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**Interview with Chief Judge Robert W. Pratt of the Southern District of Iowa:
The Use of Discretion: *Gall v. United States*
by Lucas Spoelstra, Second-Year Law Student at Drake Law School**



On June 2, 2005, Chief Judge Pratt of the Southern District of Iowa decided a case that, if nothing else, will come to stand for the reclamation of the right of district judges throughout the nation to use their discretion in the imposition of sentencing. On December 10, 2007, in a 7-2 decision, the Supreme Court agreed with Judge Pratt's decision to sentence Brian Michael Gall to 36 months of probation on his guilty plea to conspiracy to distribute ecstasy. *Gall v. United States*, 128 S. Ct. 586 (2007). While *United States v. Booker* rendered the United States Sentencing Guidelines ("Guidelines") effectively advisory, some district courts throughout the nation, particularly those in the Eighth Circuit, have continued to impose sentences

within an ascertained range, perhaps to avoid subjecting their decisions to a proportionality review. Applying this proportionality review, appellate courts would often reverse sentences that provided for downward variances and affirm those providing upward variances.¹ The practical effect of this scheme was that sentences on the upper echelon of the Guidelines were presumed reasonable, while those below it were subject to reversal. The effect of *Gall* is that a sentence which takes account of the myriad of factors applicable to variances will not be disregarded on review. This decision may prove to render the Guidelines simply another factor in the equation rather than the solution.

Judge Pratt was appointed to the bench in 1997 by President Clinton and assumed the post of Chief Judge for the Southern District in 2006. Upon appointment, he recollected being "numbed" by the realization that mandatory sentencing usurped his ability to consider the mitigating and aggravating characteristics of each defendant that appeared before him. Rather than viewing a defendant as a fellow individual with a plethora of personal attributes which deserved a higher or lower sentence, the Guidelines mandated a predetermined judgment that ignored the individual and focused on only the offense. The weight of the sentencing scheme has fallen most heavily on those convicted of drug offenses. Dismayed by the apparent futility of higher, stiffer penalties, Judge Pratt was compelled to write "Senseless Sentencing: A Federal Judge Speaks Out," in which he detailed the shortcomings of the Guidelines and urged a move towards greater discretion in federal sentencing. He stressed that rather than supplementing the system with higher sentences, we should first consider whether the system works at all. All too often the people in his courtroom are the "little fish" rather than the drug "kingpins" to whom the Guidelines would be appropriate. From this perspective, *Gall* may be the realization of a long-time goal.

In his *Gall* sentencing opinion, Judge Pratt outlined the factors taken into consideration during his analysis of the case. Among the most prevalent were the voluntariness of Gall's withdrawal from the conspiracy, his age at the time of the offense, his rehabilitative efforts (without the knowledge that a federal indictment

was impending), and the need for a penalty to corroborate the seriousness of the offense. Judge Pratt decided that all of the goals of the criminal justice system would be accomplished with a sentence of 36 months of probation. Judge Pratt stressed the importance in recognizing that leniency is not a term properly associated with probation in the adjudication of criminal matters. Substantial restrictions on the liberty of the affected individual prevent such commonplace freedoms as changing state residency or employment status, as well as undergoing mandatory drug and alcohol testing. Failure to meet the conditions that are encumbered upon the defendant will inevitably result in revocation of probation and mandatory jail time.

According to the Guidelines, Gall fell outside of the range “allowable” for probation purposes (Zone “A”), Judge Pratt gave him probation nonetheless. This penalty ran contrary to Zone “D” of the Federal Sentencing Guidelines, which called for incarceration of up to 37 months’ imprisonment. The Eighth Circuit reversed Judge Pratt, holding that (1) “the district court gave too much weight to Gall’s withdrawal from the conspiracy because the court failed to acknowledge the significant benefit Gall received from being subject to the 1999 Guidelines”; (2) “the district court gave significant weight to an improper factor when it relied on general studies showing persons under the age of 18 display a lack of maturity, which often results in impetuous and ill-considered actions”; (3) “the district court did not properly weigh the seriousness of Gall’s offense,” as Gall “sold 10,000 ecstasy pills during the time he participated in the drug conspiracy”; (4) the record failed to show that the district court “considered whether a sentence of probation would result in unwarranted sentencing disparities”; and (5) “the district court placed too much emphasis on Gall’s post-offense rehabilitation.” *United States v. Gall*, 446 F.3d 884 (2006).

In Judge Pratt’s opinion, appellate courts were not limiting themselves to a review of the trial court’s procedural aspects but were instead resentencing the defendant based on “reasonableness” grounds. The Supreme Court reversed the Eighth Circuit, determining that appellate review of sentences is only a “deferential abuse-of-discretion” standard and should not focus on arbitrary percentages of variance or “extraordinary” circumstances to justify a sentence that falls outside of the Guidelines range. In effect, the Court has reestablished a district judge’s use of discretion in sentencing and strengthened the proposition set forth in *Booker* and its progeny that the Guidelines are advisory.

Brian Gall demonstrated that rehabilitation is possible without the “encouragement” of the criminal justice system. His case also highlighted a very important point: he is not an anomaly in the realm of criminal defendants. Judge Pratt commented that “every defendant is rare” and that it is up to defense counsel, prosecutors, and amicus curiae to bring forth those aspects of each individual that should properly be before the court in a sentencing hearing. Pursuant to the Gall decision, great discretion is now vested in a district judge, and it is incumbent upon all involved in criminal matters to ensure that justice not turn a blind eye to those elements of each case that refute moral culpability or the need for an unreasonable sentence. Judge Pratt further illustrated that allocution is a right that should be exercised when practicable, for it is impossible to consider mitigating (or aggravating) circumstances when they are not before the court prior to sentencing.

Once these circumstances are presented, many different personal characteristics can provide a solid basis on which a district judge may formulate an appropriate sentence. Judge Pratt noted that guidance is provided from Justice Steven’s concurrence in *Rita v. U.S.*, 127 S. Ct. 2456 (2007), which outlines several factors not ordinarily taken into account under the Guidelines. Post-Gall decisions can now focus on a multitude of these factors, such as employment history, age, mental and emotional health, family ties, and community involvement.

When reflecting on the positive response that Gall has received, Judge Pratt is quick to recognize those individuals that provided the final push in getting this decision to the Supreme Court through a petition to grant certiorari (amicus in support of Gall by “Families Against Mandatory Minimums,” the “Washington Legal Foundation,” and Federal Public and Community Defenders). Additionally, rather than using the term “success” in reference to Gall, the Chief Judge prefers the term “luck,” as *Claiborne v. United States* was before the Supreme Court and may have provided the same result but for the untimely death of the petitioner. 127 S. Ct. 2245 (2007). Whatever the means causing Gall to reach the Court, Judge Pratt is grateful for the praise that he has received. Although a judge cannot be bound by fear that a higher court will reverse a decision, it will inevitably happen, and he feels justification in the fact that the Supreme Court has settled a long-standing dispute between appellate and district courts on the appropriate use of discretion in sentencing decisions. A high profile case such as this also afforded the Chief Judge with a barrage of e-mails and phone calls from colleagues commending his decision and thanking him for a decision that many felt was a long time coming.

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**Eric J. Magnuson Appointed Chief Justice of Minnesota Supreme Court
by John M. Baker**

The founding president of the Eighth Circuit Bar Association, Minneapolis attorney Eric J. Magnuson, will be the next Chief Justice of the Minnesota Supreme Court. His appointment was announced by Minnesota Governor Tim Pawlenty on March 17, 2008.

Magnuson will succeed the Honorable Russell A. Anderson, who announced his retirement from the Minnesota Supreme Court. Chief Justice Anderson’s retirement is effective on June 1, 2008.

Magnuson, 57, is an attorney and shareholder in the business litigation department at the Briggs

and Morgan Law Firm in Minneapolis, a position he has held since 2007. He practices almost exclusively in state and federal appellate courts and works in consultation with trial attorneys on matters in anticipation of appeal. Previously, he was an attorney and partner with the Rider Bennett law firm in Minneapolis from 1977 to 2007, where he chaired the appellate group practice and was managing partner from 1999 to 2000. He was a law clerk to former Minnesota Supreme Court Chief Justice Robert Sheran from 1976 to 1977, and a law clerk to former Minnesota Supreme Court Chief Justice Douglas K. Amdahl, who was a Hennepin County district court judge at the time. Magnuson earned his juris doctorate degree cum laude from William Mitchell College of Law in St. Paul in 1976, and his Bachelor of Arts degree in history from the University of Minnesota in 1972.

