

FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF FLORIDA
A NEWSLETTER FOR PANEL ATTORNEYS

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**JUDGE VINSON APPOINTS PANEL
REPRESENTATIVE AND PANEL OVERSIGHT
COMMITTEE**

Chief District Court Judge Roger Vinson, on February 8th, in a written order, appointed Gainesville's Gil Schaffnit to be North Florida's panel representative. As the panel representative, Gil serves as a liaison between you, as our North Florida panel members, and the Administrative Office of the Courts, as well as with the judges here in the Northern District. His most important task, though, is to serve as an advocate, advancing your interests as a panel lawyer, so that you can provide the best possible defense for your clients. Gil recently attended the panel lawyers' conference in Los Angeles. He says he's looking forward to working with the panel and hearing your concerns. Gil's phone number is (352) 378-6593.

In the same February 8th order, Judge Vinson appointed 5 lawyers as members of a standing committee to oversee the panel. Gil Schaffnit,

as the chairman, is joined by Steven Seliger from the Tallahassee Division, Tom Cassidy from the Panama City Division, Kenneth Riddlehoover from the Pensacola Division, and Federal Public Defender Randy Murrell. The committee will have its first meeting next month. The creation of the committee, as well as its role, is provided for in the Northern District's revised Criminal Justice Act Plan. The plan has been approved by the district judges and is currently under review by the Eleventh Circuit Court of Appeals.

TRAINING SESSIONS

We've started our brown bag luncheon training sessions. Within the last month or so we've presented a session in Gainesville, Tallahassee, and Panama City on the Supreme Court decision in Apprendi v. New Jersey. Last week in Pensacola we presented a video on federal discovery. The video was from last October's Advanced Criminal Practice seminar that The Florida Bar had presented in Tampa. Next month we'll present the Apprendi discussion in Pensacola, and the discovery video in Gainesville, Tallahassee, and Panama City.



As was true last month, each training session will be held from **noon to 1:00** in the Federal Courthouse in each respective city. Here's next month's schedule.

Tallahassee: May 3
Gainesville: May 10
Pensacola: May 15
Panama City: May 31

Once approved the new CJA plan will require each panel member to obtain eight hours of federal criminal continuing education. Although our luncheon training sessions will not be the only way to obtain the requisite credit, it's our goal to make training available at no cost and as conveniently and painlessly as possible. The Bar has approved CLE credit for the Apprendi presentation, but, contrary to what we had expected, has not approved credit for the discovery video. As of this writing, the Bar has said that while eight hours of credit is available for the watching the entire Advanced Criminal Practice video, they aren't willing to grant credit separately for each hour of the video. We're working on it.

REDUCTION OF OFFENSE LEVEL FOR SOME CONVICTED OF USING FIREARM IN VIOLENT OR DRUG TRAFFICKING OFFENSES

In November of last year the United States Sentencing Commission modified § 2K2.2 of the Sentencing Guidelines in such a way as to reduce the offense level for some individuals who are convicted of using a firearm in violent or drug trafficking offenses. Significantly, the amendment applies retroactively, meaning that there are individuals currently serving a sentence who are eligible for sentence reductions.

The United States Code, 18 U.S.C. § 924(c), provides for mandatory sentences ranging from 5 to 30 years for using a firearm in "any crime of violence or drug trafficking crime." In the case of an individual convicted under that provision, the Sentencing Guidelines have, for some time, prohibited an increase in the offense level for using the firearm in the underlying crime. *See* USSG § 2K2.4, comment. (n.1) (Nov. 1998); United States v. Henderson, 75 F.3d 614 (11th Cir. 1996).

The Eleventh Circuit, however, has permitted an increase of the offense level even if the defendant was convicted of the § 924(c) offense, provided the defendant, during the offense, possessed a different firearm than the one that supported the § 924(c) conviction, or if a co-defendant possessed a firearm during the offense. *See, e.g., United States v. Cover*, 199 F.3d 1270, 1277-78 (11th Cir. 2000); United States v. Gonzalez, 183 F.3d 1315, 1325-26 (11th Cir. 2000); U.S. v. Rodriguez, 65 F.3d 932, 933 (11th Cir. 1995); United States v. "LNU", 16 F.3d 1168, 1170 (11th Cir. 1994). The November amendment "overrules" this Eleventh Circuit case law. *See* USSG § 2K2.4, comment. (n.2) (Nov. 2000). The amendment, which applies to the "underlying offense" as well as to "relevant conduct," now means that a defendant who has been convicted of a § 924(c) offense is no longer subject to an enhancement for the possession of a firearm by a co-defendant or by his earlier possession of a second firearm in an ongoing offense. Note, however, that if the defendant is convicted of, for example, two robberies, the firearm used in one robbery will support a § 924(c) conviction, while the firearm used in the other robbery will still support an enhancement for that other robbery.

The amendment found at Appendix C, amendment 599, is one specifically listed in § 1B1.10(c) of the Guideline Manual (Nov. 2000), and is, therefore, retroactive. Those serving a sentence based on the now “overruled” Eleventh Circuit case law are authorized to seek a reduction pursuant to 18 U.S.C. §582(c)(2).

FUNDS AVAILABLE FOR MEALS AND LODGING OF OUT-OF-TOWN DEFENDANTS DURING TRIAL

A recurring problem faced by us, at the Federal Public Defender’s Office, as well as many panel lawyers, has been the client who is involved in a trial, but lives some distance from the city where the trial is being held. If the client is unable to pay for a motel room, the lawyer faces the seemingly almost impossible task of trying to find lodging for the client for the duration of the trial.

The solution with which we have had some success, and which is available as well to those represented by panel lawyers, is the Bench and Bar Fund. The Court established the fund in an administrative order signed in 1996. The order bears the case number 4:95mc40112. The fund is derived from attorney admission fees collected in excess of the basic admission fee established by the Judicial Conference. The fund is used to support a variety of court activities, but, as stated in the administrative order, is also available for “reimbursement of expenses for meals and lodging necessarily and reasonably incurred by indigent, non-resident, and non-custodial defendants.” The request should be filed in the pending case. The decision whether to authorize the expenditure rests with the presiding judge.

CRIMINAL PROSECUTIONS UP NATIONWIDE; DOWN IN THE ELEVENTH CIRCUIT

The Statistics Division of the Administrative Division of the United States Court, in its 2000 annual report that bears the title *Judicial Business of the United States Courts*, reports the government filed 4.7 percent more felony and class A misdemeanors during the 2000 fiscal year that ended in September 2000. There were 62,745 cases filed in 2000; 59,923 in 1999. Here in the Northern District of Florida the government filed 349 cases, a 2.8 percent decrease from the 359 cases filed the previous fiscal year. The number of pending cases as of September 30, 2000, decreased 5.4 percent from fiscal year 1999. The number of defendants decreased as well. In fiscal year 1999 there were 539 defendants. In 2000 there were 487, a 9.6 percent decrease.

Of the cases filed in North Florida, 29 percent were drug offenses, 17 percent were some kind of traffic (not to be confused with trafficking) offense, 12 percent were for weapons and firearms, 10 percent were for some form of larceny, and 8 percent were for fraud.

PAY INCREASE

As of April 1 of this year, the new hourly panel attorney rates are \$75 for in-court and \$55 for out-of-court. This increase applies to new cases and to work done on or after April 1st in open cases.

To support its policy that panel attorney rates should cover “reasonable overhead and a fair hourly fee,” the Judicial Conference has agreed to request funding for a \$113 hourly rate for in-court and out-of-court work in fiscal year 2002.

SENTENCING GUIDELINE AMENDMENTS

On April 6th the Sentencing Commission voted to promulgate a number of amendments to the *Sentencing Guidelines Manual*. The amendments will take effect November 1st. Tom Hutchinson of the Defender Training Group has provided a brief outline of the more significant amendments. Here's his outline.

Immigration. The Commission revised the aggravated-felony enhancement of 2L1.2. The new enhancement -- 16 levels for certain aggravated felonies, including (most notably) a crime of violence and a drug-trafficking offense for which the sentence imposed exceeded 13 months; 12 levels for a drug-trafficking felony for which the sentence imposed did not exceed 13 months; 8 levels for any other aggravated felony.

Drug couriers. The Commission revised the commentary to 3B1.2 to make clear that a drug courier is not precluded from a role reduction even though the courier is held accountable only for the drugs personally handled by the courier.

Theft and fraud. The Commission combined the theft, property destruction, and fraud guidelines into a new guideline, in the process increasing punishment levels. The new guideline has a comprehensive new definition of "loss."

