The BACK BENCHER

Central District of Illinois Federal Defenders

Vol. No. 42 Fall 2007

DEFENDER'S MESSAGE

Although former Illinois Governor George H. Ryan, Sr. was convicted of multiple violations of federal law, including racketeering conspiracy, mail fraud, obstruction of justice, money laundering, and tax violations, he remained free throughout his trial and while his case was pending on appeal. Some mused that Ryan's freedom was due to favoritism and political chicanery, anticipating that his status as a former governor would result in him "getting off." However, on October 25, 2007, the court of appeals denied his petition for a rehearing of his case *en banc, i.e.* by all 11 active judges on the court, and he will presumably begin to serve his prison sentence soon. The court's decision should dispel the notion held by some that the criminal justice system can be manipulated by the rich or powerful. Indeed, a careful examination of Ryan's case demonstrates that his freedom while his case was pending was the result of his right to due process of law, not favoritism.

As even a rookie federal criminal practitioner knows, the standard for whether a defendant should be incarcerated while his case is pending in the district court is whether he is a risk of flight or a danger to the community. Given Ryan's age and obvious ties to Illinois, the court correctly concluded he was no risk of flight. Likewise, although the corruption crimes with which Ryan was charged are serious, he is no longer governor and there was consequently no risk that he would–or even could–present a danger to the community through the commission of future crimes. Most individuals charged with "white collar crimes" remain free on bail, and in this sense, Ryan's freedom while his case was pending in the trial court is unremarkable. Certainly, there was no favoritism here.

Once an individual is actually found guilty by the jury, it is less common that he will remain free. However, a defendant's due process rights are not extinguished by a jury's guilty verdict. Rather, Ryan and all criminal defendants retain their right to due process of law until they have exhausted their appellate remedies. Thus, a defendant may remain free after conviction if he appeals, his appeal raises a substantial question likely to result in a reversal or new trial (a difficult standard to meet), and he continues to pose no risk of flight or danger to the community. Ryan's case easily meets this standard, and the appellate court was right to grant his motion for release pending appeal despite many pundits' thoughts to the contrary.

Specifically, Ryan argued on appeal that he was deprived of a fair trial because of serious irregularities in the jury's deliberations. Some of the unusual facts surrounding the jury deliberations include: (1) a "holdout" juror was purportedly threatened by other jurors with a charge of bribery; (2) a juror brought her own legal research into the jury room against the court's instructions; (3) background checks were conducted on the jurors during deliberations after a newspaper article revealed that some jurors lied during *voir dire* concerning their own prior criminal convictions; (4) the judge found that a majority of the jurors had lied during *voir dire*; and (5) jurors were granted immunity from prosecution by the U.S. Attorney's office after they were interrogated by the district judge and informed that they faced possible perjury charges. This is but a sampling of the facts which formed the basis of Ryan's appeal. The circus-like nature of the jury deliberations in Ryan's case raised the real possibility that his case would be sent back for a new trial. Indeed, any one of the facts listed above would call a conviction into question in a typical case.

As we know now, however, two of the three judges considering Ryan's case decided that the dysfunctional jury deliberations were not sufficient to overturn his convictions. One judge, however, wrote a vigorous dissent, positing that the majority opinion's affirmance of Ryan's convictions was the result of "the natural human desire to bring an end to the massive expenditure of time and resources occasioned by this trial–to the detriment of the defendants." He went on to state that "if this case had been a six-day trial, rather than a six-month trial, a mistrial would have been swiftly declared.

It should have been here." This writer does not intend to debate the merits of the majority and dissenting opinions in Ryan's case, but wishes only to note that the questions raised in his case were sufficiently complex to create a difference of opinion among the judges considering his case. Given that even the judges could not agree, the decision to allow him to remain free during his appeal is shown to be correct because his appeal indeed raised a substantial question.

Although Ryan's conviction was affirmed, he exercised one of the few remaining appellate remedies available to him*, i.e.* still sought full due process. Specifically, he asked all eleven active judges on the court to reconsider his case in an *en banc* hearing. In a very rare ruling, the appellate court allowed Ryan to stay out of prison while it considered his petition. But, as already noted above, the divided, complex, and controversial nature of the court's opinion in Ryan's case created a distinct possibility that the full court would rehear his case and could even conceivably order a new trial. Accordingly, the uncertain permanence of the majority opinion, and not favoritism, was the impetus for the court's decision to allow Ryan to remain free for the time being. Ultimately, the full court decided not to reconsider Ryan's case (with three judges dissenting from that decision), but that decision does not alter the fact that at the time Ryan petitioned for rehearing, the outcome of his case was uncertain enough to justify his continued freedom while his case was under consideration.

It is easy to cry foul in a case where a politician is accused. In a state where three out of our last seven governors have been convicted of one crime or another, it is easy for the citizenry to become cynical and tempted to conclude that former

governor Ryan received special treatment through political influence. However, the facts noted above show otherwise. Moreover, the circumstances of another former governor's conviction on corruption charges should make one pause before too quickly concluding that a man should be put in prison before he has received all the process he is due.

Former Illinois Governor Otto Kerner became governor in 1960 and remained so until 1968, when he resigned to become a judge on the Seventh Circuit–the very court that heard Ryan's appeal. In yet another ironic connection to the Ryan case, former Illinois Governor James Thompson, then U.S. Attorney for the Northern District of Illinois, and now defense counsel for Ryan, prosecuted Kerner for defrauding Illinois citizens of their right to honest and faithful service by a public official. According to the prosecution, Kerner committed mail fraud under this "intangible rights" theory when he approved government funded projects benefiting a racetrack in exchange for stock in the enterprise. Although he went to his grave denying the charge, the jury convicted him and he was sentenced to three years in federal prison.

It may have looked to some like justice was done, but eleven years after Kerner's death, the United States Supreme Court found unconstitutional the "intangible rights" theory used to convict Kerner. In *McNally v. United States*, 483 U.S. 350 (1987), the Court held that the mail fraud statute under which Kerner was convicted made no reference to the "intangible right of the citizenry to good government" and that a conviction under this theory is invalid. Had Kerner been alive when the decision came down, he would have undoubtedly been exonerated. Unfortunately, justice came too late for him.

Former Governor Ryan, like former Governor Kerner and all criminal defendants, is entitled to due process of all law at every stage of the judicial process. Given Ryan's age and years of service to the public, justice was served when the judicial process is hesitant to punish a man before ensuring that he was duly convicted by a jury of his peers in a fair manner. Until the court of appeals definitively made that determination, it was right for Ryan to remain free–not because of favoritism, but because of due process of law.

Sincerely yours,

Richard H. Parsons
Federal Public Defender
Central District of Illinois

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REST IN PEACE, DON ESPINOZA

Our long-time investigator and good friend, Don Espinoza, passed away on June 25, 2007 at his home. Don was a United States Navy veteran of the Vietnam War, a former police officer for the Pekin and LaSalle Police Departments, and was on special assignment with the United States Attorney's Office for the Central District of Illinois for a number of years.

Twelve years ago, when Mr. Parsons was appointed as the first Federal Public Defender for the Central District of Illinois, Don was one of the first people he brought on board as an investigator. Since that time, Don was an integral part of our team. Throughout the years, Don's hearty laugh echoed in our hallways, and his big smile brightened our days. We will always remember his warmth, his humor, his firm friendship, and his devotion to family. He never met a stranger, showed a genuine concern for our clients, and was a happy warrior on their behalf. Don was much more than our co-worker–he was our friend. We all miss him greatly, but we hold our fond memories of him in our hearts forever.

WELCOME ABOARD!

We would like to welcome two attorneys who joined our Federal Defender team in September.

William C. Zukosky is a staff attorney with a duty station in our Urbana, Illinois Division, and he will be assisting with motions, trials, and appeals. Bill comes to us with 30 years of experience as a lawyer. He spent nearly 15 years in private practice and 15 years with legal services. During that time, he handled numerous trials, appeals, and administrative hearings. He is originally from Wenona, Illinois and spent several years in the Champaign-Urbana area. Most recently, he lived in Flagstaff, Arizona working as the Litigation Director for the People's Legal Services.

Dan C. Cook is a staff attorney with a duty station in our Springfield, Illinois Division, and his primary duties involve litigating appeals appointed to our office by the Seventh Circuit. Dan is from Gillespie, Illinois, which is just a short distance from Springfield. He went to college at Millikin University in Decatur, where he graduated *Summa Cum Laude* with a degree in Political Science. He then went to the University of Minnesota for law school, where he graduated *Magna Cum Laude* and Order of the Coif. After law school, he clerked for a state court judge in Georgia, and then took a position as a staff attorney with the 11th Circuit Court of Appeals.

Position Annoucement:
Assistant Federal Public Defender

The Federal Public Defender for the Central District of Illinois has an opening for an Assistant Federal Public Defender in our Springfield, Illinois Division. Significant federal and trial experience is required. Please see the "Position Announcement" at the back of this issue for the listing of job duties, necessary qualifications, and information on how to apply.

CHURCHILLIANA

"I have no fear of the future. Let us go forward into its mysteries, let us tear aside the veils which hide it from our eyes, and let us move onward with confidence and courage. All the problems of the post-war world, some of which seem so baffling now, will be easier of solution once decisive victory has been gained, and once it is clear that victory won in arms has not been cast away by folly or by violence when the moment comes to lay the broad foundations of the future world order, and it is time to speak great words of peace and truth to all."

--Winston S. Churchill
Royal Albert Hall
September 29, 1943

Dictum Du Jour

"The idea that general reprisals upon the civil population and vicarious examples would be consonant with our whole outlook upon the world and with our name, reputation and principles, is, of course, one which should never be accepted in any way. We have, therefore, very great difficulties in conducting squalid warfare with terrorists. That is why I would venture to submit to the House that every effort should be made to avoid getting into warfare with terrorists; and if warfare with terrorists has broken out, every effort should be made–I exclude no reasonable proposal–to bring it to an end."

–Winston S. Churchill
House of Commons
January 31, 1947

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"In February 2006, Richard Leigh and Michael Baigent sued Random House, in the British High Court, claiming that Dan Brown's best-selling novel, *The Da Vinci Code* (DVC), had copied the central ideas of their 1982 nonfiction book, *Holy Blood & Holy Grail* (HBHG), also published by Random House. Baigent and Leigh argued that DVC appropriated 'the whole architecture' of their theory that Jesus and Mary Magdalene were married and that their bloodline lasts to this day. Because copyright infringement is notoriously difficult to prove, many legal pundits were skeptical as to the plaintiffs' case. Intense media interest faded as the trial progressed and evidence against Brown appeared to be weak. During testimony, Baigent was forced to retract a number of his claims, and the eventual ruling in Brown's favor was widely considered to be a foregone conclusion. (At the time of writing, Baigent and Leigh had pledged an appeal against the verdict). Unusually, Mr. Justice Peter Smith, the presiding judge, entered into the spirit of the case–inserting into his 71-page formal judgment a set of seemingly random letters, singled out in bold italic type: *s,m,i,t,h,y,c,o,d,e,J,a,e,i,e,s,t,o,s,t,g,p,s,a,c,g,r,e,a,m,q,w,f k,a,d,p,m,q,z,v,z.* A London lawyer, Dan Tench, spotted these anomalies and soon, after hints from the judge to refer to his *Who's Who* entry and employ the Fibonacci sequence, journalists uncovered the disappointingly naval message '*Smith Code Jackie Fisher who are you Dreadnought.'* It seems that this statement refers only to Justice Smith's passion for obscure Royal Navy history and not, as hoped, the meaning of life."

–Ben Schott, *Schott's Almanac 2007*

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"The worst aspect of the Korean War, wrote Lieutenant Colonel George Russell, a battalion commander with the Twenty-third Regiment of the Second Infantry Division, 'was Korea itself.' For an army that was so dependent on its industrial production and the resulting military hardware, especially tanks, it was the worst kind of terrain. Countries like Spain and Switzerland had difficult mountain ranges, but these soon opened onto flat areas where industrially powerful nations might send their tanks. To American eyes, however, as Russell put it, in Korea 'on the other side of every mountain [was] another mountain.' If there was a color to Korea, Russell claimed, 'it came in all shades of brown'–and if there was a campaign ribbon given out for service there, he added, all the GIs who fought there would have bet on the color being brown."

–David Halberstam, *The Coldest Winter*

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"Love is not an emotion, it is your very nature."

--Ravi Shankar

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"Everyone needs two caddies. One to carry your clubs, the other to watch your opponent to make sure he doesn't cheat."

--Oliver August

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"The sun don't shine on the same dog's back all the time."

-- Sam Snead

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"This case is unbelievably frivolous. We AFFIRM."

--U.S. v. States
(No. 06-2345; unpublished opinion, September 24, 2007).

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"It's undisputed: George Brett was a great baseball player. The statistics from his 21 years in The Show, all with the Kansas City Royals, seal the deal: 3,154 hits, 317 home runs, and a career batting average of .305. Only three other players—Stan Musial, Hank Aaron, and Willie Mays—ended their careers with more than 3,000 hits and 300 home runs, while still maintaining a lifetime batting average over .300. Brett's selection to the Hall of Fame, on the first ballot in 1999, was richly deserved. Yet for all his accomplishments, many who love baseball will always think of the "Pine Tar Incident" as the capstone of his career. It is a joy to recall.

It was July 24, 1983, and the Royals, trailing 4-3 to the New York Yankees, had a man on first but were down to their final out in the top half of the ninth inning. Brett was at the plate. The Yankees' ace closer, 'Goose' Gossage, was on the mound. And Brett crushed an 0-1 fastball over the 353-foot mark into the right field seats, giving Kansas City the lead, 5-4. Pandemonium broke out in the Royals' dugout. The Yankee Stadium crowd fell silent. But things were about to change.

While the Royals were celebrating, the Yankees' fiery manager, Billy Martin, walked calmly (unusual for him) to home plate where he engaged the umpire, Tim McClelland, in quiet conversation. Martin pointed to an

obscure rule (and we sometimes think the Federal Rules of Appellate Procedure are obscure!), which provides that any substance (including pine tar) that a player might rub on his bat handle for a better grip cannot extend more than 18 inches. See Major League Baseball Official Rules § 1.10(b). Martin, pointing to a lot of pine tar on the bat Brett left behind as he circled the bases, asked McClelland to check it out. McClelland, using home plate as a ruler, determined that pine tar covered 24 inches of the bat handle. So the bat, McClelland ruled, was illegal.

With his ruling ready for delivery, McClelland took a few steps toward the jubilant Royals' dugout and gave the signal: for using an illegal bat, the home run was nullified, and Brett was out. Game over. Yankees win 4-3. And all hell broke loose. An infuriated George Brett charged out of the dugout and rushed McClelland as Martin, who looked like the cat who ate the canary, stood off to the side. It was one of the great all-time rhubarbs in baseball history. And that's how it ended, at least for July 24, 1983.

But baseball, like our legal system, has appellate review. The Royals protested the game and, as luck would have it, American League President Lee MacPhail (to use a phrase with which we are accustomed) 'reversed and remanded for further proceedings.' The game resumed three weeks later with Kansas City ahead, 5-4. It ended after 12 minutes when Royals' closer Dan Quisenberry shut the door on the Yankees in their half of the ninth to seal the win. The whole colorful episode is preserved, in all its glory, on YouTube, at http://www.youtube.com/watch?v=4Cu1WXylkto (last visited June 6, 2007). See also Retrosheet Boxscore, Kansas City Royals 5, New York Yankees 4, at http://www.retrosheet.org/boxesetc/1983/B07240NYA1983.htm (last visited June 6, 2007).

And so, at last, we come to this case which presents another (albeit a less compelling) appeal of a dispute involving George Brett and a baseball bat."

–Central Mfg., Inc. v. Brett,
492 F.3d 876, 876-79 (7th Cir. 2007).

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"Meet Pull My Finger® Fred. He is a white, middle-aged, overweight man with black hair and a receding hairline, sitting in an armchair wearing a white tank top and blue pants. Fred is a plush doll and when one squeezes Fred's extended finger on his right hand, he farts. He also makes somewhat crude, somewhat funny statements about the bodily noises he emits, such as 'Did somebody step on a duck?' or 'Silent but deadly.'

Fartman could be Fred's twin. Fartman, also a plush doll, is a white, middle-aged, overweight man with black hair and a receding hairline, sitting in an armchair wearing a white tank top and blue pants. Fartman (as his name suggests) also farts when one squeezes his extended finger; he too cracks jokes about the bodily function. Two of Fartman's seven jokes are the same as two of the 10 spoken by Fred. Needless to say, Tekky Toys, which manufactures Fred, was not happy when Novelty, Inc., began producing Fartman, nor about Novelty's production of a farting Santa doll sold under the name Pull-My-Finger Santa."

–JCW Investments, Inc. v. Novelty, Inc.,
482 F.3d 910, 912-913 (7th Cir. 2007).

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"This case concerns the corrupt, Machiavellian world of permit parking at the University of Illinois's Urbana-Champaign campus, and the ill fortune of a student who became involved in it."

–Brewer v. Board of Trustees of the University of Illinois, 479 F.3d 908, 909 (7th Cir. 2007).

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"Because the Hawkinses' trial lawyers either do not read judicial opinions or do not understand them, or cannot distinguish a majority from a dissenting opinion, or are 'in denial,' or are '*Booker* protesters,' they insist that a judge cannot be allowed to base a sentence on any facts other than those determined by the jury. As a result, they failed to raise the objection now pressed on us by Gerard Hawkins's appellate lawyer (that, as we are about to see, the presentence investigation report is unreliable on the amount of loss). This demonstrates that a lawyer's obsessions can harm his clients."

–U.S. v. Hawkins,
480 F.3d 476, 477-78 (7th Cir. 2007).

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"This case involves some of the most convoluted complicated issues that legal minds can produce; what started out as a relatively simple class action evolved into battles among lawyers, suits and countersuits, settlement fights, multi-state and multi-court cases that finally bore more resemblance to a Pier-10 brawl than legal actions."

–Sanchez & Daniels v. Koresko,
___ F.3d ___ (7th Cir. 2007; No. 07-1228).

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"John Boyle is no stranger to corrupt Chicago politics. He was convicted in 1992 of embezzling millions of dollars in change—that's in change, not and change—from the state of Illinois while serving as president of the Public Armored Car Company, which retrieved, transported, and stored quarters and other coins for the Illinois Tollway Authority. That earned him a federal prison sentence and a nickname straight out of *Goodfellas*: John "Quarters" Boyle."

–U.S. v. Boyle,
484 F.3d 943, 943-44 (7th Cir. 2007).

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"A lawyer who does not show up for trial might as well be a moose, and giving the defendant a moose does not satisfy the sixth amendment."

–Nunez v. U.S.,
495 F.3d 544, 546 (7th Cir. 2007).

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"Trial by ambush has absolutely nothing to recommend itself to the judicial process."

–U.S. v. Loggins,
486 F.3d 977, 988 (7th Cir. 2007; Rovner, J., concurring).

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"Amanda Wortman made several mistakes, but her biggest, by far, was getting mixed up with Ryan McDonald. It seems reasonable to suspect that most women want to steer clear of guys who possess kiddie porn and harbored 'thoughts . . . about wanting to do certain things with children.' But not Wortman. And to top it off, McDonald was a wimp. He was 'afraid' to break the CD because, as he said, he feared it might 'cut my hand.' If having poor judgment in picking a boyfriend was a crime, Wortman would be guilty as charged. But that is not what the government, in what to me looks like a poor exercise of its vast prosecutorial discretion, charged her with. Because I believe the evidence failed, as a matter of law, to demonstrate that Wortman had the requisite intent to violate 18 U.S.C. § 1519 when, in the heat of the moment, she snatched the CD from McDonald and did what he was too afraid to do, I would reverse her conviction."

–U.S. v. Wortman,
488 F.3d 752, 755 (7th Cir. 2007; Evans, J., dissenting).

[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 from. Last month we reprinted Chapters 1 and 2, and we are continuing the series now with Chapters 3 and 4.*

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

WILKES: His Life and Crimes

A Novel by: Winston Schoonover

- 5 -

"Take All You Can Get"

One should always play fairly - when one has the winning cards!

- Oscar Wilde

A continuance is absolutely mandatory in order that I personally be able to interview each of the fornicatrices.

- John Wilkes

I'm a good one at daydreaming. I love to daydream. I get totally lost in my daydreams. Most times I'm reliving a memory just as vividly as if it were an experience happening at this instant. It's weird what triggers my dreaming. An offbeat remark, something out of place, or even a smell can launch me into reverie.

Wilkes's comment about hiding things got me to thinking about the 1950s, about Wilkes and me.

It was 1956, and Wilkes was suffering from another case of the "I-need-a-continuance blues," better known as phase three of the Old Wine Defense. He was representing a short, skinny, sleazy two-bit pimp named Hank "The Lizard" Gidone, a crook who got his nickname for his reptilian puss, nervous demeanor, and leathery hide.

The Lizard was scheduled for trial on charges of procuring the services of seventy-two women of easy virtue for thousands of New York Johnnies. The indictment looked like a telephone book. The evidence against him was overwhelming. The Lizard had cheated and abused his women so egregiously that all of them readily agreed to turn state's evidence. Seventy-two Jezebels were soon to wear that most respectable courtroom mantle, that of the wronged fornicatrix.

Old Wine Defense

Wilkes was none too anxious to see the ladies on the stand. He needed a continuance desperately. So said my friend to the Honorable Henry "Red" Fox: "Your Honor, I have to interview seventy-two tarts, and Mr. Condo, my intrepid investigator, must investigate their rather extensive criminal histories. I need six months."

"That'll be denied," sang the judge.

A week later, Wilkes came back with phase two of the Old Wine Defense. He told Judge Fox, "I'm afraid I have an irreconcilable difference over the handling of the case. I regret that I am unable to reveal the nature of the conflict to you, but you surely understand my dilemma. I ask to be relieved."

"Mr. Wilkes," answered Red Fox, "You can relieve yourself by going to the bathroom." Hizoner chuckled at his scatologic humor. Scatologic was the only kind of logic the judge possessed.

Wilkes screwed himself up and said self-righteously, "I cannot defend this man, Your Honor." This was entirely true, but it was the evidence, and not any conflict, which made it so. Wilkes continued his protest. "I must be allowed to withdraw. That's the law."

"I'll eat the decision that says that!" said Fox loudly.

"It would be far better if you read it," said my friend in equally raised voice.

"No continuance! Trial in two weeks!" So said Judge Fox.

Dr. Feelgood (Phase Three O.W.D.)

Fox's unreasonableness on the trial date question and conflict matter led Wilkes to visit the friendly offices of Dr. Simon Comfort, Wilkes's personal physician and forensic consultant on matters medical and psychiatric. Wilkes called him Dr. Feelgood because the doc dispensed drugs on demand when my friend was feeling low.

Upon learning of the terrible time problems in the Lizard's case, Dr. Feelgood quickly made his diagnosis. "Wilkes, looks to me like you have contracted a case of rapid onset litigious meticulosis, a new disease currently taking a terrible toll on trial lawyers. I must insist that you immediately deliver yourself to the hospital of your choice where I have practice privileges and stay put there for at least, uh, er, hum one . . ."

Wilkes gave the doc a terrible frown.

". . . Uh hum, er, ah two . . ."

Wilkes frowned ever harder.

" . . . Hum, ah, yes, three weeks and not a minute less!"

Within the next hour, Wilkes checked himself into the hospital and sent me on my way to address Judge Fox about the recent turn of events.

