The BACK BENCHER

Central District of Illinois Federal Defenders

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DEFENDER'S MESSAGE

When I left Washington and Lee in 1961 with my hard won law degree in hand, I exchanged the picturesque Blue Ridge and Smokey Mountains of the Shenandoah Valley of Virginia for the steel, concrete and glass canyons of Chicago. The stark contrast between my rural and genteel surroundings in law school and my harried urban environment as a young lawyer in the big city is similar to the marked contrast between what it was like to practice law then compared to what it is like today. Indeed, in the 47 years that I have been practicing law, the impact of technology on our craft is almost inconceivable.

Not so long ago, the terms "cut and paste" meant just that. While drafting a brief, if I had changes to make, I would write the changes out on a new piece of paper, cut the changes out with scissors, and literally paste them into the draft with glue for re-typing by my long suffering secretary. The final hand-written draft of my briefs, which actually resembled ancient scrolls pieced together with glue and scotch tape, would then be rolled up for presentation to my secretary. Today, of course, "cut and paste" means something completely different. Highlight the text, click the mouse, reposition the cursor, click "paste," and –voila!–the changes are made in seconds.

Writing drafts out by hand is also a relic of history. With yellow pad in hand surrounded by stacks of law books, I would write, cross-out, erase, and insert text in my own handwriting, discernable only to myself and usually my secretary. She would proceed to type the brief on an actual typewriter. If changes were needed after the draft was completed, it sometimes meant re-typing whole pages or–much to my secretary's displeasure–the entire brief. Now, attorneys edit their drafts as they go, typing away on computers at speeds many secretaries cannot match.

Legal research back when I first practiced law meant getting out from behind one's desk and heading to the law library. Once there, I would search for hours through digests and pull out lawbooks (yes, real books made from paper). Any useful cases had to then be Shepardized through a Byzantine process only a lawyer could love. Now, a lawyer can do the same amount of research in mere minutes, having never left his own desk. Indeed, with a laptop, a lawyer need not even get out of bed to research, draft, and electronically file a pleading. Times have truly changed.

Most of these technological advances – if not all – have benefited lawyers and elevated the practice of law. In keeping with the advance of technology, I would like to introduce you to a few new uses of technology which my office has introduced for the benefit of our panel attorneys.

First, we have recently launched our own website accessible at http://ilc.fd.org. We designed the website with panel attorneys in mind, and we hope that it will be a great resource not available elsewhere. On this site, you will find legal news, such as information regarding recent Seventh Circuit and Supreme Court cases. In the "Publications" section, all three of my books are electronically accessible, including *Handbook for Appeals*, *Possible Issues for Review in Criminal Appeals*, and *Pleadings Potpourri*. In the "Newsletter" section, you can access the current and all past issues of *The Back Bencher*. The "Links" section contains links to various court web sites, all the CM/ECF sites for districts in the Seventh Circuit, legal research engines, and useful legal

news and blog sites.

Another important section contained on the web site is information regarding upcoming CLE programs, sponsored by our office and other organizations as well. In particular, you will see that our office's 2008 CJA Panel Attorney Seminar is scheduled for Thursday, September 18, 2008. This free seminar offers 4.5 hours of Illinois CLE, including 0.5 hours of Professional Responsibility credit. The program will be held in Judge Mihm's courtroom in Peoria, a central location within the district and an easy drive for panel attorneys from all divisions. The seminar will start at 10:00 a.m., and end at 3:30 p.m. Included among the topics to be addressed are: an update on recent Seventh Circuit cases; common issues related to restitution; ethics for the criminal defense lawyer; an explanation of BOP inmate designations; and a presentation exploring the use of the electronic courtroom. To view the agenda and for instructions on how to register, see the flyer at the end of this issue of *The Back Bencher* or log onto our website.

Second, we now have a database containing the email addresses of the panel attorneys in the Central District of Illinois. We will use this database in the future to send you current issues of *The Back Bencher*, inform you of important legal news relevant to panel attorneys, and give you advance notice of scheduled CLE programs. If you are on this list, then you will have received this issue of *The Back Bencher* via email. If you are not on the list but would like to be added to it, please email First Assistant Jonathan Hawley at jonathan_hawley@fd.org.

It is my hope that these new services, in combination with the services that we have always offered, can help provide the support you need to vigorously represent your clients. You and your client do not face the full might of the federal government alone. Indeed, perhaps the biggest change I have seen in the practice of federal criminal defense law over the years is that the criminal defense lawyer need no longer be a loner. When I started defending the citizen-accused, there was no federal defender program, in this district or most others. With the exception of a few mentors, I was basically on my own. Now, happily, this is not the case. Our seminars, newsletter, publications, and personal assistance are there so that you won't have to stand alone. I encourage you to take advantage of everything that we can offer you.

Sincerely yours,

Richard H. Parsons
Federal Public Defender
Central District of Illinois

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REGISTER NOW FOR THE 2008 CJA PANEL ATTORNEY SEMINAR

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OTHER UPCOMING CLE PROGRAMS

Federal Public Defender for the Southern District of Illinois Panel Attorney Seminar, Collinsville, Illinois, September 11, 2008. This seminar will include presentations on the nuts and bolts of filing an appeal before the Seventh Circuit, making and preserving the record for appeal, litigating 3553(a) factors in light of *Kimbrough* and *Gaul*, a Seventh Circuit update, and a panel discussion on ethics. For more information concerning this seminar and for instructions on how to register, please email Sandy Speciale at Sandra_Speciale@fd.org.

Multi-Track Federal Criminal Defense Seminar, Los Angeles, California, September 4-6, 2008. The Multi-Track Federal Criminal Defense Seminar is designed to offer in depth instruction in a variety of substantive criminal topic areas. Several of the tracks will be presented in four distinct hour-long time blocks. The sessions will be presented on Thursday and then repeated on Friday. This design will allow seminar participants the opportunity to attend two of the separate tracks. On Saturday, seminar participants will have the opportunity to select from four additional topics. In addition to the above-referenced tracks, the seminar will also include plenary sessions addressing topics of general interest and importance to criminal defense practitioners, along with the opportunity to attend small group breakouts covering a variety of substantive criminal defense issues. Go to our website at http://ilc.fd.org for more information on the program and how to register.

POSITION ANNOUNCEMENT: LEGAL SECRETARY

The Federal Public Defender for the Central District of Illinois seeks an experienced Legal Secretary for hire in Urbana, Illinois. Duties include: typing, filing, copying, phone, dictation, maintaining office calendar, and other clerical work. Requirements include: significant experience, high school diploma, proficiency with WordPerfect, superior writing and typing skills, courteousness, and initiative. Excellent salary and federal benefits commensurate with experience. EOE. For more information about the position and how to apply, please see the complete Position Announcement at the back of this issue or log on to our website.

CHURCHILLIANA

"Courage is what it takes to stand up and speak. Courage is also what it takes to sit down and listen."

– Sir Winston Churchill

Dictum Du Jour

"You've got to get to the stage in life where going for it is more important than winning or losing."

–Arthur Ashe

* * * * * * * * * * *

"I always remember an epitaph which is in the cemetery of Tombstone, Arizona. It says, 'Here lies Jack Williams. He done his damnedest.' I think that is the greatest epitaph a man can have – when he gives everything that is in him to do the job he has before him. That is all you can ask of him and that is what I have tried to do."

–Harry S. Truman

* * * * * * * * * * *

"Curiosity is one of the most permanent and certain characteristics of a vigorous intellect."

–Samuel Johnson

* * * * * * * * * * *

"A [person's] life, like a piece of tapestry, is made up of many strands which interwoven make a pattern; to separate a single one and look at it alone, not only destroys the whole, but gives the strand itself a false value."

–Judge Learned Hand

* * * * * * * * * * *

Jennifer Aniston: television ("Friends") star; actress in several forgettable ("Rumor Has It" and "Along Came Polly") recent films; former wife of Brad Pitt; and anointed as a hottie by "FHM Magazine"—#35 on its list of the "100 Sexiest Women in the World in 2007" (she also made "People" magazine's "50 Most Beautiful People" list in 2002)—has legions of fans. Jevon Jackson,

the plaintiff in this case, is one of them. And Jackson would like to display a photograph of Aniston in his room. His "room," however, is actually a prison cell where Jackson is serving time for a state court conviction in Wisconsin. The prison authorities, relying on a rule, won't allow Jackson to receive, and thus display, a commercially published photograph of Aniston that he had ordered. So Jackson made a federal case out of the situation by filing this suit alleging that Wisconsin was violating his rights under the First Amendment.

–*Jackson v. Frank*, 509 F.3d 389 (7th Cir. 2007; No. 07-2315).

* * * * * * * * * *

When Top Tobacco obtained a federal registration for its brand of loose cigarette tobacco, it assured the Patent and Trademark Office that it was claiming only limited rights in the word "top." It could hardly be otherwise: the word "top" is too common, and too widely used to refer to the lids of packages—as well as parts of clothing ensembles, masts of ships, summits of mountains, bundles of wool used in spinning, half-innings of baseball, positions in appellate litigation (the top-side brief), and flavors of quark—to be appropriated by a single firm.

–*Top Tobacco, L.P. v. North Atlantic Operating Company, Inc.*, 509 F.3d 380 (7th Cir. 2007; No. 07- 1244)

* * * * * * * * * *

The court in *Donovan* thought that allowing a seaman to sue for retaliatory discharge would upset what it described as the delicate balance between the authority of the captain of a ship over his crew and the interest of the seamen. The court emphasized the scary history of mutiny at sea, 720 F.2d 828, which dramatized, the court thought, the danger of allowing authority to be divided between captain and crew. We have no wish to encourage mutinies on Mississippi barges, but we think that accidents due to drunken and cocaine-snorting seamen pose rather a greater risk to maritime safety in U.S. waters in the twenty-first century. . ..

–*Robinson v. Alter Barge Line, Inc.*, 513 F.3d 668 (7th Cir. 2008; No. 07-1647)

* * * * * * * * * *

If a 42-year-old man wants to change his identity and fly through the remainder of his life under the radar screen with a fake name, what kind of name would he be likely to select? Certainly he would want a common name, like Walker, Washington, White, or Williams, [FN1] to name just a few that begin with the same letter. But Donald Calloway, the appellant in this federal habeas case, did not follow the conventional wisdom: his newly adopted name (in 1979) was Robert Ducks. [FN2] Twenty two years later, after "Robert Ducks" was indicted in federal court, "Donald Calloway" came back from the past. And it was quite a past. NOTE 1: How popular are these four names? Well, the National Football League alone has 11 players named either White or Walker on current team rosters. A dozen players are named Washington. And there are 39 players with "Williams" on the back of their jerseys each weekend. See NFL.com. NOTE 2: At least Donald Calloway also changed his first name, as "Donald Ducks" was apparently even too much for him. And, just to go back to the last footnote, there are no players in the NFL named either Duck or Ducks.

–*Calloway v. Montgomery*, 512 F.3d 940 (7th Cir. 2008; No. 07-1148).

* * * * * * * * * *

But an emergency cannot be presumed in every case in which police barge into a person's home unannounced. The government has presented no evidence that, like mink devouring their young when they hear a loud noise, criminals always (or at least in the vast majority of cases) set about to destroy evidence whenever the police knock on the door. Doubtless it is a common reaction, but how common we are not told.

–*United States v. Collins*, 510 F.3d 697 (7th Cir. 2007; No. 05-4708).

* * * * * * * * * * *

But how could this conclusion assist defendants? In our example the therapeutic claim is based on scientific principles. For the Q-Ray Ionized Bracelet, by contrast, all statements about how the product works—Q-Rays, ionization, enhancing the flow of bio-energy, and the like—are blather. Defendants might as well have said: "Beneficent creatures from the 17th Dimension use this bracelet as a beacon to locate people who need pain relief, and whisk them off to their homeworld every night to provide help in ways unknown to our science." Although it is true, as Arthur C. Clarke said, that "[a]ny sufficiently advanced technology is indistinguishable from magic" by those who don't understand its principles ("Profiles of the Future" (1961)), a person who promotes a product that contemporary technology does not understand must establish that this "magic" actually works. Proof is what separates an effect new to science from a swindle.

–*Federal Trade Commission v. QT, Inc.*, 512 F.3d 858 (7th Cir. 2008; No. 07-1662).

Michael Sanders arrived in the United States from Nigeria with 3.6 kilograms of heroin in his luggage. When caught, he claimed to be a courier with no interest in the drugs apart from a $3,000 fee for his services; he agreed to participate in a controlled delivery to the next people in the chain, who were to collect the heroin at a bus station in Chicago. Several conversations in Yoruba with "Baba," Sanders's contact, preceded his arrival. Eventually Taofiq Afonja drove up and told Sanders to put his luggage in the trunk of his car. Sanders asked, in Yoruba, whether Afonja was "that person" or "the one" (and surely was not referring to Neo in *The Matrix*).

–*United States v. Moore*, 521 F.3d 681 (7th Cir. 2008; No. 06-1355).

* * * * * * * * * * *

It is probably true that witnesses who were stoned during the relevant parts of the investigation did not have all their wits about them, making their memories fuzzy when they took the stand. This could, in turn, lessen the credence that is owed to their version of events. But it is for the jury to evaluate the credibility of the witnesses, including any cloudiness brought on by their drug use.

–*United States v. Bailey*, 510 F.3d 726 (7th Cir. 2007; No. 07-1182).

* * * * * * * * * * *

Indeed, especially given the fact that the question in this case is whether a trier of fact could conclude that the defendants were intentionally discriminating against the Blochs [because of their Jewish faith], it was shocking to read at the end of their supplemental brief that "[t]hroughout this matter, Plaintiffs have been trying to get their 'pound of flesh' from Defendants due to personal animosity between Lynne and Frischholz." Perhaps the defendants have not read Shakespeare's *Merchant of Venice* lately and thus failed to recall that the play is about a bitter Jewish moneylender, Shylock, who agreed to loan funds to a man he loathed (Antonio—who spit on him because he was Jewish) only upon a promise that if the loan was not paid in time, Shylock would be entitled to carve a pound of flesh from Antonio. At the end of the play, after the disguised Portia defeats the contract by pointing out that Shylock is not entitled to shed any blood while he takes his pound of flesh, Shylock is punished by losing half of his lands and being forced to convert to Christianity. This is hardly the reference someone should choose who is trying to show that the stand-off about Hallway Rule 1 was not because of the Blochs' religion, but rather in spite of it.

–*Block v. Frischholtz*, ___ F.3d ___ (7th Cir. 2008; No. 06-3376) (Judge Wood dissenting).

Considering § 3553(a) Factors in Conjunction with Rule 35(b) and § 3553(e) Motions

By: Jonathan E. Hawley
First Assistant Federal Defender

Introduction

Two of the circumstances which allow a district judge to impose a sentence below a statutory mandatory minimum are: 1) a post-sentencing Rule 35(b) motion made by the government in exchange for substantial assistance; and 2) a rule § 3553(e) motion made by the government at the time of sentencing in exchange for substantial assistance. When the government makes either a Rule 35(b) or a § 3553(e) motion, may a district court consider § 3553(a) factors when imposing the sentence? Based on the Seventh Circuit's recent decision in *United States v. Chapman*, ___ F.3d ___ (7th Cir. 2008), 2008 WL 2685421, the answer depends on which type of motion the government files. Specifically, as the law in the Seventh Circuit currently stands, a district court *may* consider them when imposing a sentence pursuant to Rule 35(b), but *may not* consider § 3553(a) factors when imposing a sentence pursuant to § 3553(e).

Rule 35(b)

Rule 35 provides in pertinent part:

> **(b) Reducing a Sentence for Substantial Assistance.**
>
> > **(1) In General.** Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.
> >
> > * * * *
> >
> > **(4) Below Statutory Minimum.** When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

Federal Rule of Criminal Procedure 35.

Until the Seventh Circuit's decision in *Chapman*, the court had never considered what, if any, limitations

applied to the factors a judge may rely upon when considering a Rule 35(b) motion. In *Chapman*, the government filed Rule 35(b) motions to reduce the sentences of two defendants who provided substantial assistance to the government. In defendant Chapman's case, the government specifically requested that the court reduce his offense level by two levels and impose a sentence at the bottom of the new range. In defendant Frank's case, the government made no specific recommendation for a new sentence, but defense counsel suggested a 5-level reduction. The defendants both made arguments that the district court should reduce their sentences further based upon § 3553(a) factors, arguing that the extent of their cooperation was greater than the typical case and that greater reductions would prevent unwarranted sentencing disparity among like defendants.

Judge Shabaz granted both Rule 35(b) motions. However, in Chapman's case, he reduced the defendant's offense level by two, but imposed a sentence at the high end of the new range contrary to the recommendation of the parties. In Frank's case, the judge granted only a one-level reduction and imposed a sentence at the high end of the new range. Regarding the defendants' § 3553(a) arguments, the court rejected them in both cases. In choosing the reductions it did, the district court stated that the respective sentences would hold each defendant "accountable for his criminal conduct while factoring in his substantial assistance." *Chapman*, 2008 WL 2685421 at *2.

On appeal, the defendants first argued that the district court imposed their sentences in violation of the law because the district court focused improperly upon their criminal histories and the nature of their crimes, factors already considered at their original sentencing. The Seventh Circuit held that "the district court did not act in violation of the law when considering these factors in determining the extent of the reductions granted under Rule 35(b)." *Chapman*, 2008 WL 2685421 at *3. Citing cases from the Ninth and Eleventh Circuits (*United States v. Manella*, 86 F.3d 201 (11th Cir. 1996); *United States v. Doe*, 351 F.3d 929 (9th Cir. 2003)), the court found that "[n]othing in the text of Rule 35(b) limits the factors that may militate against granting a sentence reduction or for granting a smaller reduction than requested." *Chapman*, 2008 WL 2685421 at *3. Rather, "a faithful and pragmatic adherence to the mandate of 18 U.S.C. § 3553(a) counsels that the nature and extent of any reduction be determined in light of all the sentencing factors set forth in the statute." *Chapman*, 2008 WL 2685421 at *3.

The cases upon which *Chapman* relies do indeed stand for the proposition that a district court may consider § 3553(a) factors when deciding a Rule 35(b) motion, but both of those cases contain an important limitation on when those factors may be considered. In *Manella*, the district court granted the government's Rule 35(b) motion, but only reduced the defendant's sentence by seven months, rather that the sixty months recommended by the government. *Manella*, 86 F.3d at 202. As reasons for the smaller reduction, the court considered a number of § 3553(a) factors. *Manella*, 86 F.3d at 202. On appeal, the defendant made the same argument as the defendants in *Chapman*, *i.e.*, the court misapplied Rule 35(b) when it considered factors other than substantial assistance. The court found:

> A careful reading of rule 35(b) reveals that the text does not prohibit the consideration of any factor other than the defendant's substantial assistance. The rule states that "[t]he court ... may reduce a sentence to reflect a defendant's subsequent, substantial assistance...." Under this language, the only factor that may militate *in favor of* a Rule 35(b) reduction is the defendant's substantial assistance. Nothing in the text of the rule purports to limit what factors may militate *against* granting a Rule 35(b) reduction. Similarly, the rule does not limit the factors that may militate in favor of granting a smaller reduction.

Manella, 86 F.3d at 204. The Ninth Circuit in *Doe* adopted this same approach. *Doe*, 351 F.3d at 929.

According to the standard adopted by the Eleventh and Ninth Circuits, § 3533(a) factors may only be considered for the purposes of denying a Rule 35(b) motion or granting a reduction less than what consideration of the substantial assistance alone would warrant. In other words, § 3553(a) factors may not be used by a district court to grant a reduction greater than warranted by the substantial assistance. The § 3553(a) factors are the quintessential one-way street, to the detriment of the defendant only. They can make his substantial assistance reduction smaller, but not greater.

Although the Seventh Circuit's reliance upon *Manella* and *Doe* might logically imply that this limited approach was adopted by the Seventh Circuit as well, the second portion of the opinion in *Chapman* makes clear that, in the Seventh Circuit, a district court is free to consider § 3553(a) factors to grant a greater reduction than warranted by the substantial assistance alone.

Specifically, the defendants in *Chapman* also argued that the district court erred when it refused to consider their non-frivolous arguments in favor of greater sentence reductions. *Chapman*, 2008 WL 2685421 at *3. As noted above, both defendants relied upon § 3553(a) factors when

arguing for greater reductions than warranted by their cooperation alone. The court found that the district court did in fact consider the defendants' arguments, as well as a number of other 3553(a) factors. *Chapman*, 2008 WL 2685421 at *4. In discussing this argument, the court made clear that a district court had unfettered discretion to consider § 3553(a) factors without the limitations placed on courts by the Eleventh and Ninth Circuits. The court stated:

> Although the court did not mention the phrase "sentencing disparity" in either of its opinions, it did emphasize other relevant section 3553(a) factors....It further noted that the imposed sentences were "reasonable, responsible, relevant and necessary to accomplish these purposes set forrth in 18 United States Code Section 3553(a)....Here, the court did not evidence a misapprehension about its authority to consider the section 3553 factors on a Rule 35(b) motion; nor did it suggest that it refused to consider those factors. Indeed, the court stated that it *did* consider the relevant section 3553(a) factors, and it believed that the sentences that it imposed were necessary to account for the defendants' criminal history and conduct. We have little reason to doubt that the district court considered the factors that it did.

Chapman, 2008 WL 2685421 at *5.

This language makes clear that the defendants' arguments for a greater reduction based upon general § 3553(a) factors were appropriate and the that the district court had authority to consider them. However, the court refused to hold that the district court was *required* to consider the § 3553(a) factors because it was not necessary for the court to reach that question given that the district court in fact considered them in this case. *Chapman*, 2008 WL 2685421 at *4.

Chapman, then, provides in the Seventh Circuit clear authority for the first time that a district judge has authority to consider § 3553(a) factors when imposing a sentence reduction pursuant to Rule 35(b). Unfortunately, prior precedent requires that motions pursuant to § 3553(e) be judged by a different standard.

18 U.S.C. § 3553(e)

United States Sentencing Guideline Section 5K1.1 authorizes a district court to impose a below-guideline sentence when the government files a motion under this section asserting that the defendant provided substantial assistance in the investigation or prosecution of another person. However, although a motion filed pursuant to § 5K1.1 authorizes a below-guideline sentence, it does not allow the district court to impose a sentence below any statutory mandatory minimum sentence. *Melendez v. United States*, 518 U.S. 120, 125-26 (1996). Rather, if at the time the defendant is sentenced, the government believes the defendant's assistance warrants a sentence below the mandatory minimum, then it must file not only a motion pursuant to § 5K1.1, but also 18 U.S.C. § 3553(e). That statute provides in relevant part:

> **(e) Limited authority to impose a sentence below a statutory minimum.**–Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

18 U.S.C. § 3553(e).

In *United States v. Thomas*, 930 F.2d 526, 528-29 (7th Cir. 1991), the Seventh Circuit relied upon the plain language of § 3553(e) to limit the factors a judge could consider when imposing a sentence below the statutory mandatory minimum. Specifically, in *Thomas*, the court held that only factors relating to a defendant's cooperation should influence the extent of a departure for providing substantial assistance. *Thomas*, 930 F.2d at 528-29. The defendant in *Thomas* was subject to a 120-month mandatory minimum sentence, and the government at the time of sentencing made a § 5K1.1 and § 3553(e) motion to allow the district court to impose a sentence below the minimum based upon her substantial assistance. The district court not only granted the government's motion, but also departed even more than the government requested, based upon the defendant's extremely burdensome family responsibilities. *Thomas*, 930 F.2d at 529.

The Seventh Circuit reversed, holding that the language of § 3553(e) limited a district court's bases for imposing a sentence below a mandatory minimum to those "relating to a defendant's cooperation." *Thomas*, 930 F.2d at 529. The court came to this conclusion based upon the language of § 3553(e). Specifically, the court held that the statute's use of the words "so as to reflect a defendant's substantial assistance" clearly supported the "government's view that only factors relating to a defendant's cooperation should influence the extent of a departure for providing substantial assistance under § 3553(e)." *Thomas*, 930 F.2d at 529. The Seventh Circuit has repeatedly reaffirmed this holding in cases decided after *Thomas* but before the

Supreme Court's decision in *Booker*. *See, United States v. Crickon*, 240 F.3d 652, 655 (7th Cir. 2001); *United States v. Canoy*, 38 F.3d 893, 905 (7th Cir. 1994); *United States v. DeMaio*, 28 F.3d 588, 590 (7th Cir. 1994); and *United States v. Thomas*, 11 F.3d 732, 737 (7th Cir. 1993).

Every other circuit to consider the question likewise has come to the same conclusion as the Seventh Circuit. *See e.g., United States v. Richardson*, 521 F.3d 149, 159 (2nd Cir. 2008); *United States v. Williams*, 474 F.3d 1130, 1130-31 (8th Cir. 2007); *United States v. Desselle*, 450 F.3d 179, 182 (5th Cir. 2006); *United States v. Ahlers*, 305 F.3d 54, 60 (1st Cir. 2002); *United States v. Aponte*, 36 F.3d 1050, 1052 (11th Cir. 1994); *United States v. Campbell*, 995 F.2d 173, 175 (10th Cir. 1992); *United States v. Valente*, 961 F.2d 133, 135 (9th Cir. 1992); and *United States v. Snelling*, 961 F.2d 93, 97 (6th Cir. 1991).

Moreover, although the Seventh Circuit has not reaffirmed the holding of *Thomas* in a published opinion since the Guidelines were made advisory by *United States v. Booker*, 543 U.S. 220 (2005), it has reaffirmed the holding in *Thomas* in two unpublished dispositions. *See, United States v. Proctor*, 2008 WL 2178127 (7th Cir.); and *United States v. Crayton*, 259 Fed. Appx. 889 (7th Cir. 2008).

The practical effect of the holding in *Thomas* is that when a defendant is subject to a statutory mandatory minimum sentence and the government files a § 3553(e) motion, the district court may only consider factors related to substantial assistance when imposing a sentence below the mandatory minimum. In other words, a court may not consider a defendant's arguments that non-assistance related § 3553(a) factors should be considered in conjunction with the government's § 3553(e) motion to produce an even lower sentence. On the other hand, where the government makes only a § 5K1.1 motion, either because there is no statutory mandatory minimum in the case or the guideline range is substantially above the mandatory minimum, *Booker* not only allows, but requires, the district judge to consider any § 3553(a) factors the defendant brings to the court's attention. *See generally, United States v. Blue*, 453 F.3d 948, 953-54. Thus, § 3553(a) factors *must* be considered when the sentence imposed is anywhere above the mandatory minimum, but *may not* be considered when the sentence imposed is anywhere below the mandatory minimum pursuant to a §3553(e) motion.

The Different Standards

Chapman did not specifically address whether there is a different standard when a Rule 35(b) motion seeks a sentence which goes below a statutory mandatory minimum, similar to the standard for § 3553(e) motions. As noted above, a district court must consider § 3553(a) factors when imposing a sentence above the statutory mandatory minimum, but may not consider them when imposing a sentence below the minimum pursuant to a § 3553(e) motion. Because no statutory mandatory minimums were applicable in *Chapman*, the court had no occasion to address whether a different set of standards apply if a sentence pursuant to Rule 35(b) goes below the minimum. However, there is nothing in the language of *Chapman* to suggest that it is limited to situations where the sentence imposed is above the mandatory minimum. Moreover, differences in the language between § 3553(e) and Rule 35(b) support a reading which would not impose different standards in the Rule 35(b) context when imposing a sentences above or below the statutory minimum.

Both *Thomas* and *Chapman* reach their conclusions based upon the plain language of the texts at issue. In *Thomas*, the court found the language in § 3553(e) which authorized departures "so as to reflect a defendant's substantial assistance" to be dispositive. *Thomas*, 930 F.2d at 526. The court read "so as to reflect" as a specific limit on what the court could consider. Rule 35(b), however, does not contain the same qualification. Indeed, the court in *Chapman* specifically found that "[n]othing in the text of Rule 35(b) limits the factors which may militate against granting a sentencing reduction or for granting a smaller reduction than requested." *Chapman*, 2008 WL 2685421 at *3. The operative language in Rule 35(b) states that "the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person." Fed.R.Crim.P. 35(b). Unlike the language contained in § 3553(e), the actual departure is not limited by the phrase "so as to reflect" the assistance. Rather, Rule 35(b) merely requires that the defendant provide substantial assistance, without any limitations on what the sentence must "reflect." This difference in text supports a difference in treatment between § 3553(e) motions and Rule 35(b) motions which seek a sentence below the statutory mandatory minimum.