Money laundering. The Commission merged 2S1.1 and 2S1.2 into a new guideline. The purpose of the amendment is to tie the offense level for money laundering more closely to the offense level for the underlying offense that was the source of the laundered money.

Sex offenses. The Commission added a new

chapter 4, part B guideline modeled upon the career offender guideline. The new guideline, entitled "Repeat and Dangerous Sex Offender Against Minors," applies if the career offender guideline does not apply. Subsection (a) applies if the defendant committed the instant offense after having been convicted of a sex offense. Subsection (a) sets a floor of criminal history category V and sets the offense level based on the statutory maximum for the instant offense (unless the offense level from chapters 2 and 3 of the *Manual* is higher). Subsection (b) applies if the defendant engaged in a "pattern of activity involving prohibited sexual conduct" and calls for a five-level enhancement (with a floor of 22) in the offense level determined under chapters 2 and 3 of the *Manual*.

Safety Valve. The Commission removed the requirement of a minimum offense level of 26 from the safety-valve provision of 2D1.1 and added a provision to 5C1.2 imposing a floor of offense level 17 for a defendant who qualifies for the lifting of a mandatory minimum under 5C1.2.

Meth labs. The Commission repromulgated as a regular amendment the temporary amendment that takes effect May 1. The Commission, however, made some changes, most notably in the amendment to 2D1.1. The regular amendment makes the new three-level enhancement for creating a substantial risk of harm to human life or the environment an alternative to the two-level enhancement of present 2D1.1(b)(5). The temporary amendment makes those two enhancements cumulative. (See following article.)

Ecstasy. The Commission repromulgated as a regular amendment, without change, the temporary amendment that takes effect May 1.

(See following article.)

Amphetamine. The Commission repromulgated the temporary amendment that takes effect May 1. The regular amendment is the same as the temporary amendment. (See following article.)

List I chemicals. The Commission repromulgated the temporary amendment that takes effect May 1. The regular amendment is the same as the temporary amendment. (See the following article.)

Guns. (1) The Commission revised the gun table of 2K2.1. The new table has two-level increments, instead of one-level increments, and has new entries for 100-199 guns (8-level enhancement) and 200 or more guns (10-level enhancement). (2) The Commission revised 2K1.3 and 2K2.1 to make clear that for the purpose of determining the base offense level, a defendant's status as a prohibited person is to be determined as of the time of the instant offense, not the time of sentencing. (3) The Commission revised the base-offense level provisions of 2K1.3 and 2K2.1 that are triggered by the defendant having one or more "prior" felony conviction. The Commission resolved a circuit split over the meaning of "prior" by specifying that prior means before committing the instant offense, not before being sentenced for the instant offense.

TEMPORARY EMERGENCY AMENDMENTS TO GUIDELINES EFFECTIVE MAY 1

Recently the Sentencing Guidelines Commission voted to promulgate a number of emergency amendments regarding amphetamines, the drug ecstasy, List I controlled substances, and human trafficking. They take effect May 1st, and will remain in

effect until the new amendments mentioned in the previous article take effect in November. Tom Hutchinson of the Defender Training Group has summarized the amendments as follows.

Amphetamine. Adds new entries for amphetamine to drug-quantity table of 2D1.1, treating amphetamine the same as meth. A congressional mandate required this action.

Human trafficking. Amends several guidelines, including 2G1.1 (promoting prostitution) and 2G2.1 (sexually exploiting a minor by production of sexually explicit visual or printed material) [new commentary regarding upward departure if the offense involved more than 10 victims or if defendant was convicted of new offense of sex trafficking of children by force and victims were less than 14 years old], and 2H4.1 (peonage) [separate base offense level for conviction of new offense of unlawful conduct with respect to documents in furtherance of peonage and an increase in the weapon enhancement]. Adds new guideline, 2H4.2 (willful violations of the Migrant and Seasonal Agricultural Worker Protection Act), with base offense level of 6 and two enhancements, for injury (2 or 4 levels) and for committing the offense after a civil or administrative adjudication for similar misconduct (2 levels).

Ecstasy. The Commission adopted an amendment to the drug equivalency table of 2D1.1 that calls for an equivalency ratio of 1 gram = 500 grams of marijuana. The substances affected are MDA (current ratio of 1 g = 50 g), MDMA (1 g = 35 g), MDEA (1 g = 30 g), and PMA (no ratio currently).

List I Chemicals. The Commission adopted the new subsection (d)(1) in proposed

amendment 3 and a revised version of the subsection (d)(2) set forth in proposed amendment 3. Revised subsection (d)(2) caps the offense level at 30, instead of 32 (as published). A 50% yield was used to calculate the quantity of meth that a given amount of the substance would produce.

AUTHORIZATION AND PAYMENT FOR INVESTIGATIVE AND EXPERT WITNESSES

Here's a quick refresher of what's involved in securing the assistance of expert witnesses. The details are in 18 U.S.C. § 3006A(e) and in Chapter III of Volume VII of the Guide to Judiciary Policies and Procedures (Guide), a copy of which is available in each of the Clerk's offices. The CJA Form 21 Instructions (Instructions), copies of which are available in the Clerk's offices, also provide a thorough summary of the procedure. There is, as well, a brief summary in the CJA handout, which is mailed to you when you are appointed, and which can also be found on the Clerk's webpage, FLDN.USCourts.Gov.

Subsection (e)(3) of the statute authorizes payment of a modest \$1,000, exclusive of reasonably incurred expenses, for any given investigator or expert witness. Even that, however, **requires prior authorization**. The form for obtaining approval is "CJA 21." The CJA handout states that you "must file a motion and proposed order with the court" to obtain the form.

In the past, the filing of a motion was apparently optional, with many lawyers simply obtaining the CJA 21 from the Clerk, and filing the form without a separate motion. The initial portion of CJA 21 is a request for authorization to obtain services, so the form lends itself to this one step procedure.

Nevertheless, given the requirement of establishing, with some detail, the defendant's need for an expert, *see, e.g., Moore v. Kemp*, 809 F.2d 702, 711 (11th Cir. 1987), and the limited amount of space set aside for that purpose on the CJA 21, there is some advantage to filing a separate motion.

At any rate, assuming the judge grants the motion the clerk will mail you the CJA 21. Your obligation is to complete the top portion of the form and return it to the Clerk. Once the judge signs the form, it will be returned to you so that, once the investigator or expert has completed his or her services, you can resubmit the form to secure payment for the services rendered. The form requires you and the expert to sign certifying the legitimacy of the fees and expenses, as well as the submission of an itemization statement of the services rendered.

Provision is made for payment in excess of the \$1,000, "for services **authorized prior to the performance**" of the task "when certified" by the trial judge "as being necessary to provide fair compensation for services of an unusual nature," and approved by the Chief Judge of the Eleventh Circuit. Guide, Vol. VII, Chapt. III, § 3.02(A). Again, of course, a detailed written motion is required. Beware that there is, naturally, some time involved in securing authorization from the Eleventh Circuit, so it pays to make the request as soon as possible.

There are two exceptions to the requirement of advance approval. If the fee, minus expenses, does not exceed \$300, the statute does not insist upon advance approval. Even then, though, there is some risk as there will be "later review" prior to payment for the services. 18 U.S.C. § 3006A(e)(2)(A). The second exception is also in the statute, and

provides for payment of a fee between \$300 and \$1000 “in the interest of justice, and upon finding that timely procurement of necessary services could not await prior authorization.” 18 U.S.C. § 3006A(e)(2)(B). There is, however, a significant risk involved in relying upon this second exception - namely the non-payment of the expert’s fee. The Instructions are fairly blunt: “Failure to obtain prior authorization will result in the disallowance of any amount claimed for compensation in excess of \$300, unless the presiding judicial officer, finds that, in the interest of justice, timely procurement of necessary services could not await prior authorization.”

Assuming you’ve chosen the prudent course and obtained advance approval, you may find that as the case has progressed it turns out the fees and expenses are going to exceed what’s been authorized. If that happens the Instructions provide that “you should seek, from the presiding judicial officer, further prior authorization for the additional amount.”

The Guide expressly provides for *ex parte* requests for experts and investigators. If you want to take advantage of this provision, any motion you file should be designated as “sealed.” The CJA 21 will automatically be sealed. If a hearing is necessary, it “shall be heard *in camera*, and shall not be revealed without the consent of the defendant.” Guide, Vol. VII, Chapt. III, § 3.03. The request “shall be placed under seal until the final disposition of the case in the trial court . . .” *Id.* Following the resolution of the case, however, the statute provides that the “amounts paid . . . shall be made available to the public.” 18 U.S.C. § 3006A(e)(4).

