POSSIBLE ISSUES FOR REVIEW
IN
CRIMINAL APPEALS
Second Edition

By

RICHARD H. PARSONS
Federal Public Defender
Central District of Illinois

Federal Public Defender's Office

401 Main Street, Suite 1500
Peoria, IL 61602
Telephone: (309) 671-7891
Telefax: (309) 671-7898

600 East Adams Street, Second Floor
Springfield, IL 62701
Telephone: (217) 492-5070
Telefax: (217) 492-5077

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INTRODUCTION

This is the Second Edition of Possible Issues for Review in Criminal Appeals. In this edition, we have added information gleaned from last year's Seventh Circuit and Supreme Court cases.

This manual has been designed for CJA panel lawyers who have limited experience advocating criminal cases in the Seventh Circuit Court of Appeals. Panel lawyers who appear before the Seventh Circuit on an infrequent basis should also find this manual to be beneficial. Even experienced appellate counsel will find the manual useful as a "starting point" in identifying and researching issues for appeal.

It is our intention that this manual be used by lawyers accepting the challenge and rendering the public service of representing the indigent citizen-accused on appeal as a guide to possible issues. It is beyond the scope of this manual, or any other, to give you the final word on any of the topics covered. The purpose of this manual is to make you aware of issues that deserve examination and significant Seventh Circuit case law regarding possible issues on appeal. For those of you accepting this challenge for the first time, you will find that handling criminal appeals often involves litigating important issues relating to the foundation of our democracy -- the United States Constitution. At the same time, appellate practice frequently involves litigating technical questions regarding the application or interpretation of the U.S. Sentencing Guidelines or the procedural complexities regarding habeas corpus, 28 U.S.C. § 2254 and its federal counterpart, 28 U.S.C. § 2255.

As a criminal defense lawyer, you have the duty to make sure that the citizen-accused is not deprived of his liberty unless he receives a fair trial and the government proves its case beyond a reasonable doubt. If the citizen-accused is convicted, or if he enters a guilty plea, the criminal defense lawyer's task is to exercise damage control. In the federal system, a thorough knowledge of the U.S. Sentencing Guidelines is essential to the performance of that duty.

The duty to be a zealous advocate requires counsel representing a convicted citizen to search for appealable issues if the client wishes to appeal. Sometimes the issues are obvious, such as when the key issue in the case was whether key evidence should be suppressed as the fruit of an illegal search or seizure and, after the denial of an arguable suppression motion, the client pled guilty. In that case, a logical place to begin researching the suppression issue would be the SEARCH AND SEIZURE section of the manual. In that section the lawyer would find that under the Seventh Circuit's decision in United States v. Liss, 103 F.3d 617 (7th Cir. 1997) factual findings are generally reviewed for clear error while, under United States v. Green, 111 F.3d 515 (7th Cir.), cert. denied, 118 S.Ct. 427 (1997), the district court's conclusions of law are reviewed *de novo*. If the issue involved whether the police had a legal basis for an investigatory stop, United States v. Thomas, 87 F.3d 909 (7th Cir.), cert. denied, 117 S.Ct. 409 (1996) teaches that the question of whether the stop was justified by "reasonable suspicion" is reviewed only on the basis of the information available to the police at the time of the stop. To determine whether the particular facts in the case rose to the level of "reasonable suspicion," counsel might start with

the Thomas case, and either use the headnotes and the Federal Digest or use either Westlaw or Lexis to search for cases that have more similar facts to determine if they amount to "reasonable suspicion."

At other times the appealable issues are not as obvious. This manual is intended to help make you aware of both the obvious issues and a number of the less common issues. For example, many defense lawyers and prosecutors seem unaware of the limits on what a prosecutor may argue in closing argument. If after reviewing the trial transcript, counsel is concerned that the prosecutor's statements of fact in his closing were not supported by the testimony at trial, the section on PROSECUTORIAL MISCONDUCT would reveal that in United States v. Catton, 89 F.3d 387 (7th Cir. 1996), the Seventh Circuit found that reversal is required if the prosecutor misstates the evidence in his closing and it cannot be determined that the verdict would have been the same absent the misstatements of fact.

Along with the duty to be a zealous advocate, the criminal defense lawyer has a duty not to argue issues that are frivolous on appeal. Obviously, an argument is not frivolous just because it is unlikely a new trial will be granted. In most cases, if there has been a trial, there will be an arguable issue on appeal, whether an evidentiary ruling or testimony or the propriety of the prosecutor's closing argument. On the other hand, if the citizen-accused pled guilty and received the minimum legal sentence (a statutory mandatory minimum) or there were no objections to the pre-sentence report and the judge imposed a sentence within the guideline range, there may simply be no non-frivolous issues. In that case, defense counsel is required to file an Anders brief and a motion to withdraw in the Court of Appeals. The

section of the manual on ANDERS MOTION AND BRIEF discusses the duty to file an Anders brief if there are no non-frivolous arguments, the requirements for such a brief, and the way the Seventh Circuit reviews such a brief.

This edition contains the necessary standard of review for each area of the law. For the most part, the standard of review will appear in the subheadings immediately below the entry. However, many of the larger headings, including, for example, EVIDENCE and SENTENCING, have specific standards of review throughout the section. So if your evidence question is about, for instance, the admission of summary charts when the chart's admission was contested, the general standard of review is abuse of discretion. A general statement of the law to that effect will be found on the first or second page of the EVIDENCE section; however, further reading will disclose that United States v. Brown, 136 F.3d 1176, 1182 (7th Cir. 1998) states the standard of review when the admission of summary charts was specifically at issue, which will allow you to go directly to that case.

It often happens, when counsel is researching an appeal, that the issues to be appealed go through metamorphosis as the brief is researched and prepared. Issues that counsel believed promising may lose their appeal (pun intended) after the applicable case law is reviewed while other issues, which appeared weaker, may turn out to be much stronger than expected. In some cases, research may turn what might seem like a meritorious appeal, such as the constitutionality of the 100:1 disparity between crack and powder cocaine at sentencing into an Anders brief, based on the fact that it is now firmly established that the disparity is not unconstitutional.

This manual represents only a checklist of possible issues for review in criminal appeals and a starting point for your research. The criminal law seems to change more quickly than most areas of practice, and it is absolutely critical that the criminal practitioner update his research and not rely on any summary of what the law was at an earlier point in time. Please keep this point in mind in using this manual or any other summary of the law. As an example, the Antiterrorism and Effective Death Penalty Act of 1996 so extensively changed the law of habeas corpus that the law and the subsequent decisions interpreting it are the basis for a special 173 page section in Ira P. Robbins' Habeas Corpus Checklists (West, 1998 ed.), yet many resources on habeas corpus law don't yet discuss the Act. It is imperative that counsel verify and update any summary of the law, including this manual, rather than making the dangerous and incorrect assumption that the law is static.

I extend my acknowledgment and gratitude to all members of my federal defender staff for their assistance in the preparation, compilation, and editing of this manual. I especially commend Andy McGowan and Jonathan Hawley for their dedication and tireless work in making this second edition possible. We hope that it will be useful in identifying and researching possible issues for review in criminal appeals as the reader undertakes the noble task of representing the citizen-accused and protecting the rights we all enjoy under our Constitution.

In closing, please remember that tenacious, creative, dedicated advocacy has given us numerous landmark decisions including Gideon v. Wainwright, 372 U.S. 335 (1963), Brady v. Maryland, 373 U.S. 83 (1963); United States v. Lopez, 514 U.S. 549 (1995); Old Chief

v. United States, 519 U.S. 172 (1997); and Bailey v. United States, 516 U.S. 137 (1995), as well as Brown v. Board of Education, 349 U.S. 294 (1955) and Roe v. Wade, 410 U.S. 113 (1973). While precedent cannot be ignored, the lawyers who won these important cases did not let respect for precedent displace their common sense nor their fight for justice and due process of law.

RICHARD H. PARSONS,
Federal Public Defender
Central District of Illinois

POSSIBLE ISSUES FOR REVIEW
IN
CRIMINAL APPEALS[1]
(CASES CURRENT AS OF MARCH 2, 1998)

ACQUITTAL: The goal of every criminal defense. Unfortunately, if you are representing a defendant on appeal, the goal was not met. If trial counsel made a motion for judgment of acquittal which was denied, you can appeal that decision.

Review of denial of motion for judgment of acquittal: *de novo*. United States v. Draves, 103 F.3d 1328, 1332 (7th Cir.), cert. denied, 117 S.Ct. 2528 (1997)(citing United States v. Sax, 39 F.3d 1380, 1385 (7th Cir. 1994)).

HOWEVER, the Court of Appeals reviews entire record and accompanying references in light most favorable to the government. United States v. Draves, 103 F.3d 1328, 1332 (7th Cir.), cert. denied, 117 S.Ct. 2528 (1997)(citing United States v. Briscoe, 65 F.3d 576, 586 (7th Cir. 1995)).

Under this deferential standard, the Court of Appeals will only reverse if there is no evidence from which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. United States v. Draves, 103 F.3d 1328, 1332 (7th Cir.), cert. denied, 117 S.Ct. 2528 (1997)(citing United States v. Penson, 896 F.2d 1087, 1093 (7th Cir. 1990)).

A motion of acquittal made at the close of the government's case must be renewed or it will be waived. See United States v. Brimley, 148 F.3d 819, 821 (7th Cir. 1998).

Proving that no evidence exists from which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt presents "a nearly insurmountable hurdle to the defendant." United States v. Hach, 162 F.3d 937 (7th Cir. 1998)(quoting United States v. Pulido, 69 F.3d 192, 205 (7th Cir. 1995)).

The Court of Appeals will reverse only if the record is devoid of evidence from which a jury could find guilt. United States v. Hach, 162 F.3d 937 (7th Cir. 1998)(quoting United States v. Pulido, 69 F.3d 192, 205 (7th Cir. 1995)).

ANDERS MOTION AND BRIEF: A criminal defense attorney must file a notice of appeal at the client's request. As an officer of the court, however, appellate counsel has a duty not

[1]Indentions reflect outline structure and do not indicate block quotes.

to present frivolous arguments. If, after reviewing the entire record on appeal, defense counsel determines there are no non-frivolous issues to be presented in the appeal, defense counsel must file a motion to withdraw, and a brief explaining the possible issues that could be raised and why those issues are frivolous. The Supreme Court case outlining this procedure is Anders v. California, 386 U.S. 738 (1967), thus the term *Anders* brief.

> An *Anders* motion can be made and granted when there is a ground for appeal that is not barred by dispositive case law, clear statutory language, or any other clear legal bar to the ground, but instead involves the application of law to fact. A frivolous appeal is one that is groundless, and frivolous arguments are merely arguments that cannot conceivably persuade the court. United States v. Howard, 142 F.3d 959, 960 (7th Cir. 1998).
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> In an *Anders* brief, counsel must detail anything in the record that might support an argument on appeal. United States v. Sanchez-Estrada, 62 F.3d 981, 986, n. 11 (7th Cir. 1995).
>
> If Appellate Court finds that appeal is frivolous, it may grant counsel's motion to withdraw. United States v. Sanchez-Estrada, 62 F.3d 981, 986, n. 11 (7th Cir. 1995).
>
> If *Anders* brief is inadequate on its face, counsel's motion to withdraw will be denied, and the Appellate Court will either direct counsel to file a new brief or discharge counsel and appoint a new lawyer for defendant. United States v. Wagner, 103 F.3d 551, 553 (7th Cir. 1996).
>
> If *Anders* brief is adequate on its face, Appellate Court will limit its review of records to issues discussed in brief. United States v. Wagner, 103 F.3d 551, 553 (7th Cir. 1996).
>
> If the *Anders* brief explains the nature of the case and fully and intelligently discusses the issues that the type of case might be expected to involve, the Court of Appeals will not conduct an independent top-to-bottom review of the record. United States v. Wagner, 103 F.3d 551, 553 (7th Cir. 1996).
>
> The Court of Appeals gives broad discretion to attorneys to decide what matters to discuss in an *Anders* brief, however, the degree to which it relies on counsel to determine whether an appeal is warranted requires sufficient indicia in the brief that counsel has made a sound judgment. United States v. Tabb, 125 F.3d 583, 585 (7th Cir. 1997).

APPEAL: It is crucial for defense counsel to timely file the notice of appeal. If trial counsel has failed to timely file a notice of appeal when requested to do so by the defendant, appellate counsel must argue either excusable neglect or that the defendant was abandoned by trial counsel.

Under F.R.A.P. 4(b)(3)(B)(i) as amended effective December 1, 1998, a notice of appeal filed prior to a ruling on a motion to reconsider in the district court becomes effective upon the district court's entry of judgment on that motion to reconsider. U.S. v. Powers, No. 98-3734, slip op. p. 8 (7th Cir. 2/5/99).

Time for appeal may not be extended absent showing of excusable neglect. United States v. Dumas, 94 F.3d 286, 289 (7th Cir. 1996), cert. denied, Dexter v. United States, 117 S.Ct. 1109 (1997); United States v. Marbley, 81 F.3d 51, 52 (7th Cir. 1996).

The requirement of excusable neglect is jurisdictional. United States v. Dumas, 94 F.3d 286, 289 (7th Cir. 1996), cert. denied, Dexter v. United States, 117 S.Ct. 1109 (1997).

An experienced federal criminal litigator's failure to file a timely notice of appeal was not excusable neglect under F.R.A.P. 4(b), even though the attorney relied on F.R.C.P. 45(a) which allows exclusion of Saturday, Sunday and legal holidays in determining the time of filing when the deadline is ten days or less. Rule 45(a) of the Criminal Rules governs procedure in the district courts, not in the Court of Appeals. United States v. Guy, 140 F.3d 735, 736 (7th Cir. 1998).

"Trial judges must be meticulous and precise in following each of the requirements of Rule 32(c)(5) (requiring that a defendant be advised of his right to appeal). Failure to give such advice is error. Peguero v. United States, 119 S.Ct. 961, 964 (1999).

Although a court's failure to advise a defendant of his right to appeal is error, a defendant is entitled to collateral relief only when the defendant is actually prejudiced by the court's error. Peguero v. United States, 119 S.Ct. 961, 964 (1999).

A petitioner is not prejudiced by a court's failure to advise him of right to appeal where the record establishes that he had actual notice of his right to appeal. Peguero v. United States, 119 S.Ct. 961, 964-65 (1999).

Perfunctory and undeveloped arguments are waived on appeal. United States v. Berkowitz, 927 F.2d 1376, 1384 (7th Cir. 1991).

Appeal by the Government:

> The government's failure to file a certificate that the appeal is not taken for the purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding is not necessarily fatal to the appeal. United States v. Bailey, 136 F.3d 1160, 1163 (7th Cir. 1998).
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> If the government files the certificate late, the appellate court has discretion in deciding whether to hear the appeal in light of such defect. United States v. Bailey, 136 F.3d 1160, 1163 (7th Cir. 1998).
>
> Failure of government to file notice of appeal within thirty days of the district court's opinion divests jurisdiction from Court of Appeals. United States v. Bailey, 136 F.3d 1160, 1163 (7th Cir. 1998).

AUDIO RECORDINGS -- See EVIDENCE

BATSON [v. KENTUCKY] CHALLENGES: The prosecution cannot use a peremptory challenge to remove a potential juror from the jury pool based on the juror's race or sex. It is the juror's right to sit as a juror, not the defendant's right to have minorities on the jury, which is being protected. Accordingly, the race or sex of the defendant is irrelevant for purposes of a *Batson* challenge. Once challenged, the prosecutor must put forth a race-neutral or sex-neutral reason for striking the juror.

Review of ruling on motivation for strike of potential juror from panel: clearly erroneous. United States v. Carter, 111 F.3d 509, 512 (7th Cir. 1997).

A Batson hearing normally progress through three stages: (1) the defendant must make a prima facie showing that the prosecutor has exercised preemptory challenges on the basis of race; (2) once that showing has been made the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question; and (3) the trial court after hearing the defendant's response must decide whether those reasons are pre-textual and whether the defendant has thus carried his burden of proving purposeful discrimination. Mahaffey v. Page, 162 F. 3d 481, 482-483 (7th Cir. 1998).

Whether a prima facie case has been shown presents a mixed question of law and fact and is reviewed *de novo*. Mahaffey v. Page, 162 F. 3d 481, 484 (7th Cir. 1998).

Where a prosecutor excused each and every African American member of the jury veneer, such a pattern was sufficient as a matter of law to make a prima facie showing that the prosector exercised the preemptory challenges on the basis of race. Mahaffey v. Page, 162 F. 3d 481, 485 (7th Cir. 1998).

Although silly or superstitious reasons for preemptory challenges are constitutionally legitimate, the weaker the reason for the preemptory challenge the more likely it is to be a pretext for discrimination. Purkett v. Elem, 514 U.S. 765 (1995)(cited in United States v. Roberts, 163 F.3d 998 (7th Cir. 1998).

BILL OF PARTICULARS: A bill of particulars sets forth the charges against a defendant in more detail than is contained in the indictment. The prosecution can be ordered to file a bill of particulars when the information contained in the indictment is not sufficiently detailed to enable the defendant to prepare for trial.

Review of ruling on whether to grant or deny a motion for bill of particulars: abuse of discretion. United States v. Richardson, 130 F.3d 765 (7th Cir. 1997); United States v. Kendall, 665 F.2d 126, 134 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982).

Test for necessity for bill of particulars: letter of indictment sets forth elements of offense charged and sufficiently apprises defendant of charges to enable him to prepare for trial. United States v. Kendall, 665 F.2d 126, 134 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982).

Bill of particulars unnecessary where nature and operation of "open file" policy by government provided "satisfactory form" of retrievable information. United States v. Canino, 949 F.2d 928 (7th Cir. 1991), cert. denied, 503 U.S. 996, 504 U.S. 910 and 504 U.S. 915 (1992).

For the Court of Appeals to reverse a decision to deny a bill of particulars, the defendant must suffer actual prejudice from the denial. United States v. Richardson, 130 F.3d 765 (7th Cir. 1997).

BRADY [v. MARYLAND]: As a matter of due process, the prosecution must disclose to the defendant any evidence in its possession, or that is reasonably obtainable, that tends to exculpate the defendant.

Review of *Brady* determinations (whether Brady was violated by government nondisclosure of exculpatory evidence): abuse of discretion. United States v. Ashley, 54 F.3d 311, 312-313 (7th Cir.), cert. denied, 116 S.Ct. 232 (1995).

> Test for *Brady* challenge: (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that the evidence was material to an issue at trial. United States v. Silva, 71 F.3d 667, 670 (7th Cir. 1995)(citing United States v. White, 970 F.2d 328, 337 (7th Cir. 1992)).
>
> > Evidence is material only if there exists a "reasonable probability" that its disclosure would have changed the result of the trial. United States v. Silva, 71 F.3d 667, 670 (7th Cir. 1995)(citations omitted).
> >
> > A reasonable probability of a changed result exists where the suppression of evidence "undermines confidence in the outcome of the trial." United States v. Silva, 71 F.3d 667, 670 (7th Cir. 1995)(citing Kyles v. Whitley, 115 S.Ct. 1555, 1566 (1995)(quoting United States v. Bagley, 473 U.S. 667, 682 (1985)).

Review of *Brady* determinations on grounds of materiality: abuse of discretion. United States v. Silva, 71 F.3d 667, 670 (7th Cir. 1995).

> Test to evaluate prejudicial impact of prosecution failing to turn potentially exculpatory evidence over to the defendant in violation of *Brady v. Maryland*: whether, absent improprieties there is a reasonable probability that defendants would have been acquitted. United States v. Boyd, 55 F.3d 239, 245 (7th Cir. 1995).

Review of district court's decision about whether to hold a *Brady* hearing: abuse of discretion. United States v. Austin, 54 F.3d 394, 401 (7th Cir. 1995).

Under the Fourteenth Amendment, "it is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." United States v. Hach, 162 F.3d 937 (7th Cir. 1998)(quoting Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987)(citing United States v. Agurs, 427 U.S. 97 (1976)).

Under *Ritchie*, where psychiatric, investigative or medical information is privileged or confidential, it must be turned over to the trial court for an *in camera* review to balance the needs of the defendant and the state or the individual's need to keep those

records private. United States v. Hach, 162 F.3d 937 (7th Cir. 1998)(quoting Pennsylvania v. Ritchie, 480 U.S. 39, 61 (1987)).

Defendant's failure to show that the records requested are not in the government's possession is fatal to defendant's claim. United States v. Hach, 162 F.3d 937 (7th Cir. 1998).

While the "government has an obligation to tender to the defense all exculpatory records in its possession, it has no obligation to seek out such information from third parties." United States v. Hach, 162 F.3d 937 (7th Cir. 1998).

CO-CONSPIRATORS' STATEMENTS: Statements made by co-conspirators during the course of the conspiracy and in furtherance of the conspiracy are not hearsay. This hearsay exception applies regardless of whether a conspiracy is charged in the indictment. Remember, to be admissible under this exception the statement at issue must be made in furtherance of the conspiracy and during the course of the conspiracy.

Review of admission of co-conspirators' statement into evidence (F.R.E. 801(d)(2)(E)): clear error. United States v. Godinez, 110 F.3d 448, 454 (7th Cir. 1997); United States v. Katalinich, 113 F.3d 1475, 1483 (7th Cir.), cert. denied, 118 S.Ct. 260 (1997).

Review of district court findings under Rule 801(d)(2)(E) (admission of co-conspirator's statements) based on pre-trial *Santiago* proffers for clear error. United States v. Yoon, 128 F.3d 515, 525-526 (7th Cir. 1997).

Under *Santiago* and its progeny, in order to allow the admission of co-conspirators statements, the government must show, by a preponderance of the evidence, that a conspiracy existed, that the defendant and the declarant were members of that conspiracy, and that the statements sought to be admitted were made during and in furtherance of that conspiracy. United States v. Yoon, 128 F.3d 515, 526 (7th Cir. 1997)(citing United States v. Santiago, 582 F.2d 1128, 1134 (7th Cir. 1978) and United States v. Rodriguez, 975 F.2d 404, 406 (7th Cir. 1992)).

Review of district court's determination that a conspiracy existed by a preponderance of the evidence: clear error. United States v. Petty, 132 F.3d 373, 378-80 (7th Cir. 1997). While hearsay may support the existence of a conspiracy in part, the Court of Appeals requires more than the statements of the conspirators themselves to show a conspiracy. United States v. Petty, 132 F.3d 373, 380 (7th Cir. 1997)(citations omitted).

In addition to hearsay statements, the testimony of non-conspirators or by corroboration of facts contained in the statements of the conspirators may combine to show a conspiracy. United States v. Petty, 132 F.3d 373, 380 (7th Cir. 1997).

"Notwithstanding the Seventh Circuit's holding in *Santiago*, there is more than one acceptable procedure which the district court may rely on in determining whether hearsay is admissible: one method we have expressly approved . . . is to make a preliminary determination, based on Government's proffers of evidence, whether to conditionally admit the statement subject to a re-evaluation at trial if the Government fails to provide evidence supporting the assertions contained in the proffer. However, *w*e have also approved other procedures the district court can employ in making the preliminary admissibility determination required by *Santiago,* including the following: *the court can rule on each statement as it is elicited based on the evidence the Government has adduced to that point; the court can, **even in the absence of a pre-trial proffer**, conditionally admit the body of a co-conspirator statements subject to the Government's eventual proof of the foundational elements (the penalty for not so providing being a possible mistrial); or the court can hold a "full blown" preliminary hearing to consider all evidence concerning the statements."* U.S. v. McClellan, 165 F.3d 535 (7th Cir. 1999)(quoting United States v. Rodriguez, 975 F.2d 404, 409-10 (7th Cir. 1992) and United States v. Andrus, 775 F.2d 825, 836-7 (7th Cir. 1995)(emphasis in McClellan).

COMPETENCY -- See INSANITY/INCOMPETENCY

CONFESSIONS: For a confession to be admissible it must be voluntary. If the confession resulted from custodial interrogation, the defendant must have been read his *Miranda* rights prior to any questioning. A confession can be involuntary even if it is made after the defendant has been advised of his *Miranda* rights.

Review of findings of historical facts concerning whether a confession is voluntary: clear error. United States v. Brooks, 125 F.3d 484, 492 (7th Cir. 1997); United States v. D. F., 115 F.3d 413, 419 (7th Cir. 1997).

Review of the ultimate issue of the voluntariness of a waiver of *Miranda* rights: *de novo*. United States v. Brooks, 125 F.3d 484, 492 (7th Cir. 1997); United States v. D. F., 115 F.3d 413, 419 (7th Cir. 1997).

"A confession or other admission is not deemed coerced or involuntary merely because it would not have been made had the defendant not been mentally defective

or deranged." Rice v. Cooper, 148 F.3d 750 (7th Cir. 1998)(citing Colorado v. Connelly, 479 U.S. 157, 169-71 (1986)).

CONFIDENTIAL INFORMANTS -- See INFORMANTS

CONFLICT OF INTEREST: An attorney owes 100% loyalty to each of his or her clients. Problems arise when an attorney's loyalty to different clients conflicts with one another. This can happen, for example, when an attorney is representing a client in a criminal case, and a former client is called as a witness against the current client.

If trial court fails to inquire adequately into possible conflict of interest when timely objection made, Court of Appeals will presume prejudice, even absent showing of actual conflict of interest. Spreitzer v. Peters, 114 F.3d 1435 (7th Cir. 1997).

If trial court is unaware of possible conflict of interest, Court of Appeals will presume prejudice only if defendant can show that actual conflict of interest adversely affected his lawyer's performance. Spreitzer v. Peters, 114 F.3d 1435, modified, 127 F.3d 551 (7th Cir. 1997).

CONSENT -- See SEARCH AND SEIZURE

CONSTITUTIONAL RIGHTS: A criminal defendant possesses a plethora of constitutional rights, from the right to effective assistance of counsel to the right to confront the witnesses against him. Appellate counsel should search the record on appeal with an eye towards finding any violations of the client's constitutional rights.

Review of limitation on cross-examination generally: abuse of discretion. United States v. Hernandez, 84 F.3d 931, 933 (7th Cir. 1996); United States v. Sasson, 62 F.3d 874, 882 (7th Cir. 1995).

EXCEPT: if limitations of cross-examination implicate Sixth Amendment right to confrontation, review is *de novo*. United States v. Hernandez, 84 F.3d 931, 933 (7th Cir. 1996); United States v. Sasson, 62 F.3d 874, 882 (7th Cir. 1995).

Violation of defendant's right to be present at all stages of the trial requires that conviction be reversed, unless record negates any reasonable possibility of prejudice arising from the error. United States v. Rodriguez, 67 F.3d 1312 (7th Cir. 1995), cert. denied, 116 S.Ct. 1582 (1996).

> To determine appropriate standard of review, core values of confrontation rights are compared with more peripheral concerns that remain within ambit of trial judges discretion. United States v. Hernandez, 84 F.3d 931, 933 (7th Cir. 1996).
>
> Bias determination affects core value while credibility determination does not affect core value. United States v. Hernandez, 84 F.3d 931, 933 (7th Cir. 1996).

Review of ruling on defendant's request for new counsel: abuse of discretion. United States v. Golden, 102 F.3d 936, 940 (7th Cir. 1996)(assuming that the defendant has been given the opportunity to explain reasons to the court).

Due process requires the prosecution, not the defendant, bear the burden of proving every element of a criminal offense. United States v. Petty, 132 F.3d 373, 378 (7th Cir. 1997).

The Sixth Amendment right to self representation is not absolute: "[T]he trial judge may terminate self representation by a defendant who deliberately engages in serious and obstructionist misconduct." United States v. Brock, 159 F.3d 1077, 1079 (7th Cir. 1998)(quoting Faretta v. California, 422 U.S. 806 (1975)).

> When a defendant's obstreperous behavior is so disruptive that the trial cannot move forward, it is within the trial judge's discretion to require the defendant to be represented by counsel. United States v. Brock, 159 F.3d 1077, 1079 (7th Cir. 1998).

The statutory schemes may place the burden on a defendant to prove an affirmative defense. United States v. Petty, 132 F.3d 373, 378 (7th Cir. 1997).

> An affirmative defense must be sharply distinguished from a simple "defense," or a simple negation of one of the elements of the offense, because the defendant never bears the burden of proof on the elements of the offense. An affirmative defense goes beyond the elements of the offense to prove facts which some how remove the defendant from the statutory threat of criminal liability. United States v. Petty, 132 F.3d 373, 378 (7th Cir. 1997).

Receiving the verdict of the jury on every element of the offense is a "substantial right." United States v. Ladish Malting Co., 1998 WL 35167 (7th Cir. 1/30/98).

Review of the district court's due process determination: *de novo*. United States v. Newman, 144 F.3d 531, 535 (7th Cir. 1998)(citing Ornelas v. United States, 517 U.S. 690 (1996)).

To prevail on a due process claim of unduly suggestive show-up identifications, the defendant must first show that the identification procedure was unreasonably suggestive and that the identification is unreliable under the totality of the circumstances. United States v. Newman, 144 F.3d 531, 535 (7th Cir. 1998)(referring to United States v. Funches, 84 F.3d 249, 253 (7th Cir. 1996)).

> The Seventh Circuit has noted many times that a show-up identification, in which witnesses confront only one suspect, is inherently suggestive and should be employed only if compelled by extra-ordinary circumstances. United States v. Newman, 144 F.3d 531, 534 (7th Cir. 1998)(citing several Seventh Circuit and Supreme Court cases related to this issue)).

The "admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability." United States v. Newman, 144 F.3d 531, 536 (7th Cir. 1998)(quoting Manson v. Brathwaite, 432 U.S. 98, 106 (1997)).

> In identification cases, the Supreme Court has suggested five factors to guide the district court's due process inquiries: (1) assess the reliability of witness identifications by examining the "opportunity of the witness to view the criminal at the time of the crime"; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. United States v. Newman, 144 F.3d 531, 536 (7th Cir. 1998)(quoting Manson v. Brathwaite, 432 U.S. 98, 106 (1997)).

A defendant's right to testify on his own behalf, guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, are not violated when a district court does not allow the defendant to answer questions such as whether he "knowingly and intentionally became a member of a conspiracy" or whether he "ever joined a conspiracy" so long as defense counsel is "able to elicit detailed testimony from his client on all of the allegations contained in the indictment." United States v. Hach, 162 F.3d 937 (7th Cir. 1998)(quoting from the case itself and United States v. Castro, 788 F.2d 1240, 1249 (7th cir. 1986).

Under the "Due Process Clause of the Fifth Amendment and the notice of jury trial guarantee of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 1999 WL 155688 at 9 n. 6 (U.S. 3/24/99).

Pre-trial detainees are "protected by the Fourteenth Amendments Due Process Clause rather than the Eighth Amendment's prohibition against cruel and unusual punishment, which applies only to convicted persons." Collignon v. Milwaukee County, 163 F.3d 982, 986-87 (7th Cir. 1998).

The Due Process Clause is "phrased as a limitation on the State's power to act, not as a guarantee of certain minimum levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot be fairly extended to impose an affirmative obligation on the State to insure that those interests do not come to harm through other means." Collignon v. Milwaukee County, 163 F.3d 982, 987 (7th Cir. 1998) (quoting DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 195 (1989)).

> A "State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." Collignon v. Milwaukee County, 163 F.3d 982, 987 (7th Cir. 1998) (quoting DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 197 (1989)).
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> "Due process protects people from being unlawfully restrained; it provides no right to be restrained, lawfully or otherwise." Collignon v. Milwaukee County, 163 F.3d 982, 987 (7th Cir. 1998) (citing Wilson v. Formigoni, 42 F.3d 1060, 1066 (7th Cir. 1994)).
>
> A state creates a "special relationship" and an obligation to provide protection when it "affirmatively places the individual in a position of danger the individual would not have otherwise faced." Collignon v. Milwaukee County, 163 F.3d 982, 987 (7th Cir. 1998) (referring to Wallace v. Adkins, 115 F.3d 427, 429 (7th Cir. 1997)).
>
> "When a state actor deprives a person of his ability to care for himself by incarcerating him, detaining him, or involuntarily committing him, it assumes an obligation to provide some minimum level of well-being and safety." Collignon v. Milwaukee County, 163 F.3d 982, 987 (7th Cir. 1998) (quoting DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 198-200 (1989) (discussing other Supreme Court cases)).

The test for "determining whether an involuntarily committed person had been provided reasonable safety is whether 'professional judgment in fact was exercised' by the State actors." Collignon v. Milwaukee County, 163 F.3d 982, 987 (7th Cir. 1998) (quoting Youngberg v. Romeo, 457 U.S. 307, 321 (1982)).

In evaluating whether the state has exercised professional judgment, it is "not appropriate for the courts to specify which of several professionally acceptable choices should have been made." Collignon v. Milwaukee County, 163 F.3d 982, 987 (7th Cir. 1998) (quoting Youngberg v. Romeo, 457 U.S. 307, 321 (1982)).

The state's action to provide reasonable safety, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards, as to demonstrate that the person responsible actually did not base the decision on such a judgment. Collignon v. Milwaukee County, 163 F.3d 982, 987 (7th Cir. 1998) (quoting Youngberg v. Romeo, 457 U.S. 307, 322-23 (1982)).

Both the Eighth Amendment and a limited form of substantive due process require the state to provide the detained, committed, or incarcerated person minimum levels of the basic human necessities: food, clothing, shelter, medical care, and reasonable safety. Collignon v. Milwaukee County, 163 F.3d 982, 987 (7th Cir. 1998) (citing Farmer v. Brennan, 511 U.S. 825, 832 (1994)).

The "standard for liability under the Eighth Amendment is deliberate indifference, which is more than negligence and approaches intentional wrongdoing." Collignon v. Milwaukee County, 163 F.3d 982, 987 (7th Cir. 1998).

Professional judgment, like recklessness and gross negligence, generally falls somewhere between simple negligence and intentional misconduct. Collignon v. Milwaukee County, 163 F.3d 982, 988 (7th Cir. 1998) (citing Estate of Porter v. Illinois, 36 F.3d 684, 688 (7th Cir. 1994)).

The professional judgment standard only applies to decisions made by professionals such as physicians, psychiatrists, and nurses within their area of professional expertise. Collignon v. Milwaukee County, 163 F.3d 982, 988 (7th Cir. 1998).

The deliberate indifference standard applies to a variety of decisions made by prison officials, including when to segregate a prisoner to protect him from the violence of others. Collignon v. Milwaukee County, 163 F.3d 982, 988 (7th Cir. 1998).

The deliberate indifference standard applies to decisions of prison medical personnel as to what medical care a prisoner requires. Collignon v. Milwaukee County, 163 F.3d 982, 988(7th Cir. 1998).

The professional judgment standard requires: (1) that the plaintiff's medical needs must have been objectively serious; and (2) that in order for the plaintiff to show that the state actor's decision was such a substantial departure from accepted professional judgment, practice, or standards, as to demonstrate that the person responsible actually did not base the decision on such a judgment, the plaintiff must show (a) that the professional knew of the serious medical need and (b) disregarded that need. Collignon v. Milwaukee County, 163 F.3d 982, 989 (7th Cir. 1998).

Under the professional judgment standard, a trier of fact can conclude that the professional knew of the need from evidence that the serious medical need was obvious. Collignon v. Milwaukee County, 163 F.3d 982, 989 (7th Cir. 1998).

A "medical professional need not be certain that an individual is about to commit suicide before a constitutional obligation to act is triggered, but the obligation to take some action is not triggered absent a 'substantial risk' of suicide." Collignon v. Milwaukee County, 163 F.3d 982, 990 (7th Cir. 1998).

CONSTITUTIONAL STANDARDS: This section deals with both the standard of review for issues based on the United States Constitution and principles used to evaluate such claims.

Constitutionality of federal statute: *de novo*. United States v. Wilson, 73 F.3d 675, 678 (7th Cir. 1995), cert. denied, 17 S.Ct. 47 (1996).

Issue preclusion determinations: *de novo*. United States v. Salerno, 108 F.3d 730, 740 (7th Cir.), cert. denied, 117 S.Ct. 2517 (1997).

In a criminal case, issue preclusion means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit. United States v.

Salerno, 108 F.3d 730, 741 (7th Cir.), cert. denied, 117 S.Ct. 2517 (1997)(see case for further discussion concerning issue preclusion in criminal cases).

A Commerce Clause challenge to a law is reviewed to determine whether Congress could have had a rational basis for utilizing its Commerce Clause powers to ensure that the regulatory means chosen were reasonably adapted to the end permitted by the Constitution. United States v. Wilson, 159 F.3d 280, 285 (7th Cir. 1998).

> Congress may regulate three areas of activity under the Commerce Clause. First, it may regulate the use of the channels of intrastate commerce. Second, Congress can regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though threats may only come from intrastate activities. Finally, Congress can regulate activities which have a substantial relation to interstate commerce; that is, those activities which substantially affect interstate commerce. United States v. Wilson, 159 F.3d 280, 285 (7th Cir. 1998) (citing United States v. Lopez, 514 U.S. 549 (1995)).

When Congress acts pursuant to an enumerated power, there is no violation of the Tenth Amendment. United States v. Wilson, 159 F.3d 280, 287 (7th Cir. 1998).

The due process clause protects a defendant from oppressive and prejudicial pre-indictment delay. If the defendant shows an oppressive and prejudicial pre-indictment delay, the government must come forward with a justification for the delay which the court will then balance against any prejudice established. Aleman v. Honorable Judges of the Circuit Court of Cook County, 138 F.3d 302, 309 (7th Cir. 1998).

Where a defendant has a choice between two methods of execution, i.e., lethal injection and lethal gas, and insists that he desires to be executed by one particular form, he thereby waives any claim as to the unconstitutionality of that chosen method. Stewart v. LaGrand, 119 S.Ct. 1018, 1020 (1999)

CONTINUANCE: In some instances it is simply not possible to be prepared for trial by the original trial date. If this is the case, trial counsel must ask for a continuance so that counsel can provide effective assistance. While the trial judge has broad discretion when ruling on motions to continue, if defense counsel had a compelling reason for asking for the continuance and the trial judge denies the request, the trial court may have committed reversible error.

Review of denial of motion for continuance: abuse of discretion. United States v. Taylor, 116 F.3d 269, 274 (7th Cir. 1997); United States v. Depoister, 116 F.3d 292, 294 (7th Cir. 1997).

District court abuses discretion in denying motion for continuance when it chooses an option that was not within the range of permissible options from which Court of Appeals would expect trial judge to choose under given circumstances. United States v. Depoister, 116 F.3d 292, 294 (7th Cir. 1997).

"[M]yopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." United States v. Depoister, 116 F.3d 292, 294 (7th Cir. 1997)(quoting Ungar v. Sarafite, 376 U.S. 575, 589 (1964)).

List of some of the factors to be weighed in evaluating counsel's request for a delay: the time required and already permitted for trial preparation; the diligence of the moving party; the conduct of the other party; the effect of the delay; the reasons given by the movant for the continuance; the likelihood that the continuance will satisfy the movant's needs; the inconvenience to the court, the opposing party, and the witnesses; and the extent of the harm which denial of the continuance will cause the opposing party. United States v. Depoister, 116 F.3d 292, 294 (7th Cir. 1997).

Review of grant or denial of a motion to reschedule trial: abuse of discretion. United States v. Martinson, 37 F.3d 353, 355 (7th Cir. 1994).

CROSS-EXAMINATION: Cross-examination has been called "the greatest legal engine ever invented for the discovery of truth." Criminal defense attorneys must jealously guard the right to full and complete cross-examination, and should challenge any restriction on cross-examination imposed by the trial judge.

The denial of the defendant's right to challenge the declarant's statements in cross-examination implicates constitutional concerns. United States v. Williams, 133 F.3d 1048 (7th Cir. 1998)(citing Ohio v. Roberts, 448 U.S. 56 (1980)).

Review of limitations on cross-examination alleging a Sixth Amendment violation: *de novo*. U.S. v. Saunders, No. 98-1980, slip op. p. 22 (7th Cir. 2/2/99).

Review of cross-examination of defendant regarding specific instances of conduct reflecting on defendant's credibility (F.R.E. 608(b)): abuse of discretion. United States v. Smith, 80 F.3d 1188, 1193 (7th Cir. 1996).

Review of district court's ruling allowing government to cross examine defendant on specific matters: abuse of discretion. United States v. Given, 164 F.3d 389 (7th Cir. 1999).

If the Court of Appeals finds that the district court abused its discretion in allowing the government to question the defendant on certain matters, the Court of Appeals must next determine whether the error affected the trial's outcome. United States v. Given, 164 F.3d 389 (7th Cir. 1999).

