The BACK BENCHER

Central District of Illinois Federal Defenders

Vol. No. 30 Fall Edition 2002

DEFENDER'S MESSAGE

With the end of summer and the approach of Fall, the days begin to shorten, the children must return to school, and, like these other sorrows which come with the change of seasons, the new Guideline amendments take effect. With a fully staffed Sentencing Commission, this Fall marks the third straight year where new amendments will take effect on November 1. As criminal defense practitioners in federal court, it is essential that we both know and understand how these amendments will affect our current and future clients.

To help you understand the new amendments, my office will conduct a CJA Panel Attorney Training Seminar on Friday, October 11, 2002, in Judge Mihm's courtroom in Peoria. This free program will begin at 1:30 p.m. and end by 5:00 p.m. Included among the speakers are Andrea Smith, Assistant Federal Public Defender for the Southern District of Illinois, who will specifically address the new Guideline amendments; Dean Strang, Federal Public Defender for the Eastern District of Wisconsin, who will give a presentation on effective legal writing for the federal criminal defense lawyer; and, last but not least, George Taseff, our Senior Litigator, and myself, will give a demonstration of effective use of courtroom technology when defending a federal criminal case. George and I recently attended a national training seminar in Boston on the use of courtroom automation equipment, and we have a number of exciting techniques which we look forward to sharing with you. To register, please see the registration form attached to the back of this issue.

In addition to our own training programs, a number of other organizations are also providing training opportunities which may benefit you. On Tuesday, September 17, 2002, the Seventh Circuit Court of Appeals is conducting a free full-day seminar entitled, "Federal Criminal Appellate Practice for the Trial Attorney." This program is geared toward panel attorneys who do not ordinarily practice in the Seventh Circuit, but find themselves there occasionally as part of their CJA appointments. There are a number of first-rate speakers who are on the agenda, including our own Appellate Division Chief, Jonathan Hawley. It's not too late to sign up for the seminar, and a registration and information form for this program is also attached to the back of this issue.

The Federal Defender's Program for the Northern District of Illinois, Terry MacCarthy's office, in conjunction with the Illinois Association of Criminal Defense Lawyers, is also hosting a day long seminar at the Palmer House Hilton in Chicago on October 18, 2002. The seminar entitled, "Sex, Lies, & Videotape," will begin at 8:30 a.m. and continue until 4:00 p.m. Later that evening, the IACDL will conduct its Annual Banquet, where Carol Brook, Terry's Deputy Director, will be honored as Lawyer of the Year. Both the seminar and the banquet are good opportunities to not only catch-up on the law, but also catch-up with fellow defense lawyers. For more information, contact the IACDL at (773) 643-4225.

Finally, the National Association of Criminal Defense Lawyers is conducting its Fall Meeting in Chicago this year on October 30, 2002, through November 2, 2002. This meeting, entitled "What it Takes to Win Your Case," is a rare opportunity to attend one of these extraordinarily beneficial and informative meetings without having to spend a great deal of time and money on travel to and from

the meeting. Take advantage of this chance to meet

fellow defenders from across the country, all while learning new techniques and strategies from some of the best criminal defense lawyers in the country. For more information, log onto their website at www.nacdl.org or call them at (202) 872-8600.

As is obvious from the above, you, like the schoolchildren, have ample opportunities to "go back to school" this Fall. I urge you to take advantage of at least one of these training opportunities, if not all of them. You're never too old to learn something new. It is, after all, called the *practice* of law.

Yours very truly,

Richard H. Parsons
Federal Public Defender
Central District of Illinois

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ATTORNEY POSITION ANNOUNCEMENT

Our office is currently seeking a qualified applicant to fill a vacant Assistant Federal Public Defender position. The successful candidate will litigate cases in both the trial and the appellate courts. Some travel among the Peoria, Springfield, Rock Island, and Urbana Divisions will be required. Proficiency with the computer for writing and legal research is required, while management and supervisory experience is a definite plus. Extensive trial experience, preferably in federal court, preferred. For more details on the position and how to apply, please see the "Position Announcement" at the back of this issue.

CHURCHILLIANA

As Churchill boarded a splendid yacht at Cannes, he was asked, "Sir Winston, are you looking forward to your Mediterranean cruise?"

Churchill replied, "I always manage somehow to adjust to any new level of luxury without whimper or complaint. It is one of my more winning traits."

Dictum Du Jour

"To be a man is to suffer for others. God help us to be men."

- César Chávez

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"If you don't stand up to evil it eats you first and kills you later, but not soon enough."

- Alan Furst
Blood of Victory

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In a recent interview, General Norman Schwartzkof was asked if he thought there was room for forgiveness toward the people who have harboured and abetted the terrorists who perpetrated the 9/11 attacks on America.

His answer: "I believe that forgiving them is God's

function. Our job is simply to arrange the meeting."

"He was always asking you to do him a big favor. You take a very handsome guy, or a guy that thinks he's a real hot-shot, and they're always asking you to do them a big favor. Just because *they're* crazy about themselves, they think *you're* crazy about them, too, and that you're just dying to do them a favor. It's sort of funny, in a way."

- Holden Caufield in *"The Catcher in the Rye"*

By J.D. Salinger

* * * * * * * * * *

Closing argument is not simply a *pro forma* aspect of the criminal case, but an essential one:

[C]losing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact there may be reasonable doubt of the defendant's guilt . . . . In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

Herring v. New York, 422 U.S. 853, 862 (1975). (Gentry v. Roe, ___ F.3d ___ (9th Cir. Aug. 8, 2002)

* * * * * * * * * *

"[T]here is a risk that appeal waivers do nothing but cut off potentially meritorious arguments either for direct appeal or for collateral attacks under 28 U.S.C. sec. 2255."

"I would not speak so harshly of [Defendant's] decision in this case to take an appeal notwithstanding the waiver, nor of his decision to present more than the single Guidelines manual issue to this court. Parties and lawyers are scolded often enough for not attempting to present issues to the court and thus forfeiting or waiving their own or their clients' rights."

United States v. Whitlow, No. 01-3999, slip op. (7th Cir. April 25, 2002), Wood, J., concurring.

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"Secret arrests are "a concept odious to a democratic society," Morrow v. District of Columbia, 135 U.S. App. D.C. 160, 417 F.2d 728, 741-742 (D.C. Cir. 1969), and profoundly antithetical to the bedrock values that characterize a free and open one such as ours."

Center for National Security Studies v. United States Department of Justice, ___ F.Supp.2d ___, 2002 U.S. Dist. LEXIS 14168, *3 (D.D.C. Aug. 2, 2002).

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"First, it is worth noting that lawyers are a hardy brand of professionals. The legal profession has a long and noble history of fighting for the civil liberties and civil rights of unpopular individuals and political causes, ranging from their advocacy on behalf of WWI dissidents, to their resistance to McCarthy era abuses, to the defense of persons accused of heinous capital crimes."

Id. at *40-41.

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"She was blocking up the *whole goddam traffic* in the aisle. You could tell she liked to block up a lot of traffic. This waiter was waiting for her to move out of the way, but she didn't even notice him. It was funny. You could tell the waiter didn't like her much, you could tell even the Navy guy didn't like her much, even though he was dating her. And *I* didn't like her much. Nobody did. You had to feel sort of sorry for her, in a way."

- Holden Caufield in *"The Catcher in the Rye"*

By J.D. Salinger

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"There is, however, one additional matter that we address, unrelated to the issues raised on appeal, which is the appellate advocacy of Nave's counsel. He requested eight extensions of time in which to file his initial brief to this Court, and several times we issued orders to show cause why we should not take action for failure to prosecute his appeal. Though one of the extensions of time was to ostensibly correct typographical errors in the brief, when the brief was finally filed, it had many errors, including describing the second count of Nave's indictment as "*court* 2, under 18 U.S.C. § 924(c)(1)(A)(ii), for using, carrying and *rendering* a firearm during and in relation to a crime of *evidence*" (italics added).

As already described above, the

merits of the appeal presented are barely worth discussing, and we received no substantive response, either in a reply brief or at oral argument, to the government's argument that this appeal is barred by the plea agreement's waiver provisions.

The poor quality of Nave's counsel's appearance before this court and his written submissions in this case leave us at a loss. As we have said before, "[w]e do not feel it is unreasonable to expect carefully drafted briefs clearly articulating the issues and the precise citation of relevant authority for the points in issue from professionals trained and educated in the law," *Jones v. Hamelman*, 869 F.2d 1023, 1032 (7th Cir. 1989). However, we decide in our discretion to not impose a fine, and hope that an admonishment is sufficient to persuade Nave's appellate counsel to be more diligent in the future."

U.S. v. Nave, ___ F.3d ___, 2002 U.S. App. LEXIS 18176 (Sept. 4, 2002).

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Typically, misbehavior and admonition by a judge reflect badly on a trial lawyer. Plus, one could say that the award itself even provides a colorable argument (but it's only "colorable," for attorneys often ask for the stars while only hoping for the moon) that [Plaintiff's counsel] may have prejudiced his own case.

Whiting v. Westray, 294 F.3d 943 (7th Cir., 2002).

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Hylton became an informant for the Ozaukee drug unit and he participated in a series of controlled buys with Willis as the target. ... Unbeknownst to the police, Hylton participated in some "uncontrolled buys" as well.

United State v. Willis, slip op. (7th Cir., 8/12/2002).

* * * * * * * * * *

After winning the immigration lottery, the appellants were given the opportunity to apply for immigrant visas and thereby a chance to become citizens, if they could meet certain requirements within one year's time. The appellants promptly filled out all the necessary forms and jumped through all the applicable hoops the Immigration and Naturalization Service (INS) put in front of them in order to complete their applications for the visas and adjustment of status. Once the forms were filled out, all that remained was for the INS to adjudicate the appellants' status and either grant or deny the applications. Instead, the INS did nothing, and once the year was up, the INS informed the appellants that their applications were denied, not on the merits; rather they were denied simply because they were not heard within the applicable time period. Afterwards, the INS informed appellants that they would have to reapply and hope to win the lottery a second time to gain citizenship.

. . . .

The relevant statutes and regulations confirm that the INS did have the duty to adjudicate the appellants' applications in a reasonable period of time. The reason the appellants are before this court is because the INS never managed to fulfill the duty Congress placed upon it.

Nevertheless, the relief the appellants currently seek is illusory, because even if the INS adjudicated the applications today, visas could not be issued. Despite the past practices of the agency, the statute unequivocally states that the applicants only remain eligible "through the end of the specific fiscal year for which they were selected. Based on the statutory deadline set by Congress, the INS lacks the statutory authority to award the relief sought by plaintiffs.

Iddir v. INS, slip op. (7th Cir. 8/6/2002) (citations and footnoted omitted).

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"We understand that psychiatry is an imperfect science at best. However, Strickland does not require absolute certainty-it only requires a probability sufficient to undermine confidence that the result of the proceeding is reliable. Strickland, 466 U.S. at 694. The failure of the public defenders, the doctors, the probation officer, and
the state courts in the handling of this case of an indigent and mentally ill defendant not only "undermine[s] confidence" in the reliability of the result; it might well signal a system that is in need of review and repair. Given Brown's extensive and well-documented battle with chronic schizophrenia, as well as Dr. Ferrell's report characterizing Brown's crime as demonstrative of a "lack of logical, cohesive thinking" and the product of "the thought-distorting effects of schizophrenia," we refuse to countenance the appellate court's conclusion that the result of Brown's trial "would not have been different" had trial counsel taken the minimal time to secure his mental health records and properly inform the court of Brown's condition."

