The BACK BENCHER

Central District of Illinois Federal Defenders

Vol. No. 39 Winter 2006

DEFENDER'S MESSAGE

As some of you may already know, Illinois now requires Mandatory Continuing Legal Education (MCLE) for lawyers. Andy McGowan of our office summarizes the new requirements in this issue. The good news is that many of you have been attending seminars conducted by this office for years--not because Illinois required you to do so--but because you understood the need to stay abreast of the law to effectively represent your clients. Thus, for many of you, you will be able to earn your CLE credits by continuing to attend the various seminars we offer throughout the year.

We have always offered our seminars to panel attorneys free of charge, and we intend to continue to do so under the new MCLE rules. Although the rules currently provide that a fee is to be charged to those organizations who sponsor a seminar, it is my hope that once the new MCLE Director is selected, there will be a mechanism in place whereby a not-for-profit organization or government agency can have the fee waived. I assure you that we will make every effort to provide you with the same free and high-quality seminars which we have provided in the past.

Because no MCLE Director has been chosen yet, there is currently no way in which to request that a seminar will provide attendees with CLE credit. Accordingly, I am waiting to arrange a seminar until procedures are in place to do so. I hope and anticipate that by late summer, the office will conduct one or more seminars for Illinois CLE credit. So, watch for upcoming issues of *The Back Bencher* for the time and place of upcoming seminars.

Events of the past few years with cases like *Blakely* and *Booker* have demonstrated that CLE--mandatory or otherwise--is an essential part of the practice of law. We have seen a sea of change in federal criminal sentencing since *Blakely*, and no criminal defense lawyer could practice in federal court without staying current with the changes wrought by the Supreme Court and the Seventh Circuit Court of Appeals. Things like "reasonableness review" and the "*Paladino* remand" have now become familiar concepts, but only after numerous cases have elucidated on the procedural and substantive aspects of these terms. Navigating a federal sentencing hearing or appeal has therefore required lawyers to be familiar with these cases.

Although things have definitely settled down since the early post-*Blakely* days, it would be dangerous to assume that the sentencing regime which has developed will remain static. As we worried in the days immediately proceeding *Booker*, Congress will likely step in to take back the discretion given to judges by *Booker*. Indeed, post-*Blakely* sentencing statistics show that nationally the number of within-range sentences have decreased from 72.2% prior to *Blakely* to 61.9% as of February 2006. This statistic, as well as numerous others, is available in the United States Sentencing Commission's Report on *Booker* released on March 14, 2006. I have reprinted the "Executive Summary" of the report in this issue and, for those of you interested, you can access the entire 277 page report at the Commission's website at www.ussc.gov.

The ten percent drop in within-range sentences may be enough to stir Congress and the Sentencing Commission into action, perhaps resulting in new or increased mandatory minimum and guideline sentences for a variety of offenses. Indeed, the

Sentencing Commission has been holding hearings on a number of proposed amendments to the Guidelines, ranging from immigration offenses, obstruction of justice enhancements, and terrorism issues. Likewise, Congress continues to hold hearings on *Booker* issues, with the distinct possibility of more and increased mandatory minimum sentences for a wide range of offense and "topless guidelines," *i.e,* all guideline ranges having life imprisonment as the high end of the range, thereby avoiding *Booker* problems.

Whatever the Congressional "fix" looks like, it will certainly not benefit our clients, and challenging any curtailment of judicial discretion will require creativity and tenacity on the part of the criminal defense bar. The Federal Defenders around the country have been fighting hard to prevent both the Sentencing Commission and Congress from turning back the clock to the pre-*Booker* days--or worse. In addition to writing to the Commission and Congress with comments on proposed Guideline amendments and legislation, defenders have testified in-person before both entities as well. In addition to these national efforts, on the local level, we will continue to provide you with tools to assist you in any fight which may be required through *The Back Bencher*, seminars, and person-to-person assistance.

Of course, as I have said in this message many times before, a lawyer needs more than legal updates and seminars to survive--he or she also needs entertainment. Along these lines, I am pleased to provide you in this and upcoming issues of *The Back Bencher* excerpts from *Wilkes World*. Written by prominent criminal defense attorney Charles Sevilla and appearing in *The Champion* during the 1980s and 90s (as well as two books), these hilarious tales about the antics of the fictional defense lawyer John Wilkes are sure to entertain you. I am sincerely grateful to one of my old friends, Chuck Sevilla, for graciously giving me permission to reprint his work here.

Sincerely yours,

Richard H. Parsons
Federal Public Defender
Central District of Illinois

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CHURCHILLIANA

Of all the talents bestowed upon men, none is so precious as the gift of oratory . . . . Abandoned by his party, betrayed by his friends, stripped of his offices, whoever can command this power is still formidable.

- Winston S. Churchill, 1897

Dictum Du Jour

"The trite saying that honesty is the best policy has met with the just criticism that honesty is not policy. The real honest man is honest from conviction of what is right, not from policy."

- - Robert E. Lee

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"We, as criminal defense lawyers, are forced to deal with some of the lowest people on earth, people who have no sense of right and wrong, people who will lie in court to get what they want, people who do not care who gets hurt in the process. It is our job--our sworn duty--as criminal defense lawyers, to protect our clients from those people."

--Cynthia Rosenberry

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"People often ask me how I can represent people whom I know are guilty as sin. I tell them what I tell my students at Cornell: As attorneys, you will find that your clients are guilty of *all* the terrible things people say about them, that

you are dealing with people who cheat, steal, ruin lives, and do horrible damage to their communities. They have no conscience, no sense of right and wrong, they lie in court to get what they want, and they don't care about the human costs to their actions. And if *you* can't handle that, then you're not ready to be a corporate lawyer."

- - Anonymous

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"They couldn't hit an elephant at this dist---."

--General John Sedgwick, scoffing at Confederate sharpshooters moments before he was shot and killed

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"Every single person in this room," Jessica was saying [to a meeting of the NACDL], "is a committed, passionate foe of capital punishment. Because it's immoral, because it's invariably applied in a racist manner, because study after study has demonstrated that it has absolutely no deterrent value whatsoever. And because it defines us as an uncivilized nation that places a higher value on vengeance than on compassion. Sound familiar?"

--Joseph T. Klemper

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"THE COURT:	Okay. Go ahead.
MR. GERGITS:	Your Honor, may I be heard on that?
THE COURT:	Oh, yeah.
MR. GERGITS:	Your Honor, I believe your instruction is a 7th Circuit instruction regarding –
THE COURT:	Well, it probably is. I don't pay attention to the 7th Circuit. Don't bore me with the 7th Circuit."

--*United States v. Schaefer*, 99 CR 109 (S. Dist. Ind; 1999) (taken from transcript Vol. IV, p. 697).

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"If courts prohibit the introduction of any evidence that conflicts with the prosecution's case because it might 'confuse' the jury, the right of the accused to present a defense would exist only in form."

--*Alcala v. Woodford*, 334 F.3d 862 (9th Cir. 1993).

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"Achieving agreement between the circuit courts and within each circuit on post-*Booker* issues has, unfortunately, been like trying to herd bullfrogs into a wheelbarrow."

--*United States v. McBride*, 434 F.3d 470, 474 (6th Cir. 2006)

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"Verdone also received a three-year term of supervised release, which is now in effect because he has been released from prison. He contests one of the special conditions of release: that he '[c]ooperate fully and completely with the Internal Revenue Service in the calculation and collection of civil tax liabilities, interest, and penalties.' The United States contends that the contention is not ripe because Verdone has not yet violated the requirement and been sent back to prison. Yet we regularly entertain objections to conditions of release before they have been violated, on the sensible understanding that most persons endeavor to comply and that the terms thus affect ongoing conduct. The government's argument is rather like saying that, if the district judge had ordered Verdone to go over Niagara Falls in a barrel, he would not be entitled to appeal until he hit bottom."

--*United States v. Verdone*, No. 05-2868 (7th Cir; March 3, 2006) (unpublished order).

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"Walker's defense, on the other hand, was somewhere between absurd and impossible. According to Walker, Lorinda called him over to have sex during the middle of the day while she was watching her four children, all under the age of nine. When Walker appeared, Lorinda shepherded the children into a room and had sex with him. But she did not want her boyfriend to find out about the encounter. To that end, instead of simply never telling her boyfriend about the tryst, she told her daughter to call 911 while she was in the middle of having sex with Walker. Tr. of 911 Call ('[My mother] told me to call 911.'). Lorinda also put on a good show for her children by crying, and Walker got into the act of setting himself up for a false sexual assault charge by hitting Lorinda before they had sex. Id. The foregoing defense, Walker asserts, hinged on his being able to explore the fact that Lorinda was a victim of domestic violence, at least as recently as eleven months before Walker sexually assaulted her. We fail to see the connection between the stale report of domestic violence at the hands of her boyfriend and the farfetched, pre-planned set-up of Walker on sexual assault charges."

-- *Walker v. Litscher*, 421 F.3d 549, 556 (7th Cir. 2005).

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"This case reads like a manual on how not to litigate a contractual dispute in federal court authored by Baldwin Filters, Incorporated."

--*Analytical Engineering, Inc. v. Baldwin Filters, Inc.*, 425 F.3d 443, 446 (7th Cir. 2005).

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"This case is an example of how the best laid plans of mice and men can often go awry. Prior to his passing, the decedent, Robert H. Lurie, planned for the bulk of his wealth to be excluded from federal estate taxes and passed through various trust instruments set up for the benefit of his wife and children. The Commissioner of Internal Revenue, however, determined that the trusts formed for the benefit of the children, valued at approximately $40,471,059, should be included in Lurie's gross estate for tax purposes. This determination left the funds remaining in the probate estate insufficient to pay the estate tax deficiency, calculated by the Tax Court to be $12,214,209.42."

--*Lurie v. C.I.R.,* 425 F.3d 1021, 1022 (7th Cir. 2005).

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"What is more, the treatment of a mentally ill prisoner who happens also to have murdered two other inmates is much more complicated than the treatment of a harmless lunatic. Measures reasonably taken to protect inmates and staff from him may unavoidably aggravate his psychosis; in such a situation, the measures would not violate the Constitution. It was when Scarver was permitted to mingle with other inmates at the Columbia Correctional Institution that he killed two of them. Maybe there is some well-known protocol for dealing with the Scarvers of this world, though probably there is not (we have found none, and his lawyer has pointed us to none); fortunately they are few in number. . . The murderous ingenuity of murderous inmates, especially in states such as Wisconsin that do not have capital punishment, so that inmates who like Scarver are already serving life terms are undeterrable, cannot be overestimated. Prison authorities must be given considerable latitude in the design of measures for controlling homicidal maniacs without exacerbating their manias beyond what is necessary for security. It is a delicate balance."

--*Scarver v. Litscher,* 434 F.3d 972, 976 (7th Cir. 2006) (citations ommitted).

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"In 1996 George Rogge hired Joshua Belk as the bookkeeper for his insurance agency. Belk decided that he could multiply his income through embezzlement. Over the years he siphoned more than $675,000 from Rogge's business, driving it into bankruptcy."

--*United States v. Belk*, 435 F.3d 817, 818 (7th Cir. 2006).

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"In this case, the district court made a finding that Harrison obstructed justice based on two assertions he made in his testimony: that he had never dealt drugs before; and that he had been solicited repeatedly by Lyons before engaging in the first charged drug sale. At sentencing, the district court found that 'The statements by Mr. Harrison during the [conversations between Harrison and Lyons] certainly weren't those of a neophyte in the drug business. It was sophisticated. He knew exactly what he wanted and how it was to be done.' The district court described Harrison as 'sophisticated' and unlike a neophyte, which we infer as meaning that based on Harrison's knowledge of drug lingo, he had dealt them in the past. We disagree with the district court's logic here. Sadly, across many drug plagued neighborhoods in Chicago and nationwide, many law-abiding people know drug slang because drugs are so pervasive in their communities. Even in communities where drug dealing is not rampant, many law-abiding citizens are familiar with drug slang through music and other forms of media. As Harrison notes, the use of drug slang has become so pervasive that the White House has a web page defining various lingo for the benefit of parents and teachers to monitor their youngsters. On this web page is the meaning of 'Cadillac' and 'butter.'"

--*United States*. v. *Harrison*, 431 F.3d 1007, 1012 (7th Cir. 2005).

WELCOME ABOARD!

We would like to welcome our two newest lawyers to the office, Shaundra Kellam and John Taylor.

Shaundra is the newest member of our Appellate Division, and she will be litigating appeals where the office receives appointments from the Seventh Circuit. Shaundra graduated from Stetson University with a degree in English and earned her law degree from St. Thomas University. After graduating from law school, she worked as an Assistant Public Defender in the Appellate Division for the Dade County Public Defender's Office. She then worked as a staff attorney for the Eleventh Circuit Court of Appeals. Demonstrating that Shaundra not only has a

keen legal mind but also a big heart, she spent her vacation before coming to our office from the Eleventh Circuit assisting victims of Hurricane Katrina at the Astrodome in Houston, helping family members reunite and sorting donated goods. We are proud to have her as a member of our team.

John Taylor is our new Trial Division Assistant Federal Public Defender in the Urbana Division. He graduated from the University of Chicago with a degree in political science, and earned his law degree from the University of Illinois. John has been practicing law for over 27 years, having been a sole practitioner, a partner in a law firm, a CJA Panel attorney and, most recently, the First Assistant Public Defender for Champaign County. In addition to his legal background, John has been active in politics for many years, serving as an Alderman on the Urbana City Council for eight years. John is also our very own "ethics expert" in the office because he served on the Illinois ARDC's Inquiry Panel for two years and on its Hearing Panel for five. We are proud to have such a well-respected, experienced lawyer join us.

$ Implementation of Hourly Rate Increases for CJA Panel Attorneys $

The Fiscal Year 2006 Defender Services appropriation (Public Law 109-115) includes funds to raise the non-capital hourly panel attorney compensation rate from $90 to $92, and the maximum hourly capital rate from $160 to $163 (for federal capital prosecutions and capital post-conviction proceedings), for attorneys appointed to represent eligible persons under the Criminal Justice Act, 18 U.S.C. §3006A, and the Antiterrorism and Effective Death Penalty Act of 1996, codified in part in 21 U.S.C. §848(q).

The new hourly compensation rates will apply to work performed on or after January 1, 2006. Where the appointment of counsel occurred before this effective date, the new compensation rates apply to that portion of services provided on or after January 1, 2006.

[Editor's Note: Charles Sevilla is an old friend of mine, but I did not know when I first met him years ago at an NACDL meeting that he was the author of Wilkesworld, *due to his use of a* nom de plume, *Winston Schoonover. You can read more* Wilkesworld *in old issues of* The Champion *magazine, as well as in two full-length books published by Ballentine novels, entitled* Wilkes: His Life and Crimes *and* Wilkes on Trial. *Many thanks to Mr. Sevilla for allowing us to reprint the following story here. I hope our readers enjoy his work as much as I do.]*

Wilkesworld

By: Winston Schoonover

The right to speedy trial is Orwellian double-speak for the right to a speedy conviction.
-John Wilkes

If ugly were smarts, Myrtle Kernel would have been the female Einstein.
- W. Schoonover

"On Friday, June 16, two years ago, Earnie Libido got up as usual at five in the morning, kissed his wife and four small children goodbye, and drove to the office to try and earn a living for his family. It is at that office where Earnie made the calls that are the subject of the false charges brought by the prosecutor, Miles Landish. It is those false charges that bring us here today."

So began Wilkes's opening argument to the jury in the case of State v. Libido. It had been a wild time getting to this point. In fact, we were in trial now only because Earnie was afraid that, if he took the great deal we worked out for him, his true identity would be discovered. For Earnie was not Earnie. Earnie was the erstwhile Ralph Goldman, celebrated bandit, robber extraordinaire, gang leader, consummate cheat, well-known crook, and stick-up artist, turned nonviolent telephone solicitation swindler.

We were in trial for one reason - to keep Earnie's head in a paper bag for one month of trial, so no one, and especially not the shriveled court clerk, Wiggins, would recognize him and get him indicted prior to the statute of limitations running on the numerous Ralph Goldman crimes. We had to keep this damn case going for a month. Then the statute would toll for Ralph Goldman. With that hurdle behind us, we'd then have to figure out what the hell to do about the rest of the trial of Earnie Libido. For now, it was a game of beat the clock.

Of course, Wilkes had to explain his client's curious appearance to the jury: "Yes, ladies and gentlemen, Earnie Libido is a man I'm proud to represent. Come up here,

Earnie. Mind your step. Fine, now face the jury and remove the bag. You see before you, ladies and gentlemen, an innocent man. Innocent, I say! Why, you couldn't miss it with a missing machine. Put the bag on, Earnie, and return to your seat. Now ladies and gentlemen, as I said during our week of voir dire, Earnie has to wear the bag so as not to risk the horror of witness misidentification in this trial. How many innocent men are doing time right now because of that tragic mistake of misidentification? Too many! I swore my client would not risk conviction in this case because of it. Thus, the bag. If you don't like it, please blame me. I just won't have another poor, innocent man convicted..."

"Stop it!" The inevitable harsh, thundering objections poured from the swollen lips of His Corpulence, Miles Landish. "Misconduct! Contempt! Calls for sanctions, judge!"

"RISE when you address the court!" shouted Judge Buchanan-Pierce. He was not fond of the plodding, humorless Landish. B-P thought trials were a waste of time and felt that, if he had to endure one, at least it should be entertaining. Therefore, he came to love Wilkes. And B-P did not really care if attorneys spoke to him while seated, but it was an impoliteness not to, and he was not about to miss a chance to nail the prosecutor.

B-P asked both parties to approach the bench.

"First," he said, "I'll have no outbursts like that from you, Landish. I still haven't even heard a proper objection from you to Mr. Wilkes's comments. But I did hear you say words like 'contempt' and 'misconduct' and 'sanctions.' All of these will be very relevant to what I will do to you the next time I hear an outburst like that. Do you understand me, sir?"

Landish understood. He understood that the judge was humiliating him and wanted to hear him grovel and cringe in response. Such is a judge's right. But Landish seemed not to hear the judge. From his bloated face came, "Let the record reflect that on our way up to the bench, Mr. Wilkes called me a [expletive] jackass.'"

"That's untrue!" said Wilkes. "I only called him a jackass. I stand by that. He is a jackass."

B-P, of course, agreed with that, but had to say something to protect the record. "I shall ignore these vulgarities. I instruct both of you to calm down. Now, get out there and try this case."

And so it was that the trial of Earnie Libido began.

The Law's Delay

As every faithful reader of these exploits knows, the Old Wine Defense is something my friend perfected like no other lawyer before him. To Wilkes, the right to speedy trial was Orwellian double-speak for the right to a speedy conviction. Cases had to be aged like fine wine to understand them, to wear down the opposition's will to resist, or better yet, to make them forget about the whole thing. Wilkes could take a matter that should have been resolved in an hour and make it never-ending.

Earnie's case was nowhere near the longest delayed case in Wilkes's career, but it was vintage representation, nevertheless. By getting a trial on the issue of Earnie's incompetent first lawyer's representation, he created enough delay to cause a number of the elderly victims of Earnie's telephone solicitation swindles to either die of old age, move to unknown parts, or lose their memories in the murky pit of senility.

This led to an interesting first phase of the trial. Landish tried to introduce the transcripts of these missing-in-action victims, but Wilkes objected. He made the prosecutor put on evidence - outside the presence of the jury - to show that these witnesses - some seventeen in number from the first trial- were now nowhere to be found, or if located, that their memories were nowhere to be found. This was required by the law to show that the witnesses were truly unavailable. If so, Landish could ask that their previous testimony in the first trial be introduced - because of their absence.

Wilkes fought Landish on every point. He challenged the authenticity of the death certificates; he wanted open-casket identifications; he challenged the conservators of the senile witnesses by claiming, somewhat ironically, that the experts were not competent to render their opinions that the witnesses were incompetent; he demanded that these witnesses be brought before the court and examined by neutral experts. And when the investigators testified that they had diligently looked all over earth for the presumably alive but missing witnesses, Wilkes challenged them on that, too. He made the investigators name every place they looked and then asked why they didn't check elsewhere.

This was only the first line of defense. We knew we'd lose on many of the arguments, but they were godsends because they ate time, lots of time. The Clock on the statute of limitations was still ticking and few knew for whom it actually tolled. It tolled for Ralph Goldman.

Popping the Big One

After two weeks of arguing and cross-examining D.A. investigators, conservators, pathologists, and civil servants - all this watched by Earnie out of two small holes in the brown shopping bag - we lost on eight of the witnesses who had either died or turned senile. The judge ruled they were legitimately unavailable. He was prepared to let the D.A. read the transcripts of these witnesses as their testimony. Then Wilkes popped the big one.

"Oh," said my friend nonchalantly, "there is one other objection to these transcripts being read. We all seem to have forgotten that Earnie Libido got a new trial because his first trial lawyer was incompetent. "

The others may have forgotten. Wilkes hadn't. He had saved this two-week delayed devastating objection for just this occasion. He continued:

"Earnie's first attorney, the ever-learned Charles Alvin Seneca Hardson, admitted at the previous hearing that he was totally unprepared for Earnie's first trial; that he was drunk during it; and that he was ashamed of himself after it. He was confessedly incompetent. Thus, no competent lawyer cross-examined these witnesses at the first trial. This denial of confrontation during the first trial unfortunately means that there can be no use of the transcripts at this or any other time."

