

FEDERAL CRIMINAL LAW AND PROCEDURE SPRING 2011



Co-Sponsored by
THE FEDERAL PUBLIC DEFENDER'S OFFICE
AND
THE IOWA ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS

DRAKE LAW SCHOOL LEGAL CLINIC
DES MOINES, IOWA
May 26, 2011

WELCOME



**THE
SPRING 2011
FEDERAL LAW AND PROCEDURE
SEMINAR
IS CO-SPONSORED BY
THE FEDERAL DEFENDER'S OFFICE
AND
THE IOWA ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS**

Program

PROGRAM

8:00 a.m. to 8:30 a.m.

Registration

8:30 a.m. to 9:00 a.m.

Odds and Ends

James Whalen,
Sr. Litigator, FPD



Veterans Justice Outreach Program

Jennifer Miner, Veterans Justice Outreach Specialist, VA Hospital

9:00 a.m. to 10:00 a.m.

Supreme Court & Eighth Circuit Update

John Messina, Research & Writing Attorney
Federal Public Defender's Office

10:00 a.m. to 10:15 a.m.

BREAK

10:15 a.m. to 10:45 a.m.

Fun With Guns - An Overview of Federal Firearms Cases: A Pernicious Prosecution and a Limited Defense.

Bob Wichser
Assistant Federal Public Defender

10:45 p.m. to 11:15 a.m.

Criminal Defense in the Era of Social Media

Jane Kelly and Diane Helphrey
Assistant Federal Public Defenders

11:15 a.m. to 11:45 a.m.

Representing Minority Defendants

Alfredo Parrish
CJA Panel Attorney

11:45 a.m. to 1:00 p.m.

Lunch (On your own)

1:00 p.m. to 1:45 p.m.

Electronic Media in the Courtroom - Trial Director and PowerPoint

Tim Ross-Boon, Assistant Federal Public Defender
Ellen Workman, Paralegal at Federal Public Defender's Office

1:45 p.m. to 2:15 p.m.

Special Conditions of Supervised Release

Jill Johnston
Assistant Federal Public Defender

2:15 p.m. to 3:00 p.m.

Credit for Jail Time in the BOP

Mike Smart
Assistant Federal Public Defender

3:00 p.m. to 3:15 p.m.

BREAK

3:15 p.m. to 4:15 p.m.

Ethics

The Honorable Mary Tabor
Iowa Court of Appeals

CLE ACCREDITATION

FEDERAL CRIMINAL LAW AND PROCEDURE

Drake Legal Clinic

Des Moines, Iowa

May 26, 2011

This seminar has been submitted for approval for accreditation under the regulations of the Iowa Supreme Court Commission on Continuing Legal Education. It is planned that this program will provide up to a maximum of 6 hours of credit, with one hour of ethics credit, towards the mandatory continuing legal education requirements under the Iowa Rules.



This seminar has been submitted for approval for accreditation for 6 hours of federal continuing legal education credit with one hour of ethics.



The seminar is also accredited under the Amended Criminal Justice Act Plan for the Southern and Northern Districts of Iowa and will provide 6 hours of credit toward the mandatory continuing legal education requirement under the CJA Plan.

**SPEAKER
BIOGRAPHICAL
INFORMATION**

DIANE HELPHREY

EDUCATION: J.D., University of Iowa (1994); Graduate of University of Wisconsin-Madison (1990)

PROFESSIONAL: Assistant Federal Public Defender, Southern District of Iowa (2007 - Present); Assistant Public Defender, Wisconsin State Public Defender Agency (1995-2007)

JILL JOHNSTON

EDUCATION: J.D., University of Iowa (1994); B.A., Mt. Mercy College (1991)

PROFESSIONAL: Assistant Federal Public Defender (2007-Present); Private practice and Judicial Magistrate, Cedar Rapids, Iowa (2005-2007); Assistant State Public Defender, Colorado Springs, Colorado (2004-2005); Assistant State Public Defender, Waterloo and Cedar Rapids, Iowa (1996-2004); Private practice, Waterloo, Iowa (1994-1996)

JANE KELLY

EDUCATION: J.D., Harvard Law School (1991); A.B., Duke University, (1987)

PROFESSIONAL: Assistant Federal Public Defender, Northern District of Iowa (1994-Present); Visiting Instructor, University of Illinois College of Law (1993-1994); Law Clerk to the Honorable David R. Hansen, U.S. Circuit Judge, Eighth Circuit Court of Appeals (1992-1993); Law Clerk to the Honorable Donald J. Porter, U.S. District Judge, District of South Dakota (1991-1992)

JOHN MESSINA

EDUCATION: J.D., Drake University Law School (1979); B.A., Drake University (1975).

PROFESSIONAL: Research and Writing Attorney, Federal Public Defender's Office, Southern District of Iowa (2001-Present); Assistant State Appellate Defender, Iowa State Appellate's Office (1996-2001 and 1984-1988); Assistant Attorney General in the Criminal Appeals and Research Division (1980-1984).

ALFREDO PARRISH

EDUCATION: J.D., University of Iowa (1970); B.A., University of Dubuque (1967)

PROFESSIONAL: Founder and Senior Partner, Parrish, Kruidenier, Moss, Dunn & Montgomery (1974-Present); Senior Staff Attorney, Polk County Legal Aid Society (1971-74)

TIM ROSS-BOON

EDUCATION: J.D., University of Iowa (1987); B.A., University of Iowa School of Letters (1979)

PROFESSIONAL: Assistant Federal Public Defender, Southern District of Iowa (2003 - Present); Assistant Public Defender, Linn County Public Defender's Office (1995 - 2003); Attorney with Linn County Advocate (1990 - 1995); Prosecutor with Johnson County Attorney's Office (1987 - 1990).

MIKE SMART

EDUCATION: J.D., Creighton University School of Law (1983); B.S., Creighton University (1976)

PROFESSIONAL: Assistant Federal Public Defender, Northern District of Iowa (2007-present); Sole practitioner in Omaha, Nebraska (2004-2007); Partner with White, Wulff & Smart (2000-2004); Partner with Teideman, Lynch Smart and Kampfe (1984-2000). Admitted in Iowa and Nebraska. While in private practice focused on Federal criminal defense, Federal civil rights litigation and general litigation.

THE HONORABLE MARY TABOR

Mary was appointed to the Iowa Court of Appeals in May 2010. She earned her bachelor's degree from the University of Iowa in 1985 and graduated from the University of Iowa College of Law in 1991. Mary worked as a staff attorney in the Office of General Counsel for the Federal Election Commission in Washington, D.C. from 1991 to 1993. She joined the Iowa Attorney General's office in 1993 and served as director of the Criminal Appeals Division from 1999 to 2010.

JIM WHALEN

EDUCATION: J.D., University of Iowa (1978); B.A., University of Iowa (1974)

PROFESSIONAL: Assistant Federal Public Defender, Southern District of Iowa (1994-Present); Polk County Public Defender's Office (1989-1994); State Appellate Defender's Office (1987-1989); Private Practice, Waterloo, Iowa (1978-1986).

BOB WICHSER

EDUCATION: J.D., University South Dakota (1974); B.A., Morningside College, (1971)

PROFESSIONAL: Assistant Federal Public Defender, Northern District of Iowa (2003-Present); Assistant County Attorney, Pottawattamie County (2001-2003); Attorney with Sodow, Daly & Sodow, Omaha, NE (1985-2000); Attorney with Hirschbach & Wichser, Sioux City, IA (1976-1985); Assistant Attorney General, State of South Dakota (1974-1976).

ELLEN WORKMAN

EDUCATION: B.A., William Penn University (Magna Cum Laude) (2004), Business Administration

PROFESSIONAL: Paralegal, Federal Public Defender's Office (1996-Present); Court Attendant for Honorable Glenn E. Pille, Fifth Judicial District (1994-1996); Clerk II, Polk County Clerk of Court's Office - Criminal Division (1992-1994); Legal Secretary, Barrick Law Office, Des Moines, IA (1990-1992).

ODDS AND ENDS

PRESENTED BY

JIM WHALEN

SR. LITIGATOR

FEDERAL PUBLIC DEFENDER'S OFFICE

Proposed Guideline Amendments

2011



2011

Fair Sentencing Act

- App. N. 28: “maintaining a premises” includes storage of controlled substance for distribution
- June 1, 2011 hearing re: retroactivity of FSA Amendments on lowering guideline ranges

Illegal Reentry - 2L1.2(b)(1)A) and (B)

- o Enhancements based upon stale convictions or non-counting CH pts. under Chapter 4 subject to 12 or 8 level enhancement
- o 12 or 8 level upward departure if this enhancement doesn't adequately reflect seriousness of underlying conduct

Mitigating Role

o App. N. 3B1.2: struck:

App. N. 3(C) statement the court “is not required to find, based solely on the defendant’s bare assertion, that such a role adjustment is warranted.”

App. N. 4 statement “it is intended that the downward adjustment for minimal participant will be used infrequently.”

Mitigating Role (Fraud)

- Added to App. N. 3(A): “a defendant who is accountable under 1B1.3 (relevant conduct) for a loss amount under 2B1.1 (theft, property destruction, and fraud) that exceeds defendant’s personal gain from a fraud and who had limited knowledge of scheme is not precluded from an adjustment under the guideline.

Supervised Release - 5D1.1

- o (c) “The court ordinarily should not impose a term of S.R. in a case in which S.R. is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.”
- o Commentary: “The court should . . . consider imposing term of S.R. . . . if . . . it would provide an added measure of deterrence and protection. . . .”

Supervised Release

- o 2D1.2 S.R. lowered minimum term from 3 (Class A & B felonies) and 2 years (Class C & D felonies) to 2 and 1 year.
- o 5D1.1 and 5D1.2 commentary: inserted mention of criminal history & substance abuse as factors for court to consider
- o 5D1.2 commentary added language encouraging courts to consider early termination of S.R. “in appropriate cases.”

Firearms 2K2.1

- o Increased penalties for straw purchasers
- o Added 4-levels where defendant “possessed any firearm or ammunition while leaving or attempting to leave U.S., or with knowledge, intent, or reason to believe it would be transported out of the U.S.
- o Straw purchasers downward departure where none of subsection (b) enhancements apply, the defendant was motivated by intimate or familial relationship or by threats or fear to commit offense and was otherwise unlikely to commit the offense, and no monetary compensation from the offense

Firearms - 2M5.2

- o Small arms crossing border – penalties raised from BOL 14 to 26 where more than 2 non-fully automatic small arms involved.
- o Subject to lower level 14 if involved 500 rounds or less of ammo for non-fully automatic small arms.
- o Level 14 where offense involved both small arms and ammunition in quantities listed here.

Fraud - 2B1.1

- o Health care fraud involving Government health care program.
- o Tiered enhancements based upon loss amounts > \$1 mil
- o Added rebuttable special prima facie evidence rule for loss amount
- o Defines “Federal health care offense” and “Government health care program”

Child Support

- 18 U.S.C. 228 – willful failure to pay not subject to 2-level enhancement under 2B1.1(b)(8)(C)

Drug Disposal Act - 2D1.1

- App. No. 8 expands list of people subject to enhancement for abuse of position of trust or use of special skill

VETERANS JUSTICE OUTREACH PROGRAM

PRESENTED BY

**JENNIFER MINER
VETERANS JUSTICE OUTREACH
SPECIALIST
DES MOINES VA MEDICAL CENTER**



Veterans **JUSTICE** Outreach Program

Have you, or someone you know, ever served in the U.S. Armed Forces or Military and have a legal issue pending in the criminal justice system?

If so, the **Veterans Justice Outreach** program may be able to assist you with the following:

- Work with your legal representative to identify mental health or substance abuse treatment options
- Assist you with eligibility determination, enrollment and referral to VA and non-VA Services
- Offer direct outreach, assessment, and case management to you in local courts and jail

For more information, contact:

Jennifer Miner, LISW, CADAC

Veterans Justice Outreach (VJO) Specialist

(515) 577-8892



How to Know If a Veteran is Eligible for VA Services?

Ask: "Have you ever served in the United States Armed Forces or military?" Do not ask: "Are you a Veteran?" since many Veterans think this applies only to Veterans who served in combat.

To Register or Enroll for Health Care:

In Person: Building 1, Room 117, Des Moines VA Medical Center.

By mail: call **515-699-5888** for a registration packet.

On-line: <https://www.1010ez.med.va.gov/sec/vha/1010ez/>

Refer to VJO Specialist if assistance is needed

Eligibility determination is based on each individual's service. We encourage all Veterans to apply for VA services.

Available health care services may include:

- Medical, Surgical, Psychiatric, Inpatient and Outpatient Care.
- Mental Health Residential Rehabilitation Treatment Programs (Homeless Veterans Program, PTSD Program, Coping Skills Program, and Substance Use Disorder Program)
- Homeless Programs
- Post-Traumatic Stress Disorder Treatment
- Military Sexual Trauma Treatment
- Rehabilitative Care
- Nursing Home Care
- Women's Health Clinic

Contact Information

Jennifer Miner, LISW, ACSW, CADC
Veterans Justice Outreach Specialist

jennifer.miner@va.gov

(515) 577-8892

Hours: Monday - Friday 8:00 am - 4:30 pm

National Call Center for Homeless Veterans:

1-877-4AID VET (877-424-3838)

Veterans Crisis Line

1-800-273-TALK (8255)



VA Central Iowa Health Care System

3600 30th Street
Des Moines, Iowa 50310-5885

Main Phone: (515) 699-5999

Toll Free: (800) 294-8387

<http://centraliowa.va.gov/>

Come Visit us on Facebook:

www.facebook.com/VACentralIowa

Date Updated: 5-6-11



Veterans Justice Outreach Program

Mission:

"Honor America's veterans by providing exceptional healthcare that improves their health and well-being."

Veterans Justice Outreach (VJO) Initiative

“The purpose of the VJO [Veterans Justice Outreach] initiative is to avoid unnecessary criminalization of mental illness and extended incarceration among Veterans by ensuring that eligible Veterans in contact with the criminal justice system have access to :

VHA mental health and substance abuse services when clinically indicated, and Other VA services and benefits as appropriate.”

Source: Department of Veterans Affairs, April 30, 2009, Under Secretary for Health's Information Letter

The Veterans Justice Outreach Program works with Justice-Involved Veterans. A Justice-Involved Veteran is any Veteran who has contact with the judicial system, law enforcement, or jail system.



What is Veterans Justice Outreach?

VJO is a VA outreach program designed to collaborate with local justice system partners to identify Veterans that enter the criminal justice system and are in need of treatment services rather than incarceration.

The VJO Specialist will:

- Provide direct outreach, assessment, and case management for justice-involved Veterans in local courts and jails.
- Assist with eligibility determination, enrollment, and referral to both VA and non-VA services upon release.
- Provide training to local law enforcement on Veterans' issues and give strategies to help work with Veterans.
- Provide information and education to courts and attorneys about Veterans' issues and services available.
- Collaborate with judges and specialty courts to connect Veterans to VA treatment services and homeless programs.



What Veterans Justice Outreach Can Do

- Reach out to law enforcement, jails, and courts
- Refer and link Veterans to comprehensive health care services
- Communicate essentials (attendance, progress, treatment testing, discharge plan, etc.) with Veteran consent
- Serve Veterans of all eras
- Function as a court team member
- Assess Veteran's needs and identify appropriate VA and non-VA services

VJO is limited from doing the following:

- Perform forensic evaluations for the court.
- Accept custody of Veteran.
- Guarantee program acceptance.
- Write lengthy court reports or complete diversion paperwork.
- Advocate for legislation.



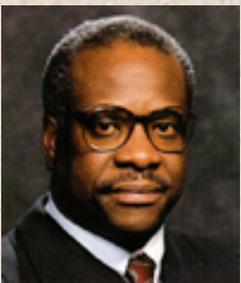
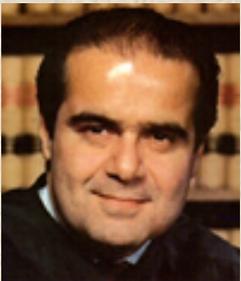
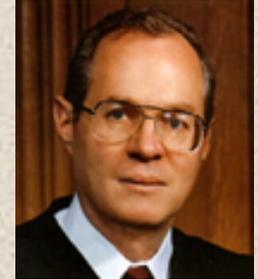
**SUPREME COURT
&
EIGHTH CIRCUIT
UPDATE**

PRESENTED BY

**JOHN MESSINA
RESEARCH & WRITING ATTORNEY**



U.S. Supreme Court Justices



Mortality Update

- Ruth Bader Ginsburg – appointed 1993 – age 78
- Antonin Scalia – appointed 1986 – age 75
- Anthony Kennedy – appointed 1988 – age 74
- Stephen Breyer – appointed 1994 – age 72
- Clarence Thomas – appointed 1991 – age 62
- Samuel Alito, Jr. – appointed 2006 – age 61
- John Roberts – appointed 2005 – age 56
- Sonia Sotomayor – appointed 2009 – age 56
- Elena Kagan – appointed 2010 – age 51
- **Average age 65 years.**

Confrontation - - Declarations of Mortally Wounded Victim

Michigan v. Bryant,
131 S.Ct. 1143 (2011)

**Statements obtained by police from
gunshot victim were not testimonial
for purposes of the Confrontation
Clause**



“When . . . the primary purpose of an interrogation is to respond to an ‘ongoing emergency,’ its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation] Clause.”

* * *

“At bottom, there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded Covington within a few blocks and a few minutes of the location where the police found Covington.”

Federal Sentencing - - Consideration of Postsentencing Rehabilitation

Pepper v. United States,
131 S.Ct. 1229 (2011)

High court tosses Eighth Circuit rule prohibiting consideration of postsentencing rehabilitation at resentencing



“[T]he Court of Appeals’ ruling prohibiting the District Court from considering any evidence of Pepper’s postsentencing rehabilitation at resentencing conflicts with longstanding principles of federal sentencing law and contravenes Congress’ directives in §§ 3661 and 3553(a).”

Collateral Review - - 28 U.S.C. § 2244(d)(2) - - Tolling the One-Year Limitations Period

Wall v. Kholi,

131 S.Ct. 1278 (2011)

Petitioner's post-appeal application to reduce sentence was an application for "collateral review" for purposes of the tolling provision in § 2244(d)(2)



“We . . . define ‘collateral review’ according to its ordinary meaning: It refers to judicial review that occurs in a proceeding outside of the direct review process.” (State argued that “collateral review” refers only to legal challenges to a conviction or sentence, and not motions for discretionary or equitable relief like the sentence reduction motion here.)

Collateral Review - - 28 U.S.C. § 2254(d)(1) - - Review of Claims Adjudicated on the Merits in State Court

Cullen v. Pinholster,
131 S.Ct. 1388 (2011)

**Federal court is limited to review of
state court record in determining
whether state court's adjudication
of petitioner's claim on the merits
was an unreasonable application of
clearly established federal law**



“Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that ‘resulted in’ a decision that was contrary to, or ‘involved’ an unreasonable application of, established law. This backward-looking language requires an examination of the state court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time – *i.e.*, the record before the state court.”

Collateral Review - - 28 U.S.C. § 2254 - - Parole Determinations

Swarthout v. Cooke;
Cate v. Clay,
___ S.Ct. ___ (2011)

**Merits of California parole denials
were not subject to federal review**



“When . . . a state creates a liberty interest, the Due Process Clause requires fair procedures for its vindication – and federal courts will review the application of those constitutionally required procedures. In the context of parole, we have held that the procedures required are minimal.”

* * *

“Because the only federal right at issue here is procedural, the relevant inquiry is what process Cooke and Clay received, not whether the state court decided the case correctly.”

