

TENTH CIRCUIT & SUPREME COURT CASES  
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Table of Contents

TENTH CIRCUIT CASES .....	3
APPELLATE PROCEDURE .....	3
BANK FRAUD .....	3
BRADY .....	3
CIVIL RIGHTS .....	3
CHILD PORNOGRAPHY .....	4
COMPETENCY .....	4
CONFESSIONS .....	5
CONFRONTATION .....	5
CONSPIRACY .....	5
CRIMINAL PROCEDURE .....	6
DEATH PENALTY .....	6
DOUBLE JEOPARDY .....	7
DRUGS .....	8
DUE PROCESS .....	8
ENTRAPMENT .....	9
EVIDENCE .....	9
EVIDENCE - EXPERTS .....	11
FALSE STATEMENT .....	12
FIFTH AMENDMENT .....	12
FIREARMS .....	13
FRAUD .....	14
GRAND JURY .....	15
HABEAS CORPUS .....	15
IMMIGRATION .....	17
INEFFECTIVE ASSISTANCE OF COUNSEL .....	18
JURISDICTION .....	19
JURY INSTRUCTIONS .....	19
JURY ISSUES .....	19
MENTAL ILLNESS .....	20
PLEAS .....	21
PROSECUTORIAL MISCONDUCT .....	22
SEARCH & SEIZURE .....	22
SENTENCING .....	27
SENTENCING–CRIME OF VIOLENCE .....	32
SEX CRIMES .....	41
VICTIM RIGHTS .....	42
SUPREME COURT CASES .....	43
ARMED CAREER CRIMINAL ACT .....	43
CIVIL RIGHTS .....	43
CONFRONTATION .....	43
CRIMINAL PROCEDURE .....	44
DRUGS .....	44
EIGHTH AMENDMENT .....	44
FIREARMS .....	44

HABEAS CORPUS .....	45
IMMIGRATION .....	46
JURY .....	46
MONEY LAUNDERING .....	46
PLEA AGREEMENTS .....	47
PORNOGRAPHY .....	47
SEARCH AND SEIZURE .....	47
SENTENCING .....	48
SIXTH AMENDMENT .....	49
SPEEDY TRIAL .....	50

## TENTH CIRCUIT CASES

### **APPELLATE PROCEDURE**

*United States v. Baum*, \_\_\_ F.3d \_\_\_, 2009 WL 322106 (10<sup>th</sup> Cir. 2009)

The COA grants a rehearing petition, changing some language and comes to the same conclusion against the D. The panel had said that when no authority from the S. Ct. and the COA compels a determination that there was an error and there is contrary authority in other circuits the error cannot be plain. After the D pointed out cases where the COA had found plain error in those circumstances, the COA said the error "can rarely be plain." The COA explained that it had only found plain error in those circumstances in the "context of an unambiguous statutory command." But here the guidelines don't define intent. So, it was not plain error for the d. ct. to hold a loss for guideline purposes is intended if it is expected.

*United States v. Uscanga-Mora*, \_\_\_ F.3d \_\_\_, 2009 WL 1100458 (10<sup>th</sup> Cir. 2009)

The COA extolls the virtues of plain error review: e.g., a contemporaneous objection will enable the court to correct any procedural error right then. But somewhat helpfully, the COA also says: "plain-error review should not be like a hidden mantrap, encountered without warning yet often deadly." So, counsel will be excused from objecting if counsel is not afforded an opportunity to object or an objection would be futile. Counsel had an opportunity to object to the inadequacy of the court's explanation for its application of the two-level leader enhancement under § 3B1.1(c). The D could not meet the third plain error prong because there was sufficient evidence to support the enhancement: wiretapped conversations evidenced the D ordering another to do things with respect to drug transactions.

### **BANK FRAUD**

*United States v. Gallant*, 537 F.3d 1202 (10<sup>th</sup> Cir. 2008)

COA overrules some challenges to sufficiency of evidence on bank fraud and related counts, and finds for Ds and a very few others. Read this lengthy opinion if you have a bank fraud case.

### **BRADY**

*United States v. Ford*, \_\_\_ F. 3d \_\_\_, 2008 WL 5173125 (10<sup>th</sup> Cir. 2008)

D was convicted of illegally selling or possessing a machine gun. At trial, his primary defense was entrapment. A firefighter with no criminal history, he contended that he sold the firearms to the informant after being pressured by the CI. He was acquitted of two counts and convicted of the third. He filed a motion to set aside the conviction, alleging that the government had failed to disclose e-mails sent between him and the informant and thereby violated *Brady*. The district court agreed that three undisclosed e-mails were favorable, but denied the motion on the grounds that, in light of all the evidence, the e-mails were not sufficiently material to cast doubt on the guilty verdict. The COA agreed, upholding the district court's decision. Judge Gorsuch, however, dissented, arguing that the COA failed to consider the significant evidence in the record that supported the defendant's defense and he would therefore conclude that the e-mail was material and the D should receive a new trial.

*United States v. Erickson*, \_\_\_ F.3d \_\_\_, 2009 WL 903387 (10<sup>th</sup> Cir. 2009)

Defendants' *Brady* claims are rejected because there was no showing that the gov't knew about the withheld audit or that it contained material evidence favorable to defendants. And while the trial judge made some caustic comments, they did not deny a fair trial or exhibit bias requiring recusal.

### **CIVIL RIGHTS**

*Keylon v. City of Albuquerque*, 535 F.3d 1210 (10<sup>th</sup> Cir. 2008)

In Sec. 1983 action arising out of cop's arrest of P without probable cause for concealing ID, the district court erred in denying P judgment as a matter of law and erred in submitting the issue of qualified immunity to the jury. Under the facts, no reasonable police officer would have believed that P violated the law and concealed her identity. Also, there were no disputed facts regarding qualified immunity—as a matter of law, P's rights were so clearly established that the cop should have known his actions in arresting her violated those rights—and therefore, the question of immunity should not have gone to the jury.

***Vondrak v. City of Las Cruces***, 535 F.3d 1198 (10<sup>th</sup> Cir. 2008)

Sec. 1983 action against 2 cops and the city arising out of cop's arrest of P for DWI. COA says arresting cop gets qualified immunity on P's illegal arrest claim. P's statement that he had consumed one beer three hours earlier gave cop RS to subject him to a field sobriety test. COA upholds denial of QI on excessive force claim against cops—handcuffs too tight and P showed he was injured (permanently. P is an orthodontist and claimed the injury affected his ability to work). Law is clearly established that too-tight cuffing equals excessive force. Plus, second non-cuffing officer has no QI because clearly established law imparts a duty to intervene to protect constitutional rights.

***Duffield v. Jackson***, \_\_\_ F.3d \_\_\_, 2008 WL 4780922 (10<sup>th</sup> Cir. 2008)

No interest of justice exception to pro se inmate's failure to object to (or failure to ask for an extension of time to object to) magistrate's recommendation dismissing his §1983 8<sup>th</sup> Amendment claim of deliberate indifference regarding inadequate medical care. P failed on the merits to show the defendants' actions rose to the level of “unnecessary and wanton infliction of pain,” and failed to show an affirmative link between each defendant and the constitutional deprivation.

### **CHILD PORNOGRAPHY**

***United States v. Schene***, 543 F.3d 627 (10<sup>th</sup> Cir. 2008)

Evidence sufficient that materials transported in interstate commerce were used to download porn images to the hard drive of D's computer to support his conviction of knowingly possessing child porn. D did not challenge sufficiency of the evidence at trial on this ground and any error did not violate his substantial rights or seriously affect the fairness of judicial proceedings. Also, there was sufficient proof that it was D, not his wife, who knowingly possessed the child porn.

### **COMPETENCY**

***United States v. Cornejo-Sandoval***, \_\_\_ F.3d \_\_\_, 2009 WL 1195527 (10<sup>th</sup> Cir. 2009)

Quite the difficult client, quite the troubling decision. COA rejects D's procedural and substantive competency claims regarding court's failure to order a second competency evaluation during trial. 18 USC Sec. 4241(a) sets out the procedure when a question of competency arises. Review of a decision whether to order a *second* exam is not plenary—rather, it is for an abuse of discretion. Counsel's initial agreement that D was competent a week before trial, the pre-trial evaluation noting that D was competent at that time but was merely a very difficult and angry client, and the trial court's observation that D was trying to disrupt the proceedings, combined so that COA could not say trial court abused its discretion in not ordering a second evaluation. D's failure to succeed on his procedural competency claim forecloses his substantive competency claim.

***United States v. Landers***, \_\_\_ F.3d \_\_\_, 2009 WL 1195094 (10<sup>th</sup> Cir. 2009)

Wacky prisoner's scheme to copyright his name, charge the warden for use of it, file liens against the warden's property, then extort his release from prison—a scheme outlined in the book *Cracking the Code* (don't look for it on Amazon, Joe). Due to D's wacky behavior, court held a pre-trial hearing but determined not to order a competency evaluation. District court denied counsel's request five days before trial for an expert on diminished capacity due to “closed belief” system and found that D was not claiming an insanity defense. (1) COA finds a reasonable judge would not have ordered a competency evaluation, 18 USC Sec. 4241(a): counsel represented that D's disruptive behavior stemmed from his attitude of protest, and D's preparations for the extortion scheme were cogent. D's bizarre behavior was not idiosyncratic but rather fit the model of his Freeman's anti-government organization. (2) No

abuse of discretion in not appointing a psychological expert for trial defense. “Closed belief system” is a defense not allowed by the 10<sup>th</sup> Cir. Moreover, D failed to assert an insanity defense as outlined in the Crim. P. Rules and even if his closed belief system were to be construed as an insanity defense claim it was untimely made.

### **CONFESSIONS**

*United States v. Burson*, 531 F.3d 1254 (10<sup>th</sup> Cir. 2008)

Once an officer credibly testifies that the defendant making a statement was sufficiently in touch with reality so that he knew his rights and the consequences of abandoning them, the defendant has the burden to show his condition rose to the level of "substantial impairment" by drugs, alcohol, and/or exhaustion, etc. In this case, despite evidence that the defendant had not slept for days and had recently used meth and cocaine heavily, had rested his head on a table during the interrogation [he was "resigned," not tired] and did not respond to some questions or responded with a moan, the videotape and the officer's testimony established the defendant's statements were voluntary, knowing and intelligent. The defendant had to do more than just establish how much drugs he indulged in, he also had to show how the amount of drugs affected his awareness.

### **CONFRONTATION**

*United States v. Kaufman*, \_\_\_ F.3d \_\_\_, 2008 WL 4868480 (10<sup>th</sup> Cir. 2008)

In an involuntary servitude case, the district court may have erred in ordering the defendants not to make eye-contact with the victim-witnesses. The district court was worried the defendants would intimidate the victims by eye contact. The major problem the COA saw was the defendants' aversion of their eyes when the witnesses looked at them might lead the jurors to infer guilty consciences, since the court didn't inform the jury of its ruling. Also, the court's failure to make an individualized decision with respect to each victim was a problem. The COA found the defendants did not meet their burden to prove a reasonable probability of a different outcome and didn't meet their prejudice burden.

### **CONSPIRACY**

*United States v. Carnagie*, 533 F.3d 1231 (10<sup>th</sup> Cir. 2008)

The COA reverses the trial court's grant of a judgment notwithstanding the guilty verdict on charges of conspiracy to defraud the U. S. and conspiracy to money launder. The two Ds were involved in a massive scheme involving many people--home buyers, real estate agents and mortgage loan officers--to create and use false documents to qualify for FHA mortgages. The pay-offs to the actors were: loan qualification, real estate commissions, and kickbacks from the commissions, respectively. The trial court reversed on the ground that there was a fatal variance in that there was evidence that supported many small conspiracies, but not evidence of one overarching massive conspiracy of which the two Ds were a part.

Read the opinion for a discussion of (1) proof of interdependence--an acting together for shared benefit--to support a single (wheel-type) conspiracy. The COA determined that there was not that proof of interdependency. (2) Variance and notice. The COA determined that there was no prejudice from the variance because the Ds had notice of all the smaller conspiracies they were alleged to have been linked to. (3) Prejudicial spillover of evidence of smaller conspiracies not involving the defendants but admitted to show the larger conspiracy--the COA ruled there was none.

*United States v. Bedford*, 536 F.3d 1148 (10<sup>th</sup> Cir. 2008)

Indictment sufficiently outlined elements of the conspiracy charge. When challenge is made post-verdict, it is sufficient if indictment contains words of similar import to the element in question. Also, in conspiracy charge, elements of the underlying overt acts need not be charged with the same specificity as the free-standing charge. Though elements of "knowledge of falsity" and "interdependence" were not charged, the indictment was sufficient when viewed as a whole.

*United States v. Zapata*, 540 F.3d 1165 (10<sup>th</sup> Cir. 2008)

COA upholds convictions and sentences for 5 co-defendants in an extensive drug conspiracy prosecution involving many family members and friends. After a key bust that turned a transporter into a cooperator, the government obtained wire taps which in turn led to a 35 count indictment, including drug trafficking conspiracy, against 18 co-defendants. Only the five appellants went to trial, with many original defendants testifying against them. Conspiracy related issues: conspiracy evidence sufficient; no plain error in conspiracy jury instructions (submitting own jury instruction does not serve as an objection to an allegedly improper one given by the court), and there was no improper inference that Ds were guilty because others were; no error in denying severance—no improper spillover in the evidence.

### **CRIMINAL PROCEDURE**

*United States v. Jones*, 530 F.3d 1292 (10<sup>th</sup> Cir. 2008)

(1) No plain error in joinder under FRCP 8(a) of bank fraud and conspiracy counts with drug and firearm counts (COA reviews this as a “forfeited” rather than a “waived” issue): D could not show that even if joinder was improper, it affected her substantial rights, because the evidence of guilt was overwhelming as to all counts.

(2) No abuse of discretion in denying severance of counts under FRCP 14 for D who wanted to testify on the drug and gun counts, but remain silent on the fraud—she did not show she would have been strongly prejudiced.

(3) No improper denial of severance under FRCP 14 of co-D’s, one of whom was charged only with bank fraud and conspiracy (not drugs and gun). D only alleged spillover effect of drugs and gun evidence; however, court allowed the drug-charged D to present evidence that the uncharged D was actually responsible for the drugs!!!!Read this entirely unconvincing opinion as to why this was not prejudicial and how limiting instructions made it all A-OK.

*United States v. Kelly*, 535 F.3d 1229 (10<sup>th</sup> Cir. 2008)

D did not waive his challenge to venue being proper in Utah—nothing on the face of the indictment alerted him to a venue issue, and it only became apparent when the government rested its case. Nor did he fail to preserve it—in generally moving for an acquittal after the government rested, a challenge to venue and all essential elements of the offense was included in the objection. PRACTICE TIP: (if he had challenged sufficiency of the evidence on a particular ground, he would have failed to preserve all other grounds except that specified).

Venue must be found by the jury, but only upon a preponderance of the evidence. The evidence was sufficient that D committed the offenses in the district of Utah. Enough evidence of particular geographic locations was introduced so that a jury could infer the crime (possession of methamphetamine by D on a motorcycle) occurred in Utah. The COA took judicial notice of the named counties as being in Utah.

### **DEATH PENALTY**

*Wilson v. Sirmons*, 536 F.3d 1064 (10<sup>th</sup> Cir. 2008)

Counsel was deficient with respect to the penalty phase in failing to: (1) give his mental health expert sufficient time before trial [three weeks] to fully develop evidence that the petitioner suffered from schizophrenia; (2) interview any family members, who were reasonably available, to develop evidence that the petitioner had delusions, hallucinations, nightmares and inability to maintain contact with reality; and (3) present the diagnoses that the expert had arrived at, such as bipolar, PTSD, generalized anxiety disorder. These failings allowed the prosecutor's cross-examination to suggest the petitioner was a psychopath. It's important that the defense be able to explain to the jury the difference between abnormal personalities and actual mental disorders for which the jury might have sympathy. For that reason, the petitioner's allegations established prejudice.

Otherwise, the COA unanimously held that: (1) it was okay for the trial court to begin the voir dire by asking prospective jurors their position on the death penalty, refuse to conduct individual sequestered voir dire and conduct a dual jury procedure whereby one jury decided one defendant's guilt and penalty and the other decided the co-defendant's guilt and penalty [one jury was excused when the defense presented evidence prejudicial with respect to his co-defendant]; (2) it was not a violation of due process to introduce a PCR DNA test result without a Daubert hearing [such analysis has been found to be reliable]; (3) it was not error to refuse to give a 2d degree murder

instruction [under state law once a dangerous weapon is involved during a robbery, 2d degree murder is not an option]; (4) there was sufficient evidence the victim endured conscious physical suffering [the victim was still alive when he was beat up and before the deadly baseball bat blow was administered], the heinous offense aggravator was not unconstitutionally vague; (5) no Miranda warnings were required during a traffic stop; (6) it was okay to consider the petitioner's conviction for being an accessory after the fact for murder and evidence he supplied the ammunition for that murder; (7) it was okay to admit out-of-court statement that the petitioner was driving a car used in a homicide because it explained why he was stopped and it's not clear the Confrontation applies to capital hearings; (8) it was improper to admit evidence of the victim's childhood, but it did not deny the petitioner a fundamentally fair trial, even though the prosecution's victim advocate was so overcome by the victim impact evidence she broke down in tears and was ordered to leave the courtroom; (9) the post-autopsy photo of the inside of the victim's skull evidence was irrelevant and prejudicial but harmless; (10) the prosecutor acted improperly in misstating that the petitioner was found with money on him, calling the petitioner an animal and unadulterated evil, disparaging defense counsel as creating a smoke screen, asking the jurors to put themselves in the victim's shoes as he left for work never to see his family again, imploring the jury to be the Great Equalizer, and misstating that the petitioner's presence at the robbery was enough to warrant a conviction. But all of the errors did not render the trial fundamentally unfair, although the 10th opined that, if the "Great Equalizer" comment had been made at sentencing, it might have warranted reversal.

*Young v. Sirmons*, \_\_\_ F.3d \_\_\_, 2008 WL 5220520 (10<sup>th</sup> Cir. 2008)

Warning: Habeophiles only. Death penalty affirmation out of Oklahoma. P challenged (1) admission of victim impact evidence: the COA held that OCCA's determination that this evidence was not unduly prejudicial (including testimony that the victims' aunt died of a heart attack after learning of the murders) was not contrary to nor an unreasonable application of Sup. Ct. precedent in *Payne*; and (2) counsel's effectiveness during the penalty phase.

The COA agrees with the federal district court that while counsel was incompetent in failing to investigate and present mitigating family and friends evidence and expert psychological evidence at the punishment phase, there was no prejudice. First, the COA was not willing to say that P could not establish prejudice because he did not want counsel to introduce mitigating evidence through family and friends, as in *Schriro*. Here, the COA could not say what P's position in that respect would have been if counsel had properly investigated and introduced mitigating expert psychological evidence. Second, however, there was not such malfeasance on the part of counsel as to support a presumption of prejudice. Third, after recounting significant and compelling mitigating evidence (submitted by affidavit to the habeas court) that was never introduced at trial, the COA finds no prejudice because in balancing that against the guilt phase evidence that supported the aggravators and the state's submission of what additional rebuttal aggravation evidence it would have presented, P failed to show that a reasonable sentencer would have found that the balance would not have warranted death.

Henry dissents, and would remand for evidentiary hearing on the prejudice prong of P's IAC claim during the penalty phase. P's mitigating evidence and the state's rebuttal was never presented, outside of affidavits and summaries respectively, to either state or federal courts. Henry does not consider the existing factual record to include the state's rebuttal summaries. Thus an evidentiary hearing is required to establish whether counsel's failure to present mitigating evidence would have been overcome by the state's rebuttal, therefore resulting in P's failing to establish prejudice.

## **DOUBLE JEOPARDY**

*United States v. Tafoya*, \_\_\_ F.3d \_\_\_, 2009 WL 448180 (10<sup>th</sup> Cir. 2009)

Double jeopardy did not bar re-trial of D after a mistrial granted when the prosecutor, in violation of the district court order, asked a question eliciting a prejudicial answer from one of its witnesses. The district court did not err in determining that the prosecutor's mistake was inadvertent, rather than intentional misconduct to goad the D into requesting a mistrial. (Must be subjective intent to goad and not mere overreaching). Evidence supporting the district court's conclusion that the government intended to try the case and not cause a mistrial included the government's "vehement" opposition to a granting of a mistrial, its not appealing pre-trial orders favoring the defendant, the prosecutor's "rational" explanation for his boo-boo, his heartfelt claim that he did not intend to goad, and his confession that this was his first trial as an AUSA.

## **DRUGS**

***United States v. Edwards***, 540 F.3d 1156 (10<sup>th</sup> Cir. 2008)

Admission of D's prior convictions for possession of personal-usage amounts of drugs was irrelevant and error. But the error was harmless due to overwhelming evidence of conspiracy to distribute drugs. There was also sufficient evidence D was a user of controlled substances [illegally possessing a firearm], even though the evidence of his usage of drugs did not "pinpoint" precise dates. Because there was sufficient evidence of a temporal nexus between the firearm possession and the drug usage the statute was not unconstitutionally vague as applied.

***United States v. Doodles***, 539 F.3d 1291 (10<sup>th</sup> Cir. 2008)

Evidence sufficient D possessed ecstasy and a firearm found in another person's bedroom, (despite no evidence he had a gun or drugs on the date the firearm and drugs were found) in light of D's access to that bedroom, his involvement in other drug transactions and shooting episodes, his membership in the gang that was connected to the pills and firearm, and his presence in the residence with the bedroom. Any error in the prosecution's elicitation from various witnesses that the gang threatened the witnesses and the witnesses feared retaliation was not plain and did not affect the defendant's substantial rights. Some of the testimony explained the witnesses' prior inconsistent statements and countered the defense's cross-examination. And, the evidence was overwhelming. Characterizations of the defendant's prior convictions as felonies when they were misdemeanors did not affect the defendant's substantial rights because a government witness later corrected the mischaracterization.

***United States v. Villegas***, \_\_\_ F.3d \_\_\_, 2009 WL 225840 (10<sup>th</sup> Cir. 2009)

D argued that the jury was wrongly instructed that it could convict of PWID 50 grams or more of "actual or pure" meth even if it found he possessed impure meth. While it might be clearer to just refer to "meth," rather than "pure" or "actual" meth, it is unlikely the jury in this case was confused as expert chemist explained his computation of the weight of the meth molecules in the substance or mixture--by multiplying the total weight of the mixture by the % that was composed of meth molecules.

***United States v. Winder***, \_\_\_ F.3d \_\_\_, 2009 WL 448181 (10<sup>th</sup> Cir. 2009)

Evidence was sufficient D possessed with the intent to deliver drugs found in the van he was driving when stopped. Recognized tools of the drug trade were found in the van along with the marijuana and cocaine--scales, empty baggies and baggies containing drugs, firearms, scales. His flight from the police indicated guilt.

