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 1, 2006 and August 31, 2006. 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

STATUTORY INTERPRETATION

Medicaid Act – Conferral of Unambiguous Rights: *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006)

The 6th Circuit addressed the issue of "'[w]hether . . . there is a private right of action under § 1983' for alleged noncompliance with the *Medicaid Act*." Id. at 536 (citation omitted). The court adhered to the Supreme Court decision in *Gonzaga University v. Doe*, which utilized the *Blessing* test to "guide judicial inquiry into whether or not a statute confers a right" that could provide a cause of action pursuant to 42 U.S.C. § 1983. *Id.* at 541-42. In *Gonzaga*, the Court made clear that rights must be unambiguously conferred, and thus the relevant inquiry was "whether or not Congress intended to confer individual rights upon a class of beneficiaries." *Id.* After *Gonzaga*, the 8th Circuit held that there was a right conferred under § 1396a(a)(30) while the 1st and 9th Circuits held that there was no such right. *Id.* In this case, the 6th Circuit followed the 1st and 9th Circuits to hold that the language of § 1396a(a)(30) does not use such "rights-creating" language to evince congressional intent to create an individually enforceable right in the Medicaid Act. *Id.* at 542. The court reasoned that the aggregate focus of § 1396a(a)(30) did not evince congressional intent to confer an individually enforceable right. *See id.* Additionally, the court found that the broad language suggested that the section is "concerned with overall methodology rather than conferring individually enforceable rights on individual Medicaid recipients." *Id.* at 543. Thus, the court held that "[a]fter examining the text and structure of § 1396a(a)(30), we agree with the First and Ninth Circuits that § 1396a(a)(30) fails the first prong of the *Blessing* test and does not therefore provide Medicaid recipients or providers with a right enforceable under § 1983." *Id.* at 542.

False Claims Act – Federal and State Statutory Requirements of "Public Disclosure": *United States v. Johnson Controls, Inc.*, 457 F.3d 1009 (9th Cir. 2006)

Noting a split among the circuits regarding the action of notification to the government before "public disclosure," the 9th Circuit held that the California False Claims Act did not require individuals to inform the government before making the "public disclosure" at issue to qualify as "original sources." *Id.* at 1022. The court followed precedents from the 2nd and 9th Circuits interpreting the federal False Claims Act, since the California statute was similar in "relevant wording and purposes." *Id.* at 1021.

Prison Litigation Reform Act – Limits on Monetary Damages: *Boxer X v. Donald*, 169 F. App'x 555 (11th Cir. 2006)

The 11th Circuit acknowledged that prisoners suing for mental, emotional, and physical injuries suffered while in custody may not receive compensatory damages under the Prison Litigation Reform Act. *Id.* at 558. The court indicated that precedent in the 11th Circuit did not resolve the question of punitive damages, explaining that the 7th and D.C. Circuits were split on the propriety of punitive damages under the Act when compensatory damages were not available. *Id.* The 11th Circuit also noted that the 7th, 9th, and 10th Circuits have interpreted § 1997e(e) of the Prison Litigation Reform Act to allow a prisoner to seek nominal damages, but the court declined to decide on that issue in this case, since it determined that the prisoner's constitutional claims were meritless. *Id.* at 559.

Prison Litigation Reform Act – Failure to Exhaust Administrative Remedies: *Roles v. Maddox*, 439 F.3d 1016 (9th Cir. 2006)

The 9th Circuit affirmed the district court's dismissal of a prisoner's complaint asserting violations of his First Amendment rights and Idaho law regarding the confiscation of magazines from his prison cell. *Id.* at 1016. The 9th Circuit cited cases from the 6th, 10th, and 11th Circuits supporting its determination that the plain language of the Prison Litigation Reform Act to exhaust all administrative remedies applied to

prisoners held in private prisons. *Id.* at 1018. The 9th Circuit also recognized the United States Supreme Court's broad interpretation of "prison conditions" within the Act, and noted the wide range of prisoner claims subjected to the exhaustion requirement by the 2nd, 6th, 8th, and 9th Circuits. *Id.*

Airline Liability – Lack of Liability Under the Warsaw Convention for Failure to Warn of the Possibility of Medical Maladies: *Caman v. Cont'l Airlines, Inc.*, No. 03-56810, 2006 U.S. App. LEXIS 19519 (9th Cir. Aug. 2, 2006)

The 9th Circuit addressed whether a passenger developed a medical malady known as Deep Vein Thrombosis ("DVT") as a result of an international flight. *Id.* at *2. The passenger brought an action under Article 17 of the Warsaw Convention, which imputes liability to the carrier "for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage . . . took place on board the aircraft or in the course of any of the operations of embarking or disembarking." *Id.* at *11. The court reasoned that in order for his malady to qualify as an "accident," the passenger must show that it was caused by an "unexpected or unusual event." *Id*. at *13. The plaintiff was not able to show this requirement. *Id.* Furthermore, the court distinguished this case from others, stating that the occurrence of the malady was not an "event" constituting Article 17 liability because the airline's failure to warn of the risk of DVT was more akin to an omission rather than a liability-inducing commission. *Id*. The court held that the airline's failure to warn the passenger of the possibility of developing the medical malady during the flight did "not constitute an 'accident' or an event under the Warsaw Convention." *Id.* at *2.

Retaliatory Discharge – Statutory Construction: *Harding v. Dep't of Veterans Affairs*, 448 F.3d 1373 (Fed. Cir. 2006)

The Federal Circuit held that provisions in 38 U.S.C. § 7425 do not bar a plaintiff's retaliatory discharge claim under 5 U.S.C. § 2105. *Id.* at 1376. The court determined that Title 5 both broadly, and expressly, stated Congress's intent to trump any contrary provisions of Title 38 regarding legal action for retaliatory discharge for whistleblowing. *Id.* at 1375-76. The court noted that other circuits have determined that Title 5 only trumps Title 38 when the particular conflicting Title 5 provision expressly states that it supersedes the contrary Title 38 provision. *Id.* at

1376. However, the Federal Circuit distinguished these cases from the present matter because those cases dealt with the "simpler circumstance" where the Title 5 provision at issue made no express or implied reference to Congressional intent to supersede Title 38. *Id.*

Washington Law Against Discrimination – Federal Preemption of State Anti-Discrimination Statutes: *Kroske v. US Bank Corp.*, No. 04-35187, 2006 U.S. App. LEXIS 3367 (9th Cir. Feb. 13, 2006)

The 9th Circuit held that "state anti-discrimination statutes enacted under a state's police powers are [not] preempted by the banking laws simply because they are part of a general category of 'state-created employment right[s].'" *Id.* at *23-24. The 9th Circuit noted that "federal preemption of the [state anti-discrimination law] must be considered in light of Congress's enactment of relevant federal employment discrimination laws and the cooperative state-federal anti-discrimination scheme." *Id.* at *24. The court found that the Age Discrimination in Employment Act's anti-discrimination provisions conflicted with, and thus limited, 29 USCS § 24(Fifth) which grants national banking associations the power to dismiss officers at will. *Id*. at *27. Accordingly, the 9th Circuit concluded that the plaintiff's state law anti-discrimination claims under the Washington Law Against Discrimination, were not preempted by federal banking laws. *Id.* at *30. This was a direct split with the 6th Circuit's holding that a Michigan anti-discrimination statute was preempted by the Federal Reserve Act's "at-pleasure provision." *Id.* at *23.

Securities Exchange Act – Enforcement: *SEC v. J.W. Barclay & Co.*, 442 F.3d 834 (3d Cir. 2006)

The SEC instituted an action against Mr. Bruno, the president of the defendant corporation, seeking repayment of a derogatory debt the corporation owed the SEC for violation of a securities law. *Id*. at 837. The SEC acted pursuant to § 20(a) of the Securities Exchange Act of 1934, which imposes joint and several liability upon a "control person" for all liabilities that the controlled person (here, a corporation) has "to any person." *Id*. at 838. Specifically, the SEC argued that Mr. Bruno, a "control person" of the corporation, was liable to the SEC for the debts the corporation had "to any person." *Id*. The court recognized a split

between the 2nd and 6th Circuits on the issue of whether the SEC is a "person" for purposes of § 20(a), and hence whether it could act pursuant to the same. *Id*. at 842. The court then adopted the 2nd Circuit's position that the SEC is a person under § 20(a), and rejected the 6th Circuit's position to the contrary. *Id*. The court explained that the ruling on this matter was largely dictated by the 1975 amendment to the Securities Exchange Act of 1934, which expanded the definition of "'person' so as to include governments and government agencies." *Id*.

