Current Circuit Splits

The following pages contain brief summaries, drafted by the *Seton Hall Circuit Review* members, of circuit splits identified by a federal court of appeals opinion between April 1, 2005 and August 31, 2005. This collection is organized first according to Civil/Criminal Matters, then by area of law.

Each summary is intended to give only the briefest overview of a current split, not a comprehensive analysis. Likewise, this compilation is by no means exhaustive, but will hopefully serve the reader well as a reference starting point.

CIVIL MATTERS

STATUTORY INTERPRETATION

Voting Rights Act: Felon Disenfranchisement – *Johnson v. Governor of State of Fla.*, 405 F.3d 1214 (11th Cir. 2005)

In this case, one issue on appeal was whether Florida's felon disenfranchisement law, which denies convicted felons the right to vote, is in violation of § 2 of the Voting Rights Act (42 U.S.C. § 1973). The 11th Circuit held that "interpreting Section 2 of the Voting Rights Act to deny Florida the discretion to disenfranchise felons raises serious constitutional problems because such an interpretation allows a congressional statute to override the text of the constitution." *Id*. at 1229. The constitutional problem arises from the 14th Amendment's proscription of the right to vote "for participation in rebellion, or other crime." U.S. CONST. AMEND. XIV, § 2. Therefore, the court sided with the 2nd Circuit by affirming the lower court and holding that § 2 of the Voting Rights Act does not apply to felon disenfranchisement provisions. *Id*. In doing so, the court declined to follow the 9th Circuit's ruling in *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), which found that a felon disenfranchisement provision violated § 2 of the Voting Rights Act. *Id*. at 1232. Furthermore, although the 6th Circuit assumed that § 2 applied to felon disenfranchisement laws, it held that there was no violation. *See Wesley v. Collins*, 791 F.2d 1255, 1259-61 (6th Cir. 1986).

Prison Litigation Reform Act (PLRA) – *Bey v. Johnson*, 407 F.3d 801 (6th Cir. 2005)

The plaintiff, a prisoner, alleged that he was a victim of excessive force and retaliation. *Id.* at 804-05. The issue was whether the PLRA required a dismissal of a prisoner's complaint when both exhausted and unexhausted claims were alleged. *Id.* at 806. The court noted that some circuits required total exhaustion, while others did not. *Id.* The 6th Circuit joined the 8th and 10th Circuits in holding that total exhaustion is required under the PLRA. *Id.* In so holding, the court reasoned that the PLRA's plain language called for such a result and that the policies underlying the PLRA required total exhaustion of the claims. *Id*. at 807. The policies, as noted by the court, included reducing frivolous actions

and giving prisons the opportunity to solve problems internally. *Id*. Lastly, the court stated that "adopting the total exhaustion rule creates comity between 1983 claims and habeas corpus claims." *Id.*

ERISA: Jurisdiction – *Mid. Atl. Med. Servs., L.L.C. v. Sereboff*, 407 F.3d 212 (4th Cir. 2005)

The 4th Circuit in this matter joined the 5th, 7th, and 10th Circuits in holding that an ERISA "plan fiduciary may maintain an action for equitable relief if the plan is seeking to recover funds that are specifically identifiable, belong in good conscience to the fiduciary, and are within the possession and control of the beneficiary." *Id*. at 219. Conversely, the 6th and 9th Circuits have held that that a "plan fiduciary's assertion of a subrogation right to reimbursement from a plan beneficiary who has received payments from a third party is legal in nature, regardless of whether the beneficiary possesses that recovery in an identifiable fund." *Id*. at 219 n.7. The split among the circuits involve the interpretation of the phrase "other appropriate equitable relief" as it is found in ERISA. *Id*.

Environmental Regulation: Public Notice & Access Requirements – *Tex. Indep. Producers & Royalty Owners Ass'n v. EPA*, 410 F.3d 964 (7th Cir. 2005)

The issue in this case was whether Notices of Intent ("NOI") and Storm Water Pollution Prevention Plans ("SWPPP") are considered to be permit applications requiring public notice and access where the statute is silent. *See id*. at 977. The EPA issues general permits, which allow companies to release storm water discharge from industrial activities into navigable waters, by approving applications for a NOI and site-specific SWPPP. *Id.* at 967-69. The 7th Circuit agreed with the EPA's characterization of the nature of the NOIs and SWPPPs and noted a circuit split with regards to the 9th Circuit's opinion that NOIs were equal to permits and should be subject to public availability. *Id*. at 978. The split is created by the 7th Circuit's determination that NOIs and SWPPPs are not permit applications requiring public notice and access. *Id*.

ADA: Reasonable Accommodation for Individuals "Regarded as" Disabled – *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220 (11th Cir. 2005)

This case required the 11th Circuit to decide whether the "ADA's reasonable accommodation requirement applies to the regarded-as category of disabled individuals." *Id*. at 1235. The court found that based on a review of the plain language of the ADA, "regarded as" individuals are "entitled to reasonable accommodations under the ADA." *Id*. The court based its holding on a plain reading of the statute whereby the court found that the language makes no distinction between an individual "in the actual-impairment sense" to an individual regarded as disabled. *Id*. The 11th Circuit's findings in this case are in line with the 3rd Circuit's holding in *Williams v. Phila. Hous. Auth. Police Dep't*, 380 F.3d 751 (2004), and the 1st Circuit's implicit holding in *Katz v. City Metal Co.*, 87 F.3d 26 (1996), where the 1st Circuit indirectly addressed the issue by assuming that the ADA applied to the "regarded as" class of individuals. *Id*.

