

FEDERAL PUBLIC DEFENDER

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NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

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INCREASING CASELOADS; LIMITED RESOURCES

In the annual report prepared by the Administrative Office of the U. S. Courts, *2003 Judicial Business*, the number of criminal cases filed in fiscal year 2003 in the U. S. District Courts increased 5.4% over the previous year, from 67,000 to 70,642. In the Northern District of Florida, the number of cases rose a dramatic 28.8%, from 466 to 600.

Nationwide, the increase in cases came primarily from immigration and firearm cases, with the number of immigration cases increasing by 22% and the number of firearm cases increasing by 23%. Similarly, the increase in our district seems to be due in large measure to an increase in firearm cases. Across the country, drug cases, although decreasing by 1%, still make up the largest percentage of cases prosecuted in federal court - nearly 27%.

Criminal appeals increased across the country by 3%. Magistrate judges disposed of 15% more misdemeanor cases than they did in

2002.

At the same time, civil filings dropped 8%, and civil appeals dropped 3%. With the decrease in civil cases, the district courts saw a 5% decline in the combined totals of criminal and civil cases.

In the March edition of the Administrative Office's newsletter, *The Third Branch*, Judge John G. Heyburn II, Chair of the Judicial Conference Budget Committee, is quoted as telling a House subcommittee that the "courts' workload and the resources to handle that workload are headed in opposite directions," and that "we run the risk of creating a second class system of justice." The courts' budget for the current year was increased 4.7% over the 2003 allotment. Nonetheless, the Judiciary is seeking a supplemental appropriation from Congress to avoid predicted layoffs and furloughs of court employees and a predicted, end-of-the-fiscal-year, three-week suspension of payments to panel lawyers. Absent the supplement, the Administrative Office is predicting "a total of 165 firings or layoffs" and temporary

furloughs affecting 2,563 employees. Dire concerns, too, are being discussed with regard to the fiscal year that begins in October of 2004. According to the Administrative Office, almost 20% of probation officers and clerks' office personnel would be laid off if the funding is limited to President Bush's intended overall .5% rate of growth.

PRIVACY REQUIREMENTS AND COURT DOCUMENTS

Pursuant to "The E-Government Act of 2002," there is an "ECF Privacy Notice" posted on the webpage of the United States District Court for the Northern District of Florida. It provides that "[y]ou should not include sensitive information in any document filed with the court unless such inclusion is necessary and relevant to the case." The notice goes on to state that "[i]f sensitive information must be included, the following personal data identifiers must be partially redacted from the document, whether it is filed traditionally or electronically: Social Security numbers, financial account numbers, dates of birth, and the names of minor children." Alternatively, the notice provides that the party needing to file a document with such information may move to file an unredacted document under seal. Should the judge grant such a request, the judge may still require the party to file a redacted copy for the public file.

The notice also urges the exercise of caution when filing documents that contain the following: personal identifying numbers, such as a driver's license number; medical records, treatment and diagnosis; employment history; individual financial information; and proprietary or trade secret information.

The Eleventh Circuit Court of Appeals has enacted a rule, 31-6, that includes the same requirements, but with additional detail. The rule explains what is meant by "redaction": the last four digits of Social Security numbers; the initials of the names of minors; the year of an individual's date of birth; and the last four digits of any account number. If you are filing a document with such information, you file two versions - a redacted version for the public file and an unredacted version under seal, i.e. with the notation "Seal" at the top of the pleading, along with a motion to file the document under seal.

Interestingly, the Judgment includes the defendant's social security number, date of birth, and register number and is, of course, one of the documents that is routinely included in the Record Excerpts. We've continued to file the document with our Record Excerpts, but we are in the process of reviewing the issue.

SWEAT PATCH CHALLENGE

A "sweat patch" is a bandage-like device, like urinalysis testing, that is designed to detect the use of illegal drugs. Some federal probation offices around the country are requiring those under supervision to wear the patch. The individual wears it for a period of (usually) seven days. The probation officer, then, removes the patch and submits it for analysis.

Many have questioned the reliability of the patch, contending that it is subject to being contaminated by the microscopic quantities of controlled substances that are present in the environment. (*See U.S. v. \$242,484, 318 F.3d 1240, vacated and reh. en banc granted*

(11th Cir. 1/23/2004), where there was testimony that 80% of United States currency is contaminated with cocaine.) Those who have challenged the accuracy of the patch cite studies showing that anywhere between seven to forty percent of patch-wearers produced false positives. While there are no decisions from the courts of appeal, district courts have split over the issues of whether to admit or rely on the analysis of the patches.

While the probation office for the Northern District of Florida uses the patch sparingly, we are currently involved in a challenge in a case in the Gainesville division. Tom Miller of our Gainesville office has spent, literally, thousands of dollars on an expert and has argued the issue before Judge Paul. Tom is currently awaiting the judge's decision.

Tom has filed a brief with Judge Paul. It's listed in our webpage brief bank, and you can get a copy by calling Pam in our Gainesville office at (352) 373-5823. Tom is, of course, happy to discuss the issue. The transcript of his expert's testimony should also be available.

NEW ASSISTANT FEDERAL PUBLIC DEFENDER

Kfahni Nkrumah has joined our staff as the fourth lawyer in our Pensacola office. Kfahni is a 1998 cum laude graduate of Texas Southern University's Thurgood Marshall School of Law, where he served as a member of the law review. Before joining us, he spent five years working in the Manhattan Criminal Defense Division of The Legal Aid Society of New York City. Before going to law school, he spent nearly eight years as a juvenile counselor in the New York City Department of Juvenile Justice and two years as a State

Trooper for the New York State Police. We're fortunate and delighted to have Kfahni working with us.

CHANGES IN NORTHERN DISTRICT'S ADMISSION REQUIREMENTS

As of January this year, you no longer have to be a member of The Florida Bar to become a member of the Bar for the Northern District of Florida. Rule 11.1 of the Local Rules now requires only membership of the bar of *any* state. The Rule substitutes an online tutorial on the local rules for what used to be a written test. There is now also a requirement that new applicants complete an online tutorial for the electronic filing system. Both tutorials are on the District Court's website.

NEW ADDITIONS TO OUR WEBSITE

Courtesy of the Florida Public Defender's Association, our website now has a current version of that organization's Directory of Forensic Experts. Courtesy of the Federal Public Defender for the Western District of Texas, we have the Eighth Version of their Introduction to Federal Guideline Sentencing.

ADMISSIBILITY OF HEARSAY IN SUPERVISED RELEASE OR PROBATION REVOCATION HEARINGS

Those accused of violating their probation in state court have some protection against the use of hearsay. While hearsay is admissible in a violation of probation hearing, a violation cannot be based solely upon hearsay evidence. *See Wilcox v. State*, 770 So.2d 733, 735 (4th DCA 2000). The federal courts have provided those that come before them with a violation of probation or supervised release with a different, but still important,

form of protection against the use of hearsay.

In considering this issue, the courts have recognized that the Federal Rules of Evidence do not apply to a revocation hearing, be it probation or supervised release. United States v. Frazier, 26 F.3d 110, 113 (11th Cir. 1994). The hearsay safeguards, however, flow from the minimal due process protections recognized by the United States Supreme Court for those faced with parole or probation revocations. See Morrissey v. Brewer, 408 U.S. 471 (1972), and Gagnon v. Scarpelli, 411 U.S. 778 (1973). Those minimal due process protections include the right to confront and cross-examine witnesses. Morrissey 408 U.S. 489. That same protection is incorporated into Fed.R.Crim.P. 32.1(b)(2)(C).

