The BACK BENCHER

Central District of Illinois Federal Defenders

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DEFENDER'S MESSAGE

Since Justice O'Connor announced her retirement from the Supreme Court, I have noticed that there has been a great deal of concern and "hand-wringing" among criminal defense lawyers (and others) over what direction her replacement may move the Court. This concern is understandable, given that for the first time in over eleven years, the composition of the Supreme Court is about to change. In part, these concerns are justified, as many of the Court's most important decisions were decided by only a single vote majority. However, history has demonstrated that faith in our Supreme Court is also warranted.

In the criminal law context, a few recent examples of important 5-4 decisions include *Roper v. Simmons*, *Atkins v. Virginia*, *Apprendi, Almendarez-Torres, Blakely,* and *Booker*. A different vote by a single justice on either part of the *Booker* opinion would have completely altered the dramatic changes wrought by that decision. Instead of an advisory Guideline regime, we could instead be facing *Blakelyized* Guidelines or a return to the old Draconian mandatory Guideline system. Thus, there is no doubt that the person who ultimately replaces Justice O'Connor (whether it is John G. Roberts or someone else) will shift the balance of the Court and impact its direction.

What is not so predictable, however, is in which direction a new Justice will push the Court. History has demonstrated time and again that once on the Supreme Court, some Justices become unpredictable. President Eisenhower appointed Chief Justice Earl Warren and Justice William Brennan, who set about expanding individual rights, freedom of speech, and the right to privacy. Indeed, as a young lawyer, I personally witnessed "Impeach Earl Warren" billboards in Southern Illinois (but not in Christian County) sponsored by the ultra-conservative John Birch Society. Referring to his Supreme Court appointments, Eisenhower called his picks "the biggest damn fool mistake I ever made."

Likewise, President Nixon's "law-and-order" choice, Justice Harry Blackman, authored *Roe v. Wade* and opposed the death penalty. Even on the current court, some of the Justices have not turned out as the appointing Presidents may have predicted. Indeed, John Paul Stevens, perhaps the Court's most liberal member, was a Ford appointee. Likewise, Justice Souter, who is a pivotal member of the Court's liberal voting block, was a George H.W. Bush appointee and the bane of many conservatives. Finally, Justice O'Connor is viewed by many as a moderate who gave the more liberal voting block majorities in key decisions, notwithstanding that she was a Reagan appointee.

Even when a Justice adheres to his or her prior legal philosophy upon elevation to the Supreme Court, how that philosophy will impact a vote in a particular case is also unpredictable. One of the most dramatic examples of this phenomenon are the votes of Justices Scalia and Thomas in *Apprendi* and its progeny. These two Justices, who unquestionably have the most solidly conservative credentials on the Court, joined with the most liberal Justices (Stevens, Souter, and Ginsberg) in *Apprendi, Blakely,* and *Booker*. Although the Justices did not deviate from their originalist philosophy which was the impetus for their votes in these cases, who could have predicted that this philosophy would be instrumental in softening the harshness of the Draconian Guidelines?

History therefore shows that with the exception of nominees who are on the extreme side of the

spectrum, have written extensively, and whose views are widely known, no amount of digging, probing, and questioning by the President or the Senate confirmation process will guarantee that any one group ends up with the Justice who will advance their interests once on the Court. Nor should it. As Alexander Hamilton noted in *Federalist* 78, providing our Justices with lifetime tenure "during good behavior" is the "best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws." We want our Justices, who have an awesome responsibility, to be free of political bias and ideology and decide cases with open minds and upon the facts, good judgment, and reason. So long as a Justice of any party approaches the cases before him or her in this manner, we, as criminal defense lawyers, will be able to use our creative and persuasive skills to move the law in a positive direction.

On the whole and over time, the Court has fulfilled its function nobly, with our judicial system in the end working well. For every *Dred Scott*, *Mistretta,* and *Bush v. Gore*, there is a *Brown v. Board of Education*, *Blakely,* and *Booker*. Regardless of what the composition of the Court will be next term, or the term after that, we, as defense lawyers, will have the obligation and opportunity to change the criminal justice system for society's and our clients' interests, ensuring that there is in fact justice for all in the grand tradition and history of our beloved Country.

Sincerely yours,

Richard H. Parsons
Federal Public Defender
Central District of Illinois

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CHURCHILLIANA

"We shall not fail, and then someday when children ask, 'What did you do to win this inheritance for us, and to make our name so respected among men?', one will say: 'I was a fighter pilot'; another will say: 'I was in the Submarine Service'; another: 'I marched with the Eighth Army'; a fourth will say: 'None of you could have lived without the convoys of the Merchant Seaman'; and you in your turn will say, with equal pride and with equal right: 'We cut the coal.'"

--*Coal Owners and Miners Conference, Central Hall, Westminster, October 31, 1942*

[The coal industry was the first industry Churchill addressed as an industry during the war, declaring, "War is made with steel, and steel is made with coal." He knew the miners may have felt left out of the national war effort, so he reminded them that their work formed the very spine of that effort. His words remind us to honor the contributions of each team member.]

Dictum Du Jour

"Working crosswords can help make you into a better, more informed, fairer, and more tolerant person."

--Marc Romano, *Crossworld: One Man's Journey into America's Crossword Obsession*

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"What? Could perhaps, in spite of all 'modern ideas' and prejudices of democratic taste, the victory of optimism, the achieved predominance of reason, practical and theoretical utilitarianism, like democracy itself, its contemporary--be a symptom of failing strength, of approaching old age, of physiological exhaustion? . . . what is the meaning of--morality? . . . all things move in double cycle: everything which we now call culture, education, civilization will at some stage have to appear before the infallible judge, Dionysus."

--Fredrich Nietzsche, *The Birth of Tragedy*

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"Some people think they are concentrating when they're merely worrying."

--Bobby Jones, Greatest Golfer Ever

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"The truth is that no one ever believes for a minute--no matter what danger you're in--that you yourself are going to be killed. The bomb is always going to hit the other person."

--Agatha Christie

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"The good and the bad of sports are exquisitely balanced even at the best of times. Victory and defeat induce respectively a joy and despair way beyond the run of normal human experience . . . A sports fan who has seen a sure victory slip away in the bottom of the ninth, or the work of a whole season obliterated by a referee's call in overtime, is disconsolate beyond the power of description."

--Wilfrid Sheen, "Why Sports Matter"

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"A trial without a jury is like an operation without an anesthetic."

~ Rumpole via John Mortimer

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"We schoolmasters [judges/lawyers?] must temper discretion with deceit."

~ *Decline and Fall*, Evelyn Waugh

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"No false move should ever be made to extricate yourself out of a difficulty, or to gain an advantage."

~ *The Morals of Chess*, Benjamin Franklin

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"In most cases, our lives are much like a mirror. The image or picture we see of others is really a reflection of us."

~ Jim Davidson (motivational consultant, speaker, and radio producer)

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"Gilding the lily, the officer testified that he was additionally suspicious because when he drove by Broomfield in his squad car before turning around and getting out and accosting him he noticed that Broomfield was 'staring straight ahead.' Had Broomfield instead glanced around him, the officer would doubtless have testified that Broomfield seemed nervous or, the preferred term because of its vagueness, 'furtive.' Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you. Such subjective, promiscuous appeals to an ineffable intuition should not be credited."

~ *United States v. Broomfield*, No. 04-4180, (7th Cir. July 29, 2005).

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"Sgt. McDonald testified that, as he approached Mr. Muriel's car, his suspicions were aroused by certain features, such as the Illinois license plates, three police support decals affixed to the windows, a teddy bear on the dashboard and an American flag on the front of the vehicle. In his experience, Sgt. McDonald testified, such items are used to divert attention from illicit activity."

~ *United States v. Muriel*, Case No. 04-3968 (7th Cir. Aug. 11, 2005).

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"Bad timing often results in one being in the wrong place at the wrong time. Levar Wade will certainly attest to that, for it was being in the wrong place at the wrong time that resulted in his ticket to a federal prison. Because bad timing is the true cause of his predicament, not an illegal detention or a nonconsensual search, we reject his appeal and affirm the judgment of the district court."

~ *United States v. Wade*, 400 F.3d 1019 (7th Cir. 2005).

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"Tempers have flared on both sides; [the judge] tells us (in his response to the petition) that he has said some things that he regrets, and the same should hold true for the United States Attorney, whose petition in this court levels some overwrought charges. We think it likely that everyone has acted from good intentions, but that a strong belief in one's own position has led to the unsound inference that anyone who disagrees must be acting in bad faith. A swift end to this contretemps will allow calmer reflection and, we trust, a restoration of the cordial and mutually respectful relations between bench and prosecutor that are vital to the administration of justice."

~ *In re United States*, 98 F.3d 615 (7th Cir. 2005).

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"A courtroom in Chicago, one would think, is an unlikely place for considering a case involving seven Nigerian citizens suing an eighth Nigerian for acts committed in Nigeria. It sounds like the sort of fare that would be heard in a courtroom on the African continent. But this case ended up in Chicago, and that leads us to consider the claims of seven Nigerian citizens against a Nigerian general over alleged torture and murder in Nigeria. The path the plaintiffs are pursuing is, as we shall see, quite thorny."

~ *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005).

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"Of course it may have been a mistake to ask for two rather than three levels. But a waiver can rest on a mistake. Suppose you ordered a hamburger, and it was served to you, and it was smaller than you expected and you decided you'd made a mistake ordering only one. You couldn't argue with a straight face that you hadn't intended to order only one hamburger, that it was an oversight on your part. The plea agreement in this case states among other things that the defendant is waiving his right to trial by jury. Suppose he waived it because his lawyer told him that in the Northern District of Illinois, owing to a shortage of jurors, baboons from Brookfield Zoo are regularly empanelled to fill out criminal juries. The waiver would be based on a profoundly mistaken premise, and the defendant would be entitled to relief, but it would not be because he hadn't waived his right to trial by jury; it would be because the conviction based on the plea agreement was invalidated by the ineffective assistance rendered him by his lawyer, . . . provided he could show that if correctly advised he would not have entered the plea."

~ *United States v. Cook,* 406 F.3d 485 (7th Cir. 2005).

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"As anyone who plays it knows, golf can be a very addicting game. And when real golfers want to tee-it-up, they head for their favorite course, which might be a gem like Brown Deer in Milwaukee, a public course that nevertheless plays host to an annual PGA Tour event every July. What most golfers do not do when they want to play 18 is head for a tavern. Also, most people are quite familiar with Tiger Woods. But who knows Jeff Harlow of Florissant, Missouri? This case is about 'golfers' who prefer taverns to fairways and aspire to be more like Harlow than Tiger. Our case concerns video golf."

~ Incredible Technologies, Inc. v. Virtual Technologies, Inc., 400 F.3d 1007 (7th Cir. 2005).

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"Rodriguez, an Illinois state prisoner, appeals from the grant of summary judgment to prison officials whom he had sued under 42 U.S.C. § 1983, claiming that they had inflicted cruel and unusual punishment on him by denying him showers and withholding meals from him. The prison has a rule, the validity of which is not challenged, that when they are outside their cells prisoners must store certain of their belongings in a storage box in the cell; the purpose is to enhance fire safety, facilitate searches of the cell, and in other ways as well promote safety and security. Unless a prisoner complies with the rule, he is forbidden to leave his cell, which means he can't take a shower, or even have a meal, because for the class of prisoners to which Rodriguez belongs meals are served only in the prison cafeteria and not in the inmates' cells. Rodriguez repeatedly refused to comply with the rule and as a result in an 18-month period missed 75 showers and between 300 and 350 meals, with various consequences that included a rash, fatigue, and a loss of 90 pounds. (Not that he needed those 90 pounds, since, before he started skipping meals, he weighed between 250 and 300 pounds and he is only 5 feet 8 inches tall.)"

~ *Rodriguez v. Briley,* 403 F.3d 952 (7th Cir. 2005).

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"To prove their worth prior to the annual college draft, NFL teams test aspiring professional football players' ability to run, catch, and throw. But that's not all. In addition to the physical tests, a draft prospect also takes up to 15 personality and knowledge tests, answering questions such as: 'Assume the first two statements are true. The boy plays football. All football players wear helmets. The boy wears a helmet. Is the final statement: True? False? Not certain.' They are also asked questions like 'What is the ninth month of the year?' This case involves a battery of nonphysical tests similar to some of those given by NFL teams, though the employees here applied for less glamorous, and far less well-paying, positions. Steven, Michael, and Christopher Karraker are brothers who worked for Rent-A-Center (RAC), a chain of stores that offer appliances, furniture, and other household goods on a rent-to-own basis."

~ *Karraker v. Rent-A-Center, Inc.*,
411 F.3d 831 (7th Cir. 2005).

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"Suppose the sealing of the tapes had been delayed for months, the explanation offered for the delay was that the assistant U.S. attorney had accidentally dropped the tapes in a birdbath and had spent the intervening months trying to dry them out with a defective hair dryer, the defendant was the FBI's Public Enemy Number One, and the tapes

were the only evidence of his guilt. The explanation would be unsatisfactory."

~ *United States v. Coney,* 407 F.3d 871 (7th Cir. 2005).

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"Theodore Mantas and Helmos Food Product, Inc. petitioned the district court for a writ of error coram nobis, challenging a $250,000 fine imposed on Helmos Food in a criminal proceeding. They appeal from the denial of their petition. In 2001, we heard the direct appeal of Mantas and Helmos Food from their convictions and sentences for violations of 21 U.S.C. §§ 458(a)(3), 461(a), and 676(a)--improperly storing adulterated poultry and meat products held for sale. For the facts involved in those charges, we refer readers with strong stomachs to our decision in *United States v. Mantas and Helmos Food Product, Inc.*, 274 F.3d 1127 (2001)."

~ *United States v. Helmos Food Product, Inc.,* 407 F.3d 848 (7th Cir. 2005).

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"This case, which began as a minor copyright infringement dispute, has mushroomed into a protracted fight over, what else, attorney fees."

~ *Woodhaven Homes & Realty, Inc. v. Hotz,* 396 F.3d 822 (7th Cir. 2005).

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"On the evening of May 29, 2003, Hayden was smoking crack with three other folks at a trailer park home on Chain of Rocks Road in Granite City, Illinois. Murphy, Sr., who had sold drugs to Hayden several years earlier, showed up later that night. He was friendly at first, but he soon called Hayden a 'snitch bitch hoe' [FN1] and hit her in the head with the back of his hand." Footnote 1 explains, "The trial transcript quotes Ms. Hayden as saying Murphy called her a snitch bitch 'hoe.' A 'hoe,' of course, is a tool used for weeding and gardening. We think the court reporter, unfamiliar with rap music (perhaps thankfully so), misunderstood Hayden's response. We have taken the liberty of changing 'hoe' to 'ho,' a staple of rap music vernacular as, for example, when Ludacris raps 'You doin' ho activities with ho tendencies.'"

~ *United States v. Murphy*, 406 F.3d 857 (7th Cir. 2005).

CA7 Case Digest

By: Jonathan Hawley
Appellate Division Chief

APPELLATE PROCEDURE

United States v. Baretz, 411 F.3d 867 (7th Cir. 2005; No. 03-3332). The Court of Appeals held that the defendant's failure to object to the use of the wrong version of the Guidelines constituted a forfeiture, rather than a waiver. The probation officer used the Guidelines in effect at the time of the defendant's offense conduct, rather than those in effect at the time of sentencing, falsely believing that the older version of the Guidelines were more beneficial to the defendant. On appeal, the defendant argued that he should have been sentenced under the more beneficial version of the Guidelines, but the government argued waiver. The Court of Appeals noted that the record did not support a conclusion that the defendant knew of his right to be sentenced under the better version of the guidelines. Indeed, the defendant garnered no advantage by accepting the use of the bad version; the only apparent explanation for its application is that the defendant and his lawyer did not realize that using the expired version was incorrect. Because the record did not evidence a knowing abandonment, the court decided to review the district court's use of the wrong Guideline version under the plain error standard. The court in fact found plain error and ordered that the defendant be resentenced.

United States v. Johnson, ___ F.3d ___ (7th Cir. 2005; No. 4322). Upon consideration of an argument that the defendant's *Miranda* rights were violated, the Court of Appeals considered the scope of the waiver rule set forth in Federal Rule of Criminal Procedure 12(e). Specifically, Rule 12(e) requires defendants to seek suppression of evidence before trial or by another deadline set by the district court, and the rule says that a failure to do so "waives" the issue. Because the defendant raised his *Miranda* issue for the first time on appeal, the government argued that the issue was unreviewable. The court disagreed, however, finding that in context the word "waiver" in Rule 12(e) does not carry the strict implication of an "intentional relinquishment of a known right" that precludes all appellate review. Rule 12(e) itself states that the court may grant relief from the waiver for good cause shown. This makes it sound more like what the court would normally call forfeiture. Accordingly, Rule 12(e) does not preclude all appellate review for issues not raised in the district court, so long as the defendant can establish some good cause for failing to do so in the district court.

United States v. Lockwood, ___ F.3d ___ (7th Cir. 2005; No. 2511). The Court of Appeals dismissed this appeal due to the defendant's appeal waiver, even though the district court gave the defendant "special leave" to appeal a specific guideline issue. At sentencing, the district court accepted the defendant's plea agreement which contained a sentencing appeal waiver, but allowed the defendant to nevertheless appeal one guideline issue. On appeal, the court held that Rule 11 does not authorize this form of departure from the agreement once accepted by the court. If the judge did not want to accept the agreement or any portion thereof, he should have rejected the whole thing, and the government and Lockwood would have been back at square one. A judge cannot, however, simply reject one portion of the agreement while enforcing the remainder.

United States v. Jaimes-Jaimes, 406 F.3d 845 (7th Cir. 2005; No. 03-2871). In prosecution for illegal re-entry, the Court of Appeals held that the defendant merely forfeited his challenge to a 16-level increase for having been deported after conviction for an aggravated felony which was a "crime of violence." In the defendant's plea agreement, he agreed that the 16-level enhancement was appropriate in his case because his prior conviction was properly considered a "crime of violence." On appeal, the defendant challenged the enhancement, arguing that his prior conviction clearly did not constitute a crime of violence. The government argued waiver because defense counsel specifically told the court at sentencing that the defendant had no objections to the guideline range. The Court of Appeals noted that although counsel's representations obviously are significant, a lawyer's statement at sentencing that the defendant does not object to anything in the presentence report does not inevitably constitute a waiver of the defendant's right to challenge on appeal any guideline calculation included in that report. Although the court had in the past found waiver in circumstances where defense counsel made a representation similar to the defendant's here, it did not read the cases as establishing an inflexible rule that every objection not raised at a sentencing hearing is waived. There may, of course, be sound strategic reasons why a criminal defendant will elect to pursue one sentencing argument while also choosing to forego another, but in this case, the court could conceive of no strategic reason for not objecting to the increase, and the government offered no reason at all either. Moreover, the court had previously suggested that an argument should be deemed forfeited rather than waived if finding a waiver from an ambiguous record would compel the conclusion that counsel necessarily would have been deficient to advise the defendant not to object. Such was the case here, since the only possibility for counsel's failure to object was deficiency in electing not to challenge it. Defense counsel also was not alone in his oversight, for no one involved with the defendant's sentencing--including the Assistant United States Attorney who now so vigorously argued waiver, the probation officer, or even the district judge--appeared to have recognized that the defendant's prior offense might not be a "crime of violence." Accordingly, the court found that a forfeiture occurred. Having done so, the court concluded that the 16-level enhancement was improper, for U.S.S.G. section 2L1.2 defines "crimes of violence" as specific, listed offenses or those which have as an element the use, attempted use, or threatened use of physical force against the person of another. Although there was no question that the defendant's prior offense of discharging a firearm into a building posed an immediate and inherent risk to the safety of another, 2L1.2 does not include this language in its definition of "crime of violence" (although the career offender guideline does). The court refused to read the career offender definition into 2L1.2's definition. Finally, under the plain error standard, the court exercised its discretion to reverse, concluding that it would be unjust to place the entire burden for the oversight concerning this question on the defendant by permitting him to serve an excessive prison sentence.