Halfadavit

With my friend tucked in his hospital bed and eagerly awaiting his first medication, I had the honor of serving the sworn declaration of Dr. Comfort - attesting to my friend's new disease and hospitalization - on Henry Fox. I said, "Judge, due to the exigencies of the unforseen medical emergency, I must reluctantly request on behalf of my fallen partner an indefinite postponement of Mr. Gidone's trial."

Fox read in deadly silence the motion papers and Dr. Feelgood's affidavit. By the time he finished, he looked at me and reflexively slapped his right hand to his forehead and rubbed to the rear of his balding head. He looked like he had just read a Dear John letter or his tax bill or, even worse - a verdict of not guilty!

Grinning evilly, he held up the motion papers and slowly tore them lengthwise, and then handed one half of the papers to the clerk, who passed them on to me. "Tell your conniving, malingering malpractitioner friend that the shreds of paper you now hold in your little hands are what his bar ticket is gonna look like in ten days if he doesn't show up for trial."

I said nothing. There was no need. We had made our record, and the good judge, his temper once again getting the best of him, had done nothing to sabotage it. Wilkes could not be held in contempt for being ill, and certainly not by the notorious lawyer-hating, Wilkes-despising Judge Henry "Red" Fox.

Contretemps

Ten days later, Wilkes was still in the hospital when Henry Fox held him in contempt for feigning illness to avoid the Lizard's trial. When I told Wilkes the news, he was thrilled.

"Great break! Appeal! Add another affidavit from the doc attesting to the chronic nature of my litigious meticulosis!"

I pointed out that this would mean extending his recuperation period quite a bit, but Wilkes was not concerned. "Great! We need the time to uncover a defense for the Lizard. And let's not underplay the seriousness of this meticulosis. It's damned debilitating. I need more drugs!"

Wilkes spent two more weeks in the hospital and then was discharged by Dr. Comfort with strict instructions to go home to bed and stay clear of the courtroom or risk relapse and rehospitalization.

After he got home, I visited him every afternoon at his place in Greenwich Village to bring him files and mail and to chat about what was happening in the office and the courts.

I Bring You Joy!

As I did most every afternoon during the illness, I opened the front door and walked into Wilkes's place without knocking. My presence I announced with a loud, "I bring you joy!" Not that I did actually. All I brought this day were the legal papers on my friend's most recent contempt at the hands of Judge Fox, but Wilkes appreciated the words. They had been the opening salutation of one of Wilkes's famous ancestors.

The setting I viewed that day was no different than those of the past few weeks. Wilkes was lying flat on his back on his sofa dressed only in pajamas and bathrobe. The living room looked like a SWAT team had just been there executing a search warrant - many items of furniture and personal possessions were strewn on the floor. Empty codeine bottles, gifts from Dr. Simon Comfort, lay at my friend's bare feet. The television was blaring. My friend was engrossed in his favorite daytime quiz program.

". . . And now, Mr. Yost, for five hundred dollars, a second refrigerator, and an all-expense-paid weekend in a Catskills resort, answer this question: What was Groucho's description of a manufacturer of padded bras?"

"A man who lives off the flat of the land!" shouted my friend at the boob tube. After the contestant failed to answer the question, the moderator quickly verified Wilkes's answer as correct.

"Jeez," I said, "you always get the answers right. You ought to get on one of those shows."

Wilkes looked up at me as if noticing for the first time my presence. "Huh" he said. I repeated my suggestion.

"You know, Schoon, I've been sitting around here all day thinking just that. Great opportunity for free national advertising, and who knows? I might win a bundle!"

Big-Game Hunters

By midyear 1956, TV quiz shows were the hottest entertainment in America. Shows like "The $64,000 Question," "Dotto," and "Twenty-One" were enormously popular, attracting each week audiences of tens of millions. Americans flocked to watch Joe Average win enormous sums of money by answering seemingly impossible questions. On "The $64,000 Question," a marine won the top prize by naming the five dishes and two wines served at the 1939 banquet King George VI held in honor of visiting French President Lebrun. Incredible!

On the same show, a Bronx cobbler won $32,000 by answering questions on Italian opera; a jockey won twice as much for his omniscience in art; Joyce Brothers won the same amount for, of all things, her knowledge of boxing; and a ten-year-old kid outdid them all and won $192,000 in his category, the sciences.

The appeal of the quiz show programs was obvious - the nation's little people demonstrated that they could be as smart as all the eggheads running the world; they were also taking home sums of money most people couldn't earn in twenty years of hard work. No wonder these shows dominated the ratings. They fed two basic instincts: greed and envy.

Jack Twink

The next morning after my visit, Wilkes drove downtown and entered himself as a contestant on the popular afternoon game show "Take All You Can Get," a program sponsored by the Willard Snap Chewing Gum Company, and hosted by that affable airhead, Jack Twink. It was Wilkes's fondness for Twink that led him to sign up for the "Take" show as opposed to the other popular shows.

Jack Twink was such a handsome fellow on the TV screen that most contestants standing beside him looked like bulldogs. Television's magic hid his one physical flaw - skin so acne-pitted that only daily belt sander treatments by the show's makeup man could cover them up. Before each show, the makeup man, wielding a small trowel, scooped a moist pile of skin-tone-colored wall spackle and deftly slapped it into the many craters on the Twink's cheeks. After a few minutes of working the slow-drying mix into the holes and light sanding, Twink's cheeks were as smooth as those on a baby's fresh-spanked bottom. Of course, once the stuff dried, his cheeks had a marble hardness, thus raising the danger of fissures during a telecast.

Not even TV could hide the Twink's other flaw. Even with cue cards, it was apparent that the Twink was a bubblehead, one of nature's ironic jokes - blessed with a fine physical temple, but completely lacking in interior design. Jack's pale blue eyes were windows to a great void lying between his ears. Original thought never penetrated that vacuum.

He was perfect for television.

Willard Snap's Son-In-Law

All prospective candidates on the "Take" show were cross-examined by the sponsor's chief executive officer, Joe Magnon, son-in-law of Willard Snap. In screening prospective contestants, Magnon was looking for lively, interesting, and knowledgeable persons capable of exciting the interest of a vast gum-chewing audience.

The interview with Wilkes was short and sweet. Magnon asked my friend for his area of expertise, and Wilkes said, "Pain. I'm a criminal lawyer."

"Pick another area," said Snapp Chewing Gum's CEO.

"Okay. Humor," said Wilkes. "My sanity, or lack thereof, is directly proportionate to my ability to laugh."

Magnon says, "So tell me a joke."

Wilkes said, "When do you know a leper's done playing poker?"

"I dunno," says Magnon.

"When he throws in his hand."

"Hey, not bad," says Magnon. "We could do a couple of shows with you doin' the humor bit and the dummy givin' you the straight lines as questions. Tell me a joke about a dummy."

The dummy was what Magnon called Jack Twink.

"Certainly. A newsman is on the street asking people what they think is the greatest invention of all time. The first person says fire. The second says it's the wheel. Then up comes a man who says it's the thermos bottle. Now, the newsman is very surprised at this answer and asks the man why he picked the thermos. The man says, 'Well, when you pour in the hot stuff, it keeps it hot. When you pour in the cold stuff, it keeps it cold. Hot or cold. How does it know?'"

"Hah!" grunted Magnon. "I know who that man was. It had to be our own Jack Twink! The fence post with cement cheeks and a bouffant hairdo. Say, you'll do, Wilkes. Be here tomorrow at nine in the morning and you're on the show."

First Show

The rules of "Take All You Can Get" were similar to all the other game shows: contestant answers questions, wins money, answers more questions, wins more money. Eventually, the contestant either won it all or failed in answering a question and lost it all.

Here's how the exuberant, marble-cheeked Jack Twink introduced the "Take" show on Wilkes's first appearance: "Hey ho, everybody! I'm Jack Twink, the host of 'Take All You Can Get,' Snap Chewing Gum's new and exciting game show. Under our rules, I give contestants a choice of three subjects to choose from. After the selection, I ask a question from that area, which, if answered correctly - hey ho! - wins the contestant money prizes and entitles him to another question. The only catch is that all questions will be related to the first subject selected.

"Sound confusing? Well, hey ho, everybody, it does to me, too, and I'm the master of ceremonies! Ho, hey! Think about that for a while I introduce our next contestant, a Mr. John Wilkes. He's a lawyer from here in New York City now on sick leave from work. So let's give him a really big hand in welcome. Hey, ho, hey! Come on out here, John Wilkes, and tell us about yourself."

Wilkes Onstage

Wilkes walked out onto the stage and stood beside the game's host, Jack Twink, a constant toothy smile frozen in concrete on his puss, read from the idiot card. "So you are a criminal attorney here in town, eh, Mr. Wilkes?"

Wilkes nodded in the affirmative. Twink made the mistake of attempting to ad-lib a line. "Does that mean you prosecute people and put them in jail?"

"Not quite," said Wilkes. "I defend the accused, who unfortunately are often threatened with jail based on the lies of the state's witnesses. You see, there's a butcher's thumb on the scales of justice. He wears a black robe and favors the state. It makes my work difficult."

The "Take" audience was live - which is more than one could say for its announcer - and Wilkes's answer left them silent and uncomfortable. Twink didn't sense this and ad-libbed his next question. "Well, hey ho! How do you know when they're lying, Mr. Wilkes?"

"When they move their lips," replied Wilkes. A few in the audience giggled, but the hapless Twink looked confused for a moment and then started reading the idiot card:

"Well, ho hey!" said the Twink. "Let's not get into that. Let's get into our great game and see if you, John Wilkes, will Take All You Can Get!"

"I'm pretty good at that," said Wilkes.

Take Your Pick

"You know the rules. I will give you three categories from which to choose. This is a most important selection since all subsequent questions will be related to this area. Your choices are: First, Pope Victor II. Second, literature of the Sudan, or third, the humor of Oscar Wilde. You've got twenty seconds. [PAUSE] Okay, John Wilkes, what'll it be?"

"Well, the only thing I know about Pope Victor II is that he was probably a Catholic, and I haven't kept up on my Sudanese novels, so I'll have to go with the Wilde humor category."

"Very smart move, Mr. Wilkes. Ho hey! This should be fun! But before I can ask you your first question, let me escort you to the isolation booth so that no distractions will interfere with your answering the questions."

The Booth

The booth looked like a cross between a jukebox and a rocket ship. It stood about ten feet tall, was adorned with multicolored fluorescent lighting tubes, and had a clear glass front which allowed Twink and the audience to see the contestant. Wilkes entered the booth, put on a set of headphones, and looked prepared to be launched into space.

"Hey ho! Can you hear me, Mr. Wilkes?" asked Twink, still reading from a cue card. "Okay, here's question number one. Take your time. God bless you and good luck."

Wilkes stuck his face so close to the glass in front of him that vapor began forming. Twink asked the first question.

"Oscar Wilde once said that he could resist anything in the world except one thing. What was that one thing?"

"Temptation," said Wilkes without hesitation.

"That's right! Hey ho, ho hey! Way to go, Mr. Wilkes!" Twink was the kind of game show host who would express amazement if the contestant knew the name of his own mother. "Good start! Now, will you take the one hundred dollars you've just won or will you try to Take All You Can Get?"

"I'll go for it," said Wilkes.

"Okay, great! This one is worth five hundred dollars, so take your time, God bless and good luck. Hey ho! Here we go. In 1880, Wilde visited the U.S. for a speaking tour. Upon entering the country in New York, a customs agent asked him what items he had to declare. What was Wilde's response?"

Wilde Declaration

Wilkes edged a little closer to the glass in front of him. The fog on the glass now covered half of his face. "I have to answer," he said. "Wilde said, 'I have nothing to declare except my genius!'"

"Hey ho! That's exactly right! Ladies and gentlemen, let's give our contestant a big hand."

The small studio audience, prompted by a man holding an audience idiot card that read, "APPLAUSE," dutifully clapped loudly.

Twink read from his cue card, "Now you have the choice again, Mr. Wilkes, but old Jack Twink thinks he knows what you're gonna do. Hey ho! Will you still try to Take All You Can Get?"

"Of course," said my friend, his face now totally obscured behind the foggy glass.

"Okay, Mr. Wilkes this is your final question this week. If you answer it correctly - hey ho! - you can come back

next week and continue playing for the grand prize of one hundred thousand dollars. Now, for twenty-five thousand dollars - hey ho! - here's the question. Wilde once said that the public has an insatiable curiosity to know everything except . . . what?"

"What is worth knowing," answered Wilkes, now just a vapory shadow behind the glass of the rainbow-lit isolation tank.

"Hey ho! Ho hey! Righto, Mr. Wilkes! Come on out here! He sure knows his Oslo Wilde, doesn't he, folks?"

Wilkes climbed out of the rocket ship and shook hands with Twink. After the exchange of a few banalities, Twink informed Wilkes that he could come back the next week or retire with his winnings. The gallery exploded in shouts of "Come back! Come back!" as the cue card holders gamely ran in front of them holding high cards which read "YELL: COME BACK!"

Of course, my friend had no thought of disappointing them. "Mr. Twink," said Wilkes, I have not yet begun to take all I can get. I shall return!"

Return Engagement

Wilkes went back to the "Take" show the next week and successfully answered his three questions. Then he went back the following week and did it again. That made nine straight Wilde trivia questions Wilkes got right. Whether it was the topic, Wilkes, the show, or all three, Wilkes became a big attraction, the biggest the show ever had. The TV audiences got so big that the "Take" show moved to prime time, with Wilkes's last question scheduled to be the centerpiece of the first evening show.

As the show gained in popularity, our law office received a few fan letters for Wilkes. I had the honor of opening and reading them. Almost all were requests for loans or gifts of money. There were also several marriage proposals, and fifteen people recently accused of crimes wanted Wilkes to represent them under the most impossible conditions - for free!

The sponsor and the network naturally loved Wilkes because so many people tuned in to the show. Sales of Snap Chewing Gum were never so good. For the first evening show, which would be Wilkes's last, newspaper ads, radio spots, and TV commercials promoted the quiz show with hype more appropriate for a televised speech by Jesus Christ or a demonstration of how to make gold out of fertilizer.

Wilkes loved it all. His name was becoming a household word not only in New York, but all over the country. "It'll be great for business," he kept saying all week before the final show.

Final Question

Wilkes was confident going into the studio for the last show. He had memorized everything memorable Oscar Wilde had ever written or been quoted as saying. He felt he had nothing to worry about.

As Wilkes won more money each week, the questions about Wilde got harder and more obscure, and the final question Jack Twink asked Wilkes that night would be the hardest and most obscure of them all. I, along with several million fellow Americans, turned in to root him on to riches.

It was a somewhat nervous Jack Twink who began the show that night. This was big-time TV for him, and the first time he had been in it. "Hey ho! Hey hey! Ho ho! Okay okay. Boy oh boy, here we go, Mr. John Wilkes. Let's see if you can Take All you Can Get! Golly, for one hundred thousand dollars, answer this question:

"When Oscar Wilde was sixteen, he attended a ball in Dublin Castle. There, the brash youth approached one of Ireland's most notable ladies of rank and asked for a dance. The lady replied contemptuously, 'Do you think I'm going to dance with a child?' What was Oscar Wilde's response?"

Wilkes put both his hands over his mouth. Despite newly installed air-conditioning in the booth, sweat poured out of his face. The camera zoomed in so we could see him ponder. After a few seconds, Wilkes grabbed the microphone and said carefully, "Wilde told the lady, 'Madame, if I had known you were in that condition, I would have never asked.'"

Hey Ho!

"Hey ho! Mr. Wilkes! You have just won one hundred thousand dollars! Come on out of there! Isn't he great, ladies and gentlemen? And here he is! Let's give him a big hand. Hey ho! And let me be the first to shake your very rich hands, Mr. Wilkes. Congratulations! In just a few days, Snap Chewing Gum will be presenting you with a certified check for one hundred thousand dollars. God bless you! You're so famous now. Golly, what would you like to say?"

"How much do I get if I answer that question? Said Wilkes, to the merriment of the audience. Even the dummy laughed.

"As to the fame," Wilkes added, "I think it's great. As Oscar Wilde said, 'There's only one thing worse than being talked about, and that's not being talked about.'"

"Well, thank you for being one of our greatest-of-all-time contestants, John Wilkes. Good night and God bless."

The Letter

It was September 11, 1957, and we were as happy as two guys who just pulled in a hundred thousand smackers could be. Wilkes was singing his chorus of "This'll be great for business" all through a twelve-course dinner at Jack Dempsey's. The future seemed glorious.

The next day, DA Frank Hogan announced that a grand jury would be investigating certain questionable quiz shows. Seems some contestants on "Dotto" and "Twenty-One" were claiming fix. Wilkes and I ignored the announcement. The "Take" show wasn't mentioned, and anyway, Wilkes had received no help in answering the Oscar Wilde questions.

On September 13 we got a letter from the Willard Snap Chewing Gum Company. We expected it. It was the check for the money, of course. Here's what was inside the envelope:

Dear Mr. Wilkes,

Due to the recent allegations of fraud concerning contestants on certain quiz shows, we are holding up the winnings of certain contestants on "Take All You Can Get." This is not a reflection on you (at this time). We believe that until the air is cleared, we owe it to our viewing audience and consumers of Snap Chewing Gum to hold your purse. Thank you for your patience.

With all due respect,
Joseph Magnon, CEO
Son-in-law of Willard Snap

Punies

Wilkes's eyes bulged as he read the letter. He looked like Judge Henry Fox reading one of our motions to continue the Lizard's case. "Bullsh*t! Bullsh*t! Bullsh*t! I want my money! Now!" He threw the letter on the floor and began pacing around the office. A minute later he stopped, pounded his desk, and howled, "B-U-L-L-S-H-*-T!" for a full minute.

"We're gonna sue those bastards, Schoon," he said, "and we're gonna get our quiz money, and we're gonna get more money for libeling my character, and we're gonna get punies!"

By the time he finished, he was smiling. I saw dollar signs form in his eyes.

"Punies?" I asked.

"Punitive damages. We're suing for a million bucks!"

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Wilkes v. Willard Snap

Respect for truth is an acquired taste.
- Mark Van Doren

No self-respecting lawyer does his own legal work!
- John Wilkes

Charles Van Doren was undoubtedly the most loved and famous TV quiz show contestant in history. Tall, handsome, and urbane, the son of a respected historian, brother of a major poet, a teacher himself at Columbia University, Charlie had everything going for him except for one little thing - a respect for the truth.

Herb Stempel, on the other hand, was everything Van Doren was not. He was not particularly glamorous or attractive; he was an ex-GI graduate of the workingman's college, CCNY. But he had two things in common with Van Doren. He, too, lacked a respect for the truth, for a while anyway, and he, too, was a brilliant contestant on the popular TV quiz show "Twenty-One."

"Twenty-One" first aired in September of 1956. Its format pitted two contestants in a race to win twenty-one points by answering difficult general-knowledge questions worth up to eleven points each. The more points a question was worth, the harder it was.

Show Biz

Herb Stempel was the show's first champion, the first to gather a large TV following, and the first to earn the tag "human encyclopedia." He started on the show in October of 1956 and lasted as champ until his staged encounter with Van Doren on December 5. On that show he lost - if you can call winning almost fifty grand

on a phony quiz show a loss.

Since the shows were fixed from the start, it was, as Herb himself later described, "harder to learn the stage directions than the answers to the questions." Shows were fixed for business reasons: Giving selected contestants the answers to the questions enhanced the dramatic quality of the shows. Champions who came back week after week attracted huge followings as unsuspecting audiences tuned in to see if the "champ" would win again or get knocked off and lose the earnings of a lifetime.

Unless the answers were given, producers feared no contestant would ever answer a question correctly unless it was of the Groucho Marx "You Be Your Life" variety - like who's buried in Grant's Tomb? So they figured they had to create a myth to sustain their shows, and that myth was that the common man is uncommonly smart. To be true to their myth, they fed their champions the answers to the questions. It was no crime. It was entertainment. The only fraud was on the public, and the public loved it. What they didn't know wouldn't hurt them.

Duel of the Titans

On November 28, 1956, Herb Stempel was challenged on "Twenty-One" by the shy, engaging teacher, Charles Van Doren. Stempel disliked his challenger, perhaps because they were so different, but most likely because he was scripted to lose on the December 5 show to close out an epic, phony battle.

Stempel begged the producer to allow him to contest Van Doren without aids or prompting. Let the best man win, he said. The producer was in partial agreement; the best man should win - that was why he selected Van Doren to come on the show in the first place. But an actual contest of wits? Forget it!

And so Charlie beat Herb Stempel unfair and unsquare, and Charlie went on to win and win and win and win and win and win. And win again. And again. All through December. Win, win, win. All through January. Win, win, win. And February! Win, win, win. And March! Win, win, win.

Charlie answered all the questions according to script and got them right. His main difficulty was learning how to feign looking perplexed while thinking of the answers. He had to learn the timing of dramatic pauses, to give short nervous, puzzled looks as his initial response to a tough question, to make stutteringly insecure verbalizations as answers, and most of all, to look surprised at being right.

Bigger Than Lucy

Charlie learned his role very well. He made "Twenty-One" the number one show in the country, bigger than Milton Berle or Ed Sullivan or even, for a short while, "I Love Lucy" - all because Mr. Charm was winning those seemingly incredible battles of wits, which he did, he said, "as a service to the teachers of America."

Charlie became more than a TV idol. He became a symbol of what was best in America: youth, good looks, intelligence, innocence, and character. Making a fortune by his wits, he was a man people believed deserved fame and wealth, and he wore both with a princely grace.

Charlie's picture made the cover of *Time* magazine. He was a news story so great that by the time of his long-postponed scripted defeat, he had an audience so big that the network had the balls to put the show on opposite the ratings-blockbuster "Lucy" show.

Finally on March 11, 1957, to the shock of a nation, Charlie correctly read his scripted wrong answer and lost. The inevitable finally happened; through his popularity and great ratings, Charlie had postponed his date of departure far beyond what anyone expected when he started. With poise and grace, he left the show with $129,000 and a five-year contract to appear as a regular on NBC's 'Today" show. He was on top of the world.

Truth Will Out

The bubble burst for Charlie in the second week of September of 1957, when DA Frank Hogan announced his grand jury investigation of rigged TV quiz shows. Too many contestants like Herb Stempel had been publishing expose′s about the phony shows. The story was bound to break open, and when it did, Charlie denied the allegations.

He said, "The truth will out."

And so it did. After testifying before Hogan's grand jury, Charlie and seventeen others got themselves indicted for perjury.

It was the day after Hogan announced his grand jury investigation that Wilkes and I received the letter from Joseph Magnon of the "Take All You Can Get" show informing my friend that his hundred-thousand-dollar purse was being withheld. Wilkes's reaction was immediate and furious. "I want my money! File a suit against the bastards! And file it tomorrow!"

Cut Man

I was pretty capable of fulfilling Wilkes's insane demands for speedily filing motions and briefs in our criminal cases. In those days, we didn't have word processors to store thousands of pages of form motions and briefs. Today, you just fill in the blanks with the name of your client, weave in a few pertinent factors, push a button, and quick as a flying daisy wheel or laser jet, out pop fifty pages of immaculate, margin-justified legal work. In my day it was different. To comply with Wilkes's unreasonable time demands, I had to use a different kind of computer, the Winston Alfred Schoonover, Series I Gray Matter Limited, and it had numerous limitations: such as limited storage; such as inaccurate recall; such as sluggish processing time.

I had to remember which of our old cases contained motions with similar issues, search the office to locate the desired file, cut and paste the various old pleadings, adding, of course, a smattering of new names and facts from the new case, and voil`a! One new, persuasive pleading, and one old, nerve-racked lawyer.