Collateral Review - - 28 U.S.C. § 2254(d)(1) - - Summary Disposition by State Court

Harrington v. Richter,
131 S.Ct. 770 (2011)

**AEDPA's deferential review
standard applies even where state
court summarily affirms without
opinion**



“Where a state court’s decision is unaccompanied by an explanation, the habeas petitioner’s burden still must be met by showing there was no reasonable basis for the state court to deny relief.”

* * *

“When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication . . . to the contrary.”

Collateral Review - - 28 U.S.C. § 2254(d)(1) - - Application of *Strickland*

Cullen v. Pinholster,
131 S.Ct. 1388 (2011)

**State court did not unreasonably
apply *Strickland* in rejecting claim
that counsel inadequately
investigated and presented
mitigation evidence in capital case**

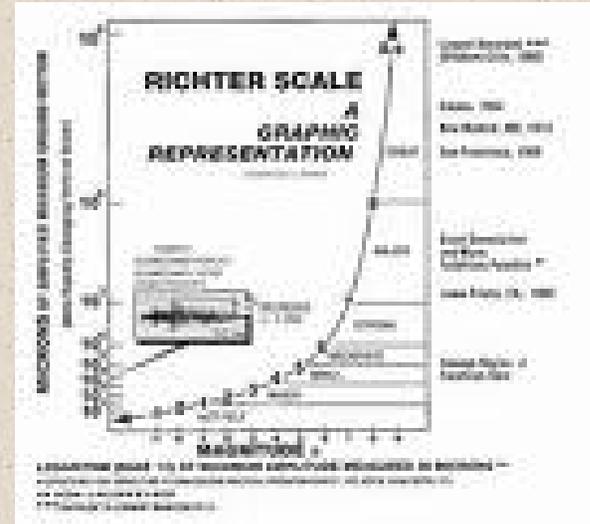


“Pinholster’s counsel confronted a challenging penalty phase with an unsympathetic client, which limited their feasible mitigation strategies.”

Collateral Review - - 28 U.S.C. § 2254(d)(1) - - Ineffective Assistance Claims

Harrington v. Richter,
131 S.Ct. 770 (2011)

**S.Ct. chastises Ninth Circuit for
failing to accord proper deference to
state court's rejection of *Strickland*
claim**



“The pivotal question is whether the state court’s application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel’s performance fell below *Strickland*’s standard.”

* * *

“A state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.”

Collateral Review - - 28 U.S.C. § 2254(d)(1) - - Ineffective Assistance - - Plea Advice

Premo v. Moore,
131 S.Ct. 733 (2011)

Trial counsel reasonably chose to forego challenge to confession in favor of advice to accept plea offer to avoid life or capital sentence; Ninth Circuit “doubly wrong” in failing to accord deference to counsel’s judgment and deference to state court decision that counsel provided effective assistance



“Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks. . . . These considerations make strict adherence to the *Strickland* standard all the more essential when reviewing the choices an attorney made at the plea bargain stage.”

Remedies - - Use of 42 U.S.C. § 1983 as a Means of Obtaining DNA Testing

Skinner v. Switzer,
131 S.Ct. 64 (2011)

Use of § 1983 was a proper means by which to assert petitioner's claim that state's DNA law denied him procedural due process



“When may a state prisoner, complaining of unconstitutional state action, pursue a civil rights claim under § 1983, and when is habeas corpus the prisoner’s sole remedy?”

* * *

“When ‘a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence,’ . . . § 1983 is not an available remedy.”

Stuff to Come

Search and Seizure - - Exigent Circumstances

Kentucky v. King

S.Ct. No. 09-1272 (cert. granted 09/28/10). Decision below reported at 302 S.W.3d 649 (Ky. 2010).

Cert. granted to consider when the conduct of law enforcement impermissibly creates the exigency that then becomes the basis for warrantless entry. (Officers smelled marijuana emanating from apartment then knocked on the door. The knock caused the occupants to hurriedly attempt to destroy evidence, which created the exigency for warrantless entry.)

Search and Seizure - - Seizure of Suspected Child Abuse Victim at Public School

Alford v. Greene

S.Ct. No. 09-1478 (cert. granted 10/12/10). Decision below reported at 588 F.3d 1011 (9th Cir. 2009).

Cert. granted to consider Fourth Amendment implications of temporary seizure and interview of suspected child abuse victim. Seizure and interview occurred at a public school.

Stuff to Come

Search and Seizure - - Jail Strip Searches

Florence v. Board of Chosen Freeholders

S.Ct. No. 10-945 (cert. granted 4/04/11). Decision below reported at 621 F.3d 296 (3rd Cir. 2010).

Cert. granted to consider whether the Fourth Amendment permits a suspicionless strip search of every arrestee, even those arrested for minor offenses.

Search and Seizure - - Leon Good Faith Doctrine - - Lawful Searches Subsequently Undermined by New Precedent

Davis v. U.S.

S.Ct. No. 09-11328 (cert. granted 11/01/10). Decision below reported at 598 F.3d 1259 (11th Cir. 2010).

Cert. granted to consider whether the good faith rule applies in cases involving a changing interpretation of the law. (Officer's search was valid at the time under *Belton*, but was later declared illegal because of intervening decision in *Gant*.)

Stuff to come cont'd

Miranda - - Age as a Custody Factor

J.D.B. v. North Carolina

S.Ct. No. 09-11121 (cert. granted 11/01/10. Decision below reported at 686 S.E.2d 135 (No. Car. 2009).

Cert. granted to consider whether a juvenile's age is a proper factor to weigh in determining whether a "reasonable person" would have felt free to terminate the encounter with law enforcement.

Miranda - - Prison Interrogation

Howes v. Fields

S.Ct. No. 10-680 (cert. granted 1/24/11). Decision below reported at 617 F.3d 813 (6th Cir. 2010).

Section 2254 case. Does "clearly established precedent" hold that a prisoner is always "in custody" for *Miranda* purposes when isolated from the general prison population and questioned by the authorities?

Stuff to come cont'd

Right to Counsel - - Indigent Defendant - - Civil Contempt Proceedings

Turner v. Price

S.Ct. No. 10-10 (cert. granted 11/01/10). Decision below reported at 691 S.E.2d 470 (So.Car. 2010).

Cert. granted to consider whether an indigent defendant has a constitutional right to appointed counsel in a civil contempt proceeding that results in incarceration.

Confrontation - - Lab Reports - - Supervisor Testimony

Bullcoming v. New Mexico

S.Ct. No. 09-10876 (cert. granted 9/28/10). Decision below reported at 147 N.M. 487 (N.Mex. 2010).

Cert. granted to consider whether lab analyst's report can be conveyed at trial by person who supervised the analyst but otherwise did not conduct or observe the lab analysis.

Stuff to come cont'd

Speedy Trial Act - - 18 U.S.C. § 3151 - - Excludable Time

U.S. v. Tinklenberg

S.Ct. No. 09-1498 (cert. granted 9/28/10). Decision below reported at 579 F.3d 589 (6th Cir. 2009).

Cert. granted to decide whether time period excluded for resolution of pretrial motion applies only when the motion actually causes a postponement or expectation of postponement of the trial date.

Armed Career Criminal Act - - Violent Felonies - - Fleeing / Eluding

Sykes v. U.S.

S.Ct. No. 09-11311 (cert. granted 9/28/10). Decision below reported at 598 F.3d 334 (7th Cir. 2010).

Supreme Court will resolve circuit split over whether fleeing in a motor vehicle constitutes a “violent felony” under the ACCA.

Stuff to come cont'd

Armed Career Criminal Act - - "Serious Drug Offense" Predicate - - Meaning of Maximum Penalty "Prescribed by Law"

McNeil v. U.S.

S.Ct. No. 10-5258 (cert. granted 1/07/11. Decision below reported at 598 F.3d 161 (4th Cir. 2010).

A "serious drug offense" is an ACCA predicate only if the maximum punishment "prescribed by law" for that offense is 10 years or more. Does this mean the punishment prescribed at the time defendant committed the prior drug offense, or is it the punishment in effect at the time of the instant federal offense?

Crimes - - Drug Trafficking - - 21 U.S.C. § 841(b)(1)(A) - - "Cocaine Base"

DePierre v. U.S.

S.Ct. No. 09-1533 (cert. granted 10/12/10). Decision below reported at 599 F.3d 25 (1st Cir. 2010).

Is "cocaine base" limited to crack cocaine, or does it refer to all forms of cocaine chemically classified as a base?

Stuff to come cont'd

Crimes - - 18 U.S.C. § 229(a) - - Use of Chemical Weapons

Bond v. U.S.

S.Ct. No. 09-1227 (cert. granted 10/12/10). Decision below reported at 581 F.3d 128 (3rd Cir. 2010).

Weirdorama! Angry spouse who dumped toxic chemicals on property of her husband's lover challenges her prosecution and conviction under statute enacted to prevent proliferation of chemical and biological weapons. Cert. granted to consider Bond's Tenth Amendment claims.

Crimes - - 18 U.S.C. § 1512(a)(1) - - Murder of a witness, victim, or informant

Fowler v. U.S.

S.Ct. No. 10-5443 (cert. granted 11/15/10). Decision below reported at 603 F.3d 883 (11th Cir. 2010).

S.Ct. will consider the elements required to prove a tampering charge under 18 U.S.C. § 1512(a)(1) (killing or attempting to kill another with intent to prevent the person from giving an officer or judge of the United States information regarding the commission of a federal offense).

Stuff to come cont'd

Crimes - - SORNA - - Standing to Challenge Attorney General's Interim Rule

Reynolds v. U.S.

S.Ct. No. 10-6549 (cert. granted 1/24/11). Decision below reported at 380 Fed.Appx. 125 (3d Cir. 2010).

Cert. granted to consider whether Mr. Reynolds has standing to challenge Attorney General's Interim Rule implementing SORNA.

Federal Sentencing - - Increasing Length of Sentence to Promote Rehabilitation

Tapia v. U.S.

S.Ct. No. 10-5400 (cert. granted 12/10/10). Decision below reported at 376 Fed.Appx. 707 (9th Cir. 2010).

Cert. granted to consider whether a district court can impose a lengthier sentence to achieve a particular rehabilitative purpose. (The district court lengthened Tapia's sentence to insure his participation in the 500-hour RDAP program.) 18 U.S.C § 3582(c) states that "imprisonment is not an appropriate means of promoting correction and rehabilitation."

Stuff to come cont'd

Crack Amendment - - 18 U.S.C. § 3582(c)(2) - - Impact of Rule 11(c)(1)(C) Agreements

Freeman v. U.S.

S.Ct. No. 09-10245 (cert. granted 9/28/10). Decision below reported at 335 Fed.Appx. 1 (6th Cir. 2009).

Cert. granted to consider whether relief under crack guideline amendment is available to defendant who was sentenced pursuant to a Rule 11(c)(1)(C) agreement.

Collateral Review - - 28 U.S.C. § 2254 - - “Clearly Established Federal Law”

Greene v. Fisher

S.Ct. No. 10-637 (cert. granted 4/4/11). Decision below reported at 606 F.3d 85 (3^d Cir. 2010).

Is there a temporal cutoff for when “clearly established federal law” became clearly established?

Stuff to come cont'd

Ineffective Assistance - - Misadvice or Omission that Causes Defendant to Reject a Favorable Plea Bargain

Lafler v. Cooper

S.Ct. No. 10-209 (cert. granted 1/07/11). Decision below reported at 376 Fed.Appx. 563 (6th Cir. 2010).

Missouri v. Frye

S.Ct. No. 10-444 (cert. granted 1/7/11). Decision below reported at 311 S.W.3d 350 (Mo.App. 2010).

Cert. granted in two cases to decide if a defendant is entitled to relief when he rejects or loses a plea bargain through counsel error or omission, despite the fact that the defendant has been validly convicted following jury trial. What's the remedy?

Eighth Circuit Case Update



Eighth Circuit Judges

Active Judges

Hon. William Jay Riley, Chief
Hon. Roger L. Wollman
Hon. James B. Loken
Hon. Diana Murphy
Hon. Kermit E. Bye
Hon. Michael J. Melloy
Hon. Lavenski R. Smith
Hon. Steven M. Colloton
Hon. Raymond W. Gruender
Hon. Duane Benton
Hon. Bobby Shepherd

Senior Judges

Hon. Myron H. Bright
Hon. Pasco M. Bowman
Hon. C. Arlen Beam
Hon. David R. Hansen
Hon. Morris Arnold

Search and Seizure - - Search Incident to Arrest - - “Crack” Search

United States v. Hambrick,
630 F.3d 742 (8th Cir. 2011)

Strip search of arrestee was reasonable, as police had reliable information that he concealed crack cocaine in his buttocks



“The search took place in an interrogation room in the Davenport Police Department and was based on highly reliable information from a well-known informant that Hambrick possessed crack cocaine between his buttocks. Moreover, the officers did not touch Hambrick, and they allowed him to remove the drugs on his own.”

Search and Seizure - - Permitting Third Parties to Enter Home During Execution of Search Warrant

United States v. Gregoire,
____ F.3d ____ (8th Cir. 2011)

Private third party was duly permitted to enter home during execution of warrant to help identify stolen property



“When the police entered Gregoire’s home to execute the warrant, they discovered a massive cache of items that appeared to fall within the universe of the suspected thefts. It was objectively reasonable for the officers to turn to the Arnolds, owners and managers of Reed’s, a theft victim, for help in confirming which items there was probable cause to believe had been stolen.”

Search and Seizure - - Contradictory Explanations for Traffic Stop

United States v. Prokupek;
United States v. McGlothen,
632 F.3d 460 (8th Cir. 2011)

Circuit rejects district court fact finding and orders suppression of fruits of traffic stop where video of stop contradicted trooper's suppression testimony.



“The district court’s factual finding that ‘Prokupek failed to signal his turn before turning from the exit ramp on to the county road’ is supported only by the court’s determination that Trooper Estwick’s testimony at the suppression hearing to that effect was credible. Because Trooper Estwick’s testimony at the hearing is so clearly and affirmatively contradicted by his own statement at the time of the events, in the absence of any explanation for this contradiction that is supported by the record, we conclude that Trooper Estwick’s after-the-fact testimony at the suppression hearing is ‘implausible on its face,’ and we are left with the ‘firm and definite conviction that a mistake has been made,’ . . .” (citations omitted)

Lineups - - Photo Array - - Use of Different Background Color for Defendant's Photo

United States v. Harris,
636 F.3d 1023 (8th Cir. 2011)

Photo array was not impermissibly suggestive by reason of “slight color variation” in background of defendant’s photograph



“The background in each photograph is of a slightly different shade of gray Upon close inspection, however, the photograph of Harris has a slightly blue or violet hue.”

* * *

“ . . . Harris does not explain why the minute variation in color would suggest to the witnesses that Harris was the offender or the person the police suspected.”

Crimes - - Attempted Receipt of Child Pornography - - 18 U.S.C. § 2252A - - Substantial Step

United States v. Bauer,

626 F.3d 1004 (8th Cir. 2010)

Defendant who sent \$25 for would-be minor to purchase webcam and record certain requested sex acts had taken a sufficient “substantial step” to establish an attempt to receive child pornography



“A substantial step is necessary for an attempt conviction, and although a substantial step must go beyond ‘mere preparation,’ it need not be the ‘last act necessary’ before the commission of the crime. Rather, a substantial step must ‘strongly corroborate’ a defendant’s intent to commit the predicate offense.”

Crimes - - Attempted Receipt of Child Pornography - - 18 U.S.C. § 2252A - - Attempts to Obtain Child Pornography from an Undercover Law Enforcement Agent

United States v. Bauer,
626 F.3d 1004 (8th Cir. 2010)

Factual impossibility is not a defense to the attempted receipt of child pornography. (Defendant solicited pictures from an undercover officer posing online as a 14-year-old)



“The stipulated facts demonstrate that Bauer believed that he was communicating with a fourteen-year-old girl and intended to receive pornographic images of her. Bauer’s undisputed belief that his victim was a minor satisfies the “knowingly” requirement of the statute. His conduct, if completed in accordance with his understanding of the facts, would have resulted in the receipt of child pornography. Accordingly, no actual minor victim was necessary for Bauer’s attempt conviction under § 2252A.” (citation omitted)

Crimes - - 18 U.S.C. §§ 2252(a)(2) and 2252(a)(4)(B) - - Receipt and Possession of Child Pornography - - Double Jeopardy

United States v. Muhlenbruch,
634 F.3d 987 (8th Cir. 2011)

Possession offense is included within receipt offense; judgment and sentence on both violates the Double Jeopardy Clause where convictions were based on same facts and images



“Other courts have considered materially similar statutes – 18 U.S.C § 2252A(a)(5)(B) and 18 U.S.C. § 2252A(a)(2) – and have found that possession of child pornography is a lesser included offense of receiving child pornography and that Congress did not intend to impose multiplicitous punishment for these offenses.”

Crimes - - Bank Robbery - - 18 U.S.C. § 2113(a) - - Convenience Store ATM

United States v. Haas,
623 F.3d 1214 (8th Cir. 2010)

Theft of ATM from convenience store constituted bank robbery, as store qualified as “any building used in whole or in part as a bank. . . .”



“There is no question that the Bank funds housed within the ATM were federally insured. . . . It is undisputed that the Bank owned the ATM located in the Store. Although the ATM did not offer every service that the Bank provided, it made many banking services available to the Bank customers. We conclude, therefore, that the building housing this ATM was used in part as a bank.”

Crimes - - Sexual Abuse of a Minor - - 18 U.S.C. § 2243 - - Intoxication

United States v. White Calf,
634 F.3d 453 (8th Cir. 2011)

Intoxication is not a defense to sexual abuse of a minor, but may be a defense to attempted sexual abuse of a minor. Intoxication does not bear on the affirmative defense that one reasonably believed the victim was age 16 or older



“Sexual abuse of a minor is a general intent crime, but attempted sexual abuse of a minor is a specific intent crime.”

* * *

“[T]he reasonableness of [a defendant’s] belief is not measured through the eyes of a reasonably intoxicated person.”

Crimes - - Attempted Sexual Exploitation of Children - - 18 U.S.C. § 2251

United States v. Johnson,
____ F.3d ____ (8th Cir. 2011)

**Secret videotaping of minor females
disrobing and weighing themselves
was an attempt to produce
“lascivious” images and not “mere
nudity” for purposes of the
exploitation offense**



“A reasonable jury could conclude that these videos of teenage minor females disrobing and weighing themselves in the nude cannot reasonably be compared to innocent family photos, clinical depictions, or works of art.”

* * *

“The fact that the young women in the videos were not acting in an obviously sexual manner . . . does not necessarily indicate that the videos themselves were not or were not intended to be lascivious. . . . [E]ven images of children acting innocently can be considered lascivious if they are intended to be sexual.”

Pretrial Motions - - Timeliness - - Delay Caused by Defendant's Flight

United States v. Transchheff,

___ F.3d ___ (8th Cir. 2011)

District court did not abuse its discretion in denying defendant an extension of time to file pretrial motions after defendant absconded to Bulgaria while on pretrial release



“A district court may set a deadline for the parties to file pretrial motions. . . . [I]f a party fails to file a pretrial motion by the deadline set by the court, the party waives that issue. If a party shows good cause for the delay, the district court has discretion to excuse the waiver.”

Trial - - Jury Questions - - Absence of Fingerprinting as Basis for Acquittal

United States v. Cox,
627 F.3d 1083 (8th Cir. 2010)

District court did not abuse its discretion in instructing the jury that “[t]here is no legal requirement that fingerprints be taken. . . .”

“The response was not factual in nature. Nor did it comment on the evidence, other than perhaps to provide indirect support for Officer Barnes’s testimony . . . that his failure to have the weapon tested for fingerprints was normal procedure and not a mistake.”

Jury Question: Is error on the part of officers in preserving the integrity of the crime scene by not handling the firearm and case in a manner in which definitive proof through fingerprinting could be obtained, grounds that the jury can use to rule not guilty?