United States v. Cook, 406 F.3d 485 (7th Cir. 2005; No. 04-1923). In prosecution for distributing ecstacy, the Court of Appeals held that the defendant had waived any objection to a 2-level, rather than a 3-level, reduction for acceptance of responsibility. In the plea agreement, the defendant agreed to a two-level reduction. However, according to the Guidelines, he was actually entitled to three. On appeal, the court held that the agreement for two levels constituted a waiver of any argument that he should have received a 3-level reduction. In doing so, the court explained the concepts of forfeiture and waiver as follows: "A forfeiture is basically an oversight, a waiver is a deliberate decision not to present a ground for relief that might be available in the law. . . [A] waiver can rest on a mistake. Suppose you ordered a hamburger, and it was served to you, and it was smaller than you expected and you decided you'd made a mistake in ordering only one. You couldn't argue with a straight face that you hadn't intended to order only one hamburger, that it was an oversight on your part. The plea agreement in this case states among other things that the defendant is waiving his right to trial by jury. Suppose he waived it because his lawyer told him that in the Northern District of Illinois, owing to a shortage of jurors, baboons from Brookfield Zoo are regularly empaneled to fill out criminal juries. The waiver would be based on a profoundly mistaken premise, and the defendant would be entitled to relief, but it would not be because he hadn't waived his right to trial by jury; it would be because the conviction based on the plea agreement was invalidated by the ineffective assistance rendered him by his lawyer, provided he could show that if correctly advised he would not have entered the plea. If the defendant's lawyer had no tactical reason

to give up the third level, the defendant might be able to demonstrate ineffective assistance of counsel." However, without asserting such an argument, the defendant's waiver based on mistaken advice is still a waiver.

United States v. Lloyd, 398 F.3d 978 (7th Cir. 2005; No. 03-3334). In this appeal, the Court of Appeals outlined the procedure which should be followed when the government believes the Court of Appeals lacks jurisdiction to hear an appeal. The petitioner filed a motion in the district court seeking a reduction in his sentence. The government then contended that the petitioner was in fact launching a second collateral attack without permission from the Court of Appeals. The district court, however, did not rule on this question and denied the motion outright. On appeal, when the time came for the government to file its brief, it filed a motion to dismiss the appeal on the grounds it had raised in the district court. The Court of Appeals criticized this strategy, noting that it was one which was all too common and previously disapproved by the court. The strategy, according to the court, is this: instead of filing a brief on the due date, the appellee files something else, such as a motion to dismiss. The goal and often the effect is to obtain a self-help extension of time even though the court would be unlikely to grant an extension if one were requested openly. The court stated that every brief must contain a jurisdictional section, where any problems with jurisdiction should be noted. Therefore, if events justify a last-minute motion concerning jurisdiction, venue, sanctions, or any other subject, then that motion may *accompany* the brief; a motion is not a substitute for a brief. Briefs must be filed when due, and jurisdictional objections should be made at the outset of the appeal, as Circuit Rule 3(c)(1) contemplates.

BOOKER

United States v. Cieslowski, 410 F.3d 353 (7th Cir. 2005; No. 03-2890). In this case, the Court of Appeals rejected a *Booker* challenge to a sentence imposed pursuant to a plea entered pursuant to 11(c)(1)(C). The court stated that nothing in *Booker* undermines the validity of sentences imposed under the Rule. *Booker* holds only that the sentencing court is no longer bound to impose a sentence mandated by the sentencing guidelines; it says nothing that would restrict the defendant's ability to agree with the prosecutor on a particular lawful sentence in a plea agreement under Rule 11(c)(1)(C). In fact, *Booker* has the effect of restoring what is now Rule 11(c)(1)(C) to the status originally occupied in 1979, when it was amended to clarify the difference between subpart (B) agreements (recommended sentences) and subpart (C) agreements (specific sentences). This took place before the advent of the Sentencing Reform Act of 1984, at a time when district judges had complete discretion to sentence anywhere between zero (or a statutory minimum) and the statutory maximum. With the important qualification that the Guidelines now exist to assist the district court in making that decision, that is once again the context in which Rule 11(c)(1)(C) is operating. Under Rule 11, the court retains absolute discretion whether to accept a plea agreement," and the agreed sentence obviously plays a role in the court's consideration. A sentence imposed under a Rule 11(c)(1)(C) plea arises directly from the agreement itself, not from the Guidelines, even though the court can and should consult the Guidelines in deciding whether to accept the plea. As *Booker* is concerned with sentences arising under the Guidelines, it is inapplicable to the Rule 11(c)(1)(C) context.

United States v. Mykytiuk, ___ F.3d ___ (7th Cir. 2005; No. 04-1196). Upon consideration of whether a sentence was "reasonable" after a *Paladino* remand where the district court indicated it would impose the same sentence under the advisory Guidelines as it had when they were mandatory, the Court of Appeals outlined the principles it will use when evaluating the reasonableness of a sentence. The court noted that a sentence within the guideline range is not *per se* reasonable. However, a clean slate that ignores the proper Guidelines range would be inconsistent with the remedial opinion in *Booker.* The Guidelines remain an essential tool in creating a fair and uniform sentencing regime across the country. The best way to express the new balance is to acknowledge that any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness. A defendant can rebut this presumption only be demonstrating that his or her sentence is unreasonable when measured against the factors set forth in section 3553(a). While the court noted that it fully expected that it will be a rare Guideline sentence that is unreasonable, the Supreme Court's charge that reviewing courts measure each defendant's sentence against the factors set forth in section 3553(a) requires the door to be left open for this possibility.

United States v. Dean, 414 F.3d 725 (7th Cir. 2005; No. 04-3172). In this case, the Seventh Circuit addressed how district court's should proceed with sentencing post-*Booker*. The court stated that the first step in sentencing is determining the correct guideline range, much as courts did prior to *Booker*. Next, the court must consider the factors set forth at 3553(a). However, the judge need not write a "comprehensive essay applying the full panoply of penological theories and considerations." Rather, the judge can discuss the application of the statutory factors to the defendant not in checklist fashion but instead in the form of an adequate statement of the judge's reasons, consistent with section 3553(a), for thinking the sentence that he has selected is indeed appropriate for the particular defendant. Judges need not rehearse on the record all of the 3553(a) factors. It is enough to calculate the range

accurately and explain why (if the sentence lies outside it) this defendant deserves more or less. The farther the judge's sentence departs from the guidelines, however, the more compelling the justification based on factors in section 3553(a) that the judge must offer in order to enable the court of appeals to assess the reasonableness of the sentence imposed. Moreover, explicit fact-finding is required if contested facts are material to the judge's sentencing decision. On the other hand, if the sentencing judge exercises her discretion to impose a sentence within a properly calculated Guideline range, the court will infer that the judge has considered all the factors for a fair sentence set forth in the Guidelines. When the judge exercises her discretion to impose a sentence within the Guideline range and states for the record that she is doing so, little explanation is required.

United States v. Jamison, ___ F.3d ___ (7th Cir. 2005; No. 05-1045). The Court of Appeals held that application of the *Booker* decision does not violate *ex post facto* and due process principles. The defendant sought to avoid application of the advisory Guidelines as set forth in *Booker*, and rather take advantage of the holding in *Blakely* which required a finding that any enhancements at sentencing be found by a jury beyond a reasonable doubt or admitted by the defendant. The defendant argued that application of the advisory guidelines pursuant to *Booker* violated the due process clause and *ex post facto* principles. The Seventh Circuit rejected this challenge, noting that the defendant had fair warning that his offense carried a potential punishment up to the statutory maximum, as spelled out in the U.S. Code. Thus, any sentence below the statutory maximum does not run afoul of the due process clause or *ex post facto* principles.

United States v. Duncan, ___ F.3d ___ (7th Cir. 2005; No. 04-1916). In this case, the Court of Appeals held that the Supreme Court's decision in *Blakely* and *Booker* have no application to mandatory minimums. Unless the Supreme Court alters its holding in *Harris*, the Courts of Appeal have no authority to apply the *Apprendi* analysis to mandatory minimums.

United States v. LaShay, ___ F.3d ___ (7th Cir. 2005; No. 04-3378). The Court of Appeals remanded for resentencing where the judge failed to calculate the appropriate Guideline range. After *Blakely* but before the Supreme Court's decision in *Booker*, the district court concluded that the Guidelines were merely advisory and consequently did not deem it necessary to calculate the appropriate Guideline range. The Court of Appeals in reversing, noted that *Booker* still requires a correct calculation of the sentencing guideline range, even though that range is advisory.

United States v. Askew, 403 F.3d 496 (7th Cir. 2005; No. 04-2574). After a *Paladino* remand, the Court of Appeals interpreted the district court's order which stated, "I am unable at this time to say that I would have imposed the same sentence if I had known the Sentencing Guidelines were merely advisory. I therefore desire to resentence the defendant." The government argued that this statement was insufficient to establish plain error because the judge did not indicate that she *would* give the defendant a different sentence. The Court of Appeals, however, concluded that the fact the judge stated she desired to resentence the defendant was enough to warrant a full remand.

United States v. Ngo, 406 F.3d 839 (7th Cir. 2005; No. 04-2662). Upon challenge of a career offender enhancement, the Court of Appeals held that certain judicial fact-finding inquiries concerning criminal history fall outside of the *Almendarez-Torres* exception to *Apprendi* and *Booker*. The defendant argued that the district court's determination that he was a career offender entailed finding facts beyond the "fact of a prior conviction," namely that his prior convictions were not consolidated for sentencing or part of a common scheme or plan. The court noted that it had previously rejected similar arguments, concluding that there was no precedent for "parsing out the recidivism inquiry." Recently, however, the Supreme Court suggested that it may indeed be appropriate to "parse out" the recidivism inquiry, at least under the ACCA. In *Shephard*, the question before the Court was whether a sentencing court can look to police reports or complaint applications to determine whether a prior guilty plea necessarily admitted a "generic" burglary (burglary of a building or structure) for the purpose of sentencing under the ACCA. The court declined to extend the scope of evidence that a judge already consider under *Taylor* and held that a sentencing court is limited to examining the statue of conviction, charging document, plea agreement, plea transcript, and "any explicit factual finding by the trial judge to which the defendant assented." Although the *Almendarez-Torres* exception for prior convictions still stands after *Shephard*, the Court signaled that the purview of the exception is quite narrow. A plurality of the Court concluded that the disputed fact in *Shephard*--whether a conviction was for "generic" burglary--was "too removed from the conclusive significance of a prior judicial record . . . to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute. The court concluded that this language suggests that the recidivism exception exempts only those findings traceable to a prior judicial record of "conclusive significance." Otherwise, Sixth Amendment concerns arise. Turning to the facts in the present case, the court concluded that the district court's finding that the defendant's prior convictions were not consolidated at sentencing was permissible because it resorted only to

information with "conclusive significance" concerning the question--the law requires a formal order of consolidation or a showing on the record at the sentencing hearing. For the determination of the offenses not being part of a common scheme or plan, however, the court concluded that this factual determination ran afoul of the Sixth Amendment. The court resorted to information concerning the underlying offenses which was not tied to a prior judicial record of "conclusive significance." Of course, with the remedial portion of *Booker* making the guidelines advisory, the court noted that this issue has no significance in the future for guideline sentencing issues. However, with respect to statutory enhancements, the narrowing of the scope of the *Almendarez-Torres* prior conviction exception will apply.

United States v. Goldberg, 406 F.3d 891 (7th Cir. 2005; No. 03-3955). The Court of Appeals denied the defendant's challenge to a vulnerable victim enhancement but ordered a *Paladino* remand. In doing so, the court indicated that the defendant's asking for a full remand was a risky procedure, for the defendant could have received a higher sentence had his request been granted. The court stated: "It is worth pointing out that the defendant may be better off with [the *Paladino*] remand than with his preferred relief, which is an order resentencing him. Any resentencing would be conducted under the new, post-*Booker* regime, in which the guidelines are merely advisory, and so he'd be exposed to the risk of a higher sentence. Suppose we agreed with him that the judge hadn't given adequate notice of intent to impose a vulnerable victim enhancement. Suppose further that if the case were remanded for resentencing, the judge, after giving the defendant due notice, again imposed the vulnerable victim enhancement. The judge might then decide that the original sentence was too light a punishment for the defendant's crime. Although the original sentence was at the midpoint of the guideline range, the range is now merely advisory. Thus, the judge might want to give the defendant a longer sentence, and if the departure were a reasonable one we would have to affirm." The court also noted that such a longer sentence would not be prohibited by doctrines regarding vindictiveness. Specifically, *Booker* brought about a fundamental change in the sentencing regime which precludes an inference that the judge's imposition of a higher sentence was out of vindictiveness, rather than application of the new authority. Given these considerations, the court concluded that the risk that a judge might increase the sentence is not significant in a *Paladino* remand. "Such a remand asks the judge whether he would have given the defendant a shorter sentence had he realized the guidelines are merely advisory. If so, this would show that his treating the guidelines as mandatory had been a plain error, and so we would vacate for resentencing. Since our basis for doing this would be the judge's having told us that he wanted to shorten the defendant's sentence, it would be an unusual case, to say the least, in which the judge would impose a heavier rather than a lighter sentence; presumably it would be a case in which damaging new information had come to light since the *Paladino* remand."

United States v. Lewis, 411 F.3d 838 (7th Cir. 2005; No. 03-4100). In prosecution for being a felon in possession of a weapon, the Court of Appeals held that the district court's determination that the defendant's prior robbery conviction was a "crime of violence" (thereby increasing his offense level by six) did not violate the rule announced in *Booker*. The court quoted the "prior conviction exception" noted in *Apprendi* and its progeny and stated that criminal history is all about prior convictions; its ascertainment therefore is excluded by *Booker's* own formulation and governed by *Almendarez-Torres*. Moreover, even if *Almendarez-Torres* were to be overruled, the defendant in this case still could not benefit, for he waived any claim under the sixth amendment when he took advantage of *Old Chief* to prevent the jury from learning the details about his prior conviction. A defendant cannot insist during trial that the jury be kept in ignorance yet demand after its end that he receive a lower sentence because the jury did not pass on the very issue that had been withheld at his request. The court did find, however, that the district court committed non-constitutional error when it looked to affidavits to determine what the defendant was alleged to have done in his prior convictions. Recidivist enhancements depend on the crime of which the person has been convicted, not on the precise conduct that led to the conviction. In the present case, instead of evaluating th elements of robbery under the relevant state law, or the risks posed by robberies as a class, the district court stressed what the defendant was alleged to have done by relying on affidavits attached to the information charging the defendant in state court. Such affidavits are not part of the charging document, the court concluded. It stated that *Shepard* and *Taylor* hold that the judge is "limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding made by the trial judge to which the defendant assented." The list in *Shepard* is designed to identify documents that illuminate *what crime* the defendant committed, which can be hard to pin down if one state statute defines both "violent" and "nonviolent" versions of a single offense. Using additional materials such as affidavits to ascertain *how* this person violated a statute departs from the categorical approach that *Shepard* and *Taylor* adopt. Finally, although the court noted that robbery is *always* a crime of violence, the district court's peek beyond the charging document required reversal because sentencing in a felon-in-possession case must not turn into a reprise of the earlier prosecution. The district

judge in this case may well have used the affidavit's allegations when deciding where in the range to sentence the defendant, which would misconceive the nature of a recidivist enhancement. What matters is the fact *of* conviction*,* rather than the facts *behind* the conviction. Thus, the court vacated the sentence and remanded for resentencing.

United States v. Cunningham, 405 F.3d 497 (7th Cir. 2005; No. 03-3006). Upon consideration of a *Booker* issue under the plain error standard, the Court of Appeals concluded that the defendant was not entitled to a limited *Paladino* remand because it was clear that the district judge would impose the same sentence, even in light of *Booker.* During sentencing for production of child pornography, the district court upwardly departed based upon the molestation and abuse of the defendant's victim over a five month period. The Court of Appeals noted that the departure imposed was not an enhancement mandated by the guidelines. Instead, it was an exercise of discretion by the judge, which is the same sort of flexibility in sentencing that judges now possess in a post-*Booker* scheme. As the court discussed in *United States v. Lee*, an upward departure by a trial court from a properly calculated range is one of the circumstances that would lead the court to conclude that any error at sentencing by the judge did not affect a defendant's substantial rights, and does not warrant even a limited remand. Also, the fact that the judge in this case "linked" the defendant's behavior to relative conduct under another provision of the guidelines does not mean that additional leeway might have affected the sentence and would justify a remand under *Paladino* to learn the district court's disposition. In this case, this is evinced by the trial judge's explanation that "this is not a situation that the Sentencing Commission could have adequately considered in developing the way these different guidelines would apply in this kind of case. The idea that a series of sexual acts of molestation and abuse of this nature should have no aggravating affect is very difficult, at least for this Judge, to fathom. It seems to me they seriously aggravate the case." With a statement such as this on the record, the Court of Appeals was convinced that a remand was not necessary to gain an understanding of the trial judge's "disposition."

United States v. Skoczen, 405 F.3d 537 (7th Cir. 2005; No. 03-1960*).* After concluding that a *Paladino* remand was appropriate in this case, the Court of Appeals commented on the necessity for it to still consider traditional guideline challenges made on appeal and their effect in light of the new "reasonableness" standard of review for sentences. The court stated: "We comment, however, on the merits of Skoczen's three arguments under the Guidelines because the Guidelines do retain force even though they are no longer mandatory, and thus errors in their application remain relevant. Even under an advisory regime, if a district court makes a mistake in calculations under the Guidelines, its judgment about a reasonable sentence would presumably be affected by that error and thus (putting aside the implications of plain error review) remand would be required just as before."

