The BACK BENCHER

Central District of Illinois Federal Defenders

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DEFENDER'S MESSAGE

Just when you thought *Apprendi v. New Jersey* had breathed its last breath, the United States Supreme Court gave it new life and turned the criminal justice system upside down with its landmark decision in *Blakely v. Washington*, 124 S.Ct. 2531 (2004).

Blakely and Its Progeny

You will no doubt recall that back in 2000 in *Apprendi*, another landmark decision, the Supreme Court held for the first time that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Unfortunately, our hopes that *Apprendi* would apply to the Guidelines were dashed by the Circuit Courts of Appeal, all of which held that *Apprendi* did not apply to the Guidelines, but rather applied only when the statutory maximum set forth in the statute defining the offense was increased.

Blakely, however, resurrected *Apprendi* by redefining what the relevant statutory maximum is in a particular case. In *Blakely*, the Supreme Court reversed an upward departure in a Washington state case because the facts supporting the departure from the sentencing guidelines range were not found by a jury or admitted by the defendant. In doing so, the Court held that the statutory maximum is not the maximum that is set forth in the statute defining the offense, but the sentence that is established by a guideline range. It found "that the `statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

Although the Court stated that it was not expressing an opinion about the Federal Sentencing Guidelines, it noted that, in its *amicus* brief, the Solicitor General questioned whether the differences between the Washington Sentencing Guidelines and the Federal Sentencing Guidelines are Constitutionally significant. Moreover, in her dissent Justice O'Connor stated:

> The structure of the Federal Guidelines likewise does not, as the Government half-heartedly suggests, provide any grounds for distinction. Brief for United States as Amicus Curiae 27-29. Washington's scheme is almost identical to the upward departure regime established by 18 U.S.C. §3553(b) and implemented in USSG §5K2.0. If anything, the structural differences that do exist make the Federal Guidelines more vulnerable to attack. The provision struck down here provides for an increase in the upper bound of the presumptive sentencing range if the sentencing court finds, "considering the purpose of [the Act], that there are substantial and compelling reasons justifying an exceptional sentence." Wash. Rev. Code Ann. §9.94A.120 (2000). The Act elsewhere provides a nonexhaustive list of aggravating factors that satisfy the definition. §9.94A.390. The Court flatly rejects respondent's argument that such soft constraints, which still allow Washington judges to exercise a substantial amount of discretion, survive *Apprendi*. Ante, at 8-9. This suggests that the hard constraints found throughout chapters 2

> and 3 of the Federal Sentencing Guidelines, which require an increase in the sentencing range upon specified factual findings, will meet the same fate. See, e.g., USSG §2K2.1 (increases in offense level for firearms offenses based on number of firearms involved, whether possession was in connection with another offense, whether the firearm was stolen); §2B1.1 (increase in offense level for financial crimes based on amount of money involved, number of victims, possession of weapon); §3C1.1 (general increase in offense level for obstruction of justice).

Justice O'Connor also stated that the *Blakely* decision casts doubt on the Constitutionality of the Federal Sentencing Guidelines and "every sentence imposed under such guidelines in cases currently pending on direct appeal is in jeopardy." Justice Kennedy added that numerous states with guidelines systems similar to that of Washington "are now commanded to scrap everything and start over."

It wasn't long before the Seventh Circuit became the first circuit to heroically confirm the *Blakely* dissenters' fears. Only 15 days after *Blakely* was decided, the Seventh Circuit in *United States v. Booker*, ___ F.3d ___, 2004 WL 1535858 (7th Cir. (Wis.) Jul. 09, 2004) (No. 03-4225), addressed the impact of *Blakely* on the Federal Sentencing Guidelines, holding that *Blakely* does indeed apply to them.

In *Booker*, the district court determined that relevant conduct increased the drug amounts upon which the defendant was sentenced by 566 grams over the 92.5 grams that the jury found. The district court also increased Booker's offense level for obstruction of justice. The court applied *Blakely* to the facts in *Booker* and found that Booker's sentence should not have been enhanced by drug amounts that the jury did not find beyond a reasonable doubt nor had been admitted by the defendant. The Court further held:

> As an original matter, then, we think that the guidelines, though only in cases such as the present one in which they limit defendants' rights to a jury and to the reasonable-doubt standard, and thus the right of defendant Booker to determine (using that standard) how much cocaine base he possessed and whether he obstructed justice, violate the Sixth Amendment as interpreted by *Blakely*.

Importantly, the court did not limit the options available to the *Booker* parties or the district court upon re-sentencing, suggesting that the severability and Constitutionality of the guidelines as a whole is a potential issue. The court also specifically suggested that the government could request a sentencing trial to determine the amount and type of drugs by a jury beyond a reasonable doubt and suggested that defense counsel could raise the issue of the Constitutionality of the Sentencing Guidelines. However, the court did not rule on the Constitutionality of the Guidelines but instead noted that this question may hinge on the severability of the explicit provisions of the Guidelines that require the district court to make certain findings on the basis of a preponderance of the evidence. Thus, in the end, the Seventh Circuit deferred creating a definitive scheme for sentencing criminal defendants in light of *Blakely*.

Since *Booker*, six other circuits have addressed *Blakely* as well. Specifically, three days after *Booker*, the Fifth Circuit created a circuit split by holding that *Blakely* does not apply to the Guidelines. *United States v. Pineiro*, 2004 WL 1543170 (5th Cir. Jul. 12, 2004). On the same day, the Second Circuit in *United States v. Penaranda*, 2004 WL 1551369 (2nd Cir. Jul. 12, 2004), invoked the rarely used procedure of certifying the *Blakely* question to the Supreme Court, rather than ruling on the question itself outright. Addressing *Blakely* in yet another unique way, the Sixth Circuit then held that in light of *Blakely*, the Guidelines are merely advisory and a judge is free to sentence a defendant anywhere between the statutory minimum and maximum range, although this decision has since been vacated upon consideration by the court *en banc*. *United States*. *v. Montgomery*, 2004 WL 1562904 (6th Cir. July 14, 2004). The Ninth Circuit, on the other hand, held that *Blakely* applies to the Guidelines, while also holding that the

Guidelines are severable and that a sentencing jury may be empaneled to consider enhancements. *United States v. Ameline*, 2004 WL 1635808 (9th Cir. Jul. 21, 2004). The Eighth Circuit issued an opinion where the judges on the panel agreed to remand a case for reconsideration in light of *Blakely*, although the panel was divided on whether the Guidelines are unconstitutional, the majority holding that the Guidelines are non-binding. *United States v. Mooney*, 2004 WL 1636960 (8th Cir. Jul. 23, 2004). Finally, on August 2, 2004, the Fourth Circuit agreed with the Fifth and held that *Blakely* does not apply to the Federal Sentencing Guidelines. *United States v. Hammoud*, 2004 U.S. App. LEXIS 15898.

Thus, seven circuits to date have ruled on the *Blakely* question, yet few decisions reach the same conclusions. Chaos reigns in the federal criminal justice system. However, on August 2, 2004, the Supreme Court granted *certiorari* in *Booker* and a case arising out of a district court in *United States v. Fanfan*. It therefore appears as though the Supreme Court will attempt to quickly answer some of the questions it left open in *Blakely*. Specifically, the Solicitor General filed on July 21, 2004, petitions for *certiorari* in *Booker* and *Fanfan*. In the petitions, the Solicitor General asked the Court to consider the following two questions: (1) Whether a district court violates the Fifth and Sixth Amendments by relying upon facts that increase the maximum sentence available under the United States Sentencing Guidelines (other than the fact of a prior conviction) when those facts were not charged in the indictment and either found by the jury on proof beyond a reasonable doubt or admitted by the defendant.; and (2) if the answer to the first question is yes, the following question is presented: What role do the Sentencing Reform Act, the Sentencing Guidelines, and Federal Rule of Criminal Procedure 32 continue to play in federal criminal sentencing? The Court granted *certiorari* on both questions and set the case for argument on October 4, 2004. Accordingly, while the Supreme Court considers these cases, many of the cases with *Blakely* issues will likely be on hold until an opinion is issued.

Given the Court's grant of *certioriari*, some of the temporary "fixes" being contemplated by Congress may also now be unnecessary. Immediately after *Blakely*, the Senate Judiciary Committee held hearings on the *Blakely* issue, hearing testimony from a broad range of judges, Sentencing Commission members, law professors, and prosecutors. Among the temporary "fixes" proposed are making the Guidelines advisory for a fixed period of time (perhaps 12 to 18 months) to raising the top of all guideline ranges to the statutory maximum as set forth in the statute for the offense of conviction. Of course, given election year politics, it is not at all clear that any temporary fix by Congress would be enacted soon enough to be of any practical use in the near term, and Congress, like many of the lower courts, will probably now wait to see how the issues are resolved in the Supreme Court.

Practical Considerations

Regardless of how these issues are ultimately and definitively resolved, and of most importance to defense lawyers, we in the here and now have cases at every stage which need immediate action. Of course, because every case is unique and our many clients oftentimes have very different interests, there is no one act which can be taken with respect to *Blakely* in each and every case. Thus, I cannot and would not presume to advise you on what action in general you should take in all of your cases. I can, however, inform you of some of the actions we have taken in my offices, as well as actions taken by other lawyers around the country.

For example, post-*Blakely*, the government has in most cases been including in indictments allegations which relate to sentencing enhancements such as amount of loss, leadership roles, etc. In such cases, it may be advisable to stand mute at the arraignment and file a motion to dismiss the indictment, arguing that the government cannot include new "elements" in an indictment without legislative authorization.

In cases where your client is considering a plea, *Blakely* may give you leverage in negotiating a favorable (c) agreement for your client. Although the government will likely ask that your client waive his *Blakely* rights in the plea agreement, you may be able to obtain the government's agreement that certain enhancements do not apply because such enhancements cannot be proved under the reasonable

doubt standard, although they may have been provable under the Guidelines' preponderance of the evidence standard. While in the past some judges have expressed an unwillingness to entertain (c) agreements, many have indicated that they are willing to do so now in the post-*Blakely* environment.

Where your clients have pled or been convicted after a trial pre-*Blakely* and are now awaiting sentencing, objections should obviously be made to any sentencing enhancements to which your client did not admit or which a jury did not find. Under such circumstances, you may wish to argue that the Guidelines can still be applied, although no enhancements not meeting the requirements of *Blakely* can be applied. Alternatively, depending on the circumstances, you may instead wish to argue that the Guidelines are not severable and unconstitutional in their entirety, therefore allowing for any reasonable sentence within the statutory minimum and maximum as set forth in the statute for the offense of conviction. Should the government or the court seek to empanel a jury to consider any sentencing enhancements, you could again argue that the Guidelines are unconstitutional as a whole, or instead argue that there is no authority in the Federal Rules or Code which allow for a sentencing jury in non-capital cases.

For cases pending on direct appeal which have not been briefed, you will want to consider whether *Blakely* will apply to your case or, if not, whether your client may benefit by arguing that the Guidelines are unconstitutional in their entirety. Should you have a *Blakely* inspired argument, you may still want to include in your brief any pre-*Blakely* issues you may have in the (hopefully unlikely) event that the Supreme Court should hold that *Blakely* does not apply to the Guidelines. If the briefs have already been filed, even in instances where you have already argued the case and are awaiting a decision, *Blakely* issues should be preserved by filing a motion to file a supplemental brief addressing the issues. To date, the Seventh Circuit has been granting such motions, giving the Appellant two weeks to file the brief and the government two weeks to respond. If the Seventh Circuit has already decided your case but you are within the time for filing a petition for *certiorari*, such a petition should be filed, at a minimum arguing that the Court of Appeals should reconsider the case in light of *Blakely*. Finally, in cases where an *Anders* brief has been filed, a motion to withdraw the *Anders* brief may need to be filed to allow for briefing on the merits of the *Blakely* issue or, at least, a discussion of why *Blakely* would not apply in the case. As with motions to file supplemental briefs, the Seventh Circuit has been granting such motions.

The remaining category of cases are those where a collateral attack may be made through the filing of a 2255 petition. For cases where your client has already filed a 2255 petition, the Seventh Circuit has already held that a successive petition premised on *Blakely* cannot be made until the Supreme Court declares *Blakely* retroactive. *Simpson v. United States* ___ F.3d ___, 2004 WL 1636967 (7th Cir. Jul. 23, 2004). For cases outside the 1-year statute of limitations, any substantive argument must be accompanied by an argument that *Blakely* is retroactive, but at least one district judge in the Seventh Circuit has already held that *Blakely* is not retroactive. *Collins v. United States*, (Central Dist. of Ill Jul. 22, 2004) (No. 01-10037). Thus, the most promising cases are those within the statute of limitations, and such cases should be evaluated for *Blakely* issues for inclusion in a petition.

Unfortunately, all of this advice and information may change tomorrow, given the rapid developments in the law since *Blakely*. It is therefore all the more imperative that you read the slip opinions as they come out and seek assistance where necessary. You can access the daily slip opinions of the Seventh Circuit at http://www.ca7.uscourts.gov/op3.fwx, and you can keep up-to-date with the latest *Blakely* developments around the country by visiting Professor Douglas A. Berman's Sentencing Law and Policy website at http://sentencing.typepad.com/, which contains extensive commentary and links on *Blakely* developments. No one practicing federal criminal law today, no matter how skilled or experienced, can afford to be unaware of the developments currently underway, and, with the wealth of sources for information available to us, there is no reason to be.

To assist you with navigating through the *Blakely* issues, I am also in the process of organizing a *Blakely* seminar in Peoria in conjunction with the Illinois

Association of Criminal Defense Lawyers. At the seminar, we will provide you with an update on *Blakely* developments, advice on using *Blakely* to your clients' benefit at all stages in a criminal case, and useful information concerning other recent changes in the law. The seminar is tentatively set for the afternoon of Thursday, October 14, 2004 in the Federal Courthouse in Peoria, and I will provide you with further details when the agenda is finalized.

Predictions

What the future holds is impossible for me or anyone else to predict. Indeed, if you had told me on June 23, 2004, that we would have courts all across the country finding the Guidelines unconstitutional, I would have laughed. Nevertheless, acknowledging the perilousness of attempting to divine the future of *Blakely*, there is enough information to make an educated guess.

First, notwithstanding the Fifth circuit's opinion in *Pineiro* and Judge Easterbrook's thoughtful dissent in *Booker*, the weight of authority has held that the Federal Sentencing Guidelines cannot be distinguished from the Washington State guideline system in a way which will avoid the holding in *Blakely*. The central tenet of the Guidelines is judge-made findings at sentencing by a preponderance of the evidence, something which *Blakely* clearly prohibits. Given that the dissenting Justices in *Blakely* all intimated that *Blakely* would apply to the Guidelines, there would seem to be an easy majority for this proposition when the Court issues its opinion in *Booker* and *Fanfan*.

Second, and perhaps most difficult to predict, is the question of whether the Guidelines are severable in the event that *Blakely* applies to them. Again, however, the weight of authority suggests that the Guidelines as a whole must fall. As numerous district judges have written across the country, it is inconceivable that Congress ever intended juries to decide sentencing enhancements in the manner required by *Blakely*. One cannot simply excise the *Blakely* offending portions of the Guidelines without creating a new animal whose visage was never contemplated by Congress. Moreover, to allow the Guidelines to stand with *Blakely* engrafted onto them would require sentencing jury trials for which there are no rules, procedures, or precedents to follow. I cannot see the Supreme Court accepting *certiorari* and reviewing the cases on an expedited basis only to leave us in the dark and fog again.

My hope is that when all the dust has settled, we will be left with a system where judges have real discretion and our clients are sentenced as human beings, rather than some variable in an algebraic formula. Yes, sentencing disparity is bad in the abstract, but in the concrete, no two cases or people are exactly alike. Any sentencing regime which seeks to take the humanity out of the sentencing equation, as the Sentencing Guidelines have, will result in injustice. I sincerely hope that the Supreme Court will render a decision which abolishes the injustice of the Guidelines under which we have suffered these many years. Of course, if this happens, we will then have the Congressional "fix" to contend with. May we not win the battle but lose the war.

Whew!

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CHURCHILLIANA

By our courage, our endurance, and our brains we have made our way in the world to the lasting benefit of mankind. Let us not lose heart. Our future is one of high hope.

Dictum Du Jour

In golf, humiliations are the essence of the game.

- Alistair Cooke

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My swing is so bad I look like a caveman killing his lunch.

- Lee Trevino
(ditto Dick Parsons)

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Golf is a game with the soul of a 1956 Rotarian.

- Bill Mandel

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The three things I love best in the world are sex, golf and hunting. Far as I can see, I ain't about to stop doing any of 'em.

- Sam Snead
(RIP 2002)

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I've done as much for golf as Truman Capote has done for sumo wrestling.

- Bob Hope

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Hence, appellants who challenge evidentiary rulings in the district court are like rich men who wish to enter the Kingdom: their prospects compare with those of camels who wish to pass through the eye of the needle.

--*United States v. While*, 368 F.3d 911 (7th Cir. 2004).

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Linda Frykholm must have the tongue of an angel, though she has the morals of a fiend. She persuaded people to invest $15 million in a get-rich-quick scheme, even though the promises she made were transparently too good to be true (100% return in a month) and she had no means to back her promises. Her only relevant credential was a 1994 conviction for theft and forgery, which she did not tout; her "business address" was a mail drop; routine inquiry would have disclosed that the corporations through which she purported to do business did not exist and that Illinois securities officials had entered a stop order against her promotions. Her persuasiveness was augmented, however, by the staple ingredient of any Ponzi scheme: the first generation of investors was handsomely rewarded with money being raised from the next generation, and these ecstatic clients became her avid promoters. Yet collapse was inevitable. The system works only while each new generation of investors puts in at least twice as much as the last, and exponential growth cannot last: after a few doublings there aren't enough suckers left in the whole world.

--*United States v. Frykholm*, 362 F.3d 413 (7th Cir. 2004).

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Illiopolis, Illinois, a small town with a population of 916, was the site of a combustible criminal conspiracy that raged for a period of years. Between the years of 1991 and 1997, the area in and around this small town saw eight successful acts of arson and one failed attempt. It is a wonder that there was anything left standing in the area when the ashes finally settled.

--*United States v. Handlin*, 366 F.3d 584 (7th Cir. 2004).

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Finally, Ellis Jordan objects to conditions imposed during his supervised release--which, we note, will not begin for quite awhile; in fact, not until he completes serving a long 180-month prison term. The conditions are that he participate in a program of testing and treatment for drug and alcohol abuse and that he refrain from using alcohol or from working in a tavern. Jordan did not object to these conditions at sentencing; consequently, our review is only for plain error. *United States v. Guy*, 174 F.3d 859 (7th Cir.1999). While we can find no plain error on this record, we are constrained to say that the conditions appear to be a tad unnecessary. Jordan will have been in prison for nearly 15 years by the

time the conditions kick in. Any drinking problem he might have had--and the government concedes there is little evidence that he has a drinking problem--might very well be effectively treated during his prison tour. He also has no history of working in a tavern; in fact, his employment history shows that he worked some 25 years for the same company--Rexworks. By the time he is released from prison he will be approximately 68 years of age. If he makes it that far, the poor fellow might well deserve a martini or a glass of Cabernet Sauvignon .... or at the very least a visit to a local tavern. On top of this, it seems to us that a busy probation office might well have better things to do than test someone like Jordan for drug or alcohol use a decade and a half from now. However, as we said, we cannot say that imposing the conditions constitutes plain error so we will not disturb them. That said, we would certainly not be aghast if the sage district judge were inclined to take another look at the situation.

--*United States v. Mayes*, 370 F.3d 703 (7th Cir. 2004).

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This case, raising *First Amendment* issues involving the University of Illinois, concerns "Chief Illiniwek," who, depending on one's point of view, is either a mascot or a symbol of the university. More on this distinction later but first, before getting to the issue at hand, we detour for a brief look at college nicknames and their embodiment as mascots.

In the Seventh Circuit, some large schools--Wisconsin (Badgers), Purdue (Boilermakers), Indiana (Hoosiers), Notre Dame (The Fighting Irish), DePaul (the Blue Demons), the University of Evansville (Purple Aces), and Southern Illinois (Salukis)--have nicknames that would make any list of ones that are pretty cool. And small schools in this circuit are no slouches in the cool nickname department. One would have a hard time beating the Hustlin' Quakers of Earlham College (Richmond, Indiana), the Little Giants of Wabash College (Crawfordsville, Indiana), the Mastodons of Indiana University-Purdue University-Fort Wayne (Fort Wayne, Indiana), and the Scarlet Hawks of the Illinois Institute of Technology.

But most schools have mundane nicknames. How can one feel unique when your school's nickname is Tigers (43 different colleges or universities), Bulldogs (40 schools), Wildcats (33), Lions (32), Pioneers (31), Panthers or Cougars (30 each), Crusaders (28), or Knights (25)? Or how about Eagles (56 schools)? The mascots for these schools, who we assume do their best to fire up the home crowd, are pretty generic--and pretty
boring.

Some schools adorn their nicknames with adjectives--like "Golden," for instance. Thus, we see Golden Bears, Golden Bobcats, Golden Buffaloes, Golden Bulls, Golden Eagles (15 of them alone!), Golden Flashes, Golden Flyers, Golden Gophers, Golden Griffins, Golden Grizzlies, Golden Gusties, Golden Hurricanes, Golden Knights, Golden Lions, Golden Panthers, Golden Rams, Golden Seals, Golden Suns, Golden Tigers, and Golden Tornados cheering on their teams.

All this makes it quite obvious that, when considering college nicknames, one must kiss a lot of frogs to get a prince. But there are a few princes. For major universities, one would be hard pressed to beat gems like The Crimson Tide (Alabama), Razorbacks (Arkansas), Billikens (St. Louis), Horned Frogs (TCU), and Tarheels (North Carolina). But as we see it, some small schools take the cake when it comes to nickname ingenuity. Can anyone top the Anteaters of the University of California-Irvine; the Hardrockers of the South Dakota School of Mines and Technology in Rapid City; the Humpback Whales of the University of Alaska-Southeast; the Judges (we are particularly partial to this one) of Brandeis University; the Poets of Whittier College; the Stormy Petrels of Oglethorpe University in Atlanta; the Zips of the University of Akron; or the Vixens (will this nickname be changed if the school goes coed?) of Sweet Briar College in Virginia? As wonderful as all these are, however, we give the best college nickname nod to the University of California-Santa Cruz. Imagine the fear in the hearts of opponents who travel there to face the imaginatively named "Banana Slugs"?

From this brief overview of school nicknames, we can see that they cover a lot of territory, from the very clever to the rather unimaginative. But one thing is fairly clear--although most are not at all controversial, some are. Even the Banana Slug was born out of controversy. For many years, a banana slug (ariolomax dolichophalus to the work of science) was only the unofficial mascot at UC-Santa Cruz. In 1981, the chancellor named the "Sea Lion" as the school's official mascot. But some students would have none of that. Arguing that the slug represented some of the strongest elements of the campus, like flexibility and nonagressiveness, the students pushed for and funded a referendum which resulted in a

landslide win for the Banana Slug over the Sea Lion. And so it became the official mascot.

Not all mascot controversies are "fought" out as simply as was the dispute over the Banana Slug. Which brings us to the University of Illinois where its nickname is the "Fighting Illini," a reference to a loose confederation of Algonquin Indian Tribes that inhabited the upper Mississippi Valley area when French explorers first journeyed there from Canada in the early seventeenth century. The university's mascot, to mirror its nickname--or to some its symbol--is "Chief Illiniwek." Chief Illiniwek *is* controversial. And the controversy remains unresolved today.

Chief Illiniwek does not participate in traditional cheerleading activities, but he does "perform" at athletic events. Whether his presence, and what he does, makes him more mascot than symbol, or vice versa, is really for others to decide. Suffice to say that opponents consider him to be a mascot, while supporters often refer to him as a symbol. The "debate," however, over the use of Native-American names whether as logos, mascots, or symbols is not unique to the University of Illinois.

Forty years ago, Marquette University used a mascot named "Willie Wampum"--a crude Indian caricature with a huge papier-mache head (about 4 feet high!)--to whip up the crowd at its basketball games in support of its nick-name--Warriors. Marquette is now the Golden Eagles. Similarly, the Stanford Indians became the "Cardinal," St. John's transformed from "Red Men" to "Red Storm," Miami of Ohio moved from "Redskins" to "Redhawks," and Eastern Michigan went from "Hurons" to "Eagles." Some schools, most notably Florida State ("Seminoles") and the University of North Dakota (the Fighting Sioux), have resisted change. And so has the University of Illinois.

--*Crue v. Aiken*, 370 F.3d 668 (7th Cir. 2004).

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Simply put, with time, resources, and opportunity to design the scenario, it is not too much to ask the government to get it right.

--*United States v. Anderson*, 371 F.3d 606 (9th Cir. 2004).

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I agree with the majority that Ramirez's sentence is inappropriately harsh. For shoplifting a $199 videocassette recorder, having previously shoplifted twice before, he was sentenced to spend between 25 years and the rest of his life in prison, with no eligibility for parole until he has served at least 25 years. Even Hammurabi limited the penalty for an eye to an eye.

--*Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004) (Kleinfeld, J., dissenting).

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The State's comparative worth arguments, which were at once without precedent and at odds with traditional precepts of due process, should have struck those learned in the law like a bucket of ice water.

--*Humphries v. Ozmint*, 366 F.3d 266 (4th Cir. 2004)

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The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the rights of people as expressed in the laws and give those accused of crime a fair trial."

--*Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) (Douglas, J., dissenting).

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It is always something of a puzzle why criminals confess.

--*United States v. Cranley*, 350 F.3d 617 (7th Cir. Nov. 19, 2003)

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Although rare, on occasion, we see arguments that simply fail the straight-face test. The United States' assertion that the "detention of goods" exception to the sovereign immunity waiver under the Federal Tort Claims Act applies to its negligent failure to remove 119 pounds of marijuana hidden in a car it sold to Jose Aguado Cervantes, whom it later incarcerated for "transporting" those very drugs, is one....Cervantes's claim for negligence is an entirely different matter. We are compelled to note that the United States'assertion, as its sole defense, that this claim is barred by the "detention of goods" exception is so off-the-mark as to be embarrassing.

