The BACK BENCHER

Central District of Illinois Federal Defenders

Vol. No. 44 Spring 2009

DEFENDER'S MESSAGE

As we all know, continuing Legal Education is essential to every lawyer, and perhaps even more so for federal criminal defense lawyers. Not only is the federal law more complex than state law, but the consequences of a federal conviction can be extraordinarily severe. Since the Guidelines went into effect in 1987, they have curtailed judges' discretion and increased sentences dramatically, resulting in Guideline issues being appealed more than any other issue in the federal Circuit Courts of Appeal. However, as cases like *Booker*, *Kimbrough*, *Gall*, and *Begay* demonstrate, the federal criminal law is also very fluid. What were once mandatory Guidelines are now advisory, and the Guidelines's iron grip on the federal sentencing process has been loosening. What was well established law the last time we appeared in federal court may well have gone out the window by the time we next appear. Accordingly, staying current with the law is critical, especially when we stop to think that the liberty of our clients is at stake, and we bear the incredible stress and responsibility to know and understand the current state of the law.

Of course, I understand that most panel attorneys do not have the luxury of focusing all of their energy on the study of the federal criminal law like we do. That is why our office provides publications like this newsletter, writes books and articles on the federal criminal practice, takes telephone calls with specific questions, and provides free seminars addressing federal criminal practice. It is my hope that these services make it possible for every panel attorney in the Central District of Illinois to stay abreast of the important aspects of defending our clients, regardless of how diverse your practice may be.

As part of these continuing efforts, I am pleased to announce that my office's 2009 CJA Panel Attorney Seminar will be held on Friday, July 10, 2009, in Peoria, Illinois at the Holiday Inn City Center from 10:00 a.m. to 3:30 p.m. The seminar will be free of charge and includes a complimentary box lunch. I am in the process of having the program approved for 4.5 hours of Illinois MCLE credit. Please mark the date on your calendar and plan on attending. It's a free seminar with top A-1 speakers, free lunch, and free CLE credits. This is one of those rare occasions when a good deal is not too good to be true. The only qualification you need to attend is that you must be a registered CJA panel attorney in a federal district court.

Chief Judge Michael P. McCuskey will present opening remarks and be available for questions regarding panel issues. Our impressive faculty includes the following outstanding lawyers, speaking on the topics described below:

_____1. Honorable Michael M. Mihm, *View from the Bench*. Judge Mihm is a United States District Judge in the Central District of Illinois. He graduated with a B.A. from Loras College in 1964 and received his law degree from Saint Louis University School of Law in 1967. He was State's Attorney of Peoria County from 1972 to 1980, then in private practice in Peoria from 1980 until being appointed by President Ronald Reagan to the federal bench in 1982. During his tenure on the bench, he has served on the very prestigious Executive Committee of the Judicial Conference and in 2004 received the USAID Oustanding Citizen Achievement Citation for his work with the Russian Judiciary. Among the many high profile cases over which he has presided during his career on the bench, he is currently the presiding judge in the al-Marri terrorism case, which continues to receive nationwide media coverage.

Judge Mihm will discuss his views on effective courtroom advocacy at all stages of a criminal case, including motions practice, trial advocacy skills, and effective sentencing strategies. Attendees will also have a unique opportunity to participate in a question and answer session with Judge Mihm. Of course, common courtesy tells us that discussion of pending cases is taboo. Rarely, if ever, do we get an opportunity to informally discuss courtroom practice with one of our federal judges. I know you won't want to miss this opportunity. When I was in private practice, a team of wild horses could not have kept me away from this seminar, even if this was the only speaker I heard. But that isn't the case because we are loaded for bear when it comes to superb speakers and useful topics.

2. Dean Strang, *The Department of Justice under the Obama Administration*. Dean, a top "go to" defense lawyer from Milwaukee, was Wisconsin's first Federal Public Defender. Dean is now in private practice as a criminal defense lawyer in Madison, Wisconsin. He is a partner with Hurley, Burish & Stanton, S.C., as well as an adjunct professor at the University of Wisconsin Law School and at Marquette University Law School. He received his undergraduate degree from Dartmouth College in 1982 and his law degree from the University of Virginia in 1985. Dean has appeared twice before the United States Supreme Court, including as co-counsel and co-author of the respondent's brief in *United States v. Booker*, which as we all know, is the landmark decision making the Guidelines advisory. I am proud to call him a close friend and former associate.

Dean will address how the policies set by the Department of Justice can often impact the federal criminal practice as much as the courts. From the types of crimes specially targeted for prosecution, to the guidelines for negotiating plea agreements, the insights that Dean can provide will give you tools to more effectively represent your clients.

3. Thomas J. Penn, Jr., *Effective Strategies for Negotiating Pleas*. As those who practice in the Central District already know, Tim has been a practicing attorney for over 40 years, with over 35 of those years serving as the Peoria County Public Defender. At the same time, he maintains a thriving active private practice and is a member of the Central District of Illinois's special capital panel. He graduated from Bradley University in 1965 and then earned his law degree from the University of Illinois College of Law in 1967.

Negotiating plea agreements is an essential part of criminal practice in federal court. Nearly 90% of all federal criminal cases result in a guilty plea. Indeed, the reality is that very few cases ever reach the trial stage in federal court. Although trial skills are still necessary for any competent federal criminal defense lawyer, we can often do the most good for our clients when negotiating a plea with the government. Consequently, effectively negotiating plea agreements is a skill that every federal practitioner must possess. To help us develop those skills, Tim will share with us some of his negotiating techniques developed over his many years of experience. Tim has used his negotiating skills in several high profile cases to the great benefit of his clients.

A sampling of Tim's incomparable ability to negotiate will include discussion of some of his local, high profile cases. One example is a case involving the death of a Bradley University student/athlete. Four members of the Bradley soccer team were charged with aggravated arson after they placed a Roman candle under one of their teammate's bedroom door, which resulted in the student's death. Although the charge carried a six-year mandatory minimum sentence, Tim was able to negotiate the charge down to involuntary manslaughter, resulting in a six month sentence followed by probation. In another case where a Peoria Police Officer was charged with reckless homicide after he was seen intoxicated while driving a boat, which subsequently ran into a barge killing a man, Tim was able to negotiate a dismissal of all charges, after an expert he retained opined that his client may not have been operating the boat. Finally, in a case involving a pharmacist charged with possessing a large amount of cocaine, Tim was retained for purposes of sentencing after the defendant was already convicted. By carefully reviewing the trial record and discovering a viable ineffective assistance of counsel claim, Tim was able to negotiate a very favorable sentencing deal for his client. As these few examples demonstrate, Tim has vast experience at successfully negotiating at the pre-trial, trial, and sentencing phases of cases. There are few practicing lawyers with his skill and

years of experience, and his advice on negotiating with the government on behalf of your client will be extraordinarily useful.

4. Phillip J. Kavanaugh, *"Litigating Government Breaches of Plea Agreements*. Phil is currently the Federal Public Defender for the Southern District of Illinois. He earned his undergraduate degree from the University of Missouri in 1971and then graduated from St. Louis University School of Law in 1977, and initially worked as a prosecutor in the states of Missouri and Illinois. After going into private practice in 1982, he became an Assistant Federal Public Defender for the Southern District of Illinois office in 1990. In 2004, he was appointed as the Federal Public Defender for the Southern District of Illinois.

After you've negotiated a plea with the government, there is always the possibility that, for a variety of reasons, the government may breach that agreement. Addressing what to do when the government breaches, Phil will discuss "Litigating Government Breaches of Plea Agreements." With Phil's years of experience practicing exclusively in federal court, he is exceedingly familiar with what happens when the government breaches and what to do about it, and how to win your argument. His many successes in this area of the law speak for themselves regarding the importance of listening to what Phil has to say.

5. Steven J. Beckett, *"Ethics for the Criminal Defense Lawyer*. Steve is the Director of Trial Advocacy at the University of Illinois College of law and the CJA Panel Attorney Representative for the Central District of Illinois. Steve is in his second term as our Panel Representative, and in that capacity has worked very hard with my office to ensure that our panel can take advantage of every resource available to them. He earned both his undergraduate and law degrees from the University of Illinois in 1970 and 1973, respectively. Steve is also "of counsel" to the law firm of Beckett & Webber, which he founded in 1988. Since 1973, he has practiced in the Champaign-Urbana area with a primary focus in both criminal and civil litigation. He is a highly regarded defense lawyer who has been involved in several high profile cases. He also appeared in the United States Supreme Court on two occasions, with both cases focusing on First Amendment Issues.

Whether it is negotiating a plea or dealing with a government breach of one, ethical questions always arise. To help us sort through these and other common ethical questions which arise for criminal defense lawyers, Steve will discuss ethical issues unique to federal criminal defense lawyers. Steve's combined experience as a professor and practitioner gives him a unique perspective on all aspects of federal criminal practice, and ethical issues in particular.

6. Jonathan E. Hawley, *Seventh Circuit Update*. Jonathan Hawley is First Assistant Federal Public Defender and Appellate Division Chief in my office. Jonathan earned his undergraduate degree from the University of Illinois at Chicago in 1992 and his law degree from De Paul University in 1997. He clerked for Chief Judge Michael P. McCuskey when Judge McCuskey sat on the Illinois Third District Court of Appeals and the United States District Court for the Central District of Illinois. He also clerked for former Illinois Supreme Court Chief Justice James D. Heiple. The remainder of Jonathan's career has been spent with my office. In the time that Jonathan has been the Appellate Division Chief, our office has litigated over 1,000 appeals in the Seventh Circuit and has for the last five years accepted appointments in approximately 25% of all criminal appeals closed in that court. Additionally, as you will read in this and other issues of *The Back Bencher*, he summarizes the significant cases from the Seventh Circuit, and in his presentation at the seminar, he will discuss trends in Seventh Circuit law which can be gleaned from these recent decisions.

I hope you can see that the seminar will offer some very practical advice on issues common to federal criminal practice, presented to you by some of the most experienced and skilled lawyers in practice today, as well as a remarkable federal judge recognized for his scholarship and professionalism not only by we who practice in his court, but also by his judicial peers as well as the Russian judiciary. I know you will agree that you could not have a better faculty discussing more useful topics than what we will have at this seminar–all without any cost to you and conveniently located right here in Central Illinois. I sincerely hope that you will take advantage of this opportunity to earn some free CLE credits, learn about the law, and visit with other like

minded criminal defense lawyers. You can register today by filling out the registration form at the back of this issue of *The Back Bencher* and faxing it to the attention of our Panel Administrator, Mary Ardis, at (309) 671-7898, or emailing her at Mary_Ardis@fd.org. I look forward to seeing you in July.

Sincerely yours,

Richard H. Parsons
Federal Public Defender
Central District of Illinois

Table Of Contents

CHURCHILLIANA

"I like pigs; cats look down on human beings, dogs look up to them, but pigs just treat us as their equals."

– Sir Winston Churchill

Dictum Du Jour

"There is no pleasure worth forgoing just for an extra three years in the geriatric ward."

–John Mortimer
(April 21, 1923 – January 16, 2009).

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"The key to success is sincerity . . . If you can fake it, you've got everything."

–Ezra Merkin
(friend and associate of Bernie Madoff)

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"It's a tragedy for a man to retire. Six months sitting around the house. They look like capons; and then they get sick [most die]."

–Ward Just in *Jack Grace*

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"Death ends a life . . . but it does not end a relationship, which struggles on in the survivor's mind . . . toward some resolution which it never finds."

–Robert Anderson, *I never Sang for my Father*

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"Clothes do not make the man, but are an outer reflection of the inner man."

–McDonald Lloyd

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"Clothes make the man. Naked people have little or no influence on society."

–Mark Twain

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"The love of learning
The sequestered nooks,
and all the sweet
serenity of books."

–Henry Wadsworth Longfellow

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"I am afraid of storms for I'm learning how to sail my ship."

–Louisa May Alcott

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"If a man does not keep pace with his companions, perhaps it is because he hears the beat of a different drummer."

–Henry David Thoreau

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"As I observed him regarding with calm, firm and cheerful gaze the approach of Death, I felt how foolish the Stoics were to make such a fuss about an event so natural and so indispensable to mankind. But I felt also the tragedy which robs the world of all the wisdom and treasure gathered in a great man's life and experience, and hands the lamp to some impetuous and untutored stripling, or lets

it fall shivered into fragments upon the ground."

–Arthur James Balfour,
The Strand Magazine, April 1931.

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ATTORNEY: This myasthenia gravis, does it affect your memory at all?
WITNESS: Yes.
ATTORNEY: And in what ways does it affect your memory?
WITNESS: I forget.
ATTORNEY: You forget? Can you give us an example of something you forgot?

–Disorder in the American Courts.

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"A successful man is one who can build a firm foundation with the bricks that others throw at him."

–David Brinkley.

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With what can only be described as chutzpah, defined by Leo Rosten as "gall, brazen nerve, effrontery, incredible guts, presumption plus arrogance such as no other word and no other language can do justice to," the objectors ask us to substitute them for the lawyers for the information-sharing class and award them the entire $750,000 in attorneys' fees that the district judge awarded those lawyers; in other words, the objectors are asking us for 40 times the $18,750 attorneys' fee that she awarded them. The request is preposterous.

–Mirfarsihi v. Fleet Mortgage,
551 F.3d 682 (7th Cir. 2008; No. 07-3402).

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Terre Haute, home to the only death row in the federal system, is not known for its hospitality. For "snitches" it is even worse.

–Dale v. Poston,
548 F.3d 582 (7th Cir. 2008; No. 06-2847).

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This is the second time we have encountered this case on the same set of facts albeit in two separate records, leading us to a feeling, in the words of Yogi Berra, of "déjà vu all over again."

–Magallanes v. Illinois Bell,
540 F.3d 694 (7th Cir. 2008; No. 07-3028).

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Litigation can sometimes take on a life of its own, propelling the parties into maneuvers and rhetorical flourishes that might not have been undertaken in more placid times. This case seems to be a cautionary tale for how the pressures of litigation can overtake parties like Hokusai's wave swamping the boats ("The Great Wave Off Kanagawa," ca. 1831, Katsushika Hokusai (1760-1849)).

–Eragen Biosciences v. Nucleic Acids Licensing,
___ F.3d ___ (7th Cir. 2008; No. 07-1726).

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They present three defenses, which we'll call the "I am just a copying machine" defense, the "honor among thieves" defense, and the "better liar" defense. To establish the first defense they argue that they merely repeated misrepresentations that defendant Gail Eldridge (not an appellant), who seems to have been the moving spirit in the prime-bank scheme, made to them. That is not true, but if it were it would not avail them. One doesn't have to be the inventor of a lie to be responsible for knowingly repeating it to a dupe. The defendants could not have thought that the fact that Eldridge told them something implausible (to put it mildly) made it true.

Their second defense is that Eldridge defrauded them, as shown by the fact that she pocketed the lion's share of the $32 million stolen from the investors. The defendants, however, pocketed almost $9 million, and even if Eldridge took more than her fair share of the loot, that would not exonerate them. One is reminded of the highwayman's case reported in Note, "The Highwayman's Case," 9 L.Q. Rev. 197 (1893); see W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 50, p. 336 n. 4 (5th ed. 1984); *Byron v. Clay*, 867 F.2d 1049, 1051-52 (7th Cir. 1989); *United States v. Kravitz*, 281 F.2d 581, 583-84 n. 3 (3d Cir. 1960). One highwayman sued another, claiming that he was entitled to a larger share of the loot from a series of joint robberies. The suit was dismissed, both were hanged, and the plaintiff's lawyers were fined for having brought a suit "both scandalous and impertinent."

The third defense is that the defendants believed the false representations that they made because the investors believed them. In other words, if a lie is skillful enough to deceive the person lied to, it must have deceived the liar as well.

Enough said.

–SEC v. Lyttle,
538 F.3d 601 (7th Cir. 2008; No. 07-2466).

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Although the dual federal-state regulatory scheme for the telecommunications industry is complex and even arcane, the parties did not have to assault us with 206 pages of briefs, brimming with jargon and technical detail, in order to be able to present the issues on appeal adequately. Clarity, simplicity, and brevity are underrated qualities in legal advocacy.

–Illinois Bell v. Box,
548 F.3d 607 (7th Cir. 2008; No. 08-1489).

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If there's any truth to the rumor that Jimmy Hoffa has been resting for the last 33+ years somewhere beneath the end zone at Giants Stadium (or "The Meadowlands" as the New York Jets prefer) in East Rutherford, New Jersey, this case, involving political infighting at a Teamster's Local in Wisconsin, might cause his body to stir just a bit.

–Vought v. Teamsters,
___ F.3d ___ (7th Cir. 2009; No. 08-2438).

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This is a case about death. To be entitled to the death benefit payable under a life insurance policy, a beneficiary must prove that the insured is actually, or, in the alternative, perhaps only legally, dead. There is a difference between the two. As is often the case in the law, words and concepts so familiar in everyday life assume esoteric identities when cloaked in legal rhetoric. It should come as no surprise, then, that not even death, perhaps the most sobering and forthright fact in life, is immune from legal definition.

–Malone v. ReliaStar Insurance Co.,
___ F.3d ___ (7th Cir. 2009; No. 08-1734)

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CHECK OUT OUR WEBSITE

The Federal Public Defender for the Central District of Illinois's own website is accessible at http://ilc.fd.org. The website is designed with panel attorneys in mind, and we hope that it will be a great resource not available elsewhere. On this site, you will find legal news, such as information regarding recent Seventh Circuit and Supreme Court cases. In the "Publications" section, all three of Richard H. Parsons's books are electronically accessible, including *Handbook for Appeals, Possible Issues for Review in Criminal Appeals*, and *Pleadings Potpourri*. In the "Newsletter" section, you can access the current and all past issues of *The Back Bencher*. The "Links" section contains links to various court web sites, all the CM/ECF sites for districts in the Seventh Circuit, legal research engines, and useful legal news and blog sites. Finally, the CLE section contains information regarding upcoming CLE programs, sponsored by our office and other organizations as well.

$ $ $ INCREASES IN CJA PANEL ATTORNEY HOURLY RATES AND CASE MAXIMUMS $ $ $

Effective March 11, 2009, the non-capital hourly panel attorney compensation rate rose from $100 to $110, and the maximum hourly capital rate from $170 to $175. Where the appointment of counsel occurred before the effective date, the new compensation rates apply to that portion of services provided on or after March 11, 2009. Additionally, the case compensation maximum for felonies at the trial court level increased from $7,800 to $8,600 and at the appellate court level from $5,600 to $6,100. The new case compensation maximums apply to a voucher submitted by appointed counsel if that person furnished any CJA-compensable work on or after March 11, 2009.

PACER ACCOUNTS

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

Gall and *Kimbrough* Practice Tip

By: Alan Ellis, Esq.

For over 39 years, the Law Offices of Alan Ellis has worked with defendants and inmates and consulted with many of the world's leading criminal defense attorneys to develop strategies that obtain the lowest possible sentence for clients, and if it's one of incarceration, to be served at the best facility possible, with the greatest opportunity for early release.

From its regional offices in San Francisco, California, Philadelphia, Pennsylvania, and international office in Shanghai, China, the Law Offices of Alan Ellis represents white collar clients and others nationwide and abroad.

Due to the generosity of Alan Ellis, we are reproducing his *Gall* and *Kimbrough* practice tip. *Gall v. United States*, 552 U.S. ___, 2007 WL 4292116 (Dec. 10, 2007), *Kimbrough v. United States*, 552 U.S. ___, 2007 WL 4292040 (Dec. 10, 2007). He has taken the unusual step of preparing this special, stand alone practice tip because of the unique importance of these two new cases. He believes that as a result of the recent Supreme Court same day landmark decisions in these two cases, the pendulum has shifted dramatically back to where judges have more discretion than they have ever had since pre-guideline days in fashioning an appropriate sentence in a particular case.

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Gall and *Kimbrough* Practice Tip

After *Booker*, Courts of Appeals rejected numerous below-guideline sentences as "unreasonable" simply because they did not believe that the mitigating circumstances on which the district courts relied were significant enough to support large "variances" from the bottom of the guideline ranges. That is likely to change with the Supreme Court's opinion in *Gall v. United States*, 552 U.S. – , 2007 WL 4292116 (Dec. 10, 2007). In that case, the Court "reject[ed] an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range." The Court also "reject[ed] the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." The Court made it clear that Courts of Appeals are not to impose their own judgment on what the appropriate sentence should be in any particular case. So long as the record demonstrates that district court considered the § 3553(a) factors and supported its sentence with a rationale that is supported by the record, the sentence should stand. It is therefore now more important than ever for defense attorneys to provide a rationale to the sentencing court.

The Court also makes clear that any attempt to give special weight to the sentencing guideline is contrary to its holding in *Booker*, which means the guidelines are advisory. See also, *Kimbrough v. United States*, 552 U.S. ___, 2007 WL 4292040 (Dec. 10, 2007) (allowing judges to impose lower sentences based on the unfairness of the 100 to 1 crack cocaine ratio). Both cases, decided the same day make it clear that the district courts are only required to give "some weight" to the advisory guidelines, as they are to the other 18 U.S.C. § 3553(a) factors.

Kimbrough goes one step beyond doing away with any special weight appellate courts have attached to the guidelines. It holds that a district court's judgment that a particular sentence is "sufficient, but not greater than necessary" is entitled to great weight, even if the district court's judgment is based on its disagreement with the policies behind the applicable guideline. Of particular note is the Court's holding that the district court in *Kimbrough* had properly imposed a below-guideline sentence to avoid the unwarranted disparity a guideline sentence would create between the defendant in that case, who was convicted on crack cocaine charges, and defendants convicted of powder cocaine offenses. *Kimbrough* gives defense attorneys license to think creatively about how guideline sentences themselves create "unwarranted disparities." It is now entirely possible to obtain a lower non-guideline sentence by arguing that a particular guideline sentence would create unwarranted disparities with sentences imposed in similar state cases. For example, the extremely harsh guidelines for simply downloading child pornography from the internet may be particularly vulnerable to attack after *Kimbrough*.

We believe that as a result of *Kimbrough* and *Gall* the pendulum has shifted dramatically back to where judges have more discretion than they have ever had since pre-guideline days in fashioning an appropriate sentence in a particular case. As such we believe that with our background, experience and knowledge of federal sentencing and prison matters, we can be more valuable than ever in assisting counsel and their clients in obtaining the lowest possible sentence and if it is one of incarceration to be served at the best place possible, under terms and conditions that will enable one to be released at the earliest possible opportunity.

WILKES: His Life and Crimes

A Novel by: Winston Schoonover

[Editor's Note: Charles Sevilla is an old friend of mine, but I did not know when I first met him years ago at an NACDL meeting that he was the author of the Wilkes *series of books due to his use of a* nom de plume, *Winston Schoonover. Many thanks to Mr. Sevilla for allowing us to reprint his stories here. I hope our readers enjoy his work as much as I do. You can read more* Wilkes*-related stories in old issues of* The Champion *magazine, as well as in three full-length books published by Ballentine novels, entitled* "Wilkesworld", "Wilkes on Trial", *and* "Wilkes: His Life and Crimes", *from which the following two Chapters are taken. In past editions of "The Back Bencher", we published Chapters 1-8. We are continuing the series now with Chapters 9 and 10.*

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

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- 9 -

"J. DANIEL CONWAY"

America gives us a great opportunity if we only seize it with both hands and make the most of it.

- Al Capone

Will I defend you? Will I defend you? I'll defend you to your very last cent!"

- John Wilkes

"Out of the suffering sometimes comes great good," I said to my melancholy friend. I was still trying to cheer him up, but he wasn't listening. He was still sulking a full week after the guilty verdicts in the Lizard's case. Wilkes hated losing trials. Even unwinnable slam dunks with clients he loathed. His ego had a hard time dealing with the searing rejection that comes with a jury saying, "Guilty. Guilty."

But it was more than ego. It was also the despair. You throw yourself into an intense battle and despite your best efforts, lose so thoroughly. It takes time off your life. Most lawyers are trained for such defeat. Not Wilkes. He believed he'd always win. This attitude helped him win cases, but it also made losing much more difficult to accept. And taking seventy-two guilty verdicts was extra tough to swallow.

Despair

Perhaps more than anything, however, guilty verdicts brought Wilkes to the depths because he knew they were bad for business: "You can produce acquittals out of thin air. You can win sixteen ax murders in a row and be hailed as a forensic Houdini. But lose one jury and you've lost it, you're a bum."

As if to confirm Wilkes's worst fears, the first days after the Lizard's guilty verdicts, our phone didn't ring. Not once. Wilkes had me call the phone company every afternoon to make sure our phone was still working, and he sank a little deeper into depression when I told him the phones were fine. "God!" he said, "You know your business is in trouble when you're calling Ma Bell to see if the phones are still hooked up!"

On the third day, we finally got a jingle, but it turned out to be an obscene phone call from one of Wilkes's ex-girlfriends. "When you get caught for doing this, you'll need help," he told the lady. "Please give me another call."

On the morning of the fourth day, Uriah Condo, our investigator, called to see if his bill had been paid for his work on the Lizard's case. I told him the check was in the mail. In the afternoon, a just-arrested former client called - collect from St. Louis - to see if we could loan him a grand for bail money. I didn't even tell Wilkes about that one.

One Ring

The fifth day was a Friday. Wilkes was moping about the office when at 10:30 a.m. the phone rang. The ring started a footrace. Wilkes sprang toward the nearest phone and had the receiver to his ear before the first ring was complete. I ran to the extension and had it to my ear just a half second later.

"Hello," we said.

"Help! This is J. Daniel Conway, president of Capital Ideas. I need a lawyer right now! I got investors pounding at my doors and some government guy trying to lay paper on me. This place is a madhouse! Can you

come right now?"