United States v. Skoczen, 405 F.3d 537 (7th Cir. 2005; No. 03-1960*).* When considering whether a local ordinance violation was properly included in the defendant's criminal history calculation, the Court of Appeals commented as follows on the interplay between *Booker* and criminal history calculations: "The Supreme Court has held that sentencing adjustments related to recidivism, in the context of applying statutory classifications, do not raise the same Sixth Amendment issues as other sentencing points. Although the Court had no occasion in *Booker* to focus on the calculation of criminal history under the Guidelines, its remedial opinion in *Booker* did not distinguish between calculations related to offense level and calculations related to criminal history. Instead, it chose to strike down the underlying statutory provisions that made the Guidelines mandatory. . . This indicates to us that assessment of criminal history for purposes of applying the Guidelines (as opposed to a statutory sentencing range) is also something that falls within the *Booker* rule."

United States v. Bownes, 405 F.3d 634 (7th Cir. 2005; No. 03-3016). In this appeal, the Court of Appeals affirmed the validity of the defendant's guilty plea and sentence. The defendant pled guilty to a fraud scheme and waived his right to appeal his sentence in his plea agreement. Subsequent to the agreement, the Seventh Circuit and then the Supreme Court decided *Booker*. Given that he had no reason to anticipate *Booker*, the defendant argued that his plea was not knowing and voluntary. The Court of Appeals, however, held that the plea was knowing and voluntary. Applying contract principles, the court concluded that by binding himself the defendant assumed the risk of future changes in circumstances such as those wrought by *Booker*. The plea agreement contained no "escape hatch" for changes in the law subsequent to the agreement. Moreover, the court rejected the argument that *Booker* is somehow special because it wrought a "sea change" in the law. Although the court noted that *Booker* has had a tremendous impact on the law because of the number of sentences it affected, it is no more a "sea change" than numerous other legal innovations scattered across the *Federal Reporter*. Moreover, a "sea change" exception to the rule that an unqualified appeal waiver is to be enforced as written would be hopelessly vague. Therefore, having upheld the validity of the appeal waiver, the court affirmed the conviction and sentence.

United States v. Scott, 405 F.3d 615 (7th Cir. 2005; 04-1053). Upon appeal after conviction for bank fraud and other related offenses, the Court of Appeals ordered a remand for resentencing. In doing so, the court noted that it was unlikely that the judge would have given the defendant a lower sentence had she not felt herself bound by the guidelines. She raised the guidelines range one level by granting an upward departure and then sentenced the defendant near the top of the elevated range. Nevertheless, the court stated that a sentencing decision by a judge who thinks himself bound by the guidelines will be, if the judge is conscientious, a sentence relative to the guidelines. The judge will compare the defendant with the average offender in the different guideline ranges, without necessarily agreeing that the ranges are correct. Also, with the guidelines merely advisory the judge can take into account mitigating factors that the guidelines ignored, provided that in doing so she is acting "reasonably." Given these circumstances, the court concluded that it could not be sure that the judge would impose the same sentence after *Booker*, and it therefore ordered a limited remand. The court then went on to consider the defendant's guideline challenges, and after finding that an obstruction of justice enhancement was improperly given, the court ordered a full remand for resentencing.

United States v. Newsom, 402 F.3d 780 (7th Cir. 2005; No. 03-3366). In prosecution for production, possession, and receipt of child pornography, the Court of Appeals ordered a limited *Paladino* remand. In doing so, the Court of Appeals stated the following: "Before concluding, we add a few words about Newsom's overall sentence. As we noted, the result of the application of the Guidelines was a sentence of 324 months' imprisonment, or 27 years. Those who think the idea of marginal deterrence should play some part in criminal sentences--that is, that the harshest sentences should be reserved for the most culpable behavior--might find little room left above Newsom's sentence for the child abuser who physically harms his victim, who abuses many different children, or who in other ways inflicts greater harm on his victims and society. The factors outlined in 18 U.S.C. section 3553(a), which now must directly inform criminal sentencing, reflect the need to take into account factors like the full nature and circumstances of the offense, the need for the sentence to reflect the seriousness of the offense, and the need to afford adequate deterrence. The district judge may conclude, on remand, that these and the other parts of section 3553(a) can be satisfied by something less than the 324-month sentence derived from the Guidelines grid."

United States v. George, 403 F.3d 470 (7th Cir. 2005; No. 04-3099). Upon consideration of a defendant's sentencing which occurred after the Seventh Circuit's decision in *Booker* but before the Supreme Court's *Booker* decision, the Court of Appeals rejected the defendant's challenge to his sentence. The defendant argued that although the district court treated the Guidelines as unconstitutional, it did not have the benefit of the analysis of the Supreme Court in *Booker* and therefore did not follow the sentencing scheme as defined by the Court. However, the Court of Appeals found that the district court's treatment of the Guidelines as "defunct" and its explanation for its decision were enough in this case. The court noted that the Supreme Court's decision in *Booker* shows that the Guidelines continue to inform district judges' decisions. Judges need not, however, rehearse on the record all of the 3553(a) factors; it is enough to calculate the range accurately and explain why (if the sentence lies outside it) this defendant deserves more or less. That is the approach the court has taken for decisions to reimprison a person after revoking supervised release, a subject on which the Guidelines have always been advisory rather than binding. It makes sense, the court therefore concluded, to follow the same approach for the Guidelines as a whole in *Booker*'s wake. In the present case, the judge explained his decision. Moreover, the judge sentenced the defendant to *less* than the guideline range. Thus, even had the judge understood the substantial sway the Guidelines still hold in light of the Court's decision in *Booker*, it is inconceivable that the court would have imposed a lower sentence--it was more likely that the sentence would have been higher. Thus, any error was harmless, assuming there was one. Finally, the court reaffirmed that *Booker* does not affect the calculation of restitution, as there is no "statutory maximum" for restitution purposes. The court did, however, remand for a recalculation of restitution on non-*Booker* grounds because the court did not adequately explain how it determined the amount of restitution.

United States v. Askew, 403 F.3d 496 (7th Cir. 2005; No. 03-2574). Upon conviction for conspiracy to possess with intent to distribute PCP, the Court of Appeals ordered a limited *Paladino* remand. Under the plain error standard, the court could not determine whether the defendant would have received the same sentence had the district court known it was free to exercise the broad sentencing discretion now afforded by *Booker*. The Court of Appeals gave no details as to how the district court arrived at its sentence or where within the guideline range the sentence fell.

United States v. Schlifer, 403 F.3d 849 (7th Cir. 2005; No. 03-2574). Upon consideration of the defendant's challenge to his sentence, the Court of Appeals vacated the sentence because the district court imposed sentence under the pre-*Booker* mandatory guideline scheme. The defendant in this case was found to be a career offender. At sentencing, the district court applied the career offender section, denied the defendant's motion for downward departure, and granted the government's substantial assistance departure motion. On appeal, the defendant

first argued that the career offender enhancement by the judge violated the Sixth Amendment, for although the "fact" of a prior conviction need not be proven to a jury, whether his prior convictions were unrelated and crimes of violence were underlying factual issues which fell outside of the *Almendarez-Torres* exception. The Court of Appeals rejected this argument, noting that there was no precedent for "parsing out the recidivism inquiry." The defendant also argued that despite the absence of a specific Sixth Amendment violation, the remedial portion of the *Booker* opinion required vacation of his sentence because he was sentenced under a mandatory guideline scheme. The Court of Appeals agreed, noting that the remedial portion of the *Booker* decision must be applied to all cases pending on direct review, even in the absence of a Sixth Amendment violation. "Thus in every pending appeal where the district court sentenced a defendant under the now-defunct mandatory guidelines scheme, error will have been committed." The critical question then becomes whether the error is reviewed for plain or harmless error. In the present case, the defendant sufficiently preserved his objection to warrant harmless error review. Specifically, he made an objection based upon *Blakely*, and the court held that this Sixth Amendment challenge was sufficient to preserve the objection to the mandatory guideline scheme. Evaluating the government's harmless error arguments, the court rejected them all. First, the government argued that the district court's meager 3-level substantial assistance departure showed a lack of interest in exercising greater discretion. The court concluded that prior to *Booker*, a district court had the guidelines and the appellate standard of review in mind when departing, and therefore sheds little light on what a judge would do under the new standards. Second, although the court rejected the defendant's own departure motion, again, the court did so because the guidelines precluded such a departure. It is unknown whether the district judge would have given a reduction under the now more flexible system. Accordingly, the court vacated the sentence and remanded for resentencing. Because the sentence was reviewed for harmless instead of plain error, the *Paladino* remand procedure was inapplicable.

***United States v. Della Rose**, 403* F.3d 891 (7th Cir. 2005; No. 03-4230). In prosecution for mail fraud, the Court of Appeals ordered a *Paladino* remand under the plain error standard. In doing so, the court noted that the defendant received a sentence at the top of the guideline range. The court stated, however, that such a circumstance does not rule out the possibility that the judge might have imposed a lesser sentence had he known that the Guidelines did not bind him. The judge picked a sentence at the top of the range specified by the Guidelines; had he realized that his discretion was broader than that, and had he thought that the Guidelines range as a whole was too high, then he conceivably might have sentenced the defendant to a lesser term.

United States v. Henningsen, 402 F.3d 748 (7th Cir. 2005; No. 03-3681). In this case, the Court of Appeals originally vacated the defendant's sentence under its decision in *Booker*, but stayed the mandate until the Supreme Court decided the case. Having guidance from the Supreme Court, the Court of Appeals issued a new opinion granting a limited remand under *Paladino*. In discussing the *Paladino* remand procedure, the court noted that "although we cannot know if there was error, or the extent of that error, until the district judge expresses himself, this court recognizes that the entry of an illegal sentence is a serious error routinely corrected on plain-error review."

United States v. Parra, 402 F.3d 752 (7th Cir. 2005; 03-2056). In prosecution for a drug distribution conspiracy, the Court of Appeals ordered limited *Paladino* remands. The court did so for one of the defendants even though he never raised an *Apprendi, Blakely*, or *Booker* issue in either the district or appellate court. Additionally, to provide guidance to the district court on remand, the Court of Appeals also considered the correctness of several guideline enhancements which the district court applied, finding all of the enhancements appropriate.

United States v. Banks, 405 F.3d 559 (7th Cir. 2005; 03-3176). In this case, the Court of Appeals ordered a limited *Paladino* remand *sua sponte*. Although the defendant raised five separate challenges to his conviction, he failed to raise a *Blakely* or *Booker* challenge in the district court or on appeal.

United States v. Macedo, 406 F.3d 778 (7th Cir. 2005; No. 02-3563). Under harmless error analysis, the Court of Appeals remanded this case for re-sentencing due to a Sixth Amendment violation. The jury returned verdicts which found the defendant guilty of distributing plain methamphetamine--no methamphetamine (actual) or "ice." The district court at sentencing, however, found that the meth in question was "ice," and therefore increased the guideline range over what the jury had found. Because this increase was based solely upon judicial fact finding, the Court of Appeals remanded for re-sentencing in light of *Booker*'s holding. Because the objection had been preserved below, a *Paladino* remand was unnecessary.

United States v. Rosas, 401 F.3d 843 (7th Cir. 2005; No. 04-2929). In prosecution for drug and gun crimes, the Court of Appeals rejected the defendant's *Booker* challenge to his career offender status. Although recognizing the prior conviction exception, the defendant argued that for career offender purposes, the *nature* of priors as "crimes of violence," as opposed to their *existence* requires a jury finding. The Court of Appeals

rejected this challenge, noting that whether a previous offense constitutes a crime of violence for purposes of sentencing enhancement is a question of law, whereas *Blakely* implicates only questions of fact. The court therefore affirmed the defendant's sentence, without engaging in any discussion regarding whether the defendant's sentence under a mandatory guideline system warranted re-sentencing.

United States v. Paladino, 401 F.3d 471 (7th Cir. 2005; No. 03-2296). In a number of consolidated appeals considering application of the plain error standard of review for unpreserved *Booker* errors, the Court of Appeals outlined its procedure for considering such issues. The court initially noted that enhancement of a sentence based upon judicial fact-finding amounts to error that is plain (the first two prongs of the plain error standard of review). However, in order to warrant reversal, a plain error must also 1) affect the defendant's substantial rights and 2) seriously affect the fairness, integrity, or public reputation of judicial proceedings. Under the "substantial rights" prong, it is necessary to determine whether the defendant would have received a different sentence without the error. However, unless a judge in sentencing a defendant pre-*Booker* stated that he would have given the same sentence even if the guidelines were merely advisory, it is impossible for a reviewing court to determine--*without consulting the sentencing judge*--whether the judge would have done that. If the judge would have in fact sentenced the defendant to a lower sentence had he or she known the guidelines were advisory, a miscarriage of justice would occur, for it is as much a miscarriage of justice to give a person an illegal sentence that increases punishment as to convict an innocent person. The court therefore concluded that the only practical way to determine whether plain error occurred in these cases is to ask the district judge. Therefore, where it is difficult for the appellate court to determine whether the error was prejudicial, the Court of Appeals will retain jurisdiction of the appeal while at the same time ordering a limited remand to permit the sentencing judge to determine whether he would (if required to resentence) reimpose his original sentence. If so, the court will affirm the original sentence against a plain-error challenge provided that the sentence is reasonable, the standard of appellate review prescribed by *Booker*. If, on the other hand, the judge states on limited remand that he would have imposed a different sentence had he known the guidelines were merely advisory, the court will vacate the original sentence and remand for resentencing. In formulating the statement, the district court should obtain the views of counsel, at least in writing, but need not require the presence of the defendant. Upon reaching its decision (with or without a hearing) whether to resentence, the district court should either place on the record a decision not to resentence, with an appropriate explanation, or inform the Court of Appeals of its desire to resentence the defendant. The court will then vacate the sentence and, with the defendant present, the district court shall resentence the defendant in conformity with the Sentencing Reform Act and *Booker*, including an appropriate explanation.

United States v. Lee, 399 F.3d 864 (7th Cir. 2005; No. 03-4239). In prosecution for being a felon in possession of a firearm, the Court of Appeals affirmed the defendant's sentence over a *Booker* plain-error argument. The judge at sentencing enhanced the defendant's sentence based upon judicial fact-finding. Although the defendant's guideline range was 168 to 210 months, the court imposed a sentence of 120 months--the statutory maximum. In doing so, he expressed frustration at not being able to impose a higher sentence. On appeal, the Court of Appeals discussed the remand procedure set forth in *Paladino* as it related to the facts of this case. The court noted that a remand is necessary only when uncertainty otherwise would leave the court in a fog about what the district judge would have done with additional discretion. Some circumstances, however, may intimate that a district court's mistaken belief about the extent of its discretion to reduce the penalty did not work to a defendant's disadvantage, and therefore could not have undercut the defendant's substantial rights. One is when the district court states on the record that, if it had more leeway, it would have imposed a higher sentence. A second is when the court departs downward from the Guidelines, imposing a sentence below the calculated range. Such a departure may imply that the Guidelines were not a constraint in the particular case and could suggest that there may have been no constitutional error: The ultimate sentence may rest on an exercise of discretion rather than on facts, found by the judge, that established the prescribed range. A third circumstance is an upward departure from a properly calculated range. Upward departure is just a special case of the first circumstance: By moving up, the judge evinces not only a belief that discretion exists but also a disposition to exercise it adversely to the accused. Such a judge, knowing that *Booker* affords yet more latitude, might impose a sentence higher still; knowledge that freedom has increased would not induce the judge to reduce the sentence. Perhaps the imposition of sentence at the top of a properly calculated range also implies lack of potential effect, the Court stated, but decided not to pursue that possibility. In the present case, the district judge expressed a strong preference to give a higher sentence if he could do so. And the actual sentence was well below the Guideline range (which had been properly calculated). It was set, not by a percentage or level-based discount, but by the statutory maximum. Thus, the Court was confident that none of the defendant's substantial rights were adversely affected by the district judge's application of pre-*Booker* law and found that plain error

had not been established.

McReynolds v. United States, 397 F.3d 497 (7th Cir. 2005; No. 04-2520). Upon consideration of a 2255 petition, the Court of Appeals concluded that *Booker* does not apply retroactively to criminal cases that became final before the decisions release on January 12, 2005. That date, rather than June 24, 2004, on which *Blakely* was decided, is the appropriate dividing line; *Blakely* reserved decision about the status of the federal Sentencing Guidelines, so *Booker* itself represents the establishment of a new rule about the federal system. The petitioner's convictions and sentences became final well before *Booker* was issued, and its approach was therefore found to not govern the collateral proceedings.

COLLATERAL ATTACKS

Robinson v. United States, ___ F.3d ___ (7th Cir. 2005; No. 04-1223). Upon consideration of the question of when a federal conviction becomes final for purposes of the one-year limitations period for pursing collateral relief under 28 U.S.C. § 2255, para. 6(1), the court held that finality attaches when the Supreme Court affirms on the merits on direct review or denies certiorari, or the time for filing a certiorari petition expires, not the later date when the Court denies a petition for rehearing a denial of certiorari or the time for filing such a petition expires.

Fuller v. United States, 398 F.3d 644 (7th Cir. 2005; No. 03-2369). Upon consideration of a 2255 petition, the Court of Appeals held that the law of the case doctrine precluded the petitioner from raising an ineffective assistance of counsel claim. On direct appeal, the defendant raised the ineffective assistance of counsel claim, acknowledging that such issues are disfavored on direct appeal in this circuit but noting that the record was sufficiently developed for direct appeal. On collateral attack, the petitioner sought to raise the issue again, noting that the Supreme Court's decision in *Massaro* changed the law. Prior to *Massaro*, the Seventh Circuit had held that if an ineffective assistance of counsel issue was sufficiently developed in the record and the defendant had new counsel on appeal, failure to raise the issue on direct appeal could result in a procedural default and bar it from being raised on collateral attack. In *Massaro*, however, the Supreme Court held that a defendant is never required to raise the issue on direct appeal and may wait to raise the issue in a collateral attack, even if the record was sufficiently developed at the time of the direct appeal. The Court was silent, however, on the question of whether a defendant who elects to raise the issue on direct appeal and loses can still raise the issue on collateral attack. The Seventh Circuit held that given the reservation of this issue in *Massaro*, the law of the case doctrine still precludes an issue from being raised a second time on collateral attack.