Had Wilkes made this objection two weeks earlier, there could have been no further hearing on this issue. He was right: no matter how dead or missing or senile the witnesses were, their words from the transcript would not be heard by this jury. Anticipating the judge's annoyance at wasting two weeks of court time with the jury outside twiddling their collective thumbs while Wilkes litigated every marginal, petty little legal and factual point, Wilkes said with consummate insincerity:

"Sorry I didn't think of this earlier, but it is a major point."

B-P seemed to take it well, or perhaps the point of what Wilkes had just said had not sunk in. He looked at a surprised Miles Landish. "What say you to this?"

"I say, I, er, I, uh, I have, hell, we had nothing to do with Hardson's incompetence." Landish was slow to catch on to the slam-dunk nature of Wilkes's objection. When he did, he wined: "Hey, now! It is not our fault Libido picked out an incompetent lawyer to represent him. Come on now judge, make him live with the consequences. Don't penalize the People."

The Wounded Duck

Landish's desperation made me think of the beautiful Chinese phrase, "The wounded duck flutters." Landish was in a panic as he saw the case of Earnie Libido slipping from his grasp. Landish could not know that Wilkes was trying two cases simultaneously (Libido's and Goldman's) and that it was the latter that concerned my friend most at the moment; it is why my friend said to B-P: "Perhaps we should take a few days to brief the issue further."

In his briefcase was a non-too-brief fifty page brief I had already written on the issue; however, we were after delay at this point to beat Goldman's cases and not after establishing our scholarship in Libido's. My brief would not see daylight this day.

"No," said B-P to Wilkes, "I think your point is a good one."

Landish grew even more distressed. If he lost this point, a big part of his case was gone. "I say Libido did it intentionally. He got an incompetent attorney to throw the case so he could later claim his right for a new trial and make the poor victims come back knowing they would not want to go through this again."

"Perhaps we should have an evidentiary hearing on that allegation," offered the ever cooperative Wilkes.

B-P looked at the flustered Landish. The prosecutor continued ranting, "I believe Wilkes was behind the whole thing."

"I would be happy to testify to the contrary," said Wilkes. "But only after hiring separate counsel to advise me. Perhaps we could set all these matters down for briefing and an evidentiary hearing. Say maybe five days from now?"

B-P was going to cut through all of this. He knew Wilkes's point about the denial of confrontation to be irrefutable. Only his happiness at seeing Landish flounder overcame his ire at having wasted so much time with the jury out. B-P said, "Mr. Wilkes's belated objection to the introduction of any testimony by transcript is well taken. The transcripts will not be admitted since there was not cross-examination in the constitutional sense at the first trial."

Landish fell into his seat. As usual, the wooden arms caught the flap of his hips allowing him to slowly ooze into his chair. Once seated, his head bowed down to look to his chest as if to see the giant cavity where the heart of his case used to be.

It was a tremendous win. The clock on the statute had but two weeks to run. Wilkes had chewed up two weeks of time without one witness being called upon to identify Earnie (and thus not pull the bag from his head and reveal to Wiggins the much wanted Ralph Goldman). The only down-side of the strategy was that, by excluding all those witnesses, Landish was down to only one remaining victim. The problem now was that, by beating so much of the Libido case, there was no way Wilkes could stretch the case so that we could beat the Goldman clock.

To Be Continued

Suddenly, Wilkes began sneezing uncontrollably. First, he sneezed a few gentlemanly phony sneezes into his pepper-laden handkerchief. This triggered real sneezes of such startling force and energy that it caused Wilkes to stagger back several steps with each AAAHHHHHCHOOOO! Keeping his nose in his hanky kept the thunderous sneezes going. Wilkes kept moving backwards toward the door of the court. Between blasts of "AAAHHHHHCHOOOO!" Wilkes managed to squeeze out these words:

"I need a recess."

Which was granted. B-P had no choice. The authenticity of the sneeze attack could not be denied. Wilkes got his recess which lasted two and one-half days--and our statute of limitations quest was that much closer.

Myrtle Kernel

When we returned to court, Landish was prepared to call his first, last, and only victim to the stand, Myrtle Kernel, a five-foot-eight, mustachioed lumberjack of a lady who, if ugly were smarts, would have been the female Einstein. We first saw her in the hallway, briskly walking past us toward the women's restroom.

Wilkes then did the damndest thing. He told me to keep Earnie going in the direction of the court while he turned in her direction. At the end of the hall he caught up to her. They were alone matching strides, and then--this is embarrassing to recount--he gave her a vicious elbow to the gut that almost doubled her over. She made no noise I could hear; she just looked up at Wilkes like he was a madman. Then Wilkes sped past her and disappeared into the men's room and came out as soon as she went into the women's.

When Wilkes got back into the courtroom, he quickly took his seat and kept his head down. This was quite understandable. Having embarrassed and demeaned himself with that display in the hallway– imagine, hitting a lady!--who wouldn't hide his face in shame? Wilkes was so into his shame he kept his hand over his face during all of Myrtle Kernel's direct examination. I figured that the stress of playing beat-the-clock for Ralph Goldman while defending Earnie Libido was too much.

Landish quickly got to Myrtle's several counts of fraud attributed to Earnie. His questions were in the eloquent style of the veteran prosecutor. He asked: "And then what happened?"

"Well," she said, "A man calls me up out of the blue and says I've just won a wonderful prize. He says, 'This is your lucky day because my company, National Specialty Marketing, has selected you at random to be a big prize winner in our special nationwide promotion campaign, and you get your pick between a new car, a super-expensive top-of-the-line gold and diamond watch, or $5,000 in cash.' And at first he says all he wants me to do is agree to have my picture taken holding his product line-personalized novelty items like either ink pens, luggage tags or key tags. All with my name and address on them. Then they're going to use the photo for their campaign along with the news of the big prize I won and my endorsement of their product. And then he has me choose the prize and I got all excited and I picked the money 'cause I'm kinda short on that and he says fine. Then just as I think that's it, he says, 'And one more thing.' I gotta pay $250 for the personalized novelty item. But this sounds okay since I'm getting the big money, but he says I get my prize and photo taken after they create the luggage tags for the photo and he wants my check right now and so I must send it that day, not tomorrow, but right then and there, express mail to a P.O. Box. Only if they receive it in twenty-four hours will I be guaranteed the prize. So I send my check and that's the last I hear of National Specialty Marketing. I never got no money, no photo, no luggage tags. All I got was fleeced for $250."

Kernel of Truth

In the flesh, Myrtle Kernel might have looked like one of God's mistakes of creation but she was pure honeyed truth on direct examination, probably because what she said was true. Earnie had fleeced enough people in his life to warmly clothe a full Giant's stadium. Myrtle was just another easy mark whose gullibility was exceeded only by her greed. But now it was time for another brilliant question from Landish.

"And then what happened?"

Myrtle replied: "After I sent the check, I felt funny about the whole scene. I mean, here's this fella giving money away randomly. Why me? Why am I so lucky all of a sudden? And why would he be so concerned about my $250 getting sent to him? In a few days, I went to the Post Office and asked a postal inspector about it and he traced the P.O. Box and they staked it out and took a picture of

the man who picked up the mail and they interviewed him and I identified his photo and his voice on the tape recording they made. It's that man right there, the one with his head in the paper bag."

"No further questions," said Landish. He sat down and started smiling after noticing Wilkes and thinking (as I did) that Wilkes's head was hung in defeat.

Wilkes pulled his hands from his face and sneered back at Landish. He rose and stepped toward the witness until he was only an arm's length away from her. When Myrtle Kernel first recognized who it was that would be examining her, she instantly stood up, pointed her long, leathery index finger and began yelling at my friend, "You lousy bastard! You [expletive]! You [expletive]!"

Now this was a great way to start cross-examination! The woman's milk toast countenance was gone. Way gone. Wilkes had started well, without even asking a question. "Madam," says Wilkes ever so politely, "have I offended thee? I just want to ask a few questions. It's my job, ma'am."

"You sonovabitch! You hit me in the hallway not ten minutes ago! You lousy bastard!" Myrtle got uglier, a seeming impossibility upon first viewing, as she got madder. "You ain't gonna ask me anything, buster. "

To the jury, Wilkes turned and smiled. "My friends, I must deny the allegations of the allegator." The jury smiled back. A few giggled. Turning to Myrtle: "I never saw you before in my life. Did I brush against you, perhaps, as we entered the courtroom or something? If I did, well, then, of course, I didn't know of it, but I extend a thousand apologies."

"You are a lying sack of [expletive]!" says Myrtle. Myrtle would make a good resource for a cussing thesaurus. "You're worse than the bag-headed [expletive] you represent. You did it to me as I was going to the bathroom."

Wilkes looked genuinely puzzled. Great actors make you believe. He said, "My heavens, ma'am, I, of course, have never been in a women's restroom in my life. The story grows more perverse with each moment. Your honor, I think I have a delicate motion to bring regarding, how shall I say it, the mental stability of the witness. May we approach the bench?"

Skinny McDermitt Ploy

B-P looked at the witness as if she were mad. And she was mad, very mad, but not that kind of mad. I now saw the brilliance of Wilkes's maneuver. He had just put into operation the only repetition in recorded history of the famous Skinny McDermitt Ploy, made notorious by a celebrated ancient lawyer from Chicago, who won a case by infuriating a witness into such belligerence toward him that she was declared incompetent right on the spot by the judge. I had forgotten all about it. Now Wilkes had pulled it off.

B-P said to Wilkes, "Let me see if I can take care of this." Turning toward Myrtle, he warned her, "Mrs. Kernel, I ask you to calm down. I shall not ask again. If you do not act civilly, if you cannot control your tongue, if you cannot answer questions, I shall strike your testimony and have you removed from the stand. Do you understand me?"

"But this [expletive], er, this guy assaulted me. He tried to [expletive] kill me!"

Wilkes generously offered the following analysis for the jury and the court: "Gracious me! Now it's attempted murder. Why, next it will be genocide! Interesting that she tells us about this now. Where's the police report? My goodness, there are a thousand of our city's finest in this building and no one saw this imaginary bid at homicide. She did not even report it. I suspect we have a woman with either an overactive imagination or a very poor ability at identification. Probably both. I renew the motion, your honor."

The prosecutor at last squeezed out of his chair to add something other than "what happened next?" But B-P warned him that he would hear no further "ridiculous accusations against Mr. Wilkes." The judge called us up to the bench and said, "Mr. Landish, I find this woman out of control. I find her accusations damaging to the defense. "

"Well, she isn't helping my case much neither," said a subdued Landish.

"Either control her or I'm declaring a mistrial. You have five minutes. We are in recess."

Calm Restored

When Myrtle got back on the stand, she refrained from the epithets against Wilkes, but her hatred of Wilkes shined through the cross-examination like a white phosphorous flare in a cave. Every word she uttered was tinged with gnashing, guttural bitterness. As counterpoint, Wilkes was the model of decorum. While her words were filled with loathing and malice, Wilkes was gentle and kind and even caring in that phony, sincere way he had. Everyone was so caught up in the saintly way Wilkes examined and the enraged way Myrtle responded, that what she said became lost in her spite.

Except the final area of cross-examination; it would be recalled. Wilkes asked Mrs. Kernel, "Now ma'am, one more question. The last thing you said to my esteemed friend over here, Mr. Landish, was that you identified my client as the man you saw in a photo shown you by the postal inspectors?"

"Yeah. That's right," said Myrtle.

"Well, since you never saw my client in the flesh and since his head has been bagged for the whole trial, how do you know the man they showed you in the photo was the man who called you or even that he is the same as the man whose head now is covered by the bag?"

"Just compare the photo with your client, Mr. Capone, and you'll see quite a match."

"So you admit you've never seen my client in the flesh? You were perhaps given a helpful hint at identification by someone from the prosecution side?"

Myrtle caught on that she was exposed in a bit of overstatement, but she hated Wilkes too much to admit it. "No one coached me to say nothin', mister shyster lawyer."

When Wilkes had someone caught in a lie, he didn't let go. "So, you are merely assuming that the defendant is the man in the photo?" Wilkes went over to Earnie and pulled the bag from his head. He said, "Look at this face, ma'am. Do you have X-ray vision or something?"

"Do I have to logic it out for you, mister shyster lawyer?"

"Ma'am, your job isn't to reason why; your role is to testify. Who told you to identify the man in the bag as the defendant?"

"Just call it a good assumption. I picked the man in the bag as the bag man."

Wilkes knew that he had a point here, even if it wasn't quite as profound as he was making it. I mean, it didn't negate the paper evidence - the incriminating telephone bills and notes in Earnie's office. But when you're on a roll in cross, the smallest point can look as big as a softball-sized olive in a martini glass. Even though Myrtle was right about the photo matching the likeness of Earnie Libido, Wilkes still looked at the jury as he said sanctimoniously, "Yes madam, an assumption - AN ASSUMPTION - the mother of all screwed-up identifications and false convictions. No further questions."

Before Wilkes sat down Myrtle got in one more lick, "Here's somethin' that ain't no assumption. You ARE an [expletive]!"

You could hear an audible clicking of tongues from several jurors. They hated Myrtle.

Landish should have scored heavily on redirect when he pulled the photo out and put it next to Earnie's exposed puss. The photo looked a lot like Earnie, all right. And Ralph Goldman, too. (Old Wiggins gave the photo exhibit extra attention when he got hold of it.) But it was too late. The jury wouldn't believe Myrtle if she said she were ugly.

Final Argument

We had a week to go to beat the statute when Wilkes rose to give his final argument. He had persuaded the judge to let Earnie continue wearing the bag because Wilkes said he wanted to use it in final argument. John Wilkes had argued cases for a long time, but arguing for a week in a one-witness case was too much to hope for. But he tried, and here are a few choice excerpts.

On reasonable doubt (Day 1, a. m.): "I picked you people because you struck me as reasonable. But now you may be confused. You don't understand the instructions; you can't quite figure the charges; and the testimony leaves you baffled. That's reasonable doubt."

Attacking Myrtle (Day 1, p.m.): "Here's a woman who has spent her life inoculating herself against reality. She stands alone here; uncorroborated; unsupported; unbelievable. She reminds me of the woman I examined once who said she was forgetful. I asked her if she had committed perjury in the case. She said she forgot."

Pimping the D.A. (Day 2, a.m.): "Myrtle should have paid attention to the Commandment, 'Thou shalt not bear false witness.' But she broke it with Earnie and, I guess just for the heck of it, she broke it to me. Remember what the Good Book says: 'He who keepeth not his commandments, is a liar, and the truth is not in him.' "

"I object to such quotations," said Miles Landish. My friend immediately retorted "Your honor, can't God's word be quoted in this courtroom?"

"Yes, the Lord may be heard in this chamber." (What else could he say?)

Bagging the Jury (Day 2, p.m.): "If you think you have been fair in this trial, then when Mr. Wiggins reads your verdicts to us and the bag is removed from my client's head, it should not make any difference to you if it is my friend Earnie Libido who is revealed, or your friend, your

son, or your spouse. For God's sake, don't strike this man down on the word of Myrtle Kernel! The world needs men like Earnie. An active Libido is a good thing."

And that was pretty much it. Wilkes could only bamboozle the jury for two days of argument. I mean, how many ways can you attack a single witness? Landish's rebuttal was only a few minutes. He said simply, "The photos don't lie. The boxes of records seized at the defendant's office don't lie. And Myrtle Kernel, although she didn't much like defense counsel, didn't lie. I can look the defendant in the eye and with a clean conscience ask you to find Earnest Libido what he is: guilty."

After the judge finished with instructions, it was time for the jury to deliberate. We prayed for at least three days of deliberation to beat the Goldman clock, but our prayers weren't even finished - no "amens" - when the jury came back and said they had a verdict. A verdict in four minutes!

We sat nervously as the verdict was passed from the foreman, to the bailiff, to B-P, and to old Wiggins. The clerk stood and said the magic words, "Not guilty."

We were stunned. Not by the verdict, but by its speed. Then our worst fears were realized. "I know that man!" said old Wiggins excitedly while looking directly at the unbagged Libido. "I finally figured it out. I recognize him!"

Wiggins ran around his little desk next to the judge's throne and hot-stepped over to where Earnie sat sweating and cringing. Wiggins positioned himself in front of the now whimpering Earnie and said, "You're the guy who use to clean up out there, right? Remember the robberies?"

Earnie just looked at Wiggins. He was being terrorized by the old man's ambiguity, but Wiggins cleared it up quickly. "Sure, man, you're the kid who used to be the janitor on this floor. The guy who caught the four punks who tried to rob me one night after hours. God almighty, that was thirty years ago, but I never forget a face. Let me shake your hand, son."

A dumbfounded Earnie stuck out his hand while looking at Wilkes. "Oh yeah," lied Earnie. "Great to see you again. I thought that was you. Even thought I might call you as a character witness for me. Fortunately, we didn't need to call any witnesses. This was a clear case of mistaken identification. "

UNITED STATES SENTENCING COMMISSION REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING

MARCH 2006

Executive Summary

A. INTRODUCTION

This report assesses the impact of *United States v. Booker* on federal sentencing. The report is prepared pursuant to the general statutory authority of the United States Sentencing Commission (the "Commission") under 28 U.S.C. §§ 994-995, and the specific responsibilities enumerated in 28 U.S.C. § 995(a)(14) and (15), which require the Commission to publish data concerning the sentencing process and to collect and systematically disseminate information concerning the actual sentences imposed and the relationship of such sentences to the factors set forth in 18 U.S.C. § 3553(a).

On June 24, 2004, the Supreme Court decided *Blakely v. Washington,* invalidating a sentence imposed under the State of Washington's sentencing guideline system. The Supreme Court held that the Washington guidelines violated the right to trial by jury under the Sixth Amendment of the United States Constitution. Although the Court stated that it expressed no opinion on the federal sentencing guidelines, the decision had an immediate impact on the federal criminal justice system. Following *Blakely*, district and circuit courts voiced varying opinions on the implication of the decision for federal sentencing and no longer uniformly applied the sentencing guidelines.

On January 12, 2005, the Supreme Court decided *Booker,* applying *Blakely* to the federal guideline system and determining that the mandatory application of the federal sentencing guidelines violated the right to trial by jury under the Sixth Amendment. The Court remedied the Sixth Amendment violation by excising the provisions in the Sentencing Reform Act that made the federal sentencing guidelines mandatory, thereby converting the mandatory system that had existed for almost 20 years into an advisory one.

The uniformity that had been a hallmark of mandatory federal guideline sentencing no longer was readily apparent as courts began to address new issues raised by *Booker*. For example, some district courts began to consider only facts proved beyond a reasonable doubt at sentencing, reasoning that *Booker* required this elevated standard. Others continued to apply the preponderance

standard generally accepted before *Booker*. Some district courts continued to use settled procedures for imposing sentences; others created new procedures to implement the decision. Some district courts fashioned sentences without any consideration of the applicable guideline range. In fashioning a sentence outside the applicable guideline range, some district courts decided to forego an analysis of whether a departure under the guidelines would be warranted and instead relied only on *Booker* to impose the sentence. The majority of district courts, however, considered the applicable guideline range first, considered guideline departure reasons under the guidelines, and then decided whether consideration of the factors listed in 18 U.S.C. § 3553(a) warranted imposition of an out-of-range sentence. While some of these questions have been answered by the courts of appeal, others remain unresolved.

B. POST-BOOKER APPELLATE JURISPRUDENCE

As Chapter 2 illustrates, the appellate case law remains at an early stage of development. Requirements for the adequacy and specificity of the reasons for sentences provided by sentencing judges are just now beginning to take shape. Appellate jurisprudence setting forth the reasons that will, or will not, be considered reasonable for imposing a sentence outside the guideline range has just begun to emerge. However, the system has begun to settle as the appellate courts decide issues arising after *Booker*. For example, the circuit courts now have uniformly agreed that all post- *Booker* sentencing must begin with calculation of the applicable guideline range. As each respective circuit arrived at this conclusion, the district courts in that circuit began to use more uniform procedures to impose sentences. Six circuits the Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth now have held that a sentence within the properly calculated guideline range is presumptively reasonable. Only one circuit has concluded that a sentence within the properly calculated guideline range is unreasonable. As appellate jurisprudence evolves, uncertainties are resolved, the system becomes more predictable, and a more complete picture of the impact of *Booker* on federal sentences can be developed.

1. IMPLEMENTATION OF THE ADVISORY GUIDELINE SYSTEM

A lack of uniformity that existed pre-*Booker* in the reporting of sentencing information to the Commission, especially the reporting of reasons for the sentence imposed, was exacerbated post-*Booker*. Statutory amendments made by The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2004 required courts to submit sentencing documentation to the Commission, including the statement of reasons for imposing a particular sentence. Courts were not required, however, to use a standard form for reporting those reasons, although the Judicial Conference of the United States had developed a form for such use. The form, including all of its early iterations that existed prior to *Booker,* was not adequate to fully capture sentencing decisions made post-*Booker*. As will be discussed in further detail in Chapter 3, the Judicial Conference, working closely with the Commission, revised the Statement of Reasons form to encapsulate post-*Booker* changes in the sentencing guideline system. The revised form, approved in June, 2005, allows for a more complete picture of post- *Booker* sentencing practices. However, the revised form was not adopted until 6 months after the decision. Consequently, for the 6-month period preceding adoption of the revised form, courts used old forms, modified the forms, or created their own. Much of the improvement brought by the revised form, therefore, was not immediately realized. Moreover, use of the revised form has not been adopted by all courts. As of the date of this report, approximately two-thirds of the 94 federal districts have implemented use of the revised form to varying degrees.

