

The BACK BENCHER



Central District of Illinois Federal Defenders

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DEFENDER'S MESSAGE

The law is continually changing, and it is the duty of every criminal defense lawyer to know and understand the current state of the law. For many panel attorneys, however, they must also stay abreast of changes in the many other areas of law in which they practice, not having the luxury of specializing in a single area. As federal public defenders, my staff and I are fortunate enough to focus solely on the federal criminal law.

Accordingly, we can read the daily opinions of the Seventh Circuit, follow legislative changes, and stay current with all the trends and changes in the law which affect our practice. It has always been a goal of my office to share the expertise we have with the members of our panel so that you can provide your clients with the best representation possible.

Among the ways we attempt to accomplish that goal is this newsletter, our website (<http://ilc.fd.org>), and our seminars. Notwithstanding these efforts, changes in the law can occur which you need to know about before the next issue of *The Back Bencher* or our next seminar. To fill in this gap, I am pleased to offer an additional support service, *i.e.*, a free listserv email subscription service for CJA Panel Attorneys and other federal criminal practitioners.

The purpose of this listserv (free to you) is to provide you via email with up-to-date information useful in defending a criminal case. For example, on St. Patrick's Day, the Seventh Circuit in *United States v. Corner*, ___ F.3d ___ (7th Cir. 2010; No. 08-1033), overruled *United States v. Welton*, 583 F.3d 494 (7th Cir. 2009), holding that career offenders can seek a variance from the guideline range based upon the crack/powder disparity. Unless you read the opinions of the Seventh Circuit

daily online or receive the slip opinions weekly in the mail, you might be unaware of this important change in the law for quite some time. The same is true for opinions of the United States Supreme Court. By subscribing to our listserv, you will receive notification of important opinions the day they are issued. Did you know that the Senate Judiciary Committee recently approved a bill eliminating mandatory minimums for simple possession of crack and reducing the crack/powder disparity from 100:1 to 20:1? If you subscribe to our listserv, you'll know how this bill progresses through Congress and what the final version, if it becomes law, provides. The listserv is the quickest, most up-to-date way for us to share information with you. Subscribers will also receive new issues of *The Back Bencher* through the service, other publications my office produces, and information about upcoming CLE programs.

Another feature of the listserv is the ability of members to send out comments or questions to all the other members of the group. Ever wonder if a so-called "policy" of the U.S. Attorney's office is uniformly applied by all the prosecutors in the district, or if instead the prosecutor is singling your client out? Through the listserv, you can post a question or comment to other group members and receive feedback from them. Have a novel motion that was granted? You can share that with the group members too. I have said many times that being a federal criminal defense lawyer is a lonely profession. So often you stand alone with your client, up against the might of the United States Government. By sharing information with each other, we can help level the playing field.

Subscribing to the listserv is free and easy. If you have not already received an email invitation from me asking you to join, all you need to do is send an email to the following address:

FPD_ILC-subscribe@yahoogroups.com. You don't need to write anything in the email. Just send an email to the address. After doing so, you will receive an email from the listserv asking you to confirm your request to join the group. Send a blank reply to that confirmation email and your subscription will be complete. If you have any difficulty subscribing or other questions, feel free to call my office at (309) 671-7891, and we will assist you. Should you for any reason decide that you no longer wish to be a member of the group, you only need to send a blank email to FPD_ILC-unsubscribe@yahoogroups.com, and you will automatically be removed from the listserv.

I sincerely hope you take advantage of this new service. By sharing information and pooling our resources, we can further provide our clients' their Sixth Amendment right to the effective assistance of counsel.

Sincerely yours,

Richard H. Parsons
Federal Public Defender
Central District of Illinois

Table Of Contents

Churchilliana 2
Dictum Du Jour. 2
Churchill on Healthcare 5
Wilkes - His Life And Crimes (continued). 9
Supreme Court Update 20
CA-7 Case Digest 24

CHURCHILLIANA

Class quarrels, endless party strife, on a background of apathy, indifference, and bewilderment, will lead us all to ruin. Only a new surge of impulse can win us back the glorious ascendancy which we gained in the struggle for right and freedom, and for which our forbears had nerved our hearts down the long aisles of time. Let us make a supreme effort to surmount our dangers. Let faith, not appetite, guide our steps.

– Sir Winston Churchill

Dictum Du Jour

No one wants to nurse a partner and watch him or her die. And yet, people do, because standing by someone in sickness is the greatest expression of love there is.

~ Anonymous

* * * * *

“No matter where I go, I always carry a blazer. It is the male version of a Chanel suit. Always appropriate, and in an emergency, when worn with a tie, it can almost pass as a suit.”

~ Tom Ford

* * * * *

“I have found out that there ain't no surer way to find out whether you like people or hate them than to travel with them.”

~ Mark Twain

* * * * *

“Travel is glamorous only in retrospect.”

~ Paul Theroux

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In a time of universal deceit, telling the truth is a revolutionary act.

~ George Orwell

* * * * *

If we say that we have fellowship with him, and walk in darkness, we lie, and do not live by the truth: 1st John 1:16

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Everything we hear is an opinion, not a fact. Everything we see is a perspective, not the truth.

~ Marcus Aurelius

* * * * *

A road trip from Atlanta, Georgia to Valparaiso, Indiana, requires driving some 685 miles. That’s not too bad if you have some company and a good radio. But it’s downright frightening if your “company” includes 21 kilos of cocaine. That’s the position in which Loera found himself when he sat down in the passenger seat of a Ford Explorer on the night of December 13, 2004. The driver, a woman named Angela Bennett, no doubt shared Loera’s fears. But money is a pretty good anti-anxiety medication, so, with the promise of a big payday upon delivery, they hit the road.

~ United States v. Loera, Jr.,
___ F.3d ___ (7th Cir. 2009; No. 08-2324).

After taking three steps towards the cruiser, Carmin turned on his heels, freezing Bennet in position as she was reaching to put the truck in gear. Playing Columbo to perfection, Carmin had “just one more thing.” Nothing major, only a small matter of drugs—were they carrying any? Bennett responded that they were not and agreed to a search of the vehicle. That was the nail in the coffin. Bloom showed up with his drug dog, which alerted to the presence of cocaine in a hidden compartment built into the floor of the rear cargo area. Carmin lifted the trap door to reveal several packages, wrapped in black duct tape, emanating an “overwhelmingly strong odor of raw cocaine.” [Footnote: Some of the packages had stickers warning “No Fumar,” Spanish for “No Smoking.” That’s curious—powder cocaine is normally snorted, not smoked—but perhaps this was some kind of marketing strategy. Cocaine peddlers often brand their products with logos (authorities have seen everything from Nike “swooshes” to Teletubbies). If that’s what dealers had in mind, it gives no meaning to the expression “mere puffery”].

~ United States v. Loera, Jr.,
___ F.3d ___ (7th Cir. 2009; No. 08-2324).

To be sure, Berry consistently behaved in a bizarre manner. Beginning with a slew of pro se motions filed in 2004, Berry made statements that we can only generously call absurd. (Berry was represented by three different lawyers from 2004 to 2006, but the vast majority of motions he filed were pro se). He said he met with Condelezza Rice at the White House; that Citibank robbed him of \$420 million (perhaps this is not as farfetched as it seems given the situation in the spring of 2009!); that he was in the process of “[n]egotiating to reduce [o]il prices and create millions of jobs in America”; that he drafted an international treaty; that two bankers (former associates)

were killed after working with him, and his own life was in danger due to some sort of global financial conspiracy; that he was business partners with the “controller of the space station”; that he represented the governments of China, Russian, and Taiwan, and had met with finance ministers all over the world; and that Bill Clinton and Boris Yeltsin had personally made promises to him.

~ United States v. Berry,
___ F.3d ___ (7th Cir. 2009; No. 07-3243).

As far as pro se defenses go, it wasn’t the worst we’ve seen. Berry managed to lodge objections, cross-examine witnesses, call a witness of his own, and make opening and closing statements. He didn’t call himself as a witness, but by choosing to represent himself was effectively able to testify throughout the trial without facing cross-examination. But to say that it wasn’t an unmitigated disaster for a pro se defense isn’t saying much. Berry’s decision to ride solo was clearly a poor one. At best, his performances served as a distraction from the government’s case, doing little (if anything) to undermine it.

~ United States v. Berry,
___ F.3d ___ (7th Cir. 2009; No. 07-3243).

The prosecutor’s reference to The Godfather does not approach impropriety. It would be one thing if the government compared Kincannon to Michael Corleone, an organized crime kingpin responsible for murders and a whole host of other criminal activity [citations omitted]. Such an analogy would be utterly unmoored from the record, which is probably why the government made no such connection. It was not Corleone’s criminality, but Francis Ford Coppola’s direction that was at the heart of the prosecutor’s closing remarks. The prosecutor alluded to the pivotal point in the movie where Corleone attends his godchild’s christening. Coppola cuts to various scenes of assassinations orchestrated by Corleone as a priest dubbed him the child’s godfather. The poetic implication is that the murders, like the priest’s liturgy, made Michael the godfather of the Corleone crime family. As the prosecutor said, “[n]ow that is how you present events that occur simultaneously in a movie so the viewer can understand it very easily.” We agree, as did the Academy of Motion Picture Arts and Sciences, who nominated Coppola for an Oscar for best director. The prosecutor explained to the jury that he would try to do orally what Coppola did in his film—that is, tie together the events that occurred during the two controlled buys into one seamless story. To do so as eloquently as Coppola is a tall task, but

there is certainly nothing improper about the attempt.

~ United States v. Kincannon,
___ F.3d ___ (7th Cir. 2009; No. 08-2891).

One would guess that the chances are pretty slim that the work of a 17th century French poet would find its way into a Chicago courtroom in 2009. But that’s the situation in this case as we try to make sense out of what has been dubbed the “cat’s paw” theory. The term derives from the fable “The Monkey and the Cat” penned by Jean de La Fontaine (1621-1695). In the tale, a clever—and rather unscrupulous—monkey persuades an unsuspecting feline to snatch chestnuts from a fire. The cat burns her paw in the process while the monkey profits, gulping down the chestnuts one by one. As understood today, a cat’s paw is a “tool” or “one used by another to accomplish his purposes.”

~ United States v. Staub,
___ F.3d ___ (7th Cir. 2009; No. 08-1316).

The date: April 14, 2005. The time: 6 p.m. The place: Ho-Chunk casino in Baraboo, Wisconsin. The event: a drawing to determine who would walk off with \$10,000. Undoubtedly, excitement was in the air. Realistically, the average schlemiel had only a .00067 percent chance of winning. But another participant in the drawing had to like his chances: Bruce Knuston had a 30 percent chance of coming up a winner. And when the winning entry form was pulled from the barrel—ta da—the winner was Bruce Knutson! The lucky winner then posed for a publicity picture, signed off on a tax form, received a check for \$5,000, and pocketed \$5,000 in cash. It was, we suspect, a night to remember. But all was not, as we shall see, quite as it seemed. The rest of the story explains why Knutson and his buddy, Darwin Moore, are here appealing their convictions after they were found guilty of bilking the casino out of \$10,000.

~ United States v. Moore,
___ F.3d ___ (7th Cir. 2009; No. 08-1177).

In the winter of 1999, Turpin was wrapping up her Ph.D. in educational psychology. She had completed all her necessary course work and had written what she believed was the final draft of her dissertation. [Footnote: We freely admit to having absolutely no clue as to what her dissertation was all about. Its title—The Link Between Vocational Rehabilitation Counselors Who Utilize

Performance Technologies Competencies and Resulting Impact Upon Their Consumer Outcome—doesn’t quite make its content self evident].

~ Turpin v. Koropchak,
___ F.3d ___ (7th Cir. 2009; No. 08-2495).

According to SIU’s Web site, the vast majority of alumni have a “positive or strongly positive” attitude toward the school [citation omitted]. Turpin is one Saluki who begs to differ. [Footnote: The Saluki is SIU’s mascot. Renowned for its endurance and beauty, the Saluki is one of the earliest breeds of domesticated dogs. In fact, images of Salukis appear on Egyptian artifacts dating back to 2100 B.C., and their remains have been found in tombs throughout the Upper Nile region. [citation omitted] So how did this pharaohs’ hound end up the mascot for a university in southern Illinois? Well, somewhere along the line southern Illinois gained the nickname “Little Egypt”—perhaps the flood plain along the Mississippi reminded settlers of the fertile Nile Valley—so the Saluki was a natural choice. (Southern Illinois is also home to a town named Cairo.) And it has served the school well. The Salukis men’s basketball team—hailing from the vaunted Missouri Valley Conference—has a storied history. The “Dawgs” captured the nation’s attention in 1967 when Walt “Clyde” Frazier led them past Marquette University (and its star, George “Brute Force” Thompson) to win the National Invitation Tournament in Madison Square Garden. More recently, they busted brackets coast to coast with runs to the Sweet Sixteen in the 2002 and 2007 NCAA Tournaments].

~ Turpin v. Koropchak,
___ F.3d ___ (7th Cir. 2009; No. 08-2495).

The Duck Test holds that if it walks like a duck, swims like a duck, and quacks like a duck, it’s a duck. Joseph Lake, the plaintiff in this suit, flunks the Duck Test. He says, in effect, that if it walks like a duck, swims like a duck, and quacks like a duck, it sure as heck isn’t a duck.

~ Lake v. Langdon,
___ F.3d ___ (7th Cir. 2009; No. 08-3765).



CHURCHILL ON HEALTHCARE

~ by: Richard H. Parsons

Recently, while reading the current issue of *The Finest Hour*, the Journal of the Winston Churchill Society, I came upon an article entitled, "Churchill on Healthcare," the subtitle of which was "What Would Winnie Do?" Here is what Churchill had to say in 1950, on a topic our country is hotly debating 60 years later:

"The discoveries of healing science must be the inheritance of all. That is clear: Disease must be attacked, whether it occurs in the poorest or the richest man or woman simply on the ground that it is the enemy; and it must be attacked just in the same way as the fire brigade will give its full assistance to the humblest cottage as readily as to the most important mansion. Our policy is to create a national health service in order to ensure that everybody in the country, irrespective of means, age, sex, or occupations, shall have equal opportunities to benefit from the best and most up-to-date medical and allied services available."

We know that Churchill was a conservative, but also very much the humanitarian as the above quote indicates. This quote supports my view that history repeats itself and, as the saying goes, "Those who ignore history and its lessons and/or mistakes are doomed to repeat it."

CHECK OUT OUR WEBSITE

The Federal Public Defender for the Central District of Illinois's own website is accessible at <http://ilc.fd.org>. The website is designed 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 Richard H. Parsons's 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. Finally, the CLE section contains information regarding upcoming CLE programs, sponsored by our office and other organizations as well.

CJA PANEL RATE INCREASE!

Congress authorized and provided funds to raise the non-capital hourly panel attorney compensation rate from \$110 to \$125, and the maximum hourly capital rate from \$175 to \$178 (for federal capital prosecutions and capital post-conviction proceedings). These rates apply to attorneys appointed to represent eligible persons under the CJA, 18 U.S.C. § 3006A, and the Antiterrorism and Effective Death Penalty Act of 1996, codified in part in 18 U.S.C. § 3599. The new hourly compensation rates apply to work performed on or after January 1, 2010. Where the appointment of counsel occurred before this effective date, the new compensation rates apply to that portion of services provided on or after January 1, 2010.

The case compensation maximums resulting from the increase in the hourly rate to \$125 include:

- \$9,700 for felonies at the trial court level and \$6,900 for appeal (previously \$8,600/\$6,100);

- \$2,800 for misdemeanors at the trial court level and \$6,900 for appeal (previously \$2,400/\$6,100);

- \$9,700 for non-capital post-conviction proceedings under 18 U.S.C. §§ 2241, 2254 or 2255 and \$6,900 for appeal (previously \$8,600/\$6,100);

- \$2,100 for most other non-capital representations and \$2,100 for appeal (previously \$1,800/\$1,800).

The new case compensation maximums apply to a voucher submitted by appointed counsel if that person furnished any CJA-compensable work on or after January 1, 2010. The former case compensation maximums apply to a voucher submitted by appointed counsel if that person's CJA-compensable work on the representation was completed before January 1, 2010.

PACER ACCOUNTS

If you represent clients as both retained and appointed CJA counsel in the district court, the Clerk's Office has asked us to remind you that you should open a separate PACER account for use with your appointed cases only. Appointed counsel are entitled to use PACER without charge. However, if you do not open a unique account for use in appointed cases, and instead login with your PACER account used in retained cases, you will incur charges when accessing PACER. If you do not have a PACER account for use in CJA cases, call (800) 676-6856

to obtain a username and password.

**NEW ELECTRONIC FILING
REQUIREMENTS FOR BRIEFS IN
THE SEVENTH CIRCUIT EFFECTIVE
APRIL 1, 2010**

Below is information from the Seventh Circuit on the new electronic filing requirements for briefs:

Beginning April 1, 2010, the Clerk’s Office will accept electronic briefs via our Case Management/Electronic Case Filing system (CM/ECF) rather than using the current brief upload system on our website.

Until the implementation of Electronic Case Filing later this year, the paper brief remains the official record of the court. This new way to submit electronic copies does not currently affect brief filing requirements in any way.

This new upload system is offered as a precursor to compulsory e-filing and the background work necessary for submitting briefs in this manner will prepare you for the eventuality of full electronic filing. Electronic submission of briefs and other documents will be mandatory when the court implements Electronic Case Filing.

Counsel who provide electronic copies for the court on diskette or CD will be asked to register for CM/ECF and submit future electronic versions through the preferred method of CM/ECF upload.

What you must remember:

1. The due date for your brief remains the date you deliver paper copies to the court and is NOT affected by the submission date of the electronic version.
2. This submission method currently does NOT affect any requirements of service incumbent upon you as counsel.
3. To use this service, you must have a PACER account and must be a registered filer with the CM/ECF system in the Seventh Circuit. Logins and passwords for the earlier brief upload system will no longer function.

To register for a PACER account visit:

<http://pacer.psc.uscourts.gov>

To register for a filing account visit:

<https://pacer.psc.uscourts.gov/psc/co/cgi-bin/cmecf/ea-regform.pl>

**CHANGES TO THE FEDERAL RULES
OF APPELLATE PROCEDURE AND
CIRCUIT RULES EFFECTIVE
DECEMBER 1, 2009**

Important changes to the Federal Rules of Appellate Procedure and the Circuit Rules went into effect on December 1, 2009. Significantly, the length of time for filing various documents has been changed in many instances. To see these changes, go to the Seventh Circuit’s website (<http://www.ca7.uscourts.gov>) and go to the “Federal Rule Changes” and “Circuit Rule Changes” links. You can then scroll through the new rules, and the new time periods will be highlighted in yellow.

**NEW ILLINOIS RULE OF
PROFESSIONAL CONDUCT 3.3:
CANDOR TOWARD THE TRIBUNAL**

Effective January 1, 2010, the new Illinois Rules of Professional Conduct went into effect. Among the many important changes in the rules are the changes to Rule 3.3: Candor Toward the Tribunal. This rule contains new professional obligations when a lawyer knows that his client has testified falsely and outlines the remedial measures which must be taken when this occurs. You should read Comment Notes 10 and 11 carefully, which set forth those remedial measures.

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is

false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of “tribunal.” It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal’s adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client’s case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate’s duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client’s behalf, and not assertions by the lawyer. Compare Rule

3.1. However, an assertion purporting to be on the lawyer’s own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4 (b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client’s wishes. This duty is premised on the lawyer’s obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness’s testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also

Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that

the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer’s compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer’s disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer’s compliance with this Rule’s duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal’s permission to withdraw. In connection with a request for permission to withdraw that is premised on a client’s misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Adopted July 1, 2009, effective January 1, 2010.

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 1-10. We are continuing the series now with Chapters 11 and 12. We will continue with successive Chapters of “Wilkes: His Life and Crimes” in future editions of “The Back Bencher.”

The Scumbag Speeches

These questions (by the judge), like questions put at trials generally, left the essence of the matter aside, shut out the possibility of that essence’s being revealed, and were designed only to form a

channel through which the judges wished the answers of the accused to flow so as to lead to the desired result, namely a conviction.

- Leo Tolstoy (from *War and Peace*)

The judges of this city are scumbags.

- John Wilkes (from *The Scumbag Speeches*)

I received the call from Wilkes about four in the afternoon. He was in court, I thought, trying the Paul Rinaldi pornography case in front of Judge Lester J. Throckton. Rinaldi had been a lifelong seller of dirty books. Many times during his career as a professional purveyor of obscenity, Rinaldi got arrested in a “smut sweep” made by New York’s finest. Then Wilkes got into the act and beat almost all of the charges with his unusual First Amendment defense.

If he could not get them dismissed on pretrial motions, Wilkes took all the cases to jury trial, where he had tremendous success. He lectured the jury about all the martyrs in history who had sacrificed themselves to permit free expression in America. He told them about the Peter Zenger trial, of his great ancestor John Wilkes of England, and of all the other heroes of history who had fought for free expression. He quoted Voltaire - “I may not agree with what you say, but I’ll defend to the death your right to say it!” Most of all, he carefully avoided saying anything about his client, Paul Rinaldi, and the filthy books which lay on the clerk’s desk as prosecution exhibits.

Wilkes’s favorite quote in these defenses - among many dozen he used in final argument to the jury - was that of Havelock Ellis, who said, “Without an element of the obscene there can be no true and deep aesthetic or moral conception of life . . . It is only the great men who are truly obscene. If they had not dared to be obscene they could never have dared to be great.”

This time Rinaldi was on trial for selling a strange little book from New Zealand which graphically expressed the pleasures of man-sheep bonding. It’s American title was *Sheep Never Get Headaches*.

This was to be one of the last, if not the last, trials of Judge Lester Throckton before his eagerly awaited and long-overdue retirement. Wilkes knew it would be a tough case, because the judge hated porn almost as much as he hated Wilkes; and it didn’t help much that Judge Throckton was psychotic.

On the phone, Wilkes’s voice was barely audible. “Schoon,” he said through a cacophonous background of inhuman howling and screaming, “come pick me up.”

I had received similar calls in my career with Wilkes. I didn't have to ask his location. I knew exactly where he was.

"What did the old bastard throw you in for this time?" I asked, wondering what slight had prompted Throckton to hold my friend in contempt and put him in jail.

SLIGHT

"Not a damn thing!" howled Wilkes. "The scumbag was on me all day. I heard he hadn't had his shock treatment this week. His clerk assured me he had. The clerk said the old man's antsy 'cause he hasn't sentenced anyone to death for over two years, and with retirement coming, he's angry 'cause it doesn't look like he'll get the chance. So the son of a bitch took his frustration out on me."

It had been common knowledge in the legal community that Throckton was slipping into the abyss of insanity. If you appeared in his court, you knew. But complaints about him were to no avail as none of the other judges would take action to get him off the bench, or even put the guy out to pasture in some unimportant court where he could do no harm. They didn't act because the line between Throckton's conduct and theirs was so fine that they feared establishing any precedent by his removal - after all, it might be used against them. And anyway, if you put a black robe on someone, sit him high up on a throne, and let him rule, you can hardly tell the sane from the insane. With Throckton, there would still be surprising bursts of lucidity punctuating long periods of lost-in-space lunacy. If you focused on those moments of normalcy, the man was as sane as the president of the United States. Lately, however, Throckton's periods of clarity had been further apart. Most of the time, he was preoccupied with the subject of death.

Wilkes continued on the phone explaining what had happened. "During the pretrial motions, he kept asking if it was time to administer the rights to my client. I told him I had explained to Rinaldi his constitutional right to trial and cross-examination, but the old fart paid me no attention. He started mumbling the last rites!

"Well, I got pissed. I shouldn't have. The guy is really out of it. But what to do, Schoon? I gotta get him back to earth, so I respond in kind to his 'ashes to ashes' speech and quote the Scriptures back to him - Romans, 2:1: 'Wherein thou judgest another, thou condemnest thyself; for thou that judgest doest the same things.'"

"That's pretty good scripture for an atheist," I remarked. "What about the contempt?"

"Didn't happen till the end of the trial. I'm amazed at my restraint, 'cause the peckerwood was on me, Schoon, really riding me all trial. Anyway, during final argument, I started reading from Rinaldi's book, *Sheep Never Get Headaches*, and telling the jury how it was a bestseller in Australia and New Zealand, when Throckton jumps all over me. 'None of that filth,' he says, 'You just stop it at once!' And I says to the hypocritical bastard, 'You liked it enough in chambers.'

"He cited me for that."

"For that?" I asked. "Given the provocation, it'd never stand up on appeal."

COUNT TWO

"There's more," he responded. "During jury deliberation, we got a note asking to see the illustrated porn books. They were in evidence as exhibits, so they had a right to 'em, but the old geezer said no. Then the jury sends out another note saying they're going on a strike until they get the books. This was too much for Throckton. He calls 'em out, finds 'em deadlocked, and dismisses 'em quick as a wink. Now, this is music to my ears, and I says, 'Thanks, Judge. Too bad you can't try Rinaldi again. Double jeopardy and all that. You can't eject the jury so easily. This is a case of premature ejaculation.'"

"That was citation number two."

I didn't think there was anything legally contemptuous in those words, but in Throckton's court there didn't need to be. He had cited lawyers before for nothing, although usually the contempt sprang from the nutty provocations of the demented jurist. In one trial, Wilkes was contempered for addressing him as "Judge" rather than "Your Honor." Throckton said calling him "Judge" was too familiar and did not confer sufficient respect due his office, so Wilkes called him "Your Highness" and "Excellency" the rest of the trial, which garnered more citations.

I thought of Throckton's coming retirement. He'd miss Wilkes.

COUNT THREE

"There's still more," said my friend. "Throckton started chewing out the jury, calling them names and telling 'em to take a laxative to cure their mental constipation. He told them that with such mental indecision they risked certain death on the highway going home this evening. I interrupted and told them that since they'd been dismissed, the court was over, and they didn't have to listen to the judge's lunatic ravings."

My mind raced over the defenses asserted on appeal. Court was over, so it wasn't a direct affront to a judge. Merely a vigorous First Amendment exercise in retaliation for judicial misconduct. I asked, "Then what happened?"

"What the hell do you think?" Wilkes fumed. "The necrophilic son of a bitch threw me in the bucket! And he jailed Rinaldi, too, pending retrial. I want you to call every goddamn criminal court reporter and tell `em to meet us in the press room for an important announcement. Now, get down here and throw my bail!"

PRESS CONFERENCE

"What'll I tell the news boys it's for?" I couldn't imagine the answer. Wilkes getting contempted was about as novel as the DA announcing he'd cleared a cop in a civilian shooting or our most recently convicted senator's announcement that he'd be vindicated on appeal. The news boys wouldn't show for that kind of dog-bites-man story.

"I can't say here," said Wilkes. "Just tell `em I've got a big story, and if they're reluctant, tell `em if they don't show, they'll never get a leak of privileged information from me again."

Having bailed out my friend so many other times, I was without equal in throwing bail. I got Wilkes and Rinaldi sprung without a hitch. We marched quickly to the press room of the Criminal Courts Building and entered the small, drab, smoke-filled cubicle. There sat five reporters - which was an amazingly large number since I had only called three. They were a lethargic, alcoholic lot generally, so I figured a couple of them simply hadn't left for home when the others came in on my request.

Adell Loomis, the *Times* reporter, was there. She was the exception to the rule of indolence which prevailed with the reporters who covered the courts. Most of them were spoon-fed all of their news from the press releases or authorized "leaks" of information from the DAs or the cops. This they gobbled uncritically, digested, and regurgitated to their papers as news.

Adell was different. Bright, tough, and always full of energy, she could pull a story out of the most tight-lipped attorney or cop. She actually investigated the information she got from whomever.

As far as I knew, she and Wilkes were no more than acquaintances. This would change over the next few months.

THE CANDIDATE

Wilkes wasted no time in getting to the point. "Lady and gentlemen," he stated. "I am announcing my candidacy for the position of justice of the Supreme Court of New York." Everyone, including me, went slack-jawed. Who could believe that Wilkes, the mast judge baiter and hater, the man who spoke so often and so publicly about how the job made unfeeling monsters out of even the best of men and women, would think of putting on the robe? A Wilkes joke, I thought.

"Who ya runnin' against?" asked one of the liquor-breathed reporters as the ash from his cigarette fell and scattered over his chest.

"I'm running for the seat vacated by that malicious scumbag who put me in the pokey today, Lester J. Throckton. As you gents know, the political hacks sold the nomination to his son, Judge Lester J. Throckton, Jr., of the Civil Court, so I'll be running against Junior."

"Sounds to me like you're out for revenge against the old man," said Adell Loomis. She smiled at Wilkes and continued, "You can't attribute the sins of the father to the son."

GENES

"I don't attribute the sins to him," Wilkes answered, "just the genes. Two generations of idiots is enough! I'm tired of lunatics like Pops, or brainless nincompoops like Junior, or all the other evil merchants of human destruction running unopposed for the job.

"It's about time someone said publicly what we all know in truth. There hasn't been a contested election for judge in New York in memory. I'm gonna say why. Because it's a fix. The two political parties take turns auctioning off nominations to the highest bidder. This year it's fifty grand, and whammo, some jerk's a judge. And what do we get for it? The lousiest judiciary in the world!"

This wasn't a joke. It was a fit of bad temper. Wilkes was really going to run. He was crazy. He couldn't win against the well-financed efforts of the politicians, and he wouldn't want to unless he'd gone bonkers.

On the other hand, he'd make a great candidate. The paper boys and girl knew it immediately. The same quality that caused them to run to the courts where Wilkes was trying a case would make him a great candidate to cover. The press is attracted to irresponsibly outspoken, free-spirited gonzo because they like to write about controversial people who won't put the reader to sleep.

Wilkes looked like a candidate the media would like: His long, thin frame and brown, bushy hair gave him a commanding appearance; in his voice, strong, deep, and often booming, God gave him a wonderful musical instrument. His face resembled a Norse sea captain's - weathered, tanned, and inlaid with sky-blue eyes, a strong nose, and thin lips. All in all, Wilkes's rough-hewn handsomeness combined with his elan could make him a very appealing and charismatic candidate. If he wanted to be one.

LOST MARBLES?

As we made our way back to the office after the short press conference, I asked him if he knew what he was getting into. I needed to know if Wilkes had lost his marbles. He laughed at my concern over the expense of mounting a campaign. "Hah!" he chortled. "We aren't gonna spend a goddamn cent! I'll just hold press conferences during spare moments at the courthouse and accept invitations to speak. I've got it all figured, Schoon. We can't miss! I'm gonna get my name plastered all over the city! It'll be great for business!"

So that was it. Thank God! He didn't want to be a judge; he wanted to be rich! Getting your name in front of millions of New Yorkers in a futile campaign for office was the old, effective way for lawyers to attract clients. It was the time-honored formula for success: ink equals notoriety, which to the public equals supercompetence.

"But what if you win?" I asked, barely concerned about her possibility.

"No way," he retorted. "Impossible. I just wanna have some fun, drum up lotsa business, and let the folks in the Big Apple know what worms they got for judges."

RUBBER CHICKEN

And so it began in the most unlikely of settings - my friend just out of the slammer on bail and announcing for the judiciary. While the announcement had the taste of sour grapes to it - a lawyer held in contempt was mad at a judge - this was just fine with Wilkes. The less credible the candidacy, the less danger of actually winning.

Wilkes, as promised, limited his campaign appearances to luncheon speeches on the rubber chicken circuit: the clubs - Kiwanis, Rotary, Elks, Masons, and the like. They invited candidates to speak on their qualifications for office. For each appearance my friend delivered his now familiar Scumbag Speech.

The speech had three parts, each intended to serve his reasons for running: attracting business, having fun, and

losing the election. The Scumbag Speech included introductory jokes recently stolen from the courthouse corridors, a vitriolic attack on the system that sold scumbags like Junior uncontested judicial nominations, and a little self-deprecation to insure defeat - "Winning? Oh, I don't think about that too much. I take too many prescription drugs to be a judge."

When Wilkes started campaigning in early September, the polls showed Junior 33 percent; Wilkes way under 1 percent; undecided 66 percent. The ratings didn't change much the first few weeks, which was just fine; Wilkes wanted the business, not the judiciary.

TROUBLE

Then a funny thing happened. *Times* reporter Adell Loomis fell in love with Wilkes and began writing pieces in the paper about "this delightful imp who has dared to challenge the Wall Streeters, the judiciary, and the party system of the city." Overnight, her laudatory articles made Wilkes into a legitimate contender. She gave him exposure and credibility. This attracted the interest of the other paper boys, who soon discovered that Wilkes was too entertaining a story to ignore. After all, without my friend, they'd have only Junior to cover.

Junior took the news of Wilkes's candidacy lightly at first. Each time a reporter asked him to comment on one of my friend's charges made in a Scumbag Speech, Junior refused comment: "I won't dignify that hooligan's scurrilous and false charges with a response."

Spoken like a true front-runner. Also very smart. Junior was a stiff on the campaign trail. He carried the courtroom around with him and acted everywhere like the vain, vacuous boob he was in court. Junior knew the less personal exposure he got, the better. The news boys and girls sensed this weakness, and after the first Adell Loomis stories, they did all they could to bring Junior out of his campaign cocoon by building Wilkes into a formidable contender. Obliging, my friend gave them plenty to write about.

In late September, Wilkes addressed the Kiwanis Club.

HOME-COOKED HUMOR

"The chicken legs and asparagus were not bad. The meal reminds me of a story. Three asparagus are walking down the street when a giant head of lettuce goes out of control and runs one down. The uninjured asparagus, or asparagi, rush their mashed friend to the hospital, where he's taken to the emergency ward. Immediately the medical staff determines it's no garden-variety injury. It's serious. In time, the doctor, a grim-looking zucchini, comes out and

says, 'He's gotta brokina stalk.' The two worried asparagus ask what this means. 'Itza so sadda,' says Dr. Zucchini. 'Heeza gonna be a vegetable for da resta his life.'

"So it is with Junior," said Wilkes. "It's in his defective genes. Like father like son. He'll be a vegetable for the rest of his life."

On September 30, the polls read: Junior 40 percent; Wilkes 7 percent, Undecided 53 percent. In early October, Wilkes appeared before the Rotarians.

PLAIN SPEAKING

"People ask me why I'm running for judge. Not for the usual reasons, I can assure you - like winning, or power, or a lifetime of fixed tickets. And I'm not one of those legislator-refugees from Albany who join the judiciary seeking a retirement home or a hiding place from an indictment.

"Nor am I Mob-connected. Yes, ladies and gentlemen, our two parties have auctioned off judgeships to the Mafia. They sell judgeships in this city like madams sell sex. Neither party discriminates based on race, color, or creed against any purchaser of a judgeship as long as they have the dough. Right now I can think of six Mob judges on the bench. There would eight, but the dons put a couple in the river last summer for conduct unbecoming a bought-and-paid-for Mob judge - finding two Mafia soldiers guilty as charged.

"Which reminds me of the story of the jet full of lawyers on a nonstop flight from here to London. The plane runs into terrible weather at the midway point and loses an engine. The captain announces that they must lose weight if they're to stay aloft. The panicked passengers hurriedly throw out everything they can, but they still lose altitude. 'Not enough!' cries the pilot. 'We've had it!'

" 'Not so!' yells a plucky French lawyer, who runs to the door, proudly bellows, 'Viva la France!' and jumps to a watery grave. 'We're still going down,' the pilot announces. 'I'll do my part,' says a courageous English barrister. He goes to the door, yells, 'Long live the Queen!' and follows the Frog into the Atlantic.

"But the pilot screams, 'No good! No good!' As the plane continues down and nears the water, two other lawyers, and American and a Mexican, run to the open door. They pause and eye each other as if to say, 'After you.' Suddenly the American grabs the Mexican, throws him out of the plane, and screams, 'Remember the Alamo!'

"Well, that maneuver saved everyone on board and is now known in aviation parlance as a Mexican standoff."

MOMENTUM WITH THE MASONS

By the second week in October, the Scumbag Speeches and media attention started something you could feel: Momentum - the Big MO. The polls showed Wilkes with a 20 percent share of the vote; he began drawing big crowds to the lousy chicken lunches. People wanted to hear the outrageous Scumbag Speeches.

Reporters now followed Wilkes-the-candidate around the courthouse seeking interviews, which he gave freely and used to pump up himself and downgrade Junior. The polls had my friend both flattered and worried. "Damn," he said proudly when he looked at the latest glowing *Times* article by Adell Loomis. "This is getting serious."

I told him he had better speak with Adell, and he said he would. I don't know what he said, but it did not have the needed effect. All I know is that they became lovers and her articles became more glowing. Wilkes countered by escalating the nastiness of his Scumbag Speeches to try and make himself less appealing.

In mid-October he spoke to the Masons:

"My opponent claims to be a clearheaded candidate. I concede this. Junior's got nothing in his head. It's completely clear. He's so dumb, he asked me the other day where he was supposed to put his armies once he was elected to the Supreme Court. I told him to put them in his sleeveies like all the other judges."

Wilkes then read from a recently published expose' which showed that forty-nine of fifty candidates for judicial office in 1968 had the backing of both parties. To get such dual endorsement, a candidate pays his fifty grand and the path is cleared to a judgeship. "These are the same judges who convict people and send them to prison for price-fixing and restraint of trade," Wilkes said. "These guys are so crooked, when they die they'll have to be screwed into the ground.

"Ladies and gents, Masons and Masonettes: Junior and the Politicians, New York's all-steal band, have been cheating us, using their positions of trust to make a bundle. We gotta throw the scumbags out!"

Loud cheers rang out. A couple of Masons stood, then the whole bunch of them jumped up as if sitting on tacks to applaud my friend.

MIXED SUCCESS

Wilkes's attempt at dampening his popularity by escalating the rhetoric failed, but it was great for business.

Clients came in such numbers, we had to refer half to other lawyers - for a modest referral fee, of course. In fact, by the third week in October, Wilkes was within easy striking distance of Junior (40 percent to 30 percent).

The days of Junior and the politicians ignoring my friend were now over. They launched a massive media counterattack aimed at painting Junior as the next Cardozo and my friend as a corrupt underworld mouthpiece.

Wilkes realized he was getting into a sticky wicket. "Christ!" he lamented. "If Junior's going to this trouble to win, I'm in deep shit. I might win, Schoon. I've gotta stop it."

But he was dancing on the razor's edge. He had to keep up a legitimate candidacy or face media disapproval and the possible loss of business. At the same time, he had to pop his swelling balloon of voter popularity to lose the election, but his ego would not allow too big a loss. He loved being loved by the masses. He elected not to pop the balloon - just let some air out.

Wilkes spent a whole night writing a new Scumbag Speech for the Croatian Alliance luncheon. The purpose - to offend every segment of New York society by an outrageous talk which would guarantee his defeat. Here's how it went.

GRAND FINALE

"Sorry I couldn't eat your delightful chicken in peanut butter sauce. I can't stand the idea of a cock stuck to the roof of my mouth."

These were the first words Wilkes spoke to the huge audience. The Croats were in shock. They didn't know how to react. Insult humor had not yet come into vogue in the fashionable nightclubs of the city, and the Croats were totally unprepared for it in a luncheon political speech.

Wilkes was only warming up. Grinning with satisfaction, he continued, "I heard the women of this area recently quit using vibrators." Wilkes paused to scan the baffled audience and then served up the punch line: "Too many chipped teeth."

I cringed. That ought to do it. He'd be lucky to get out of here alive. The discourteous crudity could only be taken as a horribly tasteless and sexist insult. Right? Wrong! Insult humor was born over the plates of peanut-covered chicken and Croatian laughter.

"And do you people know what they call a Puerto Rican with a vasectomy?" Wilkes continued. "A dry Martinez." More laughs.