Franklin v. McCaughtry, 398 F.3d 955 (7th Cir. 2005; No. 03-1031). Upon consideration of a habeas corpus petition arising out of a Wisconsin conviction, the Court of Appeals held that the writ should issue in the case because the defendant demonstrated actual bias on the part of his trial judge. While the defendant's case was pending, the trial judge in another case denied a defendant's request for release without bail, notwithstanding state law which held that a defendant could not be denied release pending an appeal solely on the ground of indigence. Upon appeal in that case, when the defendant appealed, the trial judge filed a memorandum in the appellate court. Therein, he cited the defendant's case as an example as why the Wisconsin rule was bad policy. The judge's submission to the appellate court eventually made it into the newspapers, prompting the defendant in this case to file a recusal motion. The district court denied the motion, and the state appellate court affirmed. The Court of Appeals, however, held that the judge's motive in citing the defendant's case in his memorandum was clear--prisoners released under the Wisconsin rule are free to commit more crimes. The memorandum demonstrates that the trial judge decided the issue of the petitioner's guilty long before trial. Where a judge has prejudged the facts or outcome of the dispute before her, the decision maker cannot render a decision which comports with due process. The court also found that Wisconsin's test for evaluating judicial bias as set forth in *State v. Rochelt*, 477 N.W.2d 659 (Wis. Ct. App. 1991), is contrary to clearly established federal law for two reasons. First, under federal law, actual bias and the appearance of bias violate due process, whereas the Wisconsin test looks only for actual bias. Secondly, whereas Wisconsin law has a harmless error component, federal law holds that judicial bias is a structural error requiring automatic reversal.

Peoples v. United States, ___ F.3d ___ (7th Cir. 2005; No. 03-2774). Upon consideration of the defendant's 2255 petition seeking to raise an ineffective assistance of counsel claim, the Court of Appeals held that the law of the case doctrine precluded him from making the argument, for he already made the same argument on direct appeal. The defendant argued that although he raised the issue in direct appeal, the Supreme Court's decision in *Massaro v. United States*, 538 U.S. 500 (2003) now allows such a claim to be raised on collateral attack, regardless of whether it was previously raised on direct appeal. In rejecting this argument, the court noted that *Massaro* held that a defendant never forfeits a claim of ineffective assistance by waiting until collateral attack. It disapproved of the Seventh Circuit's contrary practice which held that a defendant who has new counsel on appeal, and who does not contend that any material outside

the trial record is essential to evaluating the claim, must raise it on direct appeal or forever lose the opportunity to do so. This holding does not help the petition in this case, however, because *Massaro* did not hold that the same ground of relief may be raised *twice*, once on direct appeal and again on collateral review. Rather, the question was left open. Since, *Massaro*, the Seventh Circuit has reiterated that a defendant who chooses to make an ineffective-assistance argument on direct appeal cannot present it again on collateral review. Thus, the law of the case doctrine precluded reconsideration of the defendant's claim. [The Tenth Circuit's decision in *United States v. Galloway*, 56 F.3d 1239 (10th 1995) conflicts with this decision.]

Bintz v. Bertrand, 403 F.3d 859 (7th Cir. 2005; No. 04-2682). Upon consideration of a habeas corpus petition, the Court of Appeals held that *Crawford v. Washington* is not retroactive. At the petitioner's Wisconsin murder trial, the trial court allowed the introduction of hearsay statements of unavailable witnesses using the older *Roberts* test. By the time he filed his federal habeas corpus petition, however, the Supreme Court had decided *Crawford* and the petitioner sought to have the benefit of that decision in his collateral attack. In deciding on the retroactivity question, the court noted that when considering a habeas petition, it generally looks at the Supreme Court's holdings as of the time of the relevant state court decision to determine clearly established federal law. The Supreme Court prohibits analyzing the reasonableness of a state court determination in light of a "new" Supreme Court rule propounded after the state court made its decision. The two exceptions to this rule are for (1) new rules that place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, and (2) rules that define procedure implicit in the concept of ordered liberty*, i.e.,* a watershed rule that implicates the fundamental fairness and accuracy of the criminal proceedings. Considering whether *Crawford* announced a "new rule," the Court of Appeals concluded that it did, for it overruled *Roberts* and was a break from prior precedent. Next, the court considered whether *Crawford* announced a watershed rule. The court concluded that it did not, noting that while important, the *Crawford* decision does not introduce any fundamentally new concepts to address the fairness or accuracy of a trial; instead it calls for a complete implementation of a protection that already exists--the Confrontation Clause. Having concluded that *Crawford* does not apply retroactively, the court went on to consider whether the state courts reasonably applied the *Roberts* test, ultimately finding that no constitutional error occurred. ***Murillo v. Frank***, ___ F.3d ___ (7th Cir. 2005; No. 04-2202), stands for the same proposition, although in this case, the Court of Appeals affirmed the district court's grant of a habeas corpus petition.

Dalton v. Battaglia, 402 F.3d 729 (7th Cir. 2005; No. 03-3982). Upon consideration of a 2254 petition, the Court of Appeals reversed the district court's refusal to issue a writ. The defendant pled guilty to rape and murder in Illinois, but claimed in state post-conviction proceedings that he was never informed that he would be subjected to an "extended term" sentence under Illinois law. During the pendency of the petitioner's state court petition, however, the transcript of his change of plea hearing disappeared and the remainder of his records before the circuit court were destroyed. Notwithstanding the lack of documentation in the record, the state courts concluded that there was sufficient evidence in the record to conclude the petitioner's plea was knowing and voluntary. The Court of Appeals disagreed, noting that the Supreme Court has held that a defendant must be fully aware of the direct consequences of his plea. Although the Court did not define "direct consequences," the Court of Appeals concluded that it could "imagine no consequence of a defendant's guilty plea more direct, immediate, and automatic than the maximum amount of time she may serve as a result of her plea." Given the missing records, there was no way for the court to determine whether the petitioner's constitutional right to due process was violated. Moreover, although the government argued that the presumption of regularity to which state court proceedings are generally entitled should be applied, the Court of Appeals concluded that the disappearance of the records prior to the time when the Illinois appellate court had a chance to review the case suggested that there was good cause to suspend that presumption. In addition, the record showed that the petitioner had repeatedly attempted to obtain his records to no avail. Accordingly, the Court of Appeals construed the lack of evidence in the record against the government and remanded the case for a hearing on whether the petitioner's plea was knowing and voluntary.

Sanders v. Cotton, 398 F.3d 572 (7th Cir. 2005; No. 03-2622). Upon consideration of a habeas corpus petition stemming from an Indiana murder conviction, the Court of Appeals reversed the district court's denial of the petition. Indiana law requires the prosecution to prove the absence of sudden heat to obtain a murder or attempted murder conviction when the defendant has asserted the issue. In the present case, however, the instructions did not mention sudden heat, even though the defendant had raised the issue in defense. Instead, the jury instructions for voluntary manslaughter and attempted voluntary manslaughter stated that the jury could convict the petitioner only if the State proved beyond a reasonable doubt that he was acting under sudden heat. In other words, the burden to prove the existence, not the absence, of sudden heat was allocated to the State. The state courts affirmed the conviction, however, finding that the error was harmless due to an instruction which stated that

"sudden heat is a mitigating circumstance that reduces what otherwise would be murder to voluntary manslaughter." The Court of Appeals held, however, that the petitioner's due process rights were violated because the state is required to prove beyond a reasonable doubt the absence of heat of passion on sudden provocation when the issue is properly presented in a homicide case. The failure to properly instruct in this case gave the jury no reason to know that the absence of sudden heat was an element of murder and attempted murder. Moreover, advising the jury that sudden heat is a mitigating factor does nothing to inform them of this fact and that the prosecution bears the burden of proof. Accordingly, the Court of Appeals held that the writ should have issued.

EVIDENCE

United States v. Carter, 410 F.3d 942 (7th Cir. 2005; No. 04-2008). In prosecution for bank robbery, the Court of Appeals affirmed the district court's refusal to allow an eyewitness identification expert to testify. The defendant wanted the expert to testify that an eyewitness's memory can sometimes be inaccurate. The Court of Appeals concluded, however, that jurors generally understand that memory can be less than perfect. Furthermore, the credibility of eyewitness testimony is generally not an appropriate subject matter for expert testimony because it influences a critical function of the jury--determining the credibility of witnesses. Consequently, there is a long line of Seventh Circuit cases holding that district courts did not commit abuses of discretion by excluding expert testimony regarding the reliability of eyewitness identifications, although there is not a *per se* ban on such testimony.

GUIDELINE ISSUES

United States v. Blaylock, 413 F.3d 616 (7th Cir. 2005; No. 03-1549). Upon consideration of the defendant's sentence enhancement for being an organizer or leader of a criminal activity involving at least five participants, the Court of Appeals affirmed. The defendant argued that in order for the enhancement to apply, she must have exerted control--either direct or indirect--over at least four other participants. Noting that prior precedents implied that such control was required, the Court of Appeals held that such a formalistic approach was no longer appropriate given a 1993 amendment to the Guideline which required control over only one person. Rather, when applying the enhancement, the dispositive question is relative responsibility for the crime--not "control" over each of the other participants as such. Therefore, it is enough that the other participants act "in furtherance" of the defendant's plan; to hold otherwise would permit "masterminds" to escape responsibility by delegating duties.

United States v. Von Loh, ___ F.3d ___ (7th Cir. 2005; No. 04-2462). In prosecution for engaging in sexual acts with a 14-year old girl in violation of 18 U.S.C. §2423(b), the Court of Appeals affirmed the district court's guideline determination that the defendant's offense conduct and other stipulated misconduct were not groupable and should be treated as separate offenses. The defendant met the victim on multiple occasions and engaged in sexual activity with her, but he plead guilty to only a single count. He stipulated, however, to several other incidents with her on different occasions warranting an enhancement under §4B1.5(b)(1) for engaging in a pattern of prohibited sexual conduct. The district court, however, refused to group the offense conduct and stipulated conduct. On appeal, the defendant argued that all of the conduct should have been grouped under §3D1.2 because his conduct involved the same victim and it occurred in the context of an ongoing relationship which involved substantially the same harm. The Court of Appeals disagreed, noting that the application notes to the grouping section at issue provide an example where conduct should not be grouped where a defendant is convicted of two counts of raping the same person on different occasions. Although the rape in this instance was statutory rather than forcible, the court concluded that the Sentencing Commission was using the term "rape" inclusively in the example, which would include both statutory and forcible rape. Therefore, the district court correctly considered the conduct as not groupable.

United States v. Olson, 408 F.3d 366 (7th Cir. 2005; No. 03-3756). In prosecution for marijuana distribution, the Court of Appeals reversed the district court's criminal history determination. Under the Guidelines, a defendant's criminal history may not include any relevant conduct that is part of the instant offense or relevant conduct thereto. Because it was agreed that the defendant had been distributing marijuana for the past 10 years, prior convictions of that nature during that period were not countable for criminal history purposes. However, prior convictions for possession for personal use cannot be grouped with other distribution offenses. In the present case, the defendant had a prior misdemeanor simple possession conviction which, applying this non-grouping principle, the district court counted for criminal history purposes. The Court of Appeals remanded to the district court for further factual findings, noting that the nature of the underlying conviction was unclear. Although the name of the offense would suggest it was countable, the Guidelines specifically dictate that district courts must look to underlying offense conduct of the offense, and not the name of the offense itself, when assessing relevant conduct. Because the record was ambiguous concerning the nature of the prior offense, the Court of Appeals remanded to the district court for more specific factual findings.

United States v. Rosas, 401 F.3d 843 (7th Cir. 2005; No. 04-2929). The Court of Appeals held that the Wisconsin offense of fleeing a police officer is categorically a qualifying "crime of violence" for career offender purposes under the Guidelines.

United States v. Schmeilski, 408 F.3d 917 (7th Cir. 2005; 04-2014). In prosecution for unlawful production of child pornography, the Court of Appeals rejected the defendant's double counting argument. The defendant pled guilty to production of child pornography in violation of 18 U.S.C. § 2251(b), acknowledging that as the parent or person having custody and control of each minor, he knowingly permitted his stepchildren to engage in sexually explicit conduct for the purposes of producing visual depictions of that conduct. When calculating the defendant's sentence, the court applied U.S.S.G. §2G2.1(c)(1) which provides that if the exploitation involved more than one minor, the multiple count adjustment should be applied such that each victim is treated as a separate count (in this case three). This resulted in a three level increase in the base offense level. The court then enhanced the defendant's sentence another five levels pursuant to U.S.S.G. §4B1.5(b)(1) because the defendant engaged in a pattern of activity involving prohibited sexual conduct. The defendant argued that receiving both enhancements constituted double counting. The Court of Appeals, however, disagreed, noting that the 2G2.1(c)(1) enhancement was for multiple victims, whereas the 4B1.5 enhancement was for exploiting those victims on multiple occasions. Thus, the sections punished separate conduct, and no double counting occurred.

United States v. Arroyo, 406 F.3d 881 (7th Cir. 2005; No. 03-3113). After conviction for distribution of heroin, the district court at sentencing found that the defendant also distributed a large quantity of cocaine and, under the Guidelines, substantially increased the defendant's sentence for the cocaine distribution. The Court of Appeals held that the district court erred in doing so because it failed to explicitly state and support, either at the sentencing hearing or (preferably) in a written statement of reasons, its finding that the unconvicted cocaine distribution activity was related to the convicted offense. Although a court may consider quantities of drugs not specified in the counts of conviction but that were "part of the same course of conduct or common scheme or plan" as the convicted offense, the government must demonstrate a significant similarity, regularity, and temporal proximity between the charged and uncharged conduct. In the present case, the court made no explicit findings linking the cocaine evidence to the offense of conviction. The PSR also provided no support for such a contention. At sentencing, neither the defendant nor the government addressed the question of whether the uncharged and charged conduct were sufficiently related. However, notwithstanding this error, the court concluded under the plain error standard that the defendant could not demonstrate that his substantial rights were affected because there was enough evidence in the record to suggest the appropriate relationship. The court did nevertheless order a limited *Paladino* remand on the *Booker* question.

United States v. Scott, 405 F.3d 615 (7th Cir. 2005; No. 04-1053). On appeal after a conviction for bank fraud and other related offenses, the Court of Appeals reversed the district court's obstruction of justice enhancement. Pending disposition of the charges against him, the defendant was ordered to reside in a community confinement facility. While there, he repeatedly abused the terms of the leave privileges granted to him by falsely claiming that he had an appointment with a psychiatrist but instead visited his girlfriend and conducting personal business. He also bribed two of the facility's employees to allow him to protect his leaves. Due to this conduct, the judge gave the defendant an obstructed of justice enhancement. The Court of Appeals reversed the enhancement, noting that had the pretrial actions complicated his prosecution, he would have been guilty of obstruction of justice, but there was no indication of this fact. Although the defendant was flouting the authority of the court, he did not by doing so make it more costly or otherwise more difficult for the government to prosecute its case against him successfully. Therefore, the enhancement was improperly applied.

United States v. Gardner, 397 F.3d 1021 (7th Cir. 2005; No. 04-2969). In prosecution for possession of a weapon by a felon, the Court of Appeals held that an Indiana conviction for Residential Entry constituted a "crime of violence" under the Guidelines (specifically, section 2K2.1, which uses the same definition as the career offender guideline). Residential Entry in Indiana is defined as intentionally breaking and entering a dwelling. Because this offense does not have the use, attempted use, or threatened use of physical force against a person as an element, nor is enumerated in section 4B1.2(a), it can only be a crime of violence if the offense "otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. 4B1.2(a)(2). The Court of Appeals held that the offense met this definition, noting the Residential Entry, like burglary, creates the possibility of a violent confrontation and that the offender's awareness of this possibility may mean that he is prepared to use violence if necessary to carry out his plans or escape.

United States v. Tedder, 403 F.3d 836 (7th Cir. 2005; No. 03-3345). In prosecution for conspiracy to launder money, the Court of Appeals vacated the defendant's sentence due

to the district court's improper enhancement under section 2S1.1(b)(2)(B). This section provides for a two-level offense level increase for those convicted of conspiracy to commit money laundering. Although the defendant was in fact convicted of conspiracy to commit money laundering, Application Note 3(C) reads: Subsection (b)(2)(B) shall not apply if the defendant was convicted of a conspiracy under 1956(h) and the sole object of that conspiracy was to commit an offense set forth in section 1957." This scenario was precisely the situation presented in the present case, for the sole object of the money laundering conspiracy was the substantive 1957 offense. Thus, the enhancement was improperly applied. The Court of Appeals therefore remanded the case for a full re-sentencing under the now advisory Guidelines, noting that the district court could give the defendant the same sentence as before on remand so long as the ultimate sentence is "reasonable."

United States v. Turner, 400 F.3d 491 (7th Cir. 2005; No. 02-1193). In prosecution for a multi-defendant money laundering conspiracy, the Court of Appeals vacated the defendant's sentence and remanded for resentencing. In determining relevant conduct under the Guidelines, a defendant engaged in a jointly undertaken criminal activity is liable for all reasonably foreseeable acts performed in furtherance of the jointly undertaken criminal activity. However, a defendant's relevant conduct does not include conduct of members of a conspiracy prior to the defendant joining the conspiracy; even if the defendant knows of that conduct. In the present case, the district court assumed that the jury's guilty verdict supported a finding that the defendant was engaged in the conspiracy during its entire life span. However, the indictment for conspiracy included over fifteen people. Thus, the fact that the defendant was convicted of participating in the conspiracy was not a finding of precisely when he joined. Moreover, there was no evidence which pointed to the defendant having entered the conspiracy at its outset. Therefore, the Court of appeals vacated the sentence and remanded for re-sentencing for a determination of when the defendant entered the conspiracy. On remand, however, sentence would need to be imposed under the procedures outlined in *Booker*.

JURY ISSUES

United States v. Vincent, ___ F.3d ___ (7th Cir. 2005; No. 03-3305). The Court of Appeals affirmed the district court's refusal to dismiss an indictment where the defendant alleged that the government secured the indictment by presenting evidence to the grand jury that the prosecution knew to be false. The court initially noted that a district court can dismiss the indictment under such circumstances only if it is established that the violation substantially influenced the grand jury's decision to indict or if there is grave doubt that the decision to indict was free from the substantial influence of such violations. Assuming the veracity of the defendant's violations, the court found that this standard had not been met. Moreover, the court went on to note that even if the errors in the grand jury proceedings would have justified the district court dismissing the indictment prior to trial, the petit jury's subsequent conviction of the defendant rendered any errors harmless beyond a reasonable doubt.

United States v. Murphy, 406 F.3d 857 (7th Cir. 2005; No. 04-2032). In prosecution for witness tampering, the Court of Appeals found that the indictment was constructively amended, but refused to reverse under the plain error standard of review. The defendant was charged in the indictment with using physical force against a witness, but the judge instructed the jury that it could convict him if the government proved that he used physical force against the witness *or* knowingly intimidated the witness. The court concluded that this instruction constructively amended the indictment. It also surmised that the district judge apparently based the instruction on the old version of the witness tampering statute, which prohibited both intimidation and the use of physical force under the same paragraph (18 U.S.C. section 1512(b)(1)(1996)). The defendant, however, was charged with violating section 1512(a)(2)(A), which criminalizes "physical force or the threat of physical force," with no mention of intimidation. That conduct is now criminalized in a separate offense, section 1512(b). Notwithstanding the error, the court refused to reverse, finding that the defendant's failure to object constituted a forfeiture and that there was sufficient evidence in the record for a jury to conclude that he did indeed use physical force to intimidate the witness, rather than mere intimidation.