"This case is a striking example of a

legal system that processed this defendant as a number rather than as a human being; it signals a breakdown of a process that might very well be in need of review, adjustment, and repair. Brown's psychiatric illness was not given so much as a sideways glance by the parties involved. Not only did Brown's public defender trial attorneys drop the ball; so did the court-appointed mental health doctors (a psychologist and a psychiatrist) and probation officer, all of whom failed to conduct even a sufficient inquiry into his family background and extensive medical history. As a result, the state trial court proceeded without any awareness of his condition. We have a record before us that mandates-in the interest of justice-the conclusion that Brown was denied his Sixth Amendment right to effective assistance of counsel on the grounds that his counsels' failure to investigate his history of mental illness prejudiced the outcome of his trial."

Brown v. Sternes, No. 01-2326, __ F.3d ___ (7th Cir. Sept. 4, 2002)

* * * * * * * * * *

"The Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door. Democracies die behind closed doors. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately in deportation proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment "did not trust any government to separate the true from the false for us." Kleindienst v. Mandel, 408 U.S. 753, 773 (1972) (quoting Thomas v. Collins, 323 U.S. 516, 545 (Jackson, J., concurring)). They protected the people against secret government."

"The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic."
New York Times, 403 U.S. at 719 (Black, J., concurring).

"Even though the political branches may have unfettered discretion to deport and exclude certain people, requiring the Government to account for their choices assures an informed public -- a foundational principle of democracy."

Moreover, "[t]he natural tendency of government officials is to hold their meetings in secret. They can thereby avoid criticism and proceed informally and less carefully. They do not have to worry before they proceed with the task that a careless remark may be splashed across the next day's headlines." Id.

Furthermore, there seems to be no limit to the Government's argument. The Government could use its "mosaic intelligence" argument as a justification to close any public hearing completely and categorically, including criminal proceedings. The Government could operate in virtual secrecy in all matters dealing, even remotely, with "national security," resulting in a wholesale suspension of First Amendment rights. By the simple assertion of "national security," the Government seeks a process where it may, without review, designate certain classes of cases as "special interest cases" and, behind closed doors, adjudicate the merits of these cases to deprive non-citizens of their fundamental liberty interests.

This, we simply may not countenance. A government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the Framers of our Constitution. "[F]ully aware of both the need to defend a new nation and the abuses of the English and Colonia governments, [the Framers of the First Amendment] sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged." See New York Times, 403 U.S. at 719 (Black, J., concurring).

Lastly, the public's interests are best served by open proceedings. A true democracy is one that operates on faith - faith that government officials are forthcoming and honest, and faith that informed citizens will arrive at logical conclusions. This is a vital reciprocity that America should not discard in these troubling times. Without question, the events of September 11, 2001, left an indelible mark on our nation, but we as a people are united in the wake of the destruction to demonstrate to the world that we are a country deeply committed to preserving the rights and freedoms guaranteed by our democracy. Today, we reflect our commitment to those democratic values by ensuring that our government is held accountable to the people and that First Amendment rights are not impermissibly compromised. Open proceedings, with a vigorous and scrutinizing press, serve to ensure the durability of our democracy.

All quotes are from *Detroit Free Press v. Ashcroft*, ___ F.3d ___ (6th Cir. Aug. 26,

2002)

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"Despite our colleague's customarily colorful dissent, it was clear to the California state court that counsel "failed to meet the standard of a reasonably competent advocate" and that his performance was deficient. Under the cases discussed above, *see supra* Section II.A., the state court's decision was clearly compelled by law. Thus, our dissenting colleague's attempt to portray counsel's performance as exemplary and his choice of an unconsciousness defense as "Rios's best hope" is quite remarkable."

Rios v. Rocha, ___ F.3d ___, 2002 U.S. App. LEXIS 15329, *33, fn. 19 (9th Cir., Jul. 31, 2002)

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Judge Sentences Mobster Gravano

NEW YORK (AP) - Mob turncoat Sammy "The Bull" Gravano was sentenced Friday to the maximum 20 years in prison for running a multimillion dollar Ecstasy ring in Arizona.

U.S. District Judge Allyne Ross went above federal sentencing guidelines that recommended a maximum of 15 years, telling Gravano he deserved it because he "flagrantly violated the trust placed him by the court."

The former underboss of the Gambino organized crime family "has shown an utter lack of remorse" for his life of crime, Ross said. Gravano had previously been given leniency for his testimony against the mob.

Gravano, 57, who appeared in court with a shaved head, didn't speak during the hearing and had no visible reaction to the sentence.

In 1994, Gravano received a five-year prison term in exchange for testimony that helped put away 37 mobsters, including Gambino boss John Gotti.

Gravano later headed to Arizona under the Witness Protection Program and the alias Jimmy Moran. Authorities said he soon took over an illegal drug business that used New York suppliers.

- The Associated Press

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U.S. Secrecy on Detainees Criticized

- By LINDA DEUTSCH
AP Special Correspondent

CORONADO, Calif. (AP) - Making secret the government's actions in response to the Sept. 11 attacks could lead America toward repression, former Secretary of State Warren Christopher told a gathering of judges.

Christopher and former FBI and CIA chief William Webster both challenged administration policies dealing with terrorism suspects. The two appeared at the 9th U.S. Circuit Court of Appeals' annual conference Tuesday, where Christopher raised the specter of the kind of repression once common in Argentina.

"When I was in the Carter administration, I was in Argentina and I saw mothers in the streets protesting, asking for the names of those being held, those who had disappeared," Christopher said.

"We must be very careful in this country of not holding people without revealing their names. It leads to the 'disappeared.'"

The administration spokesman, Assistant Attorney General Viet Dinh, said detainees were being given extensive information on their rights.

Dinh said that in 1975, when he was 7 years old in Vietnam, his father was held in a re-education camp. "I cannot stress to you the feeling of pain and fear we went through," he said.

"That is why each and every person taken into custody since 9/11 is given the full panoply of rights including the right to go to the press."

American Civil Liberties Union Director Nadine Stossen said: "I hope what Mr. Dinh says is true. But it's not consistent with stories coming out from the detainees. A large number are not represented by lawyers."

Webster, asked to comment on secret military tribunals, said that he became familiar with the concept when it was considered for overseas conflicts.

"To me, this was a battlefield tribunal," he said. "I did not believe it would be a substitute for our system of justice for people being apprehended in the United States."

He said he understood that the Justice Department may have feared "another O.J. Simpson trial" if accused terrorists were tried in public.

"But I don't think we solve our problems by avoiding the process that has made us what we are," he said.

The Associated Press

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The Fourth Amendment And A Public Education

- By: David B. Mote
Deputy Chief Federal Defender

Unfortunately, but inevitably, the official end of summer has arrived once again. Schoolchildren have already returned to their classrooms to fidget until the weather is cool enough to pay attention. Grade school children, in fifth or sixth grade, will get their first formal exposure to the Constitution and the Bill of Rights. High school upperclassmen will study for the Constitution test they are required to pass to get a high school diploma. And outside of the actual classroom setting, they will learn that the Fourth Amendment now means less than it says.

More years ago than it seems like it should be, I recall conversations about what had been taught in a class that day about the Bill of Rights and, particularly, the Fourth Amendment. Perhaps, as lawyers, we are especially impressed when our children tell us how they have learned of the "right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." I found it more than a little ironic when I learned that during the time period that the class was covering the section on the Bill of Rights, the students were told that they could not go into the hallways while drug dogs were taken through the hallways to sniff everyones' lockers for drugs.

Some would point out that drug-sniffing drugs going through the hallways sniffing the lockers while the students are in class is not intrusive. Still, if you are a student who can't get an urgently needed hall pass to go to the bathroom because of the canine activities in the hallways, or if a dog decides to mark its territory as it passes your locker, it might seem more of an imposition. In 1995, the Supreme Court allowed schools to go beyond dogs sniffing lockers for the smell of drugs, allowing schools to require students participating in athletics to submit to suspicionless drug tests. See Vernonia School District v. Acton, 515 U.S. 646 (1995). In that case, the Court relied on the fact that the sports programs were voluntary, that there was a demonstrated connection in the case between drugs and sports, that there was a special risk of drug use and special dangers resulting from drug use by athletes, and that athletes had diminished expectations of privacy, mentioning specifically the communal undress common in sports.

This year, in a 5-4 decision, the Court has further diminished the Fourth Amendment rights of students. In Board of Education v. Earls, No. 01-332, ___ U.S. ___ (June 27, 2002), the Court upheld a drug testing requirement for participation in any extracurricular activity. Earls' extracurricular activities included show choir, marching band, academic team and National Honor Society. Relying on Vernonia, the Court noted that extracurricular activities are voluntary and can involve off-campus activities and communal undress. The Court opined that the way drug testing was performed, stationing someone outside the bathroom stall to listen for normal sounds of urination and accept the sample, the intrusion on the students' privacy was "negligible." (Ms. Earls, who reportedly passed her drug test, considered it humiliating.) On the other hand, the school's interest in preventing drug use by students was an important government concern. Neither probable cause nor even individualized suspicion is required to demand the student submit to a drug test.

Unfortunately, one result of the Supreme Court's decision may be that some idealistic students may decide to forego extracurricular activities rather than submit to suspicionless testing they find unreasonable and/or humiliating. Since studies show that students who are involved in extracurricular activities are less likely than other students to use drugs, suspicionless drug testing programs could actually result in more drug use among bright, idealistic teenagers.

Another result of the Supreme Court's decision and suspicionless drug testing programs in public schools is to teach students that the Fourth Amendment means nothing if the object of the search, in this case evidence of drug use, is important enough.

As criminal defense attorneys, of course, we do not deal with school drug testing. Nonetheless, we should pay attention to such issues because the schools, even as they teach the content of the Bill of Rights in the classroom, are taking desperate measures in the hallways to try to keep drugs and other problems in check. If we, as criminal defense attorneys, "Liberty's Last Champions," don't teach people about the importance of the Fourth Amendment and its true meaning, it will become meaningless.

Possible Defense in Certain Illegal Re-entry Cases

By: Eric M. Schwing
Staff Attorney

Although it is easy to despair when searching for a defense to an illegal re-entry case, things may not be as hopeless as they first appear. As noted in Vol. 13 (July/August 1998) of *The Back Bencher*, there are sometimes questions of citizenship even in cases where there has been a prior deportation. In addition, the five-year statute of limitations (18 U.S.C. §3282) sometimes can prevent a prosecution. The statute begins to run when the Government first has knowledge that a person has illegally re-entered the Country. See, eg. United States v. Barnes, 244 F.3d 331 (2nd Cir 2001) Many states, including Illinois, have programs set up to provide the INS with information on state prisoners who may be deportable in order to obtain federal funds. In addition, errors in the original deportation proceeding can be used to defeat an illegal re-entry prosecution.

In 1987, the Supreme Court held that a flawed deportation hearing could not be used as a predicate to support an unlawful re-entry prosecution. The petitioners had not been advised of their right to apply for suspension of their deportation orders. Failing to so advise them denied the petitioners the ability to make an intelligent decision regarding whether to appeal the deportation order. In a subsequent prosecution for unlawful re-entry, they moved to dismiss the Indictment. Their motion was granted. The Supreme Court assumed (without deciding) that the failure to properly advise the petitioners denied them due process of law.

"Because respondents were deprived of their rights to appeal and of any basis to appeal since the only relief for which they would have been eligible was not adequately explained to them, the deportation proceeding in which these events occurred may not be used to support a criminal conviction and the dismissal of the Indictments against them was therefore proper." United States v. Mendoza-Lopez, 481 U.S. 828, 841 (1987).

On June 25, 2001, the Supreme Court considered the 1996 changes to the immigration laws. Prior to 1996, deportable aliens were eligible for discretionary waivers of their deportation orders. However, on April 24, 1996, Congress deleted that provision from the immigration statutes. On a writ of habeas corpus, the petitioner in Immigration and Naturalization Service v. St. Cyr, 533 U.S. 289 (2001) argued the 1996 change was inapplicable to persons who had pleaded guilty prior to 1996 to a crime that rendered them deportable. The Supreme Court agreed. The elimination of discretionary relief "attaches a new disability in respect to transactions or considerations already passed." Immigration and Naturalization Service v. St. Cyr, 533 U.S. 289, 321 (2001) citing Landgraf v. U.S.I. Film Products, 511 U.S. 244, 269 (1994). The Supreme Court concluded that for *ex post facto* reasons, discretionary relief remains available for aliens who pleaded guilty to offenses rendering them deportable, if they would have been eligible to request discretionary waivers at the time they pleaded guilty.

