Current Circuit Splits

The following pages contain brief summaries, drafted by the *Seton Hall Circuit Review* members, of circuit splits identified by a federal court of appeals opinion between September 1, 2005 and January 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 512
STATUTORY INTERPRETATION 512
Westfall Act – Judicial Fact Finding:
Osborn v. Haley, 422 F.3d 359 (6th Cir. 2005) 512
Fair Labor Standards Act – Salary-Basis Test:
Whisman v. Ford Motor Co.,
157 F. App'x 792 (6th Cir. 2005) 512
Equal Pay Act – Business Reason Requirement:
Wernsing v. Dept. of Human Services, State of Illinois,
427 F.3d 466 (7th Cir. 2005) 513
Title VII – Federal Jurisdiction:
Arculeo v. On-Site Sales & Mktg., L.L.C.,
425 F.3d 193 (2d Cir. 2005)..... 514
ERISA – Waiver of Benefits by Beneficiary:
McGowan v. NJR Serv. Corp.,
423 F.3d 241 (3d Cir. 2005)..... 514
Railway Labor Act – Preemption of Minor Disputes:
Sullivan v. Am. Airlines, Inc.,
424 F.3d 267 (2d Cir. 2005)..... 515
CERCLA – Successor Liability:
United States v. Gen. Battery Corp., Inc.,
423 F.3d 294 (3d Cir. 2005)..... 515
BANKRUPTCY..... 516

Discharge of Student Loans – Declaration or Adversary Proceeding:
Whelton v. Educational Credit Mgmt. Corp.,
432 F.3d 150 (2d Cir. 2005)..... 516
Chapter 7 and 13 Filings – Concurrent Proceedings:
In re Sidebottom, 430 F.3d 893 (7th Cir. 2005)..... 517
Reclassification of Deficiencies – Sale of Collateral to Creditor:
In re Adkins, 425 F.3d 296 (6th Cir. 2005)..... 517
Standing – Rule 9019 Settlement:
In re Smart World Techs., L.L.C.,
423 F.3d 166 (2d Cir. 2005)..... 517
CIVIL PROCEDURE 518
Class Action – Standard of Review:
In re PolyMedica Corp. Sec. Litig.,
432 F.3d 1 (1st Cir. 2005)..... 518
Section 1983 – Attorney's Fees:
Wendt v. Leonard, 431 F.3d 410 (4th Cir. 2005)..... 519
Removal – Forum Defendant Rule:
Horton v. Conklin, 431 F.3d 602 (8th Cir. 2005) 519
Antitrust Law – Service and Venue Provisions:
Daniel v. Am. Bd. of Emergency Med.,
428 F.3d 408 (2d Cir. 2005)..... 520
Administrative Jurisdiction – Standard of Review:
S. Utah Wilderness Alliance v. Bureau of Land Mgmt.,
425 F.3d 735 (10th Cir. 2005) 521
Diversity Jurisdiction – Agent's Citizenship:
Pramco, LLC v. San Juan Bay Marina, Inc.,
435 F.3d 51 (1st Cir. 2006)..... 521
Securities Litigation – Pleading Requirements:
Makor Issues & Rights, Ltd. v. Tellabs, Inc.,
437 F.3d 588 (7th Cir. 2006) 522
Premature Appeal – Ripen After Final Judgment:
Adapt of Philadelphia v. Philadelphia Hous. Auth.,
433 F.3d 353 (3d Cir. 2006)..... 522
IMMIGRATION..... 523
Appellate Jurisdiction – Immigration Judge Removal Decision:
Lopez v. Gonzales, 427 F.3d 492 (7th Cir. 2005) 523

Section 212(c) Waiver – Retroactivity:
Kelava v. Gonzales, 434 F.3d 1120 (9th Cir. 2006). 524
INTELLECTUAL PROPERTY 524
Copyright Infringement – Attorney's Fees:
Twentieth Century Fox Film Corp. v. Entm't Distrib.,
429 F.3d 869 (9th Cir. 2005) 524
Trade Dress Infringement – Appeals and Rule 52(b):
Natural Organics, Inc. v. Nutraceutical Corp.,
426 F.3d 576 (2d Cir. 2005)..... 525
CONSTITUTIONAL LAW 526
Tenth Amendment – Standing to Sue:
Medeiros v. Vincent, 431 F.3d 25 (1st Cir. 2005)..... 526
CRIMINAL 526
SENTENCING 526
Sentencing Guidelines – Meaning of "any":
United States v. Williams, 431 F.3d 767 (11th Cir. 2005).. 526
Cross Reference Conduct – Relevancy to Charged Offense:
United States v. Williams, 431 F.3d 767 (11th Cir. 2005).. 527
Post-*Booker* – Harmless Error:
United States v. Glover, 431 F.3d 744 (11th Cir. 2005) 527
Post-*Booker* – Harmless Error:
United States v. Woods, 440 F.3d 255 (5th Cir. 2006) 527
CRIMINAL PROCEDURE 528
Clemency Proceedings – Federally Funded Counsel:
Hain v. Mullin, 436 F.3d 1168 (10th Cir. 2006)..... 528
Money Laundering – Proof of Predicate Offense:
United States v. Jamieson, 427 F.3d 394 (6th Cir. 2005)... 529
Illegal Re-Entry of Alien – Collateral Estoppel:
United States v. Smith-Baltiher,
424 F.3d 913 (9th Cir. 2005) 529
STATUTORY INTERPRETATION 530
Armed Career Criminal Act – Definition of "Violent Felonies":
United States v. Sperberg, 432 F.3d 706 (7th Cir. 2005).... 530
Drug Possession – Definition of "Cocaine Base":
United States v. Medina, 427 F.3d 88 (1st Cir. 2005) 530
AEDPA – Circuit Precedent in Habeas Petition:
Musladin v. Lamargue, 427 F.3d 647 (9th Cir. 2005)..... 531
CONSTITUTIONAL 531

DNA Statutes – General Balancing Test:
Nicholas v. Goord, 430 F.3d 652 (2d Cir. 2005) 531
Miranda Rights – Interrogation:
Bridgers v. Dretke, 431 F.3d 853 (5th Cir. 2005)..... 532

