

FEDERAL PUBLIC DEFENDER

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NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

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LATEST ON BOOKER

The decision in United States v. Booker, 125 S. Ct. 738 (2005), this past January has spawned a series of ongoing debates. At the center of them are a number of questions: (1) How much discretion do sentencing judges have to impose sentences below or above the Guidelines range? (2) What amounts to plain error/harmless error? (3) Do considerations of due process prohibit sentences above the Guidelines range for those who committed their crimes prior to the Booker decision? (4) Does the decision apply retroactively? And, (5) What amounts to a “reasonable” sentence for purposes of appellate review?

If you’re looking for answers, there are a number of places you can go. The Federal Public Defender’s Office for the Eastern District of Pennsylvania has prepared a wonderfully comprehensive analysis of all aspects of the Booker decision in their *Booker Litigation Strategies Manual*. You can find it at the Office of Defender Services Training Branch website, www.fd.org. There is an excellent article in the March issue of *The*

Champion, the magazine published by the National Association of Criminal Defense Lawyers. (We’d be happy to provide you with a copy). Fran Pratt, an Assistant Federal Public Defender in Virginia, has prepared an exhaustive outline that, like the *Litigation Strategies Manual*, is available at the Training Branch website. There is also the outline we maintain on our webpage, and a video of the presentation Randy Murrell gave earlier this month. Just call us at the Tallahassee office if you’d like to borrow the video.

Two district court cases, United States v. Ranum, 353 F.Supp.2d 984 (E.D. Wis. 2005), and United States v. Wilson, 350 F.Supp.2d 910, *reconsid. denied* 355 F.Supp.2d 1269 (D. Utah 2005), map out the debate over sentencing discretion. Judge Adelman, in Ranum, contends that the sentencing considerations established by Congress in 18 U.S.C. § 3553 often conflict with the limitations contained in the Guidelines and that, by necessity, full consideration of those factors will sometimes result in sentences outside the Guidelines range (a “variance” or as some suggest “statutory sentence”). She

says that “Booker is not an invitation to do business as usual.” 353 F.Supp.2d 987. The potential of Judge Adelman’s analysis can be seen in cases such as United States v. Nellum, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005), where the judge considered a long list of factors in imposing a sentence below the Guidelines range. In another one of Judge Adelman’s opinions, United States v. Smith, 359 F.Supp.2d 771 (E.D. Wisc. 2005), and in Simon v. United States, 2005 WL 711916 (E.D.N.Y. Mar. 17, 2005), the rationale has been used to justify a lesser sentence in crack cocaine cases by challenging the sentencing disparity between crack and powder cocaine.

In Wilson, Judge Cassell takes the opposite view, finding in essence that Booker is *almost* an invitation to do business as usual. He says that “[i]n all but the most unusual cases, the appropriate sentence will be the Guidelines sentence.” 353 F.Supp.2d at 913. He contends that the Sentencing Guidelines Commission is in a better position to determine what sort of sentence will fulfill Congress’ sentencing goals and that the Sentencing Commission considered those goals in establishing the Guidelines.

The subject of plain error is generating a vigorous debate in the courts of appeal. The cases in which the issue arises are, of course, those in which there was no objection in the trial court. The question is what will suffice to win the defendant a remand for a new sentencing hearing. The positions taken by the different courts are clearest in the context of those cases where the sentence is based on judicially-determined facts, i.e., a Sixth Amendment violation. The Eleventh Circuit opinion, in United States v. Rodriguez, 398 F.3d 1291, *reh’g en banc denied* (11th Cir. April 19, 2005), *petition for cert. filed*, No.

04-1148 (U.S. Feb. 23, 2005), exemplifies the least charitable view, requiring defendants to make a showing that most cannot - that there’s a reasonable chance the defendant would receive a lesser sentence upon remand. A middle position of sorts is found in cases such as the Seventh Circuit’s decision in United States v. Paladino, 401 F.3d 471 (7th Cir. 2005). There, the court held that, if the appellate court cannot determine whether the district court would impose a different sentence upon remand, the case is to be remanded for the limited purpose of asking the district judge if he or she would impose a different sentence. Finally, in cases such as United States v. Hughes, 401 F.3d 540 (4th Cir. 2005), and United States v. Oliver, 397 F.3d 369 (6th Cir. 2005), the courts are remanding for resentencing in nearly every instance where the sentence was based on facts solely determined by the judge.

Where the defendant did object in the trial court, and the circuit court reviews the case for harmless error rather than plain error, the outcomes have been more consistently favorable, with most courts remanding for new sentencing proceedings. *See, e.g., United States v. Sharpley*, 399 F.3d 123 (2d Cir. 2005), and United States v. Haidley, 400 F.3d 642 (8th Cir. 2005). One of our lawyers, Chet Kaufman, argued a harmless error case last week before the Eleventh Circuit where Judge Vinson had said, as did many of the Northern District Judges, that he would have imposed the same sentence even if he were not bound by the Guidelines. We’ll see how it turns out.

One issue that has drawn little if any attention is that of whether a district court may, under Booker’s new advisory Guidelines, impose a sentence above that permitted by the Guidelines in the case of a defendant who

committed his crime prior to the decision in Booker. We've taken the position that due process considerations prohibit the judge from doing so. If you'll go to our webpage, you'll find our argument under the banner "Booker: Fair Notice." *See also: Booker Litigation Strategies Manual*. If you plan to make the argument, be forewarned that the Eleventh Circuit in United States v. Duncan, 400 F.3d 1297 (11th Cir. 2005) has included some language that the Government will surely cite. As explained in our argument, though, it is our view that Duncan addresses a different issue.

Of the courts that have considered the issue of retroactive application of Booker, all have concluded that the decision does not apply retroactively. *See, e.g., Varela v. United States*, 400 F.3d 864 (11th Cir. 2005). Nonetheless, there is an argument to the contrary. You can find the argument in United States v. Sigelbaum, 359 F.Supp.2d 1104, 1107-1108 (D. Or. 2005); United States v. Kelley, 355 F.Supp.2d 1031, 1039 (D. Neb. 2005); Note, *Rethinking Retroactivity*, 118 Harv. L. Rev. 1642, 1644 (2005); and the *Booker Litigation Strategies Manual*.

In his part of the majority opinion in Booker, Justice Breyer established a new standard for appellate review of sentences, that of whether the sentence is "unreasonable." 125 S. Ct. at 765. The debate over the interpretation of that standard is just now surfacing in the circuit courts. In United States v. Rubenstein, 2005 WL 730081 (2nd Cir. Mar. 31, 2005) (Cardmone, J., concurring), there is a suggestion that even a sentence within the Guidelines range could be unreasonable. There are cases, too, that have found generous sentences with inadequate justification to be unreasonable. *See, e.g., United States v. Rogers*, 400 F.3d 640 (8th Cir. 2005), and

United States v. Smith, No. 02-13211 (11th Cir. April 18, 2005) (unpublished). If a variance is to be found reasonable, it seems clear that the judge is obligated to announce his or her reasons for imposing it. *See, e.g., United States v. Webb*, 2005 WL 763367 (6th Cir. April 6, 2005), slip op. at 7 ("[W]e read Booker as instructing appellate courts in determining reasonableness to consider not only the length of the sentence but also the factors evaluated and the procedures by the district court in reaching its determination"), and Hughes, 401 F.3d at 546 ("If the court imposes a sentence outside the guideline range, it should explain its reasons for doing so").

LEGISLATIVE RESPONSE TO BOOKER?

Although the American Bar Association as well as the United States Judicial Council have recommended that Congress wait and see how sentencing fares under the current procedures, there is legislation pending in the United States House of Representatives aimed at creating a new harsher sentencing scheme. The proposed legislation, H.R. 1528, would sharply limit judicial discretion by essentially transforming federal sentencing into a system of mandatory minimum sentences and by creating a new series of mandatory minimum sentences for some drug offenses.

The bill, introduced by Wisconsin's U.S. Representative James Sensenbrenner, bears the name of "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005." It is a title that gives little hint of the breadth of the legislation. By modifying the sentencing statute (18 U.S.C. § 3553), Section 12 of the proposal effectively prohibits a sentencing

judge from imposing a sentence below the Guidelines range, but leaves intact the newly established Booker discretion to impose sentences above the Guidelines range. The transformation is accomplished by prohibiting sentencing judges from considering a list of about every conceivable reason that might justify a sentence below the Guidelines range. Among the 36 prohibited reasons are such things as family ties and responsibilities, mental and emotional condition, role in the offense, likelihood of recidivism, effect of the defendant's incarceration on others, military service, and reports of the Sentencing Commission. The only real exceptions would be substantial assistance or a "fast-track" plea agreement.

The proposal increases the mandatory minimum penalties for various drug offenses: for selling or manufacturing controlled substances in the vicinity of various facilities - schools, day care centers, video arcades - or for employing minors in the distribution of controlled substances (under 18 U.S. C. §§ 860-861). It adds libraries and drug treatment to the list of facilities. It also adds mandatory minimum penalties for maintaining drug-involved premises (18 U.S.C. § 856) to which children have access.

