monitoring supervision of Florida courts, with a statutory duty to file appropriate motions in a timely manner, constitute an "extraordinary circumstance" beyond the defendant's control such that the doctrine of equitable tolling should operate to save his petition?
Decision Below: *Lawrence v. Florida*, 421 F.3d 1221 (11th Cir. 2005)

***Whorton v. Bockting*, No. 05-595, cert. granted May 15, 2006, argued November 1, 2006.** First, whether, in direct conflict with the published opinions of the Second, Sixth, Seventh, and Tenth Circuits, the Ninth Circuit erred in holding that this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004) regarding the admissibilty of testimonial hearsay evidence under the Sixth Amendment, applies retroactively to cases on collateral review. Second, whether the Ninth Circuit's ruling that *Crawford* applies retroactively to cases on collateral review violates this Court's ruling in *Teague v. Lane*, 489 U.S. 288 (1989). Third, whether, in direct conflict with the published decisions of the Fourth and Seventh Circuits, the Ninth Circuit erred in holding that 28 U.S.C. § 2254(d)(1) and (2) adopted the *Teague* exceptions for private conduct which is beyond criminal proscription and watershed rules.
Decision Below: *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005).

***Wallace v. City of Chicago*, No. 05-1240, cert. granted June 19, 2006, argued November 6, 2006.** The Supreme Court limited the inquiry in this case to the following question: When does a claim for damages arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment accrue when fruits of the search were introduced in the claimant's criminal trial and he was convicted? By doing so, the Supreme Court did not grant cert on the questions presented by the parties in the petition. Those issues were: (1) As framed by Judge Posner in his opinion dissenting from the denial of rehearing *en banc* in this case, the panel decision creates an intercircuit conflict on a recurrent issue: when does a claim for damages arising out of a false arrest or other search or seizure forbidden "by the Fourth Amendment, or a coerced confession forbidden by the due process clause of the Fifth Amendment, accrue, when the fruits of the search or the confession were introduced in the claimant's criminal trial, and he was convicted;" and (2) When an arrest without probable cause results in eight years of incarceration before charges are dismissed after a final adjudication that a confession of dubious reliability was secured by exploiting the unlawful arrest and, as the tainted fruit of that arrest, is inadmissible under *Brown v. Illinois*, 422 U.S. 590 (1975): May damages be recovered in an action brought under 42 U.S.C. §1983 for the unlawful seizure that began at the time of arrest and continued to the time that charges were dismissed, or are damages limited to compensation for the brief period of time that elapsed from arrest to arraignment?

Decision Below: *Wallace v. City of Chicago*, 440 F.3d 421 (7th Cir. 2006).

***James v. United States*, No. 05-9264, cert. granted June 12, 2006, argued November 11, 2006.** The Supreme Court granted cert on the following question: Whether the Eleventh Circuit erred by holding that all convictions in Florida for attempted burglary qualify as a violent felony under 18 U.S.C. § 924(e) creating a circuit conflict on the issue. The Court specifically rejected the other two issues raised by the petition: (1) Whether the Eleventh Circuit erred by holding that a state drug conviction, which did not necessarily involve manufacturing, distributing, or possessing with intent to manufacture or distribute, qualified as a serious drug offense under 18 U.S.C. § 924(e), in violation of *Taylor v. United States*, 495 U.S.575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005); and (2) Whether the felon-in-possession statute, 18 U.S.C. § 922(g), is facially invalid because Congress failed to define commerce as interstate or foreign commerce. Additionally, whether the statute is unconstitutional because Congress acted beyond the power of the commerce clause by failing to require a substantial nexus.
Decision Below: *United States v. James*, 430 F.3d 1150 (11th Cir. 2005).

