The BACK BENCHER

Central District of Illinois Federal Defenders

Vol. No. 33 Fall Edition 2003

DEFENDER'S MESSAGE

As some of you may already know, Seventh Circuit Chief Judge Joel Flaum appointed me on September 3, 2003, as the Acting Federal Public Defender for the Southern District of Illinois until a new permanent Federal Defender is selected for the District. Of course, I continue to serve as the Federal Defender for the Central District of Illinois as well. Accordingly, I am pleased to offer this issue of *The Back Bencher* to the panel attorneys in both the Central and Southern Districts of Illinois. For all of you receiving this publication for the first time, I hope you will find it both informative and entertaining. What follows is my "Defender's Message" column which has appeared at the beginning of each issue since the inception of this publication eight years ago.

I am sure everyone has fond memories of a favorite teacher/professor who has had a lasting impact on their lives. Mine is Dr. Nicholas Nyradi, who in the 1950s, often stated that "there is nothing new under the sun . . . . . and those who refuse to learn the lessons of history will be forced to pay the price."

With the controversial "trials" by military tribunal at Guantanamo Bay looming closer on the horizon, I am reminded that this is not the first time in our country's history that a military tribunal or commission has been convened. One such instance was the infamous Dakota Military Commission, created in response to an uprising by the Dakota people (part of the great Sioux Nation), after years of broken promises by the United States. Colonel Henry Sibley and General John Pope, the commanders of the U.S. Military District of Minnesota and the Northwest, established this Commission. Its express purpose was to quickly "try summarily" the Dakota men who participated in the uprising.

The Dakota people, truly the mightiest of Native Americans, once inhabited large areas of the Midwest, but by 1862 they had been reduced to living on a reservation occupying a narrow strip of land in southwestern Minnesota, after entering into treaties with the United States which dispossessed them of their lands in exchange for annuity and lump sum payments. As with so many other treaties with Native Americans, the United States did not fulfill its obligations. Indeed, in 1862, eleven years had passed since the government promised to make the lump sum payments, yet none had been received. Moreover, allegedly due to the heavy costs of the Civil War which had strapped the U.S. economy (as the war in Iraq is doing today), the annuity payments were late and there were reports that if and when the payment was made, it would be the last and made in paper currency, rather than gold as required by the treaties.

Thus, on August 17, 1862, the Dakota people, reduced to poverty and starvation after surrendering the lands which in the past had provided them with a means of survival, arose in an act of desperation to take back that which they had originally ceded in good faith to the United States. What followed was 37 days of violence, during which time 77 American soldiers, 29 citizen soldiers, 358 settlers, and 29 Dakota warriors were killed. After the surrender of the last Dakota warriors, Col. Sibley, under the supervision of Gen. Pope, established a five-member military commission on September 28, 1862, to "try" the Dakota fighters. Gen. Pope, assigned to the Northwest after the humiliating defeat at the Battle

of Bull Run under his command, was only too eager to redirect his shame and resentment toward the Dakota.

What followed in the proceeding 36 days of trials was a mockery of justice. During this short period, 392 men were "tried" by the Commission, with as many as 42 "trials" occurring on a single day. 303 of the "trials" resulted in convictions and sentences of death. The accused, often unable to speak or understand English, had no right to counsel or to present a defense. Rather, they were accorded only the right to address the Commission--these addresses frequently being twisted by the Commission to establish guilt. Aside from this "evidence," a statement by a single witness--often promised an annuity or leniency by the government--that an accused was merely present at a killing was sufficient for a conviction and sentence of death.

The Minnesota residents, terrified by the violence which reigned during the uprising, demanded that the executions be carried out immediately, and Col. Sibley and Gen. Pope intended to oblige them. However, on October 17, 1862, President Lincoln stayed the executions until he had an opportunity to review the proceedings. This "review" by President Lincoln was the only form of appeal available to the condemned. Less than two months later, the President completed his "review" of all 392 cases, approving the execution of 39 men. On the day after Christmas, these men met their maker at the end of a hangman's rope.

The injustices committed by the Dakota Military Commission demonstrates the dangers of by-passing the protections afforded to an accused by our Constitution. The Founders of our great county, having been subject to injustices by the Colonial powers not unlike those heaped upon the Native Americans, sought to ensure that our new nation would not repeat the mistakes of the past. Thus, the right against self-incrimination, the right to present a defense, the right to confrontation, the right to effective assistance of counsel, and indeed the necessity of the right to be proven guilty beyond a reasonable doubt by a jury of ones peers became the foundation of American jurisprudence. The Military Commission created in 1862, and perhaps the one in existence today, was a means of avoiding these beloved protections.

Currently, approximately 660 "detainees" in the custody of the United States face an uncertain fate. Like the Dakota, as of today's date, they have no right to counsel, no access to the courts, and many do not speak or understand the English language. Unlike the Dakota, however, we do not even know what, if any, alleged crimes these men have committed. There have been indications that they will eventually be "tried" by a military tribunal, but to date, not a single so-called "trial" has occurred. Although the Defense Department announced on July 3, 2003 that six detainees were eligible for "trial," protests by the detainees' native countries concerning the fairness of the military tribunal have delayed any such "trials." Ironically, the most vociferous protest came from the United Kingdom, whose oppression in a former era prompted the constitutional protections which the proposed military tribunal seems to be ignoring. Dr. Nyradi was right about the dangers of ignoring the lessons of history.

I sincerely pray that the Guantanamo Bay military tribunal will not be as unfair, un-American, and unconstitutional as the Dakota Military Commission, and they probably won't be. But, then again, we won't know. The "trials" are to be held in secret.

Yours very truly,

Richard H. Parsons
Federal Public Defender for the
Central District of Illinois
Acting Federal Public Defender for the
Southern District of Illinois

Table Of Contents

Churchilliana **3**
Dictum Du Jour **3**
Remembering Guantanamo Bay **7**
CA-7 Case Digest **8**
Circuit Conflicts **19**
Supreme Court Update **23**

CHURCHILLIANA

At this moment everyone ought to consider very carefully what is his duty towards his country, towards the causes he believes in, towards his home and family, and to his own personal rights and responsibilities.

Political Broadcast
January 21, 1950

NOTICE TO SOUTHERN DISTRICT PANEL ATTORNEYS

Because this is the first issue of *The Back Bencher* which you have received directly from our office, we have provided you with a courtesy hard copy. However, we do not ordinarily send hard copies unless an attorney specifically requests that we do so. Instead, we ask that you provide us with an email address to which we can directly send future issues. Alternatively, you can download a copy of *The Back Bencher* from the Seventh Circuit's website at http://www.ca7.uscourts.gov/pub_def.htm.

You can provide us with your e-mail address or request that you receive future issues in hard copy by contacting our managing editor, Mary Kedzior, at mary_kedzior@fd.org or 309/ 671-7891 or 309/ 671-7319.

Dictum Du Jour

"You may my glories and my state depose, but not my griefs; still I am the king of those."

- Shakespeare, Richard II

* * * * * * * * * *

May the enemies of Ireland never meet a friend.

- Irish Curse -

* * * * * * * * * *

The world is a book, and those who do not travel, read only a page.

- Saint Augustine

* * * * * * * * * *

"A criminal defense lawyer occasionally must defend the innocent, a fearfully grave responsibility, but more often defends the guilty. In defending the guilty, criminal defense lawyers perform two noble and just functions; they protect our society from unconstitutional excesses, and they protect criminals from judgments and sentences in excess of what their crimes deserve and ordinarily and properly receive under the law."

"The biggest problem criminal defense lawyers face is that their clients often lie to them. Criminal defense clients lie a great deal to their lawyers, they lie to their lawyers more than they lie to the police, they lie about things that don't matter, they lie about things that matter tremendously, they lie in ways that hurt their cases, and most importantly, they lie in ways that disable their lawyers from defending them successfully. Frequently, criminal defendants tell their lawyers some ridiculous fairy tale, even though they have truthfully admitted most or all of what is at issue to the police. It is very difficult for a lawyer to prepare a good defense or negotiate effectively for a plea agreement when the client lies to the lawyer. The polygraph is a high-tech way to scare some of the clients into telling their lawyers the truth, and identifying other clients who won't."

Miranda v. Clark County, 319 F.3d 465, (9th Cir. 2003), Kleinfeld, J., concurring and dissenting.

* * * * * * * * * *

"Twenty years from now you will be more disappointed by the things you didn't do than by the ones you did do. So throw off the bowlines, sail away from the safe harbor. Catch the trade winds in your sails. Explore. Dream. Discover."

- Mark Twain

* * * * * * * * * *

You just know there's going to be a whole lot of trouble when a man, wearing a ski mask over his face, enters a bank on a hot August afternoon.

United States v. Price, 328 F.3d 958 (7th Cir. 2003).

* * * * * * * * * *

The Wall Street Journal
Wednesday, January 29, 2003

Antiterrorism Law Used to Seize Cash From Fraud Ring

By: Gary Fields

WASHINGTON -- Federal agents, exercising civil-enforcement powers under the USA Patriot Act for the first time in a case unrelated to fighting terrorism, seized funds of a Canadian telemarketing ring that allegedly preyed on the elderly.

The Justice Department worked with Canadian authorities to shut down the scheme, which involved Canadian suspects based in Montreal targeting elderly Americans and funneling money to Jordanian and Israeli banks in Israel.

Mike Gunnison, head of the criminal unit for the U.S. attorney's office in New Hampshire, which brought the case, said recovering through asset

forfeiture the $4.5 million they found in foreign banks "would have been difficult, if not impossible," without using the 2001 Patriot Act. The government intends to use the money that is forfeited to pay restitution to the alleged victims of the fraudulent scheme.

The case could have implications for future prosecutions, because the Patriot Act will allow authorities to go after other funds that have been sent to offshore accounts, as long as those financial entities have U.S. branches. The act was designed to enhance law-enforcement officials' ability to root out terrorism, including tracking of financial sources, and to allow officials to conduct surveillance on suspects.

Lawrence Goldman, president of the National Association of Criminal Defense Lawyers, said he wasn't surprised the government would eventually use the law for nonterrorism cases. "Anytime you pass legislation that's not narrowly limited," there are opportunities to expand its use into other areas, said Mr. Goldman, a critic of the law.

Canadian and U.S. law-enforcement authorities arrested 14 people on charges ranging from racketeering to conspiracy to commit mail and wire fraud. Participants in the scheme allegedly targeted victims who were unmarried or widowed and had no dependents living with them, and who had access to significant cash. A series of "qualifying" questions regarding income and marital status were used by the participants.

After the victims were qualified, another participant would call the victims, claiming to be an attorney or government official, and would inform them they had won a cash prize, usually $200,000. The victims were told they needed to prepay Canadian taxes and fees to collect their prizes. The "winners" were also told to keep their winnings confidential or forfeit the prizes. Once the victims were drawn into the scheme, the suspects kept calling, raising the amount of the fictitious prize while requesting more money.

Telemarketing fraud from Canada is a big problem. Sylvain L'Heureux, constable with the Royal Canadian Mounted Police and spokesman for the telemarketing-fraud task force, said 90% of the victims in this scam were more than 75 years old. Since 1998, members of the Canadian-U.S. task force have discovered losses of $124 million. "That's only the tip of the iceberg. Only one out of five victims report it," Mr. L'Heureux said. The suspects arrested yesterday, along with a 15th co-defendant, are all expected to be extradited to the U.S. for trial.

* * * * * * * * * *

"Most persons have difficulty remembering or describing the features of strangers. A person who sees a criminal for only a brief time takes away a vague sense of appearance and behavior—and that sense may be focused by a sketch, photograph, showup, or lineup after the events. Sometimes the witness zeroes in on the correct person, sometimes not; there is an element of chance and an opportunity for manipulation. Once the witness decides that "X is it" the view may be unshakable. Psychological research has established that the witness's faith is equally strong whether or not the identification is correct. We described these findings in *Krist v. Eli Lilly & Co.*, 897 F.2d 293 (7th Cir. 1990): "An important body of psychological research undermines the lay intuition that confident memories of salient experiences . . . are accurate and do not fade with time unless a person's memory has some pathological impairment. . . . The basic problem about testimony from memory is that most of our recollections are not verifiable. The only warrant for them is our certitude, and certitude is not a reliable test of certainty. . . . [T]he mere fact that we remember something with great confidence is not a powerful warrant for thinking it true." 897 F.2d at 296-97 (citations to the scholarly literature omitted). See Elizabeth F. Loftus & James M. Doyle, *Eyewitness Testimony: Civil and Criminal* (3d ed. 1997); Elizabeth F. Loftus, *Eyewitness Testimony* (1979; rev. ed. 1996); Daniel L. Schacter, *The Seven Sins of Memory: How the Mind Forgets and Remembers* 112-37 (2001). See also *United States v. Hall*, 165 F.3d 1095, 1118-20 (7th Cir. 1999) (concurring opinion). Jurors, however, tend to think that witnesses' memories are reliable (because jurors are confident of their own), and this gap between the actual error rate and the jurors' heavy reliance on eyewitness testimony sets the stage for erroneous convictions when (as in Newsome's prosecution) everything depends on uncorroborated eyewitness testimony by people who do not know the accused. This is why it is vital that evidence about how photo spreads, showups, and lineups are conducted be provided to defense counsel and the court."

Newsome v. McCabe, 319 F.3d 301, (7th Cir. 2003).

The above quote might be useful in arguments or for crafting jury instructions.

In this case the Seventh Circuit affirmed a $15 million judgment against two Chicago cops and the City of Chicago for concealing exculpatory evidence that the cops had taken steps to assure the plaintiff's identification in a murder case. The plaintiff was later pardoned due to his innocence.

* * * * * * * * * *

"If a tattoo indicates ownership of an object, the mind reels at the legal and evidentiary consequences of the unicorns, dragons, mermaids, and other flights of fancy that decorate people's bodies."

"Here, the pattern the government considers specific enough to demonstrate *modus operandi* is a defendant in possession of contraband, who, upon seeing police at night, drops or hides that contraband, then flees on foot. If a pattern so generic can establish *modus operandi*, this fairly limited exception to Rule 404(b) would gut the Rule, rendering it useless as a check on character evidence that would otherwise be inadmissible."

United States v Thomas, 321 F.3d 627 (7th Cir. 2003).

* * * * * * * * * * *

"Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief."

"In this case, the statistical evidence alone raises some debate as to whether the prosecution acted with a race based reason when striking prospective jurors. The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members, and only one served on petitioner's jury. In total, 10 of the prosecutors' 14 peremptory strikes were used against African-Americans. Happenstance is unlikely to produce this disparity."

Miller-El v. Cockrell, 535 U.S. 322 (2003).

* * * * * * * * * *

Payton's second challenge–to the sufficiency of the evidence against him–can be rejected based on the trial testimony of a single witness: Payton's father Milton. Milton testified that he worked as a "runner" for his son's crack operation ....

United States v. Payton, 328 F.3d 910. (7th 2003).

* * * * * * * * * *

Indicted for selling marijuana and possessing a gun in connection with the crime, Frederick James offered the "defense" that his ancestors came from Africa, that he is therefore a Moorish national, and that as a result he need obey only those laws mentioned in an ancient treaty between the United States and Morocco. This view of legal obligations is espoused by many adherents to the Moorish Science Temple, which was founded in 1913 by prophet Noble Drew Ali. Moorish Science is a heterodox Islamic sect based on teachings of Drew and his "Seven Circle Koran." It is a tenet of Moorish Science that any adherent may adopt any title, and issue any documents, he pleases. Drew told his followers that they are not U.S. citizens and distributed "Moorish Passports." Some members of this sect hand out what they call "security agreements" that purport to oblige strangers to pay hefty sums for using the members' names, which they deem copyrighted under their private legal system. James is among those who claim a right to compensation for every mention of his name. James demanded that the prosecutor, witnesses, and judge enter into compensation contracts before James would acknowledge the court's authority.