CIVIL MATTERS

STATUTORY INTERPRETATION

Westfall Act – Judicial Fact Finding: *Osborn v. Haley*, 422 F.3d 359 (6th Cir. 2005)

In *Osborn*, the court looked at two issues, including "whether district courts evaluating a scope certification [in a Westfall Act, 28 U.S.C. § 2679, context] can resolve material disputes about the facts . . . [and] whether a federal court possesses the authority to remand if it ultimately finds substitution . . . inappropriate." *Id*. at 361-62. The 1st Circuit, in *Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993), "took the position that the Westfall Act does not permit judicial factfinding where the Attorney General's certification essentially denies the plaintiff's central allegation of wrongdoings." *Id*. The dissent in *Wood*, however, felt that "district courts must resolve all factual disputes relevant to whether the defendant acted within the scope of employment." *Id*. Notably, since *Wood*, "[t]he majority of courts addressing the issue . . . have adopted the dissenters' approach." *Id*. at 363. Here, the 6th Circuit adopted the dissenters' position in *Wood*. *Id*. With regard to the Attorney General's certification, the court also "agree[s] with the majority view that the clear language of the Act forecloses remand. . . .[and that] the district court lacked authority to remand the action." *Id*. at 365.

Fair Labor Standards Act – Salary-Basis Test: *Whisman v. Ford Motor Co.*, 157 F. App'x 792 (6th Cir. 2005)

The Supreme Court decision in *Auer v. Robbins*, 519 U.S. 452 (1997) resolved a circuit split "over the meaning of the phrase 'subject to' as used in the salary-basis test," which is used to determine if an individual is a salaried or hourly employee. *Id.* at 796. In that decision, the Court looked to the Secretary of Labor's interpretation stating that

"employees are subject to a reduction in pay when they 'are covered by a policy that permits disciplinary or other deductions in pay' as a practical matter." *Id.* (quoting Auer, 519 U.S. at 461). "That standard is met . . . if there is either an actual practice of making such deductions or an employment policy that creates a 'significant likelihood' of such deductions." *Id.* (quoting Auer, 519 U.S. at 461). The 6th Circuit suggests that there may be a split among the circuits in how to interpret the phrase "significant likelihood." *Id.* at 797. Some circuits require an employer's policy to state that a salaried employee's pay *will be* docked if the employee acts in certain ways in order to establish a violation of the Fair Labor Standards Act (FLSA); however, a 6th Circuit decision in *Tackacs v. Hahn Auto. Corp.*, 246 F.3d 776 (6th Cir. 2001), suggests that a policy that states that "pay adjustments are a possibility" may be sufficient to establish a violation. *Id.* The 6th Circuit avoids a clearer interpretation by concluding that the facts of the case show that the defendant never implemented or enforced any policy that would violate the FLSA and therefore no further analysis is needed. *Id.* at 798.

Equal Pay Act – Business Reason Requirement: *Wernsing v. Dept. of Human Services, State of Illinois*, 427 F.3d 466 (7th Cir. 2005)

In concurrence with the 8th Circuit, the 7th Circuit held that the Equal Pay Act does not require an to employer show an acceptable "business reason" for its employment practice. *Id.* at 469. The 7th Circuit noted that an employer only need to avoid using race and sex as a criteria for setting its pay scale and in this case, setting initial pay for lateral transferees based on their pay in their previous position was not discriminatory because the initial pay practice was based on a factor other than sex. *Id.* at 466. The 7th Circuit disagreed with the 2nd, 6th, 9th and 11th Circuits which have held that "wages in a former job are a 'factor other than sex' only if the employer has an 'acceptable business reason' for setting the employee's starting pay in this fashion." *Id.* at 468. The 7th Circuit determined that the text of the Equal Pay Act statute does not state an "acceptable-business-reason requirement" and that employers are justified in looking to the competitive markets for setting pay scales. *Id.* at 469-70. The 7th Circuit found alliance with the 8th Circuit in resisting the requirement of a business reason for setting initial pay rates. *Id.* at 470.

Title VII – Federal Jurisdiction: *Arculeo v. On-Site Sales & Mktg., L.L.C.*, 425 F.3d 193 (2d Cir. 2005)

The 2nd Circuit, in both this case and its previous jurisprudence, has held that the fifteen-employee requirement under Title VII is a question which goes to the merits of the claim. *Id*. at 197 n.4. However, the court noted that the 5th Circuit has held that if the fifteen-employee requirement is not met, then the court loses jurisdiction completely. *Id*. Certiorari has been granted on the issue.

ERISA – Waiver of Benefits by Beneficiary: *McGowan v. NJR Serv. Corp.*, 423 F.3d 241 (3d Cir. 2005)

Pursuant to a marital settlement agreement arising out of the dissolution of their marriage, petitioner McGowan and his former wife Rosemary agreed that Rosemary waived all rights as a beneficiary of McGowan's ERISA plan. *Id*. at 243. McGowan then sought to name his current wife as the beneficiary under the plan, but the plan administrator, NJNG, "refused to recognize McGowan's nomination of . . . the new . . . beneficiary and maintained that Rosemary was still the beneficiary under the plan." *Id*. In determining whether a change of beneficiary had occurred in this case, the 3rd Circuit first identified a split among the circuits regarding "the issue of whether administrators of an ERISA plan are required to recognize a beneficiary's waiver of his or her benefits." *Id*. at 244. The court stated that the majority of circuits to have addressed this issue (the 4th, 5th, 7th, 8th, and 10th) have found that since "ERISA does not explicitly address 'waiver' by a beneficiary, [courts] may turn to federal common law to determine whether, and under what circumstances, an individual may validly waive her benefits in an ERISA plan." *Id*. at 245. Under this federal common law approach "an individual's waiver is valid if, 'upon reading the language in the divorce decree, a reasonable person would have understood that she was waiving her beneficiary interest.'" *Id*. (quoting Clift v. Clift, 210 F.3d 268, 271-72 (5th Cir. 2000)).

