

FEDERAL PUBLIC DEFENDER
227 NORTH BRONOUGH ST., STE. 4200
TALLAHASSEE, FL 32301

CJA Panel Attorneys
NORTHERN DISTRICT OF FLORIDA

FEDERAL PUBLIC DEFENDER

NORTHERN DISTRICT OF FLORIDA

A Newsletter for Panel Attorneys

Volume II, Issue I

April 12, 2000

DOWNWARD DEPARTURES

Jacobs, Barbara Hinkle, R. Atty: Edward Stafman

Docket: 4:99cr58-RH
Charge: Mail Fraud, Money Laundering
Range: 41-51 months
Sentence: 34 months
Date of Imposition of Sentence: 3/23/00
Grounds: Defendant's diminished mental capacity.
U.S.S.G. § 5K2.13

Emenger, William Hinkle, R. Atty: Randy Murrell

Docket: 4:99cr64-RH
Charge: Dealing in FA w/o License, Sale of FA w/o License
Range: 15 - 21 months
Sentence: 3 yrs probation
Date of Imposition of Sentence: 12/16/99
Grounds: Defendant's age and physical condition.
U.S.S.G. § 5H1.1 and 5H1.4

Parramore, Donald Hinkle, R. Atty: Paul Villeneuve/Deeno Kitchen

Docket: 4:99cr59-RH
Charge: Dealing in FA w/o License (2 cts), Unlawful sale of Firearm
Range: 15 - 21 months
Sentence: 3 yrs probation
Date of Imposition of Sentence: 12/16/99
Grounds: Defendant's age and physical condition.
U.S.S.G. § 5H1.1 and 5H1.4

Please remember to send us any guideline departures. Our hope is that the information will help and encourage others to secure downward departures.

DAILY CASE REVIEWS FROM THE SUPREME COURT AND ELEVENTH CIRCUIT

Several of our lawyers have recently taken on the task of reviewing, on a daily basis, the opinions from the United States Supreme Court and the Eleventh Circuit. Those lawyers, in turn, have been sending an email to the rest of our staff with a brief synopsis of the cases they have reviewed. The end result has been that, within a day of the issuance of the opinions, all of our lawyers have the latest from the Supreme Court and the Eleventh Circuit.

We're now prepared to provide this same service to panel members. If you have an email address, and would like to receive these daily summaries, please call Margaret in our Tallahassee office, (850) 942-8818, and we'll send you the daily summaries.

WINDOW OF OPPORTUNITY

You may have a limited opportunity, that most of us never knew existed, to challenge a few of those prior State of Florida convictions that either affect your client's guideline score or, more importantly, are being used to by the Government to enhance your client's federal sentence. In Wood v. State, 750 So.2d 592 (Fla. 1999), the Florida Supreme Court amended Rule 3.850 so that its two year time limit also governs coram nobis petitions. Those defendants, though, who were adjudicated prior to May 27, 1999, the date of

the Wood, opinion have two years from that date to file their claim. Thus, up until May 26, 2001, any coram nobis claim, no matter how old the conviction, is timely.

Most remarkable, though, is the scope of the writ. The purpose of the writ has, to be charitable, been obscure to most of us. Traditionally, though, it has been used to raise claims of newly discovered evidence, by those who were not in custody. To be precise, the “function of the writ of coram nobis (has been) to correct errors of fact, not errors of law.” Hallman v. State, 371 So.2d 482, 485 (Fla. 1979). The rule has also been that “the facts upon which the petition is based must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known them by the use of due diligence.” *Id.*

There, have, however, been a number of cases that, in essence, seem to treat the writ as a 3.850 motion for those not in custody. In the oldest of them all, Nickels v. State, 86 Fla. 208, 98 So. 502 (Fla. 1923), the defendant used the writ to vacate a guilty plea because he felt threatened by mob violence. More recently coram nobis petitions have succeeded where the writ was used to vacate a plea of guilty or nolo contendere upon an allegation that the defendant’s plea was involuntary because the defendant was not advised of the affect the plea would have on his or her immigration status, Dugart v. State, 578 So.2d 789 (Fla. 4th DCA 1991); Gregersen v. State 714 Do.2d 1195 (Fla. 4th DCA 1998) *cert. gr.* 728 So.2d 505 (Fla. 1999); Kalici v. State, 24 FLW D1714 (Fla. 4th DCA July 21, 1999); Knibbs v. State, 1999 WL 1128800 (Fla. 2nd DCA, Dec. 10, 1999) [Contra: Peart v. State, 705 So. 2d 1059 (Fla. 4th DCA 1998) *cert. gr.* 722 So. 2d (Fla. 1998)]; State v. Garcia, 571 So. 2d 38 (Fla. 3rd DCA 1990)]; where it was alleged a plea was involuntary because the defendant “did not understand the elements of the crime (was) an unrepresented indigent man, and (because of) the coercion of the prosecutor,” Perry v. State, 2000 WL 220426 (Fla. 1st DCA, Feb. 28, 2000); where the defendant was denied the assistance of counsel, Weir v. State, 319 So.2d 80 (Fla. 2nd DCA 1975); and where the defendant alleged ineffective assistance of counsel, Dequesada v. State, 444 So.2d 575 (Fla. 2nd DCA 1984); Dugart v. State.

Note that a couple of these cases that have come to

opposite conclusions, Peart v. State and Gregersen v. State, are currently pending review in the Florida Supreme Court. That coupled with the fact that the case most helpful to us in north Florida, the First District’s recent decision in Perry, and a couple of others, Kalici and Knibbs, aren’t yet final is a good indication that this issue remains unsettled.

Nevertheless, we’re ahead at this point, and it may be you can use the writ to help one of your clients. We’ve recently filed one out of our Tallahassee office, so please call us in Tallahassee, (850) 942-8818, if we can help you.

SUPREME COURT UPDATE

Recent Decisions

FLORIDA v. J.L., No. 98-1993, 2000 WL 309131 (Mar. 28, 2000)

! Search and Seizure - Terry Stops and Firearms
An anonymous tip that a person is carrying a gun is not by itself sufficient to justify a police officer’s stop and frisk of that person. The Court stated that reasonable suspicion requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a certain person. The Court declined to adopt a firearm exception for Terry stops, altho it left open the possibility that in some circumstances the danger alleged may be great enough to justify a search without a showing of reliability.

GARNER v. JONES, No. 99-137, 2000 WL 309135 (Mar. 28, 2000)

! Ex Post Facto – Parole

When respondent committed original offense, Georgia’s parole rules required that reconsiderations for parole be held every three years. The parole board subsequently extended the reconsideration period to at least every eight years. The Court found that the Eleventh Circuit’s analysis failed to reveal whether retroactive application of the rule created a significant risk of increased punishment, so the Court remanded the case to the 11th for reconsideration.

PORTUONDO v. AGUARD, 120 S.Ct. 1119 (U.S. Mar. 6, 2000)

! Fifth Amendment – Prosecutorial Comment on Testimonial Advantage of Defendant’s Ability to Testify after Observing Other Witnesses. The Supreme Court ruled that a prosecutor who calls attention during closing argument to the fact that the defendant had the opportunity before testifying to hear all other witnesses testify and to tailor his own testimony accordingly did not violate the defendant’s Fifth and Sixth Amendment rights to be present at trial and confront his accusers, and his Fourteenth Amendment right to due process. The Court distinguished Griffin v. California, 380 U.S. 609 (1966), which involved an inference of guilt from silence, but that this case merely involved an inference regarding the defendant’s credibility. The Court found this case akin to cases which permit the prosecutor to “assail” the defendant’s credibility once he takes the stand. The Court also rejected the argument that it violated due process to require the defendant’s presence during trial, and then to allow the state to draw an adverse credibility inference based on that forced presence.

U.S. v. JOHNSON, 120 S.Ct. 1114 (U.S. Mar. 1, 2000)

! No Automatic Supervised Release Credit for Overservice of Prison Sentence. The Supreme Court held that, under 18 U.S.C. § 3624(e) (providing that a term of supervised release commences when an individual is “released from imprisonment”), a term of supervised release commences on the date a prisoner is released from prison, even if he had overserved his sentence by 2 ½ years when he was set free. Hence, Johnson was not entitled to a reduction of his term of supervised release by the amount of time he had unnecessarily served in prison. The Court noted that sentencing courts have certain “means to address equitable concerns,” such as, under § 3583(e)(1), terminating supervised release after one year of completed service.

ROE v. FLORES-ORTEGA, 120 S.Ct. 1029

(Feb. 23, 2000)

! Ineffective Assistance of Counsel – Failure to File Appeal Where Defendant Made No Request. The Supreme Court held that when a lawyer fails to file an appeal on behalf of a criminal defendant in cases where the defendant has not clearly conveyed his wishes about whether he wants an appeal, the defendant can obtain an appeal through a subsequent habeas suit when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

U.S. v. MARTINEZ-SALAZAR, 120 S.Ct. 774 (Jan. 19, 2000)

! Use of Peremptory Challenge to Cure Erroneous Denial of Challenge for Cause: No Violation of Fed. R. Crim. P. 24. The Supreme Court held that a defendant’s exercise of peremptory challenges pursuant to Rule 24 is not denied or impaired when the defendant chooses to use such a challenge to remove a juror who should have been excused for cause. Although the peremptory challenge plays an important role in reinforcing a defendant’s constitutional right to trial by an impartial jury, such challenges are auxiliary; unlike the right to an impartial jury guaranteed by the Sixth Amendment, peremptory challenges are not of federal constitutional dimension. So long as the jury that sits is impartial, the Court held, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated. The Court also rejected the defendant’s due process objection that forced use of a peremptory challenge to cure a trial court’s error in denying a challenge for cause arbitrarily deprived him of the full complement of peremptory challenges. However, the Court rejected the government’s contention that federal law should be read to require a defendant to use a peremptory challenge to strike a juror who should have been removed for cause, in order to preserve the claim that the for cause ruling impaired the defendant’s right to a fair trial.

The “hard choice” for defendants facing an erroneous denial of a for-cause challenge is whether to cure the error with a peremptory or preserve the error for appeal.