On it went. The more ethnic groups, religions, races, creeds, and political parties Wilkes slandered, the more laughs he got. The Croats loved it.

"What's green and flies over Germany? - Snotzis." More laughs. The Croats laughed. The paper boys and girls laughed. Only Wilkes and I didn't laugh. The more he tried to insult everyone, the more he failed. Everyone enjoyed the speech. He was a huge success.

LUBE JOB

A week before the election and despite his hara-kiri attempt, Wilkes pulled even with Junior in the polls. Junior and the politicians, of course, were not oblivious to which way the Big MO was going, and panicked. They challenged Wilkes to a debate on election eve. Wilkes versus Junior. No holds barred.

We couldn't believe it. Wilkes quickly called a press conference to announce his acceptance. "God! I feel great," he said jokingly to the assembled newspeople. "My hangover's in remission, business is booming, and Junior wants to debate. I accept the invitation on behalf of my brother and sister lawyers of this city. And I'm gonna ask Junior at the debate the most important question of this campaign."

One of the paper boys asked what the hell he meant by that, and Wilkes answered, "Well, Junior's got a reputation in the civil court as being serviceable, which means if a lawyer greases him, he gets a Cadillac for a result instead of an Edsel. It's called a 'lube job' in the trade - you pull into chambers, and Junior holds out his hand and says, 'Fill 'er up.' "

"So what's the big question for Junior?" asked Adell Loomis.

"Well, for those of us who are occasionally tight on cash, we need to know if the scumbag takes BankAmericard."

- 12 -

The Candidate Meets Sal Minchinzi

Those studies of mine . . . were designed to fit me for the law so that I might gain a great name in a profession where those who deceive the most people have the biggest reputation.

- Confessions of Saint Augustine

Per Scaluzzo assai brutta si cunchiusi, centudeci pallottuli chiummusa in corpu. ("It ended up badly for Scaluzzo, 110 bullets entered his body.")

- John Wilkes

Election week was as exciting a time as I ever experienced with Wilkes. So much was happening: Wilkes in the papers every day, most times on the front page; a troupe of media types following him around, eager to hear an unprintable joke or a derogatory remark about "Junior," otherwise known as Judge Lester Throckton, Jr.

My friend's colorful accusations and aspersions produced that familiar manifestation of a hard-fought American political campaign - the multimillion-dollar libel suit.

Sue The Bastard

Junior's civil suit didn't faze Wilkes a bit. He immediately ordered me to file a counterclaim for double what Junior was demanding. I asked on what grounds we would sue, and Wilkes responded, "File on behalf of the taxpayers. We want the taxes Throckton didn't pay on all the unreported income he took in bribes the last four years. And file a motion for the prick's deposition. Subpoena his tax records. And tell him to bring his crutches."

"Why the crutches? You gonna break his legs?"

"No. Tell him that after I've finished with him, he won't have a leg to stand on."

Obediently, I filed the counterclaim and the motion. As Wilkes instructed, I also served the newspapers with copies so that we would get more ink. "Never miss an opportunity for free advertising," Wilkes often told me, "especially since it's unethical to take out ads like the dentists do." The papers gave our countersuit page-one coverage, complete with a picture of Wilkes holding the legal pleading I had written and a crutch he was going to give Junior.

Wilkes was feeling thoroughly triumphant that final week. He had already accomplished his campaign goal of drumming up more business than we could handle from the campaign publicity. And as he said he would, he did it without spending a nickel of our money. He had fallen in love with Adell Loomis and was having a rollicking good time mercilessly attacking the judicial system and its black-robed judicial clowns with room-temperature IQs, to say nothing of the vile monsters like Blugeot, who were too eager to dispense punishment for the pure pleasure of it.

A favorite line was, "Pregnant rats don't bear cute little kitt-cats, so don't expect honest judges from the womb of this city." It was so thrilling to hear him speak his mind without inhibition, and so publicly. In no other way could you be free to say such things about judges and not be disbarred.

PERFECTION

It all seemed too perfect: Wilkes skyrocketing from nowhere to catch Junior in the polls; business booming beyond all expectation; Wilkes catching on as a media darling. I can't count the times a newscaster would come on the tube and say something like, "Wilkes says judges even fix city parades. Film at eleven."

There was one campaign goal, however, that Wilkes was failing to achieve: losing. I guess it was during that final week that I began to suspect that he might want to fail in that regard, that he might not mind winning. I could see it was getting to him. You can't be in trial for three months and not come to believe in your cause at least a little bit, and Wilkes, a lawyer's lawyer, couldn't help but believe he'd have been a better judge than Junior. But then, anybody would have made a better judge than Junior.

My concern that Wilkes's ambition was getting the better of him wouldn't last long. The events of that final week put Wilkes back in line so that by election eve, he was trying so hard to lose, you'd have thought his life depended on it. Matter of fact, at the time, it did.

BOB'S CALL

On the Tuesday before the election, I got a phone call from the Reverend Bob Smite, our gold-toothed - with a diamond inset - client from 1962 to 1966. His sodomy charge Wilkes killed with a textbook application of the Old Wine Defense. When we knew him, Bob was just a local huckster with a small following, but in the four years since then, he had become "God's Man of the Hour," the fourth wealthiest Holy Roller preacher man in the U.S.A.

Bob caught on because of his flim-flamboyant style and his attractive message - God wants everyone to be rich. Especially his preacher man.

In the years of his rise to success, Bob attracted one or two million followers to his Church of Ways and Means. He became "God's Deliverer of Cosmic Abundance," "The Way to Heavenly Health and Wealth," "The Healer of Indigence." He was to religion what Wilkes was to the law.

We hadn't heard from Bob since his case was dismissed, so his call was a surprise. After an exchange of greetings, he said, "Winnie, I've never forgotten the inspired services you and Johnny delivered in my hour of need. I'm gonna pay you back tonight."

"How's that?" I asked.

"Just watch the show at eight tonight."

"The what?"

HOLY GHOST HOUR

"Why, Winnie, you mean you haven't been watching 'Reverend Bob's Church of Ways and Means Holy Ghost Hour' every Tuesday night on channel forty-five? Every week I do a new sermon. Jeez, I've done some good ones. Probably my best was last week on the last buffet that the late J.C. had with the boys."

I interrupted God's Man of the Hour to squeeze in a question. "What're you going to do?" I couldn't see how Wilkes fit in to his Bible stories.

"It's a surprise. You just watch tonight."

That evening, I had to almost sit on Wilkes to get him to watch "The Holy Ghost Hour." He was working on cases and complained he had no time to watch a boob on the tube. I appealed to his vanity. He didn't want to miss a televised testimonial to his lawyering ability delivered by another satisfied client. Reluctantly, he sat in his leather chair and joined me as channel forty-five's Deliverer of Cosmic Abundance appeared on the screen. "This better be quick," he warned.

THE APPARITION

Bob appeared standing alone on a pedestal elevated above an ankle-deep mist covering the stage floor. As the camera moved in, Bob stood in prayerful silence in his stunning white three-piece suit, white patent leather shoes, white shirt, and white tie. Only the bloodred rose in his coat lapel broke the alabaster purity of his ensemble. The camera continued to close on Bob until his powdered, meditating puss filled the screen. Bob opened his eyes and sculpted an angelic smile, revealing his famous gold tooth with the diamond inset, which unleashed a light show of golden sparks.

Wilkes said to the TV, "You look like hell."

"My children," Bob said in his childlike, smarmy voice. "Bless you for tuning in tonight. With your continued support we're saving the lost, whatever the cost. Your

financial blessings have me it possible to put God's riches in the hands of the deserving."

"And who could be more deserving than the Reverend Bob Smite?" said Wilkes.

"So keep those love offerings coming in, children. Let's fill God's bank account and give Him the money-muscle to knock old Satan out for good." Bob swished the air with a left hook and a right uppercut.

GIVE TILL IT HURTS

"When's he gonna get to it? Christ, I don't have all night!" Wilkes fidgeted in his chair and swung his body so that his back was on one armrest and his feet over the other. For the next forty-five minutes Bob said, "Give me your money" in so many different ways, he could have written a book of synonyms on the phrase. Wilkes, restless and impatient, hated it, but I appreciated the showmanship and convincing way Bob persuaded the gullible to part with their dollars for nothing in return. It reminded me of Wilkes's final arguments to a jury.

With fifteen minutes left in the "Holy Ghost Hour," Bob said, "And now, children, it's Healing Time, praise the Lord." Wilkes groaned at the thought of further delay, but I was pleased to see that Bob had kept Healing Time as part of his act. Laying hands on the arthritic, the brain-damaged, the bodies racked with disease, Bob would summon all his holy voodoo and dispense miraculous cures. There aren't many places left on earth were you can see this.

"I can feel the surge!" Bob raised both arms to heaven. "Glory be to God, His goodness is within me! Hallelujah! I can feel it! I am His instrument! Hallelujah, watch Him work His miracles!"

Two skinny women in pink muumuus appeared escorting a thirty-year-old man described by Bob as blind, deaf, and dumb since birth. Bob grabbed the man's shoulders and tried to look sincere; instead, he looked like Liberace about to go two out of three falls with Gorgeous George. "Think of it, children! Thirty years on earth in darkness and silence!"

Wilkes said, "The man's a fool to want it any other way."

HEALING TIME!

Bob raised his right hand, placed it on the man's forehead, closed his eyes, and meditated. In a few seconds he said, "Geeeezz-zuhs! Geeeezz-zuhs! Lord, life's short-changed this man; he's due a refund. Amen." He looked to the man, whose shoulders he held. "Say, Geeeezz-

zuhs! Say, Geeeeezz-zuhs!” He shook the man. “Say, Geeeeezz-zuhs!” The man said nothing. Bob took his right hand and covered the trembling supplicant’s head with it and violently pushed him off his feet into the arms of the girls in muumuus. “Glory be to God! Hallelujah! Praise Baby Jesus! Believe! Feel! Mend! Heal! Rise and say, Geeeeezz-zuhs!”

The man rose quickly - pushed by the girls in muumuus. “Geeeezz,” he whispered. The louder, “Geeeezz! Geeeezz! Geeeezz!” Bob embraced him and the muumuu girls whisked him off camera. Bob, looking stage right, the direction where the man exited, shouted, “Children, this man believed, not in me, but in Him! Hallelujah! He gave from his pocketbook in order to earn the rewards of the Lord’s heavenly stock. Hallelujah!”

“Bullshit,” said Wilkes.

SCREEN TEST

“We’ve had so much success with Healing Time on the show,” said Bob, rubbing his hands together, “that many of you out there have written requesting that we use the miracle of television to give His healing touch a chance to reach you at home. So, children, yes, you out there in TV land, I want you to bring me your sick babies, your wounded limbs, your lame animals, why, even bring your broken appliances up close to the screen and we’ll just let the Lord’s Deliverer of Cosmic Abundance work his miracles. Praise the Lord!”

Wilkes and I giggled as Bob put his hand up to the TV camera and began shouting, “In the name of Geeeezz-zuhs! Reach out, Lord; give the viewers the golden treasure of earthly health and heavenly wealth. Come on, Lord, hand it over! In the name of Baby Jesus! In the name of the Three Rich Kings of the Orient! Glory Hallelujah! Children! I feel the surge!”

Bob’s hand shook. “I feel His glorious majesty moving within this flesh and blood and out through these mortal fingers; I feel the power leaving me and moving out through a million miles of wire and through the air and into your homes, children. Believe! Feel! Mend! Heal!”

Bob pulled his hand down and slumped exhausted and sweaty into a divan wheeled out by the muumuu girls. “Well, folks, that about wraps up another show, but before I close, I want to say something real important.”

“Son of a bitch! At last!” said Wilkes.

PUNCH LINE

“You know, it costs money to put on this show and run our money missions all over the world. We’ve put our earthly treasure where our faith is. Won’t you help me build the Lord’s paradise here on earth by just donating a tenth of your yearly income? If you call our eight-hundred number right now, I’ll send you a free copy of my popular book *Why God’s Children Don’t Pay Taxes*. It’ll tell you how to make your home a parish of the Church of Ways and Means, thus making all your worldly expenses tax-deductible. Didn’t I tell you the Lord would provide? Glory be to God.”

By my watch, the show had less than sixty seconds left, and not one word about Wilkes. My friend looked at me like I’d just robbed him of his last hour on earth. Then Bob spoke again.

“Finally, friends, as you know, this is election week, and I want to tell you that a member of our church is running for the Supreme Court.”

“What!” Wilkes jumped out of his chair and stood in disbelief in front of the TV. He kicked the wooden TV cabinet.

“His name is John Wilkes, a lawyer who has done a world of good for me and many others. He doesn’t save souls, of course, but he’s saved many a rear end. Hee hee. So when you go to the polls, friends, vote for my friend and yours, John Wilkes. He’s on God’s team. God bless and good night.”

AN INTERRUPTION

Bob’s endorsement cut Wilkes’s rage to a few muttered epithets. There wasn’t time for much grouching anyway, because a knock on the office door made us forget all about the Reverend Bob. “Who the hell could that be at nine P.M.” asked the Church of Ways and Means’ new candidate for the Supreme Court.

I walked to the door in the reception area of the office. “Probably just another reporter,” I said. I opened the door and found a swarthy man impeccably attired in black - the suit, the shirt, the shoes, the sunglasses, even the hat cocked to the right. Only his white tie and the purple hanky in his breast pocket broke the theme. I am prone to instant first impressions. My initial assessment was that this was no reporter. This was the Mob.

“You Wilkes?” His voice was strong, deep, and gravelly.

“Who wants to know?”

“I’m Frank Bollo, and I’m carrying a message to Wilkes from Sal Minchinzi.”

GREETINGS FROM THE BOSS

“I know Mr. Minchinzi,” I said respectfully. Indeed I knew of him. He was the most powerful Mafia boss in the country, head of the infamous Five Families, *Capo di Capi*, Boss of the Bosses. Men like Costello, Luciano, Genovese, Gagliano, Profaci, Mangano, and Anatassia jumped when he said move. When he spit, these guys swam; he was that big. No one was more powerful or feared. He had thousands of soldiers ready to do his bidding without questions. Anyone who broke the rule of obedience to the don (*e a lu so capu sempri ubbidiente* - “always obedient to the chief”) slept with the fishes that night.

Yes, I knew Minchinzi, and my knees began to shake. And where was Wilkes, the man Frank Bollo wanted to see? “Mr. Wilkes isn’t in at the moment,” I lied. “I’m his partner and would be happy to deliver the message to him.”

Bollo handed me the note. “Tell Mr. Wilkes it would be a good idea to accept the invitation. And no artillery.” Bollo stood in silence in the doorway as if to emphasize his point. I think he was staring, but I couldn’t see through his lenses. After a few seconds, he turned and walked down the hall.

THE LETTER

Before I could close the door, Wilkes was out from his hiding place and opening the note snatched from my sweating, nervous hands. I looked over his shoulder as he read the message:

Dear Mr. Wilkes,

As you know, I am very interested in the government of this city and am desirous of talking to you to see if you are the kind of candidate I can support for the Supreme Court. Please come to my house tomorrow night at eight.

Yours in Good Government,
Salvatore Sciortino Minchinzi

Wilkes turned to me. His eyes were wide and unfocused, and he gulped audibly before saying, “Jesus, the American Bar Association didn’t even give me the courtesy of an interview before they endorsed Junior.” It was a joke of desperation.

“I wonder what it’s all about,” I said. “After your Scumbag Speeches about judges on the Mob payroll, I can’t believe they want you. Junior’s gotta be their boy.”

Wilkes looked at the note again. “It’s obvious. Junior’s already on their team. The don wants to make it clear to me that I’d better take a dive in the last round and let Junior win.”

“In other words . . .”

“I’m gonna be made an offer I can’t refuse.”

Wilkes went to the credenza and slid the door open just enough to withdraw my bottle of Jack Daniels. He slowly unscrewed the cap, lifted the bottle, and chugged at least a half pint. He stood waiting for the effect to take hold, and when the room began to sway, he dropped into the nearest chair, bottle in one hand, note in the other.

Wilkes, usually a teetotaler, was worried, as he had every right to be. When the number one Mob man in the country beckons, you come. There was no refusing unless you wanted to be fitted with cement shoes and spend eternity in the East River. I went over to my friend and interrupted his trancelike staring at the floor just long enough to pull the bottle from his hand. At the moment, there seemed no better way to deal with the problem than numbing the medulla.

WAITING FOR BOLLO

The next morning Frank Bollo called to say that he would pick Wilkes and me up at seven for the ride to the don’s home. This cheered Wilkes somewhat: “It means they probably won’t kill me. They don’t like to make messes in their own homes.” Wilkes was grasping at straws. He knew such rides often didn’t reach their destination.

The mood was grim that day as we waited for Bollo. It was like waiting for a jury to return a verdict in a hopeless case. Wilkes was half-panicked. He refused all press interviews; he took no phone calls; he wouldn’t even talk to Adell. He spent the afternoon pacing his office, cursing himself for getting into this predicament and babbling on and on about Minchinzi. He was like a fly in a spiderweb.

Bollo’s black Cadillac pulled up in the front of the Woolworth Building, and we went down to meet it. On the way down in the elevator, Wilkes continued his soliloquy about Minchinzi. “He’s responsible for more executions in one year than the worst South American dictator. And do you know what his record is? One conviction for grand theft auto when he was a kid, and one arrest ten years ago for - get this - registering to vote; for being a felon who registered to vote! They indicted him

for doing the only socially responsible thing he's ever done in his life! Of course, by this time, he was much too big for the likes of the DA's office. They dismissed the case shortly after the prosecutor was found castrated."

"I remember that one," I said. "The papers made a big deal about that one. Poor guy died without a will or testicles."

"It's what the Mob means when they say, 'He died intestate.'"

THE AUDIENCE

Bollo said not a word to us during the thirty-minute trip through Manhattan and over the bridge to the Bronx. It was dark, so I couldn't see much of the house as we pulled into the driveway except to note that it was huge, surrounded by a tall iron grille fence, with snarling dogs roaming the grounds. Bollo escorted us into a small anteroom, patted us down, and disappeared. In a few moments he returned. "The don will see you now."

He led us through a grand hallway and into a moderately sized room off the gigantic, beautifully appointed living room. I was struck with the darkness of the room we entered. Only one small lamp with a low-wattage bulb was on to illuminate the entire room. The heavy floor-to-ceiling maroon curtains shut out whatever light could have come in from the outside. As my eyes adjusted, I could see that the walls were covered with huge religious pictures in ornate gold frames. I recognized a few El Grecos and wondered if they were originals. The irony of Don Minchinzi as a religious killer-crook struck me so funny, I almost laughed aloud.

Next to the lamp was a thronelike overstuffed chair which held the stout body of Don Salvatore Minchinzi. "Mr. Wilkes," he said, "itza pleasure to meet you. Pleasza, you and yer friend, sitta down."

ON THE SPOT

Wilkes and I found our way to the sofa that was directly across from Minchinzi. Bollo pulled up a wooden chair and sat to the don's right. There was an unnatural silence, like in an elevator full of strangers. Then the don said something in Italian to Bollo, and Bollo said that the don felt more comfortable talking in his native tongue, and so he would interpret. "The don has a few questions to ask you."

The fat man and Bollo talked for a few minutes in Italian. Then Bollo asked Wilkes, "The don wishes to know if you have ever represented anyone from the Maranzano Family." Maranzano was Minchinzi's hated enemy and

archrival for power over the Five Families that ran New York. Just the year before, the two gangs had gone to the mattresses in a struggle for supremacy over the Mob. Minchinzi won, but his rival lived, and the don was still wary of him. I heard him say to Bollo something about, "*un confidenti di la famiglia Maranzano.*"

"Never," replied Wilkes.

"Fine," said Bollo. "The don is also concerned about your fitness to be a trial judge. He wants a judge who is reliable, with an unblemished reputation and intelligence. You fit the latter requirements, more or less, but the don is worried about your reliability."

RELIABILITY

More Italian exchanges between Bollo and the don. We knew exactly what the don meant by "reliability." He meant that when one of the Family soldiers came before the court accused of some heinous crime, the reliable judge delivered a reasonable-doubt acquittal. It was a joke around the courthouse about the Mob judges. They delivered a reasonable doubt for a reasonable fee.

Wilkes said nothing, and Bollo continued, "The don hears things that displease him about your campaign speeches. He hears you talk about judges on the Mob payroll. He wonders if what he hears is accurate."

"Well," said Wilkes, "uh, er, ah, I may have made a few jokes on the subject, but nothing serious, and let me say that - "

The don leaned forward over his tummy and cut Wilkes off: "*Non scherrare giovannto ardita! Rassettarsi la testa o su famiglia na sira torno dintu senza ali!*"

Bollo interrupted. "The don says you are a daring young man who shouldn't joke about such things. You should keep your mouth shut or one night your family will come home very sad."

DISMISSAL

The don looked Wilkes over with a slight scowl on his face and said, "*Stu travagghiari ti fa mali.*" Minchinzi gave a look to Bollo which meant the interview was concluded. Bollo informed us that the don appreciated our coming to the house and that he would now be giving us a ride home. He quickly ushered us out without an exchange of good-byes to the don. It wasn't something we forgot. You don't worry about such niceties when you think you're going to be shot.

We were in the car and back on the road before Wilkes could ask Bollo what the don's last words were. Bollo said, "The don has concluded that this kind of work, the judging, is not good for you."

We knew that the don had not been pleased, but this was cold and ominous. Wilkes and I exchanged glances of concern. I wondered if we were going to make it back to Manhattan and half expected Bollo to pull out a .44 and blast us right there in the car. But nothing happened. Instead, as Bollo pulled in front of the Woolworth Building to let us off, he said, "Mr. Wilkes, I think it would be a very good idea if you lost the election."

Wilkes got out after me and turned to Bollo. "I've been trying to do just that for the last three months."

"Try a little harder," said Bollo. He floored the Caddy, wheeled it into the Broadway traffic, and disappeared into the night.

- To Be Continued -

Supreme Court Update October 2008 Term

Compiled by: Johanna Christiansen
Staff Attorney

Cases Decided - October 2009 Term

Maryland v. Shatzer, 175 L. Ed. 2d 1045 (February 24, 2010) (Scalia). In 2003, Shatzer was incarcerated in a state prison after a conviction for an unrelated offense. A police detective came to the prison to question Shatzer regarding whether he had sexually abused his son. Shatzer invoked his *Miranda* rights and refused to speak with the detective. Shatzer was released into the general prison population. In 2006, a different detective interrogated Shatzer, who was still incarcerated. During this interview, Shatzer waived his *Miranda* rights and confessed to abusing his son. The trial court refused to suppress his statements reasoning that *Edwards v. Arizona* did not apply. *Edwards* created a presumption that once a suspect invokes his *Miranda* rights, any waiver of that right in subsequent interrogations is involuntary unless there is a "break in custody." The Maryland Court of Appeals reversed, holding that Shatzer's release into the general prison population after the first interview did not constitute a break in custody. The Supreme Court disagreed and held that his release was a break in custody because it allowed him to "return to his accustomed surroundings and daily routine." The Court also held that *Edwards* applies until two weeks after a suspect's release from custody.

Bloate v. United States, 2010 U.S. LEXIS 2205 (March 8, 2010) (Thomas). The Supreme Court held that, under the Speedy Trial Act (18 U.S.C. § 3161), the time granted to prepare pretrial motions is not automatically excludable from the 70 day time limit under subsection (h)(1). However, such time may be excluded if the district court grants a continuance and makes appropriate findings under subsection (h)(7).

Florida v. Powell, 175 L. Ed. 2d 1009 (February 23, 2010) (Ginsburg). Powell was arrested by Tampa police officers. Before questioning him, the officers read him their standard *Miranda* form which states, "You have the right to talk to a lawyer before answering any of our questions" and "you have the right to use any of these rights at any time you want during this interview." Powell waived his rights and admitted he owned a firearm found during a search. He was charged with possession of a firearm by a felon and convicted. The Florida Supreme Court determined his statements should have been suppressed because *Miranda* and the state constitution require that a suspect be clearly informed of the right to have a lawyer present *during* questioning, not merely before questioning. The Supreme Court reversed and held that the language used by the standard form communicated the message mandated by *Miranda*.

Johnson v. United States, 2010 U.S. LEXIS 2201 (March 2, 2010) (Scalia). The Supreme Court held that the Florida felony offense of battery by "actually and intentionally touching another person" does not constitute a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1) because it does not have as an element the use of physical force against the person of another.

Cases Pending - October 2009 Term

Padilla v. Kentucky, No. 08-651, cert. granted February 23, 2009, argued on October 13, 2009. First, whether the mandatory deportation consequences that stem from a plea to trafficking in marijuana, an "aggravated felony" under the Immigration and Naturalization Act, is a "collateral consequence" of a criminal conviction which relieves counsel from any affirmative duty to investigate and advise? Second, assuming immigration consequences are "collateral," whether counsel's gross misadvice as to the collateral consequence of deportation can constitute a ground for setting aside a guilty plea which was induced by that faulty advice?

United States v. Stevens, No. 08-769, cert. granted April 20, 2009, argued October 6, 2009. Title 18 U.S.C. § 48 prohibits the knowing creation, sale, or possession of a depiction of a live animal being intentionally maimed, mutilated, tortured, wounded, or killed, with the intention of placing that depiction in interstate or foreign commerce

for commercial gain, where the conduct depicted is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, and the depiction lacks serious religious, political, scientific, educational, journalistic, historical, or artistic value. The question presented is whether 18 U.S.C. § 48 is facially invalid under the Free Speech Clause of the First Amendment.

***Black v. United States*, No. 08-876, cert. granted May 18, 2009, argued on December 8, 2009.** The Supreme Court held in *McNally v. United States*, a public corruption case, that the mail fraud statute could not be used to prosecute schemes to deprive the citizenry of the intangible right to good government. Congress responded in 1988 by enacting 18 U.S.C. § 1346, which expanded the definition of a “scheme or artifice to defraud” under the mail and wire fraud statutes to encompass schemes that “deprive another of the intangible right of honest services.” Presently, the courts of appeals are divided on the application of § 1346 to purely private conduct. In this case, the Seventh Circuit disagreed with at least five other circuits and held that § 1346 may be applied in a purely private setting irrespective of whether the defendant’s conduct risked any foreseeable economic harm to the putative victim. In the alternative, the Seventh Circuit ruled that the defendants forfeited their objection to the improper instructions by opposing the government’s bid to have the jury return a “special verdict,” a procedure not contemplated by the criminal rules and universally disfavored by other circuits as prejudicial to a defendant’s Sixth Amendment rights. The issues presented are: (1) whether 18 U.S.C. § 1346 applies to the conduct of a private individual whose alleged “scheme to defraud” did not contemplate economic or other property harm to the private party to whom honest services were owed and (2) whether a court of appeals may avoid review of prejudicial instructional error by retroactively imposing an onerous preservation requirement not found in the federal rules.

***Weyhrauch v. United States*, No. 08-1196, cert. granted June 29, 2009, argued on December 8, 2009.** Whether, to convict a state official for depriving the public of its right to the defendant’s honest services through non-disclosure of material information, in violation of the mail fraud statute (18 U.S.C. §§ 1341 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law.

***United States v. Comstock*, No. 08-1224, cert. granted June 22, 2009, argued on January 12, 2010.** Whether Congress had the constitutional authority to enact 18 U.S.C. § 4248 which authorizes court-ordered civil commitment by the federal government of (1) “sexually dangerous” persons who are already in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences, and (2) “sexually dangerous”

persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial.

***Carr v. United States*, No. 08-1301, cert. granted September 30, 2009, argued on February 24, 2010.** The Sex Offender Registration and Notification Act (“SORNA”) requires persons who are convicted of certain offenses to register with state and federal databases and imposes criminal penalties of up to 10 years of imprisonment on anyone who “is required to register . . . travels in interstate or foreign commerce . . . and knowingly fails to register or update a registration.” On February 28, 2007, the Attorney General retroactively applied SORNA’s registration requirements to persons who were convicted before the enactment of the requirements. The two questions presented are (1) whether a person may be criminally prosecuted under § 2250(a) for failure to register when the defendant’s underlying offense and travel in interstate commerce both predated SORNA’s enactment and (2) whether the Ex Post Facto Clause precludes prosecution under § 2250(a) of a person whose underlying offense and travel in interstate commerce by predated SORNA’s enactment.

***United States v. Marcus*, No. 08-1341, cert. granted October 13, 2009, argued on February 24, 2010.** Whether the court of appeals departed from the Supreme Court’s interpretation of Rule 52(b) of the Federal Rules of Criminal Procedure by adopting as the appropriate standard for plain error review of an asserted Ex Post Facto Clause violation whether “there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct.”

***Skilling v. United States*, No. 08-1394, cert. granted October 13, 2009, argued on March 1, 2010.** First, whether the federal “honest services” fraud statute, 18 U.S.C. § 1346, requires the government to prove that the defendant’s conduct was intended to achieve “private gain” rather than to advance the employer’s interests and, if not, whether § 1346 is unconstitutionally vague. Second, when a presumption of jury prejudice arises because of the widespread community impact of the defendant’s alleged conduct and massive, inflammatory pretrial publicity, whether the government may rebut the presumption of prejudice and, if so, whether the government must prove beyond a reasonable doubt that no juror was actually prejudiced.

***Berguis v. Smith*, No. 08-1402, cert. granted September 30, 2009, argued on January 20, 2010.** Whether the Sixth circuit erred in concluding that the Michigan Supreme Court failed to apply clearly established Supreme Court precedent under 28 U.S.C. § 2254 on the issue of the fair cross-section requirement under *Duren v. Missouri*

where the Sixth Circuit adopted the comparative-disparity test (for evaluating the difference between the numbers of African Americans in the community as compared to the venires), which the Supreme Court has never applied and which four other circuits have specifically rejected.

***Berghuis v. Thompkins*, No. 08-1470, cert. granted September 30, 2009, argued on March 1, 2010.** First, whether the Sixth Circuit expanded the *Miranda* rule to prevent an officer from attempting to non-coercively persuade a defendant to cooperate where the officer informed the defendant of his rights, the defendant acknowledged that he understood them, and the defendant did not invoke them but did not waive them. Second, whether the Sixth Circuit failed to afford the state court the deference it was entitled to under 28 U.S.C. § 2254(d) when it granted habeas relief with respect to an ineffective assistance of counsel claim where the substantial evidence of Thompkins's guilt allowed the state court to reasonably reject the claim.

***McDonald v. Chicago*, No. 08-1521, cert. granted on September 30, 2009, argued on March 2, 2010.** Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses.

***United States v. O'Brien*, No. 08-1569, cert. granted on September 30, 2009, argued on February 23, 2010.** Title 18 U.S.C. § 924(c)(1) provides for a series of escalating mandatory minimum sentences depending on the manner in which the basic crime (using or carrying a firearm during and in relation to an underlying offense or possessing the firearm in furtherance of that offense) is carried out. The question presented is whether the sentence enhancement to a 30 year minimum when the firearm is a machine gun is an element of the offense that must be charged and proved to a jury beyond a reasonable doubt or instead a sentencing factor that may be found by a judge by the preponderance of the evidence.

***Graham v. Florida*, No. 08-7412, cert. granted on May 4, 2009, argued on November 9, 2009.** Whether the Eighth Amendment's ban on cruel and unusual punishment prohibits the imprisonment of a juvenile for life without the possibility of parole as punishment for the juvenile's commission of a non-homicide.

***Sullivan v. Florida*, No. 08-7621, cert. granted on May 4, 2009, argued on November 9, 2009.** First, does imposition of a life-without-parole sentence on a 13 year old for a non-homicide violate the prohibition of cruel and unusual punishment under the Eighth and Fourteenth Amendments where the rare imposition of such a sentence reflects a national consensus on the reduced criminal

culpability of children? Second, given the extreme rarity of a life imprisonment without parole sentence imposed on a 13 year old child for a non-homicide and the unavailability of substantive review in any other federal court, should the Supreme Court grant review of a recently evolved Eighth Amendment claim where the state court has refused to do so?

***Carachuri-Rosendo v. Holder*, No. 09-60, cert. granted on December 14, 2009, to be argued on March 31, 2010.** Under the Immigration and Nationality Act, a lawful permanent resident who has been convicted of an aggravated felony is ineligible to seek cancellation of removal under 8 U.S.C. § 1229b(a)(3). The courts of appeals have divided 4-2 on the following question presented by this case: Whether a person convicted under state law for simple drug possession (a federal law misdemeanor) has been convicted of an aggravated felony on the theory that he could have been prosecuted for recidivist simple possession (a federal law felony), even though there was no charge or finding of a prior conviction in his prosecution for possession.

***Magwood v. Culliver*, No. 09-158, cert. granted on November 16, 2009, to be argued on March 24, 2010.** First, when a person is resentenced after having obtained federal habeas relief from an earlier sentence, is a claim in a federal habeas petition challenging that new sentencing judgment a second or successive claim under 28 U.S.C. § 2244(b) if the petitioner could have challenged his previously imposed (but now vacated) sentence on the same constitutional grounds? Second, did the petitioner's attorney provide ineffective assistance of counsel warranting federal habeas relief by failing to raise an argument at petitioner's resentencing proceedings that would have made clear that petitioner was constitutionally ineligible for the death penalty?

***Renico v. Lett*, No. 09-338, cert. granted on November 30, 2009, to be argued on March 29, 2010.** Whether the Sixth Circuit in a habeas case, erred in holding that the Michigan Supreme Court failed to apply clearly established Supreme Court precedent under 28 U.S.C. § 2254 in denying relief on double jeopardy grounds in the circumstance where the state trial court declared a mistrial after the foreperson said that the jury was not going to be able to reach a verdict.

***Dolan v. United States*, No. 09-367, cert. granted on January 8, 2010, to be argued on April 20, 2010.** Whether a district court may enter a restitution order beyond the time limit prescribed in 18 U.S.C. § 3664(d)(5), which states, "If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the government or the probation officer shall so inform the court, and the court

shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order."

***Barber v. Thomas*, No. 09-5201, cert. granted on November 30, 2009, to be argued on March 30, 2010.**

The federal good time credit ("GTC") statute provides for credits "up to 54 days at the end of each year of the prisoner's term of imprisonment." Throughout federal sentencing statutes, and elsewhere in the same sentence, "term of imprisonment" means the sentence imposed. However, the Bureau of Prisons ("BOP") interprets "term of imprisonment" as unambiguously meaning time served. For each year of a sentence imposed, the BOP interpretation results in seven fewer days of available credits. The first question presented is does "term of imprisonment" in § 212(a)(2) of the Sentencing Reform Act, enacting 18 U.S.C. § 3624(b), unambiguously require the computation of good time credits on the basis of the sentence imposed? The second question presented is if "term of imprisonment" in the federal good time credit statute is ambiguous, does the rule of lenity and the deference appropriate to the United States Sentencing Commission require that good time credits be awarded based on the sentence imposed?

***Holland v. Florida*, No. 09-5327, cert. granted October 13, 2009, argued on March 1, 2010.**

Whether gross negligence by collateral counsel, which directly resulted in the late filing of a petition for a writ of habeas corpus, can qualify as an exceptional circumstance warranting equitable tolling or whether, in conflict with other circuits, the Eleventh Circuit was proper in determining that factors beyond gross negligence must be established before an extraordinary circumstance can be found that would warrant equitable tolling.

***Dillon v. United States*, No. 09-6338, cert. granted December 7, 2009, to be argued on March 30, 2010.**

First, whether the Federal Sentencing Guidelines are binding when a district court imposes a new sentence pursuant to a revised guideline range under 18 U.S.C. § 3582. Second, whether during a § 3582(c)(2) sentencing, a district court is required to impose sentence based on an admittedly incorrectly calculated guideline range.

