First Impressions

The following pages contain brief summaries, drafted by the *Seton Hall Circuit Review* members, of issues of first impression identified by a federal court of appeals opinion between September 1, 2005 and January 31, 2006. This collection is organized by circuit.

Each summary presents an issue of first impression, a brief analysis and the court's conclusion. It is intended to give only the briefest synopsis of the first impression issue, not a comprehensive analysis. This compilation makes no claim to be exhaustive, but will hopefully serve the reader well as a reference starting point.

FEDERAL CIRCUIT

SKF USA Inc. v. Int'l Trade Comm'n, 423 F.3d 1307 (Fed. Cir. 2005)

QUESTION: Must "the distinction between domestic goods and gray market goods . . . be physical in nature in order to satisfy the 'material difference test,'" thereby establishing a violation of trademark under § 337 of the Tariff Act of 1930? *Id*. at 1313.

ANALYSIS: Gray market goods "'are defined as 'genuine goods that . . . are of foreign manufacture, bearing a legally affixed foreign trademark that is the same mark as is registered in the United States; gray

goods are legally acquired abroad and then imported without the consent of the United States trademark holder.'" *Id*. at 1312 (quoting Gamut Trading Co. v. Int'l Trade Co., 200 F.3d 775, 778 (Fed. Cir. 1999)). Further, where there is a material difference between the goods of the U.S. trademark holder and the gray market goods bearing the same mark, there exists an infringement of the U.S. trademark. *Id*. at 1312-13. The Federal Circuit explained that the material difference test is used because gray market goods that lack certain characteristics associated with the goods of the U.S. trademark holder but bearing the same mark may lead consumers to believe that the goods "originated from the trademark owner . . . [thereby] damag[ing] the owner's goodwill." *Id*. at 1312. The court then noted that in prior cases on the subject, "material differences were found based in part on differences in services and guarantees between authorized and gray market goods, as well as accompanying documents such as instruction manuals, nonphysical traits that were nevertheless determined to constitute a material difference to consumers." *Id*. at 1314. The Federal Circuit thus found the proposition that "nonphysical traits may constitute material differences [to be] consistent with [Federal Circuit] case law and [as promoting] the sound, established policies underlying trademark protection." *Id*.

CONCLUSION: "[M]aterial differences need not be physical in order to establish trademark infringement in gray market cases." *Id*.

Saab Cars USA, Inc. v. United States, 434 F.3d 1359 (Fed. Cir. 2006)

QUESTION: What is "[t]he correct standard of review for a judgment issued on stipulated facts in lieu of trial"? *Id.* at 1371.

ANALYSIS: The Federal Circuit stated that "in rendering judgment based upon stipulated facts, the trial judge of necessity draws – and bases legal conclusions on – factual inferences that would be impermissible in the summary judgment context under Rule 56." *Id.* at 1372. In addition, "[a] trial court's decision based upon stipulated facts resembles, in significant respects, a decision on the administrative record, which we have recently concluded is not akin to summary judgment." *Id.*; *see Bannum, Inc. v. United States*, 404 F.3d 1346, 1353-57 (Fed. Cir. 2005).

CONCLUSION: The court stated that it will "review the trial court's legal conclusions *de novo*." *Id.* Further, the court will "review inferences it drew from the stipulated facts, and its application of the law to those facts, for clear error." *Id.*

***IPXL Holdings, L.L.C. v. Amazon.com, Inc.*, 430 F.3d 1377 (Fed. Cir. 2005)**

QUESTION: "Whether a single claim covering both an apparatus and a method of use of that apparatus is invalid" in a patent infringement suit. *Id.* at 1384.

ANALYSIS: "The Board of Patent Appeals . . . has made it clear that reciting both an apparatus and a method of using that apparatus renders a claim indefinite under section 112, paragraph 2." *Id.* The court ruled that, "such a claim 'is not sufficiently precise to provide competitors with an accurate determination of the 'metes and bounds of protection involved' and is 'ambiguous and properly rejected' under section 112, paragraph 2." *Id.*

CONCLUSION: "Because [the claim] recites both a system and the method for using that system, it does not apprise a person of ordinary skill in the art of its scope, and it is invalid under section 112, paragraph 2." *Id.* (quoting Ex Parte David L. Lyell, 17 U.S.P.Q. 2d 1548, 1550-51 (BPAI 1990).

FIRST CIRCUIT

***United States v. Brito*, 427 F.3d 53 (1st Cir. 2005)**

QUESTION: "Under what circumstances should an excited utterance made to a police officer be considered testimonial?" *Id.* at 55-56.

ANALYSIS: First, the court reviewed the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), noting that the Court "decreed that, as to 'testimonial' statements, the Confrontation Clause assures a procedural right to confrontation rather than a substantive guarantee of evidentiary reliability." *Id.* at 58. In that decision, the Supreme Court provided several examples that would qualify as "testimonial statements" and thus be inadmissible. One example the Court discussed was "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 59. After examining different ways to decide whether excited utterances can constitute testimonial hearsay, the 1st Circuit rejected a categorical approach that would either always permit or never allow excited utterances, and instead chose to take "an ad hoc, case-by-case approach." *Id.* at 61. The circuit found that once a statement qualified as an excited utterance, "the court then must look to the attendant circumstances and assess the likelihood that a reasonable person would have either retained

or regained the capacity to make a testimonial statement at the time of the utterance." *Id.* at 62.

CONCLUSION: While the circumstances will vary from case to case, in "the circumstances at hand, the excited utterance was nontestimonial and, therefore, properly admitted into evidence." *Id.* at 56.

United States v. Martinez-Flores, 428 F.3d 22 (1st Cir. 2005)

QUESTION: Whether "the Congressional endorsement of downward sentencing [under the Other Tools to End the Exploitation of Children Today Act ("Protect Act"), Pub. L. No. 108-21, 117 Stat. 650 (2003)] departures in conjunction with 'fast-track' case processing violate the nondelegation doctrine?" *Id.* at 24.

ANALYSIS: Congress recently instructed the United States Sentencing Commission to add § 401(m)(2)(B) to the Protect Act, giving the Government authority to grant criminals prosecuted under the Act a four-level downward sentencing departure in exchange for their guilty pleas and waivers of rights to file motions and appeals. *See id*. at 26. This provision gives the Attorney General discretion to decide the circumstances under which he would authorize such a "fast-track" program. *Id.* at 25-26. The appellant argued that this provision is unconstitutional because it delegates too much legislative power to the Attorney General. *Id.* at 26. The 1st Circuit reasoned that "Congress created the Sentencing Commission and may constitutionally require the Commission to set sentencing policy." *Id*. at 28. The court added, "[t]he fact that the new sentencing policy contains a condition that depends for its fulfillment on actions of the Attorney General does not mean Congress has delegated either Legislative or Judicial Branch power to the Attorney General." *Id*. The court noted that the Attorney General does not have to act at all under this provision and that the authority given to the Attorney General under this provision is "'no broader than the authority [prosecutors] routinely exercise in enforcing criminal laws.'" *Id*. at 28-29 (alteration in original).

CONCLUSION: The 1st Circuit held that § 401(m)(2)(B) of the Protect Act does not violate the nondelegation doctrine. *Id*. at 24.

In re PolyMedica Corp. Sec. Litig., 432 F.3d 1 (1st Cir. 2005)

QUESTION: What is the "standard for determining whether a market was 'efficient' when applying the fraud-on-the-market presumption of investor reliance?" *Id*. at 1.

ANALYSIS: In a securities fraud action under § 10(b) of the Exchange Act and Rule 10b-5, reliance is a required element. *Id.* at 4. One theory that may be used to prove reliance is the fraud-on-the-market theory which permits "a rebuttable presumption that the plaintiff relied on the 'integrity of the market price' which reflected that misstatement." *Id.* at 5. In order to use the fraud-on-the-market theory, an investor must prove that the market is "efficient." *Id.* The Supreme Court decision adopting the fraud-on-the-market theory, *Basic v. Levinson*, 485 U.S. 224 (1988), did not adopt any particular economic theory to use for determining if a market is efficient. *Id*. at 9.

Most other circuits have adopted "a definition of market efficiency which requires that stock price fully reflect all publicly available information." *Id*. This definition is also consistent with a pre-*Basic* 1st Circuit decision. *Id.* at 10 (citing Roeder v. Alpha Indus., Inc.*,* 814 F.2d 22 (1st Cir. 1987)). Finally, the only alternative definition "allows some information to be considered 'material' and yet not affect market price." *Id*.

CONCLUSION: "An efficient market is one in which the market price of the stock *fully reflects all* publicly available information." *Id.* at 14.

United States v. Rondeau, 430 F. 3d 44 (1st Cir. 2005)

QUESTION: Whether the *Crawford* rule, which generally precludes use of testimonial hearsay, applies in supervised release revocation proceedings. *Id.* at 47.

ANALYSIS: "Nothing in *Crawford* indicates that the Supreme Court intended to extend the Confrontation Clause's reach beyond the criminal prosecution context." *Id.* The 1st Circuit joins the 6th, 8th, and 9th Circuits in concluding "a supervised release revocation hearing is not a 'criminal prosecution,'" therefore, *Crawford* does not apply. *Id.* at 48.

CONCLUSION: The use of testimonial hearsay is permitted in a supervised release revocation hearing. *Id.*

In re Antonio Rivera Torres, 432 F.3d 20 (1st Cir. 2005)

QUESTION: "[W]hether there is an explicit waiver of sovereign immunity in 11 U.S.C. § 106, as to allow an award of emotional distress damages against the United States, under the sanctions provisions of 11 U.S.C. § 105, to remedy a violation of 11 U.S.C. § 524, which enjoins actions to recover discharged debts." *Id.* at 23.

ANALYSIS: The court began by noting that the standard for waiver is stringent, and "[a] waiver must be unequivocally expressed and must be strictly construed in favor of the sovereign with ambiguities construed against waiver." *Id.* at 23-24 (internal quotations and citations omitted). The court then found that "[t]here is no doubt that § 106 is an express waiver of sovereign immunity [but that] does not answer the question of what *types* of relief are encompassed in the waiver." *Id.* at 24 (emphasis added). The 1st Circuit concluded that although the legislative history shows a waiver for monetary damages, "Congress has not 'definitely and unequivocally' waived sovereign immunity under § 106(a) of the Bankruptcy Code for emotional damages awards in circumstances such as these." *Id.* at 31.

CONCLUSION: The 1st Circuit held that "sovereign immunity bars awards for emotional distress damages against the federal government under § 105(a) for any willful violation of § 524, and that immunity is not waived by § 106." *Id.*

Powell v. United States, 430 F.3d 490 (1st Cir. 2005)

QUESTION: Whether defendant's conviction for eluding a police officer qualifies as a crime of violence under 18 U.S.C. § 924, the Armed Career Criminal Act ("ACCA"). *Id.* at 491.

ANALYSIS: The court analogized eluding a police officer to a prison escape. *Id.* Regarding the latter, the 1st Circuit had recently characterized a prison escape as similar to "a 'powder keg,' ready to explode into violence." *Id.* (quoting United States v. Winn, 364 F.3d 7, 11-12 (1st Cir. 2004). Furthermore, the court noted that a "consensus has emerged that evasive driving offenses, like prison escapes, constitute a category of 'violent crime' within the meaning of the ACCA's provision for 'conduct that presents a serious potential risk to another.'" *Id.* (quoting 18 U.S.C. § 924(e)(2)(B)(ii)). Finally, the court reasoned that "high-speed car chases pose a grave threat of death and injury by collision, as well as escalated confrontations between suspects and police." *Id.* at 492.

CONCLUSION: The court held that defendant's conviction for eluding police is a proper violent-crime predicate under the ACCA. *Id.*

In re William Smith, 436 F.3d 9 (1st Cir. 2006)

QUESTION: Whether the statute of limitations for "filing a habeas petition under 28 U.S.C. § 2255 started to run when the Supreme Court denied" a petition for certiorari or when the Supreme Court denied a rehearing of that petition. *Id.* at 9-10.

ANALYSIS: The petitioner, a federal inmate convicted of being a felon in possession of a firearm sought an appeal of the district court's denial of his habeas petition. *Id.* at 10. The 1st Circuit determined that "[a]lthough the statute itself does not define when a conviction becomes final for this purpose, every circuit that has addressed the issue has concluded that a conviction becomes final—and the one-year period therefore starts to run—when a petition for certiorari is denied." *Id.*

CONCLUSION: The 1st Circuit denied petitioner's appeal and concluded that the one-year statute of limitations runs when the Supreme Court first denies certiorari. *Id.* at 11.

***United States v. Pho*, 433 F.3d 53 (1st Cir. 2006)**

QUESTION: Whether "a federal district court, consistent with the teachings of *United States v. Booker* [may] impose a sentence outside the advisory guideline sentencing range based solely on its categorical rejection of the guidelines' disparate treatment of offenses involving crack cocaine, on the one hand, and powdered cocaine, on the other hand." *Id*. at 54 (citation omitted).