Magnuson writes and edits several federal and state appellate treatises and is co-author of the 2007 edition of West Publishing’s “Minnesota Practice: Appellate Rules Annotated”, co-editor and chapter author of the fourth edition of the “Eighth Circuit Appellate Practice Manual,” and co-editor of Matthew Bender’s “The Art of Advocacy: Appeals.”

In addition to his service as the founding president of the Eighth Circuit Bar Association, Magnuson is also a fellow and past president of the American Academy of Appellate Lawyers and co-reporter to the Minnesota Supreme Court Appellate Rules Committee. He is a member of the American Bar Association, where he co-chaired the Appellate Practice Committee of the Section on Litigation and the Appellate Advocacy of the Tort Trial and Insurance Practice Section. He is also a member of the Minnesota State Bar Association, where he has chaired the Court Rules and Judicial Administration Committee and the Court of Appeals Task Force. He has also served as chair of the Minnesota Commission on Judicial Selection since 2003.

Magnuson was born in Morris, Illinois, and resides in Inver Grove Heights with his wife, Katie. They have four adult children and one granddaughter.

TIME/PLACE/MANNER

Visiting Judges

The following visiting judges sat with the Eighth Circuit in January 2008:

(1) the Honorable Richard W. Goldberg, Senior Judge, U.S. Court of International Trade, New York, New York; (2) the Honorable Ralph R. Erickson, U.S. District Judge, Fargo, North Dakota; (3) the Honorable James E. Gritzner, U.S. District Judge, Des Moines, Iowa; and (4) the Honorable John A. Jarvey, U.S. District Judge, Davenport, Iowa.

The Honorable Bobby R. Baldock, Senior U.S. Circuit Judge for the Tenth Circuit, Roswell, New Mexico, sat with the Eighth Circuit in April 2008. Judge Baldock served on the U.S. District Court for the District of New Mexico from June 7, 1983, until January 24, 1986. On October 7, 1985, President Ronald Reagan nominated Judge Baldock to a seat on the Tenth Circuit. Judge Baldock was confirmed by the Senate on December 16, 1985, and he received his commission on December 17, 1985. He assumed senior status on January 26, 2001.

St. Paul Courthouse to Reopen in October 2008 by Mark E. Salter, Assistant United States Attorney for the District of South Dakota

After a three-year absence, the United States Court of Appeals for the Eighth Circuit will return to the St. Paul federal courthouse for a session of court in October 2008. The Court's St. Paul hiatus was prompted by the extensive remodeling of the Warren Burger Federal Courthouse, which began in October 2005.

Eighth Circuit Clerk of Court Michael Gans said the Court will hold a one-week session of court during the week of October 13, 2008. Gans anticipates that the Court will convene only one panel in an effort to allow "a dry run" before returning to a full slate of three panels in November. After that, Gans says that the Court plans to resume dividing its time between St. Louis and St. Paul in roughly a "60/40" split, with the St. Paul sessions handling most of the appeals from North Dakota, South Dakota, Minnesota, Nebraska, and the Northern District of Iowa.

The St. Paul courthouse renovation project is aimed at updating the feel and function of the 1960's-era building. The "new courthouse" will feature additional courtrooms, a new entrance, and enhanced security, according to an earlier press

release by United States District Judge Richard Kyle. According to Gans, Eighth Circuit patrons will notice a number of upgrades in the clerk's office and to the three courtrooms, especially the en banc courtroom. In addition to a new look, the courtrooms will also be equipped with new lighting and sound systems.

The reopening of the St. Paul courthouse will also be something of a homecoming for the staff of the St. Paul clerk's office. The office has remained open and operated at a nearby location throughout the construction project.

Federal Court Management Statistics

The Federal Court Management Statistics for 2007 are now available on the U.S. Courts website. You may access the statics by visiting the U.S. Courts website: <http://www.uscourts.gov/fcmstat/index.html>.

ASSOCIATION NEWS

Eighth Circuit Judicial Conference August 13-15, 2008—SAVE THE DATE by Thomas Weaver

The Eighth Circuit Judicial Conference for lawyers and judges will take place from August 13 to August 15, 2008, at the Marriott Chicago Downtown on the Magnificent Mile in Chicago, Illinois. Judge Kermit E. Bye, Conference Chairman, Millie Adams, Circuit Executive, and the Eighth Circuit Judicial Conference Planning Committee have been working for several months to arrange an informative and enjoyable schedule of educational, social, and cultural events. In addition to some of the traditional conference activities, this year's conference includes an entire afternoon of CLE programs, a chance to go one-on-one with circuit judges in a small group setting, and the opportunity to attend a White Sox game and pre-game party at the ballpark with Justice Alito.

The portion of the conference available to lawyers and judges begins with the American Inns of Court Conference Luncheon at 11:30 a.m. on Wednesday, August 13. The luncheon will be followed by three hours of CLE programs, from 2:00 p.m. to 5:00 p.m., on e-discovery, voir dire, white collar crime practice tips for the civil practitioner, an evaluation of judicial functions in the Eighth Circuit, and Daubert practices. The scheduled activities for Wednesday, August 13, will conclude with the traditional joint bench/bar reception, which always offers a great opportunity to meet and talk to judges and practitioners from around both the Seventh and Eighth Circuits.

The program on Thursday, August 14, will begin with the opening ceremony led by Chief Justice Loken. The conference will offer three excellent plenary programs, including an update on the American Constitution Society and the Federalist Society, a discussion of the Little Rock Desegregation Case, and a presentation on the history of the Eighth Circuit. At 11:45 a.m. attendees will have the opportunity to attend a Chicago White Sox baseball game and a pre-game party both to be attended by Justice Alito.

Conference activities for Friday, August 15, 2008, will begin with the traditional federal practice committee breakfast meetings for each judicial district. Thereafter, attendees will have the opportunity to participate in small group discussions with judges from the circuit, with topics limited only by the curiosity (and discretion) of the participants. Such discussions will follow the format used at the program sponsored by the Eighth Circuit Bar Association in St. Louis in September, 2007, which was very well received by both the judges and the attendees, who found that the small group format permitted a free and more personal flow of information concerning the practices of the court in general and of the individual judges in particular. After the small group discussions, there will be a presentation regarding the significance of the United States court system and its impact on American business, followed by a review of decisions from the most recent Supreme Court term.

The formal program activities will conclude with a speech by the Honorable Samuel Alito, Associate Justice of the Supreme Court of the United States. Following Justice Alito's presentation, attendees will have an opportunity to participate in a tour of the Chicago Board of Trade. As the above schedule reflects, the Conference attendees will have ample time to explore the many attractions Chicago offers.

CLE hours have been applied for in each of the states within the Seventh and Eighth Circuits.

The Eighth Circuit Judicial Conference continues to offer a rare combination of informative and useful CLE programs with the opportunity to meet and confer informally with judges and lawyers from throughout the Circuit to renew old friendships and begin new ones. This unique opportunity to meet and learn from numerous leaders in the legal, academic, business, and judicial communities makes this a unique educational as well as cultural event. The Association strongly urges all of you to attend this special conference.

A formal invitation to attend will be received from the Circuit Executive's Office in the near future.

Registration will be available both online or by completing and returning the conference registration form as instructed therein. SAVE THE DATES OF WEDNESDAY, AUGUST 13, 2008, THRU FRIDAY, AUGUST 15, 2008, FOR THE EIGHTH CIRCUIT'S VISIT TO CHICAGO!

**Procedural Justice: Perspectives on Summary Judgment, Peremptory Challenges, and the Exclusionary Rule Iowa Law Review/Eighth Circuit Symposium
February 29, 2008
by Thomas H. Boyd and Dana Oxley**

The Iowa Law Review organized and presented an all day symposium earlier this year that took up a variety of issues that should be of interest to many Eighth Circuit practitioners. The symposium took place on February 29, at the University of Iowa College of Law in Iowa City, Iowa, and was entitled, "Procedural Justice: Perspectives on Summary Judgment, Peremptory Challenges, and the Exclusionary Rule." Each of the panels addressed fundamental constitutional concepts in a contemporary and cutting edge context. The panels were made up of leading academics, with distinguished circuit judges of the Eighth Circuit moderating the presentations and discussion. Additionally, the Iowa Law Review put together an excellent lunchtime panel discussion of federal circuit and district judges which offered valuable insight into their views of the current state of the judiciary. The luncheon featuring the judges' panel was sponsored by the Eighth Circuit Bar Association.

Summary Judgment and Seventh Amendment Concerns

The first panel of the symposium addressed the intriguing topic of "Summary Judgment and Seventh Amendment Concerns." This panel was moderated by the Honorable Lavenski R. Smith, and the panel members included Professor Suja A. Thomas of the University of Cincinnati College of Law, Professor Edward Brunet of the Lewis and Clark Law School, and Professor William E. Nelson of the New York University School of Law.