--*Cervantes v. United States*, 330 F.3d 1186 (9th Cir. 2003).

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The ineptitude of the criminals is undisputed. They agreed to steal currency, which they hoped would be at least $ 5,000,000, from an armored van while it was parked outside a 42nd Street Citibank branch in the center of midtown Manhattan. From the outset, there were a number of difficulties. Unbeknownst to the conspirators, one person who was approached to become part of the criminal team was a confidential government informant. He notified the FBI, which promptly placed a recording device in the automobile the conspirators were using to plan the robbery. The conspirators were recorded discussing whether pedestrians would notice someone carrying a rifle on 42nd Street; whether it would be effective to shoot the gun into the air to distract police officers from noticing the robbery in progress; and which of several alternatives were meritorious -- to drive the armored van into the Hudson River and return later with scuba equipment to retrieve the money, or to drive it into the back of an 18-wheel truck. They decided on driving the van away. Their hope was that the guards would leave the keys in the ignition while they went into the bank; alternatively, the conspirators would use an "ignition puller" to start the van without keys. When the conspirators assembled in Brooklyn on the morning of the planned robbery, one was carrying a small bag with a protruding rifle. They had decided upon a rifle because they were unable to obtain a handgun (although almost any child in most grade schools in New York City could have told them how to procure one). One conspirator at first demurred from participating because he preferred to sleep well into banking hours. He was forcibly awakened to join the team. The conspirators had some difficulty obtaining a container to hold the money. The wife of one of the conspirators was prevailed upon to relinquish the family's bright yellow laundry bag for this purpose. She had objected on the grounds that she needed the bag to carry dirty clothes to the laundromat that day. She was not charged in the indictment. The conspirators had a "slaphammer," sometimes known as a dent-puller or ignition puller, to remove the ignition of the armored van. The tool is readily available on the streets of New York where it is used for the lawful purpose of repairing dents and for the unlawful purpose of pulling out locks in ignitions and car trunks. A key part was missing. After several unsuccessful attempts to locate the part or obtain a new tool, the prospective robbers returned to one conspirator's home to regroup. Leaving the rifle at the home, they proceeded to Manhattan to survey the scene of the prospective robbery. En route, their vehicle stalled several times on the F.D.R. Drive. FBI vehicles followed and a helicopter hovered overhead. Federal agents properly refrained from pushing the criminals' vehicle to the scene of the crime. Cf. Jacobson v. United States, 112 S. Ct. 1535, 118 L.Ed. 2d 174 (April 1992) (entrapment claim where Nebraska farmer induced into buying child pornography). All of the conspirators were arrested at the 42nd Street exit ramp; one had to be awakened so the FBI could read him his Miranda rights.

--*United States v. Vasquez*, 791 F.Supp. 348, 349-350 (E.D.NY 1992).

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The judge thus is playing U.S. Attorney. It is no doubt a position that he could fill with distinction, but it is occupied by another person.

--*In Re United States of America*, 345 F.3d 450 (7th Cir. 2003).

NOTE: Because of the importance of *Blakely v. Washington*, we are distributing hard copies of this issue to panel attorneys who may ordinarily only receive *The Back Bencher* via e-mail or from the Seventh Circuit's website. However, due to the printing and shipping costs associated with hard copies, future issues will be distributed according to our normal method. If you would like to be added to our e-mail recipient list, please contact Managing Editor Mary Kedzior at (309) 671-7891.

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Cases Decided since Blakely[1]

(as of 8/2/04)

I. Blakely Does Not Apply to U.S.S.G. Enhancements:

United States v. Pineiro, No. 03-30437, 2004 U.S. App. LEXIS 14259 (5th Cir. July 12, 2004); United States v. Lauersen, 2004 U.S. Dist. LEXIS 14491 (S.D.N.Y. July 29, 2004); United States v. Olivera-Hernandez, No. 2:04CR 0013 (D. Utah July 12, 2004).

II. Blakely Applies to U.S.S.G. Enhancements:

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[1] We would like to thank Tahlia Townsend for allowing us to publish this document here. Ms. Townsend is an Intern with the Federal Defender Division of New York's Legal Aid Society and is in the Yale Law School Class of 2005.

United States v. Ward, No. 03-2998, 2004 U.S. App. LEXIS 15298 (7th Cir. July 23, 2004); United States v. Mooney, No. 02-3388, 2004 U.S. App. LEXIS 15301(8th Cir. July 23, 2004) (per curiam); United States v. Ameline, No. 02-30326, 2004 U.S. App. LEXIS 15031 (9th Cir. July 21, 2004); United States v. Montgomery, No. 03-5256, 2004 U.S. App. LEXIS 14384 (6th Cir. July 14, 2004) vacated upon grant of reh'g en banc (July 19, 2004) and voluntarily dismissed (July 23, 2004); United States v. Booker, No. 03-4225, 2004 U.S. App. LEXIS 14223 (7th Cir. July 9, 2004); United States v. Gibson, No, 1:04-cr-12 (D. Vt. July 30, 2004); United States v. Muefflemen, Crim. No. 01-CR-10387-NG, 2004 U.S. Dist. LEXIS 14114(D. Mass. July 26, 2004); United States v. Zompa, Crim. No. 04-46-P-S-01, 2004 U.S. Dist. LEXIS 14335 (D.Me. July 26, 2004); United States v. Carter, 2004 U.S.Dist. LEXIS 14433 (C.D. Ill. July 23, 2004); United States v. Parson, No. 6:03-cr-204-Orl-31DAB (M.D. Fla. July 22, 2004); United States v. Sisson, Cr. No. 01-10185-EFH, 2004 U.S. Dist. LEXIS 14162 (D. Mass. July 21, 2004); United States v. Khoury, No. 6:04-cr-24-Orl-31DAB (M.D. Fla. July 21, 2004); United States v. Terrell, No. 8:04CR24, 2004 U.S. Dist. LEXIS 13781 (D. Neb. July 22, 2004); United States v. Marrero, No. 04 Cr. 0086 (JSR), 2004 U.S. Dist. LEXIS 13593 (S.D.N.Y. July 21, 2004); United States v. Sweitzer, No. 1:CR-03-087-01 (M.D.Pa. July 19, 2004); United States v. Harris, Crim. No. 03-244-03, 2004 U.S. Dist. LEXIS 13290 (W.D.Pa. July 16, 2004); United States v. Lockett, Crim. No. 3:04CR017, 2004 U.S. Dist. LEXIS 13710 (E.D.Va. July 16, 2004); United States v. Landgarten, No. 04-CR-70, 2004 U.S. Dist. LEXIS 13172 (E.D.N.Y. July 15, 2004); United States v. Einstman, No. 04 Cr. 97 (CM), 2004 U.S. Dist. LEXIS 13166 (S.D.N.Y. July 14, 2004); United States v. Leach, Crim. No. 02-172-14, 2004 U.S. Dist. LEXIS 13291 (E.D.Pa. July 13, 2004); United States v. Croxford, No. 2:02-CR-00302PGC, 2004 U.S. Dist. LEXIS 12825 (D. Utah July 12, 2004); United States v. Khan, No. 02-CR-1242, 2004 U.S. Dist. LEXIS 13192 (E.D.N.Y. July 12, 2004); United States v. Toro, No. 3:02 cr 362 (PCD), 2004 U.S. Dist. LEXIS 12762 (D. Conn. July 8, 2004); United States v. Montgomery, No. 2:03-CR-801 TS, 2004 U.S. Dist. LEXIS 12700 (D. Utah July 8, 2004); United States v. Thompson, No. 2:04-CR-00095 (PGC), 2004 U.S. Dist. LEXIS 12582 (D. Utah July 8, 2004); United States v. Lamoreaux, No. 03-00399-01/02-CR-W-HFS, 2004 U.S. Dist. LEXIS 13225 (W.D.Mo. July 7, 2004); United States v. Medas, No. 03 CR 1048, 2004 U.S. Dist. LEXIS 12135 (E.D.N.Y. July 1, 2004); United States v. Shamblin, Crim. No. 2:03-00217, 2004 U.S. Dist. LEXIS 12288 (S.D.W.Va., June 30, 2004); United States v. Watson, CR 03-0146 (D.D.C. June 30, 2004); United States v. Fanfan, No. 03-47-P-H (D.Me. June 28, 2004); United States v. Gonzalez, No. 03 Cr. 41 (DAB), 2004 U.S. Dist. LEXIS 11760 (S.D.N.Y. June 25, 2004).

A. Blakely-infirm Enhancements Are Severable, and Other U.S.S.G. Provisions Remain Applicable in All Cases:

United States v. Ameline, No. 02-30326, 2004 U.S. App. LEXIS 15031 (9th Cir. July 21, 2004); Unites States v. Gibson, No, 1:04-cr-12 (D. Vt. July 30, 2004); United States v. Zompa, Crim. No. 04-46-P-S-01, 2004 U.S. Dist. LEXIS 14335 (D.Me. July 26, 2004); United States v. Terrell, No. 8:04CR24, 2004 U.S. Dist. LEXIS 13781 (D. Neb. July 22, 2004); United States v. Leach, Crim. No. 02-172-14, 2004 U.S. Dist. LEXIS 13291 (E.D.Pa. July 13, 2004); United States v. Khan, No. 02-CR-1242, 2004 U.S. Dist. LEXIS 13192 (E.D.N.Y. July 12, 2004); United States v. Toro, No. 3:02 cr 362 (PCD), 2004 U.S. Dist. LEXIS 12762 (D. Conn. July 8, 2004); United States v. Montgomery, No. 2:03-CR-801 TS, 2004 U.S. Dist. LEXIS 12700 (D. Utah July 8, 2004); United States v. Shamblin, Crim. No. 2:03-00217, 2004 U.S. Dist. LEXIS 12288 (S.D.W.Va., June 30, 2004); United States v. Watson, CR 03-0146 (D.D.C. June 30, 2004); United States v. Gonzalez, No. 03 Cr. 41 (DAB), 2004 U.S. Dist. LEXIS 11760 (S.D.N.Y. June 25, 2004).

B. Blakely-infirm Enhancements Are Not Severable from Remainder of U.S.S.G.:

United States v. Mooney, No. 02-3388, 2004 U.S. App. LEXIS 15301 (8th Cir. July 23, 2004) (per curiam); United States v. Montgomery, No. 03-5256, 2004 U.S. App. LEXIS 14384 (6th Cir. July 14, 2004) vacated upon grant of reh'g en banc (July 19, 2004) and voluntarily dismissed (July 23, 2004); United States v. Muefflemen, Crim. No. 01-CR-10387-NG, 2004 U.S. Dist. LEXIS 14114 (D. Mass. July 26, 2004); United States v. Carter, 2004 U.S.Dist. LEXIS 14433 (C.D. Ill. July 23, 2004); United States v. Parson, No. 6:03-cr-204-Orl-31DAB (M.D. Fla. July 22, 2004); United States v. Sisson, Cr. No. 01-10185-EFH, 2004 U.S. Dist. LEXIS 14162 (D. Mass. July 21, 2004); United States v. Khoury, No. 6:04-cr-24-Orl-31DAB (M.D. Fla. July 21, 2004); United States v. Marrero, No. 04 Cr. 0086 (JSR),

2004 U.S. Dist. LEXIS 13593 (S.D.N.Y. July 21, 2004); United States v. King, No. 6:04-CR-35-ORL-31KRS, 2004 U.S. Dist. LEXIS 13496 (M.D. Fla. July 19, 2004); United States v. Sweitzer, No. 1:CR-03-087-01 (M.D.Pa. July 19, 2004); United States v. Harris, Crim. No. 03-244-03, 2004 U.S. Dist. LEXIS 13290 (W.D.Pa. July 16, 2004); United States v. Lockett, Crim. No. 3:04CR017, 2004 U.S. Dist. LEXIS 13710 (E.D.Va. July 16, 2004); United States v. Einstman, No. 04 Cr. 97 (CM), 2004 U.S. Dist. LEXIS 13166 (S.D.N.Y. July 14, 2004); United States v. Croxford, No. 2:02-CR-00302PGC, 2004 U.S. Dist. LEXIS 12825 (D. Utah July 12, 2004); United States v. Thompson, No. 2:04-CR-00095 (PGC), 2004 U.S. Dist. LEXIS 12582 (D. Utah July 8, 2004); United States v. Lamoreaux, No. 03-00399-01/02-CR-W-HFS, 2004 U.S. Dist. LEXIS 13225 (W.D.Mo. July 7, 2004).

1. Blakely-infirm Enhancements Are Not Severable, and No One Can Be Sentenced under the Guidelines:

United States v. Montgomery, No. 03-5256, 2004 U.S. App. LEXIS 14384 (6th Cir. July 14, 2004) vacated upon grant of reh'g en banc (July 19, 2004) and voluntarily dismissed (July 23, 2004); United States v. Mueffleman, Crim. No. 01-CR-10387-NG, 2004 U.S. Dist. LEXIS 14114 (D. Mass. July 26, 2004); United States v. Marrero, No. 04 Cr. 0086 (JSR), 2004 U.S. Dist. LEXIS 13593 (S.D.N.Y. July 21, 2004); United States v. Sisson, Cr. No. 01-10185-EFH, 2004 U.S. Dist. LEXIS 14162 (D. Mass. July 21, 2004); United States v. King, No. 6:04-CR-35-ORL-31KRS, 2004 U.S. Dist. LEXIS 13496 (M.D. Fla. July 19, 2004); United States v. Harris, Crim. No. 03-244-03, 2004 U.S. Dist. LEXIS 13290 (W.D.Pa. July 16, 2004); United States v. Einstman, No. 04 Cr. 97 (CM), 2004 U.S. Dist. LEXIS 13166 (S.D.N.Y. July 14, 2004); United States v. Lamoreaux, No. 03-00399-01/02-CR-W-HFS, 2004 U.S. Dist. LEXIS 13225 (W.D.Mo. July 7, 2004).

2. Blakely-infirm Enhancements Are Not Severable, but Guidelines Are Still Applicable in Cases Where No Enhancement Is Requested:

United States v. Lockett, Crim. No. 3:04CR017, 2004 U.S. Dist. LEXIS 13710 (E.D.Va. July 16, 2004); United States v. Croxford, No. 2:02-CR-00302PGC, 2004 U.S. Dist. LEXIS 12825 (D. Utah July 12, 2004); United States v. Thompson, No. 2:04-CR-00095 (PGC), 2004 U.S. Dist. LEXIS 12582 (D. Utah July 8, 2004).

III. Sentencing Juries

A. Sentencing Juries Endorsed:

United States v. Ameline, No. 02-30326, 2004 U.S. App. LEXIS 15031 (9th Cir. July 21, 2004); United States v. Booker, No. 03-4225, 2004 U.S. App. LEXIS 14223 (7th Cir. July 9, 2004); United States v. Landgarten, No. 04-CR-70, 2004 U.S. Dist. LEXIS 13172 (E.D.N.Y. July 15, 2004); United States v. Khan, No. 02-CR-1242, 2004 U.S. Dist. LEXIS 13192 (E.D.N.Y. July 12, 2004).

B. Sentencing Juries Criticized:

United States v. Sweitzer, No. 1:CR-03-087-01 (M.D.Pa. July 19, 2004); United States v. Croxford, No. 2:02-CR-00302PGC, 2004 U.S. Dist. LEXIS 12825 (D. Utah July 12, 2004); United States v. Montgomery, No. 2:03-CR-801 TS, 2004 U.S. Dist. LEXIS 12700 (D. Utah July 8, 2004).

IV. Blakely Not Retroactive:

Simpson v. United States, No. 04-2700 (7th Cir. July 16, 2004; In Re Dean, No. 04-13244, 2004 U.S. App. LEXIS 14191 (11th Cir. July 9, 2004) (per curiam); United States v. Stoltz, Crim. No. 99-356 (3)(DSD/JMM), 2004 U.S. Dist. LEXIS 13968 (D. Minn. July 19, 2004); United States v. Traeger, No. 04 C 2685, 2004 U.S. Dist. LEXIS 12901 (N.D. Ill. July 8, 2004); Patterson v. United States, 03-CV-74948, 2004 U.S. Dist LEXIS 12402 (E.D. Mich. June 25, 2004).

V. An Agreement to a Guidelines Sentence Made Prior to Blakely Is Not a Waiver of Blakely Objection to Sentence:

United States v. Terrell, No. 8:04CR24, 2004 U.S. Dist. LEXIS 13781 (D. Neb. July 22, 2004); United States v. Harris, Crim. No. 03-244-03, 2004 U.S. Dist. LEXIS 13290 (W.D.Pa. July 16, 2004).

List of Objections to Non-Guidelines (Or Alternative Non-Guidelines) Sentence

EDITOR'S NOTE: Richard Klugh, Assistant Federal Public Defender for the Southern District of Florida, has prepared the following useful list of objections to be used in cases where a district judge intends to impose a non-Guidelines or alternative non-

Guidelines sentence. The Seventh Circuit in *Booker* specifically recommended that district judges impose an alternative sentence in the post-*Blakely* environment, and therefore his recommendations here may be of use in your upcoming sentencing hearings.

! Object to imposition of any sentence above the statutory maximum as provided under Blakely.

! Object to the court's failure to apply the mandatory provisions of 18 U.S.C. § 3553(b) as required under Blakely, which provisions are not unseverable, because the only portions of the guidelines that must be severed are the Sentencing Commission's optional decision to define "relevant conduct" in a Blakely-violative manner in U.S.S.G. § 1B1.3, and the policy statement that reduces the government's proof burden to a mere preponderance, U.S.S.G. § 6A1.3. Because that was a Commission decision, and not a Congressional one, striking a facially constitutional statute, 18 U.S.C. § 3553(b), is prohibited. [**NOTE**: Also include here the severability analysis used by the Ninth Circuit in United States v. Ameline, 2004 WL 1635808 (9th Cir. July 21, 2004), and any good severability cases from your circuit. In the Eleventh Circuit, we rely on the presumption of severability stated in Alabama Power Co. v. U.S. Dep't of Energy, 307 F.3d 1300, 1308 (11th Cir. 2002).]

! Object to the due process (judicial ex post facto) violation in treating the statutory maximums (the substantive guidelines) as somehow erased by the fact of another constitutional violation, the attempted imposition of a Blakely-violative sentence. [**NOTE**: One way to express this due process argument is: The defendant, at the time of commission of the offense, had a reasonable expectation that the substantive guidelines – held binding since 1989 – would be applied; he equally had the right to presume that he could demand application of the guidelines consistently with the United States Constitution (recognizing, of course, that Apprendi-based claims had not yet been resolved by the Supreme Court). What the defendant could not reasonably anticipate – because no similar action has ever been taken by any court – is that a sentencing court could take away the right to be sentenced constitutionally within the existing statutory scheme (including 18 U.S.C. § 3553(b)'s mandate of binding guidelines) merely in order to avoid vindicating the defendant's constitutional rights under the Fifth and Sixth Amendments or due to concern about conflicting congressional intentions. A judicially-imposed remedy that says 'if you benefit from constitutional application of the statute, we are going to void the statute,' goes to the very core of both the vindictiveness and notice concerns that have informed judicial understanding of the ex post facto clause since Calder v. Bull, 3 Dall. 386 (1798).]

! Object to the punitive effect of the sentence in effectively punishing the defendant for raising the Blakely objection, rather than remedying the exceeding of the statutory maximum. See Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do [is] a due process violation of the most basic sort.").

! On procedural due process, and statutory and rule grounds (18 U.S.C. § 3553; Fed. R. Crim. P. 11), object to the imposition of a non-guidelines sentence [or alternative non-guidelines sentence] where the court employed an entirely different procedural and substantive structure than the rules applicable to true non-guidelines sentencing, thereby procedurally prejudicing the defendant in, for example, denial of the defendant's right to a PSI addressing paroleability factors to determine likely parole date and denying the defendant the full and effective right of allocution and presentation of evidence relevant to indeterminate sentencing, including the applicability vel non of the good-time credit as applied in connection with parole.

! Object to the violation of the three related fair warning rights of the Fifth Amendment Due Process Clause: the rule of lenity, the requirement that the criminal penalties for an offense be sufficiently intelligible at the time of commission of the offense as to be understandable to an ordinary person, and the impropriety of application of an unforeseeable judicial revision of a statutory provision. See United States v. Lanier, 117 S.Ct. 1219, 1225 (1997).

! Object to the finding of non-severability of the guidelines and, in the alternative, to the failure to declare the supervised release and restrictive gain time provisions unconstitutional [or one or the other, depending on how the court devised the sentence or alternative sentence] and request an 18 U.S.C. § 4205(b)(2) sentence, making the defendant immediately eligible for parole. Also, consider requesting a split sentence, suspending all but 6 months or less of the sentence and leaving the defendant on probation. 18 U.S.C. § 3651.

! Object to the court's failure to attempt to find a prior edition of the guidelines manual that may be applied in this case without violating Blakely.

! Renew all of the arguments in PSI objections.

CA7 Case Digest

By: Jonathan Hawley
Appellate Division Chief

APPEAL

Speights v. Frank, 361 F.3d 962 (7th Cir. 2004; No. 02-2646). Upon consideration of a 2241 petition, the Court of Appeals held that the defendant's waiver of his right to appellate counsel was knowing and intelligent. After the petitioner's conviction in Wisconsin, his appellate counsel sent him a letter advising him that his appeal had no merit and giving him three options: dismissal, the filing of a "no merits" brief, or proceeding *pro se*. The petitioner opted for the third option, but in his habeas petition argued that his waiver of appellate counsel was not "knowing and intelligent." In affirming the denial of the writ, the Court of Appeals noted that the Supreme Court has never held that waivers of counsel at any stage of the proceedings other than trial require a detailed give and take between the accused and someone trying to educate him about counsel's benefits--and the Supreme Court has held that the Constitution does not require warnings along these lines when the accused wants to plead guilty without legal assistance. It is enough if the accused knows of his right to counsel and the plea itself is voluntary. Much the same may be said about waivers of legal assistance in prosecuting an appeal. Once the trial is over, the major complexities, choices, and risks are past. When a state allows defendants to represent themselves on appeal, it may therefore permit them to decide without the rigmarole that attends waiver of counsel for trial. Just as simple consent to proceed without counsel suffices during custodial interrogation, so a straightforward assent is enough on appeal.

United States v. Craig, 368 F.3d 738 (7th Cir. 2004; No. 03-2424). After informing the district court at sentencing that he did not wish to file a notice of appeal, the defendant changed his mind and filed a late *pro se* notice. When he filed a motion to extend the period for filing such a notice, the district court denied the motion, finding that changing one's mind regarding an appeal was not "good cause" within the meaning of Rule 4(c). On appeal, the defendant argued that his notice was in fact timely when one factors in the mailbox rule set forth in Rule 4(c)(1). The Court of Appeals rejected this claim, noting that Rule 4(c) requires a defendant "confined to an institution" to establish two facts: (1) that he deposited the notice in the prison's legal mail system; and (2) that the filing had pre-paid first class postage affixed to it. Although the defendant's affidavit indicated he placed the notice in the legal mail system, it did not contain a statement that it had pre-paid first class postage affixed to it. Thus, the Court of Appeals held that the defendant could not take advantage of Rule 4(c)'s mailbox rule. In so concluding, the Court also noted that although prior precedents had held that the mailbox rule was only available to "unrepresented prisoners," the amended Rule applied to "an inmate confined to an institution." Thus, whether or not a defendant is represented by counsel, he may still take advantage of the mailbox rule so long as he meets the Rule's other requirments.

United States v. Rinaldi, 351 F.3d 285 (7th Cir. 2003; No. 03-2241). In prosecution for health care fraud, the Court of Appeals considered the appropriateness of an interlocutory appeal of the district court's order committing the defendant for a custodial examination not to exceed 45 days after he moved to withdraw his plea based upon a claim that a mental disorder prevented him from forming the requisite criminal intent at the time he committed the offense. Considering its own jurisdiction, the Court of Appeals noted that the collateral order doctrine does permit an interlocutory appeal for some non-final orders that are too important to be denied review and which are so disconnected from the merits that appellate consideration is required before final adjudication. To fit within this category, an order must meet three conditions: (1) the order must conclusively determine the disputed question; (2) it must dispose of an issue totally apart from merits of the action; and (3) it must be virtually unreviewable on appeal from a final judgment. In the present case, all three requirements were met, for the order conclusively held that the defendant should undergo psychiatric examination; the determination about the defendant's mental capacity was separate from the issue of his guilt or innocence, and the order would be virtually unreviewable because there would be no effective relief for the defendant's loss of liberty during the period of confinement.

United States v. Emerson, 349 F.3d 986 (7th Cir. 2003; No. 03-1622). Upon consideration of a defendant's appeal from the government's

decision to withdraw a post-sentencing Rule 35 motion for a reduction in sentence, the Court of Appeals held that the defendant's waiver of his right to appeal his sentence in his plea agreement precluded him from challenging the government's decision. The defendant's waiver included an agreement not to challenge his sentence on "any ground whatever." The court concluded that the language of the waiver must be read to include appeals regarding reductions in sentence for cooperating with the government.