***United States v. Poe***, \_\_\_ F.3d \_\_\_, 2009 WL 514069 (10<sup>th</sup> Cir. 2009)

Sufficient evidence that D constructively possessed F/A in jointly occupied home--his statement that the gun was his was sufficiently corroborated. He said how he acquired it, and it was found next to drugs he admitted using. Sufficient evidence D intended to distribute drugs based on quantity and baggies. Sufficient evidence of F/A in furtherance of drug offense based on all of the above.

***United States v. Rogers***, \_\_\_ F.3d \_\_\_, 2009 WL 514085 (10<sup>th</sup> Cir. 2009)

Sufficient evidence of conspiracy: D's cell phone in room with drugs, D dropped something behind door inside room when cop came and it was packaged- for-sale crack, room was a stash room for sale of crack; of possession of guns during a drug crime: though loaded guns were in a night stand by bed in which co-D was laying, all evidence that showed conspiracy showed D's connection to gun says COA (plus expert testimony that guns used in connection with stash places).

## **DUE PROCESS**

***United States v. Doodles***, 539 F.3d 1291 (10<sup>th</sup> Cir. 2008)

D's right to a fair trial was not compromised by a juror who raised concerns about the defendant having access to the jury list and alluded to the testimony about "significant repercussions." The juror said his concern was partly spurred by his wife, "an avid Court TV watcher," who had asked the juror about security precautions in federal cases. He assured the court he could be impartial.

## ENTRAPMENT

*United States v. Yarbrough*, 527 F.3d 1092 (10<sup>th</sup> Cir. 2008)

D convicted after trial on obstruction of justice related charges. D was investigated for being a “dirty cop,” for giving his buddy tips about ongoing police investigations of the buddy. Evidence was insufficient to support giving of entrapment instruction—there was no evidence D was induced by the government. The government did not create the crime, but merely gave D the opportunity to participate. There were no coercive actions by the government.

*United States v. Ford*, \_\_\_ F.3d \_\_\_, 2008 WL 5173125 (10<sup>th</sup> Cir. 2008)

D was convicted of illegally selling or possessing a machine gun. At trial, his primary defense was entrapment. A firefighter with no criminal history, he contended that he sold the firearms to the informant after being pressured by the CI. He was acquitted of two counts and convicted of the third. He filed a motion to set aside the conviction, alleging that the government had failed to disclose e-mails sent between him and the informant and thereby violated *Brady*. The district court agreed that three undisclosed e-mails were favorable, but denied the motion on the grounds that, in light of all the evidence, the e-mails were not sufficiently material to cast doubt on the guilty verdict. The COA agreed, upholding the district court's decision. Judge Gorsuch, however, dissented, arguing that the COA failed to consider the significant evidence in the record that supported the defendant's defense and he would therefore conclude that the e-mail was material and the D should receive a new trial.

## EVIDENCE

*United States v. Yarbrough*, 527 F.3d 1092 (10<sup>th</sup> Cir. 2008)

In a fairly surprising defense win, the COA reverses D's conviction after trial on obstruction of justice related charges, because the trial court refused to admit D's evidence of his good character. D was investigated for being a “dirty cop,” for giving his buddy tips about ongoing police investigations of the buddy.

D proffered character evidence of his integrity and status as a law-abiding, trusted police officer, under FREs 404(a)(1) and 405, and argued that the evidence was directly relevant to the charges that he corruptly impeded an investigation (he admitted the actions, but testified that he told his buddy because they were friends, because his buddy was clean, and because D thought the main investigating cop was overreaching) The COA found that the court abused its discretion in refusing the evidence, because its reasoning was wrong. Rather, “character evidence is admissible in cases, such as this one, where the sole issue before the jury is whether a defendant undertook his undisputed acts with a prohibited state of mind.” The error was not harmless.

The COA disposed of another evidence issue against the D. (1) government made a prima facie showing that police reasonably minimized interception of non-pertinent phone calls under the wiretap warrant—calls under 2 minutes long are not even considered under minimization analysis.

*United States v. Cerno*, 529 F.3d 926 (10<sup>th</sup> Cir. 2008)

Evid. R. 402, 404(b) and 403: the only evidence against D was his 16 y/o niece's accusations. The trial court originally ruled that evidence was inadmissible that the V and her family returned home unexpectedly early one evening to find D passed out drunk while watching an adult porn video, with his penis exposed. After D testified and was cross-examined, and after the trial court continually denied the government's request to get into the evidence, the court reversed its ruling, determining that D's testimony that drinking did not impair his judgment, and that he was in control of his senses when he drank, allowed for impeachment with the evidence. That is, passing out drunk with his penis exposed showed that he lost judgment when drunk, and impeached D's truthfulness when he denied that he lost judgment. The COA said the evidence had some, not significant impeaching relevance, it had the potential of being and was undoubtedly prejudicial to the D, but the trial court did not abuse its discretion, since it is in the front row seat, of determining that the prejudicial effect did not **substantially** outweigh the probative value of the evidence. Furthermore, as impeachment evidence, it was not improperly admitted under R. 404(b).

Dissenting, McConnell agrees with the determination that the evidence was prejudicial, and points to the district court's original refusal to admit it as an unwavering determination that it was prejudicial. He disagrees with the

majority determination on relevance. He would find it not relevant at all (thereby bypassing the majority's need to determine whether there was an abuse of discretion in the district court's 403 weighing).

***United States v. Smith***, 531 F.3d 1261(10<sup>th</sup> Cir. 2008)

No error admitting D's statement in a taped prison call conversation that he was an armed career criminal. The statement showed the materiality of the false document and the D's motive. Troublingly, the COA also agrees with the government's argument that D "can't claim unfair prejudice for words he himself chose to use." Also troubling, the COA holds the D waived a challenge to the admission of another taped statement because he told the court he had no other objections to the recorded conversations and, (COA hints this would be enough), he affirmatively used the evidence, although he did not introduce it into evidence.

***United States v. Caraway***, 534 F.3d 1290 (10<sup>th</sup> Cir. 2008)

Prosecution for causing U.S. Mail delivery--to former best friend involved in relationship with ex-wife--of an explosive device and possession of an explosive device during and in relation to a crime of violence. It was not plain error to admit testimony from D's daughter re: her prior statement that she drove her brother to the post office to mail the bomb. Premature admission of her written statement was harmless error. Testimony of D's friend that he found book re: making a bomb in garage where he and D manufactured meth was not unfairly prejudicial. Because the trial outcome was not affected by erroneous admission of evidence, there was no cumulative error requiring a new trial.

***United States v. Contreras***, 536 F.3d 1167 (10<sup>th</sup> Cir. 2008)

No error in permitting D's probation officer to testify she recognized him in bank robbery video. While the jury could review the surveillance footage, the p.o. could base her identification on many factors that would not be apparent to the jury viewing D in a courtroom. The p.o. could have been cross-examined re: her ability to ID without getting into details regarding the nature of the relationship. There was no 6th Amend. violation because D was afforded the opportunity to cross-examine the p.o., even though he elected not to take it.

***United States v. Zapata***, 540 F.3d 1165 (10<sup>th</sup> Cir.2008)

Wiretaps properly obtained--government showed necessity and was not required to exhaust all conceivable other methods of investigation. Government showed the limited success of traditional investigative techniques.

***United States v. Schene***, 543 F.3d 627 (10<sup>th</sup> Cir. 2008)

District court did not abuse its discretion in admission of evidence. Testimony that women don't generally look at or traffic in child porn did not need to have scientific basis established because it was admitted to explain that the agent acted in accord with his training by focusing on D and not his wife. Alleged prosecutorial misconduct in presenting evidence of D's visiting of gay websites was not flagrant enough to improperly influence the jury. It was OK for government to show porn images at trial, despite D's stipulation that they constituted child porn, because the government was entitled to prove its case and the images were not unfairly prejudicial.

***United States v. Phillips***, 543 F.3d 1197 (10<sup>th</sup> Cir. 2008)

COA held that the admission of an incomplete document into evidence did not violate the rule of completeness. FRE 106 does not prohibit admission of an incomplete document; it merely allows the other party to introduce the rest into evidence without further foundation.

A copy of an asylum application was admissible. COA found there was no real question regarding authenticity, under FRE 1003, that two exceptions to FRE1002 (the best evidence rule) applied: the original could not be obtained by any available judicial process or procedure, FRE 1004(1), and it was an official record under FRE 1005. D had challenged the authenticity of the document, but the COA found the government had adequately established it. Copies of applications for alien employment certifications were admissible; the district court did not abuse its discretion or clearly err in concluding that the originals were lost or not reasonably obtainable.

***United States v. Parker***, \_\_\_ F.3d \_\_\_, 2008 WL 5220512 (10<sup>th</sup> Cir. 2008)

D convicted after a jury trial of two counts of making or conveying false claims regarding a threat to blow up a

building. No plain error in admission of voice identification testimony by cop who listened to 911 tapes and who had interviewed D, that D had made the 911 threatening calls. A lay witness need only be minimally familiar with a D's voice before offering an opinion.

***United States v. Parker***, \_\_\_ F.3d \_\_\_, 2009 WL 50435 (10<sup>th</sup> Cir. 2009)

D was convicted of involvement in a conspiracy where his company would claim to have overhauled customers' airplane engines when in fact the engines were not air-worthy. Some of the uncharged, similar-act evidence was intrinsic to the crime and other such evidence outside the conspiracy time frame was properly admitted to show intent and knowledge that these engines really weren't fixed right. The evidence, which included the D making false entries in logbooks, marketing the company, learning of the engine deficiencies, refusing to correct problems when customers complained, etc., was sufficient to prove conspiracy, making false statements and mail fraud. The prosecutor's question of a reputation defense witness "would you change your opinion if you found out the D was selling unairworthy engines and not warning other customers about the engines' problems?" did not impermissibly assume the D's guilt [?]

***United States v. Rogers***, \_\_\_ F.3d \_\_\_, 2009 WL 514085 (10<sup>th</sup> Cir. 2009)

No abuse of discretion for trial court to not admit hotel log that showed a "Ricky Smith" checked out of hotel the day after D was arrested—district court found that under the business records exception it was unreliable (court adopted govt argument it was a different log from that given to investigators and tendered at the suppression hearing). It was minimally probative because jury heard that a "Ricky Smith" checked out the day after D was arrested.

***United States v. Gayle Caldwell***, \_\_\_ F.3d \_\_\_, 2009 WL 806579 (10<sup>th</sup> Cir. 2009)

Appeal of wire fraud and money laundering convictions after trial with husband and five other co-Ds. While there was ample evidence of intent to defraud to support wire fraud conviction, the money laundering conviction is reversed due to insufficient evidence that the transaction in question was designed to conceal. 404(b) evidence of two uncharged transactions was properly admitted to show motive and intent and a common scheme and design. Joinder with co-Ds was proper and there was no abuse of discretion in denial of severance.

***United States v. Charles Caldwell***, \_\_\_ F.3d \_\_\_, 2009 WL 806578 (10<sup>th</sup> Cir. 2009)

There was sufficient evidence to support Mr. Caldwell's convictions of wire fraud. As in Ms. Caldwell's case, the 404(b) evidence was properly admitted to show motive and intent and a common scheme or design; joinder was proper and severance was properly denied.

## **EVIDENCE - EXPERTS**

***United States v. Bedford***, 536 F.3d 1148 (10<sup>th</sup> Cir. 2008)

Expert testimony by IRS agent under Fed. Evid. Rule 704(a) "which expresses an opinion as to the proper tax consequences of a transaction is admissible evidence . . . so long as the expert does not directly embrace the ultimate question of whether the defendants did in fact intend to evade income taxes."

***United States v. Benally***, 541 F.3d 990 (10<sup>th</sup> Cir. 2008)

The COA finds district court did not abuse its discretion under Fed. Crim. Evid. R. 702 in not admitting testimony of defense expert on why individuals might falsely confess. Although the expert would not have testified to whether D falsely confessed, the testimony would nevertheless have encroached upon the jury function of determining credibility of the witnesses. Under 403, the district court could conclude that relevancy was low (the expert did not interview the D) and prejudice and confusion was high. The COA gives lip service to the notion that such testimony is not categorically inadmissible, but the COA points out that in other cases in which such testimony was admitted it was linked to the D's mental disorder of some kind.

***United States v. Turner***, \_\_\_ F.3d \_\_\_, 2008 WL 161737 (10<sup>th</sup> Cir. 2009)

District court properly restricted cross-examination of Mr. Rucker, who brought D the bag containing the ammunition, re: contents of ATF form Mr. Rucker filled out with the assistance of D's attorney. There was significant danger the jury would confuse the issue of counsel's credibility with D's guilt.

*United States v. Nacchio*, \_\_\_F.3d \_\_\_, 2009 WL 455666 (10th Cir. 2009) (en banc)

The former CEO of Qwest was convicted of multiple counts of insider trading.

Three days before trial he disclosed he intended to call an expert on insider trading, pursuant to R.16, and also provided the government with a short summary of the expert's testimony and his CV. The government objected that the disclosure did not comply with Rule 16. The district court agreed and ordered the defendant to produce an expert disclosure. After lengthy motions, a hearing, and argument, the D received permission to put the professor on the stand as a nonexpert, but the district court excluded his testimony as an expert.

1. The 5 judge COA majority rejects D's argument that the district court erroneously relied on Rule 16. It is clear that the exclusion was the district court's determination that the testimony lacked reliability under FRE 702 and Daubert.

2. COA rejects D's contention that he had a right to expect to be able to establish the reliability of the expert's testimony on the witness stand and that the court would allow voir dire or questioning of the witness before ruling on admissibility. The district court's failure to follow that procedure did not, by itself, constitute an abuse of discretion. D was on notice of the need to establish reliability under Daubert, but by framing the issue only as a Rule 16 issue He essentially waived the argument. As the party proffering the expert testimony, the burden was squarely on D to request a hearing on the subject, and he did not.

Four judges dissented. Notably, they would have found that the defendant did have the right to establish the reliability of his expert through testimony and, if the trial court intended a different procedure, it had to inform the parties. Furthermore, even if counsel had made a mistake, the trial court abused its discretion by refusing to allow the primary line of defense.

*United States v. Garza*, \_\_\_F.3d \_\_\_, 2009 WL 1491200 (10<sup>th</sup> Cir. 2009)

Conviction for possession of a firearm in furtherance of a drug-trafficking crime affirmed. No abuse of discretion in admitting cop's expert testimony about how gun, found under a pillow in defendant's bedroom along with pot and loaded with hollow-point bullets, related to D's drug trafficking; no plain error in admission of this testimony, to the extent that it might have constituted an opinion as to D's intent, because such error, if any, did not seriously affect the fairness, integrity, or public reputation of judicial proceedings; and evidence was sufficient to support conviction.

#### **FALSE STATEMENT**

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

COA held that allegedly forged asylum and certification applications did not qualify as "other documents" within the meaning the criminal statute prohibiting uttering false or forged documents for entry into the US. The statute's plain language does not apply to documents that are prerequisites for obtaining entry documents (visas, border crossing cards, and alien registration receipt cards).

#### **FIFTH AMENDMENT**

*United States v. Rivas-Macias*, 537 F.3d 1271 (10th Cir. 2008)

COA rejects claim that right to present a defense at drug conspiracy and PWID trial was violated by co-conspirator's invocation of his 5th A privilege. Though co-conspirator had pled and debriefed, he had not yet been sentenced and faced an authentic risk of further incriminating himself by testifying. The debrief did not waive the 5th A privilege; a witness' testimonial waiver of the privilege is effective only if it occurs in the same proceeding in which a party desires to compel the witness to testify. There was no request below for a trial continuance until after the co-D was sentenced and the district court did not commit plain error by not granting one sua sponte.

*United States v. Ivory*, 532 F.3d 1095 (10th Cir. 2008)

COA rejects defendants' claim of improper comment on their failure to testify in drug and conspiracy to murder a witness case. In arguing in closing that defendants used the word "money" as code for murder, prosecutor told jury that the only persons who used that code were witnesses the government could not call. This was a fair response to argument by defense that no witness testified that "money" was code for murder. Gov't was merely explaining why the jury must rely on circumstantial evidence to interpret the conversation at issue.

## FIREARMS

### ***United States v. Bowen*, 527 F.3d 1065 (10<sup>th</sup> Cir. 2008)**

Using a firearm as a club is "brandishing" under 18 U.S.C. § 924(c)(1)(A). The COA held the question whether "brandishing" occurred is a sentencing determination to be made by the district court, not a matter for the jury (this is okay under *Apprendi*, etc., because the determination establishes a mandatory minimum, but does not raise the maximum of life, see *Harris v. United States*, 536 U.S. 545 (2002)). "Brandishing" is a more egregious form of "using" the gun. It requires displaying the gun and an intent to intimidate another. More than "use" occurred here because clubbing the victim included a making known that the gun was present [by hitting the victim with it] and it intimidated the victim to do the culprits' bidding. While the evidence showed the clubbing occurred as retaliation, it also showed the clubbing intimidated the victim.

Sufficient evidence to show a nexus between use of the firearm and the underlying crime of retaliation against a witness. Evidence also sufficient to establish D aided and abetted use of the gun because he had knowledge of a co-conspirator's use of the gun and actively participated in the underlying crime by helping to beat the victim. The COA notes its aiding and abetting requirements differ from the vast majority of circuits, which require intentional facilitation or encouragement of the use of the firearm, not just of the underlying offense. The COA holds that, even under the other circuits' standard, there was sufficient evidence by virtue of the defendant's participation in the beating.

### ***United States v. Hill*, 539 F.3d 1213 (10<sup>th</sup> Cir. 2008)**

Upon the government's rehearing petition, the COA reverses a good decision resulting in a bad one, in light of the Supreme Court's decision in *United States v. Rodriguez*, 128 S. Ct. 1783 (2008), another bad decision. The COA previously ruled the D could not be a felon in possession of a firearm since his prior conviction was for a crime punishable by only 11 months under Kansas' guidelines, given the D's particular criminal history. But the COA now says you look at the offense, not the offender's particular characteristics, in which case the Kansas guideline range was 7 to 23 months. § 922(g)(1) speaks in terms of a *crime* punishable by imprisonment of more than one year. Thus it focuses on the offense, not the offender. *Rodriguez* supports this conclusion. In the ACCA context, the Court refused to hold the maximum punishment is limited by the defendant's guideline range. What is important is the offense, not the offender.

### ***Wyoming ex rel. Crank v. United States*, 539 F.3d 1236 (10<sup>th</sup> Cir. 2008)**

ATF interpretation of Wyoming's procedure for expunging misdemeanor convictions (for domestic violence) for purposes of restoring any lost firearm rights as being inadequate was not arbitrary and capricious. COA holds that "Congress intended the terms 'expunge' and 'set aside' as used in § 921(a)(33)(B)(ii) to require a state procedure that completely removes the effects of the misdemeanor conviction in question." Because the Wyoming law provided that any expunction is only "for the purposes of restoring any firearm rights lost," this does not provide for completely removing the effects of the conviction.

### ***United States v. Hooks*, \_\_\_ F.3d \_\_\_ 2009 WL 50205 (10<sup>th</sup> Cir. 2009)**

There was insufficient evidence the D possessed the Uzi thrown from the passenger side of a pickup in which he was a front-seat passenger where there were two other passengers in the back seat who could have thrown out the Uzi. While the government may have shown his proximity to the firearm, it had not shown ownership, dominion or control. The D's post-arrest remark that the officer did not know how to rack the Uzi might indicate general knowledge of how to operate a semiautomatic firearm but it does not establish knowledge the Uzi was in the pickup. On the other hand, there was sufficient evidence the co-D driver possessed a revolver found near the Uzi. An officer identified the revolver as the gun he saw wedged in the seat next to the co-D's leg right before the co-D fled the checkpoint at high speed and the co-D made some unfortunate remarks to the D after arrest without knowing the conversation was being recorded.

### ***United States v. Turner*, \_\_\_ F.3d \_\_\_, 2008 WL 161737 (10<sup>th</sup> Cir. 2009)**

Jury instruction on joint occupancy and constructive possession properly stated that mere proximity to the ammunition did not establish knowledge of and access to it. There was insufficient evidence to support a

"momentary or transitory control" instruction.

***Ramsey Winch, Inc. v. Henry***, \_\_\_ F.3d \_\_\_, 2009 WL 388050 (10<sup>th</sup> Cir. 2009)

The COA holds the federal Occupational Health and Safety Act, which imposes a general duty to maintain a workplace free of recognized hazards, did not preempt Oklahoma's law that makes it a criminal offense to prohibit employees from keeping firearms in their locked vehicles on company property. The state's right to exercise its police powers prevails.

***United States v. Winder***, \_\_\_ F.3d \_\_\_, 2009 WL 448181 (10<sup>th</sup> Cir. 2009)

Evidence was sufficient that D carried a firearm during and in relation to a drug offense. The guns were located on the floorboard with baggies containing drugs, and in the glove compartment with baggies containing drugs—they were proximate and D had ready access to them.

***United States v. Urbano***, \_\_\_ F.3d \_\_\_, 2009 WL 1143605 (10<sup>th</sup> Cir. 2009)

In a felon-in-possession case, evidence that the gun traveled in interstate commerce at some unspecified earlier time is enough to satisfy the Commerce Clause. No other proof of nexus or effect on interstate commerce is necessary. Therefore, the d. ct. correctly refused to instruct the jury that the government had to prove the natural and probable consequences of the defendant's acts were to affect interstate commerce. Finding crack in the defendant's pocket and seeing the defendant throw something over a fence and finding a gun in a pond on the other side of the fence provided sufficient evidence of possession of crack and a firearm respectively.

## **FRAUD**

***United States v. Redcorn***, 528 F.3d 727 (10<sup>th</sup> Cir. 2008) Reversal of wire fraud convictions of defendants who were also found guilty of embezzlement from a health care benefit program and money laundering. There was insufficient evidence to show that the defendants' transfers of funds to out-of-state investments accounts were part of the plot to defraud. The indictment was sufficient because it gave adequate notice to defendants that they needed to defend against embezzling from a health care benefit program. The court rejects the appellants' argument that the McCarran-Ferguson Act, which provides that state law generally governs insurance matters, preempts the applicable federal criminal statute.

***United States v. Baum***, \_\_\_ F.3d \_\_\_, 2008 WL 5274316 (10<sup>th</sup> Cir. 2008)

D, a real estate agent, was found guilty of wire fraud and money laundering for his scheme: he was REA for buyers who did not qualify for home loans because of poor credit; D lent money to buyers for down payment; home prices were inflated on the K; buyers agreed to pay an additional amount for remodels per a K addendum (not disclosed to mortgage lender) that were never meant to happen and that money went into a fund to pay back D, plus. The mortgage lender never knew the truth.