If your client was deported after April 24, 1996, and prior to June 25, 2001, he or she was almost certainly and incorrectly advised that there was no possibility of discretionary relief from the deportation order. Check to see whether your client appealed the deportation order. Probably not, and if not, do what the petitioners in Mendoza-Lopez did. Move to dismiss the Indictment. Insist that the faulty advice worked to deny your client due process. To win you have to show that your client was denied the ability to knowingly forego judicial review of the deportation order. You must also show that the deportation

hearing was fundamentally unfair. See United States v. Espinoza-Farlow, 34 F.3d 469, 471 (7th Cir. 1994) and 18 U.S.C. § 1326(d). To show that the deportation hearing was fundamentally unfair, you will have to show that the informed exercise of the right to appeal would have yielded your client relief from deportation. In a recent case out of the Northern District of Illinois, United States v. Adame -Salgado, 2002 WL 1610966 (right approach, wrong result) the District Court heard testimony from an experienced immigration lawyer in private practice and concluded, even though the defendant had been convicted of attempted murder, that because he had been in the country since he was a child, nearly his entire family was in this country, and his offenses were committed at a young age, he was in a "relatively favorable position" to seek discretionary relief from an Order of Deportation. So was your client, right? Good Luck!

A Federal Criminal Appeal Primer: A Guide for Clients and their Family and Friends

- By: Alan Ellis and
Karen L. Landau
Criminal Justice, Spring 2002

A direct appeal is a creature of statute. *See* 18 U.S.C. §§§§ 3732, 3742. The appeal is the first way in which a federal criminal defendant who has been convicted of a crime, either after a guilty plea or a trial, may challenge a conviction or sentence. A defendant's conviction is not final until it has been affirmed on direct appeal.

An appeal is a review by a court of appeals of the trial court proceedings to see that the proceedings were carried out according to law. The review by the court is based entirely upon written records of the trial court proceedings, including the reporter's transcripts which are the verbatim transcript of oral proceedings. The appellate court does not hold a new trial or accept new evidence. The attorneys present most of their arguments in writing and the defendant, who is known as the "appellant", does not appear before the court. The attorneys appear briefly and orally argue the case in many appeals, but not all.

Who is entitled to a direct appeal?

Every defendant convicted after a trial or guilty plea is entitled to a direct appeal. If a defendant is indigent, he is entitled to appeal without the payment of a filing fee (in forma pauperis), to a free copy of the reporter's transcript (the verbatim account of in-court proceedings), and is entitled to the appointment of counsel to represent him on appeal. *See* 18 U.S.C. §§ 3006A, 28 U.S.C. §§ 753(g).

What issues can be raised in an appeal?

The appellate court does not decide whether a defendant is guilty or innocent. Rather, the question before the court of appeals is whether there are one or more legal errors that affected the verdict. If these legal mistakes are important enough, then the case is sent back to the trial court, usually for a retrial. On fewer occasions, where the law prohibits further prosecution, a case will be reversed with directions to dismiss it. If the legal mistakes only concerned a sentence, then the defendant may be entitled to resentencing.

Many issues may be raised on direct appeal. Examples of issues raised in criminal appeals are arguments that the defendant should not have been convicted because the evidence does not support the verdict, or because evidence was improperly admitted or excluded. A judge's pretrial and trial rulings also can be raised on appeal. Other issues for appeal include problems with jury voir dire, such as when a prosecutor exercises peremptory challenges based on race, or when the district court improperly refuses to excuse a biased juror. Issues regarding the correctness of a defendant's sentence also may be raised on direct appeal.

Because the Court of Appeal does not consider evidence not presented to the district court, claims that require outside record support cannot be presented on direct appeal. *United States v. Quintero-Barraza*, 78 F.3d 1344, 1347 (9th Cir. 1995), *cert. denied*, 519 U.S. 848 (1996). The best example of such a claim is ineffective assistance of counsel which in most cases cannot be presented on direct appeal. *See United States v. Hanoum*, 33 F.3d 1128, 1131 (9th Cir. 1994). However, other claims, such as those involving the discovery of new evidence, prosecutorial misconduct involving the withholding of exculpatory evidence, or juror misconduct, also may need to be presented outside of a direct appeal, when the facts supporting those claims are not contained within the trial and pretrial record or require additional investigation and discovery.

Unfortunately, even if a defendant can establish that the district court committed legal error, he or she may not have his conviction reversed unless the error was prejudicial. If the error is harmless, i.e. one that does not affect the outcome of the case, the error will not result in reversal of the conviction or the sentence. Constitutional errors usually result in reversal unless the government can prove beyond a reasonable doubt that the error was harmless. Non-constitutional errors only result in reversal if it is reasonably probable that the error affected the verdict. In short, "no harm, no foul."

How is a sentencing appeal different from an appeal from the underlying conviction?

Sentencing appeals are slightly different from the appeals of underlying convictions. A sentence imposed under the sentencing guidelines usually may be challenged on direct appeal. However, if the guideline sentence was imposed pursuant to a plea agreement in which the defendant and the government agreed on the appropriate sentence, an individual may appeal only if the sentence imposed is greater than sentence set forth in the agreement. 18 U.S.C. §§ 3742(c)(1). If a defendant requests a downward departure from the Sentencing Guidelines and the district court decides *not* to depart downward, that decision is not appealable, unless the judge mistakenly believes he lacks the power or authority to depart. 18 U.S.C. §§ 3742(a). Under other circumstances, the appellate court reviews a district court's decision *to* depart downward or upward from the sentencing guidelines for an abuse of discretion.

What are some of the obstacles a defendant may encounter in litigating an appeal?

Waiver of particular issues

Appellate courts must address the question whether an argument presented on appeal was properly raised in the district court. The defendant's attorney must give the district court the opportunity to rule on the issue first, usually by making a timely objection. Frequently, if a timely objection was not made, the appeals court will conclude that the issue has been waived. If an issue was waived in the lower court, an appeals court will grant relief on the issue only if it finds "plain error." Plain error is defined as an error which is "clear" or "obvious," and that affects the defendant's substantial rights. *Olano v. United States*, 507 U.S. 725 (1993). An error affecting a defendant's substantial rights is one that affects the outcome of the proceedings. The effect of the plain error rule is that even if a defendant raises a valid legal issue on appeal, the court will rarely grant relief if the issue was not first raised in the district court in compliance with the applicable rules.

Standard of review

Appellate courts give varying degrees of deference to the decision of the district court, depending on the type of legal argument presented. If the issue is purely legal, for example, whether the District Court correctly instructed the jury, or presents a mixed question of law and fact, such as whether a police officer had reasonable suspicion to stop an individual, the appellate court will review the argument independently. *See United States v. Jimenez-Medina*, 173 F.3d 752, 754 (9th Cir. 1999). In other words, the Court of Appeals will not defer to the district court's ruling. *See Lake Mohave Boat Owners Ass'n v. National Park Serv.*, 138 F.3d 759, 762 (9th Cir. 1998).

If the legal argument challenges a finding of fact made by the district court, such as whether the defendant held a managerial role in the offense or whether a police officer testified truthfully, the Court of Appeals will review the finding of fact for clear error. Clear error means a definite and firm conviction that a mistake has been committed. *United States v. Murdoch*, 98 F.3d 472, 475 (9th Cir. 1996). This is a significantly deferential standard. *Sawyer v. Whitley*, 505 U.S. 333, 346 n.14 (1992).

Finally, some legal arguments are reviewed for abuse of discretion. An abuse of discretion is found only when a lower court's ruling is not within the range of decisions a reasonable judge could have made under the circumstances. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990). An example of a ruling reviewed for abuse of discretion is the trial court's denial of a continuance.

How does a direct appeal differ from a §§ 2255 motion?

One of the most significant differences between a direct appeal and a motion to vacate conviction and/or sentence, 28(U.S.C.)2255 a so called "2255" motion is that direct appeals are decided based on the district court record as it exists as of the time the notice of appeal is filed. Section 2255 motions offer defendants the opportunity to present the court with new evidence. However, unlike in a direct appeal, not all issues may be raised in a §§ 2255 motion. Section 2255 motions may only be used to raise jurisdictional, constitutional, or other fundamental errors. Because a section 2255 motion cannot be

used for all legal challenges, even if a defendant has a claim that requires extra-record support, it is generally not a good idea to forego a direct appeal and proceed directly to a §§ 2255 motion. For more information, see *"A 2255 Primer": A Guide for Clients, their Family and Friends.*

How and where do you file an appeal?

An appeal is started by the filing of a notice of appeal with the clerk of the court in which the case was tried within ten days after the district court enters the judgment of conviction, *or* within ten days after the government files a notice of appeal. Fed. R. App. P. 4(b)(1)(A). A notice of appeal may be filed immediately after sentencing, even if the judgment has not yet issued. Fed. R. App. P. 4(b)(2), 4(b)(3)(B).

The ten-day time limit is mandatory and jurisdictional. *Browder v. Director,* 434 U.S. 257 (1978). However, within the thirty days after the ten-day period has expired, a defendant may move for leave to file a late notice of appeal based on excusable neglect. Fed. R. App. P. 4(b)(4). Such a motion is filed with the district court. The denial of a motion for leave to file a late appeal is itself a final appealable order.

After filing the notice of appeal, the record must be prepared. The record on appeal consists of the reporter's transcripts (the word-for-word record of all proceedings before, during, and after trial), and the clerk's records (composed of written pleadings such as motions, court orders and jury instructions).

Do any special rules apply to appeals?

Yes, the Federal Rules of Appellate Procedure. Rule 4(b) addresses the procedure for filing a notice of appeal. Rule 3 addresses what information must be contained in the notice of appeal. The appendix to the rules contains a sample form for the notice of appeal.

How long will it take?

A briefing schedule for the appeal is set shortly after the notice of appeal is filed. This includes a date by which the appellant must order the reporter's transcripts, and a due date for the opening brief. Frequently, the reporter's transcripts are not prepared on time, and briefing schedules are continued because of court reporter delays. In addition, sometimes attorneys find it necessary to obtain an extension of time.

Most appeals take from one year to 18 months from the filing of the notice of appeal to the issuance of a decision. However, in certain complicated cases, appeals have been known to take several years to resolve.

What are the briefs?

The appellant's brief is a written argument stating the reasons why the trial court's decision should be reversed. Again, the brief is limited to the record and cannot contain arguments which are based on statements, documents, or events which are not included in the record or the sentencing. The brief contains the defendant's reasons why the conviction should be reversed, or the sentence lower, together with the factual and legal authorities in support. The law requires that an appellate court view the facts in the light most favorable toward the party which prevailed. Thus, except in limited circumstances, the evidence will be viewed most favorably to the prosecution.

Following the filing of the opening brief, the prosecution prepares its answering brief. The Assistant United States Attorney assigned to the case has 30 days to prepare and file his brief. In many cases he will ask for and be given extra time to file his brief. The prosecution's brief also must be based solely on the record, but its arguments support the trial court's actions.

What is oral argument?

Once all the briefs in the case are filed, the appellate court may set a date for oral argument. On that date, the Assistant United States Attorney and defense counsel appear before the judges of the court of appeals and argue the case. The defendant will not be brought to court for the oral argument. The court does not hear from any witnesses nor any new evidence. Not all cases are set for oral argument. Some are decided by the court of appeals only on the written briefs. These are usually cases in which the case presents simple issues which involve clearly established law.

How is the appeal decided?

