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NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

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PENDING LEGISLATION THREATENS DOWNWARD DEPARTURES

The United States House of Representatives has passed legislation that includes an amendment offered by Florida Congressman and former Speaker of the Florida House of Representatives Tom Feeney that would radically limit downward departures under the United States Sentencing Guidelines. Feeney's proposal came in the form of an amendment to HR 1104, a bill that primarily addresses child kidnaping cases. Because the amendment was attached to what had been a Senate-sponsored bill in the house, it escapes Senate debate and is now in a joint Senate and House conference committee.

The key provisions of the proposal eliminates the "heartland" analysis established by the Supreme Court in Koon v. United States, and instead limits departures to those grounds specifically provided for in the Guidelines. It also prohibits departures on the basis of aberrant behavior, the youth of the defendant, family ties and responsibilities, and, in various kinds of sexual abuse cases, for diminished responsibility. The amendment requires de novo review of any fact-based downward departure, while leaving the existing standard of substantial deference for upward departures. The proposal would also affect reductions for acceptance of responsibility, as it limits the additional one-level departure to those cases in which the government files a motion requesting it. The legislation requires the Attorney General to report to the House and Senate Judiciary Committees, within fifteen days, all downward departures, other than those for substantial assistance. It includes, as well, a moratorium until May 1, 2005, on new grounds for downward departures and any other Sentencing Commission amendments that are inconsistent with the bill's provisions.

While the Senate has not yet appointed its conferees to the joint conference committee, the house has appointed its conferees: Jim Matheson (D-Utah), Don Young (R-Alaska), Thomas Petri (R-Wisc.), Peter Hoekstra (R-Mich.), Phil Gingrey (R-Ga.), Rueben Hinjosa (D-Texas), Robert Scott (D-Va.), Martin Frost (D-Texas), F. James

Sensenbrenner (R-Wisc), Howard Coble (R-N.C.), Lamar Smith (R-Texas), Mark Green (R-Wisc.), Melissa Hart (R-Penn.), and John Conyers, Jr. (D-Mich.).

We've sent those of you with email a more detailed summary of the legislation. If you didn't receive it or if you would like a copy of the amendment itself, call Randy Murrell in Tallahassee and he'll be glad to send you a copy.

TRAINING REQUIREMENTS

The Criminal Justice Act that became effective in June of 2000 created, for the first time, an annual training requirement. It requires panel members to either participate each year in a training seminar that addresses the practice of federal criminal law or the training seminar presented by the Federal Public Defender. In lieu of the one-day seminar some Public Defender offices hold, we've opted to present our monthly luncheon seminars. In turn, Judge Vinson has decided that panel members can meet the requirement by attending six hours of the monthly luncheons. (Most of the luncheons last an hour, but we've had one that lasted 2 hours and some an hour and a half.) As 2002 was the first year the requirement was implemented, the Panel Oversight Committee has granted credit for practically any criminal CLE course.

In November of 2002, letters went to those panel members who had not yet met the 2002 training requirement. As of this month, there were twenty-five panel members who had not met the requirement. Letters have gone out to each of them.

In an effort to encourage panel members to complete the training requirement and to be fair to those who have, our office, at the request of the Panel Oversight Committee, is now giving priority in case assignments to those who are in compliance with the training requirement. It means that those who are current will be called first about any given case.

Our office as well as the judges and the Panel Oversight Committee would, of course, like to have all the panel members current. Accordingly, there is in each of our three offices a copy of almost all the videos we used last year. You may check out any of the tapes so that you can view them at home or in your office. So that the tapes will be available to others, we ask only that you not keep them for longer than two days. If our offices are not convenient to you, we'll be happy to mail you one tape at a time. Here again, though, we ask that you promptly view and return the tape.

PANEL COMMITTEE RECOMMENDS A REDUCTION IN THE SIZE OF THE TALLAHASSEE PANEL

For many years, when someone was appointed to the panel, it was for an indefinite period of time. The 2000 Criminal Justice Act Plan, however, envisioned panel members being appointed for three-year terms. To bring the District's practice into compliance with the Plan, the Panel Oversight Committee has reviewed the list of panel members. Committee Chair Gil Schafnit is in the process of sending to Judge Vinson a list of those panel members the Committee is recommending for the three-year appointment.

The Committee has recommended that all

those members in the Pensacola, Panama City, and Gainesville panels be appointed to the three-year term. That would leave Pensacola with twenty-eight resident members, Panama City with five, and Gainesville with sixteen.

Because of the large size of the Tallahassee panel, particularly relative to the number of cases assigned, the Committee has recommended that the Tallahassee panel be reduced by nineteen members, which would leave twenty-five available for trial case assignments. (Two additional members would be available only for appeals.) While some of the nineteen had moved or decided they no longer wished to be on the panel, the Committee wrestled with the difficult decision of sorting through many talented lawyers. In deciding to recommend who should stay on the list and who should not, the Committee considered, primarily, the availability of the lawyers over the last couple years to take cases. The Committee, though, also considered each lawyer's success in complying with the training requirements, interest in remaining on the panel, and level of federal experience. There were also six lawyers who had applications pending to join the Tallahassee panel. The Committee has recommended that none of them be added. Randy Murrell has written each of the nineteen panel members who are not being re-nominated as well as the new applicants.

Over the last three years, Tallahassee panel members have been receiving less than one case per year. In Gainesville, the average is closer to two cases per year, while in Panama City it has been closer to three, and in Pensacola almost three and a half. The Committee has recommended the reduction in size of the Tallahassee panel in hopes of ensuring that those who remain will receive enough cases to maintain a high level of proficiency. If the judges accept the Committee's recommendation, the size of the Tallahassee panel will remain, relative to the number of cases, the largest panel. Nonetheless, the remaining Tallahassee members should see an increase in the number of cases.

The Committee's role is to make recommendations. The judges will make the final decision about the membership of the panel.

INTERVIEWS FOR JUDGE COLLIER'S SEAT TO BE HELD APRIL 7

Judge Collier will soon be taking senior status. On April 7, at the Tallahassee Federal Courthouse, the fourteen members of the Northern District Conference of the Florida Judicial Nominating Commission will interview the fifteen individuals who have applied to fill Judge Collier's position. The fifteen applicants include United States Attorney Greg Miller, Pensacola Magistrate Casey Rodgers, two Assistant United States Attorneys from the Pensacola office - Pamela Moine and Benjamin Beard, and Judge Charles Kahn from Florida's First District Court of Appeals. The other applicants are: Kenneth Lawson, Teri Donaldson, Shawn Briese, Richard Smoak, Edward Fleming, William L. Thomas, Luther Watti, Dabney Friedrich, Kelvin Wells, and Charles Baer.

NEW MARSHAL RIDES INTO TOWN

Dennis Williamson, who had been appointed by President Bush and who, on March 24th, was confirmed by the Senate, began work this week as the new United States Marshal for the Northern District of Florida. Mr.

Williamson, who is 53, replaces James Lockley, Jr.. Mr. Williamson had, since 1977, served with the Florida Department of Law Enforcement. During his stay with FDLE he was promoted through the ranks. At the time of his appointment he was serving as the Deputy Commissioner where he was responsible for developing and implementing a policy for FDLE's Investigations and Forensic Science Program and was accountable for a budget of $89 million. From 1973 to 1977, he was a deputy sheriff with the Sarasota County Sheriff's Office. He is a 1973 graduate of Florida State University.

IN THE NEWS

- Last month the Associated Press reported that Cleveland, Ohio's City Club was awarding its Citadel of Free Speech Award to Supreme Court Justice Scalia. The club decided to do so because Justice Scalia, in the words of the club's executive director, "consistently, across the board, had opinions or led the charge in support of free speech." While Justice Scalia planned to travel to Cleveland to accept the award, the club, at the insistence of Justice Scalia, departed from its usual procedure and announced it was banning all TV and radio coverage of the award ceremony.
- In February, the Washington Post reported that the General Accounting Office had found that the Justice Department "reported inflated numbers of terrorism convictions as a result of misinformation from U.S. attorney's offices around the country." According to the Post, "at least 132 of 288 cases the GAO examined were misclassified as terrorism-related."
- Also in February, the Tampa Tribune reported that Federal District Judge Steven D. Merryday, of the Middle District of Florida, ordered the government, pursuant to the Hyde Amendment, to pay nearly $2.9 million to defense lawyers for their efforts in defending Steven and Marlene Aisenberg in a federal criminal case. The government had prosecuted the Hillsborough County residents for allegedly lying to investigators about the 1997 disappearance of their five-month old daughter. The government conceded that the defense lawyers were entitled to the award, but argued that the fee should have been limited to $250,000. According to the Tribune, Judge Merryday, "strongly suggested the government never believed its own case against the Aisenberg's and yet elected to prosecute them, apparently in the hope of forcing Marlene Aisenberg to testify against her husband." The Hyde Amendment provides for attorney's fees when a federal prosecution has been "vexatious, frivolous, or in bad faith."