SMITH v. ROBBINS, 120 S.Ct. 746 (Jan. 19, 2000)

! **Anders Procedures Not Constitutionally Based.** The Court held that the Anders procedure for counsel representing criminal appellants whose appeals are believed to be frivolous (Anders v. California, 386 U.S. 738 (1967)) is only one method of satisfying the Constitution’s requirements for indigent criminal appeals; the States are free to adopt different procedures, so long as those procedures adequately safeguard a defendant’s right to appellate counsel. Unlike under the Anders procedure, counsel under California law neither explicitly states that his review has led him to conclude that an appeal would be frivolous nor requests to withdraw; instead he is silent on the merits of the case and offers to brief issues at the court’s direction. The procedure requires that counsel provide a summary of the case’s procedural and factual history, with citations to the record. The Court found the California procedures survived constitutional scrutiny, and further that California had made a good faith effort to mitigate one of the problems that critics have found with Anders, namely, the requirement that counsel violate his ethical duty as an officer of the court (by presenting frivolous arguments) as well as his duty to further his client’s interests (by characterizing the client’s claims as frivolous).

WEEKS v. ANGELONE, 120 S.Ct. 727 (Jan. 19, 2000)

! **Answering Capital Sentencing Jury’s Question by Referring Jury to Specific Paragraph Addressing the Use of Mitigating Evidence: No Reasonable Likelihood That Jury Was Confused as to Scope of its Authority.** The Constitution is not violated when a trial judge directs a capital jury’s attention to a specific paragraph of a constitutionally sufficient

instruction in response to a question regarding the proper consideration of mitigating evidence. A jury is presumed to follow its instructions. To presume otherwise would require reversal every time a jury inquires about a matter of constitutional significance, regardless of the judge’s answer. Here, the presumption gains additional support from empirical factors, including that each of the jurors affirmed the verdict in open court, they deliberated for more than two hours after receiving the judge’s answer to their question, and defense counsel specifically explained to them during closing argument that they could find both aggravating factors proven and still not sentence petitioner to death.

ILLINOIS v. WARDLOW, 120 S. Ct. 673 (U.S. Jan. 12, 2000)

! **Terry Stop Based on Unprovoked Flight in High Crime Area.** The Supreme Court held that police do not violate the Fourth Amendment’s prohibition on unlawful searches and seizures by **detaining and conducting a pat-down search** of a person based on his “headlong flight” upon seeing a caravan of police vehicles converge in a high crime area. While acknowledging that a person’s presence in a “high crime area,” standing alone, is not enough to support a reasonable suspicion, the Court noted that a location’s characteristics are relevant in determining whether the circumstances are sufficiently suspicious to warrant further investigation. The Court noted that unprovoked flight can also reasonably arouse suspicion. While individuals have the right to ignore the police and go about their business, Florida v. Royer, 460 U.S. 491 (1983), fleeing police is the opposite of going about one’s business. The Court rejected a per se rule, recognizing that flight is not necessarily indicative of ongoing criminal activity.

NEW YORK v. HILL, 120 S. Ct. 659 (U.S. Jan. 11, 2000)

! **WAIVER OF IAD SPEEDY TRIAL**

RIGHT BY DEFENSE COUNSEL. THE INTERSTATE AGREEMENT ON DETAINERS (IAD) CONTAINS A 180-DAY SPEEDY TRIAL PERIOD. THE SUPREME COURT HELD THAT DEFENSE COUNSEL'S AGREEMENT TO A TRIAL DATE OUTSIDE THE IAD PERIOD CONSTITUTED A WAIVER OF THIS SPEEDY TRIAL RIGHT. “For certain fundamental rights, the defendant must personally make an informed waiver, but scheduling matters are plainly among those for which agreement by counsel generally controls.”

MARTINEZ v. COURT OF APPEAL OF CALIFORNIA, 120 S. Ct. 684 (U.S. Jan. 12, 2000)

! No Right to Self-Representation on Appeal. The Supreme Court held that the constitutional right to self-representation, recognized at the trial level for criminal defendants in Faretta v. California, 422 U.S. 806 (1975), does not apply at the appellate level. The Court explained that there are significant distinctions between the right to self-representation at the trial and appellate stages. First, Faretta grounded the right of self-representation on the scarcity of lawyers, a historical fact that was no longer valid. Second, the Sixth Amendment, upon which Faretta relied, does not include any right to appeal. Moreover, Faretta's reliance on historical practices in England is inapposite, since the right to appeal was not recognized in England until 1907. Finally, the Court found that the risk of disloyalty of an attorney, or the suspicion of disloyalty, which underlies the right of self-representation at trial, is inapposite in appellate proceedings, where the states have a countervailing interest in ensuring the integrity and efficiency of the appellate process. (States remain free to protect the right to self-representation on appeal under their state constitutions.)

Recent Grants of Certiorari

RAMDASS v. ANGELONE, 120 S.Ct. 784 (U.S. Jan. 11, 2000) (reported below at 187 F.3d 396 (4th Cir. 1999)). A capital murder defendant who was precluded from advising the sentencing phase jury that he was ineligible for parole – contrary to Simmons v. South Carolina, 512 U.S. 154 (1994) – challenges the Fourth Circuit's holding, based on a state court finding that, technically, his ineligibility for parole did not become final until a further ministerial act was performed two weeks after the presentation of the case to the sentencing jury.

FROM OTHER CIRCUITS

U.S. v. PALAFOX-MAZON, 198 F.3d 1182 (9th Cir. Jan. 4, 2000). The court upheld the district court's refusal to aggregate the amounts of marijuana imported by four individual backpackers. Even though the defendants were hired by the same person, picked up the drugs at the same time, and crossed the border together with the same guide, the court agreed that there was no jointly undertaken criminal activity. The court distinguished Example 8 in U.S.S.G. § 1B1.3.

ELEVENTH CIRCUIT CASE SUMMARIES

U.S. v. HERNANDEZ-FRAIRE, No. 98-3192, 2000 WL 353084 (April 6, 2000)

! Rule 11 plea colloquy. Considering a guilty plea under plain error review, the 11th found error in the district court's failure to advise a defendant of his Rule 11(c)(3) rights to plead not guilty, to be tried by a jury, to have assistance of counsel at such trial, to confront witnesses and to be protected against compelled self-incrimination. The appellate court noted that plain error can occur if a district court does not address one of the three “core concerns” of Rule 11, but other defects may be harmless error if they do not harm substantial rights of the defendant. Here the court pointed to two unpublished decisions (presented

by the government!) which found error in similar colloquys by the same district judge, and the court noted that comments by the defendant at plea suggested that he really did not understand his rights.

SPIVEY v. HEAD, No. 98-8288, 2000 WL 313333 (Mar. 28, 2000)

! Habeas in Capital case

The 11th reviewed and rejected a number of issues in this case, including: pretrial publicity and venue change, security measures in the courtroom, jury selection issues, improper prosecutor's argument, Brady claims, and a Johnson v. Mississippi claim. A summary of each issue would be too lengthy to include here, and many claims were found to be procedurally barred. The closest issue seemed to be the Johnson v. Mississippi issue, concerning whether the eight amendment is violated by the finding of an aggravating circumstance for a prior conviction for violent felony when that prior conviction was vacated.

U.S. v. MILLER, No. 99-12886, 2000 WL 269995 (Mar. 13, 2000)

! U.S.S.G. § 2B3.1(b)(2)(D), Enhancement for Otherwise Using an Object Which Merely Appeared to Be a Dangerous Weapon. The Court affirmed the imposition of a four-level sentence enhancement, pursuant to U.S.S.G. § 2B3.1(b)(2)(D), on a defendant convicted of armed bank robbery in violation of 18 U.S.C. § 2113(a) & (d). During the robbery, Miller approached a bank teller, displayed what looked like a bomb (two red sticks with a fuse), and lit the fuse, asking the teller if she knew what "it" was. The teller handed over \$8,534. The Court noted that under § 2B3.1(b)(2)(D), a four-level enhancement is applicable "if a dangerous weapon was otherwise used." The Court held that this guideline applies even if the object is not dangerous, but "only appears" to be dangerous, pointing out that such objects are already treated "as if they actually were dangerous weapons" under other guidelines. The Court further held that the three-level enhancement for "brandishing, displaying or possessing a dangerous weapon," under subsection (E), did not apply, because the defendant's conduct was more than brandishing,

citing U.S. v. Wooden, 169 F.3d 674 (11th Cir. 1999) (pointing gun and one-half inch from victim's forehead more serious than brandishing).

U.S. v. DELEVEAUX, No. 98-5685, 2000 WL 262634 (Mar. 9, 2000)

! Felon-in-possession, 18 U.S.C. § 922(g): Affirmative Defense of Justification Exists But Defendant Has Preponderance Burden of Proof. Addressing a question of first impression in the Eleventh Circuit, the Court held that the defense of justification is available in a felon-in-possession case under 18 U.S.C. § 922(g). The Court further held, likewise as a matter of first impression, that justification is an affirmative defense which the defendant must prove by a preponderance of the evidence. To establish the defense, the defendant bears the burden of proving the following "extraordinary circumstances": "(1) that [he] was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that [he] did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that [he] had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm." The defendant argued that the district court, which instructed the jury on the justification defense in this case, erred in placing the burden of proof for the defense on the defendant. Rejecting Deleveaux's argument that the justification defense negates the mens rea requirement of § 922(g), the Court noted that § 922(g) is a strict liability crime which does not require proof of criminal intent.

U.S. v. PRATHER, No. 98-9094, 2000 WL 253591 (Mar. 7, 2000)

! Sufficiency of the Evidence: 21 U.S.C. §§ 841(d), 846 & 861(d), Distribution and Conspiracy to Distribute Pseudoephedrine. The Court affirmed a conviction of the president of a company that distributed pseudoephedrine, a product commonly marketed as a nasal

decongestant, but which can be used as an ingredient to manufacture methamphetamine, a controlled substance, for conspiracy to distribute and distribution of pseudoephedrine, in violation of 21 U.S.C. §§ 861(d)(2) and 846, and for money laundering, in violation of 18 U.S.C. § 1957(a). The Court rejected Prather's argument that there was insufficient evidence to convict him because the government failed to show that any of the pseudoephedrine was actually used to manufacture methamphetamine. Looking to the plain language of the statute, the Court concluded that the law only required that the defendant know that the drug will be used to manufacture a controlled substance, and not that such manufacture actually occurred.

! **Jury Instructions: Deliberate Ignorance and 21 U.S.C. § 841(d)(2)'s Element of "Reasonable Cause to Believe."** Reviewing the issue for plain error, the Court concluded that the trial court did not err in failing to instruct the jury that it must find that Prather must have acted in "bad faith" in order to conclude that he had "reasonable cause to believe" that his sales would result in the distribution of controlled substances (an alternative element of the offense of which he was charged under 21 U.S.C. § 841(d)(2)), in light of the "overwhelming evidence" of Prather's actual knowledge of the use of the drug he sold. The Court also found no error in the giving of a deliberate ignorance instruction.