Wilkes said I was the best cut-and-paste man in the business, a pro who worked quickly and deftly to get the job done in the nick of time. Like those cut men in the corner of the ring at the Garden on fight night, standing at the ready to close vicious cuts with the latest quick-acting coagulant, or ice down an eye so swollen from punches that it looks like an immense walnut, or administer a smelling salt to awaken a punch-drunk brain - all in sixty seconds between rounds. Working for Wilkes was like that.

Faking It

I did nothing that first day after receiving Wilkes's command. There was nothing to cut and paste. Wilkes and I were criminal lawyers who didn't know the first thing about filing a civil suit. So when Wilkes came into the office the next day, I told him I needed to talk about his civil suit against the "Take" show.

"Got the complaint ready for me to review already, Schoon? Great work. Knew you could do it."

I didn't respond except to suggest we go down to the Guadalajara Café for coffee and doughnuts. He sensed my mood and followed me out the door and down to the street for the short walk to the narrow hole-in-the-wall that was the Guadalajara. We entered and took a seat at the counter. You had two choices at the Guadalajara: the counter or the floor. There were no tables and certainly nothing as elaborate as a booth. There wouldn't have been room for them in the corridor-turned-coffee shop.

The owner, cook, waiter, and bouncer of the place was a dumpy grease-ball we knew as Lunk. Since we were regulars, Lunk didn't ask for payment in advance like he did with the transients and unknowns who staggered into the place for a cup of sobriety or a bowl of sustenance.

"Da usual?" asked Lunk.

"Twice," I replied.

It was time to tell Wilkes I hadn't done anything on the civil suit. I turned to my friend and said, "You know what they say about a lawyer who represents himself?"

"Yeah. He's got a lawyer for a client."

"In this case, he's got two criminal lawyers who don't know a damned thing about civil suits. Makes me feel like a V-6."

American Turkey

"Impossible!" said Wilkes. "A V-6 is too stupid to feel ignorant. A V-6 is like the American turkey - so dumb he's been known to drown by forgetting to lift his head out of the water trough. Do you know that the turkey is too dumb to even propagate? Can't even fornicate! Don't know how. They'd be extinct by now if we didn't grow them as a crop. V-6s are like that. If the judges didn't grow them like a cash crop, they'd all be extinct. As long as judges loathe trial by jury, they'll keep appointing V-6s to cop pleas, and the crop will grow."

Wilkes clearly didn't want to talk about hiring a civil lawyer to handle the suit against the "Take" show. Our coffee and doughnuts arrived as I said, "Look, we need to hire someone else or at least associate someone in with us. We don't know what we're doing."

Wilkes looked at his doughnut as if it were a rare art object. "You know, this isn't even on my diet. Did you know that, Lunk?" Lunk was drying his hands on his filthy tank top shirt which half-covered his hairy barrel chest. "Sure it is, Wilkie. I made dat one just fer you. Diet doughnut. Wid a hole in the middle."

Wilkes and Lunk chuckled at their old joke, but I would have none of Wilkes's diversion. "What is it? Are you to cheap? Afraid of paying expenses and a one-third contingent fee? What gives?"

"Schoon, don't be such a pessimist. Where's your spirit of adventure? This case is a cinch. And it's a civil case.

Therefore, it'll never go to trial, at least not in this century. Look, don't worry about the complaint. We won't need one. Just make a few calls and we'll be fine."

He picked up his greasy plain doughnut, dipped it into the black coffee, and shoved the soggy mess into his mouth. I looked at the oil slick that appeared at the surface of his coffee. Wilkes said, "Um, yum, Lunko, what pastry, what coffee, what servicio!" To me he said, "Lunko's the best grease-and-oil man around, ain't he?"

Letter To The President

As instructed by Wilkes, as soon as I got back to the office, I wrote a letter to Willard Snap, president of the Willard Snap Chewing Gum Company, and the sponsor of the "Take All You Can Get" show, which was then in arrears to my friend Wilkes to the tune of one hundred thousand dollars.

> Dear Mr. Snap,
>
> Please be advised that Mr. John Wilkes has retained me as his counsel in the matter of securing his winnings on your quiz program, "Take All You Can Get." My client believes that your withholding of his purse is fraudulent and libelous. He has authorized me to seek the prompt payment of his winnings and, failing that, to sue you and your company for the money he won and for damages for the ugly stain you have placed upon his name. Hoping that we can resolve this matter quickly and without resort to the courts, I am sincerely,
>
> Winston Alfred Schoonover
> Attorney at Law

Within three days of mailing the letter, I received a call from Jayson Laughlin, a senior partner in a big bluenose downtown law firm. After introductions, he said coolly, "Say, old boy, about this little matter of the quiz show winnings, our client, Mr. Willard Snap, would like to get together for a friendly chat in the hopes we can work the whole thing out and avoid a messy court battle. We have an idea that may accomplish just that. What do you say?"

"Fine," I said. "Just name the time and place."

"Wonderfully agreeable of you," said Laughlin. "How about tomorrow afternoon, say about three o'clock, in our conference room? And would you mind if we brought a court reporter? Never can be too careful now, you know?"

"I'd rather you brought the hundred grand," I said. "But you bring all the court reporters you want. We'll be there." After I hung up, I had a strange feeling, like I had been frisked by a pickpocket.

Wilkes told me later I foolishly broke the basic rules of negotiations - make sure you do it on your own turf and that you bring the agenda. But I was young, and as I had told Wilkes many times already, I didn't know a damn thing about handling a civil case. And, I thought, neither did he.

Intimidators

Wilkes did find some pleasure in that my letter drew such a speedy response. He said he expected it. "These civil guys will do anything to avoid trial, Schoon. That is our trump card, or at least one of them."

When I told him that it was Jayson Laughlin who was representing Snap, he was equally pleased. "It figures Snap would pick him. Wealthy men are always suckers to mistake smoothness for sophistication, and verbal skills for knowledge. Snap's the kind of guy who would always see the ornaments of wealth as a barometer of success. Laughlin's just another silk-stocking potentate waiting in line for a career on the bench."

I asked why they wanted a court reporter present if we were just going to have a friendly chat to resolve the dispute.

"Intimidation," he said. "Simple as that. But maybe we'll have an intimidator there ourselves."

I hadn't the foggiest idea what Wilkes was talking about save for his own self-confidence.

A Wilde Meeting

When the big oak doors to the conference room at Jayson Laughlin's firm opened for Wilkes and me, I thought I was entering a board meeting of a giant corporation. There were at least a dozen people, all very properly dressed in the latest business fashion - gray flannel - seated around a magnificent rosewood conference table. The table was long, thick, highly polished, and immaculate. It was so beautiful, and I so taken with it, I missed half the introductions of the people around the table.

But I did awaken to hear that a representative of DA Frank Hogan's office was there, two representatives of the TV network, and a curious-looking local college English professor named Phillips. He was seated, smiling, behind a stack of books. Each book bore the name of Oscar Wilde on its spine.

Willard Snap was there, of course, seated at the head of the rosewood table. To his side was Laughlin, busy earning his tremendous fee by keeping three underlings in motion fetching pencils and paper and water for everyone while he himself elegantly puffed on a cigarette.

The court reporter was warming up her fingers as if getting ready to play Chopin at Carnegie Hall. Seated behind her and not at the table were Joseph Magnon and Jack Twink, the two mainstays of the "Take All You Can Get" show. From their nervous, hangdog demeanor, I sensed why we were here. They must have been suspected of cheating on the show, perhaps taking a cut of the winner's take, and we were here to see if Wilkes had been in it with them.

Wilkes surveyed the scene from the foot of the conference table and quickly surmised the purpose of our little get-together. "You want to quiz me on my Oscar Wilde knowledge! You want to do it now! You think you'll catch me cold and thereby show that I got help to win on your show! Right?"

"Say, what?" asked Jayson Laughlin blandly as he took a long drag on his cigarette. He seemed a little uncomfortable with Wilkes's coming so quickly and bluntly to the point. He audibly exhaled a puff of smoke from his lungs and waited for Wilkes to continue.

"So some other contestants on other shows are crooked; maybe even on your own show, I dunno. Therefore I must be, too, eh? Is that your proof, guilt by association? In the great American tradition, eh?"

No one responded to Wilkes. Snap's eyes looked at his son-in-law and then to Twink as if to search for guilt on their faces. The only sounds in the room were Laughlin's loud drags off his cigarette and the court reporter's tapping out her Chopin to Wilkes's lyrics.

Whatever agenda Laughlin had in mind when they opened the door to Wilkes was now out of the window. My friend continued his harangue before Laughlin could assert control.

"I'll do it. Right now! Cold! Without preparation! And with the little lady over there taking it all down for the record!"

Since this is exactly what our unworthy opponents had planned for the day, it was surprising to me how silent they were when Wilkes called them out. Laughlin just puffed on his Parliament and looked at the ceiling. Snap looked at Wilkes like he was the Creature from the Black Lagoon. Jack Twink and Joseph Magnon looked like two guys headed for transportation to Tasmania.

Wilkes filled the void by staring at Willard Snap and saying, "Yes, we'll do it right now, just like you planned it. Right in front of the DA and the TV people and on the record. But there's one little addition to your agenda today. We will do it just like on the quiz show. I win Mr. Snap's money for every correct answer I give. Winner take all. What d'ya say, Snap?"

All eyes turned from Wilkes to the other end of the table, where sat Willard Snap. It was the only time in my life I ever saw the man; to me he looked like William Howard Taft. Massive in size, blockheaded, mustached, and completely expressionless. He stared at Wilkes a minute and finally spoke. "Mr. Wilkes, I have reason to believe you don't know anything about Oscar Wilde. If I'm wrong, I've done you a disservice. So all right, for every question you answer correctly, you win money, just like on my quiz show. And by the same token, you will, of course, agree that for every question you miss, you forfeit an equal sum from your purse. Seems a fair and practical way to resolve this little controversy quickly and without my having to pay my lawyers here a fortune to defend me in a suit."

Policeman's Oath

"Agreed," said Wilkes. "I'll administer the oath to myself." Wilkes held up his right hand and said, "I do solemnly swear that the testimony that I am about to give in this case is the truth, the whole truth, and nothing but the truth, except as to those parts with respect to which I intentionally intend to lie and to which this oath no longer applies, so help me God."

The court reporter chuckled at Wilkes's impertinence. "That is the policeman's oath," said Wilkes. "You all should get down to the criminal courts and see what I mean."

"That will do quite nicely," said the silkily voiced Jayson Laughlin while sucking in another drag off his cigarette. He hissed like an irritated rattlesnake, "Okay, Professor Phillips, why don't you ask Mr. Wilkes a few questions."

"This is for ten grand, just for starters," said the still-

standing Wilkes. Although no one offered one, I found a seat at the table near Wilkes and took it. The table's rosewood grain was even more beautiful up close than it was from afar.

Willard Snap nodded to the professor, the court reporter tapped out a symbol for an affirmative nod, and the game was on.

Professor Phillips

Phillips was short, slight, and very serious-looking. The hair on his head looked like a hurricane had just swept over it - tufts of salt-and-pepper hair shot out every which way and gave the professor a slightly crazed look.

Reaching into a worn, tweedy sport jacket, the professor pulled out a sheet of paper, adjusted his horn-rimmed glasses, and asked the first question. "In Wilde's best-known play *The Importance of Being Earnest*, Lady Bracknell conveys in one line Wilde's controversial views on education. What is this famous line?"

Wilkes pulled himself to attention and cleared his throat. He lifted his hands so that his fingers touched his cheeks on both sides, and in a high falsetto he sang out: "I do not approve of anything that tampers with natural ignorance. Ignorance is like a delicate fruit; touch it and the bloom is gone."

The professor piped almost joyously. "Precisely!" Wilkes not only knew the line, he even mimicked the female part correctly! Most impressive! Phillips looked to Willard Snap at the other end of the table, and the big man bellowed, "Another!"

Another!

"Thirty grand for this one," chirped Wilkes across the length of the table. Willard Snap nodded again, and the court reporter dutifully tapped in his response.

Professor Phillips buried his eyes in his papers and read a second question to Wilkes: "In 1895, Wilde sued the Marquis of Queensbury for defamation of character after the marquess had publicly accused Wilde of engaging in the sexual debauchery of young boys. Wilde ended up being prosecuted for his dalliances with these young boys. During cross-examination at the criminal trial, the prosecutor asked Wilde a question aimed at revealing his homosexual history. He asked, 'You talked in *Dorian Gray* about one man adoring another. Did you ever adore a man?' Tell us now, Mr. Wilkes, what was Wilde's reply?"

Without hesitation, Wilkes answered, "'No, I've never adored anyone but myself.'"

"Right again!" exclaimed the professor. He seemed as excited about Wilkes's mastery of the subject matter as I was. The others, except for Twink and Magnon, were glum. Willard Snap was losing money - quick and effortless, like water down a drain.

Snap adjusted his huge body in his chair. He was noticeably uncomfortable after losing forty grand in less than two minutes. He snapped at the professor, "Give him the hard one."

The Hard One

"Fifty grand for this one," said Wilkes. All eyes went to Snap. He nodded, the court reporter typed, and the professor asked the question. "Wilde received two years hard labor for his homosexual activities. While in custody he developed the idea for his most famous poem. This question has three parts. First, name the poem."

"'The Ballad of Reading Gaol,'" answered Wilkes.

"Right. When and where was it written?"

"Eighteen ninety-seven, in France," answered Wilkes.

"Correct. Now, one more part," said the professor. He looked at my friend standing confidently at the end of the table and smiled. Embarrassed perhaps by the impossibility of his next question, he covered his mouth with his hand to hide his smile. "For fifty thousand smackers, Mr. Wilkes, please recite the entire poem."

Wilkes looked to Snap. His face no longer bore the confidence of the moment before. He said, "The whole damn thing? Word for word?"

Snap sneered, "Every damned bit of it."

His snickering grin instantly disappeared when Wilkes retorted, "You mean you actually want me to recite all one hundred nine stanzas? It's eighteen pages in my book at home and takes an hour just to read."

"Well," said Snap, "well, well, uh, we'll just have to hear you out. Unless, of course, you'd like to forfeit fifty thousand and we'll just forget about questioning you on the validity of the game show winnings."

Encirclement

"Oh no," said my friend, looking to Snap and then to Jayson Laughlin. "It's my favorite poem, a great one,

and I'd love to do it for you and the money. It's about a young soldier Wilde knew at Reading Jail. He was executed for killing his wife. I think you'll like it."

Wilkes started the poem and began circling the long, beautiful red-brown table. He began, as the poem did, talking about a person with blood on his hands:

> "He did not wear his scarlet coat,
> For blood and wine are red,
> And blood and wine were on his hands
> When they found him with the dead."

As Wilkes walked about this captive audience, he kept his eyes on either Snap or Laughlin, as if he could not choose which to torment most with the verse. As he polished off one beautiful stanza after another, their heads sank into their chests while those of the suspects, Magnon and Twink, elevated. Wilkes looked like a lion circling a small herd of antelope, imprisoning all with his stare, but eyeing a choice one - or two - for his supper.

As he circled, he managed to get out about two stanzas per circumference of the long rosewood table. As he did, he gestured, pounded, stamped in all the places where the poem was angry; he was monotone when the poem turned to narration; and he was quiet and soft in the poem's gentle moments. In ninety minutes, Wilkes circled the table 54½ times, reciting the poem as if he had lived it.

The Master

Wilkes was a master of timing and delivery that afternoon. I don't know how he did it, but each time he got to a particularly biting line, he was in perfect position to deliver it in the face of either Snap or Laughlin. In front of Snap, as if to remind him of the consequences of not paying Wilkes his prize money, he recited:

> "For Man's grim Justice goes its way,
> And will not swerve aside:
> It slays the weak, it slays the strong,
> It has a deadly stride."

Later, in front of the smoke-shrouded head of Laughlin, Wilkes delivered an apt line to the swine who was trying to steal his prize money - "'They hanged him as a beast is hanged'!"

Wilkes marched on, singing the stanzas out as if they were his own. Twink now wore a toothy grin and let out an occasional "Hey ho!" as Wilkes poured out stanza after beautiful stanza. Despite deadly stares from Willard Snap, Magnon was also vocally cheering Wilkes on.

The next time he got to Laughlin's position, he stopped to recite this refrain in the face of the lawyer:

> "But this I know, that every Law
> That men have made for Man,
> Since first Man took his brother's life,
> And the sad world began,
> But straws the wheat and saves the chaff
> With a most evil fan."

After ninety minutes of glorious recitation and sweat soaking through his suit coat, but still going strong, Wilkes delivered the final lines standing in front of a thoroughly dispirited Willard Snap:

> "And all men kill the thing they love,
> . . . The coward does it with a kiss,
> The brave man with a sword!"

He finished with a quick bow to the table and then marched to a seat and sat down for the first time all afternoon. No one said anything for a few moments until the professor gasped, "By God! He got every goddamned word of it! Beautiful! Bravo, sir! An exquisite rendition!"

Snap Decision

Thirty minutes later, we walked out of Jayson Laughlin's conference room, the one with the beautiful rosewood table, with an even more beautiful check for $190,000. "I told you we'd get the money without a suit," said Wilkes.

I congratulated him on his virtuoso performance. It was even better than on the quiz show.

"The irony," said Wilkes, "is that their game show was not fixed as far as I know. It was one helluva lot cleaner than what just went on in there. My hardest part was memorizing the lines."

Wilkes delighted in these little surprises. It was a game. Keeping me in the dark was his way of making my life full of the unexpected. I didn't mind. In fact, I loved it.

"Turns out that Professor Phillips had a daughter in trouble with the law years ago, and I snatched the damsel from distress, to the great relief of Papa. And Papa also loved my performance on the quiz show and knew I would not stoop to such a depraved level as to cheat on TV, seeing as how I was never given the opportunity. So after they contacted him and he

discovered who it was they were going to give this afternoon's pop quiz to, he called me up and offered a few areas for me to study."

"Well, that was extremely nice of him," I said. "Shows you how grateful he was for you helping his daughter."

"Grateful? The guy wants fifty grand for his kindness. And he is going to get it. Share the wealth, you know."

We continued our walk to the bank with Wilkes waxing philosophic about the depraved condition of man, the rising crime rate, and our inexhaustible line of future clients - optimism you might expect from a man carrying a check for $190,000.

- To Be Continued -

BUREAU OF PRISONS REVAMPS PRISON DESIGNATION PROCESS

By J. Michael Henderson and James H. Feldman, Jr.

In 2005, the Federal Bureau of Prisons began to phase out its Regional Designators—the people who used to decide where inmates were sent. That process is now complete. The Bureau of Prisons now processes initial designations, transfers, and inmate sentence computations from its new Consolidated Designations and Sentence Computation Center in Grand Prairie, Texas. The Consolidated Center performs the following functions for all federal prisons throughout the entire country:

✶ Initial security level classification scoring. (This used to be done by staff at the Community Corrections Office closest to the sentencing Court.)

✶ Designations and transfers. (These functions used to be performed at the Bureau's six Regional Offices.)

✶ Sentence computations. (Each prison used to do this for its own inmates.)

Under this new arrangement, after a court sentences someone to serve a term of confinement, the designation request, along with the federal judgment order and Presentence Report, are sent to the Consolidated Center. Who does the sending can vary from judicial district to judicial district. In many districts, these documents are transmitted to the Bureau electronically. The Bureau anticipates that soon all judicial districts will follow this practice.

Under the new system, once the Consolidated Center receives a designation request and the necessary documentation, it assigns the case to the team that handles cases from that particular U.S. District Court. There are 18 such teams at the Center—each with responsibility for specific federal judicial districts. Teams include records technicians (called Legal Instrument Examiners, or LIEs), Case Management staff, administrative assistants, and operations members. After the team scores the individual for security classification and completes a sentence computation, it enters the case into the Bureau's computer database for designation. It does not actually designate anyone to a particular institution. That task is handled by one of seven Senior Designators. Senior Designators also are responsible for all federal inmate transfers based on disciplinary or supervisory needs. Assistant Designators handle "routine" inmate transfers.

While this new system may be cost-effective for the Bureau, it makes it more difficult for defense counsel to help clients receive particular designations. Under the old system, an attorney could always call the Regional Designator to discuss particular areas of concern. That level of personal attention is not possible under the new system. It is simply not possible to speak with the specific Senior Designator who will be designating the particular client, because designations are randomly divided between the seven Senior Designators. What attorneys can do now, however, is to speak with the person on the team who is responsible for the pertinent judicial district. In our experience, while team members seem to welcome information that should be useful in the designation decision, they are unwilling to discuss the kinds of issues that we used to be able to discuss with Regional Designators.

Under the new system it will also not be as easy for an inmate to resolve sentence computation problems. When prison records offices did the actual sentence computations, an inmate could resolve a calculation error by bringing it to the attention of the records office. Easy fixes will no longer be possible under the new system. Not only do the institutions' records offices no longer compute sentences, they are not even able to go into the Bureau's computer system to make necessary corrections.

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CA7 Case Digest

By: Jonathan Hawley
Appellate Division Chief

APPELLATE PROCEDURE

Nunez v. United States, ___ F.3d ___ (7th Cir. 2007; No. 06-1014). In prosecution for multiple cocaine offenses, the Court of Appeals rejected the defendant's claim in a 2255 petition that his counsel was ineffective for failing to file a notice of appeal. The defendant pled guilty pursuant to a plea agreement wherein he waived his right to appeal his sentence or collaterally attack it. The defendant argued that his lawyer was ineffective for failing to file his requested notice of appeal and his waiver was invalid because he did not understand what his lawyer told him out of court about the waiver, he not being able to speak English. The Court of Appeals assumed the petitioner told his lawyer to file the notice of appeal. However, given the petitioner's responses during his Rule 11 colloquy, the court concluded that there was no basis to find that his plea was not knowing and voluntary. Accordingly, because the plea was voluntary, the waiver must be enforced. The waiver eliminates the petitioner's argument that his lawyer failed to follow his direction to file an appeal. The waiver has only two exceptions: an illegally high sentence, and a defect in the waiver itself. A claim of post-sentencing ineffective assistance falls squarely within the waiver. In doing so, the Court recognized that six other circuits have held that a waiver of appeal does not relieve counsel of the duty to file a notice of appeal on his client's request.

Corral v. United States, ___ F.3d ___ (7th Cir. 2007; No. 06-1701). On consideration of the petitioner's 2255 petition, the Court of Appeals held that the petitioner's counsel was unreasonably unavailable during the 10-day window to file an appeal and was therefore ineffective for failing to file the notice of appeal. The defendant entered into a plea agreement preserving his right to appeal the district court's denial of his motion to suppress. Prior to sentencing, the defendant initially indicated he did not want to appeal. However, after sentencing, his counsel told him that a potentially meritorious issue remained for appeal, although he stated that he would not litigate the appeal on the defendant's behalf. The defendant responded with, "I don't care. I don't care." Counsel interpreted this as the defendant not wishing to appeal, and he believed that his duty to represent the defendant had ceased. The petitioner then attempted to reach his counsel via phone during the next 10 days to instruct him to file a notice of appeal, but his calls from the prison were blocked. The Court of Appeals initially noted that only it could allow defense counsel to withdraw after judgment in the district court has been entered to ensure that trial counsel perfects the defendant's appeal. "We have seen too many examples of criminal defense attorneys wanting to bail out on appeal while leaving their clients in the lurch." Between entry of judgment and the close of the appeal window, counsel must not be allowed to withdraw precisely because a client who initially decides not to appeal might change his mind, and–as happened in this case–the consequences of the lawyer simply walking off can be too high. Of course, a defendant who has a change of heart and makes no real effort to inform counsel is not entitled to relief. Moreover, although the court concluded that an attorney should remain available to a client during the relevant ten-day period, the court was not suggesting that the attorney must adjust his schedule in anticipation of the client's decision to appeal. Rather, the court was holding that when a criminal defendant has made reasonable efforts to contact his lawyer about an appeal during the ten-day period, his lawyer must make a reasonable effort to reach the client before the time for filing a notice of appeal expires. In the present case, defense counsel actually avoided contact with the defendant, blocking the defendant's calls and refusing to return the defendant's wife's calls. Accordingly, the court found counsel to be deficient and granted the petition.