SEVENTH CIRCUIT DIGEST

by

Jonathan E. Hawley
 First Assistant Federal Public Defender

TABLE OF CONTENTS

DOUBLE JEOPARDY..... -1-
 The *Blockburger* test should be applied at the sentencing phase to determine whether separate sentences are appropriate for the crimes charged and convicted, even where those crimes arise out of a single criminal act. *United States v. Crowder*, 588 F.3d 929 (7th Cir. 2009; No. 08-3320). -1-
 Conviction for both bankruptcy fraud and obstruction of justice arising out of the same facts was a violation of double jeopardy. *United States v. Peel*, ___ F.3d ___ (7th Cir. 2010; No. 07-3933). -1-
EFFECTIVE ASSISTANCE OF COUNSEL..... -1-
 Failure to timely file a petition for writ of certiorari cannot form basis for ineffective assistance of counsel claim. *Wyatt v. United States*, 574 F.3d 455 (7th Cir. 2009; No. 08-1465)... -1-
EVIDENCE..... -2-
 BRADY..... -2-
 Government’s failure to provide evidence of star witness’s involvement in a murder required an evidentiary hearing in the district court under *Brady*. *United States v. Salem*, 578 F.3d 682 (7th Cir. 2009; No. 08-2034). -2-
 EXPERTS..... -2-
 Testimony of expert who relied upon tests and data performed and gathered by a different person, but who drew his own conclusions, did not violate the defendant’s Confrontation Clause rights. *United States v. Turner*, 591 F.3d 928 (7th Cir. 2010; No. 08-3109). -2-
 Testimony of an investigating officer that the images were child pornography was improper lay and expert opinion. *United States v. Noel*, 581 F.3d 490 (7th Cir. 2009; No. 07-2468). -3-
 District courts must use cautionary instructions and properly structure testimony when law enforcement officers testify as both fact and expert witnesses. *United States v. York*, 572 F.3d 415 (7th Cir. 2009; 07-2032). -3-
 Defendant’s expert properly excluded from courtroom during government’s expert testimony, as defense expert’s presence was not “essential” to defendant’s case. *United States v. Olofson*, 563 F.3d 652 (7th Cir. 2009; No. 08-2294). -4-
 Daubert standards for admissibility of expert testimony do not apply at suppression hearings. *United States v. Ozuna*, 561 F.3d 728 (7th Cir. 2009; No. 07-2480)... -4-
 RULE 403..... -5-
 Court erred in admitting evidence of death of individuals who purchased drugs from the defendant, when that evidence had no relevance to issue of whether defendant distributed drugs and was highly prejudicial. *United States v. Cooper*, 591 F.3d 582 (7th Cir. 2010; No. 08-4021)... -5-
 RULE 404(b). -5-
 District court erred in admitting evidence of the defendant’s other drug activities under the “intricately intertwined” doctrine, although the evidence was admissible under Rule 404(b). *United States v. Conner*, 583 F.3d 1011 (7th Cir. 2009; No. 07-3527)... -5-
 Evidence under Rule 404(b) should be evaluated on whether the prior-crimes evidence is relevant (other than to show propensity, which may be relevant to guilt, but is impermissible as evidence) to an issue in the case, and, if so, whether the probative weight of the evidence is nevertheless substantially outweighed by its prejudicial effect or by its propensity to confuse or mislead the jury. *United States v. Edwards*, 581 F.3d 604 (7th Cir. 2009; No. 08-1124). -6-
 Admission of DVD containing interrogation of Defendant containing improper 404(b) material did not constitute plain error where there was no evidence that the jury ever actually viewed the DVD. *United States v. Lewis*, 567 F.3d 322 (7th Cir. 2009; No. 08-1854). -6-
 RULE 413..... -6-
 Rule 413 allows the admission of evidence which shows a propensity to commit sexual assault, but evidence

may still be excluded under Rule 403 if it is unfairly prejudicial for reasons other than the fact that it constitutes propensity evidence. *United States v. Rogers*, 587 F.3d 816 (7th Cir. 2009; No. 08-1516)..... -7-

RULE 1006..... -7-
 Summary charts of voluminous documentary evidence inadmissible unless the underlying records are themselves admissible, whether or not the underlying records are actually admitted into evidence. *United States v. Oros*, 578 F.3d 703 (7th Cir. 2009; 08-2511). -7-

FORFEITURE..... -8-
 The amount of forfeiture is not limited to the amount of the mailing in the count of conviction where a broader scheme to defraud exists. *United States v. Venturella*, 585 F.3d 1013 (7th Cir. 2009; No. 07-3754). . . . -8-
 Where government sought forfeiture of weapons owned by convicted felon outside of the 120-day deadline, the government was obliged to credit the defendant for the value of the weapons or turn them over to someone who could lawfully possess them. *United States v. Miller*, 588 F.3d 418 (7th Cir. 2009; No. 09-2256) -8-

GUILTY PLEAS..... -9-
 The grant of certiorari by the Supreme Court on an issue that might affect the defendant’s legal innocence is not a “fair and just reason” to withdraw a plea. *United States v. Mays*, 593 F.3d 603 (7th Cir. 2010; No. 09-1767) -9-
 Waiver of appeal rights in plea agreement did not preclude appeal of denial of 3582(c)(2) motions to reduce sentences based on retroactive amendment to the Guidelines. *United States v. Woods*, 581 F.3d 531 (7th Cir. 2009; No. 08-1778). . . . -9-
 Failure to inquire about defendant’s knowledge of appeal waiver at plea hearing was not plain error where totality of circumstances indicated the defendant’s plea was knowing and voluntary. *United States v. Polak*, 573 F.3d 428 (7th Cir. 2009; No. 08-3381)..... -10-
 District Judge not required to explicitly accept plea agreement on the record, although doing so is a recommended practice. *United States v. Brown*, 571 F.3d 690 (7th Cir. 2009; No. 08-2273). . . . -10-
 Rule 11(c)(1)(C) does not apply to stipulations of fact. *United States v. Cole*, 569 F.3d 724 (7th Cir. 2009; No. 06-2547). . . . -10-
 Preservation of issue for review on appeal in a conditional plea agreement must identify precisely issues to be preserved; Court of Appeals lacks jurisdiction to consider any other issues. *United States v. Kingcade*, 562 F.3d 794 (7th Cir. 2009; No. 08-2447)..... -11-

JURY INSTRUCTIONS..... -11-
 Erroneous instruction on meaning of “resulted in death or serious bodily injury” in drug prosecution which resulted in same required reversal. *United States v. Hatfield*, 591 F.3d 945 (7th Cir. 2010; No. 09-1705). . . . -11-
 Mere negligence in failing to discover the truth concerning a fraud is insufficient to convict a defendant where the government’s theory is deliberate avoidance. *United States v. Ramirez*, 574 F.3d 869 (7th Cir. 2009; No. 08-3216). . . . -12-
 District court not required to instruct jury that it must unanimously agree on overt act in furtherance of conspiracy to support conviction thereof. *United States v. Griggs*, 569 F.3d 341 (7th Cir. 2009; No. 06-4211).... -12-

OFFENSES..... -12-
 8 U.S.C. § 1324(a)(1)(A)(iii)(CONCEALING, HARBORING, OR SHIELDING ILLEGAL ALIEN). . . . -12-
 Government need not prove the defendant engaged in “conduct tending substantially” to facilitate an alien’s remaining in the United States illegally to demonstrate “shielding;” they only need prove the “use of any means.” *United States v. Hui Ye*, 588 F.3d 411 (7th Cir. 2009; 08-1333). . . . -13-
 18 U.S.C. § 922(g) (POSSESSION OF A WEAPON BY A FELON)..... -13-
 Offense of trafficking in counterfeit telecommunications instruments meets the definition of a “crime punishable for a term exceeding one year.” *United States v. Schultz*, 586 F.3d 526 (7th Cir. 2009; No. 09-1192). . . . -13-
 Evidence insufficient to prove defendant ever possessed a weapon prior to his felony conviction. *United States v. Katz*, 582 F.3d 749 (7th Cir. 2009; No. 08-2341). . . . -13-
 18 U.S.C. § 922(g)(8) (POSSESSION OF WEAPON BY PERSON UNDER ORDER OF PROTECTION). . -14-
 A conviction for possession of a weapon by a person subject to an order of protection is valid even if the underlying order of protection is subsequently found to be void. *United States v. Wescott*, 576 F.3d

347 (7th Cir. 2009; No. 08-1211). [-14-](#)

18 U.S.C. § 922(g)(9) (POSSESSION OF FIREARM AFTER CONVICTION FOR MISDEMEANOR DOMESTIC VIOLENCE). [-14-](#)

Court of Appeals held that the government failed to meet its burden of showing that the prohibition of firearm possession for persons convicted of misdemeanor domestic violence satisfied the intermediate scrutiny test. *United States v. Skoien*, 587 F.3d 803 (7th Cir. 2009; No. 08-3770) [-15-](#)

18 U.S.C. § 922(o) (TRANSFERRING A MACHINE GUN). [-15-](#)

Defendant not entitled to instruction defining term “automatically” in prosecution for transferring a machine gun. *United States v. Olofson*, 563 F.3d 652 (7th Cir. 2009; No. 08-2294). [-16-](#)

18 U.S.C. § 924(c). [-16-](#)

Offering a rifle as a commission to complete the sale of fronted drugs is possession of the weapon “in furtherance of” the drug crime. *United States v. Vaughn*, 585 F.3d 1024 (7th Cir. 2009; No. 08-4169) [-16-](#)

Title 18, Section 924(c) charges only one offense that may be committed in more than one way, rather than two separate offenses. *United States v. Haynes*, 582 F.3d 686 (7th Cir. 2009; No. 08-1466). [-16-](#)

18 U.S.C. § 2113(d) (BANK ROBBERY). [-17-](#)

The “in-jeopardy” prong of the bank robbery statute should be viewed from the perspective of whether a violent reaction on the part of a victim or law enforcement had the potential of placing the life of someone in jeopardy by the use of a deadly weapon. *United States v. Simmons*, 581 F.3d 582 (7th Cir. 2009; No. 08-2207). [-17-](#)

18 U.S.C. § 1343(WIRE FRAUD). [-17-](#)

Wire fraud statute requires a causal connection between the defendant’s actions and the communication, not simply a temporal one. *United States v. Dooley*, 578 F.3d 582 (7th Cir. 2009; No. 08-4131) [-18-](#)

18 U.S.C. § 2422(b) (ENTICEMENT OF A MINOR). [-18-](#)

Jury must reach unanimous verdict regarding underlying state statute a Defendant violated in federal prosecution for engaging in sexual activity chargeable as a criminal offense under state law. *United States v. Mannava*, 565 F.3d 412 (7th Cir. 2009; No. 07-3748). [-18-](#)

Conviction reversed where prosecutor repeatedly stated that defendant intended to “rape” 13-year old victim, where there was no indication that defendant every intended to forcibly have sex with the victim. *United States v. Mannava*, 565 F.3d 412 (7th Cir. 2009; No. 07-3748). [-19-](#)

There is no equal protection violation where a “safety valve” provision to avoid a mandatory minimum penalty is available to certain drug offenders but not those convicted of enticing a minor in violation of 18 U.S.C. § 2422(b). *United States v. Nagel*, 559 F.3d 756 (7th Cir. 2009; No. 08-2535). [-19-](#)

The 10-year mandatory minimum sentence for violation of 18 U.S.C. § 2422(b) does not violate the Eighth Amendment’s proscription against cruel and unusual punishment. *United States v. Nagel*, 559 F.3d 756 (7th Cir. 2009; No. 08-2535). [-20-](#)

18 U.S.C. § 2423(a)(TRANSPORTATION OF MINOR TO ENGAGE IN PROSTITUTION). [-20-](#)

Government need not prove that the victim was a minor in prosecution for knowingly transporting an individual under the age of 18 in interstate commerce with intent that the individual engage in prostitution. *United States v. Cox*, 577 F.3d 833 (7th Cir. 2009; No. 08-1807). [-20-](#)

18 U.S.C. § 4248 (ADAM WALSH ACT). [-20-](#)

The civil commitment provisions of the Adam Walsh Act apply to all federal offenders, but not those housed in the BOP as a service to another entity which is responsible for that individual’s incarceration, such as those held in the BOP as a service to ICE. *United States v. Pablo*, 571 F.3d 662 (7th Cir. 2009; No. 08-2520). [-20-](#)

21 U.S.C. § 846 (CONSPIRACY TO DISTRIBUTE DRUGS). [-21-](#)

Evidence was insufficient to sustain a conspiracy conviction, where the evidence showed only a buyer-seller relationship. *United States v. Johnson*, 592 F.3d 749 (7th Cir. 2010; No. 09-1912). [-21-](#)

26 U.S.C. § 7206(1)(FILING UNDER PENALTY OF PERJURY FALSE IRS FORMS). [-21-](#)

A duty to file IRS form is not an element of a § 7206(1) offense. *United States v. Pansier*, 576 F.3d 726 (7th Cir. 2009; No. 07-3771). [-21-](#)

PROCEDURE -22-

CONTINUANCES..... -22-

 Court abused its discretion in refusing to grant a continuance where defense learned of new, crucial government witness only five calendar days before trial. *United States v. Covet*, 576 F.3d 385 (7th Cir. 2009; No. 08-1470). -22-

 Conviction reversed where district court refused to grant the defendant a continuance on the morning of trial, after defense counsel learned the previous evening that a crucial government witness changed his story about the degree of the defendant’s involvement in the offense. *United States v. Heron*, 564 F.3d 879 (7th Cir. 2009; No. 07-3726). -22-

 Court did not abuse its discretion in denying motion to continue to allow defendant to retain a second expert opinion, after the court expressed doubt about first expert’s qualifications. *United States v. Smith*, 562 F.3d 866 (7th Cir. 2009; No. 08-1477). -23-

RULE 35..... -23-

 A district court may not reduce a sentence pursuant to a Rule 35(b)(2) motion based on a consideration of anything other than the defendant’s assistance to the government. *United States v. Shelby*, 584 F.3d 743 (7th Cir. 2009; No. 08-2729). -23-

RECUSAL. -24-

 Judge should have recused himself where he expressed concern about the time that had passed between the defendant’s arrest and the commencement of federal proceedings, suggested that the case was an embarrassment to the justice system and an inefficient allocation of taxpayer resources, suggested that the case should be plead out, and indicated that neither party would be pleased with his ruling on a motion to suppress if a plea agreement was not reached. *In re: United States of America*, 572 F.3d 301 (7th Cir. 2009; No. 09-2264). -24-

SEALED RECORDS. -24-

 If documents under seal in the district court are not necessary for purposes of appeal, parties should exclude the items from the appellate record to avoid them from being unsealed in the appellate court. *United States v. Foster*, 564 F.3d 852 (7th Cir. 2009; No. 09-1248). -24-

WAIVER..... -25-

 Defendant waived his right to argue on appeal that a photo array was unduly suggestive because trial counsel failed to file a motion to suppress in the district court. *United States v. Acox*, ___ F.3d ___ (7th Cir. 2010; No. 09-1258).. -25-

 Court will refuse to consider a meritorious issue where appellate counsel refuses to raise the issue, even after invited by the court to do so at oral argument when the issue did not appear in the briefs. *United States v. Foster*, 577 F.3d 813 (7th Cir. 2009; No. 08-1914). -25-

RESTITUTION..... -26-

 Cost to bank of investigating its employee’s embezzlement scheme properly included in restitution amount. *United States v. Hosking*, 567 F.3d 329 (7th Cir. 2009; No. 08-1826).. -26-

 Costs of investigation in restitution award must be firmly connected to the investigation and reasonable. *United States v. Hosking*, 567 F.3d 329 (7th Cir. 2009; No. 08-1826).. -26-

 IRA funds may be ordered to satisfy restitution award. *United States v. Hosking*, 567 F.3d 329 (7th Cir. 2009; No. 08-1826).. -26-

RETROACTIVE AMENDMENT..... -27-

 Court must provide some explanation regarding why a 3582(c)(2) motion is denied. *United States v. Marion*, 590 F.3d 475 (7th Cir. 2009; No. 09-2525). -27-

 Waiver of right to appeal or collaterally attack conviction and sentence in plea agreement did not waive the defendant’s right to file a 3582(c)(2) petition to reduce his sentence pursuant to a retroactive amendment to the Guidelines. *United States v. Monroe*, 580 F.3d 552 (7th Cir. 2009; No. 08-2945).. -27-

 Remand necessary for factual finding of whether the defendant distributed more than 4.5 kilograms of crack, where defendant only admitted to distributing more than 1.5 kilograms of crack. *United States v. Hall*, 582 F.3d 816 (7th Cir. 2009; No. 08-2389). -28-

 Rule 36 could not be used to correct errors contained in the defendant’s PSR prepared at the time of his original sentencing. *United States v. Johnson*, 571 F.3d 716 (7th Cir. 2009; No. 08-3393). -28-

 Defendant sentenced as a Career Offender not entitled to sentence reduction under retroactive crack cocaine

amendment, even though the defendant would not qualify as a Career Offender under law as it currently exists. *United States v. Jackson*, 573 F.3d 398 (7th Cir. 2009; No. 08-3188)..... -28-

SEARCH & SEIZURE..... -29-

FRANKS HEARINGS..... -29-

District court properly refused to allow defense counsel to ask questions at a *Franks* hearing which tended to reveal the identity of a confidential informant. *United States v. Wilburn*, 581 F.3d 618 (7th Cir. 2009; No. 08-1541)..... -29-

GENERALLY..... -29-

Detective’s search of a seized computer with specialized software did not exceed the scope of the search authorized by a warrant. *United States v. Mann*, 592 F.3d 779 (7th Cir. 2010; No. 08-3041) . . . -30-

An agent’s post-indictment conversation with the defendant to determine whether the defendant was an individual captured on audiotape did not violate the Sixth Amendment right to counsel. *United States v. Gallo-Moreno*, 584 F.3d 751 (7th Cir. 2009; No. 06-1696). -30-

Police do not need search warrant for a third party’s residence to enter and arrest an individual pursuant to an arrest warrant where they have “reason to believe” the defendant is located within the dwelling. *United States v. Jackson*, 576 F.3d 465 (7th Cir. 2009; No. 08-2295). -31-

PROBABLE CAUSE..... -31-

Police has probable cause to search the defendant’s vehicle, notwithstanding *Arizona v. Gant*. *United States v. Stotler*, 591 F.3d 935 (7th Cir. 2010; No. 08-4258)..... -31-

Affidavit found insufficient to support probable cause to search defendant’s apartment. *United States v. Bell*, 585 F.3d 1045 (7th Cir. 2009; No. 07-3806)..... -32-

Statement in affidavit by agent with 10 years of experience investigating gangs and narcotics offenses indicating that high ranking gang members keep contraband in their homes was sufficient to support warrant for search of home. *United States v. Orozco*, 576 F.3d 745 (7th Cir. 2009; No. 06-4235) -32-

REASONABLE SUSPICION..... -32-

Officers had reasonable suspicion to stop an SUV exiting an apartment complex where a fight and “shots fired” was reported, because it was the only car on the road exiting the area at the same time as the reported incident, even though the SUV was not mentioned in the report. *United States v. Brewer*, 561 F.3d 676 (7th Cir. 2009; No. 08-3257)..... -33-

MIRANDA WARNINGS..... -33-

Where there is a break in questioning a defendant, there is a rebuttable presumption that *Miranda* warnings given before the break remain effective throughout subsequent questioning sessions. *United States v. Edwards*, 581 F.3d 604 (7th Cir. 2009; No. 08-1124)..... -33-

The question “Am I going to be able to get an attorney?” was not a clear and unambiguous invocation of counsel. *United States v. Shabaz*, 579 F.3d 815 (7th Cir. 2009; No. 08-3751)..... -33-

There is no clear test for evaluating a two-step interrogation process where *Miranda* warnings are not given during the first interrogation, given the divided opinion of the Supreme Court in *Missouri v. Seibert*. *United States v. Heron*, 564 F.3d 879 (7th Cir. 2009; No. 07-3726)..... -34-

RE-OPENING SUPPRESSION HEARING..... -35-

The decision to re-open a suppression hearing is within the sound discretion of the district court, even if the hearing is re-opened based on newly acquired evidence by the government which was available prior to the first hearing. *United States v. Ozuna*, 561 F.3d 728 (7th Cir. 2009; No. 07-2480). -35-

SELF-REPRESENTATION..... -35-

Counsel may constitutionally represent co-defendants so long as there is neither an actual conflict of interest nor a serious potential for a conflict to arise. *United States v. Turner*, ___ F.3d ___ (7th Cir. 2010; No. 08-2350) -35-

A defendant competent to stand trial is competent to represent himself at trial as well. *United States v. Berry*, 565 F.3d 385 (7th Cir. 2009; No. 07-3243)..... -36-

SENTENCING..... -37-

ALLOCUTION..... -37-

Defendant not denied right to allocution where court stated it would impose within-range sentence before giving defendant opportunity to address the court. *United States v. Hoke*, 569 F.3d 718 (7th Cir.

2009; No. 08-3882)..... -37-

CRIME OF VIOLENCE/VIOLENT FELONY. -37-

Wisconsin offense of criminal trespass to a dwelling is a crime of violence. *United States v. Corner*, 588 F.3d 1130 (7th Cir. 2009; No. 08-1033). -37-

Prior conviction of a minor counts for career offender purposes so long as the juvenile was convicted as an adult. *United States v. Gregory*, 591 F.3d 964 (7th Cir. 2010; No. 09-2735). -38-

Indiana conviction for criminal recklessness was a crime of violence, where the defendant was convicted of the “intentional” portion of this divisible statute. *United States v. Clinton*, 591 F.3d 968 (7th Cir. 2010; No. 09-2464)..... -38-

Wisconsin offense of vehicular fleeing is a violent felony. *United States v. Dismuke*, 593 F.3d 582 (7th Cir. 2010; No. 08-1693)..... -38-

Wisconsin offense of second-degree sexual assault of a child is not a crime of violence. *United States v. McDonald*, 592 F.3d 808 (7th Cir. 2010; No. 08-2703). -39-

Wisconsin offense of first-degree reckless injury is not a crime of violence. *United States v. McDonald*, 592 F.3d 808 (7th Cir. 2010; No. 08-2703). -39-

California offense of lewd or lascivious acts involving a person under the age of 14 not a violent felony. *United States v. Goodpasture*, ___ F.3d ___ (7th Cir. 2010; No. 08-3328). -40-

Federal escape conviction not a crime of violence. *United States v. Hart*, 578 F.3d 684 (7th Cir. 2009; No. 07-3395). -40-

Indiana offense of residential entry is a violent felony. *United States v. Hampton*, 585 F.3d 1033 (7th Cir. 2009; No. 07-3134)..... -41-

Illinois offense of reckless discharge of a firearm (720 ILCS 5/24-1.5(a)) is not a “crime of violence.” *United States v. Gear*, 577 F.3d 810 (7th Cir. 2009; No. 07-4038)..... -41-

Illinois offense of aggravated battery upon a pregnant woman (720 ILCS 5/12-4(b)(11)) is not a “crime of violence.” *United States v. Evans*, 576 F.3d 766 (7th Cir. 2009; No. 08-2424). -42-

Transporting a minor in interstate commerce with intent that the minor engage in prostitution (18 U.S.C. § 2423(a)) is a “crime of violence.” *United States v. Patterson*, 576 F.3d 431 (7th Cir. 2009; No. 08-2240)..... -42-

Wisconsin conviction for recklessly endangering safety (Wis. Stat. §941.30(2)) is not a “violent felony.” *United States v. High*, 576 F.3d 429 (7th Cir. 2009; No. 08-1970)..... -43-

Illinois offense of involuntary manslaughter (720 ILCS 5/9-3) was not a “crime of violence.” *United States v. Woods*, 576 F.3d 400 (7th Cir. 2009; No. 07-3851)..... -43-

GUIDELINE ISSUES..... -43-

1B1.3 (RELEVANT CONDUCT). -43-

Evidence must presented regarding cooking ratio before powder cocaine can be converted into crack weight for sentencing purposes. *United States v. Hines*, ___ F.3d ___ (7th Cir. 2010; No. 08-3255). -44-

2B1.1 (AMOUNT OF LOSS)..... -44-

District court has discretion to discount the amount of future loss to its present value. *United States v. Peel*, ___ F.3d ___ (7th Cir. 2010; No. 07-3933)..... -44-

2B1.1(b)(2)(A)(ii) (MASS MARKETING). -44-

A fraudulent Internet auction qualifies for a 2-level enhancement for using “mass-marketing” to promote the fraud. *United States v. Heckel*, 570 F.3d 791 (7th Cir. 2009; No. 07-3514) -44-

2B1.1(b)(2)(C) (MORE THAN 250 FRAUD VICTIMS)..... -45-

Where defendant stole Medicaid numbers to submit false claims for reimbursement, the victims were not the people whose numbers were stolen, but rather Medicaid. *United States v. Sutton*, 582 F.3d 781 (7th Cir. 2009; No. 08-3370). -45-

2B3.1(b)(2)(D) (DANGEROUS WEAPON “OTHERWISE USED”). -45-

Defendant’s sentence could not be enhanced for otherwise using a dangerous weapon during a robbery where he received a 924(c) consecutive sentence, even though the 924(c) conviction was based on firearms used by co-defendants and the improper enhancement was based upon a plastic BB gun used by the defendant. *United States v. Eubanks*, 593 F.3d 645 (7th

Cir. 2010; No. 09-1029)..... -45-

2B3.1(b)(4) (ABDUCTION OF A VICTIM). -46-
 Moving a victim from one room to another in a small retail shop does not constitute abduction, but rather only restraint. *United States v. Eubanks*, 593 F.3d 645 (7th Cir. 2010; No. 09-1029) -46-

2C1.1 (EXTORTION UNDER COLOR OF OFFICIAL RIGHT). -46-
 Guideline section 2C1.1 (extortion under color of official right) does not apply to an individual who impersonates a government official. *United States v. Abbas*, 560 F.3d 660 (No. 07-3866; 7th Cir. 2009). -46-

2D1.1 (DRUG OFFENSES). -47-
 District court erred by converting money seized from defendant into drug quantity where the court failed to make finding that money was proceeds from drug transactions. *United States v. Edwards*, 581 F.3d 604 (7th Cir. 2009; 08-1124)..... -47-
 Sentence vacated where district court failed to determine amount of drugs reasonably foreseeable to defendant involved in a conspiracy. *United States v. Dean*, 574 F.3d 836 (7th Cir. 2009; No. 08-3287). -47-

2G1.3(b)(2)(B) (UNDULY INFLUENCING A MINOR).. -48-
 Enhancement for unduly influencing a minor to engage in prohibited sexual conduct cannot apply where the defendant and the minor did not actually engage in such conduct. *United States v. Zahursky*, 580 F.3d 515 (7th Cir. 2009; No. 08-1151)..... -48-

2G2.2(b)(3)(F) (DISTRIBUTION OF CHILD PORNOGRAPHY). -48-
 Enhancement for distribution was not double counting where underlying conviction was for transportation of child pornography. *United States v. Tenuto*, 593 F.3d 695 (7th Cir. 2010; No. 09-2075). -48-

2G2.2(b)(6) (USE OF A COMPUTER). -49-
 Enhancement for “use of a computer” in transporting child pornography was not double counting where underlying conviction was for transportation of child pornography. *United States v. Tenuto*, 593 F.3d 695 (7th Cir. 2010; No. 09-2075)..... -49-

2G2.3(b)(7)(D) (POSSESSION OF MORE THAN 600 CHILD PORNOGRAPHY IMAGES) -49-
 Expert evidence is not required to prove the reality of children portrayed in pornographic images; a judge’s visual inspection of the images alone is sufficient. *United States v. Lacey*, 569 F.3d 319 (7th Cir. 2009; No. 08-2515)..... -49-

2K2.1(b)(6) (POSSESSION OF FIREARM IN CONNECTION WITH ANOTHER FELONY OFFENSE) -49-
 Enhancement for possessing weapon in connection with “another felony offense” was proper where the defendant took possession of the weapons as part of a burglary. *United States v. Hill*, 563 F.3d 572 (7th Cir. 2009; No. 07-2714). -49-

2L1.2(b)(1)(A)(ii) (ILLEGAL REENTRY AFTER AGG FELONY). -50-
 A district court is not required to reject the relevant guideline because it was not enacted in the Sentencing Commission’s typical manner. *United States v. Aguilar-Huerta*, 576 F.3d 365 (7th Cir. 2009; No. 08-2505). -50-

3A1.4 (TERRORISM ENHANCEMENT). -50-
 Environmental activists who used violence and intimidation in opposition of United States were “terrorists” as defined by Guidelines. *United States v. Christiansen*, 586 F.3d 532 (7th Cir. 2009; No. 09-1526). -50-
 Obstructing an investigation into a crime of terrorism can be one way of promoting that crime sufficient to warrant a terrorism sentencing enhancement. *United States v. Ashqar*, 582 F.3d 819 (7th Cir. 2009; No. 07-3879)..... -51-

3B1.2 (MITIGATING ROLE)..... -51-
 Defendant may receive a mitigating role adjustment even if he is charged and sentenced for his conduct alone, rather than relevant conduct committed by co-defendants. *United States v. Hill*, 563 F.3d 572 (7th Cir. 2009; No. 07-2714). -51-

3C1.1(OBSTRUCTION OF JUSTICE)..... -52-
 Attempted escape from custody, as opposed to an attempt to flee from arrest, can support obstruction of justice enhancement. *United States v. Bright*, 578 F.3d 547 (7th Cir. 2009; No. 08-1770) -52-

3E1.1(AcCEPTANCE OF RESPONSIBILITY). -52-
 Government not required to file motion for third level reduction where it would not have been an abuse of discretion for the district court to deny the defendant even the two level reduction for acceptance of responsibility. *United States v. Nurek*, 578 F.3d 618 (7th Cir. 2009; No. 07-3568)..... -52-
 Government may refuse to file a motion giving defendant third level off for acceptance of responsibility where defendant refused to sign an appeal waiver. *United States v. Deberry*, 576 F.3d 708 (7th Cir. 2009; No. 09-1111). -53-

KIMBROUGH ARGUMENTS. -53-
 A district court may not consider the crack/powder disparity to vary from a guideline sentence determined by the career offender guideline, overruling the Seventh Circuit’s decision in *United States v. Liddell*. *United States v. Welton*, 583 F.3d 494 (7th Cir. 2009; No. 08-3799). -53-
 Defendants convicted of § 846 conspiracy offenses may argue that they should receive a lower sentence based upon *Kimrough*, even if the defendant was sentenced as a career offender. *United States v. Knox*, 573 F.3d 441 (7th Cir. 2009; No. 06-4101)..... -54-

MISCELLANEOUS..... -54-
 Court may not impose a sentence below statutory mandatory minimum to account for time spent in custody on a separate, related charge where the defendant had completed his term of imprisonment on that charge. *United States v. Cruz*, ___ F.3d ___ (7th Cir. 2010; No. 08-4194). -54-
 District court’s statements at sentencing indicating an erroneous belief that parole still existed did not warrant reversal. *United States v. Smith*, 562 F.3d 866 (7th Cir. 2009; No. 08-1477). -55-

REASONABLENESS REVIEW. -55-
 Before varying upward based on additional crimes the defendant committed, a district court should analyze what the guideline range would be had the defendant actually been charged with the other crimes to avoid unwarranted disparity. *United States v. Kirkpatrick*, 589 F.3d 414 (7th Cir. 2009; No. 09-2382)..... -55-
 A district court may not consider 3553(a) factors to give a sentence below the government’s motion under 3553(e) for a reduced sentence below a mandatory minimum due to the defendant’s substantial assistance. *United States v. Johnson*, 580 F.3d 666 (7th Cir. 2009; No. 08-3541). -56-
 Court open in all cases to an argument that a defendant’s sentence is unreasonable because of a disparity with the sentence of a co-defendant, but such an argument will have more force when a judge departs from a correctly calculated Guidelines range to impose the sentence. *United States v. Statham*, 581 F.3d 548 (7th Cir. 2009; No. 08-2676). -57-
 District court was required to address the defendant’s principal argument for a variance, to wit: that the government’s delay in prosecuting him for illegal re-entry prevented him from serving a concurrent sentence on a state domestic battery charge. *United States v. Villegas-Miranda*, 579 F.3d 798 (7th Cir. 2009; No. 08-2308). -57-
 Sentence vacated where district court erroneously stated that mitigating factors of advanced age and poor health were already accounted for in the guidelines. *United States v. Powell*, 576 F.3d 482 (7th Cir. 2009; No. 08-1138)..... -57-
 A district court may consider a defendant’s cooperation with the government as a basis for a reduced sentence, even if the government has not made a § 5K1.1 motion. *United States v. Knox*, 573 F.3d 441 (7th Cir. 2009; No. 06-4101). -58-
 The mandatory add-on sentence flowing from using a gun in a crime of violence may not be used to justify a lower sentence on the underlying offense. *United States v. Calabrese*, 572 F.3d 362 (7th Cir. 2009; No. 08-2861)..... -58-
 Sentencing entrapment if proved is a plausible ground for leniency in sentencing and a judge would be required to consider a nonfrivolous claim of such entrapment. *United States v. Aguilar-Huerta*, 576 F.3d 365 (7th Cir. 2009; No. 08-2505). -58-

Court of Appeals assumed for purposes of case that sentencing entrapment and manipulation could be considered as mitigating 3553(a) factors. *United States v. Knox*, 573 F.3d 441 (7th Cir. 2009; No. 06-4101). -58-

Claim of sentencing manipulation and poor conditions of pre-trial confinement are not appropriate factors for a district court to consider under 3553(a). *United States v. Turner*, 569 F.3d 637 (7th Cir. 2009; No. 08-2413).. -58-

Attorney fees not an appropriate factor for court to use in support of a below-guideline sentence. *United States v. Presbitero*, 569 F.3d 691 (7th Cir. 2009; No. 07-1129). -59-

Within-range sentence vacated where district court failed to comment on defendant’s non-frivolous argument for a bottom of the range sentence. *United States v. Harris*, 567 F.3d 846 (7th Cir. 2009; No. 08-1192).. -59-

District courts may avoid resolving complicated guideline issues and rely solely on 3553(a) factors when imposing sentence, so long as they make it clear that they would impose the same sentence regardless of how the guideline issues was resolved. *United States v. Sanner*, 565 F.3d 400 (7th Cir. 2009; No. 07-3738).. -59-

District court’s are not *required* to ignore child-exploitation guidelines, even though they are not the product of the Sentencing Commission’s typical empirical research method. *United States v. Huffstatler*, 561 F.3d 694 (7th Cir. 2009; No. 08-2622). -60-

Miscalculation in Guideline calculations can be harmless where district court would have imposed same sentence under 3553(a) and sentence was reasonable. *United States v. Abbas*, 560 F.3d 660 (7th Cir. 2009; No. 07-3866).. -60-

STATUTORY ISSUES. -61-

 An 851 Notice of Enhancement which mislabeled a misdemeanor as a felony and incorrectly identified the defendant’s felony was harmless error. *United States v. Lane*, 591 F.3d 921 (7th Cir. 2010; No. 09-1057). -61-

 An 851 Notice of Enhancement was sufficient even though it did not set forth the conviction upon which the enhancement was based, but rather referred to a separate pretrial services report which contained a list of 19 different criminal dispositions. *United States v. Williams, Jr.*, 584 F.3d 714 (7th Cir. 2009; No. 09-1924).. -61-

 Prior “State sex offense” which triggers statutory mandatory life sentence need not actually have a federal jurisdictional nexus to trigger the statute. *United States v. Rosenbohm*, 564 F.3d 820 (7th Cir. 2009; No. 08-2620).. -62-

 Defendant’s eight prior Illinois felony burglary convictions did not count as ACCA predicates offenses because the DOC notice sent to him upon successful completion of his prison terms restored his civil rights without expressly noting that his right to possess a firearm had not been restored. *Buchmeier v. United States*, 581 F.3d 561 (7th Cir. 2009; No. 06-2958). -62-

SUPERVISED RELEASE. -63-

 CONDITIONS. -63-

 A district court is free to consider halfway-house placement as a possible condition of supervised release. *United States v. Anderson*, 583 F.3d 504 (7th Cir. 2009; No. 09-1958). -63-

GUIDELINE RANGE. -64-

 Reversible error where district court fails to calculate advisory Guideline range for supervised release term prior to imposing sentence. *United States v. Gibbs*, 578 F.3d 694 (7th Cir. 2009; No. 08-2186) -64-

I. DOUBLE JEOPARDY

The *Blockburger* test should be applied at the sentencing phase to determine whether separate sentences are appropriate for the crimes charged and convicted, even where those crimes arise out of a single criminal act. *United States v. Crowder*, 588 F.3d 929 (7th Cir. 2009; No. 08-3320). In prosecution for conspiracy and attempted possession of drugs, the Court of Appeals held that no double jeopardy violation occurred where the defendant was sentenced for both charges separately. A defendant may be charged and convicted for both conspiracy and attempt under 846, but the Court of Appeals had not previously ruled on whether imposing separate sentences for conspiracy and attempt improperly punishes a defendant for the same criminal conduct. The Ninth Circuit held that such sentencing was improper, but the Sixth, Eighth, and Tenth Circuits disagreed. The Seventh Circuit joined the majority of circuits, and held that the *Blockburger* test should be applied at the sentencing phase to determine whether separate sentences are appropriate for the crimes charged and convicted, even where those crimes arise out of single criminal act. Applying that test in the present case, a court must determine whether each provision requires proof of a fact which the other does not. Conspiracy and attempt are separate offenses under this inquiry; conspiracy requires an agreement with another person, whereas attempt may be completed alone. Thus, there was no double jeopardy violation.

Conviction for both bankruptcy fraud and obstruction of justice arising out of the same facts was a violation of double jeopardy. *United States v. Peel*, ___ F.3d ___ (7th Cir. 2010; No. 07-3933). In prosecution for bankruptcy fraud and obstruction of justice, the Court of Appeals held that convicting the defendant of both offenses violated the Double Jeopardy Clause. Both offenses were predicated upon the same conduct by the defendant. The court initially noted that the elements of the two offenses are different. However, the test for whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. Here, the test was not passed, because convicting the defendant of obstructing justice did not require proof of any fact that didn't have to be proved to convict him of bankruptcy fraud. It was thus a lesser-included offense of bankruptcy fraud and the *Blockburger* test makes clear that to punish a person for a lesser-included offense as well as the "including" offense is double jeopardy unless Congress intended double punishment, which it did not in this circumstance. The case is like a case in which a person is tried for both murder and attempted murder. The elements are different, but since conviction for murder automatically convicts the defendant of attempted murder, the defendant cannot be convicted of both crimes. Regarding which conviction to vacate, the Constitution does not dictate that a particular conviction be vacated, but it is rather committed to the trial judge's discretion. Usually, it's the conviction carrying the lesser penalty that is vacated, however.

II. EFFECTIVE ASSISTANCE OF COUNSEL

Failure to timely file a petition for writ of certiorari cannot form basis for ineffective assistance of counsel claim. *Wyatt v. United States*, 574 F.3d 455 (7th Cir. 2009; No. 08-1465). Upon consideration of the denial of the defendant's § 2255 petition, the Court of Appeals held that a petitioner may not make a claim of ineffective assistance of counsel because of a failure to file a petition for *certiorari*. The Supreme Court held in *Ross v. Moffitt*, 417 U.S. 600, 617 (1974), that a criminal defendant has no constitutional right to counsel to pursue a petition for a writ of *certiorari*. Thus, the court concluded that where there is no constitutional right to counsel, there cannot be constitutionally ineffective assistance of counsel. In other words, because the petitioner had no constitutional right to counsel in seeking review with the Supreme Court, he cannot claim

constitutionally ineffective assistance of counsel based on a failure to file a timely petition for a writ of *certiorari*.

III. EVIDENCE

A. *BRADY*

Government's failure to provide evidence of star witness's involvement in a murder required an evidentiary hearing in the district court under *Brady*. *United States v. Salem*, 578 F.3d 682 (7th Cir. 2009; No. 08-2034). In prosecution for witness intimidation and 924(c), the Court of Appeals remanded to the district court for an evidentiary hearing because of a *Brady* violation. The defendant argued that he deserved a new trial because, until it was too late to be useful, the government failed to turn over evidence that its star witness, Carlos Lopez, was involved in a murder for which he had never been charged. The first hint Salem had of this potential murder charge came moments before Salem was to be sentenced when counsel for the government handed his lawyer a copy of a plea agreement for Benny Martinez, a defendant in another federal criminal case. Martinez admitted in that plea agreement that he had gunned down a rival gang member, Adan Sotelo. But the plea agreement also disclosed that Martinez wasn't alone during this murder. There with him, lying in wait for Sotelo, was Carlos Lopez. The plea agreement identified Lopez by name, and it indicates that Lopez made some form of statement about the murder. Apparently, Lopez described how he and Martinez hid in an alley gangway waiting for Sotelo, and when Sotelo rounded the corner, Martinez shot him to death. Lopez and Martinez then fled the murder scene together, finding refuge at Martinez's grandmother's residence a few blocks away. But Lopez had never been charged with any crime related to his involvement in the Sotelo homicide. That, Salem contended, raised an inference that Lopez curried favor with the government in exchange for his agreeing to testify against Salem. And the fact that evidence of the Sotelo murder was not disclosed to him before trial is why he believed he deserved a new one. The district court denied the defendant's motion and denied his request for an evidentiary hearing, concluding that even if the evidence had been disclosed, there was no reasonable probability of a different verdict. The Court of Appeals, however, disagreed, noting that the witness's statement about the killing had never been turned over to the defendant or the court. Thus, there was a question about whether other evidence favorable to the defendant may be "out there." Although newly discovered impeachment evidence will not ordinarily warrant a new trial under *Brady*, this was not just evidence of another drug or gun crime. Murder is fundamentally different from other offenses. First-degree murder holds a unique position in our society's notion of criminality. So to say that there is no reasonable probability that the jury could reach a different result, even if the evidence showed that the government's star witness was never charged for his direct involvement in a violent gang murder, ignores the differences between the drug and gun crimes which Lopez was questioned about at trial and first-degree murder. Thus, the court remanded to the district court for a hearing to determine that all the relevant evidence had been provided to the defense and then consider whether, under *Brady*, the defendant was entitled to a new trial.

B. EXPERTS

Testimony of expert who relied upon tests and data performed and gathered by a different person, but who drew his own conclusions, did not violate the defendant's Confrontation Clause rights. *United States v. Turner*, 591 F.3d 928 (7th Cir. 2010; No. 08-3109). In prosecution for distribution of crack cocaine, the government originally intended to call as an expert a government chemist who analyzed the substances seized from the defendant for evidence of the

weight and type of drugs. However, because this expert was on maternity leave at the time of trial, the government instead called her supervisor, who relying on the data collected from the first expert, testified to his own conclusions in court. The defendant argued that allowing someone other than the chemist who actually performed the test to testify violated his Sixth Amendment confrontation right. The Court of Appeals disagreed. First, the court noted that the original chemist's lab report, notes, and data charts were not introduced into evidence. Although the witness did rely on information gathered and produced by the other chemist, the conclusions drawn by the expert were his own. Moreover, the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527(2009), did not alter the analysis. In that case, the prosecution introduced certificates of analysis as a substitute for in-court testimony to show that the substance recovered from the defendant was cocaine. The certificates were sworn to before a notary public by analysts at the State Lab in Massachusetts. The Supreme Court held that the certificates were testimonial statements and the prosecution could not prove its case without first showing that a witness was unavailable and that the defendant had an opportunity to cross-examine him. The court also noted, however, that "we do not hold that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." Here, the chemist's report was not admitted into evidence, let alone presented to the jury in the form of a sworn affidavit. Instead, the expert witness presented his own conclusions, which was permissible.

