The BACK BENCHER

Central District of Illinois Federal Defenders

Vol. No. 40 Summer 2006

DEFENDER'S MESSAGE

Summertime brings a break from studies for schoolchildren, but we criminal defense lawyers are not so lucky. Federal criminal defense practice requires constant study of an ever-changing legal landscape. We can ill-afford to be caught unaware of changes in the law which either benefit or harm our clients. The stakes are simply too high--namely, our clients' liberty.

Illinois has finally realized what we have all known for a long time. Lawyers need continuing legal education to effectively represent their clients and practice their trade. As we noted in the last issue of *The Back Bencher*, beginning this month, Illinois lawyers are required to accumulate 20 hours of CLE credit for their first two-year reporting period, and after the program is fully implemented, will be required to accumulate 30 hours of credit every two years thereafter. Four of these hours must be "professional responsibility" credits.

Recognizing the need for continuing legal education, our office has always provided seminars for panel attorneys at least annually, and I am pleased to invite you to our 2006 CJA Panel Attorney Seminar to be held on Tuesday, August 8, 2006, from 10:00 a.m. until 3:30 p.m. The seminar will be held in Judge Jeanne E. Scott's courtroom in Springfield, Illinois. We selected Springfield for its central location in the district (except for Rock Island panel attorneys to whom we apologize), requiring panel attorneys to travel no more than an hour and one-half to attend. Likewise, the later start-time and earlier end-time for the seminar will hopefully give each of you enough time to arrive for the beginning of the seminar and make it back home at a reasonable hour. As in the past, there is no charge to attend the seminar. We will also be applying for 4.5 hours of Illinois CLE credit (including 1 hour of "professional responsibility" credit), and certificates of attendance will be issued to attorneys who attend the entire program.

Although free, the value of the seminar is inestimable, as the line-up of speakers demonstrates. Specifically, for the professional responsibility portion of the program, Terence F. MacCarthy (depending on availability) and myself will give a presentation on "Interactive Ethics for the Criminal Defense Bar." Terry is a nationally renowned speaker, and one of the longest serving Federal Defenders in the country, having established the Federal Defender Program in Chicago. Many of you have had an opportunity to see Terry in action at seminars in previous years and know what a great presenter he is. As for me, most of you already know me, and I'll say only that I've learned a thing or two about ethics in the forty-five years I've been practicing law.

We are also pleased to have University of Illinois Law Professor Seven J. Beckett giving a presentation on Jenks Act disclosures. Professor Beckett is the CJA Panel Representative for our district and one of the most experienced federal criminal defense lawyers in the area. Of equally impressive experience, Phillip J. Kavanaugh will speak on rebutting the presumption of reasonableness--an issue we encounter in almost every case. Phil is currently the Federal Public Defender for the Southern District of Illinois, and he brought over two decades of experience as an Assistant Defender to his current position. Finally, our own staff members Jonathan E. Hawley (Appellate Division Chief), Robert A. Alvarado (Trial Division Chief), and John C. Taylor (Assistant Defender) will address the topics of

current Seventh Circuit law, sentencing strategies, and the difference between crack and cocaine base, respectively.

I strongly encourage you to take advantage of this opportunity to refine your legal skills, while at the same time earning some free CLE credits. You will find the complete agenda for the program and the registration form at the back of this issue of *The Back Bencher*. Please register by July 25, 2006.

I look forward to seeing you in August.

Sincerely yours,

Richard H. Parsons
Federal Public Defender
Central District of Illinois

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CHURCHILLIANA

If we must die, let it not be like hogs
Hunted and penned in an inglorious spot,
While round us bark the mad and hungry dogs,
Making their mock at our accursed lot.
If we must die, O let us nobly die,
So that our precious blood may not be shed
In vain; then even the monsters we defy
Shall be contrained to honor us though dead!
O kinsmen! we must meet the common foe!
Though far outnumbered let us show us brave,
And for their thousand blows deal one death blow!
What though before us lies the open grave?
Like men we'll face the murderous cowardly pack,
Pressed to the wall, dying, but fighting back!

- Leo M. Jenkins

"'If We Must Die': Winston Churchill and Claude McKay" *Notes & Queries* 50 September 2003): 333-37

Dictum Du Jour

Nothing in life is so exhilarating as to be shot at without result.

- Winston Churchill

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I hit the ball as hard as I can. If I can find it, I hit it again.

- John Daly

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Last week, I stated this woman was the ugliest woman I had ever seen. I have since been visited by her sister, and now wish to withdraw this statement.

- Mark Twain

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The secret of a good sermon is to have a good beginning and a good ending; and to have the two as close together as possible.

- George Burns

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Santa Claus has the right idea. Visit people only once a year.

- Victore Borge

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The nose of the bulldog has been slanted backwards so that he can breathe without letting go.

- Winston Churchill

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I was married by a judge. I should have asked for a jury.

- Groucho Marx

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Only Irish coffee provides in a single glass all four essential food groups: alcohol, caffeine, sugar and fat.

- Alex Levine

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As you know, World Cup Soccer is underway in Germany. In 1952, the British team was badly under-manned and riddled with injuries. They were set to play Germany, a much stronger and more regarded team for the final. On the eve of this final match, Mr. Churchill made an address to the British people along the following lines: "My fellow Britains. Tomorrow our team plays against the Germans. The sports writers do not give us much of a chance. If tomorrow we should be defeated by the Germans in our national sport, take heart. Although the Germans have beat us in our national sport, we have defeated them in their national sport -- TWICE."

Dressed to the Nines? A best guess of the meaning of this phrase's origins isn't clear, but there are theories-- that it refers to the smart dress of the British Army's 99th Regiment of Foot; the transcendent chic of the nine Muses; or the time-mangled result of "dressed to the eyes," which in medieval English was "to the eyne."

- Chicago Tribune Magazine

"Childs' inability to show prejudice is, in part, a function of his having a very skillful defense attorney (Robert Alvarado, an assistant Federal Defender from Peoria) at his side. Counsel was able to thoroughly impeach the witnesses once the information was belatedly made available. Nevertheless, Childs contends that, had he known of the deceit earlier, he might have offered an entrapment defense. He does not explain exactly how the information would have provided him with an entrapment defense he did not have without it, and we are at a loss to guess. Judge Mihm did not abuse his discretion in determining that no prejudice existed.

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That said, as is also surely clear by now, we are convinced that the conduct of the government was designed to deliberately mislead the court and defense counsel. The transcript of the proceedings speaks for itself. It shows the stonewalling the prosecution engaged in. Detective Wall's answer to questions about the timing of the discovery of the deception was all too often, "I do not recall." Judge Mihm had the following exchange with the prosecutors:

MR. CAMPBELL: That was approximately a week or so ago.
THE COURT: Was it before—
MR. CAMPBELL: A week or so before trial.
THE COURT: Well, why wasn't that information conveyed prior to trial?
MR. CAMPBELL: We had to confront her about it and try to figure out what it was she had done and how she had done it.
THE COURT: I don't understand that. I mean how did you learn about it? She says she told you.
MR. CAMPBELL: Well, I think that that may not be quite how it happened because I think she was confronted by us.

The prosecutors in this case were Assistant United States Attorneys Bradley Murphy and John Campbell from the Central District of Illinois. Judge Mihm indicated on the record that he had never previously known either attorney to fail to act in good faith. That said, he expressed dismay at their handling of the problems that arose in this case.

THE COURT: Did you confront her with this prior to trial?
MR. CAMPBELL: Yes, we did.
THE COURT: Why didn't you tell defense counsel about it prior to trial?
MR. CAMPBELL: We talked to her last night again and reviewed it with her and we did tell him, defense counsel.
THE COURT: He didn't learn this until last Tuesday or Wednesday.
MR. CAMPBELL: I believe that's the first time we told him.
THE COURT: Why didn't you tell him?
MR. CAMPBELL: I'm not sure, Your Honor, why we didn't. There was a transcript. The transcription was part of the problem, trying to sort out what it was we could confirm, whether it was true or not, whether it even happened or not, so it was in that rush to get to trial that we didn't do that apparently.

Campbell's explanation is weak and unconvincing and makes it appear, at least, that there was a deliberate effort to hide the facts from the court and defense counsel. After this fiasco, one would hope that the office of the United States Attorney is bending over backwards to regain the good opinion of Judge Mihm and this court."

--*United States v. Childs*, 447 F.3d 541 (7th Cir. 2006)

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"While camping at defendants' campground, plaintiff, Kelly Pageloff, stepped on a walnut and fell. Plaintiffs filed a common law negligence and loss of consortium action against defendants, Maxine Gaumer and Ruffit Park (hereinafter, collectively Gaumer). The circuit court of Whiteside County granted defendants' motion for summary judgment. Plaintiffs appeal.

Like many Americans, plaintiffs apparently enjoy getting away from their home and camping in the great outdoors. They own their own camper. During Labor Day weekend 2001, the Pageloffs went camping at Ruffit Park, which was owned by Maxine Gaumer. Gaumer owned Ruffit Park for nearly 40 years and oversaw the maintenance and operation of the campground property. The Pageloffs had camped at Ruffit Park many times. At the time that Kelly Pageloff called Gaumer to make a reservation for Labor Day weekend, she requested their usual campsite.

When the Pageloffs arrived at Ruffit Park, the site they had requested was still occupied by another camper so Gaumer offered another site. The Pageloffs were dissatisfied with this other site, but they chose to stay at Ruffit Park instead of returning home. Walnut trees were adjacent to this campsite, and for the entire weekend walnuts, as they are prone to do in late summer, fell off the trees onto the site. What might have been a baker's dream, turned into plaintiffs' nightmare: walnuts everywhere. During her deposition, Kelly stated that she and Dale had been cleaning the fallen walnuts up all weekend and that the walnuts "were everywhere" and "everywhere you tried to walk." Falling walnuts even damaged plaintiffs' camper. Notwithstanding the unrelenting barrage of falling nuts, plaintiffs remained on the campsite. The Pageloffs brought a rake with them and used it to clean walnuts from the campsite during the entire weekend. Three days after their arrival, while cleaning up the campsite to go home, Kelly stepped on a walnut and fell, suffering a rather severe injury to her left ankle. She did not know how long the offending nut had been on the ground."

--*Pageloff v. Gaumer*, 2006 WL 1061962 (Ill.App.3 Dist. Apr. 19, 2006) (No. 3-04-0533) (Justice Daniel Schmidt).

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"Divorce rates are disturbingly high. Sometimes, martial splits get nasty when an ex-spouse decides to dish out a little dose of discomfort to his or her former partner. And as far as dishing out discomfort is concerned, the havoc visited on Chicago lawyer Richard Connors by his ex-wife would win a gold medal for creativity. With substantial assistance from his ex, Connors stands convicted in federal court of (among other things) violating a law we seldom encounter, the Trading with the Enemy Act [for illegally importing cigars from Cuba]."

--*United States v. Connors*, 441 F.3d 527 (7th Cir. 2006) (Judge Evans).

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"On October 23, 2003, Bevolo and his family attended a martial arts banquet for Christiona Kajukenbo Ministry. Bevolo, an Illinois resident, was a student of Kajukenbo, a Hawaiian form of martial arts. Bevolo had been studying various forms of martial arts for five years; he had been studying Kajukenbo since January 2002. At the banquet, wearing his Gi, a black uniform worn by martial arts practitioners, Bevolo's class warmed up and sparred during the first thirty minutes of the banquet. During this time, while other classmates sparred with each other, Bevolo warmed up solo. The warm-up and sparring session was followed by a promotions ceremony and '[d]inner, [f]ellowship, and [p]hotos.'

One of the 'very special guests' from Missouri (and featured speaker) that evening was Professor Carter, a Kajukenbo expert and an 8th degree black belt. Evidently, Carter has the rare ability to 'move people with his mind.' After dinner, Bevolo was introduced to Carter and asked Carter to demonstrate this uncanny skill. With a group of onlookers (including Bevolo's own family) present and with cameras in hand, Carter began his demonstration. The demonstration, however, included the use of Carter's well-trained hands as well as his well-trained mind. The mood in the air was light, and Carter demonstrated various pressure points on Bevolo, including pulling his hair and talking with the crowd while Bevolo's family took pictures. After performing several maneuvers, including two that put Bevolo on the ground, Carter hit him in the neck. Carter did not intend to injure him, but serious damage was done with that one blow. None of the previous blows or maneuvers had caused injury.

One of the stated goals of Kajukenbo is that, '[w]hen attacked, a student's instincts will take over and the body will react to the situation, diffusing it without hesitation.' Unfortunately for Bevolo, his body did not react to Carter's demonstration, nor did it make any attempt to diffuse the situation. As the old saying goes, '[i]t's all fun and games until someone loses an eye,' or in this case, until someone injures his neck and has to have a cadaver bone and a titanium plate surgically inserted."

--*Bevolo v. Carter*, 447 F3d 979 (7th Cir. 2006) (Judge Kanne).

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"This assumes, however, that as organist and music director, Tomic, unlike the janitor at St. Mary's Cathedral, really did have religious duties. So far as his role as organist is concerned, his lawyer says that all

Tomic did was play music. But there is no one way to play music. If Tomic played the organ with a rock and roll beat, or played exerts from *Jesus Christ Superstar*, at an Easter Mass he would be altering the religious experience of the parishioners. . . At argument, Tomic's lawyer astonished us by arguing that music has in itself no religious significance--its only religious significance is in its words. The implication is that it is a matter of indifference to the Church and its flock whether the words of the Gospel are set to Handel's *Messiah* or to 'Three Blind Mice.' This is obviously false."

--*Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036 (7th Cir. 2006) (Judge Posner).

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"The Government sought clarification of the court's views regarding its discretion to depart from the Guidelines. The Government asked, '[I]s it the Court's position today that it doesn't believe it can go outside the advisory Guidelines because of the nature of the offense and the cases that the Court has cited[?]' The court responded, 'No,' explaining that it was aware of its 'authority in appropriate cases to fashion what [it] believe[s] to be a reasonable sentence in any case.' It added, however, that 'Congress created the Protect Act' because it is, 'in the vernacular, "damn mad" at judges who were continually putting people on probation because they had the wherewithal to bring in an expensive psychiatrist and say, "this isn't going to happen again."'"

--*United States v. Grigg*, 442 F.3d 560 (7th Cir. 2006) (Judge Ripple, quoting Judge Stadtmueller).

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"The immigration judge's analysis of the evidence was radically deficient. He failed to consider the evidence as a whole, as he was required to do by the elementary principles of administrative law. Instead he broke it into fragments. Suppose you saw someone holding a jar, and you said, 'That's a nice jar,' and he smashed it to smithereens and said, 'No, it's not a jar.' That is what the immigration judge did."

--*Cecaj v. Gonzales*, 440 F.3d 897 (7th Cir. 2006) (Judge Posner).

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"This is an appeal run amok. Not only does the appeal lack merit, the opening brief is a textbook example of what an appellate brief should not be. In 76,235 words, rambling and ranting over the opening brief's 202 pages, appellant's counsel has managed to violate rules of court; ignore standards of review; misrepresent the record; base arguments on matters not in the record on appeal; fail to support arguments with any meaningful analysis and citation to authority; raise an issue that is not cognizable in an appeal by her client; unjustly challenge the integrity of the opposing party; make a contemptuous attack on the trial judge; and present claims of error in other ways that are contrary to common sense notions of effective appellate advocacy--for example, gratuitously and wrongly insulting her client's daughter (the minor in this case) by, among other things, stating the girl's developmental disabilities make her 'more akin to broccoli' and belittling her complaints of sexual molestation by characterizing them as various 'versions of her story, worthy of the Goosebumps series for children, with which to titillate her audience.'"

--*In re S.C.*, 2006, 138 Cal.App.4th 396 (2006).

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"Ordinarily we count on gravity to keep heavy items in place; and so when flour barrels, armchairs, and truck wheels become airborne we assume first that something has gone wrong. Such events, lawyers say, speak for themselves, or in Latin, 'res ipsa loquitur,' and the blame for any resulting injury can be imputed to the person who had control of the item before it became a dangerous projectile."

--*Maroules v. Jumbo, Inc.*, ___ F.3d ___ (7th Cir. 2006; No. 04-3248).

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"Those who commit crimes – regardless of whether they wear white or blue collars – must be brought to justice. The government, however, has let its zeal get in the way of its judgment. It has violated the Constitution it is sworn to defend.

The final justification may be disposed of quickly. The job of prosecutors is to make the government's best case to a jury and to let the jury decide guilt or innocence. Punishment is imposed by judges subject to statute. The imposition of economic punishment by prosecutors, before anyone has been found guilty of anything, is not a legitimate governmental interest – it is an abuse of power. The government's other points, however, are far more substantial.

Moreover, a defendant's exercise of his Sixth Amendment right to counsel is not to be feared or avoided by the government.

No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise those rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, there is something very wrong with that system.

Further, the government's interference in the KPMG Defendants' ability to mount a defense "creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general.

The government was economical with the truth in its early responses to this motion. It is difficult to defend even the literal truth of the position it took in its first memorandum of law. KPMG's decision on payment of attorneys' fees was influenced by its interaction with the USAO and thus cannot fairly be said to have been a decision 'made by KPMG alone,' as the government represented. The government's assertion that the legal fee decision was made without 'coercion' or 'bullying' by the government can be justified only by tortured definitions of those terms. And while it is literally true, as Mr. Weddle wrote in his later declaration, that the government did not 'instruct' or 'request' KPMG to do anything with respect to legal fees, that was far from the whole story. Those submissions did not even hint at Mr. Weddle's raising of the legal fee issue at the very first meeting, at Ms. Neiman's 'rewarding misconduct' comment, at Mr. Weddle's statement that the USAO would look at the payment of legal fees 'under a microscope,' or at the government's use of KPMG's willingness to cut off payment of legal fees to pressure KPMG personnel to waive their Fifth Amendment rights and make proffers to the government. Those omissions rendered the declaration and the brief that accompanied it misleading.

Every court is entitled to complete candor from every attorney, and most of all from those who represent the United States. These actions by the USAO are disappointing. There should be no recurrence.

As a unanimous Supreme Court wrote long ago, the interest of the government 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' Justice is not done when the government uses the threat of indictment – a matter of life and death to many companies and therefore a matter that threatens the jobs and security of blameless employees – to coerce companies into depriving their present and even former employees of the means of defending themselves against criminal charges in a court of law. If those whom the government suspects are culpable in fact are guilty, they should pay the price. But the determination of guilt or innocence must be made fairly – not in a proceeding in which the government has obtained an unfair advantage long before the trial even has begun."

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[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 Wilkes *series of books due to his use of a* nom de plume*, Winston Schoonover. You can read more* Wilkes*-related stories in old issues of* The Champion *magazine, as well as in two 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 from.*

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.

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

WILKES: His Life and Crimes

A Novel by: Winston Schoonover

- 1 -
Meet the Honorable Joseph Blugeot

I do not like your cold justice; out of the eye of your judges there always glanceth the executioner and his cold steel.

- Nietzsche

The horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (several of them are quite intelligent), it is simply that they have got used to it. Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they see only their own workshop.

- G. K. Chesterton

It is true. I have been critical in the portraits I have painted of the federal and state judges before whom Wilkes and I appeared the many years we were in practice together. As I look back, I have erred. But it has been on the side of charity!

How is it that when the occasional decent human being gets to don the judicial black, an awful, inevitable transition takes place - hail fellows, well met, so quickly turn into cunning, snapping vipers? How come it's always two against one in a criminal trial? How come when you finish examining a witness, you instinctively feel like turning to Hizoner and saying, "Your witness"?

How come? I haven't the foggiest. All I know is that judges sooner or later metamorphose into rigid arch-protectors of the state. Nietzsche said the state is the coldest of all cold monsters. Judges are its frozen essence, each day sitting as living proof of the state's coldest lie:

"I, the State, am the people."

Blugeot

The life span of a judge is like the fruit of the lemon tree: sweet blossoms turning to bitter fruit. Some of the blossoms are rotten from the start. So it was with Judge Joseph P. Blugeot.