However, the 5th, 6th, 8th, and 9th Circuits all have found that the ADA reasonable accommodation requirements did not apply to individuals regarded as disabled. *Id*. Those courts found that "requiring employers to accommodate individuals they merely regard as disabled would produce anomalous results that Congress could not have intended." *Id*. at 1237. The 11th Circuit dismissed this rationale by stating that it is not for the courts to decide whether the statute drafted by the legislature may produce some anomalous effects, but instead it must uphold the statute as it reads. *Id*. at 1238. Therefore, the 11th Circuit joined the 1st and 3rd Circuits in holding that the ADA's reasonable accommodation requirement extends to individuals regarded as disabled. *Id*. at 1239-40.

Lanham Act: Equitable Defenses – *Pro-Football, Inc. v. Harjo*, 415 F.3d 44 (D.C. Cir. 2005)

This case presented the D.C. Circuit with the issue of whether the equitable defense of laches is available to a defendant in an action alleging violation of the Lanham Trademark Act. *Id.* The D.C. Circuit noted that the 3rd Circuit has held that the defense of laches was unavailable in such a cause of action, while the Federal Circuit permitted such use. *Id.* at 48. The D.C. Circuit adopted the position of the Federal

Circuit, noting that the Act "explicitly permits consideration of laches and other equitable doctrines . . . ." *Id.*

IMMIGRATION

Jurisdiction: Appeals at BIA "Streamlining" Procedures – *Sarr v. Gonzales*, 127 F. App'x 815 (6th Cir. 2005)

The 6th Circuit, in an unpublished opinion, affirmed an Immigration Judge's factual finding that human rights conditions in the African nation of Mauritania had changed sufficiently to rebut an alien's fear of future persecution upon removal from the United States. *Id.* at 817. On appeal, Sarr challenged the Board of Immigration Appeals' ("BIA") use of a "streamlined" procedure to affirm the IJ's findings. *Id.* at 817-18.

The 6th Circuit acknowledged a split among the circuits that have addressed the issue of whether it has jurisdiction to review a BIA decision to streamline a case pursuant to 8 C.F.R. § 1003.1(e)(4). *Id.* at 819 n.1. The 1st, 3rd, 5th, 7th and 9th Circuits have declared "that at least a certain subset of BIA decisions to streamline [is] reviewable." *Id*. The BIA's decision to streamline a case generally is not reviewable according to the 8th and 10th Circuits. *Id.* at 819 n.2.

Without deciding whether it had the jurisdiction to make such a determination, the 6th Circuit affirmed the BIA's decision to streamline Sarr's appeal. *Id.* at 819 n.3. "Assuming that we can review the BIA's decision," the 6th Circuit noted, Sarr's "cursory arguments" that merely asserted "substantial factual and legal issues" were insufficient to challenge the BIA's procedure. *Id.* at 817, 819.

Jurisdiction: Appeals of BIA Discretionary Decisions – *Mariuta v. Gonzales*, 411 F.3d 361 (2d Cir. 2005)

The transitional rules under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") provide that a court will not have jurisdiction of an appeal from a decision by the Board of Immigration Appeals ("BIA") where the decision was made under one of the statutory sections and was made under the agency's discretion. *Id*. at 364. The 2nd Circuit affirmed the standard used by other circuits to determine that they did not have jurisdiction to hear this matter, but

noted a discrepancy with the 3rd Circuit's contrary decision finding jurisdiction over a BIA decision because it was not considered to have been made "on the merits." *Id.* at 367 n.7. The 2nd Circuit expressly disagreed with the 3rd Circuit's opinion, and noted that there should not have been jurisdiction in that matter where the decision was made under the agency's discretion. *Id*.

Relief: Nunc Pro Tunc – *Pereira v. Gonzales*, 417 F.3d 38 (1st Cir. 2005)

This case presented the 1st Circuit with the issue of whether *nunc pro tunc* relief is available where an alien has become ineligible for a discretionary waiver of deportation. *Id.* at 46 (citing 8 U.S.C. § 1182(c)). Eligibility is barred where "an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years." *Id.* at 40. The 1st Circuit declined to follow the 2nd Circuit, which had held that such relief was available. *Id.* In doing so, the court noted that "the language of [the statute makes clear that] the relief sought simply does not exist for an aggravated felon who has served five years of his felony term." *Id.* at 47.

Deportation: Reinstatement Procedures – *Tilley v. Chertoff*, 144 F. App'x 536 (6th Cir. 2005)

In this *per curiam* opinion, the 6th Circuit considered a circuit split over whether the reinstatement procedures for deporting illegal immigrants under 8 C.F.R. § 241.8 are constitutional. *Id.* at 539. The court noted that the 1st and 8th Circuits have held that the regulations "fall within the discretion of the Attorney General." *Id.* The 9th Circuit, however, declared the regulations unconstitutional based on their findings that an immigration judge shall conduct these proceedings and the regulations under 8 C.F.R. § 241(a)(5) do not allow for this procedure. *Id*. at 539-40. The 6th Circuit disagreed with the 9th Circuit and held that, under the plain language of § 241(a)(5), if it is found by the Attorney General that an alien has illegally reentered the United States after prior removal or voluntary departure, the prior order of removal is reinstated and not subject to be reopened or reviewed, nor may the alien apply for relief. *Id.* at 540. The court held that the regulations in § 241.8 met all of the requirements of § 241(a)(5) and,

therefore, no ambiguity existed that required review. *Id.* The court also held that the reinstated order did not violate due process. *Id*. at 541.