United States v. Price, 491 F.3d 613 (7th Cir. 2007; No. 03-3780). In a chambers opinion, Judge Ripple recalled the mandate and appointed new counsel to assist the defendant with filing a petition for certiorari in the Supreme Court. After the conclusion of his direct appeal, the defendant filed a 2255 petition alleging that his counsel was ineffective for failing to file a petition for a writ of certiorari in the Supreme Court. The district court stayed further consideration of the 2255 motion to allow the defendant to ask the Court of Appeals to recall its mandate in the direct criminal appeal and to appoint counsel to file a petition for a writ of certiorari. The defendant then filed his motion in the Court of Appeals and the court directed appointed counsel to respond. The court initially noted that a defendant has a statutory right to counsel based on the Criminal Justice Act while seeking certiorari. The Seventh Circuit's Criminal Justice Act Plan requires an appointed attorney to prepare and file a petition for a

writ of certiorari if, after consultation, the represented person requests it and there are reasonable grounds for counsel to properly to do so. If counsel concludes that reasonable grounds do not exist, counsel must promptly inform the defendant, and the defendant may request the appellate court to order counsel to seek certiorari. In the present case, counsel initially informed the defendant that he would file a petition for certiorari, but then later informed him that he did not do so because "we did not feel it prudent to do so." Judge Ripple concluded that these communications indicated that appellate counsel did not comply with his obligations under the Seventh Circuit's Criminal Justice Act Plan. The defendant was led to believe that a petition was being filed, but only found out that one was not after he inquired of appellate counsel. Thus, the defendant was unable to ask the court to order counsel to seek certiorari. Therefore, Judge Ripple recalled the mandate and appointed new counsel. New counsel could file a petition for rehearing, a petition for writ of certiorari, or decline to do either after communicating that decision to the defendant and giving him an opportunity to request an order that a petition be filed.

AFFIRMATIVE DEFENSES

United States v. Jumah, 493 F.3d 868 (7th Cir. 2007; No. 06-2674). On appeal by the government in prosecution for drug related offenses, the Court of Appeals held that the jury was properly instructed on the burden of proof for the defendant's public authority affirmative defense. The defendant's theory at trial was that he conducted the drug transactions under public authority as a confidential informant working for the government. He submitted a jury instruction which provided that the government had the burden of disproving his public authority defense beyond a reasonable doubt. The district court refused to give the instruction, but then granted the defendant a new trial, believing that the government did in fact have the burden of disproving the affirmative defense. Subsequent to the filing of the notice of appeal but before the Seventh Circuit's decision, the Supreme Court decided *Dixon v. United States*, 126 S.Ct. 2437 (2006), which resolved a division of authority in the courts of appeals as to wether, absent an act of Congress on the issue, criminal defendants were required to prove by a preponderance of the evidence the elements of an affirmative defense that did not negate an element of the offense. The Court held that there was no constitutional requirement that an affirmative defense that did not controvert an essential element of an offense be disproved beyond a reasonable doubt. The Court further held that, absent evidence of contrary congressional intent in the structure or history of the statute, federal courts should presume that Congress intended that they follow established common law rules related to affirmative defenses when applying new criminal statues. The Seventh Circuit first held that the public authority defense does not controvert an essential element of the offense with which the defendant was charged and does not, of its own force, place the burden on the Government to disprove the defense beyond a reasonable doubt in order to prove his guilt. Furthermore, at common law, the burden of proof for all affirmative defenses of justification and excuse rests on the defendant. Thus, the court concluded that Congress intended the burden to rest on the defendant to prove the defense by a preponderance of the evidence. Finally, nothing in the structure or history of the statute with which the defendant was charged (21 U.S.C. 841(c)(2) suggested that Congress intended to depart from these common law rules. Accordingly, the district court erred in granting the defendant a new trial.

ANDERS BRIEFS

United States v. Torres, 482 F.3d 925 (7th Cir. 2007; No. 06-3583). Upon consideration of an *Anders* brief, the Court of Appeals ordered counsel to consult with his client regarding whether he wished to withdraw his guilty plea. Counsel filed an *Anders* brief where he considered whether the defendant could challenge his guilty plea by claiming that the district court failed to comply fully with Rule 11. However, the brief did not disclose the degree to which counsel consulted with the defendant about his desire to withdraw his plea. Accordingly, the court was not able to determine whether the defendant appreciated and was willing to accept the associated risks of making such an argument, as required by *United States v. Knox*, 287 F.3d 667, 670-71 (7th Cir. 2002). Therefore, the court ordered counsel to provide the court with a statement assuring the court that he had consulted with the defendant as to whether he wished to withdraw his guilty plea.

EVIDENCE

United States v. Hamilton, ___ F.3d ___ (7th Cir. 2007; No. 06-1249). In prosecution for multiple counts of mail and wire fraud in furtherance of a Ponzi scheme, the defendant appealed a jury instruction which stated that "if money or property obtained is obtained through knowingly false representations, the scheme to defraud is established, regardless of whether the defendant hoped, intended, or indeed expected the victims would eventually be satisfied." The defendant argued that although this language came from the Seventh Circuit pattern jury instruction, it was erroneous in light of the Seventh Circuit's decision in *United States v. Bessen*, 445 F.2d 463 (7th Cir. 1971). In *Besson*, the defendants

were charged with a check kiting scheme. Because the defendants presented evidence that they believed a third party would cover the overdrafts, the court held that they were entitled to an instruction on this theory. The Court of Appeals overruled *Bessen* in light of subsequent precedents, and held that the Seventh Circuit pattern instruction was correct. In other words, it is not a defense that the defendants intended to eventually fully satisfy their victims.

United States v. Jumper, ___ F.3d ___ (7th cir. 2007; No. 06-4232). In prosecution for drug offenses, the defendant argued that the district court erred in admitting the defendant's videotaped interrogation in its entirety because it contained three questions which the defendant refused to answer thereby invoking his Fifth Amendment right to remain silent. The Court of Appeals noted the general rule against the admissibility of a defendant's invocation of his right to remain silent, and phrased the question in this case as whether this rule applies only when a defendant has invoked the right to remain silent as to *all* further questions thereby terminating the interview or whether it also precludes any comment at trial about the defendant's invocation of the right to remain silent as to *selective* questions. This, in turn, begs the question whether a defendant has the right to remain silent as to specific selective questions. The court initially noted that it had previously held that the right to remain silent, in a custodial interrogation, attaches to a defendant's refusal to answer a specific question, and therefore the Government may not comment on the defendant's refusal to answer a specific question at trial. In order for a defendant to have this right, however, the defendant must indicate in some manner that he is invoking that right, but a suspect need not rely on talismanic phrases or any special combination of words to invoke the right to silence. In the present case, the defendant clearly invoked his right, and the court accordingly found it error for the government to introduce those parts of the videotape which showed the defendant invoking his right to remain silence. Nevertheless, the court did not reverse, finding that the error was harmless beyond a reasonable doubt in light of the other significant evidence in the case.

United States v. Roman, 492 F.3d 803 (7th Cir. 2007; No. 06-3450). In prosecution for tax fraud, the Court of Appeals affirmed the district court's decision to preclude the defense from making a so-called "Golden Rule" appeal to the jury. Specifically, the defendant wanted to argue to the jury that it should place itself in his shoes when coming to a verdict. Relying on prior precedent, the court noted that a "Golden Rule" appeal in which the jury is asked to put itself in the defendant's position "is universally recognized as improper because it encourages the jury to depart from the neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence."

United States v. Bustamante, 493 F.3d 879 (7th Cir. 2007; No. 03-3388). In prosecution for drug related offenses, the Court of Appeals held that the introduction of evidence about the procedures used by the government in obtaining permission to install a wiretap did not warrant a new trial. At trial, the government introduced evidence concerning the procedures required to obtain a wiretap in the home of the defendant's coconspirator. Relying on the Seventh Circuit's recent decision in *United States v. Cunningham*, 462 F.3d 708 (7th Cir. 2006), the defendants argued that such evidence unfairly bolstered the government's contention that the defendants were dealing drugs, given the extensive layers of approval necessary to obtain permission for the wiretaps. The Court of Appeals, however, distinguished this case from *Cunningham*, noting that in *Cunningham,* the government introduced evidence concerning a wiretap placed in the *defendant's* home. Here, the wiretap was not placed in the defendant's home, but a coconspirator's. Thus, unlike *Cunningham*, where the jury could have inferred from the improper evidence that *the defendant* was engaged in illegal activity before the wiretap, the primary inference that the jury could have drawn in this case is that the *codefendant* was engaged in illegal activity before the wiretap. The court concluded that this inference was not particularly damaging to the defendant's case because he did not deny that the codefendant was a drug dealer. Thus, under the plain error standard, the court concluded that an error, if it occurred at all, did not affect the defendant's substantial rights.

United States v. McMahon, ___ F.3d ___ (7th Cir. 2007; No. 05-3379). In prosecution for drug related offenses, the Court of Appeals affirmed the introduction of evidence concerning the procedures used to obtain permission to install a wiretap. Reviewing the issue under the plain error standard, the Court of Appeals first concluded that it was plain error for the court to allow the government to introduce testimony about the procedures used to obtain the wiretap, as the evidence unfairly bolstered the government's contention that the defendant was dealing drugs. However, the court concluded that the evidence did not affect the fairness and integrity of the trial. The other evidence in the case was substantial, thereby minimizing the impact of the improperly admitted evidence.

United States v. Simpson, 479 F.3d 492 (7th Cir. 2007; No. 05-2993). In prosecution for a single sale of crack

cocaine, the Court of Appeals reversed the defendant's conviction due to the introduction of evidence concerning several prior unrelated drug transactions under Rule 404(b). Specifically, at trial, the government's agent testified that after his arrest, the defendant stated to investigators that he dealt crack cocaine for three or four years and purchased an ounce of crack every two or three weeks for redistribution. Regarding the specific transaction for which he was charged (almost a year after it occurred), the defendant stated that he may have been involved in the transaction charged, but he couldn't remember. During closing argument, the government referenced this statement, arguing, "And you know what the defendant told him: Yes, I'm a crack dealer. I've been a crack dealer for three to four years." The government argued that the evidence was admissible either under the "identity" exception to Rule 404(b) or pursuant to the "intricately related evidence" doctrine. Because the defendant denied that he was the person who delivered the drugs charged in the indictment, the government argued that it could introduce the evidence that he had sold crack in the past because it needed to prove he sold the drugs on the date charged in the indictment. Here, although the defendant's alleged prior drug deals may have shown that he was more likely than an average person who had never before dealt in drugs to have sold the drugs in question, it does not show that the identity of the person who sold the drugs on the date in the indictment was he. Rather, the evidence did nothing but show the defendant's propensity to sell crack, a purpose prohibited by Rule 404(b). Likewise, the evidence was not intricately related to the crime charged. The prior drug sales did not shed any light on the charged conduct. These prior unrelated drug sales on unknown dates with unknown persons did not arise out of the same transaction or series of transactions as the charged conduct for which the defendant was on trial. Evidence of prior unrelated drug deals is not "intricately related" to the transaction on trial simply because knowledge of other deals was gained in the same interview by investigating agents. Finally, the court concluded that the evidence was prejudicial in this case given that the circumstantial evidence was close, the prosecution explicitly instructed the jury to draw the inference that the defendant had conducted so many crack deals that he could not remember the deal for which he was charged, and the district court did not give a limiting instruction.

United States v. Hawpetoss, 478 F.3d 820 (7th Cir. 2007; No. 05-4211). In prosecution for the commission of sexual offenses against children, the Court of Appeals affirmed the admission of evidence of uncharged sex offenses allegedly committed by the defendant. The evidence was admitted by the district court under Rules 413 and 414. These two rules create an exception to the general prohibition against "propensity evidence" found in Rule 404(b). Rule 413 expressly allows evidence of past sexual assault offenses when a defendant is accused of another offense of sexual assault to the extent such evidence is relevant. Similarly, Rule 414 states that, in a criminal case in which the defendant is accused of child molestation, evidence of past offenses of child molestation is admissible to the extent these offenses are relevant. For purposes of the rule, "child" refers to anyone under the age of fourteen. Neither rule places any time limit on the other offenses that may be offered into evidence. In evaluating the admissibility of evidence under these rules, the Court of Appeals noted that two different approaches have developed among the circuits. One approach uses a five factor test to evaluate the evidence: (1) the similarity of the prior acts to the acts charged; (2) the closeness in time of the prior acts to the acts charged; (3) the frequency of the prior acts; (4) the presence or lack of intervening circumstances; and (5) the necessity of the evidence beyond the testimonies already offered at trial. Another approach is a more flexible approach which consideres the five factors listed above among "innumerable" other factors, and gives the district court wide discretion in admitting or excluding the evidence, subjecting such decisions to highly deferential review. The Court of Appeals specifically adopted the latter, more flexible approach. In the present case, the defendant argued only that the evidence offered was not necessary given the other testimony already offered at trial. The Court of Appeals, however, disagreed and noted that the district court very carefully considered the disputed evidence and determined it to be both relevant and non-violative of Rule 403. Given the deferential standard of review, the court found there to be no abuse of discretion.

United States v. Holt, 486 F.3d 997 (7th Cir. 2007; No. 05-4286). In prosecution for possession of a firearm by a felon, the Court of Appeals affirmed the district court's exclusion of character evidence. At trial, the defendant sought to cross-examine two testifying officers concerning complaints filed against them and reprimands and other consequences resulting from such complaints. The district court allowed defense counsel to question the officers about the underlying conduct alleged in the complaints, but did not allow questioning regarding complaints or punishment, determining that such questioning was not permissible under Federal Rule of Evidence 608(b) and additionally that it would evoke hearsay. The Court of Appeals initially noted that the introduction of evidence of specific instances of bad conduct are prohibited by Rule 608(b), but the question in this case was whether the Rule also prohibited the asking of a question concerning whether the witness was sanctioned for his conduct. Although noting that as a general rule, Rule 608(b) prohibits only extrinsic

evidence, rather than lines of questioning, this is not to suggest that every question a lawyer might want to ask about a third party's opinion of the credibility of witnesses would be proper cross-examination. Rather, a district judge has broad discretion to limit such questioning. In the present case, the district court properly exercised its discretion, concluding that the questioning would have interjected hearsay into the proceedings.

United States v. Nitch, 477 F.3d 933 (7th Cir. 2007; No. 05-2604). In prosecution for conspiracy to distribute 500 grams or more of methamphetamine, the Court of Appeals rejected the defendant's argument that there was an impermissible variance between the single conspiracy charged in the indictment and the multiple conspiracies proven at the trial. The evidence at trial showed that the defendant began manufacturing methamphetamine in 1999. Certain people would provide raw materials, the defendant would cook the meth, and others would distribute the finished product. The defendant left town in late 2000 or early 2001, but the meth ring continued. Indeed, a codefendant, Patterson, joined the conspiracy after the defendant had left town. Given that the government failed to present any evidence that the two defendants ever worked together, the defendant argued that at the very least there were two separate conspiracies, one involving Patterson and one involving himself. The Court of Appeals disagreed, noting that to join a conspiracy is to join an agreement, rather than a group. The government was not required to show that the defendant and Patterson met with one another or even were acquainted with each other; rather, the government needed only to prove that the defendant joined the agreement alleged. Here, the evidence clearly established that there was a single multi-year conspiracy to manufacture methamphetamine which both the defendant and Patterson participated.

United States v. Jackson, 479 F.3d 485 (7th Cir. 2007; No. 05-4309). In prosecution for being a felon in possession of a weapon, the Court of Appeals affirmed the introduction at trial of an out-of-court experiment conducted in order to rebut the defendant's version of events. One of the key components of the defense was that at the time the defendant was alleged to have committed a shooting and to have possessed a gun, he was actually picking up his girlfriend from work. To rebut the alibi, the government sent a deputy U.S. Marshall to see how long it would take to drive from the scene of the shooting to the girlfriend's place of employment. The Marshal testified that his drive time was short, which provided the basis for the prosecutor to argue in closing that the defendant could have committed the shooting and still had time to pick up his girlfriend. On appeal, the defendant argued that pursuant to Rule 403, the probative value of the experiment evidence was substantially outweighed by the danger of unfair prejudice. The Court of Appeals noted that evidence of experiments is most commonly used in the context of products liability law, where recreations of accidents, explosions, and product malfunctions are now common. Because such evidence can be quite persuasive, the conditions under which an experiment is performed must be "substantially similar" to those surrounding the simulated event. This does not mean "identical," and dissimilarities can be explored on cross-examination. In other words, as a general matter, "dissimilarities between the experimental and actual conditions affect the weight, not the admissibility of the evidence." If the purpose is to recreate an actual event, the timing and physics of which are critical, courts will only admit evidence of experiments that are conducted under nearly identical conditions as the actual event. By contrast, where the purpose of the experiment is not to recreate events but simply to rebut or falsify the opposing party's sweeping hypothesis, the substantial similarity requirement is relaxed. In the present case, the experiment fell within this second category. The government was not trying to recreate the defendant's actual drive, but simply attempting to cast doubt on the defendant's claim that he did not have enough time to pick up his girlfriend and commit the crime. In such a case, any dissimilarities between the test and the actual drive alleged by the defendant could be explored on cross-examination. However, the court did note that the result might have been different had the government presented the evidence during its case in chief, rather than as rebuttal evidence.

GUILTY PLEAS

United States v. Arenal, ___ F.3d ___ (7th Cir. 2007; No. 06-2838). In prosecution for drug offenses, the defendant argued that the factual basis provided at his plea was insufficient, and he should therefore be allowed to withdraw his appeal. The government conceded that the plea agreement's factual recitation was unsatisfactory, but it argued that the rest of the information put into the record, including the PSR, prior to judgment provided a sufficient basis to support the plea. Addressing the issue under the plain error standard, the court noted that in order to show that a violation of Rule 11 constitutes reversible plain error, a defendant must demonstrate that he would not have pleaded guilty if the violation had not occurred. Although the defendant argued that the standard should be different when the Rule 11 violation concerned an insufficient factual basis, the Court of Appeals refused to make this distinction. Concerning what should be considered to ascertain the factual basis for the plea, the court noted that Rule 11 draws a distinction between the

district court's role in *accepting* a guilty plea and its role in *entering judgment* on the guilty plea. The district court may consider not only the information proffered at the plea hearing, but also information contained in the PSR to establish a factual basis before entry of judgment and imposition of sentence. Considering all these pieces of evidence, there was enough facts in the record to support the defendant's plea.

OFFENSES

United States v. Calabrese, 490 F.3d 575 (7th Cir. 2007; No. 07-1962). In a RICO prosecution alleging the Chicago "Outfit" as the enterprise, the Court of Appeals held that the prosecution was not barred by the Double Jeopardy Clause. The defendants were previously convicted of conspiring to conduct the affairs of the Carlisi Street Crew. In the new indictment, some of the predicate acts were the same as those alleged in the previous prosecution, and the defendants argued that the government could not use those predicate acts in the subsequent indictment. The Court of Appeals, however, held that the argument misunderstood the actual charge in the indictment. The defendants were not "charged" with the underlying predicate acts. They were charged with participating in a conspiracy to operate an enterprise by means of criminal acts. The enterprise was the Chicago Outfit, and it is different from the Carlisi Street Crew alleged in the first prosecution. Were it the same enterprise, the court noted the outcome might be different. The court did note, however, that as the overlap between two prosecutions of the same person grows, the characterization of the two proceedings as charging separate criminal acts becomes less convincing. Finally a point is reached at which the differences are minor and it seems that the government contrived the differences to evade the prohibition against placing a person in double jeopardy. For while the government is not required to charge in its first prosecution of a person all the possible offenses that the facts in the government's possession would enable it to charge, it can still be precluded from bringing a later prosecution for a separate offense where the Government has lost an earlier prosecution involving the same facts." In this case, however, the court concluded that it was not at that point, especially given that the government did not lose the first time around.

United States v. Are, ___ F.3d ___ (7th Cir. 2007; No. 06-2802). In prosecution for illegal re-entry, the Court of Appeals clarified when a defendant is "found in" the United States. The defendant was deported in 1996. He attempted to illegally reenter the country in May of 1998 but was caught and sent back to his country of origin. In September of 1998, however, he succeeded in illegally reentering. Immigration authorities did not discover his presence until sometime after his arrest in 2003 by Chicago police on an unrelated offense. Although the defendant gave a false name at the time of his arrest and immediately posted bail, his true identity was eventually discovered and he was arrested in 2005 on the immigration violation, *i.e.,* being "found in" the United States after previously having been deported. The offense carries a five-year limitations period. The district court held the statute of limitations had run because the government should have known of the defendant's illegal presence in 1998 or 1999 because immigration authorities had opened an investigative file in October 1998 based on his first unsuccessful reentry attempt, and they had a tip form a confidential informant that the defendant was living in Chicago. On appeal by the government, the Court of Appeals reversed. It held that the "found in" variation of 1326(a)(2) is a continuing offense; the statute of limitations generally does not begin to run for continuing offenses until the illegal conduct is terminated. Moreover, the statute makes it a crime to be "at any time found in" the United States following deportation, permitting prosecution of deportees who evade detection at the border and remain present here undetected, even for long periods of time. A "constructive knowledge" interpretation–one that starts the statute of limitations clock when the government "should have found" the deportee–is inconsistent with the straightforward text and obvious purpose of the statute. In the present case, immigration authorities did not actually discover the defendant's presence, identity, and status as a prior deportee until sometime in late 2003 or 2004, and his illegal presence continued until his arrest in June of 2005. Thus, whether measured from the date of his actual "discovery" by immigration authorities or the date of his arrest, the September 1, 2005 indictment was timely.

United States v. Bustamante, 493 F.3d 879 (7th Cir. 2007; No. 03-3388). In prosecution for a large scale drug conspiracy, the Court of Appeals held that a variance occurred between the government's evidence and the indictment. Specifically, the defendant and two of his codefendants went to trial. The government presented evidence concerning a large scale drug conspiracy lead by a codefendant named Corral. Although a great deal of evidence was introduced regarding the conspiracy as it related to Corral, less evidence was presented regarding the defendant. Specifically, the evidence showed that Corral fronted the defendant cocaine about once a month, totaling six to eight kilograms. Police also recorded a number of telephone calls between the defendant and Corral indicating he wanted to purchase cocaine. In one call, the defendant asked Corral (who was in a car at the time) if he could sell him a some cocaine, and when he stated the he couldn't, the defendant asked if anyone

else in the car with Corral could. Finally, in a search of the defendant's home, the police recovered items used in the drug trade, as well as a ledger which recorded the payment of Latin King members' monthly dues and the gang's purchase of guns. Given this evidence, the Court of Appeals concluded that the evidence was insufficient to prove that the defendant agreed to participate in a single, larger conspiracy as alleged in the indictment. Specifically, in a "hub and spoke" conspiracy as alleged in the indictment, those people who form the wheel's spokes must have been aware or each other and must do something in furtherance of some single, illegal enterprise. The court held that the evidence only established that the defendant knew of the existence of a larger conspiracy, but the evidence did not show that he actually participated in it. Notwithstanding the evidence, however, the court concluded that the defendant was not prejudiced at trial to the extent that a new trial was warranted. Although the jury heard incriminating evidence that was relevant only against the other conspirators, the government offered several recorded telephone conversations in which the defendant arranged cocaine deals with Corral. For this reason, the evidence against him was strong enough to overcome any prejudice that may have resulted from the admission of evidence relevant only to the other defendants. However, at sentencing, the court concluded that the defendant was prejudiced, for he was held accountable for drug amounts related to the larger conspiracy. Given the lack of evidence that the defendant joined that large conspiracy, he should have only been held accountable for the amounts of drugs he purchased personally from Corral. Accordingly, the court vacated the defendant's sentence.