In light of the due process consideration, a court “in deciding whether or not to admit hearsay testimony . . . must balance the defendant’s right to confront adverse witnesses against the grounds asserted by the government for denying confrontation.” Frazier, 26 F.3d at 114. That requirement, in turn, means that courts should “assess the explanation the government offers of why confrontation is undesirable or impractical,” United States v. Bell, 785 F.2d 640, 643 (8th Cir. 1986), and consider “the reliability” of the hearsay testimony. *Id.*

Using this criteria, the courts have allowed the introduction of urinalysis results, *id.*, which are recognized as reliable and a product of “a company whose business it is to conduct such tests,” *id.*, but have found error in the admission of statements of a police officer as related by a probation officer, see Bell, 785 F.2d at 644-645; statements of patients in a drug treatment facility as related by a coordinator of the facility, see United States v.

Reynolds, 49 F.3d 423, 426 (8th Cir. 1995); and statements of an informant as related by a DEA Agent, see Frazier, 26 F.3d at 114.

THIS MONTH’S PANEL TRAINING

As all of us know by now, the unfortunate truth is that the overwhelming percentage of our federal clients end up serving time in the Bureau of Prisons. In this month’s video presentation, Gainesville panel member Lloyd Vipperman will tell you what you can do to help secure a favorable designation for those clients who are headed to prison. Lloyd is one of our most experienced and able lawyers in the Northern District. He’s accumulated a wealth of information regarding the workings of the Bureau. We recorded his presentation in Orlando this past January at the Federal Practice Seminar presented by the Federal Defender of the Middle District of Florida.

We’ll also be distributing a well-written and informative handout prepared by the Federal Public Defender from Nashville, Henry Martin, in which Henry addresses the “topics of how inmates are designated to a federal prison institution, BOP programs beneficial to your clients, and pertinent aspects of inmate life.”

Panama City - April 13
Gainesville - April 28
Tallahassee - April 29
Pensacola - April 29

DOWNWARD DEPARTURES

Tavares, Gregory Hinkle, R. Atty: George Murphy
Docket: 5:03cr23-RH
Charge: Consp. To Dist. Meth; Poss FA in furtherance of crime; poss FA by

convicted felon
 Range: Mandatory Life
 Sentence: 72 months
 Date of Imposition of Sentence: 1/29/04
 Grounds: 5K1.1

Jackson, Victor Rodgers, M. Atty: Jon Dingus
 Docket: 5:03cr47-MCR
 Charge: Consp. to Dist. Meth
 Range: 30 years to Life
 Sentence: 180 months
 Date of Imposition of Sentence: 3/31/04
 Grounds: 5K1.1

Pierre, Irvens Mickle, S. Atty: Randy Murrell
 Docket: 4:02cr59-SPM
 Charge: Consp. Poss WITD Cocaine Base
 Range: 210 - 260 months
 Sentence: 126 months
 Date of Imposition of Sentence: 12/15/03
 Grounds: 5K1.1

Valle, Melva Rodgers, M. Atty: Bill Clark
 Docket: 5:03cr46-MCR
 Charge: Consp. Poss WITD Meth
 Range: 240 months
 Sentence: 80 months
 Date of Imposition of Sentence: 3/17/04
 Grounds: § 4A1.2(a)(1), § 5C1.2(1)-(5) and
 18 U.S.C. § 3553(f)(1)-(5)

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

Gwen Spivey of our Tallahassee office, with the help of the government's concession, won, from the Eleventh Circuit, a new sentencing for one of her clients. The Court agreed with her argument that Judge Collier should not have included the weight of the "sludge" or waste product of the methamphetamine manufacturing process in arriving at the drug quantity amount for purposes of the Sentencing Guidelines. **Bob Dennis** of our

Pensacola office had made the argument before Judge Collier in the trial court.

Jim Jenkins, with the assistance of another Pensacola lawyer, **Chris Janes**, convinced Judge Rodgers to reject the government's effort to disqualify Jim from one of his cases. Although Jim had obtained written waivers from both his former client and the current one, the government had argued that Jim's representation of the former client created a conflict of interest. Judge Rodgers, however, after conducting two hearings pursuant to Fed. R.Crim.P. 44(c) and United States v. Garcia, 517 F.2d 272 (5th Cir. 1975), concluded that the potential conflict was uncertain and adequately addressed by the written waivers and the current client's in-court acknowledgments.

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.

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:

SMALL v. U.S., 2004 WL 602076 (Cert.

Granted Mar. 29, 2004) (reviewing 333 F.3d 425)

Qualifying conviction under 18 U.S.C. § 922(g)(1)

The defendant, indicted for possessing a firearm in violation of 18 U.S.C. § 922(g)(1), had prior Japanese convictions for offenses punishable by a term of imprisonment exceeding one year. His motion to dismiss was denied, and he pled guilty. The Third Circuit affirmed, holding that "the district court explicitly determined that the Japanese conviction comported with our concepts of fundamental fairness by examining the Japanese trial record and transcript . . . there were no grounds for non-recognition of the Japanese conviction as the predicate offense to Small's § 922(g)(1) conviction."

Question presented: whether the district court correctly recognized defendant's Japanese conviction as a predicate offense under 18 U.S.C. § 922(g)(1)?

FLORIDA v. NIXON, 124 S. Ct. 1509 (Mem.)(Cert. Granted Mar. 1, 2004) (reviewing Nixon v. State, 857 So. 2d 172 (Fla. 2003))

Ineffective Assistance of Counsel; strategy decision; defendant's consent

The Florida Supreme Court granted death row inmate Joe Elton Nixon a new trial due to per se ineffective assistance of counsel under *Cronic* for his trial lawyer's failure to obtain Nixon's consent to the lawyer's decision to concede guilt to the jury. **Questions presented:** In capital murder case, did the Florida Supreme Court: (a) apply the incorrect standard, contrary to *Strickland* and other cases, by finding defense counsel ineffective per se under *Cronic* despite having found counsel's strategy not to contest overwhelming evidence of guilt but to vigorously contest

sentence to be in defendant's best interest and reasonably calculated to avoid death sentence, and (b), did state court err in concluding that *Boykin v. Alabama*, 395 U.S. 238 (1969), prohibited trial counsel from adopting strategy, after fully informing his client, without objection, not to contest overwhelming evidence of guilt to protect best interest of his client in contesting appropriateness of imposing death penalty?

JOHNSON v. CALIFORNIA, 124 S. Ct. 1505 (Mem.)(Cert. Granted Mar. 1, 2004) (reviewing Johnson v. California, 321 F.3d 791 (9th Cir. 2003))

Racial discrimination in prison; standard

California routinely assigns black prisoners to bunk only with other black prisoners for their first 60 days, a practice prison officials say helps keep prisoners safe from racial violence. A black prison inmate challenged the practice as an Equal Protection violation and argued it flouted previous Supreme Court desegregation rulings. The Ninth Circuit held that the policy does not violate equal protection under the deferential test of *Turner v. Safley*, 482 U.S. 78 (1987), but is rationally related to possibility of racial violence so that prison officials' failure to consider race could constitute deliberate indifference to substantial risk of serious harm to inmates in violation of the Eighth Amendment. **Questions presented:** (1) Is state's practice of routine racial segregation of state prisoners for at least 60-day period subject to same strict scrutiny generally applicable to all other challenges of intentional racial segregation, or is it subject only to more relaxed review afforded under *Turner*? (2) Does state practice violate Equal Protection Clause?