! **Fed. R. Crim. P. 16 Discovery Violations: Exclusionary Sanctions Reviewed for Abuse of Discretion.** The Court found no abuse of discretion in the trial court's refusal to allow Prather to play a tape of a government witness' conversation during cross-examination of that witness, because Prather had not disclosed the tape to the prosecution.

Ex Post Facto Clause Precludes Retroactive Application of 1996 Increase in Mandatory Special Assessment. The Court agreed with Prather, however, that the sentencing court erred in imposing a \$100 per count special assessment, instead of the \$50 per count applicable to crimes, like those Prather committed, which occurred

before the assessment figured was raised, i.e., prior to April 24, 1996.

U.S. v. GIL, 204 F.3d 1347 (Mar. 3, 2000)

! **Sufficiency of the Evidence: 21 U.S.C. § 846, Conspiracy to Possess with Intent to Distribute Cocaine.** The Court rejected defendant's sufficiency challenge to a cocaine conspiracy conviction. The evidence showed that the defendant was the spouse of a person who had been surveilled returning to the marital residence with a large quantity of cocaine and that the defendant emerged shortly thereafter from the house and drove away with \$12,500 in cash.

! **Fourth Amendment: Terry Stop and Detention of Non-arrestee to Protect Investigation, Reasonableness of Handcuffing and Restraining Detainee for Officers' Protection for More Than an Hour.** The Court rejected the argument that the defendant was arrested or that her Fourth Amendment rights were violated when she was detained, based on reasonable suspicion grounds, for 75 minutes while the police searched her house for cocaine. The Court noted that handcuffing the defendant in the back of a police car, though "a severe form of intrusion," was "reasonable" here. The totality of the circumstances showed that this was a reasonable investigatory stop under Terry v. Ohio, 392 U.S. 1 (1968). Factors relevant to this analysis include "the law enforcement purposes served by the detention, the diligence with which the police pursue the investigation, the scope and intrusiveness of the detention, and the duration of the detention."

! **Evidentiary Rulings: Lack of Foundation for Character Witness' Testimony and Admission of Circumstantial Evidence of Ties Between Co-conspirators.** The Court found no abuse of discretion in the trial court's decision to exclude a character witness on the ground the witness had an inadequate basis for expressing an opinion about the defendant, having not had contact with her, but with her family.

U.S. v. THAYER, 204 F.3d 1352 (Mar. 3, 2000)

! Sufficiency of the Evidence: 18 U.S.C. § 1956(a)(1)(B), Money Laundering (Concealment), 18 U.S.C. § 371, Conspiracy, and 18 U.S.C. §§ 1341 & 1434, Mail and Wire Fraud. The Court affirmed convictions for wire fraud, mail fraud, money laundering, conspiracy to engage in fraud, and money laundering conspiracy, for offenses arising out of a scheme to falsely promise timeshare owners that, in exchange for fees paid to the defendant, buyers of their properties would be found. Where the defendant “hired the employees, gave them a script, and taught them how to execute the scheme” and “generated and signed the phony delay letters,” evidence was sufficient to show that she was a principal in this extensive conspiracy. As to money laundering under the concealment prong of the statute, the defendant funneled profits from the fraud through fictitious accounts and into her personal bank accounts, which was sufficient to prove that she intended to conceal the fraud proceeds.

! Invited Error Precludes Challenge to Evidentiary Ruling; Judicial Comment That Merely Clarified Confusion Created In Witness Examination Was Not Improper; Bruton Violation Not Found Where Only Minimal Adverse Inferences Could Have Been Drawn from Codefendant’s Statement. The Court found no grounds for reversal in the admission of grand jury testimony when, during trial, defense counsel stated: “I really don’t object.” The Court held that the defense invited the error and review was precluded. The Court also found no error in a jury instruction regarding one witness’ plea agreement: the trial court “simply clarified the defense-created confusion about the plea agreement.” The Court rejected one defendant’s Bruton argument, noting that the co-defendant admission was “insignificant” by comparison with other incriminating evidence.

! Plain Error Review of Unobjected-to Plea Breach Looks to Injustice in the Sentence; General Application of Sentencing Guidelines for Money Laundering, U.S.S.G. § 2S1.1. The Court rejected one defendant’s claim, reviewed

for plain error, that the prosecutor breached the written plea agreement by failing to abide by its terms during sentencing. The Court also rejected the argument that the money laundering guidelines only apply to drug trafficking convictions, citing U.S. v. Adams, 74 F.3d 1093 (11th Cir. 1996).

! Plain Error in Failing to Consider Defendant’s Ability to Pay Restitution in Pre-MVRA Case; District Court Has Discretion to Deny Acceptance of Responsibility Reduction Where Defendant Went to Trial. As to three defendants, the Court vacated restitution orders (having reviewed two orders for plain error). Citing U.S. v. Siegel, 153 F.3d 1256 (11th Cir. 1998), the Court held that under pre-April 24, 1996 law, a court could not impose restitution without regard to the defendant’s financial resources.

INNAB v. RENO, 204 F.3d 1318 (Mar. 1, 2000)

! Non-retroactivity of AEDPA. Relying on Mayers v. Reno, 175 F.3d 1289 (11th Cir. 1999), the Court reversed the district court’s dismissal of a habeas petitions under 28 U.S.C. § 2241 seeking review of a decision of the Bureau of Immigration Appeals which was filed prior to the effective date of the AEDPA. The Court found no basis in the Act for applying it retroactively.

U.S. v. BROWNLEE, 204 F.3d 1302 (Feb. 29, 2000)

! Safety Valve, U.S.S.G. § 2D1.1(b)(6) - Prior Untruthful Statements Not a Bar to Sentence Reduction. The Court held that a defendant was eligible to receive a safety valve sentence reduction, pursuant to U.S.S.G. § 2D1.1(b)(6), even though he initially did not truthfully disclose the source of his cocaine, but did so only later, the day before sentencing. The Court noted that U.S.S.G. § 5C1.2(5) requires disclosure of information for safety valve purposes “not later than the time of the sentencing hearing.” Prior lies by a defendant are not “completely irrelevant” to the safety valve determination, but the court may not disqualify the defendant without

considering whether the “final proffer” was complete and truthful.

U.S. v. CHAVEZ, 204 F.3d 1305 (Feb. 29, 2000)

! No Sixth Amendment Right to Jury Trial in Petty Offense Just Because Restitution and Potential Supervised Release. The Court rejected defendant’s argument that he was denied a constitutional right to jury trial, pointing out that no such right attaches to petty offenses, for which the maximum term of imprisonment was 6 months. The jury trial right is triggered only when the legislature evinces an intent that an offense is more serious than one punishable by 6 months of incarceration. The Court rejected the defendant’s arguments that alternative sentences imposed on him showed that the offense was more serious than a 6-month prison term. The Court further rejected arguments that, *inter alia*, a restitution order, the possibility of supervised release, or loss of the right to bear arms, under 18 U.S.C. § 921, constituted additional punishment, pointing out congressional intent that the firearm prohibition is triggered regardless of whether the underlying offense was found by a jury. [NOTE: The right to a jury trial as to all crimes is found not only in the Sixth Amendment, but also in Article III of the Constitution.]

! Conditions of Probation and Notification to Third Parties. The Court rejected Chavez’ argument that it was improper for the trial court to notify third-parties of his conviction, noting that this was a matter of public record. The Court also found no fault in the order requiring Chavez as a condition of probation to pay his estranged wife, the victim of the assault, \$1,200 per month, as dependent-subsistence payments under 18 U.S.C. § 3563(b)(1).

! Oral Pronouncement of Sentence Governs Where Conflict. The Court agreed with Chavez that the written judgment of conviction, which required him to “successfully complete” a domestic violence rehabilitation program, differed from the oral pronouncement of sentence, which merely required him to attend such a program, and remanded for correction of judgment.

! Fed. R. Evid. 404(b): Evidence of Prior Assaults Was Harmless. The Court rejected Chavez’ argument that reversible error occurred at his trial when the trial court admitted, under Fed. R. Evid. 404(b), evidence of alleged prior assaults against his wife. The Court agreed with Chavez that this evidence merely established his “bad character” and should not have been admitted. However, in light of the “overwhelming” evidence that Chavez did assault his wife, and since assault is not a specific intent crime, the error was harmless.

U.S. v. MORRISON, 204 F.3d 1091 (Feb. 25, 2000)

! Jurisdictional Time Limit of Fed. R. Crim. P. 35(c) Correction of Sentence Expires 7 Days after Oral Pronouncement of Sentence. The Court held that the district court lacked jurisdiction, under Fed. R. Crim. P. 35(c), to correct a defendant’s sentence when the correction occurred more than 7 days after the court orally imposed sentence at the defendant’s sentencing hearing. Hence, the sentencing court had no authority to correct a sentence from 24 months to 46 months more than 7 days after sentencing, and the Court remanded the case for reinstatement of the 24 month-sentence.

AKINS v. U.S., 204 F.3d 1086 (Feb. 24, 2000)

! 28 U.S.C. § 2255 One-year Statute of Limitations; Equitable Tolling. The Court affirmed the district court’s ruling that the defendant’s motion under 28 U.S.C. § 2255 was untimely. Akins filed his § 2255 motion well after expiration of the one-year tolling period for filing a post-AEDPA § 2255 motion challenging a pre-AEDPA conviction, *i.e.*, prior to April 24, 1996. “A conviction ordinarily becomes final when the opportunity for direct appeal of the conviction has been exhausted.” Thus, Akins’ appeal of the district court’s ruling on review of a retroactive change in the sentencing guidelines did not affect the finality of the conviction for AEDPA purposes and toll the statute of limitations under the AEDPA. The Court found

no grounds for equitable tolling (due to deprivation of access to the law library and his legal papers), because, even taking account of periods during which he was locked down and had no access to his legal papers, Akins had “at least six months” during which he could have timely filed his § 2255 motion. The Court also rejected the argument that the limitations period was tolled, as the lockdown period did not constitute an illegal or unconstitutional impediment created by the government, since it was not shown to have been related to “legitimate penological interests.” More than mere lack of access to a prison library may now be required to establish such an impediment under Lewis v. Casey, 518 U.S. 343 (1996).