United States v. Rand, 493 F.3d 776 (7th Cir. 2007; No. 06-2374). After a jury trial convicting the defendant of witness tampering pursuant to 18 U.S.C. 1512(a)(1)(C), the Court of Appeals affirmed the defendant's conviction. A friend of the defendant was awaiting trial on charges of identity theft and on pretrial release. He hatched a plan where he would kill a homeless man and use his body as his "double," thereby allowing him to abscond. The defendant and others went through with the plan, but authorities quickly determined that the homeless man was not in fact the man awaiting trial. The defendant ultimately went to trial on a charge of aiding and abetting the murder of the homeless man under 1512(a)(1)(C), that statute prohibiting killing another to prevent the communication by any person to a law enforcement officer or judge information relating to the violation of conditions of release pending judicial proceedings. Count 2 charged the defendant with conspiring to commit the offense of causing the failure of a defendant to appear for arraignment as required by a pretrial release order. The government's theory was that the homeless man was killed to prevent the pretrial services officer from communicating to the court that the defendant's friend had violated the conditions of his release by leaving his home. The defendant, however, argued that the statute does not apply to the facts in this case because the statute is addressed to what is commonly understood to be witness tampering. Because the homeless man was not a witness, victim, or informant, his killing was not a violation of the statute. The court agreed with the government, noting that the statute demonstrates that the murder victim does not have to be a witness or an informant. The statute makes it a federal crime to kill "another person"--regardless of who that person is--in order to prevent the communication by "any person" to the court. The statute does not provide that it is a federal crime to kill another person in order to prevent *that* person from communicating the information to the court. Secondly, the court rejected the defendant's argument that the statute applies only to *prior* crimes. The statute includes potential crimes by punishing whoever kills another person with the intent to prevent the communication by any person to law enforcement officer or judge "relating to the commission or *possible* commission" of a federal crime.

United States v. Horne, 474 F.3d 1004 (7th Cir. 2007; No. 05-4049). In a Hobbes Act prosecution, the defendant was convicted of advertising fictitious vintage cars for sale on eBay. If a victim agreed to purchase a car, they would travel to Indiana to meet with the defendant. Once there, the defendant and an accomplice would rob the victim at gunpoint. The defendant argued on appeal that his crimes, since they all occurred in Indianapolis in face-to-face encounters with his victims and no car or cash or any other object was transported across state lines, did not affect interstate commerce. Rejecting this argument, the court noted that eBay is an online auction site and an avenue of interstate commerce, similar to an interstate highway or long-distance telephone service. The Internet, which is the communication channel that people use in transacting business through eBay, crosses state and indeed international boundaries, and the buy and sell offers communicated over it in this case created interstate transactions and were affected by the defendant's fraud.

United States v. Craft, 484 F.3d 922 (7th Cir. 2007; No. 06-3524). In prosecution for arson, the Court of Appeals reversed the defendant's conviction on one of several counts. The defendant was convicted of setting fire to a clubhouse belonging to a local chapter of the Hell's Angels motorcycle club. On appeal, the defendant argued that the government provided insufficient evidence to establish that the club was used in an activity affecting interstate commerce. The

evidence at trial showed that the clubhouse was used for monthly meetings and parties. The members paid dues which were used for the upkeep of the clubhouse and were not sent to a national chapter, although dues were used to occasionally reimburse members for travel on trips across state lines for rallys and funerals. Given this evidence, the court concluded that any connection the dues had on interstate commerce was too passive, too minimal, and too indirect to place the clubhouse property within the federal arson statute's reach. Thus, without further evidence that the Hells Angels members actively employed the clubhouse for commercial purposes, no reasonable jury could conclude that the clubhouse was used in a manner that affected interstate commerce.

United States v. Malone, 484 F.3d 916 (7th Cir. 2007; 06-2915). In prosecution for multiple drug charges and money laundering, the Court of Appeals reversed the defendant's conviction for money laundering. The defendant hired drivers to move drugs and money across the country. Based upon these cross-country transports of cash to pay for the drugs, the government charged the defendant with money laundering. To establish the offense of money laundering, the government must prove that the defendant conducted a financial transaction with the proceeds of an illegal activity, knew that the property represented illegal proceeds, and conducted the transaction with the intent to promote the carrying on of the unlawful activity. The defendant argued that the cash deliveries merely completed the sale of drugs and were not part of actions separate from the substantive criminal drug offenses for which he was already convicted. The court noted that at least some activities that are part and parcel of the underlying offense can be considered to promote the carrying on of the unlawful activity, but whether these activities can be considered transactions in the *proceeds* of the unlawful activity is a separate question. Unlike the act of reinvesting a criminal operation's net income to promote the carrying on of the operation, the act of paying a criminal operation's expenses our of gross income is not punishable as a transaction in proceeds. Here, the defendant was in a sense paying the expenses of his own cocaine delivery operation by exchanging funds for the product he was required to ship in order to get paid for his efforts. From the defendant's standpoint, the transported cash constituted gross income for the operation that served only to pay for the product at the core of his delivery business--his only net income was the delivery fees he was paid for each drive. Accordingly, his money laundering conviction can only stand if he were charged on the basis of evidence that he conducted or attempted to conduct a financial transaction in these delivery fees. There being no such evidence, the court reversed his conviction.

United States v. Singh, 483 F.3d 489 (7th Cir. 2007; No. 05-4509). In prosecution for kidnapping, the Court of Appeals defined when "transportation" of the victim begins for purposes of the kidnapping statute. The federal kidnapping statute is violated when the victim is willfully transported in interstate commerce regardless of whether the person was alive when transported across a State boundary if the person was alive when transportation began. In other words, the government must establish that the victim was alive when "transportation begins." For purposes of the statute, transportation begins when the victim is "willfully moved from the place of his or her abduction." Importantly, this willful movement may be intrastate, and the statue is satisfied even if the victim is dead when ultimately moved across state lines.

PROCEDURAL ISSUES

United States v. Mallett, ___ F.3d ___ (7th Cir. 2007; No. 06-1969). In prosecution for drug offenses, the Court of Appeals rejected the defendant's challenge to the district court's decision to transfer his case from one division to another. Specifically, the defendant argued that his Sixth Amendment right to trial by an impartial jury of his peers was violated when the district court transferred his case from the Hammond Division to the Fort Wayne, Division, both of which are in the Northern District of Indiana. The charged offense took place in Lake County, which is in the Hammond Division. The case was transferred because of workload considerations. The Court of Appeals held that a defendant may be tried in a division of a judicial district different than the division where the crime was committed and therefore found no error.

United States v. Stevens, ___ F.3d ___ (7th Cir. 2007; No. 07-1063). Long after the defendant's criminal case was over, he filed a "motion for return of property" in the district court, seeking the return of property seized by the government in his criminal case. Rule 41(g) of the Federal Rules of Criminal Procedure provides a mechanism by which criminal defendants may recover property seized by the Government. A prisoner may employ the rule post-trial to recover evidence that the government no longer needs. However, the Rule permits only the recovery of property in the possession of the government. Thus, if the government no longer possesses the property at issue, no relief is available. In response to the defendant's motion, the government filed a pleading asserting that it no longer possessed the items requested by the defendant. However, it offered no evidence to support this assertion. The district court denied the motion based on what it characterized as the government's arguments. The Court of Appeals reversed, noting that whether the government possesses

the items is a question of fact upon which the district court "must receive evidence." Here, the district court received no evidence, but rather unsupported arguments in the government's brief. Accordingly, the court remanded the case to allow the district court to receive evidence to support the government's assertions.

United States v. Charles, 476 F.3d 492 (7th Cir. 2007; No. 05-2815). Upon consideration of the district court's denial of the defendant's motion to suppress evidence, the Court of Appeals held that the defendant's objection to the magistrate judge's Report and Recommendation was sufficient to preserve the issue for review on appeal. The magistrate judge initially recommended that the motion to suppress be denied. In that recommendation, the magistrate judge ruled on a single issue. The defendant filed two separate objections to the Report and Recommendation, noting only that the recommendation was "in error" and asking that the district court review the recommendation in its "entirety." The district court held that these general objections were insufficient to preserve an objection for purposes of section 636(b)(1). The Court of Appeals disagreed, noting that in a single issue case, the objections were sufficient to point the district court in the right direction. However, the situation would have been different if the magistrate judge had addressed more than one issue. In that kind of case, a more specific objection is necessary to alert the district court to the finding or findings the objecting party wishes to challenge. In those circumstances, a general objection may well constitute at least a forfeiture, if not a waiver.

PROSECUTORIAL MISCONDUCT

United States v. Morris, ___ F.3d ___ (7th Cir. 2007; No. 05-4679). In prosecution for various drug offenses, the defendant argued that he was deprived of a fair trial when the government led the jury to believe that a cooperating witness was subject to a 10-year mandatory minimum sentence, when in fact the government knew at the time of the witness's testimony that it intended to move for a departure below the mandatory minimum. Specifically, the witness pled guilty and agreed to testify against the defendant as part of his plea agreement. When questioned about his plea deal at trial, the witness asserted that the mandatory minimum sentence for his plea was 10 years; the prosecutor reinforced this by arguing to the jury on multiple occasions that the witness could not get less than 10 years. However, following the defendant's conviction, the government moved under 18 U.S.C. 3553(e) and U.S.S.G. 5K1.1 for the witness to be sentenced below the mandatory minimum to a 70-month term. The Court of Appeals concluded that the prosecutor had committed prosecutorial conduct in misleading the jury. No competent Assistant U.S. Attorney, according to the court, is unaware of the ability to receive a sentence below a mandatory minimum through cooperation. It was therefore improper both to give the jury the impression that the witness's sentence could not go below 10 years during direct examination of the witness, and then later to argue the same thing to the jury, at lease when it was obvious that the United States had not firmly rejected the possibility of the 5K1.1 motion. Nevertheless, the court concluded that the improper comments did not deprive the defendant of a fair trial, where the jury already had before it the fact that the witness was receiving a substantial benefit for his testimony (the dropping of two charges). Given this proper evidence, there was no reasonable likelihood that the result would be different.

SEARCH AND SEIZURE

United States v. Ellis, ___ F.3d ___ (7th Cir. 2007; No. 06-3137). In prosecution for drug offenses, the Court of Appeals reversed the district court's denial of the defendant's motion to suppress evidence obtained via a warrantless search of the defendant's home. The police conducted a controlled buy between a CI and a suspect. When an unknown supplier arrived on the scene, the police followed him to the defendant's home (a duplex apartment). The unknown man entered the apartment for a few minutes and then left. Hoping to discover more about the unknown supplier, the police arranged a second controlled buy hoping he would reappear, but the original target of the investigation was arrested before he arrived on the scene. Officers then decided to perform a "knock and talk" at the residence where the unknown suspect went after the first buy. Erroneously believing that the residence had been involved in prior drug transactions due to bad information, officers surrounded the home, with officers at the front door and officers at the side door. After officers knocked on the front door and announced their presence, the defendant came to the door but refused to open it. Rather, through the closed door, officers told the defendant they were searching for a lost child and asked for consent to search. The defendant said he did not live there, could not give consent, and they should come back later. Meanwhile, officers at the side door heard movement in the home and a person running up and down the stairs. After they told this to the officers at the front door, one of them came to the side and they broke through the door. Officers then seized drugs and guns. The Court of Appeals held that probable cause did not exist. The court found that the four pertinent facts used by the police to justify the entry were insufficient. Those facts were: (1) an unknown drug supplier visited the house for a few minutes; (2) the registered owner of the home had two prior drug convictions; (3) the person at the door

would not let officers in; and (4) an officer heard movement in the house. The court also noted that the knowledge of the officers at the front door could not be imputed to the officers at the side door. The officers at the side door did not know what was transpiring at the front door when they made the decision to break down the door. Although an officer from the front came to assist, he did not tell the side door officers about what was transpiring at the front door. This situation is unlike those where knowledge may be imputed when the officers are in actual communication with each other. As there was no communication among these officers, the collective knowledge doctrine did not apply. The court noted that allowing the tactics used in this case would eliminate the Fourth Amendment warrant requirement. Knocking at a door will almost always result in movement inside a home–even more so if the house is surrounded by police. Nothing about the movement in this case was unusual. In other words, if the court affirmed, it would create a situation in which the police have no reason to obtain a warrant when they want to search a home with any type of connection to drugs. If the police knock on the door and seek to talk to the occupant without a warrant, there likely will be movement within any home. The police will then be able to respond that this movement increased their suspicion and also creates exigent circumstances that required that they enter into the home to prevent the destruction of the drugs that the police believe to be in the home. In other words, the occupant of the home has only two choices: consent to the search, or your movement inside the home will be used by the police to enter the home anyway. Ultimately, it was the government which chose to use the "knock and talk" approach, hoping they would gain entry into the home. When their effort was unsuccessful, while at the same time alerting the occupant of the home to police interest in them, the police couldn't then enter without consent to avoid the consequences of their decision. Thus, the Court of Appeals reversed.

United States v. Hawkins, ___ F.3d ___ (7th Cir. 2007; No. 06-2094). In a Hobbes Act and firearms prosecution, the Court of Appeals affirmed the defendant's conviction over his argument that testimony about a show-up identification done shortly after his arrest should have been suppressed. Prior to the defendant's arrest, a gas station was robbed by a man in a ski mask in an incident which lasted about one minute. As police were arriving on the scene, they observed a car speeding away from the area. After pursuing the vehicle, the vehicle stopped and the driver fled on foot. After officers apprehended the driver a short time later, they brought him back to the scene of the robbery and had him exit the car to be viewed by the victim from 25 to 30 feet away. The victim made a tentative identification based upon the defendant's height, body type, build, and clothing. The police did not have him wear the ski mask. The defendant argued in the district court and on appeal that evidence of the show-up identification should not have been presented because it was unduly suggestive and because the resulting identification was not reliable under the circumstances. The Court of Appeals initially noted that the admission of a show-up without more does not violate due process." Rather, a court must determine whether under the circumstances there was a good reason for the failure to resort to a less suggestive alternative. One such circumstances is cases of extraordinary urgency. A show-up under such circumstances serves legitimate law enforcement purposes because it allows identification of the suspect while the witness' memory is still fresh. Such identifications both protect the innocent individuals from unnecessary arrest and help authorities determine whether they must continue to search for the actual perpetrator. Here, the court concluded that the show-up was not unduly suggestive. The show-up occurred less than an hour after the robbery and the defendant had been observed and apprehended in the immediate vicinity of the crime. When asked by the victim if they had the robbery, the police responded by saying they did not know. Likewise, they did not present the defendant in the ski mask nor show her the gun they found when apprehending the defendant. Taken together, these facts demonstrate, according to the court, that the officers took no steps other than the show-up itself to suggest that Mr. Hawkins was the robber.

United States v. Bin Yang, 478 F.3d 832 (7th Cir. 2007; No. 06-3017). In prosecution for tax fraud, the Court of Appeals affirmed the district court's denial of the defendant's motion to suppress evidence. The defendant called the police to report a burglary at his home. Once at the scene, officers asked the defendant if they could take five notebooks to check for fingerprints. One officer, who knew the defendant was being investigated for tax fraud, looked through the notebooks and found what appeared to be accounting information, which ultimately led to the tax fraud indictment against the defendant. In his motion to suppress evidence, the defendant argued that his Fourth Amendment rights were violated by the search of the notebooks, but the government argued that the defendant had no expectation of privacy in the notebooks. The Court of Appeals concluded that the defendant did not, by his conduct, exhibit an actual expectation of privacy in the notebooks. Specifically, he voluntarily allowed the officers to take the notebooks in their entirety to the police station and hold them for several days. He placed no limitations on access to the notebooks. Indeed, the defendant took no affirmative steps to demonstrate any

expectation of privacy in the notebooks. Accordingly, the search did not violate the Fourth Amendment.

United States v. Watzman, 486 F.3d 1004 (7th Cir. 2007; No. 05-4669). In prosecution for possessing and receiving child pornography, the Court of Appeals affirmed the district court's denial of the defendant's motion to suppress evidence. The defendant argued that the affidavit in support of a search warrant of his home did not establish probable cause. Specifically, investigators discovered that the defendant had paid for access to a number of Internet child pornography websites and had placed a number of orders for Internet videos of child pornography. Based on this information, federal agents obtained a warrant to search the defendant's apartment for evidence of child pornography. In the district court and on appeal, the defendant argued that the district court improperly assumed that pornography is necessarily viewed in the privacy of one's own home. He argued that it is equally likely that one might download child pornography in innumerable places, such as offices, public and private libraries, universities and airports. The Court of Appeals, however, noted that a finding of probable cause does not require direct evidence linking a crime to a particular place. Moreover, in the affidavit, the federal agent specifically averred that consumers of child pornography tend to hoard their collections at home. This assertion was enough to establish probable cause to search the apartment. Moreover, although the most recent date set forth in the affidavit on which the defendant downloaded child pornography was July of 2003 and the warrant was not sought until October of 2003, the information in the affidavit was not "stale." Again, the agent averred in the affidavit that those who possess child pornography tend to save their materials, thereby providing enough evidence that probable cause existed that child pornography would be found at the defendant's residence.

United States v. Wen, 477 F.3d 896 (7th Cir. 2007; No. 06-1385). In prosecution for violating the export-control laws by providing militarily useful technology to China, the defendant argued that the district court should have suppressed evidence derived from a wiretap approved under the Foreign Intelligence Surveillance Act. Specifically, the defendant argued that evidence gathered under FISA cannot be used in domestic criminal investigations or prosecutions, even when the "domestic" crime is linked to international espionage, once that international investigation has "fizzled out" and the investigation of domestic crime necessarily assumes primary significance. In rejecting this argument, the court noted that so long as probable cause to believe that a foreign agent is communicating with his controllers outside our borders, the interception is reasonable. If, while conducting this surveillance, agents discover evidence of a domestic crime, they may use it to prosecute for that offense. That the agents may have known that they were likely to hear evidence of domestic crime does not make the interception less reasonable than if they were ignorant of the possibility. It is enough that the intercept be adequately justified without regard to the possibility that evidence of domestic offenses will turn up.

United States v. Garcia, 474 F.3d 994 (7th Cir. 2007; No. 06-2741). Upon consideration of the district court's denial of the defendant's motion to suppress evidence, the Court of Appeals held that installation of a GPS memory tracking unit on a car did not constitute an unreasonable search or seizure. The police learned through an informant that the defendant was manufacturing methamphetamine, and the police confirmed through a store security camera that the defendant purchased ingredients used to make the drug. Learning that the defendant drove a Ford Tempo, the police installed the tracking device on the car. The device recorded the car's travel over a period of time and allowed the police to determine where the car had traveled during the period between installation and retrieval of the device. By examining the data, the police learned that the defendant was traveling to a large tract of rural land. Obtaining the consent of the land owner, they discovered a meth lab. While the police were there, the defendant arrived and was arrested. The Court of Appeals first concluded that no seizure had occurred by installation of the tracking device. The device in no way affected the car's appearance, usefulness to its driver, or available space. Regarding whether installation of the tracker was a search, the court noted that the device substituted for following the car on a public street, which is unequivocally not a search within the meaning of the Fourth Amendment. Although the tracking device used advanced technology, the government is allowed to make use of such technology so long as it does not weigh too heavily in the balance between security and privacy. Ultimately, the court concluded that the use of the device in this case did not constitute a search. However, the court noted that the conclusion might be different if the government used such devices to conduct mass surveillance on individuals. "Whether and what kind of restrictions should, in the name of the Constitution, be placed on such surveillance when used in routine criminal enforcement are momentous issues," which the court concluded it need not resolve in this case because the police here only used the tracking device when they had a specific target under investigation. If a GPS device were used in mass surveillance of vehicular movements,

it might then become time to decide whether the Fourth Amendment should be interpreted to treat such surveillance as a search.

SENTENCING

United States v. Webster, ___ F.3d ___ (7th Cir. 2007; No. 06-4330). In prosecution for assault causing serious bodily injury on an Indian Reservation, the Court of Appeals affirmed a sentencing enhancement pursuant to U.S.S.G. 2A2.2(b)(3) for battery that produces "permanent or life-threatening bodily injury." The defendant punched his victim in the face five times and, after she collapsed, kicked her in the face five times. The attack broke the victim's nose and the bone around her right eye; it also caused lacerations that a physician concluded would leave prominent facials scars. The defendant argued that although the injuries were "serious," they were not "permanent or life-threatening." The Court of Appeals disagreed. A permanent disfigurement is an appropriate basis for the enhancement. Although plastic surgery might be able to correct the damage, the most that any surgeon could say was that such surgery "may" correct the disfigurement. However, rather than asking whether a victim's future might be brighter, a district court should act on the basis of the victim's current condition and current medical information. If an impairment has not been corrected by the time of sentencing, and will last for life unless surgically corrected in the future, then it should be treated as permanent unless future correction would be a straightforward procedure.

United States v. Santiago, ___ F.3d ___ (7th Cir. 2007; No. 06-3193). In prosecution for possession with intent to distribute crack and unlawful possession of ammunition be a felon, the Court of Appeals affirmed the defendant's above-the-range sentence as reasonable. The defendant's guideline range was the statutory minimum, 240 months' imprisonment. The government, however, argued for an above range sentence because the defendant's criminal history category did not adequately reflect his prior criminal conduct. Specifically, the defendant had a prior conviction for murder which was excluded from the criminal history category because it was too old. Secondly, the government argued that the defendant was involved in an uncharged murder. In support of this uncharged conduct, the government presented numerous documents and other evidence, including a letter written by the defendant where he inculpated himself. The court agreed with the government and sentenced the defendant to 360 months' imprisonment. After finding that the evidence supported the district court's conclusion that the defendant committed the uncharged conduct, the Court of Appeals found the sentence to be reasonable. Specifically, after considering the factors set forth in 3553(a), the district court concluded that a sentence of 360 months' imprisonment was sufficient but not greater than necessary to fulfill the purposes of 3553(a). The district court concluded that the defendant's history of violent and antisocial criminal conduct made a sentence above the statutory mandatory minimum necessary to promote respect for the law, to provide deterrence and to protect the public from the defendant. Each of the reasons articulated by the district court for justifying an above-guidelines sentence are grounded in 3553(a). The district court's findings revealed the defendant's involvement in a series of violent crimes spanning more than twenty years. Give his violent and persistent criminal conduct over such a long period of time, the court concluded that the district court's decision to impose a sentence greater than the guidelines sentence was not unreasonable.