ANALYSIS: In a consolidation of two appeals, the 1st Circuit found that "the lower court jettisoned the guidelines and constructed a new sentencing range by using a 20:1 crack-to-powder ratio in lieu of the 100:1 ratio embedded in both the statutory scheme and the guidelines." *Id*. at 62. Firmly articulating that "[m]atters of policy typically are for Congress," the appellate court described the "decision to employ a 100:1 crack-to-powder ratio rather than a 20:1 ratio, a 5:1 ratio, or a 1:1 ratio . . . a policy judgment, pure and simple." *Id*. (citing United States v. Andrade, 94 F.3d 9, 14-15 (1st Cir. 1996)). The Sentencing Commission, by congressional edict, "is allied with Congress in the important endeavor of calibrating sentences for federal offenses" and "[n]othing in *Booker* altered this distribution of authority over sentencing policy." *Id*. Thus, under *Booker*, "a district court may exercise discretion in fashioning sentences – but that discretion was meant to operate only within the ambit of the individualized factors spelled out in section 3553(a)." *Id*. (citing United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 764-66 (2005)). As such, "the district court's categorical rejection of the 100:1 ratio impermissibly usurps Congress's judgment about the proper sentencing policy for cocaine offenses." *Id*. at 63.

CONCLUSION: The 1st Circuit held that "the district court erred as a matter of law when it constructed a new sentencing range based on the categorical substitution of a 20:1 crack-to-powder ratio for the 100:1 ratio embedded in the sentencing guidelines. This holding recognize[d]

that sentencing decisions must be done case by case and must be grounded in case-specific considerations, not in general disagreement with broad-based policies enunciated by Congress or the Commission, as its agent." *Id*. at 64-65.

SECOND CIRCUIT

M. Fortunoff of Westbury Corp. v. Peerless Ins. Co., 432 F.3d 127 (2d Cir. 2005)

QUESTION: "Whether 49 U.S.C. § 13906(a)(3) (2000 & Supp. 2005), enacted as part of the Interstate Commerce Commission Termination Act of 1995 ("ICCTA" or "Termination Act"), Pub. L. No. 104-88, 109 Stat. 803, to replace the Motor Carrier Act's insurance provisions, allowed the Federal Motor Carrier Safety Administration ("FMCSA") – the successor agency to the Interstate Commerce Commission ("ICC") in this area of regulation – to continue to distinguish between types of motor carriage when requiring cargo liability insurance." *Id.* at 129.

ANALYSIS: "Prior to 1995 the Motor Carrier Act distinguished between two different types of motor carriers: motor common carriers and motor contract carriers." *Id.* at 130 (citing 49 U.S.C. § 10102(15)-(16) (1994)). The ICC issued separate regulations for each type, including different insurance requirements. *Id.* at 130-31. Under the ICCTA the distinction between the types of carriers was abolished, however, pursuant to the "transition rule" in 49 U.S.C. § 13902(d) (2000), the FMCSA "continued to register transportation providers as 'common carriers' and 'contract carriers.'" *Id.* at 133. Congress had, however, clearly intended to abolish separate categories for motor carriers. *Id.* at 136. Congress left to the discretion of the Secretary of Transportation the decision to require cargo liability insurance. *Id.* at 137. This incorporation of discretion allows the Secretary to require that motor carriers have cargo insurance and to require that some carry insurance while others do not. *Id.* at 138.

CONCLUSION: 49 U.S.C. § 13906(a)(3) "gives the FMCSA 'discretion to require cargo liability insurance for some types of motor carriage and not others, and that the agency's discretion is entitled to deference." *Id.* at 130.

***Bus. and Residents Alliance of East Harlem v. Jackson*, 430 F.3d 584 (2d Cir. 2005)**

QUESTION: "Whether the [New York City Empowerment] Zone's subsequent use . . . of federal funds in connection with individual projects triggers the historic preservation preview process, as set forth in § 106 of the National Historical Preservation Act, 16 U.S.C. § 407(f)." *Id.* at 586.

ANALYSIS: Section 106 is triggered only when a federal agency has jurisdiction or licensing authority over the project at issue. *Id.* In the case of the Zone, all approval and funding decisions as to the East River Plaza project are made at the state and local level. *Id.* Therefore, § 106 is not triggered, and thus construction of the East River Plaza project can move forward with construction without undergoing a historical preservation review process. *Id.* at 594.

CONCLUSION: Section 106 is inapplicable here, thus, the historical preservation review process is not triggered. *Id.*

***In re Smart World Techs., L.L.C.*, 423 F.3d 166 (2d Cir. 2005)**

QUESTION: Whether the bankruptcy court erred in granting creditor-appellees standing to pursue settlement of an adversary proceeding under FED. R. BANK. P. 9019 without the participation of, and over objections of, the debtor-in-possession. *Id*. at 174-75.

ANALYSIS: The court looked at the plain language of the rule as well as policy considerations and determined that the rule permits only the debtor-in-possession to move for settlement. *Id*. at 175. However, the court noted that certain limited circumstances allow settlement of a claim over the objections of the debtor-in-possession, such as aggrieved creditors or other parties dissatisfied with the conduct of a debtor-in-possession who appoints a trustee or examiner who then brings the motion. *Id*. at 175-76. However, those circumstances were not present in this case. *Id*. at 176. The court also held that only in rare circumstances may the doctrine of derivative standing be appropriate in the rule 9019 context if unjustifiable behavior exists on the part of the debtor-in-possession, however, those circumstances also were not present in this case. *Id*. at 177. Finally, the court held that the power granted under 11 U.S.C. § 105 does not provide the bankruptcy court with an independent basis to grant standing. *Id.* at 184.

CONCLUSION: The court held that certain circumstances authorize parties other than the debtors-in-possession to pursue a rule 9019 motion in a bankruptcy proceeding, however, those circumstances were not present in this case. *Id.* at 184.

***Guaylupo-Moya v. Gonzales*, 423 F.3d 121 (2d Cir. 2005)**

QUESTION: Whether the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") retroactively restricts deportation relief under section 212(h) of the Immigration and Nationality Act of 1952 ("INA"), codified as 8 U.S.C. § 1182(h), for offenses committed by an alien prior to the statute's enactment. *Id* at 129.

ANALYSIS: The court applied a line of case law relating to the effect of IIRIRA and the Antiterrorism and Effective Death Penalty Act ("AEDPA") to a similar section of the INA which held that no retroaction will apply unless there is clear language by Congress to the contrary. *Id*. at 129. In the event that the language is ambiguous, courts must determine whether applying the statute retroactively "would change the legal consequences of past events;" in which case the courts would find a presumption against retroactivity. *Id*. at 130. The court then concluded that section 348(a) clearly demonstrated that Congress intended the provisions of IIRIRA to apply retroactively to aliens in deportation proceedings after IIRIRA's enactment regardless of when the offense occurred and that the restriction shall apply to aliens convicted of the offense of "aggravated felonies" regardless of when the offense occurred. *Id*. at 131.

CONCLUSION: The court ultimately held that Congress's unambiguous intent shows that IIRIRA shall apply retroactively to offenses committed before the statute's enactment. *Id.* at 129.

***De La Vega v. Gonzales*, 436 F.3d 141 (2d Cir. 2006)**

QUESTION: "[W]hether this Court has jurisdiction to review a denial by the Board of Immigration Appeals ("BIA") of a petitioner's request for cancellation of removal on the basis of its finding that the petitioner failed to demonstrate that his removal would cause 'exceptional and extremely unusual hardship' to a qualifying U.S. citizen relative." *Id.* at 141.

ANALYSIS: The court joined five sister courts in finding "the BIA's discretionary determinations concerning whether to grant cancellation of removal [to] constitute "judgment[s] regarding the granting of relief under section 1229b" within the meaning of 8 U.S.C. § 1252(a)(2)(B)(i) and therefore the review of such determinations falls outside [its] jurisdiction." *Id.* at 144. The court went on to find that "the BIA's judgment that an alien has failed to demonstrate that his removal will cause a qualifying U.S. citizen relative to suffer 'exceptional and

extremely unusual hardship' is discretionary" not only because all circuit courts confronted with the issue had answered in the positive, but also because "cases construing the scope of appellate jurisdiction to review BIA denials of 'suspension of deportation'–the predecessor to 'cancellation of removal'–under the prior, "extreme hardship" statutory formulation" regard such determinations as discretionary. *Id.* at 144-45.

CONCLUSION: The court ultimately made two finding: "(1) 'exceptional and extremely unusual hardship' determinations by the BIA are discretionary judgments and (2) we therefore lack jurisdiction to review such judgments, in accordance with 8 U.S.C. § 1252(a)(2)(B)(i)." *Id.* at 145-46.

***Mastrovincenzo v. City of New York*, 435 F.3d 78 (2d Cir. 2006)**

QUESTION: Whether a New York City licensing requirement is "narrowly tailored in its application to . . . vendors of regular merchandise with sufficient expressive content to qualify for First Amendment protection." *Id.* at 102.

ANALYSIS: "[W]hether a regulation is narrowly-tailored can only be determined upon a context-specific inquiry." *Id*. at 102. The 2nd Circuit further explained that "New York City's licensing requirement is clearly a content-neutral speech restriction because it 'serves purposes unrelated to the content of [the regulated] expression,' namely: (1) keeping the public streets free of congestion for the convenience and safety of its citizens, (2) maintaining the 'tax base and economic viability of the City,' and (3) preventing the sale of 'stolen, defective or counterfeit merchandises.'" *Id.* at 99 (citing Hobbs v. County of Westchester, 397 F.3d 133, 150 (2d. Cir. 2005); Mastrovincenzo v. City of New York, 313 F. Supp. 2d 280, 283 (S.D.N.Y. 2004)). Merely because "New York City differentiates between *categories* of vendors—that is, vendors of written materials, paintings, photographs, prints and sculptures are exempt from its licensing requirement while other vendors are not—does not suggest that the City's regulation targets particular messages and favors others." *Id.* In addition, the court noted, "[the regulation] in no way precludes plaintiffs from reaching public audiences on the sidewalks generally or in any of the specific venues where they currently hawk their wares." *Id.* at 101. Despite the regulation, "plaintiffs have numerous alternative channels through which to share their art with the public." *Id.* The court held that "the alternative avenues of communication available to plaintiffs, taken together, [were] more than 'ample.'" *Id.* at 102.

CONCLUSION: Thus, "notwithstanding *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996), [the licensing requirement was] sufficiently narrowly tailored to satisfy intermediate scrutiny." *Id.*

THIRD CIRCUIT

Century 21 Real Estate Corp. v. Lendingtree, Inc., 425 F.3d 211 (3d Cir. 2005)

QUESTION: Whether the nominative fair use defense is recognized in the 3rd Circuit in an action for trademark infringement. *Id*. at 218.

ANALYSIS: As an issue of first impression in the 3rd Circuit, the court disagreed with the 9th Circuit, which had denounced the "likelihood of confusion" test. *Id*. at 220. The 3rd Circuit, while agreeing "with the Ninth Circuit Court of Appeals that a distinct analysis is needed for nominative fair use cases," concluded that the "likelihood of confusion" test should not be completely supplanted. *Id*. Thus, the court "disagree[d] with the fundamental distinction the Ninth Circuit Court of Appeals drew between classic and nominative fair use" and instead, set forth a two-step approach of its own. *Id*. at 221-22. "The plaintiff must first prove that confusion is likely due to the defendant's use of plaintiff's mark. . . . Once plaintiff has met its burden of proving that confusion is likely, the burden then shifts to defendant to show that its nominative use of plaintiff's mark is nonetheless fair. *Id*. at 222. "To demonstrate fairness, the defendant must satisfy a three-pronged nominative fair use test, derived to a great extent from the one articulated by the Court of Appeals for the Ninth Circuit. Under our fairness test, a defendant must show: (1) that the use of plaintiff's mark is necessary to describe both the plaintiff's product or service and the defendant's product or service; (2) that the defendant uses only so much of the plaintiff's mark as is necessary to describe plaintiff's product; and (3) that the defendant's conduct or language reflect the true and accurate relationship between plaintiff and defendant's products or services." *Id*.

CONCLUSION: "We hold today that the burden of proving likelihood of confusion, even in a nominative use case, should remain with the plaintiff." *Id*. at 226.

McGowan v. NJR Service Corp., 423 F.3d 241 (3d Cir. 2005)

QUESTION: Are "the administrators of a retirement plan that is covered by the Employee Retirement Income Security Act of 1974

('ERISA') . . . required to recognize an individual's waiver of her beneficiary interest under the plan?" *Id*. at 243.

ANALYSIS: Title 29 of U.S.C. § 1104(a)(1)(D) "dictates that it is the documents on file with the Plan, and not outside private agreements between beneficiaries and participants, that determine the rights of the parties." *Id*. at 245-46. Thus, "any requirement imposed on Plan administrators to look beyond these documents would go against the specific command of § 1104(a)(1)(D)." *Id*. at 246. "'[O]ne of the principal goals underlying ERISA . . . [is] ensuring that 'plans be uniform in their interpretation and simple in their application.'" *Id*. (quoting McMillan v. Parrott, 913 F.2d 310, 312 (6th Cir. 1990)). "This extremely important policy goal is best served by the conclusion that, under § 1104(a)(1)(D), outside waivers are not binding on Plan administrators." *Id*.

CONCLUSION: "Plan administrators are not required to look beyond Plan documents to determine whether a waiver has been effectuated in a private agreement between the participant and his [or her] named beneficiary." *Id*. at 242.

Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 426 F.3d 694 (3d Cir. 2005)

FIRST QUESTION: "Whether a court should look to prevailing rates in the attorney's home community or the locus of the litigation in determining the appropriate compensation for an out-of-town attorney." *Id.* at 705.

ANALYSIS: The court first looked to one of its previous decisions, *In re Fine Paper Antitrust Litigation*, 751 F.2d 562 (3d Cir. 1984), where the court "held that it was error for a district court to apply 'hypothetical national rates' in determining the size of a fee award." *Id.* at 705. The court looked to the recommendation of a task force it commissioned two decades earlier which recommended a "forum rate" rule whereby an "out-of-town lawyer would receive not the hourly rate prescribed by his district but rather the hourly rate prevailing in the forum in which the litigation is lodged." *Id.* at 704. The court found that while in most cases a "forum rate" should apply, there were "two exceptions: first 'when the need for the special expertise of counsel from a distant district is shown'; and, second, 'when local counsel are unwilling to handle the case.'" *Id.* at 705.

CONCLUSION: The "district courts in the Third Circuit should award attorney fees based on the 'forum rate' rule as set forth in the Task Force Report." *Id*. at 705.

SECOND QUESTION: "Whether a prevailing party is entitled to compensation for the costs of non-testifying experts under a fee-shifting statute." *Id.* at 715.

ANALYSIS: The court reviewed decisions in both the D.C. Circuit and the 11th Circuit, but found none to be entirely on point. *Id.* at 715-16. Instead, the court looked to the Supreme Court decision in *Missouri v. Jenkins*, 491 U.S. 274 (1989), where the Court found "the phrase 'reasonable attorney's fee' can encompass work performed by individuals who are not attorneys." *Id.* at 716. The Supreme Court continued that "[r]ather, the term must refer to a reasonable fee for the work product of an attorney." *Id.* The 3rd Circuit reasoned that "[t]o forbid the shifting of the expert's fee would encourage underspecialization and inefficient trial preparation, just as to forbid shifting the cost of paralegals would encourage lawyers to do paralegals work." *Id.* Concurring with the 7th Circuit, the 3rd Circuit noted that "prohibiting reimbursement for the fees of non-testifying experts would simply encourage attorneys to educate themselves, undoubtedly at higher costs." *Id.* at 716-17.

CONCLUSION: The 3rd Circuit concluded that "a prevailing party is entitled to compensation for the costs of non-testifying experts under a fee-shifting statute." *Id.* at 715.

Garcia v. Plaza Oldsmobile Ltd., 421 F.3d 216 (3d Cir. 2005)

QUESTION: "[W]hether the court should use Pennsylvania common law or New York's statutory law to determine if [defendant-owner, a New York corporation with its principal place of business in that state] can be liable" for the acts of a New York citizen-driver who injured a Pennsylvania citizen in Pennsylvania while driving a rented motor vehicle from defendant corporation. *Id.* at 219.

ANALYSIS: In "exercise[ing] plenary review over the choice of law question raised in this appeal," the court first noted that it must apply the choice-of-law rules of the jurisdiction in which the district court sits, here Pennsylvania. *Id.* Subsequently, pursuant to Pennsylvania law, the court must determine what type of "conflict" exists between the purported competing bodies of law before assessing the governmental interests of the jurisdictions whose law may control, and examine those contacts within the dispute. *Id.* An "'interest analysis' . . . determine[s] whether the case involves a true or false conflict or whether it is unprovided for." *Id.* at 220. In conducting this analysis, the court found that the case presented a false conflict because "there is a true conflict [only] 'when the governmental interest of both jurisdictions would be impaired if their

law were not applied.'" *Id.* (citing Lacey v. Cessna Aircraft Co., 932 F.2d 170, 187 & n.15 (3d Cir. 1991)). In cases of "false conflict, [courts] apply the law of the only interested jurisdiction." *Id.*

CONCLUSION: The court determined that the case presented "a false conflict" because "applying New York law to impose liability [on the defendant] does not impair the interests of Pennsylvania, while on the contrary, the application of Pennsylvania law would impair New York's interest in providing injured plaintiffs with a financially responsible defendant, and imposing a high degree of responsibility on the owners of vehicle[s]." *Id.* at 223. Thus, the 3rd Circuit affirmed the district court's grant of summary judgment in finding that the law of the interested jurisdiction, here New York, should apply. *Id.* at 223-224.

Slagle v. County of Clarion, 435 F.3d 262 (3d Cir. 2006)

QUESTION: "[W]hether the participation clause of section 704(a) [of Title VII] protects an employee who files a facially invalid claim for retaliatory discharge." *Id*. at 266.

ANALYSIS: Slagle alleged that he was terminated from his position as a Corrections Officer because of "unlawful retaliation in violation of Title VII." *Id*. at 264. The district court granted summary judgment holding that Slagle had failed to "establish that he engaged in protected activity, which is an essential element of a prima facie case of retaliation under Title VII." *Id*. The court noted that a "plaintiff need only allege discrimination on the basis of race, color, religion, sex, or national origin to be protected from retaliatory discharge under Title VII. Protection is not lost merely because an employee is mistaken on the merits of his or her claim." *Id*. at 268. However, the court continued, "Slagle's complaint, with its vague allegations of 'civil rights' violations, did not meet even this low bar." *Id*.

CONCLUSION: The 3rd Circuit, consistent with the 4th and 9th Circuits, held that "we cannot dispense with the requirement that the plaintiff allege prohibited grounds" to constitute a valid retaliatory claim under Title VII. *Id*. at 267.

FOURTH CIRCUIT

United States v. Amaya-Portillo, 423 F.3d 427 (4th Cir. 2005)

QUESTION: The Fourth Circuit looked at "whether a state conviction for possession of cocaine can ultimately qualify as an

'aggravated felony' under section 2L1.2 [of the United States Sentencing Guidelines] if it is [classified as] a misdemeanor under the applicable state law and punishable only as a misdemeanor under the Controlled Substances Act ("CSA"), 21 U.S.C. § 801." *Id*. at 430-31.

ANALYSIS: The statutory language of the Sentencing Guidelines, § 2L1.2(b)(1)(C) is evidence that "Congress did not intend for the same definition of 'felony' as a crime punishable by more than one year of imprisonment to apply" to felony drug offenses punishable under the CSA. *Id.* at 432. The court found compelling that Congress could have but ultimately did not define a "'drug trafficking crime' as a drug offense punishable by imprisonment for more than one year." *Id.* at 435. The court also found persuasive arguments from "seven other circuits, each of which conducted the 'aggravated felony' inquiry by focusing upon the 'classification' of an offense under state law rather than upon potential punishment." *Id.* at 432. The court noted that it applied the analysis it used in a similar case, in essence rejecting the rule adopted by the 6th and 9th Circuits. *Id.* at 430, 435.

CONCLUSION: Under Maryland law, although the defendant's offense carried a possible sentence of more than one year imprisonment, it is classified as a misdemeanor. *Id.* at 428. In addition, possession of cocaine "is neither classified as a felony by Federal or Maryland law [but is classified as a misdemeanor] . . . the offense is not a 'felony' under 21 U.S.C. § 802(13), nor an 'aggravated felony' under section 2L1.2 of the Sentencing Guidelines." *Id.* at 435. Ultimately, the court "conclude[d] that a 'felony' under the CSA means 'any Federal or State offense classified by applicable Federal or [State] law as a felony." *Id*. In doing so, the court deferred "to a state's judgment, not as to the appropriate punishment, but as to whether the offense is a felony." *Id.*

***United States v. Fitzgerald*, 435 F.3d 484 (4th Cir. 2006)**

QUESTION: Whether the application of 18 U.S.C. § 3147 can enhance a sentence for the crime of failing to appear at a criminal sentencing under 18 U.S.C. § 3146. *Id.* at 486.

ANALYSIS: The court stated that "[u]nder § 3147, a person who is convicted of committing an offense while on release . . . 'shall be sentenced, in addition to the sentence prescribed for the offense to (1) a term of imprisonment of not more than ten years imprisonment if the offense is a felony . . .' [that] 'incorporates this provision . . . by requiring a three-level increase to the base offense level when . . . § 3147 is applicable.'" *Id.* at 485. (quoting *United States v. Kincaid,* 964 F.2d 325, 327 (4th Cir. 1992)).

CONCLUSION: The court held that "the plain language of § 3147 provides for the district court's enhancement of [the defendant's] sentence." *Id.* at 487. Because Double Jeopardy does not apply to this sentence, it was affirmed. *Id.*

FIFTH CIRCUIT

United States v. Jackson, 426 F.3d 301 (5th Cir. 2005)

QUESTION: "[W]hether incarceration for a parole violation that was later held unconstitutional by a state court tolls the defendant's period of supervised release under 18 U.S.C. § 3624 (2005)." *Id*. at 301.

ANALYSIS: The court began its analysis by looking to the plain language of the statute. *Id*. at 304. The language is clear: "the period of supervised release does not run during imprisonment." *Id*. If incarceration reduced the period of supervised release, the rehabilitative objectives of that program would be void. *Id*. at 305.

CONCLUSION: Thus, the court held that "[the defendant's] prior incarceration tolled his supervised release and thereby extended the period he must submit to supervised release." *Id*. at 302.

Caldwell v. Dretke, 429 F.3d 521 (5th Cir. 2005)

QUESTION: "[W]hether orders of deferred adjudication community supervision and straight probation are final judgments for purposes of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") one-year statute of limitations." *Id*. at 522.

ANALYSIS: In this case, orders of deferred adjudication were entered against petitioners after they pled guilty to various crimes. *Id*. at 523-25. Petitioners filed habeas petitions more than one year after the entry of these judgments. *Id*. Lower courts held that petitioners' habeas petitions were time barred by AEDPA's one-year statute of limitations. *Id*. The court explained that AEDPA mandates that "'an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court' be filed within one-year of 'the date on which the judgment became final.'" *Id*. at 525. In reasoning that deferred adjudications are final judgments, the court noted that Rule 11 of the Federal Rules of Civil Procedure defines them as such; they are appealable; and treating them as final judgments fulfills the congressional intent in passing the one-year statute of limitations to "'curb the abuse of the statutory writ of habeas corpus'" which applies to habeas petitions. *Id*. 527-28 (quoting

H.R. Rep. No. 104-518, at 111 (1996)). The court added that the deferred adjudication became final "by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* at 529.

CONCLUSION: The court held that the "orders of deferred adjudication . . . and straight probation are final judgments for purposes of [AEDPA's] one-year statute of limitations." *Id.* at 523.

Praylor v. Tex. Dep't of Criminal Justice, 430 F.3d 1208 (5th Cir. 2005)

QUESTION: Whether a prison's decision to decline "to provide a transsexual with hormone treatment amounts to acting with deliberate indifference to a serious medical need." *Id.* at 1209.

ANALYSIS: Relying on three other circuit decisions (White v. Farrier, 849 F.2d 322 (8th Cir. 1988); Meriwether v. Faulkner, 821 F.2d 408 (7th Cir. 1987); and Supre v. Ricketts, 792 F.2d 958 (10th Cir. 1986)) the 5th Circuit found that the prison's medical analysis was considerate and thorough. *Id*.

CONCLUSION: The court held that the "refusal to provide hormone therapy [for incarcerated transsexuals] did not constitute" deliberate indifference. *Id.*

United States v. Burns, 433 F.3d 442 (5th Cir. 2005)

QUESTION: Whether an otherwise valid appeal waiver is rendered invalid, or inapplicable to an appeal seeking to raise a *Booker* or *Fanfan* issue, merely because the waiver was made before *Booker*. *Id.*

ANALYSIS: A waiver of a right to appeal must be voluntary, knowing and intelligent with "sufficient awareness of the relevant circumstances and likely consequences." *Id.* at 449 (citing Brady v. United States, 397 U.S. 742 (1970)). The validity of the waiver is determined by the totality of the circumstances. *Id.* In *Brady*, the petitioner argued that a statute, which was later held unconstitutional, coerced his guilty plea. *Id.* (citing *Brady*, 397 U.S. at 743-44). The Supreme Court rejected that contention, holding that "'absent misrepresentation or other impermissible conduct by state agents,'" the waiver is valid. *Id.* (quoting *Brady*, 397 U.S. at 757). Other circuits have rejected the argument that a defendant's waiver of appeal prior to *Booker* does not render such waiver invalid while relying on *Brady*. *Id.*

CONCLUSION: "[A]n otherwise valid appeal waiver is not rendered invalid, or inapplicable to an appeal seeking to raise a *Booker* or *Fanfan*

issue . . . merely because the waiver was made before *Booker*." *Id.* at 450.

***United States v. Arbizu*, 431 F.3d 469 (5th Cir. 2005)**

QUESTION: "Whether failure to provide written notice of the terms of supervised release automatically invalidates a revocation of such release if the defendant received actual notice of the conditions." *Id.* at 470.

ANALYSIS: "The purpose of §§ 3583(f) and 3603(1) is to ensure that the defendant is notified of the conditions of his supervised release. Congress decided that requiring the probation officer to provide the defendant with written notice of the conditions is the best way to ensure the defendant knows what is expected of him during the supervised release periods. It would be patently unfair to revoke a defendant's supervised release and send him back to prison for violating conditions of the release that he had no way of knowing existed." *Id.* at 471. The 5th Circuit followed the reasoning and conclusion of the 1st, 8th, and 9th Circuits on this issue. *Id.* at 470.