Sufficiency of evidence: phony sales prices, undisclosed addenda, false appraisals, false info regarding borrowers supported fraud verdicts; the unperformed remodeling work was not a matter of breach of K. (Hartz criticizes the brevity of the statement of facts in D's brief—5 pages—and hints that the COA might not even have reached the merits given how poorly D developed the facts).

***United States v. Franklin-El***, \_\_\_ F.3d \_\_\_, 2009 WL 237780 (10<sup>th</sup> Cir. 2009)

Sufficient evidence of intent to defraud (knowing and wilfully, with knowledge that her conduct was unlawful) to support D's conviction on 52 counts of health care fraud--Medicaid billing fraud related to D's non-profit addiction treatment program. She admitted she knew the business could not bill for anything but addiction services and knew that the business did bill for non-addiction services. No one was required to alert her to problems in her billing in order for the government to establish intent. (D generalized her claims to all counts, as did the court in its analysis). Sufficient evidence of willful obstruction in the timing of her asking for preauthorizations for Medicaid requests just after getting subpoenaed for records where she had not made the required preauthorization request ( I find this odd and certainly do not know enough, but sounds like obeying the law when you know the gig is up can be evidence of obstruction?). Also, a transfer of money to make income look legit.

18 USC § 1347, health care fraud statute, not vague as applied to D. Failure of statute to enumerate all possible types of schemes does not make it vague. The statute is not particularly complex, and is not defined through other regs. Finally, the specific intent mens rea required saves the statute from vagueness.

***United States v. Franklin-El***, \_\_\_ F.3d \_\_\_, 2009 WL 242911 (10<sup>th</sup> Cir. 2009)

Husband's case. 1. D challenged sufficiency of the evidence, and evidence is much the same as in wife's case on intent to defraud—admissions that some clients were not receiving addiction services as charged to Medicaid, knowledge of the billing process, colluding to get a relative to hand over her Medicaid card in exchange for free rent. Insufficient evidence on obstruction count on the willful element. The account testified that D asked him to look over the books and receipts and get things in order after receiving a government subpoena—this was insufficient.

### **GRAND JURY**

***United States v. Farr***, 536 F.3d 1174 (10<sup>th</sup> Cir. 2008)

The COA finds that during trial the government constructively amended the indictment against D in a employment tax fraud case, charging her in the indictment as an employer/individual, but having the charge amended to a charge against her as an employer/business, when D defended in closing that the case had not been proved against her as an individual. The COA said the amendment resulted in D being tried not just for the crime described in the indictment but also for a separate and additional offense. Under the Fifth Amendment, the government may only proceed on a crime found by a grand jury. In reversing and remanding the case, the COA finds that nevertheless there was sufficient evidence to convict her “and thus no double jeopardy impediment exists to her retrial under a properly framed indictment.”

***United States v. Erickson***, \_\_\_ F.3d \_\_\_, 2009 WL 903387 (10<sup>th</sup> Cir. 2009)

There was sufficient evidence to convict 2 co-Ds of obstructing and impeding a federal grand jury under 18 USC § 1503. The requirement of proof of acting corruptly with the specific intent to obstruct or impede the proceeding in its due administration of justice was met by evidence that the defendants created false docs to deliver to the grand jury in response to its subpoena. A grand jury is obstructed whenever it is presented with manufactured evidence. There is no need for proof that the altered docs defendants created were relevant to the grand jury's investigation.

### **HABEAS CORPUS**

***Wilson v. Sirmons***, 536 F.3d 1064 (10<sup>th</sup> Cir. 2008)

Review was *de novo* because the state appellate court denied the claim without considering the post-trial affidavits the petitioner submitted. Oklahoma law precludes an appellate court from considering evidence not presented at trial unless an evidentiary hearing is held in district court and no such hearing was held. Since the state court did not address the merits of the claim the petitioner raised in federal court, which included the affidavits, no deference was owed the state court's decision.

***Boyle v. McKune***, 544 F.3d 1132 (10<sup>th</sup> Cir. 2008)

Petitioner was not entitled to an evidentiary hearing on his claims of ineffective assistance by both trial and appellate counsel because his claims of deficient performance, even if true, did not establish a reasonable probability that, but for the alleged deficiencies, he would have prevailed at trial.

***United States v. Harper***, \_\_\_ F.3d \_\_\_, 2008 WL 4756393 (10<sup>th</sup> Cir. 2008)

For habeasphiles and appeal-o-philes only. The district court's denial of a § 2255 motion on the grounds that it was successive and had not been previously authorized by the 10th is a final order appealable to the 10th. It is also subject to the § 2253 certificate of appealability requirement. The district court had obviously made the correct decision in this case, the 10th says.

***Hicks v. Franklin***, \_\_\_ F.3d \_\_\_, 2008 WL 4900135 (10<sup>th</sup> Cir. 2008)

Reversal of denial of habeas relief!!! State court's holding that Mr. Hicks voluntarily pled to second degree murder

was an unreasonable application of clearly established law. Mr. Hicks was charged with first degree murder stemming from the death of his wife from a fire that took place after someone other than Mr. Hicks placed on a hot plate a jar of flammable liquid left from a methamphetamine cook Hicks conducted a couple hours earlier. Just before trial, the charge was amended to second degree murder, which under Oklahoma law includes an element of conduct evincing a depraved mind in extreme disregard of human life. The plea colloquy made clear that Hicks did not understand that element and the court's explanation suggested the charge lacked a mens rea requirement. Because Hicks did not receive true notice of the depraved mind element, which is a critical element of the offense to which he pled, his plea was involuntary.

**Sandoval v. Ulibarri**, \_\_\_ F.3d \_\_\_, 2008 WL 4966218 (10th Cir. 2008)

P did not establish that he was prejudiced by counsel's failure to follow rules re: pretrial disclosure of expert's PTSD testimony, which resulted in state court's limitation of that testimony to PTSD generally and exclusion of testimony about how PTSD contributed to P's offense behavior. P's trial testimony was not entirely consistent with the PTSD theory. Confrontation claim re: admission of victim's preliminary hearing testimony was waived in state court by defense admission that state made reasonable effort to locate witness it said was unavailable at trial. Even if P's counsel performed unreasonably at the preliminary hearing by failing to thoroughly cross-examine victim, it did not prejudice P at trial. It was not IAC to stipulate to state's reasonable attempt to subpoena victim to testify at trial because state's efforts met reasonableness standard. No Brady violation shown because P failed to establish that evidence contained in victim's undisclosed medical report would have been material or exculpatory. No evidentiary hearing warranted as proffered evidence would not have established entitlement to habeas relief.

**Smith v. Workman**, \_\_\_ F.3d \_\_\_, No. 05-6206 (10<sup>th</sup> Cir. 2008)

Death affirmed in habeas case. The offense was the killing of a confederate who refused to give P drugs and money. The aggravating circumstances supporting death, after a mitigation trial that took up only 6 pages of transcript, was P's two previous violent felony convictions and the probability of his continuing threat to society. The federal district court held an evidentiary hearing on P's claim of IAC at mitigation.

Issues on appeal and resolution by COA: (1) no IAC for failure to raise *Ake* claim during mitigation because at time of P's trial, *Ake* (entitling a D to psychiatric expert) only applied when the state presented psychiatric evidence of future dangerousness, and had not been extended to require an expert when state put on non-psychiatric evidence of future dangerousness, as was done in P's trial. (2) no IAC of appellate counsel for failing to raise *Ake* claim for trial court's failure to provide psychiatrist at guilt phase when requested by trial counsel, because record supported habeas court determination that request was for competency issues only, not for trial (sanity) purposes; cannot therefore show appellate atty would have prevailed on this issue; (3) no mitigation phase IAC. Though a wealth of information was never uncovered by counsel about P's rotten childhood and poor mental functioning, it was not an objectively unreasonable defense decision not to pursue this because it could have supported state's case that P was dangerous, and because the mentally deficient P did not point counsel in the direction of mitigating evidence; (4) guilt phase *Brady* violation is procedurally barred.

**United States v. Hollis**, \_\_\_ F.3d \_\_\_, 2009 WL 26707 (10<sup>th</sup> Cir. 2009)

In § 2255 petition, P's claim that the federal district court (pre-*Apprendi*) erred in determining his sentence based on judge-found fact of drug quantity, was defaulted because he did not raise it on direct appeal. Good cause can forgive the default. The alleged cause for this default—failure of appellate counsel to raise the issue on appeal (failure to supplement the cert petition with *Apprendi*, which was decided when P's cert petition was pending)—does not cut it according to the COA. Applying a kind of plain error analysis (because the *Apprendi* claim was not brought to the district court at sentencing), although *Apprendi* violations are always error, P's substantial rights were not affected. The drugs amounts would have been calculated mandatorily pre-*Booker*, and *Booker* is not applied retroactively. Moreover, there was no doubt as to the amount of drugs involved and P never objected to the amounts below. P could not demonstrate prejudice from the appellate attorney's error.

**Taylor v. Workman**, \_\_\_ F.3d \_\_\_, 2009 WL 213112 (10<sup>th</sup> Cir. 2009)

A habeas reversal of an Oklahoma death penalty conviction (!!!!) due to a failure to give a correct lesser-included offense instruction for second degree murder. First, the state court applied law that was contrary to S. Ct. case law when it upheld the conviction because evidence supported the first degree murder conviction. The lesser-included-

offense instruction ("LIOI") must be given if there is sufficient evidence to support it, even if there is sufficient evidence to support the greater charge. Second, there was sufficient evidence to support the LIOI where the defendant did not know the victim and testified he got scared by an encounter with someone else and, as he was leaving, saw the deceased out of the corner of his eye and fired shots in his direction, hitting the deceased in the back, without thinking. From that testimony the jury could reasonably find the defendant did not have a premeditated design to kill the deceased, even though he may have intended to harm him. The COA relied on the fact that the trial court did give an LIOI [it just wasn't the correct one] and the prosecution did not object. Third, the instructional error was not harmless. The instruction told the jury it could not find the defendant guilty of second degree murder unless it found the defendant did not intend to kill *or harm* the deceased. The law actually only required a lack of intent to kill. This went to the heart of the defense.

***Douglas and Powell v. Workman***, \_\_\_F.3d \_\_\_, (10<sup>th</sup> Cir. 2009)

Habeas win in these companion Oklahoma death penalty cases. Smith, the only "witness" to a murder, was the "linchpin" of the state's case in separate trials. In both trials, Miller, the prosecutor, extensively vouched for Smith's credibility and emphasized that Smith was getting nothing in exchange for his truthful testimony. It eventually came out post-conviction that Smith had told Miller early on that he could not identify the occupants of the car, but would identify petitioners in exchange for help in a pending drug case. Smith later leveraged the fact that Miller knew his testimony was false but presented it anyway to get Miller to intervene every time he got in trouble with the law again, which happened numerous times before Powell's trial. Miller disclosed none of this and did everything he could to prevent its disclosure. The blatant and intentional *Napue/Brady/Giglio* violations warranted habeas relief. The relief was conditional, however, because new trials could be had, free of those violations. There is an extensive discussion of the standards of review in § 2254 cases, and a very interesting one about second or successive petitions where, as in Douglas's case, the newly-discovered evidence comes to light while the original habeas petition is pending, and petitioner wants to raise that in connection with the original petition.

## **IMMIGRATION**

***Lee v. Mukasey***, 527 F.3d 1103 (10<sup>th</sup> Cir. 2008)

An immigrant wins. P's school closed through no fault of her own, she then got herself into a public school, and she tried for but was refused a status adjustment. The COA agrees that the immigration judge's interpretation of 8 USC Sec. 1184(m)(2) that P terminated her course of education was wrong. Read the opinion. Hartzless dissented.

***Kabba v. Mukasey***, 530 F.3d 1239 (10<sup>th</sup> Cir. 2008)

The Board of Immigration Appeals must review an immigration judge's credibility determination under the clearly erroneous standard, but in this case wrongly engaged in an analysis that was actually a de novo determination on credibility (though it stated it was using the clearly erroneous standard). In turn, the COA reviews the BIA determination de novo, and scrutinizes its statement that it in fact applied a de novo review. Here there were 2 permissible views of the evidence, and the IJ determination that the petitioner was credible regarding his account of persecution, was entitled to deference.

***Vicente-Elias v. Mukasey***, 532 F.3d 1086 (10<sup>th</sup> Cir. 2008)

COA defers to the immigration judge's determination that the economic hardships suffered by the indigenous people of Guatemala due to the refusal of Spanish-speaking Guatemalans to hire people who speak only indigenous languages did not amount to a threat to the alien's life or freedom. Employment discrimination, even when it results in the inability to afford education, food, etc., is not enough. The 10th also rejected the substantive due process argument that "the massacres of the Mayans in Guatemala in the 1980's sponsored by the United States shocks the conscience and therefore warrants equitable relief."

***Ribas v. Mukasey***, \_\_\_ F.3d \_\_\_, 2008 WL 4781711 (10<sup>th</sup> Cir. 2008)

Immigration judge determination that first asylum petition was frivolous, which was upheld by the board of immigration appeals and not appealed, was a final judgment which barred P from adjustment of status when he married a US citizen. COA determines that P received adequate notice about the consequences of filing a frivolous

petition and that the frivolousness determination was final before P applied for adjustment of status.

***Hernandez-Carrera v. Carlson***, \_\_\_ F.3d \_\_\_, 2008 WL 4868479 (10<sup>th</sup> Cir. 2008) ICE's regulation authorizing indefinite detention of Cubans who posed a special danger to the public due to a mental condition or personality disorder coupled with the prior commission of one or more crimes of violence was okay, even though the Supreme Court had ruled in *Zadvydas v. Davis*, 533 U.S. 678 (2001), and *Clark v. Martinez*, 543 U.S. 371 (2005), that aliens who could not be returned to their home country could not be held indefinitely but only for a period reasonably necessary to remove the aliens from the U.S. Those rulings were based on the constitutional avoidance canon applied to an ambiguous statute. But the appropriate agency may interpret such a statute differently than the Court and its interpretation is entitled to *Chevron* deference as long as its statutory interpretation avoids the Court's constitutional concerns. ICE's regulation does because it is like commitment statutes that the Court has found consistent with due process, since hearings are held, the burden is on the government and counsel is available, although not appointed. The aliens failed to show ICE did not provide mental health treatment that due process might require. Some conditions, e.g. pedophilia, (as a government expert testified), are untreatable.

***Razkane v. Holder***, \_\_\_ F.3d \_\_\_, 2009 WL 1058053 (10<sup>th</sup> Cir. 2009)

In denying P's request for restriction on removal because of the threat of persecution in Morocco due to P's homosexuality, immigration judge erred in substituting his stereotyped beliefs about homosexuality (he determined that P did not appear to be effeminate and did not have any outward appearance of being gay and for that reason would not be a target of persecution) for the evidence. Reversed and remanded.

#### **INEFFECTIVE ASSISTANCE OF COUNSEL**

***DeLozier v. Sirmons***, 531 F.3d 1306 (10<sup>th</sup> Cir. 2009)

COA affirms death penalty for a conviction out of Oklahoma. The COA reviewed, under the stringent AEDPA standard seven claims of ineffective assistance of counsel, holding in each instance that counsel was not deficient.

***Crawley v. Dinwiddie***, 533 F.3d 1226 (10<sup>th</sup> Cir. 2008)

Because there is no clearly established federal law regarding a counsel's duty to refrain from pressing his client's claim of competency in the face of evidence of incompetency, P could not meet the AEDPA standard in his challenge to his attorney's effective assistance in arguing for his competency at a state competency hearing.

***United States v. Meacham***, \_\_\_ F.3d \_\_\_, 2009 WL 1492548 (10<sup>th</sup> Cir. 2009)

The COA could decide whether the d. ct. abused its discretion in refusing to hold an evidentiary hearing regarding a motion for new trial based on a claim of ineffective assistance of counsel, even though ordinarily the COA prefers to leave ineffective assistance claims to collateral proceedings. The d. ct. did not abuse its discretion because the D's assertion that trial counsel had refused to allow him to testify was not supported by an affidavit and was not sufficiently detailed. It was not clear how counsel prevented the D from testifying. An evidentiary hearing might show what happened, but making the bare conclusory allegation that counsel "refused to let" the D testify was insufficient to entitle the defendant to a hearing.

#### **JURISDICTION**

***Hydro Resources, Inc. v. U.S. EPA***, \_\_\_ F.3d \_\_\_, 2009 WL 1027184 (10<sup>th</sup> Cir. 2009)

The COA holds the EPA did not err in finding a checkerboard area in N.W. New Mexico is "Indian country." As a result, the uranium mining company has to deal with the EPA, not state authorities. The COA held its "community of reference" test survived the S. Ct.'s decision in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998).

#### **JURY INSTRUCTIONS**

***United States v. Smith***, 531 F.3d 1261 (10<sup>th</sup> Cir. 2008)

The reasonable doubt instruction that said the defendant started off with a "clean slate" [which the defendant said

implied he was on equal footing with the government] and that used the "hesitate to act" language [ unlike the criticized "willing to act" language] was okay. The d.ct. did not have to give the requested theory of defense instruction [that someone else had filed the document unbeknownst to him] because other instructions required a jury finding of knowledge of the falsity of the document.

***United States v. Bedford***, 536 F.3d 1148 (10<sup>th</sup> Cir. 2008)

Jury instructions: (practice tip: general objection to an instruction will not preserve specific objections for appeal). Not plain error in conspiracy instruction to use "deliberately" instead of "willfully" for the MR element. There was evidence to support the giving of the instruction covering a conspiracy to defraud the US and to file fraudulent tax returns. Not plain error in omitting state of mind elements from D's theory of defense instruction because he was not entitled to "a recounting of the facts as seen through the rose-colored glasses of the defense ." No error, plain or otherwise, instructions on the elements of the underlying substantive crimes in conspiracy prosecution. The instructions did not omit the MR elements for the offenses of defrauding the US or filing a false tax return.

***United States v. Kaufman***, \_\_\_ F.3d \_\_\_, 2008 WL 4868480 (10<sup>th</sup> Cir. 2008)

The involuntary-servitude jury instructions properly defined "labor" as an expenditure of physical or mental effort and "services" as conduct or performance that assists or benefits someone. Those terms did not just mean work in an economic sense. The defendants' ordering the victims to take off their clothes and perform sexual acts was covered by the involuntary servitude statute.

## **JURY ISSUES**

***United States v. Poole***, \_\_\_ F.3d \_\_\_, 2008 WL 4756164 (10<sup>th</sup> Cir. 2008)

The jury found the defendant guilty of both the charged offense of assault resulting in serious bodily injury and the lesser-included offense of simple assault, even though the jury was instructed not to consider the defendant's guilt of the lesser offense if it could unanimously find the defendant guilty of the greater offense. When the court received the verdict, it declared in front of the jury that the simple assault conviction was a "nullity." The court then polled each juror asking "Is *this* your verdict?" All the jurors answered yes to that question. When asked if the defendant wanted to argue anything before the jury was discharged, defense counsel said "no." After the jury was discharged, the defense moved for a mistrial on the grounds that the verdict was ambiguous. The district court denied the motion. The COA reviewed for plain error because counsel had not objected before the jury's discharge, when any ambiguity could have been resolved.

The COA found no error. First, there was no ambiguity so obvious as to trigger the court's duty to resolve it. The possibility that the two verdicts were the result of an improper compromise was at best latent and so did not require district court action. Second, the district court did clear up any confusion by polling the jury about the greater charge after declaring the simple assault count a nullity. The COA dismissed D's claim the jurors might not have understood what the court meant by "nullity." The COA also rejected D's claim that when the court asked the jury "is this your verdict" the jury might have thought the court was referring to both verdicts rather than just the greater offense one. The COA believed, given the jurors' make-believe understanding of "nullity," they must have known the judge was referring only to the greater offense verdict. Furthermore, the judge was not obligated to sua sponte require the jurors to deliberate further because it was clear the jury unanimously found the defendant guilty of the greater offense.

***United States v. Benally***, \_\_\_ F.3d \_\_\_, 2008 WL 4866618 (10<sup>th</sup> Cir. 2008)

In an assault on a BIA officer case, the jury foreman during deliberations opined that "when Indians get alcohol they all get drunk and then get violent" and some jurors also discussed the need to send a message back to the reservation. One juror who argued with the foreman regarding the foreman's racist comments told defense counsel about the racism post-trial. The d.ct. granted a new trial on the ground that the jurors had lied about their racial bias on voir dire. The 10th reversed because Fed. R. Evid. 606(b) precludes considering such evidence of jury deliberations. The COA (Judge McConnell) held the Rule was the result of a conclusion that justice is more likely served by closing off deliberations from public view than by courts making sure jury verdicts are arrived at rationally. "Indeed, it might even be the jury's ability to be irrational, (e.g. *nullification*) is one of its strengths." Jury

deliberation evidence is not admissible to show voir dire deception except in a contempt proceeding against the juror. The evidence was introduced in this case to attack the verdict's validity, which the Rule prohibits. It was not extrinsic or outside-influence evidence, which is an exception to the Rule. The jurors merely made generalized statements relying on their own personal experiences. Impropriety alone does not make a statement extraneous. There is no racial bias exception to the Rule.

*United States v. Benally*, \_\_\_ F.3d \_\_\_, 2009 WL 73893 (10th Cir. 2009)

Rehearing en banc denied of panel decision reversing Utah district court grant of D's new trial motion. There were 4 votes for rehearing - Briscoe, Lucero, Henry, and Murphy. Briscoe writes a dissent joined by Lucero and there is a separate dissent by Murphy and Lucero. (See facts above). Briscoe views D's claim as inquiring into the legitimacy of pre-trial procedures and the constitutionality of the overall proceedings. She writes, and Murphy and Lucero agree, that a juror's statement that denigrates the defendant's race should fall within the "extraneous prejudicial information" exception of Rule 606(b). The panel decision conflicts with the 9th and DC Circuits' interpretation of Rule 606(b).

### MENTAL ILLNESS

*United States v. DeShazer*, \_\_\_ F.3d \_\_\_, 2009 WL 279515 (10<sup>th</sup> Cir. 2009)

The d. ct. was not clearly erroneous when it held the defendant was competent to stand trial. The defense expert opined that the defendant's mental illness interfered with his ability to assist counsel. The defendant was delusionally obsessed with the victim and believed she deliberately used him to ruin his life. His sole intent in going to trial was to avenge himself on her by making the victim testify that he is a nice person and she intentionally hurt him. The d. ct. was entitled to accept the government's expert opinion that the defendant was just obsessive compulsive and not delusional. While the d. ct. indicated it thought the defendant was purposefully manipulating the court system, that was not the basis for the d. ct.'s competency determination. The d. ct.'s conclusion was not based on the government expert's misconception that the defendant's obsessive-compulsive disorder is not a mental illness under 18 U.S.C. § 4241. And the d. ct. did recognize the requirement that the accused be rationally able to assist counsel.