Removal Proceedings: Adjustment of Status Eligibility – *Moulle v. Gonzales*, 416 F.3d 923 (8th Cir. 2005)

Congolese husband and wife aliens sought review of orders from the Board of Immigration Appeals ("BIA") which denied their application for asylum and motion to reopen removal proceedings. They sought a remand so that they could apply for adjustment of alien status under 8 U.S.C. § 1255(i). Petitioners argued, in the alternative, that 8 C.F.R. § 1245.1(c)(8) (limiting eligibility for 8 U.S.C. § 1255(i) relief to "arriving aliens in removal proceedings") was invalid. Regarding their second argument, the court created a split with the 1st Circuit by holding that the regulatory bar to status adjustment in 8 C.F.R. § 1245.1(c)(8) was valid. Unlike the 1st Circuit, the 8th Circuit did not find that the statute was invalid due to the discretionary nature of the relief available under 8 U.S.C. § 1255, nor did it find a "basis upon which to conclude that th[e] regulation does not embody the Attorney General's decision not to afford discretionary relief to the delineated class of aliens – arriving aliens in removal proceedings." *Id.* at 928. "While Congress surely did speak to eligibility in [§ 1255], it left the question, of whether adjustment-of-status relief should be granted, to the Attorney General's discretion." *Id.*

Illegal Reentry: Scienter – *United States v. Rodriguez*, 416 F.3d 123 (2d Cir. 2005)

This case presented the 2nd Circuit with the issue of whether the offense of attempted reentry is a specific intent crime that requires the government to allege and prove that a previously deported alien intended to reenter the Unite States. *Id.* at 124 (citing 8 U.S.C. § 1326(a)). Relying on the "common law's requirement of specific intent for attempt crimes," the 9th Circuit has held that Congress intended an attempted reentry under § 1326(a) to be a crime of specific intent. *Id.* at 126. However, based on the plain language of the statute and its legislative history, the 2nd Circuit joined the 1st, 5th and 11th Circuits in holding that there is no "heightened *mens rea* requirement in cases of attempted reentry." *Id.* at 125, 127.

Illegal Reentry: Retroactivity – *Labojewski v. Gonzales*, 407 F.3d 814 (7th Cir. 2005)

In *Labojewski*, the 7th Circuit declined to follow the 8th Circuit, which held that an "illegal reentry by itself is enough to trigger the presumption against retroactivity" of the Illegal Immigration Reform & Immigrant Responsibility Act ("IIRIRA"). *Id.* at 822. The 7th Circuit declined to recognize as reasonable "any claimed reliance on the perpetual availability of discretionary adjustment of status from the moment an alien contemplates illegal entry." *Id.* Thus, the 7th Circuit concluded that § 1231(a)(5) of IIRIRA "does not operate in an impermissibly retroactive fashion when applied against an alien who illegally reentered the United States before but did not apply for adjustment of status until after IIRIRA's effective date." *Id.* at 823.

IIRIRA: Reliance and Retroactivity – *Kelava v. Gonzales*, 410 F.3d 625 (9th Cir. 2005)

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") § 304(b) repealed § 212(c) and replaced it with "a new form of discretionary relief called cancellation of removal, codified in 8 U.S.C. § 1229b." *Id*. at 627. The Attorney General may grant a cancellation of removal for aliens who meet certain criteria. Under 8 U.S.C. § 1229b, an alien deportable for having been involved in terrorist activity is precluded from obtaining such relief. *Id*. The petitioner alien argued that he should not be precluded from this relief because he pled guilty in 1980. *Id*. at 629.

Circuits are split as to whether reliance on a former statute is required to establish impermissible retroactivity. The 3rd and 4th Circuits have taken the approach that a showing of reliance is not necessary to find a retroactive effect. *Id*. at 630. Conversely, the 2nd and 7th Circuits have noted that reliance should not be considered at all. This court, agreeing with the 7th Circuit's view on the "absurdity of arguing that one would not have committed a crime in the first place, or might have resisted conviction more vigorously, if he had known he could not ask for a § 212(c) waiver," held that there was no retroactive effect in applying the IIRIRA. *Id*. at 629-30.

CIVIL PROCEDURE

Statute of Limitations: *Heck* Deferred Accrual Rule – *Gibson v. Superintendent of N.J. Dep't of Law and Pub. Safety*, 411 F.3d 427 (3d Cir. 2005)

The 3rd Circuit found that there had not been delayed accrual of claims according to the *Heck v. Humphrey*, 512 U.S. 477 (1994) deferred accrual rule for claims of false arrest and false imprisonment in violation of the Fourth Amendment stemming from a previous criminal conviction where the statute of limitations had expired. *Id*. at 450. The court recognized a circuit split concerning the analysis to be applied when deciding whether the *Heck* rule should allow an extension of the statute of limitations. *Id*. at 448. The 3rd, 8th and 10th Circuits find that the *Heck* rule will not apply to claims where the success on the claims would not invalidate the prior conviction. *Id*. at 437. The 2nd, 4th, 6th, 7th, 10th and 11th Circuits, however, all endorse a more fact-specific analysis of the claims to determine whether the allow the statute of limitations to be extended through the *Heck* rule. *Id*. at 448.