United States v. James, 328 F.3d 953 (7th Cir. 2003).

* * * * * * * * * *

Curtis Smith is a truck driver with a two million mile accident-free driving record. Unfortunately, his record for theft-free driving is considerably less impressive.

~ ~ ~

In early November 2001, Hirschbach Motor Lines hired Curtis Smith, a licensed commercial truck driver, to transport a load of toys from a Hasbro toy distribution center in Massachusetts to a Wal-Mart store in Iowa. On November 2, 2001, Smith picked up more than $64,000 worth of toys from Hasbro Distribution. ***** The cargo never arrived at its planned destination, however, because Smith pulled off the road at various points between Massachusetts and Iowa and sold toys off the back of the truck. He used the money from this ill-conceived venture to buy crack cocaine for personal consumption. He was apprehended in Bridgeview, Illinois on November 20, 2001, after a local resident called police to report that a man was selling toys from the back of a truck at 1:30 in the morning.

~ ~ ~

Although it is true that a rational person is unlikely to steal an older, loaner vehicle while the owner of the loaner is repairing his new vehicle, the court was not obliged to find that Smith was acting as a rational person would act. Smith, after all, was caught in the dead of night selling hot Mr. Potato Heads out of the back of a truck in order to support his crack cocaine habit.

United States v. Smith, 332 F.3d 455 (7th Cir. 2003).

* * * * * * * * * *

"This country imposed approximately 5,760 death sentences between 1973 and 1995. During that time, "courts found *serious, reversible error in nearly 7 of every 10* of the thousands of capital sentences that were fully reviewed during the period." State

courts reviewed 4,578 of those cases and reversed 41% for serious error on direct appeal; another 10% were reversed on state collateral review. Federal courts found error in 40% of the 599 cases which state courts affirmed. 82% of defendants who received a second trial after a successful state collateral petition did not receive a death sentence; 7% of those defendants were found innocent or had their charges dropped. Recently in Illinois, a conservative Governor declared a moratorium on executions after discovering that since the death penalty was reinstated, more individuals convicted of capital crimes and sent to death row had been exonerated than executed. Following a full investigation, he pardoned some of the prisoners on death row and commuted the sentences of the rest. Since 1973, one hundred and eight people nationwide have been released from death row upon evidence of their innocence; there is no comparable statistic yet available for those who have been executed. It is virtually certain that other people who are actually innocent - much less those convicted in violation of the Constitution - currently await execution."

Summerlin v. Stewart, 3__ F.3d ___ (9th Cir. Sept. 2, 2003), (Reinhardt, J.concurring)

* * * * * * * * * *

In this en banc case, the Court effectively overturned over 100 death sentences in Arizona, Montana, and Idaho pending Supreme Court review.

* * * * * * * * * *

"While many federal judges have chafed at the notions behind and the strictures of the guidelines, they try mightily to comply with them and to assure that the sentences they impose comport with the principles guaranteed by the United States Constitution.

The Sentencing Commission, pursuant to its statutory mandate, regularly reviews the guidelines, the data and material submitted by the District Courts, and other information it gleans from its research, hearings and advisory groups. This last category represents a broad group of professionals and practitioners with extraordinarily varied experiences within the criminal justice system. One would be hardpressed to find a greater wealth of wisdom and experience that could be brought to bear upon the issues related to sentencing.

Nonetheless, some who are less dispassionate, far less experienced, and imbued with a sense of mission have set about to change the guidelines directly, not through the thoughtful and careful deliberative process informing the adoption of the Sentencing Guidelines by the Sentencing Commission. For example, the Protect Act, Pub.L. No. 108-21, 117 Stat. 650 (2003), was amended after twenty minutes of discussion on the floor of the House of Representatives. The amendments added not only statutory provisions for mandatory minimums with respect to certain crimes, but also actually added or amended the guidelines themselves. Before this Congressional tinkering with the actual guidelines, the Commission, pursuant to its mandate, thoroughly reviewed the data and research it had accumulated, consulted with the advisory groups, solicited comment and, then, amended, added or deleted guidelines providing reasons, commentary and explanations for the changes.

The Protect Act represents a significant departure from this dispassionate, deliberative process. It appears that it is the harbinger of future legislation. For example, a proposed bill entitled the "VICTORY Act", appears to be lurking in the halls of Congress. This piece of legislation would add not only more mandatory minimums, but also insinuate Congress even further into the process of actually drafting and promulgating Sentencing Guidelines, thus taking over the role of the Sentencing Commission as well as the judiciary's traditional role of sentencing. Indeed, section 401(n) of the Protect Act amends 28 U.S.C. §991(a) changing the composition of the Sentencing Commission to delete the requirement that "at least three" of the members of the Commission be "Federal judges" to "not more than three", further diluting the judiciary's input and decision making with respect to the guidelines.

It appears that much of Congress' effort is prompted and advised by the Department of Justice or persons within that Department without the benefit of the accumulated wisdom of the Sentencing Commission or the Judiciary. The thrust of the legislation is to remove more and more of the determination and discretion in sentencing from an independent judiciary and the Commission and vest it in the Department of Justice, which, of course, is a partisan in our system of justice.

Under this new regime not only will the government determine the charges to be filed, whether the indictments will undercharge or overcharge the criminal conduct, or, whether it will engage in pre-indictment or post-indictment maneuvering to bring about the government's desired result, but it also will be the only voice heard when adopting statutory sentences and Sentencing Guidelines with

less and less discretion afforded to the courts and the Sentencing Commission. To put it more bluntly, the wisdom of the years and breadth of experience accumulated by judges and the Sentencing Commission in adjudicating criminal cases and sentencing defendants is shucked for the inexperience of young prosecutors and the equally young think-tank policy makers in the legislative and executive branches.

As noted by Judge Guido Calabresi, a judge of the United States Court of Appeals for the Second Circuit Court and a law professor and former law school dean, "[A]n independent judiciary which applies rules of law...is a pain in the neck to any government that wants to get things done."

The judicial branch should not be timid nor fearful of inflicting an occasional whiplash or, where necessary, even imposing chronic pain when Constitutional rights are threatened or the balance of powers is jeopardized.

In its consequences the present case presents little more than a slight twinge, yet it is symptomatic of the problem. The government drove a bargain that allows the defendant to plead guilty to an offense that carries a guideline range of ten to sixteen months with a condition that defendant may move for a downward departure of not more than two levels. In addition, the government agrees that it will be bound by a very specific sentence of not less than two months imprisonment and four months home detention, among other provisions. The agreement, however, does not bar the government from arguing against the downward departure or arguing in favor of a sentence at the upper end of the guideline range. Nevertheless, the government will not contest a downward departure unless it is lower or different than the two months imprisonment.

By this sleight-of-hand, the government does not have to justify a downward departure or appear to have stipulated to one even though it will settle for a sentence that would require a downward departure. Indeed, it is clear from the Agreement and the customary practice in this District that the government is supporting or condoning a downward departure without appearing to agree to one. And, of course, if the government is unhappy with the sentence it can blame the court. The court is left in the untenable position of having to sentence the defendant to a sentence the government concedes is appropriate, but for which it will offer no reasons in support. The government also has the advantage of arguing against the "acceptable" sentence, thus appearing to take a hard line.

United States v. Mellert, No. CR 03-0043 MHP (N.D.CA Jul. 30, 2003).

Remembering Guantanamo Bay

By: David Mote
Deputy Chief Federal Defender

Last month, attention was focused on the two-year anniversary of the brutal attacks of September 11, 2001. It is appropriate that we remember what happened and the Americans who were lost on that day. It is also appropriate to remember that during the following two years, significantly more than 600 citizens of more than forty nations have been detained by American forces and held captive in Guantanamo Bay, Cuba. None have yet been tried. Last month, Secretary Rumsfeld made it clear that putting the detainees on trial was not a priority. "Our interest is in not trying them and letting them out," he said. "Our interest is in – during this global war on terror – keeping them off the streets, and so that's what's taking place." The Pentagon has asserted the right to hold the combatants (whom it contends are not prisoners of war with rights under the Geneva convention) until the end of the hostilities. It is acknowledged, however, that the war on terrorism could go on for decades. Reflecting on the situation in Guantanamo Bay, the classic, catchy Beach Boys' tune *Kokomo* came to my mind. Despite the seriousness of the subject, I thought satirical lyrics to that Beach Boys' classic might kindle a little awareness to the situation in Guantanamo Bay, so, without further ado, your musically-stunted writer presents the following:

Guantanamo

Lyrics by David Mote @ 2003

(to the Beach Boys tune, *Kokomo*)

Afghani, Iraqi ooh I wanna take you

Las Tunas, Matanzas you'll never see your mamas

No trials, appeals baby why don't we go Havana

Outside the law

There's a place called Guantanamo

That's where you gonna go to get away from it all

Bodies in the sand
Tropical drink in your capture's hand

He'll interogate you
To the rhythm of a oil drum band
Down in Guantanamo

Afghani, Iraqi ooh I wanna take you

To Las Tunas, Matanzas you'll never see your mamas

No trials, appeals baby why don't we go

Ooh I wanna take you down to Guantanamo

We'll get there fast And then we'll sweat you slow

That's where we wanna go
Way down to Guantanamo

Past Martinique, with that Muslim mystique

We'll put out to sea And we'll perfect our chemistry

By and by we'll defy a little bit of sanity

Afternoon sunlight
Truth serum and muggy nights

That foreign look in your eye
Give me a tropical contact high

Way down in Guantanamo

Afghani, Iraqi ooh I wanna take you

To Las Tunas, Matanzas you'll never see your mamas

No trials, appeals baby why don't we go

Ooh I wanna take you down to Guantanamo
We'll get there fast
And then we'll sweat you slow

That's where we wanna go
Way down to Guantanamo

Self-anointed prince, I wanna catch a glimpse
Everybody knows
A little place like Guantanamo

Now you are gonna go
And get away from it all

Go down to Guantanamo

Afghani, Iraqi ooh I wanna take you

To Las Tunas, Matanzas you'll never see your mamas

No trials, appeals baby why don't we go

Ooh I wanna take you down to Guantanamo

We'll get there fast
And then we'll sweat you slow

That's where we wanna go
Way down to Guantanamo

Afghani, Iraqi I wanna take you

To Las Tunas, Matanzas you'll never see your mamas

No trials, appeals baby why don't we go

Ooh I wanna take you down to Guantanamo

CA7 Case Digest

By: Jonathan Hawley

Appellate Division Chief

EVIDENCE

United States v. Rettenberger, ___ F.3d ___ (7th Cir. 2003; No. 02-3191). In prosecution for social security fraud, the Court of Appeals affirmed the district court's exclusion of the defendants' proffered expert because they failed to disclose the expert's opinions prior to trial. The defendants sought to have their expert testify concerning the opinions of other physicians who had treated the defendant. The district court excluded the testimony, for the defendants failed to disclose, pursuant to Fed. R. Crim. P. 16(b)(1)(C), that they would ask their expert these questions. The defendants argued on appeal that they did disclose that their expert would explain and support his own diagnosis, and his disagreement with the other physicians' diagnoses was therefore implied in this disclosure. The Court of Appeals noted that whether pretrial disclosure would have been senseless depends on what the expert would have said, had he been allowed to answer the questions. However, the defendants did not make an offer of proof, and an error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and in case the ruling is one excluding evidence, the substance of the evidence was made known to the court by proffer or was apparent from the context within which questions were asked. Because the defendants failed to make this showing, the Court of Appeals would not disturb the district court's decision.

United States v. Sutton, 337 F.3d 792 (7th Cir. 2003; No. 02-1679). In prosecution for a series of armed robberies, the Court of Appeals affirmed the district court's decision to disallow the admission of fingerprint reports. The defendants sought to introduce at trial reports which indicated that the defendant's fingerprints were not found at any of the crime scenes, although they did not intend to present an expert to explain the reports. In affirming the district court's denial, the Court

of Appeals first held that the reports were not hearsay, for the reports were self-authenticating and fell within the public records exception to hearsay. Nevertheless, the court held that the reports were properly excluded under Rule 403. Specifically, the court noted that without expert testimony, there was a substantial risk that the jurors would conclude that the absence of fingerprints proved that the defendants were not at the crime scene. An expert, however, would testify that such an inference was not necessarily correct. Thus, without an expert to explain the reports, the probative value of the reports was substantially outweighed by a risk of unfair prejudice.

United States v. Henderson, 337 F.3d 914 (7th Cir. 2003; No. 02-4195). In prosecution for distributing crack, the Court of Appeals rejected the defendant's argument that the government improperly bolstered the credibility of its witness. At trail, the defendant introduced evidence regarding a confidential informant's motive to frame him, although the informant did not testify at trial. The government then introduced evidence through one of its agents that the informant had assisted in numerous other cases which resulted in convictions. On appeal, the defendant argued that this constituted improper bolstering, for the informant did not testify at trial. The Court of Appeals noted that *United States v. Lindemann*, 85 F.3d 1232 (7th Cir. 1996), allows admissible rehabilitative evidence once a witness's credibility has been attacked. Moreover, the court refused to make an exception to *Lindemann* where the person at issue does not testify at trial. According to the court, the defendant's argument that the informant framed him was an attack on the informant's credibility and the government was entitled to introduce rehabilitative evidence.

GUILTY PLEAS

United States v. Howard, 341 F.3d 620 (7th Cir. 2003; No. 02-3456). In prosecution for distributing crack cocaine, the district court held that the government did not breach the plea agreement for failing to recommend a sentence reduction for acceptance of responsibility. The defendant entered into a plea agreement with the government wherein it agreed to recommend a reduction for acceptance of responsibility. At the time of the plea, the government believed the defendant had no criminal history. However, after the plea, it was discovered that the defendant had been using a false name, and he was in fact a career offender. Based on this deception, the government did not recommend the sentence reduction. The court concluded that the defendant's claim that he was entitled to a reduction for acceptance of responsibility was "ludicrous." The government only promised to make the recommendation if the defendant made a continued demonstration of acceptance of responsibility, and his deception regarding his identity clearly breached this continuing duty. Moreover, the court rejected his argument that his plea was involuntary because his sentence was much greater than expected when he entered his plea. Specifically, the court advised the defendant as to the maximum potential penalties and the defendant knew at all times that he was deceiving the court regarding his identity and therefore also aware of the risk that he would be discovered.

United States v. Mason, ___ F.3d ___ (7th Cir. 2003; No. 03-2482). In this case, the Court of Appeals outlined the appropriate procedure to follow when the government moves to dismiss an appeal due to a waiver of a right to appeal contained in a plea agreement. After the defendant appealed, the government moved to dismiss the appeal for lack of jurisdiction due to the appeal waiver. The defendant's counsel was ordered to respond within eight business days. The defendant's counsel responded with a motion to withdraw pursuant to *Anders*, noting that the wavier did not deprive the court of jurisdiction (because the question of the waiver's validity gives the court jurisdiction), but also pointing out that because the wavier was in fact valid, any appeal would be frivolous. The Court of Appeals noted that such a procedure was appropriate under the circumstances. In other words, where the government files such a motion, a response which complies with *Anders* will be construed as an *Anders* brief. The defendant will be given 30 days to respond, as with other cases where an *Anders* brief is filed. The court also noted that extensions would be granted to counsel in order to have an opportunity to completely review the record.