Disagreeing with the majority approach, the 3rd Circuit stated that 29 U.S.C. § 1104(a)(1)(D) "dictates that it is the documents on file with the Plan, and not outside private agreements between beneficiaries and participants, that determine the rights of the parties." *Id*. at 245-46. To the 3rd Circuit this meant that "any requirement imposed on Plan administrators to look beyond these documents would go against the specific command of § 1104(a)(1)(D)." *Id*. at 246. For this reason the 3rd

Circuit held as a bright-line rule that outside waivers are not binding on plan administrators. *Id*.

Railway Labor Act – Preemption of Minor Disputes: *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267 (2d Cir. 2005)

In this defamation suit, the 2nd Circuit aligned itself with the 3rd, 6th, and 11th Circuits and held that no complete preemption exists under the Railway Labor Act ("RLA"), even if the state-law claims did qualify as minor claims. *Id*. at 277-78. The court noted that, under the RLA, ordinary preemption is a viable defense and minor disputes or state-law claims disguised as minor disputes must be heard first by arbitral panels. *Id*. at 273. However, in determining if complete preemption exists under the RLA, the court held that the federal statute must be determined to provide "the exclusive cause of action" for the asserted claim. *Id.* at 275-76 (quoting Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 9 (2003)). If it does, the asserted claim is conclusively based on federal law so as to effectuate original federal jurisdiction and, therefore, it is authorized that the claim be removed to federal court. *Id*. The court held that minor disputes under the RLA cannot be filed in federal courts in the first instance but rather must be filed before an adjustment board and, therefore, removal of these claims to federal court based on complete preemption grounds is internally inconsistent. *Id*. at 276. Finally, the court noted that the RLA provides for only limited federal-court review of decisions of the adjustment board and clarified that Congress had the power to create a cause of action in federal court had it so wished. *Id*. at 277.

CERCLA – Successor Liability: *United States v. Gen. Battery Corp., Inc.*, 423 F.3d 294 (3d Cir. 2005)

Price Battery Corp., a now defunct company, manufactured lead acid batteries and disposed of its waste materials, including spent battery casings from the 1930s through 1966. *Id*. at 296. Consequently, millions of dollars in environmental response costs were incurred by the United States upon discovery of its disposal sites. *Id*. "Seeking to identify a responsible party under CERCLA," the United States filed suit against Exide Corp. alleging that "it was responsible for [the defunct corporation's] CERCLA liability as a successor in interest." *Id*. at 309. The court found Exide Corp. to be the successor in interest to General

Battery Corp., Inc., the initial successor corporation as a result of a common law de facto merger with Price Battery. The threshold issue, however, and the one over which circuits are split, was "whether to apply a uniform federal rule of successor liability [in order to determine liability under CERCLA], or whether to apply the law of a particular state." *Id*. at 298. In finding that "the issue of successor liability in this context is controlled by federal common law," the 3rd Circuit "perpetuated" a circuit split, namely with the 1st and 9th Circuits which hold, in contrast, "that only in the most limited circumstances should [courts] look beyond applicable state law." *Id*. at 309-10.

BANKRUPTCY

Discharge of Student Loans – Declaration or Adversary Proceeding: *Whelton v. Educational Credit Mgmt. Corp.*, 432 F.3d 150 (2d Cir. 2005)

In this creditor's action to have a consolidated student loan declared nondischargeable, the court noted that the circuits have split regarding whether a discharge of student loans can be obtained by declaration, rather than in an adversary proceeding. *Id*. at 153. The 9th and 10th Circuits have allowed the discharge if the student loan creditor was provided with notice of discharge declaration's placement in the bankruptcy plan, and failed to object. *Id.* (citing Great Lakes Higher Educ. v. Pardee, 193 F.3d 1083 (9th Cir. 1999); Andersen v. UNIPAC-NEBHELP, 179 F.3d 1253 (10th Cir. 1999)). More recent decisions from the 4th, 6th and 7th Circuits, however, have held that the institution of an adversary proceeding is necessary to have a student loan declared discharged. *Id*. at 154 (citing Banks v. Sallie Mae Serv. Corp., 299 F.3d 296 (4th Cir. 2002); Ruehle v. Educ. Credit Mgmt. Corp., 412 F.3d 679 (6th Cir. 2005); *In re* Hanson, 397 F.3d 482 (7th Cir. 2005)). The 2nd Circuit joined with these latter circuits in holding that adversary proceedings are required to have student loans discharged by declaration. *Id*. at 155.

Chapter 7 and 13 Filings – Concurrent Proceedings: *In re Sidebottom*, 430 F.3d 893 (7th Cir. 2005)

The 7th Circuit considered "whether [a debtor] was entitled to maintain a Chapter 13 proceeding while a Chapter 7 proceeding involving the same debts was pending." *Id.* at 896. The court joined the majority of bankruptcy courts holding that a debtor may not maintain a Chapter 13 and Chapter 7 proceeding at the same time. *Id.* at 897. However, the court posited that the 10th Circuit "may" allow "two or more concurrent actions with respect to the same debts." *Id.* at 898.

Reclassification of Deficiencies – Sale of Collateral to Creditor: *In re Adkins*, 425 F.3d 296 (6th Cir. 2005)

In this case, the 6th Circuit noted a circuit split regarding "whether [11 U.S.C. § 1329] allow[s] a debtor to modify a confirmed plan by surrendering collateral to a secured creditor . . . and then reclassifying any deficiency resulting from the sale . . . as an allowed unsecured claim to be paid back at the generally reduced rate for unsecured creditors set forth in the plan." *Id*. at 299. However, the 6th Circuit previously held that § 1329 did not allow such reclassification. *Id*. Thus, the court, remaining true to precedent, held that a debtor "generally cannot move to reclassify the deficiency resulting from the sale of the underlying repossessed collateral as an unsecured claim." *Id*. at 305.

