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A Newsletter for Panel Attorneys

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FROM TALLAHASSEE

Most of this newsletter is devoted to summaries of recent cases from the United States Supreme Court and the Eleventh Circuit. In preparing the newsletter we owe a debt of gratitude to the Federal Public Defender's Office from the Southern District.

Kathleen Williams' office sends out monthly case summaries, and we've "borrowed" from, edited, and supplemented their efforts.

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Earlier this week we sent you some information about a seminar being presented by the Central Florida Criminal Defense Attorney's Association and the Federal Public Defender's Office from the Middle District. They've done a fine job in the past with their seminar, and this one looks like it will include some valuable and useful information.

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Sometime back Judge Vinson asked me to send him a proposed revised Criminal Justice Act Plan. Earlier this week I sent it to him, and I'll be getting copies to all of you within the next few days. There is apparently a very old plan that is in existence, but hasn't been relied upon for a very long time. In 1994 our Panel Representative, Lloyd Vipperman,

prepared a plan and submitted it to then Chief Judge Paul. Judge Paul, as I understand it, was very receptive to Lloyd's proposal, but for one reason or another no action was taken. What I've sent Judge Vinson is a slightly revised version of Lloyd's proposal.

Once you receive the plan, please review it, and let me know what you think of it. You're welcome, of course to come by the office, here, in Tallahassee, or you can call me at (850) 942-8818, or email me at Fdpubdef@polaris.net. I've told Judge Vinson I would pass on any thoughts about the plan that I received, so this would be a good opportunity to influence the final product in the early stages of the process.

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Wanted: Panel Representative

Lloyd Vipperman has for three years done a fine job as the panel representative for the Northern District. His term, however, has now expired and he is ready to pass on the job to someone new. I'll be talking soon with Judge Vinson about filling the position. If you are interested in being the panel representative, please call me, email me, or stop by the office.

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Gil Schaffnit from Gainesville was good enough to attend the recent conference for panel representatives in Washington, D.C. He's in the process of preparing an article about the conference that we'll include in our next newsletter.

RPM

NEW APPELLATE RULES

Significant revisions to the Federal Rules of Appellate Procedure and the Eleventh Circuit Rules became effective December 1, 1998 and April 1, 1999. The most significant changes involve the typeface and length of briefs and the time for filing briefs. Rule 32 of the Federal Rules of Appellate Procedure now provides, along with restrictions on the size of typeface, that the principal brief may not exceed 30 pages unless it complies with word- or line-count limitations. In addition, the time for filing a brief is now 40 days from when the transcripts are filed. Eleventh Circuit Rule 12-1 now provides that the record on appeal is deemed complete on the date the court reporter files the transcript with the district court; Eleventh Circuit Rule 31-1 now provides that the appellant shall file a brief within 40 days of the date the record is deemed complete.

These are the most significant changes for criminal appeals, but not all of the changes. If you are admitted to practice in the Eleventh Circuit you should have received a copy of both these revisions. The Eleventh Circuit's website www.ca11.uscourts.gov has the new rules as well as court decisions. Our office has copies of the April 1 revisions. If you would like one, please call Margaret at (850) 942-8818.

NEW FIREARM PENALTIES

As most of you probably know, as of November 13 of last year the "Bailey-fix" legislation went into effect. In 1995 the Supreme Court decided Bailey v. U.S., 516 U.S. 137, which, of course, curtailed the scope of the statute that imposes penalties for using a firearm in the commission of a violent offense or

drug trafficking offense, 18 U.S.C. § 924(c), in that it required "active use" of the firearm. To "fix" what the government apparently perceived as a problem, Congress promulgated the new version of the statute that now prohibits possession of a firearm "in furtherance" of a violent offense or drug trafficking offense. Thus, presumably the statute applies when the gun was possessed before, during, or after the offense, so long as it was in furtherance of the offense. In addition to providing for a penalty of "not less than 7 years" if a firearm is "brandished," and providing for "not less than 10 years," if the firearm is discharged, Congress applied the same "not less than" language to the 5 year penalty for one who "uses or carries" or "possesses" a firearm.