Blugeot, unlike so many of his colleagues, was neither stupid nor a fool. There were even times in his court when a burst of fairness broke out, typically when the defendant was white, female, and pretty. Other than that, he was a uniformly wicked judge with the temperament of a cultivated mass murderer - like the Butcher of Lyon.

Blugeot fancied himself a cultured man of the world. He was fluent in several of the romance languages and loved to make derisive comments in Latin or an archaic Italian dialect to demonstrate his worldly intelligence. His favorite phrase - always interjected at the conclusion of a hearing to suppress an involuntary confession - was "*Non refert quomodo veritas habeatur, dommodo habeatur.*" It was the motto of the Spanish Inquisition: "It matters not how the truth was obtained, so long as it has been obtained."

In any language, Joseph P. Blugeot was a judge to be avoided.

Johnny Wad

For the longest time, Wilkes and I were able to keep all of our clients out of the courtroom of Judge Joseph P. Blugeot. Then came Johnny Wadkins, aka Johnny Wad, a nineteen-year-old black kid from Harlem who had been arrested for the high crime and misdemeanor of possessing one marijuana cigarette.

His first lawyer, a V-6 whom Wad hired at Montgomery Ward, being unable to extract a quick guilty plea from his client, waived jury in front of Blugeot, and agreed to a trial with the judge as trier of fact. In Blugeot's court, a nonjury trial was a slow plea of guilty.

As always, Blugeot used the court trial as a forum to vent his antidefense juridical philosophy. After Johnny Wad's lawyer criticized the arresting officer for employing the odious doctrine of guilt by association in arresting Wad for possession of the joint (the marijuana cigarette was found too closely associated with Johnny Wad at the time of his arrest - squashed under the sole of his foot), the judge sighed at the ridiculous defense argument and muttered to no one in particular, "*Optimi consiliarii mortui*" ("The best counselors are dead").

When the lawyer argued that the prosecution had proven the seized substance to be only a green, somewhat scorched leafy vegetable matter and not the prohibited controlled substances, Blugeot blurted, "*Cymini sectore!*" ("Hairsplitter!").

The V-6 continued arguing that the prosecution utterly failed to prove its case beyond a reasonable doubt. He said, "In the words of Chief Justice Warren, reasonable doubt is the law of the land." Blugeot responded, "No, I think Cicero said it best: '*Salus populi suprema lex'* ('The safety of the people is the supreme law')."

By this time, a concerned Johnny Wad, young and completely ignorant in the ways of the law, turned to his V-6 and asked, "Who is this guy?" His attorney shrugged and closed his plea to Blugeot with the comment, "The evidence produced is so insufficient that my client would be acquitted in any courtroom in the western world." To which Blugeot sighed contemptuously and responded in Sicilian, "*Si, poi vinni assoltu tanti voti e tanti comu in Italia troppo spissu'e d'su*" ("Yes, he was acquitted many times as in Italy is too often done").

After hearing this torrent of untranslated word salad, a disturbed Johnny Wad asked his V-6, "Ain't he supposed to speak to us in English? Don't the dude know English, man? I don't dig the mother's jive!" The V-6 again shrugged his shoulders as Blugeot pronounced Johnny Wad guilty and set a sentencing date in three weeks.

By this time, Johnny Wad realized he was in deep trouble and that his V-6 was not doing much to extricate him from it. Johnny Wad, being a bright kid, severed himself from his V-6 and pounded on our door.

To Take or Not To Take

Why take this petty matter, you ask? It certainly wasn't because Johnny Wad's case had any great legal issues or notoriety - i.e., the potential for lots of ink and free advertising, no matter what the context (except in an indictment, or worse yet, a conviction) means you're newsworthy and therefore a great lawyer. That's bad logic, but great for business. Thus, Wilkes's exclamation each time he saw his moniker in the news: "Ink! Gimme ink!"

But Wad's routine misdemeanor case offered no prospect of ink. There was no fee Wilkes could charge to compensate for the horror of an appearance with a black defendant before Judge Joseph Blugeot. And anyway, we had just pulled in some of our biggest fees in the history of the firm. We did not need the few bucks we might milk from this case.

So if it wasn't money, ink, or issues, what was it that caused my friend to take Johnny Wad's case? Absolutely nothing. There wasn't anything in this case but work, worry, and defeat. We turned down Johnny with a polite and emphatic "Not on your life."

A Voice From the Past

The next day, Wilkes got a call from our former client, Field Marshal Lyle Diderot, leader of the infamous Whiz Kids, an East Side gang which won its nickname by urinating on its fallen mugging victims. Wilkes had won a particularly disgusting rape case for the Field Marshal years ago, and he now learned the unfortunate fact that Johnny Wad was Diderot's first cousin. Diderot told Wilkes, "You gonna take Johnny's case, man." Wilkes thanked the Field Marshal for the referral, but declined as respectfully as he could, claiming the press of business.

"Some pencil-neck mouthpiece done got Johnny guilty in fronta some cracker judge who don't speak English. Gonna take all your voodoo to keep Johnny Wad outa da Tombs," said Lyle Diderot. "They done violated his rights," he added.

Again Wilkes declined, adding that if Johnny's rights had been violated, any decent lawyer would vindicate them. Wilkes was about to recommend someone when Diderot busted in, "You gonna represent Johnny Wad or we gonna violate all the rights you gots. You know those rights you gots? You gots the right to walk to court with two good legs. You gots the right to read da law with two good eyes. You gots the right to breathe with two good lungs."

So as it turned out, there was an excellent reason to take Johnny Wad's case. It wasn't the kind of retainer you seek out in the business, but it was one Wilkes could live with. We took the case.

Judgment Day

They come for him as they had come for thousands of others - with a trundle cart. In the name of the People, they judged him a traitor to the revolution. In the name of the State, they came to place him under the cutting edge of the national razor.

The doors flew open to the small place in the dungeon that kept the condemned man. The bright light of day nearly blinded him as he was pushed up the steps and thrown bodily into the cart. A huge laughing man with a pot belly pulled the car toward the site of the execution. Crowds filled both sides of the streets taunting the man, some mocking him with shouts of "Liberty! Equality! Fraternity!" - the rallying cry that had paved the bloody road from one monarch, King Louis, to one emperor, Bonaparte. In between and in the People's name, the People killed lots of people.

In a short time they reached the execution place; the condemned man looked up and saw the huge glistening blade that would soon take his head. He looked to the bucket below which would soon receive it. Nearby, an old woman was knitting. She cackled.

He struggled when they came for him. Two, then three strong men grabbed his arms and legs and carried the convulsing, weeping man to the stock. On the way, he drooled; he voided; he screamed to God for his life. The crowd laughed and jeered at him. The last words he heard before the shimmering blade fell were those of the executioner: "Are you ready for sentencing?"

Sentencing Day

"Are you ready for sentencing?" asked Judge Joseph P. Blugeot. His words interrupted my daydream of French justice.

"Not quite," said Wilkes. "There's the matter of my motion for new trial."

"Oh, yes. The motion for new trial. Mr. Clerk, please pass up the file so I might refresh my recollection." Judge Blugeot opened the file and allowed his eyes to pass for the first time over our motion for new trial. Then he said, "The motion for new trial based in part upon previous defense counsel's inability to speak Latin is denied. Now, Mr. Wilkes, are you ready for sentencing?"

A woman laughed. It was a hard, masculine sound which came from Blugeot's old woman court reporter. Whether she was laughing at our creative motion or what was to come, I don't know.

Wilkes began his pitch for probation. He said, "Judge, before you stands a unique young man. He is nineteen years of age. He lives in Harlem. Members of his family are said to be gang leaders. Yet he stands before you without so much as a prior arrest."

Blugeot interrupted Wilkes before he could make his point. "So what you are saying is that this is the first time he has been caught, right? You're not standing there and telling me with a straight face that this is the first time this man ever smoked marijuana?" Blugeot obviously did not believe in the existence of first offenders.

"There is certainly no evidence to the contrary before the court," said Wilkes.

Wilkes quickly added, "Judge, I want to talk straight to you. This youngster comes from an environment where it's antisocial to be law-abiding. To be nineteen and clean of arrests in Harlem is remarkable. *Judicis officium est, ut res, ita tempora rerum* (A judge's duty is to consider the times and circumstances)."

Blugeot's eyebrows rose. A thin smile formed on his face. He said, "Mr. Wilkes, *Decem annos consumpsi in legendo Cicerone* (I have spent ten years reading Cecero). Your client seems to be, as Cicero said, '*video meliora, proboque, deteriora sequor'* ('one of those who not only sees the correct course, but also approves of it, yet follows the worse')."

"I believe that's from Ovid, Your Honor," said my friend tentatively. He wanted to play the judge's erudition game without it becoming too obvious that Wilkes was ten times more leanred than Hizoner. Wilkes continued, "Ovid also wrote, '*Qui sapit, innumeris moribus aputs erit*" ('A wise man knows how to deal with all sorts of characters'). In other words, consider Johnny as the deserving individual that he is. Give him probation."

"All defendants get individual treatment in this court. Now, are you ready for sentencing, Mr. Wilkes?"

Tombs-Bound

Other than sparring with Blugeot in Latin - which did seem to amuse the judge - Wilkes wasn't getting anywhere. Johnny Wad was still on track on the Tombs. Wilkes decided to try a more aggressive approach.

Wilkes told Judge Blugeot, "You Honor, you have a reputation for sentencing black youngsters far in excess of what you sentence their white counterparts. And let me say this: I have never had the pleasure of appearing in Your Honor's court to test that assertion. But I have always been of the impression that hearsay is a most unreliable source of information, and I hope today you will give the lie to the things I have heard. This youngster no more deserves to go to jail than any of the white college kids who routinely appear before the court for blowing pot in their dorms."

Blugeot's face crimsoned as he lied, "I have not heard of this alleged reputation of mine. *Loquendum ut vulgus*, Mr. Wilkes? (Speaking with vulgar people?) All that I know is that I am very careful in these cases."

"I understand," said Wilkes.

"I am more careful in these cases than any other."

"I think Your Honor has bent over backwards," chimed the prosecutor.

"I can be so impeccably fair."

"I never questioned your fairness. I beg the indulgence of the court." Wilkes could grovel with the best on behalf of a client in trouble.

"This is something you have to be born with, a gift."

"I concede this," said my friend.

"I have that gift. It is a tremendous gift, and not many judges have the tremendous gift of fairness. It is something that I have to admit, and I admit it with a great deal of pride, but with a great deal of humility, I have it. I have an information, so to speak. It is what has made me a good student in constitutional law, I suppose. It is what made it possible for me to pass the bar examination without an error in the entire examination. It is what made it possible for an intelligent politician seeking advice of those investigative agencies at his command to appoint to the bench some little fellow who was prosecutor in the U.S. attorney's office, and make something out of him.

"I have that gift of fairness. I also have a gift of comprehensive thinking. I think all the way around every subject and get its interrelated parts and put them together as I go piece by piece, step by step. I have this, and why, I almost have the gift of reading minds.

"Yes, I have the gift. And any reputation I have is for fairness to all. It is a reputation I cherish and one that will not be sullied by the reckless remarks of a lawyer whose own reputation for deviousness needs no explication."

The Sentence

"Now, as to the matter of sentencing. Let the record reflect I have reviewed the presentence report provided by the probation office. I have reviewed the so-called alternative presentence report which you have filed, Mr. Wilkes. Let me say that I find that your written remarks completely misunderstand the serious problem of drugs in the ghetto. Today this boy is a pot head. Tomorrow a heroin junkie. Next week a mugger. Next month a murderer. As night follows day, marijuana leads to narcotics addiction and violent crime."

"The same might be said of mother's milk," said Wilkes.

My friend had stood in silence as Blugeot nearly had an orgasm during his self-congratulatory speech. It was rare for a judge to be so candid. Most of them thought the same as Blugeot about themselves, but few had the exquisite obliviousness to make those thoughts public. Now, Wilkes knew what we always knew. There was no moving Judge Joseph P. Blugeot by appeals to such nonsense as evidence or reason or compassion.

Blugeot turned his eyes to a trembling Johnny Wadkins and asked, "Mr. Wadkins, are you ready to receive the court's sentence?"

Johnny Wad said with a strong voice, "As God is my judge, I is innocent." It was a comment often heard from defendants. So, too, was Blugeot's response.

"He isn't. I am, and you're not."

Blugeot's eyes fell to the papers he held. He read the sentence he had written in the Wad file the night before. "Mr. Wadkins, you have been found guilty by the court, and it is the judgment of the court that you are guilty of the crime of possession of marijuana. You are hereby sentenced to a term of one year in jail."

I heard an audible gasp from Johnny Wad, who doubled over a bit as if he had just been kicked in the genitals. He turned to Wilkes and mumbled something angry. It was loud enough to hear, but not to understand what he said.

Blugeot picked up on the nature of the comment and asked, "What's that? What's that he said?"

Wilkes looked at Blugeot, put his arm around our client's shoulder, and said matter-of-factly, "My client just said something to me." Johnny Wad added to the tease. He smiled at Hizoner.

"That was a comment directed at me, and I demand to know what it was," said Blugeot.

"It was a comment protected by the attorney-client and work product privileges, which I cannot ethically divulge, as you very well know, Judge," said Wilkes.

"I'm ordering you to repeat what he said. I order it! Now!"

"Are you prepared to hold me in contempt and throw me in jail if I do not divulge this privileged matter?" asked Wilkes.

"Yes, I am. Out with it."

"You racist honky motherf****," said Wilkes.

Blugeot sat motionless, stunned by the profane epithet. It took him three seconds to utter the next word, and his voice rose two octaves in the process. He said, "WHAAAAAAAAAAAT!"

"I repeat, you racist honky motherf*****."

"Right on!" said Johnny Wad.

Wilkes then added, "You don't like the answer. You should've have asked the question. I move to strike it from the record."

"Mr. Wilkes, you've just shot your wad. You and your client are in contempt of court. I hereby sentence each of you to one year in custody. That's two now for you, Mr. Wadkins. Want to go double or nothing? I've always found it *beatius est dare quam accipere* (better to give than receive). Mr. Marshal, seize both of these men and take them away."

As they hauled Wilkes from the court, he yelled out, "*Impiorum putrescet!*" It means, "The wicked shall rot." Johnny Wad added the only foreign language word he knew as they dragged him away: "*Chinga! Chinga! Chinga!*"

Bar Talk

It was a bad day. Worse than even Wilkes had imagined when he reluctantly accepted the Wad case. We could expect Johnny Wad to get hammered. That was no surprise. Nor was it greatly unexpected that Wilkes would be held in contempt. Wilkes was often held in contempt in his long and illustrious career. Each contempt was like a war wound bravely suffered in battle with a brutal adversary.

Yes, it was a bad day, and it wasn't over yet. As they dragged Wilkes and Wad from the court, I made my first contribution to the proceedings: "Your Honor, may I make a motion for bail on behalf of Mr. Wilkes?"

In all of my friend's colorful career, a career filled with contempt citations, no judge ever had the patience to properly hold Wilkes in contempt. I think we beat all of his contempts, at least all of the ones he got when I was with him (some twenty-two if memory serves). We could never have done it without the help of the two most beautiful words in the English language: legal technicalities.

For some foolish reason, I felt compelled to make a record of the legal points that would surely save my friend from the outrageous contempt citation. I guess I was angry, because I only spoke about the unlawfulness of the contempt citation and tried to rub Blugeot's nose in the tyranny of his act. It was, I now know, a display of foolish courage. I should have said something about bail. Better yet, I should have said nothing at all.

I told Blugeot that the information which he forcibly elicited from my friend's mouth was privileged. I told him that, coming as it did by way of a court order, there had been no voluntary publication of the profane comment, and obviously no intent by my friend to offend; Wilkes was merely relaying, upon order of the court, the exact information given him by Johnny Wad. Even had none of these errors occurred, Wilkes had been deprived of a jury trial on each of these issues, I said.

There must have been something in the way I put all this to the judge. As I spoke, Blugeot looked at me as if I were a noisy little bug in need of stomping. And stomp he did just after the following angry, ill-chosen words left my lips: "And last, Your Honor, the words which you found so contemptuous, although admittedly strong, are entirely true."

It was my first contempt and my first trip to the Tombs as a resident.

Loose lips sink ships.

- 2 -

To The Tombs

The criminal is prevented, by the very witnessing of the legal process, from regarding his dead as intrinsically evil.

- Nietzsche

This place is a zoo.

- J. J. Roosevelt

After being roughly ushered into the court's dark holding tank by a smiling bailiff, I spotted my friend chatting away in the corner with our client, Johnny Wad. For having just been held in contempt by Judge Joseph Blugeot, Wilkes seemed in fine spirits.

Until he saw me. "What the hell are you doing here?" he snapped.

I looked at him, embarrassed to admit that "Well, I, er, uh, was asking, uh, for bail, for you, er, and the bastard held me in contempt, too."

"You idiot!" That was all he said. He didn't have to say any more. He knew that I knew that we now were in a fix that was all my fault. Invariably in the past when Wilkes was contempted, I was able to get him out on bail within a short time pending appellate review of the citation. But I had eliminated that possibility by my foolish comments to the judge following Wilkes's citation. Now I was in jail, too.

"I need to make a phone call," said Wilkes to the bailiff, who still wore a broad Cheshire grin on his puss, reflecting his delight in seeing two Enemies of the People captured, in custody, and wholly dependent on the will of the keeper.

"You'll get it in Tombs," said the bailiff. He then ordered us and several other prisoners to begin a short, forced march into the Tombs.

Tombs

The Tombs is the forbidding and accurate description of the twelve-floor structure officially designated as the Manhattan House of Detention for Men. It is part of a complex that also houses the criminal courts of the City of New York and the Office of District Attorney for the County, thus making it a self-contained factory for the charging, convicting, and confining of defendants. All

under one roof.

Wilkes and I had, of course, done plenty of time in the fortress hand-holding clients. But this was different. When you are a visitor, you know you're soon to be leaving the dungeon. When you're just arrested and a prisoner, you know nothing of the kind. I felt helpless and scared.

It was Friday, October 2, 1970. John Wilkes and your humble servant were about to enter the gates of hell.

Bull Pen

As new arrivals to the Tombs, Wilkes and I had to pass a series of checkpoints prior to our assignment to a cell. Our first stop was one of the first-floor bull pens, a large and gloomy screened cell lined with scarred wooden benches fixed to the walls. The guard opened the door, pointed to the inside, and said, "Welcome to the Tombs, boys. Have a pleasant stay."

We entered and he slammed the sliding metal door so hard that the resulting crashing clang made me jump. None of the several dozen inmates in the bull pen even looked up. They were preoccupied.

Inside, a shocking, tissue-searing stench filled my nostrils. It was the familiar smell of nervous prison sweat which all defense lawyers have smelled on clients in custody - but never so concentrated and overwhelming as this. I gagged and felt ready to vomit.

Wilkes, still furious with me, quickly went over to the nearest bench and sat down next to a shivering inmate whose eyes were fogged and at half-mast. His skin was gray and sweaty, and he softly murmured moans of pain: he was an addict in withdrawal.

I looked at each of the men in the bull pen. Since the Tombs issues no uniforms to its residents, each of the veterans wore the street clothes he came in with, which were by now reduced to rags in various stages of disintegration. From the smell, many of the men hadn't taken them off for laundering since their arrival. At least a third of the men before me looked sick as the pathetic addict next to Wilkes. A few slept through their misery on the filthy cement floor; others were doubled over in the agony of withdrawals; but most were huddled with the healthy in a corner intensely discussing the news.

Bad News

The Friday morning *Times* had a big spread on Nasser's funeral and a piece on the Charlie Manson trial in Los Angeles. These were not topics of discussion in the Tombs bull pen. No, these men were recounting the prisoner uprising in the Long Island branch of the Queens House of Detention of the day before. Some spoke with bitterness, recalling the Tomb's riot just last August in which five guards had been taken hostage for about eight hours. The cause then was the same as that which prompted the brothers in Queens to rebellion: the unbelievably wretched conditions in the jails, the guard brutality, the inedible food, the overcrowding, the high bail and long, long trial waits.