Testimony of an investigating officer that the images were child pornography was improper lay and expert opinion. *United States v. Noel*, 581 F.3d 490 (7th Cir. 2009; No. 07-2468). In prosecution for production and possession of child pornography, the Court of Appeals held that the testimony of an investigating officer that the images were child pornography was improper lay and expert opinion, although the error was harmless. At trial, a state police investigator repeatedly testified that the images found on the defendant's computer met the federal definition of child pornography. She provided no explanation for the opinion, but instead offered only conclusory statements. The Court of Appeals noted that under the Federal Rules of Evidence, testimony is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact, but it must be admissible as lay testimony under Rule 701 or expert testimony under 702. Most importantly, it must be helpful to the trier of fact under either rule. Lay testimony offering a legal conclusion is inadmissible because it is not helpful to the jury, as required by Rule 701(b), and the testimony in this case was nothing more than a statement that the photos were illegal. Given proper instructions, the jury was capable of making this determination on its own. Therefore, it was unhelpful as lay testimony and unhelpful. Even assuming the witness was properly qualified as an expert, it did not pass muster under Rule 702 either. The witness gave no basis whatsoever for her conclusions, and an expert who supplies nothing but a bottom line supplies nothing of value to the judicial process. Accordingly, the evidence was inadmissible, but because there was no objection below as well as the other evidence in the case, the court found the error to be harmless.

District courts must use cautionary instructions and properly structure testimony when law enforcement officers testify as both fact and expert witnesses. *United States v. York*, 572 F.3d 415 (7th Cir. 2009; 07-2032). In prosecution for drug offenses, the Court of Appeals rejected the defendant's argument that an FBI agent improperly testified as both a fact and expert witness. Specifically, the agent testified as to his investigation in the case against the defendant and as to general, expert knowledge of the drug trade. The court noted that there are inherent dangers with this kind of dual testimony. Accordingly, district courts must take precautions to ensure the jury understands its function in evaluating this evidence. The jury needs to know when an agent is

testifying as an expert and when he is testifying as a fact witness. This can be addressed by means of appropriate cautionary instructions and by examination of the witness that is structured in such a way as to make clear when the witness is testifying to facts and when he is offering his opinion as an expert. In the present case, the court was not as vigilant as it might have been in using these safeguards. For example, although the court gave a cautionary instruction at the end of the trial, such an instruction would have been more effective before the agent testified. Moreover, the structure of the agent's testimony was confusing. Rather than separating his fact testimony and expert testimony, the testimony went back and forth. Nevertheless, the court affirmed the defendant's conviction under the plain error rule, noting that the evidence against the defendant was overwhelming.

Defendant's expert properly excluded from courtroom during government's expert testimony, as defense expert's presence was not "essential" to defendant's case. *United States v. Olofson*, 563 F.3d 652 (7th Cir. 2009; No. 08-2294). In prosecution for transfer of a machine gun, the Court of Appeals affirmed the district court's decision to exclude the defense expert from the courtroom during the testimony of the government's expert. The defendant contended that the presence of his expert during the testimony was essential to the presentation of his case. Under Federal Rule of Evidence 615, "[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order on its own motion." The rule does not authorize exclusion of four categories of persons, including "a person whose presence is shown by a party to be essential to the presentation of the party's cause." As the party asserting a Rule 615(3) exception, the defendant bore the burden of showing that the exception applied, and the court concluded that he had not met his burden. First, the defendant argued that because an expert is permitted to base his opinion upon facts or data made known at trial, his expert needed to hear the other expert's testimony. The Court of Appeals held initially that there is no automatic exemption for expert witnesses from Rule 615 sequestration. Rather, it is within the district court's discretion. Second, much of the information relied upon by the government expert was already known to the defense expert through disclosure of reports pre-trial. Defense counsel also had ample opportunity through direct examination of its own witness to rebut, add to, or opine on the implications of any information revealed during the government expert's testimony by asking the defense expert to assume the existence of certain facts. Thus, the court concluded that although it might have been helpful to hear the government's expert testimony, the defendant failed to demonstrate that it was essential, as required by the Rule.

***Daubert* standards for admissibility of expert testimony do not apply at suppression hearings.** *United States v. Ozuna*, 561 F.3d 728 (7th Cir. 2009; No. 07-2480). Upon consideration of the denial of the defendant's motion to suppress evidence, the Court of Appeals held that a district court need not conduct a *Daubert* analysis before admitting expert testimony. The government presented the testimony of a handwriting expert to demonstrate that the defendant signed a consent-to-search form without conducting the *Daubert* analysis. The Court of Appeals held that the *Daubert* standard does not apply at suppression hearings. First, Federal Rule of Evidence 104(a) specifically states that the Rules of Evidence do not apply at pre-trial admissibility hearings. Secondly, the primary rationale behind *Daubert* is not applicable in a suppression hearing. The purpose of *Daubert* was to require courts to serve as gatekeepers so that unreliable expert testimony does not carry too much weight with the jury. Judges, on the other hand, are less likely to be swayed by experts with insufficient qualifications, and it is the judge who presides over suppression hearings. Accordingly, the expert evidence was properly admitted.

C. RULE 403

Court erred in admitting evidence of death of individuals who purchased drugs from the defendant, when that evidence had no relevance to issue of whether defendant distributed drugs and was highly prejudicial. *United States v. Cooper*, 591 F.3d 582 (7th Cir. 2010; No. 08-4021). In prosecution for conspiracy to distribute heroin, the government introduced evidence that several of the defendant's customers had died. The district court admitted the evidence as relevant, but never weighed the probative versus unfairly prejudicial effect of the evidence. The Court of Appeals held that the district court erred by failing altogether to conduct a Rule 403 analysis, which was part of the process to admitting evidence that it had no discretion to omit. Moreover, evidence of what happened to the defendant's customers after they bought heroin from him had nothing to do with the charge of conspiracy to distribute. However, because of the overwhelming evidence, the court found the error to be harmless.

D. RULE 404(b)

District court erred in admitting evidence of the defendant's other drug activities under the "intricately intertwined" doctrine, although the evidence was admissible under Rule 404(b). *United States v. Conner*, 583 F.3d 1011 (7th Cir. 2009; No. 07-3527). In prosecution for one count of distribution of crack cocaine involved in a controlled buy, the Court of Appeals held that the district court erred in admitting evidence of the defendant's other drug activities under the "intricately intertwined" doctrine, although the evidence was admissible under Rule 404(b). The defendant was prosecuted based upon a single controlled buy of crack cocaine. At trial, however, the government sought to introduce evidence of the defendant's prior drug activities with the other individuals involved, as well as another drug sale which occurred after the sale charged in the indictment. The government sought to introduce the evidence under the "intricately intertwined doctrine" and Rule 404(b), and the court admitted it under the former. It never ruled on whether it was also admissible under Rule 404(b). The Court of Appeals noted that Rule 404(b) prohibits "other bad acts" evidence to show bad character or propensity, but the court has long recognized prior bad acts are admissible when the acts are so inextricably intertwined with, or intricately related to, the charged conduct that they help the factfinder form a more complete picture of the crime. Such evidence is not "other acts" as defined by Rule 404(b) because it is intrinsic to the crime charged. Nevertheless, the intricately intertwined doctrine is often unhelpfully vague, in part because almost all evidence admitted under the doctrine is also admissible under Rule 404(b). In the present case, the court first concluded that the evidence was not intricately related to the crime charged. First, the relationship between the defendant and others involved in the transaction was not important, because the defendant was not charged with conspiracy. Likewise, there was nothing about the subsequent drug purchase which "completed the picture" related to the single sale charged in the indictment. The government merely needed to prove that the sale occurred on the date charged, and the other evidence added nothing to the story the government needed to tell. The "complete the story" theory of the "intricately related" doctrine was not meant to be used, as it was in this case, to circumvent Rule 404(b) and use the evidence to show propensity. The effect of admitting the evidence under the wrong theory was that the court put almost no restrictions on the governments use of the evidence. It did not give a limiting instruction, and it allowed the government to use the bad acts in closing argument to demonstrate propensity. The court did conclude that the evidence was admissible under Rule 404(b) because the evidence rebutted an inference that the defendant was an innocent bystander. Given the evidence's admissibility under Rule 404(b), and the nature of the other evidence in the case, the court finally concluded that the error was harmless.

Evidence under Rule 404(b) should be evaluated on whether the prior-crimes evidence is relevant (other than to show propensity, which may be relevant to guilt, but is impermissible as evidence) to an issue in the case, and, if so, whether the probative weight of the evidence is nevertheless substantially outweighed by its prejudicial effect or by its propensity to confuse or mislead the jury. *United States v. Edwards*, 581 F.3d 604 (7th Cir. 2009; No. 08-1124). In prosecution for distribution of more than five grams of crack, the Court of Appeals held that evidence of prior drug transactions between the defendant and the government's principal witness did not violate Rule 404(b). The government's principal witness testified that, working as a government informant, he had arranged to make a controlled purchase of drugs from the defendant. There was conflicting testimony about whether the defendant had drugs with him when arrested upon arriving at the informant's house, where the purchase was to take place. But the informant testified in detail about the procedures used when the defendant had sold drugs to him on previous occasions—how the sale would be set up, where it would take place, and so forth—and that he had followed the same procedures in the transaction for which the defendant was being prosecuted. The defendant argued that the evidence concerning prior purchases was improper 404(b) evidence, while the government argued that the evidence was admissible under the “intricately related” or “intricately intertwined” exception. The Court of Appeals initially noted that all the government need establish is a purpose other than to establish the defendant's propensity to commit crimes. The fact that prior-crimes evidence is “intricately intertwined” to the charge in the case at hand is “neither here nor there, if indeed any meaning can be assigned to such terms.” Rather, the focus of the inquiry should be on whether the prior-crimes evidence is relevant (other than to show propensity, which may be relevant to guilt, but is impermissible as evidence) to an issue in the case, and, if so, whether the probative weight of the evidence is nevertheless substantially outweighed by its prejudicial effect or by its propensity to confuse or mislead the jury. Here, the evidence was admissible for reasons other than propensity, because without the evidence, the jury might have thought that the informant had fabricated a planned drug sale in order to curry favor with the government. The evidence of the prior-crimes here corroborated the informant's testimony that the defendant indeed intended to sell him drugs on the date charged in the indictment.

Admission of DVD containing interrogation of Defendant containing improper 404(b) material did not constitute plain error where there was no evidence that the jury ever actually viewed the DVD. *United States v. Lewis*, 567 F.3d 322 (7th Cir. 2009; No. 08-1854). In prosecution for bank robbery, the Court of Appeals held that the admission into evidence of a 4-hour DVD containing an interview with the Defendant, wherein he made statements regarding his family's imprisonment and his prior bank robbery conviction, was not reversible error where there was no evidence that the jury actually viewed the DVD. At trial, the Defendant's entire 4-hour interrogation was admitted into evidence on a DVD. However, the DVD was never actually played to the jury. On the DVD, the defendant made the statements referenced above. The defendant failed to make an objection to admission of the DVD at trial, but argued on appeal that admission of the DVD with the statements as set forth above constituted plain error under Rule 404(b). The Court of Appeals noted that the strange manner in which the DVD was admitted into the record precluded a finding of plain error. There was no evidence that the jury ever actually viewed the DVD, and the statements were not referenced during any testimony. Although the court did conclude that the two statements flew “in the face of Rule 404(b),” plain error could not be established without showing that the jury actually viewed the DVD and the statements contained therein. The court left open the question of whether defense counsel was ineffective for failing to object to the un-redacted DVD.

E. RULE 413

Rule 413 allows the admission of evidence which shows a propensity to commit sexual assault, but evidence may still be excluded under Rule 403 if it is unfairly prejudicial for reasons other than the fact that it constitutes propensity evidence. *United States v. Rogers*, 587 F.3d 816 (7th Cir. 2009; No. 08-1516). In prosecution for attempting to entice a minor to engage in sexual activity, the Court of Appeals held that the district court improperly excluded evidence of prior similar conduct based on a finding that such evidence was improper propensity evidence. The government sought to introduce at trial two prior instances of conduct similar to that charged in the indictment, arguing that Rule 413 allowed admission of such evidence. The district court excluded the evidence under Rule 403, finding that the prior convictions were unfairly prejudicial because they risked the jury convicting based upon propensity evidence. Rule 413(a) provides: “In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant’s commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.” The Court of Appeals noted that although Rule 413 allows the admission of such evidence, it does not compel it. Thus, the initial question is whether such evidence is relevant under Rules 401 & 402, and the court concluded that the evidence was relevant. Although Rule 404(b) excludes propensity evidence, Congress intended Rule 413 to provide an exception to Rule 404(b)’s general bar on propensity evidence and to permit the trier of fact to draw inferences from propensity evidence. The question therefore becomes whether Rule 413’s permission to use propensity evidence in sexual assault trials affects a court’s Rule 403 analysis of evidence falling within that rule. The court concluded that it does, noting that Rule 404(b)’s prohibition of propensity evidence generally makes such evidence unduly prejudicial. However, because Rule 413 identifies a propensity inference as proper, such an inference can no longer be labeled as “unfair” under Rule 403 in sexual assault cases. In other words, such evidence cannot be excluded because there is a risk that the jury might convict based upon propensity evidence; Rule 413 allows such an inference. Nevertheless, such evidence may still be excluded under Rule 403 for other reasons, such as a risk that a decision on the basis of something like passion or bias may occur. Rule 413 does not say that evidence falling within the rule is *per se* non-prejudicial. Given this analysis, the district court erred by excluding the evidence because it was propensity evidence. The court therefore remanded the case to the district court for a determination of whether the evidence was still excludable under Rule 403 because of some other unfair prejudice.

F. RULE 1006

Summary charts of voluminous documentary evidence inadmissible unless the underlying records are themselves admissible, whether or not the underlying records are actually admitted into evidence. *United States v. Oros*, 578 F.3d 703 (7th Cir. 2009; 08-2511). In prosecution for bribery, the Court of Appeals held that the district court improperly allowed the admission of summary charts, but that the error was harmless. At trial, the government informed the court that it intended to introduce summaries of voluminous bank and telephone records under Federal Rule of Evidence 1006. The district court found that because the government was only introducing the summary (and not the underlying records themselves), no certification or testimony from a custodian was required. Rather, the government presented the testimony of an Inspector who testified how he obtained the records, the government believing that such testimony was sufficient to demonstrate that the records were of the type that would have been admissible under the business records exception, Federal Rule of Evidence 803(6). The Court of Appeals noted that Rule 1006 allows a party to present and enter into evidence a summary of voluminous writings, but the Rule is not an end around to introducing evidence that would otherwise be inadmissible. The proponent of such evidence is required to demonstrate that the underlying records are accurate and would be

admissible as evidence. The government failed to do that in this case. Both parties agreed that the records were hearsay, and the Inspector's testimony was insufficient to establish an exception under the business records exception. The government did not present any testimony to establish that the records were kept in the course of a regularly conducted business activity, nor did it provide certification. Without these steps, the government could not have laid the foundation necessary to demonstrate the admissibility, under the business records exception, of the underlying records or the summaries of those records. Thus, the summary was inadmissible. However, the court concluded that the error was harmless, given the nature of the evidence in the case.

IV. FORFEITURE

The amount of forfeiture is not limited to the amount of the mailing in the count of conviction where a broader scheme to defraud exists. *United States v. Venturella*, 585 F.3d 1013 (7th Cir. 2009; No. 07-3754). In prosecution for mail fraud, the Court of Appeals held that the amount of forfeiture is not limited to the amount of the mailing in the count of conviction where a broader scheme to defraud exists. The defendant pled guilty to one count of mail fraud, but was ordered to forfeit amounts related to the dismissed counts as well. The defendant argued that forfeiture was proper only for the count of conviction. The Court of Appeals disagreed. Title 18, U.S.C. § 981(a)(1)(C) authorizes forfeiture for "any property, real or personal, which constitutes or is derived from proceeds traceable to" the commission of certain specified offenses, including mail fraud. Title 18, U.S.C. § 981(a)(2)(A) defines "proceeds" as "property of any kind obtained directly or indirectly, as the result of the commission of the offense giving rise to forfeiture, and any property traceable thereto, and is not limited to the net gain or profit realized from the offense." The court concluded that the plain language of section 981(a)(1)(C) along with the expansive definition of "proceeds" indicates that the statute contemplates the forfeiture of property other than the amounts alleged in the count of conviction. Secondly, the defendant argued that an order of forfeiture and an order of restitution based upon the same conduct and amounts was improper double payment. The court rejected this argument as well, noting that forfeiture seeks to punish a defendant for his ill-gotten gains by transferring those gains to the DOJ, while restitution seeks to make the victim whole. In this case, the federal and state agencies that the defendants defrauded were separate entities from the DOJ, and there was therefore no double payment.

Where government sought forfeiture of weapons owned by convicted felon outside of the 120-day deadline, the government was obliged to credit the defendant for the value of the weapons or turn them over to someone who could lawfully possess them. *United States v. Miller*, 588 F.3d 418 (7th Cir. 2009; No. 09-2256). Upon appeal from the denial of the defendant's petition for the return of seized firearms, the Court of Appeals held that the district court erred in denying the defendant's petition. The defendant was convicted of aiding and abetting the possession of firearms, and more than 120 days prior to his indictment, the government seized 34 firearms from his farm. The Court of Appeals noted that to retain the firearms, the government needed an order of forfeiture which they did not obtain in the case, but it was too late for the government to obtain such an order, for forfeiture may only be initiated within 120 days of seizure. Although the indictment included a forfeiture allegation, it was returned after the 120 days had passed. In the district court, the defendant asked the judge to order the government to sell the weapons for his account or deliver them to someone legally entitled to possess them. The judge concluded that the government is not obliged to act as a felon's auctioneer, and that handing the guns over to one of the defendant's relatives would leave him in constructive possession, which would be as unlawful as physical possession. Thus, forced to choose between two unlawful outcomes, the judge thought it best to

order the government to destroy the guns. The Court of Appeals, however, noted that the defendant's property interest in the firearms continued even though his possessory interest had been curtailed. The court noted that there were a number of alternatives to destruction of the weapons, including a government sale of the weapons for the defendant's account, having a trustee sell or hold the guns, or giving them to someone who can be relied on to treat the weapons as his own. Accordingly, the court remanded to the district court for a determination of what method to use to satisfy the defendant's interest in the guns.

V. GUILTY PLEAS

The grant of certiorari by the Supreme Court on an issue that might affect the defendant's legal innocence is not a "fair and just reason" to withdraw a plea. *United States v. Mays*, 593 F.3d 603 (7th Cir. 2010; No. 09-1767). On appeal from the district court's denial of the defendant's motion to withdraw his guilty plea, the Court of Appeals held that the grant of certiorari by the Supreme Court on an issue that might affect the defendant's legal innocence is not a "fair and just reason" to withdraw a plea. After the defendant pleaded guilty but before sentencing, the Supreme Court granted certiorari in *Arizona v. Gant*, 129 S.Ct. 1710 (2009). Because a favorable ruling in *Gant* might have given the defendant a basis for suppressing the gun precipitating his federal charge, he moved to withdraw his plea, but the district court denied his motion. The Court of Appeals noted that it has recognized several fair and just reasons for withdrawing a plea, including: the plea was not knowing and voluntary, actual innocence, and legal innocence. The defendant characterized the basis for his claim as legal innocence. The court noted that there is some authority for the proposition that a post-guilty plea, pre-sentence change in Supreme Court precedent that bears on a defendant's legal innocence may constitute a fair and just reason for permitting the withdrawal of the plea. In this case, however, there was no intervening change in Supreme Court precedent: *Gant* was not decided until after the defendant was sentenced. The fact that the Supreme Court had granted a writ of certiorari and heard oral arguments in *Gant* was not indicative of a change in the law. At most, it signified that a change in the law was possible. No authority holds that the mere possibility of a change in Supreme Court precedent is a fair and just reason for withdrawal of a guilty plea.

Waiver of appeal rights in plea agreement did not preclude appeal of denial of 3582(c)(2) motions to reduce sentences based on retroactive amendment to the Guidelines. *United States v. Woods*, 581 F.3d 531 (7th Cir. 2009; No. 08-1778). Upon consideration of appeals from the denial of defendants' 3582 petitions, the Court of Appeals held that the defendants' waiver of their rights to collaterally attack their sentences or appeal did not preclude an appeal of the denial of their petitions. The language of the appeal waivers in the cases read as follows, "I further expressly waive my right to appeal my sentence on any ground, including any appeal right conferred by Title 18, United States Code 3742. I also agree not to contest my sentence or the manner in which it was determined in any post-conviction proceeding, including, but not limited to a proceeding under Title 28, United States Code §2255." The court held that this language did not bar an appeal from the denial of a 3582 motion. Regarding the first sentence of the waiver, the court noted that the defendants have not appealed their originally imposed sentence, rather, they appeal the denials of their sentence-reduction motions because they believe the district court incorrectly concluded that they were ineligible for a reduction. Such an appeal is not covered by the first sentence of the waiver. Regarding the second sentence, the court concluded that 3582 motions are not clearly understood to fall within a prohibition on "any collateral attack." The motions do not so much challenge the original sentence as they seek a modification of the sentence based upon an amendment

to the Guidelines. Indeed, the defendants could not contest the district court's original sentence of imprisonment through 3582 proceedings because such proceedings provide no avenue through which to attack the original sentence. Accordingly, nothing in the waiver precluded the appeals in this case. Nevertheless, the district court properly denied the motions because each defendant was responsible for more than 4.5 kilograms of crack.

Failure to inquire about defendant's knowledge of appeal waiver at plea hearing was not plain error where totality of circumstances indicated the defendant's plea was knowing and voluntary. *United States v. Polak*, 573 F.3d 428 (7th Cir. 2009; No. 08-3381). Upon consideration of the defendant's argument that his plea was not knowing and voluntary because the district judge failed to inquire about his knowledge of his plea agreement's appellate waiver before accepting his guilty plea, the Court of Appeals concluded that the totality of the circumstances indicated that the defendant's plea was knowing and voluntary. At the time of the defendant's plea, the district court failed to comply with Rule 11's requirement that it address the existence of an appeal waiver on the record. Applying the plain error standard, the Court of Appeals noted that it looks to the totality of the circumstances to determine whether the defendant's plea was knowing and voluntary. Here, unlike the defendant in *United States v. Sura*, 511 F.3d 654, 657 (7th Cir. 2007) where the court reversed for such an error, several factors indicated the defendant understood the nature of his plea, such as the fact that the defendant went over the plea with his counsel, the defendant was educated, and the court inquired about the defendant's knowledge of the waiver, although after the plea was accepted. Although the court did not find plain error, it did not that judges would do well to follow the model for conducting a plea colloquy outlined in the Benchbook for United States District Judges. Moreover, it is the responsibility of the judge, prosecutor, and defense counsel to ensure that a plea meets the requirements of Rule 11, and counsel should speak up and bring an omission to the court's attention before a plea is accepted.

District Judge not required to explicitly accept plea agreement on the record, although doing so is a recommended practice. *United States v. Brown*, 571 F.3d 690 (7th Cir. 2009; No. 08-2273). The Court of Appeals held that a district court need not explicitly state it is accepting a plea agreement. The defendant pled guilty, but the district court at not time stated on the record that it was accepting the defendant's plea agreement. The defendant argued that he was therefore entitled to withdraw his plea, given this lack of formal acceptance. The Court of Appeals disagreed, noting that the failure to formally accept a plea agreement does not overcome a court's other acts that may point to acceptance. Here, the court sentenced the defendant in a way entirely consistent with the plea agreement. Indeed, everything that occurred was consistent with the plea agreement. Given these circumstances, the court concluded that the plea was accepted. It did, however, noted that the better practice would be for district courts to explicitly indicate the status of plea agreements. Rule 11(c) provides a virtual checklist of what a district court should do when accepting a plea and, consistent with the rule, the court might have explicitly stated at the plea hearing that it was deferring acceptance pending the PSR and, at the sentencing hearing, that it was accepting the plea agreement. But since the Rule does not require such explicit statements, the court could not conclude that the court plainly erred by failing to specify that it was accepting the defendant's plea agreement.

Rule 11(c)(1)(C) does not apply to stipulations of fact. *United States v. Cole*, 569 F.3d 724 (7th Cir. 2009; No. 06-2547). Upon consideration of the defendant's argument that improperly refused to rely upon the stipulated drug quantity relied upon in the plea agreement, the Court of Appeals held that stipulated fact in a plea agreement are not binding upon the district court. Although the defendant and the government stipulated to the drug quantity in the plea agreement, the PSR reported

a higher drug quantity which the court used to sentence the defendant. The defendant argued that the district court was bound by the drug quantity stipulations pursuant to Rule 11(c)(1)(C). However, the Court of Appeals noted that this rule applies to agreements regarding sentences, sentencing ranges, or sentencing factors; it does not apply to factual stipulations. Rather, agreements under the rule typically explicitly contain an agreed-upon sentence, or an agreed upon sentencing range. Admissions regarding drug quantities are the equivalent of a stipulation of facts that fall outside the Rule's scope. Moreover, as the agreement itself noted, the district court would ultimately determine "all matters, whether factual or legal, relevant to the application of the guidelines, and that the specific sentence to be imposed will be determined by the judge." Accordingly, the district court was free to ignore the stipulations.

Preservation of issue for review on appeal in a conditional plea agreement must identify precisely issues to be preserved; Court of Appeals lacks jurisdiction to consider any other issues. *United States v. Kingcade*, 562 F.3d 794 (7th Cir. 2009; No. 08-2447). Prior to the entry of the defendant's plea, his counsel filed several motions to suppress. The defendant also filed two *pro se* motions to suppress. The defendant then entered into a written conditional plea, preserving his right to appeal "adverse determinations regarding his motions to suppress evidence seized during the execution of search warrants." The Court of Appeals held that it lacked jurisdiction to consider the defendant's *pro se* motions on appeal, because those motions challenged the consensual search of an apartment and the warrantless seizure of a safe, rather than anything seized during the execution of "search warrants." The court noted that a conditional plea must "precisely identify which pretrial issues the defendant wishes to preserve for review." Ordinarily, as in the instant case, the preservation must be in writing, although that requirement is not jurisdictional. A conditional plea may be found in the limited circumstance where the parties to the agreement clearly intended that the defendant's right to appeal an issue would be preserved. Where there is a written preservation, however, the court first looks to the language in the written agreement. Here, the agreement was explicit that the issue preserved involved the execution of search warrants. The agreement was silent about the consensual searches, and nothing else in the record clearly indicated that the parties intended the preservation to cover the *pro se* motions.

VI. JURY INSTRUCTIONS

Erroneous instruction on meaning of "resulted in death or serious bodily injury" in drug prosecution which resulted in same required reversal. *United States v. Hatfield*, 591 F.3d 945 (7th Cir. 2010; No. 09-1705). In prosecution for distributing drugs which "resulted in death or serious bodily injury," the Court of Appeals held that the district court's instruction on "resulted in" was erroneous and required a retrial. The instruction began by stating that the jury had "to determine whether the United States has established, beyond a reasonable doubt, that the victims died, or suffered serious bodily injury, as a result of ingesting a controlled substance or controlled substances distributed by the defendant." But then it added that the controlled substances distributed by the defendants had to have been "a factor that resulted in death or serious bodily injury," and that although they "need not be the primary cause of death or serious bodily injury" they "must at least have played a part in the death or in the serious bodily injury." It was the second part of the instruction which the court found to be erroneous. The statutory term "results from" required the government to prove that ingestion of the defendants' drugs was a "but for" cause of the deaths, and the death need not have been foreseeable. But the government at least must prove that the death or injury would not have occurred had the drugs not been ingested. All that would have been needed to be a proper instruction was elimination of the addition to the statutory language, which was clearer

than the addition and probably clear enough. Elaborating on a term often makes it less rather than more clear, which is what happened in this case. Moreover, no case has approved the language that was added to the instruction. Finally, the error in this case was not harmless, as the evidence showed that the victims ingested multiple drugs, some of which came from the defendants and some of which did not. It was therefore unclear how a juror would have fitted that evidence into the erroneously given instruction.

Mere negligence in failing to discover the truth concerning a fraud is insufficient to convict a defendant where the government’s theory is deliberate avoidance. *United States v. Ramirez*, 574 F.3d 869 (7th Cir. 2009; No. 08-3216). In prosecution for wire fraud, the Court of Appeals restated the law of this circuit concerning the fact that mere negligence in failing to discover the truth concerning a fraud is insufficient to convict a defendant where the government’s theory is deliberate avoidance. At trial, the court gave an “ostrich” instruction, allowing the jury to infer the defendant’s knowledge of the fraud if she deliberately avoided knowledge of the fraud. The defendant argued that the district court was also required to instruct the jury that mere negligence in discovering the truth was not sufficient to infer knowledge. The Court of Appeals noted that it has cautioned that “a jury must not be invited to infer that a particular defendant deliberately avoided knowledge on a basis of evidence that only supports the inference that a reasonable person in the situation would have deliberately avoided knowledge.” In other words, that a reasonable person would have inquired further and discovered the truth. Although this is the law in this circuit, the court of appeals concluded that the government did nothing to suggest to the jury that a conviction could be predicated on mere negligence, so the court was not required to give the defendant’s requested instruction.

District court not required to instruct jury that it must unanimously agree on overt act in furtherance of conspiracy to support conviction thereof. *United States v. Griggs*, 569 F.3d 341 (7th Cir. 2009; No. 06-4211). In prosecution for conspiracy to commit wire fraud, the Court of Appeals held that the district court was not required to instruct the jury that it was required to unanimously agree on at least one overt act in furtherance of the conspiracy. The judge failed to give such an instructions, but the court held that the judge was not required to give such an instruction. The law distinguishes between the elements of a crime, as to which the jury must be unanimous, and the means by which the crime is committed. The jurors agreed unanimously on what crime the defendant committed—agreed in other words that he had taken a step toward accomplishing the goal of the conspiracy, had gone beyond mere words. That they may have disagreed on what step he took was inconsequential, especially since they didn’t have to find that the step was itself a crime or even base conviction on an overt act charged in the indictment. Although the defendant was convicted of conspiracy in violation of a statute that requires proof of an overt act, the requirement of proving an overt act is a statutory afterthought, there being no requirement of proof of an overt act at common law. Moreover, failing to agree on the overt act that the defendant committed is not like failing to agree on the object of the conspiracy. Ultimately, the jury unanimously agreed on the crime that the defendant committed, and which overt act he committed was not an element of the offense.

VII. OFFENSES

A. 8 U.S.C. § 1324(a)(1)(A)(iii)(CONCEALING, HARBORING, OR SHIELDING ILLEGAL ALIEN)

Government need not prove the defendant engaged in “conduct tending substantially” to facilitate an alien’s remaining in the United States illegally to demonstrate “shielding;” they only need prove the “use of any means.” *United States v. Hui Ye*, 588 F.3d 411 (7th Cir. 2009; 08-1333). In prosecution for concealing, harboring, or shielding from detection illegal aliens, the Court of Appeals held that the government need not prove the defendant engaged in “conduct tending substantially” to facilitate an alien’s remaining in the United States illegally to demonstrate “shielding;” they only need prove the “use of any means.” The defendant was convicted under the “shielding” prong of the statute, and the district court defined the term as “the use of any means to prevent the detection of illegal aliens in the United States by the Government.” The defendant argued that the “use of any means” language was too vague, and this Circuit should adopt a more restrictive test used in some other circuits. The Court of Appeals declined to adopt the “conduct tending substantially” test, however, noting that such a requirement does not appear in the statute but was in state a judicial addition. Moreover, the “use of any means” language in the statute is not vague; that wording refers to the *methods* a person may use to protect an alien from discovery, and the statute does not limit the types of conduct that can constitute shielding from detection. Secondly, the language is not overbroad, as it criminalizes *all* conduct that fits the definition of “shield from detection,” not merely conduct that “tends substantially to facilitate” an alien’s evasion of discovery. Accordingly, the jury was properly instructed.

B. 18 U.S.C. § 922(g) (POSSESSION OF A WEAPON BY A FELON)

Offense of trafficking in counterfeit telecommunications instruments meets the definition of a “crime punishable for a term exceeding one year.” *United States v. Schultz*, 586 F.3d 526 (7th Cir. 2009; No. 09-1192). In prosecution for being a felon in possession of a firearm, the Court of Appeals held that the offense of trafficking in counterfeit telecommunications instruments meets the definition of a “crime punishable for a term exceeding one year.” The defendant was convicted under 18 U.S.C. § 1029(a)(7), for altering communication devices which would receive free cable. Thereafter he was charged with being a felon in possession of a firearm. The defendant argued that the offense did not qualify as a prior conviction because Congress carved out an exception under 18 U.S.C. § 921(a)(20)(A), which provides that “any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices” do not disqualify one from firearms possession. The defendant argued his offense fell within this exception. The Court of Appeals noted that it had never considered this question as it pertains to this offense. In order the exclusion to apply in this case under “regulation of business practices,” the government would be required to prove, as an element of the predicate offense, that competition or consumers were affected. The elements of the offense in question are: (1) knowingly trafficking in a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications services; (2) intent to defraud; and (3) conduct which affected interstate commerce. There is no requirement that the defendant’s conduct had an effect on competition or consumers. Although his conduct was required to affect interstate commerce, this was simply a jurisdictional nexus not requiring an effect on consumers. Accordingly, the defendant’s conviction was affirmed.

Evidence insufficient to prove defendant ever possessed a weapon prior to his felony conviction. *United States v. Katz*, 582 F.3d 749 (7th Cir. 2009; No. 08-2341). In prosecution for possession of a weapon by a felon, the Court of Appeals reversed the defendant’s conviction, finding that the evidence was insufficient to establish that the defendant possessed the weapon as charged in the indictment. Officers responded to a 911 call, whereby the caller complained that her boyfriend

(the defendant) was threatening her and she wanted him removed from her home. She also reported he was outside her home with a large revolver. When police arrived, the defendant was walking down the street. He was arrested, but had no weapon on him. A search of the girlfriend's home, however, recovered a shotgun, which was later found to have the defendant's fingerprint on it. Based on that weapon, the government indicted him. At trial, the parties stipulated that "prior to February 17, 2007 (the date of the defendant's arrest)" the defendant had been convicted of a felony. The Court of Appeals found that there was no evidence to indicate that the defendant ever possessed the shotgun prior to the date in the indictment. Although his fingerprint was on the shotgun, the fingerprint expert also testified that it was not possible to determine how long the fingerprints had been on the shotgun. Thus, there was nothing but pure speculation as to when the defendant was in contact with the shotgun. Secondly, nothing demonstrated constructive possession. The evidence showed nothing but the defendant's mere presence on the property. Nothing showed that he resided on the premises or ever stayed there for any period of time. The only evidence presented indicated that the home belonged exclusively to the defendant's girlfriend. Accordingly, the evidence was insufficient to show that the defendant possessed the weapon after he was convicted of a felony.

C. 18 U.S.C. § 922(g)(8) (POSSESSION OF WEAPON BY PERSON UNDER ORDER OF PROTECTION)

A conviction for possession of a weapon by a person subject to an order of protection is valid even if the underlying order of protection is subsequently found to be void. *United States v. Wescott*, 576 F.3d 347 (7th Cir. 2009; No. 08-1211). In prosecution for possession of a weapon by a person subject to an order of protection, the Court of Appeals held that a conviction for such an offense is valid even if the underlying order of protection is subsequently found to be void. The defendant argued that because the underlying order of protection suffered from various constitutional defects at the time of his offense, his conviction on the federal offense was invalid. The Court of Appeals noted that this circuit has not yet addressed directly the question presented, but every court to have considered the issue rejected the defendant's argument. In other contexts, the Court of Appeals has rejected similar arguments. For example, in *United States v. Wallace*, 280 F.3d 781 (7th Cir. 2002), a defendant's 922(g) conviction was sustained, even though his underlying felony offense was vacated after his plea but before sentencing. The court held in that case that the only relevant question was the defendant's status at the time he was charged with unlawfully possessing the firearm. The defendant in that case possessed the firearm while the state court conviction was still valid, and thus violated the statute even though the predicate felony was later vacated. Similarly, in *United States v. Lee*, 72 F.3d 55 (7th Cir. 1995), a defendant sought to overturn his conviction under 922(g) because his predicate state court conviction had been expunged after his arrest on the federal offense but before trial. The expungement voided the defendant's conviction *ab initio*, and the defendant argued that he was not a felon when he possessed a firearm and certainly wasn't a felon by the time of his trial on the federal offense. The court found that because the defendant's conviction had not been expunged at the time he possessed the firearm, the evidence was sufficient to demonstrate that he was a convicted felon at the relevant time. The court in this case saw no reason to treat 922(g)(8) offenses differently from 922(g). Just as any constitutional infirmities in a predicate felony conviction are irrelevant to the fact of conviction in a 922(g)(1) case, so to are infirmities in an order of protection.

D. 18 U.S.C. § 922(g)(9) (POSSESSION OF FIREARM AFTER CONVICTION FOR MISDEMEANOR DOMESTIC VIOLENCE)

Court of Appeals held that the government failed to meet its burden of showing that the prohibition of firearm possession for persons convicted of misdemeanor domestic violence satisfied the intermediate scrutiny test. *United States v. Skoien*, 587 F.3d 803 (7th Cir. 2009; No. 08-3770). In prosecution for possessing a firearm after having been convicted of a misdemeanor crime of domestic violence, the Court of Appeals held that the government failed to meet its burden of showing that the law satisfied the intermediate scrutiny test. In the district court, the defendant relied upon the Supreme Court’s decision in *Heller* to challenge the law. The district court denied the defendant’s motion to dismiss the indictment, however, based upon a passage in *Heller* presumptively approving felon-dispossession laws. On appeal, the court held that this language in *Heller* did not exempt the law from scrutiny. *Heller* invalidate D.C.’s prohibition on handgun possession, finding that the inherent right of self-defense has been central to the Second Amendment right. Because the ban on handgun possession “extends . . . to the home, where the need for defense of self, family, and property is most acute,” the Court found that under any standard of scrutiny the law was unconstitutional. The Court added, however, that nothing in the opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places, such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. The Court of Appeals interpreted the language in *Heller* to hold that other than those laws categorically invalid such as the one presented in *Heller*, all gun laws must be independently justified. Applying *Heller*, the court then outlined the general approach in such cases. First, some gun laws will be valid because they regulate conduct that falls outside the terms of the right as publicly understood when the Bill of Rights was ratified. If, however, a law regulates conduct falling *within* the scope of the right, then the law will be valid (or not) depending on the government’s ability to satisfy whatever level of means-end scrutiny is held to apply. So constitutional text and history come first, then (if necessary) an analysis of the public-benefits justification for the regulations follows. In the present case, the defendant possessed a rifle used for deer hunting. *Heller* itself referred to the founding-era importance of the right to bear arms “for self-defense and hunting.” Thus, the conduct here cannot be said to be outside the terms of the right as understood when the Bill of Rights was ratified. Moreover, on the question of whether a person convicted of domestic-violence misdemeanor is categorically excluded from exercising the Second Amendment right as a matter of founding-era history and background legal assumptions, the government did not seek to justify the statute on this basis, so the court assumed the right was intact for such persons. The court therefore moved to the second question of whether the restriction was justified under the applicable standard of review. *Heller* did not identify the proper standard of review, other than stating that laws infringing the right of “law abiding, responsible citizens to use arms in defense of hearth and home” should receive exacting scrutiny. Because the Court identified some restrictions as presumptively valid, strict scrutiny could not apply in every case. Rather, the Court of Appeals concluded that for laws which do not strike at the heart of the Second Amendment right identified in *Heller*, intermediate scrutiny is appropriate. In the present case, the defendant’s asserted right to possess a rifle for hunting did not strike at the core right of self-defense in the home, and intermediate scrutiny was therefore proper. Such scrutiny requires a reasonable fit between an important governmental end and the regulatory means chosen by the government to serve that end. This requires the governmental goal to be substantial, and the cost to be carefully calculated. Here, because the government and the district court relied solely upon the exception noted in *Heller*, no evidence was presented on this question. Accordingly, the court remanded the case for a determination of whether the law passed the intermediate scrutiny test.