Because the statute omits any mention of the maximum sentence, we've been wondering what that might be. As we understand it, there is nothing in the legislative history to indicate what maximum congress intended. The new version of the statute, though, is similar to the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), which provides that a defendant convicted of possessing a firearm under any of the circumstances outlined in 18 U.S.C. § 922(g) (prior felony conviction, fugitive, illegal alien, prior domestic violence conviction, etc.) shall be "imprisoned not less than fifteen years." The Eleventh Circuit has interpreted that provision to authorize a sentence of up to life in prison. U.S. v. Brame, 997 F.2d 1426 (11th Cir. 1993). The Second, Third, Fourth, Fifth, Seventh, and Tenth Circuits, as of 1993, had already decided the issue the same way. Thus, the maximum penalty for 924(c) offenses is apparently life.

Because the penalty is no longer fixed, i.e. there is a range of time available to the sentencing judge, the assumption is that the Sentencing Commission will promulgate new guidelines in place of the existing language of the sentencing guidelines that reads: "the term of imprisonment is that required by statute." USSG § 2K2.4.

SAFETY VALVE PITFALLS

Safety Valve eligibility may, at best, be a mixed blessing. Section 3553(f) of Title 18 permits a judge to sentence drug defendants below a mandatory minimum if certain conditions are met. Guideline § 2D1.1(b)(6) provides for a two level

decrease if those conditions are met and the offense level is 26 or above. The most problematic condition is number 5, which is met only when "not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan..."

In other words, in order to get out from under a mandatory minimum and qualify for the two level decrease in §2D1.1(b)(6), a defendant must disclose all facts and circumstances surrounding not only the offense(s) of conviction but also all "relevant conduct." In September of last year the Second Circuit issued a decision that can make this requirement a minefield for an unsuspecting defendant.

In United States v. Cruz, 156 F.3d 366 (2nd Cir. 1998), the Court decided two related issues. First, a safety valve eligible defendant is not automatically entitled to the guideline immunity established by U.S.S.G. § 1B1.8, which reads: *Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement.* That provision, the Court noted, applies only to a defendant who "agrees to cooperate with the government". Absent a cooperation agreement, the defendant is not eligible for 1B1.8 immunity and what he says at a safety valve debriefing can be used to enhance his offense level.

Second, the Court held that there is no constitutional prohibition against requiring a defendant to admit to relevant conduct in order to secure the safety valve "benefit", and then using the defendant's statements to increase his offense level. The panel analogized the choice facing a safety valve defendant to that which exists in the plea bargaining context and reasoned that there is no "compulsion" to provide incriminating information in either situation. The Court distinguished United

States v. Oliveras, 905 F.2d 623 (2d Cir. 1990) (per curiam), which holds that a defendant can not be required to admit to conduct beyond that covered by the count of conviction in order to gain credit for acceptance of responsibility.

Consequently, if your client is seeking safety valve eligibility, and you find yourself in what around here would be the rare situation of having a client that does not have a cooperation agreement with the government, it makes sense to thoroughly question your client about any relevant conduct. Then, compute your client's guidelines using the offense level based upon the offense of conviction plus all relevant conduct that will be disclosed, less the two level decrease provided in USSG s. 2D1.1(b)(6). You may find your client's disclosures about relevant conduct outweigh any safety valve benefits. If that's the case, the prudent lawyer would obviously rethink the safety valve issue.

