

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

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April 12, 2002

**SPIVEY AND SELIGER GO TO THE SUPREME COURT**

Gwen Spivey of our Tallahassee office and panel lawyer Steve Seliger from Quincy appear this Tuesday, April 16, before the United States Supreme Court to present their argument in the case of United States v. Drayton. Gwen, representing Christopher Drayton, and Steve, representing Clifton Brown, Jr., successfully argued to the Eleventh Circuit that officers of the Tallahassee Police Department had unlawfully searched their clients and that the trial court should have suppressed the drugs that were seized. The Court concluded that the “consent” to search, given by Drayton and Brown when the police officers boarded a soon-to-depart Greyhound Bus, was not sufficiently free of coercion to serve as a valid basis for the search. See United States v. Drayton, 231 F.3d 787 (11<sup>th</sup> Cir. 2000). In January the Supreme Court granted the Government’s request to review the decision.

The journey to the Supreme Court has been a remarkable one, and the subject of an article

published on March 4<sup>th</sup> by the American Lawyer Media at [www.law.com](http://www.law.com). Entitled “Bitter Battle Between Lawyers Reaches High Court,” the article recounts what took place when a lawyer from Chicago attempted to, in the words of the article, “take over representation of the two defendants.” The author of the article, Tony Mauro, described the debate as one that “may have a longer-lasting impact and could prompt the justices to look into the competitive tactics and client-poaching that goes on among lawyers.” In the end, the Supreme Court appointed Gwen and Steve to continue to represent their clients.

We wish Gwen and Steve well in their rare all important effort.

**NEW ASSISTANT UNITED STATES ATTORNEYS**

The United States Attorney’s office has hired six new assistants and has plans to hire two more. Of those already hired, two will be working in the Pensacola office, one in Gainesville, and three in Tallahassee. **Len Register**, who had been the State Attorney in Gainesville for Florida’s Eighth

Judicial Circuit and has most recently been an Assistant United States Attorney in the Western District of Tennessee, and **Deborah Tillman**, who has been working in the homicide section of the Mobile County District Attorneys office, will be filling the Pensacola slots. **Greg McMahan**, an Assistant State Attorney in Gainesville, will be in the Gainesville office. **George Abney**, who has been working in the Department of Justice's Tax Division, **Ariana Fajardo**, an Assistant State Attorney working in the RICO section in the Dade County State Attorney's office, and **Monte Richardson**, an Assistant United States Attorney from the Middle District of Florida who has most recently been on loan to the United States Sentencing Commission, are coming to Tallahassee. Of the two that have yet to be hired, one will be going to Gainesville and the other to Tallahassee.

#### **NEW VERSION OF "AN INTRODUCTION TO FEDERAL GUIDELINE SENTENCING"**

Lucien Campbell, the long time Federal Defender in the Western District of Texas, has for years published an excellent introduction to the Sentencing Guidelines, aptly named "An Introduction to Federal Guideline Sentencing." His sixth edition, published in March of this year, is now available. You can find it at two different websites: < <http://www.fd.org> > (Publications & Materials, Sentencing) and < [http://fpd.home.texas.net/pdf lib/intro6ss.pdf](http://fpd.home.texas.net/pdf_lib/intro6ss.pdf) >.

If you don't have access to these web sites, just call Margaret in our Tallahassee office (850-942-8818) and she'll be glad to send you a copy.

#### **REAL PLEA COLLOQUY NEEDED FOR VIOLATIONS OF SUPERVISED**

#### **RELEASE?**

In February the Eleventh Circuit Court of Appeals directed Tom Miller, in our Gainesville office, to brief an issue that hasn't received much attention in the Eleventh Circuit. For most of those North Florida defendants entering admissions to violations of supervised release, the plea colloquy has been a limited one. In the case in which Tom was involved, the judge asked the defendant only if he had heard his lawyer's offer of the admission, if he knew the maximum sentence under the guidelines, and if he wanted to offer any explanation. The court made no inquiry as to whether the admission was entered knowingly and voluntarily.

Courts in three districts have held that trial courts are obligated to make such an inquiry. *See United States v. LeBlanc*, 175 F.3d 511 (7<sup>th</sup> Cir. 1999); *United States v. Pelensky*, 129 F.3d 63, 68 n. 9 (2d Cir. 1997); and *United States v. Stocks*, 104 F.3d 308, 312 (9<sup>th</sup> Cir. 1997). Tom's case is *United States v. Reese*. The Court of Appeals docket number is 01-15254-G.

#### **WEB PAGES**

The Defender Services Division Training Branch has opened a wonderfully helpful web page at < <http://www.fd.org> >. It contains a long list of useful information: a list of training opportunities, materials distributed at CJA training conferences, an archive of the Training Branch's newsletter "The Defender Advocate," an update on the cases currently pending before the United States Supreme Court, and a listing of books and articles on different topics ranging from appeals to wiretaps. It features, too, a "What's New" section that the Training Branch will be continually updating.

Our web page has moved to < <http://fpd.yourvillage.com/> >. While our plans to upgrade the page are still on the horizon, you'll find an archive of all our newsletters, a list of expert witnesses compiled a couple of years ago by the Florida Public Defender Association and the Federal Defenders Office for the Middle District of Florida, and links to other websites.

### **APRIL PANEL TRAINING**

Although we skipped last month, we are back on track for April. This month's training is: "Defending a Methamphetamine Case." It is a video of a panel training session presented a few months ago in Montgomery, Alabama. By now you should have already received notice of it. The session, as always, will be held at noon at your local Federal Courthouse. The dates are:

Tallahassee: April 16  
 Gainesville: April 18  
 Pensacola: April 23  
 Panama City: April 25

### **NINETY DOLLARS AN HOUR AS OF MAY FIRST**

May 1<sup>st</sup> is the first day of the new \$90 dollar hourly rate. The increase applies to work done both in and out-of-court in those cases in which a panel lawyer is appointed as of or after that date, and to work done in existing cases as of that date. Some of the history and the details of the process were outlined earlier this year in *The Third Branch*, the newsletter published by the Administrative Office of the Federal Courts.

"Between 1996 and 2001, CJA panel attorneys in most judicial districts received just three \$5

rate increases above the rates of \$60 in-court and \$40 out-of-court that had been authorized in 1984. For 14 years, between 1970 and 1984, there were no rate increases."

"The Judicial Conference for the United States Courts requested that Congress raise the rate to \$113 per hour for both in-court and out-of-court work." According to *The Third Branch*, while "there was sympathy for the \$113 rate, budget constraints would allow for only a \$90 rate."