***Schriro v. Landrigan*, No. 05-1575, cert. granted September 26, 2006, argued January 9, 2007.** Respondent Landrigan actively thwarted his attorney's efforts to develop and present mitigation evidence in his capital sentencing proceeding. Landrigan told the trial judge that he did not want his attorney to present any mitigation evidence, including proposed testimony from witnesses whom his attorney had subpoenaed to testify. On post-conviction review, the state court rejected as frivolous an ineffective assistance of counsel claim in which Landrigan asserted that if counsel had raised the issue of Landrigan's alleged genetic predisposition to violence, he would have cooperated in presenting that type of mitigating evidence. The questions presented for review are: (1) In light of the highly deferential standard of review required in this case pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), did the Ninth Circuit err by holding that the state court unreasonably determined the facts when it found that Landrigan "instructed his attorney not to present any mitigating evidence at the sentencing hearing?" and (2) Did the Ninth Circuit err by finding that the state court's analysis of Landrigan's ineffective assistance of counsel claim was objectively unreasonable under *Strickland v. Washington*, notwithstanding the absence of any contrary authority from the Supreme Court in cases in which (a) the defendant waives presentation of mitigation and impedes counsel's attempts to do so, or (b) the evidence the defendant subsequently claims should have been presented is not mitigating?
Decision Below: *Landrigan v. Schriro*, 441 F.3d 638 (9th Cir. 2006).

***Abdul-Kabir v. Quarterman*, No. 05-11284, and *Brewer v. Quarterman*, No. 05-11287, cert. granted October 13, 2006, argued January 17, 2007.** The questions presented in these consolidated cases are: (1) Do the former Texas "special issue" capital sentencing jury instructions - which permit jurors to register only a "yes" or "no" answer to two questions, inquiring whether the defendant killed "deliberately" and probably would constitute a "continuing threat to society" - permit constitutionally adequate consideration of mitigating evidence about a defendant's mental impairment and childhood mistreatment and deprivation, in light of this Court's emphatic statement in *Smith v. Texas*, 543 U.S. 37 (2004), that those same two questions "had little, if anything, to do with" Smith's evidence of mental impairment and childhood mistreatment? (2) Do this Court's recent opinions in *Penry v. Johnson*, 532 U.S. 782 (2001) and *Smith*, both of which require instructions that permit jurors to give "full consideration and full effect" to a defendant's mitigating evidence in choosing the appropriate sentence, preclude the Fifth Circuit from adhering to its prior decisions that reject *Penry* error whenever the former special issues might have afforded some indirect consideration of the defendant's mitigating evidence? (3) Has the Fifth Circuit, in insisting that a defendant show as a predicate to relief under *Penry* that he suffers from a mental disorder that is severe, permanent, or untreatable, simply resurrected the threshold test for "constitutional relevance" that the Supreme Court emphatically rejected in *Tennard v. Dretke*, 542 U.S. 274 (2004)? (4) Where the prosecution, as it did here, repeatedly implores jurors to "follow the law" and "do their duty" by answering the former Texas special issues on their own terms and abjuring any attempt to use their answers to effect an appropriate sentence, is it reasonably likely that jurors applied their instructions in a way that prevented them from fully considering and giving effect to the defendant's mitigating evidence?
Decisions Below: *Cole v. Dretke*, 418 F.3d 494 (5th Cir. 2005); *Brewer v. Dretke*, 442 F.3d 273 (5th Cir. 2006)

***Smith v. Texas*, No. 05-11304, cert granted October 6, 2006, argued January 17, 2007.** In *Smith v. Texas*, 543 U.S. 37 (2004), this Court summarily reversed the Texas Court of Criminal Appeals and found constitutional error under *Penry v. Lynaugh*, 492 U.S.302 (1989) (*Penry I*), and *Penry v. Johnson*, 532 U.S. 782 (2001)

(*Penry II*). First, is it consistent with this Court's remand in this case for the Texas Court of Criminal Appeals to deem the error in petitioner's case harmless based on its view that jurors were in fact able to give adequate consideration and effect to petitioner's mitigating evidence notwithstanding this Court's conclusion to the contrary? Second, can the Texas Court of Criminal Appeals, based on a procedural determination that it declined to adopt in its original decision that this Court then summarily reversed, impose on remand a daunting standard of harm ("egregious harm") to the constitutional violation found by this Court?
Decision Below: *Ex parte Smith*, 185 S.W.3d 455 (Tex. Crim. App. 2006).

