Current Circuit Splits

The following pages contain brief summaries, drafted by the members of the *Seton Hall Circuit Review*, of circuit splits identified by a federal court of appeals opinion between February 25, 2008 and October 8, 2008. This collection is organized by civil and criminal matters, then by subject matter.

Each summary briefly describes a current circuit split. It is intended to give only the briefest synopsis of the circuit split, not a comprehensive analysis. This compilation makes no claim to be exhaustive, but will hopefully serve the reader well as a reference starting point.

CIVIL MATTERS

Federal Appointment Statute – Clemency under State Law: *Hood v. Quarterman*, 2008 U.S. App. LEXIS 16642 (5th Cir. 2008)
Deportation Statutes – Tax Fraud as a Removable Offense: *Arguelles-Olivares v. Mukasey*, 526 F.3d 171 (5th Cir. 2008)

Federal Criminal Forfeiture – Restraint of Substitute Assets: *United States v. Parrett*, 530 F.3d 422 (6th Cir. 2008)

Right of Defendants To Refuse Medication – Seriousness Of Victimless Crimes: *United States v. Green*, 532 F.3d 538 (6th Cir. 2008)

Criminal Sentencing Statutes – "Except" Clause of 18 U.S.C. § 924(c)(1)(A): *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008)

Touching in Rude or Angry Manner – Not a Crime of Violence: *U.S. v. Hays*, 526 F.3d 674 (10th Cir. 2008)

CIVIL MATTERS

CONSTITUTIONAL/FEDERAL LAW

First Amendment – Freedom of Speech: *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008)

The 3rd Circuit addressed the issues of whether the university's policy on Sexual Harassment is facially constitutional and whether the question of the constitutionality of the policy is moot. *Id.* at 304. The court held that the policy is facially unconstitutional and that the constitutionality of the policy is not moot. *Id.* In reaching this holding, the court noted that although Temple voluntarily amended the contested policy, the court had "no assurance that Temple will not re-implement its pre-January 15 sexual harassment policy, absent an injunction." *Id.* at 309. The court reached this conclusion because "Temple did not change its sexual harassment policy for more than a year after the commencement of litigation" and "Temple . . . continues to defend . . . the need for the former policy." *Id.* The court observed that the 11th Circuit treats the issue of mootness differently. *Id.* at 311. The 11th Circuit reasoned that an issue is moot if the new policy appears "to have been the result of substantial deliberation." *Id.* Although using a different rationale, the 3rd Circuit did not believe that its "conclusion is at odds with that of the Eleventh Circuit" because the record "does not support an assessment that Temple's policy change was the result of substantial deliberation." *Id.* In addition, in reaching the court's holding that the policy is facially unconstitutional, the 3rd Circuit noted that Temple's policy was overbroad because it could suppress protected speech. *Id.* at 314–15.

Copyright Infringement – Doctrine of Laches Barring a Claim: *Peter Letterese & Assocs. Inc. v. World Inst. of Scientology Enters.*, 533 F.3d 1287 (11th Cir. 2008)

The 11th Circuit dealt with both a circuit split and an issue of first impression on "whether the equitable doctrine of laches may bar a claim for copyright infringement that was filed within the statute of

limitations." *Id.* at 1319. The 11th Circuit modified the approach followed by the 4th Circuit, which holds, unqualifiedly, that the doctrine of laches "may [never] be interposed in a copyright infringement case. *Id.* at 1320. The 11th Circuit remained mindful of the "separation of powers principles which counsel against the use of 'the judicially created doctrine of laches to bar a federal statutory claim that has been timely filed under an express statute of limitations.'" *Id.* The court also pointed out that the purpose of laches, before Congress instituted a 3 year statute of limitations, was to prevent the inequity of the owner of a copyright, with full notice of an intended infringement, being able to stand inactive while the infringer spends money, only to intervene when it is successful. *Id.* In essence, laches was applied to ensure timely filings and with the onset of the statute of limitations it is simply not as important. *Id.* However, the court limited its agreement with the 4th Circuit and instead of an "unqualified no," the 11th Circuit held that "there is a strong presumption that a plaintiff's suit is timely if it is filed before the statute of limitations has run." *Id.* Nevertheless, even though it opened itself to some chance that laches could be invoked, it still held that "[o]nly in the most extraordinary circumstances will laches be recognized as a defense." *Id.*

Standing – Third Party Beneficiaries to Consent Decrees:
United States v. FMC Corp., 531 F.3d 813 (9th Cir. 2008)