Federal Claims Act: *Qui tam* cases – *Shaw v. AAA Eng'g*, 138 F. App'x 62 (10th Cir. 2005)

In this case, the 10th Circuit dismissed the defendant's cross appeal because the notice of appeal was untimely and thus the court did not have jurisdiction. *Id*. at 74. The court explained that the defendant could not rely on the 60-day provision under Fed. R. App. P. 4(a)(1)(B) because the United States was not a party to the action. *Id*.

In a *qui tam* action under the Federal Claims Act ("FCA"), the United States can choose to either go forward or withdraw from the lawsuit. *Id*. at 75. Under the former version of the FCA, the 10th Circuit held in *Petrofsky v. Van Colt*, 588 F.2d 1327 (10th Cir. 1978), that if the United States chooses to withdraw from the suit, the parties are no longer afforded a 60-day provision to file a notice of appeal. *Id*. at 74. Here, the 10th Circuit pointed out that under the current version of the FCA, other circuits, including the 5th, 7th and 9th Circuits, have disagreed with its decision in *Petrofsky*. The 10th Circuit noted, however, that the disagreement from the other circuits has not resulted from any pertinent changes under the FCA, but merely out of the "concern that *qui tam*

plaintiffs may be misled into believing that the United States is a party," and under the belief that "Rule 4(a)(1) should be construed to reduce uncertainty." As a result, the 10th Circuit held that it would adhere to its reasoning under *Petrofsky*.

Jurisdiction: Post-Interlocutory Appeals – *McCauley v. Halliburton Energy Servs.*, 413 F.3d 1158 (10th Cir. 2005)

This case involves a split among the federal circuits regarding whether an interlocutory appeal from the denial of a motion for arbitration divests the district court of jurisdiction to hear the merits of the underlying claim while the appeal is pending. *Id.* at 1160. The 2nd and 9th Circuits held that the district court may proceed with the case during the interlocutory appeals process. The 7th and 11th Circuits, however, have stayed district court proceedings until the interlocutory appeal has been resolved (so long as the appeal is not frivolous). The 10th Circuit agreed with the 7th and 11th Circuits, holding that the case is to be stayed, absent a showing by the opposing party (and a certification by the district court) that the appeal is either frivolous or was forfeited.

Habeas Corpus: Availability of Relief Pending Other Forms of Judicial Review – *Lee v. Gonzales*, 410 F.3d 778 (5th Cir. 2005)

Circuits are split as to whether habeas corpus relief is available when other means of judicial review are still available. *Id*. at 783-84. The 2nd and 3rd Circuits have held that "habeas corpus jurisdiction exists even where a petition for review could have been filed." *Id*. at 783. Conversely, this circuit, along with the 1st, 7th, 8th, and 9th Circuits assert that "a petitioner must exhaust available avenues of relief and turn to habeas only when no other means of judicial review exists." *Id*. at 786.

FEDERAL AND CONSTITUTIONAL ISSUES

Federal Criminal Procedures: Sovereign Immunity – *Clymore v. United States*, 415 F.3d 1113 (10th Cir. 2005)

In this FED. R. CRIM. P. 41(e) action, defendant, after pleading guilty to various drug charges, sought the return of property seized from him by the federal government, or, in the alternative, monetary compensation. *Id.* at 1114, 1118. The government claimed that it no longer possessed the property, requiring the 10th Circuit to decide whether, when return of the property is impossible, sovereign immunity barred an award of monetary damages in a FED. R. CRIM. P. 41(e) action. *Id.* at 1118. The *Clymore* court recognized that the circuits are split on the issue, with the majority holding that monetary damages are barred by sovereign immunity. *Id.* The 3rd, 4th, 5th, 8th, and 11th Circuits have all held that monetary damages cannot be awarded by a court in a FED. R. CRIM. P. 41(e) action. *Id.* at 1118-19. The *Clymore* court also noted that two circuits retained jurisdiction and allowed monetary damages when the government has destroyed the subject property. *Id.* at 1119. In one case, the 9th Circuit retained jurisdiction despite the destruction of the subject property and remanded to the district court to allow for monetary damages. *Clymore*, 415 F.3d at 1120. In another case, the 2nd Circuit held that damages may be awarded in a FED. R. CRIM. P. 41(e) action. *Id*. The 10th Circuit, however, joined with the majority of circuits in holding that "sovereign immunity bars monetary relief in a Rule 41(e) proceeding when the government no longer possesses the property." *Id.*

Section 1983: Search and Seizure – *Harvey v. Plains Twp. Police Dep't*, 421 F.3d 185 (3d Cir. 2005)

This case required the court to decide whether qualified immunity should apply in a case where plaintiff has brought a § 1983 claim against a police officer for improperly allowing plaintiff's ex-boyfriend to enter her residence, accompanied by the police officer, and remove items under the authority of a Protection of Abuse Order ("PFA") in violation of her Fourth Amendment rights. *Id*. at 187-89. The majority opinion declared, without discussion, that the constitutional violation of plaintiff's Fourth Amendment right was clearly established. *Id*. The dissent, however, noted a that a split exists amongst several circuits as to whether or not an officer may rely on an order similar to a PFA to enter property. *Id*. at 198-99 (Becker, J., dissenting). The 8th and 10th Circuits have held that orders similar to a PFA do not allow an officer to enter a premises while the 5th and 7th Circuits have held that an officer may enter a residence in order to retrieve property (5th Circuit) and that it is not clearly established that a PFA does not substitute for a warrant (7th Circuit). *Id*. at 199. Circuit Judge Becker states that because the law is

not clearly established on this point, qualified immunity should have applied to the officer. *Id*.