Despite the defendant's mental health issues and sole viable defense of insanity, it was not error to find the defendant competent to waive counsel. The applicability of a particular defense is not relevant to the self-representation competence question. While in *Edwards* the S. Ct. held it was okay to refuse to allow a defendant to represent himself because the defendant was not competent to conduct trial proceedings on his own, a trial court is not prohibited from allowing self-representation by someone who is competent to stand trial [when represented by an attorney]. And it was not error to fail to sua sponte order mental health treatment for the defendant, since he was competent.

### PLEAS

*United States v. Martin*, 528 F.3d 746 (10th Cir. 2008)

D was convicted of two assault counts and two rape counts. The district court's disallowance of D's plea to the two counts of assault is upheld. While the COA expresses doubt that the district court properly relied on the need to avoid confusing the jury and complicating the evidentiary issues, it affirms based on failure to establish a factual basis for the plea.

*United States v. Duran-Nevarez*, 287 Fed.Appx. 688 (10th Cir.2008) (unpub)

Guilty plea is vacated because it may have been coerced by the district judge's improper numerical comparison--before the plea agreement had been hammered out--of the time the defendant would do under the proposed plea agreement vs. after a jury conviction.

*United States v. Cudjoe*, 534 F.3d 1349 (10<sup>th</sup> Cir. 2008)

Government breached "the spirit and the letter" of the plea agreement in which it promised that it would stand mute, though would not support, any request by D for a 30 year sentence.

The agreement was relatively complicated in its dos and don'ts: the government retained the right to argue for a higher GL range, for application of specific GL enhancers, and retained the right to argue for and present evidence in support of additional GL adjustments and sentencing factors. It further reserved the right to change its position if new information came to light. Finally, the deal was off if D said anything or took a position that was not factually accurate. At sentencing, D prevailed on a GL challenge which brought his GL range down to 30 years to life. The government argued sort of obliquely for the life sentence, D reminded it of its promise to stand mute when he asked for 30 years, the government said something weird indicating that D took a factually inaccurate position, and D got 420 months.

(1) D did not breach the plea by objecting to one of the GL enhancers—the plea allowed him to make objections to the PSR. PLUS, the government is not entitled to breach its agreement if it thinks the D has breached his, without bringing it to the attention to the court for its ruling on the matter—the government is bound by its promise until the court rules otherwise.

(2) By advocating a life sentence, the government breached its promise. D's remedy is re-sentencing, and not "specific performance" of a sentence of 30 years, but specific performance of the government remaining silent.

*United States v. Villa-Vasquez*, 536 F.3d 1189 (10<sup>th</sup> Cir. 2008)

Government breached agreement to a reduction for acceptance of responsibility and a sentence at the low end of the guideline range by arguing against acceptance and for an upward variance in its reply to defendant's objections to the PSR. While awaiting sentencing, D got into a fight at the jail and was administratively disciplined for battery. The government claimed that this freed it from the plea agreement, and heartily endorsed an upward variance. The district court wound up rejecting the sentence recommended in plea agreement and instead sentenced defendant to 120 months (the guideline range was 37 to 46 months). The 10th held that, even though the district court had not approved the plea agreement, the government was still bound by it, and called its actions here "reprehensible."

*United States v. Trujillo*, 537 F.3d 1195 (10<sup>th</sup> Cir. 2008)

D entered into a plea agreement in which the government agreed to drop on gun charge and D pleaded guilty to the other, and waived his right to appeal his sentence. The guns found in the dismissed count were considered relevant conduct in the PSR, which increased his guideline sentencing range. D disputed this and also claimed that the government had breached its agreement by arguing and agreeing with the PSR that the conduct in the dismissed count be used to sentence him on the first count. COA held that USSG 6B1.2(a) expressly states that an agreement to dismiss a charge shall not preclude the conduct underlying the dismissed charge from being considered relevant conduct, so defendant could not reasonably have believed otherwise. The COA enforced the appellate waiver and dismissed the appeal.

*United States v. Vidal*, \_\_\_ F.3d \_\_\_, 2009 WL 350653 (10<sup>th</sup> Cir. 2009)

The COA holds the D's plea was knowing and voluntary. Even though no one thought it was an *Alford* plea at the time, the COA characterizes the plea as such because a number of times the D insisted she didn't know the drugs were in the car but on occasion expressed a willingness to plead guilty to possessing the drugs with the intent to distribute them. The COA found there was enough evidence to support the D's actual guilt to support an *Alford* plea, [nervousness, air fresheners, inconsistent stories, the co-defendant's self-serving accusations], and it seemed as though the D understood one of the elements was an intent to distribute, suggesting a "knowing and strategic" plea. While, in hindsight, the plea may not have been wise, because the D got the mandatory minimum ten years after failing to debrief to qualify for safety valve, at the time of the plea she intended to enter the plea agreement. The d. ct. also did not err when it failed to hold a competency hearing after counsel expressed doubts about the defendant's competence, given her decision to plead guilty but not debrief. As grounds for this conclusion, the COA relies on the D's assurances at the plea hearing that she reviewed the charges and penalties, discussed her rights with counsel and signed a plea agreement saying she understood everything. In other words, she must be competent because she says she is.

## **PROSECUTORIAL MISCONDUCT**

*United States v. Franklin-El*, \_\_\_ F.3d \_\_\_, 2009 WL 242911 (10<sup>th</sup> Cir. 2009)

Prosecutor's comments were not misconduct rising to the level of plain error. Arguing witness had no motive to lie was not vouching; conversely, prosecutors' "indelicate" comments calling various witnesses liars was just placing their testimony in context. The COA has never held that calling witnesses liars is per se prosecutorial misconduct. Negative evidence about co-D's wife's associations with others with criminal backgrounds was not propensity evidence against D. Calling the defense expert a "blow-hard" OK.

*United States v. Rogers*, \_\_\_ F.3d \_\_\_, 2009 WL 514085 (10<sup>th</sup> Cir. 2009)

Not plain error for govt to say cop came into the hotel room with a cross on his belt ready to go into the belly of the beast—it was a singular isolated remark and general cautionary instructions were given—D cannot show substantial rights affected. Prosecutor's closing that there was no defense under the law for what D did was not plain error—though D argued it shifted the BOP, it was just argument that D's defense did not hold up. Prosecutor's closing remarks appealing to community conscience to convict were harmless—case against D was strong.

*Whittenburg v. Werner Enterprises*, \_\_\_ F.3d \_\_\_, 2009 WL 884616 (10<sup>th</sup> Cir. 2009)

A civil case useful in prosecutorial misconduct arguments on appeal. Once again a big company facing money damages seemingly gets more protection than a defendant facing the loss of liberty. Counsel's closing argument that included reading from an imaginary letter from the company to the traffic victim's daughters placing the jurors in the victim's family's shoes, introducing evidence not in the trial record and excoriating the defendant for defending itself, [over defense objections] was so prejudicial as to warrant reversal of a multi-million dollar damage award. Helpfully, the 10th says: "the d. ct.'s discretion regarding granting a new trial is not boundless. We have the advantage of considering how individual cases fit in a wider context and pass judgment after more deliberation ... **we may not merely rubber stamp the district court's judgment.**" "There must be limits to pleas of pure passion and there must be restraints against blatant appeals to bias and prejudice." The 10th emphasized its reliance on the combination of factors.

## SEARCH & SEIZURE

*United States v. Pikyavit*, 527 F.3d 1126 (10<sup>th</sup> Cir. 2008)

D was arrested and jailed after a fight outside his home. D asked police to go to his unlocked house to view exculpatory evidence. The house was locked and police had to slip the lock using a plastic card. While inside they saw ammunition in plain view, got a search warrant, and found a gun and more ammo. D was convicted of being a felon in possession. The COA rejected his argument that he didn't consent to entry if the door was locked, concluding that the officers could have reasonably concluded they could enter even if the doors were locked so long as entry could be done without damaging the property because D didn't expressly limit his consent, he initiated the encounter with the police, and he wanted the search to occur quickly because he hoped the officers would find evidence to exonerate him in connection with the fight. D additionally argued his consent did not include the rooms off the main hallway, but only the living room and kitchen. However, there was evidence that D asked the officers to search the entire house because exculpatory evidence could be anywhere.

*United States v. Forbes*, 528 F.3d 1273(10<sup>th</sup> Cir. 2008)

The COA holds that the independent source doctrine applies to a search of the tractor portion of a rig, when the trailer portion was unfruitfully searched first, presumably in violation of the Fourth Amendment. When BP agents found nothing in their un-consented-to search of the trailer, they took a dog around the outside of the cab section. The dog alerted, thus establishing probable cause, and the BP found marijuana in the cab after a search. The dog alert was a source independent of any preceding unconstitutionality. The COA rejects D's claim that there must be two discrete searches for the independent source doctrine to apply.

*United States v. Garcia-Zambrano*, 530 F.3d 1249 (10<sup>th</sup> Cir. 2008)

Suppression of evidence for *Delaware v. Franks* violations reversed. While district court did not clearly err in finding factual inaccuracies in search warrant affidavit and determining that they were recklessly made, the COA's de novo review of the legal sufficiency of what remained after the false statements were excised led it to conclude that the affidavit established probable cause.

***United States v. Smith***, 531 F.3d 1261 (10<sup>th</sup> Cir. 2008)

Warrant to search a home, which noted a detached garage apartment, was not overbroad, although it did not note the garage had a different address from the home address listed on the warrant. Officers reasonably failed to appreciate during their execution of the warrant that the warrant described the premises too broadly.

***United States v. Chavez***, 534 F.3d 1338 (10<sup>th</sup> Cir. 2008)

Based on collective knowledge doctrine, state policeman, who had no probable cause, could legitimately stop and search D's vehicle at the direction of DEA agents who did have probable cause to stop and arrest D. (The stop was what the COA calls a putative headlight infraction). The COA calls this "vertical" collective knowledge: one officer has PC info but does not communicate it all—just the conclusions justifying PC—to the second officer.

***United States v. Jarvi***, 537 F.3d 1256 (10<sup>th</sup> Cir. 2008)

Denial of motion to suppress affirmed. D stopped for a traffic violation. Meth was found in the truck, as well as some pills in D's friend's purse. Cops arrested friend for not having the prescription for the pills with her. The friend later told the cops that D had more meth at his residence and that she had used drugs there. Cops got a search warrant, leading to the seizure of meth, guns and a lot of cash. Meth was in the attic, and guns and cash were in the bedroom closet. D moved to suppress. For undisclosed reasons, the government conceded that the seizure from the truck was illegal, even though the D conceded that the initial stop was justified. Search of the residence was OK because, reviewing a very poorly-developed record, D did not show any factual nexus between any violation of his own 4th Amendment rights and the discovery of the challenged evidence.

***United States v. Gambino-Zavala***, 539 F.3d 1221 (10<sup>th</sup> Cir. 2008)

Police sweep of apartment where multiple gunshots were reported by multiple 911 calls early in the morning was justified by exigent circumstances and motion to suppress was rightfully denied. After police knocked on apartment door for several minutes, D opened it and said no one else was there. Officers reasonably concluded that an injured victim could be inside and that there was an immediate need to search to protect the safety of others. They went in and discovered a shotgun and ammunition.

***United States v. Thompson***, \_\_\_ F.3d \_\_\_, 2008 WL 4866612 (10<sup>th</sup> Cir. 2008)

The officer did not seize the defendant when he approached him in a parking lot, which was invaded by 4 squad cars, as the defendant walked towards his car that may have been blocked by another officer's car. The COA says the question whether a reasonable person would feel free to disregard the police must be assessed in light of case law, not in light of how a real person would feel. It suggested the test should be expressed in terms of whether the officer's behavior was coercive. Here the officer's behavior was not coercive enough because: it occurred in a public place; the officer didn't touch or threaten the defendant; while other officers were there, they were busy arresting someone else, but such an arrest does not result in the seizure of others and most importantly, the officer didn't use an antagonistic tone. That the defendant's car may have been blocked was not coercive enough because, the defendant could have left the scene on foot.

***United States v. Rodriguez-Rodriguez***, \_\_\_ F.3d \_\_\_, 2008 WL 5340311 (10<sup>th</sup> Cir. 2008)

Sufficient evidence of tandem driving to give probable cause to stop and detain tandem driver. By two car lengths, D was preceding the truck where drugs were discovered; both driving along a lightly traveled NM road at 4:30 in the morning; both had California plates; and, both were traveling 5 mph below the limit. The truck behind rode low. The cop followed, and at one point D pulled into another lane to take a look at the cop's vehicle. Because the load truck lacked a light over the license plate in violation of NM law, the cop stopped it. D sped up and away. Cop radioed for someone to stop D's vehicle. Cop smelled and saw pot in load vehicle, and radioed this information too. An intermediary cop radioed this to cop who stopped D, got D's permission to search his vehicle, and found evidence linking it to the load vehicle. D later admitted transporting pot with the load truck. The relaying of info through 2 cops was OK. The key fact in finding tandem driving was how close the two vehicles were traveling. The COA compared this case with *Zamudio-Carillo* and *Valenzuela*.

***United States v. Clarkson***, \_\_\_ F.3d \_\_\_, 2009 WL 27169 (10<sup>th</sup> Cir. 2009)

There was reasonable suspicion to detain D for further investigation and to subject his vehicle to a drug-sniffing dog.

However, probable cause to search based on the alert of a drug dog depends on whether the dog is qualified. No good faith exception in situation where cop relied on the dog sniff without knowledge of whether the dog was qualified. Remanded for court to determine if dog qualified.

***United States v. Dejean***, \_\_\_ F.3d \_\_\_, 2009 WL 50236 (10<sup>th</sup> Cir. 2009)

D's nervousness and stuffing both hands down into the car seat, as though concealing something, as an officer approached in an area known for criminal activity and for people wearing local gang colors, while a back-seat passenger held a baseball bat, established reasonable suspicion.

And a troubling *Quarles* decision. Assuming the defendant was in custody after the officer drew his gun and ordered the defendant to raise his hands, the COA held it was okay for the officer to ask what the defendant was hiding without giving *Miranda* warnings. The officer had reason to believe the defendant might have had a weapon and someone other than the police might gain access to it, even though everyone had their hands up, as ordered by the police. The defendant's stuffing something into the seat and his initial refusal to show his hands gave the officers a basis to ask a pre-*Miranda* safety question under *Quarles*.

The COA acknowledges the automobile exception to the warrant requirement may not apply to a car parked at the car-owner's residence. But the D did not claim his car was parked outside his residence. There was probable cause to arrest the D because he admitted stuffing "some weed" into the seat. So, the police could search the passenger compartment of the car incident to the arrest without a warrant under *Thornton*, 541 U.S. at 623.

***United States v. Villegas***, \_\_\_ F.3d \_\_\_, 2009 WL 225840 (10<sup>th</sup> Cir. 2009)

Affirmance of PWID convictions. Suppression motion was properly denied. D maintained that after traffic stop and return of his driver's license, he did not voluntarily consent to further questioning because a hand gesture made by the officer indicated he was not free to leave. COA defers to district court fact finding because its ruling was based on demonstration of the actual gesture.

***United States v. Turner***, \_\_\_ F.3d \_\_\_, 2008 WL 161737 (10<sup>th</sup> Cir. 2009)

Affirmance of conviction for possession of ammunition by a previously convicted felon. District court properly denied motion to suppress results of search that followed arrest of D for driving with a suspended license. D argued--the COA says without authority--that officers lacked pc to proceed after their search of a bag suspected to contain drugs was found to contain ammunition and they decided not to charge him on the suspended license after learning the feds wanted to charge on the ammunition. Officers merely needed reason to believe that any crime occurred. It did not matter that possession of ammunition is not a crime under state law. State law does not determine the reasonableness of a seizure under the 4th A.

***United States v. Sanchez***, \_\_\_ F.3d \_\_\_, 2009 WL 311267 (10<sup>th</sup> Cir. 2009)

(1) There was probable cause to search a home of a drug supplier, despite the absence of direct evidence of criminal conduct at the house. It is "merely common sense" that a drug supplier will keep evidence of his crimes at his home. (2) Officers executing a warrant to search a home could detain the defendant standing by a vehicle in the home's driveway talking to the home's owner, even if there was no evidence the defendant had been in the home. The COA saw no principled distinction between a person engaging with an owner in the home's curtilage and a visitor in a home whom the S. Ct. said was okay to detain in *Muehler v. Mena*, 544 U.S. 93 (2005). The need to maintain "unquestioned command" of the situation rules. The right to detain the D included the right to order D to "get down," a reasonable means to effect the aims of preventing flight and minimizing risk of harm to the officers. (3) The D's flight when ordered to get down created probable cause to arrest him for violating the Oklahoma statute that prohibits obstructing an officer performing her/his duties---in this case, executing a warrant. The officers didn't have to let the D go because of the considerations that justified the detention. (4) The search of the D's person upon his apprehension was justified as a search incident to an arrest, even though the arrest was not formally announced. The COA acknowledged a formal arrest must be made at some point to rely on the incident-to-arrest search, but the arrest announcement need not be contemporaneous. It was irrelevant that he was formally arrested for resisting arrest, not obstruction. There was an objective basis for an arrest on obstruction grounds. Before reaching these conclusions, the COA spent a number of pages implying that it might very well find the search "substantially contemporaneous"

with the hour-later formal arrest due to the officers' need to execute the warrant, although an hour"would seem to be the outer limit." (5) It was okay for the d. ct. to rely on a police report to deny the suppression motion. Hearsay is admissible at a suppression hearing. The report was not unreliable. The officer's hearing testimony did not conflict with the report.

***United States v. Vazquez***, \_\_\_ F.3d \_\_\_, 2009 WL 311268 (10<sup>th</sup> Cir. 2009)

(1) The officer had reasonable suspicion to stop the car for not staying within the lane "as nearly as practical" when, according to the officer, the car drifted one foot into the right-hand lane 3 times without signaling and without any apparent adverse conditions. The d. ct. could believe the officer's testimony even though the officer's video did not support the weaving allegation. The video was shot from a moving car at night, the COA offered as an explanation. (2) The officer had reasonable suspicion of car theft to justify extending the detention because: (a) instead of presenting a driver's license, the D presented a citation that had his license number on it; and (b) the car registration was not in the D's name and the D explained he picked up the car from his girlfriend in Tennessee, even though he lived in Illinois [the officers were still following up to try to call the girlfriend when the drug dog alerted]. (3) While the video indicated the two so-called dog alerts on the outside of the car were minimal at best, the d ct. found they were legitimate alerts, The dog jumping into the car through the open car window was a clear alert and not unconstitutionally intrusive because the dog's leap was instinctual and the officer didn't ask the driver to open the dog's entry point [the defendant had left the window open on his own]. (4) The expert officer's trial testimony that drug traffickers use the cover of darkness to travel when less patrol officers are out; lay people could tell story inconsistencies; and drug traffickers use props, e.g. the defendant's business suit, was not prejudicial enough to meet the plain error test.

***United States v. Poe***, \_\_\_ F.3d \_\_\_, 2009 WL 514069 (10<sup>th</sup> Cir. 2009)

Although D had standing and an expectation of privacy in the home where he was a social guest, even though he did not stay overnight, bounty hunters were not state actors for 4A purposes when they acted without assistance of law enforcement in conducting a search in pursuit of D, a bail jumper. The govt did not know of or acquiesce in the bounty hunters' entry and search of the home, and the fact that it regulates the bail industry does not establish knowledge. Also, bounty hunters were furthering their own commercial ends, not fulfilling a law enforcement purpose.

***United States v. Rogers***, \_\_\_ F.3d \_\_\_, 2009 WL 514085 (10<sup>th</sup> Cir. 2009)

D was convicted of possession of crack with intent and conspiracy, possession of firearm during the course of a drug offense, and F/P of F/A.

Encounter between D and cop outside hotel suite was consensual and not a seizure and therefore no 4A violation: it lasted only seconds, cop was alone, no threats by way of words, weapon use or behavior, cop and D had encounters before at same hotel without incident, cop asked only if he could talk to D.

***United States v. Orduna-Martinez***, \_\_\_F.3d \_\_\_, 2009 WL 884619 (10<sup>th</sup> Cir. 2009)

Kansas law requires all of the registration label on a license plate to be "clearly legible" and the defendant's Ohio State University plate frame was not cut out sufficiently enough to render the label "clearly legible," authorizing the officer's stop of the vehicle. In the course of the ruling, the 10th thoughtfully says: "the Supreme Court has made a lot reasonable." "Relatively slight obstructions of the registration decal can give rise to a proper traffic stop."

***United States v. Biglow***, \_\_\_ F.3d \_\_\_, 2009 WL 1039848 (10<sup>th</sup> Cir. 2009)

Baldock opinion, reversing order to suppress evidence obtained in search of defendant's home. Gov't affidavit provided a substantial basis for magistrate's pc determination. There was showing of defendant's purchase of significant quantities of cocaine that supported inference of intent to distribute. Affiant officer's observation that drug dealers often keep drug evidence at residence provided adequate nexus between suspected drug trafficking activities and defendant's home to permit issuance of warrant to search it. COA says marginal cases require deference to magistrate's pc determination because otherwise police would just skip getting warrants. Better a relatively meaningless step than no step at all.

***United States v. Fred***, 2009 WL 1040122 (10th Cir. 2009) (unpub)

Victory in aggravated sex abuse case with 292-month sentence. District court erred in denying motion to suppress because COA finds Fred underwent custodial interrogation without *Miranda* warnings. Record did not support district court's determination that Fred was informed he was free to leave at any time; rather he was told he could leave the FBI office "when he was done." A reasonable person in Fred's position would have understood that he was in custody during interview by two agents in enclosed room at FBI office. Officers' badges and guns were displayed; Fred was not permitted to have his wife with him; and Fred had been notified that his daughter had accused him of inappropriate touching. Conviction reversed; gov't did not argue harmless error.

***United States v. Otero***, \_\_\_ F.3d \_\_\_, 2009 WL 111965 (10th Cir. 2009)

D, a postal carrier, was charged with postal-theft-related charges. The warrant to search her home listed with some particularity items to be seized and then, under a separate heading, addressed a search of her computer. The COA ruled that there was nothing about the second set of "computer" paragraphs that satisfied the particularity requirement. The first group of paragraphs that related to search of the home did not serve to modify and provide particularity to the computer paragraphs.

