

FEDERAL PUBLIC DEFENDER

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NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

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BOOKER REPORT

In March, the United States Sentencing Commission released their *Report on the Impact of United States v. Booker on Federal Sentencing*. Its conclusions are based on data collected between January 12, 2005, and January 11, 2006. While there are concerns about the accuracy of some of the data, the bottom line is that Booker doesn't appear to have dramatically changed sentencing in federal court. Still, the decision has made a difference, especially in individual cases. During the year in question, judges in the Northern District of Florida used it to impose 16 below-range sentences. They used it to impose 7 above-range sentences. Here are some of the highlights of the report:

- Nationwide, the proportion of non-government sponsored, below-range sentences (i.e. below-range sentences justified by either Booker or traditional Guidelines departure analysis) has increased from 8.6% in the 13 months or so prior to the Booker to 12.5% post-Booker.
- Since the Booker decision, the rate of imposition, throughout the county, of above-range sentences has doubled to a rate of 1.6%.
- The vast majority of below-range sentences imposed by federal district judges are between 10% to 29% below the Guidelines minimum.
- Nationwide, there has been little change in either the average or median sentence. Since Booker, the average sentence has been 58 months, and the median sentence has been 36 months. In the 13 months prior to the decision, the average sentence had been 57 months, and the median sentence was 33 months.
- A majority of the 94 districts across the country (80.9%) show rates of imposition of non-government sponsored, below-range sentences of between 5% and 20% post-Booker.
- If, since Booker, all the reasons for below-range sentences are considered, including government sponsored sentences for substantial assistance, 71.7% of all sentences

imposed in the Northern District of Florida have been within the Guidelines range. The national average is 62.2%. Sixty-nine districts have a lower percentage of within-range sentences.

- Post-Booker, there are only 10 districts that have a lower percentage than the Northern District of Florida of below-range sentences based on the combination of downward departures pursuant to the Guidelines and below-range sentences based on Booker. Nationwide, the average is 12.5%. The average in the Northern District is 6.4%. The average in the Middle District of Florida is 9.8%.
- Post-Booker, 20 districts have a lower percentage of below-range sentences based on Booker than does the Northern District of Florida. The nationwide average is 9.1%. The average in the Northern District is 5.1%. Judges in the Middle District of Florida relied upon Booker to justify below-range sentences in 6.6% of the cases.
- Across the nation, judges have used Booker to justify above-range sentences in 1.3% of the cases. In the Northern District of Florida, judges have used the decision to justify above-range sentences in 2.3% of the cases.

You can access the report in its entirety at: www.ussc.gov.

VOUCHERS

Randy Murrell

Not long ago I received a voucher in which the clerk had proposed reducing the time

claimed for in-court work to the actual time of the hearing. In doing so, the clerk had noted on the voucher the precise time the hearings started and ended. Ultimately, Judge Collier decided to pay the lawyer in-full.

Nonetheless, especially if it is a case heard by Judge Collier, you'll need to be precise and claim only the time you actually spent in court. That is not to say you won't be compensated for the time you spend at the courthouse prior to and after the hearing. It is, though, a matter of accurately describing how you spent your time. While it may be that the other judges won't require that level of specificity, it makes sense to use it in any voucher you file.

Incidentally, contrary to what I've said on occasion and what David Beneman says below, at least in the Eleventh Circuit, you can claim payment for travel time, be it to the courthouse or anyplace else, only if the round-trip travel time equals an hour or more.

I exchanged a couple of emails with David Beneman about all of this. He's the Federal Public Defender in Maine, was for many years the Maine CJA Resource Counsel, and knows as much about CJA work as anyone in the country. Here's his advice:

It is "standard" now in many courts for the courtroom clerk to track the exact time (minutes) of in court proceedings. Here is how your CJA people should be billing:

1. Travel to and from court is compensable, but needs to be a separate entry under "travel" (item 4 on the list of out of court items on the voucher). *[However, see the note above regarding the 11th Circuit*

Rule]. It may help to recall that when the current voucher forms were created we had different billing rates for in-court and out-of-court time. Sample entry: “Travel to and from court for Smith Sentencing hearing .6 hours.” They may also charge for the mileage. Our District has an informal "de minimis" rule so we only bill for mileage beyond 10 miles (which I objected to but lost on so now accept)

2. Counsel is entitled to bill for in-court time from the time hearing was set for through completion, and chambers conferences count as in court time. If the hearing starts late, and counsel is able to do other work while waiting, then bill the other work, not both. Sample entry: “Attend Smith PSR conference, set for 1 pm, delayed due to court's schedule, chambers conference attended by AUSA and PO, court to issue undisputed findings, all memos due by 3/15.” Bill this example as in court under Sentencing Hearings, time 1.5 hours.

3. Time for arriving early must be categorized as something. Merely being at court early is not compensable. However case related preparation is compensable. Bill under out of court, voucher item 5, "investigative and other work." Sample entry: “Review and work on issues for discussion with the court during PSR conference, prioritize arguments on criminal history, check docket sheets on public terminal at clerks office, brief discussion with PO on issue prior to meeting with the court. .5 hours.”

By billing under the proper categories on the voucher almost all time or expenses are compensable and do not raise issues with the clerk/court. The real problem is lawyers seem to HATE billing in detail. They would rather just put “Smith PSR hearing 2.5" and that just does not work.

REVISION OF GUIDELINES FOR VOUCHER REDUCTION

The Judicial Conference has approved a change to the section of the *Guide to Judiciary Policies and Procedures* that applies to reductions in voucher amounts submitted by CJA counsel. The new provision provides that “[i]f the court determines that a claim should be reduced, appointed counsel should be provided (a) prior notice of the proposed reduction with a brief statement of the reason for it, and (b) an opportunity to address the matter.” It goes on to say “notice need not be given” if the reduction is based upon “mathematical or technical errors.” The last sentence states that “[n]othing contained in this guideline should be construed as requiring a hearing or as discouraging the court from communicating informally with counsel” about “questions or concerns.”

The prior provision stated only that the “the judicial officer *may* wish to notify appointed counsel that his or her claim for compensation . . . has been reduced, and to provide an explanation of the reasons for the reduction.” (emphasis added.)

GETTING PAID

In 2003 David Beneman wrote an article entitled “Getting Paid: Vouchers for CJA, Experts, and Transcripts.” It’s a must read for anyone doing CJA work. The article in its entirety is posted on our webpage, <http://www.fpd-fln.org/>. Here’s how it begins:

Panel attorneys are the only members of the Federal Court criminal system who are not on salary. Prosecutors, judges, probation

agents, case agents, all get a weekly paycheck rain or shine. Direct deposit no less. And health insurance. And a retirement plan. And federal benefits. They all have staff, also on salary. They have unlimited Westlaw usage paid for by someone else. They have government cars, government computers and government phones. They have badges, id cards and special parking spaces.

CJA attorneys have vouchers. That's it. Oh, we have clients, ethical obligations and bills. But money – no; file a voucher. So, like it or not, unless you are independently wealthy and want to further subsidize the Federal Government's constitutional obligations, you must master the Art of the Voucher.

INTRODUCTION TO FEDERAL SENTENCING

We've just added to our webpage, <http://www.fpd-fln.org>, the 9th Edition of what had been, through its first eight editions, entitled "An Introduction Federal Guideline Sentencing." Published by the Federal Public Defender's Office for the Western District of Texas, the 23 page article has a new broader title: "An Introduction to Federal Sentencing." It still serves as a primer on the Guidelines, but it has been revised to reflect the Booker decision. The article is essential reading for anyone that works in federal court. Here's how it starts:

Despite the fundamental change that Booker represents, the decision so far has had relatively little practical effect on federal sentencing. Judges are now vested with far more sentencing discretion, but they have used that discretion sparingly, continuing as before to impose sentences within the guideline range in the majority of cases.

Nevertheless, the fact that the guidelines are now advisory rather than mandatory can have a tremendous effect on a particular defendant's case. The effect can be positive or negative, and defense counsel must be prepared to gauge the potential benefits and risks of the advisory guidelines at every stage of the federal sentencing process.

ETHICAL ISSUES FOR CJA COUNSEL

Part II: Communications

This is the second installment in a series of articles on problems inherent in communications between appointed counsel and a client about potential retained services. The first installment, in our January 2006 Newsletter, addressed the issue of solicitation; future articles will address payment by third parties, avoiding the appearance of impropriety, and potential conflicts of interest. The complete article is available on our website at <http://www.fpd-fln.org>.

If the attorney believes the defendant has other legal remedies, outside the scope of the appointment, such as a viable claim for post-conviction relief, the attorney is ethically free to, and perhaps will feel a personal moral obligation to, point out that the client *might have* such a potential avenue of relief and advise the client to consult counsel or proceed *pro se*. The attorney is free to advise the client that he is available to handle that claim.

The Rules provide guidance for lawyers communicating with potential clients, and the attorney would be prudent to consider these provisions when drafting written communications regarding potential representation, even though these provisions

do not strictly control communications with an existing or former client.

First, the Comment to Rule 4-7.1, Information About Legal Services, focuses on advertising but is also prudent to consider communications regarding potential legal services. It emphasizes that “The public’s need to know about legal services . . . is particularly acute in the case of persons of moderate means who have not made extensive use of legal services.” It notes important information to include in such communications: information concerning a lawyer’s name or firm name, address, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer’s fees are determined, including prices for specific services and payment and credit arrangements; a lawyer’s foreign language ability; names of references and, with their consent, names of clients regularly represented; and other factual information that might invite the attention of those seeking legal assistance.

Second, Rule 4-7.2, Communications Concerning a Lawyer’s Services, sets out requirements for “any communication” conveying information about a lawyer or lawyer’s services. Subsection (a) sets out required information, and more importantly, subsection (b) sets out information that is prohibited in such communications. Subsection (b)(1) outlines various forms of “false, misleading, deceptive, or unfair communication[s] about the lawyer or the lawyer’s services” that are prohibited. Subsection (b)(2) focuses on misleading or deceptive factual statements. Statements that describe or characterize “the quality of the lawyer’s services,” when made to an existing client, are exempted under subsection (b)(3). Exceptions to Rule 4-7.2 are found in Rule 4-7.9, Information About a Lawyer’s Services

Provided upon Request; its subsections address requests by potential clients, information regarding qualifications, and disclosure of intent to refer any matters to another lawyer or firm.

Third, Rule 4-7.4(b)(E) also proscribes any communication with prospective clients that “contains a false, fraudulent, misleading, deceptive, or unfair statement or claim.”

PANEL TRAINING

Each presentation is at the federal courthouse, except for Gainesville. Those presentations are at the Federal Public Defender’s Office.

