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NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

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LONG SENTENCES STILL THE RULE IN NORTHERN DISTRICT OF FLORIDA

The statistics are in from the Sentencing Commission for fiscal year 2007. They show, as they have in the past, that the average sentence is longer, here in the Northern District of Florida, than in almost any other district in the country. There was a marginal reduction in the length of the average North Florida sentence. It fell two months, from 114.4 months in fiscal year 2006 to 112.1 months in 2007. Thanks to increases in other districts, we have had the good fortune of surrendering our number one ranking. Of the 94 districts, there are now two ahead of us: the Southern District of Illinois with an average sentence of 133.6 months and the Central District of Illinois with an average sentence of 115.8. There were five other districts that broke the century mark: Indiana Southern, Iowa Northern, Iowa Southern, North Carolina Middle, and Wisconsin Western.

The average sentence in the Middle District of Florida was 83.8 months. It was 69.1 months in the Southern District of Florida. Our average sentence is 89% higher than the 59.3 month average across all 94 districts. Last year it was 94% higher.

The length of the average sentence for drug trafficking placed our district just a few months shy of the top spot. Our average sentence was 164 months, while the average in the Southern District of Illinois was 164.4 months. Nationwide, the average was 85.6 months, which leaves our average sentence almost 92% higher. In the Middle District of Florida, the average sentence for drug trafficking was 110.6 months. In the Southern District of Florida, it was 90.8 months.

In 69% of our North Florida cases, the judges sentenced the defendant to a within-guidelines sentence, which happened 60.8% of the time in the rest of the country. Of all the sentences imposed in the Northern District of Florida, 7.2% were below the advisory guideline range for reasons other than substantial assistance. Nationwide, that percentage was more than twice as high at 15.7%. The rest of our state was more in line with the nation: in the Middle District of Florida, 13.5% were below the guidelines for reasons other than substantial assistance, and in the Southern

District of Florida, 16.1% were below the Guidelines.

Of those sentenced in the Northern District of Florida, 20.8% received a departure below the guidelines on the basis of a 5K1.1 motion, which is notably higher than the 14.4% nationwide. There were, though, 31 districts that had a higher percentage of defendants receiving 5K1.1 motions, including the Middle District of Florida where 24.5% of defendants earned 5K1.1 motions. Only 11.2% were beneficiaries of the motion in the Southern District of Florida.

The judges in the Northern District of Florida sentenced 11 defendants to above-guidelines sentences, which represents 2.7% of the total. Even that rate, though, is more than twice the national average of 1.2%. Only .6% were sentenced above the guidelines in the Middle District of Florida, while 1% received above-guidelines sentences in the Southern District of Florida.

The Northern District of Florida had one of the highest percentage of cases proceeding to trial. Of those cases where defendants were eligible for guideline sentences, i.e. where the defendant was convicted at trial or entered a guilty plea, 11.2 percent went to trial. Only three districts had a higher rate: the Virgin Islands, the Northern Mariana Islands, and Montana. The trial rate was 4.2% across the 94 districts. In both the Middle District and the Southern District of Florida, 6.7% of the cases proceeded to trial.

The Sentencing Commission reported 419 cases for fiscal year 2007 in the Northern District of Florida, down 10 cases from the year before. Nationwide, there were 67,914 cases, which represents more than a 6% drop from the 72,518 cases reported for fiscal year 2006.

You can find all of these sentencing statistics and more at the Sentencing Commission's webpage: www.ussc.gov . They are in the *2007 Sourcebook of Federal Sentencing Statistics*.

Sentencing Commission Fixes Crack Cocaine Amendment

The recent reduction in crack cocaine penalties largely failed to extend to those who were being sentenced for their involvement with crack cocaine and one or more other drugs. It was an oversight on the part of the Sentencing Commission, but one the Commission has now fixed.

The amendment goes into effect on May 1st and is retroactive. Because it amends only the Application Notes to U.S.S.G. § 2D1.1 and the Policy Statement at § 1B1.10, the Sentencing Commission is not required to submit the changes to Congress or to follow the usual federal rule-making procedures.

Since the reduction in penalties for crack cocaine went into effect on November 1st of last year, many were affected by the oversight and received sentences in accord with the guideline. Similarly, since the lower penalties became retroactive on March 3rd of this year, many were denied a retroactive reduction in their sentences. Those in both groups will now be eligible for a reduced sentence.

The mechanism for the change is fairly simple. The new procedure which had been written into the application note has been deleted, and the conversion rate of 20 kilograms of marijuana for one gram of crack

cocaine has been reinstated. Now, it's a matter of doing the conversion to the marijuana equivalent and then subtracting two offense levels. There are three circumstances where the defendant does not get the two-level reduction: where the amount of the crack equals or exceeds 4.5 kilograms; where the subtraction of the two levels produces a range lower than the offense level produced by the other drug or drugs; and where the amount of crack cocaine is less than 250 milligrams.

CRACK RETRO

Since March 3rd, the judges in the Northern District of Florida have been entering orders reducing sentences for many who have been serving sentences for crack cocaine offenses. While most prisoners can expect to receive a sentence reduction of, probably, a couple of years, we know of one prisoner whose sentence was reduced by 8 years, and there are others who have received significant reductions in their sentences.

The statute, 18 U.S.C. § 3582(c)(2), allows a sentencing court to reduce a sentence "on its own motion." In accord with that provision, the judges in the Northern District asked, in advance of the March 3rd date, that the probation office go through all of their files and compile a list of those eligible for a reduction. That has been done, and the lists have been distributed to the judges, along with copies to the United States Attorney and to our office. The probation office is also sending the judges a memorandum in each case on the list, again with copies to our office and the United States Attorney. The memorandum includes the old and new offense levels and guideline ranges. The probation office has already completed many of those memoranda and is continuing to send them. The judges are currently working their way through the cases, trying to address the cases in order of the expected release date, with those due for immediate release at the top.

The lists have proven to be accurate, although in some instances they are over-inclusive, including the names of some who are ineligible for a reduction. It is also possible there are some who, for one reason or another, have been mistakenly left off the lists.

The exact procedure varies from one judge to the next. Some, like Judge Collier, review a case, arrive at the sentence, and enter an order. Most of the judges are entering an order announcing a tentative sentence reduction and giving the government and the defendant a certain time period to respond. In reducing the sentence, some of the judges enter a one-page form order that has been adopted by the Administrative Office of the Courts; others have much longer orders that explain the considerations in detail.

The government has objected to proposed reductions in a few instances. In most cases, though, it has either not objected to a reduced sentence or has chosen not to take a position, saying essentially that it cannot guarantee that the defendant's early release will not jeopardize public safety, but also saying that it recognizes the Court's authority to reduce the sentence.