Wilkes said, "Well, you're in luck. My trial folded this morning, so I've got a free day which I was planning to use catching up on my mail."

"I can pay immediately for your efforts. You won't regret representing J. Daniel Conway, Mr. Wilkes. I've heard you're the kind of lawyer I need. Now, please, if you could just get over here right now and deal with these pests, I'll make it worth your while."

"All right," said Wilkes, "but have your checkbook open. We'll be right over."

"Thanks a million," said our new client.

I took the address - the Chase Manhattan bank building near Wall Street - and Wilkes and I jumped into a cab and sped to the offices of our new client. When we arrived, the scene we viewed was pure bedlam. It looked like a food riot had broken out. Except none of these screaming people looked poor or hungry. There were doctors still in their hospital greens jumping up and down so hard that their gold pendants flew high above their blown-dry coifs and then crashed into their chests. Stock brokers were there, too. Their suit pockets, bulging from the mass of morning trading markers, were put to good use as padding as they slammed into one another while trying to work their way forward.

The noise level was unbelievable. It was like the uproar of the Giants' fans after Sunday's last-second loss brought on by a lousy referee's call. Dozens of loud, vicious screams pierced the air like fingernails on the blackboard: "Give me my money, damn you!" "Where's Conway!" "I'll kill the bastard!"

Wildcat

One woman nearest us was clawing like a wildcat at the men in front of her. She threw her elbows at us as soon as Wilkes and I got close behind her. She probably was a nice-looking woman normally, but her face was disfigured with ugly rage. She spat out, "That asshole's gone and lost my money! That asshole's lost my money! He just threw it away!"

"Mr. Conway, I presume?" asked Wilkes.

"No, not that crook. I mean yes, him, too. But I really mean my ex-husband, the stupid jerk. He put our money, half of *my money*, into this snake oil salesman's scam. I can't believe it!"

She turned from us, looked to the front of the room, and saw something. Yelling an unintelligible primordial cry, she plunged into the crowd, elbowing two or three banker types out of the way, and squeezed through a few padded brokers, while deftly avoiding the flying pendants of the doctors at the front of the mob. Then she disappeared from our view.

My friend took his cue from this and plunged into the thick of it, with me right behind. It was only twenty feet to the front of the room, but we had to traverse a gauntlet of flying elbows, fists, hips, shoulders, Gucci briefcases and purses, and gold pendants. When we reached the front, we found our lady leader on the floor with her teeth firmly clamped on the neck of a writhing, cringing fellow who had to be Mr. Ex.

Counterpoint

Wilkes jumped on top of a counter and started yelling for silence. He got nowhere until he screamed, "I'll get your money if you shut your mouths."

After a relative silence came, he said, "You want your money? Okay. Okay. Calm down. You people ought to be ashamed of yourselves. You're acting like a bunch of prosecutors who just lost a motion to suppress. My name is John Wilkes, and I've been retained to - -"

"Retained? That bastard gave you our money!" screamed a broker. "Kill him! Empty his pockets!" I reacted quickly and gave the loudmouth a hard elbow to the gut, which doubled him over. Nobody else yelled at Wilkes, but not because they feared my deadly elbow - they wanted to hear good news about their money, and Wilkes was perfectly prepared to give it.

"You want your money, and you'll get it. But the Chase Manhattan, right here in this building, couldn't pay all its customers if they all went crazy and made a run on it in one day. Now, if you just give your cards to my assistant here, I promise we'll get back to you by phone in twenty-four hours. Nothing in the way of business will be transacted today."

Yoo-Hoo

Wilkes's powers of oratory carried the moment. J. Daniel Conway's clients all left me their cards - not without a few murmured threats - and filed out the front door. After they split, Wilkes tried all the doors off the reception area. They were locked. Then Wilkes sang out, "Yoo-hoo! They're gone. You can come out now."

We heard the clinking of keys on a chain, and the sound of metal rasping and locks being opened. Then a door opened and a man's head popped out of one of the doors. It was a big head, square in shape, topped with wavy salt-and-pepper hair. The face was flat and nondescript.

"Thanks a million for coming," said the talking head. "My name's J. Daniel Conway, president of Capital Ideas." Conway tentatively moved out of his room and surveyed the reception area to make sure no disgruntled clients were in striking distance.

"They're all gone," said Wilkes.

"God, those people send cold shivers up my spine," said Conway. "I've racked my brain trying to make their money work for them. What gratitude! They come at me like a bunch of wild dogs at the first rumor that their treasure's not safe and sound. Spineless cowards!"

Capital Ideas

"What's that?" I asked, noting what appeared to be legal process in Conway's hand.

Conway held the papers out before him. "This is a present from the United States of America. An invitation to attend their grand jury next week. And they want me to bring all my books. This'll ruin me."

Wilkes suggested we hear something about Capital Ideas, so we sat down in Conway's cushy office, and for the next few hours Wilkes and I listened as Conway described his unbelievably complicated financial business. From what I deduced, Conway took wealthy people's money, brilliantly invested it in stocks, foreign currency, commodities, and whatever else he felt was good for a buck at the moment, and gave his investors a whopping 30 percent annual return. It had all gone so very well the first year, said Conway, but recently he'd suffered a few reverses.

After completing his description, Conway asked, "Well, what can I do? I haven't even enough money to give everyone a refund. Not even close to enough. And now there's this grand jury business. What's gonna happen, Mr. Wilkes?"

I See

During Conway's description of his business, Wilkes and I had quietly relaxed in chairs so plush, they felt like they were alive and hugging you. My friend closed his eyes, put his hands together as if to pray, and broke his silence: "I see many wealthy and powerful people becoming angry and wanting to take their vengeance. I see their lawyers swarming all over this place ordering their private investigators and accountants to search every document you've ever touched in their quest for money. I see subpoenas by the bushel and hundreds of civil suits. You'll be summoned to so many depositions, you won't remember what this office looks like. And you'll take the Fifth so many times, you'll not remember having said any other words.

"I see the story of wealthy, powerful, greedy people losing their shirts having great entertainment value. I see the paperboys doing their usual Pulitzer-prize-winning investigation of you and your stable of investors. They'll follow you to work, photograph you receiving subpoenas, run through your garbage, and call you at all hours of the night for an exclusive - which is their lingo for an opportunity to get you to confess.

"I see the attention you get bringing on more government investigations than you would have thought possible. I see the bankruptcy trustees, the IRS vultures, the SEC and FTC snoops, maybe even some Secret Service types, all competing with the federal and state prosecutors for first dibs on your hide.

"Most chilling, I see a telephone-book-size, multicount indictment charging mail fraud, wire fraud, conspiracy, SEC violations, and tax evasion. It'll charge enough crimes to put each one of a cat's nine lives away for a century."

Eye-Opener

Wilkes opened his eyes and looked straight at the now ashen-faced J. Daniel Conway. He continued, "the future poses many dangers for you, my friend, and you'll need the best legal advice your investors' money can buy."

Conway slumped in his seat at hearing Wilkes's grim prediction of the future. "Yes, yes, of course, and you're just the man for the job, Mr. Wilkes. I've heard a lot about you. Great lawyer, they say, tough as nails, sharp as a tack, a tiger in the courtroom."

Wilkes listened stone-faced as Conway buttered him in cliche′s. It would take more than that, much more, to retain the services of John Wilkes. My friend's fee-collecting philosophy - it is morally wrong to allow a client to keep his money - meant it was empty-your wallet time. Fee collecting for Wilkes was very much akin to a stickup. But Wilkes had his reasons. First was his wealth. Second was his desire to weed out the undesirables. "The client who pays the least complains the most," he'd say. "I hate whiners. Charge a bundle

and you don't have many."

J. Daniel Conway reached into his suit for his wallet - the tenderest part of the human anatomy - and pulled out a check. He handed it to Wilkes. "I thought this might do for starters," he said.

Wilkes looked at the check as if it were a banana peel just pulled from the garbage. He tore it up and stood to leave. "Mr. Conway, I can work for myself for nothing and enjoy it much more than working for you at a loss." Wilkes turned to me. "Let's go, Schoon."

"WAIT! FOR GOD'S SAKE! Can't we even talk about this? Please have a seat. I've got an idea."

We returned to our seats. "Give me a figure," said Conway, handing my friend a pen and paper. Wilkes wrote six figures on the paper. Conway's eyes bulged as he read the paper. "I might as well declare bankruptcy as soon as I retain you."

"That's just the initial retainer," said Wilkes. "I'll probably need more as things heat up."

"You obviously love money, Mr. Wilkes," said a glum Conway (this from a man who had probably stolen hundreds of millions in the last year alone).

"Well, yes," said my friend, "Mr. Green and I are old friends, but it's like the prostitutes say, 'You get me off and I'll get you off.' Anyway, you can pay me now or pay everything to a bankruptcy trustee later and petition for appointed counsel. And let me tell you this. With your problems, you don't go to the free clinic."

Conway wrote a check for a sum I'd never imagined possible as a fee. Wilkes told Conway he'd be his lawyer, and we left. As we descended in the elevator, Wilkes said we were going straight to the bank at the lobby level to see if Conway was good for the money. "I'll be damned if six months from now we're gonna stand in line with the many creditors of J. Daniel Conway."

"Capital idea," I said as we skipped off the elevator into the lobby of the Chase Manhattan Bank.

QUITO TO GUAYAQUIL

The female born criminal, when a complete type, is more terrible than the male.

- Caesar Lombroso

I can't be bought. But I can be rented.

- John Wilkes

"Would I let my own mother and father invest in Capital Ideas if I weren't certain of the security of this investment?"

Wilkes and I were in the swank offices of J. Daniel Conway listening to him sell another fifty-thousand-dollar investment opportunity in Capital Ideas. Conway was a great salesman. The psychological leverage he used to persuade his investors to part with their money was a wonder to behold. It was nothing short of a psychological kidnapping in which Conway coercively persuaded the investor to cough up the dough against the latter's better judgment. Wilkes was taking mental notes in hopes of using Conway's technique in future haggles over his fees.

"By my calculations, just this week you've lost a thousand dollars in interest income by delaying to make the investment. And I'm afraid you haven't much time left to make your decision. I've almost got enough investors to form another investment group, so you had best not wait too long to put your money to work. The train's leaving the station."

The investor looked worried about the train leaving the station without his money on board. He told Conway he'd have his check that afternoon. They shook hands as Conway said, "Thanks a million."

The List

As soon as the investor was out the door, Wilkes asked Conway for the documents that had brought us to his office that afternoon. "Let's have the investors list. Yesterday we promised them we'd call them and set up a date for a status conference about their money."

Conway handed over a pile of papers with the name of just about every powerful politician and judge in the city. And sprinkled liberally among those names were ranking religionists - even our former client and con man, the Reverend Bob Smite - editors, journalists, lawyers, doctors, dentists, psychologists, realtors and stockbrokers, architects, accountants, prosecutors, police administrators, and most menacingly, a few recognizable big names from the Five Families.

Wilkes looked at the names and then looked at me. His eyes said, "Our thieving client's a dead man," but his mouth said, "Conway, are there any powerful people who haven't invested in your company?"

Our client, thinking Wilkes had just complimented him, grinned broadly, then broke into laughter. "Needless to say, all the beautiful people have come here to let me play with their money. Impressive group, eh, Mr. Wilkes?"

"I think you don't get my drift," said Wilkes. "Let me put it this way. I'll reduce my fee by fifty percent if you'll make me the sole beneficiary of your will."

Ms. Vigilante

Conway flinched, but he didn't have time to respond with words. The doors to his office flew open. Standing in the doorway was the good-looking ex-wife of the doctor-investor we had met yesterday. The last time we saw her, she was on the floor of the reception area with her teeth well embedded in the neck of her former spouse. She had not been happy with his big investment (half her money) in Capital Ideas. She did not look happy now. But there was something different today. She still looked like a fashion plate - she wore a bright red Adolfo suit, black Hermes handbag and matching shoes, and short, dark hair which accented her high-cheekboned, pretty face, giving her that same *Vogue* look I noted yesterday. But today she also wore the hardness of a vigilante with blood revenge on the mind.

"I waited until noon for your call. I knew that was all bull yesterday. Aldo, get in here," she said.

Aldo

She was quickly joined by a giant gorilla of a man carrying the unmistakable outline of an Uzi machine gun in his hands.

"This is Aldo," she continued. "He kills people for a living."

Wilkes slowly stood up. "Well, as I was just saying to Mr. Conway, a very serious conflict of interest prevents my representing him. Mr. Schoonover and I were just leaving."

"Sit your ass down," growled Aldo.

"You're both in this, like it or not. You may be useful to us," said the woman.

I now made my contribution to the tense confrontation. "Easy, now. I'm sure we can help you, even represent you for no fee." Wilkes glanced at me. "Let's avoid a tragic waste of lives here."

"Tragic waste?" hee-hawed our lady captor. "You know what a tragic waste is? Using good bullets on you three!"

Aldo gave a low grunt, which I interpreted as hilarious laughter. His boss continued, "Conway only knows me as Mrs. Dr. Donald A. McLean, the mad ex-spouse of one of his stupid loser-investors. You can call me Maude. I represent a few persons who have decided that they've had it with Conway and Capital Ideas. We came for our money."

Conway was sprawled in his thronelike chair as if he'd just been dropped into it from a thousand feet. He began to mumble and slobber.

"What's that? Quit mumblin', man! Get your tongue together," said Aldo.

Word Salad

Conway managed a few intelligible phrases: "Don't kill. Please! I can, no shoot! I pay. What, how much?"

Terror ties the most agile tongue.

Maude responded, "The group of investors I represent are into Capital Ideas for one million bucks. Hand it over." She placed her outstretched hand under Conway's nose.

"Now!" barked Aldo.

"I don't, money like that, not here, what, couple hundred in my wallet, take you it, don't shoot, I get it, time," said (so to speak) J. Daniel Conway.

I could not help thinking that just ten minutes earlier, the now-blubbering president of Capital Ideas was deftly maneuvering a prospective investor into parting with his hard-earned capital with the adroit use of language. But here, our hero was reduced to a goo-gooing infant. Grace under fire.

"Perhaps I can translate, Maude," offered Wilkes. "Mr. Conway would be happy to fully reimburse you and the rest of your investors, except that at this moment he doesn't have a million dollars on him." My friend looked at Conway as he said, "Nevertheless, Mr. Conway would be delighted to take you to the closest bank and withdraw the cash necessary to take care of everyone." Conway nodded up and down vigorously.

Style

Wilkes picked up the papers that had the details of all of the investments in Capital Ideas. "If you'd just call out the names of your investors, we can determine the exact amount of the interest added to each investment and arrive at an agreeable total figure."

The woman we knew as Maude smiled. "I like your style, Mr., uh . . . "

"Wilkes, at your service. I was saying, since a conflict prohibits my representing Mr. Conway, perhaps I can be of service to you in a professional capacity." Wilkes rose to hand her the investors list.

"Sit your f*cking ass down, Wilkes." This was Maude speaking. She was doing an excellent job resisting Wilkes's charm attack. "You'll do what I want when I want. Aldo here hasn't pulled off a round on his Uzi in over a week, and he's dying to spray this place." She looked at the trembling J. Daniel Conway and said, "Where's my goddamn money!"

Quito

J. Daniel stammered the best he could, "Not liquid money into money like francs and marks and yen, but like beef or cattle and commodities, and realty and businesses, and wait! Banco de Quito! Quito! A million for a rainy day!"

Maude frowned at Wilkes. "Okay, Mr. Interpreter, what's he saying?"

"Mr. Conway says that he's out of currency arbitrage at the moment and heavily committed to the overseas commodity markets, also some industrial and land buys, and very little liquid moolah except, it seems, a rainy-day account in a bank in Quito, Ecuador. The Banco de Quito."

Night Flight

Four hours later, as evening was about to fall, Maude, the *Vogue* kidnapper-terrorist, was at the wheel of a small Lear jet owned by one of her investors, and flying Conway, Wilkes, and me - all under the evil eye of Aldo and the snout of his ugly Uzi – off to Ecuador. We lifted quickly and sharply off the runway and soon saw the sun, colored an unfortunate blood-red, sinking into the distant horizon. As it disappeared, it left behind an orange-brown hue to backdrop dagger-edged black clouds.

The flight took twenty-six hours. Twenty-six hours in that tiny fuselage hopping from New York to Miami to Caracas to Quito. We never left the tiny plane. It was like being inside a hollowed-out wienie. And we never even got a look at Maude. Just mean Aldo and his Uzi. But at least he let us beat the terror and boredom with drink. Even Wilkes abandoned his usual teetotaling for the flight, hoping the booze would serve as a tranquilizer and put him to sleep. It didn't. For him, the trip lasted twenty-nine whiskey sours, and instead of quiet sleep, my friend turned into a chatterbox-drunk who took advantage of his captive audience to loudly critique anything and everything that came to mind. One of his choicer comments almost got us shot: "Hey, Aldo, how long you been working for Buchenwald Bonnie? How much she paying you? Conway here's gonna double it, triple it, quadruple it. Hey, I know you can't be bought, but can't we rent you for a couple of hours?"

Aldo stuck the muzzle of his machine gun into my friend's mouth and said only, "Ready to eat lead?" This didn't shut up my drunken companion for long. He turned his critical attention to Conway: "Your investment company, my friend, was but an attractive rumor which ripened into reality only because no one was smart enough to check it out." Conway was too frightened to figure out my drunken friend's comment. He just looked at Wilkes as if he had said something profound.

The Critic

The stream-of-unconsciousness monologue continued right up to the time Maude put us down on the pavement of some small, bumpy runway near Quito. By that time, Wilkes had criticized every book, law, state, country, movie, play, client, lawyer, judge, he had ever experienced. It was all drunken drivel, but Conway was impressed by the vast fund of knowledge maintained in my friend's sotted brain. "You should have been a critic," said J. Daniel.

"I am," slurred Wilkes. "Of life." As the plane came to an abrupt halt, my friend's eyeballs slid upward and disappeared into his forehead. He fell sideways into my lap. Dead drunk.

Conway and I carried Wilkes to the backseat of a waiting car, and we sped off for a short ride to a shack on the outskirts of the city. Maude drove while Aldo kept his ever-present Uzi on us from the front passenger seat. No one said a word. After a day of hearing my drunken friend's babble, the quiet was ominous. I missed Wilkes's chatter. If we were to get out this pickle, it would take all my clever friend's sober intelligence.

When we arrived at our destination and alighted from the car, I got my first good look at Maude in over a day. Somehow she had changed clothes. Now she wore a matching prewashed denim work shirt and jeans and a pair of sneakers. Although tired from the flight, she still looked (even in these clothes) ready for a cover page.

Off To The Bank

"You come with me," she said, pointing to Conway. "We're going to make a withdrawal from the Banco de Quito right now. Aldo, cover the drunk and his friend until we get back."

And off they went, leaving me with the thought that Maude was tireless and beautiful and dangerous, like a black widow spider spinning her web.

We waited for three hours. I sat tied firmly to a rickety wooden chair while Wilkes snoozed away unbound and prostrate on the floor. Aldo sat in a chair directly in front of the only door to the shack with his Uzi nestled in his lap. Finally, as darkness came, we heard a car roll up and soon saw Maude and J. Daniel Conway come in the door. Maude had her hands full. In one, she carried a small pistol. In the other, a suitcase with the loot. She dropped the money on the floor and pushed Conway toward Aldo. She looked exhausted.

"Tie him up," she said to Aldo. "What about him?" asked Maude, pointing to my unconscious friend on the floor.

Aldo said, "He's been out of it since you left. What're we gonna do with these guys now?" Aldo started strapping J. Daniel to the same wooden chair I occupied.

Maude moved to a corner of the room and slid to the floor. "We'll figure it out after I've had some shut-eye. I need some sleep."

As soon as the words left her mouth, who should leap to his feet, grab the suitcase full of loot, and shoot out the door into the darkness but my friend Wilkes! It was so quick and unexpected, Maude did not know it had happened until she saw Aldo jump for his Uzi and scramble out the door, yelling with apparent delight, "Kill the lawyer! I'll kill the lawyer!"

Maude grabbed her pistol and trained it on Conway and me. Her tired eyes betrayed a look of failure. There wasn't much point in keeping the gun on us since we were tied tight enough to cut off the circulation in our hands and feet. "Aldo better come back with the money," she said.

Ma-Oo-Day

As I looked down the barrel of Maude's revolver, I thought of my friend on the loose with a million bucks and running for his life. I wondered why the hell he did it.

About an hour after Wilkes fled, a small Indian boy knocked on the door and said, "MA-OO-DAY. MA-OO-DAY." I took this to be Spanish for Maude. The boy continued, "*Una carta para MA-OO*-DAY." Maude backed to the door, still acting as if her bound captives might burst the rope bracelets that bound them and jump her. She took the note from the boy and read it. Here's what it said:

> Dear Maude,
>
> I couldn't trust you or Aldo to simply apologize and free us after the money came into your custody. I have a plan to trade money for hostages. Tomorrow morning the *autoferro* to Guayaquil leaves at 6:00 a.m. Put Schoonover and Conway on it, and just before the train leaves, the money will be delivered to you on the station platform. No tricks. I'll be covering your every move till then.
>
> Yours truly,
>
> John Wilkes.

That night was one of unrelieved horror. After Aldo returned and read the note, he lobbied Maude for hours to kill Conway and myself and then try for a kill on Wilkes at the train station the next morning. For the longest time, Maude was undecided, her better judgment clouded by exhaustion. Finally she told Aldo her plan. There would be no killing. Aldo kicked my chair in disgust at this. They would put Conway and me on the train, but would not let it leave the station until the suitcase was delivered. The money was what this was all about.

I sighed in relief. Conway, who was strapped on top of me, said, "God, Schoonover, you've got bad breath," to which I responded with a comment appropriate for our situation, "Halitosis is better than no breath at all."

Rendezvous

We were at the train station at five-thirty the next morning. No one had slept. Maude went in and bought

two tickets and ordered us on the train. We were to sit in the first and second rows on the window side facing the station so Aldo could cover us with his coat-covered Uzi.

The *autoferro* is a bizarre thing to behold - a school bus with train wheels. It looks as out of place on rail tracks as a bear running the hundred-yard dash. And it is small - there are only thirty seats to be had - and when Conway and I climbed on board, the inside looked and smelled like an animal farm.

The *autoferro* is an Indian commuter, and the Indians evidently like to take their farm animals with them. I sat down next to a toothless old woman who had a hen tucked under each arm. Conway's seat-mate caressed a baby pig oinking in his lap. But the accommodations were of no matter. We still had Aldo's Uzi staring us in the face just ten yards away, and Wilkes and the money were nowhere in sight.

I saw Maude trying to talk to the train's driver, who seemed to nod very agreeably to her every word. With a minute to departure, he climbed into his seat and started his engine. With thirty seconds to go, he turned toward Maude, who was now by Aldo's side. At exactly 6:00 a.m. three things happened simultaneously: Aldo and Maude ordered us off the train; just as they did, the train started quickly pulling from the station. Then I heard Wilkes's voice from somewhere nearby: "A deal's a deal. Here's the dough." A suitcase fell out of the sky and landed hard on the station platform. It was tied with ropes and belts to keep its treasure safely within as it bounced to within a few feet of Maude and Aldo. They pounced on the suitcase and were frantically pulling off belts and ropes as the train rounded a bend and they disappeared from my view.

Café' Ole'

We chugged up and down the Andes for about an hour before the train's driver made a sudden stop in the middle of nowhere. He turned to his passengers, and said, "*Diez minutos para café'! Vamanos!"* With these words of instruction, he bolted out the door and began a dash for a tiny farmhouse about three football fields away. The passengers rose as one, farm animals and all, and joined in the footrace behind the driver.

"The coffee must be good here," said Wilkes, climbing down from atop the train top, where he had been hiding in the luggage rack. I was surprised and relieved to see him, but Conway immediately chastised him for putting his life in jeopardy. "You could have got us killed! Aldo almost shot us after he came back! You bastard! You're fired!"

Wilkes smiled. "And you're felony-dumb, my friend. The money in my hands was the only thing that kept Aldo from shooting you. Maude couldn't have stopped him; that was as easy to see as the nonrefundable retainer you paid me two days ago." Wilkes pulled a strongbox from the luggage rack and opened it.

The Money

"It's my money!" yelled J. Daniel. "My money! It's all here, Mr. Wilkes, forget what I said. Thanks a million!"

"Not quite all of it," said my friend. "I had to pay the train driver to pull out fast as soon as I threw the suitcase to Maude and Aldo."

"But they'll still be after us," I said.

"I think not. I also paid the local *federales* to be at the station and watch closely as two dangerous gringo revolutionaries received an arms shipment right on the railroad station platform. I was good enough to fill the suitcase full of rusty *pistolas* last night."

"Great work, Wilkes!" said a gleeful Conway. He grabbed the strongbox and caressed it with the same affection that the old Indian on the train hugged his pig.

The balance of the trip to Guayaquil was not one of pleasure. It was incredibly slow. The *autoferro* is the only link many of the Andean Indian villages have with the world, and the driver of the *autoferro* is thus an important and popular local figure. He stopped at every clump of huts along the way (all unscheduled stops) and delivered mail, gossip, and goods - illicit, no doubt - in return for money and favors.

The trip down to Guayaquil is supposed to take ten hours. It took us sixteen. From the bare, rocky Andes to the hot, green, humid jungle plains near Guayaquil, Wilkes, Conway and I sat planted in our bus seats enduring the smells, animals, and the heat while waiting for our ordeal to end. Conway was the only one to voice anything positive during the trip. He kept saying, "That jungle green reminds me of my money. At least I got my money." Conway looked at my friend. "Maybe you should have charged me hourly, Wilkes. You could have billed all of this. Ha!"