United States v. Wachowiak, ___ F.3d ___ (7th Cir. 2007; No. 06-1643). In prosecution for downloading and electronically "sharing" child pornography on a home computer, the Court of Appeals affirmed the defendant's below-the-guidelines-range sentence as substantively reasonable, over the government's appeal. The defendant's guideline range was 121 to 151 months, but the district court sentenced the defendant to 70 months' imprisonment. The district court based its sentence on a number of factors, including the defendant's excellent character, genuine remorse, family support, and certain mitigating aspects of the offense. The Court of Appeals noted that substantive reasonableness review distinguishes between common and particularized factors. A nonguidelines sentence premised on factors that are common to offenders with like crimes may reflect a simple disagreement with the guidelines; *Booker* did not authorize courts to find that the guidelines themselves (or the statutes on which they are based) are unreasonable. On the other hand, a variance from the guidelines that is sufficiently particularized to the individual circumstances of the case and not disproportionate to the strength of the reasons for varying likely will survive reasonableness review. After analyzing all the cases where the court had found sentences to be substantively unreasonable, the court concluded that the sentence in this case was not so clearly "wrongheaded" as those in prior precedents. Specifically, the judge methodically worked through 3553(a), ultimately concluding that the 70 month sentence sufficiently punished the defendant, reflected the seriousness of his offense, promoted deterrence, protected the public, and ensured prompt treatment. While the court may have disagreed with some of the reasons for selecting a below-guidelines sentence, they were for the most part specific to the defendant (that is,

not routine in all or most child pornography cases) and generally corresponded to leniency in sentence). Accordingly, the court affirmed the sentence.

United States v. Gammicchia, ___ F.3d ___ (7th Cir. 2007; No. 06-3325). In prosecution for obstruction of justice, the Court of Appeals affirmed the defendant's sentence over a reasonableness challenge, and stated that defense counsel should have filed an *Anders* brief. The defendant received a 30-month, bottom-of-the-range sentence, but argued that he should have received a lower sentence because his codefendants received lower sentences and because his wife had cancer and he suffered from poor health. Regarding the lower sentences of codefendants, the court noted that the sentences were justified in light of their cooperation with the government. Regarding the health issues, although noting that such concerns can be considered as a 3553(a) factor, such considerations are for the sentencing judge, not the reviewing court, to weigh against the gravity of the defendant's crime and the other factors in section 3553(a). The factors are intangibles, "weighable" only in a metaphorical sense, that the sentencing judge is in a better position than appellate judges to place them in the balance with competing considerations. The sentencing judge here said that he conducted such an analysis, and the court had no reason to doubt that he did. The court also stated that the appeal bespeaks a misunderstanding of federal sentencing law under the regime created by *Booker*. "When as in this case a criminal appeal is frivolous, the defendant's attorney should file an *Anders* motion rather than waste the court's time on a lost cause. We write in the hope of heading off what is assuming the proportions of an avalanche of utterly groundless sentencing appeals."

United States v. Schmitt, ___ F.3d ___ (7th Cir. 2007; No. 06-2207). In prosecution for possession of child pornography, the Court of Appeals reversed the defendant's sentence, finding that the district court improperly indicated that the guidelines are mandatory in cases involving child pornography. After the defendant argued for a sentence below the advisory guideline range, the district court stated, "While the sentencing guidelines in today's world are viewed as advisory in the context of the post-*Blakely, Booker, Fanfan* world, the hard reality remains that against 19 years or close to it of experience, there is a growing attitude, particularly in the Court of Appeals, now that we're a little more than a year out from *Booker* and *Fanfan*, that sentences within the guidelines are presumptively correct. And if we, as trial Judges, are to impose sentences that are outside those mainstream guidelines as the sentencing commission and congress have promulgated them, there better be very, very cogent reasons why the Court believes it appropriate in a given case to impose a sentence outside the guidelines." Additionally, the judge stated, "Given the fact that Congress has spoken in unmistakable terms, I cannot in good conscience deviate from the advisory sentencing guidelines because of the good things that have been said today about William Schmidt, the good things that appear in the presentence report, and the wonderful things that professionals have to say about him in terms of lack of pedophilia, lack of pursuing in a physical sort of way those of tender age who otherwise are taken advantage of and appear in these materials. But what I am here to address is the simple reality that Congress has spoken loud and clear, and given the very close proximity to the mandatory sentence that would have otherwise applied, I frankly do not see and do not find any basis to impose other than the sentence called for at the low end of the advisory guidelines." The Court of Appeals noted that it has previously held that the PROTECT Act intended to restrict the authority of district courts to depart from the Guidelines in sexual offense and child pornography cases cannot constrain the discretion of the district court to impose a sentence outside the range recommended by the Sentencing Guidelines. There is a difference, according to the court, between weighting the seriousness of a particular offense more heavily under 3553(a) and feeling compelled to impose a guidelines sentence for a particular class of crimes, which the district court did in this case. Thus, because the district court "placed a thumb on the scale favoring a guideline sentence," the court concluded that the defendant was entitled to resentencing.

United States v. Luepke, ___ F.3d ___ (7th Cir. 2007; No. 06-3285). In prosecution for drug offenses, the Court of Appeals reversed the defendant's sentence because the district court denied him his right to allocution. At sentencing, the district court announced the defendant's sentence, and only after doing so did the district court say, "Before imposing any sentence in this matter I will call upon the defendant for those matters which he would like to bring to the Court's attention." The defendant argued on appeal that this offer to the defendant to speak after announcing his sentence denied him his right to allocution, and the Court of Appeals agreed. The court initially found that the district court erred in adjudging a definitive sentence before permitting the defendant to address the court, pursuant to Federal Rule fo Criminal Procedure 32. Moreover, the court's belated invitation to the defendant to speak after the announcement of the sentence did not alter in any significant way the detriment to the defendant from the court's earlier error. Although a district court could remedy such an error by setting aside the sentence,

reopening the proceeding, and inviting the defendant to speak, such a process must genuinely reconsider the sentence in light of the elicited statement. The court would not simply presume that a defendant's allocution rights have been protected because *at some point* before the close of a sentencing proceeding a defendant is invited to speak. Applying other factors of the plain error test, the court held that a reviewing court should presume prejudice when there is any possibility that the defendant would have received a lesser sentence had the district court heard him before imposing sentence. That the right of allocution, properly afforded, *could have* had such influence is the most the court could expect a defendant to demonstrate. Finally, when considering whether the plain error seriously affected the fairness, integrity, or public reputation of the judicial proceedings, the court stated that it believed that, in the vast majority of cases, the denial of the right to allocution is the kind of error that undermines the fairness of the judicial process. Absent some rare indication from the face of the record that the denial of the right did not implicate these core sentencing values, resentencing is the appropriate judicial response. The court applied Rule 36 on remand.

United States v. Nelson, 491 F.3d 334 (7th Cir. 2007; No. 05-3624). In prosecution for drug offenses, the Court of Appeals considered the starting point for a downward departure for substantial assistance when the mandatory minimum sentence in the case is life imprisonment. The defendant, subject to a mandatory life sentence, cooperated with the government and it therefore moved for a downward departure pursuant to 18 U.S.C. 3553(e) for substantial assistance. The government suggested that the district court carry out the reduction by starting from offense level 43, the level associated with a life sentence. Next, the district court was asked to "clump" the six guideline ranges of "360-life" under category VI (offense levels 42 to 37) "together into one." The government then recommended that the district court "go down three more from that" to arrive at offense level 34 and sentence the defendant to a guideline range of 262 to 327 months and a final sentence of 262. The defendant, however, argued that the applicable guideline range for his mandatory life sentence was the "360-life" range, and, as such, the district court should calculate his sentence by starting from offense level 37, the lowest offense level that supports a sentence of 360 months to life. The district court ultimately used the government's suggested method. The Court of Appeals affirmed the district court's method. Specifically, because the defendant was subject to the longest sentence a defendant can receive under the Guidelines, his corresponding guideline range should reflect the same. Accordingly, a straightforward interpretation of the Guidelines requires a finding that the applicable guideline range for a mandatory minimum sentence of life *is* life, which can only be found at offense level 43. According to the court, the language of the Guidelines is clear; therefore, it concluded that the district court's decision to depart from the defendant's mandatory life sentence by starting at offense level 43 was proper.

United States v. Carani, 492 F.3d 867 (7th Cir. 2007; No. 06-2007). In prosecution for possessing and receiving child pornography, the Court of Appeals affirmed a sentence enhancement for distributing child pornography pursuant to Guideline section 2G2.2(b)(3)(F). The defendant used a file sharing program called Kazaa to receive child pornography. Additionally, these files were stored on his computer which allowed access to the files by other computer users. By allowing this access, the defendant benefitted because the more files you allowed for public access, the faster the speed at which you could download files from other users of the program. The defendant argued that making his files available to other users did not constitute distribution. The Court of Appeals noted that it had not previously considered the exact contours of what constitutes "distribution" in the context of the Kazaa peer-to-peer file sharing program. The court concluded that making his child pornography collection available for others to access and download without this qualifying as "distribution" does not square with the plain meaning of the word. The defendant not only made his files available, but he knew other users were downloading these files from him. This constituted distribution for purposes of the guidelines.

United States v. Veazey, 491 F.3d 700 (7th Cir. 2007; No. 05-4780). In prosecution for attempting to entice a minor to engage in sexual conduct and interstate travel for the purpose of engaging in a sexual act with a minor, the Court of Appeals affirmed the defendant's sentence. The defendant engaged in numerous online and telephone chats with someone he believed to be a minor. He eventually flew to another state to have sex with the girl, but she turned out to be a police detective. Although only a very small portion of their extensive conversations involved discussions of photographing the anticipated sexual activity, the defendant showed up at the airport with camera equipment. Based upon the conversations and the camera equipment, the district court imposed a "visual depiction" enhancement pursuant to section 2G1.3(c) which provides that "if the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction, apply section 2G2.1." This cross-reference substantially increased the defendant's sentence. On appeal, the defendant argued

that creating a visual depiction was only a secondary, rather than primary purpose–his primary purpose being to have sex with the minor. He further argued that the cross-reference should only apply when producing the visual depiction was a primary purpose. Rejecting this argument, the Court of Appeals held that the guideline and Application Notes make clear that the cross-reference should apply if any one of the defendant's purposes in committing the offense was to create a visual depiction thereof. Thus, the cross-reference applies without regard to whether that purpose was the primary motivation for the defendant's conduct.

United States v. Sachsenmaier, 491 F.3d 680 (7th Cir. 2007; No. 05-3505). Considering a challenge to the reasonableness of a sentence for the first time since the Supreme Court's decision in *Rita*, the Court of Appeals emphasized the standards for reviewing the reasonableness of a sentence. The court stated: "As for *Mykytiuk*, the Supreme Court has now expressly endorsed the rebuttable presumption of reasonableness for appellate review of a district court's sentencing decision. *See Rita v. United States*, No. 06-5754, 2007 WL 1772146 (June 21, 2007); *United States v. Nitch*, 477 F.3d 933, 937-38 (7th Cir. 2007); *United States v. Gama-Gonzalez*, 469 F.3d 1109 (7th Cir. 2006). The *Rita* decision emphasized that this is a standard for appellate review only. *Rita*, 2007 WL 1772146, at *9. The district courts must calculate the advisory sentencing guideline range accurately, so that they can derive whatever insight the guidelines have to offer, but ultimately they must sentence based on 18 U.S.C. § 3553(a) without any thumb on the scale favoring a guideline sentence. If, however, a district court freely decides that the guidelines suggest a reasonable sentence, then on appellate review the defendant must explain why the district court was wrong.*"*

United States v. Goldbert, 491 F.3d 668 (7th Cir. 2007; No. 07-1393). In prosecution for possession of child pornography, the Court of Appeals reversed the defendant's sentence of one day in prison as unreasonable. The defendant's guideline range was between 63 and 78 months imprisonment, but the court imposed a sentence of only one day in jail. The defendant was a 23-year old who downloaded file-sharing software which gave him access to child pornography. Over a period of 18 months, he downloaded hundreds of pictures of child pornography and offered the photos to other subscribers to induce them to send similar images in return. Some of the pictures depicted two and three year old children being penetrated by adult males. When imposing sentence, the district court opted for a lengthy period of supervision. She concluded that a lengthy prison term would ruin the defendant's life. Additionally, she stated that the psychiatric reports indicated the defendant committed the offense out of "boredom and stupidity and not because he has a real problem with the kind of deviance that these cases usually suggest." The Court of Appeals concluded that a prison sentence of one day for a crime that Congress and the American public consider grave, in circumstances that enhance the gravity due to the nature of the images, committed by a convicted drug offender, does not give due weight to the "nature and characteristics of the defendant."Although the court could imagine a case, involving the downloading of a handful of images none showing prepubescent children or depicting any sexual activity in which a permissible sentence might be light. However, such was not the case here. After recounting a large number of other reasons why the sentence was unreasonable, the court concluded by stating that it did not rule that a sentence below the properly calculated guidelines range would have been improper in this case. Rather, the guidelines are merely advisory, and the statutory sentencing factors leave plenty of discretion to the sentencing judge. But that discretion was abused in this case, and the court therefore vacated the sentence and remanded for resentencing.

United States v. Griffin. 493 F.3d 856 (7th Cir. 2007; No. 05-4177). In prosecution for robbery, the Court of Appeals vacated the defendant's sentence because the district court applied a presumption that a within-the-range sentence was reasonable. At sentencing, the district court, acting without the benefit of the Supreme Court's decision in *Rita*, stated: "the burden's on the defendant to overcome the rebuttable presumption that a guideline sentence is appropriate . . . . I'm not in a position to find on this record that the presumption of reasonableness of the guideline sentence has been overcome." The court held that the application of this presumption in the district court was error in light of the Supreme Court's decision in *Rita*, which made clear that although appellate courts may apply a non-binding presumption that a sentence imposed within a properly calculated Guidelines range is reasonable, the presumption of reasonableness is an *appellate* court presumption and applies only on appellate review.

United States v. McMahon, ___ F.3d ___ (7th Cir. 2007; No. 05-3379). In prosecution for a drug conspiracy, the Court of Appeals refused to delay deciding the appeal until the Supreme Court decides *Kimbrough v. United States*. Specifically, the defendants sought to preserve an argument regarding the different treatment under the guidelines of crack cocaine and powder cocaine—the 100-to-one ratio. The Supreme Court has granted certiorari in *Kimbrough v. United States*, No. 06-6330 (U.S. June 11, 2007), which presents the question whether district judges must continue to use the 100-to-1

ratio, even if, as in *United States v. Miller*, 450 F.3d 270 (7th Cir. 2006), the judge prefers a different approach. The district judge in this case did not express dissatisfaction with the statutory ratio, so the Court of Appeals concluded that the appeal need not be held for *Kimbrough*, as appellants cannot benefit unless the Supreme Court were to hold that district judges must use a different ratio, and no such argument was advanced in the *Kimbrough* petition.

United States v. Bustamante, 493 F.3d 879 (7th Cir. 2007; No. 03-3388). In prosecution for drug conspiracy and possession of a weapon by a felon, the Court of Appeals vacated the defendant's sentence due to double counting. The defendant's base offense level on the drug charge was increased by two levels for possession of a firearm. The district court also sentenced the defendant on a separate count for possession of a weapon by a felon. Looking to Note 4 of section 2K2.4 of the Guidelines, the Court of Appeals noted that if a sentence under the drug guideline is imposed in conjunction with a sentence for an underlying offense, the court should not apply any specific offense characteristic for possession, brandishing, use, or discharge of a firearm when determining the sentence for the underlying offense. In other words, when a defendant is sentenced for the possession of a firearm under 2K1.1, the district court cannot increase the defendant's sentence on another count for that same possession of a firearm. Here, the district court increased the defendant's offense level on the conspiracy count for possessing the weapon, and then it sentence him to a concurrent term for possessing the same firearm. The district court could have done one or the other, but not both.

United States v. Boyd, 475 F.3d 875 (7th Cir. 2007; No. 06-2431). In prosecution for being a felon in possession of a weapon, the Court of Appeals affirmed the district court's sentencing enhancement for using the gun to commit another felony. Specifically, the district court found that the defendant committed the Indiana offense of recklessly performing an act that creates a substantial risk of bodily injury to another. Here, the defendant fired six armor penetrating rounds into the air at 3:00 a.m. outside an Indianapolis nightclub located downtown. Given the hour and the fact that there were no people in the direct line of fire, the defendant argued that his shooting did not create a "substantial" risk of causing bodily injury. The court disagreed, relying upon power and range for the pistol, the proximity of buildings in some of which there may have been security guards or cleaning staffs, and considering that patrons of the bar who were leaving the club were close to the parking lot where the shooting took place. Given all these circumstances, the risk of bodily injury was "substantial."

United States v. Acosta, 474 F.3d 999 (7th Cir. 2007; No. 05-3598). In prosecution for drug related offenses, the Court of Appeals reversed the district court's sentencing enhancement for the use of a minor pursuant to Guideline section 3B1.4. The evidence at sentencing demonstrated that although the defendant was aware of minors' participation in the drug conspiracy, there was no evidence that the defendant independently directed, encouraged, or played any role in bringing the minors into the criminal enterprise. Indeed, the government conceded that the defendant did not direct, command, encourage, or do any act spelled out in application note one of 3B1.4. That note provides that the term "used" includes "directing, commanding, encouraging, intimidating, counseling, training, procuring, recruiting, or soliciting" minors. Regarding the interpretation of the term "used," the circuits are split. Four circuits agree that the enhancement applies only when the defendant by some affirmative act helps to involve the minor in the criminal enterprise. In contrast, three circuits allow the enhancement where, although the defendant did not personally engage a minor, he could "reasonably foresee a co-conspirator's use of a minor." The Seventh Circuit adopted the "affirmative act" test, noting that *Pinkerton* liability makes no sense in the context of the individualized enhancements set out in section 3B of the Guidelines, which seek to punish the particular behavior of individual members of a conspiracy. Accordingly, applying this standard, the district court vacated the defendant's sentencing, finding that the enhancement did not apply.

United States v. Spano, 476 F.3d 476 (7th Cir. 2007; No. 06-1562). In prosecution for fraud and RICO offenses, the Court of Appeals affirmed the district court's loss determination. The defendant, the mayor of the town of Cicero, was convicted as part of a large conspiracy to defraud the town out of millions of dollars. The defendant was held responsible for the total amount of the loss, even though she joined the conspiracy very late. The court noted that generally, a late-joining conspirator is not enhanced because of the crimes that other conspirators committed before he or she joined. However, if she helps to cover up those crimes, he becomes liable for a sentencing enhancement as an aider and abettor. Here, the evidence clearly showed that the defendant assisted in covering up the fraud of her coconspirators committed before she joined the conspiracy, and she was therefore liable for the total amount of loss.

United States v. Harris, 490 F.3d 589 (7th Cir. 2007; No. 05-4259). In prosecution for defrauding investors through the use of interstate wires, the court of appeals

affirmed a sentencing enhancement for substantially jeopardizing the safety and soundness of a "financial institution," pursuant to Guideline section 2B1.1(b)(13)(B)(I). The defendant formed a hedge fund that engaged in trading various currency, bond and equity products. His conviction stemmed from email communications in which he made material misstatements and omissions concerning the profitability of the hedge fund. At sentencing, the defendant argued that his hedge fund was not a "financial institution" Specifically, neither the Guidelines nor the relevant application notes reference hedge funds. Rather, because the statutory definition refers to "investment companies," and not hedge funds, the defendant argued that such funds are not "financial institutions." The Court of Appeals disagreed, noting that it had previously held that "investment companies" are "financial institutions" for purposes of the Guidelines. Furthermore, an investment company is defined as "a company substantially engaged in the business of investing securities of other companies." A hedge fund such as the one in question here is engaged in the *investing* in bonds, securities and commodities, as well as making other investments. Thus for purposes of the Guidelines, a hedge fund cannot be distinguished from other types of investment companies.

United States v. Franklin, 484 F.3d 912 (7th Cir. 2007; No. 06-3462). In prosecution for using a telephone in the commission of a drug crime, the Court of Appeals reversed the district court's sentencing enhancement for possession of a dangerous weapon pursuant to Guideline section 2D1.1(b)(1). Police, who were investigating the defendant as part of a large drug conspiracy, stopped the van in which he was riding as passenger. Officers observed a knife in the van in plain view by the defendant's feet. Officers then obtained consent to search the van, found drugs inside, but did not confiscate the knife. After the defendant pled guilty, the PSR recommended the sentencing enhancement at issue. At sentencing, however, the defendant testified that he was an electricion, that the knife was similar to a pocket knife hooked on one's belt, and that he used it to strip wires. The government did not contest this evidence and the district court initially indicated that it believed the enhancement should not apply. However, the district court later changed its mind and applied the enhancement. On appeal, the court noted that the adjustment applies unless it is clearly improbable that the weapon was connected with the offense. The court noted that the police officers who stopped the defendant saw the knife, made note of it, but did not confiscate it. This indicated that the officers believed that the knife was not relevant to the defendant's offense. Likewise, the government both in the plea agreement and at sentencing did not seek the enhancement, agreeing that the knife was possessed in connection with the defendant's business. Accordingly, the defendant established that the weapon was not connected to the offense and vacated the defendant's sentence.

United States v. Hagenow, 487 F.3d 539 (7th Cir. 2007; No. 05-4443). On appeal after remand, the Court of Appeals considered the scope of new evidence the government could present at the sentencing hearing after a remand. The defendant was charged with unlawfully possessing ammunition by a felon. At sentencing, the district court relied upon an affidavit attached to a charging document to determine that one of the defendant's prior convictions was a "crime of violence." Subsequent to the sentencing hearing, the Seventh Circuit held that reliance on such an affidavit to characterize a prior conviction as a crime of violence was improper. Thus, after the defendant appealed, the court remanded the case for re-sentencing without consideration of the affidavit. At the re-sentencing hearing, the government introduced for the first time the plea colloquy transcript for the prior conviction to support its characterization as a "crime of violence." Citing the general rule that the government should not be allowed a second opportunity to present evidence in support of a sentencing enhancement for which it carries the burden of proof, the defendant argued that the government was limited to the evidence it presented at the first sentencing hearing. The Court of Appeals disagreed, making an exception to this general rule where intervening case law warrants a departure from that rule. At the time of the first sentencing hearing, the government did not know that the evidence it presented would not withstand later review. To require the government to present every piece of evidence available to support an enhancement on the chance that some of the evidence might later be held to be inadmissible by intervening case law would impose too great a burden on the government.

United States v. Simmons, 485 F.3d 951 (7th Cir. 2007; No. 06-3894). In prosecution for dealing in firearms without a license, the Court of Appeals affirmed the defendant's sentence over his challenge to his Guidelines calculation. The district court set the defendant's base offense level at 18 pursuant to U.S.S.G. 2K2.1(a)(5), for the sale of the weapon involving a semi-automatic assault weapon as defined at 18 U.S.C. 921(a)(30). This statute expired on September 13, 2004, and the defendant argued that because the statute expired before his trial and sentencing and U.S.S.G. 2K2.1(a)(5) incorporated the statute into the Guidelines, the Guideline section also expired and could not be used to sentence him. Although noting an issue of first impression, the Court of Appeals noted that it was undisputed that the statute

was in effect at the time the defendant committed the offense. Following the reasoning of the other circuits which had considered the issue, the court held that so long as the offense conduct occurred before the statute expired, the guideline section could properly be used to calculate the sentence. Secondly, the defendant also received a Guideline enhancement because the offense involved more than three weapons. However, 18 U.S.C. 922(v)(2) excepted firearms from the statute which were manufactured prior to September 13, 1994. Because one of the defendant's weapons was manufactured before this date, the defendant argued that it should not have been included in his Guidelines calculation. Again noting an issue of first impression, the Seventh Circuit followed the precedent in other circuits which held that although firearms manufactured before September 13, 1994 were excluded for consideration of a charge for simple possession, the exclusion did not apply to Guideline calculations. Therefore, the defendant's sentence was properly calculated.