District Court’s Answer: Definitive proof is not a phrase that is used. Please see Instruction No. 7, the reasonable doubt instruction. Not taking fingerprints is one of the items of evidence you can consider along with all of the other evidence in the case. There is no legal requirement that fingerprints be taken, but, again, you can consider this fact along with all the other evidence in the case in determining whether the prosecution has proved its case beyond a reasonable doubt.

Trial - - Jury Instructions - - Lesser Included Offenses

United States v. Knox,
634 F.3d 461 (8th Cir. 2011)

**No error in denial of simple assault
lesser where sexual abuse defendant
asserted that sex act with victim was
consensual**



“Generally, we affirm a district judge’s refusal to instruct the jury on a lesser-included offense when the defendant claimed complete innocence throughout trial.”

Motion for New Trial - - Fed.R.Cr.P. 33 - - Short Jury Deliberations

United States v. Aguilera,
625 F.3d 482 (8th Cir. 2010)

**Verdict in less than 30 minutes in
drug conspiracy trial did not compel
grant of new trial**



“We agree with other circuits that brief jury deliberations alone is not a sufficient basis for new trial. ‘At best, it is a factor to be considered when deciding a motion for new trial, and even then cannot be the only basis for granting a new trial.’”

Evidence - - Rule 404(b) - - Use of Remote Firearms Offenses to Prove Felon-in-Possession Charge

United States v. Halk,
634 F.3d 482 (8th Cir. 2011)

Circuit affirms admission of defendant's 1989 and 2000 firearms convictions to establish felon-in-possession charge



“Certainly, these facts may be near the outer limits of Rule 404(b) admissibility.”

Evidence - - Incriminating Rap Recording - - Rules 404(b) and 403

United States v. Moore,
____ F.3d ____ (8th Cir. 2011)

**No plain error in admission of drug
defendant's homemade rap video**



“The police all know me and I have
narcotics I brought the rack
even though cocaine prices are up.”



“Some of Moore’s lyrics tended to show that he knew cocaine prices, used drug code words, and sold drugs to supplement his income. Countering the probative value of that evidence, however, was the danger of unfair prejudice flowing from the lyrics used by Moore and the other rappers, which were replete with vulgar, inflammatory, prejudicial language, most of which was irrelevant to whether Moore was involved in a drug distribution conspiracy. Cf. United States v. Gamory, No. 09-13929, 2011 WL 832554, at *8 (11th Cir. Mar. 11, 2011) (‘The lyrics presented a substantial danger of unfair prejudice because they contained violence, profanity, sex, promiscuity, and misogyny and could reasonably be understood as promoting a violent and unlawful lifestyle.’)”

Guidelines - - USSG § 4B1.1 - - Career Offender - - “Counterfeit Substance”

United States v. Brown,
___ F.3d ___ (8th Cir. 2011)

Iowa “simulated controlled substance” offense is a “counterfeit substance” offense for career offender purposes



“[I]f a substance is “made in imitation” and “with an intent to deceive”, the substance is “counterfeit” for the purposes of § 4B1.2. . . .” (citation omitted).

Guidelines - - USSG § 3E1.1 - - Acceptance of Responsibility - - Craigslist Rant

United States v. Wineman,
625 F.3d 536 (8th Cir. 2010)

**Craigslist posting under “Rants
and Raves” costs meth defendant
a reduction for acceptance of
responsibility**

Mr. Wineman’s Craigslist Rant:

“The drug task force cops have it rough. They sit on their asses in new, off the lot, vehicles (which they change out on a weekly basis). They get full pay, while [expletive] [expletive] snitches do their [expletive] jobs so they can ruin families lives by sending people to prison for trying to support their family. All the meth dealers are doing is providing a service to people. Just like the gas station or grocery store. They don’t force these addicts to buy meth, they just sell it to them. I’m going to prison for this exact reason. I fought and was denied disability for 7 years, In July 2009 I lost part of my foot due to diabetes. I supported my family the only way I could. Now the tax payers will support me for the next 10 to life. So the next time you see [name omitted] or [name omitted] or any other N.I. drug task force cop, tell them THANX for raising your taxes. And if you know any snitches tell them the same.”

“Wineman’s only regret appears to be that law enforcement officers and informants had the temerity to disrupt the methamphetamine ‘service’ he provided to the community. . . .”

Guidelines - - USSG § 2G1.3(b)(3) - - Use of a “Computer” to Communicate with Minor in Furtherance of a Travel Offense

United States v. Kramer,
631 F.3d 900 (8th Cir. 2011)

Circuit holds that a cell phone qualifies as a “computer” for purposes of the § 2G1.3(b)(3) enhancement



“If a device is ‘an electronic . . . or other high speed data processing device performing logical, arithmetic, or storage functions,’ it is a computer. This definition captures any device that makes use of a electronic data processor. . . .”

Guidelines - - USSG § 4B1.1 - - Career Offender - - “Controlled Substance Offense”

United States v. Robinson,
___ F.3d ___ (8th Cir. 2011)

Simple proof of defendant’s Iowa drug tax stamp conviction did not suffice to establish a “controlled substance” predicate, as the statute has both simple possession and drug trafficking alternatives



“§ 453B applies equally to persons who simply possess a specified amount of drugs – a violation which unquestionably fails to qualify as a controlled substance offense.”

Guidelines - - USSG § 2B1.1(b) - - Calculating Loss - - “Victims”

United States v. Goodyke;
United States v. Robinson,
___ F.3d ___ 2011 WL 1532091
(4/25/10)

**Purchasers of defendants’ fraudulent
“diplomatic immunity” cards were
victims even though they shared
defendants’ anti-government beliefs**



“Many of these purchasers were predisposed to the same manner of thinking as Goodyke and Robinson regarding an individual’s ability to ‘opt out’ of the federal system. But the purchasers’ predispositions are immaterial to the issue of whether they were also victims of [defendants] scheme to sell fraudulent diplomatic immunity cards. Arguably, the fact that many of the card purchasers honestly believed that they had some sort of immunity by purchasing the cards makes them more compelling ‘victims,’ not less.”

Guidelines - - Criminal History - - Probation Revocations Based on Instant Offense Conduct

United States v. Heath,
624 F.3d 884 (8th Cir. 2010)

**Circuit rejects double-counting
challenge to criminal history scoring
that included probation revocation
sentence based on conduct
encompassed by instant federal
offense**



“[T]his argument ‘ignores the relation-back aspect of the law – incarceration resulting from a probation revocation is punishment for the original offense. It is imposed as a consequence of the defendant’s breach of probation terms but is not punishment for the breach.’”

Guidelines - - USSG § 2K2.1(b)(5) - - Trafficking of Firearms

United States v. Willett,
623 F.3d 546 (8th Cir. 2010)

**Enhancement for trafficking of
firearms focuses solely on
defendant's conduct, and not on the
foreseeable conduct of others**



“The commentary to § 2K2.1 conspicuously omits any reference to the foreseeability aspect of relevant conduct. . . .”

Guidelines - - USSG § 2G2.2(b)(2) (prepubescent minor or minor under age 12) and § 2G2.2(b)(4) (sadistic or masochistic conduct) - - Double-Counting

United States v. Yarrington,
634 F.3d 440 (8th Cir. 2011)

**Prepubescent minor and sadistic /
masochistic image enhancements
address different harms and do not
constitute double counting**



“[Section 2G2.2(b)(2)] focuses on the harm to the victim based on that victim’s age. . . .
[Section 2G2.2(b)(4)] focuses on the harm to the victim based on the type of conduct involved,
which may be particularly violent in character regardless of age.”

Guidelines - - USSG § 4A1.2(c)(1) - - Criminal History Scoring for Iowa Driving While Barred Offense

United States v. Phillips,
633 F.3d 1147 (8th Cir. 2011)

Iowa's driving while barred offense
(an aggravated misdemeanor) is a
countable offense for criminal history
scoring because it qualifies as a
felony under the Guidelines, USSG
§ 4A1.2(o)



“And, unlike misdemeanors, *all* felony offenses are included in the calculation of a defendant’s criminal history. § 4A1.2(c)(1).”

* * *

“We therefore reiterate that an Iowa conviction for an aggravated misdemeanor is treated as a felony offense for purposes of § 4A1.2(c).”

Guidelines - - USSG § 5G1.3 - - Multiple Undischarged Terms of Imprisonment

United States v. Bauer,
626 F.3d 406 (8th Cir. 2010)

District court properly denied credit for prior undischarged sentence even though the offense constituted relevant conduct and increased guidelines range, because defendant had multiple other undischarged sentences for unrelated offenses

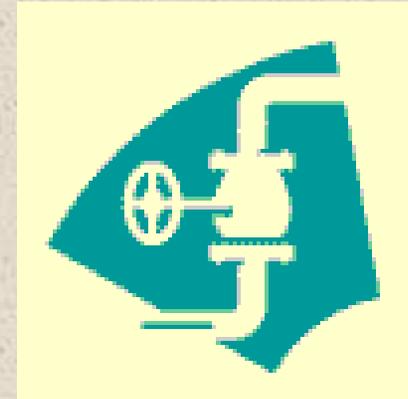


“This case, which involves multiple undischarged terms of imprisonment, only one of which was considered as relevant conduct to increase Bauer’s offense level, presents . . . a complex situation requiring the district court to apply § 5G1.3(c).”

Safety Valve - - 18 U.S.C. § 3553(f)(2) and USSG § 5C1.2(a)(2) - - Threats of Violence

United States v. Sandoval-Sianuqui,
632 F.3d 438 (8th Cir. 2011)

**Pre-plea threat against codefendant
costs defendant safety valve relief**



“To be eligible for safety-valve relief, the defendant must not have used ‘violence or credible threats of violence’ while ‘attempting to avoid detection or responsibility’ for the offense of conviction.”

Sentencing - - Crimes of Violence / Violent Felonies - - *Alford* Pleas

United States v. Vinton,
631F.3d 476 (8th Cir. 2011)

**Felony assault conviction based on
Alford plea was still a crime of
violence**



“[I]t is not important whether the previous conviction was the result of a traditional guilty plea, an *Alford* plea, or a conviction by a judge or jury; what matters is the fact of the conviction itself.”

Sentencing - - Crimes of Violence / Violent Felonies - - Possession of a Weapon in a Correctional Facility

United States v. Boyce,
633 F.3d 708 (8th Cir. 2011)

**Circuit holds that Missouri offense
for possession of a weapon in a
correctional facility is a violent
felony for ACCA purposes.
(Circuit split on this issue)**



“Possession of a dangerous weapon in a correctional facility is purposeful, violent, and aggressive, and is therefore similar, in kind as well as degree of risk posed, to the offenses listed in § 924(e).”

Sentencing - - Crimes of Violence / Violent Felonies - - Sexual Touching Without Consent

United States v. Craig,
630 F.3d 717 (8th Cir. 2011)

Tennessee “sexual battery” offense (intentional touching of another’s intimate parts or clothing covering the same, without consent, for purposes of sexual gratification) is a crime of violence for § 2K2.1 purposes



“The sexual battery conviction at issue here requires the intentional touching of the ‘intimate parts’ of a victim for the purpose of sexual gratification without the victim’s consent and with knowledge that consent was not given. As to the first part of the test, this offense creates a substantial risk of a violent, face-to-face confrontation should the victim, or another person who would protect the victim, become aware of what is happening. Further, the offense involves the intentional act of touching a person’s ‘intimate parts,’ and thus the offender’s behavior is purposeful and aggressive.”

Sentencing - - Crimes of Violence / Violent Felonies - - Theft from the Person

United States v. Abari,
___ F.3d ___ (8th Cir. 2011)

Theft from the person offense is a violent felony, even if the statute includes theft of property in the immediate presence of the person



“Whether the property was touching the victim or in the immediate presence of the victim, the offense conduct nevertheless poses a serious potential risk of physical injury to another because of the potential for confrontation by the victim or a third party.”

Sentencing - - Crimes of Violence / Violent Felonies - - USSG § 2K2.1(a)(4)(A) - - Reckless Driving Causing Injury

United States v. Ossana,
___ F.3d ___ (8th Cir. 2011)

Arizona “aggravated assault” offense (recklessly causing physical injury using a dangerous instrument) is not a crime of violence in the reckless driving context



“The parties have cited, and we have identified, no circuit-level cases post *Begay* in which a court found an offense qualified as a violent felony or crime of violence where the mens rea for the offense was mere recklessness and where there were no further qualifications to suggest purposeful, violent, or aggressive conduct.”

* * *

“We qualify and limit our holding today to the crimes such as the crime at issue which encompasses the unadorned offense of reckless driving resulting in injury. This crime is distinct from other crimes of recklessness . . . where other elements of the offense . . . involve purposeful conduct. . . .”

Sentencing - - Crimes of Violence / Violent Felonies - - Modified Categorical Approach

United States v. Williams,
627 F.3d 324 (8th Cir. 2010)

**District court erred in relying on
PSR's use of police report to
establish character of defendant's
prior escape offense**



“Under the modified categorical approach, the court examines the *Taylor* and *Shepard* documents not to see how the particular crime at issue was committed . . . but ‘*only* to determine which part of the statute the defendant violated.’ . . . While the police report might be probative of the factual circumstances of the offense, these facts do not help us determine the part of the statute under which Williams was convicted. Williams could have been convicted (perhaps by way of a plea agreement) of an offense that is different from the one we might suppose by examining the facts outlined in a police report.”

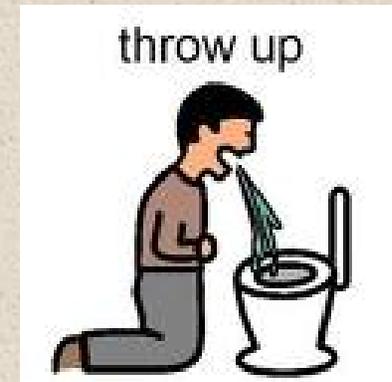
Accord *United States v. Thomas*, 630 F.3d 1055 (8th Cir. 2011).

Sentencing - - Downward Variance for Sex Offender Reversed as Unreasonable

United States v. Kane,

___ F.3d ___ (8th Cir. 2011) (2-1)

Circuit can't stomach 90-month downward variance (from 210 to 120) for woman who repeatedly subjected her child to sexual abuse



“We do not reach this conclusion lightly. We are cognizant of our limited and deferential role in the post-*Booker* world.” (citation omitted)

* * *

“The facts of this case are as nauseating as they are horrific: for \$20, Kane repeatedly sold her nine-year-old daughter to a pedophile, restraining the child to assist the pedophile in his deviant sexual gratification. The pedophile sexually molested the child more than 200 times with Kane’s active participation. Instead of accepting responsibility for her crimes, Kane challenged the truthfulness of her child’s testimony at trial, calling the child a liar, as the child mustered the courage to confront her abusers.”

Sentencing - - General Deterrence as an Upward Variance Factor

Ferguson v. United States,
____ F.3d ____ (8th Cir. 2010)

500% upward variance to “send a message” and address problem of smuggling contraband into prison was not an abuse of discretion (Range 6-12 months; 60-month sentence imposed)



“[W]e have upheld severe sentences imposed in part for reasons unrelated to the personal characteristics of the defendant. . . . Furthermore, Congress specifically made general deterrence an appropriate consideration under section 3553(a)(2)(B). . . .”

* Note also *U.S. v. Clay*, 579 F.3d 919, 934 (8th Cir. 2009) (affirming 615% upward variance).

Sentencing - - Armed Career Criminal Act - - 18 U.S.C. § 924(e)(1) - - Predicates Stemming from Short Series of Drug Transactions

United States v. Tate,
633 F.3d 624 (8th Cir. 2011)

Separate convictions for small drug sales to same informant on July 29, August 22 and August 23, 2002, were separate predicates for ACCA purposes



“[C]onvictions for discrete drug transactions on different dates count as separate predicate offenses for purposes of § 924(e)(1).”

Sentencing - - Eighth Amendment - - Challenge to 20-year Pre-Fair Sentencing Act Sentence

United States v. Neadeau,
____ F.3d ____ (8th Cir. 2011)

**Fair Sentencing Act does not render
harsh pre-FSA sentences cruel and
unusual**



“The Fair Sentencing Act was not retroactive; Neadeau is therefore subject to the penalties in place when he committed his crimes. . . . [T]his court has never held that a sentence within the statutory range violates the Eighth Amendment.”

Sentencing - - Future Deportation as Mitigation Factor

United States v. San-Miguel,
634 F.3d 471 (8th Cir. 2011)

**Judge Bright argues that future
deportation should mitigate
punishment**



“[L]ong sentences make little sense for those who face deportation.”

- Bright, J., dissenting

Sentencing - - Appeal - - Presumption of Reasonableness - - Career Offender Guideline

United States v. Coleman,
635 F.3d 380 (8th Cir. 2011)

**Presumption of reasonableness
applies to sentence imposed under
the Career Offender Guideline**



“Coleman complains that . . . U.S.S.G. § 4B1.1, should not be accorded a presumption of reasonableness because it is the product of congressional direction . . ., not the Sentencing Commission’s application of empirical data and national experience.”

Supervised Release - - Special Conditions - - Ban on Possession of Pornography

United States v. Curry,
627 F.3d 312 (8th Cir. 2010)

**Ban on possession of pornography
by SORNA defendant was plain error
where district court failed to make
individualized findings**



“We do not foreclose the imposition of such a condition in a SORNA case, but . . . the district court simply failed to make the individualized findings necessary to ensure that the special condition satisfies the statutory requirements.”

CJA Appointment - - Appointment of Retained Counsel After Retainer Is Used Up

United States v. Haas,
623 F.3d 1214 (8th Cir. 2010)

District court (N.D.Ia.) did not err in refusing to appoint retained counsel for sentencing when defendant became indigent upon conviction and detention



“[A]n attorney who fails to make adequate arrangements before accepting representation of a client cannot rely on the CJA to ‘bail [him] out.’”

Appeal - - Untimely Notice of Appeal

United States v. Watson,
623 F.3d 542 (8th Cir. 2010)

Untimely notice of appeal does not deprive circuit of jurisdiction, but does require dismissal of appeal when opposing side raises the timeliness issue



“[W]e have dismissed for lack of jurisdiction criminal appeals in which the notice was filed outside Rule 4(b)’s time constraints. In light of recent Supreme Court decisions, we conclude that our precedent that the filing deadline in Rule 4(b) is jurisdictional is no longer good law.”

•

“Although we retain jurisdiction over an untimely appeal from a criminal judgment, Rule 4(b)’s timeliness requirements remain inflexible and ‘assure relief to a party properly raising them.’”

•

“[W]e decline to consider whether we may enforce Rule 4(b)’s time limit *sua sponte*. Suffice it to say that our order directing the parties to submit briefs on the timeliness of Watson’s appeal was appropriate.”

Appeal - - Mixed Merits and *Anders* Brief

United States v. Meeks,
____ F.3d ____ (8th Cir. 2011)

Circuit disapproves of practice of including *Anders* issues in a merits brief

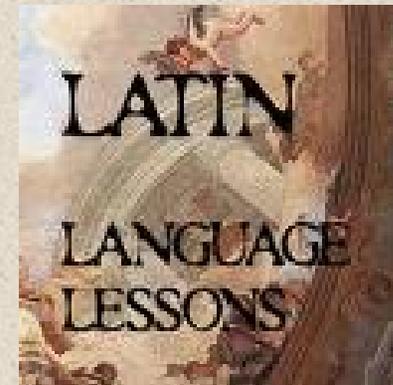


“The inclusion of issues brought pursuant to Anders in a merits brief is a practice that is to be avoided. . . . Either the issue is meritless and thus should not be included in a merits brief, or the issue has merit and should be vigorously argued.”

Latin – Cool Writs – Coram Nobis

United States v. Freeman,
625 F.3d 1049 (8th Cir. 2010)

Defendant’s presentence attempt to challenge suppression ruling via motion for writ of coram nobis was misguided



“[A] writ of error *coram nobis* . . . is only available after conviction or sentence to a defendant who is no longer in custody ‘to correct errors of the most fundamental character.’”