Not a very charitable comment to someone who just saved your life.

Into The Ass of Darkness

We finally pulled into the station shortly after nine o'clock amid an incredible storm of flying cockroaches.

Billions filled the sky. They were bird-sized and landed on or smashed into everything that moved. We were told by our train driver that this was an annual invasion in Guayaquil. "You get used to it," he said, "You have to. They're here for weeks."

Within minutes of getting off the train, we were all covered by the horrible insects. Conway, wearing a brown coat of the winged roaches, revered to his terrified babble. "Bugs! Box! Let me out! Box! Bugs!"

Wilkes took this to mean that Conway wanted someone to take hold of the strongbox so he could use his hand to slap the swarming giant roaches away. Wilkes took the box.

"So this is Guayaquil," said my friend. "Gentlemen, welcome to the asshole of the universe." We surveyed the scene before us: the sky filled with billions of huge, man-eating insects; the city not even visible although just a few hundred yards away; the heat and humidity were suffocating. Wilkes said, "Men, if there's a hell on earth, I think we've just entered it. This is worse than the Tombs."

Getting into the city proper from the *autoferro* station requires a short boat trip across the Guayas River, a sludge-filled latrine separating the jungle from the city. As we crossed, I thought I saw icebergs float by. What kind of place was this? Had Mother Nature gone completely crazy here? As the bergs drew closer, I could see they weren't made of ice. They turned out to be huge foam mounds of industrial waste. Even these were being dive-bombed by the flying bird-roaches, which plunged like kamikazes into the white cotton. So thick were the roach clouds that we never saw the other side of the river. It made the trip seem endless.

Papers

When our boat finally made port on the other side, we jumped to the ground and into the bug-covered arms of a dozen uniformed men. "Papers, gentlemen?" said the one with the most ribbons on his chest.

Having been kidnapped to Quito, we hadn't had time to get our shots and passports. Wilkes said, "Did you capture the revolutionaries, Colonel?"

"*Si, señor,*" said the colonel. These were the *federales* Wilkes had sicked on Maude and Aldo in Quito. "Now, your papers, señor. Perhaps in the box, no?"

"Ah!" said Wilkes. "You must want to inspect those papers!" A lawyer's greed filled the eyes of the colonel. "*Si, señor!"* he said.

It took about an hour for the colonel to process our papers by the age-old procedure commonly used on foreigners in trouble - confiscation - and to order us deported. We were taken to the Guayaquil airport and put on a Braniff flight back to the States. The flight's first stop was Quito, and who should board but our former traveling companions, Maude, the fashion plate kidnapper, and Aldo, the Uzi-less hit man. Like us, they were being deported as undesirables.

The next part of the flight was most uncomfortable as Maude and Aldo continually gave us the evil eye. This prompted our courageous client into action. At the next stop, in Bogota', he jumped out of his seat and said, "I have decided to emigrate. Mr. Wilkes, you can wrap up my business and legal affairs in New York. I'm going to pay a visit to my friend Señor Green at the Banco de Bogota'. I forgot to tell you about a few other rainy-day accounts I've got down here. Adios!"

We never saw Conway again. Wilkes spent the rest of the long flight home chatting with Maude and telling her how her investors should retain him to get their money back while I spent my time watching Aldo's twitching trigger finger.

- To Be Continued -

CA7 Case Digest

By: Jonathan Hawley

First Assistant Federal Defender

APPELLATE AND TRIAL PROCEDURE

United States v. Richardson, ___ F.3d ___ (7th Cir. 2009; 08-1243). Upon consideration of the district court's denial of a Rule 35(b) motion filed by the defendant, the Court of Appeals construed the defendant's motion as a 2255 petition. The defendant cooperated with the government, and the government agreed to file a Rule 35(b) motion after sentencing. However, the government thereafter insisted that the defendant dismiss his appeal before it would file the motion. When the defendant refused to do so, the government refused to file the motion. The defendant therefore filed his own Rule 35(b) motion, which the district court denied. The Court of Appeals determined that a defendant is precluded from filing his own Rule 35(b) motion. The court concluded that a defendant cannot file his own Rule 35(b) motion or a motion to

compel the government to file one. However, a defendant can file a 2255 petition where the allegation is that the government has wrongfully refused to file the motion. Specifically, if the government's refusal to file the motion deprived him of liberty without due process of law–which, it did if the government's action was not rationally related to any legitimate government end–then the sentence cannot stand. Addressing the merits, the Court of Appeals concluded that the defendant wanted a lower sentence; the government wanted him to accept the sentence rather than challenge it on appeal. That condition, the court concluded, was reasonable, and therefore the defendant was not entitled to relief.

Wiesmueller v. Kosobucki, 547 F.3d 740 (7th Cir. 2008; No. 08-2527). In this civil appeal, the Court of Appeals denied the plaintiff's motion to strike the defendant's fact section from its brief. Wisconsin grants graduates of its two lawschools the "diploma privilege," which allows their admission to the Wisconsin bar without taking an examination. Graduates of out-of-state law schools are denied the privilege, and the plaintiffs claimed that the denial violates the commerce clause of the federal Constitution. The Court of Appeals noted that Circuit Rule 28(c) provides that the statement of facts in a brief "shall be a fair summary without argument or comment." The court concluded that the plaintiffs, in arguing that the defendant's brief violated the rule, confused "argument" with "argumentative." It is forbidden for the statement of facts to misstate the record or omit unfavorable material facts. However, there are background facts (sometimes called "legislative" facts) that lie outside the domain of rules of evidence yet are often essential to the decision of a case. Those facts may include, in this case, the laws and policies of other states relating to qualifications to practice law, accounts of the history of qualifications for the bar, and data on bar exam results, and all these are facts found in sources cited in the defendants' statement of facts rather than in the record compiled in summary judgment or trial proceedings. Such facts and the sources from which they are derived could be incorporated in the argument section of the brief, but they can with equal propriety be set forth in the statement of facts, provided that the brief clearly separates them from the facts peculiar to the case, as the defendants' brief did in this case. Accordingly, the plaintiff's motion was denied.

Nunez v. United States, 546 F.3d 450 (7th Cir. 2008; No. 06-1014). After a remand by the Supreme Court for reconsideration, the Court of Appeals held that counsel is not required to file a notice of appeal where his client expressly waived his right to appeal in a plea agreement. The court stated that a lawyer who respects his client's formal waiver of appeal does not render objectively deficient performance. In saying this, the court recognized that seven other circuits have held otherwise. The Seventh Circuit, however, found that instead of being obliged to follow his client's (latest) wishes, however unreasonable they may be, a lawyer has a duty to the judiciary to avoid frivolous litigation–and an appeal in the teeth of a valid waiver is frivolous. A lawyer also has a duty to his client to avoid taking steps that will cost the client the benefit of the plea bargain. A lawyer might have a responsibility to file an appeal if the client indicated a desire to withdraw the plea, for that amounts to a declaration by the defendant of willingness to give up the plea's benefits, and withdrawal would abrogate the waiver too. The court did, however, note one important caveat. The court's analysis supposed that the defendant really had waived his entitlement to direct appeal. When a waiver is ambiguous, counsel would do well to file an appeal and let the court sort things out. If it turns out that the waiver does not cover an issue that the defendant told counsel he wanted to present on direct appeal, then counsel's failure to file a notice of appeal will lead to collateral relief without regard to prejudice.

United States v. Clark, 538 F.3d 803 (7th Cir. 2008; No. 07-1297). In prosecution for drug offenses, the Court of Appeals held that the district court properly altered the defendant's sentence pursuant to the government's Rule 35(a) motion, where the district court mistakenly entered a sentence below the mandatory minimum. At sentencing, the government stated that there was no applicable statutory mandatory minimum in the case. The day after judgment was entered, however, the government filed a Rule 35(a) motion to correct the sentence, noting that the defendant was in fact subject to a 10-year mandatory minimum sentence. The court granted the motion and imposed the mandatory minimum. On appeal, the defendant argued that the district court was not authorized to correct his sentence pursuant to Rule 35(a) because the Rule does not allow a correction in a case where the government waived the application of the mandatory minimum at the sentencing hearing. The Court of Appeals noted that Rule 35(a) allows for the correction of clear errors within 7 days after sentencing which resulted from "arithmetical, technical, or other clear error." Additionally, the advisory committee notes state that the Rule should "extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court." The Rule does not, however, give the district court a second chance to exercise "its discretion with regard to application of the sentencing guidelines," nor does it allow for changes to a sentence based on the court's change of mind. In the present case, the error was not one which applied to

discretionary considerations and enhancements or reductions under the advisory guidelines. The mistake here was more fundamental–the resulting sentence violated a legislative mandate requiring that persons convicted of the defendant's particular crime with the amount of drugs involved be imprisoned for a minimum term of 10 years. To allow a party's blunder at sentencing to defuse the mandate of Congress would convert individual lawyers into legislators each time a court mistakenly follows an illegitimate recommendation. Moreover, the mistake in this case was one that would have been reversed by the Court of Appeals on direct appeal. Accordingly, where a party makes a mistake at a sentencing hearing, which in turn leads to the imposition of a sentence that is clearly wrong–for example, a mistake in contravention of clear congressional intent or mandate–the district court may correct the sentence so long as the correction complies with Rule 35(a) and occurs within seven days. However, the scope of Rule 35(a) is narrow, and the court's reasoning should not be read to allow parties to raise, after sentencing, arguments for or against enhancements or reductions under the guidelines that should have been raised at the sentencing hearing.

United States v. Henderson, 536 F.3d 776 (7th Cir. 2008; No. 07-1014). The Court of Appeals held that the government's appeal of the district court's grant of a motion to dismiss was timely. The district court announced its decision to suppress the evidence in question on June 26, 2006, and the government did not file its appeal until December 29th. However, in the interim, it moved the district court to reconsider its order on July 21, within the 30-day period, and then filed its notice of appeal within 30 days of the district court's denial of the motion to reconsider. The defendant moved to dismiss the government's appeal for lack of appellate jurisdiction, arguing that the government should have appealed within 30 days of the June 26, 2006 ruling. The Court of Appeals disagreed, citing the case of *United States v. Healy*, 376 U.S. 75, 78 (1964) for the proposition that "criminal judgments are nonfinal for purposes of appeal so long as timely rehearing petitions are pending."

EVIDENCE

United States v. Webb, 548 F.3d 547 (7th Cir. 2008; No. 08-1338). In prosecution for drug offenses, the Court of Appeals affirmed the introduction of the defendant's prior drug conviction under Rule 404(b). Police arrived to execute a search warrant at a person's house, where they found the defendant in the driveway in workout togs. Police found exercise equipment in the residence searched, along with drugs and packaging materials scattered about. The owner of the residence and the defendant were both charged with drug offenses, and the owner testified against the defendant at trial. After the defendant's lawyer in opening statement said that the defendant had nothing to do with any drug distribution, and was only at the house by chance when the police arrived, the government introduced the defendant's prior conviction. The defendant made a 404(b) objection, but the court found that the evidence was admissible to show intent and absence of mistake. The Court of Appeals initially noted that it was difficult to see how the prior conviction was relevant to the charges in the present case. The crime of which the defendant was convicted–possession of drugs with intent to distribute them–has an intent element, but the defendant did not argue that he possessed the drugs for personal use rather than for distribution. He rather contended that he did not possess the drugs for *any* purpose. As for "absence of mistake": how does a conviction show this *except* via the prohibited inference that someone who distributes drugs once is likely to do it again, the court wondered. Nevertheless, the defendant did not make a relevance objection, but only an objection under Rule 404(b). To concentrate on Rule 404(b), when the real question has a potential for prejudice disproportionate to its valid use (Rule 403), is to misdirect attention. Looking to precedents under 404(b), the evidence was clearly not prohibited by that rule and, moreover, given those precedents, a finding of plain error based on relevance could not be made by the Court of Appeals. Finally, applying the harmless error rule, there was more than sufficient evidence to convict the defendant anyway.

United States v. Castaldi, 547 F.3d 699 (7th Cir. 2008; No. 07-3452). In prosecution for mail fraud and embezzlement, the Court of Appeals affirmed the prosecution's use of the defendant's mug shot as demonstrative evidence. During the government's opening and closing statement, the prosecutor used the defendant's mug shot as part of a demonstrative aid presenting the flow of funds between the defendant and others, with the defendant's picture accompanying the chart. The Court of Appeals noted that mug shots are generally not admissible at trial because they are indicative of past criminal conduct and thus barred by concerns about presenting evidence of a defendant's past criminal conduct to a jury. A mug shot may be introduced as evidence, however, when the following conditions have been satisfied: (1) The prosecution must have a demonstrable need to introduce the photographs; (2) the photos themselves, if shown to the jury, must not imply that the defendant had a criminal record; and (3) the manner of their introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs. In the present case, the mug shot did not indicate that the defendant was incarcerated, and it lacked the prejudicial features of a

mug shot, such as a prisoner wearing prison garb or holding up prison slates. Indeed, the photo shows the defendant wearing street clothes, standing in front of a blank background. The court noted that prosecutors are well advised not to present mug shots or other detention-related photos to a jury, particularly when a prosecutor could obtain a similar photo from another government bureau, such as the DMV. Nevertheless, the record in this case shows that the photo was not admitted into evidence and was presented in such a way that the jury would not have been aware of its origins. Accordingly, the district court did not abuse its discretion in permitting it's use.

United States v. Blanchard, 542 F.3d 1133 (7th Cir. 2008; No. 07-2780). In prosecution for drug offenses, the Court of Appeals reversed the defendant's conviction because of the introduction of judicial testimony in violation of Federal Rule of Evidence 605. A key government witness testified at a motion to suppress hearing in a manner inconsistent with his grand jury testimony. At that hearing, the district judge commented that the witness's testimony was incredible. After the hearing, the witness contacted the United States Attorney's office and stated that his testimony at the hearing was false. The court then reopened the hearing on the motion and allowed the witness to testify again. At trial, the witness testified. Defense counsel cross-examined the witness regarding his testimony, implying that the defendant only changed his story after being threatened by the government. To rebut this implication, the government introduced the district court's statements concerning the credibility of the witness made at the motion to suppress. On appeal, the defendant argued that the introduction of the district court's statements on the credibility of the witness constituted improper judicial testimony, and the Court of Appeals agreed. Federal Rule of Evidence 605 prohibits a presiding district judge from testifying at trial as a witness or engaging in equivalent conduct. The court noted that not only did the comments violate Rule 605, but they were of "dubious relevance" and the danger of unfair prejudice was unquestionably high. The court also concluded that the error was not harmless. The court noted that it was difficult to imagine a scenario in which the court's pronouncements on the credibility of a key government witness could fail to influence the jury. The district court essentially endorsed the government-friendly version of the witness's testimony. The court also noted that the case "sounds a cautionary note for district court judges, who must remain alert to the potential impact of their comments on juries and the consequent need to avoid the appearance of partiality to either side."

United States v. Rogers, 542 F.3d 197 (7th Cir. 2008; No. 06-3730). Upon consideration of the defendant's argument that the defendant's prior conviction used to impeach him at trial was outside the 10-year limitation set forth in Federal Rule of Evidence 609(b), the Court of Appeals held that probation following a term of imprisonment did not constitute "confinement" for purposes of the Rule. Rule 609 generally excludes the admission of convictions more than 10 years old, specifically prohibiting admission "if a period of more than ten years has elapsed since the date of conviction or of the release of the witness from the confinement imposed for that conviction." In the present case, both the defendant's date of conviction and his release from prison fell outside the 10 years. However, he was still serving probation for the offense within the 10-year period, and the district court held that this period of probation constituted "confinement imposed for that conviction." The Court of Appeals disagreed. The court specifically held that the clock starts at the witness's release from any physical confinement, or in the absence of confinement, from the date of conviction. Although the evidence was improperly admitted in this case, the court nevertheless affirmed, noting that the evidence against the defendant was overwhelming.

United States v. LeShore, 543 F.3d 935 (7th Cir. 2008; No. 07-1555). In prosecution for bank robbery, the Court of Appeals discussed the appellate standard of review when a defendant fails to make an objection to an issue in the district court which would ordinarily be reviewed for an abuse of discretion. The defendant argued for the first time on appeal that the district court admitted evidence at trial in violation of Federal Rule of Evidence 403. The Court of Appeals noted that an objection to the admission of evidence based on Rule 403 is ordinarily reviewed for an abuse of discretion. However, when a defendant fails to make a contemporaneous objection at trial, such errors are reviewed for "plain error." Here, because the defendant never objected, the district court did not have a chance to exercise its discretion at all. The defendant must therefore persuade the appellate court that it would have been an abuse of discretion for the district court to have rejected his position–indeed, such a serious abuse of discretion that the plain error standard is satisfied. Given the special deference paid to a district court's assessment of a Rule 403 argument, this is an extremely difficult showing to make. The defendant must essentially show that the evidence was so obviously and egregiously prejudicial that the trial court should have excluded it even without any request from the defense, and that no reasonable person could argue for its admissibility. The defendant could not meet this burden in the present case.

United States v. Cannon, 539 F.3d 601 (7th Cir. 2008;

No. 06-3461). In prosecution for drug offenses, the Court of Appeals rejected the defendant's challenge to the admission of a videotaped deposition taken pursuant to Federal Rule of Criminal Procedure 15. An agent who observed a controlled buy conducted with the defendant was in the Marine Corp Reserves and was deployed to Iraq before the start of trial. The government therefore moved to take a videotaped deposition, which was later used at trial. The defendant argued that the use of the videotaped deposition was unconstitutional and unfairly prejudicial. The Court of Appeals noted that, although rare, preservation of witness testimony by deposition is authorized in criminal cases under Rule 15(a)(1) when "exceptional circumstances and . . . the interests of justice" require it. The defendant's presence is required, and the "scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial." In the present case, all of these requirements were met, and there was no error in admitting the videotaped deposition.

United States v. Burgos, 539 F.3d 641 (7th Cir. 2008; No. 06-4091). In prosecution for illegal reentry, the Court of Appeals held that the government may use at trial the contents of a defendant's alien-registration file ("A-file")–specifically, a warrant of deportation and a "certificate of nonexistence of record"–to prove its case. At trial, the defendant objected to the use of these documents, arguing that use of the documents violated the defendant's Sixth Amendment Confrontation Clause rights as interpreted by the Supreme Court in *Crawford v. Washington*. The Court noted that *Crawford* referenced business records as an example of hearsay statements that are "by their nature" nontestimonial and therefore not subject to the requirements of the Confrontation Clause. The documents in question here have many attributes in common with business records. A warrant of deportation records movement of a deported alien; the signing witness attests to the alien's departure from the country. The warrant's primary purpose it to memorialize the deportation, not to prove facts in a potential future criminal prosecution. Similarly, a CNR certifies that a government official searched the database of the Department of Homeland Security and failed to find any record permitting a deportee's return to this country. Although prepared in anticipation of trial, a CNR simply memorializes the contents of the Department database, maintained in the ordinary course of business–or, more particularly, the *absence* of a certain sort of record in that database. Because the database underlying the CNR is not maintained for the primary purpose of proving facts in criminal prosecutions, the CNR itself, attesting to the absence of a record within that database is a nontestimonial record. Accordingly, the documents were properly introduced at trial.

United States v. Diekhoff, 535 F.3d 611 (7th Cir. 2008; No. 07-1432). In prosecution for kidnapping, the Court of Appeals held that Federal Rule of Evidence 704(b) was not violated when a government expert witness testified that the defendant stated to her that he "knew it was wrong" to commit the kidnapping. The defendant's case was based upon an insanity defense. The government called an expert witness to testify regarding the defendant's mental state, and she referred during her testimony to the defendant's statement made above. The Defendant argued that the testimony violated rule 704(b) because it constituted expert opinion as to whether the defendant was sane. The Court of Appeals rejected this argument, noting that the expert was not "stating an opinion" during the disputed portion during her testimony. Rather, she was relaying the defendant's statement to her about the crime. Although the defendant's statement was probative of the ultimate issue in the case, it did not result from the expert's expertise or the application of her technical knowledge to the facts of the case and therefore was not her "opinion."

United States v. Dalhouse, 534 F.3d 803 (7th Cir. 2008; No. 07-2654). In prosecution for carrying a gun while being an illegal drug user, the Court of Appeals affirmed the defendant's conviction over his argument that the government violated the "corroboration" rule. The defendant was arrested and was discovered to be carrying a loaded gun. He later admitted to police that he was a habitual marijuana user and that he had carried the gun and smoked marijuana on the day he was arrested. At trial, on the question of whether he was an unlawful user of drugs, the government presented the defendant's confession and the testimony of a friend of the defendant who testified that he smoked marijuana with the defendant minutes before he was arrested and that he frequently smoked marijuana with the defendant on previous occasions. On appeal, the defendant argued that the government failed to satisfy the "corroboration rule" when introducing his confession. The rule–which is premised on the idea that the pressure of criminal investigations may lead suspects to falsely confess to crimes that never occurred–forbids the government from obtaining a conviction by relying solely on a defendant's confession. What is needed is proof in addition to the defendant's admissions–corroborating evidence–to show that the confession is trustworthy. The required level of corroboration depends on the government's case. Sometimes the government uses a defendant's admissions to bolster a case that is already legally adequate. When that happens, no additional corroboration is necessary. By contrast, if the government uses the defendant's admissions to prove an

element of the crime that can't otherwise be adequately proven, then the defendant's statement must be corroborated. Most commonly, that is accomplished by presenting evidence that a few of its key assertions are true, which is sufficient to show that the statement as a whole is trustworthy. In the present case, the Court of Appeals concluded that there was plenty of evidence independent of the confession to support the conviction. Specifically, the testimony of the defendant's friend was sufficient to corroborate the information contained in the defendant's confession.

INEFFECTIVE ASSISTANCE

Stallings v. United States, 536 F.3d 624 (7th Cir. 2008; No. 06-3914). Upon consideration of the denial of the petitioner's 2255 petition, the Court of Appeals held that appellate counsel was ineffective for failing to raise a forfeited *Booker* issue. The petitioner was sentenced several months after the Seventh Circuit held the mandatory guidelines unconstitutional and three months after the Supreme Court granted certiorari in *Booker*. However, trial counsel did not make a *Booker*-type argument, and the district court applied the guidelines as if they were mandatory. On appeal, the case was briefed after the Supreme Court decided *Booker* and after the Seventh Circuit decided *Paladino*. Nevertheless, appellate counsel did not make a *Booker* argument in her brief, and the subject was not raised during oral argument. The court held that this failure constituted deficient performance. First, the omitted *Paladino* argument was "clearly stronger than the arguments raised by appellate counsel, which were "nearly doomed to fail." Second, a limited remand under *Paladino* was available to any appellant who might conceivably benefit from the procedure, and the threshold was very low. Had the argument been made, the court would have granted a limited remand. On the question of prejudice, however, the Court of Appeals could not determine if the defendant was prejudiced, for it did not know if the district judge would have imposed a lower sentence had it viewed the guidelines as advisory. Thus, the court remanded the case to the district court. If the court indicates that it would have imposed the same sentence under advisory guidelines, the petition should be denied. Alternatively, if the court would have imposed a different sentence, the petition should be granted by the district court.

JURY TRIAL ISSUES

United States v. Williams, ___ F.3d ___ (7th Cir. 2009; No. 07-3004). In prosecution for drug offenses, the Court of Appeals held that the failure of the defendant to waive his right to a jury trial and consent to a bench trial did not require reversal of his conviction. Rule 23(a) provides that if the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves. In the present case, all but the first requirement was met. Additionally, the only information concerning the knowing and voluntary nature of the defendant's waiver was his answer to the judge's question of whether he wished to waive his right to a jury trial. The Court of Appeals noted that although the written waiver is required by the Rule, there is no constitutional requirement that the waiver be made in writing. Moreover, because the defendant failed to object in the district court, it would only review the issue for plain error. Under that standard, the defendant must show that his substantial rights were affected by the error. He must show that he did not have a concrete understanding of his right to a jury trial, and that but for the trial court's failure to ensure he had that understanding, there is a reasonable probability that he would not have waived the right. The assessment of this question is informed not just by the colloquy between the district court and the defendant but by the entire record. Given that the defendant bears the burden of production, and the record was virtually silent regarding whether the defendant understood his waiver, he could not prevail on appeal. The court noted that the defendant failed to produce any evidence that he failed to understand his waiver, not even submitting his own affidavit in support of his argument. Accordingly, the Court of Appeals affirmed.

United States v. Sawyer, ___ F.3d ___ (7th Cir. 2009; No. 08-2236). In prosecution for conspiracy to distribute methamphetamine, the Court of Appeals affirmed the district court's refusal to give the jury an instruction on the elements of a duress defense. The defendant claimed that she began distributing methamphetamine to pay off a debt of a former associate, after the creditor drug dealers began harassing and threatening her. The Court of Appeals noted that to present a defense of duress or coercion, a defendant must show: (1) she reasonably feared immediate death or serious bodily harm unless she committed the offense; and (2) there was no reasonable opportunity to refuse to commit the offense and avoid the threatened injury. If the defendant had a reasonable alternative to violating the law, then the defense of duress will not lie. A defendant's fear of death or serious bodily injury is generally insufficient. Rather, there must be evidence that the threatened harm was present, immediate, or impending. Additionally, where the defendant has committed an ongoing crime, the defendant must have

ceased committing the crime as soon as the claimed duress lost its coercive force. Agreeing with the district court, the Court of Appeals noted that the defendant did not meet this test, as there was much time available for her to have reached out to law enforcement and she chose not to. The district court did, however, make a reference to the wrong standard of review for determining whether a duress instruction should have been given. The district court implied that the defendant needed to provide evidence of her defense by a preponderance of the evidence. The Court of Appeals noted that on an initial showing, a defendant need show only a foundation for the elements of the defense in evidence, not a preponderance of the evidence supporting the defense. Even if there was an error, however, it was harmless, given that the evidence did not meet even this lesser burden.

