The BACK BENCHER

Central District of Illinois Federal Defenders

Vol. No. 46 Summer 2010

DEFENDER'S MESSAGE:

ALL-STAR FACULTY FOR THIS YEAR'S SEMINAR

No one likes to play a game when the rules are constantly changing. Unfortunately, being a federal criminal defense lawyer feels a lot like playing just such a game, and the Supreme Court has again changed the rules on us in its recent decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). As discussed in more detail below, the Court in *Padilla* held that defense counsel must inform his client about whether his plea carries a risk of deportation. Accordingly, every criminal defense lawyer *now* has an obligation to have some familiarity with the esoteric and complex area of immigration law. Also, but just as importantly, there seems to be a greater influx of federal immigration cases in the Central District of Illinois in the past year or so.

To give you the information you need to fulfill your obligations in these cases and as set forth in *Padilla*, I am pleased to invite you to our **2010 CJA Panel Attorney Seminar**, which we are holding on **September 23, 2010 from 1:00 to 5:15 in Judge Mihm's courtroom in Peoria** (at no cost to panel attorneys). The focus of the seminar this year will be exclusively on the interaction between immigration law and the federal criminal law, and it is our intention to provide every seminar attendee the basic knowledge they need to properly inform non-citizen clients on the possible immigration consequences of a criminal conviction in their case.

In *Padilla,* the defendant, a lawful permanent resident of the United States for over 40 years, faced deportation after pleading guilty to drug-distribution charges in Kentucky. In post-conviction proceedings, he claimed that his counsel not only failed to advise him of this consequence before he entered the plea, but also told him not to worry about deportation since he had lived in this country so long. He alleged that he would have gone to trial had he not received this incorrect advice. The Kentucky Supreme Court denied Padilla post-conviction relief on the ground that the Sixth Amendment's effective assistance of counsel guarantee does not protect defendants from erroneous deportation advice because deportation is merely a "collateral" consequence of a conviction.

The Court noted that changes to immigration law have dramatically raised the stakes of a non-citizen's criminal conviction. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms have expanded the class of deportable offenses and limited judges'authority to alleviate deportation's harsh consequences. Because the drastic measure of deportation or removal is now virtually inevitable for a vast number of non-citizens convicted of crimes, the importance of accurate legal advice for non-citizens accused of crimes has never been more important. Thus, as a matter of federal law, deportation is an integral part of the penalty that may be imposed on non-citizen defendants who plead guilty to specified crimes. The Court therefore found that the weight of prevailing professional norms supports the view that counsel must advise his client regarding any deportation risk. In situations where the deportation consequences of a plea are unclear, a criminal defense attorney need do no more than advise a non-citizen client that pending criminal charges may carry adverse immigration consequences. But when the deportation consequence is truly clear, as it was in the *Padilla* case, there is a duty to give correct advice on that consequence.

It is hard enough to stay current with changes in the federal criminal law, but we now have a duty to have at least a working knowledge of an entirely different area the law. To assist you in

understanding and applying immigration law, our 2010 CJA Panel Attorney Seminar will focus on the immigration consequences of criminal offenses. Specifically, Heather Benno, an attorney with the National Immigrant Justice Center, will present a hands-on, interactive presentation on all aspects of immigration law and how it impacts the federal criminal law. Through the NIJC's Immigrant Legal Defense Project, Ms. Benno represents indigent non-citizens in removal proceedings and before the Department of Homeland Security. In addition, she staffs NIJC's Defender's Initiative technical assistance hotline, where she advises criminal defense attorneys on the immigration consequences of criminal proceedings. She is a 2006 graduate of Northwestern Law School, where she represented clients in post-conviction proceedings through the Bluhm Legal Clinic's Center on Wrongful Convictions. She will discuss the obligations *Padilla* places on criminal defense attorneys, an overview of immigration law and procedure, the consequences of criminal convictions for immigrants, critical factors in representing non-citizens in criminal proceedings, the criminal grounds and procedures for removal of non-citizens, and numerous other aspects of immigration law. By the conclusion of her presentation, I am confident you will have all the tools you need to effectively represent your non-citizen clients.

We are also honored to have Consul Ioana Navarrete on our faculty, who is head of the Protection Department at the Consulate General of Mexico in Chicago. She became a career Foreign Service Official in 1996, and her first post was at the Mexican Consulate's Protection Department in El Paso, Texas where she worked for eight years. She was then promoted to head that Department at the Mexican Consulate in Omaha, Nebraska for two years and later granted the opportunity by the Mexican Ministry of Foreign Affairs to participate in a one year post graduate program on American Legal Studies at the University of New Mexico School of Law. Previously, based in Mexico City, she worked for Mexico City's Attorney General's Office in the Homicides Division, and later held a position in Drug Interception Operations Division for the Attorney General of Mexico's office. With an academic law background and professional experience both in Mexico and in the United States, she has over 15 years of experience in the areas of bi-national border cooperation and US-Mexico legal and immigration issues. Her work entails dealing with immigration and legal issues including criminal, family and labor cases on a day-to-day basis.

She will discuss the services which the Mexican Consulate provides to your Mexican clients and you as their attorneys, how criminal defense lawyers can contact the Consulate, and the procedures for obtaining the assistance of the Mexican government in helping you with fulfilling your duties and obligations to your clients.

This is a rare opportunity to get expert instruction on a complex area of the law which we, as criminal defense attorneys, are now required to have a working familiarity. What makes this seminar even more unique is that there is no registration fee and it is right here in Central Illinois. We have also applied for 3.75 hours of general MCLE credit, along with 1.0 hour of professional responsibility credit. I am sure that if you were not a panel attorney with this free seminar available to you, you would be required to pay top dollar for a seminar of this type with such a distinguished faculty of speakers.

To register, please see the registration form at the back of this issue of *The Back Bencher*. The registration deadline is September 13, so sign-up as soon as possible.

I look forward to seeing all of you on September 23rd.

Sincerely yours,

Richard H. Parsons
Federal Public Defender
Central District of Illinois

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CHURCHILLIANA

The last great calvary charge in British military history in 1897 happened to be Churchill's first, and Churchill's alertness as a scout in reporting the impending raid of "the Whirling Dervishes" to General Kitchener might have spelled the difference between victory and defeat.

Though many of his fellow Lancers fell, Churchill survived the onslaught of the scimitar-wielding Islam fanatics. It was cause for celebration but, alas, no fuel for toast could be found in the empty mess hall cellar. Undaunted, Churchill mounted his steed for a jaunt to the Nile River. There he hailed a patrolling British gunboat and cried out for liquid relief. A bottle of bubbly was tossed out by a sympathetic officer, and Churchill got off his horse and waded in to retrieve the prize.

As he raised his glass with fellow officers, he intoned, "It is altogether fitting to imbibe what the dictates of our foes proscribe."

~Winston Churchill

Dictum Du Jour

"The acme of judicial distinction means the ability to look a lawyer straight in the eyes for two hours and not hear a damned word he says."

~Chief Justice John Marshall

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"If we forget that we're one nation under God, then we will be a nation gone under."

~Ronald Reagan

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"He loved treachery but hated a traitor."

~Plutarch

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"We the people are the rightful masters of both Congress and the courts, not to overthrow the Constitution, but overthrow the men who pervert the Constitution."

~Abraham Lincoln

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"A veteran is someone who, at one point in their life wrote a blank check made payable to 'The United States of America,' for an amount of 'up to and including their life.' That is Honor, and there are way too many people in this country who no longer understand anything about it."

~Jon Rasmussen

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"If befriend donkey, expect to be kicked."

~Charlie Chan

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"Impossible to prepare defense until direction of attack is known."

~Charlie Chan

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Charles Sevilla's 10 Dos & Don'ts of Jury Selection:

1. DON'T pick jurors who gasp when the charges are read.
2. DO pick jurors who have trouble understanding English.
3. DON'T select a juror who drools when he talks about capital punishment.
4. DO pick descendants of the Boss Tweed family.
5. DON'T pick religious jurors except for the followers of the Satanic Masonics, Disciples of Alphonse the Apostate, the Charles Crud Celestial Crusade, the Beelzebub Worshipers, or the New-Age Satanic Revenge Society.
6. DO pick disbarred attorneys, impeached judges and politicians, proctologists, and unemployed performance artists.
7. DON'T pick an accountant who resorts to his/her calculator to answer the question, "What do you feel about reasonable doubt?"
8. DO seek to seat jurors who raise their hands in response to the question, "Anyone been convicted of a felony?"

9. DON'T pick jurors who are evasive in answering the question, "Could you treat the defendant the same as if he were your only begotten son on trial here today?"
10. DO pick jurors whose last names begin with letters beginning after S. As children, they grew up waiting long periods of time for their names to be called, and in the process developed a personality disorder known as "alphabet neurosis." The longer the trial goes, the more likely a nervous breakdown and a mistrial.

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"With this information, law enforcement tabbed Stotler as a meth-maker-dealer–and they kept their eye on him. When the heat is on, most people curtail, or at least slow down, their illegal activity. But Stotler decided to put another item in law enforcement's growing basket of evidence against him. He opted to purchase enough pseudoephedrine (the number one ingredient necessary for making meth) to choke a horse."

~*United States v. Stotler*,
591 F.3d 935 (7th Cir. 2010)

* * * * * * * * * * *

"At the time the option was executed, the District intended to use the property solely for the construction of the levee. But, as the poet Robert Burns famously observed,

> The best-laid schemes o' mice an' men,
> Gang aft agley,
> An' lea'e us nought but grief an' pain,
> For promis'd joy!

'To a Mouse On Turning Her Up in Her Nest With the Plough' (1785). Only two months after signing the agreement, the Common Council of Lawrenceburg passed a resolution withdrawing its funding from the levee project."

~*Metro Family v. Lawrenceburg Conservancy Dist.,*
___F.3d ___ (7th Cir. 2010; No. 09-2418)

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"In early 2005, Lane moved from Chicago to Rock Island (Illinois) to sell crack cocaine with his codefendants. Barnes and Kim drove to Chicago at least every other weekend to buy drugs. Upon returning to Rock Island, the cocaine was broken down, weighed, cooked into crack, and then divvied up among the dealers. Lane sold crack almost every weekday and shared customers with Barnes and Harper. He pooled money with his codefendants for the 're-up' in Chicago at least five times before his arrest in September 2007. [Footnote: Admittedly, the Merriam-Webster Online Dictionary (2009) defines re-up as 'to sign on again' or 'to enlist again.' http:// www. merriam- webster. com/ dictionary/ Re- up (last visited December 2, 2009). But in drug slang 're-up' is used as a verb, meaning to replenish a drug supply, or as a noun, referring to the act of replenishing. See, e.g., *The Wire*. 'Those of you on the west side who need to re-up, holler at my man Monk. He gonna handle supply over there. On the east side, Cheese. One more thing, price of the brick goin' up. 30 more.' Marlo Stanfield, Season 5, Episode 56, 'The Dickensian Aspect' (HBO original air date February 10, 2008)."

~*United States v. Lane*,
591 F.3d 921 (7th Cir. 2010)

REGISTER FOR THE 2010 CJA PANEL ATTORNEY SEMINAR

As discussed at length in the Defender's Message, our 2010 CJA Panel Attorney seminar will be held **September 23, 2010**, from 1:00 to 5:00 in Judge Mihm's courtroom in Peoria. The focus of the seminar will be the immigration consequences of criminal offenses. To register, please see the registration form at the back of this issue of *The Back Bencher*. The registration deadline is September 13, so register today!

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.

JOIN THE FEDERAL DEFENDER LISTSERV

The Federal Public Defender's Office for the Central District of Illinois has created its own Listserv Email Group service. By subscribing to this free service, you will receive email notification of recent decisions of the Seventh Circuit and United States Supreme Court, important legislative changes, Administrative Office of the United States Courts announcements, new issues of this newsletter, *The Back Bencher*, and other issues of interest to CJA Panel Attorneys and federal criminal defense practitioners. You may also post messages or questions to other members of the group, subject to review by the Listserv Administrator, as well as reply to the posts and questions of other group members.

If you would like to subscribe, all you need to do is send an email to the following address: FPD_ILC-subscribe@yahoogroups.com. You do not need to put anything in the subject line or body of the email address. Just send a blank email to the address listed. You will then receive an email requesting that you confirm your desire to join group. Simply reply to that email and your subscription will be complete.

If at anytime you wish to unsubscribe to this Listserv and stop receiving emails, simply send an email to the following address: FPD_ILC-unsubscribe@yahoogroups.com.

We hope you will take advantage of this new tool and subscribe today.

☞ NEW! ☜ EDUCATIONAL and PRACTICE MATERIALS FOR CJA PANEL ATTORNEYS

Effective July 22, 2010, www.fd.org, the web site of the Office of Defender Services, has full text search capability that will allow CJA practitioners to more readily find useful educational and practice materials related to federal criminal practice.

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.

FAIRNESS IN SENTENCING ACT SIGNED INTO LAW

On August 3, 2010, President Obama signed into law the Fairness in Sentencing Act, which lowered the crack/powder ratio from 100:1 down to 18:1. Under the old law, conviction for possession with intent to distribute five grams of crack cocaine and 500 grams of powder cocaine trigger the same 5-year statutory mandatory minimum sentence. Fifty grams of crack cocaine and five kilograms of powder cocaine trigger the same 10-year statutory mandatory minimum sentence. This created what is commonly referred to as the 100:1 one ratio between crack and powder cocaine.

The new crack law reduces the 100:1 ratio to a ratio of 18:1. Under the new law, 28 grams of crack triggers a 5-year mandatory minimum, and 280 grams of crack triggers a 10-year mandatory minimum. The Act did not change the powder cocaine triggering weights. The Act also eliminates the current 5-year mandatory minimum for simple possession (without intent to distribute) of crack cocaine.

Unfortunately, the Act also directs the Sentencing Commission to amend the Guidelines to provide for several new enhancements for conduct related to the distribution of controlled substances. Additionally, the Act is not retroactive, and therefore will not benefit defendants whose cases are final before the effective date of the Act. Whether the Act applies to defendants whose cases are currently pending, or whether it instead only applies to defendants whose

offense conduct occurred after the effective date of the Act, is a question we are currently exploring. Any motions arguing that the Act should apply to all pending cases will be provided to you via our Listserv.

The full text of the Act is set forth below:

An Act to restore fairness to Federal cocaine sentencing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Fair Sentencing Act of 2010'.

SEC. 2. COCAINE SENTENCING DISPARITY REDUCTION.

(a) CSA- Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended--

(1) in subparagraph (A)(iii), by striking '50 grams' and inserting '280 grams'; and

(2) in subparagraph (B)(iii), by striking '5 grams' and inserting '28 grams'.

(b) Import and Export Act- Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended--

(1) in paragraph (1)(C), by striking '50 grams' and inserting '280 grams'; and

(2) in paragraph (2)(C), by striking '5 grams' and inserting '28 grams'.

SEC. 3. ELIMINATION OF MANDATORY MINIMUM SENTENCE FOR SIMPLE POSSESSION.

Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by striking the sentence beginning 'Notwithstanding the preceding sentence,'.

SEC. 4. INCREASED PENALTIES FOR MAJOR DRUG TRAFFICKERS.

(a) Increased Penalties for Manufacture, Distribution, Dispensation, or Possession With Intent To Manufacture, Distribute, or Dispense- Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)) is amended--

(1) in subparagraph (A), by striking '$4,000,000', '$10,000,000', '$8,000,000', and '$20,000,000' and inserting '$10,000,000', '$50,000,000', '$20,000,000', and '$75,000,000', respectively; and

(2) in subparagraph (B), by striking '$2,000,000', '$5,000,000', '$4,000,000', and '$10,000,000' and inserting '$5,000,000', '$25,000,000', '$8,000,000', and '$50,000,000', respectively.

(b) Increased Penalties for Importation and Exportation- Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended--

(1) in paragraph (1), by striking '$4,000,000', '$10,000,000', '$8,000,000', and '$20,000,000' and inserting '$10,000,000', '$50,000,000', '$20,000,000', and '$75,000,000', respectively; and

(2) in paragraph (2), by striking '$2,000,000', '$5,000,000', '$4,000,000', and '$10,000,000' and inserting '$5,000,000', '$25,000,000', '$8,000,000', and '$50,000,000', respectively.

SEC. 5. ENHANCEMENTS FOR ACTS OF VIOLENCE DURING THE COURSE OF A DRUG TRAFFICKING OFFENSE.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines to ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense.

SEC. 6. INCREASED EMPHASIS ON DEFENDANT'S ROLE AND CERTAIN AGGRAVATING FACTORS.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if--

(1) the defendant bribed, or attempted to bribe, a Federal, State, or local law enforcement official in connection with a drug trafficking offense;

(2) the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as generally described in section 416 of the Controlled Substances Act (21 U.S.C. 856); or

(3)(A) the defendant is an organizer, leader, manager, or supervisor of drug trafficking activity subject to an aggravating role enhancement under the guidelines; and

(B) the offense involved 1 or more of the following super-aggravating factors:

(i) The defendant--

(I) used another person to purchase, sell, transport, or store controlled substances;

(II) used impulse, fear, friendship, affection, or some combination thereof to involve such person in the offense; and

(III) such person had a minimum knowledge of the illegal enterprise and was to receive little or no compensation from the illegal transaction.

(ii) The defendant--

(I) knowingly distributed a controlled substance to a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual;

(II) knowingly involved a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual in drug trafficking;

(III) knowingly distributed a controlled substance to an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct; or

(IV) knowingly involved an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct, in the offense.

(iii) The defendant was involved in the importation into the United States of a controlled substance.

(iv) The defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense.

(v) The defendant committed the drug trafficking offense as part of a pattern of criminal conduct engaged in as a livelihood.

SEC. 7. INCREASED EMPHASIS ON DEFENDANT'S ROLE AND CERTAIN MITIGATING FACTORS.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines and policy statements to ensure that--

(1) if the defendant is subject to a minimal role adjustment under the guidelines, the base offense level for the defendant based solely on drug quantity shall not exceed level 32; and

(2) there is an additional reduction of 2 offense levels if the defendant--

(A) otherwise qualifies for a minimal role adjustment under the guidelines and had a minimum knowledge of the illegal enterprise;

(B) was to receive no monetary compensation from the illegal transaction; and

(C) was motivated by an intimate or familial relationship or by threats or fear when the defendant was otherwise unlikely to commit such an offense.

SEC. 8. EMERGENCY AUTHORITY FOR UNITED STATES SENTENCING COMMISSION.

The United States Sentencing Commission shall--

(1) promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act, in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note), as though the authority under that Act had not expired; and

(2) pursuant to the emergency authority provided under paragraph (1), make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.

SEC. 9. REPORT ON EFFECTIVENESS OF DRUG COURTS.

(a) In General- Not later than 1 year after the date of enactment of this Act, the Comptroller General of the United States shall submit to Congress a report analyzing the effectiveness of drug court programs receiving funds under the drug court grant program under part EE of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3797-u et seq.).

(b) Contents- The report submitted under subsection (a) shall--

(1) assess the efforts of the Department of Justice to collect data on the performance of federally funded drug courts;

(2) address the effect of drug courts on recidivism and substance abuse rates;

(3) address any cost benefits resulting from the use of drug courts as alternatives to incarceration;

(4) assess the response of the Department of Justice to previous recommendations made by the Comptroller General regarding drug court programs; and

(5) make recommendations concerning the performance, impact, and cost-effectiveness of federally funded drug court programs.

SEC. 10. UNITED STATES SENTENCING COMMISSION REPORT ON IMPACT OF CHANGES TO FEDERAL COCAINE SENTENCING LAW.

Not later than 5 years after the date of enactment of this Act, the United States Sentencing Commission, pursuant to the authority under sections 994 and 995 of title 28, United States Code, and the responsibility of the United States Sentencing Commission to advise Congress on sentencing policy under section 995(a)(20) of title 28, United States Code, shall study and submit to Congress a report regarding the impact of the changes in Federal sentencing law under this Act and the amendments made by this Act.