APPRENDI AND DRUG CONSPIRACY CASES

The Supreme Court's decision in Apprendi v. New Jersey was headline material for some time. Some of the ramifications are still playing out probably most notably in the death penalty arena. We think it is still being played out in drug conspiracy cases, too.

In some conspiracy cases, all participants are equal partners and are, therefore, equally

responsible for whatever quantity of drugs might be involved. In other cases, though, some participants play a much smaller role. It is in those cases where there is disparity between the roles of the individuals that we've come to view the decision in United States v. Banuelos, Case No. 01-50051 (9th Cir. March 10, 2003), as an important one.

Admittedly, it is a Ninth Circuit case, involves a guilty plea rather than a trial, and might have employed, by Eleventh Circuit standards, a generous harmless error analysis. Nonetheless, as we read it, the case stands for the proposition that in drug conspiracy cases the jury, in determining drug quantity, is limited to those quantities that meet the familiar Guideline tests of foreseeability and scope of conduct. [*See* USSG 1B1.3 n. 1,2 and, *e.g.*, United States v. Reese, 67 F.3d 907 (11th Cir. 1995) ("defendants are only accountable for other conduct that was reasonably foreseeable and within the scope of the criminal activity that the defendant agreed to undertake")].

While, as in Banuelos, the issue can enter into cases where there are guilty pleas, the problem in most instances will surface in the jury instructions. Foreseeability is defined by the pattern instructions and the judges seem to be routinely incorporating it in their instructions. The same can not be said for scope of conduct. As far as we know, the judges have never included it in any of their jury instructions. If you want to see our attempt at composing an instruction, both Randy Murrell in Tallahassee and Lizy Timothy in Pensacola have proposed (and rejected) instructions.

COURT ORDERS

In February, Chief Judge Roger Vinson entered an order appointing Tallahassee Magistrate Judge William Sherrill, Jr., as the Chief Magistrate Judge.

Earlier that same month, Judge Vinson entered an order setting out the distribution of cases. In Pensacola, civil and criminal cases are split equally between Judge Vinson and Judge Collier. Judge Hinkle is responsible for all the Panama City criminal cases and 32% of the Tallahassee criminal cases. Judge Mickle will handle the remaining 68% of the Tallahassee criminal cases. In Gainesville, Judge Mickle will preside over 10% of the Gainesville criminal cases. Judge Paul will take the remaining 90%.

ALABAMA V. SHELTON AND CRIMINAL HISTORY

Last May, the Supreme Court issued its opinion in Alabama v. Shelton, 535 U.S. 654, 122 S. Ct. 1764 (2002). The Court held that "a suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged." 122 S. Ct. at 1767. The Court reached that holding recognizing that "[d]eprived of counsel when tried, convicted, and sentenced, and unable to challenge the original judgment at a subsequent probation revocation hearing, a defendant in Shelton's circumstances faces incarceration on a conviction that has never been subjected to 'the crucible of meaningful adversarial testing.'" 122 S. Ct. at 1772.

As a result of the decision, our office and panel members, at least in Panama City and Pensacola, have been involved in significantly more misdemeanor cases. In those two divisions we have, for example,

between the first of October and the end of March, closed 85 misdemeanor cases. Last year during that same time period we closed 18.

More importantly, though, the decision in Shelton has caused all of us to take a closer look at the misdemeanor convictions that go into the Sentencing Guidelines' criminal history calculations. In most instances an uncounseled misdemeanor conviction will require an examination of court records and transcripts from the earlier case to determine whether the court failed to offer a lawyer or denied a request for a lawyer. If that is what occurred, the conviction can be challenged before the federal sentencing judge. *See, e.g.,* United States v. Roman, 989 F.2d 1117, 1120 (11th cir. 1993) ("when a defendant, facing sentencing, sufficiently asserts facts that show that an earlier conviction is 'presumptively void,' the Constitution requires the sentencing court to review this earlier conviction before taking it into account").

While Shelton specifically dealt with a suspended sentence, it seems clear that the decision recognizes the right to counsel whenever an individual is sentenced to probation and runs the risk of subsequent incarceration upon a finding that the individual violated his or her probation. Chet Kaufman of our Tallahassee office has written a brief that argues that Shelton is not limited to cases where the sentence is suspended. His case is United States v. Collette. Just call Margaret, in our Tallahassee office, if you'd like to see the brief.

LONGER SENTENCES FOR CORPORATE FRAUD

The United States Sentencing Commission approved an emergency plan on January 8, 2003, that will lengthen prison sentences for those convicted of corporate fraud. In some instances penalties are increased by 25 percent or more.

A person convicted of securities fraud who had faced up to six and a half years in prison can now be sentenced to as much as eight years under the new guidelines. If the offender was an officer or director of a publicly traded company, the sentence could be as much as 10 years. In some circumstances, sentences for money laundering have also been increased.

The commission approved the new guidelines by a vote of 5 to 0. They went into effect on January 25, 2003 and will last at least through November. The commission expects to forward Congress a refined and permanent plan sometime this month.

Congress ordered the new sentencing guidelines last year when it passed a corporate cleanup measure, known as the Sarbanes-Oxley Act, which was intended to help restore consumer confidence after the exposure of widespread accounting scandals in publicly traded companies.

The amendment language is available at : http://www.ussc.gov/FEDREG/fedr0102b.htm

TRAINING OPPORTUNITY AT HAWK'S CAY RESORT AND MARINA

The Federal Public Defender's Office for the Southern District of Florida is holding its Sixth Annual Litigation Seminar at the Hawk's Cay Resort & Marina located at Mile Marker 61 in Duck Key, Florida. It begins

May 1st at 1:00 PM and concludes on Saturday May 3, 2002, at noon. The Resort is offering rooms at a special rate of $135 per night. Please call Joan Grady at (305) 536-6900, ext. 223, to make reservations for the conference. For reservations at the hotel, call the group reservation number at (888) 809-7459. Sixteen hours of CLE credit will be awarded.

THIS MONTH'S BROWN BAG LUNCHEON

This month's training seminar addresses the changes regarding the admission of expert witness testimony brought about by the decisions in Daubert and Kuhmo Tire. The one hour and twenty minute video, which we recorded last November at a Federal Public Defender Conference in New Mexico, includes a discussion of challenges to what seems to be the government's ever-expanding use of expert testimony.

The presentation is made by two assistant federal public defenders: Robert Epstein, a Harvard Law School graduate who has clerked for a federal district judge, been in private practice, and currently works in the defender's office of Eastern Pennsylvania, and Steven Kalar, a former law clerk for the Ninth Circuit Court of Appeals who currently works in the defender office for the Northern District of California. Last year, Mr. Epstein's innovative efforts at excluding fingerprint evidence caused many to rethink their approach to expert testimony and generated a considerable amount of publicity.

As usual, the video will be shown at **Noon** in the federal courthouses in:

Panama City on April 15
Gainesville on April 23
Pensacola on April 24

We'll be showing the video at **9:00 AM** and at **noon** in **Gainesville** at our office at 101 S.E. 2nd Place, Suite 112.

DOWNWARD DEPARTURES

Roache, Carlton Hinkle, R. Atty: Lizy Timothy
Docket: 5:02cr21
Charge: Consp. Poss WITD Cocaine and Marijuana
Range: Mandatory Life
Sentence: 144 months
Date of Imposition of Sentence: 2/20/2003
Grounds: 5K1.1 (cooperation was extraordinary)

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.

VICTORIES

Last month, **Richard Greenberg**, in a case tried before Judge Mickle, won a not guilty verdict from a Tallahassee jury. The client, charged with possessing a firearm with an obliterated serial number, testified that he had been the victim of a home invasion robbery, that the handgun had been left behind by one of the intruders, and that he had picked up the gun just minutes before a police officer found him in possession. In the face of testimony that the client, rather than being a victim of the robbery, had been one of the perpetrators, and testimony that the client had used the gun in an earlier robbery, Richard successfully argued to the jury that, regardless of how his client came to possess the firearm, it was unlikely the client had known the serial number had been removed.

George Murphy, in a Pensacola case heard

in early February, won a judgement of acquittal in a case where his client was charged with submitting a fraudulent damages claim to the Air Force. Judge Vinson agreed with George's argument that his client, rather than making the claim with any fraudulent intent, had simply relied on what turned out to be some poor legal advice from the lawyer the client had retained.

In February, **Lizy Timothy**, from our Pensacola office, appeared at sentencing before Judge Hinkle in Panama City with her client who was charged with distribution of methamphetamine. The client began the hearing with a guideline range of 168-210 months. Relying on character letters and the client's otherwise compliant pre-trial release behavior, she convinced Judge Hinkle that, despite two positive urinalysis tests, her client was still entitled to credit for acceptance of responsibility. That reduction, when coupled with Lizy's successful showing that the presentence report had overstated the quantity of drugs, brought the guideline range down to 97-121 months. With the subsequent reduction pursuant to the government's 5K1.1 motion, the client left the courtroom with only a 48-month sentence.