United States v. Diekhoff, 535 F.3d 611 (7th Cir. 2008; No. 07-1432). In prosecution for kidnapping, the Court of Appeals held that the district court properly refused to give the defendant's proffered jury instruction. The defendant's defense was based upon insanity. During the trial, the government introduced a statement made by the defendant that "I could just get time served." Fearing that this statement could have shaded the jury's assessment of his insanity defense, the defense proffered an instruction which stated, "The Court will commit the Defendant to a suitable facility until he is eligible for release under the law" should he be found not guilty by reason of insanity. The district court refused to give the instruction. The Court of Appeals affirmed the district court. As a general matter, juries are not to consider the consequences of their verdicts. An exception to this rule exists where there is a danger that the jury had been misled regarding the consequences of its verdict. Thus, if a witness or prosecutor states in the presences of the jury that a particular defendant would "go free" if found insane, it may be necessary to counter such a misstatement. Here, the statement came during the cross-examination of the government's expert witness, nestled in the middle of a longer statement concerning the crime itself. The court concluded that the statement was not sufficient to mislead the jury because it was not a case of the prosecutor telling the jurors that a defendant would go "laughing out that door" if found insane. Additionally, the exert witness did not suggest that in her opinion the defendant would get a windfall from a finding of insanity. Instead, the expert read her notes recounting a statement made by the defendant. When read in context, the statement merely suggested that the Defendant was opining about the possible legal effects of his actions, not the jury's decision regarding insanity.

OFFENSES

United States v. Hodge, ___ F.3d ___ (7th cir. 2009; No. 06-3458). In prosecution for RICO and money laundering arising out of spa which was in reality a brothel, the Court of Appeals reversed the defendant's money laundering conviction. The prosecutor's theory was that the defendant violated the money laundering statute simply by paying business expenses: rent, advertising, utilities, and so on. The evidence did not show, however, what the defendant did with the business's "net revenues." The Court of Appeals noted that "proceeds" as defined in §1956 means an illegal business's net income rather than its gross income–in other words, that "proceeds" are profits, not receipts. To determine the net proceeds of a transaction, which is to say the profits, one must subtract *all* costs of doing business, not just an arbitrary subset of the costs. Paying ordinary and necessary expenses of a business is not a federal crime, just because that business violates state laws. Moreover, the court noted that even advertising expenses for the illegal enterprise were costs which must be subtracted from gross revenues. A brothel incurs advertising expenses, which are subtracted from gross income to create net, taxable income. No accountant would define the business's net revenue to include money used for advertising. What is paid to third parties for an input into production is not part of net income. Accordingly, because the government did not establish what the "proceeds" of the business were, the Court of Appeals reversed the money laundering conviction. *See also United States v. Lee*, ___ F.3d ___ (7th Cir. 2008; No. 06-3029), issued on the same day and standing for the same proposition.

United States v. Dixon, 551 F.3d 578 (7th Cir. 2008; No. 08-1438). In prosecution for violating the Sex Offender Registration and Notification Act, 18 U.S.C. § 2250, the Court of Appeals held that the ex post facto clause was violated where a defendant was convicted under the act when his failure to register occurred before enactment of the statute. All of the defendant's conduct, including his sex crime and the travel and the change of his residence, occurred before the enactment of the statute or the effective date of a regulation by the Attorney General making the Act retroactively applicable. The court noted that if all the acts required for punishment are committed before the criminal statute punishing the acts takes effect, there is nothing the actor can do to avoid violating the statute, and the twin purposes of the ex post facto clause are engaged, *i.e.*, legislation is prospective, whereas punishment–the job assigned by the Constitution to the judicial branch–is retrospective, and gives people a minimal sense of control over their lives by guaranteeing that as long as they avoid an act in the future they can avoid punishment for something they did in the past, which cannot be altered. In the present case, the record revealed that all of the defendant's

conduct occurred before the Act took effect with respect to him. The court noted that although a failure to register creates a continuing offense, a defendant must be given a reasonable period of time to comply with the newly enacted law. In the present case, the defendant was charged with failing to register for a period spanning from the effective date of the regulation making the Act applicable to him until a little over a month later. This period of time was not a reasonable period of time in which to allow the defendant to register. In a companion case, however, the court noted that the ex post facto clause was not violated where the defendant had failed to register more than five months after the act was enacted. As the court said, the duty to register does not come into force on the day the Act becomes applicable to a person, or on the next day or next week, but within a reasonable time; the five months the defendant had in the companion case was a reasonable amount of time.

United States v. Zawada, 552 F.3d 531 (7th Cir. 2008; No. 08-1012). In prosecution for knowingly persuading, inducing, enticing, or coercing a person under the age of 18 to engage in criminal sexual activity, in violation of 18 U.S.C. § 2422(b), the defendant took a "substantial step" toward completion of the crime. In *United States v. Gladish*, 536 F.3d 646 (7th Cir. 2008), the court held that explicit sexual talk does not, by itself, amount to the kind of "substantial step" needed to prove an attempt to violate the statute in question. Reviewing the case under the plain error standard of review, the court concluded that the defendant's actions were more than the "hot air" and nebulous comments about meeting "sometime" that took place in *Glaidish*, conduct which was not a "substantial step." Here, although the defendant never traveled to meet the minor, he had relatively concrete conversations about making a "date," and he discussed a specific date and time of day that they thought would work. He also checked on the intimate details of the victim's birth control practices, and he asked her whether he should bring some kind of protection with him. Although their plans never actually materialized, this scenario was sufficient to constitute a substantial step.

United States v. Davey, 550 F.3d 653 (7th Cir. 2008; No. 07-3533). In prosecution for knowingly persuading, inducing, enticing, or coercing a person under the age of 18 to engage in criminal sexual activity, in violation of 18 U.S.C. § 2422(b), the defendant took a "substantial step" toward completion of the crime sufficient to support his plea of guilty. In *United States v. Gladish*, 536 F.3d 646 (7th Cir. 2008), the court held that explicit sexual talk does not, by itself, amount to the kind of "substantial step" needed to prove an attempt to violate the statute in question. In the present case, the defendant made arrangements to meet the "minor" and drove to the rendevous point, which put him within the typical pattern of someone who violates the statute. Although travel is not the "sine qua non" of finding a substantial step, the court noted in *Gladish* that making arrangements for meeting the minor, such as agreeing on a time and place for the meeting can constitute a substantial step. Here, the defendant not only made such arrangements, but actually traveled to the rendevous point, which constituted as substantial step.

United States v. Carmel, 548 F.3d 571 (7th Cir. 2008; No. 07-3906). In prosecution for possessing a firearm which is not registered to him in the National Firearms Registration and Transfer Record, 26 U.S.C. § 5861(d), the Court of Appeals rejected the defendant's argument that the statute under which he was convicted was repealed by 18 U.S.C. § 922(o). The defendant was charged with the instant offense after authorities recovered more than 60 machine guns in his home. The defendant argued that because 922(o) prohibited the possession of machine guns, compliance with the registration requirements in 5861(d) was impossible. In other words, the defendant argued that he could not register the machine guns if he could not legally possess them in the first place. Thus, according to the defendant, because ownership of a machine gun was made impossible by 922(o), Congress must have intended to repeal the registration requirement of 5861(d). The Court of Appeals noted that a circuit split existed on the issue. The Seventh Circuit adopted the reasoning of the majority approach, concluding that the two statutes are reconcilable. The defendant could have complied with both statutes by simply declining to possess the illegal machine guns. Accordingly, the court affirmed his conviction.

United States v. Morris, 549 F.3d 548 (7th Cir. 2008; No. 08-2329). In prosecution for attempting to transport a minor across state lines to engage in illegal sexual conduct, in violation of 18 U.S.C. § 2423(a), the Court of Appeals affirmed the district court's denial of the defendant's motion to dismiss the indictment. The defendant began chatting online with what he thought was a minor, but turned out to be the minor's mother. The mother eventually turned the defendant into authorities, after he began soliciting her to have sex with him. The defendant argued that because the person he thought was a minor was neither a minor nor a law enforcement officer posing as one, but instead a private citizen, he did not commit any crime. The Court of Appeals rejected this argument, noting that the case law uniformly holds that the fact that a defendant is mistaken in thinking that the person he is trying to entice is underage is not a defense to a charge of attempted illegal sexual contact with a minor. The reported cases

all involve law enforcement officers posing as minors, whereas the initial girl impersonator in this case was a private citizen. However, the court could not see what difference that fact would make, and therefore relied on existing precedent to reject the defendant's argument.

United States v. Colon, 549 F.3d 565 (7th Cir. 2008; No. 07-3929). In prosecution for conspiracy to possess cocaine with the intent to sell it, the Court of Appeals held that the government failed to prove anything more than a buyer seller relationship. The defendant regularly obtained distribution quantities of cocaine from two individuals. The dealings between the defendant and these individuals were standardized and exhibited mutual trust. Morever, the two men with whom the defendant dealt had a stake in the defendant's distribution activities as well as their ongoing arrangement, given that their profits depended on the success of the defendant's distribution efforts. The Court of Appeals held that this relationship was a routine buyer-seller relationship. For example, the relationship was standardized only in the sense that because the seller and buyer dealt regularly with each other, the sales formed a regular pattern, as one would expect in any repeat purchase, legal or illegal. The court stated that how "regular" purchases on "standard" terms can transform a customer into a co-conspirator "mystifies us." As the court stated it, if you buy from Wal-Mart your transactions will be highly regular and utterly standardized, but there will be no mutual trust suggestive of a relationship other than that of buyer and seller. Also important in the present case was that there were no sales on credit to the defendant. A wholesale customer of a conspiracy is not a co-conspirator per se. If that were the case, then during Prohibition a speakeasy was a co-conspirator of the smuggler who provided it with its supply of booze. Accordingly, the Court of Appeals reversed the defendant's conspiracy conviction, finding that only a buyer-seller relationship existed.

United States v. Jackson, 555 F.3d 635 (7th Cir. 2009; No. 07-3849). In prosecution for possession of a firearm in furtherance of a drug-trafficking offense, the Court of Appeals held that the Supreme Court's Decision in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), does not give an person engaged in a felony the right to possess a firearm for protection. The defendant manufactured drugs in his home, which was in a bad neighborhood. The defendant asserted that he possessed his firearm solely for protection. The Seventh Circuit noted that in *Heller*, the Court said that the Constitution entitles citizens to keep and bear arms for the purpose of *lawful* self-protection, not for *all* self-protection. The defendant was distributing illegal drugs from his home, and the Constitution does not give anyone the right to be armed while committing a felony, or even to have guns in the next room for emergency use should suppliers, customers, or the police threaten a dealer's stash. Accordingly, the Constitution did not protect the defendant's possession of the firearm.

United States v. Thornton, 539 F.3d 741 (7th Cir. 2008; No. 07-2839). In prosecution for attempted bank robbery, 18 U.S.C. § 2113(a), and 924(c), the Court of Appeals reversed the defendant's convictions. The Defendant approached the door of a bank in disguise, but encountered a customer as he approached. He then lost his nerve and fled. The defendant was charged under § 2113(a), which provides: "Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another . . . any property or money . . . belonging to, or in the care, custody, control, management, or possession of, any bank . . . shall be fined under this title or imprisoned not more than twenty years, or both." The defendant argued that the district court erred in refusing to instruct the jury that the statute requires a finding of actual force and violence or intimidation. Looking to the plain language of the statute, the Court of Appeals concluded that the offense requires actual intimidation for a conviction. Therefore, the district court's instruction was erroneous because it did not require the jury to find actual intimidation, thus omitting an essential element necessary for a conviction. Moreover, the court concluded that a judgment of acquittal was appropriate, because the evidence was insufficient to prove intimidation. The typical bank robbery charged under this statute involves a would-be bank robber who enters the bank, interacts with bank personnel, and threatens a teller or other bank employee–or at the very least makes a demand for money, which may be viewed as an implicit threat of force. But here the defendant never even made it into the bank. He had no contact with any bank personnel and no one inside the bank even knew that a masked and disguised man was right outside the bank door. There was no evidence of either an explicit or implicit threat. The defendant's mere presence at the bank's exterior door in an apparent disguise, carrying a duffle bag, and with his hand on the door does not even approach conduct suggestive of a demand for money or an implication that force would follow noncompliance with the as-yet unmade demand. Finally, because the defendant was not guilty of the attempted bank robbery offense, he must be acquitted of the 924(c) charge as well, given that this conviction was predicated on the underlying attempted bank robbery conviction.

United States v. Khattab, 536 F.3d 765 (7th Cir. 2008; No. 07-2522). In prosecution for attempting to possess or distribute pseudoephedrine with knowledge, or a reasonable cause to believe, that it would be used to

manufacture methamphetamine, the Court of Appeals noted a circuit split on the *mens rea* portion of the offense. The defendant argued that the government did not prove that he knew the pseudoephedrine he attempted to possess would be used to manufacture methamphetamine. The Court of Appeals noted that there is a slit among the circuits as to the proper interpretation of the *mens rea* requirement in 21U.S.C. § 841(c)(2)–one circuit believing that the statute requires a defendant's subjective knowledge that the drugs he possesses or distributes will be used to manufacture a controlled substance, while at least three others allowing a conviction based upon either a subjective knowledge or an objective "cause to believe." The Seventh Circuit declined to take sides in the split, noting that under either standard, the defendant was guilty, for the evidence demonstrated that he actually knew that the pseudoephedrine he attempted to purchase from an undercover agent would be used to manufacture methamphetamine.

United States v. Gladish, 536 F.3d 646 (7th Cir. 2008; No. 07-2718). In prosecution for knowingly attempting to persuade, induce, entice, or coerce a person under 18 to engage either in prostitution or in any sexual activity for which one could be charged with a criminal offense, in violation of 18 U.S.C. § 2422(b), the Court of Appeals reversed the defendant's conviction. The defendant was caught in a sting operation in which a government agent impersonated a 14-year old girl in an Internet chat room. The defendant visited the chat room and solicited "Abagail" to have sex with him. The defendant lived in southern Indiana; "Abagail" purported to live in the northern part of the state. She agreed to have sex with the defendant and in a subsequent chat he discussed the possibility of traveling to meet her in a couple of weeks, but no arrangements were made. He was then arrested. The question on appeal was whether the defendant was guilty of having *attempted* to get an underage girl to have sex with him. To be guilty of an attempt one must intend the completed crime and take a "substantial step" toward its completion. In the typical case, the defendant goes to meet the intended victim and is arrested upon arrival. However, travel is not "a sine qua non" of finding a substantial step. The substantial step can be making arrangements for meeting the girl, such as agreeing on a time and place for the meeting. It can be taking other preparatory steps, such as making a hotel reservation, purchasing a gift, or buying a bus or train ticket, especially one that is nonrefundable. There must be more, however, than simple explicit sex talk. In the present case, there was no indication that the defendant ever had sex with an underage girl. Indeed, since "Abagail" furnished no proof of her age, he could not have been sure and may indeed have doubted that she was a girl, or even a woman. He may have thought (this is common in Internet relationships) that they were both enacting a fantasy. Treating speech (even obscene speech) as the "substantial step" would abolish any requirement of a substantial step. It would imply that if X says to Y, "I'm planning to rob a bank," X has committed the crime of attempted bank robbery, even though X says such things often and never acts. The requirement of proving a substantial step serves to distinguish people who pose real threats from those who are all hot air. Because the defendant here simply engaged in speech and made no substantial step, he was entitled to an acquittal on the 2242(b) count. The defendant was, however, still guilty of attempting to transfer obscene material to a person under 16 in violation of 18 U.S.C. § 1470, for which he received a 10-year sentence. Accordingly, the court's decision had the practical effect of lowering the defendant's sentence by three years.

United States v. Cochran, 534 F.3d 631 (7th Cir. 2008; No. 07-3611). In prosecution for enticing a minor to engage in sexual activity "for which any person can be charged with a criminal offense" in violation of 18 U.S.C. § 2422(b), the Court of Appeals rejected the defendant's argument that he did not attempt to "persuade, induce, entice, or coerce" anyone in his case. The defendant was caught fondling himself in front of a webcam for who he thought to be a thirteen-year old girl, but turned out to be an undercover officer. The offense for which he was convicted makes it a crime to (1) use interstate commerce; (2) to knowingly persuade, induce, entice, or coerce; (3) any person under 18; (4) to engage in "any sexual activity for which any person can be charged with a criminal offense, or attempts to do so." The underlying criminal sexual activity for which the defendant's conviction under § 2422(b) rested was a violation of an Indiana statute which makes it a felony for "a person eighteen years of age or older to knowingly or intentionally touch or fondle the person's own body . . . in the presence of a child less than fourteen years of age with the intent to arouse or satisfy the sexual desires of the child or the older person." Although the defendant admitted that he engaged in the alleged conduct, he argued that his actions did not rise to the level of persuasion, inducement, enticement, or coercion. Rather, according to the defendant, his conduct was the equivalent of someone touching themselves in front of an open window. The Court of Appeals, however, noted that the evidence demonstrated that he attempted to induce a minor to watch his conduct. Specifically, he had to give the purported minor specific access to view his webcam, helped the purported victim to navigate around parent control settings, and asked the victim if she liked what she saw. This evidence was sufficient to establish that the

defendant attempted to induce the victim to watch him in violation of the Indiana law.

United States v. Blum, 534 F.3d 608 (7th Cir. 2008; No. 07-3154). In prosecution for manufacturing child pornography in violation of 18 U.S.C. § 2251(a), the Court of Appeals rejected the defendant's Commerce Clause challenge. The defendant admitted to manufacturing child pornography. The only link the pornography had to interstate commerce was an allegation that the mini-DV tapes on which the film was recorded were manufactured outside of the state of Wisconsin where the events in question took place. The defendant argued that this connection to interstate commerce was too minimal to support prosecution. The Court of Appeals noted that it upheld a similar challenge to 18 U.S.C. § 2252(a)(4)(B), which prohibited possession of child pornography, against a similar challenge in *United States v. Angle*, 234 FF.3d 326 (7th Cir. 2000). In *Angle*, the court held that Congress could properly criminalize even intrastate possession of child pornography as necessary to close a loophole that was undermining its ability to regulate interstate child pornography. The court noted that the reasoning in *Angle* was equally applicable to the intrastate production of child pornography. More recently, the Supreme Court in *Gonzales v. Raich*, 545 U.S. 1 (2005) adopted a similar approach which reaffirms the soundness of the court's approach in *Angle*. In *Raich*, the Supreme Court held that Congress has the power under the Commerce clause to regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce. The Court used this rationale to uphold the federal law prohibiting the possession of marijuana for medical purposes. Given *Angle* and *Raich*, the Seventh Circuit concluded that Congress could properly regulate the intra-state manufacture of child pornography because the high demand for it in the interstate market presented the real danger that purely-intrastate child pornography would find its way to the market.

United States v. Burnley, 533 F.3d 901 (7th Cir. 2008; No. 07-1314). In prosecution for bank robbery, the Court of Appeals rejected the defendant's argument that the government failed to prove that either he or his accomplice used force or intimidation to obtain the stolen money. In the robberies in question, the defendant said to the teller, "Fill the bag and do not give me the dye pack." In a separate robbery, he told the teller not to do anything stupid and warned that he would kill her if she gave him a dye pack or bait bills. The defendant claimed that these statements did not amount to "intimidation" as required by the bank robbery statute. Under the plain error standard of review, the Court of Appeals noted that the intimidation element is satisfied if an ordinary person would reasonably feel threatened under the circumstances. The defendant does not have to make an explicit threat or even announce that he is there to rob the bank. Credibly implying that a refusal to comply with a demand for money will be met with forceful measures is enough. Here, the tellers understood from the words and context that these were not polite requests that could be ignored, they felt compelled to comply, and there was some evidence that they experienced fear and nervousness. That, according to the court, was enough.

PLEA AGREEMENTS

United States v. Farmer, 543 F.3d 363 (7th Cir. 2008; No. 07-2505). In prosecution for drug offenses, the Court of Appeals held that the government breached its proffer agreement with the defendant when it provided the defendant's statement to the probation officer concerning drug quantity, which was used in the PSR to increase the quantity of drugs for which he was held responsible. The defendant entered into a proffer agreement with the government, wherein the government agreed that no self-incriminating information would be used to enhance the defendant's Offense Level. However, a different paragraph also stated that the government would be free to provide any statements made by the defendant to the United States District Court in the event the defendant pleaded guilty. The government turned the defendant's statement over to probation, which then used the statement to increase the quantity of drugs for which he was accountable. The Court of Appeals noted that the Probation Department, a division of the government, was bound by the terms of the proffer agreement. By their nature, the two different paragraphs in the proffer agreement were almost irreconcilable. Short of attaching the defendant's proffer statements to materials provided to the court for sentencing purposes, any other mention of information obtained from the proffer would violate the agreement. Given the breach, the court concluded that the defendant was entitled to re-sentencing without consideration of his proffer for purposes of determining drug quantity.

PROSECUTORIAL MISCONDUCT

United States v. Clark, 535 F.3d 571 (7th Cir. 2008; No. 07-1336). In prosecution for drug offenses, the Court of Appeals found that the defendant was not prejudiced by the prosecutor's misconduct during closing argument. Specifically, the prosecutor during closing argument said that the defendant was making the "standard defense" made by defendants in drug cases. The Court of Appeals concluded that the statement was improper, noting that the fact that other drug conspiracy defendants have made the same argument in their

defense (that they had a buyer-seller relationship, not a conspiratorial agreement) is irrelevant to the defendant's guilt or innocence and thus improper argument. One accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced, and not on grounds of official suspicion or other circumstances not adduced as proof at trial. The prosecutor's classification of the defendant's anticipated defense as the "standard argument" for drug defendants sought to persuade the jury of the defendant's guilt on a third-party propensity-style argument: because other defendants had argued this before the defendant, the defendant's defense must not be sincere. However, notwithstanding the error, the court concluded that the defendant was not prejudiced in part because of the overwhelming evidence of guilt presented in the case.

REPRESENTATION

United States v. Cleveland, 547 F.3d 726 (7th Cir. 2008; No. 06-4109). In prosecution for drug offenses, the Court of Appeals held that the defendant was not entitled to new, separate counsel at two hearings where his counsel moved to withdraw. The defendant argued that at both hearings, he was essentially forced to represent himself, and that the district court did not conduct an investigation into his competence to do that. The Court of Appeals held that a withdrawal motion is not a critical stage of the proceedings, entitling a defendant to counsel under the Sixth Amendment. Moreover, the court noted that at no time was the defendant without counsel. At both hearings, his counsel was in fact present. Although the defendant was essentially arguing that he was entitled to additional counsel for the hearings on his counsel's motions to withdraw, the Sixth Amendment did not entitle him to such additional counsel.

Osagiede v. United States, 543 F.3d 399 (7th Cir. 2008; No. 07-1131). In prosecution of a Nigerian national for drug distribution, the Court of Appeals held that the defendant's trial counsel was ineffective for failing to advise his client of his right to consular access under the Vienna Convention. Upon appeal of the defendant's 2255 petition, the Court of Appeals held that such a failure to advise on the part of counsel constituted deficient performance. The Vienna Convention was the "Law of the Land" at the time the defendant was charged in federal court, and 28 C.F.R. §50.5 required federal agents to comply with it. Professional guidelines instructed lawyers to inform their clients of Article 36 rights. There were hundreds of cases in which courts had addressed those rights, even in a criminal setting, and these cases "generated a decent amount of fanfare." In this climate, the court concluded that Illinois criminal defense lawyers representing foreign nationals in 2003 (the time of the prosecution in question) should have known to advise their clients of the right to consular access and to raise the issue with the presiding judge. Regarding prejudice, the court of appeals rejected the government's argument that the defendant could not demonstrate prejudice because the law allows for no remedy of a Vienna Convention violation. However, the court of appeals noted that the trial judge was in a unique position to remedy a violation. The defendant's lawyer could have taken a simple action to remedy the government's violation of his rights: she could have informed the foreign national of his rights and raised the violation with the presiding judge. The court could then make the appropriate accommodations to ensure that the defendant secures, to the extent possible, the benefits of consular assistance. Before the defendant could succeed on the prejudice prong, however, he also needed to show that the Nigerian consulate *could have* assisted him with his case and whether it *would have* done so. On remand to the district court, the defendant must indicate how he proposed to show a realistic prospect of consular assistance and provide some credible indication of facts reasonably available to him to support his claim. The district court, based in major part on these indications, may then exercise its discretion to conduct a hearing.

United States v. Johnson, 534 F.3d 690 (7th Cir. 2008; No. 06-3812). Upon consideration of the defendant's case for a third time, the Court of Appeals held that the defendant's waiver of counsel was knowing and voluntary. In the defendant's first appeal, the court remanded for re-sentencing because the district court used an incorrect definition of "relevant conduct." On appeal after remand, the court ordered a limited remand pursuant to *Paladino*. In that proceeding, the district court informed the court it would have imposed the same sentence under advisory guidelines, and the defendant then appealed from that determination. At the *Paladino* remand proceeding, the defendant stated that he wanted to represent himself. The total discussion of the defendant's desire to proceed *pro se* consisted of the court asking, "You want to represent yourself?" and the defendant responding, "Yes, absolutely." On appeal, the defendant argued that given the limited inquiry, he did not knowingly and intelligently waive his right to counsel. The Court of Appeals noted that a defendant should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open. The court found that the district court should have cautioned the defendant regarding the risks and disadvantages of self-representation. However, this fact alone did not necessarily mean that the defendant's waiver was not knowing and intelligent. Indeed, the other evidence in the record indicated that the waiver was knowing, such as the defendant's background and

experience, his extensive criminal history and familiarity with the criminal justice system, and the district judge's personal familiarity with the defendant, he having appeared for sentencing before him for three times in this case.