Employment – 42 U.S.C. § 2000e-3(a) – Retaliation Claims May be Predicated Upon a Hostile Work Environment: *Jensen v. Potter*, 435 F.3d 444 (3d Cir. 2006)

The 3rd Circuit followed the majority approach and held that a retaliation claim "predicated upon a hostile work environment is cognizable under 42 U.S.C. § 2000e-3(a)." *Id.* at 448. The court explained that this statute protects employees who are involved in any manner in Title VII actions or investigations from discrimination. *Id.* The 3rd Circuit noted that both the 5th and 8th Circuits limit the statute "to 'ultimate employment decisions,' and thus do not view harassment to be within the statute's reach." *Id.* The 3rd Circuit explained that § 2000e-3(a) prohibited "a quantum of discrimination coterminous with that prohibited by § 2000e-2(a)." *Id.* The court noted several cases involving 42 U.S.C. § 2000e-2(a) prohibiting discrimination in the workplace based on sex, race, religion, and national origin. *Id.* at 449. The court held that "discriminatory ridicule or abuse can so infect a workplace that it alters the terms or conditions of the plaintiff's employment" and is offensive to § 2000e-2(a) and therefore to § 2000e-3(a) as well. *Id.*

Employment – Title VII Discrimination: *Momah v. Dominguez*, 175 F. App'x 11 (6th Cir. 2006)

The court addressed the issue of whether a "materially adverse action" actionable under Title VII would include a "purely lateral transfer or denial of the same." *Id.* at 21. The court noted that, by definition, such a transfer results in no decrease in title, pay or benefits, and is thus not an adverse employment action. The court's "conclusion [remained] consistent with the authority of [its] sister circuits." *Id.* Furthermore, the court employed "an objective test that considers whether the employment action at issue was objectively intolerable to a

reasonable person." *Id.* at 28. The court stated, "Our circuit's focus on objective indicia of adversity is consistent with the holdings of our sister circuits that an employee's subjective preference for one position over another is insufficient to render the denial of a purely lateral transfer an adverse employment action under Title VII." *Id.* at 29.

Jurisdiction for Judicial Review – Appellate Jurisdiction Regarding Relief Granted Under 8 U.S.C. 1229: *Cevilla v. Gonzales*, 446 F.3d 658 (7th Cir. 2006)

The court explained that 8 U.S.C. § 1252(a)(2)(B) declares "notwithstanding any other provision of law . . . no court shall have jurisdiction to review (i) any judgment regarding the granting of relief under section . . . 1229b . . ." except for "constitutional claims or questions of law." *Id.* at 660. The court observed that the 5th, 6th and 9th Circuits have interpreted this subsection of 8 U.S.C. § 1252 to mean "that despite its uncompromising language it does not bar judicial review of rulings that are not discretionary in character." *Id.* at 661. The court joined the 2nd Circuit in disagreeing with this interpretation, holding that "the statute itself, read literally, goes further and places all rulings other than those resolving questions of law or constitutional issues beyond the power of judicial review." *Id.* Although the court found that both the Immigration Judge and the BIA had clearly erred on the factual question of plaintiff's credibility, the court declared that the error did not involve a question of law or a constitutional issue. Therefore, the 7th Circuit determined that it had no jurisdiction to reverse on such an error and consequently could not grant an appeal. *Id.* at 663.

Title VII and the Age Discrimination in Employment Act – Fragmentary De Novo Review on Appeal: *Laber v. Harvey*, 438 F.3d 404 (4th Cir. 2006)

In an Equal Employment Opportunity Commission's Office of Federal Operations case, the 4th Circuit joined the 7th, 10th, and 11th Circuits in denying fragmentary de novo review to a federal employee-plaintiff who did not want to enforce a favorable ruling when he prevailed on liability but was unhappy with the remedial reward. *Id.* at 424. The court concluded that Title VII does not authorize a federal employee to bring a de novo civil action for the portion of the ruling he considers an insufficient remedy; the employee must again place the

employing agency's discrimination at issue. *Id.* at 423. In contrast, the 9th Circuit allows fragmentary de novo review in the enforcement context. *Id.*

ERISA – Equitable Relief: *Popowski v. Parrott*, 461 F.3d 1367 (11th Cir. 2006)

In this consolidated case, the appellant-fiduciaries sought reimbursement for medical expenses incurred pursuant to employee health-care plans. *Id*. at 1369. The beneficiaries each had their medical expenses paid according to their plans, and then subsequently collected damages from their respective tortfeasors. *Id*. at 1370-71. In addition to filing breach-of-contract claims, appellants brought claims under 29 U.S.C. § 1132(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA). *Id*. The court noted that "[a] plan fiduciary may bring a civil action under ERISA . . . to obtain other 'appropriate equitable relief.'" *Id*. at 1372. With respect to one of the claims, the district court was "faced with a split among the circuits regarding the scope of equitable relief under ERISA." *Id*. at 1370. Relying on the persuasive authority from the 6th and 9th Circuits, the district court concluded that appellants "sought legal rather than equitable restitution" and dismissed the claim. *Id*. at 1371. The 11th Circuit rejected this interpretation and instead followed the guidance from the Supreme Court's decision in *Sereboff v. Mid Atlantic Medical Services*, 126 S. Ct. 1869 (2006). *Id*. at 1373. In *Sereboff*, the Supreme Court held that "as long as a plaintiff is able to establish that 'the basis for its claim is equitable,' bringing the claim as an action for breach of contract will not disqualify it under § 1132(a)(3)." *Id*. at 1372. The 11th Circuit reasoned that although a claim may arise out of a breach of contract, equitable relief is still plausible when seeking "recovery through a constructive trust or equitable lien on a specifically identified fund." *Id*. at 1373. One of the appellant-fiduciaries prevailed on equitable claims because the beneficiary had placed the settlement funds directly into a personal bank account and the funds were in the beneficiary's possession. *Id*. In this respect, seeking reimbursement of these funds did rise to equitable relief. *Id*. at 1373-74.

ERISA – Fiduciaries: *Briscoe v. Fine*, 444 F.3d 478 (6th Cir. 2006)

Plaintiffs sought review of a district court's ruling that their former employer and a third party administrator of the employer's healthcare

plan were not ERISA fiduciaries. *Id*. at 485. The court first clarified that the relevant inquiry is not whether a person is a fiduciary with respect to certain beneficiaries, but rather, "whether a person is a fiduciary with respect to [a] particular activity in question." *Id*. at 486. The court considered the import of a bulletin issued by the Department of Labor ("DOL"), which asserted that members of the board of directors are ERISA fiduciaries insofar as they exercise certain discretionary authority or control. *Id*. at 486-87. The court then recognized that the circuits have split on their interpretation of the DOL bulletin in circumstances where "a corporation is the named fiduciary, but has not explicitly delegated administrative authority to its corporate directors." *Id*. at 487.

The court noted the 3rd Circuit's holding that, in this situation, the directors are not fiduciaries, absent a showing that they had "individual discretionary roles." *Id*. The court then contrasted this holding with that of the 5th and 9th Circuits, which rejected the 3rd Circuit's ruling to the extent that it held that corporate officers were not fiduciaries if the corporation was the named fiduciary. *Id*. Synthesizing these cases, the court noted that, despite the purported disagreement, these circuits are in agreement that "the officers of a corporation named as a fiduciary of its healthcare plan are themselves fiduciaries where they exercise discretionary authority over plan assets or plan management," but they differ on whether there is a presumption one way or the other that the officers have acted in such capacity. *Id*. In the final analysis, the court found that the result of the present case was the same under either approach, and thus the court was not compelled to rule on where the presumption lay. *Id*. at 487-88.

Class Certification – The Predominance Requirement: *Augustin v. Jablonsky*, 461 F.3d 219 (2d Cir. 2006)

The 2nd Circuit held that district courts "may employ Rule 23(c)(4)(a) to certify a class on a designated issue regardless of whether the claim as a whole satisfies the predominance test." *Id.*at 230. The court explained that the 5th Circuit adopted a strict application of the predominance requirement, while the 9th Circuit, relying on its own precedent, allowed district courts to isolate common issues and allow class treatment of those common issues. *Id.* at 226. The 2nd Circuit explained that the plain language, structure, and the notes of the Advisory Committee pertaining to Rule 23 supported the 9th Circuit's view. *Id.* For those reasons, the court held that a district court "may employ subsection (c)(4) to certify a class . . . regardless of whether the

claim as a whole satisfies Rule 23(b)(3)'s predominance requirement." *Id.* at 227.

Tax – Timely Mailing: *Crook v. Comm'r*, 173 F. App'x 653 (10th Cir. 2006)

The circuits disagree as to "the evidence required or permitted to prove timely mailing under [the Internal Revenue Code, 26 U.S.C.] § 7502." *Id.* at 657. In the 2nd and 6th Circuits, actual delivery with a legible postmark, "or a receipt for registered or certified mail, constitute the only satisfactory forms of proof, and no extrinsic evidence of mailing can be considered." *Id*. Other circuits, such as the 8th and 9th, do allow extrinsic evidence that demonstrates that a document has been mailed. *Id*. This court disposed of the case without aligning itself with either interpretation, instead holding that "a taxpayer must comply with the statutory requirements of § 7502 in order to benefit from the mailing-as-delivery rule . . . 'self serving declarations of mailing without more are insufficient to invoke the presumption of delivery.'" *Id.* at 657 (citation omitted).