Big Words - - “Peradventure”

United States v. Jones,
628 F.3d 1044 (8th Cir. 2011)

**Circuit uses “peradventure” for 51st
time in circuit history; annual streak
reaches five**



“It is by now beyond peradventure that a Guidelines-range sentence enjoys a presumption of reasonableness.”

FUN WITH GUNS

An Overview of Federal Firearm Cases: A Pernicious Prosecution and Limited Defense

PRESENTED BY

**BOB WICHSER
ASST. FEDERAL PUBLIC DEFENDER**

Fun With Guns – An Overview of Federal Firearms Cases: A Pernicious Prosecution and a Limited Defense

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Federal Criminal Law and Procedure – Spring 2011
May 26, 2011

This paper presents an outline overview of the issues involved in the defense of the basic federal firearm offenses and their prosecution.

I. Introduction

This outline is meant to provide federal defense attorneys with some “ammunition” in litigating firearm cases.

II. “Firearm” Definitions and Terminology

The word “firearm” is a term of art. The term “firearm” is defined in 18 U.S.C. § 921(a)(3) as:

(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

This definition applies to prosecutions under 18 U.S.C. § 922, affecting mostly prohibited persons, while another, set forth below, applies to cases prosecuted under 26 U.S.C. § 5861 (also known as the National Firearms Act of 1934), affecting machine guns, sawed-off shotguns/rifles, and silencers. “Firearm” is defined in 26 U.S.C. § 5845(a) as:

- (1) a shotgun having a barrel or barrels of less than 18 inches in length;
- (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18

inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machine gun; (7) any silencer (as defined in section 921 of Title 18, United States Code); and (8) a destructive device . . .

Each gun (at least under the 922 subsections) has a single piece which is actually the legally operable “firearm.” 18 U.S.C. § 921(a)(3)(B). This is referred to as the “frame” or “receiver.” A frame or receiver is the portion of the weapon which contains the firing mechanism, and to which is generally attached the grip frame, the trigger housing, the stock, the barrel, etc. . . A “frame or receiver” may not resemble a firearm at all. It may comprise most of the firearm or very little. A collection of parts which appears to be 90% of a weapon is not a firearm if it lacks a receiver. The subtle nature of the receiver may change its legal status. (*E.g.*, a receiver may have been manufactured before 1898, rendering the gun, even if composed of newer parts, an antique.)

III. Prohibited Persons Categories, 18 U.S.C. § 922

This code section imposes a maximum 10-year sentence for a “prohibited person” to: ship or transport in interstate or foreign commerce or possess in or affecting commerce, **any firearm or ammunition**; or to receive any firearm or ammunition which as been shipped or transported in interstate or foreign commerce. Since no firearms are manufactured in Iowa, any firearm that is found in Iowa has thus been shipped or transported in interstate commerce. Section 922(g) lists the main groups of “prohibited persons” as any person who:

- (1) has been convicted in any court of a crime punishable by more than 1 year imprisonment; **[a convicted felon]**;
- (2) is a fugitive from justice;
- (3) **is an unlawful user or addicted to any controlled substance** (as defined in the Controlled Substances Act, 21 U.S.C. § 802);
- (4) has been adjudicated mentally defective or has been committed to a mental institution;
- (5) is an illegal alien;
- (6) has been dishonorably discharged from the armed forces;
- (7) has renounced American citizenship;

- (8) **is subject to a court order regarding harassment or abuse of a partner or child; or**
- (9) **who has been convicted in any court of a misdemeanor crime of domestic violence.**

Pursuant to 18 U.S.C. § 922(n), also included in the “prohibited person” category is “any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year.” The “under indictment” language has been interpreted to include someone charged by felony information or even a complaint. One becomes subject to the prohibitions of 922(n) when the state files the felony complaint. *United States v. Brede*, 477 F.3d 642, 644 (8th Cir. 2007). The government must prove the offender “knew she was breaking the law when she acquired a firearm while under indictment.” *Dixon v. United States*, 126 S. Ct. 2437, 2441 (2006).

(1) **What does it take to be an unlawful user or addicted to any controlled substance?**

Federal Courts have interpreted that one must be an unlawful user at or about the time he or she possessed the firearm and, that to be an unlawful user, one also needs to have engaged in regular use over a period of time proximate or contemporaneous with the possession of the firearm. *United States v. Turnbull*, 349 F.3d, 558, 562 (8th Cir. 2003) (drug use within the week of when firearms were seized). In other words, there must be a temporal nexus between the gun possession and regular drug use.

B. What is a Misdemeanor Crime of Domestic Violence?

18 U.S.C. § 921(a)(33)(A) defines the term “misdemeanor crime of domestic violence” as an offense that –

- (i) is a misdemeanor under federal or 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, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

Keep in mind, threatening someone in a menacing manner or putting someone in fear or apprehension of imminent bodily harm or injury, even if that someone is an intimate partner, does not in and of itself involve the use or attempted use of physical force or threaten the use of a deadly weapon. A conviction based, even in part, on

allegations such as these (e.g., disturbing the peace, third degree assault) does not trigger the federal weapons ban if the record is unclear as to the factual findings of the Court. See, *United States v. Trimble*, 415 F. Supp. 2d 1015 (D. Neb. 2006).

C. What does Adjudicated Mentally Defective mean?

Courts clearly require a “formal commitment” and expressly state that involuntary confinement for “observation” is not sufficient. *United States v. Dorsch*, 363 F.3d 784, 786 (8th Cir. 2004). There is no definition of the term “committed” and there is no binding precedent on point. Although the definition of the term is a question of federal law, the Eighth Circuit reasoned that it could “seek guidance from state law” where the prior commitment occurred. *United States v. Whiton*, 48 F.3d 356, 358 (8th Cir. 1995).

D. Any case law on being a fugitive?

A “fugitive from justice” is defined under the statute as “any person who has fled from any State to avoid prosecution for a crime.” 18 U.S.C. § 921(a)(15). In *United States v. Spillane*, 913 F.2d 1079 (4th Cir. 1990), in the context of a § 922(g)(2) conviction, that court defined a “fugitive from justice” as “[a]ny person who, knowing that charges are pending, purposely (1) leaves the jurisdiction of prosecution, and (2) refuses to answer those charges by way of appearance before the prosecuting tribunal.” *Id.* at 1081-82.

E. How illegal does an illegal alien need to be?

Illegal alien cases may present some interesting factual/legal issues depending upon the timing of the alleged possession/receipt. For the purposes of a 922(g)(5) conviction, “the government must prove that the alien was in the United States without authorization at the time the firearm was received.” *United States v. Hernandez*, 913 F.2d 1506, 1513 (10th Cir. 1990) (while applying for legalization of status, an alien may not be deported and is, thus, not an illegal alien for purposes of firearm possession).

IV. Try the Firearm Element and Knowledge of the Characteristics of the Firearm

Do not take for granted that a firearm is actually a firearm. A common firearm which uses a primitive form of ignition, such as black powder, does not meet the § 922 element, regardless of its date. Likewise, a firearm which cannot be dated may raise the specter of pre-1898 manufacture and unregulated antique status. There are guns which were manufactured both before and after the 1898 date which do not appear distinct from one another.

An inoperable firearm generally counts as a gun but, at some point, modification must defeat the “designed to” or “may be converted to” “fire a projectile” requirement.

Even the ATF allows certain cuts to be made in a receiver, rendering it a non-firearm. If inoperability in your case goes beyond mere brokenness, push for instructions and Rule 29 on the issue that it must be possible to make a gun into a non-gun. See, *United States v. Seven Misc. Firearms*, 503 F. Supp. 565 (D.D.C. 1980) (finding some weapons redesigned to be museum pieces not to be firearms).

Finally, whether or not the gun is a firearm, your client must have known that it was. While the government does not have to prove that a defendant had actual knowledge that he was prohibited from possessing firearms, and due process is not violated where a defendant is unaware of the statute, *United States v. Hancock*, 231 F.3d 557 (9th Cir. 2000), the government does have to prove that the defendant “knew the particular characteristics that made his [gun] a statutory firearm.” *United States v. Reed*, 114 F.3d 557 (10th Cir. 1997). See also, *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000); *United States v. Frazier-El*, 204 F.3d 553, 561 (4th Cir. 2000); *United States v. Jones*, 222 F.3d 349 (7th Cir. 2000). This analysis derives from the reasoning in *Staples v. United States*, 511 U.S. 600 (1994), in which the Supreme Court held that a conviction for possession of an unregistered firearm under 26 U.S.C. § 5861(d), based on defendant’s possession of a machine gun, required that the government prove that defendant knew of the features of his gun that brought it within the Act. Look for whether there is some reason that your client may not have known that the firearm was a firearm, as that term is defined in the U.S. Code. There are guns which appear unique and may be easily mistaken for replicas, antiques, black powder guns, life-like petted (air) guns, or toys. See [Shotgun News and Gun List](#) for the wide availability of non-guns, often accompanied by the boast “no FFL (federal firearms license) required!” Widely available movie replicas are usually constructed from real surplus parts but substitute a “dummy receiver” for the original. It is metal, appears genuine, and may include moving parts. Caution: this may open the door for the government to introduce evidence about your client’s knowledge of guns (such as his prior three convictions for gun possession, so be careful).

V. Defenses: Justification, Self-Defense, Transitory Possession

These are defenses in which the defendant admits that he or she had the gun, but explains that there were good reasons to do so. “*Allowing for a meaningful justification defense ensures that 18 U.S.C. § 922(g)(1) does not collide with the Second Amendment.*” *United States v. Gomez*, 92 F.3d 770 n.7 (9th Cir. 1996) (note 7 not joined by Hawkins, Hall, JJ).

Unlawful firearm possession may be justified. It requires a showing of (1) an immediate and unlawful threat of death or serious injury; (2) which was not recklessly brought about by the defendant; (3) where there was no lawful alternative to possession; and (4) where a direct casual connection existed between the firearm possession and avoidance of the harm. *United States v. Gomez*, 92 F.3d 770 (9th Cir. 1996). Many circuits have recognized the justification defense. See also, *United States v. Newcomb*, 6 F.3d 1129 (6th Cir. 1993), as well as cases listed below. The Eighth

Circuit has never recognized the defense. However, they have often indicated that if it were available, the above elements would need to be proved. *United States v. Poe*, 442 F.3d 1101, 1103-04 (8th Cir. 2006). The Supreme Court presumed the accuracy of these elements for duress without specifically adopting them. *Dixon v. United States*, 126 S. Ct. 2437, 2440 (2006).

This defense is much more viable when the time frame of possession is very short. Explaining the presence of a gun through duress, if it does not amount to a defense, may lead to a downward departure for imperfect duress, and it may help distance a firearm from any drugs that may be involved in your case. In general, in most circuits, the defense of justification has replaced the duress and necessity defense in gun cases. See, *Gomez*. Sometimes you may still want to argue necessity or duress, however, depending upon the facts of your case. See, e.g., *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989) (necessity); *United States v. Moreno*, 102 F.3d 994, 997 (9th Cir. 1996) (duress). There is also a defense of self-defense. See, *United States v. Privolos*, 844 F.2d 415, 421 (7th Cir. 1988) (possibility of self-defense where “a convicted felon, reacting out of fear for the life or safety of himself, in the actual, physical course of a conflict that he did not provoke, takes temporary possession of a firearm for the purpose or in the course of defending himself.”) Again, this is now more likely to be folded within the general justification defense in gun cases.

Innocent possession may be a defense as well, It was recognized by the United States Court of Appeals for the D.C. Circuit, in an excellent opinion in *United States v. Mason*, 233 F.3d 619 (D.C. Cir. 2001). In *Mason*, the D.C. Circuit held that a defendant may “successfully invoke the innocent possession defense,” even when there is no justifiable possession defense, when “two general requirements [are] satisfied . . . (1) the firearm was attained innocently and held with no illicit purpose and (2) possession of the firearm was transitory – i.e., in light of circumstances presented, there is a good basis to find that the defendant took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible.” The Court refined the second requirement to note that the defendant had to intend to turn the weapon over to the police and to pursue that intent “with immediacy and through a reasonable course of conduct.” The Court found that this defense was “fully consistent with the legislative purpose underlying § 922(g)(1)” because “it is the retention of [a firearm], rather than the brief possession for disposal . . . , which poses the danger which is criminalized’ by felon-in-possession statutes.” The Court found that this defense “focused precisely on how the defendant came into possession of the gun, the length of time of possession, and the manner in which the defendant acts to rid himself of possession.” If you look at the fact of this case, the fact that the D.C. Circuit found that the district court should have given an innocent possession instruction and submitted the question to the jury is fairly remarkable. The Eighth Circuit has given tacit approval of the existence of this defense as well. *United States v. Montgomery*, 444 F.3d 1023 (8th Cir. 2006).

The government will most likely try to force the defendant’s hand and require a proffer that is not under seal. Unless you want a ruling prior to trial, resist this forced

disclosure of your defense. While there are some cases in which the district court has held a pre-trial hearing or has required an offer of proof, there are also a myriad of cases in which the Court has *first* allowed the admission of evidence and *then* decided whether to give an appropriate instruction at the close of the evidence. See, e.g., *United States v. Mason*, 233 F.3d 619, 624 (D. C. Cir. 2001) (above); *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000) (defendant had testified at trial that he knew he was not allowed to possess a gun, that he knew where in the attic his wife kept her gun, and that he used the gun to scare off a man who shot at him; although it was a close question as to whether defendant was allowed to assert the defense, where the defendant admitted that he did not relinquish the gun and instead hid it back in the attic, the district court “erred on the side of giving the defendant the opportunity to argue this matter to the jury”); *United States v. Elder*, 16 F.3d 733 (7th Cir. 1994) (affirming the district court’s refusal to give jury instructions regarding the necessity defense to possession of a firearm by a felon; defendant was permitted to testify extensively at trial as to facts he believed supported his necessity defense); *United States v. Paul*, 110 F.3d 869 (2nd Cir. 1997) (reversing district court’s refusal to instruct jury on issue of duress; district court had not permitted defendant to present his version of facts to the jury, but decided that there was not sufficient evidence to warrant an instruction; *United States v. Lemon*, 824 F.2d 763 (9th Cir. 1987) (defendant permitted to testify as to reasons for why he possessed the gun; district court did not err in failing to give requested jury instruction regarding self-defense).

In *Dixon v. United States*, 126 S. Ct. 2437 (2006), the Court ruled the burden falls on the defendant to prove duress by a preponderance of the evidence instead of requiring the government to prove beyond a reasonable doubt that she did not act under duress.

VI. Actual and Constructive Possession

Many firearm cases also go to trial on the issues of whether the defendant possessed the firearm. If you are considering this type of defense, make sure to look at the law about “constructive” as opposed to “actual” possession. This type of defense is not specific to gun cases, although it has been applied extensively to gun cases. In general, a person has constructive possession of a firearm as long as he or she had knowledge of and access to it. However, in constructive possession cases, think of the connection with the “knowledge” element, because if a person did not actually possess the firearm, query whether they could have known that it had the characteristics necessary to make it a firearm under the federal code.

VII. Unregistered Weapons/National Firearms Act, 26 U.S.C. § 5861

The most likely charges here are for possession of a machine gun or a short-barreled rifle or shotgun. The defense of these cases involve issues beyond those present in a § 922 case.

First, a great number of factual issues are presented by the definition of firearm. More importantly, there are more knowledge issues in these cases. The defendant must know that the weapon possesses the characteristics that bring it with the act. *Staples v. United States*, 511 U.S. 600 (1994). *Staples* applied to machine guns. Try to apply it to any type of weapon. See, *United States v. Bergen*, 172 F.3d 719 (9th Cir. 1999) (extending to short-barreled shotgun); *United States v. Sanders*, 240 F.3d 1279 (10th Cir. 2001) (applying *Staples* to knowledge of silencer characteristics). Apply this logic to all characteristics, as well; not just the length of the weapon but also whether it is actually a shotgun, to wit; smooth bore and meant to be fired from the shoulder.

Second, it is a defense that the weapon is registered. This will be rare, but it should be explored in discovery, and if the client believes that it was registered, explore the knowledge issue.

Entrapment by estoppel can be important in these cases, as these weapons are surrounded by myriad complicated and contradictory regulations, and their possession is not per se illegal. However, a government official must be guilty of affirmative misconduct in order for a defendant to put forth a viable defense of entrapment by estoppel. *United States v. Bazargan*, 992 F.2d 844, 849 (8th Cir. 1993).

Remember that the definitions of antique are not the same between the § 921 and § 5845 sections! An unregistered weapon must not be able to fire modern ammunition in order to be an antique. A § 922 gun can fire modern ammo as long as it was made before 1898.

VIII. Conclusion

The federal firearm statutes offer fertile ground for a government prosecutor and allow for potential overcharging. In most instances there is no viable substantive defense. Most often, there are serious and damaging admissions made by the client before counsel enters the case. Remember that gun possession occurs in over half the households in the United States and there are a wide variety of circumstances surrounding gun possession. It is not a fair assumption that the majority of gun possession is for offensive purposes.

Where the client's possession falls outside the "norm"; where it constitutes a lesser harm than that which the law meant to proscribe; or where there is evidence of coercion or duress, consideration should be given to addressing those concerns at the sentencing phase with an appropriate departure/variance request.

**CRIMINAL DEFENSE
IN THE
ERA OF SOCIAL MEDIA**

PRESENTED BY

**JANE KELLY AND DIANE HELPHREY
ASST. FEDERAL PUBLIC DEFENDERS**

Sample Jury Instruction

**Northern District of Iowa
Chief Judge Linda R. Reade**

PRELIMINARY INSTRUCTION NO. 7

Finally, to ensure fairness, you as jurors must obey the following rules:

First, do not talk among yourselves about this case, or about anyone involved with it, until the end of the case when you go to the jury room to decide on your verdicts.

Second, do not talk with anyone else about this case, or about anyone involved with it, until the trial has ended and you have been discharged as jurors.

Third, do not use any electronic device or media, such as the telephone, a cell or smart phone, Blackberry, PDA, computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, MySpace, YouTube or Twitter, to communicate to anyone any information about this case until the trial has ended and you have been discharged as a juror.

Fourth, when you are outside the courtroom do not let anyone tell you anything about the case, or about anyone involved with it, until the trial has ended and your verdicts have been accepted by me. If someone should try to talk with you about the case during the trial, please report it to me through the Court Security Officer.

Fifth, during the trial, you should not talk with or speak to any of the parties, lawyers or witnesses involved in this case—you should not even pass the time of day with any of them. It is important not only that you do justice in this case, but that you also give the appearance of doing justice. If a person from one side of the lawsuit sees you talking to a person from the other side—even if it is simply to pass the time of day—an unwarranted and unnecessary suspicion about your fairness might be aroused. If any lawyer, party or witness does not speak to you when you pass in the hall or the like, it is because they are not supposed to talk or visit with you.

(CONTINUED)

PRELIMINARY INSTRUCTION NO. 7 (Cont'd)

Sixth, do not read any news stories or articles about the case, or about anyone involved with it, or listen to any radio or television reports about the case, or about anyone involved with it. In fact, until the trial is over, I suggest that you avoid reading any newspapers or news journals at all, and avoid listening to any TV or radio newscasts at all. I do not know whether there might be any news reports of this case, but, if there are, you might inadvertently find yourself reading or listening to something before you could do anything about it. If you want, you can have your spouse or a friend clip out any stories and set them aside to give you after the trial is over. I can assure you, however, that by the time you have heard the evidence in this case you will know more about the matter than anyone will learn through the news media.

Seventh, do not do any research or make any investigation about the case on your own. Do not consult any reference materials such as the Internet, books, magazines, dictionaries or encyclopedias. Do not contact anyone to ask them questions about issues that may arise in this case. Remember you are not permitted to talk to anyone (except your fellow jurors) about this case or anyone involved with it until the trial has ended and I have discharged you as jurors.