The government is allowed to "front" the expected cross-examination of witnesses. In other words, the government may present evidence in its case-in-chief which is intended to rebut evidence which the defendant has indicated he intends to present at trial. Review: abuse of discretion. U.S. v. Holly, 167 F.3d 393 (7th Cir. 1999).

Cross-examination has no "natural limits, and the trial judge must therefore exercise judgment in deciding when the point of diminishing returns has been reached, or passed - a judgment that will depend on the particulars of each case, and on such unreviewable imponderables as the judge's assessment of the juries comprehension and attention span." United States v. Meyer, 157 F.3d 1067, 1081 (7th Cir. 1998)(quoting United States v. Akinrinade, 61 F.3d 1279, 1285 (7th Cir. 1995)).

For impeachment, a party-witness' examination may include whether the witness had previously been convicted of a felony, what the felony was, and when the conviction was obtained. Wilson v. Williams, 161 F.3d 1078 (7th Cir. 1998).

The "jury has a right under the law to hear that any witness . . . has a felony record that is or can be considered to be impeaching." Wilson v. Williams, 161 F.3d 1078 (7th Cir. 1998)(quoting United States v. Toney, 27 F.3d 1245, 1253 (7th Cir. 1994)).

For impeachment purposes under F.R.E. 609, the only information that is properly admissible is the date, the title of the offense, and the disposition. United States v. Fawley, 137 F.3d 458, 473-74 (7th Cir. 1998).

Exposing possible "bias is 'a proper and important function of the constitutionally protected right of cross-examination.'" United States v. Meyer, 157 F.3d 1067, 1080 (7th Cir. 1998)(quoting Delaware v. Van Arsdall, 475 U.S. 673, 678-79 (1986)).

Trial judges "retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety or interrogation that is repetitive or only marginally relevant." United States v. Meyer, 157 F.3d 1067, 1080-1081 (7th Cir. 1998)(quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)).

DETENTION PENDING APPEAL: Pursuant to 18 U.S.C. § 3143(b) and (c) a defendant can request, in the district court, bond pending appeal. If the district court denies the request, the decision can be reviewed by the Court of Appeals pursuant to Federal Rule of Appellate Procedure 9(b) and 18 U.S.C. § 3145. In the Seventh Circuit review of a denial of bond pending appeal is raised by motion in the appeal of the conviction, no separate notice of appeal is needed. Circuit Rule 9(c).

Under 18 U.S.C. § 3143(b), a convicted defendant may be allowed to remain on "bond pending appeal if: (1) the defendant is not likely to flee or pose a danger to the community, (2) the appeal is not for the purpose of delay, and (3) the appeal raises a 'substantial question of law or fact' likely to result in reversal, an order for a new trail, a sentence that does not include a term of imprisonment, or a sentence that reduces the term of imprisonment [to a length of time less than the defendant will have served by the time the appeal is concluded]." United States v. Ashman, 964 F.2d 596, modified, 979 F.2d 469 (7th Cir. 1992), cert. denied, 114 S.Ct. 62 (1993).

The district court must state in writing, or orally on the record, the reasons for an order regarding release or detention of a defendant in a criminal case. United States v. Swanquist, 125 F.3d 573, 575 (7th Cir. 1997) (per curiam) (citing Fed.R.App.P. 9(a)).

The requirement that the district court state the reasons for an order regarding release or detention can be satisfied either by a written opinion or by the transcript of an oral opinion, but there must be one or the other. United States v. Swanquist, 125 F.3d 573, 575 (7th Cir. 1997)(per curiam)(citing United States v. Hooks, 811 F.2d 391 (7th Cir. 1987)(per curiam)).

Review of orders granting or denying release pending appeal: *de novo*. United States v. Swanquist, 125 F.3d 573, 575 (7th Cir. 1997) (per curiam) (citing Fed.R.App.P. 9(a))(citing United States v. Eaken, 995 F.2d 740, 741 (7th Cir. 1993)).

Where a district court failed to comply with Rule 9(a), it is appropriate to remand a case to the district court. United States v. Swanquist, 125 F.3d 573, 576 (7th Cir. 1997)(per curiam)(citing Fed.R.App.P. 9(a)).

DISCOVERY: Aggressive discovery practice often times leads to favorable results. Any curtailment of discovery at the trial level should be closely scrutinized by appellate counsel as a possible issue on appeal. **(See also -- NEW TRIAL)**

Review of district court's decision about whether to hold a *Brady* hearing: abuse of discretion. United States v. Austin, 54 F.3d 394, 401 (7th Cir. 1995).

Reversal on appeal for discovery violation: defendant must show both abuse of discretion and prejudice. United States v. Salerno, 108 F.3d 730, 743 (7th Cir.), cert. denied, 117 S.Ct. 2517 (1997).

> Substantial prejudice from trial court's discovery ruling exists when defendant is unduly surprised and lacks adequate opportunity to prepare defense or if the mistake substantially influences jury. United States v. Salerno, 108 F.3d 730, 743 (7th Cir.), cert. denied, 117 S.Ct. 2517 (1997).

Review of discovery decision: abuse of discretion. United States v. Moore, 115 F.3d 1348, 1359 (7th Cir. 1997).

Review of decision whether to impose sanctions for violating Rule 16 disclosure requirements: abuse of discretion. United States v. Dennis, 115 F.3d 524, 534 (7th Cir. 1997).

> New trial warranted only if the government violated Rule 16 and the district court's offered remedy was inadequate to provide the defendant with a fair trial. United States v. Dennis, 115 F.3d 524, 534 (7th Cir. 1997)(citing United States v. Jackson, 51 F.3d 646, 651-52 (7th Cir. 1995)).

The "inability of a defendant to interview witnesses is a constitutional problem only if the state artificially restricted the defendant's ability to obtain evidence." United States v. Agostino, 132 F.3d 1183, 1191 (7th Cir. 1997) (quoting United States v. DeRobertis, 766 F.2d 270, 274 (7th Cir. 1985), cert. denied, 475 U.S. 1053 (1986)).

Since a witness is free to decide whether to grant an interview with defense counsel, reversal on the ground of government interference with a witness "requires a clear showing that the government instructed the witness not to cooperate with the defendant." United States v. Agostino, 132 F.3d 1183, 1191 (7th Cir. 1997) (quoting

United States v. White, 454 F.2d 435, 439 (7th Cir. 1971), cert. denied, 406 U.S. 962 (1972)).

Review of denial of motion in limine to exclude evidence: abuse of discretion. United States v. Watts, 95 F.3d 617, 619 (7th Cir. 1996); United States v. Motley, 940 F.2d 1079, 1083-84 (7th Cir. 1991).

Review of propriety of quashing a subpoena: abuse of discretion. United States v. Lloyd, 71 F.3d 1256, 1268 (7th Cir. 1995), cert. denied, 116 S.Ct. 2511 (1996)(citing United States v. McCollom, 815 F.2d 1087, 1089 (7th Cir. 1987)).

DOUBLE JEOPARDY: The double jeopardy clause of the United States Constitution protects a defendant from repeated prosecutions for the same offense, and from being punished twice for the same offense. The denial of a motion to dismiss based on double jeopardy is immediately appealable pursuant to the collateral order doctrine. United States v. Asher, 96 F.3d 270, 272 (7th Cir. 1996), cert. denied, 117 S.Ct. 786 (1997).

Test to be applied to determine whether the double jeopardy clause of the Fifth Amendment applies or not "is whether each (statutory) provision requires proof of a fact which the other does not." United States v. Chaney, 559 F.2d 1094, 1096 (7th Cir. 1977)(quoting Brown v. Ohio, 432 U.S. 161 (1977)).

Review of district court's double jeopardy ruling: *de novo*. United States v. Asher, 96 F.3d 270, 273 (7th Cir. 1996), cert. denied, 117 S.Ct. 786 (1997).

> The double jeopardy clause protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. United States v. Asher, 96 F.3d 270, 273 (7th Cir. 1996), cert. denied, 117 S.Ct. 786 (1997).

Review of double jeopardy challenges to multiple prosecutions/imposition of multiple punishments:

> A fixed monetary sanction, which exceeds the amount making the government whole, is punishment in the constitutional sense, and triggers application of the Double Jeopardy clause. United States v. Wingate, 128 F.3d 1157 (7th Cir. 1997)(quoting United States v. Halper, 490 U.S. 435, 448-51 (1989)).
>
> If the sanction is overwhelmingly disproportionate to the government's loss or is not met rationally related to the goal of making the government whole,

the sanction is punitive in nature, and is punishment in the constitutional sense. United States v. Wingate, 128 F.3d 1157 (7th Cir. 1997).

A civil sanction will be deemed to be punishment in the constitutional sense only if the sanction may not be fairly characterized as remedial, but only as a deterrent or retribution. United States v. Wingate, 128 F.3d 1157 (7th Cir. 1997).

Double jeopardy does not bar re-prosecution where the defendant bribed the judge in the original trial. Aleman v. Judges of the Circuit Court of Cook County, 138 F.3d 302, 307-308 (7th Cir. 1998).

Where the same "act or transaction constitutes a violation of two distinct statutory provisions, the tests to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932)(see also United States v. Dixon, 509 U.S. 688 (1993)).

ELECTRONIC SURVEILLANCE -- See WIRETAPS

EVIDENCE: The variety of situations in which evidentiary issues can arise is almost limitless. Because the Court of Appeals reviews a district judge's evidentiary rulings for an abuse of discretion, evidentiary issues are difficult, but not impossible, to win on appeal. If you can show that the district judge applied an incorrect legal standard in determining the admissibility of evidence, however, you can almost always show an abuse of discretion, although the error may still be found "harmless."

General:

Review of admissibility of disputed evidence: abuse of discretion. United States v. Curry, 79 F.3d 1489, 1494 (7th Cir. 1996).

The Court of Appeals applies an abuse of discretion standard to evidence admitted over an objection; however, the Court of Appeals reviews the admissibility of evidence to which an objection was not made for plain error. United States v. Williams, 133 F.3d 1048 (7th Cir. 1998).
Once made, a stipulation is binding unless relief from the stipulation is necessary to avoid manifest injustice or the stipulation was entered into through inadvertence or based on an erroneous view of the facts or law. United States v. Wingate, 128 F.3d 1157 (7th Cir. 1997).

Review of district court's decision to hold the defendant to his stipulation: clear and unmistakable abuse of discretion. United States v. Wingate, 128 F.3d 1157 (7th Cir. 1997).

Evidence is considered material only if there is a reasonable probability that the disclosure of that evidence would have changed the result of the trial. United States v. Payne, 102 F.3d 289, 293 (7th Cir. 1996).

Extrinsic evidence may not be used to prove impeachment on a collateral matter. United States v. Senn, 129 F.3d 886 (7th Cir. 1997).

Proof of motive and reason for fabrication are never collateral matters. United States v. Rodriguez, 925 F.2d 1049 (7th Cir. 1991).

To show that testimony jury credited was incredible as a matter of law, defendant must show that testimony was unbelievable on its face, either because it would have been physically impossible for witness to observe what he described or because it was impossible under the laws of nature for the events to have occurred at all. United States v. Alcantar, 83 F.3d 185, 189 (7th Cir. 1996).

Review of whether the district court committed reversible error in either admitting or excluding evidence: abuse of discretion. United States v. Whitaker, 127 F.3d 595, 601 (7th Cir. 1997)(citing United States v. Payne, 102 F.3d 289, 294 (7th Cir. 1996)).

An "evidentiary error does not justify reversing a jury's verdict unless a reviewing court determines that the error had a substantial and injurious effect or influence on the jury's verdict." United States v. Hunter, 145 F.3d 946, 951 (7th Cir. 1998)(quoting United States v. Jarrett, 133 F.3d 519, 529 (7th Cir. 1998)).

To preserve an issue for review, a party must make a proper, timely objection at trial or sentencing on the same specific ground he or she is appealing. U.S. v. McClellan, 165 F.3d 535 (7th Cir. 1999).

"Neither a general objection to the evidence nor a specific objection to other grounds will preserve the issue for review." U.S. v. McClellan, 165 F.3d 535 (7th Cir. 1999)(quoting United States v. Winn, 845 F.2d 1439, 1442 (7th Cir. 1988)).

Specific Types of Evidence:

Evidence of a defendant's flight can be probative of the defendant's consciousness of his guilt. United States v. Hunter, 145 F.3d 946, 951 (7th Cir. 1998).

> The view that a defendant would not have run from the police unless he knew he had done something wrong can be too simplistic in many cases, and the Seventh Circuit has cautioned district court's to exercise caution in admitting evidence of a defendant's flight. United States v. Hunter, 145 F.3d 946, 951 (7th Cir. 1998)(citing United States v. Williams, 33 F.3d 876, 879 (7th Cir. 1994)).

Review of decision allowing identification testimony from photo array: clear error. United States v. Moore, 115 F.3d 1348, 1359 (7th Cir. 1997).

> Test to determine whether trial court committed clear error allowing identification testimony from photo array: (1) whether identification procedure used was unduly suggestive; (2) if it is bound to be unduly suggestive, evidence may still be admissible as long as testimony was reliable, given totality of circumstances. United States v. Moore, 115 F.3d 1348, 1360 (7th Cir. 1997); United States v. Hall, 109 F.3d 1227, 1237-1238 (7th Cir.), cert. denied, 118 S.Ct. 153 (1997).
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> In assessing reliability, the Court of Appeals looks at five factors: "(1) the opportunity of the witness to view the event and the actor; (2) the degree of the witness's attention; (3) the accuracy of the witness's description; (4) the witness's level of certainty; and, finally, (5) the time elapsed between the crime and the identification." United States v. Moore, 115 F.3d 1348, 1360 (7th Cir. 1997)(quoting United States v. Fryer, 974 F.2d 813, 821 (7th Cir. 1992), cert. denied, 508 U.S. 94 (1993)).

Review of decision to allow identification testimony: clear error. United States v. Funches, 84 F.3d 249, 253 (7th Cir. 1996).

Review of denial of motion in limine to exclude evidence: abuse of discretion. United States v. Watts, 95 F.3d 617, 619 (7th Cir. 1996); United States v. Motley, 940 F.2d 1079, 1083-84 (7th Cir. 1991).

Review of admissibility of portion of statement not yet admitted following admission of another portion of statement (rule of completeness): abuse of discretion (F.R.E. 106): United States v. Glover, 101 F.3d 1183, 1190 (7th Cir. 1996).

Review of admissibility of polygraph results: abuse of discretion. United States v. Pulido, 69 F.3d 192 (7th Cir. 1995).

Review of admission of written transcripts of tape-recorded conversations: abuse of discretion. United States v. Vega, 72 F.3d 507, 513 (7th Cir. 1995), cert. denied, Early v. United States, 116 S.Ct. 2529 (1996).

Lack of proof regarding a chain of custody does not render audiotapes depicting undercover sales inadmissible. United States v. Brown, 136 F.3d 1176, 1181 (7th Cir. 1998)(citing United States v. Craig, 573 F.2d 455, 478 (7th Cir. 1997)).

> The purpose of the chain of custody requirement for audio recordings is to insure that the items offered into evidence are in substantially the same condition as they were at the time the proponent came into possession of the evidence. United States v. Brown, 136 F.3d 1176, 1181 (7th Cir. 1998)(citing United States v. Craig, 573 F.2d 455, 478 (7th Cir. 1997)).
>
> The purpose of the chain of custody rule is served where a proper foundation demonstrating the accuracy and trustworthiness of the evidence is laid. United States v. Brown, 136 F.3d 1176, 1181 (7th Cir. 1998)(citing United States v. Craig, 573 F.2d 455, 478 (7th Cir. 1997)).
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> In the Seventh Circuit "the recollections of eye witnesses to the events in question are sufficient to establish a foundation of tapes. United States v. Brown, 136 F.3d 1176, 1182 (7th Cir. 1998)(citing United States v. Carrasco, 887 F.2d 794, 802 (7th Cir. 1989)).

When "chain of custody is in question but there is no evidence of any tampering, there is a presumption that a system of regularity accompanied the handling of the evidence if the exhibits are all times within official custody." United States v. Brown, 136 F.3d 1176, 1182 (7th Cir. 1998)(citing United States v. Scott, 19 F.3d 1238, 1245 (7th Cir. 1994)).

The "possibility of a break in the chain of custody of evidence goes to the weight of the evidence, not its admissibility." United States v. Brown, 136 F.3d 1176, 1182 (7th Cir. 1998)(citing United States v. Williams, 44 F.3d 614, 618 (7th Cir. 1995)).

Review of propriety of quashing a subpoena: abuse of discretion. United States v. Lloyd, 71 F.3d 1256, 1268 (7th Cir. 1995), cert. denied, 116 S.Ct. 2511 (1996)(citing United States v. McCollom, 815 F.2d 1087, 1089 (7th Cir. 1987)).

When evidence is excluded, formal offers of proof are not required; however, the record must reflect the equivalent of a formal offer of proof (i.e., grounds for

admissibility, what the evidence will prove, and the significance of the excluded testimony.) United States v. Vest, 116 F.3d 1179, 1189 (7th Cir. 1997).

Evidence of Gang Affiliation:

> The Court of Appeals reviews the district court's ruling concerning the admissibility of evidence of gang membership for clear abuse of discretion. United States v. Westbrook, 125 F.3d 996, 1007 (7th Cir.), cert. denied, Westbrook v. United States, 118 S.Ct. 643 (1997)(citing United States v. Sargent, 98 F.3d 325, 328 (7th Cir. 1996)).
>
> Evidence of gang affiliation is admissible in cases in which it is relevant to demonstrate the existence of a joint venture or conspiracy and a relationship among its members. United States v. Westbrook, 125 F.3d 996, 1007 (7th Cir.), cert. denied, 118 S.Ct. 643 (1997).
>
> Because evidence of gang affiliation can taint a defendant in the eyes of a jury it can also establish criminal intent or agreement to conspire, the Court of Appeals examines the care and thoroughness with which a district judge considered the admission or exclusion of gang-involvement evidence. United States v. Westbrook, 125 F.3d 996, 1007 (7th Cir.), cert. denied, 118 S.Ct. 643 (1997).
>
> Introduction of evidence that defendant was affiliated with gang, allegedly violating defendant's First Amendment rights, was harmless where it was defendant's counsel who elicited the testimony in question. United States v. Hall, 109 F.3d 1227, 1231-1232 (7th Cir.), cert. denied, 118 S.Ct. 153 (1997).

Review of decision to admit information obtained via wiretap: abuse of discretion. United States v. Adams, 125 F.3d 586, 595 (7th Cir. 1997).

> When the government requests the authority for wire interception, it must give (1) a complete statement detailing the other investigative procedures attempted unsuccessfully or (2) a description of why other investigative techniques would be unlikely to succeed or (3) a statement why other techniques would be too dangerous. These requirements are in the alternative and the government need only establish only one of the three. United States v. Adams, 125 F.3d 586, 595 (7th Cir. 1997).

Review of decision to admit into evidence a recording which includes unintelligible portions: abuse of discretion. United States v. Singleton, 125 F.3d 1097, 1104 (7th Cir. 1997).

> A recording that is partially audible or unintelligible is admissible unless the inaudible portions are "so substantial as to render the recordings as a whole untrustworthy." United States v. Singleton, 125 F.3d 1097, 1104 (7th Cir. 1997)(citing United States v. Powers, 75 F.3d 335, 341 (7th Cir. 1996) and United States v. Robinson, 956 F.2d 1388, 1395 (7th Cir.), cert. denied, 506 U.S. 1020 (1992)).
>
> The district court has broad discretion in deciding whether to allow the use of written transcripts to aid the jury in listening to recorded conversations. United States v. Singleton, 125 F.3d 1097, 1105 (7th Cir. 1997), cert. denied, Cox v. United States, 118 S.Ct. 898 (1998) (citing United States v. Howard, 80 F.3d 1194, 1199 (7th Cir. 1996)).
>
> As long as the government complies with Title 3 of the Omnibus Crime Control and Safe Street's Act of 1968, 18 U.S.C. §2510, et seq., it may at trial disclose the contents of the recordings of intercepted telephone calls in whatever fashion it chooses, including the use of duplicate and compilation tapes. United States v. Rivera, 153 F.3d 809, 812 (7th Cir. 1998).
>
> A proper foundation for the admission of audiotapes may be established in two ways: a chain of custody could establish that the tapes are in the same condition as when recorded, or alternatively, other testimony could be used to establish the accuracy and trustworthiness of the evidence. United States v. Rivera, 153 F.3d 809, 812 (7th Cir. 1998).
>
> Concerning the admissibility of tapes and/or transcripts of those tapes see generally United States v. Zambrana, 841 F.2d 1320 (7th Cir. 1988).

Review of the trial court's decision to admit summary charts: abuse of discretion. United States v. Brown, 136 F.3d 1176, 1182 (7th Cir. 1998)(citing United States v. Doerr, 886 F.2d 944, 958 (7th Cir. 1989)).

As long as the underlying evidence is properly admitted, that evidence may be used in preparing summaries. United States v. Brown, 136 F.3d 1176, 1182 (7th Cir. 1998).

Review of whether sufficient evidence would allow jury to find that defendant withdrew from conspiracy: *de novo*. United States v. Maloney, 71 F.3d 645 (7th Cir. 1995), cert. denied, 117 S.Ct. 295 (1996).

When the district court is faced with a Rule 104(a) proffer of expert scientific testimony, it must determine whether the expert will testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact issue. United States v. Yoon, 128 F.3d 515, 527 (7th Cir. 1997)(citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592 (1993)).

> The Court of Appeals reviews the district court's findings as to the reliability and relevance of the expert testimony: *de novo*. United States v. Yoon, 128 F.3d 515, 527 (7th Cir. 1997)(citing United States v. Hall, 93 F.3d 1337, 1342 (7th Cir. 1996)).

Review of decision whether to admit expert testimony: abuse of discretion. United States v. Sinclair, 74 F.3d 753, 756-757 (7th Cir. 1996).

> Under *Daubert*, there is a two-part test to the admissibility of expert testimony: the first part relates to the scientific validity of the expert's methodology, while the second part is essentially a relevance inquiry. United States v. Hall, 93 F.3d 1337, 1342 (7th Cir. 1996).
>
> Review of district court's adherence to framework set forth in *Daubert*: *de novo*. United States v. Hall, 93 F.3d 1337, 1342 (7th Cir. 1996).
>
> After the Court of Appeals determines that the district court properly applied the *Daubert* framework, the review of the district court's decision to admit or exclude expert testimony: abuse of discretion. United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(citing General Elec. Co. v. Joiner, 118 S.Ct. 512, 517 (1997) and Target Mkt. Publ'g, Inc. v. Advo, Inc., 136 F.3d 1139, 1143 (7th Cir. 1998)).

Review of denial of motion to appoint expert: abuse of discretion. United States v. Daniels, 64 F.3d 311, 315 (7th Cir. 1995), cert. denied, 116 S.Ct. 745 (1996).

Determinations regarding Fed.R.Crim.P. 16 will only be reversed for abuse of discretion prejudicial to the substantial rights of the defendant. United States v. Salerno, 108 F.3d 730, 742 (7th Cir.), cert. denied, 117 S.Ct. 2517 (1997).

Review of admissibility of demonstrative evidence: clear abuse of discretion. United States v. Salerno, 108 F.3d 730, 742 (7th Cir.), cert. denied, 117 S.Ct. 2517 (1997).

Review of decision to send material to jury room: clear abuse of discretion. United States v. Salerno, 108 F.3d 730, 742 (7th Cir.), cert. denied, 117 S.Ct. 2517 (1997).

Review of district court's admission of rebuttal evidence: clear abuse of discretion. United States v. Hall, 165 F.3d 1095 (7th Cir. 1999).

Harmless error (Fed.R.Crim.P. 52(a)): Even if trial court erred in evidentiary ruling, verdict will not be overturned if error was "harmless." United States v. Marshall, 75 F.3d 1097 (7th Cir. 1996).

> The error is harmless if the Court of Appeals is certain that the evidentiary error did not have substantial and injurious effect or influence on jury's verdict. United States v. Sargent, 98 F.3d 325, 330 (7th Cir. 1996).
>
> Harmful evidentiary error results only if error has substantial and injurious effect or influence on the jury's verdict. United States v. Lloyd, 71 F.3d 1256, 1269 (7th Cir. 1995), cert. denied, 116 S.Ct. 2511 (1996); United States v. Irvin, 87 F.3d 860, 866 (7th Cir.), cert. denied, 117 S.Ct. 259 (1996).

Specific Rules of Evidence:

FED.R.EVID. 403 determinations:

> One measure of the relevance of evidence is whether "'its exclusion would leave a chronological and conceptual void in the story.'" United States v. Westbrook, 125 F.3d 996, 1007 (7th Cir.), cert. denied, 118 S.Ct. 643 (1997) (quoting Wilson v. Groaning, 25 F.3d 581, 584 (7th Cir. 1994) (quoting United States v. Vretta, 790 F.2d 651, 655 (7th Cir.), cert. denied, 479 U.S. 851 (1986)).
>
> Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or if it would mislead the jury. United States v. Williams, 133 F.3d 1048 (7th Cir. 1998).
>
> In a prosecution for mailing threatening communications in violation of 18 U.S.C. §876, the district court erred in allowing testimony of Illinois Department of Corrections counselor regarding a disciplinary hearing held to

determine if the defendant was responsible for sending the threatening letter to an assistant state's attorney. Under Rule 403, the testimony was highly prejudicial because it would look to the jury as if the IDOC had resolved one of the issues in the case. United States v. Thomas, 155 F.3d 833, 836 (7th Cir. 1998).

In cases involving threats, victim impact evidence is relevant to determine whether defendants used or attempted to use force or threat of force to intimidate or interfere with the rights of their victims. United States v. Hartbarger, 148 F.3d 777, 782 (7th Cir. 1998).

Under Rule 403, evidence is "unfairly prejudicial only if it will induce the jury to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented." United States v. Fawley, 137 F.3d 458, 466 (7th Cir. 1998)(quoting United States v. Vretta, 790 F.2d 651, 655 (7th Cir. 1986)).

Under Rule 403, the district court is required "to balance the questionable relevance of the excluded testimony against the hazards of admitting that evidence." United States v. Fawley, 137 F.3d 458, 466 (7th Cir. 1998)(quoting United States v. Pulido, 69 F.3d 192, 204 (7th Cir. 1993)).

Because it is a comparison of intangibles, a district court's Rule 403 balancing is afforded a special degree of deference. United States v. Fawley, 137 F.3d 458, 466 (7th Cir. 1998)(quoting United States v. Glecier, 923 F.2d 496, 503 (7th Cir. 1991)).

FED.R.EVID. 404(b) determinations:

Review of district court's decision to admit disputed evidence: abuse of discretion. United States v. Lloyd, 71 F.3d 1256, 1264 (7th Cir. 1995), cert. denied, 116 S.Ct. 2511 (1996); United States v. Hernandez, 84 F.3d 931, 933 (7th Cir. 1996).

"The decision to admit evidence will be reversed only when it is clear that the questioned evidence had no bearing upon any of the issues involved in trial." United States v. Lloyd, 71 F.3d 1256, 1264 (7th Cir. 1995), cert. denied, 116 S.Ct. 2511 (1996); United States v. Torres, 977 F.2d 321, 327 (7th Cir. 1992).

The test for determining admissibility of Rule 404(b) evidence is: (1) whether the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged; (2) whether the evidence shows that the other act is similar enough and close in time to be relevant to the matter in issue; (3) whether the evidence is sufficient to support a jury finding that defendant committed a similar act; and (4) whether the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. United States v. Lloyd, 71 F.3d 1256, 1264 (7th Cir. 1995), cert. denied, 116 S.Ct. 2511 (1996)(quoting United States v. Wilson, 31 F.3d 510, 514-515 (7th Cir. 1994)).

Evidence will be barred if offered to show propensity to commit the crime charged. United States v. Shackleford, 738 F.2d 776, 779 (7th Cir. 1984).

Evidence demonstrating consciousness of guilt may be properly admitted under Rule 404(b). U.S. v. Robinson, 161 F.3d 463, 466 (7th Cir. 1998).

Modus operandi evidence under 404(b) must bear a "singular strong resemblance to the pattern of the offense charged" and the similarities between the crimes must be sufficiently idiosyncratic to permit an inference of patterns for purposes of truth. U.S. v. Robinson, 161 F.3d 463, 468 (7th Cir. 1998).

Admission of evidence of flight under 404(b) depends on the degree of confidence with which the following four inferences can be drawn: (1) from behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. U.S. v. Robinson, 161 F.3d 463, 469 (7th Cir. 1998).

FED.R.EVID. 501

"Confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." United States v. Schwensow, 151 F.3d 650, 657 (7th Cir. 1998) (quoting Jaffee v. Redmond, 518 U.S. 1, 10 (1996)).

The marital communications privilege protecting only communications made in confidence, does not apply in the unusual circumstance where the spouse seeking to invoke the communications privilege knows that the other spouse

is incarcerated when the communication occurs. United States v. Madoch, 149 F.3d 596, 602 (7th Cir. 1998).

FED.R.EVID. 609:

Review of district court's decision to allow information concerning defendant's prior convictions (Fed.R.Evid. 609(a)(1)): abuse of discretion. United States v. Smith, 131 F.3d 685, 687 (7th Cir. 1997) (citing United States v. Hernandez, 106 F.3d 737, 740 (7th Cir. 1997)).

To attack a defendant's credibility, Rule 609(a)(1) provides that evidence that the defendant has been convicted of a crime punishable by death or imprisonment in excess of one year shall be admitted if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to defendant. United States v. Smith, 131 F.3d 685, 687 (7th Cir. 1997) (citing United States v. Hernandez, 106 F.3d 737, 740 (7th Cir. 1997)).

To determine whether the probative value of the evidence concerning a defendant's prior conviction outweighs its prejudicial effect, the district court should consider: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. United States v. Smith, 131 F.3d 685, 687 (7th Cir. 12/15/97) (citing United States v. Hernandez, 106 F.3d 737, 740 (7th Cir. 1997)).

Under Rule 609, when a defense witness is asked if the witness had ever been convicted of a felony, the prosecution on cross-examination may inquire what the felony was and when the conviction was obtained. United States v. Fawley, 137 F.3d 458, 473 (7th Cir. 1998)(quoting United States v. Dow, 457 F.2d 246, 250 (7th Cir. 1972)).

"A district court's ruling on admission of evidence under Federal Rules of Evidence 404(b) and 403 is reviewed for abuse of discretion. We may reverse a district court's decision to admit evidence only when it is clear that the questioned evidence had no bearing on any of the issues involved in the trial." United States v. Saunders, 166 F.3d 907 (7th Cir. 1999)(citations omitted).

FED. R. EVID. 611(c):

Under Rule 611(c), the district court has the discretion to allow or disallow leading questions of a witness identified with an adverse party: once the district court exercises his discretion in that regard, the movant must establish an abuse of discretion to obtain a reversal. United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(quoting United States v. O'Brien, 618 F.2d 1234, 1242 (7th Cir. 1980)).

FED.R.EVID. 702:

Review of district court's decision to admit or exclude evidence under Rule 702: abuse of discretion. United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(citing United States v. Larkin, 978 F.2d 964, 971 (7th Cir. 1992)).

> Under the first part of the two part test to determine the admissibility of expert testimony, the district court must "consider whether the testimony has been subjected to the scientific methods; it must rule out 'subjective belief or unsupported speculation.'" United States v. Hall, 165 F.3d 1095, 1096 (7th Cir. 1999)(quoting Porter v. Whitehall Labs, Inc., 9 F.3d 607, 614 (7th Cir. 1993)).
>
> Concerning the first step in evaluating the admissibility of expert testimony, the district court must determine "whether the reasoning or methodology underlying the testimony is scientifically valid." United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(quoting Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 592-3 (1993)).
>
> Under the second step to determine the admissibility of expert scientific testimony, the district court must "determine whether the evidence or testimony assists the trier of fact in understanding the evidence or in determining a fact in issue." United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(quoting Porter v. Whitehall Labs, Inc., 9 F.3d 607, 616 (7th Cir. 1993)).
>
> Under the second step in the evaluation of the admissibility of expert testimony, the district court must "consider whether the proposed scientific testimony fits the issue to which the experts testified." United States v. Hall, 165 F.3d 1095 (7th Cir. 1999).

A "district court may admit expert testimony *only* if such testimony will assist the trier of fact to understand the evidence or determine a fact in issue." United States v. Hall, 165 F.3d 1095 (7th Cir. 1999).

The Seventh Circuit has a long line of cases which reflect its disfavor of expert testimony on the reliability of eyewitness identification. United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(referring to United States v. Daniels, 64 F.3d 311 (7th Cir. 1995); United States v. Larkin, 78 F.3d 964 (7th Cir. 1992); United States v. Curry, 977 F.2d 1042 (7th Cir. 1992); United States v. Hudson, 884 F.2d 1016 (7th Cir. 1989)).

Rule 702 compels the district court to consider "whether the expert testimony would be misleading or confusing in the context of the trial." United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(quoting United States v. Curry, 977 F.2d 1042, 1051 (7th Cir. 1992)).

Daubert does not undermine the Seventh Circuit's analysis of the admissibility of expert scientific testimony under Rule 702 because the Seventh Circuit has consistently affirmed district court decisions rejecting expert testimony pertaining to the reliability of eyewitness identifications on a basis that it will not "assist the trier of fact" under Rule 702, rather than because such testimony was unreliable under the *Frye* test. United States v. Hall, 165 F.3d 1095 (7th Cir. 1999).

"*Daubert's* general holding - setting forth the trial judge's general 'gatekeeping' obligation - applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." Kumho Tire Co., Ltd. v. Carmichael, 1999 WL 15244 at 4 (U.S. 3/23/99).

Hearsay:

Review of admissibility of hearsay evidence under Fed.R.Evid. 807 (formerly 804(b)(5))(residual unavailable witness exception): abuse of discretion. United States v. Singleton, 125 F.3d 1097, 1106 (7th Cir. 1997), cert. denied, Cox v. United States, 118 S.Ct. 898 (1998)(citing United States v. Seavoy, 995 F.2d 1414, 1418 (7th Cir.), cert. denied, 510 U.S. 954 (1993)).

> A hearsay statement is admissible under Rule 807 (formerly 804(b)(5)) if the proponent can demonstrate the declarant is unavailable and the statement contains "circumstantial guarantees of trustworthiness equivalent to those inherent in the more specific exceptions provided under Rule 804(b)(1-4)." United States v. Singleton, 125 F.3d 1097, 1106 (7th Cir. 1997)(quoting United States v. Snyder, 872 F.2d 1351, 1354 (7th Cir. 1989).

> The facts that the district court should consider in assessing the trustworthiness of hearsay testimony include: (1) the character of the witness for truthfulness and honesty, and the availability of evidence on the issue; (2) whether the testimony was given voluntarily, under oath, subject to cross-examination, and a penalty for perjury; (3) the witness' relationship with both the defendant and the government and his motivation to testify; (4) the extent to which the witness' testimony reflects his personal knowledge; (5) whether the witness ever recants his testimony; (6) the existence of corroborating evidence; and (7) the reasons for the witness' unavailability. United States v. Bradley, 145 F.3d 889, 894 (7th Cir. 1998); United States v. Singleton, 125 F.3d 1097, 1106 (7th Cir. 1997).
>
> "This list of factors is neither exhaustive nor absolute, and each case must be analyzed on its own facts." United States v. Singleton, 125 F.3d 1097, 1106 (7th Cir. 1997), cert. denied, Cox v. United States, 118 S.Ct. 898 (1998)(quoting United States v. Doerr, 886 F.2d 944, 956 (7th Cir. 1989)).

Test to determine whether statement is not hearsay because it is offered to rebut a charge of recent fabrication: "(1) the declarant testifies at trial and is subject to cross-examination; (2) the prior statement is consistent with the declarant's trial testimony; (3) the statement is offered to rebut an express or implied charge of recent fabrication or improper motive; and (4) the statement was made *before* the declarant had a motive to fabricate." United States v. Williams, 128 F.3d 1128 (7th Cir. 1997) (quoting United States v. Fulford, 980 F.2d 1110, 1114 (7th Cir. 1992)).

> If the full requirements are not met, then the testimony is presumed to be inadmissible hearsay. United States v. Williams, 128 F.3d 1128 (7th Cir. 1997).

A police officer or government agent may reconstruct the steps taken in a criminal investigation, may testify about his contact with an informant, and may describe the events leading up to a defendant's arrest, but the officer's testimony must be limited to the fact that he spoke to an informant without disclosing the substance of that conversation. United States v. Williams, 133 F.3d 1048 (7th Cir. 1998).

Hearsay testimony about an informant's tip containing a specific charge of criminality can be extremely prejudicial because the jury may believe the

testimony without any guarantee that it represents the truth. United States v. Williams, 133 F.3d 1048 (7th Cir. 1998)(citing United States v. Lovelace, 123 F.3d 650, 654 (7th Cir. 1997)).

Review of district court findings under Rule 801(d)(2)(E) (admission of co-conspirator's statements) based on pre-trial *Santiago* proffers: clear error. United States v. Yoon, 128 F.3d 515, 525-526 (7th Cir. 1997).

> Under *Santiago* and its progeny, in order to allow the admission of co-conspirators statements, the government must show, by a preponderance of the evidence, that a conspiracy existed, that the defendant and the declarant were members of that conspiracy, and that the statements sought to be admitted were made during and in furtherance of that conspiracy. United States v. Yoon, 128 F.3d 515, 526 (7th Cir. 1997)(citing United States v. Santiago, 582 F.2d 1128, 1134 (7th Cir. 1978) and United States v. Rodriguez, 975 F.2d 404, 406 (7th Cir. 1992)).
>
> Review of district court's determination that a conspiracy existed by a preponderance of the evidence: clear error. United States v. Petty, 132 F.3d 373, 378-80 (7th Cir. 1997).
>
> While hearsay may support the existence of a conspiracy in part, the Court of Appeals requires more than the statements of the conspirators themselves to show a conspiracy. United States v. Petty, 132 F.3d 373, 380 (7th Cir. 1997)(citations omitted).
>
> In addition to hearsay statements, the testimony of non-conspirators or corroboration of facts contained in the statements of the conspirators may combine to show a conspiracy. United States v. Petty, 132 F.3d 373, 380 (7th Cir. 1997).

Under Rule 803(2) a hearsay statement may be introduced into evidence as an "exited utterance" only if: (1) a startling event occurred; (2) the declarant makes the statement while under the stress of excitement caused by the startling event; and (3) the declarant's statement relates to the startling event. United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(citing United States v. Sowa, 34 F.3d 447, 453 (7th Cir. 1994)).

To conclude that a declarant made a statement while "under the stress of excitement caused by the event," the court must be able to determine that the

declarant's state at the time the declaration was made excluded the possibility of conscious reflection. United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(quoting United States v. Moore, 791 F.2d 566, 571-72 (7th Cir. 1986)).

The length of time between the startling event and when the statement was made is not dispositive of whether the declarant uttered the statement while still under the stress of excitement caused by the startling event. United States v. Hall, 165 F.3d 1095 (7th Cir. 1999) (citing United States v. Moore, 791 F.2d 566, 572 (7th Cir. 1986)).

To show a statement is an excited utterance, a proponent must show that the statement was "made under such circumstances and so recently after the occurrence of the transaction as to preclude the idea of reflection or deliberation". United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(quoting Gross v. Greer, 773 F.2d 116, 120 (7th Cir. 1985)).

Review of district court's application of the business record exception to the hearsay rule: abuse of discretion. United States v. Given, 164 F.3d 389 (7th Cir. 1999).

> "A party establishes a foundation for admission of business records when it demonstrates through the testimony of a qualified witness that the records were kept in the course of a regularly conducted business activity, and that it was the regular practice of that business to make records." United States v. Given, 164 F.3d 389 (7th Cir. 1999).
>
> Under the business record exception, a "qualified witness does not need to be the person who prepared the records or have personal knowledge of the information contained, but the witness must have knowledge of the procedure by which the records were created." United States v. Given, 164 F.3d 389 (7th Cir. 1999).

Under Rule 803(24), a hearsay statement must meet five requirements to be admissible: (1) circumstantial guarantees of trustworthiness; (2) materiality; (3) probative value; (4) the interests of justice; and (5) notice. United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(citing Moffet v. McCauley, 724 F.2d 581, 583 (7th Cir. 1984)).

The district court's finding that a statement is trustworthy is critical to the admission of a hearsay statement under 803(24). United States v. Hall, 165 F.3d 1095 (7th Cir. 1999).

Review of district court's determination of whether hearsay statement contains the necessary "circumstantial guarantees of trustworthiness" to be admitted: clear and prejudicial error of judgment. United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(citing United States v. Guinan, 836 F.2d 350, 354 (7th Cir. 1988) and United States v. Sinclair, 74 F.3d 753, 758-59 (7th Cir. 1996)).

