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 September 1, 2006 and January 31, 2007. 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

CONSTITUTIONAL/FEDERAL LAW

Copyright Affirmative Defenses – Laches: *Chirco v. Crosswinds Cmtys., Inc.*, 474 F.3d 227 (6th Cir. 2007)

The 6th Circuit held that laches can be argued as an affirmative defense in copyright actions. *Id.* at 229. The court agreed with the 7th Circuit's conclusion that "a flat proscription such as that invoked by the [4th] Circuit against the defense of laches in cases involving a federal statutory claim is both unnecessary and unwise." *Id*. at 233-34. The court held that "laches can be argued 'regardless of whether the suit is at law or in equity, because, as with many equitable defenses, the defense of laches is equally available in suits at law'". *Id*.

Political Question Doctrine – Holocaust Survivor Claims: *Rozenkier v. AG Shering*, 196 Fed. App'x 93 (3d Cir. 2006)

The 3rd Circuit addressed the issue of whether the claims of a Holocaust survivor against German corporations alleged to have cooperated with the Nazi government "are nonjusticiable under the political question doctrine. . . ." *Id*. at 94. The court held that "the adjudication of Nazi-era claims by United States federal courts would express a lack of respect for . . . the Executive Branch's longstanding

foreign policy interest that issues relating to World War II and Nazi-era claims be resolved through intergovernmental negotiation." *Id*. at 98. In reaching this holding, the court took note of an Executive Agreement between the United States and Germany that memorialized a 1998 compromise in which "the federal governments of the United States and Germany, German corporations, and attorneys for various plaintiffs agreed that the plaintiffs would voluntarily dismiss their lawsuits in exchange for the creation of [a] German Foundation . . . which would make payments to Nazi victims from a DM 10 billion pool." *Id*. at 95. The court observed that its interpretation of the political question doctrine conflicted with the interpretation of the 11th Circuit, which had "reasoned that because the Executive Agreement, which is the same as that at issue here, stated that it did not provide an independent legal basis for dismissal, the 'President has purposely chosen not to settle [the] claims directly' and therefore adjudication of the claims does not 'interfere with American foreign relations.'" *Id*. at 101. The court disagreed with the 11th Circuit because "that language does not preclude United States federal courts from dismissing claims arising under the Executive Agreement as raising a nonjusticiable political question." *Rozenkier*, 196 Fed. Appx. at 101.

Municipal Boards of Education Liability – But For Test: *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250 (6th Cir. 2006)

The 6th Circuit held that the proper test for determining whether "a [municipal board of education], rather than its members, acts with improper motive," is a "but for" test. *Id*. at 262. The 6th Circuit noted that the 1st Circuit held that board liability existed only "where the plaintiff established both: '(a) bad motive on the part of at least a significant block of legislators, and (b) circumstances suggesting the probable complicity of others.'" *Id*. The court found that such a test would be "difficult to apply, because it leaves many questions unanswered. Among the most important of these is what constitutes a 'significant block of legislators' or 'circumstances suggesting the probable complicity of others.'" *Id*. The court explained that under the test implied by the 2nd, 3rd, and 9th Circuits, "a board is liable for actions that it would not have taken 'but for' members acting with improper motive." *Id*. The 6th Circuit found this test to be more in line with the Supreme Court's decision in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*. *Id*. For those reasons, the 6th Circuit adopted the "but

for" test to determine whether a municipal board of education, as opposed to its members, acted with an improper motive. *Id*. at 263.

