The BACK BENCHER

Central District of Illinois Federal Defenders

Vol. No. 37 Fall / Winter 2004 - 2005

DEFENDER'S MESSAGE

The Supreme Court has finally spoken in *Booker* and *Fanfan*. I noted in the last issue of *The Back Bencher* after *Blakely* that "[m]y 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." At least in the short term, judicial discretion has been restored, with the caveat that the now advisory Guidelines must still be considered as one of many factors.

The Supreme Court's Decision

The Court held that, consistent with its prior decision in *Blakely v. Washington* and *Apprendi v. New Jersey*, "any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." Because the United States Sentencing Guidelines require a judge to increase defendants' sentences based upon conduct neither admitted by the defendant nor proved to a jury, the Court concluded that the Guidelines are unconstitutional as written.

The Court, however, found that the unconstitutionality of the Sentencing Guidelines could be remedied by severing certain provisions of the Sentencing Reform Act. Specifically, the Court severed from the Act Section 3553(b)(1), which made the Guidelines mandatory. With this severance, the Sentencing Guidelines are now only advisory, and, although a sentencing judge must consider the Guidelines when imposing sentence, he may sentence a defendant to any sentence within the statutory minimum and maximum range so long as that sentence is not "unreasonable." Additionally, Section 3742(e), setting forth the standard of review on appeal, also required severance from the Act due to its critical cross-references to Section 3553(b)(1). In its place, the Court held that all sentencing appeals would be reviewed under an "unreasonableness" standard.

Finally, regarding cases currently pending on direct appeal, the Court indicated that traditional harmless and plain error analysis will apply. Accordingly, the extent to which the Court's decision will affect cases currently pending on direct appeal is very uncertain and will depend largely on how the various Courts of Appeal apply these standards of review. Likewise, the Court made no statement concerning retroactive application of its decision, and therefore the effect of the decision on cases no

longer pending is very uncertain and now rests in the hands of the district courts which will consider the retroactivity question in the first instance when the inevitable collateral attacks based upon the Court's decision will be filed in the future.

Although the Seventh Circuit and other Courts of Appeal will add flesh to these holdings in the coming months which will dictate how we will proceed in defending our clients in this new sentencing world, some immediate practical implications are apparent.

Practical Implications

For example, although the Sentencing Guidelines are no longer mandatory, they are by no means irrelevant. The Guidelines are still a factor to be considered by the district judge at sentencing, as stated in 18 U.S.C. sec. 3553(a). Given this relevance and the likely weight to be given to the guideline range by judges when imposing a now

discretionary sentence, it is still important to challenge enhancements proposed by probation in the Pre-Sentence Investigation Report. Thus, under the old regime, if you would have objected to a leader-organizer enhancement because it wasn't supported by the facts, you should still do so now in an effort to reduce that discretionary guideline range. Of course, as we gain a clearer picture of how much emphasis the various district judges will ultimately place on the Guidelines when imposing sentence, we may want to tailor the amount of time and energy we put into such objections commensurate with their importance to the sentencing judge.

In light of *Booker*, one should also consider the standards of proof applicable to sentencing including 18 U.S.C. sections 3551, 3553, 3582, and 3561. As already noted, given that the courts must still "consider" the Guidelines, one should consider how factors that were previously prohibited and/or discouraged pursuant to U.S.S.G. sections 5H1.1-12, 5K2.10-13, 5K2.19-20, and 5K2.22 - 5K3.1 are no longer prohibited and/or discouraged under an advisory system. Additionally, one can brainstorm other mitigating factors, which can now be argued at sentencing, such as cost of incarceration (including medical costs, if applicable), deportation, waivers of appeal, and waivers of pre-trial motions--to name but a few.

Although "old-fashioned" Guideline objections will still be necessary, time management with respect to these objections will be necessary, for the decision in *Booker* now gives defense counsel opportunities to perform some real advocacy at sentencing hearings. As in the pre-Guideline days, the judge may now consider the entire panoply of factors which allow for a just punishment, such as the seriousness of the offense and our clients' personal histories. Bringing such information before the court will require considerably more effort than the old system where much of this information was largely irrelevant. Independent investigation and the presentation of witnesses may now be beneficial at sentencing hearings. Through creative advocacy, we have an opportunity to demonstrate the positive human qualities of our clients at sentencing, rather than simply fiddling with points and levels in an inhuman algebraic formula.

While *Booker* dramatically changes the face of sentencing hearings, it also fundamentally alters the pre-trial landscape as well. For example, should your client elect to force the government to prove its case at trial, no longer is it a given that your client will be punished for exercising his rights by

suffering the loss of acceptance of responsibility points. While the judge could of course increase his sentence on this basis in the exercise of his or her discretion, he is no longer *required* to do so.

Our clients will also no longer be at the mercy of the government with respect to obtaining a lower sentence as a reward for cooperation with the government. Under the old regime, the power to file a motion for downward departure based upon cooperation rested solely in the hands of the government. Now, defense counsel are free to argue for a lower sentence based upon cooperation, even if the government believes that the cooperation is not sufficient to warrant a departure under the old Guideline system. It will be up to the judge, rather than the prosecutor, to determine whether cooperation merits a lower sentence.

For cases pending on direct appeal, whether your client will be entitled to a new sentencing hearing will depend largely on harmless and plain error analysis. As Justice Breyer stated at the end of his opinion, "[W]e expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain error' test. It is also because, in cases not involving a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend on the application of the harmless-error doctrine."

This language may signal a change in the rather liberal way in which the Seventh Circuit has been addressing *Blakely* issues to date. Specifically, prior to the Supreme Court's ruling in *Booker*, the Seventh Circuit repeatedly remanded cases for resentencing where it found a Sixth Amendment violation, despite the fact that the defendant had not raised the issue in the district court. *See United States v. McKee*, 389 F.3d 697, 701 (7th Cir. 2004) (remanding for resentencing even though a *Blakely* issue not raised in district court); *United States v. Shearer*, 379 F.3d 453, 457 (7th Cir. 2004) (same); *United States v. Ward,* 377 F.3d 671, 678 (7th Cir. 2004) (same); *United States v. Pree*, 384 F.3d 378, 397 (7th Cir. 2004) (remanding for resentencing where the defendant "does not address to this Court, nor can we find evidence in the record to indicate, that she addressed before the district court the constitutionality of her sentencing enhancement"). Now, we may need to more thoroughly address whether a plain error exists in cases where the *Blakely* error was not preserved below and explain to the court why it should exercise its discretion and remand the case for resentencing. One such reason is that the court has been remanding cases for resentencing under the plain error standard in the cases noted above, and to refuse to remand cases now for defendants in the same circumstance would be grossly unfair.

For cases where the error was preserved below or for cases where sentence is imposed under the new advisory Guideline system, the Supreme Court suggests that the fundamental inquiry will be whether the sentence our clients received was "reasonable"--the new standard of appellate review set forth by the Court. Exactly what constitutes an unreasonable sentence is entirely unclear. The Supreme Court provided no factors for consideration when applying such a standard, and it will therefore rest in the hands of the Courts of Appeal to add substance to this test. Appellate defense attorneys will therefore have a unique opportunity to shape the law in this area, for they will be the first to provide the Courts of Appeal with standards which comport with fairness and due process.

Lastly, the state of the law concerning the applicability of *Booker* and *Blakely* concerning collateral attacks remains largely what it was before the Supreme Court's decision because the Court made no pronouncement concerning retroactivity. Thus, for successive petitions, the Seventh Circuit's decision in *Simpson v. United States*, 376 F.3d 679 (7th Cir. 2004), appears to control and preclude such petitions unless and until the Supreme Court announces that *Booker* is retroactive. For initial collateral attacks within the 1-year statute of limitations, the retroactivity question will need to be determined by the district courts in the first instance. However, when considering petitions premised upon *Blakely*, several district courts in the Seventh Circuit have already held that the case does not have retroactive application. It is therefore likely that these courts will make the same determination in cases relying on *Booker*. Thus, for cases where collateral attack is the only means to present a *Booker* argument, there appears to be very little hope of obtaining relief in such cases unless the Supreme Court would declare *Booker* retroactive in a future case.

What the Future Holds

In this publication and elsewhere, I have often lamented that the Department of Justice's increasing control over the criminal justice system threatened to turn criminal defense lawyers and district court judges into "potted plants." The Supreme Court's decision in *Booker*, however, reestablishes the proper balance among all the participants in the sentencing process, allowing prosecutors to prosecute, defense lawyers to defend, and judges to judge. This is how the system should operate and is consistent with the Founding Fathers' vision of justice under our Constitution.

If I believed that this system established by *Booker* was permanent, I would be overjoyed. However, my many years as a criminal defense lawyer indicate that this post-*Booker* world will be a transition between a bad system and a worse one. As Justice Breyer notes, "Ours, of course, is not the last word. The ball now lies in Congress' court." This is the same legislative body that brought us the Feeney Amendment and the Patriot Act and one that is far less sympathetic to judicial discretion and criminal defendants than the Congress of 1984 which enacted the Sentencing Guidelines as we know them. It is hard to imagine that the Congress, which has so disfavored judicial discretion, will countenance a system which loosens judicial discretion so dramatically. It's "cure" may kill the patient and make the old mandatory Guideline system look like a defense lawyer's dream.

Nevertheless, whatever the ultimate outcome, we criminal defense lawyers should take pride in the victory we have achieved. Year after year, case after case, we have railed against the Draconian Guidelines, and we have finally been heard. If the Congress' "fix" should mirror the injustice of the mandatory Guidelines or create something worse, I know that we will attack those injustices with the same vigor we have shown in the past. Thus, there is always hope that justice will prevail.

Finally, the decision in *Booker* has given us a chance to use our advocacy skills at sentencing hearings, as lawyers had long been allowed to do before the Guidelines. It is worth remembering that in the famous case of Leopold and Loeb, the defendants entered guilty pleas and the entire proceeding was directed toward sentencing. Clarence Darrow delivered a successful twelve hour summation directed at saving his clients' from the death penalty. While I am not advocating lengthy

speeches, we have now been given an opportunity to emulate such grand advocacy at sentencing.

Sincerely yours,

Richard H. Parsons
Federal Public Defender
Central District of Illinois

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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.

At Woodford on October 31, 1959,
Churchill again proclaimed his belief
in a hope-filled future

Dictum Du Jour

". . . Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government . . . it is their Right, it is their Duty, to throw off such Government, and to provide new Guards for their future Security."

--Thomas Jefferson
The Declaration of Independence

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"Not many guys looked good striking out, but the Babe did."

--Phil Rizzuto
New York Yankee shortstop, 1941-42, 1946-56,
then television announcer

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"When we see society's failures--dropouts or dope addicts, petty thieves or prostitutes--we do not know whether they are Italian or English, Baptist or Orthodox. But we know when they are [African-American]. So every [African-American] who fails confirms the voice of prejudice."

--Robert F. Kennedy
Speech, National Council of Christians and Jews
April 28, 1965

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"No one has been barred on account of his race from fighting or dying for America--there are no 'white' or 'colored' signs on the foxholes or graveyards of battle."

--John F. Kennedy
Message to Congress on proposed civil rights bill
June 19, 1963

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"Out of the crooked tree of humanity no straight thing can ever be made."

--Immanuel Kant

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"The vocabulary of horror is as limited as that of lust."

--James Pope Hennessy
Sins of the Fathers

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"In this case we attend to the aftermath of a protracted lovers' quarrel in which, it would seem, each party has attempted to use the official machinery of the justice system to exact revenge on the other. It is emphatically not the sort of case that we relish."

--*Luini v. Grayeb*, ___ F.3d ___ (7th Cir. 2005).

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"If, however, the argument that the lawyer fails to make is a subtle or esoteric one--something most lawyers would not have thought of, however conscientious they might be--then the lawyer cannot be said to have fallen below the minimum level of professional competence by failing to make it, and so the claim of ineffective assistance would fail even if the argument turned out to be a valid ground for a new trial. Criminal defendants have a right to a competent lawyer, but not to Clarence Darrow."

--*United States v. Rezin*,
322 F.3d 443, 446-47 (7th Cir. 2003).

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"We're de-fanging defense counsel, by limiting flexibility in closing argument, particularly by limiting the techniques counsel can use to establish personal credibility and argue reasonable doubt. The panel majority would treat Clarence Darrow's successful closing argument in the Leopold and Loeb case as deficient under Strickland, had he lost, because he conceded that his clients were bad people for whom the death penalty would be merciful: 'I do not know how much salvage there is in these two boys. I hate to say it in their presence, but what is there to look forward to? I do not know but what your Honor would be merciful if you tied a rope around their necks and let them die; merciful to them, but not merciful to civilization, and not merciful to those who would be left behind ... I will be honest with this court as I have tried to be from the beginning. I know that these boys are not fit to be at large.'"

--*Gentry v. Roe*, 320 F.3d 891, 895 (9th Cir. 2002).

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"Although I join in the portion of Judge Canby's opinion which concludes that Ames rendered ineffective assistance at the penalty phase, I believe it necessary to respond to Judge Trott's assertion--which I assume he makes with tongue at least partly in cheek--that our decision rewards a 'skilled professional ... with a slap in the face because he wasn't Clarence Darrow.' Opinion of Judge Trott at 5053. Carried away by the excesses of his own rhetoric, Judge Trott actually likens Ames's wholly inadequate penalty phase closing argument in this case to Darrow's well-known and masterful closing argument in the case of Leopold and Loeb. It is simply ludicrous even to mention Darrow's brilliant twelve-hour plea, which raised every possible argument and touched on every possible emotion, in the same volume of the Federal Reports as Ames's disastrous summation of less than ten minutes. Ames's argument, in total contrast to Darrow's, offered the jurors one and only one justification for keeping Wade alive: so that he could be a 'human guinea pig.'"

--*Wade v. Calderon*,
29 F.3d 1312, 1330-31 (9th Cir. 1994)

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"In conclusion, as Judge Richard S. Arnold reminded us: A system of law that not only makes certain conduct criminal, but also lays down the rules for the conduct of authorities, often becomes complex in its application to individual cases, and will from time to time produce imperfect results, especially if one's attention is confined to the particular case at bar. Some criminals do go free because of the necessity of keeping government and its servants in their place. That is one of the costs of having and enforcing a Bill of Rights. This country is built on the

assumption that the cost is worth paying, and that in the long run we are all both freer and safer if the Constitution is strictly enforced."

--*Williams v. Nix*, 700 F.2d 1164, 1173 (8th Cir. 1983).

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"Theft, like fraud, is a specific intent crime. To obtain a conviction, the government must prove beyond a reasonable doubt that the defendant intended to deprive the owner permanently of some property. Someone who appears to have shoplifted may then, of course, have a valid defense--that he did not act with the requisite intent. One who walks out of a country store with a can of tunafish in his pocket that he forgot to pay for has not committed theft. The facts, however, may have terrible consequences before the defense can be raised. See, e.g., My Cousin Vinny, at Local Blockbuster Video Rental Store."