RETROACTIVE REDUCTIONS

United States v. Poole, 550 F.3d 676 (7th Cir. 2008; No. 08-2328). On appeal after the denial of a 3582(c)(2) motion, the Court of Appeals held that the defendant was not eligible for a reduction in her sentence because she was subject to a mandatory minimum sentence, even though she received a sentence below that mandatory minimum pursuant to a Rule 35(b) motion. The defendant was originally sentenced to a mandatory minimum sentence, although her guideline range was below the minimum. Thereafter, she received a Rule 35 reduction and was sentenced to a term below the minimum. After the retroactive crack cocaine amendment was enacted, she filed a motion to reduce her sentence pursuant to the amendment. The district court denied the motion, concluding that her "applicable guideline range" was the mandatory minimum, which was not lowered by the amendment. On appeal, the Court of Appeals agreed. According to the court, pursuant to U.S.S.G. § 5G1.1(b), the statutory mandatory minimum became the defendant's guideline range. That "range" was not lowered by the amendment. She was therefore ineligible for a reduction in her sentence.

United States v. Forman, 553 F.3d 585 (7th Cir. 2009; 08-2177). Upon consideration of five consolidated appeals from denials of 3582(c)(2) petitions based upon the retroactive amendment to the crack cocaine guideline, the Court of Appeals settled a number of questions concerning such motions. First, the court held that the amendment did not authorize a court to impose a sentence below a statutory mandatory minimum. Second, the court held that the amendment had no effect on a defendant's sentence where he was serving a sentence after the revocation of his supervised release term. Third, the court held that the amendment did not apply to a defendant whose offense level was determined by the career offender guideline, rather than 2D1.1. Fourth, the court held that there is no right to counsel when bringing a 3582(c)(2) petition. Finally, the court held that where the district court found a defendant responsible for distributing "more than 1.5 kilograms of cocaine base," but that finding was based on information in the PSR which clearly indicated that the defendant was responsible for more than 4.5 kilograms of crack cocaine, the defendant was not eligible for a reduction.

United States v. Cunningham, 554 F.3d 703 (7th Cir. 2008; No. 08-2901). Upon consideration of a 3582(c)(2) petition, the Court of Appeals held that *Booker* does not give a court authority to grant more than a 2-level reduction. First, the court noted that the constitutional problem that *Booker* addressed was that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. In a 3582(c)(2) proceeding, however, a district court can only decrease a defendant's sentence. Thus, this constitutional defect addressed by *Booker* is not implicated. Second, the *Booker* remedy does not affect 3582 proceedings. Unlike a full re-sentencing, Congress clearly intended 3582 proceedings to be a one way lever. The text of 3582 makes clear that Congress intended the modifications to comport with the Commission's policy statements, an impossibility if the court were to adopt the position that *Booker* rendered the Guidelines wholly advisory in the context of sentence modifications. Moreover, there is not inherent authority for a district court to modify a sentence as it pleases; indeed a district court's decision to modify a sentence is an exception to the statute's general rule that "the court may not modify a term of imprisonment once it has been imposed." When Congress granted district courts discretion to modify sentences in section 3582, it explicitly incorporated the Sentencing Commission's policy statements limiting reductions. Thus, the Commission's policy statements should for all intents and purposes be viewed as part of the statute. Finally, the sections reference to applying 3553(a) factors should be viewed as requiring district courts to consider those factors in deciding whether and to what extent to grant a sentence reduction, but only within the limits of the applicable policy statements.

United States v. Young, 555 F.3d 611 (7th Cir. 2008; No. 08-1863). Upon appeal of the denial of a 3582(c)(2) petition, the Court of Appeals held that a defendant is not entitled to notice of the district court's intention to rely on information concerning the defendant's conduct while in the BOP to deny a sentence reduction. Although the government and the defendant filed an agreed petition to reduce his sentence, the district court denied the motion, citing the defendant's misconduct while in prison as its basis for the denial. The defendant argued that if the court intended to rely on the new information about his record of prison infractions, he should have been given notice and an opportunity to contest it. The Court of Appeals disagreed. The court noted that a 3582 proceeding does not trigger the same types of protections as an original sentencing procedure. Indeed, the conduct of such a proceeding, including the decision whether to appoint counsel or hold a hearing, is committed to the discretion of the district court. This

means there is no entitlement to notice and an additional opportunity to be heard whenever the court is inclined to deny an unopposed 3582 motion. Moreover, the defendant had access to the information relied upon by the district judge four days before filing his motion and could have addressed the information about his prison behavior in his initial submission to the court. Thus, under these circumstances, the district court did not abuse its discretion in denying the sentence-reduction motion.

United States v. Lawrence, 535 F.3d 631 (7th Cir. 2008; No. 08-1556). Upon appeal by the defendants, the Court of Appeals held that the district court lacked authority to alter the judgments it entered upon the defendants' 3582 motions, where such alterations were made more than 7-days from the entry of judgment. The defendants filed motions to reduce their sentences pursuant to the retroactive amendment to the crack cocaine guideline. The court granted their motions and reduced their sentences, but the court also, apparently inadvertently, included language in the orders that converted each sentence to "time served." Within a few weeks, the court recognized its error and entered modifications to correct the language. On appeal, the defendants challenged the district court's authority to substantively modify their sentences outside of the seven-day window permitted by Federal Rule of Criminal Procedure 35. The Court of Appeals initially held that the district court altered the judgments outside the 7-day window. The district court did not hold hearings or make oral pronouncements when granting the motions, so the seven-day period began when the written orders were entered, which was more than seven days before the judge altered the judgments. Second, the Court of Appeals concluded that Rule 36 did not allow for the modification of the judgments. Rule 36 provides an exception that allows a court to correct a "clerical error" in an order at any time. However, that Rule can only be used to correct "clerical" errors; it cannot be used to fix "judicial gaffes." Under the Rule, a judge may correct a final judgment in a criminal case to reflect the sentence he actually imposed but he cannot change the sentence he did impose even if the sentence was erroneous. Here, there was only one order sentencing the defendants; there was no oral pronouncements or sentencing hearings. Thus, the change made by the judge actually altered the sentence imposed, taking it outside of changes allowed by Rule 36. Next, the government argued that the district court lacked subject-matter jurisdiction to enter its original judgments, because those judgments sentenced the defendants to "time served" in contravention of the policy statement which accompanied the retroactive amendment to the guidelines. Assuming that the sentences were imposed in error, such an error is not a jurisdictional one, the Court of Appeals concluded. Here, the court had the ability to issue a binding decree on the defendants; it just (arguably) erred in applying the proper remedy. The fact that the judgment actually entered embodied a sentence that differed from the level authorized by Congress did not divest the court of jurisdiction over the subject matter. Therefore, the order sentencing the defendants to time served was not properly before the court, because it was not appealed. However, when the district court altered the judgments, the government had not yet exercised its prerogative to forgo appeal because the time period for doing so had not expired. Now that the sentences are again at issue, the Court of Appeals would permit the government to file notices of appeal within the remainders of the 30-day time periods that had not expired as of the date that the orders altering the judgments were appealed. The court therefore vacated the orders altering the judgments and reinstated the original orders sentencing the defendants.

SEARCH AND SEIZURE

United States v. Groves, ___ F.3d ___ (7th Cir. 2008; No. 07-2227). In prosecution for possession of a weapon by a felon, the Court of Appeals affirmed the district court's denial of the defendant's motion to suppress. The police, responding to a tip, stopped and searched the defendant. Part of the information the police relied upon in conducting the stop was the fact that the arresting officer was mistakenly told by the police dispatcher that there was a warrant out for the defendant's arrest. After concluding that the mistake did not invalidate the stop because of other information supporting the stop, the court noted that even assuming the validity of the stop had been affected, the gun still need not have been suppressed, relying on the Supreme Court's recent decision in *United States v. Hensley*, 469 U.S. 221 (1985). In *Hensely*, the Court concluded that when police mistakes are the result of negligence, rather than systemic error or reckless disregard of constitutional requirements, the exclusionary rule should not apply. In the present case, there was nothing to suggest that the police recklessly disregarded constitutional requirements or that any police personnel knowingly falsified a warrant record. Accordingly, the suppression motion was properly denied.

United States v. Sims, 553 F.3d 580 (7th Cir. 2008; No. 08-1348). In prosecution for illegal possession of a gun, the Court of Appeals affirmed the district court's denial of the defendant's motion to suppress evidence. Believing there was stolen property on the defendant's premises, the police executed a draft warrant and an affidavit listing the stolen goods for which they intended to search. However, the list of stolen goods was left out of the application for the warrant and the warrant itself,

apparently inadvertently. The defendant argued that the evidence seized as a result of that search should therefore have been suppressed. The Court of Appeals noted that the warrant in this case lacked a particular description of the things to be seized (if found). Nor did it incorporate by reference the description in the warrant affidavit; incorporation by reference would have sufficed. In the present case, however, the search was reasonable. The police conducted exactly the same search that they would have conducted had the warrant described with the requisite particularity the things they were searching for. Nor was it remotely likely that the state judge would have refused to sign the warrant had it complied with the Fourth Amendment by listing those things. Moreover, it does not follow that in a case such as this, in which the judicial screening failed to prevent the search, that the fruits of the search should be suppressed. The "inevitable discovery" doctrine creates an exception to the rule for cases like this in which the harm caused by an illegal search to the values protected by the Fourth Amendment are not merely slight in relation to the social benefits of the search, but zero. Indeed, had the police complied with the Fourth Amendment the consequences for the defendant would have been exactly the same as they were. The search would have been authorized, would have taken place, and would have been identical in scope, both as to the places searched and things seized, to the search that the police did conduct. The defendant would have been no better off had the warrant complied with the Fourth Amendment. Accordingly, suppression of the evidence was not required.

United States v. Robinson, 546 F.3d 884 (7th Cir. 2008; No. 07-4048). In prosecution for being a felon in possession of a weapon, the Court of Appeals affirmed the district court's denial of the defendant's motion to suppress and request for a *Frank's* hearing. The police executed a search warrant at the defendant's home based on information provided by the defendant's ex-girlfriend. She provided detailed information about the defendant's possession of a weapon inside his home. However, one month prior to the execution of the warrant, the witness had been involved with an altercation with the defendant, which resulted in her being charged with criminal damage to property. Moreover, by going to the defendant's home the day before she executed her affidavit, she violated her bail conditions. None of this information was included in the affidavit she executed, and the defendant argued that the information was intentionally or recklessly omitted and that the information was material. On review, the Court of Appeals noted that it examines whether a hypothetical affidavit that included the omitted material would still establish probable cause. In the present case, the court concluded that an examination of the "hypothetically inclusive" affidavit still supported a finding of probable cause. Including the omitted information in the calculus, it was still the case that a named informant with long-standing ties to the defendant provided detailed first-hand information about the alleged crime against her own interest. Significant portions of this information were verified by police. Taking into account the totality of the circumstances, that was sufficient evidence to cause a reasonably prudent person to believe that a search will uncover evidence of a crime. Accordingly, the district court properly denied the motion to suppress and the request for a *Frank's* hearing.

United States v. Prideaux-Wentz, 543 F.3d 954 (7th Cir. 2008; No. 07-3708). In prosecution for possession of child pornography, the Court of Appeals held that there was no probable cause to support the issuance of a search warrant because the information contained in the supporting affidavit was stale. On January 31, 2006, a federal search warrant was issued for the home of the defendant. The affidavit in support of the warrant contained several pages of general information about child pornographers and the use of the Internet in obtaining and exchanging images. Regarding the defendant, the affidavit noted that between August 15, 2003 and January 28, 2004, the National Center for Missing and Exploited Children received nineteen Cyber Tips that a user account assigned to the defendant uploaded sixty-nine child pornography images to different Yahoo! E-groups. On appeal, the defendant argued that the search warrant did not establish probable cause because the affidavit relied on stale information, among other things. The Court of Appeals agreed. The court noted that the warrant in the present case did not indicate when the pictures were uploaded to the Yahoo! e-groups, and there was no way to discern this fact from the record. Moreover, the government could have easily found out these dates by requesting the information from Yahoo!. As the record stood in this case, the images could have been uploaded as many as two years before they Cyber Tips were received, which would mean that the information could have been at least four years old by the time the government applied for a warrant. While there is no bright-line test for determining when information is stale and although the court has previously suggested that staleness arguments take on a different meaning in the context of child pornography because of the fact that collectors and distributors rarely, if ever, dispose of their collections, there must be some limitation on this principle. Additionally, while staleness arguments have been rejected relative to evidence accumulated more than one year before the execution of the search warrant, such cases typically involved more recent evidence of continuing criminal activity to bolster probable cause and freshen older

information. Such was not the case here. Given the unknown age of the information in the present case, the court concluded that probable cause was lacking. Nevertheless, the court affirmed the denial of the motion to suppress, finding that the warrant was saved by the good faith exception.

United States v. Hicks, 539 F.3d 566 (7th Cir. 2008; No. 07-3613). In prosecution for being a felon in possession of a weapon, the district court reversed the district court's denial of the defendant's motion to suppress. A detective told an officer that they had probable cause to obtain a search warrant for the defendant's residence, but he did not relate any facts to the officer which supported this conclusion and the officer did not have knowledge of any facts that would establish probable cause. The officer then went to the defendant's home, where he obtained the consent of his girlfriend to search the residence. In doing so, the officer told the girlfriend, after she initially refused to give consent and that the police "should get a warrant," that he could get a warrant, but that it would take some time. He told her that it was Christmas Eve and that with her cooperation he would not destroy her house in the search. She then consented. The defendant argued that because the government did not show that the police threat to obtain a warrant was based in fact, the district court clearly erred when it found, without inquiry, that the police "had a legitimate belief" that they could obtain a search warrant. The district court did not conclude that there actually was probable cause to obtain a warrant; the court only determined that the officer appeared to be acting upon a legitimate belief that a search warrant could be obtained. Thus, the district court believed the officer's expressed intention to get a warrant was genuine and not a pretext to induce submission and, therefore, the girlfriend's consent was not vitiated. The Court of Appeals noted that baseless threats to obtain a search warrant may render consent to search involuntary, but when the expressed intention to obtain a warrant is genuine and not merely a pretext to induce submission, it does not vitiate consent to search. Although the court did not question the finding that the officer believed what he said, the district court erred when it failed to evaluate whether the stated intention to get a warrant was genuine or pretextual without considering whether the police actually had the underlying probable cause for the search. If the officer's mere "belief" in this case were enough to establish a genuine statement of intent to obtain a warrant (a "nonbaseless" threat) there is nothing to stop one officer from telling another officer that there is enough to get a warrant when there really isn't, just to get consent. In other words, since an officer on the scene cannot lie to the occupant that he's going to go get a warrant when he knows there isn't probable cause, then that same lie cannot be permitted simply because the police compartmentalize who knows what. The way to thwart this potential cat's-paw-like circumvention of the rule is to determine whether there was a reasonable factual basis on which to conclude that there was probable cause. Accordingly, the court remanded the case to allow the district court to make this determination.

United States v. Reed, 539 F.3d 595 (7th Cir. 2008; No. 07-2077). In prosecution for being a felon in possession of a weapon, the Court of Appeals rejected the defendant's challenge to the search of an apartment he shared with his girlfriend. The defendant was under investigation for drug offenses, and when officers noticed him driving on a suspended license, they stopped and arrested him. When officers asked if they could search an apartment which he shared with his girlfriend, the defendant responded that he only visited there, that it was not his place, and that he couldn't give permission for the search. The defendant's girlfriend then arrived on the scene. She went with officers to her apartment and gave them consent to search the apartment, where they found the guns. The defendant argued that the consent of the girlfriend was obtained in violation of the Supreme Court's decision in *Georgia v. Randolph*. The Court of Appeals disagreed. The Court in *Randolph* stated that if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out so long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection. Here, the defendant was absent from the residence at the time the girlfriend consented and the search was conducted. The defendant's absence was the result of a valid arrest, and the police did not execute the arrest for the purpose of removing the defendant from the area when the police obtained the girlfriend's consent. Accordingly, *Randolph* was inapplicable to the case, and the district court properly denied the motion to suppress evidence.

United States v. Henderson, 536 F.3d 776 (7th Cir. 2008; No. 07-1014). Upon consideration of the government's appeal of the district court's suppression of evidence, the Court of Appeals reversed the decision of the district court, holding that the Supreme Court's decision in *Randolph v. Georgia* did not prohibit the search in the present case. The police arrived at the home of the defendant and his wife after responding to a domestic battery call. The police officers entered the home with a key provided to them by the defendant's teenage son. When the defendant encountered the police, he ordered them out of the house. The police then arrested the defendant for domestic battery and took him to jail. His

wife then signed a consent to search form, and officers discovered drugs and guns in the house. The district court held that the defendant's refusal to consent to the search had to be honored by the police officers, pursuant to *Randolph v. Georgia*. The Court of Appeals disagreed. The court noted that *Randolph* left open the question presented in this case: Does a refusal of consent by a "present and objecting" resident remain effective to bar the voluntary consent of another resident with authority after the objector is arrested and is therefore no longer "present and objecting"? The two other circuits to have considered the question are split. The Seventh Circuit concluded that the contemporaneous presence of the objecting and consenting cotenants was indispensable to the decision in *Randolph*, and its holding ought not to be extended beyond the circumstances of that case. Accordingly, absent exigent circumstances, a warrantless search of a home based on a cotenant's consent is unreasonable in the face of a present tenant's express objection. Once the tenant leaves, however, social expectations shift, and the tenant assumes the risk that a cotenant may allow the police to enter even knowing that the tenant would object or continue to object if present. Both presence *and* objection by the tenant are required to render a consent to search unreasonable as to him. In the present case, it was undisputed that the defendant objected to the presence of the police in his home. Once he was validly arrested for domestic battery and taken to jail, however, his objection lost its force, and his wife was free to authorize the search of the home.

SENTENCING

United States v. Alldredge, 551 F.3d 645 (7th Cir. 2008; No. 08-2076). In prosecution for distributing counterfeit currency, in violation of 18 U.S.C. § 472, the Court of Appeals vacated the defendant's sentence because the district court improperly enhanced her sentence for committing her offense outside of the United States, pursuant to U.S.S.G. §2B5.1(b)(5). The defendant agreed to forge some checks for a Nigerian in exchange for $100 per check. However, when she received payment, the bills were counterfeit. The defendant nevertheless used the counterfeit bills until she was arrested by authorities. The Court of Appeals noted that the defendant's offense of conviction was passing counterfeit currency, rather than being charged with forgery or any other offense related to the checks. In order for the enhancement to apply, the elements of the enhancement must be foreseeable parts of the scheme or plan that includes the offense of conviction. Here, the defendant schemed with the Nigerian to utter forged checks, but she did not agree with him to engage in international counterfeiting. Rather, she was a victim rather than a beneficiary of the Nigerian's counterfeiting, which she did not anticipate. Accordingly, the district court erroneously applied the enhancement.

United States v. Poole, 550 F.3d 676 (7th Cir. 2008; No. 08-2328). In dicta, the Court of Appeals discussed the effect of *United States* v. *Chapman*, 532 F.3d 625 (7th Cir. 2008), on a district court's authority to consider factors other than cooperation when reducing a sentence pursuant to Rule 35(b). The defendant argued that a district court may consider 3553(a) factors to grant a reduction greater than warranted by the defendant's substantial assistance to the government alone. The Court of Appeals, however, noted that *Chapman* stands only for the proposition that *after* calculating the value of the defendant's assistance to the government, a district court may ask whether 3553(a) factors weigh in favor of or against granting a reduction equivalent to that level of assistance. In other words, the 3553(a) factors can only be considered to reduce the amount of the reduction based upon cooperation; they cannot be used to give a greater reduction than that warranted by cooperation alone.

United States v. Osborne, ___ F.3d ___ (7th Cir. 2009; No. 08-1176). In prosecution for possessing and distributing child pornography in violation of 18 U.S.C. § 2255(a), the Court of appeals vacated the defendant's sentence and remanded to the district court to determine if the defendant was subject to an enhanced statutory mandatory minimum penalty. The minimum penalty is enhanced for the offense where the defendant has a prior conviction "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." The district court imposed the enhanced penalty due to the defendant's prior Indiana conviction under Ind. Code section 35-42-4-9(b), which makes it a crime for a person 18 or older to "perform or submit to any fondling or touching, of either a child [any person age 14 or 15] or the older person, with intent to arouse or to satisfy the sexual desires of either the child or older person." The question on appeal was whether the Indiana offense involved "abusive" sexual conduct. Section 2252(b)(1), the enhancement provision, nowhere defines "abusive." Although the government argued that any offense arising from sexual conduct with minors must be seen as abusive, the court rejected that broad reading, for such a definition would read the term "abusive" out of the statute. The court noted that the age difference between offender and victim could be as small as two years, and the sexual contact could include behavior common among high school students, such as kissing or petting "with intent to arouse . . . the sexual desires" of either person. Exploratory touching between high school students is not a form of "abusive" sexual conduct, as

that word is ordinarily understood. Given this fact, and the lack of a definition in 2252, the Court of Appeals concluded that, as a matter of federal law, sexual behavior is "abusive" only if it is similar to one of the crimes denominated as a form of "abuse" elsewhere in Title 18 . Additionally, if the state statute in question is ambiguous, then the district court must find out, using the charging papers and any other documents that may be considered under *Taylor* and *Shepard*, whether a defendant was convicted of conduct comparable to that covered by 2243. The question is not what the defendant *did*, but what he was *convicted* of. Thus, in the present case, unless the charging papers demonstrate that the defendant was convicted of violating the Indiana statute in a way that shows "abusive" sexual behavior as the Seventh Circuit has defined it, then the court must treat the prior conviction as non-abusive. The court therefore remanded to the district court to make this determination.

United States v. Alexander, 553 F.3d 591 (7th Cir. 2009; 07-3420). In prosecution for bank robbery, the Court of Appeals held that the district court was not required to *sua sponte* consider an amendment to the guidelines which had been proposed, but had not gone into effect yet, at the time of sentencing. Specifically, the defendant was sentenced as a career offender. At the time of sentencing, however, a proposed amendment to the career offender guideline was pending, which would have, had it been in effect at the time of sentencing, precluded him from being sentenced as a career offender. Unfortunately, the amendment went into full effect six weeks after the defendant was sentenced. The defendant argued that since the amendment was pending when he was sentenced, the judge should have considered it in deciding what sentence to impose and that having failed to do so–if only because the defendant's lawyer had not drawn the amendment to the judge's attention–the judge should be required to resentence him. The Court of Appeals rejected this argument, and noted that the court properly sentenced the defendant under the guidelines in effect at sentencing. To hold otherwise would require that, in preparation for sentencing, the judge canvass all the possible sources of information or opinion or insight or advice that might influence him in deciding how severe a sentence to impose. If, after the defendant was sentenced, his lawyer discovered a source of enlightenment that the judge had somehow overlooked in his pre-sentencing research, the defendant would be entitled to be re-sentenced. The sentencing process would be interminable, according to the court. Accordingly, it affirmed the defendant's sentence.

United States v. Easter, 553 F.3d 519 (7th Cir. 2009; No. 07-2433). In prosecution for drug offenses and a 924(c) count, the Court of Appeals held that the district court properly imposed a consecutive sentence on the 924(c) count. The statute contains an "except" clause which provides, "Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law . . ." The Second Circuit in *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008), held that this clause precludes a sentencing court from imposing an additional term of imprisonment under 924(c)(1) if that term would be shorter than a greater statutory minimum required by another count of conviction, including the crime of violence or drug trafficking crime underlying the 924(c)(1) count. Thus, under the Second Circuit's reading, the district court here would not be free to impose a consecutive five-year term on the 924(c) counts because each of the defendants was subject to a mandatory term of 10 or 20 years on the conspiracy count and the mandatory term was "a greater minimum sentence . . . otherwise provided by . . . any other provision of law." The Seventh Circuit, however, rejected the analysis in *Whitley* and adopted the majority approach. Under that approach, the most natural reading of the "except" clause is that a defendant convicted under 924(c)(1) shall be sentenced to a term of imprisonment set forth in 924(c)(1)(A) unless subsections (c)(1)(B) or (c)(1)(C), or another penalty provision elsewhere in the United States Code, requires a higher minimum sentence for *that* 924(c)(1) offense. Thus, the fact that the mandatory minimum penalty for the *other*, underlying drug offense was greater, does not implicate the "except" clause, and therefore the district court properly imposed a consecutive mandatory minimum sentence on the 924(c) count.

United States v. Strode, 552 F.3d 630 (7th Cir. 2009; No. 08-1611). In prosecution for conspiracy to distribute drugs, the Court of Appeals affirmed the district court's obstruction of justice enhancement. After the defendant was arrested, the court released the defendant, but ordered him to have no contact with his codefendants. Nevertheless, in a recorded meeting between the defendant and his co-conspirators, the defendant had a lengthy discussion about who was cooperating with the government. The defendant also encouraged his co-conspirators to "stay strong" and discouraged them from cooperating with the government. Based on this conversation, the district court concluded that the defendant had obstructed justice. The Court of Appeals agreed. Although the defendant never explicitly stated that he did not want his co-defendants to cooperate with the government, indirectly implying a need for everyone to keep quiet is not a barrier to an obstruction of justice enhancement. Moreover, in the context of the conversation, the defendant clearly had an obstructive intent. He met with the co-defendants for a specific

business purpose: to see if he could persuade his co-defendants not to cooperate with the government by demonstrating loyalty to them. Under these circumstances, the enhancement was proper.