Computer Crimes

Gainesville: May 24 at 9:00 and noon

Sentencing Mitigation and Booker: Examples From Florida’s Middle District

Pensacola: May 18 at noon
Panama City: May 9 at noon
Tallahassee: May 25 at noon

Supreme Court Review

Pensacola: June 22 at noon
Panama City: June 13 at noon
Tallahassee: June 22 at noon
Gainesville: June 12 at 9:00 and noon

GUIDELINES AMENDMENT FOR STEROIDS

Effective March 27th a temporary emergency amendment to the Sentencing Guidelines increases the penalties for trafficking in anabolic steroids. The amendment to USSG § 2D1.1 adds 2 offense levels if the “offense

involved the distribution of an anabolic steroid and a masking agent,” and adds 2 offense levels if “the defendant distributed an anabolic steroid to an athlete.” The amendment implements a directive found in Congress’ Anabolic Steroid Control Act of 2004.

PANEL APPOINTMENTS SET TO EXPIRE

We’ve sent letters to all panel members explaining that the existing 3-year appointment to the Criminal Justice Act Panel for the Northern District of Florida are all scheduled to expire in June of this year. The vast majority of the letters advise that the Panel Oversight Committee will automatically consider the panel member for reappointment. In a few instances, where the panel member has not been active for some time, the letter takes a different approach. It says that the Panel Oversight Committee will assume the panel member is no longer interested in serving on the panel, and that unless the member advises otherwise, he or she will not be considered for reappointment. Call Randy Murrell at (850) 942-8818 if you have any questions about the reappointment process or your status.

TALKING TO THE PRESS

In January, Judge Rodgers ordered two Panama City lawyers to show cause why they should not be held in contempt of court for speaking to a newspaper reporter while the jury was deliberating over a case the lawyers had just tried. The lawyers filed a response admitting to violating the rule, but explaining that they had inadvertently misread it. The matter has been pending for several months and remains unresolved.

The rule involved, Local Rule 77.3, limits what both prosecutors and defense counsel can say to news reporters. In the Panama City case, the lawyers ran afoul of subsection (5) of the rule. That section prohibits, “during the trial of any criminal matter,” any “extrajudicial statement or interview, relating to the trial or parties or issues in the trial,” other than quotes from the public records of the case. Other provisions within the rule preclude a lawyer, in a pending case, from talking to a reporter about the criminal record of the accused; the existence or content of any confession; the results of any tests or examinations or the accused’s failure to submit to testing; the “identity, testimony, or credibility” of any prospective witness; “the possibility of a plea of guilty;” any opinion as to the guilt or innocence of the accused; and any opinion as to the merits of the case or evidence.

It is worth noting the Local Rule is far more restrictive than the ethical rules with which most of us are familiar. Rule 4-3.6(a) of The Florida Bar’s Rules of Professional Conduct prohibits an “extrajudicial statement . . . if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.” The local rule prohibits the release of specified information, regardless of whether it might have an impact on any proceeding.

NEW BOP DESIGNATION CENTER

The Bureau of Prisons in the final stages of transferring all of its initial designation and sentence computation services from Community Corrections and Regional

Offices to a central office in Texas. The transfer process has, at least for now, delayed some designations. The new central office is: Designation and Sentence Computation Center, Grand Prairie Office Complex, U.S. Armed Forces Reserve Complex, 346 Marine Forces Drive, Grand Prairie, Texas 75051. (850) 352-4200.

CHARLES LAMMERS RETURNS TO OUR TALLAHASSEE OFFICE

Charles Lammers, who had been working out of our Pensacola office, is now in our Tallahassee office. He will continue to regularly travel to Panama City, where over the last year there has been a significant increase in the number of cases. We've moved Charles because we think we're in a better position in the Tallahassee office to assist him in handling that increasing Panama City caseload.

BOOKER VARIANCES

Mando, Curtis Hinkle, R. Atty: Murrell, R.
Docket: 4:04cr22
Charge: Poss WITD > 5grams Cocaine, poss of firearm in furtherance of drug trafficking offense
Range: 322 - 387 months (career offender)
Sentence: 180 months
Date of Imposition of Sentence: 2/15/06
Grounds: Defendant had a limited criminal history that just barely qualified as a career offender and the instant offense was relatively minor

Ferguson, Jeffrey Vinson, R. Atty: Nkrumah, K.
Docket: 3:05cr105
Charge: Making False Statement to obtain firearm
Range: 37 - 46 months
Sentence: 1 year and a day
Date of Imposition of Sentence: 3/30/06
Grounds: limited criminal history, intended to use the firearm for lawful purpose, family responsibilities, reduced chance of recidivism

DOWNWARD DEPARTURES

Stewart, Chester Vinson, R. Atty: Riddlehoover, K.
Docket: 3:05cr116
Charge: Conspiracy to Distribute Ecstasy
Range: 24 - 30 months
Sentence: 7 days
Date of Imposition of Sentence: 2/22/06
Grounds: 5K1.1

Washington, Ronald Hinkle, R. Atty: Bubsey, W.
Docket: 4:05cr40
Charge: Dist. > 5grams crack, possession firearm in furtherance of drug crime, poss. firearm by convicted felon
Range: 262- 327months +60 mos mandatory consecutive
Sentence: 144 months
Date of Imposition of Sentence: 1/13/06
Grounds: 5K1.1

Holland, Petrose Vinson, R. Atty: Nkrumah, K.
Docket: 3:05cr107
Charge: Poss WITD Cocaine & Marijuana, poss firearm by convicted felon
Range: 188 - 235 months
Sentence: 88 months
Date of Imposition of Sentence: 3/14/06
Grounds: 5K1.1

Guajardo, Jose Collier, L. Atty: Nkrumah, K.
Docket: 3:05cr134
Charge: Consp. Poss WITD Marijuana, Poss WITD Marijuana
Range: 262 - 341 months
Sentence: 135 months
Date of Imposition of Sentence: 3/14/06
Grounds: 5K1.1

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

Over the span of the last few months, Tallahassee panel member **Cliff Davis** has won three acquittals, surely shattering all existing records! In Panama City, client Bruce Falson was charged with a powder and crack cocaine conspiracy and was facing a mandatory life sentence. Two codefendants testified that Falson was a major supplier. Falson was also caught in a car that had in it cocaine and one of the codefendant's who was carrying money destined for the wrong end of a controlled buy. **Cliff** carried the day by challenging the credibility of the codefendants and arguing that Falson wasn't a knowing participant in the activity of the codefendant.

In Pensacola, **Cliff's** client, Robert Salzar, was charged in a conspiracy involving more than 100 kilograms of marijuana and was facing, at least, a 10 year minimum mandatory sentence. **Cliff** convinced the jury that, rather than driving the truck carrying the marijuana from Texas to Pensacola, Salzar was only an associate of the guilty parties and that Salzar's presence at the scene was a happenstance.

Finally, **Cliff** convinced a Tallahassee jury to find his client, Mike Johnson, not guilty of an armed bank robbery. **Cliff** successfully discredited a time-line the government had relied upon to bolster their case. He went on to impeach the claim of a cooperating government witness, by, among other things, showing that Johnson's purported "confession" about the amount taken in the robbery was significantly at odds with the amount actually taken.

In a separate trial, panel member **George Blow** convinced another jury to acquit Johnson's co-defendant, Kurtis Wright, of that

same robbery charge.

In a case tried before Judge Rodgers, **Charles Lammers**, then, of our Pensacola office, won an acquittal in an armed carjacking case for his client, Dominique Douglas. **Charles** won by challenging the accuracy of the eyewitness testimony of the two victims. **Charles** argued that (1) the victims had a limited opportunity to see their assailant; and (2) that when the victims' identified Douglas from a photo line-up and, subsequently, in court during the trial, they had been influenced by opportunities they had to see Douglas before and after the crime.

In U.S. v. Williams, No. 04-15117 (11th Cir. Apr. 13, 2006), Tallahassee panel member **Michael Ufferman**, relying on Booker, won a resentencing for his client.

In U.S. v. Nash, 438 F.3d 1302 (11th Cir. 2006), **Gwen Spivey** of our Tallahassee office convinced the Eleventh Circuit that a condition of supervised release that required her client to participate in mental health counseling "as deemed necessary by the Probation Officer," left the question of counseling to the discretion of the probation officer, and was, therefore, an improper delegation of judicial authority.

Tom Miller of our Gainesville office convinced Judge Paul to apply the decision in Crawford v. Washington to a violation of supervised release hearing, which resulted in the exclusion of an informant's out-of-court statements.

Bob Dennis of our Pensacola office won a judgment of acquittal in a felony fleeing and eluding case that arose on the Naval Air Station Whiting in Milton. Judge Vinson

found that **Bob**'s client, who was driving an old bread truck, simply didn't realize the security officers were behind him, and that no reasonable juror could have concluded otherwise.

It took the government three jury trials to convict Tallahassee panel member **Richard Greenberg**'s client, Anthony Holt, of several drug charges and the charge of possession of a firearm by a convicted felon. Along the way **Richard** won an acquittal on the charge of use of a firearm in furtherance of a drug trafficking offense.

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 2005 term that are relevant to our practice and granted since our last newsletter:

CAREY, WARDEN v. MUSLADIN, 2006 WL 985643 (Mem), No. 05-785 (cert. granted Apr. 17, 2006) (reviewing 427 F.3d 653 (9th Cir.))

AEDPA, spectators influencing jury

The federal habeas court granted relief in holding that a state court's affirmation of a murder conviction obtained after trial at which victim's family sat in courtroom wearing buttons bearing victim's photograph constituted unreasonable application of U.S. Supreme Court precedent, which established that courtroom practices can be so inherently prejudicial as to create unacceptable risk of impermissible factors influencing jury. **Question presented:** In absence of controlling Supreme Court law, did Court of Appeals for Ninth Circuit exceed its authority under 28 U.S.C. § 2254(d)(1) by overturning defendant's state conviction of murder on ground that courtroom spectators included three family members of victim who wore buttons depicting deceased? (FYI Musladin represented by David Wayne Fermino, Federal Public Defender, Northern Dist. of CA)

U.S. v. RESENDIZ-PONCE, 2006 WL 316687 (Mem), No. 05-998 (cert. granted Apr. 17, 2006) (reviewing 425 F.3d 729 (9th Cir.))