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 1-12. We are continuing the series now with Chapters 13 and 14. We will continue with successive Chapters of* "Wilkes: His Life and Crimes" *in future editions of* "The Back Bencher."

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Wilkes v. Throckton, Jr.

There are so few trial judges who just judge, who rule on questions of law, and leave guilt or innocence to the jury. And Appellate Division judges aren't any better. They're the whores

who became madams. I would like to be a judge just to see if I could be the kind of judge I think a judge should be. But the only way you can get it is to be in politics or buy it - and I don't even know the going price.

- Martin Erdmann, *Life*, March 12, 1971
See Also *In re Erdmann* (1973) 33 NYS 2d 559

Court: *Next case. Motion to Evict.*
Tenant: *I ain't paying no rent till he gets the rats ...*
Court: *Think of them as pets.*
Tenant: *... and fixes the leaks in the roof.*
Court: *Try using an umbrella.*

- From the court files of
Judge Lester J. Throckton, Jr.

The morning after our audience with Don Minchinzi, I busied myself in the office shuffling papers, reading new appellate court opinions, answering correspondence - anything to keep my mind off the death threat of Sal Minchinzi, Boss of the Bosses. Nothing worked. I kept thinking of machine-gun bursts from passing cars, or a couple of thugs emerging from the shadows, and Wilkes - Wilkes! I looked at my watch. It was past two in the afternoon. He was supposed to be in hours ago. Thinking of Minchinzi, Frank Bollo, and machine guns, I called Wilkes's home number. No answer. I called Adell's. No answer.

Search and Seizure

I ran out of the office and began a methodical search of every bar and restaurant within walking distance of the Woolworth Building. At half past five, I found Wilkes at the Guadalajara Café' facedown in a bowl of slop. He wasn't moving. I gave him a little pat on the back and said his name. He popped up for an instant - his eyes sunken and dark like two holes burned in the snow - then his head plopped noisily back into the bowl. I pulled him out before he became the first man in history to drown in a bowl of chicken noodle soup.

Here was John Wilkes - indomitable courtroom guerilla fighter, terrorizer of prosecutors and their witnesses, slayer of overwhelming trial odds, judge baiter and hater, sometimes teetotaler and prescription drug abuser, prankster and imp, lover of laughter, money, and acquittals, premier self-promoter, and leading candidate for the Supreme Court of New York - as far down in his cups as I'd ever seen him. I half carried him back to the office.

Java Talk

After six cups of coffee, Wilkes started coming around. He was lying on the sofa in the reception area, bleary-eyed and haggard from his night of boozing and aimless walking about town. The first coherent thing he said was, "We gotta do something about Minchinzi before he makes good on it."

I agreed. "We've gotta make it clear you're doing your best to lose the election."

"I've been thinking of nothing else all night. I gotta plan that can't miss," he replied.

The plan was in two parts, the first aimed at popping Wilkes's balloon of voter popularity. I was to let slip in an "off the record" story with a preselected, slimy, untrustworthy reporter - of which there was no shortage in New York - that our own poll showed us slipping badly in voter preference because of Wilkes's "drug problem." Wilkes knew this was the kind of story that would spread like wildfire in the media - bad news travels fast - and that such a scoop would prove irresistible to the reporter we picked. So what if it was off the record? It was news, wasn't it?

What surprised me was the swiftness with which the plan paid dividends. An hour after the call, I started getting heckled by paper boys wanting confirmation. I answered, as Wilkes suggested, in a way to make sure they'd absolutely believe the rumor about the poll was true. I said, "No comment." To others I said, "Have to take the Fifth to that, " or even better, "We unequivocally deny it."

Phase Two

Phase two of the plan was more desperate, but more certain to kill Wilkes's chances in the election. At ten in the morning we marched to the Criminal Courts Building, where Wilkes had a suppression motion scheduled for a client in the drug possession case. We spotted Narcotics Task Force Officer Pete "The Flake" Tchamkoff, the state's star witness, standing out in the hall. Like any cop who'd been taken apart on the stand by Wilkes - and my friend had carved up Tchamkoff on numerous occasions - Tchamkoff hated him.

"Hi, asshole," says Wilkes.

"Beat it, prick," says Tchamkoff.

Wilkes maneuvered himself directly in front of the cop, reached in his briefcase, and pulled out his file on the case. "I just wanna ask a few questions about your

illegal arrest, unlawful search, and the rubber-hose job you did on my client to get his statement. By the way, Tchamkoff, do you own your home?"

There was nothing to provoke a cop, especially a crooked one like Pete the Flake, like the threat of a lawsuit. Most coppers would rather empty death row than face ten dollars of personal liability for their misconduct. Tchamkoff had often uttered the policeman's credo: "Better ten guilty men go free than I get a lien on my house."

Wilkes's threat to Pete the Flake was thus ill received, and Tchamkoff's anger unrestrained. He grabbed Wilkes by the lapels, pushed him across the hall, and screamed every obscenity in the book. Wilkes dropped his file and briefcase in the struggle and fell to the floor to pick up the debris. Something very unusual rolled out of the briefcase.

Eureka

"Aha! What do we have here! I don't believe it!" As Wilkes scrambled to put his files back in his briefcase, Tchamkoff lifted off the floor a small cellophane bindle of white powder. "So the great John Wilkes really is a dope fiend! I don't believe it! Son of a bitch! It gives me the greatest of pleasure to announce that you, prick, are under arrest."

Tchamkoff was in ecstasy. He cuffed Wilkes while he was still on all fours, stood him up, frisked him, and led him off to the holding tank. I went downstairs to arrange bail.

Everything had gone as planned.

As planned, you ask? Did the Great One and old Schoon take leave of their senses? All this to avoid a Mob hit? Why not just withdraw from the godddamn election?

Good questions. But it was too late to withdraw. Wilkes's name couldn't be stricken from the ballot, and if he quit, he'd still probably win given his lead in the polls that final week and all the media hype which pictured him as the next Harry Truman, a give-`em-hell, tell-it-like-it-is underdog about to clobber an Establishment stuffed shirt.

We had to make sure not only that Wilkes lost, but that Lester Throckton won. Only a disgrace, a colossal embarrassment, or a monstrous indiscretion would do, and we figured a felony drug bust would do it all.

The Real Thing

It was real Peruvian cocaine that Tchamkoff picked off the floor that morning. Thoughts of using baking soda or some other drug substitute in the bindle were dismissed as too dangerous. The coppers might do a field test, and that would blow the whole bust. So that morning Pete "The Flake" Tchamkoff seized one gram of the purest snow then being sold on the streets of New York.

Pete Tchamkoff got his nickname "The Flake" because he was one of many New York cops who practiced the art of flaking a suspect. This happened when Pete grabbed a guy he thought was a crook or whom he just didn't like. If the guy happened to be clean when Pete made his ill-timed, illegal arrest and search, Pete "flaked" his suspect, that is, planted official police contraband stolen out of the police evidence locker on the poor soul. Then he would seize it and make the arrest. All legal for court.

Flaking was going to be our defense at the trial to save Wilkes from the slammer. It was why we picked the Flake as our cop to make the bust. In the meantime, however, Tchamkoff's bust was necessary to save Wilkes's life.

Scandal

The news of Wilkes's arrest made headlines that afternoon. This ended any chance of his election, the news boys said. Throckton naturally held a press conference to call for Wilkes's immediate withdrawal from the campaign and, given the "overwhelming evidence of guilt," his resignation from the bar - this from a man who took an oath to uphold the constitution's presumption of innocence.

Although he was exactly where he wanted to be, Wilkes was not happy with his predicament. Sure, his candidacy was lost and his life insured by that fact, but there was the prosecution looming, which was no sure thing to beat even with Pete's reputation for flakery. And now we were sure to lose business.

It was with such mixed emotions that we retired that evening both too tired and demoralized to go home, refusing to answer the dozens of calls that poured in but confident that our miserable plan was working. Throckton would win. Wilkes would live. Sal Minchinzi would be pleased.

The next morning I got up and got the paper, not letting myself outside our office for more than a minute for fear of being mobbed by reporters and evil-wishers. When I

opened the *Times*, I expected to see the lurid headline, "WILKES CAUGHT ON DOPE CHARGE." Instead - and to this day I still can't believe it - I read this:

NY COP INDICTED BY GRAND JURY
FOR PLANTING EVIDENCE.
LATEST VICTIM JOHN WILKES.
DA REFUSES ALL CHARGES ON JUDICIAL CANDIDATE.
Story by Adell Loomis

> The Knapp Commission investigators have turned up yet another crooked cop in their ongoing investigation of police corruption. Peter Tchamkoff, Sergeant of Detectives for the Narcotics Task Force of NYPD, was the subject of a 57-count indictment unsealed by the special grand jury yesterday afternoon. The grand jury, according to prosecutor Turk Villon, has been looking into Tchamkoff's activities for months. Villon said the jurors heard testimony from hundreds of witnesses before secretly indicting Tchamkoff over a month ago. "We saw a definite pattern. It's called flaking, planting evidence on a citizen to make an arrest and assure a conviction," said the prosecutor.
>
> When asked about the sensational arrest of Supreme Court candidate John Wilkes, Villon said, "It's what got us to go public with the charges. We wanted to continue our investigation to catch others, but after the Wilkes arrest, it was clear to us that this cop had to be stopped. Everyone knows of Tchamkoff's dislike for Wilkes. It was the same old thing. Hopefully it won't disrupt the campaign."
>
> New York District Attorney Frank Hogan has refused to process any complaint on Wilkes. "All we can do at this point is tell the public no charges have been filed and hope that Tchamkoff's criminal conduct does not affect the campaign," he said in a press release issued at 6 P.M. last evening.
>
> As for Wilkes, he is in seclusion and has made no statement concerning the bizarre events which led to his arrest, release and vindication in just eight hours.

Shock

When Wilkes got up and read the story, he went into shock. He dropped the paper and said, "Of all the rotten luck, I can't even get arrested." Then he disappeared into his office. Those were the only words I heard him say for the next three days.

Just as well. During those three days while Wilkes wallowed alone in the depths of a black depression, he received an anonymous daily telegram, each a chilling reminder of what was in store if Wilkes defeated Throckton on November 2.

The first was almost humorous: ENTER EAST RIVER MARATHON BREATH-HOLDING CONTEST NOV 2ND! BEAT WORLD RECORD HELD BY JUDGE CRATER!

The second continued the watery theme: WHAT'S THE DIFFERENCE BETWEEN A FISH AND YOU-KNOW-WHO? ANSWER: ONE SWIMS, THE OTHER DON'T.

The third was equally ugly: NOTICE OF LIQUIDATION: NOV 2ND. I tore them all up before my friend could see them.

Debate

On the fourth day, I convinced Wilkes to go home and clean up. It was election eve, the night of the debate between Wilkes and Throckton, our last chance to do something to throw the election. Despairing and depressed by the prospect of inevitable victory, we drove to Founders Hall, where the battle of the candidates was to take place.

Walking into the hall with Wilkes, I expected to see a mostly empty cavern, with a few political types and reporters maybe filling the front row. Instead, it was like a Knicks play-off crowd. The place was packed with thousands of loud, back-slapping, laughing people, swilling liquor from the no-host bar, obviously having a good time.

Anxiety

Wooden chairs were moved about to enable groups of friends to circle and chat. Occasionally a chair folded as it was being moved and fell flat on the hardwood floor with a BLAT! That sounded like gunfire. Wilkes and I jumped instinctively at the noises. Our eyes wheeled about the room, looking for the assassin sent by Minchinzi. Even the soft pop of falling plastic liquor cups - and thousands fell that night, making the place sound like a huge popcorn machine - had us thinking of the smoking muzzle of a silenced machine gun. Within minutes, we were both drenched in a stinking, nervous sweat.

I don't know why we worried about the don that night. Not when we could worry about the sickening green fog which hung in the air of the hall like poison gas. Everyone was smoking like tobacco prohibition started at midnight, and there was no ventilation to carry out the choking fumes.

Throckton Spotted

Through the haze, Wilkes noted something and elbowed me to look in the area of the hall just beneath the stage. There was Lester Throckton, Jr., in a receiving line shaking hands with everyone coming within arm's length. Junior's movements were mechanically brisk, sudden, and jerky, as if meeting real people was completely unnatural to him. If he were naked, he couldn't have looked more awkward and out of place.

Wilkes immediately picked up on this, and it lifted his spirits. "Lets go through the line. I'll bet the bastard doesn't even recognize us." I joined him as he went to the end of Throckton's receiving line.

I'd never seen Throckton in person and was surprised to see how small he was. Instead of the burly giant depicted in newspaper ads, billboards, and TV, the schmuck was a little runt of a guy, so skinny, a sneeze would blow him off his feet. As we drew closer in the line, I heard his wimpy-voiced greeting to each well-wisher: "Good to see you. Thanks for coming. Thanks for coming. Good to see you."

And so on. His light, powder-blue rodent eyes were glazed and unfocused as he shook each hand and mouthed his meaningless greeting. Of course, no human being could personally relate to the scores of admirers, groupies, hacks, and hangers-on who flashed by, but that was the difference between Wilkes and a guy like Throckton. Wilkes wouldn't even try.

Confrontation

Junior continued his monotonous "Good to see you, thanks for coming" right up to Wilkes. My friend stuck out his hand to envelop Junior's and pump it vigorously like a tire jack. Throckton, still in his trance, gave his usual insincere greeting and tried to withdraw his hand, but my friend held it firmly. Then Junior's powder-blues focused, the glaze disappeared, and fear took its place.

Wilkes stuck his nose within an inch of Junior's and quietly said, "Listen, you sadist. Your friends with all the vowels in their names are making me take a dive. So I'm givin' the robe to ya, understand? I'm givin' it. I could kick your ass! I could kick your tiny little tight ass!"

The pressure of the past week releasing, Wilkes was on the verge of punching out Junior right here in the receiving line, which wasn't a bad idea. Might lose a few more votes. I elected not to interfere.

"Wilkes!" said Junior, his eyes darting about like a frenzied rat. Perspiration the size of goose bumps squeezed through the makeup on his face. "That's right, pimp." Wilkes was hunched over like a cobra in order to be nose-to-nose with Junior. He grabbed Junior's clothes in the vicinity of his chest. "I'm gonna kick your ass all over this place, you two-bit scumbag. You son of a bitch."

With his free hand Wilkes arched a beautiful high right hook toward Junior's jaw. I thought about diverting the punch for an instant, but I was as angry as my friend about our ridiculous situation and let it pass. The sounds of Junior's scream and the dull thud of the blow landing home were followed quickly by at least a dozen bouncer-types jumping Wilkes and flattening him on the floor.

Speech

It took about thirty minutes to restore order and get the candidates conscious and on the dais to begin the debate. Lester J. Throckton, Jr., charged the podium like a mad bull. His angry supporters screamed their heads off for him for ten nauseating minutes. Junior's campaign speeches had been dull enough to put a convention of insomniacs to permanent rest, but God bless him, he was giving this his best shot, and what he was saying was pretty potent stuff. We needed him to make a good impression to insure our defeat. Here's a bit of what he said:

"My opponent is unfit for the judiciary. In fact, he's unfit for any responsible position. He calls me a scumbag. Well, let me tell you this. I'm no scumbag. I think Wilkes has confused me with himself and the people he represents. Sure he has a right to represent murderers, dope pushers, pimps, hijackers, and burglars. But you, the people of New York, have rights, too. To safety. I want to say this: I'm so law-and-order, I can't even utter the words 'not guilty' without choking."

Pimping For Justice

After twenty minutes of such rousing rhetoric, Junior sat down to great applause. Then it was my friend's turn. In a debate under ordinary circumstances, Wilkes could

have annihilated Throckton, but that wasn't in the cards this evening. Wilkes had to take his dive. He dove.

"I rise to speak tonight to say I'm glad I'm not gonna win this lousy election. I'm glad I'm not gonna sell out and be a black-robed pimp in the whorehouse of justice! I don't want to spend all day plotting the number of tricks I can turn, trying to get defendants to lie down and give up their rights so I can screw them real good with a sentence, and all the while demanding that they honor me for it. Pimping for justice ain't my bag, man."

The audience was silenced by Wilkes's curious talk. This was not the man they had read about. Where was the free spirit, the insult comic, the imp? A lot of people sensed the oddness of my friend's demeanor as much as his comments. Many looked puzzled.

Wilkes continued, "And I wanna apologize to the many prostitutes among you for the analogy I just made. You are better any day than the three-piece-suited sluts Johnny Politician gives us for judges.

"I suppose trying to beat a party man for a judgeship in the whorehouse of justice was just a futile effort. Like giving an enema to a corpse - in the end, nothing changes. The polls seem to reflect my defeat. But that is okay with me. I am proud not to be a judge."

"So I just wanna thank my supporters tonight for all your backing and suggest you protest Throckton's certain victory tomorrow by staying away from the polls. I ask you to do that. Let the small voter turnout be the message to the party bosses that you are sick of the whores they pick to be judges. Thank you and good night."

A couple of boobs in the audience started booing and throwing things. Wilkes's supporters jumped on these disrupters, and this incited the whole damn place, which erupted with angry people screaming and throwing chairs, bottles and cups. Fights broke out everywhere. Wilkes ran off the stage after two large ladies in fur coats came up and started clobbering him with their handbags.

All in all, the debate went very well indeed.

Election Returns

The following day, Wilkes and I got up early and were the first persons to vote in our precinct. Junior got two quick votes. We spent every minute of the balance of the day driving all over Manhattan offering rides to the polls to everyone we could entice or cajole into exercising their franchise.

If we couldn't get them into the car, we explained how a vote for Junior was a vote for the self-interest. To the bums in the Bowery, we said Throckton loved to imbibe the distilled nectar of the grape and would be a compassionate bail setter on their next arrests.

To the Wall Streeters, we said Junior was heavily invested in the market and thus either would conflict out of their favorite corporation's suits or hear the case and vote for big business.

In Little Italy, we made vague references to all the Italians backing Junior: "All the heavy hitters want Throckton," we said. In the Village, Throckton became a closet bohemian poet. In the garment district, he was a friend of Dior, Coco Chanel, and Rudy G. In Times Square, he was a generous patron of the arts. And so on. We got Junior a lot of votes that day.

When the polls closed at seven, Wilkes and I grabbed a bite to eat at Jack Dempsey's and returned to our homes in the Village, exhausted and ready to collapse into bed. We had done everything we could to lose the election, and I went to sleep thinking Wilkes would lose and we would be safe.

I slept twelve hours that night, awakening at nine the next morning only because of a call from a hysterical Wilkes. He tried reading me the Adell Loomis story of the election results from the *Times*, but I couldn't understand him through all his blubbering and screaming. I ran outside to grab my paper and read the front-page story:

> In one of New York's most stunning political upsets, upstart independent lawyer John Wilkes has narrowly defeated Judge Lester J. Throckton, Jr., for the judicial seat on the Supreme Court recently vacated by Throckton's father. Throckton refuses to concede, charging voting irregularities. He demands an investigation. The only comment to date from victor Wilkes has been a hand-delivered letter to the Registrar of Voters demanding a recount.

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"Dinero the Profit"

Taking legal advice from Clinton Rexrout is like receiving flying lessons from a kamikaze pilot.

- John Wilkes

All you get from the law is what you take from the other side.

- Percy Foreman

When times are bad, there's nothing like an insanity defense to take your mind off things. Times weren't so hot for John Wilkes. Despite making every effort to lose the election to the Supreme Court, Wilkes won by a narrow margin. Now he was doing everything he could to avoid being sworn in. Fortunately, his opponent, the dishonorable Lester J. Throckton, Jr., the candidate of a peculiar coalition of the Bar Association, the two major political parties, and the Mafia, gave my friend the excuse he needed to rationalize his refusal to put on the robe.

The day after the election, Junior publicly claimed voting fraud and demanded a recount and full investigation of his charges. Unquestionably, there had been voter manipulation. Wilkes and I had hauled at least fifty bums out of the Bowery gutters and dragged them to the polls to vote for Junior.

Recount

To give Junior the time he needed to buy off the elections commissioner, Wilkes called a press conference and magnanimously announced to the assembled paper boys and girls that he would refuse to be sworn in until after a recount irrefutably secured his victory.