I listened for two hours as these men talked, each becoming more and more agitated in the process. "Fuggin' judge buried me alive in dis motherfuggin' shithold. Nine months he gives me, and says I'm lucky not to be goin' to Attica," said one.

It was getting dark in the pen, and the men were huddled so close that I couldn't make out faces that well. They were now just voices talking ominously of their dehumanizing existence.

Another said, "I had a thirty-minute visit yesterday from my ol' lady. I ain't seen her for two f***n' weeks 'cause of visiting-hour f***-ups by the shitheads who run this shitter. Went down to the room, but all the phones was taken up. That wait cost me fifteen minutes. Then when I got a phone, the c***sucker didn't work. I could only look at my ol' lady and yell, but nobody could hear nothin' 'cause everyone's yellin' 'cause none of the motherf****n' phones works, and the guy next to me is so pissed, he starts using the phone like a hammer to break the glass, but that shit's bullet-proof and the pigs grab his ass and close down the whole fuggin' vistin' room. They dragged my ol' lady away crying, and that was my visit. I'm gonna kill somebody, man."

"Nothin' works here," said another. "Phones, toilets, windows, TV, radio."

"Doctors and lawyers sure as shit don't work here," said another. "I ain't seen my legal Band-Aid since I got here."

And so on.

Checkpoint Charlie

Eventually a guard started calling out names. One by one the prisoners left the bull pen and walked or staggered, depending on their condition, down the hall out of sight. Johnny Wad's name was called, then mine. As I left, Wilkes looked at me forgivingly and spoke his first words since our imprisonment began: "Call the office if you can. Get help."

I asked the guard where he was taking me and if I could use the phone there. He said nothing. I followed him to a small, cramped room with only a chair, and a balding, middle-aged man sitting behind a beat-up gray metal desk. He wore a white smock. The nameplate on the desk said Checkpoint Charlie.

Without looking up from the paper on his desk, the man, whom I deduced to be Charlie himself, mechanically recited an admonition he uttered with the sincerity of computer-generated voice simulation. He said, "I am not a doctor. I am merely here to complete medical history forms so that you may be classified. There are only two places you will go from here: the hospital floor or your cell. There are only two classifications here: sick enough or well enough. If you are the former, you go to the hospital. If the latter, you go to your cell.

Now, please answer yes or no to the following question: Do you now suffer from cancer, tuberculosis, diabetes, leprosy, rickets, malaria, gout, cerebral palsy, eczema, syphilis, venereal disease, chicken pox, smallpox, measles, mumps, scarlet fever, trench mouth, typhoid, meningitis, hemophilia, yellow jaundice, leukemia, cretinism, schizophrenia, beriberi, heart disease, hardening of the arteries, anemia, anthrax, bubonic plague, epilepsy, any flue, cold, or other disease, illness, malady, or ailment which you can think of?"

"Might have a little cold coming on, " I said. I hoped to go to the hospital, where things might me more lax and I might get at a phone.

Charlie quickly lifted his head from his form for a second and checked a box on the form. "You look well enough." Then he asked his next question. "Are you addicted, dependent, or otherwise habituated to any medicine, balm, stimulant, narcotic - this includes heroin, morphine, cocaine, amphetamine, barbiturate, marijuana, or other form of dope - sedative, analgesic, anesthetic, antiseptic, antibiotic, sulfa drug, laxative, antacid, or any other substance, whether used for medical, recreational, or other purposes?"

Addicted to laxatives! I wondered about the inmate with that problem and prayed he would not be my cell mate as I said: "I take Alka-Seltzer and a vitamin occasionally." Charlie checked a box. Without lifting his eyes from the desk, he said, "You're definitely well enough. Guard! Next!"

As I rose, my eyes caught a prominent, hand-lettered sign on the wall behind the man's head. It said, THERE IS NO PAIN MEDICATION AVAILABLE IN THIS JAIL.

Cavity Inspection

The next checkpoint waiting me was for body cavity inspection. I was ordered to "get nude" and open every body orifice for the probing eye of a tiny, talkative man with a loud voice, a big flashlight, and a barber's manner. This guy seemed to enjoy his work. He worked quickly to carefully inspect my mouth, nostrils, eyelids, ears, hair, armpits, finger-and toe-nails, my keester, and most degradingly, the shaft of Winston, Jr. What people smuggle in that part of the anatomy, I can't imagine.

The Tombs Inspector of Body Cavities was positively chatty compared to the robot at Checkpoint Charlie. As he was scrutinizing my interior workings with his flashlight, he described a fellow - "the Importer" - who had regularly smuggled dope into the Tombs without his detection. From my experience, this would have been quite an accomplishment.

"The Importer was an expert, a real pro," said the Inspector as he motioned for me to spread my cheeks. "He purposely got arrested on minor dope beefs just to come in here for a few days and get the dopers high and make a little money.

"Never did figure out it was him until he OD'd on the ninth floor - that's where we keep the addicts and troublemakers. The Importer always swallowed heroin-filled balloons, which came out of his body naturally for distribution on the tiers. This time he digested them. Must have had some bad acid indigestion to dissolve the rubber. Anyway, that was it. Like a lot of guys around here, he died a happy man."

I left the Body Cavity Inspector after he determined my body passages were not loaded with contraband. He pointed to an elevator and looked to the next guy in line. I knew I was done when he said to the other, "Get nude."

Going Up

An elevator that was more of a moving jail cell took me up to the ninth floor, and I was escorted by a guard to my permanent cell. I kept thinking about that "no pain medication" sign at Checkpoint Charlie. The Tombs is notorious for the number of drug addicts it imprisons. I had just seen a dozen in the bull pen. If there is no pain medication for them here, what happens when the withdrawals set in? And what happens if I happen to be celled with such an addict?

When the steel elevator door slammed open on the ninth floor, the guard grabbed my arm and escorted me out the door and down a lengthy catwalk adjacent to the upper deck of the cell block. At my feet, a river of water gushed over the dirty concrete floor, jumped the side of the walkway to form a waterfall, and splashed on the floor of the cells below.

As we passed the irrigated cell from where the water was flowing out of a running toilet, the two prisoners within, both Puerto Ricans, made what sounded like pleas for help. The guard didn't understand their Spanish, said so ("*No habla da Spinich"*), and kept walking.

In the next cell, two addicts, curled in fetal positions, were moaning. As we passed the third cell, both the residents clanged metal cups against the bars and complained of the heat and humidity. "Man, give us air," one asked.

Although it was no more than sixty degrees outside, it was at least ninety-five and humid as a steam bath in the Tombs. All of the inmates were stripped down to their briefs to beat the heat. They looked like sweat-slickened caged animals - which they were.

By the time I passed the fourth cell, I already had a headache from the suffocating heat and humidity, and the earsplitting noise. The floor and walls of the Tombs's ninth floor formed a perfect sound box of windowless concrete and steel for the inmate screams - at each other or at the guards - or the moans and shrieks of the addicts undergoing the pain of withdrawal.

On top of this, TVs and radios blared. Cell doors clammed. Inmates drummed the bars, the floor, the sinks, the toilets. The cacophony was mind-numbing and disorienting.

By the time I reached the fifth cell, I was thankful that the guard had stopped and was keying the sliding steel door open. I went in and met my roomie.

J.J.

Jackson Jefferson Roosevelt was a small, wiry black man with a clean-shaven, smallish, bald head and a moderate-length gray beard. He was lying naked on the bottom bunk staring at a magazine titled *Yachting*. Only his eyes moved in my direction when I entered the cell.

After the door slammed and the guard disappeared, he said, "Well, lookee here. We got us a motherf****n' professional man. You a counselor?"

I said yes and watched his eyes return to the yachting magazine. The guys in the flooding cell could use that, I thought. I felt my clothes. They were soaked and stinking with sweat. I started taking them off.

"So you're a lawyer," said Roosevelt as I stripped to my briefs. "I got me a lawyer. The Legal Aid. I seen him 'bout three months ago for 'bout a minute when I first got locked up. Ain't seen him since. Round here, ya do your time, then you gits your trial, then you gits your sentence. Somewhere in there you sees your Legal Aid, and he tells you ya done already served all your time before the motherf****n' trial even starts. Me, I gots my trial tomorrow."

I asked, "Is it always this noisy in here?" With all the yelling and doors slamming and TVs screaming, the place sounded like a thousand dogs barking in a metal barrel.

"Yep. Drives you crazy. Everyone goes crazy in the Tombs. Funny thing. Legal Aids go crazy, too. Mine tells me they goin' on strike soon because the city ain't gonna pay enough of their shrink bills. I hopes he goes on strike tomorrow. I don't wanna go to no motherf****n' trial. He ain't got me no witnesses."

"What about bail?" I asked.

At this, J.J. turned his head to me and spat out, "Freedom's Rent! Ain't nobody here got that kind of motherf****n' rent money. The Man always raises da rent soes ya can't make it. But the Man and Legal Aid will tell you ya don't need no money to get out. Come to find you had the rent all the time. The Man says, 'You wants motherf****n' freedom? You gots the collateral in your mouth. Just give me one precious little motherf****n' word: guilty.' n That's motherf****n' coin of the realm round here. And when you've lived in this motherf****n' shithold for a while, you give the Man what he wants. But he gonna wait 'fore he gits anythin' from J.J. Roosevelt. Say, man, you a lawyer; don't you know motherf****n' nothin' about that?"

I was ashamed to admit my ignorance of much of the daily reality for Tombs residents It's what happens to you when you specialize in clients with money.

J.J. laid his head on the little pillow on his bunk and stared straight up to the steel bottom of my bunk. "Drives you motherf****n' crazy here," he said. "The motherf****n' place is fulla vermin. No exercise. Locked in this motherf****n' cell sixteen hours a day. Locked out of the cell the other eight on that plank they call a catwalk."

"Look here!" He lifted the crumpled yachting magazine. "This is the motherf****n' crap they give ya to read."

J.J. turned his expressionless face to me and asked, "You know about Safari?"

Safari

I said I didn't. He leaned up in his bed and became more animated. "It's what we do for recreation up here. Every day just before we're locked back into our motherf****n' cells, we do a count of the game our hunters find on the floor. Those motherf*****s which catches the big game gets points. Ten for rats, five for mices, a tenth for a roach. We all vote on the points for the exotics, you know, like a salamander or a snake. Safari record is forty-nine set in 1966 by a motherf****r in for murder named Johnston Washburn. Unbeatable. Motherf****r gots twenty points just for one animal."

"What was it?" I asked.

"Motherf****n' baby alligator come swimming up his damned crapper. Never seen nothin' like it. This place is a zoo."

Turnkey

I liked J.J. right off despite his scary exterior and limited vocabulary. I relaxed a bit hearing his Tombs stories, but the sound of keys turning in the cell door caused me to turn my attention from J.J. and see none other than my friend John Wilkes hurriedly going through a ring of keys. "What the hell are you doing out there?" I asked.

"They's a motherf****n' riot going on!" he shouted. Wilkes had already incorporated the multipurpose and often-used jail adjective into his vocabulary. I listened through the normal din on our tier and picked up the distinct and ominous clamoring about us.

While trying to make one key after another fit and open our cell, Wilkes said, "The inmates have taken over the twelfth floor, and they've got eighteen hostages! They got the guard I was with in the motherf****n' elevator."

Finally he got the right key, opened the door, and I was out. J.J., after putting on his briefs, followed.

"What'll we do?" I asked. "Surrender ourselves downstairs?" I was not much interested in rioting.

"Never make it," said J.J. "If we've got the motherf****n' guards and the elevators, you ain't goin' noplace. Stick with me and maybe you won't get hurt."

Not liking the tentative prospects for staying unhurt, I introduced Wilkes to J.J. in hopes that my new black friend could keep us from harm. After giving the keys to another revolutionary to free the tier, we went up to riot headquarters on the twelfth floor.

The scene there was chaos - a parley of hell-raising sociopaths. Over two hundred raging barbarians were running all over the floor, screaming, arguing, and fighting. Those not so engaged were breaking windows and merrily throwing burning rags and paper to the street below.

J.J. took me into a small room that was used during less tumultuous times as a chapel while Wilkes went off in search of Johnny Wad. "You white boys could be in some trouble lessen you be cool. Since you is a lawyer, you maybe can convince the alleged leaders that you can help. Trouble is, between the motherf****n' Panthers, the Muslims, and the Young Lords - they is the Puerto Ricans - who knows who's gonna be leading this here riot. Last one, in August, petered out in eight hours - eight motherf****n' hours! - 'cause those motherf*****s couldn't get their motherf****n' act together."

I looked around and saw what J.J. was talking about. Those savages who weren't trashing the place, or raiding the commissary, or shooting up - after a raid on the eleventh-floor medical clinic, they discovered that there was pain medication in the Tombs after all - were arguing or fighting with each other.

I was startled to see the back of a naked white man wearing a PLO turban in the middle of a heated exchange with a group of angry blacks. They were shouting at each other, and the white man was poking his finger into the chest of one of the blacks and yelling the word of the day, "You're motherf****n' crazy." Then he turned and - unbelievably - it was Wilkes!

He saw me and J.J. and came over to where we stood and said, "That is what must loosely be called the motherf****n' command of this uprising. One of the leaders happens to be a Whiz Kid who knows me. And Johnny Wad's vouched for us. They may want us to represent them with the Man."

"What were you guys arguing about then?" I asked.

Wilkes smiled for the first time since we had been in captivity. "What else? Our motherf****n' fee!"

- To Be Continued -

REASONABLENESS REVIEW OF SENTENCES POST-*BOOKER*

By: Shaundra L. Kellam
Staff Attorney

It is now well established that, after *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), the federal appellate courts review all sentences (whether they fall inside or outside the now advisory sentencing guidelines range) for unreasonableness, in light of the sentencing factors enunciated in 18 U.S.C. § 3553(a). In assessing the reasonableness of non-guideline sentences, the general consensus among the circuits is that, the farther the judge's sentence departs from the guidelines range, the more compelling the justification must be. Below is a summation of published opinions reviewing non-guidelines sentences that were issued on or before June 23, 2006. As reflected below, while some Courts have published a plethora of caselaw on the subject (like the Eighth Circuit), others have remained mute.

I. Cases Affirming Below-Guidelines Sentences As Reasonable

A. First Circuit

United States v. Caraballo, 447 F.3d 26 (1st Cir. 2006) (in a drug case, upholding a 9-year prison sentence that was 3½ years below the bottom of the advisory guidelines range, against the defendant's challenge that sentence was unreasonably high due to his serious medical condition, because the district court considered the defendant's health in deviating below the Guidelines and reasoned a further departure was unwarranted given the defendant's "terrible" domestic violence record).

B. Second Circuit

United States v. Florez, 447 F.3d 145 (2d. Cir. 2006) (affirming 210-month prison sentence for conspiracy to import, and possess with intent to distribute, more than one kilogram of heroin, even though sentence was 52-months below the bottom of the guidelines range of 262 to 327 months; Court rejected defendant's argument that a lower sentence was required to avoid a sentencing disparity between his sentence and the 120-month sentence received by his brother from a different judge for the same offenses because the two were not similarly situated, as (1) the brother plead guilty and accepted responsibility for his offenses, whereas the defendant fled from justice for about five years and went to trial, and (2) the brother obtained a downward sentencing departure based on extraordinary family circumstances, whereas the defendant did not seek such a departure).

United States v. Kane, ___ F.3d ___, 2006 WL 1669655, No. 05-2714 (2d Cir. June 19, 2006) (upholding as reasonable 24-month prison sentence for one count of equity skimming in violation of 12 U.S.C. § 1709-2, a sentence below the advisory range of 30 to 37 months, even though the defendant argued that he was entitled to an even lower sentence because of his age, poor health, and history of good works; district court's sentencing decision was premised on a sound view of facts, relevant sentencing factors, and applicable legal standards).

C. Third Circuit

None.

D. Fourth Circuit

None.

E. Fifth Circuit

None.

F. Sixth Circuit

None.

G. Seventh Circuit

United States v. Baker, 445 F.3d 987 (7th Cir. 2006) (holding, in an 18 U.S.C. § 2252A(a)(1) possession-of-child-pornography case, that 87-month prison sentence, which was 21 months below the advisory guidelines range of 108 to 135 months, was not unreasonably low given court's explanation for sentence, including the defendant's lack of criminal history, his relative youth, his strong religious background, his employment, his higher education, the fact that a prison term would mean more to him than to someone who had previously been imprisoned, and the fact that upon release from his 87-month prison sentence the defendant would be on life-long supervised release.)

H. Eighth Circuit

United States v. Krutsinger, ___ F.3d ___, 2006 WL 1527150, Nos. 05-2713, 05-2781 slip op. (8th Cir. June 6, 2006) (affirming two defendants' 21 and 24-months' imprisonment for making false declarations and obstructing justice by lying about others' involvement in

a drug conspiracy, even though sentences were considerably lower than their respective guidelines ranges of 100 to 125 months and 70 to 87 months, because the Court could not state that the district court abused its discretion by fashioning sentences to address the sentencing disparity between these defendants and two nearly identically situated individuals who committed the same crime in the same conspiracy and received lesser sentences; Court noted "[a]lthough the Guidelines remain an important factor in determining a sentence, there may be cases where another § 3553(a) factor predominates.").

I. Ninth Circuit

None.

J. Tenth Circuit

United States v. Chavez-Diaz, 444 F.3d 1223 (10th Cir. 2006) (upholding 30-month prison sentence for illegal reentry, which was 11 months below the bottom of the advisory guidelines range, against the defendant's challenge that the district court should have deviated farther from the guidelines because of the poor medical care he received during pre-sentence confinement and because of bad immigration advice which he claimed led to his unlawful reentry offense; district court already decided to impose below-guideline sentence to avoid a potential sentencing disparity between the defendant and a person sentenced earlier that day, and district court's refusal to impose an even lower sentence because of inadequate medical care could not be deemed unreasonable, especially where the district court stated it was mindful of the medical issues but did not believe it justified a downward departure)

K. Eleventh Circuit

United States v. Williams, 435 F.3d 1350 (11th Cir. 2006) (affirming as reasonable 90-month prison sentence for career offender convicted of distributing 5 grams or more of crack cocaine, even though the sentence was less than half the bottom of the advisory guidelines range of 188 to 235 months, because district court gave a specific and valid reason for imposing sentence—it believed a sentence of 188 months was unreasonable for a crime involving only the sale of $350 of crack cocaine; the Court stressed this was not a case where the district court imposed a non-Guidelines sentence based solely on its disagreement with the Guidelines).

L. D.C. Circuit

None.

II. Cases Reversing Below-Guidelines Sentences As Unreasonable

A. First Circuit

United States v. Pho, 433 F.3d 53 (1st Cir. 2006) (holding, as a matter of first impression in this Circuit, that district court could not impose sentences below the advisory guidelines range based solely on its categorical rejection of the guidelines' disparate treatment of crack and powder cocaine).

United States v. Smith, 445 F.3d 1 (1st Cir. 2006) (vacating defendant's 46-month prison sentence for six counts of crack distribution and one count of conspiring to sell crack as unreasonably low, where (1) sentence was less than half of minimum of advisory sentencing guidelines range of 100 to 125 months; (2) despite the defendant's youth, he had a significant criminal history that had graduated steadily toward more serious crimes; (3) the guidelines calculation already had accounted for the fact that the defendant was not the leader of the criminal activity; (4) the defendant had repeatedly sold crack near a school and playground; and (5) there was no indication defendant had better than usual prospects for rehabilitation).

B. Second Circuit

United States v. Rattoballi, ___ F.3d ___, 2006 WL 1699460, No. 05-1562, slip op. (2d Cir. June 21, 2006) (concluding that sentence of one-year home confinement and five years' probation for rigging bids and conspiracy to commit mail fraud, which was below the advisory 27 to 33 months guidelines range, was unreasonable, because the district court (1) relied upon the fact that being convicted of two federal crimes was punishment enough—a fact common to all defendants; (2) ignored the guidelines policy statement that "alternatives such as community confinement cannot be used to avoid imprisonment of antitrust offenders;" (3) based the sentence on the fact that a prison term would "absolutely end" the defendant's business, a fact unsupported by the record; (4) twice rewarded the defendant for accepting responsibility by giving him the § 3E1.1 acceptance-of-responsibility reduction, and then imposing a non-guidelines sentence based on the fact the defendant agreed to plead guilty and admit all wrongdoing; and (5) cited the defendant's lesser culpability in relation to the co-defendant as a reason for imposing a lenient sentence, where the defendant's 27 to 33 month guidelines range was already substantially lower than the co-defendant's 70-month prison sentence).