Omission of element of offense from indictment, harmless error

The circuit court dismissed an indictment and remanded without prejudice, holding that an indictment charging attempt to illegally re-enter United States after having previously been deported, but omitting any specific overt act that was substantial step toward entry, was fatally flawed and not subject to harmless error analysis. The court reasoned that "Failure to allege an essential element of the offense is a fatal flaw not subject to mere harmless error analysis.... The purpose of this rule is to secure the basic institutional purpose of the grand jury, by ensuring that a defendant is not "convicted on the basis of

facts not found by, and perhaps not even presented to, the grand jury that indicted him." ... this purpose has its constitutional roots in the Fifth and Sixth Amendments and historical roots in the English common-law tradition....While this protection may not extend to incidentals and details unnecessary to a conviction, an overt act that is a substantial step toward underlying offense is at the very core of an attempt charge.... The defendant has a right to be apprised of what overt act the government will try to prove at trial, and he has a right to have a grand jury consider whether to charge that specific overt act. Physical crossing into a government inspection area is but one of a number of other acts that the government might have alleged as a substantial step toward entry into the United States. The indictment might have alleged the tendering a bogus identification card; it might have alleged successful clearance of the inspection area; or it might have alleged lying to an inspection officer with the purpose of being admitted. Instead, the indictment merely alleged that Resendiz "attempted to enter" the United States, which simply repeats the ultimate charge against him. A grand jury never passed on a specific overt act, and Resendiz was never given notice of what specific overt act would be proved at trial." **Question presented:** Can omission of element of criminal offense from federal indictment constitute harmless error? [Ed. note- neither majority nor dissent cited *Neder v. United States* (U.S. 1999), which held that failure to instruct jury as to a proven essential element is harmless error]

LOPEZ v. GONZALES, ATT'Y GEN., 2006 WL 845511 (Mem), No. 05-547 (cert. granted Apr. 3, 2006) (reviewing 417 F.3d 934 (8th Cir. 2005)), & **TOLEDO-FLORES v. U.S.**, 2006 WL 842994 (Mem), No. 05-

7664 (reviewing No. 04-41378 (5th Cir. unpub. op.)) (cases consolidated for oral argument)

Aggravated felony for deportation

These cases concern what crime would qualify as an aggravated felony under federal law for purposes of deportation. **Question presented in Toledo-Flores:** Has the Fifth Circuit erred in holding - in opposition to the Second, Third, Sixth, and Ninth Circuits - that a state felony conviction for simple possession of a controlled substance is a "drug trafficking crime" under 18 U.S.C. § 924(c) (2) and hence an "aggravated felony," under 8 U.S.C. § 1101(a) (43) (B), even though the same crime is a misdemeanor under federal law? **Question presented in Lopez:** Whether an immigrant who is convicted in state court of a drug crime that is a felony under the state's law but that would only be a misdemeanor under federal law has committed an "aggravated felony" for purposes of the immigration laws.

LAWRENCE v. FLORIDA, 2006 WL 219613 (Mem), No. 05-8820 (cert. granted Mar. 27, 2006) (reviewing 421 F. 3d 1221 (11th Cir. 2005))

AEDPA, tolling of statute of limitations

Questions presented: (1) There is a split in the circuits about whether the one-year period of limitations is tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment of claim is pending" Antiterrorism and Effective Death Penalty Act (AEDPA) 28 U.S.C Section 2244(d) (2). Where a defendant facing death has pending a United States Supreme Court certiorari petition to review the validity of the state's denial of his claims for state post-conviction relief, does the defendant have an application pending

which tolls the 2244(d)(2) statute of limitations? (2) Alternatively, does the confusion around the statute of limitations -- as evidenced by the split in the circuits -- constitute an “extraordinary circumstance,” entitling the diligent defendant to equitable tolling during the time when his claim is being considered by the United States Supreme Court on certiorari? (3) And in the second alternative, do the special circumstance where counsel advising the defendant as to the statute of limitations was registry counsel – a species of state actor – under the monitoring supervision of Florida Courts, with a statutory duty to file appropriate motions in a timely manner, Florida Statutes Section 27.711(12) constitute an “extraordinary circumstance” beyond the defendant’s control such that the doctrine of equitable tolling should operate to save his petition?

JONES v. BOCK, 126 S. Ct. 1462 (Mem), No. 05-7058 (cert. granted Mar. 6, 2006) (reviewing *Jones*, No. 03-2576, 135 Fed. Appx. 837 (6th Cir. 6/15/05)) & **WILLIAMS v. OVERTON**, 126 S. Ct. 1463 (Mem), No. 03-2507, 136 Fed. Appx. 859, 2005 WL 1513102 (6th Cir. 6/22/05)

Prison Litigation Reform Act, exhaustion of administrative remedies

In separate and unrelated cases, Jones and Williams, prisoners of the State of Michigan, filed actions against prison employees under 42 U.S.C. § 1983. The Sixth Circuit approved dismissal of their suits because even though the administrative remedies of some of their respective claims had been exhausted, the Court held that total exhaustion of all claims had to be established, and dismissal of all claims was the required remedy. **Questions presented:** (1) Whether satisfaction of the PLRA’s exhaustion requirement is a prerequisite to a prisoner’s federal civil rights

suit such that the prisoner must allege in his complaint how he exhausted his administrative remedies (or attach proof of exhaustion to the complaint), or instead, whether non-exhaustion is an affirmative defense that must be pleaded and proven by the defense. (2) Whether the PLRA prescribes a “total exhaustion” rule that requires a federal district court to dismiss a prisoner’s federal civil rights complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims.

CUNNINGHAM v. CALIFORNIA, 126 S. Ct. 1503 (Mem), No. 05-6551 (cert. granted Feb. 21, 2006) (reviewing 2005 WL 880983 Cal. Ct. App. 2005) (unpublished))

Apprendi/Blakely/Booker

California characterizes its sentencing law as determinate sentencing, setting out three alternative sentences: a lower term, a middle term, and an upper term, with the middle term required to be imposed unless the judge finds aggravating or mitigating factors. The judge placed Cunningham in the upper term with a 16-year sentence, the maximum statutorily authorized sentence. Cunningham filed an appeal challenging, among other things, most of the aggravators, and filed a supplemental brief arguing *Blakely*. The California court affirmed, taking the view that “in operation and effect, the provisions of the California determinate sentence law simply authorize a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge’s selection of an appropriate sentence within a statutorily prescribed sentencing range. Therefore, the upper term is the “statutory maximum” and a trial court’s imposition of an upper term sentence does not violate a defendant’s right

to a jury trial under the principles set forth in *Apprendi*, *Blakely*, and *Booker*.” **Question presented:** Whether California’s Determinate Sentencing Law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments.

HILL v. CROSBY, 126 S. Ct. 1189 (Mem), No. 05-8794 (cert. granted Jan. 25, 2006)

Lethal injection, habeas, 42 U.S.C. s. 1983
As Clarence Hill knocked on death’s door, the Supreme Court stayed his execution and granted cert. **Questions presented:** (1) Whether a complaint brought under 42 U.S.C. Sec. 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254? (2) Whether, under this Court’s decision in *Nelson*, a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. Sec. 1983?”

DIXON v. U.S., 126 S. Ct. 1139 (Mem), No. 05-7053 (cert. granted Jan. 13, 2006) (reviewing 413 F.3d 520 (5th Cir. 2005))

Duress; burden of proof

Dixon was convicted of one count of receiving a firearm while under indictment and eight counts of making a false statement to purchase a firearm. She introduced evidence concerning battered woman’s syndrome as part of her duress defense, claiming that she had been coerced into purchasing the guns by her boyfriend and an associate. Dixon testified that she had been abused by her boyfriend, who allegedly beat her on a regular basis and threatened her

children. Her description of the relationship was largely corroborated by the testimony of her two daughters. Dixon further testified that she was afraid that, if she did not buy the guns for Wright, he would harm or even kill her or her daughters. The trial court gave a jury instruction that placed the burden of proving duress by a preponderance upon the defendant, and the circuit court affirmed.

Question presented: Where a criminal defendant raises a duress defense, whether the burden of persuasion should be on the government to prove beyond a reasonable doubt the defendant was not under duress, or upon the defendant to prove duress by a preponderance of the evidence.

Supreme Court Cases

SALINAS v. U.S., 2006 WL 1059408, No. 05–8400 (Apr. 24, 2006)

Controlled substance offense, U.S.S.G. § 4B1.1(a)

The Fifth Circuit erred, as the Solicitor General conceded, for concluding that a prior conviction for simple possession of a controlled substance constituted a “controlled substance offense” under U.S.S.C. § 4B1.1(a), because the § 4B1.2(b) defines it as “an offense under federal or state law . . . that prohibits . . . the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.”

GEORGIA v. RANDOLPH, 126 S. Ct. 1515, No. 04-1067 (Mar. 22, 2006)

Fourth Amendment Third-Party Consent

The Supreme Court ruled (Souter, for 5-3 majority) that it is unconstitutional for police, without a warrant, to search a home, if two occupants are present at the time and one consents but the other objects. But, if the objector is nearby, and not at the door, an

objection by him will not block the search. The Court stressed, though, that police may not take a potentially objecting tenant away from the home in order to be able to make the search with the other occupant's consent.

U.S. v. GRUBBS, 126 S. Ct. 1494, No. 04-1414 (Mar. 21, 2006)

Fourth Amendment, particularity requirement, anticipatory warrants

The Court (Scalia; 8-0 as to the judgment but 5-3 as to some of its reasoning), held that (1) anticipatory search warrants are not categorically unconstitutional; and (2) the particularity requirement of the Fourth Amendment does not require the anticipatory condition to be placed in the warrant itself. The Court rejected policy arguments that including the condition precedent in the warrant is necessary to delineate the limits of the executing officer's power and to allow the individual whose property is searched or seized to police the officer's conduct.

SCHEIDLER v. NATIONAL ORGANIZATION FOR WOMEN, INC. (NOW), 126 S. Ct. 1264, No. 04-1244 (Feb. 28, 2006)

Hobbs Act, RICO

NOW filed a class action alleging that individuals and organizations engaged in a nationwide conspiracy to shut down abortion clinics through violence and other unlawful acts in a pattern of racketeering activity that involved violations of the Hobbs Act. The Hobbs Act makes it a federal crime to "obstruc[t], dela[y], or affec[t] commerce . . . by . . . robbery or extortion . . . or commit[ting] or threaten[ing] physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section." The Court previously held that NOW failed to

prove the extortion theory, 537 U. S. 393. In this case, the Court concluded that NOW's alternative theory, which relied on four instances (or threats) of physical violence unrelated to extortion, fails as well. The Court (Breyer, 8-0) relied on statutory construction to hold that "physical violence unrelated to robbery or extortion falls outside the scope of the Hobbs Act."