After the judges of the Court of Appeals have read the briefs and heard oral argument (if there was oral argument), they decide whether the case should be affirmed, reversed, or the judgment modified in some way. Once their decision is reached, a judge is assigned the case to write an opinion stating the court's decision and the reasons for it. An opinion may be expected anywhere from 30 days to six months after oral argument. Usually, however, a decision is issued between 30 days and three months.

Can I give up my right to appeal?

While every criminal defendant has a right to an appeal, the right to appeal may be waived. Many government attorneys insist upon a

waiver of the right to appeal pursuant to a plea agreement under which the defendant pleads guilty in exchange for some promises or concessions from the government. Waivers of the right to appeal are enforceable if they are voluntary and knowing. The Federal Rules of Criminal Procedure require a court to specifically advise the defendant that he is waiving his right to appeal at the time he pleads guilty. *See* Fed. R. Crim. P. 11(c)(6).

A waiver of the right to appeal does not waive everything. Generally, if the government breaches a plea agreement, the defendant may still appeal. *See United States v. Bowe*, 257 F.3d 336 (4th Cir. 2001). Additionally, many courts have held that a waiver of the right to appeal contained in a plea agreement does not waive claims of ineffective assistance of counsel. *E.g.*, *United States v. Henderson*, 72 F.3d 463, 465 (5th Cir. 1995). Sometimes waivers of the right to appeal permit appeals in limited circumstances, such as when the district court departs upward from the sentencing guidelines. In order to determine whether a waiver of the right to appeal is enforceable, your attorney must carefully examine the plea agreement and the circumstances surrounding the guilty plea and the sentencing.

What happens if the defendant wins?

When a defendant prevails on appeal, it does not usually mean that a judgment of "not guilty" will replace the guilty verdict and the person will be set free, although this is possible, and does occasionally happen. More often, the defendant obtains more modest, although significant relief, such as a new trial or resentencing.

Even if the defendant "wins" on appeal, the government can and may file a petition for rehearing with the three-judge panel of the court of appeals that decided the case or, alternatively, with the entire Court of Appeals *en banc*. *See* Fed. R. App. P. 35, 40. A petition for rehearing must be filed within 14 days after entry of judgment, but an extension of time may be requested. Fed. R. App. P. 40(a)(1). Generally, a petition for panel re-hearing seeks to persuade the panel that its decision was wrong, because the decision overlooked a significant point of law or fact. Fed. R. App. P. 40(a)(2). Rehearing *en banc* is reserved for significant legal issues, involving situations where *en banc* consideration is "necessary to secure or maintain the uniformity of the court's decisions," or where the proceeding involves a "question of exceptional importance." Fed. R. App. P. 35(a)(1) & (2). If the petition for rehearing or rehearing *en banc* is denied, the government may file a petition for review (Petition for Certiorari) in the Supreme Court. S.Ct. R. 10, 12, 13.

What happens if the defendant loses?

If the appellant loses the appeal or does not prevail on one or more issues, he may file a petition for rehearing with the three-judge panel of the Court of Appeals that decided the case or, with the entire Court *en banc*. *See supra*, at 7; Fed. R. App. P. 35, 40. If this petition is denied, the appellant may file a petition for review (Petition for Certiorari) in the Supreme Court, however, the Supreme Court rarely grants such a petition. S.Ct. R. 10.

Unfortunately, the chances of obtaining relief in a criminal appeal are low. Appellants in criminal cases received some measure of success in only 5.7 percent of cases decided on the merits by all 12 federal Circuit Court of Appeals for the twelve-month period ending September 30, 2001. The Seventh Circuit had the highest rate of reversal (8.3%) with the Second Circuit having the lowest rate of reversal (1.2%). These statistics were provided by the Administrative Office of the United States Courts.

Legal assistance

A defendant is entitled to legal assistance on appeal. If he cannot afford to retain counsel, he is entitled to have counsel appointed to represent him. 18 U.S.C. §§ 3006A. Usually, indigent defendants are either represented by an Assistant Federal Public Defender, or by an attorney from the Criminal Justice Act panel. Because the chances of obtaining success on appeal are relatively small, a criminal defendant can often significantly improve his chances by retaining an appellate specialist to handle his or her appeal.

Alan Ellis is a former president of the NACDL and has offices in both San Francisco and Philadelphia. He is a nationally recognized expert on sentencing issues and specializes and consults with other lawyers throughout the United States in the area of federal sentencing. He has graciously allowed us to reproduce articles he has written for his quarterly federal sentencing column for the ABA's Criminal Justice magazine.

We extend our sincere thanks and gratitude to Mr. Ellis for sharing his expertise with us.

CA7 Case Digest

By: Jonathan Hawley
Appellate Division Chief

and Johanna Christiansen
Staff Attorney

APPRENDI

Curtis v. United States, ___ F.3d ___ (7th Cir. No. 01-2826; 06/19/02). Upon consideration of an appeal from a denial of a 2255 petition, the Court of Appeals held that Apprendi is not retroactive on collateral review. In doing so, the court joined all other circuits to have considered the question. First, the court concluded that the Apprendi decision was procedural, i.e. who makes the decision regarding facts which increase the statutory maximum sentence and by what standard of proof, and the *Teague* standard therefore applies. Under this analysis, the right identified in Apprendi was "not so fundamental that any system of ordered liberty is obliged to include them." Indeed, the Supreme Court in United States v. Cotton, 122 S.Ct. 1781 (2002), held that an Apprendi error was not structural. In other words, it is not the sort of error that necessarily undermines the fairness, integrity, or public reputation or judicial proceedings. Accordingly, Apprendi is not retroactive on collateral review.

United States v. Morris, ___ F.3d ___, (7th Cir. No. 01-4241; 6/17/02). In prosecution for possession of a firearm by a felon, the Court of Appeals rejected the defendant's argument that Apprendi required a jury determination beyond a reasonable doubt on the question of whether two prior convictions were committed "on occasions different from one another," for purposes of the Armed Career Criminal Act (18 U.S.C. § 924(e)(1)). The court initially noted that in United States v. Skidmore, 254 F.3d 635 (7th Cir. 2001), this circuit had rejected the same argument. Therefore, the law as articulated by the Supreme Court in Almendarez-Torres v. United States, 523 U.S. 224 (1998), controls, and recidivism used to enhance a defendant's maximum penalty is not an element of a crime that must be charged in the indictment and determined beyond a reasonable doubt. Although the defendant in this case did not challenge the *fact* of the convictions, but rather the question of whether the occurred on different occasions, the court saw no reason to parse out this portion of the recidivism inquiry. That fact is no different that than the facts left to the judge's determination in Almendarez-Torres.

COMMERCE CLAUSE

United States v. Marrero, ___ F.3d ___ (7th Cir. Nos. 01-2283 & 01-4078; 8/5/02). Three drug dealers from Detroit went to Chicago to purchase $25,000 worth of cocaine from the defendants. Rather than selling them cocaine, the defendants robbed the drug dealers of the $25,000. The defendants were convicted of violating the Hobbs Act (18 U.S.C. § 1951) and appealed arguing their robbery did not effect interstate commerce. The Court of Appeals affirmed their convictions determining that the robbery belonged to a class of acts that affect interstate commerce, namely the drug trade. The Court stated, "The dealers' business was in commerce not only because it bought its merchandise (cocaine) from out of state but also because conducting the business involved crossing state lines when the dealers came to Chicago to try to buy drugs from the defendants."

EVIDENCE

United States v. Owens, ___ F.3d ___ (7th Cir. No. 01-4373; 08/19/02). In prosecution for mail and wire fraud, the court of appeals affirmed the admission of expert testimony. At trial, the government introduced the testimony of an expert witness who testified that the allegedly fraudulent appraisal reports filed by the defendant were "misleading and fraudulent." According to the defendant, this testimony violated Federal Rule of Evidence 704 because the testimony went to the ultimate issue in the case, namely, whether the forms were fraudulent. The Court of Appeals rejected this argument, noting that the Rule allows testimony regarding an ultimate issue *except* when that ultimate issue concerns the defendant's mental state or condition and that issue constitutes an element or defense of the crime charged. In the present case, the expert used the terms "misleading and fraudulent" to characterize the quality of the appraisal reports, rather than the defendant's state of mind. The testimony was therefore admissible.

United States v. Thomas, ___ F.3d ___ (7th Cir. No. 01-3759; 06/26/02). In prosecution for drug conspiracy, the Court of Appeals affirmed the admissibility of tape recorded conversations made by a government agent. At trial, the government introduced into evidence a tape recorded conversation containing the voice of the defendant, a government agent, and a cooperating witness. Because the agent who made the recording could not testify due to his being in a car accident, the government laid a foundation for the recordings through the testimony of the cooperating witness. That witness testified that he listened to the tapes, identified the voices of the defendant and the agent, and that the tapes accurately reflected the

recorded conversations. It was undisputed that the witness was familiar with the voices on the tape and was present for almost all of the recorded conversation. The defendant, however, argued that the testimony was insufficient to lay a foundation because the witness was not an actual participant in the recorded conversation. The Court of Appeals disagreed, noting that a party offering a tape recording into evidence must prove that the tape is a true, accurate, and authentic recording of the conversation between the parties involved. This standard can be established in two ways: a chain of custody showing that the tapes are in the same condition as when recorded, or other testimony to demonstrate the accuracy and trustworthiness of the evidence. The authenticity and accuracy of a tape recording can be established through eyewitness testimony of the events in question. In the present case, the testimony of the cooperating witness, plus testimony of an officer concerning how the tapes were made and stored, provided a sufficient foundation for their admissibility.

United States v. Conn, ___ F.3d ___ (7th Cir. No. 01-3506; 7/16/2002). During his trial for willfully dealing firearms without a license, Conn challenged the admission of an ATF agent's testimony regarding whether the firearms seized had value as collectors items. The defense argued that the agent was not qualified to render such an opinion because he was not a firearms collector and had no knowledge of the value of collectable firearms. The Court first considered whether the agent's testimony was expert testimony under Federal Rule of Evidence 702 or lay opinion testimony under Rule 701. The Court concluded the testimony was expert testimony because the agent was asked to draw on his accumulated knowledge of firearms based on his training and experience. The Court then applied Rule 702 and considered whether (1) the testimony was based on sufficient facts or data; (2) the testimony was the product of reliable principles and methods; and (3) the witness applied the principles and methods reliably to the facts of the case. Based on the agent's knowledge and training and his inspection of Conn's firearms, the Court concluded the agent's opinions were grounded in sufficient facts and data. Second, the Court recognized that established law enforcement methodologies are reliable principles and methods. Finally, because the defense did not challenge the application of the agent's knowledge to the facts of the case, the third element had been met as well.

United States v. Fujii, ___ F.3d ___ (7th Cir. No. 01-3455; 8/20/02). Fujii was convicted of attempting to smuggle aliens into the United States for financial gain. Fujii came to the attention of INS officials when his Japanese passport did not contain certain security features normally on such passports. At the same, three women from the same flight were observed in the women's bathroom flushing Japanese passports down the toilet. An INS agent contacted the airline and requested a copy of the manifest and a copy of passenger reservations for the flight all four arrived on. An assistant manager printed the list from which the agent was able to determine Fujii and the three women were involved in the same illegal scheme. Fujii argued the district court erred in admitting the airline's records because they were not made in the ordinary course of business and because they did not contain sufficient indicia of trustworthiness. Relying in Federal Rule of Evidence 803(6), the Court of Appeals affirmed the district court's ruling, finding the records were complied and maintained as part of the airline's regular business. The Court considered the following factors: (1) the records were made from information transmitted from a person with knowledge of the transactions, (2) the entries were made at or near the time the information was received, (3) it was the regular business practice of the airline to make the entries into a computer system, and (4) the records were kept as part the airline's regular business activity.