This panel's discussion was inspired by an article that Professor Thomas authored, entitled Summary Judgment is Unconstitutional, which appeared a few years ago in the Vanderbilt Law Review. She argued that summary judgment violates the Seventh Amendment right to a jury trial. In her opening remarks, Professor Thomas noted that, since the time of publication, her article had been cited by

attorneys opposing summary judgment, federal judges questioning the propriety of summary judgment, and the media, including the New York Times which described her argument to be “perfectly plausible.”

Professor Thomas pointed out that the Seventh Amendment provides for the right of trial by jury “according to the rules of the common law.” This is the only place in the Constitution that explicitly references the common law. The Seventh Amendment has been interpreted by the Supreme Court to mean an entitlement to a “jury trial” as it would have existed under the English common law in 1791, when the Seventh Amendment was enacted. At that time, trial by jury was just one of several different types of trials that were available at common law, and it involved a determination of all facts by the jury regardless of how improbable the allegations. Professor Thomas therefore argued that the Framers’ intent precludes empowering judges to grant summary judgment because such power would displace the jury’s role as the finder of all facts.

While sensitive to the prominent role that summary judgment practice plays in modern civil litigation, Professor Thomas is not convinced that the system will “fall apart” in the event summary judgment is held to be unconstitutional. She pointed out that the parties will continue to engage in alternative dispute resolution. Further, there may well be a net benefit in eliminating the burden imposed upon judges who have to spend time deciding non meritorious motions for summary judgment.

Professor Brunet responded by arguing that summary judgment rests on a tenuous yet nonetheless constitutional basis. He pointed to what he considered to be acceptable “historical antecedents” for summary judgment, such as trial by inspection, demurrer to evidence, and directing new trials which, in his view, provide a suitable constitutional foundation for summary judgment. He also emphasized the procedural and due process safeguards which exist to enable district judges and appellate courts to moderate and protect against excessive use of summary that could otherwise threaten the right to a jury.

Professor Nelson framed his remarks in the broader context of the role of constitutional law, and advocated a dynamic view that comports with the evolving social and economic developments of our nation in an ever increasing global environment. He agreed with Professor Thomas that English common law as it existed in 1791 would not have permitted summary judgment in the context of trial by jury, but questioned the legitimacy of the underlying Supreme

Court precedent that has been cited to justify fixing the meaning of the Seventh Amendment to the English common law as it existed at the date of ratification. He also pointed out the practical problems that accompanied such a cabined and stagnant approach to the Seventh Amendment. Professor Nelson contended that it makes no sense given the evolution of the common law since the enactment of the Seventh Amendment. He argued that the Framers anticipated an evolving constitution to better fit what they anticipated would be an ever increasingly integrated society and economy.

Judge Smith moderated an active discussion that followed in the time remaining, and which raised broader questions of originalism as contrasted to a more flexible and evolving interpretation of constitutional law.

Batson v. Kentucky and the Use of Peremptory Jury Challenges

The title of the second panel was “Batson v. Kentucky and the Use of Peremptory Jury Challenges.” The Honorable Michael J. Malloy served as moderator, and the panelists were Professor David C. Baldus, of the University of Iowa College of Law, Professor Camille A. Nelson of the St. Louis University College of Law, and Dr. V. Hale Starr, founder of Starr Litigation Services in Scottsdale, Arizona. The fundamental question posed was whether the United States Supreme Court’s decision in *Batson v. Kentucky* was still vital and meaningful precedent.

Professor Baldus presented the results of a 400 case study regarding voir dire practices by state prosecutors in Philadelphia capital cases. The presentation included video clips from an instructional video by Jack McMahan, Philadelphia prosecutor, which encouraged Philadelphia prosecutors to exercise peremptory challenges on race based grounds that flaunted *Batson*. Professor Baldus presented statistical data demonstrating significant race disparities in the prosecutorial use of peremptory strike rates by Mr. McMahan, as well as by the Philadelphia prosecutor’s office overall in various capital trials. The pattern of exercising peremptory challenges demonstrated that they were much more commonly used with respect to black venire members than other venire members.

Professor Nelson followed the statistical presentation with remarks regarding *Snyder v. Louisiana*, which, at that time, was still pending before the Supreme Court. Drawing on views contained in her article entitled, *Batson, O.J., and Snyder: Lessons from an Intersecting Trilogy*, Professor Nelson took the position that the promise of *Batson* remains

largely unfulfilled. In Snyder, the prosecutor in a capital case repeatedly told the jury that this was his “O.J. case”—a reference to the infamous O.J. Simpson prosecution. She pointed out that these types of “racially toxic” and “racially polarizing” remarks would not have passed muster if applying an objective standard under Batson. She further contended that, in the event such a test is not workable, then perhaps it would be appropriate to acknowledge that peremptory challenges cannot be applied fairly and revisit whether peremptory challenges should be available at all, just as Justice Marshall had argued in his dissent from Batson.

Dr. Starr prefaced her comments by noting that, in her opinion, it is not possible to try capital murder cases fairly with death-qualified juries. She further observed that, in her view, Batson is a real issue in all types of cases, not just capital cases. Dr. Starr believes that race, gender, and ethnicity all matter a great deal when choosing a jury in any case. Dr. Starr also pointed out that the legitimacy of exercising peremptory challenges is undermined by the sources for jury pools, which are typically taken from motor vehicle registration and voter rolls, and therefore tend to disqualify groups from lower socioeconomic levels who do not own motor vehicles and do not tend to vote, as well as those who cannot serve on jury cases due to economic hardships.

In moderating the discussion that followed, Judge Malloy elaborated on the concerns and challenges of developing proportionally representative jury pools. Audience members posed questions challenging the traditional “myths” relating to jury selection practices. The panel also discussed the fact that there is a general hesitation among attorneys and judges to raising Batson issues because such challenges effectively require them to accuse the attorneys exercising the peremptory challenges of racism and lying.

Issues Facing the Federal Judiciary

The symposium included a luncheon panel of judges, consisting of Circuit Judges Michael Melloy and Lavenski Smith and District Court Judges Robert Pratt, Mark Bennett, and James Gritzner, moderated by Professor Tung Yin.

Professor Yin asked the judges to comment on an array of topics, including collegiality on the court; judge’s pay; whether law clerks are, as suggested by Judge Posner, a “scourge” on the federal bench; and the federal sentencing guidelines. The judges agreed that the Eighth Circuit enjoys a very collegial group of judges, which extends to the district court judges.

The late Judge Richard Sheppard Arnold was mentioned twice in the discussion as providing a strong leadership of collegiality, which he has furthered in what he called the “art of judging” by suggesting judges be “strong in substance, yet gentle in manner.”

Judge Melloy described Judge Posner’s assertion that law clerks are the “scourge” of the federal bench, using their positions to draft mini law review articles, as raising valid concerns but really just being hyperbole. Judge Bennett did not see a problem with writing lengthy opinions in an effort to fully explain to the losing party why they were the losing party. All of the judges agreed that judicial opinions are the opinions of the judge, not the law clerks, and it is the judge’s responsibility to ensure their law clerks are writing what the judge wants written.

Finally, the judges surmised that the concept behind the federal sentencing guidelines provides a good starting point for sentencing an individual defendant, but that the complex nature of the calculations coupled with the narrow ranges made it difficult to take into account the individual characteristics of the defendant being sentenced. Judge Bennett theorized that the guidelines represent Congress’s mistrust of federal judges, taking sentencing discretion away from experienced judges and putting it into the hands of young prosecutors, who determine whether and how many of the guideline provisions apply.

Exclusionary Rule Post-Hudson v. Michigan

The final panel of the day was titled “Exclusionary Rule Post-Hudson v. Michigan.” The panel was moderated by the Honorable Steven M. Colloton, who introduced the topic by describing the Supreme Court’s 2006 opinion in Hudson, where the Court held that a knock and announce violation by police officers executing a search warrant need not result in exclusion of the resulting evidence, applying a balancing test. Although Justice Kennedy concurred in the majority opinion, which clearly called into doubt the exclusionary rule, Justice Kennedy began his concurrence by stating that the “continued existence of the exclusionary rule is not in doubt.” Judge Breyer dissented, arguing that without the exclusionary rule, the Fourth Amendment lacked any teeth.