E. 18 U.S.C. § 922(o) (TRANSFERRING A MACHINE GUN)

Defendant not entitled to instruction defining term “automatically” in prosecution for transferring a machine gun. *United States v. Olofson*, 563 F.3d 652 (7th Cir. 2009; No. 08-2294). In prosecution for transferring a machine gun, the Court of Appeals rejected the defendant’s argument that the district court erred when it refused to give the defendant’s instruction which defined the term “automatically.” The defendant transferred a gun which would fire two or three rounds with a single pull of the trigger, but then jam. Because of this malfunction, the defendant argued that he did not transfer a “machine gun,” and sought to have the jury instructed on the definition of the term. The statute defines a “machine gun” as “any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function fo the trigger.” The district court instructed the jury with this language, but did not give any guidance on the meaning of the word “automatically.” The Court of Appeals concluded that the term as used in the statute comports with its ordinary modern meaning that is readily accessible to laypersons and is in no sense confusing. Moreover, precedents do not require a definition of automatic. Although the defendant argued that the Supreme Court’s decision in *Staples v. United States*, 511 U.S. 600 (1994), required a definition of “automatically,” the Seventh Circuit disagreed. Rather, it interpreted *Staples* as requiring the government to prove that a defendant knew of the characteristics of the gun that brought it within the ambit of the statute, but never required a specific definition of “automatically.” *Mens rea* was an element of the crime and the government had to prove the defendant’s knowledge of the features of the weapon (including automatic firing capability) that brought it within the proscriptive purview of the statute, but the precise definition of “automatically” was not at issue in the case. Accordingly, the district court properly refused the defendant’s instruction.

F. 18 U.S.C. § 924(c)

Offering a rifle as a commission to complete the sale of fronted drugs is possession of the weapon “in furtherance of” the drug crime. *United States v. Vaughn*, 585 F.3d 1024 (7th Cir. 2009; No. 08-4169). In prosecution for 924(c), the Court of Appeals rejected the defendant’s argument that his possession of a rifle did not “further” the drug offense. The defendant, a convicted felon, previously purchased a rifle from a CI for \$200. The CI later asked to buy the rifle back, but the defendant declined. Instead, he said he would give the CI the rifle if the CI successfully sold 6 kilograms of marijuana he previously fronted to the CI. On appeal, the defendant asserted that his possession of the rifle did not facilitate the delivery of the drugs. He maintained that the drug transaction was complete before the offer was made to give the gun back to the CI in exchange for the successful sale of the drugs. Moreover, the defendant argued that the Supreme Court’s decision in *United States v. Watson*, 128 S.Ct. 579 (2007), supported his argument, for that case held that receiving a gun in barter for drugs is not “use” of a gun in connection with a drug transaction. The Court of Appeals disagreed, noting that the rifle advanced the sale of the drugs by providing an incentive to the CI to sell the full quantity of drugs for their full price. In the same way that a sales commission plays a role in a business transaction, the defendant used the rifle to speed the payment and to assure full payment. The defendant both held onto the rifle (possessed it), and then used it to pay a commission, and so both the possession and the use of the rifle furthered the sale. Accordingly, the evidence was sufficient to convict the defendant.

Title 18, Section 924(c) charges only one offense that may be committed in more than one way, rather than two separate offenses. *United States v. Haynes*, 582 F.3d 686 (7th Cir. 2009; No. 08-1466). The Court of Appeals held that 924(c) charges only one offense that may be committed in

more than one way, rather than two separate offenses. The defendant argued that his indictment charging 924(c) offenses was duplicitous. The indictment charged that the defendant “knowingly possessed a firearm in furtherance of, *and* used, carried, and brandished a firearm during and in relation to, a drug trafficking crime.” The defendant argued that the district court conflated the possessed “in furtherance of” and used or carried “during and in relation to” prongs of 924(c). The court noted that the Sixth Circuit in *United States v. Savoires*, 430 F.3d 376 (6th Cir. 2005), held that 924(c) criminalizes two separate and distinct offenses: (1) a “use” or carriage offense, which has “during and in relation to” as “its standard participation,” and (2) a “possession” offense, which has “in furtherance of” as its standard. Although the Seventh Circuit had not directly decided the issue, it concluded that its prior cases suggested that 924(c) charges only one offense that may be committed in more ways than one. Where a statute defines two or more ways in which an offense may be committed, all may be alleged in the conjunctive in one count and proof of any one of those acts conjunctively charged may support a conviction. In the present case, the jury instructions covered three ways in which 924(c) may be violated: (1) possessed in furtherance of, and (2) used or (3) carried during and in relation to the drug trafficking crime. The three ways in which 924(c) can be committed may be alleged in the conjunctive in one count, as they were here, and proof of any one of them supported a conviction. Thus, the counts in the present case were not duplicitous.

G. 18 U.S.C. § 2113(d) (BANK ROBBERY)

The “in-jeopardy” prong of the bank robbery statute should be viewed from the perspective of whether a violent reaction on the part of a victim or law enforcement had the potential of placing the life of someone in jeopardy by the use of a deadly weapon. *United States v. Simmons*, 581 F.3d 582 (7th Cir. 2009; No. 08-2207). In prosecution for bank robbery, the Court of Appeals held that the “in jeopardy” prong of the statute is satisfied where there is a risk of a violent response by law enforcement. With the assistance of an accomplice bank employee, the defendant and his co-conspirators hatched a plan to break into a bank before the bank opened. Once at the bank, they waited until a bank employee with the vault code arrived, she being threatened with an unloaded gun in order to coerce her into giving the robbers the vault code. The defendant was charged under the “in jeopardy” clause of the bank robbery statute, which punishes anyone who “in committing . . . [a bank robbery], assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device.” The defendant argued that no one was actually in any objective danger from the robbery and any collateral danger that may attach to threatening a victim with an unloaded gun was not present in this case. Moreover, he argued that involvement of law enforcement was highly unlikely because of the early morning hour of the robbery and the fact that no customers were in the bank because it was not open. The court first held that given holdings from other circuits that fake guns can satisfy the statute, so too can an unloaded gun. Moreover, here there was a risk of law enforcement involvement; simply because the police did not show up does not mean there was no risk of them doing so. Adopting the view that the potential violent reaction of the victim or law enforcement, moreover, is enough to meet the in-jeopardy requirement. This requirement was met here, where a bank employee was held at gunpoint at the bank. There was a risk that the situation could have provoked a desperate response from the teller or attracted the attention of police. Therefore, the evidence was sufficient for conviction.

H. 18 U.S.C. § 1343 (WIRE FRAUD)

Wire fraud statute requires a causal connection between the defendant’s actions and the communication, not simply a temporal one. *United States v. Dooley*, 578 F.3d 582 (7th Cir. 2009;

No. 08-4131). In prosecution for wire fraud, the Court of Appeals reversed the defendant's conviction because the government failed to prove that the defendant "transmitted or caused to be transmitted a wire communication." The defendant was a police officer in charge of the evidence locker at the police station. When the FBI contacted the defendant's supervisor to request that money from a bank robbery located in the evidence locker was needed for a prosecution, the supervisor sent an email to the defendant informing him that the FBI would be coming for the money. After receiving the email, surveillance cameras recorded the defendant getting into the evidence locker and tampering with the money. After the FBI picked up the money, they discovered that much of the money was missing, and some of it was replaced with poor quality counterfeit bills. The defendant was charged with several crimes, one of which was wire fraud. The only communication in support of the charge was the email the defendant received from his supervisor. According to the government, the defendant "caused" the email to be sent because he "acted with knowledge that the use of a wire was reasonably foreseeable to him." The Court of Appeals disagreed, noting that the statute requires a causal connection between the defendant's actions and the communication, not simply a temporal one. No such causal connection existed in this case. Even if the defendant had never committed any crime, the FBI still would have asked to take possession of the money in order to use it in the prosecution of the bank robbery, and the supervisor would have sent the defendant exactly the same e-mail message asking him to prepare that evidence for the FBI. The defendant's conduct had no effect on either the existence of that wire transmission or its content. He did not "cause" it to be sent in any sense of the word. Accordingly, the evidence was insufficient to support a conviction for wire fraud.

I. 18 U.S.C. § 2422(b) (ENTICEMENT OF A MINOR)

Jury must reach unanimous verdict regarding underlying state statute a Defendant violated in federal prosecution for engaging in sexual activity chargeable as a criminal offense under state law. *United States v. Mannava*, 565 F.3d 412 (7th Cir. 2009; No. 07-3748). In prosecution for enticement of a minor in violation of 18 U.S.C. § 2422(b), the Court of Appeals held that the district court erred in failing to require the jury to reach a unanimous verdict on what underlying state offense the defendant had violated. The defendant engaged in Internet chat with what he thought was a 13-year old girl, but who actually was a police officer. The defendant made arrangements to meet the victim at an ice cream parlor, sought to persuade her to have sex with him, and persuade her to touch herself in a sexual manner. The indictment charged the defendant with having engaged in sexual activity chargeable as criminal offenses under Indiana law. The government cited two statutes: One, the "vicarious sexual gratification" law, makes it a felony for an adult knowingly to induce a child under 16 "to touch or fondle" herself "with intent to arouse or satisfy" the child or adult. The other, the "child solicitation" law, forbids an adult knowingly to solicit a child who is, or who the adult believes is, under 14 to engage in sexual activity. However, the jury was not asked to make a determination regarding which of these two statutes the defendant violated, but rather returned a general guilty verdict. The Court of Appeals noted that the jury must be unanimous with respect to all the elements of the charged offense. The liability created by the federal statute depends on the defendant having violated another statute, and the elements of the offense under that other statute must therefore be elements of the federal offense in order to preserve the requirement of jury unanimity. The government argued that if half (or some other fraction) of the jurors agreed that the defendant had violated just one of the Indiana statutes and the rest agreed that he had violated just the other, the conviction would be valid because the offense of which he was convicted was the federal offense of committing an offense or offenses chargeable under state law, and the jury was unanimous that he had committed *that* offense. But the court concluded that this reasoning led to

absurd results. Under such an approach, a defendant could be charged with violating 12 state statutes and he could be convicted even though with respect to each of the 12 state offenses 11 jurors thought him innocent and only one thought him guilty. Accordingly, the district court erred in failing to request a special verdict regarding which Indiana offense the jury believed the defendant violated.

Conviction reversed where prosecutor repeatedly stated that defendant intended to “rape” 13-year old victim, where there was no indication that defendant every intended to forcibly have sex with the victim. *United States v. Mannava*, 565 F.3d 412 (7th Cir. 2009; No. 07-3748). In prosecution for enticement of a minor in violation of 18 U.S.C. § 2422(b), the Court of Appeals reversed the defendant’s conviction because the prosecutor repeatedly stated that the defendant intended to “rape” a 13-year old victim. The defendant engaged in Internet chat with what he thought was a 13-year old girl, but who actually was a police officer. The defendant made arrangements to meet the victim at an ice cream parlor, sought to persuade her to have sex with him, and persuade her to touch herself in a sexual manner. The indictment charged the defendant with having engaged in sexual activity chargeable as criminal offenses under Indiana law. The government cited two statutes: One, the “vicarious sexual gratification” law, makes it a felony for an adult knowingly to induce a child under 16 “to touch or fondle” herself “with intent to arouse or satisfy” the child or adult. The other, the “child solicitation” law, forbids an adult knowingly to solicit a child who is, or who the adult believes is, under 14 to engage in sexual activity. Without much discussion, the court concluded that reversal was required because of “the prosecutor’s incessant harping at the trial on the theme that the defendant had been intending to ‘rape’ a 13-year old.” The court noted that sex with a minor is commonly referred to as statutory rape; but the term in the Indiana statute book is “child molestation,” and saying that someone intends to rape a person implies that he intends to use force, of which there was no evidence in this case. By repeatedly accusing the defendant of intending rape, the prosecutor intended to inflame the jury. Because the case was “sufficiently close” (the defendant claimed he knew he was chatting with an adult posing as a child), the “improper advocacy” was reversible error.

There is no equal protection violation where a “safety valve” provision to avoid a mandatory minimum penalty is available to certain drug offenders but not those convicted of enticing a minor in violation of 18 U.S.C. § 2422(b). *United States v. Nagel*, 559 F.3d 756 (7th Cir. 2009; No. 08-2535). In prosecution for attempting to entice a minor to engage in a criminal sexual act in violation of 18 U.S.C. § 2422(b), the Court of Appeals rejected the defendant’s argument that the mandatory minimum sentence applicable in his case violated the Fifth Amendment’s Equal Protection Clause because there was no “safety valve” provision similar to drug offenses. Specifically, the defendant argued that there is no rational basis to punish more severely those who have been convicted of violating § 2422(b) than those who have been convicted of the controlled substance offenses enumerated in § 3553(f), for which the “safety valve” allows a sentence below the mandatory minimum. Noting that the challenge was subject to the rational-basis test, the statute will be upheld “if there is a rational relationship between the disparity of treatment and *some* legitimate governmental purposes.” The Court of Appeals concluded that those who violate § 2422(b) and drug offenders are not similarly situated. First, given the danger presented to children which 2422(b) offenses always present, it was rational for Congress to conclude that a mandatory minimum was always required. Drug offenders, on the other hand, present varying degrees of risk to the community depending on circumstances. Second, Congress believed sex offenders were being sentenced too leniently, while certain drug offenders were receiving sentences which were too harsh. Thus, both the relative seriousness of the offense and the leniency problem are two rational bases

for withholding the safety valve from those convicted of violating § 2422(b), while permitting the operation of a safety valve in sentencing qualified violators of the offenses enumerated in §3553(f).

The 10-year mandatory minimum sentence for violation of 18 U.S.C. § 2422(b) does not violate the Eighth Amendment’s proscription against cruel and unusual punishment. *United States v. Nagel*, 559 F.3d 756 (7th Cir. 2009; No. 08-2535). In prosecution for attempting to entice a minor to engage in a criminal sexual act in violation of 18 U.S.C. § 2422(b), the Court of Appeals rejected the defendant’s argument that the mandatory minimum sentence applicable in his case violated the Eighth Amendment’s proscription against cruel and unusual punishment. Noting that the Seventh Circuit had yet to rule on this specific question, the court concluded that no constitutional violation, either as applied or on its face, was presented by the statute. Three factors are relevant in determining whether a sentence is so disproportionate to the crime committed that the sentence violates the Eighth Amendment: 1) the gravity of the offense and the harshness of the penalty; 2) the sentences imposed on other criminals in the same jurisdiction; and 3) the sentences imposed for commission of the same crime in other jurisdictions. If the court concludes that there is no gross disproportionality, then it need not consider the last two factors. Here, the defendant argued that his was one of those rare cases of disproportionality because he had no criminal history, a low risk or recidivism, and there was no actual minor victim in his case. In rejecting this argument, the court cited Supreme Court precedent rejecting Eighth Amendment challenges involving a life sentence for a first time offender possessing 672 grams of cocaine. The court noted that the defendants failed to demonstrate how his sentence was more disproportionate than that. Indeed, after setting forth the specific facts involved in the case, the court concluded that the sentence was not disproportionate. As for the defendant’s facial challenge, the defendant was required to show that no set of circumstances exists under which the statute would be valid. Given that the defendant’s as-applied challenge failed, it was obvious that a set of circumstances existed under which the statute was valid.

J. 18 U.S.C. § 2423(a)(TRANSPORTATION OF MINOR TO ENGAGE IN PROSTITUTION)

Government need not prove that the victim was a minor in prosecution for knowingly transporting an individual under the age of 18 in interstate commerce with intent that the individual engage in prostitution. *United States v. Cox*, 577 F.3d 833 (7th Cir. 2009; No. 08-1807). In prosecution for knowingly transporting an individual under the age of 18 in interstate commerce with intent that the individual engage in prostitution, the Court of Appeals held that the government need not prove that the victim was a minor. Noting that the issue was one of first impression in the Seventh Circuit, the court stated that every other circuit to have considered the question found that the government need not prove knowledge of the victim’s minor status. The Seventh Circuit joined these circuits. The court found that the most natural reading of the statute was that the verb “knowingly” modifies only the verb “transports” and does not extend to the victim’s minor status.

K. 18 U.S.C. § 4248 (ADAM WALSH ACT)

The civil commitment provisions of the Adam Walsh Act apply to all federal offenders, but not those housed in the BOP as a service to another entity which is responsible for that individual’s incarceration, such as those held in the BOP as a service to ICE. *United States v. Pablo*, 571 F.3d 662 (7th Cir. 2009; No. 08-2520). The Court of Appeals considered whether a person held by the United States Immigration and Customs Enforcement who is placed in a facility run by the Bureau of Prisons is in the custody of the BOP for purposes of the Adam Walsh Act, or

whether he is in the custody of the ICE and therefore does not fall within that Act. Under the Act, if a person is in the custody of the BOP and is certified to be a sexually dangerous person, his release from custody is stayed and he is subject to civil commitment. The defendant was being held by ICE pending deportation, but his home country refused to accept him. The defendant was being held in a BOP facility, although ICE had placed the detainer on him. He then filed for a writ of habeas corpus seeking his release on the grounds that his deportation was not likely in the reasonably foreseeable future, and the district court granted the motion. The government then sought to civilly commit him as a sexually dangerous person under the Adam Walsh Act, but the defendant argued that he was not in “BOP” custody as required by that Act. The Court of Appeals agreed. The defendant’s detention was under the authority of ICE. He is housed at a BOP facility for the convenience of ICE, and although the BOP attends to his daily needs and may even transfer him among facilities to further its own interests, the ICE retains the ultimate authority over him. The court rejected an interpretation that would allow physical custody alone to suffice under the Act. An interpretation based on the physical locale of the person would greatly expand the Act, to ensnare even those who are at the BOP by chance, as where state prisons are overcrowded, or as a result of no criminal action on their part, as with material witnesses. Moreover, such an interpretation would exclude federal offenders from coverage who do not reside in BOP custody. Accordingly, the rational reading of the Act would read custody more narrowly as including all federal offenders, but not those housed in the BOP as a service to another entity which is responsible for that individual’s incarceration. Therefore, the defendant was not subject to the Act’s provisions.

L. 21 U.S.C. § 846 (CONSPIRACY TO DISTRIBUTE DRUGS)

Evidence was insufficient to sustain a conspiracy conviction, where the evidence showed only a buyer-seller relationship. *United States v. Johnson*, 592 F.3d 749 (7th Cir. 2010; No. 09-1912). In prosecution for conspiracy to distribute drugs, the Court of Appeals held that the evidence was insufficient to sustain the defendant’s conviction, and he only engaged in a buyer-seller relationship. The government’s case was based on wiretapped phone calls that captured conversations in which the defendant asked to purchase resale quantities of drugs from his supplier. The Court of Appeals noted that a drug purchaser does not enter into a conspiracy with his supplier simply by reselling the drugs to his own customers. A conspiracy requires more; it requires evidence that the buyer and seller entered into an “agreement to commit a crime other than the crime that consists of the sale itself.” The government therefore had to prove that the defendant and someone else entered into an agreement to distribute drugs, and this required evidence that is distinct from the agreement to complete the underlying wholesale drug transaction. Although the content of the intercepted phone calls suggested the defendant was a middleman who resold drugs he purchased, that is all it suggested. As such, the evidence was insufficient to prove the defendant entered into a conspiracy to distribute drugs. The Court of Appeals therefore vacated the defendant’s conviction on the conspiracy count.

M. 26 U.S.C. § 7206(1) (FILING UNDER PENALTY OF PERJURY FALSE IRS FORMS)

A duty to file IRS form is not an element of a § 7206(1) offense. *United States v. Pansier*, 576 F.3d 726 (7th Cir. 2009; No. 07-3771). In prosecution for filing false IRS Form 8300s, the Court of Appeals held that a duty to file such forms is not an element of the offense. A Form 8300 is an IRS form used to report cash payments over \$10,000 received in one transaction or two or more related transactions. The defendant was accused of filing such forms falsely. The defendant, however,

argued that the indictment failed to allege and the government failed to prove at trial an element of the crime, *i.e.*, that the IRS code or regulation requires the Form 8300's to be filed. Without this element, the defendant argued that the government cannot show that the information contained in the Form 8300 was false as to a "material manner." The court noted that the statute in question is a perjury statute and therefore requires only that the taxpayer file a return which he does not believe to be true and correct as to every material matter. Criminal penalties for perjury under the statute apply to any document filed with the IRS. Proof of a duty to file a return is not required to establish a violation of § 7206(1) or for filing reports of nonexistent transactions. Accordingly, the government was not required to prove that the defendant was required to file the Form 8300s.

VIII. PROCEDURE

A. CONTINUANCES

Court abused its discretion in refusing to grant a continuance where defense learned of new, crucial government witness only five calendar days before trial. *United States v. Covet*, 576 F.3d 385 (7th Cir. 2009; No. 08-1470). In prosecution for two armed bank robberies, the Court of Appeals held that the district court abused its discretion in refusing to give the defendant a continuance, where the government produced a new witness five calendar days before trial. On the Wednesday before their Monday morning trial, the defense first learned of a new witness for the government, who claimed to be the get-away driver for one of the robberies. The court was immediately informed of this new information, and the defendant sought a continuance. The court held a hearing, but found that five days was sufficient time for the defense to prepare for the new witness's testimony. The Court of Appeals disagreed. The court noted that the defendants learned of the new witness on the Wednesday before a Monday morning trial; they therefore had only one half-day, two weekdays, and two weekend days to prepare (at the same time as they were engaged in the remainder of their anticipated trial preparation). Although the government also counted the two days of trial before the new witness would testify, the court noted that to expect meaningful investigation by attorneys during trial misunderstands both the reality of trial and defense attorneys' resources. It also ignores the fact that the defense would naturally want to develop a consistent theory for the trial. In short, two business days and two weekend days were not enough. Thus, because the record showed no reason to deny a continuance and several compelling reasons to grant one, the court found that the district court abused its discretion in denying a continuance. Moreover, the court concluded that the defendant was prejudiced by the denial because the defense noted several concrete, meaningful steps they would have taken and investigated had they been granted the continuance.

Conviction reversed where district court refused to grant the defendant a continuance on the morning of trial, after defense counsel learned the previous evening that a crucial government witness changed his story about the degree of the defendant's involvement in the offense. *United States v. Heron*, 564 F.3d 879 (7th Cir. 2009; No. 07-3726). In prosecution for drug offenses, the Court of Appeals held that the district court abused its discretion when denying the defendant's motion to continue his trial. The defendant rode along with another man, who was driving a semi full of drugs. The defendant claimed that he did not know the semi was full of drugs until after he had already left on the trip. The driver gave a statement to police indicating that the defendant had never participated in drug activities with him before. However, on the night before trial, the driver changed his story, stating that the defendant had been involved in two other drug running trips. The government informed defense counsel of the change in testimony, and the next morning, the day of trial, he moved for a continuance to investigate the new testimony. The district court denied the motion, stating in total that it was the morning of trial and despite its sympathy "to the immediacy

of the events that prompted your Motion at this time,” the trial would not be continued. On appeal, the court noted that several factors are considered when a district court decides whether to grant a motion to continue, including: 1) the amount of time available for preparation; 2) the likelihood of prejudice from denial of the continuance; 3) the defendant’s role in shortening the effective preparation time; 4) the degree of complexity of the case; 5) the availability of discovery from the prosecution; 6) the likelihood that a continuance would have satisfied the movant’s needs; and 7) the inconvenience and burden to the district court and its pending case load. The Court of Appeals concluded that most of these points weighed in favor of the continuance, some strongly so. For example, the defense counsel had no time to prepare for the dramatic change in testimony. The driver’s previous statements portrayed the defendant as a reluctant participant in the trip, and the change in testimony created a likelihood of prejudice. The testimony added complexity to the case, as the new trips needed to be investigated. Although the government did provide the information to the defendant as soon as it was available to them, and delaying the trial at such a late hour would have inconvenienced the court, it “cannot have a myopic insistence upon expeditiousness in the face of a justifiable reason for delay.” Given the balance of these factors, the changed testimony was a crucial piece of evidence that defense counsel should have had an opportunity to develop, and the defendant’s conviction was therefore reversed.

Court did not abuse its discretion in denying motion to continue to allow defendant to retain a second expert opinion, after the court expressed doubt about first expert’s qualifications.

United States v. Smith, 562 F.3d 866 (7th Cir. 2009; No. 08-1477). In prosecution for child pornography offenses, the Court of Appeals affirmed the district court’s denial of the defendant’s motion to continue, wherein he requested more time to obtain a second expert opinion. The defendant requested, and obtained, CJA funding to hire a psychological expert to provide mitigation at sentencing. After the district judge expressed doubts about the expert’s qualifications and found the testimony to be of little value, the defendant requested a continuance of the sentencing hearing to allow him to hire a second expert—a motion the district court denied. On appeal, the defendant argued that the denial of the continuance was an abuse of discretion. The Court of Appeals noted that to grant or deny a continuance is a matter of case management. Management decisions are for the district judge. The appellate court intervenes only when it is apparent that the judge acted unreasonably. It will only overturn a trial court’s disposition of a motion to continue for an abuse of discretion and a showing of actual prejudice. In the present case, the district court did not abuse its discretion. It was under no obligation to let the defendant have a *second* chance to present expert testimony—especially when public money had already been expended. In the words of the court, “If at first you don’t succeed, try, try again might make a memorable maxim, but it is ill-suited as a principle of case management.”

B. RULE 35

A district court may not reduce a sentence pursuant to a Rule 35(b)(2) motion based on a consideration of anything other than the defendant’s assistance to the government. *United States v. Shelby*, 584 F.3d 743 (7th Cir. 2009; No. 08-2729). Upon appeal by the government, the Court of Appeals held that a district court may not reduce a sentence pursuant to a Rule 35(b)(2) motion based on a consideration of anything other than the defendant’s assistance to the government. The defendant provided post-sentencing cooperation, and the government filed a Rule 35 motion to reduce his sentence. The district court reduced the defendant’s sentence based upon the assistance, but also considered 3553(a) factors in imposing an even lower sentence. On appeal, the government argued that the district court may only consider 3553(a) factors in reducing the amount of the reduction based upon cooperation; it may not use the factors to grant a *greater* reduction than

warranted for the cooperation. The Court of Appeals agreed. According to the court, to suppose that the happenstance of the government's wanting to reward the defendant modestly for some post-sentencing cooperation reopens the entire sentencing process, permitting or even requiring the district judge to consider the full range of sentencing factors in 3553(a) just as he did when he first sentenced the defendant would create a triple anomaly. It would create arbitrary distinctions between similarly situated defendants; it would create the equivalent of a judge-administered parole system for defendants lucky enough to be the subject of a Rule 35(b)(2) motion, even though courts are not parole boards and the Sentencing Reform Act of 1984 abolished parole in federal cases; and it would impair the objective of Rule 35(b), which is to assist law enforcement. The court acknowledged that the Sixth Circuit in *United States v. Grant*, 567 F.3d 776 (6th Cir. 2009), came to the opposite conclusion. However, that court granted a petition for rehearing *en banc*, and the case is still pending before that court. A petition for rehearing *en banc* in this case is pending as well.

C. RECUSAL

Judge should have recused himself where he expressed concern about the time that had passed between the defendant's arrest and the commencement of federal proceedings, suggested that the case was an embarrassment to the justice system and an inefficient allocation of taxpayer resources, suggested that the case should be plead out, and indicated that neither party would be pleased with his ruling on a motion to suppress if a plea agreement was not reached. *In re: United States of America*, 572 F.3d 301 (7th Cir. 2009; No. 09-2264). Upon consideration of a petition for a writ of mandamus, the Court of Appeals concluded that the district judge should have granted the government's motion for recusal filed under 28 U.S.C. § 455(a). In a case that had bounced around between the district court and the Court of Appeals, the district judge called the United States Attorney and the Federal Public Defender into his chambers for an unrecorded meeting. In that meeting, the judge the government's decision to prosecute the case, expressed concern about the time that had passed between the defendant's arrest and the commencement of federal proceedings, suggested that the case was an embarrassment to the justice system and an inefficient allocation of taxpayer resources, suggested that the case should be plead out, and indicated that neither party would be pleased with his ruling on a motion to suppress if a plea agreement was not reached. The court noted that a recusal motion is directed against the appearance of partiality, whether or not the judge is actually biased. Here, the judge improperly inserted himself into plea negotiations in violation of Federal Rule of Criminal Procedure 11 and misapprehended the limits of his authority as the presiding judicial officer and undertook to participate in determinations that are in the proper domain of the Department of Justice. Given the circumstances in this case, a reasonable, well-informed observer would question the judge's partiality in this case and, accordingly, the court directed the judge to remove himself from further proceedings in the case.

D. SEALED RECORDS

If documents under seal in the district court are not necessary for purposes of appeal, parties should exclude the items from the appellate record to avoid them from being unsealed in the appellate court. *United States v. Foster*, 564 F.3d 852 (7th Cir. 2009; No. 09-1248). Upon consideration of the government's motion to keep documents under seal in the Court of Appeals, Chief Judge Easterbrook, as the motions judge, reiterated the standards applicable to keeping documents sealed in the appellate record. The defendant appealed from a denial of his motion to reduce his sentence under the retroactive amendment to the crack cocaine guidelines, and the record on appeal contained a large volume of materials from the defendant's original trial court record. Thirty-four items sealed in the district court were included in the record. Pursuant to Operating

Procedure 10, the clerk notified the parties that the documents would be unsealed unless an appropriate motion was filed and granted. The government filed a motion to maintain secrecy, but did not give any reasons in support of the request. Finding the motion “egregiously deficient,” the court denied the motion without prejudice and reminded counsel that any future motion must meet the standards set forth in *Baxter International, Inc. v. Abbott Laboratories*, 297 F.3d 544 (7th Cir. 2002). The government again filed a motion, stating that the documents should “remain sealed in order to protect the privacy interests of the . . . witness involved.” Chief Judge Easterbrook noted that *Baxter* disapproves of any general “privacy” rationale for keeping documents confidential. Statutes, privileges, trade secrets, risk that disclosure would lead to retaliation against an informant are all legitimate reasons for maintaining records under seal, but not a witness’s or litigant’s preference for secrecy. Rather than file motions to keep documents under seal, the court suggested that it would be better simply to exclude documents from the appellate record altogether if they are not necessary to the issues on appeal, thus avoiding the problem altogether. Accordingly, the court gave the parties 10 days to address whether the sealed documents should simply be returned to the district court, avoiding any need for the court to decide whether, if they remain in the appellate record, they must be opened to public view.

E. WAIVER

Defendant waived his right to argue on appeal that a photo array was unduly suggestive because trial counsel failed to file a motion to suppress in the district court. *United States v. Acox*, ___ F.3d ___ (7th Cir. 2010; No. 09-1258). In prosecution for bank robbery, the Court of Appeals held that the defendant waived his right to argue on appeal that a photo array was unduly suggestive because trial counsel failed to file a motion to suppress in the district court. Federal Rule of Criminal Procedure 12(e) provides that a party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c), and included among the motions that are covered by the rule are “motions to suppress evidence.” The court noted that it often takes evidence from psychology and statistics to decide whether a photo spread or lineup is “unduly suggestive” and, if so whether the suggestiveness is “irreparable.” Requiring a motion in the district court allows the record to be made on such questions. Although Rule 52(b) allows for plain error review of some waived errors, the court concluded that it would be inappropriate to use Rule 52(b) to undercut an express provision of Rule 12(e), which contains its own safety valve: “For good cause, the court may grant relief from the waiver.” However, this “good cause” argument must be made in the district court, not the appellate court. Although the good-cause decision is committed to the district court rather than the court of appeals, such a conclusion does not preclude all possibility of relief when trial counsel never tries to show good cause. A court of appeals still may inquire whether, if a motion for relief had been made and denied, the district court would have abused its discretion in concluding that the defense lacked good cause. In the present case, the defendant did make such an argument, but the record did not show why counsel did not make a pretrial motion to suppress, making it impossible to evaluate or conclude that good cause existed. Accordingly, the Court of Appeals refused to consider the issue, and noted that a collateral attack where new evidence could be presented was the proper way to raise the issue.

Court will refuse to consider a meritorious issue where appellate counsel refuses to raise the issue, even after invited by the court to do so at oral argument when the issue did not appear in the briefs. *United States v. Foster*, 577 F.3d 813 (7th Cir. 2009; No. 08-1914). Upon consideration of the defendant’s argument that he did not qualify as an Armed Career Criminal, the Court of Appeals refused to consider the claim because the defendant’s counsel affirmatively waived his right to make the argument. The defendant was found to be an Armed Career Criminal, based

in part on his Indiana conviction for criminal recklessness, the precise crime found by the court in *United States v. Smith*, 544 F.3d 781 (7th Cir. 2008) to not be a “violent felony.” The argument was not raised in the district court or in the defendant’s brief, but *Smith* was decided after both of these events. However, at oral argument, appellate counsel explicitly declined the court’s invitation to consider the appropriateness of the defendant’s ACCA enhancement in the light of *Smith*. When advised at oral argument that the court had recently held that crimes of recklessness do not support an ACCA enhancement, counsel’s response was, “I think the case law is clear that firing a handgun in and of itself under the circumstances of a case such as this is, can be considered a crime of violence.” The court concluded that it cannot make a party’s arguments for him, or force him to make arguments he seems determined not to raise. Accordingly, because appellate counsel waived any challenge to the ACCA enhancement, the court refused to consider the issue, notwithstanding the fact that it appeared to be meritorious and benefit the defendant greatly.

IX. RESTITUTION

Cost to bank of investigating its employee’s embezzlement scheme properly included in restitution amount. *United States v. Hosking*, 567 F.3d 329 (7th Cir. 2009; No. 08-1826). In prosecution for one count of embezzlement by a bank employee, the Court of Appeals held that the district court properly included the bank’s cost to investigate the offense in the restitution amount. The defendant argued that the investigation cost was not an “actual loss” caused by the offense, but rather only “consequential damages.” However, the Court of Appeals noted that the MVRA expressly contemplates inclusion of the cost of “lost income . . . and other expenses incurred during participation in the investigation or prosecution of the offense . . .” The time and effort spent by the bank’s employees and outside professionals in unraveling the twelve-year embezzlement scheme was a direct and foreseeable result of the defendant’s conduct that contributed to the diminution of the bank’s property.

Costs of investigation in restitution award must be firmly connected to the investigation and reasonable. *United States v. Hosking*, 567 F.3d 329 (7th Cir. 2009; No. 08-1826). In prosecution for one count of embezzlement by a bank employee, the Court of Appeals held that the district court’s restitution award was not based upon “a complete accounting” of the loss. The defendant engaged in a 12-year embezzlement scheme from her employer bank, and the bank spent a large sum of money investigating the loss caused by the defendant’s conduct. At sentencing, the government provided a single document supporting the inclusion of the bank’s in-house costs in the restitution award. This document listed the name and title of each employee who worked on the investigation, the number of hours that the employee worked on the project, and the employee’s hourly wage rate. The resulting total was a simple tabulation of the amount paid to the employees for their collective hours worked. The district court cut this amount in half, stating only that the amount was “clearly legitimate.” The Court of Appeals found that the government’s document did not provide evidence that the costs reported were directly and reasonably required for the bank’s investigation. Moreover, simply cutting the reported costs in half did not suffice. Thus, the court remanded the case for additional findings in the district court, noting that the government must provide an explanation, supported by evidence, of how each employee’s time was spent in pursuing the investigation. Not only must the work be firmly connected to the investigation but there must be an adequate indication that the hours claimed were reasonable.

IRA funds may be ordered to satisfy restitution award. *United States v. Hosking*, 567 F.3d 329 (7th Cir. 2009; No. 08-1826). In prosecution for one count of embezzlement by a bank employee, the Court of Appeals held that a lump sum payment of restitution may be obtained through use of

the defendant's IRA. The defendant argued that her IRA, as a qualified trust under the tax code, "may not be assigned or alienated." The Court of Appeals noted, however, that 18 U.S.C. § 3613(a) states that "[n]otwithstanding any other Federal law, a judgment imposing a fine may be enforced against all property or rights to property of the person fined" As other circuits have found, the Seventh Circuit held that this statute superceded the anti-alienation provision governing IRAs. Section 3613 treats a restitution order under the MVRA like a tax liability. This means that any property the IRS can reach to satisfy a tax lien, a sentencing court can also reach in a restitution order. Thus, the IRS can levy a tax on a tax debtor's IRA pension plan to satisfy tax liability, so long as the defendant has a right to withdraw money or liquidate the account. The same standard applies to capturing those funds for satisfaction of a restitution award.

X. RETROACTIVE AMENDMENT

Court must provide some explanation regarding why a 3582(c)(2) motion is denied. *United States v. Marion*, 590 F.3d 475 (7th Cir. 2009; No. 09-2525). Upon appeal from the denial of a 3582 motion, the Court of Appeals held that the district court did not provide an adequate explanation as to why the motion was denied. The entirety of the court's explanation for the denial was a single sentence which stated, "As directed by 18 U.S.C. 3582(c)(2), the Court has considered the relevant factors in USSG 1B1.10(b) and 18 USC 3553(a) and determined a sentence reduction in not appropriate." Although the Court of Appeals noted that a district court need not provide a detailed, written explanation analyzing every 3553(a) factor, some statement of the district court's reasoning is necessary for the court to be able to meaningfully review its decision. Although a ruling on a motion to reduce is not the same as imposing a sentence, the court thought the reasoning behind requiring a brief statement of reasons at sentencing compels a similar requirement when deciding a motion to reduce. Here, the court did not supply any reasons for its decision. The court should at least address briefly any significant events that may have occurred since the original sentencing. If there have been none, some simple explanation to that effect will apprise both the defendant and the appellate court of that fact. Accordingly, the court remanded to the district court to provide a statement of reasons.

Waiver of right to appeal or collaterally attack conviction and sentence in plea agreement did not waive the defendant's right to file a 3582(c)(2) petition to reduce his sentence pursuant to a retroactive amendment to the Guidelines. *United States v. Monroe*, 580 F.3d 552 (7th Cir. 2009; No. 08-2945). Upon consideration of the defendant's appeal from the district court's denial of his motion to reduce his sentence under the retroactive amendment to the crack cocaine guideline, the Court of Appeals held that the defendant's plea agreement did not preclude him from filing the petition. At the time of the defendant's plea, he waived his right to "appeal his convictions and any sentence imposed within the statutory maximum on any ground" and "agreed not to contest his sentence or the manner in which it was determined in any collateral attack." The government argued that the petition was essentially a collateral attack, but the Court of Appeals disagreed. First, the agreement contained no language which referenced either the specific statute under which the petition was filed or, indeed, sentence reductions in general. The agreement was therefore ambiguous, and the court must interpret the terms of the agreement in light of the parties' reasonable expectations. The terms "appeal" and "collateral" attack are commonly used to describe legal, factual or procedural challenges to a court's decision. The motion at issue in this case is fundamentally different from the legal challenges and assertions of error typically at issue in appeals and collateral attacks. Therefore, the court concluded that the plea agreement did not waive the defendant's right to file a 3582 motion. Having so concluded, however, the court nevertheless found that the defendant was ineligible for a reduction, because he was subject to a mandatory minimum

and his guideline range was therefore not reduced by the amendment.