--*Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1332 (7th Cir. 1997).

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"It is equally clear to us that Houston General suffered a loss of $450,000 as a result of the breach. As the table of transactions shows, when all was said and done, Houston General was out of pocket $450,000. Whereas, if the Barneses had adhered to their agreement, either Mission would not have settled with them or it would have signed a release. Either way, Mission would have had no claim against Houston General, and Transaction 5 would not have occurred. Houston General would have been $450,000 better off. The loss flowed from the breach like water down a stream. The Barneses attempt to refute the laws of contractual physics by arguing that the $450,000 'belonged' to Seven-O, not Houston General. This argument amounts to little more than an invitation to a judicial shell game. It is an invitation we decline. No sleight of hand can conceal the causation of damages here, any more than one can hide a hare under the Ace of Spades. Unlike Elmer Fudd, this court recognizes a rabbit when it has one by the ears."

--*Barnes v. Mission Ins. Co.*, 923 F.2d 53, 55 (5th Cir. 1991).

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"In Philadelphia in those days, back of the right field wall there was a street, then a line of those houses that are all the same with those marble steps, then back of that another line of houses.

Well now, Babe had the fastest set of reflexes I've ever known on a batter. So I put one over in his hands and the Babe hit the ball and he did hit it! I'm standing there on the mound watching the ball, forgetting all about the ball game and the fact that the home run was being hit off me. I was just amazed at the tremendous distance that ball was carrying and I thought, 'By George, that's the longest home run I ever seen.'

And here I am, in complete amazement, sheer astonishment, standing on the mound and there goes the ball out over the right field wall, over the first row of houses and hit in the second street beyond.

Then all of a sudden, I remembered that the ball was hit off me and, by George, was I mad."

--Waite Hoyt
Philadelphia Athletic pitcher, 1931,
New York Yankee pitcher, 1921-30,
quoted in John Tullius, I'd Rather Be a Yankee, 1986

$ INCREASE IN CJA MAXIMUMS $

The 2005 Omnibus Appropriations Act increased the case compensation maximums applicable both to appointed CJA counsel and providers of investigative, expert, and other services. For appointed counsel in felony cases, the case compensation maximum increased from $5,200 to $7,000 in the district court and from $3,700 to $5,000 in the Court of Appeals. For providers of investigative and

expert services, the case compensation maximum increased from $300 to $500 where prior approval was not obtained and from $1,000 to $1,600 where prior approval was obtained.

The increased maximums apply to vouchers submitted on or after December 8, 2004, if the person submitting the voucher furnished any CJA-compensable work on or after December 8, 2004. However, if all CJA-compensable work was completed prior to this date, the old case maximums apply.

⌂ URBANA OPEN HOUSE ⌂

You are invited to an Open House in our new Urbana Branch Office on Friday, February 25, 2005, from 4:00 to 6:00 p.m. The new office is located at 300 W. Main Street in Urbana. Light refreshments will be provided. We hope you can join us and see our new "digs" in Urbana.

Post-*Booker* Sentencing Procedures in the Central District

By: Richard H. Parsons
Chief Federal Defender

Jonathan Hawley, Rob Alvarado, and I recently met with the head of the Probation Office in the Peoria Division to discuss how both we and Probation intend to implement the changes wrought by *Booker*. While the procedures may vary from Division to Division, and indeed from judge to judge, the following information may be helpful to you as you approach sentencing hearings in this new era.

First, Pre-Sentence Investigation Reports will be prepared in essentially the same manner as prior to *Booker*. The one exception is that the Introductory Paragraph will note that, in light of *Booker*, the Guidelines are now advisory. Where there would be grounds for departure from the Guidelines (either upward or downward), those grounds will be indicated in the PSR as usual.

Both the defense and the government should file objections to the Guideline calculations and potential grounds for departure as done in the past. However, in addition to these traditional objections, both parties should file a "Commentary of Sentencing Factors." It is in this document where the non-Guideline 3553(a) reasons for why the sentence should or should not be within the guideline range will be set forth. Thus, all of the traditional mitigating circumstances which would impact the sentence should be set forth in the Commentary, with an exposition of the evidence you intend to present in support of the mitigating factors. If you have letters which support your position, you should attach them to the Commentary, and you should also indicate in the Commentary the witnesses you intend to present, along with any other evidence you plan to introduce. As in the pre-Guideline days, you should rely on mitigating factors such as age; education; vocational skills; mental and emotional conditions; physical condition; drug, alcohol, or gambling addiction; employment record; family ties and responsibilities; role in the offense; criminal history; socio-economic status; military, civic, charitable, or public service; lack of guidance as a youth; aberrant behavior; and cooperation--to name but a few.

Through this procedure, it is hoped by Probation that no one will be surprised at the sentencing hearing, the proper amount of time will be allotted for it, and unnecessary continuances will be avoided.

The manner in which 5K1.1 substantial assistance departures will be handled has not been specifically addressed by the court yet. However, in light of the advisory Guidelines and the judges' ability to consider a substantial departure motion, even without the government making it in the first instance, it may be wise to attempt to obtain (c) agreements in cooperation cases where possible. I would expect that the government will be more willing to enter into such agreements given the uncertainty at

sentencing now, and I would expect the judges to be more willing to accept them for the same reason. The (c) agreement insulates the judges from reversal on appeal and guarantees that all parties agree that the sentence is "reasonable."

Regarding the Career Offender provisions of the Guidelines, the judges have not indicated how much weight they intend to give to this section. However, the government seems to have already conceded that, like the rest of the Guidelines, the Career Offender provisions are now advisory. Thus, in your Commentary in such cases, you may wish to set forth your bases for why the Career Offender provision should not control the sentence, *e.g.*, the severity, age, and length of sentence received for the prior convictions. Where before we could not delve into such matters, we now have an excellent opportunity to do so in the Commentary and at the sentencing hearing.

These procedures may, of course, change as post-*Booker* sentencing stabilizes. Likewise, the judges in the different Divisions and Districts may adopt their own, unique procedures as time goes on. Regardless, as noted in the "Defender's Message," we defense lawyers now have a unique opportunity to humanize the sentencing process, presenting the sentencing judge with a complete picture of our clients and giving them an opportunity to impose a just--rather than mechanical--sentence.

CA7 Case Digest

By: Jonathan Hawley
Appellate Division Chief

BLAKELY/BOOKER

***Simpson v. United States*, 376 F.3d 679 (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 declaration.

***United States v. Ward*, 377 F.3d 671 (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 of escape. The court noted that in light of its decision in *Booker*, the constitutionality of such enhancements is called into doubt. In light of 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. Moreover, the Court did so without any briefing on the *Blakely* issue by the parties. Although the appellant filed a motion to allow *post-Blakely* briefing, the Court denied the motion and issued its opinion without input from the parties. The government filed a petition for rehearing in this case, which is still under consideration by the Court of Appeals.

***United States v. Ohlinger*, 377 F.3d 785 (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*." Prior to its decision, the Court granted the Appellant's motion to file a supplemental brief on the *Blakely* issue, but then without explanation vacated its order, finding that the order had been erroneously issue. The court then issued its opinion without the benefit of supplemental briefing. The government filed a petition for rehearing which is currently pending before the court.

***United States v. Singletary*, 379 F.3d 425 (7th Cir. 2004; No. 03-3928).** In prosecution for conspiracy to distribute five grams or more of crack cocaine, the Court of Appeals reversed the defendant's sentence based upon a *Blakely* violation. The Appellant pled guilty and was sentenced to 204 months' imprisonment based upon the district court's findings that she did not qualify for a three-level reduction for acceptance of responsibility and that her relevant conduct included between 500 grams and 1.5 kilograms of crack cocaine. Using language identical to that in its previous cases addressing *Blakely*, the Court of Appeals addressed the Appellant's challenges to the district court's relevant conduct and acceptance of responsibility findings by noting that judicial factfinding as occurred in this case "runs afoul of the Sixth Amendment." It therefore remanded the case for resentencing. In this case, at no time did the parties raise the *Blakely* issue, and the Court instead raised the issue *sua sponte*. Moreover, unlike *Ohlinger* and *Ward*, the government did not seek a petition for rehearing. Thus, the mandate in the case issued on September 7, 2004. To date, the Appellant has not been resentenced.

***United States v. Shearer*, 379 F.3d 453 (7th Cir. 2004; No. 03-4004).** In prosecution for dealing in display fireworks without a license, placing false labels on cases of display fireworks, and knowingly receiving display fireworks in interstate commerce, the defendant was convicted after a jury trial. On appeal, the defendant challenged the district court's application of several sentencing enhancements, including the district court's conclusion that: (1) the defendant's offense involved more than 1,000 pounds of explosive materials; (2) the defendant was an organizer or leader; (3) the defendant used a minor to commit the offense; and (4) the defendant committed perjury during his trial. Noting that the challenges would have presented the Court with "little difficulty" prior to *Blakely*, the Court again quoted its language used in other cases presenting *Blakely* issues and again remanded the case for resentencing without further comment. As in *Ohlinger*, the Court initially granted the defendant's motion to file a supplemental brief, and then vacated the order. After then issuing its opinion, the government did not seek a petition for rehearing and the mandate issued on September 9, 2004. The district court deferred sentencing until *Booker* is decided.

***United States v. Messino*, 382 F.3d 704 (7th Cir. 2004; No. 02-1411) (Bauer, with Kanne. Easterbrook dissenting).** In a multi-defendant prosecution for several drug related charges, the Court of Appeals vacated some of the defendants' sentences, while affirming others. After *Blakely* was decided, two of the defendant's obtained permission to file supplemental briefs raising *Blakely* challenges to their sentences, while a third did not. Regarding the two defendant's who filed supplemental briefs, one of them argued that although the jury found him guilty of conspiring to distribute between 500 grams

and 5 kilograms of cocaine, the district court's additional finding of 95 kilograms of cocaine violated *Blakely*. The Court of Appeals agreed and remanded the case. Likewise, for the second defendant, where the jury made no findings with respect to drug quantity, the Court found that the judge's findings regarding drug quantity at sentencing violated both *Apprendi* and *Blakely*, and therefore remanded for resentencing. Regarding the third defendant, however, who did not file a supplemental brief addressing *Blakely*, the Court of Appeals affirmed the district court's obstruction of justice enhancement, without any discussion of *Blakely*, notwithstanding the fact that the enhancement clearly runs afoul of *Blakely*. Finally, the Court also held that *Blakely* has no application to criminal forfeiture counts. The government filed a petition for rehearing in this case, which is currently under consideration by the Court.

In a very interesting dissent, Judge Easterbrook noted that he would affirm the sentences for the reasons he stated in his dissent in *Booker*. He also noted that "prudence counsels waiting to see what the Supreme Court says before resentencing, lest a re-sentencing lie in store. One question presented in *Booker* is what to do next if the statutory provisions requiring judges to resolve factual disputes that affect federal sentences should be held unconstitutional. Until the Supreme Court has spoken, not only what to do, but also how to do it, is uncertain. I trust we will hold the mandate until *Booker's* final resolution, and that the district judge will sit tight even if we let the mandate go earlier." Judge Easterbrook also noted that he and the other panel members agreed that the *Blakely* issued was adequately preserved. He noted that both of the defendant's who obtained relief in this case raised *Apprendi* arguments in their opening briefs. "True, appellants did not develop these arguments at length in either the district court or their appellate briefs, but the law was so firmly against them that elaboration would have been pointless. When precedent is adverse, a few sentences flagging the point suffice to preserve an argument for resolution by a higher court. Thus the appropriate question (if *Booker* is correct) is whether the error was harmless, and if I were to indulge the assumption that *Booker* got it right I would agree with my colleagues that the error is not harmless." However, he also noted that a claim must be advanced to be preserved, even when all precedent is contrary. Moreover, the Supreme Court in *Cotton* held that an *Apprendi* error does not justify reversal under the plain-error standard because it does not seriously affect the fairness, integrity, or public reputation of judicial proceedings. Applying this logic to *Blakely,* Judge Easterbrook opined that "challenges raised initially after the district judge has imposed sentence therefore must fail even if the Supreme Court affirms *Booker*; but, when *Apprendi*-based arguments have been properly preserved, relief is appropriate because a *Booker* error is not harmless."

***United States v. Ford*, 383 F.3d 591 (7th Cir. 2004; No. 99-3781).** Three years after the conclusion of his direct appeal and after his initial collateral attack was denied in the district court, the Defendant filed a motion to recall the mandate in his case based upon *Blakely*. In his previous court filings, the defendant had raised *Apprendi* challenges to the district court's guideline enhancements based upon its findings of drug quantity. The Court of Appeals noted that a motion to recall the mandate cannot be used as a vehicle to circumvent the rules regarding the filing of successive petitions. Indeed, the Court had previously held that it is proper to recall the mandate only if it would authorize a second or successive collateral attack under 28 U.S.C. sec. 2244(b) and sec. 2255 para. 8. Because the Court had already held in *Simpson* that successive attacks are not permissible unless and until the Supreme Court declares *Blakely* retroactive, the motion to recall the mandate most fail. However, the Court did note that if the Supreme Court declares *Blakely* retroactive, the defendant could file an application for leave to file a successive collateral attack.

***United States v. Loutos*, 383 F.3d 615 (7th Cir. 2004; No. 03-3557).** After a plea of guilty to one count making a false statement on an application for the purpose of influencing a federally insured bank, the Court of appeals rejected the defendant's challenge to the validity of his plea, but vacated his sentence based upon *Blakely*. On

appeal, the defendant argued that his plea was not voluntary because the district court did not advise him regarding the consequences of his agreement to waive his right to appeal his sentence or collaterally attack it. Notwithstanding the waiver of appeal rights, the Court went on to vacate the defendant's sentence due to the fact that the district court's 15-level amount of loss enhancement violated the rule announced in *Blakely*. The Court engaged in no discussion as to how relief could be granted on the *Blakely* issue where the defendant had waived his right to appeal his sentence. The parties filed supplemental briefs raising the *Blakely* issue. The government has filed a petition for rehearing which is under consideration by the Court of Appeals.

***United States v. Schaefer*, 384 F.3d 326 (7th Cir. 2004; No. 03-1189).** In a prosecution for multiple counts of fraud, the Court of Appeals remanded the defendant's case for resentencing in light of *Blakely*. The defendant made several challenges to the district court's sentencing enhancements and upward departures. At the outset of its analysis, the Court of Appeals noted that the defendant's sentence must be remanded in light of *Blakely* and *Booker*. The court nevertheless went on to consider the merits of each issue without consideration of *Blakely*, in the event that the Supreme Court would hold that *Blakely* does not apply to the federal sentencing guidelines. In conclusion, the Court again stated that the case was remanded in light of *Blakely* and *Booker,* but then proceeded to state its alternative holding should *Blakely* not apply to the guidelines. The mandate in this case issued October 5, 2004, but has not been set for resentencing. The parties filed supplemental briefs on the *Blakely* issue.