OREGON v. GUZEK, 126 S. Ct. 1226, No. 04-928 (Feb. 22, 2006)

Limitations on Death Penalty Mitigation Evidence; Residual Doubt

At the guilt phase of Guzek's capital murder trial, his mother was one of two witnesses who testified that he had been with her on the night the crime was committed. He was convicted and sentenced to death. The State Supreme Court reversed the sentence and in remanding, instructed that the Eighth and Fourteenth Amendments provide Guzek a federal constitutional right to introduce live alibi testimony from his mother at the upcoming resentencing proceeding. The Court (Breyer, 8-0) held that the Constitution does not prohibit a State from limiting the innocence-related evidence a capital defendant can introduce at a sentencing proceeding to the evidence introduced at the original trial. he had no right to present additional alibi evidence at resentencing that was inconsistent with his prior conviction.

RICE v. COLLINS, 126 S. Ct. 969, No. 04-52 (Jan. 18, 2006)

Habeas; Batson; peremptory challenges

The unanimous Court (Kennedy) reversed the Ninth Circuit's grant of habeas relief because it had set aside reasonable state-court factual determinations in favor of its own debatable interpretation of the record; this did not

satisfy AEDPA. Under *Batson*, the burden of persuasion regarding racial motivation stays with the opponent of the strike. *Purkett*. The federal court could only grant relief here if it was unreasonable to credit the prosecutor's race-neutral explanation for the strike. The Ninth Circuit recited the proper standard of review but improperly substituted its evaluation of the record for that of the state trial court. A concurrence by Breyer and Souter opined that history had proven correct the prediction of Justice Marshall that the *Batson* test would fail to ferret out unconstitutional discrimination in jury selection. He concluded that ordinary mechanisms of judicial review cannot assure *Batson*'s effectiveness; he suggested we may have to choose between the peremptory challenge system and the Constitution's nondiscrimination command, and he suggested that *Batson* and the whole peremptory system be reconsidered.

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. ARBANE, 2006 WL 1045204 (Apr. 21, 2006)

Jurisdiction; extradition (Ecuador); evidence; sufficiency.

The Court reversed the convictions for conspiracy to import cocaine, under 21 U.S.C. 952(a), 960(b)(1)(B), and 963, finding insufficient evidence of the required conspiratorial "agreement" because the government's only evidence was the testimony of its CI. The government conceded that it was insufficient to prove an agreement between defendant and its CI, and it presented no other evidence of an agreement to import

cocaine into the U.S. The Court also rejected the argument that the U.S. lacked jurisdiction to try him because his arrest was not effectuated through normal judicial and treaty processes; instead, after he was acquitted on related charges in his native Ecuador, he was deported to Iran but arrested en route when his plane landed in Houston. The Court concluded this argument was precluded by *Alvarez-Machain*, 504 U.S. 655 (1992) (holding that extra-treaty seizures are permitted unless extradition treaty contains explicit provision making it the exclusive means of procuring a defendant's presence). J. Wilson's dissent argued that the majority overlooked the standard of review which requires viewing the evidence in the light most favorable to the government.

MARTINEZ v. U.S. ATTY. GEN., 2006 WL 1041742 (Apr. 21, 2006)

Immigration; jurisdiction

The Court dismissed, for lack of jurisdiction, the petition for review of a BIA denial of an application for cancellation of removal under 8 USC 1229b(b)(1)(D)'s "exceptional and extremely unusual hardship requirement."

REYES v. MASCHMEIER, 2006 WL 1028972 (Apr. 20, 2006)

Fourth Amendment "seizure," 28 U.S.C. § 1983

While Sheriff's Sgt. Maschmeier was walking across the office to meet with his captain, Maschmeier "approached sheriff's employee Rose Marie Reyes from behind and, without warning, suddenly struck her in the back of the head with a three-ring binder containing DARE (Drug Abuse Resistance Education, designed to teach elementary school children about the dangers of drugs) program materials. Maschmeier completed his meeting with the captain, walked back

past Reyes, and indicated that he was ready to meet with her about the DARE program. Maschmeier gestured for Reyes to come into his office where he berated her so badly that this then thirteen-year veteran of the Lee County Sheriff's office fled the office in tears." Reyes brought a claim under 42 U.S.C. § 1983 alleging that she was unconstitutionally seized when she was struck by Maschmeier, her supervisor and a sergeant in the county sheriff's office, and subsequently berated in an open door meeting. The district court denied the claim, reasoning that the force used was not unreasonable. The 11th Circuit affirmed (Birch, with Marcus & Mills), concluding that there was never a Fourth Amendment "seizure."

U.S. v. MAXWELL, 2006 WL 1041011 (Apr. 20, 2006)

Commerce Clause

Maxwell was convicted of two counts of knowingly possessing child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B), a provision of the Child Pornography Prevention Act of 1996 (CPPA). Essentially, he possessed disks in Florida that contained numerous images of kiddie porn. The Government's commerce proof was limited to the fact that disks had been manufactured outside of Florida – not that data later placed on the disks had crossed state lines. In its original opinion, 386 F. 3d 1042, the 11th Circuit in 2004 held that 18 U.S.C. § 2252A was unconstitutional as applied to Maxwell's conduct. The Supreme Court summarily remanded for reconsidering in light of *Gonzales v. Raich* (2005), in which the Court held that Congress had the authority to prohibit, via the Controlled Substances Act (CSA), 21 U.S.C. § 801 et seq., the local cultivation and use of marijuana in compliance with California law. On remand

[and without ordering supplemental briefing from the parties], the Court (Tjoflat, with Edmondson & Cox) reversed itself to affirm the conviction, concluding that "the Court's reasoning in *Raich* calls into question much of our earlier analysis. . . . Just as the CSA is 'lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of 'controlled substances,' the CPPA is part of a comprehensive regulatory scheme criminalizing the receipt, distribution, sale, production, possession, solicitation and advertisement of child pornography."

BASHIR v. ROCKDALE COUNTY, GA., 2006 WL 962608 (Apr. 14, 2006)

Fourth Amendment

Bashir came home to find police had just arrested his wife and two sons on disorderly conduct charges. As he spoke with a sergeant, Bashir saw his seven-year-old son crying, unattended in the carport. He picked up his son, and walked inside the house, followed by a deputy sheriff, who had no warrant, and who did not ask permission to enter. Bashir told police "if y'all didn't do this thing right I am suing the hell out of everybody." Police then rushed into the home, grabbed Bashir, threw him to the floor, handcuffed him and took him to the jail, where he spent the night. The Court found this to be evidence of an unconsented, non-existent, warrantless home entry to make an arrest in violation of *Payton* and its progeny, thereby precluding the officer's qualified immunity to Bashir's suit under § 1983.

U.S. v. WILLIAMS, 2006 WL 942875 (Apr. 13, 2006)

Evidence; standard of care; jury instructions; good faith; sentencing;

Booker; restitution

This was the appeal of P.C. Dr. Freddy Williams, whose convictions on 94 counts and concurrent life sentences resulted primarily from OxyContin prescriptions (resulting in two overdose deaths) and medicaid abuses. First, Williams argued that the expert testimony that his prescribing behavior failed to meet the CIVIL standard of care, paired with prosecutorial misconduct referring to that standard, confused the jury about the government's burden of proving a crime versus malpractice. Reviewing for plain error, the Court questioned whether there was any error at all given the lack of a trial objection and lower court ruling and the absence of any authority that this evidence was inadmissible/irrelevant; in any event, it found the proper jury instruction was given (the defendant agreed) and that it cured any possible error. Second, the trial court denied a jury instruction that a doctor's good faith prescription (good intentions and honest exercise of best professional judgment) equaled a legitimate medical purpose precluding conviction; its instruction tied good faith to "the standard of medical practice generally recognized and accepted" in the U.S. The Court found this was not abuse of discretion, citing *Moore*, 423 U.S. 122 (1975); noting the proposed instruction contained no objective standard; and noting it did not seriously impair his ability to present an effective defense. As to sentencing, the government agreed that resentencing was required. However, it concluded that restitution need not be reconsidered, and joined 7 other circuits to hold that *Booker* does not apply, citing *Dohrmann*, 05-15360 (11th Cir. 3/15/06) (holding *Apprendi* does not apply to the Mandatory Victims Restitution Act, 18 USC 3663, because it does not have a statutory maximum).

SCHEERER v. U. S. ATTORNEY GENERAL, 2006 WL 947680 (Apr. 13, 2006)

Immigration; asylum; frivolous application; fabrication; materiality; specific findings; 8 C.F.R. 1245; 8 U.S.C. 1255

A German chemist fled after prison was imposed for inciting racial hatred following his report that Auschwitz gas chambers manifested no residual chemical signs, from which he inferred that the mass killings could not have occurred. He eventually entered the US as a conditional parolee and applied for asylum before his departure date. An immigration judge held hearings and decided he was removable, presented no cognizable claim of persecution entitling him to asylum, and it was frivolous. He then moved to reopen and adjust his status to lawful permanent resident alien based on his subsequent marriage to a citizen. The BIA denied it based on 8 CFR 1245.1(c)(8) (making him ineligible for adjustment).

The Court docketed his timely petitions for review but denied a stay, after which he was removed to Germany (and presumably served his sentence). The Court affirmed the denial of asylum because Scheerer could not establish past persecution or a well-founded fear of future persecution on account of an imputed political opinion. However, it agreed his asylum application was not frivolous; under 8 CFR 208.20, because the consequences are so severe, a finding of frivolousness cannot stand absent a specific finding the applicant deliberately fabricated material portions of the asylum application. The Court held that a finding of frivolousness cannot flow directly from an adverse credibility determination; agreeing with the Third Circuit, it held the IJ must additionally make specific findings as to which material

elements were deliberately falsified. Finally, the Court applied a *Chevron* (467 US 837) analysis and agreed with three other circuits that 8 CFR 1245.1(c)(8) (regulatory bar prohibiting him for applying for adjustment of status) is invalid because it conflicted with congressional intent expressed in 8 USC 1255(a).

COLOMA v. HOLDER, 2006 WL 910249 (Apr. 11, 2006)

Sentencing; related proceedings; concurrent v. consecutive; 5G1.3

The Court affirmed denial of the 28 U.S.C. § 2241 action against BOP seeking pre-custodial credit to his sentence, because the second sentencing, which resulted in a concurrent sentence for related charges (two drug importation conspiracies committed sequentially), had already taken into account any overlap of the two cases. There was no dispute that the time served on both cases was fully concurrent after the second sentencing, but the second sentence could not start at (i.e., be backdated to) commencement of the first sentence. The Court noted an apparent circuit conflict.