United States v. Gant, 396 F.3d 906 (7th Cir. 2005; No. 04-1970). In prosecution for being a felon in possession of a weapon, the Court of Appeals affirmed the district court's refusal to give a missing witness instruction. At the jury instruction conference, the defendant offered the following proposed instruction, given that the government did not call a witness who saw the defendant during the period when he allegedly possessed the weapon: "It was particularly within the power of the government to produce Lintez Motley who could have given material testimony on an issue in the case. The government's failure to call Lintez Motley may give rise to an inference that his testimony would be unfavorable to it. You should bear in mind that the law does not impose on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. The district court refused to give the instruction, noting that such instructions are disfavored in this circuit and that, as a lay witness, the witness was not exclusively within the power

of the government to produce. The Court of Appeals noted that to establish entitlement to a missing witness instruction, a defendant must prove two things: first, that the absent witness was particularly within the government's power to produce; and second, that the testimony would have elucidated issues in the case and would not merely have been cumulative. Given that the defendant could have subpoenaed the witness, but did not, and that nothing showed that the witness was within the government's power to produce, the district court did not err in refusing the instruction.

OFFENSES

United States v. Queen, 408 F.3d 337 (7th Cir. 2005; No. 04-3189). In prosecution for making a false statement to a federal firearms dealer in violation of 18 U.S.C. § 922(a)(6), the Court of Appeals affirmed the defendant's conviction over his argument that providing a false address on a form 4473 is not a crime because a person's address is not "a fact material to the lawfulness of the sale" of a firearm. The defendant argued that a gun buyer could lie about a street address on the form so long as he or she lives within the state where the gun is sold. The court rejected this argument, noting that the statute requires a buyer to provide truthful information to a dealer about any fact material to the lawfulness of a firearm sale. Section 922(b)(5) requires the dealer to record the buyer's place of residence, thus making a firearm sale by a gun dealer illegal unless the dealer notes the buyer's place of residence in records the dealer is required to keep. Thus, a false street address is material to the lawfulness of the sale because, when the seller falsely represents his address on the form, the dealer fails to record the buyer's address, in violation of 922(b)(5).

United States v. Stewart, 411 F.3d 825 (7th Cir. 2005; No. 03-2675). In prosecution for transmitting threatening communications in violation of 18 U.S.C. §875(c), the Court of Appeals rejected the defendant's argument that a defendant must subjectively intend his communication to be a threat before he can be convicted of the offense. The court noted that to establish a "true threat" under the statute, the government must prove that the statement came "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates a statement as a serious expression of an intention to inflict bodily harm upon or to take the life of another individual." This is an objective inquiry, and there is no requirement that the defendant subjectively intend the statement to be a threat.

United States v. Ross, 412 F.3d 771 (7th Cir. 2005; No. 04-2124). In prosecution for being a felon in possession of a weapon, the Court of Appeals held that a fatal variance from the indictment required reversal. The indictment charged that the defendant possessed a weapon "on or about" September 8, 2002. However, when the evidence at trial called the defendant's possession of a weapon on this date into doubt, the jury was instructed that it could still convict the defendant if he possessed a weapon on or after May 22, 1998--a date which the evidence suggested the defendant did possess a weapon. The court noted that the canonical formula is that when "on or about" language is used in an indictment, proof of the exact date of an offense is not required as long as a date reasonably near that named in the indictment is established. The Court of Appeals could find no case where a four-year difference was allowed to fall within this rule, and noted that two cases noting unreasonable departures involved a 7-month and 2-year variance. Given that without this expansion of dates the defendant might well have been acquitted, the Court of Appeals reversed the defendants conviction due to the variance.

United States v. Stigler, 413 F.3d 588 (7th Cir. 2005; No. 03-3266). In prosecution for conspiracy to make and possess counterfeit checks, the Court of Appeals reversed the defendant's conviction because of a fatal variance between the indictment and the evidence presented at trial. The conduct at issue involved the cashing of three forged and counterfeit checks. The cashing of the first check involved the defendant and a fellow conspirator and the cashing of the second check involved the defendant and a second conspirator. The cashing of the third check did not involve the defendant at all. Although the government charged one overarching conspiracy, the defendant argued that the evidence at most established two separate conspiracies to cash the first two checks. The Court of Appeals agreed. The only piece of evidence linking the defendant to an overarching conspiracy was a single phone call placed from the defendant's residence to an individual involved in the cashing of the third check. However, there was no evidence that the defendant actually placed the call or what was said during the phone call. Likewise, there was no evidence to suggest that the defendant even knew the individuals involved with the third check or stood to profit in any way from its cashing. Given the lack of evidence, no reasonable juror could conclude that a single conspiracy existed. Moreover, the defendant was prejudiced by the variance because he received a leader organizer enhancement based upon the criminal activity involving five more participants. Therefore, the defendant's conspiracy conviction was reversed.

United States v. Ramsey, 406 F.3d 426 (7th Cir. 2005; No. 03-3787). In prosecution of the defendant for maintaining a drug house by permitting his son to use the mobile home he leased for distributing and possessing with intent to distribute crack, the Court of Appeals affirmed the district court's denial of a motion to dismiss the indictment for

failure to state an essential element. The defendant argued that the charging document failed to allege that he managed or controlled the mobile home he was leasing--an essential element--in that it only alleged that he "made available" and "as the lessee," "permitted a mobile home he leased" to be used for crack sales. Notwithstanding the fact that the indictment clearly failed to use the words "manage or control," the court has previously held that not explicitly including all the elements of the offense in an indictment is not fatal so long as the absent elements can be deduced from the language that is actually included in the charging document. Here, given the language which was included in the indictment, one cannot reasonably make a place available for another's use nor permit another to use it if one does not manage or control the place. Thus, although the indictment here "was not a model charging document," the court concluded that it was sufficient.

United States v. Turcotte, 405 F.3d 515 (7th Cir. 2005; No. 03-2988). In prosecution for possession and distribution of a controlled substance analogue, the Court of Appeals for the first time explained what the government must prove in order to obtain a conviction. The Controlled Substances Act provides that certain substances, while not officially scheduled as controlled substances themselves, may be regulated as such if they meet the definition of a "controlled substance analogue." In summary form the act requires three things: the substance in question must have a chemical structure substantially similar to a controlled substance; it must have a substantially similar effect on the central nervous system; *"or"* be purported or intended to have such an effect. The question considered by the court in this case is whether "or" should be read conjunctively or disjunctively. As the court noted, other courts to have considered the question have held that the statute should be read conjunctively to read as follows: The substance in question must have a chemical structure substantially similar to a controlled substance; *and* it must *either* have a substantially similar effect on the central nervous system *or* be purported or intended to have such an effect. According to the court, if one does not read the statute in this way, absurd results would occur, such as the possibility that alcohol and caffeine could be criminalized as a controlled substance. Thus, the court adopted the majority approach and read the statute in the conjunctive. Secondly, the court held that the government must also show that a defendant knew the substance in question was a controlled substance analogue. That is, the defendant must know that the substance at issue meets the definition of a controlled substance analogue as set forth in section 802(32)(A). A defendant must know that the substance at issue has a chemical structure substantially similar to that of a controlled substance, and he or she must either know that it has similar physiological effects or intend or represent that it has such effects.

United States v. McCarter, 406 F.3d 460 (7th Cir. 2005; No. 04-1684). In prosecution for attempted bank robbery in violation of the Hobbs Act and attempted bank robbery in violation of the federal bank-robbery statute, the Court of Appeals held that imposition of sentences on both counts violated the Double Jeopardy Clause. The defendant attempted to effectuate a robbery by kidnaping his victim and forcing her to withdraw money from the bank with her ATM card. However, the victim escaped before arriving at the ATM. The court, after looking to the legislative history of the federal bank robbery statute, concluded that because every bank robbery is also a Hobbs Act violation and the maximum punishments are the same, it was unlikely that Congress wanted to allow the government to try to obtain a longer sentence just by charging a bank robber under the Hobbs Act, as well as under the bank-robbery statute. The court also rejected the defendant's argument that forcing someone to withdraw money from an ATM is not bank robbery. The court stated that the question hinged on whether the money in an ATM is "in the care, custody, control, management, or possession of, any bank." If the depositor is robbed of the money he has just withdrawn after he leaves the bank, that is not a bank robbery. However, if the robber forces the bank's customer to withdraw the money, the customer becomes the unwilling agent of the robber, and the bank is robbed.

RECUSAL

In re: Gale Nettles, ___ F.3d ___ (7th Cir. 2005; No. 04-4104). Upon consideration of a writ of mandamus from the district judge's refusal to recuse herself, the Court of Appeals issued the writ. The defendant was charged with a plot to bomb the Dirksen Federal Building--the building in which the district judge and appellate judges considering the mandamus petition reside. The district judge denied the petition, noting that there had never been any real danger to the building because the defendant had conspired to blow up the building with federal agents. Moreover, she had no actual fear of harm that might influence her rulings in the case. The Court of Appeals held that a threat to a judge that appears to be genuine and not just motivated by a desire to recuse the judge requires recusal. Such were the facts in this case. Under the circumstances, a reasonable observer would think that a judge who works in the Dirksen building would want the defendant to be convicted and given a long sentence, rather than to be set free, either forthwith or sooner rather than later, to make another attempt to destroy the courthouse or its occupants. Therefore, the defendant was entitled to the writ of mandamus directing the recusal of the district judge, as well as any other judges of the Northern District. Moreover, because the appellate judges

considering the case also worked in the Dirksen Building, a reasonable observer might conclude that, should the defendant be convicted and sentenced, and appeal, he would no more get a fair shake in Seventh Circuit than he would in the district court, since the appellate judges in this circuit are as menaced by an Oklahoma City style attack as the district judges. The Court of Appeals therefore also recused itself, to be replaced by judges from other circuits who will be designated to hear any further proceedings instituted by the defendant in the Seventh Circuit.

RESTITUTION

United States v. Pappas, 409 F.3d 828 (7th Cir. 2005; No. 04-3453). The defendant agreed to pay his victim $69,095 in his plea agreement. Prior to sentencing, however, the defendant entered into a civil settlement agreement where he agreed to pay the victim's successor-in-interest $15,000 in exchange for a release from further civil liability. At sentencing, the defendant argued that in light of the release, he should be relieved from paying further restitution. The district court disagreed, although it did reduce the amount of restitution owed by the $15,000 paid in exchange for the release. The Court of Appeals affirmed, noting that the defendant expressly agreed to pay restitution in his plea agreement and waived the right to argue that he should be required to pay a lesser amount. Although the parties may not have anticipated the civil settlement when entering into the plea agreement, both parties assumed the risk of future changes in circumstances when they bound themselves in exchange for certain benefits. Accordingly, the defendant waived his right to argue that he should pay less than that indicated in the plea agreement.

United States v. Rand, 403 F.3d 489 (7th Cir. 2005; No. 04-1572). In prosecution for a conspiracy relating to an identity-theft scheme, the Court of Appeals rejected the defendant's challenge to the court's calculation of restitution. Specifically, the defendant argued that the district court improperly ordered restitution to individuals who were neither listed in the indictment nor admitted to by him in his plea agreement. In rejecting this argument, the court noted that while the *conduct* underlying a restitution order must be specifically articulated in the charge or a plea agreement, specific victims need not be, especially in a case (such as this one) involving "as an element a scheme, conspiracy, or patter of criminal activity." The guilty plea in this case concerned an organized identity-theft conspiracy, which clearly falls under this definition. Therefore, any individual "directly harmed" by the "criminal conduct in the course of the scheme, conspiracy, or pattern" is presumptively included in the restitution calculus, regardless of whether the individuals are listed in the charge or the plea agreement.

SEARCH, SEIZURE, & SUPPRESSION

United States v. Pittman, ___ F.3d ___ (7th Cir. 2005; No. 04-2546). In this case, the Court of Appeals discussed the applicability of the rule announced in *Belton, United States v. Arango*, 879 F.2d 1501 (7th Cir. 1989), and other cases which allow the search of the entire passenger compartment of an automobile as an incident to arresting an occupant of an automobile due to a risk that a weapon within the occupant's reach or that contraband or evidence of a crime might be in the car with which the occupant might try to flee. In the present case, after a routine traffic stop, the passenger of the car fled and was apprehended half a block away. The police searched the glove compartment of the car, and the district court upheld the search as a search incident to arrest. The government argued that the search was justified under *Arango* and similar cases, which, according to the government, created a bright-line rule intended to simplify standards governing police conduct. The court agreed, noting that the police shouldn't have to carry well-thumbed copies of LaFave with them wherever they go. However, the court questioned whether *Arango* truly established a bright line. The court mused, "What is *Arango*'s bright line? Suppose the police had not run the defendant to the ground until the following day, miles from the car; could they still search the car as an incident to arresting him? If not, what is the sharp boundary between the case and *Arango*? Is it measured by distance? By time? By both? There doesn't seem to be a bright-line alternative to a necessarily rather vague standard of "immediacy." If there is an argument for *Arango*, it is not the desirability of bright lines, but that we don't want to give occupants of a car stopped by the police an incentive to flee in order to prevent the car from being searched." Ultimately, however, the court did not decide the continued viability of *Arango*, for the court concluded that the flight of the passenger and driver gave the police probable cause to search the vehicle under the older "automobile exception" to the warrant requirement.

United States v. Lee, 413 F.3d 622 (7th Cir. 2005; No. 03-4140). Upon consideration of the district court's denial of a motion to suppress, the Court of Appeals affirmed. Upon executing a search warrant and finding drugs, the defendant stated in reference to his caretaker that "she didn't know anything about it. Don't take the kids." The officers then read the defendant his *Miranda* rights and inquired about the defendant's willingness to talk with them. He stated, "Can I have a lawyer?" The officers then informed him that they would not question him about the incident if a lawyer were present because the lawyer would tell him not to say anything. The officer also said that the defendant could help himself by talking and that he should talk to the officers. The defendant then incriminated himself. On appeal, the defendant argued that he clearly invoked his right to counsel and that his

subsequent statement should be suppressed. The Court of Appeals noted that the defendant's statement was similar to other invocations which courts have held to be unambiguous. The court also noted that when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. In this case, the police tactics addressed toward persuading the defendant to give up his right to counsel were also problematic. However, in the end, the court affirmed, finding that any error involving the introduction of the confession was harmless because of the other overwhelming pieces of evidence.

United States v. Brock, ___ F.3d ___ (7th Cir. 2005; No. 03-2279). Upon consideration of the district court's denial of the defendant's motion to suppress, the Court of Appeals affirmed. The resident of an apartment shared with the defendant consented to a search of the common areas. A drug sniffing dog alerted to the presence of drugs just outside of the defendant's locked bedroom door which had a sign on it stating, "Stay Out." Based on this alert, the officers obtained a search warrant to search the room, in which they eventually found drugs. The defendant argued that the warrantless dog sniff inside his home violated the Fourth Amendment. The Court of Appeals disagreed, noting that the Supreme Court previously held that a canine sniff used only to detect drugs is not a Fourth Amendment search. Moreover, whatever subjective privacy expectation the defendant had in his room was not one which society is prepared to consider reasonable. Critical to its conclusion was that the police were lawfully present in the common area of the apartment, and when someone shares an apartment with someone else, he or she assumes the risk that a co-tenant might consent to a search of the apartment's common areas.

United States v. Peterson, 414 F.3d 825 (7th Cir. 2005; No. 04-4180). The court of appeals rejected the defendant's argument that his post-*Miranda* statement should be suppressed. The government, prior to giving *Miranda* warnings, spent 50 minutes stating the evidence they had against the defendant. At the conclusion, they read the defendant his *Miranda* rights, whereupon he confessed. On appeal, the defendant argued that his statement should be suppressed because the summary of the evidence against him was intended to provoke a response. The court of appeals, however, noted that *Miranda* creates a rule of evidence: statements made during custodial interrogation by a person who has not been informed of, and waived, his privilege against compulsory self-incrimination (and the right to counsel designed to facilitate its invocation) are inadmissible in criminal proceedings. In the present case, the defendant did not make any pre-warning statements, so there cannot be a violation of *Miranda*.

United States v. Broomfield, ___ F.3d ___ (7th Cir. 2005; No. 04-4180). Upon consideration of the district court's denial of a motion to suppress, the court held that a police officer's request to a man who matched a description of a robber to stop and take his hands out of his pockets did not constitute a seizure because the encounter was so brief. Before the officer could even ask a single question, he noticed that the defendant was in possession of a concealed weapon, which ripened the stop into a lawful arrest. In so holding, however, the court commented on police officers' routine descriptions of suspicious behavior on the part of people whom they stop. The court stated, "Gilding the lily, the officer testified that he was additionally suspicious because when he drove by Broomfield in his squad car before turning around and getting out and accosting him he noticed that Broomfield was 'staring straight ahead.' Had Broomfield instead glanced around him, the officer would doubtless have testified that Broomfield seemed nervous or, the preferred term because of its vagueness, 'furtive.' Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you. Such subjective, promiscuous appeals to an ineffable intuition should not be credited."

United States v. Carpenter, 406 F.3d 915 (7th Cir. 2005; No. 04-2270). Upon consideration of the district court's denial of the defendant's motion to suppress evidence, the Court of Appeals held that a delay in a traffic stop of five minutes to allow a drug-sniffing dog to sniff the car was not "unreasonable" for Fourth Amendment purposes.

United States v. Martin, 399 F.3d 879 (7th Cir. 2005; No. 04-2728). In prosecution for being a felon in possession of a weapon, the Court of Appeals affirmed the district court's denial of a motion to suppress evidence. The defendant claimed that evidence seized in his home pursuant to a warrant should have been suppressed because the warrant, under Indiana law, was stale. The Court of Appeals, however, stated that any shortcoming with the warrant was one of state law only. The fourth amendment's rules for warrants do not include time limits. "No Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The defendant did not deny that all of these requirements were satisfied. Indiana, the court held, is free to add additional restrictions, but state officials' failure to comply with state law does not lead to the exclusion of evidence in federal court. In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably

suppressed. Thus, because there was no violation of the fourth amendment, the suppression motion was properly denied.