C. Third Circuit

None.

D. Fourth Circuit

United States v. Clark, 434 F.3d 684 (4th Cir. 2006) (vacating 8-month prison sentence imposed for conspiring to distribute crack cocaine, where the advisory guidelines range called for a sentence between 46 to 57 months, because the district court's justification for sentence—that the defendant would have received a much lower sentence had she been prosecuted in the state of Virginia for same offense—was unreasonable, as it did not adequately take into account the 18 U.S.C. § 3553(a)(6) factor of the need to avoid unwarranted sentencing disparities among *federal* defendants; § 3553(a)(6) is not concerned with the sentencing disparities between state and federal offenders).

United States v. Eura, 440 F.3d 625 (4th Cir. 2006) (holding two consecutive 60-month prison sentences for possession with intent to distribute five grams or more of crack cocaine and possession of a firearm in furtherance of a drug trafficking crime was unreasonable, where advisory guidelines range suggested a 78 to 97 month term of imprisonment and the district court downwardly departed because of the 100:1 sentencing disparity ratio between powder and crack cocaine, as this sentence would inevitably result in an unwarranted sentencing disparity between similarly situated defendants in direct contravention of § 3553(a)(6)).

United States v. Hampton, 441 F.3d 284 (4th Cir. 2006) (holding three-year probationary sentence for being a felon in possession of a firearm was unreasonable, considering guidelines recommended an imprisonment range of 57 to 71 months, and the district court gave too much weight to the fact that the defendant was the sole custodial parent of his two small children—a discouraged factor under U.S.S.G. § 5H1.6).

United States v. Moreland, 437 F.3d 424 (4th Cir. 2006) (vacating as unreasonable 10-year term of imprisonment imposed upon career offender convicted of two counts of possession with intent to distribute crack cocaine, where the advisory range was 360 months to life; Fourth Circuit agreed that a variance was warranted because the defendant's prior offenses involved small quantities of drugs and no firearms or violence, but not to the extent given, as district court based degree of departure on its rejection of treating certain repeat drug offenders as career offenders).

E. Fifth Circuit

United States v. Armendariz, ___ F.3d ___, 2006 WL 1520282, No. 05-20427, slip. op. (5th Cir. June 5, 2006) (holding sentence which included no supervised release term for a defendant convicted of an 18 U.S.C. § 2422(b) child-sex crime was unreasonable because it did not adequately account for (1) the three to five years' supervised release period recommended by the advisory guidelines, and (2) the need for the sentence to afford adequate deterrence, protect the public, and provide the defendant with needed correctional treatment; Court rejected district court's belief that the state sex-offender registration requirement was a sufficient substitute for federal supervised release).

United States v. Desselle, ___ F.3d ___, 2006 WL 1381875, No. 05-30401, slip. op. (5th Cir. May 22, 2006) (determining that 87-month prison sentence for money laundering and conspiracy to distribute more than 5 kilograms of cocaine that represented a 67% or 10-level reduction from the guidelines range of 262-327 months, was unreasonable because, in determining the extent of the downward departure for substantial assistance pursuant to U.S.S.G. § 5K1.1, the district court considered non-assistance related factors, such as the defendant's medical status and age; additionally, the nature of the substantial assistance provided was not extraordinary enough to support such an extraordinary reduction).

United States v. Duhon, 440 F.3d 711 (5th Cir. 2006) (vacating 60-month probationary sentence for possessing child pornography as unreasonable, where guidelines range recommended a 27 to 33 month range of imprisonment, because the district court: (1) failed to correctly determine the defendant's guidelines range, as it erroneously concluded that it could not adjust the defendant's range upwardly based upon facts neither admitted by him nor proven beyond a reasonable doubt; (2) misjudged the seriousness of the defendant's offense by stating that the defendant himself did not molest anyone and suggesting that prosecuting child pornography cases was a waste of time and resources; and (3) improperly gave weight to the guideline sentence of a differently-situated codefendant who had provided substantial assistance and deserved a lesser sentence).

F. Sixth Circuit

None.

G. Seventh Circuit

United States v. Pisman, 443 F.3d 912 (7th Cir. 2006) (vacating 60-month prison sentence, which was 48 months below the guidelines range for the defendant's convictions for using interstate commerce to entice a minor to engage in illicit conduct, where the district court's sentence was based in part on an improper application of § 3553(a)(6) because the court attempted to fashion a sentence that was similar to co-defendant's sentence, even though co-defendant's lower sentence was due to his decision to plead guilty to the offense and his cooperation with the government—factors not present in defendant's case; the sentencing disparity discussed in § 3553(a) is not one that focuses on differences among defendants in an individual case, but is concerned with unjustified differences across judges and districts).

H. Eighth Circuit

United States v. Bradford, 447 F.3d 1026 (8th Cir. 2006) (concluding that 37-month prison sentence, which was 67% below advisory guidelines range of 110 to 137 months was unreasonable, where the only reason given for the variance was that the defendant's Criminal History of VI overstated the seriousness of his past conduct because his most recent felony conviction had occurred nearly ten years before the instant arrest; Court pointed out that a person with the defendant's offense level with no criminal history would have had at least a guidelines range of 57 to 71 months).

United States v. Bryant, 446 F.3d 1317 (8th Cir. 2006) (determining that 30-month prison sentence for conspiring to distribute 50 grams or more of crack cocaine was unreasonable, as sentence was 57% below 70 to 87-month guidelines range, and one of the reasons given for the departure (the defendant's limited criminal history) was already reflected in the guidelines calculations by his Criminal History Category of I and by the fact that he avoided 120-month mandatory minimum sentence due to the safety-valve provision).

United States v. Bueno, 443 F.3d 1017 (8th Cir. 2006) (holding 18-month prison sentence for possessing with intent to distribute five kilograms or more of powder cocaine was unreasonable, where it was an 83% departure from the properly calculated advisory guidelines range of 108 to 135 months and the reasons given for deviation—that this was defendant's first offense, he was under great financial pressure when he committed the crime, and his wife was sick—were not extraordinary enough to warrant departure).

United States v. Claiborne, 439 F.3d 479 (8th Cir. 2006) (reversing 15-month prison sentence for possessing and distributing crack cocaine as unreasonable variance below the 37 to 46-month guidelines range because this extraordinary 60% reduction was unsupported by extraordinary circumstances, as guidelines calculations already accounted for small drug quantity and the defendant's lack of criminal history (the safety-valve eliminated otherwise applicable mandatory minimum sentence); Moreover, defendant committed a second serious drug offense six months after his first arrest).

United States v. Coyle, 429 F.3d 1192 (8th Cir. 2005) (vacating 36-month prison sentence for conspiracy to distribute methamphetamine, which represented a reduction of 73% and 14 offense levels from the recommended sentencing range of 135 to 168 months, because while the defendant's substantial assistance of making controlled buys and serving as a primary witness against one defendant, despite threats to herself and family, warranted more than the two-level reduction recommended by the government, it was not extensive and significant enough to warrant the degree of the reduction given by the district court).

United States v. Feemster, 435 F.3d 881 (8th Cir. 2006) (remanding for a more thorough explanation, in light of § 3553(a) factors, for imposing a 120-month prison sentence for a career offender convicted of distributing crack who had an advisory guidelines range of 360 months to life, where the defendant's youth was only mitigating factor given; Eight Circuit rejected the government's argument that any variance from guidelines would be unreasonable).

United States v. Gall, 446 F.3d 884 (8th Cir. 2006) (holding 36-month probationary sentence for conspiracy to distribute ecstasy was unreasonable, where the guidelines recommended a 30 to 37 month prison sentence, because this extraordinary 100% downward variance was not supported by extraordinary circumstances, as the district court (1) gave too much weight to the defendant's early withdrawal from conspiracy since this fact was already accounted for in guidelines calculations, (2) improperly relied upon a general study showing persons under 18 lack maturity, as the defendant was 21 when he sold drugs, (3) did not properly weigh seriousness of the offense, and (4) failed to consider whether a probationary sentence would cause unwarranted sentencing disparities).

United States v. Gatewood, 438 F.3d 894 (8th Cir. 2006) (determining 36-month prison sentence for being a felon in possession of a firearm was unreasonably lenient, where guidelines range was 63 to 78 months, because 36-month sentence did not properly account for

seriousness of offense (which involved using a stolen shotgun to aggressively threaten a cashier while robbing a store), did not afford adequate deterrence and protect the public, and failed to avoid unwarranted sentencing disparities among defendants with similar criminal histories who have illegally possessed stolen firearms to commit armed robberies).

United States v. Givens, 443 F.3d 642 (8th Cir. 2006) (concluding sentence of time served (which was no time) that was below the 24 to 30 months advisory guidelines range for the defendant's bank fraud was "wholly unreasonable" and an abuse of discretion, where reasons given for the variance—the defendant's post-offense rehabilitation, the socio-economic concerns of rural agriculture communities struggling to make ends meet in a competitive world market, placing the defendant in jail would jeopardize his new position in the community of running a cattle operation, and the bank was partially to blame for fraud because they should have known the numbers were not right—were not atypical or extraordinary enough to warrant the departure).

United States v. Goody, 442 F.3d 1132 (8th Cir. 2006) (vacating as unreasonable 72-month term of imprisonment imposed for conspiring to manufacture methamphetamine, which was less than half the bottom of the advisory guidelines range of 168 to 210 months, because there was nothing exceptional about the defendant's situation where, although he accepted responsibility for his conduct, he did not provide information to law enforcement, participate in controlled purchases, contribute to the investigation of other drug offenders, or assist the government in any way that endangered himself or his family; the district court also erred in trying to give the defendant same sentence as differently situated co-defendant who had received reductions to which the defendant was not entitled).

United States v. Lazenby, 439 F.3d 928 (8th Cir. 2006) (vacating as unreasonable 12-month prison sentence imposed for conspiring to manufacture and distribute methamphetamine, which was 83% below the 70-month bottom of the defendant's guidelines range, because it did not adequately reflect the seriousness of, and provide just punishment for, her drug offense involving assisting two different drug traffickers for at least 18 months, and allowing her house to be used by the drug ring, which endangered her 5-year-old son who was later removed from her home after testing revealed chronic exposure to meth; additionally, her dramatic post-offense rehabilitation was insufficient to justify degree of departure).

United States v. McMannus, 436 F.3d 871 (8th Cir. 2006) (holding 120-month prison sentence for defendant convicted of conspiracy to distribute, and possession with intent to distribute, methamphetamine and marijuana was unreasonable because it was 142 months below the bottom of the advisory guidelines range and the only basis for variance was the lack of any prior criminal history—a fact already taken into account under the advisory guidelines range; co-defendant's 24-month prison sentence for same offenses was also unreasonable, as it was 33 months below the low end of the guidelines range and there was nothing in the record justifying a variance of this magnitude under § 3553(a).

United States v. Myers, 439 F.3d 415 (8th Cir. 2006) (remanding for more fact-finding without deciding whether 12-month and 1 day prison sentence imposed for assaulting with intent to inflict serious injury, which was below 37 to 46 month advisory guidelines range, was unreasonable, because only factor weighing in favor of lenient sentence was lack of criminal history, and this alone was insufficient to support the wide variance from the guidelines range; moreover, the Eighth Circuit could not evaluate the nature of the offense conduct as the PSR contained conflicting accounts of what occurred and nothing was mentioned about the victim).

United States v. Rivera, 439 F.3d 446 (8th Cir. 2006) (vacating 60-month prison sentence in a case where the defendant's career offender guidelines range was 188 to 235 months because the district court gave no reason for the sentence imposed and the record was inadequate to determine whether the district court believed a Guidelines departure was appropriate, certain § 3553(a) factors predominated, or a combination of departures and variances warranted a 60-month sentence).

United States v. Rogers, 400 F.3d 640 (8th Cir. 2005) (holding 5-year probationary sentence for being a felon in possession of a firearm, which was below the advisory 51 to 63 month imprisonment range, was unreasonable when measured against the § 3553(a) factors, considering that this was the defendant's second parole violation in eight months, his admitted drug use and prior convictions for stealing, assault, and attempting to manufacture methamphetamine, and the need to avoid unwanted sentencing disparities).

United States v. Saenz, 428 F.3d 1159 (8th Cir. 2005) (vacating 20-month prison sentence that was not only below the 63 to 78 months advisory guidelines range, but the 60-month statutory maximum, because it was unreasonable, in light of the evidence concerning the defendant's substantial assistance; Eighth Circuit found troubling the district court's statement that "any defendant who is timely, completely truthful, complete,

reliable, and tells the government everything they need to know deserves more than 50 percent" reduction in sentence).

United States v. Shafer, 438 F.3d 1225 (8th Cir. 2006) (holding 48-month prison sentence imposed for conspiracy to use a minor for purposes of producing an explicit visual depiction of sexual conduct that was to run concurrently with an undischarged sentence for unrelated crimes was unreasonably lenient, where advisory guidelines range was 63 to 78 months, the district court found the defendant was "an initial mover" of a "very serious" and repugnant" crime that involved hiring a homeless 15-year old girl in need of money to appear in an amateur pornographic video, the defendant had an extensive criminal history, and the district court found that this type of crime not only has to be punished but deterred).

United States v. Ture, ___ F.3d ___, 2006 WL 1596754, No.l 05-3142 (June 13, 2006) (determining that two-year probationary sentence and 300 hours of community service for willfully attempting to evade federal income tax, which was a deviation from the advisory guidelines range of 12 to 18 months' imprisonment was unreasonable; while district court acted within its discretion to grant a variance, the extent of variance was unreasonable because the district court failed to accord significant weight to the Guidelines range, the seriousness of the defendant's offense, the need to avoid unwarranted sentencing disparities, and provide just punishment and adequate deterrence to "willful tax cheats").

I. Ninth Circuit

None.

J. Tenth Circuit

United States v. Cage, ___ F.3d ___, No. 05-2079, slip op. (10th Cir. June 8, 2006) (concluding that 6-day prison sentence for conspiracy to distribute 500 grams or more of methamphetamine and using a telephone to facilitate drug trafficking was an unreasonable and extreme divergence from advisory 46 to 57 month imprisonment guidelines range, where district court placed too much weight on facts that the defendant was a single mother with no criminal history who had ceased her drug use). (Special Note: This sentence was the alternative pre-*Booker* sentence the district court imposed in the event the Supreme Court later declared the Guidelines unconstitutional. Tenth Circuit held that district court had jurisdiction to impose alternative sentence, and noted that the issue of what causes a sentence below the recommended guidelines range to be unreasonable, was an issue of first impression in this Circuit)

K. Eleventh Circuit

United States v. McVay, 447 F.3d 1348 (11th Cir. 2006) (reversing 60-month probationary sentence imposed upon former HealthSouth executive convicted of conspiracy to commit wire and securities fraud resulting in losses of some $400 million, where this represented a 21-level departure from the advisory guidelines range of 87 to 108 months, and the district court considered non-assistance-related factors, such as the defendant's "exemplary record" and "relationship with his daughter," in determining magnitude of downward departure for substantial assistance pursuant to U.S.S.G. § 5K1.1; a § 5K1.1 departure for substantial assistance may only be based on factors related to the substantial assistance).

L. D.C. Circuit

None.

III. Cases Affirming Above-Guidelines Sentences As Reasonable

A. First Circuit

United States v. Scherrer, 444 F.3d 91 (1st Cir. 2006) (affirming 96-month prison sentence for wire fraud, even though it was 33 months longer than the top of the sentencing guidelines range, because the reasons given for varying from guidelines were adequately explained — this was not the defendant's first involvement in fraudulent activities, the defendant had become a serial criminal specializing in fraud, and he had exploited elderly victims' trust by posing as a successful professional and sympathetic figure).

B. Second Circuit

United States v. Fairclough, 439 F.3d 76 (2d Cir. 2006) (upholding 48-month prison sentence for defendant possessing a firearm after having been convicted of a felony as reasonable, even though sentence was 21 months higher than top of the 21 to 27-month guidelines range, where the district court's reasons for non-guidelines sentence reflected adequate consideration of the § 3553(a) factors, including findings that the defendant (1) had a lengthy criminal record and continuing involvement with drugs and violent crime; (2) was prone to recidivism, and (3) not only possessed the gun as an aggravated felon in the instant offense, but sold it to an undercover agent he believed was involved in criminal activity).

C. Third Circuit

None.

D. Fourth Circuit

None.

E. Fifth Circuit

United States v. Jones, 444 F.3d 430 (5th Cir. 2006) (holding district court did not plainly err in sentencing defendant who pled guilty to possession of child pornography to 120 months in prison, even though it was beyond the recommended 46 to 57 month imprisonment guidelines range, because the district court could have reasonably concluded that the possession of 4,139 images of child pornography was an aggravating circumstance that warranted the maximum statutory sentence to reflect the nature and seriousness of the offense and the need to protect the public from future crimes).

United States v. Reinhart, 442 F.3d 857 (5th Cir. 2006) (holding that defendant's 235-prison sentence that exceeded the advisory guidelines range of 121 to 151 months was not unreasonable, where district court enumerated its reasons for sentence and did not take into consideration any inappropriate or unreasonable factors; specifically, district court found the offense to be particularly reprehensible in light of the defendant's conduct of taking advantage of children under his care as a Boy Scout leader and trying to contact a victim while he was incarcerated).

United States v. Smith, 440 F.3d 704 (5th Cir. 2006) (affirming 60-month imprisonment term for defendant convicted of illegal possession of a firearm by a convicted felon, even though guidelines range was 21 to 27 months; Fifth Circuit concluded sentence was reasonable given that defendant had been released on parole less than a month when he committed the instant offense, and he had three prior juvenile convictions that were not counted in his criminal history computation).

F. Sixth Circuit

United States v. Carr, 421 F.3d 425 (6th Cir. 2005) (affirming 16-month prison sentence for violating supervised release, even though it was 7 months longer than that suggested by the Guidelines, where district court found that the defendant had failed to make restitution as previously ordered, was unlikely rehabilitative, and had not been a productive citizen).

United States v. Johnson, 403 F.3d 813 (6th Cir. 2005) (holding 18-month prison sentence for violating supervised release was neither unreasonable nor plainly unreasonable, although it exceeded guidelines recommended sentencing range of 4 to 10 months of incarceration, where the district court exceeded the guidelines because the defendant violated several supervised release conditions, forged documents to cover his violations, and lied to his probation officer).

United States v. Kirby, 418 F.3d 621 (6th Cir. 2005) (affirming imposition of 24-month prison sentence for violating supervised release, which was above the recommended guidelines range of 4 to 10 months imprisonment, where the defendant had violated the conditions of her supervised release on two prior occasions by stealing money from her employer and merchandise from a business, begun passing stolen checks and violating other terms of her supervised release, and continued to engage in criminal activities similar to the crime for which she was originally convicted).

United States v. Matheny, ___ F.3d ___, 2006 WL 1651030, No. 05-6282, slip op. (6th Cir. June 16, 2006) (holding 36-month prison term for being a felon in possession of a firearm, distributing marijuana, and possessing dihydrocodeinone with intent to distribute was reasonable, although sentence exceeded 24 to 30 month advisory guidelines range by six months, where criminal history category did not fully account for two of the defendant's uncounted prior convictions that were for the same crimes to which the defendant pled guilty in the instant case).

G. Seventh Circuit

United States v. Jordan, 435 F.3d 639 (7th Cir. 2006) (holding 240-month prison sentence was reasonable for the 42-year-old defendant's crimes of traveling in interstate commerce to engage in sex with a 15-year-old girl and interstate stalking, even though it exceeded the top of the advisory guidelines range of 110 to 137 months by more than 100 months, because the district court provided adequate reasons for variance, including that the defendant had a six-month relationship with the victim, repeatedly sexually abused his own daughter when she was three to five years old, defended his sexual activity with his daughter, and professed disagreement with the law preventing adult men from having sex with teenage girls).