Eighth, do not make up your mind during the trial about what the verdicts should be. Keep an open mind until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence.

Sample Jury Instruction

Northern District of Iowa

District Judge Mark W. Bennett

INSTRUCTION NO. 11 - CONDUCT OF JURORS DURING TRIAL

You must decide this case *solely* on the evidence and your own observations, experiences, reason, common sense, and the law in these Instructions. You must also keep to yourself any information that you learn in court until it is time to discuss this case with your fellow jurors during deliberations.

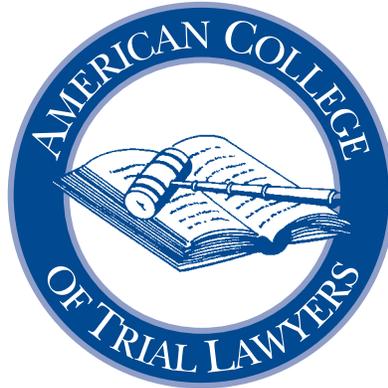
To ensure fairness, you must obey the following rules:

- Do not talk among yourselves about this case, or about anyone involved with it, until you go to the jury room to decide on your verdict
- Do not talk with anyone else about this case, or about anyone involved with it, until the trial is over
- When you are outside the courtroom, do not let anyone tell you anything about this case, anyone involved with it, any news story, rumor, or gossip about it, or ask you about your participation in it until the trial is over. If someone should try to talk to you about this case during the trial, please report it to me.
- During the trial, you should not talk to any of the parties, lawyers, or witnesses—even to pass the time of day—so that there is no reason to be suspicious about your fairness. The lawyers, parties, and witnesses are not supposed to talk to you, either.

- You may need to tell your family, friends, teachers, co-workers, or employer about your participation in this trial, so that you can tell them when you must be in court and warn them not to ask you or talk to you about the case. However, do not provide any information to anyone by any means about this case until after I have accepted your verdict. That means do not talk face-to-face or use any electronic device or media, such as the telephone, a cell or smart phone, Blackberry, PDA, computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, MySpace, YouTube, or Twitter, to communicate to anyone any information about this case until I accept your verdict
- Do not do any research—on the Internet, in libraries, in the newspapers, or in any other way—or make any investigation about this case, the law, or the people involved on your own
- Do not visit or view any place discussed in this case and do not use Internet maps or Google Earth or any other program or device to search for or to view any place discussed in the testimony
- Do not read any news stories or articles, in print, on the Internet, or in any “blog,” about this case, or about anyone involved with it, or listen to any radio or television reports about it or about anyone involved with it, or let anyone tell you anything about any such news reports. I assure you that when you have heard all the evidence, you will know

more about this case than anyone will learn through the news media—and it will be more accurate

- Do not make up your mind during the trial about what the verdict should be. Keep an open mind until you have had a chance to discuss the evidence with other jurors during deliberations
- Do not decide the case based on “implicit biases.” As we discussed in jury selection, everyone, including me, has feelings, assumptions, perceptions, fears, and stereotypes, that is, “implicit biases,” that we may not be aware of. These hidden thoughts can impact what we see and hear, how we remember what we see and hear, and how we make important decisions. Because you are making very important decisions in this case, I strongly encourage you to evaluate the evidence carefully and to resist jumping to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your individual evaluation of that evidence, your reason and common sense, and these instructions. Our system of justice is counting on you to render a fair decision based on the evidence, not on biases
- If, at any time during the trial, you have a problem that you would like to bring to my attention, or if you feel ill or need to go to the restroom, please send a note to the Court Security Officer (CSO), who will give it to me. I want you to be comfortable, so please do not hesitate to tell us about any problem



JURY INSTRUCTIONS CAUTIONING AGAINST
USE OF THE INTERNET AND SOCIAL NETWORKING

Approved by the Board of Regents
September 2010

Permission to reprint the *Jury Instructions Cautioning Against the Use of Internet and Social Networking*
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- 1951-52 C. RAY ROBINSON*
Merced, California
- 1952-53 CODY FOWLER*
Tampa, Florida
- 1953-54 E. D. BRONSON*
San Francisco, California
- 1954-55 CODY FOWLER*
Tampa, Florida
- 1955-56 WAYNE E. STICHTER*
Toledo, Ohio
- 1956-57 JESSE E. NICHOLS*
Oakland, California
- 1957-58 LEWIS C. RYAN*
Syracuse, New York
- 1958-59 ALBERT E. JENNER, JR.*
Chicago, Illinois
- 1959-60 SAMUEL P. SEARS*
Boston, Massachusetts
- 1960-61 LON HOCKER*
Woods Hole, Massachusetts
- 1961-62 LEON JAWORSKI*
Houston, Texas
- 1962-63 GRANT B. COOPER*
Los Angeles, California
- 1963-64 WHITNEY NORTH SEYMOUR*
New York, New York
- 1964-65 BERNARD G. SEGAL*
Philadelphia, Pennsylvania
- 1965-66 EDWARD L. WRIGHT*
Little Rock, Arkansas
- 1966-67 FRANK G. RAICHLE*
Buffalo, New York
- 1967-68 JOSEPH A. BALL*
Long Beach, California
- 1968-69 ROBERT W. MESERVE*
Boston, Massachusetts
- 1969-70 HON. LEWIS F. POWELL, JR.*
Washington, District of Columbia
- 1970-71 BARNABAS F. SEARS*
Chicago, Illinois
- 1971-72 HICKS EPTON*
Wewoka, Oklahoma
- 1972-73 WILLIAM H. MORRISON*
Portland, Oregon
- 1973-74 ROBERT L. CLARE, JR.*
New York, New York
- 1974- AUSTIN W. LEWIS*
New Orleans, Louisiana
- 1975-76 THOMAS E. DEACY, JR.
Kansas City, Missouri
- 1976-77 SIMON H. RIFKIND*
New York, New York
- 1977-78 KRAFT W. EIDMAN*
Houston, Texas
- 1978-79 MARCUS MATTSON*
Los Angeles, California
- 1979-80 JAMES E. S. BAKER*
Chicago, Illinois
- 1980-81 JOHN C. ELAM*
Columbus, Ohio
- 1981-82 ALSTON JENNINGS*
Little Rock, Arkansas
- 1982-83 LEON SILVERMAN
New York, New York
- 1983-84 GAEL MAHONY
Boston, Massachusetts
- 1984-85 GENE W. LAFITTE
New Orleans, Louisiana
- 1985-86 GRIFFIN B. BELL*
Atlanta, Georgia
- 1986-87 R. HARVEY CHAPPELL, JR.
Richmond, Virginia
- 1987-88 MORRIS HARRELL*
Dallas, Texas
- 1988-89 PHILIP W. TONE*
Chicago, Illinois
- 1989-90 RALPH I. LANCASTER, JR.
Portland, Maine
- 1990-91 CHARLES E. HANGER*
San Francisco, California
- 1991-92 ROBERT B. FISKE, JR.
New York, New York
- 1992-93 FULTON HAIGHT*
Santa Monica, California
- 1993-94 FRANK C. JONES
Atlanta, Georgia
- 1994-95 LIVELY M. WILSON*
Louisville, Kentucky
- 1995-96 CHARLES B. RENFREW
San Francisco, California
- 1996-97 ANDREW M. COATS
Oklahoma City, Oklahoma
- 1997-98 EDWARD BRODSKY*
New York, New York
- 1998-99 E. OSBORNE AYSCUE, JR.
Charlotte, North Carolina
- 1999-2000 MICHAEL E. MONE
Boston, Massachusetts
- 2000-2001 EARL J. SILBERT
Washington, District of Columbia
- 2001-2002 STUART D. SHANOR
Roswell, New Mexico
- 2002-2003 WARREN B. LIGHTFOOT
Birmingham, Alabama
- 2003-2004 DAVID W. SCOTT, Q.C.
Ottawa, Ontario
- 2004-2005 JAMES W. MORRIS, III
Richmond, Virginia
- 2005-2006 MICHAEL A. COOPER
New York, New York
- 2006-2007 DAVID J. BECK
Houston, Texas
- 2007-2008 MIKEL L. STOUT
Wichita, Kansas
- 2008-2009 JOHN J. (JACK) DALTON
Atlanta, Georgia

* Deceased

JURY COMMITTEE

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INTRODUCTORY NOTE

The use and misuse of technology in courtrooms and courthouses has raised a number of issues that pose new and difficult challenges to judges, lawyers, jurors and litigants. Across the country, trials have been affected by jurors who, either intentionally or unintentionally, have used technology to conduct unauthorized research or communicate about court proceedings. The American College of Trial Lawyers explored some of these issues at its Fall 2009 meeting in a program entitled “The Dark Side of Technology.” The College recognizes the importance of these issues, and seeks to develop “best practices” for handling the use of technology in the courtroom. These suggested instructions address many of the problems that have come to light in recent years.

The use of these or similar instructions is not without controversy. Despite a growing body of case law concerning the improper use of technology, some believe that the use of specific instructions such as those advocated by the ACTL will serve only to increase the number of violations by suggesting actions that would not otherwise have occurred to jurors. Others take the position that the use of specific instructions, accompanied by an explanation of why certain conduct must be prohibited during trials, will reduce at least the number of inadvertent violations, and may help to deter jurors who would otherwise not understand the potential harm that might flow from their seemingly innocuous actions. The College has concluded that the growing number of model instructions promulgated by the state and federal courts demonstrates the need to provide guidance to jurors, some of whom have shown that, without it, they are prone to lapse into use of the Internet and social networking, to the detriment of the fair administration of justice.¹

The suggested instructions are classified according to time frames or stages of court proceedings, and are tailored to address specific issues that might arise at those times. These materials also include a suggested message for impaneled jurors to send to family and friends explaining the juror’s situation, and a written agreement to be signed by each juror acknowledging the court’s instructions. It is suggested that the formality of a writing may serve to impress upon jurors the gravity of the court’s instructions.

¹ See U.S. Judicial Conference Committee on Court Administration and Case Management, Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case (available at <http://www.uscourts.gov/uscourts/News/2010/docs/DIR10-018-Attachment.pdf>); U.S. Court of Appeals for the Third Circuit General Instruction for Civil Cases 1.2; U.S. Court of Appeals for the Third Circuit Criminal Instruction 1.03; U.S. Court of Appeals for the Eighth Circuit Preliminary Instructions 1.05, 1.08; U.S. Court of Appeals for the Ninth Circuit Model Civil Jury Instruction 1.12; U.S. Court of Appeals for the Ninth Circuit Model Criminal Jury Instruction 1.9; California Civil Jury Instruction 100; Connecticut Civil Jury Instruction 1.1-1; Connecticut Criminal Jury Instruction 1.2-10; Florida General Pool Instructions, Qualifications Instruction; Florida Civil Preliminary Instruction Given Before Voir Dire Begins 201.2; Florida Civil Preliminary Instruction Given After Voir Dire Ends and the Jury Is Sworn 202.2; Florida Civil Closing Instruction 700; Indiana Supreme Court, Cause No. 94S00-1003-MS-128, Rule 20 (Preliminary Instructions) and Rule 26 (Final Instructions); Michigan Court Rule 2.511; Missouri Supreme Court 2.01 Explanatory Instructions for All Cases at (1) Prohibition of Juror Research or Communication about This Case; New York Criminal Jury Instructions, Jury Admonitions in Preliminary Instructions at (4); New York Civil Pattern Jury Instructions 1:10, 1:11; Ohio State Bar Association Jury Instructions I(C)(2)-(3); South Carolina Supreme Court Order 2009-07-20-01 re Juror Use of Personal Communication Devices; Wisconsin Criminal Jury Instruction No. 50.

JURY INSTRUCTIONS CAUTIONING AGAINST USE OF THE INTERNET AND SOCIAL NETWORKING

For Summons to Prospective Jurors

The court understands that you may be unfamiliar with the court system, and that you may have many questions about what to expect from your jury service. In order to assist you in answering some common questions, we have [prepared the enclosed pamphlet] [created a special website], which you should feel free to review before you report to court. If you have questions that are not answered, you may bring them to court with you on the day of your service, or you may call [CONTACT PERSON].

However, in order to assist the court in providing the litigants with a fair trial, it is important that you refrain from conducting any research which might reveal any information about any case pending before the court, or any of the parties involved in any case. Therefore, you should avoid any attempts to learn which cases may be called for trial during your jury service, or anything about the parties, lawyers or issues involved in those cases. Even research on sites such as Google, Bing, Yahoo, Wikipedia, Facebook or blogs, which may seem completely harmless, may lead you to information which is incomplete, inaccurate, or otherwise inappropriate for your consideration as a prospective juror. The fair resolution of disputes in our system requires that jurors make decisions based on information presented by the parties at trial, rather than on information that has not been subjected to scrutiny for reliability and relevance.

REFERENCES:

Russo v. Takata Corp., 2009 WL 2963065 (S.D. 9/16/09).

Instructions for Impaneled Jurors

Now that you have been chosen as jurors for this trial, you are required to decide this case based solely on the evidence and the exhibits that you see and hear in this courtroom. At the end of the case, I will give you instructions about the law that you must apply, and you will be asked to use that law, together with the evidence you have heard, to reach a verdict. In order for your verdict to be fair, you must not be exposed to any other information about the case, the law, or any of the issues involved in this trial during the course of your jury duty. This is very important, and so I am taking the time to give you some very detailed explanations about what you should do and not do during your time as jurors.

First, you must not try to get information from any source other than what you see and hear in this courtroom. This means you may not speak to anyone, including your family or friends. You may not use any printed or electronic sources to get information about this case or the issues involved. This includes the internet, reference books or dictionaries, newspapers, magazines, television, radio, computers, Blackberries, iPhones, Smartphones, PDAs, or any other electronic device. You may not do any personal investigation, including visiting any of the places involved in this case, using Internet maps or Google Earth, talking to any possible witnesses, or creating your own demonstrations or reenactments of the events which are the subject of this case.

Second, you must not communicate with anyone about this case or your jury service, and you must not allow anyone to communicate with you. In particular, you may not communicate about the case via emails, text messages, tweets, blogs, chat rooms, comments or other postings, Facebook, MySpace, LinkedIn, or any other websites. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, and the people involved in the trial, although you may notify your family and your employer that you have been seated as a juror in the case. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

The court recognizes that these rules and restrictions may affect activities that you would consider to be normal and harmless, and I assure you that I am very much aware that I am asking you to refrain from activities that may be very common and very important in your daily lives. However, the law requires these restrictions to ensure the parties have a fair trial based on the evidence that each party has had an opportunity to address. If one or more of you were to get additional information from an outside source, that information might be inaccurate or incomplete, or for some other reason not applicable to this case, and the parties would not have a chance to explain or contradict that information because they wouldn't know about it. That's why it is so important that you base your verdict only on information you receive in this courtroom.

Some of you may have heard about trials where the jurors are not permitted to go home at night, or were sequestered for the entire length of the trial. For a variety of reasons, this is something we rarely do anymore. It is far more of an imposition on your lives than the court wishes to make. However, it was effective in keeping jurors away from information that might affect the fairness of the trial—that was the entire purpose.

You must not engage in any activity, or be exposed to any information, that might unfairly affect the outcome of this case. Any juror who violates these restrictions I have explained to you jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over. As you can imagine, a mistrial is a tremendous expense and inconvenience to the parties, the court and the taxpayers. If any juror is exposed to any outside information, or has any difficulty whatsoever in following these instructions, please notify the court immediately. If any juror becomes aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that to the court as well. If anyone tries to contact you about the case, either directly or indirectly, or sends you any information about the case, please report this promptly as well.

These restrictions must remain in effect throughout this trial. Once the trial is over, you may resume your normal activities. At that point, you will be free to read or research anything you wish. You will be able to speak—or choose not to speak—about the trial to anyone you wish. You may write, or post, or tweet about the case if you choose to do so. The only limitation is that you must wait until after the verdict, when you have been discharged from your jury service.

REFERENCES:

U.S. v. Hernandez et al, No. 07-60027-CR (S.D. Fla. 2009): In a case from Florida, Federal prosecutors spent two years building their case against defendants accused of participating in an illegal internet pharmacy network. The judge, however, declared a mistrial when he discovered that 8 members of the jury had performed their own internet research on the case. These jurors Googled defendants' names and definitions of medical terms. Another juror discovered evidence that had been excluded from testimony. One alternate juror used the internet on his cell phone during breaks to conduct his own research.

U.S. v. Fumo, 2009 U.S. Dist. LEXIS 51581 (E.D. Penn. June 17, 2009): In a Federal corruption trial in Pennsylvania, a juror posted remarks about the trial and the jury deliberations to Facebook and Twitter. The juror even told readers that "a big announcement" was coming. Another Juror learned that the defendant had a prior overturned conviction. Regardless, the judge allowed trial to continue and the jury found the defendant guilty. A motion for a new trial was denied.

Courtroom Conduct

While court is in session, jurors, parties, witnesses, attorneys and spectators are not permitted to use electronic devices unless specifically authorized by the court. This includes sending or receiving phone calls, voice mails, text messages, tweets, or accessing the internet. No electronic device may be used to record, photograph or film any of the court proceedings.

When you arrive at the courthouse in the morning, you will be asked to give any electronic devices to the court officer. These devices will be returned to you at the end of the court day. You will be provided with a telephone number in the courtroom that your family may use to contact you in the event of an emergency. Any emergency message will be received by the court staff and communicated to you at the appropriate time.

REFERENCES:

Sky Development Inc. v. Vistaview Development Inc., 2007-32308-CA-01 (Fla. Miami-Dade County Ct. 2009): In a Florida circuit court case, a judge dismissed plaintiff's civil fraud case after finding out that a witness on the stand was texting his boss while the judge and attorneys were at sidebar. The texts were related to the content of the witnesses' testimony. Basically, the boss was telling the witness what to say during his testimony. The misconduct was brought to light when a courtroom spectator passed a note to the defense counsel informing him of the texts.

**Suggested Message for Impaneled
Jurors to Send to Family and Friends**

I am sending this message to you as instructed by Judge _____. I am now a sworn juror in a trial. I am under a court order not to read or discuss anything having to do with the trial, the parties or lawyers involved, or anything else concerning my jury service. Please do not send me any information about the case or my jury duty, and please do not ask me any questions or make any comments about the case or my jury duty. I will be following these rules for the length of the trial, which is expected to last approximately _____. I will send another note when my jury duty is completed and I am not required to follow the court order.

Suggested Statement of Compliance for Jurors to Sign

I agree that during the duration of the trial in _____, I will not conduct any independent research into any of the issues or parties involved in this trial. I will not communicate with anyone about the issues or parties in this trial, and I will not permit anyone to communicate with me. I further agree that I will report any violations of the court's instructions immediately.