Standing – Rule 9019 Settlement: *In re Smart World Techs., L.L.C.*, 423 F.3d 166 (2d Cir. 2005)

In this case, the 2nd Circuit vacated and remanded the district court's decision to affirm the judgment of the bankruptcy court to grant creditor-appellees standing to pursue settlement of an adversary proceeding under FED. R. BANK. P. 9019, despite objections of the debtor-in-possession. *Id.* at 168. While a creditor's standing under these circumstances raised an issue of first impression, the district court held that the bankruptcy court was within its powers under 11 U.S.C. § 105(a) to allow the creditors to settle. *Id*. at 173. Section 105(a) grants equitable powers to the bankruptcy court to implement the Bankruptcy Code provisions. *Id*. at 183. The 2nd Circuit noted a disagreement that existed among the circuit courts regarding how broadly to construe § 105(a)

power to fill the gaps left in the Code's language. *Id*. The court declared that under its own precedent the grant of equitable power is limited such that bankruptcy courts are barred from creating substantive rights that are not otherwise available under applicable law. *Id.* (citing *In re* Dairy Mart Convenience Stores, Inc., 351 F.3d 86, 91-92 (2d Cir. 2003)). Accordingly, the court held that the power granted under § 105 did not provide the bankruptcy court with an independent basis to grant appellees standing. *Id*. at 184.

CIVIL PROCEDURE

Class Action – Standard of Review: *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1 (1st Cir. 2005)

The 1st Circuit reviewed a lower court's certification of a class action pursuant to FED. R. CIV. P. 23(b)(3). *Id.* at 2. Defendants, officers and directors of a financially troubled company argued that the district court erred in allowing a large group of stock investors to be certified. *Id*. The court noted that the standard of review for granting class certification was "abuse of discretion," but Rule 23 provided that some issues of class certification could be reviewed *de novo*. *Id.* at 4. Specifically, the court had to determine whether it would look beyond the "four corners" of the pleading to determine whether certification was proper. *Id.* at 5. The 2nd Circuit had found that a district court could "not weigh conflicting expert evidence or engage in 'statistical dueling' of experts" when determining certification. *Id*. (citing Caridad v. Metro-North Commuter R.R., 191 F.3d 283, 292-93 (2d Cir. 1999)). Conversely, the 3rd, 4th, 5th, 7th, 11th, and D.C. Circuits developed a standard where "a decision on class certification cannot be made in a vacuum," and "some inspection of the circumstances of the case is essential" to determine whether certification is appropriate. *Id*. (citing Wagner v. Taylor, 836 F.2d 578, 587 (D.C. Cir. 1987)). In overturning the class certification, the 1st Circuit demonstrated its preference for the majority position, determining that a review beyond the pleadings was the right course for Rule 23(b)(3) class certifications. *Id*. at 6.

Section 1983 – Attorney's Fees: *Wendt v. Leonard*, 431 F.3d 410 (4th Cir. 2005)

A state taxpayer brought a § 1983 action against state officials, alleging violations of his civil rights in the seizure of his property to fulfill a tax liability. *Id.* at 412. The district court dismissed plaintiff's action for lack of subject matter jurisdiction, awarded attorney's fees to defendants under § 1988, and denied a FED. R. CIV. P. 60 motion to vacate. *Id.* at 410. The 4th Circuit undertook an examination of the definition of "void" under Rule 60(b)(4) to determine if attorney's fees could be awarded in a matter that was dismissed for lack of subject matter jurisdiction. *Id.* at 413. The 1st, 2nd, 4th, 6th, and 7th Circuits developed a standard which found a court order void for lack of subject matter jurisdiction "only when there is a 'total want of jurisdiction' and no arguable basis on which it could have rested a finding that it had jurisdiction." *Id.* (quoting Lubben v. Selective Serv. Sys. Local Bd. No. 27, 453 F.2d 645, 649 (1st Cir. 1972)). The 6th Circuit had held that that a Rule 60(b)(4) motion would succeed "only if the lack of subject matter jurisdiction was so glaring as to constitute a total want of jurisdiction, or no arguable basis for jurisdiction existed." *Id.* (citing *In re* G.A.D. Inc., 340 F.3d 331, 336 (6th Cir. 2003)). Concluding that there was an arguable basis for jurisdiction, the 4th Circuit upheld the awarding of attorney's fees against plaintiff. *Id.* at 414.

Removal – Forum Defendant Rule: *Horton v. Conklin*, 431 F.3d 602 (8th Cir. 2005)

The 8th Circuit considered whether a violation of the forum defendant rule is a procedural defect. *Id.* at 605. The forum defendant rule provides that "a non-federal question case 'shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which the action is brought." *Id.* at 604 (quoting 28 U.S.C. § 1441(b) (2000)). The court reaffirmed that "the violation of the forum defendant rule is a jurisdictional defect and 'not a mere procedural irregularity capable of being waived." *Id.* at 605 (quoting Hurt v. Dow Chem. Co., 963 F.2d 1142, 1146 (8th Cir. 1992)). However, the court did acknowledge that the 7th Circuit has held the "violation of the forum defendant rule is a procedural, nonjurisdictional defect." *Id.*

Antitrust Law – Service and Venue Provisions: *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408 (2d Cir. 2005)

In an amended complaint, plaintiffs, licensed physicians, brought suit against several medical entities, complaining that the defendants violated Sections 1 and 2 of the Sherman Act. *Id*. at 414. Plaintiff physicians appealed the district court's dismissal of their amended complaint for lack of antitrust standing. *Id*. Defendants further insisted that the district court lacked "personal jurisdiction and venue in the Western District of New York." *Id*. "The district court concluded that New York law did not provide for personal jurisdiction over [some of the defendants] but that Section 12 of the Clayton Act did." *Id.* at 420. Section 12 states that "[a]ny suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." *Id*. at 422 (quoting 15 U.S.C.S. § 12 (2005)). "The part after the semicolon provides for worldwide service of process and, therefore, the exercise of personal jurisdiction 'in such cases.'" *Id*. Thus, the question for this court was "whether service of process (and personal jurisdiction) is available under Section 12 only in cases satisfying the section's specific venue provision or regardless how venue is established." *Id*.