Such changes in practice and procedure have had an impact upon the Commission's data collection and analysis. One of the assumptions upon which the Commission's historical analysis of data is based is the relatively uniform application of the guidelines. This assumption is not necessarily valid after *Booker*. The differences in practice and procedure that resulted from *Booker* are not entirely quantifiable, and this impacts the quality of the data collected.

Booker also necessitated changes in the methodology used by the Commission in the collection and analysis of the data. The Commission had to refine the categorization of sentences in relation to the final guideline range. The new methodology implemented in response to *Booker* uses 11 categories designed to collect and report the nuances of sentencing under the advisory guideline system. Despite the Commission's best attempt to devise rigorous and specific categories, the categorization itself has limitations, and incomplete or unclear documentation often makes it difficult to characterize individual cases as falling into these categories. Moreover, because the reliability of any analyses conducted by the Commission directly correlates to the quality of the information collected, the results reported herein may not provide a complete picture of the system's adaptation to advisory guidelines.

D. FINDINGS FROM DATA ANALYSIS

For the reasons described in Part C of this executive summary, some degree of caution should be exercised in

drawing conclusions from the post-*Booker* data collected and analyzed thus far. Nevertheless, a number of conclusions reasonably can be drawn and are described in Chapters 4 through 6.

1. National Sentencing Trends

Chapter 4 of this report details the results of the Commission's data analyses of the impact of *Booker* generally on federal sentencing. For ease of discussion, the terms "within- range," "above-range," and "below-range" are used throughout this report to describe sentences in relation to the applicable guideline range. Many of the analyses in Chapter 4 compare historical guideline trends and trends in the post- *Booker* system. In sum, these analyses yielded the following findings:

* The majority of federal cases continue to be sentenced in conformance with the sentencing guidelines. National data show that when within-range sentences and government-sponsored, below-range sentences are combined, the rate of sentencing in conformance with the sentencing guidelines is 85.9 percent. This conformance rate remained stable throughout the year that followed *Booker*. The conformance rate in the pre-PROTECT Act period was 90.6 percent. The conformance rate in the post-PROTECT Act period was 91.9 percent.

* The severity of sentences imposed has not changed substantially across time. The average sentence length after *Booker* has increased.

* With respect to within-range sentences, patterns for selecting the point at which to sentence within the range are unchanged after *Booker*. Approximately 60 percent of within-range sentences are still imposed at the minimum, or bottom, of the applicable guideline range.

* The rate of imposition of sentences of imprisonment has not decreased.

* Offenders are still being incarcerated in the vast majority of cases.

* The rate of imposition of above-range sentences doubled to a rate of 1.6 percent after *Booker*.

* The rate of government-sponsored, below-range sentences has increased slightly after *Booker* to a rate of 23.7 percent, with substantial assistance departures accounting for 14.4 percent, Early Disposition Program departures accounting for 6.7 percent, and other government-sponsored downward departures accounting for 2.6 percent.

* The rate of imposition of non-government-sponsored, below-range sentences has increased after *Booker* to a rate of 12.5 percent.

* In approximately two-thirds of cases involving non-government-sponsored, below-range sentences, the extent of the reductions granted are less than 40 percent below the minimum of the range. Courts have granted small sentence reductions, of 9 percent or less, at a higher rate after *Booker* than before. Courts have granted 100 percent sentence reductions, to probation, at a lower rate after *Booker* than before.

* The imposition of non-government-sponsored, below-range sentences often is accompanied by a citation to *Booker* or factors under 18 U.S.C. § 3553(a).

* The use of guideline departure reasons remains prevalent in many cases involving the imposition of non-government-sponsored, below-range sentences, including those citing *Booker* or factors under 18 U.S.C. § 3553(a).

* Multivariate analysis indicates that four factors associated with the decision to impose a below-range sentence are different after *Booker* but not before: the application of a mandatory minimum sentence, criminal history points, career offender status, and citizenship. However, most factors associated with this decision are the same after *Booker.*

2. Regional and Demographic Differences in Sentencing Practices

Chapter 5 of this report details the results of the Commission's data analyses of *Booker's* impact on regional and demographic differences in federal sentencing practices. In sum, these analyses yielded the following findings:

* The regional differences in sentencing practices that existed before *Booker* continue to exist. There are varying rates of sentencing in conformance with the guidelines reported by the twelve circuits. Consistent with the national trend, rates of imposition of within-range sentences decreased for each of the twelve circuits following *Booker*.

* Fifty-two of the 94 districts, or 55 percent, have rates of imposition of withinrange sentences at or above the national average of 62.2 percent. Forty-two districts have rates of imposition of within-range sentences below the national average. In 33 of these 42 districts, the rates of imposition of governmentsponsored, below-range sentences exceed the rates of imposition of other below-

range sentences.

* Multivariate analysis conducted on post- *Booker* data reveals that male offenders continue to be associated with higher sentences than female offenders. Such an association is found every year from 1999 through the post-*Booker* period. Associations between demographic factors and sentence length should be viewed with caution because there are unmeasured factors, such as violent criminal history or bail decisions, statistically associated with demographic factors that the analysis may not take into account.

* Multivariate analysis conducted on post- *Booker* data reveals that black offenders are associated with sentences that are 4.9 percent higher than white offenders. Such an association was not found in the post-PROTECT Act period but did appear in 4 of the 7 time periods analyzed from 1999 through the post-*Booker* period.

* Multivariate analysis conducted on post- *Booker* data reveals that offenders of "other" races (mostly Native American offenders) are associated with sentences that are 10.8 percent higher than white offenders. This association also was found in 2 of the 7 time periods from 1999 through the post-*Booker* period.

* Multivariate analysis conducted on post- *Booker* data reveals that there is no statistical difference between the sentence length of Hispanic offenders and the sentence length of white offenders.

3. Specific Sentencing Issues

Chapter 6 of this report details the results of the Commission's data analyses of *Booker*'s impact on specific sentencing issues. In sum, these analyses yielded the following findings:

a. Cooperation Reductions without a Government Motion

* Non-government-sponsored, below-range sentences based on the defendant's cooperation with authorities, *i.e.*, below-range sentences granted for substantial assistance without a government motion for such, occur post- *Booker*. Post- *Booker*, there were 258 cases in which cooperation with authorities was given as a reason for the imposition of a non-government-sponsored, below-range sentence. In 28 of these cases, substantial assistance or cooperation with authorities was the only reason cited. In 230 of these cases, it was one of a combination of reasons for the below-range sentence.

b. Sex Offenses

* The average length of sentences for cases sentenced under each of the criminal sexual abuse guidelines has remained fairly constant.

* The rate of imposition of below-range sentences has declined continuously for criminal sexual abuse cases, and that decline was indicated post-*Booker* as well. The rate of imposition of below-range sentences in criminal sexual abuse cases is approximately the same as the rate for all cases post-*Booker*.

* The rate of imposition of below-range sentences for abusive sexual contact cases decreased following the PROTECT Act but increased post-*Booker*.

* The rate of imposition of below-range sentences for cases involving the sexual abuse of a minor decreased post-PROTECT Act but increased post-*Booker*. The increased rate post-*Booker* was less than what the rate had been pre-PROTECT Act.

* The rate of imposition of above-range sentences increased post-*Booker* for criminal sexual abuse offenses and abusive sexual contact offenses but declined for offenses involving the sexual abuse of a minor.

* The majority of below-range sentences in cases involving criminal sexual abuse are imposed for offenders with little or no criminal history.

* Consistent with the trend seen in the national post-*Booker* data for cases overall, the average length of sentences has increased for cases sentenced under the sexual exploitation, *i.e.*, child pornography, guidelines.

* The rate of imposition of below-range sentences for sexual exploitation offenses has increased over time.

* The rate of imposition of above-range sentences has decreased over time for cases involving production of child pornography and trafficking in child pornography and has increased over time for cases involving possession of child pornography.

3. Crack Cocaine Offenses

* Courts do not often appear to be using *Booker* or the factors under 18 U.S.C. § 3353(a) to impose below-range sentences in crack cocaine cases.

Courts do not often explicitly cite crack cocaine/cocaine power sentencing disparity as a reason to impose below-range sentences in crack cocaine cases.

4. First Offenders

* The rate of imposition of below-range sentences for first offenders increased after *Booker*.

* The rate of imposition of above-range sentences for first offenders also increased after *Booker*.

* The proportion of first offenders receiving prison sentences has remained essentially the same, as has the average length of sentences imposed.

e. Career Offenders

* The rate of imposition of below-range sentences for career offenders increased after *Booker*. The majority of the cases in which below-range sentences are being imposed for career offenders are drug trafficking cases.

* The average length of sentences imposed for career offenders has decreased after *Booker*. This continues the pattern that existed before Booker.

f. Early Disposition Programs

* Sentencing courts in districts without early disposition programs (EDP) report relatively low rates of imposition of below-range sentences. In its 2003 Departure Report, the Commission expressed concern that these districts increasingly might grant below-range sentences to reach outcomes for similarly-situated defendants similar to the outcomes that would be reached in EDP districts. The data do not reflect that these concerns generally have been realized. In districts without EDP, the data do not reflect widespread use of *Booker* to grant below-range sentences to reflect sentences available in EDP districts.

E. CONCLUSION

The Commission intends to continue its outreach and training efforts and to regularly release updated, real-time data on rates of imposition of within-range and out-of-range sentences, types of sentences imposed, average sentence lengths, the reasons judges report for sentencing outside the guidelines system, and the results of sentencing appeals. Uniform and complete statements of reasons and timely reporting to the Commission by the district courts can provide valuable feedback to Congress, the Commission, the courts, and all others in the federal criminal justice community regarding the long-term impact of *Booker* on the federal sentencing system. This report is an important part of the Commission's efforts to inform careful consideration of the evolving post-*Booker* federal sentencing system.

Illinois Minimum Continuing Legal Education

By: Andrew J. McGowan
Staff Attorney

The Illinois Supreme Court recently instituted Minimum Continuing Legal Education (MCLE) Rules for Illinois lawyers that goes into effect July 1, 2006. See (http://www.state.il.us/court/MCLE). As a result, with very few exceptions, all lawyers with an Illinois law license will have to attend CLE classes to maintain their licenses. That is the bad news. The good news is that many of you have been attending CLE classes anyway because, as you know, they can be extremely helpful to your practice.

The requirements are relatively straightforward. To begin with, for the first two years, lawyers are only required to accumulate 20 hours. Lawyers whose last name begins with A through M's first reporting requirements begin on July 1, 2006, and end on June 30, 2008, while those requirements for lawyers whose names begin with N through Z begin on July 1, 2007, and end on June 30, 2009. For the second two year reporting period, lawyers will be required to obtain 24 hours of credit. Once the program is fully operational, an attorney will be required to attend or, in other ways, including teaching and writing, accumulate 30 hours of CLE credits every two years. Four of these hours must be "professional responsibility" credits. These professional responsibility hours will be earned in courses in professionalism, diversity, mental illness, addiction, civility, or legal ethics. Up to ten hours may be carried over to the next reporting period, except for professional responsibility hours. In addition to accumulating the necessary hours, each attorney will have to file a MCLE Certificate of Compliance with the ARDC within at least a month of the end of the reporting period. You must keep records of compliance for at least three years. It almost goes without saying that it is very important to comply with these requirements. Failure to comply in a timely manner will lead to increased costs, yet to be determined, and can easily and quickly lead to the lawyer's name being taken off of the Master Role. Newly admitted lawyers have slightly different requirements and should check the website for more information.

So, where do you sign up? Unfortunately, that is not so clear at the moment. In fact, the web site suggests that you continue to check it for more information. The problem appears to be that while there is a Board of Directors, there is no Director yet. The web site explains the situation in this way: "The Board is working as quickly as possible to employ a MCLE Director and determine the location of and equip its MCLE offices. The Board currently has no ability to process any applications for accreditation and cannot accept applications until further notice. Illinois MCLE rules provide that attorneys can begin earning MCLE credits on January 1, 2006. The Board will consider retroactive approval of CLE credits as of that date. We will also consider reciprocity but have not yet established guidelines." So, you can take courses now, but you will not know if they will qualify until the Board is set up to consider retroactive approval. In other words, it would be safer to wait, but, if you have taken CLE that have been accredited by another state bar association, then that seminar may later be approved for Illinois credits. I am sure that all will be made clear in due time.

Since our office began, we have regularly offered several seminars that have been accredited by other state bar associations. We look forward to being able to offer these seminars where, in addition to the usual informative, useful, and, we hope, entertaining presentations, attendees will also earn Illinois MCLE hours. See you there!

Seventh Circuit Vacates Guideline Sentence

By: Andrew J. McGowan
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After *Booker*, we can finally make arguments for a sentence lower than the guideline sentence on non-guideline basis. The arguments for the lower sentence have to be tied to the factors in 18 U.S.C. § 3553, but otherwise, to date, there appear to be few restrictions. Some of the obvious arguments can be applied in any case where the facts support them, like a client's good works, bad childhood, and the fact that this was the defendant's first offense. Other arguments are more offense specific and legal. Of those, a couple of the most obvious are, in crack cases, the crack/powder cocaine disparity, and, in illegal re-entry cases, the fact that fast-track programs in some districts allow for lower sentences than in non-fast-track districts.

The question remains, what remedy does a defendant have if the judge sentences the defendant to a guideline sentence? The Seventh Circuit has recently answered this question, in part, when it reversed a sentence within the guidelines. In *United States v. Cunningham*, 429 F.3d 673 (7th Cir. 2005), the Seventh Circuit vacated a sentence that was within the guideline range and remanded it for re-sentencing because the judge did not sufficiently address the defendant's potentially meritorious and strongest argument for a sentence below the guideline range and because the judge appeared to rely too heavily on an unsubstantiated government argument.

Cunningham is an unusual case. To begin with, Mr. Cunningham was a sympathetic defendant. He was an honorably discharged Vietnam combat veteran who had worked for the postal service for 24 years. He also had a long history of psychiatric illness, coupled with alcohol abuse and a marijuana habit. Nevertheless, he was a good family man who had been married for sixteen years, and he had no criminal record. A government informant convinced him to tangentially participate in nine crack transactions. Mr. Cunningham introduced the informant to a crack dealer and he stood by during the nine transactions. The government did not contest these facts. Instead, the government argued for a guideline sentence based, in part, on a statement the government first made during argument that Mr. Cunningham did not cooperate against a co-defendant quickly enough.

Despite all of Mr. Cunningham's good qualities, the judge sentenced him to a guideline sentence of 57 months, the lowest guideline sentence he could have received. However, in so doing, the judge did not sufficiently explain why Mr. Cunningham's argument for a lower sentence based on psychological factors was not a proper basis for a lower sentence. The judge also appeared to rely too heavily on the government's insufficiently substantiated argument that Mr. Cunningham did not cooperate quickly enough. *Cunningham*, 429 F.3d at 677-678.

In vacating this guideline sentence, the Seventh Circuit was quick to point out that judges do not have to address frivolous arguments, but they do have to give proper consideration to non-frivolous arguments. As a result, *Cunningham* unfortunately does not appear to stand for the proposition that an appeal is appropriate in every case where the judge relies too heavily on a poorly supported government argument for a higher sentence. However, *Cunningham* does stand for the proposition that judges must address non-frivolous defense arguments, even if they are for a sentence below the guideline range.

Defendants with Mr. Cunningham's sympathetic facts are few and far between. However, just as it would have been a mistake to limit *Koon* to cases where the defendant was a police officer, it would be a mistake to relegate *Cunningham* to situations where your client has one fatal

flaw but is otherwise an upstanding citizen. *Cunningham* appears to have very broad application where the defendant has a strong argument for a sentence lower than the sentence imposed. *Cunningham* does not require the judge to agree with the defendant. However, *Cunningham* does require the judge to explain his or her reasoning for a particular sentence in the face of the non-frivolous argument for a lower sentence. This is especially heartening news in light of the Seventh Circuit's present position that a sentence within the guideline range is presumed to be reasonable.

In many ways, *Cunningham* is not surprising. Its reasoning is based on the well-established rule that the Court of Appeals must have sufficient information from the sentencing judge to assess the judge's reasons for the ruling. Under the mandatory guideline system, the sentencing judge could usually comply with this requirement by adopting the facts and conclusions in the pre-sentence report. On contested facts, the judge could simply rule that the winning side's facts were more reliable or that the winning side had proven the matter by the low standard of a preponderance. Because of the ease within which the sentencing judge could protect a ruling under the mandatory guideline regime, the guideline cases where the judge did not sufficiently explain the basis of a guideline ruling were rare.

However, in *Cunningham*, the facts supporting the defendant's argument for a lower sentence were uncontested. Therefore, the judge did not have to make credibility determinations on the facts supporting the argument. Instead, the judge had to explain why those facts did not support a lower sentence in Mr. Cunningham's case, despite the fact that the sentence the judge imposed was within the guidelines. Implicit in the opinion is that the panel appeared to believe that the facts would support a lower sentence, but the opinion fell far short of requiring a lower sentence.

But what about the cases where defense counsel is essentially asking the judge to ignore, or rule in a manner contrary to, guideline instruction, as with the crack/powder disparity and the fast-track arguments? Some judges have had no trouble rejecting or accepting the guidelines on these points in particular cases. However, many other judges are understandably hesitant to even address these issues. Judges are rule followers. The guidelines are rules. This may be one reason why it is so difficult to convince judges to distinguish a case from the guideline range. However, based on the *Cunningham* decision, it appears as though the Seventh Circuit now requires district courts to at least consider non-frivolous arguments against applying the guideline rules rigidly in each case. For the moment, these non-frivolous arguments can be guideline related or non-guidelines related.

Defense counsel in *Cunningham* used both guideline based arguments, and non-guideline based arguments to argue for a lower sentence. Defense Counsel pointed out that Mr. Cunningham's psychiatric problems would have justified a downward departure for diminished capacity under the guidelines. This allowed the Seventh Circuit to bolster its observations about the strength of the defendant's argument by noting that at least one of the grounds was an accepted ground for a downward departure. Defense counsel also wove Mr. Cunningham's psychiatric problems and substance abuse "into a pattern suggestive of entrapment not as a defense but as a mitigating factor not reflected in the guidelines." *Cunningham*, 429 F.3d at 678.

Since it was decided, I have cited *Cunningham* in several different cases where the judge arguably did not sufficiently address what I considered a non-frivolous argument. In one, the judge seemed reluctant to rule on the crack/powder disparity. In another, the judge gave what I thought was too little consideration to the fast-track disparity argument. The fast-track disparity argument case was particularly discouraging because the fast-track difference is based on nothing but bureaucratic considerations that, for the most part, have nothing to do with individual characteristics of defendants. Evidently, illegal aliens have either inadvertently or intentionally identified this legal system's weak point: we depend on voluntary compliance with the law. Without it, the system does not work. The government argued against the lower sentence in this case by explaining in excruciating detail that the government has instituted the fast-track in certain districts because, otherwise, the entire system would be overwhelmed. However, the government could not get around the fact that because the fast-track program exists in some districts and not others, there is a disparity in the sentences of illegal aliens. The guidelines were supposed to eliminate unwarranted sentencing disparities like this one. As one judge put it: "it is difficult to imagine a sentencing disparity less warranted than one which depends upon the accident of the judicial district in which the defendant happens to be arrested." *United States v. Bonnet-Grullon*, 53 F.Supp.2d 430, 435 (S.D.N.Y. 1999), aff'd, 212 F.3d 692 (2d Cir. 2000). In appropriate cases, *Cunningham* will require judges to rule on issues like this one.

Although *Cunningham* can be very useful, it is also important to keep in mind that it is an exception to a more general rule announced in *Dean* that the sentencing judge does not have to review each of the 3553 factors on the record. *United States v. Dean*, 414 F.3d 725, 728-729 (7th Cir. 2005). Instead, the Court in *Dean* said that: "The sentencing 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 that the sentence that he has selected is indeed appropriate for this particular defendant." *Dean*, 414 F.3d 729. *Cunningham* modified this general proposition with the following qualification: "Whenever a district judge is required to make a discretionary ruling that is subject to appellate review, we have to satisfy ourselves, before we can conclude that the judge did not abuse his discretion, that he exercised his discretion, that is, that he considered the factors relevant to that exercise." *Cunningham*, 429 F.3d at 679. The Court also observed: "A rote statement that the judge considered all relevant factors will not always suffice; the temptation to a busy judge to impose the guidelines sentence and be done with it, without wading into the vague and prolix statutory factors, cannot be ignored." *Cunningham*, 429 F.3d at 679. Furthermore, a guideline sentence is still presumed to be reasonable in this Circuit. *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005). The Court in *Cunningham* did not remand the case because the sentence was unreasonable. The Court remanded the case because the sentencing judge did not explain its reasoning fully and because the reasoning that was used left the Court of Appeals with the impression that the sentencing court may have abused its discretion. However, the Court in *Cunningham* did not say that the same sentence, if sufficiently explained, would not be reasonable.