Conclusion

The opinion in *Chapman* opens up new opportunities for advocacy when the government files a Rule 35(b) motion. The court makes clear in *Chapman* that the restrictive standard applicable to § 3553(e) motions do not apply in the Rule 35(b) context. Accordingly, defendants are now free to present arguments based on § 3553(a) factors in support of a sentence below that warranted by substantial assistance alone. Those factors may have been present when the defendant was originally sentenced (as some were in *Chapman*), or they may involve facts which arose after sentencing, such as good conduct or efforts to improve oneself while incarcerated. In other words, any

§ 3553(a) factor which one might argue at an original sentencing hearing is now relevant in the context of a Rule 35(b) motion hearing. Based upon *Chapman*, if you have § 3553(a) factors to present at a Rule 35(b) hearing, you should present them much like you would at an original sentencing hearing, and a district judge would err if he or she found that the law prohibited the consideration of those factors. Moreover, even if the judge recognizes his or her authority to consider the factors, but refuses to do so, then you should preserve the issue for appeal regarding whether the judge is *required* to consider the § 3553(a) factors when reducing a sentence pursuant to Rule 35(b)–the issue preserved in *Chapman*. Either way, *Chapman* opens new avenues for advocacy in the Rule 35(b) context, and we should avail ourselves of this opportunity

WILKES: His Life and Crimes

A Novel by: Winston Schoonover

[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 the Wilkes *series of books due to his use of a* nom de plume, *Winston Schoonover. Many thanks to Mr. Sevilla for allowing us to reprint his stories here. I hope our readers enjoy his work as much as I do. You can read more* Wilkes-*related stories in old issues of* The Champion *magazine, as well as in three full-length books published by Ballentine novels, entitled* "Wilkesworld", "Wilkes on Trial", *and* "Wilkes: His Life and Crimes", *from which the following two Chapters are taken. In past editions of "The Back Bencher", we published Chapters 1-6. We are continuing the series now with Chapters 7 and 8.*

We will continue with successive Chapters of "Wilkes: His Life and Crimes" *in future editions of* "The Back Bencher."

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"Judge Yulburton Abraham Knott"

When the mind is made up, the ear is deaf to even the best arguments. This is the sign of a strange character, in other words, an occasional will to stupidity.

- Nietzsche

The Lizard doesn't need a lawyer; he needs an exorcist.

- John Wilkes

After a wonderful interlude lolling around in the money and glory of the big win on the quiz show, Wilkes got an invitation to return to reality when Judge Henry "Red" Fox ordered him to appear for trial setting in the long-postponed case of "*State v. Hank Gidone, aka 'The Lizard,'*" wherein our client faced seventy-two counts of pimping and pandering. It was with a good bit of anxiety that my friend and I, with our creepy client in tow, slogged through the rain to the balding judge's court for the first court proceeding in the Lizard's case in over a year. As luck would have it, we were late.

"Sorry we're late, Your Honor," said Wilkes. "But it's pouring outside and traffic's a real mess." Wilkes's words were said with such enthusiasm as to strip the apology of any meaning.

Red Fox started rubbing his balding pink head front to back, as was his habit when angry. He rose from his throne and marched straight to the nearest window and studied the traffic and climatic conditions for several seconds, then turned and marched back to the bench muttering, "So it is. So it is."

Such was my friend's credibility with Judge Henry "Red" Fox.

Stroke of Luck

"You are probably wondering why I've summoned you here, Wilkes," said the judge after seating himself. "Well, I'm going to inform you that, with the aid of that quack doctor you have on retainer, who is well paid for his opinions, I'm sure, and those maggots on the appeals court, who are well paid for theirs, you've succeeded in your sick charade. Your malingering to get a continuance worked. My contempt citation was reversed. And you have had plenty of time, between television appearances, to prepare for Mr. Gidone's trial."

The judge's face was now crimson, and he stroked his balding red pate vigorously. It was a scene I had seen a million times. Wilkes in front of a reddening judge who became more furious by the moment, and all without my friend saying a word. But Fox was unusually candid about his feelings this day, which meant something was afoot. A judge wouldn't mess with the trial record by such reckless truthful comments about how he felt unless . . .

"It's the appellate judges I can't understand," Fox continued. "Maggots! Reversing my order! The fools! They've undermined this case!"

He stroked his nose-to-neck forehead even harder. "In case you haven't heard, Wilkes, I'm now in civil, so I have

the great pleasure of informing you that the case of *People v. Hank Gidone, aka 'The Lizard,'* will not be tried by this court."

Hooray! I yelled in my thoughts. Wilkes and I usually had more sense than to speak audibly in court about what we really felt. Said Wilkes, "Terribly sorry to hear that, Your Honor. It's always been my pleasure to know I was going to trial in this department."

As long as you were going and not ever arriving.

"Cut the crap, Wilkes. You no more want to be in this court with me than I want to be in it with you. But you ought to love where I'm sending you. Your colleague of the defense bar, Yulburton Abraham Knott, as you know, just got appointed to the bench, and I'm giving him you as his first trial. Ha! It'll probably ruin him! He'll probably regret he ever left the practice of law!"

The judge rose to his feet smiling. "Now the moment I've been waiting for. Mr. Wilkes, it gives me great satisfication to say to you and the Lizard, get the h*ll out of my court!"

Knott's Landing

Years later, in his prime, Judge Knott proved to be one of the cruelest judges ever to have pulled on the black sheet. He was meaner than Red Fox, more unscrupulous than Lester Throckton, and just about in the league of the infamous Judge Joseph Blugeot. Worse, being a former defense attorney, he knew all the tricks of the trade, so there would be no pulling the wool in his court. Wilkes would have some of his biggest courtroom battles with Judge Knott, but at this time we were in happy ignorance. We thought anything was better than Red Fox. We were wrong.

The first time Judge Knott opened his mouth as a judge was at the Lizard's initial appearance for trial setting. Wilkes was feeling quite chipper that morning, so much so that we took the unusual step of driving to work. My friend drove his new De Soto, bought with proceeds of his quiz show winnings, into the court parking lot and into a stall marked reserved for court witnesses.

No sooner had we alighted from the new car than a big black man, the security guard, came rushing up to us, yelling and gesturing with his arms. "Jesus Christ!" he said.

"Yes," said Wilkes as he stepped back from the car and looked it over, "it is a spectacular vehicle, isn't it? And you may call me by the earthly name, John Wilkes. Perhaps you recall me from the 'Take All You - '

The guard looked Wilkes over in disgust and interrupted him, "What the f*ck're you doin' here? This is for witnesses only."

"I'm gonna be a witness, and so is Mr. Schoonover here," said Wilkes.

"You two look like a couple of shysters to me."

"Quite right," said Wilkes. "Lawyers we are, but I'm still going to be a witness. You see, I'm about to start a trial, which means, if history is prologue, that I will be held in contempt, and since I'll be held in contempt, I of course will be the best, if not the only witness in my own defense."

Omen

The guard was quietly considering this as we seized the moment and began walking toward the courthouse. The guard didn't follow or even call out. It was a good omen for the day to come. And we were going to appear before good old Y. A. Knott, former brother in the trenches of the defense of the citizen-accused. Although Wilkes and Knott were no more than passing acquaintances, we figured we'd at least get the time of day in his court.

Trial settings usually take about thirty seconds, but given that Y. Knott was new to the bench, we figured this one might take as long as a minute. It was thus with some surprise that when court commenced, Judge Yulburton Abraham Knott opened a thick binder and began reading a prepared speech. Here is what he said:

> "I have reviewed the entire file in this case and conversed with Judge Fox about it. It appears to me that one party to this case has stalled these proceedings for almost two years. All court hearings preceding this one have been a complete waste of the taxpayer's money; the motions to continue have been a patent insult to the intelligence of the trial court. I am appalled by the file before me. The artifice, the gimmickry, the outright fraud of one party - it is incredible that both the defendant's and the State's right to speedy trial have been trampled on by the gamesmanship of one party."

And So On

For thirty-seven minutes, Knott read his diatribe and detailed all the horrible tricks played by *one party* to delay the case. Wilkes and I had an excellent idea that the one party being referred to was one John Wilkes. This was one helluva judicial baptism.

Knott concluded: "There will be no more phony, ritual motions in this court. There will be no more contemptible game playing here. And most of all, there will be no continuances! Trial in ten days."

Without another word, Knott sprang up and race-walked into his chambers, but not disappearing from view before Wilkes could get out his sole contribution to the proceedings: "Have a nice day."

The Lizard Ranks Last

Judge Y. Knott came out of the judicial blocks as a Wilkes-hater having taken a crash course in judicial distemper from Red Fox. From the start, he demonstrated his bias against defendants and delay, a readiness to help the prosecution without prompting, and an egomania and pompousness befitting a Louis XIV.

Our client, Hank "The Lizard" Gidone, was to prove as big a problem as the judge. Of all the defendants Wilkes represented in his long, colorful career - and this included mass murderers like Elmo Lead, sex perverts like Senator Hyman Taurus Fabricant, drug fiends like Peter Silkings, hit man mobsters like Vito Di Voccio, professional thieves like Lyle Diderot, thieving professionals like Judge Milton Purver, J. Daniel Conway, Earnie Libido, and the Reverend Bob Smite, and crazies like Dr. Lorenzo Pound, aka Dinero the Profit - the Lizard was the most thoroughly loathsome client my friend ever represented.

Most times, Wilkes got along fine with his clients. Of course, he clearly had his favorites: fee-paying ones were all alone at the top of the list. But in terms of crimes, Wilkes liked murderers best. If they were hit men, they knew the rules of the game and didn't whine and moan. There was simply a quiet understanding as is common between two professionals.

Passion killers were so frightened by the court proceedings that they worshipped Wilkes as a modern pathfinder leading them out of the wood-paneled jungle filled with life-threatening terrors.

Drug entrepreneurs were next on the most-favored-criminal list. These clients were well-educated, good - natured, and financially well-endowed. To them, indictments and lawyers were just an occupational hazard, much like a nuisance tax. They accepted the pain of fee paying quite nicely, and it was always a pleasure to take their money.

Bank robbers were next on the favorites list only because Wilkes enjoyed representing lunatics. Only crazies rob banks. Yes, it is where the money is, but it is also where the armed security guards are and the marked money and the trained tellers (trained to push silent alarms and to say in trial, "That's the man. I'll never forget that face.")

They shoot enough pictures of bank robbers from the wall cameras to satisfy the most finicky fashion photographer. And the pay is no good robbing banks. You figure that the two or three grand they give the robber works out to about ten cents an hour over a twenty-year stretch at Lewisberg.

So you had to be nuts to rob banks, and that is why my friend enjoyed the bank robbers. He loved exploring the unbounded expanse of minds freewheeling toward the blessed infinity of Bonkersville. It relieved a lot of the boredom from the practice of law.

Bottom of the Barrel

Actually, any client, no matter what the charge, who fit the profile could reach Wilkes's most-favored-client status. If they were deliciously crazy, or just rich, good-natured entrepreneurs, or even stupid, obedient, unquestioning followers, it was fine with Wilkes. As long as they paid their retainers in full and up front, my friend treasured their business like the family jewels.

There was only one class of crook that Wilkes despised taking on as a client even if they paid - the flesh merchants. He could be a kiddie porn peddler, or the creep who makes the flicks, or maybe an alien smuggler who stuffs half a dozen "illegal" humans in the trunk of his Camaro, or maybe a pimp like Hank "The Lizard" Gidone, on the hunt for fresh meat at Grand Central, thirteen-year-old virgin runaways being the prime target.

How Do I Hate Thee

When it came to the Most Despised Client, the Lizard was right at the top of the list. Wilkes represented the Lizard for over two years, and all he heard from him were unjustified complaints and incessant demands for attention: "Man," the Lizard would often say, "can't chew get my bail no lower? Murderers gots less bail than me." This comment first came two weeks after we got the ungrateful bastard sprung on fifteen thousand dollars bail.

The Lizard never took responsibility for *anything* he did. He took the art of rationalization to heights Wilkes and I had never seen before in a crook. The Lizard's frequent refrain on innocence went like this: "Hey, dude! The motherf*ckin' cop said on the witness stand that he arrested me at nine in the mornin'. The pig lied, man. It was ten. Therefore, I am not guilty."

The Lizard's respect for human life was on a par with that of Adolph Eichmann. He called his whores "rental units" and constantly lied to use that the balance of our retainer

would be coming soon: "I got my rental units out tonight working for you, Wilkes. Man, I'll have what I owe in the office in the morning."

His favorite "rental unit" - one he chose to sleep with - was deaf, dumb, and blind. He'd brag to Wilkes about how he instructed her to let him know when she was ready for sex: "I tells the bi*ch, 'Honey, just grab my thing and pull on it once if you wanna do it. And, baby, if you don't wanna do it, just pull on it seventy-five times.' Hah, hah, hah!"

A Stitch In Time

A whining, perverted pathological liar is bad enough, but the Lizard was also the downright meanest man we ever met. No white slaver ever treated his peons as cruelly as the Lizard did his stable of harlots. "When my bi*ches start holding out on me," he told us, "man, I puts a stop to it. First thing, I make 'em drink a glass of Drano. That usually brings most of 'em around and cleans out their pipes, too, man, but if id don't, well, man, I can gets ugly and I tells 'em, if you hold out on me, bi*ch, I will put you outta work for good, and I threaten to personally sew up their rental unit vaginas and put 'em out of the screwing business, ya dig? Not one of 'em's ever tried me on that, man. See, that's why I always say, 'A stitch in time." Ya dig?"

With this statement of personal philosophy, he showed us his big gold pendant hanging from his neck and pointed to the inscription, which said, "A Stitch In Time."

No wonder when they got the chance, every one of the Lizard's whores gladly became witnesses for the prosecution. The same feelings caused Wilkes to say, "The Lizard doesn't need a lawyer; he needs an exorcist."

Pretrial Prep

Only the Old Wine Defnese had saved the Lizard from prison thus far, but after two years of delay burdened with the Lizard's constant bi*ching, Wilkes was rather looking forward to trial, or more precisely, the end of the trial.

Given almost two years of delay, we had plenty of time to investigate the case, so during our remaining days until trial, we worked on trying to improve the Lizard's appearance. One look at the Lizard by the jury and the presumption of innocence would evaporate quicker than a bead of water on a hot griddle.

Let me describe the Lizard's standard attire. Over a small Afro, he wore a gold-colored beret. On his left earlobe, a large gold ring hung like a tire from a tree limb. Gold mirrored sunglasses covered his beady reptile eyes, and a gold cigarette holder shot out of his mouth holding an always lit brown cigarillo.

His zoot suit was fluorescent gold, with the shoulders padded so heavily, it looked like he had huge breasts there. A black silk shirt, open to the navel, revealed his bare chest and a gold chain from which dangled the large round medallion. A needle and thread were emblazoned on the medal, at the bottom of which were the words "A Stitch in Time."

Dress For Success

The Lizard looked just like a pimp. Wilkes knew that if he walked into a courtroom looking like that, we'd not need to bother with the trial. The Lizard's attire would be all the prosecutor, Miles Landish, needed. Wilkes ordered the Lizard to dress as straight as possible for trial, and the Lizard said, "Sure, baby. My bi*ches gives me the best threads, man, the best. I'll dude it up right, man. You'll see. Don't you worry 'bout a thing."

The Lizard kept us in great prolonged suspense on the first day of trial. What would he wear? No one found out. The bastard didn't show up for trial. Judge Yulburton Abraham Knott promptly revoked bail, issued a bench warrant for his arrest, and continued the trial for one day.

The next day the Lizard didn't show up again, and Judge Knott, over my friend's vehement protests, ordered us to start jury selection anyway. The judge noted a waiver-of-presence paragraph in the fine print of the bail release order; it said the defendant consented to trial in absentia if he failed to honor his bond release. Wilkes and I had never heard of this condition, but there it was in the form.

Nevertheless, for this part of the trial we were well prepared. Wilkes had brought in Ruby Fulgioni, a grandmother, part-time tarot card reader, psychic, and most important, our jury selection expert.

Ruby

Wilkes was one of the first attorneys to regularly use professional help in picking juries. Today, lawyers often use psychologists or sociologists, but Wilkes dismissed them as amateurs. "I can guess as well as they can," he'd say. But with Ruby it was different. She was a savvy old lady who could really pick 'em.

I loved watching her and Wilkes work a jury. She would listen intently to the answers each prospective juror gave, check their body language, and when the time came for the defense challenge, signal Wilkes to ax the bad ones and pass on the good ones.

No matter what the weather, Ruby wore a rumpled brown wool suit. Terrible eyesight forced her to wear purple horn-rims with red rhinestones embedded on the sides. The lenses were so thick, they could stop bullets. She spoke a blunt Brooklynese which made her sound like a brain-damaged palooka, but atop that squat, frumpy frame rested a first-rate brain that read minds as easily as Wilkes and I read the newspaper. Just the ticket for jury selection.

Ruby And The Rovers

The first thing Ruby said when she saw the panel from which we were to pick the Lizard's jury was, "Dis looks like an SS convention, Wilkie. Wid deez bums you're in real trouble. Get the rovers woikin'."

Like any good psychic, Ruby insisted on all the information she could get on her subjects before she would perform a jury reading. We used rovers to mill inconspicuously in the halls, the court cafeteria, the bathrooms, and sit in the gallery listening to juror chatter, hoping to pick up clues to their biases. I would debrief the rovers and pass on the information to Ruby in time for her to signal Wilkes to ax or pass. For the Lizard's trial, the signal to ax was Ruby blowing her nose. The signal to pass was Ruby not blowing her nose.

Ruby quickly went through a box of Kleenex. She blew her nose so often and loudly that Judge Knott called Wilkes up to the bench during voir dire to ask, "Don't you think it a bit extreme to have a woman that sick in the courtroom?"

As Knott was suggesting to Wilkes that she be removed, Ruby leaned over to me and whispered her evaluation of our jury panel. "Deez guys is killers, Schoonie. Does goils is woise."

Ruby and the rovers soon left us. Not because of Knott's concern for her health, but because Wilkes quickly used up his challenges. Ruby couldn't help after that. She left, head down, muttering, "Piranhas, barracuda, sharks. Some choices." She paused next to Wilkes as she was leaving and whispered, "May God in heaven have moicy on da Lizard, Wilkie. Deez twelve could star in a horror movie as da monsters."

With Ruby's hand still on my friend's shoulder, the doors to the courtroom flew open and slammed against the walls. Everyone turned to see the source of the commotion. There, standing alone in the doorway, was none other than our tardy client, Hank "The Lizard" Gidone, smiling, wearing his gold beret, the gold earring, mirrored sunglasses, cigarette holder with small cigar blazing, and black shirt open to the navel showing off his bare chest and gold "Stitch in Time" medallion.

As he had promised, he did change his attire somewhat for this trial. His zoot suite was made entirely of sparkling white and green sequins. It was something Liberace would find gaudy.

Hey, Baby!

"Hey, man," said the Lizard to everyone. He spotted Wilkes and yelled, "What's happening', baby?"

"Seize that man!" yelled Judge Y. Knott. Two bailiffs obediently ran to the Lizard and grabbed him.

Ruby said to Wilkes, "Jeez, dat guy looks like a pimp, Wilkie."

Things were deteriorating rapidly, but Wilkes had a kind of cool under fire few trial lawyers possessed. I always thought that if during the middle of a trial an earthquake struck and swept the court out to the middle of the Atlantic, Wilkes would swim up to the judge and calmly ask for a dismissal.

Wilkes surveyed the scene before him. Seventy-two tarts were ready to kill his client from the stand. He had a jury that looked like the Manson Family. He had a judge who hated him and a client under arrest whom he loathed. Wilkes did the only thing any self-respecting lawyer would do.

"Your Honor," he said, "I move to approach the bench to discuss your most inappropriate and prejudicial comments." Putting a negative cast on the request was sure to get the desired response.

"That'll be denied," said Judge Knott.

"Then I must move for a mistrial based upon the court's transcending the bounds of a neutral and detached magistrate and joining ranks with law enforcement by arresting my client as he attempted to enter this hallowed hall of justice seeking his day in court."

Why Not?

Wilkes was pouring it on thick. And why not? The case was a loser. If the judge does something stupid and like a common flatfoot arrests your client, well then, sock it to him. And, more important, sock it to the record.

Knott, flustered by the motion and recognizing that my friend might have a point, thought a moment and then said to the jury, "Ladies and gentlemen, it appears that Mr. Gidone was late for court today and that perhaps I overreacted by asking the bailiffs to personally escort him to his seat beside defense counsel. This is not evidence of

anything, and you are to disregard the incident entirely in determining the defendant's guilt, uh, and, er, or innocence."

He smiled to the jury and politely asked Wilkes and Miles Landish to approach the bench, where he began a memorable exchange with my friend.

"Despite what I just said, your client's bail is still revoked and the warrant for his arrest is being executed now. I should think the reasons are self-evident. If not, I shall make them so. He did not appear at all yesterday and cost the taxpayer a full day of court time. He shows up late today wearing what can only be described as a carnival sideshow outfit and looking like, well, like a pimp. Now, Wilkes, as for your filibustering motion, that will be denied. And any further accusations about this court joining ranks with the DA will result in a contempt citation."

Motions

Wilkes was fearless in the face of judge-made threats. He had heard them so often, the judges might as well have been singing his praises. It meant nothing to him except as ammunition to be turned back on the black-robed monster. Wilkes said, "Thank you, Your Honor. However, given the court's deep-seated feelings of hostility, if not hatred, toward me, which the jury has undoubtedly picked up, I must request a mistrial in order that my client obtain other counsel who will not trigger such reactions from the bench."

Knott was not one to fall for the judge baiting of John Wilkes. He said with considerable restraint: "That'll be denied. Everything you said is absolutely false."

Wilkes, however, was relentless. He replied, "Well, the record now reflects that you believe I'm being mendacious about this matter. This is tantamount to a charge of perjury. I ask the court to recuse itself."

"Denied!" All of your motions are denied! Now, get out there and try this lawsuit!"

"Let the record reflect that the court is angry with me and red-faced and speaking angrily, almost in tongues, and loudly, too. The record should also reflect that in remonstrating me so vigorously, spittle is spraying from your mouth in my directions, which is very disagreeable to me. Finally, I am sure the jury has heard every word you said and is prejudiced forever against my client. I ask for a mistrial."

I was surprised he didn't ask for an umbrella. Knott was spraying the place like a broken hydrant. He spit out, "Denied! Denied! I'll hear no more. Now, get out there or I'll have the bailiff forcibly seat you!"

Wilkes In Motion

"I move to have the jury questioned as to whether they will be affected by what they have just seen and heard," said Wilkes.

Knott grabbed the gavel and looked like he was going to hit Wilkes on the head with it, but pointed it at him instead and said, "I refuse to hear any more from you. All motions previously made, just made, or to be made are denied." To the bailiffs - who were still attending the Lizard - the judge said, "Gentlemen, would you come here a second?" To Wilkes he said, "Now, are you going to get out there and try this case or are these gentlemen going to have to move you after I cite you for contempt?"

"With all due respect, we've been up here about sixty seconds. All I'm trying to do is defend my client. I have to speak to do that. I have been respectfully urging, and I still urge this court to -"

Knott commanded the bailiffs with his favorite phrase of the morning: "Seize that man! Take him to his seat!"

Wilkes was taken by the arms and dragged to his seat next to the Lizard, who had just been dragged to his. The Lizard, shimmering in the glow of the court lights, smiled toothily to Wilkes and said, "Hey, man, you late for court this mornin', too?"

Judge Yulburton Abraham Knott then swept the air with his left hand and said with great affectation, "Let the trial begin."

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The Trial of Hank "The Lizard" Gidone

You have the right to remain silent - for as long as you can.

- NYPD To Hank "The Lizard" Gidone

*You motherf*ckers are wasting your time. Those bi*ches gave me money 'cause they wanted to. I got a high-priced motherf*ckin' attorney whose gonna get me out of this mess 'cause no bi*ches lives with me unless they give me money, and I got five bi*ches working for me on the streets right now.*

- Hank "The Lizard" Gidone to the NYPD

One of the loneliest, most helpless feelings a defense lawyer ever has in a hopeless case is while listening to the prosecutor makes his opening argument. In the Lizard's case, the DA, Miles Landish, described in minute detail the brutalization of woman after woman. They had served as part of the Lizard's stable of "rental units." Now they were about to turn on their former landlord.

As Landish argued, I could feel the growing hatred of the citizens selected to judge our client. And the jury's hatred was not isolated to our client. They hated us, too.

Landish was a dark-spirited fellow who had an unimposing flabby presence which did not command much in the way of attention. But before a jury, he'd turn into a flabby, screaming demagogue - a mad, avenging hulk for the state. Wilkes described him as D.H. Lawrence might have, "Sun extinct, and busy trying to put out the sun in everyone else."

On this day, we listened as Landish described, with regrettable accuracy, the life and times of our lowlife pimping client. He took particular delight in yelling out the Lizard's vulgar and incriminating statements made to the police just after his arrest (quoted at the outset of this chapter).

"Isn't it amazing," said Landish, "that such an alleged man could say such things and then have the audacity to come into this court and utter those two little words, not guilty?"

Wilkes sprang up to object. "It's not amazing when you hear the words were manufactured by police coercion. I object to his using the sacred plea of not guilty as evidence of guilt."

"That'll be overruled, counsel," answered Judge Knott. "Evidence will be introduced that your client pleaded not guilty and made the statements in question to the arresting officers."

More Motions

Wilkes did try to suppress the evidence of the Lizard's statements made to the police just after his arrest. The theories of suppression were twofold: First, the officers arrested the Lizard in his own home without a valid arrest warrant. The warrant was issued for one, "John Doe, aka The Lizard." The description of the suspect was equally spare, but on target: "Wears wild clothing. Looks like a pimp."

Sensing a problem with the brevity of their warrant, the arresting officers, as is routinely done on such raids, sought a consensual entry to the home and assent to the arrest so that the bust would be defense-attorney-suppression-proof.

The cops approached the Lizard's house in two squads, one half of the team covering the rear while the leader of the raiding party took his half to the front door and loudly announced his identity. From the back of the house he heard an equally loud chorus of his colleagues sing out, "Come on in!" And they went in.

This technique of warrantless house entries is known in the system as a "Mississippi Search Warrant" and has been the cause of many a judge declaring, "The officers say they heard someone say enter the house, and they reasonably entered in response. Motion to suppress denied."

Judge Knott said this, too. He said the entry into the house was legal based upon "apparent consent," and he said the rather cryptic arrest warrant was fine as written. Which prompted Wilkes to say, "Warrants are like sex. When they're good, they're very good. And when they're bad, they're still very good."

Mississippi Mirandas

Judge Knott also upheld the Lizard's subsequent statements to the cops as uncoerced and voluntary. Telling the Lizard he had the right to remain silent for as long as he could (known in the business as giving the defendant his Mississippi Mirandas) was "merely an accurate statement of the obvious," said the learned judge.

Wilkes responded testily that "the police statement was made to intimidate the Lizard by suggesting a physical response to his continuing noncooperation."

To this Judge Knott responded, "That is your speculation, Mr. Wilkes. Who am I to judge?"

At the close of the hearing, Wilkes made his usual eloquent pitch for suppression. Judge Knott responded with what would become his usual contribution to the case, "That'll be denied, counsel."

As we walked back to our office after the motion hearing, Wilkes was silent for the longest time. Then he finally barked out, "Marshall, Taney, Harlan, Holmes, Brandeis, Cardozo, and now Justice Yulburton Abraham Knott!"

"Is this a guess-the-one-who-doesn't-fit question?" I asked.

"No," said my friend. "I was commenting on one of the best arguments against Darwinian evolution I ever thought of."

"Or maybe Knott's a missing link, a throwback in time," I offered.

Wilkes just mumbled something about him being just like all the rest, and we marched in silence back to the office.

Claptrap

After Miles Landish finished his opening statement to the jury, Wilkes was covered with twenty-four contemptuous eyes, all belonging to the twelve good and true citizens of the Big Apple sitting as the jury. As he rose to open to the jury, Wilkes leaned over and whispered to me, "They already believe he's guilty, Schoon. It's in their eyes. That belief is about as easy to eliminate as a bad case of the clap."

In his prime, John Wilkes was a spellbinding orator in court. He was so persuasive that many fellow lawyers joked that given enough time arguing before a jury, Wilkes could deprive them of their free will. Part of his skill, he said, was "the ability to act sincere. You've got to make the jury believe you care about the fate of the knuckle-dragging primate you may be defending. They know you know whether he's guilty, and if you betray even for an instant that he is, you're dead."