BLAKELY

United States v. Booker, ___ F.3d ___ (7th Cir. 2004; No. 03-4225). In prosecution for distributing at least 50 grams of cocaine base, the Court of Appeals reversed the defendant's sentence and remanded the case for resentencing in light of the Supreme Court's decision in *Blakely v. Washington*. The defendant was found guilty after a jury trial of distributing at least 50 grams of cocaine base, but at sentencing, the judge found by a preponderance of the evidence that the defendant distributed a larger amount, as well as that the defendant obstructed justice. In light of *Blakely*, the Court of Appeals ordered supplemental briefing on its applicability to the case. The court ultimately concluded that the holding in *Blakely* in fact applied to the Federal Sentencing Guidelines, and a district judge may sentence a defendant based solely on those facts which were found by the jury beyond a reasonable doubt. Thus, because the jury did not find that the defendant had distributed the amount for which the judge held the defendant accountable, nor did it find that he obstructed justice, the district court could not constitutionally enhance the defendant's sentence based upon these factors. Regarding how *Blakely* would be applied on remand, the court stated as follows: "If the government does not object, the judge can simply sentence Booker to 262 months, since the choice of that sentence would not require any judicial factfinding. But if the government wants a higher sentence or unless, as explained below, the guidelines are not severable, then Booker, unless he strikes a deal with the government, will be entitled to a sentencing hearing at which a jury will have to find by proof beyond a reasonable doubt the facts on which a higher sentence would be premised. There is no novelty in a separate jury trial with regard to the sentence, just as there is no novelty in a bifurcated jury trial, in which the jury first determines liability and then, if an only if it finds liability, determines damages. Separate hearings before a jury on the issue of sentence is the norm in capital cases. . . .To summarize: (1) The application of the guidelines in this case violated the Sixth Amendment as interpreted in *Blakely*; (2) in cases where there are no enhancements--that is, no factual findings by the judge increasing the sentence--there is no constitutional violation in applying the guidelines unless the guidelines are invalid in their entirety; (3) we do not decide the severability of the guidelines, and so that is an issue for consideration on remand should it be made an issue by the parties; (4) if the guidelines are severable, the judge can use a sentencing jury; if not, he can choose any sentence between 10 years and life and in making the latter determination he is free to draw on the guidelines for recommendations as he sees fit; (5) as a matter of prudence, the judge should in any event select a nonguidelines alternative sentence." The United States Supreme Court granted *certiorari* in this case on August 2, 2004. The Court will consider the following questions: (1) Whether a district court violates the Fifth and Sixth Amendments by relying upon facts that increase the maximum sentence available under the United States Sentencing Guidelines (other than the fact of a prior conviction) when those facts were not charged in the indictment and either found by the jury on proof beyond a reasonable doubt or admitted by the defendant.; and (2) if the answer to the first question is yes, the following question is presented: What role do the Sentencing Reform Act, the Sentencing Guidelines, and Federal Rule of Criminal Procedure 32 continue to play in federal criminal sentencing? The case is set for argument on October 4, 2004.

Simpson v. United States, ___ F.3d ___ (7th Cir. 2004; No. 04-2700). Upon consideration of an application seeking permission to file a second 2255 petition raising a *Blakely* issue, the Court of Appeals held that such permission could not be granted until the Supreme Court declared *Blakely* retroactive. The court noted that assuming the Supreme Court announced a new constitutional rule in *Blakely* and that the petitioner's sentence violates that rule, the proposed claim was premature because 2244(b)(2)(A) and 2255 para. 8(2) require a declaration of retroactivity by the Supreme Court before a second or successive petition may be filed. Accordingly, the court dismissed the petition without prejudice with leave to re-file should the Supreme Court make such a declaration.

United States v. Ward, ___ F.3d ___ (7th Cir. 2004; No. 03-2998).

In prosecution for charges related to a bank robbery, the Court of Appeals remanded the defendants' sentences for reconsideration in light of *Blakely*. One of the defendants challenged an enhancement for abduction of a person to facilitate the offense or escape. The court noted that in light of its decision in *Booker*, the constitutionality of such enhancements is called into doubt. Referencing only the analysis set forth in *Booker*, the court remanded both defendants' cases for resentencing. Interestingly, the court remanded both defendants' cases for resentencing, although only one of the defendants raised a sentencing issue.

United States v. Ohlinger, ___ F.3d ___ (7th Cir. 2004; No. 03-3380). In prosecution for transporting a visual depiction of a minor engaged in sexually explicit conduct, the Court of Appeals remanded the defendant's case for resentencing in light of *Blakely*. On appeal, the defendant challenged the district court's enhancement of his sentence for a prior conviction for a crime against a child under the age of 14. Additionally, he challenged the district court's upward departure based upon a finding that his criminal history category within the Guidelines underrepresented his criminality and likelihood of recidivism. The entirety of the court's reasoning in the case is as follows: "As this Court recently determined in *United States v. Booker*, the Supreme Court's decision in *Blakely v. Washington* calls into doubt the constitutionality of the U.S. Sentencing Guidelines. Under *Blakely*, as interpreted in *Booker*, a defendant has the right to have a jury decide factual issues that will increase the defendant's sentence. As *Booker* holds, the Guidelines contrary assertion that a district judge may make such factual determinations based upon the preponderance of the evidence runs afoul of the Sixth Amendment. In this case, the district judge made several factual findings and used these findings to support the sentence enhancements for distributing pornographic images with the expectation of receiving other images and engaging in a pattern of activity involving the sexual abuse of minors. We therefore must remand Ohlinger's case to the district judge for resentencing in light of *Booker*."

EVIDENCE

United States v. Rangel, 350 F.3d 648 (7th Cir. 2003; No. 03-1606). In prosecution for distributing cocaine, the Court of Appeals affirmed the government's use of a "summary chart." This chart, introduced by the government, summarized a number of calls between the defendant and a government witness, introduced to corroborate the testimony of the government witness. The defendant argued on appeal that the chart should have been excluded due to the government's failure to abide by Federal Rule of Evidence 1006. That section requires a party seeking to introduce a summary of voluminous records to provide copies of those records to the opposing party at a reasonable time and place. A "reasonable time and place" has been understood to be such that the opposing party has adequate time to examine the records to check the accuracy of the summary. In the present case, although the defendant objected to the chart a number of times, he never articulated this basis as a ground for objection. Moreover, given that the purpose of Rule 1006 is to ensure the accuracy of a summary chart and the defendant on appeal was not claiming that the chart was inaccurate, there was no likelihood that exclusion of the chart would have changed the outcome of the case anyway.

United States v. Thompson, 359 F.3d 470 (7th Cir. 2004; No. 02-3965). In this appeal , the Court of Appeals outlined the circumstances when a threat to a witness, even if not directly related to a witnesses' courtroom testimony, can be admitted to show bias. The court stated: "We cannot agree that there is a general requirement that the threat of a party must be related specifically to a witness' courtroom testimony before such evidence and the suggestion of resulting bias can be introduced on cross-examination. Such a proposition, if accepted, would result in a significantly higher standard for admitting bias evidence under Rule 403 than is now employed by the courts. . . [However], when a party wishes to elicit on *direct* examination testimony about threats, there must be some specific purpose for introducing such evidence such as a witness' courtroom demeanor indicating intimidation or a witness' delay in testifying. Absent some finding or demonstration that a threat would explain some specific behavior of a witness that, if unexplained, could damage a party's case, the evidence does little, if anything, to demonstrate bias or to inform the jury's credibility determination. Evidence of threats toward a witness offered on direct examination to "boost" or enhance a witness' credibility therefore should be linked specifically to a credibility problem; without the link to a specific credibility issue, the evidence has extremely limited probative value. Evidence of threats on direct examination, admitted even though the witness shows no indication of intimidation, is not only of extremely weak probative value,

but it also could constitute a prejudicial attack on the opposing party. Such evidence can be highly prejudicial. The situation is very different when the purpose of introducing the evidence of a threat is to demonstrate bias on cross-examination of a witness. In such context, the probative value of such evidence is far more evident. For instance, evidence of bias, including evidence of a threat, to challenge the credibility of a witness who has made an inconsistent statement simply does not raise the same concerns as evidence of a threat offered, in the absence of a testimonial inconsistency, simply to "boost" a witness' testimony. Indeed, . . . the threat evidence can be relevant to explain a witness' inconsistent statements.

United States v. Saunders, 359 F.3d 874 (7th Cir. 2004; 02-2884). In prosecution for being a felon in possession of a firearm, the Court of Appeals held that the defendant's introduction on direct examination of evidence regarding a prior conviction waived his right to object to the district court's ruling on a motion *in limine* allowing the evidence to come in. Specifically, prior to trial, the district court denied the defendant's motion to exclude evidence regarding the prior conviction. Defense counsel then elicited information about the prior conviction on direct examination, but also attempted to appeal the district court's denial of the motion *in limine*. The Court of Appeals noted that the Supreme Court in *Ohler v. United States*, 529 U.S. 753 (2000), held that a defendant may not appeal an evidentiary ruling allowing evidence of a prior conviction if the defendant herself actually introduced the prior conviction, even if a proper contemporaneous objection was made. This challenge is foreclosed on appeal because a defendant knowingly waives her claim when, as a strategic matter, she introduces the prior conviction in order to deprive the government of its full impeachment effect on cross-examination. Accordingly, the court refused to consider the question.

United States v. Beard, 354 F.3d 691 (7th Cir. 2004; No. 2509). Upon consideration of an argument that the evidence was insufficient to establish guilt that he was a felon in possession of a weapon found in a car he was riding as passenger, the court affirmed the defendant's conviction, stating that the defendant had an obligation to come forward with an alternative explanation to the government's version of events. Specifically, the Court stated as follows: "We asked [the defendant's] lawyer at argument what the explanation of the defense was for the presence of the gun in the car that Beard had borrowed. No answer was forthcoming. The lawyer seems to have thought that since the government had the burden of proof and Beard was privileged not to testify (and he did not testify), it was irrelevant that the jury was given no alternative to the government's straightforward theory as to whose gun it was. That is incorrect. The plausibility of an explanation depends on the plausibility of the alternative explanations. And so, realistically, a jury called upon to decide guilt must compare the prosecution's version of the incident giving rise to the case with the defense version. Confidence in a proposition, such as Beard's guilt, is created by excluding alternatives undermined by more plausible alternatives. That is why the duty of a criminal defendant's lawyer to investigate is not satisfied just by looking for ways of poking holes in the government's case. There must also be a reasonable search for evidence that would support an alternative theory of the case. Evidently the search by Beard's lawyer turned up nothing. This left the jury with no alternative theory to the government's. Relative to the alternatives, the government's case was more powerful than it would have seemed in the abstract."

United States v. King, 354 F.3d 691 (7th Cir. 2004; No. 03-2180). In prosecution for distribution of methamphetamine, the Court of Appeals affirmed the district court's denial of the defendant's motion to retain a fingerprint expert at government expense. The defendant's theory was that a fingerprint expert would confirm that his fingerprints were not on the drugs in question, thereby corroborating his theory that his co-defendant distributed the drugs. The court noted that the test for determining whether expert services should be provided to an indigent defendant is whether a reasonable attorney would engage such services for a client having the independent financial means to pay for them. However, it also noted that if this standard is applied too literally, it could result in the government being forced to finance a "fishing expedition." As a result, the court has held that it is appropriate for the district court to satisfy itself that a defendant may have a plausible defense before granting the defendant's motion. In the present case, given the overwhelming nature of the other evidence, including audiotapes, and the fact that the government had already payed for two separate experts to analyze those tapes, it was not an abuse of discretion to deny the motion as a frivolous fishing expedition.

United States v. Mitrione, 357 F.3d 212 (7th Cir. 2004; No. 02-4222).

The Court of Appeals in this case changed the law regarding what a defendant must show to obtain a new trial when a government witness has committed perjury. Under the old test set forth in *Larson v. United States*, 24 F.2d 82 (7th Cir. 1928), new trials are granted when (1) the witness is material and the testimony is false; (2) the jury *might* have reached a different verdict if it knew the testimony was false or if it hadn't heard the testimony; and (3) the defense was taken by surprise by the false testimony or didn't learn of its falsity until after trial. The Court of Appeals noted that this test puts the Seventh Circuit at odds with several other circuits. The other circuits use a "probability test," holding that absent a finding that the government knowingly sponsored the false testimony, a defendant seeking a new trial must show that the jury would *probably* have reached a different verdict had the perjury not occurred. The Court of Appeals adopted this test and overruled *Larson*. Thus, in order to win a new trial based on a claim that a government witness committed perjury, assuming that the government did not knowingly present the false testimony, defendants will have to prove the same things they are required to prove when moving for a new trial for other reasons. Defendants will have to show that the existence of the perjured testimony (1) came to their knowledge only after trial; (2) could not have been discovered sooner with due diligence; (3) was material; and (4) would probably have led to an acquittal had it not been heard by the jury. *See United States v. Gonzalez*, 93 F.3d 311 (7th Cir. 1996).

United States v. Fallon, 348 F.3d 248 (7th Cir. 2003; No. 03-1330). In prosecution for bank fraud, the Court of Appeals affirmed the district court's denial of the defendant's motion in limine, seeking to preclude the government from impeaching him with prior convictions of theft, conspiracy to alter odometers, and mail fraud, all of which were outside the 10-year limitation set forth in Federal Rule of Evidence 609(b). The Court of Appeals noted that it was troubled by the district court's ruling, for the legislative history of Rule 609 indicates that it is intended that convictions over 10 years old will be admitted very rarely and only in exceptional circumstances. However, the court did not reach the merits of the district court's ruling, for the defendant's failure to testify at trial waived his right to challenge the ruling, pursuant to *Luce v. United States*, 469 U.S. 38 (1984). Specifically, the *Luce* court noted that when a reviewing court does not know the precise nature of the defendant's testimony, it is impossible for the court to weigh the probative value of a prior conviction against the prejudicial effect. Moreover, the Court of Appeals noted that although the defendant made it clear that his decision not to testify was prompted by the district court's ruling, *Luce* makes no exception for such circumstances. Thus, the Court of Appeals affirmed the defendant's conviction.

United States v. Patterson, 348 F.3d 218 (7th Cir. 2003; No. 02-3134). In prosecution for conspiracy to distribute more that 5 kilograms of cocaine, the defendant argued that the jury's acquittal of his co-defendant required reversal of his conviction unless there was "overwhelming evidence" of the conspiracy. The Court of Appeals rejected this argument, noting that the defendant assumed that inconsistent jury verdicts are subject to a different standard of review for sufficiency of the evidence than are consistent jury verdicts. But, according to the court, jury verdicts need not be consistent, nor are they reviewed on grounds of consistency. The acquittal of a co-defendant may have been motivated by sympathy for that defendant and may have acquitted him lawlessly. Additionally, in *United States v. Mancari*, 875 F.2d 103 (7th Cir. 1989), the court stated that "if there is overwhelming evidence of conspiracy, the jury will be assumed not to have convicted lawlessly the conspirator it convicted but instead to have acquitted the others lawlessly. "According to the court, *Mancari* merely explains that overwhelming evidence is sufficient to demonstrate the lawfulness of the conviction; it does not *require* overwhelming evidence for the conviction to stand. Thus, using the ordinary sufficiency of the evidence standard, the court concluded that the defendant's conviction should stand.

United States v. Patterson, 348 F.3d 218 (7th Cir. 2003; No. 02-3134). In prosecution for conspiracy to distribute more that 5 kilograms of cocaine, the defendant argued that a special verdict form submitted to the jury on a lesser amount of cocaine constituted a constructive amendment to the indictment. The Court of Appeals noted that a constructive amendment to an indictment occurs when either the government, the court, or both, broadens the possible bases for conviction beyond those presented by the grand jury. However, there is no constructive amendment when the defendant is convicted of the same offense for which he was charged in the indictment. In the present case, the defendant was convicted of the same charges for which he was indicted--namely, conspiracy to

distribute cocaine. Although the jury's determination on drug quantity differed from that contained in the indictment, drug quantity is not an element of a § 841 offense. Indeed, a jury need not make any finding of drug quantity for a conviction under § 841 to stand. Accordingly, the court affirmed the defendant's conviction.

HABEAS CORPUS

Harris v. Cotton, 365 F.3d 552 (7th Cir. 2004; No. 03-1611). Upon consideration of a 2254 petition, the Court of Appeals found that trial counsel was ineffective. The petitioner was charged with murder, and he presented a defense based upon self-defense. The victim in the case was examined by the county coroner's office, and a toxicology report showed that the victim was under the influence of alcohol and cocaine when he died. Although defense counsel knew that the report existed, he testified at the post-conviction hearing that his failure to obtain the report was an "oversight" and that he had no explanation that could justify his not having the report. The Court noted that although an inadvertent omission does not automatically equal constitutionally deficient performance, failure to conduct a reasonable investigation may satisfy the performance prong of *Strickland*. Here, because the petitioner alleged self-defense, the behavior of the victim was extremely important to his case. Thus, defense counsel's failure to obtain the report constituted deficient performance. Regarding prejudice, the Court noted that the jury heard no evidence that the victim was intoxicated, when he was in fact quite inebriated. If the jury believed that the victim was sober, there is a reasonable probability that they would not have believed the petitioner's version of events as it related to the victim. The Court therefore concluded that there was a reasonable probability that the outcome of the proceedings would have been different if the toxicology report were presented. Thus, the petitioner met both prongs of the *Strickland* test.

Walton v. Briley, 361 F.3d 431 (7th Cir. 2004; No. 01-2928). Upon consideration of a 2254 petition, the Court of Appeals reversed the district court's denial of the writ, finding that the defendant's Constitutional right to a public trial was violated. The petitioner was tried in the Cook County Courthouse late in the evening after the courthouse had been closed and locked for the night. Thus, the petitioner's fiancee and a confidential informant involved in the case were prevented from attending the trial. The Court of Appeals noted that a party seeking to bar the court's doors to the public must satisfy a four-part test: (1) the party who wishes to close the proceedings must show an overriding interest which is likely to be prejudiced by a public trial, (2) the closure must be narrowly tailored to protect that interest, (3) alternatives to closure must be considered by the trial court, and (4) the court must make findings sufficient to support the closure. The Court of Appeals noted that in the present case, the record fails to show that the court even considered the test. While this may have been due to the fact that the closure was inadvertent and merely a result of the trial judge's desire to "get it done," the judge's devotion to work is not an interest sufficient to overcome the petitioner's constitutional guarantee of a public trial. Additionally, whether the closure was intentional or inadvertent is constitutionally irrelevant. Finally, the petitioner need not show a specific prejudice. Accordingly, the court reversed with directions that the district court issue the writ.

Mataya v. Kingston, ___ F.3d ___ (7th Cir. 2004). Upon consideration of a 2254 petition, the Court of Appeals denied a *Brady* claim because the petitioner suffered no prejudice from the violation, and the information was therefore not "material" in the sense that there was no probability that its disclosure to the defense would have resulted in the jury's acquitting the petitioner . At trial, the government's main witness testified that he had made no "deals" in exchange for his testimony at trial, when, in fact, the government had agreed to drop a number of pending charges against him which resulted in saving him from several years in prison. This information was never revealed to the defense, and the government sat by while the witness perjured himself. Despite this clear *Brady* violation, the Court of Appeals refused to reverse, because although the withheld information demonstrated that the witness had a motivation to lie, the evidence in fact showed that the witness did not lie. Specifically, the witness testified to details of the crime which could have only been learned from the perpetrator himself. Thus, although the witness had a strong motive to lie, and the defense was deprived of this information, the witness did not lie and therefore no prejudice was suffered from the *Brady* violation. The Court reasoned that had a known liar found a written confession by the petitioner, and a handwriting expert confirmed that the confession was indeed the petitioner's, the fact that the confession had been found by a liar would not undermine its veracity.

Moore v. Knight, 342 F.3d 936 (7th Cir. 2004; No. 02-4257). Upon consideration of the petitioner's 2254 petition, the Court of Appeals granted the writ, holding that the trial judge's *ex parte* communication with the jury violated the petitioner's right to a fair trial. During its deliberations, the jury sent a note to the judge which contained factual questions regarding the petitioner's alibi, asking where the petitioner lived, the distance between his home and the location of the crime, and the time the petitioner arrived home on the night in question. The judge directed the Bailiff to inform the jury that their questions could not be answered and no further questions or review would be allowed. None of this was placed on the record by the trial court, and defense counsel was only informed of the communication at sentencing. The Court noted that in a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during the trial about the matter pending before the jury is deemed presumptively prejudicial and the burden rests heavily upon the government to establish that such contact with the juror was harmless. In the present case, the Court was uncertain exactly how the Bailiff relayed the information to the jury, thus raising a question as to what exactly was told to the jury. This was all the more troubling because the communications went to the substance of testimony presented at trial; specifically at issue is the jury's question regarding the time the petitioner arrived at his home on the night of the crime--a question that went to the heart of the petitioner's alibi defense. If it was the case that the jury was told there was no evidence in the record regarding the question, they were clearly given incorrect substantive information, for testimony on this issue was presented. Moreover, given that the jurors were not allowed to take notes, it "takes little imagination to see why, if the judge or her Bailiff, did indicate that there was no evidence in the record that addressed the subject of the jurors' questions, that response could have affected the outcome of the trial." Accordingly, when evaluating the effect of communication in terms of "fundamental fairness" to the petitioner," the Court was "hesitant to punish [the petitioner] for the ambiguities created by the lack of a record." Accordingly, the Court of appeals remanded with instructions to issue the writ.

Moore v. Olson, 368 F.3d 757 (7th Cir. 2004; No. 03-4053). Upon consideration of a 2241 petition, the Court of Appeals held that the location of a collateral attack is best understood as a matter of venue, which means that both waiver and forfeiture are possible. Specifically, when the case began, the respondent was the Warden of the U.S. Penitentiary in Leavenworth, Kansas, a location not only outside of the district in which the petition was filed, but also outside the Seventh Circuit. Although the respondent challenged jurisdiction in the district court and lost, it abandoned the jurisdictional argument on appeal. The Court of Appeals, however, raised the jurisdictional issue *sua sponte*, and requested briefing on the issue from the parties. In these supplemental filings, the Respondent again challenged the district court's jurisdiction. The Court of Appeals, however, ultimately concluded that the location of a collateral attack is a matter of venue, rather than jurisdiction. As such, a challenge to the issue can be waived, and the respondent's failure to initially challenge the issue on appeal constituted a waiver. Thus, the Court proceeded to consider the merits of the petition.

Harris v. United States, 366 F.3d 593 (7th Cir. 2004; No. 02-3408). Upon consideration of a 2255 petition alleging ineffective assistance of counsel, the Court of Appeals held that the petitioner was precluded from raising his argument because he had already made the argument on direct appeal and lost. On direct appeal, the petitioner argued that his counsel was ineffective for failing to argue for a downward adjustment under the safety valve. The Court of Appeals noted in its opinion on direct appeal that such claims brought on direct appeal are discouraged because the absence of pertinent factual matters not typically found in a trial record make it incredibly difficult to succeed in demonstrating that trial counsel's performance was deficient. The court then rejected the claim. On appeal from the denial of the 2255 petition, the Court again noted that it has repeatedly warned defendants against raising an ineffective assistance of counsel claim on direct appeal, and, because the defendant here did so and lost, the Court of Appeals was bound by that decision in the 2255 proceedings.

Williams v. United States, 366 F.3d 438 (7th Cir. 2004; No. 04-1758). Upon application for leave to commence a successive collateral attack, the Court of Appeals dismissed the petition as unnecessary. After the time for filing a notice of appeal had passed, the petitioner filed a motion to withdraw his guilty plea in the district court, which the district court construed as a 2255 and ultimately denied. The petitioner then filed the instant petition for leave to file a successive collateral attack. The Court of Appeals noted that *Castro v. United States*, 124 S.Ct. 786

(2003) prohibits a district court from re-characterizing a *pro se* litigant's motion as the litigant's first 2255 motion unless the court informs the litigant of its intent to re-characterize, warns the litigant that the re-characterization will subject subsequent 2255 motions to the law's second or successive restrictions, and provides the litigant with an opportunity to withdraw, or to amend, the filing. Because the events in question occurred before the decision in *Castro*, the district court did not comply with the latter two of *Castro's* requirements. Accordingly, the Court of Appeals held that the petitioner could proceed with his collateral attack without obtaining its permission.

Gomez v. Jaimet, 350 F.3d 673 (7th Cir. 2003; No. 02-4372). The Court of Appeals affirmed the district court's denial of a 2254 petition wherein the petitioner alleged that his constitutional right to testify in his own defense was denied by his trial counsel and that his trial counsel was constitutionally ineffective for failing to present his testimony at trial. Because the petitioner had procedurally defaulted his claim, he argued that this procedural bar should be overcome under an "actual innocence" theory. When a petitioner has procedurally defaulted a claim, a federal court cannot reach the merits of that claim unless the petitioner demonstrates: (1) cause for and actual prejudice arising from failing to raise the claim as required, or (2) that enforcing the default would lead to a "fundamental miscarriage of justice." The fundamental miscarriage of justice exception applies only where the petitioner is actually innocent of the crime for which he is imprisoned. To support a colorable claim of actual innocence, the petitioner must come forward with "new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial. The petitioner must also establish that "it was more likely than not that no reasonable juror would have convicted him in light of the new evidence." In the present case, the alleged evidence not considered at trial presented by the petitioner was (1) the statements of the petitioners co-defendants and (2) the petitioner's own testimony. The government argued that this evidence cannot be considered "new" because it is not newly discovered, *i.e.*, the petitioner was aware of its existence at the time of trial. The Court of Appeals, however, noted that all that is required is that the new evidence is reliable and that it was not presented at trial. Moreover, particularly in a case where the underlying constitutional violation claimed is the ineffective assistance of counsel premised on a failure to present evidence, a requirement that new evidence be unknown to the defense at the time of trial would operate as a roadblock to the actual innocence gateway. Here, the very premise of the ineffectiveness claim is that the trial counsel knew of yet failed to present evidence that the petitioner is alleging proves his innocence. If procedurally defaulted ineffective assistance of counsel claims may be heard upon a showing of actual innocence, then it would defy reason to block review of actual innocence based on what could later amount to the counsel's constitutionally defective representation. Having set forth this framework, the Court of Appeals nevertheless refused to excuse the default, finding that the petitioner failed to show that it was more likely than not that no reasonable juror would have convicted him in light of the new evidence.