The 9th circuit carved out an exception to the sweeping conclusion that "*Blue Chip Stamps* prohibits only *incidental* third party beneficiaries from suing to enforce a consent decree" and therefore "intended beneficiaries may." *Id.* at 820. The court noted that "[m]ost other circuits are in accord with [its] restrictive reading of the Supreme Court's statement in *Blue Chip*. *Id.* Other circuits, such as the 6th Circuit, have interpreted *Blue Chip* in its plain language and will so hold "until the Supreme Court revisits the unequivocal language of *Blue Chip*." *Id.* The 9th Circuit therefore held in the instant case that their restrictive reasoning will stand. *Id.* As a result, the Tribes, who were trying to prove that they were intended beneficiaries, were deemed to instead be incidental beneficiaries and were not allowed to sue to enforce the government's consent decree. *Id.*

CIVIL PROCEDURE

Post-Verdict Hearings – Rule 606(b): *U.S. v. Honken,* 541 F.3d 1146 (8th Cir. 2008)

The 8th Circuit joined the analyses of the 2nd and 7th Circuits in holding that Rule 606(b) "prohibits a juror from testifying at a post-verdict hearing as to whether extraneous information or an outside influence affected that juror's ability to be impartial." *Id.* at 1169. The court noted that Rule 606(b) does allow a juror to testify as to whether prejudicial information was brought to the jury's attention, however it prohibits the juror from testifying as "to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict . . . ." *Id.* In contrast, the 6th Circuit and the 9th Circuit have found that district courts abuse their discretion when they do *not* ask whether jurors were exposed to outside influences and whether it affected their ability to be impartial. *Id.* at 1168. Although the 8th Circuit had not previously had a case specifically addressing this issue, the court held it was improper for the district court to ask the juror what effect her boss's comments had on her ability to be impartial. *Id.* at 1169.

Rule 60(b) Relief – Cross-Circuit Vacation of Judgment by a Registering Court: *Budget Blinds, Inc. v. White*, 536 F.3d 244 (3d Cir. 2008)

The 3rd Circuit addressed the question of whether a registering district court may grant Rule 60(b) relief from a different district's rendering court, in cases where relief is not based on the rendering court's lack of personal or subject matter jurisdiction nor where relief is sought from a default judgment. *Id.* at 251. The 1st Circuit has held that under Fed R. Civ. Proc. 60(b), a defendant against whom judgment has been entered in a federal court may request to have that judgment vacated in the federal court of another district only when the judgment is based on grounds that might support an independent equitable action, or when the relief requested is from a default judgment. *Id.* at 252. The 10th Circuit has also recognized that a registering court may grant relief from a rendering court's default judgment. *Id.* at 253. The 5th Circuit has similarly held that a registering court could vacate a rendering court's default judgment but, in dicta, expressed reservations about a registering court's authority to vacate a judgment for any other reason.

Id. The 7th Circuit has held that a registering court may annul a rendering court's judgment only on the basis that the rendering court lacked personal or subject matter jurisdiction. *Id.* at 253. In the present case, the 3rd Circuit expressly declined to "adopt a rule that categorically forbids district courts from vacating the judgment" of a rendering court in cases where the judgment was on the merits, rather than a default judgment. *Id.* at 254. The majority held that under certain "extraordinary circumstances," registering courts may vacate foreign judgments. *Id.* The majority did not reach the question of what might constitute "extraordinary circumstances." *Id.* at 255.

Subject Matter Jurisdiction – Involuntary Bankruptcy Petitions: *Trusted Net Media Holdings, LLC v. Morrison Agency Inc.*, 525 F.3d 1095 (11th Cir. 2008)

The 11th Circuit reluctantly joined the 2nd Circuit in holding that the 11 U.S.C. § 303(b) requirements for filing an involuntary bankruptcy petition must be satisfied to "bestow upon the bankruptcy courts subject matter jurisdiction." *Id*. at 1098. The court noted that the "prior precedent rule" restricted the court's ability to join the 9th Circuit and "most courts to consider the issue" that hold the 303(b) requirements not to be jurisdictional in nature. *Id*. at 1101, 1107. The court concluded that both the "bona fide dispute" and "three-petitioning creditor" requirements "must be satisfied in order for a bankruptcy court to have subject matter jurisdiction" over involuntary bankruptcy proceedings. *Id*. at 1101.

STATUTORY INTERPRETATION

Attorney's Fees – Awards by the Social Security Administration: *Clark v. Astrue*, 529 F.3d 1211 (9th Cir. 2008)

The 9th Circuit joined the 6th and 10th Circuits, both of which have "held § 406(b)'s cap on attorney's fees applies only to fees awarded under § 406(b), and does not limit the combined fees awarded under both § 406(a) and § 406(b)." *Id.* at 1215. Finding the language of the statute clear on its face, the 9th Circuit disagreed with the approach of the 4th and 5th Circuits which read into the legislative history of 42 U.S.C. § 406(b). *Id.* at 1216. The 4th and 5th Circuits have held that § 406(b) limits the combined attorney's fees awarded under both § 406(a) and

§ 406(b) to 25% of the claimant's past-due benefits. *Id.* In rejecting the holdings of the 4th and 5th Circuits, the 9th Circuit reasoned that when the statutory text is clear on its face, legislative history is unnecessary in reaching a conclusion. *Id.* at 1216. Further, while the 4th and 5th Circuits held to the contrary, based on the 1968 amendment to 42 U.S.C. § 406(a), which they read to prohibit the Secretary of the Social Security Administration from authorizing an award of attorney's fees under § 406(a) in excess of 25% of past-due benefits, the 9th Circuit determined that "Congress chose not to impose a categorical ceiling on the Administration's authority to award attorney's fees for representation before the Administration." *Id.* at 1218.