LEOCAL v. ASHCROFT, 124 S. Ct. 1405

(Mem.)(Cert. Granted Feb. 23, 2004)

18 U.S.C. § 16(a); DUI/injury as crime of violence for immigration removal

The defendant, a Haitian who became a permanent resident alien in 1987, was convicted in 2000 of DUI causing serious bodily injury under § 316.193(3)(c)(2), Fla. Stat., and was sentenced to 2.5 years' imprisonment. INS commenced removal, alleging the conviction was an aggravated felony supporting removal under 8 U.S.C. § 1227(a)(2)(A)(iii). The removal order was sustained by the Board of Immigration Appeals (BIA) based on *Le v. U.S. Attorney General*, 196 F. 3d 1352 (11th Cir. 1999) (holding that this same state conviction is "aggravated felony" under immigration laws if alien received sentence of at least one year, because that is "crime of violence" under 18 U.S.C. § 16(a)). The defendant appealed but did not seek a stay of his removal. The Eleventh Circuit dismissed on jurisdictional grounds, determining that *Le* is binding circuit precedent that "DUI that causes serious bodily injury to another is a crime of violence." Accordingly, the court held that its review of Leocal's removal order was barred under 8 U.S.C. § 1252(a)(2)(C), which denies courts jurisdiction to review final orders of removal entered against aggravated felons. **Question Presented:** Whether Leocal's state conviction is a "crime of violence" under 18 U.S.C. § 16(a) that renders him removable under the immigration laws as an aggravated felon?

JAMA v. I.N.S., 124 S. Ct. 1407 (Mem.)(Cert. Granted Feb. 23, 2004)

Immigration removal; 8 U.S.C. 1231§ (b)(2)(E)(iv)

The defendant, a Somalian citizen admitted to the U.S. as a refugee, was convicted of felony assault in Minnesota, received a suspended sentence, violated probation, and served his

sentence. INS commenced removal proceedings, charging that the assault conviction was a "crime of moral turpitude" under 8 U.S.C. § 1182(a)(2)(A)(i)(I). He conceded this but applied for asylum and other forms of protection from removal under § 1231(b)(2)(E), arguing that he would be persecuted if deported. Because the defendant declined to designate a country of removal and the immigration judge determined that Jama is not eligible for relief from removal to Somalia, the judge designated Somalia as the country of removal. The Board of Immigration Appeals (BIA) affirmed. Before his planned removal, the defendant filed a habeas petition under 28 U.S.C. § 2241, arguing that INS lacks authority to remove him to Somalia in the absence of a functioning Somalian central government able to accept his return. The district court granted the petition, but the Eighth Circuit reversed, holding that § 1231(b)(2)(E)(iv) establishes that acceptance is not required for removal under that clause. **Question Presented:** Whether approval under § 1231(b)(2)(E)(iv) is appropriate where the country of removal lacks a functioning central government that is able either to accept or to refuse a defendant's return?

RUMSFELD v. PADILLA, 124 S. Ct. 1353 (Mem.)(Cert. Granted Feb. 20, 2004)

Enemy Combatant

This case involves Jose Padilla, the American citizen being held in a Navy brig as an enemy combatant. It will be heard in April with the case of Yaser Esam Hamdi, another American citizen being held in a brig without charges as an enemy combatant.

ROPER v. SIMMONS, 124 S. Ct. 1171 (Mem.)(Cert. Granted Jan. 26, 2004)

(reviewing 112 S.W. 3d 397 (Missouri 2003))

Executing Juveniles

Question Presented: Does executing a juvenile offender for a crime committed while under the age of 18 constitute cruel and unusual punishment under the 8th and 14th Amendments, or is there now a national consensus of the sort the Court discerned two years ago when it prohibited the execution of mentally retarded defendants (*Atkins*)?

KOWALSKI v. TESMER, 124 S. Ct. 1144 (Mem.)(Cert. Granted Jan. 20, 2004) (reviewing 333 F. 3d 683 (6th Cir. 2003))

Right to appointed appellate counsel; state court; third-party standing; abstention

A state statute was adopted which denies appointed appellate counsel to indigent defendants who have pleaded guilty, guilty but insane, or nolo contendere. Exceptions are (1) when the prosecutor appeals; (2) when the defendant's sentence is above the range prescribed by the state sentencing guidelines; (3) when the defendant has preserved an issue by entering a conditional plea; or (4) when there is a dispute about the calculation of the defendant's guidelines range or an issue has otherwise been preserved for appeal. Three defendants and two appellate attorneys filed suit in federal court challenging the statute's constitutionality. The defendants included three state circuit court judges who had declined to appoint appellate counsel for the plaintiffs who had pleaded guilty. The district court granted declaratory relief and enjoined all state judges from enforcing or implementing the challenged statute. The Sixth Circuit reversed, ruling that (1) the district court should have abstained, under *Younger v. Harris*, 401 U.S. 37 (1971), from adjudicating the defendant-plaintiffs' claims; (2) the attorney-plaintiffs had standing under the doctrine of *jus tertii* to assert the rights of

indigent defendants; and (3) The state statute is constitutional. **Questions presented:** (1) Does the Fourteenth Amendment guarantee right to appointed appellate attorney in discretionary first appeal of indigent criminal defendant convicted by guilty plea in state court? (2) Did attorneys have third-party standing when federal courts properly abstained from hearing claims of indigent criminal defendants themselves?

Supreme Court Cases

U.S. v. FLORES-MONTANO, 124 S. Ct. 1582 (Mar. 30, 2004)

Search; border; vehicle fuel tank; no reasonable suspicion required

The Court reversed a contrary holding of the Ninth Circuit, and held that a non-destructive search of a vehicle at the border of the United States did not require "reasonable suspicion" to justify disassembling the vehicle's fuel tank. The Court found no privacy interest in a fuel tank and noted that privacy interests at the border are reduced. "The Government's interest in preventing the entry of unwanted persons and effects is at its zenith at the international border." Routine searches and seizures at the border do not require probable cause or a warrant to regulate the collection of duties and to prevent the introduction of contraband.

The Court also rejected the property-interest complaint, noting that disassembly of fuel tanks has not caused accidents and that this was not an unduly "destructive" disassembly. The Court also noted that it was not reaching the question of "exploratory drilling searches" or whether and under what circumstances a border search might be deemed unreasonable because of the particularly offensive manner in which it was carried out. Finally, the Court rejected the

complaint about undue delay: "delays of one or two hours at international borders are to be expected."

IOWA v. TOVAR, 124 S. Ct. 1379 (Mar. 8, 2004)

Plea; pro se; court's advice; state courts

The Court held the Sixth Amendment does not require a court, in taking a guilty plea from a pro se defendant, to advise the defendant specifically that waiving counsel's assistance in deciding whether to plead guilty (1) entails the risk that a viable defense will be overlooked, and (2) deprives him of the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty. Waiver of a right is considered knowing and intelligent if the defendant understands the nature of the right "in general," and information which satisfied the "constitutional minimum" ordinarily suffices to effectuate a valid waiver. Further, the state court's "scripted admonitions" were unnecessary, and the information necessary for a valid waiver depended on the particular circumstances of a case.