United States v. Grap, 403 F.3d 439 (7th Cir. 2005; No. 04-2033). In prosecution for stealing and possessing stolen firearms, the Court of Appeals affirmed the district court's denial of a motion to suppress. Acting on a tip that stolen firearms were present in the defendant's mother's garage, the police went to the residence and obtained the mother's consent to search, whereupon they found the weapons. Although the mother appeared lucid and capable of giving consent to the officers, at the suppression hearing, the defendant presented evidence that his mother suffered from a delusional mental illness and lacked the requisite capacity to give consent. The Court of Appeals held that the proper standard in evaluating the consent in this case was what was reasonably apparent to a reasonable inquiring officer, with emphasis on the deterrence rationale of the exclusionary rule. Specifically, the purpose of suppression of evidence obtained in an unreasonable search is to deter violations by officers of the Fourth Amendment. Obviously, they cannot be deterred by circumstances that are unknown to them, like the psychiatric history of the person consenting to a search. Thus, the proper inquiry focuses upon the objective facts, as presented to a reasonable inquirer, that would reasonably put him or her on notice that a voluntary consent could not be given. In the present case, the mother's conduct was consistent with someone who understood what the officer told her and understood the implications of her consent. Thus, there was no basis to suppress the evidence.

United States v. Williams, 400 F.3d 1023 (7th Cir. 2005; No. 04-3145). In prosecution for distribution of drugs, the Court of Appeals affirmed the district court's denial of a motion to suppress evidenced seized during a warrantless search of the defendant's residence. The police had conducted two purchases of drugs from the defendant, and the lead officer decided to obtain a search warrant after a third purchase. When the third purchase was completed and the defendant was arrested, the lead officer obtained a warrant to search the defendant's residence. Unknown to the officer, however, was that other officers had already entered the defendant's residence after spotting drugs, currency, and scales inside. The Court of Appeals held that the evidence discovered during the illegal search need not be suppressed because of the independent source doctrine. This doctrine permits the introduction of evidence that was initially seized later during a search that was not tainted by the initial illegality. The key to determining whether the independent source doctrine applies, therefore, is to ask whether the evidence at issue was obtained by independent legal means. The court therefore asked whether the officer's decision to seek a search warrant was prompted by the evidence seen or seized during the warrantless search and whether such evidence affected the judge's decision to issue the search warrant. In the present case, the officer testified that he was unaware of the warrantless entry into the residence and that the entry did not influence his decision to obtain a search warrant. Also, the affidavit in support of the search warrant did not make any mention of the warrantless entry or the evidence observed there. Accordingly, because the evidence was discovered through independent, legal means, the motion to suppress evidence was properly denied.

SENTENCING--MISCELLANEOUS

United States v. Barnett, ___ F.3d ___ (7th Cir. 2005; No. 04-3646). In this case, the Court of Appeals upheld the validity of a blanket waiver of Fourth Amendment rights as a condition of probation. As an alternative to a term of imprisonment, the defendant agreed to a probationary sentence where probation officers had the unfettered right to search his home. The court of appeals upheld the blanket waiver, noting that the defendant specifically bargained for a non-custodial sentence, and the government would only agree to such a sentence if the defendant agreed to the blanket Fourth Amendment waiver. Given that the defendant bargained for a less intrusive alternative than prison, the court found that the waiver was enforceable and specifically negotiated for by the defendant.

United States v. Krueger, ___ F.3d ___ (7th Cir. 2005; No. 04-2539). The Court of Appeals rejected the defendant's argument that a statement taken from him after he had invoked his right to counsel could not be used at sentencing for purposes of establishing drug quantity. Although the court noted that it had left open the possibility the exclusionary rule might apply at sentencing where the authorities have deliberately violated the defendant's constitutional rights for the purpose of acquiring evidence to boost his prospective sentence, there was no evidence of such actions in this case. Accordingly, the court concluded that the district court was not precluded from relying at sentencing on a statement given in violation of his right to the assistance of counsel.

United States v. Alburay, ___ F.3d ___ (7th Cir. 2005; No. 03-3848). Where the district court's oral pronouncement of sentence differed from the written judgment of conviction, the Court of Appeals held that the sentence pronounced from the bench controls. Rather than ordering a full re-sentencing, however, the court remanded to the district court with instructions to correct the written judgment.

STATUTORY MAXIMUMS & MINIMUMS

United States v. Rivera, ___ F.3d ___ (7th Cir. 2005; No. 02-3238). After conviction by a jury of conspiring to distribute more than five kilograms of crack, the district judge sentenced the defendant to 97 months–a sentence below the 10-year mandatory minimum. The judge disregarded the finding of the jury on drug quantity and found that the defendant was not responsible for the entire amount of crack involved in the conspiracy. The defendant appealed, raising a *Booker* argument. The Court of Appeals noted that the district court was not entitled to disregard and the jury's drug quantity determination, and it was required to sentence the defendant to the 10-year statutory minimum. However, because the government did not cross-appeal, the defendant's sentence could not be increased. Accordingly, the court rejected the defendant's challenge, but did not order a remand for resentencing at the mandatory minimum.

United States v. Edwards*, 397* F.3d 570 (7th Cir. 2005; No. 03-4234). In prosecution for distribution of cocaine base, the Court of Appeals reversed the district court's application of a statutory minimum sentence for "crack cocaine" because it failed to distinguish between cocaine base and crack. 21 U.S.C. section 841(b)(1)(A)(iii) prescribes a statutory mandatory minimum sentence of 10 years for the distribution of "cocaine base." Although the Guidelines define "cocaine base" as "crack" for purposes of higher penalties, the statute contains no such limiting definition. Notwithstanding this fact, the Court of Appeals held that for purposes of the statute, as well as the Guidelines, "cocaine base" means "crack." Thus, because the defendant's two sentences were premised on the district court's factual finding that the defendant possessed noncrack forms of cocaine base and its legal conclusion that any form of cocaine base qualified for the mandatory minimum sentence, the Court of Appeals reversed. It did note, however, that there was a circuit split on the question and suggested that the issue was one which the Supreme Court should resolve.

United States v. Vitrano, 405 F.3d 497 (7th Cir. 2005; No. 03-4184). In prosecution under 922(g), the Court of Appeals considered whether a prior conviction for which the defendant received a discharge order stating that he was "discharged absolutely" could not be counted as a prior conviction for a "violent felony" for purposes of the Armed Career Criminal Act. The court noted that 18 U.S.C. section 921(a)(20) was an anti-mousetrapping rule which provides that if the state gives a convicted felon a piece of paper that he is no longer "convicted" and all his civil rights have been restored, a reservation in a corner of the state's penal code can not be the basis of a federal prosecution. In previous cases, the court held that a discharge order stating that "any civil rights lost as a result of conviction herein described, are restored by virtue of the discharge," needed to state expressly that the person may not ship, transport, possess or receive firearms ever after before it could be counted under the ACCA. Read as a whole, the court concluded that its prior precedents are best understood as establishing the principle that a state may not employ language in discharging a prisoner that will lull the individual into the misapprehension that civil rights have been restored to the degree that will permit him to possess firearms. If a state does use language that creates such a false sense of security, that conviction may no be used to justify an enhanced sentence under the ACCA. In the present case, however, the court concluded that it did not believe the discharge certificate in the present case as quoted above could be read as reasonably absolving an individual of criminal conviction or of the collateral consequences of that conviction.

SUPERVISED RELEASE

United States v. Deutsch, 403 F.3d 915 (7th Cir. 2005; No. 02-3235). Upon revocation of the defendant's supervised release, the Seventh Circuit held that a district court may impose consecutive terms of imprisonment for multiple counts. When the defendant was originally sentenced, the court imposed five years' supervised release on each of three bank fraud counts, and three years' supervised release on all other counts, to run concurrently. Upon revocation, the district court imposed terms of imprisonment on the various counts, ranging from one month to 36 months. In order to achieve a total term of incarceration of 61 months, the court ran the imprisonment terms consecutive to one another. On appeal, the defendant argued that consecutive terms of imprisonment upon revocation of supervised release on multiple counts of conviction was impermissible. However, the Court of Appeals rejected this argument, noting that there existed no statutory language to prohibit consecutive sentences and that other circuits that had addressed the question allowed such sentences.

Recently Noted Circuit Conflicts

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Commerce Clause

Hays v. United States, 397 F.3d 564 (7th Cir. 2005).

The Seventh Circuit held that a violation of 18 U.S.C.

§1365(a) (product tampering) may occur after the product has ceased to move in interstate commerce. The Court agreed with the Eighth Circuit's decision in *United States v. Moyer*, 182 F.3d 1018 (8th Cir. 1999), and disagreed with the Tenth Circuit's contrary holding in *United States v. Levine*, 41 F.3d 607, 614 (10th Cir. 1994) ("the effect on interstate commerce must occur at or after the tainting."). *United States v. Smith*, 402 F.3d 1303 (11th Cir. 2005).

The Eleventh Circuit applied *United States v. Maxwell*, 386 F.3d 1042 (11th Cir. 2004), to purely intrastate non-commercial production of child pornography and reversed Defendant's conviction based on a finding that it violated the Commerce Clause. The Court disagreed with the First Circuit's contrary decision in *United States v. Morales-DeJesus*, 372 F.3d 6 (1st Cir. 2004).

Wiretap Act

United States v. Coney, 407 F.3d 871 (7th Cir. 2005).

The Seventh Circuit held that review of a district court's decision that the government has a satisfactory explanation for failing to immediately seal wiretap tapes is only reviewed under the clearly erroneous standard. The Court agreed with the Sixth Circuit. *United States v. Wilkinson*, 53 F.3d 757, 760 (6th Cir. 1995). However, it disagreed with the Second and Eighth Circuits which conduct a *de novo* review of the issue. *United States v. Maldonado-Rivera*, 922 F.2d 934, 949-50 (2nd Cir. 1990); *United States v. Sawyers*, 963 F.2d 157, 159 (8th Cir. 1992).

Fifth Amendment - Indictment

United States v. Ross, 412 F.3d 771 (7th Cir. 2005) and *United States v. Carter*, 410 F.3d 1017 (8th Cir. 2005)

In *Ross*, the defendant was charged with being a felon in possession of a gun on or about September 8, 2002. The Seventh Circuit found that the district judge's instruction that the jury could convict if it found that he possessed a gun on or after May 22, 1998 was a fatal variance from the indictment. The Court found that the jury may have convicted Defendant based on a finding that he possessed a different gun at an earlier time than that charged. This conflicts with the Eighth Circuit's view, in *Carter*, that a variance between the proof and the date in the indictment does not matter if the date is not an element of the crime and the government proves that the conduct happened before the indictment and within the statute of limitiations. *United States v. Carter*, 410 F.3d 1017 (8th Cir. 2005).

Sixth Amendment

Right of Confrontation

Bockting v. Bayer, 4__ F.3d ___, 2005 U.S. App. LEXIS 9973 (9th Cir. June 1, 2005)

The Ninth Circuit held, 2-1, that *Crawford v. Washington*, 541 U.S. 36 (2004), is retroactive, for habeas purposes, under *Teague v. Lane*, 489 U.S. 288, 307 (1989). Judge McKeown wrote that *Crawford* established a watershed rule of criminal procedure. Judge Noonan, concurred and found that *Crawford* was not a new rule. The Court's decision conflicts with decisions of the Second, Sixth, Seventh, and Tenth Circuits. *Mungo v. Duncan*, 393 F.3d 327, 336 (2nd Cir. 2004) (finding that if *Crawford* did announce a new rule, it would not be retroactive); *Dorchy v. Jones*, 398 F.3d 783,788 (6th Cir. 2005); *Murillo v. Frank*, 402 F.3d 786, 789-791 (7th Cir. 2005); *Brown v. Uphoff*, 381 F.3d 1219 (10th Cir. 2004) (holding that *Crawford* is not restroactive).

United States v. Brun, 4__ F.3d ___, 2005 U.S.App.LEXIS 15747 (8th Cir. Aug. 1, 2005) and *United States v. Arnold,* 410 F.3d 895 (6th Cir. 2005).

In *Brun*, the Eighth Circuit found that "the statements of an adolescent boy who has called 911 while witnessing an argument between his aunt and her partner escalate to assault would be emotional and spontaneous rather than deliberate and calculated." Under those circumstances, the Court held that the statement was non-testimonial and therefore, admissible under *Crawford*. This conflicts with the Sixth Circuit's decision in *Arnold*, which held that held that a caller's statements during a 911 call and later to police were testimonial. Therefore, the Court held that the statements were inadmissible under *Crawford*, since the witness did not testify. This issue is pending in the Seventh Circuit in *United States v. Thomas*, No. 04-2063, which will be orally argued on September 9, 2005.

United States v. Bordeaux, 400 F.3d 548 (8th Cir. 2005).

The Eighth Circuit reversed a defendant's conviction because his right to Confrontation was violated when a child witness was allowed to testify via two-way closed circuit television without a showing that she could not testify in person because she was afraid of Defendant. The Court agreed with the Eleventh Circuit that closed-circuit television is not Constitutionally equivalent to face to face confrontation. *United States v. Yates*, 391 F.3d 1182, 1186 (11th Cir. 2004). Both Courts disagreed with the Second Circuit's contrary decision in *United States v. Gigante*, 166 F.3d 75 (2nd Cir. 1999).

Choice of Counsel

United States v. Gonzalez-Lopez, 399 F.3d 924 (8th Cir.

2005).

The Eighth Circuit held that a district court denied a defendant his right to counsel of choice when it refused his chosen attorney's motion for admission *pro hac vice*. The district court based its denial on its misinterpretation of an ethical rule barring contact with represented parties, without an attorney's permission, as applying even when the attorney does not represent any other party in the case and is merely discussing a possible substitution of counsel. The Court of Appeals joined the majority of circuits and held that denial of counsel of choice is reversible *per se*. *See*: *United States v. Voigt*, 89 F.3d 1050, 1074 (3rd Cir. 1996); *United States v. Childress*, 58 F.3d 693, 736 (D.C. Cir. 1995) (*per curiam*); *Bland v. California*, 20 F.3d 1469, 1478 (9th Cir. 1994), overruled on other grounds by *Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000); *United States v. Mendoza-Salgado*, 964 F.2d 993, 1015-16 (10th Cir. 1992); *United States v. Panzardi-Alvarez*, 816 F.2d 813, 818 (1st Cir. 1987); *Wilson v. Mintzes*, 761F.2d 275, 285-86 (6th Cir. 1985). However, the Eighth Circuit disagreed with the Seventh Circuit's contrary view that an adverse effect must be shown. *See Rodriguez v. Chandler*, 382 F.3d 670, 675 (7th Cir. 2004) (adopting a middle-ground "adverse effect" standard).

Ineffective assistance of counsel as grounds for withdrawing a plea

United States v. Peterson, 4__ F.3d ___, 2005 U.S.App.LEXIS 14431 (7th Cir. July 18, 2005).

The Seventh Circuit held that a defendant must satisfy the rule of *Hill v. Lockhart*, 474 U.S. 52 (1985), when moving to withdraw a plea based on ineffective assistance of counsel. This conflicts with a recent Ninth Circuit decision. The Ninth Circuit held that a district court has discretion to permit a defendant to withdraw his guilty plea prior to sentencing when the district court finds that defense counsel grossly mischaracterized the defendant's possible sentence, but also finds that the mischaracterization did not actually prejudice the defendant as is required to invalidate a plea post-sentence. *United States v. Davis*, 410 F.3d 1122 (9th Cir. 2005).

Statute of Limitations - Tolling under 18 U.S.C. §3292

United States v. Atiyeh, 402 F.3d 354 (3rd Cir. 2005).

The Third Circuit held that a district judge improperly tolled the statute of limitations, pursuant to 18 U.S.C. §3292, because the government made its application for tolling after it had already received evidence from foreign countries. The statute requires that the government state that the evidence "is" in a foreign country at the time of the application. The Court disagreed with the Ninth Circuit's view that the government could wait until after it received the evidence and sifted through it to apply to toll the statute of limitations. *United States v. Miller*, 830 F.2d 1073, 1076 (9th Cir. 1987); *United States v. DeGeorge*, 380 F.3d 1203, 1213 (9th Cir. 2004).

Offenses

18 U.S.C. §2113(a)

United States v. Wesley, 4__ F.3d ___, 2005 U.S. App. LEXIS 16420 (6th Cir. Aug. 8, 2005).

The Sixth Circuit held that actual intimidation is not an element of attempted robbery. The Court agreed with the Second, Fourth, and Ninth Circuits. *United States v. Stallworth*, 543 F.2d 1038, 1040 (2nd Cir. 1976); *United States v. Jackson*, 560 F.2d 112, 116 (2nd Cir. 1977); *United States v. McFadden*, 739 F.2d 149, 152 (4th Cir. 1984); *United States v. Moore*, 921 F.2d 207, 209 (9th Cir. 1990). It disagreed with the Fifth Circuit's contrary holding in *United States v. Bellew*, 369 F.3d 450 (5th Cir. 2004).

21 U.S.C. §841(a) & (b)(1)

United States v. Edwards, 397 F.3d 570 (7th Cir. 2005).

The Seventh Circuit held that only the crack form of cocaine base qualifies for the higher sentences based on lower amounts in 21 U.S.C. §§841(b)(1) 960. The Court noted that there is a significant division among the circuits on this issue, with no clear majority rule and at least three distinct approaches. Some circuits have held:

> that the mandatory minimum sentence under the statute applies only to crack, based in whole or in part on the legislative history of the 1986 Anti-Drug Abuse Act. *See United States v. Fisher*, 58 F.3d 96, 99 (4th Cir. 1995); *United States v. Crawford*, 83 F.3d 964, 965 (8th Cir. 1996). The Eleventh Circuit reached the same conclusion by a different route in *United States v. Muñoz-Realpe*, 21 F.3d 375, 377 (11th Cir. 1994) (holding that by allowing the amended definition in the Guidelines to take effect, Congress approved the new "crack only" definition for purposes of the statute as well).
>
> The Sixth Circuit in *United States v. Levy*, 904 F.2d 1026, 1033 (6th Cir.

> 1990), appears to have reached the conclusion that "cocaine base" in the statute means crack ("*Levy* recognizes the congressional intent behind the insertion of the phrase 'cocaine base' was to impose stiffer sentences upon those who traffic in crack cocaine," but the court simply assumed that cocaine base and crack are equivalent in all senses).

The Ninth Circuit has limited the term "cocaine base" to "cocaine that can be smoked," which includes but might not be limited to crack (the court's opinion was unclear on this point). *United States v. Shaw*, 936 F.2d 412, 415-16 (9th Cir. 1991) (relying on legislative history). The District of Columbia Circuit has rejected the argument that the term "cocaine base" should be read literally to include anything that chemically constitutes base cocaine, but has declined to adopt the "crack only" definition. *United States v. Brisbane*, 367 F.3d 910, 913-14 (D.C. Cir. 2004)

(reviewing legislative history and finding "much evidence" that Congress "was targeting crack," but at the same time finding it "unlikely [that] Congress intended to limit the enhanced penalty provision to one manufacturing method").