The split between circuits is "over the proper interpretation of the venue and process provisions of Section 12." *Id*. The 3rd and 9th Circuits have held that the service of process and venue provisions of Section 12 were independent of each other. *Id*. at 422-23 (citing *In re* Automotive Refinishing Paint Antitrust Litig., 358 F.3d 288, 297 (3d Cir. 2004); Action Embroidery Corp. v. Atl. Embroidery, Inc., 368 F.3d 1174, 1179-80 (9th Cir. 2004)). Conversely, the D.C. Circuit held that "'the language of the statute is plain, and its meaning seems clear: . . . Invocation of the nationwide service clause rests on satisfying the venue provision.'" *Id*. at 423 (quoting GTE New Media Servs. Inc. v. BellSouth Corp., 199 F.3d 1343, 1351 (D.C. Cir. 2000)). The 2nd Circuit joined the D.C. Circuit and held "that the plain language of Section 12 indicates that its service of process provision applies (and, therefore, establishes personal jurisdiction) only in cases in which its venue provision is satisfied." *Id*.

Administrative Jurisdiction – Standard of Review: *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735 (10th Cir. 2005)

In a land use dispute case, the 10th Circuit looked at "the standard of review of decisions whether to recognize the primary jurisdiction of an administrative agency." *Id*. at 750. The 10th Circuit, siding with the 4th and D.C. Circuits, used the abuse of discretion standard. *Id.* However, the 8th, 1st, 2nd, and 9th Circuits use a *de novo* standard of review. *Id*. The court explained that "[p]rimary jurisdiction is a prudential doctrine designed to allocate authority between courts and administrative agencies." *Id*. The doctrine of primary jurisdiction "allows the court to stay the judicial proceedings and direct the parties to seek a decision before the appropriate administrative agency." *Id*. at 750-751. The doctrine effectuates "regulatory uniformity and agency expertise . . . [which] drive the primary jurisdiction analysis." *Id*. at 751. The 10th Circuit decided not to overturn prior circuit precedent, holding that the Bureau of Land Management did not hold jurisdiction over rights of way. *Id*. at 758.

Diversity Jurisdiction – Agent's Citizenship: *Pramco, LLC v. San Juan Bay Marina, Inc.*, 435 F.3d 51 (1st Cir. 2006)

There is a potential split among the circuits as to whether an agent's citizenship may be used to determine complete diversity, or if the underlying party's own citizenship must be used. *Id.* at 55. The 2nd and 8th Circuits both held that the "citizenship of an agent who merely sues on behalf of the real parties must be ignored." *Id.* Conversely, the 3rd Circuit found that the named plaintiff's citizenship, even an agent, may be relevant to determining diversity jurisdiction. *Id.* However, the 3rd Circuit modified this holding to bar diversity when the agent was appointed "solely to create diversity jurisdiction." *Id.* The 1st Circuit declined to join either side and remanded the issue to the district court. *Id.* at 56.

Securities Litigation – Pleading Requirements: *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 588 (7th Cir. 2006)

This case presented the 7th Circuit with the issue of whether the Private Securities Litigation Reform Act ("PSLRA") "requires the plaintiff to support with particularity . . . the falsity of the statement of fact or the omission, and its materiality." *Id.* at 595. Although it is clear that more than general allegations of fraud must be present, "[i]t is not enough simply to allege in general that the defendant's statement was false and material." *Id.* Siding with the 2nd Circuit, the 7th Circuit found that "[a]lthough § 78u-4(b)(1) requires a complaint to state '*all* facts on which that belief is formed,' this does not mean that a complaint automatically survives if it lists 'all' of the facts supporting the plaintiff's belief. Nor does it mean that if the plaintiff alleges sufficient facts but leaves out a redundant detail, the court must dismiss the complaint." *Id.* Furthermore, a literal reading would be "[c]ontrary to the clearly expressed purpose of the PSLRA, [as] it would allow complaints to survive dismissal where 'all' the facts supporting the plaintiff's information and belief were pled, but those facts were patently insufficient to support that belief." *Id.* Thus, adopting the 2nd Circuit's framework for determining whether a pleading is sufficiently particular, the court held that the relevant question is "whether the facts alleged are sufficient to support a reasonable belief as to the misleading nature of the statement or omission." *Id.*

Premature Appeal – Ripen After Final Judgment: *Adapt of Philadelphia v. Philadelphia Hous. Auth.*, 433 F.3d 353 (3d Cir. 2006)

This case involved "the statutory obligation of the . . . [PHA] to furnish housing for disabled tenants." *Id.* at 354. Regarding this obligation, certain advocacy groups "sought medical information as to each tenant [whose housing was furnished by the PHA] to confirm that the PHA had complied with the terms of [their obligation.]" *Id.* at 354-55. The district court entered three separate discovery orders for these records, and appeals were filed after all three, prior to the entry of the district court's final order "denying all motions to enforce the Agreement." *Id.* at 355. The question of whether a premature notice of appeal filed before the announcement of an order could ripen upon entry of the final order is the subject of a circuit split between the 3rd and 7th Circuits. *Id.* at 361-61. For the 3rd Circuit, "a premature notice of appeal,

filed after disposition of some of the claims before a district court, but before entry of final judgment, will ripen upon the court's disposal of the remaining claims." *Id.* at 362 (citing Cape May Greene, Inc. v. Warren, 698 F.2d 179, 184-85 (3rd Cir. 1983)). The position of the 7th Circuit is that this question is settled by FED. R. APP. P. 4(a)(2), which states that "'a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.'" *United States v. Hansen*, 795 F.2d 35, 37 (7th Cir. 1986) (quoting, FED. R. APP. P. 4(a)(2)). In this case, the 3rd Circuit maintained its position with respect to the rule laid down in *Cape May Greene*, but held nonetheless that the facts of the present case did not fit within the *Cape May Greene* framework because the 3rd Circuit's position that a premature notice of appeal can ripen on entry of a final order even when such an appeal is made before the announcement of decision does not apply to "discovery or similar interlocutory orders." *Adapt of Philadelphia*, 433 F.3d at 364-65.

IMMIGRATION

Appellate Jurisdiction – Immigration Judge Removal Decision: *Lopez v. Gonzales*, 427 F.3d 492 (7th Cir. 2005)

In this case, the 7th Circuit addressed the issue of whether it has jurisdiction to review an Immigration Judge's ("IJ") removal decision that contains reviewable and nonreviewable grounds, when the Board of Immigration Appeals affirmed the IJ's decision without adopting his reasoning. *Id*. at 495. The 7th Circuit noted that the 1st, 5th, and 9th Circuits have held that the proper disposition is such cases "is to remand to the [Board of Immigration Appeals ("BIA")] so that it may clarify the basis of its holding." *Id*. In contrast, the 7th Circuit explained that the 10th Circuit looks to the IJ's decision, not the BIA's unexplained reasons, when deciding whether it has appellate jurisdiction. *Id*. at 496. The 7th Circuit adopted the view of the 1st, 5th, and 9th Circuits. *Id.* The court explained that this approach is consistent with due process, which requires that it determine whether the BIA affirmed the IJ's decision because of its procedural or substantive findings. *Id*.