The Courts' Administrative Office Director, Leonidas Ralph Mecham, gave much of the credit for the increase to a meeting arranged by the Administrative Office between the staff of the House of Representatives Appropriations Committee and five panel attorneys from across the country.

### **UNYIELDING AND UNCOOPERATIVE**

A note of encouragement from the American Bar Association:

"Defense counsel, in protecting the rights of the defendant, may resist the wishes of the judge on some matters, and though such resistance should never lead to disrespectful behavior, defense counsel may appear unyielding and uncooperative at times. In doing so, defense counsel is not contradicting his or her duty to the administration of justice but is fulfilling a necessary and important function within the adversary system. The adversary system requires defense counsel's presence and zealous advocacy just as it requires the presence and zealous advocacy of the prosecutor and the neutrality of the judge. Defense counsel should not be viewed as impeding the administration of

justice simply because he or she challenges the prosecution, but as an indispensable part of its fulfillment.”

ABA Standards, § 4-1.2, Commentary, at 122.

## **NEW RULES AND INTERNAL OPERATING PROCEDURES FOR THE ELEVENTH CIRCUIT**

Effective January 1, 2002, the Eleventh Circuit’s Rules and Internal Operating Procedures have been revised. The revision includes provisions that: provide for time limits for filing motions for reconsideration; require counsel to file an appearance of counsel form in each appeal in which the attorney participates; provide that a citation to supplemental authority may identify the relevant portion of the cited authority and the issue to which it relates; provide that the calendar clerk will advise counsel of when the clerk’s office may be contacted to learn the identity of the oral argument panel, and require counsel to attach a copy of the court’s opinion to petitions for rehearing and to petitions for rehearing en banc. The Court has sent already sent out a supplement. The new rules and procedures are also available on the internet at < [www.ca11.uscourts.gov](http://www.ca11.uscourts.gov) >.

## **NEW MILEAGE RATES**

Effective January 21, 2002, the mileage rate for panel cases increased from 34.5 cents per mile to 36.5 cents.

## **VICTORIES**

Just before leaving for her Supreme Court argument, **Gwen Spivey**, of our Tallahassee office, won a reversal in the case of United States v. Durham, No. 00-122277, 2002 U.S. App. LEXIS 6035 (11<sup>th</sup> Cir. April 4, 2002). Jeffrey Scott Durham, represented by Pensacola panel lawyer **David White**, was convicted last year of multiple bank robbery and firearm charges, and sentenced to 105 years of imprisonment. David’s challenge to the trial court’s order that his client had to wear a stun belt for security reasons was rejected by the trial court. The Eleventh Circuit, however, reversed the conviction and ordered a new trial, stating that the trial court failed to make factual findings about the belt’s operation, failed to explore alternative methods of restraint, and failed to articulate a sufficient rationale for requiring Durham to wear the belt.

Last month **Craig Crawford**, in one of the cases he pursued before leaving our Gainesville office for the Defender’s Office in Florida’s Middle District, won a reversal. In United States v. Morris, 01-10955, 2002 U.S. App LEXIS 5150 (11<sup>th</sup> Cir. March 28, 2002), a Gainesville case, the Eleventh Circuit held the district court had erred in applying an enhancement for abuse of trust pursuant to U.S.S.G. § 3B1.3.

Please call us, send us a note, or e-mail us 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**

Haynes, Kathy Jo     Hinkle, R.  
 Atty: R. Murrell  
 Docket: 4:01cr66-RH  
 Charge: Attempted poss of prohibited  
           object by inmate  
 Range: 33-41 months  
 Sentence: 18 months BOP  
 Date of Imposition of Sentence: 2/26/02  
 Grounds: Post-offense rehabilitation.

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

#### DAILY CASE SUMMARIES

The summaries that follow are prepared by our lawyers here in the Public Defender's Office. We prepare them daily as the opinions are issued. If you'd like to receive the daily summaries, via e-mail, please call Margaret in our Tallahassee office at (850) 942-8818.

#### Certiorari Granted

**EWING v. CALIFORNIA**, 2002 WL480176  
 (Apr. 1, 2002)

**LOCKYER v. ANDRADE**, 2002 WL204945  
 (Apr. 1, 2002)

**Eighth Amendment: Constitutionality of life imprisonment sentence for petty theft convictions under "three strikes" law. Consolidated cases.**

Ewing: Under California's "three strikes" law, Ewing was sentenced to 25-years-to-life, without possibility of parole for 50 years, for theft of three golf clubs. He had a criminal record dating back to 1984, including numerous misdemeanor and felony convictions for theft, battery, firearms possession, robbery, and burglary, two of which were violent and involved use of weapon. His

rehabilitative prospects are bleak, he has been on either probation or parole since 1988, and committed current offense after being released only nine months earlier. Cert. granted in direct review after California middle level appellate court affirmed and Cal S.Ct. denied review.

Andrade: He was convicted of two counts of petty theft for shoplifting a total of nine videotapes worth a total of \$153.54, from two K-Mart stores. Because Andrade had been convicted of several nonviolent prior offenses, he was sentenced under California's Three Strikes Law to life imprisonment with no possibility of parole for 50 years. On federal habeas review, the Ninth Circuit held the sentence was grossly disproportionate under the Eighth Amendment, and that the state court's decision to affirm had been an unreasonable application of U.S. Supreme Court precedent under the Antiterrorism and Effective Death Penalty Act.

**SATTAZAHN v. PENNSYLVANIA**, 122 S. Ct. 1294 (Mem) (Mar. 18, 2002)

#### **Double Jeopardy in new capital sentencing**

In 1991, Sattazahn was convicted of first-degree murder and the Commonwealth sought the death penalty. At the penalty phase, the jury deliberated without reaching a sentence, and a hung jury was declared after 3½ hours, requiring the court to enter a mandatory life sentence. On appeal, based on a jury instruction, the Superior Court reversed and remanded for a new trial. Upon retrial in 1999, a jury convicted Sattazahn again and this time the trial court sentenced him to death, holding that the Fifth Amendment's double jeopardy clause does not bar imposition of death penalty upon retrial of capital defendant after appellate court overturned initial conviction, for which trial judge imposed statutorily required life sentence following jury's deadlock regarding penalty. Court granted cert to address whether

the jury's failure to reach a verdict in the first proceeding established a double jeopardy bar to the death sentence in the second trial.

