# The BACK BENCHER

Central District of Illinois Federal Defenders

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## DEFENDER'S MESSAGE

In my last "Defender's Message," I addressed some of the risks that the legislation passed in response to the 9/11 war poses to our constitutional right to be free from unreasonable searches and seizures. As noted by myself and many others over the past months, abuses of the material witness law and the incommunicado detention of alleged persons tangentially related to terrorist investigations have become disturbingly common. Moreover, the government's historical tendency to put national security over individual, constitutional rights in time of war is likely to become a current reality. Indeed, in light of the Vice President's recent statement that "the prospects of a future attack on the U.S. are almost a certainty," the potential for government abuses is likely to worsen as the war progresses and undoubtedly becomes more intense.

Given the current climate, it is important that, when faced with a situation where the government seeks to detain your client as a material witness, or holds your client incommunicado, you are prepared to respond immediately with motions supported with case law and significant, creative analysis. Morever, after appointment as CJA counsel, you may find that you must respond to the government's request for detention and transfer of your client to another district at your first appearance in court. Failure to be adequately prepared in advance of such a situation will likely doom any chance of successfully challenging the government's requests to the court.

Of course, as CJA counsel without an appointment in such a case, it is understandably unlikely that you would have the time to perform the necessary research in advance, given that you have current clients who deserve your attention and a practice to maintain. Mindful of these necessities, I have, with the assistance of my office's Senior Staff Attorney Kent Anderson and Appellate Division Chief Jonathan Hawley, prepared an article, included within this issue, addressing ways in which you can challenge the detention of your client as a material witness, or challenge the government's incommunicado detention of your client. It is my hope that our research will give you the necessary familiarity with the law in these areas to enable you to respond to the government immediately should you be appointed in a case where these issues arise.

Included in the article is an extensive analysis on how Judge Sheindlin's decision in United States v. Awadallah III, ___ F.Supp.2d ___, 2002 U.S. Dist. LEXIS 7536 (S.D.N.Y., April 30, 2002), can be used to challenge uses of the material witness provisions. In Awadallah, Judge Sheindlin held that the government may not detain an individual where an indictment has not been issued in the underlying investigation for which the government seeks your client's testimony. Given that the detention of material witnesses has heretofore almost universally involved cases where no indictment has issued, the Awadallah case provides a solid foundation for a challenge to your client's detention.

Likewise, where the government engages in the disturbing practice of holding individuals incommunicado--denying them communication with friends, family, and lawyer--the article sets forth some creative challenges to such a situation. Among them are references to Federal Rule of Criminal Procedure 46(g), which requires the government to make a biweekly report to each

district court, listing "each defendant and witness who has been held in custody [in that district] pending indictment, arraignment, or trial in excess of ten days." Similarly, the Speedy Trial Act requires each district to have a plan concerning the administration of the Act, which oftentimes also require regular reporting of the names and locations of persons detained by the government.

Lastly, the article addresses challenges which can be made based on international law. Although an area often overlooked by criminal defense lawyers, as seen with the cases involving the Vienna Convention, courts are willing to consider such arguments. Given the government's need for international cooperation to prosecute the 9/11 war, both the government and the courts may be particularly sensitive to respecting treaties and international law. Indeed, the government's decision to accord detainees in Cuba the rights established by the Geneva Convention was in large part due to international pressure and a risk that other governments would not accord our soldiers the same rights we were denying to others.

Given the gravity and the urgency of the 9/11 war, the government has understandably and rightly reached for every tool within the bounds of its power to use in the battle. In doing so, however, it has historically and will now inevitably step outside those bounds. It is our constitutional role as criminal defense lawyers to keep the government within the appropriate bounds of power, and we can do so by ensuring that usurpation of individual rights are noticed, challenged, and stopped. In order to do so successfully, we must be innovative in our arguments, diligent in the defense of our clients, and learned in the law. I sincerely hope that this issue of *The Back Bencher* will assist you in each of these endeavors.

Yours very truly,

Richard H. Parsons
Federal Public Defender
Central District of Illinois

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# CHURCHILLIANA

**For the Love of Allah!**

As prime minister in World War II, Churchill found himself, at a state banquet at 10 Downing Street, seated next to the Iraqi ambassador. After the dinner, Churchill said, "Ambassador, why don't you come back to my study for a nightcap?"

"Mr. Churchill," replied the ambassador, "I can't. I'm a Muslim."

"What, you don't drink? Good God ... I mean Jesus Chris ... I mean Allah!"

# Defendant Sentences Himself

They've seen a lot of strange things down at San Francisco's Hall of Justice -- but no one had ever seen a prisoner ordered to put on a judge's robe to sentence himself.

But that's just what happened the other day, when Judge James Warren -- late of the infamous dog-mauling trial -- took a break from a sentencing hearing, went into his chambers and came back with one of his spare robes, then told repeat drug offender Albert Brown to put it on.

Brown -- who was no stranger to the judge's courtroom and who was looking down the barrel of a five-year sentence -- couldn't believe his eyes.

But don the robe he did, with his orange jail jumpsuit sticking out a good six inches beneath the black sleeves.

From all accounts, it was quite a sight.

"This is your life -- and you are your own judge," Warren then told Brown sternly. "Sentence yourself."

And he did -- to six months in county jail, plus a long string of self- imposed conditions such as cleaning himself up for his kids and promising to steer clear of the neighborhood where he got busted for selling a rock of crack to an undercover cop.

Not everyone is happy with the judge -- especially down in the narcotics unit.

"I mean, this guy is a suspected crack dealer and he gets to thumb his nose at all of us," groused one cop.

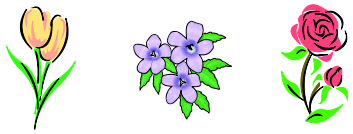
Warren, however, says the case really wasn't that cut and dried.

"It was the sentence I was going to give him anyway," the judge told us.

"In fact, the Probation Department had recommended six months and a good lecturing. But I figured, I'm not that good at lecturing. He, on the other hand, was very good at lecturing himself. And maybe this time it will stick."

But just to make sure, "I had the transcript typed up and sent over to him, " Warren added.

"Just in case he forgets."



## *Dictum Du Jour*

"*Deux fous gagnent toujours, mais trois fous, non!*" (Loosely: Two fools always win, but three fools, never!)"

- Siegbert Tarrasch

(Note: The chess piece Americans call the bishop, the French call *le fou.)*

- Stephen L. Carter
The Emperor of Ocean Park

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To live is to die, to be awake is to sleep, to be young is to be old, for the one flows into the others, and the process is capable of being reversed.

- Heraclitus
Fragment 113

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"We must consider whether the tactical decision was reasonable given a realistic understanding of jury behavior, rather than indulge the fiction that jurors always obey the judge's instructions however much the instructions go against the grain."

Pecoraro v. Walls, 286 F.3d 439, 444 (7th Cir. 2002)

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Donald Miller set out to prove that the state's voter registration process was flawed. He made his point but ended up $250 poorer.

Several years ago, Miller filled out a voter registration card for his pet poodle, Barnabas, and the county confirmed Barnabas R. Miller as a registered Republican a few days later.

In March, Barnabas got a summons for jury duty. Miller sent the summons back, reportedly saying, "I have a short attention span, I have to go to the bathroom quite often and besides, I'm a dog." He then told his story to the media.

Officials were not amused, however, and charged the 78-year-old retired ironworker with registration fraud.

Miller pleaded no contest on June 10 to one misdemeanor count and was sentenced to six months probation and fined $250, according to a Contra Costa County Superior Court clerk. He maintains that he never cast a vote in the dog's name.

- Lafayette, California

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An inmate who broke a bulletproof window with his bare buttocks has been charged with second-degree property damage.

Garrette Bellew, 21, pulled down his trousers on May 19, ran full-sprint at a door, did a quick 180-degree turnaround in mid-air and struck a jail window with his derriere, authorities said. All this occurred while a perplexed guard stood and watched on the other side.

Bellew had been awaiting trial on two counts of first-degree burglary, according to a Jefferson County court clerk. The additional property damage charge, filed May 30, carries a penalty of up to one year in jail and a $1,000 fine.

- Jefferson County, MO

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"Years ago Winston Churchill made a telling statement

about prisoners:

'[a] calm and dispassionate recognition of the rights ... even of convicted criminals against the state, a constant heart-searching by all those charged with the duty of punishment ... these are the symbols in which the treatment of crime and criminals mark and measure the stored-up strength of a nation.'

In the present case, the regulations fall below minimum standards of decency owed by a civilized society to those who it has incarcerated."

Bazetta, et al v. McGinnis, 286 F.3d 311, 323-324 (6th Cir. 2002)

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There is no ceiling on gullibility.

Marques v. Federal Reserve Bank of Chicago, 286 F.3d 1014, 1016 (7th Cir. 2002).

* * * * * * * * * *

Martin argues that he never "intended" or "agreed" to provide cocaine ... and he asserts that comments he made to that effect were the result of one too many drinks or mere boasting. (One frequently leads to the other in many area of life.)

United States v. Martin, 287 F.3d 609, 616 (7th Cir. 2002).

* * * * * * * * * *

It's not a good idea to rob banks. It's particularly not a good idea to rob banks when you have distinctive physical characteristics like being bigger than the average offensive tackle in the National Football League.

United States v. Traeger, 289 F.3d 461, 465-66 (7th Cir. 2002)(6'5", 350 lbs.).

* * * * * * * * * *

Marshall did what any sane person would do if he saw masked men with guns running toward him: he ran like hell. And he ran right to uniformed police officers for protection! He wasn't trying to get away from the "police" he was trying to get to the "police" as fast as he could.

Marshall v. Teske, 784 F.3d 765, 771 (7th Cir. 2002)(affirming damages for false arrest resulting from ten-hour detention of 14-year-old who ran from unidentified officers with guns drawn who were coming to execute a search warrant and to nearby uniformed officers).

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Writing is turning one's worst moments into money.

J. P. Donleavy.

## CJA Panel Attorney Rate Increase

It gives me great pleasure to notify all of our CJA panel attorneys that in a memorandum dated March 22, 2002, the Administrative Office of the United States Courts confirmed the implementation of a rate increase for the Criminal Justice Act Panel Attorneys.

The fiscal year 2002 judiciary appropriations bill includes funds to support a rate of $90 per hour for in-court and out-of-court work in all judicial districts for private "panel" attorneys accepting appointments under the Criminal Justice Act. This new hourly rate became effective as of May 1, 2002.

## Exemption from Electronic Public Access Fees for Attorneys Appointed Under the Criminal Justice Act

In a memorandum from the Administrative Office of the United States Courts dated May 17, 2002, please note:

Effective immediately, attorneys appointed under the Criminal Justice Act (CJA) and related statutes are now, automatically, exempt from payment of electronic public access (EPA) fees for work that is performed pursuant to such appointment in all federal courts. Although appointed attorneys have been exempt since 1994 from EPA fees for work related to CJA cases in the jurisdictions where such cases are pending, they have had to apply for credit to the PACER Service Center for charges related to those cases that were incurred in using PACER in other jurisdictions.

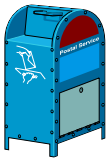
This extension of the fee exemption will be applied as part of the regular PACER billing process. Individual courts need not do anything to activate the new procedure.

Attorneys are, of course, permitted to use their fee-exempt accounts only for work related to services authorized under the CJA and related statutes.

If you have been appointed as counsel under the CJA and/or related statutes, please contact the PACER Service Center at 800/ 686-6756 to establish an exempt account.

If you have any questions concerning the exemption extension, please contact Mary

Stickney, Chief of the Electronic Public Access Program Office at 202/ 502-1500.



## Change of Address

On March 24, 2002, the Federal Defender Training Group moved. Please take a moment to update their new name, address and telephone numbers:

Defender Services Division Training Branch, Administrative Office of the U.S. Courts, One Columbus Circle, NE, Suite G-430, Washington, DC, 20544; telephone numbers: 800/ 788-9908 or 202/ 502-2900; fax number: 202/ 502-2911.

## Trees on the Slippery Slope of Appeal Waivers

**By: David Mote**
Deputy Chief Federal Defender

The increasingly trodden slope of appeal waivers has become more hazardous with use. Two recent cases from the Seventh Circuit illustrate a large hazard to those heading down that slippery slope.

United States v. Hare, 269 F.3d 859 (7th Cir. 2001) involved public policy arguments challenging the waiver of the right to appeal in the plea agreement. Not only did the Seventh Circuit reject defendant's arguments and dismiss his appeal, it concluded that Hare had breached his plea agreement by attempting to appeal and granted the prosecution 14 days to decide whether it wanted to reinstate the charges dismissed pursuant to the plea agreement. Subsequently, in United States v. Whitlow, 287 F.3d 638 (7th Cir. 2002), a defendant who had reserved the right to appeal on one issue raised additional issues in his appeal brief late. The Seventh Circuit found that this breached the plea agreement, remanded on the issue the defendant was entitled to raise, and invited the prosecutor to reinstate any dismissed charges and suggested that Whitlow's breach of his promise not to appeal, along with the fact that the defendant had received an enhancement for obstruction of justice, made it "exceptionally hard to justify" the reduction for acceptance of responsibility at the resentencing. In both Hare and Whitlow, the conclusion that the defendant had breached the plea agreement was premised on the perhaps arguable idea that waiving the right to appeal was synonymous with promising not to try to appeal.

Perhaps emboldened by the Seventh Circuit's enthusiastic position towards enforcing appeal waivers, we now have prosecutors trying to extract even more onerous conditions from criminal defendants. Recently, these have included pushing for an agreement that the attorney will not argue for a downward departure on any basis other than cooperation. It may easily be argued that such a condition requires the attorney to refrain from providing effective assistance of counsel. Such restrictions on defense counsel may themselves give rise to a challenge to the defendant's conviction or sentence. See United States v. Jones, 167 F.3d 1142 (7th Cir. 1998)(finding a waiver of the right to file a post-collateral challenge did not bar a claim that counsel was ineffective in negotiating the agreement containing the waiver). Plea agreements with such conditions raise serious questions, including what the trial court should do if the defendant wants to accept the agreement and signs it and defense counsel refuses to sign on the basis that the condition constitutes an agreement to provide ineffective assistance of counsel. It seems unlikely that the trial court should appoint new counsel who has no objection to agreeing not to vigorously represent the defendant at sentencing.

Because defense counsel has an obligation to fight for the best result for each, individual client, defense counsel is in a more difficult position than the prosecution which has only one client, a non-person, that is never facing prison time. It is clear, however, that both the defendant and defense counsel should seriously consider what the defendant surrenders in agreeing to a waiver in a plea agreement. The deference the Seventh Circuit gives to such waivers may be illustrated by the language of United States v. Josefik, 753 F.2d 585, 588 (1985):

No doubt there are limits to waiver; if the parties stipulated to trial by 12 orangutans the defendant's conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept.

Fortunately, some courts have opined that the appellate courts retain the inherent power to relieve the defendant of an appeal waiver to avoid a "miscarriage of justice." See, e.g., United States v. Teeter, 257 F.3d 14, 25 (1st Cir. 2001). Cf., United States v. Black, 201 F.3d 1296, 1302-03 (10th Cir. 2000)(once the district court has approved a plea agreement with an appeal waiver, it cannot negate the appeal waiver absent certain exceptional circumstances). Clearly, however, the best course of action is to be

mindful of the obstacles that loom ever larger as one hurtles down the slippery slope of appeal waivers and, unless the defendant is offered something more significant that an agreement not to oppose the reduction for acceptance of responsibility, choosing the clearer path of entering an open plea.

## Proposed Changes to Federal "Crack" Cocaine Sentencing

**By: Eric Schwing**
Staff Attorney

In May 2002, the United States Sentencing Commission issued its long-awaited second report to Congress regarding the federal cocaine offense sentencing structure. The bottom line: the Commission unanimously recommends increasing from 5 grams to at least 25 grams the amount of crack cocaine needed to trigger a five-year mandatory minimum sentence, increasing from 50 grams to at least 250 grams the amount of crack cocaine needed to trigger a ten-year mandatory minimum sentence, and eliminating the mandatory minimum sentence for offenses involving simple possession of crack

The Sentencing Commission has concluded that the current federal penalty structure exaggerates relative harmfulness of crack cocaine, sweeps to broadly, and is applied most often to low-level offenders. According to the Commission the federal sentencing laws also overstate the seriousness of most crack cocaine offenses, fail to provide proportionality in sentencing, and impact primarily minorities. These conclusions are no surprise to anyone familiar with the effects of the current disparity between sentences imposed in powder and in crack cocaine offenses.

Among the Commission's slightly more surprising observations, however, are that the data indicate that the federal sentencing laws have had no deterrent effect on cocaine trafficking. The Commission noted that the price of cocaine has actually declined since the federal cocaine laws took effect. The Commission also noted that the effect of pre- natal exposure to cocaine is less damaging to the fetus than exposure to alcohol and is similar to that of tobacco, and that the crack "epidemic" that Congress feared back in 1986 has never materialized.

Even though Congress has yet to take any action on the Commission's recommendations, because it is clear that the Commission did not consider this information when it promulgated its existing guidelines, the May 2002 report would seem a promising source of argument to be included in motions for downward departures following Koon v. United States 518 U.S. 81 (1996). (Of course, the existing mandatory minimums still are the "bottom line" in the absence of a motion from the government.) The Commission, in an Appendix to its Report, has offered a model amendment to the Guidelines that should be helpful in arguing what the extent of such a departure should be. The full report is available on the Commission's website: http://www.ussc.gov.

## Death Sentence Reversed Due to Corrupt Judge

The Seventh Circuit, en banc, reversed the death sentence of two petitioners because there was a strong inference that Judge Thomas Maloney engaged in compensatory bias against the petitioners in order to conceal his bribe-taking in other cases. It appeared that he did this by making and not making rulings that made a death sentence a foregone conclusion. Unfortunately, a different majority of the Court affirmed the petitioners' convictions because it held that there was insufficient evidence that Maloney's bias had an effect on his rulings in the guilt phase. There was nothing out of the ordinary about his guilt phase rulings.

Judge Rovner concluded her concurrence with the reversal of the death sentences and dissent from the affirmance of the convictions with this paragraph:

"Although some of my colleagues fear that we will be compounding the wrong that Maloney committed by granting a new trial to petitioners who did not bribe him, I submit that the opposite is true. The right to trial before an impartial judge means nothing if it is not a right that we are willing to enforce. It is hard to see why a new trial is warranted when an honest judge is faced with a financial temptation to favor one party or the other--although it is a temptation he might in fact have resisted (see Tumey, Murchison, and Aetna Life)--but not when a corrupt judge is presented with a penal as well as a financial incentive to favor a party. It is not enough for us to decry Maloney's actions as contemptible, appalling, and depraved. Those words ring hollow when, at the same time we utter them, we deem this contemptible, appalling, and depraved man a constitutionally adequate adjudicator. Due process means something, and in my view it means something more than trial and the infliction of the ultimate punishment before the likes of a judicial racketeer."

# An Introduction to International Prisoner Transfers: Going Home

**- By Alan Ellis, Esq.,**
The Champion, July 1999

In 1998, Israel, Costa Rica, and Chile became signatories to the Council of Europe Convention, wherein nationals from those countries, who are serving sentences in U.S. prisons could be transferred back to their home countries for the service of their sentences.

This brings to 59 the number of countries and their territories with which the United States has such treaties.