"It's a matter of conscience," he explained. "After all, I'd feel terrible acquitting all those defendants only to find out after the recount that if I lost the election, my verdicts weren't worth a cup of warm spit."

Comments like that were sure to have their intended effect with the Establishment powers, and within hours of Wilkes's announcement came word that an official recount would commence to determine the winner. Which brings me to the insanity business. Despite all the campaigning during the months prior to the election, our law practice was booming. This was due to the millions of dollars of free publicity Wilkes got running for office.

Now our phones rang incessantly. If anyone had heard me answer the calls, they'd have thought we were running a bookie joint. "You want Mr. Wilkes on the tenth. You gotta ADW, eh? Ten grand by noon." And so on.

Dinero The Profit

Two days after the recount announcement, I got a call from a polite, well-spoken woman beseeching me to convince my friend to take the case of Dinero the Profit. The poor woman spoke as if the name were a household word when, in fact, I'd never heard of the guy. The Profit was in the Tombs, it seemed, having just fired his attorney Clinton Rexrout.

Well, I thought, Wilkes isn't about to go see some nut in jail and waste time listening to a drooling, thorazine-bombed psychopath rant on about the Conspiracy between J. Edgar Hoover, Pope Paul, and Lady Bird Johnson to kill him.

I gave the lady the stock answer to such inquiries. "Please deliver thirty grand by way of certified check and I'm sure we can take the case."

And what d'ya know, that afternoon we got a thirty-grand check. Now, money talks, and this fee screamed, "Go see Dinero the Profit."

Had Wilkes and I been following the papers closely in the previous months - other than the campaign coverage - we would have known all about Dinero the Profit. He robbed thirty-seven banks in just ninety days - a record of some sort. Each robbery, according to the tellers, was the same: A middle-aged, bearded man wearing a tweed suit and smoking a calabash pipe pointed a chrome-plated Smith & Wesson .38 at them and handed them a withdrawal slip on the back of which was the following handwritten message:

> Don't be stupid and press yer alarm
> An I won't do you no harm.
> If you think I'm jokin
> My gun'll start smokin
> An you'll gain weight
> From all the lead
> But you won't care
> Cause you'll be dead.
> Don't get funny
> Just hand over the money.
>
> Remember Nothin,
> Dinero the Profit

Most bank robbers are crazy, and from what little we knew of the case before seeing Dinero, our new client seemed no exception. He had committed thirty-seven of the most serious federal crimes in a manner that would assure identification. Yet his appearance, dapper and intelligent, belied his crude MO. Wilkes and I went to the Tombs expecting to see a client as schizoid as his crime methodology. Actually, we hoped for it. We wanted a client hopelessly crazy and wonderfully defendable.

Surprise

Were we surprised!

Instead of a blubbering psychotic, we met our old friend Dr. Lorenzo Pound, noted psychoanalyst, head of the psychiatry department at Columbia, founder of the controversial Primal Yawn Explanation of All Human Behavior, and one of the most frequently used forensic psychiatrists in the city. Had we paid attention to the news the past months, we'd have known all about it: the sensational arrest after a shoot-out at the Morgan trust Bank; the shocking revelation of the Profit's true identity by an inmate at the Tombs (Dr. Pound had testified for the prosecution in the con's case; the latter decided to return the favor by ratting on the doc, but only after beating the crap out of him first); the hiring and firing of his first attorney, Clinton "Deathhouse" Rexrout.

Each story had been page-one news, but Wilkes and I, being wrapped up in the campaign to lose the election, missed it all.

On the way to the Tombs, I filled in Wilkes on what little I knew about the case. He was delighted to hear that Dinero had hired Clinton Rexrout. The man was to law what bubonic plague is to medicine. Rexrout was the quintessential V-6. Sadistic judges routinely appointed him to defend capital cases in order to insure electrocutions. Rexrout ended up escorting more men to their death than the chaplain at Sing Sing. Thus his moniker, "Deathhouse."

Said Wilkes as we entered the jail, "Anyone who'd hire that necrophiliac must have extensive brain damage. We've got a great defense!"

The Deathhouse Strategy

Deathhouse, of course, had completely overlooked the insanity defense and, true to form, attempted to cop Dr. Pound out to the indictment, thirty counts of armed bank robbery, at the first appearance in federal court. Deathhouse's motto was "When in doubt, cop `em out." Only the protest of the Useless Attorney - Wilkes's tag for the U.S. attorney prosecuting the case - stopped the plea.

The prosecutor objected that the plea was premature in that he had seven more counts to add and needed a new grand jury indictment. He told the judge, "Your Honor, the grand jury convenes today at two. If we could reconvene here at, say, ten after, I'm sure I can be ready with the new charges."

At ten after two that afternoon, Deathhouse had Dr. Lorenzo Pound pleading guilty to thirty-seven counts of armed bank robbery. Fortunately, Mrs. Dr. Lorenzo Pound walked into the court just as the judge asked Deathhouse, "Does your client understand that he could receive a sentence of nine hundred twenty-five years for these offenses?" Before Deathhouse could answer, Mrs. Pound intervened. She complained that her husband was obviously too deranged to understand what was going on. She fired Deathhouse. She forbade Pound from speaking. And she phoned me and hired Wilkes.

First Blush

"What the hell am I doing here?" asked a downcast Lorenzo Pound at our first meeting. Wilkes said he thought it had something to do with the number thirty-seven. "They've got thirty-seven big glossy color photos of you. They've got thirty-seven tellers ready to tell a jury about your thirty-seven cash withdrawals. They've got thirty-seven fingerprint IDs of you. And they've got thirty-seven demand notes made out in your hand-writing."

"Well, I'll be damned," said the doctor. "It's news to me."

Wilkes looked at me. I was as puzzled as he was. I asked, "Don't you remember the Dinero the Profit routine? Christ, you just about pled guilty to those bank jobs."

"Sir, I'm telling you, I have no memory of any of it."

I looked at Wilkes. He no longer looked puzzled. He even seemed pleased by Dr. Pound's answers. He said, "Doc, of course you didn't commit these ridiculous crimes. Why, the thought of it's preposterous! We'll figure it out. Don't you worry. You just hang in there and we'll have you out on bail in a jiffy."

Stupid Story

We left. I was still confused and let Wilkes know it: "He's guilty. Jesus, that amnesia bit is the stupidest story I ever heard."

"Schoon, most of our clients aren't too smart. That's the primary reason they're our clients. But this one's different. He is very smart. I think he's quite capable of pulling off thirty-seven. God, an untrained orangutan couldn't lose this case."

It wasn't at all clear to me. "Thirty-seven what? Crimes?" I asked.

"Perfect crimes," answered Wilkes.

The defense of the psychiatrist was to be psychiatric. When we got back to the office, Wilkes had me hire ten psychiatrists. I commented that ten seemed quite a few, and Wilkes said, "Our guy's loaded. Ten's a good start. If they don't find him nuts, we'll hire ten more, and so on. And make sure you pick all of the prosecution whores first."

This was an old Wilkes ploy for which I needed no explanation. Confidentially hiring all the shrinks the prosecution looks to hire is a can't-lose maneuver. If the shrink says the client is sane, it's no great loss, because then he can't say it for the Useless Attorney at trial. The attorney-client privilege would prevent that. And if he says your guy's nuts, well then, that's really something coming from a prosecution marionette.

First Wave

The reports from the first wave of psychiatrists were as bad as the recent election returns. Every shrink, even the defense whores, opined that Dr. Lorenzo Pound was the sanest bank robber they'd ever seen. None believed his amnesia story.

Wilkes, undaunted, had me hire a second wave of ten to shrink Pound's head. But again, all concluded that our man was perfectly sane. I couldn't believe it. Twenty shrinks agreeing on anything was medical history. Lorenzo Pound was still without a defense, and trial was closing in fast.

"Great," said Wilkes when I told him of the latest shrink reports. "Subpoena each of those bastards for trial."

"Let me get this straight. You want twenty shrinks available to testify that Pound, the erstwhile Dinero the Profit, New York's most dangerous bank robber, is sane?"

"Precisely," said Wilkes. "You don't expect a jury to cut loose a crazy man, do you?" My friend suggested it was time for me to go see Pound again. "He's got it all figured out. Go ask him."

The Interview

I went to Dr. Pound's office, found out what was going on, and came away from the meeting profoundly impressed that we had a solid defense, although not nearly as confident as Pound or Wilkes that it would work. After all, we were in federal court - more defenses are rejected and rights violated there in a day than Roy Bean trashed in a lifetime. Worse, we were trying to persuade the jury to buy an insanity defense, which is about as easy as selling sunshine to Count Dracula.

Our only advantage was that in federal court the government has to prove the accused sane as well as guilty beyond a reasonable doubt. "Hell," said Wilkes on my return to the office, "to win, the Useless Attorney's gotta *convince* twelve good and true people Pound is sane. I just have to *confuse* one dumb son of a bitch."

The day following my visit to see Pound, we appeared in federal court for trial setting. The judge handling the calendar was a grumpy old fart given to involuntary loud snorts from some unknown affliction of age. The courtroom was packed with people holding handkerchiefs to their faces as Dr. Pound's case was called.

What'll It Be?'

"All right, Wilkes, what'll it be?" asked the judge.

"We'd request a date for trial," responded my friend.

"Judge or jury, Wilkes?"

"Both, Your Honor, if you don't mind."

The judge smiled slightly at Wilkes's joke. "Well the court is very sensitive to all the defendant's precious constitutional rights. I will grant the defense motion for trial by jury with a judge. Mr. Clerk, draw a judge."

As bad fortune would have it, we drew Judge Julia Cunninger, the judge who tried to take Pound's pleas of guilty when Deathhouse represented him. Wilkes objected that Julia the Just couldn't be fair to Pound after hearing him try to plead guilty to the charges. He asked for another judge, but the malevolent bastard presiding said, "That'll be denied, counsel. You know how to challenge a federal judge. File your affidavit with Judge Cunninger." The judge smiled and leaned back in his chair.

He was right, unfortunately. To get a federal judge off a case for prejudice, you had to write a statement under oath swearing to the judge's bias against your client. Then that judge would decide whether your affidavit made out a case of prejudice. And when you lost the motion, you had to try your case in front of the same judge you'd just called a venal bigot. Such is federal justice.

Wilkes made the motion anyway. As he told Julia, "What if I want to waive jury and have a court trial? My client must have an unfettered option of trial to the court in this case, where the psychiatric testimony may be very complicated."

Motion Sickness

Julia Cunninger, fiftyish, graying, hair pulled back tight and rolled into a doughnut, looked at Wilkes's motion papers as if they were a notice of eviction. She bit her lower lip with her ferret's teeth. She knew he'd sooner die than waive jury in front of her.

"In all my years on the bench, no one, not one person, has ever challenged my fairness." This was probably true. Most lawyers believed her numb from the neck up and thus incapable of predisposition on a case. She shook the motion papers in front of her bobbed little button of a nose. "This is garbage."

"I've made my case, Your Honor," replied Wilkes. "I think your quarrel is not with me, but with the law."

Julia the Just's face turned crimson. She threw down the paper and stood. If looks could kill, Judge Cunninger would have been up on a murder rap.

Wilkes asked solemnly, "I take it my motion is - "

"*Denied!*" shouted the judge. She bounded off the bench and into chambers, leaving an atmosphere of mustard gas in the court.

"Jackass," said Wilkes loudly to Julia's chair. The court reporter dutifully took down the comment. And we were off to trial.

Opening Argument

Wilkes gave his opening argument to the jury after the prosecution presented eight days of unimpeachable evidence that Pound had committed thirty-seven armed bank robberies. His first words must have surprised them.

"What we have here is actually a 'whodunit.' Is Wilkes crazy, you ask? Sure, the prosecution has proven that the corporeal manifestation of Dr. Pound committed the bank jobs. But what you are about to see and hear is truly mind-boggling. I will show you that there are two people inhabiting the flesh of Pound. Two exact opposites: one kindly, articulate, do-gooder, with traditional American values; the other is mean, talks like a West Side street tough, does bad things, and values only himself.

"The gentleman you see before you now at the table is the sanest man I know, Dr. Lorenzo Pound. The cunning other who lives like a leech in Pound's body is the villain of this piece, Dinero the Profit.

"The doctors who will testify will explain the how and why. We will learn how this other spirit takes control of Pound's body and why it seeks to destroy Dr. Pound. When Dinero is in control, Dr. Pound has no conscious awareness of what is going on, which is why he has no knowledge of the evens in the various banks. That was the Profit's handiwork.

"Ladies and gentlemen, Dr. Lorenzo Pound has been a solid contributor to our community for the past twenty-five years. The doctors will tell us how his imagined failures have created a terrible sickness in his mind, like demonic possession. This multiple personality affliction is nothing new. Remember Jekyll and Hyde? *Three Faces of Eve?* And what about Richard Nixon?"

Defense Expert

I listened to all this and wondered where in hell we were going to come up with our experts. I had twenty shrinks in the gallery under subpoena ready to say Pound was sane.

Wilkes answered my question quickly. He announced to the court, "I call as my first witness the eminent forensic psychiatrist and professor at Columbia, my client and friend, Dr. Lorenzo Pound."

Pound looked every bit the professor as he ambled to the stand in his gray tweed suit. He walked slowly and gingerly, like a man twice his age. During the first hour of testimony, I had great satisfaction watching two pros at work. When you hear such a tandem, it's what I imagine listening to a Mark Twain Chautauqua was like - great storytelling. The jury was as involved as I was. Some leaned forward, some turned to face the doctor better, and all paid close attention.

Pound said it took him three months after his release from jail to figure out what had happened to him. He was self-destructing, he knew, buy why? In a desperate attempt to find out, he locked himself in a room for six days with tape recorders going all the time save for sleep periods. When he replayed the tapes, he met for the first time his nemesis, Dinero the Profit, who was all that Pound despised - a selfish, callous, remorseless crook.

Criminal Intent

"I ask you, sir," said Wilkes. "Did you intend to rob those banks?"

"No. I have no memory of ever even being in them."

"I ask you this as a forensic expert who has testified, as I'm sure the judge will agree, many times for the court and prosecution. Did Lorenzo Pound have the intent to commit bank robbery?"

Judge Cunninger didn't even appear to hear Wilkes's question. But Pound did. He said, "No. I was legally insane and unconscious of my actions. Dinero is the villain. That cunning viper who hides inside me who, who is, who - uh - argh!"

"I'm having - attack, it's - him, ahg! It's . . . Dinero, it's . . . yeah . . . yeah, man, it's me, man, the conqueror worm, yeah, Dinero the Profit appearing in person. Ha! Dig it, man!"

The change we saw was fantastic. The mild-mannered professor transformed into an arrogant street tough. Pound's face was a blank compared to Dinero, who talked out of the side of his mouth and mugged for the press. Either Pound was the world's greatest actor or we had actually witnessed the decomposition of one personality and ascendancy of another.

Wilkes appeared stunned. He turned to the Useless Attorney and said, "You take him."

Cross-Examination

"Well, Dr. Pound, or is it Dinero?" asked the prosecutor.

"The wimp headshrinker ain't here, man. It's me, Dinero."

"State your true name for the record, sir," demanded the Useless Attorney.

"Francis Kafka, man. No, wait. He's my uncle. Just call me Mr. Profit."

"Do you know where you are right now?"

"Sure, turkey, ain't dis the B&O Railroad?" Dinero made his hand into a gun. "Take me to Cuba, man. This is a hijack."

"Very funny, Mr. Profit," said the Useless Attorney. "Now, would you mind bringing back Dr. Pound so I can talk to him?"

"Forget it, man; that f*cker's nowhere. Really, you can search me, man." Dinero stood and started disrobing. "Take a look, man," he said.

"Stop that. Tell me this, sir. When Pound is in control, can you hear what's going on? Do you hear voices"

"Sure, man, I hear da voices," said Dinero.

"And just when is that?" asked the prosecutor.

"When people speak, man."

"Dr. Pound, Mr. Profit, or whatever you call yourself, it was you who robbed all those banks, wasn't it?"

"Naw, man, I just made a few withdrawals, man. Don't call it no robbery, man. This ain't no federal case, man."

"And your motivation in entering these banks was to take money, wasn't it?"

"It's where they keep the money, man. Where else ya gonna go? It's like they say, man, money talks, and in the banks, man, da money comes on to me like it wanna make love. 'Take me, I'm yours.' it says, and I do, man."

- To Be Continued -

Recently Noted Circuit Conflicts

Compiled by: Kent V. Anderson
Senior Staff Attorney

First Amendment

United States v. Wilson, 565 F.3d 1059 (8th Cir. 2009); *United States v. Malloy*, 568 F.3d 166 (4th Cir. 2009); *United States v. Humphrey*, 608 F.3d 955 (6th 2010).

The Eighth, Fourth, and Sixth Circuits held that the First Amendment does not require a mistake of age defense in a child pornography production case, under 18 U.S.C. §2251(a). These Courts agreed with holdings of the Second, Fifth, and Eleventh Circuits. *See*: *United States v. Griffith*, 284 F.3d 338, 349 (2d Cir. 2002); *United States v. Crow*, 164 F.3d 229, 236 (5th Cir. 1999); *United States v. Deverso*, 518 F.3d 1250, 1258 (11th Cir. 2008). *See also United States v. Johnson*, 376 F.3d 689, 693 (7th Cir. 2004) (holding that charge of attempt to manufacture child pornography requires that the defendant believe that the intended performer is a minor, but noting that "the commission of the completed offense under § 2251(a) . . . contains no requirement that the defendant know that the performer is a minor"). The above courts disagreed with the Ninth Circuits holding that "imposition of major criminal sanctions on these

defendants without allowing them to interpose a reasonable mistake of age defense would choke off protected speech." *United States v. United States Dist. Ct.*, 858 F.2d at 541 (9th Cir. 1988).

Fifth Amendment

Double Jeopardy

United States v. Crowder, 588 F.3d 929 (7th Cir. 2009).

The Seventh Circuit held that a person can be sentenced for both a drug conspiracy and attempted possession of, with intent to distribute, drugs even when the convictions are based on the same set of facts. The Court disagreed with the Ninth Circuit's contrary holding in *United States v. Touw*, 769 F.2d 571, 574 (9th Cir. 1985). Instead, the court agreed with the holdings in the Sixth, Eighth, and Tenth Circuits. *See: United States v. Boykins*, 966 F.2d 1240, 1245 (8th Cir. 1992); *United States v. Barrett*, 933 F.2d 355, 360-61 (6th Cir. 1991); *United States v. Savaiano*, 843 F.2d 1280, 1293 (10th Cir. 1988).

Sixth Amendment

Speedy Trial Clause

United States v. Ray, 578 F.3d 184 (2d Cir. 2009).

The Second Circuit held that the Speedy Trial Clause does not apply to sentencing. The Court disagreed with contrary holdings of the Third and Fifth Circuits. *Burkett v. Cunningham*, 826 F.2d 1208, 1220 (3d Cir.1987); *United States v. Campbell*, 531 F.2d 1333, 1335 (5th Cir.1976) *United States v. Peters*, 349 F.3d 842, 850 & n. 34 (5th Cir.2003). However, the Second Circuit held that a sentencing delay could violate the Fifth Amendment, Due Process Clause. The Court held that the 15 year delay before resentencing after an initial appeal, during which Defendant was released on bond, in this case violated Due Process. During that time, Defendant had achieved what appeared to be "complete rehabilitation." She had: "remarried, raised a family, built a career, paid income taxes, and obtained higher education." So, the Court vacated the remainder of Defendant's sentence.

Offenses

8 U.S.C. §324 (a)(1)(A)(iii)

United States v. Ye, 588 F.3d 411 (7th Cir. 2009).