United States v. Woods, ___ F.3d ___ (7th Cir. No. 01-2819; 8/20/02). During a jury trial for distribution of crack cocaine, the government provided the testimony of two informants who had participated in controlled buys with Woods. The first informant, Roberson, could not be located to testify at the time of trial. The evidence of his transactions with Woods was put on through the testimony of an FBI agent and audiotapes of the transactions. Woods argued that presentation of the testimony violated the confrontation clause and the testimony was inadmissible hearsay. The Court of Appeals disagreed holding that the statements were non-hearsay as they were properly admitted as statements of a party opponent or adoptive admissions. Furthermore, if statements are admissible because they are non-hearsay, there is no confrontation clause problem. The second informant, Davis, did testify at trial. However, the government also produced audio recordings of his dealings with Woods, including several statements made by Davis to the monitoring FBI agents. The Court determined these statements were erroneously admitted under the

present sense impression exception because the statements were clearly calculated interpretations made for the benefit of the agents listening. However, the error was harmless in view of the relatively benign nature of the statements and the overwhelming evidence against Woods.

HABEAS/2255

Moore v. Bryant, ___ F.3d ___ (7th Cir. No. 01-3619; 07/09/02). Upon consideration of the petitioner's habeas corpus petition, the Court of Appeals reversed the district court's dismissal of the petition on the ground that the petitioner had procedurally defaulted his ineffective assistance of counsel claim. In the trial court, the petitioner pled guilty to a murder charge under the mistaken belief that he would be entitled to day for day good time credit with a plea, but not if he went to trial. Although he moved to withdraw his plea in the trial court, the motion was denied. On direct appeal in the state court, the court affirmed the conviction, noting that the ineffective assistance of counsel claim had been waived. However, the court went on to reject the claim on the merits. The Illinois Supreme Court then denied his petition for leave to appeal. The petitioner then filed an Illinois post-conviction petition. The trial court held that the issue had been considered on direct appeal, and res judicata therefore barred its consideration of the issue. The appellate court affirmed, and the Supreme Court denied leave to appeal. In the federal district court, the court dismissed the petition, finding that the Illinois state courts had rejected the claim of ineffective assistance of counsel on the independent and adequate state procedural grounds of waiver and res judicata. Therefore, federal review was barred. The Court of Appeals, however, disagreed. Specifically, the court noted that the independent and adequate state grounds doctrine will not bar habeas review unless the state court actually relied on the procedural default as an independent basis for its decision. Thus, if the decision of the last state court to which the petitioner presented his federal claims fairly appears to rest primarily on the resolution of those claims, or to be interwoven with those claims, and does not clearly and expressly rely on the procedural default, a federal court may concluded that there is no independent and adequate state ground and proceed to hear the federal claims. In the present case, although the appellate court on direct appeal noted the waiver, it went on to consider the merits. Moreover, the post-conviction court's relied upon the appellate court decision to apply the doctrine of res judicata. Thus, the post conviction courts presumed that the appellate court had rested its decision on the merits. Therefore, for purposes of federal review, the adequate and independent state grounds doctrine did not preclude review, for the state courts considered the federal question on the merits.

Hampton v. Wyant, ___ F.3d ___ (7th Cir. No. 02-1296; 07/09/02). Upon consideration of a Fourth Amendment claim on in a habeas corpus petition, the Court of Appeals refused to apply the exclusionary rule on collateral review. The district court had found that the defendant's Fourth Amendment right against an unreasonable seizure had been violated, that the state court's failure to make such a finding deprived the petitioner of a full and fair opportunity to litigate the issue in state court, and suppression was warranted. The Court of Appeals, however, noted that Stone v. Powell, 428 U.S. 465 (1976), holds that, although both state and federal courts must apply the exclusionary rule at trial and on direct appeal, it is inappropriate to use the exculsionary rule as the basis of collateral relief because it would not appreciably augment the deterrence of improper police conduct. Rather, states must provide full and fair hearings so that the exclusionary rule may be enforced with reasonable (though not perfect) accuracy at trial and on direct appeal. A deprivation of such a hearing did not occur in this case where, despite the fact that the state courts may have reached an incorrect conclusion regarding the seizure, the state court judges took their task of enforcing the exclusionary rule seriously. The judges conducted research and analysis. Thus, without more than a claim of error, collateral relief based on the exclusionary rule is improper.

Harris v. Cotton, ___ F. 3d ___ (7th Cir. No. 02-2550; 07/11/02). After receiving a prison disciplinary sanction for violation of a prison order, Harris sought federal habeas corpus contending the administrative proceeding denied him the due process of law. The Court of Appeals dismissed the suit because it was untimely. Harris then asked the Court for permission to file a second or successive habeas corpus petition based on newly discovered evidence. In an issue of first impression, the Court agreed with the Eighth Circuit's determination that a second or successive habeas corpus application under § 2254, if the petition challenges not the judgment of the state court but a sanction imposed in a prison disciplinary proceeding, is subject to the mandate of § 2244(b) which requires the Court's permission to

file.

White v. Godinez, ___ F.3d ___ (7th Cir. No. 01-3503; 8/22/02). The Court of Appeals affirmed the district court's grant of a writ of habeas corpus, after it initially reversed and remanded for an evidentiary hearing. The Court held that petitioner's counsel was ineffective when he only met with petitioner twice for a total of less than 45 minutes and did not do any investigation in a murder conspiracy case. The Court had already found prejudice in its earlier opinion and reaffirmed that holding. In essence, defense counsel failed to learn about an alternative theory of defense, by among other things asking petitioner for his version of the facts, that was more promising than the one he presented.

Gilmore v. Bertrand, ___ F.3d ___ (7th Cir. No. 01-4344; 8/21/02). Gilmore filed a writ of habeas corpus alleging he was denied his Sixth Amendment right to counsel on direct appeal when his attorney withdrew from the case. The State agreed and the district court granted his petition. However, the court stayed execution of the writ for 120 days to allow the State to reinstate Gilmore's right to a direct appeal with counsel. After the State missed the deadline, the court granted an extension of the stay. Gilmore's appeal rights were reinstated. Gilmore appealed arguing the court should not have allowed the State extra time after it had missed the 120 day deadline. The Court of Appeals held that the equitable power of the district court includes the ability to grant the State additional time to cure a constitutional deficiency.

JURIES/JURY TRIAL

United States v. Rollins, ___ F.3d ___ (7th Cir. No. 01-3921; 09/19/02). In prosecution for multiple counts of bank robbery, the Court of Appeals held that a defendant's failure to renew a motion to sever counts at the close of the evidence constituted a waiver. Prior to trial, the defendant filed a motion to sever the various bank robbery counts. The district court denied the motion, and the defendant did not renew it at the close of evidence. The court found this failure to constitute a waiver, for "the timing of the motion is important because the close of evidence is the moment when the district court can fully ascertain whether the joinder of multiple-counts was unfairly prejudicial to the defendant's right to a fair trial." Moreover, the requirement to renew has the effect of discouraging strategic choices by criminal defendants who would prefer to wait for a verdict before renewing their severance arguments, thus wasting valuable judicial resources.

Henderson v. Walls, ___ F.3d ___ (7th Cir. No. 00-3834; 07/09/02). Upon consideration of a habeas corpus petition, the Court of Appeals affirmed the district court's grant of the petition based on the state courts' unreasonable application of the law as set forth by the United States Supreme Court in Batson v. Kentucky, 476 U.S. 79 (1986). At the defendant's trial, the state used 60% of its peremptory challenges against African Americans. The defendant pointed to this statistic to make a Batson challenge, but both the state trial and appellate courts held that he had failed to make a *prima facie* showing of a Batson violation. Specifically, the courts refused to consider this statistic in the *prima facie* stage of the Batson analysis, noting that at that stage it was "only concerned with whether the stricken black venire members shared any characteristics other than race; it is not our role to search for possible reasons for the prosecution's strikes or for similarities between the stricken black and accepted white venire members." The Court of Appeals, however, noted that Batson requires the consideration of "all" the circumstances surrounding the exercise of the state's peremptory challenges. By refusing to consider this relevant evidence at the *prima facie* stage of the Batson analysis, the state court unreasonably applied the law. Accordingly, the court affirmed the grant of the writ.

SEARCH & SEIZURE

United States v. Abdulla, ___ F.3d ___, (7th Cir. No. 01-1620; 06/18/02). In prosecution for aggravated bank robbery, the Court of Appeals affirmed the district court's denial of the defendant's motion to suppress evidence. Upon being arrested, the agents asked the defendant if he knew why he was being arrested. He responded, "I robbed a bank. Everyone knows I robbed a bank." Thereafter, the defendant spontaneously made a number of incriminating statements to the agents. Upon arriving at the police station, the defendant was finally given his Miranda warnings, and made no statement thereafter. The defendant argued that his statements should be suppressed because he should have been read his Miranda rights prior to the initial question asked of him, and his latter statements were "fruit of the poisonous tree." The Court of Appeals initially concluded that even if the first question violated Miranda, it was voluntary and no coerced. Likewise, the defendant's subsequent statements were voluntary, for the statements were made spontaneously, without any questioning by the agents. Given the

voluntariness of the defendant's statements, the court relied on the Supreme Court's decision in Oregon v. Elstad, 470 U.S. 298 (1985), to affirm the admissibility of the statements. In Elstad, the Court stated, "It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period . . . The admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." Therefore, in this particular case, given the voluntary nature of all the statements, exclusion was inappropriate. The court declined to decide, however, whether the fruit of the poisonous tree doctrine can *ever* apply to a Miranda violation.

United States v. Spruill, ___ F.3d ___ (7th Cir. No. 01-2721; 7/11/02). After a federal grand jury indictment him on charges of prostitution of minors and transportation of minors across state lines for the purpose of prostitution, police arrested Spruill and, after a full day of interrogation, he signed a statement acknowledging his role in the offenses. Spruill argued the district court erred in denying his motion to suppress because it was taken in a post-indictment interrogation and because the federal defender's office had assigned an attorney to his case. In Brewer v. Williams, 430 U.S. 387 (1977), the Supreme Court held that a confession elicited from an accused after the right to counsel has attached violates the Sixth Amendment if it was elicited outside the presence of counsel without a valid waiver. The Court of Appeals held that Spruill's right to counsel had attached because he was interrogated after the commencement of adversarial proceedings. However, because Spruill never explicitly requested to speak to counsel and had signed a valid waiver of his right to counsel, the Court determined he never asserted his Sixth Amendment right. Furthermore, the mere appointment of counsel, without some positive affirmation or request by the defendant, cannot be an assertion of the right to counsel.

SENTENCING

United States v. Morris, ___ F.3d ___, (7th Cir. No. 01-4241; 6/17/02). In prosecution for possession of a firearm by a felon, the Court of Appeals rejected the defendant's argument that his two prior aggravated discharge convictions were "committed on occasions different from one another," such that they did not both count as predicate convictions for purposes of the Armed Career Criminal Act (18 U.S.C. § 924(e)). The basis for the two convictions involved two shootings occurring on a single night. The defendant shot his first victim from his automobile, and the second victim at a different location a short time thereafter. The Court of Appeals noted that when analyzing the separateness requirement of the ACCA, courts should consider the "nature of the crimes, the identities of the victims, and the locations," and should determine whether the crime involved distinct criminal aggressions where the perpetrator had the opportunity to cease and desist from him criminal actions at any time but failed to do so. Regarding the timing of multiple crimes, an important inquiry is whether the crimes were simultaneous or sequential. In the present case, the shootings were sequential, involving different victims at different locations at different times. Under the framework noted above, the prior convictions were not committed on the same occasion.