Equal Protection – Congressional Override of Supreme Court Precedent: *Bolden v. City of Topeka*, 441 F.3d 1129 (10th Cir. 2006)

The court considered whether recent amendments by Congress to 42 U.S.C. § 1981 overruled the Supreme Court decision in *Jett v. Dallas Independent School District*, 491 U.S. 701 (1981), which had allowed claims against state actors for violations of § 1981, but only to receive the remedies provided under 42 U.S.C. § 1983. *Id.* at 1134. The court noted that the 9th Circuit ruled that the amendment to § 1981 did allow for implied causes of actions and thus overruled the decision in *Jett*. *Id.* at 1136. The 5th and 11th Circuits have ruled differently, stating that the amendment to § 1981 did not provide any new cause of action and that the amendment did not overrule *Jett* in any way. *Id.* at 1136-37. The 10th Circuit agreed with the finding in *Butts*, and ruled that claims against state actors arising from § 1981 violations can only be raised under § 1983. *Id.* at 1137.

Subject Matter Jurisdiction – Judicial Review of Extreme Cruelty: *Wilmore v. Gonzales*, 455 F.3d 524 (5th Cir. 2006)

The 5th Circuit followed the 10th Circuit, and disagreed with the 9th Circuit, holding that the discretionary determination of "extreme cruelty" bars the court from exercising subject matter jurisdiction. *Id.* at 527. The court noted that "although the extreme cruelty definition provides some guidance in making this determination, it certainly does not remove the discretion afforded by Congress." *Id.* at 528. The court also looked at the statutory language, determining that the jurisdiction-stripping provision, 8 U.S.C. § 1252(a)(2) (Supp. V 2005), lists extreme cruelty as discretionary. *Id.* This holding bars the court from having subject matter jurisdiction over "extreme cruelty" appeals pursuant to 8 U.S.C. § 1252(a)(2)(B) (Supp. V 2005). *Id.*

CIVIL PROCEDURE

Deliberative Process Privilege – Invocation by Lesser Officials: *Marriott Int'l Resorts, L.P. v. United States*, 437 F.3d 1302 (Fed. Cir. 2006)

The Federal Circuit followed the majority rule among the circuits in holding that lesser officers of government agencies may invoke the deliberative process privilege. *Id.* at 1306. The court noted that the Temporary Emergency Court of Appeals, the D.C. and 5th Circuits have held that lesser officers may invoke privileges, while the 3rd Circuit refused to allow an attorney to invoke the executive privilege. *Id.* at 1306-07. The "agency head" requirement, which required a "formal claim of privilege, lodged by the head of the department which has control over the matter, after actual person consideration by that officer," applied only to the "military and state secrets privilege." *Id.* at 1306. Agreeing with the D.C. Circuit's findings that "delegation promotes both efficiency in judicial administration and actual personal involvement in the complex process of invoking the privilege," and noting that unlike the state's secrets privilege, the deliberative process privilege was not absolute, the Federal Circuit held that "the head of an Agency can, when carefully undertaken, delegate authority to invoke the deliberative process privilege on the Agency's behalf." *Id.* at 1307-08.

Contracts – Forum Selection Clause: *Servewell Plumbing, L.L.C. v. Fed. Ins. Co.*, 439 F.3d 786 (8th Cir. 2006)

The court addressed the issue of "whether to apply state or federal law in determining the enforceability" of a forum selection clause. *Id.* at 789. The court recognized that "[b]ecause 'the enforceability of a forum selection clause concerns both the substantive law of contracts and the procedural law of venue,' there is some disagreement among the circuits over whether state or federal law applies." *Id.* (citation omitted). The court noted that it had not yet adopted a definitive position on this issue, and furthermore, the court declined to do so in this case because "both Arkansas and Florida follow the federal standard announced by the Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), . . . and neither party argues that the application of one or another body of law would materially affect the outcome." *Id.*

Securities Litigation – Pleading Requirements: *Deephaven Private Placement Trading, Ltd. v. Grant Thornton & Co.*, 454 F.3d 1168 (10th Cir. 2006)

The 10th Circuit disagreed with the 1st Circuit's application of the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4, which lays out the pleading standards of claims arising out of the Securities and Exchange Act of 1934, 15 U.S.C.S. § 78r(a). *Id.* at 1173-74. Section 78u-4(b)(1) of the PSLRA requires that a complaint specify "each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." *Id.* at 1173. In a similar case, the 1st Circuit held that "the allegations supporting investor-plaintiff's Section 18(a) claim against the auditor satisfied the PSLRA's pleading requirements." *Id.* at 1174 n.5. The 10th Circuit found that the 1st Circuit merely assumed that violations of GAAP standards meant they [the auditors] misled within the meaning of Section 18(a). *Id.* In conclusion, the 10th Circuit found "a more nuanced analysis [to be] appropriate." *Id.*

Discovery Appeals – Discovery Orders and the Requirements of the *Cohen* Doctrine: *Goodman v. Harris County*, 443 F.3d 464 (5th Cir. 2006)

The 5th Circuit determined whether a court order for a litigant to submit to an examination was an immediately appealable decision under the collateral order doctrine as the court had allowed in *Acosta v. Tenneco Oil Co.*, 913 F.2d 205 (5th Cir. 1990). *Id*. at 467. In *Acosta*, the court had allowed an appeal of a Rule 35 order, stating it qualified as a collateral order under the *Cohen* doctrine and was subject to immediate review. *Id.* at 468 n.3. The 5th Circuit noted that the 7th Circuit disagreed with the holding in *Acosta*, finding that the reasoning would "make every discovery order appealable." *Id.* at 468 n.4. The 5th Circuit did not question the validity of its earlier decision in *Acosta*, stating that certain orders under Rule 35 were immediately appealable. However, the court found that the order made by the district court in this case was not one that qualified as a collateral order under the *Cohen* doctrine and dismissed the appeal. *Id.* at 469.

Class Action Certification – Presumption of Unawareness: *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311 (4th Cir. 2006)

The 4th Circuit ruled that plaintiffs are not "entitled to a class-wide presumption of unawareness because the defendants concealed . . . dual-rate policies." *Id.* at 325 n.15. The court noted that "[a] presumption arises when proof of one fact gives rise to a 'natural inference' that another fact is true and proof of the second fact is difficult to obtain." *Id.* at 324. The 4th Circuit found that "the class members' unawareness of their cause of action is the 'natural inference' of the defendant's concealment, and, at any rate, evidence of unawareness of the cause of action is information uniquely in the class's possession, a fact that defeats the necessity of a presumption in the class's favor." *Id.* The court noted that this ruling is in dispute with the determination of the 5th Circuit. *Id.* at 325 n.15.

IMMIGRATION

Unilateralism – Judicial Review of BIA Decisions: *Kambolli v. Gonzales*, 449 F.3d 454 (2d Cir. 2006)

The 2nd Circuit held that it lacked jurisdiction to review a claim that a Board of Immigration Appeals ("BIA") member erred by unilaterally affirming the decision of an immigration judge without referring the case to a three-member panel for review. *Id.* at 465. This holding comported with similar cases in the 8th and 10th Circuits, which have denied review of a unilateral affirmation by one BIA member because, pursuant to the BIA's "streamlining" procedure outlined in 8 C.F.R. § 1003.1(e), the BIA member is not permitted to explain his reasoning for affirming. *Id.* at 459-60. According to the 10th Circuit, appellate review is improper where there is no explanation for the BIA's affirmation of the immigration judge's decision. *Id.* at 460. Other circuits, such as the 1st, 3rd and 9th, have taken the contrary view and remanded one-member BIA decisions for reconsideration by a 3-member panel. *Id.*

Jurisdiction – Voluntary Departures: *Thapa v. Gonzales*, 460 F.3d 323 (2d Cir. 2006)

The court decided the issue of whether it had jurisdiction over voluntary departures "issued by an immigration judge or the Board of Immigration Appeals." *Id.* at 324. The court noted that the "First, Third, Sixth, Seventh, Eighth, and Ninth Circuits have all concluded that the Courts of Appeals do have such authority. . . . Only the Fourth Circuit has reached the opposite result." *Id.* at 329. The court sided with the majority of circuits, and found that there is "nothing in any statutory or regulatory provision relating to voluntary departure that rebuts the presumption that courts may stay an agency order pending review of a petition on the merits." *Id.* at 332. The court held that "the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition." *Id.* at 329.