CONCLUSION: The "[g]overnment's failure to provide the notice required by the statutes does not limit the district court's authority to revoke supervised release where the defendant had actual notice of the release terms." *Id.*

***Withhart v. Otto Candies, L.L.C.*, 431 F.3d 840 (5th Cir. 2005)**

QUESTION: The court considered "whether a shipowner-employer may assert a negligence and indemnity claim against its seaman-employee for property damage allegedly caused by the employee's negligence." *Id.* at 841.

ANALYSIS: The court noted that the employer's claims "are consistent with general maritime law." *Id.* at 842. The court reasoned that the "Federal Employer's Liability Act ("FELA"), 45 U.S.C. §§ 51, *et seq.*, and consequently, the Jones Act, 46 U.S.C. App. § 688, contain[ed] no prohibition against a general maritime negligence and indemnity claim by a ship-owner employee against its seaman-employee for property damage." *Id.* at 841.

CONCLUSION: Ultimately, the court held that the shipowner-employer could assert a claim against an employee for property damage arising from the employee's negligence. *Id.*

***United States v. Adair*, 436 F.3d 520 (5th Cir. 2006)**

QUESTION: Whether the court should remand for resentencing a case in which the district court imposed a lower alternative sentence based on belief that the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), may have invalidated the Federal Sentencing Guidelines. *Id*. at 528.

ANALYSIS: The 5th Circuit explained that *Blakely* does apply to the sentencing guidelines in the sense that it establishes that "it violates a defendant's Sixth Amendment right to a trial by jury for a judge to enhance a sentence based on facts neither admitted by the defendant nor proved to a jury beyond a reasonable doubt." *Id*. (citing United States v. Booker, 543 U.S. 220, 242-43 (2005)). However, the court also found that "there is nothing in the record to suggest that the district court anticipated *Booker*'s remedial holding [which made the sentencing guidelines advisory] and considered the sentencing guidelines as one factor among others listed in 18 U.S. C. § 3553(a)." *Id*.

CONCLUSION: The district court's decision to impose the alternative sentence is invalid under Supreme Court precedent and the sentencing guidelines. *Id*. at 529.

***Mello v. Sara Lee Corp.*, 431 F.3d 440 (5th Cir. 2005)**

QUESTION: "Is ERISA-estoppel a cognizable legal theory?" *Id.* at 444.

ANALYSIS: The 5th Circuit joined the majority of circuits in "explicitly adopting ERISA-estoppel as a cognizable theory." *Id*. The court held that "[t]o establish an ERISA-estoppel claim, the plaintiff must establish: (1) a material misrepresentation; (2) reasonable and detrimental reliance upon the representation; and (3) extraordinary circumstances." *Id.* "Plaintiffs are able to satisfy the material misrepresentation element if their employers misrepresented any pertinent information." *Id.* at 445. The court noted that, "material misrepresentations can be made in informal documents." *Id.* The 5th Circuit held that, "it was unreasonable for Mello to rely on Sara Lee's informal material misrepresentations regarding his benefits and Mello cannot establish his estoppel claim. ERISA's policy against informal modifications of plan terms precludes a finding that Mello reasonably relied on the benefit statements' pension amounts." *Id.*

CONCLUSION: The 5th Circuit adopted ERISA-estoppel but "[b]ecause Mello has not satisfied the reasonable reliance, he cannot establish that ERISA-estoppel should be applied to preclude Sara Lee from correcting the amount of his pension benefits." *Id.* at 448.

SIXTH CIRCUIT

Gibson Guitar Corp. v. Paul Reed Smith Guitars, L.P., 423 F.3d 539 (6th Cir. 2005).

QUESTION: May the "initial-interest-confusion" doctrine be used as a substitute for actual confusion in order to find infringement of a trademark on a product's shape? *Id*. at 551.

ANALYSIS: The 6th Circuit began by explaining that "[i]nitial-interest confusion takes place when a manufacturer improperly uses a trademark to create initial customer interest in a product, even if the customer realizes, prior to purchase, that the product was not actually manufactured by the trademark holder." *Id*. at 549. The court then noted that "[t]he potential ramifications of applying this judicially created doctrine to product-shape trademarks are different from the ramifications of applying the doctrine to trademarks on a product's name, a company's name, or a company's logo." *Id*. at 551 n.15. For the court, these ramifications included allowing "trademark holders to protect not only the actual product shapes they have trademarked, but also a 'penumbra' of more or less similar shapes that would not otherwise qualify for trademark protection." *Id*. Another ramification the court highlighted was the potential for anticompetitive behavior based on the fact that allowing initial-interest-confusion to apply in the context of a product's shape "would make it substantially easier for product-shape trademark-holders to survive a defendant's summary-judgment motion than for plaintiffs alleging any other type of trademark infringement." *Id*.

CONCLUSION: Based on these concerns, the 6th Circuit would not "go so far as to hold that there is *never* a circumstance in which it would be appropriate to apply the initial-interest-confusion doctrine to a product shape trademark." *Id*. However, the court did not find that such an allowance would be appropriate in this case. *Id*.

Brumbalough v. Camelot Care Centers, Inc., 427 F.3d 996 (6th Cir. 2005)

QUESTION: "Whether a plaintiff is able to recover compensatory damages for emotional distress" that resulted from an employment termination in violation of the Family and Medical Leave Act ("FMLA"). *Id*. at 1007.

ANALYSIS: "[T]he FMLA specifically lists the types of damages that an employer may be liable for, and it includes damages only insofar

as they are the actual monetary losses of the employee such as salary and benefits and certain liquidated damages, the FMLA does not permit recovery for emotional distress." *Id*.

CONCLUSION: The court held that "damages for emotional distress are not allowed under the FMLA." *Id.* at 1008.

***Andretti v. Borla Performance Indus.*, 426 F.3d 824 (6th Cir. 2005)**

QUESTION: Whether this court should apply the clear error or *de novo* standard to review offers of judgment under FED. R. CIV. P. Rule 68 *Id.* at 837.

ANALYSIS: The court considered decisions in the 3rd, 5th, 7th, 9th, 10th and 11th Circuits and concluded that it "should apply general contract principles to interpret Rule 68 offers of judgment." *Id.*

CONCLUSION: The court decided to "review *de novo* the legal interpretations of Rule 68 and review for clear error the factual findings concerning the circumstances under which Rule 68 offers were made." *Id.*

***United States v. McClain*, 430 F.3d 299 (6th Cir. 2005)**

QUESTION: How should the court reconcile the good faith exception for the exclusion of evidence, as established in *Leon*, with the "fruit of the poisonous tree" doctrine from *Nardone*? *Id.* at 307.

ANALYSIS: After holding that a police search was unconstitutional under the Fourth Amendment, the court had to determine if warrants derived from this unconstitutional search were also illegal. *Id.* The 9th and 11th Circuits had found that any good faith on behalf of investigators did not sanitize the results of a warrantless search. *Id.* The 2nd and 8th Circuits had held, in some circumstances, the opposite view. The 8th Circuit found the *Leon* exception applicable "when circumstances surrounding both the initial detention of [evidence] and the subsequent issuance of the warrant were 'sufficiently close to the line of validity' that the officers had 'an objectively reasonable belief that they possessed a reasonable suspicion such as would support the valid detention of [the evidence] as well as an objectively reasonable belief that the warrant issued was valid." *Id.* at 308 (quoting United States v. Fletcher*,* 91 F.3d 48, 51-52 (8th Cir. 1996)).

CONCLUSION: The court determined that although there was a prior Fourth Amendment violation, the good faith exception should apply, and the evidence was improperly excluded at the trial court. *Id.* at 309. "The exclusion of evidence will not further the purposes of the exclusionary

rule 'when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope.'" *Id*. (quoting *United States v. Leon*, 468 U.S. 897, 920 (1984)).

***Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639 (6th Cir. 2006)**

QUESTION: "Whether Title VII plaintiffs can bring a class action for injunctive or declaratory relief in the same action that seeks compensatory damages under FED. R. CIV. P. 23(b)(2)." *Id*. at 653 (Keith, J., dissenting).

ANALYSIS: The court noted that the Supreme Court's holding in *Gen. Tel. Co. of the Southwest v. Falcon,* 457 U.S. 147, (1982), required plaintiffs requesting class certification in Title VII cases "to allege 'significant proof' that [a company] operated under a general policy of gender discrimination that resulted in gender discrimination manifesting itself in 'the same general fashion'' as to each of the kinds of discriminatory treatment upon which the pattern-or-practice class action rests." *Id*. at 644 (quoting Reeb v. Ohio Dep't of Rehab. & Corr*.,* 81 F.App'x 550, 559 (6th Cir. 2003). The court discussed the 5th Circuit's holding in *Allison v. Citgo Petroleum Corp.*, which found that "claims for individual compensatory and punitive damages were very particularized inquiries . . . [thus,] the damages were not 'incidental' to the requested injunctive or declaratory relief." *Id*. at 648 (quoting Allison v. Citgo Petroleum Corp., 151 F.3d 402, 414-15 (5th Cir.1998)). This contrasts with the 2nd and 9th Circuits, which found that a court could, in its discretion, certify a class action under Title VII despite claims for compensatory and punitive damages. *Id*. at 648-49.

CONCLUSION: The court followed *Allison* and held that "because of the individualized nature of damages calculations . . . the claims for individual compensatory damages of members of a Title VII class necessarily predominate over requested declaratory or injunctive relief, and individual compensatory damages [were] not recoverable by a Rule 23(b)(2) class." *Id.* at 651.

***Patel v. Gonzales*, 432 F.3d 685 (6th Cir. 2005)**

QUESTION: Whether the elimination of the 8 U.S.C. § 1182(i) waiver for parents of United States citizens has a retroactive effect. *Id.* at 690.

ANALYSIS: The court noted that "[o]nly . . . the Ninth and Fourth Circuits have addressed this issue" and both held that the waiver does not have a retroactive affect." *Id.* In addition, the court discussed the

Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001). *Id.* "In *St. Cyr*, the Supreme Court held that IIRIRA's elimination of [a] discretionary waiver . . . had a retroactive effect as applied to [specific] persons . . ." *Id.* at 690-91. The 6th Circuit, however, "limit[s] the application of *St. Cyr* to aliens who plead guilty to removable offenses prior to the enactment of IIRIRA regardless of when the removable offenses occurred." *Id.* at 691. The 6th Circuit also recognized that 8 U.S.C. § 1182(i) was "not intended to apply retroactively." *Id.* Ultimately, the court explained that the *Landgraf* factors "weigh against finding a retroactive effect" on the petitioners. *Id.* (citing Landgraf v. Usi Film Products, 511 U.S. 244, 269-70 (1994)).

CONCLUSION: "[T]he application of [8 U.S.C. § 1182(i)] . . . does not have a retroactive effect, the IJ properly applied the current version [8 U.S.C. § 1182(i)]." *Id.* at 689.

Bowles v. Russell, 432 F.3d 668 (6th Cir. 2005)

QUESTION: Where a petitioner does not receive timely notice of a district court's final ruling, thus foreclosing the petitioner's ability to file a timely appeal, may the petitioner seek relief and obtain a fourteen-day extension under FED. R. APP. P. 4(a)(6)? *Id.* at 669-70. If, in such a situation, the district court grants the "requested relief but mistakenly offer[s] an erroneous deadline" for filing of an appeal, should the erroneous deadline control, or is the fourteen-day period set out under Rule 4(a)(6) "not susceptible to extension through mistake, courtesy, or grace[?]" *Id.* at 669.

ANALYSIS: The 6th Circuit stated that for the extension beyond the fourteen-day period set out under Rule 4(a)(6) to control it would need to satisfy the test established by the Supreme Court in *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989). *Id.* at 657. The 6th Circuit stated that under the *Osterneck* test, such an extension would be applicable "'only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done.'" *Id.* The 6th Circuit found that petitioner's situation did not fit within the *Osterneck* test for three reasons. *Id.* "First, petitioner's act did not attempt to postpone a deadline for filing his appeal; it was to move for reopening of the appeal period." *Id.* "Second, it was, in fact, the district court here that performed the improper act . . . [and clearly] the district court is not a party." *Id.* Third, the *Osterneck* rule "requires that judicial assurances follow the actions of the party. Here, in contrast, the judicial assurance precedes the party's act." *Id.*

CONCLUSION: Where a district court erroneously extends the time to file a timely notice of appeal beyond fourteen days, it is the fourteen-day period set out under Rule 4(a)(6) that controls, and not the erroneous judicial order. *Id.* at 669-676.

United States v. Blood, 435 F.3d 612 (6th Cir. 2006)

QUESTION: What is "the meaning of the phrase 'with intent to deceive another' found in 18 U.S.C. § 513(a), which prohibits possession of counterfeit and forged securities with this deceptive intent." *Id.* at 616.

ANALYSIS: The defendants argued that the word "another" meant an entity other than the one which issued the security. *Id.* at 618-19. The court disagreed with the defendant's reading of *United States v. Thomas*, 54 F.3d 73 (2d Cir. 1995). The *Thomas* court, in the view of the 6th Circuit, held that the word "another" did include the issuer of the security. *Id.* at 619. The 6th Circuit agreed with the conclusion that "another" included the issuer of the security by contrasting the use of the word "another" in the statute with the word "whoever." *Id.* Thus, where the statute says that "whoever" engages in the prohibited act "with intent to deceive another," the word "another" means one other than the individual committing the prohibited act. *Id.*

CONCLUSION: The word "another" includes "the intent to deceive the purported issuers of the fraudulent securities in question." *Id.* at 622.