Choice of Law – CERCLA: *New York v. Nat'l Serv. Indus.*, 460 F.3d 201 (2d Cir. 2006)

The 2nd Circuit discussed whether state law or federal common law governs when considering corporate successor liability for the purposes of the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA"). *Id*. at 203. Although the issue was irrelevant to the ultimate holding and the court had already decided in *B.F. Goodrich v. Betkoski*, 99 F.3d 505 (2d Cir. 1996), that federal common law applied in these instances, that decision had subsequently been overruled. *Id*. at 207. Accordingly, the court articulated the test for determining whether to apply federal common law rather than state law as, "(1) whether the federal program, by its very nature, requires uniformity; (2) whether application of state law would frustrate specific objectives of the federal program; and (3) whether application of a uniform federal rule would disrupt existing commercial relationships based on state law." *Id*. The court noted that the 1st, 6th, 9th, and 11th Circuits found no conflict with applying state law in these CERCLA cases. *Id*. at 207-08. In contrast, the 3rd and 4th Circuits found a national rule to be in order in CERCLA cases. *Id.* The court ultimately applied the *Betkoski* standard and found, along with the 1st, 6th, 9th, and 11th Circuits, that there is "no conflict between the application of state law and the federal interests at issue in CERCLA, and we fail to see one." *Id*. at 208.

Fair Housing Act – Standards for Discrimination: *Cmty. House, Inc. v. City of Boise*, 468 F.3d 1118 (9th Cir. 2006)

The 9th Circuit noted that it had "not previously adopted a standard for determining the propriety or acceptability of justifications for facial discrimination under the Fair Housing Act." *Id*. at 1125. Recognizing a circuit split over the issue, the court first stated that the 8th Circuit uses "the same standard for analyzing a defendant's rationales in challenges under the Fair Housing Act as it applies to claims under the Equal Protection Clause." *Id*. The court then stated that the standard employed by the 6th and 10th Circuits require defendants to show either "(1) that the restriction benefits the protected class or (2) that it responds to

legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes." *Id*. In rejecting the 8th Circuit's approach, and adopting the standard used by the 6th and 10th Circuits, the court reasoned that, "the Eighth Circuit's approach is inappropriate for Fair Housing Act claims because some classes of persons specifically protected by the Fair Housing Act, such as families and the handicapped, are not protected classes for constitutional purposes." *Id*. at 1125-26.

Scope of Law – Court Regulation of Abusive Litigant Behavior: *Sieverding v. Colo. Bar Assoc.*, 469 F.3d 1340 (10th Cir. 2006)

Appellant appealed the district court's order prohibiting the commencement of "any *pro se* litigation in any court in the United States on any subject matter unless" appellant is represented by a lawyer or has received specific court approval. *Id*. at 1344. Appellant argued that this order was too broad and was not an exercise of "carefully tailored restrictions under the appropriate circumstances." *Id*. at 1343. On appeal, appellee cited a 2nd Circuit case supporting their "argument that the breadth of the district court's order was appropriate." *Id*. at 1344. The 10th Circuit disagreed "with the Second Circuit's decision to uphold the broad filing restriction limiting access to any federal district court in the country. . . ." *Id*. The court held that "it is not appropriate to extend those restriction to include federal district courts outside of [appellant's] Circuit." *Id*. The court noted that "it is not reasonable for a court in this Circuit to speak on behalf of courts in other circuits in the country." *Id*.

Zoning – Sexually Oriented Businesses: *Doctor John's, Inc. v. City of Roy*, 465 F.3d 1150 (10th Cir. 2006)

The 10th Circuit addressed the constitutionality of "an ordinance subjecting 'sexually oriented businesses' to certain regulations." *Id*. at 1153. The 5th Circuit held that "an ordinance which regulated both on-site and off-site adult businesses was not narrowly tailored because the City failed, as a threshold matter, to provide evidence that off-site businesses caused negative secondary effects." *Id*. at 1166. However, the 10th Circuit explicitly "rejected the on-site/off-site distinction as a basis for striking down an adult business ordinance as an unconstitutional time/place/manner restriction." *Id*. at 1167. The 10th Circuit disagreed with its sister circuit and, instead, held that "the mere fact that the ordinance reaches off-site as well as on-site businesses is insufficient for

us to declare the ordinance unconstitutional." *Id*. The court concluded that the appellant's argument "concerning on-site and off-site businesses fail[ed] to 'cast direct doubt' on the City's rationale." *Id*. at 1168.