**MILLER-EL v. COCKRELL**: 122 S. Ct. 1202 (Mem) (Feb. 15, 2002), revised, Mar. 04, 2002

**Does Swain survive Batson in jury peremptory challenge case?**

In 28 U.S.C. § 2254 proceeding where Batson was the applicable law, Miller-El contended that he may establish prima facie case of racial bias in peremptory strikes by forgoing test set forth in Batson and instead by showing prior systematic use of peremptory challenges against black members of jury pools over period of time, which was test established by Swain v. Alabama, 380 U.S. 202 (1965). The federal courts rejected the claim but the USSC granted cert. to answer the question of whether the Court of Appeals erred in denying a certificate of appealability and evaluating petitioner's claim under Batson v. Kentucky.

**U.S. v. BEAN**, 122 S. Ct. 917 (Mem) (Jan. 22, 2002)

**Restoration of federal firearms rights**

In Bean v. Bureau of Alcohol, Tobacco and Firearms, 253 F.3d 234 (5<sup>th</sup> Cir. 2001), the court held that Congress's refusal to fund processing, by Bureau of Alcohol, Tobacco and Firearms, of applications pursuant to 18 U.S.C. § 925(c) for restoration of federal firearms rights to persons under certain firearms disabilities does not prevent federal district court from granting relief to persons whose applications have been denied. The Court granted cert. to consider whether federal districts court have authority to grant relief from firearms disabilities to persons convicted of felonies despite fact that appropriations provisions bars BATF from acting

on such applications.

**RING v. ARIZONA**, 122 S. Ct. 865 (Mem) (Jan. 11, 2002)

**Apprendi in capital sentencing**

In a potentially major death penalty case, the Court agreed to consider whether in the context of the Sixth Amendment right to a jury trial, its decision in Apprendi effectively overruled Walton v. Arizona. In Walton, the Court upheld a state's death penalty procedure empowering the judge to making findings of aggravation and mitigation and impose sentence without the need to have a jury make findings of essential sentencing facts.

**U.S. v. FIOR D'ITALIA, INC.**, 122 S. Ct. 865 (Mem) (Jan. 11, 2002)

**Taxation; assessment method; FICA**

Lower court held that IRS, in calculating restaurant's employment tax liability for unreported tip income, lacks authority to use aggregate estimates derived by applying "tip rate" from meals charged to credit cards to restaurant's gross receipts but, instead, must conduct employee-by-employee audit to determine taxable tips earned by each employee. Court granted cert. to consider whether employer's share of Federal Insurance Contributions Act tax on employee tip income must be determined by accumulating result of individual audits of individual employees or may it instead be based on reasonable estimate of aggregate amount of tips received by all employees.

**U.S. v. COTTON**, 122 S. Ct. 803 (Mem) (Jan. 4, 2002)

**Apprendi; indictment; plain error**

Granting cert to consider Government's (again) argument that the Fourth Circuit is in conflict with the Eleventh Circuit and that the Fourth

erroneously held that drug quantity must be charged in the indictment under the Grand Jury Clause and that the failure to do so results in plain error if a sentence exceeding the limits of 21 USC 841(b)(1)(C) is imposed.

**U.S. v. DRAYTON**, 122 S. Ct. 803 (Mem) (Jan. 4, 2002)

**Search; bus passenger; consent; advice of rights**

Granting cert to consider Government's argument that the 11th Circuit has erected a *per se* rule that a search of a bus passenger by a drug interdiction team is invalid absent prior advice to the passenger of the right to refuse consent.

**U.S. v. RUIZ**, 122 S. Ct. 803 (Mem) (Jan. 4, 2001)

**Plea agreement; waiver; Brady**

Although the precise question is not clear, the Court granted cert to review the decision of the Ninth Circuit that the right to receive undisclosed Brady evidence was not subject to waiver through plea agreements. It reasoned that defendant's guilty plea could not be deemed intelligent and voluntary, since it was entered without knowledge of material information withheld by the prosecution and concluded it was unconstitutional for prosecutors to withhold a departure recommendation based on a defendant's refusal to accept such a waiver.

**STEWART v. SMITH**, 122 S. Ct. 1143 (Dec. 12, 2001)

**State procedural bar in federal habeas review**

Court granted cert. to review 9<sup>th</sup> Circuit's decision holding that under Ake v. Oklahoma, 470 U.S. 68 (1985), when state procedural default rule depends on assessment of federal claim, federal review is not barred and habeas

petitioner's claim of ineffective assistance of counsel can proceed in view of conclusion that state court did not make clear that its denial of rehearing was based on procedural bar, and fact that, under state's rules of court, court had to give some consideration to merits of claim before finding it defaulted. [Compare Lee v. Kemna below]

**HARRIS v. U.S.**, 122 S.Ct. 663 (Mem) (Dec. 10, 2001)

**Apprendi and Minimum Mandatory Sentencing**

The Court granted cert. to hear argument on whether, given that a finding of "brandishing", as used in 18 U.S.C. Sec. 924(c)(1)(A), results in an increased mandatory minimum sentence, must the fact of "brandishing" be alleged in the indictment and proved beyond a reasonable doubt? This is a very important case implicating Apprendi. A presentence report recommended that Harris be given a 7-year mandatory minimum sentence on a firearms count because he had brandished a weapon, and the district court complied. On appeal, the Fourth Circuit held that brandishing is not an element of a separate offense, but merely a penalty enhancement. Harris argues under Apprendi that any fact that increases his penalty must be pled in the indictment and proven to a jury beyond a reasonable doubt.

**SUPREME COURT CASES**

**MICKENS v. TAYLOR**, 122 S. Ct. 1237 (Mar. 27, 2002)

**Ineffective assistance of counsel, conflict of interest**

Scalia, writing for a 5-4 majority, wrote an opinion holding that in habeas review of state

conviction, to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known, a defendant must establish that a conflict of interest adversely affected his counsel's performance.

**U.S. v. VONN**, 122 S. Ct. 1043 (Mar. 5, 2002)  
The Court, by Souter, held, 8-1, that where a defendant remains silent in the face of a trial court's failure to advise the defendant of his right to counsel under Fed. Rule Crim. P. 11, the defendant has the burden of proving plain error, and appellate court may consult the entire record to determine the error's effect on substantial rights. 9th Cir. reversed.