Of course, that is all well and good when you've got something to say on behalf of your knuckle-dragger, but the Lizard's case seemed absolutely hopeless. Seventy-two of his tarts were prepared to testify against him. On top of that, he had made a very damaging statement to the cops. Even I wondered what my friend could possibly say to this unfriendly-looking jury.

He stood before them in silence, perhaps only a foot from the rail that separated him from them. For several very noticeable seconds he was motionless except for his eyes, which made contact with each juror. Then he placed the palms of his hands straight out before him as if he were about to lean against an invisible wall and said, "What do you see?" After a moment's pause, he let his hands fall to his sides and began pacing slowly before the jurors.

Appearances

"There's a story I like to tell about a Russian prince who went to military school and became the marksman of his class. After he graduated, he returned home. One day he came upon a village and noticed that one of the walls of the village was filled with bullet holes. Upon closer inspection, the prince saw that all of the bullet holes were grouped within small chalk-marked circles. The prince immediately concluded that this village had the greatest marksman in the kingdom. He summoned the head of the village and ordered him to find the marksman. Within a few hours, the man returned with a frail-looking little boy of twelve. The prince looked down at the boy and said in disbelief, 'You are the greatest marksman of this town?' And the boy said, 'Yes, sire." With a rifle almost as big as he was, the lad marched fifty yards from the wall and fired three rounds into it. Then he calmly walked to the wall, located the bullet holes, and drew a circle around each of them.

"Ladies and gentlemen, the young prince learned one of life's basic lessons in that village. He learned that assumption is the mother of all screw-ups. Things are not always as they appear. Here, as we shall see, a lie is a lie even if monotonously repeated by seventy-two tarts. And it is still a lie whether Mr. Landish whispers it, states it, or screams it so loud as to be a public nuisance."

Wilkes stopped talking and returned to counsel table. The jury's hatred had diminished a bit. Some even seemed amused. Before Wilkes sat down beside the Lizard and me, he again shoved his palms straight out and said, "When I asked you what these were, many of you thought you saw my hands."

Wilkes then slowly turned each hand so that the jurors saw the back side. "But you were only half-right. You didn't see the other side. Remember that as you listen to the ladies of the evening testify. Remember that none of them is being prosecuted for their crimes. Remember the other side - the truth."

For saying absolutely nothing, my friend's short opening must have been effective, since Landish and Judge Knott were agitated by it. Wilkes's sincerity had at least dissuaded the jurors from taking the law into their hands right then by lynching the Lizard on the spot. Some of the carbon monoxide was out of the air. The only problem now was that we had the rest of the case to go, and Wilkes had set up juror expectations for something to controvert Landish's overwhelming evidence.

Parade Rest

I shall skip over the bad part of the case that followed - the presentation of evidence. For the most part, Landish's parade of rental units told the jury a tale of torture and bondage under the Lizard's grisly reign as their pimp. The picture painted was one Attila the Hun would have envied. Terror was the Lizard's means of keeping his stable of whores in line, and it was a very effective motivator of submission. Terror made the Lizard powerful, cocky, and semiwealthy (until he had his first fee chat with Wilkes).

The testimony of one of the fornicatrices, Coreen North, although more poetic, was so typical of the others, you could multiply it times seventy-two and have the entire

prosecution case. In the most telling part, she said, "That there man, he turned mean on me. From my other pimp, I had only nice professional customers. I had a lot of them squeaky clean dentists fill my cavity. I had even big-shot lawyers discovering my loophole, while lovely young pilots nestled in my cockpit. I made a lot of money, honey. Then ol' Lizard come along and ruined my life. First he sweet-talked me real good with his promises and jive talk. Brags he's the man who keeps America moving. Says we all gotta have our ups and our downs. Promises I'm gonna be his number one woman. Sh*t, his words were just noise, man. All he gave me was rotten customers, a sore back, and a mouth full of Drano."

Wilkes's cross-examination of the ladies was as repetitious as their testimony on direct. Yes, they got immunity from prosecution for their whoring in return for singing in court against their pimp, the Lizard. Yes, they had many, many prior arrests and convictions, and most were on probation to some judge for prior tricks with one of New York's finest (who all too often made their undercover pinch after enjoying the fruits of the crime).

But there was a limit to what Wilkes could do. The ladies were united in their hatred of the Lizard and were keen on burying him. They also had a reasonable fear that if he got off, there would be paybacks galore. When Wilkes gave one an opening, she'd regale the jury with stories of how the Lizard cheated her out of her money, set her up with filthy johns, and beat her up when she complained. The horrific force-guzzled Drano and "stitch in time" stories epitomized my friend's failed attempt at impeaching the tarts.

After hearing all this testimony, Wilkes, hamstrung by the laws preventing subornation of perjury, presented no case himself. He simply noted after the prosecutor announced he rested, "Having heard no credible evidence against my client, we rest, too."

At this, Judge Knott leaned over his bench and said, "Mr. Wilkes, you evidently haven't been listening."

Underwater

The Lizard had been listening: he saw himself buried in an evidentiary avalanche of guilt. The presumption of innocence, which at the outset of the case had stood as an impenetrable protective shroud around the Lizard, had vanished long before the final witness left the stand.

The Lizard sensed his nakedness before the jury; he didn't like the exposure one bit. As each of the tarts testified, he kept elbowing Wilkes, urging him to "kill that b*tch." As more rental units testified, the Lizard grew angrier. He swore at Wilkes for not "Destroying that lying c*nt" in cross-examination.

By the time the last lady left the stand, the Lizard was so mad at Wilkes for not demolishing the fornicatrices, he picked up the water pitcher and poured it over my friend's head. He yelled as he emptied the pitcher on Wilkes, "I coulda made those motherf*ckin' sl*ts look like the liars! You in with the judge and his helper, the DA!"

This was the opening Wilkes was praying for. He asked to approach the bench, but Judge Knott, who was smart enough to anticipate trouble, stopped Wilkes in his tracks. He said, "The motion which I believe you are about to make is anticipatorily denied."

"Anticipatorily denied?" asked Wilkes. The words hit my soggy friend like a wet towel across the face, but he recovered from the blow quickly. Dripping wet, but excited by the prospect of now having something to work with, Wilkes said, "No, Your Honor, I wasn't making that motion. I was going to move for a mistrial in light of the assault on my person by my client. It is evident to me that even the fair ladies and gentlemen of this jury would be greatly challenged to wash this act of uncontrollable violence and obscene language from their minds."

Standing in the well of the court, his hair awash, his face dripping water on his yellow notepad which he held in his damp hands, his light-colored suit darkened at the shoulders from the water, Wilkes smiled for the first time since the trial began.

Knott was in a fix. He knew better than to continue to joust with my moistened friend in front of the jury. He said, "Yes, by all means, approach the bench and let us work it out." He turned to mug before the jury and said, "Didn't Isaiah say it best, 'Come let us reason together'?"

As Wilkes and Landish came toward the bench, Knott added, "And let us have the Lizard, or rather the defendant, up here, too." I came, too, as this was my role as cocounsel: to be ever present - seen but not heard. When we reached the bench, Knott's cool exterior came away. He was fit to be tied. He whispered loudly in the direction of Wilkes and the Lizard, "What the h*ll are you trying to do, lose us this case?"

The Lizard said angrily, "Say, man, my mouthpiece should have killed them lying b*tches on cross."

Wilkes added, "And just what do you mean - 'lose us this case'? Who's us?"

The Lizard was quick on the uptake. "Yeah, man, whatchu mean by that?"

Seeing his perfect case slipping from his grasp by the ill-chosen words of Hizoner, Miles Landish came to the rescue. "Of course, Your Honor obviously meant that the intentional misconduct we have just seen and heard from the desfense team is a clear attempt to manipulate a mistrial and thus lose the case for all of us - the defense, prosecution, the court, the jury, and the People of the State of New York."

Knott appreciated the lead. "Yes, yes, precisely!" he lied. "Precisely! It was a completely nonpartisan remark, and I deeply resent the implication you are making, Mr. Wilkes."

In all my years of practice, I never did figure exactly what motivated judges to lie like that. It was probably a combination of the desire to avoid the embarrassment of being reversed on appeal for such stupid comments in a published opinion - thus daunting one's hopes for advancement to that very August court - and the dread of retrying the case the second time after it came back. Particularly if it meant trial with John Wilkes defending.

Knott continued his tongue-lashing of Wilkes. "How dare you challenge the court's integrity. Your insulting question is sanctionable, to say the least." Knott could have held Wilkes in contempt for his simple question of the judge's revealing comment, but the judge was too new to the bench and did not have the foggiest notion of how to do it.

He would learn.

Wilkes asked, "And my mistrial motion? Given what this jury just saw and heard, my client's right to a fair trial has been lost."

"That'll be denied, counsel," said Knott, using the inevitable line which like a thundering Greek chorus filled his courtroom after every defense motion. "He did it to himself and we will have no self-help mistrials. We're in recess. Final arguments to the jury tomorrow at nine A.M."

Plea To The Jury

I mentioned that facing a jury in the opening statement of a hopeless case is a time filled with fear and loathing. Only one moment is worse in such cases - final argument, especially when you haven't produced a scintilla of doubt about your client's guilt, and the other side has put on the perfect case.

Landish's final argument was just like his long and loud opening, filled with detailed accounts of damning facts and testimony. He closed with a line that summed up my feelings at the time: "After hearing this evidence, ladies and gentlemen, you almost feel sorry for the attorney who has to argue against it. It's a task comparable to bringing the dead back to life. Let's hear what Mr. Wilkes has to say, shall we?"

With that, Landish plopped his large behind into his wooden chair. All eyes turned to my friend, and as Wilkes rose to address the jury, he whispered to me, "Don't I even get a blindfold or a last wish?"

There was only one cherished issue to argue, one sacred subject which the defense must rely upon when the evidence is so one-sided and the jury looks like a firing squad: the prosecution's burden of proof beyond a reasonable doubt. For this, Wilkes uncovered a chart, the JOHN WILKES REASONABLE DOUBT ACQUITTAL METER.

Raw Deal

"You didn't hear Miles Landish talk too much about this, did you?" Wilkes began explaining his chart and reasonable doubt. He did it in such a fashion that, if believed, would make the guilty verdict extinct.

"You see the levels of certainty I have labeled here and which ones correlate with a not guilty verdict. And you see on the chart examples of witnesses who usually carry with them a certain level of credibility. Well, the seventy-two tarts in this case are all at the very bottom, aren't they? They're there because their story's so pat - sure, pin it on Mr. Gidone, and no charges or probation revocation or sentences to jail for us. That's the deal they've received, and it's the raw deal they're handing Mr. Gidone. Does Mr. Landish really believe these ladies, who sell their bodies for fifty dollars, would hesitate at selling false testimony for their freedom? Are you prepared to rely on that kind of testimony?"

My friend put his hands to the wooden rail that fronted the two rows of jurors. "You know, ladies and gentlemen, when I was in the army, we had a story about reliance and doubt."

Landish jumped up and objected to Wilkes's reference to his old army days. Wilkes responded, "What on earth is the matter with me merely mentioning I was in the army? I certainly wasn't going to say that I served with distinction at the Battle of the Bulge and was wounded twice in destroying an enemy machine-gun nest, or received two Purple Hearts, the Silver Medal, the French Legion of Merit, the - "

Judge Knott cut off my friend and sustained the prosecutor's objection.

On And On

Wilkes continued. He argued the motivation of each of the tarts to lie. He explained the Lizard's highly incriminating postarrest statements as "ambiguous and police-coerced." He hinted at the acceptability of prostitution - "These ladies belong to a profession older than my own, and I would daresay more respected" - in the hopes that a few jurors would refuse to convict on the ground that merchandising sex wasn't all that bad.

In the middle of Wilkes's argument, he asked the court for a brief recess to "rest his tonsils." I knew there had to be another reason since my friend could, if he had to, bellow for hours without the least strain on his voice.

"I've got an idea," he said. "When court reconvenes, I want you to be outside. After I argue for a few moments, rush in and hand me this note."

He handed me a blank, folded piece of paper. I knew my friend well enough not to take time asking silly questions about it. I simply obeyed.

When court reconvened and Wilkes recommenced his peroration to the jurors, I bounded into the court and, looking quite serious, rushed to where Wilkes was standing before the jurors. As instructed, I handed him the note with great ceremony and sat down.

Eyes To The Door

Wilkes carefully opened the note so as not to let anyone see there was nothing written on it and said, "Ladies and gentlemen! I have wonderful news! This has never happened to me in my entire career! My associate here, Mr. Schoonover, informs me that the actual pimp of the seventy-two tarts has confessed and is in custody. He will be coming through those doors any second."

Wilkes pointed to the two swinging mahogany doors in the rear of the courtroom. The jurors' eyes fastened on the doors. Knott looked, too. So did Landish. We looked and waited and waited and looked.

After about a minute, Wilkes said, "Ladies and gentlemen, no one will be coming through that door. I apologize for misleading you, but I did it to make a point. The fact that every one of you looked to that door indicates you still have a doubt, a reasonable doubt, as to the truthfulness of the tarts' testimony that my client was their pimp. And, I might add, you were not alone in looking. Even Mr. Landish and the judge looked. Even they have a doubt."

With that, Wilkes sat down. It was an interesting and well-exercised gambit by defense lawyers, first used, if my memory serves me, in France by an innovative lawyer who made the same mistake Wilkes did on this day.

Rebuttal

Miles Landish got up to rebut Wilkes's argument. He was quite brief. "Yes, I looked to the door, but only to see if anyone would be foolish enough to come into this court to perjure himself. And you, ladies and gentlemen, looked out of curiosity. Anyone would. But there was one person who did not look. One person in this courtroom who knows that no one else could stand in his place as the filthy little guilty pimp!"

Landish moved over to the defense table and stuck his finger in the Lizard's face. "This man, ladies and gentlemen, this man's eyes never moved an inch. His head did not turn because he knows, as only he could, that no one would enter this courtroom because he is a guilty son of a b*tch!"

I must say that was the best argument I ever heard Miles Landish make in all the many courtroom battles Wilkes and I had with him. Wilkes had made the mistake of failing to properly choreograph his client's eyes to move in the direction of the doors when he majestically pointed there in hopes that the fantasy pimp would burst through them. It's what occurs when you don't share your brainstorms with your client.

Landish was not quite done for the day. As the jury filed out to deliberate their verdict, he said, "Judge, we're concerned about the possibility of jury tampering during deliberations."

Knott gave a look of feighed concern. No one could believe this jury would be out long enough to be tampered with. Nevertheless, this was a ploy aimed at us, so the judge figured there was no harm in playing it out. "Shall we sequester the jury until they reach a verdict, then?" asked the sanctimonious bastard.

"It might be simpler," said the DA, "if we just sequestered Mr. Wilkes with his client in the lockup."

Wilkes was about to start into it with the two of them when we heard the bailiff yell out, "They have a verdict!"

The Sentence

I shall not lengthen this tale to describe the rendering of the seventy-two verdicts. Wilkes demanded a polling of each juror on each count, which led to the Lizard hearing himself pronounced guilty 864 times over the next two and one-half hours.

The Lizard's reaction was expected. He bolted for the door, as well he should have. At sentencing two weeks later, Judge Knott gave him seventy-two consecutive one-year sentences. An angry Lizard left the court with promises to visit Wilkes someday and give him one of his famous Drano cocktails.

After sentencing, Wilkes, never good at taking defeat even in the most hopeless of cases, was despondent. He sulked all the way back to the office. As we entered the Woolworth Building and waited for an elevator, I remembered Lawrence of Arabia's brave line and said to my friend, "There could be no honor in a sure success, but much might be wrested from a sure defeat."

Wilkes looked at me in disbelief. "Yeah," he said, "like what? All I wrested out of this loser was the experience of having the living crap kicked out of me. Lawrence of Arabia never defended a pimp like Hank 'The Lizard' Gidone in front of the likes of Judge Yulburton Abraham Knott."

He had a point.

- To Be Continued -

CA7 Case Digest

By: Jonathan Hawley
First Assistant Federal Defender

APPELLATE PROCEDURE

United States v. Chapman, ___ F.3d ___ (7th Cir. 2008; No. 07-3637). Upon appeal after a sentence reduction pursuant to Rule 35(b), the Court of Appeals explained the extent of appellate review in such cases. The government filed Rule 35(b) motions to reduce the defendants' sentences. Noting the seriousness of the defendants' criminal history, the court declined to grant the full reduction suggested by the government. The defendants argued that the district court considered factors that it should not have considered (factors already considered at the original sentencing hearing), and failed to consider factors that it should have considered (the disparity between the defendants' reduction and reductions granted to other defendants who had given similar levels of assistance to the Government). The Court of Appeals noted that an appeal from a Rule 35(b) order is an appeal from an "otherwise final sentence," over which it has jurisdiction only in limited circumstances. Specifically, the court asks only whether the reduction was imposed in violation of the law, not whether the new sentence imposed was reasonable. The Government characterized the defendants' claims as mere complaints that the district court did not exercise its discretion to reduce their sentences to the extent they had hoped. In the government's view, the defendants' arguments did not amount to an allegation that they were sentenced "in violation of law." Therefore, in its view, the court did not have jurisdiction to consider the defendants' claims under section 3742. The Court of Appeals disagreed. Specifically, the court concluded that the defendants were asserting a methodological error which was an allegation of an error of law subject to the court's jurisdiction. Specifically, the defendants were alleging that their sentences were reduced in "violation of the law," arguing that the district court considered improper factors at the Rule 35(b) hearing.

Easley v. Reuss, ___ F.3d ___ (7th Cir. 2008; No. 06-1646). In this civil case, the Court of Appeals discussed the purposes of petitions for panel rehearings and petitions for rehearings en banc. Appellate Rule 40 governs petitions for panel rehearing. Petitions for panel rehearing should alert the panel to specific factual or legal matters that the party raised, but that the panel may have failed to address or may have misunderstood. It goes without saying that the panel cannot have overlooked or misapprehended an issue that was not presented to it. Panel rehearing is not a vehicle for presenting new arguments, and, absent extraordinary circumstances, the court will not entertain arguments raised for the first time in a petition for rehearing. Petitions for rehearing en banc are governed by Appellate Rule 35. En banc rehearing has a different focus than panel rehearing. Panel rehearings are designed as a mechanism for the panel to correct its own errors in the reading of the factual record or the law, rehearings en banc are designed to address issues that affect the integrity of the circuit's case law (intra-circuit conflicts) and the development of the law (questions of exceptional importance). Given the heavy burden that en banc rehearings impose on an already overburdened court, such proceedings are reserved for the truly exceptional cases.

McCarty v. Astrue, 528 F.3d 541 (7th Cir. 2008; No. 07-2104). In a civil case, the Court of Appeals considered what constitutes "excusable neglect" for failure to file a timely notice of appeal. The appellant requested a three-day extension to file her notice of appeal, explaining that counsel misunderstood Federal Rule of Civil Procedure 6(e), which allows an additional three days "whenever a party must or may act within a proscribed period after service and service is made under Rule 5(b)(2)(B)." The district court granted the extension, noting that the delay did not prejudice the other party or unnecessarily delay the judicial proceedings, and that dismissal of the appeal

would be too harsh of a sanction for a relatively minor mistake. The Court of Appeals held that the district court abused its discretion in granting the motion for extension of time to file the notice of appeal. First, the court noted that it is unlikely that harm will every result from the filing of a late notice of appeal, because there is a limited time period to request an extension of time. Thus, the word "excusable" would be read out of the rule if inexcusable neglect were translated into excusable neglect by a mere absence of harm. Second, the court was wrong to characterize the mistake as "relatively minor." A timely notice of appeal is a mandatory prerequisite to appellate jurisdiction, and a failure to timely file results in dismissal of the case. It therefore "can hardly be considered a relatively minor mistake." Moreover, an unaccountable lapse in basic legal knowledge is not excusable neglect. Rule 6(e) only enlarges the filing time when the period for acting runs from the service of notice, not when the time for acting is designated from the entry of judgment. Any trained lawyer should recognize the distinction. Finally, the attorney was an experienced federal litigator, having thirty-nine years of experience having argued before the Court of Appeals at least a dozen times. Therefore, the mistake amounted to inexcusable neglect, and the district court abused its discretion in granting the motion for extension of time to file a notice of appeal.

United States v. McHugh, 528 F.3d 538 (7th Cir. 2008; No. 07-3594). In this appeal, the district court modified the judgment pursuant to Federal Rule of Criminal Procedure 36 while an appeal was pending, and the Court of Appeals held that the district court lacked the jurisdiction to do so. The defendant appealed a recommendation made by the sentencing judge at sentencing. While the appeal was pending, the Defendant filed a *pro se* petition to correct the judgment, and the district court granted the motion. Rule 36 provides that clerical errors may be corrected at any time. However, the Court of Appeals noted that a district court may not interfere with the appellate court's jurisdiction by amending a decision that is under appellate review. The filing of a notice of appeal is an event of jurisdictional significance–it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal. Although a district court may patch up clerical errors affecting one aspect of a case while another aspect is on appeal, it may not use Rule 36 to change the precise feature of a disposition that is under appellate review.

Gross v. Town of Cicero, 528 F.3d 498 (7th Cir. 2008; No. 06-4042). Upon consideration of the appellant's motion to reconsider an order dismissing the appeal for failure to prosecute, the Court of Appeals reinstated the appeal but fined counsel $5,000 for his failure to file a timely brief. The appellant sought numerous extensions of time, totaling more than 17 months. Upon the grant of its final extension of time, the court warned that "[n]o further extensions of time will be granted, and failure to file the appellant's brief by the due date as extended will result in the dismissal of the appeal for failure to prosecute." The brief arrived in the court on April 25, four days after the April 21 deadline. The appeal was accordingly dismissed. In it's motion to reconsider the dismissal, the appellant first argued that the parties were engaged in negotiations to settle the appeal and further extensions should not have been foreclosed. The court noted, however, that if this was the case, the appellant should have sought reconsideration of its order forbidding further extensions rather than filing the brief late in violation of the order. Secondly, the appellant's counsel noted that although she had given the brief to her assistant to file on the date the brief was due, it was not until the 25th that she discovered that her assistant had failed to do so. Upon discovering the mistake, counsel dispatched a courier to deliver the brief to the court. Lastly, counsel noted that "this has not been the first time [that counsel] has had issues with that particular employee." The court first noted that counsel's "Proof of Service" was false, as it noted that the brief was dispatched to the court on April 21. Second, counsel did not explain why she didn't check to see that the brief had been filed herself, given that the assistant was known to be unreliable. Due to these mistakes, both the court and the appellees had been inconvenienced. Thus, the right response to carelessness of the type exhibited in this case was not to say "never mind" and proceed as if everything had been done properly. On the other hand, small shortcomings should not be treated the same as serious ones; otherwise people would take excessive care to avoid small injuries, while there would be no marginal deterrence of more serious problems. Accordingly, the court concluded that the proper sanction in a case like this was not dismissal of the appeal, but a financial penalty of $5,000, half of which was to be paid to the appellees and half to the clerk of the court.

United States v. Schalk, 515 F.3d 768 (7th Cir. 2008; No. 06-2142). In prosecution for drug offenses, the Court of Appeals held that the defendant's challenge to the admission of evidence at his trial would be reviewed for plain error because his reason for challenging the evidence was different on appeal than in the district court. In the district court, the defendant challenged the admission of ledgers of transactions as irrelevant and unfairly prejudicial. On appeal, the defendant challenged them as inadmissible hearsay. The Court of Appeals noted that a definitive, unconditional ruling *in limine* preserves an issue for appellate review, without the need for later objection. A litigant who loses an evidentiary ruling and then offers the evidence himself does not waive the established objection for purposes of appeal. However, Rule 103(a)(1) of the Federal Rules of Evidence requires litigants to state a specific ground for an objection to

evidence, and "grounds not presented cannot be raised later, else both judge and adversary are sandbagged (and preventable errors occur)." In other words, the specific ground for reversal of an evidentiary ruling on appeal must also be the same as that previously raised. If no objection was made that would put the district court (and the other party) on notice of the objecting party's concern then the standard of review is for plain error. Thus, because the defendant raised on appeal a new ground for challenging the admissibility of the evidence, it could only be reviewed for plain error, notwithstanding the objection on other grounds made in the district court.

United States v. Harvey, 516 F.3d 553 (7th Cir. 2008; No. 07-1308). In this appeal, the Court of Appeals considered whether the defendant's notice of appeal, filed electronically, was sufficient even though the district court's local rule requires such notices to be filed on paper. The defendant's attorney filed a timely electronic notice of appeal that contained all the necessary information, but the local rules of the Eastern District of Wisconsin required it to be filed "conventionally on paper." Although the clerk's office notified counsel that he needed to file a paper copy, he waited two months to do so. Thus, the Court of Appeals considered whether it had jurisdiction to hear the appeal. For purposes of Federal Rule of Appellate Procedure 4, the court accepts any timely filed document that identifies the parties, the judgment being appealed, and the court to which the party appeals. Although the defendant's notice satisfied these requirements, it violated the local rule. Federal Rule of Civil Procedure 5(e) ensures that any document presented to the clerk in violation of a local rule of form can nonetheless be filed for purposes of satisfying a filing deadline. Additionally, the court recently held in *Farzana v. Ind. Dep't of Educ.,* 473 F.3d 703 (7th Cir. 2007), that Rule 5(e)'s protection regarding errors of form "covers all matters regulated by the rules of procedure." Accordingly, the court held that the defendant timely filed his notice of appeal when he submitted it electronically, notwithstanding the violation of local rules.

United States v. Shaaban, 523 F.3d 680, (7th Cir. 2008; No. 06-2801). Upon consideration of the defendant's *pro se* petition to recall the mandate, the Court of Appeals appointed the defendant's new counsel to consider whether the filing of a petition for rehearing was warranted. Before the defendant's appeal was decided, defense counsel sent the defendant a letter informing him that he would argue for a rehearing if his appeal was denied. After the appeal was in fact denied, however, counsel did not file such a petition and made no mention of a petition in subsequent correspondence. In response, the defendant asked the court to recall the mandate to allow a petition to be filed. The Court of Appeals noted that an appointed counsel's duties do not end when the court renders an adverse decision; counsel must consider filing post-opinion pleadings in the Court of Appeals. The Seventh Circuit's Criminal Justice Plan explains that it is counsel's duty to file a petition for rehearing if a defendant requests that counsel do so and there are reasonable grounds for such a petition. If counsel concludes that such a petition would be frivolous, then he must inform his client of this conclusion and inform him that he can request that the court order him to file a petition. Given that these procedures were not followed in the present case, the court appointed the defendant new counsel to file a petition for rehearing, or otherwise follow the procedure set forth in Circuit Rule 51(b). Subsequent to this decision, new counsel filed a motion to withdraw and requested that the defendant be allowed to proceed *pro se*, noting that although counsel had identified a non-frivolous issue to raise in a petition for rehearing, the defendant did not want that issue raised. Instead, the defendant wanted other issues deemed by counsel to be frivolous raised. Accordingly, the court allowed counsel to withdraw and granted the defendant's request to proceed *pro se*.

United States v. Hawkins, 505 F.3d 613 (7th Cir. 2007; No. 06-2094). On motion of appointed counsel to withdraw and the defendant's motion for new counsel to assist with the preparation of a petition for rehearing after the Court of Appeals affirmed the defendant's conviction and sentence, the Court of Appeals granted both motions. In the motion, counsel noted that in her professional judgment there was no reasonable basis for filing a petition for rehearing or petition for certiorari. Judge Ripple, writing an "In Chambers" opinion, noted that appointed counsel was correct in stating that the decision to file such post-judgment petitions is left to the sound discretion of appointed counsel. In this case, however, the court concluded that given the nature of the claim raised on appeal and the conclusory nature of appointed counsel's submission, it could not accept counsel's conclusion that a petition for rehearing would necessarily be frivolous. Specifically, counsel made no effort to come to grips with existing case law or the panel's analysis. Thus, under these circumstances, the court granted counsel's motion to withdraw and appointed new counsel to evaluate the case and consult with the defendant. If replacement counsel agrees with the view of former counsel, then replacement counsel may file, with notice to the defendant, a motion to withdraw, and the defendant may, if he wishes, file a response to counsel's motion.