If Representative Sensenbrenner has his way, the Sentencing Commission would have to increase the penalties under the Guidelines in a number of ways. Among the circumstances that would produce higher offense levels are those of committing a drug offense near the presence of a minor or incompetent person, that of being a parent and endangering the safety of a minor by manufacturing a controlled substance, and possessing a firearm in connection with a drug offense in a residence occupied by a minor. The

Commission would have to limit the application of the safety valve to those who "have done everything they can to assist the government." Eligibility for the mandatory minimum life sentences for drug trafficking in the higher of the established drug ranges (21 U.S.C. § 841(b)(1)(A)) would be expanded by allowing the predicate two prior offenses to be, in addition to felony drug offenses, crimes of violence. The Commission would also have to expand the definition of relevant conduct for conspiracies.

A growing number of groups have taken a stance opposing the legislation: the Judicial Conference of the United States; the American Bar Association; the Chamber of Commerce; a group of former United States Attorneys that includes W. Thomas Dillard, the U.S. Attorney for the Northern District of Florida from 1983-1986; and a large group of law professors that includes Christopher Slobogin from F.S.U., Robert Batey from the University of Florida, and Dan Markel from Stetson. The United States Sentencing Commission, in a letter of April 19, has also been critical of the proposal. In its opposition, the ABA states: "It is quite possible if not likely that a majority of the Supreme Court will find the statute inconsistent with its rulings in Blakely, Booker, and Fanfan."

The bill has been approved by a 6-1 vote in one House subcommittee. Last Friday, the bill was referred to the House Subcommittee on Health.

BOOKER IN THE REAL WORLD

Despite the intense legal debates and efforts to radically change the federal sentencing scheme, the overall effect of the Booker decision has not been dramatic. The most recent statistics

show that between April 5, 2005, and the January 12, 2005, Booker decision, there have been 9,282 sentences imposed throughout the country. In those cases, district courts have imposed sentences below the Guidelines in 36.8% of the cases. While 9.1% of those appear to be based upon the newly established Booker discretion, the overall percentage of downward departures is less than 3% higher than the 34.2% rate of departures in Fiscal Year 2002, the most current year for which sentencing statistics are available.

Although it is still only a tiny fraction of sentences imposed, the percentage of sentences above the Guidelines has more than doubled. Between January 12, 2005, and April 5, 2005, 1.8% of the sentences were above the Guidelines. There were upward departures in only .8% percent of the cases in Fiscal Year 2002. In slightly more than half of the higher-than-Guidelines sentences imposed since Booker, the courts have relied upon Booker to justify the sentence.

Here in the Northern District, there have been roughly 60 sentences imposed since the Booker decision. While we probably lack a complete picture, we do not know of any Booker variances imposed by Judge Hinkle, Judge Collier, Judge Vinson, or Judge Paul. Judge Rodgers and Judge Mickle, however, have imposed variances both above and below the Guidelines. If our count is right, Judge Mickle has imposed a downward variance in probably 5 or 6 cases and upward variances in 2 cases. It appears that Judge Rodgers has imposed one upward variance and one downward variance.

NEW VOUCHER REVIEW

Randy Murrell

In January I met with most of our district judges and came away from the meeting with a new assignment - that of reviewing the vouchers submitted by panel members. My job is to review the vouchers for "reasonableness." Subsequently, Judge Hinkle let me off the hook for his cases, but since January, I've been reviewing the vouchers submitted to the other judges. The Clerk's office continues to examine the vouchers for compliance with the technical requirements. The judges continue to make the final decision about payment.

Mechanically, it works like this. Shortly after receiving the voucher, the Clerk's office scans the vouchers, the worksheets, and any motion for an amount in excess of the maximum compensation, and sends it all to me via email. Although I don't always make my self-imposed deadline, I try to review the voucher and send a return email to the Clerk's office within roughly 24 hours. From there, my review and the voucher goes on to the judge.

Unless the request is for minimal compensation, in addition to reviewing what the Clerk sends, I usually take a look at the docket through PACER and often take a look at pleadings filed in the case. On relatively rare occasions I have called the panel member to talk about the case or a particular entry on the worksheet. I welcome any input that panel members have, so if you have a voucher and you think there is anything that would aid in my review of it, you're welcome to call me.

While this is not a task I asked for, a significant percentage of the Federal Public Defenders around the country also review vouchers. Some federal defender offices also review the vouchers for technical compliance.

I've contacted many of the defenders and most take a positive view of the job. They see it as an opportunity to assist panel members in securing fair payment for their efforts.

In recent years, I haven't heard much in the way of complaints about the judges reducing vouchers. Given that and given my meeting with the judges, it is my impression that the judges are generally satisfied with what they have been receiving from the panel members. I don't, for example, think the judges have asked me to review the vouchers because they believe there is a problem with excessive claims. Having met with the judges, it seems to me that they have asked for my view simply for the purpose of incorporating the perspective of someone who practices criminal defense in making their judgment about the vouchers.

I can say that in reviewing the vouchers there is a range in the detail provided from one panel member to the next. I can say, too, that my job and, presumably, the job of the judge, is easier in those instances where there is a certain level of detail provided. For example, "review guidelines section on career offender for definition of 'two felony convictions'" is much more helpful than "research."

I'd say, too, your chances of getting full compensation, be it from one of our district judges or the Eleventh Circuit, are enhanced by a well-prepared voucher. In hopes of showing what some of the more carefully drawn vouchers look like, I've received permission from a couple of panel lawyers to publish their vouchers on our webpage. They'll be up there in the next couple of days, under the banner of "Sample CJA Vouchers." It wouldn't hurt to take a look at them.

DROPPING CASELOAD

We've noticed in our offices a drop in our caseload over the last year or two. Statistics from the Administrative Office of the Courts confirm that there have been fewer criminal cases filed in the Northern District of Florida. For fiscal year 2003, the government filed 600 cases. In fiscal year 2004, they filed 509 cases, some 15% fewer cases.

Across the country, case filings were relatively stable, growing by only 380 cases. While the number of cases increased in 44 districts, at least 29 districts received at least 10% fewer filings than they did in 2003.

ONE LESS REASON FOR PRETRIAL DETENTION

In a case with important day-to-day implications, the Eleventh Circuit Court of Appeals in United States v. Johnson, 399 F.3d 1297 (11th Cir. 2005), has held that, for detention purposes, the crime of possession of a firearm by a convicted felon (18 U.S.C. § 922(g)), is not a "crime of violence." In Cornelius Johnson's case, the question arose in the context of his release following his entry of a guilty plea. Under 18 U.S.C. § 3143 (2), the statute governing release pending sentencing, absent unusual circumstances, the sentencing judge must incarcerate the defendant following a guilty plea or a guilty verdict (1) if the circumstances described in 18 U.S.C. § 3142(f)(1) exist, and (2) if the defendant fails to establish by clear and convincing evidence that he is not likely to flee or pose a danger to others. In Johnson's case, the judge found that the requisite circumstances existed and that Johnson failed to make the requisite showing.

Subsection 3142(f) of Chapter 18 creates six

categories of circumstances. Three of those categories are based on the nature of the offense charged (of which the first is a "crime of violence"); one is based on the defendant's prior record (two or more convictions for specified offenses); and two on the risk that the defendant will flee, obstruct justice, or threaten a witness or juror. The existence of those §3142(f) circumstances also determine whether the government, following an individual's arrest, is entitled to a detention hearing and whether an individual may be detained on the basis of dangerousness. That is, unless those circumstances exist, the government is not even entitled to a detention hearing and a defendant may not be detained on the basis that his release would endanger the safety of other persons or the community. *See, e.g., United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1998); *United States v. Dillard*, 214 F.3d 88, 91 (2^d Cir. 2002); *United States v. Himler*, 797 F.2d 156, 160 (3^d Cir. 1986); *United States v. Byrd*, 969 F.2d 106, 109 (5th Cir. 1992).

In Johnson's case, the district court judge found one of the § 3142(f) circumstances because Johnson had entered a guilty plea to the charge of possession of a firearm by a convicted felon, which the Court concluded was a crime of violence. Whether that offense is a crime of violence, though, has been debated among the circuit courts with different outcomes, some concluding it is a crime of violence, *see, e.g., United States v. Dillard*, 214 F.3d 88 (2d Cir. 2000), others concluding it isn't, *see, e.g., United States v. Singleton*, 182 F.3d 7 (D.C. Cir. 1999). Fortunately, for Mr. Johnson, and some of our current and future clients, the Eleventh Circuit concluded that the offense "is simply not the sort of violent, active crime that may be properly characterized, categorically, as a 'crime of

violence.'" *Johnson*, 399 F.3d at 1302.