Out-of-court statements are generally inadmissible because they are presumed to be unreliable. United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(citing United States v. Daniels, 848 F.2d 758, 795 (7th Cir. 1998)).

The proponent of hearsay evidence must "rebut the presumption of unreliability by appropriate proof of 'trustworthiness'." United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(citing United States v. Daniels, 848 F.2d 785-796 (7th Cir. 1998)).

The test to determine whether a statement is sufficiently reliable for purposes of Rule 803(24) includes the following non-exhaustive factors: (1) "the probable motivation of the declarant in making the statement;" (2) "the circumstances under which it was made;" and (3) "the knowledge and qualifications of the declarant." United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(quoting Cook v. Hoppin, 783 F.2d 684, 690-91 (7th Cir. 1986)).

The "physical and mental condition of the declarant at the time a statement is made can be grounds for excluding the hearsay statement as inherently untrustworthy." United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(citing United States v. Wilkus, 875 F.2d 649, 655 (7th Cir. 1989)).

FED. R. EVID. 804(b)(3):

> Under Rule 804(b)(3) a hearsay statement may be admitted only if: (1) the declarant's statements were against the declarant's interest; (2) corroborating circumstances exist which clearly indicate the trustworthiness of the declarant's statement; and (3) the declarant is unavailable as a witness. United States v. Hall, 165 F.3d 1095 (7th Cir. 1999).
>
> Review of a district court's determination of the trustworthiness of an out-of-court statement: clearly erroneous. United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(quoting United States v. Garcia, 897 F.2d 1413, 1420 (7th Cir. 1990)).
>
> "Rule 804(b)(3) *requires* the exclusion of out-of-court statements offered to exculpate the accused unless there are corroborating circumstances that 'clearly indicate' the trustworthiness of the statement." United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(quoting United States v. Garcia, 897 F.2d 1413, 1420 (7th Cir. 1990)).

Due Process Hearsay Exception:

> Where circumstances reveal confessions to be reliable, the defendant's due process rights are violated when those confessions are not allowed into evidence because they are hearsay. United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(citing Chambers v. Mississippi, 410 U.S. 284, 302 (1973)).
>
> In *Chambers*, the circumstances which provided considerable assurance of reliability included: (1) each statement was made spontaneously to a close acquaintance shortly after the murder had occurred; (2) each statement was corroborated by some other evidence in the case whether it was the declarant's sworn confession, eyewitness testimony or evidence linking the declarant to the murder weapon; (3) each statement was against declarant's interest; and (4) the declarant was available to be cross-examined under oath about his out-of-court statements. United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(citing Chambers v. Mississippi, 410 U.S. 284, 300-01 (1973)).
>
> In Green v. Georgia, 442 U.S. 95 (1979), the Supreme Court also admitted hearsay statements because they were sufficiently reliable based on the following factors: (1) the declarant made the statement spontaneously to a close friend; (2) there was ample evidence corroborating the confession; (3)

the statement was against interest; (4) the government considered the testimony sufficiently reliable to use against the co-defendant. United States v. Hall, 165 F.3d 1095 (7th Cir. 1999).

The district court "must allow defendants to put *reliable* third-party confessions before the jury, despite the hearsay, when necessary to assist in separating the guilty from the innocent." United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(quoting Carson v. Peters, 42 F.3d 384, 384 (7th Cir. 1994)(emphasis added)).

The Seventh Circuit has understood "*Chambers* and *Green* as establishing the rule that 'if the defendant tenders vital evidence the judge cannot refuse to admit it without giving a better reason than it is hearsay.'" United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(Carson v. Peters, 43 F.3d 384, 387 (7th Cir. 1994)).

Where the "government does in fact introduce a statement at trial and uses it to secure a conviction against the declarant, a court should not later preclude a co-defendant from offering that statement in his trial merely on the basis that the statement is hearsay." United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(limiting Rivera v. Director, 915 F.2d 280 (7th Cir. 1990)).

Evidence Procedure:

Review of determination of whether a defendant has shown cause for failure to file a timely notice of intent to call an expert witness Fed.R.Crim.P. 12.2(b): abuse of discretion. United States v. Weaver, 882 F.2d 1128, 1135-36 (7th Cir. 1989).

The Court of Appeals reviews a district court's decision to bar surrebuttal testimony for an abuse of discretion. United States v. Wilson, 134 F.3d 855 (7th Cir. 1998).

Great deference is accorded to the discretion and judgment of the trial court to grant or deny a party's motion for rebuttal or surrebuttal testimony. United States v. Wilson, 134 F.3d 855 (7th Cir. 1998).

EVIDENTIARY HEARING: An evidentiary hearing is not required to resolve every motion or objection raised by the parties. If there is a factual dispute that could affect the outcome of the motion or objection, however, the denial of an evidentiary hearing may be reversible error.

Review of district court's decision about whether to hold a *Brady* hearing: abuse of discretion. United States v. Austin, 54 F.3d 394, 401 (7th Cir. 1995).

Review of denial of motion in limine to exclude evidence: abuse of discretion. United States v. Watts, 95 F.3d 617, 619 (7th Cir. 1996); United States v. Motley, 940 F.2d 1079, 1083-84 (7th Cir. 1991).

Review of district court's denial of a hearing to challenge the deportation proceeding in an illegal re-entry case on the grounds of untimeliness: abuse of discretion. United States v. Coronado-Navarro, 128 F.3d 568 (7th Cir. 1997).

Review of determination that evidentiary hearing unnecessary to determine if police "seized" defendant: clear error. United States v. Rodriguez, 69 F.3d 136, 140 (7th Cir. 1995).

Under 28 U.S.C. §636(b)(1), "when a district judge designates a magistrate to conduct an evidentiary hearing, the district judge 'may also receive further evidence' on the matter." United States v. Meyer, 157 F.3d 1067, 1078 (7th Cir. 1998).

EXCULPATORY EVIDENCE: See BRADY

EXCUSABLE NEGLECT (for failure to timely file notice of appeal): If defense counsel has failed to file a timely notice of appeal, the court may allow the filing of a late notice of appeal if the defendant or defense counsel can show excusable neglect.

The test as to what constitutes excusable neglect is an "equitable one," taking account of "all relevant circumstances surrounding the party's omission." United States v. Brown, 133 F.3d 993 (7th Cir. 1998)(quoting Pioneer Investment Services Co. v. Brunswick Assoc., 507 U.S. 380, 395 (1993)).

Circumstances surrounding an excusable neglect determination include the danger of prejudice to the nonmoving party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. United States v. Brown, 133 F.3d 993 (7th Cir. 1998)(quoting Pioneer Investment Services Co. v. Brunswick Assoc., 507 U.S. 380, 395 (1993)).

The standard is a balancing test, meaning that a delay might be excused if where the reasons for the delays are not particularly compelling. United States v. Brown, 133 F.3d 993 (7th Cir. 1998)(quoting Pioneer Investment Services Co. v. Brunswick Assoc., 507 U.S. 380, 395 (1993).

> "The federal rules are complex - a minefield for lawyers not experienced in federal practice." United States v. Brown, 133 F.3d 993 (7th Cir. 1998)(quoting Pioneer Investment Services Co. v. Brunswick Assoc., 507 U.S. 380, 395 (1993)).
>
> An experienced federal criminal litigator's failure to file a timely notice of appeal was not excusable neglect under F.R.A.P. 4(b), even though the attorney relied on F.R.C.P. 45(a) which allows exclusion of Saturday, Sunday and legal holidays in determining the time of filing when the deadline is ten days or less. Rule 45(a) of the Criminal Rules governs procedure in the district courts, not in the Court of Appeals. United States v. Guy, 140 F.3d 735, 736 (7th Cir. 1998).

EXIGENT CIRCUMSTANCES: See SEARCH AND SEIZURE

EXPERTS: See EVIDENCE

EYEWITNESS IDENTIFICATIONS: Although the average person tends to believe that eyewitness identifications are one of the most reliable forms of identification, recent studies have shown otherwise. Eyewitness identifications can be challenged on the suggestiveness of the identification process or by challenging the witness' ability to observe the defendant. Some appellate courts have begun to allow expert witnesses to testify about the limitations of eyewitness identifications. If the defense has been denied the opportunity to present expert witness testimony on eyewitness identification, the denial can be challenged on appeal.

> "[E]yewitnesses may give unreliable testimony, because of the shortcomings of memory, the difficulty of categorizing facial features of other ethnic groups, and the tricks the mind plays on people desperate to pin the blame on someone." Wright v. Gramley, 125 F.3d 1038, 1043 n. 4 (7th Cir. 1997)(quoting United States v. Cook, 102 F.3d 249, 252 (7th Cir. 1996)).
>
> "In cases where witness identification is an issue, the trial judge, must at the defendant's request, instruct the jury about eyewitness identification testimony." United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(quoting United States v. Anderson, 739 F.2d 1254, 1258 (7th Cir. 1984)).

FINE: A fine is an authorized penalty for nearly all federal offenses. In many cases the district court will find that the defendant does not have the ability to pay a fine. If a fine is imposed, appellate counsel should ensure that the fine is within the range authorized by statute and by the guidelines.

Determining the imposition of a fine, the Court of Appeals reviews the district court's factual determinations for clear error, but its interpretations of the sentencing guidelines: *de novo*. United States v. Petty, 132 F.3d 373, 382 (7th Cir. 1997).

The guideline only requires that the district court "shall consider" the relevant factors. United States v. Petty, 132 F.3d 373, 382 (7th Cir. 1997).

Express or specific findings regarding each of the relevant factors to be considered before imposing a fine are not required. United States v. Petty, 132 F.3d 373, 382 (7th Cir. 1997) (quoting United States v. Bauer, 129 F.3d 962 (7th Cir. 1997)).

Adopting the PSR suffices for express or specific findings concerning the imposition of a fine. United States v. Petty, 132 F.3d 373, 382 (7th Cir. 1997).

The Court of Appeals will remand the imposition of a fine when the district court adopts the factual findings contained in the presentence report but deviates from a firm recommendation, if any, made by the United States Probation office. United States v. Petty, 132 F.3d 373, 383 (7th Cir. 1997).

FORFEITURE: Authorities may seek forfeiture of assets both civilly and criminally. Through the asset forfeiture laws, many law enforcement agencies have been able to as much as triple their appropriated budgets. Accordingly, forfeiture issues are important and increasingly more frequent issues, especially in the context of drug offenses.

After defendant is convicted of racketeering under 18 U.S.C. §1962, 18 U.S.C. §1963 provides for the forfeiture of, among other things, any interests the defendant has in property acquired through racketeering activity and any property acquired with the proceeds of racketeering activity. §1963(m), the substitute assets provision, allows the government to take other property of the defendant when, for one reason or another, the illegally obtained property cannot be located. United States v. Infelise, 159 F.3d 300, 301 (7th Cir. 1998).

The government, under 18 U.S.C.§3742(b) may appeal forfeiture issues based on 18 U.S.C. §1963(m). United States v. Infelise, 159 F.3d 300, 301-302 (7th Cir. 1998).

Property characterized as non-forfeitable pursuant to ERISA (26 U.S.C. §408(b)) is nevertheless forfeitable under 18 U.S.C. §1963(m). United States v. Infelise, 159 F.3d 300, 305 (7th Cir. 1998).

Property which was involved in money laundering or traceable to such property is forfeitable under 18 U.S.C. §982(a)(1). United States v. Kirschenbaum, 156 F.3d 784, 788-789 (7th Cir. 1998).

Under 18 U.S.C. §982(b)(1)(A), the government may obtain a pre-conviction restraining order over property alleged in an indictment to be forfeitable under §982(a)(1) without regard to whether it was involved in federal drug offenses. United States v. Kirschenbaum, 156 F.3d 784, 790 (7th Cir. 1998).

18 U.S.C. §853(e)(1)(B) permits pre-indictment protective orders, but requires notice and an opportunity for a hearing by persons appearing to have an interest in the property. United States v. Kirschenbaum, 156 F.3d 784, 792 (7th Cir. 1998).

18 U.S.C. §853(e)(1)(A) does not require a hearing for post-indictment protective orders. United States v. Kirschenbaum, 156 F.3d 784, 792 (7th Cir. 1998).

Restraining forfeitable funds without a hearing does not violate a defendant's Sixth Amendment right to counsel of his choice. United States v. Kirschenbaum, 156 F.3d 784, 792 (7th Cir. 1998).

Protective orders under 18 U.S.C. §853(e)(1), and thus §982(b)(1) by incorporation, are not binding on third parties. United States v. Kirschenbaum, 156 F.3d 784, 794 (7th Cir. 1998).

Interlocutory appeal under 28 U.S.C. §1292(a)(1) is appropriate for protective orders entered pursuant to §982(b), dealing with forfeitable property under 18 U.S.C. §982(a)(1). United States v. Kirschenbaum, 156 F.3d 784, 788 (7th Cir. 1998).

GUILTY PLEA: The vast majority of criminal cases result in guilty pleas. If your client wishes to challenge the validity of his or her plea, Federal Rule of Criminal Procedure 11 must be consulted. Rule 11 sets forth the issues a district court must cover before accepting a guilty plea.

Agreements reached under Rule 11(a)(2) are plea agreements for purposes of §1B1.2(a). United States v. Loos, 165 F.3d 504 (7th Cir. 1998).

Under §1B1.2(a), the word "stipulation" means any acknowledgment by the defendant that he committed the acts that justify the use of a more serious guideline. United States v. Loos, 165 F.3d 504 (7th Cir. 1998).

Under §1B1.2(a), a defendant's "protection against undue severity lies not in the reading 'stipulation' as requiring a formal agreement . . . but in taking seriously the requirement that the basis of the more serious offense be established 'specifically.'" United States v. Loos, 165 F.3d 504 (7th Cir. 1998).

A defendant is entitled to plead guilty unless the court can articulate a "sound reason" for rejecting the plea. United States v. Kraus, 137 F.3d 447, 454 (7th Cir. 1988).

A guilty plea constitutes a waiver of non-jurisdictional defects occurring prior to the plea, including Fourth Amendment claims. United States v. Cain, 155 F.3d 840, 842 (7th Cir. 1998).

Remedy for flawed plea colloquy: defendant may withdraw plea. United States v. Padilla, 23 F.3d 1220, 1224-1225 (7th Cir. 1994); United States v. Fountain, 777 F.2d 351, 357 (7th Cir. 1985), cert. denied, Granger v. United States, 475 U.S. 1029 (1986).

Denial of a motion to withdraw guilty plea: abuse of discretion. United States v. Edwards, 90 F.3d 199, 203 (7th Cir. 1996), cert. denied, 118 S.Ct. 734 (1998); United States v. Jones, 87 F.3d 954, 956 (7th Cir. 1996).

> F.R.C.P. 32(e) permits a defendant to withdraw a guilty plea upon a showing of "any fair and just reason." U.S. v. Salgado-Ocampo, 159 F.3d 322, 324 (7th Cir. 1998).
>
> > Failure to raise a particular basis for withdrawal of a guilty plea in a Rule 32(e) motion constitutes a waiver and is reviewed for plain error. U.S. v. Salgado-Ocampo, 159 F.3d 322, 325 (7th cir. 1998).

The Court of Appeals uses a "totality of the circumstances" test to determine whether the defendant was informed of his rights. United States v. Fox, 941 F.2d 480, 484 (7th Cir. 1991), cert. denied, 502 U.S. 1102 (1992).

> In applying the totality of the circumstances test, court need only satisfy itself that defendant was informed of his rights and understood the consequences of his plea. U.S. v. LeDonne, 21 F.3d 1418 (7th Cir.), cert. denied, 513 U.S. 1020 (1994).

To determine whether failure of district court to properly advise defendant prior to defendant's entry of guilty plea is harmless, the Court of Appeals decides whether

failure interfered with defendant's ability to make informed and intelligent decision to plead guilty. McCleese v. United States, 75 F.3d 1174, 1181 (7th Cir. 1996).

> Failure of district court to inform defendant that any statement he made at change of plea hearing could be used in perjury prosecution was harmless error where the defendant was not presently being prosecuted for perjury and there was no such prospective prosecution. United States v. Graves, 98 F.3d 258, 259 (7th Cir. 1996).

HABEAS CORPUS AND 28 U.S.C. § 2255: A petition for a writ of habeas corpus is a collateral attack on the petitioner's conviction or sentence. Generally, habeas corpus petitions are limited to raising constitutional defects in the petitioner's conviction or sentence.

General:

> The law regarding petition by state prisoners to federal courts based on alleged violations of the petitioner's federal rights, and the counterpart for federal prisoners are codified at 28 U.S.C. § 2254 and 28 U.S.C. § 2255, respectively. Both are civil proceedings attended by complex procedural requirements. Significant changes to the law of habeas corpus were implemented on April 24, 1996 by the signing of the Antiterrorism and Effective Death Penalty Act of 1996. Habeas Corpus Checklists (1998 ed., West) by Ira Robbins, contains a special 173-page section discussing the act and early attempts by the courts to clarify its meaning, and is a good starting place for counsel appointed on either a "true habeas" or a § 2255 petition.
>
> Petitions filed before enactment of AEDPA are evaluated according to the standards that existed before the AEDPA's amendment. See Wright v. Gramley, 125 F.3d 1038, 1041 (7th Cir.1997)(citing Lindh v. Murphy, 117 S.Ct. 2059 (1997)).
>
> The AEDPA applies to all motions filed after its effective date, unless the movant had reasonably relied on the previous law in holding back a ground presented in the successive motion. In re Davenport, 147 F.3d 605, 608 (7th Cir. 1998)(referring to Alexander v. United States, 121 F.3d 312, 314-15 (7th Cir. 1997) and citing Burris v. Parke, 95 F.3d 465 (7th Cir. 1996)(en banc)).
>
> The essential function of habeas corpus "is to give a prisoner a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence." In re Davenport, 147 F.3d 605, 609 (7th Cir. 1998)(citing Carafas v. LaVallee, 391 U.S. 234, 238 (1968); Price v. Johnston, 334 U.S. 266, 283 (1948)).

New "rules generally should not be applied retroactively to cases on collateral review," that is, cases which have become final before the rules are announced. Kurzawa v. Jordan, 146 F.3d 435, 444, n. 10 (7th Cir. 1998)(quoting Teague v. Lane, 489 U.S. 288, 305 (1989)).

Appellate counsel is ineffective if counsel fails to raise issues that are both obvious and clearly stronger than the issue raised. Williams v. Parke, 133 F.3d 971, 974 (7th Cir. 1998).

> A lawyer's failure to get probative evidence suppressed "cannot be ineffective assistance, because the defendant cannot show 'prejudice' from the use of evidence that increases the probability of an accurate verdict." United States v. Evans, 131 F.3d 1192, 1193 (7th Cir. 1997).
>
> In a second federal habeas petition, the petitioner waived any claim that his trial counsel was ineffective where, in a prior habeas proceeding, the defendant represented to the district court that there was no basis for such a claim. Stewart v. LaGrand, 119 S.Ct. 1018, 1021 (1999).

§2241 petition is a proper vehicle for challenging the continuation of parole. Valona v. U.S., 138 F.3d 693, 695 (7th Cir. 1998).

> A habeas petition contesting the revocation of parole is moot where the petitioner is released while the petition is pending on appeal, notwithstanding possible future effects of a parole revocation. Diaz v. Duckworth, 143 F.3d 345, 345 (7th Cir. 1998) (citing Spencer v. Kemna, 523 U.S. 1 (1998)).

A habeas petition alleging due process violations in connection with prison disciplinary action is rendered moot when, while the petition is pending on appeal, the petitioner is deported. Diaz v. Duckworth, 143 F.3d 345, 348 (7th Cir. 1998).

> The court looks for "some evidence" to support denial of good time credits or placement in disciplinary segregation. Sylvester v. Hanks, 140 F.3d 713, 714 (7th Cir. 1998).

Habeas Corpus §2254:

General:

> "[B]oth before and after the passage of the [AEDPA,] collateral relief under § 2254 has been available only when the custody violates the Constitution, treaties, or laws of the United States. Errors of state law, such as the improper admission of evidence, do not support a writ of habeas corpus." Gonzalez v. DeTella, 127 F.3d 619, 621 (7th Cir. 1997)(citations omitted).
>
> > When reviewing a habeas petition based on an evidentiary ruling in state court, the Court of Appeals, is "limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Koo v. McBride, 124 F.3d 869, 874 (7th Cir. 1997)(citing Estelle v. McGuire, 502 U.S. 62, 68 (1991)).
> >
> > "The 'substance' of the federal claim is all that is needed to be 'fairly presented' in state court; a habeas petitioner may reformulate somewhat his arguments on collateral appeal." Kurzawa v. Jordan, 146 F.3d 435, 443 (7th Cir. 1998).
>
> The petitioner in a § 2254 habeas proceeding is not entitled to raise a claim that evidence should have been excluded on the basis of a Fourth Amendment violation unless he can show he was denied the opportunity to fully and fairly litigate the claim at trial and on direct review. Stone v. Powell, 428 U.S. 465 (1976). However, the restriction of Stone v. Powell "does not extend to a state prisoner's claim that his conviction rests on statements obtained in violation of the safeguards mandated by Miranda v. Arizona, 384 U.S. 436 (1966)." Withrow v. Williams, 507 U.S. 680, 683 (1993).
>
> > The test for whether a claim has been fully and fairly litigated is whether: 1) the petitioner clearly informed the state court of the factual basis of his claim and argued that his Fourth Amendment rights were violated; 2) the state court carefully and thoroughly analyzed the facts; and 3) the state court applied the proper constitutional case law to the facts. Weber v. Murphy, 15 F.3d 691, 694 (7th Cir.), cert. denied, 511 U.S. 1097 (1994); see also, United States ex rel. Bostick v. Peters, 3 F.3d 1023 (7th Cir. 1993)(holding that the petitioner was denied a full and fair opportunity to litigate his Fourth Amendment claim where the state courts had denied him an evidentiary hearing despite the existence of genuine factual issues).

An evidentiary hearing is required if a habeas petitioner alleges facts which, if proven, would entitle the petitioner to relief and the state courts, for reasons beyond the control of the petitioner, never considered the claim in a full and fair hearing. Wright v. Gramley, 125 F.3d 1038, 1044 (7th Cir. 1997).

In reviewing claims of a *Batson* violation based on gender-based peremptory challenges, federal courts disregard the state court's legal conclusions and reach independent judgments on the issues, Koo v. McBride, 124 F.3d 869, 872 (7th Cir. 1997), but give deference to the state court's findings of fact. Koo v. McBride, 124 F.3d 869, 872 (7th Cir. 1997)(citation omitted).

The Court of Appeals has no authority to question a state supreme court's interpretation of state law. Koo v. McBride, 124 F.3d 869, 876 (7th Cir. 1997).

§2254(d)(1) does not interfere with federal court's authority to say what constitutional law is but does require federal courts to respect state's reasonable applications of those principles to particular cases. Pack v. Page, 147 F.3d 586, 588 (7th 1998).

Under §2254(d)(1), "when federal constitutional law calls for the exercise of discretion, and thus poses a question of degree, 'a reasonable, thoughtful answer reached after full opportunity to litigate is adequate to support the judgment'". Pack v. Page, 147 F.3d 586, 588 (7th 1998)(quoting Lindh v. Murphy, 96 F.3d 856, 868-71 (7th Cir. 1996)(en banc), overruled on different grounds, Lindh v. Murphy, 521 U.S. 320 (1997)).

Section 2254(d)(1) limits collateral attack to errors so grave that the state's handling of the litigation must be called unreasonable. Pack v. Page, 147 F.3d 586, 589 (7th 1998).

For §2254 petitions, the statute of limitations does not begin to run until April 24, 1996, the AEDPA's enactment date. Gendron v. United States, 154 F.3d 672, 675 (7th Cir. 1998).

Procedural Default, Waiver, and Exhaustion:

"Before a federal court may address the merits of a § 2254 habeas petition, a petitioner must have provided the state courts with a full and fair opportunity to review his claims." Boerckel v. O'Sullivan, 135 F.3d 1194, 1196 (7th Cir. 1998), cert. granted, 119 S.Ct. 508 (1998)(citations omitted). He must have exhausted his state remedies and not have procedurally defaulted his claims. Id. Presentation of the

issues in whatever state appeal petitioner had as of right satisfies both the exhaustion and fair presentment requirements. The petitioner is not also required to raise the issue in a petition for leave to appeal to the state supreme court to avoid waiver. Id.

> The law of procedural default requires federal courts to defer to state procedural rules that bar substantive review of a claim, absent a showing of cause for the default and that petitioner will suffer actual prejudice if the claims are not heard. See, e.g., Sawyer v. Whitley, 505 U.S. 333 (1992); Murray v. Carrier, 477 U.S. 478, 485-86 (1986); Wainwright v. Sykes, 433 U.S. 72, 88-89 (1977).
>
> Similarly, a habeas petitioner who failed to develop a material fact in a state court proceeding must show " cause and prejudice" in order to have the matter reviewed. Wright v. Gramley, 125 F.3d 1038, 1043 (7th Cir. 1997)(citing Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992)).
>
> > A federal court can only review a procedurally defaulted claim when "cause and prejudice" has not been established if failure to consider the claim is likely to result in a fundamental miscarriage of justice, such as where the petitioner presents "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error." Schlup v. Delo, 513 U.S. 298 (1995).
>
> The Seventh Circuit will consider a constitutional argument waived if the petitioner's argument to the state court did not: "(1) rely on pertinent federal cases employing constitutional analysis; (2) rely on state cases applying constitutional analysis to a similar factual situation; (3) assert the claim in terms so particular as to call to mind a specific constitutional right; or (4) allege a pattern of facts that is well within the mainstream of constitutional litigation .... However, the presence of any one of these factors, particularly factors (1) and (2), does not automatically avoid a waiver; the court must consider the specific facts of each case." Kurzawa v. Jordan, 146 F.3d 435, 441 (7th Cir. 1998)(quoting Pierson v. O'Leary, 959 F.2d 1385, 1393 (7th Cir. 1992)).
>
> > The bottom line to the Seventh Circuit's waiver test is that the "task of the habeas court in adjudicating any issue of fair presentment is assessing, in concrete, practical terms, whether the state court was sufficiently alerted to the Federal Constitutional nature of the issue to permit it to resolve that issue on a federal basis." Kurzawa v. Jordan,

> 146 F.3d 435, 442 (7th Cir. 1998)(quoting Verdin v. O'Leary, 972 F.2d 1467, 1476 (7th Cir. 1992)).

Where the state finds that a petitioner has waived an issue for review but proceeds to rule on the merits of the issue anyway, the issue is not procedurally defaulted for habeas purposes. Robertson v. Hanks, 140 F.3d 707, 709 (7th Cir. 1998).

A district court is permitted to consider a waiver defense belatedly raised by the state, even to raise that defense *sua sponte*, but the court is not permitted to override the state's decision implicit or explicit to forego that defense. Kurzawa v. Jordan, 146 F.3d 435, 440 (7th Cir. 1998)(quoting Henderson v. Thieret, 859 F.2d 492, 498 (7th Cir. 1988)).

> If the state does not explicitly or implicitly forego the waiver defense, the Court of Appeals may make *sua sponte* inquiry into whether a procedural default is manifest "and decide whether comity and judicial efficiency make it appropriate to consider the merits" of the petitioner's arguments. Kurzawa v. Jordan, 146 F.3d 435, 440 (7th Cir. 1998)(quoting Galowaski v. Murphy, 891 F.2d 629, 634-35, n. 11 (7th Cir. 1989)).

A habeas corpus petitioner does not procedurally default an issue which he fails to raise in a petition for discretionary leave to appeal to a State Supreme Court where state law would not view that failure as a forfeiture of the claim. Jenkins v. Nelson, 157 F. 3d 485, 498 (7th Cir. 1998).

Claims raised on post-conviction appeal before the Illinois Appellate Court but not included in the petition for leave to appeal to the Illinois Supreme Court are not procedurally defaulted for federal habeas purposes. White v. Godinez, 143 F.3d 1049, 1053 (7th Cir. 1998).

"A state law procedural rule is not adequate to prevent federal review if the petitioner could not have been 'deemed to have been apprised of [the rule's] existence' at the time he omitted the procedural step in question." Moore v. Parke, 148 F.3d 705, 709 (7th Cir. 1998)(referring to NAACP v. Alabama ex rel Patterson, 357 U.S. 449, 457 (1958); Barr v. Columbia, 378 U.S. 146 (1964)).

A petitioner procedurally defaults a claim as to the unconstitutionality of a particular type of method of execution, i.e., lethal gas, where the he fails to

raise the issue in his direct appeal and there was sufficient debate about the constitutionality of the method at the time of the direct appeal Stewart v. LaGrand, 119 S.Ct. 1018, 1021 (1999)

28 U.S.C. §2255:

"The Supreme court has articulated that a § 2255 motion is not a vehicle to advance arguments that were not made on direct appeal, especially if the argument relies entirely on a statute. An error of law not originally raised on direct appeal may only be brought under § 2255 if the error gives rise to a 'fundamental defect which inherently results in a complete miscarriage of justice.'" Arango-Alvarez v. United States, 134 F.3d 888 (7th Cir. 1998)(citations omitted).

"[N]onconstitutional errors which could have been raised on appeal but were not, are barred on collateral review--regardless of cause and prejudice." Arango-Alvarez v. United States, 134 F.3d 888 (7th Cir. 1998)(citations omitted).

Relief under 28 U.S.C.§ 2255 "is available for a case in which the defendant argues that the conduct for which he was convicted never rose to the level of a federal offense." Howard v. United States, 135 F.3d 506, 508 (7th Cir. 1998).

In reviewing denials of motions to vacate, set aside, or correct the sentence, questions of law are reviewed *de novo* and factual determinations are reviewed for clear error. Stoia v. United States, 109 F.3d 392, 395 (7th Cir. 1997); Bond v. United States, 77 F.3d 1009 (7th Cir.), cert. denied, 117 S.Ct. 270 (1996).

"A federal prisoner should be permitted to seek habeas corpus only if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first §2255 motion": the change of law has to have been made retroactive by the Supreme Court; the change of law must be a change that eludes the permission in §2255 for successive motions; and the "change in law" is not to be equated to a difference between the law in the circuit in which the prisoner was sentenced and the law in the circuit in which he is incarcerated. In re Davenport, 147 F.3d 605, 611-12 (7th Cir. 1998).

Under the AEDPA, successive §2255 motions may only be filed if "the prisoner tenders either newly discovered evidence that shows he is not guilty or a new rule of

constitutional law made retroactive by the Supreme Court". In re Davenport, 147 F.3d 605, 607 (7th Cir. 1998).

> A successive §2255 petition is permissible where the second petition alleges that the conduct of counsel in the first habeas proceeding affected the integrity of that first proceedings. Banks v. U.S., No. 99-1037, slip op. p. 2 (7th Cir. 2/8/99).
>
> Habeas petitioner under §2241 is not subject to the prior approval requirement for successive petitions under §2255 ¶8 so long as the petition does not challenge the validity of a federal conviction or sentence. Valona v. U.S., 138 F.3d 693, 694 (7th Cir. 1998).
>
> For purposes of §§2244 and 2255, ¶8, barring successive petitions, an order granting a §2255 petition, and reimposing sentence, resets to zero the counter of collateral attacks pursued. In other words, when the first petition is successful, and the petitioner contends that new errors occurred in the subsequent proceedings, his new petition is not successive. Shepeck v. United States, 150 F.3d 800, 801 (7th Cir. 1998).

Under 28 U.S.C. § 2253(c)(2), an appellant requesting a certificate of appealability must make a substantial showing of the denial of a constitutional right. Williams v. United States, 150 F.3d 639, 641 (7th Cir. 1998)(quoting 28 U.S.C. §2253(c)(2)).

> Under AEDPA, Court of Appeals may issue certificate of appealability even if appellant has not first moved the district court for a certificate of appealability. Williams v. United States, 150 F.3d 639, 641 (7th Cir. 1998).

Where defendant's conviction and sentence are affirmed on a direct appeal, and the defendant does not file a petition for certiorari in the Supreme Court, the one year statute of limitations set forth in 28 U.S.C. §2244(d) for §2255 petitions begins to run on the date that the Court of Appeals issues the mandate in the direct criminal appeal. Gendron v. United States, 154 F.3d 672, 674 (7th Cir. 1998).

Where a defendant in a plea agreement waives his right to attack his conviction under §2255, he may nonetheless bring a §2255 petition claiming that the plea agreement was not voluntary or that his counsel was ineffective in connection with the negotiation of the agreement. Jones v. U.S., No. 97-2816, slip op. p. 5 (7th Cir. 2/5/99).

Pre-AEDPA:

Review of a denial of petition for writ of habeas corpus (pre-AEDPA): questions of law, mixed questions of law, and the district court's legal conclusions *de novo*. Kurzawa v. Jordan, 146 F.3d 435, 439 (7th Cir. 1998).

Under pre-AEDPA law, before a federal court may address the merits of a habeas corpus petition, the petitioner must provide the state courts with the opportunity to review his constitutional claims. A petitioner's failure to use available state procedures result in a procedural default preventing review of the petitioner's claims by the federal courts. Moreover, if a state court declines to review a petitioner's claim because the petitioner has failed to satisfy a state procedural rule, the claim is procedurally defaulted and barred from federal habeas review. Thus, if a claim is found to be waived by an Illinois appellate court, the federal court will not entertain that claim unless the petitioner can establish both cause for the procedural error and prejudice resulting from that error. A petitioner can establish cause for a procedural default by demonstrating that he received ineffective assistance of counsel. However, the ineffective assistance claim must have been presented to the state courts in the manner required by state procedural rules. Pisciotti v. Washington, 143 F.3d 296, 300 (7th Cir. 1998).

> In pre-AEDPA habeas, the petitioner must establish that he provided the state court with a full and fair opportunity to review his claims. Moore v. Parke, 148 F.3d 705, 708 (7th Cir. 1998) (referring to Picard v. Connor, 404 U.S. 270, 276 (1971); Boerckel v. O'Sullivan, 135 F.3d 1194, 1196 (7th Cir. 1998)).
>
> In pre-AEDPA habeas proceeding, state petitioner must have exhausted his state remedies and have avoided procedural default of his claims during the state court proceedings: failure to meet either of these requirements bars the Court of Appeals from reaching the merits of his claims. Moore v. Parke, 148 F.3d 705, 708 (7th Cir. 1998)(referring to Boerckel v. O'Sullivan, 135 F.3d 1194, 1196 (7th Cir. 1998)).
>
> In pre-AEDPA habeas, the doctrine of procedural default considers the effect on federal habeas review of a state court declining to "address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." Moore v. Parke, 148 F.3d 705, 708 (7th Cir. 1998)(quoting Coleman v. Thompson, 501 U.S. 722, 730 (1991)).
>
> Under pre-AEDPA law in a capital case, procedural default is not excused unless the petitioner can show by clear and convincing evidence that but for the constitutional error, no reasonable jury would have found him eligible for

the death penalty. Pitsonbarger v. Gramley, 141 F.3d 728, 737 (7th Cir. 1998) (citing Sawyer v. Whitley, 505 U.S. 333 (1992)).

Prior to passage of the AEDPA, decisions regarding ineffective assistance of counsel were reviewed *de novo*. Wright v. Gramley, 125 F.3d 1038, 1041 (7th Cir. 1997). In order to establish an ineffective assistance of counsel claim, the petitioner must demonstrate both that counsel's performance was deficient and that there is a reasonable probability that had counsel not been deficient, the outcome of the trial would have been different. Id.

In a pre-AEDPA case, a state prisoner can establish a violation of his due process rights where the standard of proof in question is beyond a reasonable doubt, only if he can show that no rational trier of fact could have found him guilty beyond a reasonable doubt based on the evidence adduced a trial. Moore v. Parke, 148 F.3d 705, 708 (7th Cir. 1998)(citing Jackson v. Virginia, 443 U.S. 307 (1997) and referring to Williams v. Duckworth, 738 F.2d 828, 831 (7th Cir. 1984)).

Under pre-AEDPA law, factual determinations made after a hearing on the merits are entitled to a presumption of correctness if fairly supported by the record considered as a whole. Coulter v. Gilmore, 155 F.3d 912, 917 (7th Cir. 1998).

> Under pre-AEDPA law, a petitioner may rebut a presumption of correctness with "convincing evidence." Coulter v. Gilmore, 155 F.3d 912, 917 (7th Cir. 1998).

Under pre-AEDPA law, when determining whether harmless error has occurred, a reviewing court must make a *de novo* examination of the record as a whole in order to determine whether the error had substantial and injurious effect or influence in determining the jury's verdict. Jenkins v. Nelson, 157 F. 3d 485, 496 (7th Cir. 1998).

HEARING: See EVIDENTIARY HEARING

IMMUNITY AGREEMENTS

Review of scope of defendant's immunity agreement: clear error. United States v. Meyer, 157 F.3d 1067, 1078 (7th Cir. 1998).

Any agreement made by the government must be scrupulously performed and kept. United States v. Cahill, 920 F.2d 421, 425 (7th Cir. 1990).

In regard to immunity agreements, a "fundamental requirement of the due process clause is that an individual received notice and the opportunity for a hearing before he is deprived of a significant property interest." United States v. Meyer, 157 F.3d 1067, 1076 (7th Cir. 1998)(citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985)).

"With respect to immunity agreements, due process 'requires prosecutors to scrupulously adhere to commitments made to suspects in which they induce the suspects to surrender their constitutional rights in exchange for the suspects giving evidence that the government needs against others which simultaneously implicates themselves.'" United States v. Meyer, 157 F.3d 1067, 1075 (7th Cir. 1998)(quoting United States v. Eliason, 3 F.3d 1149, 1153 (7th Cir. 1993)).

If the suspect fails to fulfill his obligations under the contract, the government is relieved of its reciprocal obligations. United States v. Meyer, 157 F.3d 1067, 1076 (7th Cir. 1998)(citing United States v. Verrusio, 803 F.2d 885, 888 (7th Cir. 1986)).

Due process prevents the government from unilaterally determining that the defendant breached the agreement. United States v. Meyer, 157 F.3d 1067, 1076 (7th Cir. 1998).

Instead of unilaterally determining that the defendant breached the agreement, the government must obtain a judicial determination of the defendant's breach. United States v. Meyer, 157 F.3d 1067, 1076 (7th Cir. 1998).

"Absent exigent circumstances, an individual is entitled to a judicial determination of his breach before being deprived of his interest in the enforcement of an immunity agreement." United States v. Meyer, 157 F.3d 1067, 1076 (7th Cir. 1998)(citing United States v. Verrusio, 803 F.2d 885, 888 (7th Cir. 1986)).

If terms of non-prosecution immunity agreements do not specify a particular procedure for the government to follow in the event of a perceived breach by the

defendant, post-indictment evidentiary hearing satisfies due process. United States v. Meyer, 157 F.3d 1067, 1077 (7th Cir. 1998).

The Court of Appeals' preferred procedure in cases where the government believes the defendant has breached a non-prosecution immunity agreement: Absent exigent circumstances, the government should seek relief from its obligations under the immunity agreement prior to indictment. United States v. Meyer, 157 F.3d 1067, 1077 (7th Cir. 1998).

"Since the government is required to obtain a judicial determination of a defendant's breach prior to trial, it is but a de minimis inconvenience for the government to secure that determination pre-indictment." United States v. Meyer, 157 F.3d 1067, 1077 (7th Cir. 1998)(referring to United States v. Ataya, 864 F.2d 1324, 1330, n. 9 (7th Cir. 1988)).

"A pre-indictment hearing would curtail prosecutorial overreaching in drafting ambiguous immunity agreements and, in cases in which the defendant had fulfilled his obligations under the agreement, would help to prevent the government from using the threat of criminal prosecution 'to achieve by coercion what it could not achieve through voluntary negotiation.'" United States v. Meyer, 157 F.3d 1067, 1077 (7th Cir. 1998)(quoting United States v. Ataya, 864 F.2d 1324, 1330, n. 9 (7th Cir. 1988)).

Review of decision by district court to re-open evidentiary hearing on defendant's motion to dismiss based on immunity agreement after evidentiary hearing held before magistrate: abuse of discretion. United States v. Meyer, 157 F.3d 1067, 10787 (7th Cir. 1998)(citing United States v. Turk, 870 F.2d 1304, 1307 (7th Cir. 1989)).

The Court of Appeals will reverse the district court's decision to reopen an evidentiary hearing on a defendant's motion to dismiss based on an immunity agreement only if it is clear that no reasonable person could concur in the district judge's decision. United States v. Meyer, 157 F.3d 1067, 10787 (7th Cir. 1998)(citing Ladien v. Astrachan, 128 F.3d 1051, 1056 (7th Cir. 1997)).