CRAWFORD v. WASHINGTON, 124 S. Ct. 1354 (Mar. 8, 2004)

Confrontation; testimonial hearsay; reliability

The Court, overruling *Ohio v. Roberts*, 448 U.S. 56 (1980), and abandoning its "reliability" test for the admission of out-of-court testimonial statements against criminal defendants, held that the Confrontation Clause of the Sixth Amendment bars the admission of such statements. The Court explained that, historically, the primary object of the Confrontation Clause was to prevent the use of *ex parte* testimony as evidence. *Roberts* allowed these statements upon a finding of "mere reliability," but this rule was too

unpredictable "[W]e decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." The Court left open both the question of how nontestimonial hearsay should now be admitted under the Confrontation Clause, as well as the exact definition of "testimonial" hearsay, stating that it encompassed at least testimony at a preliminary hearing, a grand jury, a former trial, and (as here) police interrogations.

BALDWIN v. REESE, 124 S. Ct. 1347 (Mar. 2, 2004)

Appeals; habeas; exhaustion; "fair presentation"

The Court held that appellate courts have no duty to read lower court opinions in decisions they are reviewing. Reese had filed a § 2254 petition that, on its face, did not clearly identify the federal nature of the claim that appellate counsel had violated "federal law." The Ninth Circuit held that "Reese had satisfied the 'fair presentation' requirement because the justices of the Oregon Supreme Court had had 'the opportunity to read . . . the lower [Oregon] court decision claimed to be in error before deciding whether to grant discretionary review.'" Had they read the opinion of the lower state trial court, the majority added, the justices would have, or should have, realized that Reese's claim rested upon federal law."

The Court reversed, holding that there is no obligation for appellate courts to read lower court opinions. In part, this "would impose a serious burden upon judges of state appellate courts, particularly those with discretionary review powers." However, because the state application for review, on

its face, allowed for a reading that a separate state claim of ineffective assistance of counsel was intended by the petitioner, the federal nature of the basis of relief was not "fairly presented" to the state supreme court, i.e., the petitioner failed to mention the Sixth Amendment right to counsel. Accordingly, the petitioner failed to exhaust available state remedies. Nor did the petitioner preserve in his response to the state's petition for certiorari in the U.S. Supreme Court his alternative argument, not reached by the court of appeals, that because Oregon applies the same standards to both federal and state-based claims of ineffective assistance of counsel, failure to articulate the federal basis did not prevent the claim from being fairly presented to the state court. The Court also rejected, as contradicted by both the record and a review of Oregon cases, the argument that when used in Oregon courts, the term "ineffective assistance of counsel" implied a federal claim, given use of the different term "inadequate assistance" to refer to Oregon-law-based counsel claims. Instead, the terms are used interchangeably in Oregon law.

MUHAMMAD v. CLOSE, 124 S. Ct. 1303 (Feb. 25, 2004) (Per curiam)

Prisoner litigation; 1983; wrongful detention; exhaustion; waiver

Muhammad filed a § 1983 action against state prison official Close, with whom he had a confrontation. Close overcharged Muhammad, which required prehearing detention, whereas Muhammad was found guilty of a lesser infraction, for which no prehearing detention had been required. Muhammad sought compensatory and punitive damages "for the physical, mental, and emotional injuries sustained" during six days of wrongful detention, alleging the greater charge was retaliation for prior

lawsuits and grievance proceedings against Close. The Court held that this was a proper § 1983 action, not requiring state exhaustion as in § 2254 cases under *Heck v. Humphrey*, because the action did not implicitly question the validity of Muhammad's conviction or the duration of his imprisonment. The Court also held that Close waived an argument by raising it for the first time in the Court.

BANKS v. DRETKE, 124 S. Ct. 1256 (Feb. 24, 2004)

Death Penalty; Brady; pre-AEDPA

In a Texas case, 10 minutes from execution, the Court held the Fifth Circuit erred in dismissing one *Brady* claim and denying a certificate of appealability on another *Brady* claim. When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight.

GROH v. RAMIREZ, 124 S. Ct. 1284 (Feb. 24, 2004)

Fourth Amendment; Warrants; Qualified Immunity

The Court held a search warrant was plainly unreasonable, a search subsequently conducted by the officers was plainly unreasonable, and qualified immunity does not apply to shield the ATF agent responsible for the facially inadequate warrant. The agent prepared and signed an application for a warrant to search a ranch for specified weapons, explosives, and records, supported by a detailed affidavit and a warrant form. The Magistrate Judge signed the warrant form, even though it did not identify any of the items the agent intended to seize. The portion calling for a description of the 'person or property' described Ramirez's house, not the alleged weapons; and the warrant did not

incorporate by reference the application's itemized list. The search the next day revealed no illegal weapons or explosives.

ILLINOIS v. FISHER, 124 S. Ct. 1200 (Feb. 23, 2004)

Good faith destruction of evidence

The defendant was arrested following in a traffic stop, and four police lab tests confirmed the seizure of cocaine. While the defendant was a fugitive for 10 years, the police destroyed the evidence pursuant to established procedures. His subsequent conviction was reversed by the state appellate court on due process grounds, but the Court reversed under *Arizona v. Youngblood*, 488 U. S. 51 (1988) (holding that failure to preserve potentially useful evidence does not deny due process unless the defendant can show bad faith). The Court also rejected the argument that *Youngblood* does not apply when the contested evidence provides a defendant's "only hope for exoneration" or was outcome-determinative. The critical distinction is between "material exculpatory" evidence and "potentially useful" evidence, and the substance destroyed here was, at best, only "potentially useful," invoking *Youngblood's* bad-faith requirement.

FELLERS v. U.S., 124 S. Ct. 1019 (Jan. 26, 2004)

***Miranda*; Sixth Amendment; post-indictment**

The Court unanimously reversed the Eighth Circuit and held that police violated the Sixth Amendment when they elicited information from the defendant without *Miranda* warnings and counsel while arresting him post-indictment. The district court suppressed this statement but admitted a subsequent, post-*Miranda* statement at the jail, under *Oregon v. Elstad*. The Eighth Circuit affirmed, finding

that the first statements had not been the product of "interrogation" under *Rhode Island v. Innis*. The Sixth Amendment standard is "deliberate elicitation," whether or not there was an "interrogation." Here, the Court found "no question that the officers in this case deliberately elicited information" from the defendant. "Because the ensuing discussion took place after petitioner had been indicted, outside the presence of counsel, and in the absence of any waiver of petitioner's Sixth Amendment rights, the Court of Appeals erred in holding that the officers' actions did not violate the Sixth Amendment standards established in *Massiah* [and its progeny]." The Court remanded to allow the court of appeals to decide the "fruits" question, i.e., whether the Sixth Amendment requires suppression of petitioner's jailhouse statements on the ground that they were the fruits of previous questioning conducted in violation of the Sixth Amendment deliberate-elicitation standard. "We have not had occasion to decide whether the rationale of *Elstad* applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel notwithstanding earlier police questioning in violation of Sixth Amendment standards."