Removal – Applicability of Retroactive Statutes: *Hem v. Maurer*, 458 F.3d 1185 (10th Cir. 2006)

Prior to 1996, an alien convicted of an aggravated felony, who had INS proceedings for removal brought against him, could seek relief under § 212(c) of the Immigration and Nationality Act. *Id*. at 1186. The court noted that this section granted the Attorney General discretion to stay the deportation proceedings. *Id*. The court noted that the section was repealed by § 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). *Id*. The Attorney General applied § 304(b) retroactively, instituting removal proceedings against those aliens with aggravated assault convictions pre-dating the passage of IIRIRA. *Id*. Shortly thereafter, the Supreme Court held "that application of IIRIRA § 304(b) would be impermissibly retroactive to aliens whose aggravated felony convictions followed from guilty pleas." *Id*.. The question remains as to whether § 304(b) would be impermissibly retroactive to those convicted by a jury trial. *Id*. at 1187. The court concluded that "courts have diverged on whether, and to what extent, litigants must show they relied on pre-IIRIRA law to sustain an IIRIRA retroactivity claim." *Id*. The court joined the 3rd, 4th, and 6th Circuits, which "require [merely] that a reasonable litigant could have 'objectively relied' on the availability of § 212(c) in a given situation . . . [While the 1st, 2nd, and 11th Circuits] demand that litigants demonstrate they actually relied on the availability of such relief." *Id*. The court concluded that a "defendant who proceeds to trial but forgoes his right to appeal when § 212(c) relief was potentially available, has suffered retroactive effects under IIRIRA." *Id*.

Removal – Statutory Scheme: *Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006)

This appeal considered whether a timely filed motion to re-open a removal case tolled an alien's voluntary departure period. *Id.* at 388-89. The statutory scheme provided that an alien who fails to depart voluntarily as scheduled is ineligible for cancellation of removal for 10 years. *Id.* at 389. However, 8 C.F.R. § 1003.2(d) states that "any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion." *Id.*

The plaintiff argued the 3rd, 8th, and 9th Circuits' position that this would create an absurd result by allowing a plaintiff who is removing

voluntarily to make a motion to reopen, then force him to leave, thereby voiding that motion. *Id.* This court disagreed with that assertion, and declined "to read into 8 U.S.C. § 1229c(d) the requirement that the [Board of Immigration Appeals] automatically toll an alien's voluntary departure period during the pendency of a motion to reopen." *Id.* at 391. On the contrary, the 5th Circuit found that the purpose of the statutory scheme was an exchange of benefits, permitting an alien the remedy of filing and resolving a motion to reopen, so long as it does not interfere with the agreed upon voluntary departure date, while preserving the government's interest in the finality and financial savings of an alien's voluntary departure. *Id.* at 390-91. Finally, the court found that the Title's statutorily fixed jurisdictional limits and 60-day maximum for voluntary departures precluded judicial intervention. *Id.* at 390.

Removal – Definition of "Crime Involving Moral Turpitude": *Hashish v. Gonzales*, 442 F.3d 572 (7th Cir. 2006)

The 7th Circuit reviewed a request for cancellation of removal by the petitioner alien, who stated that the Board of Immigration Appeals ("BIA") erred in finding that he had committed "crimes involving moral turpitude" as contained within 8 U.S.C. § 1229b(b)(1)(C). *Id.* at 575-75. Reviewing its decision in *Mei v. Ashcroft*, 393 F.3d 737 (7th Cir. 2004), the court noted that the circuits split over courts should defer to a BIA decision to BIA to classify a crime as one "involving moral turpitude". *Id.* at 575 n.2. In *Mei,* the 7th Circuit stated that the Supreme Court in *Chevron* extended deference to other BIA interpretations of immigration statutes. *Mei*, 393 F.3d at 739. Currently, the 1st, 3rd, and 8th Circuits extend such deference to BIA classifications of a crime as being one "involving moral turpitude", while the 5th and 9th Circuits do not. *Id.* As in *Mei*, the 7th Circuit felt that the level of deference given the BIA's decisions to classify a crime as one "involving moral turpitude" is unimportant, as the BIA's determination had to be upheld. *Id*. at 575 n.2.

Subject Matter Jurisdiction – Exhaustion of Remedies: *Geach v. Chertoff*, 444 F.3d 940 (8th Cir. 2006)

The 8th Circuit recognized that it was "prohibited from exercising subject-matter jurisdiction when an alien fails to exhaust administrative remedies 'unless the petition presents grounds which the court finds could not have been presented in such prior proceeding[s].'" *Id.* at 945.

The court joined other circuits that have considered this issue, such as the 1st, 7th, and 9th Circuits, and held that it had "subject-matter jurisdiction over aliens' unexhausted constitutional claims unless the claims concern procedural errors correctable by the administrative tribunal." *Id.*

Firm Resettlement – Burden of Proof: *Maharaj v. Gonzales,* 450 F.3d 961 (9th Cir. 2006)

The 9th Circuit noted that in an immigration suit where an alien claiming asylum stayed for a time in a third country before coming to the United States, the Department of Homeland Security ("DHS") must meet a threshold requirement of showing that the alien had a right to stay in the interim country. *Id.* at 964. The court noted that meeting that requirement creates a rebuttable presumption of "firm resettlement" that the alien must defeat in order to prevail. *Id.* The 9th circuit found that proof of firm resettlement could be met if the DHS showed "direct evidence of an offer issued by the third country's government or, where no direct evidence of a formal government offer is obtainable, by circumstantial evidence of sufficient force to indicate that the third country officially sanctions the alien's indefinite presence." *Id.* This ruling agreed with decisions from the 1st, 7th, 8th and 10th circuits. *Id.* The 2nd, 4th and D.C. Circuits disagree and favor a more comprehensive "totality of the circumstances" approach. *Id.* at 986.

Jurisdictional Limitations – Immigration Continuances: *Bogdanov v. Gonzales*, No. 04-4086, 2006 U.S. App. LEXIS 21858 (7th Cir. Aug. 24, 2006)

The 7th Circuit explained that the jurisdictional bar to judicial review of immigration continuances found in 8 U.S.C. § 1252(a)(2)(B)(ii) did not apply to extreme situations "where the procedural ruling effectively disposes of the entire case." *Id.* at *8. The court noted that the 10th Circuit had previously declined to "review a discretionary denial of a continuance for lack of jurisdiction" while the 11th Circuit had denied a "petition for review on the merits after finding that jurisdiction exist[ed]." *Id.* at *7. The 7th Circuit stated that its decision was taking the middle ground, recognizing that "the statute bars review of most denials of continuances" and at the same time acknowledging "that in some circumstances the denial of a continuance may fall outside the statute." *Id.*

Jurisdictional Limitations – Alien Convictions: *Alim v. Gonzales*, 446 F.3d 1239 (11th Cir. 2006)

The 11th Circuit determined the jurisdictional limitations of courts to review the Board of Immigration Appeal's ("BIA") final orders of removal under 8 U.S.C. § 1252(a)(2)(C). *Id*. at 1246. Jurisdiction is barred if an alien "is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct." *Id*. In the instant case, the circuit court "vacated [appellant alien's domestic battery plea] because [he] was not advised—as required by Florida law—of the immigration consequences when he pled no contest." *Id*. at 1247. Section 1101(a)(48)(A) defines "conviction" without directly addressing convictions that are vacated to remedy a defect in the underlying criminal proceeding. *Id*. at 1248. The 11th Circuit, joining the 3rd, 7th, and 10th Circuits, deferred to the BIA's interpretation that where convictions are vacated "because there was a legal defect in the underlying proceeding (i.e., a violation of a constitutional or statutory right), then there is no longer a conviction for purposes of the [Immigration and Nationality Act]." *Id*. at 1249-50. This ruling counters the 5th Circuit. *Id*. at 1250.

Petition for Habeas Corpus – Alien's Challenge of Removal: *Kholyavskiy v. Achim*, 443 F.3d 946 (7th Cir. 2006)

The 7th Circuit explained that "[t]he circuits have divided on the question of whether a detained alien challenging his impending removal must name the warden of his detention facility in a petition for habeas corpus, or whether the alien may name an immigration official instead." *Id.* at 950. Furthermore, "unlike the cases that have precipitated disagreement among some of our sister circuits, Mr. Kholyavskiy's petition for habeas corpus does not challenge the validity of his removal order, but instead attacks the constitutionality of his confinement while he was awaiting removal." *Id.* at 952. Therefore, the court did not address the split and instead applied *Padilla* to the appellant's "excessive detention" complaint. *Id.* at 953.

BANKRUPTCY

Bankruptcy Law – Interline Trust Doctrine: *Norfolk S. Ry. v. Consol. Freightways Corp.* (*In re Consol. Freightways Corp.*), 443 F.3d 1160 (9th Cir. 2006)

Plaintiff, which provided freighting services for the now-bankrupt defendant, urged the court to exclude certain funds from the defendant's bankruptcy estate under the interline trust doctrine. *Id*. at 1161-62. Under this doctrine, when several companies collaborate to provide freight services, but payment is only collected by one such company, the company receiving payment is deemed to hold the funds in trust. *Id*. at 1161. Funds held in this manner would not become a part of the bankruptcy estate if the holding company then filed for bankruptcy, since, by holding the funds in trust, the holding company does not become a creditor. *Id*. at 1161-62 The 3rd and 6th Circuits recognize the interline trust doctrine, but the 7th Circuit has rejected it. *Id*. at 1165.