Professor David Moran from Wayne State University Law School, who represented Mr. Hudson before the Supreme Court, provided a unique perspective at the symposium about the background of the case. Afraid that he will go down in history as the man who led to the demise of the exclusionary rule, Professor Moran wrote his article for the Iowa Law Review

Symposium, *Waiting for the Other Shoe: Hudson and the Precarious State of Mapp*, to defend his actions in taking the case to the Supreme Court merely to bring Michigan in line with the 38 other states and several federal courts that had routinely applied the exclusionary rule to knock and announce violations. The case got caught in the Supreme Court justices' turnover, and Professor Moran was asked to re-argue the case in May 2006, after Justice Alito joined the Court. The exclusionary rule was not even an issue in the case until the end of Professor Moran's argument in the second argument. Professor Moran described the Court as "angry" during the second argument, surmising that Justice Breyer wrote the original opinion but Justice Kennedy switched sides, requiring the need for the second argument. Justice Scalia wrote the ultimate opinion, which Professor Moran predicts will lead to the ultimate overruling of *Mapp v. Ohio* by the new Court.

Professor James Tomkovicz of the University of Iowa College of Law and author of *Hudson v. Michigan and the Future of Fourth Amendment Exclusion*, discussed honesty in judicial opinions. In his view, Justice Scalia, who traditionally is very honest and forthright in his opinions, was not so honest about what was happening to the exclusionary rule in *Hudson*. Professor Tomkovicz provided an interesting discussion of the importance of justices being upfront about what they are doing to the law in their opinions.

Finally, Professor Albert Alschuler, from Northwestern University School of Law, discussed the role of causation in the analysis of when a Fourth Amendment violation should result in the exclusion of evidence in discussing his article, *The Exclusionary Rule and Causation*. Professor Alschuler contended that a "but for" causation analysis does not fit well with the instrumental justifications for the exclusionary rule, suggesting that the better initial question might be whether the government's illegal actions facilitated, rather than provided a but-for cause, for the discovery of the challenged evidence.

Overall, the symposium provided very thought-provoking discussions of some important procedural protections that do not normally receive a sufficient amount of attention.

HIGHER AUTHORITY

Petitions for Writ of Certiorari Granted in Eighth Circuit Cases

The Supreme Court granted certiorari in *Greenlaw v. United States*, No. 07-330, on January 4, 2008. In *Greenlaw*, the defendant was convicted of several drug and firearms offenses. At sentencing, the prosecutor argued that because the defendant had been convicted on two counts under the federal gun law, he should receive mandatory consecutive sentences of 5 years for the first offense and 25 years for the second offense. The district court only gave the defendant 10 years for the second offense, stating that the mandatory minimum applied only when the second offense was the result of a separate, pre-existing indictment. The district court's conclusion, however, was incorrect under the Supreme Court's holding in *Deal v. United States*, 508 U.S. 129 (1993). The defendant appealed his sentence to the Eighth Circuit, seeking a reduction. The government did not file an appeal or cross-appeal seeking to lengthen his sentence based on the *Deal* error. The Eighth Circuit, however, determined that it was within its discretion pursuant to Federal Rule of Criminal Procedure 52(b) to address the error and held that the district court plainly erred in excluding the statutory mandatory sentence. *United States v. Carter*, 481 F.3d 601 (8th Cir. 2007). The question presented to the Court is whether a federal court of appeals may increase a criminal defendant's sentence *sua sponte* and in the absence of a cross-appeal by the government. Oral argument was held on Tuesday, April 15, 2008.

In addition to *Greenlaw*, the Supreme Court also granted certiorari in *Plains Commerce Bank v. Long Family Land & Cattle*, No. 07-411. In that case, a Sioux Nation family's cattle company had done business with the Plains Commerce Bank for seven years when the family patriarch died. The bank grew reluctant to make operating loans to the younger generation but eventually agreed to loan the company annual operating expenses if the company would deed its farmland and house to the bank. The bank gave the company two years to buy back its house at a cost of half a million dollars. The family claims that after the agreement was completed, the bank refused to make the operating loan, resulting in the starvation of more than 500 cattle and the failure of the family business. The family could not afford to buy back its land, and the bank retained it. The family filed suit in the local tribal court, seeking a temporary restraining order blocking the land transfer and charging the bank with tortious discrimination. The bank asserted that the tribal court lacked jurisdiction over the claim, but it also mounted a defense to the claim. The tribal court

ruled against the bank and ordered it to pay \$700,000 to the family. The bank then filed suit in federal district court, requesting a declaratory judgment that the tribal court improperly exercised jurisdiction. The district court found that the tribal court had jurisdiction, and the Eighth Circuit affirmed. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 491 F.3d 878 (8th Cir. 2007). The question presented to the Court is whether Indian tribal courts have subject-matter jurisdiction to adjudicate civil tort claims as an “other means” of regulating the conduct of a nonmember bank owning fee-land on a reservation that entered into a private commercial agreement with a member-owned corporation. Oral argument was held on Monday, April 14, 2008.

Six-Year Deadline for Suing the Federal Government in Property Dispute

In *John R. Sand & Gravel v. United States*, 128 S. Ct. 750 (2008), the Supreme Court ruled, in a 7-2 decision, that the Court of Federal Claims’s statute of limitations requires sua sponte consideration of a lawsuit’s timeliness, despite the government’s waiver of the issue. In *John R.*, the petitioner argued that various federal activities on land for which it held a mining lease amounted to an unconstitutional taking of its leasehold rights. The government initially argued that the claims were untimely under the Court of Federal Claims’s statute of limitations, which is six years. But, it later conceded that issue and won on the merits. While the government did not raise the timeliness issue on appeal, the Federal Circuit addressed the issue sua sponte, finding the action untimely. *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345 (Fed. Cir. 2006). The Court affirmed the Federal Circuit.

Court Rules in Ineffective Assistance of Counsel Case

In a per curiam opinion, the Court held in *Wright v. Van Patten*, 128 S. Ct. 743 (2008), that the participation of the defendant’s counsel at a court hearing through speakerphone did not presumptively constitute ineffective assistance of counsel. The defendant, who was convicted of first degree murder, argued that his lawyer’s physical absence amounted to a denial of counsel in violation of the Constitution. The Court rejected the defendant’s argument, stating that “[e]ven if we agree with Van Patten that a lawyer physically present will tend to perform better than one on the phone, it does not necessarily follow that mere telephone contact amounted to a total absence or ‘prevented [counsel] from assisting the accused....’” Justice Stevens concurred in the judgment.

Fraud Claims Not Allowed Against Third Parties That Did Not Directly Mislead Investors

The Supreme Court ruled against investors who sue businesses that help manipulate stock prices of publicly traded companies in *Stoneridge Investment Partners v. Scientific-Atlanta*, 128 S. Ct. 761 (2008). In a 5-3 decision, the Court said that investors may only sue those who issued statements or otherwise took direct action that the investors had relied upon in buying or selling stock—whether that involved public statements, omissions of key facts, manipulative trading, or conduct that was itself deceptive. This decision impacted a class-action lawsuit covering more than a million shareholders who invested in the Enron Corporation. The case is *California Regents v. Merrill Lynch*, No. 06-1341. On January 22, 2008, the Court rejected an appeal by the Enron investors in *California Regents*, refusing to resurrect a \$40 billion suit against Merrill Lynch and other banks that lent money to the now-defunct energy trader.

Court Rules Against Muslim Inmate in Sovereign Immunity Case

On January 22, 2008, the Court held, in a 5-4 decision, that Federal Bureau of Prisons officers, who allegedly lost a Muslim inmate’s copies of the Quran, prayer rug, and other personal items during his transfer to another prison, were “law enforcement officers” as that term is used in the provision of the Federal Tort Claims Act excepting from waiver of the federal government’s sovereign immunity from liability for negligent or wrongful acts of its employees any claim arising with respect to “detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer.” *Ali v. Federal Bureau of Prisons*, 128 S. Ct. 831 (2008). The inmate claimed that the missing books and rug reflected widespread harassment against Muslim inmates in federal, state, and local prisons stemming from the September 11 terrorist attacks. The issue presented to the Court was whether the federal prison guards were immune from suit for mishandling the inmate’s belongings. Justice Clarence Thomas, writing for the majority, affirmed the Eleventh Circuit, holding that the law “forecloses lawsuits against the United States for the unlawful detention of property by ‘any,’ not just ‘some,’ law enforcement officers.” Chief Justice John Roberts, Justice Samuel Alito, Justice Ruth Bader Ginsburg, and Justice Antonin Scalia joined Justice Thomas’s majority opinion. The dissenters were Justices Stephen Breyer, Anthony Kennedy, David Souter, and John Paul Stevens. According to Justice Kennedy, “The seizure of property by an officer raises serious concerns for the

liberty of our people and should not be read to permit appropriate of property without a remedy.”