Debtor Creditor Law – Setting Aside Fraudulent Conveyance: *Eberhard v. Marcu*, 530 F.3d 122 (2d Cir. 2008)

The 2nd Circuit determined "a receiver cannot employ § 276 of New York's Debtor & Creditor Law to set aside a fraudulent conveyance where he represents only the transferor." *Id*. at 126. In examining if receivers ever have the authority to pursue fraudulently conveyed assets, the 2nd Circuit followed the 7th Circuit's determination that "receivers have standing . . . only when one of the entities in receivership is a creditor of the transferor." *Id*. at 132. The 7th Circuit based its determination on a case in which a district court appointed a receiver to represent the creator of three corporations and his partners, who then sought to recover assets conveyed to third parties. *Id*. The 7th Circuit determined that the receiver was not suing on behalf of the investors but on behalf of the corporations, who were deemed distinct legal entities with the fiduciary duty to recover assets fraudulently conveyed. *Id.* Further, the court found that the corporation founder controlled them completely at the time of the fraudulent transfer, making the transfer coerced. *Id*. The 2nd Circuit agreed and concluded "that a receiver's standing to bring a fraudulent conveyance claim will turn on whether he represents the transferor only or also represents a creditor of the transferor." *Id*. at 133.

Investment Company Act of 1940 – Excessive Fees and Fiduciary Duty: *Jones v. Harris Assoc. L.P.*, 537 F.3d 728 (7th Cir. 2008)

The 2nd Circuit has determined that a court may consider whether a fee charged by an investment advisor is "so disproportionately large that it bears no reasonable relationship to the services rendered and could not

have been the product of arm's-length bargaining" when determining if the investment company has breached its fiduciary duty under the Investment Company Act of 1940. *Id*. at 729. However, in this case, the 7th Circuit disagreed with the approach established by the 2nd Circuit. *Id*. Rather, the 7th Circuit held that a "fiduciary must make full disclosure and play no tricks but is not subject to a cap on compensation." *Id*. The court felt that it should be the trustees and investors who determine how much the services rendered are worth. *Id.* The court opined that the market is sufficient to control the prices that are being charged—investors have plenty of mutual funds to choose from, and they compete with each other to provide their investors with the best combination of service and pricing. *Id*. The court noted that trustees owe "an obligation of candor in negotiation, and honesty in performance" to fulfill their fiduciary obligation, however, this does not require them to place a cap on the fees that are charged. *Id.*

FRCP – Availability of Appellate Review for Postremoval Remands Based on Declining Supplemental Jurisdiction: *Cal. Dep't of Water Res. v. Powerex Corp*., 533 F.3d 1087 (9th Cir. 2008)

The plaintiff in this case argued that the Court of Appeals was precluded from reviewing the district court's order remanding the case to the California court. *Id.* at 1091. Pursuant to 28 U.S.C. § 1447(d), an order remanding a case to the State court from which it was removed is unreviewable only if the remand is based on defects in removal procedure or on lack of subject-matter jurisdiction, which are the class of remands described in § 1447(c). *Id.* In the instant case, the district court identified 28 U.S.C. § 1367(c) as the source of its authority to remand, and explicitly stated that it was declining to exercise supplemental jurisdiction. While the Federal Circuit has split with several circuits by holding that a remand based on declining supplemental jurisdiction must be considered within the remands described in § 1447(c) and thus barred from appellate review by § 1447(d), the 9th Circuit declined to support the Federal Circuit's conclusion. *Id.* at 1092. Rather, the 9th Circuit held that a district court's order remanding pendent state claims on discretionary grounds is not pursuant to § 1447(c) and is therefore reviewable. *Id.* at 1091.