JUROR No. _____

American College of Trial Lawyers
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Irvine, California 92612
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Website: www.actl.com

**REPRESENTING
MINORITY
DEFENDANTS**

PRESENTED BY

**ALFREDO PARRISH
CJA PANEL ATTORNEY**

Federal Public Defender and IACDL's Spring 2011 Seminar
Federal Criminal Law and Procedure
May 26, 2011

Neal and Bea Smith Law Center
Drake Law School Legal Clinic
2400 University, Des Moines, Iowa

REPRESENTING MINORITY DEFENDANTS

Alfredo Parrish, CJA Panel Attorney

Prepared with the assistance of Margaret Stuart, Associate, Parrish, Kruidenier, Dunn,
Boles, Gribble, Parrish, Gentry & Fisher LLP

Representing Minority Defendants

Alfredo Parrish

- I. Iowa's Prison Population, 2010 (from the Iowa Department of Human Rights, Division of Criminal and Juvenile Justice Planning).
 - A. The percentage of African-American inmates in Iowa's prison system increased from 22.4 percent in 1990 to 23.5 percent in 2000 to 25.4 percent in 2010.
 - B. The percentage of Latino, Native American, and Asian inmates has also steadily increased in Iowa from 2.3 percent in 1990 to 7.6 percent in 2000 to 9.5 percent in 2010.
 - C. Hispanics tend to be over-represented in drug crimes, OWI, and crimes against persons, and under-represented in property and public order offenses.
 - D. A significant percentage of "safekeepers" held for federal prosecution have been Hispanic.
- II. Iowa's Prison Population Forcast, 2020 (from the Iowa Department of Human Rights, Division of Criminal and Juvenile Justice Planning).
 - A. African Americans will continue to be over-represented in the prison population in 2020. Their percentage is expected to rise slightly in the coming years.
 - B. A large change in population is expected among Latino inmates, as Iowa's Latino population rises dramatically in the coming years. If the Latino prison population rises to the same extent as is projected in the general population, Iowa can expect an increase from 590 Latino inmates at the end of 2010 to 964 at the end of 2020.
- III. Overrepresentation of minority youth in Iowa's juvenile detention centers (from Governor Culver's Youth Race and Detention Task Force Findings and Recommendations).
 - A. Minorities are overrepresented in Iowa's juvenile detention centers, and that overrepresentation is increasing. In 2007, while minority youth comprised just 13 percent of Iowa's youth population, they comprised nearly 40 percent of detention facility holds.

B. Arrests of African American youth have increased nearly *60 percent* in recent years (arrests for simple misdemeanors, assault (49% increase) and disorderly conduct (213% increase) influenced the increase).

C. African-American youth are arrested at a rate nearly *six times* higher than Caucasian youth (increases in arrests for girls exceed increases for boys).

D. Minority youth are especially overrepresented among probation holds, constituting roughly 40 percent of all probation holds, regardless of offense severity.

E. Caucasian and African-American youth have comparable recidivism rates.

IV. Sources of Disparity

A. Marc Mauer, Executive Director of The Sentencing Project, testified before the U.S. House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, October 29, 2009, that, according to a 2004 study, 61 percent of racial disparity in imprisonment can be explained by greater involvement in crime, leaving 39 percent of disparity that cannot be attributed to offending patterns. The study was national, but it's reasonable to believe it has implications in Iowa.

B. There is no single source of disparity in the overrepresentation of minorities in Iowa's criminal justice system. Iowa's Criminal and Juvenile Justice Planning Advisory Council recommended funding be made available to identify underlying causes so that appropriate policy changes can be implemented. But lawyers need to act *now* on what we do know – that biases exist in all facets of our justice system, including law enforcement, county attorney offices, the judicial branch, corrections, etc. – to ensure their clients receive equitable treatment. And did I mention that defense lawyers – all of us -- need to take a hard look at our own biases?

V. Failure to understand your client's culture, and how it plays in the courtroom, can lead to a disparate outcome.

A. Consider the rather extreme example of Hen Van Nguyen, the subject of a 2005 Drake Law Review article. 53 Drake L. Rev. 651. Hen Van Nguyen, a Vietnamese immigrant charged with *theft* in Georgia, sat in trial for *murder* two days stating repeatedly "not me, not me." None of the courtroom participants saw Mr. Nguyen as an individual. The judge, prosecutor, defense

attorney, interpreter, and sheriff's officers all failed to listen to him. Finally, a witness in the theft case recognized Mr. Nguyen as the wrong defendant in the murder trial and sent a note to the prosecution table. *Id.*, citing *Tieu v. State*, 358 S.E.2d 247, 249 (Ga. 1987) (Smith, J., dissenting) (noting that Hen Van Nguyen "sat in the courtroom for two days while" being repeatedly identified by witnesses as Tieu).

VI. Rights Affected.

A. The 5th and 6th Amendments to the United States Constitution guarantee criminal defendants due process, the right to be present at trial, and the right to a fair trial. Cultural barriers may prevent the minority defendant from understanding the court proceedings or participating in his or her own defense.

VII. Things you can do now to help your minority client (and all of your defendants).

A. Your Initial Meeting – "You never get a second chance to make a first impression".

1. Determine whether they need an interpreter.

2. Make good eye contact. Be sincere. Show an interest in the client other than the fact you are his lawyer. Finding out about the client's family or relationships is critical. Ask about how they have been treated. If they have been mistreated by the arresting officers or a person who has interviewed them regarding bond issues, this can spill over to the client's first impression of you.

3. Take a detailed history, including their geographic and socioeconomic origins, their childhood, their mental health, their extended family, traumatic events and highlights in their lives, their education, their grades, things of importance to them, their work and their financial situation.

4. We all know the importance of a detailed first interview. See if there is an extended family or relationships that don't fall within the ordinary. These can be step fathers, coaches (if they participated in sports), the minister of the church, a teacher who has taken an interest in the client, etc.

5. Don't sugar-coat the charges or hesitate to find out as much information about the client as possible. Oftentimes, lawyers don't want to put their client in an embarrassing situation. Delve as deeply as possible into the client's background as necessary. In a recent interview with a bi-racial client, I found out he was beaten up by a close black friend because he refused to join a gang. This may be excellent information to use in the sentencing brief.

6. Have the client write a short autobiography. Make it part of your requirement. Have them bring in photographs of the family and/or children. You will find excellent material when the client is allowed to write down his/her thoughts.

7. Find out what books they read, TV shows they watch and the music the client listens to.

8. Take this opportunity to learn about their culture. Ask them about it. Follow up with your own research – Google it.

9. Explain the legal jeopardy they're facing, making sure you outline all of the players including the judges, the pretrial officers, the arresting officers, courthouse security personnel, court reporters and all other essential court personnel.

10. Explain and write out what steps they will go through. Confirm that they understand what will happen next. I like to give clients an agenda and let them know in advance they should bring a list of questions into conferences.

11. If they are African American or come from an autocratic culture, they may have an intense distrust of the government, and may even believe you are aligned with the government and fail to cooperate with you. If you don't keep an office brochure, it is important for you to explain to the client what a CJA lawyer does. This applies equally to state court appointed lawyers. The Washington State Minority and Justice Task Force found that "minorities believe that bias pervades the entire legal system." (Final Report 10 (1990), available at <http://www.courts.wa.gov/committee/pdf/TaskForce.pdf>.) Explain to your client that you are acting as their lawyer independent of the prosecutor and judge and that you are there to protect their rights alone. In the alternative, a minority client who fears authority may be inclined to agree to whatever prosecutors demand, including admitting to crimes they did not commit. Take special care in cautioning minority defendants in this category to refrain from making concessions (or confessions), or talking to authorities generally. It is critical that you explain the confidential nature of the relationship.

12. Explain the extent to which their family members will be allowed to participate in their meetings with you and in court appearances. It is important to understand that if a family member decides to come to the meetings, it is a sign the person is there for the long haul and in many cases will be an asset in working with your client.

13. If your initial meeting is in court, tell your client quickly that you will get a chance to see them later in the marshal's office or at the jail and will go into more detail about the case.

14. Advise your staff if you have a minority client. Make sure you have oriented them on issues dealing with racial and cultural biases.

15. Encourage the client to bring the children to the office. We have a kid's corner in our office. If the children are young, you can learn a lot about your client based on how they treat their children.

16. In my opinion, even though clients want to feel you are a competent lawyer, minority clients have an interest in how you relate to diversity issues. Do you have diverse art in your office? Are there photographs in your office demonstrating you welcome diversity? Is your staff diverse? You can have school photos, family photos or simply photos of famous people. If you don't get the opportunity to have the client visit your office, you can always have a discussion about who the client's hero might be and engage in a discussion about that person. If it is someone you don't know, get busy reading up on them.

Emphasize the importance of being on time and dressed properly for court. Let the client know if there are problems at the jail, the client should keep you update.

B. Plea Bargaining

1. There is no such thing as "playing the race card." However, exploring pertinent cultural issues with the prosecutor is critical to getting the best possible result for your client. In most offices in this state and the federal prosecutors' office, there are few minority prosecutors to bounce ideas off of. Therefore, it is important to educate the prosecutor, who often times believes there is no bias in their office.

2. In order to seriously explore a plea agreement, gather all the information about your client and his family and make a disclosure to the prosecutor. Include any mitigating factors that are created due to his race, such as a father in prison, a violent incident toward a member of his family, success as an elementary student, good athleticism or any other factors that could help influence a decision to reduce a charge.

3. If the client is truly remorseful and is willing, have them prepare a letter to the victim.

4. Obtain letters from family members, friends, church leaders, former teachers, et al.

5. Explore all areas in which the defendant experienced discrimination, including school, prior contacts with the justice system, issues with ineffective representation and where they think the sentencing judge was unfair due to his race.

6. During this process, thoroughly explore the sentencing guidelines with the client and explain how these guidelines will assist you, the court and the prosecutor in reaching a resolution if there is a plea or conviction.

7. Encourage the client to be particularly candid during plea negotiations.

8. Make sure you review the entire plea including the factual basis.

9. Is the client satisfied with their lawyer-- like it or not -- this must be explored. Don't wait until the judge asks that question and get a big surprise.

10. Familiarize client with the particular judge's plea colloquy. Read it verbatim and make sure it is understood.

11. Outline the appeal issues and advise the client of the right to develop and issue if you don't do an adequate job representing them.

12. Make sure all family members who want to attend the plea are notified to do so.

13. The client should dress appropriately.

14. Review how the client should address the court including having good eye, speaking clearly and properly addressing the court and prosecutor. Make sure they don't mutter or say uh huh or uh uh!!!

15. If the client goes into custody, make sure the role of the marshal and correctional officers are explained (try to avoid future problems).

C. Cooperation

1. This is a delicate adventure with minority clients.

2. Make sure all of the options are laid out, including Rule 35.

3. Explore if other family members have information that might be valuable.

4. There might be a strong reluctance to being a “snitch”- outline the client’s options but emphasize the danger of telling half-truths.

5. Family involvement is always a concern, and it is important to assure the client that you will protect other family members from an indictment.

D. Jury Selection

1. The accused’s right under the Sixth and Fourteenth Amendments to be judged by a jury representing a reasonable cross section of the community is a practical consideration when representing minority clients.

2. If your client’s case comes down to his word versus a white police officer’s eye-witness testimony, your ability to generate reasonable doubt will likely be greater if you have assured the presence on the jury of minority members who have had life experiences similar to your client’s.

3. In cases involving overwhelming evidence especially, the best option you may have for representing your client is securing a jury venire most representative of your client’s community.

4. *Batson v. Kentucky* (476 U.S. 79 (1986)) held that the Equal Protection Clause forbids the state from challenging potential jurors solely on their race, and shifts the burden to the prosecutor to prove a permitted basis for striking the juror. Challenge a prosecutor’s preemptory strike if you believe their justification for striking is contrived.

5. Submit key questions.

6. Prepare client for racial makeup of jury.

7. Introduce client to jury.

8. Question of race must be addressed. Do you work with minorities? Do you think we live in a post-racial society because Obama is president? Do you harbor any ill will due to the race of an individual?

9. Don’t be afraid to touch your client.

E. Trial

1. Interpreters.

2. Dress.

3. Cultural habits.

- a. Speaking in an unnaturally loud or soft voice.
 - b. Failing to verbalize remorse.
 - c. Using exaggerated gestures.
 - d. Failing to express emotions.
 - e. Failing to make eye contact. Eye contact is critical in evaluating the credibility of a witness in our own culture, but can be problematic for some minority defendants. Avoiding eye contact indicates deception in Western culture, but in certain Asian cultures is a sign of respect. Direct eye contact is considered inappropriate in the traditional Navajo culture. 53 Drake L. Rev. at 660. Don't let this minor inconsistency in cultural habits assume unwarranted importance in the courtroom – ask your client about their habits regarding eye contact and come up with a plan that either involves assuming the appropriate level of contact or explaining the cultural difference to the court and jury (don't force your client to make a change in habit that is going to cause them to feel and look uncomfortable, and create a problem of different sort).
4. Fear. Prepare your client early for their day in court. Take them to the courthouse and into the courtroom before trial. You may even want to put your client in the jury box and ask them questions to familiarize them with the setting.
 5. Outside of the courtroom. Remind your client that they will be watched both inside and outside of the courtroom. Jurors may arrive at and leave the courthouse, and take breaks, at the same time as the defendant. They may see the car the defendant arrives to court in, and the persons with whom he arrives. They may observe those individuals later, or in the courtroom, and draw conclusions about your client based on the behavior or appearance of those persons.
 4. Cultural Knowledge. Cultural knowledge – or ignorance – can affect the outcome of your case.
 5. Appropriate dress.
 6. Timeliness.
 7. Have the client take notes.
 8. Have the client make eye contact with the jury without staring.

9. Explain that his family or friends should have contact with the jurors.
10. If the client is testifying, substantial time is necessary to prepare – you can't wing it.

F. The Verdict

1. Explain it to the client and to family.
2. Send a letter to your client with your version of what happened during trial.
3. Meet with your client at first opportunity.

G. Sentencing

1. Use information collected pre-trial.
2. Obtain character letters- try to present people who know the client well and who understand his strengths, as well as weaknesses.
3. Review treatment programs and explore any new health issues.
4. Use photographs and videos.
5. Point out how discrimination has impacted his current situation.
6. Get support letters from parents and other family members.
7. Review the client's autobiography and add relevant documents.
8. Prepare allocution. Review it with the client. See *Bennett's* article.
9. Thoroughly review the draft PSIR with your client and insist they read it

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ELECTRONIC MEDIA IN THE COURTROOM

Trial Director and PowerPoint

PRESENTED BY

**TIM ROSS-BOON, ASST. FPD
ELLEN WORKMAN, PARALEGAL, FPD**

ELECTRONIC MEDIA

- I. The coming trend in Federal Courts
 - A. Districts going to mandatory electronic presentations
 - B. Southern District probably never will make it mandatory
 - C. U.S. Attorney already using some form in almost every case
 - D. Visuals are powerful

- II. Not as hard as it looks
 - A. User friendly - play around

- III. Trial Director
 - A. Defender Services makes available to Panel attorneys at reduced price

 - B. Not a search engine. Plenty of software on the market for navigating high volume discovery cases:
 - 1. Suagit
 - 2. Camtasia
 - 3. Intact
 - C. Interactive nature very powerful.
 - D. Just as in normal trial prep, isolate documents to be used - exhibits, impeachment documents
 - E. Download into Trial Director
 - F. Media capability: Can handle Government cds etc.
 - 1. Internet, U-tube , etc.
 - 2. Call-ups - various tools
 - G. Interface with courtroom technology
 - 1. Can isolate judges and lawyers from jury and public
 - H. Portable scanners
 - I. Effective for direct and cross - call ups, highlights, side-by-side etc.
 - J. Caution: Don't over-use.

IV. Powerpoint

- A. Versatile, user friendly
- B. Create slides - static, non-interactive
- C. Good for summaries, closings, openings
- D. Powerful for sentencing in right case
 - 1. Video, clipart, graphics, charts
 - 2. Music, internet content
 - 3. Color background
- E. Don't overuse
 - 1. Studies have shown can take away from presentation if not effective
- F. Tools: Transition, animation, inserts, bullets

V. Conclusion

- A. Start small - 1 slide even, 1 document
- B. Play around - experiment, explore
- C. Waive of the future

VI. Demonstration

- A. Cross Examination
- B. Closing Argument



Office of Defender Services Training Branch

Pursuant to the Criminal Justice Act (CJA), the law governing the provision of federal criminal defense services to those unable to afford representation, the Office of Defender Services (ODS) of the Administrative Office of the U.S. Courts, primarily through the ODS Training Branch (ODSTB), provides substantial training and other resource support to Federal Defender Organization (FDO) staff and CJA panel attorneys. The Training Branch has seven principal tasks:

- Providing substantive information on federal criminal law and procedure, publications, training materials and other online resources to CJA panel attorneys and FDO staff through the Training Branch websites, www.fd.org and www.capdefnet.org.
- Designing, implementing and teaching at national and local training programs for CJA panel attorneys and FDO attorneys, paralegals, and investigators.
- Delivering training programs to FDO attorneys, paralegals and investigators through an interagency agreement with the Federal Judicial Center (FJC) and assisting in the design of those programs.
- Working with contractors on the planning and implementation of federal death penalty and federal capital habeas corpus training for FDO staff and CJA panel attorneys.
- Providing guidance and information to members of the CJA panel and FDO staff on CJA cases regarding all aspects of criminal law and procedure through our hotline (800-788-9908).
- Implementing the Supreme Court Advocacy Program, which arranges moots, performs legal research, provides substantive and strategic advice, or editing and writing drafts of merits briefs, to CJA panel members and FDO attorneys representing CJA-eligible defendants in the United States Supreme Court.
- Providing advice and consultation on litigation support tools, services and processes to federal courts, federal defender organizations, and CJA panel attorneys.

The Training Branch's main number is (202) 502-2900.

**SPECIAL CONDITIONS
OF SUPERVISED
RELEASE**

PRESENTED BY

**JILL JOHNSTON
ASSISTANT FEDERAL PUBLIC DEFENDER**

SPECIAL CONDITIONS OF SUPERVISED RELEASE

- I. STATUTORY AUTHORITY
- II. DISCRETIONARY CONDITIONS
- III. GENERAL PRINCIPLES
- IV. TROUBLESOME SPECIAL CONDITIONS
 - No computer and Internet access
 - No pornography
 - No contact/movement restrictions
 - No alcohol
- V. PRIOR NOTICE/PRESERVATION OF ERROR

107-273, Div. B, Title III, § 3006, Nov. 2, 2002, 116 Stat. 1806.)

HISTORICAL AND STATUTORY NOTES

References in Text

The Federal Rules of Criminal Procedure, referred to in text, are set out in Title 18.

The Comprehensive Drug Abuse Prevention and Control Act of 1970, referred to in subsec. (d), is Pub.L. 91-513, Oct. 27, 1970, 84 Stat. 1236, as amended, which is classified principally to chapter 13 of Title 21, Food and Drugs [21 U.S.C.A. § 801 et seq.]. For complete classification of this Act to the Code, see Short Title note set out under section 801 of Title 21 and Tables.

Effective and Applicability Provisions

1996 Acts. Amendment by section 604 of Pub.L. 104-294 effective Sept. 13, 1994, see section 604(d) of Pub.L. 104-294, set out as a note under section 13 of this title.

1984 Acts. Section effective on the first day of first calendar month beginning thirty-six months after Oct. 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 239 of Pub.L. 98-473, and except as otherwise provided for therein, see section 235 of Pub.L. 98-473, as amended, set out as a note under section 3551 of this title.

§ 3583. Inclusion of a term of supervised release after imprisonment

(a) In general.—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) Authorized terms of supervised release.—Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors to be considered in including a term of supervised release.—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

(d) Conditions of supervised release.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(e) **Modification of conditions or revocation.**—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)—

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applica-

ble to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) **Written statement of conditions.**—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) **Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing.**—If the defendant—

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release; or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(6) that the defendant—

(A) make restitution in accordance with sections 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and

(B) pay the assessment imposed in accordance with section 3019;

(7) that the defendant will notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments;

(8) for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act; and

(9) that the defendant cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000.

If the court has imposed and ordered execution of a fine and placed the defendant on probation, payment of the fine or adherence to the court-established installment schedule shall be a condition of the probation.