Last month, with the government agreeing that the motion was well taken, Judge Mickle granted a motion to suppress filed by **Randy Murrell** in a child pornography case. Assistant United States Attorney Stephen Kunz agreed that sheriff's deputies failed to honor the defendant's right to remain silent when, after the defendant had requested a lawyer, they enlisted the assistance of one of the defendant's friends to convince the defendant to make a statement. With the motion granted, the government agreed to the dismissal of the more serious charge of receipt of pornography and agreed to a guilty plea to possession. Between the dismissal of the charge and the suppression of the statement, Randy's client is now facing a significantly reduced sentence.

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.

ELECTRONIC CASE MANAGEMENT AND FILING IS ON THE WAY

A new electronic case management and filing system is scheduled to be implemented in the Northern District of Florida. As we've been told, the system will provide the Clerk's office with enhanced and updated docket management. It will also allow for the filing of case documents -- pleadings, motions, petitions -- to be filed with the court over the Internet. The management portion of the program should be implemented by October 31st. The document filing feature is scheduled for January of 2004. There are currently thirty-six districts using the program.

APPELLATE COURT RULES CHANGES

The U.S. Supreme Court on January 27th approved minor revisions to the rules governing practice before it. The revision will become effective as of May 1st. Most changes appear to concern filing requirements and modern document delivery practices. Changes include amendments to 14.1(i) (items contained in appendix to a petition for a writ of certiorari); 25.2

(respondent's brief on the merits); 25.3 (petitioner's reply brief); 29.2 (timely filing of documents); 29.3 (service of documents); 30.2 (extension of time to file a document); 32 (filing of models, diagrams, and exhibits); 39.2 (when leave to proceed in forma pauperis for the purpose of filing a document has been sought, the in forma pauperis affidavit or declaration must be attached to each copy of the accompanying document; 44.6 (rehearing)

The Eleventh Circuit also put some amended rules into effect on April 1, 2003. The amendments include changes to to rules 22-1(d), 22-2(b), 22-3, 26.1-1, 31-1(e), 33-1(c), and 41-2.

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

The following are United States Supreme Court grants of certiorari for the 2002 term that are relevant to our practice and granted since our last newsletter:

MARYLAND v. PRINGLE, 2003 WL 1446072 (Mar. 24, 2003), reviewing 805 A.2d 1016 (Md. 2002)

Probable Cause To Arrest A Passenger In A Vehicle

Pringle was a passenger in a vehicle with two other men when it was pulled over for a routine traffic stop. The arresting officer noticed a large amount of rolled up money in the glove compartment when the driver was retrieving the vehicle registration. After finding no outstanding violations the officer asked the driver for permission to search the car. The officer found money in the glove compartment and cocaine behind the armrest. All three men were arrested. Pringle later confessed that the cocaine found in the car was his and that he intended to sell it or "use it for sex." At trial, during a suppression hearing, Pringle's counsel argued that his arrest was unlawful because it was not supported by probable cause and that his confession should be suppressed as the unlawful fruit of an illegal arrest. Question presented: "In case in which drugs and roll of cash are found in passenger compartment of car with multiple occupants, and all deny ownership, does Fourth Amendment prohibit police officer from arresting occupants of car?"

FELLERS v. U.S., 2003 WL 891644 (Mar. 10, 2003), reviewing 285 F.3d 721 (8th Cir. 2002)

Miranda

Two policemen went to Fellers's home to arrest him for conspiracy to distribute methamphetamine. After Fellers admitted the police to the house, they told him that they were there pursuant to an indictment and that they wanted to discuss his involvement in the use and distribution of methamphetamine and his associations with certain persons. Fellers responded by stating that he had associated with the named persons and that he had used methamphetamine. At no time during this conversation did the police advise Fellers of his Miranda rights. The officers then escorted Fellers to jail, advised him of his Miranda rights, obtained a waiver and a confession. Questions presented: (1) Did court of appeals err when it concluded that defendant's Sixth Amendment right to counsel under Massiah v. United States, 377 U.S. 201 (1964), was not violated because defendant was not

"interrogated" by government agents, when proper standard under Supreme Court precedent is whether government agents "deliberately elicited" information from defendant? (2) Should second statements--preceded by Miranda warnings--have been suppressed as fruit of illegal post-indictment interview without presence of counsel, under this court's decisions in Nix v. Williams, 467 U.S. 431 (1984), and Brown v. Illinois, 422 U.S. 590 (1975)?

GROH v. RAMIREZ, 123 S. Ct. 1354 (Mem) (Mar. 03, 2003), reviewing 298 F.3d 1022 (9th Cir. 2002)

Search and Seizure, Defective Search Warrant, Qualified Immunity

When Officer Groh sought a search warrant for explosives and weapons in Ramirez's residence, a magistrate approved the search warrant and addendum that described the items to be sought. However, when Groh and his fellow officers searched the Ramirez residence, the addendum was not attached to the warrant. Instead of a description of the items to be searched in the space provided on the warrant, Groh had typed in the address of the Ramirez residence. The Ninth Circuit found the search unconstitutional because of the defective warrant. Groh was not immune, but line officers who conducted the search under Groh's authority were protected by qualified immunity. The questions presented are: (1) Did Ninth Circuit err in ruling that law enforcement officer violated clearly established law, and thus was personally liable in damages and not entitled to qualified immunity, when at time he acted there was no decision by U.S. Supreme Court or any other court so holding, and only lower court decisions addressing issue had found same conduct did not violate law? (2) Did law enforcement officers violate particularity requirement of Fourth Amendment when they executed search warrant already approved by magistrate judge, based on attached application and affidavit properly describing with particularity items to be searched and seized, but warrant itself did not include same level of detail?

U.S. v. BANKS, 123 S. Ct. 1252 (Mem) (Feb. 24, 2003), reviewing 282 F.3d 699 (9th Cir. 2002)

Knock and Announce

Las Vegas Police and FBI agents used the statutory "knock and announce" procedure when executing a search warrant on Banks' apartment. They knocked loudly and announced "police search warrant." After fifteen to twenty seconds of no response the SWAT officers forced entry. Once inside, the officers found Banks in the hallway outside his bathroom. Banks, who obviously had just emerged from his shower, was forced to the floor and handcuffed. He then was seated at his kitchen table for questioning and shortly thereafter was provided underwear with which to cover himself. They questioned him for 45 minutes, took his statements and apparently seized evidence. Banks moved to suppress on a variety of grounds including that the entry violated 18 U.S.C. § 3109 because the officers failed to wait a reasonable time before forcefully entering his residence. Question presented: Did law enforcement officers executing warrant to search for illegal drugs violate Fourth Amendment and 18 USC 3109, thereby requiring suppression of evidence, when they forcibly entered small apartment in middle of afternoon 15-20 seconds after knocking and announcing their presence?

CASTRO v. U.S., 123 S. Ct. 993 (Mem) (Jan. 27, 2003), reviewing 290 F. 3d 1270 (11th Cir. 2002)

Recharacterization of Pro Se post-conviction motions

Castro was convicted of federal charges in '92. In '94, he filed a pro se Motion For New Trial pursuant to Fed. R. Crim. P. 33 based upon newly discovered evidence. The government's response did not object to the motion as demanding relief under both Rule 33 and § 2255. Castro replied saying that it was a Rule 33 motion. The S.D. Ga. treated it as a request for relief pursuant to both Rule 33 and § 2255 and denied it in '94. In '97, Castro filed a pro se § 2255 motion alleging ineffective assistance, which the S.D. Ga. tossed out as an improper § 2255 successor. 11th Cir. affirmed but suggested that "in the future, district courts should warn petitioners of the consequences of recharacterizing their motions as § 2255 petitions" to give them a chance to amend. The USSC granted cert. on that issue AND directed the parties to brief and argue the following question: "Does this Court have jurisdiction to review the Eleventh Circuit's decision affirming the dismissal of a § 2255 petition for writ of habeas corpus as second or successive?"

VIRGINIA v. HICKS, 123 S. Ct. 990 (Mem) (Jan. 24, 2003), reviewing Commonwealth v. Hicks, 264 Va. 48 (Va. 2002)

Trespass, First-Amendment overbreadth

Questions Presented: In the case of the enforcement of a redevelopment and housing authority's aggressive trespass policy, 1. Whether a criminal defendant may invoke the overbreadth doctrine even though (a) his own offense did not involve any expressive conduct, and (b) his conduct was not proscribed by that portion of the government statute, regulation or policy he challenges as overbroad? 2. Whether the Constitution recognizes a distinction between actions taken by government as landlord and actions taken by government as sovereign.