United States v. Hartz, ___ F.3d ___ (7th Cir. No. 01-2801; 7/16/02). Hartz pled guilty to one count of mail fraud based on his scheme to defraud Attorney Title Guarantee Fund, an organization in the business of providing title insurance in connection with real estate transactions. Hartz fabricated more than 240 real estate transactions and netted about $1.5 million, depositing some of the money in his personal account at Bank One. When Hartz was sentenced, § 2F1.1(b)(8)(B) provided that if the offense affected a financial institution and the defendant derived more than $1 million from the offense, increase by 4 levels. Subsequent amendments to the guidelines (now § 2B1.1(b)(12)(A)) changed the provision to read if the defendant derived more than $1 million from one or more financial institutions as a result of the offense, increase by 2 levels. Hartz argued the amendment to the guidelines should have construed as a clarification rather than a substantive change and that the latter version should have been applied to him. The Court of Appeals disagreed, holding that the amendment was a substantive change as it changed the plain language of the guideline. The requirements for applying the guideline now focus on the amount derived from the financial institution rather than the amount derived from the offense as a whole. The Court further determined Hartz's offense affected a financial institution, Bank One, because the bank was forced

to pay $150,000 in civil penalties for its actions in Hartz's scheme. In addition, Hartz filtered more than $67 million through Bank One thereby exposing the bank to even greater civil penalties.

United States v. Fearman, ___ F.3d ___ (7th Cir. No. 01-3488; 7/25/02). Fearman pled guilty to one count of bankruptcy fraud for her actions in relation to the foreclosure sale by the mortgage company of a rental property she and her husband owned. The district court determined the actual loss was zero because the property had so many building code violations that the mortgage company decided to demolish it rather than bring it up to code. The mortgage company eventually wrote off the debt. However, the court concluded the intended loss was $37,000 based on the amount the mortgage company was planning to bid at the foreclosure sale before it discovered the code violations. The Court of Appeals vacated Fearman's sentence and remanded, holding that the intended loss should be based on the defendant's understanding of the value of the property, not the victim's. Therefore, it was likely that Fearman believed the property was not worth any more than a few thousand dollars because of the multiple code violations.

United States v. Tankersley, ___ F.3d ___ (7th Cir. No. 01-3425; 7/22/02). After pleading guilty to two counts of criminal contempt of court, Tankersley objected to the district court's basis for enhancing his sentence under § 3C1.1 for obstruction of justice. The court based the obstruction finding on Tankersley's concealment of assets and failing to provide information to the receiver during an FTC investigation. The Court of Appeals reversed the district court's enhancement stating that "the conduct upon which the district court enhanced Tankersley's sentence did not obstruct the investigation or prosecution of the instant offense, rather it obstructed the administration of justice with respect to the FTC civil proceedings."

United States v. Cole, ___ F.3d ___ (7th Cir. No. 02-1301; 8/1/02). Cole appealed from his guilty plea and sentence for distributing five or more grams of cocaine base arguing the district court erred by classifying him as a career offender. The only element in dispute at sentencing was whether Cole's previous conviction for "mob action" qualified as a crime of violence. The Court of Appeals, agreeing with the district court, concluded that in this case, "mob action" presented a serious potential risk of physical injury to another. Although no one was injured during the offense, Cole fired a gun and shot out the windows in a building while other individuals were nearby. The Court recognized that ordinarily, the sentencing court must consider only the charging document and the statutory definition when determining whether a crime is a crime of violence. However, an exception to this rule exists in cases, such as this one, "where it is other impossible to determine the proper classification of the offense."

United States v. Jackson, ___ F.3d ___ (7th Cir. No. 01-4347; 8/7/02). Jackson was convicted after a jury trial of several drug related crimes. The district court enhanced his base offense level pursuant to § 3C1.1 finding that Jackson willfully impeded or obstructed the administration of justice. The court based this finding on Jackson's testimony at a suppression hearing. Jackson's testimony was in direct conflict with the arresting officer's testimony. The district court, weighing the credibility of both witnesses, determined Jackson was untruthful. On appeal, he argued the court's ruling effectively "chilled his right to testify" and to mount a vigorous defense. Noting defendants do not have the right to commit perjury, the Court of Appeals affirmed the sentence.

United States v. Partee, ___ F.3d ___ (7th Cir. No. 01-3439; 8/21/02). Partee appealed the district court's assessment of a sentencing enhancement based on obstruction of justice. The enhancement was based on Partee's false statement to the probation officer that he was employed by a certain company when he, in fact, had not been. The district court found that this lie was part of Partee's continuing scheme to hide the source of his income from selling crack cocaine. The Court of Appeals affirmed the district court's sentence also agreeing with the district court's conclusion that the false statements were material because they "concerned his personal history -- a major factor in the sentencing determination."

United States v. Roach, ___ F.3d ___ (7th Cir. No. 01-2618; 7/10/02). Roach was convicted of wire fraud in connection with the embezzlement of more than $240,000 from her employer in order to repay debt incurred by her excessive purchases of jewelry and clothes. At sentencing, the district court departed downward pursuant to § 5K2.13 finding that she committed the offense while suffering from a significantly reduced mental capacity (chronic depression). The government appealed and the Court of Appeals reversed the sentence and remanded for resentencing. The district court found that Roach's offense was motivated and

caused by her compulsive shopping and depression and that she had a significantly impaired ability to control her behavior. The government did not dispute either her depression or the compulsive nature of her shopping. Rather, it argued the court erred in holding that the impairment that provides the motive to commit the offense is a sufficient connection to the offense. The Court agreed with the government and held that § 5K2.13 requires more than a connection between the impairment and the motive; it requires the court to determine the defendant's mental capacity when she committed the offense.

United States v. Noble, ___ F.3d ___ (7th Cir. 01-4287; 8/20/02). In Noble's first appeal, the Court of Appeals affirmed the district court's determination of drug quantity at sentencing but reversed for consideration in light of Apprendi. Now on his second appeal, the Court revisited the drug quantity issue and reversed its earlier ruling regarding the reliability of an informant's testimony. Although the Court admitted it generally will not revisit an issue already decided, it may do so if it has a conviction that is both strong and reasonable that the earlier ruling was wrong and that the party that benefitted from the earlier ruling would not be unduly harmed. Specifically considering the drug quantity evidence, the Court stated that the informant did not testify at trial or at sentencing and the agent to whom the informant made the statements testify as to the accuracy of the statements. In addition, the only evidence relied upon by the district court was hearsay contained in the PSR which gave no indication of reliability.

VENUE

United States v. Ringer, ___ F.3d ___ (7th Cir. No. 00-3444; 8/8/02). Ringer was convicted after a jury trial of making a false statement to a government agent while incarcerated in Kentucky. He was prosecuted in the Southern District of Indiana where his original conviction for drug trafficking occurred. Ringer appealed arguing venue was improper in Indiana because none of the elements of the crime occurred in Indiana. The Court of Appeals affirmed finding venue was proper in Indiana because events took place there which were critical to proving the materiality element of the crime. The Court stated, "The Southern District of Indiana's strong link to Ringer's conduct makes it relevant to determining venue, not as an explicit geographic element, as in Fredrick, but as a place where events took place that were necessary to establish materiality. . . . Since the halting of the investigation against Ringer's friends in the Southern District of Indiana was evidence of the materiality of Ringer's statements, venue was proper in the Southern District of Indiana."

Recently Noted Circuit Conflicts

Compiled by Kent V. Anderson
Senior Staff Attorney

United States v. Abdulla, 294 F.3d 830 (7th Cir. 2002).

The Seventh Circuit held that the fruit of the poisonous tree doctrine does not apply to spontaneous statements that a defendant makes after making an un-Mirandized, but voluntary statement.

The Court also noted a circuit conflict on the issue of whether the fruit of the poisonous tree doctrine can ever apply to a Miranda violation. "Some courts have taken the view that *Elstad* signaled the end of any use of the fruit of the poisonous tree doctrine based on a *Miranda* violation. *See, e.g., United States v. DeSumma*, 272 F.3d 176, 180-81 (3d Cir. 2001). Other courts have stated that "*Elstad* does not wholly bar the door to excluding evidence derived from a *Miranda* violation." *United States v. Byram*, 145 F.3d 405, 409 (1st Cir. 1998)." The Seventh Circuit did not find it necessary to decide and take sides on the issue in this case.

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United States v. Hurlich, 293 F.3d 1223 (10th Cir. 2002).

The Tenth Circuit held that the district court did not have to warn a defendant of the possibility that his sentence would be consecutive to a previously imposed state sentence, although the court should have done so. The Court found that a consecutive sentence is not a direct consequence of the plea, about which a defendant must be advised, because it does not affect the length of the federal sentence. With this holding and finding, the Tenth Circuit joined the majority of an 8-1 partial circuit split. The Ninth Circuit has held that a judge must tell a defendant that his sentence will be consecutive if the court has no option to make it concurrent, but not if the court has discretion. United States v. Neely, 38 F.3d 458, 461 (9th Cir. 1994) (per curiam). The Seventh Circuit is part of the majority which does not require warnings even when the sentence must be consecutive. United States v. Ray, 828 F.2d 399,

417-19 (7th Cir. 1987)

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United States v. Smalley, 294 F.3d 1030 (8th Cir. 2002).

The Eighth Circuit held that the use of prior juvenile adjudications to enhance a defendant's sentence under the Armed Career Criminal Act (ACCA) (18 U.S.C. §924(e)) does not violate Apprendi.

This decision created a circuit split because the Ninth Circuit held in United States v. Tigh, 266 F.3d 1187 (9th Cir. 2001) that Apprendi does not allow a juvenile adjudication can not be used to support a sentence under the ACCA. because juveniles do not have the right to a jury trial.

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Bennet v. Mueller, 296 F.3d 752 (9th Cir. 2002).

The Ninth Circuit held that the burden is on the state, not a habeas petitioner, to prove that a procedural bar is regularly and consistently applied. However, the petitioner bears the burden of production. The Court's holding agreed with the Tenth Circuit's decision in Hooks v. Ward, 184 F.3d 1206 (10th Cir. 1999) and disagreed with the Fifth Circuit's decision in Sones v. Hargett, 61 F.3d 410 (5th Cir. 1995). No other court has yet decided this issue.

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United States v. Roach, 296 F.3d 565 (7th Cir. 2002).

The Seventh Cir. held that a diminished capacity departure is only available if the defendant's substantially impaired mental condition reduced her judgment or control at the time of the crime and resulted in the behavior which constituted the offense. A departure is not available if the condition only gave the defendant a motive to commit the offense. In this case, the defendant suffered from depression and compulsive shopping disorder. The later provided the motive for her embezzlement. However, the Court held that it did not have anything to do with the embezzlement itself.

The Court's holding agrees with the Eleventh Circuit's decision in United States v. Miller, 146 F.3d 1281 (11th Cir. 1998), but disagrees with the Sixth Circuit's decision in United States v. Sadolsky, 234 F.3d 938 (6th Cir. 2000).

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United States v. Truman, 29_ F.3d ___, 2002 U.S. App. LEXIS 17837 (6th Cir. Aug. 29, 2002).

The Sixth Circuit held "that when a defendant moves for a downward departure on the basis of cooperation or assistance to government authorities which does not involve the investigation or prosecution of another person, U.S.S.G. §5K1.1 does not apply and the sentencing court is not precluded from considering the defendant's arguments solely because the government has not made a motion to depart." The Court held that in such cases a district court may depart under U.S.S.G. §5K2.0.

In this case, the defendant was arrested with a number of different pills that he had stolen from a pharmaceutical company that he worked for. He detailed the lax security at the company which allowed him to easily steal the pills. As a result, the company significantly upgraded its security.

The Sixth Circuit noted a circuit split between the Second Circuit's decision in United States v. Kaye, 140 F.3d 86 (2nd Cir. 1998), which held that §5K2.0 can be used to depart for assistance to state or local authorities and the Third Circuit's decision in United States v. Love, 985 F.2d 732 (3rd Cir. 1993), which held that a substantial assistance departure can only be given upon the government's motion, under §5K1.1, even if the assistance does not involve the investigation or prosecution of another person by federal authorities. The Court also cited decisions from the Seventh and Eighth Circuits as agreeing with the Third Circuit. However, none of those cases actually addressed a court's authority under §5K2.0, instead of §5K1.1. United States v. Egan, 966 F.2d 328 (7th Cir. 1992); United States v. Lewis, 896 F.2d 246 (7th Cir. 1990); United States v. Hill, 911 F.2d 129 (8th Cir. 1990).