Remand necessary for factual finding of whether the defendant distributed more than 4.5 kilograms of crack, where defendant only admitted to distributing more than 1.5 kilograms of crack. *United States v. Hall*, 582 F.3d 816 (7th Cir. 2009; No. 08-2389). Upon consideration of a defendant's petition to reduce his sentence pursuant to the retroactive amendment to the crack cocaine guideline, the Court of Appeals remanded the case to the district court for a determination of how much crack cocaine for which the defendant was responsible. When the defendant was originally sentenced, he agreed in his plea agreement that he was responsible for distributing more than 1.5 kilograms of crack cocaine. The plea agreement indicated that the defendant was responsible for various amounts of crack cocaine and powder cocaine distribution, but the calculations were not precise. Nevertheless, based on those references in the plea agreement, the district court found the defendant was responsible for distributing more than 4.5 kilograms of crack and thus ineligible for a reduction. The Court of Appeals held, however, that the total amount of crack sold in connection with the defendant's offense, as admitted in the relevant paragraphs of the plea agreement, were unclear, and a reasonable reading of the facts could result in a finding that the defendant's conduct involved less than 4.5 kilograms of crack. Thus, the district court ignored an ambiguity in the facts and misapprehended the content of the defendant's plea admission. Accordingly, the district court must answer on remand how much more than 1.5 kilograms the defendant distributed.

Rule 36 could not be used to correct errors contained in the defendant's PSR prepared at the time of his original sentencing. *United States v. Johnson*, 571 F.3d 716 (7th Cir. 2009; No. 08-3393). Upon consideration of denial of a petition to reduce sentence pursuant to retroactive amendment to crack cocaine guideline, the Court of Appeals held that Rule 36 could not be used to correct errors contained in the defendant's PSR prepared at the time of his original sentencing. The defendant was originally held responsible for 4,536 grams of crack cocaine. However, the PSR used a higher drug estimate in reaching this amount than the probation officer stated she would use, an error the probation officer later acknowledged. Using the more conservative estimate, the defendant would have been responsible for less than 4.5 kg of crack, making him eligible for a retroactive reduction. The defendant argued that the mistake in the original PSR could be corrected under Federal Rule of Criminal Procedure 36, which allows the correction of a "clerical error" in a judgment or order at any time. The Court of Appeals held, however, that Rule 36 could not be used to alter the judgment in this case. The rule is limited to errors that are clerical in nature, typically where the written sentence differs from the oral pronouncement of the sentence, not judicial mistakes. Although a district judge may correct a final judgment in a criminal case to reflect the sentence he actually imposed, he cannot change the sentence he did impose even if the sentence was erroneous. The court concluded that Rule 36 simply did not apply; nothing in the record indicated that a relevant conduct finding involving 4,536 grams of crack cocaine was added to the overall sentencing calculation without the district court's knowledge or approval. Thus, the district court had no jurisdiction to change the finding, and the defendant was therefore ineligible for a sentence reduction under the retroactive amendment.

Defendant sentenced as a Career Offender not entitled to sentence reduction under retroactive crack cocaine amendment, even though the defendant would not qualify as a Career Offender under law as it currently exists. *United States v. Jackson*, 573 F.3d 398 (7th Cir. 2009; No. 08-3188). Upon consideration of the defendant's appeal of the denial of his motion to reduce his sentence based upon the retroactive amendment to the crack cocaine guideline, the Court of Appeals held that he was not entitled to a reduction because he was a Career Offender at the time he was

originally sentenced. After the defendant was originally sentenced, he successfully obtained an order setting aside a prior state court conviction which formed the basis of his Career Offender enhancement. Thereafter, the defendant filed for a reduced sentence under the retroactive amendment, arguing that he was entitled to a reduction since he was no longer a Career Offender. The Court of Appeals rejected this argument, however. Notwithstanding the change in circumstances since his original sentencing, the fact remained that at the time he was sentenced, he was a Career Offender. Thus, the guideline range that applied to him when he was originally sentenced was not lowered by the Sentencing Commission, which is a prerequisite for a district court to have authority to modify a sentence. The defendant's situation simply falls outside the limited exception providing a district court with jurisdiction to modify a sentence.

XI. SEARCH & SEIZURE

A. FRANKS HEARINGS

District court properly refused to allow defense counsel to ask questions at a *Franks* hearing which tended to reveal the identity of a confidential informant. *United States v. Wilburn*, 581 F.3d 618 (7th Cir. 2009; No. 08-1541). Upon consideration of the district court's refusal to allow defense counsel to ask questions about the identity of a confidential informant at a *Franks* hearing, the Court of Appeals held that the district court did not abuse its discretion. The affidavit in support of a search warrant asserted that a confidential informant had purchased drugs inside a residence. During a *Franks* hearing, defense counsel attempted to inquire about: (1) the exact date of the controlled buy; (2) whether the detective who provided the affidavit had previously worked with the CI; and (3) the exact amount of buy money used during the controlled buy. The district court sustained objections to these questions, finding that the questions might reveal the identity of the CI. The Court of Appeals noted that the government possesses a limited privilege to withhold the identity of a confidential informant from a criminal defendant. This privilege "evaporates" if a 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. In doing so, the court examines 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 nature of the CI's role is an important factor to consider when determining whether the informant's identity should be disclosed. When the CI is a mere "tipster"—someone whose only role was to provide 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 witnessed the event in question. In the present case, the CI was only a "tipster." Additionally, the defendant never articulated a reason why his questions would discredit the warrant affidavit. Finally, at least two areas of the defendant's questioning would have tended to reveal the CI's identity, because if the defendant learned the date of the controlled buy or the amount of money involved in the transaction, he could have at least narrowed down the people likely to be the CI. Although the court could not see how the question concerning the detective's prior relationship with the CI would reveal the CI's identity, the court also could not see how the information would have caused the magistrate to refuse to issue the warrant. Accordingly, the court found that there was no abuse of discretion.

B. GENERALLY

Detective's search of a seized computer with specialized software did not exceed the scope of the search authorized by a warrant. *United States v. Mann*, 592 F.3d 779 (7th Cir. 2010; No. 08-3041). In prosecution for possession of child pornography, the Court of Appeals held that a detective's search of a seized computer with specialized software did not exceed the scope of the search authorized by a warrant. After receiving a report that the defendant had installed a clandestine video camera in a women's locker room, police obtained a search warrant at the defendant's residence authorizing them to search for "video tapes, CD's, or other digital media, computers, and the contents of said computers, tapes, or other electronic media, to search for images of women in locker rooms or other private areas." Officers seized the defendant's desktop computer, a laptop, and an external hard drive. Two months after seizure, a detective used software known as "forensic tool kit" ("FTK") to catalogue images on the defendant's computer into a viewable format. The software would also flag files with an alert for images already known by law enforcement as containing child pornography. Upon running the application, the officer found images from the locker room, child pornography, and evidence that the external hard drive had been connected to the computer. Another two months later, the detective ran the same software search on the external hard drive. That search produced numerous flagged files, as well as 4 alerts for known child pornography images. The detective opened the files and discovered numerous child pornography images. The defendant argued that the search of these images violated the scope of the original warrant. The Court of Appeals noted that although the officer was limited by the warrant to a search likely to yield "images of women in locker rooms and other private places," those images could be essentially anywhere on the computer. Officers were searching for "images" of women—a type of file that he could not search thoroughly for without stumbling on the defendant's extensive child pornography collection. The court did conclude, however, that the officer should have obtained a separate warrant to view the four "flagged" files. Once those files had been flagged, the officer should have known that the files contained child pornography, which would have been outside the scope of the warrant to search for images of women in locker rooms. There was no rapidly unfolding situation or searching a location where evidence was likely to move or change location, and there was no downside to halting the search to obtain a second warrant. Nevertheless, given the large amount of child pornography discovered which was within the scope of the search, the improperly viewed images had no effect on the defendant's guilt.

An agent's post-indictment conversation with the defendant to determine whether the defendant was an individual captured on audiotape did not violate the Sixth Amendment right to counsel. *United States v. Gallo-Moreno*, 584 F.3d 751 (7th Cir. 2009; No. 06-1696). In prosecution for a large scale drug conspiracy, the Court of Appeals held that an agent's post-indictment conversation with the defendant to determine whether the defendant was an individual captured on audiotape did not violate the Sixth Amendment right to counsel. The only issue at the defendant's bench trial was whether he was in fact the person charged in the indictment. An individual referred to as "Carrion's" voice was captured on tape in several recorded telephone calls during the DEA's investigation, and an agent named Tovar who participated in some of these calls in an undercover capacity. After the defendant was arrested on suspicion of being Carrion, Tovar listened to the recordings in anticipation of attempting a voice identification. The next day he transported the defendant from jail to the DEA to obtain voice exemplars from him. While waiting for the exemplar procedure to begin, he engaged the defendant in casual conversation and recognized the defendant's voice as Carrion's. This identification occurred postindictment when the defendant's lawyer was not present. According to Supreme Court precedent, such an identification on is inadmissible if it was made during a "critical stage" of the criminal proceedings requiring the presence of counsel. To determine whether the identification occurred at a critical stage, a court must first ask whether the identification occurred when the defendant himself was present in a trial-

like confrontation; and, second, the court asks whether any errors or overreaching that may have infected the identification can be “cured through the presence of counsel at trial. Here, the court declined to decide whether the confrontation was sufficiently trial-like to trigger the right to have counsel present. Rather, it concluded that under the circumstances, the defendant had sufficient opportunity to expose any errors in Tovar’s identification through counsel at trial. Carrion’s participation in the conspiracy was captured on audiotape, and Tovar’s identification was based solely on his study of Carrion’s voice on the tapes. His identification was only as strong as the tapes, which were admitted into evidence, and any flaws in the identification could be adequately exposed through cross-examination by counsel at trial.

Police do not need search warrant for a third party’s residence to enter and arrest an individual pursuant to an arrest warrant where they have “reason to believe” the defendant is located within the dwelling. *United States v. Jackson*, 576 F.3d 465 (7th Cir. 2009; No. 08-2295). In prosecution for felon in possession of a weapon, the Court of Appeals affirmed the denial of the defendant’s motion to suppress, where he argued that a gun found on his person should have been suppressed because he was arrested pursuant to a warrant in a third party’s residence and police did not have a search warrant for that location. The police had an arrest warrant for the defendant and received a tip that he was located in a third party’s residence. Police, without a warrant, entered the residence, arrested the defendant, and found a gun on his person. The defendant argued that authorities could not enter the residence without a search warrant, in addition to the arrest warrant. The Court of Appeals disagreed. For Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within. If officers enter a third party’s residence in order to effect an arrest, the third party herself may have a Fourth Amendment claim against officers. That person may have a civil claim for damages against the officers. If the officers uncover evidence that the resident committed a crime, then the evidence may be suppressed. However, the person whom the arrest warrant is directed does not have a Fourth Amendment claim. Indeed, it would be anomalous if the subject of an arrest warrant had a greater expectation of privacy in another person’s home than he had in his own. So long as officers have “reason to believe” the person against whom the arrest warrant is directed will be located within a particular dwelling, no search warrant is needed to effectuate the warrant. Although there is a circuit split on what constitutes “reason to believe” (probable cause or something less), the court declined to decide the issue in the Seventh Circuit given that officers had probable cause in the instant case.

C. PROBABLE CAUSE

Police has probable cause to search the defendant’s vehicle, notwithstanding *Arizona v. Gant*. *United States v. Stotler*, 591 F.3d 935 (7th Cir. 2010; No. 08-4258). In prosecution for attempted possession of pseudoephedrine with intent to manufacture meth, the Court of Appeals affirmed the denial of the defendant’s motion to suppress evidence. Police had suspected the defendant of meth manufacturing for a very long time, and a warrant was issued for the defendant’s arrest in August of 2006. Officers executed the warrant a year later while the defendant was driving his truck, after setting up a controlled buy. The controlled buy did not occur as officers planned, but they arrested the defendant anyway on the outstanding warrant. The defendant was removed from his truck, handcuffed, and placed in the patrol car. His truck was then searched, including the glove box, where drugs were found. After the defendant went to trial, the Supreme Court decided *Arizona v. Gant*, and the defendant argued that *Gant* required suppression of the seized evidence. The Court of Appeals disagreed. *Gant* held that police may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the

search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. The Court of Appeals distinguished *Gant*, however, noting that in *Gant* there was no independent probable cause to search the car, the officer's instead relying on an overly broad interpretation of the vehicle-search-incident-to-arrest rule. Here, the police had probable cause to believe the truck contained drugs based on the information they already had before stopping the defendant. Thus, there was no need to appeal to the search incident to arrest rule, and *Gant* was inapplicable.

Affidavit found insufficient to support probable cause to search defendant's apartment. *United States v. Bell*, 585 F.3d 1045 (7th Cir. 2009; No. 07-3806). In prosecution for drug offenses, the Court of Appeals held that an agent's affidavit lacked probable cause to support issuance of a warrant. The affidavit recounted information the agent learned from an informant. This person said he had just left the defendant's residence, saw an undisclosed amount of crack and cash on the table, described the location of the apartment, and had seen crack and a handgun at the residence previously. Based on this affidavit, the trial judge issued a "no knock" warrant. The Court of appeals noted that the affidavit failed to provide any information about the informant's reliability. There was no information on whether the CI provided information in the past or the informant's relationship to the defendant, and he did not appear before the issuing judge. Thus, there was little information to believe the CI was reliable. The affidavit also lacked detail, not indicating the amount of drugs, the amount of cash, or how the CI could identify the substance as crack (other than a conclusory statement that the CI knew what crack looked like). Finally, the officer conducted insufficient corroborative efforts, noting only in the affidavit that several unidentified arrestees and "confidential sources" also implicated the defendant as a drug dealer. There was no additional details about these additional sources whatsoever, and it would be bootstrapping to argue that such unreliable reports sufficiently corroborate the statements of the primary CI, especially when his credibility is also in question. Although the warrant was not supported by probable cause, the court refused to reverse, finding that the good faith exception applied.

Statement in affidavit by agent with 10 years of experience investigating gangs and narcotics offenses indicating that high ranking gang members keep contraband in their homes sufficient to support warrant for search of home. *United States v. Orozco*, 576 F.3d 745 (7th Cir. 2009; No. 06-4235). In prosecution for drug offenses, the Court of Appeals concluded that a search warrant issued for the home of the defendant was supported by probable cause. The affidavit of the agent in support of the warrant stated that reliable gang sources indicated that the defendant was second in command of a gang, the gang dealt large quantities of drugs, and in the agents 10 years of experience in narcotics investigations, high-ranking gang members often kept detailed records of drug transactions and gang membership lists in their homes. The government conceded that the only support for a link between the defendant's home and the sought-after evidence of drug dealing and gang activity was the agent's believe that such items are generally kept in the home of high-ranking gang members. The Court of Appeals concluded that this link was sufficient to provide probable cause for a warrant to search the defendant's home. The issuing judge was entitled to credit the agent's lengthy experience and high degree of confidence that the sought-after evidence was very likely to be found in the defendant's home.

D. REASONABLE SUSPICION

Officers had reasonable suspicion to stop an SUV exiting an apartment complex where a fight and "shots fired" was reported, because it was the only car on the road exiting the area at the same time as the reported incident, even though the SUV was not mentioned in the report. *United States v. Brewer*, 561 F.3d 676 (7th Cir. 2009; No. 08-3257). In prosecution for possession

of a weapon by a felon, the Court of Appeals held that the stop of the defendant's SUV which resulted in the discovery of a gun was reasonable. At 2:30 a.m., an officer was parked outside a complex known for criminal activity, when he received a dispatch about a fight. He then heard what he thought were gunshots, which the dispatcher then confirmed by reporting "shots fired." The officer headed into the complex on the only road in or out and passed a white SUV leaving the area, the only other car on the road. He radioed to other officers to watch for the SUV. Those officers stopped the SUV and discovered the weapons. Meanwhile, the other officer proceeded into the complex and learned that shots had indeed been fired from the SUV, but after it was already stopped. The Court of Appeals noted that since the stop was made before the officer who made the stop learned that someone in the complex had said that shots were fired from the SUV, that report could not be used to justify the stop. Without that report, the case, according to the court, was on the line between reasonable suspicion and pure hunch, but the court concluded that the unusual circumstances presented in the case met the test for reasonable suspicion. Specifically, the officer who received the initial dispatch had three years' experience with criminal activity in the particular complex, was parked in a position in which he had an unobstructed view of the only exit from the complex, heard gunfire, received confirmation of a report of shots fired, and saw a vehicle emerge seconds later from the complex. That vehicle was the only vehicle on the road at that late hour in a high crime area, and it was pulled over and stopped for only moments before the officers making the stop learned that the SUV had been seen at the site of the shooting. Under these circumstances, the court concluded that the stop was reasonable.

E. MIRANDA WARNINGS

Where there is a break in questioning a defendant, there is a rebuttable presumption that *Miranda* warnings given before the break remain effective throughout subsequent questioning sessions. *United States v. Edwards*, 581 F.3d 604 (7th Cir. 2009; No. 08-1124). In prosecution for distributing five or more grams of crack, the Court of Appeals held that police officers were not required to re-administer *Miranda* warnings to the defendant after a break in their questioning. Officers administered the *Miranda* warnings, and the defendant agreed to speak with them. He did not, however, incriminate himself. Officers then took a 20 minute break, and new officers began the questioning. These officers showed him the waiver he originally signed, which listed his *Miranda* rights. He again spoke with officers, but incriminated himself during this second round of questioning. The defendant argued that the break in questioning caused the *Miranda* warnings to become "stale." The Court of Appeals, however, stated that the practical question was not whether the warnings became "stale," but whether the defendant when he gave the statement didn't realize he had a right to remain silent. Here, the *Miranda* form told him he had that right, and the presumption should be that he would remember this even if some time had elapsed between his receiving the warnings and undergoing the questioning that elicited the inculpatory statement. Although cases do not speak in terms of a presumption, that is the practical effect of their reluctance to attach dispositive weight to a break in questioning, even when the break is protracted and other circumstances might have made it less likely that the defendant would remember that he could stop the questioning at any time. While the presumption can be rebutted, it was not in this case, because the break was only 20 minutes long and there was nothing in the record to rebut the presumption that the defendant remembered that he had the right to remain silent.

The question "Am I going to be able to get an attorney?" was not a clear and unambiguous invocation of counsel. *United States v. Shabaz*, 579 F.3d 815 (7th Cir. 2009; No. 08-3751). In prosecution for bank robbery, the Court of Appeals held that the question "Am I going to be able to get an attorney" was not a clear and unambiguous invocation of counsel. The defendant was taken

to the police statement, and he made the quoted statement. Police did not answer him, but instead read him his *Miranda* rights. He then spoke with investigators and confessed. The defendant argued that interrogation should have stopped after he made this statement, as he invoked his right to counsel. The court disagreed. If a suspect makes reference to an attorney that is ambiguous in that a reasonable officer in light of the circumstances would have understood that the suspect *might* be invoking the right to counsel, it is not necessary for the authorities to cut off questioning. Law enforcement officials are not under any obligation to clarify ambiguous statements made by an accused. The burden is instead on the suspect to make a “clear and unambiguous assertion of his right to counsel to stop questioning.” Here, the statement was not a clear request for counsel under the circumstances. A common point among statements that have been deemed insufficient is that they do not clearly imply a present desire to consult with counsel. Here the words “am I going to be able to get an attorney?” did not unambiguously indicate that the defendant was right then asking for counsel. Moreover, the circumstances demonstrate that it was not a clear invocation, as the defendant could have easily requested counsel after receiving his *Miranda* warnings, but he did not. He never followed upon on his initial question. Therefore, the district court properly denied the motion to suppress.

There is no clear test for evaluating a two-step interrogation process where *Miranda* warnings are not given during the first interrogation, given the divided opinion of the Supreme Court in *Missouri v. Seibert*. *United States v. Heron*, 564 F.3d 879 (7th Cir. 2009; No. 07-3726). In prosecution for drug offenses, the Court of Appeals interpreted the Supreme Court’s divided opinion in *Missouri v. Seibert*, 542 U.S. 600 (2004). *Seibert* addressed the situation where a defendant is not given his *Miranda* warnings, makes a statement, then later given the warnings, and gives a second statement confirming his first statement—the scenario presented by the present case. In the district court, the district court suppressed the defendant’s initial statement made without the benefit of *Miranda* warnings, but allowed the second statement into evidence, applying the test set forth in Justice Kennedy’s concurring opinion in *Seibert*. This test requires that the court suppress statements that are a product of a two-step interrogation technique that is used in a calculated way to undermine the *Miranda* warning. The district court found no intent on the part of the interrogators to engage in a two-step effort to evade the dictates of *Miranda*. It therefore analyzed the interrogations under *Oregon v. Elstad*, 470 U.S. 298 (1985), and found that the statements were given voluntarily after *Miranda* warnings had been administered. As an initial matter, the Court of Appeals noted that no single opinion spoke for the Court in *Seibert*. Thus, *Marks v. United States*, 430 U.S. 188 (1977), sets forth the general rule for dealing with such an outcome: “When a fragmented Court decided a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” When, however, a concurrence that provides the fifth vote necessary to reach a majority does not provide a “common denominator” for the judgment, the *Marks* rule does not help to resolve the ultimate question. In the present case, the court concluded that the *Marks* rule did not apply to the *Seibert* case. Although Justice Kennedy provided the crucial fifth vote for the majority, the court found it a strain to view his concurrence taken as a whole as the narrowest ground on which a majority of the Court could agree. Specifically, Justice Kennedy’s intent-based test was rejected by both the plurality and the dissent. At best, only one other Justice (Justice Breyer) agreed with the approach, falling far short of any “common denominator.” It was therefore risky in this situation to assume any particular rule of law, where the plurality and the dissent garnered only four votes each. The only thing the court knew for sure was that at least seven members of the Court rejected an intent-based approach and accepted some kind of exception to *Elstad*, even if the scope of that exception remains unclear. Looking to its own precedents, the Seventh Circuit noted that it had not yet settled on a definitive approach toward the

problem addressed in *Seibert*, and it refused to do so in the present case because, regardless of what test was used, the defendant's statement was not suppressible. Under Justice Kennedy's intent-based test, there was no evidence that the investigators were attempting to by-pass the requirements of *Miranda*. Under the plurality approach, the central inquiry is whether, given the totality of the circumstances, the midstream *Miranda* warnings were effective. Several factors must be weighed, including: "1) the completeness and detail of the questions and answers in the first round of interrogation; 2) the overlapping content of the two statements; 3) the timing and setting of the first and the second; 4) the continuity of police personnel, and 5) the degree to which the interrogator's questions treated the second round as continuous with the first." The balance of these factors in this case favored admissibility.

F. RE-OPENING SUPPRESSION HEARING

The decision to re-open a suppression hearing is within the sound discretion of the district court, even if the hearing is re-opened based on newly acquired evidence by the government which was available prior to the first hearing. *United States v. Ozuna*, 561 F.3d 728 (7th Cir. 2009; No. 07-2480). Upon consideration of the district court's denial of the defendant's motion to suppress evidence, the Court of Appeals held that a district court's decision to re-open the suppression hearing based upon newly acquired evidence by the prosecution was not an abuse of discretion. Officers stopped the defendant's semi-truck. The police officer testified that the defendant signed a written consent-to-search form, but the defendant claimed that he did not. The district court concluded that the government had failed to prove by a preponderance of the evidence that the defendant consented to the search, noting that it was not convinced the defendant actually signed the form. After the hearing, the government hired a handwriting expert to examine the signature on the form, and after the expert opined that the signature belonged to the defendant, moved to re-open the hearing. The court granted the motion, allowed the defendant to retain his own expert, and then conducted a hearing. The government expert was certain the signature belonged to the defendant, and the defense expert said it was possibly the defendant's. Based on this testimony, the district court reversed itself and found that the defendant in fact consented to the search. On appeal, the defendant argued that the district court should be precluded from re-opening a suppression hearing where the evidence was available at the time of the previous hearing, *i.e.*, the government could have had the signature analyzed prior to the first hearing. The Court of Appeals rejected this argument, noting that society has an interest in admitting all relevant evidence. There is no requirement that a court have a specific justification to reopen a suppression hearing, but rather that decision is within the sound discretion of the district court. On the question of whether the district court abused its discretion in reopening the hearing, the court concluded that it did not. Reopening a suppression hearing may be appropriate when the proffered evidence calls the credibility of a witness into question. Here, the testimony of the two witnesses varied dramatically, and the handwriting analysis was helpful in evaluating the credibility of the witnesses. Moreover, there was no evidence that the government was engaged in a deliberate strategy to proceed in a piecemeal fashion, as it was not evident that the signature on the consent form would be central to the case until the hearing occurred.

XII. SELF-REPRESENTATION/RIGHT TO COUNSEL

Counsel may constitutionally represent co-defendants so long as there is neither an actual conflict of interest nor a serious potential for a conflict to arise. *United States v. Turner*, ___ F.3d ___ (7th Cir. 2010; No. 08-2350). Upon consideration of the district court's disqualification of retained counsel because he represented a co-defendant, the Court of Appeals held that the

disqualification denied the defendant his Sixth Amendment right to the counsel of his choice. The government argued that the joint representation presented an insurmountable conflict of interest because one defendant might decide to cooperate against the other. But the defendant argued that there was no actual conflict because neither client wanted to assist the government and prosecutors had not shown the slightest interest in securing either defendant's testimony against the other. Moreover, both defendants waived any conflict of interest. The district court however focused on the *possibility* of cooperation against each other and held that this possibility was sufficient to create an "absolute" conflict of interest. The Court of Appeals disagreed, noting that a defendant has the right to counsel of his choice if he does not require appointed counsel. There is a presumption in favor of this choice, although it may be overridden if there is an actual conflict of interest or a "serious potential for conflict." Here, the district court relied on a mere possibility of a conflict, yet such a possibility is present in nearly every case of joint representation. Only a *serious* potential conflict will justify overriding the defendant's choice of counsel. This requires an inquiry into the likelihood that the potential conflict will mature into an actual conflict and the degree to which it threatens the right to effective assistance of counsel. Accordingly, before disqualifying counsel based on a *potential* conflict, the district court should evaluate (1) the likelihood that the conflict will actually occur; (2) the severity of the threat to counsel's effectiveness; and (3) whether there are alternative measures available other than disqualification that would protect the defendant's right to effective counsel while respecting his choice of counsel. The government bears the burden of nonpersuasion, and in the present case, the facts made clear that the likelihood of a conflict actually occurring, the most important factor, was very remote. Thus, the case was remanded for a new trial.

District court properly disqualified counsel due to conflict of interest where testimony of government witness represented by defense counsel was not entirely cumulative and necessary for the government to prove its case. *United States v. Gearhart*, 576 F.3d 459 (7th Cir. 2009; No. 08-1558). The Court of Appeals held that the defendant was not denied his Sixth Amendment right to counsel after his trial counsel was disqualified due to a conflict of interest. Shortly before trial, the government disclosed that a new witness against the defendant was also represented by the defendant's counsel in a different criminal case. The government sought to disqualify counsel due to a conflict of interest, and defense counsel filed a motion to withdraw, stating that the government's addition of the witness gave him no choice but to withdraw. The court noted that disqualification of defense counsel should be a measure of last resort, and the government bears a heavy burden of establishing that disqualification is justified. Disqualification of a defendant's counsel of choice can pose a Sixth Amendment problem, and the court uses a balancing test when the government seeks to introduce evidence that would create a conflict of interest for the defendant's attorney. The introduction of such evidence is subject to the analysis under Rule 403. In the present case, the defendant argued that the testimony of the government's proposed witness was merely cumulative and not essential to the government's case. The court disagreed, however, noting that although some of the witness's testimony was similar to that of other witnesses, it also presented some new information not included in other evidence. Thus, the government's interest in proving its case beyond a reasonable doubt outweighed the defendant's interest in continuity of counsel. Moreover, defense counsel never asked the court for an alternative to disqualification, such as limiting the testimony of the witness. Thus, the district court could not have abused its discretion.

A defendant competent to stand trial is competent to represent himself at trial as well. *United States v. Berry*, 565 F.3d 385 (7th Cir. 2009; No. 07-3243). The Court of Appeals rejected that defendant's claim that the district court erred in allowing him to represent himself at trial, even though he was found competent to stand trial. The defendant insisted that he be allowed to represent

himself, although he exhibited signs of delusion. The district court had him evaluating for competency, and after he was found fit to stand trial, the court allowed him to represent himself at trial, although it repeatedly warned the defendant against doing so. On appeal, the defendant argued that competency to stand trial does not equal competency to represent oneself *at* trial. The court first noted that a defendant has a fundamental right to represent himself. Under the Supreme Court’s decision in *Godinez v. Moran*, 509 U.S. 389 (1993), the Supreme Court specifically held that as far as the Constitution was concerned, defendants competent to stand trial were competent to represent themselves. However, the Supreme Court’s more recent decision in *Indiana v. Edwards*, ___ U.S. ___, 128 S.Ct. 2379 (2008), requires a deeper analysis. In *Edwards*, the Court held that the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves. But in both *Godinez* and *Edwards*, the Court talked about what the Constitution permits—limitation of the self-representation right in connection with pleading guilty and presenting a trial defense, respectively—not what it mandates. Moreover, even if the court were to read *Edwards* to *require* counsel in certain cases—a dubious reading according to the court—the rule would only apply when the defendant was suffering from a “severe mental illness.” Nothing in the opinion suggests that a court can deny a request for self-representation in the absence of this. Because there was no evidence before the trial court showing that the defendant suffered from a “severe mental illness,” *Edwards* is therefore inapplicable. Therefore, given that the defendant was competent to stand trial and the defendant asserted his right to self-representation, the district court did not err in allowing him to proceed *pro se*.

XIII. SENTENCING

A. ALLOCUTION

Defendant not denied right to allocution where court stated it would impose within-range sentence before giving defendant opportunity to address the court. *United States v. Hoke*, 569 F.3d 718 (7th Cir. 2009; No. 08-3882). In prosecution for child pornography offenses, the Court of Appeals held that the defendant was not denied his right to allocution, even though the district court stated that it would impose a within-range sentence before allowing the defendant to speak. The defendant argued that the district court foreclosed any possibility of a below-guideline sentence, prior to his opportunity to address the court, when it stated that his sentence would be “within the advisory guideline range.” The Court of Appeals noted that looking at the entire context of the sentencing hearing, the district court was merely communicating that it would use the Guidelines as its baseline, the court also noting that the guidelines were advisory. Moreover, after it made this statement the defendant had an opportunity to present witness and invited him to address the court. Accordingly, looking at the totality of the circumstances, the defendant was not denied his right to allocution.

B. CRIME OF VIOLENCE/VIOLENT FELONY

Wisconsin offense of criminal trespass to a dwelling is a crime of violence. *United States v. Corner*, 588 F.3d 1130 (7th Cir. 2009; No. 08-1033). The Court of Appeals held that the Wisconsin offense of criminal trespass to a dwelling is a crime of violence. That statute provides: “Whoever intentionally enters the dwelling of another without the consent of some person lawfully upon the premises, under circumstances tending to create or provoke a breach of the peace, is guilty of a Class A Misdemeanor.” Looking to the residual clause, the court concluded that entering a residence without permission, as in the case of burglary, could lead to an encounter with an occupant, and thereby could create a serious potential risk of injury. The same is true for an offender engaging in

criminal trespass to a dwelling. Regarding whether the offense is similar in kind and degree to the enumerated offenses, the court concluded that the offense is similar to burglary. Both are purposeful property offenses that involve the deliberate entry into a dwelling without the permission of the owner. Both offenses are also violent and aggressive in nature because the perpetrator could encounter occupants of the dwelling and provoke confrontation. The fact that the latter offense does not include an intent to steal or to commit a felony does not lessen the risk of such an encounter. Consequently, the court held that criminal trespass to a dwelling is a crime of violence.

Prior conviction of a minor counts for career offender purposes so long as the juvenile was convicted as an adult. *United States v. Gregory*, 591 F.3d 964 (7th Cir. 2010; No. 09-2735). The defendant had a prior conviction for robbery, committed when he was 15 years old. He was tried as an adult, however, although he served his sentence in a juvenile facility. The defendant argued that because he served his sentence as a juvenile, the offense should not count for career offender purposes. The court noted Note 7 to 4A1.2 provides, “[F]or offenses committed prior to age eighteen, only those that resulted in adult sentences of imprisonment . . . or the imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant’s commencement of the instant offense are counted.” The defendant argued that because he commenced his instant offense six years after his release on the prior conviction, and served his sentence as a juvenile, the conviction didn’t count. The court pointed out that a circuit split existed on the question of whether, in addition to distinguishing between adult and juvenile convictions, the Guidelines also call for distinguishing between adult and juvenile sentences, depending on whether the sentence was imposed pursuant to the adult or juvenile code. The Seventh Circuit sided with those courts that look to whether the juvenile was convicted as an adult, not how he was sentenced. It found it difficult to believe that the Commission would have made such an important point about juveniles convicted as adults using such subtle linguistic signals. In the present case, there was no question the defendant was convicted as an adult, and that was what mattered for purposes of the career offender enhancement.

Indiana conviction for criminal recklessness was a crime of violence, where the defendant was convicted of the “intentional” portion of this divisible statute. *United States v. Clinton*, 591 F.3d 968 (7th Cir. 2010; No. 09-2464). The offense in question outlaws bodily harm-risking acts performed “recklessly, knowingly, or intentionally. Only if the defendant was convicted for the “intentional” part of this “divisible” statute did he commit a crime of violence. Looking to additional court materials to determine which version the defendant committed, the court looked to the defendant’s plea colloquy where he admitted to stabbing his victim “too many times.” Based on this statement, the court concluded that the defendant was convicted for intending both (1) the *act* of stabbing his victim multiple times; and (2) the *act’s consequences*. The court could not conceive of a situation where someone stabs an unarmed, already stabbed, bleeding man and not intend or know that bodily injury will result. Accordingly, the defendant’s sentence was properly enhanced.

Wisconsin offense of vehicular fleeing is a violent felony. *United States v. Dismuke*, 593 F.3d 582 (7th Cir. 2010; No. 08-1693). The Court of Appeals held that the Wisconsin offense of vehicular fleeing is a violent felony. The Court of Appeals first held that the statute in question was “divisible,” in that it can be committed in one of two ways: 1) fleeing or attempting to elude an officer by willful or wanton disregard of the officer’s signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians, and 2) increasing the speed of the operator’s vehicle or extinguishing the lights of the vehicle in an attempt to elude or flee. Because the statute was divisible, the court looked to the charging documents to determine which of the two versions the defendant committed, and it concluded he committed the

second version of the offense. Next, under the residual clause, the court noted that for the offense to be a crime of violence it must (1) present a serious risk of potential risk of physical injury similar in degree to the enumerated crimes of burglary, arson, extortion, or crimes involving the use of explosives; and (2) involve the same or similar kind of “purposeful, violent, and aggressive” conduct as the enumerated crimes. In the present case, the defendant conceded that the offense satisfied the first criteria, so the court only considered the second question. Regarding the “purposeful” question, the court noted that the offense had a *mens rea* of “knowingly.” Although the offense did not require purposefulness as to the infliction of physical harm upon another, this was not necessary. Only the act which creates that risk must be purposeful, and the statute required a “knowing” act of fleeing, sufficient to satisfy this prong. Regarding whether the offense was similarly “violent and aggressive,” the court asked whether the conduct encompassed by the statutory elements of the crime, in the ordinary or typical case, presents a serious potential risk of physical injury and bears sufficient similarity—both in kind and degree of risk posed—to the conduct encompassed by the enumerated offenses. The court concluded that the offense had a similar potential for violence to the enumerated offenses, noting that taking flight in a vehicle calls the officer to give chase, and aside from any accompanying risk to pedestrians and other motorists, such flight dares the officer to needlessly endanger himself in the pursuit. Accordingly, the court concluded that the offense was a violent felony.

Wisconsin offense of second-degree sexual assault of a child is not a crime of violence. *United States v. McDonald*, 592 F.3d 808 (7th Cir. 2010; No. 08-2703). Upon appeal of a finding that the defendant was a career offender, the Court of Appeals held that a Wisconsin conviction for second-degree assault of a child is not a crime of violence. The statute provides: “Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony. Relying upon the pre-*Begay* case of *United States v. Shannon*, 110 F.3d 382 (7th Cir. 1997), the district court held that the offense was a crime of violence. The Court of Appeals noted that in *Shannon*, the court rejected the argument that *any* sexual contact with a minor presented a serious risk of injury for purposes of the residual clause, and the crime did not categorically present a serious risk of injury. However, the court also held that the defendant’s particular violation of the statute qualified as a crime of violence because judicial records established that he had engaged in consensual sexual intercourse with a 13-year old girl, which always presented serious risks of injury such as pregnancy and medical complications accompanying pregnancy of a young girl. The court left open the question of whether a violation of the statute involving a 14- or 15-year old victim could be a crime of violence. In the present case, the government argued that the defendant’s intercourse with a 15-year old girl presented the same risks as that with a 13-year old. The Court of Appeals, however, refused to consider the age of the victim in the present case because, according to *Woods*, the statute in question is not divisible. The statute does not enumerate multiple categories of offense based upon age of the victim. In this regard, *Shannon’s* approach to the modified categorical approach is no longer valid in light of *Begay* and *Woods*. Finally, and most importantly, the Wisconsin offense is a strict liability offense. There is no *mens rea* with respect to the age of the victim. *Begay* requires “purposeful” conduct, and such is not present in a strict liability offense.

Wisconsin offense of first-degree reckless injury is not a crime of violence. *United States v. McDonald*, 592 F.3d 808 (7th Cir. 2010; No. 08-2703). In prosecution for possession of a firearm by a felon, the Court of Appeals held that the Wisconsin offense of first-degree reckless injury was not a crime of violence because the *mens rea* of recklessness was not “purposeful” as required by *Begay*.

California offense of lewd or lascivious acts involving a person under the age of 14 not a

violent felony. *United States v. Goodpasture*, ___ F.3d ___ (7th Cir. 2010; No. 08-3328). In prosecution for being a felon in possession, the Court of Appeals held that the defendant was not an Armed Career Criminal because his California conviction for lewd or lascivious acts involving a person under the age of 14 (Cal. Penal Code 288(a)) was not a “violent felony.” Section 288(a) provides, “Any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony.” The Court of appeals noted that the prosecution need not show that the child was harmed (physically or mentally) or at risk of harm. Nor need the prosecution show that force or fraud was used or that one participant was older than the other. A person aged 13 or under may be convicted under the statute and, indeed, the petting in which many middle school students engage is a felony in California. The court first concluded that the offense did not have the use of force as an element. Tickling, kissing and fondling involve touching but are not ordinarily understood to involve “force.” Although a child cannot give consent in California, the absence of consent does not turn a light touch into “physical force.” Moreover, the kind of force referred to in the ACCA is the kind capable of causing bodily injury, not the kind that poses a psychological risk (the subject of 288(a)). Regarding whether it involved a “serious risk of physical injury,” the court noted that *Begay* defines this term in the context of the enumerated offenses. Noting that the Supreme Court held that drunk driving (even when it results in death) and failure to report to prison are not violent or aggressive, it is even harder to classify kissing and fondling as aggressive. Secondly, because only adult convictions count as predicate offenses, the court considered whether the fact that the defendant had to be an adult when convicted of his offense made a difference. A 16-year old can be convicted of the offense (as the statute was written at the time of the offense) so the defendant was at least two years older than the victim. Such an age gap did not convert the offense into a violent felony, however, because the court had held that a two year age difference for a different statute did not convert the offense into a violent felony previously. Finally, the court refused to look at the actual age of the defendant and victim, as opposed to only the proof required by 288(a). The court only asks what the defendant was convicted of, not what he did in fact. And, because there was no argument that the statute was in any way divisible as defined in *Woods*, the government failed to show the offense as “generally committed” meets the criteria of *Begay*. Accordingly, the offense is not a violent felony.