JONES v. VINCENT, 123 S. Ct. 816 (Mem) (Jan. 10, 2003), reviewing 292 F.3d 506 (6th Cir. 2002)

Habeas, Prior acquittal, double jeopardy

Petitioner and two co-defendants were charged with open murder in connection with a shooting death that occurred during a confrontation between two groups of youths. At the close of the State's case, counsel for petitioner and the co-defendants moved for directed verdicts of acquittal. The trial court stated that premeditation or planning had not been shown and that second-degree murder was the appropriate charge. The trial court later reconsidered that decision, stating that double jeopardy had not attached because the motion had been granted but no verdict was directed. The Michigan Supreme Court affirmed. In habeas, the court found the state supreme court's determination was not entitled to deference, that defendant had in fact been given a directed verdict of acquittal of first-degree murder, the trial court was not entitled to reverse that decision, and subsequent submission of the open murder charge to the jury was a double jeopardy violation. Question Presented: whether the state supreme court's conclusion that the trial court did not direct a verdict of acquittal constitutes a factual finding entitled to deference on habeas review; and whether the trial court subjected the habeas petitioner to prosecution for first-degree murder in violation of the Fifth Amendment's double jeopardy clause.

Supreme Court Cases

WOODFORD v. GARCEAU, 2003 WL 1477291 (Mar. 25, 2003)
AEDPA
Garceau, sentenced to death, filed in federal district court a motion for the appointment of federal habeas counsel and an application for a stay of execution on May 12, 1996. On July 2, 1996, Garceau filed his full petition. The District Court ruled that Garceau's petition was subject to the more harsh AEDPA standards because it was filed after the AEDPA's effective date, even though he had begun the process before the AEDPA's effective date. The U.S.S.C. held, 6-3 (opinion by Thomas; dissent by Souter with Ginsburg and Breyer), that the petition itself had to be filed before the AEDPA effective date because a case is "pending" only after an application for habeas corpus is filed in federal court.

EWING v. CALIFORNIA, 123 S. Ct. 1179 (Mar. 5, 2003)
Eighth Amendment Proportionality
The USSC affirmed the constitutionality of California's three-strikes law as applied to Ewing, a parolee convicted of felony grand theft for stealing three golf clubs worth $399 apiece and sentenced to 25 years' to life imprisonment. The Plurality applied Kennedy's Harmelin proportionality analysis, said the state had made a legitimate deliberate policy choice to isolate recidivists whose conduct has not been deterred by more conventional punishment approaches, and concluded that although the sentence is long, it reflects a rational legislative judgment that is entitled to deference after comparing the gravity of the offense and D's background with the harshness of the penalty. Rehnquist & Kennedy joined. Scalia and Thomas concurred on the basis that proportionality analysis is inappropriate. The other four dissented.

LOCKYER v. ANDRADE, 123 S. Ct. 1166 (Mar. 5, 2003)
AEDPA, Eighth Amendment Proportionality
California charged Andrade with two felony counts of petty theft with a prior conviction after he stole approximately $150 worth of videotapes from two different stores. Under California's three strikes law, the judge sentenced him to two consecutive terms of 25 years to life. The state appellate court affirmed, fining no Eighth Amendment proportionality violation. In a 28 U.S.C. § 2254 habeas petition, the Ninth Circuit held that the eighth amendment decision was an unreasonable application of clearly established federal law. The USSC (O'Connor, 5-4) reversed, holding that the Court has not established a clear or consistent path for courts to follow in determining whether a particular sentence for a term of years can violate the Eighth Amendment.

CONNECTICUT DEPT. OF PUBLIC SAFETY v. DOE, 123 S. Ct. 1160 (Mar. 5, 2003)
Sex Offender Registration Law (Megan's Law), Procedural Due Process
Connecticut's "Megan's Law" requires persons convicted of sexual offenses to register with the Department of Public Safety (DPS) upon their release into the community, and requires DPS to post a sex offender registry containing registrants' names, addresses, photographs, and descriptions on an Internet Website and to make the registry available to the public in certain state offices. Respondent, a convicted sex offender who is subject to the law, filed a 42 U.S.C. §1983 action on behalf of himself and similarly situated sex offenders, claiming that the law violates due process. USSC held it did not. Mere injury to reputation, even if defamatory,

does not constitute the deprivation of a liberty interest. But even assuming that Doe has been deprived of a liberty interest, due process does not entitle him to a hearing to establish a fact-that he is not currently dangerous-that is not material under the statute.

SMITH v. DOE, 123 S. Ct. 1140 (Mar. 5, 2003)
Sex Offender Registration Law (Megan's Law), Ex Post Facto
The USSC, 6-3, held that held that Alaska's version of Megan's Law was intended to create a civil, nonpunitive regime, and thus did not constitute an Ex Post Facto law.

CLAY v. U.S., 123 S. Ct. 1072 (Mar. 4, 2003)
AEDPA, Habeas, 28 U.S.C. § 2255
Clay was convicted of a federal charge, lost his appeal, and did not file a cert. petition. The time in which he could have filed for cert. expired 90 days after entry of the Court of Appeals' judgment and 69 days after issuance of its mandate. One year and 69 days after the Court of Appeals issued its mandate, and exactly one year after the time for seeking certiorari expired, Clay filed a motion for postconviction relief under 28 U.S.C. § 2255. The district court barred his claim, ruling that the clock started upon issuance of the court of appeals' mandate, and the Seventh Circuit affirmed. USSC reversed, holding that for the purpose of starting the clock on § 2255's one-year limitation period, a judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction.

SCHEIDLER v. NATIONAL ORGANIZATION FOR WOMEN, INC., 123 S. Ct. 1057 (Feb. 26, 2003)
RICO, Extortion, Hobbs Act, Rule of Lenity
In an 8-1 opinion authored by Rehnquist, the Court struck down a civil RICO verdict won by the National Organization for Women (NOW) against anti-choice activists who the jury had found had engaged in a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity that included acts of extortion in violation of the Hobbs Act. The Seventh Circuit had held, inter alia, that the things NOW claimed were extorted from them--the class women's right to seek medical services from the clinics, the clinic doctors' rights to perform their jobs, and the clinics' rights to conduct their business--constituted "property" for purposes of the Hobbs Act, and that the "property" had been "obtained." The USSC reversed, concluding that the anti-choice activists did not commit extortion within the Hobbs Act's meaning because they did not "obtain" property from NOW. Petitioners may have deprived or sought to deprive respondents of their alleged property right of exclusive control of their business assets, but they did not acquire any such property. They neither pursued nor received "something of value from" respondents that they could exercise, transfer, or sell.

MILLER-EL v. COCKRELL, 123 S. Ct. 1029 (Feb. 25, 2003)
Batson, Habeas
The Court reversed the Fifth Circuit's decision that had erroneously denied certificate of appealability regarding a Batson claim in a capital habeas case out of Texas. The Court (Kennedy writing for 8-Thomas majority) concluded that the Fifth Circuit and the district court did not give full consideration to the substantial evidence Miller-El put forth in support of the prima facie racial discrimination case. Instead, they

accepted, without question, the state court's evaluation of the demeanor of the prosecutors and jurors in Miller-El's trial. Historical evidence of racial discrimination by the Dallas County District Attorney's Office was damning.

U.S. v. RECIO, 123 S. Ct. 819 (Jan. 21, 2003)

Conspiracy

Police stopped a truck carrying illegal drugs, seized the drugs, and, with the help of the truck's drivers, set up a sting. The drivers paged a contact who said he would call someone to get the truck. Jimenez Recio and Lopez-Meza appeared in a car; Jimenez Recio drove away in the truck, and Lopez-Meza, in the car. They were convicted of conspiracy. The Ninth Circuit reversed the conviction because Circuit precedent states that a conspiracy terminates when "'there is affirmative evidence of ... defeat of the object of the conspiracy,'" and the evidence here was insufficient to show that they had joined the conspiracy before the drug seizure. The USSC reversed, holding that a conspiracy does not automatically terminate simply because the Government has defeated its object.

SATTAZAHN v. PENNSYLVANIA, 123 S. Ct. 732 (Jan. 14, 2003)

No Double Jeopardy bar to Death Penalty

The Supreme Court held (Scalia for 5-4 majority) that there was no double-jeopardy bar to Pennsylvania from seeking the death penalty on retrial after Sattazahn got an automatic life sentence from a deadlocked penalty phase jury but subsequently won a new trial and got reconvicted. The Court held that the relevant inquiry is not whether the defendant received a life sentence the first time around, but whether a first life sentence was an "acquittal" based on findings sufficient to establish legal entitlement to the life sentence--i.e., findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt. The Court also declined to hold that the Due Process Clause provides greater double-jeopardy protection than does the Double Jeopardy Clause.

Selected Eleventh Circuit Case Summaries

The following are selected opinions from the 11th Cir. that have been issued since our last newsletter:

IN RE COMMISSIONER'S SUBPOENAS, 2003 WL 1645236 (Mar. 31, 2003)

Subpoenas; Canadian

On an issue of first impression for federal appellate courts, the Court held that a mutual assistance treaty between U.S. and Canada compelled the U.S. to comply with Canada's request to issue subpoenas to compel witness testimony in a criminal investigation, and to arrange for the taking of such testimony, prior to the filing of formal charges.