The Seventh Circuit held that 8 U.S.C. §324(a)(1)(A)(iii), which prohibits the shielding of illegal aliens from detection does not require that the Defendant's conduct substantially tended to prevent the detection of illegal aliens. The Court disagreed with the contrary holdings of the Second, Third, Fifth, and Eighth Circuits which either explicitly stated or implicitly suggested that conduct tending substantially to prevent detection is a separate element necessary for conviction under the statute. *See, e.g., United States v.Ozcelik*, 527 F.3d 88, 100 (3d Cir. 2008)*; United States v. Tipton*, 518 F.3d 591, 595 (8th Cir. 2008); *United States v. DeJesus-Batres*, 410 F.3d 154, 160 (5th Cir. 2005); *United States v. Kim*, 193 F.3d 567, 574 (2d Cir. 1999).

18 U.S.C. §1546(a)

United States v. Phillips, 543 F.3d 1197 (10th Cir. 2008).

The Tenth Circuit held that the first paragraph of 18 U.S.C. §1546(a) (forgery of a document for entry into or authorization to stay in the United States) does not apply to an application for a permit to remain in the United States, or to reenter the United States. The Court disagreed with the Fourth Circuit's contrary holding in *United States v. Ryan-Webster*, 353 F.3d 353, 357 (4th Cir. 2003).

Sentencing

18 U.S.C. §924(e)

United States v. McNeill, 598 F.3d 161 (4th Cir. 2010).

The Fourth Circuit held that courts must look to the law when a Defendant committed a prior state offense, rather than current state law, 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 Fifth Circuit's decision in *United States v. Hinojosa*, 349 F.3d 200, 205 (5th Cir. 2003). The Fourth Circuit disagreed with the contrary decisions of the Second and Sixth Circuits. *United States v. Darden*, 539 F.3d 116 (2d Cir. 2008); *United States v. Morton*, 17 F.3d 911, 915 (6th Cir. 1994).

Buchmeier v. United States, 581 F.3d 561 (7th Cir. 2009) (*en banc*).

In an *en banc* decision, the Seventh Circuit reaffirmed its statement in *United States v. Erwin*, 902

F.2d 510 (7th Cir. 1990), that if a state sends a defendant a notice that his civil rights have been restored and does not say that this does not include the right to possess a firerarm the conviction(s) to which the notice relates do not count as prior convictions for purposes of §924(e). This leaves a 5-4 circuit split unchanged. Compare *United States v. Chenowith*, 459 F.3d 635 (5th Cir. 2006); *United States v. Gallaher*, 275 F.3d 784 (9th Cir. 2001); *United States v. Fowler*, 198 F.3d 808 (11th Cir. 1999); and *United States v. Bost*, 87 F.3d 1333 (D.C. Cir. 1996) (all following *Erwin*), with *United States v. McLean*, 904 F.2d 216 (4th Cir. 1990); *United States v. Cassidy*, 899 F.2d 543 (6th Cir. 1990); *United States v. Collins*, 321 F.3d 691 (8th Cir. 2003); and *United States v. Burns*, 934 F.2d 1157 (10th Cir. 1991) (all reaching the opposite conclusion).

U.S.S.G. §3B1.3

United States v. Hayes, 574 F.3d 460 (8th Cir. 2009).

The Eighth Circuit held that the abuse of trust enhancement may apply to Medicaid and Medicare providers. The Court joined decisions of the Second, Fourth, Fifth, and Seventh Circuits. *United States v. Wright*, 160 F.3d 905, 910-11 (2d Cir.1998); *United States v. Bolden*, 325 F.3d 471, 478, 504-05 (4th Cir.2003); *United States v. Gieger*, 190 F.3d 661, 663, 665 (5th Cir.1999); *United States v. Hoogenboom*, 209 F.3d 665, 671 (7th Cir.2000). The Eighth Circuit disagreed with the Eleventh Circuit's holding that, as a matter of law, a Medicaid-funded health care provider does not occupy a position of trust vis-à-vis Medicaid. *See United States v. Mills*, 138 F.3d 928, 930, 941 (11th Cir.), modified on reh'g on other grounds, 152 F.3d 1324 (11th Cir.1998). However, the Eighth Circuit found insufficint evidence to support the enhancement in this case because there was no showing that Defendant's relationship with Medicaid went beyond an ordinary commercial relationship.

Rule 35(b)

United States v. Shelby, 584 F.3d 743 (7th Cir. 2009); *United States v. Grant*, 567 F.3d 776 (6th Cir. 2009).

The Seventh Circuit held, 2-1, that a court can not base part of a sentence reduction, after a Federal Rule of Criminal Procedure 35(b) motion, on the 18 U.S.C. §3553(a) factors. The Court disagreed with the Sixth Circuit's holding in *United States v. Grant*, 567 F.3d 776 (6th Cir. 2009). The Seventh Circuit agreed with the pre-*Booker* decisions of *United States v. Doe*, 351 F.3d 929, 933 (9th Cir. 2003), and *United States v. Manella*, 86 F.3d 201, 204-05 (11th Cir. 1996) (*per curiam*). The Sixth Circuit distinguished the later two holdings because they concerned an earlier version of Rule 35.

18 U.S.C. §3582(c)(2)

United States v. Doublin, 572 F.3d 235 (5th Cir. 2009); *United States v. Washington*, 584 F.3d 693 (6th Cir. 2009).

The Fifth and Sixth Circuits joined the majority of what is now a ten to one circuit split and held that a district court can not sentence a defendant below the amended Guidelines range in response to an 18 U.S.C. §3582(c)(2) motion for a reduced sentence. The Fifth and Sixth Circuits followed the holdings in: *United States v. Fanfan*, 558 F.3d 105 (1st Cir.2009); *United States v. Savoy*, 567 F.3d 71 (2d Cir.2009); *United States v. Doe*, 564 F.3d 305 (3d Cir.2009); *United States v. Dunphy*, 551 F.3d 247 (4th Cir.2009); *United States v. Cunningham*, 554 F.3d 703 (7th Cir.2009); *United States v. Starks*, 551 F.3d 839 (8th Cir.2009); *United States v. Rhodes*, 549 F.3d 833 (10th Cir.2008); and *United States v. Melvin*, 556 F.3d 1190 (11th Cir.2009). The Ninth Circuit is the only court which has held that a district court can further reduce a sentence based on the 18 U.S.C. §3553(a) factors. *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007). The D.C. Circuit does not appear to have ruled on this issue.

Supreme Court Update

October 2009 Term

Compiled by: Johanna Christiansen
Staff Attorney

***Beard v. Kindler,* 130 S. Ct. 612 (December 8, 2009) (Roberts).** Kindler was convicted of capital murder in Pennsylvania and the jury recommended a death sentence. Kindler filed postverdict motions challenging his conviction and sentence, but before the trial court could consider the motions or the jury's death recommendation, Kindler escaped and fled to Canada. As a result of the escape, the trial court dismissed the postverdict motions. When he was captured and returned to Pennsylvania, Kindler sought to reinstate his postverdict motions but the motion was denied pursuant to Pennsylvania's fugitive forfeiture law. Kindler's claims regarding the merits of his postverdict motions were rejected on direct appeal and on state habeas review. He then sought federal habeas. Under the "adequate state ground doctrine," a federal habeas court will not review a claim rejected by a state court "if the

decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson,* 501 U.S. 722, 729 (1991). The federal district court granted the petition, holding that the fugitive forfeiture rule did not provide an adequate ground to bar federal review because state courts had discretion in applying it. The Supreme Court held that a state procedural rule is not automatically inadequate under the adequate state ground doctrine, and therefore unenforceable on federal habeas review, because the state rule is discretionary rather than mandatory. A discretionary state procedural rule can serve as an adequate ground to bar federal habeas review even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others.

***Smith v. Spisak,* 130 S. Ct. 676 (January 12, 2010) (Breyer).** Spisak was sentenced to death in Ohio and his claims on direct appeal and state habeas were denied. He filed a federal habeas petition alleging that (1) the instructions and verdict forms unconstitutionally required the jury to consider in mitigation only those factors that it unanimously found to be mitigating and (2) his counsel's inadequate closing argument deprived him of effective assistance of counsel. The district court denied the petition, but the Sixth Circuit accepted both arguments and ordered relief. The Supreme Court reversed and held that the jury instructions regarding mitigating evidence were appropriate. The instructions made clear that, to recommend a death sentence, the jury had to find unanimously that each of the aggravating factors outweighed any mitigating circumstances, but they did not say that the jury had to determine the existence of each individual mitigating factor unanimously. In addition, the Court held that, even assuming counsel's closing argument was inadequate, there was no evidence to show a better closing argument would have made a difference in the outcome of the trial.

***Wood v. Allen,* 130 S. Ct. 841 (January 20, 2010) (Sotomayor).** Wood was convicted of capital murder and sentenced to death in Alabama. Wood sought state postconviction relief arguing that he was mentally retarded and not eligible for the death penalty, and that his trial counsel were ineffective because they failed to investigate and present evidence of his mental deficiencies. The court found that counsel had made a strategic decision not to pursue evidence of Wood's retardation. Wood then sought federal habeas relief and the district court granted his ineffective assistance of counsel claim. The Eleventh Circuit held that the state court's rejection of Wood's ineffective assistance claim was neither an unreasonable application of clearly established law nor based on an unreasonable determination of the facts. The Supreme Court affirmed and held the state court's conclusion that his counsel made a strategic decision not to pursue or present evidence of his mental deficiencies was not an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

***Florida v. Powell*, 130 S. Ct. 1195 (February 23, 2010) (Ginsburg).** Powell was arrested by Tampa police officers. Before questioning him, the officers read him their standard *Miranda* form which states, "You have the right to talk to a lawyer before answering any of our questions" and "you have the right to use any of these rights at any time you want during this interview." Powell waived his rights and admitted he owned a firearm found during a search. He was charged with possession of a firearm by a felon and convicted. The Florida Supreme Court determined his statements should have been suppressed because *Miranda* and the state constitution require that a suspect be clearly informed of the right to have a lawyer present *during* questioning, not merely before questioning. The Supreme Court reversed and held that the language used by the standard form communicated the message mandated by *Miranda*.

***Maryland v. Shatzer*,130 S. Ct. 1213 (February 24, 2010) (Scalia).** In 2003, Shatzer was incarcerated in a state prison after a conviction for an unrelated offense. A police detective came to the prison to question Shatzer regarding whether he had sexually abused his son. Shatzer invoked his *Miranda* rights and refused to speak with the detective. Shatzer was released into the general prison population. In 2006, a different detective interrogated Shatzer, who was still incarcerated. During this interview, Shatzer waived his *Miranda* rights and confessed to abusing his son. The trial court refused to suppress his statements reasoning that *Edwards v. Arizona* did not apply. *Edwards* created a presumption that once a suspect invokes his *Miranda* rights, any waiver of that right in subsequent interrogations is involuntary unless there is a "break in custody." The Maryland Court of Appeals reversed, holding that Shatzer's release into the general prison population after the first interview did not constitute a break in custody. The Supreme Court disagreed and held that his release was a break in custody because it allowed him to "return to his accustomed surroundings and daily routine." The Court also held that *Edwards* applies until two weeks after a suspects release from custody.

***Johnson v. United States*, 130 S. Ct. 1265 (March 2, 2010) (Scalia).** The Supreme Court held that the Florida felony offense of battery by "actually and intentionally touching another person" does not constitute a violent felony under the Armed Career

Criminal Act, 18 U.S.C. § 924(e)(1) because it does not have as an element the use of physical force against the person of another.

***Bloate v. United States,* 130 S. Ct. 1345 (March 8, 2010) (Thomas).** The Supreme Court held that, under the Speedy Trial Act (18 U.S.C. § 3161), the time granted to prepare pretrial motions is not automatically excludable from the 70 day time limit under subsection (h)(1). However, such time may be excluded if the district court grants a continuance and makes appropriate findings under subsection (h)(7).

***Berghuis v. Smith*, 130 S. Ct. 1382 (March 30, 2010) (Ginsburg).** In *Taylor v. Louisiana,* the Supreme Court held that defendants have a Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community. To establish a prima facie violation of the fair-cross-section requirement, a defendant must prove that: (1) a group qualifying as "distinctive" (2) is not fairly and reasonably represented in jury venires, and (3) "systematic exclusion" in the jury-selection process accounts for the underrepresentation. At the voir dire in the Michigan state court trial of Smith, an African-American, the venire panel included between 60 and 100 individuals, only three of whom were African-American. The trial court rejected Smith's objection to the panel's racial composition, an all-white jury convicted him of second-degree murder and felony firearm possession. Smith alleged on appeal that the county's process of assigning prospective jurors involved "siphoning" and caused underrepresentation of African-Americans on juries. The Michigan Supreme Court concluded that Smith had not established a prima facie *Sixth Amendment* violation because there is no preferred method for determining underrepresentation and, using all three methods, the court concluded Smith had not shown systematic exclusion. Smith then sought federal habeas review. The Sixth Circuit disagreed with the Michigan Supreme Court and determined that courts should use the comparative disparity test to measure underrepresentation where the allegedly excluded group is small. The court then held the county's venires were unfair and unresonable. The Supreme Court reversed and remanded and held that the Supreme Court has never specified the specific test to use to measure underrepresentation. The Court further held that Smith could not prove that the county's venire process had any significant effect on the representation of African-Americans on juries.

***Padilla v. Kentucky,* 130 S. Ct. 1473 (March 31, 2010) (Stevens).** Padilla, a lawful permanent resident of the United States for over 40 years, faces deportation after pleading guilty to drug-distribution charges in Kentucky. In postconviction proceedings, he claimed that his counsel not only failed to advise him of this consequence before he entered the plea, but also told him not to worry about deportation since he had lived in this country so long. He alleged that he would have gone to trial had he not received this incorrect advice. The Kentucky Supreme Court denied postconviction relief on the ground that the Sixth Amendment's effective assistance of counsel guarantee does not protect defendants from erroneous deportation advice because deportation is merely a "collateral" consequence of a conviction. The Supreme Court reversed and held that defense counsel must inform a client whether a guilty plea carries the risk of deportation. First, the Court determined that deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes. Second, the Court held that it has never distinguished between direct and collateral consequences in defining the scope of constitutionally reasonable professional assistance required under *Strickland*.

***United States v. Stevens,* 130 S. Ct. 1577 (April 20, 2010) (Roberts).** Congress enacted 18 U.S.C. § 48 to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty. It applies to any visual or auditory depiction "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if that conduct violates federal or state law where "the creation, sale, or possession takes place." Stevens was indicted under § 48 for selling videos depicting dogfighting. He argued that § 48 is facially invalid under the First Amendment. The Supreme Court held that § 48 is substantially overbroad, and therefore invalid under the First Amendment.

***Renico v. Lett,* 130 S. Ct. 1855 (May 3, 2010) (Roberts).** At Lett's first trial for first-degree murder, the judge declared a mistrial after the jury said they were unable to reach a unanimous verdict. At the second trial, the jury found him guilty of second-degree murder. Lett argued that because the judge in his first trial had announced a mistrial without any manifest necessity to do so, the Double Jeopardy Clause barred the state from trying him a second time. In Lett's federal habeas petition, he contended that the Michigan Supreme Court's rejection of his double jeopardy claim was an unreasonable application of clearly established Federal law. The district court granted the writ, and the Sixth Circuit affirmed. The Supreme Court reversed. Clearly established federal law stats that when a judge discharges a jury on the grounds that the jury cannot reach a verdict, the Double Jeopardy Clause does not bar a new trial for the defendant before a new jury. Therefore, the Michigan Supreme Court's adjudication

involved a straightforward application of longstanding precedents to the facts of Lett's case.

***Graham v. Florida,* 130 S. Ct. 2011 (May 17, 2010) (Kennedy).** Graham was 16 years old when he committed armed burglary. Under a plea agreement, the trial court sentenced him to probation and withheld adjudication of guilt. Subsequently, Graham violated the terms of his probation by committing additional crimes. The trial court adjudicated Graham guilty of the earlier charges, revoked his probation, and sentenced him to life in prison for the burglary. Because Florida has abolished its parole system, the life sentence left Graham no possibility of release except executive clemency. He challenged his sentence under the Eighth Amendment's Cruel and Unusual Punishment Clause. The Supreme Court held that the Clause does not allow juvenile offenders to be sentenced to life in prison without parole for nonhomicide crimes.

***United States v. Comstock,* 130 S. Ct. 1949 (May 17, 2010) (Breyer).** Under 18 U.S.C. § 4248, a district court may order the civil commitment of sexually dangerous federal prisoners beyond the date they would otherwise be released. The respondents in this case moved to dismiss the commitment proceedings on the ground that Congress exceeded its powers under the Necessary and Proper Clause, U.S. Const., Art. I, § 8, cl. 18. The Supreme Court held that the Necessary and Proper Clause grants Congress the authority to enact § 4248. However, the Court specifically indicated that it was not reaching the questions of whether the statute or its application denies equal protection, procedural or substantive due process, or any other constitutional rights, leaving these questions open.

***United States v. O'Brien,* 130 S. Ct. 2169 (May 24, 2010) (Kennedy).** Respondents O'Brien and Burgess each carried a firearm during an attempted robbery. They were charged with using a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c)(1)(A)(i). Another count of the indictment charged the use of a machinegun in furtherance of the crime under 18 U.S.C. § 924(c)(1)(B)(ii) which carries a 30 year mandatory minimum sentence. The government moved to dismiss the machinegun count because it could not establish the count beyond a reasonable doubt but it maintained that it could use § 924(c)(1)(B)(ii)'s machinegun provision as a sentencing enhancement to the sentence on the § 924(c)(1)(A)(i) charge. The district court rejected the government's argument and imposed sentences based on the § 924(c)(1)(A)(i) convictions. The First Circuit affirmed the district court's determination based on the Supreme Court's decision in *Castillo v. United States,* 530 U.S. 120 (2000) which held that the machinegun provision in an earlier version of § 924(c) constituted an element of an offense, not a sentencing factor. The Supreme Court affirmed and held the fact that a firearm was a machinegun is an element of the offense to be proved to the jury beyond a reasonable doubt, not a sentencing factor, even after the change in the statute.

***United States v. Marcus,* 130 S. Ct. 2159 (May 24, 2010) (Breyer).** Marcus was convicted of engaging in sex trafficking between January 1999 and October 2001. On appeal, he argued for the first time that the statutes he violated did not become law until October 2000 and claimed the indictment and evidence permitted at trial allowed a jury to convict him exclusively on the basis of preenactment conduct in violation of the Ex Post Facto Clause. The Second Circuit agreed and vacated the conviction holding that retrial is necessary if there is "any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct," even under plain error review. The Supreme Court reversed, disagreeing with the Second Circuit's interpretation of third and fourth criteria of the plain error rule. Plain error requires the error to be prejudicial, meaning that there is a reasonable probability that the error affected the trial's outcome, not that there is "any possibility," however remote, that the jury could have convicted based exclusively on preenactment conduct.

***Berghuis v. Thompkins,* 130 S. Ct. 2250 (June 1, 2010) (Kennedy).** Prior to questioning Thompkins about a shooting, police officers advised him of his *Miranda* rights. During the three hour interrogation, Thompkins did not say he wanted to remain silent and did not request an attorney. He was mostly silent during the interrogation but he answered "yes" when asked if he prayed to God to forgive him for the shooting. He moved to suppress his statements, claiming that he had invoked his Fifth Amendment right to remain silent, that he had not waived that right, and that his inculpatory statements were involuntary. At trial, the prosecution mentioned one of Thompkins co-defendants' trials and the verdict. Defense counsel did not ask the district court to instruct the jury that it could not consider evidence of a co-defendant's verdict as evidence of Thompkins's guilt. After raising both issues on state post-conviction review, Thompkins filed a federal habeas petition. The district court denied the petition but the Sixth Circuit reversed. The Supreme Court reversed the Sixth Circuit and held that Thompkins's silence during the interrogation did not invoke his right to remain silent. The Court also held that his ineffective assistance of counsel claim could not be sustained

because Thompkins could not prove the proceedings would have had a different outcome.