Despite its limitations, the ruling in *Cunningham* is a breath of fresh air and may be useful in a fair amount of cases on appeal. However, before I end this discussion, there is one other very important lesson from *Cunningham*. It is essential for defense counsel to fully present any argument for a lower-than-guideline sentence to the sentencing judge. It is apparent from the opinion that defense counsel for Mr. Cunningham did a very thorough and imaginative job of presenting an argument to the sentencing judge for a lower sentence. Defense counsel's careful, thorough, and creative presentation of the evidence and arguments tied to the factors in 3553, as well as appropriate references to the guidelines, were crucial to the success on appeal. If defense counsel had simply relied on information in the pre-sentence report or otherwise incomplete arguments, this case would not have been reversed. Kudos to Helen J. Kim of the Federal Community Defenders for the Northern District of Illinois on a magnificent job! Now that *Cunningham* is on the books, we all have possible appellate issues in cases where there is a good argument for a sentence lower than the sentence imposed and the judge did not fully address the argument, even if the sentence is within the guideline range.

CA7 Case Digest

By: Jonathan Hawley
Appellate Division Chief

ACCA

United States v. Browning, 436 F.3d 780 (7th Cir. 2006; No. 05-1991). In prosecution for 922(g), the defendant argued that he was entitled to a jury trial on the question of whether a potentially qualifying ACCA prior conviction was a conviction of the defendant or someone else. In holding that the defendant was not entitled to such a jury trial, the Court of Appeals commented on the continued viability of *Almendarez-Torres.* Specifically, the court stated: "*Almendarez-Torres* is vulnerable to being overruled not because of *Shephard* but because of *United States v. Booker*. *Booker* holds that there is a right to a jury trial and to the reasonable-doubt standard in a sentencing proceeding (that is, the Sixth Amendment is applicable) if the judge's findings dictate an increase in the maximum penalty. Findings made under the Armed Career Criminal Act do that. So if logic rules, those findings too are subject to the Sixth Amendment. But law is not always logical, and a good thing it isn't. An immense practical difference between the fact of a prior conviction and other facts bearing on a sentence is that defendants normally are loath to have their prior convictions paraded before a jury. In states such as Wisconsin that entitle defendants to jury consideration of sentencing enhancements based on prior sentences, the entitlement is almost always waived. So overruling *Almendarez-Torres* would have little practical significance, though it would doubtless beget a torrent of postconviction proceedings, just as *Booker* has done. Maybe, then, *Almendarez-Torres* will survive. But that is neither here nor there; the continued authority of *Almendarez-Torres* is not for us to decide."

United States v. Sperberg, 432 F.3d 706 (7th Cir. 2005; No. 04-4135). In prosecution for 922(g), the Court of Appeals rejected the defendant's challenge to two prior convictions used to enhance his sentence pursuant to the Armed Career Criminal Act. One of the prior convictions was a Wisconsin felony for "threatening a security guard." The defendant noted that although the offense has the threatened use of force as an element, two kinds of threats can satisfy the statute. One threat is to injure another, while another threat is to accuse another falsely of a crime. The court noted that only be examining the charging documents could the district court know which kind of threat was involved in this case. By looking to the plea colloquy with the state judge, the district court determined

that the defendant had threatened the guard with a gun. Thus, this conviction met the definition for a "violent felony." The defendant's second challenged prior conviction was the defendant's eighth drunk driving conviction--a felony in Wisconsin. The court held that as a matter of law, a felony drunk driving conviction poses a serious risk to other motorists and pedestrians which involves conduct that presents a serious potential risk of physical injury to another. Thus, the offense also qualified as a violent felony. Although noting that the court had only held that felony drunk driving was a "crime of violence" under the career criminal provisions of the guidelines, the language used in the ACCA was identical to that in the guidelines and there was no basis for reading to two provisions differently.

APPEAL

United States v. Vega, ___ F.3d ___ (7th Cir. 2006; No. 06-1031). In this appeal, the district court held that the appropriate venue for review of a detention or release order is in the district court where charges are pending. The defendant was arrested in a district other than the one where charges were pending, was brought before a magistrate, and released with conditions. The government sought review of the order in the district where the charges against the defendant were pending. The question the Court of Appeals considered was whether such review should be made in the district of arrest or the district where charges were pending. The Court of Appeals held that under 18 U.S.C. sec. 3145, the government or a charged party who moves for review of a release or detention order must do so in the court where charges are pending, regardless of where the initial appearance and detention hearing took place.

Wayne v. United States, ___ F.3d ___ (7th Cir. 2005; No. 05-3092). Upon consideration of the district court's dismissal of a 2255 petition due to the defendant's waiver of his right to collaterally attack his sentence, the Court of Appeals outlined the proper procedure the government should follow in the Court of Appeals when seeking to enforce the waiver. In the present case, the government "buried" its request for dismissal in a jurisdictional memorandum, the ostensible purpose of which is to assure the court that the petitioner's action is not subject to the pre-approval mechanism of 28 U.S.C. § 2244(b). Because the government's pleading did not contain a copy of the plea agreement and such agreements differ in scope, the court found it necessary to order additional briefing on the question to ensure that the petitioner's waiver barred his motion. To prevent the unnecessary delays and confusion in the future, the Court of Appeals stated that when the government wishes to enforce a waiver, it should file a separate motion to dismiss the § 2255 proceeding on this ground, in which it specifically calls that court's attention to the waiver. The plea agreement should be attached to the motion, so that the court is in a position to ensure that it applies to the case at hand. Following this procedure will properly alert the court to the existence of the waiver and its exact terms.

United States v. Price, 418 F.3d 771 (7th Cir. 2005; No. 03-3780). Upon consideration of the defendant's argument that the district court improperly admitted evidence under Federal Rule of Evidence 403, the Court of Appeals considered whether a general "relevance" objection was sufficient to preserve an argument on appeal that admission of the evidence violated Rule 403. The Court of Appeals held that a general objection to relevance is not sufficient to preserve an objection under Rules 404(b) or 403. Thus, when a party has failed to raise at trial the specific ground on which he appeals the trial court's evidentiary ruling, the court reviews only for plain error.

BOOKER/REASONABLENESS

United States v. Boscarino, 437 F.3d 634 (7th Cir. 2006; No. 05-2657). On appeal, the Court of Appeals rejected the defendant's argument that his sentence was unreasonable due to a disparity with a co-defendant's sentence. Although the defendants had similar backgrounds and committed similar conduct, the co-defendant received a substantially lighter sentence because he cooperated with the government, and the defendant argued that the difference in sentences made his sentence unreasonable in light of 18 U.S.C. sec. 3553(a)(6). In rejecting this argument, the court noted that a sentencing difference is not a forbidden "disparity" if it is justified by legitimate considerations, such as rewards for cooperation. The statute is concerned with *unwarranted* sentence disparities, not all sentence differences, and a reduction based upon cooperation is warranted. Moreover, *Booker* is about the allocation of fact-finding authority between judge and jury, and about the burden of persuasion. It does not change rules of law. A reason bad before *Booker* is bad today. One rule of law that preceded *Booker*, and retains vitality after it, is that a sentencing difference based on one culprit's assistance to the prosecution is legally appropriate. Another way to put the point is that the kind of disparity with which the statute is concerned is unjustified differences across judges (or districts) rather than among defendants to a single case. Sentencing disparities are at their ebb when the Guidelines are followed, for the ranges are themselves designed to treat similar offenders similarly. That was the main goal of the Sentencing Reform Act. The more out-of-range sentences that judges impose after *Booker*, the more disparity there will be. A sentence within a properly ascertained range

therefore cannot be treated as unreasonable by reference to section 3553(a)(6).

United States v. Smith, ___ F.3d ___ (7th Cir. 2006; No. 05-1638). Between *Blakely* and *Booker*, the defendant was sentenced. At the hearing, the district court imposed a guidelines sentence, but also gave an alternative sentence in the event that the Supreme Court held the guidelines to be unconstitutional. The defendant did not appeal from his sentence. After the Supreme Court's decision, the defendant filed a motion asking the district court to substitute the alternative sentence for the one imposed, but the district court declined, finding that the Supreme Court had not in fact found the guidelines unconstitutional. The defendant appealed from this decision. The Court of Appeals held that the defendant's appeal was untimely, as he should have appealed from the original imposition of the sentence. The court noted that the district court had no jurisdiction to alter the sentence it imposed, except pursuant to the very limited circumstances set forth in the Sentencing Reform Act, Rule 35, and Rule 36. Because none of the circumstances set forth in these Rules and statutes applied in this case, the district court could not have imposed the alternative sentence, even if it had wanted to. Rather, the defendant should have appealed from the original sentence imposed. Because he did not, his later appeal from the district court's denial of his motion to have the alternative motion imposed did not make his appeal timely, and both the Court of Appeals and the district court lacked jurisdiction to consider his case.

United States v. Peters, 435 F.3d 746 (7th Cir. 2006; No. 04-3913). In this appeal, the Court of Appeals rejected the defendant's challenge to his indictment, where the indictment contained a number of sentencing allegations, in addition to the elements of the crime charged. The sentencing allegations were put into the indictment after the uncertainty of *Blakely*, but before *Booker*. The jury was instructed to make a finding as to each sentencing allegation. On appeal, the defendant argued that the inclusion of the sentencing factors violated the longstanding separation of powers prohibition of a federal common law of crimes. Specifically, the defendant argued that the authority to enact criminal statutes originates in Congress and, under the nondelegation doctrine, must remain with Congress. Because the guidelines are promulgated by the Sentencing Commission which is part of the judiciary, an indictment citing the Guidelines amounts to a common law charge originating in the judiciary, rather than Congress. In rejecting this challenge, the court noted that for an indictment to allege a common law crime, the sentencing factors must be essential to convict the defendant. Otherwise, a part of the indictment unnecessary to and independent of the allegations of the offense proved may normally be treated as a useless averment that may be ignored. In the present case, the defendant was charged with only one crime. Regardless of whether the jury found the sentencing enhancements proven or not, it's determination of his guilt for the actual crime was independent of its determination on the sentencing factors. Thus, the sentencing factors did not constitute elements of a common law charge.

United States v. Della Rose, 435 F.3d 735 (7th Cir. 2006; No. 03-4230). Upon appeal after a *Paladino* remand, the Court of Appeals held that a district court is not required to hold a hearing on the *Paladino* question. In the present case, the district court did not allow the defendant to have a hearing on the 3553(a) factors which would support a different sentence than originally imposed, but instead relied upon written submissions. The court concluded that although district courts have the discretion to convene a hearing upon *Paladino* remand, they are not required to do so whenever a defendant requests it. Rather, so long as the parties are given the opportunity to make written arguments as to the impact of *Booker* on the judge's sentencing decision, a hearing is not necessarily required. The court did not go so far as holding that a hearing would *never* be required, although it gave no indication of when one might be necessary.

United States v. Brock, 433 F.3d 931 (7th Cir. 2006; No. 03-2279). On appeal after a *Paladino* remand, the Court of Appeals considered the sufficiency of the district court's indication that it would not have given the defendant a different sentence had the guidelines been advisory at the time he was originally sentenced. In the district court's order after the *Paladino* remand, the court stated only, "This court would not have sentenced David Brock to any different sentence had the guidelines been advisory at the time of the imposition his sentence." The Court of Appeals acknowledged that from this statement alone, it could not determine whether the district court gave meaningful consideration to the statutory factors. However, it is enough that the record confirms that the judge has given meaningful consideration to section 3553(a) factors. Thus, the court looked to the defendant's original sentencing hearing. After reviewing the sentencing hearing, the court concluded that the district court sufficiently considered the 3553(a) factors. Although the defendant argued that many of the 3553(a) factors were "irrelevant" to the sentence prior to *Booker*, the court disagreed. Although the court agreed that the 3553(a) factors could not be used to impose a sentence outside the then mandatory range, the factors were still relevant to determine where within the range the defendant could be sentenced. Moreover, the district court's statement at the original sentencing hearing indicated that it considered these factors when choosing the within-range sentence it ultimately imposed.

United States v. Vaughn, 433 F.3d 917 (7th Cir. 2006; 05-1518). Upon consideration of a challenge to the reasonableness of a sentence, the Court of Appeals defined the scope of its post-*Booker* authority to review a district court's refusal to make a downward departure from the guidelines range. The court noted that prior to *Booker*, it did not have jurisdiction to review a district court's discretionary challenge to deny a downward departure. However, since *Booker*, the concept of a discretionary departure has been rendered "obsolete" in the post-*Booker* world. Instead, what is at stake is the reasonableness of the sentence, not the correctness of the departures as measured against pre-*Booker* decisions that cabined the discretion of sentencing courts to depart from the guidelines that were then mandatory. Post-*Booker*, because the court must review all sentences for reasonableness in light of the factors specified in § 3553(a), the court must necessarily scrutinize, as part of that review, the district court's refusal to depart from the advisory sentencing range. *See also United States v. Laufle*, ___ F.3d ___ (7th Cir. 2006; No. 04-3978).

United States v. Lister, 432 F.3d 754 (7th Cir. 2005; No. 04-4304). Upon a reasonableness challenge to the defendant's sentence, the Court of Appeals rejected the defendant's argument that the crack/cocaine disparity in sentencing made his sentence unreasonable. The court stated, "[The Defendant] contends that *Booker* and its predecessors charge this court with the responsibility to avoid unwarranted disparities between co-defendants, and between controlled substances where Congress has specifically legislated differing, advisory, punishments. We note only briefly that the judiciary has no power to maintain charges against an individual where the United States Attorney exercises its executive discretion and chooses to dismiss them, as was the case here. This is not a matter of the "sentencing disparities" as considered by *Booker*, but instead an example of the separation of powers in our legal system. Regarding the different punishment recommended for cocaine base and cocaine, this Court has previously upheld the ratio differential codified in 21 U.S.C. § 841. The Supreme Court's holdings in *Booker* do nothing to overturn this decision. *Booker* rendered the sentencing guidelines advisory; it did not strike them down in their entirety."

United States v. Robinson, 435 F.3d 699 (7th Cir. 2006; No. 05-2224). Upon appeal of the defendant's sentence, the Court of Appeals reversed the defendant's sentence because the district court failed to completely calculate the appropriate guideline range before imposing sentence. The court noted that a district court must first determine the appropriate guideline range, including all of the enhancements and reductions, prior to imposing the ultimate sentence. *See also United States v. Bokhari*, ___ F.3d ___ (7th Cir. 2006; No. 05-1302); *United States v. Hawk*, ___ F.3d ___ (7th Cir. 2006; No. 04-4112).

United States v. Williams, 425 F.3d 478 (7th Cir. 2006; No. 05-2380). Upon appeal of the defendant's sentence, the Court of Appeals rejected the defendant's challenge to the presumption that a within-range sentence is reasonable. The defendant argued that the presumption improperly shifts the burden to the defendant to either disprove certain facts that support the sentence or prove mitigating facts. The court rejected the challenge, noting that while a *per se* or conclusively presumed reasonableness test would undo the Supreme Court's merits analysis in *Booker*, a clean slate that ignores the proper guidelines range would be inconsistent with the remedial opinion. The presumption strikes the proper balance between these two considerations.

United States v. Cannon, 429 F.3d 1158 (7th Cir. 2005; No. 05-1841). Upon appeal by the government, the Court of Appeals held that the district court erred when it declined to impose a life sentence as required by 21 U.S.C. §851(b)(1)(a). The defendant was convicted of distribution of cocaine base, and he had two prior serious drug felonies, making him liable to a mandatory life sentence. The district court, however, imposed a 20-year sentence, finding that the amount of drugs involved in the prior convictions was so small as to overstate the defendant's criminal history and concluding that *Booker* gave him the discretion to "decide what should be counted as a prior drug felony drug conviction." The district court concluded that although the prior convictions were felonies under state law, they were not serious enough to count as "drug felonies" for purposes of federal sentencing. The Court of Appeals disagreed, noting that *Booker* has nothing to do with recidivist sentencing or mandatory minimum sentences. Recidivist provisions set floors, and judges must implement the legislative decision whether or not they deem the defendant's criminal record serious enough; the point of such statutes is to limit judicial discretion rather than appeal to the court's sense of justice. The defendant here had two drug-felony convictions; the district judge was not free to deprecate their seriousness and disregard the defendant's actual criminal record. The statute speaks of *any* drug felony, not just of those that entail large quantities. Moreover, the Court of Appeals rejected the defendant's additional argument that the two prior offenses should be treated as one under U.S.S.G. §4A1.2(a)(2) which merges cases for the purpose of calculating criminal history points. The court noted that 841(b)(1)(A) does not contain a proviso similar to the Guidelines, and it was the statute--not the guidelines--which required the life sentence in this case. Language in the Guidelines cannot be used to modify statutes. Thus, the Court of Appeals remanded the case to the district court for re-sentencing with instructions to impose a life sentence.

United States v. Cunningham, 429 F.3d 673 (7th Cir. 2005; No. 05-1774). In prosecution for possession with intent to distribute more than five grams of crack, the Court of Appeals vacated and remanded the defendant's sentence for reconsideration, finding that the district court's explanation for its within-the-range sentence was inadequate. The district court sentenced the defendant to the bottom of the guideline range, 57 months. However, defense counsel argued that such a sentence was unreasonable because of the defendant's lack of criminal history, 24 years of service as a postal employee, long history of mental illness, the meager earnings he made from his offense conduct, and the trivial role he occupied in his offense conduct. The government argued for a guideline sentence, noting that the defendant did not come in early in the process to cooperate against his co-defendant. The district court imposed the guideline sentence, stating that "I cannot see that a sentence within the guidelines is not appropriate, given all of the factors that I have to adhere to." The court also made reference to the defendant's late cooperation, as well as the fact that he engaged in nine separate transactions. The Court of Appeals noted that the sentencing judge may not rest on the guidelines alone, but must, if asked by either party, consider whether the guidelines sentence actually conforms, in the circumstances, to the statutory factors. He cannot treat all sentences that would fall within the guidelines sentencing range as reasonable per se. Although a judge need not address every argument that a defendant makes at the sentencing hearing, he is required to make a discretionary ruling that is subject to appellate review, allowing the Court of Appeals to consider whether the district judge considered the factors relevant to the exercise of his discretion. Thus, a rote statement that the judge considered all relevant factors will not always suffice; the temptation to a busy judge to impose a guidelines sentence and be done with it, without wading into the vague and prolix statutory factors, cannot be ignored. In the present case, the court concluded that it did not have confidence in the judge's considered attention to the factors in this case, when he passed over in silence the principal argument made by the defendant even though the argument was not so weak as not to merit discussion. Indeed, diminished mental capacity is a ground stated in the sentencing guidelines themselves for a lower sentence, and a judge who fails to mention a ground of recognized legal merit (provided it has a factual basis) is likely to have committed an error or oversight. Moreover, the district court's reliance on the defendant's "late" cooperation was misplaced, where there was no confirmation in the record or the PSR confirming the government's assertion. Therefore, although making no finding as to the ultimate reasonableness of the sentence imposed, the court vacated the sentence due to the inadequate explanation.

United States v. Newsom, 428 F.3d 685 (7th Cir. 2005; No. 03-3366). In prosecution for multiple child pornography offenses, the Court of Appeals upheld the defendant's 324-month within the guidelines sentence as reasonable. The court previously remanded the case pursuant to *Paladino*. In so doing, the court noted that the length of the defendant's overall sentence was troubling in light of theories of marginal deterrence, which provide that the harshest sentences should be reserved for the most heinous behavior. The court mused, "What of the defendant who does something even worse than Newsom?" Despite this comment, the district court on *Paladino* remand indicated that it would impose the same sentence under an advisory guideline regime. Specifically, the district court pointed to the defendant's flight from the jurisdiction before trial, the harm he inflicted on his victims, and to the protection of the rights of the children involved. The district court also emphasized the importance of providing punishment that reflects the seriousness of the offense and affords adequate deterrence. Thus, the district court addressed some of the 3553(a) factors, including the nature and circumstances of the offense, the need to reflect the seriousness of the offense, deterrence, and protecting the public. On reasonableness review, the defendant argued that (1) the district court failed to consider the defendant's personal history and characteristics as required by 3553(a); and (2) the sentence is unreasonable because others who committed more heinous crimes were sentenced to shorter prison terms, which is inconsistent with 3553(a)(6). Regarding the first argument, the Court of Appeals noted that it was unfortunate that the district court did not mention the defendant's personal characteristics, including his depression, alcohol abuse, and work history, given that the defendant relied heavily on these factors on remand. However, the court noted that 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. District courts must resolve disputed material issues of fact that relate to a particular 3553(a) factor that a defendant brings to the court's attention; they must explain the conclusions they draw with respect to "decisive" characteristics; and, to the extent that they are departing from the sentence recommended by the Guidelines, they must set forth the justification for doing so. In this case, the district judge selected a sentence at the center of the Guidelines range and explained in his order on remand why he thought this was appropriate, which was sufficient. Regarding unwarranted disparity, the court noted that contrary to pre-*Booker* practice, the district court is now obliged to consider comparison of sentences as one of the 3553(a) factors. In the present case, the court acknowledged several cases the defendant brought to its attention where more serious conduct was punished less harshly. But, the court also noted other cases where the defendant's

sentence was comparable to similar cases. Finally, the court noted that under both the statute and the guidelines, the defendant could have received a longer sentence, he being sentenced to the middle of the range. Accordingly, the court concluded that the sentence was reasonable.