**LEE v. KEMNA**, 122 S. Ct. 877 (Jan. 22, 2002)

**Due process; continuance denial; habeas**

In a 6-3 decision, Ginsburg, the Court held that state procedural bar rules invoked by the state court to avoid granting relief did not constitute adequate grounds to bar federal habeas review in a case involving the "sudden, unanticipated, and at the time unexplained disappearance of critical, subpoenaed witnesses on what became the trial's last day." The Court adhered to its general rule acquiescing to state procedural bars, but this case presented an egregious exploitation of that rule.

**KANSAS v. CRANE**, 122 S. Ct. 867 (Jan. 22, 2002)

**Due process; civil commitment; sexual predator**

In a 7-2 decision, the Court refined Kansas v. Hendricks, 521 US 346 (1997), and held that the Constitution requires states to make determination that an inmate lacked at least some control of his behavior before the inmate could be subjected to civil commitment as a sexually

violent predator; however the state need not prove total or complete lack of control.

**U.S. v. ARVIZU**, 122 S. Ct. 744 (Jan. 15, 2002)

**Search; vehicle stop; totality of the circumstances; reasonable suspicion**

The Court unanimously reversed the 9<sup>th</sup> Circuit in a search and seizure case to hold that facts capable of innocent explanation must still be considered as part of the totality of circumstances in determining whether an officer acted reasonably in conducting a vehicle stop. In so doing, the Court rejected the 9<sup>th</sup> Circuit's view that law enforcement needed some clearer guidance than "totality of the circumstances," holding instead that *de novo* appellate review provides enough clarity and guidance.

**KELLY v. SOUTH CAROLINA**, 122 S. Ct. 726 (Jan. 9, 2002)

**Sentencing (capital); jury instruction; future dangerousness**

The Court reversed a South Carolina death sentence based on the trial court's refusal to instruct the jury that the defendant would be ineligible for parole if the jury recommended a life sentence. The prosecution had introduced testimony and argument that went to the defendant's future dangerousness, the Court concluded, contrary to the trial court's refusal to give the jury instruction on the basis that these matters went, instead, to the defendant's character. Justices Thomas and Scalia dissented.

**DUSENBERY v. U.S.**, 122 S. Ct. 694 (Jan. 8, 2002)

**Due process; forfeiture; notice**

The Court held that the certified mail notice of forfeiture sent to and received by the FCI where petitioner was housed satisfied due process,

regardless whether he actually received the notice personally. The straightforward reasonableness under the circumstances test of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, supplied the analytical framework for deciding the due process issue.

#### ELEVENTH CIRCUIT CASE SUMMARIES

**U.S. v. HESTER**, Case No. 97-9232 (Apr. 11, 2002)

##### **Apprendi plain error**

Drug quantity enhancement not plain error because statutory maximum not exceeded.

**U.S. v. YOUNG**, Case No. 01-11856 (Apr. 11, 2002)

##### **Faretta request untimely after jury empaneled**

On issue of first impression, Court held a defendant's right of self-representation is unqualified if the defendant asserts that request before the jury is empaneled, absent any indication that the defendant is attempting to delay the proceedings. Because the request here was made after the jury was empaneled but before the jury was sworn, trial court's refusal to grant Faretta request was affirmed.

**WENG v. UNITED STATES A.G.**, 2002 WL 533658 (Apr. 10, 2002)

##### **Alien removal**

Weng failed to provide clear and convincing evidence that his removal order is prohibited as a matter of law when his petition for asylum was denied.

**U.S. v. VANGATES**, 2002 WL 523087 (Apr. 8, 2002)

##### **No Fifth Amendment compulsion arising from state civil testimony**

Vangates, a state corrections officer, contended that her conviction for deprivation of a prison inmate's constitutional rights under color of law and obstruction of justice should be overturned because the district court erroneously concluded that her testimony from her previous § 1983 civil trial was admissible in the criminal proceeding. She argued fifth amendment protection under *Garrity v. New Jersey*, 385 U.S. 493 (1967). Circuit affirmed, finding "Vangates could not have formed an objectively reasonable belief that her testimony in the civil case was compelled by any state action."

**U.S. v. PHILLIPS**, 2002 WL 517085 (Apr. 5, 2002)

##### **Vulnerable victim enhancement**

No plain error in application of "vulnerable victim" enhancement under U.S.S.G. § 3A1.1 for finding bank tellers were vulnerable victims in bank robbery based on the victims' perspective in that case. [Ed.: But cf. *Morris*, summarized above]

**AKINWALE v. ASHCROFT**, 2002 WL 506330 (Apr. 4, 2002)

##### **Alien removal**

Petitioner detailed for removal upon being released from prison, and four months later he filed 2254 seeking release alleging unlawful indefinite detention.

Petition denied, and denial affirmed, because four months isn't too long and he failed to show no significant likelihood of removal in the reasonably foreseeable future.

**U.S. v. DURHAM**, 2002 WL 523094 (Apr. 4, 2002)

##### **Stun belt; security measures; Sixth Amendment rights**

In a lengthy opinion addressing this issue of first

impression, the Court (Wilson, Tjoflat, and Barkett) reversed and remanded for new trial the defendant's 1,295 month sentence (consecutive to 330-month sentence from Middle District) based on the district court's failure to conduct an adequate inquiry and make an adequate record to justify requiring the defendant to proceed to trial wearing not only shackles but also a stun belt, as well as a record that the jury could not see these devices. The Court expressed most concern about the impact this would likely have on a defendant's Sixth Amendment rights to participate in his defense and communicate with counsel but also noted the impact this has on the dignified administrative of criminal justice.

**U.S. v. ACOSTA**, 2002 WL 499423 (Apr. 3, 2002)

**State's felony youthful offender adjudication = prior conviction**

Acosta's prior youthful offender adjudication from New York qualified as a prior conviction for purposes of sentencing enhancement under 21 U.S.C. § 841(b)(1)(A). Also, court's refusal to apply safety valve under U.S.S.G. § 5C1.1 is not error upon conflicting evidence.

**SANCHEZ-VELASCO v. SEC'Y OF THE DEP'T OF CORR.**, 2002 WL 487359 (Apr. 2, 2002)

**Death penalty volunteer**

Carnes assaults CCRC lawyer because lawyer filed 2254 motion without client's consent to prevent execution after client volunteered to die.

**U.S. v. WILKERSON**, 2002 WL 480101 (Mar. 29, 2002)

**Violent felony sentencing enhancement**

Florida state conviction for conspiracy to commit robbery was a "violent felony" for federal sentencing enhancement under 18 U.S.C. §

924(e) in conviction of possession of firearm by convicted felon under § 924(g).