Davis v. Borgen, 349 F.3d 1027 (7th Cir. 2003; No 03-2354). Upon consideration of the government's motion to dismiss a certificate of appealability, the Court of Appeals outlined the statutory requirements for the issuance of such a certificate. Specifically, a certificate of appealability may be issued only if the prisoner has at least one substantial constitutional question for appeal. Second, the certificate must identify each substantial constitutional question. Next, if there is a substantial constitutional issue, *and* an antecedent non-constitutional issue independently substantial, then the certificate may include that issue as well. Fourth, any substantial non-constitutional issue must be identified specifically in the certificate. Fifth, if success on a non-constitutional issue is essential (compliance with the statute of limitations is a good example), and there is no substantial argument that the district judge erred in resolving the non-constitutional question, then no certificate of appealability should issue even if the constitutional question standing alone would have justified an appeal.

Nolan v. United States, 358 F.3d 480 (7th Cir. 2004; No. 02-2162). Upon denial of a 2255 petition, the Seventh Circuit clarified that the one-year statute of limitations for the filing of such petitions may be equitably tolled. The court stated that it had consistently held that section 2255's period of limitations is not jurisdictional but is instead a procedural statute of limitations subject to equitable tolling. In fact, every circuit to have considered the question has reached the same conclusion. The tolling, however, is a remedy reserved for extraordinary circumstances far beyond the litigant's control that prevented timely filing. Indeed, equitable

tolling of the statute of limitations is such exceptional relief that "we have yet to identify a circumstance that justifies equitable tolling in the collateral relief context," the present case being one of them as well.

Dye v. Frank, 355 F.3d 1102 (7th Cir. 2004; No. 03-1368). Petitioner filed a 2254 petition, alleging his Wisconsin conviction for delivery of cocaine violated the Double Jeopardy Clause where he had already been subjected to a Wisconsin tax assessment and seizure based upon his possession of the same drugs. The Court of Appeals agreed. After police executed a search warrant at the petitioner's home and discovered cocaine which did not bear Wisconsin Controlled Substance Tax Stamps as required by statute for possession of controlled substances, the state sought and received a court order freezing the petitioner's assets, although it later returned the assets and cancelled the tax assessment. The petitioner was thereafter criminally charged for possession with intent to deliver the cocaine. In finding that the subsequent criminal prosecution violated the Double Jeopardy Clause, the Court of Appeals noted that the drug tax is on its face part of a civil statutory scheme. However, even in those cases where the legislature has indicated an intention to establish a civil penalty, the court has inquired further whether the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty. To make this determination, the court looks to (1) whether the sanction involves an affirmative disability or restraint; (2) whether the sanction has historically been regarded as a punishment; (3) whether the sanction comes into play only upon a finding of *scienter*; (4) whether the sanction promotes the traditional aims of punishment such as retribution or deterrence; (5) whether the behavior which is sanctioned is already a crime; (6) whether the sanction serves an alternative purpose; and (7) whether the sanction appears excessive in relation to the alternative purposes. Using these factors, the court concluded that the Wisconsin drug tax was so punitive in purpose and effect that it constituted a criminal punishment. The court in part noted that the legislature never expected the tax to raise revenue, and a tax that is created in order to deter criminal conduct, which applies only to those violating criminal laws, and which serves no revenue-generating purpose, is divorced from typical tax assessments and struck the Court as punitive in nature. Having concluded that the tax was punitive in nature, the Court went on to find that jeopardy attaches in such a case when the defendant voluntarily pays the amount due in full or when the government takes title to a defendant's assets. In such cases, if the fine has been paid, the defendant has fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offense and therefore the court's power to punish for that offense was at an end. Thus, in this case, when the state of Wisconsin seized the petitioner's assets, he endured one of the alternative punishments allowed under the Wisconsin Statutes. Moreover, Wisconsin could not undo the punishment by returning the money, nor could it seek to impose another punishment once the money had been paid.

Melton v. United States, 359 F.3d 855 (7th Cir. 2003; No. 03-3903). After petitioner had filed an initial 2255 petition, the petitioner again sought relief by a writ of audita querela. The Court of Appeals held that the district court should have dismissed the petition for want of jurisdiction because the petition should have been construed as a second 2255 petition. In doing so, the court noted that the Supreme Court in *Castro v. United States*, 124 S.Ct. 786 (2003), held that unless a district judge has warned a petitioner that a motion will be treated as a collateral attack, and offered the opportunity to withdraw it, the motion does not count as the one collateral attack allowed to each prisoner. In other words, district courts cannot defeat a petitioner's right to file an initial 2255 petition by recaptioning motions filed by petitioners. For successive collateral motions, however, the court held that such recaptioning is appropriate, for there is no risk that a legal novice may think that the motion does not jeopardize the right to one complete round of collateral review. In such cases, the petitioner has already enjoyed the initial round of collateral review.

Moore v. Bryant, 348 F.3d 238 (7th Cir. 2003; No. 03-1126). Upon consideration of the government's appeal from the district court's grant of a petition for habeas corpus under 28 U.S.C. § 2254, the Court of Appeals affirmed the district court and held that trial counsel's deficient performance prejudiced the defendant. Prior to trial, the petitioner's counsel informed him that if the defendant pled guilty to a first degree murder charge, the government would recommend the minimum 20-year prison sentence. According to his lawyer, he would serve only 10 years under Illinois' good-time credit system. However, due to a pending change in the law, if he went to trial and lost, he would serve 85% of his sentence which would range between 25 and 30

years. In other words, according to his lawyer, a plea would subject him to a 10 year sentence, while he would end up serving between 22 and 27 years if he was convicted after trial. The defendant, based on this advice, reluctantly pled guilty. The advice given by counsel was, however, incorrect, for the change in Illinois' good-time credit law was not retroactive. Thus, in reality, he faced a 12 ½ to 15 year sentence if convicted. The Court of Appeals held that counsel's erroneous advice constituted deficient performance. The court noted that the attorney admitted that he had not reviewed the relevant statute prior to giving his advice and he was uncertain as to its effect. The court concluded that this failure to undertake a good-faith analysis of all the relevant facts and applicable legal principles was deficient. Moreover, the court concluded that, but for the erroneous advice, the defendant would not have pled guilty. The court noted that the defendant consistently maintained his innocence prior to trial, and only after a lengthy discussion regarding the potential penalties as erroneously explained to him did he reluctantly plead guilty. Given this record, the court concluded that the petitioner was in fact prejudiced, and therefore affirmed the district court's grant of the habeas corpus petition.

Kramer v. Olson, 347 F.3d 214 (7th Cir. 2003; No. 03-2187). In this case, the petitioner sought a writ of habeas corpus under 28 U.S.C. § 2241, challenging his conviction under *Richardson v. United States*, 526 U.S. 813 (1999). The district court concluded that the petitioner could not proceed under § 2241 because the principal means of attacking a federal conviction, a motion to vacate under 28 U.S.C. § 2255, was not inadequate to test the legality of the petitioner's conviction. The district court accordingly characterized the petition as a mislabeled § 2255 motion and dismissed for lack of jurisdiction because the petitioner had once before sought relief under § 2255 and had not received permission from the Court of Appeals to do so again. The Court of Appeals affirmed. In doing so, the Court of Appeals noted that although § 2255 is ordinarily the exclusive means for a federal prisoner to attack his conviction, § 2255 contains a "savings clause" permitting prisoners to proceed under § 2241 in those cases where § 2255 is "inadequate or ineffective to test the legality of the detention." 28 U.S.C. § ¶ 5. The Court of Appeals noted that § 2255 is inadequate when its provisions limiting multiple § 2255 motions prevents a prisoner from obtaining review of a legal theory that "establishes the petitioner's actual innocence." In other words, the petitioner must first show that the legal theory he advances relies on a change in law that both postdates his first § 2255 motion and eludes permission in section 2255 for successive motions. Secondly, he must establish that his theory supports a non-frivolous claim of actual innocence. Addressing these requirements in the present case, the petitioner satisfied the criteria that the legal theory (*Richardson)* post-dated his original petitioner and that his claim would not allow permission for a second § 2255 petition, for he did not rely on new evidence of his innocence and *Richardson* did not announce a new rule of constitutional law (it instead interpreting the statutory term "series of violations)." However, on the actual innocence standard, the petition failed. Unlike defendants who raised *Bailey and Jones* issues who were allowed to proceed under § 2241, a petitioner making a claim based upon *Richardson* cannot admit to all of the conduct charged in the indictment, but said conduct no longer constituting a crime. Specifically, the jury in the petitioner's case heard evidence that established he imported seven boatloads of marijuana into the United States. Even thought the jury was not required to agree unanimously about which of those seven transactions constituted the "series of violations," such a shortfall has no bearing on whether Kramer's conduct violated the CCE statute. Accordingly, the Court of appeals affirmed the district court's dismissal of the petition as an unauthorized successive § 2255 petition.

GUILTY PLEAS / PLEA AGREEMENTS

United States v. Gibson, 356 F.3d 761 (7th Cir. 2003; No. 02-2051). In prosecution for mail fraud, wire fraud, and conspiracy, the Court of Appeals reversed the defendant's conviction and sentence. The defendant entered into a plea agreement with the government wherein he agreed to plead guilty to conspiracy in exchange for dismissal of the remaining charges. He also agreed to a 262-month sentence in exchange for the agreement. The district court accepted the plea and plea agreement and sentenced him in accord with the agreement. On appeal, the defendant argued that his 262-month sentence exceeded the 5-year statutory maximum sentence for conspiracy. The Court of Appeals agreed. The Court initially noted that because the plea agreement was made under Rule 11(e)(1)(c), the court could not reduce the defendant's sentence, but rather was required to void the entire plea agreement given the error. Secondly, although the plea

agreement contained a waiver of the defendant's right to appeal his sentence, the explicit terms of the waiver did not relinquish the defendant's right to challenge a sentence which exceeded the statutory maximum. Finally, the Court of Appeals found the excessive sentence to constitute plain error, requiring reversal. The court noted that it will overturn a criminal conviction under this standard only when necessary to avoid a miscarriage of justice. Although the defendant received the precise amount of prison time for which he bargained, the fact remained that his sentence exceeded the maximum term of imprisonment provided by statute. "To allow an illegal sentence to stand would impugn the fairness, integrity, and public reputation of the judicial proceedings that have taken place in this case. This error was not harmless." "Clearly the integrity of the judicial system would be offended by ignoring this error . . . ."

INDICTMENT

United States v. Wren, 363 F.3d 654 (7th Cir. 2004; No. 03-2199). In prosecution for conspiracy to unlawfully transport firearms, the Court of Appeals rejected the defendant's argument that "venue and jurisdiction" were improper in the Northern District of Illinois because the defendant had no direct contacts with the districts. The Court of Appeals, however, concluded that jurisdiction was proper because all that is necessary is that one of the conspirators carried out an overt act in the district--a fact beyond dispute. The Court also noted that when a crime is committed in more than one district, venue is proper in any district in which any part of the crime was committed. Thus, in a conspiracy case, venue is proper in any district where at least one avert act in furtherance of the conspiracy occurred. It is not necessary that the conspiracy was formed in the district, that the defendant himself carried out an overt act in the district, or even that the defendant entered the district.

United States v. Pearson, 340 F.3d 459 (7th Cir. 2003; No. 02-4356). In prosecution for wire fraud and conspiracy to commit wire fraud, the Court of Appeals rejected the defendant's arguments that a superceding indictment was filed outside the applicable statute of limitations. The original indictment was filed against the defendants under seal and within the statute of limitations, but the superceding indictment was filed outside the statute of limitations--extending the length of the conspiracy by four years and adding three additional overt acts which occurred during those four years. On appeal, the defendants argued that the statute of limitations should not be tolled when an indictment is filed under seal and that the superceding indictment did not relate back to the original indictment. The Court of Appeals rejected both of these arguments, noting first that Rule 6 does not require the statute of limitations analysis to be altered when an indictment is sealed, and where, as here, an open indictment was filed only two months later, there was no reason why the statute of limitations should not continue to run. Secondly, the court concluded that the superceding indictment related back to the original because the initial indictment informed the defendants in no uncertain terms that they would have to account for essentially the same conduct with which they were ultimately charged in the superceding indictment. In other words, the superceding indictment did not materially broaden nor substantially amend the charges initially brought against the defendants.

JURY ISSUES

United States v. Sanapaw, 366 F.3d 492 (7th Cir. 2004; No. 03-2786). In prosecution for distributing marijuana, the Court of Appeals affirmed an instruction to the jury stating that "marijuana means all species of marijuana containing tetrahydrocannabinol." In affirming, the Court of Appeals noted that the Controlled Substances Act of 1970 defined marijuana to include "all parts of the plant Cannabis sativa L., " rather than as defined in the instruction. However, at the time the Act was drafted, Congress believed that only one species of marijuana existed. Assuming more than one species of marijuana, the question was whether it was unreasonable to apply the Act to only one species of marijuana--namely, Cannabis staiva L." The Seventh Circuit, as well as every other circuit to consider the issue, has held that it would be manifestly unreasonable to interpret the Act to apply solely to Cannabis sativa L. The legislative history of the Act indicates that the purpose of banning marijuana was to ban the euphoric effects produced by THC. All species of marijuana contain THC. It is therefore absurd to believe that Congress intended to ban the euphoric effect of one species of marijuana but not the exact same euphoric effect of other species of marijuana. Accordingly, the Court held that the instruction was proper as given.

United States v. Degraffenried, 339 F.3d 576 (7th Cir. 2003; No. 02-3561). In prosecution for being a felon in possession of a firearm, the Court of Appeals affirmed the defendant's conviction, finding that

the district court's errors in handling a note from the jury were harmless. Four hours after deliberations began, the jury sent a detailed note to the district judge indicating that it was deadlocked. Although the district court consulted counsel, he refused to read the contents of the note and conferred with the lawyers in the case outside the presence of the defendant. Ultimately, the judge sent a note back to the jury stating, "Members of the jury, I've read your note. Please continue to deliberate." Thereafter, the judge decided to read the entire note to counsel, again outside the presence of the defendant, and the note indicated that two jurors believed the defendant was not guilty and were not inclined to change their minds. On appeal, the defendant argued that he had a right to be present when the issue of the note was addressed and that the judge should have read the entire note prior to replying to the jury. The Court of Appeals agreed that the defendant had the right to be present when the issue arose, but nevertheless concluded that the error was harmless. Although the defendant claimed that had he been present he may have suggested a response that was contrary to the district court's which allowed the jury to continue to deliberate without requesting a mistrial, the court noted that the note was issued less than four hours into deliberations and no matter what the defendant may have said, the judge would not have granted a mistrial at such an early stage. Secondly, the Court of Appeals concluded that the judge erred by not answering the jury's communication in open court after allowing counsel to respond before the judge resolves the situation. The defendant argued that this error was not harmless, for had he known the entire contents of the instruction, he would have requested that a *Silvern* instruction be given. Again, the Court of Appeals disagreed, noting that a *Silvern* instruction is only appropriate when the judge has concluded that the jury is deadlocked. Given the short period of deliberations, the judge was not required to make this conclusion. Moreover, the note he did send back to the jury was not coercive and its language was neutral, such an instruction not carrying a plausible potential for coercing the jury to surrender their honest opinions for the mere purpose of returning a verdict.

Aki-Khuam v. Davis, 339 F.3d 521 (7th Cir. 2003; No. 02-1945). Upon consideration of the district court's grant of a writ of habeas corpus, the Court of Appeals affirmed, finding that the Indiana State trial court judge's misapplication of *Batson* violated the petitioner's Fourteenth Amendment due process and equal protection rights. During jury selection, the trial judge required each party to present a "neutral reason" for each peremptory challenge. Using this procedure, the trial court rejected the petitioner's stated reasons for five of his seven total challenges, even though the State raised no objection to the challenges. In doing so, the judge did not find that the race-neutral explanations demonstrated a discriminatory motive, but rather because he found the reasons "terrible," unsupported in the record, based on a prospective juror's response to a "trick question," or due to defense counsel's introduction of the word "slickster." The Court of Appeals noted that the *Batson* analysis entails the following three steps: (1) the party opposing a peremptory challenge must make a prima facie showing of racial discrimination; (2) the party exercising the peremptory challenge must provide a race-neutral explanation thereof: and (3) the trial court must determine whether the parties have satisfied their respective burdens fo proving or rebutting purposeful racial discrimination. The court concluded that because the prosecution at no-time raised a *Batson* challenge, the trial judge replaced the first step of the analysis with the court's presumption of purposeful discrimination, thereby saddling the petitioner with the burden of overcoming that presumption. The voir dire process, however, is still adversarial and the case law, including *Batson*, make it clear that *Batson* is not self-executing. Moreover, *Batson* does not demand an explanation that is persuasive, or even plausible. Unless a discriminatory intent is inherent in the party's explanation, the reason offered will be deemed race neutral. Thus, the district court, in rejecting the petitioner's reasons outright as unreasonable instead of evincing some inherent discriminatory intent, collapsed the second and third steps into one. Given these errors, the petitioner was deprived of his liberty by a jury whose very creation involved a denial of his statutory and constitutional rights.

MISCELLANEOUS

United States v. George, 363 F.3d 666 (7th Cir. 2004; No. 02-2996). In prosecution for bank fraud and uttering false securities, the defendant argued that his Sixth Amendment rights were violated when the prosecutor intimidated a witness into pleading the Fifth Amendment instead of testifying as a witness for the defendant. At trial, the defendant wanted the witness to testify that he had lied to the grand jury about the defendant's involvement in the fraud schemes; indeed, the witness had already told

the FBI a similar story a month earlier. In court, however, the witnesses' attorney advised him that "there is a strong chance that the government could move to revoke the plea agreement" he had entered into, and a "very real possibility that he could be charged with perjury or false statement." The court confirmed these advisements. The prosecutor then stated that it counted five possible criminal consequences to the witness testifying as anticipated. The witness naturally pleaded the Fifth after these warnings. Although the defendant on appeal argued that these advisements amounted to improper witness intimidation in violation of his Sixth Amendment right to present witnesses in his defense, the Court of Appeals concluded that the prosecutor's and court's actions were a necessary conveyance of information so as to allow the witness to make an educated decision regarding his Fifth Amendment rights. In so concluding, the Court noted that the discussions in question occurred in court and on the record. The warnings contained accurate information about the risks the witness faced by testifying and were initiated by the witnesses' own attorney. The court and prosecutor merely corroborated, in a straightforward, and nonthreatening manner, the information given to the witness by his attorney. Thus, the Court found no Sixth Amendment violation--the witnesses' exercise of his Fifth Amendment privilege to be well considered.

United States v. Snook, 366 F.3d 439 (7th Cir. 2004; No. 02-2304). In prosecutions for violations of the Clean Water Act, the Court of Appeals affirmed the defendant's conviction over his argument that the prosecutor improperly commented on his decision not to testify at trial. At trial, the defendant's theory of defense was that was his employer had selectively reported clean water tests in the past, and he was therefore under the impression that not all clean water test reports were required to be submitted to the relevant agency. The Court of Appeals concluded that the prosecutor's comments were not improper. Specifically, after summarizing the government's case, the prosecutor asked, "[a]nd what is the defendant's response?" Second, after referring to statements made in the defendant's opening statement, the prosecutor stated, "I've heard nothing, nothing that backs up those representations." Third, in discussing the conspiracy count, the prosecutor stated that "[a]ll you have to find is that the defendant agreed not to report violations, and the evidence is basically uncontroverted in that instance." The Court of Appeals concluded that these statements were not improper. Specifically, the context of the first two statements reveals that the prosecutor was commenting on the defendant's case rather than on his decision not to testify. The first statement came as a transition after a summary of the government's case and just before a summary of the case put on by the defendant. The second statement was a response to statements made by the defendant's counsel that the evidence would show that selective reporting was the established procedure at the company and the procedure taught to the defendant. And following both statements, the court reminded the jury that the government and not the defendant had the burden of proof. The Court concluded that because these statements were comments on the weakness of the defendant's case, rather than his silence, they were not improper. Finally, regarding the third statement that the defendant's decision to selectively report was "uncontroverted," the Court noted that such a statement would be inappropriate if the defendant were the only person who could refute the point. However, such was not the case, for the defendant's counsel could have tried to show that the documents submitted by the defendant did report all of the available data or that others submitted the data without his knowledge. Moreover, the defendant never challenged whether he selectively reported: his theory was that he believed it to be legal. Thus, the Court concluded that the prosecutor was referring to this fact, rather than the defendant's silence.

United States v. Colvin, 353 F.3d 569 (7th Cir. 2003; No. 00-3400). In prosecution for use of fire in the commission of "any felony" (18 U.S.C. sec. 844(h)(1)) and intimidation and interference with federal housing by fire (42 U.S.C. sec. 3631), the Court of Appeals held that the 3631 offense can serve as a predicate offense for the 844(h)(1) offense without violating the Double Jeopardy Clause. The defendant argued on appeal that his conviction under 844(h)(1) violated the Double Jeopardy Clause to the extent it was based on his conviction under 3631, which itself carries an enhanced punishment for using fire. Thus, the court considered whether Congress intended to authorize cumulative punishment under 844(h)(1) when the predicate felony already contains an enhancement for use of fire. After a lengthy analysis of the statutory language of the offenses and Supreme and Circuit court precedents, the Seventh Circuit concluded that no double jeopardy violation occurs under the circumstances noted above. However, the court did hold that defendant's conviction under

18 U.S.C. sec. 241 conspiracy to threaten or intimidate persons in the free exercise or enjoyment of their housing rights could not serve as a predicate offense for purposes of 844(h)(1). As the defendant argued, it makes no sense to speak of using fire to commit a conspiracy under section 241, for the conspiracy offense is the agreement, and one cannot use fire to form an agreement unless, for example, "the conspirators 'communicated across the Mississippi River by smoke signals or by hanging a lantern in a belfry.'" Thus, fire could not be used to commit the conspiracy and the offense cannot support an 844(h)(1) offense as a predicate offense of using fire to commit a felony. To the extent that this conclusion conflicted with prior circuit precedent, the Court of Appeals overruled *United States v. Hartbarger*, 148 F.3d 777 (7th Cir. 1998) and *United States v. Haywood*, 6 F.3d 1241 (7th Cir. 1993).

United States v. Rinaldi, 351 F.3d 285 (7th Cir. 2003; No. 03-2241). In prosecution for health care fraud, the Court of Appeals reversed the district court's order committing the defendant for a custodial examination not to exceed 45 days after he moved to withdraw his plea based upon a claim that a mental disorder prevented him from forming the requisite criminal intent at the time he committed the offense. First, the Court of Appeals noted that Federal Rule of Criminal Procedure 12.2 was developed to require a defendant who intended to present a defense of mental illness, insanity, incompetence or diminished capacity to provide notice to the government before trial and allow the government to request a psychiatric examination. However, the Rule did not create authority for the court to order in-custody examinations of defendants filing notice of intent to present expert evidence on a diminished capacity defense. Likewise, the district court erred when it relied on 18 U.S.C. sec. 4241 and 4242 as the basis for ordering an in custody examination. These sections only apply in specific circumstances and not in situations where the defendant has given notice that he wished to present evidence of diminished capacity. Section 4241 applies where there is an issue of the defendant's competency to stand trial and Section 4242 applies when there is an issue of insanity at the time of the offense. The defendant fell into neither of these categories. The court did note, however, that while Rule 12.2 does not provide authority for the district court to order a custodial examination, nothing in the rule prevents a court from inviting the defendant's *consent* to an examination. This consent might be elicited by telling him that unless he agreed to the mental examination, the court will simply deny the motion to withdraw the plea and will proceed to with sentencing.

United States v. Sandoval, 347 F.3d 627 (7th Cir. 2003; No. 03-1004). In prosecution for kidnaping, the Court of Appeals rejected the defendant's argument that use of an uncertified translator violated the Court Interpreter's Act, 28 U.S.C. § 1827. During the course of the defendant's trial, a second interpreter was needed to translate for a witness. This translator, however, was uncertified, and he challenged this fact on appeal. The Court of Appeals noted that the Court Interpreter's Act provides in pertinent part: "The presiding judicial officer shall utilize the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise qualified interpreter, in judicial proceedings in the United States." From this language, the court concluded that an interpreter need not be certified so long as the uncertified interpreter is otherwise qualified. In the present case, the district judge specifically found the interpreter to be competent and the defendant could therefore not establish that he would not have been convicted but for the use of the uncertified interpreter.

SEARCH AND SEIZURE

United States v. Robeles-Ortega, 348 F.3d 679 (7th Cir. 2003; No. 02-3365). Upon consideration of the district court's denial of a motion to suppress, the Court of Appeals reversed the district court. DEA agents were monitoring a conversation between a CI and the defendant in which they were negotiating the price of seven kilos of cocaine. The CI was supposed to view the cocaine, then leave the apartment and convince the defendant to follow him outside, at which time the DEA agents planned to arrest the defendant. Instead, the defendant quoted a higher price than originally proffered, and the CI left the apartment alone. When the CI told the DEA agents that he had spotted the cocaine, they illegally entered the residence without a warrant. They then identified the leaseholder and obtained her consent to search the apartment. After obtaining her consent, they discovered the cocaine in a gym bag an arrested the defendant. The district court held that the leaseholder's consent was sufficiently voluntary that it was not tainted by the illegal entry. On appeal, the court noted that where a search following an illegal entry is justified based on alleged consent,

courts must determine whether that consent was voluntary, and in addition the court must determine whether the illegal entry tainted the consent. Factors relevant to this inquiry include (1) the temporal proximity of the illegal entry and the consent, (2) the presence of intervening circumstances, and, particularly, (3) the purpose and flagrancy of the official misconduct. The Court of Appeals initially noted that all of the district courts findings addresses whether agents coerced the consent. That focus, however, was misplaced because the defendant does not bear the burden of demonstrating that the agents coerced the consent; instead, where a consent is obtained pursuant to an illegal entry, the burden of persuasion is on the government to demonstrate that the consent was obtained by means sufficiently distinguishable from that illegal and violent entry so as to be purged of the primary taint. Focusing on this question, the court concluded that the consent was not sufficiently distinguishable because of the violent and sudden nature of the intrusion, the extremely short time period between the entry and the consent, and the absence of any other event that would have attenuated the impact of that illegal entry.