SEVENTH CIRCUIT

Illinois Dep't of Revenue v. Hayslett/Judy Oil, Inc., 426 F.3d 899 (7th Cir. 2005)

QUESTION: "Whether the Illinois Motor Fuel Tax falls under [11 U.S.C.] § 507(a)(8)(C) or § 507(a)(8)(E)." *Id.* at 902.

ANALYSIS: The 7th Circuit noted that to determine "whether a tax falls within the purview of subsection C" the court must decide whether "the tax is imposed on the consumer or the retailer." *Id.* at 903. "The Illinois Supreme Court has ruled that a prior version of the Tax was assessed on the *consumer* and not the *distributor*." *Id.* at 904. The 7th Circuit then noted that "[t]he plain language of the statute itself leads to the same conclusion." *Id.* The court found that the tax met a two-part test for inclusion under subsection C that it had previously established. *Id.*

CONCLUSION: The 7th Circuit found that because the defendant collected taxes from consumers, even though it "may be an excise tax," it

was "an excise tax imposed on consumers that is collected by a third party" and that it accordingly should fall under § 507(a)(8)(C). *Id.* at 904-05.

***United States v. McKissic*, 428 F.3d 719 (7th Cir. 2005)**

QUESTION: Whether constructive notice is enough warning when a court wishes to impose special conditions of education, employment and community service requirements for the supervised release of an inmate. *Id.* at 725.

ANALYSIS: The 7th Circuit determined that special conditions at issue were listed among the discretionary conditions that may be imposed by the court, under 18 U.S.C. § 3563(b). *Id.* Agreeing with the 5th, 9th, and 10th Circuits, the 7th Circuit held that constructive notice was adequate for conditions that are explicitly named in the statute. *Id.* at 725-26.

CONCLUSION: Since the special conditions of education, employment, and community service requirements are contemplated within the supervised release statute, actual notice is not required before the court may impose them. *Id.* at 726.

***United States v. Arnaout*, 431 F.3d 994 (7th Cir. 2005)**

QUESTION: Whether a defendant "need not be convicted of a federal crime of terrorism as defined by § 2332b(g)(5)(B) for the district court to apply [a federal terrorism sentencing enhancement]." *Id.* 1000-01.

ANALYSIS: The court reviewed an 11th Circuit opinion, which expressly confronted this issue and held that the statutory language "unambiguously cast a broader net by applying the enhancement to any offense that 'involved' or was 'intended to promote' a terrorism crime." *Id.* at 1002 (quoting United States v. Mandhai, 375 F.3d 1243, 1247 (11th Cir. 2004). The Sixth Circuit had held the same. *Id.* (citing United States v. Graham, 275 F.3d 490, 517 (6th Cir. 2001)).

CONCLUSION: The court held that a terrorism sentencing enhancement could be applied even when the underlying crime was not terrorism, but "a district court must identify which enumerated federal crime of terrorism the defendant intended to promote, satisfy the elements of § 2332b(g)(5)(A), and support its conclusions by a preponderance of the evidence with facts from the record," thus satisfying the *Booker* requirements for the Federal Guidelines. *Id.*

EIGHTH CIRCUIT

United States v. Smith, 422 F.3d 715 (8th Cir. 2005)

QUESTION: Whether the "categorization of the reckless use of a firearm [regardless of it resulting in actual physical injury] as a crime of violence" as defined by United States Sentencing Guidelines, § 4B1.2, is proper. *Id.* at 721.

ANALYSIS: Citing decisions from the 6th and 7th Circuits, the 8th Circuit found that regardless of whether there was actual physical injury to another or intent to harm, "discharging a firearm is an inherently risky act." *Id.* at 722 (citing United States v. Cole, 298 F.3d 659, 662 (7th Cir. 2002)). The court also noted that it has "previously concluded that certain firearm offenses that do not necessarily result in or require physical injury constitute crimes of violence . . . [just as] mere possession of a short-barreled shotgun is a crime of violence." *Id.* Similarly, "[t]he common theme throughout these cases is that the recklessness of the act matters, not the intended target or actual victim." *Id.* (citing Shepard v. United States, 125 S. Ct. 1254, 1257-58 (2005)).

CONCLUSION: Ultimately, the court held that the "district court properly held that the Iowa offense of the reckless use of a firearm is a crime of violence as defined by § 4B1.2." *Id*. at 732. Essentially, "recklessly using a firearm around others always creates a serious risk of injury." *Id.*

In re Marlar, 432 F.3d 813 (8th Cir. 2005)

QUESTION: Whether for the purposes of 28 U.S.C. § 303(a), "an alleged debtor in an involuntary bankruptcy case must timely assert his or her status as a farmer as an affirmative defense, lest it be waived." *Id*. at 814.

ANALYSIS: In a 1998 involuntary bankruptcy hearing, a federal bankruptcy court judged Marlar to be a debtor. *Id*. In December 2003, Marlar challenged that hearing, "asserting that 11 U.S.C. § 303(a) strips bankruptcy courts of subject matter jurisdiction over involuntary bankruptcy petitions brought against farmers." *Id*. Marlar "contended that he was a farmer when the involuntary petition was filed and that, accordingly, the bankruptcy proceedings against him should [have been] dismissed for lack of jurisdiction." *Id*. The 8th Circuit adopted the 5th Circuit's reasoning, which determined that status as a farmer is an affirmative defense rather than a question of the bankruptcy court's jurisdiction. *Id*. (citation omitted). The court determined that § 303(a)

requires that "a farmer against whom an involuntary petition is filed must timely controvert the petition by raising his or her status as a farmer in order to preclude the commencement of an involuntary case." *Id*. at 815.

CONCLUSION: The court held "that an alleged debtor must timely assert his or her status in one of the exempted categories as an affirmative defense. If the alleged debtor fails to timely raise the issue, it is waived." *Id*.

NINTH CIRCUIT

Reynolds v. Hartford Fin. Servs. Group, Inc., 435 F.3d 1081 (9th Cir. 2006)

QUESTION: "Does [the Fair Credit Reporting Act's ("FCRA")] adverse action notice requirement apply to the rates first charged in an initial policy of insurance or is it limited to an increase in a rate that the consumer has previously been charged?" *Id*. at 1090.

ANALYSIS: The 9th Circuit began with the text of the statute to determine the meaning of the term "adverse action." *Id*. The court looked to 15 U.S.C. § 1681a(k)(1)(B)(i) to define adverse action as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance." *Id*. The court then applied the ordinary meaning of the terms "increase" and "charge" to refute the insurance company's argument that an increased charge only refers to a previous charge a consumer has paid. *Id*. The court agreed, holding that affording the statute its plain meaning would further the purpose of FCRA to "promote the rights of consumers by giving them essential information about how their credit report is used." *Id*. at 1091-92.

CONCLUSION: "We hold that whenever because of [a consumer's] credit information a company charges a consumer a higher initial rate than it would otherwise have charged, it has increased the charge within the meaning of FCRA. Therefore, the fact that [the consumer's] policy was an initial one, and his rate was the initial rate charged, is of no consequence." *Id*. at 1092.

Clemens v. U.S. Dist. Court for Cent. Dist. of Cal., 428 F.3d 1175 (9th Cir. 2005)

QUESTION: Whether a defendant, pursuant to 28 U.S.C. § 455(a), can disqualify all district judges in a particular district court "because of

threats he allegedly made on the life and health of three judges in the district." *Id*. at 1179.

ANALYSIS: "[R]ecusal of an individual judge pursuant to § 455(a) may be required when the judge himself has been subject of a personal threat, unless the threat was motivated by a desire to recuse the judge." *Id*. at 1179. "No reasonable observer could conclude that a threat against three judges based on their handling of the defendant's *pro se* cases should be construed as a threat against all the judges of the district." *Id*. at 1180. "[T]he threats that the defendant allegedly made were in no way related to complaints about the Central District as an entity." *Id*. Instead, "the threats were aimed at particular judges perceived to have made unfavorable rulings in the defendant's *pro se* cases." *Id.*

CONCLUSION: The 9th Circuit ruled that "[t]he district court correctly held that mandatory disqualification of all judges on the Central District of California was not justified under § 455(a)." *Id*.

Bona v. Gonzales, 425 F.3d 663 (9th Cir. 2005)

QUESTION: "[W]hether a paroled alien, who is also deemed an arriving alien under 8 C.F.R. § 1.1(q), is properly precluded from applying for adjustment of status in removal proceedings." *Id*. at 667.

ANALYSIS: An application of the plain language revealed that the petitioner was an "arriving alien." *Id*. at 667-68. Then, the 9th Circuit, persuaded by the petitioner's argument, adopted the reasoning of *Succar v. Ashcroft*, 394 F.3d 8 (1st Cir. 2005), which held that "8 C.F.R. § 245.1 (c)(8), the regulation that precludes arriving aliens from seeking adjustment of status in removal proceedings, is valid." *Id*. at 665.

CONCLUSION: The petitioner is entitled to apply for adjustment in the removal proceedings. *Id*. at 664-65.

Ramadan v. Gonzales, 427 F.3d 1218 (9th Cir. 2005)

QUESTION: Whether a material change in circumstances affecting a foreign citizen's asylum eligibility constitutes a "question of law" under 8 U.S.C. § 1252(a)(2)(D) (2005). *Id*. at 1219-20.

ANALYSIS: In this case, an Egyptian woman appealed the immigration judge's denial of her political asylum application because she failed to file it within the mandatory one-year time period and did not demonstrate a material change in circumstances that would have excused her lateness. *Id*. at 1221. The court noted that a recently passed provision, § 1252(a)(2)(D), authorizes it to review decisions about the one-year time bar that raise constitutional issues or questions of law. *Id*. The court

for the first time decided whether a finding of a material change in circumstances, or lack thereof, constitutes a question of law that is subject to judicial review. *Id*. at 1221-22. The court reviewed §1252(a)(2)(D)'s legislative history, concluding that a material change in circumstances is a question of fact, not law. *Id*. at 1222.

CONCLUSION: A decision concerning the existence of a material change in circumstances is not a question of law under § 1252(a)(2)(D) and is not subject to judicial review. *Id*.

***Camacho v. Bridgeport Financial Inc.*, 430 F.3d 1078 (9th Cir. 2005)**

QUESTION: Whether a consumer's dispute of the validity of a debt under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C.A. §§ 1692g and 1692e (2000 & 2005), must be in writing.

ANALYSIS: In analyzing a statute a court should examine the statute's plain meaning, whether the plain meaning would lead to absurd or unreasonable results, and legislative intent. *Id.* at 1081. Further, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* (citing Russello v. United States, 464 U.S. 16, 23 (1983)). "The plain language of the text of § 1692g(a)(3) does not state that the consumer must dispute the debt in writing." *Id*. Allowing oral communication "does not lead to absurd results because an oral dispute triggers multiple statutory protections." *Id.* at 1081-82. Oral communication is also consistent with legislative intent of giving alleged debtors an opportunity to respond to initial communications from a collections agency. *Id*. at 1082.

CONCLUSION: There is no writing requirement implicit in § 1629g(a)(3).

***United States v. Esparza-Gonzalez*, 422 F.3d 897 (9th Cir. 2005)**

QUESTION: "Whether under the struck jury system waivers of peremptory strikes can form the basis of a *Batson* challenge." *Id.* at 902.

ANALYSIS: Essentially, "[u]nder the struck jury system, when either side waives a peremptory strike, this results in an excess number of potential jurors, and therefore, the juror with the highest juror number is removed from the jury panel. For this reason, a waiver of a peremptory strike under this system is properly viewed as the effective removal of an identifiable juror." *Id.* at 899. In the present context, "[b]y waiving its second peremptory strike, the prosecution effectively removed the only

potential juror [with an allegedly similar ethnic heritage as the defendant].” *Id.* at 899-900. The Supreme Court’s ruling in *Batson*, “held that a ‘state’s privilege to strike individual jurors through peremptory challenges[] is subject to the Equal Protection Clause.’” *Id.* at 901 (citing Batson v. Kennedy, 476 U.S. 79, 89 (1986)). Thus, the 9th Circuit held “that for purposes of determining whether . . . a *Batson* violation has been established, waivers of peremptory strikes in a struck jury system should be treated the same as exercises of peremptory strikes in an alternate system.” *Id.* at 899.

CONCLUSION: The court “reverse[d] the district court’s finding that the defendant failed to establish a *prima facie* case of [intentional] discrimination.” *Id.* at 907. Given the practical effects of the struck jury system, the failure to use a peremptory strike, standing alone without other evidence of discriminatory intent, can form the basis of a *Batson* challenge. *Id*.

***Panaro v. City of North Las Vegas*, 432 F.3d 949 (9th Cir. 2005)**

QUESTION: “[W]hether a prisoner’s participation in an internal investigation of official conduct should be considered equivalent to exhausting a detention center’s available administrative grievance procedure.” *Id.* at 953.