CONGRATULATIONS

Here’s the recent victories we know about:

The victory of the year, and maybe for many years to come, has undoubtedly already been sewn up by Assistant Federal Public Defender Elizabeth Timothy and Pensacola’s Roy Kinsey. They each represented one of the eight defendants in a six week long wire fraud, security fraud, and money laundering case that was tried before Judge Collier in Pensacola, and completed just last week. The case involved a staggering amount of discovery: 250,000 hard copy documents, 32 CDs loaded with information, and an entire computer hard drive filled with documents. Both Roy and Lizy’s clients, both of whom were lawyers, were acquitted outright, and are now home with their families.

Federal Public Defender Randy Murrell won two habeas corpus claims. In a § 2255 claim, a woman who was the girlfriend of one of the primary participants in a cocaine conspiracy had, despite her relatively minor role, received nearly 20 years of imprisonment. Following an evidentiary hearing conducted by Judge Sherrill and the subsequent grant of a new sentencing, Judge Paul reduced the sentence to the 7 years the woman had already served. In the second case, a § 2254 claim, a state prisoner won a new control release revocation hearing before the Florida Parole Commission. Some 5 years earlier he had “waived” his revocation hearing thinking he was going to be reinstated, only to find that he was not going to be released again on control release, and would have to complete his sentence, a task that would take another 15 to 20 years. Judge Sherrill, however, in a Report and Recommendation adopted by Judge Stafford, found the “waiver” to have been

invalid, and granted the new hearing. The outcome of that hearing is still pending.

Please call us, send us a note, or e-mail us, here, at the Tallahassee office with news of any victories you've won. Be it a not guilty verdict or any favorable trial outcome, an appellate victory, a winning pre-trial motion, or a particularly successful sentencing outcome, we'd like to mention it in this newsletter. Please don't be modest. Think of it as contributing to the esprit de corps of an embattled group of fellow warriors.

DOWNWARD DEPARTURES

Brown, Arthur Mickle, S. Atty: Tanya Higgins
Docket: 5:00cr23-SPM
Charge: Consp. to Poss WITD Cocaine
Range: 135 - 168 months
Sentence: 60 months probation w/12 months home detention
Date of Imposition of Sentence: 2/12/01
Grounds: 5K1.1 motion of Government as well as USSG § 5H1.4 taking into consideration defendant's health problems.

Braxton, Robert Mickle, S. Atty: Stephen Bernstein
Docket: 5:99cr15-SPM
Charge: C o n s p . t o P o s s W I T D Methamphetamine & Amphetamine
Range: 97 - 121 months
Sentence: 60 months probation w/12 months home detention
Date of Imposition of Sentence: 2/12/01
Grounds: 5K1.1 motion of Government as well as USSG § 5H1.4 taking into consideration defendant's health problems.

Johnson, Michael Vinson, R. Atty: Robert Dennis
Docket: 3:00cr33-RV
Charge: Bank Robbery
Range: 155 - 188 months
Sentence: 66 months
Date of Imposition of Sentence: 02/16/01
Grounds: Applying Koon v. U.S. analysis, § 4A1.3 criminal history result of mental condition, and § 5K2.13 diminished mental capacity.

Conyers, David Hinkle, R. Atty: Randolph Murrell
Docket: 4:00cr39-RH
Charge: Possession Firearm by Convicted Felon
Range: 27 - 33 months
Sentence: 18 months BOP
Date of Imposition of Sentence: 02/16/01
Grounds: § 5K2.13 - Diminished mental capacity.

Dease, Lori Collier, L. Atty: Elizabeth Timothy
Docket: 3:00cr82-LAC
Charge: Assisting Escape
Range: 10 - 16 months
Sentence: 30 days BOP (time served)
Date of Imposition of Sentence: 3/8/01
Grounds: § 5K2.13 diminished capacity.

Please remember to let us know if any of your clients are the beneficiaries of a downward departure. We publish them, here, in hopes of providing a "roadmap" of sorts to help guide others in securing sentence reductions.

SUPREME COURT UPDATE

TEXAS v. COBB, 2001 WL 309572 (Apr. 2, 2001)

Right to counsel; confession; related offenses

While under indictment and in custody for burglary, the defendant confessed to killing the home's occupants. The Texas Court of Criminal Appeals reversed the conviction (and death sentence), holding that the right to counsel, which had attached in the burglary case, also attached to any other offense that was closely related factually.

In a 5-4 decision (Rehnquist, O'Connor, Scalia, Kennedy, and Thomas), the Supreme Court reversed, holding that the *Blockburger* test should be used to determine whether there are two different offenses or only one (i.e., whether each charge requires proof of a fact which the other does not). Under this test, burglary and murder are two separate charges, and the defendant's right to counsel on the

burglary charge did not entitle him to counsel before questioning on the murder charge.

The concurring opinion of Kennedy, joined by Scalia and Thomas, questions the ongoing validity of *Michigan v. Jackson*, 475 U.S. 625 (1986), regarding a suspect's right to waive his/her Miranda rights.

The dissent, authored by Breyer, argues that the majority's definition of offense-specific is unnecessarily technical and "threatens to diminish severely the additional protection that . . . the Sixth Amendment provides when it grants the right to counsel to defendants who have been charged with a crime and insists that law enforcement officers thereafter communicate with them through that counsel" while doing nothing to further effective law enforcement.

RAVELO v. U.S., 2001 WL 310285 (Apr. 2, 2001)

Apprendi

The Court GVR'd (Granted, Vacated, and Remanded) another decision of the 11th Circuit in light of *Apprendi*. The defendant had a life sentence.

FERGUSON v. CHARLESTON, 121 S. Ct. 1281 (Mar. 21, 2001)

Unreasonable search; hospital patients

The Supreme Court held that a state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure. In a 6-3 opinion, the Court stated that the interest in using the threat of criminal sanctions to deter pregnant women from using cocaine cannot justify a departure from the general rule that an official, nonconsensual search is unconstitutional if not authorized by a valid warrant. Justices Rehnquist, Scalia, and Thomas dissented.

BUFORD v. U.S., 121 S. Ct. 1276 (Mar. 20, 2001)

Sentencing appeal; standard of review

A unanimous court held that deferential review is appropriate when an appeals court reviews a trial court's sentencing guideline determination as to whether an offender's prior convictions were consolidated for sentencing. The guidelines define a career offender as one with at least two prior felony convictions for violent or drug-related crimes and provide that a sentencing judge must count as a single prior conviction all "related" convictions, advising that they are "related" when, inter alia, they were consolidated for sentencing. The relevant statute requires that the appeals court "give due deference to the court's application of the guidelines to the facts." 18 U.S.C. § 3742(e). The "deference that is due depends on the nature of the question presented." *Koon v. United States*, 518 U.S. 81, 98, 116 S. Ct. 2034 (1996). The Court gave two reasons for its conclusion. First, the district court is in a better position to decide whether individual circumstances demonstrate functional consolidation. Second, the decision's fact-bound nature limits the value of appellate court precedent. Finally, if greater uniformity is necessary, the Court concluded, the Sentencing Commission can provide it.

SHAFER v. SOUTH CAROLINA, 121 S. Ct. 1263 (Mar. 20, 2001)

Death penalty; jury instruction; sentencing options; Simmons v. S.C.

In *Simmons v. South Carolina*, 512 U.S. 154, 114 S. Ct. 2187 (1994), the Supreme Court held that, where a capital defendant's future dangerousness is at issue and the jury's only options are life without parole eligibility or death, due process requires that the jury be informed of the defendant's parole ineligibility. Following *Simmons*, South

Carolina amended its sentencing scheme. Under the new scheme, the jury must unanimously decide whether a statutory aggravating circumstance exists. If it fails to so find, the sentencing options, left to the judge's discretion, are either a minimum mandatory 30-year sentence or life without possibility of parole. On the other hand, if the jury unanimously finds the presence of a statutory aggravator, the jury must then make a recommendation of either life without possibility of parole or death.

At trial, the defense request for a jury instruction as to these options was denied, as was the jury's request, during deliberations, for advice whether and when the defendant could be eligible for parole. The jury unanimously found the aggravator and recommended death, which the judge imposed. The South Carolina Supreme Court affirmed, holding *Simmons* inapplicable to the new sentencing scheme.

The Supreme Court reversed. When the jury endeavors the moral judgment whether to impose the death penalty, parole eligibility may become critical, and *Simmons* comes into play. Thus, whenever future dangerousness is at issue, due process requires that the jury be informed that a life sentence carries no possibility of parole.