***Carr v. United States,* 130 S. Ct. 2229 (June 1, 2010) (Sotomayor).** The Sex Offender Registration and Notification Act (SORNA), which was enacted in 2006, makes it a federal crime for any person who is required to register and who travels in interstate commerce to knowingly fail to register. 18 U.S.C. § 2250(a). Before SORNA was enacted enactment, Carr, a registered sex offender in Alabama, relocated to Indiana without complying with the state's registration requirements. He was indicted under § 2250 after SORNA was enacted. He filed a motion to dismiss asserting that the prosecution violated the Ex Post Facto Clause because he traveled to Indiana prior to the effective date. Affirming the conviction, the Seventh Circuit held that the statute does not require that travel postdate SORNA and that reliance on a defendant's pre-SORNA travel poses no Ex Post Facto problem. The Supreme Court reversed and held that § 2250 does not apply to sex offenders whose travel occurred before SORNA's effective date. The Court rejected the notion that only the failure to register must occur after the date of effect and held that both travel and failure to register must happen after the effective date.

***Barber v. Thomas,* 2010 U.S. LEXIS 4717 (June 7, 2010) (Breyer).** The federal sentencing statute at issue, 18 U.S.C. § 3624(b)(1), provides that a prisoner serving a term of imprisonment of more than one year may receive credit toward the service of the sentence of up to 54 days at the end of each year for good behavior. The Bureau of Prisons (BOP) applies this statute using a methodology that awards 54 days of credit at the end of each year the prisoner serves and sets those days to the side. When the difference between the time remaining in the sentence and the amount of accumulated credit is less than one year, the BOP awards a prorated amount of credit for that final year proportional to the awards in other years. Petitioners claim that the BOP's calculation method is unlawful because § 3624(b)(1) requires a calculation based on the length of the term of imprisonment imposed by the sentencing judge, not the length of time that the prisoner actually serves. The district court rejected this challenge and the Ninth Circuit affirmed. The Supreme Court affirmed holding that the BOP's method of calculating good time credit reflects the most natural reading of the statute.

***Carachuri-Rosendo v. Holder*, 2010 U.S. LEXIS 4764 (June 14, 2010) (Stevens).** Carachuri-Rosendo, a lawful permanent resident of the United States, faced deportation after committing two misdemeanor drug offenses in Texas. For the first, possession of a small amount of marijuana, he received 20 days in jail. For the second, possession without a prescription of one anti-anxiety tablet, he received 10 days. After the second conviction, the government initiated removal proceedings. Carachuri-Rosendo conceded that he was removable, but claimed that he was eligible for discretionary cancellation of removal under the Immigration and Nationality Act because he had not been convicted of any "aggravated felony" under 8 U.S.C. § 1229b(a)(3). The Immigration Judge, the Board of Immigration Appeals, and the Fifth Circuit held that the second conviction was an "aggravated felony" for immigration law purposes because the conduct could have been punishable as a felony recidivist simple possession. The Supreme Court reversed holding that second or subsequent simple possession offenses are not aggravated felonies where the state conviction is not based on the fact of a prior conviction.

***Dolan v. United States,* 2010 U.S. LEXIS 4762 (June 14, 2010) (Breyer).** Dolan pleaded guilty to assault resulting in serious bodily injury and entered into a plea agreement which stated that the district court could order restitution for his victim. Dolan's presentence report also noted that restitution was required, but did not recommend an amount because of a lack of information on hospital costs and lost wages. The Mandatory Victims Restitution Act (MVRA) provides that "if the victim's losses are not ascertainable by the date that is 10 days prior to sentencing," the court "shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. § 3664(d)(5). On July 30, the district court held a sentencing hearing and imposed a sentence of imprisonment and supervised release. On August 8, the court entered a judgment, stating that restitution was "applicable" but leaving open the amount of restitution given that no information had yet "been received regarding possible restitution payments." On October 5, 67 days later, an addendum documenting the restitution amount was added to the presentence report. The court did not set a hearing until February 4, about three months after the 90-day deadline had expired. At the hearing, Dolan argued that because that deadline had passed, the law no longer authorized restitution. Disagreeing, the court ordered restitution, and the Tenth Circuit affirmed. The Supreme Court affirmed finding that a sentencing court that misses the 90-day deadline nonetheless retains the power to order restitution, at least where the court made clear prior to the deadline's expiration that it would order restitution, leaving open only the amount.

***Holland v. Florida,* 2010 U.S. LEXIS 4946 (June 14,**

2010) (Breyer). Holland was convicted of first degree murder and sentenced to death in state court. After the state supreme court affirmed on direct appeal and denied collateral relief, Holland filed a *pro se* federal habeas corpus petition, which was five weeks late under the one year statute of limitations set forth by AEDPA. The petition was late because Holland's court-appointed post-conviction relief attorney had failed to file a timely petition. On many occasions, Holland sent requests to the attorney emphasizing the importance of filing the federal petition. However, the attorney did not do the appropriate research to determine the proper filing date, failed to inform Holland in a timely manner that the state supreme court had decided his case, and failed to communicate with Holland over a period of years. During this time, Holland requested the state courts and bar remove the attorney from his case. Based on this facts, Holland asked the federal district court to toll the AEDPA limitations period for equitable reasons. The district court held Holland had not demonstrated the requisite diligence to invoke equitable tolling. The Eleventh Circuit affirmed. The Supreme Court reversed holding the statute of limitations is subject to equitable tolling in appropriate cases, particularly where the petitioner shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.

***Dillon v. United States,* 2010 U.S. LEXIS 4975 (June 17, 2010) (Sotomayor).** In 1993, Dillon was convicted of crack and powder cocaine offenses. After the Sentencing Commission amended the Guidelines to reduce the base offense level associated with each quantity of crack cocaine and made that amendment retroactive, Dillon moved for a sentence reduction under 18 U.S.C. § 3582(c)(2). In addition to the two level reduction authorized by the amendment, Dillon sought a variance below the amended Guidelines range, contending that *United States v. Booker* authorized the exercise of such discretion. The district court imposed a sentence at the bottom of the revised range but refused to grant a further reduction. The Third Circuit affirmed. The Supreme Court agreed, holding *Booker* does not apply to § 3582(c)(2) proceedings.

***Black v. United States,* 2010 U.S. LEXIS 5253 (June 24, 2010) (Ginsburg).** The Defendants were executives of Hollinger International, Inc. and were indicted for mail fraud, 18 U.S.C. §§ 1341, 1346, and other federal crimes. The government pursued alternative mail-fraud theories, charging that (1) Defendants stole millions from Hollinger by fraudulently paying themselves bogus noncompetition fees; and (2) by failing to disclose those fees, Defendants deprived Hollinger of their honest services. The district court instructed the jury on each of the alternative theories. As to honest-services fraud, the court informed the jury that a person commits that offense if he misuses his position for private gain for himself and/or a co-schemer and knowingly and intentionally breaches his duty of loyalty. The jury found the Defendants guilty on the mail fraud counts. Based on the Supreme Court's decision in *Skilling* v. *United States* (see below), which vacated a conviction on the ground that the honest-services component of the federal mail-fraud statute, *§ 1346*, criminalizes only schemes to defraud that involve bribes or kickbacks, the honest-services instructions given in the present case were incorrect.

***Skilling v. United States,* 2010 U.S. LEXIS 5259 (June 24, 2010) (Ginsburg).** Skilling was charged with conspiracy to commit "honest-services" wire fraud, pursuant to 18 U.S.C. §§ 371, 1343, 1346, by depriving Enron and its shareholders of the intangible right of his honest services. Skilling raised two arguments on appeal and in the Supreme Court. First, he argued pretrial publicity and community prejudice prevented him from obtaining a fair trial in Houston, Texas. Second, he alleged that the jury improperly convicted him of conspiracy to commit honest-services wire fraud. The Supreme Court held that Skilling had not established the presumption of juror prejudice arose or that actual bias infected the jury. The Supreme Court reversed on the honest-services issues by holding that § 1346, which proscribes fraudulent deprivations of "the intangible right of honest services," only covers bribery and kickback schemes. Because Skilling's misconduct entailed no bribe or kickback, it does not fall within the Court's confinement of § 1346.

***Magwood v. Patterson,* 2010 U.S. LEXIS 5258 (June 24, 2010) (Thomas).** Magwood was sentenced to death for murder. After state courts denied relief on direct appeal and in post-conviction proceedings, he sought federal habeas relief. The district court conditionally granted the writ as to his sentence and mandated that he be released or resentenced. The state trial court sentenced him to death a second time. He filed another federal habeas application, challenging the new sentence and the district court once again conditionally granted the writ. The Eleventh Circuit reversed, holding Magwood's challenge to his new death sentence was a "second or successive" challenge under 28 U.S.C. § 2244(b). The Supreme Court reversed concluding that because the second habeas petition challenges a new judgment for the first time, it is not "second or successive."

***McDonald v. Chicago,* 2010 U.S. LEXIS 5523 (June 28, 2010) (Alito).** Chicago and Oak Park, a Chicago

suburb, have laws effectively banning handgun possession by almost all private citizens. After *Heller*, petitioners filed this federal suit against Chicago alleging that the handgun ban has left them vulnerable to criminals. They sought a declaration that the ban and several related ordinances violate the Second and Fourteenth Amendments. The district court rejected petitioners' arguments and the Seventh Circuit affirmed. The Supreme Court concluded that the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller* to keep and bear arms for the purpose of self-defense.

Cases Pending - October 2010 Term

***Michigan v. Bryant*, No. 09-150, cert. granted March 1, 2010.** Whether preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting are nontestimonial because "made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," that emergency including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual?

***Abbott v. United States*, No. 09-479, cert. granted January 25, 2010.** Title 18 U.S.C. § 924(c)(1)(a) provides, in part, that a person convicted of a drug-trafficking crime or crime of violence shall receive an additional sentence of not less than five years whenever he "uses or carries a firearm, or . . . in furtherance of any such crime, possesses a firearm" unless "a greater minimum sentence is . . . provided . . . by any other provision of law." The questions presented are: (1) Does the term "any other provision of law" include the underlying drug trafficking offense or crime of violence? and (2) If not, does it include another offense for possessing the same firearm in the same transaction?

***Gould v. United States,* No. 09-7073, cert. granted January 25, 2010.** Did the United States Court of Appeals for the Fifth Circuit correctly hold, in direct conflict with the Second Circuit (but in accordance with several other circuits), that a mandatory minimum sentence provided by 18 U.S.C. § 924(c)(1)(A) applies to a count when another count already carries a greater mandatory minimum sentence?

***Connick v. Thompson*, No. 09-571, cert. granted March 22, 2010.** Prosecutors in the Orleans Parish District Attorney's Office hid exculpatory evidence, violating John Thompson's rights under *Brady v. Maryland*. Despite no history of similar violations, the office was found liable under § 1983 for failing to train prosecutors. Inadequate training may give rise to municipal liability if it shows "deliberate indifference" and actually causes a violation. *See City of Canton v. Harris; Bd. of County Comm'rs of Bryan County v. Brown.* A pattern of violations is usually necessary to show culpability and causation, but in rare cases one violation may suffice. The Court has hypothesized only one example justifying single-incident liability: a failure to train police officers on using deadly force. The issue presented is: Does imposing failure-to-train liability on a district attorney's office for a single *Brady* violation contravene the rigorous culpability and causation standards of *Canton* and *Brown County*?

***Harrington v. Richter,* No. 09-587, cert. granted February 22, 2010.** In granting habeas corpus relief to a state prisoner, did the Ninth Circuit deny the state court judgment the deference mandated by 28 U.S.C. § 2254(d) and impermissibly enlarge the Sixth Amendment right to effective counsel by elevating the value of expert-opinion testimony in a manner that would virtually always require defense counsel to produce such testimony rather than allowing him to rely instead on cross-examination or other methods designed to create reasonable doubt about the defendant's guilt? The parties were also ordered to address the following question: Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland v. Washington*?

***Premo v. Moore*, No. 09-658, cert. granted March 22, 2010.** The Supreme Court established in *Hill v. Lockhart* the standard for assessing, in a collateral challenge to a conviction that was based on a guilty or no-contest plea, whether an attorney's deficient performance requires reversal of a conviction. In *Arizona v. Fulminante* - a direct appellate review case - the Court reviewed all the evidence presented at trial and held that the erroneous admission of a coerced confession at the trial was not harmless. If a collateral challenge is based on a defense attorney's decision not to move to suppress a confession prior to a guilty or no contest plea, does the *Fulminante* standard apply, even though no record of a trial is available for review? Even if the *Fulminante* standard applies in that context, is it "clearly established Federal law" for purposes of 28 U.S.C. § 2254(d)(1)? In the underlying criminal case, Moore confessed to police that he personally shot the victim. He also confessed to two other people, and he ultimately pleaded no contest to murder. In his collateral challenge to his conviction, he alleged that his attorney should have moved to suppress the confession to police, but he offered no evidence that he would have insisted on going to trial had counsel done so. Did the

Ninth Circuit err by granting federal habeas relief on Moore's ineffective assistance of counsel claim?

***Wall v. Kholi,* No. 09-868, cert. granted May 17, 2010.** Does a state court sentence reduction motion consisting of a plea for leniency constitute an "application for State post-conviction or other collateral review," 28 U.S.C. § 2244(d)(2), thus tolling the Anti-Terrorism and Effective Death Penalty Act's one year limitations period for a state prisoner to file a federal habeas corpus petition, an issue as to which there is a 3-2 circuit split?

***Walker v. Martin,* No. 09-996, cert. granted June 21, 2010.** Under state law in California, a prisoner may be barred from collaterally attacking his conviction when the prisoner "substantially delayed" filing his habeas petition. In federal habeas corpus proceedings, is such a state law "inadequate" to support a procedural bar because (1) the federal court believes that the rule is vague and (2) the state failed to prove that its courts "consistently" exercised their discretion when applying the rule in other cases?

***Cullen v. Pinholster,* No. 09-1088, cert. granted June 14, 2010.** First, whether a federal court may reject a state court adjudication of a petitioner's claim as "unreasonable" under 28 U.S.C. § 2254, and this grant habeas corpus relief, based on a factual predicate for the claim that the petitioner could have presented to the state court but did not. Second, whether a federal court may granted relief under 28 U.S.C. § 2254 on a claim that trial counsel in a capital case ineffectively failed to produce mitigating evidence of organic brain damage and a difficult childhood because counsel, who consulted with a psychiatrist who disclaimed any such diagnosis, as well as with petitioner and his mother, did not seek out a different psychiatrist and different family members?

***Flores-Villar v. United States,* No. 09-5801, cert. granted March 22, 2010.** Whether the Court's decision in *Nguyen v. INS* permits gender discrimination that has no biological basis?

***Pepper v. United States,* No. 09-6822, cert. granted June 28, 2010.** There is a conflict among the United States Courts of Appeals regarding a defendant's post-sentencing rehabilitation and whether it can support a downward sentencing variance under 18 U.S.C. § 3553(a). First, whether a federal district judge can consider a defendant's post-sentencing rehabilitation as a permissible factor supporting a sentence variance under 18 U.S.C. § 3553(a) after *Gall v. United States*? Second, whether as a sentencing consideration under 18 U.S.C. § 3553(a), post-sentencing rehabilitation should be treated the same as post-offense rehabilitation? Third, when a district court judge is removed from resentencing a defendant after remand, and a new judge is assigned, is the new judge obligated under the doctrine of the "law of the case" to follow sentencing findings issued by the original judge that had been previously affirmed on appeal?

***Skinner v. Switzer*, No. 09-9000, cert. granted May 24, 2010.** For ten years, Henry W. Skinner has sought access to DNA testing that could prove him innocent of the murders that landed him on Death Row. After the Texas courts arbitrarily turned back his diligent attempts to take advantage of state statutes affording such relief, he sued in federal court under 42 U.S.C. § 1983 to vindicate his due process right to "fundamental fairness in [the] operation" of Texas's scheme. The district court dismissed Mr. Skinner's § 1983 suit solely on the ground that his claim sounded only in habeas corpus, and the Fifth Circuit summarily affirmed. The question presented is: May a convicted prisoner seeking access to biological evidence for DNA testing assert that claim in a civil rights action under 42 U.S.C. § 1983, or is such a claim cognizable only in a petition for writ of habeas corpus?

SEVENTH CIRCUIT CRIMINAL CASE DIGEST

by

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I. COUNSEL, RIGHT TO

Counsel may constitutionally represent co-defendants so long as there is neither an actual conflict of interest nor a serious potential for a conflict to arise. *United States v. Turner*, 594 F.3d 946 (7th Cir. 2010; No. 08-2350). Upon consideration of the district court's disqualification of retained counsel because he represented a co-defendant, the Court of Appeals held that the disqualification denied the defendant his Sixth Amendment right to the counsel of his choice. The government argued that the joint representation presented and insurmountable conflict of interest because one defendant might decide to cooperate against the other. But the defendant argued that there was no actual conflict because neither client wanted to assist the government and prosecutors had not shown the slightest interest in securing either defendant's testimony against the other. Moreover, both defendants waived any conflict of interest. The district court however focused on the *possibility* of cooperation against each other and held that this possibility was sufficient to create an "absolute" conflict of interest. The Court of Appeals disagreed, noting that a defendant has the right to counsel of his choice if he does not require appointed counsel. There is a presumption in favor of this choice, although it may be overridden if there is an actual conflict of interest or a "serious potential for conflict." Here, the district court relied on a mere possibility of a conflict, yet such a possibility is present in nearly every case of joint representation. Only a *serious* potential conflict will justify overriding the defendant's choice of counsel. This requires an inquiry into the likelihood that the potential conflict will mature into an actual conflict and the degree to which it threatens the right to effective assistance of counsel. Accordingly, before disqualifying counsel based on a *potential* conflict, the district court should evaluate (1) the likelihood that the conflict will actually occur; (2) the severity of the threat to counsel's effectiveness; and (3) whether there are alternative measures available other than disqualification that would protect the defendant's right to effective counsel while respecting his choice of counsel. The government bears the burden of nonpersuasion, and in the present case, the facts made clear that the likelihood of a conflict actually occurring, the most important factor, was very remote. Thus, the case was remanded for a new trial.

II. DOUBLE JEOPARDY

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

Conviction for both bankruptcy fraud and obstruction of justice arising out of the same facts was a violation of double jeopardy. *United States v. Peel*, 595 F.3d 763 (7th Cir. 2010; No. 07-3933). In prosecution for bankruptcy fraud and obstruction of justice, the Court of Appeals held that convicting the defendant of both offenses violated the Double Jeopardy Clause. Both offenses were predicated upon the same conduct by the defendant. The court initially noted that the elements of the two offenses are different. However, the test for

whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. Here, the test was not passed, because convicting the defendant of obstructing justice did not require proof of any fact that didn't have to be proved to convict him of bankruptcy fraud. It was thus a lesser-included offense of bankruptcy fraud and the *Blockburger* test makes clear that to punish a person for a lesser-included offense as well as the "including" offense is double jeopardy unless Congress intended double punishment, which it did not in this circumstance. The case is like a case in which a person is tried for both murder and attempted murder. The elements are different, but since conviction for murder automatically convicts the defendant of attempted murder, the defendant cannot be convicted of both crimes. Regarding which conviction to vacate, the Constitution does not dictate that a particular conviction be vacated, but it is rather committed to the trial judge's discretion. Usually, it's the conviction carrying the lesser penalty that is vacated, however.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Counsel's failure to file a motion to suppress based upon a misunderstanding of the law constituted ineffective assistance of counsel. *Johnson v. United States*, 604 F.3d 1016 (7th Cir. 2010; No. 08-1777). Upon consideration of the district court's denial of a 2255 petition, the Court of Appeals held that defense counsel rendered ineffective assistance of counsel by failing to file a motion to suppress. Officers searched the defendant's car after they observed him leave the vehicle with what appeared to be an open container of alcohol. Although the defendant requested that defense counsel file a motion to suppress the drugs subsequently found in the car which formed the basis of his current conviction, defense counsel refused to do so. In his affidavit, defense counsel noted that the defendant had borrowed the car from a relative, and he therefore did not have a reasonable expectation of privacy in the vehicle. The district court agreed. The Court of Appeals, however, noted that it is well-established that a driver of a borrowed vehicle may establish a reasonable expectation of privacy in a vehicle even though the driver is not the owner of it. In lawfully possessing and controlling the car, the driver has the right to exclude others which corresponds with an expectation of privacy. Similar to an owner driving the car, the authorized driver may have an expectation of privacy in that circumstance. Although the inquiry is fact specific, nothing in the record in this case cast doubt on the existence of the defendant's reasonable expectation of privacy in the car. Defense counsel also stated that he thought it was a better defense strategy to argue at trial that the defendant did not know the drugs were in the car. However, the court noted that the defense could have made the motion to suppress and still have maintained that trial strategy. There was nothing contradictory about arguing that the defendant had an expectation of privacy in the car and that he did not know drugs were in the car. Finally, defense counsel seemed concerned that any testimony of the defendant would impact his testimony at trial. However, when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection. Given that suppression of the drugs would have destroyed the government's case, the defendant was clearly prejudiced. Accordingly, the Court of Appeals remanded the case to the district court for an evidentiary hearing on the ineffective assistance of counsel claim.