The procedure varies, too, from one district in the country to the next. In many, the judges are not proceeding on their own, but are instead appointing the Federal Public Defender in most if not all cases where the defendant is potentially eligible for a reduction. In some districts there are

negotiations between the United States Attorney's Office and the Federal Public Defender's Office. Here in the Northern District of Florida, the judges have, consistent with existing case law, concluded that prisoners do not have a *per se* right to counsel. Judge Vinson, though, has appointed us in a significant number of cases, and many of the judges have appointed us to particular cases, upon receiving a motion from us. At the same time, the judges have been denying many requests for appointment of counsel that have been filed by prisoners. They have occasionally denied motions for appointment of counsel that we filed on a prisoner's behalf.

Consistent with the language of U.S.S.G. §1B1.10, sentence reductions are being denied to those who were sentenced as career offenders, those who were held responsible for 4.5 kilograms or more of crack cocaine, and those whose sentence was the statutory minimum. Some who were held accountable for multiple drugs and whose offense level under the new guidelines had not changed have also been denied reductions; however, as mentioned in the article above, these prisoners will now be eligible for a reduction.

The biggest debate that has emerged centers around those who received substantial assistance reductions, be they a Rule 35 motion or a 5K1.1 motion, and who, at the time of sentencing, had a guideline range below the statutory mandatory minimum. The government has, around the country as well as here in North Florida, argued that those defendants are ineligible for a reduction (1) because the guideline range remains unchanged as the mandatory minimum became the "guideline range" and (2) because the substantial-assistance sentence was not based on the crack cocaine guideline. The response has been (1) that the mandatory minimum became the "guideline sentence," as opposed to the "guideline range," with the latter having changed due to the amendment, and (2) that judges have in the past and continue to, as required by *United States v. Gall*, take the guidelines into account when imposing any below-guidelines sentence. For now the issue is unresolved in most parts of the country, as well as in the Northern District. Judge Hinkle has said he will be entering a written order in a case pending before him, and his order may help resolve the issue, at least here in North Florida. The case under review by Judge Hinkle is *United States v. Ruth Weaver*, Case No. 4:04cr5 RH. The pleadings in the case are available through PACER and among the pleadings are arguments for and against the reduction.

The other primary challenge is in those cases where the defendant did not receive a bottom-of-the-guidelines sentence in the first instance. In those cases, some of the judges have tended to impose a reduced sentence proportional to the old one, i.e. if the original sentence was in the middle of the old guideline range, the new sentence will be in the middle of the new range. In a number of cases, we have argued that the Sentencing Commission sees the reduction in the crack guideline as only a partial solution, that the new ranges are still too high, and that a bottom-of-the-range sentence is a necessary step toward remedying what are still unjustifiably disproportionate sentences.

There are some 600 names on the lists that the probation office distributed to the judges. In our offices we have had hundreds of phone calls from prisoners and their relatives. In most instances, we offer to review the case, while at the same time explaining that does

not mean that we will necessarily be representing the individual. The most immediate challenge has been that of getting a copy of the presentence report so that we can make a reasonable assessment as to whether the individual is eligible. In some cases, where the judge has granted our request to be appointed, we have secured a copy from the probation office. In those cases where we have not been appointed, we try to get a copy of the report from a relative, the prison, or the former lawyer. Once we've reviewed the case, we provide the individual with our assessment as to whether he or she is eligible for a reduced sentence. For those eligible, the options range from asking the court to appoint the Federal Public Defender and filing a motion asking for a specific sentence to waiting on the order from the judge to see what sort of sentence he or she proposes.

Supreme Court Sends New Criminal Rules to Congress

The Supreme Court has proposed a new rule and additional language for the Rules of Criminal Procedure and transmitted the changes to Congress. If Congress takes no action, the amendments will become effective on December 1st. The changes are almost entirely directed toward implementing the Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771.

Among the changes are these:

- an amendment to Rule 12.1 (Alibi Defense) that requires the defense to make a showing of need before the government has to disclose the address and phone number of a victim the government intends to use to establish the defendant's presence at the scene of the crime;
- an amendment to Rule 17 (Subpoena) that requires a court order before the defense can issue a subpoena to a third party for personal or confidential information about the victim;
- an amendment to Rule 32 (Sentencing and Judgment) providing that the victim has a right "to be reasonably heard" at sentencing; and
- a new Rule 60 that, among other things, requires the government to notify the victim of court proceedings; prohibits the court from excluding the victim from court proceedings absent clear and convincing evidence that the victim's testimony would be materially altered by his or her presence; and provides that the victim has the right to be reasonably heard at any public hearing on release, plea, or sentencing.

Electronic Transcript Request Form

There is now an electronic version of the transcript request form available at the Court's website, www.flnd.uscourts.gov/index . All you have to do is fill out the from and email it to the court reporter. Be advised, though, that you do need the full version of Adobe Acrobat to use it.

Panel Training

We have videos lined up for both May and June. We'll be showing them at the usual times in the usual places.

Identity Theft

Panama City: May 13
Gainesville: May 21
Pensacola: May 22
Tallahassee: May 22

Supreme Court Review

Panama City: June 10
Gainesville: June 18
Pensacola: June 19
Tallahassee: June 26

VICTORIES

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.

In Gainesville, **Lloyd Vipperman** won an acquittal for his client, Edna Anton, on the charge of disposing of firearms to a convicted felon. The "convicted felon" was her husband. Convicted of the remaining charge of aiding a felon in possessing firearms, Ms. Anton, who had no prior record, was facing a guidelines range of 63-78 months primarily because of the large number of firearms. **Lloyd**, however, convinced Judge Paul to impose a sentence of 5 years' probation by arguing that Ms. Anton was dominated by her husband and had only yielded to his demands.

Tom Keith, from our Pensacola office, convinced a Pensacola jury to acquit his client, Chrystal Giluso, of four counts of conspiring to commit mail fraud. The charges related to an alleged scheme to defraud insurance companies by staging car accidents and making claims for lost wages, medical bills, and other related losses. Ms. Giluso testified that, while she did help her boyfriend, her alleged coconspirator, with one of the false claims, she did so only because she believed the claim to be valid. **Tom** had to overcome some collateral crime evidence to the effect that Ms. Giluso and her boyfriend had falsely reported the theft of her car just a few months earlier.

Jonathan Dingus of the Panama City panel won a remarkable victory in a state child pornography case. His client was charged with 75 counts of promoting and possession of child pornography. The client testified that he had "shotgun downloaded" many files at a time and saved them without looking at them. The outcome revolved around some of the complexities of using Limewire to download what the client testified he believed to be adult pornography. In the end, it took the clerk at least 10 minutes to read all of the not guilty verdicts.