ANALYSIS: First, the court pointed to the Prison Litigation Reform Act (“PLRA”), which “precludes an action by a prisoner ‘until such available administrative remedies as are available have been exhausted.” *Id*. Because the plaintiff did not “initiate, let alone exhaust, his administrative remedies through that procedure” the court found the PLRA to preclude plaintiff’s civil rights claim. *Id.* Second, the court noted that the 6th Circuit had come to the same conclusion when considering the issue at bar. *Id.*

CONCLUSION: Ultimately, the 9th Circuit adopted the rule that “participating in an internal affairs investigation does not by itself satisfy the exhaustion requirement of the PLRA.” *Id*.

***Lindsey v. SLT Los Angeles, LLC*, 432 F.3d 954 (9th Cir. 2005)**

QUESTION: Whether the *McDonnell Douglas* test, as applied to claims of employment discrimination, must be modified when applied to “claims of racial discrimination in non-employment contracts arising under 42 U.S.C. § 1981.” *Id.* at 959.

ANALYSIS: The court first held “that the first three elements of the *McDonnell Douglas* test are easily adapted to claims arising under

section 1981 outside of an employment context." *Id.* Therefore, the plaintiff must show that: "(1) it is a member of a protected class, (2) it attempted to contract for certain services, and (3) it was denied the right to contract for those services." *Id.* As for the fourth element, which requires "that such services remained available to similarly-situated individuals who were not members of the plaintiff's protected class," the court declined to determine whether such must be modified, finding that the plaintiff "offered clear evidence that a similarly-situated group of a different protected class was offered the contractual services which were denied" to the plaintiff. *Id.*

CONCLUSION: Ultimately, the court applied all four elements of the *McDonnell Douglas* test without modification.

Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal., 435 F.3d 1011 (9th Cir. 2006)

QUESTION: Whether the court should grant a writ of mandamus pursuant to the Crime Victim's Rights Act ("CVRA") because the lower court denied the victim an opportunity to speak at a second co-defendant's sentencing merely because it believed that it had heard the victim's concerns at the first hearing. *Id*. at 1013

ANALYSIS: A writ of mandamus can be granted when the decision merits review under the *Bauman* standard. Once the petitioner meets this threshold standard, the court must then apply the *Bauman* factors and determine if a writ should be granted. In this case, the petitioner raises an issue of first impression, and therefore meets the threshold requirement for review; thus, the court must apply the *Bauman* factors and determine if writ should be granted. *Id*. at 1017. The underlying rationale in the *Bauman* standard is to prevent interlocutory review. *Id*. However, in this case, the writ was made pursuant to the CVRA, which specifically allows for the interlocutory review that *Bauman* seeks to prevent. *Id*. Therefore, the *Bauman* factors are inapplicable in the petitioner's case. Instead, under the CVRA, the 9th Circuit held that the court must issue the writ when there is an abuse of discretion or legal error. *Id*. The court noted that the 2nd Circuit has held similarly and that it is unaware of any decision to the contrary. *Id*.

CONCLUSION: "The District Court here committed an error of law by refusing to allow petitioner to allocute at Zvi's sentencing and we must therefore issue the writ." *Id.*

***Hamilton v. Wash. State Plumbing & Pipefitting Indus. Pension Plan*, 433 F.3d 1091 (9th Cir. 2006)**

QUESTION: Whether, "under ERISA, a QDRO can divest a surviving spouse of her statutorily-guaranteed right to a QPSA only if the QDRO expressly assigns surviving spouse rights to a former spouse." *Id*.

ANALYSIS: The court first looked to the plain language of the statute to determine the scope of the strict spousal consent privileges of § 1055 of ERISA and the interplay between § 1059(d)(3)(F) which states that "'[t]o the extent provided in any qualified domestic relations order,' surviving spouse rights may be assigned to a 'former spouse.'" *Id.* at 1098-99. The court determined that a QDRO must specifically assign the rights under it to a former spouse in order to divest the surviving spouse's right to benefits under the pension plan. *Id.* The 9th Circuit also found support for its interpretation of the statute in other circuits, citing to 5th and 3rd Circuit precedent. *Id.* at 1100.

CONCLUSION: "[A] surviving spouse benefit must be explicitly assigned to a former spouse in a QDRO in order to overcome the surviving spouse's right to a QPSA under ERISA." *Id.* at 1103-04.

***United States v. Pacheco-Navarette*, 432 F.3d 967 (9th Cir. 2005)**

QUESTION: Whether a guilty plea colloquy is deficient when a court does not make a defendant aware of rights established by changes in the law or subsequent judicial decisions. *Id.* at 969.

ANALYSIS: In this 9th Circuit case, defendant challenged his plea of guilty which was made pursuant to a plea agreement. *Id.* at 968. The court noted that FED. R. CRIM. P. 11 obligates a court to describe to a defendant the consequences of the plea that have "'a definite, immediate and largely automatic effect on the range of [his] punishment.'" *Id.* at 969 (quoting United States v. Littlejohn, 224 F.3d 960, 965 (9th Cir. 2000)). The court stated that "potential changes in the law" have no such effect on a defendant's ultimate sentence. *Id.* Therefore, the court held that defendant could not claim that a guilty plea was rendered unknowing or involuntary when the lower court correctly stated his rights at the time the colloquy was given. *Id.* The court noted the issue of first impression and rested its holding on "well-established law stating that substantive changes in the law do not invalidate guilty pleas." *Id.* at 969 (citing Brady v. United States, 397 U.S. 742, 756-58 (1970); United States v. Cardenas, 405 F.3d 1046, 1048 (9th Cir. 2005)).

CONCLUSION: The court held that "a guilty plea colloquy is not deficient solely because the district court did not advise a defendant of

rights established by *subsequent* judicial decisions or changes in the law." *Id.* at 969.

***United States v. Clark*, 435 F.3d 1100 (9th Cir. 2006)**

QUESTION: "[W]hether Congress exceeded its authority 'to regulate Commerce with foreign Nations,' U.S. CONST. Art. I, § 8, cl. 3, in enacting a statute that makes it a felony for any U.S. citizen who travels in 'foreign commerce,' i.e. to a foreign country, to then engage in an illegal commercial sex act with a minor." *Id.* at 1101.

ANALYSIS: The court first noted that only a plain showing that Congress had exceeded its constitutional authority would suffice to invalidate the law. *Id.* at 1109 (citing United States v. Morrison, 529 U.S. 598, 607 (2000)). The court held that the showing was not made by the defendant in this case. *Id.* The court noted that Congress's power to regulate commerce between nations is not as well defined as its domestic powers. *Id.* at 1112. Congress's power for regulating commerce between nations, the court held, is sweeping and not subject to restrictions that may be put on the power domestically. *Id.* at 1113. Using the rational basis test, the court analyzed the statute and determined that because it targeted commercial sex, it was constitutional. *Id.* at 1115.

CONCLUSION: Congress was within its authority under the Foreign Commerce Clause to prohibit U.S. citizens from traveling in foreign commerce to engage in illegal commercial sex acts with minors. *Id.* at 1117.

***United States v. Scott*, 424 F.3d 888 (9th Cir. 2005)**

QUESTION: "[W]hether police may conduct a search based on less than probable cause of an individual released while awaiting trial." *Id.* at 888.

ANALYSIS: In determining whether to grant the defendant's motion to suppress evidence obtained by officers while released on recognizance, the court carefully conducted a two-step inquiry into whether: 1) "a drug test and search of the [defendant]'s house were valid because the [defendant] consented to them as a condition of his release"; and 2) "the search in question (taking the fact of consent into account) was reasonable." *Id.* at 890-893. The court pointed out that "one who has been released on pretrial bail does not lose his or her Fourth Amendment right to be free of unreasonable searches," nor do they waive these rights by consenting to searches as a condition of such release. *Id.* at 893. Second, although "Fourth Amendment reasonableness" standards of

probable cause may be relaxed "when 'special needs, beyond the normal need for law enforcement,' make an insistence on the otherwise applicable level of suspicion impracticable," the court concluded that protecting the community was not a special needs exception as crime prevention was a quintessential law enforcement purpose. *Id.* at 893 (citing Griffin v. Wisconsin, 483 U.S. 868 (1987)). Furthermore, the court found that the connection between the drug test and the harm to be avoided, nonappearance in court, was not obvious. *Id.* at 895. The court noted that the issue before the court was not only one of first impression in the 9th Circuit, but also "one of first impression in any federal circuit and the vast majority of state courts." *Id.* at 889.

CONCLUSION: The court "affirm[ed] the district court's order granting the [defendant]'s motion to suppress," holding that warrantless searches, including drug testing, imposed as a condition of pretrial release, required a showing of probable cause, despite defendant's prerelease consent." *Id.* at 898.

***Kelava v. Gonzales*, 434 F.3d 1120 (9th Cir. 2006)**

QUESTION: Whether it is impermissible "to deny [an alien petitioner] eligibility for previously available discretionary relief" of a "waiver of inadmissibility or cancellation of removal for having engaged in terrorist activity" retroactively within the meaning of 8 U.S.C. § 1227(a)(4)(B) and 8 U.S.C. § 1182(a)(3)(B)(iii)(II). *Id.* at 1121.

ANALYSIS: In 1978, petitioner, an alien from Croatia, and another man "entered the West German Consulate in Chicago, armed with handguns, ropes and a phony bomb" and "seized several employees." *Id.* at 1122. "[I]nitially indicted and convicted in federal court of conspiracy and kidnapping of foreign officials," petitioner later pled guilty to unarmed imprisonment of a foreign national on retrial and was sentenced. *Id.* "Nearly 20 years later . . . the INS commenced removal proceedings . . . pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii)" and 8 U.S.C. § 1227(a)(4)(B). *Id.* The Board of Immigration Appeals ("BIA") found the alien removable for the terrorist activities and "precluded from seeking a waiver of inadmissibility under former § 212(c) under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c), commonly referred to as a '§ 212(c) waiver.'" *Id.* In an issue of first impression, the alien argued that it was "impermissibly retroactive to deny him eligibility for previously available discretionary relief" (a § 212(c) waiver) because he was not *convicted of* engaging in a terrorist activity but rather entered into a plea bargain. *Id.* at 1121. However, the court reasoned that aliens "'cannot plausibly claim that they would have

acted any differently if they had known' about the elimination of § 212(c) relief, even though the criminal act and conviction occurred before the [Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")] amend[ed]" the statute. *Id.* at 1124. The alien only had to have committed, not been convicted of, the terrorist act, and it would be absurd for him to argue that he would not have committed that act if he had known he would lose the possibility of obtaining § 212(c) relief. Thus, "there is no retroactive effect in applying the IIRIRA elimination § 212(c) relief to [an alien], who quite clearly engaged in the requisite terrorist activity prior to IIRIRA's enactment." *Id.* at 1126.

CONCLUSION: The court disagreed with petitioner, finding that it was not impermissibly retroactive to deny [alien-petitioner] eligibility for a § 212(c) waiver from removal when the alien "had engaged in terrorist activity following his admission to the United States" despite it being prior to the statute's amendment. *Id.* at 1123.

***Mancebo v. Adams*, 435 F.3d 977 (9th Cir. 2005)**

QUESTION: "[W]hether the failure to prevent the introduction of improper polygraph evidence can serve as grounds for reversing a conviction pursuant to AEDPA." *Id*. at 979.

ANALYSIS: "Mancebo argues that he was denied his right to effective counsel at his original trial because his counsel failed to object to the state's introduction of the recording of a conversation Mancebo had with police, during which Mancebo indicated his desire not to take a polygraph examination." *Id*. The court first noted that "[p]ursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we can only overturn Mancebo's conviction if the state court decision affirming his conviction was 'an unreasonable application of . . . clearly established Federal law.'" *Id*. at 978. The court then noted that "for an ineffective assistance of counsel claim to succeed, a party must demonstrate that the performance of his or her attorney 'fell below an objective standard of reasonableness' and that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id*. at 979 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1994)). The court held that it "need not determine whether counsel's performance was deficient before examining the prejudice suffered." *Id*. (quoting *Strickland*, 466 U.S. at 697).

CONCLUSION: The 9th Circuit held that "[i]n addition to the small role the polygraph evidence played in the trial, there is sufficient other evidence supporting Mancebo's conviction to preclude us from finding

'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id*. at 980 (quoting *Strickland*, 466 U.S. at 694).

McSherry v. City of Long Beach, 423 F.3d 1015 (9th Cir. 2005)

QUESTION: Whether the grant of a motion for judgment as matter of law under FED. R. CIV. P. 50 "at the outset of trial, prior to the presentation of any evidence, is appropriate." *Id.* at 1019.

ANALYSIS: FED. R. CIV. P. 50(a) "presumes that a jury trial has begun, and that the nonmoving party 'has been fully heard' on the issue prior to the court's ruling." *Id.* Further, Rule 50(a)(2) provides that motions for judgment as a matter of law may be made at any time before submission of the case to the jury. However, the argument that a "Rule 50 motion may be made at, literally, 'any time' once a trial has commenced, regardless of the state of evidence admitted" is erroneous. *Id.* "Nothing about the language or structure of the provisions suggests that Rule 50(a)(2) has a force independent of Rule 50(a)(1). Reading the two provisions together, it is apparent that Rule 50(a)(1) sets forth the standards under which a court may grant judgment as a matter of law, while Rule 50(a)(2) explains when a party may make a motion." *Id.* Furthermore, Rule 50(a)(2) is "not intended as an alternative mechanism for obtaining summary judgment, as the advisory committee notes make clear." *Id.* at 1020.