> Other circuits are diametrically opposed .... The Second Circuit acknowledged that in passing the mandatory minimum sentence for cocaine base Congress was concerned with the problem of crack. *United States v. Jackson*, 968 F.2d 158, 162 (2d Cir. 1992). But the court concluded that by using the chemical name, cocaine base, rather than the colloquial name, crack, Congress intended not to limit application of the enhanced penalties to crack alone, and nothing in the legislative history dispelled that plain language reading. *Ibid.* ... [T]he Third Circuit held that passage of the 1993 guideline amendment did nothing to cast doubt on the plain meaning of the statutory text, which does not limit cocaine base to the form known as crack. *United States v. Barbosa*, 271 F.3d 438, 466-67 (3rd Cir. 2001). The Fifth Circuit has held that the term "cocaine base" in §841(b) encompasses non-crack forms of cocaine base. *United States v. Butler*, 988 F.2d 537, 542-43 (5th Cir. 1993). The Tenth Circuit has adopted the Second Circuit's conclusion in *Jackson* without elaboration. *United States v. Easter*, 981 F.2d 1549, 1558 (10th Cir. 1992).
>
> And, finally, in *United States v. Lopez-Gil*, 965 F.2d 1124 (1st Cir. 1992), the First Circuit initially held that "cocaine base" for purposes of §841(b) means "crack," but on rehearing retreated from that position: "Although we continue to believe that Congress indeed was concerned primarily with the crack epidemic in enacting the legislation, the Government now persuades us that it does not necessarily follow that the term 'cocaine base' includes *only* crack." *Id.* at 1134 (emphasis in original).

Sentencing

***Booker* - reasonableness**

United States v. Mykytiuk, 4__ F.3d ___, 2005 U.S. App. LEXIS 13508
(7th Cir. July 7, 2005).

In *Mykytiuk*, the Seventh Circuit held that a Guidelines sentence is entitled to a rebuttable presumption of reasonableness. *Mykytiuk* found that "[t]he defendant can rebut this presumption only by demonstrating that his or her sentence is unreasonable when measured against the factors set forth in §3553(a)." This created an intra-circuit and inter-circuit conflict. In *United States v. Dean*, 4__ F.3d ___, 2005 U.S. App. LEXIS 13510 (7th Cir. July 7, 2005), a different panel of the Seventh Circuit stressed the mandatory nature of 18 U.S.C. §3553(a) and the advisory nature of the Guidelines. The Court then cited, with approval, three district court opinions that rejected the position that the Guidelines are entitled to presumptive or heavy weight. *Id.*, citing *United States v. Ranum*, 353 F.Supp.2d 984, 985-986 (finding that, under *Booker*, the Guidelines are just one of a number of sentencing factors); *United States v. Kelley*, 355 F.Supp.2d 1031, 1035-1037 (D. Neb. 2005) (refusing to afford the Guidelines a presumption of reasonableness in every case); *Simon v. United States*, 361 F.Supp.2d 35, 39-41 (E.D. NY 2005) (adopting the view that the Guidelines are entitled to the same weight as other §3553(a) factors). *Mykytiuk* also conflicts with decisions of the Second and Sixth Circuits.

The Second Circuit found that:

> Because "reasonableness" is inherently a concept of flexible meaning, generally lacking precise boundaries, we decline to fashion any per se rules as to the reasonableness of every sentence within an applicable guideline or the unreasonableness of every sentence outside an applicable guideline. Indeed, such per se rules would risk being invalidated as contrary to the Supreme Court's holding in *Booker/Fanfan*, because they would effectively re-institute mandatory adherence to the Guidelines.

United States v. Crosby, 397 F.3d 103, 115 (2nd Cir. 2005). The Sixth Circuit also found that "[s]uch a per-se test is not only inconsistent with the meaning of `reasonableness,' but is also inconsistent with the Supreme Court's decision in *Booker*." *United States v. Webb*, 403 F.3d 373, 385 fn. 9 (6th Cir. 2005) (citing and quoting *United States v. Crosby*, 397 F.3d at 115).

Aggravated felony

United States v. Palacios-Suarez, 4__ F.3d ___, 2005 U.S. App. LEXIS 14930 (6th Cir. July 22, 2005).

The Sixth Circuit held that an aggravated felony drug offense is any offense that would be a felony under the federal Controlled Substances Act. The Court agreed with the Second, Third, and Ninth Circuits. *See Aguirre v. INS*, 79 F.3d 315, 317-18 (2nd Cir. 1996); *Gerbier v. Holmes*, 280 F.3d 297, 311 (3rd Cir. 2002); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 919 (9th Cir. 2004). It disagreed with the courts that read the phrase "any felony punishable under the CSA" "to mean that a state drug conviction is a "drug trafficking crime" and therefore an "aggravated felony" if (1) the conviction is a felony under *either state or federal law* and (2) the conduct underlying the conviction is punishable under the CSA (or the other two statutes not at issue here)." *See United States v. Wilson*, 316 F.3d 506, 513 (4th Cir.); *United States v. Pornes-Garcia*, 171 F.3d 142, 148 (2nd Cir.); *United States v. Simon*, 168 F.3d 1271, 1272 (11th Cir.); *United States v. Hinojosa-Lopez*, 130 F.3d 691, 694 (5th Cir. 1997); *United States v. Briones-Mata*, 116 F.3d 308, 309 (8th Cir. 1997); *United States v. Cabrera-Sosa*, 81 F.3d 998, 1000 (10th Cir.); *United States v. Restrepo-Aguilar*, 74 F.3d 361, 365 (1st Cir. 1996). The Seventh and D.C. Circuits do not appear to have decided the issue.

U.S.S.G. §2A3.2(b)(2)(B)

United States v. Chriswell, 401 F.3d 459 (6th Cir. 2005).

The Sixth Circuit held that the U.S.S.G. §2A3.2(b)(2)(B) enhancement for unduly influencing a victim to engage in prohibited sexual conduct does not apply to cases involving undercover law enforcement officers representing themselves to be children under the age of sixteen. The court disagreed with the Eleventh Circuit's contrary holding in *United States v. Root*, 296 F.3d 1222, 1223 (11th Cir. 2002). The Court agreed with the Seventh Circuit's holding in *United States v. Mitchell*, 353 F.3d 552, 554 (7th Cir. 2003). However, the Court declined to follow part of the
Seventh Circuit's reasoning which suggests that the enhancement would not apply to attempted crimes even when there is an actual victim.

U.S.S.G. §3B1.4

United States v. Pojilenko, 4__ F.3d ___, 2005 U.S. App. LEXIS 15366 (3rd Cir. July 27, 2005).

The Third Circuit held that a defendant must have personally used or directed a minor in order to qualify for the enhancement under §3B1.4. Use by a co-conspirator is not enough. This conflicts with decisions by the First, Second, and Eleventh Circuits that the enhancement can be based on a co-conspirator's actions. *United States v. Patrick*, 248 F.3d 11, 27-28 (1st Cir. 2001); *United States v. Lewis*, 386 F.3d 475, 479-480 (2nd Cir. 2004); *United States v. McClain*, 252 F.3d 1279 (11th Cir. 2001).

Habeas Procedure

Relation back of amended petition to original

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

In this case, which I reported in my last column, 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. As I noted, there was a circuit conflict on this issue. However, the Supreme Court has now reversed this case and held that that an amendment to a habeas petition can not relate back to the original petition "when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth." *Mayle v. Felix*, 5__ U.S. ___, 125 S.Ct. 2562, 162 L.Ed.2d 582 (2005).

Requirement for DNA sample

United States v. Cooper, 396 F.3d 308 (3rd Cir. 2005).

The Third Circuit held that "the DNA Analysis Backlog Elimination Act of 2000, 42 U.S.C. §14135a (2000) (the "DNA Act") [does not] require a defendant convicted of possession of stolen bank funds in violation of 18 U.S.C. §2113(c) to submit a sample of her DNA to her probation officer." The Court agreed with the Second Circuit's interpretation of the act. *See United States v. Peterson*, 394 F.3d 98, (2nd Cir. 2005) (subsection (E) only encompasses those offenses in section 2111 through 2114 that involve robbery or burglary). However, the Third Circuit disagreed with the Seventh Circuit's interpretation. *See United States v. Henderson*, 376 F.3d 730 (7th Cir. 2004) (deciding first that the language of the DNA Act is ambiguous, and then, as a result of the ambiguity, deferring to the Government's interpretation that subsection (E) includes any offense under §2113, including subsection (b), bank larceny).

Supreme Court Update
October 2004 Term

Compiled by: Johanna Christiansen
Staff Attorney

***Leocal v. Ashcroft,* 125 S. Ct. 377 (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*, 125 S. Ct. 400 (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,* 125 S. Ct. 564 (December 13, 2004) (Chief Justice Rehnquist).** 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.* 125 S. Ct. 551 (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,* 125 S. Ct. 588 (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*, 125 S. Ct. 687 (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,* 125 S. Ct. 738 (January 12, 2005).** In this follow-up case to last term's *Blakely v. Washington*, the Court reaffirmed its holding in *Apprendi* and *Blakely* stating, "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." A sentence imposed in contravention of this rule, such as a sentence imposed using the mandatory United States Sentencing Guidelines, violates the Sixth Amendment. In fashioning the remedy for such a violation, the Court concluded two statutory provisions must be excised from the Sentencing Reform Act - 18 U.S.C. § 3553(b)(1), which makes application of the guidelines mandatory and 18 U.S.C. § 3742(e), which sets forth the standard of review on appeal. Without these two provisions, the remainder of the Sentencing Reform Act "functions independently" and requires the Guidelines be treated as advisory rather than mandatory. Therefore, district court judges must still consider the "sentencing range established for the applicable category of offense committed by the applicable category of defendant" in addition to all of the other sentencing goals listed in 18 U.S.C. § 3553(a). District court judges are required to consider "sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care." If a defendant's sentence violates the Sixth Amendment using the *Booker* analysis, the Supreme Court concluded the sentence must be vacated and remanded for resentencing, subject to the possible effects of plain error review.

***Illinois v. Caballes*, 125 S. Ct. 834 (January 24, 2005) (Justice Stevens).** The Court held that a dog sniff conducted during an otherwise lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment. In so holding, the Court declined to consider two related issues - first, whether the unlawfully prolonged detention of an individual while waiting for a drug-sniffing dog to arrive violates the Fourth Amendment and second, whether the use of a drug-sniffing dog with a high number of false positives calls into question the premise that such dogs only alert to contraband. The Court reconciled its opinion in *Kyllo v. United States*, which held that the use of thermal-imaging devices violated the Fourth Amendment, by noting a drug-sniffing dog only alerts to contraband and does not reveal lawful, private activities.

***Bell v. Cone,* 125 S. Ct. 847 (January 24, 2005) (Per Curiam).** In this capital case, the Sixth Circuit granted a writ of habeas corpus after concluding that the "especially heinous, atrocious, or cruel" aggravating circumstance found by the jury during the sentencing phase of his trial was unconstitutionally vague and that the Tennessee Supreme Court failed to cure an constitutional deficiencies on appeal. The Supreme Court reversed. In *Proffitt v. Florida,* the Court upheld the same aggravating circumstance where a narrowing construction had been adopted by the state supreme court. The Sixth Circuit found that the Tennessee Supreme Court had not specifically mentioned any narrowing construction in this case but the Supreme Court rejected this holding. Where a state supreme court has construed the aggravating circumstance narrowly in other cases and had followed that precedent numerous times, reviewing courts must presume the court followed it in this case absent an affirmative indication to the contrary.

***Howell v. Mississippi*, 125 S. Ct. 856 (January 24, 2005) (Per Curiam).** Convicted of capital murder, Howell argued the Mississippi state courts violated his Eighth and Fourteenth Amendment rights by refusing to require a jury instruction about a lesser included offense. However, because he did not raise this claim to the Supreme Court of Mississippi, the Supreme Court dismissed the writ of certiorari as improvidently granted.

***Smith v. Massachusetts*, 125 S. Ct. 1129 (February 22, 2005) (Justice Scalia).** Smith was tried by jury on various charges, including unlawful possession of a firearm. At the conclusion of the prosecution's case, Smith moved for a directed verdict on the firearm count based on Massachusetts Rule of Criminal Procedure 25(a), which is patterned on Federal Rule of Criminal Procedure 29. The trial judge granted the motion, the prosecution rested, and the trial proceeded on the other counts. Prior to closing

arguments, the prosecution argued the evidence was sufficient to support the firearms charge and the judge reversed the previous ruling, allowing the firearms count to go to the jury. Smith was convicted on all counts. The Supreme Court held the trial court had violated the Double Jeopardy clause by subjecting Smith to "further factfinding proceedings on guilt or innocence" after an acquittal by the court. The Court also held the Double Jeopardy clause forbade the judge to reconsider the ruling later in the trial.

***Garrison S. Johnson v. California,* 125 S. Ct. 1141 (February 23, 2005) (Justice O'Connor).** The California Department of Corrections (CDC) has an unwritten policy of racially segregating prisoners for 60 days each time they enter a new facility based on the rationale that such segregation prevents racial gang violence. The Ninth Circuit upheld the policy using the deferential standard articulated in *Turner v. Safley*, which asks whether a regulation that burdens prisoners' fundamental rights is "reasonably related" to legitimate penological interests. The Supreme Court reversed holding that, because the police is immediately suspect as a racial classification, strict scrutiny should apply requiring the CDC to demonstrate the police is narrowly tailored to serve a compelling state interest. While not making a final determination on this issue, the Court noted "Virtually all other States and the Federal Government manage their prison systems without reliance on racial segregation."

***Roper v. Simmons*, 125 S. Ct. 1183 (March 1, 2005) (Justice Kennedy).** Simmons planned and committed murder at the age of 17 in Missouri. He was tried and sentenced to death after his 18th birthday. The Supreme Court held the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. The Eighth Amendment's prohibition against cruel and unusual punishment must be interpreted by considering history, tradition, and precedent, and with due regard for its purpose and function. The Court must look to the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual. Relying on the recent *Atkins* opinion (abolishing the death penalty for the mentally retarded), the Court concluded the indicia of national consensus supported its conclusion, particularly the infrequency of execution of juveniles and the rejection of the policy by the majority of states. Furthermore, capital punishment must be limited to those offenders who commit the most serious crimes and whose extreme culpability makes them most deserving of execution. The Court held that juvenile offenders cannot with reliability be classified among the worse offenders because of (1) their susceptibility to immature and irresponsible behavior; (2) their vulnerability and lack of control; and (3) their struggle to define their identity makes it less likely they suffer from irretrievable depraved character. Finally, the Court noted the United States is the only country in the world that officially sanctions the juvenile death penalty.

***Wilkinson v. Dotson*, 125 S. Ct. 1242 (March 7, 2005) (Justice Breyer).** The respondents challenged the Ohio parole procedures asking for declaratory and injunctive relief under 42 U.S.C. § 1983. The federal district court concluded the respondents could not proceed under § 1983 and would have to seek federal habeas corpus relief. The Sixth Circuit reversed and held the respondents may seek § 1983 relief. The Supreme Court agreed and held that § 1983 remains available for procedural challenges where success would not necessarily mean immediate or faster release of the prisoner. However, § 1983 cannot be used where success would necessarily demonstrate the invalidity of confinement or its duration. Because success for the respondents would only mean an opportunity for a new parole proceeding, not release, their actions could proceed under § 1983.

***Shepard v. United States,* 125 S. Ct. 1254 (March 7, 2005) (Justice Souter).** Shepard pled guilty to being a felon in possession of a firearm. At sentencing, the government sought to sentence him under the Armed Career Criminal Act (ACCA) thereby increasing his sentence from 37 months to 15 years. In the majority portion of the opinion (written by Justice Souter and joined by Justices Stevens, Scalia, Ginsburg, and Thomas), the Supreme Court held that the inquiry under the ACCA to determine whether a guilty plea to burglary under a nongeneric statute necessarily admitted elements of the generic offense is limited to the terms of the charging document, the plea agreement, the transcript of the change of plea colloquy where the defendant confirmed the factual basis, or some other comparable judicial record. The Court rejected the government's argument to broaden the scope of inquiry to include police reports and other similar documents. In section III of the opinion, Justice Souter comments on the impact of a defendant's Sixth Amendment's rights, as discussed in *Jones* and *Apprendi*, on the ACCA factual determinations. Section III indicates judicial factfinding regarding prior convictions on evidence aside from what is mentioned above may implicate Sixth Amendment concerns. However, section III did not command a majority of the justices with Justice Thomas refusing to join in the section. Note - Chief Justice Rehnquist did not take part in this decision.

***Brown v. Payton*, 125 S. Ct. 1432 (March 22, 2005) (Justice Kennedy).** During the penalty phase of his capital murder trial, Payton presented extensive post-offense rehabilitation evidence. The jury instructions contained a "factor (k) instruction" which directed jurors

to consider any other circumstance which extenuates the gravity of the crime. During closing arguments, the prosecutor erroneously argued factor (k) did not allow them to consider post-offense rehabilitation. Applying *Boyde v. California*, a case involving a similar factor (k) instruction, the California Supreme Court concluded there was no reasonable likelihood the jury believed it was required to disregard the post-offense mitigating evidence. The Ninth Circuit disagreed and granted the federal habeas corpus petition. The Supreme Court reversed holding the California Supreme Court's interpretation of *Boyde* was not unreasonable and therefore shielded from review by AEDPA.

***Muehler v. Mena*, 125 S. Ct. 1465 (March 22, 2005) (Chief Justice Rehnquist).** Police executed a search warrant on a dwelling looking for deadly weapons and evidence of gang membership. Mena was one of the occupants of the home during the search and was detained in handcuffs. Police also questioned Mena about her immigration status while she was in handcuffs. Mena filed a suit under 42 U.S.C. § 1983 and the district court found in her favor, a decision the Ninth Circuit affirmed. The Supreme Court reversed holding Mena's detention in handcuffs during the search did not violate the Fourth Amendment pursuant to *Michigan v. Summers*, which held officers who are executing a search warrant for contraband have the authority to detain the occupants of the premises during the search. Officer safety is a substantial justification for detaining occupants during the search. Furthermore, the officers' questions regarding her immigration status, which did not unreasonably prolong her detention, did not constitution an additional seizure requiring independent reasonable suspicion.

***Rhines v. Weber*, 125 S. Ct. 1528 (March 30, 2005) (Justice O'Connor).** Rhines was convicted in state court of murder and burglary. After the conviction became final and his state habeas petition was denied, he filed a federal habeas petition. When the district court issued a ruling finding that eight of Rhines's claims had not been exhausted in state court, the AEDPA limitations period had run. The district court held the federal petition in abeyance while allowing Rhines to present his unexhausted claims in state court. The Supreme Court approved of this procedure, holding a federal district court has discretion to stay a mixed petition to allow a petitioner to present his unexhausted claims to the state court in the first instance and then return to federal court for review of the perfected petition if dismissing the entire petition would unreasonably impair the petitioner's right to obtain federal relief.