Selected Eleventh Circuit Case Summaries

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

U.S. v. MORTON, 2004 WL 637909 (Apr. 1, 2004)

Sentencing; 2G2.2; sexual abuse of minor; law enforcement masquerade

The Court held, as a matter of first impression, that a law enforcement officer posing as a minor satisfies the standard for

imposition of the five-level enhancement under U.S.S.G. § 2G2.2 for activity that involves the sexual exploitation or abuse of a minor, even though no minor is actually involved. The commentary defines victim as specifically including undercover law enforcement officers and uses the word "victim" interchangeably with the word "minor," citing USSG § 2A3.2, comment. (n.1); § 2G1.1, comment. (n.1)

U.S. v. BROWN, 2004 WL 627436 (Mar. 31, 2004)

Constitutional; nondelegation doctrine; misdemeanors; traffic; national parks

The Court rejected a facial constitutional challenge to National Park Service traffic regulation misdemeanors. The defendant claimed that the regulations were unconstitutional because they were promulgated by the Secretary of the Interior, not by Congress, violating the nondelegation doctrine. The Court, relying principally on Mistretta v. U.S., 488 U.S. 361 (1989), found that Congress had laid down an "intelligible principle" to which the delegated authority was directed to conform. The Secretary of the Interior was unambiguously designated as the public agency to apply this policy and was directed to promulgate regulations, and the Secretary had properly found that prohibiting the improper operation of vehicles were enumerated national policies. The Court also rejected the argument that, because the regulations involved criminal conduct, a higher standard than "intelligible principle" should govern. "[T]o deny the legislature the ability to delegate its power to agencies to fill in the details of a legislative mandate would 'stop the wheels of government.'" Further, Congress specifically created the penalties, at 16 U.S.C. § 3, to be imposed (not more than 6 months' imprisonment) for violations of the

regulations.

CARR v. SCHOFIELD, 2004 WL 628208 (Mar. 31, 2004)

Habeas; Brady/Giglio; closing argument; ineffectiveness; capital sentencing

The Court rejected the defendant's *Brady/Giglio* challenge based on an alleged "deal" offered to two key witnesses to prosecute their cases in juvenile court in exchange for their testimony against defendant. Applying AEDPA's deferential review to the state court habeas judgment, the Court noted substantial evidence that there was no such "deal" (and hence no perjury about it) and that, even if there was such a deal, it would not have affected the trial or sentencing outcome in view of the overwhelming evidence against Carr.

The Court also rejected the argument that the prosecutor in closing argument mischaracterized the jury's role in the decision to impose the death penalty, hence there was no violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (prohibiting leading the sentencer to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere).

The Court also rejected Carr's claim that trial counsel was ineffective in presenting mitigating circumstances. Counsel's failure to present the only available evidence that the defendant was less reprehensible than the facts of the case indicate is unreasonable, even where the prosecution has available other crimes evidence in rebuttal that might cast a negative light on the defendant. Nevertheless, while recognizing that counsel must put on more than a "hollow shell" on this issue, and that counsel here failed to call all possible witnesses, the witnesses who did testify

provided positive character information as well as information regarding the physical, emotional and sexual abuse that Carr suffered during childhood, thus providing "the jury with the information necessary to ensure the determination that death was the appropriate sentence."

U.S. v. MORENO, 2004 WL 615092 (Mar. 30, 2004)

Rule 35(b)

The defendant *pro se* appealed the district court's denial of a second Rule 35 motion. The defendant cooperated, but the government's Rule 35(b) motion was denied because the district court concluded the assistance was not based on information unknown to the defendant during the year following sentencing. Rule 35(b) was subsequently expanded to include these circumstances, and the Supreme Court had noted that the amendment took effective 12/1/02 and governed in "all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings then pending." The government filed another Rule 35(b) motion, and the district court again denied it, finding that (1) the criminal case against the defendant had commenced prior to 12/1/02, and (2) the Rule 35(b) proceeding was not pending on that date.

The Court reversed, holding that a Rule 35(b)(2) motion is a separate "proceeding in a criminal case" and that the Supreme Court's order adopting the rules applied to the government's motion filed three years after sentencing because that motion was a separate proceeding in a criminal case commenced after the effective date of the rule.

U.S. v. KIM, 2004 WL 615743 (Mar. 30, 2004)

Sentencing; downward departure;

extraordinary restitution

The Court affirmed the district court's ruling that, "extraordinary restitution, whether paid before or after adjudication of guilt, may, in the unusual case, support a departure from the guidelines." The defendants were grocers, recruited into a WIC program fraud, who had profited by almost \$200,000 over three years, out of a gross profit of almost \$300,000. The Court noted that that the defendant wife pled guilty despite having passed a lie detector test. Under their plea agreements, the defendants agreed to pay restitution for the entire loss from the fraud. By sentencing, they paid that full restitution, based on their savings and loans from family and friends here and in South Korea. The district court specifically found that the basis for the restitution was remorse, not the government-argued desire to reduce their sentences. Both defendants received a downward departure from levels 13 and 10 to level 9, with both receiving probation including some in-home detention. Joining seven other circuits, the Court concluded this factor is not a prohibited factor, but only a discouraged factor. Further, the Court analyzed the relevant factors to conclude that this was the rare case where the restitution was "extraordinary."

U.S. v. GUPTA, 2004 WL 602389 (Mar. 29, 2004)

Jurisdiction; post-verdict motions; Rules 29 & 33; Medicare and wire fraud; different judge on remand

The Court reversed the judgment of acquittal; because the motions to reconsider the earlier denial were filed outside the time limits of Rules 29 and 33, so the district court plainly lacked jurisdiction to entertain them. On the date of the jury verdict, the district court granted the defendants' request for an

extension of "at least three weeks" to file post-verdict motions. One defendant filed a post-trial motion for JOA 24 days later, and the remaining defendants filed motions 28 days later. All motions were denied on the merits. A year later, several defendants moved the court to reconsider the earlier denial and filed additional supporting materials. The court granted both the Rule 29 and 33 motions almost three years after the original motions had been filed. [All parties agreed the JOA grants were not based upon newly discovered evidence or in reliance on the three-year period permitted by Rule 33(b)(1).]

On appeal, the Court found all the initial motions timely, counting the three-week extension plus the initial 7 days allowed for its filing. However, the amended motions for reconsideration were clearly not timely. *See Carlisle*, 517 U.S. at 433 (holding motion filed one day after seven-day limit was untimely and vacating order granting acquittal). *Accord Bramlett*, 116 F.3d 1403, 1405 (11th Cir. 1997) (holding that renewed motion for new trial made outside seven-day period or any extension granted during that period was barred). The untimely reconsideration effectively disregarded the jurisdictional limits of the district court and was an impermissible extension under Rule 33.

Finally, the Court soundly rejected the government's request for assignment of a different judge on remand.

U.S. v. INCLEMA, 2004 WL 603527 (Mar. 29, 2004)

Sentencing; 2B1.1, 2B5.1; counterfeiting; alterations; lenity

The Court **agreed** with the defendant's argument that, because he merely "altered" (by changing the face value) genuine - rather than produced counterfeit - Federal Reserve Notes,

2B1.1 instead of 2B5.1 applied, resulting in a lesser sentence. And in any event, the Court said, "the rule of lenity should apply."