H. Eighth Circuit

United States v. Donelson, ___ F.3d ___, 2006 WL 1596762, No. 05-4330, slip op. (8th Cir. June 13, 2006) (holding, in a felon-in-possession-of-a-firearm case, the district court did not abuse its discretion by upwardly departing from the 78 to 97-month advisory guidelines range and imposing a prison sentence of 120 months, pursuant to: (1) U.S.S.G. § 5K2.6 for endangering multiple victims by firing ten rounds from a semiautomatic firearm at a group of four people; and (2) U.S.S.G. § 4A1.3(a)(1), on the ground that the defendant's criminal history score did not adequately account for the seriousness of his prior juvenile offenses which included carrying a loaded revolver, striking a woman in the face with his fist and a stick, and robbing and threatening to kill a victim at gunpoint).

United States v. Hacker, ___ F.3d ____, 2006 WL 1652712, Nos. 05-2709 & 05-3450, slip op. (8th Cir. June 16, 2006) (concluding that 180-month prison sentence, which was approximately 56% higher than the top of the advisory guidelines range of 92 to 115 months, was not unreasonable, where the reasoning for the upward departure was that the defendant's criminal history category did not adequately reflect his pattern of deceit and misconduct, which included stealing his deceased brother's life insurance proceeds from his mother, and there was a strong likelihood of recidivism).

United States v. Hawk, 433 F.3d 622 (8th Cir. 2006) (affirming 18-month prison sentence for stealing construction equipment, although it exceeded 6 to 12 month advisory guidelines range, because the district court adequately considered the § 3553(a) factors in imposing a non-guideline sentence, including the fact that the instant offense involved theft of various tools, the defendant's extensive criminal history, the fact that by reason of his criminal history he has not been deterred from further criminal conduct, and the 18-month period of incarceration would provide the educational and medical care he needed for his alcoholism).

United States v. Kelly, 436 F.3d 992 (8th Cir. 2006) (holding 96-month prison sentence for being a felon in possession of ammunition was not unreasonable where sentencing guidelines range was 70 to 87 months, considering (1) the defendant shot at a car containing his girlfriend and his children, (2) section 5K2.6 of the guidelines recognize that the "discharge of a firearm might warrant a substantial sentence increase," and (3) the defendant had a history of illegal conduct concerning firearms).

United States v. Larrabee, 436 F.3d 890 (8th Cir. 2006) (upholding 363-month prison sentence for second degree murder, even though it exceeded advisory guidelines range of 188 to 235 months; sentence was reasonable as it was supported by facts relating to the § 3553(a) factors, including the seriousness of the offense (defendant (1) struck murder victim hard in the head with a wood log, without provocation, even though victim told him he was too old to fight, and (2) despite knowing that murder victim's injuries were serious, he did nothing to assist him and assaulted one of the witnesses to prevent him from seeking help for the murder victim), the defendant had an extensive criminal history, and the court noted that the sentence imposed was needed to protect the public from future crimes, provide just punishment, and promote respect for the law).

United States v. Little Hawk, ___ F.3d ___, 2006 WL 1527155, No. 04-3666, slip op. (8th Cir. June 6, 2006) (concluding imposition of 60-month prison sentence for assault resulting in serious bodily injury was reasonable, although it was above guidelines range of 46 to 57 months, considering the seriousness of the offense which involved the defendant placing his two-year-old daughter in scalding bath water for soiling herself, causing severe injuries that required three weeks hospitalization and multiple painful medical procedures, including blood transfusions and skin grafting).

United States v. Rogers, 423 F.3d 823 (8th Cir. 2005) (affirming 360-month imprisonment term for two counts of possession of child pornography, five counts of distribution of child pornography, and three counts of distribution of obscene materials, which was 24 years more than the top of the advisory guidelines range of 57 to 71 months; substantial upward departure was warranted given the defendant's offense conduct, which included (1) removing the male genitalia of a person wanting a sex change in a motel room without a medical license, (2) ingesting several male genitals, (3) publishing this "heinous" conduct on the internet, (4) possessing an exceptionally large number of pornographic and obscene images, (5) his expressed interest in torturing children, and (6) his boast that he had tortured, raped, and murdered a child).

United States v. Shannon, 414 F.3d 921 (8th Cir. 2005) (determining that 58-month prison sentence for making a false statement to law enforcement officers by misrepresenting that he purchased methamphetamine in a controlled buy was reasonable, even though guidelines range was 6 to 12 months imprisonment, where the defendant had an extensive criminal record, including three prior convictions similar to the instant offense, had committed several offenses in a row, had numerous parole violations, and the district court believed the defendant's criminal history category of VI did not accurately reflect the seriousness of his criminal past).

United States v. Winters, 416 F.3d 856 (8th Cir. 2005) (upholding 240-month prison sentence for a defendant with no criminal history convicted of voluntary manslaughter, despite the fact the defendant' sentencing guidelines range was 171 to 191 months; Court concluded sentence was reasonable, in light of relevant § 3553(a) factors, including the seriousness of the offense which involved the defendant, while intoxicated, getting into an argument with the victim, leaving the scene to retrieve a gun, and returning to shoot the victim in the head at point blank range).

I. Ninth Circuit

United States v. Mix, ___ F.3d ____, 2006 WL 1549737, No. 05-10088, slip op. (9th Cir. June 8, 2006) (holding defendant's life prison sentence for kidnaping and aggravated sexual abuse, which was above advisory guidelines range, was not unreasonable, given the brutality of the sexual assault which was not accounted for in the guidelines calculations, the defendant's 17-year history of unspeakable inhuman sexual abuse of women, and his continued characterization of his conduct as unintentional during sentencing proceeding).

J. Tenth Circuit

None.

K. Eleventh Circuit

United States v. Eldick, 443 F.3d 783 (11th Cir. 2006) (holding imposition of total 180-month prison sentence for healthcare fraud and distributing hydrocodone was not unreasonable, even though it exceeded recommended guidelines range of 87 to 108 months, where the defendant impersonated a physician and conducted gynecological and surgical services which caused unquantifiable harm to over at least 851 victims, some of whom may have perished due to the defendant's actions).

United States v. Valnor, ___ F.3d ___, 2006 WL 1529118, No. 05-15071, slip op. (11th Cir. June 6, 2006) (affirming 28-month prison sentence for defendant convicted of conspiracy to produce identification documents as part of a scheme to provide fake driver's licenses to illegal immigrants, in a case where the guidelines range was 15 to 21 months' imprisonment; sentence was reasonable in light of the "egregious nature of the offense" based on its impact on national security, the fact that the defendant aided persons who would not have been able to renew their licenses otherwise after 9/11, there were no safeguards in place to prevent persons like the defendant from returning to the unregulated market of illegally obtaining and selling driver's licenses, and the above-guideline sentence was needed to afford adequate deterrence and protect the public).

L. D.C. Circuit

None.

IV. Cases Reversing Above-Guidelines Sentences As Unreasonable

A. First Circuit

United States v. Zapete-Garcia, 447 F.3d 57 (1st Cir. 2006) (holding 48-months' imprisonment, which was 8 times the advisory guidelines range of 0 to 6 months imprisonment, was unreasonable, for knowingly using or attempting to use forged, counterfeit, or altered immigration document; the district court's reasons for imposing the sentence—that the defendant had previously been deported twice from the United States and had a prior arrest for drug possession—did not justify the magnitude of the variance since the guidelines sentencing range already accounted for the defendant's prior deportations, and the defendant's lone prior arrest without conviction may or may not have been indicative of wrongdoing; sentence was reversed not solely because of the major variance, but because the district court provided no adequate explanation for large variance and no circumstances that would make the deviation reasonable were obvious from the record).

B. Second Circuit

None.

C. Third Circuit

None.

D. Fourth Circuit

United States v. Davenport, 445 F.3d 366 (4th Cir. 2006) (concluding that 120-month imprisonment term, which was more than three times the top of the advisory guidelines range of 30 to 37 months for fraudulent use of an access device under 18 U.S.C. § 1029(a)(5), was unreasonable, where the facts known to the court at the time—(1) the defendant had been involved in pick-pocketing and credit card theft during one weekend, (2) had identified seven other persons with whom he had been involved in similar activities, and (3) possessed a substantial history of similar conduct—did not justify a sentence so far above the top of the guidelines range, although it did support the district court's decision to impose a sentence above the range).

E. Fifth Circuit

None.

F. Sixth Circuit

None.

G. Seventh Circuit

United States v. Castro-Juarez, 425 F.3d 430 (7th Cir. 2005) (holding 48-month imprisonment term, which was more than twice the high-end of the advisory guidelines range was unreasonable, where only reason cited for departure was the defendant's criminal history consisting of several times illegally reentering the United States and domestic violence).

H. Eighth Circuit

United States v. Kendall, 446 F.3d 782 (8th Cir. 2006) (vacating 84-month prison sentence as being unreasonable, where (1) it was 155% higher than the maximum 27 to 33 month guidelines range; (2) there was nothing exceptional about the defendant's methamphetamine manufacture case that set it apart from other cases, and (3) his criminal record of burglary, careless driving, driving while intoxicated, and misdemeanor possession of a controlled substance was not so extraordinary to justify such an extraordinary variance).

I. Ninth Circuit

None.

J. Tenth Circuit

None.

K. Eleventh Circuit

None.

L. D.C. Circuit

None.

V. Cases Reversing Within Guidelines Sentences As Unreasonable

A. First Circuit

None.

B. Second Circuit

None.

C. Third Circuit

None.

D. Fourth Circuit

None.

E. Fifth Circuit

None.

F. Sixth Circuit

None.

G. Seventh Circuit

United States v. Cunningham, 429 F.3d 673, 679 (7th Cir. 2005) (vacating the defendant's bottom of the guidelines sentence of 57-months in prison for conspiring to distribute more than 5 grams of crack cocaine, where district court failed to adequately address the defendant's non-frivolous arguments for non-guideline sentence, which included his diminished mental capacity due to a long history of psychiatric illness and the lack of the seriousness of his offense (the defendant, who was a good family man with no criminal history and 24-year work record with the postal service, had a marijuana problem and unwittingly introduced a confidential informant ("CI") to his marijuana supplier, who in turn, engaged in 9 crack cocaine transactions with the CI in the defendant's presence; the defendant did not participate in the transactions and received only $100 from CI for introducing him to the drug dealer).

H. Eighth Circuit

United States v. Goodwin, 439 F.3d 928 (8th Cir. 2006) (holding defendant Goodwin's 87-month-bottom-of-the-guidelines-prison sentence was unreasonable, where Goodwin was first of her co-defendants to plead guilty, her similarly situated co-defendant Lazenby received 12-month sentence (which was reversed in this same opinion as being unreasonably low), district court gave too little weight to this extreme disparity, and district court placed too much weight on government's statement that it was unauthorized to support a downward variance in Goodwin's case).

I. Ninth Circuit

None.

J. Tenth Circuit

United States v. Sanchez-Juarez, 446 F.3d 1109 (10th Cir. 2006) (vacating defendant's 65-month-within-guidelines-prison sentence because the district court failed to address his meritorious argument that he should have received a below the guidelines sentence, gave no reason for the sentence imposed, and made no reference to the § 3553(a) sentencing factors at all during sentencing).

K. Eleventh Circuit

None.

L. D.C. Circuit

None.

CA7 Case Digest

By: Jonathan Hawley
Appellate Division Chief

2006 SUMMER SUMMARIES

BAIL

United States v. Davis, 442 F.3d 1003 (7th Cir. 2006). In prosecution for tax fraud, the defendant appealed the district court's order requiring her to be taken into custody after the first day of her two-day sentencing hearing. The defendant was on pre-trial release until after the first day of her sentencing hearing, when the judge ordered the defendant remanded into custody, noting that after what it had heard, there was no question the court would impose a sentence of incarceration and that it had concerns how the defendant would conduct herself between the conclusion of the first day of the sentencing hearing and the remaining procedures. On appeal, the defendant claimed that the remand order effectively constituted the imposition of a sentence without calculating the Guideline range, denying her purported rights of allocution and surrender. In rejecting the defendant's argument, the court noted that central to her claims was her characterization of the district court's remand to custody as a "sentence" rather than a mere revocation of bail. The right of allocution must be afforded prior to imposition of a sentence, but it does not accrue earlier. The same is true of the court's duty to calculate the Guideline range. Here, when the court ordered the defendant taken into custody, it did so contemplating her return for the conclusion of her sentencing hearing. Although the district court did not use the words "revocation of bail," that is what the court did by remanding the defendant to the custody as it was required to do. Accordingly, the defendant's rights to allocution and the court's duty to consult the Guidelines were not at stake because the court's incarceration order did not amount to a "sentence."

EVIDENCE

United States v. Olson, ___ F.3d ___ (7th Cir. 2006; No. 01-1772). In a multi-defendant prosecution on RICO charges stemming from the activities of the Milwaukee Latin Kings, the Court of Appeals held that the district court did not err by allowing a co-defendant to testify at trial after he pled guilty mid-trial. The defendants argued that the testimony of their former co-defendant (1) was improper because he had participated in pre-trial defense planning and thus was aware of privileged conversations and strategies; (2) violated Federal Rule of Evidence 615, the witness exclusion rule, because he had been present for the entire trial and could mold his testimony to fit the government's case; and (3) required reversal because the prejudicial impact upon the jury of a defendant-turned-government witness could not be overstated. However, the court held that the district court allowed the testimony only for limited purposes and gave a very detailed cautionary instruction prior to the testimony--an instruction to which the defendants did not object. Accordingly, it found no abuse of discretion.

United States v. Darif, 446 F.3d 701 (7th Cir. 2006). In prosecution for conspiracy to commit marriage fraud, marriage fraud (8 U.S.C. sec. 1325(c) and related offenses, the Court of Appeals considered the scope of the marital communications and marital testimonial privileges. Regarding the marital communications privilege, the defendant objected to the introduction of a letter he wrote to his wife wherein he attempted to persuade her to change her testimony. The government introduced the letter to prove a witness tampering charge. Rejecting a marital communications privilege as it applied to the letter, the Court of Appeals noted that the privilege applies only to communications made in confidence between the spouses during a valid marriage. The privilege may be asserted by either spouse. It exists only to ensure that spouses generally, prior to any involvement in criminal activity or a trial, feel free to communicate their deepest feelings to each other without fear of eventual exposure in a court of law. A recognized exception to the privilege, however, is when spouses are joint participants in the underlying offense. "We do not value criminal collusion between spouses, so any confidential statement concerning a joint criminal enterprise are not protected by the privilege." Here, because both spouses were charged with conspiracy to commit marriage fraud, the joint crime exception applied to the privilege. Regarding the marital testimonial privilege, the wife testified against her husband at trial, after the government gave her a grant of immunity in exchange for her testimony. This privilege protects an individual from being forced to testify against his or her spouse. The testimonial privilege looks forward with reference to the particular marriage at hand: the privilege is meant to protect against the impact of the testimony on the marriage. Only the testifying spouse can assert the privilege; and the privilege may be waived. Because the wife never attempted to assert the privilege herself, but rather the defendant tried to assert it for her through his counsel, the privilege did not apply in this case.

INEFFECTIVE ASSISTANCE

United States v. Spence, ___ F.3d ___ (7th Cir. 2006; No. 05-1848). In prosecution for drug related offenses, the Court of Appeals held that the defendant's trial counsel was not ineffective. In the district court, the court ordered the defendant to provide a handwriting exemplar. Trial counsel initially argued that the district court lacked authority to enter such an order, but when the court threatened the defendant with contempt, counsel requested an adjournment to perform additional research. After performing this research and communicating with his client, counsel informed the court that he now believed the court to have the authority to order the taking of an exemplar and he advised his client to comply with the court's order. However, the defendant still refused to comply, said refusal resulting in a finding of contempt. On appeal, despite the Court of Appeals advisement against pursing ineffective assistance of counsel claims on direct appeal, the defendant argued that his counsel's mistaken belief that the court did not have authority to compel his handwriting exemplars resulted in his criminal contempt charge. The Court of Appeals disagreed, noting that counsel's misapprehension of law may constitute objectively unreasonable performance. However, although counsel was initially mistaken, he went to great lengths to remedy the initial error by researching the issue, communicating with his client, requesting and receiving an adjournment, and conducting additional research. Having eventually reached a proper understanding of the law, counsel could not control his client's decision to persist in his refusal to comply with the court's order. Accordingly, the contempt citation resulted from the defendant's own conduct, not any deficient performance on the part of his lawyer.

JURY ISSUES

United States v. Lott, 442 F.3d 981 (7th Cir. 2006). In prosecution for being a felon in possession of a weapon, the Court of Appeals rejected the defendants claim that his Sixth Amendment right to an impartial jury was violated when a potential juror vouched for the credibility of a government witness during *voir dire* in the presence of the entire venire. When a juror was asked whether he knew an officer who was a key government witness, the juror stated that he had worked with the witness for over 20 years, knew him to be a very honorable man, an upright officer, and would not purposely try to deceive anybody. Although the juror was dismissed for cause, because the defendant did not move to dismiss the entire venire at trial, the Court of Appeals reviewed the issue of taint applicable to the entire venire for plain error. The court noted that the decision whether to dismiss any or all jurors lies in the sound discretion of the trial judge. On review, the court is charged with determining whether manifest injustice resulted from the judge's refusal to dismiss all of the jurors who heard the improper comments. Moreover, for manifest injustice to result, improper comments must prevent other jurors from being fair and impartial. In conducting this analysis, the court credits jurors' own affirmations of impartiality, absent any reasons to suspect as untrue the jurors' claims of ability to remain impartial despite exposure to an improper third party comment. In the present case, the court found no abuse of discretion. After the comments in question, the court questioned the remaining potential jurors about their ability to remain impartial after the juror made his comments. The venire members affirmed their ability to remain impartial, and no evidence was presented to call the truth of those statements into question. Finally, even assuming error, the evidence against the defendant was overwhelming in light of the fact that the gun in question was found underneath the defendant's car seat.

PROSECUTORIAL MISCONDUCT

United States v. Childs, 447 F.3d 541 (7th Cir. 2006). In prosecution for drug related offenses, the Court of Appeals rejected the defendant's argument that he was entitled to a new trial or dismissal of the indictment due to prosecutorial misconduct. During defense counsel's cross-examination, he learned that a government witness had kept some narcotics for himself during controlled buys, a fact known to the prosecutors before trial but not disclosed to the defense. After defense counsel moved for dismissal of the indictment due to the non-disclosure, the government then informed the court that it had learned "the night before" that a second government witness had also kept drugs for herself during controlled buys. Upon further inquiry by the court, it was revealed that the prosecutors had in fact learned of this misconduct before the trial began, not "the night before" as they told the court. Because defense counsel was able to cross-examine the witnesses with the belatedly revealed information, the district court denied the motion to dismiss the trial and the motion for new trial. On appeal, the Court of Appeals found that the government had willfully suppressed impeachment evidence. However, because the defendant's very skillful defense attorney was able to thoroughly impeach the witnesses once the information was made available, the defendant suffered no prejudice from the government's misconduct. The Court also rejected the defendant's argument that the indictment should be dismissed on the basis of outrageous government conduct. Although noting that the Supreme Court has left open the possibility of such relief under the right case, the court noted it has never taken such an "extreme step" before. Moreover, it concluded that such relief in the absence of prejudice to a defendant would be to confer an unearned windfall on the defendant.