United States v. Reed, 349 F.3d 457 (7th Cir. 2003; No. 02-2378). Upon consideration of the district court's denial of a motion to suppress, the Court of Appeals reversed the district court, finding that the defendant's confession was the unconstitutional by-product of a (presumably) illegal arrest. After finding that the defendant's confession was voluntary, the court went on to consider whether the temporal proximity of the illegal conduct to the statements, the presence of any intervening circumstances, and, most importantly, the purpose and flagrancy of the police misconduct. Applying these factors in a fact-intensive, detailed analysis, the court concluded that the confession should be suppressed. However, the court remanded the case to the district court for a determination of whether the defendant was in fact illegally arrested in the first place, a question on which the district court made no findings on initially. Of course, if the district court finds that the arrest was appropriate, then the confession would not be subject to suppression.

United States v. Allman, 336 F.3d 555 (7th Cir. 2003; No. 02-1859). Upon consideration of a district court's denial of a motion to suppress, the Court of Appeals affirmed the district court. A postal employee noticed what he recognized as part of an M-16 protruding from a package. He also noticed that another package being sent to the same address and addressed in the same handwriting was of a size which could contain the other parts of the weapon. He notified a postal inspector, the packages were sent to Chicago, where they were x-rayed and found to in fact contain the parts of an M-16. A warrant was then obtained and the packages were opened. The Court of Appeals concluded that the protruding portion of the M-16 created probable cause to believe that the federal firearms laws were being violated, and the identical handwriting and same address on the other package likewise created probable cause. The court then went on to note, however, that it believed that the subsequent warrant to search the packages was unnecessary. According to the court, when one considers that all persons, with all their belongings, who travel by air are subject to search without a warrant, the court had trouble making sense of a rule that would forbid such a search if a parcel is traveling by itself, also by air, as part of a mail shipment. Moreover, although noting that x-raying a package is a form of search requiring a warrant when it is conducted on a parcel in transit, the court also noted that airline passengers and their luggage are searched on embarking, not arriving; and numerous cases hold that a parcel may not be opened by the authorities without a warrant even if there is probable cause to believe that it contains contraband or evidence of a crime. Again, however, the court stated that it had trouble seeing how, in this age of routine, soon to be universal, x-raying of containers shipped by air, the defendant could have had a reasonable expectation that his package would not be x-rayed at any point during transit.

SENTENCING

United States v. Mayes, ___ F.3d ___ (7th Cir. 2004; No. 03-1245). Upon consideration of the defendant's challenge to a condition of supervised release requiring that he participate in alcohol testing and treatment and that he refrain from using alcohol or from working in a tavern, the Court of Appeals found no plain error but did conclude that the conditions appeared to be "a tad unnecessary." Specifically, the defendant will be in prison nearly 15 years before the conditions kick in and, by then, any drinking problem he might have had might very well be effectively treated ruing his prison stay. There was also very little evidence in the record of alcohol abuse and none that he had every worked in a tavern. Thus, by the time the defendant is released from prison he will be approximately 68 years old and, "if he makes it that far, the poor fellow might well

deserve a martini or a glass of Cabernet Sauvignon or at the very least a visit to the local tavern." On top of this, it seemed to the Court that a busy probation office might well have better things to do than test someone like the defendant for alcohol use a decade and a half from the present. That being said, the court refused to find plain error since there was no objection, but "would certainly not be aghast if the sage district judge were inclined to take another look at the situation."

United States v. Hanhardt, 361 F.3d 382 (7th Cir. 2004; No. 02-2253). In prosecution for RICO, the Court of Appeals reversed the district court's obstruction of justice enhancement. On the day set for trial, the defendant was unavailable because of an attempted suicide. At sentencing, the district judge found that due to the suicide attempt, the defendant acted both willfully and with the specific intent not to be present in court as ordered, as well as impeding the prosecution of his case. The Court of Appeals, however, concluded that an attempted suicide cannot be considered an obstruction of justice. The court noted that the nature of suicide does not lend itself to a clear understanding of an individual's motivation other than the obvious intent to end his life. Accordingly, the enhancement was improper.

United States v. Stewart, 361 F.3d 373 (7th Cir. 2004; No. 03-1857). In prosecution for manufacturing and distributing methamphetamine, the Court of Appeals held that 825 grams of a solution generated during a thwarted attempt to produce methamphetamine could not be used to calculate drug quantity for purposes of applying a statutory mandatory minimum. The Court of Appeals held that, as with other types of drugs, only usable or consumable mixtures or substances can be included in drug quantity under section 841(b)--commonly referred to as the market-oriented approach. In the present case, the defendant had begun the process of making methamphetamine, but was interrupted by authorities before the process was complete, leaving 825 grams of a mixture which could have been used through completion of the process to produce pure methamphetamine. The Court noted that if the defendant had completed the processing into usable methamphetamine and discarded the waste before being caught, only the amount of finished product would be attributed to him for sentencing. Similarly, if the defendant had been caught with his raw materials before starting to manufacture the methamphetamine, only the amount of finished produce that could be produced from the raw materials would have been attributed to him for sentencing. It would therefore be illogical to include the entire weight of the solution here merely because the defendant was caught after he had combined the raw materials, but before he had produced usable methamphetamine; to do so would reward defendants able to complete the manufacturing process without detection.

United States v. Rodriquez-Cardenas, 362 F.3d 958 (7th Cir. 2004; No. 03-2494). On appeal in a prosecution for conspiracy to distribute heroin, the Court of Appeals published an opinion "to correct statements in several of our recent cases that might be read as inconsistent with a 2001 amendment that expressly rejected a limitation we had placed on eligibility for a mitigating-role reduction pursuant to U.S.S.G. sec. 3B1.2, App. C, amend. 635. Prior to the amendment, the Seventh Circuit had held that where a defendant's offense level is tied only to drug amounts he personally handled, he is precluded from receiving a 3B1.2 reduction. However, on November 1, 2001, the Sentencing Commission explicitly rejected this limitation and stated that in all types of offenses, the court must consider the defendant's conduct against the relevant conduct that he is held accountable for at sentencing, and even in cases where the defendant is held accountable only for conduct in which he was personally involved, he is not precluded from receiving the reduction. Notwithstanding this amendment, the Court of Appeals stated that "we have unintentionally repeated language from pre-amendment opinions that appears to be more consistent with our now rejected view that a defendant held accountable only for his own conduct cannot qualify for the mitigating-role reduction . . . Recognition of Amendment 635 necessitates that we disavow our post-amendment cases to the extent that they can be read as inconsistent with the amended guideline."

United States v. Snook, 366 F.3d 439 (7th Cir. 2004; No. 02-2304). In prosecution for violations of the Clean Water Act, the defendant challenged an abuse of trust enhancement, arguing that his position as Environmental Manager at the private company where he worked did not place him in a position of public trust. The Court of Appeals, however, noted that the Clean Water Act is public-welfare legislation and the victims of violations are the public. As Environmental Manager, the defendant was given discretion to devise how his employer's wastewater treatment and testing systems, as wells as to decide when to conduct testing. The matters covered by the Act apply directly and significantly affect the public's

health and safety. Thus, given the responsibility and discretion given to the defendant in complying with the regulations, it was appropriate to apply the sentencing enhancement.

United States v. Hicks, 368 F.3d 801 (7th Cir. 2004; No. 03-1833). In prosecution of a multi-defendant drug conspiracy, the Court of Appeals affirmed the district court's denial of an acceptance of responsibility adjustment. Prior to trial, the defendant entered into a plea agreement with the government, contingent upon the two remaining co-defendant's entering into a plea as well. When the co-defendants declined to do so, the government moved to withdraw the plea according to the terms of the agreement. The defendant therefore proceeded to trial, but argued at sentencing that he was entitled to a reduction for acceptance of responsibility because he manifested his intent to plead guilty prior to trial. Moreover, he argued that he did not actually contest his guilt at trial, but instead only challenged drug quantity issues relevant to sentencing, which was a legal principle falling within the exception in the guidelines for those who go to trial but are still entitled to acceptance of responsibility. Declining to decide whether challenging the amount of drugs could be considered "a legal principle," rather than factual evidence of guilt, the Court of Appeals concluded that the record showed that the defendant in fact contested issues related to his involvement in the conspiracy as well. Moreover, in order to receive the reduction, the defendant was obliged to make it known to the government in advance of trial that he intended to challenge on the drug quantity issue, thereby allowing the government to avoid wasting resources in preparation of prosecuting him for the crimes alleged in the indictment. Because he failed to do so, the Court affirmed the denial of the adjustment.

United States v. Noble, 367 F.3d 681 (7th Cir. 2004; No. 03-2088). On appeal after remand, the Court of Appeals held that the district court erred by allowing the government to introduce new evidence on remand in an attempt to establish additional drug quantities. In the appeal precipitating the remand, the Court of Appeals held that the government's evidence establishing drug quantity was unreliable. On remand, the district court allowed the government to re-call a witness to introduce new evidence regarding drug quantities. The Court of Appeals held that, if the government failed to meet its burden the first time, it is not permitted on remand to try again and submit new evidence in a belated effort to carry its burden. The government is entitled to only one opportunity to present evidence on the issue. Accordingly, the Court of Appeals again remanded the case for imposition of sentence without consideration of the new testimony.

United States v. Slater, 348 F.3d 666 (7th Cir. 2003; No. 02-2059). In prosecution for conspiracy to commit copyright infringement, the Court of Appeals affirmed the district court's loss calculation. The defendants ran a copyright infringement scheme for computer software. Individuals interested in pirated software became "members" of the group, paying no money, but instead contributing services such as providing access to other copyrighted programs or "cracking" the copyright protections on other software. Members could then freely download any of approximately 5,000 programs contained on the groups servers. In determining the scope of the defendant's activity, the district court determined that 3,947 functioning, distinct programs were on the server at the time of its seizure. Then, based on a sample of 71 programs, the court found that 94% of the extant programs functioned in the same manner as the retail version of the program. Thus, applying this percentage to the total number of programs, the court concluded that 3,710 functioning programs were on the server at the time of its seizure. The court then turned to determining the retail value of the infringing items. Based on the average retail price of the programs on the computer, the court concluded that the average retail value for each item was $384, for a grand total of $1,424,640. Upon consideration of the appropriateness of this method, the Court of Appeals noted that the value of loss is ordinarily measured by the retail value of the "infringing items," defined as "the items that violate the copyright or trademark laws." In nonsoftware cases, the court has calculated the value of infringing items based on the retail value of those goods on the black market--"the full price the willing buyer in this market would have paid the willing seller in the same market for the appellant's products." This approach, however, assumes that the infringing produce is somehow distinguishable from and less valuable than the original. Neither assumption necessarily applies in digital copies that have been purged of copy-protection features. Thus, where, as here, there is little or no evidence of the value of the infringing item, the court may consider the retail value of the infringed item.

United States v. Reneslacis, 349 F.3d 412 (7th Cir. 2003; No. 02-3498). In prosecution for offering bribes to a public official and making materially false statements to a public official, the Court of Appeals reversed a leader/organizer enhancement. The defendant engaged in referring to a purportedly corrupt INS officer individuals interested in illegally obtaining permanent-resident-alien status. The Court of Appeals held that the defendant was not a leader because everyone who he referred was his customer, not a subordinate under his control. Likewise, the defendant was not an organizer because the government failed to show that he worked with others toward a common criminal objective. Specifically, everyone the defendant worked with had his own agenda. Each of the clients wanted immigration papers for themselves, making it impossible to say that the defendant was organizing them for *concerted* action. By referring immigrants who wanted to become permanent residents--with the expectation that he would receive a portion of the bribes--his role was the same as a broker in a drug case who is compensated for referring an addict to a dealer--a situation already held by the Court of Appeals not warranting the leader/organizer enhancement.

United States v. Reneslacis, 349 F.3d 412 (7th Cir. 2003; No. 02-3498). In prosecution for offering bribes to a public official and making materially false statements to a public official, the Court of Appeals affirmed an upward adjustment for attempting to "an elected official or any official holding a high-level decision-making or sensitive position." (U.S.S.G. sec. 2C1.1(b)(2)(B). The defendant here attempted to bribe a district-adjudications officer of the INS. The court initially noted that such an officer did not hold a "high-level" position, for he occupied a position for the first level of intake for applicants seeking to change their immigrations status; he did not supervise other employees or establish policy; and occupied the same pay level as office assistants, record keepers, and other support staff within the agency. Nevertheless the court concluded that he held a "sensitive position" because only a handful of the officer's decisions were ever reviewed and he had near total control over who could become a permanent resident and eventually a U.S. citizen. Wielding such power of important public decisions reflects a sensitive post-even if existing rules dictate how those decisions should be made. Accordingly, the court affirmed the enhancement.

United States v. Castellano, 349 F.3d 483 (7th Cir. 2003; No. 02-3166). In prosecution for multiple counts of wire fraud, the Court of Appeals reversed the district court's determination that the fraud "affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense." (U.S.S.G. sec. 2F1.1(b)(7)(B)). The defendant and his son managed a company which built single family homes. The defendants through their corporation accepted loan payments on the houses from the financing banks, even when the houses were not completed or constructed at all, resulting in a loss between $1.5 and $2.5 million. The district court, in applying the enhancement, assumed that all of the corporation's receipts must be attributed to the defendant because he founded the business and was its principal manager, although his son, rather than he, owned all the stock. The Court of Appeals noted that the question was whether the defendant obtained more than one million dollars of receipts "individually." It also noted that all of the money obtained entered the corporate coffers and most was distributed to pay the expenses of construction. Less than $200,000 reached the defendant as salary or reimbursement of his expenses. The Court noted that in order to determine whether the enhancement applied, the district court needed to turn to Illinois state law to decided whether to "pierce the corporate veil." Accordingly, the court remanded the case back to the district court to perform this analysis.

United States v. Clemons, 349 F.3d 1007 (7th Cir. 2003; No. 03-1470). Upon consideration of the defendant's challenge to the district court's drug quantity determination at sentencing, the Court of Appeals remanded the case for reconsideration. The defendant was arrested with 3.37 grams of crack cocaine on his person. He also made a statement to the arresting officers that he was selling $100 to $200 worth of crack "off and on for approximately a year." Based solely on this statement, the district court found that the defendant was responsible for between 50 and 150 grams, reasoning that a gram of crack sells for $100 and that selling crack at that price for a year equals 52 grams sold. The Court of Appeals, however, found that the defendant's limiting "off and on" description of his prior dealing was too vague a reference upon which to rest the district court's finding. If he was "off" much or most of the time, that range is too high a point to use. Accordingly, the case was remanded to the district court for reconsideration.

United States v. Donaby, 349 F.3d 1046 (7th Cir. 2003; No. 02-3144).

In prosecution for bank robbery and 924(c), the Court of Appeals considered whether damage to a stolen getaway car was properly considered as loss under section 2B3.1(b)(7). Noting that the question was one of first impression in this circuit, the court stated that the commentary to the relevant guideline section provides that loss should include "the value of property taken, damaged, or destroyed. This amount is calculated by adding the "loss" caused by the underlying crime and the loss caused "in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." U.S.S.G. sec. 1B1.3. Under this analysis, the district court properly included the cost of repairing the damaged getaway car, although the court could not included the full value of the van.

United States v. Donaby, 349 F.3d 1046 (7th Cir. 2003; No. 02-3144). In prosecution for bank robbery and 924(c), the Court of Appeals considered whether the district court improperly awarded restitution to a municipal police department based on the damage inflicted to a police vehicle during a high-speed chase. The court noted that the statutory definition of a "victim" under the MVRA is a "person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." In the present case, the question was whether the municipality can, as a matter of law, be "directly and proximately harmed" by the criminal act at issue despite the delay between the acts satisfying the criminal elements of bank robbery and the damage to the police vehicle. The court concluded that "but for the robbery, it is certain that this particular chase would not have occurred. Moreover, the need to elude the police after the robbery is a likely and foreseeable outcome of the crime." Thus, the municipality was a victim of the bank robbery because the defendant directly and proximately caused the damage to the police car by committing the bank robbery, and the restitution order was therefore properly entered.

United States v. Meza-Urtado, 351 F.3d 301 (7th Cir. 2003; No. 02-3132). Upon cross-appeal by the government of a district court's downward departure because the defendants were illegal aliens who would not receive certain "end of sentence" considerations (like halfway house) that would be available to them if they were citizens of the United States, the Court of Appeals held that the departures were not permissible. The court stated, "Because this issue seems to be presenting itself with increasing frequency, we think it's time to make a more definitive statement: These downward departures are not permissible because denying certain end-of-sentence modifications to illegal or deportable aliens cannot be viewed as a term of imprisonment "substantially more onerous" than the guidelines contemplate in fixing a punishment for a crime. Indeed, the conditions of confinement will be exactly what the guidelines require, "a sentence of imprisonment." The court went on to state that "under our *Guzman-Gallo* line of cases, we now hold that departures from the correctly established guideline range based merely on a defendant' status as a deportable alien are not authorized."

United States v. Mitchell, 353 F.3d 552 (7th Cir. 2003; 02-3562). In prosecution for traveling in interstate commerce with the intent to engage in a sexual act with an undercover agent whom the defendant believed to be a fourteen-year-old girl, the Court of Appeals reversed the district court's sentencing enhancement pursuant to U.S.S.G. sec. 2A3.2(b)(2)(B), which provides an enhancement where the defendant unduly influenced a minor under the age of sixteen to engage in prohibited sexual conduct. The court concluded that the plain language of the guideline section indicates that it cannot be applied where the participant had either failed in his attempt to influence the victim or where the two otherwise had not engaged in prohibited sexual conduct. Because there was no actual minor victim, the enhancement could not be applied. In so holding, the court noted that its conclusion conflicted with the Eleventh Circuit's decision in *United States v. Root*, 296 F.3d 1222 (11th Cir. 2002), where that court held that the enhancement could apply, even in the case of a sting operation.

United States v. Saunders, 359 F.3d 874 (7th Cir. 2004; 02-2884). In prosecution for being a felon in possession of a firearm, the Court of Appeals affirmed the district court's sentence enhancement for obstruction of justice, but clarified the circumstances when perjury during in-court testimony qualifies for the enhancement. The district court reasoned that when a false statement is made in court, "even if it doesn't matter, perjury is an offense against the solemnity and dignity of the judicial system" and the obstruction of justice enhancement is warranted. According to the Court of Appeals, this was an incorrect statement of law. Willful obstruction of justice includes perjury in court only when a defendant "gives false testimony concerning a material matter with the willful intent to provide false testimony." If the defendant had

perjured himself on an immaterial matter, even in court, there would be no obstruction of justice. Nevertheless, in the present case, the court concluded that the testimony was material, thereby causing the court to affirm the enhancement.

United States v. Morgan, 354 F.3d 621 (7th Cir. 2004; 03-2459). When considering whether two prior convictions were "related" for criminal history purposes, the court of appeals rejected the defendant's argument that his two prior convictions for driving on a revoked license were not separated by an intervening arrest. He was arrested for his first offense, and then 15 days later "stopped" and given a citation for the second offense, but not taken to jail. The defendant argued that he was not "arrested" on the second occasion but only "stopped." The court rejected this argument, however, stating that a traffic stop is an "arrest" in federal parlance. Here, the defendant was halted and prevented from leaving until the officer released him. That a simple arrest did not become a full custodial arrest does not matter for Guidelines' purpose. The relevant section refers to "arrest" rather than extended custody because it is the apprehension followed by a new offense that identifies the recidivist.

United States v. Gillaum, 355 F.3d 982 (7th Cir. 2004; 02-4015). Upon consideration of a defendant's armed career criminal status, the Court of Appeals held that only where a state court discharge order restores *all* of a defendant's civil rights and there is no notice to the defendant that he may not possess a firearm is the offense excluded from counting toward the enhancement. The defendant received an "Order For Discharge" in Illinois which stated that the defendant was "finally discharged" from the convictions for attempted robbery and aggravated battery. The Order also stated that the defendant's "rights to vote and administer estates are regained." There was no notice to the defendant that he could not possess a firearm. At issue before the court was whether, based upon the language of the Order, whether restoration of some of a defendant's civil rights (here the rights to vote and administer estates) triggers the notice requirement of sec. 921(a)(20). In other words, if a discharge order states that some specific civil rights have been restored but does not notify the defendant that he is prohibited from possessing guns, can the conviction covered by such order still count towards sentence enhancement under sec. 924(e)(1)? The Seventh Circuit concluded that it is the law of this circuit that a conviction is not counted only where the discharge order restores *all* of a defendant's civil rights and there is no notice to the defendant that he may not possess firearms. Because the Order here did not restore all of his rights, it counted for armed career criminal purposes.

United States v. Sienkowski, 359 F.3d 463 (7th Cir. 2004; No. 03-2099). Upon appeal by the government, the Court of Appeals reversed the district court's decision not to enhance the defendant's sentence for being a manager or supervisor (U.S.S.G. sec. 3B1.1) because the district court denied the government's request to continue the sentencing hearing so that it could provide more evidence in support of the enhancement. In the defendant's plea agreement, he agreed to the role enhancement. Likewise, the PSR recommended the enhancement. At sentencing, however, the district judge indicated that it believed the evidence was insufficient to support the enhancement. Upon hearing this, the government proffered that it could provide testimony to support the enhancement and requested a continuance to bring the witnesses to court. The district court, however, denied the request as well as the enhancement. The Court of appeals noted that absent notice from the district court, there was no way for the government to anticipate that there would be a dispute regarding this particular sentencing enhancement. While sentencing courts are not bound by parties' agreements in determining the proper application of the Guidelines, the procedural requirements of section 6A1.2 and systematic efficiency are contravened when a court fails to notify the parties that such agreements are in fact disputed by the court itself. When the court found that the facts in the record were insufficient to support the enhancement, the court should have notified the parties in advance of the sentencing hearing of the issue in dispute or at the sentencing hearing granted a continuance to the party seeking to supplement the record on that issues. The Court of Appeals limited application of this rule, however, to situations where both the plea agreement and the PSR contain recommendations or agreements for the enhancements, noting that when parties have not entered into a formal agreement, the inclusion of a recommendation in the PSR may be sufficient notice that the issue is an open question at sentencing.

United States v. Wallace, 355 F.3d 1095 (7th Cir. 2004; No. 03-2687). In prosecution for mail fraud, the Court of Appeals reversed a 2-level enhancement for the offense involving "a violation of any prior, specific judicial or administrative

order, injunction, decree, or process not addressed elsewhere in the guidelines" (U.S.S.G. sec. 2B1.1(b)(7)). The postal service became aware of the defendant's fraudulent activities, confronted the defendant, and obtained his signature on a "Statement of Voluntary Discontinuance." The defendant, however, continued to engage in the fraud and was charged with mail fraud. Applying the guideline section noted above, the district court found that Statement to be a prior "administrative process," thereby warranting the enhancement. The Court of Appeals, relying on very little prior precedent, held that the Statement did not rise to this level. The court noted that there were not extensive negotiations preceding the Statement and no official action taken by the Postal service such as a seizure. Rather, the court analogized the situation to where a speeder is issued a warning where the driver essentially promises to "slow it down," but cannot be doubly punished if he violates the speed limit in the future.

United States v. Ferron, 357 F.3d 722 (7th Cir. 2003; No. 03-1911). Upon consideration of a district court's denial of a motion for downward departure based upon diminished capacity, the Court of Appeals found that the district court erred in refusing to consider evidence offered by a psychologist. The district court, in refusing to consider the evidence, held that the expert did not meet the standards set forth in *Daubert*. This was error, according to the Court of Appeals, for *Daubert* and the Rules of Evidence do not apply at sentencing hearings. Nevertheless, the court found the error to be harmless, in part because the district judge did in fact consider the expert's testimony when denying the motion, despite his having also stated that he was excluding the evidence.

United States v. Jacques, 345 F.3d 960 (7th Cir. 2003; No. 03-1402). In prosecution for methamphetamine possession, the Court of Appeals rejected the defendant's argument that the district court erred by failing to provide her with sufficient time to object to the PSR. Specifically, she alleged that her rights under Rule 32(e)(2) and Rule 32(f)(1) were violated when the sentencing occurred seventeen days after the PSR was tendered and the District Judge allowed the defendant only seven days to file objections to the PSR, in violation of Rule 32's mandate that a defendant receive the PSR 35 days in advance of sentencing and have 14 days to raise objections. Initially noting that the defendant's participation in the sentencing hearing without requesting a continuance or objection constituted a forfeiture of the issue, the court reviewed for plain error. Under this standard, the court concluded that the defendant was not prejudiced by the truncated time periods. Specifically, although the defendant argued that the statutory time provided in Rule 32 would have allowed her the time required to meet the standards for a safety valve reduction, the court could not see how a few extra days would have made a difference, especially in light of the fact that she had three months to cooperate with the government. Accordingly, the court affirmed her sentence.