SUPREME COURT UPDATE:

WYOMING v. HOUGHTON, 1999 WL 181177 (Apr. 5, 1999)

! Police Officers with Probable Cause to Search a Car May Inspect Passengers' Belongings Found in the Car That are Capable of Concealing the Object of the Search. During a traffic stop a Wyoming highway patrol officer developed probable cause to search a car driven by David Young. During the course of this search the highway patrolman discovered and searched a purse belonging to the passenger, Sandra Houghton. Following Houghton's conviction in a state court, the Wyoming Supreme Court held that the trial court should have granted Houghton's motion to suppress. The Wyoming Supreme Court concluded that because there was no probable cause to search Houghton, and because the trooper knew the purse belonged to Houghton, the purse was outside the scope of the search authorized by the probable cause. The United States Supreme Court, though, reversed. Relying on U.S. v. Ross, 456 U.S. 798 (1982), the court held that if police officers have probable cause to search a car they may inspect the passengers' belongings found in the car if these belongings are capable of concealing the object of the search.

MITCHELL v. U.S., 1999 WL 181164 (Apr. 5,

1999)

! Guilty Plea Does Not Waive Right to Remain Silent, and Trial Court May Not Draw Adverse Inference From Defendant's Silence. Amanda Mitchell pled guilty to conspiring to distribute 5 or more kilograms of cocaine, but reserved the right to contest at sentencing the quantity of the drugs attributable to her under the conspiracy theory. At her sentencing, the government presented several witnesses that testified that Mitchell participated in sales that exceeded 5 kilograms making her eligible for a 10 year minimum sentence. Mitchell did not testify at that proceeding, but her lawyers argued that the only credible testimony failed to establish Mitchell's participation in sales of more than 5 kilograms. The district judge, however, concluded that there was credible testimony proving Mitchell's participation in sales in excess of 5 kilograms. In reaching that decision the judge explained that he held Mitchell's failure to testify against her. In an opinion written by Justice Kennedy the Supreme Court held that Mitchell's guilty plea did not waive her right to self incrimination, and that the trial judge should not have drawn an adverse inference from Mitchell's silence. The Court remanded the case for a resentencing.

CONN v. GABBERT, 1999 WL 181181 (Apr. 5, 1999)

! Search of Lawyer Did Not Violate Lawyer's Fourteenth Amendment Right to Practice His Profession.

In a spin off from the famous California Menendez brothers case one of the witnesses, Traci Baker, was called to testify before the grand jury. The prosecutors, having learned that Lyle Menendez, had written a letter to Baker in which he may have instructed her to testify falsely, and that Baker had given the letter to her lawyer, Paul Gabbert, caused a search warrant to be presented to Gabbert when he appeared with Baker at the grand jury proceedings. Gabbert brought a civil rights action for civil damages against the prosecutors. Although the Ninth Circuit held for Gabbert, the United States Supreme Court reversed holding that the prosecutor's actions did not violate whatever right there might be under the Fourteenth Amendment to practice one's profession.

UNITED STATES v. RODRIGUEZ-MORENO, 119 S.Ct. 1239 (Mar. 30, 1999)

! Venue: Even Though Gun Used In One District, the Offense of Using a Gun in a Crime of Violence Could be Prosecuted in Any State Where the Kidnapping Offense Could be Prosecuted. Rodriguez-Moreno participated in a kidnapping that covered a number of states and that resulted in a federal kidnapping charge. The only place the gun was used, though, was in the State of Maryland. Nevertheless, the Supreme Court found that the proper venue for the firearm charge, 18 U.S.C. § 924(c)(1), would properly lie in any state through which the kidnappers traveled.

JONES v. UNITED STATES, 119 S.Ct. 1215 (Mar. 24, 1999)

! Carjacking: Subsections of Statute Represent Elements That Must Be Proven. The federal carjacking statute, 18 U.S.C. § 2119, provides, in different subsections, up to 15 years for carjacking, up to 25 years if serious bodily injury results, and up to life if a death occurs. In this case, the government's indictment alleged only carjacking, and omitted any mention of serious bodily injury. When Jones went to trial the jury instructions likewise omitted any reference to bodily injury. The district court, though, finding that serious bodily injury had occurred imposed a 25 year prison sentence. The Supreme Court, however, found that Congress intended for the statute to cover 3 separate crimes and that, therefore, whether it be serious bodily injury or death, that circumstance must be alleged in the indictment and proven at trial. In his opinion, Justice Souter noted that to construe the statute as requested by the government, as merely providing sentencing considerations, would raise serious Sixth Amendment issues.