However, the *Leon* good faith exception applied. The officers testified to a subjective belief that the warrant was good, reading the computer search paragraphs as being limited by the more particular home search paragraphs, and so lacked a subjective knowledge that the warrant was unconstitutional. Objectively, a reasonably well-trained officer might rely on the warrant under "all of the circumstances, not only the text of the warrant." These circumstances? The drafting officers reliance on the advice of the US atty; the magistrate's approval of the warrant; the main investigator's affidavit accompanying the warrant limiting the search to offenses relating to federal crimes for which there was PC and her listing of known victims; and the executing officers reading the computer search as limited by the house search paragraphs.

***Poolaw v. Mercantel***, \_\_\_ F.3d \_\_\_, 2009 WL 1176466 (10th Cir. 2009)

Fourth Amendment violated when police stopped the car of the sister-in-law and searched the home of the parents-in-law of the primary suspect in a police killing (Astorga case). Familial relationship is not particularized enough suspicion to overcome an individual's reasonable expectation of privacy. The family relationship, even when combined with "meager" additional facts, did not establish RS in the case of the sister-in-law, nor PC for a search warrant in the case of the parents-in-law. These principles are clearly established, and the cops do not have qualified immunity in Sec. 1983 action. O'Brien dissented.

***United States v. Warren***, \_\_\_ F.3d \_\_\_, 2009 WL 1492546 (10<sup>th</sup> Cir. 2009)

A police officer's search of a parolee's home without probable cause or a warrant was okay because the police officer acted under the direction of a parole officer [who coincidentally happened to be his wife]. The D was incorrect when he claimed Colorado law precluded police officers from assisting in parole searches. Troublingly, although the COA did not rely on the doctrine, it took some time to explain the "totality of circumstances" basis for a police search of parolees, even when parole officers are not involved, given parolees' lower expectations of privacy.

***Cassady v. Goering***, \_\_\_ F.3d \_\_\_, 2009 WL 1482169 (10<sup>th</sup> Cir. 2009)  
facially overbroad warrant.

## **SENTENCING**

***United States v. Bowen***, 527 F.3d 1065 (10<sup>th</sup> Cir. 2008)

The COA remanded for the correction of the written judgment, which reflected a 96-month sentence when the district court had orally announced an 84-month sentence. The oral pronouncement prevails over the written judgment.

***United States v. Wittig***, 528 F.3d 1280 (10<sup>th</sup> Cir. 2008)

Third time is a minuscule charm. D's third sentencing appeal (won the previous 2, and sentence went from 51 to 60 to the current 24 months imprisonment). The 24 month sentence was a variance from 0 to 6 months in a fraud case, but COA says procedurally and substantively reasonable under 3553. Previous *Wittig* decisions held certain GL enhancements inapplicable, but that does not mean they could not be considered under 3553—perhaps “a fine point,” said the court, but the GL can act as guideposts. What D wins this time is a remand to remove an occupational restriction as a supervised release condition—that he not take any executive or professional position that involves engaging in financial negotiations without court approval. D's criminal conduct in this case did not involve an abuse of his management position. Moreover, the court did not find that there was a danger of D engaging in similar criminal behavior in the future. It was not imposed for the minimum amount of time necessary. In short, the condition did not comply with Sec. 3583(d) and 3563(b).

***United States v. Brown*, 529 F.3d 1260 (10th Cir. 2008)**

Sentence for possession of child porn was erroneously enhanced under 18 U.S.C. § 2252A(b)(2) based on D's previous conviction under Article 134 of the Uniform Code of Military Justice. The statute provides that prior convictions "under this chapter" count as sentence-enhancers and D's prior conviction was for a violation of the catchall provision of Article 134, not § 2522, even though the military court assimilated the elements of the prior crime from § 2252 and the elements of D's prior crime were identical to the elements of the enumerated sentence-enhancer. Plain language rules and does not produce an absurd result.

***United States v. A.B.*, 529 F.3d 1275 (10<sup>th</sup> Cir. 2008)**

Government moved for a sentence below the mandatory minimums for drugs and a gun in light of D's cooperation. COA ruled that, in keeping with its precedent in *Campbell*, which remains unaffected by *Booker*, a sentencing court can sentence below the mandatory minimum only for cooperation, and cannot consider other mitigating facts that might support either a downward departure or presumably a variance, to further decrease a sentence below MM. The COA left open D's alternative argument—can the sentencing court “time” its consideration of mitigating facts to, for example, first vary the sentence downward to the mandatory minimum threshold, and then use the cooperation facts to move the sentence further down below the MM? The COA found that the district court did consider D's mitigating facts before it engaged in the cooperation departure.

***United States v. Huckins*, 529 F.3d 1312(10<sup>th</sup> Cir. 2008)**

COA affirms a downward variance in possession of child pornography case, in which the district court would not impose a lengthy sentence on a young man who was going through some problems, did not possess the images for long, immediately sought help and got his life on a good track, and who the government did not prosecute for a year and a half after seizing his computer. However, the crime was serious enough to require some time, so the court gave him 18 months.

***United States v. Scott*, 529 F.3d 1290 (10<sup>th</sup> Cir. 2008)**

The district court's calling and examining a witness in support of the higher sentence did not violate Due Process and show judicial partiality, and did not entail the judge acting as an advocate. The court has the power to call witnesses at sentencing and did not abuse its discretion in so doing in this case.

Procedural reasonableness: No error in applying vulnerable victim GL enhancement in Mann Act conviction. D did not contest the girl's characteristics of fragility, use of meth, immaturity, runaway status, and was aware of at least some, though not all, of them after first encountering her and during the commission of the offense. No error in applying GL organizer enhancement—one of D's prostitutes assisted him in the business and was a participant in the offense, and not merely just another of his prostitutes. Substantive reasonableness: The 120 month sentence—greater than the 87 month GL sentence—was reasonable. No ex post facto violation in imposing an upward variant sentence for pre-*Booker* crime. Avoiding any decision regarding whether D had fair warning that his sentence could be so far above the GL, the COA held that he did have fair warning under the GL. It reached this decision by engaging in a series of re-calculations—what if he did not receive an acceptance reduction, for example—which would bring the GL calculation within the range of the 120 month sentence he received.

***United States v. Cerno*, 529 F.3d 926 (10<sup>th</sup> Cir. 2008)**

The district court committed reversible, procedural error in refusing to consider, as a matter of law, D's mitigation

argument that evidence of the minimal amount of force involved would support a lower sentence (as a first offender, he received a life sentence for 2 counts of touching and 3 counts of digital or oral penetration).

***United States v. Contreras***, 536 F.3d 1167 (10th Cir. 2008)

D's life sentence is upheld. Analogizing to the defendant's burden of proof of an affirmative defense at trial, the COA reaffirms prior case law holding constitutional the requirement that the defendant prove, in order to avoid a life sentence, that a prior robbery conviction should not count as a serious violent felony because no gun or dangerous weapon was used or threatened and there was no death or serious bodily injury.

***United States v. Jarvi***, 537 F.3d 1256 (10<sup>th</sup> Cir. 2008)

Sentence vacated and case remanded for re-sentencing because of denial of defendant's right of allocution. Before sentencing, D filed a *pro se* motion challenging the PSR's conversion of the cash found in his closet into its equivalent quantity of meth, which substantially increased his sentencing guideline range. D's lawyer did not object to the cash-to-meth conversion. At sentencing, the district court did not address, or permit the defendant to argue, the objection to the cash-to-meth issue because it was raised only in the *pro se* motion and defendant was represented by counsel. This was error because defendant had the right to address the court with arguments "to mitigate the sentence."

***United States v. Gambino-Zavala***, 539 F.3d 1221 (10th Cir. 2008)

D was convicted of unlawful possession of a firearm and ammunition by an illegal alien. Judge's requests that the government present more testimony to support the enhancements he wanted to impose did not bespeak actual bias or the appearance of bias. There was sufficient evidence to support enhancement for an offense involving 3-7 guns found in apartment closets and under a bed because D had access to all areas, co-signed the lease, and was listed on the lease as a resident. The sentence was also appropriately enhanced for possession of a gun used in connection with distribution of heroin found in the apartment.

***United States v. Sells***, 541 F.3d 1227 (10th Cir. 2008)

COA affirms 30-year sentence of 62 yo man convicted of meth offenses. Drug quantity determination based on co-conspirators' conduct was fine. Even though D did not personally make meth, there was ample evidence that co-D's meth manufacture was within the scope of the activity to which D agreed and was reasonably foreseeable to him. District court failure to explain its rejection of D's request for a downward variance was not procedurally unreasonable. COA defers to district court's weighing of 3553(a) factors.

***United States v. Mendoza***, 543 F.3d 1186 (10th Cir. 2008)

COA reviewed the 84 month downward variance appealed by the government for plain error and affirmed the sentence. The government contended the court's statement of reasons was procedurally insufficient. Although the government had substantively objected to the variance, it made its objections before the court's explanation and thus did not address procedural deficiency; plain error applied.

The district court's explanation for its downward variance was error because it was generalized and not specifically about the defendant; in contrast to when a variance is granted, the district court doesn't have to provide a "particularized analysis" when imposing a within-guidelines sentence. However, in the absence of any indication the court would have imposed a higher sentence if the procedural error had been brought to its attention, the government had failed to show its substantial rights were affected.

***United States v. Fay***, \_\_\_ F.3d \_\_\_, 2008 WL 4866605 (10<sup>th</sup> Cir. 2008)

Defense counsel's admissions in a sentencing memo that the defendant violated his supervised release terms and the defendant's guilty plea in state court to the offense that triggered the revocation proceedings was enough to establish a violation. The court didn't commit plain error when it failed to elicit the defendant's oral admission of guilt in open court. The district court did not have the authority to run the revocation sentence concurrently with a completely discharged state sentence.

***United States v. Rhodes***, \_\_\_ F.3d \_\_\_, 2008 WL 5102247 (10<sup>th</sup> Cir. 2008)

*Booker* does not apply to § 3582(c)(2) proceedings. As a result, the guidelines in § 3582(c)(2) proceedings are

mandatory and a defendant seeking a lower sentence by virtue of a retroactive guideline amendment may not receive a sentence below the amended guideline range unless the defendant had received a below-guideline-range sentence at the original sentencing. The COA reasons *Booker* did not refer to § 3582(c)(2), but § 3553(b), but how § 3582(c)(2) becomes mandatory without § 3553(b) is unclear. The COA notes that § 3582(c)(2) proceedings are not full resentencings. The 6th Amendment concerns in *Booker* don't matter because a sentence can only be reduced in a § 3582(c)(2) proceeding. The COA disagrees with the opposite holding of the 9th Circuit in *Hicks*. The latest version of § 1B1.10 prohibits a sentence below the amended guideline range.

***United States v. Zubia-Torres*, \_\_\_ F.3d \_\_\_, 2008 WL 5274166 (10<sup>th</sup> Cir. 2008)**

1. D's failure to challenge his prior conviction under Nevada law as not categorically a drug trafficking felony was a forfeiture, not a waiver of the argument. The COA tries to give better direction regarding the difference, and says because D never made the argument he could not have "affirmatively abandoned" it—waiver is abandonment.
2. D's vague statement during allocution did not preserve the issue for de novo review, and the COA hints that only under unusual circumstances will allocution by a D preserve a sentencing issue—Rule 32 objections is the route.
3. The COA agrees that the Nevada law is broad and is not categorically a drug trafficking crime. However, by not raising the issue, D never gave the government or probation the opportunity to gather documents to demonstrate under a modified categorical approach whether it was a qualifying offense. The COA also faults the D on appeal: "Even on appeal, the defendant offers no evidence that his conviction was for mere possession rather than sale." (The COA does not suggest how this might be done). All these burdens are laid at D's feet under the plain error standard: the D must show that his substantial rights were affected, and cannot do so without showing a negative—that the government could not show (per *Shepard*) that the offense was a qualifying offense. Practice tip: prior convictions under a broad statute must be challenged as non-qualifying in the district court—the COA has made it a virtual impossibility to rescue the issue under a plain error standard.

***United States v. Wilfong*, \_\_\_ F.3d \_\_\_, 2008 WL 5340423 (10<sup>th</sup> Cir. 2008)**

Restitution for phoning in bomb threat to an Air Force base can include compensation for lost employee work hours due to the evacuation.

***United States v. D.C.*, \_\_\_ F.3d \_\_\_, 2008 WL 5340429 (10<sup>th</sup> Cir. 2008)**

D had previously received 5K1.1 and Sec. 3553(e) reductions. D claimed that the district court, in the reduction resentencing, erroneously took the extent of those cooperation reductions into account when denying the retroactive crack reduction. COA holds that district courts may indeed factor in prior guideline applications into the decision on whether to grant the retroactive reduction in spite of GL language that in considering the reduction, "all other GL applications decisions [must remain] unaffected." It is discretionary whether to reduce a sentence under the crack amendment, and a court appropriately considers the overall length of a sentence in making that decision. Sec. 3582(c) modifications are narrow in scope.

***United States v. Pedraza*, \_\_\_ F.3d \_\_\_, 2008 WL 5274446 (10<sup>th</sup> Cir. 2008)**

The COA refused to permit the guidelines to be considered advisory in the defendant's § 3582(c)(2) proceedings, applying its recent decision in *Rhodes* that *Booker* did not apply. *Rhodes* was governed by later § 1B1.10 guidelines that explicitly prohibited a sentence below the amended guideline range unless a departure or variance had been originally granted and D's guidelines were ambiguous on the point. But a majority read the older guidelines as suggesting the judge's discretion was limited to substituting the new guideline range for the old one. McKay dissented, disagreeing with *Rhodes'* creation of a circuit split and, in any event, felt the old § 1B1.10 was ambiguous and the rule of lenity required an interpretation permitting a variance below the amended guideline range.

***United States v. Algarate-Valencia*, \_\_\_ F.3d \_\_\_, 2008 WL 5401415 (10<sup>th</sup> Cir. 2008)**

After submitting a lengthy sentencing memo, counsel asked to speak at sentencing. The judge said "you have 30 seconds." Counsel spoke, quickly. After the judge pronounced sentence and did not address the grounds D raised for a variance, the government asked the judge to make findings on D's variance grounds. The judge had an interesting retort: "I'm not going to do that." Issue 1: cutting counsel short on allocution. COA: plain error because no objection to the limitation. Under PE, no showing that the time limit affected D's substantial rights—that there were more or different arguments to be made than what was on paper. Issue 2: not addressing the variance grounds. The COA

acknowledges this would have been futile given the judge's retort, so harmless error (not PE) review. On the merits, the COA rules that while less than ideal, what the judge said was adequate. Apparently nothing equals something. Third issue: substantive reasonableness challenge of the low end of the GL in a case with a departed-downwards criminal history—gets nowhere. The COA confirms that it is not double counting to assign criminal history points for the same prior that aggravates the reentry GL under 2L1.2.

*United States v. Cook*, \_\_\_ F.3d \_\_\_, 2008 WL 5413144 (10<sup>th</sup> Cir. 2008)

The *Shepard* restrictions on what documents can be used to justify an enhancement do not apply to guidelines that relate to the D's conduct, as opposed to the D's convictions. In this case, the court could review whatever reliable evidence it wanted to determine whether the defendant possessed or used a weapon in connection with a felony offense so as to trigger the enhancement under § 2K2.1(b)(6). Police reports disclosing the victim's and eyewitness's statements relating the events were sufficiently reliable. Unlike the unsworn over-the-phone statement found unreliable in *U.S. v. Fennell*, 65 F.3d 812 (10<sup>th</sup> Cir. 1995), the officers had an opportunity to observe the demeanor of the witnesses, each witness corroborated the other and the victim's phone conversation with the officer was consistent with the witnesses' in-person version.

Plain error review applied to whether the district court complied with its fact-finding obligations under Rule 32(i)(3)(B) in imposing the enhancement because at the sentencing hearing counsel merely renewed its objection to the enhancement. **To preserve the Rule 32 error, counsel must make a separate objection that the court did not comply with Rule 32.** It is not enough to object to a disputed PSR fact at sentencing. The COA refused to decide whether the court erred. Instead, the COA held that a D can never prove that a Rule 32(i)(3)(B) error has affected a D's substantial rights under the third prong of the plain error standard if the evidence supports the challenged enhancement. And the D can never meet the fourth fairness-and-integrity prong where the court has explicitly made a finding resolving a D's objections to the reliability of evidence and the COA decides the record is sufficient to sustain the finding. So much for any hope for plain error relief under Rule 32(i)(3)(B).

*United States v. Hooks*, \_\_\_ F.3d \_\_\_, 2009 WL 50205 (10<sup>th</sup> Cir. 2009)

The co-D's contention before the d.ct. that the beyond-a-reasonable-doubt standard applied to the determination whether he possessed the revolver in connection with felony possession of drugs did not amount to an objection to the accuracy of the PSR's finding that the envelope found near the revolver contained ecstasy. That undisputed finding supported the § 2K2.1(b)(6) enhancement.

*United States v. Franklin-El*, \_\_\_ F.3d \_\_\_, 2009 WL 237780 (10<sup>th</sup> Cir. 2009)

No plain error procedural unreasonableness at sentencing, even though court applied wrong standard, because D cannot satisfy the 4<sup>th</sup> prong—she cannot show that the court likely would impose a “significantly lower sentence” than it did if had understood its discretion. No substantive unreasonableness in sentence where district court did not vary from the GL.

*United States v. Friedman*, \_\_\_ F.3d \_\_\_, 2009 WL 311155 (10<sup>th</sup> Cir. 2009)

An extremely rare post-*Gall* substantively-unreasonable reversal, unfortunately in a downward variance case. D was a serial bank robber with quite a few other convictions on his record, having spent almost all his adult life [he was 45] incarcerated. He qualified as a career offender with a guideline range of 151 to 188 months. The d. ct. sentenced him as though he was not a career offender to 57 months. As justification for the sentence the d. ct. said: "Under the nature of the offense and the individual's characteristics, he might not be regarded as a career offender. Isn't 57 months enough for this offense? . . . I may be an absolute fool but I'm very troubled to regard this man as a career offender. 57 months is a just and fair sentence. . . . [With] the unusual characteristic of the defendant's changed attitude, I have a feeling he can make it. The court is determined to allow one more chance." The COA found nothing that distinguished D from the run-of-the-mill career offender. Given his extensive criminal history, his failure to accept full responsibility [rather than show remorse he wrote a letter blaming the system for not rehabilitating him when he was in prison] and inability to grasp the impact of his criminal conduct [he insisted he didn't traumatize the bank teller much], the d. ct. abused its discretion.

The COA gratuitously proceeded to trash in dicta in a footnote a possible d. ct. policy disagreement with the career offender guidelines. The COA held that the defendant could not rely on the notion that the d. ct. disagreed on policy grounds with the career offender guidelines because the d. ct. never said that. The COA went on to note the *Kimbrough* language that a "closer review" may be necessary when a variance is given solely based on a judge's personal policy view of the guidelines. It then distinguished the suspect crack guidelines that were the subject of *Kimbrough* from the career offender guidelines in that Congress required career offender guidelines. So they exemplified the Commission's exercise of its characteristic, institutional role of taking into account empirical data and national experience, the COA indicated.

***United States v. Yanez-Rodriguez*, \_\_\_ F.3d \_\_\_, 2009 WL 311269 (10<sup>th</sup> Cir. 2009)**

The COA affirms a very large upward variance by Judge Johnson. (1) The government did not breach its promise to recommend the low end of the guideline range by; (a) taking no position on the d. ct.'s proposed upward variance ; (b) cross-examining a psychologist to bring out some bad stuff about the D, [the cross was justified by the government's opposition to D's downward variance request, surely not in support of an upward variance]; (c) praising the court for trying to impose a just sentence. [But doesn't that mean the government was saying it made a mistake in agreeing to a low-end sentence and would never do that again?]]

(2) It was not plain error to find Kansas' sexual battery offense was a "forcible sex offense" and therefore a "crime of violence" under § 2L1.2. When the statute, as here, prohibits nonconsensual sexual contact with another person, it doesn't matter if the offense need not be accomplished by physical compulsion.

(3) The upward variance from a range of 41-51 months to 144 months was reasonable. The d. ct. explained the variance in light of all the § 3553(a) factors. The court had broad discretion to consider particular facts even when those facts are already accounted for in the guideline range. In this case, the harm the D caused to the sexual battery victim, his repeated violations of the law, many of which were not considered by the guidelines because they were too old, and the expert opinion that he was likely to re-offend justified the variance [the mental health factor could be used as an aid and the d.ct. did rely on other factors as well], even though the d. ct. didn't explicitly attach a particular amount of variance to each factor. Where the d.ct. varies "after a careful, reasoned and reasonable consideration of the § 3553(a) factors, we cannot say the d. ct. abused its discretion."

***United States v. Navarrete-Medina*, \_\_\_ F.3d \_\_\_, 2009 WL 313337 (10<sup>th</sup> Cir. 2009)**

In an apparent effort to add precedential weight against the zillions of substantively-unreasonable challenges to within-guidelines sentences in reentry cases, the COA publishes this very short and unthoughtful affirmance. In this case, the D reentered to seek necessary medications for his HIV condition. The COA was unimpressed, pointing out the many unpublished affirmances where the D reentered for other medically-related reasons. The COA also took the occasion to knock down another popular argument. Contrary to the D's claims, reentry is "far more serious" than a standard trespassing offense, as Congress has indicated.

***United States v. Dozier*, \_\_\_ F.3d \_\_\_, 2009 WL 323269 (10<sup>th</sup> Cir. 2009)**

A state sentence imposed upon revocation of probation counts in calculating criminal history points, even if the revocation was the result of the federal crime the federal court is punishing. The revocation sentence is imposed for the original offense, not the new federal offense. Who cares how unfair that is?

***United States v. Brown*, \_\_\_ F.3d \_\_\_, 2009 WL 486775 (2009)**

The COA interprets § 1B1.10(b)(2) to mean generally it would not be appropriate to reduce a sentence based on the crack guideline reduction amendment where the d. ct. originally gave a downward variance under *Booker* and § 3553(a). Even the Commission doesn't agree with that. Only when the d. ct. has not considered the guideline range, [which is never] should the D not get a further reduction, the Commission has said. In the usual case, the pre-crack amendment range would have affected the d. ct.'s sentence. So lowering the range should lead to a further sentence reduction. Yet, the COA calls the D's reduction request "clearly" contrary to the Commission's policy statement. The circumstances of this case were not so compelling for the D, however. The d. ct. reduced the D's offense level four levels because of the unfair crack-powder ratio. So, while affirming the failure to reduce the sentence in this case might make sense, the COA has created bad case law for others.