United States v. McGee, 508 F.3d 442 (7th Cir. 2007; No. 07-2078). Upon appeal of a district court's grant of a Rule 35(b) motion for substantial assistance, the Court of Appeals held that it lacked jurisdiction to hear the appeal. After the defendant's direct appeal was concluded, the government filed a Rule 35(b) motion and the court granted it. The defendant, however, appealed and argued

that the district court did not lower his sentence enough. His appellate counsel then filed an *Anders* brief, concluding that the district court did not have jurisdiction to hear the appeal. The Court of Appeals agreed. An appeal from a Rule 35(b) order is an appeal from an otherwise final sentence as that phrase is used in §3742(a), and thus that section, and not 28 U.S.C. §1291, governs the appellate court's jurisdiction. That section allows the court to review sentences, but the jurisdictional mandate is limited and does not extend to a district court's discretionary decisions regarding sentencing. This limited jurisdiction allows for appellate review of a Rule 35(b) determination only if the contention on appeal is that the decision was imposed, for example, in violation of law, or because of an incorrect application of the sentencing Guidelines. The statute does not authorize an appeal from a Rule 35(b) decision if the only contention is that the district court did not exercise its discretion more favorably to the defendant. The court concluded by noting that *Booker* did not change this analysis, given that the decision excised §3742(e) from the statute, not §3742(a), the statute which governed jurisdiction in this case.

United States v. Reyes-Sanchez, 509 F.3d 837 (7th Cir. 2007; No. 05-4040). In prosecution for illegal re-entry, the government originally appealed the district court's below Guideline sentence of 33-months based upon a discount for being an illegal alien, and the Court of Appeals reversed the variance as improper. After the remand, neither the district court nor the U.S. Attorney took action. Thus, rather than being re-sentenced, the defendant completed his original term of imprisonment, was released, and deported back to his home country. Fourteen months after the original mandate issued, the U.S. Attorney discovered its error, asked the Court of Appeals to recall its mandate, and reinstate the 33-month sentence it originally found to be erroneous. The reason for this proposed step was that the case otherwise would loiter on the district court's docket until the defendant again illegally reenters the country, is caught, and is compelled to resume serving time in this case. The Court of Appeals noted that, although a court of appeals has the authority to recall its mandate, the power should be used only in extraordinary circumstances when inaction would lead to an injustice. Here, no such injustice would occur if the case is allowed to remain on the district court's docket. Moreover, if the U.S. Attorney thinks that a case lingering on the district court's docket is an intolerable blot on a federal record-keeping system, he is free to dismiss the indictment or recommend that the President commute Reyes-Sanchez's sentence to time served. As things are, however, the court concluded that the Judicial Branch should stand ready to impose a lawful sentence as soon as the defendant is available for sentencing, or is deemed voluntarily absent for the purpose of Rule 43(c)(1)(B). Thus, the court denied the motion to recall the mandate.

EVIDENCE

United States v. Nunez, ___ F.3d ___ (7th Cir. 2008; No. 07-2617). In prosecution for drug related offenses, the Court of Appeals affirmed the introduction of transcripts of intercepted telephone conversations. At trial, the government introduced 21 telephone conversations conducted in Spanish. English transcripts of those conversations were also introduced, and the transcripts had certain drug terms of the trade footnoted and defined as well. The interpreter also testified at trial, stating that he inserted the definitions on his own accord without anyone requesting that he do so. The judge instructed the jury that it could afford as much weight as it felt proper to the transcripts of the intercepted conversations. The Court of Appeals held that this instruction was error. Transcripts should not ordinarily be given independent weight. The jury should instead be instructed that it is the tape recording itself which is the primary evidence, that the transcript is to assist the jury in evaluating the primary evidence, and that if the jury determines that the transcript is in any respect incorrect, it should disregard it to that extent and rely on its own interpretation of the recording. Nevertheless, the court held that the error was not reversible because the language specialist testified at trial as to the definitions given the code words marked in the transcripts, and that testimony was entitled to as much or as little weight as the jury wanted to give it.

United States v. Harris, ___ F.3d ___ (7th Cir. 2008; No. 07-1315). On appeal from the district court's refusal to compel the government to reveal the identity of a confidential informant at a *Franks* hearing, the Court of Appeals affirmed. The court noted that the government has a limited privilege to withhold the identity of a confidential informant from a criminal defendant. This privilege gives way if the defendant proves that the disclosure of the informant's identity is relevant and helpful to his defense or is essential to a fair determination of a cause. To determine whether the government is required to disclose the identity of the informant, the court must balance the public interest in protecting the flow of information against the individual's right to prepare his defense. This depends on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. Additionally, the role of the confidential informant is an important factor to consider when determining whether the informant's identity need be disclosed. When the confidential informant is a mere "tipster"–someone whose only role was to provide the police with the relevant information that served as the foundation for obtaining a search warrant–rather than a "transactional witness" who participated in the crime charged or witnesses the event in question, disclosure will not be required. In the present

case, the CI played no part in the transaction charged against the defendant. He did not actively participate in the investigation, and his role was only to provide information that served as the basis for obtaining the search warrant. Therefore, the government was not required to disclose the CI's identity.

United States v. Shrake, 515 F.3d 743 (7th Cir. 2008; No. 07-1790). In the first case to consider the constitutionality of the Adam Walsh Act in a child pornography prosecution, the Court of Appeals rejected all of the defendant's challenges to a discovery provision contained in the Act. The defendant was arrested for possession and transmission of child pornography over the Internet, and the government seized his computer. Section 3509(m) of the Act required the defendant's expert to visit a governmental office to analyze the contents of the hard disk. The defendant filed a motion asking the district court to order the prosecutor to make a copy of the hard disk for his expert's use; the expert could then use his own forensic tools to analyze the hard disk's contents. The judge denied the motion based upon §3509(m). On appeal, the defendant maintained that §3509(m) violates the first amendment (because 18 U.S.C. §2256, to which it refers, is overbroad), the fifth amendment (because it allows the prosecutor to determine whether evidence comes within the scope of §2256 and because the statute lacks a rational basis), and the sixth amendment (because it deprives the defendant of confrontation and compulsory process). The Court of Appeals noted that all of the defendant's challenges rested on the assumption that the Constitution creates a right to pretrial discovery in criminal prosecutions. In fact, defendants are not constitutionally entitled to discovery. Accordingly, the court concluded that it was hard to see how limits on discovery could be unconstitutional–and impossible to see how a statute that qualifies its limit with a requirement that the evidence be "reasonably available to the defendant" before trial could be invalid. Only one aspect of the statute's implementation gave the court pause in this case. Although the district court denied the defendant's motion for an exact copy of the hard disk for his expert's use, the prosecution provided such a copy to its own expert. When the defendant learned about this differential access, he asked the district court to foreclose testimony by the prosecution's expert; the judge denied the motion. On appeal, the government argued that an expert for the prosecution is part of "the Government" as used in §3509(m). The Court of Appeals disagreed, noting that the expert was a private consultant. Access provided to private experts retained by the prosecution must be provided to private experts retained by the defense. The district court did not, however, abuse its discretion in denying the defendant's pretrial motion to prevent the prosecution's expert from testifying. The appropriate relief which was not requested would have been access to the defense on equal terms. Accordingly, the Court of Appeals affirmed the conviction.

United States v. Taylor, 522 F.3d 731 (7th Cir. 2008; No. 06-4112). In prosecution for drug offenses, the Court of Appeals found that the district court erred in allowing the admission of 404(b) evidence. The defendant was arrested after an officer observed an illegal tinted cover on the defendant's car's license plate. At trial, the officer testified that he recognized the defendant as a result of having known him "throughout his career as a police officer and as a drug and gang officer." This evidence was both irrelevant and damaging, according to the court. According to the court, it is not as if the government had to try to justify the arrest on the basis not of the traffic offenses but of suspicion that the defendant was a drug dealer. Not only was the legitimacy of the arrest for the traffic offense not questioned, it was an issue for the judge rather than for the jury to decide. The court also rejected the government's argument that the evidence was "inextricably intertwined" with admissible evidence. The court noted that the formula for "inextricably intertwined" evidence is unhelpfully vague. Courts do not agree on whether it refers to evidence "intrinsic" to the charged crime itself, in the sense of being evidence of the crime, or whether though evidence of another crime it may be introduced in order to "complete the story" of the charged crime. Neither formula, however, is satisfactory, according to the court. To courts adopting the former, inextricably intertwined evidence is intrinsic, and evidence is intrinsic if it is inextricably intertwined, while the "complete the story" definition of "inextricably intertwined" threatens to override Rule 404(b). A defendant's bad act may be only tangentially related to the charged crime, but it nevertheless could "complete the story" or incidentally involve the charged offense or explain the circumstances. If the prosecution's evidence did not explain or incidentally involve the charged crime, it is difficult to see how it could pass the minimal requirement for admissibility that evidence be reliable. The officer's testimony in this case did not connect to any of the exceptions contained in either formulation of the doctrine. It was just a way of telling the jury that the officer knew the defendant to be a drug offender and gang member for a long time. Although erroneously admitted, the error was harmless, according to the court, because of the other overwhelming evidence against the defendant.

United States v. Moore, 521 F.3d 681 (7th Cir. 2008; No. 06-1355). In prosecution for drug offenses, the Court of Appeals explored the contours of Rule 702. The defendant was involved in a drug transaction where he picked up a suitcase full of heroin. At trial, he claimed that he did not know what was in the suitcase. The government presented the testimony of a police officer assigned to a drug task force, positing that he was an

expert under Rule 702. He testified that except for children, only "people that are involved in the drug deal will be present–and by involved he meant people who have knowledge as to what's taking place, the illegal activity." The parties focused only on the question of whether the witness qualified as an expert and ignored the three questions Rule 702 requires to be answered: 1) whether the witness's view is based upon sufficient facts or data; 2) whether it is the product of reliable principles and methods; and whether the witness has applied the principles and methods reliably to the facts of the case. The Court of Appeals noted that no "facts or data" were presented to demonstrate upon what the expert's opinion rested. Facts are essential to testimony based on "specialized knowledge" as well as to scientific and technical expertise. Yet the witness did not describe any data. The prosecutor's brief rested on the proposition that testimony by any genuine expert is admissible under Rule 702. The court found "that's not so." Most junk science is the work of people with Ph.D. degrees and academic positions. Good credentials may be a necessary condition for expert testimony, but are not a sufficient condition. Ultimately, however, the court refused to reverse, noting that neither party asked the right questions regarding whether the witness's testimony was admissible under Rule 702. A judge is not obliged to look into the questions posed by Rule 702 when neither side either requests or assists. So there was no error; the judge answered correctly the only questioned that the parties posed (whether the witness was an expert).

United States v. Moon, 512 F.3d 359 (7th Cir. 2007; No. 05-4506). In prosecution for drug offenses, the Court of Appeals denied the defendant's Confrontation Clause challenge. At trial, the chemist who performed the tests to determine that the defendant distributed cocaine was unavailable. Therefore, another chemist testified that, based upon the data in the report prepared by the chemist who performed the tests, the substance was in fact cocaine. The defendant argued that the testimony of the chemist, the underlying data in the report, and the opinions of the chemist in the report who performed the test were all admitted improperly pursuant to *Crawford v. Washington*. First, the court concluded that the chemist's testimony was admissible, as he was testifying as an expert witness, not a fact witness. Thus, it was irrelevant whether he actually performed the tests himself. Second, the court held that the data contained in the report was admissible because the data was not "testimonial." Lab results are not "statements" in any useful sense of the word. If they were, then the machine would be the declarant. Thus, the Sixth Amendment does not demand that a chemist or other testifying expert have done the lab work himself for the underlying data to be admissible. Finally, the actual conclusions drawn by the non-testifying chemist as stated in the written report were testimonial and should not have been admitted. However, the conclusions were not harmful to the defendant given that any chemist would have come to the same conclusion, as evidenced by the testimony of the expert who did testify.

FORFEITURE

United States v. Silvious, 512 F.3d 364 (7th Cir. 2007; No. 05-4576). In prosecution for mail fraud, the defendant challenged the district court's forfeiture order. The indictment stated that the government sought forfeiture pursuant to 18 U.S.C. §982, §2314, and 21 U.S.C. §853. At sentencing, the defendant argued that section §982 did not authorize forfeiture because a financial institution was not affected. The government conceded its error, but argued that forfeiture was appropriate under another statute, 28 U.S.C. 2461(c), which authorizes criminal forfeiture in connection with any crime for which civil forfeiture would be authorized–and civil forfeiture for simple mail fraud may be pursued under various statutes. The district court agreed. On appeal, the Court of Appeals noted that the interpretation of 28 U.S.C. 2461 was an issue of first impression in this circuit. However, the court noted that other circuits had held that this statute authorizes criminal forfeiture of the proceeds of any offense for which there is no specific statutory basis for criminal forfeiture as long as civil forfeiture is permitted in connection with that offense. Additionally, the court held that use of this statute instead of the one listed in the indictment did not constructively amend the indictment. Constructive amendment of the indictment is concerned with changes made to the indictment that affect *elements* of the crime. Forfeiture is part of the sentence, not a substantive charge in itself. Accordingly, the court affirmed this portion of the district court's judgment.

INEFFECTIVE ASSISTANCE OF COUNSEL

Suggs v. United States, 513 F.3d 675 (7th Cir. 2008; No. 06-2220). In prosecution for drug distribution and being a felon in possession of a firearm, the Court of Appeals reversed the district court's denial of the defendant's §2255 petition, finding that his appellate counsel was ineffective. Appellate counsel originally sent the defendant a letter noting that he intended to raise three issues of "great merit." Specifically, he noted that the district court mistakenly: (1) admitted evidence of an uncharged conspiracy involving the defendant and a codefendant; (2) admitted the codefendant's written statement in violation of the defendant's right to confrontation; and (3) enhanced the defendant's sentence based on an improper adjustment to his Guideline range for possession of dangerous weapon during his drug offense. Ultimately, however, appellate counsel raised only the variance issue and lost on appeal. The defendant

argued in his §2255 petition that appellate counsel was ineffective for failing to raise the other two issues. The Court of Appeals noted that when evaluating such a claim, it must first analyze the trial court record to determine whether the appellate attorney, in fact, ignored "significant and obvious" issues. It must then compare each neglected issue to, in this case, the issue actually raised on appeal. Only if an ignored issue is "clearly stronger" than the arguments raised on appeal will the attorney's performance be considered constitutionally deficient. To establish prejudice, the defendant must show that there is a reasonable probability that, but for the deficient performance of his attorney, the result of the appeal would have been different. Applying this standard, the court first noted that the issue concerning the admission of the codefendant's statement was very strong. It constituted a clear *Bruton* violation. However, because of the overwhelming nature of the evidence, the court concluded that any error in failing to raise the issue was harmless. On the sentencing issue, however, the court concluded that appellate counsel was ineffective. The enhancement was improperly based on inaccurate information in the PSR. Defense counsel objected at sentencing, and appellate counsel initially identified the issue for appeal in his letter to the client, but failed to raise it inexplicably. This issue was definitely stronger than the variance issue raised, especially given that the variance issue is reviewed under a very difficult sufficiency of the evidence standard. Finally, the defendant was prejudiced by the failure to raise the issue given that elimination of the enhancement would have changed his range from 292-365 months to 235-293 months.

JURY ISSUES

United States v. Vasquez-Ruiz, 502 F.3d 700 (7th Cir. 2007; No. 06-2180). In prosecution form mail and healthcare fraud, the Court of Appeals reversed the defendant's conviction because of a note reading "GUILTY" scrawled in one of the jurors notebooks. The juror in question used her notebook during trial and noticed that someone had written the word "GUILTY" on a blank page in her book. Upon revealing the note to the judge, the judge investigated whether the note improperly influenced the juror or indicated that another juror wrote the note and was trying to sway others on the jury. The district court first tried to determine who wrote the note. The juror indicated that she sometimes left the notebook in the court, but may have taken it home as well. The court then compared the writing to the writing of the other jurors, but could not find a match between the handwriting. Ultimately, the court concluded that "it's not at all clear that this was done by another juror." Secondly, after determining the juror in whose notebook the note appeared could put the event out of her mind and decide the case based on the law and the evidence, the district court gave a curative instruction to the entire jury. The Court of Appeals therefore denied the defendant's motion for mistrial based on the note. The court first noted that a number of aspects of the case gave it grave concern. First, the content on the note was central to the function of the jury. Secondly, the district court's assumption that the note could have been written only by another juror or court cleaning staff excluded the possibility that another person might have obtained access to the notebook and tried to interfere with the jury's deliberations. Given these circumstances, the district court was required to conduct a more thorough investigation. Where the court cannot say with assurance that it was another juror who wrote the note, there was a need to make a greater effort to find out what had happened before declaring that it did not make any difference. Such an investigation would not necessarily involve questioning the other jurors, but as a last resort such a step may have been unavoidable. Given the paucity of the record, the court concluded that the government failed to rebut the presumption of prejudice that arises when a juror is subject to outside influence, on the assumption that the writer was someone not on the jury. However, even if the writer was another juror, the court concluded that the curative instruction was insufficient in this case.

United States v. Taylor, 509 F.3d 839 (7th Cir. 2007; No. 05-2007). In prosecution for armed robbery and murder, the Court of Appeals held that the district court did not put sufficient factual findings in the record regarding the credibility of the government's reason for striking a potential juror. During *voir dire*, an African-American juror stated that she would not consider imposing the death penalty on a non-shooter. The government then used a peremptory challenge to remove the juror and, after a *Batson* challenge, gave the juror's response to the question as its reason for striking her. Under the third prong of the *Batson* test, the trial court must decide whether the defendant established that the government's stated reason is pretext for racial discrimination. In the present case, the government left on the jury two white jurors who gave the same response as the struck African-American juror. When considering the government's reason for striking the juror, however, the district court failed to address the government' reason for striking the juror. Rather, without explanation, the court upheld the strike. Given the district court's failure to put on the record its reasons for finding the government's stated reason acceptable, the Court of Appeals retained jurisdiction over the case and remanded the case to the district court for the limited purpose of supplementing the record with its findings about whether the government's stated reasons for exercising a peremptory challenge against the African-American juror was credible, or whether the defendants met their burden of demonstrating discrimination.

United States v. Menoza, 510 F.3d 749 (7th Cir. 2007; No. 06-2999). In prosecution for distributing methamphetamine, the Court of Appeals held that the district court's flawed procedure for selecting alternate jurors constituted harmless error. At the beginning of jury selection, the court informed the parties that it intended to select 16 tentative jurors to hear the evidence and, after closing arguments, designate four at random to be the alternates. The Court of Appeals held that this procedure violated Federal Rule of Criminal Procedure 24(c). This Rule assumes alternates will be selected separately and sequentially prior to the presentation of evidence and provides for additional peremptory challenges for the parties to use specifically against potential alternates. By delaying the identification of the alternates until after the parties presented evidence, the district court erred. However, pursuant to Rule 52(a), such errors are reversible only if the defendant's substantial rights are affected. Generally, a loss of a peremptory challenge does not constitute the deprivation of a substantial right. Only if the loss has a substantial and injurious effect or influence in determining the jury's verdict does the loss amount to reversible error. Here, the defendant could present no evidence to suggest that the jury was impartial, and the error was therefore harmless.

United States v. Mannie, 509 F.3d 851 (7th Cir. 2007; No. 06-1353). In prosecution for drug offenses, the Court of Appeals reversed the defendant's conviction, finding that his co-defendant's disruptive behavior during trial deprived him of a fair trial. The defendants were accused of being violent gang members part of a large drug conspiracy. From the inception of the proceedings to the end, the codefendant disrupted the proceedings. Among the disruptions were threatening behavior by members of the gallery, repeated outbursts during the trial by the co-defendant, a physical altercation between the co-defendant and his attorneys, and other numerous instances of extreme misconduct on the part of the co-defendant as recounted at length in the opinion. After each incident, the trial judge questioned the jurors to determine whether they could still render an impartial verdict and gave a cautionary instruction. The Court of Appeals noted that in the vast majority of cases, the trial judge can cure the bias that may develop in jurors' minds by issuing cautionary instructions and conducting *voir dire*. However, this case clearly involved a unique set of circumstances that compelled the Court to return to first principles and ascertain what the right to a fair trial truly meant. Certain courtroom situations are so beyond the pale, so prejudicial, that no amount of *voir dire* and cautionary instructions can remedy the defect. Here, things should have never evolved and erupted in the manner they did. The combination of what the jury was exposed to in this case–the co-defendant garbed in prison attire verbally assaulting his attorneys, a campaign of intimidation by members of the gallery, a violent courtroom brawl–amounted to prejudice. This was especially true when considering that the government's theory of the case was that the defendants were dangerous members of a street gang. Finally, noting that the set of circumstances in this case were extremely rare, the Court of Appeals reversed, holding that the defendant was denied a fair trial.

OFFENSES

United States v. Cote, 504 F.3d 682 (7th Cir. 2007; No. 06-3575). In prosecution for using a facility or means of interstate commerce to attempt to persuade, induce or entice a minor to engage in a sexual act in violation of 18 U.S.C. §2422(b), the Court of Appeals affirmed the defendant's conviction over his argument that the statute was unconstitutional because it did not contain a *mens rea* requirement as to the victim's age. At the time of the defendant's offense, the statute read: "Whoever, using a facility or means of interstate commerce . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years to engage in prostitution or any sexual act for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 15 years, or both." The Court of Appeals noted that Section 2422(b), read without a scienter requirement for the age of the victim, arguably could chill protected forms of expression. However, the court concluded that it was not appropriate to read the statute in such fashion. Specifically, in *Morissette v. United States*, 342 U.S. 246 (1952), the Supreme Court established a presumption in favor of a scienter requirement for each statutory element that criminalizes otherwise innocent conduct. Here, the age of the victim is the crucial element separating legal innocence from wrongful conduct. Accordingly, Section 2422(b) may best be interpreted to contain a *mens rea* requirement regarding the victim's age. Therefore, the court held that Section 2422(b) is not unconstitutional on its face and that, in order to ensure the requisite criminal intent, the statute should instead be interpreted to require proof of the defendant's knowledge of the age of the victim.

United States v. Matthews, 520 F.3d 806 (7th Cir. 2008; No. 06-3918). In prosecution for being a felon in possession of a firearm, the Court of Appeals held that momentary possession of an unloaded firearm was sufficient to support the defendant's conviction. The defendant arranged with an informant to trade drugs for guns. After meeting with the informant, the defendant picked up each of the three weapons for a few seconds to inspect them. He was then arrested before he ever took complete possession of the weapons. The defendant argued that the law supporting convictions for momentary possession presumed the possession of loaded guns. The

Court of Appeals disagreed. Although noting that the ability to fire a weapon is one rationale supporting the "momentary" possession rule, the Firearms Act was meant to prevent criminals from in any way coming in contact with firearms of any kind. A momentary possession rule prevents felons from coming into contact with firearms, thus giving effect to one of the purposes of §922. Accordingly, a firearm need not be loaded and operable for a defendant to be guilty under the statute.

United States v. Salgado, 519 F.3d 411 (7th Cir. 2008; No. 07-2163). In prosecution for attempting to rob a person having custody of money belonging to the United States in violation of 18 U.S.C. §2114(a), the Court of Appeals reversed the defendant's conviction. The defendant arranged a drug deal with an undercover DEA agent, but intended to actually rob him. The agent, however, actually had no money on his person when he arrived for the transaction. The defendant argued that he did not commit the offense of attempting to rob a person having custody of money belonging to the United States because the agent had no money on his person. The Court of Appeals noted that the statute makes it a crime to assail "any person having lawful charge, control, or custody of any mail matter or money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs or attempts to rob any such person of mail matter or money, or other property of the United States." Had the agent possessed any currency, the defendant would have clearly been guilty. However, the scope of §2114(a) depends on what is in the victim's pocket. The informant did not carry any money of the United States. So the attempt to rob him did not violate the statute. As stated by the court, "It's really that simple."

United States v. Abu-Shawish, 507 F.3d 550 (7th Cir. 2007; No. 06-1459). In prosecution for federal program fraud in violation of 18 U.S.C. § 666(a)(1)(A), the Court of Appeals vacated the defendant's conviction. The defendant was founder and executive director of a Milwaukee-based non-profit community organization, which received a $75,000 grant to research and create a development plan for part of Milwaukee. The grant came in part from federal funds. The indictment alleged that instead of actually developing a plan, the defendant submitted a plan already created by another entity. The charged offense restricts criminal activity to an individual who is an agent of "an organization, or of a state, local, or Indian Tribal government, or agency thereof." Additionally, the fraudulently obtained property must be "owned by, or is under the care, custody, or control of such organization, government, or agency." The government argued that the defendant was properly charged under the statute because the defendant was an agent of an organization that received federal funding, and he obtained federal funds in a fraudulent manner. The defendant argued that the indictment was insufficient because it did not charge that he was an agent of the organization he defrauded. In other words, he contended that the indictment alleged that he defrauded the City of Milwaukee, though he was not an agent of the city. The Court of Appeals agreed with the defendant, noting that the government neither alleged nor presented proof that the defendant was an agent of the city. Rather, he was an agent of the organization which he ran. According to the to court, the plain language of the statute requires an agency relationship between the defendant and the organization defrauded. The statute contemplates a situation where an insider in an organization that receives federal funds has fraudulently siphoned away funds from the organization. Moreover, the government's reading of the statute would lead to absurd results. Specifically, under its reading, an agent of an organization would be held criminally liable under this provision if he fraudulently obtained funds from any private organization or individual not in any way affiliated with the government so long as these funds were subsequently in the custody of his organization, and his organization incidentally also receives $10,0000 in federal funds that year. Congress did not intend to criminalize with this statutory provision an act that does not implicate the integrity of federal funds in any way. Finally, the court noted that the indictment properly alleged and the evidence was sufficient to show that the defendant defrauded the City. However, he was not an agent of the City, and so he was not properly charged under this statute. Rather, the government should have charged him with mail and wire fraud, but, for reasons unknown, it did not.

United States v. Gordon, 513 F.3d 659 (7th Cir. 2008; No. 07-1714). In prosecution for illegal reentry, the Court of Appeals rejected the defendant's statute of limitations defense. The defendant was originally in the United States on a green card, but was deported after several convictions. In 1995, the defendant presented his now invalid green card at the border, along with his correct name and other identifying information. He was allowed into the country, and he remained here until his illegal status was discovered in 2006, resulting in his prosecution for illegal reentry. The defendant argued that his prosecution was time-barred, arguing that the government had constructive knowledge of his presence in the country, given that he did not surreptitiously enter the country. The Court of Appeals disagreed, noting that a deportee who reenters the United States by presenting an invalid green card but uses his real name still deceives immigration officials as to the legality of his presence, and therefore enters surreptitiously. Additionally, the court previously held in *Are* that when the government "should have discovered" a deportee's illegal presence in the United States is irrelevant to when the statute of limitations begins

to run. Being "found in" the United States at any time is a continuing offense and a deportee who has reentered surreptitiously prolongs his illegal presence in the United States each day he goes undetected. The limitations clock does not run during this period because the deportee's crime continues: he remains illegally "present in" the United States. Here, the date for purposes of the statute of limitations was in 2006, when the defendant was actually discovered by immigration officials. Although noting a circuit split on this issue, the Court of Appeals declined to overrule its prior precedent on the issue.

United States v. Moses, 513 F.3d 727 (7th Cir. 2008; No. 07-1123). In prosecution for possessing destructive devices in violation of 26 U.S.C. § 5861(d), the Court of Appeals affirmed the defendant's conviction over his argument that the indictment underlying his convictions was multiplicitous in violation of the Fifth Amendment's guarantee against double jeopardy. The defendant was convicted of five counts of possession of destructive devices, based upon his possession of five high-explosive grenades. The defendant asserted that his possession of the five devices was a single offense. The Court of Appeals noted that for charges stemming from the possession of multiple firearms under 18 U.S.C. §922, the unit of prosecution was the act of possession, and not the number of firearms possessed. That holding, however, was not based on a determination that the act of possession was the clearly intended unit of prosecution; in fact, the intended unit of prosecution was not clear at all. Because Congress did not clearly articulate the intended unit of prosecution for simultaneous §922 violations, the court declined to turn a single transaction into multiple offenses. Looking to §5861(d) as a matter of first impression, the court noted that the other courts of appeal to consider the question agree that the unit of prosecution for simultaneous and multiple violations of this section is the number of non-registered firearms possessed. Agreeing with the other circuits, the Seventh Circuit held that the government may prosecute a defendant separately for each destructive device possessed.