CONCLUSION: The court ruled that the trial judge erred in granting judgment as a matter of law before taking evidence. *Id*. Under Rule 50, the nonmoving party has a right to be fully heard on the issue before the grant of the motion. *Id.* at 1019. The court concluded "this use of Rule 50 is not supported by the language of the rule, the advisory committee's notes, or caselaw governing the proper use of Rule 50." *Id.*

TENTH CIRCUIT

Am. Soda v. U.S. Filter Wastewater Group, 428 F.3d 921 (10th Cir. 2005)

QUESTION: "Whether the U.S. district courts are courts *of* the various states in which they are located." *Id*. at 925.

ANALYSIS: "Other courts have described the issue as a question of sovereignty versus geography." *Id*. at 925. "If the contract language refers to the state courts to the exclusion of the federal courts, it is a term

of sovereignty." *Id*. Otherwise, if the contract language encompasses particular state courts and the federal court sitting within that particular state, then "it is a term of geography." *Id*.

CONCLUSION: The court of appeals concluded that "the forum selection clause in the parties' agreement designates the Colorado state court system as the forum for resolution of disputes arising out of the contract, and does not include the federal district court." *Id*. at 926.

In re Joelson, 427 F.3d 700 (10th Cir. 2005)

QUESTION: Whether the phrase "respecting the debtor's financial condition" in 11 U.S.C. § 523(a)(2)(A) & (B) "should be interpreted broadly, to include all oral communications that reflect on the extent of any of [the debtor's] assets, liabilities, and income," or strictly, "to include only information as to [the debtor's] overall financial health." *Id.* at 705-06.

ANALYSIS: Although the Supreme Court has not directly addressed this issue, the decision in *Field v. Mans*, 516 U.S. 59 (1995), "lends some support to the notion that a statement 'respecting the debtor's . . . financial condition' must relate to a debtor's overall financial health." *Id.* at 710. Additionally, the court reasoned that a strict reading is "consistent with the text and structure of the Bankruptcy Code, Congress's intent as expressed in the legislative history of 11 U.S.C. § 523(a)(2)(A) and (B), and case law." *Id.* at 706.

CONCLUSION: The 10th Circuit held that the phrase "respecting the debtor's financial condition" in 11 U.S.C. § 523(a)(2)(A) & (B) "should be interpreted strictly to include only information as to [the debtor's] overall financial health." *Id.* at 709.

Mactec, Inc. v. Gorelick, 427 F.3d 821 (10th Cir. 2005)

QUESTION: Whether "a non-appealability clause in an arbitration agreement that forecloses judicial review of an arbitration award beyond the district court level is enforceable." *Id.* at 824.

ANALYSIS: In this case, the parties included a clause in their contract providing for arbitration of any disputed contractual term and that such arbitration would be final once confirmed by the district court. *Id*. at 823. A dispute arose, the parties submitted it to arbitration, the arbitrator found in the defendant's favor and the plaintiff sought judicial review of the arbitrator's decision. *Id.* at 823-24. The court reviewed its prior holdings concerning the enforceability of contractual restrictions limiting judicial review of arbitration awards. *Id*. at 828-30.

CONCLUSION: The court held that "contractual provisions limiting the right to appeal from a district court's judgment confirming or vacating an arbitration award are permissible, so long as the intent to do so is clear and unequivocal." *Id.* at 830.

***Paper, Allied-Indus., Chem. And Energy Workers Int'l Union v. Cont'l Carbon Co.*, 428 F.3d 1285 (10th Cir. 2005)**

QUESTION: What is the correct standard for determining "whether particular state's laws are comparable to 33 U.S.C. § 1319(g)" for purposes of determining whether federal action is barred under the Clean Water Act ("CWA"), 33 U.S.C. § 1365(a) (2000), and if so, whether the jurisdictional bar applies to both civil penalties and equitable relief. *Id.* at 1288-89.

ANALYSIS: The court found that the "[CWA] calls for something less than a rigorous comparability standard." *Id.* at 1293. Hence, the 10th Circuit followed the 11th Circuit's "rough comparability" approach in determining whether a state law is comparable to the CWA. *Id.* The "rough comparability" approach examines "the three categories of provisions" found within 33 U.S.C. § 1319(g), which includes "penalty assessment, public participation, and judicial review." *Id.* at 1294. Therefore, any court using the "rough comparability" approach "engaged in an independent analysis for each category of state-law provisions." *Id.* If one category "is found to be lacking," then the suit cannot be precluded. *Id.*

CONCLUSION: The 10th Circuit ruled "that in order to satisfy U.S.C. § 1319(g)(6)(A)(ii), three categories of state law provisions-penalty-assessment, public participation and judicial review must be roughly comparable to the corresponding categories of federal provisions." *Id.* at 1288. In addition, the jurisdictional bar found under this section of the statute only applies to civil penalty claims. *Id.* at 1289.

***Peoples v. CCA Detention Ctrs.*, 422 F.3d 1090 (10th Cir. 2005)**

QUESTION: "[W]hether the existence of a state-law cause of action for damages, standing alone, precludes a *Bivens* claim against an employee of a privately operated prison." *Id.* at 1100.

ANALYSIS: Although considered by three district courts, no court of appeals has ruled on the matter. *Id.* The court held that under state law the employees had a duty to protect the detainee from known harm, and the detainee thus had a state tort remedy for violation of that duty. *Id*. State law also provided a civil remedy for eavesdropping or breach of

privacy; therefore, implying a federal cause of action was therefore unwarranted. *Id*. Moreover, the court continued, the detainee's segregation was based solely on the needs of the prison, was not punitive, and the detainee was provided with reasonable access to legal materials. *Id*. at 1103.

CONCLUSION: Ultimately, the court affirmed the district court in holding that under *Malesko*, a *Bivens* claim should not be implied when an alternative cause of action arising under either state or federal law exists. *Id.* Thus, "federal prisoners have no implied right of action for damages against an employee of a privately operated prison under contract with the United States Marshals Service when state or federal law affords the prisoner an alternative cause of action for damages for the alleged injury." *Id.* at 1108.

***Norton v. Marietta, Oklahoma*, 432 F.3d 1145 (10th Cir. 2005)**

QUESTION: Whether a plaintiff "who seeks to bring suit about prison life after he has been released and is no longer a prisoner [must] satisfy the [Prison Litigation Reform Act ("PLRA")] before bringing suit." *Id.* at 1151.

ANALYSIS: Because the PLRA requires "a *prisoner* [to] exhaust all available administrative remedies before bringing suit," the court first looked to the PLRA's definition of "prisoner." *Id.* at 1149 (emphasis added). The PLRA defines "prisoner" as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." *Id.* at 1150. Siding with other circuits who "have unanimously held that it is the plaintiff's status at the time he files suit that determines whether [the PLRA] exhaustion provision applies," the court found that the exhaustion provision does not apply to a plaintiff who is not a prisoner. *Id.* at 1150.

CONCLUSION: The 10th Circuit, siding with its sister circuits, found the "statutory language [to be] plain and unambiguous [and] [t]herefore plaintiff, who was not a prisoner confined in a jail, prison, or other correctional facility when he brought suit, did not have to exhaust his administrative remedies first." *Id.*

***United States v. Morales-Chaires*, 430 F.3d 1124 (10th Cir. 2005)**

QUESTION: Whether "the sentencing factors specified in 18 U.S.C. § 3553(a) support a sentence below the otherwise applicable Guideline

range," post-*Booker*, because of the "disparities between sentences imposed in districts where a 'fast-track' program exists for aliens accused of illegal reentry and in districts, like Colorado, where no such 'fast-track' program exists." *Id.* at 1127.

ANALYSIS: The court discussed so-called "fast track" sentencing programs in certain states where illegal immigrants would plead guilty and waive certain appeals in exchange for lighter sentences, and the fact that defendant was not subject to a fast-track proceeding in Colorado. *Id.* at 1127. It noted that since the Federal Sentencing Guidelines were changed by the *Booker* decision, federal courts had not developed a consistent standard for reviewing the fast-track program. *Id.* at 1130. The 1st Circuit had suggested that downward departures were not necessary, while several district courts had held that courts may use discretion to minimize sentencing disparities. *Id.*

CONCLUSION: The court upheld defendant's conviction, but did not make a determination as to the propriety of the fast-track sentencing programs. *Id.* at 1131. The court held that defendant's sentence was appropriate under conditions laid out in 18 U.S.C. § 3553(a)(6). *Id.*

***Robbins v. Wilkie*, 433 F.3d 755 (10th Cir. 2006)**

QUESTION: Whether a party's "failure to appeal the district court's order denying dismissal on qualified immunity precludes [the party] from appealing an order denying summary judgment on the same qualified immunity issues." *Id*. at 762.

ANALYSIS: "Although this issue is one of first impression in this circuit, the Supreme Court and several other circuits have addressed the issue." *Id*. In *Behrens v. Pelletier*, 516 U.S. 299 (1996), the Court concluded that "resolution of the immunity question may 'require more than one judiciously timed appeal.'" *Id*. (citing *Behrens*, 516 U.S. at 309). It reasoned "that a defendant should be permitted to raise the qualified immunity defense at successive stages of litigation because different legal factors are relevant at various stages." *Id*. (citing *Behrens*, 516 U.S. at 309). The 3rd Circuit ruled that "a defendant's failure to appeal an order denying dismissal on qualified immunity does not preclude him from appealing a subsequent denial of the same legal arguments in a motion for summary judgment on qualified immunity." *Id*. (citing Grant v. City of Pittsburgh, 98 F.3d 116, 120-21 (3d Cir. 1996)). The 9th Circuit went further and "assert[ed] jurisdiction over an appeal of an order denying a second motion for summary judgment after defendant failed to appeal the denial of his first summary judgment motion." *Id*. (citing Knox v. Southwest Airlines, 124 F.3d 1103, 1105-06

(9th Cir. 1997)). Thus, "after *Behrens*, no circuit has held that an appellate court lacks jurisdiction over denial of a motion for summary judgment when the motion raises the same legal arguments as a prior unappealed motion to dismiss but relies on evidence developed during discovery. Similarly, [this court] decline[s] to adopt such a rule." *Id*. at 763.

CONCLUSION: The court held that in the present case, "[d]efendants' failure to appeal the district court's denial of dismissal on qualified immunity does not divest this court of jurisdiction to consider Defendants' current appeal because Defendants' summary judgment motion relies in part on evidence developed during discovery." *Id*. at 764.

ELEVENTH CIRCUIT

United States v. Howell, 425 F.3d 971 (11th Cir. 2005)

QUESTION: Whether a convicted felon is entitled to the actual or constructive return of his or her firearms under FED. R. CRIM. P. 41(e).

ANALYSIS: "'Rule 41(e) compels a district court to afford . . . persons an opportunity to submit evidence in order to demonstrate that they are lawfully entitled to the challenged property . . . . When it is apparent that the person seeking a return of the property is not lawfully entitled to own or possess the property, the district court need not hold an evidentiary hearing. Federal law prohibits convicted felons from possessing guns. Based upon [defendant's] status as a convicted felon, the district court could properly conclude without receiving evidence that [the defendant] is not entitled to a return of firearms.'" *Id*. at 976 (quoting United States v. Felici, 208 F.3d 667, 670 (8th Cir. 2000)). According to the 11th Circuit, a convicted felon could not use Rule 41(e) to make a request of constructive return of firearms. *Id*. at 977. Constructive return would either be accomplished through the sale of those firearms with the proceeds going to the convicted felon or by allowing a third party to hold the weapons in trust for the felon. *Id*. The 11th Circuit noted that "'[f]ederal law prohibits convicted felons from possessing guns . . . . [The defendant] is also not entitled to have the firearms held in trust for him by a third party. Such a request suggests constructive possession. Any firearm possession, actual or constructive, by a convicted felon is prohibited by law.'" *Id*. (quoting *Felici*, 208 F.3d at 670)).

CONCLUSION: A convicted felon cannot successfully use Rule 41(e) to force a court to actually or constructively return firearms to the felon's possession.

***Jackson v. Cintas Corp.*, 425 F.3d 1313 (11th Cir. 2005)**

QUESTION: "[W]hether an order compelling arbitration and dismissing a complaint, but retaining jurisdiction over a motion for sanctions, is a final and appealable decision." *Id*. at 1315.

ANALYSIS: The court commenced its analysis with a thorough review of the statute: "The Federal Arbitration Act (FAA) [9 U.S.C. § 16(a)(3)] allows an immediate appeal from any 'final decision with respect to arbitration.'" *Id*. at 1316. A decision is final when the entire case is completed and no part remains before the court. *Id*. In this case, the district court dismissed the case, but retained jurisdiction over the motion for sanctions. *Id*. The 11th Circuit, drawing on prior precedent, viewed the motion for sanctions as a collateral issue. *Id*.

CONCLUSION: "Because the dismissal disposes of the entire case on the merits and the motion for sanctions raises only a collateral issue, [the court] conclude[d] that the dismissal [was] a final and appealable order." *Id*. at 1315.