**U.S. v. ROSS**, 2002 WL 480098 (Mar. 29, 2002)

**Receiving \$ = stealing \$**

Ross was cab driver in cab waiting for Johnson outside a bank as Johnson robbed bank. Ross pleaded guilty to "receiving" bank proceeds of "approximately \$500" in the robbery. At sentencing, he objected to being sentenced as a felon because the amount he "received" was under \$1000. However, the amount actually stolen exceeded \$1000. Court said his plea subjected him to the same maximum statutory penalty as that facing the person who robbed the bank.

**U.S. v. MORRIS**, 2002 WL 470841 (Mar. 28, 2002)

**Failure to give notice of restitution, no enhancement for abuse of trust**

Morris challenged restitution ordered upon guilty pleas to money laundering and fraud conspiracies. District court violated Rule 11 by failing to inform him of restitution possibility in plea colloquy, but plain error review applied because he did not object to restitution order at sentencing. Court found no plain error because he was warned at time of guilty plea of potential fines that amounted to a sum larger than the amount of restitution ordered. Money is fungible, so it's the liability, not the label "restitution" that matters. But court did reverse enhancement for abuse of trust under U.S.S.G. § 3B1.3 because the determination must be made based on individual's culpability, not just looking at the representation of the victims' and their perspective on whether the D abused a position of trust. Implicit is possible conflict within 11<sup>th</sup> Cir. as well as with other circuits. Decision on

enhancement was 2-1, with Hull dissenting.

**VALENZUELA v. U.S.**, 2002 WL 452860 (Mar. 25, 2002)

**Gov't breach of confidentiality in extradition**

In extradition proceeding, the magistrate judge permitted Government to introduce into evidence an affidavit that contained statements defendants to DEA agents exchange for a promise of confidentiality. This was error, and because that's pretty much all the Government had, it was reversible, so writ of habeas corpus issued. Tjoflat writing for majority, Wilson dissenting.

**U.S. v. WHITESIDE**, 2002 WL 448494 (Mar. 22, 2002)

**False statements**

Reversing conviction and holding that where the truth or falsity of a statement centers on an interpretive question of law when a person is faced with arguably unclear or ambiguous legal requirements, "the government bears the burden of proving beyond a reasonable doubt that the defendant's statement is not true under a reasonable interpretation of the law."

**MOON v. HEAD**, 2002 WL 415391 (Mar. 18, 2002)

**Habeas**

On appeal of 2254 denial in Georgia death penalty case, Moon was not entitled to a writ because he failed to show Georgia possessed but failed to disclose evidence favorable to Moon's sentencing hearing.

**U.S. v. ACEVEDO**, 2002 WL 404464 (Mar. 15, 2002)

**Appendi**

No plain error under Appendi because sentences do not exceed statutory max.

**U.S. v. BROWN**, 2002 WL 389267 (Mar. 13, 2002)

**Statutory speedy trial**

D indicted on 11/2/01(sic--must be 11/2/00). On 2/26/01, Government filed "motion for determination of speedy trial status and/or trial setting." On 3/20/01, D moved to dismiss on speedy trial grounds. On 3/29/01, court denied speedy dismissal. Then on 4/3/01, court set trial for 4/4/01. Circuit ct. reversed because Gov's document was not a motion qualifying for excludable time, therefore the time ran out.

**DOMINGUEZ v. UNITED STATES AG & INS**, 2002 WL 370198 (Mar. 8, 2002)

**Alien removal**

Alien subject to removal proceeding had given a handwritten note to INS advising where she could be located. INS sent notice of hearing to the most recent address provided "in writing" by alien - her former address - which, of course, she never got. The handwritten note was deemed not to be "written notice." Therefore, INS properly sent notice to the last written address.

**BRIDGES v. JOHNSON**, 2002 WL 347827 (Mar. 6, 2002)

**Habeas**

A prisoner's § 2254 petition was time-barred because his application for "sentence review" under a Georgia statute did not qualify as state postconviction review and did not affect his postconviction remedies, thus did not toll the statute of limitations period.

**BROOKS v. ASHCROFT**, 2002 WL 331956 (Mar. 1, 2002)

**Deportability appeal, subject matter jurisdiction**

Brooks sought review of a final order of removal

issued pursuant to a charge of deportability as an alien convicted of an aggravated felony. His appeal was in direct review of a decision by the Board of Immigration Appeals. The Court held it had no jurisdiction unless substantial constitutional claim was raised.

**U.S. v. NAJJAR**, 2002 WL 331962 (Mar. 1, 2002)

**Statute of limitations, waiver**

Statute of limitations is an affirmative defense that defendant waived when he entered his guilty plea.

**U.S. v. FRAZIER**, 2002 WL 261953 (Feb. 25, 2002)

**Sentencing; revocation of supervised release; allocution; Fed.R.Crim.P. 32**

The Court reviewed the question of first impression whether a defendant has the right of allocution upon resentencing for violating supervised release. The defendant argued that the district court improperly denied the defendant's right of allocution under Federal Rule of Criminal Procedure 32. Although the district court clearly offered no right of allocution, there was no objection, so it was reviewed for plain error. The Court rejected the argument, concluding that Rule 32.1 does not incorporate the additional provisions of Rule 32, including the right of allocution, and reasoning that such a requirement would impose all demands of the rule on resentencing courts, including ordering PSI's. However, "given the importance of allocution, . . . the better practice" is for courts to provide this right. The Court distinguished Eads, 480 F.2d 131, 133 (5th Cir. 1973), where it sua sponte reversed based on denial of the right of allocution, distinguishing (without explanation) the Eads' revocation of probation from the present revocation of supervised release and noting Rule 32.1 was added in 1980. The Court did

recommend that this question be addressed by the Rules Advisory Committee. [Sounds ripe for en banc consideration]

**U.S. v. TIMMONS**, 2002 WL 272231 (Feb. 26, 2002)

**Sufficiency of evidence; illegal poss. of firearm; §924(c); sentencing;**

The Court affirmed the district court's post-judgment denial of a motion for acquittal as to one count and reversed its grant of a motion on the second count. The Court discussed the distinction between the §924(c) charge on one count that the defendant had used or carried a firearm "during and in relation to" a drug trafficking offense, and on the second that he had possessed a firearm "in furtherance of" a drug offense. However, the Court vacated the sentence for the underlying drug offenses because it included a weapon enhancement for the possession of weapons which was the same course of conduct for which the defendant was convicted on other counts. [Note the Court granted the defense motion to strike references in the Government's brief to expert testimony showing that drug dealers keep guns, noting the district court gave the jury a limiting instruction on this point.]