Supreme Court Denies Certiorari in Eighth Circuit Case Regarding Donated Tissues

On January 22, 2008, the Court denied certiorari in *Washington University v. Catalona*, No. 07-525. The petition for writ of certiorari was taken from the Eighth Circuit’s decision. *Washington Univ. v. Catalona*, 490 F.3d 667 (8th Cir. 2007). In *Catalona*, the University brought a declaratory judgment action against Dr. William Catalona, a former University medical school faculty member, seeking to establish the University’s ownership of biological materials contributed by individuals for the purpose of genetic cancer research. The Court let stand the Eighth Circuit’s unanimous ruling that, under Missouri law, tissue and serum samples donated to the University can continue to be used by the institution for cancer research. The Eighth Circuit had affirmed the federal district court’s ruling that donors who gave tissue or serum samples to the University for research purposes cannot later compel the school to transfer ownership of the samples to another research institution. *Washington Univ. v. Catalona*, 490 F.3d 667 (8th Cir. 2007).

Federal Law Prevents the Referral of a Dispute that the Parties Agreed To Arbitrate to an Initial Review by an Administrative Agency under State Law

The Supreme Court held, in an 8-1 decision, that when parties agree to arbitrate all questions arising under a contract, the Federal Arbitration Act (FAA) supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative. *Preston v. Ferrer*, 128 S. Ct. 978 (2008). In 2002, Arnold Preston, an entertainment industry attorney, and Alex Ferrer, who appears on television as “Judge Alex,” entered into a contract where Preston agreed to act as Ferrer’s personal manager in exchange for a portion of the earnings from a potential television deal. The contract contained a clause requiring arbitration of “any dispute...relating to the [contract’s] terms...or the breach, validity, or legality thereof...in accordance with [American Arbitration Association (AAA)] rules.” Preston invoked this provision to gain fees allegedly due under the contract. Thereafter, Ferrer petitioned the California Labor Commission for a determination as to whether the contract was invalid and unenforceable under California’s Talent Agencies Act because Preston had acted as a talent agent without the required license. The Labor Commission’s hearing officer denied

Ferrer’s motion to stay the arbitration, and Ferrer filed suit in state court, seeking to enjoin arbitration; Preston moved to compel arbitration. The court denied Preston’s motion and enjoined him from proceeding before the arbitrator unless and until the Labor Commissioner determined that she lacked jurisdiction over the dispute. While Preston’s appeal was pending, the Supreme Court held in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2003), that challenges to the validity of a contract requiring arbitration of disputes ordinarily “should...be considered by an arbitrator, not a court.” Affirming the judgment below, the California Court of Appeal held that the Talent Agencies Act vested the Labor Commissioner with exclusive jurisdiction over the dispute, and that *Buckeye* was inapposite because it did not involve an administrative agency with exclusive jurisdiction over a disputed issue. The Supreme Court reversed, holding that federal law prevents the referral of a dispute that the parties agreed to arbitrate to an initial review by an administrative agency under state law. Just as state laws that divert an arbitral dispute to an initial court review are preempted by the Federal Arbitration Act, so are laws that set up an administrative review first. Justice Clarence Thomas filed a dissenting opinion.

FDA’s Pre-Market Approval of Safety and Effectiveness of Medical Device Bars All State Court Damage Lawsuits by Those Injured From Such Device

In *Riegel v. Medtronic*, 128 S. Ct. 999 (2008), Charles Riegel and his wife, petitioner Donna Riegel, brought suit against respondent Medtronic after a Medtronic catheter ruptured in Charles Riegel’s coronary artery during heart surgery. The catheter is a Class III device that received FDA premarket approval. According to the Riegels, the device was designed, labeled, and manufactured in a manner that violated New York common law. The federal district court held that the Medical Device Amendment of 1976 (MDA) preempted the Riegels’ common law claims insofar as the claim was not premised on the theory that Medtronic had violated federal law. The MDA calls for federal oversight of medical devices that varies with the type of device at issue. The most extensive oversight is reserved for Class III devices that undergo the premarket approval process. These devices may enter the market only if the FDA reviews their design, labeling, and manufacturing specifications and determines that those specifications provide a reasonable assurance of safety and effectiveness. Manufacturers may not make changes to such devices that would affect safety or effectiveness unless they first seek and obtain permission from the FDA. On appeal, the Second Circuit affirmed the district court.

In turn, the Supreme Court, in an 8-1 vote, affirmed the Second Circuit, holding that the MDA's preemption clause bars common law claims challenging the safety or effectiveness of a medical device marketed in a form that received premarket approval from the FDA. Justice Ginsburg dissented.

Individual Taking Part in Retirement Plan Covered by ERISA Has Right To Recover Money Losses in His Pension Account Because of Fault of Plan Managers or Administrators

In *LaRue v. DeWolff*, 128 S. Ct. 1020 (2008), a participant in a defined contribution pension plan alleged that his stock market holdings plunged \$150,000 when administrators at his retirement plan failed to follow his instructions to switch to safer investments. According to the participant, the administrator's failure to follow his directions amounted to a breach of fiduciary duty under the Employee Retirement Income Security Act (ERISA). The federal district court granted the respondents judgment on the pleadings. The Fourth Circuit affirmed, holding that ERISA § 502(a)(2) provides remedies only for entire plans, not for individuals. The Supreme Court vacated and remanded, holding that while § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, it does permit recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account.

Court Rules in Age Discrimination Evidence Case

In *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008), the Court left open the possibility for workers in age discrimination cases to present supporting evidence from other workers who suffered job bias but were not parties to the federal age discrimination case. In *Mendelsohn*, the defendant moved in limine to exclude the testimony of former employees alleging discrimination by supervisors of the defendant company who did not play a role in the adverse employment decision challenged by the plaintiff. The district court excluded the evidence of discrimination against those not "similarly situated" to the plaintiff. On appeal, the Tenth Circuit engaged in its own analysis of the relevant factors under Federal Rules of Evidence 401 and 403, determined that the district court improperly applied a per se rule to exclude the evidence, and remanded with instructions to admit the challenged testimony. The Supreme Court held that the Tenth Circuit erred in concluding that the district court applied a per se rule and thus improperly engaged in

its own analysis of the relevant factors under Rules 401 and 403. The Court found that the Tenth Circuit did not accord due deference to the district court's determination.

Federal Express Workers Can Sue Over Age Bias

The Age Discrimination in Employment Act of 1967 (ADEA) states, "No civil action...be commenced until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC]." The ADEA, however, does not define the term "charge." In *Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147 (2008), after Federal Express initiated programs tying its couriers' compensation and continued employment to certain performance benchmarks, the defendant, a Federal Express courier over the age of 40, filed with the EEOC, in December 2001, a Form 283 "Intake Questionnaire" and a detailed affidavit supporting her allegation that the Federal Express programs discriminated against older couriers in violation of the ADEA. In April 2002, the defendant and others filed the instant ADEA suit claiming, inter alia, that the programs were veiled attempts to force out, harass, and discriminate against older couriers. In response, Federal Express moved to dismiss the action, contending that the defendant had not filed the "charge" required by the ADEA. The plaintiff argued that her Form 283 and affidavit constituted a valid charge. The district court disagreed and granted Federal Express's motion. On appeal, the Second Circuit reversed. By a 7-2 vote, the Supreme Court ruled that the plaintiff could start the case before the EEOC only if she spells out more than a bare allegation of discrimination and the name of the employer. The Court concluded that a "charge" necessary to open a case must include enough substance for it to be "reasonably construed" as a request for the EEOC to take action to protect the workers' rights or to settle a dispute over those rights. The Court largely deferred to the EEOC's views of what might constitute a "charge," which determines when the legal time lines start to run. The Court said that the proper test is whether an objection observer examining what the complaining worker has filed is enough to ask the agency "to activate its machinery and remedial processes." The Court concluded that the materials submitted by the plaintiff sufficiently constituted a "charge."

Court Overturns Death Row Inmate's Conviction in Race-Based Jury Challenge Case

The Supreme Court held in *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008), that a prosecutor's proffered reasons for striking a black prospective juror was pretext for racial discrimination and accordingly

overturned the conviction of a black Louisiana death row inmate. During voir dire in the defendant's capital murder case, the prosecutor used peremptory strikes to eliminate black prospective jurors who had survived for-cause challenges, resulting in an all-white jury. The defendant objected to the removal of two potential jurors, asserting that prosecutor's decision was improperly based on race. The defendant also argued that the prosecutor's racial prejudice was evidenced during sentencing when he compared the defendant to O.J. Simpson. The prosecutor told jurors that, in seeking the death penalty, that circumstances in the defendant's case resembled the highly-publicized murder case against the former black football star "who got away with it." The defendant was convicted and sentenced to death for stabbing his estranged wife 15 times and killing a man with whom she was talking. The Court, per Justice Alito, held that the trial judge committed clear error in ruling against the defendant over the removal of one of the black potential jurors—a black college student. The prosecutor offered two reasons for removing the student: (1) he appeared nervous and (2) the student had obligations as a student teacher. According to the Court, neither explanation justified the strike of that juror. The Court did not address the second potential juror nor did it mention the Simpson remarks in its decision. Justice Thomas, joined by Justice Scalia, dissented, contending that "none of the evidence in the record as to jurors Jeffrey Brooks and Elaine Scott demonstrates that the trial court clearly erred in finding that they were not stricken on the basis of race."