U.S. v. WILLIAMS, 2006 WL 871200 (Apr. 6, 2006)

Pandering under the PROTECT Act, vagueness & overbreadth

After *Ashcroft* (U.S. 2002) held portions of the Child Pornography Prevention Act of 1996 (CPPA) unconstitutional, Congress passed the PROTECT Act, which includes a prohibition against “pandering,” 18 U.S.C. § 2252A(a)(3)(B). The pandering provision criminalizes not the speech expressed in the underlying materials, but the speech promoting and soliciting such materials. The Eleventh Circuit (Reavley, with Barkett & Wilson) held the pandering restriction on that

speech is too broad. “Congress may regulate the distribution or solicitation of the illegal materials described in subsections (i) (obscene child pornography) and (ii) (‘real’ child pornography) of the pandering provision. If that were all the provision did, we would find no constitutional infirmity on vagueness grounds. However, the statute is unnecessarily muddled by the nebulous ‘purported material’ and ‘reflects the belief, or is intended to cause another to believe’ language. Because of this language, the pandering provision fails to convey the contours of its restriction with sufficient clarity to permit law abiding persons to conform to its requirements. Because of this language, the provision is insusceptible of uniform interpretation and application by those charged with the responsibility of enforcing it. Accordingly, we find it impermissibly vague.”

ESPY v. MASSAC, 2006 WL 845376 (Apr. 3, 2006)

28 U.S.C. § 2254, Confrontation Clause

Noting a circuit split, the Court (Cox, with Birch & Wilson) held that *Crawford v. Washington* does not apply retroactively on collateral review. “At least five other circuits have directly addressed this issue, and all but one have either concluded or suggested that *Crawford* does not apply retroactively.... We agree with the weight of authority on this issue and hold that *Crawford* did not announce a watershed rule of criminal procedure, and it therefore does not apply retroactively to cases on collateral review.”

U.S. v. SPEARS, 2006 WL 820404 (Mar. 30, 2006)

Sentencing; ACCA; separate convictions; adjudication withheld; juvenile; jury question; Rule 32; PSI

The Court rejected all arguments but did remand for the district court to attach a copy of the sentencing hearing transcript to the PSI, under FRCrP 32(i)(3), so that it reflected the rulings on defense objections. First, defendant's two robbery convictions, which arose out of victims he approached in a parking lot, separated by less than 3 minutes and 30 feet, were two separate robberies for ACCA purposes, because one robbery was complete before (defendant saw another potential victim and made) a subsequent conscious decision to commit the second. Second, the argument that one conviction did not count because adjudication was initially withheld was meritless in light of the fact that adjudication was imposed following a VOP. Third, the argument that a juvenile conviction did not count was also meritless because he was convicted and sentenced as an adult. Fourth, the district court did not plainly err by deciding the robberies were separate or by using the preponderance burden of proof.

RAINEY v. SEC'Y, DOC, 2006 WL 779797 (Mar. 29, 2006)

Habeas; timeliness; resentencing; equitable tolling

The defendant's federal habeas petition was filed within one year of his state resentencing, but more than one year after his original judgment of conviction became final. The habeas petition, however, challenged only the original conviction, not the resentencing. The Court affirmed the denial of a 28 U.S.C. § 2254 habeas petition as time-barred under the one-year limitations period of AEDPA. It held, first, that the applicable one-year period began to run from the date of the original judgment because the petition only challenged the original judgment. For purposes of Rainey's petition, the relevant judgment became "final" on the date the original conviction became final, without regard to the

subsequent resentencing. Second, the Court rejected the argument that equitable tolling should apply to the period during which a post-conviction motion was pending before being dismissed for failure to comply with Florida's oath requirement. The Court noted that Rainey let the motion sit unaddressed for seven months. He did not demonstrate the "extraordinary" circumstances which justify a finding of equitable tolling.

U.S. v. DE LA CRUZ, 2006 WL 759777 (Mar. 27, 2006)

Jurisdiction; 46 U.S.C. § 1903; vessel without nationality; sentencing; minor role; 3B1.2(b)

Defendant was arrested aboard a go-fast vessel in international waters with beaucoup kilos of cocaine. The Court rejected defendant's argument that the district court was without jurisdiction under 46 U.S.C. § 1903, the Maritime Drug Law Enforcement Act, which subjects "vessels without nationality" to U. S. jurisdiction; the vessel flew no flag, carried no registration paperwork, and bore no markings of nationality; its crew claimed no nationality or registry for it; and the captain hid and failed to identify himself or the vessel's nationality. The Court also held that denial of a downward adjustment for a minor participant, under USSG § 3B1.2(b) and cmt. n. 5 (2004), was not clearly erroneous, because defendant had the burden yet produced no evidence.

U.S. v. HARRIS, 2006 WL 734475 (Mar. 24, 2006)

Sentencing; PSI; Rule 32(c)(1)(A)(ii); waiver; invited error

The defendant pled guilty to possession with intent to distribute 5 or more grams of crack; he told the court, through counsel's response, that he was waiving his right to a PSI so he

could proceed directly to sentencing, given the parties' joint recommendation of an 80-month sentence, which was imposed. Nevertheless, the defendant appealed, arguing he did not waive his PSI, could not be sentenced without one, and a subsequently created PSI erred on his criminal history category. The Court concluded that the district court had plainly violated Fed. R. Crim. P. 32(c)(1)(A)(ii) because it merely stated it was inclined to accept the parties' recommended sentence and did not comply with the rule's requirement that the court "finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record." Nevertheless, counsel's waiver invited the error, so it was not reversible.

U.S. v. MOLINA, 2006 WL 736971 (Mar. 24, 2006)

Government appeal; Acquittal; sufficiency; mere presence; constructive possession

The defendant was convicted of knowingly participating in a drug trafficking conspiracy and possessing a firearm in furtherance of a drug trafficking crime. Because defendant was arrested in her bedroom (which she shared with her husband, in a house shared with others), which contained a number of incriminating items (including a garbage with more than \$300,000 cash in the closet), and other incriminating evidence within her home, a reasonable jury could have found she knowingly participated. Because a firearm was in a night stand drawer that contained her and her brother's passports, a reasonable jury could also have found she possessed a firearm in furtherance of the conspiracy. The Court concluded "this appeal is not about mere presence," because defendant could be deemed in constructive possession of the contraband in her residence, and the money in

her closet supported the jury's verdict; the jury was free to discredit her husband's exculpatory testimony.

U.S. v. MASSEY, 2006 WL 723449 (Mar. 23, 2006)

Sentencing; obstruction; 3C1.1; willfulness; capacity; material; clerical error; sua sponte correction

The defendant was with other females who Customs suspected of being internal carriers of drugs; after consensual x-rays at the airport's secondary inspection, all were found to have foreign objects in their pelvic regions. However, they were taken to the hospital; defendant, handcuffed to her bed, refused treatment and became verbally and physically abusive to hospital staff and customs officers. She removed and hid in her pillow two heroin packages but was unable to remove the third; when she later went into medical distress because the heroin package leaked in her vagina and consented to doctor's removing it. After pleading guilty, the parties agreed there was potential mitigation in that she did not receive her Zoloft prescription for bipolar disorder during the hospital stay. Her sentence was enhanced for obstruction, based on hiding the packages in the pillow. The Court rejected the defendant's arguments attacking the 2-level enhancement for obstruction under USSG § 3C1.1. The Court also rejected her second argument that the hiding was not a material hindrance to the investigation, arguing under Application Note 4(d) that there was no "actual hindrance" or "significant hindrance." Even though officers knew from the x-ray that she was carrying foreign objects, they did not know it was heroin, and they would not have known the total drug weight had her concealment efforts been successful.

U.S. v. MOORE, 2006 WL 704915 (Mar. 22, 2006)

Supervised release revocation, subject matter jurisdiction

Moore began serving her 60-month term of supervised release on June 11, 1999. She was arrested for a new crime on May 30, 2004, and after failing to so advise the probation officer, the officer, on or about June 2, petitioned for a summons on grounds that she violated supervised release, followed by a petition for revocation filed on June 9. The court issued the summons on June 9, but it was not signed by the clerk of court until June 10. Moore argued that the district court had no subject matter jurisdiction by issuance of a valid summons under 18 U.S.C. § 3583(i), because, she said, the valid summons was not issued prior to the expiration of her term of supervised release on June 10, 2004. The Eleventh Circuit affirmed (Fay, with Edmondson and Anderson), finding that the summons had “issued” on June 10, which was “prior to the expiration of her supervised release.” The court also affirmed the 18-month sentence despite the guidelines range of 3-9 months.

U.S. v. SILVA, 2006 WL 708340 (Mar. 22, 2006)

Probation revocation sentencing of juvenile offender

Silva, at age 17, committed aggravated sexual abuse on federal park grounds in violation of the Federal Juvenile Delinquency Act. After numerous violations of probation, he got 24 months imprisonment although Chapter 7 recommended a sentence within the 3-9 month range. Silva appealed, arguing that the district court improperly considered his age at the time of re-sentencing, rather than his age at the time he originally received probation,

when it imposed a sentence which extended beyond his 21st birthday, in violation of 18 U.S.C. § 5037. The Eleventh Circuit affirmed (per curiam by Anderson, Carnes, Pryor), based on statutory construction, and otherwise found the sentence was permissible on the facts.

U.S. v. EL DICK, 2006 WL 706259 (Mar. 22, 2006)

Booker

Eldick pleaded guilty to healthcare fraud and unlawfully distributing hydrocodone. He argued that the district court was required to impose a sentence within the guidelines range of 87 to 108 months based upon language in his pre-*Blakely* plea agreement. The district court instead sentenced him to 180 months, and the Eleventh Circuit affirmed (per curiam by Tjoflat, Anderson, Fay). “[T]he language of Eldick’s plea agreement does not support his argument that the agreement required that the guidelines be applied in a mandatory fashion and a guideline sentence be imposed. The agreement provides that ‘the parties acknowledge that the Sentencing Guidelines apply. The District Court’s discretion in sentencing is limited only by statutory provisions and the Sentencing Guidelines.’ It further provides that the ‘defendant understands that any prediction of his sentence by any person is not a guarantee or promise.’ Furthermore, at his plea colloquy, Eldick was made aware and understood that, after the applicable guidelines had been determined, the district court still possessed authority ‘under certain circumstances’ to impose a more or less severe sentence than what the guidelines required. Thus, on its face, the agreement did not require the court to apply the guidelines and Eldick understood that the court could, under the proper

circumstances and within statutory provisions and the guidelines themselves, impose a higher sentence than recommended by those guidelines.” The sentence was otherwise supported by the facts under § 3553(a).