Motor Vehicle Information and Cost Savings Act – Private Right of Action Unrelated to Vehicle Mileage: *Bodine v. Graco, Inc.,* 533 F.2d 1145 (9th Cir. 2008)

The 9th Circuit recognized a divergence among the 7th and 11th Circuits when interpreting the Motor Vehicle Information and Cost Savings Act ("Odometer Act"), 49 U.S.C. §§ 32701–32711 to "allow a private right of action where the fraud relates to something other than the vehicle's mileage." *Id.* at 1147. The 9th Circuit joined the 7th Circuit, concluding "that the private right of action under the Odometer Act is limited to allegations of fraud relating to a vehicle's mileage," and rejected the 11th Circuit's interpretation that "no such limit exists." *Id.* at 1147, 1151. The court first noted that both the 7th and 11th Circuits looked to "the plain language of the statute," and yet reached "directly opposite conclusions." *Id.* at 1150. Though the court recognized that § 32710, which requires a violation with intent to defraud in the private cause of action, "is not intrinsically limited" when "studied in isolation," the court looked at the context of the statutory scheme. *Id.* at 1152. Addressing the "list of Congress's findings and purposes" at the beginning of the statutory scheme, the court found that the purposes speak "specifically of odometer fraud," and contain "not a single statutory phrase that suggests Congress wished to reach additional types of fraud." *Id.* at 1148, 1151. Therefore, the court the court refused the 11th Circuit's broad interpretation by identifying "no cogent reason why Congress would fastidiously restrict the substantive reach of the Act to odometer fraud, while making §32710(a) liability turn on intent to commit *any* type of fraud." *Id.* at 1152 (emphasis in original).

Federal Telecommunications Act – No Private Right of Action in FTA § 253(a) Enforceable Under § 1983: *Southwestern Bell Tel., L.P. v. City of Houston*, 529 F.3d 257 (5th Cir. 2008)

In light of the U.S. Supreme Court's decision in *Gonzaga Univ. v. Doe*, which held that "where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action," the 5th Circuit held that §§ 253(a) and (c) of the Federal Telecommunications Act did not create a private cause of action. *Id*. at 261. Section 253(a) "proscribes state and local governments from prohibiting the ability of any entity to provide telecommunications

service," while § 253(c) is a "safe-harbor provision preserving a government's power to manage its public rights-of-way." *Id*. at 259. Acknowledging a three-to-two circuit split on the issue of whether these sections provide for a private right of action, the Court noted that the two circuits that recognized a private right of action under § 253 had recognized that right prior to the *Gonzaga* decision. Conversely, the three circuits that had declined to find a private right of action had all issued their rulings after the *Gonzaga* decision. These holdings were also consistent with the 5th Circuit's own previous holding that a federal statute must "*unambiguously* give rise to privately enforceable, substantive rights." *Id*. After examining the text of the relevant sections of the Federal Telecommunications Act, the court determined that "Congress did not intend to create a private right enforceable under § 1983." *Id.* at 262. Accordingly, the court affirmed the district court's dismissal of Southwestern Bell's claims. *Id.* at 264.

Rehabilitation Act – Standard of Causation Requirement for § 501: *Pinkerton v. Spellings*, 529 F.3d 513 (5th Cir. 2008)

The 5th Circuit agreed with the 1st, 2nd, 4th, 7th, 8th, 9th and 11th Circuits regarding whether the standard of causation between disability discrimination and employment decisions under the American Disabilities Act ("ADA") requires a showing that termination was based solely on the injured party's disability. *Id.* at 515–16, 518–19. These seven circuits hold that the "solely" restriction cannot be read into § 501 of the Rehabilitation Act because a plain reading of the ADA's causation standard "'conveys the idea of a factor that made a difference in the outcome,' not one that was *necessarily* the 'sole cause' of the outcome." *Id.* at 518–19. The 6th Circuit has disagreed with this approach, instead "holding that, despite contrary law in other circuits, in the Sixth Circuit an ADA plaintiff must show that her disability was the 'sole reason' for the employer's adverse employment action." *Id.* at n.30. Here, the 5th Circuit determined that the court must apply the same causation standard to claims brought under both the ADA and § 501 of the Rehabilitation Act. *Id.* at 517. Consequently, the 5th Circuit held that "sole causation" is not required under the ADA standard and instead chose to adopt the rule, in accordance with the majority of circuits, that "[u]nder the ADA, 'discrimination need not be the sole reason for the adverse employment decision, [but] must actually play a role in the employer's decision making process and have a determinative influence on the outcome.'" *Id.* at 519.