**HENSLEY v. MOORE**, 281 F.3d 1208 (Feb. 6, 2002)

**Habeas; statute of limitations; COA; equitable tolling**

The Court applied Duncan v. Walker, 121 S. Ct. 2120 (2001), affirmed denial of 2254 on grounds that defendant's previously filed 2254 petition seeking same relief did not toll AEDPA's one-year statute of limitations, and declined to amend COA to consider equitable tolling argument not raised in district court.

**U.S. v. MIRAVALLS**, 280 F.3d 1328 (Jan. 29, 2002)

**Search; expectation of privacy**

The Court held, as a matter of first impression, that the tenants of a large, multi-unit apartment building do not have a reasonable expectation of privacy in the common areas of the building, at least where the lock on the building's door is not functioning and anyone may enter. Five other circuits have reached the same conclusion, four in cases where the door was locked; one circuit has disagreed. The Court distinguished Fixel v. Wainwright, 492 F.2d 480 (5th Cir. 1974), which held that tenants in a four-unit apartment building had a reasonable expectation of privacy in their fenced backyard, distinguishing it from common passageways or other common areas. On a related challenge to the subsequent warrantless search of the defendant's apartment, the Court found that it was justified by exigent circumstances that evidence was about to be or being destroyed, where the defendant's wife, after denying entry to the officers, was observed removing two bags of trash which were discovered to contain evidence, and she then refused to answer her apartment door when the officers knocked again.

**BUI v. HALEY**, 279 F.3d 1327 (Jan. 25, 2002)

**Batson; impartial jury; equal protection; due process**

The Court (Tjoflat, Black, & Wilson) granted relief on this 2254, reversing the state murder conviction and the district court's denial of relief. The Court concluded the State had failed to carry its burden under Batson of rebutting the showing of a prima facie violation, first because it did not present testimony from the trial prosecutor but only co-counsel who could not say her reasons were those of the actual prosecutor. It applied Batson's statement that the trial prosecutor's

statement of good faith is insufficient to meet its burden. Likewise, "vague explanations" are inadequate; Horsely, 864 F.2d 1543, 1546 (11th Cir. 1989). Second, it found the State had failed to carry its burden because it gave no reason for the striking of one juror; the evidence contained no basis to establish circumstantial proof of a race neutral motivation for that strike. The lower courts had mistakenly relied on dicta from David, 803 F.2d at 1571. [Note: This case is probably a must-read for trial attorneys because of all the factual nuances relevant to these situations. In particular see fn. 7, slip op. at 7, in which the Court likened the prosecution's "attempt at offering a race neutral reason amounted to no reason at all," because the prosecutor contradicted herself by stating earlier they were looking for jurors with maturity and experience, and the juror at issue was 40. Prosecutors frequently give contradictory reasons.]

**FEQUIERE v. INS**, 279 F.3d 1325 (Jan. 25, 2002)

**Immigration; deportation; aggravated felony; evidence**

The Court affirmed the order of deportation for conviction of an aggravated felony. (The defendant, a minister with a wife and six children here, argued he was merely present at a house where a drug raid occurred and that his public defender told him to plead guilty to avoid a prison sentence.) The Court concluded that 8 U.S.C. 1229a(c)(3)(A) does not state that the means listed are the only ways to prove the conviction; the defendant's testimony admitting his conviction sufficed.

**QUIK CASH PAWN, ETC. v. SHERIFF OF BROWARD COUNTY**, 279 F.3d 1316 (Jan. 25, 2002)

**Pawnbrokers; search and seizure**

The Court (Barkett, Kravitch, and Carnes) reversed the district court's grant of summary judgment in this §1983 action. The Court held that the Florida Pawnbroking Act did give deputies the authority to conduct warrantless searches to fulfil the statutory mandate, but it neither gave deputies the authority to seize any item in a pawn shop for which the owner could not immediately produce a receipt, nor did it authorize them to seize immediately any undocumented items as evidence of the misdemeanor crime of failing to keep adequate records. The Sheriff's seizures violated the shop owners' rights to pre-deprivation notice and a hearing under the Fourth Amendment.

**SPIVEY v. STATE BOARD OF PARDONS AND PAROLES, ET AL.**, 279 F.3d 1301 (Jan. 24, 2002)

**Clemency; 1983; habeas; successive**

The Court interpreted the capital defendant's §1983 action seeking a stay of execution as a second or successive habeas and affirmed denial of relief.

**U.S. v. DUNLAP, AKA "CUDDL DAD,"** 279 F.3d 965 (Jan. 18, 2002)

**Sentencing; child pornography; 2G2.2(b)(2),(3)**

The defendant pled to charge of transportation of child pornography through interstate commerce. The Court affirmed the 5-level enhancement under §2G2.2(b)(3), without discussion, but vacated as plain error and remanded for resentencing on the 4-level enhancement under §2G2.2(b)(2) for possession of "sadistic," etc. depictions. The Court rejected the legal argument that the images discovered in 8/98 were not "relevant conduct" for the offense (electronic transmission on 5/21/98) because they were not

the same images. However, because the Government conceded that no evidence was presented to establish the defendant possessed the sadistic materials on the date of the transmission, the case was remanded for further evidence on that issue. (Additional evidence was permissible since the defense had not objected below that the evidence was insufficient.)