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United States v. Sofsky, 287 F.3d 122 (2nd Cir. 2002)

In Sofsky, the Second Circuit struck a condition of supervised release that "the defendant [who was convicted of possessing child pornography] may not `access a computer, the Internet, or bulletin board systems at any time, unless approved by the probation officer.'" The Second Circuit vacated the internet restriction because it was broader than reasonably necessary. In doing so, the Court of Appeals relied on its earlier decision in United States v. Peterson, 248 F.3d 79 (2d Cir. 2001). In that case, the court vacated a condition of probation which prohibited a bank larceny defendant, with a prior state incest conviction, rom possessing or using a computer that was capable of internet access.

Three other courts have also examined similar restrictions on internet access with mixed results. United States v. Walser, 275 F.3d

981 (10th Cir. 2001) (holding that restriction was not plain error); United States v. Paul, 274 F.3d 155 (5th Cir. 2001) (affirming complete ban on computer or internet use); United States v. White, 244 F.3d 1199 (10th Cir. 2001) (reversing complete ban); United States v. Crandon, 173 F.3d 122 (3rd Cir. 1999) (affirming prohibition on internet usage without permission of the probation office).

Supreme Court Update

Compiled by:
Johanna Christiansen
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An "**" before the case name indicates new information.

Recent Decisions

***Dusenberry v. United States*, 534 U.S. 161 (January 8, 2002) (Chief Justice Rehnquist).**

When the government proposes to forfeit property in which a prisoner may have interest, the Fifth Amendment's Due Process Clause does not require that the government provide actual notice of the pending forfeiture. Notice sent by certified mail to a prison with procedures for delivering mail to inmates is sufficient. (5-4 decision.)

***Kelly v. South Carolina*, 534 U.S. 246 (January 9, 2002) (Justice Souter).**

In a capital case where future dangerousness is at issue, due process requires that the court instruct the jury that life imprisonment means life without parole even where there is no jury question as to parole eligibility. (5-4 decision.)

***United States v. Knights*, 534 U.S. 246 (January 9, 2002) (Chief Justice Rehnquist).**

Where there was blanket permission to search as a condition of probation, and there was reasonable suspicion to conduct search, search of probationer's home was reasonable and did not violate the Fourth Amendment. (9-0 decision.)

***United States v. Arvizu*, 534 U.S. 266 (January 15, 2002) (Chief Justice Rehnquist).**

The Court of Appeals erroneously departed from the totality of the circumstances test governing reasonable suspicion determinations under the Fourth Amendment by holding that certain factors relied upon by law enforcement officer were entitled to no weight. Under the totality of the circumstances test, a border patrol agent in this case had reasonable suspicion that justified the stop of a vehicle near the Mexican border. (9-0 decision.)

***Kansas v. Crane*, 534 U.S. 407 (January 22, 2002) (Justice Breyer).**

Due process precludes civil commitment of sex offender as a sexually violent predator absent proof that the person sought to be committed has serious difficulty controlling dangerous behavior, but complete lack of volitional control is not required. (7-2 decision.)

***Lee v. Kemna*, 534 U.S. 362 (January 22, 2002) (Justice Ginsburg).**

Recognizes exception to the rule that a defendant's violation of state procedural rule bars federal habeas review where, in a typical case, compliance with the state rule would serve no perceivable state interest. (6-3 decision.)

***United States v. Vonn*, 122 S. Ct. 1043 (March 4, 2002) (Justice Souter).**

Where a defendant fails to object to the district court's omission of one of the Rule 11 mandates from the change of plea colloquy, the defendant must show plain error under Rule 52(b) rather than putting the government to the burden of showing harmless error under Rule 11(h). In addition, an appellate court may consult the entire record on appeal, rather than just the plea proceedings, when considering the effect of an error on the defendant's substantial rights. (8-1 decision.)

***Oakland Housing Authority v. Rucker*, 122 S. Ct. 1230 (March 26, 2002) (Chief Justice Rehnquist).**

The plain language of 42 U.S.C. § 1437d(l)(6) givens public housing authorities the power to evict tenants and terminate their leases when a member of the household or a guest engages in drug-related activities, regardless of whether the tenant knew, or should have known, of the drug-related activity. The Court held the language of the statute was unambiguous and reinforced by a comparison to the civil forfeiture provision of 21 U.S.C. § 881(a)(7) which allows for forfeiture of all

leasehold interests when used to commit drug-related activities but requires a showing of the tenant's knowledge of the activity. This distinction showed that Congress knew of the ability to require knowledge of drug activity, but deliberately chose not to in this case. Because the language of § 1437d(l)(6) is unambiguous, the Court refused to consider the legislative history of the statute and the canon of constitutional avoidance which the Ninth Circuit Court of Appeals relied upon. (8-0 decision, Justice Breyer took no part.)

***Mickens v. Taylor*, 122 S. Ct. 1237 (March 27, 2002) (Justice Scalia).**

In order to prevail based on counsel's conflict of interest, defendants must show counsel had an actual conflict of interest that adversely affected the adequacy of his representation, regardless of whether the district court knew or should have known of the conflict or whether the court failed to inquire further into the possibility of a conflict. The previous interpretation of Supreme Court precedent by the courts of appeals established a rule of "automatic reversal," i.e., that where the defendant could prove the district court knew or should have known that a potential conflict of interest existed, an appellate court will presume the defendant was prejudiced if the district court judge made no inquiry into it. The Supreme Court held that the rule of automatic reversal "makes little policy sense." The trial court's awareness of a potential conflict does not make it more or less likely that counsel's conflict affected his representation. Likewise, the court's failure to make an inquiry into a conflict does not make it more difficult for appellate courts to determine whether a conflict exists and its effect on the proceedings. (5-4 decision.)

***Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (April 16, 2002) (Justice Kennedy).**

The prohibitions of the Child Pornography Prevention Act (CPPA), 21 U.S.C. § § 2256(8)(B) and 2256(8)(D), are overbroad and unconstitutional. The CPPA extends to images that are not obscene under Miller v. California, 413 U.S. 15 (1973) which requires the government to prove that the image, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value. In addition, the CPPA cannot be supported by New York v. Ferber, 458 U.S. 747 (1982) which upheld a ban on the production, distribution, and sale of child pornography because these acts were intrinsically related to the sexual abuse of children. In contrast, the CPPA prohibits speech that records no crime and creates no victims by its production. The Court rejected the government's assertions that virtual child pornography leads to actual child abuse, that pedophiles may use virtual child pornography to seduce children, and that child pornography whets pedophiles' appetites for sexual contact with children. The Court held, "The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." (6-3 decision.)

***Ashcroft v. American Civil Liberties Union*, 122 S. Ct. 1700 (May 13, 2002) (Justice Thomas).**

The Child Online Protection Act (COPA), 47 U.S.C. § 231, prohibits any person from "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, making any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." The Supreme Court held that COPA's reliance on community standards to define material that is harmful to minors does not render the statute overbroad for purposes of the First Amendment. However, the Court stated, "We do not express any view as to whether COPA suffers from substantial overbreadth for other reasons, whether the statute is unconstitutionally vague or whether the District Court correctly concluded that the statute likely will not survive strict scrutiny analysis once adjudication of the case is completed below." (8-1 decision.)

***United States v. Cotton*, 122 S. Ct. 1781 (May 20, 2002) (Chief Justice Rehnquist).**

The Supreme Court considered whether the omission of the specific drug amount from an indictment (a fact that would enhance the statutory maximum sentence) mandates reversal of the enhanced sentence where the defendant failed to object to the omission in the district court. The Court held first that a defect in an indictment does not deprive a court of jurisdiction of the case. Second, because the defendant failed to object to the omission of specific drug amounts in a pre-Apprendi conviction, the Court applied plain error review. Although the government conceded error in this case and conceded that the error was plain, the Court found that, even if the defendants' substantial rights were violated, the error did not seriously affect the fairness,

integrity, or public reputation of judicial proceedings because evidence of the drug amount was "overwhelming and essentially uncontroverted." (9-0 decision.)

***Alabama v. Shelton*, 122 S. Ct. 1764 (May 20, 2002) (Justice Ginsburg).**

The defendant, who represented himself at trial, was convicted of third-degree assault (a class A misdemeanor) and sentenced to a jail term of 30 days, which was immediately suspended by the trial court, and placed on probation for two years. The Supreme Court held that "a suspended sentence that may end up in the actual imprisonment or deprivation of a person's liberty may not be imposed unless the defendant was accorded the assistance of counsel in the prosecution for the crimes charged. (5-4 decision.)

***Bell v. Cone*, 122 S. Ct. 1843 (May 28, 2002) (Chief Justice Rehnquist).**

The defendant argued under United States v. Cronic, 466 U.S. 648 (1984), that trial counsel in his capital murder case completely failed to subject the prosecution's case to meaningful adversarial testing by failing to present mitigating evidence and by waiving closing argument. The Supreme Court held that the state appellate courts neither decided his former appeals in a manner contrary to clearly established Federal Law nor unreasonably applied applicable legal principles to his case. After determining Strickland applied rather than Cronic, the Court held counsel's performance was well within the range of reasonable professional legal assistance and that counsel had "sound tactical reasons" for his trial decisions. Specifically, counsel was legitimately concerned that presenting witnesses during the mitigation phase and presenting closing argument would only allow the prosecution another chance to point out to the jury harmful and prejudicial information about the defendant immediately before the jury was to begin its deliberations. (8-1 decision.)

***McKune v. Lile*, 122 S. Ct. 2017 (June 10, 2002) (Justice Kennedy).**

The defendant challenged a Kansas state prison program called the Sexual Abuse Treatment Program (SATP). SATP is a prison program where inmates are required to complete and sign an Admission of Responsibility form in which they discuss and accept responsibility for the crime for which they have been sentenced and list all prior sexual activities. Prison staff are required to report any uncharged sexual offenses involving minors described on the forms to law enforcement. The Supreme Court concluded that SATP is supported by the legitimate state penological purpose of rehabilitation and that SATP and the consequences for nonparticipation in the program do not create a compulsion that violated the Fifth Amendment's right against self incrimination. (5-4 decision.)

***Carey v. Saffold*, 122 S. Ct. 2134 (June 17, 2002) (Justice Breyer).**

The AEDPA requires a state prisoner seeking federal habeas corpus review to file his federal petition within one year after his state conviction has become final; however, the statute excludes from the one year period any time during which an application for state review is pending. The Supreme Court held that, as used in the AEDPA, the term pending covers the time between a lower state court's decision and the filing of a notice of appeal or petition to a higher state court. Although the state argued the Court should adopt a national rule that a petition is not pending during the period between the lower court's decision and the notice of appeal to the higher court, the majority rejected this contention holding that this reading was not consistent with the ordinary meaning of pending and would create "a serious statutory anomaly." This pending rule applies equally to California's unique collateral review process which only requires a petitioner file within a reasonable time after judgment. The Court remanded the case to the Ninth Circuit to determine whether Saffold's delay in seeking post-conviction relief was reasonable. (5-4 decision.)

***United States v. Drayton*, 122 S. Ct. 2105 (June 17, 2002) (Justice Kennedy).**

In *Florida v. Bostick*, 501 U.S. 429 (1991), the Court held the Fourth Amendment allows officers to approach passengers on a bus at random to ask questions and request consent to search, provided a reasonable person would feel free to decline the requests or otherwise terminate the encounter. Applying this analysis to the present case, the Court held the passengers on the bus were not seized. If the same encounter had occurred on a street, it would have been constitutional and merely because it occurred on a bus does not make the situation an illegal seizure. In addition, the Court held that the Fourth Amendment does not require police officers to advise the passengers on the bus of their right to not to cooperate and to refuse consent to searches. (6-3 decision.)