U.S. v. PEREZ, 2006 WL 696507 (Mar. 21, 2006)

Bringing aliens to U.S.; consensual encounter; Fed. R. Evid. 404(b)

Officers discovered six Cuban nationals on a boat from which Perez and the boat’s owner had disembarked in Miami-Dade County. Perez said agents had boarded his boat without consent or a warrant, so he moved to suppress evidence that had been seized. The district court denied the motion, finding that the initial encounter with Perez and the others was consensual, despite the fact that the officer flashed his blue lights and was in uniform. The district court reasoned that the officer did not tell the men that they were being detained and did not remove his weapon or “perform any acts that would indicate the Defendants were detained,” thus it was a constitutionally permissible consensual encounter. The Eleventh Circuit agreed and affirmed. The Court also affirmed the district court’s decision to permit introduction of Perez’s 2002 conviction for smuggling aliens, under Fed. R. Evid. 404(b), and denial of his JOA motion which argued failure to show he knowingly committed the offense or acted with reckless disregard of his passengers’ status as illegal aliens.

U.S. v. BREHM, 2006 WL 658951 (Mar. 17, 2006)

Booker; safety valve; withdrawal of guilty plea

Brehm was indicted for heroin trafficking. His mental defense was supported by expert report that he was schizophrenic and paranoid,

that drugs and liquor contributed to his paranoia, and that medication would help if he refrained from substance abuse. Nevertheless, he was found competent and was allowed to plead guilty. At sentencing, he was told he was ineligible for the safety valve, 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2, having lost his argument that *Booker* rendered the requirements discretionary. He then moved to withdraw his plea, arguing that he had been unaware of a previous conviction in 2002, at which time he had been hospitalized for schizophrenia, and as a result, he did not have a rational understanding of the consequences of his present guilty plea. The district court denied the motion.

The Court affirmed; the record supported his knowing waiver, and *Booker* did not make the safety valve requirements advisory/discretionary.

U.S. v. PALEY, 2006 WL 623592 (Mar. 15, 2006)

Money laundering; value; initial cost v. appreciated value; 2S1.1(a)(2); prejudicial; resentencing

The Court reversed the sentence of an attorney who helped a “friend” launder drug money by investing it in the stock of a privately-held company, holding that the district court should have assessed the amount of the laundered funds under U.S.S.G. § 2S1.1 based on the initial amount, not the ultimate appreciated value. Because the defendant committed only misprision, not the substantive offense, subsection (a)(2) applied. The Court clarified that *Barrios*, 993 F.2d 1522 (11th Cir. 1993) (holding that interest earned is properly included in value of funds), and *Martin*, 320 F.3d 1223 (11th Cir. 2003) (recognizing change from “value of the funds” to “value of the laundered

funds” could affect money laundering calculation), were distinguished by a subsequent guideline amendment to 2S1.1. The Court interpreted the amended phrase “value of the laundered funds” to exclude any appreciation, or depreciation, in the subsequent value of those funds. This was not harmless, given the bottom-of-the-range sentence and court statements, but the Court noted the district court could have avoided the necessity of remand by clarifying its sentencing intentions should it be reversed.

DOHRMANN v. U.S., 2006 WL 623652 (Mar. 15, 2006)

Habeas; § 2241; restitution; 18 USC § 3663; Apprendi; retroactivity; ineffectiveness

The Court (1) held that a defendant cannot challenge an initial restitution calculation under 28 U.S.C. § 2241 without demonstrating exceptional circumstances; (2) joined other circuits and held that *Apprendi* does not apply to restitution orders and does not apply retroactively in a § 2241 petition; and (3) held the ineffectiveness claim could not be raised initially on appeal from denial of a § 2241 petition.

U.S. v. BROWN, 441 F.3d 1330 (Mar. 13, 2006)

Death penalty; *Miranda*; *Payne*; victim impact; magistrate judge court review; confrontation; photographs; expert funds

The defendant received a death sentence for murder/robbery of a postmistress, and the Court affirmed, writing on a number of issues. Among them was rejection of his *Miranda* claim, finding that he was not in custody and was free to leave where officers interrogated him at residence while an officer was in the front yard with a shotgun, and other officers were armed, but not the interviewers; one investigator confined defendant to a chair

about 15" while he got the owner's consent; he cautioned defendant about any sudden movements there; when he tried to put on his sneakers (an item of evidence police sought, since there was a sneaker print at the crime scene), officers seized them; because he had no shoes and was unwilling to leave barefoot, officers continued talking with him there; and other facts delineated in opinion. The Court also refused to find *Payne* error in the omission of evidence that the victim's husband opposed the death penalty. The Court found it was without jurisdiction to review a number of issues because the magistrate's ruling had not been appealed to the district court. (However, it noted it would have denied the challenge to the death-qualification of the guilt-phase jury.) Even though the government conceded the Court's jurisdiction over the issue of denial of the request for bifurcated juries, the Court rejected it both jurisdictionally and substantively. The Court found one hearsay objection was properly overruled, because the third-party testimony as to a statement of defendant's mother he overheard on the phone was an “excited utterance,” and it was not “testimonial” under *Crawford*. Other penalty testimony by a victim was not hearsay because it did not include direct statements of the speaker; also not testimonial; alternatively, hearsay rules do not apply during the penalty phase. The Court also rejected challenges to the constitutionality of the Federal Death Penalty Act; the jury penalty instructions, though they could have been more clear; and the denial of a hearing on remand to determine whether any portions of the transcript were missing was not an abuse of discretion.

HILLS v. WASHINGTON, 441 F.3d 1374 (Mar. 13, 2006)

Habeas; 2254; exhaustion; certiorari

After the Court decided *Nelson v. Schofeld*, 371 F.3d 768 (11th Cir. 2004) (applying *O'Sullivan*, 526 U.S. 838, to Georgia's appellate system to conclude that defendant must petition for certiorari to Ga. Sup. Ct. to exhaust remedies), Georgia "opted out" of the *O'Sullivan* rule by amending its certiorari review rule. This amendment occurred after the district court had dismissed the instant 2254 petition under *O'Sullivan*. However, noting the state attorney general had waived a procedural bar in this case, the Court granted its request to remand for the district court to decide the merits. (If this subject interests you, take a look at J. Carnes' concurrence.)

U.S. v. BARNER, 441 F.3d 1310 (Mar. 10, 2006)

Indictment; dismissal; prosecutorial vindictiveness; standard of review

This was a government appeal following the district court's dismissal of the Fifth Superseding Indictment. The case had a rather contentious history, including the government's dismissal of counts because its witness lied before the grand jury, and the government's trial continuance which it used to get a Fifth Superseding Indictment substantially elevating the charges against the defendant. The magistrate found no actual vindictiveness, but the district court found a realistic likelihood of vindictiveness and dismissed.

The Court held the district court erred in *presuming* the indictment resulted from prosecutorial vindictiveness and remanded for the court to determine whether the indictment resulted from *actual* vindictiveness. The Court held the standard of review was abuse of discretion. While a prosecutor's decision to seek heightened charges after a successful post-trial appeal is enough to invoke a

presumption of vindictiveness, such increased charges following a defendant's success in the pretrial context does not create such a presumption. Even though the Court assumed that "a realistic likelihood of vindictiveness" (which the district court found) could justify a presumption in the pretrial setting, it reweighed the factors cited by the district court and concluded they did not present that likelihood. Additionally, those factors "were not legally cognizable evidence of vindictiveness," and as such rejected their consideration as legal error. In closing, the Court noted that, although the district court expressed doubt about the prosecutors' claim they only discovered shortly before trial they could solve the multiplicity problem via the additional charges, it had not positively rejected that claim; the Court directed the district court to resolve it on remand.

U.S. v. SCOTT, 441 F.3d 1322 (Mar. 10, 2006)

Threats; 18 U.S.C. § 115; sentencing; 2A6.1; 3A1.2; 3553(a); departure; Rule 32(h)

Stupid young defendant gets 60 months for carjacking. Still mad at the federal judge, he mails envelope to him, clearly marked as from inmate, with letter threatening to get judge "Killed One Day" and signed "TIME BOMB." Second such threat made references to blowing up the building, killing "all feds, judges" and threatened judge's kids and included a harmless white powder. Defendant told agents he thought the judge lied to him about the sentence if he cooperated, and he included the powder to "scare [the judge] good." He also made some incriminating statements regarding his intent. Charged with six counts, he pled guilty to one count under 18 U.S.C. § 115(a)(1)(B).

First, the Court published its first decision on the application of U.S.S.G. § 2A6.1(b)(2) ("offense involved more than two threats"), which requires counting the number of threats involved. It **affirmed** the district court's application of this two-level enhancement; although there were only two letters mailed, the second one contained two envelopes so could be construed as two threats, plus it contained multiple threats which "were distinct in their nature and purpose." Thus, he made "at least three [distinct] threats." Second, the Court **reversed** the application of § 2A6.1(b)(1) ("offense involved any conduct evidencing an intent to carry out" threats), agreeing the district court erred because there was no serious conduct before or during the offenses which indicated such intent, and neither did his post-conduct statement. This error in determining the correct range was not harmless, because no statement from the court evidenced its intent. Third, the Court declined to rule on the departure issue, noting that the defendant is now on notice for resentencing.

U.S. v. DULCIO, 441 F.3d 1269 (Mar. 8, 2006)

Evidence; FRE 704(b); expert; prosecutorial misconduct; waiver; jury instruction re: multiple conspiracies; severance; closing argument; sufficiency; Booker.

Dulcio and St. Fleur were convicted by a jury of conspiracy to import and possess, as well as actual possession and importation, of cocaine. The Court affirmed, finding (1) any error, if there was one, as to whether the admission of expert testimony on knowledge of the presence of drugs usurps the jury's function in violation of Rule 704(b) (there may be a split on the merits), was harmless; (2) prosecutorial misconduct in filing a superseding indictment was waived; (3) no abuse of discretion in

rejecting proposed jury instruction on multiple conspiracies; (4) no reversible *Bruton* error in denying severance of defendants; (5) no error in restricting closing argument; (6) evidence was sufficient; and (7) no reversible *Booker* error.