***United States v. Pree*, 384 F.3d 378 (7th Cir. 2004; No. 03-1516).** In prosecution for tax fraud, the Court of Appeals vacated the defendant's sentence, notwithstanding the fact that she never raised a *Blakely* issue, either in the district of appellate court. The Court stated: "As a final matter, we address an issue not raised by the parties--the constitutionality of the sentencing enhancement for obstruction of Justice. Ms. Pree's case was briefed and argued prior to the Supreme Court's decision in *Blakely v. Washington*. Following the Court's decision, this court held in *United States v. Booker*, that enhancements imposed by the court without a jury finding violate the Sixth Amendment. Ms. Pree does not address to this court, nor can we find evidence in the record to indicate, that she addressed before the district court the constitutionality of her sentencing enhancement. In light of the sea of change in federal sentencing law wrought by *Blakely* and *Booker,* we think it appropriate to take notice of the possibility of an unconstitutional sentencing enhancement. Given the precedent in this circuit prior to *Blakely*, we think it would be unfair to characterize Ms. Pree as having waived a challenge to the validity of her sentencing enhancement. The Supreme Court has granted certiorari in *Booker* and will consider, in the very near future, the application of *Blakely* to the United States Sentencing Guidelines and therefore the correctness of this court's decision in *Booker*. We therefore shall stay our mandate in this case until the Supreme Court's decision in *Booker*. Within fourteen days of the Supreme Court's decision in *Booker*, each party may submit a memorandum presenting its views on application of that decision to this case."

***United States v. Malik*, 385 F.3d 758 (7th Cir. 2004; 03-3404).** In prosecution for receipt and possession of child pornography, the government appealed and the Court of Appeals vacated the defendant's sentence because the district court used the wrong guideline section to sentence the defendant. The Court of Appeals also noted that because the defendant needed to be resentenced, the district court would need to take account of *Booker*. Although the defendant failed to make a *Booker*-type challenge in the district court, he is free to develop the contention at a new sentencing after *Booker*. The Court stated that "defendants may raise after a remand new arguments based on statutes or opinions that post-date the original sentencing and are not logically foreclosed by the appellate decision. Appellate mandates may limit the issues that are open on remand, but we impose no such restrictions; the defendant should be resentenced from scratch. Forfeiture is significant only to the extent that, by not filing a cross-appeal, the defendant disabled himself

from obtaining a sentence lower than originally imposed. The court then noted that the district court should defer resentencing until the Supreme Court decides *Booker*.

***United States v. LaGiglio*, 384 F.3d 924 (7th Cir. 2004; No. 04-2934).** In prosecution for impeding the collection of taxes, the Court of Appeals reversed the district court's grant of the defendant's request that she be released pending appeal. She was originally sentenced to 41 months imprisonment, the length of said sentence being precipitated by an 11-level increase due to the amount of tax loss. Post-*Blakely* and *Booker*, she moved for release pending appeal, arguing that *Booker* caps her sentence at 12 months and she has already been in prison that long. The court ruled that the defendant's sentence was unlawful under *Booker* and ordered her released, precipitating the present appeal by the government. The Court of Appeals noted that release pending appeal is authorized only if the appeal raises a substantial question of law or fact likely to result in a reduced sentence to a term of imprisonment less than the total of time already served plus the expected duration of the appeal process. Here, the district judge did not indicate whether he thought the defendant was entitled to a sentence short enough not to exceed the time she has already served, and rather than speculate, the court remanded and directed the court to revisit the motion. In doing so, the court noted that only three circumstances allow for release of a defendant pending appeal: 1) the district court plans not to rely on the sentencing guidelines at all, but instead to use its discretion to sentence the defendant to a term of imprisonment shorter than the time the defendant is expected to serve pending appeal; 2) the court plans to empanel a sentencing jury to consider the government's evidence in support of increasing the base offense level and believes that the jury will make findings that will preclude a sentence longer than the expected duration of the appeal; or 3) the court intends that there shall be no adjustments to the base offense level and a sentence consistent with that level will expire before the appeal is likely to be resolved. Finally, the court noted that if the district court is minded to release the defendant, it would have to consider the government's argument that the defendant waived or forfeited her reliance on *Booker*.

***United States v. Hennignsen*, 387 F.3d 585 (7th Cir. 2004; No. 03-3681).** In prosecution for mail fraud, the Court of Appeals vacated the defendant's sentenced based upon *Blakely and Booker*, but stayed the mandate pending the Supreme Court's decision in *Booker.* "Although [the defendant] did not raise the issue of constitutionality in his brief, he made notice of the *Blakely* and *Booker* decisions in a subsequent filing and raised the issue during argument. In light of the uncertainty surrounding this issue and the questionable constitutionality of the defendant's sentencing enhancement, we do not find that he has waived his right to challenge the validity of the district court's sentencing enhancement."

***United States v. Smith*, ___ F.3d ___ (7th Cir. 2004; No. 03-3004).** In prosecution for drug offenses, the Court of Appeals remanded for resentencing under *Blakely* due to the district court's imposition of an obstruction of justice enhancement for perjury at trial. The totality of the Court's analysis stated, "Under *Blakely* and *Booker*, an increase in the defendant's sentence may not be based solely on a judge's findings of fact, so we vacate the enhancement and remand for re-sentencing." There was no discussion of whether the error was preserved below, nor any comment on whether the remand was made under a plain error standard of review.

***United States v. Pittman*, 388 F.3d 1104 (7th Cir. 2004; No. 03-1812).** Where the defendant was sentenced as a career offender, the Court of Appeals rejected his *Blakely* challenge to the district court's career offender determination. The career offender guideline requires that the defendant be at least 18 at the time of the commission of the offense, be convicted of a crime of violence or controlled substances offense, and have at least two prior felony convictions of either a crime of violence or a controlled substance offense. The defendant conceded that he was convicted of a controlled substance offense, but argued that *Blakely* required that the fact of his prior convictions and his age at the time of the offense be alleged in the indictment and proved to the jury beyond a

reasonable doubt. As two the fact of the prior convictions, the Court of Appeals relied upon *Almendarez-Torres* to reject this challenge, noting that it had not been overruled by *Blakely*. As to the fact that the defendant was at least 18 years of age at the time he committed the instant offense, the Court avoided directly deciding whether this was a determination affected by *Blakely*. Instead, the court decided the case by relying on the plain error standard, noting that the defendant never claimed that he was actually less than 18 years of age or that application of *Blakely* would ultimately change the result in the case. The court did, however, state that the statutory maximum for *Apprendi* puposes is the maximum sentence a judge may impose based solely on facts found by the jury or admitted by the defendant. This statement seemed to imply that *Blakely* would apply in this circumstances had it been properly preserved.

***United States v. Harris*, ___ F.3d ___ (7th Cir. 2005; No. 03-3961).** In a 922(g) prosecution, the Court of Appeals rejected the defendant's *Blakely* challenge to his sentence as a career offender. The court stated, "We recently addressed this same scenario in *United States v. Pittman*, 388 F.3d 1104, 1108-10 (7th Cir. 2004). We noted that prior to *Apprendi* or *Blakely*, the Supreme Court held that prior felony convictions were sentencing factors that need not be charged in an indictment nor proven beyond a reasonable doubt because they are not elements of the charged offense. *See Almandarez-Torres*, 523 U.S. 224, 244 (1998). Because neither *Apprendi* nor *Blakely* overruled *Almendarez-Torres*, we held that the district court did not err in considering prior felony convictions when calculating the defendant's sentence. *Pittman*, 388 F.3d at 1109. That rule applies here as well. Harris was sentenced pursuant to the career offender provision of the Guidelines. He did not object to the criminal history information compiled by the probation office. Indeed, his lawyer affirmatively accepted the calculation. In light of our holding in *Pittman*, Harris' challenge to his sentence fails."

***United States v. Swanson*, ___ F.3d ___ (7th Cir. 2005; No. 03-1863).** In prosecution for wire fraud related offenses, the Court of Appeals remanded for re-sentencing because the district court used the wrong version of the Guidelines in calculating the amount of loss. On appeal, the government conceded that the district court used the wrong version of the Guidelines, but argued that the remand should be limited to recalculation of the sentence using the correct version of the Guideline. The Court of Appeals, however, remanded the sentence in full, noting that the defendant had filed a supplemental brief after *Blakely* was decided. In light of the Supreme Court's acceptance of *certiorari* in *Booker*, the Court of Appeals remanded for resentencing in light of any changes in sentencing proceedings precipitated by the Supreme Court's anticipated decision in *Booker* and urged the district court to delay resentencing until the Court issued a decision. The court also noted that although the indictment contained an allegation of the amount of loss, the jury was never asked to specifically determine the amount of loss. Thus, even thought the indictment contained an amount of loss figure, the general verdict the jury returned did not indicate that the jury found the specific amount alleged, given that the amount of loss was not essential to returning a conviction. Finally, the Court of Appeals held that *Booker* and its progeny do not affect the manner in which findings or restitution or forfeiture amounts must be made. The court noted that it previously held that forfeiture and restitution orders do not come within *Apprendi's* rule, because there is no "prescribed statutory maximum" and no risk that the defendant has been convicted *de facto* of a more serious offense. Thus, the Court of Appeals assumed that whatever the decision the Supreme Court comes to in *Booker* will no affect review of the restitution and forfeiture orders in the case.

EVIDENCE

***United States v. Jones*, 389 F.3d 753 (7th Cir. 2004; No. 03-2513).** In prosecution for possession with intent to distribute cocaine, the defendant challenged the government's introduction of his two prior convictions for delivery of controlled substance. The government introduced the evidence on the theory that the prior

convictions demonstrated intent to possess the cocaine in the present prosecution because they showed that he had, in the past, possessed other illegal drugs with the intent to distribute. The Court of Appeals, however, noted that this argument failed to shed any light on the difference between propensity and intent. The Court noted that it is impossible to know whether the convictions show intent or improper propensity evidence without both specific evidence about the prior convictions and a well articulated theory of the legitimate purpose that allegedly serves for the present case. Here, the government did not introduce any facts or details associated with the defendant's prior convictions. Moreover, the prosecutor repeatedly told the jury that the defendant's prior convictions showed that he was a drug dealer, and that they should, therefore, find that he intended to deal drugs in the present case. "This looks, walks, and sounds like the argument 'once a drug dealer, always a drug dealer.'" Finally, the Court noted that in order to establish a proper use for the prior convictions, the government must affirmatively show why a particular prior conviction tends to show the more forward-looking fact of purpose, design, or volition to commit the new crime. A prior conviction may be relevant to show intent if the defendant concedes that he possessed the drugs but denies that he planned to distribute them, or if he denies knowing that the substance was contraband. Merely introducing prior convictions without more, however, can prove nothing but propensity, which is not enough to take the evidence out of the exclusionary principle established by Rule 404(b). Notwithstanding the improper use of the prior convictions, the Court of Appeals nevertheless affirmed the defendant's conviction under the harmless error rule.

***United States v. Gilbert*, 391 F.3d 882 (7th Cir. 2004; No. 03-3365).** In prosecution for being a felon in possession of a weapon and ammunition, the Court of Appeals reversed the defendant's conviction because of the improper admission of evidence in violation of the rule announced by the Supreme Court in *Crawford v. Washington*. Prior to trial, the defendant's wife gave a tape recorded statement to police indicating that the defendant possessed the weapon and ammunition found in her home. However, at trial, she refused to testify and asserted a marital privilege. The district court admitted her tape recorded statement and a transcript thereof under the residual exception to the hearsay rule (Rule 807) which allows the admission of a hearsay statement if the declarant is unavailable and there are sufficient circumstantial guarantees of trustworthiness. While this evidence's admission would have been proper prior to the Supreme Court's decision in *Crawford*, the Court of Appeals noted that *Crawford* held that the admission of testimonial hearsay evidence in a criminal trial where the defendant has no opportunity to cross-examine the witness violates the Confrontation Clause. Under this rule, the government conceded error but argued that the error was harmless beyond a reasonable doubt. After conducting a thorough examination of the evidence in the case, the Court concluded that the error was not harmless because the improperly admitted hearsay was the most probative evidence as to the defendant's knowledge of the gun and intention to exercise dominion over it.

***United States v. Silva*, 380 F.3d 1018 (7th Cir. 2004; No. 03-3628).** In prosecution for conspiracy to possess with intent to distribute methamphetamine, the Court of Appeals reversed because the defendant was convicted on the basis of improper hearsay. Regarding the nature of the hearsay, the court stated as follows: "A few examples of the evidence to which the defendant objected will suffice. Agent Zamora, who coordinated the operation for the DEA, testified at trial to conversations conducted between the DEA's confidential informant (whose identity remained secret and who therefore did not testify) and an alleged supplier, regarding a future sale of methamphetamine. Zamora testified that he heard the supplier (who likewise did not testify) use the name 'Juan' [the defendant's first name] several times during conversations and that the informant spoke on several occasions of 'this individual named Juan who indicated that he was going to be making the delivery.' Other testimony elicited from Zamora and another agent

concerned the attempted delivery of a sample of Silva's wares and conversations between Silva and the informant, plus the informant's observations." The district judge allowed the hearsay in finding that the evidence was not being offered for the truth of the matter asserted. The judge did not, however, find that the statements were made by co-conspirators in furtherance of the conspiracy. The Court of Appeals, however, pondered as to what issue other than the truth could the testimony have been relevant. Although the government argued that the evidence was admissible to show "the actions taken by each witness," the court noted that allowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the Sixth Amendment and the hearsay rule. Under the prosecution's theory, every time a person says to the police "X committed the crime," the statement (including all corroborating details) would be admissible to show why the police investigated X. That would eviscerate the constitutional right to confront and cross-examine one's accusers. The court refused to find the admissions harmless because the prosecutor explicitly used some of the evidence in closing argument as evidence of the defendant's guilt. When the prosecutor did so, instead of sustaining the defendant's objection, the court told the jury: "The jury will determine what the evidence shows and why it was admitted. If it was admitted for a different purpose, they will make that decision. I ruled on all of that. They heard the evidence. And if the evidence was not admitted for that purpose, they will so take it into account." The Court of Appeals found that this instruction invited the jury to decide for itself what evidence to use and how to use it, amounting to abdication by the district judge. When the prosecutor violated the limitations on the evidence's use, the judge had to set things straight. This he failed to do; instead of enforcing his rulings, he abandoned them and deferred to the prosecutor and the jurors. Accordingly, the court reversed the defendant's conviction.

HABEAS/2255

***Perruquet v. Briley*, 390 F.3d 505 (7th Cir. 2004; No. 02-2981).** Upon consideration of a 2254 petition, the Court of Appeals affirmed the district court's denial of the petition, relying on the petitioner's procedural default, even though the State did not assert a procedural default argument in the district court. The defendant argued that this failure constituted a waiver of the defense. The Court of Appeals noted that it had discretion on appeal to consider a procedural default claim raised for the first time, although it further stated that it was "by no means suggesting that this court or the district courts should routinely overlook the forfeiture of a procedural default defense." Nevertheless, the Court in this case exercised its discretion to consider the defense because the procedural default was clear, comity and federalism principles weighed strongly against the petitioner's claim given that his claim was never presented to any state court, and without any state court consideration of the issue, the Court of Appeals review would have to be *de novo*. Such review would be an anomaly, affording a procedurally defaulted claim a very broad review, while those who preserved their claims in the courts below would be entitled only to the very narrow review mandated by section 2254(d).