1. Under these treaties, inmates serving federal sentences as well as inmates serving state sentences in certain states, can apply to be considered for transfer to their home countries to serve their sentences.

2. For federal prisoners, the transfers in some cases (depending upon the treaty) may not be available to: (1) inmates in custody for civil contempt; (2) inmates with
committed fines without permission of the court; (3) inmates serving sentences for certain immigration law violations; and (4) inmates with pending court proceedings, e.g., appeals, 2255 motions, etc.

3. Additionally, most of the prisoner transfer treaties outline some restrictions on eligibility. In general, the conditions that must be met include: (1) the prisoner must be a citizen or national of the receiving country; (2) the prisoner must not be a citizen of the U.S.; (3) the offense for which the prisoner is incarcerated must be a crime under the laws of the country to which the prisoner wishes to be transferred; (4) the prisoner must have at least six months left to serve on the sentence at the time of application. Individual treaties may have additional transfer requirements. The United States' treaties with Canada and Mexico, for example, preclude the transfer of prisoners who are serving out sentences for immigration or military offenses; the treaty with Mexico further precludes the transfer of persons who have been present for at least five years, with an intent to remain permanently in the United States.

A federal inmate can obtain an application for transfer from his unit team. A federal inmate must wait until he is in the custody of the Bureau of Prisons (BOP) before the application can be made. Once made, if the application is rejected, he cannot reapply for another two years unless compelling, humanitarian reasons develop.

Once the application is completed and returned to a unit team staff member, a package is put together and forwarded to the warden.

**Request Packet**

A transfer request packet is compiled by BOP and typically contains: (1) the prisoner's application; (2) the criminal judgment; (3) the pre-sentence investigation report (PSI); (4) any information about the prisoner's adjustment to prison life; (5) the prisoner's sentence computation information; (6) information about the prisoner's ties to the receiving country (as reflected in the PSI); and (7) information about pending appeals or detainers.

The warden then transmits the package to the BOP Assistant Director, Correctional Programs Division, Bureau of Prisons, in Washington, D.C. who checks the package to make sure it contains all the necessary documents. The package is then sent by messenger to the Office of Enforcement Operations (OEO), Criminal Division, International Prisoner Transfer Unit (IPTU), Department of Justice (DOJ). Once it arrives at the DOJ, a case analyst is assigned to review the paperwork to determine eligibility and to contact interested parties such as the U.S. Attorney's Office that prosecuted the case and the investigative agency (Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), Internal Revenue Service (IRS), etc.) to ascertain their position on the transfer.

The role of the U.S. Attorney's Office is to provide facts and recommendations to the IPTU that can be considered in approving or denying an offender's transfer request. Typically, absent compelling factors, any relevant information requested by IPTU must be supplied within ten days of the request. The views of the federal law enforcement agency involved in the case, concerning the prisoner's involvement in related crimes or the subject of other investigations, are always sought as well. Although the views and recommendations of the U.S. Attorney's Office are accorded greater weight than those of law enforcement agencies, neither are determinative of the final decision on any particular transfer request.

4. While there are no formal

regulations governing the considerations to be applied to prisoner transfer requests, non-binding internal guidelines - setting forth a number of factors which are considered - do exist. These factors include: (1) the seriousness of the underlying offense; (2) the payment of fines or restitution; (3) the existence of a prior record; (4) the offender's ties to each country; and (5) the likelihood of rehabilitation.

If DOJ approves the transfer, it is then forwarded to the embassy or ministry of justice of the receiving country (the country to which transfer is sought). The receiving country's embassy or ministry of justice then determines whether to accept the inmate. If the inmate is accepted, the paperwork goes back via the same pipeline and winds up back on the desk of DOJ's International Prisoner Transfer Unit. The inmate is then notified, and preparations are made for the physical transfer.

**Two-Fold Benefits**

The benefits of being transferred to one's home country to serve one's sentence are twofold: (1) the inmate is closer to his friends and family and, according to studies, is better able to be rehabilitated in his or her home culture; and (2) the amount of time to be served is governed by laws of the receiving or home country which oftentimes results in an earlier release. Parole eligibility, if any, and good time are determined by the receiving/home country.

Defense counsel can facilitate a client's transfer by negotiating a provision in the plea agreement wherein the U.S. Attorney's Office agrees to recommend - or at least, not to oppose - the defendant's transfer and to recommend to the sentencing judge that the court itself, make such a recommendation to the International Prisoner Transfer Unit.

Counsel can also, once the application is made, assist the Department of Justice by providing relevant information that will make the likelihood of approval that much greater.

**Notes**

1. The countries include: Austria, Bahamas, Belgium, Bolivia, Bulgaria, Canada, Chile, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Federated States of Micronesia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Marshall Islands, Mexico, Netherlands (Netherlands Antilles and Aruba), Norway, Panama, Peru, Poland, Portugal, Republic of Palau, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Thailand, Trinidad/To-bago, Turkey, Ukraine, United Kingdom and U.K. Territories.

2. States with legislation authorizing the transfer of foreign prisoners include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Northern Marianna Islands (United States Territory), Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont (transfers to Canada only), Virginia, Washington, Wisconsin, and Wyoming.

3. 318 U.S.C. § 4100 (c).

4. U.S. Department of Justice, United States Attorneys' Criminal Resource Manual § 735 (1998)

*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.*

# CA-7 Case Digest

Compiled by: Jonathan Hawley
Assistant Federal Defender
Appellate Division Chief

**APPRENDI**

U.S. v. Vera, 278 F.3d 672 (7th Cir. 2002). On appeal after conviction for drug related offenses, the Court of Appeals considered whether *Apprendi* requires matters relevant to criminal forfeiture to be established beyond a reasonable doubt. Upon the defendant's conviction, he was ordered to forfeit cash and property. In special verdicts, the jury determined that forfeiture was warranted, after being instructed by the judge to make its decision based upon a preponderance of the evidence. The defendant argued that this standard of proof violated

*Apprendi*. According to the court, forfeiture does not come within *Apprendi's* rule because there is no "prescribed statutory maximum" in this context. Rather, the forfeiture statute (21 U.S.C. § 853(a)) is open-ended; all property representing the proceeds of drug offenses is forfeitable. Accordingly, there is no risk that a defendant has been convicted *de facto* of a more serious offense, as in the *Apprendi* context.

U.S. v. Brown, 276 F.3d 930 (7th Cir. 2002). In prosecution for bank robbery, the Court of Appeals rejected the defendant's argument that the federal "three strikes" law was unconstitutional because it requires a defendant to prove by clear and convincing evidence that the offense of conviction involving robbery did not involve the use of a firearm or other dangerous weapon and did not inflict serious bodily injury, before disqualifying the offense of conviction from consideration for three strikes purposes. Specifically, the defendant noted that the statutory maximum for robbery was increased to life imprisonment under the three strikes law based on a finding by the district judge that he used a dangerous weapon during the course of the robbery. However, contrary to Apprendi, this fact was not pled in the indictment nor found by a jury beyond a reasonable doubt. Indeed, the defendant was required to disprove the fact by clear and convincing evidence. The court, however, rejected this argument and stated that the federal "three strikes" law does not alter the existing statutory definition of robbery. It merely allows the defendant to show that the particular robbery he committed was not very violent. Thus, rather than being an element of the offense, the statutory scheme set forth an affirmative defense for the defendant, on which it was permissible to require him to carry the burden.

## EVIDENCE

U.S. v. Gajo, 290 F.3d 922 (7th Cir. 2002). In prosecution for arson related offenses, the Court of Appeals affirmed the admission of a witnesses prior grand jury testimony where the witness could not remember at trial crucial facts related to the prior testimony. The Court of Appeals noted that in the context of recalcitrant witnesses, a lack of memory is inconsistent with the description of specific details given before the grand jury, and the prior grand jury testimony is therefore admissible under Federal Rule of Evidence 801(d)(1)(A). However, where the witness in question is not a recalcitrant witness, no court has considered the precise question of whether grand jury testimony can be admitted under Rule 801(d)(1)(A) where the witness simply cannot remember. The Court of Appeals concluded that regardless of whether the witness is recalcitrant or not, prior grand jury testimony may be admitted under the rule where a witness cannot remember the details at trial. A lack of memory at trial is "inconsistent," under Rule 801(d)(1)(A), with prior testimony on the subject before the grand jury. Thus, the grand jury testimony is admissible.

U.S. v. Thompson, 286 F.3d 950 (7th Cir. 2002). In prosecution for drug related offenses, the Court of Appeals held that for purposes of Federal Rule of Evidence 804(b)(6), where a murder is reasonably foreseeable to a co-conspirator, the co-conspirator waives his right to confront that murdered witness (i.e., object to the introduction of his hearsay statements) at trial just as if he killed the witness himself. The Rule provides that a defendant who "acquiesces in conduct intended to procure the unavailability of a witness waives his hearsay objection. " The court concluded that this rule should apply to co-conspirator's as well, for without the rule, the majority of the members of a conspiracy could benefit from a few members engaging in misconduct. The only qualification to the application of the rule to co-conspirators is that waiver may only be imputed to those conspirators to whom it was reasonably foreseeable that another conspirator would engage in the misconduct intended to procure the unavailability of the witness, and here, where that misconduct involved murder, that the conspirator reasonably foresaw that a pre-meditated murder would occur.

U.S. v. Scott, 284 F.3d 758 (7th Cir. 2002). In prosecution for a drug conspiracy, the Court of Appeals rejected the defendant's argument that the district court improperly admitted hearsay testimony at trial. A cooperating witness against the defendant originally testified against him in a grand jury proceeding, but thereafter refused to testify a second time before the grand jury, as well as at trial. The government sought to admit the witness's original grand jury testimony under Federal Rule of Evidence 804(b)(6). Specifically, that rule provides that if the declarant is unavailable, a statement is not excluded as hearsay if it is "offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." The Court of Appeals noted that to admit a statement under this rule,

the government must show (1) that the defendant engaged or acquiesced in wrongdoing, (2) that the wrongdoing was intended to procure the declarant's unavailability, and (3) that the wrongdoing did procure the unavailability. As an initial matter, the court joined the other circuits which have considered this issue, and held that the government must make this showing by a preponderance of the evidence. Secondly, the court noted that the word "wrongdoing" as used in the Rule is not defined, although the advisory committee's notes point out that it need not consist of a criminal act. Ultimately, the court concluded that the term wrongdoing encompasses coercion, undue influence, or pressure to silence testimony and impede the truth-finding function of trials. Likewise, threats of harm and suggestions of future retribution fall within the definition as well. Applying these standards in the present case, the court concluded that the government had met its burden where it produced evidence of communications between the defendant and the witness designed to coerce him into not testifying.

## GUILTY PLEAS

U.S. v. Knox, 287 F.3d 667 (7th Cir. 2002). In prosecution for drug related offenses, appellate counsel filed a no-merits brief. In that brief, counsel first inquired whether it was possible for the defendant to challenge his guilty plea on the ground that the judge did not comply with Federal Rule of Criminal Procedure 11, although the defendant never moved to withdraw his guilty plea in the district court. Upon consideration of this argument, the Court of Appeals discussed whether such an issue needs to be raised in an Anders brief. Specifically, the court questioned whether the defendant wanted to withdraw his plea on appeal, given that if he were to succeed, he would likely lose acceptance of responsibility and end up with a longer sentence. The court concluded that if a client should express a desire to advance a Rule 11 argument on appeal, counsel would be entitled to make an independent decision. "A lawyer may limit appellate arguments to those that in his best judgment would do more good than harm. Lawyers should not blindly assume that their clients will benefit from every legal contention, no matter the hazard, and in particular should not present (or even explore in an Anders submission) a Rule 11 argument unless they know after consulting their clients, and providing advice about the risks, that the defendant really wants to withdraw the guilty plea."

U.S. v. Whitlow, 287 F.3d 638 (7th Cir. 2002). The defendant in this case pled guilty to a number of finance related crimes. The defendant's plea agreement contained a waiver of his right to direct appeal and collateral attack, with the exception of one issue. Namely, the defendant preserved his right to appeal which version of the Guidelines applied to his sentencing hearing. Despite the waiver, the defendant raised seven other issues which were apparently waived by the agreement. In doing so, the defendant argued that a breach of the agreement by the government canceled his waiver, for the government failed to recommend a 3-level reduction for acceptance of responsibility as required by the plea agreement. The Court of Appeals, however, noted that a prosecutor's failure to keep one part of a plea agreement usually leads to a judicial order of specific performance; it does not relieve the defendant of all promises. Unless a prosecutor's transgression is so serious that it entitles the defendant to cancel the whole plea agreement, a waiver of appeal must nevertheless be enforced. Moreover, in the present case, the defendant did not ask the district court to set aside his plea, and even on appeal he did not seek that relief. Rather, according to the court, he wanted the benefits of the agreement shorn of one detriment. Accordingly, the defendant's appeal of issues waived in the plea agreement constituted a breach thereof, and the appropriate remedy, according to the court, was to allow the prosecutor to withdraw the benefits conferred by the agreement. The court therefore directed the prosecutor to alert the district court within 10 days of the decision if it wished to do so.

U.S. v. Shaker, 279 F.3d 494 (7th Cir. 2002). Upon consideration of the defendant's argument that he should be allowed to withdraw his plea, the Court of Appeals agreed and held that where a district court defers acceptance of the plea until sentencing, a defendant may withdraw his plea as of right until the court actually accepts the plea. After engaging in a Rule 11 colloquy, the district court stated that it was deferring acceptance of both the plea and the plea agreement until sentencing. Prior to sentencing, the defendant filed a motion to withdraw his plea. The district court conducted a hearing, but concluded that, pursuant to Federal Rule of Criminal Procedure 32(e), the defendant failed to establish a fair and just reason for the withdrawal. The Court of Appeals held that Rule 32(e) does not govern pleas which have not been accepted by the district court. Rather, the Rule is only triggered when the district

court completes the plea process by accepting the plea. Thus, because the plea had not been accepted in the present case, the district court should have permitted the defendant to withdraw his plea freely, without any inquiry into the defendant's reasons for seeking to set it aside.

## HABEAS/2255

Moffat v. Broyles, 288 F.3d 978 (7th Cir. 2002). Upon consideration of a petition filed under 28 U.S.C. 2254 alleging the improper loss of good time credits, the Court of Appeals reaffirmed that a certificate of appealability is not required prior to the filing of an appeal, for a decision of a state's prison disciplinary apparatus is not a state court. Specifically, 28 U.S.C. 2253(c)(1)(A) provides that "unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a habeas proceeding in which the detention complained of arises out of process issued by a State court." Because loss of good time credit in this case came from the decision of the prison disciplinary board, and not a "State court," consistent with this circuit's prior precedent, no certificate of appealability was required. However, the court did note that since its original decision on this subject, five circuits have come to the opposite conclusion. Because the parties did not challenge the prior precedent in this case, the court adhered to its prior precedent, but it did note that the court "may find it necessary to decide eventually whether to eliminate or perpetuate the conflict."

Fischer v. U.S., 285 F.3d 596 (7th Cir. 2002). Upon consideration of a certificate of appealability raising a violation of Richardson v. United States, 526 U.S. 813 (1999), the Court of Appeals held that the issue was not properly before it for consideration. In the petitioner's original 2255 petition, he failed to raise the Richardson issue, for it had not yet been decided. After the district court denied the petition, the petitioner filed for a certificate of appealability and the Supreme Court thereafter decided Richardson. The petitioner then sought to amend his certificate of appealability to include the Richardson issue. However, the Court of Appeals noted that an issue waived in the district court cannot be resurrected on appeal. Because the issue was not included in the original petition, the only means by which he could bring the Richardson error before the court would be to file a successive petition in the district court, rather than present it for the first time on appeal from the denial of the original petition.

Bracy v. Schomig, 286 F.3d 406 (7th Cir. 2002). Upon review of the defendant's convictions for murder and death sentences, the en banc court rejected the defendant's claims that they were entitled to a new trial, but ordered that they were entitled to a new hearing on whether the death sentence should be imposed. The men were tried by a judge convicted of taking bribes during the course of his entire career. Although the judge had not solicited or received bribes from these petitioners, they argued that the judge habitually came down harder on defendants who had not bribed him than he would have done had he not been taking bribes. He did this, they argued, both to deflect any suspicion that might arise in the cases in which he had accepted bribes and as a result acquitted or gone easy on defendants, and to increase the size and frequency of the bribes offered him. As they termed it, the judge engaged in compensatory bias. The Court held that, although the judge clearly engaged in such conduct, they were still required to connect such bias with their particular cases. Likewise, the attorney appointed to represent them by the judge was known to engage in bribery schemes with the judge. Nevertheless, upon reviewing the trial record in their case, the court concluded that no discretionary rulings during the guilt phase of their trial lead to an inference that the corrupt judge was actually biased against these defendants. However, the record of the penalty phase led the court to a different conclusion. Specifically, the government sought to use as an aggravating factor two murders allegedly committed by one of the petitioners in Arizona. When defense counsel sought a continuance to investigate the murders, noting that the petitioner had not even been convicted of them, the judge refused to give counsel the requested time. This evidence was not only inflammatory, but also inappropriate given that the petitioner had not been convicted of the murders. Likewise, almost no evidence was presented in mitigation. The judge, however, was unconcerned about this deficiency, and, in fact, attempted to dissuade defense counsel from making a closing argument to the jury during the sentencing phase. Given these facts, and the history of the judge in question, the petitioner presented enough to show a connection between the judge's practice of compensatory bias and actual bias in their case. Thus, the court ordered that a new penalty hearing be held.

Cox v. McBride, 279 F.3d 492 (7th Cir. 2002). Upon appeal of

the district court's dismissal by the district court of a 2254 petition arising out of a prison disciplinary board's decision to deny the petitioner two years of good time credits. The district judge determined that the petition was barred by the one-year statute of limitations set forth at 28 U.S.C. § 2244(d)(1). However, the Court of Appeals held that this statutory limitations period does not apply to cases where the habeas corpus petition challenges the actions of a prison disciplinary board. The court noted that the provision in question is limited to petitions filed by persons "in custody pursuant to the judgment of a State court." While the petitioner was in prison in the first place pursuant to his state court criminal conviction, the custody he was challenging that confers federal jurisdiction is the additional two years imprisonment he must serve as the result of the judgment of the prison disciplinary board. The board is not a "State court" within the meaning of the statute, and the limitation period does not apply. Rather, the only time limitation applicable to such petitions is the equitable principle of laches codified in Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts. Unlike a statute of limitations, application of the doctrine of laches requires a showing that the petitioner's delay was not only unreasonable, but also prejudicial to his opponent. No such showing was made here, so the Court of Appeals reversed the judgment of the district court.

Eads v. Hanks, 280 F.3d 728 (7th Cir. 2002). On appeal after a prison disciplinary committee hearing, finding the petitioner guilty of disorderly conduct and revoking 90 days of good-time credit, the Court of Appeals held that where a hearing officer has an "intimate" relationship with a crucial prosecution witness, the petitioner's due process right to a fair and impartial hearing is valid. In the present case, the petitioner alleged that one of the hearing officers was the "live in boyfriend" of a female guard witness. Although noting that it could find no cases on the issue, the Court of Appeals held that the due process right to an impartial hearing, even in the relaxed rules of the prison context, would require recusal where such an intimate relationship existed and the witness in question was crucial. However, notwithstanding this holding, the Court of Appeals denied the petitioner relief, noting that the relationship was known to him at the time of the hearing, but he failed to bring it to the committee's attention. Accordingly, he forfeited the issue.