Randall Lockhart of our Pensacola office convinced the government and the probation office that his client, Tommy Morton, should receive a sentence of nearly half of what was initially calculated in the presentence report. Mr. Morton faced a 10-year minimum mandatory and a guidelines range of 97-121 months for a conspiracy involving more than 5 kilograms of cocaine and 100 kilograms of marijuana. **Randall** persuaded both the prosecutor and the probation officer that the quantity of cocaine was less than 5 kilograms and that a prior misdemeanor conviction was invalid because there was no valid wavier of counsel. With the reduction in the criminal history score, Mr. Morton became eligible for the safety valve, and with the lower drug quantity the guideline range dropped to 57-71 months. Judge Vinson imposed a sentence of 64 months.

CORRECTION

In our last newsletter we set out the number of cases handled by each panel member in 2007.

We mistakenly reported that **Tom Edwards** did not have any cases assigned to him. He had, in fact, represented 6 different defendants in 2007.

Variances

Anton, Edna Paul, M. Atty: Vipperman, L.
Docket: 1:06cr29
Charge: Aiding and Abetting Poss of FA by Convicted Felon
Range: 63 - 78 months
Sentence: 2 yrs probation
Date of Imposition of Sentence: 2/20/08
Grounds: lack of any criminal history, domination by husband, good character

Lilliman, Michael Mickle, S. Atty: Murrell, R.
Docket: 4:07cr49
Charge: Poss FA by Convicted Felon
Range: 37 to 46 months
Sentence: 24 months BOP
Date of Imposition of Sentence: 1/22/08
Grounds: defendant's progress in rehabilitating himself, family responsibilities, and limited poss. of firearm

Footman, Richard Mickle, S. Atty: Garcia, A.
Docket: 4:07cr6
Charge: Consp. to dist. > 50 g. crack and retaliating against witness
Range: 360 - life (20 yr min. mand.)
Sentence: 240 months
Date of Imposition of Sentence: 1/12/08
Grounds: difficult childhood

Johnson, Columbus Mickle, S. Atty: Murrell, R.
Docket: 4:07cr57
Charge: Dist. > 5 g. crack
Range: 262 - 327 months
Sentence: 180 months
Date of Imposition of Sentence: 4/21/08
Grounds: small quantity of cocaine, efforts at providing substantial assistance

Downward Departures

Henry, Vernon Smoak, R. Atty: Garcia, A.
Docket: 5:07cr36
Charge: Consp. Dist. > 1000 kilos marijuana, poss FA by convicted felon
Range: ?????? (min mand. 10 + 5 yrs)
Sentence: 130 months
Date of Imposition of Sentence: 11/15/07
Grounds: 5K1.1

Darden, Michael Smoak, R. Atty: Downing, J.
Docket: 5:07cr48
Charge: Consp. Dist Cocaine, Poss FA in furtherance of drug trafficking
Range: 15 yr mandatory min.
Sentence: 90 months
Date of Imposition of Sentence: 12/12/07
Grounds: 5K1.1

Lyons, Alex Mickle, S. Atty: Johnson, H.
Docket: 1:05cr36
Charge: Consp dist. > 100 kilos marijuana
Range: ?????
Sentence: 5 years probation
Date of Imposition of Sentence: 1/7/08
Grounds: 5K1.1

Coney, Giovanni Paul, M. Atty: Johnson, H.
Docket: 1:06cr27
Charge: Consp dist. > 5 kilos cocaine
Range: ?????
Sentence: 5 years probation
Date of Imposition of Sentence: 11/28/07
Grounds: 5K1.1

Dasher, Gus Mickle, S. Atty: Murrell, R.
Docket: 4:07cr50
Charge: Dist > 5 g. crack
Range: 10 yr min. mand.
Sentence: 60 months BOP
Date of Imposition of Sentence: 3/18/08
Grounds: 5K1.1

Maestrey, Rolando Paul, M. Atty: Miller, T.
Docket: 1:07cr39
Charge: Consp. to manufacture marijuana (>100 plants)
Range: 24 - 30 months (5 yr min. mand)
Sentence: 1 yr probation
Date of Imposition of Sentence: 4/28/08
Grounds: 5K1.1 and aberrant behavior

Williams, Taggett Hinkle, R. Atty: Clark, W.
Docket: 4:07cr76
Charge: Consp. dist, PWITD > 5 kilos

cocaine and > 50 g. crack
Range: 188 - 235 months
Sentence: 96 months BOP
Date of Imposition of Sentence: 4/28/08
Grounds: 5K1.1

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

CASE SUMMARIES

The summaries that follow are prepared by our lawyers here in the Federal 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 2007 term that are relevant to our practice and granted since our last newsletter:

CHAMBERS v. U.S., 2008 WL 1775023 (Mem)(cert. granted Apr. 21, 2008) (reviewing No. 06-2405 (7th Cir. 2007))

Failure to report to prison as ACCA enhancement for escape

Question presented: Whether a defendant's failure to report to confinement is a violent felony under the ACCA? [Ed. Note: 11th Cir. law holds that it is. *United States v. Gay*, 251 F.3d 950 (11th Cir. 2001)].

VAN DE KAMP v. GOLDSTEIN, 2008 WL 1699467 (Mem)(cert. granted Apr. 14, 2008) (reviewing 481 F.3d 1170 (9th Cir. 2007))

Prosecutorial immunity

Questions Presented: 1) Where absolute immunity shields an individual prosecutor's decisions regarding the disclosure of informant information in compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972), made in the course of preparing for the initiation of judicial proceedings or trial in any individual prosecution, may a plaintiff circumvent that immunity by suing one or more supervising prosecutors for purportedly improperly training, supervising, or setting policy with regard to the disclosure of such informant information for all cases prosecuted by his or her agency? 2) Are the decisions of a supervising prosecutor as chief advocate in directing policy concerning, and overseeing training and supervision of, individual prosecutors' compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) in the course of preparing for the initiation of judicial proceedings or trial for all cases prosecuted by his or her agency, actions which are "intimately associated with the judicial phase of the criminal process" and hence shielded from liability under *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)?

U.S. v. HAYES, 2008 WL 754339 (Mem)(cert. granted Mar. 24, 2008) (reviewing 482 F.3d 749 (4th Cir. 2007))

Firearm possession, misdemeanor crime of domestic violence

Question presented: 18 U.S.C. 922(g)(9) makes it a crime for any person convicted of a 'misdemeanor crime of domestic violence' to possess a firearm. To qualify as a 'misdemeanor crime of domestic violence' under 18 U.S.C. 921(a)(33)(A), must an offense have as an element a domestic relationship between the offender and the victim.? The case involves an asserted circuit split with decisions including *United States v. Chavez*, 204 F.3d 1305, 1313-1314 (11th Cir. 2000), where the offense was committed against a spouse.