United States v. Kelly, 337 F.3d 897 (7th Cir. 2003; No. 02-2226). In prosecution for importation of heroin, the Court of Appeals rejected the defendant's argument the government breached the plea agreement by failing to file a motion for downward departure based upon the defendant's substantial assistance. Although the defendant cooperated extensively with the government, he refused to go on a car ride with government agents in an effort to locate a house. Based on this refusal, the government refused to file the downward departure motion. The court did not make an independent determination of

whether the defendant's conduct constituted a breach, but rather took the government's conclusion as determinative. Although the Court of Appeals concluded that the district court erred by failing to make an independent finding regarding the alleged breach, the court also noted that a judicial failure to make a formal finding of substantial breach can be harmless where there was sufficient evidence before the district court to make such a finding (although other circuits have held that the government's breach of a plea agreement is never subject to harmless-error analysis). Applying this principle, the court concluded that the district court's error was harmless because the defendant's refusal to take the ride amounted to a substantial breach of the plea agreement.

United States v. Sowemimo, 335 F.3d 567 (7th Cir. 2003; No. 01-3558). In prosecution for drug related offenses, the defendant argued that the district court erred when it failed to compel the government to make a 5K1.1 motion for downward departure after the defendant had provided the government with valuable cooperation, but then ceased to cooperate. The Court of Appeals noted that although the government may not unilaterally decide whether a defendant has substantially breached the terms of a plea agreement in deciding whether it is bound to move for a downward departure per the parties' agreement, the defendant in this case actually admitted at sentencing that he in fact stopped cooperating with the government. This admission eliminated the need to hold an evidentiary hearing and relieved the government of its obligation to move for a downward departure. That the defendant's cooperation was significant before he experienced a change of heart did not change the fact that he failed to continue to cooperate as he was asked to do. Indeed, the parties did not include any provisions for a partial fulfillment of the terms of the plea bargain and the Court refused to write such a clause into their agreement.

United States v. Bennett, 332 F.3d 1094 (7th Cir. 2003; No. 02-3176). Upon consideration of a defendant's challenge to the validity of his guilty plea, the Court of Appeals outlined the procedures required before acceptance of a plea which is part of a broader deal involving other defendants. Specifically, the defendant and his co-defendant both pled guilty to various mail and wire fraud charges. Without informing the court at the time of the defendant's plea, the government had entered into an agreement with the co-defendant whereby the government conditioned a 2-level reduction in the co-defendant's offense level on the defendant entering a plea. The defendant argued that the government's failure to disclose this "package deal," or "wired plea," violated Rule 11. The Court of Appeals, addressing this issue for the first time, held that the government must advise the district court of any package deals or wired pleas during the Rule 11 plea colloquy of any defendant involved in the deal. The possibility of coercion resulting from plea agreements linking multiple defendants together, or defendants and third persons together, argues for the adoption of this rule. Therefore, the prosecution must comply with this rule or face the penalty of withdrawal of the accepted plea. Upon disclosure of a package deal, the district court should make a more detailed examination as to the voluntariness of each defendant's guilty plea pursuant to the package deal. The Court, however, adopted the rule prospectively, and found that in the defendant's case, the defendant would not have pled differently had the package deal been disclosed.

HABEAS CORPUS

Piggie v. Cotton, ___ F.3d ___ (7th Cir. 2003; No. 03-1067). Upon appeal from the denial of a 2254 petition, the Court of Appeals reversed and held that Indiana's Conduct Adjustment Board violated *Brady* when refusing to allow the petitioner to view a videotape used to convict him of battery. Specifically, the CAB viewed a videotape which allegedly showed the petitioner battering a prison guard. The CAB relied upon this tape in convicting him, but never allowed the petitioner to view the tape due to a blanket policy prohibiting inmates from viewing security tapes. On appeal, the Court of Appeals noted that *Brady* applies to prison disciplinary proceedings. The district court, however, held to the contrary and failed to conduct an *in camera* review of the tape to determine if it contained exculpatory evidence. Moreover, because the court did not know what the videotape contained, it could not say that the failure to disclose the tape to the inmate was harmless. Thus, the Court of Appeals remanded the case to the district court for a determination of whether the prison had a legitimate security reason for refusing to allow the petitioner to view the tape and, if not, whether the error was harmless.

Altman v. Benik, 337 F.3d 764 (7th Cir. 2003; No. 03-2737). Upon consideration of a request to file a second or successive petition under § 2254, the Court of Appeals held that a previous petition dismissed

as untimely counts for purposes of § 2244(b). In so holding, the court noted that not every petition filed in the district court counts as a first petition, such as those dismissed for technical or procedural deficiencies that the petitioner can cure before refiling. For untimely petitions, however, the petitioner is incapable of curing the defect underlying the district court's judgment, and permission from the Court of Appeals must therefore be obtained before filing another petition after the first petition has been dismissed as untimely.

Harris v. McAdory, 334 F.3d 665 (7th Cir. 2003; No. 02-1620). Upon consideration of a 2254 petition, the Court of Appeals affirmed the district court's finding that the petitioner had procedurally defaulted his ineffective assistance of counsel claim by failing to present the claim to the state courts. The petitioner did not dispute that he failed to raise the issue, but instead argued that he established sufficient cause to excuse the default. Specifically, he argued that he established cause because of (1) his pro se status; (2) his borderline mental retardation; and (3) his organic brain dysfunction. The Court of Appeals rejected all of these grounds, noting that cause sufficient to excuse a procedural default most involve some objective factor external to the defense which precludes the petitioner's ability to pursue his claim in state court. Examples of such causes include interference by officials or that the factual or legal basis for a claim was not reasonably available to counsel. In the present case, the Court noted that it had already previously held that pro se status does not provide sufficient cause to excuse a default. Regarding mental retardation, although the Court had never explicitly ruled on the issue, it noted that something that comes from a source within the petitioner is unlikely to qualify as an external impediment. Moreover, his claim was belied by the fact that he had gainful employment as a security guard at the time of his underlying crime and prepared a 60-page pro se petition in the state court. Finally, regarding the organic brain dysfunction, the Court concluded that the petition had failed to present plausible evidence of the condition.

Gibbs v. VanNatta, 329 F.3d 582 (7th Cir. 2003; 01-2246). Upon appeal from the denial of a habeas corpus petition, the Court of Appeals affirmed the denial, but found that the petitioner's appellate counsel was ineffective. The petitioner was prosecuted in state court for 19 theft counts and 19 burglary counts. At his trial, the state introduced evidence of 39 other, unrelated burglaries to show the petitioner's modus operandi. The petitioner was convicted of all charged counts and also found by the jury to be a habitual offender because he had accumulated two prior unrelated felony convictions. On appeal in the Indiana state court, appellate counsel challenged the introduction of evidence on the unrelated 39 burglaries as it related to his convictions for theft and burglary. He did not, however, argue that their introduction tainted the jury's habitual offender finding. The Indiana court of appeals vacated most of the counts of conviction, but affirmed the habitual offender finding, given that it was not challenged on appeal. Then, in the state post-conviction proceedings, the petitioner argued that his appellate counsel was ineffective for failing to challenge the habitual offender finding, but the Indiana court found that the petitioner could not show that he was actually innocent of the habitual offender charge. The Seventh Circuit held that the Indiana courts applied the wrong standard, noting that the defendant need not show he is innocent of the charge, but only that with effective assistance, he would have had a shot at acquittal. He had such a shot in Indiana, for Indiana's Constitution allows the jury to be not only the finders of fact, but also the interpreters of law in a case. This unusual grant of authority to Indiana juries opened the door to the petitioner's trial counsel to argue (as he in fact did argue) that despite the two prior convictions, the jury should not find the petitioner guilty of the habitual offender charge. Thus, the petitioner's appellate lawyer should not only have argued that the evidence of the extraneous burglaries had impaired his client's defense to the charge of being a habitual offender, but also that if any of the 38 convictions were reversed the case should be remanded so that the jury could consider the habitual-offender charge free from the contamination of invalid convictions as well as of inadmissable evidence. Despite having found deficient performance, the Court of Appeals nevertheless affirmed, noting that the petitioner could not show that he had a chance of beating the habitual offender charge, even without the improper evidence.

Lewis v. Peterson, 329 F.3d 934 (7th Cir. 2003; No. 00-3040). Upon consideration of the denial of a 2255 petition, the Court of Appeals affirmed the denial. The defendant pled guilty pursuant to a plea agreement to a 924(c) charge. In exchange, the government agreed to dismiss another 924(c) charge which stemmed from conduct occurring prior to the charge to which he pled guilty. He did not file a direct appeal. The petitioner later filed a 2255 petition based on the Supreme Court's decision in *Bailey v. United States*, 516 U.S. 137, 150 (1995), and the government acknowledged that

under *Bailey*, he was innocent of the charge. The district court denied the petition prior to the Supreme Court's decision in *Bousley v. United States*, 523 U.S. 614 (1998), which held that a person who was convicted before *Bailey* and failed to challenge his conviction by way of a direct appeal, thus forfeiting his normal right to mount a collateral attack on the conviction, can nevertheless get his conviction set aside by means of a collateral proceeding if he proves that he is innocent both of the section 924(c) offense of which he was convicted and of any "more serious" charge that the government dropped or otherwise forwent in the course of plea negotiations. The defendant then filed a second collateral attack, arguing that although he could not demonstrate his innocence of the dropped offense, because the dropped offense occurred first, and a later offense cannot be used to enhance the punishment for an earlier one, the "more serious" criterion of *Bousley* was not met in his case. The dropped charge, the one that he cannot demonstrate he did not commit, was no more serious than the one to which he pleaded guilty and which he has shown that he did not commit. The Court of Appeals, however, held that the logic of the *Bousely* opinion does not require that the charge that was dropped or forgone in the plea negotiations be more serious than the charge to which the petitioner pleaded guilty. It is enough that it was as serious. In so holding, the Court noted that this decision was in conflict was the Eight Circuit's decision in *United States v. Johnson*, 260 F.3d 919, 921 (8th Cir. 2001).

MISCELLANEOUS

In re: United States of American, ___ F.3d ___ (7th Cir. 2003; No. 03-3037). In this bizarre case, the government asked the Court of Appeals to issue a writ of mandamus commanding the district judge to dismiss a count of an indictment and rescind the appointment of a private prosecutor. The defendant, a police officer, was originally charged with assaulting an arrested person and inducing other officers to write false reports. The original indictment contained two obstruction of justice counts and one civil rights counts. A plea agreement was eventually reached where the government agreed to drop all but one obstruction of justice count. The district court, displeased with the intended dismissal of the civil rights count, refused to accept the plea. The defendant went ahead and pled guilty without the benefit of the plea agreement to one count of obstruction. At sentencing, the government went ahead and moved to dismiss the remaining counts. The district court refused to dismiss the civil rights count and appointed a private lawyer to prosecute the count. The government then sought a writ of mandamus in the Court of Appeals which would rescind the appointment and require the court to dismiss the civil rights charge. The Court of Appeals noted that a judge does not have the authority to tell prosecutors which crimes to prosecute and when to prosecute them. According to the court, Judge Shabaz was playing U.S. Attorney and although "it is no doubt a position that he could fill with distinction, it is occupied by another person." Accordingly, the Court issued the writ of mandamus.

United States v. Miller, 327 F.3d 598 (7th Cir. 2003; No. 02-2077). In prosecution for drug related offenses, the Court of Appeals affirmed the district court's denial of the defendant's third motion to continue his trial, where the court had granted two previous motions to continue, had appointed back-up counsel, lead counsel was hospitalized two days prior to trial, and back-up counsel felt unprepared to proceed. In reaching this conclusion, the Court of Appeals noted that back-up counsel had over a month to prepare for trial, she being specifically informed by the district court that she may be needed to try the case in the place of lead counsel. Additionally, the case, in the opinion of the Court, was not complex, it involving two charges of drug distribution. Accordingly, the Court found that the district court did not abuse its discretion in denying the motion to continue.

United States v. De La Torre, 327 F.3d 605 (7th Cir. 2003; No. 01-3929). In prosecution for drug related offenses, the Court of Appeals found that the defendant's Rule 35(c) motion to reconsider his sentence was timely, despite it being filed more than seven days after he was sentenced. Rule 35(c) provides that the district court, "acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." The Seventh Circuit had previously held, however, that the seven-day period for filing the motion begins to run from the date the judgment is entered in the docket, rather than the date the sentence is orally pronounced. Applying this qualification, the defendant's motion was timely, for although his motion was filed more than seven days after the imposition of sentence, it was filed before the judgment was entered on the docket.

United States v. James, 328 F.3d

953 (7th Cir. 2003; No. 02-3424). Upon consideration of an appeal arguing that a district court's refusal to allow spectators to wear their national and religious headdress, the Court of Appeals denied the defendant's first amendment argument, but offered some comments to district judges. Specifically, although the court found that the defendant lacked standing to raise the spectators' first amendment challenge, the court also noted that the judicial branch has an interest in the prudent handling of public relations and no formal controversy is needed to say a few words on the topic. The court then went on to state: "The Constitution does not oblige the government to accommodate religiously motivated conduct that is forbidden by neutral rules, and therefore does not entitle anyone to wear religious headgear in places where rules of general application require all heads to be bare or to be covered in uniform ways. Yet the judicial branch is free to extend spectators more than their constitutional minimum entitlement. Tolerance usually is the best course in a pluralistic nation. Accommodation of religiously inspired conduct is a token of respect for, and a beacon of welcome to, those whose beliefs differ from the majority's. The best way for the judiciary to receive the public's respect is to earn that respect by showing a wise appreciation of cultural and religious diversity. Obeisance differs from respect; to demand the former in the name of the latter is self-defeating. It is difficult for us to see any reason why a Jew may not wear his yarmulke in court, a Sikh his turban, a Muslim woman her chador, or a Moor his fez. Most spectators will continue to doff their caps as a sign of respect for the judiciary; those who keep head covered as a sign of respect for (or obedience to) a power higher than the state should not be cast out of court or threatened with penalties. Defendants are entitled to trials that others of their faith may freely attend, and spectators of all faiths are entitled to see justice being done."

SEARCH AND SEIZURE

United States v. Raney, 342 F.3d 551 (7th Cir. 2003; No. 02-2086). In prosecution for attempted manufacture of child pornography, the Court of Appeals rejected the defendant's argument that the seizure of adult pornographic pictures taken by the defendant exceeded the scope of his consent to search. The defendant was arrested after having been caught in a sting where he had arranged to meet a person who he believed to be a 14-year old girl for sex. The girl turned out to be an undercover police officer. Inside the defendant's car, the police discovered a camera, film, condoms, and sexual lubricant. The defendant also signed a written consent form authorizing agents to search his car, residence, computer, and on-line computer accounts for materials "in the nature of" child abuse, child exploitation, and child erotica. Pursuant to this search, the government seized, among other items, four homemade photographs of the defendant in various sexual acts with his former wife. At trial, these photographs were introduced on cross-examination in response to the defendant's claim that he did not intend to take lewd photographs of the young girl he had planned to meet, although his e-mails to her indicated that he had planned to do so. On appeal, the court concluded that the adult photographs were within the scope of his consent to search. The court found that it was the homemade nature of the photos and the particular sex acts depicted therein in combination with the defendant's clearly stated intention to make homemade child pornography with the young girl depicting those very same acts that places the items within the scope of a search for materials "in the nature of" child abuse, etc.