WEEKLY v. MOORE, 204 F.3d 1083 (Feb. 24, 2000)

! 28 U.S.C. § 2254 Statute of Limitations Tolloed During Pendency of Properly Filed State Petitions. The Court affirmed the district court’s ruling that a habeas petition was untimely filed. Weekly’s motion, challenging his state court conviction, was filed after expiration of the one-year AEDPA statute of limitations (and more than one year after passage of the AEDPA). Weekly sought to invoke the tolling provision of the Act, on the basis that two of his state habeas petitions were still pending in state court during the year following enactment of the AEDPA, and the Act provides that the time during which a “properly filed” petition is pending is not counted against the petitioner. (Both petitions were ultimately dismissed by the Florida courts for being invalid “successive” petitions.) The term “properly filed” is not defined in the Act. The Court noted a split in the circuits between those that consider a petition not to be “properly” filed if it is dismissed as a “successive” petition by the state courts, and those which deem a petition to be properly filed if it satisfies the “bare minimum” requirements of time and place. In a 2-1 decision, the Court sided with the narrower, minority view and extended Webster v. Moore, No. 99-4201 (11th Cir. 2000) (failure to meet state filing

deadlines means a complaint is not “properly filed”), ruling that Weekly’s prior petitions which were determined to be “successive” were not “properly filed,” and therefore he could not invoke the protections of the Act against untimely § 2254 petitions. [NOTE: The dissenting opinion, which sided with the majority of the circuits to address the issue, argues that there is a significant difference between an untimely prior petition, as in Webster, and a non-meritorious petition, due to a determination of successiveness, as in the instant case. “When state courts do in fact have to look at the merits of a petition for post-conviction relief, it seems to me that their merits determination should have no bearing on whether the petition was ‘properly filed’ under the AEDPA.”]

U.S. v. ROMINES, 204 F.3d 1067 (Feb. 18, 2000)

! Restitution, under 18 U.S.C. §§ 3556, 3663, May Not Be Ordered (Either at Original Sentencing or on Supervised Release Violation) as to Losses Sustained by Persons Who Are Not Victims of the Federal Offense of Conviction. The Court vacated the portion of a sentence imposed for violation of supervised release which ordered the defendant to pay restitution. Romines had originally been convicted and sentenced for interstate transportation of stolen goods. He violated the supervised release portion of that sentence, and was confined to a half-way house from which he escaped, and was then convicted of escape. While serving the supervised release portion of that sentence, he stole \$8,000 and a motorcycle from two persons with whom he resided. At the sentencing for violating this supervised release, the district judge ordered Romines to pay restitution for the objects he stole. Reviewing the matter for plain error, the Court reversed the restitution order. The Court pointed out that Romines had never been charged with embezzling money or a motorcycle. The Court noted that under the restitution statute, 18 U.S.C. §§ 3556, 3663(a)(1), only “victims of the offense” can be

compensated through restitution, and that this limitation applied in orders regarding violations of supervised release. Here, the restitution order did not have anything to do with the victims of Romines' two prior offenses (transportation of stolen goods, escape), and therefore was invalid.

U.S. v. MAGLUTA, 203 F.3d 1304 (Feb. 17, 2000), vacating in part U.S. v. Magluta, 198 F.3d 1265 (11th Cir. 1999)

! Resentencing – Application of Amended Guideline in Effect at Time of Resentencing. On petition for rehearing, the Court amended its prior order to clarify that on resentencing, the district court should apply the current version of a guideline, which had been changed by a clarifying amendment.

U.S. v. MAGLUTA, 198 F.3d 1265, on rehearing (Feb. 17, 2000)

During his trial for these offenses, Magluta jumped bond, was apprehended, and pled guilty to failure to appear during trial. Magluta received a 71-month sentence for the false identification convictions and a consecutive 41-month sentence for the bond jumping.

! Erroneous Upward Departure; Impermissible Double Counting. After rejecting numerous defense sentencing arguments, the Court found merit in parts of Magluta's challenge to a six-level upward departure under U.S.S.G. § 5K2.7 for "significant disruption of a governmental function," and under § 5K2.9 for "facilitat[ing] or conceal[ing] the commission of another offense." The Court agreed that the upward departure could not be justified simply because the U.S. Marshals Service expended significant resources attempting to apprehend him, noting that is one of their functions. The Court further agreed that the court abused its discretion in enhancing Magluta's sentence pursuant to both § 2F1.1 and § 5K2.7 based on the same conduct. Although the Court agreed with the lower court's finding on two other points, it remanded the case to the district court to

determine whether a six-level departure remained reasonable, given that one of the grounds relied on by the district court constituted double counting. **! Erroneous Upward Departure for Understated Criminal History: Counting of Conduct Already Factored into the Sentence.** The Court also found some merit in Magluta's challenge to a departure which raised his criminal history category from III to VI. The Court agreed that the bond-jumping had already been factored into his sentence under the relevant conduct provisions of the Guidelines and remanded the case for reconsideration of the appropriate departure without this ground.

! Plain Error - Absence of Precedent. The Court reviewed for plain error Magluta's argument that he should not have been separately sentenced for jumping bond but rather should have been subject only to a guidelines enhancement for obstruction of justice. The Court found no plain error, because, even though the sentencing court "may have committed error," the case law left room for doubt on how to resolve an apparent conflict between U.S.S.G. § 2J1.6, comment. (n. 3), and 18 U.S.C. § 3146(b), and an error is not plain "if there is no precedent directly resolving [an] issue."

! U.S.S.G. § 2J1.6(b)(2)(A) - Bond Jumping Enhancement. The Court agreed with Magluta that the district court erred in enhancing his sentence by nine levels under U.S.S.G. § 2J1.6(b)(2)(A). The guideline provides for an enhancement above the offense level based on the maximum statutory term of "the underlying offense." The Court noted that the use of the singular, coupled with the pre-Guideline holding of U.S. v. Iddeen, 854 F.2d 52 (5th Cir. 1988), that consecutive sentences based on bond jumping should be based on the maximum term of the most severely punished offense, not the aggregate of all offenses charged, indicated that the § 2J1.6(b)(2)(A) enhancement should be based on the most serious of the counts referred to in the indictment. Thus, the sentencing court erred by aggregating all the counts in the indictment; only a six-level enhancement was proper. On

rehearing, the district court was directed to follow the amended application note for resentencing.

! Supervised Release Terms Must Run Concurrently. Finally, the Court vacated the imposition of consecutive terms of supervised release, noting that the governing statute, 18 U.S.C. § 3624(e), expressly requires concurrent, not consecutive, terms.

U.S. v. COOPER, 203 F.3d 1279 (Feb. 14, 2000)

! Unregistered Person in Hotel Room Has No Reasonable Expectation of Privacy under Fourth Amendment. The Court held that the defendants did not have a reasonable expectation of privacy in a hotel room for which they neither paid nor registered, in which they had no personal belongings, and in which they failed to even allege that they were overnight guests (only that the room was “theirs”). The defendants’ motion to suppress failed to allege facts sufficient to create any issue whether they had a reasonable expectation of privacy in the room; even after the government raised the issue of standing, defendants failed to amend their motion to provide the specific facts essential. The warrantless invasion of the hotel room by police was therefore proper, as was the district court’s denial of an evidentiary hearing on the standing issue. The Court did not address whether an unregistered overnight guest in a hotel room has a qualifying reasonable expectation of privacy, because the defendants did not allege that they were such guests. However, in *dicta*, the Court observed that the defendants here might not have succeeded even on that ground: “In Minnesota v. Carter, 119 S. Ct. 469, 474 (1998), the Court held that in order to establish a reasonable expectation of privacy in a third-party’s home, an individual must demonstrate she is a guest on the premises for a personal occasion, rather than for strictly a commercial purpose. Because the evidence in this case suggests Defendants were using the hotel room predominantly to engage in narcotics trafficking, Defendants likely would lack standing even if they had been ... overnight guests”

! Sufficiency of Evidence: 21 U.S.C. §§ 841 &

846. The Court rejected one defendant’s argument that there was insufficient evidence to support his convictions, noting the defendant’s recurrent association with the room where substantial quantities of various narcotics and related money and objects were found and \$6500 in various denominations of cash, bundled in rubber bands, was found on his person upon arrest. “The trial evidence adequately supports the jury’s ultimate conclusions that Urbina at a minimum constructively possessed the narcotics in [the hotel room] and was engaged in the ongoing criminal conspiracy. In addition to observing Urbina frequenting the sixth floor of the hotel at unusual hours of the morning, [a hotel security officer] testified that on one occasion, he even assisted Urbina in entering [the room] because Urbina’s key was not working properly, indicating Urbina had authorized access.” To prove aiding and abetting, the Government needed only to demonstrate Urbina “willfully associated himself with the enterprise to possess the [narcotics] and contributed to its success.” [NOTE: The Court refused to consider another defendant’s sufficiency argument because she had merely adopted that of Urbina, without individualizing her sufficiency argument as required on appeal.]

U.S. v. BRAVO, 203 F.3d 778 (Feb. 11, 2000)

! 18 U.S.C. § 3582(c)(2) – Lack of Jurisdiction to Depart Downward on Correction of Sentence for Changed Guideline. After his sentencing, the base offense level for Bravo’s crime, conspiracy to import cocaine, was lowered from 40 to 38, and the law gave district courts discretion to apply the amendment retroactively. Bravo filed a motion for reduction of sentence under 18 U.S.C. § 3582(c)(2), and sought, in addition, a downward departure because of a serious medical condition developed while in prison. The district court granted the motion to apply the base offense level reduction, noting that one reason for doing so was Bravo’s medical condition, but found it lacked jurisdiction to grant the downward departure. The Court

affirmed that the sentencing court had discretion to lower Bravo's sentence based on the reduction of the base offense level and to take account of a medical condition, but lacked jurisdiction to depart downward in order to further reduce Bravo's sentence based on his medical condition.

U.S. v. TAIT, 202 F.3d 1320 (Feb. 4, 2000)

! **Felon-in-possession, 18 U.S.C. § 922(g): Restoration of Rights; Possession of Gun in Gun-free School Zone, 18 U.S.C. § 922(q): Possession Authorized by State Law.** The Court rejected a government appeal and affirmed the district court's dismissal of a two-count indictment charging the defendant with being a felon in possession of a firearm and with possessing a gun in a gun-free school zone, in violation of 18 U.S.C. §§ 922(g)(1) and 922(q)(2)(A). As to the first count, the Court noted that all three of Tait's prior convictions were under Michigan law, and found that Tait's civil rights had been restored by operation of Michigan law. Because Tait's civil rights had been restored, under 18 U.S.C. § 921(a)(2) the felon-in-possession statute did not apply. As to the second count (which involved alleged conduct in Alabama), the criminal statute also did not apply, because 18 U.S.C. § 922(q)(2)(B)(ii) created an exception for persons licensed by the state to possess a firearm, and for whom the state has verified that the individual is qualified for such a license. The Court pointed out that federal law looks to state law to determine the issue.