United States v. Cano-Rodriquez, 552 F.3d 637 (7th Cir. 2009; No. 07-3721). In prosecution for illegal re-entry, the Court of Appeals concluded that the district court properly applied two criminal history points because the defendant committed the offense while under a criminal justice offense, pursuant to U.S.S.G. § 4A1.1(d). The defendant illegally entered the United States and was subsequently imprisoned in Illinois for a drug conviction. Upon his release from state custody, he was charged and convicted of the current immigration offense. The defendant argued that the 2 criminal history points were improperly applied, because it was unseemly in this context to penalize the defendant where it was not his choice to remain in the United States unlawfully after the state sent him to prison. The Court of Appeals noted, however, that the defendant was in the United States unlawfully while he sat in prison, necessarily committing the immigration offense "while under a sentence of imprisonment." Noting that this circuit had not addressed the precise question of whether 4A1.1(d) applies to aliens found in the country illegally while in prison, the court did note that every other circuit to have considered the question concluded that the extra criminal history points should be added, and the Seventh Circuit adopted the approach used by the other circuits.

United States v. Williams, 553 F.3d 1073 (7th Cir. 2009; No. 07-1573). In prosecution for multiple armed robberies, the Court of Appeals vacated the defendant's sentence and remanded for the district court to more fully consider the defendant's disability in relation to his sentence. The defendant, in support of a bottom-of-the-range sentence, presented evidence that he was diagnosed with "autistic disorders and other pervasive developmental disorders" since he was 10. Defense counsel noted that these disabilities made him exceptionally susceptible to manipulation by his brother, who was a leader in the conspiracy to rob the banks. In discussing the defendant's disability, the district court relied upon a report prepared by a court-appointed expert, who concluded that the defendant was exaggerating his disability. The district court relied upon this conclusion in rejecting the defendant's request for a low sentence, and sentenced him to the top of the guideline range. The Court of Appeals found two problems with the district court's analysis. First, the district court focused solely on the expert's conclusion that the defendant was exaggerating his disability. That fact was not, however, dispositive of whether the defendant was actually mentally disabled or whether his *actual*, undisputed disability justified a lower sentence. Second, the judge did not take into account the combination of the defendant's diminished capacity along with the fact that the ringleader was his brother, and the exacerbating effect that might have had on his ability to think for himself. Accordingly, the court remanded for consideration of these factors.

United States v. Williams, 557 F.3d 489 (7th Cir. 2009; No. 07-3608). In prosecution for multiple armed robberies, the Court of Appeals affirmed a sentence enhancement for the robberies involving a carjacking, pursuant to U.S.S.G. § 2B3.1(b)(5). The defendant did not directly participate in the carjacking, but the guidelines provide that a defendant may be held responsible for "all reasonably foreseeable acts and omissions of others in furtherance of jointly undertaken criminal activity." In the present case, there was no evidence that the defendant *knew* his co-defendant would commit the act of carjacking (indeed, the plan was to escape in a getaway car), so it was arguable that the co-defendant's actions were not foreseeable to the defendant. However, the Court of Appeals noted that co-conspirators do not have to agree to specific conduct in order to be held liable for each other's conduct so long as that conduct was reasonably foreseeable in carrying out the robbery. The Court of Appeals concluded that it was reasonably foreseeable that a carjacking might occur, given that a person who enters a bank robbery with firearms and other people intending to do whatever is necessary to effect that robbery would want to get away without being apprehended. Thus, the court concluded that the enhancement was properly applied.

United States v. Bryant, 557 F.3d 489 (7th Cir. 2009; No. 07-3608). In prosecution for conspiracy to distribute cocaine base, the Court of Appeals rejected the defendant's argument that the government failed to prove he distributed crack cocaine at sentencing. Specifically, the defendant argued that because the government did not prove that the cocaine base he distributed contained sodium bicarbonate, it did not prove he distributed the "crack" form of cocaine base. The Court of Appeals rejected this argument, noting that the presence of sodium bicarbonate is not a litmus test for establishing that a substance is crack for purposes of sentencing. Instead, courts consider the following factors: (1) whether the substance at issue has tested positive for the presence of cocaine base; (2) the color of the substance; (3) the shape and texture of the substance; (4) the method of packaging; (5) the price of the substance; and (6) whether the seller represents the substance as or understands the substance to be crack. A comprehensive analysis that focuses on not only the chemical composition of a substance but also its

appearance and other properties, its packaging, and the representations associated with its sale is consistent with the congressional concerns that prompted the statutory sentencing disparity for crack. The court therefore concluded that district courts may rely on a number of factors, including those set forth above, in determining whether a substance is crack. In the present case, these factors established that the substance was in fact crack.

United States v. England, 555 F.3d 616 (7th Cir. 2008; No. 08-2440). In prosecution for being a felon in possession of a weapon and obstruction of justice, the Court of Appeals vacated the defendant's sentence because the district court lacked sufficient evidence to increase the defendant's sentence based upon its belief that the defendant's conduct was more like "attempted murder" than obstruction of justice. The defendant, while in pre-trial custody, made various threats to his family members who were cooperating with authorities. These threats resulted in the obstruction of justice charges. At sentencing, after carefully considering the guideline range and the 3553(a) factors, the district judge went on to find that the defendant's sentence should be enhanced because his conduct was more like attempted murder than obstruction of justice. The court stated that if the defendant had been out on bond, it believed that the defendant would have taken action to follow through on the threats he made against his relatives. The Court of Appeals noted that sentencing courts have discretion to draw conclusions about the testimony given and evidence introduced at sentencing. Yet, this discretion is neither boundless nor is the information upon which a sentencing court may rely beyond due process limitations. To the contrary, the court recognized that due process requires that sentencing determinations be based on reliable evidence, not speculation or unfounded allegations. The question in this case was whether a preponderance of the evidence supported the court's belief that the defendant would have committed the crime of attempted murder. Here, the court concluded that there was an insufficient quantum of evidence to support such a conclusion. The defendant's own family members, who were the objects of the threats, testified that they did not feel threatened by the defendant's statements and that the defendant was merely "blowing off steam." Given the speculative nature of the district court's findings and the evidence presented by the witnesses, the court concluded that the evidence failed to meet the preponderance of the evidence standard.

United States v. Stephenson, 557 F.3d 449 (7th Cir. 2008; No. 06-2574). In prosecution for distribution of a controlled substance, the Court of Appeals rejected the defendant's argument that the government failed to establish that he distributed "crack," as opposed to some other form of cocaine base. The Court of Appeals noted that it had rejected a rigid definition of crack because employing a rigid definition would invite those in the drug trade to make minor changes in structure, processing, or packaging to avoid the increased penalties for selling crack cocaine. Instead, the Seventh Circuit has held that a sentencing judge must determine whether a defendant sold "crack," as those who buy and sell in the market generally understand the term. The experts in this field are those who spend their lives and livelihoods enmeshed with drugs–users, dealers, and law enforcement officers who specialize in narcotics crimes. In this case, all the "experts" agreed that the defendant sold crack and not some other form of cocaine to the confidential source in the case. Indeed, the defendant himself admitted repeatedly that he was selling "crack" cocaine." Unlike the situation in *United States v. Edwards*, 397 F.3d 570 (7th Cir. 2005), where the defendant never admitted to selling "crack" and the expert testimony was not conclusive, the situation in the present case was different; all of the evidence presented demonstrated that the defendant sold "crack." Accordingly, he was properly sentenced based upon distributing crack, as opposed to some other form of cocaine base.

United States v. Wise, 556 F.3d 629 (7th Cir. 2008; No. 08-2794). In prosecution for being a felon in possession of a weapon, the Court of Appeals affirmed a sentencing enhancement pursuant to U.S.S.G. § 2K2.1(b)(6) for possession of the firearm "in connection with another felony offense." The defendant, a convicted felon, possessed a weapon which he left lying around his home, and his two-year old cousin picked up the gun and accidentally killed himself with it. At sentencing, the court enhanced the defendant's sentence, finding that leaving the loaded gun out constituted the Illinois offense of reckless endangerment of a child resulting in death. On appeal, the defendant argued that the guideline in question is meant to punish more severely a defendant who, on top of the firearms offense, commits a separate felony that is made more dangerous by the presence of the firearm. He argued that the willful endangerment offense was not made more dangerous by possessing the firearm, but rather his lapse in properly handling the firearm was the essence of that offense. The endangerment was not "another felony offense" but rather the same crime as the federal crime of being a felon in possession of a firearm. The Court of Appeals disagreed. It found that by carelessly leaving his loaded gun in a location accessible to children, the defendant willfully caused or permitted the life of a child to be endangered, which, in this case, resulted in the death of a child. It is fair to say, according to the court, that

possessing a gun is one thing, but leaving it loaded, lying around where children can find it, is quite another. Accordingly, the endangerment offense was "another felony offense" as defined in the guideline.

United States v. Wayland, 549 F.3d 526 (7th Cir. 2008; No. 08-2194). In prosecution for making false statements relating to health care matters, the Court of Appeals affirmed an enhancement to the defendant's base offense level for use of sophisticated means under U.S.S.G. § 2B1.1(b)(9). The defendant, as his mother's power of attorney, claimed that his disabled mother had a full-time personal assistant, and received more than $108,000 from the Illinois Department of Rehabilitation Services to compensate the assistant. There was in fact, however, no personal assistant. To perpetrate the fraud, the defendant submitted false documents so the Department would believe that his mother had a personal assistant. He also fraudulently registered a joint bank account and post office box to facilitate the payments and filed fraudulent tax returns so that the IRS would not alert the Department. The district court and the Court of Appeals concluded that the scheme required a greater level of planning or concealment than the typical health care fraud case, which typically involved inflated claims of hours actually worked by a personal assistant. Accordingly, the district court did not clearly err in applying the enhancement.

United States v. Podhorn, 549 F.3d 552 (7th Cir. 2008; No. 06-2139). In prosecution of a licensed firearms dealer, the Court of Appeals reversed a sentencing enhancement under U.S.S.G. § 2K2.1(b)(4), based on the fact that some of the firearms involved in the offenses of conviction were stolen. The defendant was charged with multiple offenses, including two counts of selling stolen firearms in violation of 18 U.S.C. § 922(j) and 22 counts of selling firearms without maintaining proper records in violation of 18 U.S.C. § 922(b)(5). At sentencing, the district court enhanced the defendant's sentence under the above-noted guideline section because some of the firearms were stolen, but the defendant argued that the enhancement constituted impermissible double-counting. The guideline section provides that, in calculating the offense level, "if any firearm (A) was stolen, increase by two levels." Application Note 9, however, qualifies that rule stating: "If the only offense to which §2K2.1 applies is 18 U.S.C. §922(I), (j), or (u) . . . and the base offense level is determined under subsection (a)(7), do not apply the adjustment unless the offense involved a firearm with an altered or obliterated serial number." There was no dispute that the stolen weapons in this case did not have an altered or obliterated serial number and that the defendant's base offense level was in fact determined under subsection (a)(7). The government argued that notwithstanding this language, the enhancement applied because the stolen firearms were involved in the 922(b)(5) offenses, in addition to the 922(j) offenses. According to the Court of Appeals, the question was whether Application Note 9 applies in the situation where the very same firearm supports both the 922(j) convictions on *different* counts and the 922(b)(5) conviction. The court concluded that because the same stolen weapons supported both the subsection (j) and (b)(5) counts, the enhancement could not be applied. In reaching this conclusion, the court noted that the enhancement would have been permissible if in a different count the government had relied on a different stolen weapon. Judge Ripple dissented.

United States v. Singleton, 548 F.3d 589 (7th Cir. 2008; No. 07-3399). In prosecution for drug offenses, the Court of Appeals held that the district court did not improperly rely on the defendant's proffer made to the government to determine his relevant conduct. The PSR and testimony of a witness at sentencing indicated that the defendant was responsible for 5.124 kilograms of crack cocaine, in addition to the 6.6 grams of crack involved in the defendant's offense conduct. In addition to this evidence, the government introduced the defendant's proffer, wherein he stated that he sold more crack than that which was set forth in his indictment. The government claimed the proffer was admissible, because the terms of the proffer agreement allowed its use if the defendant took a position inconsistent with statements made therein, which the defendant did when he argued at sentencing that he was responsible for only the amount set forth in the indictment. The Court of Appeals noted that it recently decided *United States v. Farmer*, 543 F.3d 363, 374 (7th Cir. 2008), where it found that the government violated the terms of the defendant's proffer agreement by improperly using information given by the defendant in his proffer against him. However, the court distinguished *Farmer*. In *Farmer*, the defendant's proffer was the sole evidence of the amount of cocaine used to increase his offense level. Here, the district court relied upon the testimony of a witness and the PSR in determining the drug quantity. Accordingly, the court concluded that these sources, rather than the defendant's proffer, were what the district court relied upon when making its relevant conduct findings.

United States v. Miller, 547 F.3d 718 (7th Cir. 2008; No. 08-1069). In prosecution for possession of a weapon by a felon, the Court of Appeals affirmed the district court's refusal to lower the defendant's offense level pursuant to U.S.S.G. § 2K2.1(b)(2). The defendant bought, refurbished, and sold many weapons, stored in a shed behind his residence. He also possessed at least one loaded weapon in his house, which he conceded was

for security purposes. The defendant argued that his offense level should have been reduced because he was "an entry-level collector." Section 2K2.1(b)(2) provides: "If the defendant . . . possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above by 6." The district court refused to apply this guideline section, finding that because the defendant sold a gun, he no longer possessed it for collection. The Court of Appeals disagreed. The sale of a single weapon does not inevitably prevent a person from being a collector. Collectors–whether of coins, stamps, baseball cards, comic books, paintings, or guns–regularly buy and sell in order the shed duplicates or less desirable items and acquire replacements that they value more highly. The guideline section in question does not exclude from its coverage collectors who sell some holdings as a means of improving the collection as a whole, any more than it excludes those who buy or barter with that goal in view. Accordingly, the court concluded that a person who sells weapons can remain a collector, unless the sales are so extensive that the defendant becomes a dealer (a person who trades for profit) rather than a collector (a person who trades for betterment of his holdings). However, in the present case, the guideline section was still inapplicable, because the defendant possessed at least one weapon for security purposes, rather than for collecting.

United States v. Anderson, 547 F.3d 831 (7th Cir. 2008; No. 07-3654). In prosecution for bank robbery, the Court of Appeals affirmed the district court's denial to appoint a mental health expert for purposes of sentencing. The defendant made a motion under the Criminal Justice Act for appointment of a mental health expert to evaluate him for diminished mental capacity. The basis for the motion was that the defendant was HIV-positive and suffered from severe depression. The motion also noted that there is a condition known as "HIV-associated dementia" that impairs memory, speech, concentration, motor function, and emotional control. The Court of Appeals noted, however, that there was no indication that the defendant was suffering from any of these impairments when he robbed the bank. Indeed, the court noted that a person can be asymptomatic with HIV for years without developing AIDS. The record did not indicate that the defendant had AIDS, or even when he contracted HIV. Moreover, there was no suggestion that at the time of the robbery the defendant had any symptoms such as dementia, of his being infected with HIV. A judge is not required to appoint a mental health expert without showing that the appointment would have some (not necessarily a great) likelihood of resulting in a reduced sentence. The defendant failed to make such a showing in this case.

United States v. Fox, 548 F.3d 523 (7th Cir. 2008; No. 07-3830). In prosecution for conspiracy to distribute and to possess with intent to distribute crack cocaine, the Court of Appeals held that 40 grams of crack cocaine found in a co-defendant's home was improperly included as relevant conduct. The defendant was involved with two other co-conspirators who used and sold crack cocaine together. After discovery by investigators, police executed a search warrant at a co-defendant's home, where they found 40 grams of crack cocaine and other items indicative of the use and sale of drugs. At sentencing, the district court found the 40 grams to be part of the defendant's relevant conduct. In doing so, the court stated, "The defendant is responsible for the crack cocaine located at [the co-defendant's] residence on the date of the search warrant. The [co-defendant] provided drug customers to the defendant. Defendant was aware that [co-defendant] stored drugs in his residence. Defendant was observed traveling to that residence to obtain additional crack cocaine on the date he delivered crack cocaine to an undercover agent." The Court of Appeals noted that the district court focused exclusively on the foreseeability requirement of relevant conduct, ignoring its other requisites. Although the government relied upon *Pinkerton* liability to hold the defendant accountable for the drugs, the court noted that *Pinkerton* liability is generally broader than jointly undertaken criminal activity under U.S.S.G. § 1B1.3. The only significant facts in the record involving joint criminal activity between the two men in this case was the defendant's participation in a single crack deal and the fact that the defendant spent time at the co-defendant's house "getting high." It was thus impossible for the court to tell if the co-defendant's possession of the 40 grams of crack was in furtherance of any joint criminal activity involving him with the defendant. Moreover, the drugs were found in the co-defendant's residence five days after the end of the charged conspiracy. Although the court did consider the whether the co-defendant's possession of the drugs was foreseeable to the defendant, in did not consider the question in the context of a connection with the joint criminal activity between the two men. Without considering whether the defendant's awareness arose out of the defendant's joint criminal activity with the co-defendant, the district court's foreseeability finding was insufficient, because reasonable foreseeability requires more than just subjective awareness. Accordingly, the Court of Appeals vacated the defendant's sentence.

United States v. Jackson, 546 F.3d 465 (7th Cir. 2008; No. 07-3226). In prosecution for drug offenses, the

Court of Appeals vacated the defendant's sentence because the district court failed to adequately explain why it imposed the federal sentence consecutive to a state court sentence. According to application note 3(A) to U.S.S.G. § 5G1.3(c), a district court is required to consider a number of factors (including those set forth in 3553(a)), when deciding whether to run a sentence consecutive to another term. In the present case, the district court's only explanation for why it imposed a consecutive sentence was, "You don't get a bonus in this court because you have engaged in more criminal activity than others. It doesn't work that way." The court read these statements as an explanation for why the court imposed a sentence in the middle of the range, not a reason for the consecutive sentence. The defendant made a detailed argument for why the sentences should be concurrent, and the district court could not pass over in silence an argument that is "not so weak as not to merit discussion." Accordingly, the court sent the case back for resentencing.

United States v. Jennings, 544 F.3d 815 (7th Cir. 2008; No. 07-1818). In prosecution for drug offenses, the Court of Appeals held that an Indiana conviction for felony resisting a law enforcement officer constituted a "crime of violence" for career offender purposes. The felony version of this offense had as an element that "the person draws or uses a deadly weapon, inflicts bodily injury on another person, or operates a vehicle in a manner that creates a substantial risk of bodily injury to another person." Applying the principles set forth by the Supreme Court in *Begay*, the court concluded that the offense was a "crime of violence." First, by definition, the offense required conduct that created a "substantial risk of bodily injury to another." Second, the offense involves the sort of purposeful and aggressive conduct that the Court's decision in *Begay* requires. Accordingly, the offense qualifies as a "crime of violence."

United States v. Parr, 545 F.3d 491 (7th Cir. 2008; No. 06-3300). In prosecution for threatening to use a weapon of mass destruction against a federal government building in violation of 18 U.S.C. § 2332a(a)(3) & (a), the Court of Appeals reversed the enhancement of the defendant's sentence pursuant to U.S.S.G. § 3A1.4, which applies a 12-level enhancement for an "offense that involved, or was intended to promote, a federal crime of terrorism." The defendant told his cell mate that he intended to blow up a federal building. The Application Note provides that a "federal crime of terrorism" has the meaning given that term in 18 U.S.C. § 2332b(g)5)." That statute, in turn, defines a "federal crime of terrorism" as an offense that is (1) "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct"; *and* (2) listed in 18 U.S.C. § 2332b(g)(5)(I)." The definition is stated in the conjunctive, and the Court of Appeals concluded that both requirements must be met before a sentence can be enhanced. The defendant's crime of conviction is specifically listed in the statute, and the only question therefore was whether his offense met the first requirement. The district court found that because the defendant's threat was uttered to his cellmate, it was not "calculated to influence or affect the conduct of government." However, the court nevertheless applied the enhancement, concluding that because the act the defendant *threatened* to commit *was* a crime of terrorism, the offense "involved" a crime of terrorism within the meaning of the guideline. The Court of Appeals disagreed. The term "involve" as used in the guideline is not so broad. An offense "involves" a federal crime of terrorism only if the crime of conviction itself is a federal crime of terrorism. On this understanding, if the defendant's crime–the threat–was not itself a crime of terrorism as defined in the statute, the enhancement could not apply. Accordingly, the court vacated the defendant's sentence.

United States v. Templeton, 543 F.3d 378 (7th Cir. 2008; No. 07-2949). In prosecution for bank robbery, the Court of Appeals held that not all escapes as defined by Wisconsin statute are "crimes of violence" for career offender purposes. Applying the test set forth by the Supreme Court in *Begay*, the court first considered whether escapes poses a serious risk of physical injury to another. In support of his argument that escape does not present such a risk, the defendant presented data which showed that 11% to 15% of escapes in Wisconsin present a serious risk of physical injury. However, the Court of Appeals concluded that these percentages were sufficient to demonstrate that escapes are sufficiently risky to qualify as crimes of violence. However, the court went on to evaluate escape offenses under the second portion of the *Begay* test, *i.e.*, whether escapes and failures to return are sufficiently similar to the listed offenses in the career offender provision. The court noted that although some escapes, such as prison breaks, clearly are sufficiently similar to enumerated offenses, other escapes are not. A furloughed prisoner, for example, who does not return commits a form of escape, as does a prisoner's walkaway from a halfway house or a camp that lacks fences. A walkway or similar offense is not a crime of violence under *Begay*. These offenses do not involve "aggressive" conduct against either a person or property. All the Wisconsin statute requires is that the escapee "leave." The crime does not require any violent or aggressive act. Although the statute does require intent, the required mental state is only intent to be free of custody, not intent to injury or threaten. Thus, it is possible to violate the Wisconsin statute in a

manner that constitutes a crime of violence, and possible to do so in a way that does not. Under *Taylor*, in such a case, the district court may look at the indictment or other charging papers to determine in what way the defendant committed the offense. In the present case, the record does not contain charging papers for the defendant's prior convictions. The court therefore remanded the case to the district court to determine whether the defendant's escapes were crimes of violence. If the charging papers do not reveal which type of escape the defendant committed, then the district court should find that the prior convictions for escape were not crimes of violence.

United States v. Liddell, 543 F.3d 877 (7th Cir. 2008; No. 07-3373). In prosecution for drug offenses, the Court of Appeals held that a district court can consider the crack/powder disparity when varying from the career offender guideline. The Court of Appeals initially reaffirmed its holding in *Harris*, which it characterized as holding that *Kimbrough* did not change the way the courts calculate career offender guideline ranges. The court went on to note, however, that the defendant in the present case made a "more nuanced argument based on *Kimbrough*: while a district court cannot consider the crack/powder disparity in calculating the career offender guideline range, it can consider the disparity as a reason for issuing a below-guideline sentence. The court noted that since *Booker*, the Supreme Court has consistently reaffirmed that *all* the sentencing guidelines are advisory. The Court of Appeals has clearly held that this includes the career offender guidelines. However, in this particular case, the defendant could not benefit from the holding in this case because he failed to make his *Kimbrough* argument in the district court. *Kimbrough* itself didn't deal with the career offender context and it was not clear before the present opinion that *Kimbrough's* rationale extended to that context. Accordingly, given that the law had been unsettled, it would be inappropriate to find plain error.

United States v. Tanner, 544 F.3d 793 (7th Cir. 2008; No. 07-1801). In prosecution for drug offenses, the Court of Appeals affirmed the district court's refusal to delay the defendant's sentencing hearing until a more favorable version of the Guidelines went into effect. The defendant was subject to a 20-year mandatory minimum sentence. However, under the 2007 version of the Guidelines, the Defendant's criminal history score would have gone down, making him eligible for the "safety valve." Accordingly, the defendant asked that the district court delay his sentencing hearing until the new version of the Guidelines went into effect, which would have allowed him to avoid the mandatory minimum. The district court refused. The Court of Appeals noted that sentencing judges can properly grant continuances to await clarification of the law, or, what is analytically similar, if an impending change in law would require modification of a judgment entered on the basis of the law currently in force. However, it is improper for a judge to grant (or deny) a continuance for the very purpose of changing the substantive law applicable to the case. The power to grant or deny a continuance is abused when it is exercised not in order to manage a proceeding efficiently but in order to change the substantive principles applicable to a case. That would be like the judge's trying to change the effective date of a statute because he liked, or disliked, how the statute had changed the existing law. Accordingly, the district court properly denied the request to continue the sentencing hearing.

United States v. Smith, 544 F.3d 781 (7th Cir. 2008; No. 07-1853). In prosecution for being a felon in possession of a weapon, the Court of Appeals held that an Indiana conviction for "criminal recklessness" was not a violent felony under the Armed Career Criminal Act. The question in the case was whether the prior conviction was a violent felony under the residual clause of the ACCA. The court noted that after the Supreme Court's decision in *Begay*, a finding that a prior offense poses a risk of serious physical injury to another is a *necessary*, but not *sufficient*, condition for the offense to be included within the scope of the ACCA's residual clause. The government must also show that the predicate offense "typically involve[s] purposeful, violent, and aggressive conduct." Defendants with prior convictions for offenses that do not involve "purposeful or deliberate" conduct are not the type of defendants that Congress intended to include within its definition of an armed career criminal. After *Begay*, the residual clause of the ACCA should be interpreted to encompass only "purposeful" crimes. Therefore, those crimes with a *mens rea* of negligence or recklessness do not trigger the enhanced penalties mandated by the ACCA. In the present case, the Indiana statute contained three potential *mens rea*: recklessly, knowingly, and intentionally. Using the categorical approach, it was impossible to tell which of the three *mens rea* with which the defendant was charged. Accordingly, because the offense could have been committed in a non-purposeful way, the prior conviction could not serve as a predicate offense under the ACCA.