**BREEDLOVE v. MOORE**, 279 F.3d 952 (Jan. 17, 2002)

**Habeas; §2254; evidentiary hearing; Brady**

The Court denied relief on this capital habeas. The only issue discussed was the defendant's plea for an evidentiary hearing on a Brady claim under the AEDPA, which places "a fairly stringent limitation on the power of the federal courts to order evidentiary hearings in habeas cases." A federal hearing was not barred by §2254(e)(2) because he was prevented from developing a factual basis for this claim by the state courts' repeated denials of a hearing. The denial of an evidentiary hearing was not an abuse of discretion, because he would not prevail even if all factual allegations were proven. The state court had found that his allegations failed to prove the elements of a Brady claim. The Court affirmed in a footnote the district court's denial of relief on the other claims of constitutional error

**U.S. v. RODRIGUEZ**, 279 F.3d 947 (Jan. 15, 2002)

**Apprendi; drugs; resulting death or serious bodily injury; 2D1.1; causal connection**

The Court rejected, first, the argument that Apprendi required the "death or serious bodily injury" fact under 21 USC 841(b)(1)(C) be treated as an element. Reviewing for plain error because there was no objection below, the Court relied on the fact that the 20-year sentence did not exceed the maximum under (b)(1)(C). (The

Court rejected in footnotes 3 & 4 the arguments, not raised on appeal, as to the 20-year minimum mandatory and the 5-year supervised release term.) The Court did not mention the pending cert grant in Harris as to the analogous issue under 18 U.S.C. §924(c). Second, the Court rejected the argument that there was insufficient evidence to connect his sale of heroin offense with the victim's death because the intervention of two others who could have saved his life but took no action "severed" that causal connection. The Court declined to address whether there is an intervening cause exception to the enhancement provision of §2D1.1 and further concluded defendant failed to adduce sufficient facts of an intervening cause to relieve him of liability, which requires a showing that gross medical negligence was the sole cause of the victim's death.

**DEAN v. U.S., 278 F.3d 1218 (Jan. 10, 2002)**  
**Habeas; 2255; amendment; timeliness; relation back**

The Court reversed Judge Stafford's order denying habeas relief on the ground that his untimely, amended claims did not relate back to his timely petition but granted a COA on that issue. Refining Davenport, the Court noted that the "key consideration is that the amended claim arises from the same conduct and occurrences upon which the original claim was based. This may be the case even if one or both claims do not explicitly state supporting facts. When the nature of the amended claim supports specifically the original claim, the facts there alleged implicate the original claim, even if the original claim contained insufficient facts to support it." The Court concluded that three of the amended claims expanded the facts and served to further specific the original claims, "precisely the sort of amendment contemplated by Rule 15(c)."

**WRIGHT v. SECRETARY, DOC, 278 F.3d 1245 (Jan. 10, 2002)**

**Habeas; 2254; competency; hearing; due process; COA**

Addressing two issues, the Court denied relief. Fifteen years prior to commission of the instant offense, the defendant had been found incompetent to stand trial due to a diagnosis as schizophrenic and psychotic episodes. The following year, he was released and advised to continue taking anti-psychotic medication and psychiatric treatment. The defendant was subsequently convicted of seven different robberies, but the record does not reflect whether his competency was questioned in any. The instant robbery occurred; the defense was granted appointment of a mental health expert but denied two additional experts. Insanity was plead, but the defense never requested a competency hearing. At the trial, five months after the offense, the defense expert testified to the defendant's paranoid schizophrenia, psychopathy, active psychosis, legal "insanity" and need for treatment and continued care. He expressed no opinion as to his competency to stand trial. The jury rejected the insanity defense, and the defendant was sentenced to consecutive life terms without parole eligibility. Within several months, the defendant was found incompetent to stand trial on other charges and involuntarily committed; about a year later, he was found competent and pled to those charges.

As to the defendant's procedural due process claim that the state court should not have tried him without a competency hearing, the Court first addressed the question, of first impression in this circuit, whether "the state court's summary, which is to say unexplicated, rejection of the federal constitutional issue qualifies as an adjudication" under 2254(d) entitled to deference. Agreeing with six other circuits that

the summary nature of the adjudication does not lessen the deference to which it is entitled, the Court found no due process violation because “the objective facts known to the trial court at the time [did not] create a bona fide doubt as to mental competency” such that it should have held a hearing on its own motion.

Similarly, the Court rejected the second claim that the defendant’s trial without a competency determination violated substantive due process. Although the district court’s ruling that he had procedurally defaulted this claim was contrary to the law of this circuit that such claims cannot be defaulted, he could not meet the high standard for proof on the merits that he was incompetent when tried.

[The Court also agreed with the defendant’s contention that it should construe a COA as to a merits claim as including the threshold issue of procedural default.]

**FAHIM v. U.S. ATTORNEY GENERAL, INS**, 278 F.3d 1216 (Jan. 9, 2002)

**Immigration; removal**

The Court affirmed denial of relief from an order of deportation.

**GARCIA v. U.S.**, 278 F.3d 1210 (Jan. 9, 2002)

**Habeas; 2255, timeliness; retroactivity; statement of non-testifying co-defendant**

The Court rejected the defendant’s argument that his §2255 motion was timely, on the basis that he was entitled to retroactive application of the rule announced in Gray v. Maryland, 523 U.S. 185 (1998), which he contended invalidated the district court’s admission of the redacted post-arrest statement of a non-testifying co-defendant. The district court had denied the motion for severance, instead redacting Garcia’s name from the statement. Garcia’s direct appeal claim that

admission of the statement was error under Bruton was rejected. His sentence became final Nov. 14, 1995. On Mar. 9, 1998, Gray applied Bruton and held that the redaction which substituted a blank space or “deleted” did not adequately protect the defendant’s Sixth Amendment right of confrontation. Within a year, Garcia filed a §2255, arguing his motion was timely under §2255(3) because filed within one year of Gray. The Court agreed with the magistrate’s conclusion that Gray was not retroactive under either its own terms or Teague v. Lane.

**U.S. v. BRADFORD**, 277 F.3d 1311 (Jan. 4, 2002)

**Sentencing; escape; 2P1.1; 3C1.1; obstruction; 3D1.2; multiple counts; consecutive; 5G1.3**

The Court affirmed on all issues in this prison escape case. First, an issue of first impression, the Court held that the §3C1.1 obstruction enhancement applied, even though the defendant’s threats were indirect and were not communicated to the witness, because this enhancement applies to attempts to obstruct justice. Second, the district court did not err in refusing to apply the 7-level reduction under §2P1.1(b)(2), applicable where a defendant escapes from non-secure custody and returns voluntarily within 96 hours, because the defendant committed several qualifying offenses and had not returned voluntarily where he did not intend to surrender but rather continued to escape for 12-hour periods of time. Third, the district court had correctly refused to group the 12/24 and 1/29 escapes under 3D1.2 because they were sufficiently distinct offenses. Finally, the district court correctly ran the sentences consecutive with the prior (third) escape conviction, properly considering the 18 U.S.C.

§3553(a) factors.

**U.S. v. RUIZ-RODRIGUEZ**, 277 F.3d 1281 (Jan. 2, 2002)

**Magistrate; sentencing**

The Court vacated the defendants' sentences for conspiracy to smuggle aliens into the U.S. and for illegal reentry because the district court erred in delegating to the magistrate the evidentiary and fact-finding portion of the sentencing hearing in a felony case without the defendants' consent.