U.S. v. JAMIESON, 202 F.3d 1293 (Jan. 31, 2000)

! **Sentence Enhancement under U.S.S.G. § 2K2.1(a)(3) for Possession of Assault Weapon, 18 U.S.C. § 921(a)(30).** The Court vacated a two-level sentence enhancement under U.S.S.G. § 2K2.1(a)(3), which authorizes an enhancement if the defendant possesses an assault weapon proscribed by 18 U.S.C. § 921(a)(30)(A)(i) or by § 921(a)(30)(B). The Court found that the statutory exemptions from the prohibition for

certain Norinco weapons meant that not "all" Norinco weapons were covered. The Guideline enhancement, therefore, was not applicable, because defendant's weapon did not fall within the category of prohibited weapons

U.S. v. KENNEDY, 201 F.3d 1324 (Jan. 28, 2000)

! **State Court Actions as Affecting Forfeiture under 18 U.S.C. § 982.** A spouse of a defendant whose interest in a home was forfeited under 21 U.S.C. § 853 was not a bona fide purchaser of the husband's interest where she and the husband took title to the property jointly, even though a divorce court awarded her (through special equity) the whole property free and clear of the husband's claims and that any superior interest the spouse may have had in the property did not vest until after the act giving rise to the forfeiture. The Court recognized a direct conflict with the Sixth Circuit and that a different analysis was applicable to civil in rem forfeitures under 21 U.S.C. § 881.

U.S. v. PROSPERI, 201 F.3d 1335 (Jan. 28, 2000)

! **Inquiry into Internal/External Jury Misconduct under Fed. R. Evid. 606(b).** The Court affirmed the district court's decision to limit inquiry into an alternate juror's report that one of the deliberating jurors had phoned her to say she was being pressured by other jurors to convict the defendant and that another juror had decided to convict from the very first day and had arranged the election of a like-minded foreman. The Court found no error in the district court's investigating possible external influence by the excused alternate, but declining "to investigate allegations of internal influence occurring during deliberations." "Even if the district court underestimated the scope of its discretion under Rule 606(b), the court's ultimate decision not to investigate allegations of misconduct that were entirely endemic to the deliberations was not an abuse of its discretion."

! **Allen Charge.** The Court also rejected the

defendant's challenge to a pre-Allen charge advising a bogged-down deliberating jury to "continue to deliberate," distinguishing the reversible-error situation where a jury question invites permission to return a partial guilty verdict and the district court's reply suggests that the jury continue to deliberate on counts as to which a guilty verdict has not yet been rendered.

! **"Counterfeit" Securities: Sufficiency of Evidence under 18 U.S.C. § 513(a).** The Court reversed the grant of a judgment of acquittal to the defendant on a charge of possessing a counterfeited security, under 18 U.S.C. § 513(a), even though the security, a J.P. Morgan CD, was not shown to be at all similar to the real thing. The Court held that under the unique use of the term "counterfeited" in this securities statute (and unlike the use of the term in the counterfeit currency statutes), the crime can be committed without the defendant's making an attempt to fool someone who actually knows what such a security looks like. Similarity to genuine CDs, to the extent that could have been elucidated given their inherent variety, is only one factor to consider in determining whether a security 'purports to be genuine.' Other, and in this case apparently sufficient, factors on the "genuineness" issue could be supporting documentation and representations by attorneys, trustees, and the like, the exhibition of official-looking features, as well as the fact that the victim accepted them as genuine.

! **Prejudicial Spillover Evidence of Dismissed Charges; Prior Crimes Admitted under Fed. R. Evid. 404(b).** The Court rejected the defendant's argument that spillover evidence from dismissed fraud and money laundering counts (and the district court's failure to give a limiting/excluding instruction thereafter) tainted his tax convictions where much of the evidence was admissible anyway either as inextricably intertwined or as bad acts under Fed. R. Evid. 404(b), and alternatively where the record does not indicate that the defendant's tax convictions were prejudicially influenced by the evidence. The Court also found that the district court did not

abuse its discretion in admitting under Fed. R. Evid. 404(b) uncharged tax violations (failures to file tax returns) by the defendant where they were relevant to criminal intent.

U.S. v. SMITH, 201 F.3d 1317 (Jan. 27, 2000)
! **Fourth Amendment - "Seizure" of Bus Passenger in Bus Sweep; Reasonable Suspicion Justifying Terry Stop on Bus.** Considering a bus passenger interdiction "nearly identical to the bus check" in U.S. v. Washington, 151 F.3d 1354 (11th Cir 1998), the Court held that a "seizure" of the defendant/bus passenger occurred, but that suppression of the drug evidence obtained was not required because the seizure in this case was warranted by reasonable suspicion under the Terry standard. The reasonable suspicion was created by circumstances officers observed before the bus search: the defendant and another passenger appeared nervous at the bus terminal; they had a whispered conversation in the terminal and their joint transportation of certain suitcases made apparent they were traveling together, although they waited separately in the terminal in an apparent attempt to conceal their association; they left their new, expensive suitcases unattended until immediately before boarding (which the officers said was a common drug courier practice); the suitcases came from a known drug source city (Miami); and the other passenger scanned and surveilled the terminal watching every person who passed him at the bus station.

U.S. v. WEST, 201 F.3d 1312 (Jan. 26, 2000)
! **CCE - Requirement of Jury Unanimity on Series of Predicate Violations.** On remand for reconsideration under Richardson v. U.S., 526 U.S. 813 (1999), the Court accepted the government's concession that the defendant's continuing criminal enterprise (CCE) conviction, under 21 U.S.C. § 848, could not stand, due to the absence of unanimous jury agreement on the defendant's commission of a series of individual violations necessary to make up a continuing

series as required under Richardson.

U.S. v. ANDERSON, 200 F.3d 1344 (Jan. 18, 2000)

! Safety Valve, 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2, Inapplicable to School-Grounds Drug Offense, 21 U.S.C. § 860; Statutory Interpretation - Inclusio Unius Est Exclusio Alterius. The Court affirmed the denial of a safety valve sentence reduction to a defendant convicted of distributing crack cocaine within 1000 feet of a public elementary school in violation of 21 U.S.C. §§ 841(a)(1) and 860. The Court rejected defendant's argument that the safety valve reduction could apply even though neither the statute nor the Sentencing Guideline which promulgated it, 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2, list § 860 among the statutes for which the provision applies. The Court held that the maxim inclusio unius est exclusio alterius (the inclusion of one implies the exclusion of others) applied in construing the safety valve.

ALIKHANI v. U.S., 200 F.3d 732 (Jan. 11, 2000)

! Petition for Writ of Error Coram Nobis: Limited Availability and Procedural Default, Jurisdictional Questions, Standard of Review.

The Court affirmed the denial of a petition for a writ of error coram nobis. The defendant pled guilty and simultaneously withdrew a motion which challenged the validity of prosecuting a "non-U.S. person." He did not appeal his conviction but later sought coram nobis relief. Citing one of its unpublished cases, the Court noted that denials of such relief are reviewed for abuse of discretion and that "an error of law is an abuse of discretion per se." The Court noted that coram nobis relief is available only "when there is and was no other available avenue of relief." Hence, all but one of Alikhani's challenges warranted no discussion, because the other challenges were not raised in pretrial motions or on direct appeal. Alikhani argued that his challenge to the prosecution of non-U.S. citizens could be adjudicated in coram nobis, because it

amounted to a challenge to the court's subject matter jurisdiction. The Court acknowledged that a subject matter jurisdiction challenge would be cognizable on coram nobis, but concluded that his statutory arguments were not jurisdictional. They were not, therefore, properly raised for the first time in a collateral proceeding when they could have been raised earlier.

CASTILLO v. U.S., 200 F.3d 735 (Jan. 11, 2000)

! Pinkerton Liability for Co-Conspirator's Gun Possession - 18 U.S.C. § 924(c). The Court affirmed the denial of § 2255 relief to a defendant convicted of violating 18 U.S.C. § 924(c) because, even though his conviction for "use" of a firearm was not valid in light of Bailey v. U.S., 516 U.S. 137 (1995), his conviction could stand on the alternative "carry" theory that was submitted to the jury, based on the fact that a co-conspirator carried a firearm.

! U.S.S.G. § 4A1.2: Counting of Vacated Conviction for Purposes of Criminal History Points Where Vacation of Sentence Was Due to Adverse Government Appeal. The Court rejected Castillo's argument that a prior Florida state conviction should not count in the calculation of his criminal history points, because the conviction was reversed and the case was subsequently nolle prossed. The Court pointed out that Castillo originally was charged with two counts of trafficking in cocaine, which a trial court reduced to charge simple possession, to which Castillo pled nolo contendere. On appeal, the Florida appellate court reversed the trial court's reduction of the charges. Hence, the reversal was adverse to Castillo, and his nolo plea to possession admitted guilt. In these circumstances, the sentencing court was authorized by the Guidelines to add criminal history points. The Court relied on U.S.S.G. § 4A1.2, comment. (n. 10) (convictions set aside "for reasons unrelated to innocence or errors of law" are to be counted).

U.S. v. BREWER, 199 F.3d 1283 (Jan. 7, 2000)

! Fed. R. Crim. P. 24(c) Violated By Failing to Designate Alternates Prior to

Commencement of Trial; Harmless Error. The district court violated Rule 24(c) when, prior to deliberations, it eliminated the alternate jurors by “raffle” – i.e., at random, instead of eliminating the last two jurors picked, as the rule envisions. However, the Court found no actual prejudice and therefore no grounds for reversal. Finally, the Court cautioned that “[t]he next time. . . the error may affect a defendant’s substantial rights and mandate reversal. . . .”

! Double Jeopardy/Lesser Included Offense - Distribution and Employing a Minor in Connection with Distribution. The government confessed error that a prosecution for distributing cocaine under 21 U.S.C. § 841(a)(1), and for employing a minor to distribute cocaine in connection with the same transaction, under 21 U.S.C. § 861(a)(1), constituted prosecution for the same offense, in violation of double jeopardy.