U.S. v. LECROY, 441 F.3d 914 (Mar. 2, 2006)

Federal death penalty; constitutionality; jury instruction; carjacking; sufficiency; evidence; Fourth Amendment; Rule 404(b); lay opinion on forensic evidence; mitigation; future dangerousness

LeCroy was convicted of carjacking in which a person died, 18 U.S.C. § 2119(3), and sentenced to death. The Court affirmed, finding no errors. LeCroy's issues included that the district court erred: (1) by failing to conclude that *Ring v. Arizona* (2002) rendered the Federal Death Penalty Act unconstitutional; (2) by refusing to give a jury instruction on "simple" carjacking as a lesser included offense; (3) by upholding his conviction despite insufficient evidence; (4) by admitting 13-year-old evidence allegedly seized in violation of the Fourth Amendment; (5) by improperly admitting evidence of bad acts from 1991, in violation of Federal Rule of Evidence 404(b); (6) by allowing an agent to give his opinion about blood transfer patterns on the victim's clothing; (7) by preventing the presentation of mitigating evidence in violation of the Eighth Amendment; (8) by admitting evidence of aggravation outside the government's Notice of Intent to Seek the Death Penalty; and (9) by instructing the jury inaccurately on the nonstatutory aggravating factor of future dangerousness.

U.S. v. JOHNSON, 440 F.3d 1286 (Feb. 27, 2006)

Money laundering; evidence; sufficiency; 18 U.S.C. §§ 1957, 1956; conspiracy; agreement

The Court affirmed some money laundering convictions under 18 U.S.C. § 1957, which criminalizes engaging in a monetary transaction in property derived from specified unlawful activity, based on evidence Johnson used 25 financial accounts to transfer millions of dollars of fraudulently obtained investor funds. The Court reversed other money laundering convictions under § 1956(a)(2)(B)(i), which criminalizes transfer of money from the U.S. to outside the country with the intent to conceal illegal proceeds. The Court found insufficient evidence of intent to conceal; it noted that “evidence of concealment must be substantial” and that transfers of funds outside the country, while indicative of concealment, are not alone sufficient. Because the transfer here was between accounts bearing the correct name, there was no evidence of concealment. Additionally, the Court vacated convictions under § 1956(h), which criminalizes money laundering conspiracy, because the evidence failed to show the alleged co-conspirator, who was acquitted, was aware of the illegal source of the transferred money. Thus, there was no evidence this person conspired to commit money laundering and no proof of agreement.

U.S. v. GREER, 440 F.3d 1267 (Feb. 24, 2006) (substituting for 1/10/06 opinion)

Evidence; sufficiency; constructive possession; venue; ineffective assistance of counsel; sentencing; Booker; Armed Career Criminal Act; prior convictions; terrorist threats

The Court rejected defendant's arguments about insufficiency of the evidence based on constructive possession, venue, and ineffective assistance of counsel. It reversed

the district court's refusal to apply the minimum mandatory 15-year sentence under ACCA based on defendant's three prior convictions for terroristic threats (all resulting in probation). A district court cannot refuse to apply *Almendarez-Torres*, even though the Supreme Court has indicated it will likely be reversed. A jury need not determine whether a prior conviction was for a violent felony, under *Booker*, where that is obvious from the indictment.

CENTENO v. U.S. ATTORNEY GENERAL, 441 F.3d 904 (Feb. 17, 2006)

Immigration; NACARA; jurisdiction

An immigration judge denied the Nicaraguan's application for adjustment of status under the Nicaraguan Adjustment and Central American Relief Act of 1997 (“NACARA”). The Board of Immigration Appeals' (BIA) affirmed. The Court held it has no subject matter jurisdiction to review that determination.

VUKSANOVIC v. U.S. ATTORNEY GENERAL, 439 F.3d 1308 (Feb. 17, 2006)

Immigration; removal; arson; 8 U.S.C. § 1182; jurisdiction

Vuksanovic petitioned for review of the BIA's order affirming the immigration judge's decision that he was not entitled to relief from removal under NACARA, because his conviction for second-degree arson was a crime involving moral turpitude rendering him inadmissible under 8 U.S.C. § 1182(a)(2)(A). The Court agreed, and further held that it lacked jurisdiction to review.

U.S. v. DEVEGTER, 439 F.3d 1299 (Feb. 16, 2006)

Sentencing; Booker; wire fraud; value; 2B4.1; downward departure; 5K2.0

In this wire fraud and conspiracy to commit

wire fraud conviction (commercial bribery), U.S.S.G. § 2B4.1 requires the court to use the greater of the bribe amount or net value of improper benefit conferred; the Court addressed the proper calculation method for this value enhancement issue and vacated. Also, the Court vacated the downward departures given both defendants under § 5K2.0, noting aberrant behavior was unfounded given the significant planning and multiple acts, neither defendant's physical condition was exceptional (one had Restless Leg Syndrome "RLS" and the other an injury adequately accommodated by a delay in surrender), and the unfortunate family circumstances were not exceptional or even relevant. The court on remand could consider one defendant's satisfaction of his previous sentence.

U.S. v. NASH, 438 F.3d 1302 (Feb. 13, 2006)
Sentencing; improper delegation; Article III; conditions of supervised release

The Court vacated, as plain error under *Heath*, 419 F.3d 1312, 1315 (11th Cir. 2005), and remanded for resentencing the district court's imposition of a special condition which delegated to the probation officer ("As deemed necessary by the probation officer, the defendant shall . . .") the defendant's participation in mental health treatment. The Court held that, like *Heath*, this was an improper delegation violating Article III of the U. S. Constitution.

The Court rejected similar argument that Standard Condition No. 13 ("As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by defendant's criminal record or personal history or characteristics"), also violated *Heath*. The Court held that Standard Condition No. 13 is not vague and overbroad, and approved another special condition ("The

defendant shall secure prior approval from the probation office before opening any checking, credit, or debit account.").

[**Note:** Rehearing en banc emphasized the fact that this Standard Condition is imposed in all cases yet enforced in only a few, proving that it is an improper delegation; rehearing has just been denied, but certiorari is possible. A future constitutional challenge at sentencing to this Standard Condition, presenting evidence to support this contention as to its application, would be reviewed *de novo* and not under the plain error standard faced here; I would love to appeal it if someone will make the objection.]

U.S. v. YATES, 438 F.3d 1307 (Feb. 13, 2006) (en banc)

Cross-examination; Crawford; testimony via television; confrontation; Sixth Amendment

The Court, en banc, reaffirmed the panel decision, based on *Maryland v. Craig*, 497 U.S. 836 (1990), that witness testimony via two-way video conferencing violates the Confrontation Clause of the Sixth Amendment. (Dissents by Tjoflat, Marcus, and Birch might spell certiorari post-*Crawford*.)

U.S. v. NIX, 438 F.3d 1284 (Feb. 9, 2006)
18 U.S.C. § 921(a)(20), § 922(g)(1)

Nix was convicted of possessing a firearm after having been "convicted in any court of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). However, § 921(a)(20) provides an exception if the defendant has had his civil rights restored, unless the restoration expressly restricts the defendant's firearm rights. The Court, in this issue of first impression, rejected the argument that,

although Nix had never had his civil rights restored, he still qualified for this exception because his Alabama felony marijuana conviction did not cause him to ever lose his state law rights to possess a firearm. “Even though Nix did not lose his right to possess a firearm under state law, he did lose other ‘civil rights’ within the meaning of § 921(a)(20).” While Alabama law did not forbid Nix from possessing a firearm, federal law did under § 922(g)(1). The only limitation on predicate convictions contained in § 922(g)(1) is that they must be “punishable by imprisonment for a term exceeding one year,” and it is that condition which § 921(a)(20) provides “shall be determined in accordance with the law of the jurisdiction in which the proceedings were held.”

ROLLING v. CROSBY, 438 F.3d 1296 (Feb. 9, 2006)

Habeas; capital sentence; ineffective assistance

Rolling argued his four attorneys rendered ineffective assistance at his capital penalty phase when they delayed filing a motion for change of venue. The Court affirmed the reasonableness of the Florida Supreme Court’s conclusion that this action was reasonable strategy that caused no prejudice.

U.S. v. WILLIAMS, 438 F.3d 1272 (Feb. 8, 2006)

Sentencing; reasons; statutory duty; 18 U.S.C. § 3553(c)(1); illegal sentence

Williams was convicted and sentenced to life under 21 U.S.C. § 841(a)(1) for possession of cocaine base with intent to distribute. After summarily rejecting four arguments, the Court reversed, agreeing with Williams’ claim that the district court failed to comply with 18 U.S.C. § 3553(c)(1). It requires the court, at sentencing, to “state in open court the reasons

for its imposition of the particular sentence, and, if the sentence . . . exceeds 24 months, the reason for imposing a sentence at a particular point within the range” advised by the guidelines. The Court held (1) this error was reviewable on the merits and not under the heightened plain error standard, regardless of lack of objection, because the resulting sentence was illegal; and (2) reversal was required because the trial court offered no reason for the life sentence it imposed. “The duty of this Court in the instant case, then, is as clear as the explicit statutory duty imposed by § 3553(c)(1).”

U.S. v. PRATT, 438 F.3d 1264 (Feb. 8, 2006)

Fourth Amendment; particularity requirement; missing search warrant

Pratt argued that the particularity requirement of the Fourth Amendment had not been, and could not be, satisfied when the search warrant could not be produced. A police officer claimed he obtained a search warrant from a state judge, executed it with other officers, and seized evidence; however, neither the warrant nor any copies could be found at trial. The Government introduced the probable cause affidavit (which was facially sufficient), the officer’s testimony that he showed that affidavit and a form warrant containing identical language to the judge, and the judge’s testimony that he had no recollection but always compares the probable cause affidavits and warrants before signing. The district court said this extrinsic evidence was sufficient, and the Court affirmed. The Court distinguished Groh v. Ramirez, where officers did produce the warrant but accidentally omitted a portion of the facially valid probable cause affidavit when transposing it to the warrant form. Groh held that, even though the probable

cause affidavit was sufficient, the accidental omission from the warrant was a fatal defect. The 11th Circuit concluded that, unlike Groh, a supporting affidavit and other relevant evidence established that there had been a warrant that satisfied the particularity requirement of the Fourth Amendment.

U.S. v. SHARPE, 438 F.3d 1257 (Feb. 7, 2006)

Dismissal; post-trial; mail fraud

The Court reversed a post-trial dismissal, under Fed. R. Crim. P. 12(b)(3)(B), for failure to state an offense charging mail fraud and conspiracy to launder proceeds of mail fraud, arising out of 3 defendants' alleged involvement in a scheme to conceal funds. The Court held the indictment contained allegations sufficient, as a matter of law, to state the offenses charged.