United States v. Carroll, 346 F.3d 744 (7th Cir. 2003; No. 02-2633). In prosecution arising from a foreign service official's issuance of visas in exchange for bribes, the Court of Appeals reversed the district court's finding that (1) the defendant obstructed justice; (2) was not entitled to an acceptance of responsibility adjustment; and (3) an upward departure was warranted. The defendant pled guilty to the charged conduct, as well as a forfeiture count conceding liability in the amount of $2.5 million, although the defendant had only $1.7 million in assets. At his change of plea hearing, the defendant noted that six brokerage accounts he possessed were unrelated to his ill-gotten gains, and during a session with probation, noted that his wife's pre-marital assets then worth $100,000 should be excepted from forfeiture. Based on these statements, the district court concluded that the defendant had obstructed justice, finding that all of the money was in fact tainted. The Court of Appeals, however, find that the statements were not "material," for two reasons. First, given that his conceded forfeiture liability exceeded his worth, it was of zero consequence whether the seized assets were legitimately or illicitly derived, in light of the provision in 21 U.S.C. § 853 for the forfeiture of substitute assets in satisfaction of a forfeiture judgment. Second, cases where the enhancement was warranted because a defendant sought to conceal assets were distinguishable, where the defendant here at best overstated the amount of his legitimate, commingled assets. Moreover, because the district court relied on this obstruction in denying the defendant acceptance of responsibility, this determination required review as well. Removing the obstruction of justice basis for the denial, the court noted that the district court ignored the fact that the defendant has engaged in numerous, intensive proffer sessions over a period of months, in which he described his illegal conduct in considerable detail. In light of this fact and without the obstruction of justice, the district court's reasons for denying acceptance of

responsibility failed. Finally, the Court of Appeals found the extent of the district court's upward departure to be unreasonable. In doing so, the court noted that the government initially offered the defendant a plea agreement with a 57-month term of imprisonment. The defendant rejected this offer because the government refused to move for a downward departure based on substantial assistance. Secondly, between the time of this offer and sentencing, no aggravating facts came to light which would warrant a departure, notwithstanding the fact that the court ultimately imposed a 262-month prison sentence, triple the maximum 87 month sentence recommended by probation. Finally, pursuant to a plea agreement, the defendant's co-conspirator was sentenced to only a 38-month prison term. The Court of Appeals concluded, "Absent some other intervening facts between the time of the prosecution's offer of a 57-month prison term and the district court's imposition of a 262-month prison term--and we know of none--this Court is at a loss to discern the reasonableness of such a draconian increase in [the defendant's] prison term." The court therefore concluded that the sentencing range without departure was sufficient to provide a just punishment and will avoid unwarranted sentencing disparity.

United States v. Mallon, 345 F.3d 943 (7th Cir. 2003; No. 03-2049). In prosecution for seeking to entice a minor to engage in sexual activity, the Court of Appeals reversed the district court's downward departure. As an initial matter, the Court of Appeals considered the proper standard of review to use, in light of the PROTECT ACT's effective date. According to *Koon*, the court of appeals reviews a district court's departure decision under an "abuse of discretion" standard. However, after the district court pronounced sentence in this case, Congress amended the relevant statute relied upon by *Koon*. Accordingly, post-amendment, although resolutions of contested issues of fact stand unless clearly erroneous, with respect to departures on one of the grounds listed in § 3742(e)(3)(B) the court of appeals must review de novo the district court's application of the guidelines to the facts. If after independent consideration the court of appeals finds a departure justified, then the extent of the departure must be reviewed deferentially under *Koon's* standard. Finding that this new standard applies to cases pending on appeal, the change being procedural only and presenting no ex post facto problem, the court concluded that the reasons for departure were in reality the district judge's belief that the defendant's life and good works prior to his misconduct warranted a lesser sentence. The Court of Appeals noted, however, "Perhaps the Sentencing Commission should afford district judges more latitude under § 5K2.20 to recognize the good a person has done in life, and to adjust sentences on account of shame, lost income, and other kids of extra-legal punishment. Under the Guidelines as the stand, however, a departure could not be based on § 5K2.20, and restrictions deliberately placed on the aberrant-behavior departure may not be circumvented.

United States v. Knight, 338 F.3d 697 (7th Cir. 2003; No. 01-4219). In a multi-defendant prosecution for distribution and conspiracy to distribute controlled substances, the Court of Appeals affirmed the district court's use of the Seventh Circuit's Pattern Jury Instruction pertaining to 841 and 846 offenses. At trial, the court gave the pattern instruction, as well as a special verdict question, to be answered only if the jury found at least one defendant guilty of the charged, which asked the jury to determine if the offense involved five kilograms or more of cocaine. The defendants argued that *Apprendi* requires a defendant-specific finding regarding drug quantity and type rather than the offense-specific finding used by the district court. Noting that the requisite content of a jury instruction in a multi-defendant case alleging drug conspiracy and possession post-*Apprendi* was a question of first impression in this circuit, the court relied on the First Circuit's decision in *Derman v. United States*, 298 F.3d 34, 42 (1st Cir. 2002). Doing so, the Court of Appeals concluded that once the jury determines the existence of the conspiracy, the defendants' participation in it, and assigns a type and quantity attributable to the conspiracy as a whole, it has established the statutory maximum sentences that any one participant in that conspiracy may receive. Once that maximum sentence has been established (ceiling), the judge may determine the drug quantity attributable to each defendant (floor) and sentence him accordingly. The sentencing judge's findings do not, because they cannot, have the effect of increasing an individual defendant's exposure beyond the statutory maximum justified by the jury's verdict.

United States v. Nonahal, 338 F.3d 668 (7th Cir. 2003; No. 02-3942). Upon consideration of a district court's denial of the defendant's petition to modify the conditions of his supervised release, the Court of Appeals held that a district court is not required to hold a hearing before denying such a petition. The defendant's supervised release

conditions prohibited him from relocating from the district in which he was under supervision, and he moved to modify this condition to allow him to return to Pakistan for dental school. Without a hearing and without explanation, the district court denied the petition. On appeal, the defendant argued that the district court was required to hold a hearing. The Court of Appeals disagreed, noting that Federal Rule of Criminal Procedure 32.1(c) requires the court to hold a hearing, with exceptions, "before *modifying* the conditions of probation or supervised release." (Emphasis added.) However, the rule does not compel the court to hold a hearing before *refusing* a request for modification. Although the Court of Appeals noted that district courts should ordinarily proved some explanation for their decisions, in the present case, the court's reasons were obvious--namely, that his departure to Pakistan would effectively end his supervision term.

Recently Noted Circuit Conflicts

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Commerce Clause

United States v. Stewart, 348 F.3d 1132 (9th Cir. 2003)

The Ninth Circuit held that 18 U.S.C. §922(o) violates the Commerce Clause as applied to the possession of homemade machine guns that are made from legally available parts. The Court disagreed with the Third, Seventh, and Eleventh Circuits which have held §922(o) is Constitutional based on the affect of mere possession on interstate commerce. *See United States* v. *Rybar*, 103 F.3d 273, 276-85 (3d Cir. 1996); U*nited States* v. *Kenney*, 91 F.3d 884, 890-91 (7th Cir. 1996); *United States* v. *Wright*, 117 F.3d 1265, 1268-71 (11th Cir. 1997), *vacated in irrelevant part by* 133 F.3d 1412 (11th Cir. 1998). The Court also disagreed with the *Rybar* court's conclusion that the legislative history for other subsections of section 922 supported the Constitutionality of section 922(o). Much of the Court's reasoning could also be used in a felon in possession case, under 18 U.S.C. §922(g)(1). The defendant was also charged with and convicted of that offense. However, he only challenged that conviction under the Second Amendment.

Fourth Amendment - Protective Sweep

United States v. Vargas, 3__ F.3d ___, 2004 U.S. App. LEXIS 14673 (2nd Cir. July 16, 2004)

The Second Circuit noted a circuit conflict on the issue of whether a protective sweep is only constitutional, under *Maryland v. Buie*, 494 U.S. 325 (1990), when it is conducted in the course of arresting someone on the premises. *Compare United States v. Reid*, 226 F.3d 1020, 1027 (9th Cir. 2000) (interpreting *Buie* to require an arrest) with *United States* v. *Gould*, 364 F.3d 578, 584 (5th Cir. 2004) (*en banc*) (holding that an arrest is not, "per se, an indispensable element of an in-home protective sweep"); *United States v. Taylor*, 248 F.3d 506, 513 (6th Cir. 2001) (same).

Fifth Amendment

Due Process - Delay in Indictment

United States v. Avants, 367 F.3d 433 (5th Cir. 2004)

In this case, the Fifth Circuit noted a circuit conflict regarding the test for determining whether pre-indictment delay violates due process. The Fifth Circuit follows a two-part test under which "an accused must show: the delay `was intentionally brought about by the government for the purpose of gaining some tactical advantage over the accused in the contemplated prosecution or for some other bad faith purpose'; and `the improper delay caused actual, substantial prejudice to his defense'." This is the majority view among the circuits. *See United States v. Lebron-Gonzalez*, 816 F.2d 823, 831 (1st Cir. 1987); *United States v. Hoo*, 825 F.2d 667, 671 (2nd Cir. 1987); *United States v. Ismaili*, 828 F.2d 153, 166 (3rd Cir. 1987); *United States v. Brown*, 667 F.2d 566, 568 (6th Cir. 1982); *United States v. Stierwalt*, 16 F.3d 282, 285 (8th Cir. 1994); *United States v. Jenkins*, 701 F.2d 850, 854 (10th Cir. 1983); *United States v. Caparole*, 806 F.2d 1487, 1514 (11th Cir. 1986); *United States v. Mills*, 925 F.2d 455, 464 (D.C. Cir. 1990). However, the Fourth, Seventh, and Ninth Circuits differ. In those courts, once a defendant has shown actual and substantial prejudice for the delay the reasons for the delay are balanced against the prejudice to the defendant. *See Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990); *United States v. Sowa*, 34 F.3d 447, 450-451 (7th Cir. 1994); *United States v. Moran*, 759 F.2d 777, 780-782 (9th Cir. 1985).

Sixth Amendment

Ineffective Assistance of Counsel

United States v. Hernandez-Rivas, 348 F.3d 595 (7th Cir. 2003)

In this case, the Seventh Circuit held that it did not need to determine if Defendant's trial counsel was ineffective for failing to file objections to the magistrate's report and recommendation on the suppression issue because the admission of the possibly improper evidence did not make the outcome of the trial any less reliable. Under that standard, a failure to file or adequately pursue a suppression motion could never be ineffective assistance. So, it should be no surprise that the Seventh Circuit's decision conflicts with the Supreme Court's decision in *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). The Court held that "[w]here defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." *Ibid.*

Fifth and Sixth Amendments - *Blakely*

As you undoubtedly already know, there is a circuit conflict on the application of *Blakely v. Washington*,___ U.S. ___, 124 S. Ct. 2531; 159 L. Ed. 2d 403 (2004) to the Federal Sentencing Guidelines, which will be resolved by the Supreme Court within the next few months. As of this writing, the circuits stack up as follows. The Second Circuit dodged the issue and certified three questions to the Supreme Court in *United States v. Penaranda*, 3__ F.3d ___, 2004 U.S. App. LEXIS 14268 (2nd Cir. July 12, 2004). The Fourth and Fifth Circuits have both held that *Blakely* has no effect on the Guidelines. *United States v. Hammoud*, 3__ F.3d ___, 2004 U.S. App. LEXIS 15898 (4th Cir. Aug. 2, 2004), *en banc order*; *United States v. Pineiro*, 3__ F.3d ___, 2004 U.S. App. LEXIS 14259 (5th Cir. July 12, 2004). The Seventh Circuit held that *Blakely* applies to the Guidelines, but left several issues undecided, including whether the Guidelines are severable. *United States v. Booker*, 2004 U.S. App. LEXIS 14223 (7th Cir. July 9, 2004). The Ninth Circuit followed *Booker*, in a case involving a guilty plea, except that it went further and held that the Guidelines are severable. *United States v. Ameline*, 3__ F.3d __, 2004 U.S. App. LEXIS 15031 (9th Cir. July 21, 2004). In contrast, the Eighth Circuit held that *Blakely* applies to the Guidelines and they are entirely unconstitutional because they are not severable. *United States v. Mooney*, 3__ F.3d ___, 2004 U.S. App. LEXIS 15301 (8th Cir. July 23, 2004)

Offenses

18 U.S.C. §1031(a)

United States v. Reitmeyer, 356 F.3d 1313 (10th Cir. 2004)

The Tenth Circuit held that major fraud is not a continuing offense for purposes of the statute of limitations. In so holding, the Court disagreed with the Ninth Circuit's holding, in *United States v. Naijor*, 255 F.3d 979, 983-84 (9th Cir. 2001), that the similar offense of bank fraud is a continuing offense. Likewise, the Court disagreed with "cases in the Eighth and Sixth circuits that hold violations of the mail fraud and bank fraud statutes are continuing for *ex post facto* purposes. *See United States v. Blumeyer*, 114 F.3d 758, 766 (8th Cir. 1997) (noting mail fraud is a continuing offenses for *ex post facto* purposes); *United States v. Buckner*, 9 F.3d 452, 454 (6th Cir. 1993) (holding a violation of the bank fraud statute is a continuing offense for *ex post facto* purposes)." The Court noted that "[b]oth circuits held violations of the statutes were continuing with little or no analysis, and neither circuit cited, much less applied, the *Toussie* analysis." As part of its disagreement, the Court also pointed to contrary authority in other circuits. *See United States v. Barger*, 178 F.3d 844, 847 (7th Cir. 1999) (holding a violation of the mail fraud statute is not a continuing offense for *ex post facto* purposes); *United States v. Ortland*, 109 F.3d 539, 546-47 (9th Cir. 1997) (same); *United States v. Miro*, 29 F.3d 194, 198 (5th Cir. 1994) (same); *United States v. Bakker*, 925 F.2d 728, 739 (4th Cir. 1991) (noting mail and wire fraud are not ongoing crimes that can "straddle" the effective date of the sentencing guidelines)."

18 U.S.C. §1956(h)

United States v. Hall, 349 F.3d 1320 (11th Cir. 2003), *cert. granted* 124 S.Ct. 2871 (2004)

The Eleventh Circuit held that conspiracy to commit money laundering, under 18 U.S.C. §1956(h), does not require an overt act. However, the Court noted that there is a circuit conflict on this issue. "See *United States v. Godwin*, 272 F.3d 659, 669 n.9 (4th Cir. 2001) (noting that 18 U.S.C. §1956(h) does not explicitly require

proof of an overt act); *United States v. Tam*, 240 F.3d 797, 802 (9th Cir. 2001) (finding that §1956(h) does not require the indictment to allege an overt act). *But see United States v. Wilson*, 249 F.3d 366, 379 (5th Cir. 2001) (finding proof of an overt act is required for a conviction under §1956(h)); *United States v. Hildebrand*, 152 F.3d 756, 762 (8th Cir. 1998) (finding that §1956(h) requires proof of an overt act for conviction)." The Supreme Court granted certiorari in this case on June 21, 2004.

18 U.S.C. §2252(a)(5)(B)

United States v. Hilton, 363 F.3d 58 (1st Cir. 2004)

The First Circuit affirmed a district court's grant of a 28 U.S.C. §2255 petition in a case in which the petitioner was convicted of possession of child pornography. (18 U.S.C. §2252A(a)(5)(B).) The Court based its decision on *Ashcroft v. Free Speech Coalition I*, 535 U.S. 234 (2002). It held that "the government must introduce relevant evidence in addition to the images to prove the children are real." The Court disagreed with holdings of the Eighth, Tenth, and Eleventh Circuits "that the pornographic images themselves should suffice to prove the use of actual children in production. *See United States v. Kimler*, 335 F.3d 1132, 1142 (10th Cir. 2003) ("Juries are still capable of distinguishing between real and virtual images . . . ."); *United States v. Deaton*, 328 F.3d 454, 455 (8th Cir. 2003) (reaffirming the reasonableness of "a jury's conclusion that real children were depicted even where the images themselves were the only evidence the government presented on the subject"); *United States v. Hall*, 312 F.3d 1250, 1260 (11th Cir. 2002) (affirming pre-*Free Speech Coalition* conviction because "no reasonable jury could have found that the images were virtual children created by computer technology as opposed to actual children")."

21 U.S.C. §841

United States v. Stewart, 361 F.3d 373 (7th Cir. 2004)

The Seventh Circuit reversed a defendant's sentence because the district court improperly used the entire amount of a mixture that constituted a stage in the process of making methamphetamine when finding that Defendant was subject to a ten year mandatory minimum. The Court concluded with the statement that "we reiterate our conclusion ... that only usable or consumable mixtures or substances can be used in determining drug quantity under § 841(b). Under this approach, only the amount of pure drug contained in an unusable solution, or the amount of usable drug that is likely to be produced after that unusable solution is fully processed, may be included in the drug quantity under the statute."

The Court disagreed with the holdings of the First and Tenth Circuits which have refused to apply the market-oriented approach to determining drug quantity. See *United States v. Mahecha-Onofre*, 936 F.2d 623, 625-26 (1st Cir. 1991) (holding that cocaine combined with acrylic material to form part of suitcase was a "mixture"); *United States v. Richards*, 87 F.3d 1152, 1157 (10th Cir. 1996) (holding that solution not yet processed into usable methamphetamine was a "mixture"). The Court also disagreed with the holdings of the Fifth, Eighth, and Ninth Circuits that the market-oriented approach should not apply to methamphetamine because the statute distinguishes between mixture or substance containing the drug and the amount of the pure drug. *United States v. Palacios-Molina*, 7 F.3d 49, 53 (5th Cir. 1993) (stating that *Chapman*'s market-oriented analysis applies to cocaine, but does not apply to methamphetamine or PCP); *United States v. Kuenstler*, 325 F.3d 1015, 1023 (8th Cir. 2003) (using similar reasoning when it counted for statutory purposes a partially processed solution containing methamphetamine because the solution would eventually be processed into a distributable product); *United States v. Beltran-Felix*, 934 F.2d 1075, 1076 (9th Cir. 1991) (holding that entire weight of solution containing small amount of methamphetamine should be used to calculate mandatory minimum sentence under §841(b) even though solution was in early stage of production).

United States v. Brisbane, 367 F.3d 910 (D.C. Cir. 2004)

The D.C. Circuit vacated a defendant's conviction for distributing cocaine base and remanded the case to the district court with instructions to enter a verdict for distributing cocaine. In this case, the government's expert testified that the drug the defendant distributed was 49% cocaine base, but she had not done any tests to determine that it was crack. Defendant made a Rule 29 motion, after the government rested, and the district court ruled that the government had not proven that the substance was crack. However, the district court ruled that the government had still presented enough evidence to convict Defendant of distributing cocaine base and the jury convicted him of

that crime.

The Court of Appeals held that the term "cocaine base" in the statute is ambiguous. The Court stated that "Congress could hardly have intended to apply the enhanced penalties to forms of cocaine base that are not smokable or even consumable without further processing, while imposing the lesser penalties on defendants dealing in similar amounts of ready-to-snort cocaine hydrochloride." The Court disagreed with "[f]our of the courts of appeals to consider this issue [which] read "cocaine base" to include all base forms of cocaine and "cocaine, its salts ...'' to mean only cocaine hydrochloride. *See United States v. Barbosa*, 271 F.3d 438, 461-67 (3rd Cir. 2001); *United States v. Butler*, 988 F.2d 537, 542-43 (5th Cir. 1993); *United States v. Jackson*, 968 F.2d 158, 161-63 (2d Cir. 1992); *United States v. Easter*, 981 F.2d 1549, 1558 (10th Cir. 1992)." *But see United States v. Lopez-Gil*, 965 F.2d 1124, 1130 (1st Cir. 1992) (holding that cocaine base equals crack for purposes of sentencing); *United States v. Booker*, 70 F.3d 488, 493-494 (7th Cir. 1995) (same). *Brisbane* found that Congress did not intend to reach all forms of cocaine base with the enhanced penalty. Instead, the Court found that the term "cocaine base" in 21 U.S.C. §841 must mean either crack or any form of cocaine that is smokable. The Ninth Circuit took the later approach in *United States v. Shaw*, 936 F.2d 412 (1991). However, the D.C. Circuit did not decide which approach it thought was correct. It simply decided that those were the only two possible options and it did not matter which one was chosen in this case.

Affirmative Defenses

Justification for 18 U.S.C. §922(g)(1)

United States v. Beasley, 346 F.2d 930 (9th Cir. 2003)

The Ninth Circuit held that a defendant has the burden to prove a justification defense to a §922(g) charge beyond a reasonable doubt. This decision furthered a circuit split. The Court agreed with the Third and Eleventh Circuits. *United States v. Dodd*, 225 F.3d 340, 344 (3d Cir. 2000); *United States v. Deleveaux*, 205 F.3d 1292, 1299 (11th Cir. 2000). However, it disagreed with the Seventh Circuit's holding that the government has the burden to disprove the defense beyond a reasonable doubt because Congress has not said otherwise. *United States v. Talbott*, 78 F.3d 1183, 1185 (7th Cir. 1996).

Fed.R.Crim.P. 29 & 33

United States v. Viayra, 365 F.3d 790 (9th Cir. 2004)

The Ninth Circuit held that a district court does not have the authority to *sua sponte* grant a new trial on the basis of a Federal Rule of Criminal Procedure 29 motion. A defendant must first make a Rule 33 motion before a district court can grant a new trial. In this case, the district court denied the Rule 29 motions, but then concluded that it had the power to convert the Rule 29 motions into Rule 33 motions and granted a new trial because it found that failure to do so would result in a substantial miscarriage of justice.

The Court of Appeals followed the Fifth Circuit's decision in *United States v. Brown*, 587 F.2d 189 (5th Cir. 1979). *United States . See also United States v. Di Bernardo*, 880 F.2d 1216, 1223 fn. 2 (11th Cir. 1989). The Court disagreed with the Sixth Circuit's opposite conclusion in *United States v. Taylor*, 176 F.3d 331 (6th Cir. 1999), noting that it did not mention the Advisory Committee notes. It does not appear that any other circuits have considered this precise issue.

Sentencing[2]

U.S.S.G. §2B3.1 (loss amount)

United States v. Donaby, 349 F.3d 1046 (7th Cir. 2003)

In this case, the Seventh Circuit held that the value of a car that was stolen to use as the getaway car for a bank robbery was properly included in the loss amount when determining Defendants' offense levels. The Court agreed with the Eighth Circuit's holding in *United States v. Powell*, 283 F.3d 946 (8th Cir. 2002). However, "the First Circuit maintains a distinction between carjackings that occur during the robbery itself and vehicles stolen in preparation for a robbery." The First Circuit holds that "it is acceptable to include the value of carjacked vehicles as `loss,'"

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[2] The Guidelines cases may not mean much after *Blakely v. Washington*,___ U.S. ___, 124 S. Ct. 2531; 159 L. Ed. 2d 403 (2004) and the Court's forthcoming decisions in *United States v. Booker*, ___ F.3d ___, 2004 U.S. App. LEXIS 14223 (7th Cir. July 9, 2004), *cert. granted*, 5__ U.S. ___ 2004 U.S. LEXIS 4788 (Aug. 2, 2004) and *United States v. Fanfan, cert. granted*, 5__ U.S. ___ 2004 U.S. LEXIS 4789 (Aug. 2, 2004). However, I am including them anyway in case they do.

United States v. Cruz-Santiago, 12 F.3d 1 (1st Cir. 1993), but not vehicles stolen in preparation for and used during the robbery. *United States v. Austin*, 239 F.3d 1 (1st Cir. 2001).

U.S.S.G. §2D1.1

United States v. Smack, 347 F.3d 533 (3rd Cir. 2003)

The Third Circuit held that a defendant's counsel was ineffective by stipulating to the maximum offense level that could possibly be supported by the evidence in a reverse sting case, instead of using application note 12 to argue that a lesser amount was agreed upon and/or the defendant did not intend to and was not capable of actually purchasing the agreed upon amount. The Court remanded this case to the district court for a determination of prejudice.

The Court did not decide, but implied that the last sentence of U.S.S.G. §2D.1.1, application note 12, allowing a defendant to establish that he did not intend to provide or was not capable of providing the agreed upon amount of a controlled substance applies to reverse sting operations. The Court noted that the First, Second, and Tenth Circuits have refused to apply the last sentence of note 12 to reverse sting cases. *See United States v. Brassard*, 212 F.3d 54 (1st Cir. 2000); *United States v. Gomez*, 103 F.3d 249, 252-53 (2d Cir. 1997); *United States v. Perez de Dios*, 237 F.3d 1192 (10th Cir. 2001). "But the Courts of Appeals for the Seventh and Ninth Circuits seem to apply the final sentence of the new Note 12 to reverse stings. *See United States v. Minore*, 40 Fed. Appx. 536 (9th Cir. 2002) (mem. op.); *United States v. Estrada*, 256 F.3d 466 (7th Cir. 2001). The Court of Appeals for the Eighth Circuit has declined to reach this question. *See United States v. Williams*, 109 F.3d 502 (8th Cir. 1997). The other Courts of Appeals do not appear to have weighed in."

U.S.S.G. §2K2.4(a)(4)(A)

United States v. Turner, 349 F.3d 833 (5th Cir. 2003)

The Fifth Circuit reversed an enhancement under U.S.S.G. §2K2.1(a)(4)(A) because the district court erroneously found that the defendant had previously been convicted of a crime of violence. In this case, the defendant was originally charged with burglary of a habitation, but pled to the lesser offense of burglary of a building. The district court found that Defendant had been convicted of a crime of violence based on the indictment. The Court of Appeals held that the district court could only base such a finding on the actual count of conviction which, in this case, did not qualify as a crime of violence.

The Court refused to follow *United States v. Gacinik*, 50 F.3d 848, 856 (10th Cir. 1995), which allowed the district court to look to the unchallenged facts recited in a presentence report. It also noted that the Tenth Circuit view had not been followed elsewhere. *See United States v. Sacko*, 178 F.3d 1, 7 (1st Cir. 1999) (*en banc* order on denial of rehearing) (holding presentence reports may only be used to determine the character of a prior criminal offense); *United States v. Arnold*, 58 F.3d 1117, 1122 (6th Cir. 1995) ("[T]he district court's reliance on the presentence investigation report was outside the scope of its discretion"); However, the Second, Seventh, Eleventh and D.C. Circuits have followed the Tenth Circuit's view. *See United States v. Pearson*, 77 F.3d 675, 677 (2nd Cir. 1996); *United States v. Sebero*, 45 F.3d 1075, 1078 (7th Cir. 1995); *United States v. Spell*, 44 F.3d 936, 939 (11th Cir. 1995); *United States v. Hill*, 131 F.3d 1056, 1063-1065 (D.C. Cir. 1997). The Eighth Circuit noted the question, but did not decide it. *United States v. Menteer*, 350 F.3d 767, 771 (8th Cir. 2003). The Fourth and Ninth Circuits do not appear to have addressed this precise issue.