Federal escape conviction not a crime of violence. *United States v. Hart*, 578 F.3d 684 (7th Cir. 2009; No. 07-3395). In prosecution for armed bank robbery, the Court of Appeals held that the federal offense of escape was not a crime of violence for career offender purposes. The court initially detailed the various cases which previously addressed the issue of whether escape offenses are crimes of violence and discussed how the analysis has changed since *Begay*, *Chambers*, and *Woods*. In the present case, the question was whether the offense was a crime of violence under the residual clause. Prior precedents established that escape can be committed in both violent and non-violent ways (walk-aways). Where a statute covers both violent and non-violent types of conduct, *Woods* holds that a statute is divisible only if it “expressly identifies several ways in which a violation may occur.” Thus, a statute that said “anyone who escapes from custody, whether by jailbreak, walk away, or failure to report, has committed a felony,” would be treated by the court as divisible, while a statute that simply said “anyone who escapes from custody has committed a felony” would be treated as indivisible, even if the two statutes covered the same range of conduct. Looking to the federal escape statute, it is clear that the statute prohibits not only escapes from secure custody, but also walkaways from nonsecure custody and failures to report at the end of an authorized period of freedom. Thus, the federal escape statute covers a wide range of conduct, from violent jailbreaks to quiet walkaways to passive failures to report. It does not, however, enumerate

explicitly the different ways in which the statute can be violated. Under *Woods*, therefore, it is an indivisible statute. Accordingly, the categorical approach required the court to determine whether escape under the federal statute, as a general matter, is “roughly similar, in kind as well as in degree of risk posed,” to the crimes of burglary, arson, extortion and use of explosives. Put another way, the court must ask if the offense is of a type that, but its nature, presents a serious potential risk of injury to another. One can commit escape under the federal statute without putting oneself, or anyone else, in harm’s way. Accordingly, it is not a crime of violence.

Indiana offense of residential entry is a violent felony. *United States v. Hampton*, 585 F.3d 1033 (7th Cir. 2009; No. 07-3134). On appeal from a finding that the defendant was an Armed Career Criminal, the Court of Appeals held that the Indiana offense of residential entry was a violent felony. Although *United States v. Gardner*, 397 F.3d 1021 (7th Cir. 2005), had previously held that the offense was a “crime of violence” under the Guidelines, the Court of Appeals had not reconsidered this holding since the Supreme Court’s decision in *Begay*. Doing so in this case, the court noted that the offense of residential entry is defined as: “a person who knowingly or intentionally breaks and enters the dwelling of another person commits residential entry.” The court held that the offense does not have as an element the use of physical force, is not a listed offense, and therefore could only qualify as a violent felony under the residual clause. Under the residual clause, the court looks only to the statutory definition of the offense and not the underlying facts of the defendant’s prior conviction. Looking at the definition, although it is listed in the same chapter as burglary in the Indiana Code, residential entry does not meet the definition of generic burglary because residential entry does not require the intent to commit a felony therein. This fact is not dispositive, however, because the real inquiry under the residual clause is whether the offense prohibits conduct that “presents a serious potential risk of injury to another.” The court concluded that residential entry is similar in risk to the enumerated offense of burglary because both create a substantial risk that if the offender is confronted by someone inside the home, violence will ensue. Moreover, the offense is the type of intentional conduct that *Begay* requires—the statute itself requires knowing and intentionally breaking and entering into someone’s home. Lastly, it is inherently aggressive and creates a serious risk that the homeowner may resort to violence to defend himself or his loved ones. Thus, even post-*Begay*, the offense is a violent felony. The Court of Appeals did reverse the ACCA enhancement, however, because another prior conviction for criminal recklessness is no longer a violent felony, as *United States v. Smith*, 544 F.3d 781 (7th Cir. 2008), holds.

Illinois offense of reckless discharge of a firearm (720 ILCS 5/24-1.5(a)) is not a “crime of violence.” *United States v. Gear*, 577 F.3d 810 (7th Cir. 2009; No. 07-4038). In prosecution for being a felon in possession. The Court of Appeals held that the Illinois offense of reckless discharge of a firearm (720 ILCS 5/24-1.5(a)) is not a “crime of violence.” U.S.S.G. § 2K2.1(a)(4) sets a base offense level of 20 for a person who has a prior felony conviction for a crime of violence, as defined by the career offender guideline. The defendant had a prior conviction for reckless discharge of a firearm, defined as follows: “A person commits reckless discharge of a firearm by discharging a firearm in a reckless manner which endangers the bodily safety of an individual.” Examining the offense under the residual clause, the court initially noted that the offense includes at least two varieties of weapons offenses. In the first, the person discharges the gun recklessly. In the second, the person fires the gun deliberately but is reckless about the consequences. The second variety satisfies *Begay* because firing a gun in a purposeful, violent, and aggressive manner creates a substantial risk of harm. However, the first variety does not, because the reckless firing of the gun is not purposeful. Relying on *Woods*, the court looked to see whether the statute was “divisible” as defined by that case. Only when an offense is divisible may a court examine the charging papers to determine if the defendant committed the offense properly considered a crime of violence. The court

concluded that the offense was not “divisible,” because it establishes a single offense; neither subsections nor a list mark any discrete offense as one in which the defendant intends to shoot and is reckless about the bullet’s destination. Rather, the statute creates only one offense, the “recklessness” component applies to all of its elements, including the discharge of the gun. Accordingly, the offense need not denote the sort of purposeful, aggressive, and violent conduct that *Begay* requires for classification as a violent felony under the residual cause, and the enhancement was therefore improperly applied.

Illinois offense of aggravated battery upon a pregnant woman (720 ILCS 5/12-4(b)(11)) is not a “crime of violence.” *United States v. Evans*, 576 F.3d 766 (7th Cir. 2009; No. 08-2424). Upon consideration of a career offender enhancement, the Court of Appeals held that the Illinois offense of aggravated battery upon a pregnant woman (720 ILCS 5/12-4(b)(11)) is not a “crime of violence.” Under Illinois law, “a person commits a battery if he intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual.” So far as it pertains to this case, such a battery is “aggravated” if the defendant “knows the individual harmed is pregnant.” The court first concluded that the offense does not have the use of force as an element. Although the offense requires “insulting or provoking” physical contact, such contact could include spitting on a person and such conduct does not involve the use of force. Looking to the residual clause, the court concluded that the offense did require intentional conduct. However, such conduct could be no more violent than spitting, and a battery that consists merely of deliberately spitting on someone is not comparable to burglary, arson, extortion, or a crime involving the use of explosives. Looking to Illinois cases, the court noted that Illinois courts have held that the statute in question embraces more forceful conduct as well, such as blows that knock a person to the ground. Thus, this same statute, the same form of words, embraces two crimes: offensive battery, and forcible battery. If the two crimes were in separate sections of the battery statute (or within the same section but listed separately) and the defendant were convicted of violating the section punishing forcible battery, the fact that another section punished a battery that was not forcible and therefore not a crime of violence under federal law would be irrelevant. But, under *Woods*, when a statute fails to place a crime that is a crime of violence, and the crime that is not a crime of violence, in separate sections (or in a list of separate crimes in the same section), the defendant cannot be given the crime of violence enhancement. Although there is an exception if the “generic” crime is *generally* committed in a violent way, no such argument was made in this case. Accordingly, the offense was not a crime of violence.

Transporting a minor in interstate commerce with intent that the minor engage in prostitution (18 U.S.C. § 2423(a)) is a “crime of violence.” *United States v. Patterson*, 576 F.3d 431 (7th Cir. 2009; No. 08-2240). Upon consideration of the application of the career offender enhancement, the Court of Appeals concluded that transporting a minor in interstate commerce with intent that the minor engage in prostitution (18 U.S.C. § 2423(a)) is a “crime of violence.” Reviewing the offense under the residual clause, the court first concluded that the offense is “purposeful” and “aggressive.” It is “purposeful” because it requires the perpetrator to knowingly transport a minor to another state as well as intend that the minor engage in prostitution. The crime is therefore “deliberate,” unlike the strict liability offenses contrasted in *Begay* where the offender need not have had any criminal intent at all. Second, it is aggressive because commission of the crime puts the perpetrator into a position of power over the minor such that an element of coercion is inherent in the crime. On the question of whether the offense is “violent,” the court concluded that the offense categorically creates a significant risk of violence against the victim by the perpetrator as well as third parties. Consideration of such attendant risks are appropriate, as demonstrated by the fact the burglary is a

crime of violence, although it too only carries risks attendant to the commission of the crime. Although the offense does not require violent conduct, it presents a substantial risk that violence will occur, and it is surprisingly difficult to see how burglary could be treated as a violent crime yet child trafficking not be. Accordingly, the court concluded that the offense was similar in kind to the enumerated offenses set forth in the career offender provision.

Wisconsin conviction for recklessly endangering safety (Wis. Stat. §941.30(2)) is not a “violent felony.” *United States v. High*, 576 F.3d 429 (7th Cir. 2009; No. 08-1970). Upon consideration of an armed career criminal enhancement, the Court of Appeals held that a prior Wisconsin conviction for recklessly endangering safety (Wis. Stat. §941.30(2)) is not a “violent felony.” The court noted that according to *Woods*, courts must not look beyond the statutory ingredients of a crime, unless the offense is “divisible” into parts, some of which meet the standard of §924(e) and some of which don’t. Only when an offense is divisible may a court examine the charging papers and plea colloquy to classify the conviction. *Woods* holds, second, that as a rule an offense in which the mental state is recklessness does not meet the standards established by the Court in *Begay*. The statute in question provides that “whoever recklessly endangers another’s safety is guilty of a Class G felony.” Thus, as written, the statute is not divisible. Given how *Woods* treats recklessness offenses, lack of divisibility means that a conviction does not necessarily signify any intentional, violent, and aggressive act of the sort that *Begay* requires. Although the defendant did not object at sentencing, *Begay* changed the rules, and under the holding of *Woods* the district court’s classification of the offense as a violent felony was plain error. Thus, the court reversed the ACCA enhancement.

Illinois offense of involuntary manslaughter (720 ILCS 5/9-3) was not a “crime of violence.” *United States v. Woods*, 576 F.3d 400 (7th Cir. 2009; No. 07-3851). Upon consideration of application of the career offender enhancement, the Court of Appeals held that the Illinois offense of involuntary manslaughter (720 ILCS 5/9-3) was not a “crime of violence.” Looking to whether the offense fell with in the guideline’s residual clause, the court noted that crimes with a *mens rea* of negligence or recklessness do not constitute crimes of violence. As in the Supreme Court’s decision in *Begay*. Although in both *Begay* and the present case, the defendant intended his acts, he was reckless as to the consequences of those acts. Every crime of recklessness necessarily requires a purposeful, volitional act that sets in motion the later outcome, and it is the recklessness as to the consequences of the act which takes it out of the ambit of crimes of violence. The court also rejected the government’s argument that it should apply a “modified categorical approach” and look to the judicial records to examine the defendant’s conduct. The court held that the only thing that counts for purposes of determining the nature of the prior conviction is the prior crime for which the defendant was actually convicted. The question is not whether the defendant’s actual conduct as a matter of fact created a serious risk of potential injury. Moreover, only where the statute defining the crime is “divisible,” which is to say where the statute creates several crimes or a single crime with several modes of commission, may the court look to the judicial records. The Illinois statute is not divisible in this way, and the court therefore had no occasion to consult the judicial records. Accordingly, the court found that the prior offense was not a crime of violence and reversed the enhancement. *See also United States v. Booker*, ___ F.3d ___ (7th Cir. 2009; No. 07-3094) (relying on *Woods* and holding that Illinois involuntary manslaughter conviction not a “crime of violence”).

C. GUIDELINE ISSUES

1. 1B1.3 (RELEVANT CONDUCT)

Evidence must presented regarding cooking ratio before powder cocaine can be converted into

crack weight for sentencing purposes. *United States v. Hines*, ___ F.3d ___ (7th Cir. 2010; No. 08-3255). In prosecution for distribution of crack cocaine, the Court of Appeals reversed the district court’s relevant conduct finding, holding that the court improperly used a 1:1 ratio for cooking powder cocaine into crack. The defendant admitted to having bought 1.531 grams of powder cocaine, which the prosecution translated into the identical quantity of crack on the theory that when one cooks a gram of powder cocaine to make crack one ends up with a mixture of substance that has the identical weight. The Court of Appeals noted that the cooking process reduces the weight of the end product, and under ideal conditions the process yields a product which weighs 11% less than what was used at the outset. Moreover, the percentage can be much higher for poorer cooks. Therefore, if the government wants the sentencing judge to infer the weight of the crack from the weight of the powder from which the crack was manufactured, it has to present evidence, concerning the cooking process, that would enable a conversion ratio to be estimated. Because no such evidence was presented, the court remanded to the district court for resentencing.

2. 2B1.1(AMOUNT OF LOSS)

District court has discretion to discount the amount of future loss to its present value. *United States v. Peel*, ___ F.3d ___ (7th Cir. 2010; No. 07-3933). In prosecution for bankruptcy fraud, the Court of Appeals held that the district court had discretion to discount the amount of loss to its present value. In a bankruptcy proceeding, the defendant attempted to blackmail his wife into dropping her claim under their marital settlement agreement for a \$230,000 lump sum and \$2500 a month for the rest of the defendant’s life. The district court calculated the defendant’s life-expectancy to be 17.5 years, and multiplied this number of months by the monthly payment amount, to come up with a figure of \$525,000 payable over those years. He then added this amount to the lump sum for purposes of calculating the amount of intended loss. The defendant argued that the amount based upon the monthly payments should have been discounted to present value, since a smaller sum received today and conservatively invested would yield \$525,000 over a period of 17.5 years. Although this is a common method for determining damages in civil cases, it is rarely used in criminal contexts. However, the court found no cases that refused to discount a future loss to present value if asked to do so. Thus, if a defendant presents credible evidence for discounting a stream of future payments to future value, the district court must consider it. In the present case, the defendant presented such expert evidence, demonstrating that the present value of the stream of future monthly payments owed to his ex-wife was \$314,000. Had the district court used this amount, the defendant’s offense level would have been 2-levels lower. The court finally noted that although the district judge may use the present value of intended loss, it need not give controlling weight to the present-value calculation. Other factors may warrant the district judge using the higher figure, depending on the circumstances of the case. However, because the court was already remanding the case for other reasons, the district court should at least consider the present value argument upon resentencing.

3. 2B1.1(b)(2)(A)(ii) (MASS MARKETING)

A fraudulent Internet auction qualifies for a 2-level enhancement for using “mass-marketing” to promote the fraud. *United States v. Heckel*, 570 F.3d 791 (7th Cir. 2009; No. 07-3514). In prosecution for wire fraud stemming from the defendant’s offering non-existent items for sale on Internet auction sites, the Court of Appeals affirmed a 2-level enhancement for mass-marketing. The commentary to the guideline explains that mass-marketing includes a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to purchase goods or services. The defendant argued that an

Internet auction does not fall within this definition, because such a scheme only has one victim: the winning bidder. The Court of Appeals disagreed, noting that the guideline suggests that the mass-marketing enhancement applies to solicitation schemes reaching a large number of potential victims regardless of the number of actual victims. Although the defendant’s conduct netted only a small number of victims, the loss that those few suffered was exacerbated by the defendant’s chosen method of solicitation. The competitive bidding process of an Internet auction often increases the price that a bidder might otherwise have to pay and exposes more consumers to the fraud than would otherwise have been possible. Accordingly, an Internet auction is the type of plan, program, promotion or campaign that the enhancement was designed to reach.

4. 2B1.1(b)(2)(C) (MORE THAN 250 FRAUD VICTIMS)

Where defendant stole Medicaid numbers to submit false claims for reimbursement, the victims were not the people whose numbers were stolen, but rather Medicaid. *United States v. Sutton*, 582 F.3d 781 (7th Cir. 2009; No. 08-3370). In prosecution for health care fraud, the Court of Appeals reversed the district court’s sentencing enhancement for the offense involving more than 250 victims. The defendant ran a completely phony psychological counseling center, whereby he stole the Medicaid numbers of over 2,000 individuals to submit false bills for Medicaid payments. The district court relied found the individuals whose numbers were stolen to be victims of the crime and enhanced the defendant’s sentence because the fraud involved more than 250 victims. The defendant argued on appeal that the only victim of his fraud was Medicaid. The Court of Appeals agreed. The Application Note to the relevant guideline defines a “victim” as “any person who sustained any part of the actual loss determined” under the guideline. Moreover, subsection (b)(1) of the guideline refers exclusively to the monetary loss occasioned by the crime, and the relevant application notes explain that the actual loss must be “pecuniary harm . . . that is monetary or that otherwise is readily measurable in money.” In the present case, none of the individuals whose numbers were stolen actually paid for a service they did not receive. They were not even aware of the crime until the government began investigating the crime. Although the government argued they were harmed because their Medicaid benefits were exhausted by the fraud, the government also conceded that a system had been put in place to allow those individuals to go through a process that would waive the limits on their benefits so that the defendant’s exhaustion of their benefits would not affect their eligibility for services. Therefore, given the government’s failure to demonstrate that any of the individuals suffered pecuniary harm, the court concluded that they were not victims.

5. 2B3.1(b)(2)(D) (DANGEROUS WEAPON “OTHERWISE USED”)

Defendant’s sentence could not be enhanced for otherwise using a dangerous weapon during a robbery where he received a 924(c) consecutive sentence, even though the 924(c) conviction was based on firearms used by co-defendants and the improper enhancement was based upon a plastic BB gun used by the defendant. *United States v. Eubanks*, 593 F.3d 645 (7th Cir. 2010; No. 09-1029). In prosecution for bank robbery and 924(c), the Court of Appeals held that the district court improperly enhanced the defendant’s sentence for “otherwise using” a dangerous weapon during a robbery, when he also received a 924(c) consecutive sentence. The defendant robbed a beauty salon with two co-defendants who were armed with semi-automatic pistols. The defendant carried only a plastic BB gun, which he used to beat a victim. The basis for the defendant’s 924(c) charge were the pistols possessed by his co-defendants. Additionally, the district court enhanced the defendant’s offense level for “otherwise using” a dangerous weapon during the robbery. The district court believed this to be permissible because 924(c) requires use of a firearm, and, according to 18 U.S.C. 921, a BB gun is not a firearm. Because the defendant could not have been sentenced under

924(c) for using the BB gun, his use of the weapon was not subsumed by the 924(c) sentence, and the four-level enhancement was proper. The Court of Appeals disagreed. The court noted that if a defendant is sentenced for using a firearm in furtherance of a violent crime under 924(c), the sentencing court may not enhance the defendant’s sentence under the guidelines for the same weapon and the conduct that underlie the 924(c) conviction. And the sentence under 924(c) accounts for all guns used in relation to the underlying offense. Although a defendant may receive both the 924(c) statutory sentence and a guideline enhancement if the enhancement and the statutory sentence are imposed for different underlying conduct, for enhancement purposes, real guns are treated as indistinguishable from fake guns. If the court were to adopt the district court’s reasoning, the defendant would be subject to an enhancement under the guidelines for otherwise using the plastic BB gun, but would have been precluded from such an enhancement if he had beat the store owner with a real firearm—an absurd result. Thus, the 924(c) sentence had to account for all the guns used, including the plastic BB gun.

6. 2B3.1(b)(4) (ABDUCTION OF A VICTIM)

Moving a victim from one room to another in a small retail shop does not constitute abduction, but rather only restraint. *United States v. Eubanks*, 593 F.3d 645 (7th Cir. 2010; No. 09-1029). In prosecution for bank robbery, the Court of Appeals held that moving a victim from one room to another in a small retail shop did not constitute abduction, but rather only restraint. In two separate robberies, the defendant moved a victim from one room to another in small retail shops. The Guidelines provide for a four-point enhancement for abduction, but only two for restraint, and the defendant argued that his conduct was the latter. The district court applied the greater enhancement, concluding that moving an employee from one room to another was more serious than keeping all of the employees in the same room because it isolated the employee, increasing the likelihood that the employee would resist and thus increasing the chance of injury. The Court of Appeals rejected this reasoning, concluding that transporting the victims from one room to another is simply not enough for abduction. To find otherwise would virtually ensure that any movement of a victim from one room to another within the same building, without any other aggravating circumstances, would result in an abduction enhancement. While there may be situations in which an abduction enhancement is proper even though the victim remained within a single building, those facts were not present in this case.

7. 2C1.1 (EXTORTION UNDER COLOR OF OFFICIAL RIGHT)

Guideline section 2C1.1 (extortion under color of official right) does not apply to an individual who impersonates a government official. *United States v. Abbas*, 560 F.3d 660 (No. 07-3866; 7th Cir. 2009). In prosecution for impersonating an FBI agent, the Court of Appeals held that the district court improperly applied a cross-reference in the Guidelines to § 2C1.1 (extortion under color of official right). The defendant posed as an FBI agent to assist immigrants threatened with deportation. He would accept money from them, claiming that he could assist them in avoiding deportation. Not being an FBI agent, he was convicted after a trial. At sentencing, the district court referred to Guideline section 2J1.4, which is the guideline applicable to impersonating an FBI agent. That guideline contains a cross-reference that reads, “If the impersonation was to facilitate another offense, apply the guideline for an attempt to commit that offense, if the resulting offense level is greater than the offense level determined above.” The judge applied this cross-reference, finding that the impersonation was to facilitate color of official right extortion. Extortion under color of official right punishes anyone who “obstructs, delays, or affects commerce . . . by . . . extortion,” defined as “the obtaining of property from another, with his consent, induced by wrongful use of actual or

threatened force, violence, or fear, or under color of official right.” The court said that its understanding of “under color of official right” liability must begin with the notion that ordinarily the phrase applies to public officials who misuse their office. The rationale that animates decisions supporting this understanding is the fact that extortion under color of official right is a crime against public trust. Victims of this type of extortion are vulnerable based on the authority that their victimizer wields. Here, the defendant cloaked himself in the state’s authority, and from the victim’s perspective, the effect was the same as if the defendant had actually been an FBI agent. However, the court noted that criminal liability has never turned solely on the crime’s effect on its victim. The statute in question is basically an “ethics in government act.” Thus, applying 2C1.1 as punishing those in government dishonesty matches the roots of under color of official right liability, and the court saw no reason to extend it for the first time in this case to private citizens who masquerade as public officials. However, because the district court stated that even without the cross-reference, it would have imposed the same sentence, the court found the sentence to be harmless.

8. 2D1.1 (DRUG OFFENSES)

District court erred by converting money seized from defendant into drug quantity where the court failed to make finding that money was proceeds from drug transactions. *United States v. Edwards*, 581 F.3d 604 (7th Cir. 2009; 08-1124). In prosecution for drug distribution, the Court of Appeals vacated the defendant’s sentence because the district court improperly included drugs to the defendant as relevant conduct. When the defendant was arrested, the defendant had \$765 in cash on his person. The district judge converted this amount of money into drugs, which increased the defendant’s guideline range. The defendant argued that he obtained the money from the sale of a minivan, but he testified that the minivan had no license plates, that title had never been transferred to him, and that the vehicle had never been registered in his name; and this made it impossible to verify his having sold, or for that matter ever owned or possessed, a minivan. The defendant argued, however, that even if his testimony about the minivan was false, the prosecution should have been required to present evidence of what the true source of the money was, and the Court of Appeals agreed. The falsity of the defendant’s testimony makes reasonably clear that the \$765 was proceeds of an illegal transaction of some sort, but does not show that it was proceeds from selling crack. For all one knows, the defendant sold other illegal drugs (he had been convicted in the past of possession of marijuana) or other contraband, such as guns, but did not want to acknowledge other illegal behavior, which he might have thought would get him into even worse trouble. The fact that a witness lies about one thing doesn’t automatically invalidate all his testimony. Rather, the trier of fact must consider whether particular falsehoods in a witness’s testimony so undermine his credibility as to warrant disbelieving the rest of his testimony—or a critical part, such as, in this case, the defendant’s denial that the cash found on him when he was arrested was the proceeds of a sale of crack. Here, the district judge gave no reason for his belief that the money had to be proceeds of selling crack. Moreover, although the Guidelines are advisory, the court couldn’t be sure that the district court would have imposed the same sentence without the error. The judge imposed the minimum guideline sentence which suggested a lean toward lenity, making it difficult to predict the outcome of a new sentencing hearing. Thus, the court vacated the sentence and remanded for further proceedings.

Sentence vacated where district court failed to determine amount of drugs reasonably foreseeable to defendant involved in a conspiracy. *United States v. Dean*, 574 F.3d 836 (7th Cir. 2009; No. 08-3287). In prosecution for conspiracy to distribute methamphetamine, the Court of Appeals vacated the defendant’s sentence because the district court failed to determine the quantity of drugs for which the defendant was responsible. The jury returned a verdict finding the defendant

responsible for not more than 500 grams of methamphetamine. The PSR, however, recommended the defendant be held accountable for 150 kilograms, the total amount involved in the conspiracy. The district judge at sentencing adopted the recommendation in the PSR, stating that the amount was a reliable estimate of the amount of drugs being dealt by members of the conspiracy. However, the court also stated that it would reduce the defendant's sentence to take into account the fact that the entire amount was probably not all foreseeable to the defendant, especially in light of the jury's verdict. The court noted that a defendant convicted of conspiracy is not automatically liable for the acts of his coconspirators; a defendant may be held liable only for those acts or omissions that were both made in furtherance of the conspiracy and foreseeable to the defendant. Here, the district court never undertook the essential step of ascertaining the quantity of drugs reasonably foreseeable to the defendant. In fact, the district court specifically stated that the entire amount involved in the conspiracy was not foreseeable to the defendant, but never determined what amount actually was foreseeable to him. Although determination of drug quantity can be accomplished by reasonable approximation, mere "eyeballing" of the amount is not sufficient. Accordingly, the court remanded to the district court for a more precise determination.

9. 2G1.3(b)(2)(B) (UNDULY INFLUENCING A MINOR)

Enhancement for unduly influencing a minor to engage in prohibited sexual conduct cannot apply where the defendant and the minor did not actually engage in such conduct. *United States v. Zahursky*, 580 F.3d 515 (7th Cir. 2009; No. 08-1151). In prosecution for attempting to coerce or entice a minor under the age of 18 to engage in sexual activity in violation of 18 U.S.C. § 2422(b), the Court of Appeals reversed the district court's enhancement for unduly influencing a minor to engage in prohibited sexual conduct under U.S.S.G. § 2G1.2(b)(2)(B). The defendant chatted with an undercover agent he believed to be a minor, traveled to have sex with the what he thought was a minor, and was arrested. The district court enhanced his sentence under the noted guideline, but the defendant argued that the enhancement was improper where no sexual conduct occurred. The Court of Appeals agreed. In *United States v. Mitchell*, 353 F.3d 552 (7th Cir. 2003), the court considered whether § 2A3.2(b)(2)(B)(ii) was applicable to sting operations where not illicit sexual conduct occurred, a guideline section the court found to be substantially the same as the section at issue in the present case. In that case, the court concluded that the enhancement cannot apply where the offender and victim have not engaged in illicit sexual conduct, for where no prohibited sexual conduct has occurred, there has been no undue influence. The reasoning in *Mitchell* controls in the present case as well, and the court concluded that the guideline section at issue cannot apply where the defendant and the minor have not engaged in prohibited sexual conduct.

10. 2G2.2(b)(3)(F) (DISTRIBUTION OF CHILD PORNOGRAPHY)

Enhancement for distribution was not double counting where underlying conviction was for transportation of child pornography. *United States v. Tenuto*, 593 F.3d 695 (7th Cir. 2010; No. 09-2075). In prosecution for transporting child pornography, the Court of Appeals held that it was not double counting to also receive a guideline enhancement for distribution. The Court of Appeals noted that when a district court relies on conduct that was necessary to satisfy an element of the defendant's conviction yet uses that same conduct to enhance the defendant's guideline range, double counting occurs. However, in the present case, no such double counting occurred. Transporting child pornography is a distinct offense from distributing child pornography. The two crimes are similar because a person who has distributed child pornography has likely transported it, and a person who transports it is likely to eventually distribute it. But a conviction for transporting

child pornography does not necessarily entail distribution or an intent to distribute. Accordingly, there is no double counting when convicted of transporting and enhanced for distribution.

11. 2G2.2(b)(6) (USE OF A COMPUTER)

Enhancement for “use of a computer” in transporting child pornography was not double counting where underlying conviction was for transportation of child pornography. *United States v. Tenuto*, 593 F.3d 695 (7th Cir. 2010; No. 09-2075). In prosecution for transporting child pornography, the Court of Appeals rejected the defendant’s argument that a guideline enhancement for “use of a computer” constituted double counting. The transportation statute makes it a crime to knowingly mail, transport, or ship “by any means, *including by computer*, any child pornography.” The defendant argued that given this language in the statute, he could not also receive a guideline enhancement for use of a computer, for that constituted double counting. The Court of Appeals noted that it was not *necessary* that the defendant use a computer to commit the offense. He could have chosen the mail, fax, or any other means to transport the material. The fact the statute specifically articulates one means of transportation does not transform that means into an element of the offense. Therefore, there was no double counting.

12. 2G2.3(b)(7)(D) (POSSESSION OF MORE THAN 600 CHILD PORNOGRAPHY IMAGES)

Expert evidence is not required to prove the reality of children portrayed in pornographic images; a judge’s visual inspection of the images alone is sufficient. *United States v. Lacey*, 569 F.3d 319 (7th Cir. 2009; No. 08-2515). In prosecution for child pornography, the Court of Appeals held that a judge’s visual inspection of images alone is sufficient to prove that the real children, as opposed to virtual images, were depicted. The district court applied a 5-level enhancement because the defendant possessed more than 600 child pornography images. To reach this conclusion, the district court visually inspected the images on the CDs possessed by the defendant, until it was satisfied that at least 1,000 images depicted children. The defendant, relying on an overruled district court case from the First Circuit, argued that without the testimony of a person who participated in the creation of a digital image, no authenticity of the claimed images could be determined. The Court of Appeals flatly rejected this argument, noting that the government is not required to present any further evidence of the reality of the children depicted other than the pictures themselves. Expert evidence is not required to prove the reality of children portrayed in pornographic images, and all other circuits to consider the question have come to the same conclusion. Thus, the district court’s visual inspection of the images was sufficient to support its finding.

13. 2K2.1(b)(6) (POSSESSION OF FIREARM IN CONNECTION WITH ANOTHER FELONY OFFENSE)

Enhancement for possessing weapon in connection with “another felony offense” was proper where the defendant took possession of the weapons as part of a burglary. *United States v. Hill*, 563 F.3d 572 (7th Cir. 2009; No. 07-2714). In prosecution for being a felon in possession of a weapon, the Court of Appeals rejected the defendant’s argument that he was not subject to an enhancement for possession of the firearm in connection “with another felony offense” pursuant to 2K2.1(b)(6). The defendant, a felon, burglarized a home and stole weapons during the burglary. Accordingly to the commentary to 2K2.1(b)(6), “in a case in which a defendant, . . . during the course of a burglary, finds and takes a firearm, even if that defendant did not engage in any other conduct with that firearm during the course of the burglary . . .,” the enhancement should apply. The

defendant did not dispute that the language of the commentary made the enhancement applicable to him, but rather argued that the commentary should be ignored because it was contrary to the language in the guideline section itself. Specifically, he argued that the language in Note 14(b)(I) quoted above disregards the guideline's requirement that the defendant possess a firearm in connection with "another" felony offense, that is, an offense distinct from the weapons offense itself. He argued that because he took possession of the firearms as a result of the burglary, his possession cannot be divorced from that offense; in other words, the burglary was not "another" offense but one of which his possession of the guns was part and parcel. The Court of Appeals agreed that the commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline. But it concluded that there was no inconsistency in this case. The central question is whether the defendant's offense of conviction and the other felony offense are based on the same conduct. The question is not whether the two offenses occur simultaneously or have some causal relationship with one another. Here, the enhancement was based on conduct that was distinct from the simple possession of the firearms, namely the burglary. The offenses are based on separate conduct, and the fact that the defendant committed one of the crimes did not mean that he necessarily had to commit the other: He could have burglarized the residence without taking possession of the guns. Therefore, there was no legal bar to applying the enhancement.

14. 2L1.2(b)(1)(A)(ii) (ILLEGAL REENTRY AFTER AGG FELONY)

A district court is not required to reject the relevant guideline because it was not enacted in the Sentencing Commission's typical manner. *United States v. Aguilar-Huerta*, 576 F.3d 365 (7th Cir. 2009; No. 08-2505). In prosecution for illegal reentry after an aggravated felony, the Court of Appeals held that a district court is not required to reject the relevant guideline because it was not enacted in the Sentencing Commission's typical manner. The defendant argued that the district court was required to reject the guideline because the Sentencing Commission failed to fulfill its "institutional role" when it prescribed the 16-level enhancement for reentry after an aggravated felony. The defendant noted that the enhancement is not the result of the Commission's utilizing empirical data, national experience, or input from a range of experts in the field. Although the Court of Appeals agreed regarding how the guideline was enacted, the court concluded that this fact does not require a judge to reject the guideline. He is free to do so, as he can reject a guideline as inconsistent with his own penal theories; and rejecting a guideline as lacking basis in data, experience, or expertise would thus be proper. But he is not required to reject such a guideline in any case; a judge should not have to delve into the history of a guideline so that he can satisfy himself that the process that produced it was adequate to produce a good guideline.

15. 3A1.4 (TERRORISM ENHANCEMENT)

Environmental activists who used violence and intimidation in opposition of United States were "terrorists" as defined by Guidelines. *United States v. Christiansen*, 586 F.3d 532 (7th Cir. 2009; No. 09-1526). In prosecution for destroying government property, the Court of Appeals held that the defendant's sentence was properly enhanced for being a terrorist. The defendant was convicted of destroying over a million dollars in government property as part of his environmental activist activities. The defendant argued that he was not a terrorist because his only motivation was "the hope of saving our earth from destruction" and redressing "the misdeeds and injustice that [he] felt industry inflicted on the natural world." The Court of Appeals noted that a terrorist is "any one who attempts to further his views by a system of coercive intimidation" The Guidelines provide a practical definition for what constitutes and act of terrorism, and thereby establishes a very workable

definition of who is a terrorist. It looks at the crime involved and the perpetrator's motive. Among many crimes, destruction of government property is listed as a type of offense that can qualify for the enhancement. Moreover, the offense must be calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. If an offense meets these criteria, then the offender is a terrorist. Here, the purpose behind the defendant's actions was to further a political agenda: the end to industrial society. The method he and his organization chose to communicate this desire was not peaceful protest with speeches, songs, and a petition outside the facility but instead a violent attack against government property. It doesn't matter why the defendant opposed capitalism and the United States government—if he used violence and intimidation to further his views, he was a terrorist. Accordingly, the enhancement applied.

Obstructing an investigation into a crime of terrorism can be one way of promoting that crime sufficient to warrant a terrorism sentencing enhancement. *United States v. Ashqar*, 582 F.3d 819 (7th Cir. 2009; No. 07-3879). In prosecution for obstruction of justice and civil contempt, the Court of Appeals held that the district court properly applied an enhancement because the defendant's offense was "intended to promote" a federal crime of terrorism. The defendant was under investigation for 10 years for his role as a communication and financial conduit for the terrorist organization Hamas. Twice he was subpoenaed to testify before the grand jury, but he refused to testify, even after being granted immunity and being ordered by the judge to do so. The government charged him with obstruction of justice and criminal contempt, and the district court enhanced his sentence because the criminal contempt conviction was "intended to promote" a federal crime of terrorism. The defendant argued that an intention to obstruct a terrorism investigation did not "promote" a federal crime of terrorism as required by the guideline. The Court of Appeals disagreed, holding that obstructing an investigation into a crime can be one way of promoting that crime. Intent to obstruct is enough, at least where obstructing an investigation promotes the crime. Promoting a crime includes helping and encouraging that crime, and one way of furthering a crime is to try to prevent the government from finding out about it. So long as the sentencing court finds that the defendant intended to obstruct an investigation into a federal crime of terrorism, as opposed to an investigation into more ordinary violations of the law, the court has found the intent required by the guideline.

16. 3B1.2 (MITIGATING ROLE)

Defendant may receive a mitigating role adjustment even if he is charged and sentenced for his conduct alone, rather than relevant conduct committed by co-defendants. *United States v. Hill*, 563 F.3d 572 (7th Cir. 2009; No. 07-2714). In prosecution of possession of a weapon by a felon, the Court of Appeals vacated the defendant's sentence because the district court committed a legal error when denying the defendant a mitigating role adjustment pursuant to § 3B1.2. The defendant's co-defendant burglarized a home, stealing guns. He then sold them to a CI. The defendant played no part in the burglary or the sale of the weapons. Rather, he only wrapped the guns in a blanket and transferred them from one trunk to another. He pled guilty to being a felon in possession of a weapon, but he was neither charged nor sentenced for conduct related to the co-defendant's burglary or sale of the weapons. The defendant argued that he was entitled to the minimal role reduction because of the small part he played compared to his co-defendant. The district court refused to apply the reduction, noting that the defendant was charged and sentenced only for his own conduct. The Court of Appeals cited the commentary to the mitigating role guideline as amended in 2001. Prior to the amendment, the Seventh Circuit held that if a defendant, notwithstanding his participation in concerted activity, was sentenced solely for his own criminal conduct and not the conduct of the other participants in the concerted activity, then he was ineligible for a mitigating role reduction.

Other circuits held to the contrary, and in 2001 the Commission amended the commentary to state that “[a] defendant who is accountable under 1.3 (Relevant Conduct) only for the conduct in which the defendant was personally involved and who performs a limited function in concerted criminal activity is not precluded from consideration for an adjustment under this guideline.” In view of this commentary, the Court of Appeals held that the district court committed legal error in deeming the defendant ineligible for the reduction. The district court’s rationale was that because the defendant was charged with, convicted of, and sentenced for only his own possession of the firearms, and not the burglary or the sale of those firearms, the court could not credit him for his lesser role in the broader scheme to obtain and distribute the firearms. This is precisely the view that the Commission rejected. There is nothing unique about the nature of the felon-in-possession offense that alters the analysis. Because of the district court’s legal error, it did not weigh the factors necessary to determine if the adjustment was warranted, and a remand was therefore necessary.

17. 3C1.1(OBSTRUCTION OF JUSTICE)

Attempted escape from custody, as opposed to an attempt to flee from arrest, can support obstruction of justice enhancement. *United States v. Bright*, 578 F.3d 547 (7th Cir. 2009; No. 08-1770). The Court of Appeals held that an obstruction of justice enhancement is proper for someone who attempts to flee from custody. In a similar context, the court held in *United States v. Draves*, 103 F.3d 1328 (7th Cir. 1997), the court held that willful intent for purposes of this guideline cannot be presumed by the unauthorized flight of a handcuffed defendant from the back of an officer’s car. The defendant argued that, like the defendant in *Draves*, his attempt to escape from police custody was instinctual, reactionary flight (which is not sufficient for the enhancement) rather than a willful intent to escape custody (which is sufficient). The court noted, however, that there is a difference between fleeing from arrest and fleeing from custody. Application note 4(e) states that “escaping or attempting to escape from custody” justifies the enhancement. Here, the defendant attempted to escape after pending the night in jail, and while under minimal supervision in federal custody in a hallway. Thus, the defendant’s attempted escape was a calculated evasion from custody when his chances for escape were the greatest, thereby demonstrating willful intent on his part.