Piggie v. McBride, 277 F.3d 922 (7th Cir. 2002). Upon consideration of a 2254 petition arguing that a prison disciplinary hearing denied the petitioner due process of law, the Court of Appeals held that a state may not benefit from § 2254(e)(1)'s "presumption of correctness" in appeals from prison disciplinary proceedings where the state has chosen not to make judicial process available to review prison disciplinary board decisions. In the proceedings below, the petitioner alleged that the prison's refusal to view a videotape showing the events under consideration in his prison disciplinary hearing violated his due process rights. The prison superintendent found, on appeal from the initial hearing, however, that the request to view the tape was not timely. On appeal to the Court of Appeals, the state argued that this finding was entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1) which states, "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a state court shall be presumed to be correct." Notwithstanding this language, the Court of Appeals noted that it had not yet considered the question of whether a prison disciplinary board may be considered a "state court" for purposes of this section. However, the court limited the language of the statute to its strict terms, especially where the state does not allow judicial review of the prison disciplinary board decision.

## INDICTMENT

U.S. v. Conley, ___ F.3d ___ (01-1587; 05/23/02). In prosecution for unlawful possession of a weapon, the defendant challenged the indictment on the ground that it was multiplicitous. Specifically, the two-count indictment charged the defendant with possessing the same rifle on two different dates seven months apart. The defendant argued that the relevant statute required that the indictment allege that his possession of the weapon was interrupted where multiple counts involve the same weapon. Because defendants should only be punished for possessing weapons in separate courses of conduct, a felon may be charged and convicted of two counts of possessing the same firearm only if: (1) he possesses the weapon; (2) he is aware that his possession of the weapon has been interrupted; and (3) he thereafter reacquires possession of the weapon himself. In the present case, the government was required to prove these facts and establish two separate crimes. The Court of

Appeals noted that there is no requirement that the indictment expressly state that the two dates involved have been interrupted by an intervening lack of possession. Rather, when an indictment alleges possession of the same weapon on two different dates, it follows that the defendant has been notified of the government's intent to prosecute him for unlawfully possessing a weapon in two separate courses of conduct.

U.S. v. Anderson, 280 F.3d 1121 (7th Cir. 2002). In prosecution for possessing images of child pornography on a computer hard drive that had been transported in interstate commerce, the Court of Appeals rejected the defendant's challenge to the sufficiency of the indictment. The indictment charged the defendant with knowingly possessing a computer hard drive which had traveled in interstate commerce, said hard drive containing images of child pornography. On appeal, the defendant argued that the indictment was defective in that it charged only that the computer hard drive "contained" images of child pornography even though the criminal statute requires proof that his computer hard drive "produced" such images. Although the court agreed that the indictment was "flawed" it did not find it so deficient to require that it be set aside. The court noted that although the statute requires that the images be "produced" using materials that have traveled in interstate commerce, in determining whether an essential element of the crime has been omitted from the indictment, courts will not insist that any particular word or phrase be used. At trial, the government established that the hard drive had traveled in interstate commerce and that the defendant had downloaded the images using his hard drive. Because computerized images are "produced" when computer equipment is used to copy or download the images, the indictment was sufficient, despite its flaws.

## SEARCH & SEIZURE

U.S. v. Yang, 286 F.3d 940 (7th Cir. 2002). In prosecution for importation of opium, the Court of Appeals affirmed a search of the defendant at O'Hare Airport under an "extended border search" doctrine. The defendant successfully passed through customs, proceeded out of the international terminal, and went to another terminal where he was to make his domestic connection. His traveling companion, however, was randomly searched, and the officials discovered that his clothing was soaked in opium. He eventually informed authorities that he was traveling with the defendant. Authorities then intercepted the defendant's bags, found the defendant, took him to identify his luggage, and searched his bags. Based upon these facts, the defendant argued that the officers conducted an unreasonable search of his luggage without a warrant. The Court of Appeals, however, noted that administrative border searches have long been recognized as an exception to the warrant requirement. Such searches are per se reasonable. O'Hare is an international gateway into the United States, and incoming passengers from international ports are subject to border searches because the airport is the functional equivalent of an international border. Here, however, the defendant was searched after he had already passed through customs (and by analogy, the "border"). Nevertheless, the court upheld the search under the "extended border doctrine." Under this doctrine, non-routine border searches that occur near the border are deemed constitutionally permissible if reasonable under the Fourth Amendment. Reasonableness in this context requires that (1) there is a reasonable certainty that a border crossing has occurred; (2) there is a reasonable certainty that no change in condition of the luggage has occurred since the border crossing; and (3) there is a reasonable suspicion that criminal activity has occurred. In the present case, all three factors were satisfied, for agents had watched the defendant go through customs, the defendant had re-checked his bags after passing through customs, and the search of his fellow traveler established reasonable suspicion.

U.S. v. Crowley, 285 F.3d 553 (7th Cir. 2002). In prosecution for conspiracy to distribute methamphetamine, the Court of Appeals affirmed the district court's denial of the defendant's motion to suppress. Upon obtaining information that drugs were being mailed to the defendant, the authorities notified various delivery services to be on the lookout for suspicious packages mailed to the defendant's address. Thereafter, a U.P.S. employee spotted such a package, opened it, saw what she believed to be marijuana, and then resealed the package. She then contacted authorities, who came to look at the package. While speaking with the U.P.S. employee, the officers were distracted by a car which had pulled up nearby. While officers looked at this car, the employee spontaneously re-opened the package. When officers looked at the opened package, they saw what they believed to be methamphetamine packed in coffee grounds. The officers then sought a warrant and discovered

3.8 ounces of the drug. The defendant argued that the employee of U.P.S. conducted an unreasonable warrantless search, for she was acting as an "agent" of the authorities when she opened the package. The Court of Appeals, however, noted that the first time the package was opened, no law enforcement authorities were present. Moreover, although authorities instructed employees to be on the lookout for such packages, they at no time instructed anyone to open them. Likewise, the second time the package was opened, this time in the presence of the police, again, the opening was not done at the officer's urging. The district court specifically credited the testimony of the officers and found that they did not ask or encourage her to do so. Thus, the search was that of a private party, not the government, and the Fourth Amendment was not implicated.

U.S. v. Harris, 281 F.3d 667 (7th Cir. 2002). On appeal from the district court's denial of the defendant's motion to suppress a line-up identification by a bank teller conducted by authorities after a bank robbery, the Court of Appeals clarified the proper standard of review for evaluating such issues on appeal. The court initially noted that the proper standard of review in such cases has been described as both clear error and *de novo* with due deference to the district court's findings of historical fact. Consistent with Ornelas v. United States, 517 U.S. 690 (1996), the court adopted the latter standard. In other words, while deference is given to the district court's findings of fact, the ultimate legal question of whether those facts amount to an unreasonably suggestive line-up is reviewed *de novo*.

U.S. v. McGee, 280 F.3d 803 (7th Cir. 2002). On appeal from the district court's denial of a motion to suppress evidence, the Court of Appeals rejected the defendant's argument that the government violated the "knock and announce" rule when it waited only 10 seconds before entering the defendant's apartment. The defendant lived in an older home subdivided into four separate apartments. Upon arriving to execute the search warrant, officers noticed the defendant enter through the rear door of the building. However, officers decided to enter through the front. The officers knocked and announced to the exterior door of the building, but finding it unlocked, proceeded into a common area of the building. The entry team then proceeded to break down the inner door to the defendant's apartment. Meanwhile, at the rear of the apartment, officers stationed there noticed the defendant leave his apartment and head up the stairs at the time the team at the front knocked and announced at the front, exterior door. They seized him when he left his apartment. At the motion to suppress hearing in the district court, the court concluded that the 10 second wait after knocking on the exterior door was unreasonable. However, the court nevertheless upheld the search, noting that any further wait would have been a useless gesture given the defendant's exit through the rear. The Court of Appeals agreed, noting that given the defendant's exit from the apartment, the team could have waited outside of his front door for "thirty seconds, a minute, or two minutes" to little avail.

U.S. v. Childs, 277 F.3d 947 (7th Cir. 2002) (en banc). In this case, the en banc court considered whether questioning during the course of lawful custody must be related to the reason for that custody. The court held that, because questions are neither searches nor seizures, police need not demonstrate justification for each inquiry. Questions asked during detention may affect the reasonableness of that detention (which is a seizure) to the extent that they prolong custody, but questions that do not increase the length of detention (or that extend it by only a brief time) do not make the custody itself unreasonable or require suppression of evidence found as a result of the answers. In this case, officers noticed a car with a cracked windshield, the same car they had stopped three days previously and told the driver to fix the windshield. The officers therefore stopped the vehicle for the traffic violation. The defendant was in the passenger seat. While one officer dealt with the driver, another officer questioned the defendant. First, he asked why the windshield had not been fixed, second he asked whether he was carrying any marijuana (the officer knew he had a marijuana charge pending), and third whether he would consent to a search (he said yes). During the search, the officer found crack cocaine. The defendant argued on appeal, and the original panel of the court agreed, that the second question affected an unconstitutional seizure of the defendant, because the traffic stop was unrelated to drugs and the officer had no independent reasonable suspicion to believe that the defendant possessed drugs. The en banc court, however, rejected this reasoning. The court noted that an officer may ask without suspicion questions of persons who are not in custody without effectuating a seizure. The fact that a suspect is in legal custody and likely to be released

soon does not alter the permissibility of questioning. Moreover, the questioning by the officers did not unreasonably delay the length of the original stop. The Fourth Amendment does not require the release of a person arrested on probable cause at the earliest moment that step can be accomplished. Thus, questions that hold potential for detecting crime, yet create little or no inconvenience, do not turn reasonable detention into unreasonable detention.

## SENTENCING

U.S. v. Gajdik, ___ F.3d ___ (01-2752; 06/04/02). In prosecution for wire fraud, the Court of Appeals considered whether a sentence to Illinois's "Impact Incarceration" Program operated as a suspended sentence. In determining the defendant's criminal history, the probation officer assigned two criminal history points for a prior burglary conviction and five-year prison sentence in Illinois. As part of the sentence, the Illinois judge recommended that the defendant be allowed to serve his sentence through the Impact Incarceration Program. The Illinois Department of Corrections accepted the defendant into the program and notified the court of its decision. The defendant successfully completed the program in 121 days, and the state court thereafter reduced the defendant's sentence to a sentence of time served. Although a 5-year sentence normally constitutes three criminal history points under guideline section 4A1.1(a), the probation officer concluded that the defendant's successful completion of the boot camp "suspended" the remainder of the sentence. Thus, since the defendant served fewer than 13 months, the probation officer concluded that the defendant should be assigned only two criminal history points, pursuant to section 4A1.1(b). Both the district court and Court of Appeals, however, disagreed. The Court of Appeals initially noted that criminal history points are based on the sentence pronounced, not actually served. However, if a defendant's prior sentence of imprisonment was "suspended," then "prior sentence of imprisonment" refers only to the portion of the sentence not suspended. According to the Court of Appeals, the common definition of a "suspended sentence" is a definite sentence postponed so that the defendant is not required to serve his time in prison unless he commits another crime or violates some court-imposed condition during a probationary period. Given this definition, the Illinois Impact Incarceration program did not operate to "suspend" the remainder of the 5-year sentence, but rather more closely resembled a pardon or commutation by the executive. Specifically, the IDOC determines eligibility for the program and ultimately determines whether the defendant successfully completes the program. Therefore, where a defendant is sentenced to Illinois' Impact Incarceration program for a prior conviction, a court must look at the sentence actually imposed when assessing criminal history points.

U.S. v. Timbrook, 290 F.3d 957 (01-3646; 05/29/02). In prosecution for mail fraud, the Court of Appeals considered whether a sentence of work release in a county jail is a "sentence of imprisonment" as that term is used in section 4A1.1(b) of the sentencing guidelines. At the defendant's sentencing hearing, the district court imposed a two-point enhancement pursuant to section 4A1.1(b) for a prior sentence of imprisonment, where the defendant had received a sentence of four years of probation ans six months of work release. Section 4A1.1(b) provides for a two-point enhancement for "each prior sentence of imprisonment of at least sixty days." The district court concluded that the six months of work release qualified as a sentence of imprisonment, and the Court of Appeals agreed. Specifically, although the work release allowed the defendant to be outside of custody for defined periods of time, the defendant was incarcerated for those periods of time when he was not at work. "This amounts to imprisonment for purposes of section 4A1.1(b)."

United States v. Cross, 289 F.3d 476 (01-2720; 05/10/02). In prosecution for mail and wire fraud, the Court of Appeals reversed the district court's upward departure. The defendant had 20 criminal history points, 7 more than necessary for placement into a category VI. Thus, the government argued that the defendant's criminal history category did not adequately reflect his prior criminal conduct. The district judge not only agreed, but sentenced the defendant to the maximum possible sentence. Specifically, on the three counts to which the defendant pled guilty, the judge sentenced the defendant to the statutory maximum of five years on each count consecutively. Thus, the district court departed from a range of 77 to 96 months to 180 months. As a basis for departure, the district judge stated, "And, so, while I am told by the guideline manuals and the Court of Appeals where, if I were to depart upward, to find some measure in the guidelines in order to find the number, do you want to know the truth of it? And I will state it on the record. There is no number that the guidelines supply me that

brings me some measure of reason." The Court of Appeals concluded that these comments made it clear that the judge was not tailoring the departure by increasing the offense level in response to the extra criminal history points, but, rather, reaching a result dictated by his stated sentencing goal and then referencing the offense level and sentencing range housing that number. Thus, because the district judge made no effort to tie the extent of the departure to the guidelines, the Court of Appeals reversed the district court's decision and remanded for re-sentencing.

U.S. v. Alvarez-Martinez, 286 F.3d 470 (7th Cir. 2002). In prosecution for illegal re-entry after deportation, the Court of Appeals affirmed the district court's determination that the defendant was subject to a 16-level enhancement for having been deported after committing an "aggravated felony." The prior felony in question was for an Illinois conviction for burglary of a vehicle. The court first held that such an offense is not per se a crime of violence. The court then articulated the proper approach to use when evaluating whether a particular offense is an "aggravated felony" under Guidelines section 2L1.2(b). Analogizing to the standards articulated in United States v. Shannon, 110 F.3d 382 (7th Cir. 1997), the court held that the characterization of a previous conviction offered to enhance the defendant's federal sentence is to be based on the facts charged in the indictment or information, without deeper inquiry into the circumstances of the offense. Deviation from this rule is permissible only when it is impossible otherwise to determine the proper classification of the offense, and second, that the deviation does not require a hearing to resolve contested factual issues. Using this standard in the present case, the court noted that it was not possible to tell from the face of the charge if the conviction in question was a crime of violence. However, because the defendant had stipulated in the PSR that he had pried open the door of the vehicle, this fact was enough to make the offense an aggravated felony. Specifically, the act of prying open the window of a locked vehicle qualifies as a use of physical force against the property of another, as 18 U.S.C. § 16(a) uses the term.

U.S. v. Thompson, 286 F.3d 950 (7th Cir. 2002). In prosecution for drug related offenses, the Court of Appeals reversed the district court's cross-reference to the Guidelines' pre-meditated murder guideline (2A1.1). Evidence was presented that an informant worked for the government inside the conspiracy. He eventually turned up dead. Relevant witnesses could not, however, agree on who committed the murder. However, there was a great deal of evidence showing that three of the defendants had attempted to cover up the murder. Based on the cover-up, the district court applied the cross-reference, holding that the attempt to cover up the murder was done in furtherance of the goals of the conspiracy and in an attempt to avoid detection pursuant to U.S.S.G. § 1B1.3(a)(1). However, because the district court relied upon this Guidelines section to hold the defendant's responsible for the murder, the precise question at issue was whether it was reasonably foreseeable to the defendants that the victim could be killed with malice aforethought in furtherance of the conspiracy. On this precise question, the court concluded that the enhancement was appropriate as to one, but not to two other, defendants. Specifically, the evidence showed that one defendant knew of the victim's activities as an informant and, at a meeting of conspirators to discuss the situation, had informed the attendees that he would not let anyone hurt them. Based on this evidence, the defendant knew that it was likely that the victim would be murdered in an attempt to prevent him from exposing the conspiracy. For the other two defendants, however, no such specific knowledge existed. No evidence was presented that these two defendants knew of the victim's informant activities, nor was evidence presented as to a tendency of the conspiracy members to kill informants. Without some evidence establishing a reason for these two defendants to foresee that an informant would be killed, the enhancement was improper.

U.S. v. Gallo-Vasquez, 284 F.3d 780 (7th Cir. 2002). In prosecution for drug offenses, the Court of Appeals, upon motion of the government, reversed the district court's downward departure based on the defendant's status as a deportable alien. In departing, the district court stated only that "I do know that because of citizenship status, he will have a worse situation than would other persons of U.S. citizenship convicted of the exact same thing with the exact same criminal history." While noting that a district court may depart based on alien status, a district court must make specific findings on how the defendant's conditions of confinement would differ as a result of his alienage and whether those differences would have made the defendant's sentence more onerous than was contemplated by the framers of the Sentencing

Guidelines. Because the district court failed to make such findings in the present case, the court reversed the departure and remanded to the district court.

U.S. v. Chay, 281 F.3d 682 (7th Cir. 2002). In prosecution for trafficking in counterfeit documents and packaging for computer programs in interstate commerce, the Court of Appeals rejected the defendant's challenge to he district court's calculation of restitution. The defendant engaged in packaging and selling pirated computer software. To determine the amount of restitution owed, the court used the number of pirated programs sold by the defendant multiplied by the actual price he received for the programs. Thus, the court used the defendant's gross receipts as the amount of restitution. On appeal, the defendant argued that the district court was required to deduct his cost of packaging and marketing the pirated programs from the gross receipts. However, the court flatly rejected this argument, noting that the victim's loss is not determined by the defendant's gain. Indeed, the court analogized the argument to that of a bank robber who seeks to have the amount of restitution to the bank to be offset by the cost of robbing the bank. The court concluded that victims are not required to subsidize defendants' illegal activities.

U.S. v. Frost, 281 F.3d 654 (7th Cir. 2002). In prosecution for a fraud scheme whereby two defendants managed a trade school where they fraudulently obtained grants and loan guarantees for students, the Court of Appeals affirmed the district court's offense level enhancement for being an organizer or leader of the criminal activity involving five or more participants. The defendant's argued that only they could have been subjected to prosecution, and therefore there were an insufficient number of participants to support the enhancement. The Court of Appeals assumed that the defendant's were correct, and that all others who were involved in the scheme were the dupes of the defendants. Nevertheless, the court noted that Application Note 3 states that a fraud involving less than five participants which used the unknowing services of many outsiders could be considered extensive. In the present case, the defendants used the services of many individuals within the school's organization who, even if unwittingly, allowed the fraudulent scheme to occur. Accordingly, the enhancement was proper, even if the two defendants were the only two criminally culpable individuals involved in the offense.