U.S. v. FIGUEROA, 199 F.3d 1281 (Jan. 7, 2000)

! Safety Valve Improperly Awarded to Defendant Who Fails to Truthfully Provide Full Information Concerning Offense. On a government appeal, the Court concluded that the district court erred in applying the safety valve to reduce the sentence of a defendant convicted of importation of heroin after the discovery of contraband in her luggage at Miami International Airport. The Court noted that, under U.S.S.G. § 5C1.2, a sentencing court is authorized to grant a safety valve reduction based on five factors, the fifth of which is that “not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan.” The Court noted that this disclosure requires a defendant “to both truthfully and fully disclose information.” Here, at several junctures during sentencing, the sentencing court found that the defendant’s disclosures were “incomplete and untruthful.”

U.S. v. HESTER, 199 F.3d 1287 (Jan. 7, 2000)

! Drug Quantity Merely a Sentencing Factor Under 21 U.S.C. § 841 Despite Due Process, Notice, and Jury Trial Right. The Court held that

the Supreme Court’s recent decision in Jones v. U.S., 119 S. Ct. 1215, 1219 (1999) (higher penalty for injury or death resulting from carjacking involves an element of the offense, not a mere sentencing factor), did not mean that prosecutions for drug trafficking under 21 U.S.C. § 841 must prove the amount of drugs as an element of the offense, rather than as a mere sentencing factor. The Court rejected the defendant’s invitation that it revisit its prior holdings that drug quantities were merely a sentencing factor, concluding that Jones is better read not as extending this rule to any statute that involves a factor which triggers a higher maximum sentence, but as holding that when a statute and its legislative history are “unclear,” a court should find such a factor to be an element of the offense, rather than a mere sentencing matter. Here, the Court found no ambiguity in § 841 and hence no reason to revisit its prior interpretation.

! Mandatory Sentence for Marijuana Plant Possession: Constitutionality of Disparate Treatment under Statute and Sentencing Guidelines. The Court held that it was not irrational for Congress to impose statutory mandatory minimum sentences for marijuana plant possession with intent to distribute on the basis of the number of plants, while at the same time approving a Sentencing Guideline which imposed punishment based on a more lenient standard weight equivalency of 100 grams per plant. The Court rejected the defendant’s argument that it violated due process for Congress to have approved of a new Sentencing Guideline, U.S.S.G. § 2D1.1, which punished drug trafficking offenses based on an equivalency of 100 grams per marijuana plant, while maintaining in effect the statutory minimum, which punished defendants convicted of having trafficked in 1000 or more plants regardless of weight, and much more severely, i.e., a twenty-year minimum.

U.S. v. JACKSON, 199 F.3d 1279 (Jan. 5, 2000)

! U.S.S.G. § 4B1.2: Possession of Fire Bomb with Intent to Damage Structure Is Crime of Violence under Career Offender Guideline. The Court held that a prior conviction for possession of a fire bomb with intent to use it on a building, under Fla. Stat. § 806.111, qualified as

a prior conviction for purposes of sentencing as a career offender under U.S.S.G. § 4B1.2(a). The Court rejected the argument that this offense did not involve any threat to another person, noting that the Guideline defines “crime of violence” as an offense which presents “a serious potential risk of physical injury to another,” and this conduct “inherently” presents a serious risk of physical injury to another person.

U.S. v. COVER, 199 F.3d 1270 (Jan. 4, 2000)

! **“Otherwise Using” a Firearm in a Robbery; Enhancement for Co-conspirator’s Carjacking; Loss Based on All Money in Vault; Enhancement for Codefendant’s Firearm Despite Defendant’s Separate Punishment under 18 U.S.C. § 924(c) for Firearm Use.** Three persons, including Cover, participated in a bank robbery which the police stopped while it was in progress. At sentencing, the court enhanced Cover’s sentence under U.S.S.G. §§ 2B3.1(b)(4)(A), (b)(5), because an unidentified co-conspirator committed a carjacking to escape, rejecting the argument that it was not reasonably foreseeable to him. The court also enhanced under § 2B3.1(b)(7)(C), based on the amount of money in the unopened vault, noting that the key was in the vault lock when the police arrived, and, but for the intervention of the police, Cover would have seized all funds contained in the vault. The defendant was convicted of bank robbery and use of a firearm in connection with a crime of violence. On appeal, the Court agreed with the government in its cross-appeal, reversing the district court’s refusal to enhance the sentence based on a codefendant’s “otherwise using” a firearm during the robbery. The Court rejected Cover’s argument that it was “plain error” to enhance his sentence for brandishing a firearm when he was already punished for using a firearm under § 924(c); it would have been “double counting” if Cover had been twice punished for his own use of a firearm, but noted the enhancement could have been based on his accomplices’ use of a firearm. The Court pointed

to the extensive case law, including U.S. v. LaFortune, 192 F.2d 157 (11th Cir. 1999), which holds that a “specific” threat to a person involves more than “brandishing” and therefore requires a six-level enhancement under § 2B3.1. The court also found that the bank manager’s “estimate” of the amount of loss was not unacceptable speculation.

WEBSTER v. MOORE, 199 F.3d 1256 (Jan. 4, 2000)

! **28 U.S.C. § 2254 - Untimely State Petition Does Not Toll Statute of Limitations.** The Court held that the one-year statute of limitations for the filing of § 2254 habeas petitions under the AEDPA is not tolled by the prior filing of state post-conviction petitions, which were untimely under state law. The one-year limitations period is tolled when a state petition that is “properly filed” is pending during the limitations period. The Court recognized a circuit split over the meaning of “properly filed” under AEDPA but reasoned that deference to state law counseled for a reading of “properly filed” that encompassed timeliness.

U.S. v. ROSARIO-DELGADO, 198 F.3d 1354 (Dec. 30, 1999)

! **Three Strikes Law - Ex Post Facto, Nature of Predicate Offenses.** The Court rejected a defendant’s challenge to his mandatory life sentence under the three strikes law, 18 U.S.C. § 3559(c), first rejecting the argument that application of the law violated the Ex Post Facto Clause, where the law went into effect before he committed the bank robbery that counted as his third strike. The Court also held (a) that a prior felony may match either enumerated or unenumerated offenses to qualify as a strike, and (b) that Congress plainly intended that defendant’s convictions in Puerto Rico could count as qualifying strikes even though not one of the federal bank robbery offenses listed in the statute.

U.S. v. CHASTAIN, 198 F.3d 1338 (Dec. 30,

1999)

! Enhancement for Use of Plane in Drug Trafficking. The Court reversed a two-level upward adjustment under U.S.S.G. § 2D1.1(b)(2), noting that the enhancement is authorized only if a plane was in fact “used to import” drugs, and an inchoate attempt to import did not qualify. The Court affirmed the imposition of a two-level “special skill” enhancement under § 3B1.3 as to a defendant who was to pilot the plane, rejecting any distinction between professionals and amateurs who possess special skills.

! Scope of Voir Dire; Rule 16 Notice of Expert Witness; Testimony of Expert in Drug Smuggling Admissible; Failure to Instruct on “Theory of Defense” Which Summarizes Evidence But Espouses No Legal Theory; Questioning Agent’s Investigative Efforts Opened Door to Comment on Counsel’s Invocation of Rights; Due Process - Government Manufacture of Offense. The Court found that the district court did not abuse its discretion by failing to allow further questioning of two prospective jurors who said they might be prejudiced in favor of the government, noting the two were ultimately dismissed and their comments were commonplace and innocuous. The Court agreed with defendants that the government had violated Fed. R. Crim. P. 16(a)(1)(E) by failing to disclose that a government police witness would in fact be used as an expert on the use of airplanes in drug trafficking, and noted that it was “not impressed with the government’s behavior and actions in this case,” but found no basis for reversing where no prejudice resulted, noting the defendants did not ask for a continuance, did not call a rebuttal expert, and had sufficient opportunity to interview the expert mid-trial to prepare for cross-examination. The Court noted that the general techniques of drug smuggling by plane were a legitimate subject of expert testimony. Finally, the Court rejected the argument that the conspiracy was manufactured by the government, noting that the defendants initiated the scheme

and approached a government informant to obtain a plane to carry out the scheme.

U.S. v. DeVEGTER, 198 F.3d 1324 (Dec. 29, 1999)

! Violation of Fiduciary Duty with Economic Consequences Satisfies Honest Services Fraud. An indictment charged the financial adviser of a municipality and the partner of an investment banking firm with having manipulated the bidding process for choosing the underwriter for a bond offering. The Court reversed the district court’s dismissal of counts charging honest services fraud under 18 U.S.C. §§ 1343 & 1346. The “honest services fraud” statute, adopted by Congress to overrule McNally v. U.S., 483 U.S. 350 (1987), extends criminal liability for fraud to encompass schemes to defraud another of intangible rights. The Court reasoned that “honest services fraud” required the breach of a fiduciary duty and that no such duty existed between the defendants and the municipality. The Court did not reach the question whether honest services fraud requires the breach of a fiduciary duty, but assumed that it does and reversed, finding that the indictment sufficiently alleged this duty and its breach. The defendants’ “de facto control” over the underwriter selection decision established the existence of a fiduciary duty.

U.S. v. GILBERT, 198 F.3d 1293 (Dec. 28, 1999)

! Attorney’s Fees for Successful Criminal Defense - Hyde Amendment, 18 U.S.C. § 3006A; Scope of Government’s Brady Obligation; Need to Supplement Record on Appeal to Support Factual Assertions. In a case of first impression, the Court interpreted the “Hyde Amendment” (which authorizes prevailing private parties in criminal or civil cases against the government to recover attorney’s fees) to have a “narrow” scope and to allow recovery only if the government’s position “was foreclosed by binding precedent or so obviously wrong as to be frivolous.” The law allows recovery only for suits that are “vexatious, frivolous or in bad faith,” and

Gilbert was not entitled to fees because, even though the appellate court ultimately held the prosecution was barred by the statute of limitations, the law on this point was not developed prior to the appellate court decision. The Court also held that the failure to present exculpatory evidence to the grand jury could not justify an award of attorney's fees because prosecutors generally are not required to present Brady material to the grand jury (citing U.S. v. Williams, 504 U.S. 36 (1992)). Finally, the Court rejected Gilbert's claim that the government vexatiously filed a lien on his assets even after it lost in the appellate court, noting that he failed to raise this point below and failed to supplement the record to establish the government's conduct.