***United States v. James***, \_\_\_ F.3d \_\_\_, 2009 WL 1195856 (10th Cir. 2009)

Remanded and affirmed in part on restitution order in mortgage fraud case. Both parties agreed restitution was based on a wrong calculation, but they disagreed as to amount. Under plain error review, any order of restitution above what is correct is illegal and constitutes plain error, and parts of the calculations were wrong (read opinion for particulars). COA discusses concepts of “value” under the MVRA and actual loss under the GL, and that restitution is to make the victim whole but not to provide the V with a windfall, and not to punish the D. COA comes down on an actual loss calculation in this case, which the probation office calculated incorrectly. It rejects D’s argument about offsets to loss by re-sales, but only because D presented no evidence on that theory when he originally was sentenced.

***United States v. Dolan***, \_\_\_ F.3d \_\_\_, 2009 WL 1464814 (10<sup>th</sup> Cir. 2009)

Restitution order entered more than 90 days after sentencing, which ordered defendant to pay \$250/month against total restitution of over \$100,000, affirmed. The time limit in the MVRA is a claim-processing rule designed to protect victims by making sure they get restitution timely and to prevent Ds from dissipating their assets, not a jurisdictional bar that would reward defendants for governmental negligence by relieving them of their duty to pay restitution. Also, the payment schedule was reasonable; even though D may have difficulty paying it, there was evidence suggesting it was not impossible. Even if it later proves to be, he can always ask the court to amend the plan.

### **SENTENCING—CRIME OF VIOLENCE**

***United States v. Zuniga-Soto***, 527 F.3d 1110 (10<sup>th</sup> Cir. 2008)

Using the *Taylor* categorical approach, the COA determines that D’s prior conviction for assault of a public servant under Texas law was not a crime of violence (D pled guilty in Fed Ct. to reentry). The Texas statute allows convictions for reckless conduct and, therefore, does not require the active use of physical force as required under “developing case law” (*Leocal*) for commission of the crime. USSG Sec. 2L1.2’s “crime of violence” definition is the same as 18 USC Sec. 16, and negligent and reckless *mens reas* do not satisfy the definition. Nice to get recklessness into the fold.

USSG Sec. 2L1.2 “as an element” provision refers to the elements of the statute underlying the prior conviction, not the facts underlying the prior offense. In conducting the *Shepard* part of the analysis, the COA clarifies that consultation with the *Shepard*-approved documents—plea hearing, etc.—is not to determine if violence in fact was used in the commission of the earlier offense, but to determine under which portion of the broad statute the defendant was convicted. Otherwise, there were no *Shepard* type documents introduced in this case from which the district court could have made the proper determination.

***United States v. Tiger***, 538 F.3d 1297 (10<sup>th</sup> Cir. 2008)

In a *Begay* remand, the COA extends *Begay* from the determination that a DWI does not satisfy the statutory ACCA “crime of violence” definition to a determination that a DWI does not satisfying the USSG Sec. 4B1.1 career offender definition (4B1.2(a)) for crime of violence.

***United States v. Cummings***, 531 F.3d 1232 (10<sup>th</sup> Cir. 2008)

Maine burglary statute defines a generic burglary and qualifies as a 924(e) ACCA crime of violence. The Maine definition of “structure” in its burglary statute does not broaden the statute (does not make it non-generic).

***United States v. Herrera***, 286 Fed.Appx. 546 (10<sup>th</sup> Cir. 2008) (unpub'd)

Although unpublished, this case is important---a plain error reversal of a “crime of violence” § 2L1.2 16-level enhancement on rather esoteric grounds. The COA held that the defendant’s conviction for battery under California law was not a “crime of violence.” First, the court engaged in a discussion of when to apply the pure, and when to apply the modified, categorical approach. You apply the modified categorical approach, i.e., you can look at court documents, such as the indictment, etc., *only* when the statute in question can be divided into two or more separate element sets, e.g. a battery statute that can be committed by rude touching or by causing bodily injury. It is *not*

enough that the statute covers both violent and non-violent offenses to trigger the modified approach. In this case the California statute only has one set of elements in every situation: (1) wilful and unlawful use of (2) force or violence, and (3) against the person of another. The statute could not be divided into those involving force and those involving violence because under California law "force or violence" is a term of art. So, the pure categorical approach applied. California law indicated a battery conviction could be committed by the "least touching." This did not amount to the use of the active, violent "physical force" required to qualify as a "crime of violence" under § 2L1.2. It did not matter that the battery could be committed in a violent way. The court could *not* look at the underlying court documents.

The COA found the enhancement error to be plain, because California state law was unanimous about the force required to constitute battery, the Ninth Circuit considered California battery not to be a "crime of violence" and, most significantly, because "an improper interpretation or application of the Guidelines is plain error." The 3rd and 4th prongs of the plain error test were met because the enhancement was substantial, the judge probably would give a lower sentence on remand and it is a miscarriage of justice for a defendant's incarceration to be significantly lengthened based on an improper legal interpretation.

***United States v. West***, \_\_\_ F.3d \_\_\_, 2008 WL 5158599 (10th Cir. 2008)

The COA holds that D's prior Utah conviction for failing to stop a vehicle at a police officer's command is a predicate offense for sentencing pursuant to the Armed Career Criminal Act. Applying *Begay*, 128 S.Ct. 1581 (2008), but relying on many of the escape cases and the usual "powder-keg" rationale, the COA concluded that failure to stop categorically presents a serious potential risk of physical injury to another for purposes of ACCA. The Court declined to find that the offense was not sufficiently similar to the other listed crimes and refused to limit the residual clause to property type crimes. Instead, it held the failure-to-stop offense was "sufficiently similar to the offenses enumerated in Sec. 924((e)(2)(B)(ii) because "it "typically involves purposeful, violent, and aggressive conduct." It listed several reasons to interpret *Begay* more broadly. Failure to stop under the relevant statute qualified as purposeful, violent and aggressive conduct because it required the D to have operated a vehicle in willful or wanton disregard of the officer's signal to stop so as to interfere with or endanger the operation of any vehicle or person.

***United States v. Dennis***, \_\_\_ F. 3d \_\_\_, 2008 WL 5274098 (10<sup>th</sup> Cir. 2008)

The taking of indecent liberties with a minor in Wyoming is not a "forcible sex offense" and does not present a serious potential risk of physical injury to another under § 4B1.2. The Wyoming statute covered activities that are otherwise permissible between consenting adults when one of the parties is under 18. No force was required so it was not a forcible sex offense. [Note the where-the-consent-is-invalid amendment to "forcible sex offenses" in the § 2L1.2 definition of "crime of violence" might make this case unhelpful in the § 2L1.2 context]. The statute did not "necessarily" involve conduct that presented the same kind of risk as the other enumerated offenses, e.g. burglary. The COA found the physical injury risk was not high enough, pointing to the application of the statute in case law to consensual sex with a 16 year-old, providing pornographic magazines, surreptitious videotaping. The COA thought it significant there was no age difference requirement [i.e., it covered consensual sexual intercourse between a near 18 year-old and a just-turned 18 year-old]. The COA rejected the government's argument for "categorical plus" analysis by virtue of the reference in the "crime of violence" definition to conduct "expressly charged." That reference did not allow consideration of the defendant's actual conduct. It is the elements that matter.

***United States v. Barraza-Ramos***, \_\_\_ F.3d \_\_\_, 2008 WL 5401417(10<sup>th</sup> Cir. 2008)

D's Florida conviction for felony aggravated battery was not categorically a crime of violence and could not support the 16 level upward adjustment under USSG 2L1.2 on a reentry conviction. Because agg battery is not one of the enumerated COVs in the GL, the COA looked to whether it had the element of use, attempted use, or threatened use of physical force against the person of another. The subsection of the Fla. statute to which D pleaded guilty applied to battery of a pregnant person, elevating the offense of simple battery to a felony and requiring a look at simple battery. Fla. simple battery is broad, and can be committed in a number of ways, including touching the person of another against that person's will. Employing the modified categorical approach, the COA determined that D's charging document listed "touching *or* striking" as the manner of battery. The charging document therefore failed to show that force was involved in D's conviction (it did not show which of the two prongs he was convicted of).

The COA referred to the recent *Hays* opinion in which it held that rude touching does not amount to the force needed to constitute a categorical COV.

***United States v. Zuniga*, \_\_\_ F.3d \_\_\_, 2009 WL 104304 (10<sup>th</sup> Cir. 2009)**

The COA continues to expand the meaning of "purposeful, violent and aggressive" under *Begay* and, as a result, expand the kinds of offenses that are violent felonies under the ACCA, [and by extension "crimes of violence" under the Guidelines]. The COA holds possession of a deadly weapon in prison is an ACCA violent felony. (1) Following *U.S. v. Romero*, 122 F.3d 1334 (10<sup>th</sup> Cir. 1997), the COA notes that, because a deadly weapon has no legitimate recreational uses in prison, the offense involves conduct that presents a serious potential risk of physical injury to another. *Begay* doesn't change that conclusion. (2) *Begay* required that a non-enumerated offense must "typically involve purposeful, violent and aggressive conduct." The COA found the offense in this case met all those criteria. (a) The offense conduct is purposeful. The offense can be committed knowingly, intentionally or recklessly. The COA discounts the recklessly part because *Begay* refers to what the offense "typically" involves and "typically," the COA surmises, the offense is committed knowingly or intentionally. (But, if you can't tell which mens rea applies through a modified categorical approach, it is assumed to be reckless. See *U.S. v. Zuniga-Soto*, 527 F.3d 1110 (10<sup>th</sup> Cir. 2008) in a § 2L1.2 "crime of violence" context). (b) The offense conduct is violent. What *Begay* meant by violent was the offense creates the "likelihood of violence." The offense indicates the defendant was "prepared to use violence." (c) The offense conduct is aggressive. To be aggressive the offense needs to be "offensive and forceful and characterized by initiating hostilities or attacks" **or** committed by one who is "inclined to behave in an actively hostile fashion." The latter phrase that broadens the meaning of "aggressive" enabled the COA to include the offense in question as a violent felony. It also seems to open the violent felony door to all sorts of offenses.

***United States v. Rooks*, \_\_\_ F.3d \_\_\_, 2009 WL 530814 (10<sup>th</sup> Cir. 2009)**

Another disappointing application of *Begay* this time in the guideline, "crime of violence" context. Attempted sexual assault involving intentional penetration without consent involves a similar risk of physical injury as the enumerated crimes (burglary, arson, use of explosives, extortion) do and is purposeful, aggressive and violent. That the crime was an attempt and not a completed act is not a problem. Troublingly, the COA lists the ways the statute could be violated and some of them don't seem likely to risk physical injury, e.g. when the victim is unaware a sexual assault is occurring, including because the person erroneously believes the actor is the person's spouse. But the COA doesn't address that issue. Also troublingly, the court notes the phrase "potential risk" implies the inclusion of more remote contingencies than a simple risk would entail. [Then again it must be a "serious" potential risk]. Further troublingly, the COA notes in passing that perhaps the "crime of violence" definition in the guidelines encompasses more offenses than "violent felony" under the ACCA does, given the possibly broader language of application note 1 of § 4B1.2.

***United States v. Gonzales*, \_\_\_ F.3d \_\_\_, 2009 WL 651806 (10<sup>th</sup> Cir. 2009)**

Prior Wyo burglary conviction fell w/in the "burglary" definition of 18 USC § 924(e) because, even tho the state statute also covered entry of vehicles, the information and plea colloquy made clear that the burglary in this case did not involve a vehicle. District court did not commit plain error in characterizing Mr. Gonzales' battery/domestic violence conviction as a violent felony under § 924(e). The treatment of the conviction as a violent felony was not challenged at sentencing, so the sentencing court did not address which "violent felony" definition the Wyoming battery conviction met. If there was error at all, it was not plain or obvious.

***United States v. Williams*, \_\_\_ F.3d \_\_\_, 2009 WL 692323 (10<sup>th</sup> Cir. 2009)**

Prior conviction for battery on a peace officer, a felony under Oklahoma law, counted as a crime of violence under ACCA. D tried to argue that this was really a misdemeanor that was aggravated to felony status only because of the victim's status. Wrong. First, the COA had already held that a violation of this particular statute was categorically a crime of violence. D tried to get around that by arguing that the prior opinion "because the analysis lacks sufficient specificity." Wrong again. Battery on a cop is categorically a crime of violence under the residual clause of 4B1.2(a)(2) because the statute requires the intentional use of force or violence, is similar in kind to the enumerated offenses in that it ordinarily involves purposeful, violent and aggressive conduct, and presents a similar risk as the enumerated offenses because hitting a cop creates a risk of a serious escalation in violence.

*United States v. Scoville*, \_\_\_ F.3d \_\_\_, 2009 WL 929521 (10th Cir. 2009)

Defendant was properly sentenced as an armed career criminal. His Ohio breaking and entering conviction does not categorically qualify as generic burglary, but under modified approach, it qualified as generic burglary because he pled guilty to unlawfully entering a building (a laundromat) with intent to commit a crime. His Ohio third degree burglary convictions qualified as violent felonies under the catchall "otherwise involve[d] conduct that presents a serious risk of potential physical injury to another." Third degree burglary prohibited trespass into a habitation with purpose to commit a misdemeanor that is not a theft offense. The Court reasoned that although the offenses are not generic burglary, they "typically involve unlawful entry into a home ... for the purpose of committing a crime." Thus, the typical offense ordinarily creates a serious potential risk of injury to another.

*United States v. Serafin*, \_\_\_ F.3d \_\_\_, 2009 WL 983055 (10th Cir. 2009)

Possession of an unregistered firearm—a short-barreled .22 assault rifle—was not a crime of violence, so that D's possession of a different firearm at the same time he possessed the unregistered rifle could not constitute the offense of possession of a firearm during a crime of violence in violation of 18 USC Sec. 924(c)(1).

The COA employed the *Taylor* categorical approach. The operative language for crime of violence under 924(c)(3)(B), which has not been construed by the S. Ct., is most similar in language and purpose to that under 18 USC § 16(b): to address the risk of force being used in the course of committing the crime and not merely the risk of force as a possible result of the crime. Any earlier opinions by the COA addressing possession of an unregistered firearm as a COV for purposes of applying the § 4B 1.2 crime of violence enhancement are inapplicable, since the GL is broader and addresses risk of violence as a result of the crime, not risk of violence in the commission of the crime. The COA rejected any other circuit decisions holding that the risk of force *resulting* from possession of an unregistered FA qualified the offense as a COV (the COA relied on the *Leocal* interpretation of § 16(b)).

In sum, "the unlawful act of possession does not 'by its nature' involve a substantial risk that physical force will occur in the course of committing the offense."

## **SENTENCING GUIDELINES**

*United States v. Martin*, 528 F.3d 746 (10th Cir. 2008)

The beating and rape charges against Mr. Martin were properly grouped for sentencing purposes and the bodily-injury enhancement was properly applied to the sexual assault charges. There was no clear error in denying an acceptance-of-responsibility adjustment.

*United States v. Muñoz-Tello*, 531 F.3d 1174 (10th Cir. July 1, 2008)

Court upwardly departed to a 96 month sentence for D, who lost control of the vehicle he was driving and crashed, resulting in the deaths of 4 passengers and the serious and permanent injuries to 3 others.

Recklessness enhancement, Sec. 2L1.1(b)(5): 2 of the court's 3 factual findings regarding overcrowding and the sufficient availability of seatbelts, were not clearly erroneous. The 3d—that the overloading affected maneuverability—lacked support in the record. However, the two error-free determinations supported application of the recklessness enhancement, as supported by the GL commentary that it is directed towards the carrying of more people than a vehicle is rated to carry, or harboring them in a crowded condition. The COA, looking at the totality of facts, distinguished D's cases to the contrary.

Upward departure: Even after *Booker* and *Gall*, the COA applies a 4 part review under a unitary abuse of discretion standard, with varying degrees of deference. *United States v. Jose-Gonzales*, 291 F.3d 697, affirming an upward departure in an alien smuggling case involving multiple deaths, remains good law. The COA agreed that post-*Booker*, legislative history could be considered in construing the GL, but determined that regardless of legislative history in this area, the commission itself indicated its displeasure with the GL that meted out the same punishment, whether one death or multiple deaths were caused in an alien smuggling accident. The other parts of the 4 part test were met: the case was removed from the heartland, the record supported the determination, and the degree of departure was reasonable.

***United States v. Maytubby***, 272 Fed.Appx. 749 (10th Cir. 2008)(unpub'd)

COA reaffirms precedent indicating that quantity of drugs suppressed because they were discovered during an unconstitutional search may be included in GL calculations.

***United States v. Jones***, 530 F.3d 1292 (10<sup>th</sup> Cir. 2008)

“Sophisticated means” enhancement Sec. 2B1.1(b)(9)(C) supported by evidence showing complex methods means to avoid detection of the bank fraud.

***United States v. Rojas***, 531 F.3d 1203 (10<sup>th</sup> Cir. 2008)

Not double counting to add one point to D’s GL on interstate transport of stolen property for a gun that was part of the property stolen, and to sentence him under 924(c) for use of a gun during the transport crime—the taking of the gun was a distinct harm from use of the gun to effect the crime. D did not overcome the presumption that his within-GL sentence was reasonable. His argument that his co-Ds’ below-GL sentence demonstrated unreasonableness did not prevail because while consideration of disparity is allowed, it is not mandated, and he could not show he was similarly situated to his co-Ds anyway.

***United States v. Ivory***, 532 F.3d 1095 (10th Cir. 2008)

Blocking victim's car so she could not escape during attempted murder supported increase for physical restraint.

***United States v. Smith***, 531 F.3d 1261 (10<sup>th</sup> Cir. 2008)

The 3-level enhancement for substantial interference with the administration of justice under § 2J1.3(b)(2) applied where the state court held a hearing to unseal the file regarding the supposedly expunged conviction, even though the evidence of the actual expenditures for the hearing “may have been limited.” The COA could not review whether the hearing was motivated simply by federal investigators because that determination required factual determinations that were not made because the defendant failed to raise the challenge below.

***United States v. Sallis***, 533 F.3d 1218 (10<sup>th</sup> Cir. 2008)

Evidence supported a leadership upward adjustment. Fronting drugs is not enough to justify such an enhancement, but here, the defendant and his twin brother exercised joint decision-making authority re: the amount of drugs to purchase etc. and recruited others. It was also okay to enhance for firearm possession under § 2D1.1, despite the acquittal on the firearm possession charge. There was evidence the defendant drove his truck while it contained both a gun and drugs.

***United States v. Hanson***, 534 F.3d 1315 (10th Cir. 2008)

Affirmance of denial of reduction of total offense level under USSG § 2K2.1(b)(2) - the “sporting exception.” D presented evidence that he used his 9 mm handgun for “plinking,” which the COA finds is a lawful sporting purpose. However, that type of gun is most commonly used for self-protection and his meth addiction made the use of the weapon against other persons more likely. While the COA recognizes the absurdity of permitting a district judge to infer a nonsporting purpose from the bare fact of a defendant's criminal involvement (in which case it would never apply), it overlooks the absurdity of requiring the defendant to establish by a preponderance that he “had not considered using the gun for non-sporting purposes.” You just prove the thought never entered the guy's head.

***United States v. Servin-Acosta***, 534 F.3d 1362 (10<sup>th</sup> Cir. 2008)

16-level enhancement based on California conviction for 2d degree robbery in this reentry case reversed and case remanded for resentencing. Although a minute order, along with Border Patrol records, were sufficient to establish the fact of conviction, mere fact that “robbery” is an enumerated crime of violence under USSG 2L1.2 was not sufficient to establish that the defendant's conviction was for “generic robbery.” The California statute defines robbery as the felonious taking of personal property of another, from his person or immediate presence, against his will, accompanied by means of force or fear. The government made no attempt to show that the California statute satisfies the definition of “generic robbery” ( in other words, passes muster under the categorical approach, although the COA did not use that term here), and merely argued that “robbery is robbery.”

***United States v. Torres-Romero***, 537 F.3d 1155 (10<sup>th</sup> Cir. 2008)

D was convicted of illegal entry after deportation. The COA held that his prior Colorado drug conviction was properly treated as a qualifying “drug trafficking offense” for the 16 point guideline enhancement. The COA looked only at the state information, and the judgment that stated D had pleaded guilty to the information, to support its decision, even though it appeared that the information parroted the broad language of the statute that included both possession and trafficking acts. Because under 10<sup>th</sup> Cir. law and under Colorado law, a “plea admits all material allegations already contained in the indictment,” this was sufficient to establish that D had been convicted of a qualifying drug trafficking offense. Hartz dissented.

***United States v. Gallant*, 537 F.3d 1202 (10<sup>th</sup> Cir. 2008)**

Long opinion involving a complex bank fraud. The government and all four Ds appealed aspects of the district court’s sentencing procedures and conclusions. COA found that court erred in calculating loss only as the amount of Ds’ gain without attempting to calculate the loss (a potentially much greater amount), and in not taking into account under the conspiracy counts the loss attributable to other members of the conspiracy, but chargeable to each defendant. The Ds and the government also argue that the district court erred in imposing various other enhancements under the Guidelines. Generally, the COA remanded for the court to make better findings on some of the enhancements, noting that the facts were in the record to support the enhancements. In addition, the court cannot forego preparation of the PSR unless it makes a sufficient record on the exception for ordering preparation of a PSR. Under the mandatory victim restitution act, court erred in not considering certain persons victims; the COA also noted that settlement between the Ds and one of the victims did not bar restitution.

***United States v. Miera*, 539 F.3d 1232 (10<sup>th</sup> Cir. 2008)**

The COA upholds application of the two level GL enhancement, §2B3.1(b)(4)(B), restraint of a person, when D’s accomplice waved a gun at the bank door during a robbery and ordered no one to move. While more is required to be done with the gun to restrain than just brandishing it for the application of the enhancement, there also is no requirement that an individual be targeted for restraint. In this case, that “more” was demonstrated by the accomplice waving the gun around generally, by his ordering a number of times that no one was to move, and by his positioning himself at the door, preventing anyone from leaving.

***United States v. Edwards*, 540 F.3d 1156 (10<sup>th</sup> Cir. 2008)**

It was not error to add criminal history points for convictions that resulted in deferred sentences. USSG § 4A1.1(c) does not limit the addition of one point to convictions that result in sentences of imprisonment.

***United States v. Pinson*, 542 F.3d 822 (10<sup>th</sup> Cir. 2008)**

D was a 21-year-old “mentally-ill inmate with a propensity for making grandiose threats,” convicted of threatening to harm the President. He compounded his offense by sending out two more threatening letters before sentencing, and was convicted. At sentencing, the district court varied upward and imposed the maximum he could on each count, to be served consecutively. The government presented evidence that Mr. Pinson had written letters describing violent acts against people and animals, and made other threats. There was no corroboration that the acts had occurred or the threats carried out. The defense presented evidence that Mr. Pinson suffered from severe PTSD from severe childhood abuse and had a family history of mental illness. The COA affirmed the sentence, which was more than double the guideline range, even though it was somewhat concerned that the district court had effectively circumvented the civil commitment process. The district court’s determination that he is a danger to the public was not clearly erroneous.