CIVIL PROCEDURE

Service of Process – Rule 4(m) Extension: *United States v. McLaughlin*, 470 F.3d 698 (7th Cir. 2006)

The 7th Circuit decided the effect of Rule 6(b)(2) on Rule 4(m) regarding service of process on a defendant where the 120-day notice requirement had lapsed and the plaintiff then sought an extension. *Id*. at 700. The court offered that "some courts," including the 5th and 6th Circuits, automatically apply the "excusable neglect" standard from Rule 6(b)(2) to all Rule 4(m) requests for an extension where the motion is made after the lapse. *Id*. The court explained that this would mean that a plaintiff who missed the original deadline and failed to file an extension before the expiration of that 120-day period would need to show excusable neglect in order to have the motion granted. *Id*. The 7th Circuit, however, read Rule 6(b)(2) to only be implicated *after* a district court had applied Rule 4(m), specifying a new period of time. *Id*. The court further held that once the plaintiff did not meet the *new* deadline, and subsequently filed a motion to extend *that* time period, only then would Rule 6(b)(2) "come into play." *Id*.

IMMIGRATION

Jurisdictional Limitations – Streamline Review Process: *Gutnik v. Gonzales*, 469 F.3d 683 (7th Cir. 2006)

The 7th Circuit reviewed whether it had jurisdiction to review a Board of Immigration Appeals ("BIA") decision to commit an appeal to streamlined procedures. *Id*. at 690. The defendant argued that his case was improperly subjected to the streamline review process because there is no prior BIA or federal court precedent on point for the legal issue

raised by his case. *Id*. The court noted that "as a result, his case falls within one of the exceptions set forth in the streamlining regulations at 8 C.F.R. § 1003.1(a)(6) such that his appeal of the IJ's decision should have been reviewed by a three-member BIA panel." *Id*. Circuits have split on the jurisdictional question, with the 2nd, 8th, and 10th Circuits finding no jurisdiction and the 1st, 3rd, and 9th Circuits finding for a remand to a three member BIA panel review. *Id*. at 691. The court joined with the 2nd, 8th, and 10th Circuits in finding no jurisdiction on the grounds that finding otherwise would only exacerbate an already overburdened case load. *Id*. at 692.

LABOR LAW

Collective Bargaining Agreements – Scope of Arbitration Clauses: *United Steelworkers of America v. Cooper Tire & Rubber Co.*, 474 F.3d 271 (6th Cir. 2007)

The 6th Circuit addressed the issue of "whether a dispute over a side agreement that does not provide for arbitration falls within the CBA's [collective bargaining agreement's] arbitration clause . . . ." *Id*. at 278. The court noted that the 2nd, 4th, and 8th Circuits apply the collateral test, which requires that "courts consider the similarity of the side agreement's subject matter to the subject matter of the CBA," and "[i]f the subject matter is dissimilar, the side agreement is deemed collateral to the CBA." *Id.* Under the collateral test, "where the side agreement is 'integral' to the CBA, courts permit arbitration of disputes over its provisions." *Id*. In contrast, the court noted that the 3rd, 7th, and 9th Circuits apply the scope test, which requires that "unless the parties indicate otherwise, disputes over a side agreement are arbitrable if the subject matter of the side agreement is within the scope of the CBA's arbitration clause." *Id*. at 278-79. The 6th Circuit adopted the 9th Circuit's interpretation of the scope test. *Id.* The court held that "[i]n determining the arbitrability of side letters and side agreements, we begin our inquiry by analyzing the CBA's arbitration clause." *Id*. at 279. The court went on to explain that "[w]ith the scope of the arbitration clause in mind, we then look to the subject matter of the side agreement to determine if it falls within the clause's intended coverage." *Id*.