United States v. Whited, 539 F.3d 693 (7th Cir. 2008; No. 07-1015). In prosecution for distribution of child pornography, the Court of Appeals affirmed the enhancement of the defendant's sentence under U.S.S.G. § 2G2.2(b)(3)(B), which adds five levels if the distribution of child pornography was "for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain." The basis of the enhancement was an

email exchange between the defendant and another individual in which child-pornography images were transmitted and arrangements for a sexual encounter were discussed. Specifically, the defendant sent images and expressed his interest in using child pornography in connection with a sexual encounter they were planning together. The recipient expressed his approval of the images and asked for the defendant to continue sending the pictures to make him "happy." The Court of Appeals noted that it had not had a prior occasion to consider the meaning of the enhancement in question. According to the Application Notes, a "thing of value" is defined as "anything of valuable consideration." The defendant conceded that the sexual encounter would qualify as a "thing of value." The defendant, however, argued that "expectation of receipt" required an explicit agreement or precise bargain, but the Court of Appeals disagreed. Distribution of child pornography in the reasonable anticipation or reasonable belief of receiving a thing of value is enough for the enhancement.

United States v. Arreola-Castillo, 539 F.3d 700 (7th Cir. 2008; No. 06-4055). In prosecution for drug offenses, the defendant challenged his mandatory life sentence, arguing that the 851 notices in his case were insufficient. The government filed two notices in the case. The first notice alleged a single prior conviction. The notice improperly listed the conviction as occurring in Arizona, instead of New Mexico. The second notice alleged two other prior convictions involving the distribution of cocaine on two separate occasions, six days apart. Regarding the first notice, the Court of Appeals concluded that the clerical error contained in the notice was not fatal. Specifically, although the notice listed the wrong state of conviction, it incorporated by reference a certified copy of the conviction which set forth all the correct information. Moreover, the government moved to correct the error prior to sentencing, which § 851 clearly permits. Regarding the second notice which listed two convictions, the defendant argued that the two convictions should have been treated as only one. The court noted that almost nothing existed in the record concerning the facts of the two convictions, which made it difficult to determine whether the two incidents of distribution separated by only six days were truly separate, such as involving separate planning, separate customers, and so forth. Moreover, it appeared that the two convictions contained in the notice were treated by the government and probation as one conviction up until sentencing. Both the government and the PSR referred to the defendant as having "two" prior felony drug convictions, but treating the two convictions in the second notice would have given the defendant three. Ultimately, however, the court found no error because even if the two convictions were treated as one, the conviction in the first notice gave the defendant a total of two, subjecting him to the mandatory term of life imprisonment.

United States v. Carson, 539 F.3d 611 (7th Cir. 2008; No. 07-2944). In prosecution for conspiring to transport a minor across state lines for the purpose of unlawful sexual activity, the Court of Appeals affirmed a 2-level enhancement under U.S.S.G. § 2G2.1(b)(5), which applies when the defendant is "a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant." In the present case, an aunt had legal custody of the minor. She allowed the minor's mother and the defendant to be alone with the minor, leaving him in their care temporarily. The defendant and the mother then sexually abused the child. The defendant argued that he was not subject to the enhancement noted above because the minor was in his mother's custody throughout the abuse. The Court of Appeals rejected this argument, noting that the defendant assumed incorrectly that only one person at a time can have "custody, care, or supervisory control" of a minor. The court looked to Application Note 3(A) to § 2G2.1, which states that the enhancement applies to teachers, day-care providers, baby-sitters, or other temporary caretakers. If the enhancement applies to a babysitter, even though the parents have ongoing legal custody and a right to direct the babysitter's performance, there is no reason why the enhancement cannot apply to the defendant, who shared custody and control with the victim's mother.

United States v. Robinson, 537 F.3d 798 (7th Cir. 2008; No. 07-2428). In prosecution for being a felon in possession of a weapon, the Court of Appeals reversed the district court's application of U.S.S.G. §2K2.1(b)(6)(use or possession of a gun in connection with another felony offense), holding that the district court needed to conduct additional factfinding. The defendant resisted arrest, reaching for a gun in his waistband several times during his struggle with the police. At his sentencing hearing for being a felon in possession, the district court applied the guideline enhancement, finding that the defendant was attempting to shoot officers and therefore had committed the felony offenses of attempted aggravated battery and attempted aggravated firearm discharge. The Court of Appeals, however, noted that reaching for a gun may indicate an intent to point, brandish, *or* fire it, or perhaps use it in another way–for example, to hold the officers at bay in order to effectuate an escape. Although attempting to shoot (or pistol-whip or otherwise harm) the officers would be a felony attempted aggravated battery, attempting to point or brandish the gun would only be a misdemeanor attempted aggravated assault under Illinois

law. The district court apparently concluded that *any* use of the gun would have been felonious, so he did not distinguish an attempt to shoot the officers from any other attempt possibilities that existed in the record, some of which were only misdemeanors. Accordingly, the court sent the case back to the district court for additional fact finding.

United States v. Schroeder, 536 F.3d 746 (7th Cir. 2008; No. 07-3773). In prosecution for tax preparer fraud, the Court of Appeals vacated the defendant's sentence due to numerous errors made at sentencing. First, the district court improperly announced its findings on the amount of loss before allowing defense counsel to present any argument. Defense counsel had to interrupt the court's recitation of its loss findings to indicate that he intended to present testimony and argument disputing the amount of loss. Although the court allowed counsel to offer evidence in the form of an offer of proof, whether the court gave the defense's arguments the due consideration they deserved is questionable "to say the least" in light of the court's conclusive pronouncement of its findings at the beginning of the hearing. Moreover, the court is required to allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence. Secondly, the court appeared to be confused about the proper burden of proof at sentencing. The court implied that the government met its burden simply by submitting admissible evidence at sentencing, as opposed to proving the amount of loss by a preponderance of the evidence. Indeed, the court never found that the government proved the loss by a preponderance of the evidence. Lastly, the court did not sufficiently consider the defendant's 3553(a) argument that he should receive a lower sentence due to extraordinary family circumstances. In rejecting the defendant's argument, the court merely stated that the defendant's criminal conduct was the cause of the alleged hardship caused to his family. The Court of Appeals noted that such an observation is an obvious one, but not dispositive, since the culpability of a defendant who appears for sentencing is a given. When a defendant presents an argument for a lower sentence on extraordinary family circumstances, the relevant inquiry is the effect of the defendant's absence on the family members. The defendant's responsibility for the adverse effects of his incarceration on his family is not the determinative issue. If it were, there would never be an occasion on which the court would be justified in invoking family circumstances to impose a below-guidelines sentence.

United States v. Spells, 537 F.3d 743 (7th Cir. 2008; No. 07-1185). In prosecution for robbery, the Court of Appeals affirmed the district court's determination that the defendant was an armed career criminal. The defendant argued for the first time on appeal that his prior Indiana conviction for resisting law enforcement by fleeing in a vehicle was not a "violent felony" under the residual clause of the ACCA. The Seventh Circuit, employing the analysis set forth by the Supreme Court in *Begay*, held that the offense was a violent felony. As set forth by the Supreme Court in *Begay*, the residual clause covers only those crimes that are roughly similar in kind as well as in degree of risk posed to the examples set forth in the statute (burglary, arson, extortion, or crimes involving explosives). The Court in *Begay* distinguished DUI offenses from the enumerated offenses by relying upon the strict liability nature of a DUI offense. In the present case, the Indiana law specifically provides that the flight must be done "knowingly or intentionally," thus ensuring that the law is only violated when an individual makes a "purposeful" decision to flee from an officer. Additionally, such conduct, when committed with a vehicle, is inherently "aggressive." Therefore, under the *Begay* analysis, the offense in question was sufficiently similar to the enumerated offenses in the ACCA to constitute a violent felony.

United States v. Lang, 537 F.3d 718 (7th Cir. 2008; No. 07-2278). In prosecution for being a felon in possession of a firearm, the Court of Appeals affirmed the district court's application of a guideline enhancement for use or possession of any firearm or ammunition in connection with another felony offense pursuant to U.S.C. § 2K2.1(b)(6). The defendant traded a gun for drugs, which was the basis for the enhancement. The defendant argued that his barter of the gun did not constitute "use" as contemplated in the guideline section. The Court of Appeals, however, held that even if a gun is used as barter, rather than as a weapon, the definition of "use" in the guidelines is broad enough to bring such "use" within the guideline enhancement.

United States v. Billups, 536 F.3d 574 (7th Cir. 2008; No. 07-2037). The Court of Appeals held that a prior Wisconsin conviction for false imprisonment, is a "crime of violence" for career offender purposes, finding that the offense "otherwise involves conduct that presents a serious potential risk of injury to another." It was conceded that the offense neither had use of force as an element or was a specifically listed offense in the career offender guideline. The defendant argued that the Wisconsin offense did not invariably pose a risk of physical harm to the victim, because the victim's confinement may be effected through deception or fraud, rather than force. The court, however, noted that the benchmark should be the possibility of violent

confrontation, not whether one can postulate a nonconfrontational hypothetical scenario. Here, the court had "little trouble" concluding that, in the ordinary case, Wisconsin's false imprisonment offense poses just such a risk. Even where the victim is falsely imprisoned through deception, the victim may discover the ruse and resist, risking a violent confrontation. Additionally, the court concluded that the analysis employed by the Supreme Court in *Begay* bolstered its conclusion. In *Begay*, the Supreme Court found that a DUI offense was not a violent felony under the ACCA because the offense lacked the sort of "purposeful, violent, and aggressive" conduct exemplified by the crimes enumerated in the statute–burglary, arson, and extortion. Here, unlike a DUI, which may be committed without criminal intent, false imprisonment always involves purposeful behavior and typically involves aggressive, violent behavior similar to that involved in the enumerated crimes. Moreover, the commentary to § 4B1.2 indicates that the term "crime of violence" also includes kidnapping, an offense involving conduct remarkably similar to that involved in false imprisonment. Accordingly, the court held that the Wisconsin offense was a crime of violence.

United States v. Clanton, 538 F.3d 652 (7th Cir. 2008; No. 07-1773). In prosecution for drug offenses, the Court of appeals remanded the cases of two defendant's for reconsideration in light of *Kimbrough*, but affirmed the sentence of a third defendant because he was sentenced under the career offender guideline. All three defendants challenged the 100:1 ratio in the district court and on appeal. For the first defendant, who was not a career offender, he was sentenced according to 2D1.1. Because he preserved his argument and the district court felt constrained, pre-*Kimbrough*, to follow the 100:1 ratio, the court ordered a full remand. For the second defendant, he was a career offender. However, because his offense level under 2D1.1 was higher than his career offender level, the quantity of drugs was used to set his base offense level. Accordingly, he too was entitled to a remand for the district court to consider the defendant's *Kimbrough* argument. For the third defendant, however, he was a career offender and the career offender guideline was used to set his base offense level. As the court already held in *Harris*, a sentence entered under the career offender guideline raises no *Kimbrough* problem. Accordingly, the court affirmed this defendant's sentence.

United States v. Harris, 536 F.3d 798 (7th Cir. 2008; No. 07-2195). In prosecution for drug offenses, the Court of Appeals held that a sentence entered under the career offender guideline raises no *Kimbrough* problem because to the extent it treats crack cocaine differently from powder cocaine, the disparity arises from a statute, not from the advisory guidelines. The defendant was sentenced as a career offender. Although no *Kimbrough* argument was made in the district court or initially on appeal, the court ordered supplemental briefing on the effect, if any, of *Kimbrough* on someone sentenced as a career offender. The court noted that § 4B1.1 correlates offense levels and sentencing ranges with the gravity of the crime by incorporating the statutory maximum sentence for the underlying offense. For example, under § 4B1.1, a defendant is assigned an offense level of 37 if his crime carries a statutory maximum sentence of life. Thus, § 4B1.1 does not inherently prescribe different punishments for crimes involving crack cocaine than it does for crimes involving powder cocaine. To the extent that a sentencing disparity might occur under § 4B1.1 based upon the type of cocaine involved, it does not result from the now-advisory drug quantity table, but is the product of a discrepancy created by *statute*. While the sentencing guidelines may be only advisory for district judges, congressional legislation is not. Moreover, quoting the First Circuit, the court stated that the decision in *Kimbrough*–though doubtless important in some cases–is only of academic interest in a case arising under the career offender guideline. Finally, although holding that *Kimbrough* had no application in the career offender context, the court did note that its discussion should not be read to suggest that the career offender guideline is any less advisory for a district judge than other sentencing guidelines.

United States v. Hearn, 534 F.3d 706 (7th Cir. 2008; No. 07-1613). Upon appeal from a conviction for distributing five grams or more of crack, the Court of Appeals remanded for re-sentencing in light of *Kimbrough*. Importantly, the Court of Appeals noted that the defendant was sentenced as a career offender. The court did not, however, address how *Kimbrough* applied to the career offender context. Rather, the court simply stated, "Because the district court sentenced Mr. Hearn before *Kimbrough* was issued, however, it would have had no reason to express any disagreement with the 100:1 ratio at the sentencing hearing. At that time, such a statement would have been futile under our precedent. The district court sentenced Mr. Hearn to 360 months' imprisonment, a sentence at the low end of the applicable guidelines range. It might have imposed a lesser sentence had it known that it was permissible to deviate from the 100:1 crack/powder ratio based on a disagreement with the policy. Mr. Hearn adequately preserved the *Kimbrough* issue, and therefore we shall remand to permit the district court to reconsider the sentence in light of *Kimbrough*. *See United States v. Padilla*, 520 F.3d 766, 774 (7th Cir. 2008); *see also Taylor*, 520 F.3d at 747."

United States v. Acosta, 534 F.3d 574 (7th Cir. 2008; No.

06-1519). In prosecution for a multi-defendant drug conspiracy prosecution, the Court of Appeals held that the defendant's due process rights were not violated when the district court relied upon the testimony from codefendants' trials to determine the drug quantity in the defendant's case. In concluding that the defendant was responsible for at least 1.5 kilograms of crack, the district judge made reference to having sat through the trial of certain other defendants and heard substantial evidence to support the drug quantity finding. The defendant argued that the district court relied on information unavailable to him and deprived him of notice and the opportunity to respond. First, the court noted that the government provided all the excerpts of trial testimony on which it intended to rely for the determination of relevant conduct. Moreover, a district court does not violate the due-process rights of a coconspirator who pleads guilty by relying, for sentencing purposes, on evidence presented at the trial of conconspirators. The defendant was on notice that under the sentencing guidelines, he would be held responsible for the relevant conduct of his coconspirators if reasonably foreseeable to him. Accordingly, there was no due process violation.

United States v. Woolsey, 535 F.3d 540 (7th Cir. 2008; No. 06-4058). In prosecution for drug and firearm offenses, the Court of Appeals vacated the sentence, finding that the district court improperly sentenced the defendant to a term below the statutory mandatory minimum sentence. Prior to trial, the government filed an enhancement information pursuant to 21 U.S.C. § 851, detailing two prior drug felonies that would trigger a mandatory term of life imprisonment. At sentencing the defendant challenged one of his convictions. That conviction, dating from 1974, had resulted in a sentence of two years' probation under the Federal Youth Corrections Act, for possessing with intent to distribute approximately 125 pounds of marijuana. The defendant claimed that he was informed at the time that his conviction would be set aside automatically upon successful completion of his probation. This information, however, turned out to be inaccurate; only an *early* discharge of probation had the effect of setting aside a conviction under the Act, and because the defendant's term was not discharged early, his only recourse after he completed his probation in 1976 was to petition the district court in Arizona to grant him a nunc pro tunc early conditional discharge and set aside his conviction. The court delayed the sentencing to allow the defendant to seek such an order, but after five months, went ahead and sentenced the defendant without a ruling on his petition (the Arizona court later denied it). At sentencing, the district court disregarded the 1974 conviction, concluding that it ought to treat "as having been done what should have been done under general equitable powers." Thus, the court imposed a 300-month sentence rather than life imprisonment. The Court of Appeals reversed, noting that the judge was not free to ignore the earlier conviction. The defendant's effort to alter his prior conviction amounted to a collateral attack on his prior conviction. However, 851 bars any challenge to the validity of any prior conviction alleged under that section which occurred more than five years before the date of the information alleging such prior conviction. The five-year window was closed in this case. Moreover, even if the window was not closed, sentencing is not the right time to collaterally attack a prior conviction unless the prior conviction was obtained in violation of the right to counsel–a fact not suggested in this case. Finally, the recidivism penalties in 841(b)(1)(A) are not optional, even if the court deems them unwise or an inappropriate response to repeat drug offenders. Accordingly, the decision to disregard the prior conviction in light of what the court believed "should have been done" three decades earlier was incorrect.

SPEEDY TRIAL ACT

United States v. Braodnax, 536 F.3d 695 (7th Cir. 2008; No. 07-1985). The Court of Appeals held that 18 U.S.C. § 3162(a)(2) requires a defendant to move to dismiss on speedy trial grounds before a trial begins or before a plea is entered. In the present case, the defendant made his objection after the government closed its case at trial. The court held that the objection was too late, and the defendant therefore waived his claim that his Speedy Trial Act rights were violated. Strictly enforcing the waiver rule avoids double jeopardy issues, given the fact that jeopardy attaches as soon as the jury is empaneled. Secondly, it reinforces the right of the prosecutor to appeal from the dismissal of an indictment before jeopardy attaches. Finally, the Act specifically states that "failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal."

SUPERVISED RELEASE

United States v. Rhodes, 552 F.3d 624 (7th Cir. 2009; No. 07-3953). In prosecution for possessing a computer hard drive containing video depictions of a minor engaging in sexually explicit conduct, the Court of Appeals rejected the defendant's challenge to a special condition of supervised release. That condition stated that the defendant "undergo a psychosexual evaluation and participate in an outpatient sex offender counseling program if recommended by the evaluator which may involve use of polygraph and plethysmograph examinations." The last procedure involves placing a pressure-sensitive device around a man's penis,

presenting him with an array of sexually stimulating images, and determining his level of sexual attraction by measuring minute changes in his erectile responses. Experts disagree as to the tests effectiveness. On appeal, the defendant urged the Court of Appeals to follow the Ninth Circuit's approach in evaluating this condition, which requires a district court to state precisely why the PPG testing is no greater deprivation of liberty than is reasonably necessary, given the mentally and physically intrusive nature of the test. The government, on the other hand, argued that the court should follow the Sixth Circuit's approach, which holds that such a condition cannot be challenged on appeal, where the condition only potentially requires the defendant to have such a test and a court could not predict whether the probation officer would in fact find such testing necessary, given that it will be years before the defendant is released. The Seventh Circuit adopted this latter approach, finding that the challenge to the condition was based upon a number of contingencies. If it were to consider the validity of the condition at the present time, it would be addressing a question full of contingency and abstraction founded in an evolving scientific field, perhaps to the detriment of the defendant's rehabilitation–and doing so with an undeveloped trial court record. Moreover, the defendant can always later petition the district court to modify the condition. The court did note, however, that it was not saying that a defendant can never immediately appeal a condition of supervised release after sentencing. But to do so, the condition must be determinate, not dependent on a string of contingencies.

United States v. Paul, 542 F.3d 596 (7th Cir. 2008; No. 07-4024). The district court ordered the defendant to serve a prison term and, thereafter, undergo frequent drug testing as a condition of his supervised release. On appeal, the defendant contended that because he had no history of drug abuse, the court had no ground on which to impose the condition. The Court of Appeals affirmed. The court noted that drug testing is a mandatory conditions of supervised release, which a district court has broad discretion to ameliorate or suspend. A lack of history of drug abuse alone does not demonstrate that the district court was compelled to exercise that discretion. The defendant had a history of alcohol abuse and gambling. Both of these facts were consistent with an addictive personality which might well lead him to the use of illegal drugs. A regime of drug testing would ensure that the defendant did not trade one vice for another and that he remained on the path to rehabilitation.

Recently Noted Circuit Conflicts

Compiled by: Kent V. Anderson

Senior Staff Attorney

Ex Post Facto Clause

United States v. Turner, 548 F.3d 1094, 1099-1100 (D.C. Cir. 2008); *United States v. Austin*, 479 F.3d 363, 367 (5th Cir. 2007); *United States v. Carter*, 490 F.3d 641, 643 (8th Cir. 2007); and *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006)

In *Turner*, the D.C. Circuit disagreed with the Seventh Circuit's holding, in *Demaree*, that the *ex post facto* clause no longer applies to the Sentencing Guidelines because *Booker* made them advisory. The Fifth and Eighth Circuits have come to the same conclusion as *Turner*. *United States v. Austin*, 479 F.3d 363, 367 (5th Cir. 2007); *United States v. Carter*, 490 F.3d 641, 643 (8th Cir. 2007). *But see United States v. McBirney*, 261 Fed.Appx. 741, 747 fn. 11 (5th Cir. 2008) (stating that application of the *ex post facto* clause to the Guidelines after *Booker* is a dubious proposition.) The Third and Ninth Circuits have also continued to apply the *ex post facto* clause to the Guidelines after *Booker*, but without discussion. *United States v. Wood*, 486 F.3d 781, 790 (3d Cir. 2007); *United States v. Stevens*, 462 F.3d 1169, 1170 (9th Cir. 2006). In addition, the First and Sixth Circuits have questioned the validity of the Seventh Circuit's holding in *Demaree*, but did not need to decide the issue in their cases. *United States v. Gilman*, 478 F.3d 440, 449 (1st Cir. 2007); *United States v. Duane*, 533 F.3d 441, 447 (6th Cir. 2008).

Fourth Amendment

Co-tenant consent to search after objection by Defendant

United States v. Henderson, 536 F.3d 776 (7th Cir. 2008); *United States v. Hudspeth*, 518 F.3d 954 (8th Cir. 2008); and *United States v. Murphy*, 516 F.3d 1117 (9th Cir. 2008).

The Seventh Circuit held that if a Defendant objects to a search of his home the police can still search the home if a co-tenant consents to the search after the Defendant is arrested and removed from the scene. The Court agreed with the Eighth Circuit's decision in *Hudspeth*. It disagreed with the Ninth Circuit's contrary decision in *Murphy*.

Statute of limitations

Effect of 18 U.S.C. §3292(a)(1)

United States v. Kozeny, 541 F.3d 166 (2d Cir. 2008).

The Second Circuit held that the government must apply to suspend the statute of limitations while it seeks evidence in a foreign country, pursuant to 18 U.S.C. §3292(a)(1), before the statute of limitations has expired. The court held that an application for suspension that is filed after the statute of limitations has expired can not extend the statute of limitations. The Court disagreed with the contrary holding of the Ninth Circuit in *United States v. Bischel*, 61 F.3d 1429 (9th Cir. 1995).

Offenses

21 U.S.C. §841(c)(2)

United States v. Khattab, 536 F.3d 765 (7th Cir. 2008).

The Seventh Circuit noted that:

> There is a split among our sister circuits as to the proper interpretation of the *mens rea* requirement in 21 U.S.C. §841(c)(2) —one circuit believes the statute requires a defendant's subjective knowledge that the drugs he possesses or distributes will be used to manufacture a controlled substance, while at least three other circuits parse the statute to allow conviction based upon either subjective knowledge or an objective "cause to believe." *Compare United States v. Truong*, 425 F.3d 1282, 1289 (10th Cir. 2005) (requiring government to prove "actual knowledge, or something close to"), *and United States v. Saffo*, 227 F.3d 1260, 1269 (10th Cir. 2000) ("The 'reasonable cause to believe' standard thus comports with the subjective 'guilty mind' or 'guilty knowledge' requirement for imposing criminal liability."), *with United States v. Galvan*, 407 F.3d 954, 957 (8th Cir. 2005) (rejecting proposed jury instruction that required actual knowledge and ignored "reasonable cause to believe" statutory language); *United States v. Kaur*, 382 F.3d 1155, 1157-58 (9th Cir. 2004) ("[C]onsistent with the text of the statute, the instruction incorporates both subjective and objective considerations."); and *United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir. 2000) ("[T]he jury thus needed to find either that he knew the pseudoephedrine would be used to manufacture methamphetamine or that he had reasonable cause to believe that it would be.").

However, the Seventh Circuit did not need to decide the issue in this case because the evidence supported the district court's finding of actual knowledge.

28 U.S.C. §5861

United States v. Carmel, 548 F.3d 571, 577-579 (7th Cir. 2008).

The Seventh Circuit noted a conflict among the circuits about whether 18 U.S.C. §922(o) implicitly repealed 28 U.S.C. §5861 since someone can not register a gun that he can not legally possess. The Tenth Circuit found that § 922(o) implicitly repealed § 5861(d). *See United States v. Dalton*, 960 F.2d 121 (10th Cir. 1992).

The Fourth Circuit rejected *Dalton* in *United States v. Jones*, 976 F.2d 176 (4th Cir. 1992). *Jones* stated that "[s]imply put, Jones can comply with both acts by refusing to deal in newly-made machine guns." *Id*. at 183. The Third, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits have all followed *Jones*. *United States v. Grier*,

354 F.3d 210, 214 (3d Cir. 2003); *United States v. Bournes*, 339 F.3d 396, 399 (6th Cir. 2003); *United States v. Elliot*, 128 F.3d 671, 672 (8th Cir. 1997); *Hunter v. United States*, 73 F.3d 260, 261-62 (9th Cir. 1996); *United States v. Rivera*, 58 F.3d 600, 601-02 (11th Cir. 1995); *United States v. Ardoin*, 19 F.3d 177, 179-80 (5th Cir. 1994). The Seventh Circuit also chose to follow *Jones*.