***United States v. Sharkey*, 543 F.3d 1236 (10<sup>th</sup> Cir. 2008)**

Retroactive amendments to crack guidelines do not apply to career offender sentence in this case because according to the COA the amendment did not have the effect of lowering the guideline range for career offender guidelines and therefore a reduction was not authorized under 18 USC § 3582(c)(2) and the sentencing commission policy statements. Although the district court did not reach D’s argument that it separately had the authority under *Booker* to reduce his sentence through consideration of the § 3553(a) factors, the COA rejects the argument saying that § 3582(c)(2) gives jurisdiction to reduce only when the sentencing commission, not the Supreme Court, has lowered sentencing ranges.

***United States v. Hernandez-Noriega***, 544 F.3d 1141(10<sup>th</sup> Cir. 2008)

While D, a previously-deported alien, was serving a state prison term, he was "found" in the United States and prosecuted for and pled guilty to being found in the US after deportation, in violation of 8 USC Sec. 1326. The district court added two points to his criminal history score pursuant to USSG Sec. 4A1.1(d) because D committed the offense while under a criminal justice sentence, and added a third point under Sec. 4A1.1(e) because he was serving a prison sentence of more than sixty days when he committed the offense. The COA affirmed these additions to the criminal history score, rejecting D's argument that being found in the US after deportation should not be considered a continuing offense under these circumstances. It followed its earlier holding in *US v. Rosales-Garay*, 283 F.3d 1200 (2002), that the offense is a continuing one for sentencing purposes, and that it was therefore not unfair to add these points.

***United States v. Martinez-Barragan***, \_\_\_ F.3d \_\_\_, 2008 WL 4632806 (10<sup>th</sup> Cir. 2008)

Procedural reasonableness: COA ducks whether to review under plain error standard because it found there was no error, but signals that the "unforeseeable error" doctrine that avoids PE review might no longer be viable. "Heartland" is a term that applies to both guideline and § 3553 analyses, so district court determination that case was not outside the heartland did not signify it was mandatorily applying the GL. COA says that GL and variance analyses are distinct and must not be confused but a judge does not commit reversible error by consolidating the two discussions (thus freeing district courts even further from having to be thorough and clear). Because the district court discussed §3553, it did not erroneously confine itself to just a GL heartland consideration. It explained the reasons for its sentence. Good Stuff: dicta-ish language gives the parsimony argument some weight. Sentence was PR.

Substantive reasonableness: signaling what a non-starter a substantive unreasonableness of a within-GL- sentence claim is, the COA devotes all of two pages to it. Without (thankfully) any serious discussion of failure to rebut the presumption of reasonableness, the COA finds that based on the violence of D's predicate felony and his general criminal history, in spite of the mitigating reason for his return to the US, the district court did not abuse its discretion in sentencing him to the low end of the GL range.

***United States v. Kaufman***, \_\_\_ F.3d \_\_\_, 2008 WL 4868480 (10<sup>th</sup> Cir. 2008)

In involuntary-servitude conviction, the d. ct. erred by not deciding if there were a "large" number of vulnerable victims under § 3A1.1(b)(2)(B). The COA determined 10 was a large number based on an analogy to § 2H4.1, n. 3, which suggests an upward departure if there were more than 10 involuntary servitude victims. On remand the d. ct. is to decide if particular victims were "vulnerable" and see if the number adds up to 10. The wife's conviction for obstructing a federal audit was enough by itself to warrant an obstruction enhancement.

***United States v. Alapizco-Valenzuela***, \_\_\_ F.3d \_\_\_, 2008 WL 4866609 (10<sup>th</sup> Cir. 2008)

The evidence supported an enhancement under § 2L1.1(b)(8) for involuntarily detaining smuggled aliens where 2 aliens reported the defendant carried a firearm, and the defendant knew the aliens were barefoot and without personal belongings, that several armed guards were watching them and the aliens were instructed not to leave the van to urinate. The COA determined the d. ct. imposed an above-guideline sentence as a variance, not a departure, although the d. ct. alternatively used language applicable to one or the other. "A d. ct. does not commit procedural error when it relies on the same facts for an enhancement as for a variance so long as it articulates specifically the reasons that this particular defendant's situation is different from the ordinary situation covered by the guidelines calculation." The d. ct. did so here, indicating the coercion was more extensive than a minor detention contemplated by the enhancement. The 10th indicated its analysis would have been different the court had departed.

***United States v. Parker***, \_\_\_ F.3d \_\_\_, 2008 WL 5220512 (10<sup>th</sup> Cir. 2008)

D convicted after a jury trial of two counts of making or conveying false claims regarding a threat to blow up a building. Sentence was procedurally reasonable. The USSG Sec. 2A6.1(b)(2) enhancement for "more than 2 threats" refers to more than 2 communications of threats, not more than 2 targets, and the jury found D responsible for making 3 threatening calls to 911. Counts were not required to be grouped under 3D1.2 because there were multiple victims: multiple schools and city hall.

***United States v. Hahn***, \_\_\_ F.3d \_\_\_, 2008 WL 5247929 (10<sup>th</sup> Cir. 2008)

Sentence for ATM technician who pled to stealing from “straps” of cash meant for the ATMs affirmed. There was no clear error in loss calculation or restitution order, ordering sentence to run consecutively to state court sentence for lewd and indecent proposal to children was not an abuse of discretion, nor was imposing sex offender conditions as part of supervised release convictions because the conduct underlying the sex offender convictions occurred after defendant was fired for stealing the cash and is part of his history and characteristics.

***United States v. Baum***, \_\_\_ F.3d \_\_\_, 2008 WL 5274316 (10<sup>th</sup> Cir. 2008)

D, a real estate agent, was found guilty of wire fraud and money laundering for his scheme: he was REA for buyers who did not qualify for home loans because of poor credit; D lent money to buyers for down payment; home prices were inflated on the K; buyers agreed to pay an additional amount for remodels per a K addendum (not disclosed to mortgage lender) that were never meant to happen and that money went into a fund to pay back D, plus. The mortgage lender never knew the truth. “Intended loss” under the GL does not include an element of purpose or desire—if so, perhaps D did not intend that anyone lose anything, and intended his scheme to work. Although knowledge of probable consequences might not be enough to establish intended loss, that is left for another day—D did not raise the issue below, and any error does not rise to the level of plain error.

***United States v. Montgomery***, \_\_\_ F.3d \_\_\_, 2008 WL 5401410, (10<sup>th</sup> Cir. 2008)

Upward departure for death under USSG Sec. 5K2.1 is not limited to homicide deaths and can apply as a matter of law to a resulting suicide—in this case, D’s wife committed suicide with a gun he illegally possessed as a felon. For 5K2.1 to apply, the death must be a reasonably foreseeable result of the crime of conviction. In this case, there was evidence that D knew of his wife’s depression, and that his escalating emotional and physical abuse of her exacerbated her depressed mental state. There need not be proof that he actually knew his wife would commit suicide.

***United States v. Villarreal-Ortiz***, \_\_\_ F.3d \_\_\_, 2009 WL 57491 (10<sup>th</sup> Cir. 2009)

After having been deported, D re-entered and was arrested on drug charges. He admitted being in the US w/o inspection. After he got probation on the drug charge, an immigration agent determined his true name and status as a prior deportee. COA holds that when D was sentenced for being a deported alien “found” in the US, he properly received an increase in criminal history points under USSG § 4A1.1(d) for committing his offense while on probation for another crime. He was still committing his offense of being “found” in the US after he was placed on probation. The crime of being “found” in the US is a continuing offense that continues after the defendant’s re-entry to the US until the gov’t knows or could have know the defendant’s prior deportee status, his illegal presence in the US, and his whereabouts.

***United States v. Parker***, \_\_\_ F.3d \_\_\_, 2009 WL 50435 (10<sup>th</sup> Cir. 2009)

There was support for the d.ct.’s finding that D was a leader or organizer under § 3B1.1(c) where he alone placed ads, explained to victims why engines were available for resale, engraved data plates indicating the engines were safe and directed the engine overhaul work. The record supported the amount of restitution ordered. The court did not have to subtract the “core-value” of the engines from the amount the victims paid for the engines because the “core value” was really zero or negative given the extra expense and time required to fix the “overhauled” engines.

***United States v. Patterson***, \_\_\_ F.3d \_\_\_, 2009 WL 921060(10<sup>th</sup> Cir. 2009)

In spite of *Chambers* remand on D’s prior conviction for escape, D was still correctly sentenced as a career offender because the district court correctly found three other enhancement-qualifying prior convictions, and only two are needed for CO. COA therefore did not consider whether D’s escape was a crime of violence.

***United States v. Egbert***, \_\_\_ F.3d \_\_\_, 2009 WL 983054 (10<sup>th</sup> Cir. 2009)

Three white supremacists convicted of conspiracy to violate civil rights and, in the case of one of the three Ds, a substantive civil rights offense, launched unsuccessful and successful challenges to guideline calculations.

1. Because the overt acts of the conspiracy count included the single substantive assault offense that involved only one of the three Ds, that one assault was relevant conduct for the other two Ds—the assault was a reasonably

foreseeable act of the conspiracy to beat up non-whites. The guidelines allow the overt acts, because they involve two different victims, to be grouped as if separate counts, even though they are part of a single conspiracy count. Read the opinion and the GL if you have a multiple overt act conspiracy and wonder how the guidelines might be calculated.

2. Demonstrating that it can be fairly exacting in how it reads the language of the GL and the evidence that satisfies that language, the COA reverses the sentence on the ground that there was insufficient evidence of serious bodily injury to support the SBI GL enhancement. Looking to the definition for SBI, and reviewing cases in which the extent of the injury necessitated medical care, the COA found that the statements of witnesses about the blows they saw the victim receive and that fact that he seemed unconscious afterwards was insufficient (the victim apparently left and was not found afterwards). Also, there was no evidence that the unconsciousness was protracted as required by the SBI enhancement.

3. The COA reverses the “organizer and leader” enhancement to the D who was the head honcho of the white supremacist group. The fact that he was the titular head was not enough to show leadership in relation to the crime, and no other evidence was sufficient to establish his leadership role in the assaults—specifically, no evidence that he controlled the others.

***United States v. Morris***, \_\_\_ F.3d \_\_\_, 2009 WL 989011 (10th Cir. 2009)

D was convicted of being a felon in possession of a firearm for the gun he took during a burglary. The district court properly applied the § 2K2.1(b)(6) enhancement for possession of the gun in connection with another felony (the burglary), and there was no plain error in the court’s use of Application Note 14 (B). D argued that the Note improperly expanded the enhancement phrase “in connection with” to a situation like D’s, where the gun was the object of the burglary and possessed only as a consequence of the burglary. The COA noted that the Note was added in 2006 to address a conflict among the circuits—some had decided that the “in connection with another felony” required a time separation between the gun possession and the commission of the offense, and other circuits did not require such a separation. The Note, which adopted the more Draconian view, is binding.

***United States v. Pech-Aboytes***, \_\_\_F.3d \_\_\_, 2009 WL 1026484 (10<sup>th</sup> Cir. 2009)

A post-federal-plea nunc pro tunc state court order that shortened the D's probation so that it ended before he committed the federal offense did not preclude the application of the two level increase under § 4A1.1(d) for committing an offense while under a criminal justice sentence because the state court entered the order for reasons unrelated to the D's innocence or errors of law. As a result, the D did not qualify for the safety valve. He gets 10 years instead of 70 months.

***United States v. Dryden***, \_\_\_F.3d \_\_\_No. 08-3310 (10<sup>th</sup> Cir. 2009)

The COA affirms the denial of a crack sentence reduction because D’s offense level (38) and resulting guidelines range did not change as a result of Amendment 706. On appeal, D claimed for the first time that the limitation contained in USSG § 1B1.10(a)(2) that courts are not authorized to reduce a sentence on the basis of a retroactive amendment to the guidelines unless the amendment has the effect of lowering D’s applicable guideline range was an unconstitutional delegation of Congress’s authority to regulate Article III jurisdiction. The COA rejected this “novel argument” because the policy statement merely reiterates the language of 18 USC § 3582(c)(2). In other words, Congress itself created the jurisdictional limitation, not the Sentencing Commission, so there was no delegation of Article III power at all.

***United States v. Meacham***, \_\_\_F.3d \_\_\_, 2009 WL 1492548 (10<sup>th</sup> Cir. 2009)

The d. ct. erred in sentencing for possession of destructive devices in 2 respects: (1) the two-level enhancement for being a prohibited person under § 2K2.1(a)(4)(B) was not warranted because the D's misdemeanor conviction for battery was not a misdemeanor crime of domestic violence under § 922(g)(9). The relevant Kansas battery statute allowed for a conviction based solely on "physical contact," which does not amount to the "physical force" required to constitute a § 922(g)(9) crime of violence, as held in *U.S. v. Hays*, 526 F.3d 678 (10th Cir. 2008). (2) The d. ct. mistakenly counted the D's firearms, in addition to the destructive devices, in finding there were 8 or more firearms involved under § 2K2.1(b). Firearms cannot be counted unless the D was prohibited from possessing them, which,

as explained under (1), he was not. Most importantly, the COA found the errors warranted reversal under the plain error standard, finding a reasonable probability the errors affected the sentence, since the sentence imposed, while a downward departure from the incorrect guideline range, was above the high end of the correct range. The likelihood of a lower sentence was enough to satisfy the third and fourth prongs of the plain error test.

## **SEX CRIMES**

*United States v. Martin*, 528 F.3d 746 (10th Cir. 2008)

Denial of instruction on apparent consent from a § 1983 case was proper because it inaccurately equated apparent and actual consent and failed to explain how either form related to the elements the jury was required to find. The beating and rape charges against Mr. Martin were properly grouped for sentencing purposes and the bodily-injury enhancement was properly applied to the sexual assault charges. There was no clear error in denying an acceptance-of-responsibility adjustment.

*United States v. Husted*, \_\_\_ F.3d \_\_\_, 2008 WL 4792339 (10th Cir. 2008)

A SORNA win for the defense. Under a plain language analysis, SORNA does not apply to someone who only traveled interstate before SORNA's effective date. One of the elements of SORNA [unless the person is convicted of a federal sex offense] is the person "travels" in interstate commerce. The present tense of that word and of the other related words in the statute, [e.g., enters, leaves resides], indicates travel that has not already occurred. So "travels" only refers to travel after SORNA's effective date. This does not lead to an absurd result, as the government claimed. Congress may have wished to avoid the ex post facto concern the defendant raised. The broad purpose to protect the public from evil sex offenders cannot create an ambiguity in a separate, specific portion of the statute where no ambiguity exists. Plus there is a presumption against retroactive application of a statute. Unclear legislative history couldn't overcome the plain statutory language.

*United States v. Lawrence*, \_\_\_ F.3d \_\_\_, 2008 WL 5123846 (10th Cir. 2008)

The COA reaffirms prior holdings that prosecution under SORNA does not violate the Ex Post Facto Clause because it is civil in intent and nonpunitive in purpose. The Attorney General's Interim Rule deals only with initial registration and does not apply to D, who traveled in interstate commerce after July 2006 and failed to update his prior registration as SORNA required. SORNA does not violate the Commerce Clause because it regulates interstate activity -- the evasion of registration requirements by sex offenders who cross state lines. And there was adequate notice of SORNA's registration requirements to satisfy due process.

*United States v. Hinckley*, \_\_\_ F.3d \_\_\_, 2008 WL 5146353 (10<sup>th</sup> Cir. 2008)

A companion to *Lawrence*—Murphy's dissent in *Lawrence* referred to McConnell's dissent in *Hinckley*.

As in *Lawrence*, the *Hinckley* panel found that the Feb. 28, 2007, Attorney General's clarifying Interim Rule, promulgated later than SORNA's effective date, did not in essence create a new effective date for SORNA's registration requirements for certain convicts. The Rule was promulgated under 42 U.S.C. § 16913(d), which authorizes the AG "to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006." (D, who had registered already in one state, traveled to another after the effective date of SORNA but before the date of the Rule, and registered too late for SORNA's deadline but before the date of the Rule). The panel found 16913(d) ambiguous, and construed it to mean that the Rule only encompassed those who had not previously *initially* registered, and because D had registered in one state, SORNA's effective date, and not the date of promulgation of the Rule, applied to him. McConnell's dissent, and Murphy's in *Lawrence*, would follow the circuits which have held that the meaning of 16913(d) was plain, not requiring any construction, and that the Rule promulgated under that section addressed and clarified that SORNA applied to all offenders convicted before SORNA's effective date, thus making the date of the Rule's promulgation the effective date by which someone must have registered.

As in *Lawrence*, the COA held that SORNA does not violate the Commerce Clause because it regulates interstate activity—the evasion of registration requirements by sex offenders who cross state lines; and there was adequate notice of SORNA's registration requirements to satisfy due process. Also, SORNA does not violate the Ex Post

Facto Clause: as applied to D, because he initially registered and failed to re-register when he traveled during the period after the effective date of SORNA; and in general, because it is civil, not criminal in nature.

The COA rejected D's non-delegation argument—that Congress could not delegate to the AG establishment of the effective date of SORNA—because the COA ruled that the AG's Rule did not apply to his case, and D therefore had no standing.

### **VICTIM RIGHTS**

*United States v. Hunter*, \_\_\_ F.3d \_\_\_, 2008 WL 5062140 (10<sup>th</sup> Cir. 2008)

District court decision that dead woman was not a victim under Crime Victims' Rights Act (CVRA) of D's unlawful sale of a firearm to the shooter/killer was upheld by the COA by its earlier denial of a writ of mandamus to the parents of the dead woman. Parents could not now appeal D's judgment and conviction (neither D nor the government appealed). A petition to the COA for mandamus is the only vehicle under the CVRA that alleged victims can use for appellate redress if the district court denies a victim's rights (the government, however, can appeal a denial). The COA also extensively discusses how a non-party in a criminal case has no right to appeal a final judgment (distinguishing cases where non-parties could file interlocutory appeals in a criminal case). The COA dismissed the appeal, reaffirming against "victim's rights" inroads some core principles that a criminal case is between the government and the accused.

## SUPREME COURT CASES

### **ARMED CAREER CRIMINAL ACT**

*United States v. Rodriguez* 128 S.Ct. 1783 (2008)

The Court held that the "maximum term of imprisonment . . . prescribed by law" under ACCA (§ 924(e)(2)(A)(ii)) for the state drug convictions at issue includes state recidivist enhancements, which in this case was a ten-year maximum.

*Chambers v. United States*, \_\_\_ S.Ct. \_\_\_, 2009 WL 63882 (2009)

Crime of failure to report for penal confinement does not constitute a "violent felony" under the ACCA. Chambers did not show up four times to serve sentence of 11 weekends of incarceration. Citing *Begay*, the S.Ct. concludes his crime does not have as an element the use, attempted use, or threatened use of physical force against the person of another and does not fall within the statutorily enumerated violent crimes or "involve conduct that presents a serious potential risk of physical injury to another." The Court looked to a USSC report on 160 cases of failure to report, none of which involved violence.

### **CIVIL RIGHTS**

*Pearson v. Callahan*, \_\_\_ S.Ct. \_\_\_, 2009 WL 128768 (2009)

The Court unanimously reversed the 10<sup>th</sup> Circuit, holding that when assessing an issue of qualified immunity in a § 1983 matter, courts are not required to rigidly adhere to the sequence of the *Saucier v. Katz*, 533 U. S. 194 (2001) procedure, when determining whether the law the cop allegedly violated was "clearly established." In violation of the 4<sup>th</sup> A, police entered P's house without a warrant, arguing that they were justified under the consent-once-removed doctrine, because consent had given a confidential informant permission to enter. Ultimately, the Court held that it was NOT clearly established that consent to an *informant* was ineffective consent for cops to enter (the law was that consent to an *undercover cop* was good consent for other cops to enter). In doing so, it jettisoned the requirement that courts invariably first decide whether the facts that a plaintiff has alleged make out a violation of a constitutional right before making the "clearly established" inquiry.

It is not clear where the *Saucier* standard stands, since in some language the Court says it is not mandatory but beneficial to apply; and, it is not clear where this leaves lower courts in assessing issue of QI.

## CONFRONTATION

*Giles v. California*, 128 S.Ct. 2678 (2008)

The Court held that "theory of forfeiture by wrongdoing" allowing admission of wife's pre-death statements made to a cop who responded to a DV call (because D had forfeited his right to confront the victim's testimony because he had committed the murder for which he was on trial) did not historically exist and couldn't be created now. The rule allowing admission of the statements of absent witnesses applied where the defendant's conduct was intended to keep the witness from testifying. However, the Court did not shut the door on admission of the testimony. It stated that because acts of domestic violence are often intended to prevent the victim from obtaining help, a defendant's prior abuse or threats of abuse that were intended to dissuade the victim from seeking help would be highly relevant to determining whether the defendant intended with a subsequent act to cause the victim's absence, as would evidence of ongoing court proceedings at which the victim was expected to testify. The state courts did not consider the defendant's intent in this case, and could do so on remand.

## CRIMINAL PROCEDURE

*Irizzary v. United States*, 128 S.Ct. 2198 (2008)

Federal Rule of Criminal Procedure 32(h), requiring the sentencing court to give notice of a potential upward departure on a ground not specified in a PSR or pre-hearing submissions, does not apply to variances from a recommended guideline range.

*Van de Kamp v. Goldstein*, \_\_\_ U.S. \_\_\_, 2009 WL 160430 (2009)

In another unanimous decision, the Court says absolute immunity extends to the bosses of those who fail to turn over *Giglio* impeachment material. The Court had already extended absolute immunity to the front-line prosecutors for that unconstitutional conduct. It now applies for failure to properly train or supervise prosecutors and for failure to establish an information system containing potential impeachment material about informants. The Court saw no reason to distinguish the bosses from their underlings in terms of the reasons for prosecutorial absolute immunity related to trial matters. The plaintiff argued there was a distinction between administrative duties and court-officerish responsibilities. But the Court didn't buy that, given that eventually it all comes down to an individual trial. The Court was afraid allowing prosecutors to be sued for violating *Giglio* would lead to all sorts of horrors: the "constant dread of retaliation" would hinder the prosecutors' exercise of their discretion and the "unique and intolerable burden" of having to defend themselves when they are responsible for hundreds of indictments and trials every year. In this case, the plaintiff had gotten his conviction overturned on habeas review because the prosecution had not told his trial attorney the informant in his case had reaped many benefits from the state in many cases. Unfortunately, by the time he succeeded he had spent 24 years in prison.