U.S. v. GRESHAM, 2003 WL 1590772 (Mar. 28, 2003)

Sentencing; supervised release; plain error; 18 USC 3583(e)(3); credit for time served

Following revocation of supervised release, Gresham was sentenced to two years imprisonment followed by three years supervised release. The Court concluded that the district court committed plain error by applying a statute that was not in effect at the time of Gresham's underlying offenses, 18 USC 3583(h) (which was effective 9/13/94). However, this error was harmless, because

under 3583(e)(3), a defendant is not entitled to credit for time previously served on supervised release and, therefore, the aggregate of multiple supervised release terms may exceed the maximum length of supervised release attached to the underlying offense.

U.S. v. HARRISTON, 2003 WL 1563716 (Mar. 27, 2003)

Inadmissible evidence of prior homicide

Harriston was charged with four counts, including RICO, RICO conspiracy, and drug conspiracy. One of the predicate acts for RICO was a homicide. During the cross-examination of Los Angeles Police Officer Darren Dupree, the prosecution asked a series of questions that exposed that Harriston had pled guilty to a murder in California - murder not connected in any manner with the charged counts. Harriston objected. The district court recognized the error, chastised the prosecutor, but granted only a "partial mistrial" on two of the four predicate acts listed under the substantive RICO offense, removed the two predicate acts from the indictment, and gave the jury curative instructions. The jointly-tried co-defendants were acquitted, and Harriston was acquitted on two counts, convicted only of the two conspiracy counts. The Court (Hull, Fay and Gibson) reversed those convictions and remanded for a new trial, saying "After considerable review, we conclude that the inadmissible testimony about Harriston's murder conviction not only was unfairly prejudicial to Harriston on the two predicate racketeering acts, but also was unfairly prejudicial to Harriston on the RICO conspiracy and drug conspiracy counts as well."

U.S. v. McNAB, 2003 WL 1419848 (Mar. 21, 2003)

Lacey Act, validity of foreign law

McNab and others were convicted of conspiracy, smuggling, money laundering, and Lacey Act violations in connection with the importation, sale, and purchase of Caribbean spiny lobsters from Honduras. The district court determined that Honduran laws that served as the underlying basis of their convictions were valid and enforceable. The 11th Cir. affirmed (Wilson & Hull vs. Fay).

WASHINGTON v. CROSBY, 2003 WL 1418689 (Mar. 21, 2003)

AEDPA, Government wins reversal of habeas grant on Confrontation Clause

Authorities videotaped a drug transaction. The audio portion contained several incriminating statements by the CI, whose identity the state would not divulge. At trial, Bonds testified that he was with the CI during the drug transaction. He saw two black males approach the CI's car, not knowing either, and he relied heavily on the videotape in making his identification of Washington as one of the suspects. Washington's motion to exclude the audio portion under the Confrontation Clause was denied at trial, but the district court granted habeas on that basis. The Court reversed, holding that "Washington does not cite any Supreme Court precedent that has held that playing the audio portion of a videotape, without an opportunity to cross- examine the speaker, violates a defendant's Confrontation Clause rights. Thus, we conclude that the Florida state court's decision cannot be "contrary to" clearly established federal law as determined by the Supreme Court" under the AEDPA.

U.S. v. NICKELS, 2003 WL 1343219 (Mar. 20, 2003)

Presentence psychiatric or psychological

examination, competency
Nickels sought a presentence psychiatric or psychological examination under 18 U.S.C. § 552(c), but the Court affirmed the district court's denial, finding no abuse of discretion because the district court had enough information. Nickels also argued that reasonable cause existed to believe he was incompetent for trial and sentencing, and sought an examination under 18 U.S.C. § 4241. The Court affirmed the district court's denial of that motion as well, because "Nickels did not present any bona fide doubt as to his competency to be sentenced. The district court also determined that Nickels had consulted rationally with his attorney, had an understanding of the proceedings against him, and was competent to enter a guilty plea."

U.S. v. RAMIREZ, et al., 2003 WL 1237783 (Mar. 18, 2003)
Waiver; statute of limitations; 18 USC 3282; Fed.R.Crim.P. 29; indictment; JOA
Defendants were charged by indictment returned May 11, 2000, with witness-tampering offenses (actually 3 murders, including one lawyer, and other attempts) ending June 22, 1993. Because this was more than five years, it was time-barred unless it charged a capital crime. The defendants waited until after opening statements to move for JOA under Rule 29, arguing the indictment failed to charge a capital crime because it did not include the element of intent. The district court denied it as untimely because it should have been a motion to dismiss under Rule 12(b)(2), and the Eleventh Circuit agreed.

U.S. v. HUNTER, et al., 2003 WL 1192407 (Mar. 17, 2003)
Sentencing; loss amount; 1B1.3(a)(a)(B)(1998); scope of activity
Appellants were runners who cashed checks on the bottom rung of a counterfeiting conspiracy. The probation officer contended the government had not proven the defendants had specific knowledge of the actions of co-defendants to constitute reasonable forseeability. The district court disagreed with the probation officer. The Court reversed, holding that the district court misapplied USSG 1B1.3 by failing to make particularized findings as to the scope of criminal activity undertaken by each Appellant. Although the district court had made findings regarding reasonable forseeability, it did not first determine the scope of the criminal activity the defendants agreed to jointly undertake. The fact that each defendant knew s/he was part of some ring was insufficient.

U.S. v. FRANKLIN, 2003 WL 1055436 (Mar. 12, 2003)
Fourth Amendment Motion to Suppress under Wardlow
A SWAT team was patrolling "problem areas" for drinking, loitering, drug-trafficking, trespassing and crowd control. The team traveled in a two-vehicle caravan, and members were dressed in uniforms including body armor, boots, fatigues and side arms. At approximately 10:15 p.m., the team noticed Franklin standing by himself, underneath a "no loitering" sign in front of a Chinese take-out restaurant. The officers decided to ask Franklin what he was doing. They pulled up in front of Franklin and stopped. The officers began to step out of the van. As soon as he saw the officers, Franklin ran away. Two SWAT officers chased him around the side of the building, over a chain-link fence and across a parking lot, when he was caught while attempting to climb the second fence. As Franklin was struggling with Detective Newton, Franklin attempted

to reach for something in his waistband. Newton thought it might be a weapon. Officer Mammino arrived and helped Newton secure Franklin, handcuff him, and move him to a lighted area. The officers asked Franklin why he had run. He said that he had an outstanding arrest warrant. Officer Mammino searched Franklin and found two bags of marijuana and a pill bottle containing 18.5 grams of crack cocaine. Detective Newton searched the area around the second fence; he found Franklin's hat and 106 small zipped plastic bags containing a white powder which tested positive for cocaine. The 11th Circuit held no 4th Amend. violation under Wardlow: Decision was 2-1: Edmondson and Anderson v. Pogue, who opined that Franklin's flight was provoked by the police themselves.

U.S. v. GOMEZ, 2003 WL 1056256 (Mar. 12, 2003)

Disclosure of PSI to State Prosecutors

While Gomez's federal case for money crimes was pending sentencing, state prosecutors were preparing to try Gomez for 2$^{\cdot}$ murder in which Gomez asserted a diminished-capacity defense based on PTSD. The state prosecutors asked for the portion of his federal PSI that addressed Gomez's mental status, and the district court agreed. The 11th Cir. affirmed, assuming, for the sake of argument, that a test as strict as the "compelling need" applies, finding that the "State of Florida has articulated a sufficiently compelling need and has limited its request to only the materials necessary to meet that need," and the court did not abuse its discretion.

U.S. v. YEAGER, 2003 WL 1056598 (Mar. 12, 2003)

No need for reliance in Mail Fraud, Loss Calculation, multiple leaders in two-member conspiracy

(1) A three-judge panel relied on dicta in Neder (US) to expressly overrule the holding of United States v. Brown, 79 F.3d 1550, 1557 (11th Cir. 1996), thus now mail fraud making conviction in this circuit no longer dependent on the objective test of proof of reasonable reliance. (2) The loss calculation under U.S.S.G. § 2F1.1 for theft of an unrestricted distribution right is the value of the purloined portion of the distribution right - the additional benefit of unrestrained distribution stolen through fraud. (3) "In a conspiracy of two people ... each participant can be sentenced as a leader assuming that both exercise authority and control over a distinct portion of the criminal activity" under § 3B1.1(c). [Ed. note: this case is on rehearing en banc, and its Brown holding may not be subject to retroactive application under Bouie v. City of Columbia]

HART v. FLORIDA, 2003 WL 732451 (Mar. 5, 2003)

Miranda; confession; self-incrimination; deception; juveniles; habeas

The Court reversed the Florida and district courts' denial of relief based on a claim that the juvenile defendant was misled regarding his right to counsel and his privilege against self-incrimination. A detective the juvenile trusted essentially told him that the disadvantage in requesting a lawyer was that the lawyer would advise him to exercise his privilege against self-incrimination and that "honesty wouldn't hurt him," which is directly contrary to *Miranda* warnings. Slip op. at 21-22. The Court concluded the state court decision was contrary to clearly established federal law as determined by the Supreme Court.