CERCLA – Standard of Review for Apportionment of Liability: *United States v. Burlington Northern & Santa Fe Ry. Co.*, 520 F.3d. 918 (9th Cir. 2008)

The 9th Circuit held that a district court can apportion liability among tortfeasors under CERCLA. *Id.* at 934. The court adopted the *Chem-Dyne* standard, finding that "[a]s *Chem-Dyne* persuasively recounts, the history of § 107(a) of CERCLA, 42 U.S.C. § 9607(a), indicates that although Congress declined to mandate joint and several liability, it did not intend by doing so 'a rejection of joint and severable liability.'" *Id.* at 935. In developing standards of apportionment and when apportionment is necessary, the court looked to the 4th, 5th, 6th and 10th Circuits for guidance. *Id.* As to the appellate standard of review, the court acknowledged a split among the 5th, 8th, and 6th Circuits. "The Fifth and Eighth Circuits look first to whether there is a reasonable basis for apportioning the harm, an inquiry they consider a question of law reviewed de novo." *Id.* at 941. "These two circuits then examine, as a question of fact reviewed under the clearly erroneous standard, precisely how damages are to be divided." *Id.* The court observed that, "[i]n contrast, the Sixth Circuit considers divisibility as a whole a factual matter of causation, reviewed entirely under the clearly erroneous standard. This view, however, disregards a distinction between conceptual divisibility and actual allocation that we find both persuasive and useful." *Id.* at 941–42. The court noted that "[t]he latter inquiry can involve the resolution of credibility issues and of conflicting evidence, while the former ordinarily does not." *Id.* at 942. The 9th Circuit adopted the approach used by the 5th and 8th Circuits and reversed the lower court because the record did not support a finding for apportionment. *Id.* at 942.

Clean Air Act – Establishing Appellate Jurisdiction on Appeal: *United States v. Grace*, 526 F.3d 499 (9th Cir. 2008)

The 9th Circuit overturned its own precedent and joined the 3rd, 4th, 7th and 8th Circuits in holding that a United States Attorney's personal certification that an appeal was not taken for the purpose of delay and that the evidence is substantial proof of a fact material in the proceeding was sufficient for purposes of establishing our jurisdiction under 18 U.S.C. § 3731. *Id*. at 506. The court held that the plain language of the statute showed Congress's intent that, as long as the other requirements of § 3731 are present, the mere certification regarding

the delay and materiality prerequisites is all the statute required to invoke appellate jurisdiction. *Id*. Specifically, the court noted the phrasing of § 3731—"An appeal by the United States *shall* lie to a court of appeals . . . *if* the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding." *Id*. In fact, the court noted that it had been the only Circuit to further require that the evidence suppressed by the district court was actually material to the upcoming trial. *Id*.

CRIMINAL MATTERS

CONSTITUTIONAL/FEDERAL ISSUES

Pornography – Supervised Released Condition: *United States v. Wilkinson*, 282 Fed. Appx. 750 (11th Cir. 2008)

The 11th Circuit examined whether Special Condition 7 of 18 U.S.C. § 3583(e)(2), which requires that defendants who have plead guilty to transporting and shipping child pornography not possess any pornographic, sexually oriented, or sexually stimulating material or patronize establishments where such materials are available, is vague, overbroad, and unduly restrictive of a defendant's First Amendment rights. *Id.* at 753–54. In determining whether the term "pornography" used in Special Condition 7 is unconstitutionally vague, the 11th Circuit looked toward the Supreme Court, which has not ruled on the issue, and other circuits. *Id*. at 754. The 9th and 3rd Circuits have determined that the supervised release condition restricting possession of "any pornographic, sexually oriented or sexually stimulating materials" was unconstitutionally vague. *Id.* at 754. However, the 5th, 8th, and 9th Circuits have concluded that the supervised release condition is not unconstitutionally vague and does not violate the First Amendment. *Id*. The 11th Circuit determined that "[b]ecause neither the Supreme Court nor this Court has addressed [whether] "pornography" is an unconstitutionally vague term] and other circuits differ in their holdings, [the defendant could not] show that the district court committed plain error by imposing Special Condition 7 as a term of his supervised release." *Id*.

Unconstitutional Imprisonment – Favorable Termination Requirement: *Wilson v. Johnson*, 535 F.3d 262 (4th Cir. 2008)

The 4th Circuit allowed a plaintiff to bring a claim for unconstitutional imprisonment under § 1983, even though it was no longer possible to meet the favorable termination requirement of *Heck v. Humphrey* via a habeas action, since the plaintiff was already released. *Id.* at 263. The 4th Circuit disagreed with the 1st, 5th, and 8th Circuits, which "interpret *Heck* as barring individuals from filing virtually all § 1983 claims unless the favorable termination requirement is met." *Id.* at 267. The 4th Circuit agreed with the 2nd, 6th, 7th, 9th, and 11th Circuits, and reasoned that the "sweeping breadth, high purposes, and uniqueness of § 1983 would be compromised in an unprincipled manner if it could not be applied . . . to a habeas ineligible former prisoner." *Id.* at 267–68.