U.S.S.G. §3B1.3

United States v. *Snook*, 366 F.3d 439 (7th Cir. 2004)

The Seventh Circuit affirmed an abuse of public trust enhancement for an environmental manager at a Clark oil refinery who submitted false data and did not report violations. This decision furthers a circuit split. In *United States* v. *Technic Services, Inc.*, 314 F.3d 1031, (9th Cir. 2002), the Ninth Circuit held than an employee of a government contractor or licensee does not hold a position of public trust. In *Technic Services*, the Court held that "[a]n obligation to follow important laws that further the public health and safety cannot, merely by its own force, create a position of public trust. To hold otherwise would convert the enhancement into the general rule." *Id.* at 1050. This created a split with the First Circuit opinion in *United States* v. *Gonzalez-Alvarez*, 277 F.3d 73 (1st Cir. 2002) (holding that a person with a license to produce and sell milk held a position of public trust), which the Seventh

Circuit cited in support of its holding.

U.S.S.G. §3C1.1

United States v. Stolba, 357 F.3d 850 (8th Cir. 2004)

The Eighth Circuit held that an obstruction enhancement could not be based on a defendant's actions before an official investigation had begun, even though he knew that one would begin soon. The Court disagreed with contrary holdings by the Tenth and D.C. Circuits. *See, e.g., United States v. Mills*, 194 F.3d 1108, 1114-15 (10th Cir. 1999); *United States v. Barry*, 938 F.2d 1327, 1335 (D.C. Cir. 1991). *See also United States v. McGovern*, 329 F.3d 247, 252 (1st Cir. 2003) (same). The Fourth and Fifth Circuits agree with the Eighth Circuit's holding in this case. *See United States v. Self*, 132 F.3d 1039, 1042 (4th Cir. 1997); *United States v. Clayton*, 172 F.3d 347, 353-355 (5th Cir. 1999). The Seventh Circuit has not resolved the issue under the current version of the guideline. *United States v. Snyder*, 189 F.3d 640, 648-649 (7th Cir. 1999). The remaining circuits do not appear to have considered the issue.

U.S.S.G. §4A1.2

United States v. Irvin, 369 F.3d 284 (3rd Cir. 2004)

In this case, the Third Circuit reversed a defendant's sentence, under the plain error standard, because the district court improperly included a state conviction in his criminal history score when that state conviction was for relevant conduct in the federal case. The defendant was convicted, in federal court, of being a felon in possession of a firearm. In state court, he was convicted of endangering a child and involuntary manslaughter based on his possession of the same gun in a place where his son found it and accidentally shot himself.

The Court held that the offenses were related because the defendant could not have exercised criminally negligent control over the gun until he possessed it. The Court noted that it focuses on the relationship between the conduct and has rejected the test of whether the offenses are severable. The later test is used by the First, Sixth, Eighth, and Tenth Circuits. *See United States v. Collazo-Aponte*, 216 F.3d 163, 203 (1st Cir. 2000); *United States v. Beddow*, 957 F.2d 1330, 1338 (6th Cir. 1992); *United States v. Blumberg*, 961 F.2d 787, 792 (8th Cir. 1992); *United States v. Banashefski*, 928 F.2d 349, 352 (10th Cir. 1991). *But see United States v. Connor*, 950 F.2d 1267, 1270-1271 (7th Cir. 1991) (noting that Sentencing Commission intended a broad reading of the term "related cases" and rejecting severability test).

U.S.S.G. §4B1.2(a)

United States v. Fish, 368 F.3d 1200 (9th Cir. 2004)

The Ninth Circuit held that possession of an explosive device is not a crime of violence under the Guidelines. The Court found that if it were the specific inclusion of the crime of use of explosives as a crime of violence would be surplusage. The Court disagreed with the Fifth Circuit's contary holding in *United States v. Jennings*, 195 F.3d 795 (5th Cir. 1999).

United States v. Matthews, 3__ F.3d ___,
2004 U.S. App. LEXIS 13953 (9th Cir. July 7, 2004)

The Ninth Circuit held that some burglaries that are not burglaries of a dwelling may still be crimes of violence under the otherwise clause of U.S.S.G. §4B1.2(a)(2). It disagreed with contrary holdings of the Fourth and Tenth Circuits. *See United States v. Harrison*, 58 F.3d 115, 119 (4th Cir. 1995) (holding that only burglary of a dwelling is a crime of violence); *United States v. Smith*, 10 F.3d 724, 732-34 (10th Cir. 1993) (determining that the Sentencing Commission purposefully chose to omit burglaries other than burglaries of a dwelling from §4B1.2. Thus, under a narrow interpretation of the "otherwise" clause, non-dwelling burglaries could not qualify as crimes of violence.). In contrast, the Eleventh Circuit held that burglaries of occupied buildings other than dwellings are still crimes of violence. *United States v. Spell*, 44 F.3d 936, 938-39 (11th Cir. 1995) (excluding all burglaries except those of dwellings and occupied structures). The First and Eighth Circuits go further and include burglaries of commercial buildings as well as dwellings (whether a person is present or not), citing the nearly identical language in the Armed Career Criminal Act, under which *all* burglaries are considered to be violent felonies that "present[ ] a serious potential risk of physical injury to another." *See United States v. Fiore*, 983 F.2d 1, 4-5 (1st Cir. 1992) (burglary of commercial structure is crime of violence under "otherwise" clause); *United States v. Blahowski*, 324 F.3d 592, 594-95 (8th Cir. 2002) (same).

"Although the Seventh Circuit has also found burglary of a commercial building to qualify under the "otherwise" clause, *see United States v. Nelson*, 143 F.3d 373, 375 (7th Cir. 1998) (burglary of sporting

goods store was, under facts of case, crime of violence under "otherwise" clause), it did so not on a *per se* basis as in the First and Eighth Circuits, but rather in accordance with a case-by-case approach to determining whether a particular burglary of a building that is not a dwelling is a crime of violence. *See United States v. Hoults*, 240 F.3d 647, 651-52 (7th Cir. 2001) (adopting case-by-case approach). The Fifth and Sixth Circuits also follow a case-by-case approach. *United States v. Wilson*, 168 F.3d 916, 929 (6th Cir. 1999) (holding that, although burglary of nondwelling is not *per se* a crime of violence, it may possibly be one under certain circumstances); *United States v. Jackson*, 22 F.3d 583, 585 (5th Cir. 1994) (considering particular circumstances of burglary of non-dwelling in determining whether it qualifies as a crime of violence under "otherwise" clause), cited for this proposition by *United States v. Turner*, 305 F.3d 349, 351 (5th Cir. 2002).

The Ninth Circuit chose to follow the later approach. It found "that burglary of an occupied building -where "occupied" merely indicates lack of abandonment and does not indicate a person's physical presence-is simply too broad a category to necessarily `present[ ] a serious potential risk of physical injury to another" as required by U.S.S.G. § 4B1.2(a)(2).'"

Supervised Release Revocation

United States v. Okoko, 365 F.3d 962 (11th Cir. 2004)

The 11th Circuit held that a court can not toll a period of supervised release while a defendant is legally outside the country. The Court agreed with the Second, Fifth, and Eighth Circuits. *United States v. Balogun*, 146 F.3d 141, 146 (2d Cir. 1998); *United States v. Quaye*, 57 F.3d 447, 449 (5th Cir. 1995); *United States v. Brown*, 54 F.3d 234, 239 (5th Cir. 1995); *United States v. Juan-Manuell*, 222 F.3d 480, 487 (8th Cir. 2000). It disagreed with the Sixth Circuit's decision in *United States v. Isong*, 111 F.3d 428 (6th Cir.1997). It appears that no other court has decided the issue.

Appeals

Appeal Waivers

There is a circuit split regarding the scope of appeal waivers in plea agreements. Some circuits apply them more strictly than others. All courts have exceptions for: sentences that are based on unconstitutional factors, such as race; for sentences above the statutory maximum; and for a claim that the plea itself is invalid. However, some courts will also allow appeals in other circumstances, despite a waiver.

The Second and Seventh Circuits do not allow any additional exceptions to an appeal waiver, including for a claim of a breach of a plea agreement, unless the defendant is seeking to withdraw his plea. *See United States v. Hernandez*, 242 F.3d 110, 114 (2nd Cir. 2001); *United States v. Hare*, 269 F.3d 859 (7th Cir. 2001); *United States v. Whitlow*, 287 F.3d 638, 640 (7th Cir. 2002).

The Sixth and Ninth Circuits will allow appeals raising a claim of a breach of the plea agreement. *See United States v. Swanberg*, 370 F.3d 622 (6th Cir. 2004); *United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996)

The First Circuit may refuse to honor an appeal waiver if to do so "would work a miscarriage of justice." This would include the normal factors of exemption such as a sentence based on an unconstitutional factor or which exceeds the statutory maximum or ineffective assistance of counsel regarding the plea proceedings. It would also include a sentence that violates a material term of a plea agreement. The Court also stated that with regard to actually applying the exception, "some of the considerations come readily to mind: the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result." *United States v. Teeter*, 257 F.3d 14, 25-26 (1st Cir. 2001). The Third Circuit followed *Teeter* and held that a miscarriage of justice may invalidate a waiver. *United States v. Khatak*, 273 F.3d 557, 562-563 (3rd Cir. 2001). The Eighth Circuit will also refuse to enforce an appeal waiver "where to do so would result in a miscarriage of justice." *United States v. Andis*, 333 F.3d 886, 890-891 (8th Cir. 2003) (*en banc*) (following *Teeter* and *Khatak* and noting that exception would be narrow).

The Tenth Circuit followed *Andis*, but elaborated on the miscarriage of justice exception. The Court held that a miscarriage of justice would be shown if 1) the district court relied on an impermissible factor, such as race; 2) counsel rendered ineffective assistance in connection with the negotiation of the waiver; 3) the sentence exceeds the statutory

maximum; or 4) the waiver is otherwise unlawful. The Court then held that in order to satisfy the fourth factor the waiver must seriously affect the fairness, integrity, or public reputation of judicial proceedings as under the plain error standard. *United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004) (*en banc*).

The Fourth Circuit held that "a defendant's agreement to waive appellate review of his sentence is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations." As a result, it allowed an appeal based on a claim of ineffective assistance of counsel with regard to a motion to withdraw the plea and sentencing. *United States v. Attar*, 38 F.3d 727, 732-733 (4th Cir. 1994).

The Fifth, Eleventh, and D.C. Circuits do not appear to have explicitly decided if they will place any limits on the scope of appeal waivers other than the basic three mentioned above.

Reviewability of Denials of Downward Departures

The First, Third, Fourth, and Seventh Circuits have held that they can not review a district court's factual findings underlying its denial of a downward departure. *United States* v. *Dewire*, 271 F.3d 333, 337-339 (1st Cir. 2001); *United States v. Minutoli*, 3__ F.3d ___, 2004 U.S. App. LEXIS 14100 (3rd Cir. July 8, 2004); *United States* v. *Underwood*, 970 F.2d 1336, 1338 (4th Cir. 1992); *United States* v. *Steels*, 38 F.3d 350, 352 (7th Cir. 1994). The Eleventh Circuit has also implicitly agreed with that position. See *United States v. Patterson*, 15 F.3d 169, 171 (11th Cir. 1994) (refusing to review a denial of a downward departure that was based on the district court's view of the facts). However, the Second and D.C. Circuits have both held that a district court's refusal to depart which is based on a clearly erroneous factual finding would be reviewable as an incorrect application of the Sentencing Guidelines. *United States* v. *Adeniyi*, 912 F.2d 615, 619 (2nd Cir. 1990); *United States* v. *Sammoury*, 74 F.3d 1341, 1345 (D.C. Cir. 1996); *United States* v. *Brooke*, 308 F.3d 17, 19-20 (D.C. Cir. 2002). The Eighth Circuit has not explicitly held that it may review a district court's factual findings underlying a decision to deny a downward departure. However, it has conducted such a review. See *United States* v. *Rice*, 332 F.3d 538, 540 (8th Cir. 2003) (finding that appellant had not shown how his history made him an extraordinary robber). There is an intra-circuit conflict on this issue in both the Fifth and the Ninth Circuits. *See United States* v. *Ardoin*, 19 F.3d 177, 181 (5th Cir. 1994) (holding that the court reviews findings of fact in an appeal from a denial of a downward departure under the clearly erroneous standard); *United States* v. *Garay*, 235 F.3d 230, 232 (5th Cir. 2000) (holding that a refusal to depart is only reviewable if it was based on a mistaken belief that the district court lacked discretion to depart); *United States* v. *Walter*, 256 F.3d 891, 895 (9th Cir. 2001) (holding that the court reviews a district court's factual determination that childhood abuse was not extraordinary for clear error); *United States* v. *Rivera-Sanchez*, 222 F.3d 1057, 1064-65 (9th Cir. 2000) (holding that a factual determination underlying a refusal to depart was not reviewable).

Standard of Review - Breach of Plea Agreement, not raised below

In Re Sealed Case, 356 F.3d 313 (D.C. Cir. 2004)

In this case, the D.C. Circuit held that a claim that the government breached a plea agreement, that was not raised below, is only reviewed for plain error. This holding agreed with the First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits. *See United States v. Saxena*, 229 F.3d 1, 5 (1st Cir. 2000); *United States v. Fant*, 974 F.2d 559, 564-65 (4th Cir. 1992); *United States v. Wilder*, 15 F.3d 1292, 1301 (5th Cir. 1994); *United States v. Barnes*, 278 F.3d 644, 646 (6th Cir. 2002); *United States v. Matchopatow*, 259 F.3d 847, 851 (7th Cir. 2001); *United States v. Cohen*, 60 F.3d 460, 462-63 (8th Cir. 1995); *United States v. Maldonado*, 215 F.3d 1046, 1051 (9th Cir. 2001); *United States v. Thayer*, 204 F.3d 1352, 1356 (11th Cir. 2000). However, the Second, Third, and Tenth Circuits review claims of a breach of the plea agreement *de novo* even when they were not raised below. *See United States v. Lawlor*, 168 F.3d 633, 636 (2nd Cir. 1999); *United States v. Rivera*, 357 F.3d 290, 294-295 (3rd Cir. 2004); *United States v. Peterson*, 225 F.3d 1167, 1170 (10th Cir. 2000).

Habeas Procedure

Release during 28 U.S.C. §2255 proceedings

Pagan v. United States, 353 F.3d 1343 (11th Cir. 2003)

The Eleventh Circuit held that an order denying bond during the pendency of a 28 U.S.C. §2255 proceeding is immediately

appealable under the collateral order doctrine. The Court agreed with holdings of the Second, Third, Sixth, Seventh, Eighth, and D.C. Circuits. *Grune v. Coughlin*, 913 F. 2d 41 (2nd Cir. 1990); *United States v. Smith*, 835 F.2d 1048 (3rd Cir. 1987); *Dotson v. Clark*, 900 F.2d 77 (6th Cir. 1990); *Cherek v. United States*, 767 F.2d 335 (7th Cir. 1985); *Martin v. Solem*, 801 F.2d 324 (8th Cir. 1986); *Guerra v. Meese*, 786 F.2d 414 (D.C. Cir. 1986). "The First and Ninth Circuits have declined to hold the denial of a bond immediately appealable, but have construed such an appeal as a petition for writ of mandamus. *Land v. Deeds*, 878 F.2d 318 (9th Cir. 1989); *United States v. DiRusso*, 548 F.2d 372 (1st Cir. 1976)."

Harris v. United States, 366 F.3d 593 (7th Cir. 2004)

In a 28 U.S.C. §2255 case in which the petitioner raised an ineffective assistance of counsel claim, the Seventh Circuit held that it was bound by its prior decision on direct appeal that petitioner had not shown ineffective assistance. The Court did this in spite of the fact it ruled against petitioner on direct appeal due to insufficient evidence. This decision conflicts with the Second Circuit's decision in *United States v. Doe*, 365 F.3d 150 (2nd Cir. 2004), which denied an ineffective assistance of claim on direct appeal due to insufficient evidence, but held that Defendant could raise the claim in a §2255 petition.

Supreme Court Update October 2003 Term

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

***Yarborough v. Gentry*, ___ U.S. ___, 124 S. Ct. 1 (October 20, 2003) (Per Curiam).**

The California Court of Appeals affirmed Gentry's conviction for assault with a deadly weapon based on the stabbing of his girlfriend. Gentry pursued federal habeas relief based on ineffective assistance of trial counsel during closing argument. The district court denied relief, but the Ninth Circuit reversed, holding that counsel was ineffective during closing for failing to highlight various potentially exculpatory pieces of evidence, mentioning details that hurt Gentry's defense, not demanding the jury find Gentry not guilty, not arguing explicitly that the government had failed to sustain its burden of proof beyond a reasonable doubt, and implying he did not believe Gentry's testimony. The Supreme Court reversed, finding that all of counsel's alleged deficiencies were the result of reasonable trial tactics, not ineffective assistance. The Court noted, "Judicial review of a defense attorney's summation is therefore highly deferential - and doubly deferential when it is conducted through the lens of federal habeas."

***Mitchell v. Esparza*, ___ U.S. ___, 124 S. Ct. 7 (November 3, 2003) (Per Curiam).**

Esparza was convicted in Ohio state court of aggravated murder during the commission of an aggravated robbery. He was sentenced to death. He argued on state postconviction review that, because the indictment had not charged him as being a "principal offender," which is required for imposing the death penalty for felony murder in Ohio. The state courts rejected his arguments and he sought federal habeas review. Both the district court and the Sixth Circuit granted his habeas petition finding that the state court opinions were contrary to *Apprendi v. New Jersey* and *Sullivan v. Louisiana*. The Sixth Circuit held that the state's failure to charge in the indictment that Esparza was a principal offender was the equivalent of dispensing with the reasonable doubt requirement. The Supreme Court disagreed and held that, even in capital cases, courts must consider whether the trial court's failure to instruct the jury on all of the statutory elements of an offense is harmless error. The Court concluded that, in Esparza's case, the jury's verdict would have been the same even if it had been instructed correctly and therefore, any error was harmless.

***United States v. Banks*, ___ U.S. ___, 124 S. Ct. 521 (December 2, 2003) (Justice Souter).**

When executing a federal search warrant at Banks's home to search for cocaine, officers knocked loudly on the front door, called out "police search warrant," and waited 15 to 20 seconds before forcibly entering the apartment. Banks was in the shower and had not heard anything until the door was broken down. The Ninth Circuit ordered suppression of the drug and gun evidence found in the apartment, holding the 15 to 30 second delay was insufficient and that no exigent circumstances existed. The Supreme Court reversed, holding that the standards a court would use to dispense with the knock-and-announce requirement are identical to the standards used to determine whether officers can forcibly enter after knocking and announcing. The

requirement to knock and announce goes away when officers have reasonable grounds to expect futility or to suspect that an exigency, such as destruction of evidence, will arise instantly upon knocking. Finally, the Court noted that exigency is based on the circumstances known to the officers, not facts such as that the defendant was in the shower, did not hear the knock, and could not have answered in 20 seconds. However, the Court rejected the government's argument that damage to property should not be part of the analysis.

***Castro v. United States*, ___ U.S. ___, 124 S. Ct. 786 (December 15, 2003) (Justice Breyer).**

This case considers a district court's treatment of a *pro se* prisoner's motion as a petition pursuant to 28 U.S.C. § 2255. As in many cases, Castro filed a motion for new trial in the district court invoking Federal Rule of Criminal Procedure 33. The government argued the motion was more appropriately brought under § 2255 and the district court agreed. When Castro filed another motion, this time labeled as a § 2255 petition, it was characterized as a "second or successive" motion based on the earlier § 2255 petition. The Supreme Court held, in line with the majority of circuit courts (including the Seventh Circuit), that, "the district court must notify the *pro se* litigant that it intends to recharacterize the pleading, warn the litigant that this recharacterization means that any subsequent § 2255 motion will be subject to the restrictions on 'second or successive' motions, and provide the litigant an opportunity to withdraw the motion or to amend it so that it contains all of the § 2255 claims he believes he has. If the court fails to do so, the motion cannot be considered to have become a § 2255 motion for purposes of applying to later motions the law's 'second or successive' restrictions."

***Maryland v. Pringle*, ___ U.S. ___, 124 S. Ct. 795 (December 15, 2003) (Chief Justice Rehnquist).**

A police officer pulled over a car for speeding which had three occupants. The officer's search of the car revealed $763 in the glove compartment and cocaine hidden in the back seat armrest. The officer arrested all three occupants, including Pringle, who was in the front passenger seat. The Maryland Court of Appeals held that the evidence should have been suppressed because the officer did not articulate specific facts tending to show Pringle's knowledge and dominion over the drugs. The Supreme Court reversed, holding that the officer had probable cause to arrest all three occupants based on his belief that a felony had been committed or was being committed in his presence. It was a reasonable inference that any or all of the car's occupants had knowledge of the drugs and exercised control over them.

***Illinois v. Lidster*, ___ U.S. ___, 124 S. Ct. 885 (January 13, 2004) (Justice Breyer; Justice Stevens, concurring in part, dissenting in part).**

This case deals with the propriety of a highway checkpoint in light of *Indianapolis v. Edmund*, which invalidated a police checkpoint set up for general crime control purposes. In this case, however, the police checkpoint was set up to investigate a hit-and-run accident that had occurred at the same location and same time as the checkpoint. As Lidster approached the checkpoint, he swerved his minivan and nearly hit an officer. After stopping his car, the officer smelled alcohol on his breath. Lidster failed the sobriety test and was arrested. The Supreme Court held that the police had not violated *Edmund* because the primary purpose of the checkpoint was not to determine whether people were committing crimes but to ask the members of the public to provide information about a crime. The Court further held that the concept of individualized suspicion has "little role to play" where the purpose of the checkpoint is to seek information, not to investigate crime.

***Fellers v. United States*, ___ U.S. ___, 124 S. Ct. 1019 (January 26, 2004) (Justice O'Connor).**

After Fellers had been indicted by a grand jury, police officers went to his home pursuant to an arrest warrant. At his home, Fellers made several incriminating statements. Once he was arrested and taken to county jail, the officers advised him of his *Miranda* rights. Fellers signed a waiver of his *Miranda* rights and repeated the statements made at his home. The district court suppressed the statements made at home, but allowed the jail statements based on *Oregon v. Elstad*. The Eight Circuit affirmed. The Supreme Court reversed, holding the statements at Feller's home should have been suppressed because the officers deliberately elicited the statements after he had been indicted, outside the presence of counsel, and without a waiver of his Sixth Amendment rights in violation of *Massiah v. United States*. The Court also held the Eighth Circuit had failed to consider whether Feller's jail statements were also inadmissable under *Elstad* as the fruits of the original violation of his

Sixth Amendment rights at his home. The Court remanded with instructions for the Eighth Circuit to consider this issue.

***Illinois v. Fisher,* ___ U.S. ___, 124 S. Ct. 1200 (February 23, 2004) (Per Curiam; Justice Stevens concurring).**

The Appellate Court of Illinois held that charges against Fisher must be dismissed where the police had destroyed evidence requested by Fisher 10 years earlier in a discovery motion. The Supreme Court held that, contrary to the Appellate Court's holding, Fisher must still show bad faith on the part of police in destroying the evidence pursuant to *Arizona v. Youngblood*. Because the police acted in good faith in this case according to normal procedures, Fisher's due process rights had not been violated. Justice Stevens concurred but noted Illinois's petition for certiorari should not have been granted.

***Banks v. Dretke,* ___ U.S. ___, 124 S. Ct. 1256 (February 24, 2004 (Justice Ginsburg; Justice Thomas, concurring in part, dissenting in part).**

Banks was charged and convicted of first-degree murder and sentenced to death. Throughout the trial and direct appeal, the state continued to withhold exculpatory evidence that would have discredited two essential prosecution witnesses. On federal habeas, the district court granted the writ as to Bank's death sentence based on the state's failure to disclose one of the witnesses status as an informant. The Fifth Circuit reversed determining that Banks had not acted diligently to develop his *Brady* claims on state postconviction. The Fifth Circuit also ruled the witness's informant status was not material. The Supreme Court reversed holding Banks had shown cause for failing to present evidence supporting his *Brady* claim in the postconviction proceedings and that the witness's informant status was material.

***Groh v. Ramirez,* ___ U.S. ___, 124 S. Ct. 1284 (February 24, 2004) (Justice Stevens; Justice Kennedy, dissenting; Justice Thomas, dissenting).**

Groh, an ATF agent, prepared an application for a search warrant to search Ramirez's Montana ranch for weapons, explosives, and records. The magistrate signed a warrant even though it did not identify the items Groh wished to seize or reference the application's list of items. Groh and other officers searched the ranch but found nothing. Ramirez sued Groh and the officers under *Bivens v. Six Unknown Fed. Narcotics Agents*. The officers prevailed on summary judgment, which the Ninth Circuit affirmed except as to Groh. The Supreme Court agreed with the Ninth Circuit and held (1) the search warrant was plainly invalid; (2) because the warrant was so deficient, the search must be considered warrantless and presumptively unreasonable; and (3) Groh was not entitled to qualified immunity because it should be clear to a reasonable officer that his conduct was unlawful.

***Baldwin v. Reese,* ___ U.S. ___, 124 S. Ct. 1347 (March 2, 2004) (Justice Breyer; Justice Stevens, dissenting).**

After pursuing state postconviction relief, Reese filed a federal habeas petition raising a federal constitutional ineffective assistance of counsel claim. The district court denied the claim because he had not raised the federal claim in the state proceedings. The Ninth Circuit reversed, holding the state courts had the opportunity to consider Reese's claim as resting in federal law. The Supreme Court disagreed holding that a petitioner does not fairly present his federal claim to the state courts if the courts must read beyond the petition, brief, or other documents to find material that will alert it to the federal claim.