PEARSON v. CALLAHAN, 2008 WL 754340 (Mem) (cert. granted Mar. 24, 2008) (reviewing 494 F.3d 891 (10th Cir. 2007))

"Consent once removed" exception to Fourth Amendment

Questions presented: (1) Several lower courts have recognized a "consent once removed" exception to the Fourth Amendment warrant requirement. Does this exception authorize police officers to enter a home without a warrant immediately after an undercover informant buys drugs inside (as the Sixth and Seventh Circuits have held), or does the warrantless entry in such circumstances violate the Fourth Amendment (as the Tenth Circuit held below)? (2) Did the Tenth Circuit properly deny qualified immunity when the only decisions directly on point had all upheld similar warrantless entries? (3) [This question added by the Court] "Whether the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001) should be overruled?" [Ed. Note: According to the cert. petition, the "consent once removed" exception allows narcotics investigators to make a warrantless entry into a home after an undercover agent personally observes narcotics inside the home. The doctrine applies when the agent (or informant) entered at the express invitation of someone with authority to consent, at that point established the existence of probable cause to effectuate an arrest or search, and immediately summoned help from other officers. No Eleventh Circuit case was cited in the briefing as having opined on the doctrine. And *Saucier* held that in a *Bivens* action for excessive force, "qualified immunity requires an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest," and qualified immunity should be decided early in the proceedings.]

JIMENEZ v. QUARTERMAN, DIR., TX DOC, 2008 WL 695626 (Mem) (cert. granted Mar. 17, 2008) (reviewing No. 06-11240 (5th Cir. 5/25/07))

Certificate of Appealability, habeas limitations period

Question presented: Whether a certificate of appealability should issue pursuant to *Slack v. McDaniel…*, on the question of whether pursuant to 28 U.S.C. 2244(d)(1)(A), when, through no fault of the petitioner, he was unable to obtain a direct review and the highest state court granted relief to place him back to original position on direct review, should the 1-year limitations begin to run after he has completed that direct review, resetting the 1-year limitations period?" The case involves a 43-year prison term for burglary of a home.

MELENDEZ-DIAZ v. MASSACHUSETTS, 2008 WL 695627 (Mem)(cert. granted Mar. 17, 2008) (reviewing 870 N.E.2d 676 (Table), 2007 WL 2189152 (Mass. Ct. App. 7/31/07))

Confrontation Clause

Question presented: Whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004)?

WADDINGTON, SUPT., WA v. SARAUSAD, 2008 WL 695629 (Mem)(cert. granted Mar. 17, 2008) (reviewing 503 F.3d 822 (9th Cir. 2007))

Jury instructions, due process, habeas

Questions presented: The Washington Supreme Court has repeatedly approved the pattern accomplice liability jury instructions given in Sarausad's trial, which mirror the statutory language on accomplice liability under state law. The Ninth Circuit found a

violation of due process based its independent conclusion that the instructions were ambiguous, and that there was a reasonable likelihood a jury could misapply the instructions so as to relieve the prosecution of its burden to prove each element of a crime beyond a reasonable doubt. 1. In reviewing a due process challenge to jury instructions brought under 28 U.S.C. § 2254, must the federal courts accept the state court determination that the instructions fully and correctly set out state law governing accomplice liability? 2. Where the accomplice liability instructions correctly set forth state law, is it an unreasonable application of clearly established federal law to conclude there was no reasonable likelihood that the jury misapplied the instructions so as to relieve the prosecution of the burden of proving all the elements of the crime?

OREGON v. ICE, 2008 WL 112170 (Mem)(cert. granted Mar. 17, 2008) (reviewing 170 P.3d 1049 (Or. Oct 11, 2007))
Judicial fact-finding for consecutive sentences under Sixth Amendment
Question presented: "Whether the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant?" Ice was sentenced to 340 months in prison after convictions on two counts of first-degree burglary and four counts of first-degree sexual abuse. Three of the sentences imposed were ordered to be served consecutively. Under Oregon law, sentences imposed for multiple crimes are to be served together (concurrently) unless the judge finds that the crimes did not occur as part of the same conduct, and that, even if they did, the multiple crimes resulted in separate harms. In Ice's case, the trial judge found that the two burglary convictions and the sex crime convictions arose out of separate incidents, and thus set the sentences to run consecutively.

NEGUSIE v. MUKASEY, ATT'Y GEN., 2008 WL 695623 (Mem)(cert. granted Mar. 17, 2008) (reviewing 231 Fed. Appx. 325, 2007 WL 1454482 (5th Cir. 2007))
Asylum
Question presented: The Immigration and Nationality Act (INA) prohibits the Secretary of Homeland Security and the Attorney General from granting asylum to, or withholding removal of, a refugee who has "ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 208(b)(2)(A), 8 U.S.C. § 1158(b)(2)(A). Does this "persecutor exception" prohibit granting asylum to, and withholding of removal of, a refugee who is compelled against his will by credible threats of death or torture to assist or participate in acts of persecution?

ARIZONA v. GANT, 128 S. Ct. 1443 (Mem) (cert. granted Feb. 25, 2008) (reviewing 162 P.3d 640 (AZ 2007))
Fourth Amendment
Question presented: Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured? According to the cert. petition, officers went to an alleged narcotics-

dealing home where they expected to find Gant, who had a DWLS warrant outstanding. They found two individuals outside the house and, after investigation, arrested them just as Gant drove up in his car and parked in the driveway. One officer summoned Gant as he got out of his car. Gant walked 8-12 feet toward the officer, and was placed in handcuffs. Officers then searched the passenger compartment of Gant's car and found a handgun and a plastic baggie containing cocaine. The Arizona Supreme Court ordered suppression of the cocaine because even though *Belton* and *Thornton* established a bright-line rule permitting searches incident to arrest, it did not go so far as to permit a search of the passenger compartment once the scene is secure.

CHRONES, WARDEN v. PULIDO, 128 S. Ct. 1444 (Mem)(cert. granted Feb. 25, 2008) (reviewing 487 F.3d 669 (9th Cir. 2007))
Habeas, erroneous jury instruction as structural error
Question presented: *Stromberg v. California*, 283 U.S. 359 (1931), required the reversal of the judgment if a general verdict could have rested on an instruction that defined a constitutionally defective alternative theory of criminal liability. However, a modern line of cases, including *Neder v. United States*, 527 U.S. 1 (1999), establishes that error in instructing on an element of a charged crime is not "structural error," so as to require automatic reversal, but is instead "trial error" and, as such, may be harmless. Did the Ninth Circuit fail to conform to "clearly established" Supreme Court law, as required by 28 U.S.C. § 2254(d), when it granted habeas corpus relief by deeming an erroneous instruction on one of two alternative theories of guilt to be "structural error" requiring reversal because the jury might have relied on it? The circuit court had held that "[b]ecause the felony-murder instructions presented to the jury allowed conviction on the basis of after-the-murder robbery involvement, the felony-murder instructions are invalid and are insufficient to support the conviction, which requires a finding of contemporaneity under California criminal law."