United States v. Julian, 427 F.3d 471 (7th Cir. 2005; No. 04-1574). In prosecution for conspiring to travel in foreign commerce with the intent to engage in illicit sexual conduct, the Court of Appeals held that a Sixth Amendment violation occurred when the jury did not make a determination of when the conspiracy ended. The end date of the conspiracy was significant in this case because, during the period of the defendant's offense conduct, the relevant statute was amended, increasing the maximum penalty from 10 to 15 years. The increase in the penalty, which took effect after the conspiracy was underway, therefore implicated the defendant's ex post facto rights. Specifically, a law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed can implicate ex post facto rights. If a defendant completes a crime before an increased penalty takes effect, it would violate his right not to be subject to ex post facto legislation to impose the increased penalty upon him. If, on the other hand, the defendant was engaged in a continuing crime, such as conspiracy, that did not conclude until after the new penalty took effect, it would not amount to an ex post facto violation to subject him to the higher penalty. Because the date upon which the conspiracy ended would determine the statutory maximum to which the defendant was subjected, *Apprendi* and its progeny required that the question be submitted to the jury. Because the district court made the determination at sentencing, the Sixth Amendment was violated. However, because the defendant raised the issue for the first time on appeal, the court reviewed the issue for plain error only. The court ultimately affirmed the sentence, finding that the fairness and integrity of the proceedings was not affected, as no reasonable jury could have concluded that the conspiracy ended before the effective date of the increased statutory maximum sentence.

United States v. Johnson, 427 F.3d 423 (7th Cir. 2005; No. 04-1463). In prosecution for child pornography offenses, the Court of Appeals held that a sentence three times higher than the top of the guideline range was reasonable. The defendant was sentenced prior to *Booker*, and the district court upward departed from the then mandatory guideline range. The court did so based upon the following: (1) for possession of 42 images involving bestiality, four levels; (2) for possession of 4,638 images, five levels; and (3) for criminal history under-representing criminal conduct, increased Criminal History Category from I to II. The Court of Appeals first found that a *Paladino* remand was unnecessary, as the district court's sentence and explanation for it clearly indicated that the judge was not inclined to give the defendant a lower sentence post-*Booker*. Secondly, the court concluded that the sentence was reasonable. Because the sentence was so far outside the guideline range, the district court was required to provide a compelling justification for the sentence. The court concluded that such was provided in this case, with the district court at length providing clear justifications for why he imposed the higher sentence.

United States v. Rodriguez-Alvarez, 425 F.3d 1041 (7th Cir. 2005; No. 05-1317). In this appeal, the Court of Appeals outlined the standard of review for considering arguments where the defendant claims the district court failed to properly follow post-*Booker* sentencing procedures. In the present case, the defendant did not argue that his sentence was unreasonable, but instead argued that the district court made two procedural errors at sentencing, to wit: (1) failure to consider the 3553(a) factors; and (2) failure to state its reasons for imposition of a particular sentence with reference to those factors. Although the defendant argued that these alleged procedural errors made his sentence "unreasonable," the Court of Appeals held that a sentence can be vacated for unreasonableness only based on misapplication of 3553 factors. Because the defendant's argument was based on procedural errors and not on the application of the factors, it is not appropriate for the court to consider the defendant's arguments under the reasonableness framework. Instead, the court reviews the question of whether the district court complied with the mandatory post-*Booker* sentencing procedures under a non-deferential standard of review. Under this approach, the court must determine whether the sentencing court complied with the mandatory procedures and, if it did not, conduct a harmless error analysis if harmlessness is asserted by the government. Those procedures include calculation of the applicable guidelines range even though the guidelines are now advisory. Courts must also give defendants the opportunity to draw the judge's attention to any factor listed in section 3553(a) that might warrant a sentence different from the guidelines sentence. Finally, in entering the sentence, the judge must consider the sentencing factors in 3553(a) and articulate the factors that determined the sentence imposed. Looking to the procedures, the Court of Appeals concluded that the sentence was properly imposed. First, although the district court did not go through each 3553(a) factor, it is required only to properly calculate the range and explain why (if the sentence is outside it) the defendant deserves more or less. Second, although the district court did not make explicit factual findings regarding the defendant's claimed mitigating factors, where a district court does not make such findings, the Court of Appeals will assume, for the purposes of reasonableness analysis, that the district court considered the submission in a light favorable to the

offering party. If it can be effectively argued that the sentence was unreasonable, given favorable implicit factual determinations, the case will be remanded for the trial court to make explicit factual findings. Here, however, viewing the fact in the light favorable to the defendant, there was still sufficient aggravating facts to support the district court's ultimate sentence.

United States v. Long, 425 F.3d 482 (7th Cir. 2005; No. 04-1721). In prosecution for possession of child pornography, the Court of Appeals invoked the *Paladino* remand procedure, notwithstanding the fact that the district court upward departed at sentencing. The government argued on appeal that the district court's upward departure was evidence that the district court would not have imposed a different sentence under the advisory guideline scheme. The Court of Appeals disagreed, however, noting that, as a responsible district judge in the pre-*Booker* era, the judge here adhered scrupulously to both the guidelines and the structure of the guidelines in determining the departure. Freed from the mandatory nature of that structure, the court will now be free to consider factors outlined in 3553(a), including those that were specifically prohibited by the guidelines and those that are not constitutionally prohibited such as race or sex. At the original sentencing hearing, the lawyers for both sides emphasized numbers: the number of images possessed; the method the government used to calculate the number of images; the number of images that contained actual pornographic images; the number of possible duplicate images; and the quantity of images that contained aggravating circumstances to warrant the application of other guidelines. Under advisory guidelines, defense counsel now has the opportunity to present and argue a wider range of factors that should be factored into the calculation and the weight to be accorded each factor--such as the defendant's long history of community service.

United States v. Williams, 425 F.3d 478 (7th Cir. 2005; No. 03-4091). Upon consideration of a sentence after a *Paladino* remand, the Court of Appeals noted the rarity with which a sentence within the guideline range will be found unreasonable. The court stated, "Deciding whether or not the sentence imposed by the district court is reasonable entails deferential review. The question is not how we ourselves would have resolved the factors identified as relevant by 3553(a)--many of which are vague and, worse, hopelessly open-ended--nor what sentence we ourselves ultimately might have decided to impose on the defendant. We are not sentencing judges. Rather, what we must decide is whether the district judge imposed the sentence he or she did for reasons that are logical and consistent with the factors set forth in section 3553(a). As we have noted, a sentence imposed within a properly calculated Guidelines range is presumptively reasonable. We have left room for the possibility that there will be some cases in which a sentence within the Guidelines range, measured against the factors identified in section 3553(a), stands out as unreasonable. But those cases will be rare."

United States v. Castro-Juarez, 425 F.3d 430 (7th Cir. 2005; No. 05-1195). In prosecution for illegal re-entry, the Court of Appeals held that a defendant does not need to make a specific "reasonableness" objection at sentencing in order to preserve the issue for appeal. In rejecting a specific objection requirement, the court found that to insist that defendants object at sentencing to preserve appellate review for reasonableness would create a trap for unwary defendants and saddle busy district courts with the burden of sitting through an objection--probably formulaic--in every criminal case. Since the district court will have already heard argument and allocution from the parties and weighed the relevant 3553(a) factors before pronouncing sentence, the court failed to see how requiring the defendant to then protest the term handed down as unreasonable would further the sentencing process in any meaningful way.

United States v. Castro-Juarez, 425 F.3d 430 (7th Cir. 2005; No. 05-1195). In prosecution for illegal re-entry, the Court of Appeals held that the district court did not sufficiently explain its choice of a sentence which was more than twice the high-end of the advisory guidelines. In imposing the non-Guidelines sentence, the district court stated that "the Guidelines in your case don't seem to take into account a person who has re-entered now on three occasions and who has the kind of criminal history that you have, and so I'm not going to apply the Guideline in your case." The Court of Appeals noted that a sentence within a properly calculated guideline range is entitled to a rebuttable presumption of reasonableness. The farther the judge's sentence departs from the guidelines sentence (in either direction), 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. Justifying a sentence outside the range does not require canvassing the statutory factors: Judges need not rehearse on the record all of the considerations that 3553(a) lists; it is enough to calculate the range accurately and explain why (if the sentence lies outside it) this defendant deserves more or less. Thus, in the present case, the court is not asked to decide whether the sentence imposed *could* be a reasonable sentence; the courts function is to assess whether the district court's choice of sentence was adequately explained given the record before it. In assessing the reasonableness of the sentence in question, the court looked to pre-*Booker* law concerning departures where a defendant's criminal history substantially underrepresents his criminal history (4A1.2(a)(1)). Under

this approach, the district court's sentence was problematic because the court did not link the extent of the higher sentence imposed to the structure of the guidelines. Indeed, had the sentence reached the court under the mandatory guidelines regime, it would have concluded that the sentence was not adequately tied to the structure of the guidelines. Although noting that the court now looked to 4A1.2(a)(1) solely for purposes of analogy because now all that is necessary is for the court to make an adequate statement for why the sentence imposed is appropriate, the Court of Appeals concluded that the district court did not meet this standard. Although the court singled out the defendant's criminal history, it did not single out any other 3553(a) factors. Given the extent of the departure cannot be explained solely by reference to the defendant's criminal history, the court remanded the case for a more detailed explanation by the district court.

United States v. Gipson, 425 F.3d 335 (7th Cir. 2005; No. 05-1407). In prosecution for possession of crack cocaine, the Court of Appeals rejected the defendant's argument that a sentence based upon the guidelines is unreasonable because the guidelines punish crack cocaine offenses too severely relative to offenses involving powder cocaine. The defendant' sole argument at sentencing was that the penalties under the guidelines for crack cocaine as contrasted with powder are "grossly disproportionate" and therefore his sentence was unreasonable within the meaning of *Booker*. In rejecting the argument, the court noted that the question in the present case was not whether after *Booker* a sentencing court may use the differential as a reason to impose a shorter sentence than the one recommended by the guidelines, but rather whether it is error for a court *not* to have taken the differential into account. Given the fact that the court routinely upheld the differential against constitutional attack and, under the pre-*Booker* guideline system, rejected wholesale downward departures from the guidelines on this basis, the court concluded that it would be inconsistent to *require* the district court to give a nonguideline sentence based on the differential. Moreover, in this case, the district court in this case imposed a sentence within the guideline range, which needed little explanation for the court's reasonableness review.

United States v. Duncan, 427 F.3d 464 (7th Cir. 2005; No. 04-1916). Upon a *Paladino* remand, the district court re-sentenced the defendant. Upon appeal of that sentence, the Court of Appeals noted that the district court was without jurisdiction to fully re-sentence the defendant upon a *Paladino* remand. The court held that the limited remand to the district court was solely to ascertain whether the district court was inclined to re-sentence *if* the Court of Appeals later remanded the case to the district court.

United States v. Bryant, 420 F.3d 652 (7th Cir. 2005; No. 04-2850). In prosecution for being a felon in possession of a weapon, the Court of Appeals rejected an argument that *Booker* required all factual determinations at sentencing to be proved beyond a reasonable doubt. The court held that *Booker* does not foreclose judicial fact-finding in the sentencing context, nor does it dictate that judges must find those facts beyond a reasonable doubt. *Booker* and its predecessors make clear that a Sixth Amendment problem emerges if judicial fact-finding results in a sentence exceeding the statutory maximum, for example if such fact-finding requires a particular sentence in the context of a mandatory sentencing guidelines scheme. However, because the guidelines are no longer mandatory, the Sixth Amendment is not implicated.

United States v. Paulus, 419 F.3d 693 (7th Cir. 2005; No. 04-3092). In prosecution of a former state prosecutor for bribery and various fraud counts, the Court of Appeals rejected the defendant's Ex Post Facto Clause challenge to his sentence. The defendant's offense conduct was committed from 1998 to 2000. The defendant plead guilty before *Blakely* and was sentenced after the Supreme Court's decision in *Booker*. At that time, the district court upwardly departed from a range of 27-33 months to a 58 month sentence because of the number and amount of bribes the defendant accepted as part of his offense conduct, as well as the disruption of government functions. The defendant argued that application of advisory guidelines pursuant to *Booker* violated the Ex Post Facto Clause, and the district court was instead limited by the clause to application of the principles set forth in *Blakely*, *i.e.*, the district court could not enhance the defendant's sentence based upon judge-found facts under the preponderance of the evidence standard. In rejecting this argument, the court noted that the Constitution prohibits application of laws inflicting greater punishment than the law prescribed when the crime was committed. The Supreme Court has held that this principle is to be incorporated into the Due Process Clause of the Fifth and Fourteenth Amendments, barring courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. Thus, in the present context, the relevant inquiring is whether the defendant had fair warning at the time he engaged in the bribery scheme that the court could sentence him to 58 months for that conduct. The court concluded that *Blakely* was irrelevant to the due process analysis in this case, because the proper period for determining fair notice was the period of the offense conduct, *i.e.,* 1998-2000. At that time, the judge could have properly departed based on judge-found facts under the preponderance of evidence standard. Thus, the defendant had fair notice at the time of his offense that a 58-month sentence was possible.

United States v. Re, 419 F.3d 693 (7th Cir. 2005; No. 04-2587). Upon consideration of a sentence after a *Paladino* remand, the Court of Appeals set forth the information a district court may properly consider under such a limited remand. Specifically, the Court of Appeals held that a district court should exclude post-sentencing events and conduct for purposes of the *Paladino* remand. Rather, the conduct or circumstances that bear on the §3553(a) factors must have been in existence at the time the original sentence was imposed. The goal of the *Paladino* remand is to determine if, at the time of sentencing, the district judge would have imposed a different sentence in the absence of mandatory guidelines. Post-sentencing events or conduct simply are not relevant to that inquiry.

United States v. Jones, 419 F.3d 582 (7th Cir. 2005; No. 04-2587). Upon consideration of a mandatory minimum sentence, the Court of Appeals concluded that the holding in *Booker* did not require facts which establish a mandatory minimum sentence to be found by a jury beyond a reasonable doubt. The court stated that although there may be some tension between *Booker* and *Harris*, the Supreme Court's extension of the *Apprendi* rule in *Booker* did not enlarge the underlying constitutional argument, which was duly considered by the Court in *Harris*. The distinction drawn in *Harris* appears to have survived--that is, that judicially found facts used to set minimum sentences are not properly deemed "elements" of the offense for Sixth Amendment purposes because the jury's verdict authorizes the judge to impose the minimum sentence with or without the judicial fact-finding. In any event, to the extent that *Booker* has unsettled *Harris*, it is the Supreme Court's prerogative--not the Court of Appeals--to say so.

United States v. Jamison, 418 F.3d 726 (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. *See also United States v. Cross*, ___ F.3d ___ (7th Cir. 2005; No. 05-2222) (reaffirming).

CONFLICT OF INTEREST

United States v. Lafuente, 426 F.3d 894 (7th Cir. 2005; No. 04-2194). In prosecution for drug related offenses, the Court of Appeals rejected the defendant's argument that he was entitled to an evidentiary hearing on his claim that his attorney had a conflict of interest. After the defendant's conviction, he filed a motion for new trial alleging his attorney failed to disclose that she previously represented a defendant in a separate proceeding where that defendant gave a proffer to the government which implicated the appellant. However, the appellant's attorney represented that defendant after he gave the proffer. In rejecting the defendant's argument, the court noted that in order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. In order to demonstrate an adverse effect, a defendant must show that there is a reasonable likelihood that his counsel's performance would have been different had there been no conflict of interest. If the petitioner's counsel could not have done anything differently, if there was no alternative course of action, then there can be no Sixth Amendment violation. In the present case, the court concluded that even if a conflict of interest existed, there was no adverse effect. First, there was no possibility that counsel would be forced to cross-examine her former client, as the information he gave against the defendant was not relevant to the trial. Second, there was no possibility that defense counsel did not advise his client to cooperate with the government against her former client, as the defendant made it clear that he would not cooperate with the government under any circumstances.

EVIDENCE

United States v. Garcia ___ F.3d ___ (7th Cir. 2006; No. 04-3159). In prosecution for conspiracy to distribute narcotics, the defendant challenged the government's introduction of expert testimony to the effect that innocent parties are not usually present when a drug deal takes place. The defendant's theory of defense was that he was merely an innocent bystander to the drug transaction. On appeal, he argued that the introduction of the expert testimony deprived him of the presumption of innocence. The Court of Appeals rejected this challenge, noting that it has repeatedly allowed expert evidence on the practices of drug dealers. The opinion in this case that it is unlikely for innocent parties to be present at drug deals was logical and reasonable because it accords with expert experience as well as common sense. Although this evidence raised an inference that the defendant's presence at the drug deal tended to show his guilt, this inference was not mandatory nor a presumption. Accordingly, the evidence did not

deprive the defendant of the presumption of innocence.

United States v. Danford, 435 F.3d 682 (7th Cir. 2006; No. 04-4233). In prosecution for mail fraud related offenses, the Court of Appeals affirmed the admission of a statement against a hearsay challenge. The defendant was tried for fraud, stemming from his making a false claim that jewelry from his store had been stolen, collecting the insurance proceeds, and then reselling the falsely reported stolen jewelry. As part of it's case in chief, the government called a store employee who observed the defendant talking with the store manager two weeks before the alleged robbery. The witness testified that she asked the manger what he has said to the owner, and he responded that the owner was asking how to work the alarm, as he had lost his password. The defendant argued that this was "testimonial hearsay" in violation of the rule established by the Supreme Court in *Crawford*. The Court of Appeals noted that although the Court in *Crawford* declined to spell out a comprehensive definition of "testimonial," it did offer clarifying examples of what testimonial hearsay covers. Testimonial hearsay includes prior testimony from a preliminary hearing or testimony in response to police interrogations. When nontestimonial hearsay is offered, however, the Court maintains that a judicial determination of reliability is sufficient. The Court further noted that an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. In the present case, the conversation between the employee and the store manager was more akin to a casual remark, according to the court, and the evidence was properly admitted under Federal Rule of Evidence 803(a) as a present-sense impression.

United States v. Serrano, 434 F.3d 1003 (7th Cir. 2006; No. 04-3995). In prosecution for aiding and abetting cocaine distribution, the Court of Appeals affirmed the admission of documents at trial over a hearsay objection. The defendant was present in an apartment when another individual sold cocaine to an informant. When the informant asked where the drugs were, the defendant pointed to a cabinet where the drugs were located. At trial, the defendant's defense was based on an argument that the government was required to show that he was more than just a visitor at the apartment where the drug deal occurred. To counter this defense, the government introduced five documents found in the apartment or the trash outside which belonged to the defendant. In affirming the admission of the documents, the court noted that merchandise receipts, utility bills, and similar documents are not hearsay when they are offered as circumstantial evidence to link a defendant to a particular place, to other defendants, or to an illegal item. Specifically, the documents are not introduced for the truth of the matters they assert--for example, that the defendant rented a car, bought a television, or used 500 kilowatt hours of electricity. Rather, the documents are introduced for the inferences that may be drawn circumstantially from their existence or from where they are found, regardless of whether the assertions contained therein are true. When someone's important personal papers turn up inside a house or in the trash right outside, it is reasonable to believe, in the absence of some believable alternative explanation, that their owner is affiliated in some way with the premises.

United States v. Chavis, 429 F.3d 662 (7th Cir. 2005; No. 04-2787). In prosecution for conspiracy to possess with intent to distribute crack cocaine, the Court of Appeals affirmed the defendant's conviction over his argument that the district court improperly admitted 404(b) evidence. At trial, the government introduced evidence of the defendant's 1997 conviction for possession of crack cocaine with intent to distribute. The Court of Appeals noted that when a defendant is charged with a specific intent crime, the government may introduce evidence of other acts to prove intent. However, the court recognized that the permissible use of prior convictions to prove intent may have the potentially impermissible side effect of allowing the jury to infer propensity. To distinguish between proper and improper use, the government must affirmatively show why a particular prior conviction tends to show the more forward-looking fact of purpose, design, or volition to commit the new crime. In other words, a prior conviction introduced solely for its own sake is propensity evidence, but a prior conviction shown to have some additional relevance can qualify as intent evidence. In the present case, the defendant presented a defense that he was simply in the wrong place at the wrong time. He claimed no intent to distribute drugs because he was completely innocent. Thus, by portraying himself as a clueless bystander, he gave the prior conviction the requisite relevance to satisfy Rule 404(b).

United States v. Julian, 427 F.3d 471 (7th Cir. 2005; No. 04-1574). In prosecution for conspiracy to travel in foreign commerce with intent to engage in illicit sexual conduct, the Court of Appeals affirmed the admission of evidence concerning the defendant's prior conviction for sexual assault of a minor under Federal Rule of Evidence 413. The defendant argued that because his prior offense conduct occurred 12 years prior to his current offense and did not involve foreign commerce, it was improper propensity evidence under Rule 404(b). In affirming the evidence's admission, the Court noted that Rule 413, not Rule 404(b), governed its admissibility. Rule 413(a) permits a court to admit evidence concerning a prior sexual assault committed by a defendant when he is charged with "an offense of sexual assault." "Offense of sexual assault" is defined as a crime under federal law that "involved," among other conduct, "any contact without

consent, between any part of the defendant's body or an object and the genitals or anus of another person" and "any contact, without consent, between the genitals or anus of the defendant and any part of another person's body," or an attempt or conspiracy to engage in such conduct. The defendant's offense met this definition because the government's proof at trial established that the acts in furtherance of the conspiracy included the forcible rape of a child under the age of 18. Additionally, Rule 413(a) permits the consideration of a prior sexual assault "for its bearing on any matter to which it is relevant." This includes a defendant's propensity to engage in the offense of sexual assault with which he has been charged. Moreover, Congress intended for the lapse of time between the prior and charged offenses to pose no categorical bar to the admission of the prior assault, but rather that it represent a factor that the jury may consider in assessing the probative force of the prior assault. Thus, there is no time limit on the admissibility of prior offenses. Although evidence admitted under rule 413(a) is still subject to the considerations in Rule 403, here, the court concluded that the district court did not abuse its discretion in concluding that the prejudicial impact of the evidence did not outweigh its probative value.