INDICTMENT: The indictment is the formal method of charging a defendant with a federal crime. Challenges to the indictment must be raised prior to trial or they are waived. If trial counsel challenged the indictment, the district court's ruling could present an issue for appeal.

Neither charge nor convictions are invalidated by wrong section of statute being cited in count, unless the defendant was misled by the erroneous reference and prejudiced

thereby. United States v. Lowe, 860 F.2d 1370, 1381 (7th Cir. 1988), cert. denied, 490 U.S. 1005 (1989).

Review of sufficiency of indictment (where objected to in district court): *de novo*. United States v. Agostino, 132 F.3d 1183, 1189 (7th Cir. 1997); United States v. Briscoe, 65 F.3d 576, 582 (7th Cir. 1995); United States v. Bates, 96 F.3d 964, 967 (7th Cir. 1996), aff'd, 118 S.Ct. 285 (1997).

> An indictment is constitutionally sufficient and satisfies Fed.R.Crim.P. 7(c)(1) if it states the elements of the crime charged, informs the defendant of the nature of the charge so she may prepare a defense, and enables the defendant to plead the judgment as a bar against future prosecutions for the same offense. United States v. Agostino, 132 F.3d 1183, 1189 (7th Cir. 1997).

Any broadening of the indictment from what was charged by the grand jury is reversible *per se.* United States v. Pedigo, 12 F.3d 618 (7th Cir. 1993); United States v. Remsza, 77 F.3d 1039, 1043 (7th Cir. 1996).

> A constructive amendment to an indictment occurs when either the government, the court, or both, broadens the possible basis for conviction beyond those presented by the grand jury. United States v. Cusimano, 148 F.3d 824, 829 (7th Cir. 1998).
>
> > In the context of plain error review regarding constructive amendment claims, the amendment must constitute a mistake so serious that but for it, the defendant probably would have been acquitted. United States v. Cusimano, 148 F.3d 824, 828 (7th Cir. 1998).

A variance between the indictment and the proof offered at trial occurs when the terms of the indictment are "unaltered", but the evidence offered at trial proves facts materially different from those alleged in the indictment" or bill of particulars. United States v. Hach, 162 F.3d 937 (7th Cir. 1998)(quoting United States v. Mosley, 786 F.2d 1330, 1335-36 (7th Cir. 1986)).

"However, a variance between the information and a bill of particulars and the evidence at trial is not fatal unless the defendant can show he has been deprived of an adequate opportunity to prepare a defense." United States v. Hach, 162 F.3d 937 (7th Cir. 1998).

Charging that an act occurred on one date and proving that it occurred at a different time is a classic variance, which does not change the nature of the crime alleged and

is not a constructive amendment of the indictment in violation of the grand jury clause of the Fifth Amendment. United States v. Krilich, 159 F.3d 1020, 1027 (7th Cir. 1998).

The government need not choose between presenting an actual knowledge case versus a conscious avoidance case to the jury. It may present both when the evidence so warrants. United States v. Wilson, 134 F.3d 855 (7th Cir. 1998).

> An amended indictment making deletions from an original indictment: (1) may not strike any portion of the charging paragraph: (2) may not change the charged offense; (3) must be definite and certain; (4) may not take the defendant by surprise; and (5) may not prevent the defendant from introducing evidence available before the change. United States v. Mankarious, 151 F.3d 694, 701 (7th Cir. 1998).

A prosecutor is entitled to interlocutory review under 18 U.S.C.§3731 from an order "dismissing an indictment or information . . . as to any one or more counts." Moreover, there is no statutory barrier to an appeal from an order dismissing only a portion of a count. United States v. Bloom, 149 F.3d 649, 651-52 (7th Cir. 1998).

An indictment and criminal prosecution for a RICO offense cannot be pre-empted by federal labor law, notwithstanding a reference to or the interpretation of a collective bargaining agreement. United States v. Palumbo Bros., Inc., 145 F.3d 850, 872 (7th Cir. 1998).

> Indictment and prosecution of a criminal enterprise does not interfere with the primary jurisdiction of the National Labor Relations Board or impair the underlying purpose in application of federal labor law and policy, although the terms and conditions of a collective bargaining agreement may be referenced in the prosecution, so long as those labor contracts are not the subject of the dispute, and the adjudication and ultimate resolution of the prosecution will not substantially depend upon an analysis of those terms and conditions. United States v. Palumbo Bros., Inc., 145 F.3d 850, 876 (7th Cir. 1998).

INEFFECTIVE ASSISTANCE OF COUNSEL: The Seventh Circuit has repeatedly warned appellate counsel that ineffective assistance of counsel claims should not be raised on direct appeal, but rather presented in a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. See e.g., United States v. Yack, 139 F.3d 1172, 1176 (7th Cir. 1998). The reason for this rule is that the presentation of an ineffective assistance claim will almost inevitably require review of evidence outside the record on appeal. Unless the basis for the claim appears fully in the record, appellate counsel should follow the Seventh Circuit's advice

and save ineffective assistance claims for a habeas petition. **(See also--Habeas Corpus and its federal counterpart.)**

Defendant represented by different counsel on appeal may raise claim of ineffective assistance of trial counsel on direct appeal; however, Court of Appeals would only review counsel's performance based on record at trial, and the defendant would be prohibited from challenging trial counsel's performance in post-conviction proceeding. United States v. Madoch, 108 F.3d 761, 765 (7th Cir. 1997).

On direct appeal defendant's claim of ineffective assistance of counsel was not ripe where record did not provide clear evidence supporting claim. United States v. Garrett, 90 F.3d 210, 214-215 (7th Cir. 1996).

A defendant bears a heavy burden when seeking to establish an ineffective assistance of counsel claim. United States v. Monigan, 128 F.3d 609, 611 (7th Cir. 1997)(citing Jones v. Page, 76 F.3d 831, 840 (7th Cir.), cert. denied, 117 S.Ct. 363 (1996)).

To establish claim for ineffective assistance of counsel, a defendant must prove that: (1) an attorney's performance fell below an objective standard of reasonableness; and (2) the attorney's deficient performance prejudiced the defense. United States v. Monigan, 128 F.3d 609, 611 (7th Cir. 1997)(citing Strickland v. Washington, 466 U.S. 668, 687 (1984)).

To satisfy the first part of the Strickland test, a defendant must identify acts or omissions of counsel that form the basis of his claim of ineffective assistance. United States v. Monigan, 128 F.3d 609, 611 (7th Cir. 1997).

Concerning the second prong, "the defendant must show that there is a probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." United States v. Monigan, 128 F.3d 609, 611 (7th Cir. 1997)(citing Strickland v. Washington, 466 U.S. at 611).

Ineffectiveness claims based on a counsel's performance in connection with a motion to suppress evidence do not constitute the type of prejudice contemplated by *Strickland*. Evidence that should have been suppressed but for counsel's incompetence retained all indicia of reliability, while prejudice in the *Strickland* sense refers to unprofessional errors that are so egregious that the trial was rendered unfair and the verdict rendered suspect. United States v. Jones, 152 F.3d 680, 688 (7th Cir. 1998).

A defendant who desires to withdraw his plea because counsel rendered ineffective assistance must show that advice he received was not within the range of competence demanded of attorneys in criminal cases and that there is a reasonable probability that but for counsel's unprofessional errors, the result would have been different. Competence in this situation requires the defense counsel: (1) "learn all the facts of the case and . . . make an estimate of a likely sentence"; (2) "communicate the results of his analysis of the case" to the defendant; and (3) "the scrutiny must be undertaken in good faith." The attorney's analysis need not provide a precisely accurate prediction of the sentence, but failure to provide good faith advice about the sentencing consequences of a guilty plea can show a deficient performance. United States v. Gwiazdzinski, 141 F.3d 784, 790 (7th Cir. 1998) (quoting United States v. Barnes, 83 F.3d 934, 939 (7th Cir. 1996)).

When analyzing prejudice in the context of ineffective assistance of counsel during plea negotiations the court should consider whether the defendant established (1) through objective evidence that (2) there is a reasonable probability that he would have accepted the allegedly proposed plea agreement absent defense counsel's advice. Paters v. United States, 159 F.3d 1043, 1045-46 (7th Cir. 1998)(citing Toro v. Fairman, 940 F.2d 1065 (7th Cir. 1991)).

Ineffective assistance of counsel due to a conflict of interest arises when a defense attorney is required to make a choice of advancing his own interest to the detriment of his client. Gray-bey v. United States, 156 F.3d 733, 738 (7th Cir. 1998).

> In order for a defendant to establish that he was denied effective assistance of counsel, he must demonstrate how an alleged conflict of interest adversely affected his lawyer's performance. Gray-bey v. United States, 156 F.3d 733, 738 (7th Cir. 1998).
>
> > A defendant is required to demonstrate both an actual conflict of interest and an adverse impact on the lawyer's performance in the defense of his client. Gray-bey v. United States, 156 F.3d 733, 739 (7th Cir. 1998).

In order to establish prejudice resulting from mistakes made by counsel at sentencing the defendant must show that the sentencing proceeding was unreliable or fundamentally unfair such that the error produced a significant effect on his sentence. Paters v. United States, 159 F.3d 1043, 1046 (7th Cir. 1998)(citing Durrive v. United States, 4 F.3d 548, 550-51 (7th Cir. 1993)).

In a death penalty case, the defendant's lawyer is required to conduct a reasonable investigation into the possibilities for proving mitigating factors that might persuade the jury not to impose the death penalty. Thomas v. Gilmore, 144 F.3d 513, 515 (7th Cir. 1998)(citing Strickland v. Washington, 466 U.S. 668, 691 (1984)).

"A reasonable investigation is not, however, the investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources, but also with the inestimable benefit of hindsight, would conduct." Thomas v. Gilmore, 144 F.3d 513, 515 (7th Cir. 1998)(citing Kokoraleis v. Gilmore, 131 F.3d 692, 696 (7th Cir. 1997)).

The Court of Appeals' review of counsel's performance is highly differential, presuming reasonable judgment and declining to second guess strategic choices. United States v. Monigan, 128 F.3d 609, 611 (7th Cir. 1997).

INSANITY/INCOMPETENCY: If there is reasonable cause to believe that the defendant may not be competent the parties and the district court have a duty to order a competency hearing. If the record on appeal reveals that there is reasonable cause to believe that the defendant was not competent but no hearing was held, a remand may be ordered.

Incompetency:

Review of determination of competency to stand trial: clear error. United States v. Jones, 87 F.3d 954, 955 (7th Cir. 1996).

Whether to hold a competency hearing after the completion of a psychiatric examination "is a discretionary decision of the trial court, and findings regarding competence are reviewed only for clear error." United States v. Downs, 123 F.3d 637, 641 (7th Cir. 1997)(citation omitted). The trial court is in the best position to determine the need for a competency hearing. Id.

The fact that a defendant is incompetent does not, ordinarily, affect the appeal. United States v. Graves, 98 F.3d 258, 260 (7th Cir. 1996).

A defendant's participation in the appeal process is generally quite limited because the decisions involved in prosecuting an appeal are almost entirely of a technical legal character. United States v. Graves, 98 F.3d 258, 260 (7th Cir. 1996).

The district judge is required to order a competency hearing on his own initiative "if there is reasonable cause to believe that the defendant may

> presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to properly assist in his defense." United States v. Graves, 98 F.3d 258, 261 (7th Cir. 1996)(quoting 18 U.S.C. §4241(a)).
>
> Where there are sufficiently strong indications that a person has suffered substantial effects from a stroke, an expert on the effects of strokes, such as a neurologist, must be used to help determine competency. See United States v. Graves, 98 F.3d 258, 261-62 (7th Cir. 1996).
>
> If, after the preliminary inquiry, reasonable cause to believe the defendant incompetent persisted, an evidentiary hearing becomes mandatory. United States v. Graves, 98 F.3d 258, 262 (7th Cir. 1996).
>
> Determining past as distinct from present competence has been ruled to be infeasible when more than a few years have elapsed since the plea, but not when the interval is shorter. United States v. Graves, 98 F.3d 258, 260 (7th Cir. 1996)(citations omitted).

Insanity: If a defendant intends to present an insanity defense, he must give notice in writing to the government and the court pursuant Fed. R. Crim. P. 12.2(a). The trial court may then order him to submit, upon motion of the government, to an examination pursuant to 18 U.S.C. §§ 4241 or 4242. Fed. R. Crim. P. 12.2(c). Failure to give the required notice or to submit to an ordered examination may result in the exclusion of any *expert testimony* on the issue of defendant's guilt. Fed. R. Crim. P. 12.2(d).

> "[T]o prevail on an insanity defense in a federal trial the defendant must prove his insanity by clear and convincing evidence." Bennett v. United States, 119 F.3d 468, 469 (7th Cir. 1997).
>
> Insanity is a legal term. The Court of Appeals does not ask whether the defendant is insane by psychiatric or psychological standards, but rather whether he has established insanity as defined by the Legal Insanity Defense Reform Act, 18 U.S.C. § 17. Under the Act, in order to establish the affirmative defense of legal insanity, defendant must prove by clear and convincing evidence that: 1) he suffered from a severe mental disease or defect, and 2) that his severe mental disorder rendered him unable at the time of the crime to appreciate the nature and quality or the wrongfulness of his

acts. United States v. Shlater, 85 F.3d 1251, 1257 (7th Cir. 1996) (citing United States v. Reed, 997 F.2d 332, 334 (7th Cir. 1993)).

INSUFFICIENCY OF THE EVIDENCE -- See SUFFICIENCY OF THE EVIDENCE

JURISDICTION: Federal courts are courts of limited jurisdiction, and take jurisdictional matters very seriously. Subject matter jurisdiction can be raised at any time. Thus, even if trial counsel did not raise the issue of subject matter jurisdiction, it can still be raised on appeal.

Court of Appeals has inherent jurisdiction to decide issues of contested subject matter jurisdiction. United States v. Draves, 103 F.3d 1328, 1331 n. 1 (7th Cir.), cert. denied, 117 S.Ct. 2528 (1997).

Jurisdiction of Court of Appeals to hear interlocutory appeal of double jeopardy ruling unfavorable to the defendant:

> Denials of motions to dismiss on double jeopardy grounds are immediately appealable under the doctrine of collateral order exception to the final judgement rule. United States v. Asher, 96 F.3d 270, 272 (7th Cir. 1996), cert. denied, 117 S.Ct. 786 (1997).
>
> To fit within the collateral order exception, an order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment. United States v. Asher, 96 F.3d 270, 273 n. 2 (7th Cir. 1996), cert. denied, 117 S.Ct. 786 (1997).

Wisconsin statute imposing civil penalties for first offense drunk driving may not be prosecuted under the Assimilative Crimes Acts. United States v. Devenport, No. 97-1292, slip op. at 13 (7th Cir. 10/30/97).

Review of subject matter jurisdiction: *de novo*. United States v. Draves, 103 F.3d 1328, 1331 (7th Cir.), cert. denied, 117 S.Ct. 2528 (1997).

"Under the federal common law of res judicata, a subsequent suit is barred if the claim on which it is based arises from the same incident, events, transaction, circumstances, or other factual nebula is a prior suit that had gone to final judgment." Okoro v. Bohman, 164 F.3d 1059 (7th Cir. 1999)(citing Wilson v. City of Chicago, 120 F.3d 681, 687 (7th Cir. 1997)).

Only a judgment on the merits has res judicata effect. Okoro v. Bohman, 164 F.3d 1059 (7th Cir. 1999).

"A judgment that does not resolve the dispute between the litigants and in that sense is not 'on the merits' may nevertheless have a preclusive effect, though it will usually be in more limited effect than that of a judgment on the merits." Okoro v. Bohman, 164 F.3d 1059 (7th Cir. 1999).

A court has jurisdiction to determine its own jurisdiction. Okoro v. Bohman, 164 F.3d 1059 (7th Cir. 1999)(citing United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 79 (1988)).

JURY: If a member of the jury has discussed the case with anyone outside of deliberations, a new trial may be in order.

Allowing alternates to deliberate and render verdict with other jurors is plain error and can be a basis for reversal. United States v. Ottersburg, 76 F.3d 137 (7th Cir. 1996).

The district court has discretion to allow a jury to separate, and for separation of the jury to constitute reversible error, defense counsel must object, supporting objection with specific reasons against separation, and must show that defendant was actually prejudiced by the separation. United States v. Arciniega, 574 F.2d 931, 933 (7th Cir.), cert. denied, 437 U.S. 908 (1978).

Erroneous excusal of juror for cause will not overturn conviction unless defendant can show prejudice (Fed.R.Crim.P. 24(c)). United States v. Vega, 72 F.3d 507, 512 (7th Cir. 1995), cert denied, Early v. United States, 116 S.Ct. 2529 (1996).

Extrinsic Influences:

Review of determination whether extraneous material had reasonable possibility of prejudicing jury: abuse of discretion. United States v. Berry, 92 F.3d 597, 600 (7th Cir. 1996).

Crucial factor is the degree and pervasiveness of the prejudicial influence possibly resulting from the jury's exposure to the extraneous material. United States v. Berry, 92 F.3d 597, 600 (7th Cir. 1996).

The Court of Appeals has distinguished between an extraneous contact that may have affected a jury's ability to remain fair and impartial and an intrinsic

influence from a juror's pre-existing bias. United States v. McClinton, 135 F.3d 1178, 1186 (7th Cir. 1998).

If outside contacts may have affected the jury, due process requires some form of hearing. United States v. McClinton, 135 F.3d 1178, 1186 (7th Cir. 1998).

Voir Dire is the tool for examining an extrinsic influence like juror bias. United States v. McClinton, 135 F.3d 1178, 1186 (7th Cir. 1998).

Failure to poll jury upon timely request is *per se* error requiring reversal. United States v. F.J. Vollmer & Co., Inc., 1 F.3d 1511, 1522 (7th Cir. 1993), cert. denied, 510 U.S. 1043 (1994).

Review of decision to give copy of the indictment to the jury: abuse of discretion. United States v. Vega, 72 F.3d 507, 517 (7th Cir. 1995), cert. denied, Early v. United States, 116 S.Ct. 2529 (1996).

Review of district court's decision to deliver exhibits and information to jury room: abuse of discretion. United States v. McClellan, 165 F.3d 535 (7th Cir. 1999)(quoting United States v. Guy, 924 F.2d 702, 708 (7th Cir. 1991)).

Should the jury request clarification in a matter during deliberations, it is when the court responds with a misleading, incorrect, unclear, or unresponsive (i.e., not with "concrete accuracy") statement of law or fact, or with facts not in evidence, the Seventh Circuit might have cause for concern. U.S. v. McClellan, 165 F.3d 535 (7th Cir. 1999).

A jury's question must be "answered in open court and . . . petitioner's counsel should have been given an opportunity to be heard before the trial judge responded." U.S. v. McClellan, 165 F.3d 535 (7th Cir. 1999)(quoting Rogers v. United States, 422 U.S. 35, 39 (1975)).

Review of whether district court had just cause to excuse 12th Juror (Fed.R.Crim.P. 23): abuse of discretion. United States v. Araujo, 62 F.3d 930, 933 (7th Cir. 1995).

Review of whether district court was correct in allowing bobtailed jury (11 members) to continue deliberating rather than declaring a mistrial: abuse of discretion. United States v. Araujo, 62 F.3d 930, 934 (7th Cir. 1995).

"A court may not grant summary judgment for the prosecution on any element of a criminal offense, however clearly the element has been established, from which it follows that removing a contested element of the offense from the jury's consideration cannot be harmless error even if the evidence strongly favors the prosecution." United States v. Ladish Malting Co., 135 F.3d 484 (7th Cir. 1998)(citation omitted).

The test for determining impartiality of a prospective juror is whether he can lay aside his impression or opinion and render a verdict based on the evidence presented in court. United States v. McClinton, 135 F.3d 1178, 1186 (7th Cir. 1998).

Review of whether a defendant was denied his right to a jury from a fair cross-section of the community: mixed question of law and fact reviewed *de novo*." U.S. v. Raszkiewicz, No. 98-1525, slip op. p. 4 (7th Cir. 2/18/99).

> "To make a prima facie case that the fair cross-section requirement has been violated, a defendant must show that: (1) the group allegedly excluded is a distinctive part of the community; (2) the representation of this group and veneers from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this under-representation is due to systematic exclusion of the group in the jury selection process." U.S. v. Raszkiewicz, No. 98-1525 (7th Cir. 2/18/99).
>
> "Whether or not a cross-section of persons is a sufficiently distinctive group to be cognizable for jury representativeness purposes is a question of fact." The criteria for group distinctiveness for fair cross-section purposes are: (1) the existence of qualities that define a group; (2) similarity of attitudes, beliefs, or experiences; and (3) the community of interest among group members. This test is a question of fact. U.S. v. Raszkiewicz, No. 98-1525 (7th Cir. 2/18/99).

JURY INSTRUCTIONS: Jury instructions are often times the subject of heated debate in the district court. If the defense submitted jury instructions which were not given, the district court's failure to give the tendered instruction may be grounds for reversal. Appellate counsel must convince the Court of Appeals how the district court's refusal to give a tendered instruction hampered the defense in presenting its case to the jury.

A general objection to a jury instruction is insufficient to preserve an issue for appeal. Neither a general objection to the evidence nor a specific objection on a ground other than the one advanced on appeal is enough. To preserve an issue for appellate review, a party must make a proper objection at trial that alerts the court and

opposing party to the *specific grounds* for the objection. United States v. Linwood, 142 F.3d 418, 422 (7th Cir. 1998).

Overall test: "whether the instructions as a whole were sufficient to inform the jury correctly of the applicable law and the theory of defense." United States v. Rios-Calderon, 80 F.3d 194, 197 (7th Cir. 1996)(quoting United States v. Rice, 995 F.2d 719, 724 (7th Cir. 1993)).

Standard of review regarding supplemental instructions (necessity, extent, and character): abuse of discretion. United States v. Alexander, 163 F.3d 426 (7th Cir. 1998); United States v. Rios-Calderon, 80 F.3d 194, 197 (7th Cir. 1996)(quoting United States v. Rice, 995 F.2d 719, 724 (7th Cir. 1993)); United States v. Sanders, 962 F.2d 660, 677 (7th Cir.), cert. denied, 506 U.S. 892 and 506 U.S. 900 (1992).

> For a supplemental instruction, the Court of Appeals asks whether (1) the instructions as a whole fairly and adequately treat the issues, (2) the supplemental instruction is a correct statement of the law, and (3) the district court answered the jury's specific question correctly. United States v. Alexander, 163 F.3d 426 (7th Cir. 1998); United States v. Rios-Calderon, 80 F.3d 194, 197 (7th Cir. 1996)(quoting United States v. Rice, 995 F.2d 719, 724 (7th Cir. 1993)).

Even though a supplemental instruction that is issued after the jury has started deliberating technically violates Fed.Crim.Pro. 30, the Court of Appeals will reverse only where the defendant can show that actual prejudice resulted. United States v. Alexander, 163 F.3d 426 (7th Cir. 1998).

The Seventh Circuit affirmed a conviction based in part on a supplemental jury instruction defining possession as:

> "A person may have actual possession or constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a thing, is then in constructive possession of it.
>
> Whenever the word 'possession' is used in these instructions it includes actual as well as constructive possession." United States v. Alexander, 163 F.3d 426 (7th Cir. 1998).

A defendant is entitled to a jury instruction as to his particular theory of defense provided: "(1) the instruction represents an accurate statement of the law; (2) the instruction reflects the theory that is supported by the evidence; (3) the instruction reflects the theory which is not already part of the charge; and (4) the failure to include the instruction would deny the appellant a fair trial." U.S. v. Swanquist, 161 F.3d 1064, 1075 (7th Cir. 1998).

> In order to be entitled to a theory of defense instruction, the defendant must satisfy all four parts of the four part test. United States v. Meyer, 157 F.3d 1067, 1074 (7th Cir. 1998).
>
> The second prong of the four part test to determine whether the defendant is entitled to a jury instruction on the defendant's theory of defense will be fulfilled if there is evidence sufficient to create a reasonable doubt of guilt in the mind of a reasonable juror. United States v. Meyer, 157 F.3d 1067, 1074 (7th Cir. 1998).
>
> For a defendant to prevail on a third element, whether the theory of defense is not already part of the charge, the defendant must show that the instructions given did not adequately express the defendant's theory of defense. United States v. Koster, 163 F.3d 1008 (7th Cir. 1998).
>
> Failure of trial court to give theory of defense instruction when all four parts of tests are met is reversible error. See, United States v. Meyer, 157 F.3d 1067, 1075 (7th Cir. 1998).
>
> In a dubious case, it may often be better to give the proposed theory of defense "instruction and let the jury sort it out." United States v. Meyer, 157 F.3d 1067, 1075 (7th Cir. 1998).
>
> Review of determination that evidence insufficient to support defendant's theory of defense: *de novo*. United States v. Turner, 93 F.3d 276, 285 (7th Cir.), cert. denied, 117 S.Ct. 596 (1996).

"The defendant seeking a voluntary intoxication instruction must support this request with sufficient evidence on which a reasonable jury could conclude either (1) that the defendant's mental faculties were so overcome by intoxicants that he was incapable of forming the intent requisite to the commission of the crime," or (2) "the intoxication was so extreme as to suspend entirely the power of reason." United States v. Nacotee, 159 F.3d 1073, 1076 (7th Cir. 1998) (citing United States v. Boyles, 57 F.3d 535, 542 (7th Cir. 1995)).

Materiality of false statements is a question for the jury, and the trial court committed plain error when it decided issue of materiality as a question of law. United States v. Ross, 77 F.3d 1525 (7th Cir. 1996).

Juries are presumed to be capable of both sorting through evidence and following court's instructions. United States v. Lomeli, 76 F.3d 146, 149 (7th Cir. 1996).

> **BUT:** presumption rebuttable if substantial evidence to contrary. United States v. Hernandez, 84 F.3d 931, 935 (7th Cir. 1996).
>
> **BUT**: *Bruton* is an exception to general principle that jurors' follow their instructions. Richardson v. Marsh, 481 U.S. 200, 206-07 (1987).

Review of decision to give "ostrich" instruction: abuse of discretion. United States v. Vega, 72 F.3d 507, 516-517 (7th Cir. 1995), cert. denied, Early v. United States, 116 S.Ct. 2529 (1996); United States v. Nobles, 69 F.3d 172, 185 (7th Cir. 1995).

> The *Ostrich* instruction is typically given in cases where the defendant is prosecuted under a criminal statute with a *mens rea* component and the defendant "[1] claims a lack of guilty knowledge and [2] there are facts in evidence that supports an inference of deliberate ignorance." United States v. McClellan, 165 F.3d 535 (7th Cir. 1999)(quoting United States v. Fawley, 137 F.3d 458, 467 (7th Cir. 1998)).
>
> The inference of deliberate indifference required for an *Ostrich* instruction "need not be shown by overt or physical acts." United States v. McClellan, 165 F.3d 535 (7th Cir. 1999)(quoting United States v. Neville, 82 F.3d 750, 759 (7th Cir. 1996)).
>
> The ostrich instruction is appropriately given when the defendant claims a lack of guilty knowledge and there is evidence that supports an inference of deliberate ignorance or willful blindness. United States v. Wilson, 134 F.3d 855 (7th Cir. 1998).
>
> Behaving like an ostrich supports an inference of actual knowledge; it is not some kind of substitute for proof of knowledge. United States v. Ladish Malting Co., 135 F.3d 484 (7th Cir. 1998).

"A buyer-seller instruction 'reminds juries that distribution of drugs is not itself a conspiracy, although a history of transactions may be evidence of a conspiracy."

United States v. Meyer, 157 F.3d 1067, 1075 (7th Cir. 1998)(quoting United States v. Thomas, 150 F.3d 743, 746 (7th Cir. 1998)(per curiam)).

> The Seventh Circuit approved of a buyer-seller instruction that reads "the fact that a defendant may have bought or sold cocaine from another person is not sufficient, without more, to establish that the defendant was a member of the charged conspiracy." United States v. Hach, 162 F.3d 937 (7th Cir. 1998).
>
> The Seventh Circuit approved of a buyer-seller instruction that reads "proof that a defendant merely bought or sold drugs from alleged members of the alleged conspiracy is not sufficient, without more to establish a defendant's guilt." United States v. Meyer, 157 F.3d 1067, 1075 (7th Cir. 1998).

A federal criminal defendant has a due process right to unanimous verdict. United States v. Fawley, 137 F.3d 458, 470 (7th Cir. 1998)(citing F.R.C.P. 31(a)).

The Seventh Circuit approved the following jury instruction cautioning the jury concerning witness identification: When evaluating the reliability of testimony of an eye-witness, consider (1) the opportunity the witness had to observe the offender at the time in question and later to make a reliable identification; (2) the influences and circumstances under which the witness had made the identification; (3) the credibility of each identification witness; (4) whether the witness is truthful; and (5) whether the witness had the capacity and opportunity to make a reliable observation on the matter covered in the witness' testimony. United States v. Hall, 165 F.3d 1095 (7th Cir. 1999).

In order to preserve an objection to the district court's refusal to give a proposed jury instruction on appeal, defendant must object to judge's refusal on the record and clearly state reasons for his objection; otherwise objection reviewed only for plain error. United States v. Katalinich, 113 F.3d 1475, 1483 (7th Cir.), cert. denied, 118 S.Ct. 260 (1997).

Merely submitting an instruction is insufficient to preserve objection for appeal. United States v. Katalinich, 113 F.3d 1475, 1483 (7th Cir.), cert. denied, 118 S.Ct. 260 (1997).

On claim challenging sufficiency of jury instruction given, party tendering alternative instruction bears part of the responsibility, along with the court clerk, for insuring that alternative jury instruction is in record placed before reviewing court. United States v. Akinrinade, 61 F.3d 1279, 1286-87 (7th Cir.), cert. denied, 116 S.Ct. 541 (1995).

Review of ruling regarding failure to meet burden for duress instruction: *de novo*. United States v. Sotelo, 94 F.3d 1037, 1039 (7th Cir. 1996).

Review of ruling on whether to give an entrapment instruction: *de novo*. United States v. Neville, 82 F.3d 750, 760 (7th Cir.), cert. denied, 117 S.Ct. 249 (1996).

Overall test: jury instructions are not reviewed in isolation; they are put in the context of the trial as an integrated whole, and the evidence is reviewed drawing any reasonable inferences in the light most favorable to the government. United States v. Nobles, 69 F.3d 172, 185 (7th Cir. 1995).

To challenge a court's refusal to give a missing witness instruction, the defendant must show "not only the testimony would have been helpful to the jury, but also that the witness was under the government's control and unavailable to the defense." United States v. Monigan, 128 F.3d 609, 612 (7th Cir. 1997) (quoting United States v. Huels, 31 F.3d 476, 480 (7th Cir. 1994)).

Knowledge in a criminal statute means *actual* knowledge. United States v. Ladish Malting Co., 135 F.3d 484 (7th Cir. 1998)(emphasis in original)).

An error concerning the nature and extent of the defendant's knowledge in a jury instruction is equivalent to no instruction at all on the mental-state element of a crime - although such an omission is not invariably plain error, it is not harmless error. United States v. Ladish Malting Co., 135 F.3d 484 (7th Cir. 1998)(citing United States v. Kerley, 838 F.2d 932 (7th Cir. 1988); See Johnson v. United States, 117 S.Ct. 1544 (1997)).

Court of Appeals reviews jury instructions to determine whether the instructions as a whole provided the jury with sufficient guidance and correctly informed the jury of the applicable law and theory of defense. United States v. Liporace, 133 F.3d 541 (7th Cir. 1998).

Giving of *Silvern* charge to deadlocked jury impedes a defendant's right to a trial by an impartial jury and to due process. United States v. Chaney, 559 F.2d 1094, 1096 (7th Cir. 1977).

Brown and Silvern require trial judges in a circuit not to depart from a prescribed supplemental instruction. United States v. Chaney, 559 F.2d 1094, 1098 (7th Cir. 1977)(citing United States v. Brown, 411 F.2d 930 (7th Cir. 1969), cert. denied, 396 U.S. 1017 (1970) and United States v. Silvern, 484 F.2d 879 (7th Cir. 1973)(en banc)).

Reversal for improper instruction is warranted only if instruction misguides jury so much that litigant is prejudiced. United States v. Lloyd, 71 F.3d 1256, 1266 (7th Cir. 1995), cert. denied, 116 S.Ct. 2511 (1996).

Trial court's failure to submit to jury instruction on essential element of crime cannot be harmless; it is necessarily prejudicial. Waldemer v. United States, 106 F.3d 729, 732 (7th Cir. 1996).

> When "use" of firearm instruction concerning drug trafficking crime is clearly flawed, appellate court will affirm if evidence shows defendant actively used firearm, will reverse outright if none of the evidence presented qualifies as either active-employment "use" or "carry", and, if the evidence is unclear concerning the defendant's active use, will reverse and remand for new trial. United States v. Cooke, 110 F.3d 1288 (7th Cir. 1997); United States v. Robinson, 96 F.3d 246, 250 (7th Cir. 1996).

Failure to instruct on a lesser included offense is reviewed for a "fundamental miscarriage of justice." Robertson v. Hanks, 140 F.3d 707, 711 (7th Cir. 1998).

"In cases where witness identification is an issue, the trial judge, must at the defendant's request, instruct the jury about eyewitness identification testimony." United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(quoting United States v. Anderson, 739 F.2d 1254, 1258 (7th Cir. 1984)).

The following modification to Federal Criminal Jury Instruction of Seventh Circuit §5.05 (1980) was upheld. "A defendant need not personally perform every act constituting the crime charged for which that defendant is accused of aiding and abetting. Every person who willfully participates in the commission of a crime may be found guilty." United States v. Woods, 148 F.3d 843, 849 (7th Cir. 1998).

In prosecution for unlawful possession of a firearm by a felon, the following jury instruction was held to be an incorrect statement of Indiana law: "Federal law recognizes that a person who is a convicted felon and who is also a resident of the State of Indiana has a right to possess a firearm as long as he possesses it in his dwelling or on his property." Such an instruction is contrary to Seventh Circuit precedent. United States v. Maher, 145 F.3d 907, 909-10 (7th Cir. 1998).

Money laundering jury instruction describing predicate offense as a "mail fraud scheme," adequately captured the essence of the predicate offense. United States v. Mankarious, 151 F.3d 694, 703 (7th Cir. 1998).

The following jury instruction was found to violate due process because it deleted an element of causation from the offense of felony murder as required by Illinois law. "A person commits the offense of murder when he commits a forcible felony and an individual is killed during the course of the commission of that forcible felony." Jenkins v. Nelson, 157 F.3d 485, 492 (7th Cir. 1998).

When a reviewing court determines that the giving of a Briggs instruction (informing jurors in a capital sentencing hearing that the governor had the power to commute a sentence of life without parole) constituted constitutional error, that court is bound to apply the harmless error analysis mandated by Brecht v Abrahamson, 507 U.S. 619 (1993). Calderon v. Coleman, 119 S.Ct. 500, 503 (1998).

> The Brecht harmless error test may not be substituted with the analysis used in Boyde v. California, 494 U.S. 370 (1990), because the Boyde analysis does not inquire into the actual effect of the error on the jury's verdict; it merely asks whether constitutional error has occurred. Calderon v. Coleman, 119 S.Ct. 500, 503 (1998).

JUVENILES: Juveniles are rarely charged in federal court. Before a juvenile can be charged as an adult, a transfer hearing must be held. In this hearing the district court must determine if it is appropriate to treat the juvenile as an adult. If the district court allows the transfer, this ruling can be challenged on appeal.

Juveniles may not be charged with federal crimes until they are transferred to adult status (18 U.S.C. §§5031-42). United States v. Jarrett, 133 F.3d 519(7th Cir. 1998).

For the district court to have jurisdiction to engage in the ultimate inquiry regarding the suitability of transferring a juvenile to adult status, the attorney general must provide certain information to the district court, pursuant to 18 U.S.C.§ 5032. United States v. Jarrett, 133 F.3d 519 (7th Cir. 1998).

Once the government meets the pre-jurisdictional requirements for transfer, the district court must decide whether the juvenile's transfer to adult status is "in the interest of justice." United States v. Jarrett, 133 F.3d 519 (7th Cir. 1998)(citing 18 U.S.C.§ 5032).

The Court of Appeals reviews a district court's transfer decision for abuse of discretion. United States v. Jarrett, 133 F.3d 519 (7th Cir. 1998).

Transfer from juvenile to adult status pursuant to 18 U.S.C. §5032 is reviewed for an abuse of discretion. United States v. Wilson, 149 F.3d 610, 612 (7th Cir. 1998).

Pursuant to 18 U.S.C. §5032 involving transfer from juvenile to adult status, six factors are considered in determining whether a transfer to adult status is in the interest of justice: (1) the age and social background of the juvenile; (2) the nature of the alleged offense; (3) the extent and nature of the juvenile's prior delinquency record; (4) the juvenile's present intellectual development and psychological maturity; (5) the nature of past treatment efforts and the juvenile's response to such efforts; and (6) the availability of programs designed to treat the juvenile's behavioral problems.

In weighing these factors the district court has discretion to give more weight to some factors than to others. United States v. Wilson, 149 F.3d 610, 611, 614 (7th Cir. 1998).

LAW OF THE CASE: The law of the case doctrine prohibits the parties in a law suit from relitigating issues which have previously been ruled upon in the case. The doctrine is usually applied when a case has been remanded.

"The law of the case doctrine is a corollary to the mandate rule and prohibits a lower court from reconsidering on remand an issue expressly or impliedly decided by a higher court absent certain circumstances." United States v. Polland, 56 F.3d 776, 779 (7th Cir. 1995).

Under the law of the case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." United States v. Story, 137 F.3d 518, 520 (7th Cir. 1998)(quoting United States v. Thomas, 11 F.3d 732, 736 (7th Cir. 1993)(quoting United States v. Feldman, 825 F.2d 124 (7th Cir. 1987)).

While the Seventh Circuit has discretion to reconsider an issue that it has already decided in prior stages of litigation, it usually declines to do so unless "an intervening change in the law, or some other special circumstance, warrants re-examining the claim." United States v. Story, 137 F.3d 518, 520 (7th Cir. 1998)(quoting United States v. Thomas, 11 F.3d 732, 736 (7th Cir. 1993) and referring to Avitia v. Metropolitan Club of Chicago, 49 F.3d 1219, 1227 (7th Cir. 1995)).

Decision of prior appeal by co-defendant, while not controlling, is highly persuasive authority if the same issue is raised. United States v. Dexter, 165 F.3d 120, 1124 (7th Cir. 1998).

MISTRIAL: Mistrials occur when something has gone so wrong during the course of a trial that the defendant can no longer receive a fair trial. If the district court grants a mistrial over the defendant's objection, the double jeopardy clause may prohibit the retrial of the defendant.

Review of grant or denial of a mistrial generally: abuse of discretion. United States v. Cotnam, 88 F.3d 487, 498 (7th Cir.), cert. denied, 117 S.Ct. 326 (1996).

Review of determination of legal standard: *de novo*. United States v. Cotnam, 88 F.3d 487, 498 (7th Cir.), cert. denied, 117 S.Ct. 326 (1996).

Review of the manner in which district court conducts a trial: abuse of discretion. United States v. Hall, 165 F.3d 1095 (7th Cir. 1999).

The ultimate inquiry on a motion for mistrial based on jury impartiality is whether a substantial likelihood exists that the criminal defendants were denied a fair trial. United States v. McClinton, 135 F.3d 1178, 1186 (7th Cir. 1998).

Review of decision to deny a motion for mis-trial based on juror bias: abuse of discretion. United States v. McClinton, 135 F.3d 1178, 1186 (7th Cir. 1998).

NEW TRIAL: (Fed. R. Crim. P. 33) Appellate counsel should check the record on appeal to see if a new trial motion was filed by trial counsel. If so, the motion can provide a good starting point for appellate counsel in determining what issues to raise on appeal.

In reviewing the denial of a motion for a new trial based on an alleged *Brady* violation, deference is given to the district court's judgment as to whether disclosure of the evidence might have changed the outcome of the trial. When the question revolves on a "pure issue of law," the review is *de novo*. United States v. Maloney, 71 F.3d 645, 652-53 (7th Cir. 1995), cert. denied, 117 S.Ct. (1996).

Review of finding of no influence on jury in the face of a threat against another juror: abuse of discretion. United States v. Sanders, 962 F.2d 660, 673 (7th Cir.), cert. denied, 506 U.S. 892 and 506 U.S. 900 (1992).