The court framed its analysis of whether to adopt the interline trust doctrine as a matter of federal common law by recalling the Supreme Court's warning that "cases in which judicial creation of a special federal rule would be justified . . . are . . . limited to situations where there is a significant conflict between some federal policy or interest and the use of state law." *Id*. at 1162. The court then reviewed the federal interests in bankruptcy law and interstate transportation to determine if such a conflict existed. *Id*. at 1163. The court declared that, although Congress considered legislation concerning interline balances, "[n]othing in the Bankruptcy Code creates a special status for interline balances . . . [and] [t]hus, one cannot say that the underlying principles of federal bankruptcy law auger for the recognition of a federal common law rule." *Id*. at 1162-63. Similarly, the court found that federal regulation of the transportation industry was not of such a nature that it brought federal policy into direct conflict with the use of state law, such that a federal common law rule should be created. *Id*. at 1163-64. Moreover, the court noted, there has been a trend towards federal deregulation of the transportation industry. *Id*. at 1164. As such, the court joined the 7th Circuit in rejecting the interline trust doctrine. *Id*. at 1165.

CONSTITUTIONAL/FEDERAL LAW

Freedom of Speech – Requirements for the Enactment of Initiatives: *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082 (10th Cir. 2006)

The 10th Circuit considered whether freedom of speech is implicated when "a supermajority requirement for enactment of initiatives on specific topics" is imposed. *Id.* at 1085. The court determined that freedom of speech is not implicated as a result of the requirement, disagreeing with the 1st Circuit which holds that "a state constitutional provision prohibiting ballot initiatives on a particular subject constitutes a restriction on speech subject to intermediate scrutiny." *Id.* The 10th Circuit explained that "the right to free speech . . . [is] not implicated by the state's creation of an initiative procedure, but only by the state's attempts to regulate speech *associated with* an initiative procedure." *Id.* at 1099. The court added that "[t]he distinction is between laws that regulate or restrict the communicative conduct of persons advocating a position in a referendum, which warrant strict scrutiny, and laws that determine the process by which legislation is enacted, which do not." *Id.* at 1099-1100.

First Amendment – Article III Independent Standing Requirement for Intervenor-Applicants: *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006)

In an appeal affirming a ballot measure's prohibition of payment to petition signature gatherers as constitutional under the First Amendment, the 9th Circuit noted that a circuit split exists as to whether intervenor-applicants must establish independent Article III standing in order to intervene as of right. *Id.* at 956. The court cited cases from the 8th and D.C. Circuits that require a party to show independent standing before intervening as of right, in contrast to other cases from the 2nd and 6th Circuits that allow intervention without such standing. *Id.* The 9th Circuit did not have to reach the issue in this case, since the motion to intervene being reviewed on appeal had been granted on other grounds. *Id.*

Freedom of Association – Applying the Free Speech Test for Public Employees to Freedom of Association: *Shrum v. City of Coweta,* 449 F.3d 1132 (10th Cir. 2006)

The 10th Circuit acknowledged that the circuit courts disagree over whether the Supreme Court's use of the *Pickering* test to determine a public employee's right to freedom of speech should be applied to a public employee's right to freedom of association. *Id.* at 1138. Instead of making a statement on that broader question, the court ruled that the *Pickering* test, and more precisely the issue of "public concern," does not apply when the public employee's association is with a union. *Id.* The court reasoned that by reaching an agreement with a union, an employer contractually accepted the union, receives some benefit from the agreement, and is therefore "estopped from claiming that its 'interests as an employer' are inconsistent with the freedom of its employees to associate with the union . . . ." *Id.* at 1139. The court noted that this is a narrow holding on a broader question. *Id.* at 1138. The 5th and 11th Circuits more broadly rejected the "public concern factor" in considering a public employee's freedom of association. *Id.* at 1139. The 2nd, 4th, 6th, 7th, and 9th Circuits disagree and generally apply the pubic concern factor of the *Pickering* test regarding freedom of association. *Id.*

First Amendment – Workplace Speech: *Weaver v. Chavez*, 458 F.3d 1096 (10th Cir. 2006)

In reviewing the propriety of a State's discharge, the court warned that a State is prohibited from "discharg[ing] an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." *Id*. at 1099. The court recognized, however, that a State, acting in the dual role of government and employer, must be afforded greater leeway when acting in its role as employer in order to effectively carry out is duties. *Id*. Specifically, the court articulated that, where an employee's speech touches on matters of "public concern," the court is required to "balance the employee's interest in commenting upon matters of public concern against the interest of the State . . . in promoting the efficiency of the public services it performs through its employees." *Id*.

The court noted, however, that "[a]lthough superficially simple, the distinction between 'finding facts' and 'applying law' can be quite elusive," and hence it is unclear to what extent the jury should be engaged in making this determination. *Id*. at 1101. Indeed, the court recognized that there is a split between the Circuits concerning the role of the jury *vel non* in aiding in this determination, with the 2nd and 8th Circuits allowing the jury to play some role, while the 4th Circuit rejected such a possibility. *Id*. The court joined the 2nd and 8th Circuits,

holding that, because "[t]the district court . . . is generally in the best position to assess whether the inquiry involves an underlying question of historical fact . . . the decision to submit questions of fact to the jury is within the sound discretion of the district court." *Id*. at 1102. In conclusion, the court reiterated that while the courts must be the final arbiter of the constitutional claims, it is permissible to submit underlying questions of historical fact to the jury. *Id*. Accordingly, the court upheld the district's court submittal of fact-sensitive issues to the jury pertaining to the balancing determination. *Id*.

ERISA – "De Facto" Administrator and Denial of Benefits: *Rud v. Liberty Life Assurance Co.*, 438 F.3d 772 (7th Cir. 2006)

The 7th Circuit determined that a "de facto" plan administrator can exist alongside an official plan administrator, where an insurance company determines who can receive benefits under a plan administered and explained by the employer company. *Id.* at 774. The court suggested that equitable estoppel could prevent an employer from denying its status as plan sponsor to avert any potential for confusion surrounding decision-making power. *Id.* at 774-75. The court commented that the 8th Circuit does not acknowledge "de facto" administrators. *Id.* at 774. Further, the court rejected the 3rd, 8th, and 11th Circuits' approach of automatically assuming a conflict of interest to allow departure from the "arbitrary and capricious" standard for denial of benefits, and the sliding scale approach employed by the 5th, 7th and 10th Circuits in determining whether a conflict of interests exists. *Id.* at 775-77. Instead, the court here sought to preserve freedom of contract by following its precedent and the 9th Circuit's method that permits a plaintiff to show that "the particular circumstances of his case demonstrate the existence of a real and not merely notional conflict of interest . . . the parties would not have foreseen when they agreed that the plan administrator's determinations would be conclusive." *Id.* at 777.

ERISA Recovery of Attorney's Fees – Computer-Based Research: *Trs. of the Constr. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co.*, 460 F.3d 1253 (9th Cir. 2006)

The 9th Circuit held that a prevailing plaintiff in an ERISA action for delinquent contributions may recover as attorney's fees, "reasonable charges for computerized research . . . if separate billing for such

expenses is 'the prevailing practice in the local community.'" *Id.* at 1259. The court noted a circuit split as to "whether expenses for computer-based legal research are compensable as 'reasonable attorney's fees.'" *Id.* at 1258. The court recognized that the 1st, 2nd, 10th, and D.C. Circuits agree with the 9th Circuit on this issue. *Id.* The court further noted that only the 8th Circuit is in disagreement, requiring fees for computer-based research to be included in the attorney's hourly rate. *Id.* The court emphasized that "'reasonable attorney's fees' do not include costs that, like expert fees, have by tradition and statute been treated as a category of expenses distinct from attorney's fees." *Id.* The court also stated that "'reasonable attorney's fees' include litigation expenses only when it is 'the prevailing practice in a given community' for lawyers to bill those costs separately from their hourly rates." *Id.*

LABOR LAW

Arbitration – "Just Cause" Provisions in Collective Bargaining Agreements: *LB&B Assoc., Inc. v. Int'l Bhd. of Elec. Workers, Local No. 113*, 461 F.3d 1195 (10th Cir. 2006)

The 10th Circuit adopted the approach used by the 3rd and 6th Circuits to compel affirmation of an arbitrator's interpretation of a "just cause" termination provision in a collective bargaining agreement, where the agreement did not explicitly provide that a listed offense was such a cause. *Id.* at 1200. In adopting its view, the court acknowledged that the parties had bargained for arbitration as a means of resolving disputes, and indicated that an arbitrator's interpretation of the circumstances amounting to just cause for a termination warranted deference. *Id.*