U.S. v. PHILLIPS, 2004 WL 595268 (Mar. 26, 2004)

Sentencing; child support; Deadbeat Parents Punishment Act; 18 USC 228(a)(3); double counting; USSG 2B1.1(b)(7)(C)

The Court rejected the argument that the two-level enhancement under U.S.S.G. § 2B1.1(b)(7)(C), applicable where the conviction involves "a violation of any prior, specific judicial . . . order . . . not addressed elsewhere in the guidelines," did apply to a prosecution based on failure to pay child support. The base offense level under § 2B1.1(a) covered a wide variety of crimes, and did not fully account for the type of harm covered by the enhancement.

U.S. v. PORTILLO, 2004 WL 595293 (Mar. 26, 2004)

Sentencing; correction; Fed.R.Crim.P. 36; jurisdiction; clerical errors

The Court affirmed the district court's *sua sponte* order under Rule 36, four years after sentencing, correcting the written judgment to make restitution payable to the six victims, not the law enforcement agency mistakenly cited in the written judgment, and ordering sole versus joint responsibility for the restitution, since the earlier-sentenced defendant had not been ordered to pay any restitution, and substituting the victims as payees. These corrections were merely clerical ones, which the court had jurisdiction to correct. Rule 36 provides that, "after giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record

arising from oversight or omission." The court could not have made a substantive alteration in the sentence, *Pease*, 331 F.3d 809, 816 (11th Cir. 2003), but the change from shared to sole liability did not "make Portillo's sentence more onerous" because he was fully liable in the first order and the district court was merely correcting its own oversight in not realizing that it had not made the earlier-sentenced co-defendant responsible.

U.S. v. ONE PIECE OF PROPERTY AT 5800 SW 74TH AVENUE, 2004 WL 575094 (March 24, 2004)

The Court reversed a grant of summary judgment in a forfeiture proceeding, even though the government's summary judgment motion was unopposed. However, certain facts contained in attachments to the government's motion, specifically the deposition of the defendant's girlfriend which called into question whether the search of the defendant's home was consensual, in and of themselves created material issues of fact. Consequently, material factual disputes existed, and the district court erred in granting it "by default."

U.S. v. ACOSTA, 2004 WL 584572 (Mar. 25, 2004)

Suppression under 4th and 5th Amendments

The defendant was stopped in his car, told he was not under arrest, and questioned. The defendant gave his identification to officers and was patted down. He answered officers that he did not have any money, weapons, or drugs in the car. He gave written consent to search his car and admitted there was money in the car. Officers found two bags filled with approximately \$278,000. The passenger, who told officers he lived in the apartment they had just left, consented to its search. Inside,

officers found a padlocked duffelbag. The defendant verbally consented to the bag's search and produced the key; officers did not seek his written consent for this search. Inside the bag was more currency and heroin. Officers then read *Miranda* rights and arrested defendant. The defendant claimed the heroin and exonerated the passenger. He was later questioned at the Customs Service, where he was asked to read a *Miranda* form aloud and to initial each paragraph, and his compliance signified his understanding. The Court affirmed the conviction: (1) The initial stop was a valid *Terry* stop; (2) Defendant was not in "custody" when he made his pre-*Miranda* statement; (3) He consented to the bag's search; and (4) The customs officer did not violate his rights by continuing questioning after the defendant had arguably invoked his rights.

U.S. v. RODRIGUEZ-LOPEZ, 2004 WL 584609 (Mar. 25, 2004)

U.S.S.G. § 2L1.1(b)(5); high speed chase; substantial risk of death or serious bodily injury

Defendant pleaded guilty to conspiracy and alien smuggling, 18 U.S.C. § 371 and 8 U.S.C. § 1324(a)(2)(A). He argued the district court erred by misapplying U.S.S.G. § 2L1.1(b)(5), which provides for a two-level enhancement when a smuggling offense "involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person." The Court affirmed, holding the district court did not clearly err in finding his participation in the high speed chase created a substantial risk of death or serious bodily injury to the aliens that he was transporting.

U.S. v. WALDON, 2004 WL 584593 (Mar. 25, 2004)

Grand Jury; Federal Death Penalty Act; sentencing; jury; death qualification

The Court affirmed the conviction of a former police officer for a crime spree culminating in a robbery and murder of a convenience store owner. The Court rejected claims based upon perceived grand jury irregularities, refusal to suppress his own grand jury testimony, and the death qualification of the jury. The Court also rejected his sentencing claim that, when the jury failed at sentencing to recommend either death or life, the language of the Federal Death Penalty Act ("FDPA") precluded the trial judge from giving him a life sentence.

U.S. v. ORREGA, 2004 WL 575107 (Mar. 24, 2004)

Downward departure; U.S.S.G. § 5K2.20; no mootness due to deportation

The defendant pleaded guilty to using a means of interstate commerce to entice a minor to engage in sexual acts, in violation of 18 U.S.C. § 2422(b). The PSI noted that he was "technically eligible for a downward departure pursuant to U.S.S.G. § 5K2.20 for aberrant behavior," but concluded it was "not appropriate in this case." The district court departed downward anyway, because the defendant had "no previous criminal record, worked, and attended school to better himself. . . . a 'textbook example of aberrant behavior,'" and sentenced him to probation. The Court reversed, holding (1) the government's appeal of Orrega's sentence is not rendered moot by the fact that the defendant was deported during the pendency of the appeal; and (2) this is not an "extraordinary case" under § 5K2.20 to render the conduct "aberrant behavior."

U.S. v. CORREA, 2004 WL 541172 (Mar. 19, 2004)

Fed. R. Crim. P. 33; ex post facto clause

More than three years after conviction, the defendant filed Rule 33 motions seeking a new trial. The rule was amended December 1, 1998. The old Rule required that motions grounded on newly discovered evidence be made "within two years after final judgment," whereas the amended rule relies on the date of the verdict as the triggering event and enlarges the time frame to three years. The Court held that application of the amended rule was just and practicable and did not violate the Ex Post Facto Clause. Therefore, the Court applied it retroactively in this case to affirm the dismissal of his motions.

U.S. v. O'NEAL, 2004 WL 541183 (Mar. 19, 2004)

Apprendi/plain error; reasonably foreseeable quantity

Defendants claimed on appeal that the jury's verdict form insufficiently apprised the jury that it was required to find drug quantity and type beyond a reasonable doubt, in violation of *Apprendi*. The Court, looking at the verdict form and the instructions, found no plain error requiring reversal. The only standard of proof included in the court's instructions was beyond a reasonable doubt, and "there is no reason to think that the jury did not understand that this standard applied to all its determinations. The law does not require that the standard of proof be included in the verdict form." Alternatively, even if the instructions were erroneous, it was harmless under *Sanchez*, 269 F.3d 1250 (11th Cir. 2001) (en banc). Also, the district court did not commit reversible error in failing to find that the quantity of cocaine that triggered mandatory sentences for two defendants was reasonably foreseeable to each defendant. Sufficient individual findings had been made as to two defendants, and the court's omission as to a third defendant did not affect

his substantial rights under the plain error test.