Review of denial of motion for new trial generally: abuse of discretion. United States v. Morgan, 113 F.3d 85, 89 (7th Cir. 1997).

> Implicit in the concept of discretion of the district court is the possibility that two judges could come to opposite conclusions based on the same record and that the appellate court could affirm both. United States v. Williams, 81 F.3d 1434, 1437 (7th Cir. 1996).

Standard of review when a motion for new trial presents issues of law: plenary. United States v. Cotton, 101 F.3d 52 (7th Cir. 1996)(citing United States v. Boyd, 55 F.3d 239, 242 (7th Cir. 1995)).

Review of denial of motion for new trial based on prosecutor's alleged use of perjured testimony: abuse of discretion. United States v. Payne, 102 F.3d 289, 291-292 (7th Cir. 1996); United States v. Saadeh, 61 F.3d 510, 523 (7th Cir.), cert. denied, 116 S.Ct. 521 (1995).

> In order to receive a new trial on the basis of the government's use of allegedly perjured testimony, the defendant must establish that: (1) the prosecution's case included perjured testimony; (2) the prosecution knew, or should have known, of the perjury; and (3) there is a likelihood that the false testimony affected the judgment of the jury. United States v. Saadeh, 61 F.3d 510, 523 (7th Cir. 1995), cert. denied, 116 S.Ct. 521.
>
> Decision will not be disturbed unless there has been an error as a matter of law or clear and manifest abuse of judicial discretion. United States v. Saadeh, 61 F.3d 510, 523 (7th Cir. 1995), cert. denied, 116 S.Ct. 521.

Evaluation of motion for new trial based on prosecutorial misconduct requires both the district judge and, later, appellate court to examine the trial record as a whole, considering not only the parts of the record affected by the government's improprieties but also the untainted evidence that the jury heard. United States v. Williams, 81 F.3d 1434, 1438 (7th Cir. 1996).

It is not enough that the untainted evidence would be sufficient for a conviction: test is whether there is a reasonable likelihood that the improprieties (prosecutorial misconduct) affected the jury's judgment. United States v. Williams, 81 F.3d 1434, 1438 (7th Cir. 1996).

Defendant may not raise for first time on appeal ground of newly discovered evidence that was not used to support the defendant's motion for new trial. United States v. Higham, 98 F.3d 285, 293 (7th Cir. 1996).

OUTRAGEOUS GOVERNMENTAL MISCONDUCT: Unfortunately, this is not by itself a valid claim on appeal in the Seventh Circuit. When there is serious government misconduct, it should always be considered carefully. Oftentimes, it may have interfered with the defendant's right to a fair trial. **(See also -- PROSECUTORIAL MISCONDUCT)**

Doctrine of outrageous governmental misconduct does not exist in the Seventh Circuit. United States v. Boyd, 55 F.3d 239, 241 (7th Cir. 1995).

PLEA AGREEMENT: A plea agreement is a contract between the government and your client. If the government fails to meet its obligations under the plea agreement, your client should be entitled to relief.

Whether plea agreement is ambiguous or unambiguous: de novo. United States v. Williams, 102 F.3d 923, 927 (7th Cir. 1996).

Plea agreements are contracts and their content and meaning are determined according to ordinary contract principles. United States v. Williams, 102 F.3d 923, 927 (7th Cir. 1996).

However, plea agreements are unique contracts, and the ordinary contract principles are supplemented with a concern that the bargaining process not violate the defendant's right to fundamental fairness under the Due Process Clause. United States v. Williams, 102 F.3d 923, 927 (7th Cir. 1996).

Whether a plea agreement should have been enforced is a question of law subject to *de novo* review. U.S. v. Lezine, 166 F.3d 895 (7th Cir. 1998).

Any attempt by either party to solicit the room clerk's views on a proposed 11(e)(1)(C) plea agreement is improper. United States v. Kraus, 137 F.3d 447, 456 (7th Cir. 1988).

Under Rule 11(e)(1)(C), once the parties have themselves negotiated a plea agreement and presented that agreement to the court for approval, it is not only permitted but expected that the court will take an active role in evaluating the agreement. United States v. Kraus, 137 F.3d 447, 452 (7th Cir. 1988)(citing United States v. Crowell, 60 F.3d 199, 204 (5th Cir. 1995)).

It is "exactly because the court plays such a vital role in assessing the validity of the plea that it must remain removed from the discussions, culminating in that plea, lest its objectivity and impartiality be compromised." United States v. Kraus, 137 F.3d 447, 453 (7th Cir. 1988)(citing United States v. Miles, 10 F.3d 1135, 1140 (5th Cir. 1993)).

If a judge elects to reject a plea agreement under Rule 11(e)(1)(C), "it must be able to 'articulate a sound reason' for doing so." United States v. Kraus, 137 F.3d 447, 453 (7th Cir. 1988)(citing United States v. Delegal, 678 F.2d 47, 50 (7th Cir. 1982)).

Once a district court has rejected an 11(e)(1)(C) agreement, the court's license to speak about what it finds acceptable and unacceptable about the agreement - to

suggest an appropriate sentencing range, for example - is at an end. United States v. Kraus, 137 F.3d 447, 454 (7th Cir. 1988)(citing United States v. Crowell, 60 F.3d 199, 204 (5th Cir. 1995)).

The Court of Appeals review the language of the plea agreement objectively and holds the government to the literal terms of the plea agreement. United States v. Williams, 102 F.3d 923, 927 (7th Cir. 1996).

> The government cannot unilaterally determine that a defendant has breached a plea agreement. Rather, the court must determine whether there has been a substantial breach of the plea agreement. U.S. v. Lezine, 166 F.3d 895 (7th Cir. 1998).

Although the government must fulfill any express or implied promise made in exchange for a guilty plea, the parties' rights under the plea agreement are limited to those matters upon which they actually agreed. United States v. Williams, 102 F.3d 923, 927 (7th Cir. 1996).

Requirements of conditional guilty plea: it must be in writing; it must be approved by both government and district court; it must precisely identify which pretrial issues defendant wishes to preserve for review; and defendant must show that decision on one of those preserved issues will dispose of case either by allowing the plea to stand or by such action as compelling dismissal of the indictment or suppressing essential evidence. United States v. Cain, 155 F.3d 840, 842 (7th Cir. 1998); United States v. Markling, 7 F.3d 1309, 1312-1313 (7th Cir. 1993).

Review of decision to accept or reject plea agreement: abuse of discretion. United States v. Sandles, 80 F.3d 1145, 1147 (7th Cir. 1996).

Review of district court's interpretation of terms of plea agreement: clearly erroneous. United States v. Gonzalez, 112 F.3d 1325, 1327 (7th Cir.), cert. denied, 118 S.Ct. 396 (1997); United States v. Lovell, 81 F.3d 58, 61 (7th Cir. 1996).

The Court of Appeals will enforce a plea agreement in which the defendant agrees to waive appeal, provided the waiver is voluntary. United States v. Hicks, 1998 WL 25694 (7th Cir. 1998)

The Court of Appeals will not enforce the waiver if the district judge relied on impermissible facts in sentencing (for example, the defendant's race or gender) or if the judge sentenced the defendant in excess of the statutory maximum sentence for the offense(s) committed. United States v. Hicks, 1998 WL 25694 (7th Cir. 1998).

A defendant's failure to allege the breach of a plea agreement at sentencing waives the matter for appeal. United States v. Hicks, 1998 WL 25694 (7th Cir. 1998).

Defendant's waiver of an alleged breach of a plea agreement is subject to plain error review. United States v. Hicks, 1998 WL 25694 (7th Cir. 1998).

PRE-INDICTMENT DELAY: Pre-indictment delay is difficult to establish. Generally, as long as the Indictment was filed within the statute of limitations relief will be denied.

Review of decision to deny a motion to dismiss for prosecutorial delay: abuse of discretion. United States v. Pardue, 134 F.3d 1316 (7th Cir. 1998).

Once a defendant has proven actual and substantial prejudice it is up to the government to come forward with its reasons for the delay. Those reasons are then balanced against the prejudice to the defendant to determine whether due process has been violated. U.S. v. Spears, 159 F.3d 1081, 1084 (7th Cir. 1998); United States v. Pardue, 134 F.3d 1316 (7th Cir. 1998).

To establish a claim for pre-indictment delay, defendant must prove that "the delay caused actual and substantial prejudice to his fair trial rights," and "that the government delayed indictment to gain a tactical advantage or some other impermissible reason." United States v. Miner, 127 F.3d 610, 615 (7th Cir. 1997) (quoting United States v. Sowa, 34 F.3d 447, 450 (7th Cir. 1994), cert. denied, 513 U.S. 1117 (1995)).

A defendant must show more than the mere possibility that the delay was prejudicial. United States v. Miner, 127 F.3d 610, 615 (7th Cir. 1997) (quoting United States v. Sowa, 34 F.3d 447, 450 (7th Cir. 1994), cert. denied, 513 U.S. 1117 (1995)).

A defendant's showing of prejudice must be in the form of concrete evidence of material harm, which can include the loss of a vital defense witness. United States v. Pardue, 134 F.3d 1316 (7th Cir. 1998).

The "prejudice must be concrete and substantial; a defendant is not deprived of due process if he is 'only somewhat prejudiced by the lapse of time.'" United States v. Miner, 127 F.3d 610, 615 (7th Cir. 1997)(citations omitted).

PRE-TRIAL MOTIONS

In limine motion must be renewed at trial or the objection is waived. Wilson v. Williams, 161 F.3d 1078 (7th Cir. 1998)(overruling Favala v. Cumberland Eng'g. Co., 17 F.3d 987 (7th Cir. 1994).

A motion *in limine* is merely speculative in effect, and "a district judge is free, in the exercise of silent judicial discretion, to alter a previous *in limine* ruling." Wilson v. Williams, 161 F.3d 1078 (7th Cir. 1998)(quoting Luce v. United States, 469 U.S. 38, 41-42 (1984)).

Upon renewal of objections to evidence at trial that had been previously addressed in a motion in limine, defense counsel may ask for a "continuing objection" specific enough to reach the evidence in dispute for purposes of possible appeal. Wilson v. Williams, 161 F.3d 1078 (7th Cir. 1998).

"A continuing objection serves . . . to obviate repeated objections to evidence admitted within the scope of court's specific evidentiary ruling." Wilson v. Williams, 161 F.3d 1078 (7th Cir. 1998)(quoting United States v. Gomez-Norena, 908 F.2d 497, 500 n.2 (9th Cir. 1990)).

A defendant waives his right to appeal a "trial court's pre-trial ruling that a prior conviction can be used by the prosecution for purposes of impeachment when the defendant himself brought out the fact of the prior conviction in his direct testimony." Wilson v. Williams, 161 F.3d 1078 (7th Cir. 1998)(quoting United States v. DePriest, 6 F.3d 1201, 1209 (7th Cir. 1993)).

PROSECUTORIAL MISCONDUCT: Prosecutorial misconduct can take many forms, intimidating potential defense witnesses, commenting on a defendant's silence, or attacking defense counsel during closing argument. If the prosecution engages in unfair tactics appellate counsel should raise the issue on appeal.

The "purpose of an opening statement is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole." United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(quoting Testa v. Village of Mundelein, Ill., 89 F.3d 443, 445 (7th Cir. 1996)).

In opening statements, it would be a "rare situation where it would be appropriate for a prosecutor to comment on anticipated defense evidence because a defendant is under no obligation to put forward evidence on his or her own behalf." United States v. Hall, 165 F.3d 1095 (7th Cir. 1999).

It is reversible error when prosecutor intentionally forces own witness to invoke witnesses' Fifth Amendment privilege against self-incrimination, resulting in an unfavorable inference against the defendant. Harmon v. McVicar, 95 F.3d 620, 624 (7th Cir. 1996).

Showing that prosecutor's introduction of false testimony need not rise to the level of constitutional violation on direct appeal; it is enough that the jury may have reached a different verdict absent the false testimony or if the jury had known the testimony was false. United States v. Catton, 89 F.3d 387, 389 (7th Cir. 1996).

Prosecutor's misstatements of fact in closing argument, and the false testimony by his witness, require a new trial only if they were prejudicial. United States v. Catton, 89 F.3d 387, 389 (7th Cir. 1996).

Prosecutorial errors are weighed jointly. United States v. Catton, 89 F.3d 387, 389 (7th Cir. 1996).

Although any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded (Fed.R.Crim.P. 52(a)), the defendant prevails when the effect of the error is a close question. United States v. Talbott, 78 F.3d 1183, 1188 (7th Cir. 1996).

The court employs a two part test for assessing whether prosecutorial remarks are improper. First a court looks to determine whether the comments, looked at in isolation, were improper. If the remarks were improper, the court then looks at the remarks in the light of the entire record to determine whether the defendant was deprived of a fair trial. United States v. Cusimano, 148 F.3d 824, 831 (7th Cir. 1998).

If prosecutors' remarks are found to be improper, a five-factor evaluation of the misstatements determines if the prosecutor's improper comments deprived the defendant of a fair trial: 1) the nature and seriousness of the misconduct; 2) the extent to which the comments were invited by the defense; 3) the extent to which any prejudice was ameliorated by the court's instruction to the jury; 4) the defense's opportunity to counter any prejudice; and 5) the weight of the evidence supporting the conviction. United States v. Cusimano, 148 F.3d 824, 831-32 (7th Cir. 1998) (citing United States v. Granados, 142 F.3d 1016, 1021-22 (7th Cir. 1998)); United States v. Kelly, 991 F.2d 1308, 1315 (7th Cir. 1993)(citing Darden v. Wainright, 477 U.S. 168, 182 (1986)).

> The Seventh Circuit has stated that there is a sixth factor in evaluating whether a prosecutor's improper comments deprived defendant of a fair trial, namely whether the defendant had an opportunity to rebut the prosecutor's comments. Swofford v. Dobucki, 137 F.3d 442, 445 (7th Cir. 1998)(citing Darden v. Wainwright, 477 U.S. 168, 181-82 (1986) and referring to United States v. McClinton, 135 F.3d 1178, 1188-89 (7th Cir. 1998)).
>
> The six factors are not the only relevant considerations in assessing the fairness of the defendant's trial; they are only helpful guides in answering the ultimate question of "whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Swofford v. Dobucki, 137 F.3d 442, 445 (7th Cir. 1998)(citing Darden v. Wainwright, 477 U.S. 168, 181-82 (1986)(quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)).

Review of improper remarks in closing argument: abuse of discretion. United States v. Lovelace, 123 F.3d 650, 654-655 (7th Cir. 1997), cert. denied, __S.Ct.__, 1997 WL 810719 (1998)).

Under "invited response" doctrine, prosecutor may make reasonable but otherwise improper response to improper defense argument. United States v. Johnson-Dix, 54 F.3d 1295, 1305 (7th Cir. 1995).

> The issue on appeal under the "invited response" doctrine is whether the prosecutor's invited response taken in context unfairly prejudiced the defendant. United States v. Johnson-Dix, 54 F.3d 1295, 1305 (7th Cir. 1995).
>
> Test to determine whether prosecutorial misconduct was harmless: trial is viewed as a whole and Court of Appeals reviews strength of prosecution's case, whether curative instruction was given to jury, whether improper details were argued to jury during prosecution's closing argument, and length and complexity of trial. United States v. Robinson, 8 F.3d 398, 411 (7th Cir. 1993).

The trial court may exercise broad discretion in controlling closing arguments and in ensuring that argument does not stray unduly from the mark. United States v. Wables, 731 F.2d 440, 449 (7th Cir. 1984).

To assess allegations of improper vouching in closing argument, the Court of Appeals first considers the prosecutor's remarks in isolation. If the remarks are improper in the abstract, the Court of Appeals then reviews them in the context of the entire

record and asks whether they denied the defendant a fair trail. United States v. Alexander, 163 F.3d 426 (7th Cir. 1998)(United States v. Johnson-Dix, 54 F.3d 1295, 1304 (7th Cir.)).

In reviewing allegations of improper vouching, the Court of Appeals evaluates several factors: (1) the nature and seriousness of the statement; (2) whether the defense counsel invited it; (3) whether the district court sufficiently instructed the jury to disregard it; (4) whether defense counsel had the opportunity to respond to the improper statement; and (5) whether the weight of the evidence was against the defendant. United States v. Alexander, 163 F.3d 426 (7th Cir. 1998).

Review of the denial of a motion for new trial on the grounds of improper vouching: abuse of discretion. United States v. Alexander, 163 F.3d 426 (7th Cir. 1998).

Griffin error (comment on defendant's failure to testify):

> A prosecutor's direct reference to a defendant's failure to testify violates the defendant's privilege against compelled self-incrimination. Griffin v. California, 380 U.S. 609 (1965).
>
> *Griffin* violation is reviewed using a two-step analysis: the prosecutor must have made improper remarks and, in light of the entire record, the remarks must have deprived the defendant of a fair trial. United States v. Senn, 129 F.3d 886 (7th Cir. 1997); See also United States v. Butler, 71 F.3d 243, 254 (7th Cir. 1995).
>
> The Fifth Amendment forbids direct "comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." United States v. McClellan, 165 F.3d 535 (7th Cir. 1999)(quoting Griffin v. California, 380 U.S. 609, 615 (1985)).
>
> The Fifth Amendment also prohibits indirect commentary on the defendant's decision not to testify. United States v. McClellan, 165 F.3d 535 (7th Cir. 1999).
>
> Indirect comment on the defendant's decision not to testify occurs where the government characterizes its offer of evidence of as "uncontradicted", "undenied", "unrebutted", "undisputed", "unchallenged", or "uncontroverted" and the only person capable of contradicting, denying, rebutting, disputing, challenging, or controverting the evidence at issue is the defendant. United States v. McClellan, 165 F.3d 535 (7th Cir. 1999).

Interference with attorney-client relationship:

> If prosecutorial misconduct denies defendant right of counsel or any other fundamental right of a criminal defendant, including the right to an impartial judge or to trial by jury, it is reversible error regardless of whether it was prejudicial or harmless. United States v. DiDomenico, 78 F.3d 294, 299 (7th Cir.), cert. denied, 117 S.Ct. 507 (1996).
>
> When prosecutor's closing argument was a constitutional violation (in this case, indirect comment on defendant's failure to testify and improperly vouching for prosecution witnesses), prosecution must prove beyond a reasonable doubt that defendant would have been convicted absent prosecutor's unconstitutional remarks. United States v. Cotnam, 88 F.3d 487, 499-500 (7th Cir.), cert. denied, 117 S.Ct. 326 (1996).

Improper "prosecutorial remarks standing alone cannot justify a new trial unless they 'undermined the fairness of the trial and contributed to a miscarriage of justice.'" United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(quoting United States v. Young, 470 U.S. 1, 16 n. 14 (1985) and citing United States v. Mealy, 851 F.2d 890, 903 (7th Cir. 1998)(recognizing that "even if the prosecutor engaged in improper conduct, we must re-examine the improper remark in light of the entire record to determine whether the remark deprived the defendant of a fair trial.")).

The Seventh Circuit will not "lightly overturn a conviction 'on the basis of a prosecutor's comment standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct effected the fairness of the trial.'" United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(quoting United States v. Saadeh, 61 F.3d 510, 521 (7th Cir. 1995)(quoting United States v. Young, 470 U.S. 1, 11 (1985)).

To determine whether a prosecutor's remarks amount to prejudicial error, a court "must consider the probable effect the prosecutor's behavior would have on the jury's ability to judge the evidence fairly." United States v. Hall, 165 F.3d 1095 (7th Cir. 1999)(quoting United States v. Young, 470 U.S. 1, 12 (1985)).

Prosecutor's comments to jury during closing arguments were improper in that they appealed to jurors' emotions and invited the jury to consider the social consequences of its verdict: prosecutor improperly put the jurors in the citizen witness' place by asking how the jurors would feel if the jurors were called liars when they attempted to help in the apprehension and prosecution of the defendant. The prosecutor also implied that if the jury disbelieved the citizen witness, people would be more reluctant

to come forward to testify for fear that they too would be called liars. United States v. Morgan, 113 F.3d 85, 90 (7th Cir. 1997).

Prosecutorial vindictiveness: See VINDICTIVE PROSECUTION

RESTITUTION: If a defendant's criminal conduct causes a victim to suffer a financial loss, the defendant can be ordered to pay restitution to the victim.

Legality of restitution order: Court of Appeals will vacate order for restitution if defendant cannot possibly comply. United States v. Wilson, 98 F.3d 281, 284 (7th Cir. 1996)(citing United States v. Mahoney, 859 F.2d 47, 52 (7th Cir. 1988)).

The Court of Appeals will not vacate an order of restitution unless the defendant demonstrates that the district court abused its discretion in determining that restitution was appropriate or in setting the amount to be paid. United States v. Ross, 77 F.3d 1525, 1552 (7th Cir. 1996).

District court's compliance with the statutory requirements of the Victim and Witness Protection Act (VWPA): appellate court will reverse if (1) district court repudiated a statutorily mandated factor or if (2) it was not improbable that judge failed to consider mandatory factor and was influenced thereby. United States v. Viemont, 91 F.3d 946, 951 (7th Cir. 1996).

REVOCATION PROCEEDINGS -- See SUPERVISED RELEASE

SAFETY VALVE: See SENTENCING SANCTIONS

SEARCH AND SEIZURE: Search and seizure issues are governed by the Fourth Amendment. Although the Court of Appeals reviews a district court's finding of historical facts for an abuse of discretion, the district court's legal determinations are reviewed *de novo*. Thus, don't be afraid to challenge a district court's refusal to suppress evidence on appeal. **(See also WARRANTS; CONFESSION)**

Confession:

Review of ultimate question of whether a confession was voluntary: *de novo*. United States v. Williams, 128 F.3d 1128 (7th Cir. 1997).

The trial court may admit a confession into evidence only if the accused made it voluntarily. United States v. Williams, 128 F.3d 1128 (7th Cir. 1997).

Consent:

Review of determination of whether defendant gave consent to officer to search: clear error. United States v. Patterson, 97 F.3d 192, 194 (7th Cir. 1996); United States v. Yusuff, 96 F.3d 982, 986-987 (7th Cir. 1996).

Consent for IRS agents to search is unreasonable under the Fourth Amendment and violative of due process under the Fifth Amendment if the consent was induced by fraud, deceit, trickery or misrepresentation by the revenue agent. United States v. Peters, 153 F.3d 445, 451 (7th Cir. 1998).

> A defendant seeking suppression under this theory must set forth the following: "to prevail on this point defendant must produce clear and convicting evidence that the agents affirmatively misled him as to the true nature of their investigation. Defendant must also prove that the mis-information was material in his decision to speak with agents. Simple failure to inform defendant that he was a subject of the investigation, or that the investigation was criminal in nature, does not amount to affirmative deceit unless defendant inquired about the nature of the investigation and the agent's failure to respond was intended to mislead." United States v. Peters, 153 F.3d 445, 451 (7th Cir. 1998) (quoting United States v. Serlin, 707 F.2d 953, 956 (7th Cir. 1983)).
>
> Civil revenue agents affirmatively misrepresent the nature of their investigation where they engage in a covert criminal investigation such that they continue to audit the defendant after they develop a firm indication of fraud. United States v. Peters, 153 F.3d 445, 451 (7th Cir. 1998).
>
> A court may infer that a revenue agent has developed "firm indications of fraud" where he has established that the taxpayer has engaged in a consistent pattern of substantial under reporting of income and/or overstatement of deductions such that an intent to evade taxes can be inferred. United States v. Peters, 153 F.3d 445, 455 (7th Cir. 1998).

A defendant's consent to make a search during an interrogation is involuntary and thus unconstitutional when the police coerce the defendant's consent. United States v. McClellan, 165 F.3d 535 (7th Cir. 1999).

A consent to search is not an incriminating statement. United States v. McClellan, 165 F.3d 535 (7th Cir. 1999).

A third party with common authority over the premises sought to be searched may provide consent to search the premises. United States v. Aghedo, 159 F.3d 308, 310 (7th Cir. 1998).

> Common authority is based upon mutual use of property by persons generally having joint access or control. United States v. Aghedo, 159 F.3d 308, 310 (7th Cir. 1998).

Custodial Interrogation:

Review of determination that defendant was subject to custodial interrogation: *de novo*. United States v. Yusuff, 96 F.3d 982, 988 (7th Cir. 1996).

Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." United States v. James, 113 F.3d 721, 726 (7th Cir. 1997)(quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)).

Custody implies a situation in which the suspect knows he is speaking with a government agent and does not feel free to end the conversation; the essential element of a custodial interrogation is coercion. United States v. James, 113 F.3d 721, 726 (7th Cir. 1997)(citing United States v. Martin, 63 F.3d 1422, 1429 (7th Cir. 1995)).

The initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. United States v. James, 113 F.3d 721, 726 (7th Cir. 1997).

The only relevant inquiry is how a reasonable man in the suspect's shoes would have understood his situation. United States v. James, 113 F.3d 721, 726 (7th Cir. 1997).

In "determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." United States v. James, 113 F.3d 721, 727 (7th Cir. 1997)(quoting Stansbury v. California, 511 U.S. 318, 323 (1994)).

Question of whether reasonable man in defendant's situation would have felt free to leave interview with postal inspectors, and thus whether he was in custody and entitled to receive *Miranda* warnings, was a mixed question of law and fact which is reviewed *de novo*. United States v. James, 113 F.3d 721, 727 (7th Cir. 1997).

Exigent Circumstances:

Whether exigent circumstances exist in the execution of a search warrant is a mixed question of law and fact. United States v. Bailey, 136 F.3d 1160, 1164 (7th Cir. 1998); United States v. Howard, 961 F.2d 1265, 1267 (7th Cir.), cert. denied, 506 U.S. 882 (1992).

Review of factual findings regarding presence of exigent circumstances: clear error. United States v. Bailey, 136 F.2d 1160 (7th Cir. 1998); United States v. Howard, 961 F.2d 1265, 1267 (7th Cir.), cert. denied, 506 U.S. 882 (1992).

The determination that those facts constitute exigent circumstances is a legal question subject to *de novo* review. United States v. Bailey, 1998 WL 67562, at 4 (7th Cir. Feb. 20, 1998); United States v. Howard, 961 F.2d 1265, 1267 (7th Cir.), cert. denied, 506 U.S. 882 (1992).

Exigent circumstances "exist . . . when a suspect's awareness of the search would increase the danger to police officers or others, or when an officer must act quickly to prevent the destruction of evidence," United States v. Singer, 943 F.2d 758, 762 (7th Cir. 1991), or when "a reasonable person [would] believe that entry . . . was necessary to prevent physical harm to the officers, the destruction of relevant evidence, the escape of a suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." United States v. Howard, 961 F.2d 1265, 1267 (7th Cir.), cert. denied, 506 U.S. 882 (1992)(quoting United States v. McConney, 728 F.2d 1195, 1205 (9th Cir.)(en banc), cert. denied, 469 U.S. 824 (1984)).

The exigencies must be viewed from the totality of the circumstances known to the officers at the time. United States v. Howard, 961 F.2d 1265, 1267 (7th Cir.), cert. denied, 506 U.S. 882 (1992).

Franks hearing:

Court of Appeals reviews the district court's refusal to hold a *Franks* hearing for clear error. United States v. Hunter, 86 F.3d 679, 682 (7th Cir.), cert. denied, 117 S.Ct. 443 (1996).

A *Franks* hearing is proper where the defendant has made a substantial preliminary showing that an affiant, in obtaining a search warrant, included deliberately false material statements, or recklessly disregarded the truth. United States v. Taylor, 154 F.3d 675, 679 (7th Cir. 1998) (citing Franks v. Delaware, 438 U.S. 154, 170-171 (1978)).

On review of a district court's refusal to hold a *Frank's* hearing, the Seventh Circuit presumes that the *affidavit supporting the search warrant is valid*. United States v. McClellan, 165 F.3d 535 (7th Cir. 1999)(italics in original).

Defendants face a "formidable task" in attempting to overcome the presumption that the affidavit supporting the search warrant is valid. United States v. McClellan, 165 F.3d 535 (7th Cir. 1999).

In support of a request for a *Frank's* motion, the petitioner is required to make an offer of proof demonstrating that: (1) the affidavit for the search warrant on his home contained a false statement; (2) the affiant's state of mind in making the false statements was reckless; and (3) the false statement was material to the finding of probable cause (i.e., that probable cause cannot be established without the false statement). United States v. McClellan, 165 F.3d 535 (7th Cir. 1999).

Informants:

Review of factual finding that informant was not a government agent: clearly erroneous. United States v. Li, 55 F.3d 325, 328 (7th Cir. 1995); United States v. Malik, 680 F.2d 1162, 1165 (7th Cir. 1982).

The Court of Appeals may draw its own legal conclusions from the district court's actual finding that an informant was not a government agent. United States v. Li, 55 F.3d 325, 328 (7th Cir. 1995); United States v. York, 933 F.2d 1343, 1358 (7th Cir.), cert. denied, 502 U.S. 916 (1991).

Test of whether jailhouse informant violated defendant's Sixth Amendment rights: the statements must have been (1) "deliberately elicited", and (2) by a government "agent". United States v. Li, 55 F.3d 325, 328 (7th Cir. 1995).

Investigatory Stops:

To review district court's decision that an investigatory stop was supported by reasonable suspicion, Court of Appeals may rely only on information that was

available to police officers at the time the stop occurred. United States v. Thomas, 87 F.3d 909, 912 (7th Cir.), cert. denied, 117 S.Ct. 409 (1996).

The scope and duration of a traffic stop is limited to what is necessary to fulfil the purpose of the seizure. United States v. Walden, 146 F.3d 487, 490 (7th Cir. 1998).

"The scope and detention must be carefully tailored to its underlying justification." United States v. Walden, 146 F.3d 487, 490 (7th Cir. 1998)(quoting Florida v. Royer, 460 U.S. 491, 500 (1983)).

When there is reasonable suspicion that the occupants of a vehicle are engaged in other illegal activity, an officer may prolong a traffic stop to investigate that activity. United States v. Walden, 146 F.3d 487, 490 (7th Cir. 1998)(citing United States v. Finke, 85 F.3d 1275 (7th Cir. 1996)).

Reasonable suspicion of criminal activity cannot be based solely on a person's prior criminal record. United States v. Walden, 146 F.3d 487, 490 (7th Cir. 1998).

A criminal record in conjunction with other information can form the basis of a reasonable suspicion. United States v. Walden, 146 F.3d 487, 491 (7th Cir. 1998).

Motion to Suppress:

In reviewing motion to suppress, Court of Appeals may consider evidence from both the suppression hearing and the trial. United States v. Duguay, 93 F.3d 346, 350 (7th Cir. 1996).

BUT: If defendant fails to renew motion to suppress at trial, appellate court should not rely on evidence first produced at trial to reverse pre-trial denial. United States v. Smith, 80 F.3d 215, 220 (7th Cir. 1996).

BUT: Court of Appeals reviews a district court's denial of a motion to suppress based solely on what the district court knew at the time of the ruling. United States v. Smith, 80 F.3d 215, 220 (7th Cir. 1996).

General: factual findings are reviewed for clear error, and the district court's conclusions of law are reviewed *de novo*. United States v. Green, 111 F.3d 515, 518 (7th Cir.), cert. denied, 118 S.Ct. 427 (1997); United States v. Liss, 103 F.3d 617, 620 (7th Cir. 1997).

Review of determination that evidentiary hearing unnecessary to determine if police "seized" defendant: clear error. United States v. Rodriguez, 69 F.3d 136, 140 (7th Cir. 1995).

Failure to file objection to a magistrate's report recommending denial of a motion to suppress generally waives any challenge to the magistrate's ruling on appeal. United States v. Dexter, 165 F.3d 120, 1124 (7th Cir. 1998).

When reviewing a district court's denial of a motion to suppress, the Court of Appeals reviews the court's legal determinations *de novo*, and its factual findings of historical fact for clear error. United States v. Brown, 133 F.3d 993 (7th Cir. 1998)(quoting Pioneer Investment Services Co. v. Brunswick Assoc., 507 U.S. 380, 395 (1993)).

The exclusionary rule requires that evidence tainted by official wrongdoing be suppressed. United States v. Gravens, 129 F.3d 974, 979 (7th Cir. 1997), petition for cert. filed (Feb. 19, 1998).

It is well established that the inevitable discovery rule provides exception to the exclusionary rule's requirement that evidence tainted by official wrongdoing be suppressed. United States v. Gravens, 129 F.3d 974, 979 (7th Cir. 1997), petition for cert. filed (Feb. 19, 1998).

> If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means, then the evidence should be received. United States v. Gravens, 129 F.3d 974, 979 (7th Cir. 1997).

The "independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation." United States v. Gravens, 129 F.3d 974, 981 (7th Cir. 1997)(quoting Nix v. Williams, 467 U.S. 431, 443 (1984)).

Independently discovered and untainted evidence will be admitted in certain circumstances as an exception to the exclusionary rule. United States v. Gravens, 129 F.3d 974, 981 (7th Cir. 1997).

"The party seeking suppression bears the burden of establishing that he had a reasonable expectation of privacy in the area and items searched." United States v. Meyer, 157 F.3d 1067, 1079 (7th Cir. 1998)(citing United States v. Ruth, 65 F.3d 599, 604 (7th Cir. 1995)).

"In order to establish a reasonable expectation of privacy, the party must show that he had an actual, subjective expectation of privacy that society is prepared to recognize as reasonable." United States v. Meyer, 157 F.3d 1067, 1079 (7th Cir. 1998).

Since the "existence of a privacy interest ‘depends, in part, on the defendant’s subjective intent’ it is ‘almost impossible’ to establish a reasonable expectation of privacy without an affidavit or testimony from the defendant." United States v. Meyer, 157 F.3d 1067, 1080 (7th Cir. 1998)(quoting United States v. Ruth, 65 F.3d 599, 605 (7th Cir. 1995)).

A defendant’s "testimony given to meet standing requirements for motions to suppress cannot be used to direct evidence against the defendant at trial on the question of guilt or innocence." United States v. Meyer, 157 F.3d 1067, 1080, n. 5 (7th Cir. 1998)(referring to Simmons v. United States, 390 U.S. 377, 390 (1968)).

Probable Cause/Reasonable Suspicion:

Review of determination of reasonable suspicion and probable cause for traffic stop seizure: *de novo*. United States v. Finke, 85 F.3d. 1275, 1278 (7th Cir. 1996).

Review of determination of probable cause: *de novo*. United States v. Green, 111 F.3d 515, 518 (7th Cir.), cert. denied, 118 S.Ct. 427 (1997).

Review of ultimate conclusion that probable cause exists or does not exist: *de novo*. Ornelas v. United States, 517 U.S. 690 (1996); United States v. Green, 111 F.3d 515, 518 (7th Cir.), cert. denied, 118 S.Ct. 427 (1997); United States v. Guiterrez, 92 F.3d 468, 471 (7th Cir. 1996).

BUT: Review of factual findings supporting probable cause determination: clear error. United States v. Williams, 106 F.3d 1362, 1366 (7th Cir. 1997).

Determination of reasonable suspicion: *de novo*. Ornelas v. United States, 517 U.S. 690 (1996).

HOWEVER, while "as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. . . a reviewing court should take care to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." Ornelas v. United States, 517 U.S. 690 (1996).

Probable cause or reasonable suspicion are "fluid concepts that take their substantive contents from the particular context in which the standards are being assessed." United States v. McClinton, 135 F.3d 1178, 1183 (7th Cir. 1998)(citing Ornelas v. United States, 517 U.S. 690 (1996)).

Probable cause exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." United States v. McClinton, 135 F.3d 1178, 1183 (7th Cir. 1998)(quoting Ornelas v. United States, 517 U.S. 690 (1996)).

Probable cause exists if under the totality of the circumstances, "including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of the crime will be found in a particular place." United States v. McClinton, 135 F.3d 1178, 1183 (7th Cir. 1998)(quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)).

The subjective intentions of police officers executing a search warrant play no role in ordinary probable cause Fourth Amendment analysis. United States v. Van Dreel, 155 F.3d 902, 905 (7th Cir. 1998) (quoting Whren v. United States, 517 U.S. 806 (1996)).

Miranda issues:

Review of the ultimate issue of the voluntariness of a waiver of *Miranda* rights: *de novo*. United States v. Brooks, 125 F.3d 484, 492 (7th Cir. 1997).

The trial court's findings with respect to the historical facts on which the voluntariness claim was based: deferential. United States v. Brooks, 125 F.3d 484, 492 (7th Cir. 1997).

It is not improperly coercive conduct for an officer to tell a suspect that the prosecutor will be informed of his cooperation and will evaluate his case in light of his cooperation. United States v. Westbrook, 125 F.3d 996, 1005 (7th Cir.), cert. denied, 118 S.Ct. 643 (1997)(citing United States v. Rutledge, 900 F.2d 1127, 1130-31 (7th Cir.), cert. denied, 498 U.S. 875 (1990)).

"The police are allowed to play on a suspect's ignorance, his anxieties, his fears, and his uncertainties; they are just not allowed to magnify those fears, uncertainties, and so forth to the point where rational decision becomes impossible." United States v. Westbrook, 125 F.3d 996, 1005-1006 (7th Cir.), cert. denied, 118 S.Ct. 643 (1997)(quoting United States v. Rutledge, 900 F.2d 1127, 1130-31 (7th Cir.), cert. denied, 498 U.S. 875 (1990)).

The Court of Appeals assesses the voluntariness of the statement by considering whether, in light of the totality of the circumstances, the statement was the product of a rational intellect and free will, or whether it was obtained by the authorities through coercive means. United States v. Brooks, 125 F.3d 484, 492 (7th Cir. 1997).

"The issue of coercion is determined from the perspective of a reasonable person in the position of the suspect." United States v. Brooks, 125 F.3d 484, 492 (7th Cir. 1997) (quoting United States v. Fazio, 914 F.2d 950, 955 (7th Cir. 1990)).

The Court of Appeals considers whether a reasonable objective observer would have believed that any words or actions on the part of police were in fact "reasonably likely to elicit" an incriminating response. United States v. Westbrook, 125 F.3d 996, 1002 (7th Cir.), cert. denied, 118 S.Ct. 643 (1997) (quoting Enoch v. Gramley, 70 F.3d 1490, 1499 (7th Cir. 1995), cert. denied, 117 S.Ct. 95 (1996)).

Review of whether a defendant is in custody for Miranda purposes: *de novo*. United States v. Madoch, 149 F.3d 596, 600 (7th Cir. 1998).

Statements taken in violation of Miranda can generally be used to impeach inconsistent trial testimony. United States v. Madoch, 149 F.3d 596, 601 (7th Cir. 1998).

To determine whether a suspect's right to end questioning was "scrupulously honored," a court must consider the amount of time that lapsed between interrogation; the scope of the second interrogation; whether new Miranda warnings were given; and the degree to which police officers pursued further interrogation once the suspect had invoked his right to silence. United States v. Schwensow, 151 F.3d 650, 658 (7th Cir. 1998) (citing Michigan v. Mosley, 423 U.S. 96, 104-105 (1975).

The constitutionality of a subsequent police interview depends not on its subject matter but, rather, on whether the police, in conducting the interview, sought to undermine the suspect's resolve to remain silent. United States v. Schwensow, 151 F.3d 650, 660 (7th Cir. 1998).

Miranda right to counsel cannot be invoked by an attorney prospectively before the client is in custody. Rather, the authorities must be conducting an interrogation or interrogation must be imminent. U.S. v. Muick, No. 98-1315, slip op. p. 6 (7th Cir. 2/8/99).

Warrantless Search:

Review of ultimate search issue is *de novo*, but historical facts are reviewed only for clear error. United States v. Ladell, 127 F.3d 622, 624 (7th Cir. 1997).

A warrantless search of an automobile (limited to the areas in which a weapon may be placed or hidden) is permissible when the police officer possesses "a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and . . . may gain immediate control over weapons." United States v. Brown, 133 F.3d 993 (7th Cir. 1998)(quoting Michigan v. Long, 463 U.S. 1032, 1049-50 (1983) and Terry v. Ohio, 392 U.S. 1, 21 (1968)).

> The test is reasonableness: would a "reasonably prudent man in the circumstances be warranted in the belief that his safety or that of others was in danger." Michigan v. Long, 463 U.S. 1032, 1050 (1983).

Luggage is not seized for Fourth Amendment purposes where law enforcement officials touch and remove luggage from a bus luggage compartment. A defendant has no reasonable expectation that his luggage would not be touched, handled or even removed from the bus prior to the bag's arrival at its destination. United States v. Ward, 144 F.3d 1024, 1033 (7th Cir. 1998).