***Earls v. McCaughtry*, 379 F.3d 489 (7th Cir. 2004; No. 03-2364).** Upon consideration of the petitioner's 2254 petition arising out of his Wisconsin conviction for first-degree assault of a child, the Court of Appeals concluded that the petitioner was denied the effective assistance of counsel. The petitioner's conviction stemmed from a six-year old's allegation that the petitioner molested her during a camping trip, in which numerous other adults were present. After the child made the allegation to her mother, she was interviewed by a social worker. At trial, the government presented the testimony of the social worker, as well as the victim's mother, father, aunt, and uncle, all of whom testified that they believed the girl's allegation. Defense counsel did not object to this testimony. The government also presented the videotaped interview between the social worker and the girl. Although the court ordered that a portion of the tape be redacted where the social worker says that what the

petitioner did "was not okay and we don't want him to do this to you anymore," defense counsel failed to redact this portion of the tape or object when it was played to the jury. On appeal, the court noted that it was in violation of Wisconsin law to allow the expert to opine as to the truthfulness of the victim's testimony, and defense counsel's failure to object was therefore deficient. Likewise, defense counsel's failure to redact the offending portion of the videotape or object when it was played was deficient, especially given that defense counsel testified that his failure to do so was an oversight. Finally, although lay witnesses may testify as to a witnesses characteristic for truthfulness, they may not do so regarding their opinion on the witnesses' truthfulness on a particular occasions. Thus, the attorney should have objected to this type of testimony elicited from the girl's relatives. Regarding prejudice, the girl's credibility was central to the State's case, especially given that there was no witness who could corroborate her story, no physical evidence of assaults, and no witnesses testified to any impropriety involving the petitioner. Thus, the question of the petitioner's guilt depended on the credibility of the girl, and counsel's numerous errors regarding this very issue required that the writ issue in this case.

***Ward v. Hinsley*, 377 F.3d 719 (7th Cir. 2004; No. 03-4342).** Upon consideration of the district court's dismissal of a 2254 petition, the Court of Appeals held that a federal habeas court may not review procedurally defaulted claims of alleged structural errors when the petitioner has not argued that the procedural default was excused by cause and prejudice or that a fundamental miscarriage of justice would result if the claims are not addressed. Although the district court dismissed the petition for failing to meet the cause and prejudice standard, it granted a certificate of appealability on the question of whether *Edwards v. Carpenter*, 529 U.S. 446 (2000), requires a petitioner to establish cause and prejudice with respect to procedurally defaulted claims of alleged ex parte communications, perjured testimony, and *Brady* violations, in order to obtain review in the habeas court. The petitioner argued that due to the "structural" nature of such defects which require automatic reversal, he need not satisfy those requirements due to the structural nature of his claims. The Court of Appeals disagreed, however, noting that *Edwards* recognized only one exception to the cause and prejudice rule: only in "the circumstance in which the habeas petitioner can demonstrate a sufficient probability that our failure to review his federal claim will result in a fundamental miscarriage of justice" may a federal habeas court review a procedurally defaulted claim that has not been excused by a demonstration of cause and prejudice. Thus, the procedural default doctrine does not seek to distinguish claims of trial error from claims of structural error.

***Owens v. United States*, 387 F.3d 607 (7th Cir. 2004; No. 03-1507).** Upon consideration of the district court's dismissal of a 2255 petitioner alleging that trial counsel was ineffective for failing to file a motion to suppress, the Seventh Circuit overruled its prior precedent and held that such a claim can be made in a 2255 petition. The Seventh Circuit had previously held in *Holman v. Page*, 95 F.3d 481, 488-92 (7th Cir. 1996), that a failure to make a Fourth Amendment objection to the admission of evidence, however meritorious the objection, cannot amount to ineffective assistance of counsel in a constitutional sense if the evidence was reliable, so that its admission, even if improper, created no risk that an innocent person would be convicted. After analyzing Supreme Court and other circuit precedents subsequent to the decision in *Holman*, the Seventh Circuit concluded that *Holman* was wrongly decided, overruled the case, and held that an ineffective assistance of counsel claim in a 2255 proceeding may be premised upon counsel's failure to file a potentially meritorious motion to suppress evidence.

***Johnson v. McBride*, 381 F.3d 587 (7th Cir. 2004; No. 04-1354).** Upon appeal of the district court's dismissal of a 2254 petition as untimely, the Court of Appeals affirmed the dismissal. The petitioner's counsel mailed his petition on the last day for filing the petition, mistakenly believing that Federal Rule of Civil Procedure 6(e) added three days to the filing date if the petition was sent to the court via the mail. The Court of Appeals, however, disagreed and noted that this Rule only applies to documents "served" on

opposing counsel, not to documents such as complaints or notices of appeal that must be filed in court. Nothing in the Rules Governing Section 2254 Cases in the United States District Courts treats any document as "filed" before actual receipt by the district court's clerk. Thus, the petition was filed outside the 1-year statute of limitations. The petitioner argued that the deadline should be equitably tolled because despite all due diligence he was unable to obtain vital information bearing on the existence of his claim. While noting that the statute of limitations can be tolled in certain instances, the court also noted that in a 2254 proceeding, the petitioner's counsel acts as his agent and counsel's actions are attributable to the petitioner himself. Thus, the fact that counsel made a mistake does not excuse the delay, for it is as if the petitioner himself filed the petition late. Finally, the court found that it mattered not that the defendant was sentenced to death, for the Rules provide for no different treatment when a defendant is under a sentence of death, as opposed to a term of imprisonment.

***White v. United States*, 371 F.3d 900 (7th Cir. 2004; No. 04-2126).** Upon consideration of an application to file a successive 2255 petition, the Court of Appeals considered whether a direct appeal is a "prior application" within the meaning of section 2244(b)(1). That section prevents the grant of leave to file a successive petition if the claim was "presented in a prior application." In the present case, although the petitioner's challenge to his armed career criminal status was not presented in a previous 2255 application, it was presented in his direct appeal from his conviction, by his lawyer, in an *Anders* brief. The court concluded that "prior application" includes a direct appeal. Moreover, the court held that it makes no difference that the claim presented in the direct appeal was in an *Anders* brief where the appeal was dismissed as frivolous. "Presented is presented, whether in an *Anders* brief or in any other format; and if an appeal is dismissed as frivolous, that is a binding adjudication that the claims presented in it had no merit at all, rather than an invitation to refile.

GUILTY PLEAS

***United States v. Bradley*, 381 F.3d 641 (7th Cir. 2004; 03-3909).** Upon consideration of the district court's denial of the defendant's motion to withdraw his guilty plea, the Court of Appeals reversed, finding that the defendant's plea was not knowing and voluntary. The defendant was charged with one count of possession of five or more grams of crack with intent to distribute and one count of carrying a firearm during and in relation to a drug trafficking crime, to wit, possession with intent to deliver crack. The defendant then negotiated a plea agreement. The factual statement set forth in the agreement noted only that the defendant possessed marijuana and a firearm while in possession of the marijuana. At the change of plea hearing, the government cited these facts as the basis for the 924(c) charge. No one addressed the change in the predicate offense from "possession of crack with intent to deliver" as charged in the indictment to "possession of marijuana in the vehicle." After the plea was accepted, the defendant moved to withdraw his plea, arguing that the plea was not knowing and voluntary because of a misrepresentation or mistake as to criminal culpability on the 924(c) offense and the void or voidable nature of the plea agreement based on this misrepresentation or mistake. The Court of Appeals agreed. The Court noted that possession of cocaine base with intent to distribute was an essential element of the 924(c) offense, and the government was required to connect that predicate offense with the firearm possession. Given the lack of any reference to the correct predicate offense, it was clear that the defendant was misinformed during the change-of-plea hearing as to what conduct would suffice to establish the 924(c) offense with which he was charged. Indeed, the facts admitted to by the defendant in both the plea agreement and at the hearing failed to establish facts sufficient for a 924(c) conviction. In light of the confusion, the Court reversed the district court's denial of the motion to withdraw the guilty plea.

***United States v. Jones*, 381 F.3d 615 (7th Cir. 2004; No. 02-1669).** In prosecution for multiple drug counts, the Court of Appeals set forth the standard for determining whether a defendant is entitled to a hearing on his motion to withdraw his guilty plea. Noting that such a claim is

reviewed for an abuse of discretion, the court stated that a hearing on a motion to withdraw a guilty plea is to be routinely granted if the movant offers any substantial evidence that impugns the validity of the plea. However, if no such evidence is offered, or if the allegations advanced in support of the motion are mere conclusions or are inherently unreliable, the motion may be denied without a hearing. Furthermore, the defendant must overcome the presumption of verity that attaches to statements made at the Rule 11 colloquy. Applying these principles, the Court of Appeals affirmed the district court's denial of a hearing, noting that the defendant's claim that he didn't really understand his plea bargain or guilty plea was directly contradicted by the Rule 11 colloquy.

JURY TRIALS

***United States v. Eberhart*, 388 F.3d 1043 (7th Cir. 2004; No. 03-2068)**. After a jury trial for conspiring to distribute cocaine, the Court of Appeals reversed the district court's grant of a new trial. The defendant, after his conviction, filed his initial motion for a new trial within the 7-day period set forth in Federal Rule of Criminal Procedure 33. Several months later, he filed a supplement to that motion raising three new additional claims, two of which formed the basis of the district court's grant of the motion. On appeal, the government argued that the district court lacked jurisdiction to grant the motion because the supplemental motion was filed outside the 7-day period. The defendant, in turn, argued that the government had forfeited their right to challenge the district court's jurisdiction by not objecting on jurisdictional grounds in the district court. The Court of Appeals noted that it had previously held that the 7-day time limit set forth in Rule 33 is jurisdictional, although recent Supreme Court precedents on related questions call those precedents into question. Because the time limitation is jurisdictional, the government may raise the jurisdictional challenge at any time, including for the first time on appeal. Considering whether the supplemental motion related back to the original filing, thus falling within the time period, the court rejected such an analysis. It noted that "should we allow an amendment or supplemental motion to relate back to the original date would defeat the express language of this rule, and would create a back door through which defendants could raise additional grounds for the new trial long after the 7-day period had expired."

MISCELLANEOUS

***United States v. Fish, 388* F.3d 284 (7th Cir. 2004; No. 04-1197).** In prosecution for assault with a deadly weapon, a Menominee Indian challenged the district court's refusal to allow him to raise an entrapment by estoppel defense. Such a defense is available when a government official has actively misled a defendant into a reasonable belief that his or her charged conduct is legal. In support of the defendant's motion, he focused not upon his own personal situation or the crime he allegedly committed, but rather upon his analysis of the historical relationship between the Menominee Indian tribe and the United States government. He noted that in 1954, the government terminated its official recognition of the tribe, only to restore official recognition in 1973. The defendant argued that the process of termination followed by restoration of recognition worked an injury to the collective psyche of the tribe, the net result of which was rampant crime and lawlessness on the reservation. Compounding this problem was the failure of the Department of the Interior to establish a democratic form of government on the reservation following restoration of tribal recognition. Thus, the defendant argued that he was born into a culture of pervasive violence and disrespect for the rule of law that was created and fostered by flawed governmental policy. In this roundabout way, the defendant argued that the government had entrapped him into shooting his brother. The Court of Appeals rejected the argument, noting that it need not debate or discuss the merits of the defendant's analysis because his argument "misses the point entirely." In order for the defense of entrapment by estoppel to arguably apply, the defendant must identify a person or persons, cloaked with actual or apparent authority of a governmental entity, who actively assured him that shooting his brother in the leg with a shotgun was a legal activity. It will not suffice to allege

(or even prove) that "the government," in the abstract, has pursued policies that have unintentionally contributed to an inordinately high crime rate in a given community.

***United States v. Flowers*, 389 F.3d 737 (7th Cir. 2004; No. 04-1917).** Upon appeal by the government of an order expunging records of a criminal conviction kept by the judicial branch, the Court of Appeals elaborated on the proper standard to be employed when considering such requests. In 1996, the defendant, when she was 18, was convicted of interfering with housing rights on account of race and received a sentence of one years' probation. In order to assist her in gaining employment, she then sought to have her record expunged, to the extent that the judicial branch maintained such records. She did not, however, seek to have records maintained by the Executive branch expunged, for the courts had already held that the judicial branch was without jurisdiction to order such expungement. On appeal, the Court noted that district courts have jurisdiction to expunge records maintained by the judicial branch. The test for the expungement of judicial records is a balancing test: if the dangers of unwarranted adverse consequences to the individual outweigh the public interest in maintenance of the records, then expunction is appropriate. This balance, however, very rarely tips in favor of expungement. Indeed, expungement is an extraordinary remedy and unwarranted adverse consequences must be uniquely significant in order to outweigh the strong public interest in maintaining accurate and undoctored records. Thus, adverse consequences which attend every arrest and conviction will be insufficient to support expungement. The Court went on to note that adverse employment consequences accompany every criminal conviction. Thus, if such consequences were sufficient to outweigh the government's interest in maintaining criminal records, expunction would no longer be the narrow, extraordinary exception, but a generally available remedy. As an example of a case which would involve extraordinary circumstances, the Court cited *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967), where expungement was affirmed where the defendants' minor arrests and convictions were a result of a pattern of baseless arrests and prosecutions aimed at interfering with African-Americans' efforts to register to vote. Because the situation in this case did not involve such extraordinary circumstances, the Court of Appeals reversed the district court's expungement order.

OFFENSES

***United States v. Cummings*, ___ F.3d ___ (7th Cir. 2004; No. 03-2660).** In prosecution for conspiracy to violate RICO, the Court of Appeals reversed the defendant's convictions. The defendants worked for the Illinois Department of Employment Security ("IDES") and used their positions to obtain confidential employment information. Then, in exchange for payments from an outside collection agency, the defendants would give this information to the collection agency to assist them in locating debtors. The government charged the defendants with a RICO conspiracy, identifying the IDES as the relevant enterprise. The Court of Appeals noted that in order to be guilty of a RICO conspiracy, the defendant must form an agreement to knowingly facilitate the activities of the operators or managers of the enterprise. In the present case, the court found that the government failed to prove this element of the offense. Specifically, the defendants were low level employees of the IDES without any supervisory or management control over the IDES. The evidence failed to show that they conspired to facilitate the activities of any operator or manager of the IDES. Rather, they assisted the co-conspirator in the operation of his business--the collection agency. Although the court noted that had the enterprise been identified as the collection agency, they facilitation requirement would have clearly been met, the government did not allege that the business was the enterprise. Thus, the evidence was insufficient on this element.