U.S. v. FUENTES-RIVERA, 2003 WL 721756 (Mar. 4, 2003)

Sentencing; 2L1.2; burglary
The defendant was convicted of illegal reentry after having been previously deported and was given a 16-level enhancement under 2L1.2(b)(1)(A)(ii) based on a California conviction for burglary. Application Note 1 defines a crime of violence as having an element of physical force against another person and lists burglary of a dwelling. The defendant had a prior conviction for burglary of a dwelling but argued that the prior offense must meet both criteria and that his offense, as defined under state law, did not include the element of physical force. The defendant relied on the fact that these notes are separated by "and" instead of "or," as in 4B1.2, arguing this evidenced an intent that 2L1.2 be more restrictive. The Court rejected this argument, following other circuits, because doing so would render the other part of the guideline surplusage.

U.S. v. VEAL, 2003 WL 549204 (Feb. 27, 2003)
Special condition of supervised release
Veal was convicted of transporting or shipping child pornography by computer, and sentenced to 41 mos. with a special condition that he register with the State Sexual Offender Registration Agency in any state where he resides. He challenged the special condition on grounds that the finding that he is a sexual predator is unsupported, and he was not afforded a due process hearing to determine whether he is "particularly likely to be currently dangerous." The Court affirmed that special condition under the abuse of discretion standard.

U.S. v. FRAZIER, 2003 WL 480129 (Feb. 26, 2003)
Opinion evidence
The Court reversed the defendant's conviction for kidnaping in violation of 18 U.S.C. § 1201(a)(1) because the trial court erroneously refused, under Federal Rule of Evidence 702, to allow Frazier's forensic expert to opine, from the absence of sperm, that "there is no forensic evidence to substantiate the claim of rape in this case."

MOORE v. CROSBY, 2003 WL 367921 (Feb. 21, 2003)
Habeas
"Pending" under 28 U.S.C. § 2244(d)(2) was interpreted to apply against a state habeas petitioner, on a complicated chronology of facts, to conclude that his belated appeal motion was not pending during the limitations period, thus making his petition time-barred.

DE LA TEJA v. U.S., 2003 WL 367927 (Feb. 21, 2003)
Immigration removal, 28 U.S.C. § 2241
Continuing detention pending the entry of a final order of removal does not violate Due Process; his detention does not violate double jeopardy; his removal would not violate the district court's vacated judicial order of deportation; and removal would not be inconsistent with the United Nations Convention Against Torture.

U.S. v. PATE, 2003 WL 367910 (Feb. 21, 2003)
Assimilative Crimes Act
Pate appealed the district court's imposition of sentence under the Assimilative Crimes Act, 18 U.S.C. § 13(a) for driving under the influence in violation of the Alabama Code. State law would permit alternative sentencing such as community service, split sentence, or early release. None of these alternatives, however, are available under federal sentencing laws for a sentence the length of

Pate's (one year and one day). Pate wanted to benefit from the more lenient state law, and the district court refused to do so. The Circuit Court affirmed, holding held that the "like punishment" clause of the ACA does not require a federal court to implement state policies regarding eligibility for early release and alternative forms of confinement even though they conflict with federal sentencing policies.

U.S. v. DELGADO, et al., 2003 WL 360265 (Feb. 20, 2003)
Sentencing; loss; 2T2.1; laches; sufficiency of evidence; taxes; 18 USC 371
Defendants were convicted of evading liquor taxes in an elaborate scheme. One defendant argued the loss determination should have been zero because the government could have collected on the bond for the liquor shipments but had not yet chosen to do so. The Court relied on USSG 2T2.1(a), defining "tax loss" as the amount of taxes which the taxpayer failed or attempted not to pay. The Court also held that the government's failure to (yet) collect on the bond did not qualify as one of the rare exceptions to the rule that the federal government "is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights." The Court noted that no exception to this rule had ever been applied in a criminal case.

U.S. v. McCORKLE & BAILEY, 2003 WL 347655 (Feb. 18, 2003)
Forfeiture
In a much-publicized case, F. Lee Bailey had petitioned the district court under 21 U.S.C. §§853(n)(6)(B) to prove that he had received fund from McCorkle, his client, as a bona fide purchaser for value ("BFP") without cause to believe that the money was subject to forfeiture. The district court denied the § 853(n), giving the Government clear title to the $2 million trust fund earmarked for attorney's fees, including the $1,994,301 that had been disbursed as Bailey directed. The district court held Bailey in contempt. Bailey appealed both those decisions, and the 11th Cir. affirmed. It rejected the § 853(n) claim because (1) "It is clear that the McCorkles used $2 million in laundered, and therefore forfeitable, funds to create the trust fund for payment of attorney's fees. It is also clear that Bailey knew from the outset that the funds were subject to forfeiture."; and (2) Bailey failed to prove the Government should be estopped pursuant to his claim that the Government's conduct induced him to provide legal services that he would not have provided had he known that the Government intended to pursue the money.

U.S. v. ZINN, 321 F.3d 1084 (Feb, 14, 2003)
Conditions of supervised release
The Court rejected Zinn's challenge to conditions of his supervised release, following a conviction for possession of child pornography and his admission of psychological problems and request for mental health treatment during incarceration. The challenged conditions required participation in mental health treatment with polygraph testing to aid treatment and supervision and not possessing or using a computer with access to any online service without written approval. Counsel objected to these conditions as excessive punishment. The Court rejected the government's argument that the polygraph condition generally was not ripe (because supervised release had not yet begun). The court found the issue ripe and the requirement "reasonably related" to the 18 USC 3553(a) factors. Although the polygraph testing might burden his Fifth Amendment privilege

against self-incrimination, a state may generally require a probationer to discuss matters affecting his probationary status, *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984), and so long as this was only a hypothetical possibility it was not a cognizable Fifth Amendment claim. The Court also rejected the challenge to the Internet restriction, finding it proper, reasonably related, and not a 1st Amendment violation. [Ed. note: There is a circuit split on this issue.]

U.S. v. POIRIER, 321 F.3d 1024 (Feb. 13, 2003)

Wire fraud, conspiracy to defraud, U.S.S.G. § 3B1.3

The Court affirmed convictions of wire fraud and conspiracy as a result of evidence that defendants participated in a scheme to defraud involving "competitive bidding information." The Court also rejected a contention that the district court erroneously applied the U.S.S.G. § 3B1.3 enhancement for abuse of a position of trust because "Fulton County hired deVegter to serve as a fair and unbiased financial advisor and put him in a position to do that. With that position came Fulton County's trust, and deVegter clearly abused it."

HOLMES v. KUCYNDA, 321 F.3d 1069 (Feb. 13, 2003)

No probable cause of constructive possession of drugs in home

In a § 1983 case, Holmes and Wisong had been arguing in the living room of Wisong's apartment when police responded to a possible domestic violence complaint. Wisong acquiesced to police entry. Wisong, searching for his identification, opened a drawer in a desk in the bedroom/office, and police said they observed a clear plastic bag containing a white powdery substance that they presumed was cocaine. Clearly, Holmes did not have actual possession of drugs, but police arrested Holmes along with Wisong. Officer Rolfe then presented a magistrate with a warrant application. All of the Officers agreed that the drugs had been found in the office/den of the apartment - not in the bedroom where Wisong and Holmes were sleeping - and that no other drugs were found in the apartment; and that Holmes had been fully cooperative. Nonetheless, Rolfe's affidavit said, in contrast to what the officers had actually observed, that 'both [Wisong & Holmes] sleep in bedroom with drugs'; that there were 'marijuana seeds in plain view'; that Rolfe 'believed custody was joint'; and that Holmes was 'evasive as to presence of others.' The Court found that (1) nothing in this record reflects that there was even arguable probable cause to believe that Holmes knew about the drugs or had the requisite ability to exercise control or dominion over them. On the contrary, all of the available evidence supported the conclusion that she was simply a visitor." (2) There was no valid search incident to arrest as to Homes; and (3) Officer Rolfe may be held liable for making false statements in his affidavit.

U.S. v. MAUNG, 320 F.3d 1305 (Feb. 10, 2003)

Downward Departure Reversed

The district court agreed to downward depart to less than a year due to extraordinary collateral consequences, i.e., that Maung could avoid the restrictions on seeking relief from alien removal due to an agg felony conviction sentenced to 1 year or more. The Court reversed, holding that the policy of alien removal cannot be defeated by a downward departure.