HERRING v. U.S., 128 S. Ct. 1221 (Mem)(cert. granted Feb. 19, 2008) (reviewing 492 F.3d 1212 (11th Cir. 2007))
Exclusionary rule
Question presented: "Whether the Fourth Amendment requires evidence found during a search incident to an arrest to be suppressed when the arresting officer conducted the arrest and search in sole reliance upon facially credible but erroneous information negligently provided by another law enforcement agent." According to the cert. petition, "In *Arizona v. Evans*, 514 U.S. 1 (1995), this Court held that evidence seized incident to an arrest that violates the Fourth Amendment because of a negligent error by a court clerk need not be suppressed in a criminal prosecution. At the same time, this Court expressly reserved the question whether the exclusionary rule would apply to evidence seized incident to an arrest that violates the Fourth Amendment because of a negligent error by law enforcement personnel. *Id.* at 16 n.5. This case presents that issue. The Eleventh Circuit [Carnes, 3-0, in a case out of Alabama] held that the exclusionary rule does not apply in such a situation, deepening a substantial conflict over this important question of Fourth Amendment law."

GILES v. CALIFORNIA, 128 S. Ct. 976 (Mem) (cert. granted Jan. 11, 2008) (reviewing 152 P.3d 433 (Cal. 2007))
Confrontation Clause

Issue presented: Whether an accused person has a right to bar the testimony of a witness who is unavailable for trial, if the accused caused that absence by killing her — but did not do so with the specific aim of silencing the witness – the "forfeiture by wrongdoing rule" that dates from an 1879 Supreme Court decision, *Reynolds v. U.S.*

Supreme Court Cases

VIRGINIA v. MOORE, 2008 WL 1805745 (Apr. 23, 2008)

Fourth Amendment

The Supreme Court held that a state law violation by police in conducting an arrest does not amount to a federal constitutional violation requiring suppression of the fruits of a resulting search. [Ed note: It appears that states may restrict the remedies available when police deny arrestees the extra protection provided by state law, and it also appears that states are free to require suppression as a matter of State law; *cf. State v. Bamber*, 630 So.2d 1048 (Fla. 1994) (approving suppression where search violated Florida's no-knock law).]

BEGAY v. U.S., 128 S. Ct. 1581 (Apr. 16, 2008)

DUI under ACCA

The Court held that the New Mexico crime of DUI is not a predicate "violent felony" to qualify for sentencing enhancement under the Armed Career Criminal Act.

BURGESS v. U.S., 128 S. Ct 1572 (Apr. 16, 2008)

State misdemeanor drug offense is federal felony drug offense

The Court held that a state drug offense punishable more than one year qualifies as a prior conviction of a "felony drug offense" under 21 U.S.C. § 841(b)(1)(A) , even if the state law classifies the offense as a misdemeanor. The reason is that the term "felony drug offense" under 21 U.S.C. § 841(b)(1)(A) is defined exclusively by 21 U.S.C. § 802(44) and does not incorporate 21 U.S.C. § 802(13)'s definition of "felony."

BAZE v. REES, 128 S. Ct. 1520 (Apr. 16, 2008)

Lethal Injection

In a lengthy splintered decision, the Court held that Kentucky may lethally inject Baze. ROBERTS, C. J., announced the judgment of the Court and delivered an opinion, in which KENNEDY and ALITO, JJ., joined. ALITO, J., filed a concurring opinion. STEVENS, J., filed an opinion concurring in the judgment. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined. BREYER, J., filed an opinion concurring in the judgment. GINSBURG, J., filed a dissenting opinion, in which SOUTER, J., joined.

MEDELLIN v. TEXAS, 128 S. Ct. 1346 (Mar. 25, 2008)

Vienna Convention, presidential power *vis a vis* state criminal procedure

The Court held that the President does not have the authority to order states to relax their criminal procedures to obey a Vienna Convention ruling of the World Court. Neither a World Court decision requiring U.S. states to provide new review of criminal cases involving foreign nationals, nor a memo by President Bush seeking to enforce the World Court ruling, preempts state law restrictions on challenges to convictions.

SNYDER v. LOUISIANA, 128 S. Ct. 1203 (Mar. 19, 2008)
Batson
The Court held that the state trial judge committed clear error in rejecting the *Batson* objection to the strike of one juror in a 1996 trial for capital murder that resulted in a death sentence. All 5 of the prospective black jurors were eliminated by the prosecution through the use of peremptory strikes, and "the explanation given for the strike of Mr. Brooks is by itself unconvincing and suffices for the determination that there was *Batson* error."

BOULWARE v. U.S., 128 S. Ct. 1168 (Mar. 3, 2008)
Income tax evasion
The Supreme Court held that a defendant in a criminal tax case does not need to show a contemporaneous intent to treat diversions as returns of capital before relying on those sections to demonstrate no taxes are owed.

DANFORTH v. MINNESOTA, 128 S. Ct. 1029 (Feb. 20, 2008)
Retroactivity
The Supreme Court held that states, under their own laws or constitutions, may give state prisoners the retroactive benefit of Supreme Court criminal law decisions even if the Supreme Court has ruled they are not retroactive under federal law.

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. LIVESAY, 2008 WL 1810195 (Apr. 23, 2008)
Sentencing; procedural due process; *Gall*; 5K1.1 v. 3553(a)
The Court had previously vacated a 60-month probationary sentence for the defendant's participation in the $1.4 billion Healthsouth fraud case. On remand from the Supreme Court for reconsideration in light of *Gall*, the Court remanded to the district court for reconsideration. First, the Court held the district court commited "prong one or 'procedural' *Gall* error when it departed 18 levels udner 5K1.1" because it should not have considered the defendant's repudiation of or withdrawal from the conspiracy. As to the alternative sentence whereby the district court indicated it would impose the same sentence under *Booker*, the Court held that the district court had erred procedurally by failing to sufficiently explain itself to allow meaningful appellate review. Although it listed the 3553(a) factors, it failed to discuss the applicable facts.

U.S. v. MOORE, 2008 WL 1792001 (Apr. 22, 2008)
Evidence; sufficiency; bribery; conspiracy; witness tampering; agreement; official act; material variance; jury instruction
The Court affirmed the convictions of two FCI Tallahassee guards in a sex-for-contraband conspiracy to accept an illegal gratuity under 18 U.S.C. 201(c)(1)(B). There was sufficient evidence of an agreement to receive something of value based on "a mutual unstated understanding," and an "official act" is broadly construed; the multiple conspiracy instruction was correctly denied; bribery and contraband instructions were proper; sex was properly defined as a "thing of value"; and the evidence was sufficient to prove witness tampering.

U.S. v. VELASQUEZ, 2008 WL 1776588 (Apr. 21, 2008)
Sentencing; authority; improper basis for sentence

The district court exceeded its sentencing authority when it based the 9-month prison sentence, for an admittedly "de minimis" violation of supervised release, on the district judge's disagreement with the fact that the immigration judge had released the defendant on bond pending appeal of his asylum application.