Accordingly, Mr. Johnson was entitled to be released pending his sentencing without having to make that clear and convincing showing. Maybe more importantly for our purposes, it limits the government's ability to detain an individual who is charged with the crime of possession of a firearm by a convicted felon. Specifically, it means the government cannot even have a detention hearing if their only claim is that the defendant is dangerous. If there is to be a hearing, the government must at least claim there is a "serious risk" that the accused will flee or that there is a "serious risk" he will obstruct justice, or threaten or intimidate a prospective witness or juror. It means, too, that the defendant may not be detained on the basis that he "will endanger the safety of any other person or the community."

MAGISTRATE JUDGES DAVIS AND SHERRILL REAPPOINTED

The District Court Judges of the Northern District of Florida have reappointed both Judge Miles Davis and William Sherrill, Jr., to serve new 8-year terms as magistrate judges. Judge Davis' new term was effective November 26, 2004; Judge Sherrill's December 1, 2004.

PRISON POPULATION CONTINUES TO EXPAND

Statistics Released by the Bureau of Justice show that 2,121,180 individuals were in the nation's jails and prisons as of June 30, 2004. It represents a 2.3% increase since July 1, 2003, a rate of increase less than the 3.5% average annual increase that has occurred since the end of 1995. During the 12 month period that ended on June 30, 2004, the

number of individuals in state custody increased 1.6%, while the number in federal custody increased 5.1%.

With a prison population of 84,733, the State of Florida has the 5th highest prison population among the states. With 489 individuals per 1,000 residents serving prison sentences, Florida has the 10th highest incarceration *rate* in the nation. Maine has the lowest incarceration rate, with 149 prisoners per 1,000 residents, while Louisiana, with 814 prisoners per 1,000 residents, has the highest rate. Since the end of 1995, the overall state incarceration rate has increased by about 14%, while during that same time the federal incarceration rate has increased by 66%.

Twenty percent of all federal prisoners were non-citizens as of midyear 2004. Among males age 25 to 29, 12.6% of blacks were in prison or jail, compared to 3.6% of Hispanics, and about 1.7% of whites.

VICTORIES

In Pensacola, **Jim Jenkins** endured a trial of 8 weeks and won an acquittal from a Pensacola jury for his client, Douglas Kordel. The government had charged Kordel, who is a young lawyer, with conspiracy to commit mail fraud, money laundering, 5 counts of mail fraud, and 3 counts of transporting fraudulently obtained property across state lines. In the case, which involved the sale of investments in viaticals, Jim successfully argued that there was little evidence that his client participated in the fraud and that what evidence did exist simply wasn't credible. Two codefendants were convicted of all charges.

Tallahassee panel member **Richard Greenberg** won an acquittal for Marlon

Brown who had served seven years on a 22-year sentence. Earlier this year, **Gwen Spivey**, of our Tallahassee office, convinced the Eleventh Circuit to overturn Brown's convictions for participating in a cocaine conspiracy and possessing a firearm on the basis that Brown wasn't advised by trial counsel that he had a right to testify and that it was his decision whether to do so. Brown testified this time, explaining that he was not a member of the conspiracy and that the firearm did not belong to him. The two codefendants that testified against Brown at the first trial could not be found, and the government read their testimony from that first trial. Brown left the courthouse a free man for the first time in seven years.

Gainesville's **Lloyd Viperman** successfully defended his client, Loretta Duncan, in a case involving charges of theft from the Veteran's Administration and making false statements to V.A. officials. The allegation was that Duncan, who was the guardian of James Lappe, had stolen Lappe's V.A. benefits. Although it found Duncan guilty of the charges involving the statements, the jury acquitted her of the more serious charge of stealing \$28,000 of Lappe's benefits.

Donald Sheehan, of the Pensacola panel, convinced Judge Vinson to grant his client, James Sharpe, a post-trial judgment of acquittal in a mail fraud and money laundering case that involved the sale of a commercial property in Destin. The judge found that the actions of Sharpe and the two codefendants did not amount to either mail fraud or money laundering.

In another trial, **Donald Sheehan** persuaded a Pensacola jury that his client, Amy Holley, was not responsible for all of the more than 500

grams of methamphetamine charged in a conspiracy to manufacture and distribute case. Despite the testimony of Holley's boyfriend/codefendant, the jury found Holley responsible for less than 50 grams. At sentencing, Don convinced Judge Vinson that Holley was a minimal participant and that she was entitled to acceptance of responsibility and the benefit of the safety valve. End result, instead of serving what would have been a 10-year minimum mandatory sentence, Holley is serving a sentence of 15 months.

Chet Kaufman won a new sentencing hearing from the Eleventh Circuit for his client, Irving Pierre. In Pierre's cocaine conspiracy case, Chet successfully argued that Judge Mickle had erroneously found Pierre to be a leader/organizer. The Court concluded that the government had failed to present evidence to support the conclusion and remanded the case for a new sentencing hearing.

Charles Lammers of our Pensacola office won an acquittal for his client, Kessler Stewart, from Judge Davis in a DUI trial. Charles convinced the Judge to exclude the results of the roadside sobriety tests because the officer conceded he had told Stewart that he had no choice but to submit to the roadside testing. He also convinced the Judge to exclude testimony of Stewart's refusal to submit to a breathalyzer test because the officer had erroneously told Stewart it was a crime to refuse the test. Those decisions, coupled with evidence that Stewart suffered an appearance of instability from an old leg injury, carried the day.

The government dismissed a DUI charge against Jon Bolen, thanks to a motion to suppress filed by his lawyer, Pensacola panel member **Kirk Owens**. The government did so

even before the judge heard the motion.

Bob Dennis, of our Pensacola office, saved his client from two probation modifications sought by the government. Magistrate judge Miles Davis rejected the government's request for conditions that would have subjected the client to searches by the probation officer and would have excluded the client from internet access. Judge Davis found the Government's requests, based on a recent investigation of the client for participation in a child pornography offense, were not related to the trespass charge for which the client was on probation.

Tallahassee panel members **Clyde Taylor** and **Greg Cummings**, having won acquittals on the most serious charges as reported in the last newsletter, continued to have success in their representation of Marcus and Susan Edenfield. Clyde, representing Marcus Edenfield, convinced Judge Rodgers that the firearms found in the Edenfield residence were not connected to any drug transactions, saving his client 4 offense levels. Greg won the first variance from Judge Rodgers, and his client, Susan Edenfield, who was facing a 33 to 41 month sentence, received a period of home detention.

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

DOWNWARD DEPARTURES

Davis, Omar Paul, M. Atty: Hatfield, Gene

Docket: 1:04cr14-MP
 Charge: Consp. Dist. > 50 grams Crack and
 > 5 kilos powder cocaine
 Range: 262 -327 months
 Sentence: 120 months BOP
 Date of Imposition of Sentence: 3/30/05
 Grounds: 5K1.1 motion

Nelson, Kevin Mickle, S. Atty: Hatfield, Gene
 Docket: 1:04cr22-SPM
 Charge: Consp. Dist > 1,000 kilos Marij.
 Range: Life
 Sentence: 300 months BOP
 Date of Imposition of Sentence: 3/14/05
 Grounds: 5K1.1

Young, Jerald Mickle, S. Atty: Edwards, Tom
 Docket: 1:04cr17-SPM
 Charge: Dist. Crack Cocaine
 Range: 108 - 122 months
 Sentence: 48 months BOP
 Date of Imposition of Sentence: 2/14/05
 Grounds: 5K1.1

Hayden, Benjamin Paul, M. Atty: Bernstein, S.
 Docket: 1:04cr6-MP
 Charge: Consp. WITD Crack
 Range: 235 - 293 months
 Sentence: 96 months BOP
 Date of Imposition of Sentence: 2/11/05
 Grounds: 5K1.1

Young, Everett Mickle, S. Atty: Edwards, Tom
 Docket: 1:04cr10-SPM
 Charge: Consp. To Defraud Gov't
 Range: 34 - 42 months
 Sentence: 12 months & 1 day BOP
 Date of Imposition of Sentence: 1/10/05
 Grounds: 5K1.1

Petnuch, Robert Vinson, R. Atty: Owens, Kirk
 Docket: 3:03cr58-RV
 Charge: Poss Firearm by Convicted Felon
 Range: ???
 Sentence: 37 months
 Date of Imposition of Sentence: 4/2/04
 Grounds: Diminished Capacity

Beverly, Danny Vinson, R. Atty: Hendrix, M.
 Docket: 3:04cr62-RV
 Charge: Consp. to deliver Marijuana

Range: 37 - 46 months
 Sentence: 34 months
 Date of Imposition of Sentence: 4/19/05
 Grounds: post-offense rehabilitation

BOOKER VARIANCES:

Young, Everett Mickle, S. Atty: Edwards, Tom
 Docket: 1:04cr10-SPM
 Charge: Consp. To Defraud Gov't
 Range: 34 - 42 months
 Sentence: 5 yrs probation
 Date of Imposition of Sentence: 1/27/05
 Grounds: 5K1.1 and post-offense
 rehabilitation (Judge Mickle first granted a
 5K1.1 departure, reducing the sentence to a
 year, and, then, after the decision in Booker,
 granted a variance, further reducing the
 sentence to probation.)