Cases Awaiting Argument - October 2006 Term

***Claiborne v. United States*, No. 06-5618, cert. granted November 3, 2006, to be argued February 20, 2007.** In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court ruled that the mandatory use of the United States Sentencing Guidelines violated the Sixth Amendment right to a jury trial on any fact required to enhance a criminal sentence. The Court remedied the error by making the Guidelines "effectively advisory" and, therefore, just one of many factors a court considers in choosing a sentence under 18 U.S.C. § 3553(a). The Court also prescribed appellate review of sentences for "reasonableness" in light of all the section 3553(a) factors and the reasons for the sentence as stated by the sentencing judge. The model of review on which *Booker* based this "reasonableness" standard paid "substantial deference" to a sentencing judge's discretionary choices in departing from the guidelines range, as held in *Koon v. United States*, 518 U.S. 81(1996). In light of the foregoing, these issues are presented: (1) Does an appellate court make the Sentencing Guidelines effectively mandatory by granting a presumption of reasonableness to the Guidelines range in reviewing a sentence outside that range, rather than granting deference to the sentencing judge's decision in light of all the 3553(a) factors? and (2) Does granting a presumption of reasonableness to the guidelines range deny the substantial deference granted a district court's discretionary sentencing decision under the "reasonableness" standard chosen in *Booker*?
Decision Below: *United States v. Claiborne*, 439 F.3d 479 (8th Cir. 2006)

***Rita v. United States*, No. 06-5754, cert. granted November 3, 2006, to be argued February 20, 2007.** The original question presented when certiorari was granted in November was "Whether the Fourth Circuit Court of Appeals appellate review for "unreasonableness" has preserved *de facto* mandatory Guidelines, contrary this Court's ruling in *United States v. Booker*, by discouraging district courts from sentencing outside of the recommended guidelines ranges? The question was later limited to following issues: (1) Was the district court's choice of within-guidelines sentence reasonable? (2) In making that determination, is it consistent with *Booker* to accord a presumption of reasonableness to within-guidelines sentence? and (3) If so, can that presumption justify a sentence imposed without an explicit analysis by the district court of the 18 U.S.C. § 3553(a) factors and any other factors that might justify a lesser sentence?
Decision Below: *United States v. Rita*, 2006 U.S. App. LEXIS 10850 (4th Cir. 2006).

***Fry v. Pliler*, No. 06-5247, cert. granted December 7, 2006, to be argued March 20, 2007.** The Supreme Court limited the review to the following question: If constitutional error in a state trial is not recognized by the judiciary until the case ends up in federal court under 28 U.S.C. § 2254, is the prejudicial impact of the error assessed under the standard set forth in *Chapman v. California*, 386 U.S. 18 (1967), or that enunciated in *Brecht v. Abrahamson*, 507 U.S. 619 (1993)? Does it matter which harmless error standard is employed? And, if the *Brecht* standard applies, does the petitioner or the State bear the burden of persuasion on the question of prejudice? The Court did not grant review of the other questions presented by the petition, which were as follows: (1) Can a trial court's unconstitutional exclusion of reliable evidence of third party guilt be deemed harmless error? and (2) The Supreme Court's decisions in *Holmes v. South Carolina*,126 S.Ct. 1727 (2006), and *House v. Bell*, 2006 U.S. Lexis 4675 (2006), were handed down after the decision of the Ninth Circuit below. Should this Court issue a GVR order in this case, directing the Ninth Circuit to reconsider its decision that the unconstitutional exclusion of reliable evidence of third party guilt can be harmless, in light of *Holmes* and *House*?
Decision Below: *Fry v. Pliler*, 2006 U.S. App. LEXIS 2694 (9th Cir. 2006).