OHIO v. REINER, 121 S. Ct. 1252 (Mar. 19, 2001)

Self-incrimination; claim of innocence

The Supreme Court of Ohio held that a person who denies all culpability does not have a valid Fifth Amendment privilege against self-incrimination. The Court reversed, reaffirming that "the privilege protects the innocent as well as the guilty." The issue arose in the context of a witness granted immunity to testify against the defendant after asserting her Fifth Amendment privilege on the advice of

counsel.

ILLINOIS v. McARTHUR, 121 S. Ct. 946 (Feb. 20, 2001)

Fourth Amendment; temporary seizure

Law enforcement, with probable cause to believe that McArthur had hidden marijuana in his home, prevented him from entering the home unaccompanied by an officer for about two hours while they obtained a search warrant. The Court stated that the test to determine whether the seizure was unlawful was to balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable. Based on a totality of the circumstances, the Court found the law enforcement action reasonable because: (1) law enforcement had probable cause to believe that McArthur's home contained marijuana; (2) law enforcement had good reason to fear that, unless restrained, McArthur would destroy the evidence before they could obtain a warrant; (3) law enforcement used a less restrictive intrusion than a warrantless search; and (4) the restraint was for a limited period, two hours, no longer than necessary to obtain a warrant.

SELING v. YOUNG, 121 S. Ct. 727 (Jan. 17, 2001)

Civil commitment; sexually violent predator; § 2254

Young was civilly committed as a sexually violent predator in Washington and filed an action under § 2254 for release. The district court initially found the Washington act unconstitutional. However, the Supreme Court then issued its opinion in *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072 (1997), finding that a similar Kansas statute on its face met substantive due process requirements, was nonpunitive, and thus did not violate either double jeopardy or ex post

facto prohibitions. The Ninth Circuit eventually granted relief on the basis that Young was challenging the act "as applied" to him and that *Hendricks* had not precluded the possibility that the conditions of actual confinement could be so punitive as to divest a facially valid statute of its civil label.

On certiorari, the Supreme Court reversed, holding that an act which has been found to be civil cannot be deemed punitive "as applied" to a single individual in violation of double jeopardy and ex post facto and provide cause for release. The Court noted in closing that committed individuals still retain the right to seek remedial relief under § 1983 and other avenues.

LOPEZ v. DAVIS, 121 S. Ct. 714 (Jan. 10, 2000)

BOP; early release; drug treatment; crime of violence

The Bureau of Prisons classifies all inmates incarcerated for "crimes of violence" as ineligible for early release based upon their completion of drug abuse treatment programs. Lopez was convicted of possession with intent to distribute methamphetamine, and the district court enhanced his sentence for possession of a firearm in connection with that offense. The BOP found him eligible for the treatment but ineligible, based on its regulation, for early release. The Court found this regulation to be a permissible exercise of the BOP's discretion under 18 U.S.C. § 3621(e)(2)(B).

GLOVER v. U.S., 121 S. Ct. 696 (Jan. 9, 2001)

Ineffective assistance; prejudice; increased sentence

The Court reversed the decision of the Seventh Circuit, which had affirmed the district court holding, that any increase in

sentence must meet a test of significance to satisfy the prejudice prong of the test of ineffective assistance of counsel under *Strickland v. Washington*. The lower courts had found that an increase in sentence of 6-21 months was inadequate to prove prejudice. It is interesting to note that, before the Supreme Court, the Government changed its position and no longer contested that this increase was not prejudicial. The Court reaffirmed that its ruling in *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993), which held that in some circumstances a mere difference in outcome will not suffice to prove prejudice, does not supplant the Strickland analysis. See *Williams v. Taylor*, 529 U.S. 420, 393 (2000). "[O]ur jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance." 121 S. Ct. at 700.

FIORE v. WHITE, 121 S. Ct. 712 (Jan. 9, 2001)

State postconviction; retroactivity; new decisions; legal innocence

The Court granted certiorari to clarify when, or whether, the Due Process Clause requires a state to apply a new interpretation of a state criminal statute retroactively to cases on collateral review. The defendant had already been denied relief in state courts. In response to a certified question from the Court, the Pennsylvania Supreme Court had responded that retroactivity was not an issue and clarified that its interpretation of the statute made clear that the defendant did not violate it. Thus, the question presented was solely whether, consistent with federal due process, a state can convict a defendant for conduct that its criminal statute, as properly interpreted, does not prohibit. The answer was clear that a state which does so violates due process under the federal constitution.

ELEVENTH CIRCUIT CASE SUMMARIES

U.S. v. FARESE; U.S. v. DeROSA, 2001 WL 376408 (Apr. 16, 2001)

Racketeering; sentencing; money laundering; organizer; loss calculation

The defendants were charged with racketeering, with money laundering and mail fraud as two objects, and entered a plea to one count, reserving the right to appeal their objection that the elements of money laundering were not proven. (Note that, even though one defendant did not reserve the right to appeal this issue in his plea agreement, the district court at sentencing approved his adoption of the codefendant's reservation of that issue.) At sentencing, the court found that the Government had met its burden of proving, by a preponderance, that the object was money laundering. This resulted in a base offense level of 20 under 2S1.1(a)(2) and 2E1.1(a), U.S.S.G., as opposed to a level 6 had the object been mail fraud, under 2F1.1(a). Although the Court rejected their first argument that exchanging cash for cash (small denominations for large denominations) does not "create the appearance of legitimate wealth" and therefore cannot be money laundering, it agreed with their second argument that, under *United States v. Ross*, 131 F.3d 970 (11th Cir. 1997), the sentencing court had improperly failed to apply the reasonable doubt standard of proof that money laundering was the object of the conspiracy. Because the jury's verdict did not specify what object it found, and the commentary to 1B1.2(d) cautions about this situation, the *Ross* had concluded that the higher standard of proof was required. *Ross*, 131 F.3d at 990. The Court noted that, on remand, the district court should enter specific findings on the defendants' challenges to proof on the elements of money laundering. Given

this disposition, the Court declined to address the other issues, including the Government's cross-appeal.

U.S. v. DICKERSON, 2001 WL 376399 (Apr. 16, 2001)

Multiple, overlapping conspiracies; prosecutorial misconduct/perjured testimony; Giglio; contradictory prosecution theories; cause challenge; evidentiary rulings

(This is a long opinion; read it if you face one of these issues.) The defendant was charged with a series of multi-state drug conspiracies in different cases. The Court rejected his first argument that prosecutorial misconduct in knowingly presenting perjured testimony required a new trial; it concluded that, even if the witness had testified falsely about pretrial preparation and ongoing drug use, neither could be said to "undermine confidence in the verdict." Though the witness might have lied about preparation, it was not clearly perjury, and it was cured by the agent's subsequent testimony on the issue. The witness' false testimony about drug treatment did not become apparent until the witness' sentencing three months later, so that it did not come out on cross-examination or otherwise. However, the Court concluded that the defense had sufficiently impeached the witness such that this issue would "have been of minimal significance" to the jury. The Court also rejected his argument that the Government's use of inconsistent, contradictory theories of prosecution in his earlier conviction (arguing multiple conspiracies covering distinct regions, including Florida) and the instant conviction (arguing one overarching conspiracy covering the entire Eastern seaboard and the midwest, including Florida) violated due process. Although the district court's admission of hotel records under

Fed.R.Evid. 803(6) was error, because it was hearsay introduced to prove the truth of the matter asserted, it was harmless. The Court rejected other challenges to jury selection, evidentiary rulings, and an *Allen* charge.

U.S. v. GALLEGO, 2001 WL 369783 (Apr. 13, 2001)

***Apprendi*; conspiracy**

The defendants were fifteen members of an alleged conspiracy to commit home invasions and robberies of drug dealers; the indictment charged 17 counts of conspiracy to possess, possession, robbery, and firearms offenses. The four appellants all raised *Apprendi* claims. The Court noted the absence of timely constitutional objections, *Candelario*, 240 F.3d at 1303-06, and applied plain error review. (Note: The date of trial is not given, but it appears to have been even before the *Jones* decision.) The concurrent sentences on the conspiracy and possession counts netted 168 months for Abel Rizo. The court cited *Gerrow*, 232 F.3d at 834, as holding that "there is no error, plain or otherwise, under *Apprendi* where the term of imprisonment is within the statutory maximum set forth in § 841(b)(1)(C) for a cocaine offense without regard to drug quantity." Felix Gallego's 324-month sentence constituted plain error but did not affect his substantial rights because he had admitted personal possession of 4 kilos, which allows up to 40 years under (b)(1)(B). (Note that, although there was testimony to his possession of more, the court only relied on the undisputed quantity for this analysis.) Lazaro Gallego's concurrent life sentences on two counts (conspiracy and possession) likewise constituted plain error but did not affect his substantial rights based on the court's conclusion that there was undisputed testimony that 326 kilos were involved in a robbery and that the defendant possessed 25

kilos from that robbery, so there was no basis on which the jury could have convicted on that count and yet found that the quantity was less than 5 kilos, such that (b)(1)(A) authorized a life sentence. (Note, however, that the defendant disputed the entire quantity, as he presented an alibi defense that he was not involved at all.) Likewise, the life sentence of Evelio Rizo, Sr. was plain error but did not affect his substantial rights, because the defense conceded possession of 10 kilos, which supported a life sentence under (b)(1)(A). The court explains at length in footnote 19 why the result would be the same, even without the quantity finding, because the guidelines dictate a mandatory life sentence, so that a resentencing court would have to impose consecutive sentences to equal that result. Finally, the court rejected the argument that *Apprendi* required the jury to decide whether he was a leader or organizer for purposes of sentencing, as this is solely a guidelines issue.