United States v. Brown, 333 F.3d 850 (7th Cir. 2003; No. 01-2613). In prosecution for distributing child pornography, the Court of Appeals affirmed the district court's denial of the defendant's motion to suppress evidence. In the district court, the defendant challenged the search of his apartment where the police executed a "no-knock" search warrant. The "no-knock" warrant issued solely on the basis of an agent's statement that commercial encryption products allow a user to encrypt an entire hard drive by striking a single key. The defendant argued that this fact did not provide any particular circumstances that justified the no-knock warrant. The Court of Appeals, however, noted that in *United States v. Langford*, 314 F.3d 892, 894 (7th Cir. 2002), the Seventh Circuit explicitly held that violation of the knock and announce rule "does not authorize exclusion of the evidence seized pursuant to the ensuing search." While noting that this issue was currently pending before the United States Supreme Court in *United States v. Banks*, 282 F.3d 699 (9th Cir. 2002), *cert. granted*, 123 S.Ct. 1252 (2003), *Langford* remained the law in this circuit until the Supreme Court decides the issue. *See also United States v. Sutton*, ___ F.3d ___ (7th Cir. 2003; No. 02-4086).

United States v. Funches, 327 F.3d 582 (7th Cir. 2003; No. 02-2999). In prosecution for drug related offenses, the Court of Appeals

reversed the district court's finding that agents lacked probable cause to arrest the defendants after observing what they believed to be a drug transaction. Trained narcotics officers observed the defendants meeting in a grocery store parking lot, where defendant Toro serving as an intermediary got into defendant Funches's car and conversed for approximately half an hour while the third defendant, Munoz, waited in another car. Munoz then led the car in which Toro and Funches were located from the parking lot to an alley about ten minutes away. The Court of Appeals surmised that experienced agents would recognize the use of an intermediary and the parties moving to a less-visible location before goods are exchanged as common characteristics of drug transactions undertaken to protect the identity of sellers and to avoid detection by authorities. Additionally, upon reaching the alley, Munoz left Funches and Toro behind and drove to an apartment less than a minute away, where he retrieved the goods to be delivered. The agents, according to the court, would recognize such action as consistent with common precautions taken by dealers in drug transactions. These circumstances admitted to no innocent explanations sufficient to negate probable cause to believe that a drug transaction was occurring. Thus, the Court of Appeals concluded that the arrest of the defendants based upon these observations by the agents was supported by probable cause and the evidence recovered was improperly suppressed by the district court.

United States v. Brown, 328 F.3d 352 (7th Cir. 2003; No. 02-2214). In prosecution for drugs seized from the defendant's apartment, the Court of Appeals affirmed the defendant's conviction for possession of a controlled substance over his argument that the government failed to establish he possessed the drugs. Agents executing a state arrest warrant for the defendant entered his home, arrested him, and found drugs in the home. Apart from the drugs being present in the apartment, the government established no other connection between the defendant and the drugs. The Court of Appeals, however, noted that the government need not catch a defendant red-handed to satisfy the possession requirement. Rather, it only needs to demonstrate that the defendant constructively possessed drugs. To establish constructive possession, the government must establish a nexus between the accused and the contraband in order to distinguish the accused from a mere bystander. In the present case, the defendant's constructive possession was established by his substantial connection to the house. Specifically, the defendant lived at the residence where the drugs were found, was at the residence during the search, was the sole tenant in the apartment, and agents found his clothes, money, and other belongings in the apartment.

SENTENCING

United States v. Johnson, 342 F.3d 731 (7th Cir. 2003; No. 02-3663). In prosecution for distributing crack cocaine, the court of appeals affirmed the district court's sentence, which was based in large part on relevant conduct derived from the defendant's own statement. Specifically, after his arrest, the defendant made a statement that he dealt one ounce of crack every day for the preceding seven or eight months. This statement resulted in seven and a half years being added to the defendant's sentence as relevant conduct. On appeal, the defendant argued that the statement was unreliable. However, the court noted that self-incriminating statements such as the defendant's, which was clearly against penal interest, have long been considered reliable for use at trial and therefore obviously not too unreliable for use at sentencing.

United States v. Goode, 342 F.3d 741 (7th Cir. 2003; No. 00-2789). Upon consideration of a district court's denial of a petition in the district court seeking to excuse the defendant from paying interest on his fine because of financial hardship, the Court of Appeals affirmed the district court's denial and outlined the jurisdictional basis for making such a motion. Specifically, because the motion was made 29 months after the imposition of sentence, the Court of Appeals explored whether the district court had jurisdiction to consider the petition at all. The court first noted that Fed. R. Crim. P. 35(a) did not confer jurisdiction, for motion made under this rule must be made within seven days of sentencing. Additionally, § 2255 could not confer jurisdiction, for the defendant was not challenging his custody as required by the statute. Nevertheless, the court found jurisdiction through 18 U.S.C. § 3572(d), which allows a criminal defendant to seek relief from fines based on economic hardship. While noting that this statute requires a formal "notice" to the court regarding a material financial change and the defendant's petition was not captioned as such, the court found the defendant's submission sufficient to trigger subject matter jurisdiction.

United States v. Gunderson, ___ F.3d ___ (7th Cir. 2003; No. 01-1311). In prosecution for possessing child pornography, the

Court of Appeals rejected the defendant's challenge to a five-level enhancement for being involved in a "pattern of sexual abuse or exploitation of a minor," pursuant to U.S.S.G. § 2G2.2(b)(4). In applying this enhancement, the district court relied upon the defendant's prior state court conviction for having sex with his then 17-year-old girlfriend. On appeal, the defendant argued that under federal law, consensual sex is criminal only if it involves a minor under 16 (18 U.S.C. § 2243(a)). The court noted, however, that § 2G2.2 itself provides the relevant definition of the word "minor," which, for purposes of the guideline means an individual what had not attained the age of 18. Furthermore, the guideline reaches not only conduct that constitutes a violation of federal law, but also "similar offenses under state law." The defendant's conviction was a state law offense sufficiently similar to the federal crime of sexual abuse of a minor, and the defendant's sentence was therefore properly enhanced.

United States v. Griffith, ___ F.3d ___ (7th Cir. 2003; No. 03-1234). In prosecution for distributing child pornography, the Court of Appeals declined to answer whether the PROTECT Act's change to the standard of review the court uses to evaluate downward departures applies to cases pending on appeal when the Act was passed. The district court upwardly departed at sentencing, and the defendant appealed. The Court of Appeals noted that the Act changed the appellate standard of review from "abuse of discretion" to *de novo* when reviewing the bases for a departure from the Guidelines. The court did note, however, that the Act did not change the abuse of discretion standard of review applicable to the *degree* of a sentencing departure. Because the defendant's appeal was pending when the Act was passed, there was a question of whether the Act applied to the present case. The Court of Appeals, however, avoided answering this question, finding that the departure was appropriate under either standard of review.

United States v. Vasquez-Abarca, 334 F. 3d 587 (7th Cir. 2003; No. 02-1727). In prosecution for illegal re-entry, the Court of Appeals rejected the defendant's argument that his prior conviction for aggravated sexual abuse of a minor was not a "crime of violence," thereby subjecting him to a 16-level enhancement pursuant to U.S.S.G. § 2L1.2(b)(1)(A). Under Application Note 1(B)(ii), a "crime of violence" includes crimes that involve physical force, as well as certain enumerated offenses. Specifically, the Note provides that "crime of violence (I) means an offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another; and (II) includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including sexual abuse of a minor), robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling)." Despite sexual abuse of a minor being listed in section (II), the defendant argued that a prior conviction is a "crime of violence" only if the offense is specifically listed in section (II) *and* the offense involved force as set forth in paragraph (I). In rejecting this argument, the Court of Appeals noted that the defendant's reading ignored the word "includes" contained in section II. Under the defendant's interpretation, certain crimes enumerated under paragraph (II) that do not necessarily involve physical force would not qualify as "crimes of violence," effectively nullifying their inclusion in the commentary. Thus, the offenses listed in paragraph II do not require the prosecution to establish actual, attempted, or threatened use of force, for the precise reason that they are explicitly listed.

United States v. Brown, 333 F.3d 850 (7th Cir. 2003; No. 01-2613). In prosecution for distribution of child pornography, the defendant challenged a five-level enhancement for distribution of the images, pursuant to U.S.S.G. 2G2.2(b)(2). Specifically, Application Note 1 of § 2G2.2(b)(2) states that, with respect to the section, the term "distribution" "includes any act related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute." The defendant argued that in order to qualify as "distribution," an exchange must be made for pecuniary gain. Although the defendant traded pictures with other on-line users, the pictures were not exchanged for commercial purposes. The Court of Appeals, however, found that Application Note 1 recognized that pecuniary gain is a broad concept itself, and it does not exclude the possibility of swaps, barter, in-kind transactions, or other valuable consideration. To interpret the Note otherwise would "limit its application to cases involving an exchange of money and would miss a great deal of economic activity that takes place through trades, barter, and other transactions." The Court also noted that other circuits had gone beyond the holding in this case and found that *no* pecuniary gain of any kind is required by § 2G2.2(b)(2). However, the Seventh Circuit refused to go so far, noting only that the defendant's trading in this case constituted "distribution."

United States v. Lard, 327 F.3d 551 (7th Cir. 2003; No. 02-3092). In prosecution for various weapons related offenses, the Court of Appeals affirmed a sentence enhancement for reckless endangerment during flight pursuant to U.S.S.G. § 3C1.2. This adjustment is warranted where "the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer." To obtain the adjustment the government must show that the defendant did more than merely flee, the guideline requires "additional conduct" that creates a substantial risk of serious bodily injury. In the present case, the defendant, while fleeing, threw a weapon with one round in the chamber and the safety off into a briar patch. When an officer recovered the weapon, the round discharged. The Court of Appeals refused to find that the act of discarding the weapon into the briar patch warranted the enhancement, but did find that the fact that the weapon had a round in the chamber and the safety off was enough to justify the upward adjustment.

United States v. Boos, 329 F.3d 907 (7th Cir. 2003; No. 02-3006). In prosecution for weapons and drug related offenses, the Court of Appeals rejected the defendant's argument that the government was required to prove by clear and convincing evidence that he committed a murder before enhancing his sentence by 17 years for the conduct. Specifically, the government conducted a two-day hearing on a murder which it argued was relevant conduct to the defendant's offenses of conviction and argued that the murder cross-reference (U.S.S.G. § 2D1.1(d)(1)) should apply. On appeal, the defendant argued that although the preponderance of the evidence standard is ordinarily used for guideline enhancements, where an enhancement becomes the "tail that wags the dog," due process requires a higher clear and convincing evidence standard. The Court of Appeals noted that some other circuits required the higher standard, and the Seventh Circuit had suggested that such a standard could apply in certain cases (although the Court had never actually required the higher standard in any particular case). In the present case, the Court of Appeals avoided resolving the question, finding that under either standard, the evidence was sufficient to warrant the enhancement.

United States v. Gray, 332 F.3d 491 (7th Cir. 2003; No. 02-1216). In prosecution for assault of a drug enforcement officer in violation of 18 U.S.C. § 111, the Court of Appeals affirmed the defendant's sentence under the plain error standard of review, even though the defendant's sentence exceeded the statutory maximum to which he pleaded guilty. The defendant was charged in a three-count indictment for assaulting a DEA agent and two counts of possession of controlled substances. The indictment, however, did not specify which of § 111's two subsections the defendant was charged with violating. Subsection (a) provides a maximum penalty of 36 months for anyone that "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with an officer while engaged in the performance of official duties." Subsection (b) provides a maximum penalty of 120 months for anyone that in violating subsection (a) "uses a deadly weapon or inflicts bodily injury." Although both parties assumed that the defendant pleaded to subsection (b), the charge to which the defendant actually pleaded guilty did not allege the use of a deadly weapon or bodily injury. Thus, the Court assumed that the indictment charged the defendant with a violation of subsection (a) rather than subsection (b). Therefore, the 87 month sentence on Count one exceeded the 36-month statutory maximum sentence for a subsection (a) violation. Nevertheless, the Court of Appeals affirmed the defendant's sentence. Under the plain error standard, no reversal is warranted when the sentence imposed does not exceed the combined statutory maximum achievable by running the sentences consecutively. In the present case, the consecutive statutory maximum of the three counts for which he was convicted was 156 months. U.S.S.G. § 5G1.2(d) would have required that the sentences on these counts be run consecutively to achieve a sentence within the guideline range. Thus, even if the Court were to remand, the guidelines would require the exact same sentence. No plain error therefore occurred, for the fairness and integrity of the judicial proceedings was not affected by the improper sentence.

United States v. Smith, 332 F.3d 455 (7th Cir. 2003; No. 02-3481). In prosecution for theft of interstate freight in violation of 18 U.S.C. § 659, the Court of Appeals affirmed the district court's finding that the defendant's license as an over-the-road commercial truck driver was a special skill, warranting an enhancement under U.S.S.G. § 3B1.3. The defendant, rather than delivering a truck-load of toys, sold them off the back of the truck. At sentencing, the district court found that the defendant used his special skill as a truck driver to significantly facilitate the commission or concealment of his offense, thereby increasing his offense level by 2. The Court of Appeals affirmed, noting that an over-the-road commercially

employed truck driver is required to have a special operator's license. Members of the general public would have more than a little trouble successfully maneuvering a loaded eighteen-wheeler along roads and through parking lots. Moreover, the skill facilitated the crime, for it allowed the defendant access to the cargo even though be had several prior felonies. His skills also allowed him to drive the load away from its owner, disable the tracking device to conceal his whereabouts along the route, and pull off at selected stops to sell the toys he was hired to deliver.

SPECIFIC OFFENSES

United States v. Rawlings, 341 F.3d 657 (7th Cir. 2003; No. 02-4177). In prosecution for being a felon in possession and conspiracy to commit armed bank robbery, the Court of Appeals reversed the defendant's 922(g) conviction. The evidence at trial showed that the defendant drove his three coconspirators to an alley next to a bank, and parked and remained in the car while they robbed it. Just before leaving the car, two of the coconspirators drew and displayed their pistols, which the defendant saw, although he had no gun himself. During the subsequent police chase, the coconspirators threw their guns out the window. This was the extent of the government's evidence, and the jury was not given an instruction on the meaning of possession. The Court of Appeals noted that in a case such as this, the defendant's possession could only be constructive, and he must therefore have some dominion and control over the pistols. Here, although the defendant was the driver of the car and a conspirator in the bank robbery, he was not the leader of the conspiracy and did not supply the guns. He therefore did not have the requisite level of control for constructive possession. Moreover, a *Pinkerton* theory of liability was inapplicable, for *Pinkerton* ascribes the *crimes* of coconspirators to each other, not a conspirator's *acts* that when combined with the acts of another conspirator might add up to a crime. This would be obvious if the defendant's coconspirators had been charged with being felons in possession on the basis of *their* possession and *the defendant's* felony record. Accordingly, because the government failed to show the requisite level of control, the court reversed the 922(g) conviction for insufficiency of the evidence.