United States v. Jarrett, 447 F.3d 520 (7th Cir. 2006). In prosecution of a prominent defense attorney for money laundering, the Seventh Circuit affirmed the defendant's conviction over his claim of selective prosecution. The essence of the defendant's argument was that the United States resurrected a very old investigation of him after he won an acquittal of a client in state court, which caused embarrassment to the state prosecutors. Thus, the U.S. Attorney's office vindictively decided to pursue the old charges against the attorney in retaliation for his victory in the other case. The Court of Appeals noted that the Constitution prohibits the government from undertaking a prosecution based solely on a vindictive motive. A claim of vindictive prosecution is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. However, because a vindictive prosecution claim asks a court to exercise judicial power over a "special province" of the Executive, courts must begin from a presumption that the government has properly exercised its constitutional responsibilities to enforce the nations's laws. This presumption of regularity in prosecutorial decision making can only be overcome by clear and convincing evidence to the contrary, the standard of proof being "a

demanding one." To succeed, a defendant must affirmatively show through objective evidence that the prosecutorial conduct at issue was motivated by some form of prosecutorial animus, such as a personal stake in the outcome of the case or an attempt to seek self-vindication. A defendant may do this by showing that the decision to pursue an indictment was not based on the usual determinative factors a responsible prosecutor would consider before bringing charges. Only after a defendant comes forward with objective evidence of actual vindictiveness does the burden shift to the government to show that the motivation behind the charges was proper. A court must be persuaded that the defendant would not have been prosecuted but for the government's animus or desire to penalize him. Applying this rigorous standard, the court found insufficient evidence to support a claim of vindictiveness, relying (among other things) on the fact that the timing of the U.S. Attorney's decision to prosecute the defendant and his victory in state court did not support an inference that his prosecution was in any way related to the state court case.

SEARCH AND SEIZURE

United States v. Burton, 441 F.3d 509 (7th Cir. 2006). In prosecution for being a felon in possession of a weapon, the Court of Appeals rejected the defendant's claim that the gun in question was seized in violation of the Fourth Amendment. Officers on bicycles were watching a house suspected of housing drug activity when the defendant, accompanied by a woman in the passenger seat, stopped near the house with the motor running. A man came out of the house, stood in the street and leaned through the open driver's side window of the defendant's car. After seeing two cars swerve to avoid the man, officers approached the car, one stopping his bike in front of the car and the others stopping their bikes on each side of the car. The officers asked the man what he was doing in the street, he responded "talking to friends," but also could not identify the passengers of the car. When officers asked the defendant (the car driver) for a license, he said that he did not have one. Additionally, they noticed him repeatedly reaching into his pocket. They then ordered the defendant out of the car, patted him down, and discovered a gun. The Court of Appeals first held that the police "seized" the car when they surrounded it, although only in a very attenuated sense because the defendant wouldn't have driven away with the pedestrian leaning into the window anyway. Moreover, the entire encounter was a few minutes, which may not have resulted in a net delay for the defendant, who would have probably remained stopped for this period until he finished his business anyway. The court further stated: "Contrary to popular belief, the Fourth Amendment does not require that a search be based on probable cause to believe that the search will yield contraband or evidence of crime. The amendment requires that *warrants* be based on probable cause, but forbids only unreasonable searches. What is unreasonable depends on the circumstances, including how intrusive the search is--how costly, in other words, to the person searched. There is a big difference between police ransacking a house in a search for evidence and stopping a pedestrian and asking him whether he's seen a fleeing man in a Santa Claus costume. Even though approaching a person on the street (or at work, or on a bus) to ask him a question causes him to stop for at least the time needed to hear the question and answer (or refuse to answer), the curtailment of the bystander's mobility, privacy, and peace of mind is so slight that neither probable cause nor reasonable suspicion is required to justify the police action. No suspicion at all is required in such a case, or is present if the person stopped really is a bystander--the police do not suspect the bystander of being the Santa Claus imposter. The intermediate case is the *Terry* stop, that is, a stop and frisk; since people are averse to being frisked, the courts require reasonable suspicion, except in special circumstances, such as airport searches. The principle that emerges from the cases is that the less protracted and intrusive a search is, the less suspicion the police need in order to be authorized by the Fourth Amendment to conduct it, and vice versa. In the present case, no frisk of the defendant occurred until the police had grounds for reasonable suspicion based on the tip about the drug house, the man's emergence from the suspected house, his not knowing his "friend's" name, and the defendant's furtive gestures. The stop was minimal, requiring only minimal suspicion; and that the police had." Judge Rovner concurred, but stated that she would say nothing about whether seizures that are unsupported by either probable cause or reasonable suspicion may nonetheless be sustained as reasonable based on their relative brevity and minimal degree of intrusiveness.

United States v. Goodwin, ___ F.3d ___ (7th Cir. 2006; No. 05-1809). In prosecution for distribution of Ecstasy, the Court of Appeals affirmed the district court's denial of a motion to suppress. The defendant purchased with cash a one-way ticket from Chicago to Denver 1-hour before the scheduled departure time. Agents,

recognizing such purchases as consistent with drug couriers, found the defendant's compartment on the train and asked him some questions five minutes before the train was to depart. When the officers asked to search the defendant's bags, he refused, stating that he had lost the key. The officers then offered to open the bags for him without damaging them, but he again refused. The officers then seized the bags and informed the defendant that they would be held until a drug sniffing dog arrived. Although the defendant was told he was free to leave and not under arrest, they did ask him to accompany them to the station for a receipt. Once at the station, the defendant gave officers the key to the luggage, wherein the drugs were found. The Court of Appeals initially held that there was no Fourth Amendment seizure when the officers initially questioned the defendant. The encounter was consensual. Moreover, the defendant was already "stopped" in his compartment with no intention of going elsewhere. Thus, the questioning of the defendant by the officers could not be said to have detained the defendant. Moreover, once the defendant gave the suspicious story about the lost key, officers then had reasonable suspicion to seize the bags in order to have them searched by a drug sniffing dog. To stop a piece of luggage and interrogate it with a dog's nose fits the principle though not the facts of *Terry*. Finally, the court at length defined the "sliding scale" of suspicion which can arise from mere consensual encounters up to arrests for probable cause.

United States v. Miller, ___ F.3d ___ (7th Cir. 2006; No. 05-2978). In prosecution for distributing cocaine, the Court of Appeals affirmed the defendant's conviction over his argument that statements he made to the police were involuntary. Specifically, the defendant contended that his incriminating statements to the police were involuntary because the police threatened to arrest his girlfriend and put their children in foster care if he did not cooperate. The court initially noted that an objectively unwarranted threat to arrest or hold a suspect's paramour, spouse, or relative without probable cause could be the sort of overbearing conduct that society discourages by excluding the resultant statements. But a factually accurate statement that the police will act on probable cause to arrest a third party unless the suspect cooperates differs from taking hostages. Here, the defendant did not give any reason to doubt that the police accurately stated what they would do if he clammed up, and the defendant did not deny that the Constitution would have allowed them to carry out that plan, for they had probable cause to arrest both Miller and his girlfriend. This is not to say that candor always is essential; a modicum of trickery is tolerable during criminal investigations. How far agents may mislead is not, however, an issue in this case, for the defendant here was told the truth.

SENTENCING

United States v. Wasz, ___ F.3d ___ (7th Cir. 2006; No. 05-1463). In prosecution for mail and wire fraud, the Court of Appeals affirmed the district court's loss calculation. The defendants engaged in a scheme whereby their confederates stole merchandise off the shelves of retail stores, and the defendants then sold the items at a substantial discounted price on eBay. In determining the amount of loss, the district court used the retail value of the items stolen to determine the amount of loss. The defendants, however, argued that the amount of loss should be determined by the amount of profit the retailers would have realized from the sale of the stolen goods or, alternatively, by the amount of gain the defendants realized (their selling price for the goods minus their expenses). The Court of Appeals affirmed the use of the stolen items' retail value to determine loss, noting that the guidelines themselves stated that where stolen goods are concerned, the fair market value of the property unlawfully taken is among the factors that the court should consider in placing a value on loss. Moreover, case law supports the proposition that the price at which the retailers would have sold the merchandise serves as a reasonable estimate of loss. Rejecting the calculation of loss by looking to the defendants' gain the court concluded that (1) the defendants' gain does not serve as an accurate measure of the loss where fair market value of the stolen goods can be determined; (2) the defendants elected to sell the items at substantially discounted prices due to the fact that they were stolen; and (3) the defendants were not operating a legitimate business and their costs in selling the stolen goods do not necessarily correspond with the harm inflicted on the retailers.

United States v. Brisson, ___ F.3d ___ (7th Cir. 2006; No. 05-1540). In prosecution for one count of bank fraud, one count of submitting a false claim for an income tax refund, and one count of failing to pay employment taxes to the IRS, the Court of Appeals affirmed the district court's grouping determination under the Guidelines. At sentencing, the district court first determined that because the false claim count involved a tax refund, his sentence on that count should be governed by the tax guideline, rather than the fraud guideline. The judge then grouped this count with the

failure to pay employment tax count, but refused to group these two offenses with the bank fraud count. On appeal, the defendant argued that all three counts should have been grouped together, as they all involved "economic offenses arising out of the failed ownership" of the defendant's hotel business. Moreover, the defendant argued that subsection 3D1.2 allows for grouping of offenses covered by the fraud and tax guidelines. In rejecting this argument, the Court of Appeals noted that there is not automatic grouping of counts simply because those counts are on the "to be grouped" list in the guidelines. Rather, offenses may be grouped if they are "of the same general type and otherwise meet the criteria for grouping under subsection (d)." The court found the criteria were not met in this case because there was no necessary connection between the defendant's fraud on the bank and his "bilking of the government."

United States v. Jones, ___ F.3d ___ (7th Cir. 2006; No. 05-4272). Upon the defendant's challenge to the district court's calculation of his criminal history, the Court of Appeals held that Illinois dispositions of court supervision count as prior convictions under the Guidelines. Illinois provides that a court may, upon a plea of guilty or a stipulation by the defendant of facts supporting the charge or a finding of guilty, defer further proceedings and the imposition of a sentence, and enter an order for supervision of the defendant. Upon successful completion of supervision, the court shall discharge the defendant and enter judgment dismissing the charges. Moreover, the Illinois statute states that the dismissal shall be deemed without adjudication of guilt and shall not be termed a conviction for purposes of disqualification or disabilities imposed by law upon conviction of a crime. The Court of Appeals noted that U.S.S.G. 4A1.2(f) provides that a diversionary disposition resulting from a finding or admission of guilt, or a plea of *nolo contendere*, in a final judicial proceeding is counted as a sentence . . . even if conviction is not formally entered. Looking to this language and its prior precedents, the court concluded that however the effects of a judicial proceeding might be retroactively transmogrified for purposes of Illinois law, a disposition of supervision is in fact preceded by an adjudication of guilt. It is, therefore, countable under the federal sentencing guidelines. Indeed, the Due Process Clause does not let judges go around imposing court-ordered supervision on innocent people. A disposition of supervision is not to be confused with a deferred prosecution. In the latter, a defendant avoids an adjudication of guilt because he never reaches that point in the criminal process. Moreover, when a case is dismissed after supervision, the court does not wave a magic wand to erase the defendant's criminal conduct from the time-space continuum. Dismissal may give a petty criminal a break for certain purposes under state law, but it does not compel the federal courts to pretend that the wrongdoing for which he was found culpable never occurred. And it is the fact of that prior wrongdoing, not how the judicial disposition is labeled, which matters in calculating criminal history.

United States v. Miller, ___ F.3d ___ (7th Cir. 2006; No. 05-2978). In prosecution for distributing crack cocaine, the Court of Appeals held that district courts are required to apply the 100 to 1 ratio for crack vs. cocaine as set forth in the Guidelines. At sentencing, the district court applied a ratio of 20 to 1, but, on appeal, the defendant argued that the district court should have used a 1 to 1 ratio. The court held that the judiciary is not free to replace Congress's approach with one that it deems superior. By legislative decision, the 100 to 1 ration appears in the Guidelines as well as the statute, and the court has previously held that choice to be a constitutional one. The Supreme Court did not alter this conclusion in *Booker*. Thus, even after *Booker*, district judges are obliged to implement the 100 to 1 ratio as long as it remains part of the statute and Guidelines. However, *Booker* does make the Guidelines advisory rather than binding, so *after* computing the sentencing range according to the statute and Guidelines a judge has discretion to impose a reasonable sentence that is outside the range. What makes a sentence "reasonable," however, depends on the specifics of the case at hand; 18 U.S.C. section 3553(a), which lists the factors that control after *Booker*, does not include a factor such as "the judge thinks the law misguided." Finally, the court noted that the defendant was lucky that the government did not appeal because, had it done so, his sentence would have been reversed so that the district judge could use the 100 to 1 ratio, rather than the 20 to 1 ratio it used.

United States v. Walker, 447 F.3d 999 (7th Cir. 2006). In prosecution for stabbing correctional officers, the Court of Appeals rejected the defendant's argument that the district court violated Federal Rule of Criminal Procedure 32(h) when it failed to give him reasonable notice before imposing an upward out-of-Guidelines sentence. The court initially noted that after *Booker*, the concept of departures is "obsolete," and the question in this case is therefore whether, in light of this fact, Rule 32(h) has any continuing application. In deciding this

question, the court stated that the concerns animating Rule 32(h) notice for upward departures no longer apply in light of the advisory nature of the guidelines. Prior to *Booker*, the concern was about the unexpected sua sponte invocation of a departure provision as grounds to exceed an otherwise mandatory Guidelines sentence. A sentencing court applying *Booker* now consults the Guidelines as *guidance* for what is a wholly discretionary decision--discretion that is exercised by reference to the broad array of sentencing factors set forth in section 3553(a). The element of unfair surprise which led to the creation of Rule 32(h) is no longer present; defendants are on notice post-*Booker* that sentencing courts have discretion to consider any of the factors specified in 3553(a). Accordingly, the district court was not required to provide the defendant with notice prior to imposing a sentence above the guideline range.

United States v. Anderson, ___ F.3d ___ (7th Cir. 2006; No. 04-4113). In prosecution for distribution of crack cocaine, the Court of Appeals affirmed the defendants' convictions. For the first time on appeal, the defendants argued that the government misstated the nature of a stipulation during closing argument. The parties stipulated that an expert would testify that the substance was "cocaine base," but the prosecutor referred to the stipulation as one for "crack." Because not all cocaine base is crack, the defendants argued that they were prejudiced by these statements of the prosecutor. Although the court found the misstatements to be in error, it nevertheless affirmed, finding the evidence for crack overwhelming. Specifically, the court noted that it has repeatedly held that the government can prove a substance is crack by offering testimony from people familiar with the drug, including those who sell or use crack, since they are the real experts. Here, four admitted crack users or dealers testified that they bought crack from the defendants, which was sufficient to overcome any prejudice from the prosecutors' misstatements.

United States v. Baker, 445 F.3d 987 (7th Cir. 2006). In prosecution for distribution of child pornography, the Court of Appeals affirmed a below-guideline sentence as reasonable. Specifically, the district court sentenced the defendant to 87 months' imprisonment, a term below the advisory guidelines range. At sentencing, the defendant filed a sentencing memorandum identifying several mitigating factors, including: the defendant's complete cooperation with law enforcement; his good academic record in high school; his college and church attendance; the fact that his mother left the family while he was an infant; his father's itinerant lifestyle as a preacher; and his lack of any criminal record. He also attached letters from family, friends and past employers attesting to his good character and employment history. The district court addressed all of these matters at the sentencing hearing, although the written sentencing order only addressed a "lack of aggravating factors." The government on appeal argued that the district court therefore imposed an unreasonable sentence, it failing to adequately justify the variance. The Court of Appeals disagreed, noting that it had never held that its review of the district court's rationale, and ultimately the reasonableness of the sentence it imposed, is limited to the reasoning set forth in a written statement. In similar contexts, the court has held that, so long as the sentencing court provides an adequate rationale for its decision, it is irrelevant whether the rationale is contained in a written statement or, alternatively, was articulated orally at the sentencing hearing. The court then explicitly adopted this rule in this context, holding that it will review for thoroughness the district court's reasoning for sentencing a defendant below the advisory guidelines range as contained in its written statement and as articulated during the sentencing hearings. In the present case, the district court provided an adequate explanation of the sentence it imposed under this standard.

United States v. Barevich, 445 F.3d 956 (7th Cir. 2006). In prosecution for transporting a visual depiction of a minor engaged in sexually explicit conduct in violation of 18 U.S.C. sec. 2252(a)(1), the Court of Appeals affirmed the district court's four-level enhancement to the defendant's sentence for sadomasochistic images, pursuant to U.S.S.G. sec. 2G2.2(b)(3). Although the defendant possessed such images as relevant conduct, the image he actually transported in interstate commerce (his offense conduct) was *not* sadomasochistic. Therefore, the defendant argued that the enhancement should not apply to him. Consistent with prior precedent, however, the Court of Appeals held that the enhancement applies, even if it applies only to images which constitute relevant conduct, rather than offense conduct.

United States v. Bonner, 440 F.3d 414 (7th Cir. 2006). After remanding this case for a *Paladino* remand, the original judge recused himself. The new judge entered an order explaining that he could not proceed because he was not the sentencing judge and thus was unable to carry out the purpose of the limited remand. The parties

then asked the Court of Appeals to direct the new judge to conduct the *Paladino* analysis, despite his not having been the original sentencing judge. The Court of Appeals noted, however, that the *Paladino* determination is subjective, the only person who could really tell the court whether he would have imposed the same sentence based on the facts and evidence being the original sentencing judge. Therefore, in cases such as this where the original judge is unavailable, it made good sense to remand the case completely, allowing the new judge to start from a clean slate.

United States v. Grigg, 442 F.3d 560 (7th Cir. 2006). In prosecution for one count of possession of child pornography, the Court of Appeals held that *Booker* applies to the Feeney Amendment. In pertinent part, the Feeney Amendment amended 18 U.S.C. sec. 3553(b) to restrict the authority of the district courts to depart from the Sentencing Guidelines in sexual offense and child pornography cases. The legislation, however, preceded *Booker*, in which the Supreme Court held that mandatory application of the Sentencing Guidelines violates the Sixth Amendment. The Court's holding in *Booker*, however, focused only on those portions of the United States Code that generally govern the application of the Sentencing Guidelines to crimes (18 U.S.C. sec. 3553(b)(1). The Court had no occasion to address whether the sentencing restrictions government by the Feeney Amendment also violate the Sixth Amendment. As a matter of first impression in the circuit, the Court concluded that the Feeney Amendment did violate the Sixth Amendment. Specifically, in reviewing the language in light of *Booker*, the Amendment's mandating a sentence with the Guideline range is precisely the same requirement found unconstitutional in *Booker*. Given the similarities between the provision struck down in *Booker* and section 3553(b)(2), the court concluded that the same objection voiced in *Booker* applied in this case as well. Moreover, the court concluded that the same remedy as applied in *Booker* applied here--namely, excising and severing the mandatory language and replacing it with an "advisory Guideline regime" under which sentences are reviewed for reasonableness. Finally, although noting that the range was not mandatory, courts should still give respectful attention to Congress' view that crimes such as those covered by the Feeney Amendment are serious offenses deserving serious sanctions.

United States v. Galicia-Cardenas, 443 F.3d 553 (7th Cir. 2006). In prosecutions for illegal re-entry, the Court of Appeals remanded the cases for resentencing because the district court departed from the applicable Guideline ranges because the district in which they were prosecuted did not have fast-track programs. Citing to *Martinez-Martinez*, the Court of Appeals noted that it rejected the defendant's claim that his sentence was unreasonable because the relevant jurisdiction did not have a fast-track program. The court observed in that case, "Given Congress' explicit recognition that fast-track procedures would cause discrepancies, we cannot say that a sentence is unreasonable simply because it was imposed in a district that does not employ an early disposition program." By the same logic, the court concluded that it could not say that a sentence imposed after a downward departure is by itself reasonable because a district does not have a fast-track program. Accordingly, the Court affirmed the sentence of the defendant who was sentenced within the range without receiving a discount for the lack of a fast-track program and vacated the sentence of the defendant who received a discount because of a lack of a fast-track program.