Hardy, Sheldon Mickle, S. Atty: Miller, Tom
 Docket: 1:04cr13-SPM
 Charge: Consp Dist > 50 grams Crack
 Range: 324 - 372 months
 Sentence: 150 months BOP
 Date of Imposition of Sentence: 2/1/05
 Grounds: uniformity in sentences between
 defendant and codefendants; defendant's
 limited role

Wallace, Michael Mickle, S. Atty: Banks, James
 Docket: 4:03cr20-SPM
 Charge: Dist. Crack Cocaine
 Range: 262 - 327 months
 Sentence: 120 months
 Date of Imposition of Sentence: 3/24/05
 Grounds: Cooperating, yet did not qualify for
 5K1.1 (?)

Edenfield, Susan Rodgers, C. Atty: Cummings, G.
 Docket: 5:04cr8-MCR
 Charge: Consp. Dist. Marij., Poss FA
 Range: 33 - 41 months
 Sentence: 5 years probation w/home det.
 Date of Imposition of Sentence: 3/9/05
 Grounds: Mother of 17 yr old that just gave
 birth, Defendant possibly has breast cancer

Nealy, Kenneth Mickle, S. Atty: Murrell, Randy
 Docket: 4:04cr42-SPM
 Charge: Dist. Cocaine and Poss FA by CF

Range: 21 - 27 months
 Sentence: 18 months BOP
 Date of Imposition of Sentence: 3/24/05
 Grounds: Possession was coincidental to drug sales.

Reeves, Larry Mickle, S. Atty: Clark, Bill
 Docket: 4:04cr48-SPM
 Charge: Credit Card Fraud
 Range: 15 - 21 months
 Sentence: *60 months BOP*
 Date of Imposition of Sentence: 1/18/05
 Grounds: no reasons given

Garner, James Mickle, S. Atty: Pagliuca, J.
 Docket: 4:04cr47-SPM
 Charge: Fraud
 Range: 27- 33 months
 Sentence: *60 months BOP*
 Date of Imposition of Sentence: 2/8/05
 Grounds: unknown

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

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 2004 term that are relevant to our practice and granted since our last newsletter:

MARYLAND v. BLAKE, 2005 WL 873540 (Mem), No. 04-373 (Apr. 18, 2005), reviewing 849 A.2d 410
Miranda

Tolbert implicated Blake in a murder. Police arrested Blake, 17, at his home, transported him to the station, gave him his Miranda rights, and Blake asked for a lawyer. He was placed in a holding cell at approximately 5:25 a.m. At 6:00 a.m., Detective Johns and Officer Reese went to the cell, gave Blake a copy of the arrest warrant and statement of charges. The form said he was subject to "DEATH" even though, because of his age, he was not. Reese, in a loud and confrontational tone, said "I bet you want to talk now, huh!" Johns said that he was surprised by Reese's statement and said, loudly within petitioner's hearing, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." Blake remained in the cell block, wearing only his boxer shorts and t-shirt. Approximately one-half hour after the earlier contact, Johns went back to Blake's cell to give him clothing. Blake then said "I can still talk to you?" Detective Johns responded: "Are you saying that you want to talk to me now?" Blake responded "yes." Detective Johns left the cell area and returned after a few minutes. He told Blake that he would have to read him his rights again and that he would be back in a few minutes. Blake then was taken back to the intake room, was re-advised of his Miranda rights, which he waived, and made incriminating statements in the absence of an attorney. The Maryland court concluded that police actions constituted the functional equivalent of interrogation, thereby violating Blake's rights and requiring suppression of the statements.

GEORGIA v. RANDOLPH, 2005 WL 319935 (Mem), No. 04-1067 (Apr. 18, 2005) reviewing 604 S.E.2d 835 (Ga. Nov 08, 2004)
Fourth Amendment Third-Party Consent
 The question below was whether an occupant may give valid consent to search common

areas of a premises shared by another occupant who is present and objects to the search. The Georgia court concluded that consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search. The Georgia court thus affirmed a suppression order, and the state petitioned the Supreme Court for certiorari review.

GONZALES v. O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL, 2005 WL 349538 (Mem), No. 04-1084 (Apr. 18, 2005) reviewing 342 F.3d 1170 (10th Cir., aff'd en banc)

Religious freedom & controlled substances
The question presented is whether the Religious Freedom Restoration Act of 1993...requires the government to permit the importation, distribution, possession, and use of a Schedule I hallucinogenic controlled substance (a religious tea called Hoasca, a liquid tea-like mixture made from the plants), where Congress has found that the substance has a high potential for abuse, it is unsafe for use even under medical supervision, and its importation and distribution would violate an international treaty?"

BROWN v. SANDERS, 2005 WL 153310 (Mem), No. 04-980 (Mar. 28, 2005), to review the Ninth Circuit's grant of habeas (penalty) relief in a capital case, in *Brown v. Sanders*, No. 01-99017 (9th Cir. 7/8/04).

Supreme Court Cases

RHINES v. WEBER, No. 03-9046, 125 S. Ct. 1528 (Mar. 30, 2005)

Habeas; exhaustion; stay

The Court resolved an inter-circuit split and

held that a district court has discretion to stay a mixed petition, containing both exhausted and unexhausted claims, to allow a habeas petitioner to return to state court to exhaust others claims and then to return to federal court for review of his then-perfected petition. The Court held that nothing in AEDPA deprived district courts of discretion to issue stays. However, such orders can only be issued where the petitioner demonstrates good cause for failure to exhaust and the unexhausted claims are not plainly meritless. The Court also instructed district courts to curb abuse by placing time limits on a petitioner's trip to state court and back. Finally, the Court opined that "it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics."

BROWN v. PAYTON, No. 03-1039, 125 S. Ct. 1432 (Mar. 22, 2005)

Habeas; jury instruction; mitigation; catch-all instruction sufficient

Payton, a California capital prisoner, argued his jury was prevented from considering evidence of his jailhouse religious conversion. After the state court denied relief, the Ninth Circuit reversed, but the Court reversed, holding that the state court did not unreasonably apply federal law in holding that the state's "catch-all" instruction on mitigating evidence adequately alerts jurors to their ability to consider post-offense evidence. Further, the fact that the prosecutor misstated the sweep of the catch-all instruction did not entitle Payton to habeas relief.

MUEHLER v. MENA, No. 03-1423, 125 S.

Ct. 1465 (Mar. 22, 2005)

Fourth Amendment

Mena was detained in handcuffs 2-3 hours during a search of the she shared with others; she won a 1983 action against officers, and the Ninth Circuit affirmed, holding that the use of handcuffs to detain Mena during the search violated the Fourth Amendment and that the officers' questioning of Mena about her immigration status during the detention constituted an independent Fourth Amendment violation. The Supreme Court held that her detention was reasonable and the officers' questioning did not violate her Fourth Amendment rights because the officers' questions did not subject her to an additional "seizure" requiring individualized suspicion.

SHEPARD v. U.S., No. 03-9168, 125 S. Ct. 1254 (Mar. 7, 2005)

Armed Career Criminal Act; predicate offenses; government burden

Shepard pleaded guilty to felon in possession of firearm; he had four prior guilty plea convictions of burglary as defined by one of Massachusetts' burglary statutes. Under ACCA, the government relied on these priors as predicate "violent felonies" to seek a mandatory minimum 15-year sentence. The district court refused, relying on Taylor, 495 U.S. 575 (1990) (holding burglary is predicate "violent felony" under ACCA only if "generic burglary," committed in a building or enclosed space, not a boat or motor vehicle; and that proof whether the conviction qualified as generic burglary was limited to a "categorical approach" - looking only to the fact of conviction and elements of the statute, or charging document and jury instructions. Shepard had pleaded guilty, but there was no contemporaneous record of the plea proceedings, and the state judgments were general verdicts of guilt.

The First Circuit held the government was allowed to rely on complaint applications and police reports to prove the priors were acceptable "generic burglary" predicate offenses under ACCA.

The Supreme Court. Souter, writing for a 5-3 majority, said Taylor's more narrow evidentiary limit controls. "We hold that enquiry under the ACCA . . . is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." In a 4-1-3 section (§ III), the plurality inched toward removing the Almendarez-Torres prior-conviction exception to the Booker ban on judicial fact-finding on enhanced sentences. The plurality said "While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to Jones and Apprendi, to say that Almendarez-Torres clearly authorizes a judge to resolve the dispute."

Thomas, separately concurring in part, wrote that "Almendarez-Torres, like Taylor, has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that Almendarez-Torres was wrongly decided. . . **The parties do not request it here, but in an appropriate case, this Court should consider Almendarez-Torres continuing viability.**"

WILKINSON v. DOTSON, No. 03-287, 125 S. Ct. 1242 (Mar. 7, 2005)

Prisoner litigation; parole; procedures

State prisoners argued under 1983 that their state parole proceedings failed to follow state

due process procedures. Success for one would not have meant immediate release but at most new eligibility review; success for the other would have meant at most a new hearing and no relief. The Sixth Circuit reversed the denial of relief, concluding that the “favorable termination requirement” of Heck v. Humphrey, 512 U.S. 477 (1994), does not cover claims challenging parole procedures because success would not necessarily guarantee speedier release but only a new parole hearing.