United States v. Howze, ___ F.3d ___ (7th Cir. 2003; No. 03-1119). In prosecution for possession of a weapon by a felon, the Court of Appeals held that the defendant's prior convictions for theft from a person and fleeing an officer were predicate offenses for purposes of the Armed Career Criminal Act. First, because fleeing an officer does not have as an element the use of force, the court evaluated the offense to determine whether it presented a "serious potential risk" of physical injury. The court analogized the offense to escape, and concluded that fleeing an officer categorically involves a serious potential risk of physical injury and is therefore a predicate offense. Applying the same analysis to theft from a person, the court concluded that there always exists a risk that violence will erupt between the offender their and victim, and thus this offense constitutes a crime of violence as well.

United States v. Richeson, 338 F.3d 653 (7th Cir. 2003; No. 02-3896). In prosecution for conspiring to use interstate commerce in the commission of a murder for hire, in violation of 18 U.S.C. § 1958(a), the Court of Appeals rejected the defendant's argument that the evidence to convict him was insufficient because (1) the evidence did not establish he provided consideration for the murders-for-hire; and (2) he made only intrastate phone calls to plan the murders. The federal murder-for-hire statute requires the government to prove that the accused intended for a murder to be committed "as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value." Although the Seventh Circuit had never before defined "consideration" in this context, it concluded that consideration retains its contract law meaning of a bargained-for exchange of something of value. The statute contemplates a quid-pro-quo between the solicitor and the murderer. In the present case, the defendant promised to buy the murder weapons and allow the murderers to keep the weapons after the crime. Moreover, he discussed partnering up on future crimes which would provide the murderers with cash profits. According to the court, this fell within the traditional contract meaning of "consideration." Regarding the interstate commerce element, the statute requires that the defendant use "any facility in intrastate or foreign commerce" with intent that a murder be committed. Because he made only intrastate telephone calls to plan the murders, the defendant argued that he could not be found guilty of using a facility in interstate commerce. Considering this question for the first time, the Court concluded that the plain language of the murder-for-hire statute requires that the facility, and not its use, be in interstate commerce. Thus, although the defendant only used the phone lines for intrastate purposes, the phone lines were undeniably "in"

interstate commerce, and the evidence on this element was sufficient.

United States v. Jefferson, 334 F.3d 670 (7th Cir. 2003; No. 3506). In prosecution for knowingly delivering a firearm to a felon in violation of 18 U.S.C. § 922(d), the Court of Appeals considered the breadth of the offense conduct. The defendant gave a handgun to his brother, a convicted felon, for safekeeping while he was out of town. For this conduct, he was prosecuted under the above-cited statute, which provides that it is "unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing that such person" is a felon. The defendant argued that the temporary transfer of a gun for safekeeping is not encompassed by the extent of the statutory language. The Court of Appeals, however, disagreed, finding that the legislative history of the statute indicated that Congress wanted to broaden the reach of the gun control statute to cover a wider range of firearm transfers. Given the potential breadth of the word "disposal," the Court concluded that Congress must have been aware that non-dealers may be equally likely to engage in gratuitous, temporary transfers as to engage in permanent, commercial transfers, and must have found both types of transfers potentially dangerous and undesirable. Thus, the Court concluded that the defendant was properly convicted under the statute.

United States v. Veysey, 334 F.3d 600 (7th Cir. 2003; No. 01-4208). In prosecution for federal arson, the Court of appeals rejected the defendant's argument that his burning of a rental property did not affect interstate commerce as required by 18 U.S.C. § 844(i). Supreme Court precedent makes clear that owner-occupied homes are not within the reach of the federal arson statute, while arson of an apartment building consisting of rental units is within the statute's reach. The present case presented an intermediate set of facts, where a home owner not in the business of renting apartments leased his home to the defendant with an option to buy. As the court characterized it, the building owner was an "accidental renter." The court, however, concluded that the property was in interstate commerce, for to decide the case differently would imply a need to inquire in every case into the motives for renting, and the inquiring would complicate decision making without offsetting gain. Thus, the Court repeated that the real estate rental market really is an interstate market and the rental in the present case was an interstate transaction. *See also Martin v. United States*, ___ F.3d (7th Cir. 2003; No. 02-3428).

United States v. Synowiec, 333 F.3d 786 (7th Cir. 2003; No. 03-1169). In prosecution for bribing an Immigration agent in violation of 18 U.S.C. § 201(b), the Court of Appeals rejected the defendant's argument that he did not "offer" a bribe to the official because, on the date set forth in the indictment, he did not discuss or agree to an actual price during his conversation with the agent. The Court of Appeals noted, however, that it is sufficient under the statute if a defendant expresses an ability and a desire to pay the bribe. This can be done in the often clandestine atmosphere of corruption with a simple wink and a nod if the surrounding circumstances make it clear that something of value will pass to a public official if he takes improper, or withholds proper, action. Under the facts of this case, there was clear evidence that the defendant was in fact offering a bribe, and the Court therefore affirmed his conviction.

United States v. Fassnacht, 332 F.3d 440 (7th Cir. 2003; No. 02-3059). In prosecution for obstruction of justice in violation of 18 U.S.C. § 1503, the Court of Appeals rejected the defendants' sufficiency of the evidence argument. To prove an the obstruction of justice charge, the government must show that there was a pending judicial proceeding, that the defendant was aware of that proceeding, and that the defendant corruptly intended to impede the administration of that judicial proceeding. The defendants argued that the government offered evidence which showed that, while the defendants were aware of a grand jury proceeding related to their case, they only acted with an intent to mislead the IRS investigation, not the grand jury proceeding itself. The Court noted that the Supreme Court in *United States v. Aguilar*, 515 U.S. 593 (1995), doubted that uttering false statements to an investigating agent who might or might not testify before a grand jury is sufficient to make out a violation of § 1503. If an accused makes a false statement to an investigating agent without the knowledge that the agent will forward that information to the grand jury, it is far more speculative whether the false statement will have the natural and probable effect of obstructing justice, such that it is insufficient to support a conviction under § 1503. Nevertheless, in the present case, the Court of Appeals concluded that there was sufficient evidence presented for the jury to have rationally concluded that the defendants were aware of the grand jury investigation into their tax returns and that they understood that the IRS agents were "integrally

involved" in that grand jury investigation or, at the least, that the IRS agents would provide to the grand jury the information they garnered from the defendants during their investigation. Thus, the Court of Appeals affirmed their convictions.

Recently Noted Circuit Conflicts

Compiled by: Kent V. Anderson
Senior Staff Attorney

Fourth Amendment - Airport Searches

United States v. *$242,484.00*, 2003 U.S. App. LEXIS 13273 (11th Cir. Jun. 30, 2003).

In this now unpublished case, the Eleventh Circuit noted that "at least one Circuit has said that the use of Airport Security screeners to check for drugs and money and to report those items to law enforcement exceeds the permissible bounds of the security search and that all fruits of the screeners' search must be suppressed. See *United States* v. *$124,570.00*, 873 F.2d 1240, 1247-48 (9th Cir. 1989)"; *United States* v. *$191,910.00*, 16 F.3d 1051, 1058 fn. 15 (9th Cir. 1994). "[b]ut see *United States* v. *$557,933.89*, 287 F.3d 66, 81-82 (2d Cir. 2002) (`As long as the scope of that initial search comported with the Fourth Amendment -- i.e., was no more intrusive than necessary to accomplish its purpose of detecting weapons or explosives -- then it is of no constitutional moment that the object found was not what was sought.').

Sixth Amendment - Right to Jury Trial

Apprendi

United States v. *Jones*, 332 F.3d 688 (3rd Cir. 2003).

The Third Circuit held that juvenile priors come under the prior conviction exception to *Apprendi*, even though juveniles do not have the right to a jury trial. The Court's holding added to a circuit split by disagreeing with the Ninth Circuit's decision in *United States* v *Tighe*, 266 F.3d 1187, 1193 (9th Cir. 2001) and agreeing with the Eighth Circuit's decision in *United States* v. *Smalley*, 294 F.3d 1030 (8th Cir. 2002). No other circuit has ruled on the issue.

Summerlin v. *Stewart*, 341 F.3d 1082 (9th Cir. 2003).

In an 8-3 en banc decision, the Ninth Circuit reversed an Arizona death sentence pursuant to *Ring* v. *Arizona*, 536 U.S. 584 (2002). This decision had the effect of reversing all death sentences in all pre-AEDPA cases in Arizona, Montana, and Idaho.

The Court held that *Ring* established a new rule of substantive law, at least with respect to Arizona. Therefore, retroactive application of the decision was not barred by *Teague* v. *Lane*, 489 U.S. 288 (1989). In the alternative, the Court held that *Ring* fell under the *Teague* exception for watershed rules of criminal procedure. Unfortunately, the AEDPA standard is even more restrictive than *Teague*. So, the Court's decision does not cover cases in which the federal habeas petitions were filed on or after April 21, 1996.

The Ninth Circuit's decision conflicts with decisions from the Tenth and Eleventh Circuits. *Cannon v. Mullin*, 297 F.3d 989, 994 (10th Cir. 2002); *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003). Of course, the Supreme Court will probably have the final word.

Sixth Amendment - Venue

United States v. *Pearson*, 340 F.3d 459 (7th Cir. 2003).

The Seventh Circuit noted that in *United States v. Pace*, 314 F.3d 344, 350 (9th Cir. 2002), the Ninth Circuit held that venue for a wire fraud offense may only "lie where there is a direct or causal connection to the . . . wires." This differs from the Seventh Circuit's approach to venue which says that venue is proper in any district in which an act was intended to have an effect. See: *United States v. Ringer*, 300 F.3d 788, 792 (7th Cir. 2002); *United States v. Ochoa*, 229 F.3d 631, 636 (7th Cir. 2000); *United States v. Frederick*, 835 F.2d 1211, 1212 (7th Cir. 1987).

The D.C. Circuit agrees with the Ninth Circuit that venue is only proper in the district in which an act was committed. See *United States* v. *White*, 887 F.3d 267 (D.C. Cir. 1989) (holding that venue for bribery was only proper in the district in which it took place not where only the effects of the bribery are felt.)

Eighth Amendment - Death Penalty

Banks v. *Horn*, 316 F.3d 228 (3rd Cir. 2003)

In my last column, I noted that after remand from the Supreme Court, the Third Circuit held that *Mills* v. *Maryland*, 486 U.S. 367 (1988), applies retroactively because it did not announce a new rule of constitutional law. In *Mills*, the Supreme Court reversed a death sentence where there was a substantial probability that a reasonable jury could have

understood the sentencing instructions and forms to prohibit the consideration of mitigating factors that it did not unanimously agree on.

The Third Circuit's decision agrees with the Sixth Circuit's holding in *Gall* v. *Parker*, 231 F.3d 265, 323 (6th Cir. 2000). The Court distinguished the Eighth Circuit's contrary holding in *Miller* v. *Lockhart*, 65 F.3d 676 (8th Cir. 1995), because Miller's conviction became final much earlier than Banks' conviction did. The Court also disagreed with holdings of the Fifth Circuit. See *Woods* v. *Johnson*, 75 F.3d 1017, 1036 (5th Cir. 1996); *Nethery* v. *Collins*, 993 F.2d 1154, 1161-62 (5th Cir. 1993); *Wilcher* v. *Hargett*, 978 F.2d 872, 877-78 (5th Cir. 1992); *Cordova* v. *Collins*, 953 F.2d 167, 173 (5th Cir. 1992).

On September 30, 2003, the Supreme Court granted certiorari in *Banks*.

Evidence

United States v. *Chase*, 340 F.3d 978 (9th Cir. 2003).

In an 8-3 en banc decision, the Ninth Circuit held that there is no dangerous patient exception to the psychotherapist-patient privilege. That does not mean that a psychotherapist can not tell authorities about suspected imminent harm by a patient, but it does mean that such communications can not be introduced as evidence in court. The Court's holding agreed with the Sixth Circuit's holding in *United States v. Hayes*, 227 F.3d 578, 583 (6th Cir. 2000) and disagreed with the Tenth Circuit's holding in *United States v. Glass*, 133 F.3d 1356, 1360 (10th Cir. 1998). No other circuit has considered the issue.

Offenses

18 U.S.C. §922(g)(1)

United States v. *Gayle*, 3__ F.3d ___, 2003 U.S. App. LEXIS 17900 (2d. Cir. Aug. 27, 2003, amended Sept. 15, 2003 and Sept. 18, 2003).

The Second Circuit furthered a circuit split by holding that a person can not be guilty of being a felon in possession of a firearm, under 18 U.S.C. §922(g), based on a prior conviction in a foreign court. The Court agreed with the Tenth Circuit on this point. *United States v. Concha*, 233 F.3d 1249, 1253–56 (10th Cir. 2000). It disagreed with the Third, Fourth, and Sixth Circuits. *United States v. Small*, 333 F.3d 425, 427–28 (3d Cir. 2003); *United States v. Atkins*, 872 F.2d 94, 96 (4th Cir. 1989); *United States v. Winson*, 793 F.2d 754, 757–59 (6th Cir. 1986). The other circuits have not decided the issue.

Transfer of Juvenile to Adult Status

United States v. *Juvenile Male*, 336 F.3d 1107 (9th Cir. 2003.)

After reversing a district court on other grounds, the Ninth Circuit declined to address the question of whether the district court should have considered the juvenile's prior unadjudicated arrests when deciding whether to transfer him to adult status. Instead, the Court of Appeals gave the district court a chance to consider the issue first, in the context of the juvenile's overall record. However, the Court did note that there is a circuit split on the issue. The Seventh and Tenth Circuits "have held that `record,' as used in [18 U.S.C.] §5032, includes both arrests and convictions. See *United States* v. *Wilson*, 149 F.3d 610, 613 (7th Cir. 1998); cf. *United States* v. *Anthony Y.*, 172 F.3d 1249, 1253 (10th Cir. 1999) (permitting unadjudicated offenses to be considered under other statutory factors). The 8th and D.C. Circuits have reached the opposite conclusion. See *United States* v. *LWO*, 160 F.3d 1179, 1184 (8th Cir. 1998); *In Re: Sealed Case*, 893 F.2d 363, 369 (D.C. Cir. 1990).

Sentencing

U.S.S.G. §2B1.1(b)(1)

United States v. *Machado*, 333 F.3d 1225 (11th Cir. 2003).

The Eleventh Circuit held that loss amount in a theft case should be measured by the value to the person from whom the goods were stolen. In this case that meant that the district court should have used the wholesale value, rather than the retail value. In so holding the Court agreed with decisions from the First, Sixth, Ninth and Tenth Circuits. *United States* v. *Carrington*, 96 F.3d 1, 6 (1st Cir. 1996); *United States* v. *Warshawsky*, 20 F.3d 204, 213 (6th Cir. 1994); *United States* v. *Hardy*, 289 F.3d 608, 613-14 (9th Cir. 2002); *United States* v. *Williams*, 50 F.3d 863, 864 (10th Cir. 1995). The Court disagreed with cases from the Fifth and Eighth Circuits. *United States* v. *Watson*, 966 F.2d 161, 163 (5th Cir. 1992); *United States* v. *Russell*, 913 F.2d 1288, 1292-93 (8th Cir. 1990). The Seventh Circuit has apparently not ruled on this issue.

U.S.S.G. §2K2.1(b)(5)

United States v. *Blount*, 337 F.3d 404 (4th Cir. 2003).