U.S. v. MOCK, 2008 WL 1700214 (Apr. 14, 2008)

Findings needed for cross-reference support of USSG § 2A2.1(a)(1)

In sentencing Mock for arson, the district court applied the arson guideline, USSG § 2K1.4(c), and its cross-reference to the attempted first-degree murder guideline, USSG § 2A2.1. However, it made no explicit findings to support the cross-reference. Had Mock acted with reckless disregard, the district court should not have applied the cross-reference. The cross-reference applies only if Mock knowingly creating a substantial risk of death or serious bodily injury. In the absence of specific findings, the Court reversed the sentence, concluding that it "cannot be sure" that the cross-reference was justified.

ALEXANDER v. FLORIDA DOC, 2008 WL 926137 (Apr. 8, 2008)

Habeas; 2254; tolling

The Court reaffirmed that a motion filed in state court under Florida Rule of Criminal Procedure 3.800(c) does not toll the AEDPA statute of limitations.

U.S. v. ELLISOR, 2008 WL 919670 (Apr. 7, 2008)

Mail fraud; sufficiency; evidence; FRE 404(b); exclusion of "good conduct" defense

The Court affirmed the mail fraud convictions arising out of a scheme selling raffle tickets to schoolchildren and 87-month sentence. The Court found the evidence sufficient. It affirmed admission of extrinsic act evidence of a similar Utah fraud under FRE 404(b) as relevant to defendant's intent to defraud, and evidence of an unpaid Florida hotel bill as inextricably intertwined with evidence of the instant offense. The Court affirmed the rule that excludes evidence of good conduct (here, legitimate business dealings) offered to negate proof of intent, and it was also hearsay.

U.S. v. SVETE, 2008 WL 788407 (Mar. 26, 2008)

Jury instruction; mail fraud; sufficiency; Brady; Giglio; FRE 609; withheld adjudication; sentencing; loss calculation; restitution inclusion of insurance premiums

Svete and Girardot were convicted of mail fraud, money laundering, conspiracy, and interstate transporation of money obtained by fraud, arising out of their dealings in viaticals. (The defendants were sentenced to 200 months and 63 months, respectively, and restitution in excess of $100 million.) The Court reversed the defendants' mail fraud convictions, arising out of the sale of viaticals, because the standard jury instruction's omission of the requirement of ordinary prudence by investors seriously impaired the defendants' ability to present their defense: "In this circuit, mail fraud requires the government to prove that the defendant intended to create a scheme 'reasonably calculated to deceive persons of ordinary prudence and comprehension.'" However, the circuit's Pattern Jury Instruction 50.1 does not include this reasonable person standard set out in *Brown*, 79 F.3d at 1557. The Court rejected Svete's argument that inconsistencies between the trial and sentencing testimony of a major government witness, about which the

government noticed the court, required a new trial, because there was no/insufficient prejudice. A withheld adjudication is not generally a criminal conviction for impeachment under FRE 609. Finally, the Court affirmed the district court's loss calculation as exceeding $80 million, and included the cost of life insurance premiums to maintain the viability of the viatical portfolios to preclude further loss to the victims.

U.S. v. MAUPIN, 2008 WL 754645 (Mar. 24, 2008)

Sentencing; child pornography; 18 USC 2252A; prior conviction

The Court affirmed the enhancement and 40-year sentence of this child pornography defendant, because his prior similar conviction based on a nolo contendere plea, with adjudication withheld and 5-year probationary sentence, was a prior conviction.

DOWNS v. McNEIL, 2008 WL 756348 (Mar. 24, 2008)

Habeas; statute of limitations; equitable tolling; counsel's fault

The Court agreed the capital habeas petitioner was entitled to a hearing because, if his allegation that his petition was filed eight days late due to counsel's fault was true (all due to problems in the CCRC-N office), the statute of limitations would be equitable tolled. The Court rejected his argument that the Florida statute's use of "under laws of any State" meant that Florida law should determine whether it was a prior conviction.

U.S. v. DEVINE, 2008 WL 731748 (Mar. 20, 2008)

Ineffective assistance in failing to appeal

The Court held that counsel had no duty to consult with Devine about an appeal under the circumstances of this case because "a rational defendant in Devine's position would not want to appeal, because there were no nonfrivolous grounds for appeal." He had pleaded guilty with an appeal waiver and was sentenced at the bottom of the guidelines.

TRAWICK v. ALLEN, 2008 WL 706581 (Mar. 18, 2008)

Capital habeas; gender discrimination; jury selection

The Court rejected Trawick's multi-faceted claim of gender discrimination in his jury selection. The original venire was 45% women, and the jury was 42%. The disparity did not show the state court's ruling was clearly erroneous. The fact that two women stricken offered similar answers to men who were seated, in response to a single question, was inadequate. Although *J.E.B.* may have recognized that "gender and race are overlapping categories," and past racial discrimination may be evidence the prosecutor is willing and able to discriminate in jury selection, there was no evidence evincing a relationship to gender discrimination in this case.

U.S. v. BURGEST, 519 F.3d 1307 (Mar. 13, 2008)

Sixth Amendment; right to counsel; dual sovereignty; post-arrest statement; Miranda

Answering this question of first impression, the Court joined the majority of other circuits and held that the dual sovereignty doctrine applies in the Sixth Amendment context. Thus, the defendant's post-arrest statement given to federal authorities after he waived his Miranda rights, but while he had retained counsel for a pending state drug charge, was admissible. Alternatively, the admission was harmless beyond a reasonable doubt.

U.S. v. STRATTON. 519 F.3d 1305 (Mar. 13, 2008)

Sentencing; crack disparity

On remand by the Supreme Court, the Court remanded to the district court for resentencing in light of *Kimbrough*, given the district court's original ruling that it lacked authority to consider the crack/powder cocaine disparity.

LAWHORN v. ALLEN, 519 F.3d 1272 (Mar. 11, 2008)

Capital habeas; voluntary confession; ineffective assistance

The Court reversed the district court grant of habeas relief based on its suppression ruling but affirmed its grant of relief for penalty phase ineffective assistance of counsel. Defendant was detained six days before an arrest warrant was obtained and then gave a Mirandized confession. Alabama law required arraignment within 72 hours, and *County of Riverside v. McLaughlin* (US 1991) held that a delay in obtaining a probable cause determination which exceeded 48 hours presumptively violated the Fourth Amendment.

First, the Court held that, in spite of the constitutional violation, suppression was not an appropriate remedy for an otherwise voluntary confession. Second, counsel's representation was objectively deficient, because his waiver of closing argument was based not on a thorough investigation of the law but "on a gross misunderstanding of a clear rule of Alabama criminal procedure." Because the deficiency was prejudicial, it required a new penalty phase.