(b) Discretionary conditions.—The court may provide, as further conditions of a sentence of probation, to the extent that such conditions are reasonably related to the factors set forth in section 3553(a)(1) and (a)(2) and to the extent that such conditions involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2), that the defendant—

(1) support his dependents and meet other family responsibilities;

(2) make restitution to a victim of the offense under section 3556 (but not subject to the limitation of section 3663(a) or 3663A(c)(1)(A));

(3) give to the victims of the offense the notice ordered pursuant to the provisions of section 3555;

(4) work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip him for suitable employment;

(5) refrain, in the case of an individual, from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business, or profession only to a stated degree or under stated circumstances;

(6) refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons;

(7) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(8) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(9) undergo available medical, psychiatric, or psychological treatment, including treatment for drug or alcohol dependency, as specified by the court, and remain in a specified institution if required for that purpose;

(10) remain in the custody of the Bureau of Prisons during nights, weekends, or other intervals of time, totaling no more than the lesser of one year or the term of imprisonment authorized for the offense, during the first year of the term of probation or supervised release;

(11) reside at, or participate in the program of, a community corrections facility (including a facility maintained or under contract to the Bureau of Prisons) for all or part of the term of probation;

(12) work in community service as directed by the court;

(13) reside in a specified place or area, or refrain from residing in a specified place or area;

(14) remain within the jurisdiction of the court, unless granted permission to leave by the court or a probation officer;

(15) report to a probation officer as directed by the court or the probation officer;

(16) permit a probation officer to visit him at his home or elsewhere as specified by the court;

(17) answer inquiries by a probation officer and notify the probation officer promptly of any change in address or employment;

(18) notify the probation officer promptly if arrested or questioned by a law enforcement officer;

(19) remain at his place of residence during non-working hours and, if the court finds it appropriate, that compliance with this condition be monitored by telephonic or electronic signaling devices, except that a condition under this paragraph may be imposed only as an alternative to incarceration;

(20) comply with the terms of any court order or order of an administrative process pursuant to the law of a State, the District of Columbia, or any other possession or territory of the United States, requiring payments by the defendant for the support and maintenance of a child or of a child and the parent with whom the child is living;

(21) be ordered deported by a United States district court, or United States magistrate judge,

pursuant to a stipulation entered into by the defendant and the United States under section 238(d)(5) of the Immigration and Nationality Act, except that, in the absence of a stipulation, the United States district court or a United States magistrate judge, may order deportation as a condition of probation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable;

(22) satisfy such other conditions as the court may impose or;

(23) if required to register under the Sex Offender Registration and Notification Act, submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of probation or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(c) **Modifications of conditions.**—The court may modify, reduce, or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term of probation, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the conditions of probation.

(d) **Written statement of conditions.**—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the sentence is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(e) **Results of drug testing.**—The results of a drug test administered in accordance with subsection (a)(5) shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A defendant who tests positive may be detained pending verification of a positive drug test result. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with Unit-

ed States Sentencing Commission guidelines from the rule of section 3565(b), when considering any action against a defendant who fails a drug test administered in accordance with subsection (a)(5).

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1993, and amended Pub.L. 99-646, §§ 11(a), 12(a), Nov. 10, 1986, 100 Stat. 3594; Pub.L. 100-182, §§ 10, 18, Dec. 7, 1987, 101 Stat. 1287, 1270; Pub.L. 100-690, Title VII, §§ 7086, 7110, 7303(a)(1), 7305(a), Nov. 18, 1988, 102 Stat. 4408, 4419, 4464, 4465; Pub.L. 101-647, Title XXXV, § 3584, Nov. 29, 1990, 104 Stat. 4930; Pub.L. 102-521, § 3, Oct. 25, 1992, 106 Stat. 3404; Pub.L. 103-322, Title II, § 20414(b), Title XXVIII, § 280002, Title XXXII, § 320921(b), Sept. 13, 1994, 108 Stat. 1830, 2096, 2130; Pub.L. 104-132, Title II, § 203, Apr. 24, 1990, 110 Stat. 1227; Pub.L. 104-208, Div. C, Title III, §§ 308(g)(10)(E), 374(b), Sept. 30, 1996, 110 Stat. 3009-625, 3009-647; Pub.L. 104-294, Title VI, § 601(k), Oct. 11, 1996, 110 Stat. 3501; Pub.L. 105-119, Title I, § 115(a)(8)(B)(i) to (iii), Nov. 26, 1997, 111 Stat. 2465; Pub.L. 106-546, § 7(a), Dec. 19, 2000, 114 Stat. 2734; Pub.L. 107-273, Div. B, Title IV, § 4002(c)(1), (e)(12), Nov. 2, 2002, 116 Stat. 1808, 1811; Pub.L. 109-248, Title I, § 141(d), Title II, § 210(a), July 27, 2006, 120 Stat. 603, 615; Pub.L. 110-406, § 14(a), (c), Oct. 13, 2008, 122 Stat. 4294.)

HISTORICAL AND STATUTORY NOTES

References in Text

The Sex Offender Registration and Notification Act, referred to in subsecs. (a)(3), (b)(23), is Pub.L. 109-248, Title I [§ 101 et seq.], July 27, 2006, 120 Stat. 590, which is classified principally to chapter 151 of Title 42, 42 U.S.C.A. § 16901 et seq. For complete classification, see Short Title note set out under 42 U.S.C.A. § 16901 and Tables.

Section 3 of the DNA Analysis Backlog Elimination Act of 2000, referred to in subsec. (a)(9), is Pub.L. 106-546, § 3, Dec. 19, 2000, 114 Stat. 2728, which is classified to section 14135a of Title 42.

Section 238(d)(5) of the Immigration and Nationality Act, referred to in subsec. (b)(21), is section 238(d)(5) of Act June 27, 1952, as added, amended, and redesignated, which is classified to section 1228(c)(5) of Title 8, Aliens and Nationality.

The Federal Rules of Criminal Procedure, referred to in subsec. (c), are set out in this title.

The United States Sentencing Commission guidelines, referred to in subsec. (e), are the Federal Sentencing Guidelines, set out in this title.

Codifications

Amendment by section 3584(1) of Pub.L. 101-647 directed the substitution of "defendant" for "defendant" in subsec. (a)(3). Such substitution had already been editorially executed, therefore, no further change was required.

Section 601(k) of Pub.L. 104-294, which directed that subsec. (a) of be amended by striking "and" at the end of par. (3); by striking the period at the end of first par. (4) and inserting "; and"; by redesignating the second par. (4) as (5); and by placing pars. (4) and (5), as so amended and redesignated, in numerical order, was incapable of execution except for insertion of "; and" due to prior amendment by section 203(1)(A) to (C) of Pub.L. 104-132. See also 2002 and 1996 Amendments notes set out under this section.

Background: This section specifies the length of a term of supervised release that is to be imposed. Subsection (c) applies to statutes, such as the Anti-Drug Abuse Act of 1986, that require imposition of a specific minimum term of supervised release.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 52); November 1, 1989 (see Appendix C, amendment 302); November 1, 1995 (see Appendix C, amendment 529); November 1, 1997 (see Appendix C, amendment 570); November 1, 2001 (see Appendix C, amendment 615); November 1, 2002 (see Appendix C, amendments 637 and 646); November 1, 2004 (see Appendix C, amendment 664); November 1, 2005 (see Appendix C, amendment 679); November 1, 2007 (see Appendix C, amendment 701); November 1, 2009 (see Appendix C, amendment 736).

§5D1.3. Conditions of Supervised Release

(a) Mandatory Conditions--

- (1) the defendant shall not commit another federal, state or local offense (see 18 U.S.C. § 3583(d));
- (2) the defendant shall not unlawfully possess a controlled substance (see 18 U.S.C. § 3583(d));
- (3) the defendant who is convicted for a domestic violence crime as defined in 18 U.S.C. § 3561(b) for the first time shall attend a public, private, or private non-profit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is available within a 50-mile radius of the legal residence of the defendant (see 18 U.S.C. § 3583(d));
- (4) the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release on probation and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant (see 18 U.S.C. § 3583(d));
- (5) if a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine (see 18 U.S.C. § 3624(e));
- (6) the defendant shall (A) make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013;
- (7) (A) in a state in which the requirements of the Sex Offender Registration and Notification Act (see 42 U.S.C. §§ 16911 and 16913) do not apply, a defendant convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4) (Pub. L. 105-119,

§ 115(a)(8), Nov. 26, 1997) shall report the address where the defendant will reside and any subsequent change of residence to the probation officer responsible for supervision, and shall register as a sex offender in any State where the person resides, is employed, carries on a vocation, or is a student; or

- (B) in a state in which the requirements of Sex Offender Registration and Notification Act apply, a sex offender shall (i) register, and keep such registration current, where the offender resides, where the offender is an employee, and where the offender is a student, and for the initial registration, a sex offender also shall register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence; (ii) provide information required by 42 U.S.C. § 16914; and (iii) keep such registration current for the full registration period as set forth in 42 U.S.C. § 16915;
- (8) the defendant shall submit to the collection of a DNA sample from the defendant at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 14135a).
- (b) The court may impose other conditions of supervised release to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (C) the need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission.
 - (c) (Policy Statement) The following "standard" conditions are recommended for supervised release. Several of the conditions are expansions of the conditions required by statute:
 - (1) the defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer;
 - (2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
 - (3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
 - (4) the defendant shall support the defendant's dependents and meet other family responsibilities (including, but not limited to, complying with the

terms of any court order or administrative process pursuant to the law of a state, the District of Columbia, or any other possession or territory of the United States requiring payments by the defendant for the support and maintenance of any child or of a child and the parent with whom the child is living);

- (5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- (6) the defendant shall notify the probation officer at least ten days prior to any change of residence or employment;
- (7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician;
- (8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court;
- (9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- (10) the defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- (11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- (12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- (13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;
- (14) the defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment;
- (15) the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's

ability to pay any unpaid amount of restitution, fines, or special assessments.

- (d) (Policy Statement) The following "special" conditions of supervised release are recommended in the circumstances described and, in addition, may otherwise be appropriate in particular cases:

(1) Possession of Weapons

If the instant conviction is for a felony, or if the defendant was previously convicted of a felony or used a firearm or other dangerous weapon in the course of the instant offense -- a condition prohibiting the defendant from possessing a firearm or other dangerous weapon.

(2) Debt Obligations

If an installment schedule of payment of restitution or a fine is imposed -- a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

(3) Access to Financial Information

If the court imposes an order of restitution, forfeiture, or notice to victims, or orders the defendant to pay a fine -- a condition requiring the defendant to provide the probation officer access to any requested financial information.

(4) Substance Abuse Program Participation

If the court has reason to believe that the defendant is an abuser of narcotics, other controlled substances or alcohol -- a condition requiring the defendant to participate in a program approved by the United States Probation Office for substance abuse, which program may include testing to determine whether the defendant has reverted to the use of drugs or alcohol.

(5) Mental Health Program Participation

If the court has reason to believe that the defendant is in need of psychological or psychiatric treatment -- a condition requiring that the defendant participate in a mental health program approved by the United States Probation Office.

(6) Deportation

If (A) the defendant and the United States entered into a stipulation of deportation pursuant to section 238(c)(5) of the Immigration and

Nationality Act (8 U.S.C. § 1228(c)(5)*); or (B) in the absence of a stipulation of deportation, if, after notice and hearing pursuant to such section, the Attorney General demonstrates by clear and convincing evidence that the alien is deportable -- a condition ordering deportation by a United States district court or a United States magistrate judge.

*So in original. Probably should be 8 U.S.C. § 1228(d)(5).

(7) Sex Offenses

If the instant offense of conviction is a sex offense, as defined in Application Note 1 of the Commentary to §5D1.2 (Term of Supervised Release) --

- (A) A condition requiring the defendant to participate in a program approved by the United States Probation Office for the treatment and monitoring of sex offenders.
- (B) A condition limiting the use of a computer or an interactive computer service in cases in which the defendant used such items.
- (C) A condition requiring the defendant to submit to a search, at any time, with or without a warrant, and by any law enforcement or probation officer, of the defendant's person and any property, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects upon reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the defendant, or by any probation officer in the lawful discharge of the officer's supervision functions.

(e) Additional Conditions (Policy Statement)

The following "special conditions" may be appropriate on a case-by-case basis:

(1) Community Confinement

Residence in a community treatment center, halfway house or similar facility may be imposed as a condition of supervised release. See §5F1.1 (Community Confinement).

(2) Home Detention

Home detention may be imposed as a condition of supervised release, but only as a substitute for imprisonment. See §5F1.2 (Home Detention).

(3) Community Service

Community service may be imposed as a condition of supervised release. See §5F1.3 (Community Service).

(4) Occupational Restrictions

Occupational restrictions may be imposed as a condition of supervised release. See §5F1.5 (Occupational Restrictions).

(5) Curfew

A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

(6) Intermittent Confinement

Intermittent confinement (custody for intervals of time) may be ordered as a condition of supervised release during the first year of supervised release, but only for a violation of a condition of supervised release in accordance with 18 U.S.C. § 3583(e)(2) and only when facilities are available. See §5F1.8 (Intermittent Confinement).

Commentary

Application Note:

1. Application of Subsection (a)(7)(A) and (B).—Some jurisdictions continue to register sex offenders pursuant to the sex offender registry in place prior to July 27, 2006, the date of enactment of the Adam Walsh Act, which contained the Sex Offender Registration and Notification Act. In such a jurisdiction, subsection (a)(7)(A) will apply. In a jurisdiction that has implemented the requirements of the Sex Offender Registration and Notification Act, subsection (a)(7)(B) will apply. (See 42 U.S.C. §§ 16911 and 16913.)

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendments 276, 277, and 302); November 1, 1997 (see Appendix C, amendment 569); November 1, 1998 (see Appendix C, amendment 584); November 1, 2000 (see Appendix C, amendment 605); November 1, 2001 (see Appendix C, amendment 615); November 1, 2002 (see Appendix C, amendments 644 and 646); November 1, 2004 (see Appendix C, amendment 664); November 1, 2007 (see Appendix C, amendments 701 and 711); November 1, 2009 (see Appendix C, amendment 733).

GENERAL PRINCIPLES

Broad Discretion

“It is fundamental that a district judge has wide discretion in formulating the terms of supervised release.” *U.S. v. Stults*, 575 F.3d 834, 850 (8th Cir. 2009).

Tailoring Requirement

District court’s discretion “is limited by the requirement that the conditions be reasonably related to §3553(a) factors, involve no greater deprivation of liberty than is reasonably necessary, and are consistent with any pertinent policy statements issued by the United States Sentencing Commission.” *U.S. v. Stults*, 575 F.3d 834, 850 (8th Cir. 2009).

Relation to Instant Offense

“Courts can impose special conditions of supervised release not directly related to the offense for which the defendant is being sentenced when ‘the special conditions are related to another offense that the defendant previously committed.’” *U.S. v. Kelly*, 625 F.3d 516, 519 (8th Cir. 2010).; *U.S. v. Smart*, 472 F.3d 556, 559 (8th Cir. 2006)(upholding sex offender condition for felon in possession defendant).

Individualized Determination

“The proper ‘inquiry must take place on an individualized basis; a court may not impose a special condition on all those found guilty of a particular offense.’” *U.S. v. Bender*, 566 F.3d 748, 752 (8th Cir. 2009) (striking condition that banned possession of sexually stimulating materials where district court based condition on general belief that a sex offender “doesn’t have any business looking at *Playboy* magazine.”)

Conditions Implicating Fundamental Rights

“This court is ‘particularly reluctant to uphold sweeping restrictions on important constitutional rights.’” *U.S. v. Bender*, 566 F.3d 748, 753 (8th Cir. 2009) (striking condition that banned use of any public or private library; “Although *Bender* improperly used library resources, libraries are essential for research and learning.”)

TRoublesome Special Conditions

Bans on Use of Computer and Internet Access

Mere use of a computer to facilitate the offense does not alone justify a broad ban

Restrictions on computer and Internet access are appropriate where defendant “sold, transferred, produced, or attempted to arrange sexual relations with minors.” *U.S. v. Bender*, 566 F.3d 748, 751 (8th Cir. 2009). However, such bans are inappropriate “where the defendant was solely convicted of knowingly receiving and possessing child pornography.” *Bender*, 566 F.3d at 751 (citing *U.S. v. Crume*, 422 F.3d 728, 733 (8th Cir. 2005); accord *U.S. v. Wiedower*, No. 09-3192, 2011 WL 520839 (8th Cir. Feb. 16, 2011) (vacating condition).

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“In [*U.S. v. Ristine*, 335 F.3d 692], we identified two relevant considerations in respect to the propriety of a restriction on computer and internet use. We look to whether there was evidence ‘the defendant did more than merely possess child pornography’ and whether the restriction amounts to a total ban on internet and computer use.” *U.S. v. Koch*, 625 F.3d 470, 481 (8th Cir. 2010).

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U.S. v. Demers, No. 09-2886, 2011 WL520838 (8th Cir. Feb. 16, 2011) (per curiam) (upholding ban on computer and Internet access without prior approval, where defendant’s possession of child pornography offense involved printing images from a public library computer; court notes that it has not said “how much beyond mere possession of child pornography is necessary to justify a complete ban.”)

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U.S. v. Stults, 575 F.3d 834, 855-56 (8th Cir. 2009) (upholding ban for defendant who used LimeWire and had prior sexual abuse conviction).

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U.S. v. Curry, 627 F.3d 312, 314 (8th Cir. 2010) (vacating computer ban where defendant had a history of sex offenses involving minors, but record showed no evidence of computer use; Govt. conceded error).

Bans on Possession of Pornography

Narrowly worded ban ok when tied to defendant with concerning sexual history

“Despite some reservations about the breadth and vagueness of such restrictions, we have repeatedly upheld bans on the possession of pornography and other sexually explicit material.” *U.S. v Wiedower*, No. 09-3192, 2011 WL 520839 (8th Cir. Feb. 16, 2011).

“To be sure, we have struck down as overbroad conditions that restrict access to “any material ... that ... alludes to sexual activity,” *United States v. Kelly*, 625 F.3d 516, 519-22 (8th Cir. 2010), or any material ... that contains nudity,” *United States v. Simons*, 614 F.3d 475, 483-85 (8th Cir. 2010). However, it was the breadth of these restrictions ... that was fatal to the conditions in these cases. This flaw is not shared by the ban on “possess[ing] pornographic materials of any type” that Demers challenges in the instant case. In our circuit it remains settled that a condition that bars access to pornography alone does not constitute a greater restriction of First Amendment rights than is necessary when imposed on someone with a history of sexual offenses like Demers.” *U.S. v. Demers*, No. 09-2886, 2011 W.L. 520838 (8th Cir. Feb. 16, 2011) (emphasis added) (noting Demers’ prior convictions for sexual abuse and domestic violence, and his two prior arrests for possession of child pornography).

But See

US v. Curry, 627 F.3d 312, 314-15 (8th Cir. 2010) (vacating pornography ban for SORNA defendant where district court gave no explanation for the condition; “We do not foreclose the imposition of such a condition in a SORNA case, but as in *Bender*, the district court simply failed to make the individualized findings necessary ...”).

and

U.S. v. Bender, 566 F.3d 748, 752 (8th Cir. 2009) (holding that a pornography ban can’t be imposed categorically on a class of offenders; district court had expressed its belief that “sex offenders” shouldn’t look at *Playboy* magazine).

Bans on Contact with Minors, Including Defendant's Own Children, Without Prior Approval of the Probation Office

Routinely upheld, but what happens in cases where family unit is intact?

U.S. v. Koch, 625 F.3d 470, 481 (8th Cir. 2010) (possession of child pornography defendant).

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U.S. v. Simons, 614 F.3d 475, 481 (8th Cir. 2010). (SORNA defendant. “Simons is correct that we have often upheld [no contact conditions] for defendants convicted of child pornography offenses. But Simons is incorrect in inferring that possession of child pornography is the only type of offense for which a prohibition on contact with children is appropriate.... In many of our cases affirming no-contact conditions, we have cited a defendant’s history of sexual abuse of minors as a factor in our decisions.”)

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US v. Stults, 575 F.3d 834, 850-51 (8th Cir. 2009) (possession of child pornography defendant).