U.S. v. DICTER, 198 F.3d 1284 (Dec. 23, 1999)
! Waived Error - Failure to Raise Rule 23(b) Violation until Reply Brief; Proof of Forfeiture by Preponderance; Constitutional Issues Implicated by Forfeiture of Professional License. The Court affirmed a doctor's convictions and sentences for conspiring to distribute controlled substances, in violation of 21 U.S.C. § 841, and the forfeiture of a medical license, under 21 U.S.C. § 853. The Court rejected the defendant's argument that the district court violated Fed. R. Crim. P. 23(b) when it decided to proceed with forfeiture deliberations with a jury of eleven jurors, because the defendant waived this argument by failing to raise it until his reply brief on appeal. The Court held that the government's burden of proof to establish the elements of forfeiture is only a preponderance of the evidence, because forfeiture exists to punish the defendant so the standard is the one applicable at sentencing. The Court further held that a medical licence is forfeitable "property," within the definition of 21 U.S.C. § 853(b)(2), rejecting arguments that the forfeiture statute infringed on the state's procedures for revocation of a medical license and finding that the federal criminal prosecution created no conflict with Georgia's administrative scheme. Additionally, the Court found no Tenth Amendment defect in the

forfeiture, noting that Georgia remained free to issue a new medical license to Dicter. The Court also found no Eighth Amendment violation, because, in light of defendant's repeated unlawful conduct, the forfeiture was not "grossly disproportionate to the gravity" of the crimes.

U.S. v. FOWLER, 198 F.3d 808 (Dec. 17, 1999)
! 18 U.S.C. § 922(g) - Restoration of Rights Precludes Felon-in-Possession Conviction. The Court reversed a conviction under 18 U.S.C. § 922(g)(1), reaffirming its holding in U.S. v. Swanson, 947 F.2d 914 (11th Cir. 1991), in light of the Supreme Court's decision in U.S. v. Caron, 524 U.S. 308 (1998), that a person formerly convicted of a felony under Alabama law can no longer be convicted for violating 18 U.S.C. § 922(g)(1) for being a convicted felon in possession of a firearm once his civil and political rights have been restored and the certificate of restoration contains no limitations on the defendant's right to carry, possess, or purchase firearms. 18 U.S.C. § 921(a)(2)) provides that a previous conviction is not a predicate offense for § 922(g) liability if the offender has had his civil rights restored "unless such . . . restoration of civil rights expressly provides that the person may not . . . possess firearms." In Caron, the Supreme Court held that a Massachusetts restriction on the right to carry handguns activated the "unless" clause of the statute. Here, the Alabama restoration certificate carried no restriction.

U.S. v. WALKER, 198 F.3d 811 (Dec. 17, 1999)
! 18 U.S.C. § 2255 - Relief from Enhanced Sentence Based on Subsequent Vacation of Predicate Conviction. The Court granted relief under 28 U.S.C. § 2255 and held that a sentence imposed under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), should be vacated where one of three underlying state convictions had been vacated in a subsequent state habeas action. All seven circuits previously considering the issue had agreed, construing language in Custis v. U.S., 114 S. Ct. 1732, 1738 (1994), that the vacatur of a prior state conviction would be

grounds for setting aside the ACCA sentence. “Unwilling to create a split with such a majority,” the Court held that Walker’s ACCA sentence should be vacated because following a state hearing – uncontested by the State – a state judge had set aside one of Walker’s three qualifying prior convictions on the ground that he was not apprized of the elements of the offense at the guilty plea colloquy.

HENRY v. FLORIDA DEPARTMENT OF CORRECTIONS, 197 F.3d 1361 (Dec. 15, 1999)

! Certificate of Appealability - Rulings on Procedural Defaults Reviewable; Appeal Seeking Evidentiary Hearing on State Habeas Claim Sufficient to Exhaust Appellate Claims. The Court held that a petitioner under 28 U.S.C. § 2254 was entitled to a certificate of appealability (COA). Following his Florida murder and armed burglary convictions, and unsuccessful appeal in Florida courts of his motion for postconviction relief alleging ineffectiveness of counsel, Henry brought a federal habeas action, again alleging ineffectiveness of counsel. The district court denied relief, on the ground that Henry had sought only an evidentiary hearing in his state motion, not a new trial, and also denied a certificate of appealability. The Court held that, under the new standard of the AEDPA, which provides for certificates of appealability for “constitutional” questions only, an appellate court could review a claim that the district court erroneously applied the exhaustion doctrine. The Court also held that a COA was appropriate and that the failure to seek a new trial in an appeal of the denial of a 3.850 motion does not amount to a failure to exhaust state remedies.

U.S. v. MIRANDA, 197 F.3d 1357 (Dec. 15, 1999)

! Ex Post Facto - Retroactive Application of Money Laundering Statute; Error to Include Transactions That Predate Statute. The Court reversed one count of conviction for conspiracy to

launder money in violation of 18 U.S.C. § 1956(h). The government conceded on appeal that the conspiracy ended one year before the statute took effect and that because this was an ex post facto violation, see Landgraf v. USI Film Products, 511 U.S. 244 (1994), it constituted plain error. The Court also vacated that portion of the sentence based on the vacated count, agreeing that the amount of laundered funds should not include any prior to the effective date of the statute.

U.S. v. CUCHET, 197 F.3d 1318 (Dec. 14, 1999)

! Failure of Appellate Counsel to Properly Brief; Exclusion of Defendant from Part of Voir Dire Was Harmless; During voir dire and over objection, the trial court questioned jurors, at the bench and out of the hearing and observation of the defendant, about their involvement with drugs and criminal justice. The Court acknowledged that the defendant’s exclusion was error, because Fed. R. Crim. P. 43 gives a defendant the right to be present “at every stage of the trial including the impaneling of the jury.” The Court noted that this argument had been raised only in a footnote of appellant’s brief, without citation to authority. Appellate counsel argued for the first time at oral argument that the error was of constitutional dimension, requiring review under the harmless-beyond-a-reasonable-doubt standard of Chapman v. California, 386 U.S. 18 (1967). Hence, the Court reviewed for ordinary harmless error, and found no ground for reversal, because the defendant had conferred with counsel after the bench questioning and prior to the exercise of peremptory strikes, and because the evidence was overwhelming.

KILPATRICK v. HOUSTON, 197 F.3d 1134 (Dec. 10, 1999)

! Error to Exclude from BOP Drug Treatment Program Persons Convicted of Drug Crimes Involving Firearms. The Bureau of Prisons (BOP) had refused to make the habeas petitioner eligible for a sentence reduction based on the successful completion of an in-custody substance abuse treatment program, on the ground

that a co-defendant had used a firearm. The statute allows only persons convicted of nonviolent offenses to be eligible for sentence reductions based on the successful completion of substance abuse programs. The Court affirmed the district court's grant of habeas relief. This BOP regulation was invalid under Byrd v. Hasty, 142 F.3d 1395 (11th Cir. 1998), which held that a 1995 BOP regulation was void because it was inconsistent with the statute in that it eliminated from eligibility inmates convicted of nonviolent crimes, such as drug trafficking in violation of 21 U.S.C. § 846, whose sentences had been enhanced based on possession of a dangerous firearm.

U.S. v. NEDER, 197 F.3d 1122 (Dec. 10, 1999)

! Harmless Error - Removing Materiality Element from the Jury. Neder engaged in a number of real estate development transactions in the 1980s, in which he induced banks to loan him money. The Supreme Court has held that "in general, a false statement is material if it has a natural tendency to influence or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed." On remand from the Supreme Court to consider whether the district court's failure to instruct the jury on materiality as an element of mail, wire, and bank fraud, was harmless error, the Court held it was. "To determine whether the removal of an element from the jury's consideration is harmless error, this Court is to consider whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." The Court found the evidence of Neder's falsehoods so overwhelming that no jury rationally could have found they were not material.

U.S. v. WILLIAMS, 197 F.3d 1091 (Dec. 8, 1999)

! Speedy Trial Act, 18 U.S.C. § 3161 - Order Imposing Motion Deadline Does Not Toll Speedy Trial Clock. The Court vacated a conviction for abusive sexual contact in the territorial jurisdiction of the United States under

18 U.S.C. § 2244(a)(1), on the ground that the government violated the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* The Court rejected the government's argument that the 20-day deadline set by the court for the filing of all pretrial motions should be excluded from the computation, but the Court pointed out that the statute provided exclusions only for delay of proceedings attributable to the defendant.

! Instructions - Simple Assault Is Lesser Offense of Abusive Sexual Contact. The trial court also should have instructed the jury that simple assault is a lesser included offense of abusive sexual contact. First, because some forms of assault do not require an intent to do bodily harm but merely "the least touching of another's person wilfully" (citing 3 Blackstone's Commentaries on the Law of England 120), this sex offense, and sex offenses generally, encompass simple assault. Second, a rational jury could have believed the defendant's testimony that he merely hit the victim on the leg and grabbed her shoulders and that his touching was not of "a sexual nature."

U.S. v. HIDALGO, 197 F.3d 1108 (Dec. 8, 1999)

! Co-conspirator Can Be "Victim of Restraint" under U.S.S.G. § 3A1.3. A co-conspirator who was "restrained" because of suspected betrayal of the conspiracy could be considered a victim for purposes of the sentence enhancement provision of U.S.S.G. § 3A1.3. The guideline contemplates the restraint of any victim, co-conspirator or otherwise.

FULLER v. ATTORNEY GENERAL OF ALA., 197 F.3d 1109 (Dec. 8, 1999)

! Habeas Claim Rejected Where Grounded on Incredible Testimony. The Court reversed a grant of a writ of habeas corpus to a state prisoner. Fuller was convicted of cocaine possession following a police raid on an apartment in which they found Fuller, material identifying Fuller as an occupant of the premises, and cocaine paraphernalia. Fuller's defense was that the police planted the drugs. Following his

conviction and unsuccessful Alabama appeals, Fuller's federal habeas petition claimed that he received ineffective assistance of counsel because counsel failed to call as a witness a person who would have testified that the drugs and tools belonged to him and that Fuller was innocent. The Court noted that Alabama courts had already rejected this argument. Without debating the degree of deference such mixed findings of law and fact are now owed under the AEDPA (an issue, the Court noted, which the Supreme Court will soon resolve in Williams v. Taylor), the Court found that, even affording the prior state findings "no deference," the witness would not have been credible because he was convicted of drug possession and his story that the drugs belonged to him would have contradicted the defendant's claim that they were planted by the police. Thus, there was "no reasonable probability" that the outcome of the trial would have been different.