United States v. Parker, 508 F.3d 434 (7th Cir. 2007; No. 05-2798). In prosecution for being a felon in possession of a firearm (§922(g)(a)) and for being an illegal drug user in possession of a firearm (§922(g)(3)), the Court of Appeals reversed the defendant's conviction based on his multiplicity challenge. It was undisputed that the charges arose from a single incident of firearm possession. Noting that the Seventh Circuit had not addressed the question of whether a single incident of firearm possession may support multiple convictions under §922(g) when the defendant is included in more than one class of persons the statute disqualifies from possessing firearms, the court agreed with the other circuits which have addressed the question and have concluded that multiple convictions are not allowable because the unit of prosecution is the incident of possession, not the defendant's membership in a class of persons disqualified from possession. Nevertheless, because the defendant failed to object and received concurrent sentences on the two convictions, the government argued that the court need not reverse pursuant to its previous holding in *United States v. McCarter*, 406 F.3d 460, 464 (7th Cir. 2005). The Court of Appeals overruled *McCarter*, however, finding that it was contrary to the Supreme Court's precedent in *Rutledge v. United States*, 517 U.S. 292, 309 (1996), which rejected the argument that a concurrent sentence with only a $50 assessment is too insignificant a consequence to warrant vacating a multiplicitous conviction.

PLEAS AND PLEA AGREEMENTS

United States v. Hernandez-Rivas, 513 F.3d 753 (7th Cir. 2008; No. 06-2647). In prosecution for transportation of illegal aliens and illegal reentry, the Court of Appeals affirmed the district court's refusal to accept the defendant's attempts to plead guilty. At the change of plea hearing, the district judge attempted to elicit a factual basis for the plea, but the defendant insisted that he was unaware that his actions were illegal. After giving the defendant three opportunities to admit his guilt, the district judge finally found that there existed an insufficient factual basis for the plea and set the matter for trial. On appeal, the defendant argued that the district court abused its discretion when it refused to accept his plea, because it did not consider any other evidence other than the defendant's statements at the plea. The Court of Appeals noted that a defendant has no absolute right to have a court accept his guilty plea, and a court may reject a plea in the exercise of sound judicial discretion. Nevertheless, a court cannot arbitrarily reject a plea, and must articulate on the record a "sound reason" for the rejection. Here, while it is true that the district judge had a number of options to find a factual basis, including a confession that was contained in the plea agreement or eliciting facts from the prosecutor, the Court of Appeals concluded that the district judge did not err in looking to the defendant to provide the factual basis. The defendant was given numerous opportunities to provide a factual basis for his plea, but all such attempts indicated that the defendant would not be entering into a knowing and voluntary plea because he did not believe he committed a crime. Thus, the district court was within its discretion when denying the attempts to plead.

United States v. Collins, 503 F.3d 616 (7th Cir. 2007; No. 07-1532). Upon a district court's finding that the defendant breached his plea agreement, the Court of Appeals affirmed. The defendant was originally convicted of drug offenses and money laundering. As part of his plea agreement, the defendant agreed to disclose his

interests in any assets that stemmed from his drug transactions, to aid the government in the recovery of those assets, to forfeit all those assets and interests in the United States, and not to contest any action initiated by the government for that purpose. In particular, the defendant agreed to identify and assist in the forfeiture of millions of dollars that he held through various corporate entities in accounts in the Principality of Liechtenstein. In return, the government committed to set aside a significant portion of the recovered funds in trust for the defendant's wife and children. When the government sought to pursue the funds in Liechtenstein, however, the defendant retained an attorney to oppose the government's recovery efforts. After several years of litigation, a Liechtenstein court ruled that the funds were not the product of illegal transactions and returned the funds to the defendant. Five years after entering his plea agreement, the government moved for a finding by the district court that the defendant had breached the plea agreement due to his actions. The district found that a breach had occurred. On appeal, the defendant argued that the district court did not have jurisdiction to consider the government's motion because the motion came five years after the entry of judgment and because the court never ordered the forfeiture of his assets at sentencing. As to the timing, the court held that a court always has jurisdiction to enforce a defendant's obligations under a plea agreement unless the government too has breached. This jurisdiction is secured by 28 U.S.C. §1345, which provides to the federal district courts "original jurisdiction of all civil actions, suits or proceedings commenced by the United States." The motion in this case was a proceeding initiated by the government to enforce its rights under the plea agreement. Moreover, it does not matter how many years have passed since the district court entered judgment. Finally, the court concluded that the defendant's actions clearly violated the terms of the plea agreement, and it therefore affirmed the finding of the district court.

In the Matter of: United States of America, 503 F.3d 638 (7th Cir. 2007; No. 07-2612). Upon petition for a writ of mandamus by the government, the Court of Appeals held that the district court erred in refusing to accept the defendant's plea. The defendant appeared in court to enter a plea, with an agreement with the government that it would file a motion for a sentence below the statutory minimum if she provided substantial assistance in the prosecution of others. Instead of accepting or rejecting the plea, the district court decided to postpone decision until after the defendant had provided whatever information and assistance she could render and the prosecutor revealed whether the motion would be filed. The government then filed a motion to reconsider, arguing that a district court should have accepted or rejected the plea. In response, the district court insisted that the United States provide all the information that the judge thought necessary to make an immediate decision about the defendant's eligibility for favorable treatment for a substantial assistance motion. Thus, the judge submitted a very lengthy list of interrogatories to the government. Rather than answering them, the government filed for a petition for a writ of mandamus. The Court of Appeals held that the district court must rule on the motion for reconsideration without requiring access to information about the ongoing investigations or deliberations within the Executive Branch. Exercise of prosecutorial discretion may be overseen only to ensure that the prosecutor does not violate the Constitution or some other rule of positive law. Judicial review of a prosecutor's discretionary choices is permissible only after the defendant has made a *prima facie* showing that impermissible considerations such as race have affected the prosecutor's decision. Discovery into the prosecutor's decision-making processes may follow, but must never precede, such a showing. If the prosecutor declines, the remedy is to dismiss the indictment rather than hold an inquest. Moreover, if the prosecutor should act unreasonably in failing to make the motion after the defendant's cooperation has been completed, that would provide a "fair and just reason" for allowing her to withdraw her plea. If the prosecutor should act *so* unreasonably that the decision not to make the motion lacks even a rational basis, the court might be entitled to proceed as if such a motion had been made. The existence of these options after the prosecutor had made a decision makes it unnecessary to postpone action on a guilty plea. It is inappropriate for a court to presume that the prosecutor will act unreasonably. What is more, a judicial effort to supervise the process of reaching a decision intrudes impermissibly into the activities of the Executive Branch of government. Accordingly, the court issued the writ.

United States v. Sura, 511 F.3d 654 (7th Cir. 2007; No. 05-1478). In prosecution for being a felon in possession of a weapon, the Court of Appeals held that the defendant's plea was not knowing and voluntary where the district court failed to comply with Federal Rule of Criminal Procedure 11(b)(1)(N), which requires the district court to inform the defendant during the plea colloquy of any waiver of appellate rights contained in the plea agreement and to ensure that the defendant understands the waiver. Applying the plain error test because the defendant did not object below, the court initially noted that given the explicit language of the Rule, there was no question that an error occurred in this case which was plain. Looking to whether the defendant's substantial rights were affected, the court noted that it looks to the totality of the circumstances in the case on the question of whether there was a reasonable probability that, but for the error, the defendant would not have entered the plea. In this case, nothing in the record provided an adequate substitute for the Rule 11 advisement. The defendant was un-

sophisticated and had no legal experience. The record was utterly silent on the question of the appeal waiver, with the district court even failing to ask the defendant if he reviewed the plea agreement with his lawyer. If the court were to assume that the waiver was knowing and voluntary based only on the fact that the defendant (at the time 71 years old and undergoing mental health treatment) is literate and signed the agreement, the court would render meaningless Rule 11(b)(1)(N). Finally, on the question of whether the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings, the court concluded that it did. Given the court's wholesale failure to ascertain that the defendant understood the waiver provision, the enforcement of the waiver would seriously affect the fairness, integrity and public reputation of the plea proceedings. Therefore, the court vacated the defendant's plea and remanded to the district court for further proceedings.

PROSECUTORIAL MISCONDUCT

United States v. Nunez, ___ F.3d ___ (7th Cir. 2008; No. 07-2617). In prosecution for drug offenses, the Court of Appeals held that prosecutorial misconduct did not amount to reversible error. First, when the defendant's testimony differed from the case agent's, the prosecutor asked the defendant if the agent was lying. The Court of Appeals held that this question was prosecutorial misconduct, for circuit precedent makes clear that assessing the credibility of a witness's testimony is the job of the jury, and asking a defendant to comment on the veracity of the testimony of another witness is improper. Secondly, when objecting to an answer given by the defendant, the prosecutor stated that the answer was "unresponsive to the question . . . as well as being patently false." The government conceded that this statement was improper. Nevertheless, the Court of Appeals concluded that the misconduct did not amount to reversible error, given the overwhelming evidence establishing the defendant's guilt.

RESTITUTION & FINES

United States v. Ellis. 522 F.3d 737 (7th Cir. 2008; No. 05-4677). The sole question considered in this appeal concerned the extent of a district court's obligation to establish a payment schedule when imposing a criminal fine. The defendant argued that the court's decision in *United States v. Day*, 418 F.3d 746 (7th Cir. 2005), which held that a district court must establish a payment schedule when imposing restitution, is applicable to the imposition of fines. In *Day*, evidence established that the defendant could not presently make any payments toward restitution; the court held that an order making his restitution payable immediately operated to assign responsibility to the Probation Office to formulate a payment schedule and this constituted an impermissible delegation of judicial authority to the defendant's probation officer. In the present case, the district judge ordered that the defendant's fine be payable in full immediately. However, the court held that *Day's* holding did not reach criminal fines, and the differences between the Mandatory Victims Restitution Act and the fine statute (§3572) demonstrate that the concern in *Day* about improper delegation of judicial authority is not implicated here. Restitution under the MVRA is mandatory, regardless of a defendant's ability to pay and permits consideration of a defendant's ability to pay *only* when establishing a payment schedule. In contrast, criminal fines are discretionary, and sentencing courts must consider ability to pay when determining whether to impose any fine at all. Perhaps because its process requires this threshold determination, the fine statute contains no requirement that the sentencing court establish any manner of payment, but rather makes all fines due immediately absent a court order the contrary. That is, it *permits* but does not *require* the district court to set an alternative payment schedule. Because *Day's* holding turns on mandatory payment scheduling provisions in the MVRA that are absent in §3572, the court concluded that *Day* should not be extended to the imposition of fines under §3572.

United States v. Sawyer, 521 F.3d 792 (7th Cir. 2008; No. 06-1275). In a group of three consolidated appeals, the Court of Appeals considered whether the district court committed plain error by not specifying an installment plan for the payment of restitution. It was conceded that in each case, the defendants lacked the financial ability to pay restitution in full immediately. The defendants first asserted that because they could not pay in full, the district courts were required to set a payment schedule for repayment while they were incarcerated. The Court of Appeals disagreed, noting that prison earnings and other transactions concerning prison trust accounts are so completely within the BOP's control that it would be pointless for a judge to tell the convict how much to pay a month. Although recognizing that six circuits reached contrary conclusions, the court held that leaving payment during imprisonment to the Inmate Financial Responsibility Program is not an error. The statute requires the judge to set a schedule if the defendant cannot pay in full at once, but it does not say when the schedule must begin. The court held that it need not, and as a rule should not, begin until after the defendant's release from prison. Concerning the setting of a schedule for repayment once the defendants' incarceration was completed, the court found that the district court did err in failing to set a schedule for repayment once they were release as required by the statute. Nevertheless, the court found that ordering a defendant to pay restitution in full immediately upon release was not "plain error," and in so holding, overruled several prior precedents which held to the contrary (*Thigpen*, *Pendiello*, and *Mohammad*).

Rather, the court held that where a defendant lacks the wealth to pay at once but the district court orders restitution to be paid in full immediately upon release, such an error does not jeopardize substantial rights, and the uncorrected error does not imperil the fairness, integrity, or public reputation of judicial proceedings.

RIGHT TO COUNSEL

United States v. Ryals, 512 F.3d 416 (7th Cir. 2008; No. 06-4373). In prosecution for drug offenses, the Court of Appeals held that the district court abused its discretion when it failed to make an adequate inquiry into the defendant's motion for new counsel. Three weeks prior to sentencing, counsel filed a motion for a substitution of counsel. However, the district court did not consider the motion until the morning of the sentencing hearing. At the hearing, defense counsel indicated that communications between him and his client had broken down and that he was not prepared to represent the defendant at the sentencing hearing. The defendant also reiterated that he did not want to go forward with his attorney and stated his belief that his counsel had been ineffective at trial. The district judge, however, refused to conduct a further inquiry and forced counsel to proceed with the sentencing hearing. The defendant personally made the majority of arguments at the sentencing hearing, although his counsel made one brief statement. The Court of Appeals concluded that the defendant's motion was timely, for the breakdown in communication had not occurred until the motion was filed. Secondly, the court concluded that the district court failed to make an adequate inquiry into the dispute between the lawyer and client. The district judge asked only two questions of counsel. Additionally, the motion for substitution was the first indication of dissatisfaction with any appointed lawyer, and it was based on a genuine and unbridgeable disagreement about the course of representation. These points suggested that this was a matter to be taken up quickly and seriously. But when the district court turned to the motion it did not even follow up on counsel's answer; it heard a paragraph's worth of transcript from the defendant, and then denied the motion outright. Finally, the court concluded that communication between the lawyer and client had completely broken down, with the two standing apart from each other with "folded arms." The court therefore concluded that the defendant was entitled to a new sentencing hearing. Although the court could not know for certain that having a different lawyer to make better arguments at sentencing would make a difference, they were certain that the circumstances of the defendant's first sentencing hearing gave him almost no chance of obtaining a better sentence based on §3553(a) factors.

SEARCH AND SEIZURE, MOTION TO SUPPRESS

United States v. Hicks, ___ F.3d ___ (7th Cir. 2008; No. 07-1630). Upon consideration of the district court's denial of a motion to suppress evidence, the Court of Appeals affirmed the district court. The defendant was arrested when police responded to a 911 caller who reported that an armed man was beating a woman. The defendant argued that the officers lacked reasonable suspicion to stop him (he possessed a firearm and was a felon) because of striking inconsistencies in the 911 call. Specifically, the caller gave two different names for himself, said that he was inside a house before admitting that he was outside, and revised his position on whether the man he was reporting had a gun. The defendant argued that under the Supreme Court's decision in *Florida v. J.L.*, 529 U.S. 266 (2000), an anonymous and uncorroborated tip is unreliable. The Court of Appeals rejected this argument, first noting that the tip in the present case, unlike in *J.L.*, involved an ongoing emergency. Additionally, unlike *J.L.*, the tipster in the present case gave his name, location, and described his clothing. The court also rejected the defendant's argument that the tip was not reliable because it lacked predictive information that would allow the officer on the scene to test it. The court noted that such testing of the tip would almost never be possible in an emergency situation. Moreover, a rule requiring a lower level of corroboration before conducting a stop on the basis of an emergency report is not simply an emergency exception to the rule of *J.L.* It is better understood as rooted in the special reliability inherent in reports of ongoing emergencies. Reports of ongoing emergencies made in 911 calls are subject to less testing in court than other out-of-court statements. Similarly, when an officer relies on an emergency report in making a stop, a lower level of corroboration is required. Accordingly, the Court of Appeals affirmed the denial of the motion to suppress.

United States. v. Harris, ___ F.3d ___ (7th Cir. 2008; No. 07-1315). Upon consideration of an appeal after a *Franks* hearing, the Court of Appeals affirmed the district court's determination that probable cause existed to support the issuance of a warrant to search the defendant's residence. The defendant originally challenged the warrant in his case, arguing that he was entitled to a *Franks* hearing. The district court denied the defendant a hearing, relying upon a supplemental affidavit filed by the government to bolster a finding of probable cause. Although the district court found that the false statements contained in the original affidavit were made either intentionally or recklessly, the court relied upon the supplemental affidavit to find probable cause. Upon the defendant's first appeal, the Court of Appeals held that the district court improperly denied the *Franks* hearing. Specifically, allowing the government to bolster the magistrate's probable cause determination through post-hoc findings does not satisfy the Fourth Amendment concerns addressed in *Franks*. Having excised the information that the district court

found to be false in the warrant affidavit, the court concluded that the affidavit lacked information that there was ongoing criminal activity at the residence. Accordingly, the court remanded for a *Franks* hearing. Upon remand, the district court decided that it would start at "square one," but to the extent that the evidence did not conflict with the court's prior rulings, the court would apply law of the case principles. However, if new evidence cast a different light on the court's findings, it stated it would reconsider those findings. After holding the hearing, the court in fact changed its finding that the false information in the affidavit was made intentionally or recklessly. The evidence adduced at the hearing, according to the court, showed that the false information in the affidavit was not placed there intentionally or recklessly. Upon the defendant's second appeal, the defendant argued that the law of the case doctrine precluded the district judge from changing its finding on this question. Had it not done so, it would have had to grant the defendant's motion to suppress. The Court of Appeals noted that a court generally should not reopen issues decided in earlier stages of the same litigation. However, the law of the case doctrine authorizes such reconsideration of a previous ruling in the same litigation if there is a compelling reason, such as a change in, or clarification of, law that makes clear that the earlier ruling was erroneous. Moreover, the doctrine is discretionary. Here, the district court did precisely what the Court of Appeals directed it to do, which was to conduct a *Franks* hearing and determine whether the defendant could demonstrate that the search warrant must be voided. The evidence produced at the hearing caused the district court to change its conclusion, and forcing the court to adhere to its original finding would have forced it to ignore new evidence produced at the hearing. Accordingly, the Court of Appeals affirmed the district court.

United States v. Groves, ___ F.3d ___ (7th Cir. 2008; No. 07-1217). In prosecution for possession of ammunition by a felon, the Court of Appeals affirmed the district court's denial of the defendant's motion to suppress evidence. Police responded to a report of "shots fired" in the defendant's neighborhood. Upon questioning outside by the police, the defendant admitted he was a felon, but claimed he was shooting off fireworks. He repeatedly denied the requests for consent to search his apartment, and a magistrate judge denied a search warrant. A few weeks later, police arrived at the defendant's residence when they knew he would be at work and his girlfriend would be at home. The received consent from the girlfriend to search the apartment and recovered ammunition, precipitating the charge in this case. On appeal, the Court of Appeals found that *Georgia v. Randolph*, 547 U.S. 103 (2006) did not require suppression of the evidence. In *Randolph*, the Supreme Court held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to police by another resident." The Court drew a formalistic line requiring the objecting party to be physically present and objecting at the door. Here, the defendant was not physically present. Moreover, there was no evidence to show that the officers did anything to procure the defendant's absence from the premises. This fact is critical, making the case removed from the facts of *Randolph*. *Randolph* expressly disinvites anything other than the narrowest of readings; because the facts here were readily distinguishable, *Randolph* did not render the consent in this case invalid.

United States v. Garcia, 528 F.3d 481 (7th Cir. 2008; No. 07-3582). Upon consideration of an argument that the district court should have suppressed evidence because it was seized pursuant to a search warrant not supported by probable cause, the Court of Appeals succinctly stated the proper standard of review in such cases. Specifically, the court stated: "Recently, in *United States v. McIntire*, 516 F.3d 576 (7th Cir. 2008), we clarified our complex standard of review on this issue. A district court's findings of historical fact are reviewed for clear error, but its legal conclusions are reviewed without deference. On the mixed question whether the facts add up to probable cause, we give no weight to the district judge's decision but 'great deference' to the conclusion of the judge who initially issued the warrant. *Id*. at 578. Here, the district court made no findings of fact, so the appropriate inquiry is whether, with the benefit of 'great deference,' the issuing judge acted on the basis of probable cause."

United States v. Tyler, 512 F.3d 405 (7th Cir. 2007; No. 06-2904). Upon appeal of the denial of a motion to suppress evidence, the Court of Appeals held that officers did not have reasonable suspicion to stop the defendant. While on patrol in Hammond, Indiana, officers observed the defendant walking down the street on a Saturday afternoon with a beer bottle in his hand. Mistakenly believing that it was illegal to have an open container of liquor on the street, the officers stopped the defendant, told him he was breaking the law, and detained him until they could complete a warrant check. After performing the check and returning the defendant's ID, an officer noticed a bulge in the defendant's waist line. The officer then pulled the bulge out and discovered crack cocaine. On appeal, the government first argued that no seizure occurred, analogizing the encounter to a police-citizen questioning situation. The court rejected this characterization, noting that a reasonable person in the defendant's position would not believe he was free to leave given that the officers informed him that he was breaking the law, took his identification, and performed a warrant check. Thus, the defendant was seized. Regarding reasonable suspicion,

the only basis for the stop was the defendant's possession of the bear bottle. In Hammond, however, it is not illegal to possess an open container of liquor on the street. Although the government argued that the beer bottle gave the officers a reasonable belief that the defendant was publicly intoxicated, both officers testified that they did not believe the defendant was intoxicated. Without more, the possession of the bottle supported only a suspicion that the defendant had been drinking, not that he was drunk. Accordingly, the police had no basis for detaining the defendant, and the court vacated his conviction and remanded to the district court.

United States v. Williams, 522 F.3d 809 (7th Cir. 2008; No. 06-3620). In prosecution for armed robbery, the Court of Appeals affirmed the district court's denial of the defendant's motion to suppress the identification of the defendant. After the robbery, four eye witnesses were shown a line-up of six persons who generally matched the description of the robber. The six were identically dressed in prison garb, except that the defendant was the only person wearing white tennis shoes–something the eye witnesses said the robber was wearing. Three of the four identified the defendant as the robber. The defendant argued that the white tennis shoes made the line-up unduly suggestive. The Court of Appeals noted that for eyewitnesses to be prevented from identifying a suspect in court, the pretrial procedure must be "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Misidentification is "irreparable" when the source of the error is so elusive that it cannot be demonstrated to a jury, which therefore will give excessive weight to the eyewitness testimony. Perceptual biases, such as the one in this case, are endemic to identification. The normal way of dealing with them is to expose the problem at trial so that a discount may be applied to the testimony, rather than to exclude relevant evidence. Moreover, the line-up was not unduly suggestive in this case. Although the defendant suggested that "common sense" indicated that putting only one person in white tennis shoes was unduly suggestive, the majority stated that such reliance on common sense was misplaced. Rather, the defendant should have presented some empirical studies demonstrating that such a procedure was unduly suggestive. Having failed to present any such evidence, the court concluded that the procedure was not unduly suggestive. Judge Evans concurred, noting that the majority opinion gives a "bad rap" to common sense. By way of example, Judge Evans assumed that the tellers reported that the robber wore a green sweatshirt with the words, "Girdwood, Alaska" on the front. If the line-up placed only the defendant in such a shirt, common sense tells us that such a line-up is unduly suggestive and no scientific studies would be needed to make the point. Judge Evans nevertheless concurred, noting that his "common sense" told him that the shoes in this case did not make the lineup unduly suggestive.

United States v. Tejada, 524 F.3d 809 (7th Cir. 2008; No. 07-1395). Upon appeal of the district court's denial of the defendant's motion to suppress, the Court of Appeals affirmed the district court relying upon the inevitable discovery doctrine. The defendant met with an undercover agent to conduct a drug deal. The defendant noted that the drugs were in a blue bag which he held, but the defendant insisted they travel to his apartment to complete the deal. When the defendant entered his apartment, agents decided to forcefully enter into the apartment and arrest the defendant. Once inside, the defendant resisted, reaching for a gun in his waistband. Officers eventually subdued the defendant on the living room floor. After the defendant was handcuffed and moved to the kitchen area, agents opened an entertainment center near the spot where the defendant was subdued as part of a protective sweep. Inside, they saw the blue bag. They opened the bag, finding another bag inside. They then opened that bag as well, finding the drugs. On appeal, the Court initially held that the agents were lawfully in the apartment, because the unexpected move in location for the drug deal gave officers exigent circumstances to enter the apartment. Secondly, the officers were justified in opening the entertainment center in a search for weapons. Although it was unlikely that the defendant, handcuffed and on the floor, would be able to lunge for the entertainment center, police did not know how strong the defendant was and he was clearly desperate. However, it was inconceivable that the defendant would have been able to open the cabinet door and then unzip a bag inside another bag and retrieve a weapon. Nevertheless, the court found that the inevitable discovery doctrine saved the search and seizure. Specifically, the court held that if the government wants to use the doctrine of inevitable discovery to excuse its failure to have obtained a search warrant, it must prove that a warrant would certainly, and not merely probably, have been issued had it been applied for. When a warrant is sure to issue (if sought), the exclusionary "remedy" is not a remedy, for no legitimate privacy interest had been invaded without good justification. A requirement of sureness preserves the incentive of police to seek warrants where warrants are required without punishing harmless mistakes excessively. Here, this test was met. The police were unquestionably lawfully in the apartment and entitled to open the entertainment center. There, in plain view, was the blue travel bag which officers knew contained cocaine. There isn't a shadow of doubt that had they applied for a warrant to search the bag, the warrant would have issued. Accordingly, the district court did not err in denying the motion to suppress.

United States v. Cazares-Olivas, 515 F.3d 726 (7th Cir. 2008; No. 07-2080). In prosecution for drug offenses, the Court of Appeals affirmed the district court's denial of the

defendant's motion to suppress. An agent and Assistant United States Attorney placed a call to a federal magistrate judge at 11 pm seeking a telephonic warrant. The magistrate judge gave authorities "judicial authorization" to enter the premises they sought to search, but he failed to actually issue a warrant. Although telephonic warrants are authorized by Federal Rule of Criminal Procedure 41, an agent is supposed to fill out a form and must "read or otherwise transmit the contents of that document verbatim to the magistrate judge." The judge then transcribes the information into the "original warrant," which he signs. Because of the failure to follow this procedure, the Court of Appeals concluded that the search occurred without a warrant. The court also assumed that this fact made the search unreasonable. Nevertheless, the court concluded that the exclusionary rule should not apply. The exclusionary rule is used only for a subset of constitutional errors. Permitting people to get away with crime is too high a price to pay for errors that either do not play any causal role in the seizure (the inevitable-discovery situation) or stem from negligence rather than disdain for constitutional requirements (the *Leon* situation). Here, had the magistrate judge written out and signed a warrant after hanging up the phone, everything would have proceeded exactly as it did. The defendant received the benefit of a magistrate judge's impartial evaluation before the search occurred, and the search was supported by probable cause. All that occurred was a violation of Rule 41, but violations of federal rules do not justify the exclusion of evidence that has been seized on the basis of probable cause, and with advance judicial approval. Allowing the defendant to go free would be a remedy wildly out of proportion to the wrong, which caused him no injury.

United States v. Barnett, 505 F.3d 637 (7th Cir. 2007; No. 06-3215). On appeal by the government of the district court's grant of a motion to suppress evidence, the Court of Appeals reversed and held that the police had reasonable suspicion to frisk the defendant for weapons. Police stopped the defendant after observing him late at night in an area surrounded by a number of closed businesses. They suspected that he may have been involved in a robbery of a nearby restaurant, although they had no report of a robbery in the area. The defendant did not challenge the validity of the stop. After officers stopped the defendant, they observed that he was very nervous and sweating, although the temperature was very cold outside. When they asked him why he was in the area, he said he had just gotten off work at the restaurant and was walking home. When he provided the officers with ID, however, his address was 40 miles away. As the defendant reached for his ID, one of the officers testified that he observed the outline of a gun in the defendant's waistband. Up to that point, the officers said they did not believe the defendant to have been armed. At the suppression hearing, the defendant put on the sweatsuit he wore the night of his arrest. The sweatsuit was grossly oversized, having been borrowed by the defendant from his 400-pound cousin. From the demonstration, the district court concluded that the officers could not have seen the outline of a gun in the sweatsuit's waistband. Eliminating this evidence, the court noted that the officers testified that they did not believe the defendant was armed. Thus, the court concluded that the officers lacked reasonable suspicion to frisk the defendant for weapons. On appeal, the court found that the district court improperly transformed the reasonable suspicion test from an objective to a subjective test. What the officers subjectively believed about the defendant's possession of a weapon was irrelevant. The court concluded that the search was objectively reasonable. Some crimes by their very nature are so suggestive of the presence and use of weapons that a frisk is always reasonable when officers have reasonable suspicion that an individual might be involved in such a crime. Here, the officers had reasonable suspicion that the defendant might have been involved in a burglary, a crime normally and reasonably expected to involve a weapon. Moreover, this suspicion did not dissipate upon questioning by the officers. As long as that suspicion remained alive, the objectively reasonable suspicion that the defendant was armed remained alive. Had the questioning dispelled the objectively reasonable suspicion of the defendant's commission of a crime that often involved weapons, then the court would have had a different case before it.