Standing: Rights to Participate in Adjudications – *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934 (9th Cir. 2005)

This case involved the decision of whether an entity with a purely economic interest in the issuance of an Environmental Impact Statement (EIS) had standing to bring a claim that the EIS involved was deficient. The 9th Circuit noted that the statute at issue, § 102(2)(C) of the National Environmental Protection Act, does not provide a private right of action. The court found that the instant matter concerned purely economic, not environmental, interests; thus, there was no private right of action. *Id*. at 939-40

This ruling conflicted with 8th Circuit decisions holding that purely economic interests could fall within § 102(2)(C)'s zone of interests. *Id.* at 941. The 9th Circuit stated that while § 102(2)(C)(iv) (the provision relied upon by the 8th Circuit) did address the issue of "productivity," it did so only in terms of the "relationship between uses of the environment and productivity" and therefore the statute did not "require a discussion of the impacts on productivity that [were] not intertwined with the environment." *Id.*

CRIMINAL MATTERS

SENTENCING

Post-*Booker*: Plain Error Review – *United States v. Gonzalez-Huerta*, 403 F.3d 727 (10th Cir. 2005)

Since the Supreme Court's decision in *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 738 (2005), courts are no longer required to impose a sentence that falls within the U.S. Sentencing Guidelines ("the Guidelines"), but must only consider the Guidelines in determining sentences. In this post-*Booker* appeal, the issue was whether the lower court's mandatory application of the Guidelines constituted reversible error when the lower court relied solely on the defendant's prior convictions and admitted facts in determining his maximum sentence. Because the issue was not raised below, the court reviewed the claim under a plain error standard, which requires "(1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id*. at 732. The court held that to satisfy the third prong, the defendant must show that "the error . . . affected the outcome of the district court proceedings." *Id*. In doing so, the court declined to adopt the approach of the 2nd and 7th Circuits, which provide for limited remands to determine whether the district court would issue a lower sentence. Further, the court refused to collapse the third and fourth prong analyses, which several other courts of appeals have done.

The appellant argued that he bears the burden under the third prong to show that his substantial rights were affected. The court held that although there is a limited exception for "structural errors," which the court defines as a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," the court held that the type of error committed below, what the court calls a "non-constitutional *Booker* error," is not a structural error and defendant therefore bears the burden of showing the he satisfied the third prong. *Id*. at 733-34. Alternatively, the appellant argued that "when a case is pending on appeal and an intervening decision overturns law that was well-settled while the case was in the district court, the appellee should bear the burden to establish that substantial rights were not affected." *Id*.

at 734. In rejecting this argument, the court declined to adopt the approach taken by the 6th Circuit. *Id*. at 735.

Post-*Booker*: Plain Error Review – *United States v. Pirani*, 406 F.3d 543 (8th Cir. 2005)

The Supreme Court has held that "before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, (3) that affects substantial rights." *Id*. at 550 (citing *United States v. Olano*, 507 U.S. 725, 732-36 (1993)). *Olano* also noted a 4th part to the test that would allow for discretion by the court if "the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id*. Here, the 8th Circuit noted a split among the circuits with regard to the third factor, whether the error "affected substantial rights." *United States v. Pirani*, 406 F.3d at 550. The court noted that, in interpreting the third *Olano* factor, it agreed with the 1st, 2nd, 5th, 7th and 11th Circuits. *Id.* at 551. These circuits reason that the third *Olano* factor turns on whether the appellant "has demonstrated a reasonable probability that he would have received a more favorable sentence with the *Booker* error eliminated by making the Guidelines advisory." *Id.* In addition, the court stated that, like the 5th and 11th Circuits, it rejects "the limited remand approach as contrary to [the] obligation as an appellate court to apply the third and fourth *Olano* factors based upon the existing record on appeal." *Id.* at 552. Lastly, the court noted that, like the 1st, 5th and 11th Circuits, the court could "consider whether to exercise . . . discretion under the fourth *Olano* factor to review a forfeited *Booker* error, the defendant must show a 'reasonable probability,' based on the appellate record as a whole, that but for the error he would have received a more favorable sentence." *Id.*

Post-*Booker*: Standard of Review – *United States v. Higdon*, 418 F.3d 1136 (11th Cir. 2005)

On appeal, in a supplemental brief, the defendant claimed the sentence he received must be reviewed based upon the decisions in *Blakely v. Washington* and *United States v. Booker*. *Id.* at 1137. The majority held that parties must bring challenges to sentencing enhancements in their initial brief or on appeal. *Id.* The dissent pointed out that this decision makes the 11th Circuit the only circuit to interpret the "prudential issues-not-briefed-are-waived rule in such a strict

fashion." *Id.* The dissent concluded that all other circuits have considered the merits of claims that are similar to the case at bar and have considered *Blakely/Booker* claims even when not submitted in the initial brief. *Id.* at 1145.

Post-*Booker*: Remand – *United States v. Sanders*, 421 F.3d 1044 (9th Cir. 2005)

This case required the 9th Circuit to decide whether to grant limited remand, full remand, or a modified limited remand in cases where the original sentencing judge is unavailable and the sentence needs to be remanded due to the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). *Sanders*, 421 F.3d at 1051-52. Normally, the 9th Circuit grants a limited remand, but held in this case that granting limited remand for sentencing under *Booker* should not apply when the original sentencing judge is not available. *Id*.