IV. EVIDENCE

A. EXHIBITS

Inadvertent failure to provide two exhibits to the jury during its deliberations did not warrant a mistrial. *United States v. Collins*, 604 F.3d 481 (7th Cir. 2010; No. 09-2360)**.** In trial for drug distribution, two exhibits were not provided to the jury during its deliberations. The defendant argued that without these exhibits readily available to the jury, it was unable to properly consider his argument concerning the credibility of the government's key witness. The Court of Appeals noted that when deciding whether a mistrial is warranted because admitted evidence was not provided to the jury, a new trial is required if there is a reasonable possibility

that a party is prejudiced by the district court's failure to provide certain exhibits to the jury, even if the exhibits are properly admitted. However, absent some special circumstance, a failure to make an exhibit available to a jury during deliberations is no cause for a mistrial, particularly when the trial was short and the information is such that it should be fresh in the jurors' minds. In the present case, the trial was short and the exhibits were discussed during closing argument. The exhibits themselves, a map and a photograph of a car, did not contain information the jurors could not easily recall without reference to the exhibits themselves. Although a mistrial may be warranted if exhibits are provided and excluded from the jury in a non-evenhanded manner, there was no such evidence of unfairness in this case. Indeed, one of the two excluded exhibits was a government exhibit.

B. EXPERTS

Testimony of expert who relied upon tests and data performed and gathered by a different person, but who drew his own conclusions, did not violate the defendant's Confrontation Clause rights. *United States v. Turner*, 591 F.3d 928 (7th Cir. 2010; No. 08-3109). In prosecution for distribution of crack cocaine, the government originally intended to call as an expert a government chemist who analyzed the substances seized from the defendant for evidence of the weight and type of drugs. However, because this expert was on maternity leave at the time of trial, the government instead called her supervisor, who relying on the data collected from the first expert, testified to his conclusions in court. The defendant argued that allowing someone other than the chemist who actually performed the test to testify violated his Sixth Amendment confrontation right. The Court of Appeals disagreed. First, the court noted that the original chemist's lab report, notes, and data charts were not introduced into evidence. Although the witness did rely on information gathered and produced by the other chemist, the conclusion drawn by the expert was his own. Moreover, the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527(2009), did not alter the analysis. In that case, the prosecution introduced certificates of analysis as a substitute for in-court testimony to show that the substance recovered from the defendant was cocaine. The certificates were sworn to before a notary public by analysts at the State Lab in Massachusetts. The Supreme Court held that the certificates were testimonial statements and the prosecution could not prove its case without first showing that a witness was unavailable and that the defendant had an opportunity to cross-examine him. The court also noted, however, that "we do not hold that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." Here, the chemist's report was not admitted into evidence, let alone presented to the jury in the form of a sworn affidavit. Instead, the expert witness presented his own conclusions, which was permissible.

C. CROSS-EXAMINATION

District court properly precluded cross-examination of witness regarding his arrest warrant for murder where defense counsel was allowed to adequately challenge the witness's veracity and examine his motives to lie through other means. *United States v. Linzy*, 604 F.3d 319 (7th Cir. 2010; No. 09-2046). In prosecution for a drug conspiracy, the defendant's co-defendant testified at trial pursuant to an agreement with the government. Defense counsel extensively cross-examined him regarding his agreement with the government and his prior convictions. When he attempted to cross-examine him regarding an arrest warrant for murder, however, the district court would only allow defense counsel to refer to the pending murder charge as a "very serious felony charge." The defendant argued that he should have been allowed to attack the witness's credibility with "every weapon at hand." The Court of Appeals noted that when deciding whether limits on cross-examination are permissible, it must distinguish between the core values of the Confrontation Clause and more peripheral concerns which remain within the trial court's ambit. In determining whether the district court abused its discretion by limiting cross-examination, the court examines whether the jury had sufficient details about the witness to assess the witness' motives and biases. Although a core value is the ability to expose a

witness's motivation for testifying, his bias, or his possible incentives to lie, once a trial court permits a defendant to expose a witness's motivation, it is of peripheral concern to the Sixth Amendment how much opportunity defense counsel gets to hammer that point home to the jury. The right to confrontation is not implicated where limitations on cross-examination did not deny the defendant the opportunity to establish that the witness may have had a motive to lie and the limitation only denied the defendant the opportunity to add extra detail to that motive. Here, the district court allowed defense counsel to thoroughly cross-examine the defendant regarding his bias and motive to lie. Thus, refusing to allow defense counsel to refer to the murder charge directly was within the trial court's discretion.

D. RULE 403

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

V. GUILTY PLEAS

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

VI. JURY INSTRUCTIONS

District court did not err in denying a for-cause challenge to a juror in a child pornography case, where the juror initially indicated that an attempted kidnapping of her daughter would prejudice her against the defendant but then later indicated she could be fair after the judge questioned her. *United States v. Allen*, 605 F.3d 461 (7th Cir. 2010; No. 09-2539). In prosecution stemming from child pornography charges, the

Court of Appeals affirmed the district court's denial of the defendant's for-cause challenge to a juror. In response to a question on the juror questionnaire asking if anything would make it difficult for her to be fair, the juror replied "yes" because of an incident in which a man had attempted to kidnap her then six-year old, now grown daughter. The judge then instructed her about each side being entitled to fairness, and the juror then said she could be fair. However, upon questioning by defense counsel, she again indicated that she would have a difficult time being fair, the judge again instructed her, and she again indicated that she could judge the defendant fairly. The defendant then challenged the juror for cause, but the district court denied the motion. The Court of Appeals held that the district court acted within its discretion for three reasons. First, the unrelatedness of the defendant's case and of the kidnapping attempt suggested that any bias would be minimal. The juror's prior experience was wholly unrelated to whether the defendant committed the crimes for which he was indicted. The juror's predisposition was to find those who commit crimes against children particularly heinous. That belief had nothing to do with whether any particular defendant is guilty of committing crimes against children. Moreover, the crime here involved child pornography, not kidnapping. Second, the juror eventually made unequivocal statements that she could be fair. Third, the trial judge was in the best position to gauge the credibility of the juror's answers regarding her ability to follow the judge's instructions. Judge Wood dissented.

Erroneous instruction on meaning of "resulted in death or serious bodily injury" in prosecution of drugs which resulted in same required reversal. *United States v. Hatfield*, 591 F.3d 945 (7th Cir. 2010; No. 09-1705). In prosecution for distributed drugs which "resulted in death or serious bodily injury," the Court of Appeals held that the district court's instruction on "resulted in" was erroneous and required a retrial. The instruction began by stating that the jury had "to determine whether the United States has established, beyond a reasonable doubt, that the victims died, or suffered serious bodily injury, as a result of ingesting a controlled substance or controlled substances distributed by the defendant." But then it added that the controlled substances distributed by the defendants had to have been "a factor that resulted in death or serious bodily injury," and that although they "need not be the primary cause of death or serious bodily injury" they "must at least have played a part in the death or in the serious bodily injury." It was the second part of the instruction which the court found to be erroneous. The statutory term "results from" required the government to prove that ingestion of the defendants' drugs was a "but for" cause of the deaths, and the death need not have been foreseeable. But the government at least must prove that the death or injury would not have occurred had the drugs not been ingested. All that would have been needed to be a proper instruction was elimination of the addition to the statutory language, which was clearer than the addition and probably clear enough. Elaborating on a term often makes it less rather than more clear, which is what happened in this case. Moreover, no case has approved the language that was added to the instruction. Finally, the error in this case was not harmless, as the evidence showed that the victims ingested multiple drugs, some of which came from the defendants and some of which did not. It was therefore unclear how a juror would have fitted that evidence into the erroneously given instruction.

VII. OFFENSES

A. 8 U.S.C. § 1326 (ILLEGAL REENTRY)

A defendant may collaterally attack an underlying order of deportation supporting an illegal reentry charge if he can demonstrate he exhausted his administrative remedies, the deportation proceedings improperly deprived him of judicial review, and the entry of the order was fundamentally unfair. *United States v. Arita-Campos*, 607 F.3d 487 (7th Cir. 2010; No. 09-2368). In prosecution for illegal reentry, the defendant was originally apprehended by immigration officials when he was 14-years old. He failed to appear at his deportation hearing and was therefore ordered to deport *in absentia*. The order was not executed until 10-

years later when the defendant was again apprehended. Thereafter, he reentered and was charged in the present case. The defendant moved to dismiss the indictment, alleging that he never received notice of the original deportation hearing at which he failed to appear. The Court of Appeals noted that a defendant may collaterally attack the deportation order underlying the offense, and the government may rely on a prior deportation as an element of the crime of unlawful reentry if the proceedings leading up to the deportation comported with principles of due process. To successfully make such a showing, the defendant must demonstrate he exhausted his administrative remedies, the deportation proceedings improperly deprived him of judicial review, and the entry of the order was fundamentally unfair**.** Several circuits have held that because the three requirements are stated in the conjunctive in the relevant statute, a defendant must satisfy all three prongs to prevail in his collateral attack. However, the Ninth Circuit has held that the exhaustion requirement cannot bar collateral review of a deportation proceeding when the waiver of right to an administrative appeal did not comport with due process. The Seventh Circuit has never ruled on these questions, and it declined to do so in the present case because the defendant here failed to meet *any* of the three requirements. Specifically, he never sought to reopen the deportation proceedings, even after he learned that an order of deportation had been entered *in absentia*. Second, the defendant had an opportunity for judicial review of the immigration judge's legal interpretations through a habeas corpus petition. Finally, the original deportation proceedings were not fundamentally unfair, because he could not demonstrate that judicial review of the deportation proceedings would have yielded him relief from deportation.

Being mistakenly removed to the wrong country is not a defense to a charge of illegal reentry. *United States v. Sanchez*, 604 F.3d 365 (7th Cir. 2010; No. 09-2666). In prosecution for illegal reentry, the defendant argued on appeal that the district court erred when it prevented him from arguing during closing argument that he was never properly removed from the United States because he was sent to the wrong country. Specifically, the defendant was a native of El Salvador, but he was mistakenly removed to Mexico. The Court of Appeals noted that a district court errs when it precludes counsel from raising a significant issue during closing argument. Here, however, the issue was not significant. The location to which the defendant was removed was irrelevant to the ultimate determination of whether he violated 8 U.S.C. 1326. That statute does not require that defendants be removed in a certain way or to a certain place for removal to have taken place for its purposes. Thus, the fact he was removed to the wrong country was irrelevant, and the district court properly excluded an argument based upon that fact.

B. 18 U.S.C. § 228(a)(3)(FAILURE TO PAY CHILD SUPPORT)

Failure to pay child support is a continuing offense, does not require that the defendant know he is violating a federal statute for conviction, and enhancing the sentence for violating a court order is double-counting. *United States v. Bell*, 605 F.3d 1060 (7th Cir. 2010; No. 09-2555). In prosecution for failure to pay child support**,** the Court of Appeals first held in an issue of first impression that it is a continuing offense and can be prosecuted for purposes of the statute of limitations. Second, a defendant only need willfully fail to pay the child support. The willfulness requirement does not require that he be aware that his failure to pay child support violates a federal statute. Finally, the Sentencing Guidelines specify that for violations of 18 U.S.C. 228, the offense level is set by a cross-reference to 2B1.1 for theft, property destruction, and fraud. That section contains an enhancement for violation of a court order, which the district court applied in this case. The Court of Appeals reversed, holding that the offense in question has as an element violation of a court order. Thus, because the conviction and the enhancement are triggered by the same conduct, application of the enhancement constitutes double-counting.

C. 18 U.S.C. § 2113 (BANK ROBBERY)

Subsection (a) of the bank robbery statute defines two distinct offenses, robbery by force or intimidation and entry into a bank with intent to rob it. *United States v. Loniello*, ___ F.3d ___ (7th Cir. 2010; No. 09-1494). In prosecution for bank robbery, the Court of Appeals held that subsection (a) of the statute creates two distinct offenses. The first paragraph of the statute prohibits bank robbery by force or intimidation, while the second paragraph prohibits entering a bank with intent to commit any felony affecting such bank. The defendants were originally charged with bank robbery by force or intimidation, but those indictments were dismissed after the Court of Appeals held in a previous case that a defendant must actually use force to be convicted under the first paragraph. The government then returned an indictment under the second paragraph, but the district court dismissed that indictment, holding that 2113(a) defined only one offense, and the double jeopardy clause therefore prevented another prosecution. The government appealed, and the Court of Appeals reversed. Applying the *Blockburger* test, the court noted that paragraph 1 requires proof of force or intimidation, while paragraph 2 does not. Paragraph 2 requires proof of an actual or attempted entry of a bank, while paragraph 1 does not. It is therefore possible to violate paragraph 1 without coming anywhere near a bank–the robber could steal the bank's money from an armored car or obtain it by kidnapping a bank's employee and demanding that a ransom be left at a pick-up point far from the bank. By contrast, it is impossible to violate paragraph 2 without at least attempting to enter the bank. Finally, the court did note that prior Supreme Court precedents do prohibit multiple *sentences* for the various subsections of the statute, but the various subsections are still different crimes. Only with respect to punishment do the sentences merge.

D. 18 U.S.C. § 2250 (SORNA)

SORNA conviction does not require proof that defendant knew of his federal obligation to register, but rather only proof that he had a duty to register under any relevant state or federal statute. *United States v. Vasquez*, ___ F.3d ___ (7th Cir. 2010; No. 09-2411). In SORNA prosecution, the Court of Appeals rejected the defendant's argument that SORNA requires proof that a defendant have specific knowledge that he was required to register under SORNA. Rather, the court held that SORNA merely requires that a defendant have knowledge that he was required by law to register as a sex offender. The government need not prove that, in addition to being required to register under state law, a defendant must also know that registration is mandated by a federal statute. Here, the defendant stipulated that he was required to register as a sex offender, had previously faced jail time for failing to register, and had even signed a notification form acknowledging that he was required to register under state law. This was more than sufficient to establish a conviction under SORNA. Additionally, consistent with precedents in other circuits, the court rejected the defendant's arguments that Congress exceeded its authority under the Commerce Clause when enacting the statute.

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

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

complete the underlying wholesale drug transaction. Although the content of the intercepted phone calls suggested the defendant was a middleman who resold drugs he purchased, that is all it suggested. As such, the evidence was insufficient to prove the defendant entered into a conspiracy to distribute drugs. The Court of Appeals therefore vacated the defendant's conviction on the conspiracy count.

VIII. PROCEDURE

A. *ANDERS* BRIEFS

When filing an *Anders* brief after appeal from the revocation of supervised release, appellate counsel need not address whether supervision was properly revoked where the defendant only seeks to challenge his sentence. *United States v. Wheaton*, ___ F.3d ___ (7th Cir. 2010; No. 09-3171). Upon consideration of an *Anders* brief filed on appeal after the revocation of the defendant's supervised release, the Court of Appeals held that appellate counsel need not discuss the validity of the revocation where the defendant seeks only to challenge the sentence imposed upon revocation. Citing *United States v. Knox*, 287 F.3d 667 (7th Cir. 2002), the court noted that upon appeal of a conviction, when defense counsel files an *Anders* brief, he is required to inquire of the appellant whether he seeks to challenge any aspects of his conviction, or only his sentence. Where the defendant indicates he only wishes to challenge his sentence, counsel should not discuss the validity of the defendant's conviction in an *Anders* brief. For the first time in this case, the court extended the *Knox* procedure to supervised release revocations. Only if the defendant seeks to challenge the validity of his revocation should the validity thereof be discussed. Otherwise, counsel should limit his analysis to the sentence imposed, while indicating that the defendant does not seek to challenge on appeal the validity of the revocation itself.

Court rejected Anders brief in a case where there was a 5-day trial when counsel on appeal failed to address any issues related to the defendant's conviction, as opposed to sentencing issues. United *States v. Palmer*, 600 F.3d 897 (7th Cir. 2010; No. 09-2558). Upon submission of an *Anders* brief**,** the Court of Appeals rejected the *Anders* brief, finding that its discussion of the defendant's trial was inadequate. The defendant had a 5-day jury trial. Appellate counsel submitted an *Anders* brief wherein she set forth the nature of the government's evidence at trial and noted potential sentencing issues, but did not point to any potential issues concerning the defendant's conviction. The court said that the problem with the submission was that the brief recounted the trial evidence in isolation without any mention of the pretrial proceedings or the conduct of the defendant's trial. If counsel had disclosed the disputes that arose before and during trial–if she had provided contexts for her summary of the government's evidence–then the court would infer that she made a reasoned decision not to identify any potential issue arising from the adverse rulings. Perhaps the defendant did not wish to challenge his conviction, but if so, the brief should have indicated that fact. Accordingly, the court gave appellate counsel 60 days to revise the *Anders* brief to contain a more thorough discussion of potential issues related to the guilt phase of the case.

B. NOTICE OF APPEAL

A motion to reconsider tolls the time limit for filing a notice of appeal. *United States v. Rollins*, ___ F.3d ___ (7th Cir. 2010; No. 09-2293). In prosecution for drug offenses, the defendant filed a motion under Federal Rule of Criminal Procedure 33 seeking a new trial based upon newly discovered evidence. The district court denied the motion, finding that none of the information relied upon in the motion was "newly discovered." The defendant then filed a motion to reconsider, citing Federal Rule of Civil Procedure 59. The judge denied the motion, stating first that Rule 59 does not apply to criminal cases, and second that none of the criminal rules authorizes reconsideration of any decision in a criminal proceeding. The defendant filed a notice of appeal from

the entry of the order denying the motion for reconsideration, but the government argued that the notice of appeal was untimely. They argued that the motion for reconsideration was ineffectual and therefore did not extend the time to appeal from the decision denying the motion for a new trial. The Court of Appeals disagreed. A motion for reconsideration presenting a substantive challenge to the decision makes a district judge's order non-final and postpones the time for appeal until entry of the order on that motion. The time limit for appeals begins anew when the district judge is really finished with the case. Although it is true that the Rules of Criminal Procedure do not authorize a generic motion to reconsider, motions may exist as a matter of general practice. Moreover, several Supreme Court cases have held that motions to reconsider are ordinary elements of federal practice that exist in criminal prosecutions despite their omission from the Rules. The defendant here filed his motion to reconsider within the time available for appeal and sought substantive modification of the judgment. The motion therefore suspended the finality of the district court's order. That the defendant cited Civil Rule 59 was harmless; the Supreme Court precedents and the common law supply all the authority needed. Therefore, the appeal was timely.

The time limits in Rule 4(b) for filing a notice of appeal are not jurisdictional, but rather claim-processing rules, that can be waived or forfeited. *United States v. Neff*, 598 F.3d 320 (7th Cir. 2010; No. 08-3643). Upon consideration of an appeal where the defendant's notice of appeal was untimely filed, but the government did not invoke the time limits in Rule 4(b), the Court of Appeals held it had jurisdiction to consider the appeal. Looking to Supreme Court precedents in other areas, the court noted that only time periods which have a statutory basis may be considered jurisdictional. Rule 4(b) does not have a statutory basis. It was adopted in 1967 and derived from former Federal Rule of Criminal Procedure 37(a)(2). Since the prescribed deadline to file a notice of appeal in a criminal case promulgated in Rule 4(b) is not a Congressionally-created statutory limitation, the court found that the rule was not jurisdictional and is merely a claim-processing rule that can be forfeited.