U.S. v. Bissonette, 281 F.3d 645 (7th Cir. 2002). In a prosecution for federal assault with intent to do bodily harm, the Court of Appeals rejected the defendant's argument that he did not qualify for sentencing as a career offender. The defendant's prior conviction at issue was a Wisconsin battery conviction classified by Wisconsin as a misdemeanor with a maximum sentence of 9 months. However, the defendant was sentenced under Wisconsin's habitual offender statute, which raised the statutory maximum to three years. He ultimately received a 2-year sentence on the predicate offense. According to the defendant, the conviction did not qualify as a "prior felony conviction" for career offender purposes, for the court should have only considered the statutory maximum without any statutory enhancements. The Court of Appeals, however, rejected this argument and held that a court should consider any statutory sentence enhancements when determining whether a predicate offense for career offender status constitutes a "prior felony conviction." In doing so, the Court of Appeals noted that in United States v. LaBonte, 520 U.S. 751 (1997), the Supreme Court held that, when considering whether the offense of conviction makes a defendant eligible for the career offender enhancement, the courts are to look to the relevant statutory sentencing enhancements. Although LaBonte did not involve the predicate convictions, but rather the current offense of conviction, the Court of Appeals noted that it had previously extended the rationale of LaBonte to analogous situation involving the revocation of supervised release. Specifically, for revocation proceedings, the grade of violation is determined by the "conduct constituting" any "federal, state, or local offense punishable by various terms of imprisonment." A question arose whether the "offense punishable" by a certain term referred to only the base offense sentence or to the base sentence plus enhancements. After LaBonte, the Court concluded that all statutory enhancements should be considered. Accordingly, both LaBonte and the court's subsequent treatment of analogous situations supported a conclusion that statutory enhancements should be considered when determining whether a predicate offense is a "prior felony conviction" for career offender purposes.

U.S. v. Thomas, 280 F.3d 1149 (7th Cir. 2002). In prosecution for being a felon in possession of a firearm, the Court of Appeals reversed the district court's sentence of natural life based upon a cross-reference to the first degree

murder guideline. The defendant was convicted of bartering a semi-automatic pistol for thirty dollars worth of crack cocaine, along with being a felon in possession of a firearm. The weapon which the defendant bartered turned out to belong to a man who had been murdered the night before the barter occurred. Moreover, the defendant was arrested in the car of the murdered man, and that man's blood was found in the car, as well as in the defendant's driveway. Additionally, a neighbor of the defendant testified at sentencing that he had heard gun shots near the defendant's home the night of the murder, and had seen the defendant driving away in the victim's car. However, the gun which was used to murder the victim was not the same one bartered by the defendant the following day. The Court of Appeals noted that in order to cross-reference the homicide guidelines, U.S.S.G. § 2K2.1(c) states that "if the defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense, and death resulted, "the court must cross reference the homicide guidelines." To do so, a district court must ascertain whether death resulted from the defendant's conduct. If so, it must identify the analogous homicide guideline that most closely resembles the defendant's conduct. In the present case, the court noted that the district court failed to make any findings that the defendant's conduct put into motion a series of events that led to the victim's death. Rather, all the court found was that the defendant was "involved" in the victim's murder. However, on this record, the Court of Appeals could not determine if the theft and possession of the firearm in question resulted in the death of the victim or, instead, the theft and possession of the firearm were the result of the death. All of the evidence would support a theory that the theft and possession occurred either before or after the death of the victim. Under these circumstances, the evidence failed to sufficiently establish a connection between the defendant's offense of conviction and the death of the victim. This conclusion is bolstered by the fact that the victim was not killed with the weapon which the defendant possessed. Accordingly, the record is void of an indication of whether the defendant possessed a weapon before or at the time of the killings. Moreover, even if there was sufficient evidence, the court erred in using the first degree murder guideline. There was nothing in the record concerning premeditation. Thus, without more, that guideline could not be used.

U.S. v. Smith, 280 F.3d 807 (7th Cir. 2002). In prosecution for distribution of crack, the Court of Appeal rejected the defendant's challenge to a 2-level enhancement for possessing a firearm during the commission of a drug offense (U.S.S.G. § 2D1.1(b)(1)). The enhancement was based solely upon the testimony of the agent in the case, who recounted that the confidential informant who conducted controlled buys from the defendant noted, after conducting one of these buys, that someone within the residence where he obtained the drugs had pointed a gun at him. Ten days after receiving this information, agents conducted a photographic line-up, whereupon the informant identified the defendant as the person who pointed the gun at him. Despite the hearsay nature of this testimony, the Court of Appeals held that a number of factors made the information sufficiently reliable to support the enhancement. First, the informant made the statement to the authorities immediately after the incident with the gun had occurred. Second, the statement was consistent with other evidence in the case, such as that of a tenant of the building where the controlled buys occurred, who stated that she saw the defendant in the building frequently and that guns were often in the house. Given the standard of review and the standard for applying the guideline section, the district court did not err when these facts are considered.

U.S. v. Warren, 279 F.3d 561 (7th Cir. 2002). In prosecution for armed bank robbery, the Court of Appeals affirmed the district court's sentencing enhancement for "otherwise using" a dangerous weapon during a robbery, pursuant to U.S.S.G. § 2B3.1(b)(2)(D). The victim testified that the defendant poked the gun into her back and stated that he did not want to hurt her. The defendant, however, claimed that he never made physical contact with the teller with the gun. The Court of Appeals noted that physical contact with the gun was not necessary for the enhancement. Indeed, the court had previously affirmed enhancements where a defendant pointed a weapon at a specific victim and therefore created a personalized threat of harm. Although the enhancement requires more than just a general display of the weapon, pointing at the victim and stating that he "didn't want to hurt her" was sufficient personal intimidation to warrant the enhancement.

U.S. v. Bolden, 279 F.3d 498 (7th Cir. 2002). In prosecution for drug related offenses, the Court of Appeals affirmed the district court's obstruction of justice

sentencing adjustment for the defendant's failure to appear on the day set for his trial. When the defendant failed to appear for trial, the district court recessed allowing defense counsel to attempt to contact the defendant. Upon returning to court, defense counsel stated that the defendant indicated that he was not coming to court, although he knew his presence was required. His refusal to appear delayed his trial by two months. On appeal, the defendant argued that his failure to appear was not "willful" because he did not attempt to engage in illegal activities, flee the jurisdiction, alter his appearance, or otherwise elude the authorities in the time between his failure to appear and his arrest. The court rejected this argument, noting that a failure to appear is "willful" if the defendant knew that he was required to appear in court and "voluntarily and intentionally" failed to do so. His attorney's statement to the court clearly satisfied this test. Moreover, the two month delay in the trial resulting from the failure to appear warranted the obstruction of justice adjustment as well, for the adjustment is proper when the defendant's actions have a "delaying effect on the administration of justice."

U.S. v. Jones, 278 F.3d 711 (7th Cir. 2002). In prosecution for criminal contempt, the Court of Appeals held that the district court's 17-level upward departure was not unreasonable. The defendant originally pled guilty to drug charges pursuant to a plea agreement in which he agreed to cooperate with the government. As a result of the cooperation agreement, the defendant received a substantial benefit at sentencing. Thereafter when, pursuant to the plea agreement, the government sought the defendant's testimony before the grand jury, the defendant refused to testify. The defendant was ultimately charged with and plead guilty to criminal contempt of court for doing so, after the district court had granted him immunity. At sentencing, the district court departed upward from a Guideline Range of 4 to 10 months, ultimately sentencing the defendant to 71 months. The Court of Appeals affirmed the departure, noting that where a defendant is convicted of contempt of court for refusal to fulfill the terms of his cooperation agreement, a departure is appropriate to the extent that the benefit the defendant originally received at sentencing via the cooperation agreement is eliminated by the departure in the criminal contempt proceeding.

U.S. v. Colvin, 276 F.3d 945 (7th Cir. 2002). In prosecution for intimidation and interference with the exercise of housing rights on the basis of race (42 U.S.C. § 3631), conspiracy to threaten or intimidate persons in the free exercise or enjoyment of housing rights (18 U.S.C. § 241), use of fire in the commission of a felony (18 U.S.C. § 844(h)(1)), and use or carrying a firearm in the commission of a felony (18 U.S.C. § 924(c)), the Court of Appeals rejected the defendant's argument that a consecutive sentence for use of fire in the commission of a felony violated the Double Jeopardy Clause. The defendant, along with two confederates, placed a burning cross in the yard of the victim in this case, leading to his ultimate conviction for the offenses noted above. When considering the defendant's double jeopardy challenge, the Court of Appeals focused its inquiry on whether Congress intended to authorize cumulative punishment of fire-related felonies such as cross burning under 18 U.S.C. § 844(h)(1). The Court of Appeals held that the language of the statute was clear. Specifically, the statute provides that "whoever uses fire . . . to commit any felony . . . shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years . . . [not to] run concurrently with any other term of imprisonment." Accordingly, even for underlying felonies which are fire-related, the court concluded that Congress authorized cumulative punishment.

## SUFFICIENCY OF THE EVIDENCE

U.S. v. Thomas, 284 F.3d 746 (7th Cir. 2002). In a 2-1 decision, the Seventh Circuit reversed the defendant's conviction for conspiracy to distribute crack because the evidence was insufficient to show more than a buyer-seller relationship with the alleged co-conspirators. This was the second time this case was on appeal, after a trial, and the second time the Court reversed the defendant's conviction. The first time, the Court reversed for failure to give a buyer-seller instruction and stated that the government would not be in that situation if it had charged the defendant with the substantive crime of distribution, instead of conspiracy. (The Court stated that the crime of conspiracy can not be equated with repeated transactions.) The government ignored this advice and retried the defendant for conspiracy. This time, the Court held that the evidence was insufficient to prove conspiracy. The Court stated that the evidence established that (1) in late May, the defendant flagged down Jones (the person with whom he had a buyer-seller relationship) as she and the others were driving about Charleston, brokered the sale of a half ounce of crack, and told Jones to look him up when she inquired about

the possibility of future sales; (2) the defendant brokered at least three more sales to Mrs. Jones prior to the July 26 search of the Jones residence, for a total of at least four sales; (3) at the conclusion of the third sale, the defendant gave Jones his telephone and beeper numbers; (4) the defendant was Jones' exclusive source of crack cocaine between late May and late July. However, the court concluded that these facts did not alone evidence an agreement between Thomas and Jones. At most, they established a series of four, spot-market, cash transactions. The terms of these transactions were apparently satisfactory enough to Jones that she continued to seek Thomas when she needed more crack cocaine, and sufficiently advantageous for Thomas that he supplied his contact information to Jones and continued to do business with her. But there is nothing in the facts, the court concluded, that suggests even a commitment to future sales, let alone some interest in the success of Jones's re-distribution of the cocaine to her customers. Indeed, when Jones was asked whether there was a reason why Thomas was her one and only source between May and July of 1995, she responded, "Not really." Additionally, the Court pointed out that the jury was not instructed that if Thomas did not reach an agreement with his alleged co-conspirators until after the rest of them were all cooperating with the government, that could not support a conspiracy conviction. The strongest evidence of conspiracy was during this time period. Thus, the failure to instruct would have been plain error if the evidence had been sufficient to convict Thomas.

U.S. v. Scialabba, 282 F.3d 475 (7th Cir. 2002). In prosecution for money laundering, the Court of Appeals reversed the defendants' convictions, holding that when a crime entails voluntary, business-like operations, "proceeds" of a crime as used in 18 U.S.C. § 1956(a)(1), must be net income, rather than gross income from the offense. In this case, the defendants provided video poker machines to various business establishments. "Credits" which patrons earned could then be illegally "cashed in" at the business establishment. When the defendants retrieved the coins from the machines, the money would then be split between the defendants and the owner of the establishment where the machine was located. Some of this money went to cover the business owner's payment to customers, some was retained as compensation to the owner of the business establishment for his role, and the defendants kept the rest as compensation for the machines, the defendant's not only supplying the machines, but also fixing and replacing them. According to the government, the defendant's committed money laundering when they handed some of the money from the machines over to the business establishment owners and used more of that revenue to meet the expenses of the business. However, the court noted that under the government's logic, every drug dealer who uses the receipts from drug sales to purchase more drugs, every bank robber who uses part of his take to finance his next robbery, and every embezzler who spend part of his take on food and rent in order to stay alive to commit further embezzlements, would be a money launderer. Yet, none of these transactions entails financial transactions to hide or invest profits in order to evade detection, the normal understanding of money laundering. In other words, the defendant's convictions depended on the proposition that "proceeds" equals "gross income" under the statute. However, according to the court, such an equation would be illogical. Proceeds from a slot-machine in a legitimate casino are understood to consist of the amount of coin which went into the machine, minus what was paid out to customers. Had the statute meant to equate proceeds with "receipts," it could have very easily used the term "receipt" instead. The Rule of lenity counsels against imposing this interpretation upon the statute and catching people by surprise.

U.S. v. Peters, 277 F.3d 963 (7th Cir. 2002). In prosecution for engaging in a sexual act with a victim at a time when the defendant knew that the victim was physically incapable of declining participation in the sexual act in violation of 18 U.S.C. §§ 2242(2)(B) and 1153, the Court of Appeals reversed the defendant's conviction based on insufficiency of the evidence. The evidence produced at trial showed that the defendant and victim, along with others, were drinking heavily over the course of an evening. The victim eventually passed out, and remembered nothing until being awoken sometime after the alleged incident took place. No witness saw the victim and the defendant have intercourse, and could not therefore testify as to whether the victim was passed out at the time. Rather, when the owner of the residence where the party had taken place arrived, all were passed out. When she tried to enter the back bedroom, the door was locked. After forcing the door open, she discovered the victim passed out, with her pants off. She then discovered the defendant in the closet wearing only his boxer shorts. She then called the police. A subsequent DNA test of the

victim showed that she had in fact had intercourse with the defendant, although nothing indicated whether the intercourse was consensual or non-consensual. At trial, the Defendant maintained that the sexual act was consensual, and he presented witnesses attesting to a previous relationship between the victim and the defendant. Based on these facts, the Court of Appeals concluded that the government failed to prove beyond a reasonable doubt that the victim was physically incapable of declining participation in a sexual act. Essentially, no one knew what occurred during the two hour period when the alleged act occurred. Although the victim had been drinking heavily, there was evidence that she could still sometimes function after doing so. Thus, the government also failed to prove that the defendant *knew* that the victim was incapable of declining participation, for she could have appeared relatively normal. Under these circumstances, the court concluded that the conviction must be reversed.

### TRIAL

U.S. v. Chiappetta, 289 F.3d 995 (7th Cir. 2002). In prosecution for mail fraud, the defendant argued that the district court abused its discretion in denying her third motion to continue the trial. After the second motion to continue the trial, the defendant's mother was diagnosed with terminal cancer and given 8 to 12 weeks to live. The defendant moved for a continuance, requesting that the court postpone the trial until her mental and emotional state improved and until she could arrange for assistance for her mother. The government opposed the motion, arguing that because its witnesses had already twice been through the inconvenience of arranging their schedules to appear for trial, it did not believe it was fair to reschedule them again. The district court denied the motion, but took several measures designed to accommodate the defendant. Specifically, he changed the trial schedule to half days and told the defendant that he would consider "whatever else" would be helpful if particular problems arose during the course of trial. The Court of Appeals noted that a number of factors are considering when evaluating a district court's denial of a motion to continue, including: (1) the amount of time available for preparation, (2) the likelihood of prejudice from denial, (3) the defendant's role in shortening the effective preparation time, (4) the degree of complexity of the case, (5) the availability of discovery from the prosecution, (6) the likelihood the continuance would satisfy the movant's needs, and (7) the inconvenience to the court. Additionally, courts have also considered the age of the case; whether the government opposed the continuance; whether there would be a hardship to anyone; and the defendant's interest in being represented by the lawyer of her choice. Given all these factors, the Court of Appeals concluded that the district court did not abuse its discretion here.

## Recently Noted Circuit Conflicts

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United States v. Lee, 2001 U.S. App. LEXIS 27047 (7th Cir. 2001). In an unpublished decision, the Seventh Circuit held that the issue of whether a defendant's sentences should have been concurrent or consecutive to his undischarged sentence was not made frivolous by his appeal waiver. The Court stated that:

"Whether the sentencing appeal waiver would prevent such a challenge is an open question in this Circuit. The only Circuit to address the issue, the Second Circuit, has held that a waiver of the right to appeal a sentence within the guidelines range does not prevent a challenge to the imposition of a sentence to run consecutively to an undischarged prison term. United States v. Williams, 260 F.3d 160, 164 (2d Cir. 2001); United States v. Brown, 232 F.3d 44, 48 (2d Cir. 2000), cert. denied., 149 L. Ed. 2d 152, 121 S. Ct. 1245 (2001)." The Court affirmed the conviction and sentence on other grounds.

United States v. Swan, 275 F.3d 272 (3rd Cir. 2001). The Third Circuit held that a court does not have to impose a sentence for conduct committed while on supervised release consecutive to a sentence for a supervised release revocation. Two other circuits agree with this holding. Four circuits have held that consecutive sentences are mandatory in such situations. The Seventh Circuit has not ruled on the issue.

Valansi v. Ashcroft, 278 F.3d 203 (3rd Cir. 2002). The Third Circuit held, 2-1, that a conviction for embezzlement, from a bank, of more than $10,000 is not always an aggravated felony making an alien defendant deportable. The Court held that, "A conviction establishing that the defendant acted with the intent to defraud his or her employer qualifies as an offense that involves fraud or deceit, and therefore as an aggravated felony. A conviction establishing that the defendant acted only with an intent

to injure his or her employer does not."

Since, the petitioner had not admitted an intent to defraud when she pled guilty her offense counted as a theft offense, rather than one with an intent to defraud. This did not make her deportable, since she received a sentence of less than one year.

This decision created a circuit split because the 11th Circuit held in Moore v. Ashcroft, 251 F.3d 919 (11th Cir. 2001), that bank embezzlement must always be categorized as a fraud offense.

United States v. Anthony, 280 F.3d 694 (6th Cir. 2002). The Sixth Circuit came down on the minority side of a circuit split and held that an organizer/leader adjustment is only justified under the otherwise extensive prong of the test when the combination of knowing participants and non-participants in the offense is the functional equivalent of an activity involving five criminally responsible participants. Therefore, the Court of Appeals remanded the case for resentencing and instructed the district court to apply this test, instead of the totality of the circumstances test. The Seventh Circuit follows the majority view. United States v. Briscoe, 65 F.3d 576, 590 (7th Cir. 1995)

United States v. Haywood, 280 F.3d 715 (6th Cir. 2002). The Sixth Circuit held that a district court abused its discretion when it admitted evidence that the defendant possessed 1.3 grams of crack five months after the date he was charged with selling crack. The Court found that there was nothing to suggest that the 1.3 grams was possessed for sale, rather than personal use. The Court held that possession for personal use is not probative of possession for sale. This holding agrees with the Ninth Circuit and disagrees with the Fifth, Eighth, and Eleventh Circuits.

United States v. Carter, 283 F.3d 755 (6th Cir. 2002). The Sixth Circuit affirmed a defendant's sentence based on the district judge's finding that the defendant's three prior drug sales to the same individual on different dates, within the same month, were unrelated because they were indicted separately and never consolidated. However, the Court of Appeals noted the Circuit split on the question of whether "related" should mean the same thing under the criminal history guideline as it does for relevant conduct. (Both the 6th and 7th Circuits take a more restrictive view of what is related for criminal history purposes.) The Court suggested that the Sentencing Commission resolve this question.