Section 212(c) Waiver – Retroactivity: *Kelava v. Gonzales*, 434 F.3d 1120 (9th Cir. 2006)

In 1978, Kelava, an alien from Croatia, "entered the West German Consulate in Chicago, armed with handguns, ropes and a phony bomb" and "seized several employees." *Id.* at 1122. At retrial, he plead guilty and was sentenced for unarmed imprisonment of a foreign national. *Id.* at 1122. In removal proceedings nearly 20 years later, the Board of Immigration Appeals ("BIA") found Kelava was removable for the terrorist activity and "precluded from seeking a [§ 212(c)] waiver of inadmissibility under former § 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c)." *Id.* The alien argued that it was "impermissibly retroactive to deny him eligibility" for a § 212(c) waiver, which was previously available before it was repealed by "the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") § 304(b), and was replaced with a new form of discretionary relief called cancellation of removal, codified at 8 U.S.C. § 1229b." *Id.* n.3 (citation omitted). The Court disagreed with petitioner, finding that "removability does not hinge on a 'conviction'" and thus it was not impermissibly retroactive to deny him eligibility for a § 212(c) waiver for engaging in a terrorist activity. *Id.* at 1124. Rather, "Kelava is ineligible for relief under this new provision because he is deportable for having engaged in terrorist activity [pursuant to 8 U.S.C. § 1229b(c)(4)]." *Id.* at 1122 n.3. The Court, recognizing that there was a circuit split on this issue, opined that "it cannot reasonably be argued that aliens committed crimes in reliance on such a possibility [of § 212(c) relief]." *Id.* at 1125. This approach, as also followed by the 7th and 2nd Circuits, however, differs from the 3rd and 4th Circuits which argue "that some sort of reliance by an alien on existing immigration laws is not a requisite in the retroactivity analysis." *Id.* n.7.

INTELLECTUAL PROPERTY

Copyright Infringement – Attorney's Fees: *Twentieth Century Fox Film Corp. v. Entm't Distrib.*, 429 F.3d 869 (9th Cir. 2005)

There is a split among the circuits as to whether non-taxable costs may be awarded in copyright infringement cases under § 505 of the 1976 Copyright Act (17 U.S.C. § 505), because the Supreme Court ruled in

Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987) that a court may not exceed the award limits created in 28 U.S.C. §§ 1920, 1821 without "plain evidence of congressional intent to supersede those sections." *Id.* at 884 (quoting Crawford Fitting Co., 482. U.S. at 445). The 8th Circuit held that § 505 did not "clearly evidence congressional intent" to go beyond § 1920 and § 1821, while the 7th Circuit disagreed and held that non-taxable costs may be awarded under § 505. *Id.* at 855. The 9th Circuit agreed with the 7th Circuit to determine that "district courts may award otherwise non-taxable costs, including those that lie outside the scope of § 1920, under § 505. *Id.*

Trade Dress Infringement – Appeals and R. 52(b): *Natural Organics, Inc. v. Nutraceutical Corp.*, 426 F.3d 576 (2d Cir. 2005)

"At issue are the trade dresses of two competing soy protein drink mixes: Natural Organics' 'SPIRU-TEIN'; and 'Soytein,' which is made by Nutraceutical Corp. and Solaray, Inc. ("Nutraceutical"). Natural Organics alleges in essence that the Soytein label is virtually identical to the SPIRU-TEIN label, and that confusion is likely between the two products in the marketplace." *Id*. at 577. The district court ruled in favor of defendant Nutraceutical, finding that "the products' 'trade dresses are sufficiently distinguishable considering their individual elements and the total impressions they give to customers.'" *Id*. at 578. *Natural Organics* claims that the district court erred by failing to consider all eight *Polaroid* factors. *Id*. at 578-79. Rather than filing for amendment under Rule 52(b), regarding judgment on partial findings, appellant *Natural Organics* filed for notice of appeal. *Id*. at 578.

"There is a split in the circuits on the question of whether to preclude appeals by parties who have not made use of Rule 52(b)." *Id*. at 579. The 8th and 9th Circuits "hold that a party's failure to make use of Rule 52(b) forecloses arguments on appeal that the district court failed to make certain factual findings, or that its findings lack sufficient specificity." *Id*. Conversely, the 1st Circuit "has held that failure to file a Rule 52(b) motion in the district court does not preclude appeal." *Id*. (citing Supermercados Econo, Inc. v. Integrand Assurance Co., 375 F.3d 1, 5 (1st Cir. 2004)). The 2nd Circuit agreed with the 1st Circuit, reasoning that to "endorse a rule requiring that a party wishing to appeal the absence of a factual finding must first make a Rule 52(b) motion . . . would burden district courts with unnecessary Rule 52(b) motions." *Id*.

Tenth Amendment – Standing to Sue: *Medeiros v. Vincent*, 431 F.3d 25 (1st Cir. 2005)

Plaintiff, a lobsterman, brought suit against the federal government and claimed a Tenth Amendment infringement resulting from environmental regulations. *Id.* at 33. The 1st Circuit discussed the historical significance of *Tenn. Elec. Power Co. v. Tenn. Valley Auth.* ("*TVA*"), 306 U.S. 118 (1939), which held that private citizens lacked standing to bring Tenth Amendment claims. Although *TVA* has not been expressly overruled by subsequent Supreme Court precedent, the 7th and 11th Circuits have allowed private causes of action in certain circumstances. *Medeiros*, 431 F.3d at 35. In declining to follow the 11th and 7th Circuits, and joining the 10th and D.C. Circuits, the court stated that it was "reluctant to second-guess" the Supreme Court's jurisprudence, and held that plaintiff did not have standing to pursue a Tenth Amendment claim. *Id.* at 36.