Court Rules in Arbitration Case

In *Hall Street Associates v. Mattel, Inc*, 128 S. Ct. 1396 (2008), the Court limited the role of the courts in reviewing arbitration awards under federal law. The question presented to the Court was whether Mattel and Hall Street Associates could agree in advance to broad court review of an arbitration award to correct any errors of law. The case involved a clean-up dispute between toymaker Mattel and the owner of a factory site in Oregon contaminated with an industrial solvent. An arbitrator initially ruled in favor of Mattel, finding that Mattel did not have to pay for environmental clean-up on Hall Street's property. A federal court subsequently rejected the arbitrator's legal reasoning. The Ninth Circuit reversed, finding that the Federal Arbitration Act (FAA) bars judicial review of arbitration awards in such circumstances. The Court held that the ground stated in the FAA either for vacating, or for modifying or correcting, an arbitration award constitute the exclusive grounds for expedited vacatur and modification of an arbitration award pursuant to provisions of

the FAA. Nevertheless, the Court concluded that the case had to be remanded for consideration of whether the arbitration agreement, having been entered into by parties in course of district court litigation, having been submitted to district court as request to deviate from the standard sequence of trial procedure, and having been adopted by district court as an order, should be treated as an exercise of district court's authority to manage its cases, such that relief from the arbitration award might be sought upon more than just the limited grounds permitted for expedited vacatur and modification under the FAA.

ISSUES ON APPEAL

Eighth Circuit Upholds Missouri Escape Law

The Eighth Circuit upheld a Missouri law that limits the appeal rights of convicted criminals who escape. *Echols v. Kemna*, 511 F.3d 783 (8th Cir. 2007). In *Echols*, the petitioner fled while awaiting sentencing in Jackson County for first-degree murder in the 1990 slaying of his mistress's husband. That escape subjected the petitioner to the law that limited his right to appeal the conviction. The petitioner was apprehended in Louisiana in 1999. He returned to Jackson County and was sentenced to life in prison without the possibility of parole for murder and an additional eight years' imprisonment for his armed criminal action conviction. The petitioner filed a direct appeal to challenge his convictions. The Missouri Court of Appeals allowed the petitioner to appeal his conviction based on the use of his confession at trial even though the State of Missouri objected on escape rule grounds. The court affirmed the petitioner's conviction on the merits. When the petitioner then sought postconviction relief, the Missouri courts denied him such relief, citing the Missouri escape rule. The petitioner then sought habeas relief in federal district court. The district court refused to hear his petition for habeas relief because the court determined that the Missouri escape rule is an adequate and independent state law ground barring recovery. The Eighth Circuit, in an opinion authored by Judge Lavenski Smith, affirmed, holding that the Missouri escape rule was an adequate ground to bar the petitioner's federal habeas claim.

Missouri Inmates Must Have Access to Abortion Clinics

On the 35 anniversary of *Roe v. Wade*, the Eighth Circuit held unconstitutional the Missouri Department of Corrections (MDC) policy prohibiting transportation of pregnant inmates off-site for elective, nontherapeutic abortions. *Roe v. Crawford*,

514 F.3d 789 (8th Cir. 2008). In *Crawford*, the inmate's request for transportation outside of the MDC—an "outcount"—or an elective abortion was denied. The district court granted the inmate's request for emergency preliminary injunctive relief and ordered the MDC to provide the inmate with transportation outside of the MDC facility. The inmate then amended her complaint, seeking injunctive relief on behalf of a class composed of all women in the custody of the MDC who seek elective, non-therapeutic abortions. The district court certified the class. Both the class and the MDC moved for summary judgment, and the district court granted summary judgment in favor of the class, reasoning that the MDC policy is unreasonable under the Fourteenth Amendment using the four-part test established by *Turner v. Safley*, 482 U.S. 78 (1987), for reviewing the reasonableness of prison regulations impacting constitutional rights. The Eighth Circuit affirmed the judgment of the district court, finding that the *Turner* test represented the proper framework for analyzing the Fourteenth Amendment challenge. The court found that the MDC policy could not withstand scrutiny under *Turner* because, even if the MDC policy rationally advanced prison's legitimate security interests, the policy acted as a complete bar to elective abortions, as transportation "outcounts" to outside facilities were provided only for medically necessary, therapeutic abortions due to a threat to the mother's life or health. According to the court, obtaining an abortion prior to incarceration was not a valid alternative means of exercising the right. The court also found that the MDC policy did not reduce the overall number of outcounts and so did not reduce any strain on financial or staff resources. Finally, the court concluded that ready alternatives to the MDC policy existed, including reverting to the previous policy of allowing outcounts for elective abortions

Probable Cause Existed to Stop Minnesota Driver

In *Sherbrooke v. City of Pelican Rapids*, 513 F.3d 809 (8th Cir. 2008), the plaintiff filed a § 1983 lawsuit against the City of Pelican Rapids, Minnesota, and several of its police officers, claiming that the officers violated his rights under the Fourth Amendment by stopping his car without probable cause and by recording one side of a conversation between the plaintiff and his attorney. After leaving his high school reunion, the plaintiff was stopped by a police officer who claimed that the man's hazard lights were activated. The officer administered several sobriety tests and a portable breath test. When the test showed a .11 blood alcohol level, the plaintiff was arrested on suspicion of driving while intoxicated. At the police station, the plaintiff consented to another, more

accurate breath test. Pursuant to the standard operating procedure of the police department, the plaintiff remained under video and audio surveillance so that the officers could monitor his food and water intake prior to administering the test. During the wait, the plaintiff called his attorney and spoke to him while officers remained in the room. After speaking to his attorney, the plaintiff took the test, which revealed that his blood alcohol level was over the legal limit for driving. The charges against the plaintiff, however, were dropped, and he was never prosecuted. The district court denied the City's motion for summary judgment on the plaintiff's claim that the initial traffic stop was an unlawful seizure and granted summary judgment for the plaintiff on his claim that the officers unlawfully recorded one side of the telephone conversation with his attorney. The Eighth Circuit, in a 2-1 decision, held that the plaintiff's use of hazard lights, after he pulled onto the roadway from a stopped position and continuing until he reached the posted speed limit of 55 mph, violated Minnesota law; the officer had probable cause to stop the plaintiff even if such conduct did not violate a Minnesota statute; and the recording of the conversation between the plaintiff and his attorney did not constitute a search. Judge Beam dissented from the majority's determination that probable cause existed for the stop.

UPS Failed to Accommodate Employee's Religious Practice

In *Sturgill v. United Parcel Service, Inc.*, 512 F.3d 1024 (8th Cir. 2008), the Eighth Circuit upheld a jury verdict finding that the United Parcel Service (UPS) failed to accommodate an employee's religious practice. The employee, a Seventh-Day Adventist, was discharged for refusing to complete his route on Friday, December 17, 2004. The employee believed that working past sundown on Friday would violate his beliefs as a member of the Seventh-Day Adventist Church. The jury found that UPS did not discriminate against the employee because of his religion but failed to reasonably accommodate the employee's religious observance or practice and awarded the employee \$103,722 in compensatory damages and \$207,444 in punitive damages. The employee was awarded reinstatement pay for the time that he was away from work and an injunction requiring UPS to accommodate the employee's religious observation of the Sabbath in the future. He also received \$134,838 in attorney's fees. In an opinion authored by Chief Judge James B. Loken, the Eighth Circuit determined that ample evidence existed for the jury to find that UPS could have accommodated the employee's religious practice on the day in question. But, the court reversed the punitive damages award, concluding that UPS's actions did not rise to the level of malice or

reckless indifference to the company's obligations under the law. The case was remanded back to the United States District Court for the Western District of Arkansas for an appropriate amended judgment.