In footnote 9, the Court again declined to address the issue as to the maximum term of supervised release.

U.S. v. PADILLA-REYES, 2001 WL 360744 (Apr. 11, 2001)

Sexual abuse of a minor; Apprendi

Padilla pled to reentering the United States after deportation. The district court applied a 16-level enhancement because Padilla had previously pled nolo contendere to the charge of "lewd, lascivious, or indecent assault or act upon or in the presence of child," a second-degree felony in Florida, and had been sentenced to one year probation and 60 days jail. First, Padilla argued that the 16-level enhancement was only appropriate where there is actual physical contact because the statute is ambiguous and should be qualified by reference to other federal statutory

provisions (which all require actual physical contact); the Court held it was not ambiguous and meant a perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification. Further, the Court held that the lack of an explicit reference to other federal statutory provisions (which all require actual physical contact) indicated Congress intent to rely on the plain meaning of the terms. Second, Padilla argued that the Court should anticipate the death-knell of *Almendarez-Torres* and extend the logic of *Apprendi* to cases where the omitted fact is a prior conviction; because the issue was raised first in a supplemental brief, the Court deemed it waived, citing *Nealy*, 232 F.3d at 830.

U.S. v. MESA, 2001 WL 360752 (Apr. 11, 2001)

Organizer/leader enhancement; issues at resentencing after mandate; downward adjustment for rehabilitative efforts

In the initial appeal, the Court had vacated the organizer/leader enhancement and remanded for more detailed findings of fact. The Court stated that the record on the leadership role was exceedingly sparse with respect to any control, influence, or leadership exercised by Mesa over a codefendant(s). Specifically, the Court stated that it "VACATED the sentence enhancement and REMANDED for further factual findings." On remand, the district court again applied the enhancement and declined to address new issues raised by Mesa. On appeal, the Eleventh Circuit affirmed. Although the Court felt that the leadership enhancement was a close call, it affirmed the district court's two-prong theory. The Court also agreed that the district court should not review new issues, as the remand was limited. Finally, as to post-sentencing rehabilitation, the Court extended the decision

of *United States v. Pickering*, 178 F.3d 1168 (11th Cir. 1999), which prohibited a downward adjustment to a defendant's offense level. Although *Pickering* involved a defendant who had not yet been sentenced (and exhibited extraordinary rehabilitative acts), the Court held that the distinction (that Mesa dealt with resentencing) was one without a difference. The Court reaffirmed that, where the adjustment was appropriate, "departure for post-offense rehabilitation must occur along the criminal history axis." Because Mesa was already sentenced under Criminal History Category I, he was ineligible for any adjustment.

DELANCY v. FLORIDA DOC, 2001 WL 336033 (Apr. 6, 2001)

§ 2254; period of limitations

Delancy, a *pro se* prisoner, filed a 2254 petition. The district court denied it as time-barred. On appeal, the Eleventh Circuit held that the petition was not time-barred based on the following findings: **First**, Delancy's convictions were final before the effective date of AEDPA, thus, the one-year period to file extended from the statute's effective date, April 23, 1996, until April 23, 1997. **Second**, the one-year period was tolled because Delancy filed a state petition (a Rule 3.800 motion) on October 16, 1996 (leaving over 6 months left before the one-year limitations period expired). The Court found that although Delancy improperly filed the motion under rule 3.800 instead of 3.850, it was properly filed under *Artuz*. The state appellate court denied the 3.800 motion on October 31, 1997. **Third**, Delancy properly filed a Rule 3.850 motion on November 25, 1997. The Eleventh Circuit found that the state motion properly alleged newly discovered evidence. Thus, Delancy's properly filed 3.850 motion again tolled the one-year period, leaving five

months from the date the state appellate court resolved the 3.850 motion, which was on April 9, 1999. **Fourth**, Delancy filed his 2254 petition on April 13, 1999. This was within one year, based on the two tolling periods; therefore, the Court reversed and remanded.

ROSS v. MOORE, 2001 WL 326859 (Apr. 4, 2001)

COA; § 2254; time-barred

The Court entered an order that the district court, when it dismissed the § 2254 petition as time-barred, had erred in granting a COA as to an underlying issue; the court denied the pending motion for COA as moot.

HARDY v. MOORE, 2001 WL 326855 (Apr. 4, 2001)

§ 2254; time-barred; statute of limitations; properly filed state postconviction motion

The sole question before the Court was whether the filing of two state postconviction motions tolled the statute of limitations for filing his federal habeas appeal. The Court remanded to the district court for reconsideration in light of *Artuz v. Bennett*, 121 S. Ct. 361 (2000). The petitioner had filed two state postconviction motions, the first denied because it had already been raised and denied, and the second denied because he had already filed the prior postconviction motion which was denied. The district court had denied the federal habeas action on the basis that the petitioner's first state postconviction motion had not been "properly filed." However, as *Artuz* instructed, that question goes simply to the procedural issue, not the substantive claim underlying the motion. The State conceded error under *Artuz* and requested a remand; also, the district court had failed to even consider whether the second state postconviction motion was "properly filed."

U.S. v. WIMS, 2001 WL 298922 (Mar. 28, 2001)

Apprendi; plain error; multiple counts

Wims was convicted of conspiracy to distribute cocaine and cocaine base and five counts of possession with intent to distribute cocaine. He was sentenced to life imprisonment on the conspiracy count and one of the substantive counts; he received forty-year sentences on the remaining counts. All sentences were concurrent. On appeal, the Court affirmed, rejecting an *Apprendi* claim. The Supreme Court then GVR'd for reconsideration under *Apprendi*.

On remand, because Wims did not raise a constitutional objection at or before sentencing, the Court found plain error. However, the Court ruled that the error did not affect Wims' substantial rights. As to all counts, the Court ruled that the citation of § 841(b)(1)(A) in the indictment put Wims on notice that he was subject to increased punishments based on drug quantity. (Otherwise, the Court did not address Wims' primary claim that the indictment's omission of drug quantity was a jurisdictional defect.) As to five counts, Wims did not contest the drug quantity, and the Court concluded that the jury must have found the requisite amounts. As to the remaining substantive count, Wims did not contest a six-kilogram quantity but claimed it did not belong to him. The Court concluded that the guilty verdict necessarily meant the jury attributed that 6 kilograms to Wims.

SHOFF v. BOP, 2001 WL 298921 (Mar. 28, 2001)

Negligence suit; Federal Tort Claims Act; BOP regulations

Shoff filed an administrative claim with BOP alleging negligence. BOP denied his claim by

certified letter. Seven months later, Shoff filed suit; the district court dismissed because he failed to bring the suit within the six-month period prescribed by the Federal Tort Claims Act. On appeal, Shoff argued that the BOP notification should have been sent to his attorney, not him, and thus the limitations period was not triggered. The Eleventh Circuit disagreed as the plain language of the regulation required notice to "the claimant, his attorney, or legal representative."

U.S. v. MARIN-NAVARETTE, 2001 WL 286603 (Mar. 23, 2001)

Aggravated felony; illegal reentry

Marin-Navarette was convicted for reentering the United States after having been previously deported. The issue on appeal was whether his prior conviction for Attempted Child Molestation (a misdemeanor in Washington) qualified as an aggravated felony under 8 U.S.C. § 1101(a)(43)(A), triggering a 16-level increase in his base offense level. Marin-Navarette argued that felony status was an absolute requirement for the "aggravated felony" enhancement, but the Court disagreed. It held that Congress had included sexual abuse of a minor as an aggravated felony, regardless of the term or possible term of incarceration. The Court reasoned that Congress' failure to specify a term of imprisonment evinced its intent to include misdemeanors within the category. A strongly worded dissent by Judge Cox followed.