C. WAIVER

Defendant waived his right to argue on appeal that a photo array was unduly suggestive because trial counsel failed to file a motion to suppress in the district court. *United States v. Acox*, 595 F.3d 729 (7th Cir. 2010; No. 09-1258)**.** In prosecution for bank robbery, the Court of Appeals held that the defendant waived his right to argue on appeal that a photo array was unduly suggestive because trial counsel failed to file a motion to suppress in the district court. Federal Rule of Criminal Procedure 12(e) provides that a party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c), and included among the motions that are covered by the rule are "motions to suppress evidence." The court noted that it often takes evidence from psychology and statistics to decide whether a photo spread or lineup is "unduly suggestive" and, if so whether the suggestiveness is "irreparable." Requiring a motion in the district court allows the record to be made on such questions. Although Rule 52(b) allows for plain error review of some waived error, the court concluded that it would be inappropriate to use Rule 52(b) to undercut an express provision of Rule 12(e), which contains its own safety valve: "For good cause, the court may grant relief from the waiver." However, this "good cause" argument must be made in the district court, not the appellate court. Although the good-cause decision is committed to the district court rather than the court of appeals, such a conclusion does not preclude all possibility of relief when trial counsel never tries to show good cause. A court of appeals still may inquire whether, if a motion for relief had been made and denied, the district court would have abused its discretion in concluding that the defense lacked good cause. In the present case, the defendant did make such an argument, but the record did not show why counsel did not make a pretrial motion to suppress, making in impossible to evaluate or conclude that good cause existed. Accordingly, the Court of Appeals refused to consider the issue, and noted that a collateral attack where new evidence could be presented was the proper way to raise the issue.

IX. RETROACTIVE AMENDMENT

Defendant sentenced pursuant to a plea agreement for a specific sentence was not entitled to a 3582(c)(2) reduction. *United States v. Franklin*, 600 F.3d 893 (7th Cir. 2010; No. 09-2265). Upon appeal from the denial of a 3582(c)(2) motion based upon the retroactive amendment to the crack cocaine guideline, the Court of Appeals held that the defendant's sentence was not "based on" a sentencing range that had subsequently been lowered by the Sentencing Commission. The defendant received a 157 month term of imprisonment pursuant to a (c) agreement he entered with the government. This sentence was 40% lower than the guideline range as contemplated by the parties in the plea agreement. The defendant argued that he should receive a sentence reduction to 40% below the amended guideline range. The Court of Appeals noted that the parties did consider the guidelines range during their negotiations, but they ultimately agreed to a specified term of imprisonment. The statute allows a sentence to be lowered only if it was "based on" the guideline range. Here, the sentence did not meet this requirement. The plea agreement did not state that the 157-month term was based upon the guidelines, and it did not explain how the parties chose the term of imprisonment. Although the term was 40% of the low end of the range as anticipated by the parties, it was not 40% of the low end of the range as ultimately determined by the district court. The court concluded that the plea agreement simply did not reflect an intent to tie the sentence to the guidelines. The court went on to state, however, that its decision did not mean that all (c) plea agreements foreclose retroactive relief. If the plea agreement clearly states that the agreed upon term is somehow based upon the guideline range, such as stating a certain percentage of the guideline range, then the sentence would in fact be "based" on the guideline range. But such was not the case here.

In absence of explicit language in the agreement to the contrary, a sentence imposed pursuant to a Rule 11(c)(1)(C) plea agreement cannot be said to be "based on" the Sentencing Guidelines, thereby precluding retroactive relief for a subsequent guideline amendment. *United States v. Ray*, 598 F.3d 407 (7th Cir. 2010; No. 09-2392).

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

X. SEARCH AND SEIZURE

A. GENERALLY

Detective's search of a seized computer with specialized software did not exceed the scope of the search authorized by a warrant. *United States v. Mann*, 592 F.3d 779 (7th Cir. 2010; No. 08-3041). In prosecution for possession of child pornography, the Court of Appeals held that a detective's search of a seized computer with

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

B. PROBABLE CAUSE

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

XI. SENTENCING

A. CRIME OF VIOLENCE/VIOLENT FELONY

Illinois offense of aggravated battery was a "crime of violence," where charging document indicated the defendant was convicted of the version which required bodily harm. *United States v. Rodriguez-Gomez*, 608 F.3d 969 (7th Cir. 2010; No. 08-3173). In prosecution for illegal reentry, the defendant challenged a 16-level sentencing enhancement based upon a finding that he reentered after a conviction for a "crime of violence." Specifically, he had a prior Illinois conviction for aggravated battery, stemming from an arrest for driving under the influence and leaving the scene of an accident. Although a copy of the charging document was not submitted to the district court, the PSR quoted from the indictment, as offered by the government, which indicated that he was charged with causing bodily harm to two police officers while they attempted to arrest him. To determine whether the offense was a crime of violence, the court must determine whether the aggravated battery conviction has as an element the use of physical, attempted use, or threatened use of physical force–and "physical force" means violent force capable of causing physical pain or injury to another person. The Illinois battery statute provides two ways of committing the offense: bodily harm or physical contact of an insulting or provoking nature. Because there is more than one way to commit battery, the mere fact that the defendant was convicted of the offense does not tell the court whether he committed a crime that necessarily involved force, and the court must determine which prong under which he was convicted. To do so, the court looks to admissions made by the defendant and the charging document, plea agreement, plea colloquy, and comparable judicial records from the conviction. Here, although none of these documents were in the record, the PSR did contain a quotation from the indictment indicating the defendant was convicted of the prong involving physical force. For purposes of plain error review, the unobjected to quotation in the PSR was a sufficient basis to conclude that the defendant was convicted of a "crime of violence."

Under the plain error standard of review, silence in the record about which version of an offense the defendant committed as defined in a "divisible" statute does not warrant reversal of the district court's application of the career offender guideline, because the defendant bears the burden of demonstrating both error and prejudice under this standard of review. *United States v. Ramirez*, 606 F.3d 396 (7th Cir. 2010; No. 09-1815). Upon consideration of a challenge to the defendant's career offender status, the Court of Appeals declined to reverse the district court's determination under the plain error standard of review, notwithstanding the government's confession of error. The defendant had two prior convictions for domestic assault in Texas, which formed the basis of the career offender classification. The defendant did not object to the enhancement in the district court. On appeal, he argued that the offenses were not "crimes of violence." The Court of Appeals noted that the Texas offense is defined as "intentionally, knowingly, or recklessly" causing bodily injury to a family member. Since the use of force is not an element of the offense, it can only be a crime of violence under the residual clause. Given that the offense requires injury to occur, it clearly covers acts that entail a serious risk of injury, but the offense must also be purposeful, which excludes recklessness. Given the three mental states listed in the statute, it is a "divisible" statute as defined by *Woods*. Thus, the court may look to the charging papers, plea colloquy, and other judicial findings or admissions to ascertain the nature of the conviction. However, the record in the federal case was silent as to which version of the offense the defendant committed. The defendant argued that silence in the record required reversal, but the Court of Appeals disagreed when the plain error standard of review was applicable. On plain error review, it is the defendant who has the burden of demonstrating both error and prejudice. The defendant did not meet his burden in this case. The PSR contained information which indicated that the prior offenses were of the intentional type. The defendant did not demonstrate on appeal that those statements were incorrect, nor did he argue that the statements in the PSR were not supportable by sources allowed by *Shephard* and *Taylor*. Therefore, because the defendant failed to show that it was more likely than not that the PSR's description of

events could not be supported under the standards of *Taylor* and *Shephard*, reversal under the plain error standard was not warranted.

Relying on *Spells* and *Sykes*, the Court of Appeals reaffirmed that the Indiana offense of fleeing a police officer in a vehicle is a crime of violence. *United States v. Dunson*, 603 F.3d 1023 (7th Cir. 2010; No. 08-1691). Relying on *Spells* and *Sykes*, the Court of Appeals reaffirmed that the Indiana offense of fleeing a police officer in a vehicle is a crime of violence.

Indiana offense of resisting law enforcement in a vehicle is a violent felony, relying on *Spells*. *United States v. Sykes*, 598 F.3d 334 (7th Cir. 2010; No. 08-3624).

Illinois offense of aggravated fleeing or attempting to elude a police officer is a violent felony. *Welch v. United States*, 604 F.3d 408 (7th Cir. 2010; No. 08-3108). Upon consideration of the denial of a 2255 petition, the Court of Appeals held that the Illinois offense of fleeing or attempting to elude a police officer is a violent felony. The court initially held that the rule announced in *Begay*, that a crime must be similar in kind to the enumerated offenses in order to qualify as a violent felony under the ACCA, was retroactive for purposes of collateral review. Specifically, *Begay* narrowed the scope of the ACCA, and a statutory rule defining the scope of a sentencing enhancement that increases the maximum allowable statutory sentence on the basis of a prior conviction is properly classified as substantive. Next, examining the offense under the residual clause, the court first noted that the offense does not contain an explicit intent term, but a requirement of intentional conduct is implied in the statute. Fleeing implies willfulness, implying a *response* to some stimulus. Accordingly, the statute does require purposeful conduct as required by *Begay*. On the question of whether the proscribed conduct is violent and aggressive, the court noted that the statute allows the offense to be committed in four different ways, to wit, the fleeing is: 1) more than 21 mph over the speed limit; 2) causes bodily injury; 3) causes property damage over $300; or involves disobedience of 2 or more official traffic control devices. Because the charging documents did not indicate which of the four versions the defendant committed, the court had to determine whether all four branches constituted violent felonies. For all of them, the statute requires that the defendant intentionally flee a police officer after having been signaled to stop. Looking to prior precedent, the court previously held in *Spells* that a similar Indiana statute was a violent felony. The court concluded that the Supreme Court's decision in *Chambers* did not disturb the holding in *Spells*. *Chambers* held that failing to report for confinement was not a violent felony, but specifically distinguished that offense from an escape. The court concluded that vehicular fleeing is more akin to escape, where it involves affirmative action on the part of the perpetrator. Moreover, Seventh Circuit precedent in *Dismuke* and *Sykes* both held that post-*Begay*, intentional vehicular fleeing is a violent felony. Judge Posner dissented, however.

Wisconsin offense of criminal trespass to a dwelling is a crime of violence. *United States v. Corner*, 598 F.3d 411 (7th Cir. 2009; No. 08-1033). The Court of Appeals held that the Wisconsin offense of criminal trespass to a dwelling is a crime of violence. That statute provides: "Whoever intentionally enters the dwelling of another without the consent of some person lawfully upon the premises, under circumstances tending to create or provoke a breach of the peace, is guilty of a Class A Misdemeanor." Looking to the residual clause, the court concluded that entering a residence without permission, as in the case of burglary, could lead to an encounter with an occupant, and thereby could create a serious potential risk of injury. The same is true for an offender engaging in criminal trespass to a dwelling. Regarding whether the offense is similar in kind and degree to the enumerated offenses, the court concluded that the offense is similar to burglary. Both are purposeful property offenses that involve the deliberate entry into a dwelling without the permission of the owner. Both offenses are also violent and aggressive in nature because the perpetrator could encounter occupants of the dwelling and provoke confrontation. The fact that the latter offense does not include an intent

to steal or to commit a felony does not lessen the risk of such an encounter. Consequently, the court held that criminal trespass to a dwelling is a crime of violence.

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

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

Wisconsin offense of vehicular fleeing is a violent felony. *United States v. Dismuke*, 593 F.3d 582 (7th Cir. 2010; No. 08-1693). The Court of Appeals held that the Wisconsin offense of vehicular fleeing is a violent felony. The Court of Appeals first held that the statute in question was "divisible," in that it can be committed in one of two ways: 1) fleeing or attempting to elude an officer by willful or wanton disregard of the officer's signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians, and 2) increasing the speed of the operator's vehicle or extinguishing the lights of the vehicle in an attempt to elude or flee. Because the statute was divisible, the court looked to the charging documents to determine which of the two versions the defendant committed, and it concluded he committed the second version of the offense. Next, under the residual clause, the court noted that for the offense to be a crime of violence it must (1) present a serious risk of potential risk of physical injury similar in degree to the enumerated crimes of burglary, arson, extortion, or crimes involving the use of explosives; and (2) involve the same or similar kind of "purposeful, violent, and aggressive" conduct as the enumerated crimes. In the present case, the defendant conceded that the offense satisfied the first criteria, so the court only considered the second question. Regarding the "purposeful" question, the court noted that the offense had a *mens rea* of "knowingly." Although the offense did not require purposefulness as to the infliction of physical harm upon another, this was not necessary. Only the act which creates that risk must be purposeful, and the statute required a "knowing" act

of fleeing, sufficient to satisfy this prong. Regarding whether the offense was similarly "violent and aggressive," the court asked whether the conduct encompassed by the statutory elements of the crime, in the ordinary or typical case, presents a serious potential risk of physical injury and bears sufficient similarity–both in kind and degree of risk posed–to the conduct encompassed by the enumerated offenses. The court concluded that the offense had a similar potential for violence to the enumerated offenses, noting that taking flight in a vehicle calls the officer to give chase, and aside from any accompanying risk to pedestrians and other motorists, such flight dares the officer to needlessly endanger himself in the pursuit. Accordingly, the court concluded that the offense was a violent felony.

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

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

California offense of lewd or lascivious acts involving a person under the age of 14 not a violent felony. *United States v. Goodpasture*, 595 F.3d 670 (7th Cir. 2010; No. 08-3328). In prosecution for being a felon in possession, the Court of Appeals held that the defendant was not an Armed Career Criminal because his California conviction for lewd or lascivious acts involving a person under the age of 14 (Cal. Penal Code 288(a)) was not a "violent felony." Section 288(a) provides, "Any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony." The Court of appeals noted that the prosecution need not show that the child was harmed (physically or mentally) or at risk of harm. Nor need the prosecution show that force or fraud was used or that one participant was older than the other. A person aged 13 or under may be convicted under the statute and, indeed, the petting in which many middle school students engage is a felony in California. The court first concluded that the offense did not have the use of force as an element. Tickling, kissing and fondling involve touching but are not ordinarily understood to involve "force." Although a child cannot give

consent in California, the absence of consent does not turn a light touch into "physical force." Moreover, the kind of force referred to in the ACCA is the kind capable of causing bodily injury, not the kind that poses a psychological risk (the subject of 288(a)). Regarding whether it involved a "serious risk of physical injury," the court noted that *Begay* defines this term in the context of the enumerated offenses. Noting that the Supreme Court held that drunk driving (even when it results in death) and failure to report to prison are not violent or aggressive, it is even harder to classify kissing and fondling as aggressive. Secondly, because only adult convictions count as predicate offenses, the court considered whether the fact that the defendant had to be an adult when convicted of his offense made a difference. A 16-year old can be convicted of the offense (as the statute was written at the time of the offense) so the defendant was at least two years older than the victim. Such an age gap did not convert the offense into a violent felony, however, because the court had held that a two year age difference for a different statute did not convert the offense into a violent felony previously. Finally, the court refused to look at the actual age of the defendant and victim, as opposed to only the proof required by 288(a). The court only asks what the defendant was convicted of, not what he did in fact. And, because there was no argument that the statute was in any way divisible as defined in *Woods*, the government failed to show the offense as "generally committed" meets the criteria of *Begay*. Accordingly, the offense is not a violent felony.

B. GUIDELINES

1. 1B1.3 (RELEVANT CONDUCT)

District court's relevant conduct finding reversed where it neglected to make a finding on the scope of the criminal activity the defendant agreed to jointly undertake. *United States v. Salem*, 597 F.3d 877 (7th Cir. 2010; No. 08-2378). In prosecution for a wire fraud offense, the Court of Appeals reversed the district court's relevant conduct determination because it failed to make a finding on the scope of criminal activity the defendant agreed to jointly undertake. Eleven codefendants participated in a scheme where 2000 victims were tricked into believing that they were purchasing items listed for sale on Internet sites and wired funds to the defendants in amounts in excess of $6 million. The victims never received the items. The district court enhanced the defendants' sentences based on the amount of money involved in the scheme. The defendants argued that the evidence must show that a defendant assisted or agreed to promote a co-conspirator's conduct for such conduct to be within the scope of jointly undertaken activity. Moreover, the district court erred because it neglected to make a finding of jointly undertaken criminal activity before addressing whether their codefendants' conduct was forseeable to them. The Court of Appeals agreed. Actions of co-conspirators that a particular defendant does not assist or agree to promote are generally not within the scope of that defendant's jointly undertaken activity. In applying the relevant conduct guideline, the district court must make a preliminary determination of the scope of the criminal activity the defendant agreed to jointly undertake. Then the court must make a two-part determination of whether the conduct of others was both in furtherance of that joint criminal activity and reasonably foreseeable to the defendant in connection with the joint criminal activity. Here, the district court made findings as to reasonable foreseeability of the co-schemers' acts only; it made no finding as to the scope of the jointly undertaken criminal activity. Although the PSR in the case contained a wealth of information, its focus was on the forseeability of the conduct of others and virtually ignored the scope of the joint criminal activity. Moreover, the district court did not adopt the findings in the PSR, although it did check the box in the Statement of Reasons saying it did so. The court found this to be inadequate because it was merely a pro forma checking of a box on a preprinted form. And the judge signed the "Statement of Reasons" a few days after he imposed the sentences. Although the adoption of a PSR's findings in this manner may suffice under a plain error standard of review, it is inadequate when reviewed for clear error. Even if the court had adopted the findings of the PSR at the time of sentencing, it still would have been insufficient, as the PSR must

define the scope of the activity if the court intends to rely entirely on the PSR. As noted, the PSR did not do so in this case. Accordingly, the court remanded for findings regarding the scope of the jointly undertaken activity.

Evidence must be presented regarding cooking ratio before powder cocaine can be converted into crack weight for sentencing purposes. *United States v. Hines*, 596 F.3d 396 (7th Cir. 2010; No. 08-3255). In prosecution for distribution of crack cocaine, the Court of Appeals reversed the district court's relevant conduct finding, holding that the court improperly used a 1:1 ratio for cooking powder cocaine into crack. The defendant admitted to having bought 1.531 grams of powder cocaine, which the prosecution translated into the identical quantity of crack on the theory that when one cooks a gram of powder cocaine to make crack one ends up with a mixture of substance that has the identical weight. The Court of Appeals noted that the cooking process reduces the weight of the end product, and under ideal conditions the process yields a product which weighs 11% less than what was used at the outset. Morever, the percentage can be much higher for poorer cooks. Therefore, if the government wants the sentencing judge to infer the weight of the crack from the weight of the powder from which the crack was manufactured, it has to present evidence, concerning the cooking process, that would enable a conversion ratio to be estimated. Because no such evidence was presented, the court remanded to the district court for resentencing.

2. 2B1.1(AMOUNT OF LOSS)

District court has discretion to discount the amount of future loss to its present value. *United States v. Peel*, 595 F.3d 763 (7th Cir. 2010; No. 07-3933). In prosecution for bankruptcy fraud, the Court of Appeals held that the district court had discretion to discount the amount of loss to its present value. In a bankruptcy proceeding, the defendant attempted to blackmail his wife into dropping her claim under their marital settlement agreement for a $230,000 lump sum and $2500 a month for the rest of the defendant's life. The district court calculated the defendant's life-expectancy to be 17.5 years, and multiplied this number of months by the monthly payment amount, to come up with a figure of $525,000 payable over those years. He then added this amount to the lump sum for purposes of calculating the amount of intended loss. The defendant argued that the amount based upon the monthly payments should have been discounted to present value, since a smaller sum received today and conservatively invested would yield $525,000 over a period of 17.5 years. Although this is a common method for determining damages in civil cases, it is rarely used in criminal contexts. However, the court found no cases that refused to discount a future loss to present value if asked to do so. Thus, if a defendant presents credible evidence for discounting a stream of future payments to future value, the district court must consider it. In the present case, the defendant presented such expert evidence, demonstrating that the present value of the stream of future monthly payments owed to his ex-wife was $314,000. Had the district court used this amount, the defendant's offense level would have been 2-levels lower. The court finally noted that although the district judge may use the present value of intended loss, it need not give controlling weight to the present-value calculation. Other factors may warrant the district judge using the higher figure, depending on the circumstances of the case. However, because the court was already remanding the case for other reasons, the district court should at least consider the present value argument upon resentencing.