KUMHO TIRE CO., LTD. v. CARMICHAEL, 119 S.Ct. 1167 (Mar. 23, 1999)

! Standards Established in Daubert v. Merrell Dow Pharmaceuticals, Inc. for the Admissibility of Scientific Expert Testimony Also Applies to Testimony Based on Technical and Other Specialized Knowledge. In this civil case, which involves the testimony of an expert in tire failure analysis, the Supreme Court upheld a district court's exclusion of the expert's testimony. In doing so, the court upheld the trial court's finding that the expert's methodology failed the test of Federal Rule of Evidence 702 and the holding in Daubert, and held that Daubert and the rule apply not only to

“scientific” testimony but to all expert testimony including the testimony of engineering and technical experts.

STEWART v. LaGRAND, 119 S.Ct. 1018 Mar. 3, 1999)

! **Habeas Procedural Default and Waiver: Objection to Method of Execution.** The Supreme Court reversed the Ninth Circuit’s injunction of a capital execution by means of lethal gas. The Court held that LaGrand waived his Eighth Amendment challenge to execution by lethal gas. “By declaring his method of execution, picking lethal gas over the state’s default form of execution - lethal injection - Walter LaGrand has waived any objection he might have to it.

HOLLOWAY v. U.S., 119 S.Ct. 966 (Mar. 2, 1999)

! **Carjacking, 18 U.S.C. § 2119: Requirement of Proof of a Conditional Intent to Harm or Kill.** The Supreme Court reversed the Ninth Circuit’s holding that the carjacking statute, 18 U.S.C. § 2119, covers only “unconditional” carjackings, *i.e.*, those where the carjacker, regardless of what occurred during the course of the carjacking, intended to harm or kill the victim. The Supreme Court ruled that the statute encompasses crimes where the carjacker “conditionally” intended to harm or to kill, *i.e.*, if he was met with resistance when he demanded or took over the car. Consequently, as Justice Scalia’s dissent points out, “feigned intent” to kill or harm is not within the scope of the statute.

PEGUERO v. U.S., 119 S.Ct. 961 (Mar. 2, 1999)

! **No Automatic Right to Habeas Relief Where District Court Fails to Advise of Right to Appeal.** The Supreme Court ruled that a sentencing court’s failure to advise a defendant of his right of appeal, though error, was harmless when the defendant “knew of his right to appeal.”

CALDERON v. COLEMAN, 119 S.Ct. 500 (Dec. 14, 1998)

! **Habeas Harmlessness Standard.** The Brecht v. Abrahamson, 507 U.S. 619 (1993), “substantial and injurious effect or influence” standard must be applied to determine whether an erroneous jury instruction at the penalty phase of a capital case

is a basis for habeas relief. The erroneous instruction had informed the jury that the Governor had the power to commute a sentence of life without parole, when, in addition, such action required the approval of four judges of the state Supreme Court. The Court rejected the Boyd v. California, 494 U.S. 370 (1990) standard -- whether there was a reasonable likelihood that the jury applied the instruction to prevent consideration of constitutionally relevant evidence -- as inapplicable to habeas proceedings.

ELEVENTH CIRCUIT **CASE SUMMARIES**

U.S. v. BRUNDIDGE, 1999 WL 181850 (Apr. 2, 1999)

! **The Fourth Amendment Does Not Require Independent Corroboration of Confidential Informant’s Claim in Every Case.** Brundidge’s hotel room was searched on the basis of claims made by “a reliable confidential informant.” Although Brundidge claimed that there was no probable cause to support the issuance of the warrant because of a lack of corroboration, the court held that there was a sufficient showing of probable cause based upon the totality of the circumstances, the confidential informant’s basis of knowledge, and the confidential informant’s prior veracity.