CRIMINAL

SENTENCING

Sentencing Guidelines – Meaning of "any": *United States v. Williams*, 431 F.3d 767 (11th Cir. 2005)

In *Williams*, the 11th Circuit joined the 8th and 10th circuits in concluding that the term "any" is general and non-specific and therefore when "any" is used in the U.S.S.G. § 2K2.1(c)(1) it refers to any firearm the defendant possessed at the time of arrest regardless of whether or not the defendant was charged with possessing that firearm. *Id.* at 769-70. The court noted that when the Sentencing Guideline applies to a particular firearm, the Guidelines use "the," which is particular and specific. *Id.* at 770. Therefore, in the context of sentencing, "any" truly means "any" and does not have to have direct relation to the crime being charged in order to be considered. *Id.* In dicta, the 5th Circuit has

disagreed with this reasoning and concluded that "any firearm" must at least relate to the charge in the indictment. *Id.*

Cross Reference Conduct – Relevancy to Charged Offense: *United States v. Williams*, 431 F.3d 767 (11th Cir. 2005)

Here, the 11th Circuit joined the 6th, 7th, and 10th circuits in concluding that a cross referenced offense in U.S.S.G. § 2K2.1(c) must be within the relevant conduct of the charged offense. *Id*. at 772. Therefore, § 1B1.3's relevant conduct definition must be applied to the conduct contained in § 2K2.1(c). *Id*. at 771. The 11th Circuit adopted the reasoning of the 7th Circuit which relies on the language of § 1B1.3 that expressly states, "cross references under Chapter Two have to fit under the relevant conduct test." *Id.* In contrast, the 5th Circuit has held that "§ 1B1.3's strictures [sic] on relevant conduct do not apply to § 2K2.1(c)'s cross referenced conduct." *Id.* at 772.

Post-*Booker* – Harmless Error: *United States v. Glover*, 431 F.3d 744 (11th Cir. 2005)

In this case, the 11th Circuit, recognizing that it is just as hard for the government to meet the harmless error standard as it is for a defendant to meet the standard for plain error review, and that "'the fact that the district court sentenced the defendant to the bottom of the applicable guidelines range' does not establish plain error," it decided that "[t]o announce a rule that a mid-range sentence establishes harmless error would run counter to these holdings." *Id.* at 750. The court noted that, "[t]he government must do more than rely upon a mid-range sentence to satisfy its burden under the harmless error standard." *Id.* This ruling is in dispute with the determination of the 8th and 10th Circuits. *Id.*

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

Defendant appealed his sentence for bank fraud, claiming that the Supreme Court's holding in *United States v. Booker* necessitated a resentencing. *Id.* at 256. The government contended that vacating of the sentence was improper, because the district court's error was harmless.

Id. at 257. Specifically, the government claimed that under FED. R. CRIM. P. 52(a), there was no evidence of substantial prejudice when a defendant's sentence was near the maximum allowed by the United States Sentencing Guidelines. *Id.* at 258. The 10th and 11th Circuits had held that a "constitutional *Booker* error was harmless where the district court sentenced at the top of the range." *Id.* at 259 n.3 (citing United States v. Riccardi, 405 F.3d 852, 874-75 (10th Cir. 2005)). The 2nd Circuit reached a different conclusion, overturning a defendant's sentencing under the Guidelines. In *United States v. Lake* the court determined that "the Government has not shown that the possibility is so remote as to render the sentencing error harmless." *Id*. at 259 (quoting United States v. Lake, 419 F.3d 111, 114 (2d Cir. 2005)). The 5th Circuit followed the holding in *Lake*, finding that "the government has 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.

CRIMINAL PROCEDURE

Clemency Proceedings – Federally Funded Counsel: *Hain v. Mullin*, 436 F.3d 1168 (10th Cir. 2006)

The 10th Circuit "consider[ed] the reach of 21 U.S.C. § 848(q)(4)(B), which provides federally-funded counsel for indigent state death row prisoners seeking federal habeas relief." *Id.* at 1170. The court held "'that counsel appointed under § 848(q)(4)(B) to represent state death row inmates in 28 U.S.C. § 2254 proceedings are authorized by the statute to represent these clients in state clemency proceedings and are entitled to compensation for clemency representation.'" *Id.* The 10th Circuit joined the 8th Circuit, noting that the "plain language of § 848(q) evidences a congressional intent to insure that indigent state petitioners receive reasonably necessary . . . clemency services from appointed counsel." *Id.* at 1172 (quoting Hill v. Lockhart, 992 F.2d 801, 803 (8th Cir. 1993)). By contrast, the 11th Circuit held that § 848(q)(B) applies only to federal proceedings. *Id.*

Money Laundering – Proof of Predicate Offense: *United States v. Jamieson*, 427 F.3d 394 (6th Cir. 2005)

In this case, the 6th Circuit discussed a current circuit split over "whether funds must be traced to support a [money-laundering] conviction under [18 U.S.C. § 1957]." *Id*. at 404. The 6th Circuit explained that under the 1st Circuit view, "a § 1957 conviction 'does not require proof that the defendant committed the specified predicate offense; it merely requires proof that the monetary transaction constituted the proceeds of a predicate offense.'" *Id*. On the other hand, the 6th Circuit noted that the 9th Circuit allows some tracing of funds in § 1957 cases. *Id*. The 6th Circuit declined to take a position in this split because the Government did present sufficient evidence tying the money used in the transactions at issue to the defendant's money laundering scheme. *Id*. at 404-05.