Contracts – Evidence of Bargaining History: Paper, Allied-Industrial, Chem. & Energy Workers Int'l Union Local No. 4-2001 v. ExxonMobil Ref. & Supply Co., 449 F.3d 616 (5th Cir. 2006)

The 5th Circuit explored the role that bargaining history plays in the interpretation of contracts. *Id.* at 620. The court rejected the 9th Circuit's view that "evidence of bargaining history can be 'most forceful evidence' that a particular dispute is not arbitrable." *Id.* Instead, the court annunciated its view that "evidence of bargaining experience can be introduced only where the contract language is ambiguous as to

arbitrability." *Id.* The court defended its position saying that a court "must construe the 'language of the contract as finally agreed upon . . . in accordance with ordinary rules of construction without reference to the give and take of the bargaining sessions which produced the final terminology.'" *Id.* The court explained that any other construction would completely abandon the parol evidence rule. *Id.*

CRIMINAL MATTERS

SENTENCING

Sentencing Guidelines – General Intent Requirement: *United States v. Brown*, 449 F.3d 154 (D.C. Cir. 2006)

The D.C. Circuit followed the 9th Circuit in determining that a general intent requirement precludes imposition of the minimum ten-year sentence for discharging a firearm under 18 U.S.C. § 924(c)(1)(A). *Id.* at 156. The court stated that requiring a finding of general intent comports with the "presumption against strict liability in criminal statutes." *Id.* at 157. In so holding, the court rejected the contrary view embraced by the 10th Circuit, which has found that no intent requirement should be necessary for application of sentencing statutes that do not establish independent offenses. *Id.* at 158.

Sentence Enhancements – Prior Criminal Convictions: *United States v. Torres-Duenas*, 461 F.3d 1178 (10th Cir. 2006)

The 10th Circuit held that no plain error occurred where a district court enhanced a defendant's sentence by 16 levels as a result of a prior criminal conviction. *Id.* at 1182. The court analyzed the language in comment 3(A) to U.S.S.G. § 2L1.2(a) which states that "*aggravated felony* . . . 'has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), *without regard to the date of conviction* for the aggravated felony.'" *Id.* at 1181. The court reasoned that the phrase "without regard to the date of conviction" means that a crime of violence is to be considered without regard to the date of conviction. *Id.* at 1182. The court noted that the 11th Circuit, the only other circuit to have addressed this issue, reached the same conclusion, but on different grounds. *Id.* at 1181-82.

Dangerous Weapons – Upward Departure from Sentencing Guidelines: *United States v. Chase*, 451 F.3d 474 (8th Cir. 2006)

The 8th Circuit held that U.S.S.G. §§ 5K2.6 and 5K2.8 both permit an upward departure from the Sentencing Guidelines for the use of a dangerous weapon in a voluntary murder case. *Id.* at 483. The court, in agreement with the 7th and 9th Circuits, found that the voluntary manslaughter guidelines did not consider the use of a dangerous weapon in sentencing. *Id.* The court noted that the Guidelines allow for departure from the recommended sentence when certain circumstances are present in a case, as long as the specific offense guideline has not already considered that circumstance in the formulation of the recommended sentence. *Id.* at 482. The 8th Circuit noted that "[c]ourts [are] to treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes." *Id*. at 482.

The court further noted that the voluntary manslaughter section of the Guidelines do not mention use of a weapon, and use of a weapon could not be inferred from the underlying offense. *Id.* at 483. This conflicts with holdings in the 4th and 10th Circuits, where the use of a dangerous weapon is included in the sentencing recommendation for voluntary murder. *Id.* at 482-83. The 4th Circuit held that although the voluntary manslaughter guideline did not take the use of a dangerous weapon into account, most murders are committed with a dangerous weapon, therefore the dangerous weapon falls within the 'heartland' of the guideline. *Id.* at 483. The 10th Circuit held that since the end result of the conduct leading to the offense is murder, it implies that any instrumentality used was done so in a dangerous manner. *Id.*

Armed Career Criminal Act – *Letterlough* Balancing Test: *United States v. Leeson*, 453 F.3d 631 (4th Cir. 2006)

In analyzing whether a felon qualified for an increased sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), the 4th Circuit used a balancing test, including the five *Letterlough* factors, to determine whether the defendant had committed two separate and distinct criminal episodes as required by 924(e). *Id.* at 640. The 6th Circuit had analyzed a similar issue but concluded differently, without using the *Letterlough* factors. *Id.* The 4th Circuit stated that it "simply disagree[d] with the 6th Circuit's analysis." *Id.* at 643.

Liberty Interest – Specific Condition That Must be Supported on the Record: *United States v. Weber*, 451 F.3d 552 (9th Cir. 2006)

The 9th Circuit followed circuit precedent by "generally not requir[ing] a district court to articulate the reasons behind imposing a certain condition." *Id.* at 561. However, the court articulated that if "the condition implicates a particularly significant liberty interest of the defendant, then the district court must support its decision . . . with . . . evidence that the condition of supervised release sought to be imposed is 'necessary to accomplish one or more of the factors listed in § 3583(d)(1)' and 'involves [a reasonably necessary] deprivation of liberty.'" *Id.* at 561. The court noted that this approach disagrees with the 3rd and 10th Circuits, which "require an explanation for each supervised release condition." *Id.* at 560 n.10.

Plain Statements – Threat of Death Sentencing Enhancement: *United States v. Jennings*, 439 F.3d 604 (9th Cir. 2006)

The 9th Circuit followed circuit precedent by employing an "objective, reasonable teller" test to determine whether a bank robber's plain statement that he has a gun is "sufficient to instill a fear of death in a victim" and warrant a two-level "threat of death" sentencing enhancement under the U.S. Sentencing Guidelines. *Id.* at 605. The court noted that prior to the 1997 amendments to the Sentencing Guidelines, the 11th Circuit had employed a "cramped" requirement of "direct" threats, but has since recognized that view as no longer correct. *Id.* at 610.

Judicially Found Facts – Increasing a Mandatory Minimum Sentence: *United States v. Lizardo*, 445 F.3d 73 (1st Cir. 2006)

The 1st Circuit rejected defendant's argument that the district court "committed plain error in determining the statutory mandatory minimum sentence on the basis of a drug quantity found by the judge rather than by the jury." *Id.* at 89. The court cited one of its recent opinions that "addressed precisely this issue" and "upheld the district court's application of a mandatory minimum sentence under [21 U.S.C.] § 841(b)(1) based on judicially found facts." *Id*. The 1st Circuit followed circuit precedent, restating that "judicially found facts can be used to increase the statutory mandatory minimum sentence under § 841(b)(1)."

Id. at 90. The court noted that "*Booker* left intact the Supreme Court's precedent in *Harris v. United States*, 536 U.S. 545, 568 (2002), which allowed the use of judicially found facts to increase a mandatory minimum sentence." *Id.* This ruling conflicts with the determination of the 4th, 9th, and D.C. Circuits, as well as a concurrence in the 3rd Circuit. *Id.* at n.11.

Post-*Booker* – Harmless Error: *United States v. Woods*, 440 F.3d 255 (5th Cir. 2006)

The 5th Circuit found that "a sentence imposed at the top of the Guidelines-determined range might be sufficient to prevent a defendant from prevailing under plain-error review, but not sufficient to demonstrate that a Booker error was harmless beyond a reasonable doubt . . . ." *Id.* at 259. The court recognized that the 2nd Circuit agrees on this issue. *Id.* at 259. However, the 10th Circuit has disagreed. *Id.* at 259 n.3. The court noted that the 10th Circuit based its disagreement on the 6th Circuit's opinion in *United States v. Bruce*, 396 F.3d 697 (6th Cir. 2005), which held that the "opinion . . . concludes only that a sentence at the top end of the Guidelines-determined range was probative under the plain-error standard, not the harmless error standard. Moreover, the Sixth Circuit's opinion on these grounds in Bruce was later vacated, and the defendant's sentence vacated and remanded for resentencing." *Id.* The 5th Circuit further noted, "whether imposition of consecutive sentences is sufficient to demonstrate that a Booker error is harmless is a fact-sensitive inquiry that must examine the relationship between the two sentences imposed." *Id.* at 260. The court "conclude[ed] that the government ha[d] failed to meet its burden of showing beyond a reasonable doubt that the district court would have imposed the same sentence under the post-Booker advisory sentencing regime." *Id.* at 261-62.