***United States v. Allen*, 383 F.3d 644 (7th Cir. 2004; No. 04-1199).** After a jury trial on one count of being a convicted felon in possession of the weapon, the Court of Appeals reversed the defendant's conviction due to insufficient evidence. The government's evidence of a prior conviction consisted solely of a 1995 Indiana abstract

of judgment bearing the same name as the defendant. To link the judgment to the defendant, the government introduced a 1999 Indianapolis arrest report bearing the defendant's thumbprint and a case number that corresponded to the 1995 conviction. Although the defendant conceded that he was arrested in 1999 on a post-conviction warrant in the 1995 case, he argued that the arrest report was insufficient to establish beyond a reasonable doubt that he was the same individual convicted in the 1995 case. The Court of Appeals noted that the question presented here was one of first impression in the Seventh Circuit, as well as the argument of whether a name alone is sufficient to identify a defendant to a judgment of conviction. Concluding that the weight of authority was on the defendant's side, the court reversed. In so concluding, the court stated that, by itself, the fact of an arrest on the post-conviction warrant in the 1995 case was insufficient to support an inference that the defendant was the same individual convicted in the 1995 case. Even in the best of circumstances and intentions, mistaken arrests can and do occur based upon a similarity or identity of name. That the case number on the arrest report matched the case number on the judgment proved only that the warrant was connected to the earlier judgment, not that the earlier judgment was connected to the defendant or that the police arrested the right man.

***United States v. Fuller*, 387 F.3d 643 (7th Cir. 2004; No. 03-4081).** In prosecution for threatening to kill the President in violation of 18 U.S.C. sec. 871, the Court of Appeals held that an objective standard is used for determining whether the offense has been committed. In the present case, the defendant, an inmate who has been in prison most of his life, sent a letter to the President threatening his life. In the district court, the defendant argued that he did not violate section 871 because his threat was not a "true threat." He urged the court to adopt a subjective standard, under which only threats that are actually intended to be carried out are punishable. He also claimed that, under this standard, he did not actually mean to carry out his threat, but that he suffered from a mental disorder known as "institutionalization," which made him fear freedom and engage in conduct designed to avoid release from prison. The Court of Appeals noted that a circuit split existed on this question. The Seventh Circuit, however, adhered to its objective standard in these cases, which defines a communication as a "true threat" if "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President." The court believed that this standard best protects the safety of the President, while a subjective test would hinder the government's ability to prosecute threats against the President, seriously compromising his safety.

***United States v. Daniels*, 387 F.3d 636 (7th Cir. 2004; No. 03-1105).** In prosecution for two counts of income tax evasion in violation of 26 U.S.C. sec. 7201, the Court of Appeals held that a tax deficiency need not be "substantial" to satisfy the elements of the offense. Specifically, as set forth by the Seventh Circuit in *United States v. Sandoval*, 347 F.3d 627, 633 (7th Cir. 2003), the elements of 7201 are will-fullness; the existence of a tax deficiency; and an affirmative act constituting evasion or attempted evasion of the tax." Although the Seventh Circuit has also qualified the term "tax evasion" with the word "substantial" in other opinions (see, e.g. *United States v. Davenport*, 824 F.2d 1511 (7th Cir. 1987), the court noted that it did so in cases where the precise question of the substantiality of the tax deficiency was not before the court. Given this language, however, the court stated as follows: "We take this opportunity to clarify the law in this Circuit: the government need not charge a substantial tax deficiency to indict or convict under 26 U.S.C. sec. 7201. To hold otherwise would contradict the clear language of the statute and lead to an absurd result. Requiring the government to charge and prove that a defendant's tax deficiency is substantial in order to prosecute her for tax evasion would prevent the prosecution and punishment of those who willfully cheat the government out of small or "insubstantial" amounts of money. A substantiality element would invite taxpayers to cheat on their taxes in small amounts without fear of prosecution. We cannot countenance such a result. Although evidence of a large or substantial tax deficiency

may aid the government in proving willfulness, it is not itself an element of the offense."

SEARCH AND SEIZURE

***United States v. Rogers*, 387 F.3d 925 (7th Cir. 2004; No. 02-3578).** In prosecution for possession with intent to distribute cocaine, the Court of Appeals reversed the district court's denial of the defendant's objection to an in-court identification. Prior to trial, the primary witness against the defendant was shown a photographic array which included a picture of the defendant, but the witness failed to identify the defendant. Thereafter, when both the defendant and the witness were appearing in the district court on the same day, the two were "inadvertently" placed in the same cell as one another while awaiting their hearings. Upon entering the cell, the witness claimed that he then recognized the defendant as the man involved in the drug transaction he witnessed which formed the basis of the charge against the defendant. At trial, the defendant objected to any in-court identification because the placement of the defendant and the witness in the cell together was unduly suggestive. The district court overruled the objection, but the Court of Appeals reversed. The Court of Appeals noted that a two-step analysis is used to determine if an identification procedure comports with due process. First, the defendant must demonstrate that the identification procedures were unduly suggestive, and, second, that under the totality of the circumstances, whether the identification was reliable despite the suggestive procedures. The Court first concluded that the identification was unduly suggestive. Noting that it was irrelevant whether the placement of the two men in the same cell was intentional or not, the circumstances of the identification were more than simply a chance encounter. Specifically, both men were in the cell because of their complicity in the same criminal transaction. A probation officer interviewed the witness in preparation for sentencing on that offense, while the defendant sat close by. The witness had been shown a picture of the defendant in the photo array a few weeks earlier at most, and he may well have determined--if only subconsciously--that finding the same man in his cell on the day he pleaded guilty was no coincidence. Moreover, the witnesses failure to recognize the defendant from the photo array casts suspicion on his "immediate" recognition in the holding cell. Regarding reliability of the in-court identification, the Court applied the five factors set forth in *Neil v. Biggers*, 409 U.S. 188 (1972), and concluded that the balance of the factors fell in favor of the defendant. The court therefore reversed the defendant's conviction, the government having conceded that such an error was not harmless. [The *Biggers* factors are: 1) the witness' opportunity to view the suspect at the scene of the crime; 2) the witness' degree of attention at the scene; 3) the accuracy of his pre-identification description of the suspect; 4) the witness' level of certainty in the identification; and 5) the time elapsed between the crime and the identification.]

***United States v. Arnold*, 388 F.3d 237 (7th Cir. 2004; No. 03-1376).** In prosecution for 922(g), the Court of Appeals affirmed the district court's denial of the defendant's motion to suppress. After stopping the defendant for a traffic violation, the police officer observed the defendant move into the back seat of his car and then to the front again. After determining that the defendant had only a driving permit, he decided to issue a citation and have the defendant's vehicle towed pursuant to Indiana law. Before doing so, however, he searched the car for a weapon, going to the back seat where the defendant had been, opening the armrest which gave access to the trunk, and retrieving a plainly visible handgun in the trunk through the opening. The defendant argued that the retrieval of the gun from the trunk through the opening exceeded the scope of a protective search under *Michigan v. Long*, 463 U.S. 1032 (1983). The Court of Appeals noted that *Long* permits a protective search of the passenger compartment of a vehicle without a warrant for those areas in which a weapon may be placed or hidden. Although no court had previously addressed the specific problem of a trunk that is readily accessible from inside the passenger compartment, the Court of Appeals saw no reason to distinguish this accessible area from any other. That the officer here reached into the trunk while he was inside the car, by pulling down the armrest in the

back seat, does not mean that his search automatically exceeded the boundaries delineated in *Long*. An officer armed solely with reasonable suspicion may not search the trunk of a vehicle when the motorist would not have been able to reach a weapon located there. Here, however, the area behind the armrest that opened into the trunk was generally accessible from the passenger compartment. Just as if the gun had been behind the back seat in a hatchback or in the covered cargo area of an SUV, the defendant could have gained immediate access to it through the armrest, even though the weapon was technically located in the usually protected realm of the trunk. Therefore, the search was proper.

***United States v. Stewart*, 388 F.3d 1079 (7th Cir. 2004; No 03-2377).** In this case, the Seventh Circuit for the first time considered the contours of the Supreme Court's decision in *Missouri v. Seibert*, 124 S.Ct. 2601 (2004). In the present case, the defendant was arrested for bank robbery, cuffed, and placed in the back seat of the squad car without being given *Miranda* warnings. During the five-minute drive to the police station, the police questioned him about the robbery, but he denied involvement. He was then placed in an interview room and uncuffed, again being asked about his involvement. At this point, he admitted to assisting another individual in the robbery. Five or ten minutes into this interview, the detectives left and then returned with two FBI agents. Shortly thereafter, the defendant broke down and confessed to committing the robbery alone. The officers then gave him *Miranda* warnings, tape-recorded his statement, and along with obtaining new information, solicited the information he had previously given before the warnings. While the defendant's appeal was pending, the Supreme Court decided *Seibert*, and the parties briefed and argued the issue on appeal for the first time, the defendant claiming that the two-step interrogation process violated *Miranda*. In *Seibert*, a plurality held that *Miranda* warnings given mid-interrogation, after a suspect has already confessed, are generally ineffective as to any subsequent, post-warning incriminating statements. In doing so, the plurality distinguished *Oregon v. Elstad*, 470 U.S. 298 (1985), limiting it to its facts. *Elstead* addressed the admissibility of a *Mirandized* station-house confession that was preceeded by an earlier, unwarned inculpatory remark by the defendant at the scene of the arrest. The Court held in *Elstad* that the failure to administer *Miranda* warnings prior to the defendant's initial inculpatory statement did not require suppression of his subsequent *Mirandized* confession. Because the Fourth Amendment exclusionary rule is different in purpose and effect from the *Miranda* suppression rule, the Court refused to extend the Fourth Amendment "fruits" doctrine to the Fifth Amendment *Miranda* contect. The *Siebert* plurality followed *Elstad* to the extent that it rejected application of Fourth Amendment "fruits" doctrine to the testimonial fruits of *Miranda* violations. However, the plurality distinguished *Elstad* by noting that the conduct in *Siebert* was a deliberate use of a question-first interrogation strategy defined to circumvent the purposes of the *Miranda* warnings. After then analyzing the various opinions produced in *Siebert*, the Court of Appeals noted that "what emerges from the split opinions in *Seibert* is this: at least as to *deliberate* two-step interrogations in which *Miranda* warnings are intentionally withheld until after the suspect confesses, the central voluntariness inquiry of *Elstad* has been replaced by a presumptive rule of exclusion, subject to a multifactor test for change in time, place, and circumstances from the first statement to the second. According to the plurality, this multifactor test measures the effectiveness of midstream *Miranda* warnings and applies in all cases involving sequential unwarned and warned admissions. However, where the initial violation of *Miranda* was not part of a deliberate strategy to undermine the warnings, *Elstad* appears to have survived *Seibert*. Given the critical nature of the "deliberateness" determination, the Court of Appeals remanded the proceedings to the district court for further findings. Specifically, because the district court did not have an opportunity to consider this question in the first instance, the Court could not determine whether the two-step interrogation process was deliberate and whether the multifactor test nevertheless showed that the warning were effective.

***United States v. Montgomery*, 390 F.3d 1013 (7th Cir.**

2004; No. 03-3096). In prosecution for being a felon in possession of a weapon, the Court of Appeals rejected the defendant's novel argument that a failure to electronically record a statement to the police renders the statements inadmissible for purposes of impeachment at trial. The defendant asked the Court to expand the scope of *Miranda* by finding that prior inconsistent statements to the police are only admissible if recorded, thus "taking the bold step of brining the Constitutional protection of our forefathers into the 21st Century." The Court declined the invitation.

***United States v. Bernitt*, ___ F.3d ___ (7th Cir. 2004; No. 03-3065).** In prosecution for manufacturing marijuana, the Court of Appeals affirmed the district court's denial of the defendant's motion to suppress evidence. Police arrived at the defendant's residence to follow-up on information received that he was growing marijuana on his rural farm. Upon arriving, police observed several marijuana plants growing beside the defendant's home. They arrested him, cuffed him, and placed him in the back of their squad car. Without giving him his *Miranda* warnings, the officers asked for consent to search his residence, which he gave. The defendant argued that his consent was not voluntary due to the officer's failure to provide him with his *Miranda* warnings. Although the Court of Appeals was troubled by the lack of *Miranda* warnings, the Court also noted that "the fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search." In the present case, there was no evidence that the police badgered the defendant, the defendant was an intelligent and articulate young man, and he was only in custody for three or four minutes. Given these facts, the Court concluded that the consent was voluntary.

***United States v. Cellitti*, 387 F.3d 618 (7th Cir. 2004; No. 03-3777).** Upon consideration of the district court's denial of a motion to suppress, the Court of Appeals reversed and remanded. After receiving a call regarding a man threatening people with a gun, the police arrived on the scene, eventually tracing the suspect to his fiancee's residence. The police ordered all of the occupants of the house out, including the defendant, and handcuffed them. Included among these individuals was the defendant's fiancee, who owned the house. After obtaining the fiancee's consent to search the home, the police did not find the weapon involved, but did find a set of keys. They then transported the fiancee to the police station, placed her in a holding cell, handcuffed her to a bench for six hours, and finally obtained her consent to use the keys to search a car shared by her and the defendant, where they found the weapon. The defendant was then charged with possession of a weapon by a felon. The Court of Appeals held that the weapon should have been suppressed. The Court first noted that the police had no probable cause to arrest the fiancee. Thus, consent given during an illegal detention is presumptively invalid. Although the consent may nevertheless be valid provided that it is sufficiently attenuated from the illegal police action to dissipate the taint, the government in this case did not establish that the fiancee's consent was attenuated from her illegal arrest. Specifically, when consent to search is given by a person who remains illegally detained, the government is unlikely to meet its burden of showing that the consent was sufficiently attenuated from the illegality. Here, the consent was given while the fiancee was still in custody because of the illegal arrest and there was no intervening event of significance. Under these circumstances, the court concluded that her consent to search the car was tainted by her illegal arrest and was therefore invalid.

SENTENCING

***United States v. Murray*, ___ F.3d ___ (7th Cir. 2005; No. 03-2413).** In prosecution for one count of transporting fraudulently obtained merchandise across state lines and one count of obtaining goods through the unauthorized use of an access device, the Court of Appeals reversed the district court's restitution order under a plain error standard of review. The PSR noted that the total amount of loss in the case, including loss for charged conduct and relevant conduct, was $647,054.22. The report did not, however, apportion this amount between charged and relevant conduct, and the court ordered the entire amount to be paid as restitution. The Court of Appeals reversed, noting that although a court is not limited to losses proved

at trial, restitution is limited to the losses caused by charged conduct. In the present case, $88,888.11 of the losses occurred outside the time period specifically alleged in the indictment, so this amount should have been deducted from the restitution order. Additionally, because the final restitution order included additional amounts of relevant conduct, the district court was required on remand to exactly determine the amount of relevant conduct included in the final order and remove it therefrom.