The Supreme Court affirmed, holding that state prisoners may file a civil rights lawsuit seeking declaratory and injunctive relief challenging the constitutionality of state procedures, and are not required to pursue such claims solely under federal habeas law.

JOHNSON v. CALIFORNIA, No.03-636, 125 S. Ct. 1141 (Feb. 23, 2005)

Prisons; racial discrimination; strict scrutiny

Rejecting California’s unwritten policy of routinely racially segregating all new or transferred prison inmates in their cell assignments for the initial 60 days, the Supreme Court held that racial segregation of prisoners, arguably in any prison setting, must be measured by strict scrutiny rather than the much more deferential standard generally applicable to prison administration under Turner v. Safley, 482 U. S. 78 (1987). “The ‘necessities of prison security and discipline’ are a compelling government interest justifying only those uses of race that are narrowly tailored to address those necessities.” The Court remanded for determination whether the policy satisfies the strict scrutiny standard.

SMITH v. MASSACHUSETTS, No. 03-8661, 125 S. Ct. 1129 (Feb. 22, 2005)

Double Jeopardy Clause; judgment of

acquittal; retraction

Smith was charged with three offenses; the “firearm” element of one required proof the weapon had a barrel “less than 16 inches” in length. The victim testified petitioner had shot him with “a pistol,” specifically “a revolver” that “appeared to be a .32 or a .38.” Midway through trial, Smith won a JOA on the firearm count, in part because the prosecution had not proved the gun barrel was less than 16 inches. After the parties rested but before closing arguments, the prosecutor reopened the issue, and the judge agreed to defer ruling until after the jury verdict, announcing orally that she was “reversing” her previous ruling; the jury convicted of all three counts. A state appellate court held that the Double Jeopardy Clause was not implicated because the trial judge’s correction of her ruling had not subjected petitioner to a second prosecution or proceeding. The USSC, however, reversed, holding that the Double Jeopardy Clause forbade the judge to reconsider that acquittal later in the trial. The Court held (1) when the judge granted petitioner’s motion, there was, in fact, a judgment of acquittal even though the jury was the primary factfinder, because the trial judge still resolved elements of the offense in granting the motion in the absence of a jury verdict based on insufficient evidence. (2) Submission of the firearm count to the jury plainly and impermissibly subjected petitioner to further factfinding proceedings going to guilt or innocence following an acquittal. “[A]n acquittal, once final, may not be reconsidered

on appeal or otherwise.” The only exception would be if “the availability of reconsideration has been plainly established by pre-existing rule or case authority expressly applicable to midtrial rulings on the sufficiency of the evidence. That requirement was not met here. The Commonwealth has failed to show that

under state procedure as it existed at the time of petitioner's trial, the trial court's ruling on the motion for a required finding of not guilty was automatically, or even presumptively, nonfinal." The Court cited "the well established rule that the bar will attach to a pre-verdict acquittal that is patently wrong in law."

ILLINOIS v. CABALLES, No. 03-923, 125 S. Ct. 834 (Jan. 24, 2005)

Fourth Amendment; dog sniff

In a short opinion, the Court ruled narrowly that police do not violate the Fourth Amendment when they use a drug-detecting dog to locate illegal drugs during a legal traffic stop. "In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement. This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. Kyllo v. United States, 533 U. S. 27 (2001). Critical to that decision was the fact that the device was capable of detecting lawful activity--in that case, intimate details in a home, such as 'at what hour each night the lady of the house takes her daily sauna and bath.' *Id.*, at 38. The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." "In our view, conducting

a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy. Our cases hold that it did not." The Court appeared to leave open the question of constitutionality of a similar "sniff" outside of a home if that were capable of detecting legal activity going on inside the residence. (A number of cases are pending at the Court challenging the use of dogs to sniff the exterior of homes.) Ginsburg and Souter dissented, clarifying they were not saying police could not use dog-sniffs to detect explosives or biological weapons, perhaps used by a terrorist.

BELL v. CONE, No. 04-394, 125 S. Ct. 847 (Jan. 24, 2005)

Habeas; capital; deference to state courts; HAC aggravator

The Sixth Circuit granted a capital habeas after concluding the "especially heinous, atrocious, or cruel' aggravating circumstance found by the jury at the sentencing phase of his trial was unconstitutionally vague, and that the state supreme court failed to cure constitutional deficiencies on appeal.

The Supreme Court reversed, however, because the court of appeals failed to accord due deference to the state court. "Federal courts are not free to presume that a state court did not comply with constitutional dictates on the basis of nothing more than a lack of citation. . . . the State Supreme Court had construed the aggravating circumstance narrowly and had followed that precedent numerous times; absent an affirmative indication to the contrary, we must presume that it did the same thing here."

HOWELL v. MISSISSIPPI, No. 03-9560,

125 S. Ct. 856 (Jan. 24, 2005)

Habeas; capital; federal claim defaulted

Because the capital habeas petitioner failed to raise the instant claim as one arising under federal law, not citing the Constitution or any cases construing it, in the state supreme court, “which unsurprisingly did not address it,” the Court dismissed the writ of certiorari as improvidently granted.” The Court rejected the argument that a federal constitutional claim could be preserved by citing a state case which cited another state case which cited a U. S. Supreme Court case.

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. RODRIGUEZ, 2005 WL 895174 (Apr. 19, 2005) (on Petition for En Banc review)

The Court rejected Rodriguez' petition for en banc review of the Booker plain error analysis reported at 398 F. 3d 1291. There are three opinions: Carnes, concurring with denial of en banc review and casting stones at conflicting decisions; Tjoflat, dissenting from denial of en banc review and opining that Booker constitutional error is structural error (distinguishing that from Booker "statutory" error) ; and Barkett, dissenting from denial of en banc review and saying that whether Booker error is structural or not, the Rodriguez burden analysis for Booker error is wrong and misapplies U.S. Supreme Court precedent.

U.S. v. DAY, 2005 WL 858294 (Apr. 15, 2005)

Victim vulnerability

Timothy Day, his wife Donna Day, and Hallock, were among six defendants indicted

in

a conspiracy to commit mail fraud involving sham not-for-profit organizations that solicited money from victim contributors under the pretext that the contributions would be used to assist police officers and their families, firefighters and their families, veterans and their families, substance abusers, and needy youths. The Days were convicted of conspiracy to commit mail fraud. Timothy Day was sentenced to 121 months' imprisonment, and Donna Day was sentenced to 63 months' imprisonment. Hallock was convicted of one count of conspiracy to commit mail fraud and eight counts of mail fraud and was sentenced to 21 months' imprisonment. In a fact-specific opinion, the Court (Fay, with Marcus & Siler) affirmed all convictions and sentences, (1) Rejecting Donna Day's claim that the district court erred in applying a two-level enhancement to her sentence for targeting uniquely vulnerable victims, pursuant to U.S.S.G. §3A1.1(b), concluding that the “district court properly determined that the victims in this case were “particularly susceptible” because they had been repeatedly solicited for further contributions to the Organizations.” In other holdings, the Court found (2) no abuse of discretion by refusing to sever the conspiracy count from the mail fraud counts; (3) no Brady violation; (4) Hallock's Blakely claim made in his reply brief for the first time was procedurally defaulted under Levy; (5) no evidentiary violation.

U.S. v. CUSTER, 2005 WL 845687 (Apr. 13, 2005)

Booker; sentence enhancements; appeal waivers

The Court granted panel rehearing and vacated its 1/10/05 opinion, based on the defendant's preservation of the *Booker* claim in the district

court and appellate court. The Court noted **both** that the district court had imposed two enhancements **and** that the defendant's plea agreement did not include an appeal waiver (the only point of this notation appeared to be a suggestion to the government to get its act together on the appeal waiver front). There was no discussion of the harmless error standard or its application; just enhancements + objection + appeal = resentencing.