COLLIER v. TURPIN, 12 FLW Fed. C657 (11th Cir. Mar. 29, 1999)

! **Ineffective Assistance of Counsel During Penalty Phase Results in New Sentencing Hearing.** In Collier’s fourth petition for writ of habeas corpus in which he challenged his Georgia death penalty, the court vacated Collier’s 1978 death sentence, and granted him a new sentencing. In a long opinion that demonstrates the hazards of unrecorded conferences with the judge, the court held that in failing to present available evidence “of Collier’s upbringing, his gentle disposition, his record of helping family in times of need, specific instances of his heroism and compassion, and evidence of his circumstances at the time of the crimes - including his recent loss of his job, his poverty, and his diabetic condition - counsel’s performance brought into question the reliability of the jury’s determination that death was the

appropriate sentence.” The Court issued the opinion on Collier’s petition for rehearing and withdrew the earlier opinion found at 155 F.3d 1277.

U.S. v. WILKERSON, 1999 WL 156072 (Mar. 23, 1999)

! Speedy Trial Time Period Begins Running Once the Defendant Appears Before Judicial Officer of the Court in Which the Charge is Pending. Wilkerson was indicted in the Middle District of Florida. He was, though, arrested and given a first appearance in the Northern District of Florida. When more than 70 days ran from the appearance in North Florida, the district court dismissed the indictment pursuant to the Speedy Trial Act, 18 U.S.C. § 3161(c)(1). Noting, however, that the statute provides that the time begins to run on “the date the defendant has appeared before a judicial officer of the court in which (the) charge is pending..” the court reversed the order of dismissal.

U.S. v. VAGHELA, 1999 WL 133028 (Mar. 12, 1999)

! Obstruction of Justice, 18 U.S.C. § 1503, and Conspiracy, 18 U.S.C. § 371 - Mere Attempt to Conceal Incriminating Evidence from the Authorities Insufficient to Satisfy Nexus Element. The Court reversed a conviction for conspiracy to obstruct justice, in violation of 18 U.S.C. §§ 371 and 1503. The Court stated that under 8 U.S.C. § 1503, the catch-all obstruction statute, and U.S. v. Aguilar, 515 U.S. 593 (1995), “the government need not always show that a judicial proceeding existed at the time the defendants formed the [obstructive] conspiracy, but must demonstrate that the actions the conspirators agreed to take were directly intended to prevent or otherwise obstruct the processes of a specific judicial proceeding in a way that is more than merely ‘speculative.’” In this case, at the time the defendants drew up a “bogus contract” and agreed to “stick” with it, there was no grand jury proceeding, and although there had been some FBI investigation (the exact parameters of which were not “discernable” from the record), “there is no indication that the pair had reason to anticipate further proceedings, nor that they viewed their own actions as a way to forestall them. They were simply trying to conceal the evidence of their

crime.” This conduct, while “far from praiseworthy,” was not criminal. “It would be stretching the language of 1503 ... to allow the act of hiding incriminating evidence to serve as the basis for a conspiracy to obstruct justice.”

U.S. v. CALDERON, 1999 WL 133016 (Mar. 12, 1999)

! Sufficiency of Evidence - Money Laundering, 18 U.S.C. § 1956(a)(1): Promotional Versus Concealment Laundering. The Court reversed the money laundering conviction of a defendant who provided \$150,000 to an undercover agent posing as a money launderer, acknowledged awareness of the drug source of the funds, and assisted in recounting the money with the undercover agent. “The evidence in this case shows only that Appellant entered into the transaction with Agent Perez knowing the transaction was designed to conceal the nature or source of the proceeds, which would be a violation of § 1956(a)(1)(B)(i), or arguably, as the Government contended in closing, to avoid state or federal transaction reporting requirements, which would be a violation of § 1956(a)(1)(B)(ii). This is insufficient to support a § 1956(a)(1)(A)(i) promotion conviction.”