***United States v. McKee*, 389 F.3d 697 (7th Cir. 2004; No. 02-2626).** In prosecution for drug related offenses, the Court of Appeals affirmed the district court's denial of a downward adjustment for being a minor participant under U.S.S.G. sec. 3B1.2. The defendant argued that he was entitled to the reduction because all of the other participants in the drug distribution were higher up on the food chain than he was. The Court of Appeals noted, however, that where each person was an "essential component" in the conspiracy, the fact that other members of the conspiracy were more involved does not entitle a defendant to a reduction in the offense level. Moreover, the district court found that the defendant was an average participant, thus precluding an adjustment for this reason as well.

***United States v. Wilson*, 390 F.3d 1003 (7th Cir. 2004; No. 03-2170).** Upon consideration of the defendant's motion to compel the government to file a Rule 35(b) motion, the Court of Appeals held that the government's decision not to file the motion lacked a rational relationship to a legitimate government interest and the refusal was made in bad faith. The defendant pled guilty to drug related offenses and agreed to cooperate with the government. In exchange, the government agreed to file a 5K or Rule 35 motion for reduction in sentence. Prior to sentencing, defense counsel discovered that due to an administrative error, the defendant served an extra two-years in prison on a prior conviction. Based upon the service of this extra time in prison, defense counsel moved for a downward departure in the present case equal to the excess amount of time previously served. The government, extremely displeased with the motion, refused to file a 5K, but ultimately agreed to file a Rule 35 if the defendant would withdraw his motion for downward departure. The defendant acquiesced in the government's demands. Once the deadline for filing the Rule 35 arrived, the government again refused to file, arguing that it would not do so unless the defendant agreed to waive any lawsuits he may have premised on his service of the extra two-years in prison on the prior conviction. The defendant then filed a motion to compel the government to file the motion and enforce the plea agreement. The district court ultimately concluded that all of the reasons cited by the government for its failure to file the motion were "pretextual for the real reason"--the government's desire to use its control over the Rule 35(b) motion as a tool to secure a release from liability for the two extra years the defendant spent in prison. Indeed, the government acknowledged that the defendant had already provided substantial assistance to the government. Nevertheless, although "seriously questioning the legitimacy" of the government's stated reasons, the court concluded that the defendant had not met "his heavy burden" of proving that the government's action was not rationally related to a legitimate government interest. Morever, the court concluded that, although questionable, the refusal to file the motion was not made in bad faith. The Court of Appeals reversed. Although noting that it would not go so far as to hold that the government's reason for failing to file a Rule 35 motion must *always* be related to the quality of a defendant's assistance, in the present case, the government's attempt to block a civil suit with its Rule 35 power was "so far afield from the purposes of 5K1.1 and Rule 35 as to be irrational. It has nothing whatsoever to do with even general prosecutorial aims, which our circuit and others have assumed should animate a refusal to move for a substantial-assistance departure." Likewise, the Court concluded that the government acted in bad faith, for it imposed new conditions on the defendant after he had already completed his part of the bargain. First, it required him to withdraw his motion for downward departure, something not prohibited by his plea agreement. Then, when he did this, the government imposed yet another condition requiring him to drop any civil lawsuit. It was unfair for the prosecutor to ignore his reciprocal

obligations to perform under the plea agreement unless the defendant jumped over new hurdles that were not part of the bargain. Accordingly, the Court of Appeals reversed the decision of the district court and remanded the case for further proceedings.

***White v. Scibana*, 390 F.3d 997 (7th Cir. 2004; No. 04-2410).** In this attack on the manner in which the BOP calculates "good time" credits, the Court of Appeals affirmed the method used by the BOP. Under the good-time statue, an eligible prisoner may receive credit "beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term." The BOP interprets this statute as allowing an award of up to fifty-four days of credit for each year the inmate *actually serves in prison*. The term an inmate actually serves is not the term imposed by the court but something less; annual good-time awards operate to incrementally reduce the term of imprisonment imposed in the sentence. The statutory good-time calculation is thus not fifty-four days times the number of years *imposed* but fifty-four days for each year actually *served*. This calculation is based on the premise that for every day a prisoner serves on good behavior, he may receive a certain amount of credit toward the service of his sentence, up to a total of fifty-four days for each full year. Thus, under the BOP's formula, a prisoner earns .148 days' credit for each day served on good behavior (54/365=.148) and for ease of administration the credit is awarded only in whole day amounts. Recognizing that most sentences will end in a partial year, the BOP's formula provides that the maximum available credit for that partial year must be such that the number of days actually served will entitle the prisoner (on the .148-per-day basis) to a credit that when added to the time served equals the time remaining on the sentence. The Court of Appeals concluded that the BOP's interpretation of the statute was reasonable, and therefore reversed the district court's determination that the calculation of good-time credits should be determined by the number of years imposed, instead of the number of years actually served.

***United States v. Frazer*, 391 F.3d 866 (7th Cir. 2004; No. 03-4351).** In prosecution for making threatening communications, the Court of Appeals affirmed the district court's application of U.S.S.G. sec. 2A6.1(b)(2), which provides for a 2-level upward adjustment if the offense involved "more than two threats." The defendant tape-recorded a message stating that a bomb had been place in two schools and on a school bus. He then played the message to the secretary at the district superintendent's office, as well as to the Junior High School secretary. When the call was disconnected after the secretary attempted to transfer it to the principal, the defendant called back and played the message again. In the district court, the judge determined that because three different locations were threatened, more than two threats occurred. The Court of Appeals, however, rejected this analysis and concluded that it is the number of threatening communications, not the number of victims or locations threatened, which is important for this adjustment. Under this analysis, the defendant argued that there were at most two threats, for the third call was "de minimis" and part of a single instance or episode, the disruption from the previous call already underway. The Court however, rejected this argument and noted that the test the defendant sought to apply was a subjective one, which would look to the number of communications a defendant intended to make. The proper test is instead an objective one, and by this measure, the defendant made three calls and therefore three threats.

***United States v. Schreckengost*, 384 F.3d 922 (7th Cir. 2004; No. 04-1921).** In prosecution for counterfeiting, the Court of Appeals rejected the government's appeal of the defendant's sentence. The defendant produced counterfeit bills by removing the ink from $5 bills and then printing $100 bills on the inkless paper, thereby giving the fakes the feel of real currency. At sentencing, the court used the generic fraud guideline (2B1.1), instead of the counterfeiting guideline (2B5.1), because of application note 3 to section 2B5.1, which reads: "Counterfeit, as used in this section, means an instrument that purports to be genuine, but is not, because it has been falsely made or manufactured in its entirety. Offenses involving genuine instruments that have been altered are covered under

2B1.1." The Court of Appeals concluded that because the U.S. Treasury will replace a note whose ink has washed off, thereby honoring the inkless paper as currency, the defendant did not manufacture the counterfeits in their entirety, but rather altered a genuine instrument. Accordingly, the district court correctly used the general fraud guideline.

***United States v. Dowell*, 388 F.3d 254 (7th Cir. 2004; No. 04-1671).** In prosecution for attempt to distribute cocaine, the court of appeals dismissed the defendant's appeal of the district court's denial of his motion for downward departure. The defendant, who was in need of a heart transplant, moved for a downward departure under U.S.S.G. sec. 5H1.4, which allows a departure for "an extraordinary physical impairment." The defendant argued that home detention would be a more appropriate placement, but the district court disagreed, noting that the defendant would more likely receive better care from the Bureau of Prisons. The court affirmed this denial as an unreviewable exercise of discretion. However, because the BOP does not provide organ transplants, the defendant also argued that the policy makes his sentence to a term of imprisonment as cruel and unusual. The court rejected this challenge as well, noting that the policy allows the "medical director to make an exception to this rule, if the medical or other facts of a particular inmate's case so warrant."

***United States v. Zingsheim*, 384 F.3d 867 (7th Cir. 2004; No. 04-1671).** In this action, the United States sought a writ of mandamus, asking the Court of Appeals to expunge a standing order of the district court. The district judge in this case, *sua sponte*, announced that the prosecutor must reveal specific details as part of any request under U.S.S.G. sec. 5K1.1 before a defendant could receive a downward departure. In what the district court described as a "standing order," the court set forth the following: "Court notes the new procedure to be followed when the government wishes to file any downward departure motion for substantial assistance: 1) the court will no longer take up U.S.S.G. 5K1.1 downward departure motions as part of the initial sentencing hearing; instead, all 5K1.1 motions need be filed formally, in writing, and will be considered in an entirely separate proceeding; 2) all motions for downward departure will be heard within 60-days from the day of filing; and 3) all motions for downward departure must be accompanied by the following (which may be filed under seal as appropriate and consistent with Local Rule 79.4): a) copies of all statements given by the defendant to any component of law enforcement, b) copies of transcripts of testimony given by the defendant whether before a grand jury, trial or other relevant proceeding in state or federal court, c) a copy of a recommendation approved and signed by an individual holding a supervisory position in the law enforcement agency with whom the defendant cooperated (multiple agencies require multiple submissions), d) a written recommendation of a supervisor in the office of the prosecutor (e.g. United States Attorney, local district attorney, or state attorney general), and e) a written report from the downward departure committee which shall include the names and signatures of the committee members who considered the matter, the date(s) the matter was considered, and the recommendation(s) of the committee together with any dissenting view(s). Failure to adhere to this policy will result in the motion being summarily denied without prejudice." The Court of Appeals found numerous problems with this standing order. First, a "standing order" has much the status of a local rule, which is ordinarily the province of the Judicial Council. Secondly, the order requires that the United States Attorney's office and other agencies turn over to the court information which is protected by a at least four different recognized privileges. The court, however, denied the petition for mandamus, and rather decided the propriety of the district court's application of the order in the particular appeals before it. Finding that the district court's failure to act on the departure motions because of the government's refusal to comply with the "standing order" was an error, the court vacated the defendant's sentence and remanded for resentencing.

***United States v. Diamond*, 378 F.3d 720 (7th Cir. 2004; No. 02-1070).** In prosecution for conspiracy to commit mail and wire fraud, the Court of Appeals reversed the

district court's loss determination. At sentencing, the district court held the defendant liable for the amount of loss resulting from the conspiracy's entire existence, although it was undisputed that the defendant did not enter into the conspiracy until after its inception. The Court of Appeals noted that application note 2(ii) of U.S.S.G. sec. 1B1.3(a)(1)(B) states that "a defendant's relevant conduct does not include the conduct of members of a conspiracy prior to the defendant's joining the conspiracy, even if the defendant knows of that conduct." Given this language, the district court clearly erred in attributing loss amounts to the defendant for a period in which she was not a member of the conspiracy.

***United States v. Roach*, 372 F.3d 907 (7th Cir. 2004; No. 03-3078).** In prosecution for wire fraud, the Court of Appeals considered when a district court may consider new evidence on an issue remanded by the Court of Appeals. In the first appeal, the Court of Appeals vacated the defendant's sentence because the district court's diminished capacity downward departure was supported by insufficient evidence. On remand, the defendant attempted to present new expert testimony on his mental state, but the district court refused to hear the evidence. On appeal, the court noted that although district courts may on remand effectuate their original sentencing intent, they may not necessarily reopen fully heard issues anew. In *United States v. Wyss*, 147 F.3d 631 (7th Cir. 1998), the court precluded the government from presenting additional evidence on an enhancement during the resentencing hearing stating: "The government was entitled to only one opportunity to present evidence on the issue." The rule, however, is not absolute, for there is a difference between an issue that was fully explored at the initial sentencing hearing and one that received no attention, but was nonetheless reviewed on appeal under the plain error standard. In the latter case it may be appropriate to admit additional evidence, whereas if an issue has been fully explored, the party bearing the burden of proof should be precluded from presenting additional evidence. In the present case, the district court rightly excluded the evidence, for the issue of the defendant's mental capacity was fully explored at her initial sentencing hearing. Although the court noted that this was the first application of the *Wyss* rule to a defendant, the rule applies to both the government and defendants. Here, the defendant had the burden of establishing that she was entitled to a downward departure. When either party fails to meet its burden to prove a guidelines' sentencing departure or enhancement, it cannot use the opportunity of a remand to supplement the record in its favor.

***United States v. Garcia-Lopez*, 375 F.3d 586 (7th Cir; No. 03-3513).** In prosecution for illegal re-entry, the Court of Appeals vacated the defendant's sentence because the district court should have applied a 13-level enhancement for the defendant having been previously deported after having committed a crime of violence. Although the defendant had a prior armed robbery conviction, prior to his federal sentencing hearing, the defendant obtained a judicial order vacating the prior conviction because the state court failed to inform him of the possible immigration consequences stemming from his guilty plea, in violation of state law. On appeal, the court considered whether the 16-level enhancement applied when the underlying felony conviction was vacated on technical grounds after deportation but prior to a defendant's sentencing for the illegal reentry. The court concluded that the enhancement applies. The court noted that the plain language of the guideline indicates that the enhancement applies if the defendant had been convicted of the crime of violence "at the time of deportation."

***United States v. Henderson*, 376 F.3d 730 (7th Cir. 2004; 03-1759).** In prosecution for bank larceny in violation of 18 U.S.C. sections 2113(b) and 2, the defendant challenged the application of the DNA Analysis Backlog Elimination Act of 2000 to him. This act requires probation officers to collect DNA samples from individuals, convicted of certain qualifying offenses, who are on probation, parole, or supervised release. In the district court, the trial court agreed with the defendant that bank larceny was not a qualifying offense under the act and enjoined the United States Probation Office from taking the defendant's DNA sample. The government appealed, and the Court of Appeals reversed. The Court

of Appeals first noted that the Act defines as a qualifying conviction an offense involving robbery or burglary as described in Chapter 103 of Title 18, sections 2111 through 2114. Thus, although the statute seems to limit the offenses to robbery and burglary, bank larceny in fact falls within the statutory sections set forth in the Act. Given this seemingly confusing language, the Court of Appeals held that the statutory language was ambiguous. Indeed, it was unclear whether Congress intended for bank larceny to be a qualifying offense for purposes of the DNA Act. In such a case, the interpretation of the Attorney General as set forth in 28 C.F.R. sec. 28.2(a) is given deference under *Chevron*. In that section, the Attorney General explicitly provided that bank larceny was such a qualifying offense. Therefore, given that the Attorney General's construction was reasonable and comported with the Act's legislative history, the court adopted its interpretation.