United States v. Martinez-Martinez, 442 F.3d 539 (7th Cir. 2006). In prosecution for illegal re-entry, the Court of Appeals rejected the defendant's argument that his sentence was unreasonable because the district in which he was sentenced lacked a "fast-track" program. The Court of Appeals noted that the district court considered the defendant's fast-track argument along with several other factors. In considering all of the circumstances surrounding the defendant's case, any disparity between the defendant's sentence and those sentenced in fast-track jurisdictions was considered appropriately as a single, not controlling factor. Thus, the court could not say that the defendant's sentence was unreasonable.

United States v. Pisman, 443 F.3d 912 (7th Cir. 2006). In prosecution for charges stemming from travel in interstate commerce to engage in sexual conduct with a minor, the Court of Appeals reversed a below-Guideline sentence because the sentence was based in part on an improper application of one factor of section 3553(a). The district court sentenced the defendant to 48 months below the Guideline range because the co-defendant was more culpable than the defendant, although the co-defendant pleaded guilty and cooperated with the government. The Court of Appeals reversed the variance, noting that comparison of co-defendants is not a proper application of the 3553(a) mandate that a court minimize unwarranted disparities in sentences. First, the co-defendant's sentence was not an "unwarranted" disparity, because the co-defendant's cooperation provided a basis for the different sentences. Secondly,

the disparity mentioned in 3553(a) concerns differences across districts and judges--not co-defendants in the same case. Accordingly, the court remanded for resentencing without the improper disparity analysis.

SPEEDY TRIAL

United States v. White, 443 F.3d 582 (7th Cir. 2006). In prosecution for armed robbery, the Court of Appeals rejected the defendant's Speedy Trial Act claim because of a waiver. Specifically, the defendant failed to present his statutory speedy trial claim to the district court. The Act expressly provides that defendants waive their rights under the Act when they do not move to dismiss the indictment. Although a defendant's failure to move for dismissal has in the past been viewed as forfeiting the argument but allowing for plain error review, the Court of Appeals has since recognized a defendant's failure to move for dismissal as a waiver--not a forfeiture--of his rights under the Act. Accordingly, because the defendant never moved to dismiss the indictment in the district court, he waived his rights under the Act and the Court of Appeals may not address his claim for the first time on appeal. The court did, however, consider the defendant's Sixth Amendment speedy trial claim, which is analyzed under the following four-part test: 1) whether delay before trial was uncommonly long; 2) whether the government or the criminal defendant is more to blame for that delay; 3) whether in due course the defendant asserted his right to a speedy trial; and 4) whether he suffered prejudice as the delay's result. Noting that the length of time from accusation to trial is a triggering mechanism, the court stated that without a delay that is presumptively prejudicial, it need not examine the other factors. Although courts have in general found delays approaching one year to be presumptively prejudicial, each case requires an analysis into the peculiar circumstances of the case. In the present case, although the nine-month delay was enough to trigger an analysis of the remaining factors, the court ultimately found that these factors weighted against the defendant and therefore affirmed his conviction.

SUPERVISED RELEASE

United States v. Kelley, 446 F.3d 688 (7th Cir. 2006). Upon appeal after revocation of supervised release, the Court of Appeals held that the Sixth Amendment right of confrontation and the holding in *Crawford* do not apply to revocation hearings, as they are not criminal prosecutions.

United States v. Eskridge, 445 F.3d 930 (No. 05-2808; 7th Cir. 2006). On appeal after revocation of supervised release, the Court of Appeals considered when and if a defendant has a right to counsel in the revocation proceeding. The court noted that in the case of probation revocations, analogous to revocation of supervised release, the Supreme Court has held that a defendant has a constitutional right to counsel only if the denial of counsel would violate due process of law, which ordinarily will be true only if the defendant makes a colorable claim 1) that he has not committed the alleged violation; or 2) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate. Additionally, the responsible agency should consider whether the probationer is capable of speaking effectively for himself. The court held that the same test should be applied to revocations of supervised release. In the present case, then, because the defendant did not deny the violation or suggest any grounds in justification or mitigation, due process did not entitle him to counsel either in the district court or in the Court of Appeals. However, the court also noted that the defendant had a *statutory* right, although not constitutional, to counsel pursuant to 18 U.S.C. sec. 3006a(a)(1)(C), (E) and 3006A(c). The court went on to vacate the defendant's sentence, engaging in a complex and lengthy analysis of the effect of the revocation of multiple terms of supervised release and the scope of consecutive supervised release imprisonment terms.

Recently Noted Circuit Conflicts

Compiled by: Kent V. Anderson
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Sentencing

18 U.S.C. §924(c)

United States v. Brown, 4__ F.3d ___, 2006 U.S. App. LEXIS 13607 (D.C. Cir. June 2, 2006).

The D.C. Circuit held that accidentally firing a weapon was not sufficient to increase the mandatory minimum for an 18 U.S.C. §924(c) violation to the ten years that

normally applies when a gun used in an offense is fired. Instead, the Court agreed with the Ninth Circuit that Defendant must have had a general intent to fire the gun. *United States v. Dare*, 425 F.3d 634, 641 n.3 (9th Cir. 2005). It disagreed with the Tenth Circuit's contrary holding in *United States v. Nava-Sotelo*, 354 F.3d 1202, 1206 (10th Cir. 2003).

21 U.S.C. §851

United States v. Flowers, 441 F.3d 900, 902-903 (10th Cir. 2006).

The Tenth Circuit agreed with the First, Second, Fifth, Seventh, Eighth, and Ninth Circuits and held that the requirements of 21 U.S.C. §851(a) are not jurisdictional. *Prou v. United States*, 199 F.3d 37, 45 (1999); *Sapia v. United States*, 433 F.3d 212, 217 (2d Cir., 2005); *United States v. Dodson*, 288 F.3d 153, 160 fn. 9 (5th Cir. 2002); *United States v. Ceballos*, 302 F.3d 679, 692 (7th Cir. 2002); *United States v. Mooring*, 287 F.3d 725, 727 (8th Cir. 2002); *United States v. Severino*, 268 F.3d . 850, 856-859 (9th Cir. 2001). The Court disagreed with the Eleventh Circuit's contrary holding in *Harris v. United States*, 149 F.3d 1304, 1306 (11th Cir. 1998).

Guidelines

U.S.S.G. §2B1.1

United States v. Harms, 442 F.3d 367, 379-380 (5th Cir. 2006).

The Fifth Circuit reversed the sentence of a defendant who was convicted of making false statements on unemployment reports. The Court held that the loss amount should not have been the total amount of benefits Defendant received. Instead, it should have been the amount of benefits he received minus the amount of benefits he would have received if he had been honest. The Court agreed with the Fourth Circuit's decision in *United States v. Dawkins*, 202 F.3d 711 (4th Cir. 2000). However, it disagreed with decisions of the Seventh and Tenth Circuits that held that the loss amount was the total amount of benefits. *United States v. Brothers*, 955 F.2d 493, 495 (7th Cir. 1993); *United States v. Henry*,164 F.3d 1304, 1310 (10th Cir. 1999).

U.S.S.G. §2L1.2

United States v. Murillo-Lopez, 444 F.3d 337, (5th Cir. 2006).

The Fifth Circuit disagreed with the Ninth Circuit's decision in *United States v. Wenner*, 351 F.3d 969, 973 (9th Cir. 2003), and held that a burglary can count as a crime of violence, under the Guidelines, even if it is a burglary of a tent or vessel that is used as a dwelling.

U.S.S.G. §4B1.2

United States v. Piccolo, 441 F.3d 1084, 1088-1090 (9th Cir. 2006).

The Ninth Circuit disagreed with all other circuits that have considered the issue and held that escape is not always a crime of violence and specifically that walk-away escape is not a crime of violence. *Contra, e.g., United States v. Winn*, 364 F.3d 7, 12 (1st Cir. 2004); *United States v. Bryant*, 310 F.3d 550, 554 (7th Cir. 2002); *United States v. Luster*, 305 F.3d 199, 202 (3d Cir. 2002); *United States v. Gay*, 251 F.3d 950, 954-55 (11th Cir. 2001) (per curiam); *United States v. Nation*, 243 F.3d 467, 472 (8th Cir. 2001); *United States v. Ruiz*, 180 F.3d 675, 676-77 (5th Cir. 1999); *United States v. Harris*, 165 F.3d 1062, 1068 (6th Cir. 1999); *United States v. Mitchell*, 113 F.3d 1528, 1533 (10th Cir. 1997); *United States v. Dickerson*, 77 F.3d 774, 777 (4th Cir. 1996). "Courts have similarly applied *Taylor* in analogous circumstances to rule that an escape conviction qualifies as a "violent felony" under the Armed Career Criminal Act. *United States v. Wardrick*, 350 F.3d 446, 455 (4th Cir. 2003); *United States v. Franklin*, 302 F.3d 722, 724 (7th Cir. 2002); *United States v. Jackson*, 301 F.3d 59, 62 (2d Cir. 2002); *United States v. Hairston*, 71 F.3d 115, 117-18 (4th Cir. 1995)."

***Booker* - reasonableness**

United States v. Goody, 442 F.3d 1132 (8th Cir. 2006); *United States v. Zavala*, 443 F.3d 1165, 1168-1170 (9th Cir. 2006) *United States v. Terrell,* 445 F.3d 1261 (10th Cir. 2006).

There is a developing Circuit split over the question of whether there is a presumption that a district court should impose a sentence within the Guidelines range. The Eighth Circuit held that a sentence within the

Guidelines range is presumed to be reasonable in the district court and a district court must justify a decision to impose a sentence outside the range. *United States v. Goody*, 442 F.3d at 1134 (finding that the Guidelines were fashioned taking the 18 U.S.C. §3553(a) factors into account). The Tenth Circuit held that district courts are free to presume that a Guidelines sentence is reasonable and give heavy weight to it. The Tenth Circuit also justified its decision to presume that a Guidelines sentence is reasonable by finding that "the Guidelines are generally an accurate application of the factors listed in §3553(a)." *United States v. Terrell*, 445 F.3d at 1265.

However, the Ninth Circuit held that a district court can not presume that a Guidelines sentence is appropriate. It held that the Guidelines range is merely a starting point for a district court's sentencing decision. *United States v. Zavala*, 443 F.3d at 1168-1170. The Court explained that:

> Some might say that this is just semantics and that the same process will take place regardless of what we call it, but that is unduly cynical. We recognize that when one chooses a starting point, if nothing appears that would suggest movement beyond that point, it also becomes the finishing point. Thus, in that instance, it does look a bit like a presumption. Still, it only looks that way because in that discrete instance there is a single possible reasonable sentence pointed to. That is an exception.
>
> Yet that exception does more than test the rule; it truly does prove it. While an appellate court will review the sentencing result to see if it comes within the extended territory of reasonableness, and will merely conduct a periplus of the borders of that territory, the district court has a very different charge. It is sentencing an individual, and its task is to attempt to find the most reasonable sentence for that person within the territory of all possible reasonable sentences. That difference in charge is central; it is not simply semantical. The difference in approach can be captured in the difference between starting points and presumptions. The former bespeak a mind open to all of the nuances and possibilities of the human condition that district judges are so good at perceiving. The latter bespeaks a mind which is rather closed unless it can be pried open by something truly extraordinary. It harkens back to Guideline "departures," which were expected to be quite extraordinary. See USSG §1A1.1 ed. n. 4(b). To put it another way, even though it is very likely that the Guideline calculation will yield a site within the borders of reasonable sentencing territory, that still does not mean either that there are no other sites within those borders, or that one of them will not prove to be the most reasonable sentence for the particular individual, or that the district court should resist being led to another site, or that the district court should not strive to reach the best site.

Id. at 1170.

> In short, *Booker* has resuscitated the much-lamented discretion that the sentencing statute seemed to take away from district courts, and has at least partially restored that halcyon condition that district judges have longed for these many years. District courts neither should, nor can, ignore that by placing undue weight on the Guideline portion of the sentencing chemistry. They must properly use the Guideline calculation as advisory and start there, but they must not accord it greater weight than they accord the other §3553(a) factors. Rather, they must consider all of the information before them, as they used to do, and then reach for the correct sentence under all of the circumstances.

Id. at 1171.

The rationale for *Goody* and *Terrell* also conflicts with the Sixth Circuit's finding that a Guidelines sentence does not imply consideration of the §3553(a) factors. *United States v. Foreman*, 436 F.3d 638, 644 (6th Cir.

2006). It also conflicts with the Ninth Circuit's recent holding that there is no presumption that a Guidelines sentence has taken into account all of the relevant factors in §3553(a). *United States v. Diaz-Argueta*, 4__ F.3d ___, 2006 U.S. App. LEXIS 12034, *10 (9th Cir. May 16, 2006).

Supervised release revocation hearings

United States v. Kelley, 446 F.3d 688 (7th Cir. 2006.

In *Kelley*, the Seventh Circuit noted a circuit conflict over the admission of hearsay at supervised release or probation revocation hearings. The Seventh Circuit allows reliable hearsay to be admitted at such hearings without a specific showing of good cause for its admission. *Id*. at 692. However, the Court noted that:

> We are aware that some circuits interpret *Morrissey* to require an explicit finding of good cause before admission of hearsay at a revocation hearing, and others have adopted a balancing test that requires the court to weigh the confrontation interest of the parolee/probationer against the interests of the government. *E.g.*, *United States v. Rondeau*, 430 F.3d 44, 47-48 (1st Cir. 2005) (hearsay was admissible at revocation hearing only because court determined the hearsay was reliable, and that the government had a good reason not to produce declarants); *Barnes v. Johnson*, 184 F.3d 451, 454 (5th Cir. 1999) ("To fall within the good-cause exception to the right of confrontation at a parole revocation hearing[,] the hearing officer must make an explicit, specific finding of good cause and state the reasons for that finding. . . . The hearing officer must weigh the parolee's interest in confronting the witness with the government's interest in denying the parolee that right."); *United States v. Martin*, 382 F.3d 840, 844 (8th Cir. 2004) ("To comport with *Morrissey v. Brewer*, the district court must balance the probationer's right to confront a witness against the grounds asserted by the government for not requiring confrontation.") (quotation marks and citation omitted); *United States v. Hall*, 419 F.3d 980, 986 (9th Cir. 2005) ("To determine whether the admission of hearsay evidence violates the releasee's right to confrontation in a particular case, the court must weigh the releasee's interest in his constitutionally guaranteed right to confrontation against the Government's good cause for denying it.") (quotation and citation omitted); *United States v. Frazier*, 26 F.3d 110, 114 (11th Cir. 1994) (in deciding whether to admit hearsay testimony at a revocation hearing, "the court must balance the defendant's right to confront adverse witnesses against the grounds asserted by the government for denying confrontation"). Other circuits follow our approach and do not require an explicit good cause finding or a balancing test. *See United States v. McCallum*, 677 F.2d 1024, 1025-26 (4th Cir. 1982); *Kell v. United States Parole Comm'n*, 26 F.3d 1016, 1019-20 (10th Cir. 1994).

Id. at 692 fn. 4.

Supreme Court Update
October 2005 Term

Compiled by: Johanna Christiansen
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Cases Decided - October 2005 Term

***Dye v. Hofbauer*, No. 04-8384, 126 S. Ct. 5 (2005) (Per Curiam).** The Sixth Circuit denied Dye's habeas petition because the opinion of the state court failed to show Dye had raised a federal claim based on prosecutorial misconduct in state court. The Supreme Court reversed, holding that the Court of Appeals cannot just look to the state court's opinion when determining whether a federal claim has been raised; the Court must also consider Dye's briefs to the state appellate court.

***Schriro v. Smith*, No. 04-1475, 126 S. Ct. 7 (2005) (Per Curiam).** Smith was convicted of first-degree murder and sentenced to death. Shortly after the Supreme Court

decided *Atkins v. Virginia*, Smith asserted in habeas filings that he is mentally retarded and cannot be executed. The Ninth Circuit ordered the state courts to conduct a jury trial to resolve Smith's mental retardation claim. The Supreme Court reversed, holding the Ninth Circuit exceeded its authority by imposing the jury trial condition. After *Atkins*, each state must be given the opportunity to choose its own measures for adjudicating mental retardation claims, which should not have been dictated by the Ninth Circuit.

***Eberhart v. United States*, No. 04-9949, 126 S. Ct. 403 (2005) (Per Curiam).** Federal Rule of Criminal Procedure 33(a) allows the district court to vacate any judgment and grant a new trial in the interest of justice. Any motion must be filed within seven days after the verdict or finding of guilty. Eberhart filed his motion with the district court outside of the seven day time limit; however, the government did not object to the untimeliness of the motion. The district court granted Eberhart's motion. On appeal, the government asserted the untimeliness issue for the first time. The Seventh Circuit construed Rule 33's time limitations as jurisdictional, thereby permitting the government to successfully raise noncompliance with the limitations for the first time on appeal. The Supreme Court reversed holding Rule 33 is not jurisdictional. Rather, Rule 33 is a "claim-processing rule" that can be forfeited if the party asserting the rule waits too long to raise the point. Therefore, the government was not allowed to assert the untimeliness of the motion.

***Kane v. Garcia Espitia*, No. 04-1538, 126 S. Ct. 407 (2005) (Per Curiam).** Garcia Espitia, proceeding *pro se*, was denied access to a law library while in jail prior to trial. On habeas review, the Ninth Circuit held the lack of any pretrial access to legal materials violated his constitutional right to represent himself under *Faretta v. California*. The Supreme Court reversed, holding that *Faretta* does not, as § 2254(d)(1) requires, clearly establish a right to law library access. The Court noted a circuit split on this issue, which was resolved by this opinion. (The Seventh Circuit Court of Appeals has held that a defendant who knowingly proceeds *pro se* also relinquishes his right to a law library.)

***Maryland v. Blake*, No. 04-373, 126 S. Ct. 602 (2005) (Per Curiam).** The case was dismissed as improvidently granted. The question presented was, "When a police officer improperly communicates with a suspect after invocation of the suspect's right to counsel, does *Edwards* permit consideration of curative measures by the police, or other intervening circumstances, to conclude that a suspect later initiated communication with the police?"

***Bradshaw v. Richey*, No. 05-101, 126 S. Ct. 602 (2005) (Per Curiam).** Richey set fire to an apartment intending to kill his ex-girlfriend and her new boyfriend. Both adults escaped the fire, but a two year old child was killed in the fire. Richey was convicted of aggravated felony murder on a theory of transferred intent. He sought federal habeas review of his conviction and sentence. The Sixth Circuit reversed and held Richey was entitled to relief because transferred intent was not a permissible theory for aggravated felony murder under Ohio law. The Supreme Court reversed, holding the Sixth Circuit had disregarded the Ohio Supreme Court's authoritative interpretation of Ohio law which provided that transferred intent was sufficient to prove aggravated felony murder.

***Brown v. Sanders*, No. 04-980, 126 S. Ct. 884 (2006) (Scalia).** Sanders was convicted of first-degree murder and sentenced to death. The jury found four special circumstances, each of which allowed the death penalty to be imposed. On direct appeal, the state supreme court invalidated two of the special circumstances but affirmed Sanders's conviction and sentence. The Supreme Court issued the following rule to apply to these situations: "An invalidated sentencing factor will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the jury to give aggravating weight to the same facts and circumstances." In Sanders's case, the Supreme Court held that the jury's consideration of the invalid special circumstances was not unconstitutional.

***Rice v. Collins*, No. 04-52, 126 S. Ct. 969 (2006) (Kennedy).** At Collins's state court drug trial, the prosecutor struck a young African-American woman from the panel. As a race-neutral explanation, the prosecutor said he struck the woman because of her age and her lack of ties to the community. On habeas review, the Ninth Circuit reversed, holding the state court's rulings were based on an unreasonable factual determination. The Supreme Court reversed the Ninth Circuit, stating the Court of Appeals improperly substituted its evaluation of the record for that of the state court. Although reasonable minds might disagree about the prosecutor's credibility, this cannot supersede the trial court's determinations.