MICHEL v. U.S., 519 F.3d 1267 (Mar. 11, 2008)

Habeas; 2255; statute of limitations

Defendant's original 2255 motion was timely filed, but because it was unsigned the district court clerk, acting under Rule 3(b) of Rules Governing § 2255 Proceedings, did not file and docket it until defendant provided a signed copy, which was after the statutory deadline. The district court dismissed the motion, but the Court reversed, holding that 2004 rules amendments required the clerk to accept the defective motion and then require the moving party to submit a corrected motion that conformed to the rules.

GORDON v. U.S., 518 F.3d 1291 (Mar. 7, 2008)

Ineffective assistance; Fed. R. Crim. P. 11

Without explanation, the Court sua sponte vacated its original opinion, 496 F.3d 1270, and substituted another opinion that reached the same result, that counsel was not ineffective for not objecting to the district court's (1) failure to inform Gordon of the nature of the charges to which he was pleading, or (2) failure to address Gordon personally concerning his right of allocution.

U.S. v. DEVERSO, 518 F.3d 1250 (Mar. 5, 2008)

Evidence; authenticity of foreign public documents; FRE 902(3); child porn; jury instruction; knowingly; knowledge of age

At child porn trial, the government relied on Federal Rule of Evidence 902(3) to introduce, over objection, a certified copy of a foreign birth certificate of an alleged victim, depicted in a photo with defendant, to prove she was under 18. The victim had shown a copy of her birth certificate to an agent in Manila; the agent then requested a copy of the birth certificate from the National Census and Statistics Office and had it certified at the U.S. Embassy; he testified at trial that the copy was exactly the same as the one the victim had shown him. The Court affirmed admission of the certified copy, even though it lacked the

signature of an attendant at birth. The Court also rejected defendant's claim that he was entitled to a jury instruction on the mistake of age defense. Even though the charge was that he did "knowingly" employ, use, persuade, entice, or coerce a minor to engage in sexually explicit conduct, "knowledge of age is not an element of" 18 U.S.C. § 2251(c).

U.S. v. AVILES, 518 F.3d 1228 (Mar. 4, 2008)
Sentencing; relevant conduct; ex post facto
At sentencing, the district court's relevant conduct analysis under USSG § 1B1.3 applied the 2000 Guidelines Manual instead of the 2004 Manual. The latter manual included a more severe penalty that could have been avoided by withdrawal from the conspiracy before the penalty amendment took effect. The Court agreed with the government's cross-appeal, vacating the sentences and holding that the relevant ex post facto analysis should have applied to this conspiracy because it was constant and consistent and its continuation was reasonably foreseeable. The Court distinguished *Peeples* (11th Cir. 1994), which created an exception to the generally applicable ex post facto analysis by not requiring affirmative withdrawal in cases where the conspiracy is sporadic and there is little opportunity for the defendant to effectively withdraw.

U.S. v. FUTCH, 518 F.3d 887 (Mar. 3, 2008)
Habeas; 2255; jurisdiction; finality of partial denial of relief; COA; § 3B1.4
In August 2005, the district court granted defendant's 28 U.S.C. § 2255 motion as to sentence and remanded for resentencing, but denied relief on his conviction claims. The defendant waited until after resentencing to appeal the earlier denial of his challenges to his conviction. The jurisdictional question here is, "was Futch required to immediately appeal the partial denial of his § 2255 motion in August 2005, or, because the district court granted his § 2255 motion in part and ordered resentencing, could he wait until he was resentenced?" The Court held the defendant's 2255 proceeding was not final until after resentencing and thus his notice of appeal was timely as to his conviction claims. However, the Court denied a certificate of appealability on those claim.
Although no COA was needed for the sentencing appeal, the Court found no clear error in the district court's factfinding that defendant used a baby to physically conceal cocaine and no legal error in application of the USSG § 3B1.4 enhancement for use of a minor to avoid detection or apprehension.

THOMPSON v. SEC'Y, DOC, 517 F.3d 1279 (Feb. 25, 2008)
Habeas; cruel and unusual punishment; Eighth Amendment; prolonged confinement; aggravating factors
The Court affirmed the rulings that (1) defendant's claim that execution after 31 years on Death Row is cruel and unusual punishment was unexhausted and did not merit relief; and (2) his claim about the use of non-statutory (or the doubling of) aggravating circumstances was barred.

U.S. v. DEAN, 517 F.3d 1224 (Feb. 20, 2008)
Hobbs Act conspiracy; 18 USC 1951 v. 2113; enhancement; accidental discharge of firearm
Appellants argued that insufficient evidence was presented as to the victim bank's Federal Deposit Insurance Corporation insured status. The Court held that 18 U.S.C. § 1951(a), unlike 18 U.S.C. § 2113, requires no proof of the victim bank's FDIC status; the government needed to prove only that

defendants committed a robbery that had an effect on interstate commerce, which it did because "a mere depletion of assets is sufficient to prove an effect on commerce." Also, the Court held that § 924(c) is a sentencing enhancement, not an element of an offense, and that § 924(c)(1)(A)(iii) does not contain a separate intent requirement. Thus, even an accidental discharge of a firearm qualifies.

FOTOPOULOS v. SEC'Y, DOC, 516 F.3d 1229 (Feb. 14, 2008)

Habeas; deference to state factual findings; due process; inconsistent prosecution theories

The state prosecuted the defendant's girlfriend first, successfully attacking her defense that she was under the domination of defendant; they then prosecuted the defendant on the theory that he dominated his girlfriend and so was responsible for her acts. After Florida courts denied relief to this capital defendant, the district court granted relief. The only case cited by the district court, *Bradshaw v. Stumpf*, 545 U.S. 175 (2005), was years after the state court decision.

The Court reversed on two grounds: (1) the district court erred in rejecting the Florida Supreme Court finding that counsel made a strategic decision in not impeaching the state's inconsistent theories in separate prosecutions of codefendants, when the state court had not unreasonably applied a clearly established federal law, here *Strickland*; and (2) the district court erred in finding a due process violation, under *Berger*, 295 U.S. 78 (1938), based on the state's use of inconsistent theories when the U. S. Supreme Court has never held that.

U.S. v. PUGH, 515 F.3d 1179 (Jan. 31, 2008)

Sentencing; guidelines; standard of review; abuse of discretion; probation unreasonable

The Court reversed, under the new abuse-of-discretion standard of review for variances from the guidelines, a downward departure sentence to probation. In a guideline range of 97-121 months, this child pornography defendant was sentenced to 5 years' probation; the district court relied heavily on his history, characteristics, and alleged motive. The government objected and asked for at least one day of incarceration. The Court concluded the district court had not provided "sufficiently compelling justification to support the degree of its variance, nor did it give any apparent weight to many other important statutory factors" under 3553(a) that must be considered at sentencing. "As we see it, this probationary sentence failed to adequately promote general deterrence, reflect the seriousness of Pugh's offense, show respect for the law, or address in any way the relevant Guidelines policy statements and directives." The Court reviewed precedent of the last several years, noting *Gall* "makes clear that the district court is obliged to 'consider all of the'" 3553(a) factors. (emphasis in original) Symptoms of a substantively unreasonable sentence, the Court reasoned, are unjustified reliance on any one 3553(a) factor, or when the sentence is selected arbitrarily, based on impermissible factors, or facts to consider all the 3553(a) factors. But it "hastened to add" these symptoms "do not necessarily make a sentence unreasonable," citing *Gall's* statement that the district court there did not commit reversible error simply because it "attached great weight" to a single factor. The Court then reviewed at length the issues pertinent to a child pornography sentence, making it sound like it might not have reached the same conclusion in a different offense.