***Johnson v. United States*, 125 S. Ct. 1571 (April 4, 2005) (Justice Souter).** Johnson pled guilty to a federal drug charge and was sentenced using the career offender provisions of the Sentencing Guidelines based on two prior Georgia drug convictions. Four years later, a Georgia court entered an order of vacatur reversing his prior convictions. Three months after the order of vacatur was entered, Johnson filed a *pro se* § 2255 petition to vacate his federal sentence under the AEDPA provision which sets the one-year limitations period based on "the date on which the facts supporting the claim . . . could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255, paragraph 6(4). The district court dismissed the petition as untimely and the Eleventh Circuit affirmed. The Supreme Court held that, in a case where the defendant collaterally attacks his federal sentence on the ground that a state conviction used to enhance that sentence has been vacated, paragraph 6(4)'s one-year limitations period begins to run when the petitioner received notice of the order vacating the prior conviction, provided that he has sought it with due diligence in state court after the entry of judgment in the federal case. However, the Supreme Court also held that Johnson did not exercise due diligence in seeking vacatur of his state convictions because he waited four years after receiving his federal sentence before challenging the convictions. The Court held that *pro se* representation and procedural ignorance are not excuses for "prolonged inattention."

***Small v. United States*, 125 S. Ct. 1752 (April 26, 2005) (Justice Breyer).** Small was convicted in Japan of attempting to smuggle firearms and ammunition into that country. When he returned to the United States, he purchased a firearm and was charged in federal court under 18 U.S.C. § 922(g)(1) which forbids "any person . . . convicted in any court . . . of a crime punishable by imprisonment for a term exceeding one year" to possess a firearm. He argued foreign convictions cannot satisfy the requirement of a conviction "in any court." The Supreme Court agreed and held that Congress intended the scope of § 922(g)(1) to only encompass domestic convictions, not foreign convictions.

***Pasquantino v. United States*, 125 S. Ct. 1766 (April 26, 2005) (Justice Thomas).** At common law, the "revenue rule" generally barred courts from enforcement the tax laws of foreign sovereigns. Pasquantino and his co-defendants executed a scheme to smuggle liquor from Canada from the United States to avoid Canada's high alcohol import taxes. They were convicted of wire fraud (18 U.S.C. § 1343) and argued their convictions were barred by the common law "revenue rule." The Fourth Circuit disagreed and affirmed their convictions. The Supreme Court agreed with the Fourth Circuit and held that the petitioners' scheme clearly fell within the elements of wire fraud. Furthermore, their convictions did not violate the revenue rule because enforcement of the United States criminal laws differs from enforcement of

Canada's liquor tax laws. A conviction for wire fraud falls under the former.

***Pace v. DiGuglielmo*, 125 S. Ct. 1807 (April 27, 2005) (Chief Justice Rehnquist).** After his convictions in state court, Pace filed a state postconviction petition. The state supreme court eventually denied the petition determining it was untimely under the state postconviction relief statute. Pace then filed a federal habeas petition outside of the one-year AEDPA state of limitations. The district court refused to dismiss the petition finding that Pace was entitled to statutory and equitable tolling while his state postconviction petition was pending. The Supreme Court disagreed that held that Pace was not entitled to statutory tolling because an untimely state petition is not a "properly filed application for state postconviction or other collateral review" under 28 U.S.C. § 2244(d)(2). The Court also held that Pace could not qualify for equitable tolling where he waited "for years" before filing his state postconviction relief petition and three months after the state petition was denied to file his federal petition.

***Deck v. Missouri*, 125 S. Ct. 2007 (May 23, 2005) (Justice Breyer).** Deck was convicted of capital murder and sentenced to death. At the sentencing hearing, he was visibly shackled with leg irons, handcuffs, and a belly chain. The Supreme Court held that the Constitution forbids the use of visible shackles during the penalty phase, just as during the guilt phase, unless the use is justified by an essential state interest specific to the particular defendant. The Court found that Missouri had offered no evidence the use of shackles in this case was justified. The trial judge did not refer to an escape risk or threat to courtroom security or explain why non-visible shackles were not made available. Finally, the Court determined that shackling is "inherently prejudicial."

***Arthur Anderson, L.L.P. v. United States*, 125 S. Ct. 2129 (May 31, 2005) (Chief Justice Rehnquist).** Arthur Anderson, Enron Corporation's auditor, instructed its employees to destroy documents pursuant to its document retention policy. Arthur Anderson was indicted under 18 U.S.C. §§ 1512(b)(2)(A) and (b), which make it a crime to knowingly corruptly persuade another person with intent to cause that person to withhold documents from, or alter documents for use in, an official proceeding. The jury returned a guilty verdict and Arthur Anderson appealed arguing the jury instructions did not properly convey the meaning of corruptly persuades or official proceeding. The Fifth Circuit affirmed the conviction and held that the jury need not find any consciousness of wrongdoing in order to convict. The Supreme Court reversed holding the jury instructions failed to convey the requisite consciousness of wrongdoing and diluted the meaning of corruptly such that it covered innocent conduct.

***Gonzales v. Raich*, 125 S. Ct. 2195 (June 6, 2005) (Justice Stevens).** California state law authorizes limited marijuana use for medicinal purposes. Respondents Raich and Monson are California residents who use doctor-recommended marijuana to treat their medical conditions. After the DEA destroyed Monson's marijuana plants, respondents sought injunctive and declaratory relief prohibiting the enforcement of the federal Controlled Substances Act to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use. The Supreme Court held Congress' Commerce Clause authority includes the power to prohibit the local cultivation and use of marijuana in compliance with California state law. The Court distinguished *Lopez* and *Morrison* by noting those cases involved invalidation of an entire statute where, in this case, the respondents only ask the Court to excise individual application of a concededly valid statutory scheme.

***Miller-El v. Dretke*, 125 S. Ct. 2317 (June 13, 2005) (Justice Souter).** During Miller-El's state trial for capital murder in 1986, two Dallas County, Texas assistant district attorneys used peremptory strikes to exclude 10 of the 11 African-Americans eligible to serve on the jury. Miller-El appealed his conviction, arguing the prosecution's tactics violated *Batson v. Kentucky.* The Supreme Court determined Miller-El was entitled to prevail on his *Batson* claims and entitled to habeas relief. Miller-El was able to show that: (1) 91% of eligible black jurors were removed by peremptory strikes, while only 13% of non-black jurors were; (2) the prosecutors questioned prospective black jurors differently about their willingness to impose the death penalty; (3) the prosecutors informed black jurors less frequently about imposition of the minimum sentence; (4) the prosecutors engaged in "jury shuffling," a practice common in Texas at the time; and (5) the Dallas County State's attorney office had practices and policies in place at the time of the conviction designed to ensure fewer blacks were placed on juries.

***Wilkinson v. Austin*, 125 S. Ct. 2384 (June 13, 2005) (Justice Kennedy).** This case challenged the placement procedures used to designate Ohio state prisoners to the state's Supermax prison - OSP. The Supreme Court held that the procedures used at OSP for classifying prisoners for placement provide prisoners with sufficient protection to comply with the Due Process Clause. The Court first found that inmates have a constitutionally protected liberty interest in avoiding assignment to OSP. The Court then articulated three factors to evaluate the sufficiency of prison procedures: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute safeguards; and (3) the government's interest, including

the function involved and the fiscal and administrative burdens that additional or substitute requirements would entail. The Court held that OSP's system involving multiple levels of classification review, a placement review within 30 days, notice of the factual basis for placement, and an opportunity to rebut placement were sufficient safeguards.

***Bradshaw v. Stumpf*, 125 S. Ct. 2398 (June 13, 2005) (Justice O'Connor).** Stumpf and his co-defendant armed robbery during which one of them shot and killed a victim. Stumpf maintained his co-defendant shot the victim. In the state court proceedings, Stumpf pled guilty to aggravated murder and one of three capital murder specifications. At the sentencing hearing, the state argued Stumpf shot the victim and therefore deserved the death penalty as the principle offender. However, at the co-defendant's trial, the state maintained the co-defendant shot the victim. Stumpf argued that he did not understand that specific intent was a necessary element of the aggravated murder charge to which he pled guilty. The Supreme Court disagreed that held that Stumpf's guilty plea had been knowing and voluntary because his attorneys represented at the plea hearing that they had explained the elements of the crime to him and Stumpf confirmed their representations. However, the Supreme Court remanded the case for consideration of the effect of the prosecutions inconsistent theories of the offense on Stumpf's sentence.

***Jay Shawn Johnson v. California*, 125 S. Ct. 2410 (June 13, 2005) (Justice Stevens).** Johnson, a black man, was charged in California state court with assaulting and murdering a white child. During jury selection, a number of jurors were removed for cause until 43 remained, three of whom were black. The prosecutor used peremptory challenges to remove all three black prospective jurors. Johnson challenged the jury selection process which was upheld based on California's precedent requiring the defendant to show a "strong likelihood" that the peremptory challenges were based on racial bias. The Supreme Court held this standard conflicts with *Batson v. Kentucky* which only requires the defendant to initial provide a prima facie case by proving he is a member of a racial group and the prosecutor's exercise of peremptory challenges excluded members of that group.

***Rompilla v. Beard*, 125 S. Ct. 2456 (June 20, 2005) (Justice Souter).** Rompilla was convicted of capital murder. During the penalty phase, his family members pleaded for mercy but no other mitigating evidence was presented. In this habeas action, he claimed ineffective assistance of trial counsel who failed to present significant mitigating evidence about Rompilla's traumatic childhood, mental capacity and health, and alcoholism. The Supreme Court held that, even when a capital defendant and his family members have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence aggravation at the trial's sentencing phase.

***Dodd v. United States*, 125 S. Ct. 2478 (June 20, 2005) (Justice O'Connor).** Dodd filed a motion under 28 U.S.C. § 2255, claiming that his conviction for knowingly and intentionally engaging in a continuing criminal enterprise should be set aside because it was contrary to *Richardson v. United States*. The district court held that, because *Richardson* had been decided more than one year before Dodd filed his motion, the motion was untimely under § 2255, paragraph 6(3). Dodd argued that paragraph 6(3)'s limitation period began to run on the date the Eleventh Circuit recognized *Richardson*'s retroactive application to cases on collateral review. The Eleventh Circuit held that the period began to run on June 1, 1999, the date that the Supreme Court initially decided *Richardson*. The Supreme Court agreed with the Eleventh Circuit and held that the one-year limitation period begins to run on the date on which the Court "initially recognized" the right asserted in an applicant's motion, not the date on which that right was made retroactive. Because Dodd's § 2255 motion was filed more than a year after the Court decided *Richardson*, his motion was untimely.

***Mayle v. Felix*, 125 S. Ct. 2562 (June 23, 2005) (Justice Ginsburg).** Felix was convicted of murder and robbery in California state court and sentenced to life imprisonment. Felix's conviction was affirmed on appeal and became final on August 12, 1997. Under the one-year limitation period imposed by AEDPA, Felix had until August 12, 1998 to file a habeas petition in federal court. On May 8, 1998, in a timely filed habeas petition, Felix asserted his Confrontation Clause challenge. On January 28, 1999, over five months late, Felix filed an amended petition asserting a Fifth Amendment objection to admission of his pretrial statements. Felix asserted the rule that pleading amendments relate back to the filing date of the original pleading when both the original plea and the amendment arise out of the same "conduct, transaction, or occurrence set forth in the original pleading." The Supreme Court held that an amended habeas petition does not relate back (and thereby avoid AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those set forth in the original pleading.

***Halbert v. Michigan*, 125 S. Ct. 2582 (June 23, 2005) (Justice Ginsburg).** In *Douglas v. California,* the Court held that, in criminal proceedings, a state must provide counsel for an indigent defendant in a first appeal as of

right. Later, in *Ross v. Moffitt,* the Court held that a state need not appoint counsel to aid a poor person seeking to pursue a second-tier discretionary appeal to the state's highest court, or, thereafter, certiorari review in this Court. Michigan has a two-tier appellate system. The state supreme court hears appeals by leave only. Under Michigan law, most indigent defendants convicted on a plea must proceed *pro se* in seeking leave to appeal to the intermediate court. In *People* v. *Bulger*, the Michigan Supreme Court held that the *Fourteenth Amendment's* Equal Protection and Due Process Clauses do not secure a right to appointed counsel for plea-convicted defendants seeking review. The Supreme Court held that the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals.

***Gonzalez v. Crosby*, 125 S. Ct. 2641 (June 23, 2005) (Justice Scalia).** Gonzalez's federal habeas corpus petition was dismissed as time barred when the district court concluded that the federal limitations period was not tolled while his motion for postconviction relief was pending in state court. After he abandoned review of the district court's decision, the Supreme Court decided that a state postconviction relief petition can toll the federal statute of limitations even if the petition is ultimately dismissed as procedurally barred. Gonzalez filed a Federal Rule of Civil Procedure 60(b)(6) motion, which was denied. The Eleventh Circuit affirmed the denial, holding that the Rule 60(b) motion was in substance a second or successive habeas petition. The Supreme Court held that because Gonzalez's Rule 60(b) motion challenged only the previous ruling on AEDPA's statute of limitations, it was not a successive habeas petition.

***Bell v. Thompson*, 125 S. Ct. 2825 (June 27, 2005) (Justice Kennedy).** After Thompson was convicted of murder and sentenced to death, state courts denied postconviction relief on his claim that his trial counsel had been ineffective for failing to adequately investigate his mental health. His federal habeas attorneys subsequently retained psychologist Dr. Sultan, whose report and deposition contended that Thompson suffered from serious mental illness at the time of his offense. The district court dismissed the petition, but counsel had failed to include Sultan's report in the record. Upholding the dismissal, the Sixth Circuit found no ineffective assistance and did not discuss Sultan's report and deposition in detail. That court later denied rehearing, but stayed issuance of its mandate pending disposition of Thompson's certiorari petition. After the Supreme Court denied certiorari, the Sixth Circuit stayed its mandate again, pending disposition of a petition for rehearing, which was denied. The Sixth Circuit did not issue its mandate. Competency proceedings were pending when the Sixth Circuit issued an amended opinion, remanding the case for an evidentiary hearing on the ineffective-assistance claim. The Sixth Circuit then supplemented the record on appeal with Sultan's report. The Supreme Court held that, assuming that Federal Rule of Appellate Procedure 41 authorizes a stay of a mandate following a denial of certiorari and that a court may stay the mandate without entering an order, the Sixth Circuit's decision was an abuse of discretion. The Court focused on the fact that the Sixth Circuit did not release its amended opinion for more than five months after the Court denied rehearing. The consequence of delay for the State's criminal justice system was compounded by the Sixth Circuit's failure to issue an order or otherwise give notice to the parties that it was reconsidering its earlier opinion.

OCTOBER 2005 TERM PENDING CASES - QUESTIONS PRESENTED

***Brown v. Sanders*, No. 04-980, cert. granted March 28, 2005.** First, is the California death penalty statute a "weighing statute" for which the state court is required to determine that the presence of an invalid special circumstance was harmless beyond a reasonable doubt as to the jury's determination of penalty? Second, if an affirmative answer to the first question was dictated by precedent, was it necessary for the state supreme court to specifically use the phrases "harmless error" or "reasonable doubt" in determining that there was no "reasonable possibility" that the invalid special circumstance affected the jury's sentence selection? Decision below: 373 F.3d 1054 (9th Cir. 2004).

***Maryland v. Blake*, No. 04-373, cert. granted April, 18, 2005.** When a police officer improperly communicates with a suspect after invocation of the suspect's right to counsel, does *Edwards* permit consideration of curative measures by the police, or other intervening circumstances, to conclude that a suspect later initiated communication with the police? Decision below: 849 A.2d 410 (Md. App. 2004).

***Georgia v. Randolph*, No. 04-1067, cert. granted April 18, 2005.** Should this Court grant certiorari to resolve the conflict among federal and state courts on whether an occupant may give law enforcement valid consent to search the common areas of the premises shared with another, even though the other occupant is present and objects to the search? Decision below: 604 S.E.2d 835 (Ga. 2004).

***Oregon v. Guzek*, No. 04-928, cert. granted April 25, 2005.** Does a capital defendant have a right under the Eighth and Fourteenth Amendments to the United States Constitution to offer evidence and argument in support of a residual-doubt claim -- that is, that the jury in a penalty-

phase proceeding should consider doubt about the defendant's guilty in deciding whether to impose the death penalty? Decision below: 86 P.3d 1106 (Or. 2004).

***LaMarque v. Chavis*, No. 04-721, cert. granted May 2, 2005.** Did the Ninth Circuit contravene this Court's decision in *Carey v. Saffold* when it held that a prisoner who delayed more than three years before filing a habeas petition with the California Supreme Court did not "unreasonable" delay in filing the petition -- and therefore was entitled to tolling during that entire period -- because the California Supreme Court summarily denied the petition without comment or citation, which the Ninth Circuit construes as a denial "on the merits?" Decision below: 382 F.3d 921 (9th Cir. 2004).

***Kansas v. Marsh*, No. 04-1170, cert. granted May 31, 2005.** First, does it violate the Constitution for a state capital sentencing statute to provide for the imposition of the death penalty when the sentencing jury determines that the mitigating and aggravating evidence is in equipoise? Second, does this Court have jurisdiction to review the judgment of the Kansas Supreme Court under 28 U.S.C. § 1257, as construed by *Cox v. Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)? Third, was the Kansas Supreme Court's judgment adequately supported by a ground independent of federal law? Decision below: 102 P.3d 445 (Kan. 2004).

***Hudson v. Michigan*, No. 04-1360, cert. granted June 27, 2005.** Does the inevitable discovery doctrine create a *per se* exception to the exclusionary rule for evidence seized after a Fourth Amendment "knock and announce" violation, as the Seventh Circuit and the Michigan Supreme Court have held, or is evidence subject to suppression after such violations, as the Sixth and Eighth Circuits, the Arkansas Supreme Court, and the Maryland Court of Appeals have held? Decision below: 2001 Mich. LEXIS 2469 (Mich. Dec. 18, 2001); 2005 Mich. LEXIS 116 (Mich. Jan. 31, 2005) (unpublished).

***Rice, et al. v. Collins*, No. 04-52, cert. granted June 28, 2005**. Does 28 U.S.C. § 2254 allow a federal habeas corpus court to reject the presumption of correctness for state fact finding, and condemn a state court adjudication as an unreasonable determination of the facts, where a rational fact finder could have determined the facts as did the state court? Decision below: 348 F.3d 1082 (9th Cir. 2003).

***House v. Bell*, No. 04-8990, cert. granted June 28, 2005.** First, did the majority below err in applying this Court's decision in *Schlup v. Delo* to hold that Petitioner's compelling new evidence, though presenting at the very least a colorable claim of actual innocence, was as a matter of law insufficient to excuse his failure to present that evidence before the state courts - merely because he had failed to negate each and every item of circumstantial evidence that had been offered against him at the original trial? Second, what constitutes a "truly persuasive showing of actual innocence" pursuant to *Herrera v. Collins* sufficient to warrant freestanding habeas relief? Decision below: 386 F.3d 668 (6th Cir. 2004).

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