18. 3E1.1(ACCEPTANCE OF RESPONSIBILITY)

Government not required to file motion for third level reduction where it would not have been an abuse of discretion for the district court to deny the defendant even the two level reduction for acceptance of responsibility. *United States v. Nurek*, 578 F.3d 618 (7th Cir. 2009; No. 07-3568). In prosecution for child pornography offense, the Court of Appeals held that the government properly refused to move for the third-level off for acceptance of responsibility. The district court enhanced the defendant’s sentence for obstruction of justice, but also gave the defendant two levels off for acceptance of responsibility. The government then refused to move for the third level reduction, believing that the defendant should not have even received the two levels already granted by the district court. The defendant argued that the government is required to file the motion so long as the conditions set forth in the guideline are met. The Court of Appeals disagreed, noting that although subsection (a) confers an entitlement on a defendant, subsection (b) confers an entitlement on the government. So long as the government’s reasons for refusing to file the motion are not invidious or unrelated to a legitimate governmental objective, a defendant cannot complain if the government refuses to file the motion. Here, the government properly refused to file the motion where the district court could have properly refused to give the defendant even the two level reduction set forth in subsection (a).

Government may refuse to file a motion giving defendant third level off for acceptance of responsibility where defendant refused to sign an appeal waiver. *United States v. Deberry*, 576 F.3d 708 (7th Cir. 2009; No. 09-1111). In prosecution for being a felon in possession of a weapon, the Court of Appeals held that the government can legitimately refuse to file for the additional one-level reduction set forth in subsection (b) because the defendant refused to sign an appeal waiver. Subsection (b) provides that a defendant can receive a third level off for acceptance of responsibility upon motion of the government stating that the defendant assisted authorities in the investigation or prosecution of his own misconduct by timely notifying the authorities of his intention to enter a plea of guilty. The government refused to file the motion solely because the defendant refused to sign a waiver of his sentencing appeal rights. On appeal, the court assumed the defendant had met all the prerequisites for the filing of such a motion set forth in the guideline. However, the court concluded that subsection (b) does not confer an entitlement on the defendant, but rather on the government: if it wants to give the defendant additional credit for acceptance of responsibility, perhaps to induce additional cooperation, and can satisfy the criteria in the subsection, it can file a motion and the defendant will get the additional one-level reduction in his offense level. And, although it may not base a refusal to file the motion on an invidious ground or on a ground unrelated to a legitimate governmental objective, requiring an appeal waiver before making such a motion was a legitimate governmental objective. There was nothing unreasonable about the government's deciding not to file the motion. It wanted an appeal waiver in order to avoid the expense and uncertainty of having to defend the defendant's conviction and sentence on appeal. That was a legitimate desire, closely related to the express criteria in subsection (b).

D. KIMBROUGH ARGUMENTS

A district court may not consider the crack/powder disparity to vary from a guideline sentence determined by the career offender guideline, overruling the Seventh Circuit's decision in *United States v. Liddell*. *United States v. Welton*, 583 F.3d 494 (7th Cir. 2009; No. 08-3799). In prosecution for distribution of crack cocaine, the Court of Appeals held that a district court may not consider the crack/powder disparity to vary from a guideline sentence determined by the career offender guideline. The defendant was found to be a career offender, but argued that the court should sentence him to a below-guideline sentence to the crack/powder disparity. Specifically, the career offender offense level is determined by the statutory maximum for the crime of conviction, and the statutory maximum for distributing crack cocaine is significantly higher than that for powder cocaine. Accordingly, through the statutory maximum, the career offender guideline reflects the disparity which *Kimbrough* held a district court may consider when varying from the Guidelines. The Court of Appeals held, however, that unlike the crack/powder disparity, the career offender Guideline range is the produce of a Congressional mandate. As even *Kimbrough* noted, Congress specifically required the Sentencing Commission to set Guidelines sentences for serious recidivist offenders "at or near" the statutory maximum." Deviating from the career offender Guideline based on a policy disagreement necessitates that a sentencing court disregard those statutory maximums. Although the Sentencing Guidelines may be only advisory for district judges, congressional legislation is not, and the statutory origin of the disparity embedded in the career offender guideline removes that disparity from the sentencing discretion provided by *Kimbrough*. In so holding, the court noted that its decision in *United States v. Liddell*, 543 F.3d 877 (7th Cir. 2008), indicated a contrary conclusion. In *Liddell*, the court recognized what it called the defendant's "more nuanced" argument of whether a district court "can consider the disparity as a reason for issuing a below-guideline sentence" for career offenders. This reasoning in *Lidell* was inconsistent with the court's decision in *United States v. Harris*, 536 F.3d 798 (7th Cir. 2008), which specifically held that a court may not consider the disparity in the career offender context. The court concluded that *Liddell*

under-read *Harris* as merely reaffirming that *Kimbrough* did not change the way the court's calculate the career offender guideline ranges, but this reading overlooked *Harris*'s emphatic point that *Kimbrough* does not authorize a district court to disagree with the statutory authority embedded in the career offender guideline. Accordingly, to the extent that *Liddell* was inconsistent with *Harris*'s holding that a district court may not rely on the crack/powder disparity embedded in the career offender guideline as a basis for imposing a non-Guidelines sentence, the court disavowed that portion of its decision in *Liddell*. Because *Liddell* was overruled, the opinion was circulated among all the judges, three of whom dissented from the denial of a hearing *en banc*.

Defendants convicted of § 846 conspiracy offenses may argue that they should receive a lower sentence based upon *Kimbrough*, even if the defendant was sentenced as a career offender.

United States v. Knox, 573 F.3d 441 (7th Cir. 2009; No. 06-4101). In prosecution for conspiracy to distribute crack cocaine, the Court of Appeals held that career offenders prosecuted for a conspiracy drug offense could argue that the crack/cocaine disparity warranted a lower sentence. Because the defendants were career offenders, the district court refused to consider their *Kimbrough* arguments pursuant to the Seventh Circuit's decision in *United States v. Harris*, 536 F.3d 798, 813 (7th Cir. 2008). In *Harris*, the court reasoned that, although a sentencing disparity might occur under § 4B1.1 based on the type of cocaine involved, that disparity is the product of a discrepancy created by statute. Specifically, 28 U.S.C. § 944(h) directs that career offenders be sentenced "at or near" the statutory maximum applicable to certain enumerated offenses, included substantive drug offenses. However, conspiracy offenses are not among the offenses enumerated in § 944(h). Moreover, based on the deliberate manner in which § 944(h) includes specific drug offenses but excludes others, Congress did not intend to include § 846 offenses among those requiring sentences "at or near" the statutory maximum. Because § 846 is not included in this statutory mandate, § 944(h) does not limit a district court's discretion under *Kimbrough* to consider the crack/powder disparity affecting a career offender convicted under § 846. Finally, the court also noted a conflict between its decision in *Harris* and *United States v. Liddell*, 543 F.3d 877 (7th Cir. 2009). *Liddell* cited *Harris* for its holding that the disparity in the career offender guideline was the result of a statutory directive. However, the court went on to recognize a "more nuanced" argument off whether a district court "can consider the disparity as a reason for issuing a below-guideline sentence." The court ultimately rejected the challenge in *Lidell* because it was not raised below, but the Court of Appeals noted that "*Liddell* is difficult to reconcile with *Harris*." The court did not, however, reach that issue, given its resolution of the question based upon the conspiracy statute.

E. MISCELLANEOUS

Court may not impose a sentence below statutory mandatory minimum to account for time spent in custody on a separate, related charge where the defendant had completed his term of imprisonment on that charge. *United States v. Cruz*, ___ F.3d ___ (7th Cir. 2010; No. 08-4194). In prosecution for selling illegal drugs, the Court of Appeals held that the district court could not sentence the defendant to less than the 10-year mandatory minimum sentence to account for 18 months the defendant served on a related state court conviction. The defendant had a prior conviction, considered as relevant conduct, for a state drug offense arising out of the same facts which prompted the federal prosecution. The defendant completed his 18-month term of imprisonment on that charge, but argued at his federal sentencing hearing that he should receive 18 months off his 10-year minimum to account for the time spent in state custody, pursuant to the Seventh Circuit's decision in *United States v. Ross*, 219 F.3d 592 (7th Cir. 2000). The district court refused. On appeal the government conceded error, but the Court of Appeals nevertheless affirmed. The court noted that only two instances allow a court to sentence a defendant to less than the

statutory mandatory minimum, *i.e.*, safety valve or a 3553(e) cooperation motion. Although a court may impose concurrent sentences for two or more crimes arising from the same course of conduct, the sentence on the federal charge must still not be less than the minimum. Moreover, in the present case, the defendant had completely served his time on the state charge, so there was nothing to run the federal sentence concurrent with. *Ross* did not support the defendant’s position. In *Ross*, the judge made the defendant’s sentence run concurrently with a state sentence for related conduct. He had served 34 months of his state sentence and the court held that the judge could deduct that number of months from the federal sentence so long as the combined length of the state and federal prison sentences was not less than the federal statutory minimum. The federal sentence was for a gun offense in violation of 18 U.S.C. 924, which provides that certain violators “shall be imprisoned . . . not less than fifteen years,” and the court pointed out in *Ross* that “the statute does not specify any particular way in which the imprisonment should be achieved.” In the present case, however, the statute provides that the offender “shall be *sentenced* to a term of imprisonment which may not be less than 10 years.” The language does not permit a shorter sentence to be imposed. Finally, the defendant in *Ross* had not finished his federal term. Accordingly, the district court was required to impose the 10-year sentence and could not discount the time spent in state custody.

District court’s statements at sentencing indicating an erroneous belief that parole still existed did not warrant reversal. *United States v. Smith*, 562 F.3d 866 (7th Cir. 2009; No. 08-1477). In prosecution for child pornography offenses, the Court of Appeals declined to reverse the defendant’s sentence, where the district court erroneously stated that the BOP would determine the ultimate amount of time the defendant served. Specifically, over the course of four separate sentencing hearings, the district court made statements at the earlier sentencing hearings which indicated its belief that the BOP had control over the amount of the sentence the defendant would serve, similar to the system in place before parole was abolished. The defendant argued that this erroneous belief required reversal of his sentence. The Court of Appeals held that the defendant had the burden of showing that the district court *relied* upon this erroneous information when sentencing him. Looking to the context of the judge’s statements, the court found that the district court made these statements at the earlier sentencing hearings, but not the latter ones. Moreover, in one of the discussions on the question, the court stated that the accuracy of its belief was “neither here nor there,” indicating that it did not believe the question was relevant to the ultimate sentence imposed. Accordingly, the court found that the mistake did not require reversal. Judge Rovner dissented, noting that a district judge who believes the BOP can release a prisoner at any time thinks he is sentencing a defendant to a term *up to* the sentence imposed. In such a case, the judge may not have understood the gravity of the sentence he imposed. Secondly, the district court delegated to the BOP to determine when the defendant could be safely released, abdicating its own responsibility for determining how dangerous the defendant was and whether he could be rehabilitated. Finally, the district judge’s “neither here nor there” statement was over-emphasized by the majority. As Judge Rovner stated, “Why we should accept the district court’s blithe dismissal of the significance of its own error is mystifying. We have no obligation to defer to a district court making an error of law.” She would reverse.

F. REASONABLENESS REVIEW

Before varying upward based on additional crimes the defendant committed, a district court should analyze what the guideline range would be had the defendant actually been charged with the other crimes to avoid unwarranted disparity. *United States v. Kirkpatrick*, 589 F.3d 414 (7th Cir. 2009; No. 09-2382). After the defendant was arrested for being a felon in possession, the defendant confessed to four murders and for placing a contract hit out on the federal agent investigating his case. After 200 hours of investigative work, authorities concluded that the

defendant had lied about everything. The defendant's guideline range was 37 to 46 months, but the judge sentenced him to 108 for lying to the authorities, close to the 120-month maximum. The defendant argued that an extra five years for his conduct was too much. The Court of Appeals found that the district court appeared to select the sentence arbitrarily. Leaping close to the statutory maximum creates a risk of unwarranted disparity with how similar offenders fare elsewhere—not only because this over-punishes braggadocio, but also because it leaves little room for the marginal deterrence of persons whose additional deeds are more serious (for example, *actually* putting out a contract on an agent's life). Before *Booker*, departures had to be explained in the Guidelines' own terms. Thus if the district court's reason for an upward departure was an additional crime, the departure could not exceed the incremental sentence that would have been appropriate had the defendant been charged with, and convicted of, that additional crime. Although the Guidelines are now advisory, a judge must still start by using the Guidelines to provide a benchmark that curtails unwarranted disparity. When a judge believes that extra crimes justify extra punishment, it is wise to see how much incremental punishment the Sentencing Commission recommends. In the present case, applying all the Guideline enhancements assuming the defendant had been convicted of lying to federal agents, his guideline range would have been 57 to 71 months. For his ultimate sentence to be within a guideline range, the defendant would have had to actually set out to have the case agent murdered. *Booker* means a guideline range of 57 to 71 months is only a non-conclusive recommendation. But before exercising discretion the judge should know what the recommendation is, and thus how the defendant's sentence will compare with the punishment of similar persons elsewhere. Accordingly, the court remanded the case for re-sentencing.

A district court may not consider 3553(a) factors to give a sentence below the government's motion under 3553(e) for a reduced sentence below a mandatory minimum due to the defendant's substantial assistance. *United States v. Johnson*, 580 F.3d 666 (7th Cir. 2009; No. 08-3541). The Court of Appeals held that a district court may not consider 3553(a) factors to give a sentence below the government's motion under 3553(e) for a reduced sentence below a mandatory minimum due to the defendant's substantial assistance. At sentencing, the government moved to reduce the defendant's sentence below the statutory minimum for his assistance to the government. The district court granted the motion but refused to consider other mitigating factors to further reduce the defendant's sentence. In the district court and on appeal, the defendant argued that once the district court reduced his sentence pursuant to 3553(e), it was also obliged to consider 3553(a) to further reduce his sentence below the otherwise mandatory sentence. The Court of Appeals disagreed, noting that the language of 3553(e) clearly supports the view that only factors relating to a defendant's cooperation should influence the extent of a departure for providing substantial assistance. The title of the statute makes clear that it grants courts only *limited* authority to depart below the statutory mandatory minimum "so as to reflect a defendant's substantial assistance." If a district court imposes a sentence below the minimum in part so as to reflect the history and characteristics of the defendant, then the court exceeds its authority granted by 3553(e). Moreover, *Booker* does not change the analysis, for nothing in that case expands the authority of a district court to sentence below a statutory minimum, and the Seventh Circuit joined the other circuits, holding that, even after *Booker*, a court may not use the 3553(a) factors to reduce a sentence below the statutory minimum beyond what is warranted for the defendant's substantial assistance. Although the Seventh Circuit's decision in *United States v. Chapman*, 532 F.3d 625 (7th Cir. 2008), held that a district court may consider 3553(a) factors when giving *less* of a reduction than warranted by substantial assistance, this case involved Rule 35(b), and the court declined to decide whether *Chapman* applied in the context of 3553(e).

Court open in all cases to an argument that a defendant's sentence is unreasonable because

of a disparity with the sentence of a co-defendant, but such an argument will have more force when a judge departs from a correctly calculated Guidelines range to impose the sentence. *United States v. Statham*, 581 F.3d 548 (7th Cir. 2009; No. 08-2676). Upon consideration of the defendant's argument that his sentence was unreasonable, the Court of Appeals held that a defendant may argue that there is an unwarranted disparity between his sentence and that of his co-defendants. Although the court found no disparity in this case, it noted that it was not relying on any presumption that a sentencing disparity is problematic only if it is between the defendant's sentence and the sentences imposed on other similarly situated defendants nationwide. Such a categorical rule is now foreclosed by *Gall*, which endorsed a district court's consideration of the need to "avoid unwarranted disparities, but also unwarranted similarities among the other co-conspirators" when calculating a reasonable sentence. However, even after *Gall*, 3553(a) does not require that defendants in a single case be sentenced to identical prison terms. To the contrary, that provision seeks only to avoid "unwarranted" sentencing disparities. If a district court has correctly calculated a Guidelines range, the court assumes that significant consideration has been given to avoiding unwarranted disparities between sentences. And logically it is more likely that an unwarranted discrepancy might be present if the court has chosen sentences outside the Guidelines range. The court therefore stated that it was open in all cases to an argument that a defendant's sentence is unreasonable because of a disparity with the sentence of a co-defendant, but such an argument will have more force when a judge departs from a correctly calculated Guidelines range to impose the sentence.

District court was required to address the defendant's principal argument for a variance, to wit: that the government's delay in prosecuting him for illegal re-entry prevented him from serving a concurrent sentence on a state domestic battery charge. *United States v. Villegas-Miranda*, 579 F.3d 798 (7th Cir. 2009; No. 08-2308). In prosecution for illegal re-entry, the Court of Appeals vacated the defendant's sentence because the district court failed to address the defendant's principal argument for a variance, to wit: that the government's delay in prosecuting him for illegal re-entry prevented him from serving a concurrent sentence on a state domestic battery charge. The defendant was arrested and sentenced to 30 months' imprisonment for domestic battery. Not until he was due to be paroled was an immigration detainer placed on him. When he was released from state custody, he was charged with the federal illegal re-entry offense. The defendant argued that he should receive a variance because the delay in prosecuting him for the federal offense precluded him from serving his time concurrently with the state charge. The district court did not specifically address this argument at sentencing and imposed a sentence within the Guidelines. Citing *Cunningham*, the Court of Appeals reiterated that a district court must address a defendant's principal argument for a lower sentence and must state its reasons for rejecting the argument if the argument has merit. Here, the district court did not do this. Moreover, the court concluded that the argument was not so weak as to lack merit. Several other circuit's have allowed variances on this basis, although the Seventh Circuit had not specifically ruled on the question. Although the court declined to rule on the permissibility of using such a factor in this case as well, it did not that a defendant is reasonable to believe that such an argument may succeed, and the court therefore found the argument to be legally meritorious.

Sentence vacated where district court erroneously stated that mitigating factors of advanced age and poor health were already accounted for in the guidelines. *United States v. Powell*, 576 F.3d 482 (7th Cir. 2009; No. 08-1138). In prosecution for wire fraud offenses, the Court of Appeals vacated the defendant's sentence because the district court apparently made a mis-statement concerning it's authority to vary from the guidelines. The defendant argued for a lower sentence due to his advanced age and health problems. In response, the court noted it considered these factors, but went on to state that "they are, of course, also taken into account by the guidelines themselves."

The Court of Appeals noted that this appeared to be a mis-statement of the law. Although the Guidelines do account for a defendant's criminal history, they do not factor in a defendant's age and health. Moreover, the district court has authority to consider such factors under 3553(a). Thus, because the district court appeared to misapprehend its authority under 3553(a), a remand was appropriate to give the district court an opportunity to clarify its ruling.

A district court may consider a defendant's cooperation with the government as a basis for a reduced sentence, even if the government has not made a § 5K1.1 motion. *United States v. Knox*, 573 F.3d 441 (7th Cir. 2009; No. 06-4101). The Court of Appeals held that "as a general matter, a district court may consider a defendant's cooperation with the government as a basis for a reduced sentence, even if the government has not made a § 5K1.1 motion."

The mandatory add-on sentence flowing from using a gun in a crime of violence may not be used to justify a lower sentence on the underlying offense. *United States v. Calabrese*, 572 F.3d 362 (7th Cir. 2009; No. 08-2861). In prosecution for armed robbery and 924(c) offenses, the Court of Appeals reaffirmed its previous holding in *United States v. Roberson*, 474 F.3d 432 (7th Cir. 2007), that the mandatory add-on sentence flowing from using a gun in a crime of violence may not be used to justify a lower sentence on the underlying offense. The Court of Appeals noted that since its decision in *Roberson*, three other circuits have agreed with its holding, with no other circuits definitely rejecting the Seventh Circuit's approach (although they have at least questioned it). Accordingly, the court adhered to its prior precedent.

Sentencing entrapment if proved is a plausible ground for leniency in sentencing and a judge would be required to consider a nonfrivolous claim of such entrapment. *United States v. Aguilar-Huerta*, 576 F.3d 365 (7th Cir. 2009; No. 08-2505). The Court of Appeals held that sentencing entrapment if proved is a plausible ground for leniency in sentencing and a judge would be required to consider a nonfrivolous claim of such entrapment, although the claim in the present case was not supported by any evidence.

Court of Appeals assumed for purposes of case that sentencing entrapment and manipulation could be considered as mitigating 3553(a) factors. *United States v. Knox*, 573 F.3d 441 (7th Cir. 2009; No. 06-4101). Upon consideration of the defendant's arguments that he was entitled to a lower sentence under 3553(a) because of sentencing entrapment and sentencing manipulation, the Court of Appeals rejected the defendant's argument, finding there was insufficient evidence to support the claims. The court initially noted that this circuit does not recognize claims of sentencing manipulation or sentencing entrapment as defenses to criminal conduct. In this case, however, the defendant was not raising these arguments as a defense, but as 3553(a) factors. The court did not specifically rule on whether such factors were permissible 3553(a) factors, but rather assumed they were, before concluding that the evidence did not show that either argument had merit.

Claim of sentencing manipulation and poor conditions of pre-trial confinement are not appropriate factors for a district court to consider under 3553(a). *United States v. Turner*, 569 F.3d 637 (7th Cir. 2009; No. 08-2413). In prosecution for drug offenses, the Court of Appeals noted that neither a claim of sentencing manipulation or a claim of poor conditions of presentencing confinement are appropriate 3553(a) considerations. The Court of Appeals noted that a claim of sentencing manipulation arises when the government engages in improper conduct that has the effect of increasing a defendant's sentence. This Circuit does not recognize such a claim, although other circuits do, and the court refused to overturn its prior precedents. Likewise, prior circuit decisions made clear that "conditions of presentencing confinement are not considered as part of the 3553(a)

factors,” and the district court therefore did not err in refusing to considering those conditions in mitigation. Accordingly, the sentence was reasonable.

Attorney fees not an appropriate factor for court to use in support of a below-guideline sentence. *United States v. Presbitero*, 569 F.3d 691 (7th Cir. 2009; No. 07-1129). In prosecution for filing false tax returns, the Court of Appeals held that the district court improperly considered the defendant’s attorney’s fees when imposing a below-guideline sentence. At sentencing, the district court imposed a below-guideline sentence, stating that the defendant had probably spent a good part of his savings defending against the charges brought by the government, that the investigation had gone on for 10 years, and involved a great deal of stress and expense for the defendant. The Court of Appeals held that these factors were not mitigating. Using such factors as a basis for imposing a lower sentence would not only encourage overspending, but also would be double counting, since the pricier the lawyer that a defendant hires, the less likely he is to be convicted and given a long sentence. Accordingly, on remand, the district court was prohibited from considering such factors.

Within-range sentence vacated where district court failed to comment on defendant’s non-frivolous argument for a bottom of the range sentence. *United States v. Harris*, 567 F.3d 846 (7th Cir. 2009; No. 08-1192). In prosecution for drug offenses, the Court of Appeals vacated the defendant’s 504-month sentence because the district court failed to adequately explain the sentence. The defendant’s guideline range was 360 months to life. At sentencing, he argued that his serious health problems, including diabetes, warranted a sentence at the low end of the range. The totality of the district court’s explanation for the sentence imposed was that “the Court’s considered all the information in the presentence report including guideline computations and factors set forth in 3553(a),” along with a few lines in the Statement of Reasons noting the defendant had four prior drug felony convictions and was a leader in the “drug business.” The Court of Appeals noted that rote statements that a judge considered all the relevant factors will not always suffice. Although the sentence was within the range, the sentence was 12-years above the bottom of the range, no party requested the sentence imposed, and the judge provided almost no explanation for that precise sentence. Given that the defendant’s argument based upon his health issues was not frivolous, the district court could not pass over that argument without comment and, therefore, the court could not assure itself that the district court weighed the health factors against other factors when it imposed the sentence.

District courts may avoid resolving complicated guideline issues and rely solely on 3553(a) factors when imposing sentence, so long as they make it clear that they would impose the same sentence regardless of how the guideline issues was resolved. *United States v. Sanner*, 565 F.3d 400 (7th Cir. 2009; No. 07-3738). Upon consideration of two consolidated appeals raising challenges to the application of the guidelines, the Court of Appeals suggested that district courts can avoid complicated guideline issues by relying upon 3553(a) factors at sentencing. One defendant challenged a 16-level enhancement for having illegally re-entered the country subsequent to conviction for a crime of violence. The other defendant challenged a 1-level increase to his bank robbery offense level based on the value of a car he stole during the robbery. Regarding the 16-level enhancement, the Court of Appeals first concluded that the enhancement was appropriate, based on a prior conviction the defendant had which was not challenged in the district court. The court then went on to note how the issues in these cases illustrate how guideline calculations can sometimes bog a case down—and generate an appeal—even if the end result has little importance in the big picture. The court said that the guideline issues need not have been decided. For example, in the illegal re-entry case, the judge could have viewed the factual basis for the defendant’s prior

conviction as an indication that he was a bad guy and that the public deserved protection from further criminal acts he might be inclined to commit. The judge could have said that she made her best assessment of the guideline calculation but that the defendant's sentence was not dependent on that calculation. She could have increased the sentence pursuant to 3553(a) factors, regardless of whether the crime was technically a "crime of violence." When a judge proceeds in such a manner, however, she must make clear that the 3553(a) factors drive the sentence without regard to how the prior conviction fits under a particular guideline. Doing so will make the often nit-picking review of issues like this under the now advisory guidelines scheme unnecessary. Regarding the 1-level enhancement for the stolen care, the court stated that it was hard to see why a district judge should bother with a possibly controversial adjustment which will have no—or little—effect on the sentence. Again, the judge could have just considered 3553(a) factors and imposed the same sentence, avoiding the tricky guideline question, so long as the judge made it clear that the sentence was based on the 3553(a) factors instead of the guideline question.

District court's are not required to ignore child-exploitation guidelines, even though they are not the product of the Sentencing Commission's typical empirical research method. *United States v. Huffstatler*, 561 F.3d 694 (7th Cir. 2009; No. 08-2622). In prosecution for possession of child pornography, the Court of Appeals rejected the defendant's argument that his sentence was unreasonable because the child-pornography sentencing guidelines are not the product of empirical research. The child-pornography guidelines are atypical in that they were not based on the Sentencing Commission's nationwide empirical study of criminal sentencing. In the main, the Commission developed Guidelines sentences using an empirical approach based on data about past sentencing practices. But the guidelines for child-exploitation offenses were not crafted this way. Instead, much like policymaking in the area of drug trafficking, Congress has used a mix of mandatory minimum penalty increases and directives to the Commission to change sentencing policy for sex offenses. Since it was the Commission's failure to exercise its "characteristic institutional role" that persuaded the Supreme Court that district courts possess the discretion to sentence below the crack guidelines based on policy disagreements in *Kimbrough*, the defendant contended that sentencing judges possess the same discretion when dealing with the child-exploitation guidelines. Over the past year, many district courts have repeatedly cited an argument developed by federal defender Troy Stabenow for the proposition that the child-pornography guidelines' lack of empirical support provides sentencing judges the discretion to sentence below those guidelines based on policy disagreements with them. The defendant here, however, took the argument one step further, not only arguing that a district court *may* impose a non-guideline sentence based upon a policy disagreement with the guideline, but *must* do so. The Court of Appeals rejected this extension of the argument. Despite *Kimbrough*, the crack guidelines remain valid. Judges are not *required* to disagree with the crack guidelines; a within-guidelines sentence may be reasonable. The child-exploitation guidelines are not different; while district courts perhaps have the freedom to sentence below the child-pornography guidelines based on disagreement with the guidelines, they are certainly not required to do so. Accordingly, the district court committed no error, and the ultimate sentence imposed was reasonable.

Miscalculation in Guideline calculations can be harmless where district court would have imposed same sentence under 3553(a) and sentence was reasonable. *United States v. Abbas*, 560 F.3d 660 (7th Cir. 2009; No. 07-3866). Upon consideration of the defendant's argument that the district court made a guideline error at sentencing, the Court of Appeals found that the district court committed error, but that the error was harmless. Specifically, the Court of Appeals found that the district court improperly applied Guideline section 2C1.1 (extortion under color of official right) to an individual who was not a government agent, but was instead impersonating one. Notwithstanding

the error, the court found it to be harmless, because the district court specifically stated and explained that, even without application of the particular guideline section, the judge would have imposed the same sentence using 3553(a) factors. The Court of Appeals noted that a finding of harmless error is only appropriate when the government has proved that the district court's sentencing error did not affect the defendant's substantial rights. To prove harmless error, the government must be able to show that the Guidelines error did not affect the district court's selection of the sentence imposed. This question being different from reasonableness review, a judge must first correctly understand what the Guidelines recommend. After getting the Guidelines right, the district judges possess discretion to take the defendant's circumstances into account under 3553(a). The recognition that some Guideline miscalculations can be harmless does not change these basic principles. It merely removes the pointless step of returning to the district court when the court is convinced that the sentence the judge imposes will be identical to the one it remanded. In conducting reasonableness review, the court takes the degree of variance into account and considers the extent of a deviation from the Guidelines. Therefore, on review it is crucial to understand just what the correct Guidelines sentence should be even if the court is certain that the sentence imposed in the district court would have been the same absent the error. The correct sentence provides the launching point for the courts substantive reasonableness review. Here, the court made a guideline error. But she stated that she would have imposed the same sentence without the guideline question. Thus, the error was harmless. Next, the court found the sentence to be reasonable, noting that the judge made a searching evaluation of the defendant's case.

G. STATUTORY ISSUES

An 851 Notice of Enhancement which mislabeled a misdemeanor as a felony and incorrectly identified the defendant's felony was harmless error. *United States v. Lane*, 591 F.3d 921 (7th Cir. 2010; No. 09-1057). In prosecution for drug offenses, the Court of Appeals held that errors in the 851 notice were harmless. The government mislabeled a misdemeanor as a felony and misidentified the defendant's felony. The court noted that the two main purposes of an 851 information are to give the defendant an opportunity to contest the accuracy of prior convictions and to inform his decision on whether to plead guilty or proceed to trial. Here, the government correctly identified the dates, jurisdiction, and classification of two of the priors as felonies, which put the defendant on notice that he faced a mandatory life sentence. This was a case of careless mislabeling that was harmless.

An 851 Notice of Enhancement was sufficient even though it did not set forth the conviction upon which the enhancement was based, but rather referred to a separate pretrial services report which contained a list of 19 different criminal dispositions. *United States v. Williams, Jr.*, 584 F.3d 714 (7th Cir. 2009; No. 09-1924). In prosecution for drug offenses, the Court of Appeals held that an 851 Notice of Enhancement was sufficient even though it did not set forth the conviction upon which the enhancement was based, but rather referred to a separate pretrial services report which contained a list of 19 different criminal dispositions. The government's notice of enhancement did not specifically identify the prior conviction upon which the notice was based, but rather referred to the pretrial services report, which contained a list of 19 criminal dispositions in the criminal history section. The defendant first argued that the notice failed to comply with the statute because it did not contain the information in the pretrial services report, but rather that information was in a separate document. The court noted that the argument implied that stapling the document to the notice would not have complied with the statute, which is too strict an interpretation of the statute. Second, the defendant argued that even if a physically attached list of convictions would satisfy the statutory requirement, a physically separate list would not. Again, the court concluded

that the difference between stapling a list of convictions to the notice and setting forth the convictions in a completely separate document is too slight. If the conviction is incorporated by reference, that is enough. Finally, the defendant argued that the government should not be allowed to send the defendant's lawyer to rummage in the probation office and try to guess which in a long list of "dispositions" the government might argue was a conviction usable for enhancement—especially, as in this case, when the list had not even been compiled yet. The court, however, held that even if the government failed to comply with the statute, the notice adequately informed the defendant of what he was facing and so fulfilled the statutory purposes. In this case the lawyer could arrive at the critical conviction in a simple two-step reading: the notice itself, which referred him to the list of convictions in the probation office; and the list itself, in which only one eligible conviction appeared, as would be obvious from a quick reading. Accordingly, although the court warned the government that such sloppy compliance with the statute was risky, it found no reversible error.

Prior "State sex offense" which triggers statutory mandatory life sentence need not actually have a federal jurisdictional nexus to trigger the statute. *United States v. Rosenbohm*, 564 F.3d 820 (7th Cir. 2009; No. 08-2620). In prosecution for federal sex offenses, the Court of Appeals held that the defendant was properly sentenced to a statutory mandatory life sentence under 18 U.S.C. § 3559(e)(1), because he had a "prior sex conviction." The defendant argued that his Illinois aggravated criminal sexual abuse conviction did not qualify as a "prior sex conviction." He argued that 3559(e)(2)(B) requires that a prior state conviction must have an actual basis for exercising federal jurisdiction to trigger the mandatory life sentence, and that his Illinois conviction did not qualify because no federal nexus *actually* existed. The Court of Appeals disagreed. The statute defines a "prior sex conviction" as "a conviction for which the sentence was imposed before the conduct occurred constituting the subsequent Federal sex offense, and which was a Federal sex offense or a State sex offense." "State sex offense" is further defined as "an offense under State law that is punishable by more than one year in prison and consists of conduct that would be a Federal sex offense if" the offense involved interstate or foreign commerce, the mails, or occurred within certain federal jurisdictions. The court held that the plain language indicated that a federal nexus need not *actually* exist. Rather, Congress intended that a prior state conviction must be congruent to one of several specific, enumerated federal offenses and *would have* constituted a "Federal sex offense" had a federal nexus existed. Thus, the statute does not require that a federal jurisdictional hook actually exist. The statute demands only that the conduct resulting in the prior state conviction satisfy the elements of one of the Federal sex offenses enumerated in § 3559(e)(2)(A) before a district court may rely on it as the basis for imposing a mandatory life sentence. The defendant's prior conviction clearly met that requirement.

Defendant's eight prior Illinois felony burglary convictions did not count as ACCA predicates offenses because the DOC notice sent to him upon successful completion of his prison terms restored his civil rights without expressly noting that his right to possess a firearm had not been restored. *Buchmeier v. United States*, 581 F.3d 561 (7th Cir. 2009; No. 06-2958). Upon consideration of the denial of a 2255 petition alleging ineffective assistance of counsel due to counsel's failure to challenge an Armed Career Criminal enhancement, the Court of Appeals held that the content of a notice sent to the defendant upon completion of his Illinois prison terms precluded his prior convictions from being qualifying felonies. Because the government did not argue that the defendant could not make out an IAC claim, but instead went directly to the merits of the nature of the prior convictions, the Court considered the case as if it was a re-litigation of the direct appeal and did not consider the IAC question. The defendant had eight felony burglary convictions in Illinois. After completing his prison term for these offenses, he received a notice for

the state which said in part that “we are pleased to inform you of the restoration of your right to vote and to hold offices created under the constitution of the state of Illinois.” The defendant contended that this notice was a “restoration of civil rights” and that, because it did not provide that he “may not ship, transport, possess, or receive firearms,” none of the convictions meets the definition of a “crime punishable by imprisonment for a term exceeding one year.” Section 921(a)(20) states that “what constitutes a conviction of such a [crime for ACCA purposes] shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.” In cases interpreting this wording, the Seventh Circuit had previously held that three civil rights matter: the rights to vote, to hold office, and to serve on juries.” If these rights are restored, and there is no express provision excluding firearm possession from the restoration, then the conviction cannot support the enhancement. In the present case, the document the defendant received mentioned only two of the three civil rights; it being silent about jury service. Because this civil right had not been restored, the district court held that the convictions counted, relying on *United States v. Gillaum*, 372 F.3d 848, 859-61 (7th Cir. 2004), which holds that, when a restoration of rights omits one of the “big three” civil rights, there is not need for a firearm reservation.” In that case, the restoration mentioned neither the right to hold public office or serve on juries, so the defendant’s convictions counted. The Court of Appeals noted, however, that there is no need to notify a defendant that a given civil right has been restored, unless it was first taken away. The right to serve on juries is not suspended in Illinois; the notice did not mention its restoration because he never lost it. Although *Logan v. United States*, 128 S.Ct. 475 (2007), holds that, if a person never loses *any* of the “big three” civil rights, then they cannot be “restored” for the purpose of the paragraph in question, the defendant here did lose civil rights; they could be, and were, “restored” to him; and the document announcing this restoration could have contained (but lacked) a warning that he must not possess firearms. Finally, *United States v. Erwin*, 902 F.2d 510 (7th Cir. 1990) holds that the “express” notice must be in the document informing the convict of the restoration, rather than in the state’s statutes at large. Four other circuits agree with this holding, while four others do not. The Seventh Circuit considered overruling *Erwin*, but declined to do so based on principles of *stare decisis*. Although Illinois, by statute, did not restore the defendant’s right to possess firearms, because such an exclusion was not expressly contained in the restoration of rights which the defendant received, this state statute did not matter under *Erwin*. Accordingly, the defendant’s burglary convictions did not count for ACCA purposes. The decision was *en banc*, with three judges dissenting.

XIV. SUPERVISED RELEASE

A. CONDITIONS

A district court is free to consider halfway-house placement as a possible condition of supervised release. *United States v. Anderson*, 583 F.3d 504 (7th Cir. 2009; No. 09-1958). The Court of Appeals held that a district court is free to consider halfway-house placement as a possible condition of supervised release. The district court concluded that the Seventh Circuit’s decision in *United States v. Head*, 552 F.3d 640 (2009), precluded it from imposing, as a condition of supervised release, placement in a halfway house. The defendants argued that the court over-read *Head*, which in their view held only that halfway-house placement is not expressly authorized as a discretionary condition of release by §§ 3583(d) and 3563(b), not that it is affirmatively forbidden. The Court of Appeals noted that district courts have authority to impose certain specific discretionary conditions

of supervised release, but the statute authorizing these conditions also includes a catch-all phrase which allows a court to impose “any other condition it considers to be appropriate.” Those other conditions must respect three limitations. First, the condition must respect factors set forth in 3553(a). Second, the condition cannot impose any “greater deprivation of liberty than is reasonably necessary” to advance the goals of deterrence, protection of the public, and serving the defendant’s correctional needs. Third, the condition must be consistent with the Sentencing Commission’s policy statements. Halfway-house placement has always affirmatively been authorized as a discretionary condition of probation. Although it was excluded from the list of discretionary conditions expressly permitted as a condition of supervised release, the statute is otherwise silent about this particular condition. Moreover, the 2008 amendment to the statute does not carry with it the negative inference that halfway-house placement fell beyond the scope of the residual clause prior to the amendment. As the court discussed in *Head*, the omission of halfway-house placement from the list of permitted conditions was almost certainly accidental, and the court understood the 2008 amendment simply to be correcting that glitch in the statute. Accordingly, the court held that placement in a halfway house should be viewed as a legitimate additional condition not affirmatively authorized by statute, rather than one expressly forbidden.

B. GUIDELINE RANGE

Reversible error where district court fails to calculate advisory Guideline range for supervised release term prior to imposing sentence. *United States v. Gibbs*, 578 F.3d 694 (7th Cir. 2009; No. 08-2186). The Court of Appeals vacated the defendant’s sentence because the district court failed to calculate the defendant’s guideline range for supervised release before imposing sentence. At sentencing, the district court noted that the defendant’s statutory supervised release term was five years to life, but nothing in the record indicated that the district court ever calculated the supervised release term under the advisory Guidelines. The Court of Appeals noted that a district court must begin all sentencing proceedings by correctly calculating the applicable Guideline range, and a failure to do so is a significant procedural error. In the present case, the defendant’s guideline range for supervised release was five years, but the court sentenced him to ten. Given that nothing in the record indicated the district court calculated the advisory supervised release term range, the defendant was entitled to a redetermination of his supervised release term.

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