United States v. Hobbs, 509 F.3d 353 (7th Cir. 2007; No. 06-3371). On appeal of the district court's denial of a motion to suppress evidence, the Court of Appeals affirmed. Authorities had information establishing that the defendant had committed a murder. Officers began surveillance on the defendant's home, observed him leave and drive away, and stopped him shortly thereafter. Officer's discovered 24 grams of cocaine in the defendant's car when he was arrested. Officers then began drafting a complaint for a search warrant of the defendant's home. While they were doing so at the police station, other officers were keeping the defendant's home under surveillance. They observed the defendant's girlfriend leave the house, walk down the street, talk with an unidentified man, and walk quickly back to the residence. As she did so, one of the officers believed that the girlfriend spotted his surveillance. The officers therefore detained her at the door of her house. They then used her key to enter the house and perform a protective sweep, fearing that someone else might be in the house destroying evidence. During the sweep, they observed a powdery substance they believed to be cocaine. They related this information to the officers preparing the complaint and they included a reference to the powdery substance in their complaint. The district court found that the entry into the home was improper because the police

had no basis for believing that anyone else was in the home. The defendant then argued that the inclusion of the improperly obtained evidence in the complaint supporting the warrant invalidated the warrant. Assuming that the entry into the home was improper, the Court of Appeals held that the warrant was supported by probable cause. The fact that a complaint for a search warrant contains information obtained through an illegal entry does not render the search warrant invalid. Rather, if the judge could have found probable cause for the warrant without the improper information, then the warrant is lawful and the independent source doctrine applies, provided that the officers were not prompted to seek the search warrant as a result of what they observed during the initial unlawful entry. Here, the officers had already begun drafting the complaint for the search warrant before the initial sweep of the house took place. Thus, the officers were not prompted to obtain the warrant as a result of the information about the powdery substance inside the house. Moreover, the officers reasonably believed that the defendant, an alleged drug dealer, would keep his drug supply at his house, especially given that only three hours earlier he had been seen leaving the residence and found to possess 24 grams of cocaine only moments later. It was therefore this discovery of cocaine, not the powdery substance seen in the house, that led the officers to obtain the search warrant. The district court therefore properly denied the motion to suppress evidence.

United States v. Collins, 510 F.3d 697 (7th Cir. 2007; No. 05-4708). In prosecution for drug offenses, the Court of Appeals reversed the district court's denial of the defendant's motion to suppress evidence. Believing that the defendant was dealing drugs from his home, a team of DEA officers and uniformed police officers approached his house, carrying a battering ram. They knocked on the front door and heard movement within and a voice say "the police are at the door." After waiting at least 20 seconds, the police then broke the door down and proceeded to search the home without a warrant. The district judge ruled that the officers reasonably believed that there was an emergency–that the defendant or his accomplices were about to destroy evidence. The Court of Appeals noted that the factual basis creating this emergency was that a large number of police officers appeared at the door, someone inside said "the police are at the door," and there was movement inside the house. The Court noted that unless someone was standing right by the door, there would naturally be movement inside a home when someone knocks on the door. Although it was possible that evidence was being destroyed, no evidence was presented to demonstrate that criminals always destroy evidence when the police are at the door. If the police hear evidence being destroyed after they knock on a door, then they may enter without a warrant. Here, however, nothing occurred which would give the officers probable cause to believe evidence was being destroyed. The reactions of the occupants were consistent with perfectly innocent behavior made by anyone answering a knock on the door by police. Accordingly, the Court of Appeals reversed.

SENTENCING

United States v. Higdon, ___ F.3d ___ (7th Cir. 2008; No. 07-3951). In prosecution for defrauding Indiana's Medicaid program out of $294,000, the district court imposed a 60-month sentence, which was above the range of 18 to 24 months as recommended by the PSR and the government. The Court of Appeals vacated the sentence and remanded for resentencing. The court noted that the district judge appeared to believe that the sentencing guidelines treat white-collar criminals too leniently. After *Kimbrough*, a sentencing judge may have his own penal philosophy at variance with that of the Sentencing Commission. Nevertheless, as a matter of prudence, a judge should think long and hard before substituting his personal penal philosophy for that of the Commission. The guidelines are advisory, but they are not advisory in the sense in which a handbook of trial practice is, which a trial lawyer could ignore completely if he wanted to. Rather, a judge must give respectful consideration to the judgment embodied in the guidelines range that he computes. In the present case, the district court made several mistakes and misunderstandings which were decisive in his imposing a sentence almost three times the length of the midpoint of the guidelines range. Among the nine mistakes listed by the court were the following: The judge believed that Medicaid fraud is more serious than other fraud because it is fraud against the government. However, the statute under which the defendant was charged applied almost exclusively to public programs. The judge believed that the fraud was more serious because Medicaid beneficiaries are elderly and poor. However, the program only applies to a subset of the poor, and the victim of the fraud was not the beneficiaries but the program itself. The judge thought the defendant was motivated by "personal greed," but the court noted that this is true of most frauds. Additionally, the judge found that the amount of money involved in the fraud warranted the sentence. However, the defendant would have had to steal $20 million from the program for a sentence of 60 months to be within the guidelines. Finally, although the judge noted that the sentence was imposed to "avoid unwarranted disparity," the court noted that it just recently found a sentence reasonable where a sentence of 36 months was imposed for a case of Medicaid fraud where the loss was twice as much as that involved in the present case. The Court of Appeals also suggested that when a judge decides to impose an out-of-guidelines sentence–whether it is above or below the guidelines range–he should write out his reasons rather than relying

entirely on the transcript of his oral remarks to inform the reviewing court of his grounds. "The discipline of committing one's thoughts to paper not only promotes thoughtful consideration but also creates a surer path of communication with the reviewing court."

United States v. Chapman, ___ F.3d ___ (7th Cir. 2008; No. 07-3637). Upon appeal after a sentence reduction pursuant to Rule 35(b), the Court of Appeals held that a district court may consider 3553(a) factors when reducing a sentence under the Rule. The government filed Rule 35(b) motions to reduce the defendants' sentences. Noting the seriousness of the defendants' criminal history, the court declined to grant the full reduction suggested by the government. The defendants argued that the district court considered factors that it should not have considered (factors already considered at the original sentencing hearing), and failed to consider factors that it should have considered (the disparity between the defendants' reduction and reductions granted to other defendants who had given similar levels of assistance to the Government). The Court of Appeals noted that nothing in the text of Rule 35(b) limits the factors that may militate against granting a sentence reduction or for granting a smaller reduction than requested. A faithful and pragmatic adherence to the mandate of 18 U.S.C. §3553(a) counsels that the nature and extent of any reduction be determined in light of all the sentencing factors set forth in the statute. Post-arrest cooperation cannot be assessed in a vacuum. Whether such cooperation represents an opportunistic attempt to obtain a sentence reduction or a genuine alteration in the defendant's life perspective can best be determined by assessing that cooperation in light of earlier criminal history and the nature of the crime for which the defendant is being sentenced under Rule 35(b). Therefore, the court concluded that "the district court did not act in violation of the law when it considered the defendant's prior criminal histories and the seriousness of their offenses in determining the extent of the reductions granted under Rule 35(b)." Although holding that the court *may* consider the 3553(a) factors at a Rule 35(b) hearing, it specifically withheld ruling on the question of whether the court is *required* to consider those factors. The court did so because whether or not the district court was required to consider the section 3553 factors when granting a sentence reduction under Rule 35(b), the record revealed that the court in fact did so in the cases before it.

United States v. Wallace, ___ F.3d ___ (7th Cir. 2008; No. 07-4052). In prosecution for mail fraud, the Court of Appeals affirmed the defendant's below-guideline sentence as reasonable. The defendant was sentenced to 36 months imprisonment, a sentence below the bottom of his range of 51 to 63 months. The defendant nevertheless appealed, arguing that the sentence was unreasonable because it was not low enough. The Court of Appeals noted that it had never deemed a below-range sentence to be unreasonably high. A 36-month sentence would have been too low before *Booker*; an increase in judicial discretion does not make it too high. A sentence within the range is presumptively reasonable, and it follows that a sentence below the range also is presumptively not too high. Although in principle extraordinary circumstances could make even a below-range sentence excessive, generic arguments for lenity "of the sort normally wheeled out before a district judge, are wasted on an appellate court." A feeble contention that a below-range sentence is too high diminishes the force of the brief's remaining arguments, moreover. Given that there was nothing special about the defendant's case, the sentence imposed was reasonable.

United States v. Allen, 529 F.3d 390 (7th Cir. 2008; No. 06-3837). In prosecution for mail fraud, the Court of Appeals reversed the district court's order of restitution because the district court failed to deduct from the actual loss the value of services provided by the defendant to the victim. The defendant falsely held himself out as an expert microbiologist and obtained a contract to perform a number of mold inspections for the victim Indian Tribe. The defendant performed 400 such inspections. At sentencing, the defendant argued that the district court, in determining the actual loss for restitution purposes, was required to deduct from the restitution the value of any services the defendant actually provided to the victim. The district court refused to do so for two reasons. First, the court stated that calculating the actual loss suffered by the victim "would place an undue burden on the court." Second, the court relied on Application Note 3(F)(v) of U.S.S.G. §2B1.1, which provides, "In a case involving a scheme in which (I) services were fraudulently rendered to the victim by persons falsely posing as licensed professionals . . . loss shall include the amount paid for property, services or goods transferred, rendered, or misrepresented, with no credit provided for the value of those items or services." The Court of Appeals held that the district court erred in relying on this Application Note. First, the Note applies to determine the amount of loss for sentencing purposes, but does not apply to the determination of restitution. Second, even if the Note did apply, it was inapplicable in this context because the profession in which the defendant held himself out was not one which required a license in the state where he committed his crime. Additionally, the district court is required to determine the victim's "actual loss," and its calculation must take into account (and deduct) pecuniary value the victim gained by way of the defendant's conduct. By failing to calculate the actual losses of the victim, the district court may have required the defendant to pay in restitution more than he owed. Therefore, under the plain error standard, the court remanded for a redetermination of the amount of restitution.

United States v. Carter, ___ F.3d ___ (7th Cir. 2008; No. 06-2412). In prosecution of a public official for three counts of extortion in violation of the Hobbs Act, the Court of Appeals vacated the defendant's sentence, holding that the district court improperly gave too much weight to the guidelines. At sentencing, the defendant moved for a variance, asking the court to consider his lengthy career in public service as a reason for reducing his sentence. The district court inquired as to whether public service had ever been provided as a valid reason for "departure" from the Guidelines in the past, to which defense counsel answered no. The judge then stated, "I attended a conference last year with regards to the Guidelines. And I was put on notice by the Congress, and by their staff members. As you know there has been a controversy where there was a Supreme Court case that talks about the Guidelines only being advisory. And we were put on notice by Congress that if we departed from them on a regular basis for no valid reason–I say valid, because I was looking to see if there is authority for doing that–that what Congress was going to do is come back and have mandatory minimums and everything. . . . So I don't have a problem with the departure, but I have to find some authority, some basis for it before I'm going to do it. Otherwise, I'm going to have some reluctance to go through with it." The Court of Appeals first noted that the use of the term "departure" was not in and of itself problematic, but there is error in using the term when it makes a "substantive difference" on the proper role of the Guidelines, as was the case here. Indeed, the district court placed too much weight on the Guidelines. The Guidelines are but one factor among those listed in 18 U.S.C. §3553(a), and regardless of whether courts have previously recognized public service as a ground for departure from the Guidelines, sentencing courts are charged with considering as part of the 3553(a) factors "the history and characteristics of the defendant," which would include a defendant's public service. Accordingly, the court remanded so the district court could consider this factor in imposing sentence.

United States v. Garrett, 528 F.3d 528 (7th Cir. 2008; No. 06-3982). In prosecution for drug offenses, the Court of Appeals held that a Wisconsin misdemeanor conviction for bail jumping was improperly included in the defendant's criminal history. U.S.S.G. §4A1.2(c)(1) provides that fifteen listed offenses, including contempt of court, and "offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to the instant offense. The only question on appeal was whether Wisconsin's misdemeanor bail jumping offense was "similar to" contempt of court. The Court of Appeals concluded that the offenses were similar enough to warrant exclusion from the defendant's criminal history. Both offenses constituted a disobedience of a court order and were fashioned in order to ensure the authority of the court and encourage obedience to its orders. Accordingly, even under plain error review, the Court of Appeals vacated the sentence and remanded for resentencing.

United States v. McHugh, 528 F.3d 538 (7th Cir. 2008; No. 07-3594). Upon appeal of the district court's recommendation to the Bureau of Prisons, the Court of Appeals held that it lacked jurisdiction to consider the question. The judge at sentencing recommended that the defendant be allowed to participate in substance abuse treatment programs, but the written recommendation in the judgment of conviction included the statement "which do not include an early release program." The defendant appealed, arguing that the oral pronouncement should control over the statement containing the qualification in the written judgment. The Court of Appeals held that it was not entitled to change the recommendation made by the district judge. Citing *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), the court noted that although a judge may tender a recommendation to the Executive Branch, the recommendation cannot be treated as if it were a judgment and reviewed or revised by some other judge. The district judge gave a recommendation to the BOP which the BOP was free to accept or reject. In doing so, the judge did not exercise the judicial power, and the defendant's request that the recommendation be altered likewise did not appeal to the judicial power. The defendant's lawyer was free to communicate with the BOP on the subject, but no Article III court could issue an advisory opinion changing a suggestion that does not affect the sentence. Accordingly, the court dismissed the appeal for want of a justiciable controversy.

United States v. England, 507 F.3d 581 (7th cir. 2007; No. 06-2381). In prosecution for threatening physical force with intent to prevent testimony of a witness in violation of 18 U.S.C. §1512(a)(2)(A) and witness tampering in violation of 18 U.S.C. §1512(b), the Court of Appeals remanded for resentencing because the district court failed to consider the potential disparity that the defendant's sentence posed. The defendant threatened to kill his brother, who was cooperating with police against him, which gave rise to the charges in this case. In determining the defendant's sentence, the district court looked to the statutory index of the Guidelines and found the Guidelines sections corresponding to 18 U.S.C. §1512(a), the most germane of which was U.S.S.G. §2A2.1, which punishes "Assault with Intent to Commit Murder; Attempted Murder." In so doing, the court rejected the defendant's argument that it should apply U.S.S.G. §2J1.2, which governs "Obstruction of Justice," but which the Guidelines do not link to §1512(a). Additionally, the district court declined to vary from the Guidelines pursuant to 18 U.S.C.

§3553(a). As stated by the court, "[t]he issue on appeal is straightforward: England threatened to kill his brother yet the Sentencing Guidelines point to a sentence for attempted murder. The difference between the two is not negligible; attempted murder carries a base offense level of 33 whereas threats of physical injury carry a base offense level of 22." The court concluded that given this disparity, the sentence needed to be remanded for resentencing because the record lacked any indication that the district court considered the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. Specifically, the court first noted that the district court properly declined to apply the "Obstruction of Justice" Guideline, for the district court was required to use the Guideline provided for in the statutory index. However, having used the index, the district court was required to consider if the use of the Guideline in question resulted in an unreasonable sentence. Given that the defendant's conduct more closely resembled obstruction of justice, rather than attempted murder, the court should have considered the disparate sentence the defendant would receive due to what the court characterized as a probable "scrivener's error" which directed the court to the attempted murder Guideline. The court then examined in detail recent changes to §1512 which changed the type of conduct the statute punished, while the statutory index did not change accordingly. These changes perhaps explained the unusual result in this case.

United States v. Pacheco-Diaz, 513 F.3d 776 (7th Cir. 2007; No. 05-2264). In prosecution for illegal re-entry, the Court of Appeals affirmed the district court's 8-level sentencing enhancement because the defendant had a prior conviction for an aggravated felony. The defendant had a prior conviction for possession of marijuana in Illinois. The offense was a felony under Illinois law, but only a misdemeanor under federal law. 8 U.S.C. §1101(a)(43)(B) applies to "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." Section 924(c) defines the term "drug trafficking crime" as, among other things, "any felony punishable under the Controlled Substances Act." Relying upon this language, the district court held that the marijuana conviction qualified as an "aggravated felony." Specifically, the court parsed the phrase "felony punishable under the Controlled Substances Act" and found that the conviction was a felony under Illinois law. The court also found that the same conduct was punishable under the Controlled Substances Act, albeit as a misdemeanor. The court therefore found this conviction met the definition of a drug trafficking crime because it was a felony and it was punishable under the CSA. In the alternative, the court found the conviction would be treated as a federal felony under the recidivist provision of 21 U.S.C. §844(a), because the defendant had another prior conviction for possession of marijuana as well. Pursuant to section 844(a), the district court held the second possession conviction could have been treated as a felony punishable under the CSA. The Court of Appeals held that the district court erred by extracting the felony designation from state law when the offense under the CSA was a misdemeanor. In *Lopez v. Gonzales*, 127 S.Ct. 625, 633 (2006), the Supreme Court held that "a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under federal law." Thus, the district court's first rationale for the enhancement was in error. However, the alternate holding that the recidivist provision in §844(a) made the offense a federal felony was correct. Although noting that the circuits are split on the use of the §844(a) recidivist provision in this context, the Seventh Circuit noted that had the defendant been charged in federal court with his second drug possession charge, he would have been eligible for a recidivist enhancement under §844(a). This enhancement would have exposed him to a possible sentence of two years' imprisonment, a felony under federal law. As a felony punishable under the Controlled Substances Act, the second state law possession conviction would constitute a "drug trafficking crime" under section 924(c) had it been charged in federal court. In turn, that conviction would be considered an aggravated felony as that term is defined in 8 U.S.C. 1101(a)(43)(B), thereby warranting the eight-level increase.

United States v. White, 519 F.3d 342 (7th Cir. 2008; No. 06-4185). In prosecution for crack cocaine offenses, the Court of Appeals denied the defendant's request for a remand to allow the district court to reconsider his sentence in light of *Kimbrough*. Shortly after oral argument, the Supreme Court decided *Kimbrough*. The court then requested supplemental briefing on whether a remand would be appropriate. The court ultimately concluded that any remand would be inappropriate given the district court's comments at sentencing. Specifically, the district judge stated that he would have imposed the same sentence even if there were not Guidelines, thus making clear that the crack/powder disparity reflected in the Guidelines in no way affected the court's sentencing decision.

United States v. Rice, 528 F.3d 811 (7th Cir. 2008; No. 06-3190). In prosecution for being a felon in possession, the Court of Appeals held that an Illinois felony conviction for aggravated discharge of a firearm was a "crime of violence" for career offender purposes. The offense is defined as knowingly and intentionally "discharging a firearm in the direction of another person or in the direction of a vehicle he or she knows or reasonably should know to be occupied by a person." Relying on

prior precedent holding that discharging a firearm into an occupied building was a "crime of violence," the court held that doing so into a vehicle presented the same substantial risk of physical injury to another.

United States v. Trout, 523 F.3d 762 (7th Cir. 2008; No. 05-4616). The Court of Appeals held that a defendant may not receive more than one obstruction of justice enhancement in a single case. The district court found that the defendant had committed two acts of perjury and therefore gave the defendant the obstruction of justice enhancement twice. The Court of Appeals held that multiple acts of perjury produce a single two-level enhancement under 3C1.1 and possibly a higher or above-Guidelines sentence based on the discretion conferred by 3553(a), not the imposition of multiple obstruction of justice enhancements.

United States v. Taylor, 528 F.3d 746 (7th Cir. 2008; No. 06-4123). In prosecution for crack cocaine offenses, the Court of Appeals outlined the procedure to follow where a *Kimbrough* issue was not preserved in the district court when the defendant was sentenced before the Court's decision in that case. Because the issue was not preserved, such issue could only be reviewed for plain error. Adopting the procedure used in the *Booker* context, the Court of Appeals held that in such cases a limited remand to the district court was warranted to determine whether, in light of *Kimbrough*, the district court would have imposed a different sentence. However, the retroactive amendment to the sentencing Guidelines complicated the procedure in the *Kimbrough* context. Specifically, persons sentenced for crack offenses have been able to move for a reduction in their sentence to conform to the Sentencing Commission's decision to reduce retroactively the 100:1 ratio that generates such harsh sentences for crack offenses relative to powder offenses. Accordingly, where a limited remand is granted, the district judge should hold off on telling the Court of Appeals whether she is minded to resentence the defendant under *Kimbrough* until she decides whether to act favorably on the defendant's motion (if he makes one, or on the judge's own initiative, if he does not) for relief under the Commission's new crack regime. If she decides to impose the same sentence under the new Guideline, or if though she lowers the sentence the defendant believes that 18 U.S.C. 3553(a) would warrant a still lower sentence, or if he does not make a proper motion for relief under the new Guideline and she is not minded to grant such relief on her own initiative, she will then have to advise us whether she would be inclined to reduce his sentence under the dispensation granted sentencing judges by *Kimbrough*. To avoid delay, the judge should impose a deadline on the filing of a motion to resentence. The court suggested 21 days after the date of decision.

United States v. Padilla, 520 F.3d 766 (7th Cir. 2008; No. 06-4370). In prosecution for crack related offenses, the Court of Appeals remanded for resentencing in light of *Kimbrough*. The defendant argued in the district court that the he was responsible for a form of cocaine base other than crack. He did not argue that his sentence should be lower due to the 100:1 disparity between crack and powder. On appeal, *Kimbrough* having been decided after the defendant was sentenced, the Court of Appeals held that the defendant had preserved a *Kimbrough* argument. Specifically, although he did not make a precise *Kimbrough* argument, he did contest in the district court and on appeal whether the drugs in question were crack. The court presumed that the defendant's primary purpose in doing so was to avoid the harsh effects of the crack sentencing disparity, since no other logical inference exists. In doing so, the defendant preserved the issue, however obliquely, of whether the district court could consider the 100:1 sentencing disparity. Accordingly, the court ordered a full remand for consideration of the defendant's sentence.

United States v. Bush, 523 F.3d 727 (7th Cir. 2008; No. 07-1307). In prosecution for distribution of crack cocaine, the Court of Appeals remanded for resentencing in light of the Supreme Court's decision in *Kimbrough*. The defendant argued at sentencing that the court should impose a below-Guideline sentence because of the unfair disparity between sentencing for crack and powder cocaine. The district court refused to consider the disparity, relying on the Seventh Circuit's precedent that a district court may not reduce the 100:1 ratio when initially calculating the appropriate sentencing range for a crack-related sentence. The Seventh Circuit had held prior to *Kimbrough* that a district court could consider criticism of the 100:1 ratio to the extent the criticism was refracted through the court's application of the §3553(a) factors to an individual defendant's facts and circumstances. But it had also held that a district court committed reversible error if it accepted a defendant's invitation to ignore or modify the ratio because it is simply unfair or an unwise policy. The Supreme Court in *Kimbrough*, however, held that a court may sentence a crack offender below the Guideline range in a routine case if it believes the 100:1 ratio alone punishes the defendant in excess of what is justified under the §3553(a) factors. In the present case, because the defendant preserved his argument in the district court, a remand for resentencing was warranted. Although the court was not required to use something other than the 100:1 ratio, it had to consider the argument raised by the defendant before imposing sentence.

United States v. Omole, 523 F.3d 691 (7th Cir. 2008; No. 06-2252). In prosecution for wire fraud and identity theft, the Court of Appeals reversed the district court's below-Guideline sentence as a substantively unreasonable

sentence. The district court entered a 12-month sentence–81% below the bottom of the advisory Guideline range. At sentencing, however, the judge severely chastised the defendant, saying he demonstrated a lack of feeling for other human beings that is absolutely alarming in a 20-year old; that his conduct had been nothing but contemptuous of the court; and that his failure to follow his release conditions and his continued participation in the fraudulent schemes after being convicted in state court was nothing but arrogant. Additionally, the judge stated that "you've caught a break that I'm not at all sure you deserve." The judge did note in the Statement of Reasons some reasons for the variance, such as the defendant's young age, the fact that he was a good student in college, his participation in high school in football and the chess team; and the fact that his father was murdered in 1999. However, these comments directly contradicted the denigrating statements made at sentencing, and supported a conclusion that the sentence was unreasonable given that the Court of Appeals was given a wildly divergent and seemingly irreconcilable picture of the defendant. Accordingly, the court concluded that the district court failed to enunciate sufficient reasons to justify a variance of the size imposed. Although noting that it was not holding that any below-Guidelines sentence would be unreasonable, it was finding that the 12-month sentence in this case was an abuse of discretion.

United States v. Soto-Piedra, 525 F.3d 527 (7th Cir. 2008; No. 07-1399). In prosecution for conspiring to distribute cocaine, the Court of Appeals reversed the district court's finding that the defendant was responsible for 14 to 15 kilograms of crack cocaine. The defendant arranged with his co-conspirator to distribute around 15 or 16 kilograms of powder cocaine. However, at sentencing, the district court held the defendant responsible for crack cocaine, based upon a statement of an undisclosed law enforcement officer who said the defendant understood that the powder would be converted into crack cocaine by individuals to whom his co-defendant sold the powder. The Court of Appeals noted that the record demonstrated that the defendant never sold crack cocaine to anyone. Thus, before he could be held responsible for crack cocaine, the government needed to prove that the defendant reached an agreement with his co-defendant to sell powder cocaine intending it to be converted into crack. The court concluded that the record only showed that the defendant contemplated supplying his co-defendant with powder cocaine, which would be passed along to unknown customers with unknown intentions. The government put forth no evidence suggesting that converting powder cocaine to crack was within the scope of the defendant's contemplated undertaking. Although the defendant pleaded guilty to conspiracy, the scope of relevant conduct is not necessarily the same as the scope of the entire conspiracy. In order the be held accountable for the conduct of others, that conduct must have been both in furtherance of the jointly undertaken criminal activity and reasonably foreseeable in connection with that criminal activity. Here, the defendant's plea established only that he conspired to distribute powder cocaine.

United States v. Achbani, 507 F.3d 598 (7th Cir. 2007; No. 06-4190). In prosecution for making and uttering a counterfeit check, the Court of Appeals affirmed the district court's decision to sentence the defendant *in absentia*. After pleading guilty, the defendant did not appear for sentencing, and defense counsel informed the court that he did not know the defendant's whereabouts. The court then postponed the sentencing hearing to allow the government to investigate whether the defendant was indeed voluntarily absent. After investigation, the government informed the court that a person with the defendant's name and date of birth had traveled to Austria using a Moroccan passport. Although the government possessed the defendant's Moroccan passport, it surmised that he had obtained a new one. Additionally, a witness testified that the defendant had contacted her and told her that the he was visiting family in France. Given this information, the court found the defendant to be voluntarily absent and sentenced the defendant *in absentia*. On appeal, the defendant's counsel argued that the government failed to demonstrate that the defendant's absence was "voluntary," as Federal Rule of Criminal Procedure 43 requires. Rule 43 guarantees a defendant the right to be present at both trial and sentencing. Prior to 1995, the rule provided that, under certain circumstances, a defendant could waive his right to be present at trial; the rule was silent, however, as to whether the right to be present at sentencing could be waived. The Rule was then amended to allow a noncapital defendant to waive the right to be present at his sentencing if he is "voluntarily absent." "Voluntarily absent" includes a defendant who flees before sentencing. Considering the question of when a defendant is "voluntarily absent" from his sentencing hearing, the Court of Appeals held that the same standard for determining whether a defendant is voluntarily absent at trial should be used for sentencing. Under this standard, the court should indulge every reasonable inference against a finding of voluntary absence. Before proceeding, the district court must explore on the record any "serious questions" raised about whether the defendant's absence was knowing and voluntary. For example, a defendant taken into legal custody is not voluntarily absent. However, the district court's duty to explore such possibilities varies to the extent that defense counsel suggests circumstances that raise a *plausible* doubt that the defendant's absence was voluntary. Here, the district court's finding did not constitute plain error. The information the government collected ruled out a "serious possibility" that the defendant was anything other than voluntarily absent.