U.S. v. ORIHUELA, 320 F.3d 1302 (Feb. 10, 2003)

U.S.S.G. § 2L1.2(b)(1)(A) and (B)

Telephone facilitation offense qualifies as a "drug trafficking offense" within the meaning of U.S.S.G. § 2L 1.2(b)(1)(A) and (B), which provides that when an alien is deported after being convicted of a felony "drug trafficking offense," his later reentry in violation of 8 U.S.C. § 1326(a) becomes subject to a 16-level enhancement.

HARDEN V. PATAKI, 320 F.3d 1289 (Feb. 10, 2003)

Extradition

The Court held that a violation of state extradition procedures can serve as the basis of a section § 1983 action where the violation of state law causes the deprivation of rights protected by the Constitution and statutes of the United States, A successful challenge of extradition procedures under attack would not necessarily invalidate the underlying conviction or sentence for which he was extradited, directly or indirectly, and thus care not subject to § 1983 action.

U.S. v. WATKINS, 320 F.3d 1279 (Feb. 7, 2003)

Third-part claims in criminal forfeiture

In denying third-party claims to forfeited property in connection with a criminal forfeiture, the court held that "unsecured or general creditors cannot be considered bona fide purchasers for value within the meaning of 21 U.S.C. § 853(n)(6)(B)." [Ed. note: the Court recognized a split among the circuits]

U.S. v. MARTINEZ, 320 F.3d 1285 (Feb. 7, 2003)

Career offender under U.S.S.G. § 4B1.1

Martinez asserted that the district court, in computing his criminal history, should have counted his three prior state felony convictions as a single conviction for purposes of career offender sentencing because the state sentences were consolidated. At issue is whether prior convictions are related when the offenses occurred on different days and involved different victims, there was no intervening arrest, the offenses were charged in separate indictments and the defendant received separate judgments, but the defendant was sentenced to concurrent sentences on the same day before the same judge. The Court affirmed the district court's conclusion that Martinez had three prior felony convictions because concurrent sentences did not result in related convictions that were consolidated for sentencing.

U.S. v. MARTIN, 320 F.3d 1223 (Feb. 6, 2003)

Sentencing; 2S1.1 (1998 version); money laundering

One stolen check was $380,050.08, but the total amount of 97 separate monetary transactions involving that check was more than $1,000,000. The district court used the higher sum under U.S.S.G. § 2S1.1, increasing the offense level by 5 levels. The Court rejected the argument that the "value of the funds" was limited to the amount originally injected into the money laundering scheme, holding that it did not accurately measure the magnitude of the criminal enterprise consistent with the purpose of the concealment or design provision of the money laundering statute, 18 USC 1956(a)(1)(B)(i), and because money laundering is not a continuing offense but a series of separate offenses. The Court also distinguished loss calculation in theft or fraud cases, where the loss falls on the victim, from the loss to society caused by the fact that

money laundering impedes law enforcement efforts to track ill-gotten gains.

<u>THOMPSON v. CROSBY</u>, 320 F.3d 1228 (Feb. 6, 2003)

Habeas; capital 2254; mixed petitions

The Court concluded the district court had not abused its discretion in choosing not to stay exhausted claims pending exhaustion of the other claims which could not have been raised earlier.

<u>McCARTHY v. U.S.</u>, 320 F.3d 1230 (Feb. 6, 2003)

Habeas; 2255; prior convictions; sentencing

The Court rejected a challenge to prior state court convictions used to enhance his federal sentence, noting that 2255 and not 2254 was the proper vehicle. A defendant is without recourse to challenge a prior conviction which was used to enhance a federal sentence but which was no longer open to direct or collateral attack in its own right.

<u>U.S. v. RIDGEWAY</u>, 319 F.3d 1313 (Jan. 31, 2003)

Conditions of supervised release; 5D1.3(b); vagueness; statutory construction

The Court found that Standard Condition 16 in the S.D. Ala., which requires that releasee's "refrain from conduct or activities which would give reasonable cause to believe [he has] violated any criminal law," extended to "a range of behavior so broad as to be inherently vague. and thus could not meet the requirements of 5D1.3(b)(1) & (2).

<u>HARDWICK v. CROSBY</u>, 320 F.3d 1127 (Jan. 31, 2003)

Capital habeas; ineffectiveness; sentencing; conflict of interest; self-representation

The Court affirmed the denial of habeas relief as to the conviction but vacated the denial of relief on the issue of ineffectiveness at sentencing and remanded for evidentiary hearing on that issue, noting that the attorney provided no defense at the guilt or penalty phase.

<u>U.S. v. LEJARDE-RADA</u>, 319 F.3d 1288 (Jan. 28, 2003)

Consequences of guilty plea, plain error

"No decision of this Court or the Supreme Court requires a district court to inform the defendant during a guilty plea colloquy that he may or will be unable to appeal any refusal by the court to depart downward at sentencing ....Lejarde-Rada was not misinformed of anything, and there is no indication that he reasonably believed that he could appeal the court's refusal to depart downward." Rule 11 does not require a court to inform a defendant about § 3742(a) or its effect on his right to appeal.

<u>U.S. v. HERNANDEZ-GONZALEZ</u>, 318 F.3d 1299 (Jan. 27, 2003)

No Plain Error in applying ambiguous sentencing guideline

D was convicted of illegally reentering the United States after having been deported. The Court found no plain error in imposing a 16-level sentence increase for through the application of U.S.S.G. § 2L1.2 where the defendant had been previously convicted of a "crime of violence" for prior conviction of "obstruction of an officer." Without reaching the merits of the defendant's argument about two plausible readings of the guideline, the Court held that the guideline provision is ambiguous and lacks judicial interpretation on the point argued, and therefore "even if it was erroneously applied, the error could not have been plain. An error cannot be plain if such error is not obvious or clear under current law."

HAWKINS v. ALABAMA, 318 F.3d 1302 (Jan. 27, 2003)
"Unreasonable application of federal law" in AEDPA explained
The Court found no unreasonable application of federal law under AEDPA for state court's refusal to extend Oregon v. Kennedy (1982) to situation where prosecutor secretly had court clerk unbag marijuana evidence for jury. "[H]ere is how we think AEDPA works. If a state court can reach an objectively reasonable conclusion that the circumstances of the case before it are substantially different from the circumstances treated as material in the cases decided by the Supreme Court, the state court -- to acquire AEDPA's protection -- is not required to predict that the Supreme Court might widen its rule if the Supreme Court were faced with these new and substantially different circumstances. In this sense, the failure to extend -- that is to widen or to enlarge -- a Supreme Court rule can never be an 'unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States.' In this kind of situation, the state court's decision is filling a gap for which the Supreme Court (the state court can reasonably believe) has not yet determined the law. By 'substantially different circumstances' we mean differences which objectively reasonable judges could believe might make a difference on whether or not the Supreme Court's preexisting decisional principles laid down in one set of circumstances would apply to the new circumstances."

U.S. v. SAUNDERS, 318 F.3d 1257 (Jan. 23, 2003)
U.S.S.G. § 2B6.1; being in the business of receiving and selling stolen property
The court held that the sentencing enhancement under U.S.S.G. § 2B6.1, for being in the business of receiving and selling stolen property, applies to the extent that an individual personally participated in the scheme in a manner sufficient to trigger application of the enhancement. The correct test for being "in the business" is the totality of the circumstances; but a prerequisite to the application of the two-level enhancement in § 2B6.1(b)(2) is that the defendant personally received and sold stolen property. In applying the totality standard, the Court said it was properly applied to a thief's wife who: (1) submitted fraudulent paperwork to register at least twenty vehicles stolen by her husband over a ten-year period; (2) conveyed title to, and accompanied her husband in delivering, the vehicles to buyers; (3) permitted some of the vehicles to be kept on her property; and (4) drove at least one of the stolen vehicles.

U.S. v. $242,484.00 & DEBORAH STANFORD, 318 F.3d 1240 (Jan. 22, 2003)
Civil forfeiture of "drug" money reversed
Stanford, an American citizen born in Surinam, owns an export business. In '98, she went to NYC regarding an '88 car accident lawsuit, and was asked by her brother to pick up cash for the business from Surinamese people she did not know. The bundles were not of uniform size and did not bear the binding of a bank or financial institution. She wrapped the cash in black plastic and a Christmas bag and flew to Miami, disclosing to authorities that she had the cash. In Miami, DEA examined the package and questioned her. She had no criminal record; did not produce documentation connecting the currency to the business; and a DEA dog may have alerted to the package; she had paid $96 in cash for her ticket to Surinam; and she did not provide details of her NYC trip. The Government moved for civil forfeiture under 21 U.S.C. §

881(a)(6), which provides for the forfeiture of money linked to drug crimes, but the Court reversed the forfeiture order because even though the facts were suspicious, "insufficient evidence supports the finding of probable cause" connecting the cash to a narcotics transaction.