**O'RYAN CASTRO v. U.S.**, 277 F.3d 1300 (Jan. 2, 2002)

Addressing an issue of first impression in this circuit, the Court agreed with a majority of other circuits and held that a §2255 petition cannot be denied as successive solely because the prisoner's earlier postconviction motion (filed under Fed.R.Crim.P. 33) was recharacterized by the district court as a §2255 petition, especially when the petitioner was not warned about the consequences of such recharacterization.

**OGUEJIOFOR v. ATTORNEY GENERAL**, 277 F.3d 1305 (Jan. 2, 2002)

**Immigration; deportation**

The Court (Judge Paul on the panel) dismissed the appeal for lack of jurisdiction, rejecting various constitutional and statutory challenges to his removal order.

**U.S. v. BURGOS**, 276 F.3d 1284 (Dec. 21, 2001)

**Sentencing; refusal to cooperate**

The Court ruled that, under federal sentencing law, a district court is barred from taking into account in fashioning a sentence the defendant's refusal to cooperate with the government in an unrelated offense. In this case, the plea agreement provided that the government could

refuse to recommend the two-level reduction for acceptance of responsibility if she refused to make complete disclosure regarding relevant offense conduct. It made no mention of cooperation in other pending cases. She cooperated extensively and was eligible for probation. At sentencing, however, the prosecution argued for incarceration based on the defendant's husband's recent indictment, implying but not explaining that his case was related. The district court inquired whether the defendant had cooperated in the case against her husband and continued sentencing, advising that she could earn a sentence at the bottom of the guidelines if she cooperated in her husband's case. Fifteen days later, as a result of her failure to cooperate and assertion of the Fifth Amendment in that regard, the court sentenced her to six months.

Reviewing *de novo*, the Court concluded that a court's sentencing discretion under 18 U.S.C. §3661 and §1B1.4, USSG, is limited in two significant ways. First, §3553(a)(2) codifies four sentencing objectives. "If a district court gives weight to a factor irrelevant to these purposes, then the imposed sentence necessarily exceeds the court's sentencing discretion." Second, the sentencing guidelines and a district court imposing sentence are subject to specific and definite parameters set by Congress. Despite the broad language of §1B1.4 that a sentencing court "may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law," it is subject to the constraints of § 3553. In sum, "information of the type considered by section 3661 is subject to the limitations of section 3553." Any sentence imposed in order to accomplish some other purpose [than the four goals of section 3553(a)(2)] would violate section 3553(a) and would be unlawful."

**U.S. v. JACKSON**, 276 F.3d 1231 (Dec. 21, 2001)

**Sentencing; firearm; 2K2.1(b)(5); double counting; 3A1.2(b)**

The Court first affirmed the four-level enhancement under §2K2.1(b)(5) for possession of a firearm “in connection with another felony offense” where defendant pled guilty to possession of a firearm by a convicted felon but was found to have assaulted and battered the officers when he resisted arrest with violence and kept attempting to reach into his pocket, where the pistol was found. The Court rejected arguments that the assault and battery was not “another felony offense” because there was no separation in time from the offense of conviction, and that the gun was not possessed in connection with the assault because he never actually reached it. Second, the Court considered for the first time but rejected the argument that the imposition of the three-level enhancement under §3A1.2(b) for having created a substantial risk of serious bodily injury was double counting. Given the presumption of cumulative imposition, slip op. at 9, and the lack of a specific prohibition, the double counting was affirmed.

### **Lagniappe**

**Judicial back-seat driver**: Palm Beach Post editorial, March 12, 2002

#### **Judge Ryskamp**

How many judges must tell a judge he’s wrong before he believes it? Kenneth Ryskamp is testing the limit.

The federal district judge in West Palm Beach has popped his cork because the Palm Beach County State Attorney’s Office wants a convicted felon to do his prison time. In 1997, a jury convicted Nicholas Copertino in the deaths of five teenagers. The victims were in the back of

Copertino’s car six years ago when the then-19-year-old drove more than 90 mph west of Boca Raton before losing control and swerving into the oncoming lane.

Convicted on five counts of manslaughter, Copertino could have received 75 years. Instead, the judge imposed the sentences concurrently, giving him 15 years. He appealed on the grounds that speed alone does not constitute reckless driving. State appeals judges unanimously disagreed and upheld the conviction. Copertino then sought a new trial from the federal courts, arguing that Assistant State Attorney Ellen Roberts prejudiced the jury by referring to Copertino as “young Mr. Hitler.” Judge Ryskamp agreed. The 11<sup>th</sup> U.S. Circuit, however, overruled him in December. Despite calling Ms. Roberts’ remark “despicable,” the judges reinstated the conviction because the comment did not change the outcome.

Now, Judge Ryskamp has responded, fuming that “rogue prosecutors can purposefully and intentionally inject inflammatory remarks into a criminal trial without suffering the consequences of mistrial.” He blasted the prosecution for being “unethical, reprehensible, contemptible and sanctionable.” He further said that the appellate decision showed why Al-Qaeda prisoners couldn’t get a fair trial in federal court.

Copertino, having served all of 18 months, remains free while deciding whether to appeal to the Supreme Court on constitutional grounds that don’t exist. The system has reviewed the reasons for the conviction and found them to be sound. There’s a rogue element here, all right, and it wears a robe.

**FISHER v. GIBSON**, 2002 U.S. App. LEXIS 4116 (10th Cir 03/12/2002)

#### **Grossly ineffective counsel**

Court appointed counsel E. Melvin Porter - a

State Senator when appointed - was found ineffective for failing to investigate; failing through apparent ineptitude to act as a reasonably diligent and professional advocate; failing through his homophobic hostility to his client and his client's interests, and his apparent sympathy and assistance for the state's case, to act as his client's loyal advocate; failing to advance any defense theory, even that of holding the state to its burden of proof; and, under the circumstances, failing to make a closing argument.

**NEW JERSEY v. CARTY**, 790 A.2d 903 (NJ March 4, 2002)

**Requests for consent to search forbidden absent reasonable suspicion**

The New Jersey Supreme Court interpreted its state constitution's search and seizure provision to forbid law enforcement officers from requesting consent to search a vehicle after a routine traffic stop in the absence of articulable suspicion that the search will uncover evidence of a crime. The ruling responded to what the court said were "the problems caused by standardless requests for consent searches of motor vehicles lawfully stopped for minor traffic offenses."

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