STATUTORY INTERPRETATION

Coal Industry Retiree Health Benefit Act of 1992 – Benefits Formula: *A. T. Massey Coal Co. v. Barnhart*, 472 F.3d 148 (4th Cir. 2006)

The 4th Circuit considered the merits of a suit brought by several hundred members or affiliates of the coal industry to determine the meaning of the word "reimbursements" as used in a premiums formula under the Coal Industry Retiree Health Benefit Act of 1992 ("the Coal Act"). *Id*. at 154. The court explained that the premiums formula dictates the premiums that coal operators are to pay into the common fund for each beneficiary on the basis of, *inter alia*, payments made to beneficiaries in a base year, minus "'reimbursements' received from Medicare and other publicly financed programs for the base year . . . ." *Id*. at 153. The court then explained that the issue is whether "'reimbursements' . . . includes the *total* payments that Medicare made . . . ($182.3 million) or only the amount that the [fund] actually paid out in Medicare benefits to beneficiaries . . . ($156.3 million)." *Id*. at 154. The court discussed how negotiations prior to the passage of the Coal Act between Medicare and the Plans to simplify the reasonable cost methodology resulted in the adoption of a capitated method. *Id*. at 155-57. With this background, the court stated that "'reimbursements' . . . has a statutory context and historical context, and both reveal a uniform and precise meaning of the term . . . history shows that the method of reimbursement adopted from the reimbursements made [under the capitation method] was a purposeful act, . . . which Congress incorporated by reference in the Coal Act." *Id*. at 160, 162. From this, the court concluded that "'reimbursements' is an unambiguous historical term of art used by Congress to refer to the total reimbursements that Medicare actually made, using a capitation method." *Id*. at 154. The court thus sided with the 11th Circuit in a split between that circuit and the D.C. Circuit. *Id*. at 154 n.2.

Medicare – Immunity Provision: *United States ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah*, 472 F.3d 702 (10th Cir. 2006)

The 10th Circuit faced, in part, a question of statutory interpretation. *Id*. at 710. Appellant had alleged that the Medicare carrier

for the State of Utah "presented false Medicare claims to the Government" and "submitted a false budget payment request to . . . the agency that manages Medicare." *Id*. at 705. Under the Medicare statutory scheme pursuant to 42. U.S.C. § 1395(u)(e), Congress granted immunity to a Medicare contractor's payment of a claim. *Id*. at 709. The 11th Circuit had previously interpreted this immunity provision to have "unambiguously provided absolute immunity to Medicare" contractors. *Id.* The 10th Circuit disagreed with its sister circuit's interpretation. *Id*. at 710. In contrast, the court construed the immunity provision to not provide absolute immunity, but rather that "the immunity excludes cases involving fraud and gross negligence." *Id*. at 711. The 10th Circuit found support for this interpretation within the legislative history. *Id*. Although the district court had relied on the 11th Circuit's interpretation, the 10th Circuit affirmed this portion of the district court's decision based on other specific procedural issues. *Id*. at 712.

Longshore Act – Requirements to Obtain Attorney's Fees: *Pittsburgh & Conneaut Dock Co. v. Dir.*, 473 F.3d 253 (6th Cir. 2007)

The 6th Circuit held that 33 U.S.C. § 928(b) requires a written recommendation by the district director in order for the plaintiff to recover attorney's fees pursuant to a claim under the Longshore Act. *Id*. at 265. The 6th Circuit explained that the 9th Circuit "has routinely held employers liable for attorney's fees under subsection (b) even when the literal terms of the statute [have] not been met." *Id.* The court also explained that both the 4th and 5th Circuits "required that each of the requirements set forth in subsection (b) be met before an employer incurs liability for attorney's fees." *Id*. The 6th Circuit agreed with both the 4th and 5th Circuits, emphasizing that these circuits had relied on the statutory construction in coming to this conclusion. *Id*. at 266. The court found "little, if any, support for the Ninth Circuit's position, even in the legislative history," which the 9th Circuit had so heavily relied on in its decision. *Id*. at 267. The 6th Circuit concluded that all of the requirements of 33 U.S.C. § 928(b) must be met before an employer will incur liability for attorney's fees under the Longshore Act.