United States v. Diaz, 285 F.3d 92 (1st Cir. 2002). The First Circuit held that it was not plain error for a district court to place the burden on the defendant to prove the defense of justification to a charge of being a felon in possession of a firearm. This was because the law on this issue is unsettled. The Seventh Circuit is on the good side of a 2-1 circuit split. The Seventh Circuit requires the government to prove beyond a reasonable doubt that the defense does not apply. United States v. Talbott, 78 F.3d 1183, 1186 (7th Cir. 1996)

United States v. Mason, 284 F.3d 555 (4th Cir. 2002). The Fourth Circuit reversed a district court's decision to sentence to a defendant as a career offender. The Court held that one of the defendant's predicate convictions should not have counted because even though he received an adult conviction at age 16 he was then given a juvenile disposition. In addition, more than five years had passed since the defendant's release from confinement on that offense. Due to time passage and the juvenile sentence the conviction did not count.

The Court acknowledged a circuit split on this issue. It noted that the Ninth Circuit has taken the position that an adult conviction counts regardless of the sentence imposed. The Eleventh Circuit also seems to follow this rule, although the facts in its case are not as clear. It appears that no other court has dealt with this precise issue.

United States v. Morris, 286 F.3d 1291 (11th Cir. 2002). The 11th Circuit reversed a defendant's enhancement for abuse of a position of trust. The Court held that the facts the defendant and his coconspirators represented himself as a professional trader and the Defendant had total control over the victims' money was not enough to show a position of trust. The Court recognized that six other circuits had upheld the application of the enhancement in similar circumstances and the Seventh Circuit had explicitly criticized the Eleventh Circuit rule in United States v. Davaluri, 239 F.3d 902, 909 (7th Cir. 2001)

United States v. Outen, 286 F.3d 622 (2nd Cir. 2002). The Second Circuit held that the default statutory maximum for a marijuana distribution offense is five years, not one year. The Court stated that "[i]n applying Apprendi to two or more statutory provisions, therefore, we believe the proper "baseline" or "default" provision is not the provision with the lowest penalty, but rather the one which states a complete crime upon the fewest facts. The competing provisions must then be analyzed to determine what effect their additional facts have on the maximum punishment prescribed in the baseline: If a fact

increases that punishment, it must be treated as an offense element; otherwise, it need not be." This decision conflicts with the decision of the Southern District of West Virginia in United States v. Lowe, 143 F.Supp.2d 613 (S.D.WV 2000). Most other courts have accepted five years as the default statutory maximum for marijuana without question.

The Second Circuit also endorsed the argument that an Apprendi violation is harmless if there are multiple counts and the sentence imposed could have been achieved by making the sentences run consecutive. The Second Circuit joins the 4th, 6th, 7th, 8th, 9th, 10th, and 11th Circuits in this conclusion. However, this decision conflicts with decisions of the 5th and 8th (yes, they go both ways) Circuits.

United States v. Thompson, 287 F.3d 1244 (10th Cir. 2002). The Tenth Circuit held that the filing of an indictment tolls the statute of limitations even if the indictment was improperly sealed. The Court's decisions agrees with decisions of the Third and Seventh Circuits (by analogy to a case involving the filing of an information to toll the statute of limitations, before an indictment was obtained). However, it conflicts with the logic of decisions from the Second, Fifth, Eighth, and Ninth Circuits holding that a properly sealed indictment tolls the statute of limitations.

United States v. Oestreich, 286 F.3d 1026 (7th Cir. 2002). In a tax case, the Seventh Circuit noted "that one case has drawn a distinction between the use of "the defendant" in U.S.S.G. sec. 2T1.1(b)(1) and the use of the passive voice in sec. 2T1.1(b)(2), possibly suggesting an argument that (1) is applicable only to the defendant who failed to report and not to a co-conspirator who had no duty to report. United States v. Lewis, 93 F.3d 1075, 1084 (2d Cir. 1996)."

United States v. Warnick, 287 F.3d 299 (4th Cir. 2002). The Fourth Circuit held that the cross-reference in section 2D1.2 that requires courts to add two levels to the offense level in 2D1.1 for people convicted of distributing drugs within 1,000' of a protected location (21 USC 860) means that all of 2D1.1 is to be applied, not just the drug quantity table. The Court held that the Guidelines Commentary, which says otherwise, violates the statute. This holding disagrees with an unpublished Ninth Circuit decision. No other court has considered the issue.

The Court also held that people who are convicted of violating section 860 are eligible for the two-level safety valve reduction in 2D1.1(b)(6). The Court distinguished cases from the Ninth and Eleventh Circuits which held that such defendants are not eligible for the 5C1.2 or statutory safety valve.

## Supreme Court Update
**(as of June 17, 2002)**

The following Supreme Court Update was compiled by Fran Pratt of the Federal Defender's Office for the Eastern District of Virginia and Johanna M. Christiansen, Staff Attorney for the Federal Public Defender's Office for the Central District of Illinois. Their update is a valuable tool for keeping current with Supreme Court decisions, and we are pleased to share this with you.

An "**" before the case name indicates new information.

### RECENT DECISIONS

***Dusenberry v. United States*, 122 S. Ct. 694 (January 8, 2002).** 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*, 122 S. Ct. 726 (January 9, 2002).** 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*, 122 S. Ct. 587 (January 9, 2002).** 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*, 122 S. Ct. 744 (January 15, 2002).** 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*, 122 S. Ct. 867 (January 22, 2002).** 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*, 122 S. Ct. 877 (January 22, 2002).** 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,* ___ S. Ct. ___ (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*, ___ S. Ct. ___ (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*, ___ S. Ct. ___ (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.)

## CASES AWAITING DECISION

***Atkins v. Virginia*, No. 00-8452, cert. granted September 25, 2001, argued February 20, 2002.** Whether execution of mentally retarded individuals convicted of capital crimes violates the Eighth Amendment.

Case below: 534 S.E.2d 312 (Va. 2000).

****Board. of Education of Pottawatomie County v. Earls*, No. 01-332, cert. granted November 8, 2001, argued March 19, 2002.** Whether board of education can implement suspicionless drug-testing policy covering students who voluntarily engage in interscholastic competition without first identifying actual drug users among students to be tested.

Case below: 242 F.3d 1264 (10th Cir. 2001).

****Harris v. United States*, No. 00-10666, cert. granted December 10, 2001, argued March 25, 2002** Whether fact of "brandishing," as term is used in 18 U.S.C. §924(c)(1)(A), must be alleged in indictment and proved beyond a reasonable doubt where finding of "brandishing" results in increased mandatory minimum sentence.

Case below: 243 F.3d 806 (4th Cir. 2001).

****Ring v. Arizona*, No. 01-488, cert. granted January 11, 2002, argued April 22, 2002**. Whether *Walton v. Arizona* should be overruled in light of Supreme Court's subsequent holding, in *Apprendi v. New Jersey*, that legislature's removal from jury assessment of facts that increase prescribed range of penalties to which criminal defendant is exposed violates defendant's Sixth Amendment right to jury trial.

Case below: 25 P.3d 1139 (Ariz. 2001).

****United States v. Ruiz*, No. 01-595, cert. granted January 4, 2002, argued April 24, 2002**. Whether before pleading guilty, criminal defendant has constitutional right to obtain exculpatory information, including impeachment material, from government, and if so, whether that right may be waived through plea agreement.

Case below: 241 F.3d 1157 (9th Cir. 2001).

## CASES AWAITING ARGUMENT

***Miller-El v. Cockrell*, No. 01-7662, cert. granted February 15, 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).

***Otte v. Doe I*, No. 01-729, cert. granted February 19, 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).

***Stewart v. Smith*, No. 01-339, cert. granted December 12, 2001.** Whether state superior court's procedural ruling was independent of merits of respondent's claims of ineffective assistance of trial and appellate counsel; certifying predicate question to Arizona Supreme Court for resolution.

Case below: 241 F.3d 1191 (9th Cir. 2001).

***United States v. Bean*, No. 01-704, cert. granted January 22, 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.** (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.** 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.** (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.** (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.** 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.** 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 (Vir. 2001).

*****United States v. Recio*, No. 01-1184, cert. granted May 28, 2002.** Whether a conspiracy ends as a matter of law when the government frustrates its objective.

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

# Reversible Error

Morris v. Reynolds, 264 F.3d 38 (2d Cir. 2001) (Jeopardy barred prosecution for lesser offense after guilty plea).

United States v. Scarfo, 263 F.3d 80 (3rd Cir. 2001) (Prohibiting defense lawyer's extrajudicial statements violated free speech).

United States v. Martinez, 274 F.3d 897 (5th Cir. 2001) (Under Assimilative Crimes Act, a federal sentence three times longer was not "like" the state sentence).

United States v. Lopez, 264 F.3d 527 (5th Cir. 2001) (Mandatory minimum has no effect when the safety valve applies).

United States v. Fix, 264 F.3d 532 (5th Cir. 2001) (Defendant is not a felon when prior was set aside).

United States v. Baptiste, 264 F.3d 578 (5th Cir. 2001) (Charge failed to allege drug quantity and issue not

submitted to jury).

Magana v. Hofbauer, 263 F.3d 542 (6th Cir. 2001) (Lawyer gave erroneous advice before guilty plea).

United States v. Smith, 263 F.3d 603 (6th Cir. 2001) (Reasonable suspicion was needed to further detain driver even after valid traffic stop).

United States v. Shabazz, 263 F.3d 603 (6th Cir. 2001) (Obstruction enhancement applies only to crime of conviction).

Boss v. Pierce, 263 F.3d 734 (7th Cir. 2001) (Prosecutor was not excused from producing exculpatory evidence for reason that defense could have found it).

United States v. Nguyen, 262 F.3d 998 (9th Cir. 2001) (Denial of continuance and denial of right to substitute counsel).

United States v. Rodriguez, 285 F.3d 759 (9th Cir. 2002) (Sentence above statutory maximum was error absent charge and proof of guilt which included evidence of sufficient drug quantity).

United States v. Knight, 266 F.3d 203 (3rd Cir. 2001) (Use of wrong sentencing range was plain error).

Northrup v. Trippett, 265 F.3d 372 (6th Cir. 2001) (No reasonable suspicion to stop based upon non-predictive anonymous tip).

United States v. Sumner, 265 F.3d 532 (7th Cir. 2001) (Failure to make factual findings was plain error).

United States v. Lynch, 282 F.3d 1049 (9th Cir. 2001) (Robbery did not deplete assets of
a person who was directly and customarily engaged in interstate commerce).

United States v. Bishop, 264 F.3d 919 (9th Cir. 2001) (Admitting evidence from illegal traffic stop was not harmless).

United States v. Ochoa-Gaytan, 265 F.3d 837 (9th Cir. 2001) (Denial of acceptance could not be based upon filing motion to suppress).

United States v. Sparks, 265 F.3d 825 (9th Cir. 2001) (Conviction for breaking into lockers was not violent felony).

United States v. Stapleton, 268 F.3d 597 (8th Cir. 2001) (Court could not adopt PSR when facts were in dispute).

United States v. Barrie, 267 F.3d 220 (3rd Cir. 2001) (Defendant neither organized nor led persons with whom he had one-time transactions).

United States v. Calbat, 266 F.3d 358 (5th Cir. 2001) (High restitution payments scheduled during defendant's prison sentence were abuse of discretion).

United States v. Valadez, 267 F.3d 395 (5th Cir. 2001) (Once motorist cleared computer check he should have been allowed to leave).

United States v. McGiffen, 267 F.3d 581 (7th Cir. 2001) (Court's inadequate findings of perjury did not support obstruction).

United States v. Lomow, 266 F.3d 1013 (9th Cir. 2001) (Expenses incurred after seizing defendant's property were not to be part of restitution).

United States v. Liss, 265 F.3d 1220 (11th Cir. 2001) (Once defendant objects to loss calculation government must present evidence in support).

United States v. Bass, 266 F.3d 532 (6th Cir. 2001) (Notice to seek death penalty dismissed when government failed to provide discovery on selective prosecution).

United States v. Higgins, 270 F.3d 1070 (7th Cir. 2001) (Bank fraud did not justify 10-level upward departure).

United States v. Tighe, 266 F. 3d 1187 (9th Cir. 2001) (Court could not use prior non-jury juvenile adjudication as prior under ACCA).

United States v. Adelzo-Gonzalez, 268 F.3d 772 (9th Cir. 2001) (Court abused discretion denying substitution of counsel).

United States v. Maung, 267 F.3d 1113 (11th Cir. 2001) (Defendant who created false paperwork to assist the transfer of stolen cars was not in the business of receiving and selling stolen property).

United States v. La Mata, 266 F.3d 1275 (11th Cir. 2001) (Ex post facto application of bank fraud statute).

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# Ways to Challenge the Detention of Your Client Who Has Been Declared a Material Witness or the Incommunicado Detention of Any Client

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"First They Came for the Jews"

First they came for the Jews
and I did not speak out
because I was not a Jew.
Then they came for the Communists
and I did not speak out
because I was not a Communist.
Then they came for the trade unionists
and I did not speak out
because I was not a trade unionist.
Then they came for me
and there was no one left
to speak out for me.

Pastor Martin Niemöller

Pastor Niemöller wrote the above poem in response to the infamous events of the Third Riech. It refers to the arrest of people whom the Nazis deemed enemies of the state. Many of those people were then shipped to concentration camps where they either became slave laborers or were immediately murdered. Others who were arrested by the SS and the Gestapo were taken to jail where they awaited various fates, most often ending in a show trial and summary execution. Before that, the people were often held incommunicado and secretly interrogated. One could point to similar conduct, although usually on a smaller scale, in almost any dictatorship. However, what is important for lawyers and judges to remember is that everything the Nazis did was legal under German law. This clearly shows that the law can be used to justify gross abuses of human rights, just as other laws can be used to defend against such abuses.

However, one does not have to look beyond American shores to find abuses directed at people who were deemed to be enemies of the state or simply undesirables. Our history is ripe with examples of such abuses; although thankfully never on the scale of the Third Reich. Before the ink was even dry on the Bill of Rights, Congress passed the Sedition Act of 1798 which made it a crime to speak out against the government. African-Americans have been subject to discriminatory laws and law enforcement throughout our history. It took a Civil War to make slavery illegal. Even after that, laws were used to segregate African-Americans and deny them the right to: vote, sit on juries, or sometimes even own land. African-American males, especially, are still subject to discriminatory treatment by law enforcement and the courts. Native Americans have faced similar discrimination by being confined to reservations and forced to go to schools where they were not allowed to speak their own language or follow the ways of their own culture and religion. In the Nineteenth Century, Congress passed the Chinese Exclusion Acts which not only prevented additional Chinese immigration, but declared that Chinese immigrants could not become U.S. citizens. See United States v. Wong Kim Ark, 169 U.S. 649, 699-702 (1898).

In the late Nineteenth and early Twentieth Centuries, those who dared to unionize and strike for better, and sometimes, simply humane working conditions and decent wages were often beaten and imprisoned. The Espionage Act of 1917 was also used to prosecute and imprison those who spoke out against the American entry into World War I. See Debs v. United States, 249 U.S. 211 (1919). Then in the next World War, Japanese-Americans were taken from their homes and put in concentration camps because it was feared that they would aid the enemy.[1] A few years later came the McCarthy witch hunts for communists and those who might be associated with them. The McCarthy hearings were accompanied by prosecutions under the Smith Act. See Yates v. United States, 354 U.S. 298 (1957). In the next couple of decades, J. Edgar Hoover used the FBI to infiltrate organizations and spy on individuals that he disliked. Other examples from that era include: the trials of the Chicago Eight, the killing of students at Kent State University, and the targeting of the American Indian Movement.

This list shows that the law has often been used to justify injustices, even in this country. Once again, we are faced with obvious abuses as a result of the government's actions after the tragic mass murders of September 11th. Our government's actions bring to mind the events that followed the Reichstag Fire of 1933. The Nazis started the fire at the Reichstag and blamed the communists for it. There is no reason to believe that the American government had anything to do with the terrorist acts on September 11th or would have knowingly permitted them. However, in both cases a criminal act was used by the government administration in power to advance a pre-existing legislative agenda that involved the restriction of civil rights and the targeting of so-called undesirables.

It has always been the job of lawyers to stand against such governmental abuses, even when there was a law allowing them. In such cases, it has been the job of lawyers to argue for changes in the law.

This article is an attempt to help you fight such abuses, by addressing ways to challenge three aspects of the government's response to September 11th. The first part of the article discusses challenges that might be made to the detention of people as material witnesses. The second part mentions some possible grounds on which to challenge the indefinite detention, without charges, of aliens who are suspected of being associated with terrorist activity. The third part of the article deals with arguments which can be pursued if the government is holding your client incommunicado, whether

[1] It is worth noting a few other things about this episode. One is that those Japanese-Americans who served in the armed forces proved to be some of our best soldiers, although they were only allowed to serve in the European Theater. Another is that people of German and Italian heritage were not similarly imprisoned. Soldiers with German or Italian heritage were not restricted to service in the Pacific Theater either.

as a material witness or suspect. The suggested challenges rely on: the Federal Rules of Criminal Procedure, statutory interpretation, the Constitution, and international law. This article is certainly not the definitive word on any of these topics. However, it will hopefully be useful to counsel who are faced with such issues and need ideas about how to respond to them.

## I. Your Client has been detained as a Material Witness. Now What?

The government has used 18 U.S.C. §3144 to justify the indefinite detention of material witnesses both before and after an indictment has been issued against a suspect. Section 3144 states:

> "If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure."

This statute clearly allows the government to detain a material witness, under some circumstances, after an indictment has been issued for the crime to which that person's testimony would relate. However, there are ways to challenge or seek relief from such detention even then.

Judge Sheindlin of the Southern District of New York recently addressed the question of whether the statute can be used to support the detention of a witness before an indictment has issued. She held that section 3144 does not authorize the government to detain witnesses before an indictment has been issued. Judge Scheindlin also found that such detention would probably be unconstitutional even if it was statutorily authorized. United States v. Awadallah III, ___ F.Supp.2d ___ 2002 U.S. Dist. LEXIS 7536 (S.D.N.Y, April 30, 2002).

### A. Challenges to the detention itself.

#### 1. Challenges to the government's statutory authority to detain.

If no indictment has been issued in the case for which your client is held, you can argue that the government has no authority to detain him. As noted above, Judge Sheindlin has convincingly held that section 3144 does not allow the government to detain a witness before it has obtained an indictment. Ibid. Awadallah is one of the few opinions that discusses this issue at all. It is by far the most comprehensive.

The legality of the government's conduct in Awadallah will ultimately be decided by the Second Circuit or the Supreme Court, since the government has appealed the district court decision. However, the government will have a very hard time refuting Judge Sheindlin's reasoning.

Osama Awadallah is a Jordanian citizen who was a student at Grossmont College in San Diego when he was arrested as a material witness in the investigation of the terrorist acts on September 11, 2001. United States v. Awadallah IV, ___ F.Supp.2d ___ 2002 U.S. Dist. LEXIS 7537 (S.D.N.Y, April 30, 2002). He was treated as a high security federal prisoner and detained in various prisons around the country before being placed in the Metropolitan Correctional Center in New York City. Once there, he was placed in solitary confinement and strip-searched whenever he left his cell. He was not allowed to have any family visits or make any telephone calls. The government even kept Awadallah's location a secret after they moved him from the San Diego MCC, until a government attorney told his attorney that he was in New York. This appears to be typical of the way the government treats the people that it has detained as material witnesses in this investigation. United States v. Awadallah III, supra, 2002 U.S. Dist. LEXIS 7536, *9-13.