***Tinker v. Beasley*, 429 F.3d 1324 (11th Cir. 2005)**

QUESTION: Whether a "coercive interrogation that does not result in a confession or other self-incrimination may constitute a violation of substantive due process rights." *Id.* at 1327.

ANALYSIS: Following the Supreme Court's decision in *Miller v. Fenton*, 474 U.S. 104, 109 (1985), which held that courts must condemn interrogation techniques that "are so offensive to a civilized system of justice," the 11th Circuit ruled that "the officers were justified in believing they had the right person in custody at the time of the interrogation." *Id*. at 1329. Therefore, the officers' conduct was not "so offensive" to the justice system as to warrant a due process violation. *Id.*

CONCLUSION: The court held that "only the most egregious official conduct" during an interrogation will be considered a due process violation. *Id.* at 1328.

***Peebles v. Merrill Lynch, Inc.*, 431 F.3d 1320 (11th Cir. 2005)**

QUESTION: Whether the amount in controversy requirement for diversity jurisdiction under 28 U.S.C. § 1332(a)(1) is controlled by the amount claimed in an original action that went to arbitration, or by the amount of an arbitration award. *Id*. at 1325.

ANALYSIS: The maximum amount sought by the plaintiff in this case was the "vacatur of a zero dollar arbitration award *and* a new arbitration hearing at which he could urge his argument that he was entitled to up to $2,000,000 in damages." *Id.* at 1325-26.

CONCLUSION: "A federal court has subject matter jurisdiction where a party seeking to vacate an arbitration award hearing at which he will demand a sum which exceeds the amount in controversy for diversity jurisdiction purposes." *Id*. at 1325.

***United States v. Williams*, 425 F.3d 987 (11th Cir. 2005)**

QUESTION: Whether, under the 1991 version of 18 U.S.C. § 3583(e)(3), the statutory caps apply to each revocation of supervised release or to the aggregate of the sentences imposed on multiple revocations of supervised release." *Id*. at 988.

ANALYSIS: Section 3583(e)(3) allows a court to require a felon on supervised release to serve his remaining time back in jail if that felon violates any of the provisions of the supervised release. *Id*. at 988. The statute also provides a method for granting credits for time served on supervised release. *Id*. First, the court looked to the plain meaning of the statute to determine its meaning; however, in this case, the court found that the statute was ambiguous. *Id*. at 989. The 11th Circuit then looked to the legislative history of the statute to find support for the aggregation argument. *Id*. The court further noted that six other circuits have addressed the issue and found that the aggregation method should be applied. *Id*.

CONCLUSION: "Section 3583(e)(3)'s statutory maximums apply in the aggregate." *Id*. at 990.

***Klay v. All Defendants, et al.*, 425 F.3d 977 (11th Cir. 2005)**

QUESTION: "Whether the requirement of reasonable compensation in FED. R. CIV. P. 45(c)(3)(B) obliges a party that has compelled, by subpoena, the production of confidential data to pay a license fee for the data, even though the district court, by protective order, limited the use of the data to litigation purposes, avoided any diminution of the value of

the data, and required the payment of the production costs of the data." *Id*. at 980.

ANALYSIS: First, the 11th Circuit stated that district courts have broad discretion in managing pretrial discovery and allocation of costs; therefore, it only reviewed the district court's interpretation of Rule 45(c)(3)(B). *Id*. at 982. The court began its analysis by looking to the text of Rule 45(c)(3)(B) to determine if the enforcement of a subpoena for confidential data requires the payment of reasonable compensation. *Id*. The court looked to the construction of the statute itself to determine that the reasonable compensation standard was intended to apply to a subpoena that requires disclosure of certain types of commercial information. *Id*. at 983. The 11th Circuit then found that reasonable compensation is required for any losses caused by the production of confidential material. *Id*. However, the court noted that reasonable compensation is a broad and flexible term; therefore, it does not necessarily apply in every possible situation. *Id.* at 984. The court then found that the district court did not abuse its discretion since the company suffered no harm or loss by producing the information. *Id.* at 986.

CONCLUSION: The district court did not abuse its discretion when it only required payment of production costs, because the property in question did not diminish in value. *Id*. at 980.

United States v. Rahim, 431 F.3d 753 (11th Cir. 2005)

QUESTION: Whether 18 U.S.C. § 924(c) "permit[s] two convictions for the use of a firearm in the course of a crime of violence when the underlying offenses were part of a single course of conduct . . . [and] if the statute allows two convictions for a single course of conduct, [whether it is] unconstitutional under the Double Jeopardy Clause of the Fifth Amendment." *Id.* at 757.

ANALYSIS: The court reasoned that "[n]othing in the language of section 924(c)" suggests that the statute prohibits two convictions simply because the "predicate crimes of violence arise from the same course of conduct." *Id.* Rather, "section 924(c) makes it a crime to use, carry, or possess a firearm 'during and in relation to any crime of violence . . . .'" *Id.* (quoting § 924(c)(1)(A) (2000)). Finally, the court noted that "[t]his interpretation is consistent with our precedent and the decision of every other circuit to address the issue on similar facts." *Id*. As to the issue of double jeopardy, the court reasoned that "[m]ultiple convictions for the same course of conduct violate the Double Jeopardy Clause unless each of the two offenses charged 'requires proof of an additional fact which

the other does not.'" *Id.* at 758 (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)). In this case, each conviction "required proof of an element that the other did not." *Id.*

CONCLUSION: The court held that § 924(c) permits two convictions arising from the same course of conduct, and such convictions are not prohibited by the Double Jeopardy Clause so long as each conviction "required proof of an element that the other did not." *Id.*

***United States v. Grant*, 431 F.3d 760 (11th Cir. 2005)**

QUESTION: In determining intended loss under United States Sentencing Guidelines § 2B1.1, "whether a district court clearly errs by including the full face value of photocopied corporate checks in its calculation." *Id.* at 762.

ANALYSIS: The court began by noting that a district court must make a reasonable estimate of the intended loss. *Id.* Next, the court noted that other circuits, including the 3rd and 10th Circuits, have concluded that a "district court does not clearly err when it uses the full face value of a check to calculate intended loss." *Id.* Finally, the court observed that in the context of stolen credit cards, the 11th Circuit previously determined that "'a district court does not err in determining the amount of the intended loss as the total line of credit to which Defendant could have access, especially when Defendant presents no evidence that he did not intend to utilize all of the credit available on the cards.'" *Id.* at 764 (quoting United States v. Manoocher Nosrati Shamloo, 255 F.3d 1290, 1291 (11th Cir. 2001)).

CONCLUSION: The 11th Circuit held that "when an individual possesses a stolen check, or a photocopy of a stolen check, for the purpose of counterfeiting, the district court does not clearly err when it uses the full face value of the stolen check in making a reasonable calculation of the intended loss." *Id.* at 765.

***United States v. Williams*, 431 F.3d 767 (11th Cir. 2005)**

QUESTION: The court examined "the meaning of the word 'any' as it is used in United States Sentencing Guideline § 2K2.1(c)(1)." *Id.* at 768.

ANALYSIS: The court rejected defendant's argument that the word "any" is limited to the "firearms that he was charged with possessing." *Id.* at 769. The court reasoned that where the guidelines reference the firearm in possession, they require that "the firearm had to be the one which was charged in the violation." *Id.* The court noted that the word

"any" is "general and nonspecific," and recognized that the guidelines "evince an understanding of this distinction." *Id.* Finally, the court observed that the 8th and 10th Circuits also hold that "'any firearm' truly means any firearm." *Id.* at 770.

CONCLUSION: The court found that the word "any" includes "any firearm that is used in connection with the commission of another offense which is within the relevant conduct of the charged offense." *Id.* at 768.

***Bennett v. Hendrix*, 423 F.3d 1247 (11th Cir. 2005)**

QUESTION: What is the "precise test for determining whether the defendants' actions violated the plaintiffs' rights against retaliation." *Id*. at 1250.

ANALYSIS: In this civil rights case, the court looked to the law applied in other circuits and found a common three-prong test. *Id*. The plaintiff first must establish that his act or speech was constitutionally protected; second, that the defendant's retaliatory action adversely affected the protected act or speech; and third, that a causal connection exists between the retaliatory conduct and the adverse affect it had on speech. *Id*. The court was concerned only with which standard to apply to the second prong and looked to other circuits, the majority of which utilized an objective "ordinary firmness" test. *Id*. at 1250-51. The court found the adoption of an objective test by the majority of other circuits to be persuasive and sided with their reasoning that "[a]n objective standard provides notice to government officials of when their retaliatory actions violate a plaintiff's First Amendment rights" whereas a subjective standard would lead to inconsistent rulings on liability despite identical conduct. *Id*. at 1250. Finally, the court held that the objective standard is consistent with statements from other 11th Circuit cases. *Id*. at 1254.

CONCLUSION: The court ultimately utilized an objective "ordinary firmness" test to determine whether defendants' actions violated plaintiffs' rights against retaliation. *Id.* at 1251.

***Watson v. Drummon Co.*, 436 F.3d 1310 (11th Cir 2006)**

QUESTION: "Whether and under what circumstances a union can qualify as an employer for purposes of the EPPA ("Employee Polygraph Protection Act")." *Id.* at 1316.

ANALYSIS: In considering this question, the 11th Circuit adopts the "economic reality test," which defines "employer" as the "level of control the union yielded over the employer as per the economic realities

of their relationship." *Id.* The Court reasoned that "given the substantial similarities between the definition of "employer in the EEPA and in the FMLA and FLSA, we find that the economic reality test appropriate here as well." *Id.* In addition, the court pointed to *del Canto v. ITT Sheraton Corp.*, 865 F. Supp. 927, 932-33 (D.D.C. 1994), and noted that the Court used the "economic reality test" to answer this precise question.

CONCLUSION: "In this case there is no evidence that the Union exerted control of the company to be considered an 'employer.'" *Id.* at 1316. "The record indicates that the Union was acting in the interests of its members . . . and not in the interest of the company." *Id.* The company denied the Union's request for the reinstatement of its members. *Id.* The Union's suggestion for polygraph tests was to provide for a quick way for the employees to clear their names and regain their jobs, not to benefit the employer. *Id.*

***Barnes v. United States*, 437 F.3d 1074 (11th Cir. 2006)**

QUESTION: Under the Antiterrorism and Effective Death Penalty Act of 1996, whether "a timely motion seeking a new trial under FED. R. CRIM. P. 33 serves to render a judgment of conviction as not final for purposes of the running of the one-year statute of limitations under 28 U.S.C. § 2255." *Id.* at 1078 (quoting Johnson v. United States, 246 F.3d 655, 657 (6th Cir. 2001)).

ANALYSIS: The 1st, 4th, and 6th Circuits had held that a Rule 33 filing did not extend the statute of limitations. *Id*. at 1078-79. A "petitioner was free to file his § 2255 [motion to vacate] without fear that it would be dismissed for failing to exhaust post-conviction remedies." *Id.* at 1079. The 1st Circuit had determined that the "one-year statute of limitations would sometimes require a prisoner to initiate duplicative proceedings, [but the] district courts were well equipped to alleviate the problem through consolidation of motions for collateral relief." *Id.*

CONCLUSION: Defendant's "§ 2255 motion, filed nearly two years after the Supreme Court denied him *certiorari*, was untimely," and a Rule 33 filing "had no effect on when his conviction became 'final.'" *Id.*

***United States v. Cantellano*, 430 F.3d 1142 (11th Cir. 2005)**

QUESTION: There are three issues of first impression presented for the court: (1) "whether, under *Crawford v. Washington*, 541 U.S. 36 (2004), a warrant of deportation is testimonial evidence subject to confrontation at trial; (2) whether, under *Crawford*, a defendant has a right to confrontation at sentencing; and (3) whether, under *Shepard v.*

United States, 125 S. Ct. 1254 (2005), a sentencing court may use documents other than court records to identify a defendant with a conviction." *Id.* at 1143.

ANALYSIS: As to the first issue, "[w]e are persuaded that a warrant of deportation does not implicate adversarial concerns in the same way or to the same degree as testimonial evidence. A warrant of deportation is recorded routinely and not in preparation for a criminal trial." *Id.* at 1145. As to the right to confrontation at sentencing, the court ruled that "[w]e also have held recently that the admission of hearsay testimony at a sentencing hearing 'cannot be plain error.'" *Id.* at 1146 (quoting United States v. Quan Chau, 426 F.2d 1227, 1254-55 (11th Cir. 1982)). "The Supreme Court, in distinguishing pre-trial rights, explicitly has said that 'the right to confrontation is a trial right.'" *Id.* (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 52 (1987)). "*Shepard* [ ] restrict[s] only the sources a sentencing court may consider to determine the character of a prior conviction as a violent felony." *Id.* at 1146

CONCLUSION: "Because a warrant of deportation does not raise the concerns regarding testimonial evidence stated in *Crawford*, we conclude that a warrant of deportation is non-testimonial and therefore is not subject to confrontation." *Id.* at 1145. The court joined the 1st, 2nd, 5th, 6th, 7th, 8th, and 10th Circuits and concluded, "[w]e see no reason to extend *Crawford* to sentencing proceedings. The right to confrontation is not a sentencing right." *Id.* at 1146. "The fact of a prior conviction clearly may be found by the district court." *Id.* at 1147.