Eighth Circuit Upholds 15-Year Sentence for Child Pornography Conviction

In an opinion authored by Judge Roger L. Wollman, the Eighth Circuit upheld the child-pornography conviction of a former St. Joseph pharmacist who had been charged with one count of distributing child pornography and one count of publishing a notice that offered to distribute child pornography. *United States v. Sewell*, 513 F.3d 820 (8th Cir. 2008). The defendant, Walter E. Sewell, had admitted that he used the Kazaa file-sharing program to distribute child pornography on the Internet, but he argued that federal prosecutors in Kansas City went too far when they accused him of publishing a notice of the material online. If Sewell was convicted of mere distribution, he faced a minimum sentence of five years, while posting notices pushed the sentence to 15 years. The district court sentenced Sewell to fifteen years' imprisonment. The Eighth Circuit held that Sewell's use of Kazaa, by placing files containing child pornography in a shared folder with descriptive text, was an "offer" to distribute child pornography, as required for the sufficiency of the indictment by alleging an essential element of the offense of knowingly making or causing to be made any notice offering to distribute child pornography, considering that the purpose of Kazaa is to allow users to download each other's files. The purpose of the descriptive fields was to alter users to the pornography content of the downloadable files.

Eighth Circuit Finds District Court Should Have Applied Previous Conviction

In *United States v. Sturdivant*, 513 F.3d 795, (8th Cir. 2008), the defendant was convicted by a jury of various drug charges, including conspiracy to manufacture and distribute cocaine. He was arrested in January 2005 and sentenced by the federal district court to 29 years' imprisonment. The defendant appealed the district court's denial of motions for acquittal and for a new trial. The government cross-appealed the district court's denial of a sentencing enhancement, arguing that the defendant's three prior felony drug convictions meant that he should have been given a mandatory life sentence. On appeal, the defendant argued that convicted informants who carried on criminal conduct during the investigation corrupted the integrity of the government's evidence. He also argued that the lack of credibility in the government's case and its violation of discovery

orders justify his acquittal. The Eighth Circuit rejected his arguments, concluding that sufficient evidence existed to support the convictions. In addition, the court held that the district court did not err in denying the motions for acquittal and a new trial. The court did find, however, that the district court erred in refusing to apply a conviction in Van Buren County, Michigan, because of a clerical error that read that the conviction was in Missouri.

Motion To Vacate Judgment Under Federal Rule of Civil Procedure 60(b)

In *Jones v. Swanson*, 512 F.3d 1045 (8th Cir. 2008), a husband filed suit against his wife's former paramour, asserting a state law claim for alienation of affection. After a jury trial, the federal district court entered judgment in favor of the husband. The paramour then appealed. The Eighth Circuit, 341 F.3d 723, affirmed on the condition that the husband accept a remitted verdict. The husband accepted the reduced verdict, and the district court entered an amended judgment. Thereafter, the paramour filed a motion to vacate the judgment under Federal Rule of Civil Procedure 60(b), claiming that the wife gave false testimony at trial. He argued that the wife's admission constituted newly discovered evidence and warranted relief from judgment under Rule 60(b). In the alternative, the paramour argued that the perjury of a non-party witness warranted relief under Rule 60(b)(6)'s catch-all provision. The district court ultimately concluded that the Rule 60(b)(2) motion was untimely because it had not been made within one year of the date the district court first entered judgment in favor of the husband. The court also concluded that the Rule 60(b)(6) motion was untimely because it had not been made within a reasonable time after entry of the first judgment. The paramour appealed to the Eighth Circuit, arguing that the one-year limitations period for filing a motion under Rule 60(b)(2) began on the date the original judgment was filed instead of the date the judgment remitting the damage award was filed. He also argued that the district court abused its discretion in finding that the Rule 60(b)(6) motion was not filed within a reasonable time. The Eighth Circuit rejected the paramour's arguments, holding that because the paramour's Rule 60(b)(2) motion only focused on the issue of liability, the one-year limitations period for bringing the motion began to run when the district court's original judgment was entered and not when the amended judgment was entered following an appeal to the Eighth Circuit. In addition, the Eighth Circuit held that the district court did not abuse its discretion in deciding the motion was untimely under Rule 60(b)(6).

Eighth Circuit Holds That District Court May Reconsider Crack Cocaine-Related Sentences

The Eighth Circuit held that a federal district court may, if it so desires, reconsider a sentence imposed on two defendants for crack cocaine-related crimes in light of crack cocaine-powder cocaine sentencing disparities. *United States v. Roberson*, 517 F.3d 990 (8th Cir. 2008). In *Roberson*, the defendants argued, inter alia, that the district court erroneously ignored their arguments for lighter sentences based on the 100:1 disparity between crack and powder cocaine under the Guidelines. The Eighth Circuit concluded that the holding in *Kimbrough* does not mean that a district court acts unreasonably or abuses its discretion if it does not consider the crack/powder sentencing disparity. According to the court, the Supreme Court in *Kimrough* did not mandate that district courts consider the disparity in all sentences for crimes involving crack cocaine. The court, however, vacated the sentences and remanded to the district court so that it could reconsider the sentences in light of *Kimrough*, given that it was unclear whether the district court declined to use its discretion because of then-current Eighth Circuit precedent or because it did not find that the disparity justified a variance from the Guidelines.

Public Safety Exception to Miranda

In *United States v. Liddell*, 517 F.3d 1007 (8th Cir. 2008), the court held that the public safety exception to *Miranda* applied to post-arrest questioning of a defendant by police officers. In *Liddell*, a police officer stopped the defendant's car for a loud music violation. The officer arrested the defendant when a check revealed that he was barred from driving in Iowa. After the arrest, the officer did a pat-down search of the defendant and found a bag of marijuana, \$183 in cash, and two cell phones. The officer handcuffed the defendant and placed him in the patrol car. Meanwhile, another officer arrived to assist and began to search the defendant's car incident to the arrest. When the assisting officer discovered an unloaded .38 caliber revolver under the front seat, he showed the gun to the arresting officer and asked whether the defendant's person had been thoroughly searched after the arrest. The arresting officer then removed the defendant from the patrol car and asked, referring to the defendant's car, "Is there anything else in there we need to know about?" The assisting officer added, "That's gonna hurt us?" The arresting officer then repeated, "That's gonna hurt us? Since we found the pistol already." The defendant laughed and said, "I knew it was there but...it's not mine," before telling the officers that there were no other weapons in his car. The assisting

officer completed the search of the car, finding a .38 caliber ammunition and rolling papers. The defendant was charged with unlawful possession of the firearm and moved to suppress his incriminating statement. The government conceded that the defendant was in custody and had not been given his *Miranda* warnings at the time the officers asked the question. The district court denied the motion to suppress. On appeal, the question presented was "whether the statement [wa]s admissible under the public safety exception to *Miranda*, as articulated by the Supreme Court in *Quarles*...." The court, per Chief Judge Loken, affirmed the district court, holding that the public safety exception to the requirement that *Miranda* warnings be given prior to custodial questioning applied to post-arrest questioning of defendant by police officers, although defendant had been handcuffed and was sitting in the back of the officers' patrol car, where officers had discovered an unloaded revolver in the car, officers asked only if there was anything else in the car that was potentially harmful to them, and it was reasonable for officers to be concerned that another, possibly loaded, firearm or other weapon was in the car, which could cause harm if mishandled in some way. Judge Gruender concurred in the court's opinion but wrote separately "to explain [his] concern that [the Eighth Circuit's] decisions applying the public safety exception to *Miranda* have strayed from the Supreme Court's tethering of the exception to the existence of exigent circumstances."

Eighth Circuit Holds Frisk Evidence Should Have Been Suppressed

The Eighth Circuit held that a police officer's stop and frisk of a defendant was not a justified *Terry* stop. *United States v. Hughes*, 517 F.3d 1013 (8th Cir. 2008). In *Hughes*, a police officer was dispatched to an apartment building on a call of "suspicious parties on the property" in response to an anonymous complaint. The building was in a high-crime area because of reputed narcotics trafficking. Dispatch also mentioned a red bicycle. When the officer arrived, he saw the defendant, another male, and a female standing a few feet from a bus stop across the street from the building. The officer stopped all three, questioned them as to what they were doing in the area, and frisked them. The officer felt hard cylindrical objects in one of the defendant's pockets. The officer removed them and determined they were live rounds of ammunition. At some point, the officer did a computer check indicating that the defendant had no warrants but was under supervision for domestic assault and was affiliated with a gang. The district court, upon the magistrate judge's report and recommendation, denied the defendant's motion to suppress. The

Eighth Circuit reversed, holding, “On the facts here, the governmental interest in investigating a previous trespass does not outweigh Hughes’s personal interest. Being stopped and frisked on the street is a substantial invasion of an individual’s interest to be free from arbitrary interference by police.” The court, however, declined to forbid the police from stopping suspects while investigating misdemeanors. According to the court, “There may be cases where a Terry stop is justified to investigate completed trespass, such as where there is a strong threat to public safety.” The court found that no facts in the present case indicated such a threat.