United States v. Ogle, 425 F.3d 471 (7th Cir. 2005; No. 05-1035). In prosecution for drug related offenses, the Court of Appeals set forth the standard to be applied when a defendant alleges that he is entitled to a new trial because the government presented false testimony. Specifically, in cases where the government did not knowingly present the false testimony, a "reasonable probability test is used." Here, the defendant will have to prove the same things he is required to prove when moving for a new trial for other reasons and show that the existence of the perjured testimony (1) came to the defendant's knowledge only after trial; (2) could not have been discovered sooner with due diligence; (3) was material; and (4) would probably have led to an acquittal had it not been heard by the jury. In contrast, where a criminal defendant alleges that the government knowingly presented false testimony, a new trial is warranted when (1) the government presented perjured testimony; (2) the government knew or should have known of the perjury; and (3) there is some likelihood that the testimony could have affected the verdict. Whether the defendant met the appropriate standard in the present case was not reached by the Court of Appeals, however, because the defendant's motion for a new trial was untimely.

United States v. Dawson, 425 F.3d 389 (7th Cir. 2005; No. 04-2557). In prosecution for drug offenses, the Court of Appeals rejected the defendants' argument that the testimony of the government's principal witness should have been excluded because he had a "contingency fee" arrangement with the government. Specifically, the government's witness was to receive 20 percent of any proceeds of drug sales that the government recovered as a result of his efforts. The Court of Appeals first noted that the fee was not a "contingent fee," but rather a bounty. A bounty is rewarded for rendering a service that the offeror wants done, whether it's shooting wolves that prey on sheep or catching criminals who prey on humans. Here, the bounty was for helping the authorities nail drug offenders. Although rather than being a flat fee it was a percentage of money that the government recovered from the offenders, this form of compensation is what economists call "incentive compatible": it gives the bounty hunter an incentive to concentrate on the biggest prey. Moreover, the bounty was not a contingent fee because it was paid whether the witness testified or not. From the standpoint of incentive to lie, a bounty based on an adjudicative outcome is much more suspect than one obtained simply by procuring a seizure of forfeitable goods. This is why witnesses may not be paid for their testimony. Indeed, even an expert witness may not be paid more if the party for whom he is testifying wins the case. Finally, the court noted that even if the witness was improperly paid a contingency fee, exclusion of the evidence would not be required. An exclusionary rule is unnecessary here, where a jury should be competent to discount appropriately testimony given under a powerful inducement to lie. Any inducements must be disclosed to the jury, which can use its common sense to screen out evidence that it finds to be wholly unreliable because of the inducements that the witness received. The more extravagant the blandishments, the more likely the jury is to discredit the witnesses who received them. Thus, exclusion is an unnecessary remedy.

United States v. Burke, 425 F.3d 400 (7th Cir. 2005; No. 03-3483). In prosecution for perjury, the Court of Appeals rejected the defendant's argument that the district court should have dismissed the indictment based on a theory of the government having set a "perjury trap." Under this theory as set forth by the Ninth Circuit, a "perjury trap" is created when the government calls a witness before a grand jury for the primary purpose of obtaining testimony from him in order to prosecute him later for perjury. The Seventh Circuit rejected this theory, asking why should a prosecutor be forbidden from giving a suspect an opportunity to commit the crime of perjury. Investigators offer opportunities to commit many offenses and may lead people toward their commission. Usually the offers concern drugs, weapons, or bribery. If the inducement is so powerful that it amounts to entrapment by overcoming the will of a person not already predisposed to commit the offense, while providing the means to a person who could not have committed the crime without assistance, then criminal punishment is not proper. However, the defendant here did not make an entrapment argument given that the defendant's predisposition to lie was

obvious and he did not need the government's aid to lie. Finally, the Court found that if the defendant deemed the prosecutor's questions before the grand jury improper for any reason, he could have refused to answer and obtained a judicial decision on the subject. Instead, he chose to lie, and he must live with the consequences of that choice.

United States v. Owens, 424 F.3d 694 (7th Cir. 2005; No. 04-2793). Upon appeal from a bank robbery conviction, the Court of Appeals reversed the defendant's conviction, holding that the admission of evidence which suggested the defendant robbed the same bank seven and a half years prior to the instant offense was not admissible under Rule 404(b) nor intricately related to the charged crime. The government argued that the evidences was admissible to show (1) the defendant's participation in, and control of, the charged offense; (2) the absence of mistake or accident in finding himself involved in the charged offense; and (3) his knowledge of the particular bank he chose to rob. The Court of Appeals rejected all of these proffered reasons, noting that none of these proffered reasons were really at issue in the case and that the evidence amounted to propensity evidence. As to the evidence being intricately related to the charged crime, the government argued that the evidence showed the defendant's familiarity with the bank he chose to rob. However, the government had other evidence which established this same fact and "the government got greedy, invoking the specter of the 1995 robbery, thereby tainting the record, inviting the risk of unfair prejudice, and placing its case in jeopardy.

United States v. Seals, 419 F.3d 600 (7th Cir. 2005; No. 02-4235). In prosecution for aggravated bank robbery, the Court of Appeals explained the proper standard for the admission of reverse 404(b) evidence. The court noted that Rule 404(b) evidence is typically used by prosecutors seeking to introduce evidence of a criminal defendant's prior misconduct as proof of motive or plan to commit the crime at issue. However, a defendant can seek to admit evidence of other crimes under this rule if it tends to negate the defendant's guilt of the crime charged against him. This is commonly referred to as reversed 404(b) evidence. In determining whether to admit reverse 404(b) evidence, a district court must balance the evidence's probative value, under Rule 401, against considerations such as prejudice, undue waste of time, and confusion of the issues under Rule 403. The standard for 404(b) evidence and reverse 404(b) evidence differ, in that a lower standard of similarity should govern reverse 404(b) evidence because prejudice to the defendant is not a factor. In other words, the defense is not held to as rigorous of a standard as the government in introducing reversed 404(b) evidence. Because the district court held the defendant to the higher 404(b) standard, it held that the court made an error, although it still affirmed because, according to the court, the evidence the defendant sought to admit was irrelevant.

GUIDELINES

United States v. McCaffrey, 437 F.3d 684 (7th Cir. 2006; No. 03-2189). In prosecution for child pornography related offenses, the Court of Appeals rejected the defendant's double-counting objection. Based upon the defendant's admission that he had a long history of abusing minors, the district court imposed an upward departure under 2G2.2(b)(4) for engaging in a pattern of child sexual abuse and another under 4A1.3 because the defendant's criminal history category of one did not adequately reflect the seriousness of his criminal background. Because both departures were based on the same set of prior acts by the defendant, the defendant argued that double-counting had occurred. The Court of Appeals noted that as a general principle, the same acts by the defendant cannot be used as the basis for two separate upward departures. However, prior convictions for sexual abuse may support upward departures under the sections used in this case. Although, in the present case, the defendant's conduct were not "prior convictions," the court treated them in this fashion because the defendant admitted the conduct on the stand, and the testimony was corroborated by extensive victim testimony and documentary evidence. Accordingly, the acts were proven beyond a reasonable doubt, the acts could be treated as prior convictions, and, thus, no double-counting occurred.

United States v. Chamness, 435 F.3d 724 (7th Cir. 2006; No. 05-1902). In prosecution for attempting to manufacture meth, the Court of Appeals upheld the district court's enhancement for creating a substantial risk of harm to human life or the environment during the manufacture attempt, pursuant to U.S.S.G. § 2D1.1(b)(6)(B). According to the guideline's commentary, when determining whether there existed a "substantial risk of harm," a court should look to factors such as the quantity of chemicals or toxic substances at the lab, how they were stored, how they were disposed of, the likelihood of their release into the environment, the duration and extent of the manufacturing operation, the location of the laboratory, and the number of human lives placed at substantial risk. In the present case, the police entered the lab located in a trailer park while the manufacturing process was taking place, there being a white fog permeating the inside of the trailer. Officers ultimately discovered two glass jars containing 923 milliliters of liquid that contained meth, one gallon of muriatic acid, one gallon of Coleman stove fuel, peeled lithium batteries, an operating air pump, and 26 ounces of salt. Weighing these facts against the factors in the commentary, the court concluded that the enhancement was warranted. In doing so, the court noted that the "white fog" presented a health risk to the officers

and others located in the lab, the chemicals stored in the lab were toxic and flammable, the sophistication of the lab was unusually high, and the lab's location in the trailer park posed a risk to the nearby residents.

United States v. Ortiz, 431 F.3d 1035 (7th Cir. 2005; No. 03-1471). In prosecution to distributing marijuana and cocaine, the Court of Appeals reversed the defendant's sentence, finding that the district court's finding that the defendant's relevant conduct involved 100 kilograms of cocaine was an error, as the evidence did not show that the distribution of this additional amount was part of a "common scheme or plan." The defendant pled guilty to distributing marijuana and cocaine to a government informant on three separate occasions. While investigating the defendant's offenses, the government learned through another drug dealer this dealer was selling drugs to a third party, who in turn was selling the drugs to the defendant. At sentencing, the government called this dealer as a witness, and he testified that he and the third party had sold the defendant more than 100 kilograms of cocaine. The district court included the full amount as relevant conduct. On appeal, the court noted that "the relevant conduct rule has limits." Quantities of drugs not specified in the counts of conviction may be considered at sentencing so long as the unconvicted activities bore the necessary relation to the convicted offense. The court found such a connection lacking in this case. First, there was no temporal proximity between the offenses of conviction and the other drug quantities. The witness's testimony provided no firm dates for any of the alleged additional purchases, other than a loose two-year time period. Likewise, there was little regularity or similarity of acts. The witness included the defendant in a large, multi-state drug conspiracy, while the charged offenses were three small scale drug purchases to the same informant at the same location over a six-month period. Moreover, as to the amount of drugs, the offense of conviction involved only 10 ounces, whereas the witness's testimony attributed 100 kilograms to the defendant. Thus, the Court of Appeals remanded for resentencing without inclusion of the 100 kilograms in the defendant's relevant conduct.

United States v. Arnaout, 431 F.3d 994 (7th Cir. 2005; No. 03-3297). In prosecution for conspiracy to violate RICO, the Court of Appeals held that the domestic terrorism enhancement (3A1.4) can apply to offenses which are not defined as a "crime of domestic terrorism" as set forth at 18 U.S.C. §2332b(g)(5)(B). The basis for the defendant's conviction was that he conspired to defraud donors of a charity he operated. He represented to donors that his charity would use donated funds solely for humanitarian purposes. In reality, he diverted a portion of the money raised to support groups engaged in armed confrontation and violence overseas. The government argued at sentencing that the domestic terrorism enhancement applied. Specifically, Section 3A1.4 provides that "if the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32." The district court read the statute as allowing the enhancement for only those crimes defined as a "crime of domestic terrorism" in the relevant statutes. The Court of Appeals, however, disagreed. As a matter of first impression, the court noted that the phrase "intended to promote" broadened the category of crimes for which the enhancement could be applied. Although RICO is not defined as a "crime of domestic terrorism," the object of the defendant's offense was in fact to "promote terrorism." Thus, by the plain language of the guideline section, the enhancement applied.

United States v. Bothun, 424 F.3d 582 (7th Cir. 2005; No. 04-1388). In prosecution for drug related offenses, the Court of Appeals affirmed the district court's denial of an acceptance of responsibility reduction. While the defendant was incarcerated on the instant offense, he conspired with his wife over the telephone to produce methamphetamine. Based on this conduct, the district court denied the defendant acceptance of responsibility, stating that it was the court's "practice" to deny acceptance of responsibility where a defendant continues to engage in post-plea criminal activity. The Court of Appeals noted that it was somewhat troublesome that the judge said that she had a "practice" of not giving defendants a reduction when they continue to engage in criminal activity, because the Guidelines do not authorize the court to adopt a *per se* rule denying a reduction when a defendant engages in further criminal activity after his plea. Nevertheless, the court affirmed the denial, noting that the judge's comments taken as a whole reassured the court that she properly weighted all the circumstances before rejecting the adjustment for acceptance of responsibility.

United States v. Graves, 418 F.3d 739 (7th Cir. 2005; No. 04-3720). In prosecution for possession with intent to distribute crack, the Court of Appeals affirmed the district court's determination that the defendant was a career offender and that two of his prior offenses were not consolidated for sentencing. In making this determination, the district court looked to determine whether a formal order of consolidation or the previous sentencing transcript indicated that the prior convictions were "consolidated." The Court of Appeals noted that the recidivism exception to *Apprendi* and its progeny exempts only those findings traceable to a prior judicial record of "conclusive significance." The sentencing court may only examine "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and

defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." In the present case, the district court's findings were made by resorting only to such information with conclusive significance of a prior judicial record.

United States v. Hagenow, 423 F.3d 638 (7th Cir. 2005; No. 04-4175). In prosecution for unlawful possession of a weapon by a felon, the Court of Appeals vacated the defendant's sentence because the district court looked beyond "the simple fact of conviction" to determine whether the defendant's Indiana conviction for criminal confinement constituted a crime of violence. The Court of Appeals noted that criminal confinement does not necessarily constitute a crime of violence, as one could theoretically confine someone without creating a "serious potential risk of physical injury." Accordingly, the district court looked beyond the simple fact of conviction to the information and affidavit in support of probable cause to determine the nature of the conviction. The Court of Appeals held that the Supreme Court's decision in *Shephard*, prohibits such an inquiry. When inquiring into the nature of a prior conviction, a court is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented. Affidavits attached to an information as part of Indiana practice are not part of the "charging document" for this purposes.

United States v. Hagenow, 423 F.3d 638 (7th Cir. 2005; No. 04-4175). In prosecution for unlawful possession of a weapon by a felon, the Court of Appeals held that a misdemeanor conviction for possession of a police scanner under Indiana law should not count for purposes of criminal history. Section 4A1.2(c)(1) enumerates 15 offenses and "offenses similar to them" which are not ordinarily counted for criminal history purposes unless the sentence for the offense was for at least one year of probation of 30 days in jail or the offense was similar to the instant offense. Although possession of a police scanner is not an enumerated offense, the Court of Appeals held that the offense conduct was similar to hindering police or resisting arrest--enumerated offenses. Moreover, the court could find no quality about the offense which made it more serious than the enumerated crimes. Thus, the court held that the offense should not be counted for criminal history purposes.

HABEAS CORPUS/2255

Van Patten v. Deppisch, 434 F.3d 1038 (7th Cir. 2006; No. 04-1276). Upon consideration of the district court's denial of a habeas corpus petition, the Court of Appeals considered the following question, "What does the law require when a client on the other end of a telephone hookup with his lawyer is standing before a judge about to relinquish a bevy of important constitutional rights?" In the present case, at the defendant's change of plea hearing, all parties were present in open court except defense counsel, who was connected via a telephone. As an initial matter, the Court of Appeals determined that the issue must be resolved according to the *Cronic* standards, rather than *Strickland*. *Cronic* applies where there has been a complete denial of counsel; where counsel has been prevented from assisting the accused during a critical stage of the prosecution; where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; or under circumstances where "although counsel is available the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice without inquiry into the actual conduct of the proceeding is necessary. In the present case, although the record indicated that the judge attempted to conduct the plea with great care, the defendant stood alone before the judge and prosecutor. Unlike the usual defendant in a criminal case, he could not turn to his lawyer for private legal advice, to clear up misunderstandings, to seek reassurance, or to discuss any last-minute misgivings. Listening over an audio connection, counsel could not detect and respond to cues from his client's demeanor that might have indicated he did not understand certain aspects of the proceeding, or that he was changing his mind. Under this circumstance, the *Cronic* standard was appropriate. Under this standard, the court found that the defendant was denied his right to the effective assistance of counsel. The Sixth Amendment requires more than formal compliance with its guarantees. Defense counsel should be fully engaged at a plea hearing no less than at trial because in both settings, the accused is confronted with both the intricacies of the law and the advocacy of the public prosecutor. Over a phone line, it would be all too easy for a lawyer to miss something. For example, she might prejudice her client by failing to make some important point during the proceedings and later claim it was a tactical decision, when in reality she wasn't paying attention. Or an attorney might realize he had neglected to inform the client of some crucial piece of information but be tempted to let it pass rather than broadcasting the issue to everyone in the room. Accordingly, the court remanded the case to the district court with instructions to enter an order granting the habeas corpus petition.

Pavlovsky v. VanNatta, 431 F.3d 1063 (7th Cir. 2005; No. 05-1911). After his state court conviction, the petitioner filed a habeas petition which the district court found to be untimely, therefore dismissing the petitioner, but doing so without prejudice. Thereafter, the petitioner filed a second petition, which the district court again dismissed as

untimely, which he then appealed. On appeal, the state argued that the district court had no jurisdiction to consider the second petition, as the defendant did not obtain permission to file it from the court of appeals. The Court of Appeals noted that a petition dismissed "without prejudice" does not count as a "first petition" requiring a petitioner to obtain permission to file again. Although a dismissal for untimeliness is on the merits and should be with prejudice, the fact that the district court incorrectly characterized the finality of the original dismissal did not alter the dismissal's nature as "without prejudice." To now characterize the dismissal as "with prejudice" would be unfair to the defendant at this stage. However, the court did state that "we take this opportunity to remind district judges that they should be careful not to label a dismissal of a habeas corpus petition on the merits as being without prejudice, thereby depriving the dismissal of the finality it ought to have."

Ben-Yisrayl v. Davis, 431 F.3d 1043 (7th Cir. 2006; No. 03-3169). Upon consideration of the district court's grant of a habeas corpus petition, the Court of Appeals affirmed, finding that the prosecutor violated the defendant's right to remain silent during closing argument. After arrest for murder, the defendant confessed. At trial, the defendant presented a defense based in part on the theory that the confession was false. During closing argument, the prosecutor stated, " Let the Defendant tell you why somebody would freely and voluntarily confess . . .." Although the state argued that the reference to "the Defendant" was directed at defense counsel, the Court of Appeals rejected this argument, noting that throughout the prosecutor's closing, he used the term "the Defendant" repeatedly to refer to the defendant personally, rather than his counsel. Moreover, the facts of the case indicated that the jury could have believed that the prosecutor was arguing that, because the defendant failed to testify as to why he would confess to a crime that he did not commit, the inference is that his confession was voluntary and true. Finally, the error was not harmless, as the defendant's confession was the only real hard evidence linking the defendant to the crime.

Bridges v. Chambers, 425 F.3d 1048 (7th Cir. 2005; No. 05-3264). In this habeas action arising from an Illinois conviction, the Court of Appeals denied the state's request to name the director of the Illinois Department of Corrections as the respondent, rather than the warden of the institution in which the petitioner is held. According to the state, naming the Director would be more efficient because, if the warden is named, transfer of the defendant or a new warden requires substitution of the respondent, whereas if the respondent is the Director, then substitution would be required far less frequently. The Court of Appeals, however, noted that the convenience of such a procedure was slight, especially in light of the fact that a petitioner whose case is on appeal cannot be transferred without the court's permission. Moreover, under the rules and precedent, the proper respondent is the warden who has custody of the petitioner--not the warden's supervisor.

Burt v. Uchtman, 422 F.3d 557 (7th Cir. 2005; No. 04-1293). In a state murder prosecution, the Court of Appeals held on review of the denial of a habeas corpus petition that the defendant's right to due process was violated when the trial court failed to order a hearing on the defendant's fitness to plead guilty and that his trial counsel was ineffective for failing to request such an examination. The defendant was tried before a jury, but near the end of the state's case, the defendant abruptly changed his plea to guilty without any concessions from the government and against the strenuous advice of his attorneys. During more than 14 months between his arrest and guilty plea, the defendant was taking a number of powerful psychotropic medications prescribed for him by prison doctors. He was also examined by a psychologist eight months before his trial began, and the doctor, while noting several psychological impairments, deemed him fit to stand trial. The psychologist, however, did not consult the defendant's medication records and his report mentions only in passing that the defendant was even on medication. Neither defense counsel nor the trial court ever requested a further evaluation to determine if the defendant was competent at the time he pleaded guilty. The Court of Appeals noted that a sudden guilty plea with no attempt to seek concessions from the prosecution may, when coupled with other evidence of mental problems, raise doubts as to the defendant's competency. The defendant here had significantly below average intelligence and had been diagnosed with attention deficit hyperactive disorder and a brain impairment that made him prone to poor impulse control. A sudden and highly questionable tactical decision seems more likely a product of his mental deficiencies than strong will and reasoned thought. Given these facts, the trial court should have *sua sponte* ordered a fitness examination, and defense counsel, who were entirely aware of the defendant's mental condition, was ineffective for failing to request such an examination prior to the entry of the guilty plea.