U.S. v. RAY, 2001 WL 289888 (Mar. 26, 2001)

USSG § 2K2.1(a)(4)(A); hotel room is a dwelling

Ray pled guilty to possession of a firearm by a convicted felon. The PSI recommended a base offense level of 20 because Ray was previously convicted of a violent crime

(burglary of a presumably unoccupied hotel room). Ray objected to the PSI's determination that his burglary of a hotel room constituted the burglary of a "dwelling." The Eleventh Circuit held that a hotel room - occupied or not - constitutes a dwelling under the pertinent Guidelines.

U.S. v. RATCLIFF, 2001 WL 289885 (Mar. 26, 2001)

Statute of limitations; indictment

A grand jury returned a timely indictment against Ratcliff for conspiring between late 1992 and April 1993 to import marijuana and to possess marijuana with intent to distribute. Other than the dates and location of the offenses, the indictment was devoid of factual detail. Pursuant to the initial indictment, Ratcliff was arrested on April 10, 1998. On August 19, 1998, a grand jury returned a superseding indictment alleging the two conspiracies began in 1980 (12 years earlier) and continued through April 1993. Ratcliff moved to dismiss it on statute of limitations grounds. He pointed out that the superseding indictment was returned more than 5 years after the alleged criminal actions, and he argued that the statute of limitations had not been tolled by the existence of the initial indictment because the superseding one broadened and substantially amended it.

The Eleventh Circuit agreed and held that the superseding indictment was returned outside of the limitations period and that it materially broadened and substantially amended the conspiracy counts. Specifically, the Court stated that while the initial indictment alleged incidents that occurred in 1992 through April 1993, the superseding indictment charged Ratcliff with participating in conspiracies spanning 13 years. Instead of one incident of smuggling, the government presented evidence of at least 8 smuggling

ventures. Instead of a conspiracy involving 5 individuals, the government proved 15 people were involved. Instead of the importation of 1,500 pounds of marijuana, the government proved 6,800 pounds. The Court ordered the district court to dismiss the superseding indictment but left open the possibility that the government could go forward on the initial indictment.

U.S. v. TELEMAQUE, 2001 WL 265142 (Mar. 19, 2001)

Plea colloquy; Rule 11; plea negotiations; elements of offense

The Court rejected the defendant's first argument that the district court meddled in plea negotiations, in violation of Rule 11(e)(1), noting that the plea agreement was complete during the colloquy in question and no case holds that a post-agreement remark can violate the rule, and also noting that the court's statement was not even potentially coercive. However, the Court vacated the sentence, agreeing that the district court committed prejudicial plain error in failing to inform the defendant of the nature of the offense, one of the core concerns of Rule 11. The Court relied on the facts that the district court (S.D. Fla.) referred to the nature of the offense only once, did not refer to the elements of the offense, and did not get a statement on the record that defense counsel had assisted the defendant in understanding the elements.

U.S. v. GILBERT, 2001 WL 264976 (Mar. 16, 2001)

Forfeiture; RICO; family trust

This case involved a forfeiture issue following a protracted RICO prosecution and the transfer of a silent partnership in a family's irrevocable trust and the means by which other family members could reclaim their interests.

The Court rejected the Government's argument that the district court had abused its discretion by denying the Government's request that the defendant's family members should be required to file third-party petitions to reclaim their interests in the trust.

U.S. v. SIGMA INTERNATIONAL, 2001 WL 258041 (Mar. 15, 2001)

Prosecutorial misconduct; lies to grand jury; dismiss indictment

On rehearing, a panel of the Eleventh Circuit criticized the United States Attorney's Office for the Middle District of Florida and dismissed the indictment against the defendants. The opinion found that Assistant United States Attorney Michael Rubenstein lied to a grand jury, rushed the panel, and pressured it to rubber-stamp indictments.

U.S. v. HARRIS, 2001 WL 258400 (Mar. 14, 2001)

Government appeal; *Apprendi*

The district court ruled that *Apprendi* prohibited the court from considering drug quantities other than those involved in the counts of conviction. The Eleventh Circuit disagreed and held that the district court erred and could consider drug quantities relating to relevant conduct under the sentencing guidelines.

WEEKLEY v. MOORE, 2001 WL 258043 (Mar. 15, 2001)

Properly filed; successive petitions; statute of limitations

In its original decision, the Eleventh Circuit had concluded that successive state court filings do not constitute properly filed applications for purposes of tolling 28 U.S.C. § 2244(d)(2)'s statute of limitations period. On remand from the Supreme Court to reconsider under *Artuz v. Bennett*, 121 S. Ct.

361 (2000), the Eleventh Circuit held that the habeas petition was timely because the second and third state postconviction motions were properly filed from a procedural standpoint, thereby tolling the statute of limitations.

PARKER v. HEAD, 2001 WL 258036 (Mar. 15, 2001)

§ 2254; procedural bars; affirmance of state court decisions

Parker raised several issues, including whether the defendant's rights were violated by the admission of statements obtained after the defendant allegedly asked for assistance of counsel. Parker agreed to a polygraph examination, over his attorney's objection, and his attorney was not allowed to be present. Parker's attorney asked the sheriff to let him know when the examination was over and to allow his client to contact him. After the examination, Parker attempted unsuccessfully to contact his attorney. The sheriff read Parker his Miranda rights and began interrogating him. Parker ultimately confessed and a short time later the sheriff was able to contact his attorney.

Parker contended his confession should have been suppressed. The Eleventh Circuit affirmed the Georgia Supreme Court findings: (1) Parker plainly invoked his right to counsel prior to the polygraph examination; (2) Parker, disregarding his attorney's advice, voluntarily took the polygraph examination; (3) Parker had not unambiguously and unequivocally reinvented his right to counsel after the polygraph examination. The Eleventh Circuit held that the Georgia Supreme Court's conclusions were not contrary to, or involve an unreasonable application of, clearly established federal law as determined by the U.S. Supreme Court.

U.S. v. ALLEN-BROWN, 2001 WL 237207 (Mar. 9, 2001)

***Batson* challenges**

The Eleventh Circuit held that *Batson* applies to race-based peremptory challenges made for the purpose of achieving a more diverse jury, finding the defense peremptoriness for this purpose impermissible.

WASHINGTON v. U.S., 2001 WL 237243 (Mar. 9, 2001)

AEDPA deadline; mailbox rule

The Court held that the AEDPA one-year deadline is one year from the date when the Supreme Court either denies certiorari or issues a decision on the merits. Additionally, under Federal Rule of Civil Procedure 6(a), the one-year time period does not begin until the day after the Supreme Court decision. Thus, if the Supreme Court denies certiorari on 10/6/97, a petitioner must file a 2255 petition by 10/7/98. Additionally, a prisoner's pro se 2255 motion is deemed filed on the date it is delivered to prison authorities for mailing. Absent evidence to the contrary in the form of prison logs or other records, the Court will assume that a prisoner's motion is delivered to prison authorities on the day he signed it.

U.S. v. SANCHEZ, 242 F.3d 1294 (Feb. 26, 2001)

***Apprendi*; harmless error; involuntary plea; sentencing guidelines**

Two defendants pled guilty to conspiracy to distribute methamphetamine and amphetamine. Their motion to dismiss the indictment for failing to include the drug quantity was denied. The Eleventh Circuit found that their sentences were within the lowest statutory maximum punishment for those drugs and so any *Apprendi* error was harmless. The Court also rejected their claim

that their pleas were involuntary because they had no notice of the drug quantities; the district court advised them of the possible penalties of 40 years to life and that the sentences would be based on the amount of drugs the court determined at sentencing. Finally, the Court rejected their argument that *Apprendi* requires that a reasonable doubt standard apply to a guidelines firearm enhancement, because *Apprendi* stated that its holding did not address the guidelines.

U.S. v. THOMAS, 242 F.3d 1028 (Feb. 23, 2001)

Evidence; abandoned issues; acceptance; *Apprendi*

First, the Court held that evidence of possession of illegal drugs is relevant to determining whether a defendant knowingly possessed a weapon found in close proximity (temporally and physically) to the drugs. Second, the Court reaffirmed its earlier decisions that an issue must be raised in the initial brief, not in a reply brief, or is considered abandoned. Third, to receive acceptance, a defendant must accept responsibility for all crimes he has committed and with which he has been charged; the Court affirmed the district court's denial of acceptance where the defendant pled guilty to two charges but went to trial and was convicted of the third. Finally, the Court held that *Almendarez-Torres* was still good law, regardless of the defendant's urging that *Apprendi* cast doubt on the decision.