***Crawford v. Washington,* ___ U.S. ___, 124 S. Ct. 1354 (March 8, 2004) (Justice Scalia; Chief Justice Rehnquist, concurring).**

Crawford was charged with the assault and attempted murder of a man who allegedly tried to rape his wife, Sylvia, who was present during the assault. Sylvia did not testify at trial based on marital privilege. The state sought to introduce her earlier recorded statement as evidence, which Crawford challenged as a violation of his Confrontation Clause rights. The Washington Supreme Court upheld the conviction because the statement was "interlocked" with Crawford's own statement to the police. The Supreme Court reversed, holding that Sylvia's statement violated the Confrontation Clause because, where testimonial statements are the issue, the only test for reliability sufficient to satisfy the Constitution is confrontation. In so holding, the Court overruled *Ohio v. Roberts.*

***Iowa v. Tovar,* ___ U.S. ___, 124 S. Ct. 1379 (March 8, 2004) (Justice Ginsburg).**

Tovar was charged in 2000 with third-offense operating while intoxicated, which enhances the offense from an aggravated misdemeanor to a felony. He sought to exclude use of his 1996 OWI conviction because his waiver

of the right to counsel was invalid. The Iowa Court of Appeals affirmed his conviction, but the Iowa Supreme Court reversed, holding the district court must advise a defendant of the risks of proceeding without counsel including (1) the risk that a viable defense will be overlooked and (2) deprivation of the opportunity to obtain an independent review of the facts and applicable law. The Supreme Court reversed, determining that neither warning is mandated by the Sixth Amendment. The Court held that the constitutional requirement is satisfied when the trial court advises the defendant of the nature of the charges against him, the right to be counseled regarding his plea, and the potential punishment.

***United States v. Flores-Montano*, ___ U.S. ___, 124 S. Ct. 1582 (March 30, 2004) (Chief Justice Rehnquist).**

At the border between Mexico and the United States in California, customs agents searched Flores-Montano's car, including removing and disassembling the gas tank in his car. The search revealed 37 kilograms of marijuana. The district court suppressed the evidence. The Ninth Circuit affirmed, holding that removal of a car's gas tank requires reasonable suspicion. The Supreme Court reversed, holding that the Ninth Circuit's evaluation of whether the search was "routine" or "intrusive" had no place in the determination of the constitutionality of border searches. Therefore, the search in this case was not required to be supported by reasonable suspicion because the government's interest in preventing the entry of unwanted persons is "at its zenith at the international border." The Court stated, "the government's authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank."

***United States v. Lara*, ___ U.S. ___, 124 S. Ct. ___ (April 19, 2004) (Justice Breyer; Justice Souter, dissenting).**

Lara was charged and convicted of assaulting an officer both in Tribal Court and in federal court. He argued the successive prosecutions were barred by the Double Jeopardy Clause. The Eighth Circuit reversed his conviction in federal court holding that the dual sovereignty doctrine did not apply because the Tribal Court was exercising a federal prosecutorial power. The Supreme Court reversed, holding that the Tribal Court was acting as a separate sovereign, not as a federal court, and the second prosecution was not barred.

***Sabri v. United States*, ___ U.S. ___, 124 S. Ct. 1941 (May 17, 2004) (Justice Souter).**

Sabri was charged with bribery in violation of 18 U.S.C. § 666(a)(2). He moved to dismiss the indictment on the grounds that the statute was unconstitutional on its face for failure to require proof of a connection between the federal funds and the bribe. The district court agreed but the Eighth Circuit reversed. The Supreme Court agreed with the Eighth Circuit that the statute was constitutional under the Constitution's Necessary and Proper Clause. The Court also criticized the type of constitutional attack Sabri raised, noting "Facial challenges of this sort are to be discouraged because they invite judgments on fact-poor records, and entail a departure from the norms of federal court adjudication by calling for relaxation of familiar standing requirements to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand."

***Nelson v. Campbell*, ___ U.S. ___, 124 S. Ct. 2117 (May 24, 2004) (Justice O'Connor).**

Nelson was scheduled to be executed by lethal injection. However, because of years of drug use, Nelson had severely damaged the veins normally used to administer the injection. The state sought to deliver the lethal injection by a "cut-down" procedure in which prison officials would make an incision in Nelson's arm to reach the correct vein. Nelson filed a 42 U.S.C. § 1983 action arguing the procedure constituted cruel and unusual punishment and sought a permanent injunction against the state. The district court and the Eleventh Circuit dismissed his claim, finding that it was not appropriate under § 1983. The Supreme Court disagreed, holding that challenges to the conditions of confinement may properly be brought under § 1983.

***Thornton v. United States*, ___ U.S. ___, 124 S. Ct. 2127 (May 24, 2004) (Chief Justice Rehnquist; Justice Stevens, dissenting).**

Before the officer could pull over Thornton, he got out of his car and walked away. The officer arrested him and found drugs in his pocket. The officer then searched Thornton's car, revealing a handgun under the seat. Thornton argued *New York v. Belton* should not apply in situations where the officer's first contact is with the defendant outside of the car. The Supreme Court held that *Belton* applies even when an officer does not make contact until after the

person has left the car.

***Yarborough v. Alvarado,* ___ U.S. ___, 124 S. Ct. 2140 (June 1, 2004) (Justice Kennedy; Justice Breyer, dissenting).**

Alvarado, who was 17 years old, was called in for an interview by police investigation a stolen truck. Alvarado's parents brought him to the police station, but were in the lobby when he was interviewed for two hours by a detective, without receiving *Miranda* warnings. He subsequently admitted his involvement in the crime. The state court ruled *Miranda* warnings were not required because Alvarado was not in custody. On federal habeas review, the Ninth Circuit disagreed, holding the state court erred in failing to account for Alvarado's age and inexperience when determining whether he would have felt free to leave the interview. The Supreme Court disagreed holding the state court's decision was not an unreasonable application of clearly established law.

***United States v. Dominguez-Benitez,* ___ U.S. ___, 124 S. Ct. 2333 (June 14, 2004) (Justice Souter).**

Dominguez pled guilty pursuant to a plea agreement with the government. The plea agreement stated that the parties believed Dominguez would be eligible for the safety valve reduction. However, the probation officer determined he had three previous convictions, making him ineligible for the safety valve. For the first time on appeal, Dominguez argued that the district court's failure to warn him that he could not withdraw his guilty plea if the court did not accept the government's recommendations required reversal. The Ninth Circuit agreed, applying the plain error standard stated in *United States v. Olano*. The Supreme Court reversed finding that, in order to obtain relief for an unpreserved Rule 11 violation, the defendant must show a reasonable probability that, but for the error, he would not have pleaded guilty.

***Pliler v. Ford,* ___ U.S. ___, 124 S. Ct. 2441 (June 21, 2004) (Justice Thomas; Justice Ginsburg, dissenting; Justice Breyer, dissenting).**

Ford filed a petition in federal district court containing a mixture of exhausted and unexhausted claims. The district court dismissed the petitions without prejudice. After Ford exhausted all of his claims in state court, he refiled the habeas petitions, however outside the one year statute of limitations. The district court dismissed the petitions as untimely. The Ninth Circuit reversed instructing district courts to issue the following advice in such situations: (1) that it cannot consider motions to stay the mixed petitions unless the petitioner chose to amend them and dismiss then unexhausted claims and (2) if applicable, the petitioner's federal claims would be time barred, absent cause for equitable tolling. The Supreme Court disagreed, holding district courts do not have to give either warning as required by the Ninth Circuit.

***Hiibel v. Sixth Judicial District of Nevada,* ___ U.S. ___, 124 S. Ct. 2451 (June 21, 2004) (Justice Kennedy; Justice Stevens, dissenting; Justice Breyer, dissenting).**

Nevada has a "stop and identify" statute requiring individuals detained by a police officer to identify themselves. Hiibel was arrested and convicted for refusing to identify himself during an investigative stop. Hiibel appealed, arguing the statute's application to his case violated his Fourth and Fifth Amendment rights. The Supreme Court disagreed, holding the statute did not violate his constitutional rights. First, the officer's initial stop of Hiibel was based on reasonable suspicion. Second, the statute is narrow and asks for precise information - just that the person give his name, not his driver's license or other documents. Further, Hiibel's Fifth Amendment rights were not violated because his refusal to give his name was not based on a fear that his name would be used to incriminate him.

***Beard v. Banks,* ___ U.S. ___, 124 S. Ct. 2504 (June 24, 2004) (Justice Thomas; Justice Stevens, dissenting; Justice Souter, dissenting).**

The Supreme Court decided *Mills v. Maryland* in 1990, which invalidated capital sentencing schemes which required juries to disregard mitigating factors not found unanimously. In the present case, the Court determined *Mills* does not apply retroactively on federal habeas review. The Court held that *Mills* announced a new rule of constitutional criminal procedure that does not fall within any *Teague v. Lane* exception.

***Schriro v. Summerlin,* ___ U.S. ___, 124 S. Ct. 2519 (June 24, 2004) (Justice Scalia; Justice Breyer, dissenting).**

The Supreme Court decided *Ring v. Arizona* in 2002, and concluded that because Arizona law authorized the death penalty only if an aggravating factor was present, *Apprendi* required the existence of the factor to be proved to a jury

rather than to a judge. In the present case, the Court determined *Ring* does not apply retroactively on federal habeas review. The Court classified the rule announced in *Ring* as a new procedural rule because it does not alter the range of conduct or the class of people subjected to the death penalty, but only the method of determining whether the defendant engaged in the conduct.

***Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531 (June 24, 2004) (Justice Scalia; Justice O'Connor, dissenting; Justice Kennedy, dissenting; Justice Breyer, dissenting).**

This case contested the application of the Washington State determinative sentencing scheme. Blakely entered a guilty plea to the offenses of second-degree kidnaping and admitted allegations regarding domestic violence and firearms. However, at sentencing, the judge increased Blakely's sentence because he had acted with "deliberate cruelty" during the crime, a fact neither proven by the government beyond a reasonable doubt to a jury nor admitted by the defendant. In reversing and remanding Blakely's sentence, the Supreme Court applied the principles announced in *Apprendi v. New Jersey* to sentencing determinations. While the Supreme Court specifically stated it was not expressing any opinion regarding the validity of the Federal Sentencing Guidelines, it noted that the Solicitor General filed an *amicus curiae* brief questioning whether the differences between the Washington State sentencing regime and the Federal Guidelines are constitutionally significant. In her dissent, Justice O'Connor listed the many similarities between the Washington State guidelines and the Federal Guidelines and noted that any structural differences that exist between the Federal and Washington State guidelines actually make the Federal Guidelines "more vulnerable to attack."

***Tennard v. Dretke*, ___ U.S. ___, 124 S. Ct. 2562 (June 24, 2004) (Justice O'Connor; Chief Justice Rehnquist, dissenting; Justice Scalia, dissenting; Justice Thomas, dissenting).**

The Fifth Circuit denied a certificate of appealability to Tennard on his *Penry v. Lynaugh* issue finding that it was not constitutionally relevant. Specifically, the Court held that low IQ evidence was not a uniquely severe condition and that Tennard's crime was not linked to his law IQ. The Supreme Court reversed, holding the Fifth Circuit's "constitutional relevance" test has no foundation in the Court's precedent. Therefore, the Court concluded reasonable jurists could conclude that Tennard's low IQ evidence was relevant mitigating evidence and the state court's application of *Penry* was unreasonable.

***Missouri v. Seibert*, ___ U.S. ___, 124 S. Ct. 2601 (June 28, 2004) (Justice Souter; Justice O'Connor, dissenting).**

Seibert was arrested based on her alleged involvement in the arson of her home and death of her son. She was taken to the police station, questioned for 40 minutes and then confessed. After a 20 minute break, the officer returned and gave her *Miranda* warnings for the first time. Seibert signed a waiver of those rights and repeated the statements she made prior to the *Miranda* warnings. The district court suppressed the first statements but admitted the second statements. The state court of appeals affirmed, relying on *Oregon v. Elstad*. The State Supreme Court reversed holding that, because the interrogation was continuous, the second statement was a product of the first and should be suppressed. The Supreme Court affirmed, specifically criticizing the interrogation process used in this case as an attempt to frustrate *Miranda*.

***United States v. Patane*, ___ U.S. ___, 124 S. Ct. 2620 (June 28, 2004) (Justice Thomas; Justice Souter, dissenting; Justice Breyer, dissenting).**

While investigating Patane's violation of a restraining order, officers learned that Patane was illegally in possession of a gun. The officers went to Patane's home and arrested him. They attempted to advise him of his *Miranda* rights, but Patane interrupted and said that he knew what his rights were. The officers then asked about the gun and Patane told them where it was. The Tenth Circuit upheld the district court suppression holding that a failure to give *Miranda* warnings is a violation of the Fifth Amendment. The Supreme Court disagreed and held that the failure to give the warnings does not require suppression of the physical evidence obtained as a result of unwarned statements if the statements were voluntary.

***Hamdi v. Rumsfeld*, ___ U.S. ___, 124 S. Ct. 2633 (June 28, 2004) (Justice O'Connor; Justice Souter, concurring in part, dissenting in part; Justice Scalia, dissenting; Justice Thomas, dissenting).**

Hamdi, an American citizen classified as an "enemy combatant,"

was captured in Afghanistan and presently is detained at a naval brig in Charleston. Hamdi's father filed a habeas petition on his behalf under *28 U.S.C. § 2241*, alleging the Government holds his son in violation of the Fifth and Fourteenth Amendments. The district court found that the government's statement for detaining Hamdi did not support his detention. The Fourth Circuit reversed, holding that, because Hamdi was captured in an active combat zone, no factual inquiry or evidentiary hearing allowing Hamdi to be heard. The Supreme Court reversed and concluded that, although Congress authorized the detention of combatants in the narrow circumstances alleged in this case, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.

***Rasul v. Bush,* ___ U.S. ___, 124 S. Ct. 2686 (June 28, 2004) (Justice Stevens; Justice Scalia, dissenting).**

Petitioners, two Australians and twelve Kuwaitis captured abroad during hostilities in Afghanistan, are being held in military custody at the Guantanamo Bay, Cuba. Petitioners filed suits under federal law challenging the legality of their detention, alleging that they have never been charged with wrongdoing, permitted to consult counsel, or provided access to courts or other tribunals. The district court classified the suits as habeas petitions and dismissed them for want of jurisdiction, holding that, under *Johnson v. Eisentrager*, aliens detained outside United States sovereign territory may not invoke habeas relief. The D.C. Circuit Court of Appeals affirmed. The Supreme Court held that the federal district courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay.

***Rumsfeld v. Padilla,* ___ U.S. ___, 124 S. Ct. 2711 (June 28, 2004) (Chief Justice Rehnquist; Justice Stevens, dissenting).**

Padilla, a United States citizen, was arrested pursuant to a material witness warrant in connection with the investigation into the September 11, 2001, terrorist attacks. While his motion to vacate the warrant was pending, President Bush designated Padilla an "enemy combatant" and directed that he be detained in military custody. Padilla's attorney filed a habeas petition under *28 U.S.C. § 2241*, alleging that Padilla's military detention violates the Constitution The district court agreed with the government's argument that the President has authority as Commander in Chief to detain as enemy combatants citizens captured on American soil during a time of war. The Second Circuit reversed. The Supreme Court reversed, but did not reach the merits of the case because the district court lacked jurisdiction to consider the habeas petition.

***Sosa v. Alvarez-Machain,* ___ U.S. ___, 124 S. Ct. 2739 (June 28, 2004) (Justice Souter).**

The DEA used Mexican nationals to abduct Alvarez-Machain, also a Mexican national, from Mexico to stand trial in the United States for a DEA agent's torture and murder. He was acquitted and then sued the United States for false arrest under the Federal Tort Claims Act ("FTCA"), which waives sovereign immunity in suits for personal injury caused by the negligent or wrongful act or omission of any government employee while acting within the scope of his office or employment. He also sued Sosa, one of the Mexican nationals, for violating the law of nations under the Alien Tort statute ("ATS.") The district court dismissed the FTCA claim, but awarded Alvarez summary judgment and damages on the ATS claim. The Ninth Circuit affirmed the ATS judgment, but reversed the dismissal of the FTCA claim. The Supreme Court reversed as to the FTCA claim holding that the waiver of sovereign immunity bars claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred. The Supreme Court also reversed the judgment on the ATS claim holding that the ATS does not recognize the type of claim brought here.

CASES AWAITING ARGUMENT

***Leocal v. Ashcroft,* No. 03-583, cert. granted February 23, 2004 (to be argued October 12, 2004).**

Petitioner was convicted of DUI with serious bodily injury in state court. The state statute requires only a showing of negligence. The district court interpreted the statute to constitute an aggravated felony and therefore a crime of violence under 18 U.S.C. § 16. The question is whether DUI with serious bodily injury can constitute a crime of violence where there is an absence of mens rea or recklessness.

Case Below: ___ F.3d ___ (11th Cir. 2003).

***Crawford v. Martinez*, No. 03-878, cert. granted March 1,**

2004; *Benitez v. Wallis*, No. 03-7434, cert. granted January 16, 2004 (to be argued October 13, 2004).

Whether 8 U.S.C. § 1231(a)(6) and *Zadvydas v. Davis* require release of an alien who, upon arrival, was apprehended at the United States border, denied admission, and ordered removed from the United States.

Case Below: 337 F.3d 1289 (11th Cir. 2003).

***Wilkinson v. Dotson*, No. 03-287, cert. granted March 22, 2004 (unscheduled).**

This case involves the interpretation of the "favorable termination requirement" of *Heck v. Humphrey*. The two issues presented are: first, when a prisoner involves § 1983 to challenge parole proceedings, whether *Heck*'s favorable termination requirement applies where success on the claim would result only in a new parole hearing, not guarantee release from prison. Second, whether a federal district court judgment ordering a new parole hearing invalidate the decision of the previous parole hearing.

Case Below: 329 F.3d 463 (6th Cir. 2003).

***Kowalski v. Tesmer*, No. 03-407, cert. granted January 20, 2004 (to be argued October 4, 2004).**

Michigan state law provides (with some exceptions) that criminal defendants who pled guilty cannot have appointed appellate counsel for review of the defendant's conviction and sentence. The issues before the Court are (1) whether the Fourteenth Amendment guarantees the right to appointed appellate counsel in an appeal from a guilty plea; and (2) whether attorneys have standing to challenge the statute on behalf of future indigent defendants.

Case Below: 333 F.3d 683 (6th Cir. 2003).

***Roper v. Simmons*, No. 03-633, cert. granted January 26, 2004 (to be argued October 13, 2004).**

In *Stanford v. Kentucky*, the Supreme Court held that the minimum age for capital punishment is sixteen. This case questions whether a state supreme court can depart from this precedent based on its own analysis of evolving standards. This case also raises the specific issue of whether imposition of the death penalty on a defendant who commits murder at age seventeen constitutes cruel and unusual punishment.

Case Below: 112 S.W.3d 397 (Mo. 2003).

***Jama v. INS*, No. 03-674, cert. granted February 23, 2004 (to be argued October 12, 2004).**

Whether the INS and the Attorney General can remove an alien to one of the countries listed in 8 U.S.C. § 1231(b)(2)(E) without obtaining the country's acceptance of the alien prior to removal.

Case Below: 329 F.3d 630 (8th Cir. 2003).

***Johnson v. Gomez*, No. 03-636, cert. granted March 1, 2004 (unscheduled).**

California state prisons routinely racially segregate prisoners for a 60-day period. The Supreme Court will consider whether it will review this policy using the strict scrutiny standards applicable to other racial segregation challenges or the standards set out in *Turner v. Safley*. The Court will also consider whether the policy violates the Equal Protection Clause.

Case Below: 321 F.3d 791 (9th Cir. 2003).

***Florida v. Nixon*, No. 03-931, cert. granted March 1, 2004 (unscheduled).**

In this capital murder case, the issue is whether the Florida Supreme Court applied an incorrect standard when finding defense counsel ineffective under *United States v. Cronic* and whether the court erroneously concluded *Boykin v. Alabama*, prohibited defense counsel from pursuing a strategy not to contest evidence of guilt but contesting the appropriateness of a sentence of death.

Case Below: 857 So. 2d 172 (Fla. 2003).

***Small v. United States*, No. 03-750, cert. granted March 29, 2004 (unscheduled).**

This cases address a conflict between circuits as to whether a foreign felony conviction can serve as the predicate felony in a prosecution pursuant to 18 U.S.C. § 922(g). The Third, Fourth, and Sixth Circuits have held that a foreign conviction does count, the Tenth and the Second Circuits have held that a foreign conviction does not count.

Case Below: 333 F.3d 425 (3d Cir. 2003).

***Pasquantino v. United States*, No. 03-725, cert. granted April 5,**

2004 (unscheduled).

Whether 18 U.S.C. § 1343 (wire fraud) authorizes a prosecution of a scheme to avoid payment of foreign taxes.

Case Below: 336 F.3d 321 (4th Cir. 2003).

***Illinois v. Caballes*, No. 03-923, cert. granted April 5, 2004 (unscheduled).**

Whether the Fourth Amendment requires a reasonable, articulable suspicion to justify obtaining a drug-detection dog sniff of a vehicle during a legitimate traffic stop.

Case Below: 802 N.E.2d 202 (Ill. 2003).

***Devenpeck v. Alford*, No. 03-710, cert. granted April 19, 2004 (unscheduled).**

This case will address a circuit conflict has to whether an arrest can deemed objectively reasonable if there is probable cause to arrest the suspect for any offense. Two Circuits hold that it is objectively reasonable, five other circuit courts have held that an arrest is objectively reasonable only if there is probably cause to arrest for crimes "closely related" to the crimes articulated by the arresting officer.

Case Below: 333 F.3d 972 (9th Cir. 2003).

***Goughnour v. Payton*, No. 03-1039, cert. granted May 24, 2004 (unscheduled).**

The Supreme Court upheld California's "catch-all" mitigation instruction in capital cases as it applies to pre-crime evidence in mitigation in *Boyde v. California*, 494 U.S. 370 (1990). In the present case, the California Supreme Court held that *Boyde* applied to the same "catch-all" provision with respect to post-crime evidence in mitigation. In a 6-5 decision, the Ninth Circuit Court of Appeals reversed the California Supreme Court, holding the state court's interpretation of the statute objectively unreasonable. The Ninth Circuit also determined *Boyde* did not control based on the distinction between pre- and post-crime evidence. (Deputy Federal Public Defender Dean R. Gits represents Payton in this case.)

Case Below: 346 F.3d 1204 (9th Cir. 2003).

***Muehler v. Mena*, No. 03-1423, cert. granted June 14, 2004 (unscheduled).**

The Supreme Court will consider two issues in this case. First, whether police question constitutes a seizure where police have detained a person pursuant to a valid search warrant but then ask questions of that person without probable cause to believe the person has engaged in illegal activity. Second, whether a valid search warrant implies authority to detain occupants of the dwelling while the search is conducted. The Ninth Circuit held in this case that a three hour detention (at gun point and handcuffed) of the occupant of a suspected gang safe-house while police searched for weapons and other evidence of a gang shooting was an illegal seizure.

Case Below: 332 F.3d 1255 (9th Cir. 2004)

Smith v. Massachusetts, **No. 03-8661, cert. granted June 14, 2004 (unscheduled).**

This case seeks to resolve a conflict among the federal circuits and state courts as to whether trial judges violate the Double Jeopardy clause's protection against successive prosecution by withdrawing a verdict of not guilty and entering a verdict of guilty. This case purports to reach the issue left undecided in *Price v. Vincent* about whether Double Jeopardy is violated where the trial judge rules that the defendant is not guilty based on insufficient evidence but then reverses that ruling.

Case Below: 788 N.E.2d 977 (Mass. App. Ct. 2003)

***Whitfield v. United States*, No. 03-1293, *Hall v. United States*, No. 03-1294, cert. granted June 21, 2004 (unscheduled).**

Whether commission of an overt act is required as an element of the crime of conspiracy to commit money laundering under 18 U.S.C. § 1956(h).

Case Below: 349 F.3d 1320 (11th Cir. 2003).

***Shepard v. United States*, No. 03-9168, cert. granted June 21, 2004 (unscheduled).**

Whether the Armed Career Criminal Act (18 U.S.C. § 924(e)) can constitutionally require a mandatory minimum sentence of 15 years for anyone convicted as a felon in possession of a firearm who has three or more prior convictions for a violent felony or serious drug offense. The government argued that the district court could consider extraneous information when determining whether the defendant's prior convictions could be considered under the ACCA. The district court ruled that the complaint applications and police reports could not be considered and declined to sentence Shepard under the ACCA. On appeal, the First Circuit reversed, holding that there was no absolute bar to considering extraneous information. The district court again refused to sentence

under the ACCA. The First Circuit again reversed.

Case Below: 348 F.3d 308 (1st Cir. 2003).

***Ashcroft v. Raich*, No. 03-1454, cert. granted June 28, 2004 (unscheduled).**

This case deals with the validity of California's medical marijuana statute.

Case Below: 352 F.3d 1222 (9th Cir. 2003).

***Howell v. Mississippi*, No. 03-9560, cert. granted June 28, 2004 (unscheduled).**

Whether Petitioner Howell's federal constitutional claim properly raised before the Mississippi Supreme Court for purposes of 28 U.S.C. § 1257.

Case Below: 860 So. 2d 704 (Miss. 2003).

***Miller-El v. Dretke II*, No. 03-9659, cert. granted June 28, 2004 (unscheduled).**

Whether the Fifth Circuit Court of Appeals, by reinstating on remand from the Supreme Court its prior rejection of petitioner's claim that the prosecution had purposefully excluded African-Americans from the jury in his capital case, so contravened the Supreme Court's decision in *Miller-El v. Cockrell*, that an exercise of the Court's supervisory powers under Supreme Court Rule 10(a) is required.

Case Below: 361 F.3d 849 (5th Cir. 2004).

***United States v. Booker*, No. 04-104, cert. granted August 2, 2004 (to be argued October 4, 2004).**

First, whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant. Second, if the answer to the first question is "yes," the following question is presented: whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Sentencing Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentencing the defendant within the maximum and minimum set by statute for the offense of conviction.

Case Below: *United States v. Booker*, ___ F.3d ___, 2004 U.S. App. LEXIS 14223 (7th Cir. July 9, 2004).

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