OFFENSES

United States v. Lee, ___ F.3d ___ (7th Cir. 2006; No. 05-1385). In prosecution for uttering counterfeit securities in violation of 18 U.S.C. sec. 513(a), the Court of Appeals reversed the defendants' convictions on two counts. The statute in question prohibits making, uttering, or possessing a counterfeit or forged security "of a State or political subdivision thereof or of an organization, with intent to deceive another person, organization, or government." Thus, the government must prove that a

counterfeit check was of a legal entity that affected interstate commerce. Such a "legal entity" could be either the payor company or the drawee bank. At the defendants' trial, the government was required to show that the payor company or the drawee banks existed. The Court of Appeals concluded that the government failed to do so. Specifically, at trial, the government did not present any evidence that either the payor company or the drawee bank existed. Accordingly, the convictions on the counts involving these entities had to be reversed.

United States v. Graham, 431 F.3d 585 (7th Cir. 2005; No. 04-1335). In prosecution for assaulting federal officers in violation of 18 U.S.C. § 111(a), the Court of Appeals rejected the defendant's claim that his conviction should be reversed because the trial judge incorrectly defined the term "intentionally" in a supplemental jury instruction when he stated that in order to find the defendant acted intentionally under § 111 they must find that the defendant made contact with one or more of the federal officers "deliberately and not by accident or mistake." The court noted that § 111 is not a specific intent crime. Rather, the government may establish proof of a forcible assault by demonstrating that the defendant made such a threat or display of physical aggression toward the officers as to inspire fear of pain, bodily harm, or death. Thus, if anything, the district court's instruction placed a *more* onerous burden on the prosecution than was required by the statute, thereby precluding a finding that the defendant was harmed by the challenged instruction.

United States v. Wilson, 437 F.3d 616 (7th Cir. 2005; No. 04-4022). In prosecution for being a felon in possession of ammunition, the Court of Appeals rejected the defendant's argument that Wisconsin's restoration of his right to possess ammunition--but not firearms--precluded his conviction. The Court held that it was irrelevant that Wisconsin allowed the defendant to possess ammunition. State law is only relevant to the federal offense to the extent of determining whether the defendant is a convicted felon. Once the felony conviction is established, federal law prohibits the possession of either firearms or ammunition. There was no question that the defendant's right to possess a *firearm* had not been restored, thereby making him a convicted felon without fully restored rights.

United States v. Spano, 421 F.3d 599 (7th Cir. 2005; No. 03-1111). In prosecution for offenses arising out of a scheme to defraud the Town of Cicero, Illinois, the Court of Appeals rejected a defendants claim that she was not guilty of any form of fraud because she received no benefit from the scheme. In rejecting this argument, the court stated that "a participant in a scheme to defraud is guilty even if he is an altruist and all the benefits of the fraud accrue to other participants, just as a conspirator doesn't have to benefit personally to be guilty of conspiracy--a point so obvious that we can't find a case that states it, although it is implicit in statements of the elements of conspiracy, of which personal benefit is not one."

RESTITUTION

United States v. Havens, 424 F.3d 535 (7th Cir. 2005; No. 04-2956). In prosecution for offenses related to identity theft, the Court of Appeals reversed the district court's restitution award. In awarding restitution, the district court entered a judgment equal in amount to a civil judgment which had been entered against the defendant. The civil judgment amount was based on a theory of "stolen credit" and, the defendant argued, did not reflect the actual monetary losses suffered by the victim as required by the MVRA. The Court of Appeals agreed, noting that under the MVRA, in the case of damage to property, the defendant must return the property to the victim or if that is not possible, the defendant must pay the victim an amount equal to the loss of value of the property. This measure of damages is less generous than common law damages, since it does not extend to consequences beyond the diminution of the value of property stolen or damaged. Thus, a civil award by itself is insufficient to support an order of restitution because some damages and costs recoverable in a civil action, such as treble damages, consequential damages and attorney's fees spent in pursuing litigation against the wrongdoer do not qualify as "losses" under the MVRA. Therefore, the Court of Appeals remanded the case to the district court for a more specific determination of the amount of restitution. In doing so, the court noted that the victim could recover restitution for the time she spent attempting to restore her credit, to the extent that the time she spent would have otherwise been compensated, perhaps because she had to miss work and forgo hourly compensation, or because she had to turn down professional clients to whom she could have provided services if she was not occupied with her credit restoration activities. Additionally, fees paid to counsel or other experts for dealing with banks and credit agencies in the effort to correct her credit history and repair the damage to her credit rating are also properly included in a restitution order. However, time spent for which the opportunity cost was zero cannot be compensated because the loss to the victim is zero.

United States v. Farr, 419 F.3d 621 (7th Cir. 2005; No. 04-3502). In prosecution for bank fraud, the Court of Appeals held that the ninety-day time limit in section 3664(d)(5) applies to restitution orders entered as a condition of supervised release as well as those issued pursuant to the MVRA. Under 3556, a district court is authorized to order restitution as a condition of supervised release, that section stating that "the procedures under section 3664 shall apply to all orders or restitution under this section." The

mandatory "shall" of section 3556 indicates that, in ordering restitution as a condition of supervised release, the court was required to follow the procedures set forth in section 3664. That section limits the time period for ordering restitution to 90 days after sentencing. In the present case, because the district court imposed the condition of supervised release once the defendant began serving his supervised release term–more than three years after sentencing–the court vacated the condition.

United States v. Day, 418 F.3d 746 (7th Cir. 2005; No. 04-2663). In this appeal, the Court of Appeals considered the interplay between §3663 and 3664. While 3663 allows a district court to impose restitution for certain crimes at the court's discretion, this section requires a district court to consider a defendant's financial circumstances when deciding whether to impose a restitution order. However, §3664 requires a district court to order that each victim receive restitution in the full amount of lass, regardless of the defendant's financial ability to pay. In resolving this apparent conflict, the Court of Appeals held that when considering whether to impose an order of restitution under §3663, the court must consider the defendant's financial circumstances. However, once the district court elects to exercise that discretion, the Court must then order that each victim be ordered to receive the full amount of their loss in restitution, regardless of the defendant's ability to pay. Finally, when setting a payment schedule, the district court must once again consider the defendant's financial resources. Thus, a district court must consider the defendant's financial circumstances and set a payment schedule if a defendant cannot pay the restitution in full and immediately. In other words, district courts cannot order restitution be made immediately and then leave it to the probation office to set a schedule later.

SEARCH AND SEIZURE

United States v. Cherry, 436 F.3d 769 (7th Cir. 2006; No. 04-3527). In prosecution for 922(g), the Court of Appeals affirmed the district court's denial of the defendant's motion to suppress based upon a proper inventory search. After conducting a traffic stop and arresting the defendant, officers conducted an inventory search of the defendant's car before towing it. When doing so, they discovered a gun in the trunk. The court noted that inventory searches are a recognized exception to the warrant and probable-cause requirements of the Fourth Amendment, and such searches are lawful if conducted pursuant to standard police procedures aimed at protecting the owner's property--and protecting the police from the owner's charging them with having stolen, lost, or damaged his property. The court then examined the Joliet police department inventory search policies, determined that they were reasonable, and that the officers followed the procedures in the present case, thereby making the search a proper inventory search.

United States v. Breit, 429 F.3d 725 (7th Cir. 2005; No. 05-1372). In prosecution for receiving explosive materials and related offenses, the Court of Appeals held that officers searching the defendant's home for "guns or anything related to them" pursuant to the defendant's consent did not exceed the scope of this consent when they read through his notebooks and personal journal. The police told the defendant they wanted to search for guns or anything related to them, but the defendant signed a general consent that gave the police authority to conduct a complete search of the defendant's apartment. The defendant argued that notwithstanding the language in the consent form, the scope of his consent did not reasonably include a search of his private notebooks and journals. The Court of Appeals noted that the standard for reviewing the scope of consent is "what would the typical reasonable person have understood the scope of the consent to be by the exchange between the officer and the suspect?" Moreover, a general consent form does not override a more explicit statement specifying the object of the search. Government agents may not obtain consent to search on the representation that they intend to look only for certain specified items and subsequently use that consent as a license to conduct a general exploratory search. Here, however, the court concluded that the defendant's agreement to a search for "anything related" to guns included his notebooks and journals. Specifically, the notebooks may have uncovered relevant and useful information, such as receipts, completed forms, or a personal inventory of all of the defendant's guns. It may have also revealed whether the defendant possessed owner's manuals for the guns. Searching for this type of information was permissible because it "related to" the search for guns. Thus, the search did not exceed the scope of the defendant's consent.

United States v. Johnson, 427 F.3d 1053 (7th Cir. 2005; No. 03-3364). In prosecution for distribution of crack cocaine, the Court of Appeals reversed the defendant's conviction, finding that evidence seized from the defendant's home should have been suppressed. The police received an anonymous tip over the telephone that the defendant had a large amount of crack cocaine in his home, that he picked up shipments on Thursdays, and that he drove a white car. The police then went to the defendant's home, told the defendant about the tip, and asked to search his home. After a conversation of several minutes at the defendant's door, the defendant turned and walked down his hallway. An officer then drew his gun, pointed it at the ground, and said, "If you go down the hallway, John, now its an officer safety issue." The defendant came back to the door at this time and said, "Well, you might as well come on in." The defendant later

moved to suppress the crack found in his home during the search, arguing that his consent was involuntary and, in any event, tainted by his illegal detention. The Court of Appeals agreed. When police approach an individual in a confined space, a seizure occurs when a reasonable person would not feel free to decline the officer's request or otherwise terminate the encounter. Here, the defendant was seized inside his house when the officer drew his gun and prevented the defendant from walking further into the interior of his home. Thus, the critical question was whether the detectives had a reasonable suspicion that the defendant had been, or was about to be, engaged in criminal activity. The court concluded that they did not. The uncorroborated anonymous tip that prompted the visit was insufficient to supply reasonable suspicion. Moreover, although the officer testified in the district court that he feared the defendant might retrieve a weapon when he walked down his hallway, the district court discredited this testimony, finding that the officer's primary motivation in stopping the defendant was to prolong the encounter until the defendant consented to a search. Thus, the seizure was unlawful, and it was ongoing when the defendant voiced his consent, foreclosing the possibility that the consent was sufficiently attenuated from the unlawful conduct as to purge the taint. Finding no exceptions to the exclusionary rule that would allow for the admission of the evidence, the court reversed the defendant's conviction.

SUPERVISED RELEASE

United States v. McKissic, 428 F.3d 719 (7th Cir. 2005; No. 04-3377). In prosecution for bank robbery, the Court of Appeals outlined the notice requirements prior to a district court's imposition of special conditions of supervised release. At sentencing and without any prior formal notice to the defendant, the district court imposed as special conditions of supervised release a total ban on alcohol, a requirement that the defendant make efforts to obtain his GED, and that he obtain and maintain employment or job training. On appeal, the defendant challenged the conditions, arguing that the district court was required to give him notice that it was contemplating these special conditions prior to sentencing. The Court of Appeals noted that notice for special conditions of supervised release is necessary to give the parties an adequate opportunity to comment on matters relating to the appropriate sentence; notice also promotes focused, adversarial resolution of the legal and factual issues relevant to sentencing. However, formal notice is only required for conditions which are "out of the ordinary." In the present case, the special conditions regarding employment, education, and community service were listed explicitly among the discretionary standard conditions that a court may impose. Thus the defendant was given constructive notice that they could be imposed without requiring additional notice from the district court. In other words, no special notice is required for recommended "standard" conditions found in U.S.S.G. 5D1.3(d). For the total ban on alcohol, however, the court held that notice was required, because the recommended standard condition allows only for the prohibition of "excessive use of alcohol," rather than a total ban. Thus, because the defendant did not have constructive notice of a total ban through the Guidelines, the district court should have provided the defendant with advance notice that the condition was being contemplated.

Recently Noted Circuit Conflicts

Compiled by: Kent V. Anderson
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Fourth Amendment

Exigent Circumstances

United States v. Coles, 437 F.3d 361 (3rd Cir. 2006).

The Third Circuit reversed the denial of a motion to suppress the results of a warrantless search of a hotel room. The Court held that the search could not be justified by exigent circumstances because the officers created the exigency when they knocked on the door and demanded entry. The court agreed with the Fifth, Sixth, and Eighth Circuits that officers can not create the exigency they rely on for a search. *United States v. Richard*, 994 F.2d 244, 247-48 (5th Cir. 1993); *United States v. Chambers*, 395 F.3d 563, 566 (6th Cir. 2005); *United States v. Duchi*, 906 F.2d 1278, 1284 (8th Cir. 1990). However, the court disagreed with the Second Circuit's view that the conduct of the police before the exigency is irrelevant. *United States v. MacDonald*, 916 F.2d 766 (2d Cir. 1990) (*en banc*).

Protective Sweep

United States v. Gandia, 424 F.3d 255 (2nd Cir. 2005).

The Second Circuit noted a circuit split over the issue of whether a protective sweep is ever valid without a warrant. However, the Court did not decide the issue. Four circuits have

> "expanded *Buie* to authorize protective sweeps even when officers have not entered a suspect's home pursuant to an

> arrest warrant. *See, e.g., United States v. Martins*, 413 F.3d 139, 149-51 (1st Cir. 2005); *Leaf v. Shelnutt*, 400 F.3d 1070, 1086-88 (7th Cir. 2005); *United States v. Gould*, 364 F.3d 578, 581-87 (5th Cir 2004.) (*en banc*) ... ; *United States v. Taylor*, 248 F.3d 506, 513-14 (6th Cir 2001) ...; *United States v. Patrick*, 294 U.S. App. D.C. 393, 959 F.2d 991, 996-97 (D.C. Cir. 1992). ....
>
> But there is something less than a consensus. *See United States v. Davis*, 290 F.3d 1239, 1242 n. 4 (10th Cir. 2002) (rejecting argument that warrantless entrance justified a protective sweep and emphasizing that a protective sweep "'is a quick and limited search of premises, *incident to an arrest* and conducted to protect the safety of police officers or others.'" (quoting *Buie*) (emphasis in Davis)); *United States v. Reid*, 226 F.3d 1020, 1027 (9th Cir. 2000) (holding that a protective sweep was improper, in part because at the time of the search, the defendant, "was *not* under arrest" (emphasis in original)).

Good-faith exception

United States v. McClain, 430 F.3d 299 (6th Cir. 2005).

The Sixth Circuit held that since an initial warrantless search was close to the line of being legal and it was disclosed to the magistrate a later search, pursuant to a warrant ,was covered by the *Leon* good-faith exception. The Court agreed with decisions from the Second and Eighth Circuits. *United States v. Thomas*, 757 F.2d 1359, 1368 (2nd Cir. 1985); *United States v. Fletcher*, 91 F.3d 48, 51-52 (8th Cir. 1996). However, the Ninth and Eleventh Circuits have held that the good-faith exception does not apply to a warrant that is obtained on the basis of evidence found in an illegal search. *United States v. Wanless*, 882 F.2d 1459, 1466-67 (9th Cir. 1989); *United States v. McGough*, 412 F.3d 1232, 1239-40 (11th Cir. 2005).

Fifth Amendment - Due Process

Perjury trap

United States v. Burke, 425 F.3d 400 (7th Cir. 2005).

The Seventh Circuit refused to adopt the doctrine of a perjury trap as a defense to a perjury charge. "According to the Ninth Circuit, a `perjury trap' is created when `the government calls a witness before a grand jury for the primary purpose of obtaining testimony from him in order to prosecute him later for perjury.'" *United States v. Chen*, 933 F.2d 793, 796 (9th Cir. 1991). In addition, the Eighth Circuit reversed a perjury conviction, in part, because the only purpose for having the defendant testify before the grand jury was to secure a perjury indictment. *Brown v. United States*, 245 F.2d 549, 555 (8th Cir. 1957).

Sixth Amendment

Right of Confrontation

United States v. Yates, 4__ F.3d ___, 2006 U.S. App. LEXIS 3433 (11th Cir. Feb. 13, 2006) (*en banc*).

In an *en banc* decision, the Eleventh Circuit affirmed a panel decision that reversed Defendants' convictions because their right to Confrontation was violated when two witnesses testified by two-way video teleconference. The Court held that the rule of *Maryland v. Craig*, 497 U.S. 836 (1990) applied to this case. This holding conflicts with the Second Circuit's view that *Craig* only applies to one-way closed circuit testimony. *United States v. Gigante*, 166 F.3d 75 (2nd Cir. 1999). However, the Eleventh Circuit's holding agrees with decisions of the Sixth, Eighth, Ninth, and Tenth Circuits. *United States v. Moses*, 137 F.3d 894, 897-98 (6th Cir. 1998); *United States v. Weekley*, 130 F.3d 747 (6th Cir. 1997); *United States v. Bordeaux*, 400 F.3d 548, 554-55 (8th Cir. 2005); *United States v. Turning Bear*, 357 F.3d 730, 737 (8th Cir. 2004); *United States v. Rouse*, 111 F.3d 561, 568 (8th Cir. 1997); *United States v. Quintero*, 21 F.3d 885, 892 (9th Cir. 1994); *United States v. Garcia*, 7 F.3d 885, 887-88 (9th Cir. 1993); *United States v. Carrier*, 9 F.3d 867 (10th Cir. 1993); *United States v. Farley*, 992 F.2d 1122, 1125 (10th Cir. 1993).

Federal Rule of Evidence 408

United States v. Arias, 431 F.3d 1327 (11th Cir. 2005).

The Eleventh Circuit held that a defendant's agreement to settle an administrative claim against him was inadmissible under Rule 408. It held that Rule 408 applies to both criminal and civil proceedings. The Court also described a circuit conflict on this issue as follows.

> Our sister circuits are divided on the question of whether Rule 408 applies to criminal cases: the Second, Sixth, and Seventh Circuits have held that the Rule applies only in civil cases, while the Fifth

and Tenth Circuits have held it applicable in both civil and criminal cases. *Compare, Manko v. United States*, 87 F.3d 50, 54-55 (2d Cir. 1996) (holding Rule 408 inapplicable in criminal cases), *United States v. Logan*, 250 F.3d 350, 367 (6th Cir. 2001) (same), and *United States v. Prewitt*, 34 F.3d 436, 439 (7th Cir. 1994) (same), with *United States v. Hays*, 872 F.2d 582, 588-59 (5th Cir. 1989) (holding that Rule 408 prevents the introduction of settlement agreements in a criminal proceeding) and *United States v. Bailey*, 327 F.3d 1141, 1146 (10th Cir. 2003) (same).

Offenses

18 U.S.C. §1344

United States v. Staples, 435 F.3d 860 (8th Cir. 2006).

Several circuits have held that the bank fraud statute does not extend to situations where the defendant has no intent to expose the bank to an actual or potential loss, *see United States v. Thomas*, 315 F.3d 190, 200 (3d Cir. 2002); *United States v. Laljie*, 184 F.3d 180, 189 (2d Cir. 1999); *United States v. Rodriguez*, 140 F.3d 163, 167 (2d Cir. 1998), or does not place the bank at risk of civil liability. *United States v. Odiodio*, 244 F.3d 398, 401 (5th Cir. 2001); *United States v. Sprick*, 233 F.3d 845, 852 (5th Cir. 2000); *United States v. Davis*, 989 F.2d 244, 246-47 (7th Cir. 1993). For example, a "scheme to pass bad checks," and a "pigeon drop" scheme, in which a victim is induced to withdraw money from a bank and entrust it to the defendant, have been held insufficient to establish bank fraud. *Laljie*, 184 F.3d at 190. The reasoning of these courts is typified by the statement of the Seventh Circuit that the purpose of the bank fraud statute "is not to protect people who write checks to con artists but to protect the federal government's interest as an insurer of financial institutions." *Davis*, 989 F.2d at 247; *see also Thomas*, 315 F.3d at 199 ("Money is taken from banks every day for countless foolish purposes, but in such instances, banks are not exposed to liability nor is their integrity compromised.").

Other circuits, however, have rejected the requirement of an intent to harm or create a risk of loss to a financial institution, and have upheld convictions in the absence of any such intent. *See United States v. McNeil*, 320 F.3d 1034, 1038 (9th Cir. 2003); *United States v. De la Mata*, 266 F.3d 1275, 1298 (11th Cir. 2001); *United States v. Kenrick*, 221 F.3d 19, 27 (1st Cir. 2000) (*en banc*); *United States v. Sapp*, 53 F.3d 1100, 1103 (10th Cir. 1995). Some of these courts have required the government at least to prove that the defendant intended to deceive the bank, *Kenrick*, 221 F.3d at 29; *De la Mata*, 266 F.3d at 1298, although one circuit has gone so far as to say that there is a violation of §1344(2) if the defendant merely intends to defraud someone, and then causes a bank, as an unwitting instrumentality, to transfer funds pursuant to a fraudulent scheme. *United States v. Everett*, 270 F.3d 986, 991 (6th Cir. 2001).

For our part, we have treated the two subsections of the bank fraud statute differently, on the view that "otherwise, there seems to be no reason for Congress to have set out two separate ways in which bank fraud could be committed under this statute." [*United States v.*] *Ponec*, 163 F.3d [486,] 488 [(8th Cir. 1998)]. Subsection (2), we concluded, appears to require "some loss to the institution, or at least an attempt to cause a loss." *Id.* As for subsection (1), we have held that no actual loss or intent to cause a loss is required, so long as the defendant has "defrauded" a financial institution. *Id.*; *United States v. Whitehead*, 176 F.3d 1030, 1041 (8th Cir. 1999). Even then, however, we granted that the government must prove that the defendant "deliberately made false representations to the bank," because "otherwise, there would be no scheme or artifice to defraud."

18 U.S.C. §2113(a) & (d)

United States v. Burton, 425 F.3d 1008 (5th Cir. 2005).