STATUTORY INTERPRETATION

"Physical Force" under the ACCA: *United States v. Griffith*, 455 F.3d 1339 (11th Cir. 2006)

The 11th Circuit held that a prior conviction for violating Georgia's battery statute qualified as a "misdemeanor crime of domestic violence" that could satisfy the elements for conviction for carrying a firearm under the Armed Career Criminal Act ("ACCA"), 18 U.S.C.S. § 922(g)(9). *Id.*

at 1340. The ACCA defines the term "misdemeanor crime of domestic violence" to include an offense that "(i) is a misdemeanor under . . . State . . . law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse . . . ." *Id.* at 1341. In this case, the 11th Circuit held that Georgia's battery statute, which included as an element "[i]ntentionally makes physical contact of an insulting or provoking nature with the person of another[,]" qualified as a "use of physical force" and thus convicted defendant for possession of a firearm. *Id.* In doing so, the 11th Circuit followed the 1st and 8th Circuits which also reasoned that "physical contact of an insulting or provoking nature" was necessarily "physical force" as used in § 922(g)(9). *Id.* The court reasoned that "[a] person cannot make physical contact—particularly of an insulting or provoking nature—with another without exerting some level of physical force." *Id.* at 1342. The court departed from the 9th Circuit, which had read the word "violent" before the element of "physical force" in the ACCA, in order to differentiate physical "force" from "contact." *Id.* at 1345. The court criticized the 9th Circuit for neglecting to "carry[] out the assignment of responsibility that Congress ha[d] decided upon, courts should be faithful to the language that [Congress] has chosen to express its will." *Id.* at 1344.

Bank Fraud - Mens Rea of Fraud: *United States v. Leahy*, 445 F.3d 634 (3d Cir. 2005)

In this criminal case, the 3rd Circuit examined the reading of 18 U.S.C. § 1344 regarding what constitutes bank fraud. *Id.* at 642. The court ruled that the two provisions of § 1344 could not be read in a disjunctive manner, and that an intent to defraud a bank is an element of both sections. *Id.* at 642-43. The court also noted the circuits currently disagree as to the exact reading of § 1344, stating that the 2nd Circuit does read it in the disjunctive. *Id.* at 643 n.6. Despite the difference in reading however, the interpretation of the statute with regard to the intent element is the same in the two circuits, and the 5th and 7th Circuits have similarly held that the intent to defraud a bank is required for both sections of the statute. *Id.* The 6th Circuit, however, has taken an opposite view, stating that § 1344(2) does not require any intent by the defendant to defraud a bank. *Id.*

Statute of Limitations – Post-Conviction Motions: *Jones v. Hulick*, 449 F.3d 784 (7th Cir. 2006)

The 7th Circuit upheld the lower court's determination that defendant's post-conviction application for a habeas petition was untimely. *Id.* at 789. The court followed 7th Circuit precedent in denying defendant's request to toll the 90-day period during which defendant could, but did not, file a petition for a writ of certiorari to the Supreme Court for purposes of extending the statute of limitations. *Id.* at 788. In so holding, the 7th Circuit reinforced the split with the 5th, 10th and 11th Circuits, which have allowed the tolling of the statute of limitations for pending post-conviction motions. *Id.* at 789.

Retroactive Application – Crawford Interpretation: *Fulcher v. Motley*, 444 F.3d 791 (6th Cir. 2006)

The 6th Circuit rejected appellant's argument that the Supreme Court, in *Crawford v. Washington*, 541 U.S. 36 (2004), announced a "watershed rule" of criminal procedure (regarding the admissibility of testimonial hearsay evidence under the Sixth Amendment) that "warrants retroactive application" to cases undergoing collateral review. *Id.* at 811. The court observed that "[a] panel of the Sixth Circuit rejected this conclusion in *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir. 2005)." *Id*. In a concurring opinion, Judge Clay agreed with appellant's argument, contending that "[t]he *Dorchy v. Jones* case . . . does not actually treat *Crawford*'s retroactivity sufficiently to bind subsequent panels of this Court." *Id*. at 813. Judge Clay noted an existing circuit split on the *Crawford* retroactivity issue in which the 9th Circuit held that *Crawford* applies retroactively, and the 2nd, 7th, and 10th Circuits have held that it does not. *Id*. at 818-19. The court here followed circuit precedent and stated "we find it unnecessary to address . . . Judge Clay's concern that the analysis in *Dorchy* was insufficiently thorough to bind later panels of this court." *Id.* at 811. The court thus reaffirmed its alignment with the 2nd, 7th, and 10th Circuits and noted that "a petition for a writ of certiorari was filed on November 7, 2005 and currently pends" regarding the 9th Circuit's *Crawford* retroactivity determination. *Id*.

Plain Language Review – The Meaning of "Hearing" in the Context of a State Domestic Violence Order: *United States v. Young*, 458 F.3d 998 (9th Cir. 2006)

The 9th Circuit joined the 6th and 8th Circuits by following the plain language of a statutory definition of "hearing" to deny the necessity for validation of an underlying state proceeding that granted a domestic violence order. *Id.* at 1006. Rejecting constitutional concerns that prompted the 7th Circuit to insist upon due process inquiries into domestic violence orders, the court construed the explicit language of 18 U.S.C. § 922(g)(8) to require that the state proceeding only afford the defendant "actual notice and an opportunity to participate." *Id.* The 9th Circuit reasoned that such inquiries did not follow the "statutory scheme as whole" as guided by the Supreme Court's decision in *Lewis v. United States*, 445 U.S. 55 (1980). *Id.* at 1005.

Definition of "Use" of Firearms – Bartering of Drugs: *United States v. Cotto*, 456 F.3d 25 (1st Cir. 2006)

The 1st Circuit held that a person who "barters drugs for firearms has 'used' the firearms within the meaning of 18 U.S.C. § 924(c)(1)(A)," which imposes a "mandatory five-year sentence for using a firearm 'during and in relation to any . . . drug trafficking crime.'" *Id.* at 26. The court explained that the 3rd, 5th, 8th, and 9th Circuits have treated bartering drugs for firearms as "use" under § 924(c)(1)(A), while the D.C., 6th, 7th, and 11th Circuits held the opposite. *Id.* at 28. The 1st Circuit noted that it was following the Supreme Court's interpretation of "use" of a firearm as an item for barter in *Smith v. United States*, 508 U.S. 223 (1993). *Id.* at 27-28. The court concluded that "use" under § 924(c) did apply to instances of bartering with or for firearms. *Id.* at 28-29.

CRIMINAL PROCEDURE

Admissibility of Evidence – Denial of Motion for Court's Recusal: *United States v. Giordano*, 442 F.3d 30 (2d Cir. 2006)

The 2nd Circuit rejected the argument that the trial court should have recused itself from hearing and ruling on the admissibility of wiretap evidence "because it had earlier authorized the Title III

applications and supervised the wiretap." *Id.* at 48. The court recognized that the "authorization of a wiretap under Title III does not 'evidence the degree of favoritism or antagonism required' to necessitate recusal under § 455(a) from ruling on the admissibility of the resulting evidence." *Id.* The court noted that it joined the 1st and 5th Circuits in considering and rejecting this argument. *Id.*

Fourth Amendment – Requirements for Search Warrant Affidavits: *Baranski v. Fifteen Unknown Agents*, 452 F.3d 433 (6th Cir. 2006)

The 6th Circuit held that the failure to attach an affidavit to a search warrant does not violate the Fourth Amendment. *Id.* at 436. The court looked at the "totality of the circumstances" in holding that it would have been a better practice to attach the affidavit to the search warrant, but that the failure to do so did not make the search unconstitutional. *Id.* at 444-45. This contradicts the holding of the 9th Circuit. *Id.* at 449. The 9th circuit has held that to meet the particularity requirement of the Fourth Amendment, the search warrant must incorporate the affidavit and that the affidavit must also accompany the search warrant at the time of its execution. *Id.*

CONSTITUTIONAL/FEDERAL ISSUES

Extended Traffic Stop – Consent: *United States v. Rodriguez*, No. 05-7082, 2006 U.S. App. LEXIS 13060 (10th Cir. May 23, 2006)

The 10th Circuit addressed whether law enforcement must advise an individual that he or she is free to terminate an encounter in order for the extended encounter to be deemed consensual. *Id.* at *10. The court declined to adopt the position of the 9th Circuit, which stated that "unless a person is explicitly told that she is free to leave then a reasonable person would not have concluded that she is." *Id.* at *9. Instead, the 10th Circuit declared that it would use a "totality of the circumstances" test in order to determine whether an extended encounter was voluntary and consensual. *Id.* at *10. The court held that a law enforcement officer is not required to advise an individual that he or she may decline questioning or otherwise terminate the encounter. *Id.*

Voir Dire – Juror Impartiality: *United States v. Guzman*, 450 F.3d 627 (6th Cir. 2006)

The 6th Circuit rejected the defendant's argument that the jury pool was biased by follow-up questioning during voir dire, rendering the pool partial. *Id.* at 633. The court stated that the Supreme Court has not established any per se rule that it requires trial judges to follow regarding voir dire of the jury pool. *Id*. at 629. Trial judges are therefore given great deference in their voir dire procedure. *Id.* at 630. Applying this deferential standard, the court found that defendant relied entirely on speculation and failed to provide any sufficient evidence to overcome the presumption of juror impartiality. *Id.* at 629. In so holding, the 6th Circuit aligned itself with the majority of the circuit courts. *Id.* at 630. Only the 9th Circuit has found that additional voir dire may be necessary where a potential juror offers "expert-like statements" that could have tainted the jury pool. *Id.* at 631. The 6th Circuit distinguished the 9th Circuit rule, finding that there was no offering of "expert-like statements" to the jury pool in this case. *Id.* at 631-32.