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US v. Mark, 425 F.3d 505, 507-08 (8th Cir. 2005) (possession of child pornography defendant).

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Absence of a pre-approval exception is not “*per se* fatal to a contact-with-minors condition.”
U.S. v. Demers, No. 09-2886, 2011 WL 520838 , fn.5 (8th Cir. Feb. 16, 2011).

But See

U.S. v. Davis, 452 F.3d 991, 995 (8th Cir. 2006) (vacating no contact condition that lacked a pre-approval exception; court also failed to make an individualized assessment; “[A] court may not categorically impose such a condition in every child pornography case”).

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U.S. v. Davis, 452 F.3d 991, 995 (8th Cir. 2006) (noting that “[t]he relationship between a parent and child is a fundamental liberty interest protected by the due process clause.”).

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U.S. v. Bender, 566 F.3d 748, 754 (8th Cir. 2009) (vacating condition that barred defendant from going to places that minors frequent unless given prior approval and accompanied by a responsible chaperone; circuit notes that “case law on contact conditions is distinguishable from movement restrictions.” Here, circuit finds “no basis for a movement

restriction requiring a supervisor.”). Movement restrictions with a prior approval exception are generally ok for a defendant with a history related to child pornography or sexual abuse. *See, e.g., Simons*, 614 F.3d at 482-83 (reviewing cases and upholding ban on “coming within 500 feet of schools, parks, playgrounds, or other places used primarily by children ... unless [defendant] secures prior approval from his probation officer.”); *U.S. v. Wiedower*, No. 09-3192, 2011; WL 520839 (8th Cir. Feb. 16, 2011). *Stults*, 575 F.3d at 851-53.

Bans on Use of Alcohol and Access to Bars and Taverns

Generally ok for defendant with substance abuse problem. Mere substance abuse history may not justify complete ban.

“Our prior reviews of special conditions imposing complete bans on alcohol have yielded mixed results. In general, we have upheld such bans for defendants with substance-abuse problems.”

[W]e question whether Simons’ self-reported manic-depressive disorder, coupled with an application to revoke his suspended sentence in Oklahoma due, at least in part, to dishonesty about his alcohol use, is sufficient to justify a 20-year ban on using or possessing alcohol.”

U.S. v Simons, 614 F.3d 475, 480-81 (8th Cir. 2010) (finding alcohol ban for SORNA defendant did not rise to level of plain error).

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U.S. v Behler, 187 F.3d 772, 778-79 (8th Cir. 1999) (upholding alcohol ban where drug trafficking defendant had a significant history of substance abuse).

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U.S. v Cooper, 171 F.3d 582, 584-87 (8th Cir. 1999) (upholding alcohol ban for over-the-road trucker convicted of explosives offense; court also notes defendant’s history of alcohol-related domestic abuse).

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U.S. v Bass, 121 F.3d 1218, 1223-25 (8th Cir. 1997)(vacating complete alcohol ban for drug trafficking defendant with history of marijuana use).

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U.S. v Prendergast, 979 F.2d 1290, 1292 (8th Cir. 1992) (vacating alcohol ban for fraud defendant where alcohol played no role in commission of offense).

PRIOR NOTICE/PRESERVATION OF ERROR

“Ristine did not object at sentencing to the release conditions that he now appeals, but he argues that we should use an abuse of discretion standard, and not plain error, because his failure to object stemmed from his lack of notice that the challenged conditions would be imposed. We reject this argument ...” *U.S. v. Ristine*, 335, F.3d 692, 694 (8th Cir. 2003).



“... since Demers did not object at sentencing to any of the special conditions he now challenges on appeal, we review his claims for plain error ...” *U.S. v. Demers*, No. 09-2886, 2011 WL 520838 (8th Cir. Feb. 16, 2011).

CREDIT FOR JAIL TIME IN THE BOP

PRESENTED BY

MIKE SMART, ASST. FPD



CREDIT FOR JAIL TIME IN B.O.P.

**Calculating Good Time Credit
18 U.S.C. §3624(b)**

**... A prisoner who is serving a term of imprisonment of more than 1 year
... May receive credit toward the service of the prisoner's sentence. . . Of
up to 54 days at the end of each year of the prisoner's term of
imprisonment, beginning at the end of the first year of the term.**

Common Understanding

**“You can earn a reduction in your prison sentence for ‘good time’ of
up to 15% of your sentence, which is about 54 days per year.**

B.O.P. Way of Computing Good Time Credit

Prisoner actually earns about 12.9% off sentence.

Example: What we tell our clients:

120 month sentence, serve 102 months (550 days good time)

What Happens: 120 month sentence, defendant serves 105 months (470 days good time)

Barber v. Thomas, 130 S.Ct. 2499(2010)

Supreme Court holds BOP is right.



OFFICIAL DETENTION

18 U.S.C. § 3585

A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences.

Example 1: Defendant ordered into inpatient drug treatment as a condition of release

Example 2: Illegal immigrant serves 3 months on state ID Theft charge. Upon release, in ICE custody for 30 days. Transferred to marshal's custody when complaint or indictment filed.

BASIC FEDERAL SENTENCE COMPUTATION DECISIONS

First Factor: Date of Commencement of Federal Sentence

- **§3585(a) sentence commences on date defendant is received into custody awaiting transportation to or voluntarily reports to the official detention facility**

Second Factor:

What Extent Defendant Can Receive Credit for Time Spent in Official Detention Prior to Commencement of the Sentence

Example #1:

Defendant arrested by Federal Warrant on January 5th and detained. Defendant is convicted and sentenced on July 1st.

Defendant's sentence commences July 1st (the day he is bound over to U.S. Marshal). Will receive credit from January 5th.

Example #2:

Defendant arrested by Federal Warrant on January 5th. Defendant released to community based drug rehab.

March 5th – defendant released to work release center.

June 5th – defendant sentenced to 5 years. Sentence commences on June 5th. Receives no BOP credit from January 5th through February 5th.

B.O.P. Program Statement No. 5880.24(5)(b)

Time spent in a jail-type facility (not including a community based program located in a Metropolitan Correctional Center or jail) as a condition of bail or bond is creditable as jail time.

Credit for time spent in official detention is to be determined by the U.S. Attorney General after defendant has begun to serve his sentence rather than by the District Court at the time of sentencing.

U.S. v. Uhlon, 503 U.S. 329 (1992)

DEFENDANT COMMITS FEDERAL DRUG CONSPIRACY CRIME

January 1st: Arrested on state burglary charge

February 1st: During pendency of state
proceedings, Defendant indicted
on federal charges

State dismisses their charges

Defendant sentenced on federal
charges on June 1st

EXAMPLE #1

- Defendant serving 5-year state term for auto theft
- Defendant appears by writ in federal court for drug charge
- 9 months later, defendant sentenced on federal charge to 10 years consecutive to undischarged state sentence

EXAMPLE #2

- January 1st, Defendant arrested on state felony charge of burglary
- April 1st, Defendant appears by federal writ for federal gun charge
- July 1st, Defendant receives 5 years on federal charge
- August 1st, receives 5 years on state charge – consecutive to federal charge

EXAMPLE #3

PRIOR CUSTODY CREDIT CANNOT BE GRANTED IF PRISONER HAS RECEIVED CREDIT TOWARDS ANOTHER SENTENCE (18 U.S.C. §3585(b)).

- **January 1st, Defendant arrested on state burglary charge**
- **May 1st, defendant appears by writ on federal gun charge**
- **August 1st, defendant receives 10-year federal sentence**
- **August 2nd, state dismisses burglary charge**

INTERACTION OF FEDERAL AND STATE SENTENCES WHEN FEDERAL DEFENDANT IS UNDER STATE PRIMARY JURISDICTION

- Defendant produced by writ from state custody
- State retains primary jurisdiction
- Jurisdiction is normally with sovereign that first arrested
- Prisoner is merely borrowed
- Prisoner is then returned to state to complete sentence

CONCURRENT V. CONSECUTIVE SERVICE OF FEDERAL SENTENCE WITH STATE SENTENCE

- General rule is that sentence imposed by the sovereign with primary jurisdiction is served first
- Concurrent or consecutive is not dependent on order of sentence imposition

If Federal Judgment and Commitment order is silent and state has primary jurisdiction over defendant, the default by the BOP is to compute the federal sentence as consecutive to the state.

18 U.S.C. §3584(a) . . . Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.



COURT MAY ORDER FEDERAL SENTENCE TO RUN CONCURRENT WITH AN UNDISCHARGED STATE SENTENCE

Can the Court order a sentence to run concurrent with yet to be imposed state sentence?

Circuit split:

2nd, 6th, 7th, 8th, 9th and 11th – YES

4th - NO

BOP Position: § 3584(a) does not authorize a federal sentencing court to order concurrent or consecutive service with yet to be imposed state sentence

- Judge can recommend federal sentence run concurrent to yet to be imposed state sentence
- Earliest date a federal sentence can commence is the date it is imposed
- A sentence may not be ordered to run concurrent with a sentence or any part of a sentence, already served

EXAMPLE



- January 1st: Defendant arrested on state charge of possession with intent
- July 1st: Writted out on federal conspiracy charge
- October 1st: Defendant sentenced to 10 years on federal conspiracy charge with recommendation to be concurrent with any yet to be imposed state charge
- December 1st: Defendant sentenced to 5 years on state drug charge

ETHICS

PRESENTED BY

**THE HONORABLE MARY TABOR
IOWA COURT OF APPEALS**

Three Suggestions for Ethical and Effective Advocacy (or how to avoid doing a “half-fast job”)

I. Don’t copy, or at least don’t copy above your skill level

“Un-learned in the fine art of the law”

A. Iowa Rule of Professional Conduct 32:8.4 (c)

“It is professional misconduct for a lawyer to ... engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. . . .”

B. Plagiarizing a law review article

Iowa Supreme Court Attorney Disciplinary Board v. Cannon, ___ N.W.2d ___ (Iowa 2010) – A bankruptcy judge having found an attorney’s work “to be of unusually high quality,” issued an order directing the attorney to certify that he was the author of two briefs submitted to the court. Attorney admitted that he “relied heavily” on a law review article on bankruptcy law and, in fact, “exceeded permissible fair use without attestation.” The court noted that seventeen of nineteen pages of the legal analysis were lifted verbatim from the article.

Interpreting Rule 32:8.4 (c), the Iowa Supreme Court found that plagiarism—here the attorney’s wholesale copying of a published writing—*does* amount to a misrepresentation to the court in violation of the ethical rules. The court suggests that lesser levels of borrowing may not be punishable: “We do not believe our ethical rules were designed to empower the court to play a ‘gotcha’ game with lawyers who merely fail to use adequate citation methods.”

The court did not find a plagiarism violation in a second brief filed by the same attorney. The second allegation involved a lengthy string cite including parentheticals lifted from the same law review article. The court reasoned: “While parentheticals can include original ideas or creative expression, often they merely represent summaries of cases without any unique intellectual work product.”

The attorney in this case received a public reprimand—rather than a license suspension—due to the fact that he candidly admitted that his activity represented dishonesty and not negligence or incompetence. This penalty is in contrast to *Iowa Supreme Court Board of Professional Ethics v. Lane*, 642 N.W.2d 296 (Iowa 2002) where a plagiarizing attorney buried the title of the treatise he copied from in a list of 200 other sources and received a six-month suspension.

C. Plagiarizing a co-defendant’s brief

In re Ayeni, 822 A.2d 420, 421 (D.C. 2003) – An attorney was appointed to represent a criminal defendant on appeal. He filed a brief in the District of Columbia Court of Appeals that was “virtually identical” to the brief filed earlier by his client’s co-defendant. The attorney denied having plagiarized the brief, claiming to have never seen the brief filed the attorney representing the co-defendant. He later stated that the brief was primarily written by an intern. However, the attorney submitted a voucher for payment asserting that he expended more than nineteen hours researching and writing the brief. The D.C. Board on Professional Responsibility concluded that the attorney’s conduct violated Rule 8.4(c).

D. Copying prior attorney’s brief

Columbus Bar Ass’n v. Farmer, 855 N.E.2d 462, 467-68 (Ohio 2006) – A defendant convicted to life in prison received court appointed counsel in his appeal to the Ohio Court of Appeals. That attorney filed a timely appellate brief asserting two assignments of error: sufficiency of the evidence and ineffective assistance of trial counsel in the sentencing. The defendant’s family consulted attorney Farmer about taking over the appeal. Attorney Farmer promised the defendant’s sister that he would write a new brief, one that explored details that she thought had been wrongly overlooked during her brother's trial. He told the family that the original brief “wasn’t worth the paper it was written on.” The attorney filed a substitute brief that was in all substantive respects a nearly verbatim recasting of his predecessor’s work. The sister realized Farmer had not kept his promise and confronted him. He told her he was up against a filing deadline and had needed to work on another case. Farmer gave a different explanation to the Disciplinary Counsel, claiming “after careful research and contemplation,” he decided that his client would be best served by essentially plagiarizing his predecessor's work. The Columbus Bar found

that Attorney Farmer misled investigators and accepted excessive fees, and suspended him from practice for two years.

E. Ghost writing for pro se litigants

Johnson v. Bd. of County Com'rs for County of Fremont, 868 F. Supp. 1226, 1231 (D. Colo. 1994) (cited with approval in *Iowa Supreme Court Board of Professional Ethics v. Lane*, 642 N.W.2d 296 (Iowa 2002)) – Sheriff filed documents in sexual discrimination case “in his individual capacity and *pro se*.” Although signed by him, they were drafted by the Fremont County Attorney. The federal court held that “[s]uch ghost-writing is far more serious than might appear at first blush. It necessarily causes the court to apply the wrong tests in its decisional process and can very well produce unjust results.” Ghost-writing is condemned as a deliberate evasion of the responsibilities imposed on counsel by rule and is “*ipso facto* lacking in candor.”

II. Disclose adverse authority, even if it is not controlling

Look for close relationship—like “my cousin baby mama brother”

A. Iowa Rule of Professional Conduct 32:3.3(a)

“A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”

B. Comment to Rule 32:3.3(a)

“Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.”

C. Failing to disclose case from another jurisdiction

Rural Water System No. 1 v. City of Sioux Center, 967 F. Supp. 1483 (N.D. Iowa 1997) – Counsel for rural water association should have included in its brief non-controlling federal Court of Appeals decision from another circuit--handed down three weeks before filing of summary judgment motion--which considered directly one of questions presented. Even though Iowa Rule of Professional Conduct 32:3.3(a) only requires disclosure of authority from the controlling jurisdiction—the court opined that such rules establish the “‘floor’ or minimum standards for professional conduct, not the ‘ceiling;’ basic notions of professionalism demand something higher.”

The court was bothered that counsel “did not hesitate to cite a decision” from another state supreme court on comparable issues in support of its position. “This selective citation of authorities, when so few decisions are dead on point is not good faith advocacy, or even legitimate ‘hard ball.’” At best it constitutes failure to confront and distinguish or discredit contrary authority, and at worst, constituted an attempt to hide from the court and opposing counsel a decision adverse” to its position “simply because it is adverse.”

The court also found the omission more egregious because the same counsel also represented the parties in the case from the other circuit. “Failure to cite obscure authority that is on point through ignorance is one thing; failure to cite authority that is on point and known to counsel, even if not controlling is quite another” Counsel acknowledged in oral argument he should have cited the non-controlling, but related case. He explained he did not do so because he was surprised and disappointed by its outcome. That explanation did not satisfy the court, which noted that non-controlling decisions should be brought to the attention of the court so they may be considered on the strength of their reasoning and analysis.

D. Failing to disclose arguably distinguishable case

Tyler v. State, 47 P.3d 1095 (Alaska Ct. App. 2001) – In a drunk driving sentencing case, neither the State nor the defense attorney alerted the Alaska Court of Appeals to an Alaska Supreme Court case addressing a similar issue in an administrative licensing case.

Interpreting Rule 3.3(a), the Alaska court sanctioned an attorney for his knowing failure to advise the Court of Appeals of a Supreme Court decision inconsistent with the legal argument raised in his appellate brief. The attorney argued that the decision at issue was not “controlling authority” and to support his point, cited a superior court judge who expressed the same view of its holding.

The appellate court concluded that the phrase “directly adverse” in Rule 3.3(a) was not synonymous with the terms “controlling” or “dispositive.” Even if attorney had a good faith basis to consider the omitted decision distinguishable, this appeal involved a novel legal issue on which there was a dearth of authority and the omitted case came closest to addressing the issue. The court opined that not citing the case “at the very best” caused an unneeded expenditure of judicial resources for judges or law clerks to track it down. At worst, it risked leading to confusion and unfair results. The attorney had an obligation under the ethical rules to disclose the decision.

III. Be careful about venting.

“Treading in these waters is a two-edged sword.”

A. Iowa Rule of Professional Conduct 32:3.6 (a)

“A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”

B. Iowa Rule of Professional Conduct 32:8.2(a)

“A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office.”

C. Criticizing appellate judges and their decisions

Timothy Dacey, Does a Lawyer Check First Amendment Rights at the Courthouse Door? Boston Bar Journal (May/June 2006) – This journal article recounts an exchange between Paul Walsh, the District Attorney for Bristol County, and *Lawyers Weekly*. When the Massachusetts Appeals Court overturned a conviction won by his office on the grounds that the prosecutor committed “serious improprieties” in closing argument, Walsh told the *Boston Globe* that he was not surprised. Singling out one of the judges on the three-judge panel, he said that the judge was “clearly to the defense side of the aisle” and, with that judge participating in the decision, “we could have predicted a result like this.” *Boston Globe*, 12/20/05, p. B3.

“An editorial in *Lawyers Weekly* charged that Walsh had gone too far. Baseless allegations of bias against a judge, the editorial pointed out, might be grounds for disciplinary action. *Lawyers Weekly*, 1/9/06. Walsh was not abashed. In a letter to the editor of *Lawyers Weekly*, Walsh contended that his comments were no different in principle than the comments that Senator Kennedy and others were then making about the judicial record of Supreme Court nominee Samuel Alito. Public comments about the performance of the judiciary, Walsh argued, are protected by the Constitution. *Lawyers Weekly*, 1/30/06.”

The journal article notes that when a lawyer associated with a pending case makes an extrajudicial statement, the propriety of the lawyer's statement is usually analyzed under Rule 3.6, which requires a showing that the statements “will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” Because this standard is designed to protect jurors and witnesses from improper influence, it has

little bearing on cases at the appellate stage. Restatement (Third) of the Law Governing Lawyers, § 109, comments b and c. As the New Jersey Supreme Court has observed, an attorney not involved in a pending case “would seemingly enjoy the same free speech rights as any other citizen.” *In re Hinds*, 90 N.J. 604, 634 (1982).

D. Accusing Supreme Court of “ducking” issue

Matter of Frerichs, 238 N.W.2d 764, 765 (Iowa 1976) — In a petition for rehearing filed following an unsuccessful appeal, a criminal defense attorney wrote the following:

Petitioner's Petition for Rehearing specifically charges the Iowa Supreme Court with willfully avoiding the substantial constitutional issues raised by defendant's appeal and of violating his rights to due process and equal protection of the laws.

This allegation is not made in haste or without appropriate consideration by defendant's counsel. This is the third criminal appeal in a row pursued by defendant's counsel where the Iowa Supreme Court “ducked” the constitutional questions raised in the appeals.

As a threshold matter, the Court noted that in all three cases, it had not avoided the constitutional issue, but rather determined the circumstances complained of did not rise to the level of a constitutional violation. The Court went on to highlight that our system of justice rests upon “the mutual regard of the bench and bar.” Analyzing the attorney's conduct under Disciplinary Rule 8-102B (the predecessor to Rule 32.8.2(a)), the Court found the attorney's assertions to be unprofessional because they attributed sinister and deceitful motives to the court. The Court admonished the attorney, but saw no need for other discipline.

**Mary Tabor
Iowa Court of Appeals
May 2011**