<u>**U.S. v. AL-ARIAN**</u>, 514 F.3d 1184 (Jan. 25, 2008)

Appeal; mootness; 2255; subject matter jurisdiction; specific enforcement; plea agreement; grand jury subpoena

The Court affirmed the district court's denial of defendant's motion to enforce his plea agreement, in which he sought to quash the government's grand jury subpoena issued in the E. D. Virginia and argued that the government had agreed in exchange for his guilty plea never to seek his testimony on other matters. As an issue of first impression, the Court agreed with defendant that the district court had jurisdiction under 28 U.S.C. § 2255 to consider the post-conviction motion to enforce his plea agreement, which was filed within one year of the triggering event (the grand jury subpoena), and that it had jurisdiction over the appeal. It denied relief, however, based on the absence of any such provision from the written plea agreement, which expressly bound only the USA in the M.D.Fla. and the DOJ.

<u>**U.S. v. MASFERRER**</u>, 514 F.3d 1158 (Jan. 22, 2008)

Judicial assignment; evidence; guidelines; loss calculation

After S.D. Fla. Judge Lawrence King recused himself and transferred his case to Judge Michael

Moore, the Court refrained from finding a violation of local rules governing case assignments or the recusal statute, 28 U.S.C. § 455. It effectively found it harmless because vacatur is only available as a remedy when the defendant can point to particular circumstances that prove that "the potential bias on the part of the judge represented a risk of injustice to it," and here there was none shown. The Court also found no violation in excluding defense evidence of the subsequent history of an allegedly illegal "swap" because the only thing that mattered was what Masferrer "believed *at the time* of the transactions." Bloomberg Financial Service's testimony about the value of assets were admissible under Fed. R. Evid. 803(17), and "the fact that the Bloomberg information was used to price an illiquid asset does not bring it outside the scope of 803(17)." It was appropriate to use the more harsh 2002 guidelines rather than 2001 because the judge found a conspiracy violation had occurred in 2002. Also, a loss calculation was not improper, even though defendant did not cause assets to decline in value, where "his criminal activity did cause them to be sold when they were in fact worthless."

<u>**U.S. v. MERRILL**</u>, 513 F.3d 1293 (Jan. 17, 2008)

Evidence; sufficiency; prejudicial; 404(b); inconvenient forum; jury instructions; intent; burden shifting; prosecutorial misconduct; effective assistance of counsel; juror dismissal after deliberations begun

The Court affirmed the convictions of Panama City's Dr. Merrill resulting from prescription overdose deaths; he apparently did not appeal his life sentence. The Court affirmed. <u>First</u>, the Court found the evidence sufficient that patients died as a result of defendant's actions where the medical examiner testified the cause of death was the same type drugs as prescribed by defendant within 2-1/2 weeks of the death and defendant was their only source.

<u>Second</u>, the government's evidence of defendant's prescription practices was relevant to a *pattern* of overprescribing. Even though it did not relate solely to the charges, it was relevant and not outweighed by prejudicial potential. It was not excludable as evidence of uncharged crimes under FRE 404(b) because it was relevant both to whether he committed

health care fraud by prescribing excessive and inappropriate quantities and combinations of drugs outside the usual course of professional practice, and to whether he was relieved of liability under the CSA because he acted in the "usual course of professional practice."
Third, the trial's transfer to Pensacola, more than 100 miles from PC, over defense objection, solely for the district court's convenience, and which resulted in defendant's ultimate indigency, did not violate FRCP 18 or abuse the court's discretion. The district court had considered all the Rule 18 factors, noting the space, security, and judicial administration concerns.
Fourth, the Court rejected the plain error challenge to a jury instruction, noting that it must focus on objective standards, not the physician's subjective intent. Also, language such as "defendant maintains" did not shift the burden when taken in context with the other instructions clearly indicating it was the government's burden of proof.
Fifth, although AUSA Kunz's statements regarding evidence at the JOA motion argument, in which he misstated evidence, were improper, there was no prejudice because the court expressly stated that point was irrelevant to its denial of the motion. The same statements in closing were not plain error requiring the district court to *sua sponte* correct it given the instructions and abundant independent evidence.
Sixth, the ineffectiveness claim was not sufficiently developed and should be raised in a 2255.
Seventh, the district court's mistaken sending of an alternate juror to deliberate did not violate FRCP 24(c)(3). The district court quickly realized its error, and the defendant requested the original juror; no one mentioned the different race of the two; the district court found no prejudice and denied the correction. The Court noted that the record did not support the defendant's assertions regarding race or perceived bias. However, the Court held that the district court *did err* and violated Rule 24(c) when it mistakenly sent the alternate to deliberate. Answering "the real question," though, the Court concluded it was harmless error, citing precedent that this is not per se reversible error.

JOHNSON v. SEC'Y, DOC, 513 F.3d 1328 (Jan. 17, 2008)

Habeas; 2254; timeliness; state impediments; equitable tolling; actual innocence

The Court agreed that both petitions (2 cases) were untimely. First, the alleged state-created impediments to timely filing (delay in appointing collateral counsel, ineffectiveness of first appointed counsel, and state's delay in providing needed documents) were contrary to precedent, and precedent did not support his equitable tolling claims. Also, the Court noted the defendant raised a "difficult constitutional question" - which it has heretofore avoided addressing - whether AEDPA's one-year limitations period violates the Suspension Clause when an otherwise time-barred petitioner can show he is actually innocent. But it found that his actual innocence claim, on only 1 of his 2 death cases, was unfounded.

U.S. v. DORSEY, 512 F.3d 1321 (Jan. 14, 2008)

Prosecutorial vindictiveness; 5K1.1; unconstitutional motive; right to jury trial; due process

The Court reissued its earlier opinion,497 F.3d 1221 (2007), solely to delete the Court's thoughts on remand evidence, leaving that to the district court.

BROWN v. BARROW, 512 F.3d 1304 (Jan. 11, 2008)

Habeas; statute of imitations; tolling

The Court held that a Georgia inmate's federal habeas petition challenging a denial of parole was time-barred by AEDPA's one-year statute of limitations, when it was filed seven years late. The inmate's letters to the parole board did not toll the limitations period. Georgia has long provided that the sole means to attack a denial of parole is a writ of mandamus in state court, and the defendant did not do this sufficiently early to avoid the one-year time-bar.

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