The 4th Circuit held that the §2K2.1(b)(5) enhancement for possession of a gun in connection with another felony offense did not apply to a defendant who stole guns during a burglary. However,

the Court furthered a circuit split by holding that it could apply in the right case. The Third, Sixth, and Seventh Circuits have held that the same conduct can not be used to support both the base offense level and the enhancement. *United States* v. *Fenton*, 309 F.3d 825 (3rd Cir. 2002); *United States* v. *McDonald*, 165 F.3d 1032, 1037 (6th Cir. 1999) (relying on *United States* v. *Sanders*, 162 F.3d 396, 399-401 (6th Cir. 1998); *United States* v. *Szakacs*, 212 F.3d 344, 348-52 (7th Cir. 2000). However, the Fifth and Eighth Circuits have come to the opposite conclusion. See *United States* v. *Luna*, 165 F.3d 316, 323 (5th Cir. 1999) (upholding the application of the enhancement when a convicted felon was prosecuted in federal court for possession of firearms which were obtained through a burglary); *United States* v. *Kenney*, 283 F.3d 934, 938 (8th Cir. 2002) (holding that the Sentencing Commission intended to allow both the 2K2.1(b)(4) stolen firearms, and (b)(5) enhancements to apply to the same conduct).

In this case, the Court held that the enhancement did not apply because there was no evidence that the defendant used or intended to use the guns he stole to further the burglary

U.S.S.G. §3E1.1

United States v. *Miller*, 3__ F.3d ___, 2003 U.S. App. LEXIS 18490 (7th Cir. Sep. 8, 2003).

In this case, the Seventh Circuit noted a circuit split on the issue of acceptance of responsibility. The Ninth Circuit has said that what a defendant says about his motivation for committing the crime can not be used to deny acceptance, unless the motivation would lessen his criminal responsibility or affect his sentence. *United States v. Gonzalez*, 16 F.3d 985, 991 (9th Cir. 1993). The Sixth Circuit held that a court can base a denial of an acceptance adjustment on a defendant's professed motivation for committing the crime even if it would not otherwise affect his punishment. *United States v.Greene*, 71 F.3d 232, 235 (6th Cir. 1995). Unfortunately, in *Miller*, the Seventh Circuit explicitly agreed with the Sixth Circuit. It had implicitly done so before.

Departures

United States v. *Joaquin*, 326 F.3d 1287 (D.C. Cir. 2003).

In a 2-1 decision, the D.C. Circuit held that a district court may not consider prior arrests when deciding whether to depart downward for under-representation of criminal history. The Court held that by doing so the district court committed plain error. The Court disagreed with the Second Circuit's decision in *United States* v. *Miller*, 263 F.3d 1, 4-5 (2d Cir. 2001) (*per curiam*), that consideration of prior arrests was not plain error. The Seventh Circuit does not appear to have decided this issue.

United States v. *Greger*, 339 F.3d 666 (8th Cir. 2003).

The 8th Circuit held that a "district court has the authority to depart downward under U.S.S.G. §4A1.3 both horizontally in criminal history category and vertically in offense level from [a defendant's] sentencing guideline range, which was enhanced under §4B1.1 due to his career offender status. Any downward departure in offense level should not result in a lower offense level than was designated before the career offender adjustment," unless there are other grounds for departure. The Court's holding agreed with that of eight other circuits. See, e.g., *United States* v. *Lindia*, 82 F.3d 1154, 1165 (1st Cir. 1996) (referring to a departure from the "career offender category"); *United States* v. *Rivers*, 50 F.3d 1126, 1130 (2d Cir. 1995) (stating that criminal history category, offense level, or both may be reduced in a career offender situation); *United States* v. *Shoupe*, 35 F.3d 835, 838 (3d Cir. 1994) (stating that in the career offender context, a §4A1.3 downward departure is not limited to the criminal history category, but is also permitted in the offense level); *United States* v. *Adkins*, 937 F.2d 947, 952 (4th Cir. 1991) (allowing for a downward departure from "career offender status"); *United States* v. *Fletcher*, 15 F.3d 553, 557 (6th Cir. 1994) (affirming a § 4A1.3 downward departure in criminal history category and offense level); *United States* v. *Reyes*, 8 F.3d 1379, 1388-89 (9th Cir. 1993) (stating that, in a career offender context, §4A1.3 does not preclude a downward departure from the base offense level); *United States* v. *Bowser*, 941 F.2d 1019, 1026 (10th Cir. 1991)(affirming a sentence in the guideline range computed before the application of §4B1.1, acknowledging that the career offender "jump" was initially made in a single "step"); *United States* v. *Clark*, 8 F.3d 839, 846 (D.C. Cir. 1993)(stating that the district court properly exercised its discretion in sentencing the defendant within the original guideline range that applied before the career offender enhancement). The only circuit that has disagreed and held that a departure can only be made along the criminal history axis is the Eleventh Circuit. *United States* v. *Smith*, 289 F.3d 696, 711 (11th Cir. 2002). The Seventh Circuit has not yet ruled on this issue.

Federal Rule of Criminal Procedure 35(c).

United States v. *De La Torre*, 327 F.3d 605 (7th Cir. 2003).

As noted in this case, the Seventh Circuit interprets Rule 35(c) to require the filing of a motion for resentencing within seven days after the order of judgment and commitment is issued. However, other circuits interpret Rule 35(c) to require that the motion be filed within seven days of the oral imposition of sentence. See *e.g.*, *United States* v. *Morrison*, 204 F.3d 1091, 1093 (11th Cir. 2000); *United States* v. *Aguirre*, 214 F.3d 1122, 1125-26 (9th Cir. 2000); *United States* v. *Gonzalez*, 163 F.3d 255, 264 (5th Cir. 1998); *United States* v. *Layman*, 116 F.3d 105, 108 (4th Cir. 1997); *United States* v. *Abreu-Cabrera*, 64 F.3d 67, 73 (2d Cir. 1995); *United States* v. *Townsend*, 33 F.3d 1230, 1231 (10th Cir. 1994); but see *United States* v. *Morillo*, 8 F.3d 864, 869 n.8 (1st Cir. 1993) (entry of judgment controls); *cf.* Andrew P. Rittenberg, Comment, *"Imposing" A Sentence Under Rule 35(c)*, 65 U. CHI. L. REV. 285 (1998) (collecting cases).

Supervised Release Revocation

United States v. *Russell*, 340 F.3d 450 (7th Cir. 2003).

The Seventh Circuit held that, under the old law, a court could not revoke a term of supervised release and sentence a defendant to a combination of a term of imprisonment and a new term of supervised release that exceeds the original term of supervised release. The Court disagreed with the Sixth Circuit's contrary holding in *United States v. Marlow*, 278 F.3d 581 (6th Cir. 2002).

Habeas Procedure

United States v. *Gadsen*, 332 F.3d 224 (4th Cir. 2003.)

The Fourth Circuit held that a petitioner timely filed his 28 U.S.C. §2255 petition for relief from his sentence as a career offender when he filed it within one year of the date that the state courts finally invalidated his predicate sentence. The Court disagreed with the First Circuit's holding in *Brackett* v. *United States*, 270 F.3d 60, 68 (1st Cir. 2001), that "the operative date under §2255(4), is not the date the state conviction was vacated, but rather the date on which the defendant learned, or with due diligence should have learned, the facts supporting his claim to vacate the state conviction." No other circuit has yet decided this issue.

Supreme Court Update October 2002 Term

Compiled by:

Johanna Christiansen

Staff Attorney

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

***Foster v. Florida*, 123 S. Ct. 470 (October 21, 2002) (Justice Breyer dissenting from the denial of certiorari; Justice Thomas, concurring in the denial of certiorari; and Justice Stevens, statement respecting the denial of certiorari).**

Justice Breyer dissented from the denial of certiorari and argues Charles Foster's 27 year wait on death row, prolonged repeatedly by the State's procedural errors, constitutes cruel and unusual punishment. Justice Thomas disagreed and states that Foster could have "long ago ended his anxieties and uncertainties by submitting to what the people of Florida have deemed him to deserve: execution." Justice Stevens, in response to Justice Thomas, stated that the denial of a petition for a writ of certiorari does not constitute a ruling on the merits.

***In re Stanford*, 123 S. Ct. 472 (October 21, 2002) (Justice Stevens, dissenting from denial of writ of habeas corpus).**

Justices Stevens, Souter, Ginsburg, and Breyer dissent from the denial of writ of habeas corpus asking the Court to hold the execution of offenders who were juveniles at the time of the offense unconstitutional. Justice Stevens noted the reasons supporting the holding in *Atkins v. Virginia* (holding execution of mentally retarded persons unconstitutional) apply with equal or greater force to the execution of juvenile offenders.

***Woodford v. Visciotti*, 537 U.S. 19 (November 4, 2002) (Per Curiam).**

The Supreme Court reversed the Court of Appeals' affirmance of the district court's grant of habeas corpus. Visciotti was convicted of murder and sentenced to death, however defense counsel presented little mitigating evidence in the sentencing phase. On appeal, the state supreme court assumed counsel had provided ineffective assistance but concluded Visciotti had not been prejudiced by counsel's failures. The Court of Appeals determined the state court had incorrectly applied *Strickland v. Washington*. The Supreme Court held the state appropriately applied *Strickland* and that the Court of Appeals erred by substituting its judgment for that of the state supreme court. The appropriate standard of review is whether the state court *unreasonably* applied federal law not whether it *incorrectly* applied federal law.

***Early v. Packer*, 537 U.S. 3 (November 4, 2002) (Per Curiam).**

William Packer was tried in state court for several crimes, including murder. After 28 hours of deliberation, one juror informed the judge she felt she could no longer deliberate. The judge asked her to try a little longer, which she did. The foreperson then sent a note to the judge stating the jury was unable to reach a verdict. The judge again sent the jury back to deliberate longer. Packer was ultimately convicted and appealed to the state court of appeals. The state courts held that the judge's actions were not improper and were not coercive. The Court of Appeals, however, held that the state court's decision was contrary to clearly established federal law because it: (1) failed to cite any federal law; (2) failed to apply the totality of the circumstances test required by *Lowenfield v. Phelps*, 484 U.S. 231 (1988); and (3) failed to follow *Jenkins v. United States*, 380 U.S. 445 (1964), which prohibits the judge from pressing the jurors to arrive at a verdict. The Supreme Court held that the Court of Appeals mistakenly applied 28 U.S.C. § 2254(d)'s requirement that decisions which are not contrary to clearly established law can be subjected to habeas relief only if they are an *unreasonable* application of federal law (not merely an erroneous application).

***Abdur'rahman v. Bell*, 537 U.S. 88 (December 10, 2002) (Justice Stevens dissenting from the dismissal of writ of certiorari).**

Justice Stevens disagrees with the Court's decision to dismiss the writ and writes that the Court should consider whether Federal Rule of Civil Procedure 60(b) is available to habeas corpus petitioners to challenge the integrity of final orders entered in habeas corpus proceedings. Justice Stevens argues that Rule 60(b) motions are available to habeas petitioners and would not constitute a second or successive habeas corpus application where the motion sought relief from a final order entered by the district court in the habeas proceeding rather than a challenge to the state court conviction.

***United States v. Bean*, 537 U.S. 71 (December 10, 2002) (Justice Thomas)**.

After being convicted in Mexico of importing ammunition, Thomas Bean petitioned the ATF for relief from his inability to possess firearms pursuant to 18 U.S.C. § 925(c). The ATF returned his application unprocessed because an appropriations bar prevented it from expending any funds to investigate or act upon such applications. Bean then petitioned the district court for relief, which it granted. The Court of Appeals affirmed. The Supreme Court reversed holding the district court lacked jurisdiction to consider the matter because the absence of an actual denial of Bean's petition by the ATF (rather than a refusal to consider) precludes judicial review under § 925(c).

***Sattazahn v. Pennsylvania*, 537 U.S. 101 (January 14, 2003) (Justice Scalia).**

In a 5-4 decision, the Supreme Court held that a state may seek the death penalty against a defendant in a second trial even after a life sentence was imposed in a first trial as a result of a hung jury in the penalty phase. In this case, the defendant was tried and convicted of murder. The jury hung 9-3 in favor of life. The defendant then asked the judge to declare a hung jury and impose a life sentence, which Pennsylvania law requires when the jury can not reach a verdict. The defendant then appealed his conviction and won. The state sought to impose the death sentence against the defendant again in the second trial and bolstered its case with additional evidence. This time, it convinced a jury to let it do so. Defendant appealed his death sentence, arguing that it violated the Double Jeopardy Clause. The Pennsylvania Supreme Court disagreed. The Supreme Court affirmed this decision. The Court held that it would have been different if the jury had unanimously agreed on a life sentence, but a hung jury did not trigger Double Jeopardy protection, regardless of any statutory mandate to impose a life sentence in such a case.

***United States v. Recio*, 537 U.S. 270 (January 21, 2003) (Justice Breyer).**

The Ninth Circuit held that a conspiracy terminates when there is affirmative evidence of defeat of the object of the conspiracy; for example, when the government intervenes, making the conspiracy's goals impossible to achieve. Under this rule, a defendant could not be convicted unless the government was able to show he joined the conspiracy before the government's intervention which caused the defeat of the purpose of the conspiracy. The Supreme Court held this rule was incorrect. In the present case, police officer stopped a truck carrying illegal drugs and persuaded the driver cooperate in a sting against his codefendents. The driver paged someone to come and pick up the truck and drugs. The defendants arrived and drove the truck away. The police stopped the truck and arrested everyone. The defendants were convicted by a

jury and subsequently appealed. The Ninth Circuit reversed their convictions based on the above rule. The Supreme Court held the Ninth Circuit's rule was incorrect for two reasons. First, the rule is inconsistent with basic conspiracy law. A conspiracy is "an agreement to commit an unlawful act" which may exist and be punished whether or not the substantive crime occurs. The conspiracy itself poses a threat to the public independent of the threat if the crime is actually committed. Second, the Court noted that the Ninth Circuit is the only circuit to uphold such a rule. No other circuit has followed the Ninth Circuit's rule, and three have specifically rejected it (the First, Second, and Seventh Circuits). Although Justice Stevens concurred in the Court's opinion, but dissented based on a procedural error. He believed the government had waived its right to challenge the Ninth Circuit's rule because it had not objected to that error until its petition for rehearing *en banc* in the Court of Appeals. He noted, "The prosecutor, like the defendant, should be required to turn square corners."

***Miller-El v. Cockrell,* 537 U.S. 322 (February 25, 2003) (Justice Kennedy).**

During Miller-El's state trial for capital murder in 1986, two Dallas County (Texas) assistant district attorneys used peremptory strikes to exclude 10 of the 11 African-Americans eligible to serve on the jury. Miller-El appealed his conviction, arguing the prosecution's tactics violated *Batson v. Kentucky.* After exhausting his state court remedies, Miller-El filed a federal petition for writ of habeas corpus. The district court denied the petition and Miller-El appealed to the Fifth Circuit, which denied a certificate of appealability ("COA") concluding "the state court's findings are not unreasonable and that Miller-El has failed to present clear and convincing evidence to the contrary." The Fifth Circuit also determined that "the state court's adjudication neither resulted in a decision that was unreasonable in light of the evidence presented nor resulted in a decision contrary to clearly established federal law." The Supreme Court held that the Fifth Circuit had used the wrong standard for evaluating the request for a COA and remanded the case to the Court of Appeals with instructions to grant the COA. In so holding, the Supreme Court considered the evidence presented by Miller-El in support of his *Batson* claim. The Court noted that, although a court of appeals' evaluation of a case for eligibility for a COA is not an adjudication on the merits, it may be necessary to consider the facts raised by the petitioner to determine whether there was a "substantial showing of the denial of a constitutional right" and whether "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." In Miller-El's case, he was able to show that: (1) 91% of eligible black jurors were removed by peremptory strikes, while only 13% of non-black jurors were; (2) the prosecutors questioned prospective black jurors differently about their willingness to impose the death penalty; (3) the prosecutors informed black jurors less frequently about imposition of the minimum sentence; (4) the prosecutors engaged in "jury shuffling," a practice common in Texas at the time; and (5) the Dallas County State's attorney office had practices and policies in place at the time of the conviction designed to ensure fewer blacks were placed on juries. In addition, the Court analyzed all three prongs of the *Batson* rule. Looking at all of this evidence, the Supreme Court held that there was a debatable issue regarding Miller-El's *Batson* challenge significant enough to warrant a COA.