***United States v. Keller*, 376 F.3d 713 (7th Cir. 2004; No. 03-3789).** In prosecution for possession of a weapon by a felon, the Court of Appeals reversed the district court's downward departure pursuant to 5K2.12, which allows a departure "if the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense." In the present case, after the defendant was released from state prison, he resolved to commit no more crime and leave his gang. However, shortly after his release, he was shot in the face in response to his efforts to the leave the gang. Later, he was the victim of a drive-by shooting and then an armed robbery. He later learned that the same individuals were involved in all the incidents. The defendant thereafter obtained a firearm for his protection. Given these circumstances, he argued that he was entitled to a departure under 5K2.12. The district court agreed and departed 2-levels. Upon the government's cross-appeal, the Court of Appeals reversed the departure. The court noted that many convicted felons unfortunately will return to a milieu of violence after serving their sentences, and many--even those who desire to distance themselves from criminal activity--will become the victims of violence. However, if 5K2.12 were to operate as an automatic sentence reduction for convicted felons who find themselves in dangerous surroundings, invocation of the guideline would render nugatory much of the Congressional determination that felons ought not be permitted to carry firearms. In the present case, although there was no question that the defendant met with violence after his release from prison, there was also no evidence to indicate that the defendant believed he would meet with violence on the night which it occurred. Moreover, the record did not indicate that the defendant lacked an alternative to arming himself: There is no evidence that the defendant sought police protection, that such protection was denied or that it proved ineffective. Finally, there was no evidence that the defendant considered relocating to an area that would be less dangerous.

Recently Noted Circuit Conflicts

Compiled by: Kent V. Anderson
Senior Staff Attorney

Commerce Clause

United States v. Maxwell, 386 F.3d 1042 (11th Cir. 2004)

The Eleventh Circuit held that 18 U.S.C. §2252A is unconstitutional as applied to a defendant's purely intrastate possession of child pornography even though it was produced with computer disks that came from out of state. The Court first found that there was nothing commercial or economic about the possession of child pornography. It then found that the jurisdictional element of materials that were transported in interstate commerce was a pretext for Congress' real desire to criminalize the possession of child pornography which was a proper subject for state regulation.

The Court then found that the substantial effect of Defendant's possession was attenuated. The Court

disagreed with the aggregate effects test which has been employed by other circuits. *See e.g.*, *United States v. Holston*, 343 F.3d 83, 90 (2nd Cir. 2003); *United States v. Kallestad*, 236 F.3d 225, 230 (5th Cir. 2000); *United States v. Angle*, 234 F.3d 326, 338 (7th Cir. 2000). The Eleventh Circuit found that this test was not appropriate for intrastate non-economic activity. The Court stated that "the misguided aggregation approach suggests that jurisdictional elements in all of Congress's Commerce Clause enactments amount to nothing more than superfluous hurdles to federal law enforcement." It further stated that:

"By finding that Congress's power to regulate intrastate possession follows naturally from its power to regulate interstate possession, our sister circuits have taken two leaps. They first assume that intrastate possession affects the interstate market for child pornography. They then assume that this effect on the interstate market yields a substantial impact on interstate commerce. Whether or not a substantial effect on the interstate market for child pornography necessarily translates into a substantial effect on interstate commerce, we detect a flaw in their application of leap one. The effect on the interstate market-and ultimately interstate commerce-must be measured in relation to the isolated conduct at issue, rather than as a nationwide aggregate, because the intrastate possession of child pornography is a criminal, noneconomic activity."

The Court also rejected the Third Circuit's addiction theory as requiring too many inferences to sustain it. *See United States v. Rodia*, 194 F.3d 465, 478-479 (3rd Cir. 1999).

Next, the Court held that the jurisdictional hook of production with materials that traveled through interstate commerce is insufficient to limit the scope of the statute.

Finally, the Court found that Congress' findings in support of the statute were insufficient to show an effect on interstate commerce.

Fourth Amendment - Independent Source

United States v. Johnson, 383 F.3d 538 (7th Cir. 2004)

The Seventh Circuit held that the government can not use an illegal search of a third party to show inevitable discovery or provide an independent source for evidence that was seized illegally from a defendant. The other search had to have been lawful in order to satisfy the requirements of either doctrine. The Court disagreed with the First Circuit's contrary holding, in *United States v. Scott*, 270 F.3d 30 (1st Cir. 2001), that the fact the other search was illegal is not dispositive.

Sixth Amendment - Right of Confrontation

United States v. Yates, 391 F.3d 1182 (11th Cir. 2004)

The Eleventh Circuit reversed Defendants' convictions because their right to Confrontation was violated when two witnesses testified by two-way video tele-conference. The Court held that the rule of *Maryland v. Craig*, 497 U.S. 836 (1990) applied to this case. It disagreed with the Second Circuit's view that *Craig* only applies to one-way closed circuit testimony. *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999).

Choice of Counsel

Rodriguez v. Chandler, 382 F.3d 670 (7th Cir. 2004)

The Seventh Circuit held that an improper denial of choice of counsel is only reversible if the Defendant can show an adverse effect from that denial. The Court agreed with the Tenth Circuit's decision in *United States v. Mendoza-Salgado*, 964 F.2d 993 (10th Cir. 1992) (prejudice required unless trial court acted "unreasonably or arbitrarily" in disqualifying counsel) with respect to the requirement that some form of prejudice must be shown. The Court disagreed with the First, Third, Sixth, and Ninth, Circuits which apply a rule of automatic reversal after finding that a district court violated defendant's right to choice of counsel. See *United States v. Panzardi*

Alvarez, 816 F.2d 813 (1st Cir. 1987); *United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1996); *Wilson v. Mintzes*, 761 F.2d 275 (6th Cir. 1985); *Bland v. California*, 20 F.3d 1469 (9th Cir. 1994), overruled on other grounds by *Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000).

Hybrid-representation and *Faretta*

United States v. Cromer, 389 F.3d 662 (6th Cir. 2004)

The Sixth Circuit held that *Faretta* warnings were not required when the district allowed Defendant to partially cross-examine a witness and split oral argument with counsel.

The Court agreed with the majority of circuits that such instances of hybrid representation do not involve a waiver of a right to counsel, requiring warnings. *See "Buhl v. Cooksey*, 233 F.3d 783, 790 (3d Cir. 2000) ("Courts must indulge every reasonable presumption against a waiver of counsel. In order to overcome this presumption, and conduct his/her own defense, a defendant must clearly and unequivocally ask to proceed pro se.") (citations omitted); *United States v. Taylor*, 113 F.3d 1136, 1143 (10th Cir. 1997) (holding that because defendant *pro se*, the trial

court was obligated to ensure that the waiver of counsel was knowingly and intelligently made); *United States v. Leggett*, 81 F.3d 220, 224 (D.C. Cir. 1996) ("The law presumes that a defendant has not exercised his right to represent himself nor waived the right to counsel in the absence of an articulate and unmistakable demand by the defendant to proceed *pro se*."); *Stano v. Dugger*, 921 F.2d 1125, 1144 (11th Cir. 1991) ("The *Faretta* case law does not provide for proceeding *pro se* without assertion of the right to self-representation. There simply is no precedent in this circuit for proceeding *pro se* by constructive notice without an obvious assertion of the right to self-representation."); *see United States v. Frazier-El*, 204 F.3d 553, 558 (4th Cir. 2000) (stating that a request for self-representation must be clear and unequivocal); *United States v. Arlt*, 41 F.3d 516, 519 (9th Cir. 1994)(stating that the requirement of an unequivocal assertion of the right to proceed without counsel "protects against two unacceptable occurrences: an inadvertent waiver of the right to counsel by a defendant's 'occasional musings on the benefits of self-representation' and manipulation by the defendant of the mutually exclusive rights to counsel and self-representation" (quoting *Adams v. Carroll*, 875 F.2d 1441, 1444 (9th Cir. 1989))); *Robinson v. United States*, 897 F.2d 903, 907-08 (7th Cir. 1990) (finding simultaneous representation rather than partial waiver of counsel where defendant interrupted his attorney's summation at mid-point and concluded the summation *pro se*); *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990) ("In recognition of the thin line that a district court must traverse in evaluating demands to proceed *pro se*, and the knowledge that shrewd litigants can exploit this difficult constitutional area by making ambiguous self-representation claims to inject error into the record, this Court has required an individual to clearly and unequivocally assert the desire to represent himself.") (footnote omitted); *Bontempo v. Fenton*, 692 F.2d 954, 961 n.6 (3d Cir. 1982) (declining to find partial waiver of counsel where defendant presented to jury summation that was "supplemental to, and not in lieu of, retained counsel's closing to the jury")."

The Court disagreed with the Fifth and Ninth Circuits, which have held otherwise. *See United States v. Davis*, 269 F.3d 514, 519-20 (5th Cir. 2001); *United States v. Turnbull*, 888 F.2d 636, 638 (9th Cir. 1989).

Offenses

18 U.S.C. §922(g)(1)

United States v. Allen, 383 F.3d 644 (7th Cir. 2004)

The Seventh Circuit reversed a §922(g)(1) conviction

because it held that a prior judgment that only contained the name of the person who was convicted was insufficient to prove that Defendant was the same person and had therefore been convicted of a felony. The Court agreed with decisions from the Second, Third, and Tenth Circuits.

United States v. Jackson, 368 F.3d 59, 68 (2d Cir. 2004) (explaining, "[n]ames, of course, vary enormously in common ness, some names being shared by a great many users"); *United States v. Weiler*, 385 F.2d 63, 66 (3d Cir. 1967); *Gravatt v. United States*, 260 F.2d 498, 499 (10th Cir. 1958) ("It is common knowledge that in many instances men bear identical names."). The Seventh Circuit disagreed with the Fifth and Ninth Circuits which also require the defendant to challenge the evidence before they will reverse a §922(g) conviction due to insufficient evidence. *See Rodriguez v. United States*, 292 F.2d 709, 710 (5th Cir. 1961); *Pasterchik v. United States*, 400 F.2d 696, 701 (9th Cir. 1968).

18 U.S.C. §924(c)

United States v. Montano, 381 F.3d 1265 (11th Cir. 2004)

The 11th Circuit held that a defendant who trades drugs for guns does not violate 18 U.S.C. §924(c) because he does not actively use the guns. The Court agreed with similar holdings from the Sixth, Seventh, and D.C. Circuits. *United States v. Warwick*, 167 F.3d 965 (6th Cir. 1999); *United States v. Westmoreland*, 122 F.3d 431 (7th Cir. 1997); *United States v. Stewart*, 246 F.3d 728, 733 (D.C. Cir. 2001). The Court disagreed with the opposite conclusion reached by the Third, Fifth, and Eighth Circuits. *United States v. Sumler*, 294 F.3d 579, 583 (3d Cir. 2002); *United States v. Ulloa*, 94 F.3d 949 (5th Cir. 1996); *United States v. Cannon*, 88 F.3d 1495, 1500 (8th Cir. 1996).

18 U.S.C. §1956(h)

Whitfield v. United States, 5__ U.S. ___, 2005 U.S. LEXIS 625

The Supreme Court resolved a circuit conflict I mentioned in my last column when it unanimously held that conspiracy to commit money laundering, in violation of 18 U. S. C. §1956(h), does not require proof of an overt act in furtherance of the conspiracy.

Affirmative Defenses

Entrapment by Estoppel

United States v. Hardridge, 379 F.3d 1188 (10th Cir. 2004).

The Tenth Circuit agreed with the majority view and held that a licensed firearms dealer is not a government agent for purposes of entrapment by estoppel. *See United States v. Howell*, 37 F.3d 1197, 1206 (7th Cir. 1994); *United States v. Austin*, 915 F.2d 363, 367 (8th Cir. 1990); *United States v. Billue*, 994 F.2d 1562, 1569 (11th Cir. 1993). The Court disagreed with the Ninth Circuit's opposite holding. *United States v. Talmadge*, 829 F.2d 767, 770 (9th Cir. 1987).

Sentencing

U.S.S.G. §§2G2.2 & 2G2.4

United States v. Farrelly, 389 F.3d 649 (6th Cir. 2004).

The Sixth Circuit held that reciept of child pornography, which is not accompanied by an intent to traffic, must be sentenced under U.S.S.G. §2G2.4 (the possession guideline), rather than §2G2.2 (the trafficking and receipt guideline). The Court reasoned that all possession must first be preceded by either receipt or the more culpable act of production. Therefore, the Court found that failure to apply §2G2.4 to defendants who received child pornography as an end user and without intent to traffic in it would read §2G2.4 out of the Guidelines. §2G2.2 would apply to every child pornography defendant who did not produce the child pornography that he possessed. The Court agreed with the Eleventh Circuit's holdings in *United States v. Davidson*, 360 F.3d 1374 (11th Cir. 2004) and *United States v. Dodds*, 347 F.3d 893 (11th Cir. 2003). It disagreed with the Seventh Circuit's holding in *United States v. Ellison*, 113 F.3d 77, 78-79 (7th Cir. 1997) and dicta in *United States v. Sromalski*, 318 F.3d 748 (7th Cir. 2003). *See also United States v. Myers*, 335 F.3d 1040 (7th Cir. 2004). The Court noted that the actual reasoning

of *Sromalski* supported its decision.

Downward departures[1]

Delayed arrest in 8 U.S.C. §1326 cases

United States v. Barrera-Saucedo, 385 F.3d 533 (5th Cir. 2004)

The Fifth Circuit held "that it is permissible for a sentencing court to grant a downward departure to an illegal alien for all or part of time served in state custody from the time immigration authorities locate the defendant until he is taken into federal custody." The Court agreed with both the Second and Ninth Circuits on this point. However, it noted that the Second Circuit requires a bad faith or unreasonable delay in federal prosecution before allowing a departure. *United States v. Los Santos*, 283 F.3d 422, 428-29 (2d Cir. 2002). In contrast, the Ninth Circuit allows a departure regardless of the reason for the delay. *United States v. Sanchez-Rodriquez*, 163 F.3d 697, 710-13 (9th Cir. 1998) (en banc). The Fifth Circuit agreed with the Ninth Circuit on this point.

Departures based on minor nature of prior felony in illegal reentry cases

United States v. Lopez-Zamora, 3__ F.3d ___, 2004 U.S. App. LEXIS 27076

The Ninth Circuit held that the 2001 amendments to U.S.S.G. §2L1.2 did not preclude a downward departure based on the minor nature of an underlying prior felony conviction in exceptional circumstances. The Court disagreed with contrary holdings in the Second and Eleventh Circuits. *United States v. Stultz*, 356 F.3d 261, 268 (2d Cir. 2004); *United States v. Ortega*, 358 F.3d 1278, 1280 (11th Cir. 2003).

[1] This is no longer an accurate term after *United States v. Booker*, 2005 U.S. LEXIS 628 (Jan. 12, 2005), but I am continuing to use it for cases that were decided before *Booker*.

Halfway-house placement

Goldings v. Winn, 383 F.3d 17 (1st Cir. 2004); *Elwood v. Jeter*, 386 F.3d 842 (8th Cir. 2004); and *Richmond v Scibana*, 387 F.3d 602 (7th Cir. 2004).

In *Goldings*, the First Circuit addressed the Bureau of Prisons' new halfway house policy. The Court held"Under [18 U.S.C.] §3621(b), the BOP has discretionary authority to designate any available penal or correctional facility that meets minimum standards of health and habitability as the place of a prisoner's imprisonment, and to transfer a prisoner at any time to such a facility. A community correction center is a correctional facility and therefore may serve as a prisoner's place of imprisonment." In *Elwood*, the Eighth Circuit reached the same conclusion in a 2-1 decision.