U.S. v. McCRANIE, 1999 WL 133020 (Mar. 12, 1999)

! Federal Jurisdiction over Vote Buying in an Election with No Contested Federal Races: Conspiracy to Buy Votes, 18 U.S.C. § 371; 42 U.S.C. §§ 1973i(c) and (e). The Court affirmed the conspiracy convictions of a defendant who engaged in fraudulent voting activities, specifically, vote buying, vote selling, multiple voting, and votes casts by felons and deceased voters, with the intent to affect a county commission election. The Court held there was federal jurisdiction because a federal election (with an unopposed candidate) was on the same ballot as the county commission race.

TARVER v. HOPPER, 1999 WL 128953 (Mar. 11, 1999)

! Habeas Procedural Default of Batson Claim - Inconsistent Application of Procedural Bar, Effect of Plain Error Rule. The Court affirmed the district court’s denial of habeas relief to a defendant sentenced to death after his 1985 conviction for the murder of a store owner. The Court rejected the defendant’s Batson v. Kentucky, 476 U.S. 79

(1986), claim because it had been procedurally defaulted in the Alabama courts at trial and on direct appeal. The Court rejected the argument that the default rule should not apply where the state court's own review standards do not deem default to be an insurmountable obstacle to review.

! **Ineffective Assistance of Counsel at Penalty Phase Sentencing and in Failing to Raise Batson Claim.** The Court rejected the claim that counsel was ineffective for failing to make a Batson objection at trial; Batson had not been decided at the time of trial, and the Court has previously held that a failure to anticipate Batson was not ineffective. "Tarver might complain that his lawyer was unimaginative, but a lack of creativity does not constitute ineffective assistance. ... Futility also justifies Tarver's lawyer's refusal to object because no evidence in this case would have supported a Swain violation: the only valid objection available at that time."

! **Giglio Violation: Government's Failure to Disclose Promises Made to a Witness, Mere Possibility of Benefit Not an Agreement.** The Court found no Giglio v. U.S., 405 U.S. 150 (1972), violation in the failure to disclose a plea agreement between the prosecution and a cooperating witness, because there was no "definite agreement" before the defendant's trial. Here, according to the testimony of the prosecutor, the witness was "not promised a deal" and was "merely trying to cooperate in hopes of improving [his] bargaining position later."

WRIGHT v. HOPPER, 1999 WL 125557 (Mar. 10, 1999)

! **Brady Violation: No Duty to Disclose Evidence Fully Available to Defendant.** The Court denied habeas relief to an inmate sentenced to death for the murder of two persons in 1977. The Court found no Brady v. Maryland, 373 U.S. 83 (1963), violation based on the state's suppression of testimony and an affidavit which placed another suspect at the murder scene. The Court held that the existence of this evidence was part of the public record in another case and therefore was "fully available [to the defendant] through the exercise of due diligence."

! **Ineffective Assistance of Counsel - Strategic Decision; Defaulted Retrospective Batson Claim.** The Court rejected defendant's ineffective

assistance of counsel claim, finding that trial counsel's decision not to investigate the involvement in the murder of the person the state initially believed to be guilty was a "strategic decision." Counsel was also not ineffective in failing to object to the state's removal of all blacks from the jury, because the trial occurred pre-Batson; Batson relief is not available retrospectively on habeas corpus, and the defendant procedurally defaulted this claim by failing to raise it on direct appeal in the state courts.