The 2nd Circuit, by contrast, has held that a modified limited remand should be granted, which would create two alterations to the standard limited remand. *Id*. at 1052. The 9th Circuit, however, declared that this is in essence the same result as granting a full remand and, therefore, refused to accept the 2nd Circuit's rationale because the 9th Circuit believes that the confusing terminology will only serve to be misleading. *Id*.

Potentially Consecutive Sentencing – *United States v. Cox*, 125 F. App'x 973 (10th Cir. 2005)

Appellant was sentenced to 168 months, "to run consecutively to his sentence on [a] state charge, which had not yet been imposed." *Id.* at 973. The issue was whether it was permissible for a court to order a sentence, such as this, which would run consecutively to a potential future sentence. *Id.* The court noted a split among the circuits on this issue, in which the 2nd, 5th, 8th, and 11th Circuits hold that such sentences are allowed. *Id.* However, the 6th, 7th and 9th Circuits hold that such sentences are not permissible. *Id.* The 10th Circuit, reaffirming a prior holding, sided with the 2nd, 5th, 8th and 11th Circuits.

Evidence Obtained from Detention: Suppression – *United States v. Pulliam*, 405 F.3d 782 (9th Cir. 2005)

On appeal was the district court's ruling to suppress the introduction of a gun into evidence that was found during an illegal search and seizure of a car in which the defendant was only a passenger and had no possessory interest in. The 9th Circuit held that because the defendant did not have a possessory interest in the vehicle, his rights were not violated by the illegal search and seizure of the vehicle. However, the court agreed with the district court that the defendant was detained in violation of his 4th Amendment rights. Accordingly, the 9th Circuit held that "to suppress the gun, [the defendant] must show that it is in 'some sense the product' of his unlawful detention." *Id*. at 787. Applying this standard, 9th Circuit reversed the district court, holding that the "discovery and seizure of the gun was simply in no sense the product of any violation of [the defendant's] 4th Amendment rights." *Id*. The dissent, in arguing that the "detention of the vehicle and the detention of its occupants are part of a single, integrated instance of unconstitutional police conduct," noted a circuit split on this issue. *Id*. at 794 (Wardlaw, J. dissenting). The dissent pointed to a 5th Circuit ruling that analyzed the lower court's decision to suppress evidence the same for both driver and passenger. The dissent stated that the 5th Circuit "did not require the passenger to demonstrate that, but for his, and only his, illegal detention, the evidence would not have been found." *Id*.

Warrantless Searches: Reasonableness – *United States v. Plummer*, 409 F.3d 906 (8th Cir. 2005)

There is a split among circuits on the issue of whether an officer's actual motivation for conducting a protective, warrantless search is relevant to the reasonableness analysis set forth by *Terry v. Ohio*, 392 U.S. 1, 24 (1968). While the 7th Circuit "reason[s that] a particular officer's motivation is irrelevant to the *Terry* analysis, the First and Ninth consider the actual motivation of an officer dispositive." The 8th Circuit, siding with the 7th Circuit, declared that the subjective belief of the searching officer should not be factored into a determination of validity. *Id*. at 909. Rather, "such a search is valid if a hypothetical officer in the

same circumstances could reasonably believe the suspect is dangerous." *Id*.

STATUTORY INTERPRETATION

Racketeering: Definition of "Facility in Interstate Commerce" – *United States v. Perez*, 414 F.3d 302 (2d Cir. 2005)

This case required the 2nd Circuit to address a circuit split over whether, under 18 U.S.C. § 1958, a facility of interstate commerce must be actually used in interstate commerce. The defendant appealed his conviction under § 1958(a), which criminalizes the use of a "facility in interstate . . . commerce" in committing a murder for hire. *Id.* at 303. Defendant argued that the facility of interstate commerce in question, the telephone, was used only to make intrastate calls, and thus fell outside the scope of § 1958(a). *Id.* The court noted that the 5th and 7th Circuits do not require that the facility actually be used in interstate commerce. *Id.* at 304. The 6th Circuit, however, has disagreed by holding that the use of the facility of interstate commerce must affect interstate commerce. *Id.* The *Perez* court adopted the reasoning of the 5th and 7th Circuits by holding that because § 1958(b) used the phrase "facility of interstate commerce," that phrase and "facility in interstate commerce" in § 1958(a) should be read interchangeably. *Id.* Therefore, the court held, under § 1958, the use of a facility of interstate commerce need not be actually used interstate. *Id.* at 304-05.

RICO: Business or Property Injuries – *Diaz v. Gates*, 420 F.3d 897 (9th Cir. 2005)

Plaintiff alleged that he was wrongfully imprisoned and that his wrongful imprisonment caused a loss of employment and employment opportunities as well as compensation losses resulting therefrom. *Id.* at 898. Plaintiff appealed the lower court's decision that he lacked standing on the grounds that he did not allege an injury to business or property as required by the RICO statute. *Id*. The Court of Appeals reversed under recent precedent established under *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1179 (9th Cir. 2002), in which it the court held that a property interest exists in the "legal entitlement to business relations" and, therefore, a qualifying injury is established under RICO when that interest is

hampered. *Id.* at 899. The court, noting that no elaboration on the standard was provided in *Mendoza*, reasoned that harm to a specific interest in business or property is required to satisfy the RICO statute and that state law determines whether that specific interest amounts to property. *Id.*

The dissent argued that by extending the *Mendoza* standard the majority created a circuit split with the 7th and 11th Circuits, which held that losses resulting from personal injury were incompensable under RICO. *Id.* at 908 (Gould, J., dissenting). The dissent urged the court to adhere to the reasoning of the 11th and 7th Circuit and hold that plaintiff's loss of employment claim was only a secondary effect of his allegedly false imprisonment and that his loss should be considered a personal injury and not a business and property injury within the meaning of the RICO statute. *Id*. at 909.