Illegal Re-Entry of Alien – Collateral Estoppel: *United States v. Smith-Baltiher*, 424 F.3d 913 (9th Cir. 2005)

In a case that reviewed illegal re-entry into the United States in violation of 8 U.S.C. § 1326, the 9th Circuit looked at the use of offensive collateral estoppel. The defendant alleged that the "district court improperly allowed the government to use collateral estoppel to prevent him from challenging two elements of the offense—namely, his status as an alien and his *mens rea*." *Id*. at 919. The collateral estoppel doctrine "cautions litigants that 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *Id*. However, the court found that collateral estoppel needed to be applied rationally. *Id*. at 920. When the district court had ruled on the case at bar, prior circuit jurisprudence "had held that collateral estoppel could be used offensively against a criminal defendant in the context of illegal reentry prosecutions." *Id*. Therefore, the district court "understandably ruled that Smith was collaterally estopped from contesting his status as an alien on the ground that he had admitted to that status in two of his prior guilty pleas." *Id*. However, the 3rd, 10th, and 11th Circuits had all come to a different conclusion, determining that "collateral estoppel could not be used in a criminal case to prevent a defendant from contesting an element of the offense." *Id*. However, the circuit split was resolved by a governmental "confession of error," where "the government abandoned its defense of the use of offensive collateral estoppel against criminal

defendants, informing us that 'in federal criminal trials, the United States may not use collateral estoppel to establish, as a matter of law, an element of an offense or to conclusively rebut an affirmative defense on which the Government bears the burden of proof beyond a reasonable doubt.'" *Id.* (quoting United States v. Arnett, 353 F.3d 765, 766 (9th Cir. 2003)).

STATUTORY INTERPRETATION

Armed Career Criminal Act – Definition of "Violent Felonies": *United States v. Sperberg*, 432 F.3d 706 (7th Cir. 2005)

The 7th Circuit was presented with the question of whether the offense of drunk driving constitutes a "violent felony," which is defined as "conduct that presents a serious potential risk of physical injury to another." *Id.* at 708. The court noted that the 10th Circuit had answered this question in the affirmative, while the 8th Circuit had gone the other way. *Id.* at 709. Ultimately, the 7th Circuit followed its precedent, which held drunk driving to constitute a "violent felony." *Id.* at 709.

Drug Possession – Definition of "Cocaine Base": *United States v. Medina*, 427 F.3d 88 (1st Cir. 2005)

The defendant, Medina, argued that a jury instruction regarding 21 U.S.C. § 841(b)(1)(A)(iii) was "deficient because it permitted the jury to convict him under the statute, . . . without determining whether the substance he possessed was the particular form of cocaine base known as 'crack' or was rather some other form of cocaine base." *Id.* at 92. The 5th Circuit, citing the 7th Circuit decision in *United States v. Edwards*, 397 F.3d 570 (7th Cir. 2005), acknowledged that the question of "whether the statute regulates only possession of crack or whether its rule encompasses other forms of cocaine base is the subject of some debate and conflict among the circuits." *Id.* However, the 5th Circuit found that 21 U.S.C. § 841 "regulates exactly what its terms suggest: the possession of any form of 'cocaine base,'" and that defendant did not establish plain error in the jury instruction. *Id.*

AEDPA – Circuit Precedent in Habeas Petition: *Musladin v. Lamargue*, 427 F.3d 647 (9th Cir. 2005)

This case arose from a panel rehearing of a 9th Circuit decision involving the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Id*. at 647. The previous panel applied 9th Circuit precedent to overturn a murder conviction. *Id*. The dissenting judges noted that by this action the 9th Circuit had "sharpened a serious circuit split." *Id*. The split arises from a statutory interpretation of the AEDPA which sets the standard for federal review of state court criminal convictions in habeas cases. *Id*. The statute states that "we may grant a habeas petition if and only if the last reasoned state court decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" *Id*. (quoting 28 U.S.C. § 2254(d)(1) (2000)). The 4th, 6th, 7th, and 10th Circuits have read the statute to expressly disallow federal courts from using circuit precedent when evaluating a habeas petition, only permitting the use of Supreme Court jurisprudence. *Id.* at 650. The 9th Circuit joins the 1st, 3rd, and 8th circuits in holding that courts may rely on authority from the lower federal courts in considering a habeas petition. *Id.* at 651. Ultimately, the 9th Circuit found that the murder conviction should be overturned where, as here, the victim's family wore buttons in the courtroom presenting a picture of the victim, despite no Supreme Court precedent stating that such display would offend defendant's due process rights. *Id.*

CONSTITUTIONAL

DNA Statutes – General Balancing Test: *Nicholas v. Goord*, 430 F.3d 652 (2d Cir. 2005)

In this case, the 2nd Circuit followed circuit precedent by employing the "special needs" test to determine whether a DNA-indexing statute to assist in solving crimes served a special need. *Id.* at 668. The court noted that the 7th and 10th Circuits have adopted the "special needs" test, while the 3rd, 4th, 5th, 9th and 11th Circuits have adopted the "general balancing test." *Id.* at 659. The 2nd Circuit took issue with a 3rd Circuit opinion stating that the "special-needs inquiry is less rigorous than the general balancing test." *Id.* at 664 n.22. The 2nd

Circuit noted that, "[t]he special needs exception requires the court to ask two questions. First, is the search justified by a special need beyond the ordinary need for normal law enforcement? Second, if the search does serve a special need, is the search reasonable when the government's special need is weighed against the intrusion on the individual's privacy interest?" *Id.* The 2nd Circuit reaffirmed its employment of the "special needs" test, noting that the general balancing test "only requires the court to balance the government's interest in conducting the search against the individual's privacy interests." *Id.*

Miranda Rights – Interrogation: *Bridgers v. Dretke*, 431 F.3d 853 (5th Cir. 2005)

The 5th Circuit joined the 2nd, 4th, 7th and 8th Circuits in concluding that *Miranda* warnings "are adequate without explicitly stating that the right to have counsel includes having counsel present during the interrogation." *Id.* at 859. In this case, the prisoner argued that *Miranda* "warnings given by Florida law enforcement officers prior to custodial interrogation were insufficient to protect his Fifth Amendment rights." *Id.* at 857. The 5th Circuit noted that the Supreme Court instructed "reviewing courts to determine whether the warnings reasonably convey to the suspect his rights as required by *Miranda.*" *Id.* at 858 (quoting Duckworth v. Eagan, 492 U.S. 195, 203 (1989)). On review, the 5th Circuit concluded that the Court of Criminal Appeals' conclusion that *Miranda* warnings given prior to custodial interrogation were sufficient was not unreasonable. *Id.* Taking the minority position, the 6th, 9th and 10th Circuits have concluded that *Miranda* requires a more explicit warning, including indications that a suspect has a right to counsel during interrogation. *Id.* at 859.