U.S. v. ARDLEY, 242 F.3d 989 (Feb. 20, 2001)

Apprendi

On remand following *Apprendi*, the Court reinstated its opinion holding that Ardley had abandoned the *Apprendi* issue since he had not raised it in his initial brief, reply brief, or suggestion for rehearing en banc.

U.S. v. TARKOFF, 242 F.3d 991 (Feb. 20, 2001)

Money laundering; interstate or foreign commerce connection

Tarkoff appealed his conviction, arguing that he could not be convicted of money laundering under 18 U.S.C. § 1956(h) and (a)(1)(B)(i), where the indictment charged and the government proved that the two monetary transactions at issue occurred wholly outside the United States. The Eleventh Circuit disagreed and held that the government established that Tarkoff violated the statute in two ways: (1) international travel and communication was required to execute the wire transactions, which affected foreign commerce "in any way or degree," and (2) because the transactions involved the use of an Israeli bank, a financial institution which, by communicating with parties in the United States and providing banking services to United States citizens, was a "financial institution that was engaged in, or the activities of which affected, foreign commerce in any way or degree." The Court distinguished this case from *United States v. Kramer*, 73 F.3d 1067 (11th Cir. 1996) (reversing a money laundering conviction with somewhat similar facts), because *Kramer* involved a different subsection of the statute, § 1956(a)(2)(B)(i), which involves the transfer of funds to or from the United States.

U.S. v. MARTINEZ, 241 F.3d 1329 (Feb. 12, 2001)

Motion for return of property

Eight years after his conviction, Martinez filed a Rule 41(e) motion for return of property that had been confiscated at his arrest. The Eleventh Circuit found that the district court could exercise equitable jurisdiction in the matter, following six other circuits that treat such motions as civil proceedings for

equitable relief.

U.S. v. DRUMMOND, 240 F.3d 1333 (Feb. 8, 2001)

Speedy trial; INS detentions; meaning of aggravated felony

Drummond appealed his conviction and sentence for attempted reentry. First, Drummond had moved to dismiss on speedy trial grounds, but the Court held that INS detentions preceding deportation are civil in nature and do not trigger rights under the Speedy Trial Act, unless deportations are used by the government as "mere ruses to detain a defendant for later criminal prosecution." Such was not the case for Drummond. Second, Drummond challenged the 16-level enhancement for an aggravated felony (menacing), which was a class A misdemeanor in New York punishable by up to one year's imprisonment; Drummond was actually sentenced to the maximum - one year. The Court found that Drummond's conviction for menacing was an aggravated felony: (1) menacing is when a person intentionally places another in fear of physical injury and, thus, was a crime of violence; and (2) the length of the sentence actually imposed determines whether crimes of violence constitute aggravated **felonies**. Since Drummond's sentence for menacing was exactly one year, and not less, it constituted an aggravated felony.

U.S. v. DUNHAM, 240 F.3d 1328 (Feb. 7, 2001)

Revocation of probation; jurisdiction; § 2255

Dunham, a federal prisoner, argued the district court's order denying her 2255 motion and revoking her probation was illegal because it exceeded the maximum under the guideline range applicable at the time she was initially

sentenced. Specifically, Dunham argued that the court erred by lengthening her sentence for the sole purpose of rehabilitation. As a threshold issue, the Court held, *sua sponte*, that the district court lacked jurisdiction to consider and rule on the 2255 during the pendency of her direct appeal of her sentence, and was thus dismissed without prejudice. As to the illegal sentence issue, the Court extended *United States v. Brown*, 224 F.3d 1237 (11th Cir. 2000), which held that a court can consider an incarcerative sentence for the purpose of providing a defendant with rehabilitative treatment upon revocation of supervised release, and applied the holding to revocation of probation cases as well. Thus, the Court found no error.

U.S. v. REGUEIRO, 240 F.3d 1321 (Feb. 6, 2001)

Upward departure; § 5K2.7; disparity between sentences

Regueiro appealed her sentence for conspiracy to defraud the United States by submitting false Medicare claims, conspiracy to commit money laundering, and money laundering. Regueiro argued that the district court erred by departing upward for disruption of a government function, pursuant to U.S.S.G. § 5K2.7, based on her involvement in a scheme to defraud Medicare. The Eleventh Circuit disagreed, concluding that the nature and scope of Regueiro's conduct (loss to Medicare of \$15,238,489) significantly disrupted the government's provision of Medicare benefits. Additionally, Regueiro's argument that the district court's disparate treatment of her and her codefendant (who was equally involved in the scheme) violates the sentencing guidelines was rejected by the Court. The Court held that disparity between the sentences imposed on codefendants is generally not an appropriate basis for relief on appeal.

U.S. v. CANDELARIO, 240 F.3d 1300 (Feb. 5, 2001)

Apprendi; plain error v. preserved error; constitutional objection; timeliness

On rehearing (previous opinion was unpublished table decision), the Court conducted an exhaustive review of when plain error review is applied vs. when preserved error review is applied. In cases raising *Apprendi* concerns, the reviewing court asks two questions: (1) Did the defendant make a **constitutional** objection? and (2) Was the objection **timely**? According to the Court, the answer to the first question is critical. A defendant may be deemed to have made a constitutional objection if his objection invokes *Apprendi* or *Jones*. To raise a constitutional question, a defendant must make the following types of objections: (a) the issue of drug quantity should go to the jury; (b) an element of the offense was not proved; (c) the judge cannot determine quantity; and (d) quantity must be proven beyond a reasonable doubt. However, an objection to the quantity of drugs that the government attributes to a defendant is not, on its own, a constitutional objection. Such an objection can be characterized as either an evidentiary objection or a sufficiency of the evidence objection. Finally, an objection to the indictment is not a constitutional objection if the indictment properly charges a crime.

Regarding timing, a constitutional objection for *Apprendi* purposes is timely if a defendant makes the objection at sentencing.

To receive preserved error review, a defendant must make a timely constitutional objection. Preserved error cases are reviewed *de novo*. However, under preserved error review cases, if the reviewing court finds such an error, it is nonetheless subject to harmless error analysis under Rule 52(a). The Court cited *Rogers*, 228 F.3d 1318, and *Nealy*, 232

F.3d 825, as preserved error review cases.

In contrast to the preserved error line of *Apprendi* cases are those cases that receive plain error review. These cases are exemplified by *Swatzie*, 228 F.3d 1278; *Gerrow*, 232 F.3d 831; *Smith*, ___ F.3d ___, Case No. 99-11377; and *Pease*, ___ F.3d ___, Case No. 99-2301. The Court explained how each of these cases failed to raise a timely constitutional objection. The Court stated that *Apprendi* error is plain error, but also suggested that there is no error at all if the maximum sentence is within the limits of § 841(b)(1)(C).

The Court also noted that the proof of prejudice is essentially the same under harmless error analysis and the third prong of plain error analysis (i.e., whether the defendant's substantial rights are affected), but the burden is merely shifted to the defendant in the latter scenario.

U.S. v. GRIGGS, 240 F.3d 974 (Jan. 31, 2001)

CJA; appealability

Attorney Griggs appealed the district court's order compelling her to reimburse the CJA fund pursuant to 18 U.S.C. § 3006A(f) for funds she received from a client. The Eleventh Circuit held that it lacked jurisdiction to hear the appeal. The Court concluded that § 3006A(f) payment orders, like § 3006A(d) fee determinations, are administrative in nature and therefore are not appealable final orders under 28 U.S.C. § 1291.

U.S. v. JAMIESON, 202 F.3d 1293 (Jan. 31, 2001)

Interpretation of 18 U.S.C. § 921(a)(30)(A)(i)

The district court interpreted § 921(a)(30)(A)(i) to prohibit any semiautomatic

assault weapon manufactured by Norinco. The Eleventh Circuit disagreed and stated that the statute only prohibited models of Norinco's "Avtomat Kalasnikovs." Thus, the Court concluded that the enhancement under U.S.S.G. § 2K2.1(a)(3) was in error and reversed.

U.S. v. PEASE, 240 F.3d 938 (Jan. 30, 2001)
***Apprendi*; withdrawal of plea; appeal waivers**

Pursuant to a plea agreement (containing a sentence appeal waiver), Pease pleaded guilty to conspiracy to distribute cocaine. The magistrate judge informed Pease of the 10-year minimum mandatory and life maximum, and stated that the sentence imposed might be different than the estimate or prediction by his attorney. In preparing the PSR, probation recommended that Pease be sentenced as a career offender. At sentencing, Pease asked to withdraw his guilty plea, stating that his attorney told him he would be sentenced from 5-10 years, since his attorney had failed to uncover previous convictions.