U.S. v. TORRES, 318 F.3d 1058 (Jan. 17, 2003)
Statute of Limitations, 18 U.S.C. § 3292
"Final action" within the meaning of 18 U.S.C. § 3292, the statute that permits the tolling of the limitations period so that the government may pursue an official request for evidence located in a foreign country, "occurs when a foreign court or authority provides a dispositive response to each of the items listed in the government's official request for information."

U.S. v. STEIGER, 318 F.3d 1039 (Jan. 14, 2003)
Search; Fourth Amendment; computer hacker/private person; Wiretap Act; suppression
First, the Court affirmed the denial of suppression, finding that the search by an anonymous private party via "hacking" into the defendant's computer, then providing police with identification of the defendant and proof he was producing child porn, did not warrant suppression. Second, the Court resolved two issues of first impression in this circuit on the Wiretap Act: (1) The anonymous hacker did not intercept electronic communications in violation of the Wiretap Act (though these actions were possibly tortious), agreeing with the Fifth and Ninth circuits that contemporaneous interception of an electronic communication (versus info stored on a hard drive) is required; and (2) while the Act provides sanctions for the unlawful interception of electronic communications, it provides no basis for suppression.

GONZALEZ v. MOORE, 317 F.3d 1308 (Jan. 13, 2003)
Rule 60(b) relief
The Court entered an order agreeing with five other circuits and concluding that an appeal may not be taken from any order denying Rule 60(b) relief from the denial of a 2254 petition unless a COA is issued.

HUBBARD v. HALEY, 317 F.3d 1245 (Jan. 7, 2003)
Death penalty, habeas, 28 U.S.C. § 2254
Habeas denied: (1) Hubbard's statement was voluntary despite claims that he had marginal intelligence, consumed alcohol the morning of the murder, chronic alcoholism, that a detective gave him a drink so he could sign his statement; (2) Hubbard wants the present habeas petition - which seeks relief from his 1982 conviction - to include a collateral attack on his 1957 conviction, but the court cannot do that; (3) no ineffective assistance of counsel prior to the commencement of his 1982 trial even though his attorneys failed to support their motion to suppress his statement with expert testimony and in-patient treatment records, or for failing to raise due process for the detective's act of giving him a drink; for failing to object to burden-shifting malice instruction; and for failing to present mitigating evidence.

U.S. v. RUBIO, 317 F.3d 1240 (Jan. 7, 2003)
U.S.S.G. §§ 4B1.2, 3E1.1, 3C1.1
Rubio, convicted of conspiracy/possession of 1000 grams of cocaine, appealed his sentence of 327 months, but the court affirmed: (1) Rubio's prior felony DUI conviction was a

crime of violence under U.S.S.G. § 4B1.2, and Rubio therefore was a career offender, because his DUI causing serious bodily injury presented a serious potential risk of physical injury to another; (2) Rubio initially appeared to accept responsibility by offering a plea of guilty; but he withdrew the plea and thereafter steadfastly failed to accept responsibility further, going to trial, putting government to its proof, and consistently minimizing his role despite videotaped evidence to the contrary. Rubio, therefore, has not accepted responsibility under § 3E1.1, and the district court did not err in refusing to grant him a reduction; and (3) The district court did not clearly err in determining that Rubio's assault on government witness and codefendant Fernandez was in retaliation for Fernandez's cooperation with the government during the investigation and trial. As such, the assault fits within the range of conduct justifying a § 3C1.1 enhancement for obstruction of justice.

U.S. v. JORDAN & WOODWARD, 316 F.3d 1215 (Jan. 7, 2003)
Discovery, Brady, Gilgio, Jencks, Prosecutorial Misconduct
No cumulative prosecutorial misconduct in complex opinion.

U.S. v. ADAMS, 316 F.3d 1196 (Jan. 2, 2003)
Sentence; downward departure; career offender; 5K2.0 v. 4A1.3
Hinkle denied downward departure, recognizing he had discretion but holding that he must compare the defendant with other defendants who are in Crminal History Category VI solely by virtue of their career offender status. The Court reviewed the sentence because "while the district court raised an interesting legal question, it was the wrong question to ask on the facts of this case." The court wrongly applied U.S.S.G. § 5K2.0 instead of 4A1.3 for downward departures for overrepresentation of criminal history. Even under 4A1.3, however, no downward departure was proper because appellant's criminal history differed from the benchmark given in the commentary.

LAGNIAPPE

FARROW v. WEST, 320 F.3d 1235 (11th Cir. Feb. 7, 2003)
Cruel or unusual dental care
Farrow, a state prisoner, filed a § 1983 action against prison medical caregivers asserting that the eighteen-month delay in medical treatment constituted deliberate indifference to his serious medical need and violated his constitutional rights under the Eighth Amendment, and that a nurse ordered her staff not to treat him in retaliation for his written complaints about the inadequacy of care. The Court reversed the lower court's grant of summary judgment against the dentist on Eighth Amendment grounds. Farrow had endured a dental and medical condition for at least fifteen months and it became serious. "[T]he evidence shows pain, continual bleeding and swollen gums, two remaining teeth slicing into gums, weight loss, and such continuing medical problems, establishing a serious medical need."

GONZALES V. RENO, 2003 WL 1481583 (11th Cir. Mar. 25, 2003)
"Elian"
The Court held in a Bivens action that former Attorney General Janet Reno, former INS Commissioner Doris Meissner, and former Deputy Attorney General Eric Holder, are entitled to qualified immunity for their alleged involvement in the April 2000 seizure of Elian Gonzalez from the home of Lazaro,

Angela, and Marisleys, his Gonzalez, great-uncle, great-aunt, and cousin. "In sum, plaintiffs allege that the agents on the scene used excessive force in violation of their Fourth Amendment rights, but they fail to allege any facts which, if true, would establish that the supervisory defendants caused that violation. Because plaintiffs have failed to allege that the supervisory defendants' conduct constituted a constitutional violation, the supervisory defendants are entitled to qualified immunity under the first step in our qualified immunity analysis."

BROWN v. LEGAL FOUNDATION OF WASH., 2003 WL 1523550 (U.S. Mar. 26, 2003)
IOLTA, Takings Clause
The Court, 5-4, held that a state law requiring that client funds that could not otherwise generate net earnings for the client be deposited in an IOLTA account is not a "regulatory taking," but a law requiring that the interest on those funds be transferred to a different owner for a legitimate public use could be a per se taking requiring the payment of "just compensation" to the client.

THOMAS v. ROBERTS, 2003 WL 934249 (11th Cir. Mar. 10, 2003)
Fourth Amendment; qualified immunity
On remand from the USSC, the court reaffirmed its findings in *Thomas v. Roberts*, 261 F.3d 1160, 1177 (11th Cir. 2001), that a mass strip search of fifth grade students was unreasonable in violation of the Fourth Amendment, but that the school officials are immune because case law did not "give a school official fair, much less clear, warning that the search conducted here would be unlawful. Furthermore, the search does not rise to a level so egregious as to alert the officials that such conduct is unconstitutional even without caselaw."

WILLINGHAM v. LOUGHNAN, 2003 WL 351200 (11th Cir. Feb. 18, 2003)
§ 1983; Fourth Amendment
Judge Edmonson wrote a caustic opinion to defend the 11th Circuit's application of qualified immunity in light of the U.S. Supreme Court's rejection of one of the 11th Circuit's cases. The USSC previously reversed Hope v. Pelzer, 240 F.3d 975 (11th Cir. 2001) at 536 U.S. 730 (2002), and subsequently issued a GVR in Willingham (Grant cert, Reverse and Remand in light of Hope). The 11th Cir. here stuck to its guns to defend its decision. You should read it.

DOJ Encourages Waiving Attorney-Client Privilege
New York Law Journal
In January, just as the SEC was backing off its "noisy withdrawal" proposal for attorney conduct after a barrage of lobbying from the corporate bar, the Justice Department released a set of prosecutorial guidelines that could put just as much, if not more, pressure on lawyers and their corporate clients. And the DOJ makes it clear that waiving attorney-client privilege will help a corporation avoid federal prosecution. Read full text <http://www.law.com/jsp/article.jsp?id=1045754121051>

ABA Demands Legal Rights for Enemy Combatants
The Associated Press
The American Bar Association on Monday denounced the classification of certain U.S. terrorism suspects as "enemy combatants," which has allowed the government to hold them indefinitely and block access to lawyers and courts. The ABA resolution was debated at its winter meeting in Seattle and concerns

only American citizens and "U.S. residents," which the group said would include illegal immigrants. Read full text <http://www.law.com/jsp/article.jsp?id=1044059453636>

Reasonable Doubt
The Recorder
For nearly 100 years, fingerprints have been considered solid forensic evidence to identify defendants, but that may be changing as some judges and legal scholars question their reliability and methodology. Critics say fingerprint analysis must undergo scientific refinement to ensure its reliability. But while some judges have questioned the validity of fingerprint IDs, such evidence is still far from being tossed. Read full text <http://www.law.com/jsp/article.jsp?id=1042568655359>

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