***Scheidler v. National Organization of Women,* 537 U.S. 393 (February 26, 2003) (Chief Justice Rehnquist).**

NOW sued various members of Operation Rescue and other anti-abortion groups alleging they had committed various acts of racketeering activity, including extortion, under the Hobbs Act, 18 U.S.C. §1951. NOW claimed the anti-abortion activists committed extortion by using or threatening to use force, violence, or fear to cause individuals to give up intangible property rights, namely "a woman's right to seek medical services from a clinic, the right of doctors, nurses, or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion, and fear." The Seventh Circuit held that these acts constituted extortion as defined by the Hobbs Act. The Supreme Court disagreed. In so holding, the Court stated that the language of the Hobbs Act requires both the deprivation and the acquisition of another's property. The activists' actions may have deprived or sought to deprive individuals of certain property interests; but they did not obtain any of their property through their actions. The Court based this holding on the distinction between the crimes of extortion and of coercion. While extortion constitutes a violation of the Hobbs Act, coercion does not. Congress's deliberate exclusion of coercion from the Hobbs Act indicates it did not intend the crime of extortion to encompass actions constituting mere coercion. Because the activists did not commit the crime of extortion, those claims were fatally flawed

and must be dismissed.

***Clay v. United States,* 537 U.S. 522 (March 4, 2003) (Justice Ginsburg).**

The Supreme Court resolved a circuit split in this case by adopted the majority view that a federal prisoner's conviction becomes final on the date when the time for filing a petition for certiorari expires. In this appeal from the Seventh Circuit, the Supreme Court rejected the lower court's adherence to the minority view that a defendant's conviction becomes final on the date that the Court of Appeals issues the mandate if the defendant does not file a petition for certiorari with the Supreme Court. The Court rejected arguments to the contrary stating that language from both statutory and case law supported the majority view.

***Ewing v. California,* 538 U.S. ___, 123 S. Ct. 1179 (March 5, 2003) (Justice O'Connor).**

In this plurality opinion, the Supreme Court held that Ewing's life sentence imposed pursuant to California's "Three Strikes" legislation was not grossly disproportionate and does not violate the Eighth Amendment's ban on cruel and unusual punishment. The Court noted that the Eighth Amendment does not require strict proportionality between the crime and the sentence but forbids extreme sentences that are grossly disproportionate to the crime. In determining whether a sentence is grossly disproportionate, courts must look at the gravity of the offense, the harshness of the penalty, and the criminal history of the offender. The Court also noted states have a legitimate interest in incapacitating and deterring recidivist offenders. The split among the justices causing a plurality opinion was based on the use of the "proportionality" analysis when evaluating Eighth Amendment Claims. In his concurring opinion, Justice Scalia agreed with the Court's result, but argued the proportionality standard cannot be applied intelligently. Justice Thomas also concurred in the result but believes the Eighth Amendment does not contain a proportionality principle.

***Connecticut Dept. of Public Safety v. Doe,* 538 U.S. ___, 123 S. Ct. 1160 (March 5, 2003) (Chief Justice Rehnquist).**

Doe raised a challenge to Connecticut's sex offender registry, also called Megan's Law, which required all persons convicted of criminal offenses against minors, violent and nonviolent sexual offenses, and felonies committed for a sexual purpose to register their name and address with the state. Doe, a convicted sex offender, challenged the law based on procedural due process, claiming he had not been given a hearing to determine whether he currently posed a danger to the community. The Second Circuit upheld the district court's permanent injunction against the state and the Supreme Court reversed. The Court reasoned that because Connecticut's registration requirement was based solely on the fact of a previous conviction, not current dangerousness, there was no procedural due process deprivation. A claimant is not entitled to a hearing to establish a fact (current dangerousness) that is not a factor in the statutory scheme. Because Doe did not raise a substantive due process claim, the Court declined to specifically address whether Connecticut's sex offender registration statute violates substantive due process principles.

***Lockyer v. Andrade,* 538 U.S. ___, 123 S. Ct. 1166 (March 5, 2003) (Justice O'Connor).**

In another case challenging California's "Three Strikes" law, the Supreme Court concluded the law was not contrary to or an unreasonable application of the Court's clearly established Eighth Amendment precedent within the meaning of AEDPA. Andrade received consecutive sentences totaling 50 years to life after his conviction for two counts of felony theft for video tapes valued at less that $200. The Court first decided what the clearly established law was in its Eighth Amendment jurisprudence and reaffirmed the "grossly disproportionate" rule as stated in this term's *Ewing v. California.* The Court next found fault with the Ninth Circuit's analysis of the "unreasonable application" clause of AEDPA. Under this clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle but unreasonably applies it to the facts of the prisoner's case. The state court decision must be "objectively unreasonable," not just incorrect or erroneous. The Ninth Circuit wrongly equated objectively unreasonable with clearly erroneous and found the state court's application of the grossly disproportionate standard to be wrong. In reversing the Court of Appeals, the Supreme Court concluded, "Under § 2254(d)(1)'s unreasonable application clause . . . a federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly." Finally, the Court concluded Andrade's sentence was not grossly disproportionate.

***Smith v. Doe,* 538 U.S. ___, 123 S. Ct. 1925 (March 5,**

2003) (Justice Kennedy).

In a case challenging Alaska's sex offender registry which requires all sex offenders to register with the Department of Corrections (if still incarcerated) or with local law enforcement (if at liberty), the Supreme Court held the registry's retroactive application did not violate the *Ex Post Facto* Clause. The respondents were convicted of aggravated sex offenses and served their terms of incarceration prior to the enactment of the registration requirement. However, they were required to register with local law enforcement periodically and were subjected to the public dissemination of their information on the Internet. In evaluating their *Ex Post Facto* claim, the Court first considered whether the state legislature in establishing the registry meant to create "civil proceedings" or to impose punishment. The Court concluded the state had merely created civil proceedings, based on: (1) the primary interest of the registry was public safety; (2) the placement of the registry's notification provisions in the state's health, safety, and housing code; and (3) the investment of the authority to implement the plan with the Department of Public Safety. The next inquiry was whether the actual implementation of the registry negate the state's efforts to establish a civil regulatory scheme. The Court concluded the operation of the scheme did not create punishment or enforce punitive measures.

***Woodford v. Garceau,* 538 U.S. ___, 123 S. Ct. 1398 (March 25, 2003) (Justice Thomas).**

In this matter, the Court considered when a capital habeas case becomes "pending" for the purposes of the amendments made to chapter 153 of AEDPA, which applies to cases pending in federal court on April 24, 1996. After exhausting his state court remedies and six months before the effective date of the amendments, Garceau filed a motion for appointment of federal habeas counsel and an application for a stay of execution in federal district court. The district court stayed the execution and appointed counsel. Garceau then filed his habeas corpus petition after April 24, 1996. The Supreme Court held that a case does not become pending until an actual application for relief seeking an adjudication on the merits of the petitioner's claim is filed. The Court resolved a circuit split in this case and adopted the majority rule which had been espoused by the Seventh Circuit and four other circuit courts.

***Massaro v. United States,* 538 U.S. ___, 123 S. Ct. 1690 (April 23, 2003) (Justice Kennedy).**

A unanimous Court held that defendants may bring claims of ineffective assistance of counsel in a collateral proceeding under § 2255 whether or not the defendant could have raised the claim on direct appeal. In so holding, the Court agreed with the majority of federal and state courts (including the Seventh Circuit) and resolved a circuit conflict. The Court noted that the minority rule requiring defendants to raise ineffective assistance of counsel claims on direct appeal does not promote the traditional objectives of the procedural default rule; namely to conserve judicial resources and respect the law's interest in the finality of judgments. In addition, applying the procedural default rule would result in claims being raised for the first time in appellate courts, a forum which is not suited for those types of claims. District courts are far better suited to evaluate ineffective assistance of counsel claims as they are familiar with the defendant, trial counsel, and the facts of the case. Furthermore, the minority rule created conflict between trial and appellate counsel because trial counsel may be unwilling to assist appellate counsel become familiar with the case if it sheds light on his own incompetence.

***Demore v. Kim,* 538 U.S. ___, 123 S. Ct. 1708 (April 29, 2003) (Chief Justice Rehnquist).**

Kim, a deportable alien previously convicted of an aggravated felony, challenged the portion of the Immigration and Nationality Act which allows detention of deportable aliens pending removal proceedings. He argued his detention under 8 U.S.C. § 1226(c) violated his right to due process because the INS had made no determination that he posed either a danger to society or a flight risk. The Ninth Circuit determined § 1226(c) violated substantive due process but the Supreme Court disagreed. Citing statistics indicating deportable criminal aliens fail to appear at their removal hearings in high numbers, the Court held Congress may require that these persons be detained for a brief period before their removal proceedings. The section serves the important purpose of preventing deportable criminal aliens remaining "at large" and detention under this section is usually relatively brief (less than 90 days) with a specific point of termination.

***Kaupp v. Texas,* 538 U.S. ___, 123 S. Ct. 1843 (May 5, 2003) (Per Curiam).**

The Court reversed a state court of appeals decision affirming the denial of a motion to suppress the defendant's confession made

after an illegal arrest. In this case, six police officers went to 17-year-old Kaupp's home at 3 am, awakened him with a flashlight, and said "we need to go and talk" to which Kaupp responded "Okay." He was then handcuffed and led, shoeless and dressed in boxer shorts and a T-shirt in January, into a patrol car. He was subsequently taken to the sheriff's office and advised of his *Miranda* rights. After a few minutes of questioning, he admitted his involvement in a murder. The Court held that the police officers' actions in entering his home in the middle of the night and the surrounding circumstances amounted to an arrest. Because he was arrested before he was questioned without probable cause to detain him, his subsequent confession had to be suppressed.

***Price v. Vincent,* 538 U.S. ___, 123 S. Ct. 2293 (May 19, 2003) (Chief Justice Rehnquist).**

At Vincent's trial on a murder charge, defense counsel moved for a directed verdict as to the first degree murder charge. The trial judge stated that second-degree murder was the appropriate charge. The next day, the judge submitted the first degree murder charge to the jury, of which Vincent was convicted. On appeal Vincent argued his conviction violated Double Jeopardy because the trial court had granted a directed verdict on the first-degree murder charge. The state supreme court ultimately affirmed his conviction and determined the trial judge's statements were not sufficiently final to terminate jeopardy. Vincent filed a state prisoner habeas corpus claim, which was granted by the district court and affirmed by the Sixth Circuit. The Supreme Court reversed, holding that Vincent had not met the requirements that the state supreme court's ruling was "contrary to" or an "unreasonable application of" Supreme Court precedent.

***Chavez v. Martinez,* 538 U.S. ___, 123 S. Ct. 1994 (May 27, 2003) (Justice Thomas).**

In a § 1983 suit filed by Martinez alleging police officer Chavez violated his Fifth Amendment right not to be "compelled in any criminal case to be a witness against himself," the Supreme Court reversed the Ninth Circuit's determination Chavez violated Martinez's constitutional rights. Martinez was shot during an altercation with several police officers. Immediately after arriving at the hospital, while Martinez was being treated in the emergency room, Chavez began questioning Martinez about what happened. Chavez did not administer *Miranda* warnings at any time. During the interview, Martinez admitted he had taken an officer's gun and pointed at the police during the altercation. The Supreme Court reasoned that no constitutional violation had occurred during the questioning because Martinez's was never charged with a crime. Therefore, his statements were never used against him in any criminal prosecution. The Ninth Circuit's conclusion that mere compulsive questioning violates the Constitution was in error.

***Bunkley v. Florida,* 538 U.S. ___, 123 S. Ct. 2020 (May 27, 2003) (Per Curiam; Chief Justice Rehnquist dissenting).**

In an opinion which was issued without briefing or oral argument, the Supreme Court reversed the Florida Supreme Court's decision in Bunkley's postconviction relief action. In 1986, Bunkley burglarized an unoccupied restaurant. When he was arrested, police found a three-inch pocket knife folded in his pocket. He had not used the knife during the commission of the burglary. He was convicted of first degree burglary because he was armed with a dangerous weapon and sentenced to life in prison. Florida state law contains a definition of a dangerous weapon which has an exception for a "common pocketknife." In 1997, the Florida Supreme Court interpreted the common pocketknife exception to mean a pocketknife with a blade of four inches or less. After the opinion issued, Bunkley filed a petition for postconviction relief arguing his conviction for first-degree burglary was invalid. The trial court and both Florida appellate courts rejected his claim holding that the 1997 decision did not apply retroactively. The Florida Supreme Court characterized the 1997 decision as "a change in the law which culminated the century-long evolutionary process." However, the Florida court did not find at what point the evolutionary process was in when Bunkley's conviction became final in 1989. The Court reversed under *Fiore v. White* and ordered the Florida Supreme Court to consider whether, in light of the 1997 decision, Bunkley's pocketknife fit into the common pocketknife exception in 1989. Chief Justice Rehnquist dissented and stated that the Court had made new law and expanded *Fiore* beyond its original boundaries.

***Nguyen v. United States,* 539 U.S. ___, 123 S. Ct. 2130 (June 9, 2003) (Justice Stevens).**

Petitioners were convicted on federal drug charges in the District of Guam and appealed their sentences to the Ninth Circuit Court of Appeals. The panel hearing their case was comprised of two Ninth Circuit Court of Appeals Judges and the Chief Judge of the District Court for the

Northern Mariana Islands, an Article IV judge. Article IV judges are appointed by the President and serve 10-year terms. After the Court of Appeals' decision had been entered, petitioners objected for the first time to the makeup of the panel deciding their case. The Supreme Court granted review as an exercise of the Court's supervisory power and held the panel did not have the authority to decide the petitioners' cases because Article IV judges are not district court judges within the meantime of 28 U.S.C. § 292(a). Furthermore, the government's arguments that the decision was not plainly erroneous and the Article IV judge could be considered a *de facto* officer were not convincing. First, the *de facto* officer doctrine applies primarily to cases were there is a "merely technical" defeat in statutory authority, not in cases such as this one where there has been a statutory violation implicating a congressional policy governing the organization of the federal courts. Second, plain error analysis is not appropriate in a case where the issue implicates congressional management of federal courts, rather than just the validity of the petitioner's convictions. Finally, the federal quorum statute cannot be used to support the panel's decision because three valid judges are needed on the original panel before the quorum rule is applicable.