Fourth Amendment – Standard of Review for Challenges Alleging that a Police Search Exceeded the Scope of Defendant's Consent: *United States v. Pikyavit*, 527 F.3d 1126 (10th Cir. 2008)

The 10th Circuit adopted to review a district court's factual findings for "clear error" under the totality of circumstances when considering defendant's Fourth Amendment challenge to a police search that he alleged exceeded the scope of his consent. *Id.* at 1129. In so doing, the 10th Circuit rejected the 1st Circuit's selection of a standard other than clear error, calling the distinction "illusory" since "every case notes the fact-intensive nature of the inquiry and the deference given to the lower court's determination." *Id.* at n.1. To this end, the court cited cases from the 2nd, 6th, 7th, 8th, 9th, and 11th Circuits and noted that the 5th Circuit itself emphasized the centrality of "factual circumstances surrounding the consent . . . to determine the nature of the consent and how it would have been viewed by a reasonable person." *Id.* Therefore, the court concluded that unless the district court's determination is clearly erroneous, that is, unless there is a "definite and firm conviction that a mistake has been made" or "two permissible views of the evidence" are not possible, the district court's determination will be upheld. *Id.* at 1130.

Maritime Drug Law Enforcement Act (MDLEA) – Requirement of Nexus with the United States: *United States v. Estrada-Obregon*, 270 Fed. Appx. 978 (11th Cir. 2008)

The 11th Circuit addressed the issue of whether "the MDLEA requires a nexus between a foreign-registered vessel and the United States" in order to establish jurisdiction. *Id.* at 981. The court acknowledged that the 1st and 3rd Circuits "have held that no nexus is required when the flag nation consents to the enforcement of U.S. law." *Id.* at 981 n.1. In contrast, the 2nd and 9th Circuits required "a nexus between conduct on foreign-registered vessels and the United States analogous to the minimum contacts required for personal jurisdiction." *Id.* The court noted that "there is no binding precedent clearly holding the MDLEA requires a nexus between a foreign-registered vessel and the United States." *Id.* Furthermore, the court referred to its decision in *United States v. Mena* where the court suggested there was no nexus requirement. *Id*. at 981. The court joined the 1st and 3rd circuits in not requiring nexus and therefore held that there was no plain error "by the district court in not dismissing the case for lack of nexus." *Id*.

SENTENCING

Sentencing Guidelines – "Extraordinary Cases" Where Both an Upward and Downward Adjustment May Be Warranted: *United States v. Swanson*, 284 Fed. Appx. 365 (7th Cir. 2008)

The 7th Circuit noted that the circuits are split as to how to analyze whether a case is "extraordinary" under U.S. Sentencing Guidelines Manual § 3C.1, which would allow a district court to increase a defendant's offense level for obstruction of justice and also decrease the offense level for significant acceptance of responsibility. *Id.* at 368. However, 3rd Circuit's law was already settled and in the company of the majority of the courts of appeals that have rejected the 9th Circuit's position, which allows an obstructive defendant to earn the acceptance of responsibility discount just by pleading guilty and thereafter refraining from obstructing justice further. *Id.* The 7th Circuit has previously held that a defendant has not accepted responsibility, let alone extraordinarily so, when he initially cooperates but later obstructs justice, or when he lies to authorities to conceal certain details of his crime while otherwise

"cooperating." *Id.* Although there may be some limited circumstances in which an obstructive defendant has nonetheless accepted responsibility, the court must examine the timing and nature of the defendant's conduct to form such a conclusion. *Id.*

Ex Post Facto Clause – Sentencing Guidelines: *United States v. Andrews*, 532 F.3d 900 (D.C. Cir. 2008)

The D.C. Circuit considered whether the use of the U.S. Sentencing Guidelines Manual in effect on the date the defendant is sentenced violates the *ex post facto* clause if it yields a harsher penalty than the manual that was in effect on the date of the offense. *Id.* at 908. The court gave great weight to the Supreme Court declaration that the guidelines are advisory, rather than mandatory. *Id.* at 909. The court noted that the 6th, 7th, and 11th Circuits concluded that since the guidelines are not mandatory, using a later manual does not violate the *ex post facto* clause, while the 1st, 3rd, 8th, and 9th Circuits concluded that the clause would be violated if the latter manual yields a higher penalty. *Id.* The D.C. Circuit declined to address the issue, and instead relied on the circuit split to hold that the district court did not make plain error in using the manual in effect on the date of sentencing. *Id.*

STATUTORY INTERPRETATION

Statutory Interpretation – *Mens Rea* Requirement of Knowledge: *United States v. Khattab*, 536 F.3d 765 (7th Cir. 2008)

The 6th Circuit declined to adopt sister circuit interpretations of the *mens rea* requirement of 21 U.S.C. § 841(c)(2), which makes it illegal for any person to knowingly or intentionally possess or distribute "a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance . . . ." *Id*. at 768. The court noted that there is a split among the circuits regarding the proper interpretation of the statute's *mens rea* requirement. *Id*. at 769. The court compared the 10th Circuit's approach, which holds that "the statute requires a defendant's subjective knowledge that the drugs he possesses or distributes will be used to manufacture a controlled substance" with the approach taken by the 8th, 9th, and 11th Circuits that "allow(s) conviction based upon either subjective knowledge or an objective 'cause to believe.'" *Id*. However, the 7th Circuit declined to adopt either approach because evidence supported the district court's

conclusion that the defendant "actually knew that the pseudoephedrine he attempted to purchase . . . would be used to manufacture methamphetamine." *Id.* Instead, the 7th Circuit concluded that the defendant's "actual knowledge constitutes *mens rea* under either approach." *Id*.