U.S. v. THURSTON, 2004 WL 541177 (Mar. 19, 2004)

Double jeopardy; reindictment; prosecutorial misconduct

Defendant was indicted for violating 18 U.S.C. § 1115, which makes it a federal offense for an officer of a U.S. vessel to cause the death of another person through misconduct, negligence, or inattention to his duties. He pleaded guilty based on simple negligence. At the sentencing hearing, the district court determined that § 1115 required gross negligence and, consequently, set aside the guilty plea and dismissed the indictment as defective. The defendant, reindicted for gross negligence, moved to dismiss the second indictment under the Double Jeopardy Clause of the Fifth Amendment. The district court denied the motion to dismiss. The Court affirmed: "We conclude that the withdrawal of a guilty plea and the vacation of a guilty plea, as occurred in the instant case, are not sufficiently different" and therefore "we hold that a defendant's jeopardy does not terminate when, upon the defendant's motion, an indictment is dismissed or a guilty plea is vacated." The Court also found that the government did not engage in prosecutorial misconduct in the initial proceedings to warrant application of double jeopardy principles.

U.S. v. RAINEY, 2004 WL 442688 (Mar. 11, 2004)

Sentencing; ACCA; 4B1.4; violent felony; attempted arson

The Court decided an issue of first impression, concluding that an attempt to commit an enumerated felony under 18 U.S.C. § 924(e) constitutes a violent felony. The Court noted the terms "crime of violence" and "violent

felony" are not interchangeable, citing *Wilkerson*, 286 F.3d 1324 (holding that conspiracy to commit robbery presents serious risk of physical injury to another and thus was violent felony under 924(e)(2)(B)), and *Mendoza-Cecelia*, 963 F.2d 1467 (holding that attempted arson is crime of violence under U.S.S.G. § 4B1.2). Noting that § 924(e)(2)(B)(ii) enumerates arson as a violent felony, the Court concluded that attempted arson should also be considered a violent felony because, like conspiracy, it presents the potential risk of physical injury to another.

DIAZ V. SECY., DEP'T OF CORRECTIONS, 2004 WL 464631 (Mar. 10, 2004)

Habeas; statute of limitations; equitable tolling; pro se; advice; actual innocence

The Court rejected the petitioner's two claims for equitable tolling of the statute of limitations in this habeas action. "Equitable tolling is to be applied when 'extraordinary circumstances' have worked to prevent an otherwise diligent petitioner from timely filing his petition." Thus, such a petitioner must show both extraordinary circumstances and due diligence. The Court distinguished this case from precedent because the district court had not recharacterized the petition or taken any action on its own, but rather had granted the (pro se) petitioner's request. The Court concluded the petitioner had failed to prove due diligence, given the delay in filing his initial petition (258 days) and the second petition (274 days after state proceedings ended). Thus, the Court declined to resolve the merits of a district court's burden to advise a defendant prior to allowing dismissal of his first habeas, to the effect that it might result in the second petition being time-barred; and (2) the Court did not

address the "actual innocence" argument, as grounds for equitable tolling, because it was not included in the COA.

U.S. v. McCRIMMON, 2004 WL 434630 (Mar. 10, 2004)

Sufficiency; Ponzi scheme; money laundering

The Court found that Judge Collier had correctly denied the motion for judgment of acquittal and there was sufficient evidence to support the conviction for conspiring to enroll investors in an illegal Ponzi scheme and to launder the money, and also that the defendant was properly held accountable for the total amount lost to investors in the overall conspiracy, \$51 million, even though he only generated commissions for himself and his company of \$2 million.

U.S. v. DAVIDSON, 2004 WL 370367 (Mar. 1, 2004)

Sentencing; child pornography

The government appealed the 33-month sentence imposed following Davidson's plea of guilty to receiving and attempting to receive images of child pornography. The government argued that the district court erred in sentencing him under U.S.S.G. § 2G2.4 rather than § 2G2.2, because Davidson pled guilty to receipt of child pornography under 18 U.S.C. § 2252A(a)(2), and not merely possession of child pornography under § 2252A(a)(5)(B), the language and history of § 2G2.2 dictates that it, and not § 2G2.4, is the appropriate sentencing guideline. Applying *United States v. Dodds*, 347 F.3d 893 (11th Cir. 2003), the Court disagreed and held that § 2G2.4 is the appropriate guideline to be applied under the facts of this case.

U.S. v. BLAS, 360 F.3d 1268 (Feb. 19, 2004)

Sentencing; standard of review;

PROTECT; sexual conduct with minor; misrepresenting identity; 2A3.2; upward departure; atypical case; extreme conduct

The Court applied the higher standard of review under the PROTECT Act, which was enacted after the offense and sentencing; the result was to **raise** the standard of review on the upward departure from abuse of discretion to de novo. The defendant, via the Internet, had enticed one teenage girl in Florida to eventually have sex with him, when he knew he was HIV positive; he didn't tell the first but said he used a condom; he told the second teenager he attempted to seduce that his medication prevented transmission. The Court did not address the argument that the defendant's misrepresentation about his age (18 v. 47) only lasted two weeks, was corrected before it became sexual, and did not compel the subsequent sexual conduct. Instead, the Court found that the upward, 7-level departure to the statutory maximum 180 months was justified under either 5K2.8 ("unusually heinous, cruel, brutish or degrading") or 5K2.0 (outside heartland) and was reasonable.

QUINCE v. CROSBY, 360 F.3d 1259 (Feb. 18, 2004)

Habeas; recusal; ineffectiveness; conflict; capital sentencing

The Court held that the failure of a state court judge to recuse himself in a collateral proceeding was not cognizable on habeas, because the claim went to an issue unrelated to the cause of petitioner's detention. Noting the claim could have been that there was a deficiency which rendered the state proceedings less than full and fair, thereby removing the presumption of correctness with respect to judge's findings, the Court expressed doubt that the judge's technical

involvement in petitioner's direct appeal (the judge had been the administrative coordinator of appeals in the PD's office where the trial attorney worked at the time) was sufficient to undermine the presumption. Also, trial counsel was not ineffective based on a conflict due to his position as a special deputy sheriff, under either the *Strickland* or *Cuyler* standards, because there was no actual conflict of interest; the position was merely an honorary title and carried no law enforcement duties, but merely served the purpose of allowing counsel to carry a firearm; further, it resulted in no perceived detriment to petitioner's representation. Finally, the trial court had not failed to consider nonstatutory mitigation; this argument had been rejected already by the state supreme court and, further, was fairly supported by the record.

RIVERA v. LEAL, 359 F.3d 1350 (Feb. 11, 2004)

Prosecutorial immunity

The Court held that a prosecutor is absolutely immune to suits for money damages under 42 U.S.C. § 1983, where the prosecutor obtained the driver's license records of a wrongly-arrested person and one other, erroneously concluded the second person was actually the wanted party, and shared that (unsworn) opinion with a state judge during a court proceeding.

U.S. v. AISENBERG, 358 F.3d 1327 (Feb. 6, 2004)

Hyde amendment

The government appealed the district court's order granting: (1) attorney's fees of \$2,680,602.22 under the Hyde Amendment for the bad faith prosecution of Steven and Marlene Aisenberg in connection with the disappearance of their daughter Sabrina, and (2) the wholesale disclosure of all grand jury

transcripts. The Court (1) accepted the unquestioned application of the Hyde Amendment but reduced the fees to \$1,298,980.00 under the statutory standard, and (2) vacated the ordered disclosure of all grand jury transcripts, because "the public already knows" about the government's misconduct and did not need the transcripts' further detail.