***Overton v. Bazzetta,* 539 U.S. ___, 123 S. Ct. 2162 (June 16, 2003) (Justice Kennedy).**

The Supreme Court upheld the Michigan prison system's new regulations significantly limiting prison visitation. The Court first held that the regulations bear a rational relationship to the prison's legitimate penological interests regardless of whether the inmates have a constitutional right to association while they are in prison. Further, the regulations satisfy the four factors used to determine whether a regulation affects a constitutional right: (1) the regulations all have legitimate penological and public safety interests; (2) inmates have alternative means of exercising their right of association; (3) accommodating the full rights of association would have a harsh impact on the safety of other inmates, guards and prison resources; and (4) respondents suggested no viable alternatives.

***Sell v. United States,* 539 U.S. ___, 123 S. Ct. 2174 (June 16, 2003) (Justice Breyer).**

After he had been charged with various federal crimes, a magistrate judge found Sell incompetent to stand trial and ordered him hospitalized to determine whether he could attain competence. The hospital staff determined Sell could be made competent if he took antipsychotic medication. The hospital sought to force Sell to be medicated against his will, a decision he challenged. The magistrate authorized forced medication. The district court affirmed the magistrates order based on the need to render Sell competent to stand trial but found Sell was not a danger to himself or others. The Eighth Circuit affirmed the district court. The Supreme Court vacated and remanded the matter for further proceedings. In so ordering, the Court held that the Constitution permits the government to involuntarily administer antipsychotic medication to render a defendant competent to stand trial, but stressed the limited application of the rule. When deciding to involuntarily medicate a defendant, courts must find that: (1) important government interests are at stake including the interest in bringing the defendant to trial and the interest in ensuring the defendant a fair trial; (2) forced medication will significantly further those government interests; (3) involuntary medication is necessary to further government interests and alternative, less intrusive treatments are unlikely to achieve substantially the same results; and (4) administration of medication must be medically appropriate. If a court chooses to force medication on other grounds, such as dangerousness to self or others, the need to consider the above factors will diminish.

***Virginia v. Hicks,* 539 U.S. ___, 123 S. Ct. 2191 (June 16, 2003) (Justice Scalia).**

The Richmond (Virginia) Redevelopment and Housing Authority (RRHA) owns and operates low income housing developments. The RRHA enacted a policy allowing the Richmond police to serve notice on any person lacking a legitimate business or social purpose for being on the premises and to arrest for trespassing any person who remains or returns after having been notified. Hicks was arrested and convicted of trespass. He appealed to the state supreme court which held the policy to be unconstitutionally overbroad in violation of the First Amendment because the policy contained an unwritten rule that persons wishing to hand out flyers on the sidewalks of the housing complex need to obtain the complex manager's approval. The Supreme Court reversed, noting that the unwritten rule had not been applied to Hicks. Even assuming the unwritten rule was unconstitutional, Hicks did not show that the policy prohibits a substantial amount of protected speech in relation to its legitimate applications.

***Stogner v. California,* 539**

U.S. ___, ___ S. Ct. ____ (June 26, 2003) (Justice Breyer).

In 1993, California passed a law permitting prosecutions of child abuse offenses where the prior statute of limitations has expired if the prosecution is begun within one year of the victim's report to police. Stogner was prosecuted under this new law for abuse which occurred from 1955 to 1973. Stogner moved to dismiss the prosecution arguing that it violated the *Ex Post Facto* Clause. The Supreme Court agreed and reversed. The Court held that "a law enacted after expiration of a previously applicable limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time0barred prosecution." The Court noted that the *Ex Post Facto* Clause seeks to prohibit precisely the type of law California enacted which produces "manifestly unjust and oppressive retroactive results." Furthermore, the law falls into one of the categories described by the Court 200 years ago in *Calder v. Bull* and inflicts punishment were the individual was not previously liable to any punishment. Finally, courts and legislatures commonly agree that the *Ex Post Facto* Clause forbids resurrection of a time-barred prosecution.

***Lawrence v. Texas,* 539 U.S. ___, ___ S. Ct. ____ (June 26, 2003) (Justice Kennedy).**

When responding to a reported disturbance in a private home, Houston police entered Lawrence's apartment and observed him and another man engaging in a private consensual sexual act. Both men were charged and pleaded *nolo contendre* to the misdemeanor charge. They challenged the state sodomy statute as violative of the Due Process Clause. The Supreme Court agreed and held the statute to be unconstitutional, overruling *Bowers v. Hardwick.* In so holding, the majority noted the *Bowers* Court failed to appreciate the extent of the liberty interest at stake. Although the crime involved may have minimal punishment (in this case, a fine), the penalties and purposes of such statutes have more far reaching consequences - affecting the most private of human conduct, sexual behavior, in the most private of places, the home. The liberty protected by the Constitution allows homosexuals the right to choose to enter into relationships in the confines of their homes and their own private lives. Furthermore, the *Bowers* Court's reliance on history law prohibiting homosexual conduct was erroneous. Historical sodomy laws were not directed at homosexuals, rather sought to prohibit any non-procreative sexual activity. Finally, the Court adopted Justice Stevens' rational in his dissent in *Bowers* that: (1) the fact that the majority has traditionally viewed a particular practice as immoral cannot sustain a law prohibiting the practice; and (2) individual decisions concerning intimate personal relationships are a form of liberty protected by due process.

***Wiggins v. Smith,* 539 U.S. ___, ___ S. Ct. ____ (June 26, 2003) (Justice O'Connor).**

The Supreme Court reversed and remanded this postconviction relief action holding that Wiggins had been denied effective assistance of counsel at his capital murder trial. Wiggins was charged and convicted of capital murder in 1989. He elected to be sentenced by a jury. His trial counsel in her opening statement to the sentencing jury indicated that they would hear about his difficult life but the evidence was never introduced. The evidence included severe abuse by his alcoholic mother, physical and sexual abuse in his foster home, periods of homelessness, and his diminished mental capacity. The Supreme Court held the performance of Wiggins's counsel during the sentencing phase was deficient. The Court's principal concern is not whether counsel should have presented a mitigation case, but whether counsel's investigation supporting the decision not to introduce evidence of Wiggins's background was reasonable. In this matter, counsel did not conduct a reasonable investigation for the following reasons: (1) they did not investigate beyond the information provided in the presentence investigation report; (2) they did not pursue mitigating facts such as his alcoholic mother and problems in foster care; and (3) the record indicates there was no reason an investigation would have been counterproductive or detrimental to Wiggins. Furthermore, counsels' errors prejudiced Wiggins because there was a high probability that confronted with mitigating evidence, the jury would have returned a different sentence.

CASES AWAITING ARGUMENT (OCTOBER 2003 TERM)

***Castro v. United States,* No. 02-6683, cert. granted January 27, 2003 (to be argued October 15, 2003).**

The first issue that will be considered by the Court is whether the Court has jurisdiction to review the Eleventh Circuit's decision affirming the dismissal of a § 2255 petition for writ of habeas corpus as second or successive. The second issue is whether the district court's re-characterization of a *pro se* federal prisoner's first post conviction motion as a habeas petition under 28 U.S.C. § 2255 makes the prisoner's subsequent attempt to file a § 2255 petition a

"second or successive petition" within the meaning of the Antiterrorism and Effective Death Penalty Act (AEDPA).

Case below: 290 F.3d 1270 (11th Cir. 2002).

***United States v. Banks*, No. 02-473, cert. granted February 24, 2003 (to be argued October 15, 2003).**

Whether law enforcement officers executing a search warrant for illegal drugs violated the Fourth Amendment, when they forcibly entered a small apartment in the middle of the afternoon 15-20 seconds after knocking and announcing their presence.

Case below: 282 F.3d 679 (9th Cir. 2002).

***Maryland v. Pringle*, No. 02-809, cert. granted March 24, 2003 (to be argued November 3, 2003).**

Whether the Fourth Amendment prohibits a police officer from arresting the occupants of a car where drugs and a roll of cash are found in the passenger compartment of a car with multiple occupants and all deny ownership of the items.

Case below: 805 A.2d 1016 (Md. 2002).

***Groh v. Ramirez*, No. 02-811, cert. granted March 3, 2003 (to be argued November 4, 2003).**

Whether law enforcement officers violate the particularity requirement of the Fourth Amendment when they execute a search warrant already approved by a magistrate judge, based on an attached application and affidavit properly describing with particularity the items to be searched and seized, but the warrant itself does not include the same level of detail. In addition, in a case involving the determination of whether an officer was not entitled to qualified immunity and personally responsible for damages, the Court will determine whether the law enforcement officer violated clearly established law when, at the time he acted, there was no decision by the Supreme Court addressing his conduct and the only lower court decisions addressing the issue had found the same conduct did not violate the law.

Case below: 298 F.3d 1022 (9th Cir. 2002).

***Arizona v. Gant*, No. 02-1019, cert. granted April 21, 2003 (to be argued November 5, 2003).**

Whether the police are precluded from searching a vehicle when they arrest the recent occupant of the vehicle outside of the vehicle, unless the occupant was actually or constructively aware of the police before getting out of the vehicle.

Case below:43 P.3d 188 (Ariz. Ct. App. 2002).

***Illinois v. Lidster*, No. 02-1060, cert. granted May 5, 2003 (to be argued November 5, 2003).**

Whether *Indianapolis v. Edmond* prohibits law enforcement from setting up a checkpoint designed to investigate a prior offense, stopping all oncoming motorists to hand out flyers about the offense, and then arresting motorists for drunk driving, which was unrelated to the prior offense being investigated.

Case below: 779 N.E.2d 855 (Ill. 2002).

***Crawford v. Washington*, No. 02-9410, cert. granted June 9, 2003 (to be argued November 10, 2003).**

The Court will first determined whether the Confrontation Clause of the Sixth Amendment allows admission against a criminal defendant of a accomplice's custodial statement on the ground that part of the statement "interlocks" with the defendant's custodial statement. The Court will also consider whether the Confrontation Clause analysis in Ohio v. Roberts should be interpreted to prohibit the admission of out of court statements where they are contained in "testimonial materials," such as tape recorded custodial statements.

Case below: 54 P.2d 656 (Wash. 2002).

***Muhammad v. Close*, No. 02-9065, cert. granted June 16, 2003 (to be argued December 1 , 2003).**

First, whether a prisoner who wishes to bring a 42 U.S.C. § 1983 suit challenging only the conditions of his imprisonment (not the fact or duration) must satisfy the favorable termination requirement of Heck v. Humphrey. Second, whether a prisoner who has been in segregation, but is no longer, may bring a § 1983 suit without satisfying the favorable termination requirement of Heck.

Case below: 2002 U.S. App. LEXIS 20306 (6th Cir.)

***Banks v. Cockrell*, No. 02-8286, cert. granted April 21, 2003 (to be argued December 8, 2003).**

First, whether the government violated *Brady v. Maryland* by suppressing material

witness impeachment evidence that prejudiced the defendant in the penalty phase of his trial where the evidence supporting the claim was procedurally defaulted and the suppressed evidence was immaterial to his death sentence. Second, whether the Court of Appeals misapplied *Strickland v. Washington* when it considered each item of suppressed evidence separately and concluded no single category of evidence would have produced a different result without weighing the impact of the evidence collectively. Third, whether Federal Rule of Civil Procedure 15(b) applies to habeas proceedings where evidentiary hearings in habeas proceedings are not similar to civil trials.

Case below: 2002 U.S. App. LEXIS 19381 (5th Cir.)

***Baldwin v. Reese*, No. 02-964, cert. granted May 27, 2003 (to be argued December 8, 2003).**

The Court will consider whether, when determining if a state prisoner has exhausted all available state court remedies, the prisoner "alerts" the state's highest court that he is raising a federal claim when, in that court, he does not cite a specific provision of the federal Constitution or any authority that has decided the claim on a federal basis.

Case below: 282 F.3d 1184 (9th Cir. 2002).

***United States v. Patane*, No. 02-1183, cert. granted April 21, 2003 (to be argued December 9, 2003).**

Whether a failure to give a suspect the warnings prescribed by *Miranda v. Arizona* requires the suppression of physical evidence derived from the suspect's un-Mirandized but voluntary statement.

Case below: 304 F.3d 1013 (10th Cir. 2002).

***Missouri v. Seibert*, No. 02-1371, cert. granted May 19, 2003 (to be argued December 9, 2003).**

Whether the lower court erroneously held that a law enforcement officer's intentional violation of *Miranda v. Arizona*, in obtaining a statement requires suppression of a second statement, secured after a *Miranda* warning was given, where the second statement was based on the first, requires suppression of the statement.

Case below:93 S.W.2d 700 (Mo. 2002).

***Fellers v. United States*, No. 02-6320, cert. granted March 10, 2003 (to be argued December 10, 2003).**

The Court will consider whether the Eighth Circuit erred by deciding that the defendant's Sixth Amendment right to counsel was not violated because he was interrogated by government agents even though, under *Messiah v. United States*, the proper standard is whether the government agents deliberately elicited information from him. The Court will also determine whether the defendant's second set of statements made after he received Miranda warnings should have been suppressed as fruits of an illegal post-indictment interview without the presence of counsel.

Case below: 285 F.3d 721 (8th Cir. 2002).

***Yarborough v. Alvarado*, No. 02-1684, cert. granted September 30, 2003 (unscheduled).**

The Court will consider the rights of juveniles who are questioned by police in a case involving the interrogation of a 17 year old murder suspect.

Case below: 316 F.3d 841 (9th Cir. 2002).

***Smith v. Dretke*, No. 02-11309, cert. granted September 30, 2003 (unscheduled).**

Smith was convicted of shooting a man in 1990 while attempting to steal his truck. He is currently sitting on death row in Texas. The Court granted certiorari to determine whether he was given adequate opportunity to prove he was mentally impaired.

Case below: 311 F.3d 661 (5th Cir. 2002).

***United States v. Lara*, No. 03-107, cert. granted September 30, 2003 (unscheduled).**

Whether the federal government can prosecute crimes on Indian reservations involving visiting members of another tribe.

Case below: 324 F.3d 635 (8th Cir. 2003).

***Beard v. Banks*, No. 02-1603, cert. granted September 30, 2003 (unscheduled).**

This case involves the propriety of jury instructions in Pennsylvania death penalty cases. Specifically, this defendant was convicted of killing 13 people during a shooting rampage in Wilkes-Barre, Pennsylvania in 1982.

Case below: 316 F.3d 228 (3d Cir. 2003).

***Iowa v. Tovar*, No. 02-1541, cert. granted September 30, 2003 (unscheduled).**

Felipe Tovar claims his first OWI conviction should not have been used to enhance the penalty for his current conviction for third OWI because his prior conviction resulted from an uncounseled guilty plea, and he had not made a valid waiver of his Sixth Amendment right to counsel at the guilty plea proceeding.

Case below: 656 N.W.2d 112 (Iowa 2003)

The Back Bencher

Published by:

The Federal Public Defender's Office for the Central District of Illinois

Editor:

Richard H. Parsons,
Federal Public Defender
Central District of Illinois,
and Acting Federal Defender,
Southern District of Illinois

Associate Editor:

Jonathan E. Hawley,
Appellate Division Chief

Managing Editor:
Mary Kedzior
CJA Panel Administrator
Federal Defender's Office
Central District of Illinois

Your comments and suggestions are appreciated!

Federal Public Defender's Office
Central District of Illinois
401 Main Street, Suite 1500
Peoria, Illinois 61602
Phone: 309/ 671-7891
Fax: 309/ 671-7898