> Luggage is seized where law enforcement officials interfere with defendant's contractually based expectation that he would regain possession of his luggage at a particular time. United States v. Ward, 144 F.3d 1024, 1033 (7th Cir. 1998).

Seizure of garbage left at the curb is a Fourth Amendment violation only if the defendant has manifested a subjective expectation of privacy in the garbage that society accepts as objectively reasonable. U.S. v. Redmon, 138 F.3d 1109, 1112 (7th Cir. 1998).

> There is no expectation of privacy in trash left for collection in an area accessible to the public. U.S. v. Redmon, 138 F.3d 1109, 1114 (7th Cir. 1998).

Review of determination of whether probable cause existed to believe that defendant's vehicle contained contraband: *de novo*. United States v. McClinton, 135 F.3d 1178, 1183 (7th Cir. 1998).

Pursuant to the "moving vehicle" exception to the warrant requirement of the Fourth Amendment, police officers may search a vehicle without a warrant if they have probable cause to believe it contains contraband or evidence of a crime. United States v. McClinton, 135 F.3d 1178, 1183 (7th Cir. 1998).

When determining whether a private citizen has acted as a government agent when conducting a warrantless search, the question is whether in light of all the circumstances of the case the person must be regarded as having acted as an instrument or agent of the state. United States v. Hall, 142 F.3d 988, 993 (7th Cir. 1998).

> A court determines whether: (1) the government knew of and acquiesced in the intrusive conduct; and (2) the private party's purpose for conducting the search was to assist law enforcement efforts or further his own ends. Another consideration is whether the government offered the private party a reward. United States v. Hall, 142 F.3d 988, 993 (7th Cir. 1998).

When the police seize property during the course of a criminal investigation, due process does not require the state to provide the owner with notice of state law remedies which provide for the return of seized property. City of West Covina v. Perkins, 119 S.Ct. 678, 681 (1999).

> When law enforcement agents seize property pursuant to a warrant, due process requires them to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return. However, actual notice of the specific state law remedies which provide for the return of seized property is not required because such information is published and generally available to the public. City of West Covina v. Perkins, 119 S.Ct. 678, 681-82 (1999).

Two historical rationales exist for the search incident to arrest exception: (1) the need to disarm a suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial. Knowles v. Iowa, 119 S.Ct. 484, 487 (1998).

> Police officer may not conduct a search incident to arrest where the officer stops the defendant for a traffic offense and issues him a citation rather than arrests him, even if a state statute allows such a search where a citation is issued. Knowles v. Iowa, 119 S.Ct. 484, 486 (1998).

Standing:

In order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one which has "a source outside the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." Minnesota v. Carter, 119 S.Ct. 469, 472 (1998).

> The capacity to claim the protection of the Fourth Amendment depends upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place. Minnesota v. Carter, 119 S.Ct. 469, 473 (1998); United States v. McNeal, 77 F.3d 938, 945 (7th Cir. 1996).

“While the trial court's factual findings regarding the execution of the warrant are subject to the clearly erroneous standard, the determination of whether those facts constitute an exigent circumstance exception to the knock-and-announce requirement

is a legal question subject to de novo review." United States v. Bailey, 136 F.3d 1160, 1164 (7th Cir. 1998)(citation omitted).

Because Rakas' principle of "standing" is rooted in the substantive law of the Fourth Amendment and not Article III, the government may waive standing types of arguments. United States v. Price, 54 F.3d 342, 346 (7th Cir. 1995)(citing Rakas v. Illinois, 439 U.S. 128, 138-139 (1978)).

> Indeed, the Supreme Court has recently stated that an analysis determining whether a defendant has a legitimate expectation of privacy under the rubric of Article III "standing" is an analysis which it rejected 20 years ago. Minnesota v. Carter, 119 S.Ct. 469, 472 (1998) (citing Rakas v. Illinois, 439 U.S. 128 (1978)).

Where the facts of a case place it between the situation of an overnight guest in a home who may claim the protection of the Fourth Amendment and one who is merely present with the consent of a householder who may not claim such protection, the Supreme Court has looked to the following factors to determine if the person has a protectable privacy interest: the nature of any transactions engaged in on the premises, (commercial versus residential), the period of time on the premises, and whether the defendant had any previous connection with the premises. Minnesota v. Carter, 119 S.Ct. 469, 474 (1998).

> Although an overnight guest in a home may claim the protection of the Fourth Amendment, one who is merely present with a consent of the householder may not. Minnesota v. Carter, 119 S.Ct. 469, 473 (1998).
>
> Where the defendant is merely present in an apartment for the sole purpose of bagging cocaine and is not a signatory to the lease of that apartment, he has no protectable privacy interest in that apartment. Minnesota v. Carter, 119 S.Ct. 469, 473 (1998).

SENTENCING: With the advent of the Sentencing Guidelines, sentencing has been transformed from an area in which appealable issues almost never arose into an area that can provide numerous appealable issues. Initially, appellate counsel should always ensure that the defendant's sentence is within the statutory maximum. If the sentence is within the statutory maximum, appellate counsel should then review the presentence report and any sentencing order to determine if the district court properly applied the Sentencing Guidelines and whether the district court departed from the guidelines.

General:

How the guidelines are to be interpreted is a question of law, which is reviewed *de novo*. United States v. Gonzalez, 112 F.3d 1325, 1328 (7th Cir.), cert. denied, 118 S.Ct. 396 (1997). However, factual findings under the guidelines are reviewed only for clear error. United States v. Gonzalez, 112 F.3d 1325, 1328 (7th Cir.), cert. denied, 118 S.Ct. 396 (1997).

The Court of Appeals reviews the district court's interpretation of the scope of the guidelines *de novo* and its factual findings for clear error. United States v. Yoon, 128 F.3d 515, 528 (7th Cir. 1997) (citing United States v. Binford, 108 F.3d 723, 726 (7th Cir.), cert. denied, 117 S.Ct. 2530 (1997)).
Defendants who benefit from favorable calls under the Federal Sentencing Guidelines should think twice about appealing their cases when their appeals have little likelihood of success because a defendant's appeal may draw a guideline cross appeal. U.S. v. Szarwark, 2/18/99, No. 98-1968, slip op. p. 4-5 (7th Cir.).

In deciding between calling an amendment substantive or clarifying, the Seventh Circuit has looked closely at the language of the change. United States v. Minneman, 143 F.3d 274, 282 (7th Cir. 1998).

Jurisdiction:

The Court of Appeals has no jurisdiction to review a refusal to downward departure unless the refusal resulted from the sentencing court's erroneous belief that is lacks the statutory authority to depart. United States v. Jarrett, 133 F.3d 519 (7th Cir. 1998); United States v. Saunders, 129 F.3d 925, 933 (7th Cir. 1997).

Absent finding that defendant had timely notice of possibility of enhanced sentence, district court lacked jurisdiction, under §§ 841 and 851 to impose enhanced sentence and error was not harmless. Kelly v. United States, 29 F.3d 1107, 1110 (7th Cir. 1994).

Sentencing Hearing:

A defendant has the right to be sentenced on the basis of reliable information. United States v. McClinton, 135 F.3d 1178, 1192 (7th Cir. 1998).

The facts on which the court bases its sentence must have sufficient indicia of reliability to support its probable accuracy. United States v. McClinton, 135 F.3d 1178, 1192 (7th Cir. 1998).

If the defendant provides no evidence controverting the information in the pre-sentence investigation report (PSI) the district court may rely entirely on the PSI. United States v. Wing, 135 F.3d 467, 469 (7th Cir. 1998).

Ordinary procedural protections do not apply to sentencing proceedings. United States v. Wicks, 132 F.3d 383, 388 (7th Cir. 1997).

The due process clause requires only that the proceedings be fundamentally fair and the sentence be based on accurate and reliable information. United States v. Wicks, 132 F.3d 383, 388 (7th Cir. 1997).

District court erred in deciding the amount of drugs involved in a conspiracy where it determined the amount based on the testimony of one witness who had given four different versions of how much drug was involved in the conspiracy. United States v. McEntire, 153 F.3d 424, 437 (7th Cir. 1998).

A sentencing judge may adopt facts contained in the PSI to support findings for such things as the quantity of drugs attributable to the defendant so long as those facts bear "sufficient indicia of reliability to support their probable accuracy." United States v. Berkey, 161 F.3d 1099 (7th Cir. 1998)(quoting United States v. Burke, 148 F.3d 832, 835 (7th Cir. 1998)).

The Seventh Circuit has noted that increased precautions may be necessary in cases in which the use of cross-references within the sentencing guidelines dramatically alters the balance between trial and sentencing. United States v. Meyer, 157 F.3d 1067, 1082 (7th Cir. 1998)(referring to United States v. Masters, 978 F.2d 281, 287 (7th Cir. 1992)).

All that is required is that the sentencing court refer to the findings and rationale in a PSR to allow the Court of Appeals to evaluate the sentencing court's decision. United States v. Brimley, 148 F.3d 819, 822 (7th Cir. 1998)(quoting United States v. Taylor, 135 F.3d 478, 483 (7th Cir. 1998)).

Under 18 U.S.C. §3583(d), the court, not the probation office, must determine how many drug tests should be administered during supervised release. United States v. Bonanno, 146 F.3d 502, 511 (7th Cir. 1998).

Appellate Review:

To ascertain intent of district court at sentencing, Court of Appeals must look at record as a whole. United States v. Wolf, 90 F.3d 191, 193 (7th Cir. 1996).

Review of waived sentencing arguments: plain error. United States v. Wilson, 134 F.3d 855 (7th Cir. 1998).

Article III judges are presumed to know the law. United States v. Wilson, 134 F.3d 855 (7th Cir. 1998).

Review of constitutionality of sentencing guideline provisions: *de novo*. United States v. Carroll, 110 F.3d 457, 461 (7th Cir. 1997).

Guideline application notes are binding unless they violate the constitution or a statute. United States v. Draves, 103 F.3d 1328, 1338 (7th Cir.), cert. denied, 117 S.Ct. 2528 (1997)(citing Stinson v. United States, 508 U.S. 36 (1993)).

The Court of Appeals must defer to the Sentencing Commission's interpretation of the scope of 28 U.S.C. §994 unless that interpretation is "arbitrary, capricious, or manifestly contrary to the statute." United States v. Santoyo, 146 F.3d 519, 524 (7th Cir. 1998)(quoting Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 844 (1984)).

The Sentencing Commission has the power and the duty not only to interpret specific provisions of federal statutes regulating criminal punishment but also to establish, in its "discretion except insofar as that discretion is cut down by statutes fixing minimum and maximum penalties, standards designed to promote uniform and rational federal sentencing." United States v. Lauer, 148 F.3d 766, 769 (7th Cir. 1998)(citing 28 U.S.C. §§991(b), 994(a), (f); Mistretta v. United States, 488 U.S. 361, 367-70 (1989)).

The Sentencing Commission's authority is legislative in character rather than interpretive, and the "commission is free to seek guidance from any source that may contain information relevant to calibrating criminal punishment." United States v. Lauer, 148 F.3d 766, 769 (7th Cir. 1998).

If federal statutes control sentencing considerations, the Sentencing Commission's tasks are limited to interpretation and application. United States v. Lauer, 148 F.3d 766, 769 (7th Cir. 1998).

In drafting §5K1.1, the Sentencing Commission did not exceed its statutorily granted authority in establishing the requirement that the government make the motion for downward departure under §5K1.1 and, therefore, did not violate the separations of powers doctrine. United States v. Santoyo, 146 F.3d 519, 524 (7th Cir. 1998)(citing 28 U.S.C. §994)).

Whether a sentencing court has incorrectly applied the Guidelines by double counting is a question of law reviewed *de novo*. United States v. Compton, 82 F.3d 179, 183 (7th Cir. 1996).

Review of determination of meaning of "market value": *de novo*. United States v. Eyoum, 84 F.3d 1004, 1007 (7th Cir.), cert. denied, 117 S.Ct. 326 (1996).

Review of interpretation of United States Supreme Court case and effect on enhancement: *de novo*. United States v. Carmack, 100 F.3d 1271, 1278-1279 (7th Cir. 1996).

Review of alleged discrepancies between district court's oral statements and written orders: *de novo*. United States v. Bonanno, 146 F.3d 502, 511 (7th Cir. 1998).

When an orally pronounced sentence is ambiguous the judgment and commitment order is evidence which may be used to determine the intended sentence. United States v. Bonanno, 146 F.3d 502, 511 (7th Cir. 1998).

Once the "court of appeals has decided that the district court misapplied the Guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, i.e., that the error did not affect the district court's selection of the sentence imposed." United States v. Newman, 144 F.3d 531, 543 (7th Cir. 1998)(quoting Williams v. United States, 503 U.S. 193, 203 (1992)).

The Court of Appeals will remand for re-sentencing if there is no evidence at all to support the District court's determination of benefit received under §2C1.1. United States v. Sapoznik, 161 F.3d 1117 (7th Cir. 1998).

A remand is necessary if the court has misapplied the guidelines, unless the Court of Appeals concludes, on the record as a whole, that the error was harmless because it did not affect the district court's selection of the sentence imposed. United States v. Saunders, 129 F.3d 925, 932 (7th Cir. 1997).

On remand for re-sentencing, there are some issues on which parties are entitled only one opportunity to present evidence. United States v. Wyss, 147 F.3d 631, 633 (7th Cir. 1998)(citing United States v. Wilson, 131 F.3d 1250, 1253-54 (7th Cir. 1997); United States v. Parker, 101 F.3d 527, 528 (7th Cir. 1996); United States v. Leonzo, 50 F.3d 1086, 1088 (D.C. Cir. 1995)).

Sentencing Guidelines Commentary:

"[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." Stinson v. United States, 508 U.S. 36, 37 (1993).

Sentences for Pre-guidelines Cases:

Court of Appeals will affirm as long as sentence is within statutory limits and trial court did not rely on improper information. United States v. McClain, 2 F.3d 205, 206 (7th Cir. 1993).

Sentences for Guideline Cases:

Sentence of imprisonment must be proportional to crime, however, except for the death penalty, principle of proportionality will rarely require reconsideration of sentence. United States v. Martin, 63 F.3d 1422, 1433 (7th Cir. 1995).

Review of district court decision to order consecutive or concurrent sentences: abuse of discretion. United States v. Plantan, 102 F.3d 953, 956 (7th Cir. 1996).

The court must impose consecutive sentences when necessary to impose the total punishment prescribed by the applicable guideline range (5 G.1.2(d)). United States v. Johnson, 127 F.3d 625, 630 (7th Cir. 1997).

Statutory Mandatory Minimums:

Under 18 U.S.C. §3553(e), Congress granted the authority to district courts, subject to the requirement that the motion be brought by the government, to impose a sentence below the statutory minimum in consideration of a defendant's substantial assistance. United States v. Santoyo, 146 F.3d 519, 524 (7th Cir. 1998).

Under the safety valve provisions of 18 U.S.C. §3553(f)(5) and U.S.S.G. §5C1.2(5), "in order for a defendant who provides the government with untruthful pre-sentencing disclosures to satisfy the 'not later than the time of the sentencing hearing' requirement and thus avail himself the benefit of the safety valve, the defendant must meet the safety valve's requirement of complete and truthful disclosure by the time of the commencement of the sentencing hearing." United States v. Marin, 144 F.3d 1085, 1091 (7th Cir. 1998).

Base Offense Level:

Relevant Conduct:

Review of determination that uncharged offenses were part of same course of conduct as offense of conviction (relevant conduct -- U.S.S.G. § 1B1.3(a)(2)): clear error. United States v. Acosta, 85 F.3d 275, 279 (7th Cir. 1996).

Relevant conduct, in a narcotics case, includes all acts and omissions that were part of the same course of conduct. United States v. Adams, 125 F.3d 586, 596 (7th Cir. 1997).

The government may prove relevant conduct under more relaxed rules of evidence, including the admission of hearsay evidence and proof need be made by a preponderance of the evidence only. United States v. Adams, 125 F.3d 586, 596 (7th Cir. 1997) (citations omitted).

Review of the district court's determination of relevant conduct: clear error. United States v. Berry, 133 F.3d 1020 (7th Cir. 1998); United States v. Adams, 125 F.3d 586, 596 (7th Cir. 1997).

Relevant conduct: Court of Appeals determines if acts are relevant conduct under § 1B1.3(a)(2) by looking at the similarity, regularity, and temporal

proximity of the uncharged acts to the offense conviction. United States v. Sykes, 7 F.3d 1331, 1336 (7th Cir. 1993).

When a defendant is sentenced "on the basis of uncharged drug-related misconduct, the burden is on the government to prove the amount of drugs involved in that conduct." United States v. Wyss, 147 F.3d 631, 633 (7th Cir. 1998).

By Offense Guideline:

When the statutory index lists more than one potentially applicable guideline, the District court is charged with choosing from among the guidelines specified the one that is most appropriate based on the nature of the offense conduct. United States v. Agostino, 132 F.3d 1183, 1195 (7th Cir. 1997).

In choosing between two guidelines (bribe and gratuity) the issue is a factual determination that is reviewed for clear error. United States v. Agostino, 132 F.3d 1183, 1195 (7th Cir. 1997).

Drugs:

The quantity of drugs is a sentencing factor, not an element of the offense. United States v. Richardson, 130 F.3d 765 (7th Cir. 1997), petition for cert. filed (Feb. 11, 1998).

For enhanced penalty provisions to apply, the quantities are not required to be alleged in the indictment. United States v. Richardson, 130 F.3d 765 (7th Cir. 1997).

The hundred to one disparity between crack cocaine and regular cocaine does not violate the Constitution. United States v. Richardson, 130 F.3d 765 (7th Cir. 1997).

Review of finding regarding drug quantity: clear error. United States v. Taylor, 72 F.3d 533, 542 (7th Cir. 1995); United States v. James, 113 F.3d 721, 730 (7th Cir. 1997).

A conspirator is responsible for the amount of drugs that conspirator actually distributes, as well as for any quantity distributed by the conspiracy that was reasonably foreseeable to the conspirator. United States v. Jarrett, 133 F.3d 519 (7th Cir. 1998).

The aggregation rule allows a court to aggregate all of the quantities of drugs involved in an entire basic scheme of multiple defendants when it determines an individual's base offense level. Gray-bey v. United States, 156 F.3d 733, 740 (7th Cir. 1998).

Determination of reasonable foreseeability is a factual determination and is therefore reviewed for clear error. United States v. Jarrett, 133 F.3d 519 (7th Cir. 1998).

Under the 1993 amendment to the Sentencing Guidelines, in order for the sentence enhancement for crack cocaine to be applied, the government must prove that the defendant possessed a crack form of cocaine base. United States v. Adams, 125 F.3d 586, 592 (7th Cir. 1997).

Under U.S.S.G. §2D1.1, higher base offense levels apply only to the crack form of cocaine base. "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rock like form. United States v. Valenzuela, 150 F. 3d 664, 667 (7th Cir. 1998).

The district court must make an explicit finding of the calculation of drug quantity and the offense level and how it arrived at the sentence. United States v. Singleton, 125 F.3d 1097, 1108 (7th Cir. 1997), cert. denied, Cox v. United States, 118 S.Ct. 898 (1998)(citing United States v. Phillips, 37 F.3d 1210, 1213 (7th Cir. 1994)).

Under §§1B1.3(a)(2), 3D1.2(d), 2D1.1, and 2D2.1, amounts of controlled substances intended for the defendant's private use cannot be added to the amounts of controlled substances that defendant intended to distribute, except if the defendant is charged with both intent to distribute and conspiracy with intent to distribute. United States v. Wyss, 147 F.3d 631, 632 (7th Cir. 1998).

Under un-amended U.S.S.G. §2D1.1, the government bears the burden of proving, by a preponderance of the evidence, what type of methamphetamine was involved in an offense. United States v. McEntire, 153 F.3d 424, 432 (7th Cir. 1998).

Under U.S.S.G. §2B1.1 as amended November 1, 1995, there is no distinction for sentencing purposes between l-methamphetamine and d-

methamphetamine. United States v. McEntire, 153 F.3d 424, 431 (7th Cir. 1998).

Loss:

Review of factual finding of amount of loss: clear error. United States v. Jackson, 95 F.3d 500, 505 (7th Cir.), cert. denied, 117 S.Ct. 404, 117 S.Ct. 532 (1996) and 117 S.Ct. 717(1997).

Review of definition of loss: *de novo*. United States v. Jackson, 95 F.3d 500, 505 (7th Cir.), cert. denied, 117 S.Ct. 404, 117 S.Ct. 532 (1996) and 117 S.Ct. 717(1997).

Review of method by which district court calculated loss: *de novo*. United States v. Jackson, 95 F.3d 500, 505 (7th Cir.), cert. denied, 117 S.Ct. 404, 117 S.Ct. 532 (1996) and 117 S.Ct. 717(1997).

Review of questions regarding definition of loss and the method of calculation of loss: *de novo*. United States v. Senn, 129 F.3d 886 (7th Cir. 1997).

Under U.S.S.G.§2F1.1, review of a district court's loss valuation is for clear error. U.S. v. Swanquist, 161 F.3d 1064, 1077 (7th Cir. 1998).

When fraud is equivalent to simple theft, actual loss is measured at the time the fraud is detected. United States v. Saunders, 129 F.3d 925, 931 (7th Cir. 1997).

Under U.S.S.G. §2F1.1, in fraudulent loan application cases involving a defendant who obtains a loan by misrepresenting the value of his assets, the amount of loss is the amount of the loan not repaid at the time the offense is discovered. The concept of when an offense is discovered relates to discovery by the victim or the proper authorities, whichever comes first. However, after discovery has occurred, money subsequently repaid on fraudulently procured loans may not be set-off against the amount of loss calculated under the applicable guideline. U.S. v. Swanquist, 161 F.3d 1064, 1077 (7th Cir. 1998).

Under §2F1.1, "the amount of the intended loss . . . is the amount that the defendant placed at risk by misappropriating money or other property." United States v. Lauer, 148 F.3d 766, 768 (7th Cir. 1998).

Under the guidelines for "intended loss" (§2F1.1), the "relevant inquiry is not 'how much would the defendants probably have gotten away with?', but, rather, 'how many dollars did the culprits' scheme put at risk?'" United States v. Bonanno, 146 F.3d 502, 509-510 (7th Cir. 1998).

Under §2F1.1, in fraudulent procurement of loans and contract cases, "the loss is the part of the loan that the defendant does not intend to repay, or the value of the part of the contractual performance that he intends to omit, rather than the entire loan or the entire contract price." United States v. Lauer, 148 F.3d 766, 768 (7th Cir. 1998).

Under U.S.S.G. §2F1.1, comment, no. 7, in fraud cases, if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss. United States v. Stockheimer, 157 F.3d 1082, 1089 (7th Cir. 1998).

In prosecution for conspiracy to commit bank fraud, under U.S.S.G. §2F1.1(b)(1), loss is attributable to a defendant not only for loss resulting from conduct in which the defendant directly participated but also for loss that the defendant helped bring about in some way, even if he did not share in all of the proceeds. United States v. Giang, 143 F.3d 1078, 1080 (7th Cir. 1998).

Under §2F1.1, loss in a food stamp fraud case "is the value of the benefits diverted from intended recipients or uses." United States v. Brown, 136 F.3d 1176, 1183 (7th Cir. 1998)(quoting United States v. Barnes, 117 F.3d 328, 334-35 (7th Cir. 1997)).

Under §2F1.1 for food stamp fraud case, "the amount of loss should equal the aggregated food stamp redemptions less actual food sales." United States v. Brown, 136 F.3d 1176, 1183 (7th Cir. 1998)(citing United States v. Barnes, 117 F.3d 328, 334-35 (7th Cir. 1197)).

Under 2F1.1, to determine the amount of loss, a court can consider whatever evidence is before it. United States v. Brown, 136 F.3d 1176, 1184 (7th Cir. 1998)(citing United States v. Carmack, 100 F.3d 1271, 1276 (7th cir. 1996)).

In setting the base offense level for fraud, whether the total intended loss bore any relation to economic reality because the plan had no chance of success is irrelevant. Rather, economic reality is taken into account in a district court's

downward departure decision. United States v. Stockheimer, 157 F.3d 1082, 1089 (7th Cir. 1998).

A defendant cannot reduce the amount of loss for sentencing purposes by offering to make restitution after he is caught. United States v. Saunders, 129 F.3d 925, 931 (7th Cir. 1997).

In calculating actual loss in a fraudulent loan case, the trial judge should determine how much of the collateral has been realized or can be expected to be realized and should deduct that amount from the amount of loss. United States v. Saunders, 129 F.3d 925, 931 (7th Cir. 1997); See United States v. Johnson, 16 F.3d 166, 171 (7th Cir. 1994); United States v. Chevalier, 1 F.3d 581, 585-86 (7th Cir. 1993).

In calculating actual loss, the district court should offset the amount of the loan only by the value of the collateral the bank has or expects to gain at the time the fraud is discovered. United States v. Saunders, 129 F.3d 925, 931 n.4 (7th Cir. 1997) (citing United States v. Mau, 45 F.3d 212, 216 (7th Cir. 1995)).

Under U.S.S.G. §2F1.1, the amount of loss attributable to a co-owning corporate embezzler is the full amount of corporate loss if the corporation follows formalities, if it has other active co-owners, and/or if the defendant in question receives a salary and benefits tightly controlled by the co-owners. These factors need not all be present and they are not exhaustive. United States v. Mankarious, 151 F.3d 694, 709 (7th Cir. 1998).

In prosecution for conspiracy to defraud Customs and the FDA, under U.S.S.G. §2F1.1, a defendant's gain may be used to calculate a victim's loss when a more precise measure is unavailable. The gain may be used only if there is in fact a loss, and the use of the gain results in a reasonable estimation of the loss. United States v. Vitek Supply Corp., 144 F.3d 476, 490 (7th Cir. 1998).

In prosecution for mail and wire fraud, calculating an investor's loss under §2F1.1(b)(1) is not limited solely to the original investment amount. Rather accrued interest or appreciation that the investor was told that he had earned is also includable in the amount of loss. United States v. Porter, 145 F.3d 897, 901 (7th Cir. 1998).

A district court's miscalculation of the amount of loss is harmless error if it does not affect the guideline range. United States v. Saunders, 129 F.3d 925, 932 (7th Cir. 1997).

Other:

To calculate the base offense level for robbery offenses, under U.S.S.G. §2C1.1(b)(2)(A) the sentencing guidelines increase the base offense level based on "the 'benefit received' in return for the bribe." United States v. Sapoznik, 161 F.3d 1117 (7th Cir. 1998).

Under §2C1.1(b)(2)(A), the relevant "benefit received" is profit (net revenue) and not (gross) revenue. United States v. Sapoznik, 161 F.3d 1117 (7th Cir. 1998).

Under §2C1.1(b)(2)(A), rough approximations of profit are sufficient. United States v. Sapoznik, 161 F.3d 1117 (7th Cir. 1998)(citing U.S.S.G. §2F1.1, Application Note 8)).

To determine the benefit received under §2C1.1, it is the government's burden to provide evidence from which these costs may be estimated. United States v. Sapoznik, 161 F.3d 1117 (7th Cir. 1998).

Under §2C1.1(c)(1)(A) new definition of tax laws (Amendment 491) did not clarify old definition of "tax law." United States v. Minneman, 143 F.3d 274, 282 (7th Cir. 1998).

Under U.S.S.G. §2G2.4(b)(2), a computer file constitutes an "item containing a visual depiction involving a sexual exploitation of a minor," rather than the entire disc on which the file is contained. United States v. Hall, 142 F.3d 988, 997 (7th Cir. 1998).

Under U.S.S.G. §2K2.1(b), a part which converts a semi-automatic rifle into a fully automatic machine gun, is considered a "firearm" itself. Diaz v. Duckworth, 143 F.3d 345, 345 (7th Cir. 1998); United States v. Cash, 149 F.3d 706 (7th Cir. 1998).

Under §2L2.1, identification documents include uncompleted documents. United States v. Castellanos, 165 F.3d 1129, 1132 (1998).

Under §2T1.1(b)(2) (sophisticated means), use of multiple corporate names and the placement of funds in an attorney's trust account both constitute a complex effort to hide income. United States v. Minneman, 143 F.3d 274, 283 (7th Cir. 1998).

Criminal History:

Review of determination that conviction counts as prior sentence under criminal history: *de novo*. United States v. Redding, 104 F.3d 96, 98 (7th Cir. 1996); United States v. Binford, 108 F.3d 723, 726 (7th Cir.), cert. denied, 117 S.Ct. 2530 (1997).

The district court may consider prior sentences not used in computing the criminal history category in sentencing the defendant. United States v. Ewing, 129 F.3d 430, 437 (7th Cir. 1997); U.S.S.G. §§ 4A1.3(a), (c), (e) and 4A1.2, Comm. Appl. Note 8.

Impermissible "double counting" is the imposition of two or more upward adjustments when both are premised on the same conduct. United States v. Haines, 32 F.3d 290, 293 (7th Cir. 1994).

Collateral attack of prior sentence at sentencing: prior conviction may be collaterally attacked at sentencing where defendant claims unconstitutional deprivation of counsel for prior case. United States v. Redding, 104 F.3d 96, 99 (7th Cir. 1996).

For purposes of U.S.S.G.§4A1.1(d) (criminal history enhancement for committing an offense while under any criminal justice sentence, including probation), court supervision is a criminal justice sentence. United States v. Burke, 148 F.3d 832, 839 (7th Cir. 1998).

Operation of an uninsured motor vehicle is similar to an offense listed in §4A1.2(c)(1). United States v. Boyd, 146 F.3d 499, 502 (7th Cir. 1998).

Under §4A1.2(d), only an offense committed before the age of 18 that resulted in a conviction as an adult or that was committed within five years of the offense charged may be included in the defendant's criminal history score. U.S. v. Spears, 159 F.3d 1081, 1088 (7th Cir. 1998).

Under U.S.S.G. §4A1.2, a prior sentence is "any sentence previously imposed . . . for conduct *not part of the instant offense*." United States v. Berkey, 161 F.3d 1099 (7th Cir. 1998)(quoting U.S.S.G. §4A1.2)(emphasis added).

"Determining whether conduct that has resulted in a prior sentence is part of the instant offense is a fact-specific inquiry." United States v. Berkey, 161 F.3d 1099 (7th Cir. 1998)(citing United States v. Hopson, 18 F.3d 465, 468 (7th Cir. 1994)).

To determine if conduct that resulted in a prior sentence is part of the instant offense, the "court can look beyond the elements of the two offenses, and they look at other factors such as temporal and geographic proximity, common victims, and a common criminal plan or intent of the two offenses." United States v. Berkey, 161 F.3d 1099 (7th Cir. 1998).

The district court is proscribed from increasing a defendant's sentence (criminal history) based on a conviction from a proceeding in which the defendant was unconstitutionally denied the right of assistance of counsel. United States v. Hach, 162 F.3d 937 (7th Cir. 1998)(citing United States v. Katalinich, 113 F.3d 1475, 1481 (7th Cir. 1997)).

The Court of Appeals starts with the presumption that the prior uncounseled conviction was in fact constitutional. United States v. Hach, 162 F.3d 937 (7th Cir. 1998).

The defendant has the burden of proving the prior conviction invalid. United States v. Hach, 162 F.3d 937 (7th Cir. 1998).

Downward Adjustments:

Acceptance of Responsibility (3C1.1):

The defendant has the burden of clearly demonstrating, by a preponderance of the evidence, that he merits a reduction for acceptance of responsibility. United States v. Ewing, 129 F.3d 430, 435 (7th Cir. 1997).

Under U.S.S.G. §3E1.1, acceptance of responsibility may be demonstrated even after a trial if the defendant goes to trial only to assert and preserve issues that do not relate to factual guilt. U.S. v. Szarwark, 2/18/99, Nos. 98-1968 and 98-2189, slip op. p. 6 (7th Cir.).

Review of district court's finding as to whether defendant qualifies for acceptance of responsibility (U.S.S.G. § 3E1.1): clear error. United States v. Townsend, 73 F.3d 747, 754 (7th Cir. 1996).

A defendant must prove by a preponderance of the evidence that he is entitled to the one level reduction in U.S.S.G. § 3E1.1(b)(2). United States v. Wilson, 134 F.3d 855 (7th Cir. 1998).

In the absence of evidence of sincere remorse or contrition for one's crimes, a guilty plea entered for the apparent purpose of obtaining a lighter sentence does not entitle a defendant to a reduction for acceptance of responsibility. United States v. Ewing, 129 F.3d 430, 436 (7th Cir. 1997) (quoting United States v. Purchess, 107 F.3d 1261, 1269 (7th Cir. 1997) (quoting United States v. Hammick, 36 F.3d 594, 600 (7th Cir. 1994)).

Review of district court's factual findings regarding acceptance of responsibility: clear error. United States v. Wilson, 134 F.3d 855 (7th Cir. 1998).

Review of whether court considered appropriate factors determining acceptance responsibility: *de novo*. United States v. Townsend, 73 F.3d 747, 754 (7th Cir. 1996).

Safety Valve (5C1.2):

Many controlled substance offenses carry mandatory minimum sentences. These sentences set the minimum sentence a judge can impose if the defendant meets certain criteria. The "safety valve" is a statutorily created exception to mandatory minimum sentences. If a defendant meets all of the requirements of the "safety valve," the mandatory minimum sentence is waived.

Review of determination that defendant is eligible for sentence below statutory minimum (U.S.S.G. § 5C1.2 -- "safety valve"): clear error. United States v. Thompson, 76 F.3d 166, 171 (7th Cir. 1996); United States v. Thompson, 106 F.3d 794, 800 (7th Cir. 1997).

"Safety valve" exception to statutory mandatory minimum sentences benefit only those defendants who have "made a good faith attempt to cooperate with the authorities." United States v. Ramunno, Jr., 133 F.3d 476 (7th Cir. 1998)(quoting United States v. Arrington, 73 F.3d 144, 148 (7th Cir. 1996)).

Under the safety valve provisions of 18 U.S.C. §3553(f)(5) and U.S.S.G. §5C1.2(5), “in order for a defendant who provides the government with untruthful pre-sentencing disclosures to satisfy the ‘not later than the time of the sentencing hearing’ requirement and thus avail himself the benefit of the safety valve, the defendant must meet the safety valve’s requirement of complete and truthful disclosure by the time of the commencement of the sentencing hearing." United States v. Marin, 144 F.3d 1085, 1091 (7th Cir. 1998).

Review of district court’s determination of defendant’s eligibility for the "safety valve" exception: clear error. United States v. Ramunno, Jr., 133 F.3d 476 (7th Cir. 1998)(quoting United States v. Arrington, 73 F.3d 144, 148 (7th Cir. 1996)).

Minimal or Minor Participant (§3B1.2):

A defendant is not eligible for the minimal or minor participant reduction just by being a courier or by serving as a go between rather than a principle. United States v. McClinton, 135 F.3d 1178, 1190 (7th Cir. 1998); United States v. Beltran, 109 F.3d 365, 370 (7th Cir.), cert. denied, 118 S.Ct. 145 (1997).

The defendant bears the burden of establishing "minor participant" (§3B1.2) status. United States v. Brown, 136 F.3d 1176, 1185 (7th Cir. 1998)(citing United States v. Soto, 48 F.3d 1415, 1423 (7th Cir. 1995)).

A defendant seeking to decrease his offense level as a "minor participant" (§3B1.2) must prove that he was substantially less culpable than other co-conspirators. United States v. Brown, 136 F.3d 1176, 1185 (7th Cir. 1998)(citing United States v. Navarro, 90 F.3d 1245, 1263 (7th Cir. 1996)).

Under the analysis for the "minor participant" status, the relevant "inquiry is whether the defendant was a minor participant in the crime for which he was convicted, not whether he was a minor participant in some broader conspiracy that may have surrounded it." United States v. Brown, 136 F.3d 1176, 1185-86 (7th Cir. 1998)(citing United States v. Burnett, 66 F.3d 137, 140 (7th Cir. 1995)).

The defendant has the burden of demonstrating his eligibility for reduction in his offense level by a preponderance of the evidence. United States v. McClinton, 135 F.3d 1178, 1190 (7th Cir. 1998).

Review of determination of whether a defendant played a mitigating role in an offense as a minimal or minor participant (U.S.S.G. § 3B1.2): clear error. United States v. James, 113 F.3d 721, 731 (7th Cir. 1997).

Review of refusal to adjust downward based on minor or minimal participant status: clearly erroneous. United States v. Jarrett, 133 F.3d 519 (7th Cir. 1998)(citing United States v. Bolin, 35 F.3d 306, 310 (7th Cir. 1994)).

Upward Adjustments:

Generally:

Conduct for which defendant actually has been acquitted may be used to enhance a sentence. United States v. Wicks, 132 F.3d 383, 390 (7th Cir. 1997)(citing United States v. Watts, 117 S.Ct. 633 (1997)).

Impermissible "double counting" is the imposition of two or more upward adjustments when both are premised on the same conduct. United States v. Haines, 32 F.3d 290, 293 (7th Cir. 1994).

Concerning a court applying two upward adjustments, even if the factual basis for each adjustment overlaps, a district court's decision to apply both will be affirmed as long as the court finds a sufficient independent factual basis for both adjustments. United States v. Minneman, 143 F.3d 274, 283 (7th Cir. 1998).

By Offense:

In prosecution for mailing threatening communications in violation of 18 U.S.C. §876, pursuant to U.S.S.G. §2A6.1(b)(1), (enhancement for offenses involving any conduct evidencing an intent to carry out that threat) the sentencing court shall consider conduct that occurred prior to the offense so long as it is substantially and directly connected to the offense, under the facts of the case taken as a whole. United States v. Thomas, 155 F.3d 833, 837 (7th Cir. 1998).

Under U.S.S.G. §2A6.1(b)(1)(intent to carry out threat), enhancement is proper for all prior conduct that was aimed at the recipient of the threats. United States v. Thomas, 155 F.3d 833, 838 (7th Cir. 1998).

The district court erred in enhancing under U.S.S.G. §2A6.1 where the district court enhanced the offense level due to an armed robbery which was unconnected to the recipient of the threats. United States v. Thomas, 155 F.3d 833, 838 (7th Cir. 1998).

The enhancement under U.S.S.G. §2B1.1(b)(1)(possession of a gun) in a conspiracy case is appropriate when the government can prove by a preponderance of the evidence that the defendant possessed a firearm during the course of the conspiracy. United States v. Berkey, 161 F.3d 1099 (7th Cir. 1998).

For the enhancement under §2B1.1(b)(1)(possession of a gun) in a conspiracy, once the government proves that the defendant possessed the firearm during the course of the conspiracy, the burden shifts to the defendant to show that it was clearly improbable that the weapon was used in connection with the offense. United States v. Berkey, 161 F.3d 1099 (7th Cir. 1998).

To prove possession of a weapon for purposes of §2B1.1(b)(1), the government need only show that the defendant possessed the firearm during the offense that lead to the conviction, or during relevant conduct (§1B1.3): the government need not show the defendant used the firearm during the commission of a drug sale. United States v. Berkey, 161 F.3d 1099 (7th Cir. 1998)(citing United States v. Cain, 155 F.3d 840, 843 (7th Cir. 1998)).

Under §2B3.1(b)(2)(F), enhancement for a "threat of death" is appropriate for a menacing gesture alone so long as it could put a reasonable person in fear of death and there was no unusual or mitigating circumstances that would have deprived the gesture of its ordinary and intended meaning. U.S. v. Raszkiewicz, 2/18/99, No. 98-1525, slip op. p. 16.

Under U.S.S.G. 2B3.1(b)(2)(F), the statement "I have a gun" constitutes a "threat of death." United States v. Gibson, 155 F.3d 844, 845 (7th Cir. 1998).

Under U.S.S.G. §2B3.1(b)(2)(F), express threat of death, the statement "I have a gun" in the context of a bank robbery without any threatening gesture still constitutes an "express threat of death." United States v. Carbaugh, 141 F.3d 791, 795 (7th Cir. 1998).

Review of application of "gun possession" enhancement under U.S.S.G. § 2D1.1(b): clear error. United States v. Green, 111 F.3d 515, 524 (7th Cir.), cert. denied, 118 S.Ct. 427 (1997); United States v. Wetwattana, 94 F.3d 280, 283 (7th Cir. 1996).

Under U.S.S.G. §2D1.1(b)(1), for certain offenses involving drugs, an increase in the base offense level should be applied if a weapon was present, unless it is clearly improbable that the weapon is connected with the offense. United States v. Cain, 155 F.3d 840, 843 (7th Cir. 1998).

For the enhancement for possession of a weapon under U.S.S.G.§ 2D1.1(b)(1), the guidelines do not require actual possession; the enhancement applies also for constructive possession. United States v. Adams, 125 F.3d 586, 597 (7th Cir. 1997).