***Roper v. Weaver*, No. 06-313, cert. granted December 7, 2006, to be argued March 21, 2007.** The question presented in this case is, since this court has neither held a prosecutor's penalty phase closing argument to violate due process, nor articulated, in response to a penalty phase claim, what the standard of error and prejudice would be, does a court of appeals exceed its authority under 28 U.S.C. §2254(d)(l)by overturning a capital sentence on the ground that the prosecutor's penalty phase closing argument was "unfairly inflammatory?"
Decision Below: *Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006).

***Bowles v. Russell*, No. 06-5306, cert. granted December 7, 2006, to be argued March 26, 2007.**
Whether an appellate court may *sua sponte* dismiss an appeal which has been filed within the time limitations authorized by a district court after granting a motion to reopen the appeal time under Rule 4(a)(6) of the Federal Rules of Appellate Procedure.
Decision Below: *Bowles v. Russell*, 432 F.3d 668 (6th Cir. 2005)

***Uttecht v. Brown*, No. 06-413, cert. granted January 12, 2007, argument date to be determined.** In *Wainwright v. Witt*, 469 U.S. 412 (1985), and *Darden v. Wainwright*, 477 U.S. 168 (1986), this Court held that a state trial judge may, without setting forth any explicit findings or conclusions, remove a juror for cause when the judge determines the juror's views on the death penalty would substantially impair his or her ability to follow the law and perform the duties of a juror. The Court further held that a federal habeas court reviewing the decision to remove the juror must defer to the trial judge's ability to observe the juror's demeanor and credibility, and apply the statutory presumption of correctness to the judge's implicit factual determination of the juror's substantial impairment. Did the Ninth Circuit err by not deferring to the trial judge's observations and by not applying the statutory presumption of correctness in ruling that the state court decision to remove a juror was contrary to clearly established federal law?
Decision Below: *Brown v. Lambert*, 451 F.3d 946 (9th Cir. 2006)

***Panetti v. Quarterman*, No. 06-6407, cert. granted January 5, 2007, argument date to be determined.**
Does the Eighth Amendment permit the execution of a death row inmate who has a factual awareness of the reason for his execution but who, because of severe mental illness, has a delusional belief as to why the state is executing him, and thus does not appreciate that his execution is intended to seek retribution for his capital crime?
Decision Below: *Panetti v. Dretke*, 448 F.3d 815 (5th Cir. 2006)

***Brendlin v. California*, No. 06-8120, cert. granted January 19, 2007, argument date to be determined.**
Whether a passenger in a vehicle subject to a traffic stop is thereby "detained" for purposes of the Fourth Amendment, thus allowing the passenger to contest the legality of the traffic stop.
Decision Below: *People v. Brendlin*, 136 P.3d 845 (Cal. 2006).

The Back Bencher

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THE FEDERAL PUBLIC DEFENDER CENTRAL DISTRICT OF ILLINOIS

2007 APPELLATE ADVOCACY SEMINAR

FRIDAY, MARCH 23, 2007
10:00 A.M. TO 3:15 P.M.

JUDGE MICHAEL M. MIHM'S COURTROOM
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MORNING SESSION: 10:00 A.M. TO 11:45 P.M.

Introductory Remarks
Richard H. Parsons, Federal Public Defender

Preserving Issues for Appeal
Robert A. Alvarado, Trial Division Chief

Seventh Circuit Update
Jonathan E. Hawley, Appellate Division Chief

BREAK: 11:45 A.M. TO 1: 00 P.M.

AFTERNOON SESSION: 1:00 P.M. TO 3:00 P.M.

The Ins and Outs of *Anders* Briefs
Andrew J. McGowan, Appellate Division Staff Attorney

The Nuts and Bolts of Appellate Procedure
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