U.S. v. GARCIA, 2005 WL 845532 (Apr. 13, 2005)

Booker; safety valve; temporal requirement; 5C1.2(a)(5); dicta

The Court granted panel rehearing, vacated its 3/22/05 opinion, and remanded for resentencing for two defendants. The Court vacated Valdes' sentence, because the district court had authority and should reconsider granting a sentencing continuance to give the defendant time to satisfy the government as to the fifth requirement for a safety valve reduction. The Court rejected the government's arguments (1) that the language of 5C1.2(a)(5) ("not later than the time of the sentencing hearing") meant the *commencement* of the sentencing hearing, and (2) that *Brownlee*, 204 F.3d 1302, 1304 (stating that "lies and omissions do not, as a matter of law, disqualify a defendant from safety-valve relief so long as the defendant makes a complete and truthful proffer *not later than the commencement of the sentencing hearing*"), did not create a jurisdictional rule cutting off the safety valve issue as of the commencement of the sentencing hearing but rather that this statement was *dicta*. Noting the language of (a)(5) requires the proffer be made at "the *time* of sentencing," [*] the Court concluded a district court is not precluded by this language from continuing a sentencing hearing for this purpose. The district court's conclusion to the

contrary was error. The Court noted that, in most cases, the proffer should be complete before the sentencing hearing, but explained why circumstances warranted the continuance here (defendant was first-time offender who did not speak English, and all translation at debriefing was by agent, not independent translator; counsel believed defendant had made a sufficient debriefing, and the agent indicated they would have additional debriefings; perhaps most importantly, there was no evidence the failure to adequately debrief prior to sentencing was an attempt to mislead, manipulate, stall or delay; thus, there was good cause to continue the sentencing. [*Note: this language is curious, because the correct language is that quoted in the fifth line of this summary, "the time of the sentencing hearing," not "the time of sentencing."]

As to the second defendant, Artires, the district court made a factual determination that he was responsible for 312 marijuana plants, based on the same evidence and a preponderance standard, in spite of the jury's special verdict that he was not responsible for more than 100 plants. The defendant objected in the district court and raised the issue in his initial brief; and the government conceded *Booker* error. Thus, Artires' sentence violated the Sixth Amendment because it was not authorized by the jury's verdict, and he was entitled to resentencing.

U.S. v. PAZ, 2005 WL 757876 (Apr. 6, 2005)

Harmless error; Booker

Calling it a case of first impression in the circuit, the Court found the government failed to overcome its reasonable doubt burden of harmless error where a loss sentence enhancement had been imposed over a timely Blakely objection and where the district court said it would have imposed a lower sentence but for the mandatory guidelines.

U.S. v. ORDUNO-MIRELES, 2005 WL 768134 (Apr. 6, 2005)

Booker; plain error; "crime of violence" under U.S.S.G. § 2L1.2(b)(1)(A)

Orduno-Mirales pleaded guilty to illegally reentering the U.S. after being deported subsequent to an aggravated felony conviction. At sentencing, he argued that neither of his prior felony convictions (unlawful sexual activity with certain minors and burglary of a dwelling) constituted "crimes of violence" under U.S.S.G. § 2L1.2(b)(1)(A) to warrant a 16-level enhancement. The Court affirmed, finding that both qualified, and rejecting his argument that he could avoid the guideline as to the sex crime because he successfully got the conviction vacated after illegally returning to the U.S. "The relevant time period is the time of deportation, not the time of sentencing..." The Court also rejected the plain error argument under Booker, saying Almendarez-Torres still controls. In a footnote, the Court stated that imposition of a mandatory guidelines sentence is a "non-constitutional Booker" error.

U.S. v. CAMACHO-IBARQUEN, 2005 WL 713597 (Mar. 30, 2005)

Illegal reentry; 2L1.2(b)(1); prior violent felony; prior conviction

The Court affirmed a 77-month sentence for an attempted illegal reentry conviction. It rejected appellant's argument that the now-advisory guideline section, §2L1.2(b)(1), contains an implicit temporal element requiring that only violent offenses for which a conviction was procured within the previous ten years can support a sixteen-level increase. The plain language of §2L1.2(b)(1)(A) contains no temporal restrictions and requires a sixteen-level increase for "a conviction for a felony that is -- a crime of violence."

Reviewing for plain error, the Court also held that the increase in his sentence based on a prior conviction for a crime of violence did not violate the Sixth Amendment. Almendarez-Torres remains valid even in light of the Supreme Court's recent decision in Shepard.

U.S. v. YATES, 2005 WL 723897 (Mar. 30, 2005)

Sixth Amendment; confrontation; video testimony

The Court vacated its previously published opinion, 391 F.3d 1182 (11th Cir. 2004), and granted rehearing en banc. In its original panel opinion, the Court vacated fraud convictions based on a violation of the Sixth Amendment's Confrontation Clause. Specifically, the Court held that the testimony of key witnesses via two-way video teleconference violated the defendants' Sixth Amendment rights under the rule announced in Maryland v. Craig. [We await a new decision.]

U.S. v. BYRD, 2005 WL 678119 (Mar. 25, 2005)

Right to testify; armed bank robbery

Byrd, on trial for charges related to armed bank robbery, made a knowing and voluntary waiver of his right to testify in his own behalf after the government rested. He then put on some defense witnesses, and the government put on a rebuttal witness. The evidence closed, and on defense counsel's request, court recessed for the day. The next morning, defense counsel informed the court that Byrd had changed his mind and wanted to testify. The court responded, "We closed the evidence yesterday. And all the other witnesses were released. So, any rebuttal that the government would need is gone." The court denied Byrd's request to reopen the evidence stating, "It would be untenable to [the government], with

all their witnesses released, for him to then say whatever he wants to without much fear of anybody being around to rebut it." The court sent the case to the jury, which convicted Byrd on all counts.

On appeal, the Court affirmed, finding no abuse of discretion. "We join the Jones [Eighth Circuit] and Peterson [First Circuit] Courts in holding that the defendant's right to testify generally must be exercised before the evidence-taking portion of the trial has closed." The Court also found the evidence sufficient.

U.S. v. PETERS, 2005 WL 673987 (Mar. 24, 2005)

Commerce Clause, 18 U.S.C. §§ 922(d)(1) and 924 (a)(2)

The Court (Marcus, with Fay and Siler) held, on plain error review, that banning the sale of firearms to felons falls within the scope of Congress' commerce power, finding Lopez and Morrison distinguishable. "The sale of a firearm undoubtedly "is commerce" in its truest form, and the national nature of the market for firearms ensures that this commerce concerns all states, and that its relation to the national interest could hardly be more real or substantial. This much is clear not only from Supreme Court precedent, but also from the history of federal firearms legislation in general, and of § 922(d) in particular." In so holding the Court agreed with the Eighth Circuit, the only other court to address the issue. The Court also held that sufficient evidence was presented at trial for the jury to conclude that Peters knowingly sold a firearm and ammunition to a convicted felon.

U.S. v. ADAMS, 2005 WL 659156 (Mar. 23, 2005)

10-year rule under U.S.S.G. § 4A1.2(e)(2)
Adams argued that the district court erred by

assessing him one criminal history point for a 1991 conviction, in sentencing him for distribution and a March-May 2001 cocaine conspiracy, because the offense occurred outside the ten-year window provided for in U.S.S.G. § 4A1.2(e)(2). According to Adams, the instant offense occurred on April 4, 2001, the date of the earliest substantive offense. Adams urged that the 1991 offense should not be considered because the offense occurred on January 28, 1991, but he was not sentenced, through no fault of his own, until August 22, 1991, the first scheduled court date after his initial appearance. The Court (Marcus, with Fay and Siler) affirmed. "Because Adams's prior sentence was imposed on August 22, 1991, and he commenced the instant offense no later than March 2, 2001 (well within 10 years of the prior conviction), the district court correctly assessed a criminal-history point for the prior conviction. We decline Adams's invitation to recognize an exception to the 10-year rule where, due to an alleged backlog in the state-court system in which he was convicted, imposition of the sentence for his prior conviction was delayed. Such an exception would be contrary to the plain language of the § 4A1.1(c) and its accompanying commentary, including the definitions of its terms."

U.S. v. DOWLING, 2005 WL 658938 (Mar. 23, 2005)

No Booker plain error

A jury found Dowling guilty of conspiracy to distribute cocaine, but returned a special verdict finding that the conspiracy involved less than 500 grams of cocaine, and no crack. At sentencing, the court found that, according to Dowling's own testimony, the conspiracy involved at least 150 kilograms of powder cocaine and 1.5 kilograms of crack, establishing a base level of 38. The court,

expressing some hesitation, then found that the conspiracy involved a murder, and using the applicable cross-reference, increased Dowling's Guideline level to 43. The court finally increased four Guideline levels, based upon its finding that Dowling was the organizer/leader of the conspiracy, and arrived at Guideline level 47. The maximum Guideline level is 43, and the court determined that the sentencing guidelines recommended a sentence of life at this level. The court, however, recognized that the jury's verdict that found Dowling guilty of conspiring to distribute less than 500 grams of cocaine authorized a maximum sentence of only twenty years. Accordingly, the court sentenced Dowling to 240 months' imprisonment. Following Rodriguez, the Circuit Court (Anderson, with Pryor and Hill) found no Booker issue had been preserved, and there was no reversible plain error despite the judge's hesitation because that enhancement made no difference to Dowling's resulting sentence. Even if the judge had not applied the enhancement for murder, Dowling's sentence would have been the same twenty year maximum allowed by the United States Code. The Court did note, however, that "mandatory application of the Guidelines can violate a defendant's Sixth Amendment rights," though it did not reconcile that statement with the Rodriguez analysis.