***Oregon v. Guzek*, No. 04-928, 126 S. Ct. 1226 (2006) (Breyer).** The question before the Court was whether a capital defendant must be allowed to introduce "residual doubt" evidence at his sentencing proceeding. Guzek was convicted of capital murder despite his presentation of an alibi defense. At his sentencing, he sought to introduce new evidence tending to support his alibi defense, evidence that was inconsistent with the conviction. The Supreme Court relied on three factors to determine that the limitation on Guzek's right to present evidence was constitutional: (1) evidence relevant to sentencing should concern *how* a defendant committed the crime, not *whether* he committed the crime; (2) the alibi defense was previously submitted and rejected by the jury's verdict and, therefore, should not be available for collateral attack at the sentencing hearing; and (3) state law gives defendants the right to present all trial evidence, in transcript form, during sentencing but does not allow defendants to present new evidence.

***United States v. Grubbs*, No. 04-1414, 126 S. Ct. 1494 (2006) (Scalia).** A magistrate judge issued an anticipatory search warrant for Grubbs's house based on an officer's affidavit that explained the warrant would not be executed until a package containing child pornography, which Grubbs ordered from an undercover postal inspector, was delivered to the house. When the package was delivered, the search warrant was executed and the pornography seized. Grubbs filed a motion to suppress the evidence, which was denied by the district court. The Ninth Circuit reversed. The Supreme Court reversed the Ninth Circuit and held that anticipatory search warrants are not categorically unconstitutional. When issuing such a warrant, the magistrate must determine that it is probable that contraband, evidence of a crime, or a fugitive will be on the described premises when the warrant is executed. When the warrant contains a "triggering event," such as the delivery of the pornography, the probable cause finding goes not only to what will be found if the condition is met, but also to the likelihood that the condition will be met.

***Georgia v. Randolph*, No. 04-1067, 126 S. Ct. 1515 (2006) (Souter).** Police were called to a residence regarding a domestic dispute. The wife told the police the husband used illegal drugs and gave the police consent to search the residence for evidence of drug possession and use. The husband, who was also present, "unequivocally refused" to give consent. The husband was later indicted for possession of cocaine and filed a motion to suppress. The Supreme Court held that a physically present occupant's refusal to permit entry when another occupant has given consent renders a warrantless entry and search unreasonable and invalid as to the objecting occupant.

***Day v. McDonough*, No. 04-1324, 126 S. Ct. 1675 (2006) (Ginsburg).** Day filed a federal habeas petition after his state conviction became final. The state filed a response stating that Day's petition was timely. However, the magistrate judge found the state had miscalculated the tolling period and found Day's petition was untimely. The district court dismissed the petition, which was affirmed by the Court of Appeals. The Supreme Court affirmed holding that the district court had discretion to correct the state's erroneous calculation and dismiss the petition. The Court held that a statute of limitations defense is not jurisdictional and where the state had forfeited the defense, rather than deliberately waived it, the court could raise the issue *sua sponte*. However, before dismissing the petition *sua sponte*, the court must give the parties fair notice and an opportunity to present their positions on the issue. The court must also assure itself the petitioner is not prejudiced by the delayed focus on the limitations issue.

***Holmes v. South Carolina*, No. 04-1327, 126 S. Ct. 1727 (2006) (Alito).** At Holmes's trial for murder, the state relied heavily on forensic evidence to prove his guilt. Holmes sought to undermine the state's case by introducing evidence of a third party's guilt of the crime. The trial court excluded the third party guilt evidence. The Supreme Court held that a defendant's constitutional rights are violated by an evidentiary rule where the defendant may not introduce evidence of third party guilt if the prosecution has introduced forensic evidence supporting a guilty verdict. However, the rules of evidence still permit judges to exclude evidence if its probative value is outweighed by unfair prejudice, confusion of the issues, or potential to mislead the jury.

***Zedner v. United States*, No. 05-5992, 126 S. Ct. 1976 (2006) (Alito).** The Speedy Trial Act, 18 U.S.C. § 3161(c)(1), generally requires a federal criminal trial to begin within 70 days of indictment or initial appearance. A district court may grant extensions if it finds one of the many exceptions applicable. Zedner was indicted in April of 1996 and requested several continuances. After the second continuance, the district court suggested Zedner should waive application of the Speedy Trial Act "for all time" and created a written waiver. Zedner signed the waiver in November of 1996. The district

court made no additional findings excluding time in compliance with the Act. Four years later, when Zedner still had not been brought to trial, he filed a motion to dismiss the indictment, which the district court denied based on the waiver "for all time." Zedner was finally convicted in 2003. The Supreme Court held that a defendant cannot prospectively waive application of the Speedy Trial Act, based on the language of the Act itself which required findings by the district court. The Court also held that when a district court does not make findings on the record to support a § 3161(h)(8) continuance, harmless error review does not apply.

***House v. Bell*, No. 04-8990, 2006 U.S. LEXIS 4675 (June 12, 2006) (Kennedy).** House was convicted of murder and sentenced to death. The state's evidence against him included blood and semen samples seemingly connecting him to the murder. On federal habeas review, House was able to challenge the forensic evidence presented against him at trial. First, he was able to show that, in direct contradiction of the evidence presented at trial, DNA testing established that semen on the victim's clothing came from her husband, not from House. Second, he was able to show that the clothing containing blood stains linking him to the murder had possibly been contaminated multiple times prior to trial, including evidence that the clothing had been transported by the FBI in the same container with autopsy blood samples and the samples spilled during transport. Third, House provided a confession of the victim's husband. The Supreme Court held House made the showing required by the actual innocence exception, giving him the right to seek federal review of his conviction. The Court held that a petitioner need not establish absolute certainty about innocence to obtain federal review, rather, the burden is to demonstrate that it is more likely than not, in light of the new evidence, that no reasonable juror would find him guilty.

***Hudson v. Michigan*, No. 04-1360, 2006 U.S. LEXIS 4677 (June 15, 2006) (Scalia).** Police officers executing a search warrant violated the Fourth Amendment's knock and announce rule. The district court granted Hudson's motion to suppress the evidence. The Michigan Court of Appeals reversed, holding a violation of the knock and announce rule does not require suppression of evidence. The Supreme Court affirmed, holding that it has repeatedly rejected "indiscriminate application" of the exclusionary rule. The knock and announce rule was intended to protect human life, property, and privacy. However, it was not intended to protect an interest in preventing the government from seeing or taking evidence described in a warrant. Because the interests violated have nothing to do with the seizure of evidence, the exclusionary rule is inapplicable. Rejecting Hudson's argument that without suppression, the police will not be deterred from violating the knock and announce rule, the Supreme Court stated police misconduct is deterred by civil rights suits and by increasing professionalism of police forces.

***Davis v. Washington*, No. 05-5224, & *Hammon v. Indiana,* No. 05-5705, 2006 U.S. LEXIS 4886 (June 19, 2006) (Scalia).** This case decided whether statements made to a 911 operator (as in Davis's case) or to law enforcement at a crime scene (as it Hammon's case) are testimonial as defined by *Crawford v. Washington*. In Davis's case, Davis's girlfriend called 911 and indicated he had assaulted her. The tape indicated he was in the process of assaulting her while she was on the telephone, but left during the call. At trial, the district court admitted the 911 tape against Davis. In Hammon's case, police responded to a domestic disturbance call to the Hammon home. Officers interviewed Hammon's wife, who signed a written statement accusing Hammon of battery. When the wife did not appear at trial, the court admitted the affidavit and the interviewing officer's testimony. The Supreme Court held that the statements made to the 911 operator were not testimonial and, therefore, could be admitted without violating the Confrontation Clause. In contrast, the Court held in Hammon that the wife's statements to the officers were testimonial and could not be admitted.

***Samson v. California*, No. 04-9728, 2006 U.S. LEXIS 4885 (June 19, 2006) (Thomas).** Samson was on parole in California. Pursuant to statute, every parolee must agree to be subject to search or seizure by a parole officer or other peace officer, with or without a search warrant and with or without cause. The Supreme Court upheld the statute, finding that the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee. The Court reasoned that parolees are on the continuum of state-imposed punishments and have fewer expectations of privacy than people on probation because parole is more akin to imprisonment than probation.

***Dixon v. United States,* No. 05-7053, 2006 U.S. LEXIS 4894 (June 22, 2006) (Stevens)**.Dixon purchased firearms at a gun show while under indictment in violation of 18 U.S.C. § 922(n). She admitted that she knew purchasing the firearms while under indictment

was a crime but asserted she was acting under duress because her boyfriend threatened to harm her and her children if she did not buy the guns for him. The district court denied her request for a jury instruction placing the burden upon the government to disprove her duress defense beyond a reasonable doubt. The Fifth Circuit affirmed. The Supreme Court agreed with the Fifth Circuit that Dixon's Due Process rights had not been violated. The government bore the burden of proving beyond a reasonable doubt that Dixon knew she was breaking the law. Dixon bore the burden of establishing her duress defense by a preponderance of the evidence. The Supreme Court concluded that the duress defense does not normally controvert any of the elements of the offense, although it may excuse otherwise punishable conduct. The Court distinguished this situation from *Davis v. United States*, 160 U.S. 469 (1895), where the Court required the government to prove the defendant's sanity beyond a reasonable doubt in a murder case. The rule announced in the present case does not conflict with *Davis* because the *Davis* defense of insanity tended to disprove an essential element of the offense, whereas the defense of duress does not.

***Kansas v. Marsh*, No. 04-1170, 2006 U.S. LEXIS 5163 (June 26, 2006) (Thomas).** Marsh was convicted of capital murder and sentenced to death. He argued that the Kansas death penalty statute establishes an unconstitutional presumption of death by directing imposition of the death penalty when aggravating and mitigating circumstances are in equipoise. The Supreme Court held that Kansas's death penalty statute is constitutional. The statute at issue met the requirements of *Furman v. Georgia*, which held that the system must rationally narrow the class of death-eligible defendants and permits a jury to consider any mitigating evidence relevant to its sentencing determination.

***Washington v. Recuenco*, No. 05-83, 2006 U.S. LEXIS 5164 (June 26, 2006) (Thomas).** Prior to the Court's decisions in *Apprendi* and *Blakely*, Recuenco was convicted of second degree assault after threatening his wife with a handgun. At sentencing, the district court imposed a three year firearm enhancement to Recuenco's sentence based on the court's factual findings. The state admitted the enhancement was a Sixth Amendment *Blakely* violation but contended the error was harmless. The Washington Supreme Court held a *Blakely* error constitutes structural error, which always invalidates a conviction. The Supreme Court disagreed and held that failure to submit a sentencing factor to the jury is not structural error. Therefore, the error can be subjected to harmless error analysis. The Court likened the instant case to *Neder v. United States*, which held that failure to submit an element of an offense to the jury is subject to the harmless error rule.

***United States v. Gonzalez-Lopez*, No. 05-352, 2006 U.S. LEXIS 5165 (June 26, 2006) (Scalia).** Gonzalez-Lopez hired Low, an out of state attorney, to represent him on a drug charge in federal court. The district court denied Low's application for admission *pro hac vice* on the ground that he had violated a professional conduct rule and the court prevented Gonzalez-Lopez from meeting or consulting with Low throughout the trial while another attorney represented him. The jury found Gonzalez-Lopez guilty. The Eighth Circuit held that the district court's refusal to admit Low violated respondent's Sixth Amendment right to paid counsel of his choosing, and that this violation was not subject to harmless error review. The Supreme Court affirmed holding that the district court's erroneous deprivation of a defendant's choice of counsel entitles him to reversal of his conviction. The government conceded the erroneous deprivation of counsel of choice. However, the Supreme Court rejected the government's argument that Gonzalez-Lopez was required to meet the *Strickland v. Washington* standard and prove substitute counsel's performance was deficient and the defendant was prejudiced by it. The Court stated that the right to counsel of choice commands that the accused be defended by the counsel he believes to be best. No additional showing of prejudice is required. Furthermore, this Sixth Amendment violation is not subject to harmless error analysis and that erroneous deprivation of the right to counsel of choice qualifies as structural error. The Court was careful to note that this opinion does not cast doubt upon its previous holdings limiting the right to counsel of choice and recognizing trial courts' authority to establish criteria for admitting lawyers to argue before them. This opinion was premised on the government's concession that the district court erred by not admitting Low *pro hac vice*.

***Sanchez-Llamas v. Oregon*, No. 04-10566 and *Bustillo v. Johnson*, No. 05-51, decided June 28, 2006 (Roberts).** The Vienna Convention on Consular Relations provides that if a person detained by a foreign country "so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State" of such detention and inform the detainee of his rights. Both Sanchez-Llamas and Bustillo were foreign nationals detained and later convicted in the United States. They claimed the

authorities violated their rights under the Vienna Convention and argued evidence obtained as a result of that violation should have been suppressed. The Supreme Court disagreed and held suppression is not an appropriate remedy for a Vienna Convention violation.

***Beard v. Banks,* No. 04-1739, decided June 28, 2006 (Breyer).** Pennsylvania houses its most dangerous inmates in a Long Term Segregation Unit. The prison has a policy of denying these inmates access to newspapers, magazines, and photographs. One of the inmates challenged the policy as violating the First Amendment. The Supreme Court upheld the policy. Under *Turner v. Safley*, prison regulations are permissible if they are reasonably related to legitimate penological interests. This standard has been met with this policy because inmates with good behavior can improve their status in the prison and thereby gain access to the denied materials. This interest, to motivate better behavior, satisfies the *Turner* standard.

***Hamdan v. Rumsfeld*, No. 05-184, decided June 29, 2006 (Stevens).** After the September 11, 2001, attacks on the United States, the United States military invaded Afghanistan. During the hostilities, Hamdan, a Yemeni national, was captured and transported to prison in Guantanamo Bay, Cuba. A year later, President George W. Bush deemed him eligible for trial by military commission. A year after that, he was charged with conspiracy to commit offenses triable by military commission. Hamdan filed habeas and mandamus petitions, asserting the military commission lacked authority to try him because (1) no congressional act or common law of war supports the military commission trial for an offense that is not a violation of the law of war and (2) the procedures adopted to try him violate basic tenets of military and international law. The district court granted the petitions but the D.C. Circuit reversed, holding that Hamdan was not entitled to relief because the Geneva Conventions are not judicially enforceable and the military commission trial did not violate any military or international law. The Supreme Court reversed. The Court first held that the Detainee Treatment Act of 2005 did not repeal the Court's jurisdiction to review the D.C. Circuit's decision. The Court then held that the military commission at issue lacks the power to proceed because its structure and procedures violate the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions. A plurality of the Court (Justices Stevens, South, Ginsburg, and Breyer) concluded the government has not charged Hamdan with an offense that by the law of war may be tried in a military commission. In the charging document, Hamdan was not alleged to have committed any overt act in a theater of war because the crime of conspiracy has rarely, if ever, been tried by a military commission

***Clark v. Arizona*, No. 05-5966, decided June 29, 2006 (Souter).** Clark was convicted of first degree murder for killing a police officer in the line of duty. At trial, he did not dispute that he killed the officer by shooting him, but asserted he did not have the requisite specific intent based on his paranoid schizophrenia. Clark raised the affirmative defense of insanity at trial and argued that at the time of the crime, he did not know the criminal act was wrong. He also sought to use his mental illness to rebut the prosecution's evidence that he acted intentionally or knowingly to kill the officer. The Arizona Supreme Court ruled Clark could not rely on insanity evidence to dispute the *mens rea*, relying on an Arizona statute that refused to allow psychiatric testimony to negate specific intent. Clark argued the statute impermissibly limited the traditional *M'Naghten* test of insanity. The *M'Naghten* test asks whether a mental defect leaves a defendant unable to understand what he was doing or whether a mental disease or defect leaves a defendant unable to understand that his action was wrong. The Arizona statute proscribes the defense of insanity to proving the defendant knew his action was wrong. The Supreme Court upheld the statute.

Cases Awaiting Argument (October Term 2006)

***Ornaski v. Belmontes*, No. 05-493, cert. granted May 1, 2006.** First, whether *Boyde* confirm the constitutional sufficiency of California's "unadorned factor (k)" instruction where a defendant presents mitigating evidence of his background and character which relates to, or has a bearing on, his future prospects as a life prisoner. Second, does the Ninth Circuit's holding, that California's "unadorned factor (k)" instruction is constitutionally inadequate to inform jurors they may consider "forward-looking" mitigation evidence constitute a "new rule" under *Teague v. Lane*? Decision Below: 414 F.3d 1094 (9th Cir. 2005).

***Toledo-Flores v. United States*, No. 05-7664, cert. granted April 3, 2006**. Whether the Fifth Circuit erred in holding, in opposition to the Second, Third, Sixth, and Ninth Circuits, that a state felony conviction for simple possession of a controlled substance is a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) and hence an "aggravated felony," under 8 U.S.C. § 1101(a)(43)(B), even though the same crime is a

misdemeanor under federal law.
Decision Below: 2005 U.S. App. LEXIS 17891 (5th Cir. August 17, 2005).

***Whorton v. Bockting*, No. 05-595, cert. granted May 15, 2006.** First, whether, in direct conflict with the published opinions of the Second, Sixth, Seventh, and Tenth Circuits, the Ninth Circuit erred in holding that this Court's decision in *Crawford v. Washington*, regarding the admissibility of testimonial hearsay evidence under the Sixth Amendment, applies retroactively to cases on collateral review. Second, whether the Ninth Circuit's ruling that *Crawford* applies retroactively to cases on collateral review violates this Court's ruling in *Teague v. Lane*. Third, whether, in direct conflict with the published decisions of the Fourth and Seventh Circuits, the Ninth Circuit erred in holding that 28 U.S.C. § 2254(d)(1) and (2) adopted the *Teague* exceptions for private conduct which is beyond criminal proscription and watershed rules.
Decision Below: 399 F.3d 1010 (9th Cir. 2005).

***Carey v. Musladin*, No. 05-785, cert. granted April 17, 2006.** In the absence of controlling Supreme Court law, did the Court of Appeals for the Ninth Circuit exceed its authority under 28 U.S.C. § 2254(d)(1) by overturning respondent's state conviction of murder on the ground that the courtroom spectators included three family members of the victim who wore buttons depicting the deceased?
Decision Below: 427 F.3d 653 (9th Cir. 2005)

***United States v. Resendiz-Ponce*, No. 05-998, cert. granted April 17, 2006**. Whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error.
Decision Below: 425 F.3d 729 (9th Cir. 2005).

***Cunningham v. California*, No. 05-6551, cert. granted February 21, 2006.** Whether California's determinate sentencing law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments.
Decision Below: 2005 Cal. LEXIS 7128 (June 29, 2005).

***Lawrence v. Florida*, No. 05-8820, cert. granted March 27, 2006.** There is a split in the circuits about whether the one-year period of limitations is tolled for "[t]he time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment of claim is pending." Where a defendant facing death has pending a United States Supreme Court certiorari petition to review the validity of the state's denial of his claims for state postconviction relief, does the defendant have an application pending which tolls the § 2244(d)(2) statute of limitations? Alternatively, does the confusion around the statute of limitations, as evidenced by the split in the circuits, constitute an "extraordinary circumstance," entitling the diligent defendant to equitable tolling during the time when his claim is being considered by the United States Supreme Court on certiorari? And in the second alternative, do the special circumstance where counsel advising the defendant as to the statute of limitations was registry counsel, a species of state actor, under the monitoring supervision of Florida courts, with a statutory duty to file appropriate motions in a timely manner, constitute an "extraordinary circumstance" beyond the defendant's control such that the doctrine of equitable tolling should operate to save his petition?
Decision Below: 421 F.3d 1221 (11th Cir. 2005)

***Burton v. Waddington*, No. 05-9222, cert. granted June 5, 2006.** First, is the holding in *Blakely* a new rule or is it dictated by *Apprendi*? Second, if *Blakely* is a new rule, does its requirement that facts resulting in an enhanced statutory maximum be proved beyond a reasonable doubt apply retroactively?
Decision Below: 2005 U.S. App. LEXIS 15497 (9th Cir. July 28, 2005)

***James v. United States*, No. 05-9264, cert. granted June 12, 2006.** Whether the Eleventh Circuit erred by holding that all convictions in Florida for attempted burglary qualify as a violent felony under 18 U.S.C. § 924(e), creating a circuit conflict on the issue.
Decision Below: 430 F.3d 1150 (11th Cir. 2005).

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