Tax – Deduction of Investment-Advice Fees for Trusts: *William L. Rudkin Testamentary Trust v. Comm'r*, 467 F.3d 149 (2d Cir. 2006)

The 2nd Circuit addressed the issue of "whether investment-advice fees incurred by a trust are fully deductible in calculating adjusted gross income for purposes of the Internal Revenue Code ("IRC") under 26 U.S.C. § 67(e)(1)(2000), or whether these fees are deductible only to the extent that they exceed two percent of the trust's adjusted gross income under § 67(a)." *Id*. at 150-51. The court explained that under § 67(e)(1), "[a] trust's costs are fully deductible, rather than subject to the two-percent floor, if they satisfy both of the following two requirements: (1) they are 'paid or incurred in connection with the administration of the . . . trust'; and (2) they 'would not have been incurred if the property were not held in such trust.'" *Id*. at 153. The court observed that the 6th Circuit disagreed with the Federal Circuit and the 4th Circuit on whether investment-advice fees meet § 67(e)(1)'s second requirement. *Id*. at 153-54. The court elected to join the Federal Circuit and the 4th Circuit, and held that investment-advice fees fail the second requirement. *Id*. at 156. The court stated that its "conclusion follows from the fact that individual property owners obviously can incur investment-advice fees and from the regulation explicitly including investment-advice fees among an individual's miscellaneous itemized deductions subject to § 67(a)'s two-percent floor." *Id*. at 160.

Employment – Title VII Claim Preclusion: *Nestor v. Pratt & Whitney*, 466 F.3d 65 (2d Cir. 2006)

The 2nd Circuit decided the issue of "whether a Title VII plaintiff who prevailed on her discrimination claims before a state administrative agency and in appeals of the agency decision to state court can subsequently file suit in federal court seeking relief that was unavailable in the state proceedings." *Id*. at 69. The court observed that this issue created a split between the 7th and 8th Circuits, which held that such federal claims were not precluded, and the 4th Circuit, which held that such federal claims are precluded. *Id*. The court ruled that its "usual approach to preemption is . . . seemingly inapplicable" in the Title VII context because "Title VII permits a claimant to seek—in federal court—'supplemental' relief that was unavailable in the state court." *Id*. at 71-72. The court joined the 7th and 8th Circuits in holding that Title VII claims filed in federal court seeking supplemental remedies unavailable

in state court were not precluded by the prior litigation of such claims in state court. *Id*. at 72.

Sarbanes-Oxley Act – Time Barred?: *Margolies v. Deason*, 464 F.3d 547 (5th Cir. 2006)

The 2nd, 3rd, 4th, 7th, and 8th Circuits have considered the issue of whether causes of action arising prior to the passage of the Sarbanes-Oxley Act of 2002 are time barred. *Id*. at 551. These circuits agree that the Act did not revive previously extinguished causes of action. *Id.* The 11th Circuit disagreed with the other circuits in *Tello v. Dean Witter Reynolds, Inc.*, 410 F.3d 1275 (11th Cir. 2005) finding that statutes that are unambiguous on retroactivity should be retroactively applied. *Id*. Here, the 5th Circuit agreed with the majority of circuits in holding that the Act did not apply retroactively to revive the pre-Act causes of action. *Id*.

Railroad Revitalization and Regulatory Reform Act of 1976 – State Valuation Methodology: *CSX Transp., Inc. v. State Bd. of Equalization*, 472 F.3d 1281 (11th Cir. 2006)

The 11th Circuit held that "railroads may not challenge state [property tax] valuation methodologies under subsection (b)(1) [of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act)]." *Id*. at 1289. The court adopted the 4th Circuit's view on this issue, which is in direct conflict with the views of the 2nd and 9th Circuits. *Id*. at 1287-88. The 11th Circuit explained that "[i]t is a well-settled principle of statutory interpretation that a statute will not be construed to burden states in the exercise of their traditional powers unless it clearly states its intent to do so." *Id*. at 1288. Additionally, the court was influenced by Supreme Court precedent that "has 'long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration.'" *Id*. at 1288-89.