Federal Appointment Statute – Clemency under State Law:
Hood v. Quarterman, 2008 U.S. App. LEXIS 16642 (5th Cir. 2008)

The 5th Circuit addressed the issue of whether "the federal appointment statute, 18 U.S.C. § 3599, provides prisoners sentenced under state law the right to federally appointed and funded counsel to pursue clemency under state law." *Id.* at *1. The court held that the "statute does not apply to state clemency proceedings." *Id.* However, the court noted that there was a split among the circuits on this issue. *Id.* The 10th Circuit disagrees with the 5th Circuit by stating that "counsel appointed to represent state death row inmate . . . must represent the defendant through every subsequent stage of available judicial proceedings including . . . clemency." *Id*. The 10th Circuit clarifies that by "clemency," it means "state clemency proceedings given that federal officials have no authority to commute a state court sentence." *Id.*

Deportation Statutes – Tax Fraud as a Removable Offense:
Arguelles-Olivares v. Mukasey, 526 F.3d 171 (5th Cir. 2008)

The 5th Circuit joined the 9th Circuit in holding that an alien's "prior conviction for filing false federal tax return" qualifies as a removable offense. *Id*. at 173. The court assessed the opposite conclusion held by the 3rd Circuit, stating that "we cannot agree that Congress intended to exclude tax offenses involving fraud and deceit" from those tax crimes that constitute an "aggravated felony." *Id*. at 173, 175. The court found the term "aggravated felony" unambiguous and held that Congress did not intend for the inclusion of tax evasion "among aggravated felonies to the exclusion of other tax felonies." *Id*. at 174. The court concluded that a "conviction under 26 U.S.C § 7206(1) for filing a false tax return constitutes an aggravated felony" and may support removal of an alien. *Id*. at 173.

Federal Criminal Forfeiture – Restraint of Substitute Assets: *United States v. Parrett*, 530 F.3d 422 (6th Cir. 2008)

Federal criminal forfeiture law indentifies two types of assets: those that have been tainted by criminal activity ("tainted") and those that are free of such taint ("substitute"). *Id.* at 429. When an asset is tainted by certain types of criminal activity, criminal forfeiture proceedings can be instituted on it. *Id.* Furthermore, Congress gave federal prosecutors the power to request that the district court "enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of this property" pursuant to 21 U.S.C. § 853(e). *Id.* There is also a timing provision under § 853(c) called "relation back" which allows the government's interest in any tainted property to vest when the defendant commits the act giving rise to the forfeiture. Currently the circuits are split as to whether the government's interest in substitute property (that which is not tainted and is reserved for the government if the interest in the tainted property is sold or otherwise lost before a conviction and subsequent forfeiture order) relates back to the date of the act giving rise to the forfeiture in same way as tainted property. *Id.* at 430. The 10th Circuit "focuses on the plain language of § 853, holding that the federal government has only a 'potential and speculative future interest' in substitute assets prior to a conviction." *Id.* The 4th Circuit, by contrast, reads § 853 "in light of what it consider[s] to be the statute's broader purpose; it held that because the purpose of relation back was to 'prevent defendants from escaping the impact of forfeiture by transferring assets to third parties' . . . the forfeiture of substitute property 'relates back to the date of the acts giving rise to the forfeiture.'" *Id.* The 6th Circuit followed the majority rule outlined by the 10th Circuit and held that "the plain language of 21 U.S.C. § 853 conveys Congress' intent to authorize the restraint of *tainted* assets prior to trial, but *not* the restrain of *substitute* assets." *Id.* at 431.