***Horn v. Banks*, 122 S. Ct. 2147 (June 17, 2002) (Per Curiam).**

Banks filed a federal habeas corpus petition arguing the state trial

court committed error by requiring the jurors in the death penalty phase of his case to unanimously agree that a particular mitigating circumstance existed before they were allowed to consider that circumstance in their sentencing determination in violation of *Mills v. Maryland*, 486 U.S. 367 (1988). The state raised the issue of whether *Mills* could be applied retroactively pursuant to *Teague*. The Court of Appeals decided that it need not address *Teague* because its analysis was governed by the issues discussed by the state supreme court. The United States Supreme Court disagreed holding that because the state raised the retroactivity issue in both the district court and the appellate court, it was clear error for the appellate court to refuse to determine the retroactive application of new case law. The *Teague* retroactivity question is a threshold issue which must be resolved prior to consideration of the merits of the claims.

***Atkins v. Virginia*, 122 S. Ct. 2242 (June 20, 2002) (Justice Kennedy).**

The Supreme Court held that the execution of mentally retarded defendants is cruel and unusual punishment prohibited by the Eight Amendment, overruling *Penry v. Lynaugh*, 492 U.S. 302. All of the legislatures that have recently addressed the matter have concluded that death is not a suitable punishment for a mentally retarded defendant. Therefore, this has now become a national consensus on the issue. The execution of the mentally retarded will not measurably advance the determent or retributive purpose of the death penalty. Furthermore, mentally retarded defendants in the aggregate face a special risk of wrongful execution because they are more likely to wrongfully confess, are less able to give meaningful assistance to their defense, and are often poor witnesses. However, the Court left "to the states the task of developing appropriate ways to enforce the constitutional restriction." (6-3 decision.)

***United States v. Ruiz*, 122 S. Ct. 2450 (June 24, 2002) (Justice Breyer).**

The Supreme Court held the Fifth and Sixth Amendments do not require the government, before entering into a binding plea agreement with a defendant, to disclose impeachment information relating to any informants or other witnesses. Several reasons support this decision. First, the right to impeachment material is a part of the right to a fair trial, not a voluntary guilty plea. Second, no legal authority exists to support the Court of Appeals' decision a defendant is entitled to such information. The Constitution does not require the defendant's complete knowledge of the relevant circumstances to make a voluntary guilty plea. Third, due process mitigates against a defendant's right to impeachment material in this situation. (9-0 decision.)

***Ring v. Arizona*, 122 S. Ct. 2428 (June 24, 2002) (Justice Ginsburg).**

An Arizona jury found Ring guilty of felony murder which occurred during an armed robbery. Under Arizona law, Ring could not be sentenced to death unless the judge made further findings of aggravating circumstances and found no significant mitigating circumstances. The Supreme Court had previously upheld this system in *Walton v. Arizona*, 497 U.S. 639. However, the Supreme Court determined *Walton* is inconsistent with *Apprendi* thereby overruling *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. (7-2 decision.)

***Kirk v. Louisiana*, 122 S. Ct. 2458 (June 24, 2002) (Per Curiam).**

Acting on an anonymous tip, police officers entered Kirk's home without a warrant where they arrested and searched him. The Louisiana Court of Appeals concluded that the warrantless entry, search, and arrest did not violate the Fourth Amendment because there had been probable cause to arrest Kirk. The Supreme Court disagreed holding the lower court's decision violated *Payton v. New York*, 445 U.S. 573 (1980) which states that, absent exigent circumstances, "the firm line at the entrance to the house . . . may not reasonably be crossed without a warrant."

***Harris v. United States*, 122 S. Ct. 2406 (June 24, 2002) (Justice Kennedy).**

Harris was indicted for carrying a firearm during a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A). At sentencing, the judge determined Harris had brandished the firearm therefore qualifying him for a mandatory minimum sentence of seven years rather than five years. Harris challenged the court's decision arguing that brandishing was an element of the offense and should have been included in the indictment and determined by the jury. The Supreme Court disagreed holding that § 924(c)(1)(A) defines a single offense in which brandishing and discharging are sentencing factors rather than elements of the offense. The court looked to the structure of the statute which separates the definition of the

offense from the subsections describing how the defendant shall be sentenced. Furthermore, brandishing has been consistently used as a sentencing factor both in case law and in the Sentencing Guidelines. (5-4 decision.)

***Board of Education v. Earls*, 122 S. Ct. 2559 (June 27, 2002) (Justice Thomas).**

Several students involved in non-athletic extracurricular activities challenged the school's drug testing policy because it failed to identify a special need for testing the students and neither addressed a proven drug problem nor required individualized suspicion. The Supreme Court held the policy did not constitute an unreasonable search because it reasonably served the school's important interest in detecting and preventing drug use among its students. The school's regulation of extracurricular activities diminished the expectation of privacy among students. In addition, the school's method of obtaining urine samples and maintaining test results was minimally intrusive to the students' privacy interests. (5-4 decision.)

***United States v. Bass*, 122 S. Ct. 2389 (June 28, 2002) (Per Curiam).**

Bass was indicted in federal court and charged with the intentional killing of two individuals. The government sought to impose the death penalty and Bass alleged the government did so because he is African-American. The district court granted Bass's motion for discovery regarding the race issue. The government refused to comply and the court dismissed the death penalty notice. The Supreme Court found the court's actions to be in contravention with *United States v. Armstrong*, 517 U.S. 456 (1996), where the Court held a defendant who seeks discovery on a claim of selective prosecution must show some evidence of both discriminatory effect and discriminatory intent. Bass failed to provide such evidence, particularly evidence of the treatment of similarly situated individuals.

***Stewart v. Smith*, 122 S. Ct. 2578 (June 28, 2002) (Per Curiam).**

In this habeas corpus action, the district court rejected Smith's petition because he failed to follow Arizona Rule of Criminal Procedure 32.2(a)(3) which provides that if claimants fail to raise certain issues on post-conviction relief, they are waived. The Ninth Circuit reversed, ruling the court was required to consider the merit's of Smith's claim before dismissing it. The Supreme Court disagreed based on the Arizona Supreme Court's ruling that the court was not required to review the merit's of the claim but only to categorize it as involving significant rights requiring knowing, voluntary, and intelligent waiver by the defendant.

Cases Awaiting Decision

None

Cases Awaiting Argument

***Miller-El v. Cockrell*, No. 01-7662, cert. granted February 15, 2002; to be argued October 16, 2002.**

Did the Court of Appeals err in denying certificate of appealability and in evaluating petitioner's claim under Batson v. Kentucky?

Case below: 261 F.3d 445 (5th Cir. 2001).

***Smith v. Doe I*, No. 01-729, cert. granted February 19, 2002; to be argued November 13, 2002.**

Whether Alaska's Sex Offender Registration Act, on its face or as implemented, imposes punishment for purposes of ex post facto clause.

Case below: 259 F.3d 979 (9th Cir. 2001).

***United States v. Bean*, No. 01-704, cert. granted January 22, 2002; to be argued October 16, 2002.**

Where congressional appropriations provision bars Bureau of Alcohol, Tobacco, and Firearms from acting on applications for relief from federal firearms disabilities imposed on persons convicted of felonies, whether federal district court has authority to grant relief from disability.

Case below: 253 F.3d 234 (5th Cir. 2001).

***Sattazahn v. Pennsylvania*, No. 01-7574, cert. granted March 18, 2002; to be argued November 4, 2002.**

(1) Does the double jeopardy clause of the Fifth Amendment bar the imposition of the death penalty upon reconviction after an initial conviction, set aside on appeal, in which the trial court imposed a statutorily mandated life sentence when the capital sentencing jury failed to reach a unanimous verdict? (2) Is a capital defendant's life and liberty interest in the imposition of a life sentence by operation of state law, following a capital sentencing hearing in which the sentencing jury fails to reach a unanimous verdict, violated when his first conviction is later overturned and the state seeks and obtains a death sentence on retrial?

Case below: 763 A.2d 359 (Penn. 2000).

***Lockyer v. Andrade*, No. 01-1127, cert. granted April 1, 2002; to be argued November 5,**

2002.

Whether California's Three Strikes and You're Out Law is constitutionally impermissible where a non-violent recidivist who twice shoplifted merchandise worth a total of $153.54 received a life sentence in prison with no possibility of parole for 50 years. The Ninth Circuit held that "the California Court of Appeal unreasonably applied clearly established United States Supreme Court precedent when it held, on Andrade's direct appeal, that his sentence did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. Our decision does not invalidate California's Three Strikes law generally. Rather, we conclude that it is unconstitutional only as applied to Andrade because it imposes a sentence grossly disproportionate to his crimes."

Case below: 270 F.3d 743 (9th Cir. 2001).

***Scheidler v. NOW, Inc.*, No. 01-1118, cert. granted April 22, 2002 (unscheduled).**

(1) Did the Seventh Circuit correctly hold, in acknowledging a conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under the Racketeer Influenced and Corrupt Organizations Act (RICO)? (2) Does the Hobbs Act, which makes it a crime to obstruct, delay, or affect interstate commerce "by robbery or extortion" and which defines extortion as "the obtaining of property from another, with the owner's consent, when the owner's consent is induced by the wrongful use of actual or threatened force, violence or fear," 18 U.S.C. § 1951(b)(2), criminalize activities of political protesters who engage in sit-ins and demonstrations that obstruct public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there?

Case below: 267 F.3d 687 (7th Cir. 2001).

***Abdur'rahman v. Bell*, No. 01-9094, cert. granted April 22, 2002; to be argued November 6, 2002.**

(1) Did the Sixth Circuit err in holding, in square conflict with decisions of the United States Supreme Court and other circuits, that every Federal Rule of Civil Procedure 60(b) motion constitutes a prohibited "second or successive" habeas petition as a matter of law?

(2) Does a Court of Appeals abuse its discretion in refusing to permit consideration of a vital intervening legal development when its failure to do so precludes a habeas petitioner from ever receiving any adjudication of his claims on the merits?

Case below: 226 F.3d 696 (6th Cir. 2002).

***Connecticut Dept. of Public Safety v. Doe*, No. 01-1231, cert. granted May 20, 2002; to be argued November 13, 2002.**

Whether the Due Process Clause of the Fourteenth Amendment prevents a State from listing convicted sex offenders in a publicly disseminated registry without first affording such offenders individualized hearings on their current dangerousness.

Case below: 271 F.3d 38 (2d Cir. 2001).

***Virginia v. Black*, No. 01-1107, cert. granted May 28, 2002 (unscheduled).**

Whether Virginia Code § 18.2-423, which prohibits the burning of a cross with the intent of intimidating any person or group of persons, impermissibly infringes upon constitutionally protected speech. The Supreme Court of Virginia concluded that, "despite the laudable intentions of the General Assembly to combat bigotry and racism, the selectivity of its statutory proscription is facially unconstitutional because it prohibits otherwise permitted speech solely on the basis of its content, and the statute is overbroad."

Case below: 553 S.E.2d 738 (Cir. 2001).

***United States v. Recio*, No. 01-1184, cert. granted May 28, 2002 (unscheduled).**

Whether a conspiracy ends as a matter of law when the government frustrates its objective.

Case below: 258 F.3d 1069 (9th Cir. 2001).

***Clay v. United States*, No. 01-1500, cert. granted May 28, 2002 (unscheduled).**

Whether petitioner's judgment of conviction became final within the meaning of 28 U.S.C. § 2255, paragraph 6(1) when the Court of Appeals issued its mandate on direct appeal or when his time for filing a petition for a writ of certiorari expired.

Case below: 2002 U.S. App. LEXIS 1217 (7th Cir. 2002).

***Demore v. Kim*, No. 01-1491, cert. granted July 28, 2002 (unscheduled).**

Whether respondent's mandatory detention under 8 U.S.C. § 1226(c) violates the Due Process Clause of the Fifth Amendment where respondent was convicted of an aggravated felony after his admission into the United States.

Case below: 276 F.3d 523 (9th Cir. 2002).

The Back Bencher

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