An upward departure is appropriate for brandishing and threatening the use of a firearm in a drug transaction where such conduct falls outside the heartland of U.S.S.G. §2D1.1(b)(1), the mere possession of a dangerous weapon. United States v. Raimondi, 159 F.3d 1095, 1106 (7th Cir. 1998).

On the question of whether it is "clearly improbable" that a gun was connected to a drug business, the defendant bears the burden of persuasion, and the district court's finding is one of fact that the Court of Appeals reviews for clear error. United States v. Burns, 128 F.3d 553, 556 (7th Cir. 1997).

Review of determination that defendants "otherwise used" a dangerous weapon (U.S.S.G. § 2B3.1(b): clear error. United States v. Taylor, 135 F.3d 478, 481 (7th Cir. 1998).

Review of application of enhancement pursuant to U.S.S.G.§ 2F1.1(b)(3)(B) for violation of judicial process: clear error. United States v. Webster, 125 F.3d 1024, 1036 (7th Cir. 1997), cert. denied, 118 S.Ct. 698 (1998).

More Than Minimal Planning (§2F1.1(b)(2)):

Review of application of "more than minimal planning" (U.S.S.G. § 2F1.1(b)(2)): clear error. United States v. Boatner, 99 F.3d 831, 837 (7th Cir. 1996).

Under U.S.S.G. §2F1.1(b)(2)(A), more than minimal planning can be shown in one of three ways: (1) more planning than is typical for commission of the

offense in a simple form; (2) significant affirmative steps taken to conceal the offense; or (3) repeated acts over a period of time, unless it is clear that each instance was purely opportunistic. U.S. v. DeAngelo, No. 98-2952, slip op. p. 3 (7th Cir. 2/8/99).

Substantially Jeopardizing the Soundness of a Financial Institution(§2F1.1(b)(6)):

Under §2F1.1(b)(6), an increase in offense level for substantially jeopardizing the safety and soundness of a financial institution does not require actual insolvency. U.S. v. Brierton, 165 F.3d 1133 (7th Cir. 1998).

Sophisticated Means (§2T1.1(b)(2)):

Under U.S.S.G. §2T1.1(b)(2), an enhancement for use of sophisticated means in a tax fraud case, a scheme may constitute a sophisticated means of tax fraud even if that was not its primary purpose. United States v. Mankarious, 151 F.3d 694, 710-711 (7th Cir. 1998).

Chapter 3:

Vulnerable Victim (§ 3A1.1):

Review of application of "vulnerable victim" enhancement under U.S.S.G. § 3A1.1: clear error. United States v. Billingsley, 115 F.3d 458, 462 (7th Cir. 1997).

The district court must make two findings to warrant the vulnerable victim upward adjustment (§3A1.1): (1) the victim is unusually vulnerable to the defendant's crime; and (2) the defendant targeted the victim because of that vulnerability. United States v. Almaguer, 146 F.3d 474, 478 (7th Cir. 1998).

Obstruction of Justice (3C1.1):

Review of finding of obstructive conduct for purposes of obstruction of justice enhancement (U.S.S.G. § 3C1.1): clear error. United States v. Friend, 104 F.3d 127, 130 (7th Cir. 1997); United States v. Draves, 103 F.3d 1328, 1337 (7th Cir.), cert. denied, 117 S.Ct. 2528 (1997)(citing United States v. Robinzine, 80 F.3d 246 (7th Cir. 1996)).

"A district court must make an independent finding of perjury when a defendant objects to a sentence enhancement based on an obstruction of

justice via perjury." United States v. Emerson, 128 F.3d 557, 563 (7th Cir. 1997).

Review of interpretations of the obstruction of justice enhancement's guidelines: *de novo*. United States v. Draves, 103 F.3d 1328, 1337 (7th Cir.), cert. denied, 117 S.Ct. 2528 (1997)(citing United States v. Jones, 983 F.2d 1425, 1429 (7th Cir. 1993)).

Under U.S.S.G. §3C1.1, enhancement for willful obstruction of justice, an enhancement is proper for a defendant's flight from arrest where that flight was not a spontaneous flight but rather calculated and deliberately planned to evade the authorities when indictment was imminent. United States v. Porter, 145 F.3d 897, 904 (7th Cir. 1998).

Under U.S.S.G.§3C1.1, enhancement for obstruction of justice based on perjury is proper where the false testimony was willful and made with the intent to interfere with the proceeding and affect the outcome. U.S. v. Miller, 159 F.3d 1106, 1112 (7th Cir. 1998).

The test for the application of the obstruction of justice enhancement: the sentencing court must find that the defendant gave false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory. United States v. Senn, 129 F.3d 886 (7th Cir. 1997).

A matter is material if it is crucial to the question of guilt. United States v. Senn, 129 F.3d 886 (7th Cir. 1997)(citing United States v. Mustread, 42 F.3d 1097, 1106 (7th Cir. 1994)).

For the obstruction of justice enhancement, the prosecution bears the burden to prove by a preponderance of the evidence that the enhancement is warranted. United States v. Ewing, 129 F.3d 430, 434 (7th Cir. 1997).

The defendant has the burden of clearly demonstrating, by a preponderance of the evidence, that he merits a reduction for acceptance of responsibility. United States v. Ewing, 129 F.3d 430, 435 (7th Cir. 1997).

When a sentencing court properly enhances a defendant's offense level for obstruction of justice, the defendant is "presumed not to have accepted responsibility." United States v. Ewing, 129 F.3d 430, 435 (7th Cir. 1997) (quoting United States v. Larsen, 909 F.2d 1047, 1050 (7th Cir. 1990).

There may be extraordinary cases in which adjustments under both obstruction of justice and acceptance of responsibility may apply. United States v. Ewing, 129 F.3d 430, 435 (7th Cir. 1997).

"A defendant obstructs justice [3C1.1] not only when he makes it more difficult for the government to apprehend or (once he is apprehended) convict him, but also when he makes it more difficult for the court to give him the sentence that is his just dessert." United States v. Sapoznik, 161 F.3d 1117 (7th Cir. 1998)(brackets added).

To show that a district court's determination that the defendant's sentence should be enhanced under §3C1.1 for obstruction of justice, the defendant must show the Court of Appeals that the district court's factual findings were incorrect - merely showing that they might be erroneous is insufficient. United States v Hach, 162 F.3d 937 (7th Cir. 1998).

To enhance a defendant's sentence for obstruction of justice [3C1.1] for perjury, "the district court must make 'independent findings' of perjury and identify specific false testimony to support an enhancement." United States v. Hach, 162 F.3d 937 (7th Cir. 1998)(quoting United States v. Dunnigan, 507 U.S. 87, 95-96 (1993)).

The requirement that the sentencing court must construe testimony in a light most favorable to the defendant for purposes of the §3C1.1 enhancement for obstruction of justice means that when the judge "after weighing the evidence, has no firm conviction" the benefit of the doubt goes to the defendant. United States v. Hach, 162 F.3d 937 (7th Cir. 1998)(quoting United States v. Vaquero, 997 F.2d 78, 85 (5th Cir. 1993)).

Review of whether the defendant willfully committed perjury: clear error. United States v. Agostino, 132 F.3d 1183, 1198 (7th Cir. 1997).

Other:

Uncharged conduct may be used effectively to enhance a sentence through the guideline's relevant conduct rules. United States v. Wicks, 132 F.3d 383, 390 (7th Cir. 1997)(citing Witte v. United States, 515 U.S. 389 (1995)).

Review of finding that sentencing enhancement warranted by defendant's aggravated role in offense: clear error. United States v. Lewis, 79 F.3d 688, 690 (7th Cir. 1996).

The question of whether the captain/navigator enhancement requires special skill involves an interpretation of terms used by the guidelines, subject to *de novo* review. United States v. Senn, 129 F.3d 886 (7th Cir. 1997).

Review of determination that upward adjustment for reckless endangerment applies: deferential. United States v. Velasquez, 67 F.3d 650, 654 (7th Cir. 1995).

Review of enhancement for abuse of position of trust (U.S.S.G. § 3B1.3): *de novo*. United States v. Sinclair, 74 F.3d 753, 762 (7th Cir. 1996); United States v. Bhagavan, 116 F.3d 189 (7th Cir. 1997).

To determine whether to apply the abuse of trust enhancement, a court must determine "(1) whether the defendant occupied a position of trust; and (2) whether his abuse of the position of trust significantly facilitated the crime." United States v. Emerson, 128 F.3d 557, 562 (7th Cir. 1997) (quoting United States v. Brown, 47 F.3d 198, 205 (7th Cir. 1995)).

Review of district court's finding concerning whether a particular defendant occupies a position of trust (U.S.S.G. § 3B1.3): clearly erroneous. United States v. Bhagavan, 116 F.3d 189, 192 (7th Cir. 1997).

Review of district court's interpretation of the meaning of "position of trust" (U.S.S.G. § 3B1.3): *de novo*. United States v. Bhagavan, 116 F.3d 189, 192 (7th Cir. 1997).

The upward adjustment under §3B1.4 for "more than five" additional counts of conviction encompasses the sixth charged offense. United States v. Szabo, 147 F.3d 559, 561 (7th Cir. 1998).

Review of finding that a defendant is an organizer/leader: clearly erroneous. See United States v. Porretta, 116 F.3d 296, 299 (7th Cir. 1997); United States v. Austin, 103 F.3d 606 (7th Cir. 1997).

Review of trial court's compliance with the requirement that it state its reasons to increase a base offense level because the defendant was an organizer, leader, manager, or supervisor: *de novo*. United States v. Taylor, 135 F.3d 478, 481 (7th Cir. 1998).

Review of district court's finding underlying an enhancement for a defendant's aggravating role as an organizer or leader (U.S.S.G. §3B1.1): clear error. United States v. McClinton, 135 F.3d 1178, 1191 (7th Cir. 1998).

> In determining whether a defendant is an organizer or leader, courts have considered a defendant's exercise of decision-making authority, the nature of his participation in committing the crime, his recruitment of accomplices, his claimed right to a larger share of the criminal proceeds, his exercise of control and authority over others, and the nature and scope of the illegal activity. United States v. McClinton, 135 F.3d 1178, 1191 (7th Cir. 1998).

In prosecution for mail fraud prior to the November 1, 1995 amendment to U.S.S.G. §3B1.4 providing a two level increase if a defendant used or attempted to use a minor in avoiding detection of or apprehension for an offense, upward departure was proper for the use of the minor in committing a mail fraud offense. United States v. Porter, 145 F.3d 897, 904 (7th Cir. 1998).

Statutory Enhancement under 21 U.S.C. §§ 841 and 851.

Absent finding that defendant had timely notice of possibility of enhanced sentence, district court lacked jurisdiction, under §§ 841 and 851 to impose enhanced sentence and error was not harmless. Kelly v. United States, 29 F.3d 1107, 1110 (7th Cir. 1994).

Career offender (U.S.S.G. §§ 4B1.1, 4B1.2):

Appellate court "review[s] the interpretation of § 4B1.1 *de novo*, and the factual findings for clear error."

Felon in possession of a firearm offenses are not "crime of violence' under career offender provisions (U.S.S.G. §§ 4B1.1, 4B1.2). United States v. Linnear, 40 F.3d 215, 223 n. 7 (7th Cir. 1994).

Under U.S.S.G. §4B1.2(1)(ii), defining a crime of violence, there is no per se rule that commercial burglaries are crimes of violence and always present a risk of physical injury. Rather, the court looks to see whether the defendant's conduct in a commercial burglary created a substantial risk of physical confrontation and resultant physical injury. United States v. Nelson, 143 F.3d 373, 374-75 (7th Cir. 1998).

Armed Career Criminal Act (18 U.S.C. §924(c)):

Review of determination of conduct that otherwise presents serious potential risk of physical injury to another: *de novo*. United States v. Fife, 81 F.3d 62, 63 (7th Cir. 1996).

> In determining whether a particular crime is a violent felony, a sentencing court's inquiry is limited to the elements of the crime involved; the court is not free to look at the underlying facts of a particular case to see if conduct was, in fact, violent. United States v. Fife, 81 F.3d 62, 63 (7th Cir. 1996)(citing Taylor v. United States, 495 U.S. 575 (1990)).
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> In "determining whether an offense falls under the 'otherwise' clause, the benchmark should be the possibility of violent confrontation, not whether one can postulate a non-confrontational hypothetical scenario." United States v. Fife, 81 F.3d 62, 63 (7th Cir. 1996)(quoting United States v. Davis, 16 F.3d 212, 217 (7th Cir.), cert. denied, 513 U.S. 945 (1994)).

Under 18 U.S.C.§924(e)(2)(B)(ii), defining "violent felony" for purposes of sentencing as an armed career criminal, attempted burglary under Wisconsin law is a violent felony. United States v. Collins, 150 F.3d 668, 670-71 (7th Cir. 1998).

In determining whether an offense "otherwise includes conduct that presents a serious potential risk of physical injury to another," (§924(e)(2)(B)(ii)), the benchmark is whether the possibility of violent confrontation existed, not whether one can postulate a non-confrontational hypothetical scenario. United States v. Collins, 150 F.3d 668, 670 (7th Cir. 1998).

Review of determinations of qualifying prior convictions: *de novo*. United States v. Williams, 68 F.3d 168, 169 (7th Cir. 1995).

Where, after a defendant completes his sentence for a state conviction and is thereafter issued a certificate which does not expressly provide that he may not ship, transport, possess, or receive firearms and also states that his civil rights have been restored, such a conviction does not count as a "previous conviction for a violent felony" for purposes of §924(e)(1) (armed career criminal). Dahler v. United States, 143 F.3d 1084, 1088 (7th Cir. 1998).

Failure to restore the rights to vote, hold public office, or serve on a jury precludes a finding of sufficient restoration of rights (18 U.S.C. §924(a)(20)). United States v. Williams, 128 F.3d 1128 (7th Cir. 1997).

For purposes of the Armed Career Criminal Act (18 U.S.C. §924(e)), a felony conviction has been expunged or set aside if the state documents to the felon that all of his civil rights have been restored or, if no documentation has been sent, whether the particular civil right to carry guns has been restored by law. United States v. Walden, 146 F.3d 487, 49192 (7th Cir. 1998).

A statute generally restoring the civil rights of all prisoners when they complete their sentences is insufficient for purposes of § 921(a)(2) if the state continues to withhold some rights from felons. United States v. Williams, 128 F.3d 1128 (7th Cir. 1997).

Illinois statute that punishes a man who has consensual sexual intercourse with a woman who is under the age of 17 and more than five years younger than he (70 ILCS 5/12-16D) is not a violent felony as defined in 18 U.S.C. §924(e)(2)(B)(ii) for purposes of being sentenced as an armed career criminal. United States v. Thomas, 159 F.3d 296, 298 (7th Cir. 1998).

Three Strikes Law (18 U.S.C. §3559(c)):

Review of interpretation of the statutory definition of "serious violent felony" (18 U.S.C. §3559(c)): *de novo*. United States v. Wicks, 132 F.3d 383, 386 (7th Cir. 1997).

Review of constitutionality of three strikes law: *de novo*. United States v. Wicks, 132 F.3d 383, 386 (7th Cir. 1997); See United States v. Turner, 93 F.3d 276, 286 (7th Cir.), cert. denied, 117 S.Ct. 596 (1996) (constitutional arguments); United States v. Fife, 81 F.3d 62, 63 (7th Cir. 1996) (statutory interpretation).

Murders, manslaughters (other than those fitting within the definition of involuntary manslaughter provided in 18 U.S.C. §1112(a)), and robberies (as exemplified by 18 U.S.C. §§2111, 2113 and 2118), no matter what the name and no matter where they occur, count as prior "strikes." United States v. Wicks, 132 F.3d 383, 386 (7th Cir. 1997).

Downward Departures:

Generally:

The Court of Appeals has no jurisdiction to review a district court's discretionary refusal to depart downward unless the sentence was imposed in violation of the law or the result of an incorrect application of the Guidelines. United States v. Yoon, 128 F.3d 515, 529 (7th Cir. 1997) (citing United States v. Winters, 117 F.3d 346, 348 (7th Cir. 1997), cert. denied, 118 S.Ct. 727 (1998)). There now appears to be a "unitary abuse-of-discretion standard."

"The appellate court should not review the departure decision *de novo,* but instead should ask whether the district court abused its discretion." Koon v. United States, 518 U.S. 81 (1996)

"[W]hether a factor is a permissible factor for departure under any circumstances is a question of law, and the court of appeals need not defer to the district court's resolution of the point. Little turns, however, on whether we label review of this particular question abuse of discretion or *de novo,* for . . . [a] district court by definition abuses its discretion when it makes an error of law." Koon v. United States, 518 U.S. 81 (1996).

The "heartland" of a particular offense guideline is restricted to cases involving conduct in violation of those statutes *explicitly* referenced either in the commentary following the particular guideline or in the statutory index. U.S. v. Leahy, No. 98-1176, slip op. p. 15 (7th Cir. 2/17/99).

Tests appellate court uses to review district court's departure from applicable sentencing guideline range: (1) *de novo* review of whether district court's stated grounds for departure may be relied upon to justify departure, (2) review for clear error of whether the facts that support the grounds for departure actually exist in a case, and (3) deferential review of whether the degree of the departure is appropriate. United States v. Akindele, 84 F.3d 948, 953 (7th Cir. 1996).

The Court of Appeals lacks jurisdiction to review the extent of the district court's downward departure. United States v. Prevatte, 66 F.3d 840, 845 (7th Cir. 1995).

District court's denial of downward departure based on mistaken belief that court lacked authority to depart is an error of law over which the Court of Appeals has appellate jurisdiction. United States v. Prevatte, 66 F.3d 840, 843 (7th Cir. 1995).

The Court of Appeals has no jurisdiction to review a refusal to downward departure unless the refusal resulted from the sentencing court's erroneous belief that is lacks the statutory authority to depart. United States v. Jarrett, 133 F.3d 519 (7th Cir. 1998); United States v. Saunders, 129 F.3d 925, 933 (7th Cir. 1997).

Review of the district court's evaluation of whether a particular set of facts takes the case outside the heartland: abuse of discretion. United States v. Santoyo, 146 F.3d 519, 525 (7th Cir. 1998).

Particular Downward Departures:

Substantial Assistance:

Under §5K1.1, absent a government motion for a downward departure, the sentencing court is without power to grant a downward departure. United States v. Santoyo, 146 F.3d 519, 523 (7th Cir. 1998).

Under §5K1.1, the government's refusal to file a substantial - assistance motion for downward departure is reviewable only for unconstitutional motive. United States v. Santoyo, 146 F.3d 519, 523 (7th Cir. 1998).

The Supreme Court has commented in dicta that defendants are entitled to attack a prosecutor's refusal to make a §5K1.1 departure motion as irrational or withheld in bad faith. United States v. Santoyo, 146 F.3d 519, 523, n.3 (7th Cir. 1998)(citing Wade v. United States, 504 U.S. 181, 186 (1992)).

The Seventh Circuit has previously held that "arbitrariness" is not a proper basis for a constitutional challenge to a prosecutor's refusal to file a departure motion. United States v. Santoyo, 146 F.3d 519, 523, n.3 (7th Cir. 1998)(citing United States v. Kelly, 14 F.3d 1169, 1177 (7th Cir. 1994) and United States v. Smith, 953 F.2d 1060, 1065-66 (7th Cir. 1992)).

In drafting §5K1.1, the Sentencing Commission did not exceed its statutorily granted authority in establishing the requirement that the government make the motion for downward departure under §5K1.1 and, therefore, did not

violate the separations of powers doctrine. United States v. Santoyo, 146 F.3d 519, 524 (7th Cir. 1998)(citing 28 U.S.C. §994)).

The Seventh Circuit does not foreclose the possibility that a defendant may be entitled to a downward departure based on grounds of substantial assistance under §5K2.0 in a case where the government fails to make a motion for downward departure under §5K1.1; however, in order to prevail on this §5K2.0 claim, the defendant would have to prove that he offered assistance that was so unusual in type of degree as to take it out of the heartland of the §5K1.1 cases contemplated by the Sentencing Commission. United States v. Santoyo, 146 F.3d 519, 525, n. 5 (7th Cir. 1998).

Extraordinary Family Circumstances:

Upholding a departure of 48 months based on a downward departure for extraordinary family circumstances. United States v. Owens, 145 F.3d 923, 926, (7th Cir. 1998)

Extraordinary Post Offense Rehabilitation:

Case remanded for resentencing acknowledging that extraordinary post offense rehabilitation may provide basis for downward departure. United States v. Jaroszenko, 92 F.3d 486 (7th Cir. 1996).

Sentencing Disparity:

There are two kinds of disparities in sentencing co-conspirators. United States v. Meza, 127 F.3d 545, 549 (7th Cir. 1996).

A disparity is justified if it results from the proper application of the guidelines. United States v. Meza, 127 F.3d 545, 549 (7th Cir. 1996).

A disparity is unjustified if it does not result from the proper application of the guidelines. United States v. Meza, 127 F.3d 545, 549 (7th Cir. 1996).

"An unjustified disparity, however, is potentially a sentencing factor to consider because '[t]he goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities.'" United States v. Meza, 127 F.3d 545, 550 (7th Cir. 1996)(quoting Koon v. United States, 518 U.S. 81 (1996)).

Disparity between federal sentence and state sentence for same conduct cannot remove a case from the heartland and provide a basis for a downward departure of a federal sentence. United States v. Schulte, 144 F.3d 1107, 1111 (7th Cir. 1998).

Others:

While vulnerability to abuse is an accepted basis for departing from the recommended sentencing range, to qualify for a downward departure, a defendant's vulnerability must be so extreme as to substantially affect the severity of confinement such as where only solitary confinement can protect the defendant from abuse. United States v. Wilke, 156 F.3d 749, 753 (7th Cir. 1998).

Mere membership in a particular class of offenders that may be susceptible to abuse in prison does not merit a departure for vulnerability to abuse in prison. United States v. Wilke, 156 F.3d 749, 753 (7th Cir. 1998).

In setting the base offense level for fraud, whether the total intended loss bore any relation to economic reality because the plan had no chance of success is irrelevant. Rather, economic reality is taken into account in a district court's downward departure decision. United States v. Stockheimer, 157 F.3d 1082, 1089 (7th Cir. 1998).

Application note 7B to U.S.S.G. §2F1.1, which provides "where the loss determined above significantly understates or overstates the seriousness of the defendant's conduct in upward or downward departure may be warranted" may be considered by a district judge in departing from the offense level as determined by U.S.S.G. §2F1.1(b)1 (fraud and deceit). United States v. Krilich, 159 F.3d 1020, 1029-1030 (7th Cir. 1998).

Upward Departures:

Upward departures are always worthy of scrutiny in preparing an appeal. When an upward departure is based on the number of units under the grouping provisions of U.S.S.G. § 3D1.4, the difference between the way the Sixth and Seventh Circuits currently look at such departures is worth examining. If the client would have a lesser guideline range under the mathematical approach taken by the Sixth Circuit, an argument could be made regarding how § 3D1.4 should be interpreted.

Notice to the defendant of a contemplated departure and of the specific grounds being considered is required. U.S. v. Raimondi, 159 F.3d 1095, 1104 (7th cir. 1998).

Where the Sentencing Commission must have taken conduct into account in formulating the guideline, such conduct may be the basis of an upward departure only where it is present to a degree substantially in excess of that which ordinarily is involved in the offense. United States v. Almaguer, 146 F.3d 474, 477 (7th Cir. 1998).

It is an abuse of discretion when a district court fails to make an initial finding that a basis for upward departure is so unusual either in kind or degree that it takes the case out of the heartland. United States v. Almaguer, 146 F.3d 474, 477 (7th Cir. 1998).

Grouping of multiple counts under U.S.S.G. § 3D1.4: choice of devisor of number of uncounted crimes above 5-unit top is exercise of judgment the Court of Appeals will not serve unless exceeds bounds of reason. United States v. DiDomenico, 78 F.3d 294, 305 (7th Cir.), cert. denied, 117 S.Ct. 507 (1996); cf. United States v. Valentine, 100 F.3d 1209 (6th Cir. 1996)(discussing a mathematical approach to determining the relationship between additional units and levels of upward departure). However, the Seventh Circuit has indicated that an upward departure for a sixth unit would be double-counting. See United States v. Dawson, 1 F.3d 457. 462 (7th Cir. 1993), cert. denied, 513 U.S. 1176 (1995). "Unconvicted, unstipulated crimes may not be used for a departure based on [§ 3D1.4.]" DiDomenico, 78 F.3d at 305.

According to U.S.S.G. §3D1.2, multiple counts are to be grouped when they involve substantially the same harm, that is, one of the counts is treated as a specific offense characteristic or other adjustment to the guideline applicable to another of the counts. U.S. v. Salgado-Ocampo, 159 F.3d 322, 327 (7th cir. 1998).

Under U.S.S.G.§3D1.2, illegal re-entry into the U.S. after a previous deportation (8 U.S.C. §1326) and being an illegal alien in possession of firearms (18 U.S.C. §922(g)(5)) should not be grouped because the offenses share no common characteristics. U.S. v. Salgado-Ocampo, 159 F.3d 322, 328 (7th cir. 1998).

A presentence report listing specific factors that may warrant an upward departure provides adequate notice to defendant that the court may depart upward from his guideline range. United States v. Ewing, 129 F.3d 430, 436-437 (7th Cir. 1997).

Upward departures are appropriate where the defendant has accumulated criminal history points that far exceed the number required to place him in the highest criminal history category. United States v. Ewing, 129 F.3d 430, 437 (7th Cir. 1997) (see United States v. McKinley, 84 F.3d 904, 911 (7th Cir. 1996) (40 points); United States v. Glas, 957 F.2d 497 (7th Cir. 1992) (39 points); United States v. Lewis, 954 F.2d 1386, 1397 (7th Cir. 1992) (22 criminal history points)).

In a murder for hire case where the defendant entered into two separate contracts to kill a single victim, upward departure was proper where the second, independent and overlapping contract for the murder of the single victim removed the defendant's case from the heartland of cases considered in U.S.S.G. §3D1.2(b). United States v. Scott, 145 F.3d 878, 887 (7th Cir. 1998).

Under U.S.S.G. §4A1.3, upward departure is proper where the defendant's criminal history score does not adequately reflect the seriousness of his past criminal conduct. U.S. v. DeAngelo, 2/8/99, No. 98-2952, slip op. p. 5 (7th Cir.).

Where a defendant has 25 criminal history points, it is not an abuse of discretion for the district court to add one offense level for every three points that exceed 15 criminal history points. United States v. Ewing, 129 F.3d 430, 437 (7th Cir. 1997).

Under §4A1.3, a sentencing judge may depart upward based on criminal history if either the criminal history category fails to "adequately reflect the seriousness of the defendant's past criminal conduct" or if the defendant's criminal history category does not adequately reflect "the likelihood that the defendant will commit other crimes." United States v. Melgar-Galvez, 161 F.3d 1122 (7th Cir. 1998)(quoting U.S.S.G. §4A1.3).

Under §4A1.3, "upward departures may be founded solely upon an excessive number of criminal history points." United States v. Melgar-Galvez, 161 F.3d 1122 (7th Cir. 1998)(quoting U.S.S.G. §4A1.3).

Under §4A1.3, eighteen criminal history points provides an adequate foundation for a one point upward departure. United States v. Melgar-Galvez, 161 F.3d 1122 (7th Cir. 1998)(quoting U.S.S.G. §4A1.3).

District court's finding of a likelihood that the defendant will commit more criminal offenses in the future also provides a basis for an upward departure under §4A1.3. United States v. Melgar-Galvez, 161 F.3d 1122 (7th Cir. 1998)(quoting U.S.S.G. §4A1.3).

Restitution:

Generally:

The "difference between having to pay no restitution at all and paying it on a periodic schedule is significant enough to constitute an 'increase" in punishment." United States v. Newman, 144 F.3d 531, 537, n. 5 (7th Cir. 1998).

Restitution does not qualify as criminal punishment. United States v. Newman, 144 F.3d 531, 538 (7th Cir. 1998).

If the legislature only designates a penalty as civil or if the label is ambiguous, courts look deeper to see whether the statutory scheme was so punitive either in purpose or effect as to transfer what was clearly intended as a civil remedy into a criminal penalty. United States v. Newman, 144 F.3d 531, 540 (7th Cir. 1998)(quoting Hudson v. United States, 118 S.Ct. 488, 493 (1997)).

Courts "determine the character of a sanction by first examining 'whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.'" United States v. Newman, 144 F.3d 531, 540 (7th Cir. 1998)(quoting Hudson v. United States, 118 S.Ct. 488, 493 (1997)(quoting United States v. Ward, 448 U.S. 242, 248 (1980)).

To determine whether a penalty is civil or criminal, the following factors are useful guideposts: "(1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment -- retribution and deterrents; (5) whether the behavior to which it applies is already a crime; (6)

whether an alternative purpose to which it may be rationally connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned." United States v. Newman, 144 F.3d 531, 540 (7th Cir. 1998)(quoting Hudson v. United States, 118 S.Ct. 488, 493 (1997)(quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)).

In an employer/employee bribery case, where employer is victim, the amount of restitution is the "difference in the value of the services that [the employee] rendered [the employer] and the value of the services that an honest [employee] would have rendered." United States v. Sapoznik, 161 F.3d 1117 (7th Cir. 1998)(brackets added).

To prove the amount of restitution, the government has the burden of proof. United States v. Sapoznik, 161 F.3d 1117 (7th Cir. 1998)(citing 18 U.S.C. §3664(e); United States v. Menza, 137 F.3d 533, 537 (7th Cir. 1998)).

Victim and Witness Protection Act:

Under the VWPA an order of restitution cannot stand if the district court ordered restitution either (1) without considering the defendant's ability to pay, or (2) in an amount so high that as a practical matter, the defendant had no hope of satisfying the restitution order. United States v. Newman, 144 F.3d 531, 537, n. 5 (7th Cir. 1998)(citing United States v. Jaroszenko, 92 F.3d 486, 491 (7th Cir. 1996) and United States v. Wilson, 98 F.3d 281, 284 (7th Cir. 1996)).

Determination of ability to pay restitution under VWPA: abuse of discretion. United States v. Jaroszenko, 92 F.3d 486, 492 (7th Cir. 1996).

"Immediate payment" does not mean immediate payment in full; rather it means payment to the extent that the defendant can make it in good faith, beginning immediately. United States v. Burke, 125 F.3d 401, 407 (7th Cir. 1997) (citing United States v. Jaroszenko, 92 F.3d 486, 492 (7th Cir. 1997)).

Government entities are victims within the meaning of the Victim and Witness Protection Act. United States v. Martin, 128 F.3d 1188, 1192 (7th Cir. 1997).

The Court of Appeals will vacate an order of restitution under VWPA if the defendant shows that the district court abused its discretion in determining the

defendant's ability to pay or the amount of restitution. United States v. Martin, 128 F.3d 1188, 1192 (7th Cir. 1997); See United States v. Viemont, 91 F.3d 946, 949 (7th Cir. 1996).

The Court of Appeals will find an abuse of discretion only if it is probable that the district court failed to consider crucial factors relevant to a defendant's ability to make restitution (VWPA). United States v. Martin, 128 F.3d 1188, 1192 (7th Cir. 1997).

In determining whether restitution is appropriate in a particular case under VWPA, a district court need not make explicit findings on each requisite factor in the record, although the Court of Appeals has always encouraged comprehensive explanations of sentencing decisions. United States v. Martin, 128 F.3d 1188, 1192-1193 (7th Cir. 1997).

However, under VWPA it is enough that the record shows that the district court had at its disposal sufficient information about the defendant's financial needs. United States v. Martin, 128 F.3d 1188, 1193 (7th Cir. 1997).

"The VWPA permits the district court to order restitution, in its discretion, to any victim of the defendant's criminal conduct directly related to the offense of conviction." United States v. Menza, 137 F.3d 533, 537 (7th Cir. 1998).

The government has the burden under the VWPA of presenting a victim's claim for restitution to the district court and to support that claim by a preponderance of the evidence. United States v. Menza, 137 F.3d 533, 537 (7th Cir. 1998)(citing 18 U.S.C. §3664(e) and referring to United States v. Viemont, 91 F.3d 946, 951 (7th Cir. 1996)).

Investigatory costs incurred by the government do not constitute a loss to be recovered in the form of restitution within the scope of the VWPA. United States v. Menza, 137 F.3d 533, 5397 (7th Cir. 1998).

Under the VWPA, the district court must consider the defendant's ability to pay and not whether he can pay. United States v. Menza, 137 F.3d 533, 540 (7th Cir. 1998)(citing United States v. Viemont, 91 F.3d 946, 951 (7th Cir. 1996)).

"The VWPA requires the district judge 'to balance the victim's interest in compensation against the financial resources and circumstances of the defendant -- all while remaining faithful to the usual rehabilitative, deterrent,

retributive, and restrictive goals of criminal sentencing.'" United States v. Menza, 137 F.3d 533, 540 (7th Cir. 1998)(quoting United States v. Lampien, 89 F.3d 1316, 1323 (7th Cir. 1996)(citing United States v. Mahoney, 859 F.2d 47, 49 (7th Cir. 1988)).

Mandatory Victims Restitution Act:

Under the Mandatory Victim Restitution Act (effective April 24, 1996), courts are no longer permitted to consider a defendant's financial circumstances when determining the amount of restitution to be paid. U.S. v. Szarwark, No. 98-1968, slip op. p. 7-8 (7th Cir. 2/18/99).

The Mandatory Victim Restitution Act does not increase punishment for criminal conduct and therefore is not an invalid ex post facto law. U.S. v. Szarwark, No. 98-1968, slip op. p. 9 (7th Cir. 2/18/99).

Fines:

Determining the imposition of a fine, the Court of Appeals reviews the district court's factual determinations for clear error, but reviews its interpretations in the sentencing guidelines *de novo*. United States v. Petty, 132 F.3d 373, 382 (7th Cir. 1997).

"The Sentencing Guidelines require that a district court impose a fine unless the defendant establishes that he is currently unable to pay and is not likely to become able to obtain the means to pay." United States v. Hach, 162 F.3d 937 (7th Cir. 1998)(U.S.S.G. §5E1.2(a); United States v. Bauer, 129 F.3d 962, 964 (7th Cir. 1997)).

"When a district court adopts the PSR's fact finding but deviates from its fine recommendations, it must articulate why it chooses this route." United States v. Hach, 162 F.3d 937 (7th Cir. 1998).

The guideline only requires that the district court "shall consider" the relevant factors. United States v. Petty, 132 F.3d 373, 382 (7th Cir. 1997).

Express or specific findings regarding each of the relevant factors to be considered before imposing a fine are not required. United States v. Petty, 132 F.3d 373, 382 (7th Cir. 1997) (quoting United States v., Bauer, 129 F.3d 962 (7th Cir. 1997)).

Adopting the PSR suffices for express or specific findings concerning the imposition of a fine. United States v. Petty, 132 F.3d 373, 382 (7th Cir. 1997).

The Court of Appeals will remand the imposition of a fine when the district court adopts the factual findings contained in the presentence report but deviates from a firm recommendation, if any, made by the United States Probation office. United States v. Petty, 132 F.3d 373, 382 (7th Cir. 1997).

Sentencing court has the option but not the duty to provide for payment of a fine in installments. McGhee v. Clark, 166 F.3d 884 (7th Cir. 1998).

Programs Affecting Release:

Under 18 U.S.C. §3621(e)(2)(B), governing eligibility for early release for successfully completing BOP substance abuse program, for purposes of this section, possession of a firearm by a felon in violation of 18 U.S.C. §922(g) constitutes a crime of violence, thereby prohibiting application for early release. Parsons v. Pitzer, 149 F.3d 734, 736-37 (7th Cir. 1998).

SEVERANCE AND MULTIPLICITY: There are two types of motions to sever, motions to sever offenses and motions to sever defendants. Federal Rule of Criminal Procedure 14 authorizes motions to sever while Rule 8 sets forth the rules for joining offenses and defendants. Accordingly, Rule 14 and Rule 8 must be reviewed when challenging a district court's refusal to sever or join either offenses or defendants.

Review of denial of request for relief from prejudicial joinder: abuse of discretion or plain error affecting substantive right. United States v. Raineri, 670 F.2d 702, 709 (7th Cir.), cert. denied, 103 S.Ct. 446, 459 U.S. 1035 (1982).

Review of whether joinder of offenses in indictment permitted (Fed.R.Crim.P. 8(a)): plenary. United States v. Turner, 93 F.3d 276, 283 (7th Cir.), cert. denied, 117 S.Ct. 596 (1996); United States v. Jamal, 87 F.3d 913, 914 (7th Cir.), cert. denied, 117 S.Ct. 406 (1996).

Test for when two or more defendants may be charged in the same indictment under Rule 8(b) of the F.R.C.P.: whether the indictment alleges that the defendants participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. The test focuses on what the indictment charges, not what the evidence shows. The defendants must be charged with crimes that well up out of the same series of such acts,

but they need not be the same crime. U.S. v. Marzano, 160 F.3d 399, 401 (7th Cir. 1998).

A claim of misjoinder under Rule 8(b) is subject to the doctrine of harmless error. U.S. v. Marzano, 160 F.3d 399, 401-02 (7th Cir. 1998).

Where joinder is proper, denial of motion to sever (Fed.R.Crim.P. 14) is reviewed for clear abuse of discretion. United v. Vest, 116 F.3d 1179, 1189-1190 (7th Cir. 1997); United States v. Turner, 93 F.3d 276, 283 (7th Cir.), cert. denied, 117 S.Ct. 596 (1996).

Review of refusal of trial court to sever raised for first time on appeal: plain error. United States v. Sweeney, 688 F.2d 1131, 1140 (7th Cir. 1982).

In assessing the propriety of joinder under Fed.R.Crim.P. 8(a), the Court of Appeals looks solely to the face of the government's indictment and not to any evidence ultimately presented at the defendant's trial. United States v. Alexander, 135 F.3d 470, 475 (7th Cir. 1998).

To determine if misjoinder was harmless, Court of Appeals reviews whether misjoinder had substantial and injurious effect or influence in determining jury's verdict. United States v. Hubbard, 61 F.3d 1261, 1271 (7th Cir. 1995).

There is a strong policy preference in favor of the joinder of qualifying charges and the rule must be broadly construed toward that end. United States v. Alexander, 135 F.3d 470, 476 (7th Cir. 1998).

The "same or similar character" requirement of Rule 8(a) "is a rather clear directive to compare the offenses charged for categorical, not evidentiary, similarities." United States v. Alexander, 135 F.3d 470, 476 (7th Cir. 1998)(quoting United States v. Coleman, 22 F.3d 126, 134 (7th Cir. 1994)).

Where joinder is based upon the "similar character" of the indictment's charges, the risk of potential prejudice to the defendant from a joint trial is enhanced, and the district court must therefore be especially vigilant in monitoring the proceedings for developing unfairness. United States v. Alexander, 135 F.3d 470, 477 (7th Cir. 1998)(citing United States v. Turner, 93 F.3d 276, 284 (7th Cir.), cert. denied, 117 S.Ct. 596 (1996).

The decision on whether to the grant or deny a severance: abuse of discretion. United States v. Alexander, 135 F.3d 470, 477 (7th Cir. 1998)(citing United States

v. Vest, 116 F.3d 1179, 1189-90 (7th Cir. 1997), cert. denied, 118 S.Ct.1058 (1998)).

> An abuse of discretion will be found only where the defendant is able to show that the denial of a severance caused him actual prejudice in that it prevented him from receiving a fair trial; it is not enough that the separate trials may have provided him with a better opportunity for acquittal. United States v. Alexander, 135 F.3d 470, 477 (7th Cir. 1998)(citations omitted).

A severance may be required in a case in which a defendant can convincingly show that he has important testimony to give on one count but a strong need to remain silent on another. United States v. Alexander, 135 F.3d 470, 477 (7th Cir. 1998).

> The Court of Appeals requires specific examples of the exculpatory testimony that the defendant would give. United States v. Alexander, 135 F.3d 470, 477 (7th Cir. 1998).
>
> Severance is not mandatory every time a defendant wishes to testify to one charge but to remain silent on another. Rather, severance is necessary if the defendant makes a convincing showing that he has both important testimony to give concerning one count and a strong need to refrain from testifying as to other counts. United States v. Freland, 141 F.3d 1223, 1227 (7th Cir. 1998).
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> > A defendant fails to make a convincing demonstration of a strong need to refrain from testifying on particular counts where without the defendant's testimony, the government offered sufficient evidence to support the jury's verdict on these counts. United States v. Freland, 141 F.3d 1223, 1227 (7th Cir. 1998).