U.S. v. LYONS, 2005 WL 659134 (Mar. 23, 2005)

Search, irrelevance of prior acquittal, Eighth Amendment

Lyons appealed his conviction for possession of ammunition by a convicted felon, and the 235-month sentence the district court imposed based on his status as an "armed career criminal." In a fact-specific opinion, the Court rejected Lyons' claims that (1) the district

court erred by denying his pre-trial motion to suppress four bullets found on his person during a search incident to his arrest for disorderly conduct, a violation of Fla. Stat. § 877.03; (2) the district court erred by granting the government's motion in limine, on the grounds of relevancy, to exclude evidence of Lyons's state-court acquittal on the § 877.03 charges; and (3) the imposition of a 235-month "armed career criminal" sentence constitutes cruel and unusual punishment, in violation of the Eighth Amendment.

U.S. v. SMITH, 2005 WL 628686 (Mar. 18, 2005)

Plain error; fourth prong; intrastate possession; commerce clause; 18 USC 2251

Smith was convicted of producing and possessing child pornography in violation of 18 U.S.C. § 2251(a) and § 2252A(a)(5)(B). His initial appeal brief was filed May 4, 2004. On October 1, 2004, the Eleventh Circuit decided Maxwell (holding that purely intrastate possession of child pornography was not converted "into an activity subject to Commerce Clause regulation" simply because "the disks on which the pornography was ultimately copied traveled, when blank, to Florida from someplace outside of Florida.") The Court concluded that Maxwell necessarily cast doubt on Smith's conviction because the asserted basis for federal jurisdiction was that the film, photo paper, and film processor had traveled in interstate commerce sometime before being used. (1) The Court rejected the government's argument, under Levy, that Smith did not raise the issue in his initial brief, but the Court rejected that argument, applying a "principle that we 'liberally read briefs to ascertain the issues raised on appeal,' United States v. Starke, 62 F.3d 1374, 1379 (11th Cir.1995)." The Court then did a lengthy Commerce Clause and plain error review to

find Maxwell applicable, the error plain, and the plain error reversible because affirming would undermine public confidence in the justice system

DE LISI v. CROSBY, 2005 WL 628568 (Mar. 18, 2005)

Habeas, confrontation

In reversing the grant of a 2244 petition, the court (Pryor, with Anderson and Hill) found harmless any Sixth Amendment violation to deny DeLisi the right to cross-examine the state's star witness against him, White, as to certain items of impeachment because De Lisi already had elicited "abundant evidence" that White was a career criminal who lived a suspiciously lavish lifestyle and had received lenient treatment by the government.

DIAZ v. SECY., DOC, 402 F.3d 1136 (Mar. 14, 2005)

Ineffective assistance of appellate counsel; defendant's presence; security

In this capital habeas appeal, the Court held that appellate counsel was not ineffective for failing to argue on direct appeal the defendant's right to be present at pretrial hearings and other court conferences, because the proceedings were minor, were outside the presence of the jury, no objection was made, and he was not prejudiced. Thus, the district court was correct that this argument would have had no chance of success on appeal. The Court also rejected his reliance on *Durham* (11th Cir. 2002), in support of his argument that the trial court erred in not making factual findings about the use of extra courtroom security.

U.S. v. FRYE, 402 F.3d 1123 (Mar. 11, 2005) (on rehearing)

Meth conspiracy, predicate to 924(c); admission to enhancements avoid Booker

Frye pleaded to conspiracy to manufacture methamphetamine, and 2 counts of using or carrying a firearm in connection with a drug felony under 18 U.S.C. § 924(c). He got 548 months' imprisonment. The Court (PC with Carnes, Marcus, and Pryor) affirmed. (1) "Whether a defendant can be found guilty under section 924(c) when he was not convicted of the predicate offense or separately charged with the predicate offense is an issue of first impression in this circuit. We hold that conviction under section 924(c) does not require either that the defendant be convicted of or charged with the predicate offense." In other words, "only the fact of the offense, and not a conviction, . . . is needed to establish the required predicate." (2) The court rejected Frye's argument that the district court neglected to inquire adequately concerning the motion to withdraw due to irreconcilable differences that Frye's counsel had filed the morning of the plea hearing. (3) on rehearing, finding the *Blakely* claim was waived in accordance with *Rubbo*.

U.S. v. LEOVITZ, 401 F.3d 1263 (Mar. 4, 2005)

Child sex & porn guidelines

Lebovitz pleaded guilty to traveling in interstate commerce with the intent to have sex with a minor, in violation of 18 U.S.C. § 2423(b), and to possessing child pornography obtained through interstate commerce, in violation of 18 U.S.C. § 2252A. The district court sentenced him to 118 months in prison. Lebovitz challenged the application of the sentencing guidelines. Lebovitz first contended that the district court misapplied a series of guidelines related to porn and child sex abuse. The 11th Circuit rejected all his claims and affirmed.

PADGETT v. DONALD, 401 F.3d 1273

(Mar. 4, 2005)

Fourth Amendment, DNA Testing of Prisoners

In an opinion by Birch, with Anderson and Royal, the Court said: "In a case of first impression for our circuit, we decide whether the United States and Georgia Constitutions permit the Georgia Department of Corrections to compel incarcerated felons to submit saliva samples for DNA profiling. . . . The district court granted summary judgment in favor of the Commissioner of the Georgia Department of Corrections. Because we conclude that the statute does not violate the Fourth Amendment, the search and seizure provisions of the Georgia Constitution, or the felons' rights to privacy under the United States or Georgia Constitutions, we AFFIRM."

U.S. v. DOCKERY, 401 F.3d 1261 (Mar. 3, 2005)

Booker remand; preservation; initial brief
The Court considered a remand from the Supreme Court under *Booker*. Citing *Ardley*, and the defendant's failure to raise any *Apprendi*-type issue in his initial brief on appeal, the Court reinstated its previous opinion and affirmed.

U.S. v. CURTIS, 400 F.3d 1334 (Feb. 28, 2005)

Booker; supplemental briefing; rehearing
The Court granted panel rehearing on its Order entered 8/10/04, and published at 380 F.3d 1308, solely to amend footnote 2, denying relief under the plain error standard of review, to conform that footnote to *Rodriguez* and *Duncan*. The Court made no change in the published decision in the case, 380 F.3d 1311 (11th Cir. 2004), and noted the petition for rehearing en banc was still pending.

U.S. v. SHELTON, 400 F.3d 1325 (Feb. 25,

2005)

Booker plain error

In sentencing, the district court expressed dissatisfaction with a sentence at the low end of the Guidelines range, indicating the guidelines dictated that result; it considered the sentence "very, very severe" and "unfortunately" the guidelines took into account all prior charges and not the facts of his youth or short sentences or drug quantities involved. The Court distinguished *Rodriguez* and found plain error under *Booker*.

U.S. v. DUNCAN, 400 F.3d 1297 (Feb. 24, 2005) (on rehearing granted)

Booker plain error

The panel (Anderson, with Birch, Land) originally found no plain error under *Blakely*. Now, in light of *Booker*, the panel adhered to its decision, relying on *Rodriguez* to find no plain error even though drug quantity had been based on acquitted conduct. The Court also said that "Duncan makes a creative argument . . . that Justice Breyer's remedial interpretation, if applied retroactively, would increase the sentence authorized by the jury's verdict to a maximum of life, and therefore would operate, in light of his life sentence, as an ex post facto law in violation of his due process rights." The Court rejected that argument, relying on the [distinguishable] Ex Post Facto Clause case of *Dobbert v. Florida* (U.S. 1977), and the [distinguishable] Due Process Clause decision in *Rogers v. Tennessee* (U.S. 2001) to conclude that Duncan "had ample warning at the time he committed his crime that life imprisonment was a potential consequence of his actions. Applying the principles announced in *Rogers*, Duncan's due process rights cannot be said to have been violated."

VARELA v. U.S., 400 F.3d 864 (Feb. 17,

2005)

***Booker*; retroactivity; collateral attack**

The Court applied *Schriro v. Summerlin*, 124 S. Ct. 2519 (2004) (concluding *Ring*'s construction of *Apprendi* is not retroactive), and agreed with *McReynolds v. United States*, 2005 WL 237642 (7th Cir. 2/2/05), holding that *Booker* is not applicable retroactively to cases on collateral review.

HURTH v. MITCHEM, 400 F.3d 857 (Feb. 16, 2005)

Habeas; procedural bar; state rules; panel overriding circuit panel precedent

This case presents an interesting intra-circuit squabble. The Court, noting conflicting prior panel precedent, held that both procedural and substantive state rules must be considered "firmly established and regularly followed" in order to serve as the basis for a procedural bar in federal habeas proceedings. Appellant's appeal to the Court, after losing in district court, was granted a COA on his assertion that "it is arguable among jurists of reason that the state's rationale [state habeas statute of limitations] for failing to reach the merits of appellant's [ineffective assistance] claims was not consistently applied." He relied on *Moore v. Campbell*, 344 F.3d 1313 (11th Cir. 2003) (PC: Edmondson, Kravitch, & DJ) (concluding that Alabama's Rule 32.2(c) was not firmly established and regularly followed). The opinion here of Carnes [former Alabama AG] notes that *Moore*'s conclusion was erroneous and that the *Moore* panel "went astray" because its reliance on another 11th circuit case was unfounded. This panel first acknowledges that it is bound by a prior panel decision, and may not reach a contrary result merely out of disagreement, "we must reach a contrary result where the prior panel decision is itself inconsistent with earlier ones." That is, a current panel must follow the earliest

precedent where two or more are inconsistent. Perhaps the panel should have asked the en banc court to resolve the issue, because it looks like that's where it is bound.