Section 3144 authorizes the detention of witnesses whose testimony is material in a criminal proceeding. However, it does not define the phrase criminal proceeding.

In 1971, the Ninth Circuit found that section 3149, which was the predecessor statute to section 3144 authorized the detention of witnesses whose testimony is material to a grand jury investigation. Bacon v. United States, 449 F.2d 933, 937-

941 (9th Cir. 1971). Through a process of tortured and somewhat specious reasoning, the court found that a grand jury hearing is a criminal proceeding for purposes of material witness detention. Ultimately, the court's finding came down to a decision that section 3149 must include grand jury proceedings because that was the best policy. However, that finding was dicta because the Court reversed the district court's detention order on other grounds. It is also very poorly reasoned Ibid.; United States v. Awadallah III, supra, 2002 U.S. Dist. LEXIS 7536, *45-56. Thus, Bacon is not even binding authority in the Ninth Circuit and should not be followed anywhere.

The phrase "criminal proceeding" in section 3144 is limited by the context in which it appears. For one thing, section 3144 only allows the arrest of a witness when it appears from an affidavit by a party that the witness' testimony is material. However, the grand jury is an investigatory body that does not decide cases. Therefore, there are no parties to a grand jury proceeding. It is not until after a grand jury returns an indictment, if it does so, that parties to a criminal proceeding exist. This indicates that section 3144 does not allow the detention of witnesses in order to secure their testimony before a grand jury. United States v. Awadallah III, supra, 2002 U.S. Dist. LEXIS 7536, *15-17.

In addition, a judge must determine whether a witness' testimony is material. However, judges do not preside over or even intrude into grand jury proceedings. Thus, a court would be forced to take the prosecutor's word that a witness' testimony was material to the grand jury's investigation. That is how the Bacon court read the predecessor statute. Bacon v. United States, supra, 449 F.2d at 943. However, the Court of Appeals did not consider the fact that allowing the prosecutor to decide whose testimony is material reads the requirement of a judicial finding of materiality out of the statute. United States v. Awadallah III, supra, 2002 U.S. Dist. LEXIS 7536, *19.

Furthermore, section 3144 requires the party seeking the witness' detention to show why the witness should not be released if her testimony can be secured by a deposition taken pursuant to the Federal Rules of Criminal Procedure. Depositions in criminal cases are covered by F.R.Crim.P. 15. Rule 15 allows the taking of a deposition, in exceptional circumstances, to preserve a witness' testimony for use at trial. (F.R.Crim.P. 15(a).) It does not mention grand jury hearings.

In addition, Rule 15 requires that all parties be notified of a motion to take a deposition. A defendant also has the right to be present at a deposition and the right to cross-examine the witness. ( F.R.Crim.P. 15(a), (b), & (d).) None of these things can be done in a grand jury proceeding, since there is no defendant until either an indictment is issued or it is waived and an information is filed. Therefore, the reference to the Rules of Criminal Procedure for taking depositions also shows that the phrase "criminal proceeding" in section 3144 can not be read to encompass a grand jury proceeding. United States v. Awadallah III, supra, 2002 U.S. Dist. LEXIS 7536, *24-26.

In addition, Rule 15 is under the section of the Federal Rules of Criminal Procedure that is labeled, "Arraignment and preparation for trial." In contrast, Rule 6 is the only rule that explicitly applies to grand jury proceedings. Rule 6 does not mention section 3144 or the detention of grand jury witnesses. United States v. Awadallah III, supra, 2002 U.S. Dist. LEXIS 7536, *28.

That section 3144 does not contemplate the detention of witnesses prior to indictment is further reinforced by its placement in Chapter 207 of Title 18. Chapter 207 is known as the Bail Reform Act of 1984. The predecessor statute to section 3144 was the former section 3149. Judge Sheindlin found that the legislative history for section 3149 shows that the Congress only discussed the detention of material witnesses in the context of a pending trial, not a pending indictment. The changes that Congress made when it replaced section 3149 with section 3144 do not enlarge the scope of the permissible detention of material witnesses. United States v. Awadallah III, supra, 2002 U.S. Dist. LEXIS 7536, *28-41. Therefore, the legislative history lends further support to the argument that Congress has not authorized the government to detain material witnesses.

In Bacon, which was decided before the enactment of section 3144, the Ninth Circuit acknowledged that there was no explicit statutory authority for the government to detain a material witness. However, it held that former section 3149 and former F.R.Crim.P. 46 implied that authority since they talked about the release of material witnesses pending trial. Bacon v. United States, supra, 449 F.2d at 937-939. The Court of Appeals may have been right in the post-indictment context. In any event, section 3144 now clearly allows the arrest and detention of material witnesses after an indictment has been issued. However, the Bacon court found that this implied authority also extended to the grand jury context because a grand jury proceeding is a criminal proceeding. Id. at 939-941. That conclusion is wrong.

The Ninth Circuit found that since the statutory authorization for the Federal Rules of Criminal Procedure states that the Supreme Court shall have the power to prescribe rules of procedure with respect to any proceeding prior to and including a plea or verdict of guilty, (18 U.S.C. §3771) and the Supreme Court had held that a grand jury proceeding is part of a criminal case for purposes of the Fifth Amendment right of self-incrimination, a grand jury proceeding must be a criminal proceeding. Bacon v. United States, supra, 449 F.2d at 939-941. This ignores the fact that most of the Federal Rules of Criminal Procedure do not apply to grand jury proceedings. Yet, if the logic of the Bacon court were accepted, one would be forced to conclude that all of the Federal Rules of Criminal Procedure somehow apply to grand jury proceedings. United States v. Awadallah III, supra, 2002 U.S. Dist. LEXIS 7536, *52.

The Bacon court also found it unlikely that the drafters of former Rule 46(b), which it apparently interpreted as being co-extensive with former section 3149, would have intended to provide for the arrest and detention of material witnesses for a trial, but not a grand jury. The court felt that this could not have been intended because, in the court's opinion, it was bad policy. Bacon v. United States, supra, 449 F.2d at 940-941. Yet, the Court of Appeals ignored the fact that Congress had drawn a distinction between pretrial and grand jury proceedings in various acts which provided for the arrest and release of material witnesses from 1789 to 1948.[2] United States v. Awadallah III, supra, 2002 U.S. Dist. LEXIS 7536, *55, fn. 25.

Two other Courts of Appeals have also found that the phrase "criminal proceeding" includes a grand jury proceeding. However, both of those courts made their findings in the course of deciding that the government could appeal from a district court's order to quash a grand jury subpoena. In the Matter of Grand Jury Empanelled February 14, 1978, 597 F.2d 851, 857 (3rd Cir. 1979); United States v. Calandra, 455 F.2d 750, 752 (6th Cir. 1972). Since that is a completely different issue, those cases do not support the government's interpretation of section 3144.

Furthermore, interpreting section 3144 to allow for the detention of witnesses prior to an indictment would raise serious Constitutional questions. Whenever possible, courts must interpret statutes in a manner that avoids Constitutional questions. INS v. St. Cyr, 533 U.S. 289, 299-300 (2001). The Ninth Circuit simply chose not to address this question in Bacon because it stated that Ms. Bacon had not cited any provision of the Constitution or case authority which supported her claim of unconstitutionality. Bacon v. United States, supra, 449 F.2d at 941. However, imprisoning a material witness until a grand jury chose to hear from him would raise a serious question under the Fourth Amendment prohibition of unreasonable seizures. United States v. Awadallah III, supra, 2002 U.S. Dist. LEXIS 7536, *60. The scope of a detention must be carefully tailored to its underlying justification. Florida v. Royer, 460 U.S. 491, 501 (1983).

The government's preferred interpretation of section 3144 would also implicate the Due Process Clause of the Fifth Amendment. The Due Process Clause bars arbitrary government actions that result in a deprivation of liberty. Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (holding that the state could not keep a person in prison who was not convicted without showing that he was mentally ill and a danger to himself or others). If a judge were forced to rely on the government's assurance of materiality, there would be no assurance that the government's decision to detain people as material witnesses was not arbitrary.[3]

In addition, a witness could conceivably be held indefinitely while a grand jury or successive grand juries investigated a case. The Supreme Court has stated that a statute which permits indefinite detention of people, except in such cases as a criminal conviction or a finding that a person poses a threat to himself or others as the result of mental illness, would raise a serious constitutional problem under the due process clause. Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

Another factor weighing against the idea that section 3144 allows the arrest and detention of grand jury witnesses

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[2] In 1948, Congress repealed the then-existing statutes and authorized the creation of the Rules of Criminal Procedure. Bacon v. United States, supra, 449 F.2d at 940.

[3] In fact, "Attorney General John Ashcroft has been reported as saying: `Aggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting or delaying new attacks.' Cam Simpson, `Roundup Unnerves Oklahoma Muslims,' 4/21/02 Chi. Trib. 1, available at 2002 WL 2647213 (quoting Attorney General John Ashcroft). Relying on the material witness statute to detain people who are presumed innocent under our Constitution in order to prevent potential crimes is an illegitimate use of the statute. If there is probable cause to believe an individual has committed a crime or is conspiring to commit a crime, then the government may lawfully arrest that person, but only upon such a showing." United States v. Awadallah III, supra, 2002 U.S. Dist. LEXIS 7536, *61, fn. 28.

is the fact a grand jury already has the power to subpoena witnesses. A witness can be cited for contempt if he fails to comply with the subpoena. He can then be either imprisoned or fined until he chooses to comply with the subpoena.

Therefore, you should be able to convince a court that the government does not have the authority to detain your client as a material witness, if it has not yet obtained an indictment.

2. Challenges based on international law.

There are some provisions of international law which may affect the detention of material witnesses. The American government and courts do not have a very good record of following international law. However, Justice O'Connor recently urged courts to pay more attention to issues involving international law. *Justice O'Connor urges judges to focus on international law in wake of Sept. 11*, AP, May 15, 2002, *available in* LEXIS, Nexis Library, AP File. If the courts reject your arguments based on domestic law, you can encourage them to follow Justice O'Connor's prodding.

Raising international law issues also may help you get the courts to take your domestic law arguments more seriously. An act of Congress should not be construed to violate international law when it is possible to do otherwise. Murray v. The Schooner Charming Betsy, 6 U.S. 64, 67 (1804); Filartiga v. Pena-Irala, 630 F.2d 876, 887 fn. 20 (2nd.Cir. 1980). In addition, raising these issues may help your cause in other ways. If your client is not an American citizen, you may be able to get his country to apply diplomatic pressure on the basis of international law. This pressure will only increase if you lose in the U.S. courts and present or set the stage for a winning argument before an international body. In such instances, there would be diplomatic pressure on the United States even if your client is an American citizen. This may not help, but it certainly can not hurt.

a. Treaty Violations

i. Provisions of treaties, international declarations, and U.N. Resolutions which may apply to material witness detention.

The following is a list of treaty provisions or parts of international declarations which the United States may be violating by detaining material witnesses. Some of these provisions can be argued directly. Others could only be used as evidence of generally accepted international law which the United States is required to follow. Some of them are limited to evidentiary value either because they do not create binding obligations or because the United States has not ratified them. You can make both arguments with respect to other provisions, including those which courts have previously held can not be raised by individuals.

United Nations Charter
(55 Stat. 1600; EAS 236; 3 Bevans 697.)

Article 55

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56

> All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

Universal Declaration of Human Rights
(General Assembly Resolution 217 (III)(A) (Dec. 10, 1948).)

Article 8.

> Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

American Declaration on the Rights and Duties of Man

Article XXV.

.....

> Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released.
>
> It could be argued that this provision prohibits the detention of witnesses, since witnesses are not tried.

American Convention on Human Rights
(O.A.S. Official Records, arts. 7(2)-7( 3), OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 2 (1970) (signed but not ratified by the United States), reprinted in 9 I.L.M. 673, 676 (1970).)

Article 5. Right to Humane Treatment

3. Punishment shall not be extended to any person other than the criminal.[4]

ii. Challenges based on treaty violations.

The above provisions can be used to either support an argument that the detention of material witnesses is illegal or support an argument that you can raise a violation of international law in a U.S. court.

The Supremacy Clause of the Constitution says that "all treaties which the United States is a party to are the supreme law of the land, along with the Constitution and federal statutes, notwithstanding anything in the Constitution or the laws of any state to the contrary." (U.S. Const. art. VI.) In spite of the Supremacy Clause, allegations of treaty violations have generally not fared well in U.S. Courts. That is no reason not to raise them, though.

The United States has signed the American Convention on Human Rights, but the Senate has not ratified it. Of course, the United States is a party to the United Nations Charter. However, the U.N. Charter does not help much, standing alone, because it is so vague. In addition, courts have held that articles 55 and 56 of the U.N. Charter are not binding on member states. Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373-375 (7th Cir. 1985) (citing cases).

The American Declaration on the Rights and Duties of Man was adopted by the Ninth International Conference of American States in 1948, which also adopted the Charter of the Organization of American States. The Seventh Circuit has held that it is not binding law in U.S. courts and the Sixth Circuit has agreed. Garza v. Lappin, 253 F.3d 918, 924-925 (7th Cir. 2001); Buell v. Mitchell, 247 F.3d 337, 372 (6th Cir. 2001).[5] However, it has been applied to claims by individuals against the United States or a state government in cases before the Inter-American Commission on Human Rights. The government did not object to the ability of the Commission to examine such cases. See Juan Raul Garza - United States, Case No. 12.243 Inter-Am. C.H.R. 52/01 OEA/ser /L/V/II.111 doc. 20 rev. (2001) (finding that admission of uncharged murders in petitioner's penalty phase violated the American Declaration on the Rights and Duties of Man); Rafael Ferrer-Mazorra, et al. - United States, Case 9903 Inter-Am. C.H.R. 51/01 OEA/ser /L/V/II.111 doc. 20 rev. (2001) (finding that failure to recognize right of liberty of Marielito Cuban detainees and arbitrary provisions for their release violate the American

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[4] Most people would consider the treatment that was described in United States v. Awadallah III, supra, 2002 U.S. Dist. LEXIS 7536, *8-13, to be punishment. Obviously, material witnesses are not being imprisoned for a crime. Therefore, it can be argued that this provision indicates an international prohibition on the detention of material witnesses.

[5] This finding was not necessary to the court's holding that the petitioner procedurally defaulted these claims and is therefore dicta. Buell v. Mitchell, supra, 247 F.3d at 376 (Daughtrey, J., concurring).

Declaration on the Rights and Duties of Man) ; Ram`on Martinez Villareal - United States, Case No. 11.753 Inter-Am. C.H.R. 108/00 OEA/ser /L/V/II.111 doc. 20 rev. (2001) (finding that the case is admissible for hearing before the Commission). Therefore, there is an argument that people who are detained by the government have a right to seek relief from violations of the American Declaration on the Rights and Duties of Man. This argument is strengthened by article 8 of the Universal Declaration of Human Rights which guarantees every person the "right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." This argument probably will not succeed in U.S. courts. However, arguments based on international law must be exhausted in the domestic courts before they can be raised in an international tribunal. (See: International convenant on Civil and Political Rights art. 41 §1(c) , adopted Dec. 16, 1966, S. Treaty Doc. 95-2, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, entered into force for the United States Sept. 8, 1992); Convention against torture and other cruel, inhuman, or degrading treatment or punishment art. 22 §5(b), adopted by unanimous agreement of the U.N. General Assembly, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/RES/39/708 (1984), (entered into force as to the United States Nov. 20, 1994, signed April 18, 1988); Charter of the Organization of American States art. 106, 2 UST 2394; TIAS 2361; 119 UNTS 3; American Convention on Human Rights art. 46 §1(a); Restatement (Third) of the Foreign Relations Law of the United States: Rules and Principles §703 cmt. d (1987).)[6] In addition, any diplomatic pressure that results from raising the argument both with the courts and, perhaps indirectly, with the State Department can not hurt.

The Universal Declaration on Human Rights was adopted by the United Nations General Assembly. (General Assembly Resolution 217 (III)(A) (Dec. 10, 1948).) It can not specifically be argued in court as a source of law, rather than simply evidence of what international law is. However, "U.N. declarations are significant because they specify with great precision the obligations of member nations under the Charter. Since their adoption, `(m)embers can no longer contend that they do not know what human rights they promised in the Charter to promote.'" Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2nd.Cir. 1980) (citation omitted).

The Universal Declaration on Human Rights also has a special status. The General Assembly of the United Nations has declared that the Universal Declaration embodies the precepts in the U.N. Charter. Id. at 882. (G.A.Res. 2625 (XXV) (Oct. 24, 1970).) "Accordingly, it has been observed that the Universal Declaration of Human Rights 'no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement, 'but is rather an authoritative statement of the international community.'" Filartiga v. Pena-Irala, supra, 630 F.2d at 883; Alvarez-Machain v. United States, 266 F.3d 1045, 1050 (9th Cir. 2001). The U.N. has also included it as one of the documents that list principles embodied in international law. (United Nations G.A. Res. 56/153 (Feb. 13, 2002).)

Unfortunately, the Charter itself has not been held to be self-executing. Id. at 881; Frolova v. Union of Soviet Socialist Republics, supra, 761 F.2d at 373-375. In light of this ambiguity, it may be better to use the Universal Declaration of Human Rights more as evidence of what international law is than as an independent source of law.

b. Violations of general international law.

There is a category of international law that is called jus cogens. This means a peremptory norm of general international law. "[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." (Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 332.)

There is also an older standard which is known simply as "the law of nations." However, the law of nations or customary international law "rests on the consent of states. A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm, see Restatement § 102 Comment d, just as a state that is not party to an international agreement is not bound by the terms of that agreement." Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1991). "In contrast, jus cogens `embraces customary laws considered binding on all nations,' and `is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested

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[6] There may not be a need for exhaustion of some claims if the claims are brought by other countries, instead of the individual. However, it is probably the better practice to give the U.S. Courts a chance to decide the issues first, even if you do not have to do so.

The United States has not recognized the competence of the Committee Against Torture to hear claims brought by individuals for violations of the Convention against torture. The International covenant for civil and political rights does not provide for complaints to be submitted to an international tribunal by individuals.

choices of nations.' Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting jus cogens transcend such consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II." Ibid. (citations omitted).

Jus cogens is always binding on the United States. (Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 332.) Customary international law is binding on the United States if it can be shown that our government has consented to it. The Paquette Habana, 175 U.S. 677, 700 (1900). The later may be difficult to do when you are arguing against a government action. However, the government might concede the standard and simply dispute whether it has been violated or whether the federal courts have jurisdiction to grant relief for a violation. In addition, one court has stated that "[t]he United States applies the international customary law of human rights which is part of the greater body of law. See Restatement (Third) of the Foreign Relations Law of the United States § 701 cmt. e (1987)." Maria v. McElroy, 68 F.Supp.2d 206, 233 (E.D.NY 1999).

> "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or juridicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." The Paquette Habana, supra, 175 U.S. at 700 (holding that seizure of Cuban fishing vessels during the Spanish-American War was illegal because it violated international law.)