ERISA – Delegating Fiduciary Authority: *Geddes v. United Staffing Alliance Employee Med. Plan.*, 469 F.3d 919 (10th Cir. 2006)

In choosing to apply deferential review to benefits claims under an arbitrary and capricious standard, the 10th Circuit rejected the logic embraced by the 11th Circuit. *Id*. at 926-27. Instead of reserving deferential review for cases in which an ERISA plan administrator delegates its authority to other explicit fiduciaries, the court explained that the plain language of ERISA and trust law empowered named fiduciaries to delegate their authority to independent, non-fiduciary third parties. *Id*. at 927. The court then reasoned that those third parties acted as agents of the fiduciary, and consequently held that a plan administrator allotted discretionary authority through a benefits plan was entitled to judicial deference for any decisions made by a third party. *Id*.

RICO – Personal Jurisdiction: *Cory v. Aztec Steel Bldg., Inc.*, 468 F.3d 1226 (10th Cir. 2006)

The 10th Circuit joined the 2nd, 7th, and 9th Circuits in holding that section 1965(b) of the RICO statute, "when raised in the proper venue, extends personal jurisdiction into 'any judicial district of the United States' if necessary to satisfy 'the ends of justice.'" *Id*. at 1229. In contrast with the 4th and 11th Circuits, the court considered section 1965(d) of the statute only for guidance on personal jurisdiction regarding service of process that was not a summons or a government subpoena. *Id*. at 1230. The court relied on other circuits' readings of the statute in conjunction with the legislative history and the body of antitrust legislation to conclude that section (b) was the proper provision for nationwide service of process on parties outside of the district using personal jurisdiction based on the "ends of justice" test. *Id*. at 1231.

§ 11 and § 12(a)(2) Securities Claims – Pleading with Particularity: *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273 (11th Cir. 2006)

The 11th Circuit referred to §§ 11 and 12(a)(2) securities as "nonfraud claims" and considered "whether there are circumstances when FED. R. CIV. PROC. 9(b) would require nonfraud securities claims to be pled with particularity." *Id.* at 1277. The court found that "[t]he purpose of the rule is to protect a defendant's good will and reputation when that defendant's conduct is alleged to be fraudulent." *Id*. at 1278. Therefore, the court decided that Rule 9(b) does apply in "nonfraud" claims and that such claims must be pled with particularity, agreeing

with the 2nd, 3rd, 5th, and 9th Circuits, but opposing the 8th Circuit. *Id*. at 1277.

Medicaid Act – Meaning of the Term "Assistance": *Mandy R. v. Owens*, 464 F.3d 1139 (10th Cir. 2006)

The 10th Circuit agreed with the 6th and 7th Circuits' definition of the phrase "medical assistance" in 42 U.S.C. § 1396d(a) of the Medicaid Act. *Id*. at 1143. The court found that "the statutory reference to 'assistance' appears to have reference to *financial* assistance rather than to actual medical *services*." *Id*. The 10th Circuit reasoned that the Medicaid statute does not require states to be service-providers of last resort." *Id*. at 1146. Noting that the existence of a circuit "split is not entirely clear," the 10th Circuit suggested that a circuit split may exist as to "whether 'medical assistance' requires a state to provide actual services." *Id*. at 1143 n.2. This ruling is in dispute with the determinations of the 1st and 11th Circuits. *Id*.

Administrative Expense Priority – Collective Bargaining Agreements: *Peters v. Pikes Peak Musicians Ass'n*, 462 F.3d 1265 (10th Cir. 2006)

The 10th Circuit joined the majority of circuits in "limit[ing] the administrative expense priority provided in [11 U.S.C.] § 507 to claims that meet the textual requirements of [11 U.S.C.] § 503, even in cases that arise under collective bargaining agreements that implicate [11 U.S.C.] § 1113." *Id*. at 1269-70. The 6th Circuit and several district courts follow the minority approach which hold that "the remedial purpose of § 1113 trumped the literal language of § 503, thus entitling parties to administrative expense priority under § 507 for claims filed pursuant to collective bargaining agreements, even where the requirements of § 503 had not been satisfied." *Id*. at 1269. In adopting the majority approach, the 10th Circuit quoted the 3rd Circuit's reasoning, that "if Congress had wished to create an automatic priority for collective bargaining agreement claims, it would have been similarly explicit in [§] 1113. Conversely, its failure to do so should counsel against a court's attempts to read such requirements into the statute." *Id*. at 1270.