U.S. v. EVANS, 358 F.3d 1311 (Feb. 5, 2004)

Controlled substance; counterfeit; intent; career offender; 4B1.1

The Court rejected the argument that a conviction for attempt to commit a controlled substance offense, under 21 U.S.C. §§ 841 & 846, should be set aside because it involved chalk, not drugs. The Court explained that the defendant had pled guilty and that looking solely to the elements of the attempt offense -- which require proof merely that the defendant possessed the mens rea for the underlying offense and that he took a substantial step toward the commission of the crime -- the fact that there was no controlled substance did not undermine the conviction. The Court also affirmed the defendant's career offender enhancement under U.S.S.G. § 4B1.1.

U.S. v. ORTEGA, 358 F.3d 1278 (Dec. 5, 2003)

Appeal; dismissal; downward departure; court discretion

The Court first gave the defendant the benefit of the doubt and agreed the district court's statements reflected some ambiguity whether it mistakenly believed it lacked discretion to depart downward. The Court then disagreed, however, that a downward departure was appropriate because, the defendant argued, the guidelines for illegal reentry do not

adequately take into account the differences in severity between underlying prior felony convictions. The mitigating circumstance was adequately taken into consideration by the Commission, and the Commission had deleted the application note in the 2000 Guidelines that had previously allowed for downward departure based on the seriousness of the aggravated felony.

U.S. v. DRURY, 358 F.3d 1280 (Feb. 3, 2004)

Federal murder-for-hire statute; 18 USC 1958; interstate commerce element; "use" of facility; evidence of defendant's truthful character; FRE 608

The en banc Court voted to rehear the case en banc and vacated the prior panel opinion, 344 F.3d 1089 (11th Cir. 2003), which had affirmed the defendant/doctor's murder-for-hire conviction based on his "use" of facilities in manner implicating interstate commerce, based on the fact that the defendant's cell phone calls (all local in Brunswick, Georgia) had been routed through a Jacksonville switching center, and rejected numerous arguments. Marcus' special concurrence had "strongly disagree[d] with the majority's conclusion that 18 U.S.C. § 1958's jurisdictional element can be satisfied only by a showing that the action taken in furtherance of a murder-for-hire scheme involved the actual crossing of state lines. Instead, I have little doubt that the purely intrastate use of *an instrumentality of interstate commerce* is sufficient to confer jurisdiction under 1958. . . . As a corollary, I also respectfully disagree with the majority's determination in section C of its opinion that the district court erred under *United States v. Gaudin*, 515 U.S. 506, . . . by instructing the jury that a telephone is *per se* a

facility in interstate commerce." Local panel attorney Bill Bubsey advises there were two bases for the petition for rehearing en banc: whether or not the interstate commerce element should have been given to the jury because it is a mixed question of law and fact, and whether the district court erred in excluding testimony that the doctor had a reputation for truthfulness, as rehabilitative evidence under the "otherwise attacked" provision in Rule 608(a)(2), FRE, in response to government affirmative challenges to his credibility. (We await the final decision.)

POPE v. RICH, 358 F.3d 852 (Jan. 30, 2004)

Habeas; 2254; ineffectiveness of appellate counsel; procedural bar

The Court affirmed denial of the claim, because the defendant's failure to apply for a certificate of probable cause to appeal the denial of his state habeas petition to the Georgia Supreme Court was a failure to exhaust all available state remedies.

CASTRO v. U.S., 358 F.3d 827 (Jan. 29, 2004)

Recharacterizing habeas petition

On remand after the Supreme Court's reversal, the Court remanded for the district court to "consider the merits of Castro's petition." The Supreme Court held that, when a district court treats as a request for habeas relief under 28 U.S.C. § 2255 a motion that a pro se federal prisoner has labeled differently, "the district court must notify the pro se litigant that it intends to recharacterize the pleading, warn the litigant that this recharacterization means that any subsequent § 2255 motion will be subject to the restrictions on 'second or successive' motions, and provide the litigant an opportunity to withdraw the motion or to

amend it so that it contains all the § 2255 claims he believes he has."

ADEFEMI v. ASHCROFT, 358 F.3d 828 (Jan. 29, 2004), reh'g en banc granted, 335 F.3d1269 (Feb. 24, 2004)

Immigration appeals, discretionary deportation waiver

Most recently, the Court has voted to rehear this case en banc. Initially, a panel of the Court (2-1) reversed a Board of Immigration (BOI) decision finding Adefemi, a Nigerian citizen, ineligible for a deportation waiver under 8 U.S.C. § 1182(c) (repealed 1996), due to a two-sided traffic ticket which indicated on its face that police officer had cited alien for firearms offense, but which offered only a cryptic record of how this citation was ultimately disposed. Then on rehearing, again 2-1, the Court vacated and withdrew the previous opinion but reached the same result: "In sum, we think the 'clear and convincing' evidentiary standard applicable in deportation proceedings requires something more than this ambiguous ticket before an individual may be 'compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification.' [] We also think a reasonable factfinder would have to conclude that the INS has not shown by clear and convincing evidence that Adefemi was convicted of a firearms offense."

U.S. v. SAUCEDO-PATINO, 358 F.3d 790 (Jan. 27, 2004)

Downward departure; standard of review; retroactivity of PROTECT act; ex post facto

Defendant pled guilty to illegal reentry after deportation subsequent to an aggravated felony conviction and received an 8-level downward departure under U.S.S.G. § 5K2.0

based on (1) the nature of his prior conviction, and (2) his claim that he reentered the United States to support his family. When the government appealed, the Court reversed, holding (1) the PROTECT Act (Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act) applies retroactively to change the standard of review of the district court's decision to downward depart from abuse of discretion to de novo review, and does not violate the Ex Post Facto Clause because the Act "merely changes 'who within the federal judiciary makes a particular decision, ... not the legal standards for that decision'"; (2) the district court was prohibited from departing downward 8 or more levels where its only basis for doing so was the nature of the underlying offense; and (3) the defendant's motive for reentering the United States was not a valid basis.

U.S. v. BREITWEISER, 357 F.3d 1249 (Jan. 26, 2004)

Sentencing; abusive sexual contact with minor; evidence; venue

Two teenaged girls were approached by the defendant at an airport; he made conversation, then sat next to one of them on the flight and engaged in inappropriate touching and appeared to be masturbating. When he left his seat briefly, another passenger who had observed notified the flight attendants, who then ensured the girls' safe conduct to their connecting flight. Defendant was convicted of abusive sexual contact with a minor as a repeat sex offender 18 U.S.C. §§ 2244(a)(3) and 2247, and simple assault of a minor, 18 U.S.C. § 113(a)(5). The Court affirmed his convictions and sentences, holding: (1) venue was proper; (2) evidence of prior sexual conduct with children was relevant to

show motive, intent, knowledge, plan and preparation, and lack of mistake; (3) probative value of evidence was not outweighed by its prejudicial effect; (4) evidence of defendant’s subsequent hospitalization was not relevant; (5) district court, in determining whether to sentence as repeat sex offender, properly looked past defendant’s prior state court conviction for endangering the welfare of a child; (6) district court did not commit reversible error in looking at defendant’s plea colloquy in prior state court conviction to determine whether to sentence as repeat sex offender; and (7) sentence enhancement as repeat offender was appropriate.

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