Jury instructions

Attempted bank robbery

United States v. Thornton, 539 F.3d 741 (7th Cir. 2008).

The Seventh Circuit held that a jury instruction in an attempted bank robbery case was wrong because it did not require the jury to find that the defendant used actual force, violence, or intimidation, instead of merely attempting to do so. The Court noted that:

> Among the circuits that have directly addressed the issue, there is a split as to whether the statute requires proof of actual force and violence or

> intimidation. In *United States v. Bellew*, 369 F.3d 450, 453-56 (5th Cir. 2004), the Fifth Circuit held that the most natural reading of the text of the statute requires that a defendant actually commit an act of intimidation; attempted intimidation is insufficient under the first paragraph of § 2113(a). *See also United States v. Brown*, 412 F.2d 381, 384 n.4 (8th Cir. 1969) (approving of jury instruction on intimidation that required proof of one or more acts or statements done or made so as to produce in an ordinary person fear of bodily harm)
>
> The Second, Fourth, Sixth, and Ninth Circuits, however, have concluded that an attempt to use force and violence or intimidate is sufficient under the statute, *United States v. Jackson*, 560 F.2d 112, 116-17 (2d Cir. 1977) ...; *United States v. McFadden*, 739 F.2d 149, 152 (4th Cir. 1984) (following *Jackson*); *United States v. Wesley*, 417 F.3d 612, 618 (6th Cir. 2005); *United States v. Moore*, 921 F.2d 207, 209 (9th Cir. 1990), but they did so without analyzing the statutory text. These courts relied on the elements of an attempt crime—the specific intent to commit a crime and a substantial step towards the commission of that crime—instead.

Sentencing

18 U.S.C. §924(c)

United States v. Whitley, 529 F.3d 153 (2d Cir. 2008); *United States v. Easter*, 553 F.3d 519 (7th Cir. 2009).

The Second Circuit held that if a defendant is subject to a longer sentence for another count of conviction the defendant can not be sentenced for violating 18 U.S.C. §924(c) because in such a case a greater minimum sentence is otherwise provided for the offense conduct. In *Easter*, the Seventh Circuit rejected this holding and agreed with the holdings of every other court which has considered the issue. *See*: *United States v. Studifin*, 240 F.3d 415, 423 (4th Cir. 2001); *United States v. Collins*, 205 Fed. Appx 196, 198 (5th Cir. 2006) (unpub.); *United States v. Jolivette*, 257 F.3d 581, 587 (6th Cir. 2001); *United States v. Alaniz*, 235 F.3d 386, 389 (8th Cir. 2000).

18 U.S.C. §924(e)

United States v. Darden, 539 F.3d 116 (2d Cir. 2008).

The Second Circuit held that courts must look to the current law, not the law when a Defendant committed a prior offense, to determine if a prior offense is punishable by at least ten years imprisonment making it a qualifying prior for Armed Career Criminal Act sentencing. The Court agreed with the Sixth Circuit's decision in *United States v. Morton*, 17 F.3d 911, 915 (6th Cir. 1994). The Court disagreed with the Fifth Circuit's opinion that the punishment attached to the prior offense on the date of the offense governs. *United States v. Hinojosa*, 349 F.3d 200, 205 (5th Cir. 2003).

Restitution

United States v. Webber, 536 F.3d 584, 601-605 (7th Cir. 2008); *United States v. Boring*, 5__ F.3d ___, 2009 U.S. App. LEXIS 4022, *11-*16 (6th Cir. Feb. 27, 2009).

The Seventh Circuit reversed an order of restitution for a violation of 18 U.S.C. §1920 (lying on forms to obtain government benefits) because the Court ordered the total amount of benefit payments, instead of only the amount to which the defendant was not entitled. The Court agreed with a similar Fourth Circuit decision. *United States v. Dawkins*, 202 F.3d 711, 715 (4th Cir. 2000). However, the Court disagreed with the Fifth Circuit's holding that restitution in section 1920 cases is the total amount of benefits paid. *United States v. Harms*, 442 F.3d 367, 380-81 (5th Cir. 2006). In *Boring*, the Sixth Circuit followed *Webber* and disagreed with *Harms*.

18 U.S.C. §3582(c)(2) & *Booker*

United States v. Fanfan, 2009 U.S. App. LEXIS 5074, *10-*14 (1st Cir. Mar. 4, 2009); *United States v. Dunphy*, 551 F.3d 247, 252-255 (4th Cir. 2009); *United States v. Cunningham*, 554 F.3d 703 (7th Cir. 2009); *United States v. Starks*, 551 F.3d 839, 842 (8th Cir. 2009); *United States v. Rhodes*, 549 F.3d 833 (10th Cir. 2008); *United States v. Melvin*, 5__ F.3d ___, 2009 U.S. App. LEXIS 2055, *7-*10 (11th Cir. Feb. 3, 2009).

In the above cases, the First, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits held that *Booker* does not apply to resentencing proceedings under 18 U.S.C. §3582(c)(2). All of the above decisions disagreed with the contrary decision of the Ninth Circuit in *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007).

Appeals

Standard of Review

United States v. Sevilla, 541 F.3d 226 (3d Cir. 2008).

The Third Circuit held that it reviews an argument that a district court failed to address an 18 U.S.C. §3553(a) factor, which a defendant raised, for meaningful review by the district court even if the defendant did not object to the court's failure. The Third Circuit does not apply the plain error standard in such cases. However, it noted that there is a circuit conflict about the appropriate standard of review for such arguments.

> [Several courts] have applied plain error review to unpreserved allegations that the district court did not explain its discretionary sentence adequately. *See, e.g., United States v. Penson*, 526 F.3d 331, 337 (6th Cir. 2008); *United States v. Peltier*, 505 F.3d 389, 391–94 (5th Cir. 2007); *United States v. Villafuerte*, 502 F.3d 204, 208–09 (2d Cir. 2007); *United States v. Romero*, 491 F.3d 1173, 1176–77 (10th Cir. 2007); *United States v. Gilman*, 478 F.3d 440, 447 (1st Cir. 2007); *United States v. Sylvester Norman Knows His Gun, III*, 438 F.3d 913, 918 (9th Cir. 2006). Other courts seem to disagree with this approach, however, reviewing for reasonableness. *See, e.g., United States v. Dale*, 498 F.3d 604,610 n.5, 611–12 (7th Cir. 2007); *United States v. Swehla*, 442 F.3d 1143, 1145 (8th Cir. 2006) (arguably in conflict with *United States v. Bistrup*, 449 F.3d 873, 883–84 (8th Cir. 2006) (unpreserved objection to district court's explanation reviewed for plain error)); *United States v. Williams*, 438 F.3d 1272, 1274 (11th Cir. 2006).

Supreme Court Update

October 2008 Term

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***Chambers v. United States*, 129 S. Ct. 687 (January 13, 2009) (Breyer).** At Chambers's sentencing for being a felon in possession of a firearm, the district court determined he qualified as an Armed Career Criminal and imposed the mandatory 15 year prison term. Chambers disputed his prior conviction for failing to report for weekend confinement did not fall within the ACCA definition of a "violent felony." The district court and the Seventh Circuit Court of Appeals considered the failure to report as a form of escape from a penal institution and held that it qualified as a "violent felony" under ACCA. The Supreme Court disagreed and held that the Illinois crime of failure to report falls outside of the scope of ACCA's violent felony definition. The relevant statute contains several different offenses. Failure to report is a separate crime from escape, even though they are contained in the same statute. Furthermore, failure to report does not involve conduct that presents a serious potential risk of physical injury to another. The crime amounts to a form of inaction, and there is no reason to believe that an offender who fails to report is otherwise doing something that poses a serious potential risk of physical injury.

***Herring v. United States*, 129 S. Ct. 695 (January 14, 2009) (Roberts).** Herring was arrested based on an outstanding warrant and the search incident to that arrest yielded methamphetamine and a firearm. After the arresting officers performed the search and obtained the evidence, they discovered the warrant had been recalled but that information was not entered into the county's database through negligence. Herring was indicted on gun and drug possession charges and moved to suppress the evidence on the ground that his initial arrest had been illegal. Although all courts to hear the issue assumed there was a Fourth Amendment violation, the question presented to the Supreme Court was whether the exclusionary rule applied in this situation. The Supreme Court held that when police mistakes leading to an unlawful search are the result of isolated negligence rather than systemic error or reckless disregard, the exclusionary rule does not apply. The Court noted the exclusionary rule does not apply in all cases where there is a constitutional violation. The extent to which the rule applies varies with the degree of law enforcement culpability in the violation. In order to trigger the exclusionary rule, conduct must be sufficiently deliberate that exclusion can meaningfully deter it and sufficiently culpable that such deterrence is worth the price paid by the justice system.

***Hedgpeth v. Pulido*, 129 S. Ct. 530 (December 2, 2008) (Per Curiam).** Pulido was convicted in California of on a felony murder charge. The instructions given to the jury contained a legally valid basis to convict him of felony murder and an illegal instruction which provided

an erroneous basis to convict him. In this case the Ninth Circuit Court of Appeals held that such an error is "structural error," which requires the conviction be set aside regardless as to whether the error prejudiced the defendant. On review in the Supreme Court, the parties agreed the Court of Appeals was wrong to categorize this type of error as "structural" and agreed that the court should have asked whether the flaw in the instructions "had a substantial injurious effect or influence in determining the jury's verdict." However, Pulido maintained that the Ninth Circuit had indeed performed the prejudice analysis when reversing his conviction and asked that the Supreme Court affirm the Court's ruling. The Supreme Court refused and remanded for further proceedings.

***United States v. Hayes,* 129 S. Ct. 1079 (February 24, 2009) (Ginsburg).** Hayes was charged under 18 U.S.C. §§ 922(g)(9) and 924(a)(2) with possessing firearms after having been convicted of a misdemeanor crime of domestic violence. The predicate misdemeanor offense was a 1994 conviction for battery against his then-wife. Hayes moved to dismiss the indictment on the ground that the conviction did not qualify as a predicate offense because he was convicted under a generic battery statute did not designate a domestic relationship between aggressor and victim as an element of the offense. The Supreme Court held that a domestic relationship need not be an element of the predicate offense, although it must be established beyond a reasonable doubt in the § 922(g)(9) prosecution. The text of the statute supports this holding in addition to practical considerations, including the fact that when the statute was passed, only about one-third of all states had criminal statutes specifically proscribing domestic violence as distinct from generic battery. The Court concluded Congress defined "misdemeanor crime of domestic violence" to include an offense committed by a person who had a specified domestic relationship with the victim, whether or not the misdemeanor statute itself designates the domestic relationship as an element of the crime.

***Waddington v. Sarausad,* 129 S. Ct. 823 (January 21, 2009) (Thomas).** Sarausad was the driver of a car during a driveby shooting at a high school and had two passengers in his car, one of whom fired the weapon. Sarausad and the other passenger, who were tried as accomplices, argued that they were not accomplices to murder because they had not known the shooter's plan. The jury received two instructions that directly quoted the state's accomplice-liability law. The shooter was convicted on all counts, the jury failed to reach a verdict as to the other passenger and a mistrial was declared, and Sarausad was convicted of second-degree murder. Sarausad sought postconviction relief arguing that the prosecutor's improper argument on accomplice liability may have caused the jury to convict him as an accomplice based solely on the finding that he had anticipated the shooting would occur. The district court granted the petition, and the Ninth Circuit affirmed, finding that the jury instruction on accomplice liability was ambiguous and there was a reasonable likelihood that the jury misinterpreted the instruction. The Supreme Court disagreed and reversed. The Court relied on a ruling by the state supreme court after Sarausad's conviction that the jury instruction used in his case was unambiguous and determined the Ninth Circuit's analysis should have ended at that point.

***Oregon v. Ice*, 129 S. Ct. 711 (January 14, 2009) (Ginsburg).** Defendant Ice entered an 11-year-old girl's home and sexually assaulted her on two occasions. For each of the incidents, a jury found Ice guilty of first-degree burglary and first-degree sexual assault. He was sentenced under a state statute providing for concurrent sentences, but allowing the judge to impose consecutive sentences in certain circumstances. The trial judge exercised his discretion to impose consecutive sentences for Ice's crimes. On appeal, Ice argued that the sentencing statute was unconstitutional under *Apprendi* and *Blakely*. The Supreme Court held that, considering historical practice and the states' genearl authority over administration of their criminal justice systems, the Sixth Amendment does not inhibit states from assigning to judges, rather than to juries, the finding of facts necessary to the imposition of consecutive, rather than concurrent, sentences for multiple offenses.

***Arizona v. Johnson,* 129 S. Ct. 781 (January 26, 2009) (Ginsburg).** While patrolling near a neighborhood associated with the Crips gang, police officers serving onthe gang task force stopped an automobile for a vehicular infraction warranting a citation. At the time of the stop, the officers had no reason to suspect the car's occupants of criminal activity. After learning that Johnson was from a town with a Crips gang and had been in prison, one of the officers asked him get out of the car in order to question him further about his gang affiliation. The officer suspected that Johnson was armed and patted him down for safety. During the patdown, the officer felt the butt of a gun. Johnson was arrested charged with possession of a weapon. Johnson filed a motion to suppress. The Arizona Court of Appeals found that Johnson was lawfully seized but the detention had evolved into a consensual conversation about his gang affiliation and the officer had no right to pat down Johnson. The Supreme Court disagreed and held that the officer's patdown of Johnson did not violate the Fourth Amendment.

***Knowles v. Marzayance,* 2009 U.S. LEXIS 2329 (March 24, 2009) (Thomas).** Mirzayance entered pleas

of not guilty by reason of insanity ("NGI") at his state murder trial. After the guilt phase of the trial, the jury convicted him of first-degree murder. After the NGI phase was scheduled, Mirzayance accepted his attorney's recommendation to abandon the insanity plea. Mirzayance alleged in state postconviction proceedings that his attorney's recommendation to withdraw the NGI plea constituted ineffective assistance of counsel under *Strickland v. Washington*. He then filed a federal habeas petition. During the evidentiary hearing, the magistrate judge made findings of fact, including that the NGI phase medical evidence essentially would have duplicated the evidence the jury rejected in the guilt phase; and that counsel had made a carefully reasoned decision not to proceed with the NGI plea after weighing his options and discussing the matter with experienced co-counsel. However, the magistrate found trial counsel had been ineffective, a finding adopted by the district court and upheld by the Court of Appeals. The Supreme Court reversed, holding that Mirzayance failed to establish trial counsel's performance was ineffective. The Court concluded that Mirzayance could not establish either the deficient performance nor the prejudice required by *Strickland.* As to performance, he did not show that counsel's representation fell below an objective standard of reasonableness. The failure to show ineffective assistance is also confirmed by the magistrate judge's finding that counsel's decision was essentially an informed one made after thorough investigation of law and facts relevant to plausible options.

***Jimenez v. Quarterman*, 129 S. Ct. 681 (January 13, 2009) (Thomas).** In this case involving the AEDPA's one year limitations period under § 2244(d)(2), the Supreme Court held that where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not final until the conclusion of the out-of-time direct appeal. The Court reasoned that the order granting an out-of-time appeal restored the pendency of the direct appeal, and petitioner's conviction was again capable of modification through direct appeal to the state courts.

***Puckett v. United States,* 2009 U.S. LEXIS 2330 (March 25, 2009) (Scalia).** In exchange for Puckett's guilty plea in a federal case, the government agreed to a three-level reduction in his offense level for acceptance of responsibility and to recommend a sentence at the low end of the applicable guidelines range. After the district court accepted his guilty plea but before sentencing, Puckett assisted another person commit a crime. The government then opposed any reduction for acceptance and a sentence at the low end of the range. For the first time on appeal, Pucked argued the government had violated the terms of the plea agreement. The Supreme Court held that Rule 52(b)'s plain error test applies to a forfeited claim that the government failed to meet its obligations under the plea agreement.

***Vermont v. Brillon*, 2009 U.S. LEXIS 1780 (March 9, 2009) (Ginsburg).** Brillon was arrested on felony domestic assault and habitual offender charges. Almost three years later, he was tried by jury, found guilty as charged, and sentenced to 12 to 20 years in prison. During this time, six different attorneys were appointed to represent him, most of them asking to withdraw from representation of him because of breakdown in communications. Brillon moved to dismiss based on want of a speedy trial. The trial court denied the motion but the state supreme court reversed. The Supreme Court reversed and held the state supreme court erred in ranking assigned counsel essentially as state actors in the criminal justice system and that appointed counsel, just as retained counsel, act on behalf of their clients, and delays sought by counsel are ordinarily attributable to the defendants they represent.

Cases Pending - October 2008 Term

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

***Melendez-Diaz v. Massachusetts*, No. 07-591, cert. granted March 17, 2008, argued November 10, 2008.** Whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004)?

***Cone v. Bell*, No. 07-1114, cert. granted June 23, 2008, argued December 9, 2008.** On state post-conviction review, the Tennessee courts refused to consider petitioner's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), on the ground that the claim had already been "previously determined" in the state system. On federal habeas, a divided panel of the Sixth Circuit held that the state courts' ruling precluded consideration of the *Brady* claim. The court of appeals reasoned (in conflict with the decisions of five other circuits) that the claim had been "procedurally defaulted." The court of appeals further reasoned

(widening an existing four-to-two circuit split) that the state courts' ruling was unreviewable. Seven judges dissented from the denial of rehearing *en banc*. The question presented is whether petitioner is entitled to federal habeas review of his claim that the state suppressed material evidence in violation of *Brady v. Maryland*, which encompasses two sub-questions. First, is a federal habeas claim "procedurally defaulted" because it has been presented twice to the state courts? Second, is a federal habeas court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?

***Boyle v. United States*, No. 07-1309, cert. granted October 1, 2008, argued on January 14, 2009.** Does proof of an association-in-fact enterprise under the RICO statute, 18 U.S.C. §§ 1962(c)-(d), require at least some showing of an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages - an exceptionally important question in the administration of federal justice, civil and criminal, that has spawned a three-way circuit split?

***Kansas v. Ventris*, No. 07-1356, cert. granted October 1, 2008, argued January 21, 2009.** Whether a criminal defendant's "voluntary statement obtained in the absence of a knowing and voluntary waiver of the [Sixth Amendment] right to counsel," *Michigan v. Harvey*, 494 U.S. 344, 354 (1990), is admissible for impeachment purposes - a question the Court expressly left open in *Harvey* and which has resulted in a deep and enduring split of authority in the Circuits and state courts of last resort?

***Montejo v. Louisiana*, No. 07-1529, cert. granted October 1, 2008, argued January 13, 2009.** When an indigent defendant's right to counsel has attached and counsel has been appointed, must the defendant take additional affirmative steps to "accept" the appointment in order to secure the protections of the Sixth Amendment and preclude police-initiated interrogation without counsel present? The Supreme Court further ordered the parties to address whether *Michigan v. Jackson*, 475 U.S. 625 (1986) should be overruled.

***Harbison v. Bell*, No. 07-8521, cert. granted May 23, 2008, argued January 12, 2009.** First, does 18 U.S.C. § 3599(a)(2) and (e) (recodifying verbatim former 21 U.S.C. § 848(q)(4)(B) and (q)(8)), permit federally-funded habeas counsel to represent a condemned inmate in state clemency proceedings when the state has denied state-funded counsel for that purpose? Second, is a certificate of appealability required to appeal an order denying a request for federally-funded counsel under 18 U.S.C. § 3599(a)(2) and (e)?

***Rivera v. Illinois*, No. 07-9995, cert. granted October 1, 2008, argued February 23, 2009.** Whether the erroneous denial of a criminal defendant's peremptory challenge that resulted in the challenged juror being seated requires an automatic reversal of a conviction because it undermines the trial structure for preserving the constitutional right to due process and an impartial jury?

***Corley v. United States*, No. 07-10441, cert. granted October 1, 2008, argued January 21, 2009.** Whether 18 U.S.C. § 3501, read together with Federal Rule of Criminal Procedure Rule 5(a), *McNabb v. United States*, 318 U.S. 332 (11943), and *Mallory v. United States*, 354 U.S. 449 (1957), requires that a confession taken more than six hours after arrest and before presentment be suppressed if there was unreasonable or unnecessary delay in bringing the defendant before the magistrate judge. Several United States Courts of Appeals have addressed this issue and have issued conflicting decisions, and the panel in this case was split two to one on the issue. The Court granted certiorari to consider the issue in *United States v. Alvarez-Sanchez*, 511 U.S. 350 (1994), but then resolved the case on a separate "threshold" ground and expressly left open "the subtle questions of statutory construction concerning the safe harbor set out in § 3501(c)."

***Yeager v. United States*, No. 08-67, cert. granted November 14, 2008, argued March 23, 2009.** The courts of appeals are deeply divided as to whether, when conducting the Fifth Amendment collateral estoppel analysis set out by this Court in *Ashe v. Swenson*, 397 U.S. 436 (1970), a court should consider the jury's failure to reach a verdict on some counts. The issue presented here is whether, when a jury acquits a defendant on multiple counts but fails to reach a verdict on other counts that share a common element, and, after a complete review of the record, the court of appeals determines that the only rational basis for the acquittals is that an essential element of the hung counts was determined in the defendant's favor, collateral estoppel bars a retrial on the hung counts?

***Flores-Figueroa v. United States*, No. 08-108, cert. granted October 20, 2008, argued February 25, 2008.** Whether to prove aggravated identity theft under 18 U.S.C. § 1028A(a)(1), the government must show that the defendant knew that the means of identification he used belonged to another person?

***Abuelhawa v. United States*, No. 08-192, cert. granted November 14, 2008, argued March 4, 2009.** Whether the use of a telephone to buy drugs for personal use

"facilitates" the commission of a drug "felony," in violation of 21 U.S.C. § 843(b), on the theory that the crime facilitated by the buyer is not his purchase of drugs for personal use (a misdemeanor), but is the seller's distribution of the drugs to him (a felony)?

***Bobby v. Bies*, No. 08-598, cert. granted January 16, 2009, to be argued April 27, 2009.** First, did the Sixth Circuit violate the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") when, in overruling an Ohio post-conviction court on double jeopardy grounds, it crafted a new definition of "acquittal" that conflicts with this Court's decisions? Second, do the Double Jeopardy Clause's protections apply to a state post-conviction hearing on the question of a death-sentenced inmate's mental retardation under *Atkins v. Virginia*, 536 U.S. 304 (2002), that does not expose the inamte to the risk of any additional criminal punishment? Third, did the Sixth Circuit violate AEDPA when it applied the Double Jeopardy Clause's collateral estoppel component to enjoin an Ohio post-conviction court from deciding the issue of a death-sentenced inmate's mental retardation under *Atkins* even though the Ohio Supreme Court did not actually and necessarily decide the issue on direct review?

***Dean v. United States*, No. 08-5274, cert. granted November 14, 2008, argued March 4, 2009.** Whether 18 U.S.C. § 924(c)(1)(A)(iii), establishing a ten-year mandatory minimum sentence for a defendant who "discharge[s]" a firearm during a crime of violence, requires proof that the discharge was volitional, and not merely accidental, unintentional, or involuntary?

Cases Pending - October 2009 Term

***McDaniel v. Brown*, No. 08-559, cert. granted January 26, 2009, argument date to be determined.** First, what is the standard of review for a federal habeas court for analyzing a sufficiency-of-the-evidence claim under the AEDPA? Second, does analysis of a sufficiency-of-the-evidence claim pursuant to *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979), under 28 U.S.C. § 2254(d)(1) permit a federal habeas court to expand the record or consider non-record evidence to determine the reliability of testimony and evidence given at trial?

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

***Maryland v. Shatzer*, No. 08-680, cert. granted January 26, 2009, argument date to be determined.** Is the *Edwards v. Arizona* prohibition against interrogation of a suspect who has invoked the Fifth Amendment right to counsel inapplicable if, after the suspect asks for counsel, there is a break in custody or a substantial lapse in time (more than two years and six months) before commencing reinterrogation pursuant to *Miranda*?

***Smith v. Spisak*, No. 08-724, cert. granted February 23, 2009, argument date to be determined.** First, did the Sixth Circuit contravene the directives of the AEDPA and *Carey v. Musladin*, 127 S. Ct. 649 (2006), when it applied *Mills v. Maryland*, 486 U.S. 367 (1988), to resolve in a habeas petitioner's favor questions that were not decided or addressed in *Mills*? Second, did the Sixth Circuit exceed its authority under AEDPA when it applied *United States v. Cronic*, 466 U.S. 648 (1984), to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements made by his trial counsel during closing argument instead of deferring to the Ohio Supreme Court's reasonable rejection of the claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?

***Johnson v. United States*, No. 08-6925, cert. granted February 23, 2009, argument date to be determined.** First, whether, when a state's highest court holds that a given offense of that state does not have as an element the use or threatened use of physical force, that holding is binding on federal courts in determining whether that same offense qualifies as a "violent felony" under the federal Armed Career Criminal Act, which defines "violent felony" as, *inter alia*, any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another?" Second, whether this Court should resolve a circuit split on whether a prior state conviction for simple battery is in all cases a "violent felony" and whether this Court should resolve a circuit split on whether the physical force required is a *de minimis* touching in the sense of "Newtonian mechanics" or whether the physical force required must be in some way violent in nature - that is the sort of force that is intended to cause bodily injury, or at a minimum likely to do so?

The Back Bencher

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