*Corley v. United States*, \_\_\_ S. Ct. \_\_\_, 2009 WL 901513 (2009)

In a 5-4 decision, McNabb-Mallory lives on. The government argued Congress had wiped out the suppression of voluntary confessions given during the delay from arrest to bringing the defendant before the magistrate, established in McNabb and Mallory. 18 U.S.C. § 3501(a) says a confession shall be admissible if it is voluntarily given. But (c) indicates a confession would be inadmissible if given after six hours pre-magistrate delay, absent a decent reason for further delay. The majority [the usual suspects plus Justice Kennedy] holds that (a) was meant to eradicate *Miranda*, but not the McNabb-Mallory rule, while (c) was meant to limit McNabb-Mallory to delays of more than six hours.

## DRUGS

*Abuelhawav. United States* \_\_\_U.S. \_\_\_, 2009 WL 1443133 (2009)

While it may take two to tango, the same is not necessarily true in facilitating a felony with a phone. D's two 1-gram purchases of cocaine were misdemeanors under 21 USC § 844, and his use of a telephone to make those purchases, according to a unanimous Court, did not facilitate the felony committed by his seller in distributing the drugs to him (the Court adopted the side in the circuit split followed by the 10<sup>th</sup>, so this is not new for us). The Court rejects the wide-sweeping literal interpretation argued by the government of "facilitate" as used in the statute (use of the phone made the seller's distribution easier), as contrary to common usage: a sale always presupposes at least two

parties so “facilitate” adds nothing; also, the legislature has already calibrated a gradation of punishment as higher for distributor, lower for user/buyer.

## **EIGHTH AMENDMENT**

***Kennedy v. Louisiana***, 128 S.Ct. 264 (2008)

The Court struck down as unconstitutional the Louisiana law allowing the DP for child rape. If the victim does not die or death was not intended, capital punishment violates the Eighth Amendment. The broad declaration that death sentences should be reserved “for crimes that take the life of the victim” will apply, the Court said, to crimes against individuals — thus leaving intact, for example, a death sentence for treason.

## **FIREARMS**

***United States v. Ressaam***, 128 S.Ct. 1858 (2008)

D was convicted of (1) knowingly giving false information to a customs official in violation of 18 U.S.C. § 1001 while attempting to enter the United States and (2) carrying an explosive during the commission of that felony in violation of § 844(h)(2). The Court held that D was “carrying” those explosives “during” the commission of the false statement, finding that Congress “did not intend to require the Government to establish a relationship between the explosive carried and the underlying felony.”

***United States v. Hayes***, \_\_\_ U.S. \_\_\_, 2009 WL 436680 (2009)

In order to establish a violation of 18 U.S.C. § 922(g)(9), which prohibits gun possession by a person convicted of a “misdemeanor crime of domestic violence” (defined in § 921(a)(33)(A)), there must be proof that the predicate misdemeanor involved a domestic relationship. However, it is not necessary that the predicate misdemeanor have as an element the domestic relationship between the aggressor and victim. In this case, Mr. Hayes was convicted in West Virginia of battery; as reflected in the indictment, the vic was his wife. Looking to statutory construction, purpose, and legislative history, the Court overruled the 4th Cir., which had ruled contrary to 9 other COAs, including the 10<sup>th</sup>.

***Dean v United States***, \_\_\_ S. Ct. \_\_\_, 2009 WL 1138892 (2009)

In a 7-2 opinion upholding the 11<sup>th</sup> Cir., the court ruled that one can be convicted of discharging a firearm during the course of a drug trafficking crime or violent crime (resulting in a mandatory consecutive 10 year sentence under Sec. 924(c)(1)(A)(iii)), even if the gun accidentally discharged (there was strong evidence the gun discharged accidentally). The court construes the statute as not having an intent requirement (intent to discharge). The court rejects arguments that a mens rea element must be implied in a statute that punishes so severely, stating that unintended consequences of unlawful acts are routinely punished; and, it rejects application of the rule of lenity, since there is no ambiguity in the statute.

(Interestingly cert was granted on just a two circuit conflict, between the 11<sup>th</sup> and the DC Cir.)

## **HABEAS CORPUS**

***Hedgpeth v. Pulido***, \_\_\_ S.Ct. \_\_\_, 2008 WL 5055738 (2008) (per curiam)

instructional error that permitted jury to convict Pulido of felony murder under a theory invalid under California law is subject to *Brecht v. Abrahamson* harmless error analysis, i.e., whether the error had a “substantial and injurious effect” on the verdict.

***Jimenez v. Quarterman***, \_\_\_ S.Ct. \_\_\_, 2009 WL 63833 (2009)

When a state habeas court permits a defendant to file a direct appeal out of time, the state conviction does not become final for purposes of the 1-year AEDPA limit for filing a federal habeas corpus petition until the conclusion of the out-of-time state appeal proceeding or the expiration of time for seeking review of that appeal on certiorari.

***Waddington v. Saurasad***, \_\_\_ S.Ct. \_\_\_, 2009 WL 209 WL 129033 (2009)

For habeophiles: a 6-3 opinion reversing granting of the writ. The federal constitutional right at issue: the state’s

burden to prove each element beyond a reasonable doubt. The context: a prosecutor who misstated the standard for accomplice liability in argument (“in for a dime, in for a dollar” rather than the required proof that the D knew the co-D’s intent when the co-D shot and killed another), and state instructions on accomplice liability that were arguably ambiguous. The Court first noted that when the instruction is based on the state statute, even if somewhat ambiguous, the P must show “ a reasonable likelihood that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt.” According to the Court, the highest state court determination that the instruction was not ambiguous was not unreasonable and the federal inquiry should have ended. Additionally, the state court reasonably applied S. Ct. precedent when determining that there was no “reasonable likelihood” that the prosecutor’s closing argument caused P’s jury to apply the instruction in a way that relieved the prosecution of its burden to prove every element of the crime beyond a reasonable doubt. The dissent weighs the facts and record differently and would find that indeed there was a reasonable likelihood that the prosecutor’s erroneous argument and the ambiguous instructions caused the jury to not hold the prosecution to its correct burden.

***Knowles v. Mirzayance***, \_\_\_S.Ct. \_\_\_, 2009 WL 746274 (2009) - reversal of § 2254 relief based on ineffective assistance. Pursuant to counsel's recommendation, Mirzayance withdrew his not guilty by reason of insanity plea after he was found guilty of first degree murder. Under California law, guilt is determined first, then there is a second phase to determine the viability of the insanity defense. After state courts denied postconviction relief, district court and 9th Cir. concluded counsel was ineffective because there was nothing to lose by putting on insanity evidence and there was a reasonable probability the jury would have bought it. The Supremes conclude state court decision did not violate clearly established federal law and was not unreasonable and that neither prong of *Strickland* was established. Further, they point out that they have never endorsed any such standard as "nothing to lose" for evaluating ineffective assistance claims. "And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." A § 2254 *Strickland* claim calls for "doubly deferential judicial review."

***Harbison v. Bell***, \_\_\_ S. Ct. \_\_\_, No. 07-8521 (2009)

28 USC § 3599(e) provides for federal appointment of counsel to state prisoner on state clemency proceedings when counsel has been appointed to represent that person in § 2254 proceedings challenging a death sentence or the underlying conviction. Federally appointed counsel moved to represent petitioner in clemency proceedings after losing the federal habeas and after the state of Tennessee refused to appoint counsel for his clemency petition citing lack of authority to appoint. A plain reading of the statute does not limit appointment to federal clemency proceedings. Procedurally, P was not required to seek a certificate of appealability under § 2253 to appeal federal district court denial of counsel’s motion—that provision only applies to final orders on the merits of a habeas petition, which this motion was not.

***Cone v. Bell***, \_\_\_ S.Ct. \_\_\_, 2009 WL 1118709 (2009)

Mr. Cone was convicted in Tennessee court of murdering two people and sentenced to death. His defense was insanity -- that he was suffering from acute amphetamine psychosis as a result of a severe addiction attributable to trauma Cone experienced in Vietnam. Years later, he discovered that the state withheld witness statements supporting his drug addiction claims. The Supremes conclude that the state did not reject the *Brady* claim on a state law ground that bars federal review--contrary to the holdings of the lower federal courts, Cone fairly presented his claim to the state courts for their initial consideration, so it was properly preserved and exhausted in Tennessee courts. While there was not a reasonable probability that the withheld evidence would have altered the trial outcome, the suppressed evidence might have been material to at least one juror's assessment of the appropriate penalty. Case is remanded to the district court to assess the cumulative effect of the suppressed evidence with respect to the capital sentence.

## **IMMIGRATION**

***Niken v. Holder***, \_\_\_ S. Ct. \_\_\_, 2009 WL 1065976 (2009)

Traditional stay factors, not the much more demanding standard in the Illegal Immigration Reform and Immigrant Responsibility Act §1252(f)(2) , govern a court of appeals’ authority to stay an alien’s removal pending judicial

review. “An appellate court’s power to hold an order in abeyance while it assesses the order’s legality has been described as inherent, and part of a court’s traditional equipment for the administration of justice.”

## **JURY**

*Rivera v. Illinois*, \_\_\_ S.Ct. \_\_\_, 2009 WL 815033 (2009)

trial court's erroneous denial of a peremptory juror challenge did not amount to a structural error and did not violate the federal constitutional right to a fair trial before an impartial jury because the improperly seated juror was qualified and unbiased.

## **MONEY LAUNDERING**

*United States v. Santos*, 128 S.Ct. 2020 (2008)

Applying the rule of lenity, the Court held that the term “proceeds,” as used in the federal money-laundering statute, means profits, not receipts.

*Cuellar v. United States*, 128 S.Ct. 1994 (2008)

The Court held that in order to prove a violation of the money laundering statute, the government does not need to show that the defendant attempted to make illegal funds appear legitimate, but it is required to show that the defendant did more than merely hide the funds during transport. To sustain a conviction, the government must prove that the defendant knew that a purpose of the transportation was to conceal or disguise a listed attribute of the illicit funds.

## **PLEA AGREEMENTS**

*Puckett v. United States*, \_\_\_ S. Ct. \_\_\_, 2009 WL 763354 (2009)

When a defendant fails to object at the time of sentencing that the government has violated/breached the terms of its plea agreement, the claim is forfeited and on appeal it is reviewed under Fed. Crim. P. R. 52(b) for plain error. The Court confirms that Rule 52 is basically a contemporaneous objection rule. (Breach in this case was the government’s countering its promise to ask for 3 point reduction for acceptance by arguing for no acceptance based on fact D had committed a new crime after the plea and before sentencing. Government conceded breach on appeal).

Court rejects a number of D’s claims: a breach does not render the plea involuntary so that counsel’s failure to object is immaterial to voluntariness and moreover, counsel did not *waive* the claim; in *Santobello* counsel did object to the breach and that case only addressed harmlessness, not the standard of review; practically, a contemporaneous objection can be fruitful—maybe there was no breach, some breaches can be cured, etc.; regarding third PE prong of prejudice, a plea breach is not a “structural” error that so effects the framework of a prosecution rendering it fundamentally unfair or unreliable for determining guilt or innocence and *Santobello* did not hold otherwise (*Santobello*’s automatic reversal for breach was based on policy of establishing trust between defendants and prosecutors—Court hints darkly that this automatic reversal remedy might disappear); regarding the fourth PE prong, every breach of a plea agreement does not constitute a miscarriage of justice. PS: This is a reversal of the 10<sup>th</sup> Circuit’s position which did not require contemporaneous objections to plea breaches.

Souter and Stevens dissent: the third PE prong of prejudice should focus NOT on what sentence the defendant would have received but for the error (breach), but on the conviction in the absence of a trial—the right to a trial lost/given up in the plea contract.

## **PORNOGRAPHY**

*United States v. Williams*, 128 S.Ct. 1830 (2008)

In child pornography case, the Court held that the pandering and solicitation provision at 18 U. S. C. § 2252A(a)(3)(B) is neither overbroad under the First Amendment nor impermissibly vague under the Due Process

Clause.

## **SEARCH AND SEIZURE**

***Herring v. United States***, \_\_\_ S.Ct. \_\_\_, 2009 WL 2009 WL 77886 (2009)

In a 5-4 decision, Roberts writing for the majority, the S.Ct., applying the *Leon* good faith exception, determines that under the facts of this case, the exclusionary rule does not bar admission of evidence gathered incident to an illegal arrest. P was arrested on a warrant that had been recalled some months earlier, but was not taken out of the database, so the officer believed it to be an active warrant. Incident to arrest, police discovered drugs and a gun on P's person. The S. Ct. accepted the parties' agreement that the arrest was in violation of the Fourth Amendment. Here, there was no evidence that the police maintenance of its warrants system was anything but negligent—it was not recklessly or intentionally out of date. (The opinion suggest what evidence might show recklessness). So basically leaping over the illegal arrest and looking back at the out-of-date warrant that caused the arrest, the majority reasoned that because the officer relied on that warrant in good faith, the exclusionary rule purposes were not served by suppressing the evidence. Ginsburg dissents, (with Stevens, Souter and Breyer): If there is an acknowledged illegal arrest, there must be some remedy, and that remedy is excluding the evidence gained as a result of the illegality. Moreover, police must be held to some standards of maintaining their record keeping, since there are grave consequences from failure to maintain accuracy.

***Arizona v. Johnson***, \_\_ U.S. \_\_\_, 2009 WL 160434 (2009)

In a unanimous decision, the Court holds that to justify a pat-down of a passenger in a car lawfully stopped by the police, the police need not have cause to believe the passenger was involved in criminal activity. They only have to believe the passenger was armed and dangerous. The Court opined that "the temporary seizure of passengers ordinarily continues, and *remains reasonable*, for the duration of the stop. Normally the stop ends when the police have no further need to control the scene." That point had not been reached in this case. The officer could not have been expected to allow the passenger to leave the scene "without first ensuring she was not permitting a dangerous person to get behind her." The Court did not determine if there was reason to believe the passenger was armed and dangerous. The lower court could decide that on its own.

***Arizona v. Gant***, \_\_\_ S.Ct. \_\_\_, 2009 WL 1045962 (2009)

The Supremes decided that the Fourth Amendment permits police search of a vehicle's interior after an arrest only if there is reason to believe that the arrested individual might gain access to the vehicle or that evidence *of the crime of arrest* might be found in the vehicle. The court noted that its decision in *NY v. Belton*, 453 U.S. 454 (1981), permitted searches of every purse, briefcase, and other container inside the passenger compartment and concluded that authorizing such an invasive search whenever a traffic offense occurs "creates a serious and recurring threat to the privacy of countless individuals."

## **SENTENCING**

***Greenlaw v. United States***, 128 S.Ct. 2559 (2008)

Absent a government appeal or cross-appeal, a court of appeals does not have the power to *sua sponte* increase a defendant's sentence, even if it is to correct a plain error. The Court relied on "that unwritten but long-standing rule" that "an appellate court may not alter a judgment to benefit a nonappealing party," as well as the express limitations on government appeals in 18 USC § 3742(b).

The majority opinion recognizes two important protections for our clients who seek to appeal their sentences. First, it makes clear that its holding does not modify standard practice in "sentencing package cases," meaning cases involving multiple counts and a successful appeal of some but not all of the convictions. According to the Court, an appellate court remains free to vacate the entire sentence, and a district court remains free to impose the same or a higher sentence on the remaining counts on remand so long as the new sentence is not longer than the original sentence taken in the aggregate. This provides a crucial protection for our clients because, as the Court notes, although such a defendant "ultimately may gain nothing from his limited success on appeal, . . . he will also lose nothing, as he will serve no more time than the trial court originally ordered." Second, the majority rejects the

argument that its holding will produce anomalous results by permitting the district court on remand to correct the same legal error that the court of appeals was powerless to correct: "The cross-appeal rule, we of course agree, does not confine the trial court. But default and forfeiture doctrines do. It would therefore be hard to imagine a case in which a district court, after a court of appeals vacated a criminal sentence, could properly increase the sentence based on an error the appeals court left uncorrected because of the cross-appeal rule."

***Oregon v. Ice***, \_\_\_ S.Ct. \_\_\_, 2009 WL 77896 (2009)

In a 5-4 decision, Ginsburg writing for the majority, the S. Ct. determines Oregon law that allows a judge to find facts to support a determination that sentences should run consecutive to one another rather than the statutory default position that they run concurrently, does not run afoul of *Apprendi/Blakely* and the Sixth Amendment. Oregon is one of only a few states that constrains a judge's discretion on imposition of consecutive or concurrent sentences by allowing consecutive only in certain circumstances. *Apprendi* was based upon what was seen as traditional jury function, and the decision on whether to impose a sentence consecutively or not is not a traditional jury function. This, in combination with respect for a state's sovereignty in its administration of its penal system, counsels a determination that the Oregon system is constitutional. Scalia dissents (with Roberts, Thomas, and Souter): *Apprendi* is *Apprendi*. The majority makes a distinction without a difference.

***Spears v. United States***, \_\_\_ S.Ct. \_\_\_, 2009 WL 2009 WL 129044(2009)

Per curiam opinion, hammering away at a recalcitrant 8<sup>th</sup> Circuit on a fairly straightforward *Kimbrough* issue: can a district court disagree with and vary from the crack guidelines, and when determining the sentence it will impose, substitute a 20:1 ratio for the 100:1 ratio? After the S. Court's first post-*Kimrough* remand, the 8<sup>th</sup> still held that the district court could not categorically reject the ratio. Hence, the Court's second grant of cert, reversal and remand: "*Kimrough* considered and rejected the position taken by the Eighth Circuit below." Most importantly, the Court identifies that a policy disagreement can be a stand-alone reason for a variance and it affirmatively does not need to be coupled with a determination that a sentence based on a 100:1 ratio is too harsh (in other words, it rejected the 8<sup>th</sup> and the dissent's position that a policy disagreement is possible only if in conjunction with an individualized assessment of the case as a whole). This becomes yet another strong decision cutting sentencing court discretion loose from the binds of the guidelines.

Roberts, Alito and Thomas dissent, recognizing that the 8<sup>th</sup> may have misapplied *Kimrough* but complaining about the harshness of summary reversal and saying that the case should simply not have been taken by the Supremes at this point in time.

***Nelson v. United States***, \_\_\_ U.S. \_\_\_, 2009 WL 160585 (2009) (per curiam)

The S. Ct. holds the d. ct. erred when it presumed a guideline range sentence to be reasonable. The 4th Circuit had recognized the d. ct.'s presumption conflicted with what *Rita* had said, but affirmed because the d. ct. had not applied the guidelines in a mandatory fashion. The Court made clear it is also error for a d. ct. to presume the guideline range to be reasonable. Breyer and Alito would have just vacated and remanded without a decision.

## **SIXTH AMENDMENT**

***Rothgery v. Gillespie County***, 128 S.Ct. 2578 (2008)

The Court held that the Sixth Amendment right to counsel attaches at the initial appearance before the magistrate judge where the D learns the charges against him and is subject to a potential loss of liberty, even if the proceeding is so preliminary that the prosecutor is unaware of it and uninvolved in it.

***Indiana v. Edwards***, 128 S.Ct. 2379 (2008)

Criminal defendants with a history of mental illness do not always have the right to represent themselves, even though they have been judged competent to stand trial. States can give trial judges discretion to prevent someone from acting as his own lawyer if they are concerned that the trial could turn into a farce.

***Kansas v. Ventris***, \_\_\_ S. Ct. \_\_\_, 2009 WL 1138842 (2009)

Reversing the state decision in favor of the defendant in a 7-2 opinion authored by Scalia, the court found that a

confession taken in violation of the 6A right to counsel (in this case, the state conceded it planted an informant in D's cell to elicit a confession from him in violation of the 6A, and conceded that the confession was not admissible in the case in chief) is still usable to impeach the D if he should testify at trial. Scalia uses the case as an opportunity to pronounce again on the reasons for and therefore applications of the exclusionary rule as a deterrence remedy for a constitutional violation.

*Montejo v. Louisiana* \_\_\_ U.S. \_\_\_, 2009 WL 1443049 (2009)

Allowed to whittle, Scalia will do so, with a chain saw. In a 5-4 decision the Court overruled *Michigan v. Jackson*, reasoning that its prophylactic rule—that once an attorney is requested at arraignment, that is an invocation of the 6A right to counsel for every subsequent critical stage of the prosecution and police may not question a suspect—is “untenable.”

The toehold for Scalia is the variety of state laws dealing with appointment of counsel at first appearances—because some automatically appoint counsel, there is no “request” by the accused, and with no invocation of the right to counsel there could be no corresponding later waiver of the right to be analyzed for voluntariness.

In weighing whether to overrule *Jackson*, Scalia indulged in his favorite fiction: the benefit of a rule protecting rights of individuals was minimal as opposed to the hindrance to effective law enforcement. Under *Miranda-Edwards-Minnick*, the territory is covered (hence, a D must invoke the right to counsel) (Scalia acknowledged that *Miranda* and *Edwards* are 5<sup>th</sup> A cases). Scalia finds it inconsequential that *Miranda* and *Edwards* apply only to custodial interrogations, because if out of custody, a suspect is least likely to be exposed to coercive police questioning.

The dissent points out that *Miranda* and *Edwards*, as 5A cases, deal with the badgering/involuntary confession line of police misconduct. *Jackson*, however, vindicates the 6A right to counsel, and the principle that a professional advocate should be at the side of the accused at critical stages of prosecution.

### **SPEEDY TRIAL**

*Vermont v. Brillon*, \_\_\_ U.S. \_\_\_, 2009 WL 578642 (2009)

Two main holdings by a 7-2 vote regarding the *Barker v. Wingo* 4-part test to determine if a defendant's speedy trial right has been violated : (1) An appointed counsel's failure to move the case forward does not count against the state unless there has been a breakdown in the public defender system, which did not occur in this case, according to the majority. Defense counsel acts on behalf of the defendant, not the state. We don't want to encourage nefarious counsel seeking continuances in the hope of creating a speedy trial violation and dismissal. (2) The defendant's role in delaying the trial by, for example, threatening one attorney and asking for a new attorney on the eve of trial, should have been counted against the defendant.

The S. Ct. did indicate that the six months of time in which the defendant had no counsel could be counted against the state. Without actually addressing the other *Barker* factors, the S. Ct. rules that, in light of the new attributions of delay, the almost 3-year delay did not constitute a speedy trial violation.

Justice Breyer joined by Justice Stevens dissented. Justice Breyer primarily disagreed with the majority's interpretation of the Vermont S. Ct.'s decision. He did not feel the court relied on the attribution to the state of defense counsel's actions. He also pointed out a lot of the delay was due to public defender issues, e.g. contracts running out and contract lawyers who didn't do much. He says the Court should have dismissed the writ as improvidently granted. On the merits, he concludes the state supreme court had leeway in supervising the appointment of public defenders and it did not exceed its leeway in this case.