U.S. v. WARD, 197 F.3d 1076 (Dec. 8, 1999)

! Sufficiency of Evidence - Bankruptcy Fraud and Money Laundering; False Statement - Proof of Falsity and Lack of Ambiguity; Commingled Funds Do Not Remove Taint of Modest Amount of Tainted Funds. In a prosecution for bankruptcy fraud and money laundering in violation of 18 U.S.C. §§ 152, 1956, the Court affirmed the dismissal of the two false statement counts but rejected the district court's reasoning that a money laundering conviction could not stand where it involved "a modest amount of cash" and the passage of time, coupled with the intermingling of legitimate funds, such that the "taint" from the illegitimate funds was removed. The commingling of legitimate and illegitimate funds is a mechanism for money laundering and, far from absolving a defendant of guilt, evidenced it; further, the small amount at stake should not have affected the conviction.

U.S. v. HUNERLACH, 197 F.3d 1059 (Dec. 7, 1999)

! Statute of Limitations: Last Affirmative Act of Tax Evasion. The Court affirmed convictions for willful evasion of payment of taxes and filing a false statement in violation of 26 U.S.C. §§ 7201 & 7206(1). In 1988, Hunerlach entered a plea agreement to pay income tax but failed to pay, and in the 1990's he engaged in acts designed to conceal his income. Hunerlach challenged his conviction on the ground that the six-year statute of limitations should have run on his evasion of 1988 obligations, notwithstanding his acts of concealment in the 1990s, because a person who refuses to pay taxes would be subject to "continued prosecution" if the six-year limit were not strictly enforced. Rejecting this argument, the Court noted that evasion typically continues until the "last affirmative act of evasion."

! Refusal to Sign Waiver Not Compelled Communication for Application of Fifth Amendment Privilege. Hunerlach argued that the trial court erred in admitting his refusal to sign a waiver respecting his Bahama bank account, as well as the reasons he gave for this refusal, because this evidence violated his Fifth Amendment privilege against self-incrimination. Citing Doe v. U.S., 487 U.S. 201 (1988), the Court pointed out that the Fifth Amendment protects against only "compelled" communications that are "testimonial." Here, Hunerlach was not subpoenaed or otherwise compelled to release his records, and the signing of a waiver was not necessarily testimonial.

! Tax Loss for Offense Level Purposes Does Not Include Interest and Penalties. The Court held that the district court incorrectly included the amounts of interest and penalties owed on the tax liability in its calculation of "tax loss" under U.S.S.G. § 2T1.1, based on the unequivocal statement in the commentary.

U.S. v. DAVIS, No. 98-3671, 1999 WL 1482027 (Aug. 18, 1999)

! Reversing Downward Departure in Child Pornography Possession Case Where Personal Use Motivation of Defendant Was Not Outside

the Heartland. The Court reversed a district court’s grant of a downward departure to a defendant convicted of possession of child pornography, in violation of 18 U.S.C. § 2252(a)(5)(B), but vacated the offense level portion of the sentence because it was unclear from the record how the court arrived at that calculation. The district court granted a downward departure because of “the absence of the victim,” and “the fact that the defendant made no use of the pornographic material other than for personal use.” The Court found that this was an invalid basis for finding “extraordinary circumstances” – the standard for imposing downward departures from the guideline range of the Sentencing Guidelines – because “the harm resulting from possession of child pornography occurs when one sustains a market for such pictures. U.S. v. Miller, 146 F.3d 1281, 1285 (11th Cir. 1998). Therefore, it is not necessary for one to derive any benefit from the child pornography or actively solicit the pornography, provided one’s actions play a role in the distribution network.” [Note: The phrase “the absence of the victim” was not explained in the opinion.]

! Plain Error in 2-level Miscalculation of Total Offense Level. The Court vacated the offense level portion of the sentence, noting that, had the court followed the calculation it announced during the sentencing, it would have imposed a level 14 sentence, not the level 16 it actually imposed. Despite the absence of an objection at sentencing, the Court found the error to be “plain.”

TABLE OF CASES IN THIS ISSUE

Supreme Court

<u>Florida v. J.L.</u> , No. 98-1993, 2000 WL 309131 (Mar. 28, 2000)	2
<u>Garner v. Jones</u> , No. 99-137, 2000 WL 309135 (Mar. 28, 2000)	2
<u>Illinois v. Wardlow</u> , 120 S.Ct. 673 (U.S. Jan. 12, 2000) ...	4

<u>Martinez v. Court of Appeal of California</u> , 120 S.Ct. 684 (U.S. Jan. 12, 2000)	5
<u>New York v. Hill</u> , 120 S.Ct. 659 (Jan. 11, 2000)	5
<u>Portuondo v. Aguard</u> , 120 S.Ct. 1119 (U.S. Mar. 6, 2000) .	3
<u>Roe v. Flores-Ortega</u> , 120 S.Ct. 1029 (Feb. 23, 2000)	3
<u>Smith v. Robbins</u> , 120 S.Ct. 746 (Jan. 19, 2000)	4
<u>U.S. v. Johnson</u> , 120 S.Ct. 1114 (U.S. Mar. 1, 2000)	3
<u>U.S. v. Martinez-Salazar</u> , 120 S.Ct. 774 (Jan. 19, 2000) ...	3
<u>Weeks v. Angelone</u> , 120 S.Ct. 727 (Jan. 19, 2000)	4

Eleventh Circuit

<u>Akins v. U.S.</u> , 204 F.3d 1086 (Feb. 24, 2000)	9
<u>Alikhani v. U.S.</u> , 200 F.3d 732 (Jan. 11, 2000)	15
<u>Castillo v. U.S.</u> , 200 F.3d 735 (Jan. 11, 2000)	15
<u>Fuller v. Attorney General of Ala.</u> , 197 F.3d 1109 (Dec. 8, 1999)	22
<u>Henry v. Dept. of Corrections</u> , 197 F.3d 1361 (Dec. 15, 1999)	20
<u>Innab v. Reno</u> , 204 F.3d 1318 (Mar. 1, 2000)	8
<u>Kilpatrick v. Houston</u> , 197 F.3d 1134 (Dec. 10, 1999) ...	21
<u>Spivey v. Head</u> , No. 98-8288, 2000 WL 313333 (Mar. 28, 2000)	6
<u>U.S. v. Anderson</u> , 200 F.3d 1344 (Jan. 18, 2000)	15
<u>U.S. v. Bravo</u> , 203 F.3d 778 (Feb. 11, 2000)	12
<u>U.S. v. Brewer</u> , 199 F.3d 1283 (Jan. 7, 2000)	16
<u>U.S. v. Brownlee</u> , 204 F.3d 1302 (Feb. 29, 2000)	8
<u>U.S. v. Chastain</u> , 198 F.3d 1338 (Dec. 30, 1999)	18
<u>U.S. v. Chavez</u> , 204 F.3d 1305 (Feb. 29, 2000)	9
<u>U.S. v. Cooper</u> , 203 F.3d 1279 (Feb. 14, 2000)	12
<u>U.S. v. Cover</u> , 199 F.3d 1270 (Jan. 4, 2000)	17
<u>U.S. v. Cuchet</u> , 197 F.3d 1318 (Dec. 14, 1999)	20
<u>U.S. v. Davis</u> , 1999 WL 1482027 (Aug. 18, 1999)	23
<u>U.S. v. Deleveaux</u> , 2000 WL 262634 (Mar.9, 2000)	6

U.S. v. DeVegter, 198 F.3d 1324 (Dec. 29, 1999) 18

U.S. v. Dicter, 198 F.3d 1284 (Dec. 23, 1999) 19

U.S. v. Figueroa, 199 F.3d 1281 (Jan. 7, 2000) 16

U.S. v. Fowler, 198 F.3d 808 (Dec. 17, 1999) 19

U.S. v. Gil, 204 F.3d 1347 (Mar. 3, 2000) 7

U.S. v. Gilbert, 198 F.3d 1293 (Dec. 28, 1999) 18

U.S. v. Hernandez-Fraire, No. 98-3192,
2000 WL 353084 (April 6, 2000) 5

U.S. v. Hester, 199 F.3d 1287 (Jan. 7, 2000) 16

U.S. v. Hidalgo, 197 F.3d 1108 (Dec. 8, 1999) 21

U.S. v. Hunerlach, 197 F.3d 1059 (Dec. 7, 1999) 22

U.S. v. Jackson, 199 F.3d 1279 (Jan. 5, 2000) 17

U.S. v. Jamieson, 202 F.3d 1293 (Jan. 31, 2000) 13

U.S. v. Kennedy, 201 F.3d 1324 (Jan. 28, 2000) 13

U.S. v. Magluta, 198 F.3d 1265 (Dec. 23, 1999) 11

U.S. v. Magluta, 203 F.3d 1304 (Feb. 17, 2000), vacating in part
U.S. v. Maglutta, 198 F.3d 1265 (11th Cir. 1999) 11

U.S. v. Miller, 2000 WL 269995 (Mar. 13, 2000) 6

U.S. v. Miranda, 197 F.3d 1357 (Dec. 15, 1999) 20

U.S. v. Morrison, 204 F.3d 1091 (Feb. 25, 2000) 9

U.S. v. Neder, 197 F.3d 1122 (Dec. 10, 1999) 21

U.S. v. Prather, 2000 WL 253591 (Mar. 7, 2000) 6

U.S. v. Prosperi, 201 F.3d 1335 (Jan. 28, 2000) 13

U.S. v. Romines, 204 F.3d 1067 (Feb. 18, 2000) 10

U.S. v. Rosario-Delgado, 198 F.3d 1354 (Dec. 30, 1999) . 17

U.S. v. Smith, 201 F.3d 1317 (Jan. 27, 2000) 14

U.S. v. Tait, 202 F.3d 1320 (Feb. 4, 2000) 13

U.S. v. Thayer, 204 F.3d 1352 (Mar. 3, 2000) 8

U.S. v. Walker, 198 F.3d 811 (Dec. 17, 1999) 20

U.S. v. Ward, 197 F.3d 1076 (Dec. 8, 1999) 22

U.S. v. West, 201 F.3d 1312 (Jan. 26, 2000) 15

U.S. v. Williams, 197 F.3d 1091 (Dec. 8, 1999) 21

Webster v. Moore, 199 F.3d 1256 (Jan. 4, 2000) 17

Weekly v. Moore, 204 F.3d 1083 (Feb. 24, 2000) 10