The Fifth Circuit reversed a defendant's conviction for bank robbery due to insufficient evidence. It held that when the defendant forced the victim to withdraw money from her account at an ATM and give it to Defendant, the money was not in the care, custody, or control of the bank. The Court declined to follow the Seventh Circuit's contrary holding in *United States v. McCarter*, 406 F.3d 460 (7th Cir. 2005).

21 U.S.C. §841(a) & (b)(1)

United States v. Gonzalez, 420 F.3d 111 (2nd Cir. 2005).

The Second Circuit held that the facts necessary to establish a mandatory minimum in 21 U.S.C. §841(b) are elements of an offense because they are the same facts that increase the maximum possible penalty. The Court agreed with the Fourth, Ninth, and D.C. Circuits. *United States v. Martinez*, 277 F.3d 517, 530, 532-34 (4th Cir. 2002); *United States v. Velasco-Heredia*, 319 F.3d 1080, 1085-87 (9th Cir. 2003); *United States v. Graham*, 317 F.3d 262, 275 (D.C. Cir. 2003). The Court disagreed with the First, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits. *See*: *United States v. Goodine*, 326 F.3d 26, 31-32 (1st Cir. 2003); *United States v. Solis*, 299 F.3d 420, 454 (5th Cir. 2002); *United States v. Copeland*, 321 F.3d 582, 603 (6th Cir. 2003); *United States* v. *Rodgers*, 245 F.3d 961, 965-967 (7th Cir. 2001); *United States* v. *Titlbach*, 300 F.3d 919, 922 (8th Cir. 2003); *United States v. Sanchez*, 269 F.3d 1250, 1269 (11th Cir. 2001) (*en banc*). The Third and Tenth Circuits do not appear to have decided the issue.

Sentencing

***Booker* - reasonableness**

United States v. Crosby, 397 F.3d 103 (2nd Cir. 2005); *United States v. Lincoln*, 413 F.3d 716 (8th Cir. 2005); *United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005); *United States v. Winters*, 416 F.3d 856 (8th Cir. 2005); *United States v. Talley*, 431 F.3d 784 (11th Cir. 2005); *United States v. Alonzo*, 435 F.3d 551 (5th Cir. 2006); *United States v. Green*, 436 F.3d 449 (4th Cir. 2006); *United States v. Foreman*, 436 F.3d 638, 2006 U.S. App. LEXIS 2989 (6th Cir. 2006); *United States v. Cooper*, 4__ F.3d ___, 2006 U.S. App. LEXIS 3453 (3rd Cir. Feb. 14, 2006); *United States v. Kristl*, 4__ F.3d ___, 2006 U.S. App. LEXIS 3817 (10th Cir. Feb. 17, 2006); *United States v. Jimenez-Beltre*, 4__ F.3d ___, 2006 WL 562154 (1st Cir. Mar. 9, 2006).

The Circuits have split on whether the Guidelines are entitled to a presumption of reasonableness and, if so, what that means.

First, the Second Circuit declined to fashion any *per se* rules as the reasonableness of a Guidelines sentence. *United States v. Crosby*, 397 F.3d at 115.

One panel of the Eighth Circuit also found that:

> We have been directed to review a sentence for reasonableness based on all the factors listed in §3353(a)(6). The Guidelines range is merely one factor. We cannot isolate possible sentencing disparity to the exclusion of all the other §3553(a) factors.

United States v. Winters, 416 F.3d 856, 861 (8th Cir. 2005). However, *Winters* has rarely, if ever, been followed on this point.

In addition, the Third and First Circuits have explicitly refused to adopt a presumption that a Guidelines sentence is reasonable. *United States v. Cooper*, 4__ F.3d ___, 2006 U.S. App. LEXIS 3453, *20-*21 (3rd Cir. Feb. 14, 2006) (noting that "[a]ppellants already bear the burden of proving the unreasonableness of sentences on appeal."); *United States v. Jimenez-Beltre*, 4__ F.3d ___, 2006 WL 562154, *1-*3 (1st Cir. Mar. 10, 2006) (declining to hold that the Guidelines are presumptively or *per se* reasonable, but agreeing with the district court that they are entitled to substantial weight). Judge Torruella concurring, in *Jimenez-Beltre* stated

> it is of critical importance that the majority opinion be understood to reinforce our commitment to the statutory requirement that, in all cases, district courts must impose sentences that are "sufficient, but not greater than necessary" to effectuate the goals of criminal punishment, as articulated in 18 U.S.C. §3553(a). In articulating its reasons for imposing any sentence, the district court must make clear reference to this central principle."

Id. at *6.

However, a different panel of the Eighth Circuit and the Fifth, Seventh, Tenth, and Eleventh Circuits have adopted an unqualified presumption that a Guidelines sentence is reasonable. *United States v. Lincoln*, 413 F.3d at 717 (8th Cir. 2005) (holding that a Guidelines sentence is presumptively reasonable); *United States v. Mykytiuk*, 415 F.3d 606, 607-608 (7th Cir. 2005) (holding that a

Guidelines sentence is entitled to a rebuttable presumption of reasonableness and finding 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)"); *United States v. Talley*, 431 F.3d 784, 788 (11th Cir. 2005) (stating that "ordinarily we would expect a sentence within the Guidelines range to be reasonable."); *United States v. Alonzo*, 435 F.3d 551, 2006 U.S. App. LEXIS 447, *8 (5th Cir. 2006) (agreeing with *Mykytiuk*); *United States v. Kristl*, 4__ F.3d ___, 2006 U.S. App. LEXIS 3817, *7-*8 (10th Cir. Feb. 17, 2006) (same)

The Fourth and Sixth Circuits also adopted a presumption of reasonableness, but further explained it. The Fourth Circuit held that

> review for unreasonableness will not depend on whether we agree with the particular sentence selected, but whether the sentence was selected pursuant to a reasoned process in accordance with law, in which the court did not give excessive weight to any relevant factor, and which effected a fair and just result in light of the relevant facts and law.

United States v. Green, 436 F.3d 449, 2006 U.S. App. LEXIS 2833, *16 (4th Cir. 2006). So, even though it said the Guidelines are presumptively reasonable, the Fourth Circuit appears to be simply applying an appellate presumption that any sentence is reasonable if the district court followed the proper sentencing process.

Similarly, the Sixth Circuit found that:

> [I]n *United States v. Williams*, we held that a Guidelines sentence is afforded a presumption of reasonableness. [436 F.3d 706 (6th Cir. 2006).] Although this statement seems to imply some sort of elevated stature to the Guidelines, it is in fact rather unimportant. *Williams* does not mean that a sentence outside of the Guidelines range ----either higher or lower ---- is presumptively *unreasonable*. It is not. *Williams* does not mean that a Guidelines sentence will be found reasonable in the absence of evidence in the record that the district court considered all of the relevant section 3553(a) factors. A sentence within the Guidelines carries with it no implication that the district court considered the 3553(a) factors if it is not clear from the record, because, of course, under the Guidelines as mandatory, a district court was not required to consider the section 3553(a) factors. It would be unrealistic to now claim that a Guideline sentence implies consideration of those factors.
>
> Moreover, *Williams* does not mean that a sentence within the Guidelines is reasonable if there is no evidence that the district court followed its statutory mandate to "impose a sentence sufficient, but not greater than necessary" to comply with the purposes of sentencing in section 3553(a)(2). Nor is it an excuse for an appellate court to abdicate any semblance of meaningful review. Appellate review is more important *because* the Guidelines are no longer mandatory.

United States v. Foreman, 436 F.3d 638, 2006 U.S. App. LEXIS 2989, *15-*17 (6th Cir. 2006) (emphasis in original). Thus, the Sixth Circuit indicated that, regardless of its use of the word presumption, it does not view a sentence as reasonable just because it is a Guidelines sentence.

Departures after *Booker*

United States v. Selioutsky, 409 F.3d 114 (2nd Cir. 2005); *United States v. Moreland*, 4__ F.3d ___, 2006 U.S. App. LEXIS 4166 (4th Cir. Feb. 22, 2006); *United States v. McBride*, 434 F.3d 470 (6th Cir. 2006); *United States v. Johnson*, 427 F.3d 423 (7th Cir. 2005); *United States v. Haack*, 403 F.3d 997 (8th Cir. 2005); *United States v. Menyweather*, 431 F.3d 692 (9th Cir. 2005)

There is a conflict among the circuits regarding the continued validity of departures under the Guidelines. Most courts have held that district courts should still engage in a departure analysis as part of determining the advisory Guidelines range. *United States v. Selioutsky*, 409 F.3d at 118; *United States v. Moreland*, 2006 U.S. App. LEXIS 4166, *18 -*19; *United States v. McBride*, 434 F.3d at 476-477; *United States v. Haack*, 403 F.3d at 1003

In addition, the Second, Eighth, and Ninth Circuits have expressly found that an invalid Guidelines departure can be grounds for reversal of a sentence under *Booker*. *See*: *United States v. Selioutsky*, 409 F.3d at 118-120 (reversing sentence due to inadequate findings to support a departure); *United States v. Haack*, 403 F.3d at 1004-1006 (reversing sentence because a departure was excessive); *United States v. Menyweather*, 431 F.3d 696-697. The Tenth Circuit has also reversed sentences because downward departures were improper. However, that Court

has held that reasonableness review is not appropriate for pre-*Booker* sentences. *United States v. Serrata*, 425 F.3d 886, 911-915 (10th Cir. 2005).

In contrast, the Seventh Circuit held that the concept of departures is now obsolete. Therefore, it does not consider the correctness of a departure to be part of the reasonableness analysis under *Booker*. *United States Johnson*, 427 F.3d at 426.

Habeas Procedure

AEDPA - equitable tolling

Araujo v. Chandler, 435 F.3d 678 (7th Cir. 2005).

The Seventh Circuit held that there is no actual innocence exception to the AEDPA statute of limitations. This conflicts with decisions of the Sixth and Eighth Circuits. *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005) (holding that tolling is appropriate if a petitioner can show that it is more likely than not that no reasonable juror would have found petitioner guilty, beyond a reasonable doubt when new evidence is considered); *Flanders v. Graves*, 299 F.3d 974, 978 (8th Cir. 2002) (finding that for tolling to be appropriate a petitioner must show both actual innocence and reasonable diligence in finding facts showing innocence). The Tenth Circuit has also stated, in *dicta*, that "[e]quitable tolling would be appropriate, for example, when a prisoner is actually innocent" *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000).

Supreme Court Update
October 2005 Term

Compiled by: Johanna Christiansen
Staff Attorney

***Dye v. Hofbauer*, No. 04-8384, decided October 11, 2005 (Per Curiam).** The Sixth Circuit denied Dye's habeas petition because the opinion of the state court failed to show Dye had raised a federal claim based on prosecutorial misconduct in state court. The Supreme Court reversed holding that the Court of Appeals cannot just look to the state court's opinion when determining whether a federal claim has been raised; the Court must also consider Dye's briefs to the state appellate court.

***Schriro v. Smith*, No. 04-1475, decided October 17, 2005 (Per Curiam).** Smith was convicted of first-degree murder and sentenced to death. Shortly after the Supreme Court decided *Atkins v. Virginia*, Smith asserted in habeas filings that he is mentally retarded and cannot be executed. The Ninth Circuit ordered the state courts to conduct a jury trial to resolve Smith's mental retardation claim. The Supreme Court reversed holding the Ninth Circuit exceeded its authority by imposing the jury trial condition. After *Atkins*, each state must be given the opportunity to choose its own measures for adjudicating mental retardation claims, which should not have been dictated by the Ninth Circuit.

***Eberhart v. United States*, No. 04-9949, decided October 31, 2005 (Per Curiam).** Federal Rule of Criminal Procedure 33(a) allows the district court to vacate any judgment and grant a new trial in the interest of justice. Any motion must be filed within seven days after the verdict or finding of guilty. Eberhart filed his motion with the district court outside of the seven day time limit; however, the government did not object to the untimeliness of the motion. The district court granted Eberhart's motion. On appeal, the government asserted the untimeliness issue for the first time. The Seventh Circuit construed Rule 33's time limitations as jurisdictional, thereby permitting the government to successfully raise noncompliance with the limitations for the first time on appeal. The Supreme Court reversed holding Rule 33 is not jurisdictional. Rather, Rule 33 is a "claim-processing rule" that can be forfeited if the party asserting the rule waits too long to raise the point. Therefore, the government was not allowed to assert the untimeliness of the motion.

***Kane v. Garcia Espitia*, No. 04-1538, decided October 31, 2005 (Per Curiam).** Garcia Espitia, proceeding *pro se*, was denied access to a law library while in jail prior to trial. On habeas review, the Ninth Circuit held the lack of any pretrial access to legal materials violated his constitutional right to represent himself under *Faretta v. California*. The Supreme Court reversed, holding that *Faretta* does not, as § 2254(d)(1) requires, clearly establish a right to law library access. The Court noted a circuit split on this issue, which was resolved by this opinion. (The Seventh Circuit Court of Appeals has held that a defendant who knowingly proceeds *pro se* also relinquishes his right to a law library.)

***Maryland v. Blake*, No. 04-373, decided November 14, 2005 (Per Curiam).** The case was dismissed as improvidently granted. The question presented was, "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?"

***Bradshaw v. Richey*, No. 05-101, decided November 28, 2005 (Per Curiam).** Richey set fire to an apartment intending to kill his ex-girlfriend and her new boyfriend. Both adults escaped the fire, but a two year old child was killed in the fire. Richey was convicted of aggravated felony murder on a theory of transferred intent. He sought federal habeas review of his conviction and sentence. The Sixth Circuit reversed and held Richey was entitled to relief because transferred intent was not a permissible theory for aggravated felony murder under Ohio law. The Supreme Court reversed, holding the Sixth Circuit had disregarded the Ohio Supreme Court's authoritative interpretation of Ohio law which provided that transferred intent was sufficient to prove aggravated felony murder.

***Brown v. Sanders*, No. 04-980, decided January 11, 2006 (Scalia).** Sanders was convicted of first-degree murder and sentenced to death. The jury found four special circumstances, each of which allowed the death penalty to be imposed. On direct appeal, the state supreme court invalidated two of the special circumstances but affirmed Sanders conviction and sentence. The Supreme Court issued the following rule to apply to these situations: "An invalidated sentencing factor will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the jury to give aggravating weight to the same facts and circumstances." In Sanders's case, the Supreme Court held that the jury's consideration of the invalid special circumstances was not unconstitutional.

***Rice v. Collins*, No. 04-52, decided January 18, 2006 (Kennedy).** At Collins's state court drug trial, the prosecutor struck a young African-American woman from the panel. As a race-neutral explanation, the prosecutor said he struck the woman because of her age and her lack of ties to the community. On habeas review, the Ninth Circuit reversed, holding the state court's rulings were based on an unreasonable factual determination. The Supreme Court reversed the Ninth Circuit, stating the Court of Appeals improperly substituted its evaluation of the record for that of the state court. Although reasonable minds might disagree about the prosecutor's credibility, this cannot supersede the trial court's determinations.

***Oregon v. Guzek*, No. 04-928, decided February 22, 2006 (Breyer).** The question before the Court was whether a capital defendant must be allowed to introduce "residual doubt" evidence at his sentencing proceeding. Guzek was convicted of capital murder despite his presentation of an alibi defense. At his sentencing, he sought to introduce new evidence tending to support his alibi defense, evidence that was inconsistent with the conviction. The Court relied on three factors to determine the limitation on Guzek's right to present evidence was constitutional: (1) evidence relevant to sentencing should concern *how* a defendant committed the crime, not *whether* he committed the crime; (2) the alibi defense was previously submitted and rejected by the jury's verdict and, therefore, should not be available for collateral attack at the sentencing hearing; and (3) state law gives defendants the right to present all trial evidence, in transcript form, during sentencing but does not allow defendants to present new evidence.

Cases Awaiting Decision - October 2005 Term

***Georgia v. Randolph*, No. 04-1067, argued November 8, 2005.** Should this Court 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)

***Kansas v. Marsh*, No. 04-1170, argued December 7, 2005.** 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? In addition to the question presented by the petition, the parties are directed to brief and argue the following questions: (1) Does this Court have jurisdiction to review the judgment of the Kansas Supreme Court under 28 U.S.C. § 1257, as construed by *Cox Broadcasting Corp*. v. *Cohn*, 420 U.S. 469 (1975), and (2) 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, argued January 9, 2006.** 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: 639 N.W.2d 255 (Mich. 2001).

***House v. Bell*, No. 04-8990, argued January 11, 2006.** 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)

***United States v. Grubbs*, No. 04-1414, argued January 18, 2006.** Whether the Fourth Amendment requires suppression of evidence when officers conduct a search under an anticipatory warrant *after* the warrant's triggering condition is satisfied, but the triggering condition is not set forth either in the warrant itself or in an affidavit that is both incorporated into the warrant and shown to the person whose property is being searched?
Decision below: 377 F.3d 1072 (9th Cir. 2004)

***Holmes v. South Carolina*, No. 04-1327, argued February 22, 2006.** Whether South Carolina's rule governing the admissibility of third-party guilt evidence violates a criminal defendant's constitutional right to present a complete defense grounded in the Due Process, Confrontation, and Compulsory Process Clauses?
Decision below: 605 S.E.2d 19 (S.C. 2004)

***Samson v. California*, No. 04-9728, argued February 22, 2006.** Does the Fourth Amendment prohibit police from conducting a warrantless search of a person who is subject to a parole search condition, where there is no suspicion of criminal wrongdoing and the sole reason for the search is that the person is on parole?

***Day v. Crosby*, No. 04-1324, argued February 27, 2006.** First, does the State waive a limitations defense to a habeas corpus petition when it fails to plead or otherwise raise that defense and expressly concedes that the petition was timely? Second, does Habeas Rule 4 permit a district court to dismiss a habeas petition *sua sponte* after the State has filed an answer based on a ground not raised in the answer?
Decision below: 391 F.3d 1192 (11th Cir. 2004)

***Davis v. Washington*, No. 05-5224, to be argued March 20, 2006.** Whether an alleged victim's statements to a 911 operator naming her assailant - admitted as "excited utterances" under a jurisdiction's hearsay law - constitute "testimonial" statements subject to the Confrontation Clause restrictions enunciated in *Crawford v. Washington,* 541 U.S. 36 (2004).
Decision below: 111 P.3d 844 (Wash. 2005)

***Hammon v. Indiana*, No. 05-5705, to be argued March 20, 2006.** Whether an oral accusation made to an investigating officer at the scene of an alleged crime is a testimonial statement within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004).
Decision below: 829 N.E.2d 444 (Ind. 2005)

***Sanchez-Llamas v. Oregon*, No. 04-10566, to be argued March 29, 2006.** First, does the Vienna Convention convey individual rights of consular notification and access to a foreign detainee enforceable in the Courts of the United States? Second, does the state's failure to notify a foreign detainee of his rights under the Vienna Convention result in the suppression of his statements to police?
Decision below: 108 P.3d 573 (Ore. 2005)

***Bustillo v. Johnson*, No. 05-51, to be argued March 29, 2006.** Whether, contrary to the International Court of Justice's interpretation of the Vienna Convention on Consular Relations, April 24, 1963,21 U.S.T. 77, 100-101, state courts may refuse to consider violations of Article 36 of that treaty because of a procedural bar or because the treaty does not create individually enforceable rights.

***Washington v. Recuenco*, No. 05-83, to be argued April 17, 2006.** Whether error as to the definition of a sentencing enhancement should be subject to harmless error analysis where it is shown beyond a reasonable doubt that the error did not contribute to the verdict on the enhancement?
Decision below: 110 P.3d 188 (Wash. 2005)

***United States v. Gonzalez-Lopez*, No. 05-352, to be argued April 18, 2006.** Whether a district court's denial of a criminal defendant's qualified right to be represented by counsel of choice requires automatic reversal of his conviction.
Decision below: 399 F.3d 924 (8th Cir. 2005)

***Zedner v. United States,* No. 05-5992, to be argued April 18, 2006.** First, whether the requirements of the Speedy Trial Act may be waived only in the limited circumstances mentioned in the statute, in light of the statute's text and Congress's goal of protecting the public interest in prompt criminal trials, the issue left open in *New York v. Hill*, 528 U.S. 110 (2000). Second, whether a violation of the Speedy Trial Act's 70-day time limit for bringing a defendant to trial is subject to harmless error analysis, despite the statute's mandatory language stating that in the event of a violation, the "indictment shall be dismissed."
Decision below: 401 F.3d 36 (2d Cir. 2005).

***Clark v. Arizona*, No. 05-5966, to be argued April 19, 2006.** First, whether Arizona's insanity law, as set forth in A.R.S. § 13-502 (1996) and applied in this case, violated Petitioner's right to due process under the United States Constitution, Fourteenth Amendment? Second, whether Arizona's blanket exclusion of evidence and refusal to consider mental disease or defect to rebut the state's evidence on the element of *mens rea* violated Petitioner's

right to due process under the United States Constitution, Fourteenth Amendment?

***Dixon v. United States,* No. 05-7053, to be argued April 25, 2006.** Where a criminal defendant raises a duress defense, whether the burden of persuasion should be on the government to prove beyond a reasonable doubt the defendant was not under duress, or upon the defendant to prove duress by a preponderance of the evidence.
Decision below: 413 F.3d 520 (5th Cir. 2005).

***Cunningham v. California*, No. 05-6551, cert. granted February 21, 2006.** Whether California's determinate sentencing law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments.

The Back Bencher

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