Firearms: Right to Possess – *United States v. Brailey*, 408 F.3d 609 (9th Cir. 2005)

In this case, the 9th Circuit addressed the issue of whether someone who is convicted of a misdemeanor crime of domestic violence and prohibited from possessing a gun, can come under 18 U.S.C. § 921(a)(33)(B)(ii), an exception for persons who have had their "civil rights restored." *Id*. at 610. The 9th Circuit sided with the 4th, 8th, and D.C. Circuits in holding that "a person convicted of a misdemeanor crime of domestic violence cannot benefit from the federal restoration exception." *Id.* at 612. Since the misdemeanor conviction did not remove the "core civil rights of voting, serving as a juror, or holding public office, his civil rights have not been 'restored' within the meaning of federal law." *Id.* at 613. The 6th Circuit has taken a different position in holding that persons who commit misdemeanors under state law cannot be convicted under the statute because their civil rights were never lost. *Id.* The 9th Circuit dismissed this reasoning and declared that "not all persons convicted of a misdemeanor become prohibited persons; only those convicted of a misdemeanor crime of domestic violence are persons prohibited from possessing guns." *Id.*

Firearms: Violation During a Drug Transaction – *United States v. Frederick*, 406 F.3d 754 (6th Cir. 2005).

A circuit split developed during the 1990s over the question of "whether exchanges of drugs and guns could, without more, violate 18 U.S.C. § 924(c)." *Id.* at 763. During the early- and mid-90s, "§ 924(c) only criminalized the 'use' of firearm 'during or in relation to' a drug crime." However, Congress took action in 1998 to broaden the jurisdictional scope of § 924(c). *Id*. The new § 924(c) "prohibits not only the 'using' a firearm 'during or in relation to' a drug trafficking crime, but also simply 'possessing' a firearm 'in furtherance of' such a crime." *Id*. at 764. The 6th Circuit noted that the 2nd Circuit has declared that the new §924(c) eliminates the previous circuit split over the matter. *Id*. The 6th Circuit, however, believes that the interpretation of the statute needs to be read more narrowly because of the phrase "in furtherance of." *Id.* The 6th Circuit held that the phrase 'in furtherance of" should be interpreted with "'its ordinary or natural meaning,' which is 'a helping forward: advancement, promotion.'" *Id*. Hence, "the weapon must promote or facilitate the crime." *Id.* (quoting *United States v. Mackey*, 265 F.3d 457, 461 (6th Cir. 2005). The court thus declared that a "specific nexus" must exist between the drug transaction and possession of a firearm. *Id*.

CRIMINAL PROCEDURE

Standard of Review: Frivolity Dismissals – *Cummings v. Baker*, 130 F. App'x 446 (11th Cir. 2005)

A state prisoner appealed the district court's frivolity review of his claim for an injunction forcing the court to address his motion for resentencing pursuant to 42 U.S.C. § 1983 (2000). *Id*. at 447. The 11th Circuit noted that the circuits are split regarding the correct standard of review for frivolity dismissals. *Id*. at 448. Though some circuits review such matters for abuse of discretion (e.g. 5th Circuit) and others review de novo (e.g. 2nd Circuit), the 11th circuit held that the prisoner's claim, which must be brought in a habeas corpus proceeding, failed regardless of the applicable standard of review. *Id*.

Standard of Review: Equitable Tolling Available for § 2255 Habeas Corpus Petition – *United States v. Martin*, 408 F.3d 1089 (8th Cir. 2005)

In this case, the 8th Circuit addressed, as a matter of first impression, whether equitable tolling of the statute of limitations contained in 28 U.S.C. § 2255 is available to a defendant where the defendant's motion was untimely due to misconduct by the defendant's lawyer. *Id*. at 1093. The court held that equitable tolling does apply to a § 2255 petition because equitable tolling is available under § 2254, and because its has the same operative language and purpose as § 2254. *Id*. at 1092. Thus, § 2255 is the "statutory analogue of habeas corpus for persons in federal custody." *Id*. at 1093. The court noted that the 6th, 7th, 9th, 10th and 11th Circuits are all currently in agreement on this point. *Id*. at 1093-94. However, in determining whether the district court properly allowed for equitable tolling, the 8th Circuit noted that the courts are split on whether the review of the district court's decision should be *de novo* or for abuse of discretion. *Id*. at 1092. The 6th, 9th, 11th and D.C. circuits review *de novo*, while the 5th and 10th Circuits review for abuse of discretion. *Id*. Finally, the 8th Circuit held that a *de novo* review was appropriate in this case because § 2255's characterization as an analogue to § 2254 demands a consistent treatment of the standard of review. *Id*. at 1093. Thus, where § 2254 is reviewed *de novo*, it would be appropriate to review § 2255 motions *de novo* as well. *See id*. at 1093.