3. 2B1.3(b)(2)(B)(DANGEROUS WEAPON "OTHERWISE USED")

Defendant's sentence could not be enhanced for otherwise using a dangerous weapon during a robbery where he received a 924(c) consecutive sentence, even though the 924(c) conviction was based on firearms used by co-defendants and the improper enhancement was based upon a plastic BB gun used by the defendant. *United States v. Eubanks*, 593 F.3d 645 (7th Cir. 2010; No. 09-1029). In prosecution for bank robbery and 924(c), the Court of Appeals held that the district court improperly enhanced the defendant's

sentence for "otherwise using" a dangerous weapon during a robbery, when he also received a 924(c) consecutive sentence. The defendant robbed a beauty salon with two co-defendants who were armed with semi-automatic pistols. The defendant carried only a plastic BB gun, which he used to beat a victim. The basis for the defendant's 924(c) charge were the pistols possessed by his co-defendants. Additionally, the district court enhanced the defendant's offense level for "otherwise using" a dangerous weapon during the robbery. The district court believed this to be permissible because 924(c) requires use of a firearm, and, according to 18 U.S.C. 921, a BB gun is not a firearm. Because the defendant could not have been sentenced under 924(c) for using the BB gun, his use of the weapon was not subsumed by the 924(c) sentence, and the four-level enhancement was proper. The Court of Appeals disagreed. The court noted that if a defendant is sentenced for using a firearm in furtherance of a violent crime under 924(c), the sentencing court may not enhance the defendant's sentence under the guidelines for the same weapon and the conduct that underlie the 924(c) conviction. And the sentence under 924(c) accounts for all guns used in relation to the underlying offense. Although a defendant may receive both the 924(c) statutory sentence and a guideline enhancement if the enhancement and the statutory sentence are imposed for different underlying conduct, for enhancement purposes, real guns are treated as indistinguishable from fake guns. If the court were to adopt the district court's reasoning, the defendant would be subject to an enhancement under the guidelines for otherwise using the plastic BB gun, but would have been precluded from such an enhancement if he had beat the store owner with a real firearm–an absurd result. Thus, the 924(c) sentence had to account for all the guns used, including the plastic BB gun.

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

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

5. 2D1.1 (DRUG OFFENSES)

Cocaine base does not need to be "cooked" in a specific way in order to constitute the "crack" form of cocaine base. *United States v. Gonzalez*, 608 F.3d 1001 (7th Cir. 2010; No. 08-3528). In prosecution for drug offenses, the Court of Appeals rejected the defendants' arguments that they were not subject to enhanced sentences for distributing the "crack" form of cocaine base. The defendants entered into plea agreements which authorized a sentencing enhancement for cocaine base only if the district judge found that the substance sold by the defendants was cocaine base in the specific form for which enhanced penalties are required as set forth in the *Edwards* case. The defendants interpreted this to mean that the sentencing judge had to find that they had sold crack that had been "produced by mixing cocaine hydorchloride with baking soda and water, boiling the mixture until only a solid substance is left, and allowing it to dry, resulting in a rocklike substance." This is a

quotation from *Edwards*, although the defendants omitted the word "usually" which qualified the definition as stated in the guidelines and *Edwards*. In the present case, the court noted that there was abundant evidence that the cocaine sold by the defendants was crack but little evidence concerning how it had been produced. However, the court held that it was a misreading of *Edwards* to suppose that the identity of the weak base used to produce crack was an element of the court's definition of the word. Different processes can create the same product. The defendants' insistence that Congress, and the court in *Edwards*, were concerned not with the end product of creating crack but with the particular cooking process normally used to transform cocaine hydrochloride into crack is relevant to no conceivable penological concern. Thus, the "street" definition is sufficient to establish a substance is "crack," to wit, "a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form." No expert testimony is needed to establish that a substance meets this definition, and the evidence was sufficient to warrant the enhancements in this case.

6. 2G2.2(b)(3)(F) (DISTRIBUTION OF CHILD PORNOGRAPHY)

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

7. 2G2.2(b)(6) (USE OF A COMPUTER)

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

C. *KIMBROUGH* ISSUES

A district court may consider the crack/powder disparity and vary from the career offender guideline, overruling the circuit's prior precedent in *Welton*. *United States v. Corner*, 598 F.3d 411 (7th Cir. 2010; No. 08-1033). The defendant was convicted of possessing more than five grams of crack and sentenced as a career offender. A panel concluded that the career-offender classification was correct and affirmed the sentence in

light of *Welton*, which held that district courts are not entitled to disagree withe 4B1.1. The effect of *Welton* is that, although judges may disagree with the Guidelines' equation of crack cocaine to 20 or more times the quantity of powder cocaine, they are bound by the crack/powder ratio when the defendant is also a career criminal–because 28 U.S.C. 944(h) requires the Sentencing Commission to ensure that the Guidelines for career offenders are at or near the statutory maximum sentences, and the conversion ratio affects the statutory maximum and minimum sentences under 21 U.S.C. 841. The defendant filed a petition for rehearing *en banc* limited to the question of whether a district judge is entitled to disagree with the career-offender Guideline. The United States confessed error and asked to the court to overrule *Welton.* The Court of Appeals noted that it stood alone in refusing to allow variances for career offenders, and therefore took a fresh look at the issue. It concluded that sentencing judges must implement all statutes, whether or not the judges agree with them–but all 944(h) requires is that the Sentencing Commission set the presumptive sentencing range for certain serial criminals at or near the statutory maximum. Guideline 4B1.1 in turn provides a benchmark that every judge must take into account. The need to consider this reference point does not imply that the sentence must be within the Guideline range–indeed, *Rita* adds that a district judge must not begin with a presumption that each case should be within the range. A sentencing judge needs to understand the Commission's recommendations, but *Booker, Kimbrough,* and *Spears* conclude that a judge who understands what the Commission recommends, and takes account of the multiple criteria in 3553(a), may disagree with the Commission's recommendation categorically, as well as in a particular case. Because 4B1.1 is just a Guideline, judges are as free to disagree with it as they are with 2D1.1(c). No judge is required to sentence at variance from a Guideline, but every judge is at liberty to do so. *Welton* was therefore overruled.

D. MISCELLANEOUS

Court may not impose a sentence below statutory mandatory minimum to account for time spent in custody on a separate, related charge where the defendant had completed his term of imprisonment on that charge. *United States v. Cruz*, 595 F.3d 744 (7th Cir. 2010; No. 08-4194). In prosecution for selling illegal drugs, the Court of Appeals held that the district court could not sentence the defendant to less than the 10-year mandatory minimum sentence to account for 18 months the defendant served on a related state court conviction. The defendant had a prior conviction, considered as relevant conduct, for a state drug offense arising out of the same facts which prompted the federal prosecution. The defendant completed his 18-month term of imprisonment on that charge, but argued at his federal sentencing hearing that he should receive 18 months off his 10-year minimum to account for the time spent in state custody, pursuant to the Seventh Circuit's decision in *United States v. Ross*, 219 F.3d 592 (7th Cir. 2000). The district court refused. On appeal the government conceded error, but the Court of Appeals nevertheless affirmed. The court noted that only two instances allow a court to sentence a defendant to less than the statutory mandatory minimum, *i.e.*, safety valve or a 3553(e) cooperation motion. Although a court may impose concurrent sentences for two or more crimes arising from the same course of conduct, the sentence on the federal charge must still not be less than the minimum. Moreover, in the present case, the defendant had completely served his time on the state charge, so there was nothing to run the federal sentence concurrent with. *Ross* did not support the defendant's position. In *Ross*, the judge made the defendant's sentence run concurrently with a state sentence for related conduct. He had served 34 months of his state sentence and the court held that the judge could deduct that number of months from the federal sentence so long as the combined length of the state and federal prison sentences was not less than the federal statutory minimum. The federal sentence was for a gun offense in violation of 18 U.S.C. 924, which provides that certain violators "shall be imprisoned . . . not less than fifteen years," and the court pointed out in *Ross* that "the statute does not specify any particular way in which the imprisonment should be achieved." In the present case, however, the statute provides that the offender "shall be *sentenced* to a term of imprisonment which may not be less than 10 years." The language does not permit a shorter sentence to be imposed. Finally,

the defendant in *Ross* had not finished his federal term. Accordingly, the district court was required to impose the 10-year sentence and could not discount the time spent in state custody.

It is plain error for a district court to order a defendant to pay his fine and special assessments through the Inmate Financial Responsibility Program, as that programs is voluntary. *United States v. Boyd*, 608 F.3d 331 (7th Cir. 2010; No. 09-1425). At sentencing, the district court ordered the defendant to pay his fine and special assessments through the Inmate Financial Responsibility Program. Although the defendant did not object at sentencing, the defendant on appeal argued that the district court erred in compelling him to participate in the program, given that the program is voluntary. The Court of Appeals agreed, noting that participation in the program cannot be compelled. On the question of whether the error was plain, the Court of Appeals concluded that it was. The court overstepped its bounds when it ordered the defendant to participate in the program. That term of the judgment cannot be enforced as written, and the BOP cannot look to it as authority for compelling the defendant to participate in the program. The court declined, however, to remand the case for full resentencing. Rather, it held that a simple modification in the district judgment will suffice to correct the error, and the court consequently affirmed the sentence as modified.

E. REASONABLENESS REVIEW

Sentence procedurally unreasonable where the district judge failed to adequately consider the defendant's argument that a variance was appropriate in order to avoid unwarranted disparity. *United States v. Panice*, 598 F.3d 426 (7th Cir. 2010; No. 08-3323). In prosecution for large scale white collar crimes, the district court sentenced the defendant to 360 months's imprisonment. The defendant argued at sentencing that a variance would be appropriate in order to avoid unwarranted disparity. The judge, however, was not receptive to considering the need to avoid unwarranted sentence disparities, and stopped the defendant's lawyer short as he was trying to make a comparison to Conrad Black, who was convicted by a jury of mail and wire fraud and obstruction of justice. That case, coming out of the same district and having more loss than the defendant, resulted in a 78 month prison sentence. Likewise, the defendant identified several other similar cases involving large scale frauds where the defendants received considerably lower sentences that himself. The Court of Appeals held that the district court did not give adequate consideration to the disparities between the defendant's sentence and those given to the other white collar criminals the defendant identified. Although a sentencing judge need not articulate the 3553(a) factors in a checklist fashion, the judge is required to consider the 3553(a) factors and to address any substantial arguments the defendant made. Here, it was not clear the judge gave adequate consideration to the defendant's argument, and the case was therefore remanded for resentencing.

Sentence 142 months below the low end of the guidelines procedurally unreasonable because the district court failed to make sufficient factual findings to support the variance. *United States v. Brown*, ___ F.3d ___ (7th Cir. 2010; No. 09-1028). In prosecution for drug offenses, the Court of Appeals held that the district court's variance of 142 months below the low end of the guidelines was procedurally unreasonable. In its short explanation of the variance, the district court mentioned the defendant's age (40 years old), the short length of his previous state sentences (he was a career offender), and the conditions of his upbringing. Although noting that the court invoked several relevant sentencing factors, its brief explanation for departing from the guidelines fell far short of what *Gall* requires. In justifying the sentence, the district court began by citing the fact that the defendant was 40 years old as something that supported a lower sentence. Yet the court never made any attempt to explain how his age was pertinent to any legitimate sentencing consideration. Likewise, regarding the other factors the court mentioned, it never linked those factors with why they supported a lower sentence. Moreover,

several of the court's comments at the hearing actually supported a lengthier sentence. Accordingly, while not commenting on the substantive reasonableness of the sentence, the court remanded to the district court for resentencing, concluding that the district court failed to articulate the necessary justification for such a sizable departure from the guidelines.

Sentence 50% above the high end of the guideline range for travel in interstate commerce to have sex with a minor was unreasonable where the district court based the variance on unsupported assumptions about recidivism and deterrence for sex offenders. *United States v. Miller*, 601 F.3d 734 (7th Cir. 2010; No. 09-2791). In prosecution for travel in interstate commerce to engage in sex with a minor, the Court of Appeals held that the district court's variance of 50% above the high end of the range was unreasonable because it was unsupported by the record. The defendant, a 33-year old female, traveled to have sex with a 14-year old female. At sentencing, the district court varied upward to the statutory maximum, stating that the recidivism rate for child sex offenders was massive and that deterrence did not work with such offenders. The Court of Appeals noted that a major departure should be supported by a more significant justification than a minor one. The judge must give a justification that explains and supports the magnitude of the variance. Here, the reasons cited by the judge, if true, would apply to all sex offenders, not just the defendant. An above guidelines sentence is more likely to be reasonable if it is based on factors that are sufficiently particularized to the individual circumstances of the case rather than factors common to offenders with like crimes. Moreover, neither party presented evidence that supported the district court's views about recidivism and deterrence of sex offenders, nor did the court provide any support for them. The court's comments were also contrary to studies previously cited by the Seventh Circuit to the contrary. Given that the judge's comments were certainly subject to debate and the absence in the record to support the judge's view, the court failed to provide sufficient support for its variance. Thus, the case was remanded for re-sentencing.

Before varying upward based on additional crimes the defendant committed, a district court should analyze what the guideline range would be had the defendant actually been charged with the other crimes to avoid unwarranted disparity. *United States v. Kirkpatrick*, 589 F.3d 414 (7th Cir. 2009; No. 09-2382). After the defendant was arrested for being a felon in possession, the defendant confessed to four murders and for placing a contract hit out on the federal agent investigating his case. After 200 hours of investigative work, authorities concluded that the defendant had lied about everything. The defendant's guideline range was 37 to 46 months, but the judge sentenced him to 108 for lying to the authorities, close to the 120-month maximum. The defendant argued that an extra five years for his conduct was too much. The Court of Appeals found that the district court appeared to select the sentence arbitrarily. Leaping close to the statutory maximum creates a risk of unwarranted disparity with how similar offenders fare elsewhere–not only because this overpunishes braggadocio, but also because it leaves little room for the marginal deterrence of persons whose additional deeds are more serious (for example, *actually* putting out a contract on an agent's life). Before *Booker*, departures had to be explained in the Guidelines' own terms. Thus if the district court's reason for an upward departure was an additional crime, the departure could not exceed the incremental sentence that would have been appropriate had the defendant been charged with, and convicted of, that additional crime. Although the Guidelines are now advisory, a judge must still start by using the Guidelines to provide a benchmark that curtails unwarranted disparity. When a judge believes that extra crimes justify extra punishment, it is wise to see how much incremental punishment the Sentencing Commission recommends. In the present case, applying all the Guideline enhancements assuming the defendant had been convicted of lying to federal agents, his guideline range would have been 57 to 71 months. For his ultimate sentence to be within a guideline range, the defendant would have had to actually set out to have the case agent murdered. *Booker* means a guideline range of 57 to 71 months is only a non-conclusive recommendation. But before exercising discretion the judge should know what the recommendation is, and thus how the defendant's sentence will compare with the punishment of similar persons elsewhere. Accordingly, the court remanded the case for re-sentencing.

F. STATUTORY ISSUES

Government's failure to file an 851 notice did not prejudice the defendant where he was fully aware of his prior convictions and the enhanced sentence to which he was subject. *United States v. Lewis*, 597 F.3d 1345 (7th Cir. 2010; No. 08-3278). In prosecution for drug offense, the defendant argued that the district court improperly sentenced him to a 20-year statutory maximum penalty where the government did not file an 851 notice which subjected him to that sentence. The Court of Appeals held that the failure to file the notice was an error, but not one it would correct under plain error review. The prior conviction was mentioned many times during the proceedings. The defendant was advised of the enhanced penalty at his arraignment, the prior conviction was the subject of two motions in limine, and the defendant acknowledged the mandatory minimum sentence prior to sentencing. Given that the two main purposes of the 851 information requirement are to give a defendant an opportunity to contest the accuracy of his prior convictions and to inform his decision on whether to plead guilty or proceed to trial, both of these purposes were met in this case. The government's failure to file the 851 information was a slipup, but it did not change the fact that the defendant had full knowledge of his prior conviction and the penalty he faced.

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

XII. SUPERVISED RELEASE

A. CONDITIONS

Court did not err imposing special condition of supervised release barring defendant from personal access to Internet services where he used the Internet to commit his crimes and a computer was not essential to his occupation. *United States v. Angle*, 598 F.3d 392 (7th Cir. 2010; No. 08-2087). In prosecution for possession and receipt of child pornography and child enticement, the Court of Appeals affirmed a special condition of supervised release barring the defendant personal access to the Internet. The defendant had used the Internet in his crime of conviction, as well as several other times to commit relevant conduct. The Court of Appeals noted that although it had previously expressed skepticism about the reasonableness of banning Internet use entirely, such a condition can be justified if the Internet was used to commit the crime of conviction, as it had been in the present case. Moreover, the use of the Internet was not integral to the defendant's profession. Finally, the ban on Internet use was not complete; it disallowed only "personal" access to the Internet. Accordingly, given the circumstances of the case, the condition was permissible.

B. REVOCATION

When filing an *Anders* brief after appeal from the revocation of supervised release, appellate counsel need not address whether supervision was properly revoked where the defendant only seeks to challenge his sentence. *United States v. Wheaton*, ___ F.3d ___ (7th Cir. 2010; No. 09-3171). Upon consideration of an *Anders* brief filed on appeal after the revocation of the defendant's supervised release, the Court of Appeals held that appellate counsel need not discuss the validity of the revocation where the defendant seeks only to

challenge the sentence imposed upon revocation. Citing *United States v. Knox*, 287 F.3d 667 (7th Cir. 2002), the court noted that upon appeal of a conviction, when defense counsel files an *Anders* brief, he is required to inquire of the appellant whether he seeks to challenge any aspects of his conviction, or only his sentence. Where the defendant indicates he only wishes to challenge his sentence, counsel should not discuss the validity of the defendant's conviction in an *Anders* brief. For the first time in this case, the court extended the *Knox* procedure to supervised release revocations. Only if the defendant seeks to challenge the validity of his revocation should the validity thereof be discussed. Otherwise, counsel should limit his analysis to the sentence imposed, while indicating that the defendant does not seek to challenge on appeal the validity of the revocation itself.

Federal Rule of Criminal Procedure 32.1(b)(2) prohibits a judge from participating in a revocation hearing via videoconferencing technology. *United States v. Thompson*, 599 F.3d 595 (7th Cir. 2010; No. 09-1926). At the defendant's revocation of supervised release hearing, although the defendant, defense attorney, and prosecutor were personally present in the courtroom, the judge participated from Key West, Florida via videoconference. Rule 32.1(b)(2) provides that before revoking a defendant's supervised release, the court must give the defendant "an opportunity to appear" for purposes of presenting evidence, questioning witnesses, arguing in mitigation, and making a statement to the court. The defendant argued that the "appearance" mandated by Rule 32.1(b)(2) requires the defendant and the judge to be physically present in the same courtroom. The Court of Appeals agreed. As used in this context, the word "appear" means "to come forward before an authoritative body," suggesting that this only occurs if the defendant comes into physical–not virtual–presence of the judge. The face-to-face meeting between the defendant and the judge permits the judge to experience those impressions gleaned through any personal confrontation in which one attempts to assess the credibility or to evaluate the true moral fiber of another. Without this personal interaction between the judge and the defendant–which videoconferencing cannot fully replicate–the force of the other rights guaranteed by Rule 32.1(b)(2) is diminished. This interpretation is supported by the fact that where videoconferencing is permitted in the rules (Rules 5 and 10), it is permitted only with the consent of the defendant. Given that the technology is permitted only pursuant to a specifically enumerated exception and with the defendant's consent demonstrates that the use of the technology is the exception to the rule. Finally, although the violation was subject to harmless error review, the court had no way of knowing what the judge would have done had he been present in court and face-to-face with the defendant, thereby precluding a finding of harmless error.

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