United States v. Miranda, 505 F.3d 785 (7th Cir. 2008; No. 06-4195). In prosecution for bank robbery, the Court of Appeals reversed the defendant's sentence because the district court failed to address the defendant's arguments for a non-Guidelines sentence based upon his diminished mental capacity and that his criminal history category over-represented his actual criminal history. The defendant presented significant evidence, including the testimony of a court-appointed psychiatrist, at sentencing that he suffered from a severe schizoaffective disorder and that this disorder not only contributed to him committing the current offense, but also was partly responsible for his criminal history. The bulk of this evidence was uncontested by the government, and the defendant argued that he should receive a below-Guideline sentence. Instead, the judge sentenced to the defendant to a Guideline sentence which was four months longer than even the government requested. In doing so, the court noted that he respected the expertise and testimony of the psychiatrist, but focused solely on the severity of the defendant's crime and the fact that the defendant understood he was committing a crime. The Court of Appeals noted that when a defendant challenges a within-Guidelines sentence as unreasonable, the judge must explain why the sentence imposed is appropriate in light of the §3553(a) factors. When a court gives little or no attention to the defendant's principal argument when that argument was not so weak as not to merit discussion, the Court of Appeals cannot have confidence that the judge adequately considered the §3553(a) factors. In the present case, anyone acquainted with the facts of the defendant's well-documented mental health history would not know why the district court rejected his arguments for a lesser sentence unless the court commented on its reasons. Given the substantial nature of the reasons presented by the defendant for a non-Guidelines sentence and the district court's failure to address those arguments with any depth, the Court of Appeals vacated the defendant's sentence and remanded for resentencing.

United States v. Upton, 512 F.3d 394 (7th Cir. 2008; No. 07-1456). On appeal after being sentenced as an Armed Career Criminal, the Court of Appeals held that the Illinois offense of possession of a sawed-off shotgun constitutes a violent felony for purposes of the Armed Career Criminal Act. The court noted that it had already held that the offense constituted a crime of violence for purposes of enhanced punishment under the Sentencing Guidelines. The relevant language in the Guidelines and the Act are identical: Both enhancements apply when an offense involves the "serious potential risk of physical injury to another." Because of the identical language, the court's holding regarding the Guideline enhancement forecloses the defendant's argument under the ACCA. Moreover, one cannot deny that a sawed-off shotgun poses such a risk. People do not shorten their shotguns to hunt or shoot skeet. Instead, a shortened barrel makes the guns easier to conceal and increases the spread of the shot when firing at close range–facts that spurred Congress to require the registration of all sawed-off shotguns, along with other dangerous weapons. Accordingly, the district court did not err in concluding that the defendant's conviction constituted a "violent felony."

United States v. McIlrath, 512 F.3d 421 (7th Cir. 2008; No. 07-1266). In prosecution for traveling across state lines to have sex with a minor, the Court of Appeals addressed reasonableness review in light of the Supreme Court's decision in *Gall*. The defendant received a Guideline sentence of 46 months, but argued that he should have been sentenced to home confinement. After addressing the specific factors in the defendant's case, the court concluded that the sentence was reasonable. In doing so, the court discussed the standard of review as follows: "But we should consider the possible bearing on our analysis of the Supreme Court's decision last month in *Gall*. The Court held that a sentence outside the Guidelines range must not be presumed unreasonable by the appellate court, which also may not hogtie sentencing judges with a rigid formula for determining whether the justification for an out-of-range sentencing is 'proportional' to the extent of the sentence's deviation from the range. Neither approach had been followed by this court. Even before *Rita*, our court, anticipating *Gall* in this respect, rejected the notion that a sentencing judge can presume the reasonableness of a sentence within the Guidelines range. . . All he has to do is consider the Guidelines and make sure that the sentence he gives is within the statutory range and consistent with the sentencing factors listed in 18 U.S.C. 3553(a). His choice of sentence, whether inside or outside the Guideline range, is discretionary and subject therefore to only light appellate review. The applicable Guideline nudges him toward the sentencing range, *but his freedom to impose a reasonable sentence outside the range is unfettered*. With specific reference to out-of-range sentences, we had said, again before the Supreme Court's decision in *Gall*, that 'when the Guidelines, drafted by a respected public body with access to the best knowledge and practices of penology, recommend that a defendant be sentenced to a number of years in prison, a sentencing involving no (or, as in this case, nominal) imprisonment can be justified only by a careful, impartial weighing of the statutory sentencing factors.'. . . While disapproving sentencing presumptions and rigid formulas, the Supreme Court made 'clear' in *Gall* . . . 'that a district judge must give serious consideration to the extent his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications. A major departure should be supported by a more significant justification than a minor one.'" [internal citations omitted.]

United States v. Franco-Fernandez, 511 F.3d 768 (7th Cir. 2007; No. 06-3273). In prosecution for illegal reentry, the Court of Appeals held that the Illinois offense of "putative father" child abduction was neither a crime of violence nor an aggravated felony for purposes of the increased offense levels specified in U.S.S.G. §2L1.2(b)(1)(A)(ii) and (b)(1)(c). The district court held that the offense was a crime of violence, thereby increasing the defendant's offense level by 16. Illinois' putative father child abduction offense is committed by one who "intentionally conceals, detains or removes the child without the consent of the mother or lawful custodian of the child if the person is a putative father and ether: (A) the paternity of the child has not been legally established or (B) the paternity . . . has been legally established but no orders relating to custody have been established." The relevant Guideline lists the offense of kidnaping as a crime of violence, and the government argued that the abduction offense is a species of kidnaping. The Court of Appeals, however, rejected this approach, noting first that child abduction is not a listed offense in the Guideline section. Second, it found that the offense was not analogous to kidnaping because, unlike kidnaping, child abduction by a putative father does not require confinement against the victim's will. Additionally, looking to the broader definition of a crime of violence, the offense in question does not have as an element the "use, attempted use, or threatened use of physical force." Rather, the offense only requires the putative father conceal, detain, or remove the child without the consent of the mother or legal custodian. Having concluded that the offense was not a crime of violence, the court also determined that the offense was not an aggravated felony, which would have subjected the defendant to an 8-level increase. An aggravated felony under this Guideline is defined by reference to 18 U.S.C. §16, which contains an even broader definition, to wit: any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. Distinguishing this case from "escape" and "unlawful confinement offenses" (both previously having been found to meet this definition), the court held that the offense in question does not contain a requirement of restraint against the victim's will. Rather, the offense specifically targets nonforcible conduct by a putative noncustodial father without regard to the victim's resistence, consent, or acquiescence. Accordingly, the court vacated the defendant's sentence and remanded the case for resentencing without the 16 and 8-level enhancements.

United States v. Katalinic, 510 F.3d 744 (7th Cir. 2007; No. 07-1588). In prosecution for bank robbery and §924(c), the Court of Appeals held that application of a 2-level upward adjustment for a co-defendant's death threat (U.S.S.G. §2B3.1) during a robbery constituted double counting when the defendant also receives a consecutive sentence on related §924(c) count. Noting that the double-counting issue was one of first impression in this circuit, the Court noted that Application Note 4 to U.S.S.G. §2B3.1 prohibits a sentencing court from applying any specific offense characteristic for possession, brandishing, use, or discharge of a firearm in an underlying offense when the court has imposed a sentence for a §924(c) conviction, including any adjustment that would apply based on relevant conduct. Additionally, the note provides that sentencing courts should not apply any weapon enhancement in the Guideline for the underlying offense if a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under §924(c). According to the court, if a defendant's sentence cannot be increased based on a co-defendant's use of a firearm, it seemed anomalous to nevertheless allow the defendant's sentence to be increased based on his co-defendant's threat of death–a less serious offense characteristic as evidenced by the fewer points added for a death threat than for using a firearm. Accordingly, the court held that death threats related to the firearm forming the basis of a §924(c) sentence cannot be double counted by increasing the base offense level for the underlying crime. Prohibiting double counting in this context comports with both the language in Application Note 4 and the intent of the Sentencing Commission.

United States v. Thomas, 510 F.3d 714 (7th Cir. 2007; No. 06-1381). Upon the government's cross-appeal in a prosecution for election fraud offenses, the Court of Appeals held that the district court improperly refused to adjust the defendant's sentence upward for abuse of a position of trust. The defendant was Chairman of the East St. Louis Democratic precinct committee and paid voters cash to cast their ballots. In response to the PSR's recommendation that an abuse of trust enhancement be applied, the defendant argued that he acted in accordance with the party's interests by increasing Democratic voter turnout; given his position with the party, he had not abused its trust, but rather did what benefitted the party by getting out the vote. The district court agreed, finding that before the enhancement could apply, evidence would need to be presented that the Democratic Party did not want the defendant to engage in his misconduct. The Court of Appeals rejected this reasoning, noting that the abuse of trust enhancement carries with it an assumption that the person entrusted with the position will act in accordance with the law. It presupposes that one who uses a position of trust to significantly facilitate the commission of a crime has abused that trust–that is, has acted contrary to the interests of those who have entrusted him with the position. Lawbreaking in the exercise of a position of public or private trust is necessarily an *abuse* of that position. Moreover, a particular "victim" relationship

between the criminal and the person or group whose trust has been abused is not required before the enhancement can apply. Thus, the government need not prove actual harm to the interests of those whose trust has been abused. The court therefore vacated the sentence and remanded for resentencing.

SPEEDY TRIAL ACT

United States v. Killingsworth, 507 F.3d 1087 (7th Cir. 2007; No. 07-1684). In prosecution for drug offenses, the Court of Appeals reversed the district court's dismissal of the indictment with prejudice for a Speedy Trial Act violation. The defendant was arrested upon a complaint, but his case was never set for an arraignment after his indictment. Three days after the Speedy Trial Act clock had run, the defendant filed a motion to dismiss the indictment. The district court held a hearing where the government offered two explanations for the violation. First, it stated that, historically, it had never had to request an arraignment in a criminal case when an individual had been indicted, even when a complaint had been filed first; the magistrate judge had always provided a date. Second, the government claimed that it had contacted the magistrate judge's chambers at least twice within the speedy trial time to inquire about an arraignment but had received no reply. The district court ultimately concluded that there was no way to find out why the mistake had occurred. The district court then dismissed the indictment with prejudice, finding that wherever the fault blamed for the error, it did not rest with the defendant and the dismissal should therefore be with prejudice. The Court of Appeals noted that in determining whether to dismiss a case with or without prejudice, the Act requires the district judge to consider (1) the seriousness of the offense, (2) the facts and circumstances which led to the dismissal, and (3) the impact of reprosecution on the administration of the Speedy Trial Act and on the administration of justice. Regarding the first factor, the seriousness of the offense weighed against dismissal with prejudice. On the second factor, the court concluded that there was no dispute that the government acted intentionally in denying the defendant a timely arraignment. Moreover, the delay due to the inadvertent violation was relatively brief. Thus, this factor too weighed against dismissal with prejudice. Finally, the administration of the Act or the administration of justice would not be impacted by reprosecution in a case like this considering the seriousness of the offense, the minor delay, and the lack of bad faith. Indeed, the purposes of the Act would not be served by requiring the court to impose the maximum sanction for a minimum violation. Accordingly, the Court of Appeals reversed.

SUPERVISED RELEASE

United States v. Kizeart, 505 F.3d 672 (7th Cir. 2007; No. 07-1397). Upon consideration of an appeal of the defendant's revocation of supervised release, the Court of Appeals held that the proper standard of review in such cases was whether the sentence was "plainly unreasonable." After *Booker*, five courts of appeal have held that the proper standard of review was "unreasonable," rather than "plainly unreasonable," thereby bringing the standard of review for revocations into line with that for sentences in general. However, the Seventh Circuit noted that nothing in either of the Court's majority opinions in *Booker* suggests that the standard of review in supervised release revocations should change. Accordingly, the court held that it would adhere to the "plainly unreasonable" standard. In doing so, however, the court noted that realism required it to acknowledge that the practical difference between "unreasonable" and "plainly unreasonable" is slight, perhaps even nil. While appellate courts understand and can implement the difference between deferential and nondeferential review, the making of finer gradations within the category of deferential review strains judicial competence. In most cases, regardless of the formal gradation of deferential review, the appellate judges are merely giving the benefit of the doubt to the trier of fact or other first-level decision maker–how much benefit of the doubt depends less on the formal standard than on the nature of the issue and the institutional competence of the first-level decision maker relative to that of the appellate court. So while the court must do its best to mark any gradations prescribed by Congress, it could not promise great success in the endeavor.

United States v. Pitre, 504 F.3d 657 (7th Cir. 2007; No. 06-3935). Upon revocation of supervised release, the Court of Appeals affirmed the revocation over the defendant's argument that she was denied her right to allocution. The defendant appeared three times before the district court for revocation proceedings. On the first occasion, the court modified the terms of her release to require inpatient drug treatment. Within six months of completing that program, the defendant again appeared before the judge for violations. At that hearing, the judge granted the defendant's motion to continue the revocation hearing to see how she did for the next 30 to 60 days. However, the court warned that if the defendant tested positive for drugs during that period, then he would revoke her supervision and sentence her to 18 months. When the defendant did just that, the court did as it warned. However, before imposing sentencing, the judge failed to give the defendant an opportunity to personally address the court. The Court of Appeals initially held that the right to allocution created by Rule 32.1 is not substantively different than the right created by Rule 32. Rule 32.1 requires a district court to

ask the defendant if she wishes to make a statement for the court to consider before imposing a term of reimprisonment following supervised release. Here, there was no question that the district court erred in failing to follow the rule. However, because no contemporaneous objection was made, the court reviewed the issue for plain error. The court initially found that it could not conclude that the defendant would not have received a lesser sentence had she been allowed to address the court, and her substantial rights were therefore affected. On the question of whether the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings, the court noted that remand is ordinarily required when a defendant has been denied the right to allocution. However, the unique facts of this case demonstrated that this factor was not met. Specifically, the defendant was on notice previously that she would receive an 18-month sentence if she violated the terms of her supervision during the 30-day continuance. When she appeared in court before sentencing, all the parties understood that the court would impose the sentence he previously warned her about. Therefore, given this understanding between the defendant and the court, the district court's error did not undermine the integrity of the proceedings.

United States v. Neal, 512 F.3d 427 (7th Cir. 2008; No. 07-1638). Upon revocation of the defendant's supervised release, the Court of Appeals reiterated the appropriate standard of review in such cases post-*Booker*. Specifically, the court noted that a sentence imposed after the revocation of supervised release can be set aside only if it is plainly unreasonable. *United States v. Kizeart*, 505 F.3d 672, 673 (7th Cir. 2007). To reach a reasonable sentence, the district court must begin its analysis with the recommended imprisonment ranges found in U.S.S.G. §7B1.4, but these ranges inform rather than cabin the district court's sentencing discretion. The court must also consider the sentencing factors enumerated in 18 U.S.C. §3553(a). As with an initial sentencing decision, the court need not make factual findings on the record for each factor; however, the record should reveal that the court considered to those factors.

United States v. O'Hallaren, III, 505 F.3d 633 (7th Cir. 2007; No. 07-1559). Upon revocation of the defendant's supervised release, the Court of Appeals vacated the defendant's sentence because he was denied his right to allocution. The district court revoked the defendant's supervised release and sentenced him to 24-months imprisonment. Before doing so, the district court did not give the defendant an opportunity to address the court. Upon plain error review, the Court of Appeals noted that Federal Rule of Criminal Procedure 32.1(b)(2)(E) states that a defendant is entitled to an opportunity to make a statement and present any information in mitigation. The Rule requires that a district court ask the defendant if he or she would like to make a statement for the court to consider in determining his or her sentence. There was no question that the defendant was not given this opportunity. As to whether this error affected the defendant's substantial rights, the court presumes prejudice when there is any possibility that the defendant would have received a lesser sentence had the district court allowed him to speak before imposing sentence. Here, the court could not say with any assurance that the denial of the defendant's right to allocution did not affect his sentence. Finally, on the question of whether the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, remand is generally required when a defendant has been denied his right to allocution. Absent some rare indication from the face of the record that the denial did not implicate the core values in our sentencing process, resentencing is the appropriate judicial response.

United States v. Silvious, 512 F.3d 364 (7th Cir. 2007; No. 05-4576). In prosecution for mail fraud, the Court of Appeals held that the imposition of two special conditions of supervised release did not constitute plain error. The Court of Appeals first held that two special conditions of supervised release were overly broad. First, the district court imposed a ban on gambling and a requirement that the defendant attend Gambler's Anonymous. There was no evidence in the record that the defendant had a gambling problem. Second, the court imposed a total ban on the use of computers with access to the Internet. The court concluded that a total ban on the use of computers with access to the Internet is in most cases an overbroad condition of supervised release and nothing in the record here suggested this case was exceptional. Nevertheless, reviewing for plain error, the court refused to reverse. Specifically, the court noted that conditions of supervised release are readily modifiable at the defendant's request and encouraging this simple expedient pursuant to Federal Rule of Criminal Procedure 32.1(c) promotes the integrity and reputation of criminal proceedings by not perpetuating expensive and time-consuming appeals and resentencing. Thus, the court affirmed the judgment.

Recently Noted Circuit Conflicts

Compiled by: Kent V. Anderson
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Fourth Amendment

Standard of Review for Warrants

United States v. McIntire, 516 F.3d 576 (7th Cir. 2008).

The Seventh Circuit adopted a confusing standard of review for the determination of whether there was probable cause for a search. The Court held that:

> A district court's findings of historical fact are reviewed for clear error, whether or not a warrant issued. A district judge's legal conclusions are reviewed without deference. And on the mixed question whether the facts add up to "probable cause" under the right legal standard, we give no weight to the district judge's decision—for the right inquiry is whether the judge who issued the warrant (rarely the same as the judge who ruled on the motion to suppress) acted on the basis of probable cause. On that issue we must afford "great deference" to the issuing judge's conclusion.

(citation omitted)

This conflicts with the holdings of other circuits which review factual findings for clear error and legal conclusions regarding the existence of probable cause *de novo*. *United States v. Irving*, 452 F.3d 110, 125 (2d Cir. 2006); *United States v. Hammoud*, 381 F.3d 316, 332 (4th Cir. 2004); *United States v. Jackson*, 470 F.3d 299, 306–07 (6th Cir. 2006); *United States v. Grant*, 490 F.3d 627, 631–32 (8th Cir. 2007). These decisions follow the Supreme Court's holding that review of findings of fact is for clear error, but review of the determination that those facts amounted to reasonable suspicion is *de novo*. *Ornelas v. United States*, 517 U.S. 690, 697-699 (1996).

Illegal arrest and suppression of fingerprints

United States v. Oscar-Torres, 507 F.3d 224 (4th Cir. 2007).

The Fourth Circuit held that sometimes fingerprints can be suppressed. It noted

> "that when applying this rule, a court must focus on the "purpose" for the illegal arrest and fingerprinting, as the Supreme Court did in *Hayes* and *Davis*. *See, e.g.*, *Davis*, 394 U.S. at 727 (holding that "[d]etentions for the sole purpose of obtaining fingerprints" in a criminal investigation are "subject to the constraints of the Fourth Amendment"). Thus, an alien's fingerprints taken as part of routine booking procedures but intended to provide evidence for a criminal prosecution are still *motivated* by an investigative, rather than an administrative, purpose. Such fingerprints are, accordingly, subject to exclusion. *See Olivares-Rangel*, 458 F.3d at 1114."

The Court agreed with the Eighth, and Tenth Circuits. *United States v. Guevara-Martinez*, 262 F.3d 751, 754-55 (8th Cir. 2001); *United States v. Olivares-Rangel*, 458 F.3d 1104, 1106 (10th Cir. 2006). It disagreed with decisions of the Third, Fifth, and Sixth Circuits which held that fingerprints are never subject to suppression. See *United States v. Bowley*, 435 F.3d 426, 430-31 (3d Cir. 2006); *United States v. Navarro-Diaz*, 420 F.3d 581, 588 (6th Cir. 2005); *United States v. Roque-Villanueva*, 175 F.3d 345, 346 (5th Cir. 1999).

Offenses

8 U.S.C. §1326 and INA §212(c)

United States v. De Horta Garcia, 519 F.3d 658 (7th Cir. 2008)

The Seventh Circuit held that

> retroactive application of §212(c) is impermissible because it would disturb reasonable expectations in only two situations: (1) when an alien had conceded deportability before repeal in reliance on the possibility of §212(c) relief,, and (2) when an alien had pleaded guilty to the underlying offense before repeal partly in reliance on the possibility of relief. In both cases, we required a showing of specific facts demonstrating actual reliance.

(citations omitted).

Other circuits have taken alternative approaches to the reliance question. First, some circuits have applied *St. Cyr* to aliens who did not plead guilty or concede deportability before enactment, but did take some affirmative action in their prosecution that evidenced reliance on §212(c) before enactment. E.g., *Restrepo v. McElroy*, 369 F.3d 627, 634-35 (2d Cir. 2004); *Ponnapula v. Ashcroft*, 373 F.3d 480, 494-96 (3d. Cir. 2004). Second, two circuits, the Third and the Tenth have criticized the majority of circuits for requiring a showing of actual detrimental reliance and have only required objectively reasonable reliance. *Id.* at 489-90; *Hem v. Maurer*, 458 F.3d 1185, 1197 (10th Cir. 2006). The Fourth Circuit has gone further and not required a showing of reliance at all, reasoning, in part, that it is always reasonable to rely on governing law. *Olatunji v. Ashcroft*, 387 F.3d 383, 389-96 (4th Cir. 2004).

18 U.S.C. §1028(a)

United States v. Godin, 5__ F.3d ___, 2008 U.S. App. LEXIS 15301 (1st Cir., July 18, 2008); *United States v. Montejo*, 442 F.3d 213 (4th Cir (2006); *United States v. Mendoza-Gonzalez*, 520 F.3d 912 (8th Cir. 2008); *United States v. Miranda-Lopez*, 5__ U.S. ___, 2008 U.S. App. LEXIS 15200 (9th Cir. July 17, 2008); *United States v. Hurtado*, 508 F.3d 603 (11th Cir. 2007); and *United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008).

The First, Ninth, and D.C. Circuits held that 18 U.S.C. §1028A(a)(1) requires the government to prove that a defendant actually knew that false means of identification which he possessed, used, or transferred actually belonged to someone else. It is not enough that the defendant simply made up false means of identification that happened to match a real person. *United States v. Godin*, 2008 U.S. App. LEXIS 15301, *23; *United States v. Miranda-Lopez*, 2008 U.S. App. LEXIS 15200, *15; *United States v. Villanueva-Sotelo*, 515 F.3d at 1246.

The Fourth, Eighth, and Eleventh Circuits disagreed and held that the defendant does not have to know that the means of identification belonged to a real person. *United States v. Montejo*, 442 F.3d at 214; *United States v. Mendoza-Gonzalez*, 520 F.3d at 915; *United States v. Hurtado*, 508 F.3d at 607.

Sentencing

U.S.S.G. §4A1.2

United States v. Godin, 522 F.3d 133 (1st Cir. 2008); *United States v. Wood*, 526 F.3d 82 (3d Cir. 2008); and *United States v. Marler*, 527 F.3d 874 (9th Cir. 2008).

The Third and Ninth Circuits refused to apply amendment 709, which changed the definition of separate prior convictions, retroactively. *United States v. Wood*, 526 F.3d 82; *United States v. Marler*, 527 F.3d 874. The First Circuit also refused to apply the amendment retroactively for the purposes of a Guidelines calculation. However, unlike the other two circuits, the First Circuit remanded a case in order for the district court to consider the amendment as a reason to sentence the appellant outside of the applicable Guidelines range. *United States v. Godin*, 522 F.3d 133.

BOP Halfway House Placement

Muñiz v. Sabol, 517 F.3d 29 (1st Cir. 2008).

The First Circuit upheld the Bureau of Prisons' regulation prohibiting prisoners from spending more than the last ten percent of their sentence in a halfway house or community corrections center. (28 C.F.R. § 570.20(a).) The Court disagreed with the other four circuits that have considered the issue. *Levine v. Apker*, 455 F.3d 71 (2d Cir. 2006); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235 (3d Cir. 2005); *Fults v. Sanders*, 442 F.3d 1088 (8th Cir. 2006); *Wedelstedt v. Wiley*, 477 F.3d 1160 (10th Cir. 2007).

Habeas Corpus

Equitable Tolling

Downs v. McNeil, 520 F.3d 1311 (11th Cir. 2008)

The 11th Circuit held that serious misconduct by state post-conviction counsel that goes beyond mere negligence can justify equitable tolling. The Court agreed with similar holdings by the Second, Third, Fifth, Eighth, Ninth, and Tenth Circuits. *See*: *Baldayaque v. United States*, 338 F.3d 145, 152 (2d Cir. 2003); *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001), abrogated in part by *Carey v. Saffold*, 536 U.S. 214, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002); *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002); *United States v. Martin*, 408 F.3d 1089, 1093 (8th Cir. 2005); *Spitsyn v. Moore*, 345 F.3d 796, 801-02 (9th Cir. 2003); *Fleming v. Evans*, 481 F.3d 1249 (10th Cir. 2007). The Court disagreed with the Seventh Circuit's rule that attorney misconduct can never be a reason for equitable tolling. See *Powell v. Davis*, 415 F.3d 722, 727 (7th Cir. 2005).

Supreme Court Update
October 2007 Term

Compiled by: Johanna Christiansen
Staff Attorney

***Logan v. United States*, 128 S. Ct. 475 (December 4, 2007) (Ginsburg).** Petitioner Logan pled guilty in a United States District Court to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). However, the district court determined he qualified as an Armed Career Criminal under 18 U.S.C. § 924(e)(1) based on his prior convictions, including three prior Wisconsin convictions for misdemeanor batter, each punishable by a maximum sentence of three years. These three convictions did not result in the revocation of any of Logan's civil rights. Therefore, he argued that § 921(a)(20)'s exception to the ACC statute, which allows that any conviction where the offenders civil rights have been restored should not qualify, should apply to him. The district court rejected Logan's argument and held the exemption applies only to defendants whose civil rights were both lost and restored. The United States Court of Appeals for the Seventh Circuit affirmed, holding that "an offender whose civil rights have been neither diminished nor returned is not a person who has had civil rights restored." The Supreme Court agreed and held that the exemption contained in § 921(a)(2) does not cover the case of an offender who retained civil rights at all times and whose legal status remained in all respects unaltered by any state dispensation. The Court reasoned that each term in § 921(a)(2) is meant to describe a measure by which the government relieves an offender of some or all of the consequences of his conviction. In contrast, a defendant who never loses his civil rights has received no token of forgiveness from the government.

***Watson v. United States*, 128 S. Ct. 579 (December 10, 2007) (Souter).** Petitioner Watson gave 24 does of OxyContin to an undercover agent in exchange for a .50 caliber semiautomatic pistol. He was indicated for distributing a controlled substance and for "using" the pistol during and in relationship to that crime in violation of § 924(c)(1)(A). The Supreme Court granted certiorari to resolve the split among the circuits on whether a person uses a firearm when he trades narcotics to obtain a gun. The government relied on two previous cases interpreting "use" in § 924(c) - *Smith v. United States*, 508 U.S. 223 (1993) and *Bailey v. United States*, 516 U.S. 137 (1995). However, the Court rejected the government's reasoning stating that its position "lacks authority in either precedent or regular English." In *Smith*, the defendant traded his gun for drugs and the Court held this was within the meaning of "use." However, in this case, the defendant only received the gun in the transaction and cannot be said to have used the gun in the transaction. Therefore, the Court held that a person does not use a firearm when he receives it in trade for drugs.

***Kimbrough v. United States*, 128 S. Ct. 558 (December 10, 2007) (Ginsburg).** Petitioner Kimbrough pled guilty to several offenses involving crack cocaine and his advisory guideline range was 228 to 270 months. The district court imposed a sentence of 180 months, relying in part on the "disproportionate and unjust effect that crack cocaine guidelines have in sentencing." The United States Court of Appeals for the Fourth Circuit vacated the sentence finding that a sentence outside the Guidelines range is unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder offenses. The Supreme Court disagreed and held that the district court's sentence should have been upheld. Specifically, the Court noted that under *United States v. Booker*, 543 U.S. 220 (2005), the cocaine guidelines, like all other guidelines, are advisory only, and the Fourth Circuit erred in holding the crack/powder disparity effectively mandatory. District courts must consider the guidelines range in the array of factors warranting consideration, but the judge may determine that, in the particular case, a within-guidelines sentence is "greater than necessary" to serve the objectives of sentencing. In making that determination, the judge may consider the disparity between the guidelines' treatment of crack and powder offenses.