The Eleventh Circuit affirmed the district court's rejection of Pease's motion to withdraw his guilty plea. Pease was informed repeatedly that he was facing a maximum term of life. His attorney's limited investigation of his criminal history, after asking Pease his history, was not per se deficient performance. As to sentencing issues, the Court held that a conspiracy indictment need not be as specific as an indictment charging a substantive count. As to the *Apprendi* issue (Pease received a 30-year sentence under (b)(1)(B)), the Court found error, under plain error analysis, but concluded the error did not affect substantial rights. Pease had admitted a quantity over 500 grams. Thus, under § 841(b)(1)(B), he could have received a 5-40 year sentence, and 30 years was within that range.

U.S. v. SMITH, 240 F.3d 927 (Jan. 30, 2001)
***Apprendi*; consecutive sentences; methamphetamine**

Defendants were convicted of three counts involving methamphetamine and were sentenced to 30 years. At sentencing, the government's expert witness testified that 2,000 grams of meth could be made using the most abundant precursor chemical, 91 grams using the least abundant precursor. The district court found that the defendants could have produced 2,000 grams of meth and sentenced accordingly.

The Eleventh Circuit stated that drug amount approximations should be reasonably fair, accurate, and conservative. However, the Court found no error in the estimation of drug quantity based on the most abundant precursor. As to *Apprendi*, the Court found that with no finding of drug quantity, the statutory max was 20 years for each count. However, the Court found no violation of substantial rights because the defendants were convicted on three counts, making them subject to a maximum sentence of 60 years, assuming consecutive sentences.

CHANDLER v. MOORE, 240 F.3d 907 (Jan. 30, 2001)
§ 2254; IAC; comments on presumption of innocence

The Court denied relief in this state death penalty case. The district court had granted a COA but failed to enumerate the issues. Thus, the Court addressed all issues presented. The following issues were addressed: (1) whether the trial court's comments deprived Chandler of the presumption of innocence; (2) whether the prosecuting attorney's comments deprived Chandler of his rights; (3) whether the state knowingly presented false or misleading evidence and failed to disclose exculpatory evidence; (4) whether Chandler's rights were

violated when the trial court denied his challenges for cause; and (5) whether the state violated Chandler's right of confrontation when it presented hearsay evidence at his resentencing.

U.S. v. CHRISTOPHER, 239 F.3d 1191 (Jan. 22, 2001)

Shoplifting as aggravated felony; illegal reentry

The defendant challenged, and the Court affirmed, his 16-level sentence enhancement under USSG § 2L1.2(b)(1)(A), finding that his prior conviction for theft by shoplifting qualified as an "aggravated felony" under 8 USC § 1101(a)(43)(G). The Court rejected the defendant's distinction that his theft conviction did not qualify because, instead of a possible sentence of at least one year, it carried a sentence of at most one year. Last year, the Court held that the length of sentence imposed determines whether a crime of theft constitutes an "aggravated felony." *U. S. v. Maldonado-Ramirez*, 216 F.3d 940, 944 (11th Cir. 2000), *pet. for cert. filed*, Sept. 25, 2000 (No. 00-6264). Given the clear legislative intent to punish any theft for which the sentence is at least one year, it did not matter that the defendant's theft carried a sentence of at most one year.

As an issue of first impression in this circuit, the Court likewise rejected the argument that the offense could not be an "aggravated felony" because it is a misdemeanor under state law, following the decisions of the Second, Third, and Fourth Circuits. Slip op. at 5-8.

UNITED KINGDOM v. U.S., 238 F.3d 1312 (Jan. 19, 2001)

Discovery

The Court affirmed, finding no abuse of discretion in the district court's refusal to

order the government to disclose to criminal defendants in England, for purposes of their defense, certain documents including grand jury materials, work product, and wiretap information.

HOUSEL v. HEAD, 238 F.3d 1289 (Jan. 18, 2001)

§ 2254; IAC; sentencing; confession

The Court affirmed denial of Mr. Housel's 2254 petition, rejecting issues as to (1) ineffective assistance of counsel at sentencing (and at the guilt/innocence phase regarding evidence of intoxication) based on failure to develop mitigation evidence of a difficult childhood; (2) introduction of evidence of unadjudicated offenses at sentencing; and (3) a claim that his confession to one of the unadjudicated offenses was involuntary and so should not have been admitted.

U.S. v. BRADFORD, 237 F.3d 1306 (Jan. 9, 2001)

Trial; commencement; defendant's voluntary absence

The defendant challenged the district court's decision to try her in absentia under Fed. R. Crim. P. 43, but the Court affirmed. The district court had evidence that the defendant refused to attend a competency hearing, conducted the hearing, and concluded she was competent to stand trial. This was not challenged on appeal. The defendant then refused to attend trial, and the court declined to force her attendance out of safety concerns. The court reset trial, and the defendant attended for jury selection but refused to return on the date the jury was sworn and trial began. The district court determined that her decision was voluntary and again expressed safety concerns should she be forced to attend. Thus, the court concluded that, since she had attended jury

selection, trial had commenced under Rule 43(b) and her voluntary absence did not preclude the trial continuing.

As for the threshold issue whether trial commenced with jury selection or when the jury was sworn, the Court agreed with its assumptions in two prior cases, and all other circuits to have addressed the issue, that trial begins under Rule 43 when jury selection begins. Even though Rule 43(a) requires the defendant's presence at every stage of the trial, including the impaneling of the jury, subsection (b) refers only to "after the trial has commenced;" the Court concluded that a bright line at the swearing of the jury would frustrate the purpose of the rule. The Court also rejected the double jeopardy arguments and agreed that the defendant's absence was voluntary.

U.S. v. PURCELL, 236 F.3d 1274 (Jan. 4, 2001)

Warrantless search; automobile; detention; consent; criminal history check

The defendant was stopped for failure to leave sufficient space between him and the car ahead. The deputy obtained identification for the driver and occupants of the car, as well as the rental agreement. Writing a traffic citation, the officer questioned whether the driver had ever been arrested; the driver answered yes, for drugs. In response to the officer's next question, the driver denied that he had "any narcotics, weapons, firearms, contraband, anything like that in the car." The driver, 14 minutes into the stop, consented to a search of the car. A bag containing crack was found. The deputy then arrested the two men (but not the woman w/baby).

The Court, rejecting the defendant's three arguments on appeal, found: (1) The initial stop was supported by probable cause; the defendants admitted to only 3 car lengths'

distance, while the law required 7; an officer may stop a vehicle with probable cause of a traffic violation. *Whren v. U.S.*, 517 U.S. 806, 810 (1996).

(2) The defendants contended that both the duration and the scope of the traffic stop were excessive, both issues of first impression in this circuit. The Court concluded that 14 minutes' duration was not facially unreasonable and rejected the defendant's argument that the deputy could not prolong the stop to await the occupants' criminal histories, finding that the criminal history check was included in the "steps [which are] reasonably necessary to protect [the officers'] personal safety." *U. S. v. Hensley*, 469 U.S. 221, 235 (1985). Thus, the criminal history check was similar to the permissible protective search of driver, passengers, and vehicle, the seizure of contraband in plain view, the use of a flashlight to light the car's interior, and the check of the driver's license and registration, including a computer check. Slip op. at 6-8. The Court also noted that, prior to completion of the citation, the deputy had received the driver's consent to search the vehicle.

Notably, however, the Court refused to adopt a "bright-line" rule that a criminal history check is a reasonable, constitutional part of all or most traffic stops, concluding instead that courts must examine the totality of the circumstances to determine reasonableness of the check. The Court suggested it might be unreasonable if it exceeded the time necessary for the normal license and warrant checks. "So long as the computer check does not prolong the traffic stop beyond **a reasonable amount of time under the circumstances of the stop**, the inclusion of a request for criminal histories does not constitute a Fourth Amendment violation." [Emphasis added.] *See Hardy*, 855

F.2d at 761 (50" approved); *cf. Place*, 462 U.S. at 709 (90" probably too long). Slip op. at 9-11.

As for the scope of the stop, the Court concluded that, once the driver admitted to drug convictions, **reasonable safety concerns** justified the further question whether the driver had firearms, drugs, or guns in the car. Further, the question did nothing to prolong the duration of the stop.

(3) The Government conceded the lack of probable cause to support a warrantless search, so the search was illegal absent the driver's voluntary consent. Although there was no evidence the driver was informed of his right to refuse consent, the district court's finding it was voluntary was not clearly erroneous. As to the deputy's retention of the driver's license, the Court concluded that was merely one factor to be considered under *Schneckloth*.

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