Standard of Review: Franks Hearing – *United States v. Lewis*, 139 F. App'x 455 (3d Cir. 2005)

The 3rd Circuit noted, but did not add to, a split regarding the standard of review for a denial of a *Franks* hearing. *Id*. at 457. A district court uses a *Franks* hearing in criminal proceedings to inquire into allegations that a submitted affidavit is deliberately false or recklessly disregards the truth. *Id*. The 3d Circuit noted that the 1st, 2nd and 7th Circuits review *Franks* hearing denials for clear error; the 5th and 9th Circuits review *de novo*; and the 8th Circuit reviews for abuse of discretion. *Id*. The 3rd Circuit, however, did not take a position on the proper scope of review within that circuit because the denial in this case satisfied the most exacting standard: *de novo* review. *Id*.

Jury Instructions: Mixed Terminology – *United States v. Dowlin*, 408 F.3d 647 (10th Cir. 2005)

This case addressed whether the interchangeable use of the terms "not guilty" and "innocence" constituted error in jury instructions. The 10th Circuit found that, "in light of the instruction as a whole we do not see how the jury was misled concerning its obligation to apply the presumption of innocence." *Id.* at 666. In so holding, the 10th Circuit departed from the 1st Circuit's view that "interchanging the terms could confuse a jury and 'risk[] undercutting the government's burden by suggesting that they should find the defendant guilty if they think he is not innocent—regardless of how convincing the government's proof has been.'" *Id.* (quoting *United States v. Mendoz-Acevedo*, 950 F.2d 1, 4 (1st Cir. 1991)). The 10th Circuit, however, found that the terms "were not likely to confuse the jury in applying the proper burden of proof." *Id.*

Firearm Possession: Scienter Requirement – *United States v. Erhart*, 415 F.3d 965 (8th Cir. 2005)

Among other convictions, defendant was convicted of possession of a firearm in trying to sell a sawed-off shotgun to a "patient" who was an undercover cooperating witness, pursuant to 26 U.S.C. § 5861(d). On appeal, defendant argued that the district court erred in convicting him of possession of a firearm with a barrel less than eighteen inches (one of the weapons prohibited by 26 U.S.C. § 5845(a)(1)); specifically that there was "insufficient evidence to show that he knew the characteristics of the prohibited weapon." *Id.* at 968-69. The statute is silent, however, as to the requisite *mens rea* for illegal possession. Here, the 8th Circuit concluded that the only knowledge required to support a conviction under the National Firearms Act is knowledge that the weapon is a "firearm" as that term is generally defined. *Id.* at 969. Following the logic of the Supreme Court decision in *Staples v. United States*, 511 U.S. 600 (1994), the 8th Circuit further concluded that if the characteristics of the weapon render it "quasi-suspect," then the owner of the weapon does not have to know the specific characteristics to violate the Act. *Id.* This reasoning differs from the 5th Circuit's position that "there is no principled reason to suggest Congress intended the eight categories of firearms listed in the … statute to have different mens rea elements." *Id.* (quoting *United States v. Reyna*, 130 F.3d 104, 109 n.5 (5th Cir. 1997)).

Jurisdiction: Prisoner Release Conditions – *United States v. D'Amario*, 412 F.3d 253 (1st Cir. 2005)

The 1st Circuit undertook a review of a district court's modification of conditions of a prisoner's release, under which the court revoked the supervised release of defendant and sentenced him back to prison. *Id.* at 254-55. Defendant argued that the appeal of the revocation order divested the district court of jurisdiction to change aspects of his supervised release and contended that jurisdiction of the case belonged with the appellate court. *Id.* at 255. The court noted that the 9th and 10th Circuits have retained jurisdiction in similar instances, whereas the 1st and 8th Circuits have held that the district court "[did] not lose all jurisdiction upon appeal." Reaffirming a prior holding, the 1st Circuit held that the district court had the jurisdiction to modify defendant's conditions of his supervised release. *Id*. at 257.

Identification Testimony: Admissibility – *United States v. Dixon*, 413 F.3d 540 (6th Cir. 2005)

The 6th Circuit was presented with a case involving the admissibility of identification evidence of an alleged actor in an extortion plot. *Id.* at 543. The U.S. government tried to have defendant's son and ex-wife testify whether they recognized defendant as the perpetrator captured on a videotape surveillance of the crime scene. *Id.* at 544. The district court excluded the identification testimony, which became the issue on appeal. *Id.* In affirming the exclusion of the testimony, the court noted that such decisions are reviewed on an abuse of discretion standard. *Id.* In making its decision, the court noted that the 8th Circuit found that a lay opinion concerning identification of a photograph was admissible if "there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." *Id*. (quoting *United States v. Farnsworth*, 729 F.2d 1158, 1160 (8th Cir. 1984)). This contrasts with *United States v. Pierce*, where the 11th Circuit used a four part test to determine admissibility: (1) the witness's familiarity with the defendant's appearance, (2) the witness's familiarity of the defendant's appearance at the time the photograph was taken, (3) whether the defendant had disguised his appearance at the time of the offense, and (4) whether the defendant had changed his appearance prior to trial. *Id*. (quoting *Pierce*, 136 F.3d 774, 774-75 (11th Cir. 1998)). The 1st Circuit also considers the quality and clarity of the photograph. In upholding the district court's ruling, the 6th Circuit did not articulate its own admissibility test, but instead created a sort of hybrid by applying all of the factors set out by the other circuits. *Id*. at 545-46.