***Gall v. United States*, 128 S. Ct. 586 (December 10, 2007) (Stevens).** Petitioner Gall joined an ongoing enterprise distributing the controlled substance "ecstasy" while in college, but withdrew from the conspiracy after seven months, sold no illegal drugs since, used no illegal drugs, and worked steadily since graduation. Three and half years after withdrawing from the conspiracy, Gall pled guilty to his participation. The presentence report recommended a sentence of 30 to 37 months in prison, but the district court sentenced Gall to 36 months' probation, finding that a term of probation reflected the seriousness of his offense and that imprisonment was unnecessary. The Eighth Circuit reversed on the ground that a sentence outside the guidelines range must be supported by extraordinary circumstances and was not. The Supreme Court reversed holding that while the extent of the difference between a particular sentence and the recommended guidelines range is relevant, courts of appeals must review all sentences, no matter the relation to the guideline range under a deferential abuse of discretion standard. The courts of appeal may not require "extraordinary" circumstances or employ a rigid mathematical formula using a departure's percentage as the standard for determining the strength of the

justification required for a specific sentence. In addition, the district court may not presume that the guidelines range is reasonable but must make an individualized assessment based on the facts presented.

***Danforth v. Minnesota*, 128 S. Ct. 1029 (February 20, 2008) (Stevens).** After the Supreme Court decided *Crawford v. Washington,* 541 U.S. 36 (2004), Petitioner Danforth sought state postconviction relief, arguing that he was entitled to a new trial because admitting the victim's taped interview at his trial violated *Crawford's* rule. The Minnesota trial and appellate courts concluded that *Crawford* did not apply retroactively under *Teague v. Lane,* 489 U.S. 288 (1989). The Minnesota Supreme Court agreed, and also concluded that state courts are not free to give a decision of the United States Supreme Court announcing a new constitutional rule of criminal procedure broader retroactive application than that given by the Court. The Supreme Court determined *Crawford* shall not be applied retroactively. *Whorton v. Bockting*, 549 U.S. 406 (2007). However, in the present matter, the Supreme Court held that *Teague* does not constrain the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion. Therefore, no federal rule, either implicitly announced in *Teague* or in some other source of federal law, prohibits states from giving broader retroactive effect to new rules of criminal procedure than give by the Supreme Court.

***Boulware v. United States*, 128 S. Ct. 1168 (March 3, 2008) (Souter).** Petitioner Boulware was charged with criminal tax evasion and filing a false income tax return for diverting funds from a closely held corporation of which he was the president, founder, and controlling shareholder. To support his argument that the Government could not establish the tax deficiency required to convict him, Boulware sought to introduce evidence that the company had no earnings and profits in the relevant taxable years, so he in effect received distributions of property that were returns of capital, up to his basis in his stock, which are not taxable. The district court granted the government's *in limine* motion to bar evidence supporting Boulware's return-of-capital theory, relying on the Ninth Circuit's *Miller* decision that a diversion of funds in a criminal tax evasion case may be deemed a return of capital only if the taxpayer or corporation demonstrates that the distributions were intended to be such a return. In affirming his conviction, the Ninth Circuit held that Boulware's proffer was properly rejected under *Miller* because he offered no proof that the amounts diverted were intended as a return of capital when they were made. The Supreme Court reversed and held that a distributee accused of criminal tax evasion may claim return of capital treatment without producing evidence that, when the distribution occurred, either he or the corporation intended a return of capital.

***Snyder v. Louisiana*, 128 S. Ct. 1203 (March 19, 2008) (Alito).** During *voir dire* in Petitioner Snyder's capital murder case, the prosecutor used peremptory strikes to eliminate black prospective jurors who had survived challenges for cause. The jury convicted petitioner and sentenced him to death. The Louisiana Supreme Court rejected Snyder's claim that the prosecution's peremptory strikes of certain prospective jurors were based on race, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). The Supreme Court held that the trial judge committed clear error in rejecting the *Batson* objection to the strike of potential juror Brooks. The explanation given for striking Brooks, a college senior attempting to fulfill his student-teaching obligation, was insufficient by itself and sufficed for a *Batson* error determination. The prosecution's first race-neutral reason, that Brooks looked nervous cannot suffice. The second reason, Brooks's student teaching obligation, also is not enough. The implausibility of the prosecutor's explanation is reinforced by his acceptance of white jurors who disclosed conflicting obligations that appear to have been at least as serious as Brooks's. Under *Batson's* third stage, the prosecution's pretextual explanation gives rise to an inference of discriminatory intent.

***Medellin v. Texas*, 128 S. Ct. 1346 (March 25, 2008) (Roberts).** The International Court of Justice held that the United States had violated Article 36(1)(b) of the Vienna Convention on Consular Relations by failing to inform 51 named Mexican nationals, including Petitioner Medellin, of their Vienna Convention rights. The ICJ found that those named individuals were entitled to review and reconsideration of their U.S. state-court convictions and sentences regardless of their failure to comply with generally applicable state rules governing challenges to criminal convictions. In *Sanchez-Llamas v. Oregon,* 548 U.S. 331 (2006), this Court held, contrary to the ICJ's determination, that the Convention did not preclude the application of state default rules. The President then issued a memorandum stating that the United States would "discharge its international obligations" by having State courts give effect to the decision. Petitioner Medellin filed a second Texas state-court habeas application challenging his state capital murder conviction and death sentence on the ground that he had not been informed of his Vienna Convention rights. The Supreme Court affirmed the Texas Court of Appeals' ruling dismissing the writ, holding that neither the ICJ determination nor the President's Memorandum constitutes directly enforceable federal law that pre-empts state limitations on the filing of successive habeas petitions.

***Begay v. United States*, 128 S. Ct. 1581 (April 16, 2008) (Breyer).** The Armed Career Criminal Act defines a "violent felony" as a crime punishable by more than one year's imprisonment that "is burglary, arson, or extortion,

involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." After Petitioner Begay pled guilty to being a felon in possession of a firearm, his presentence report revealed he had 12 New Mexico convictions for driving under the influence of alcohol. Based on these convictions, the district court concluded that Begay had three or more "violent felony" convictions and, therefore, sentenced him to the mandatory minimum15 year sentence. The United States Court of Appeals for the Tenth Circuit rejected Begay's claim that DUI is not a "violent felony" under the ACCA. The Supreme Court held that felony DUI falls outside the scope of the ACCA's clause (ii). Specifically, the Court determined that, even assuming that DUI involves conduct that presents a serious potential risk of physical injury to another, the crime falls outside the clause's scope because it is simply too unlike the clause's example crimes (burglary, arson, extortion, or using explosives) to indicate that Congress intended that provision to cover it. The Clause's listed examples should be read as limiting the crimes covered to those that are roughly similar in kind as well as in degree of risk posed.

***Burgess v. United States*, 128 S. Ct. 1572 (April 16, 2008) (Ginsburg).** Petitioner Burgess pled guilty in federal court to conspiracy to possess with intent to distribute 50 grams or more of crack. Burgess had a prior South Carolina cocaine possession conviction, which carried a maximum sentence of two years but was classified as a misdemeanor under state law. The government argued that Burgess' minimum federal sentence should be enhanced to 20 years under 21 U.S.C. § 841(b)(1)(A) because his state conviction was punishable by more than one year's imprisonment. Burgess argued because the term "felony drug offense" incorporates the word "felony," a word that is separately defined in 21 U.S.C. § 802(13), a prior drug offense does not warrant an enhanced sentence unless it is both classified as a felony under the law of the jurisdiction and punishable by more than one year's imprisonment. Rejecting his argument, the district court ruled that § 802(44) alone controls the meaning of "felony drug offense" under § 841(b)(1)(A). The Fourth Circuit affirmed the district court's decision and the Supreme Court affirmed the Fourth Circuit. The Supreme Court held that, because the term "felony drug offense" is defined exclusively by § 802(44) and does not incorporate § 802(13)'s definition of "felony," a state drug offense punishable by more than one year qualifies as a "felony drug offense," even if state law classifies the offense as a misdemeanor.

***Virginia v. Moore*, 128 S. Ct. 1598 (April 23, 2008) (Scalia).** Law enforcement arrested Respondent Moore for the misdemeanor of driving on a suspended license in violation of state law which required merely a citation. A search incident to Moore's arrest yielded crack cocaine, and Moore was tried on drug charges. Moore filed a motion to suppress, which was denied by the trial court. The Virginia Supreme Court reversed, reasoning that the search violated the Fourth Amendment because the arresting officers should have issued a citation under state law, and the Fourth Amendment does not permit search incident to citation. The United States Supreme Court reversed and held that the police did not violate the Fourth Amendment when they made an arrest that was based on probable cause but prohibited by state law, or when they performed a search incident to the arrest. The Court has previously held that when an officer has probable cause to believe a person committed even a minor crime, the arrest is constitutionally reasonable. Therefore, the Court reasoned that prior decisions weighed against changing the analysis when a state chooses to protect an individual's rights beyond the level required by the Fourth Amendment.

***Gonzalez v. United States*, 128 S. Ct. 1765 (May 12, 2008) (Kennedy).** With the parties' consent, a federal magistrate judge may preside over the *voir dire* and jury selection in a felony criminal trial. Before Petitioner Gonzalez's trial on drug charges, his counsel consented to the magistrate judge's presiding over jury selection. However, Gonzalez was not asked for consent and contended for the first time on appeal that it was error not to obtain his consent to the magistrate's *voir dire* role. The Supreme Court held that consent by counsel suffices to permit a magistrate to preside over *voir dire*. The Court reasoned that *the* acceptance of a magistrate judge at the jury selection phase is a tactical decision well suited for the attorney's own decision. As with other tactical decisions, requiring personal, on-the-record approval from the client could necessitate a lengthy explanation that the client might not understand and that might distract from more pressing matters as the attorney seeks to prepare the best defense.

***United States v. Ressam*, 128 S. Ct. 1858 (May 19, 2008) (Stevens).** After Ressam gave false information on his customs form while attempting to enter the United States, a search of his car revealed explosives that he intended to detonate in this country. He was subsequently convicted of making a false statement to a customs official in violation of 18 U.S.C. § 1001, and carrying an explosive during the commission of that felony in violation of § 844(h)(2). The Ninth Circuit set aside his § 844 conviction because it read "during" to require that the explosive be carried "in relation to" the underlying felony. The Supreme Court reversed holding that the most natural reading of § 844(h)(2) clearly indicates carrying the explosives during his violation of § 1001 fell within the meaning of § 844(h)(2).

***United States v. Rodriquez*, 128 S. Ct. 1783 (May 19, 2008) (Alito).** Respondent Rodriguez was convicted for being a felon in possession of a firearm pursuant to 18 U.S.C. § 922(g)(1). He had three prior Washington State convictions for delivery of a controlled substance. Washington law specified a maximum five year prison term for the first such offense; however a recidivist provision raised the maximum sentence to 10 years for a second or subsequent offense. Under the ACCA, a state drug trafficking conviction qualifies as a serious drug offense if a maximum term of imprisonment of ten years or more is prescribed by law. The government argued two of Rodriguez's prior drug convictions, for which the recidivist enhancement applied, should be used to qualify him for the mandatory minimum sentence under the ACCA. The District Court disagreed, holding that the maximum term of imprisonment for ACCA purposes is determined without reference to recidivist enhancements. The Ninth Circuit affirmed. The Supreme Court disagreed and held that the maximum term of imprisonment for the state drug convictions was the ten year maximum set by the applicable recidivist provision.

***United States v. Williams*, 128 S. Ct. 1830 (May 19, 2008) (Scalia).** After this Court decided *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, Congress passed the pandering and solicitation provision found at 18 U.S.C. § 2252A(a)(3)(B). Respondent Williams pled guilty to this offense and reserved the right to challenge the constitutionality of his pandering conviction. The district court rejected the challenge, but the Eleventh Circuit reversed, finding the statute both overbroad under the First Amendment and impermissibly vague under the Due Process Clause. The Supreme Court reversed and found that § 2252(a)(3)(B) is not overbroad under the First Amendment. In so finding, the Court determined the statute's important features include: (1) a scienter requirement; (2) operative verbs that are reasonably read to penalize speech that accompanies or seeks to induce a child pornography transfer from one person to another; (3) a phrase ("in a manner that reflects the belief") that has both a subjective component and an objective component; (4) a phrase ("in a manner . . . that is intended to cause another to believe") that has only a subjective element; and (5) a "sexually explicit conduct" definition that is very similar to that in the New York statute upheld in *Ferber*. Therefore, as construed, the statute does not criminalize a substantial amount of protected expressive activity. The Court also held that the provision at issue was not impermissibly vague under the Due Process Clause.

***Cuellar v. United States*, 128 S. Ct. 1994 (June 2, 2008) (Thomas).** Petitioner Cuellar was arrested after a search of the car he was driving in Texas toward Mexico revealed $ 81,000 bundled in plastic bags and covered with animal hair in a secret compartment under the rear floorboard. He was convicted of attempting to transport funds from a place in the United States to a place outside the United States knowing that the funds represented the proceeds of unlawful activity and that such transportation was designed to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of the money, in violation of 18 U.S.C. § 1956(a)(2)(B)(i). The Fifth Circuit rejected Cuellar's argument that the government must prove that he attempted to create the appearance of legitimate wealth, but held that his extensive efforts to prevent the funds' detection during transportation showed that he sought to conceal or disguise its nature, location, source, ownership, or control. The Supreme Court agreed that § 1956(a)(2)(B)(i) does not require proof that the defendant attempted to create the appearance of legitimate wealth. However, the Court reversed on the concealment issue, finding that § 1956(a)(2)(B)(i) cannot be satisfied solely by evidence that the funds were concealed during transport. The Court reasoned that the statute's text clearly requires proof that the transportation's purpose (not merely its effect) was to conceal or disguise one of the listed attributes: the funds' nature, location, source, ownership, or control.

***United States v. Santos*, 128 S. Ct. 2020 (June 2, 2008) (Scalia).** Respondent Santos ran an illegal lottery where runners took commissions from the bets they gathered, and some of the rest of the money was paid as salary to Respondent Diaz and other collectors and to the winning gamblers. Based on these payments to runners, collectors, and winners, Santos was convicted of money laundering under § 1956 which prohibits the use of the "proceeds" of criminal activities for various purposes, including engaging in, and conspiring to engage in, transactions intended to promote the carrying on of unlawful activity, § 1956(a)(1)(A)(i) and § 1956(h). Based on his receipt of a salary from the illegal lottery business, Diaz pleaded guilty to conspiracy to launder money. On collateral review, the district court ruled that, under Seventh Circuit precedent interpreting the word "proceeds," that § 1956(a)(1)(A)(i) applies only to transactions involving criminal profits, not criminal receipts. When the district court found no evidence that the transactions on which respondents' money-laundering convictions were based involved lottery profits (rather than proceeds), the court vacated the convictions. The Seventh Circuit affirmed. The Supreme Court also affirmed and held that the term "proceeds" in § 1956(a)(1) means "profits" not "receipts."

***Irizarry v. United States*, 128 S. Ct. 2198 (June 12, 2008) (Stevens).** Petitioner Irizarry pled guilty to making a threatening interstate communication to his ex-wife in violation of federal law. Although the presentence report recommended a guidelines range of 41 to 51 months in prison, the court imposed the statutory maximum sentence - 60 months in prison. In doing so, the district court

rejected Irizarry's argument that he was entitled to notice that the court was contemplating an upward departure under Federal Rule of Criminal Procedure 32(h). The Eleventh Circuit affirmed, as did the Supreme Court. The Court held that Rule 32(h) does not apply to a variance from a recommended advisory guidelines range. With the guidelines now advisory, neither the government nor the defendant may place the same degree of reliance on the type of "expectancy" that gave rise to a special need for notice under the mandatory guidelines.

***Indiana v. Edwards,* 128 S. Ct. 2379 (June 19, 2008) (Breyer).** Respondent Edwards was charged with attempted murder and other crimes for a shooting during his attempt to steal a pair of shoes. Edwards's mental condition became the subject of three competency proceedings and two self-representation requests. Referring to the lengthy record of psychiatric reports, the trial court noted that Edwards suffered from schizophrenia and concluded that, although it appeared he was competent to stand trial, he was not competent to defend himself at trial and denied Edwards's request to represent himself. The state appellate courts ordered a new trial, agreeing with Edwards that the trial court's refusal to permit him to represent himself deprived him of his constitutional right of self-representation under the Sixth Amendment and *Faretta v. California*. The Supreme Court held that the Constitution does not forbid States from insisting upon representation by counsel for those competent enough to stand trial but who suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves. The Court relied on several of its prior decisions, although not directly on point. *Dusky* and *Drope* suggest that choosing to forgo trial counsel presents a very different set of circumstances than the mental competency determination for a defendant to stand trial. In addition, *Faretta* rested its self-representation conclusion in part on pre-existing state cases that are consistent with a competency limitation on the self-representation right. Furthermore, the nature of mental illness cautions against using a single competency standard to decide both whether a defendant who is represented can proceed to trial and whether a defendant who goes to trial must be permitted to represent himself.

***Greenlaw v. United States,* 2008 U.S. LEXIS 5259 (June 23, 2008) (Ginsburg).** Petitioner Greenlaw was convicted in federal court of several drug and firearms offenses and was sentenced to imprisonment for a total of 442 months. However, the district court erroneously imposed a 10 year sentence on a count that carried a 25 year mandatory minimum. Greenlaw appealed arguing his sentence should have been much lower. However, the government did not appeal or cross-appeal based on the district court's error. The Eighth Circuit found no merit in any of Greenlaw's arguments, but considered whether his sentence was too low based on the district court's error despite the fact the government had not raised the issue. The Court of Appeals ordered the District Court to enlarge Greenlaw's sentence by 15 years. The Supreme Court reversed holding that, absent a government appeal or cross-appeal, the Court of Appeals could not on its own initiative order an increase in a defendant's sentence.

***Kennedy v. Louisiana,* 2008 U.S. LEXIS 5262 (June 25, 2008) (Kennedy).** Petitioner Kennedy was charged with the aggravated rape of his eight year old stepdaughter and was convicted and sentenced to death. The Supreme Court reversed and held that the Eighth Amendment bars Louisiana from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim's death. Under the precept of justice that punishment is to be graduated and proportioned to the crime, informed by evolving standards, the Court held that capital punishment must "be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." The Court's review of the authorities informed by contemporary norms, including the history of the death penalty for this and other non-homicide crimes, current state statutes and new enactments, and the number of executions since 1964, demonstrated a national consensus against capital punishment for the crime of child rape.

***Giles v. California,* 2008 U.S. LEXIS 5264 (June 25, 2008) (Scalia).** Petitioner Giles was charged with murder and, at the trial, the trial court allowed prosecutors to introduce statements that the murder victim had made to a police officer responding to a domestic violence call. While Giles's appeal was pending, the Supreme Court decided *Crawford v. Washington*. The state Court of Appeal concluded that the Confrontation Clause permitted the trial court to admit into evidence the unconfronted testimony of the murder victim under a doctrine of "forfeiture by wrongdoing." It concluded that Giles had forfeited his right to confront the victim's testimony because it found Giles had committed the murder for which he was on trial. The Supreme Court reversed holding at the theory of "forfeiture by wrongdoing" is not an exception to the Sixth Amendment's confrontation requirement because it was not an exception established at the founding. No case before 1985 applied forfeiture to admit statements outside the context of conduct designed to prevent a witness from testifying.

***District of Columbia v. Heller,* 2008 U.S. LEXIS 5268 (June 26, 2008) (Scalia).** The District of Columbia bans handgun possession by making it a crime to carry an unregistered firearm and prohibiting the registration of handguns and also provides separately that no person may carry an unlicensed handgun. Respondent Heller applied

to register a handgun he wished to keep at home, but the District refused. He filed a lawsuit on Second Amendment grounds to enjoin the city from enforcing the bar on handgun registration, the licensing requirement insofar as it prohibits carrying an unlicensed firearm in the home, and the trigger-lock requirement insofar as it prohibits the use of functional firearms in the home. The Supreme Court held that the Second Amendment protects an individual's right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home. The Court's interpretation was supported by analogous arms-bearing rights in state constitutions that preceded and immediately followed the Second Amendment. The Court added, however, that the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose, and may limit concealed weapons, possession of firearms by felons or mentally ill, carrying firearms in schools or government buildings, or certain commercial sales of firearms.

Cases Pending - October 2008 Term

***Chambers v. United States*, No. 06-11206, cert. granted April 21, 2008, argument date to be determined.** Whether a defendant's failure to report for confinement "involves conduct that presents a serious potential risk of physical injury to another" such that a conviction for escape based on that failure to report is a "violent felony" within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e)?

***Herring v. United States*, No. 07-513, cert. granted February 19, 2008, to be argued October 7, 2008.** Whether the Fourth Amendment requires evidence found during a search incident to an arrest to be suppressed when the arresting officer conducted the arrest and search in sole reliance upon facially credible but erroneous information negligently provided by another law enforcement agent?

***Arizona v. Gant*, No. 07-542, cert. granted February 25, 2008, to be argued October 7, 2008.** Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?

***Chrones v. Pulido*, 07-544, cert. granted February 25, 2008, to be argued October 15, 2008.** Did the Ninth Circuit fail to conform to "clearly established" Supreme Court law, as required by 28 U.S.C. § 2254(d), when it granted habeas corpus relief by deeming an erroneous instruction on one of two alternative theories of guilt to be "structural error" requiring reversal because the jury might have relied on it?

***Melendez-Diaz v. Massachusetts*, No. 07-591, cert. granted March 17, 2008, argument date to be determined.** Whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004)?

***United States v. Hayes*, 07-608, cert. granted March 24, 2008, argument date to be determined.** Section 922(g)(9) of Title 18, United States Code, makes it a crime for any person convicted of a "misdemeanor crime of domestic violence" to possess a firearm. The question presented is whether, to qualify as a "misdemeanor crime of domestic violence" under 18 U.S.C. § 921(a)(33)(A), an offense must have as an element a domestic relationship between the offender and the victim?

***Waddington v. Sarausad*, No. 07-772, cert. granted March 17, 2008, to be argued October 15, 2008.** The Washington Supreme Court has repeatedly approved of the pattern accomplice liability jury instructions given in Sarausad's trial, which mirror the statutory language on accomplice liability under state law. The United States Court of Appeals for the Ninth Circuit found a violation of due process based on its independent conclusion that the instructions were ambiguous, and that there was a reasonable likelihood a jury could misapply the instructions so as to relieve the prosecution of its burden to prove each element of a crime beyond a reasonable doubt. First, in reviewing a due process challenge to jury instructions brought under 28 U.S.C. § 2254, must the federal courts accept the state court determination that the instructions fully and correctly set out state law government accomplice liability? Second, where the accomplice liability instructions correctly set out state law, is it an unreasonable application of clearly established federal law to conclude there was no reasonable likelihood that the jury misapplied the instructions so as to relieve the prosecution of the burden of proving all the elements of the crime?

***Oregon v. Ice*, No. 07-901, cert. granted March 17, 2008, to be argued October 15, 2008.** Whether the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant?

***Arizona v. Johnson*, No. 07-1122, cert. granted June 23, 2008, argument date to be determined.** In the context of a vehicular stop for a minor traffic infraction, may an

officer conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense?

***Cone v. Bell*, No. 07-1114, cert. granted June 23, 2008, argument dated to be determined.** On state post-conviction review, the Tennessee courts refused to consider petitioner's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), on the ground that the claim had already been "previously determined" in the state system. On federal habeas, a divided panel of the Sixth Circuit held that the state courts' ruling precluded consideration of the *Brady* claim. The court of appeals reasoned (in conflict with the decisions of five other circuits) that the claim had been "procedurally defaulted." The court of appeals further reasoned (widening an existing four-to-two circuit split) that the state courts' ruling was unreviewable. Seven judges dissented from the denial of rehearing *en banc*. The question presented is whether petitioner is entitled to federal habeas review of his claim that the state suppressed material evidence in violation of *Brady v. Maryland*, which encompasses two sub-questions. First, is a federal habeas claim "procedurally defaulted" because it has been presented twice to the state courts? Second, is a federal habeas court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?

***Bell v. Kelly*, No. 07-1223, cert. granted May 12, 2008, argument dated to be determined.** Petitioner asserted ineffective assistance of counsel at sentencing, and the district court found that he had diligently attempted to develop and present the factual basis of this claim in state court, on habeas, but that the state court's fact-finding procedures were inadequate to afford a full and fair hearing. After an evidentiary hearing, the district court found deficient performance but no prejudice and denied relief. The Fourth Circuit affirmed. The questions presented are: (1) Did the Fourth Circuit err when, in conflict with decisions of the Ninth and Tenth Circuits, it applied the deferential standard of 28 U.S.C. § 2254(d), which is reserved for claims "adjudicated on the merits" in state court, to evaluate a claim predicated on evidence of prejudice the state court refused to consider and that was properly received for the first time in a federal evidentiary hearing; (2) Did the Fourth Circuit err when, in conflict with decisions of several courts of appeals and state supreme courts, it categorically discounted the weight of mitigated evidence for *Strickland* prejudice purposes whenever the evidence could also have aggravating aspects; and (3) Does Virginia's use and/or manner of administration of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, as a method of execution by lethal injection, violate the Cruel and Unusual Punishment Clause?

***Knowles v. Mirzayance*, No. 07-1315, cert. granted June 27, 2008, argument date to be determined.** Concluding that defense counsel was ineffective in advising petitioner to withdraw his not guilty by reason of insanity plea, the Ninth Circuit Court of Appeals granted habeas relief to petitioner without analyzing the state court adjudication deferentially under "clearly established" law as required by 28 U.S.C. § 2254(d) and by supplanting the district court's factual findings and credibility determinations with its own, opposite factual findings. This Court vacated the Ninth Circuit decision and remanded the case for further consideration in light of *Carey v. Musladin*, 127 S. Ct. 649 (2006). On remand, the Ninth Circuit conceded that "no Supreme Court case has specifically addressed a counsel's failure to advance the defendant's only affirmative defense" but nonetheless concluded that its original decision was "unaffected" by *Musladin* and subsequent § 2254(d) decisions of this Court. The questions presented are: (1) Did the Ninth Circuit again exceed its authority under § 2254(d) by granting habeas relief without considering whether the state-court adjudication of the claim was "unreasonable" under "clearly established Federal law" based on its previous conclusion that trial counsel was required to proceed with an affirmative insanity defense because it was the only defense available and despite the absence of a Supreme Court decision addressing the point; and (2) May a federal appellate court substitute its own factual findings and credibility determinations for those of a district court without determining whether the district court's findings were "clearly erroneous?"

***Jimenez v. Quarterman*, No. 07-6984, cert. granted March 17, 2008, argument date to be determined.** Whether a Certificate of Appealability should have issued pursuant to *Slack v. McDaniel*, 529 U.S. 473 (2000) on the question of whether pursuant to 28 U.S.C. § 2244(d)(1)(A) when through no fault of the petitioner, he was unable to obtain a direct review and the highest state court granted relief to place him back to original position on direct review, should the one year limitations begin to run after he has completed that direct review resetting the one year limitations period?

***Harbison v. Bell*, No. 07-8521, cert. granted May 23, 2008, argument date to be determined.** First, does 18 U.S.C. § 3599(a)(2) and (e) (recodifying verbatim former 21 U.S.C. § 848(q)(4)(B) and (q)(8)), permit federally-funded habeas counsel to represent a condemned inmate in state clemency proceedings when the state has denied state-funded counsel for that purpose? Second, is a certificate of appealability required to appeal an order denying a request for federally-funded counsel under 18 U.S.C. § 3599(a)(2) and (e)?

The Back Bencher

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THE FEDERAL PUBLIC DEFENDER CENTRAL DISTRICT OF ILLINOIS

2008 CJA PANEL ATTORNEY SEMINAR

THURSDAY, SEPTEMBER 18, 2008
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PEORIA, ILLINOIS

MORNING SESSION: 10:00 A.M. TO 12:00 P.M.

Seventh Circuit Update: 10:00 a.m. to 10:45 a.m.
Jonathan E. Hawley, First Assistant Federal Defender

Restitution: 10:45 a.m. to 11:30 a.m.
Johanna M. Christiansen, Staff Attorney

Ethics for the Criminal Defense Lawyer: 11:30 a.m. to 12:00 p.m.
Richard H. Parsons, Federal Public Defender

BREAK: 12:00 P.M. TO 1: 00 P.M.

AFTERNOON SESSION: 1:00 P.M. TO 3:30 P.M.

BOP Inmate Designations: 1:00 p.m. to 1:45 p.m.
Karl W. Bryning, Assistant Federal Defender

Using the Electronic Courtroom: 1:45 p.m. to 3:15 p.m.
George F. Taseff and Robert A. Alvarado, Senior Litigators

Questions and Answers for Speakers: 3:15 p.m. to 3:30 p.m.

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