United States v. Babul, 476 F.3d 498 (7th Cir. 2007; No. 05-4538). In prosecution under 18 U.S.C. 1014 stemming from the defendant's assisting unqualified individuals to receive commercial driver's licenses in Wisconsin, the Court of Appeals upheld a sentencing enhancement pursuant to U.S.S.G. 2B1.1(b)(12)(A) because the offense involved "the conscious or reckless risk of death or serious bodily injury." The district judge concluded that the enhancement was appropriate where the defendant's offense put 200 incompetent truck drivers on the road, thereby creating such a risk. The Court of Appeals initially noted that whether evading the state's testing system creates an incremental risk of death or serious bodily injury is an empirical question, on which both sides of the case remained silent. Given this paucity of empirical data, the court was tempted to say that the prosecutor, as the proponent of the increase must lose because no data was presented to support the enhancement. However, in the present case, the fact that incompetent drivers create risks of injury is a fact that no one contests, and drivers who elect to use bribery and fraud to obtain licenses identify themselves as more likely to be incompetent than drivers who obtain licenses the honest way. Finally, the relevant guideline section speaks of "risk" rather than "substantial" or even "material" risk, and the defendant's crime must have created *some* risk. Therefore, given the facts of this case and the wording of the enhancement, the district court properly enhanced the defendant's sentence.

United States v. Ngatia, 477 F.3d 496 (7th Cir. 2007; No. 05-4629). In prosecution for importing heroin, the Court of Appeals affirmed the defendant's below-guideline sentence as reasonable. The defendant's guideline range was 188 to 235 months, but the district court sentenced her to 84 months' imprisonment. In doing so, the district court relied on the defendant's rehabilitative efforts, as evidenced by her certificates of achievement while incarcerated; her shame, as reflected by a letter from a fellow inmate and her own letter to the district court; and her good character, to which her friends and family attested. Based upon these factors, the district court found that an 84-month sentence was sufficient to satisfy the goals of sentencing deterrence, incapacitation, and rehabilitation. The government appealed, arguing that the defendant was not entitled to a below-range sentence because she lied to federal agents about her knowledge of the scheme to import heroin and the commonplace opinions of family and friends cannot reasonably comprise the basis for the downward deviation. The Court of Appeals noted that the district court's choice of sentence, whether inside or outside the guideline range, is discretionary and subject therefore to only light appellate review. Here, the district court had sufficient facts to warrant the sentence imposed, and the court would not find the sentence unreasonable under the appropriate standard of review.

United States v. Singh, 483 F.3d 489 (7th Cir. 2007; No. 05-4509). In prosecution for kidnapping, the Court of Appeals reversed the district court's obstruction of justice enhancement. The district court based this enhancement on the fact that the defendants buried the body of their kidnapping victim, after the victim died. The district judge stated that burying the body conceals it in a way that leaving it in the back of a vehicle does not. He also stated that burying the body during the investigation of the crime is concealing evidence of the crime. The Court of Appeals noted that the act of burying the body can easily be seen as part of the ongoing conspiracy, rather than as an attempt to impede the investigation. Moreover, in this case, as soon as the defendants learned that the police were looking for them, they surrendered, confessed, and showed the police where the body was buried. Under these circumstances, the court said the burying of the body was part of the conspiracy, rather than as an attempt to obstruct justice.

United States v. LePage, 477 F.3d 485 (7th Cir. 2007; No. 06-1881). In prosecution for being a felon in possession of a firearm, the Court of Appeals affirmed the district court's sentencing enhancement pursuant to U.S.S.G. 2K2.1(b)(1)(a) because the offense involved three or more firearms. When the defendant was arrested, he possessed two firearms. The defendant admitted that these two firearms were stolen during a home invasion in which five firearms were taken, the defendant having driven the getaway car. The defendant was given his choice of the firearms, and all five

firearms were stored in his basement. The government argued that all five firearms taken during the home invasion should be attributed to the defendant as relevant conduct as part of the same course of conduct and a common scheme or plan. The Court of Appeals agreed, holding that the defendant's participation in the joint criminal endeavor made the total quantity of firearms relevant for sentencing. Specifically, in cases involving contraband, a defendant is responsible not only for that in which he is directly involved but also all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.

United States v. Sriram, 482 F.3d 956 (7th Cir. 2007; No. 05-2752). In prosecution of a doctor for defrauding Medicare, the Court of Appeals reversed the district court's fraud calculation. At a 13-day sentencing hearing, the government presented extensive evidence regarding the amount of loss caused by the defendant's fraud. However, because of difficulty in determining the exact amount of the defendant's fraud, the district court concluded that the only loss the government proved was the face amount of two checks the defendant admitted having received for medical services he didn't perform. Thus, the judge imposed a sentence of five years' probation and restitution in the amount of $1,258, the face amount of the two checks. On appeal by the government, the Court of Appeals concluded that the district court erred in imposing this "absurdly light" sentence. Although noting that there were difficulties in determining the exact amount of loss, the court concluded that it was inconceivable that the amount of loss was as slight as the district judge thought. At a minimum, the Court of Appeals concluded that the government has proved $1.4 million in loss. As the court noted, suppose the evidence presented at sentencing showed that the loss inflicted by the defendant's crimes was no less than $1 million or more than $5 million but it was impossible to be more specific. Then for sentencing purposes the estimate of loss should not be zero, which is the implication of the district judge's approach in this case; it should be, at the very least, $1 million. Indeed, the defendant couldn't even complain if the district judge had split the difference between the bottom and the top of the range of possible loss; for when precision in calculating the loss inflicted by a crime is unattainable, a reasonable estimate is all that the law requires. Accordingly, the court remanded to the district court for resentencing, noting that the district judge must use as its "floor" $1.4 million in loss and moving up from that amount, depending on what the government could prove.

United States v. Newbern, 479 F.3d 509 (7th Cir. 2007; No. 05-4709). In prosecution for drug offenses, the Court of Appeals held that the Illinois offense of reckless discharge of a firearm is a crime of violence for purposes of the career offender guideline. The Illinois statute provides: "A person commits reckless discharge of a firearm by discharging a firearm in a reckless manner which endangers the bodily safety of an individual." The defendant argued that this definition does not require a "serious" risk of physical injury "to another" and therefore does not qualify as a crime of violence. In rejecting this argument, the Court of Appeals noted that it has previously held that the general rule is that possession of a weapon plus some overt action implying or indicating its use is a crime of violence. Here, the firing of a weapon created a serious potential risk of injury to another sufficient to bring it within the career offender guideline.

United States v. Tejeda, 476 F.3d 471 (7th Cir. 2007; No. 06-1492). In prosecution for drug offenses, the Court of Appeals held that a district judge's failure to specify in the Judgment of Conviction the number of drug tests to which a defendant may be subjected on supervised release cannot constitute plain error. At sentencing, the district court imposed a special condition of supervised release which ordered the defendant to "participate in a program of testing and residential or outpatient treatment for drug and alcohol abuse, as approved by the supervising probation officer." No limit was placed on the number of drug tests which the probation office could require. The Court of Appeals had previously held that delegating to probation the decision regarding the number of drug tests to which a defendant must submit is error. In several unpublished cases, the court accepted the government's concession that such an error constituted plain error. However, the Court of Appeals in this case reevaluated the wisdom of the concessions and concluded that the improper delegation is not plain error. Specifically, among other reasons, a defendant always has available to him the remedy of moving to modify the conditions of his supervised release should the number of drug tests become excessive. Thus, because this simple remedy remains available to the defendant, the error cannot undermine the fairness and integrity of the proceedings.

United States v. McGowan, 478 F.3d 800 (7th Cir. 2007; No. 06-1546). Upon appeal of a 132-month sentence for two counts of distributing cocaine, the Court of Appeals reversed the district court's relevant conduct determination. The two counts of conviction involved a total of 12.1 grams of cocaine distributed to one individual, yielding a guideline range of 27 to 33 months. However, relying upon an additional 489 grams of relevant conduct, the defendant's guideline range was increased to 110 to 137 months. This relevant conduct was based upon testimony at trial concerning the

defendant's participation in a conspiracy (for which he was acquitted) which ended 8-months prior to the two distributions for which he was convicted. The Court of Appeals noted that it looks for a strong relationship between uncharged conduct and the convicted offense, focusing on whether the government demonstrated a significant similarity, regularity, and temporal proximity, such that the conduct is part of the same course of conduct or common scheme or plan. Here, the 8-month gap negated temporal proximity. Additionally, there was no regularity in the transactions, for while the distributions in the offense conduct were small, the distributions in the uncharged conduct were very large. Finally, the government conceded at sentencing that the relevant conduct was not part of the same course of conduct which led to the charges against the defendant. The fact that a defendant engages in other drug transactions is not, standing alone, sufficient justification for treating those transactions as part of the same course of conduct or common scheme or plan when making a relevant conduct determination. Accordingly, the court vacated the sentence and remanded for re-sentencing.

SUPERVISED RELEASE

United States v. Ross, 475 F.3d 871 (7th Cir. 2007; No. 06-1821). In prosecution for making false statements to the FBI, the Court of Appeals affirmed the district court's imposition of a condition of supervised release that the defendant participate in a sex offender mental health assessment and any necessary treatment. Although the defendant had never been charged or convicted of any sex offense, the PSR indicated that the defendant had engaged in sexual activities with other inmates during a previous incarceration. Moreover, the majority of the inmates with whom Ross had sexual contact were victims of sexual abuse or in the sex offender treatment program. A psychological evaluation of the defendant noted that the defendant was a highly manipulative individual who was likely to prey on vulnerable dependent individuals, although it also noted that he was unlikely to act out in a sexually violent manner. At sentencing, the district court imposed the sex offender treatment condition, stating: "Let me add hastily, in light of your personal background you're not to associate or have any type of conduct with any person under the age of 18 without adult supervision or approval by your supervising probation officer. You're required to participate in a program of sex offender mental health assessment and treatment as approved by your supervising probation officer." On appeal, the defendant argued that the condition did not meet the criteria necessary for imposing a special condition of supervised release because his offense of lying to the FBI was not reasonably related to the condition and the condition was not reasonably related to his personal history. In considering this issue, the Court of Appeals first noted that it was reviewing the issue for plain error, as the defendant failed to object in the district court. At least under this standard, the court concluded that sex offender treatment may be imposed as a special condition of supervised release where the offense of conviction is not a sex offense. In this case, the district court considered evidence suggesting that the defendant fantasized about crimes against children. Although the imposition of sex offender treatment in this case is somewhat unusual given that the offense of conviction, on its face, is not sexual in nature, the facts underlying the conviction convinced the court that the sentence did not result in a miscarriage of justice under the plain error standard.

United States v. Jordan, 485 F.3d 982 (7th Cir. 2007; No. 05-2673). In prosecution for drug offenses, the Court of Appeals affirmed the imposition of a condition of supervised release requiring the defendant to participate in a drug or alcohol abuse treatment program. The defendant argued that the condition was a greater deprivation of liberty than reasonably necessary for sentencing purposes because the only evidence in the record about his drug or alcohol use was a statement to his probation officer that he used neither of these substances. The court rejected this argument, noting that prior precedents establish that drug or alcohol treatment conditions are not necessarily reserved only for individuals with extensive personal histories of drug or alcohol abuse. Given the defendant had an extensive prior history involving drug offenses and the nature of his current drug offense conviction, the imposition was not inappropriate, especially given that the defendant was charged on three separate occasions with possession of drugs. Finally, when the defendant completes his lengthy sentence of imprisonment, it is possible that his probation officer will conclude that placement in drug and alcohol treatment will be unnecessary. Thus, reviewing the issue under the plain error standard, the court affirmed the imposition of the condition.

United States v. Blinn, 490 F.3d 586 (7th Cir. 2007; No. 06-2976). The defendant entered into an 11(c)(1)(A) plea agreement on money laundering charges. The agreement called for a sentence of twelve to twenty months' imprisonment, but was silent as to any term of supervised release. The defendant was sentenced to sixteen month's imprisonment and placed on supervised release for three years. In addition to these terms, the district court ordered, as a condition of supervised release, that the defendant be confined to his home with electronic monitoring for twelve months. The defendant did not object to this condition nor move to withdraw his plea agreement in the district court. However, on

appeal, he argued that his sentence of sixteen months' imprisonment plus twelve months of home confinement violated the terms of his plea agreement by exceeding the high end of the sentencing range set forth in his plea agreement by four months. Specifically, the defendant noted that section 5F1.2 of the Guidelines advises that home detention may be imposed as a condition of supervised release, "but only as a substitute for imprisonment." The Court of Appeals dismissed the defendant's appeal, however, because his plea agreement contained a waiver of his right to appeal his sentence. Although the defendant argued that the waiver should not be enforced because he did not receive the benefit of his bargain, the court disagreed. The agreement clearly stated that the defendant "will be sentenced to a sentence within the range of 12 to 20 months imprisonment." Additionally, there was no question that the sentencing judge would set the terms of the defendant's supervised release term. Given that the defendant did not object to the conditions of supervised release in the district court, the court found no basis to make an exception to his appellate waiver and consider the merits of his case.

United States v. Flagg, 481 F.3d 946 (7th Cir. 2007; No. 06-3092). Upon being imprisoned for 36 months' for a violation of the terms of supervised release, the Court of Appeals rejected the defendant's argument that *Apprendi* and its progeny limited his term of imprisonment to one year. The defendant originally pled guilty in 1994 to one count of conspiracy to distribute cocaine base in violation of 21 U.S.C. 846 and 21 U.S.C. 841(a)(1). Thereafter, after the defendant's release and violation of his supervised release, the district court sentenced him to 36 months' imprisonment, based upon the fact that his original offense of conviction was a Class A felony. In the district court and on appeal, the defendant argued that his original conviction could only be classified as a Class C felony (thereby subjecting him to a 1-year maximum term for a supervised release violation) because his original conviction was imposed in violation of *Apprendi*. Specifically, at the time of the 1994 conviction, the district court found by a preponderance of the evidence the amount and type of drug quantity, which in turn determined the statutory maximum available. However, subsequently, *Apprendi* held that such a determination must be made by a jury beyond a reasonable doubt. Thus, according to the defendant, because of this *Apprendi* violation, the court was required upon imprisoning the defendant for a supervised release violation to classify the original offense without consideration of the district court's original drug quantity determination. In rejecting this argument, the Court of Appeals first noted that there was no *Apprendi* violation at the defendant's original sentencing hearing. In his plea agreement, the defendant specifically agreed to the quantity of drugs in his plea agreement. Accordingly, the drug quantity amount was established beyond a reasonable doubt and in compliance with *Apprendi*. Secondly, even had the defendant not made this agreement in his plea agreement, the Court of Appeals would still be unable to address this alleged defect through an appeal from the revocation of supervised release. The proper method for challenging a conviction and sentence is through direct appeal and collateral review, not a supervised release revocation proceeding. Because *Apprendi* has been held not to apply retroactively on collateral review, the court could not allow the defendant to use the alternative vehicle of the revocation proceeding to challenge his underlying conviction and sentence when this challenge is forbidden to him on collateral review. Thus, the court affirmed his sentence.

Recently Noted Circuit Conflicts

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Fourth Amendment

Actual authority to consent to search

United States v. Cos, 4__ F.3d ___, 2007 U.S. App. LEXIS 19839 (10th Cir. Aug. 21, 2007).

The Tenth Circuit noted that different circuits have reached varying formulations of the standard for determining a third party's actual authority to consent to the search of a home. "For example, the D.C. Circuit has required proof of both mutual use and joint access." *See United States v. Whitfield*, 939 F.2d 1071, 1074 (D.C. Cir. 1991)). "The Second Circuit requires proof of (1) access to the area searched and (2) common authority over the area, a substantial interest in the area, or permission to gain access to the area." *See United States v. Davis*, 967 F.2d 84, 87 (2d Cir. 1992). "In several cases, the Ninth Circuit has taken yet another approach, concluding that even if a third party lacked `joint access or control for most purposes,' she or he may nevertheless validly consent to a search of the defendant's property if the defendant `assumed the risk that [the third party] would allow a search of the [property].' *United States v. Kim*, 105 F.3d 1579, 1583 (9th Cir. 1997) (citation omitted); *"See also United States v. Davis*, 332 F.3d 1163, 1170 n.4 (9th Cir. 2003) (explaining that "[w]e have rarely applied the

`assumption of risk' analysis urged by the dissent, and the few cases in which we have done so have involved situations where the person whose property was searched clearly ceded authority over the property, either partially or totally, to the consenting third party"). The Seventh Circuit has also followed the `assumption of the risk' approach on occasion. *See United States v. Cook*, 530 F.2d 145, 149 (7th Cir. 1976)." The Tenth Circuit has used "the following standards for assessing actual authority to consent to a search of a residence: `(1) mutual use of the property by virtue of joint access, or (2) control for most purposes over it.' *United States v. Rith*, 164 F.3d 1323, 1329 (10th Cir. 1999)."

Consent once removed to enter a home

Callahan v. Millard County, 494 F.3d 891 (10th Cir. 2007).

The Tenth Circuit held that the consent once removed doctrine which allows an undercover police officer who is lawfully in a home to invite other officers into the home does not apply when an informant enters and then invites officers into the home. The Court disagreed with contrary holdings of the Sixth and Seventh Circuits. *See United States v. Yoon*, 398 F.3d 802, 807 (6th Cir. 2005); *United States v. Paul*, 808 F.2d 645, 648 (7th Cir. 1986).

Search of a vehicle after impoundment

United States v. Proctor, 489 F.3d 1348 (D.C. Cir. 2007).

The D.C. Circuit reversed a denial of a suppression motion for evidence found after a car was impounded because police failed to follow a standard impoundment procedure for the car. The Court noted a circuit conflict on the issue. At least two circuits have held that the decision to impound must be made pursuant to a standard procedure. *See United States v. Duguay*, 93 F.3d 346 (7th Cir. 1996); *United States v. Petty*, 367 F.3d 1009, 1012 (8th Cir. 2004). On the other hand, the First Circuit has concluded that an impoundment does not have to be governed by a standard police procedure. *See United States v. Coccia*, 446 F.3d 233, 238-239 (1st Cir. 2006) (requiring only that impoundment be based, at least in part, on a reasonable community caretaking concern).

Title III

United States v. Rice, 478 F.3d 704 (6th Cir. 2007).

The Sixth Circuit held that "the good-faith exception to the warrant requirement is not applicable to warrants obtained pursuant to Title III." The Court disagreed with the Eighth and Eleventh Circuit holdings to the contrary. *United States v. Moore*, 41 F.3d 370, 376 (8th Cir. 1994); *United States v. Malekzadeh*, 855 F.2d 1492, 1497 (11th Cir. 1988).

Sixth Amendent - Right to Counsel

Nuñez v. United States, 495 F.3d 544 (7th Cir. 2007).

The Seventh Circuit held that a defendant can not raise the issue of his attorney's failure to file a notice of appeal in a 28 U.S.C. §2255 motion if he waived his right to collateral attack as part of a plea agreement. The Court also suggested that an attorney is not ineffective by refusing to file a notice of appeal after an appeal waiver even when the defendant wants to appeal. This holding and *dicta* conflicts with decisions of the other six circuits that have considered the issues. "*See United States v. Campusano*, 442 F.3d 770, 772–77 (2d Cir. 2006); *United States v. Poindexter*, 492 F.3d 263 (4th Cir. 2007); *United States v. Tapp*, 491 F.3d 263 (5th Cir. 2007); *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1195–99 (9th Cir. 2004); *United States v. Garrett*, 402 F.3d 1262, 1265–67 (10th Cir. 2005); *Gomez-Diaz v. United States*, 433 F.3d 788, 791–94 (11th Cir. 2005)."

Speedy Trial Act

United States v. Suarez-Perez, 484 F.3d 537 (8th Cir. 2007).

The Eighth Circuit noted that the Seventh Circuit stated that a *sua sponte* routine scheduling order setting a deadline for pretrial motions makes time excludable under the Speedy Trial Act. *United States v. Montoya*, 827 F.2d 143, 153 (7th Cir. 1987). However, other circuits have refused to follow *Montoya*. *See United States v. Moran*, 998 F.2d 1368, 1370-1371 (6th Cir. 1993); *United States v. Hoslett*, 998 F.2d 648, 656 (9th Cir. 1993); *United States v. Williams*, 197 F.3d 1091, 1095 n. 7 (11th Cir. 1999). The Eighth Circuit did not decide the issue because the parties in this case assumed that the district court's routine order setting a deadline for filing pretrial motions does not result in excludable time.

The Court also recognized that "there is a circuit split on the issue of whether the time requested for preparing pretrial motions is excluded from the speedy trial clock. Some circuits have said the time for preparing pretrial motions is excluded if the defendant requested such time. *See United States v. Lewis*, 980 F.2d 555, 564 (9th Cir. 1992); *United States v. Wilson*, 266 U.S. App. D.C.

344, 835 F.2d 1440, 1444-45 (D.C. Cir. 1987); *United States v. Tibboel*, 753 F.2d 608, 610 (7th Cir. 1985); *United States v. Jodoin*, 672 F.2d 232, 238 (1st Cir. 1982). However, the Sixth Circuit has stated, `The statute does not provide that a period allowed by the district court for preparation of pretrial motions is to be excluded from the seventy-day computations.' *Moran*, 998 F.2d at 1371." The Eighth Circuit did not decide this issue either because the parties assumed that the time for preparing a pretrial motion is excluded from the speedy trial clock when the defendant requests such time.

Offenses

18 U.S.C. §922(g)(9)

United States v. Hayes, 482 F.3d 749 (4th Cir. 2007).

The Fourth Circuit reversed a conviction under 18 U.S.C. §922(g)(9) for possession of a gun by a person who was previously convicted of a misdemeanor crime of domestic violence because the defendant's prior offense did not have a relationship with the victim as an element of the offense. Therefore, the prior conviction was not a misdemeanor crime of domestic violence. The Court disagreed with contrary decisions of the First, Eighth, Ninth, Tenth, and D.C. Circuits which held that a prior misdemeanor crime of domestic violence does not have to have such an element. *United States v. Meade*, 175 F.3d 215, 218-19 (1st Cir. 1999); *United States v. Smith*, 171 F.3d 617, 620 (8th Cir. 1999); *United States v. Belless*, 338 F.3d 1063, 1066 (9th Cir. 2003); *United States v. Heckenliable*, 446 F.3d 1048, 1050 (10th Cir. 2006); *United States v. Barnes*, 295 F.3d 1354, 1360 (D.C. Cir. 2002).

18 U.S.C. §1341

United States v. Amico, 486 F.3d 764 (2d Cir. 2007).

The Second Circuit disagreed with the Eleventh Circuit's holding that "“mail fraud requires the government to prove that a reasonable person would have acted on the representations.” *United States v. Brown*, 79 F.3d 1550, 1557 (11th Cir. 1996). “The majority of circuits to address the issue have rejected this defense, holding that a victim’s lack of sophistication is not relevant to the intent element of mail or wire fraud.” *See United States v. Brien*, 617 F.2d 299, 311 (1st Cir. 1980)*; United States v. Coyle*, 63 F.3d 1239, 1244 (3d Cir. 1995); *United States v. Colton*, 231 F.3d 890, 903 (4th Cir. 2000); *United States v. Davis*, 226 F.3d 346, 358-59 (5th Cir. 2000); *United States v. Biesiadecki*, 933 F.2d 539, 544 (7th Cir. 1991); *United States v. Ciccone*, 219 F.3d 1078, 1083 (9th Cir. 2000); *United States v. Drake*, 932 F.2d 861, 863-864 (10th Cir. 1991); *United States v. Maxwell*, 920 F.2d 1028, 1036 (D.C. Cir. 1990).