Right of Defendants To Refuse Medication – Seriousness Of Victimless Crimes: *United States v. Green*, 532 F.3d 538 (6th Cir. 2008)

The 6th Circuit adopted the 4th Circuit standard for determining the seriousness of a crime for the purposes of a *Sell* analysis, and held that a crime would be considered serious if the maximum statutory penalty for

the offense is at least ten years of incarceration. *Id.* at 549. The court rejected the defendant's argument that *Sell* limited the definition of "serious crime" to violent and property crimes, and stated that the phrase "whether the offense is a serious crime against the person or a serious crime against property" used in *Sell* does not preclude other types of crime from being serious. *Id.* at 551. Further, the court disapproved of a district court case from the 5th Circuit that deemed a particular crime not serious because it was not directed at either person or property, and sided with the 10th Circuit, which held that a crime could be serious even if it was not "violent or harmful to others." *Id*. at 550. Although the defendant argued that the statutory sentence for his crimes was arbitrarily enhanced due to the presence of crack cocaine and, therefore, should not be used to determine the seriousness of his crimes, the 6th Circuit concluded that "[b]y utilizing the potential statutory penalty to assess the seriousness of a crime, we employ an objective standard for application and thereby avoid any arbitrary determinations, and further, respect the judgment of the legislative branch as reflective of societal attitudes." *Id.* at 549.

Criminal Sentencing Statutes – "Except" Clause of 18 U.S.C. § 924(c)(1)(A): *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008)

The 2nd Circuit considered whether to interpret the "except" clause of 18 U.S.C. § 924(c)(1)(A) literally, rendering a ten-year minimum consecutive sentence imposed under § 924(c)(1)(A)(iii) and § 924(c)(1)(D)(ii) inapplicable by virtue of § 924(e), which subjects a defendant to a minimum fifteen-year sentence. *Id.* at 153. The court recognized that the 4th, 5th, 6th and 8th Circuits rejected a literal interpretation of the clause. *Id.* at 156. While reluctant to "precipitate a circuit split," the court concluded that "there are substantial grounds for doing so." *Id.* First, the court emphasized that "we have repeatedly been instructed to give statutes a literal reading and apply the plain meaning of the words Congress has used . . . Indeed, the Supreme Court has reversed a court of appeals for *not* giving a literal reading to another provision of *section* 924(c)." *Id.* at 156. Second, the court stated that "case law rejecting a literal reading of the 'except' clause was initiated . . . on the unexplained argument . . . that a literal reading would render *section* 924(c) 'grammatically and conceptually incomplete.'" *Id.* at 157. Third, the court noted that "four of the five decisions rejecting a literal reading of the 'except' clause did not involve a defendant . . . subject to a minimum fifteen-year sentence" as required by § 924(e). *Id.* Only the

4th Circuit rejected a literal interpretation of the "except" clause as applied to a defendant sentenced under § 924(e); however, as the court noted, the 4th Circuit interpreted the "except" clause "to exempt minimum sentence requirements only where another provision provides 'an even greater mandatory minimum *consecutive* sentence for a violation of § 924(c).'" *Id.* The court thus rejected such a statutory interpretation, noting that the Supreme Court in *United States v. Rodriguez* "condemn[ed] the insertion of words into a statute as 'not faithful to the statutory text.'" *Id.* As such, the court adopted a literal interpretation of the "except" clause of § 924(c)(1)(A). *Id.* at 158.

Touching in Rude or Angry Manner – Not a Crime of Violence: *U.S. v. Hays*, 526 F.3d 674 (10th Cir. 2008)

The 10th Circuit addressed whether a misdemeanor conviction of domestic violence under a Wyoming statute was an adequate predicate conviction for firearm possession under a federal statute. *Id.* at 676. The defendant was indicted under 18 U.S.C. §§ 922(g)(9) and 924 (a)(2) for possession of a firearm after having been convicted of a "misdemeanor crime of domestic violence" under the Wyoming statute. *Id.* at 675. The term "misdemeanor crime of domestic violence" was defined in the federal statute as an offense that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon." *Id*. Under the Wyoming statute, however, a person could be convicted of simple battery "if he unlawfully touches another in a rude, insolent, or angry manner . . . ." *Id*. Noting a split between the circuits, the 10th Circuit held that context presented in Wyoming's battery statute did not satisfy the "use of physical force" element necessary for a predicate conviction under the federal statute, because it included "conduct that is minimally forcible, though ungentlemanly." *Id.* at 680–82. Citing 7th and 9th Circuit precedent as instructive, and looking also to supporting congressional history, the 10th Circuit found that "physical force" required more than *de minimis* touching. *Id.* at 681. The court followed the 9th Circuit's reasoning that the federal statute's "use or attempted use of physical force" language did not intend to include as predicate offenses "mere impolite behavior," but instead contemplated the type of "gravely serious" use of physical force associated with the phrase "threatened use of a deadly weapon." *Id.* at 679. The court also noted a 7th Circuit finding that a conception of physical violence that includes *de minimis* touching "collaps[es] the distinction between violent and non-violent offenses." *Id.* at 681. Although the 10th Circuit noted that the 1st, 8th, and 11th Circuits' contrary holdings might be "correct from a

scientific perspective," it concluded that, from a legal perspective, physical force in a crime of violence must entail more than mere contact. *Id.* Otherwise, *de minimis* touching could give federal statutes like the one in question an overly broad scope and impact. *Id.*