CRIMINAL MATTERS

SENTENCING

Appeals – Finality of Judgment: *Burrell v. United States*, 467 F.3d 160 (2d Cir. 2006)

The 2nd Circuit addressed the issue of "whether a criminal judgment is final when we have affirmed a defendant's conviction and sentence on at least one count, but remanded for the district court to dismiss the defendant's conviction and sentence on another count." *Id*. at 163. The court noted that a split on this issue exists between the 4th Circuit, which held that "finality is not delayed if an appellate court disposes of all counts in a judgment of conviction but remands for a ministerial purpose that could not result in a valid second appeal[,]" *United States v. Dodson*, 291 F.3d 268, 275 (4th Cir. 2002), and the 9th Circuit, which held that "a judgment is not final if the appellate court reverses any portion of the district court's judgment and remands to the district court, even if the remand is only ministerial. . . ." *Id*. at 168. The court sided with the 4th Circuit, and held that "a remand for ministerial purposes, such as the correction of language in a judgment or the entry of a judgment in accordance with a mandate, does not delay a judgment's finality." *Id*. at 166.

Post-*Booker* – Sentencing Ration Guidelines: *United States v. Castillo*, 460 F.3d 337 (2d Cir. 2006)

The 2nd Circuit decided whether the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005) meant that district courts were free to calculate sentences for drug crimes using a ratio other than the 100:1 ratio provided in 18 U.S.C. § 3553(a)(4). *Id*. at 353. The court noted that the 7th and 8th Circuits have held that district courts have discretion to deviate from the guideline ratio, provided they do not exceed it. *Id*. On the other hand, the 1st, 4th, and 11th Circuits have decided that district courts must conform to the 100:1 ratio guideline. *Id*.

The circuit court stressed the differences between § 3553(a)(2), which lays out policy factors to consider in sentencing, and § 3553(a)(4), which establishes the sentence categories and their respective ranges. *Id*. at 355. Looking at the language of the statute, the legislative history of the statute, and the history of the guidelines, the 2nd Circuit concluded that, while a district court has discretion to consider the policy factors laid out in § 3553(a)(2), it cannot create its own ratio, but must sentence within the established ratio of the guidelines promulgated in § 3553(a)(4), despite any disparity in sentencing this approach may create. *Id*. at 361.

Guidelines – Calculating the Sentencing Range: *United States v. Jackson*, 467 F.3d 834 (3d Cir. 2006)

In this case, the 3rd Circuit determined that "district courts must still calculate what the proper Guidelines sentencing range is," and as such, the court stressed "that the entirety of the Guidelines calculation be done correctly, including rulings on Guidelines departures." *Id*. at 838-39. The court noted its departure from the 7th and 9th Circuits, "which have ruled Guidelines departures obsolete in the wake of *Booker*." *Id*. at 839. Moreover, the court noted that "[a]t least six other circuits essentially employ the same approach to departures . . . and one other has fashioned a modified (but continuing) role for Guidelines departures." *Id*. The court stated that its determination was "not for jurisdictional reasons, but rather because the . . . Guidelines still play in integral role in criminal sentencing." *Id*. at 838.

Armed Career Criminal Act – *Taylor* and Meaning of "Unlawful or Unprivileged" Entry for Generic Burglary: *United States v. Bennett*, 469 F.3d 46 (1st Cir. 2006)

The 1st Circuit recognized the split that exists between circuits over the "unlawful or unprivileged" element of generic burglary defined by the Supreme Court in *United States v. Taylor*, for purposes of sentencing enhancement under the Armed Career Criminal Act. *Id*. at 50. The court indicated that the 4th Circuit, in *United States v. Bowden*, held that one who "enters without breaking with intent to commit a felony or larceny is neither lawful nor privileged" and thus falls under *Taylor*. *Id*. The 6th Circuit, however, in *United States v. Maness*, stated that the statute addressed in *Bowden* does not meet the definition of "generic burglary" set forth in *Taylor*, because "intent to commit a crime is a 'separate and

distinct element[]' from unlawful or unprivileged entry." *Id.* Because this issue was not raised below, the 1st Circuit reviewed only for clear error. *Id*. at 50-51.