18 U.S.C. §2252(a)

United States v. Schaefer, 4__ F.3d ___, 2007 U.S. App. LEXIS 21200 (10th Cir. Sep. 5, 2007)

The Tenth Circuit does:

> not read §2252(a) as contemplating that the mere connection to the Internet would provide the interstate movement required by the statute. After establishing a computer or Internet connection as the method of transport, the government must still prove that the Internet transmission also moved the images across state lines.

This conflicts with the First Circuit's opinion finding that "[t]ransmission of photographs by means of the Internet is tantamount to moving photographs across state lines and thus constitutes transportation in interstate commerce." *United States v. Carroll*, 105 F.3d 740, 742 (1st Cir. 1997). The Third and Fifth Circuits agree with the First Circuit. *United States v. MacEwan*, 445 F.3d 237, 244 (3rd Cir. 2006); *United States v. Runyan*, 290 F.3d 223, 239 (5th Cir. 2002).

Rules of Evidence

Rules 701 and 702

United States v. Oriedo, 4__ F.3d ___, 2007 U.S. App. LEXIS 18607 (7th Cir. Aug. 6, 2007).

The Seventh Circuit held that an officer's testimony about common drug packaging techniques, based on his experience, was expert testimony. Therefore, the district court should not have admitted it as lay testimony. The Court agreed with several other circuits that have reached similar holdings. "*See United States v. Hopkins*, 310 F.3d 145, 150-51 (4th Cir. 2002); ... *United States v. Watson*, 260 F.3d 301, 307 (3d Cir. 2001) (collecting cases from the Second, Fifth, Eighth and Ninth Circuits holding “the operations of narcotics dealers [to be] a proper field of expertise”); *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1245-46 (9th Cir. 1997)." However, the Court disagreed with the First Circuit's holding that testimony based on a police officer's own experience is not expert testimony. *United States v. Ayala-Pizarro*, 407 F.3d 25, 28-29 (1st Cir. 2005).

Sentencing

18 U.S.C. §16(b)

United States v. Sanchez-Garcia, 4__ F.3d ___, 2007 U.S. App. LEXIS 21455 (10th Cir. Sep. 6, 2007).

The Tenth Circuit held that the Arizona offense of unlawful use of a means of transportation is not a crime of violence under 18 U.S.C. § 16(b). The Court disagreed with the Fifth Circuit's decision holding that a similar Texas offense is a crime of violence. *United Statesv. Galvan-Rodriguez*, 169 F.3d 217 (5th Cir. 1999).

18 U.S.C. §924(e)

United States v. Amos, 4__ F.3d ___, 2007 U.S. App. LEXIS 18833 (Aug. 9, 2007).

The Sixth Circuit held that possession of a sawed-off shotgun is not a violent felony under the Armed Career Criminal Act. The Court disagreed with every other circuit that has considered the issue. *See United States v. Fortes*, 133 F.3d 157, 163 (1st Cir. 1998)*; United States v. Johnson,* 246 F.3d 330, 334-35 (4th Cir. 2001)*; United States v. Serna*, 309 F.3d 859, 864 (5th Cir. 2002); *United States v. Brazeau*, 237 F.3d 842, 845 (7th Cir. 2001); *United States v. Allegree*, 175 F.3d 648, 651 (8th Cir. 1999); *United States v. Hayes*, 7 F.3d 144, 145 (9th Cir. 1993).

Rule 32

United States v. Mejia-Huerta, 480 F.3d 713 (5th Cir. 2007).

The Fifth Circuit joined the Third, Seventh, Eighth, and Eleventh circuits by holding that the notice requirement of Rule 32 that a court give advance notice of the possibility of a sentence outside the Guidelines range no longer applies after *Booker*. *See United States v. Vampire Nation*, 451 F.3d 189, 195-98 (3d Cir. 2006); *United States v. Walker*, 447 F.3d 999, 1005-07 (7th Cir. 2006); *United States v. Egenberger*, 424 F.3d 803, 805-06 (8th Cir. 2005); *United States v. Irizarry*, 458 F.3d 1208, 1212 (11th Cir. 2006). The Court disagreed with contrary holdings from the Second, Fourth, Sixth, Ninth and Tenth Circuits. *SeeUnited States v. Anati*, 457 F.3d 233, 236-38 (2d Cir. 2006); *United States v. Davenport*, 445 F.3d 366, 371 (4th Cir. 2006); *United States v. Cousins*, 469 F.3d 572, 580 (6th Cir. 2006); *United States v. Evans-Martinez*, 448 F.3d 1163, 1167 (9th Cir. 2006); *United States v. Dozier*, 444 F.3d 1215, 1217-18 (10th Cir. 2006).

Appeals

Appeal Waivers and Resitution Orders

United States v. Hudson, 483 F.3d 707 (10th Cir. 2007).

The Tenth Circuit held that an appeal waiver does not prevent a defendant from appealing an illegal restitution order because it is an illegal sentence. The Court agreed with the Fourth and Ninth Circuits. *United States v. Brougthon-Jones*, 71 F.3d 1143, 1147 (4th Cir. 1995); *United States v. Cohen*, 459 F.3d 490, 497-98 (4th Cir. 2006); *United States v. Phillips*, 174 F.3d 1074, 1076 (9th Cir. 1999). It disagreed with a contrary decision by the Eighth Circuit. *United States v. Schulte*, 436 F.3d 849, 851 8th Cir. 2006).

Standards of Review

Failure to object to a magistrate's recommendations

Nara v. Frank, 488 F.3d 187 (3rd Cir. 2007).

The Third Circuit held that plain error review applies to a magistrate's recommendations to which a party did not object in the district court. The Court followed the Fifth Circuit's decision in *Douglass v. United Services Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (*en banc*). The Court also noted that the Eighth, Ninth, and Eleventh Circuits also apply a qualified waiver rule. *Griffini v. Mitchell*, 31 F.3d 690 (8th Cir. 1994); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991); *Henley v. Johnson*, 885 F.2d 790 (11th Cir. 1989). The D.C. Circuit has not decided the issue. The remaining circuits have held that failure to object to a magistrate's recommendations waives an issue for appeal. *Henley Drilling Co. v. McGee*, 36 F.3d 143, 150-51 (1st Cir. 1994); *FDIC v. Hillcrest Assocs.*, 66 F.3d 566, 569 (2d Cir. 1995); *United States v. George*, 971 F.2d 1113, 1118 n.7 (4th Cir. 1992); *Kelly v. Withrow*, 25 F.3d 363, 366 (6th Cir. 1994); *Video Views, Inc. v. Studio 21, Ltd.*., 797 F.2d 538, 539 (7th Cir. 1986); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

Right of Allocution

United States v. Luepke, 495 F.3d 443 (7th Cir. 2007).

The Seventh Circuit held that the plain error standard of review applies to an unobjected to denial of the right of allocution. The Third, Fourth, Fifth, and Eleventh Circuits use the same standard of review. *See United States v. Plotts*, 359 F.3d 247, 250 (3d Cir. 2004); *United States v. Muhammad*, 478 F.3d 247, 249 (4th Cir.

2007); *United States v. Magwood*, 445 F.3d 826, 828 (5th Cir. 2006); *United States v. Prouty*, 303 F.3d 1249, 1251 (11th Cir. 2002). The Sixth Circuit applies plain error review in cases alleging not a total denial of the right to allocution, but an inappropriate limitation of it. *United States v. Carter*, 355 F.3d 920, 926 & n.3 (6th Cir. 2004) (applying). However the Sixth Circuit reviews an allegation of a total denial of the right to allocution *de novo*. *United States v. Wolfe*, 71 F.3d 611, 614 (6th Cir. 1995). The Ninth Circuit reviews a denial of the right to allocution for harmless error even when the defendant did not object to the denial in the district court. *United States v. Carper*, 24 F.3d 1157, 1158, 1162 (9th Cir. 1994). The Eighth Circuit has not decided whether plain or harmless error review applies to such cases. *United States v. Griggs*, 431 F.3d 1110, 1114 fn. 4 (8th Cir. 2005).

Breach of a Plea Agreement

United States v. Vandam, 493 F.3d 1194 (10th Cir. 2007).

The Tenth Circuit continued its practice of applying *de novo* review to an argument that the government breached a plea agreement even though the argument was not raised in the district court. The Second and Third Circuits also review such arguments *de novo*. *United States v. Lawlor*, 168 F.3d 633, 636 (2d Cir. 1999); *United States v. Hodge*, 412 F.3d 479, 484-485 (3d Cir. 2005). However, the Fourth, Fifth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits apply plain error review. *United States v. Fant*, 974 F.2d 559, 562 (4th Cir. 1992); *United States v. Palomo*, 998 F.2d 253, 256(5th Cir. 1993); *United States v. D'Iguillont*, 979 F.2d 612, 614 (7th Cir. 1992); *United States v. Flores-Payon*, 942 F.2d 556, 560 (9th Cir. 1991); *United States v. Thayer*, 204 F.3d 1352 (11th Cir. 2000); *In re Sealed Case*, 356 F.3d 313, 316-317 (D.C. Cir. 2004).

Sentences for violating supervised release

United States v. Kizeart, ___ F.3d ___, 2007 U.S. App. LEXIS 23730 (7th Cir. Oct. 10, 2007).

The Seventh Circuit held that sentences for violations of supervised release are still subject to a plainly unreasonable standard of review after *Booker*. It held that *Booker* did not change the standard of review to whether the sentence was reasonable. The Court agreed with the Fourth Circuit. *See United States v. Crudup*, 461 F.3d 433, 437-39 (4th Cir. 2006). It disagreed with four other circuits. *United States v. Fleming*, 397 F.3d 95, 99 (2d Cir. 2005); *United States v. Bungar*, 478 F.3d 540, 542 (3d Cir. 2007); *United States v. Miqbel*, 444 F.3d 1173, 1176 n. 5 (9th Cir. 2006). Three other circuits have held that there is no difference between the two standards. *See United States v. Cotton*, 399 F.3d 913, 916 (8th Cir. 2005); *United States v. Tedford*, 405 F.3d 1159, 1161 (10th Cir. 2005) (following *Cotton*); *United States v. Sweeting*, 437 F.3d 1105, 1006-1107 (11th Cir. 2006) (same). The Fifth and Sixth Circuits have addressed, but not decided the issue. *United States v. Hernandez-Martinez*, 485 F.3d 270, 273-274 (5th Cir. 2007) (criticizing adoption of reasonableness standard, but affirming under the plain error standard); *United States v. Johnson*, 403 F.3d 813, 816-17 (6th Cir. 2005) (criticizing adoption of reasonableness standard, but affirming under either standard).

Supreme Court Update October 2007 Term

Compiled by: Johanna Christiansen
Staff Attorney

Cases Awaiting Decision - October 2007 Term

***Watson v. United States*, No. 06-571, cert. granted February 26, 2007, argued October 9, 2007.** Title 18 U.S.C. § 924(c)(1)(A) criminalizes the "use" of a firearm during and in relation to a drug trafficking offense and imposes a mandatory consecutive sentence of at least five years' imprisonment. In *Bailey v. United States*, 516 U.S. 137 (1995), this Court held that the "use" of a firearm under § 924(c) means "active employment." The question presented in this case is whether mere receipt of an unloaded firearm as payment for drugs constitutes "use" of the firearm during and in relation to a drug trafficking offense within the meaning of 18 U.S.C. § 924(c)(1)(A) and this Court's decision in *Bailey*.
Decision Below: *United States v. Watson,* 191 Fed. Appx. 326 (5th Cir. 2006).

***Medellin v. Texas*, No. 06-984, cert. granted April 30, 2007, argued October 10, 2007.** In the case concerning Mexican Nationals, the International Court of Justice determined that 51 named Mexican nationals, including petitioner, were entitled to receive review and reconsideration of their convictions and sentences through the judicial process in the United States. On February 28, 2005, President George W. Bush determined that the United States would comply with its international obligation to give effect to the judgment by giving those 51 individuals review and reconsideration in the state courts. However, the Texas Court of

Criminal Appeals held that the President's determination exceeded his powers and it refused to give effect to the Avena judgment or the President's determination. This case presents the following questions: (1) Did the President of the United States act within his constitutional and statutory foreign affairs authority when he determined that the states must comply with the United States' treaty obligation to give effect to the Avena judgment in the cases of the 51 Mexican nationals named in the judgment; and (2) are state courts bound by the Constitution to honor the undisputed international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to the Avena judgment in the cases that the judgment addressed.
Decision Below: *Ex parte Medellin,* 223 S.W.3d 315 (Tex. Crim. App. 2006).

***United States v. Santos*, No. 06-1005, cert. granted April 23, 2007, argued October 3, 2007.** The principal federal money laundering statute, 18 U.S.C. § 1956(a)(1), makes it a crime to engage in a financial transaction using the proceeds of certain specified unlawful activities with the intent to promote those activities or to conceal the proceeds. The question presented is whether proceeds means the gross receipts from the unlawful activities or only the profits, *i.e.* gross receipts less expenses.
Decision Below: *Santos v. United States,* 461 F.3d 886 (7th Cir. 2006).

***Gall v. United States*, No. 06-7949, cert. granted June 11, 2007, argued October 2, 2007.** Whether, when determining the "reasonableness" of a district court sentence under *United States v. Booker*, 543 U.S. 220 (2005), it is appropriate to require district courts to justify a deviation from the United States Sentencing Guidelines with a finding of extraordinary circumstances.
Decision Below: *United States v. Gall,* 446 F.3d 884 (8th Cir. 2006).

***Kimbrough v. United States*, No. 06-6330, cert. granted June 11, 2007, argued October 2, 2007.** In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that mandatory application of the U.S. Sentencing Guidelines violates a criminal defendant's right under the Sixth Amendment to have facts that increase his or her sentence determined by a jury beyond a reasonable doubt. The Court further held that to avoid the Sixth Amendment violation, the Guidelines are to be applied as advisory only, and as one as a number of factors both that a sentencing court must consider pursuant to 18 U.S.C. § 3553(a) in exercising its discretion in selecting a sentence and that a court of appeals must consider when reviewing the sentence for reasonableness. In light of the Court's holdings, the following questions are presented. (1) In carrying out the mandate of § 3553(a) to impose a sentence that is "sufficient but not greater than necessary" on a defendant, may a district court consider either the impact of the so-called "100:1 crack/powder ratio" implemented in the U.S. Sentencing Guidelines or the reports and recommendations of the U.S. Sentencing Commission in 1995, 1997, and 2002 regarding the ratio? (2) In carrying out the mandate of § 3553(a) to impose a sentence that is "sufficient but not greater than necessary" upon a defendant, how is a district court to consider and balance the various factors spelled out in the statute, and in particular, subsection (a)(6), which addresses "the need to avoid unwarranted disparity among defendants with similar records who have been found guilty of similar conduct"?
Decision Below: *United States v. Kimbrough,* 174 Fed. Appx. 798 (4th Cir. 2006).

Cases Awaiting Argument - October 2007 Term

***United States v. Williams*, No. 06-694, cert. granted March 26, 2007, to be argued October 30, 2007**. Title 18 U.S.C. § 2252A(a)(3)(B) prohibits knowingly advertising, promoting, presenting, distributing, or soliciting any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is illegal child pornography. The question presented is whether § 2252A(a)(3)(B) is overly broad and impermissibly vague and thus facially unconstitutional.
Decision Below: *United States v. Williams,* 444 F.3d 1286 (11th Cir. 2006).

***Logan v. United States*, No. 06-6911, cert. granted February 20, 2007, to be argued October 30, 2007.** Whether the "civil rights restored" provision of 18 U.S.C. § 921(a)(20) applies to a conviction for which a defendant was not deprived of his civil rights thereby precluding such a conviction as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1).
Decision Below: *United States v. Logan,* 453 F.3d 804 (7th Cir. 2006).

***Danforth v. Minnesota*, No. 06-8273, cert. granted May 21, 2007, to be argued October 31, 2007.** First, are state supreme courts required to use the standard announced in *Teague v. Lane*, 489 U.S. 288 (1989) to determine whether United States Supreme Court decisions apply retroactively to state court criminal cases, or may a state court apply state law or state constitution based retroactivity tests that afford application of Supreme Court decisions to a broader

class of criminal defendants than the class defined by *Teague*. Second, did *Crawford v. Washington*, 541 U.S. 36 (2004), announce a new rule of constitutional criminal procedure, as *Teague* defines that phrase and, if it did, was it a watershed rule of procedure subject to full retroactive application.
Decision Below: *Danforth v. Minnesota,* 718 N.W.2d 451 (Minn. 2006).

***Virginia v. Moore*, No. 06-1082, cert. granted September 25, 2007, argument date to be announced.** Does the Fourth Amendment require the suppression of evidence obtained incident to an arrest that is based upon probable cause, where the arrest violates a provision of state law?
Decision Below: *Moore v. Virginia,* 636 S.E.2d 395 (Va. 2006).

***Boumediene v. Bush*, No. 06-1195, cert. granted June 29, 2007, argument date to be announced.** First, whether the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, validly stripped federal court jurisdiction over habeas corpus petitions filed by foreign citizens imprisoned indefinitely at the United States Naval Station at Guantanamo Bay. Second, whether petitioners' habeas corpus petitions, which establish that the United States government has imprisoned petitioners for over five years, demonstrate unlawful confinement requiring the grant of habeas relief or, at least, a hearing on the merits. (Consolidated with *Al Odah v. United States*, No. 06-1196, see below).
Decision Below: *Boumediene v. Bush,* 476 F.3d 981 (D.C. Cir. 2007).

***Al Odah v. United States*, No. 06-1196, cert. granted June 29, 2007, argument date to be announced.** First, did the D.C. Circuit err in relying again on *Johnson v. Eisentrager*, 339 U.S. 763 (1950), to dismiss these petitions and to hold that petitioners have no common law right to habeas protection by the Suspension Clause and no constitutional rights whatsoever, despite this Court's ruling in *Rasul v. Bush*, 542 U.S. 466 (2004), that these petitioners are in a fundamentally different position from those in *Eisentrager*, that their access to the writ is consistent with the historical reach of the writ at common law, and that they are confined within the territorial jurisdiction of the United States? Second, given that the Court in *Rasul* concluded that the writ at common law would have extended to persons detained at Guantanamo, did the D.C. Circuit err in holding that petitioners' right to the writ was not protected by the Suspension Clause because they supposedly would not have been entitled to the writ at common law? Third, are petitioners, who have been detained without charge or trial for more than five years in the exclusive custody of the United States at Guantanamo, a territory under the plenary and exclusive jurisdiction of the United States, entitled to the protection of the Fifth Amendment right not to be deprived of liberty without due process of law and of the Geneva Convictions? Fourth, should section 7(b) of the Military Commissions Act of 2006, which does not explicitly mention habeas corpus, be construed to eliminate the courts' jurisdiction over petitioners' pending habeas cases, thereby creating serious constitutional issues?
Decision Below: *Al Odah v. United States,* 476 F.3d 981 (D.C. Cir. 2007).

***Ali v. Achim*, No. 06-1346, cert. granted September 25, 2007, argument date to be announced.** First, whether the Seventh Circuit erred in concluding - in direct conflict with the Third Circuit - that an offense need not be an aggravated felony to be classified as a "particularly serious crime" that bars eligibility for withholding of removal under 8 U.S.C. § 1231(b)(3)(B). Second, whether the Seventh Circuit erred in narrowly construing the scope of its jurisdiction to review particularly serious crime determinations of the Board of Immigration Appeals under 8 U.S.C. §§ 1252(a)(2)(B)(ii) and (a)(2)(D), by treating non-discretionary denials of asylum and withholding of removal as discretionary in nature, and by refusing to consider arguments that the agency applied an incorrect legal standard, in direct conflict with the construction of those statutes by the Third, Ninth, and Tenth Circuits.
Case below: *Ali v. Achim,* 468 F.3d 462 (7th Cir. 2006).

***Boulware v. United States*, No. 06-1509, cert. granted September 25, 2007, argument date to be announced.** Whether the diversion of corporate funds to a shareholder of a corporation without earnings and profits automatically qualifies as a non-taxable return of capital up to the shareholder's stock basis, *see* 26 U.S.C. § 301(c)(2), even if the diversion was not intended as a return of capital.
Case below: *United States v. Boulware,* 470 F.3d 931 (9th Cir. 2006).

***United States v. Rodriquez,* No. 06-1646, cert. granted September 25, 2007, argument date to be announced.** The Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e), provides for an enhanced sentence for felons convicted of possession of a firearm, if the defendant has three prior convictions for, *inter alia*, a state-law controlled substance offense "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(i). The question presented is: whether a state drug-trafficking offense, for which state law authorized a ten year sentence because the defendant was a recidivist, qualifies as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. § 924(e).

Case below: *United States v. Rodriquez,* 464 F.3d 1072 (9th Cir. 2006).

***Snyder v. Louisiana*, No. 06-10119, cert. granted June 25, 2007, argument date to be announced.** The Supreme Court previously directed the court below to reconsider Mr. Snyder's *Batson* claims in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005). *See Snyder v. Louisiana*, 545 U.S. 1137 (2005). On remand, a bare majority adhered to its prior holding, once again disregarding substantial evidence establishing discriminatory intent, including the prosecutor's references to the O.J. Simpson case, the totality of strikes against African American jurors, and evidence showing a pattern of practice of race-based peremptory challenges by the prosecutor's office. In addition, the majority imposed a new and higher burden on Mr. Snyder, asserting that *Rice v. Collins*, 546 U.S. 333 (2006), permitted reversal only if "a reasonable factfinder [would] necessarily conclude the prosecutor lied" about the reasons for his strikes. Three justices, including the author of the original opinion, dissented, finding the prosecutor's reference to the O.J. Simpson case in argument to an all-white jury, made "against a backdrop pf the issues of race and prejudice," supported the conclusion that the State improperly exercised peremptory strikes in a racially discriminatory fashion. The Louisiana Supreme Court's consideration of Mr. Snyder's *Batson* claims on remand from this Court raises the following questions: (1) Did the majority below ignore the plain import of *Miller-El* by failing to consider highly probative evidence of discriminatory intent, including the prosecutor's repeated comparisons of this case to the O.J. Simpson case, the prosecutor's use of peremptory challenges to purge all African Americans from the jury, the prosecutor's disparate questioning of white and black prospective jurors, and documented evidence of a pattern of practice by the prosecutor's office to dilute minority presence in petit juries? (2) Did the majority err when, in order to shore up its holding that Mr. Snyder had failed to prove discriminatory intent, it imported into a direct appeal case the standard of review this Court applied in *Rice v. Collins*, and AEDPA habeas case? (3) Did the majority err in refusing to consider the prosecutor's first two suspicious strikes on the ground that defense counsel's failure to object could not constitute ineffective assistance of counsel because *Batson* error does not render the trial unfair or the verdict suspect - *i.e.*, that failure to raise a *Batson* objection can never result in prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984) - a holding directly conflicting with decisions from *inter alia* the Third Circuit Court of Appeals and the Alabama and Mississippi Supreme Courts?
Case below: *Louisiana v. Snyder,* 942 So. 2d 484 (La. 2006).

***Begay v. United States,* No. 06-11543, cert. granted September 25, 2007, argument date to be announced.**
Is felony driving while intoxicated a "violent felony" for purposes of the Armed Career Criminal Act?
Case below: *United States v. Begay,* 470 F.3d 964 (10th Cir. 2006).

***Gonzalez v. United States*, No. 06-11612, cert. granted September 25, 2007, argument date to be announced.**
First, must a federal criminal defendant explicitly and personally waive his right to have an Article III judge preside over voir dire? Second, did the Court of Appeals err when it reviewed petitioner's objection for plain error?
Case below: *United States v. Gonzalez,* 483 F.3d 390 (5th Cir. 2007).

The Back Bencher

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