Double Jeopardy – *Blockburger* Test: *United States v. Agofsky*, 458 F.3d 369 (5th Cir. 2006)

The 5th Circuit re-considered whether a defendant can be convicted of two separate crimes for one single act without violating his double jeopardy rights, when those crimes contain different jurisdictional elements, but are in all other aspects, the same offense. *Id.* 371-72. Previously, in *United States v. Gibson*, 820 F.2d 692 (5th Cir. 1987), the court had held that because the purpose of the *Blockburger* test is to adhere to Congress's desire to combat certain evil conduct, jurisdictional elements are irrelevant in double jeopardy analysis. *Id.* at 372. The 9th Circuit rejected *Gibson* because it "ignores the fact that Congress may have strong interests in treating crimes occurring within the jurisdiction of the United States differently from those occurring elsewhere." *Id.*. Here, the 5th Circuit questioned its ruling in *Gibson*, citing the 9th Circuit's reasoning in *United States v. Hairston*, 64 F.3d 491 (9th Cir. 1995). *Id.* However, this court ultimately upheld *Gibson*, leaving further analysis to either its en banc panel or the Supreme Court. *Id.*

Sixth Amendment – Dual Sovereignty Doctrine: *United States v. Constanza*, 440 F.3d 191 (4th Cir. 2006)

The 4th Circuit applied the dual sovereignty doctrine in the Sixth Amendment context. The court held that federal and state crimes are separate crimes for the purpose of the constitutional right to counsel, a right which arises merely for the specific offense for which a defendant is charged. *Id.* at 196-97. The court noted its agreement with other circuits, including the 1st and 5th, while noting that the 2nd Circuit continues to hold to the contrary. *Id.* at 198.

False Arrest Claims: *Wallace v. City of Chicago*, 440 F.3d 421 (7th Cir. 2006)

The 7th Circuit clarified the law governing when a false arrest claim accrues, by reaffirming its holding in *Booker v. Ward*, 94 F.3d 1052 (7th Cir. 1996), and explaining that an "unlawful arrest claim . . . accrues on the day of [ ] arrest." *Id.* at 427. The court also overruled *Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003), as it contradicts *Booker* and the instant case. *Id.* at 423. The court noted that "the [2nd, 4th, 5th, 6th, and 9th Circuits] have held that false arrest claims that would undermine the defendant's conviction cannot be brought until the conviction is nullified." *Id.* at 428. The court also recognized that the 1st, 3rd, 8th, 10th, and 11th Circuits, like the 7th Circuit, "have held that false arrest claims accrue at the time of arrest." *Id.* The court recognized that, by aligning itself with one side of the split, it did not "break any new ground." *Id.*

***Strickland* Test – Scope of the *Sullivan* Rule**: *Schwab v. Crosby*, 451 F.3d 1308 (11th Cir. 2006)

The 11th Circuit disagreed "with the Second Circuit's statements in *Tueros* about the Supreme Court's analysis and statements in *Mickens*[,]" that the Supreme Court's discussion about the scope of the *Sullivan* rule is dicta and should not be considered binding. *Id.* at 1237. The court also disagreed with the 4th Circuit to the extent, if any, that the "Fourth Circuit's decision in *United States v. Stitt*, 441 F.3d 297, 303-305 (4th Cir. 2006) . . . treats the Supreme Court's statements in *Mickens* in the way the Second Circuit did in *Tueros*." *Id.* at 1327. The court agreed

with the reasoning of the 6th and 9th Circuits that the *Mickens* Court "specifically and explicitly concluded that *Sullivan* was limited to joint representation, and that any extension of *Sullivan* outside of the joint representation context remained, as far as the jurisprudence of [the Supreme Court was] concerned, an open question." *Id.*

Due Process – Administrative Detention: *Hill v. Fleming*, 173 F. App'x 664 (10th Cir. 2006)

The 10th Circuit looked at whether the prison condition at issue presented the type of atypical, significant deprivation in which a state might conceivably create a liberty interest requiring the provision of due process to the defendant. *Id*. at 670. The court found that in determining whether circumstances arise to an 'atypical situation,' the circuits have differed on the baseline for comparison – "either relying squarely on comparisons with other inmates in the same administrative segregation or those in the general population." *Id*. at 670-71. The court identified the distinct approach and yet rejected them both, holding that "despite the parties' opposing contentions on which baseline applies, the result is the same, no matter which baseline is used." *Id.* at 670. The court made its decision that way because it "has never held the conditions, duration or restrictions of the detentions presented on appeal created a liberty interest, even in circumstances where the detention exceeded the 399-day duration of Mr. Hill's detention or restricted some of the same privileges." *Id*. Ultimately, the court recognized that incarcerated individuals retain only a narrow range of liberty interests and rejected Hill's claim as most circuits generally reject inmate contention of liberty interest violations while in administrative detention. *Id*. at 671.

***Miranda* Rights – Interrogation**: *United States v. Courtney*, 463 F.3d 333 (5th Cir. 2006)

The court ruled on statements allegedly made without prior *Miranda* warnings. *Id*. at 335. On three separate occasions, government agents had interviewed the defendant, but the defendant had only received *Miranda* warnings before the third interview. *Id*. Applying *Missouri v. Seibert*, 542 U.S. 600 (2004), the district court suppressed the evidence from all three interviews. *Id*. at 336. In *Seibert*, the Supreme Court had proscribed the procedure of agents (1) questioning a defendant without providing the proper *Miranda* warnings, (2) gaining a

confession, and (3) following this with a warning and "cover the same ground a second time" to obtain an admissible confession. *Id*. at 337. However, "*Siebert* only addressed admissibility of the second, warned statement; the first statement was inadmissible." *Id*. The 5th Circuit agreed with the 3rd Circuit in that a *Siebert* analysis does not apply "when the first interrogation did not violate *Miranda*." *Id*. The 5th Circuit concluded that because the defendant was not subject to custodial interrogation during the first two interviews, *Miranda* warnings were not required. *Id*. at 337-38. Therefore, a *Siebert* analysis was erroneously applied by the district court. *Id*. at 338.

SEARCH AND SEIZURE

DNA Indexing Statutes – DNA Collection: *United States v. Kraklio*, 451 F.3d 922 (11th Cir. 2006)

The 11th Circuit recognized that "every federal circuit considering DNA indexing statutes has upheld the statutes as constitutional under the Fourth Amendment," and followed circuit precedent and the majority of circuits in applying the "*Knights* reasonable" test. *Id.* at 924. The court noted that under this test, the 3rd, 4th, 5th, and 9th Circuits look to "whether the search and seizure is reasonable based on the totality of the circumstances surrounding the search and seizure and the nature of the search and seizure itself." *Id.* The court observed that the 2nd, 7th, and 10th Circuits employ the "special needs" inquiry. *Id.* The 11th Circuit adopted the reasoning in *United States v. Sczubelek*, 402 F.3d 175, 184 (3d Cir. 2005), and held that "the collection of DNA under the DNA Act for inclusion in the CODIS database does not constitute an unreasonable search and seizure in violation of the Fourth Amendment." *Id.* at 925.

Arrest Warrants – Reasonable Belief vs. Probable Cause: *United States v. Pruitt*, 458 F.3d 477 (6th Cir. 2006)

The 6th Circuit joined the majority of circuit courts in deciding that "the standard required for establishing a 'reasonable belief' upon which officers may rely in order to enter a third-party's dwelling with only an arrest warrant" for a suspect as opposed to a valid search warrant for the

dwelling is a lesser standard than probable cause. *Id*. at 482. The Supreme Court held in *Payton v. New York*, 445 U.S. 573 (1980), that "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is *reason to believe* the suspect is within." *Id*. at 482. The 9th Circuit interpreted that holding to mean that probable cause is the standard. *Id*. The court noted that "'the reason to believe,' or reasonable belief, standard of *Payton* . . . embodies the same standard of reasonableness inherent in probable cause." *Id*. at 483. The 6th Circuit disagreed with that analysis, finding that the Supreme Court's "use of 'probable cause' in describing the foundation for an arrest warrant and its use of 'reason to believe' in describing the basis for the authority to enter a dwelling . . . shows that the Court intended different standards for the two." *Id*. at 484. The circuit felt that had the Supreme Court meant otherwise, it would have expressly ruled, or used the same phrase for each. *Id*. Furthermore, the 6th Circuit found that when enforcing an arrest warrant, a reasonable belief that a suspect is within a residence is to be based on common sense factors and the totality of the circumstances. *Id.* at 485.