JACKSON v. CROSBY, 437 F.3d 1290 (Feb. 2, 2006)

Habeas; COA; intervening decision; Rule 60(b) motion; jurisdiction; appeals

Having previously denied petitioner's motion for a certificate of appealability (COA), here the Court denied Petitioner's motion for reconsideration. The Court acknowledged that an intervening S. Ct. decision, *Gonzalez v. Crosby*, 125 S. Ct. 2641 (2005), had rejected the broad circuit rule regarding when a Rule 60(b) motion for relief from final judgment on a habeas petition should be treated as a second or successive habeas petition. Although the Court would normally remand for reconsideration of the intervening decision, here the Court lacked jurisdiction to do so absent a COA. Further, he was not entitled to a COA to challenge the district court's denial of his Rule 60(b) motion because he had not made the required showing of entitlement to relief.

U.S. v. SCHIER, 438 F.3d 1104 (Jan. 31, 2006)

Speedy Trial Act; evidence; airport security; sufficiency; JOA; timeliness; standard of review; Jencks Act; disclosure
The defendant was convicted under 49 U.S.C. §§ 46505 & 46314 for possessing and boarding an aircraft with an icepick; she was sentenced to "time served" and supervised release, 6 months of which was on home detention, and \$10,000 fine.

The Court first ruled that, even though the trial was within 30 days of the superseding indictment, defendant had not moved for a continuance, and the superseding indictment did not charge a new offense and thereby restart the 30-day clock under the Speedy Trial Act. *Rojas-Contreras*, 474 U.S. 231 (1985). Second, because defendant failed to renew her JOA motion at the close of all evidence, the Court would not review the sufficiency of the evidence *de novo*, but would only reverse if there is a manifest miscarriage of justice, i.e., "evidence on a key element of the offense is so tenuous that a conviction would be shocking." Given the defendant's stipulations, there was no basis to reverse for insufficiency. Finally, there was no basis - and no district court objection - for defendant's argument that the government had violated the Jencks Act by not providing the agent's report prior to trial; the statute does not so require, plus it only applies to testifying agents.

U.S. v. GONZALEZ-LAUZAN, JR., 437 F.3d 1128 (Jan. 30, 2006)

Suppression; Miranda; statements; Sixth Amendment; counsel

The Court rejected the defendant's arguments that his post-Miranda statements should have been suppressed, in addition to his pre-

Miranda statements, because he was represented by counsel and invoked his right to counsel at the time of the continuous interrogation and police delay in giving Miranda warnings. Defendant was serving a VOSR sentence and had been indicted for murder. Officers met him to solicit a confession on the murder case but intentionally omitted Miranda warnings until they were sure defendant would give a custodial statement. After officers reviewed their evidence in the murder case about 2-1/2 hours, but did not question defendant, he said, "okay, you got me," at which point officers read his Miranda rights and had him execute a waiver form. The magistrate suppressed this statement but admitted post-Miranda ones.

The Court applied Missouri v. Seibert, 542 U.S. 600 (2004), and rejected the argument that the focus should be on whether there was a two-step interrogation process in which police deliberately withheld Miranda warnings in the first part. Instead, the Court focused on the fact that the defendant voluntarily waived his Miranda rights before the admitted confession.

On the Sixth Amendment claim, the Court found that it was unlikely defendant was represented by counsel at the time, but more importantly he did not invoke his right to counsel during the entire interview but instead executed a valid waiver.

IN RE: RUTHERFORD, 437 F.3d 1125 (Jan. 30, 2006)

Habeas; successive

The Court rejected this capital defendant's motion for stay of execution and application for leave to file a successive habeas petition, finding that none of the five new claims met the requirements of 28 U.S.C. § 2244(b)(2)(A)-(B).

U.S. v. SWEETING, 437 F.3d 1105 (Jan. 26, 2006)

VOSR sentencing; Booker; reasonableness

Although defendant had received a concurrent prison sentence for his second conviction of cocaine distribution, his third such conviction while on supervised release from the first two resulted in revocation and consecutive terms of imprisonment in all three cases. The defendant argued the consecutive terms, for the same violation of supervised release, was an abuse of discretion because it resulted in a doubling of the applicable guideline recommendation and, therefore, was unreasonable. The Court affirmed, holding that reasonableness is the proper post-Booker standard for VOSR sentencing review, and this sentence was reasonable.

U.S. v. BRITT, 437 F.3d 1103 (Jan. 26, 2006)

Dockery; Levy; Nealy; Booker

The Court reaffirmed that it will not entertain *Blakely/Booker* arguments raised after the initial brief is filed, even following a Supreme Court remand.

IN RE: HILL, 437 F.3d 1080 (Jan. 24, 2006)

Successive habeas; timeliness; execution; mental retardation; Eighth Amendment; jurisdiction; stays

Hill applied for leave to file a successive habeas petition to forestall his imminent execution. He claimed brain damage and/or mental retardation would make execution cruel and unusual punishment in violation of the Eighth Amendment. He also claimed these factors exempted him from execution under the Eighth Amendment because it would not be an appropriate punishment under *Atkins v. Virginia*. The Court denied

Hill's § 2244(b)(3)(A) application as untimely for being "over 29 months late." The Court also said it has no jurisdiction to entertain Hill's application for a stay of execution under 28 U.S.C. § 1651 (All Writs) or 2251 (habeas stays).

BARNES v. U.S., 437 F.3d 1074 (Jan. 24, 2006)

Habeas; 2255; Rule 33; motion for new trial; tolling; timeliness

Barnes filed a timely direct appeal, and more than a year later, while it was still pending, filed a Rule 33 motion for new trial in the district court based on newly discovered evidence. Shortly thereafter, the 11th Circuit affirmed. Prior to the Supreme Court's denial of certiorari, the district court denied the new trial motion without a hearing. Barnes appealed of that denial was then affirmed. More than a year and a half after the denial of certiorari, Barnes filed a 2255 motion, which the district court dismissed as untimely. The Court affirmed, rejecting the argument that AEDPA's one-year limitation period is tolled while a Rule 33 motion is pending. "Nothing prevented Barnes from filing a timely § 2255 motion while his Rule 33 motion was pending." Joining other circuits, the Court held that "a Rule 33 motion for a new trial is neither a continuation or extension of a direct appeal, nor does it serve to toll AEDPA's one-year limitation period for filing a § 2255 motion."

JONES v. CAMPBELL, 436 F.3d 1285 (Jan. 20, 2006)

Capital habeas; 2254; ineffective assistance

The Court rejected four ineffective assistance allegations in this capital habeas which raised (1) sentencing counsels' alleged failure to investigate and present mitigation of Jones's abusive childhood, mental health problems,

and intoxication; (2) counsels' failure to object to the trial court's jury instructions relating to the burden of proving malice; (3) counsel's failure to raise and argue on appeal issues related to the jury instructions on proving malice; and (4) counsel's alleged racial bias against him. In a fact-intensive opinion, the Court affirmed (Dubina, with Birch and Anderson).

U.S. v. WILLIAMS, 435 F.3d 1350 (Jan. 13, 2006)

Sentencing; Booker; reasonable; career offender

The Court **rejected** the government's post-Booker appeal of a below-guidelines sentence as unreasonable. Within the range of 188-235 months, the 90-month sentence (MD FL) was based in part upon an incorrectly high base offense level which the district court had properly corrected; however, the career offender scoring overrode that BOL to yield the higher range. The defendant challenged the career offender enhancement, based in part on a prior conviction for carrying a concealed firearm, asserting that Gilbert, 138 F.3d 1371, should not apply, but the district court disagreed. The reduced sentence was based on the district court's assessment that the guidelines produced an unjust result: "188 months in prison for selling \$350 worth of cocaine is akin to the life sentence for the guy that stole a loaf of bread in California. To me, that . . . does not promote respect for the law and is way out of proportion to the seriousness of the offense and to [Williams'] prior criminal conduct." The district court also noted it could not "in good conscience" impose what it considered an unreasonable sentence, noting it rarely ventured outside the guidelines post-Booker, and it noted that, but for the career offender scoring, the range was 84-105 months.

First, the Court noted the district court had correctly interpreted and applied the guidelines in calculating the range; it rejected the government's argument that the court had refused to apply Gilbert as "without merit." "Having correctly calculated the advisory Guidelines range, including the career offender enhancement, the court was then able to sentence Williams outside the applicable range, if the final sentence was reasonable." Second, the Court rejected the government's percentage-based argument, based on the fact that the sentence imposed was less than half the minimum of the appropriate range. Reviewing for reasonableness requires the Court to consider both the 3553(a) factors and the district court's express reasons. The Court also noted with approval the district court's notation of the disparity of as much as 151 months between the low end of the unenhanced range and the high end of the enhanced range, and that the sentence imposed was longer than the mandatory statutory minimum, and nearly 1/5 of the statutory maximum. "This is not a case where the district court imposed a non-Guidelines sentence based solely on its disagreement with the Guidelines. [It] correctly calculated the Guidelines range and gave specific, valid reasons for sentencing lower than the advisory range." Additionally, the Court also rejected as "without merit" another government argument, noting that the "sentence does not have to be justified as a downward departure." The absence of a downward departure motion was not relevant.

(Note: this has a good analysis for trial lawyers to use)

U.S. v. PREVO, 435 F.3d 1343 (Jan. 11, 2006)

Search; warning signs; Fourth Amendment
The Court affirmed the conviction of a woman

visitor to a work release center, after her car was searched in the center's parking lot and a gun, drugs, and cash were found. The Court (unlike my recent case involving "No Trespassing" signs at the gate to a rural residence) focused on the large warning signs posted at the entrance to the work release facility, and the number of times the defendant had previously passed/seen those signs, concluding "the nature of inmate populations ["Most prisoners have more than a passing acquaintance with illegal drugs. . . . Most of them are sociopaths."] and the necessity of keeping contraband out of prison facilities does factor heavily in the determination of what is reasonable." The Court rejected the defendant's many arguments, including that this is less true at a work release center where inmates are routinely allowed to leave and thus can get contraband in any event, noting the "wide-ranging deference" given to prison administrators under Bell v. Wolfish, 441 U.S. 520 (1979). The Court noted that its deference to prison administrators' expertise was "bolstered by one trenchant fact. Whatever else may be said about the effectiveness of the search policy, it did work in this case." Finally, the Court rejected her argument that parking lot automobile searches were unnecessary to the goal of keeping contraband out of the facility, given that everyone is searched upon entering the facility itself; the Court deferred "to the common sense judgment of corrections officials that two layers of searches, a double-tier of deterrence, is better than just one." She was at the center, after all, to pick up an inmate, with a loaded pistol in her purse on the front passenger seat, and drugs and cash in the trunk; at a minimum, this policy was reasonable where other inmates were allowed in the parking lot of the center and could

have gained access to the pistol in her purse in plain view in the car. The Court also analogized the driver's passing of the warning signs as consent to search, which could not be revoked to avoid search (when approached by officers, she asked to be allowed to leave instead of having her car searched).

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