U.S. v. JOHNSON, 399 F.3d 1297 (Feb. 14, 2005)

Detention; post-plea; 18 U.S.C. § 3156; felon-in-possession; crime of violence

The Court held that possession of a firearm by a felon, under 18 U.S.C. § 922(g)(1), is NOT a crime of violence within the meaning of 18 U.S.C. § 3156(a)(4). The Court concluded that felon-in-possession offense did not categorically present a substantial risk of violence, recognizing that many felons have the same motives as lawful possessors. "It is not an active crime, like burglary, which necessarily creates a substantial risk of violence."

U.S. v. GRINARD-HENRY, 399 F.3d 1294 (Feb. 11, 2005)

***Booker*; appeal; waiver**

The Court denied the defendant's post-*Booker* motion for reconsideration of the Court's granting of the government motion to dismiss the appeal. The Court reaffirmed the appeal waiver provisions of the plea agreement and held that the plea agreement exceptions (particularly for a sentence exceeding the statutory maximum and a sentence in violation of the law apart from the sentencing guidelines) did not apply to the *Booker* issue.

U.S. v. RODRIGUEZ, 398 F.3d 1291 (Feb. 4, 2005)

***Booker* no plain error; conflict with other circuits apparent**

The Court (Carnes, with Marcus and Fay) issued a lengthy analysis of the plain error rule, noted conflicts with various circuits, and held that imposition of a sentence under the

mandatory guidelines is a Booker error that is plain but not reversible under prong 3 of plain error analysis so long as nothing in the record persuades the court that the sentence would have been different but for the use of mandatory guidelines. The Court said “equipoise” is not enough to carry the day, albeit without mentioning its prior decision in *Swatzie* which said the opposite.

HERRING v. SECY., FLORIDA DOC, 397 F.3d 1338 (Jan. 31, 2005)

Capital habeas; conflict of interest

The Court denied relief in this Florida capital habeas, affirming the lower courts' holding that counsel was not ineffective in the penalty phase and that the defense attorney, a public defender, did not have an actual conflict of interest based on his special deputy status which he held solely to be able to carry a firearm while traveling.

U.S. v. GRANT, 397 F.3d 1330 (Jan. 27, 2005)

Sentencing; drug quantity; LSD; resentencing

The Court held that the weight of LSD, for which the pure LSD weight was 0.1263 grams, and the weight with the water in which it was contained was 103.7 grams (or the equivalent of 2526 dosage units or "hits"), must, for sentencing computation purposes, include the water within which it is contained. The Court rejected the argument that the defendant should have been sentenced on the basis of the pure weight of the LSD. As to the sentencing guidelines issue of the allocation of USSG 5K1.1, the Court, applying the standard of review applicable prior to *Booker* in reviewing the district court's application of the sentencing guidelines, rejected Grant's argument that, at a resentencing after a successful appeal of a sentence in which he

received a downward departure below the otherwise applicable mandatory minimum, the mandatory minimum could no longer be a relevant consideration for his sentence. The Court held that the resentencing "wiped the slate clean." The Court noted that Grant's new sentence was half the mandatory minimum, and that the district court was free to reconstruct the sentence as it did, based on the mandatory minimum and a new downward departure.

U.S. v. REESE, 397 F.3d 1337 (Jan. 27, 2005)

Recognizing that *Booker* overruled earlier decision

The panel (Anderson, Birch, Land) vacated its prior decision in *Reese* and remanded for resentencing where (1) Reese's initial brief on appeal raised a constitutional challenge to his sentence based upon *Apprendi*; (2) After *Blakely*, the court ordered supplemental briefing; (3) *Booker* overruled the holding in *Reese* that *Blakely* did not apply to the federal guidelines. "[I]n light of *Booker*, we vacate our previous opinion with respect to Reese's challenge to his sentence; we vacate the judgment of the district court with respect to the sentence; and we remand to the district court for resentencing consistent with the Supreme Court opinions in *Booker*."

WILLIAMS v. U.S., 396 F.3d 1340 (Jan. 24, 2005)

28 U.S.C. § 2255; waiver of post-conviction rights in plea agreement

Williams entered a written plea agreement in which he agreed to plead guilty to all charges, agreed that the district court had jurisdiction and authority to impose any sentence up to the statutory maximum set forth for the offense and pursuant to the sentencing guidelines, and expressly waived the right to appeal [his]

sentence, directly or collaterally, on any ground. Two years later, Williams filed this pro se § 2255 petition alleging that he received ineffective assistance of counsel at sentencing. The Eleventh Circuit (Marcus, with Black and Pryor) agreed with other circuits and held that a sentence-appeal waiver that includes the waiver of the right to challenge the sentence collaterally in the context of a § 2255 petition asserting ineffective assistance of counsel "precludes the defendant from attempting to attack, in a collateral proceeding, the sentence through a claim of ineffective assistance of counsel during sentencing."

IN RE: JERRY J. ANDERSON, 396 F.3d 1336 (Jan. 21, 2005)

Habeas; second or successive; Booker analysis

The Court denied the pro se application for an order authorizing the district court to consider a second or successive 2255 motion. Because the claim did not involve newly discovered evidence or a new rule of constitutional law under 2255, relief was denied. The Court concluded that neither *Richardson*, 526 U.S. 813 (1999), nor *Olano*, 507 U.S. 725 (1993), were new rules of constitutional law made retroactive to cases on collateral appeal. As for the *Apprendi* and *Booker* arguments, the Court recognized the latter's conclusion that there was "no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue" in *Blakely*. Thus, the mandatory nature of the guidelines were incompatible with the Sixth Amendment. However, because the Supreme Court had not expressly made *Booker* retroactive to cases on collateral review, *Tyler v. Cain*, 533 U.S. 656 (2001), relief was denied.

U.S. v. RUBBO, 396 F.3d 1330 (Jan. 21,

2005)

Appeal; waiver; Booker

The Court held that broad appeal waiver language in a plea agreement includes an *Apprendi/Booker* claim, absent some evidence the parties intended otherwise.

TAYLOR v. U.S., 396 F.3d 1322 (Jan. 19, 2005)

Habeas; immigration; removal; exhaustion; "aggravated felony"; INA 212(c); venue

Following its earlier remand, 49 Fed. Appx. 287 (11th Cir. 9/11/02) (unpublished), the Court affirmed the district court's dismissal of the habeas petition. It rejected the argument that solicitation of sexual activity with a minor was not "sexual abuse of a minor" and thus an aggravated felony under the INA. And it held that collateral attacks (here based on lack of advice as to immigration consequences in state court plea proceeding) to state court convictions underlying deportation are prohibited in immigration cases.

CALLAHAN v. CAMPBELL, 396 F.3d 1287 (Jan. 18, 2005)

Habeas

The Court remanded to the district court to address the merits of ALL claims in the petition, even though it had granted the petition as to two claims and then granted a COA on all eight claims without addressing the other six.

LITTLE v. HOLDER, 396 F.3d 1319 (Jan. 18, 2005)

Habeas; time served credit

The Court rejected the § 2241 claim for credit against his federal sentence for time (4 years) spent erroneously at liberty. The defendant was transferred from state custody to federal custody, sentenced consecutively, and then returned to state custody; he was erroneously

released at expiration of his state sentence because the marshal failed to file a detainer. After a new state conviction and sentence, the marshal filed the detainer and eventually took him into custody to serve the federal sentence. The Court distinguished *Barfield*, 03-14077 (11th Cir. 2004) (holding that convicted person "who has yet to serve any part of her sentence, is not entitled to credit for time spent erroneously at liberty when there is merely a delay in executing her sentence"), finding that the time the defendant had been in federal custody for trial and sentencing was not service of "any part" of his sentence but merely a delay in commencement of his sentence. Further, the Court distinguished cases where relief was granted on the basis of service of a sentence "in installments." "Thus, we do not decide the issue of whether a defendant who has been subjected to installment service is entitled to credit for time at liberty."

U.S. v. DRURY, 396 F.3d 1303 (Jan. 18, 2005) (en banc)

Interstate commerce; telephone use; 18 U.S.C. § 1958; murder for hire; jurisdiction

The Court affirmed a doctor's conviction of murder-for-hire and firearm possession. The initial opinion is at 344 F.3d 1089 (11th Cir. 2003). Upon en banc remand for further consideration of statutory amendment to 18 U.S.C. § 1958, the Court again concluded the evidence was sufficient to establish the jurisdictional element of 1958(a) under any reading.

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