Where a codefendant has given exculpatory testimony relative to a codefendant the district court should grant motion for separate trials. United States v. Echeles, 352 F.2d 892, 898-899 (7th Cir. 1965)(en banc).

Multiple counts for bankruptcy fraud will lie when each fraudulent transfer is a separate act, taken at a discrete time, with the requisite intent. United States v. McClellan, 868 F.2d 210, 213 (7th Cir. 1989).

In bankruptcy fraud, "when the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even

though all unite in swelling a common stream of action, separate indictments lie." United States v. McClellan, 868 F.2d 210, 213 (7th Cir. 1989)(citation omitted).

SPECIFIC OFFENSES: The government must always prove each and every element of the offense charged beyond a reasonable doubt. This section contains references to cases which have specifically addressed the elements of an offense or the manner in which a particular element of an offense may be proved.

Aiding and Abetting:

To establish aiding and abetting liability the government must prove that a defendant "in some sort associated himself with a venture, that he participated in it as in something he wished to bring about, and that he sought by his actions to make it succeed." United States v. Sewell, 159 F.3d 275, 278 (7th Cir. 1998)(quoting United States v. Valencia, 907 F.2d 671, 677 (7th Cir. 1990)).

> The aiding and abetting standard has two prongs -- association and participation. To prove association the state must show that the defendant shared the principal's criminal intent. To show participation, "there must be evidence to establish that the defendant engaged in some affirmative conduct [or] . . . overt act . . . designed to aid in the success of the venture." United States v. Sewell, 159 F.3d 275, 278 (7th Cir. 1998)(quoting United States v. Valencia, 907 F.2d 671, 677 (7th Cir. 1990)).
>
> To prove this affirmative conduct or overt act, "a high level of activity need not be shown," although "mere presence" and "guilt by association" are insufficient. United States v. Sewell, 159 F.3d 275, 278 (7th Cir. 1998)(quoting United States v. Valencia, 907 F.2d 671, 677 (7th Cir. 1990)).

To be liable under an aiding and abetting theory, a defendant must have the specific intent to aid in the commission of the crime in doing whatever he did to facilitate its commission. United States v. Nacotee, 159 F.3d 1073, 1076 (7th Cir. 1998) (citing United States v. Boyles, 57 F.3d 535, 541 (7th Cir. 1995)).

Transporting the principal and the firearm to the scene of the crime is facilitation under an aiding and abetting theory of a §924(c) violation. United States v. Wards, 148 F.3d 843, 948 (7th Cir. 1998).

Not withstanding Bailey v. U.S., 516 U.S. 137 (1995), a defendant may still be found guilty of aiding and abetting in using or carrying a firearm pursuant to 18 U.S.C. 924(c)(1). Wright v. U.S., 139 F.3d 551, 552 (7th Cir. 1998).

Conspiracy to Distribute a Controlled Substance:

To sustain a conspiracy conviction for distribution of cocaine, the record must contain evidence showing that a conspiracy to distribute cocaine existed, and that the defendant knowingly participated in it. United States v. Hach, 162 F.3d 937 (7th Cir. 1998)(quoting United States v. Hunter, 145 F.3d 946, 949 (7th Cir. 1998)).

To demonstrate conspiracy, the government must show "proof of an agreement to commit a crime other than the crime that consists of the sale [of cocaine] itself." United States v. Hach, 162 F.3d 937 (7th Cir. 1998)(quoting United States v. Pearson, 113 F.3d 758, 761 (7th Cir. 1997)).

> "[A] simple agreement between a buyer and seller to exchange something of value for cocaine cannot alone constitute a conspiracy because such an agreement is itself the substantive crime." United States v. Hach, 162 F.3d 937 (7th Cir. 1998)(quoting United States v. Clay, 37 F.3d 338, 341 (7th Cir. 1994)).

To establish a conspiracy, the Court of Appeals may consider circumstantial evidence which tends to establish a conspiracy to distribute cocaine. United States v. Hach, 162 F.3d 937 (7th Cir. 1998)(quoting United States v. Larkins, 83 F.3d 162, 166 (7th Cir. 1996)).

In reviewing a record to establish a conspiracy, the Court of Appeals looks for evidence of a "prolonged and actively pursued course of sales coupled with the seller's actual knowledge in a shared stake in the buyer's illegal venture." United States v. Hach, 162 F.3d 937 (7th Cir. 1998)(quoting United States v. Clay, 37 F.3d 338, 341 (7th Cir. 1994)).

The Seventh Circuit has "identified four factors as particularly salient in determining whether a conspiracy existed, and whether a defendant knowingly participated in it: (1) the length of the affiliation, (2) the established method of payment, (3) the extent to which the transactions were standardized, and (4) the demonstrated level of mutual trust." United States v. Hach, 162 F.3d 937 (7th Cir. 1998).

> To establish a conspiracy, none of the four listed factors are dispositive; however, if enough are present and point to a concrete, interlocking interest beyond individual buy-sell transactions, the Seventh Circuit will not disturb the fact-finders inference that at some point, the buyer-seller relationship developed into a cooperative venture. United States v. Hach, 162 F.3d 937 (7th Cir. 1998).

A conspiracy conviction can be supported by evidence of frequent and repeated transactions with an established method of payment that includes a rudimentary form of credit. United States v. Hach, 162 F.3d 937 (7th Cir. 1998)(citing United States v. Fagan, 35 F.3d 1203, 1206 (7th Cir. 1994).

Evidence that parties must negotiate the terms of every transaction, or seek to maximize their gains at the expense of others suggests that the transaction costs among the group are high and this evidence counsels against the finding of conspiracy between the members. United States v. Hach, 162 F.3d 937 (7th Cir. 1998)(quoting United States v. Townsend, 924 F.2d 1385, 1395 (7th Cir. 1991)).

In a conspiracy to distribute controlled substances case, the conspiracy charge requires the government to prove agreement to commit a crime other than the crime that consists of the sale itself. United States v. Meyer, 157 F.3d 1067, 1075 (7th Cir. 1998)(citing United States v. Thomas, 150 F.3d 743, 746 (7th Cir. 1998)(per curiam)).

In a conspiracy to distribute controlled substance case, an agreement cannot be equated with repeated drug transactions. United States v. Meyer, 157 F.3d 1067, 1075 (7th Cir. 1998)(citing United States v. Thomas, 150 F.3d 743, 746 (7th Cir. 1998)(Per Curiam)).

In conspiracy to distribute controlled substance offenses, defenses include that the arrangement was merely between that of a buyer and a seller, that the defendant was merely present during certain transactions, or that the evidence was consistent with innocence as well as guilt. United States v. Brimley, 148 F.3d 819, 822 (7th Cir. 1998)(citing numerous Seventh Circuit precedents for defenses mentioned)).

The criminal defendant may not be convicted of both the offense of conducting a continuing criminal enterprise and the offense of conspiracy to distribute cocaine base, for the latter is a lessor included offense of the former. United States v. Story, 137 F.3d 518, 520 (7th Cir. 1998) (summarizing the holding Rutledge v. United States, 517 U.S. 292, 300-301 (1996)).

Fraud Offenses:

The elements of mail fraud are: (1) a scheme to defraud; (2) use of the mail to advance the fraud; and (3) the defendant's participation with intent to defraud. United States v. Stockheimer, 157 F.3d 1082, 1087 (7th Cir. 1998) (citing United States v. Carlino, 143 F.3d 340, 343 (7th Cir. 1998)).

In prosecution for mail fraud, an employee deprives his employer of his honest services only if he misuses his position (or the information he obtained in it) for personal gain. United States v. Bloom, 149 F.3d 649, 656-57 (7th Cir. 1998).

The requirement in bank fraud cases that a defendant act both knowingly and willingly has no independent significance beyond the knowledge requirement in the express language of the statute. That is to say that willfulness in this context simply means knowing and purposeful conduct. United States v. Stockheimer, 157 F.3d 1082, 1089 (7th Cir. 1998).

"Bank fraud creates proceeds only after execution. Wire fraud often creates proceeds only after a wire transfer. A mail fraud scheme, however, can create proceeds long before the mailing ever takes place." United States v. Mankarious, 151 F.3d 694, 705 (7th Cir. 1998).

A defendant's belief in the legality of his conduct is not a defense to mail or bank fraud. United States v. Stockheimer, 157 F.3d 1082, 1088 (7th Cir. 1998).

In prosecution for tax fraud, amount of taxes owed is irrelevant. United States v. Minneman, 143 F.3d 274, 279 (7th Cir. 1998).

To sustain a conviction for conspiracy to defraud the United States, the record must demonstrate: (1) an agreement to accomplish an illegal objective against the United States; (2) one or more overt acts in furtherance of the illegal purpose; and (3) an intent to commit the substantive offense. United States v. Cueto, 151 F.3d 620, 635 (7th Cir. 1998) (citing United States v. Cyprian, 23 F.3d 1189, 1202 (7th Cir. 1994)).

Others:

18 U.S.C. §1623(a) (perjury) makes it a crime to knowingly make any false material declaration under oath in a proceeding before or ancillary to a court or a grand jury. Material statements are those that have a natural tendency to influence, or are capable of influencing, the decision of the decision making body to which it was addressed. United States v. Akran, 152 F.3d 698, 700 (7th Cir. 1998).

An attorney acting in his professional capacity can be criminally liable under the omnibus clause of 18 U.S.C. §1503 for traditional litigation related conduct that results in an obstruction of justice where the attorney has the requisite corrupt intent. United States v. Cueto, 151 F.3d 620, 631 (7th Cir. 1998).

Under prosecution for violation of the Hobbs Act, 18 U.S.C. §1951, a defendant who robs a government informant of cash during a controlled buy obstructs interstate commerce sufficient to violate the Hobbs Act. United States v. Thomas, 159 F.3d 296-98 (7th Cir. 1998).

In prosecution under 26 U.S.C. §5861(d) for unlawful possession of a "destructive device" as defined by 26 U.S.C. §5845(f), the following test is applied. When the destructive nature of the device or the component parts is obvious because it is suited only for a proscribed purpose, no inquiry into the intent of the possessor is necessary; when the item or items charged can serve either a destructive or a salutatory purpose, the intent of the possessor becomes important and criminal liability only attaches when the possessor intends to possess a device for destructive purposes. United States v. Johnson, 152 F.3d 618, 627 (7th Cir. 1998).

> The "destructive device" definition contained in 26 U.S.C. §5845(f) was intended to operate in a precise, but flexible manner. Generally, persons in possession of fully assembled devices that are clearly bombs or similar devices will be charged only under subpart (1) of 26 U.S.C. §5845(f). In those cases, the only issue is whether the objective characteristics of the device bring it within the ambit of the statute; subjective intent regarding the device is not an appropriate consideration in that inquiry. In contrast, a person found to possess unassembled component parts or an assembled combination of parts that is less clearly within the ambit of subpart (1) generally will be charged under subpart (3). In those cases, the statute indicates that the objective characteristics of the device or component parts first should be considered. If the objective design of a device or component parts indicates that the object may only be used as a weapon, i.e., for no legitimate social or commercial purpose, then the inquiry is at an end and subjective intent is not relevant. However, if the objective design inquiry is not dispositive because the assembled device or unassembled parts may form an object with both illegitimate and legitimate use, then subjective intent is an appropriate consideration in determining whether the device or parts at issue constitute a destructive device under subpart (3). United States v. Johnson, 152 F.3d 618, 627-28 (7th Cir. 1998).

Under 18 U.S.C. §876, mailing threatening communications with the intent to extort money, the government need only prove two elements: (1) a threatening communication; and (2) sent through the mail. There is no requirement that the victim actually receive the threatening communication. United States v. Geisler, 143 F.3d 1070, 1071-72 (7th Cir. 1998).

A violation of RICO occurs when a person is: (1) employed by or associated with; (2) an enterprise; (3) engaged in or affecting interstate commerce; and (4) where that person conducts or participates in a pattern of racketeering activity for the collection of unlawful debt. Separate violations of other federal and state criminal statutes are the predicate acts upon which a pattern of racketeering activity is created. Those predicate acts involve conduct that is otherwise chargeable or indictable in violations that are punishable pursuant to independent criminal statutes. To establish a criminal violation of RICO, the government must first establish a defendant's predicate acts. United States v. Palumbo Bros., Inc., 145 F.3d 850, 867 (7th Cir. 1998).

> Under RICO, to sufficiently allege a pattern of racketeering activity, the statute requires at least two acts of racketeering activity within ten years. However, something beyond the number of acts also is required; the indictment must contain sufficient facts to demonstrate that the racketeering acts are related and that those acts establish or threaten continuing criminal activity. United States v. Palumbo Bros., Inc., 145 F.3d 850, 877 (7th Cir. 1998).
>
> Although continuity is an element of proof necessary at trial to conclusively establish a defendant's pattern of racketeering activity it is not an essential element of a RICO offense that must be clearly and specifically established in the indictment. United States v. Palumbo Bros., Inc., 145 F.3d 850, 878 (7th Cir. 1998).

Under 18 U.S.C. §2252(a)(4)(B) a single computer file is "material" containing depictions, rather than the entire disk in which that file is contained. United States v. Hall, 142 F.3d 988, 998 (7th Cir. 1998).

Extortion is the wrongful use of force or fear, including fear of economic harm, to obtain money or property from another person (18 U.S.C. §1951(b)(2)). United States v. Gianados, 142 F.3d 1016, 1020 (7th Cir. 1998).

> It is unnecessary for the government in an extortion case to prove that the defendant actually created the fear in the minds of his victims. Rather, the exploitation of the victim's reasonable fear constitutes extortion regardless of whether or not the defendant was responsible for creating that fear. United States v. Gianados, 142 F.3d 1016, 1020-21 (7th Cir. 1998) (quoting United States v. Crowley, 504 F.2d 992, 996 (7th Cir. 1974)).

Under 18 U.S.C. §113(f) (serious bodily assault), the prosecution need not show that a defendant intended to assault the victim. It need show only the defendant did in fact commit the assault. United States v. Nacotee, 159 F.3d 1073, 1075 (7th Cir. 1998).

> To "prove that a true threat was made, the government must establish that the statement was made 'in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates a statement as a serious expression of an intention to inflict bodily harm upon or to take the life of [another individual].'" United States v. Hartbarger, 148 F.3d 777, 782-83 (7th Cir. 1998)(quoting United States v. Khorrami, 895 F.2d 1186, 1190 (7th Cir. 1990)(quoting Roy v. United States, 416 F.2d 874, 877 (9th Cir. 1969); see also Watts v. United States, 394 U.S. 705, 708 (1969)(stating that a threat must be evaluated in context, including the reaction of the listeners)).

Assault with a dangerous weapon against correctional officers (18 U.S.C. §111) is a general intent crime. United States v. Ricketts, 146 F.3d 492, 497 (7th Cir. 1998)(overruling United States v. Staggs, 553 F.2d 107, 387 (7th Cir. 1997)).

To establish a violation of 21 U.S.C. §841(a)(1), the government must prove beyond a reasonable doubt that the defendant "(1) knowingly or intentionally possessed powder cocaine, (2) possessed the cocaine with the intent to distribute it, and (3) knew the cocaine was a controlled substance." United States v. Hunter, 145 F.3d 946, 950 (7th Cir. 1998).

> To prove the possession aspect of possession with intent to distribute a controlled substance, possession need not be actual or exclusive; the government satisfies its burden to prove possession if it establishes joint or constructive possession. United States v. Hunter, 145 F.3d 946, 950 (7th Cir. 1998)(referring to United States v. Tirrell, 120 F.3d 670, 675-76 (7th Cir. 1997)).
>
> "Constructive possession exists when a person does not have actual possession of contraband but instead was able and intended to exert control over it at a particular time. The person may exercise this control either directly or through others." United States v. Hunter, 145 F.3d 946, 950, n. 2 (7th Cir. 1998)(citing United States v. Kitchen, 57 F.3d 516, 520-21 (7th Cir. 1995)).

In a prosecution for using or carrying a firearm during or in relation to a crime of violence (§924(c)(1)), venue is appropriate where any part of the offense can be

proved to have been done. United States v. Rodriguez-Moreno, 1999 WL 168547, at 5 U.S. 3/30/99).

18 U.S. §2019 (carjacking) establishes three separate offenses by the specification of distinct elements, each of which must be charged by the indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict. Jones v. United States, 1999 WL 155688 at 13 (U.S. 3/24/99).

Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 8 U.S.C. §1252(g) applies without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings and eliminates appellate review of an INS decision or action to commence proceedings, adjudicate cases, or execute removal orders. The section denies judicial jurisdiction to review these discretionary immigration and naturalization service determinations. Reno v. American-Arab Anti-Discrimination Committee, 119 S.Ct. 936 (1999).

In a conspiracy case, where the trial court has instructed the jury not to consider statements against a co-defendant, the Court of Appeals does not consider those statements in evaluating a sufficiency of the evidence claim. United States v. Minneman, 143 F.3d 274, 281 (7th Cir. 1998).

SPEEDY TRIAL: A defendant's constitutional right to a speedy trial has been codified at 18 U.S.C. § 3161 et. seq. While technically a defendant can raise a constitutional speedy trial challenge, if the defendant's trial did not violate the Speedy Trial Act, the Court of Appeals will not find a constitutional violation.

Review of district court's interpretation of Speedy Trial Act: *de novo*. United States v. Salerno, 108 F.3d 730, 734 (7th Cir.), cert. denied, 117 S.Ct. 2517 (1997).

Review of factual findings supporting a Speedy Trial Act ruling: clear error. United States v. Salerno, 108 F.3d 730, 734 (7th Cir.), cert. denied, 117 S.Ct. 2517 (1997).

Review of decision to exclude time from speedy trial period: abuse of discretion. United States v. Ousley, 100 F.3d 75, 76 (7th Cir. 1996).

Review of denial of motion to dismiss due to prosecutorial delay: abuse of discretion. United States v. Smith, 80 F.3d 1188, 1192 (7th Cir. 1996).

Absent legal error, exclusions of time from speedy trial period cannot be reversed unless trial court abused discretion and the defendant can show actual prejudice.

United States v. Ruth, 65 F.3d 599, 605 (7th Cir. 1995), cert. denied, 116 S.Ct. 1548 (1996).

§3161(c)(2) of the Speedy Trial Act provides that "unless the defendant consents in writing to the contrary, the trial shall not commence less than 30 days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se." However, the 30 day preparatory period begins the day a defendant's counsel files a general appearance on his behalf, not on the day the defendant decides to dismiss his attorney and proceed pro se. United States v. Schwensow, 151 F.3d 650, 655 (7th Cir. 1998).

STANDARDS OF REVIEW: The standard of review determines the amount of deference the Court of Appeals must give to the district court's rulings. Appellate counsel should attempt to frame the issues on appeal in a manner that invokes the most favorable standard of review.

Implicit in the concept of discretion of the district court is the possibility that two judges could come to opposite conclusions based on the same record and that the appellate court could affirm both. United States v. Williams, 81 F.3d 1434, 1437 (7th Cir. 1996).

Arguments that were waived below can only be reviewed for "plain error". United States v. Kuipers, 49 F.3d 1254, 1258 (7th Cir. 1995).

For there to be plain error, there must be "error" that is "plain" and that affects "substantial rights". United States v. Olano, 507 U.S. 725, 732 (1993).

Test for plain error: defendant must demonstrate (1) that there was error, (2) that error was plain, (3) that error affected defendant's substantial rights, and (4) that error seriously affected standards, integrity or public reputation of judicial proceedings. United States v. Bursey, 85 F.3d 293, 296 (7th Cir. 1996).

Relief from plain error is permissive, not mandatory. See United States v. Laurenzana, 113 F.3d 689, 695 (7th Cir.), cert. denied, 118 S.Ct. 240 (1997); United States v. Holmes, 93 F.3d 289, 291 (7th Cir. 1996).

Discretion to correct plain error should be employed in those cases which error has affected outcome of trial. United States v. Laurenzana, 113 F.3d 689, 695 (7th Cir.), cert. denied, 118 S.Ct. 240 (1997).

> Under the plain error doctrine, the Court of Appeals will not reverse the district court unless, in the Court of Appeals' discretion, it finds the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings. United States v. Wilson, 134 F.3d 855 (7th Cir. 1998).
>
> "Under the plain error standard of review, the defendant bears the burden of showing that he suffered prejudice in his sentence due to the court's erroneous interpretation." United States v. Szabo, 147 F.3d 559, 561 (7th Cir. 1998).

There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome. United States v. Olano, 507 U.S. 725, 735, 113 S.Ct. 1770 (1993).

Particular deference is paid to the district court's credibility determinations because of the district court's unique opportunity to hear testimony and observe the demeanor of witnesses. United States v. McNeal, 77 F.3d 938, 946 (7th Cir. 1996).

A finding is clearly erroneous when reviewing court is left with the definite and firm conviction that a mistake has been made, even though there is evidence to support the finding. United States v. Liss, 103 F.3d 617, 620 (7th Cir. 1997).

Fact finder's choice between two permissible choices cannot be clearly erroneous. United States v. Nobles, 69 F.3d 172, 190 (7th Cir. 1995).

Affirmance means no more than that, from appellate perspective, fact finder has performed its duties satisfactorily; affirmance on evidence generates no precedential force upon decision making processes of fact finding at criminal trials. United States v. Willoughby, 27 F.3d 263, 267-268 (7th Cir. 1994).

The government must raise the defense of waiver. United States v. Westbrook, 125 F.3d 996, 1005 (7th Cir.), cert. denied, 118 S.Ct. 643 (1997).

Special deference is given to findings based upon credibility determinations, which can virtually never be clear error. United States v. Agostino, 132 F.3d 1183, 1198 (7th Cir. 1997).

When a discrepancy exists between an oral and written sentence, the oral sentence controls. United States v. Agostino, 132 F.3d 1183, 1200 (7th Cir. 1997).

The Court of Appeals has discretion to overlook a failure to argue harmlessness. United States v. Wilson, 134 F.3d 855 n.5 (7th Cir. 1998).

STANDING: See SEARCH AND SEIZURE:

STATUTE OF LIMITATIONS: Although statute of limitations issues are often straightforward, as shown below, complications can arise in determining when the statute begins to run when a charged offense is of an ongoing nature.

An offense is "continuing" per statute of limitations only when: (1) the explicit language of the substantive criminal statute compels such a conclusion or (2) the nature of the crime involved is such that Congress must have intended that it be treated as a continuing one. U.S. v. Yashar, 166 F.3d 873 (7th Cir. 1998).

For offenses that are not continuing offenses, the limitations period begins to run once all elements of the offense are established, regardless of whether the defendant continues to engage in criminal conduct. U.S. v. Yashar, 166 F.3d 873 (7th Cir. 1998).

The filing of an information with the district court is sufficient to "institute" the information as that language is used in the statute of limitations, 18 U.S.C. §3282. United States v. Burdix-Dana, 149 F.3d 741, 742 (7th Cir. 1998).

STATUTORY INTERPRETATION: Interpreting a statute always involves a question of law. Accordingly, the Court of Appeals does not defer to the district court's interpretation of a statute.

Review of issues of statutory interpretation: *de novo*. United States v. Thomas, 77 F.3d 989, 990 (7th Cir. 1996).

When interpreting a statute, it is the Supreme Court's usual practice to make the interpretation retroactive. See In re Davenport, 147 F.3d 605, 610 (7th Cir. 1998)(referring to Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 96-97 (1993) and Bousley v. United States, 118 S.Ct. 1604, 1610 (1998)).

"Placing a pre-trial detainee on suicide watch, even the highest level, does not demonstrate a subjective awareness of a substantial risk of imminent suicide." Collignon v. Milwaukee County, 163 F.3d 982, 990 (7th Cir. 1998).

A "new rule for the conduct of criminal prosecutions is to be applied to all cases, state or federal, pending on direct review that were not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Kurzawa v. Jordan, 146 F.3d 435, 443 (7th Cir. 1998)(quoting Griffith v. Kentucky, 479 U.S. 314, 328 (1987)).

The ex-post facto clause prohibits the application of "any statute which punishes as crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed . . . " Kurzawa v. Jordan, 146 F.3d 435, 4449 (7th Cir. 1998)(quoting Beazell v. Ohio, 269 U.S. 167, 169 (1925)).

The Supreme Court has long recognized that the "right to have a fair warning of that conduct which will give rise to criminal penalties . . . is protected against judicial action by the due process clause of the Fifth Amendment." Kurzawa v. Jordan, 146 F.3d 435, 444-445 (7th Cir. 1998)(quoting Marks v. United States, 430 U.S. 188, 191-92 (1977)).

SUFFICIENCY OF THE EVIDENCE: A challenge to the sufficiently of the evidence is a claim that even viewing the evidence produced at trial in the light most favorable to the government, no rational finder of fact could have convicted the defendant. This is a very difficult standard to meet. Therefore, it is seldom productive to raise this issue on appeal, except in unusual cases, as discussed below.

"Anyone claiming insufficiency of the evidence 'faces a nearly insurmountable hurdle.'" United States v. Given, 164 F.3d 389 (7th Cir. 1999)(quoting United States v. Teague, 956 F.2d 1427, 1433 (7th Cir. 1992)).

Each count of an "indictment is to be treated as a separate indictment and an acquittal on one count does not dictate an acquittal on any other count." United States v. Castillo, 148 F.3d 770, 774 (7th Cir. 1998)(citing United States v. Powell, 469 U.S. 57, 62-63 (1984)).

In a denaturalization case, the government must prove its claims by clear, convincing, and unequivocal evidence. United States v. Hajda, 135 F.3d 439 (7th Cir. 1998); United States v. Kairys, 782 F.2d 1374, 1379 (7th Cir.), cert. denied, 476 U.S. 1153 (1986).

In determining whether testimony is incredible as a matter of law, the Court of Appeals does not assess the credibility of witnesses even where the testimony is

"totally uncorroborated and came from an admitted liar, convicted felon, large-scale drug dealing, paid government informant." United States v. Emerson, 128 F.3d 557, 561 (7th Cir. 1997)(quoting United States v. Davis, 15 F.3d 1393, 1398 (7th Cir. 1994)(quoting United States v. Beverly, 913 F.2d 337, 358 (7th Cir. 1990) and United States v. Molinaro, 877 F.2d 1341, 1347 (7th Cir. 1989)).

The Court of Appeals "will reverse a conviction for insufficient evidence only if, after viewing the evidence in the light most favorable to the prosecution, it is determined that no rational jury could have found the defendant guilty beyond a reasonable doubt." United States v. Maloney, 71 F.3d 645, 655 (7th Cir. 1995)(citation omitted).

Reversal is warranted when the record is devoid of any evidence, regardless of how it is weighed, from which a jury could find guilt beyond a reasonable doubt. United States v. Gutierrez, 978 F.2d 1463, 1468-69 (7th Cir. 1992).

The "critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be to determine whether the record evidence could reasonably support a finding of guilty beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318 (1979).

Furthermore, where it is argued that a witness' testimony is incredible as a matter of law and should be disregarded by the trier of fact, the Court of Appeals has recognized that "it must have been physically impossible for the witness to observe that which he or she claims occurred, or impossible under the laws of nature for such an occurrence to have taken place at all." United States v. Alcantar, 83 F.3d 185, 189 (7th Cir. 1996); United States v. Henderson, 58 F.3d 1145, 1149 (7th Cir. 1995).

Defendant who fails to move for judgment of acquittal at the close of evidence or within seven days of the verdict waives challenge on appeal to sufficiency of evidence other than for manifest miscarriage of justice. United States v. Lewis, 100 F.3d 49, 53 (7th Cir. 1996); United States v. Meadows, 91 F.3d 851, 854 (7th Cir. 1996).

Remedy for reversal on insufficiency of evidence is entry of judgment of acquittal. United States v. Locklear, 97 F.3d 196, 199-200 (7th Cir. 1996).

If a "defendant takes the stand and 'denies the charges and the jury thinks he's a liar, this becomes evidence of guilt to add to the other evidence.'" United States v. Brimley, 148 F.3d 819, 822 (7th Cir. 1998)(referring to United States v. Zafiro, 945 F.2d 881, 888 (7th Cir. 1991)).

SUPERVISED RELEASE: Supervised release is a form of court supervision which follows every prison sentence. Supervised release does not take the place of any portion of the defendant's term of imprisonment. A defendant begins serving his term of supervised release after he has served his complete term of imprisonment. If the defendant violates the conditions of his supervised release, the supervised release can be revoked and the defendant can be sentenced to a term of imprisonment equal to the maximum term of supervision the district court could have imposed at the time of sentencing.

Review of interpretation of guidelines governing terms of imprisonment: *de novo*. United States v. Lee, 78 F.3d 1236, 1239 (7th Cir. 1996).

Sentence imposed for violation of supervised release (for which there are no Guidelines): plainly unreasonable. United States v. Doss, 79 F.3d 76, 79 (7th Cir. 1996); United States v. Hale, 107 F.3d 526, 529 (7th Cir. 1997).

Under the sentencing guidelines, chapter 7 provisions are merely advisory rather than mandatory, subject to the statutory maximum terms of imprisonment provided in 18 U.S.C. §3583(e)(3). United States v. McClanahan, 136 F.3d 1146, 1149 (7th Cir. 1998); United States v. Marvin, 135 F.3d 1129, 1137 (7th Cir. 1998)).

While the chapter 7 policy statements are entitled to "great weight" they do not bind the sentencing judge; while they are an "element in his exercise of discretion," they are not a substitute for that discretion. United States v. McClanahan, 136 F.3d 1146, 1149 (7th Cir. 1998)(quoting United States v. Hill, 48 F.3d 228, 231 (7th Cir. 1995)).

The range set forth in the policy statements at § 7B1.4(a) is neither a guideline nor interpretive of a guideline. United States v. Marvin, 135 F.3d 1129, 1136 (7th Cir. 1998).

Before a district court can depart upward on a ground not identified as a ground for upward departure either in the pre-sentence report or in a preliminary submission by the government, Rule 32 requires the district court give the parties reasonable notice that it is contemplating such a ruling. United States v. Marvin, 135 F.3d 1129, 1142 (7th Cir. 1998).

Pursuant to 18 U.S.C. §3583(d) a condition of supervised release must be reasonably related to certain sentencing factors set forth in 18 U.S.C. §3553(a), including the need for the sentence to provide the defendant with medical care or other correctional treatment in the most effective manner. Second, the condition must involve no greater deprivation of liberty than is reasonably necessary to accomplish the sentencing objectives of §3553(a). Third, the condition must be consistent with any

pertinent policy statements issued by the sentencing commission. United States v. Wilson, 154 F.3d 658, 667 (7th Cir. 1998).

No notice is required to depart upward from a policy statement. United States v. Marvin, 135 F.3d 1129, 1142 (7th Cir. 1998).

Upward deviations from advisory sentencing ranges in § 7B1.4(a) are not departures, and therefore, a district court is not required to give defendants prior notice of such deviation. United States v. Marvin, 135 F.3d 1129, 1142 (7th Cir. 1998).

Objections to district court's factual findings, statements, methodalities, and/or conclusions may be waived if they are not presented first to the district court. United States v. Marvin, 135 F.3d 1129, 1135 (7th Cir. 1998).

Review of sentence imposed following revocation: plainly unreasonable. United States v. Marvin, 135 F.3d 1129, 1136 (7th Cir. 1998).

The "plainly unreasonable" standard entails a differential appellate posture concerning issues of fact and the exercise of discretion. United States v. Marvin, 135 F.3d 1129, 1136 (7th Cir. 1998).

A violation of a condition of supervised release is not a crime, but it is a "breach of trust," and a ground for revocation of supervised release. United States v. Marvin, 135 F.3d 1129, 1137 (7th Cir. 1998)(citing United States v. Hill, 48 F.3d 228, 232 (7th Cir. 1995)).

SUPPRESSION--See SEARCH AND SEIZURE

VENUE:

A decision to transfer venue: abuse of discretion. United States v. Martin, 63 F.3d 1422, 1430 (7th Cir. 1995).

The "'locus delicti [of the charged offense] must be determined from the nature of the crime alleged in a location of the act or acts constituting it.'" United States v. Rodriguez-Moreno, 1999 WL 168547, at 3 U.S. 330 (1999) (quoting United States v. Cabrales, 524 U.S. 1, 6-7 (1998) (quoting United States v. Anderson, 328 U.S. 699-703 (1946)).

To perform the venue inquiry, "a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission

of the criminal acts." United States v. Rodriguez-Moreno, 1999 WL 168547, at 3 (U.S. 3/30/99).

Where "a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done." United States v. Rodriguez-Moreno, 1999 WL 168547, at 5 (U.S. 3/30/99) (quoting United States v. Lombardo, 241 U.S. 73, 77 (1916)).

Rule 41(e)(return of property) requires only that the motion be filed in the district court in which the property was seized. Okoro v. Bohman, 164 F.3d 1059 (7th Cir. 1999).

VINDICTIVE PROSECUTION: Vindictive prosecution occurs when the prosecution seeks to punish the defendant for successfully exercising his constitutional or statutory rights.

Review of factual findings on prosecutorial vindictiveness: clear error. United States v. Perez, 79 F.3d 79, 81-82 (7th Cir. 1996).

To prove vindictiveness on the part of the government for its decision to seek an indictment, a defendant must present objective evidence showing genuine prosecutorial vindictiveness. This showing can be made by showing that the decision to prosecute was not based on the usual determinative factors. U.S. v. Spears, 159 F.3d 1081, 1086 (7th Cir. 1998).

WAIVER OF APPEAL -- See PLEA AGREEMENTS

WARRANTS: Searches pursuant to search warrants are presumptively reasonable. This presumption can be rebutted, however, if the defense can establish that there was a defect in the warrant, the process used to obtain the warrant, or the execution of the warrant.

Review of determination of probable cause supporting issuance of no knock warrant: *de novo*. United States v. Stowe, 100 F.3d 494, 499 (7th Cir. 1996).

Review of legal probable cause determinations: *de novo*. United States v. Dennis, 115 F.3d 524, 528 (7th Cir. 1997).

Review of legal determinations concerning validity of warrant: *de novo*. United States v. Dennis, 115 F.3d 524, 528 (7th Cir. 1997).

Anticipatory warrant:

> Probable cause to uphold an anticipatory search warrant exists when a government official presents independent evidence indicating that delivery of contraband will, or is likely to, occur and when the magistrate conditions the warrant on that delivery. United States v. Dennis, 115 F.3d 524, 528 (7th Cir. 1997).
>
> Showing that contraband was on a sure course to the destination to be searched would demonstrate a sufficient nexus between the parcel and the place to be searched to support probable cause for an anticipatory search warrant. United States v. Dennis, 115 F.3d 524, 530 (7th Cir. 1997).

Review of determination of probable cause to issue warrant: *de novo*. United States v. Hunter, 86 F.3d 679, 681 (7th Cir.), cert. denied, 117 S.Ct. 443 (1996).

In issuing a search warrant, a magistrate is given license to draw reasonable inferences concerning where the evidence referred to in the affidavit is likely to be kept, taking into account the nature of the evidence and the offense. United States v. Singleton, 125 F.3d 1097, 1102 (7th Cir. 1997).

> Some of the factors which demonstrate that an informant's information is sufficiently reliable to support the magistrate's issuance of a warrant include: (1) personal observation by the informant; (2) the degree of detail given; (3) an independent police corroboration of the informant's information; and (4) the informant's testifying at the probable cause hearing. United States v. McKinney, 143 F.3d 325, 328 (7th Cir. 1998); United States v. Singleton, 125 F.3d 1097, 1103-1104 (7th Cir. 1997(citing United States v. Reddrick, 90 F.3d 1276, 1280 (7th Cir. 1996).

To determine whether a specific warrant meets the particularity requirement, a court must inquire whether an executing officer reading the description in the warrant would reasonably know what items to be seized. If detailed particularity is impossible, generic language is permissible if it particularizes the types of items to be seized. United States v. Hall, 142 F.3d 988, 996 (7th Cir. 1998).

Whether exigent circumstances exist in the execution of a search warrant is a mixed question of law and fact. United States v. Bailey, 136 F.3d 1160, 1164 (7th Cir. 1998); United States v. Howard, 961 F.2d 1265, 1267 (7th Cir.), cert. denied, 506 U.S. 882 (1992).

> Review of factual findings regarding presence of exigent circumstances: clear error. United States v. Bailey, 1998 WL 67562, at 4 (7th Cir. Feb. 20, 1998);

United States v. Howard, 961 F.2d 1265, 1267 (7th Cir.), cert. denied, 506 U.S. 882 (1992).

The determination that those facts constitute exigent circumstances is a legal question subject to *de novo* review. United States v. Bailey, 1998 WL 67562, at 4 (7th Cir. Feb. 20, 1998); United States v. Howard, 961 F.2d 1265, 1267 (7th Cir.), cert. denied, 506 U.S. 882 (1992).

Exigent circumstances "exist . . . when a suspect's awareness of the search would increase the danger to police officers or others, or when an officer must act quickly to prevent the destruction of evidence," United States v. Singer, 943 F.2d 758, 762 (7th Cir. 1991), or when "a reasonable person [would] believe that entry . . . was necessary to prevent physical harm to the officers, the destruction of relevant evidence, the escape of a suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." United States v. Howard, 961 F.2d 1265, 1267 (7th Cir.), cert. denied, 506 U.S. 882 (1992)(quoting United States v. McConney, 728 F.2d 1195, 1205 (9th Cir.)(en banc), cert. denied, 469 U.S. 824 (1984)).

The exigencies must be viewed from the totality of the circumstances known to the officers at the time. United States v. Howard, 961 F.2d 1265, 1267 (7th Cir.), cert. denied, 506 U.S. 882 (1992).

Separate "warrants are not necessary for each unit when a warrant describes the units to be searched with particularity and independent probable cause supports each of those searches." United States v. Funderwhite, 148 F.3d 794, 795 (7th Cir. 1998).

Failure to knock and announce the execution of a search warrant is excused if exigent circumstances exist, such as when the defendant's awareness of a search would increase the danger to police officers or others, when drugs or firearms are regularly observed inside a defendant's residence, or when information leads police to reasonably conclude that the defendant is in possession of a large amount of drugs. United States v. Mattison, 153 F.3d 406, 410 (7th Cir. 1998) (citing United States v. Buckley, 4 F.3d 552, 558 (7th Cir. 1993)).

Under 18 U.S.C. §3109, after an officer is refused admittance at one door, he may break open any other doors at the dwelling without having to knock and announce again. U.S. v. Bragg, 138 F.3d 1194, 1195 (7th Cir. 1998).

A no-knock search is justified when there is a reasonable suspicion that knocking and announcing the police officers' presence would be dangerous or futile, or that it would inhibit the effective investigation of a crime. United

States v. Mattison, 153 F.3d 406, 410 (7th Cir. 1998) (quoting Richards v. Wisconsin, 520 U.S. 385 (1997)).

The subjective intentions of police officers executing a search warrant play no role in ordinary probable cause Fourth Amendment analysis. United States v. Van Dreel, 155 F.3d 902, 905 (7th Cir. 1998) (quoting Whren v. United States, 517 U.S. 806 (1996)).

The Court of Appeals reviews a district court's ruling that the unchallenged portions of an affidavit establish probable cause for the warrant to issue to ascertain "whether the district court erred in its determination that the allegations of the affidavit, without the [false] information . . . were sufficient to establish probable cause." United States v. McClellan, 165 F.3d 535 (7th Cir. 1999)(quoting United States v. Muhammad, 928 F.2d 1461, 1464-65 (7th Cir. 1991)).

"Probable cause is demonstrated by 'facts sufficient to induce a reasonably prudent person to believe that a search . . . will uncover evidence of a crime". United States v. McClellan, 165 F.3d 535 (7th Cir. 1999)(quoting United States v. Muhammad, 928 F.2d 1461, 1465 (7th Cir. 1991)).

In issuing a search warrant, "a Magistrate is entitled to draw reasonable inferences about where the evidence is likely to be kept, based on the nature and evidence of the type of offense, *and that in the case of drug dealers evidence is likely to be found where the dealers live*". United States v. McClellan, 165 F.3d 535 (7th Cir. 1999)(quoting United States v. Reddrick, 90 F.3d 1276, 1281 (7th Cir. 1996)(emphasis in McClellan)).

While considering whether to issue a search warrant, the judge must make inquiry into the informant's "veracity" or "reliability" and his or her "basis of knowledge." These are not independent elements, however, and "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability. United States v. McClellan, 165 F.3d 535 (7th Cir. 1999)(quoting Illinois v. Gates, 462 U.S. 213, 230 & 233 (1983)).

WIRETAPS: See EVIDENCE

WITHDRAWAL (from representation): -- See *Anders*