In contrast, in *Richmond*, the Seventh Circuit rejected a challenge to the Bureau of Prisons' revision of its halfway-house placement policy by holding that the petitioner should have proceeded under the Administrative Procedures Act, instead of section 28 U.S.C. §2241 and he failed to exhaust his administrative remedies either way.

Appeals

Government appeals - standard of review

United States v. Dickerson, 381 F.3d 251 (3rd Cir. 2004)

The Third Circuit held that the government can meet the plain error standard when it failed to object to a sentence that was below a mandatory minimum. It agreed with the First, Second, Fourth, Sixth, Tenth, Eleventh, and D.C. Circuits. See *United States v. Rodriguez*, 938 F.2d 319 (1st Cir. 1991); *United States v. Gordon*, 291 F.3d 181 (2d Cir. 2002); *United States v. Perkins*, 108 F.3d 512 (4th Cir. 1997); *United States v. Barajas-Nunez*, 91 F.3d 826

(6th Cir. 1996); *United States v. Zeigler*, 19 F.3d 486 (10th Cir. 1994); *United States v. Clark*, 274 F.3d 1325, 1329 (11th Cir. 2001); *United States v. Edelin*, 996 F.2d 1238 (D.C. Cir. 1993). However, the Eighth and Fifth Circuits have held that such an error does not affect the government's substantial rights. *United States v. Posters 'N' Things, Ltd.*, 969 F.2d 652, 663 (8th Cir. 1992) (refusing to find plain error where the sentence imposed violated the statutory minimum); *United States v. Garcia-Pillado*, 898 F.2d 36, 39 (5th Cir. 1990) (same), *overruled on other grounds by United States v. Calverley*, 37 F.3d 160 (5th Cir. 1994) (clarifying the plain error standard of review). The Seventh Circuit does not appear to have ruled on this issue.

Habeas Procedure

Relation back of amended petition to original

Felix v. Mayle, 379 F.3d 612 (9th Cir. 2004)

The Ninth Circuit held that an amended habeas petition, which added a new claim, related back to the original petition because it arose from the same set of facts. The Court found that the set of facts was the petitioner's state trial and conviction, not every discrete instance within the trial. The Court's holding agreed with the Seventh Circuit's holding in *Ellzey v. United States*, 324 F.3d 521 (7th Cir. 2003). The Court disagreed with contrary holdings in the Third, Fourth, Eighth, Eleventh, and D.C. Circuits. *United States v. Duffus*, 174 F.3d 333, 337-38 (3rd Cir. 1999); *United States v. Pittman*, 209 F.3d 314, 317-18 (4th Cir. 2000); *United States v. Craycraft*, 167 F.3d 451, 457 (8th Cir. 1999); *Davenport v. United States*, 217 F.3d 1341, 1344-45 (11th Cir. 2000);*United States v. Hicks*, 283 F.3d 380, 388 (D.C. Cir. 2002). The Supreme Court granted certiorari in this case on January 7, 2005. *Mayle v. Felix*, 5__ U.S. ___, 2005 U.S. LEXIS 618 (Jan. 7, 2005).

Immigration Consequences

Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905 (9th Cir. 2004)

The Ninth Circuit held that state felony drug offenses are not aggravated felonies for immigration purposes unless the offense contains a trafficking element or is punishable as a felony under the federal laws enumerated in 18 U.S.C. § 924(c)(2). In so holding, the Court agreed with the Second and Third Circuits. *Aguirre v. INS*, 79 F.3d 315 (2d Cir. 1996); *Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002). It disagreed with the Fifth Circuit which has held that the state law definition is controlling. *United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2001).

Supreme Court Update
October 2004 Term

Compiled by: Johanna Christiansen
Staff Attorney

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

***Leocal v. Ashcroft,* 543 U.S. ___, ___ S. Ct. ___ (November 9, 2004) (Chief Justice Rehnquist).** The Court held that DUI offenses that do not have a *mens rea* component or require only a showing of negligence, are not crimes of violence. In doing so, the Court considered the meaning of the word "use" within the statute and determined "use" suggests a higher degree of intent than negligent or merely accidental conduct. The Court also stated that, "In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.' The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses." The Court specifically noted it was not considering whether reckless conduct qualifies as a crime of violence.

***Smith v. Texas*, 543 U.S. ___, ___ S. Ct. ___ (November 15, 2004) (Per Curiam; Justice Scalia dissenting).** Smith was convicted of capital murder and sentenced to death by a jury in Dallas County, Texas. At the punishment stage, the jury was give two instructions: first, to determine whether the killing was deliberate, and second, to determine whether the defendant posed a continuing danger to others. The jury was also given a supplemental nullification instruction on the effect of mitigating evidence. Relying on *Tennard v. Dretke*, *Penry v. Lynaugh,* and *Penry v. Johnson*, the Supreme Court reversed and held that the supplemental instruction did not provide the jury with an adequate vehicle for expressing a "reasoned moral response" to all of the evidence relevant to the defendant's culpability, rather than the mitigating evidence specifically addressing the two jury instructions of deliberateness and dangerousness.

***Kowalski v. Tesmer,* 543 U.S. ___, ___ S. Ct. ___ (December 13, 2004) (Chief Justice Rehnquist; Justice Thomas, concurring; Justice Ginsburg dissenting).** Michigan amended its constitution to allow for appeal from guilty pleas only by leave of court. Subsequently, judges refused indigent defendants appointed appellate counsel. Two lawyers and three indigent defendants filed suit in federal court alleging the practice denies indigent defendants their due process and equal protection rights. The Sixth Circuit found that abstention barred the indigent defendant's suit, but the attorneys had third-party standing to proceed. The Supreme Court reversed and held that the attorneys lacked third-party standing to assert the rights of indigent defendants because the attorneys claimed standing based on future attorney-client relationships, not actual relationships.

***Florida v. Nixon.* 543 U.S. ___, ___ S. Ct. ___ (December 13, 2004) (Justice Ginsburg).** Nixon was arrested and charged with capital murder. After his arrest, he confessed fully to the police. Defense counsel investigated the case and determined Nixon's guilt was not subject to dispute. Counsel initiated plea negotiations but the state refused to agree to any sentence other than death. Faced with indisputable evidence, defense counsel conceded Nixon's guilt at trial and focused primarily on the penalty stage of the proceedings, without Nixon's consent. At the sentencing stage, counsel presented significant mitigating evidence but the jury imposed the death penalty. Nixon claimed he received ineffective assistance of counsel but the Supreme Court disagreed and held that counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt in a capital trial does not automatically render ineffective assistance of counsel.

***Devenpeck v. Alford,* 543 U.S. ___, ___ S. Ct. ___ (December 13, 2004) (Justice Scalia).** Alford was pulled over for impersonating a police officer but subsequently arrested when Officer Devenpeck discovered Alford was secretly recording their conversation. The charge was eventually dismissed but Alford brought a federal suit claiming the arrest violated the Fourth Amendment. The Ninth Circuit held the arrest violated the Fourth Amendment because Devenpeck did not have probable cause to arrest Alford for recording their conversation. The Ninth Circuit rejected Devenpeck's claim that probable cause existed to arrest Alford for impersonating an officer because the offense was not "closely related" to the actual offense for which Alford was arrested. The Supreme Court reversed holding a warrantless arrest is reasonable if, given the facts known to the officer, there is probable cause to believe a crime has been or is being committed. The Court rejected the Ninth Circuit's additional factor - that the offense establishing probable cause be closely related to the offense the officer identifies at the time of the arrest.

***Whitfield v. United States*, 543 U.S. ___, ___ S. Ct. ___ (January 11, 2005) (Justice O'Connor).** The Supreme Court held that, in a prosecution for conspiracy to commit money laundering under 18 U.S.C. § 1956(h), the government is not required to prove beyond a reasonable doubt that at least one of the co-conspirators committed an overt act in furtherance of the conspiracy. In doing so, the Court compared § 1956(h) to the drug conspiracy statute, 21 U.S.C. § 846, which does not require proof an overt act. Section 1956(h) does not explicitly make an overt act an

element of the offense and, therefore, need not be proven beyond a reasonable doubt.

***United States v. Booker,* 543 U.S. ___, ___ S. Ct. ___ (January 12, 2005).** This case is summarized in great detail previously in this newsletter.

CASES AWAITING DECISION

***Roper v. Simmons,* No. 03-633, cert. granted January 26, 2004 (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).

***Johnson v. Gomez,* No. 03-636, cert. granted March 1, 2004 (argued November 2, 2004).** 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).

***Small v. United States,* No. 03-750, cert. granted March 29, 2004 (argued November 3, 2004).** This case addresses 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).

***Shepard v. United States*, No. 03-9168, cert. granted June 21, 2004 (argued November 8, 2004).** 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).

***Pasquantino v. United States,* No. 03-725, cert. granted April 5, 2004 (argued November 9, 2004).** The issue presented by this case is whether 18 U.S.C. § 1343 (wire fraud) authorizes a prosecution of a scheme to avoid payment of foreign taxes. The Defendants were convicted of executing a scheme to defraud Canada and the Province of Ontario of excise duties and tax revenues relating to the importation and sale of liquor. They argued their convictions and sentences cannot stand because application of the common law revenue rule precludes prosecution. The common law revenue rule states that Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other countries. The Fourth Circuit rejected the argument and held the common law revenue rule does not preclude prosecution.
Case Below: 336 F.3d 321 (4th Cir. 2003).

***Illinois v. Caballes,* No. 03-923, cert. granted April 5, 2004 (argued November 10, 2004).** 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. Using the *Terry v. Ohio* analysis, the Illinois Supreme Court held evidence

obtained during a traffic stop should have been suppressed because the canine sniff was performed without "specific and articulable facts" to support its use. The Court held that the canine sniff unjustifiably enlarged the scope of the routine traffic stop into a drug investigation.
Case Below: 802 N.E.2d 202 (Ill. 2003).

***Goughnour v. Payton,* No. 03-1039, cert. granted May 24, 2004 (argued November 10, 2004).** The Supreme Court previously 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).

***Ashcroft v. Raich*, No. 03-1454, cert. granted June 28, 2004 (argued November 29, 2004).** Whether the Controlled Substances Act, 21 U.S.C. 801 *et seq.,* exceeds Congress's power under the Commerce Clause as applied to the intrastate cultivation and possession of marijuana for purported personal "medicinal" use or to the distribution of marijuana
without charge for such use.
Case Below: 352 F.3d 1222 (9th Cir. 2003).

***Howell v. Mississippi,* No. 03-9560, cert. granted June 28, 2004 (argued November 29, 2004).** Whether Petitioner Howell's federal constitutional claim properly raised before the Mississippi Supreme Court for purposes of 28 U.S.C. § 1257. Section 1257 states that "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."
Case Below: 860 So. 2d 704 (Miss. 2003).

***Smith v. Massachusetts,* No. 03-8661, cert. granted June 14, 2004 (argued December 1, 2004).** 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)

***Wilkinson v. Dotson,* No. 03-287, cert. granted March 22, 2004 (argued December 6, 2004).** 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 invalidates the decision of the previous parole hearing.
Case Below: 329 F.3d 463 (6th Cir. 2003).

***Miller-El v. Dretke II,* No. 03-9659, cert. granted June 28, 2004 (argued December 6, 2004).** 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).

***Muehler v. Mena*, No. 03-1423, cert. granted June 14, 2004 (argued December 8, 2004).** 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)

***Rhines v. Weber*, No. 03-9046, cert. granted June 28, 2004 (argued January 12, 2005).** This case will resolve a split in the federal circuit courts of appeals as to whether the court can stay (or must dismiss) § 2254 habeas corpus petitions that include both exhausted and unexhausted claims. The questions presented for review are: (1) Can a federal court stay (rather than being compelled to dismiss) a § 2254 habeas corpus petition which includes exhausted and unexhausted claims, when the stay is necessary to permit a petitioner to exhaust claims in state court, without having the one year statute of limitations in the AEDPA bar the right to a federal petition, and (2) Whether the Eighth Circuit is correct that dismissal of a "mixed" § 2254 petition is mandated by *Rose v. Lundy*, or are the First, Second, Sixth, Seventh, and Ninth Circuits correct in following the separate concurrences of Justices Souter and Stevens in *Duncan v. Walker* that a stay of an otherwise timely filed federal petition is permissible under AEDPA.
Case Below: 346 F.3d 799 (8th Cir. 2003).

***Rompilla v. Beard*, No. 04-5462, cert. granted September 28, 2004 (argued January 18, 2005).** This case presents five issues for review. The first two issues relate to the application of *Simmons v. South Carolina*, 512 U.S. 154 (1994) and the last three issues relate to counsel's ineffective assistance during the sentencing phase of a capital trial. First, does *Simmons* require the trial court to give a life-without-parole instruction where the only alternative to a death sentence is life without parole; the jury asks three questions regarding parole during deliberations, the prosecution introduces evidence that the defendant is a violent recidivist who functions poorly outside of prison, and the prosecution argues the defendant has learned from prior convictions that he should kill anyone who can identify him. Second, is the state court decision denying the defendant's *Simmons* claim contrary to and/or an unreasonable application of clearly established Supreme Court law where the state court held the defendant's history of violent convictions is irrelevant to the jury's assessment of future dangerousness. Third, whether counsel provided ineffective assistance where counsel did not review records of the defendant's prior convictions that provided mitigating evidence regarding the defendant's traumatic childhood and mental health impairments. Fourth, whether counsel was ineffective for conducting a limited background mitigation investigation by only speaking to a few family members. Finally, whether counsel's ineffective assistance warranted federal habeas relief.
Case Below: 355 F.3d 233 (3d Cir 2004).

***Johnson v. United States*, No. 03-9685, cert. granted September 28, 2004 (argued January 18, 2005).** When a federal court bases an enhanced sentenced on a vacated state conviction, whether the vacatur of the state conviction is a "fact" supporting a prisoner's 28 U.S.C. § 2255 claim requiring reduction of the prisoner's sentence.
Case Below: 340 F.3d 1219 (11th Cir. 2003).

CASES AWAITING ARGUMENT

***Pace v. DiGuglielmo*, No. 03-9627, cert. granted September 28, 2004 (to be argued February 28, 2005).** The Supreme Court will consider in this case the meaning of "properly filed" under 28 U.S.C. § 2244(d)(2) in light

of the Court's previous rulings in *Artuz v. Bennett*, 531 U.S. 4 (2000) and *Carey v. Saffold*, 536 U.S. 214 (2002). Case Below: 2003 U.S. App. LEXIS 15209 (3d Cir. 2003).

***Deck v. Missouri*, No. 04-5293, cert. granted October 18, 2004 (to be argued March 1, 2005)**. Whether the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution are violated by forcing a capital defendant to proceed through the penalty phase of trial while shacked and handcuffed to a belly chain in full view of the jury. If so, whether the state bears the burden to prove the error was harmless or whether the defendant must show he was not prejudiced by the error.
Case Below: 136 S.W.3d 481 (Mo. 2004).

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