CRIMINAL PROCEDURE

Post-Conviction – Access to Physical Evidence: *Savory v. Lyons*, 469 F.3d 667 (7th Cir. 2006)

The 4th, 5th, 6th, 9th and 11th circuits have considered whether a claim for post-conviction access to physical evidence is cognizable under § 1983. *Id*. at 671. The 11th Circuit, having expressly disagreed with the 4th Circuit approach in *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002), found that access to the evidence is proper. *Id*. The court in that case reasoned that testing of evidence for DNA can be either exculpatory or inculpatory and is not a direct or indirect attack on the conviction or sentence. *Id*. The 9th Circuit has also joined the 11th Circuit's approach in *Bradley*. *Id*. The 4th and 5th Circuits were concerned that the defendant would use his claim to access evidence in preparation for a future challenge to his incarceration. *Id.* In an unpublished opinion the 6th Circuit espoused this view as well. *Id*. Here, the 7th Circuit joined the 9th and 11th in its interpretation. *Id*. at 672. It found that granting the defendant access to the evidence "would not imply the invalidity of his conviction." *Id*. Nor would it "demonstrate the invalidity of any outstanding criminal judgment against him and will not unduly intrude upon the territory of core habeas corpus relief." *Id*.

Due Process – An Inmate's Liberty Interest During Segregation in Prison: *Jordan v. Fed. Bureau of Prisons*, 191 Fed. App'x 639 (10th Cir. 2006)

The 10th Circuit contemplated two splits at issue among the circuit courts and held that an inmate's five-year administrative detention did not create a constitutionally-recognizable liberty interest subject to procedural due process protections. *Id*. at 650-51. The court noted that the Supreme Court had not decided whether an examination of the conditions, durations, or restrictions of prison confinement should utilize

a baseline comparison between inmates in the same segregation, or those from the general prison population. *Id*. at 652. The circumstances of the case led the court to find that the conditions of segregation were "comparable to those of general population inmates" and rejected the appellant's argument that his restrictions of confinement presented an "atypical and significant hardship." *Id*. The court agreed with the 6th Circuit that segregation was not atypical for an inmate whose participation in violent conduct while in prison was being investigated. *Id*. at 653. Further, the court agreed that it was reasonable for prison officials to adjust conditions of imprisonment while the investigation was pending. *Id*. Stating that a "majority of other circuits have also held no liberty interest arose in administrative detentions presented on appeal, while a few others have rendered contrary decisions," the 10th Circuit denied the appellant's argument that the segregation violated a liberty interest, reasoning that due process rights of prisoners were subject to reasonable limitation given the institution's legitimate security concerns. *Id*.

STATUTORY INTERPRETATION

Court Rules – Imposing an Upward Variance: *United States v. Cousins*, 469 F.3d 572 (6th Cir. 2006)

In this case, the 6th Circuit held that FED. R. CRIM. PROC. 32(h), which requires that courts give notice of "its intention to impose an upwards variance," applies to all sentences that deviate from the sentencing guidelines. *Id*. at 574, 580. The 3rd, 7th, 8th, and 11th Circuits have all held that Rule 32(h) does not apply to sentences which vary, rather than deviate, from the guidelines. *Id*. at 580. The 4th, 9th, and 10th Circuits have held that Rule 32(h) applies to all non-guidelines sentences. *Id*. The 6th Circuit agreed with the reasoning of the 4th, 9th, and 10th Circuits. *Id*. The court explained that the departure criteria of "Chapter 5 of the Guidelines, like § 3553(a), specifically identifies various factors that a court should take into consideration when deciding whether or not to grant a departure." *Id*. The 6th Circuit could not "discern any distinction between the [Chapter 5] departure criteria and the § 3553(a) factors." *Id*. Accordingly, the court held that Rule 32(h)

applies to all variances from the sentencing guidelines under Chapter 5 and § 3553(a). *Id*.