Any of the above sources can be argued as evidence of jus cogens. This includes the treaties which can be argued both as independent sources of law and as evidence of jus cogens or customary international law. Some federal courts have considered the U.N. Charter, International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), the American Convention on Human Rights, the American Declaration on the Rights and Duties of Man, the Universal Declaration on Human Rights, other U.N. declarations, and other human rights instruments as evidence of both jus cogens and customary international law. Alvarez-Machain v. United States, supra, 266 F.3d at 1050-1051 (affirming judgment against Mexican citizen who kidnaped the plaintiff and brought him to the U.S. for the DEA and reversing dismissal of action against the United States); Martinez v. City of Los Angeles, 141 F.3d 1373, 1384 (9th Cir. 1998) (finding that arbitrary detention violates international law); Blake v. Republic of Argentina, supra, 965 F.2d at 715-716 (finding that torture violates jus cogens); Filartiga v. Pena-Irala, supra, 630 F.2d 881-884 (finding that torture violates customary international law); Maria v. McElroy, supra, 68 F.Supp.2d at 231-233 (finding that petitioner who was convicted before a restrictive change in immigration law must be allowed to petition for relief from deportation because interpreting the new law as applying to him would conflict with international law); Eastman Kodak v. Kavlin, 978 F.Supp. 1078, 1092 (S.D.FL 1997) (finding that prolonged arbitrary detention violates international law); Forti v. Suarez-Mason III, 694 F.Supp. 707, 710-712 (N.D.CA 1988) (finding that causing disappearance violates international law).[7] Contra Beazley v. Johnson, 242 F.3d 248, 268 (5th Cir. 2001) (finding that courts only look to norms of international law when there is no treaty and no controlling or legislative act or judicial decision and courts can not look to the ICCPR because of reservations by the Senate which purport to restrict its domestic use ).

Thus, it may be worth arguing that the detention of material witnesses violates either a jus cogens or customary international law.

### B. How to get your client released if a court finds that such detention is legal.

#### 1. Challenge Materiality

If your client is detained as a grand jury witness and the district court rejects the above arguments, you will be stuck with the government's assertion that your client's testimony is material. Obviously, you can't challenge this finding when you are not allowed to know anything about the case due to the way grand juries operate.

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[7] Most of these cases arose under the Alien Tort Claims Act (28 U.S.C. §1350), which allows aliens to sue in the United States courts for acts committed in violation of the law of nations or a treaty of the United States. Maria v. McElroy, supra, 68 F.Supp.2d at 206 was a habeas case arising from an order of deportation.

However, if your client is detained as a trial witness, you will have the opportunity to contest the government's assertion of materiality. In that situation, a district judge will make the finding of materiality, not the government. Your client will have the right to contest the government's assertion. Therefore, the government will also have to tell you and the judge what they anticipate your client to testify to and how that testimony would be important to the case.[8] Of course, the government will already have presented these facts to the judge when it sought an arrest warrant for your client. However, section 3144 calls for a detention hearing after the witness is arrested. If your client's testimony is not important, section 3144 does not allow the court to order his detention.

2. Look at who certified materiality

There is one potential challenge that should not be overlooked no matter what type of proceeding for which your client is detained to testify. Even under the Bacon court's interpretation of material witness detention, the attorney for the government must certify to the district court that the witness' testimony is material. Bacon v. United States, supra, 449 F.2d at 943. However, you may find that some other government employee has made the certification. For example, in Awadallah the statement of materiality was made in an affidavit by an FBI agent. Judge Sheindlin held that this did not comply with the statute even if pre-indictment detention was authorized. She found that the agent could not have made an informed judgment about materiality because he was not present in the grand jury, except possibly for a time as a witness. The only officials who can be present during the entire grand jury investigation are attorneys for the government. United States v. Awadallah IV, supra, 2002 U.S. Dist. LEXIS 7537, *38. In addition, section 3144 requires the certification to be made by a party. The only representative of the government in a criminal case is the prosecutor. (28 U.S.C. §516.) Therefore, the identity of the person who certified materiality should not be overlooked as providing a possible ground to challenge the arrest and detention.

3. Challenge the government's assertion that your client is not likely to comply with a subpoena.

Section 3144 requires a judge to look at the factors in section 3142 in order to decide whether to release or detain a material witness. These factors are familiar to any attorney who practices in federal district court and they have been thoroughly discussed in many other publications. However, section 3144 also requires a judge to find that "it may become impracticable to secure the presence of the person by subpoena." You can either: challenge the government's facial assertions as insufficient; try to undermine those assertions by way of a Franks hearing; or introduce new evidence to rebut the government's initial showing.

a. Are the government's assertions facially sufficient?

The Bacon court reversed the district court's denial of Ms. Bacon's petition for a writ of habeas corpus, which she filed after a district court had ordered her arrest and detention as a material witness. The Court of Appeals held that the government did not make a sufficient showing that it might become impracticable to secure Ms. Bacon's presence by subpoena. Bacon v. United States, supra, 449 F.2d at 934-935, 943-945.

The Ninth Circuit found that the complaint did not state anything, beyond a mere assertion, from which it could be concluded that Ms. Bacon would not comply with a subpoena. Id. at 943.

The government introduced additional evidence at Ms. Bacon's detention hearing. The Court of Appeals agreed that such evidence could support a witness' continued detention even if the initial arrest was invalid. However, the court also held that the facts shown at the detention hearing were insufficient to support Ms. Bacon's detention. Bacon v. United States, supra, 449 F.2d at 944-945. The court held that a law enforcement officer's report that Ms. Bacon would not comply with a subpoena was not enough to establish that fact. The fact she had access to large sums of money was not enough without evidence that she had previously attempted to evade judicial process or traveled clandestinely. The fact Ms. Bacon had personal contact with fugitives tended to show, along with her access to money, that she might be able to flee successfully, but did not support the conclusion that she would be likely to do so. Id. at 944.

The court did find that, standing alone, the fact Ms. Bacon was captured on the roof of the building next to her home might be sufficient to show an intent to avoid complying with a subpoena. However, Ms. Bacon did not know why the FBI

[8] This assumes that the party seeking detention is the government. It usually is, but it could be a defendant. For purposes of seeking the release of a witness, it does not matter who wants to have him detained.

had broken down the front door of the house where she was staying. She called her attorney, who told her to stay where she was and not make any effort to contact the authorities until he could arrange her voluntary surrender. However, the FBI returned ten minutes later. The Court of Appeals found that, in these circumstances, it could not be determined what Ms. Bacon might have done if she had been served with a subpoena and had the opportunity to reflect on her course of action, like most witnesses. Therefore, the Court of Appeals reversed the district court's order denying Ms. Bacon's petition for a writ of habeas corpus. Id. at 944-945.

b. Consider a Franks motion.

In Awadallah, FBI Agent Plunkett asserted, in the affidavit in support of the arrest warrant, that: "(1) Awadallah came from Jordan and maintained family ties to that country; (2) his `substantial overseas ties' made him a `risk of flight'; (3) his connection to `one or more of the hijackers' gave him an `incentive to avoid appearing before the grand jury'; and (4) he might have been concerned that his `prior conduct' would provide a basis for law enforcement officers to `investigate and possibly prosecute him.'" The court did not question the facial sufficiency of these allegations to show that Awadallah might not comply with a subpoena. United States v. Awadallah IV, supra, 2002 U.S. Dist. LEXIS 7537, *40.

However, the court did consider other evidence that the agent was aware of which contradicted his assertions in the affidavit. The court conducted a Franks analysis and concluded that "there were both misrepresentations and omissions in the affidavit, and that this was not a result of mistake or accident." United States v. Awadallah IV, supra, 2002 U.S. Dist. LEXIS 7537, *42-44.

Mr. "Awadallah had voluntarily consented to searches of his home and cars and had voluntarily spoken with [agents] in their offices. The two agents who testified about Awadallah's demeanor repeatedly stated that he was very cooperative." "In addition, after questioning Awadallah for hours on [one day], the agents permitted him to return home and trusted that he would voluntarily appear for a polygraph examination the next morning, which he did. He was not guarded or surveilled overnight." Yet, the government never told either the judge who signed the arrest warrant or the magistrate who conducted the initial detention hearing about Mr. Awadallah's cooperation. The agents were also aware, but failed to tell the court, that at the time of the warrant application Mr. Awadallah's telephone number that was found in a hijacker's car had not been used by Mr. Awadallah for some eighteen months. "Finally, there was no `prior conduct' by Awadallah that would subject him to prosecution, as the agents well knew." Awadallah IV, supra, 2002 U.S. Dist. LEXIS 7537, *44-45. The court found that "had there been full disclosure, a neutral judicial officer would not have found probable cause to believe that `it may become impracticable to secure [Awadallah's] presence. . . by subpoena.'" Id. at *46. This shows that a Franks challenge can be successful and should be made in any case where the facts warrant it.

4. Seek your client's deposition.

"No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice." (18 U.S.C. §3144.) A material witness can make a motion, under F.R.Crim.P. 15(a), that the district court order the taking of his deposition. A court can only deny the motion if the deposition would not serve as an adequate substitute for the witness' live testimony. (18 U.S.C. §3144; F.Crim.P. 15(a).) Torres-Ramirez v. U.S. District Court, 120 F.3d 933, 935 (9th Cir. 1997) (ordering the district court to schedule videotape depositions as soon as possible); Aguilar-Ayala v. Ruiz, 973 F.2d 411, 413 (5th Cir. 1992) (appeal from a denial of attorney fees after the witnesses obtained relief in the district court). This simply means that the deposition must be admissible over any objection under the Federal Rules of Evidence or the Confrontation Clause of the Sixth Amendment. Aguilar-Ayala v. Ruiz, supra, 973 F.2d at 413.

Once the deposition has been taken and subscribed, the witness must be released unless his continued detention is necessary to prevent a failure of justice. (18 U.S.C. §3144; F.Crim.P. 15(a).) Torres-Ramirez v. U.S. District Court, supra, 20 F.3d at 935; Aguilar-Ayala v. Ruiz, supra, 973 F.2d at 413 (5th Cir. 1992).

There are very few cases that deal with this point. However, there also do not appear to be any cases in which a witness' motion for the taking of her deposition was denied or in which the witness was not then released from custody. So,

if your client is willing to be deposed that should be his ticket out of jail, even if his detention is otherwise legal.[9]

5. Challenge the length of detention.

You could argue that the length of detention violates the Due Process Clause of the Fifth Amendment. "The government cannot be permitted to defeat the restrictions with which the Bill of Rights hedges about criminal prosecutions by indefinite delay in bringing defendants to trial." United States v. Infelise, 934 F.2d 103, 104 (7th Cir. 1991). Thus, the Due Process Clause of the Fifth Amendment protects defendants from excessive pretrial detention by allowing for release if such detention runs too long. United States v. Warneke, 199 F.3d 906, 908 (7th Cir. 1999). In such cases, the defendant's remedy is to seek review of the detention order. Ibid. The same principles should apply to material witnesses with an even stronger weight being placed on the side of the detainee's interest in release, since he has not been charged with a crime.

In addition, Congress has declared that prolonged detention without charges and trial is a gross violation of human rights. (22 U.S.C. §2304(d)(1).) This is a clear statement from our government about the status of international law. Since, a material witness will never be charged or tried there is a great potential for a gross violation of human rights in such cases. Obviously, such a violation is illegal under several of the international standards that are discussed above and below.

## II. What if your client is an alien who is being held by the INS as a terrorist?

There is a provision in the new U.S.A. Anti-Patriot Act[10] which allows the Attorney General to detain an alien who has been ordered removed indefinitely, if his removal is unlikely and the Attorney General has reasonable grounds to believe that the alien is a terrorist or has committed a terrorist activity and there is an undefined showing that "the release of the alien will endanger the national security of the United States or the safety of the community or any person." (8 U.S.C. §1226a(a)).[11] It will be difficult to challenge such a detention, but there are limited grounds of challenge available.

First,

> "A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to `deprive' any `person . . . of . . . liberty . . . without due process of law.' Freedom from imprisonment -- from government custody, detention, or other forms of physical restraint -- lies at the heart of the liberty that Clause protects. And [the Supreme] Court has said that government detention violates that Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, or, in certain special and `narrow' non-punitive `circumstances,' where a special justification, such as harm-threatening mental illness, outweighs the `individual's constitutionally protected interest in avoiding physical restraint.'" Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (citations omitted).
>
> "[The Court has] upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections. In cases in which preventive detention

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[9] Even if your client is not willing to be deposed, you may be able to have the court order that he be placed in a better facility. In United States v. Li, 949 F.Supp. 42 (D.Mass. 1996), the court was concerned that the detained material witnesses, who refused to be deposed, were being treated as if they were charged with an offense. Therefore, the court ordered the government to transfer the witnesses to a minimum security, residential facility. The court also stated that it would consider any other alternative minimal security arrangements for housing that were proposed by counsel for the witnesses. Id. at 46.

[10] The authors realize this is not the official name of the act, but believe is a more accurate description of it.

[11] The National Legal Aid and Defender Association has pointed out that the alien's country may be less likelty to take him back if the Attorney General has declared him to be a terrorist. There is also the possibility that some countries may designate a political dissident as a terrorist so the U.S. will keep him imprisoned indefinitely. (National Legal Aid and Defender Association, Significant Provisions of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA Patriot Act"), P.L. 107-56, signed October 26, 2001 <http://www.nlada.org/DMS/Documents/1006186143.01/USA%20Patriot%20Act%20Summary.pdf>

> is of potentially indefinite duration, [the Court has] also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger." Id. at 691 (citations omitted).

In Zadvydas, the Court did note that the detention did not apply only to a narrow class of individuals such as protected terrorists. Id. at 691. However, the Court did not say for sure that such a designation would make a difference. The Court would probably at least require individualized consideration and the availability of judicial review.

Zadvydas also distinguished the aliens before the Court who had been lawfully admitted to the United States with those who are stopped at the border, or its functional equivalent, and never granted admission. The Court found that Constitutional protections do not apply to aliens who are stopped at the border. The distinction is between aliens who are already in the United States and those who are legally speaking still at the border awaiting entrance. Id. at 693-694. So, you are not likely to get far with an argument based on federal law or the Constitution if your client was caught trying to enter the United States. However, international law does provide some support in such situations.

In Rafael Ferrer-Mazorra, et al. - United States, supra, 51/01 OEA/ser /L/V/II.111 doc. 20 rev., the Inter-American Commission for Human Rights found that the failure of U.S. law to recognize the right of liberty for aliens who the law places conceptually at the border still seeking admission deprives such persons of the protections guaranteed by the American Declaration on the Rights and Duties of Man. The Commission also found that giving the Executive Branch of government unfettered authority and discretion to detain such aliens based on ill-defined grounds constitutes arbitrary detention in violation of the American Declaration on the Rights and Duties of Man. This decision provides a basis to challenge the indefinite detention of a person in this situation under international law and argue for his release on parole.

## III. What if your client is being held incommunicado?

It has been reported that many of the people who have been detained as material witnesses to the terrorist attacks on September 11th or for immigration violations have been held incommunicado for varying lengths of time. (E.g. the description of Mr. Awadallah's confinement above; Edward Klein, *"`We're not destroying rights, we're protecting rights'",* Parade Magazine, May 19, 2002, at 4.) The government may also seek to hold any actual suspects incommunicado for some time. The conditions of confinement may deny the witness contact with anyone, including an attorney, or allow contact with the attorney, but no one else. You may be able to help your client in either of these situations.

### A. Federal Rule of Criminal Procedure 46(g)

The first thing you may need to do is find your client, if the government will not tell you where he is being housed. F.R.Crim.P. 46(g) requires the attorney for the government to make biweekly reports to each district court, listing "each defendant and witness who has been held in custody [in that district] pending indictment, arraignment, or trial in excess of ten days." In the Central District of Illinois, where the writers of this article practice, the government submits a separate list for each division within the district.[12] The lists include: the name and date of birth of each person who is held in a facility within that division; their custody status; the location where they are housed; the date they were taken into custody; and a brief description of the offense they are charged with. Copies of these lists can be obtained from the court clerk's office. Therefore, a look at one of these lists may be the place to start if you think you know the district in which your client is housed, but have not been able to locate him.

Of course, if your client does not show up on the list in the district where you are located, you are faced with the daunting task of perusing the lists in all the various districts in the country--a practical impossibility. However, nearly every district in the country now has a Federal Public or Community Defender. Each of these Defenders has the ability to contact every other Defender in the country via e-mail with the click of one button. Thus, if your client is not listed on the Rule 46(g) list in your district, contact the Defender in your district and ask them to e-mail the other Defenders in the country, requesting that an attorney from their office check their district's list for the name of your client. Assuming the government is complying with its Rule 46(g) obligations in each district, your client should appear on one of the lists.

Another use to which the Rule 46(g) reporting requirements can be put is to locate detained individuals who have

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[12] Contrary to the rule's requirements, the list is actually submitted by the Marshall's Service.

not yet been afforded their right to counsel. Where a person is detained and has not been given an opportunity to retain counsel or obtain appointed counsel, there will be no one looking for this individual. In today's climate, this is an unfortunate, but very real possibility. It is accordingly advisable for the Defender in each district to periodically obtain a copy of the Rule 46(g) list and cross-check it to ensure that each person on the list has been afforded the opportunity to obtain counsel and challenge their detention. This is not an easy task and requires a commitment of time and resources. However, if the organized Defender offices around the country do not undertake this task, who will? The answer is clearly no one. Therefore, to ensure that unrepresented individuals are not languishing incommunicado in undisclosed locations throughout the country, every means available, including Rule 46(g), must be used to locate these persons and get them counsel.

**B. Constitutional Objections**

There are also several Constitutional objections which can be raised to a client's incommunicado detention.

1. The First Amendment

Even convicted prisoners retain a First Amendment right to communicate with others. People on the outside also have a First Amendment right to communicate with prisoners. Those rights are subject to certain limits for the sake of prison security. However, they can not be eliminated altogether. Thornburgh v. Abbott, et al., 490 U.S. 401, 407 (1989). In particular, the Supreme Court stated that "access is essential to lawyers and legal assistants representing prisoner clients, to journalists seeking information about prison conditions, and to families and friends of prisoners who seek to sustain relationships with them." Ibid., citations omitted. In order to have that access, these people must be able to know where the prisoner is housed.

Of course, outgoing mail, other than legal mail, can be censored to assure that it does not contain information regarding escape plans or proposed criminal activity. Procunier v. Martinez, 416 U.S. 396, 413 (1974). However, that does not justify a complete ban on outgoing mail or any other unjustified governmental interference with it. Id. at 408-409. Prison officials may censor inmate mail in order to further a substantial governmental interest other than the suppression of expression. In addition, a restriction on outgoing mail may not be unnecessarily broad. Id. at 413; Thornburgh v. Abbott, et al., supra, 490 U.S. at 411-413. Any restriction that prevents a prisoner from letting legal counsel, family, and friends know where he is so they can communicate with him would seem to fail this test.

The Ninth Circuit has also recognized that "prisoners have a First Amendment right to telephone access, subject to reasonable security limitations. Strandburg v. City of Helena, 791 F.2d 744, 747 (9th Cir. 1986)." Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996). The Sixth Circuit has also recognized this right. Washington v. Reno, 35 F.3d 1093, 1099 (6th Cir. 1994).