FOOTNOTES

New Web Page Helps Pro Se Bankruptcy Filers

The Administrative Office’s Bankruptcy Judges Advisory Group (BJAG) developed a web page for individuals who are thinking of filing a bankruptcy petition pro se. The website is <http://www.uscourts.gov/bankruptcycourts/prose.html>. The website advises potential pro se filers that “[w]hile individuals can file a bankruptcy case without an attorney ‘pro se,’ it is extremely difficult to do it successfully.” The website cautions individuals that the bankruptcy rules are “very technical, and a misstep may affect a debtor’s rights.” After warning of the pitfalls of filing pro se, the website then provides information on credit counseling, free legal services, foreclosure resources, and petition prepares.

Retroactivity of Crack Cocaine Amendment

Effective November 1, 2007, the United States Sentencing Guidelines eliminated the sentencing disparity between convictions based on crimes involving crack-cocaine and powder-cocaine. The amendment to the Guidelines adjusts downward by two levels the base offense level assigned to each threshold quantity of crack cocaine listed in the Drug Quantity Table in §2D1.1 and provides a mechanism for determining the guideline range for offenses involving crack cocaine and other controlled substances.

On December 11, 2007, the United States Sentencing Commission voted to add the crack cocaine amendment to the list of amendments in §1B1.10 [Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)] that may be applied retroactively. The retroactive sentencing reduction does not go into effect until March 3, 2008, at which time reductions in sentence pursuant to 18 U.S.C. § 3582(c)(2) based on the retroactive application of the crack cocaine amend-

ment will be authorized.

For more information, go to the Commission’s website: <http://www.ussc.gov>.

Judicial Conference Supports Legislation To Remedy Sentencing Disparity Between Powder and Crack Cocaine Offenses

On February 12, 2008, Judge Reggie B. Walton of the United States District Court for the District of Columbia testified before the Senate Judiciary Committee that the Judicial Conference supports legislation to remedy the sentencing disparity that exists between powder and crack cocaine offenses. According to Judge Walton, existing sentencing policies on cocaine reduce the public’s confidence in the federal courts. Judge Walton, who serves as a member of the Judicial Conference Committee on Criminal Law, stated that the Judicial Conference supports such legislation because of its concerns for equity and fundamental fairness.

In 1986, Congress passed the Anti-Drug Abuse Act, which established the current crack-powder disparity. During that time, it was believed that crack cocaine was uniquely addictive and associated with greater levels of violence than powder cocaine. Experience, however, has shown that these beliefs were flawed.

Judge Walton informed the Senate Judiciary that while African-Americans comprise approximately 12.3 percent of the U.S. population, they comprise 81.8 percent of the federal crack cocaine offenders. Because crack offenses carry longer sentences than powder cocaine offenses, African-American defendants end up serving prison terms that are greater than those served by other cocaine defendants. According to Judge Walton, “The disparate impact of crack sentencing on African-American communities shapes social attitudes. When large segments of the African-American population believe that our criminal justice system is racist, it presents the courts with serious practical problems. People come to doubt the legitimacy of the law—not just the law associated with crack, but all laws.”

The Judicial Conference strongly favors legislative to reduce the sentencing disparity between crack and powder cocaine, but it has no established view on whether the disparity should be reduced by raising penalties for powder cocaine, reducing penalties for crack cocaine, or through some combination of approaches. But, the Judicial Conference does oppose mandatory minimum penalties and favors legislation leaving sentencing decisions to judges.

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EIGHT CIRCUIT LAW LIBRARY NEWS

Circuit Librarian Ann Fessenden: President of the American Association of Law Libraries

Circuit Librarian Ann Fessenden is currently serving as president of the American Association of Law Libraries. In the capacity, she has in recent months represented the 5000-member Association at meetings of the American Bar Association in San Francisco, the International Association of Law Libraries in Mumbai, India, the Association of American Law Schools in New York, and the American Library Association in Philadelphia. She also testified before a Congressional oversight hearing reviewing operation of the Library of Congress. Her testimony focused on the funding needs of the Law Library of Congress.

"Images of Justice" Exhibit

"Images of Justice," an exhibit consisting of 10 free-standing panels, is currently on display in the 1st floor Judicial Learning Center in St. Louis' Eagleton U.S. Courthouse. It highlights courthouse art and architecture that convey the authority of the law in a democracy. It is the first traveling exhibit created specifically for courthouses by the General Services Administration. Its next stop will be the new Cape Girardeau, Missouri federal courthouse. On display until the end of 2007 was "The Presidents Men—Black United States Marshals," courtesy of Robert Moore & Associates Black Police Resource Center, Springfield, Illinois, with text by Laura Dreon of the Eastern District of Missouri Clerk's Office. It chronicled the 132 years of dedicated service by African American men as United States Marshals and Deputy U.S. Marshals during the agency's 218 year history.

Interviews of Judges from the District of Nebraska

Oral history interviews of judges from the District of Nebraska are now available in streaming video on Creighton University's Law Library's Website at: <http://law.creighton.edu/oralhistories>. These interviews were sponsored by the Nebraska branch of the Historical Society of the United States Courts in the Eighth Circuit and conducted by Creighton University law professor Richard Shugrue. They include U.S. Court of Appeals Judges C. Arlen Beam, Donald P. Lay, and Donald R. Ross.

"Moments in Time" Interviews

Also, the Western District of Missouri completed an oral history project last year with interviews of its judges, including Court of Appeals Judge John R. Gibson. This series of interviews, called Moments in Time, captures stories and defines historical events in the Western District of Missouri. The interviews are available on DVD in the U.S. Courts' St. Louis and Kansas City libraries.

Road to Nowhere: Faulty Web Links in Opinions (Update) by Kris Albertus, Reference/CALR Librarian (Originally Published in the Eighth Circuit Law Library's Sept/Oct 2007 Library Newsletter)

Back in 2004 I wrote an article about the problem of faulty web links in judicial opinions. In light of the ever increasing number of web pages being cited in opinions, along with recent efforts by some circuit libraries to capture these links before they go bad, it seems like a good time for an update on the issue.

Recap: The amount of information that is moving to the Internet is staggering. This is particularly true with respect to information produced by government agencies. Unfortunately, the Internet still cannot be considered a stable source of information. The web page you find today, whether it is part of a commercial site or a government site, may be a dead end only a month from now, or the content that was once there may have been changed.

Those in the library science and IT professions often refer to this as “link rot.” The older the case, the more likely this is to occur. As the practice of citing to Internet materials becomes more common, it is important to consider how courts will deal with these often ephemeral resources.

As of October 12, 2007, a total of 366 opinions from appellate and district courts in the 8th Circuit cite to web pages. That’s up from 153 back in 2004. Looking at just the 8th Circuit appellate opinions, there are 70 opinions that contain a total of 100 web citations. Of those 100 citations, 38 are no longer good.

Other circuits are beginning to think about solutions to this problem. Circuit libraries have been particularly proactive on the issue, given how sensitive librarians in general are to the issue of “link rot.” This year the 7th Circuit Library began scanning the daily opinion releases and started a database of pdf captures for web citations that appear in 7th Circuit appellate opinions. The 8th Circuit Library is considering a similar approach.

The larger question to be considered is whether this problem would be better addressed in the earlier stages of a case? Should attorneys citing to web pages in their briefs be required to submit print copies of screen captures? Should chambers immediately print off a copy of a web page they plan to cite in an opinion? Sometimes web pages go bad within weeks. In cases like that, a cited web page could be altered or gone by the time the opinion is released - too late for the libraries to catch it.

EIGHTH CIRCUIT NEWSLETTER

This newsletter is compiled by the communications committee of the Association of the Bar of the United States Court of Appeals for the Eighth Circuit. Comments and suggestions should be addressed to committee chair Tiffany Milligan Brown (TMill720@aol.com).

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FOOTNOTES

1. See *United States v. Garate*, 482 F.3d 1013 (8th Cir. 2007); *United States v. Goody*, 442 F.3d (8th Cir. 2006); *United States v. Likens*, 464 F.3d 823 (8th Cir. 2006); *United States v. McDonald*, 461 F.3d 948 (8th Cir. 2006); *United States v. Morales-Uribe*, 470 F.3d 1282 (8th Cir. 2006); *United States v. Myers*, 439 F.3d 415 (8th Cir. 2006); *United States v. Cassandra Plaza*, 471 F.3d 928 (8th Cir. 2006); *United States v. Rene Plaza*, 471 F.3d 876 (8th Cir. 2006) (all reversing Judge Pratt for unreasonably varying from the Guidelines).