In addition, the Sixth Circuit has held that prisoners and their families retain a First Amendment right to freedom of association. The court held that "prisoners retain a limited right to freedom of association - specifically non-contact visits with intimate associates - even while incarcerated." Bazetta, et al. v. McGinnis, 286 F.3d 311, 316 (6th Cir. 2002). In Bazetta, the Sixth Circuit affirmed a district court ruling which overturned state prison regulations that: forbade visits from minor siblings; forbade visits by natural children of prisoners when the prisoners had had their parental rights terminated; forbade visits by all former prisoners or probationers other than immediate family, including social workers or those who would accompany minor children; required children to be accompanied by immediate family members or a legal guardian; and banned all visitation, except for attorneys and clergy, for prisoners who had two or more major misconduct charges of substance abuse. The Court of Appeals held that these regulations violated the: First Amendment right to freedom of association, the Eighth Amendment prohibition against cruel and unusual punishment, and the Fourteenth Amendment right to due process. Id. at 318-323.

These cases show that the First Amendment provides a basis to challenge a client's incommunicado detention. Incommunicado detention deprives an inmate of his First Amendment right to communicate with the outside world and deprives others of their right to communicate with him.

2. The Fifth Amendment

The Supreme Court has recognized that prisoners have a due process right to be afforded access to the courts.

"This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid. " Procunier v. Martinez, supra, 416 U.S. at 420.

People who are detained as material witnesses are also entitled to the representation of counsel. In Re: Class action application for Habeas Corpus, 612 F.Supp. 940 (W.D.TX 1985).

The Ninth Circuit has also stated that the "right of an arrestee not to be held incommunicado involves a substantial liberty interest." Carlo v. City of Chino, 105 F.3d 493, 496 (9th Cir. 1997) (involving right of an arrestee to make a phone call). In another case, the same court noted that, "[t]here is a well established tradition against holding prisoners incommunicado in the United States." However, the court also noted that "Federal case authority is surprisingly scanty, perhaps because our tradition is so strong, or perhaps because statutes protect the right to communicate after arrest in the more common circumstances." Halvorsen v. Baird, 146 F.3d 680, 688-689 (9th Cir. 1998). The federal courts that have addressed the practice have soundly criticized it, though. In fact, they have sometimes reversed convictions because a confession was obtained during an incommunicado detention.

In Haley v. Ohio, 332 U.S. 596, (1948), the petitioner was a 15 year old boy who was held incommunicado from early Saturday morning until the following Thursday. In that time, a lawyer hired by his mother tried to see him twice, but was refused admission by the police. Petitioner's mother was not allowed to visit him until Thursday. Id. at 598, 600. The Court found that the petitioner's treatment showed a disregard for standards of decency. It ordered the suppression of the petitioner's confession, which occurred before this treatment, because this treatment left the Court unable to accept the state's assurance that petitioner's confession was not the result of mistreatment. Id. at 600.

In Payne v. Arkansas, 356 U.S. 560 (1958), the petitioner was a mentally challenged 19 year-old who was held incommunicado for three days. He was not told of his right to counsel. He was refused permission to make a phone call. Members of his family tried to see him, but were turned away. As a result of these and other factors, the Court held that the petitioner's confession, which came at the end of this period and after a threat of mob violence, was not voluntary. Id. at 566.

In Darwin v. Connecticut, 391 U.S. 346, 349 (1968), the Court held that the petitioner's confession must be suppressed because police officers kept him incommunicado for 30-48 hours while they sought and obtained his confession.

The holdings in these cases may have been undermined by the Supreme Court's later holding that the police do not have to inform a suspect of his attorney's efforts to speak with him and can mislead the attorney. Moran v. Burbine, 475 U.S. 412, 425, 428-432, 434 (1986). However, Moran did not mention any of the cases cited above and they have not been overruled. In addition, it is distinguishable on two grounds. First, the Court noted that Mr. Burbine had the opportunity to use a telephone. Id. at 418. The petitioners in the Court's previous cases do appear to have been denied that opportunity. Second, the Court stated that on facts more egregious than those in Moran, it might find a due process violation. Id. at 432.

Lower courts have also found that incommunicado detention violates a person's right to due process. See Halvorsen v. Baird, supra, 146 F.3d at 689 (plaintiff was held incommunicado for six hours in a detox facility); Franco De-Jerez v. Burgos, 876 F.2d 1038, 1042 (1st Cir. 1989) (plaintiff was held incommunicado for 13 days to the point where she had to attach a note to a rock and throw it out the window of the detention facility in order to contact her husband); Walters v. Western State Hospital, 864 F.2d 695, 696-697, 699 (10th Cir. 1988) (plaintiff was held under a state law permitting the emergency detention of people in need of medical treatment and prevented from communicating with people outside the institution for seven to ten days). "[P]art of the process due to a person if his liberty is taken is the opportunity to communicate with someone outside the institution where he is held, at a time and in a manner consistent with practical management of booking and confinement procedures and institutional security and order." Halvorsen v. Baird, supra, 146 F.3d at 689. "That the call need not be allowed immediately upon entry into the facility does not absolve the facility of the obligation to allow a call by a reasonable means and within a reasonable time." Id. at 690.

Thus, an argument that your client's incommunicado detention violates his rights under the Fifth Amendment due process clause should be successful.

3. The Sixth Amendment

If your client's Sixth Amendment right to counsel has attached, that provides further support for his right not to be held incommunicado. Timmons v. Peyton, 360 F.2d 327, 330-331 (4th Cir. 1966). In Timmons, the petitioner was denied counsel for three and a half months following the offense, the first 60 days of which he was held incommunicado, for all practical purposes. "The killing occurred on October 19, 1961. The confession was taken by the police on October 20, 1961. On October 24, 1961, the petitioner was served with notice of the motion to have him committed to ... a state institution for the criminally insane. On October 25, 1961, the commitment order was signed. On December 20, 1961, ... the [hospital] superintendent ... reported that the petitioner was competent to stand trial. On December 27th [the superindentent] further reported that in his opinion the petitioner was sane at the time of the commission of the offense, pointing out that he had overlooked this request in the order when his original report was made. On January 20, 1962, the petitioner, on advice of the police, waived a preliminary hearing. On February 1, 1962, counsel was appointed. On February 5, 1962, an indictment was returned by the grand jury." Id. at 330. The Court of Appeals held that this chronology established a violation of the petitioner's right to counsel. Id. at 330.

**C. Challenges based on international law**

1. Treaty Violations

a. Provisions of treaties, international declarations, and U.N. Resolutions.

The following is a list of treaty provisions or parts of international declarations, in addition to those listed above, which are or may be violated by incommunicado detention.

Universal Declaration of Human Rights
(General Assembly Resolution 217 (III)(A) (Dec. 10, 1948).)

Article 5.

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 9.

No one shall be subjected to arbitrary arrest, detention or exile.

Article 19.

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

American Declaration on the Rights and Duties of Man

Article IV.

Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.

Article X.

Every person has the right to the inviolability and transmission of his correspondence.

Article XXII.

Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.

International Covenant on Civil and Political Rights

(adopted Dec. 16, 1966, S. Treaty Doc. 95-2, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, entered into force for the United States Sept. 8, 1992) )

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Declarations and Reservations

UNITED STATES OF AMERICA

Declarations:

"(1) That the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing.

Reservations:

"(3) That the United States considers itself bound by article 7 to the extent that `cruel, inhuman or

degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.

Convention against torture and other cruel, inhuman, or degrading treatment or punishment.
(adopted by unanimous agreement of the U.N. General Assembly, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/RES/39/708 (1984), (entered into force as to the United States Nov. 20, 1994, signed April 18, 1988) )

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

Reservations by the United States:

"I. The Senate's advice and consent is subject to the following reservations:

(1) That the United States considers itself bound by the obligation under article 16 to prevent `cruel, inhuman or degrading treatment or punishment', only insofar as the term `cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States. "

"III. The Senate's advice and consent is subject to the following declarations:

(1) That the United States declares that the provisions of articles 1 through 16 of the Convention are not self-executing."

Vienna Convention on Consular Relations and Optional Protocols
(21 UST 77; TIAS 6820; 596 UNTS 261).

Article 36

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access

to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

American Convention on Human Rights
(O.A.S. Official Records, arts. 7(2)-7( 3), OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 2 (1970) (signed but not ratified by the United States), reprinted in 9 I.L.M. 673, 676 (1970).)

Article 5. Right to Humane Treatment

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

Article 13. Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:

a. respect for the rights or reputations of others; or

b. the protection of national security, public order, or public health or morals.

3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

Declaration on the protection of all persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment.
(Adopted by G.A. Res. 3452 (XXX) (Dec. 9, 1975).)

Article 1

1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with

the Standard Minimum Rules for the Treatment of Prisoners.

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

Article 2

Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

Article 3

No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

Article 12

Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings.

Declaration on the protection of all persons from enforced disappearance.
(G.A. Res. 47/133 (Dec. 18, 1992).)

Article 1

1. Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field.

2. Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.

Article 2

1. No State shall practise, permit or tolerate enforced disappearances.

Article 3

Each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction.

Article 6

1. No order or instruction of any public authority, civilian, military or other, may be invoked to justify an enforced disappearance. Any person receiving such an order or instruction shall have the right and duty not to obey it.

2. Each State shall ensure that orders or instructions directing, authorizing or encouraging any enforced disappearance are prohibited.

Article 7

No circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances.

Article 9

1. The right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty and/or identifying the authority ordering or carrying out the deprivation of liberty is required to prevent enforced disappearances under all circumstances, including those referred to in article 7 above.

Article 10

1. Any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention.

2. Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information unless a wish to the contrary has been manifested by the persons concerned.

3. An official up-to-date register of all persons deprived of their liberty shall be maintained in every place of detention. Additionally, each State shall take steps to maintain similar centralized registers. The information contained in these registers shall be made available to the persons mentioned in the preceding paragraph, to any judicial or other competent and independent national authority and to any other competent authority entitled under the law of the State concerned or any international legal instrument to which a State concerned is a party, seeking to trace the whereabouts of a detained person.

Basic principles for the treatment of prisoners.
(G.A. Res. 45/111 (Dec. 14, 1990).)

5. Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.

b. Challenges

The provisions of the above documents that prohibit cruel, inhuman, or otherwise degrading treatment or punishment or arbitrary detention, and guarantee the rights to communicate and associate with others can be asserted in support of an objection to or motion to prohibit incommunicado detention. The basic principles of a treaty-based challenge were discussed in the section on the detention of material witnesses. The possibility of raising arguments based on the Universal Declaration of Human Rights and American Declaration on the Rights and Duties of Man was also discussed in that section. However, some other specific treaty provisions are discussed below.

i. International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights was ratified by the Senate on June 8, 1992. Article Two, Section Three requires each state to provide a remedy for violations of the Covenant.

Two provisions of the ICCPR seem to prohibit incommunicado detention. Article 7 prohibits cruel, inhuman, or degrading treatment or punishment. Article 9 prohibits arbitrary arrest and detention. Prohibiting outside contact can make a detention arbitrary. Martinez v. City of Los Angeles, supra, 141 F.3d at 1384.

Article Four, Section One allows countries to derogate from their obligations under the covenant "[i]n times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed" "to the extent strictly required by the exigencies of the situation." However, Article Four, Section Two forbids a derogation from articles 7 under any circumstances.

Unfortunately, when adopting the ICCPR, the Senate tried to both take credit for ratifying a major human rights instrument and at the same time nullify its effect. The Senate declared that the provisions of the Covenant are not self-executing. This means that the Covenant is not to be given effect without special implementing legislation. Beazley v. Johnson, supra, 242 F.3d at 267. The Senate also imposed a reservation stating that the United States only "considers itself bound by article 7 to the extent that `cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." If these provisions are valid, the ICCPR is useless as a source of protection against American authorities.

So far, a majority of courts have given binding effect to the Senate's declaration and reservation. In Beazley v. Johnson, supra, 242 F.3d 248, the Fifth Circuit found that the Senate's reservation regarding article 7 is valid, in spite of a contrary finding by the U.N. Human Rights Commission with respect to the execution of people for crimes committed while they were juveniles. Id. at 263-267. The Fifth Circuit also found that the Senate's declaration that the treaty is not self-executing prevented Mr. Beazley from raising its violation as a defense to his execution. Id. at 267.[13]

The Sixth Circuit also found that the declaration prevented a petitioner from raising the ICCPR in support of his petition for a writ of habeas corpus. Buell v. Mitchell, supra, 247 F.3d at 372.)[14] The First Circuit applied the non-self-executing declaration as a reason to bar a civil cause of action based on the ICCPR, as well. De La Rosa, et al. v. United States, 32 F.3d 8, 10, fn. 1 (1st Cir. 1994) (suit seeking right to vote in presidential elections for citizens and residents of Puerto Rico).

However, two other Courts of Appeals have not given effect to the Senate's reservations. The Eleventh Circuit noted the declaration, but did not consider its effect. Instead, the Court of Appeals went on to analyze the merits of the defendant's claim that the ICCPR prevented his prosecution for an offense that he had already been convicted of in Columbia. United States v. Duarte-Acero, 208 F.3d 1282, 1284 fn. 8, 1285-1287 (11th Cir. 2000) (holding that double jeopardy provision did not apply because it only forbids successive prosecution for the same offense by the same country). The Ninth Circuit treated the ICCPR as a source of rights for citizens in one case, but did not mention the Senate's reservations. Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1441-1442 (9th Cir. 1996) (finding that restrictions on travel to Cuba did not violate the ICCPR because it only guarantees the right to leave the U.S., not travel to a specific destination). Since, neither of these cases considered the Senate's reservations, they are not strong authority for the assertion that the reservations do not prevent a person from asserting the protections of the ICCPR against the government. However, they do provide some authority for such an argument.

In addition, a strong argument can be made that both the Senate's declaration and reservation are void. This argument has been made in objections by several countries. Denmark, the Netherlands, Norway , Portugal, Spain, and Sweden have noted that derogation from article 7 is never permitted by the treaty. Therefore, these countries regard the Senate's reservation as incompatible with the object and purpose of the covenant. Germany, Italy simply interpreted the Senate's reservation as not affecting the United States' obligations under article 2.

In addition, neither of the above reservations appear to be allowed by The Vienna Convention on Treaties (VCLT), to which the United States is a party. Article 19 of that Convention states:

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[13] These findings can not properly be characterized as holdings because they were not necessary to the decision. Instead, the court rested its decision on a finding of procedural default. Beazley v. Johnson, supra, 242 F.3d at 265.

[14] This finding was not necessary to the court's holding that the petitioner procedurally defaulted these claims and is therefore dicta. Buell v. Mitchell, supra, 247 F.3d at 376 (Daughtrey, J., concurring).

> A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

As the objecting countries noted, the reservation limiting the protections of article 7 of the ICCCPR to those already present in the U.S. Constitution is a prohibited derogation from the terms of the treaty. It also appears to be incompatible with the object and purpose of the treaty of protecting individual rights and making sure that nation states protect them. The Senate's declaration that the treaty is not self-executing is also incompatible with the object and purpose of the ICCPR. Therefore, that declaration is also void under the VCLT. In addition, under article 27 of the VCLT "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." That would seem to be the effect of making the treaty non-self-executing.

ii. Convention against torture and other cruel, inhuman, or degrading treatment, or punishment.

Unfortunately, the Senate used the same tactic of adopting the CAT, but attempting to nullify it within U.S. borders as it did with the ICCPR. The Senate issued a reservation that purports to limit the definition of torture or cruel, inhuman, or degrading treatment or punishment to that already prohibited by the Constitution. The Senate also declared that the Convention is not self-executing. Federal courts will probably treat these reservations the same as the Senate's reservations to the ICCPR. However, the same arguments can be made to show that the reservations are void.

Some countries filed objections to the Senate's reservations to the Convention. Finland objected that a general reference to national law is "subject to the general principle to treaty interpretation according to which a party may not invoke the provisions of its internal law as justification for failure to perform a treaty." The Netherlands objected that the Senate's reservation concerning the prohibition of cruel, inhuman, or degrading treatment or punishment in article 16 is incompatible with the object and purpose of the Convention to which article 16 is essential. Sweden reiterated its objections to the similar reservations which the Senate made to the ICCPR.[15]

iii. Vienna Convention on Consular Relations and Optional Protocols

Obviously, holding an alien in incommunicado detention would violate the Vienna Convention if that person was prevented from contacting their consul. It would also violate the Convention if the person's consul was prevented from visiting him. Federal courts have so far refused to enforce the Vienna Convention by giving aliens a remedy for its violation. See United States v. Bustos de la Pava, 268 F.3d 157, 164-166 (2nd Cir. 2001); United States v. Minjares-Alvarez, 264 F.3d 980, 986-987 (10th Cir. 2001) (and cases cited therein). However, in those cases the alien was either seeking suppression of evidence or dismissal of an indictment as a remedy for the treaty violation. Courts might look more favorably on a claim if the prisoner was simply seeking an order that he be allowed to contact his consul, which the treaty guarantees, and not seeking any other form of relief based on the violation. Such a claim would almost certainly succeed before an international tribunal.

2. Jus Cogens or customary international law

The argument for applying jus cogens or customary international law was presented in the section on the detention of material witnesses. However, four specific types of violations which incommunicado detention may fall within are discussed below.

i. Arbitrary detention

Courts have found a clear international prohibition against arbitrary detention. Alvarez-Machain v. United States, supra, 266 F.3d at 1052; Eastman Kodak v. Kavlin, supra, 978 F.Supp. at 1092. Detention may be arbitrary "if it is incompatible with the principles of justice or with the dignity of the human person." Martinez v. City of Los Angeles, supra, 141 F.3d 1384. It is also arbitrary "'if the person detained is not given early opportunity to communicate with family

[15] Other countries may have felt that it was pointless to object to the Senate's reservations to the CAT, when the Senate had ignored their earlier objections to its reservations to the ICCPR.

or to consult counsel; or is not brought to trial within a reasonable time.'" Ibid. (citations omitted).

ii. Causing disappearance

Congress has classified causing the disappearance of persons by the abduction and clandestine detention of those persons as a "gross violation of internationally recognized human rights." (22 U.S.C. §2304.)

In addition, one district court has held that causing disappearance is a violation of customary international law. Forti v. Suarez-Mason III, 694 F.Supp. at 711. The Forti court held that the elements of causing disappearance are: "(1) abduction by state officials or their agents; followed by (2) official refusals to acknowledge the abduction or to disclose the detainee's fate." Ibid. You may have some trouble with the first element, since the initial arrest will probably be legal. However, you can argue that a legal arrest can qualify as an abduction the fact of arrest and location of the arrestee are not later acknowledged.

iii. Cruel, inhuman, or degrading treatment or punishment

You should not have a problem with establishing that cruel, inhuman, or degrading treatment or punishment violates customary international law. However, there is a problem with defining what constitutes cruel, inhuman, or degrading punishment. You can argue that cutting someone off from all contact with the outside world and possibly even refusing to acknowledge that they are being held qualifies. However, the phrase is not clearly defined. As a result, one federal court has refused to find that a violation of international law can be based on it. Forti v. Suarez-Mason III, 694 F.Supp. at 712.

iv. Right to associate with family members

In Maria v. McElroy, supra, 68 F.Supp.2d at 234, Judge Weinstein found that the right to be free from arbitrary interference with family life is part of customary international law. Your client's actual detention may not qualify as arbitrary interference. However, prohibiting her from contacting family members and preventing family members from contacting her should qualify.

## Conclusion

As you can see, all is not hopeless when dealing with a client who has been detained as a material witness or suspected terrorist or even detained incommunicado. Hopefully, the above points will help you fight for the rights of your clients against the government. We also hope that this article will spur the development of other ideas to help our clients, by the many dedicated, resourceful, and creative men and women who serve as Liberty's Last Champions.

*The Back Bencher*

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