U.S. v. CHAVES, 1999 WL 123688 (Mar. 9, 1999)

! **Fourth Amendment - Illegal Warrantless Search of a Warehouse; Reasonable Expectation of Privacy in Locked Warehouse Despite Lack of Ownership; "Protective Sweep" Doctrine Inapplicable Where No Actual Danger; Impropriety of Two-Judge Suppression Hearing; Harmless Error.** The Court held that the government's initial warrantless search of a warehouse violated the Fourth Amendment, but ruled that the 400 kilograms of cocaine ultimately seized in the warehouse did not have to be suppressed at trial, because the later search that uncovered the contraband was based on an affidavit which, in turn, was based on information independent of the illegal search sufficient to support probable cause. In reach the decision the Court held that Chaves had a reasonable expectation of privacy in the warehouse even though he did not own the property. The Court found that Chaves' connection to the warehouse was sufficient to create a reasonable expectation of privacy, because, among other reasons, Chaves "had the only key to the warehouse, giving him a measure of control and ability to exclude others." The Court also found the "protective sweep" exception to the warrant requirement inapplicable, because the officer lacked a reasonable belief based on specific and articulable facts that the warehouse harbored someone posing a threat to the officers.

U.S. v. WOODEN, 1999 WL 118301 (Mar. 8, 1999)

! **U.S.S.G. § 2B3.1(b)(2)(B) - Sentence Enhancement for Use of Firearm That Exceeds Mere Brandishing or Display.** The Court held that by holding a .9 millimeter semi-automatic handgun "about one-half inch from the victim's forehead and point[ing] it at him" in the course of a

carjacking, the defendant qualified for the six-level sentence enhancement under U.S.S.G. § 2B3.1(b)(2)(B), which provides enhancements for those who “otherwise use” a firearm in a robbery, not just the five-level enhancement applicable to those who “brandish, display or possess” a firearm.

U.S. v. SIMON, 168 F.3d 1271 (Mar. 4, 1999)

! **U.S.S.G. § 2L1.2(b)(1)(a) - Sentence Enhancement for Alien Reentry Based on Defendant’s Predeportation Commission of Aggravated Felony: Simple Possession of Drugs, If a Felony, Qualifies.** The Court rejected the argument that a prior Florida felony conviction for simple possession of cocaine did not qualify as an “aggravated felony” under U.S.S.G. § 2L1.2(b)(1)(a) and therefore did not warrant a 16-level enhancement for illegal reentry after deportation. The defendant argued that he did not meet the criteria for the enhancement because cocaine possession is not a felony under the Controlled Substances Act. The Court rejected this claim, because the Controlled Substances Act defines a felony as “any Federal or State offense classified by applicable Federal or State law as a felony.” 21 U.S.C. § 802(13). Hence, since the defendant was convicted of a third-degree felony under Florida law, he committed a felony for purposes of § 924(c), and for purposes of the 16-level guideline enhancement.

U. S. v. FISCHER, 168 F.3d 1273 (Mar. 4, 1999)

! **18 U.S.C. § 666: Jurisdiction of Embezzlement Statute - Defining Medicare Service Provider as Recipient of Federal Assistance.** The Court affirmed convictions under 18 U.S.C. § 666, which prohibits embezzlement from an organization that receives at least \$10,000 in benefits from the federal government in a “grant, contract, . . . or other form of Federal assistance.” The defrauded organization was a hospital that had received millions of dollars in Medicare payments from the federal government. The defendant claimed that Medicare patients, not the hospital, are the “target recipients” of Medicare. The Court rejected this argument, pointing out that hospitals often receive Medicare payments as the assignees of patients, and that the funds were received “as part of an ‘assistance’ program.”

U.S. v. MATTHEWS, 168 F.3d 1234 (Mar. 1,

1999)

! **Brady Violation in the Context of a Guilty Plea: No Violation Where Prosecution Unaware of Information Pre-plea and No Effect on Sentencing.** The Court affirmed multiple convictions for conspiracy to distribute cocaine and cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 846. The Court ruled that no trial was required despite post-guilty plea revelations that the investigating police captain was terminated from the force following charges that he falsified records of payments to confidential informants and to himself. ! **Fed. R. Evid. 405, Fed. R. Evid. 608(b), Cross-Examination on Prior Criminal Acts, Proof by Extrinsic Evidence, Absence of Proof of Exchange for Testimony.** The Court affirmed the exclusion of evidence that charges against an informant for unauthorized use of a vehicle were dropped, purportedly in exchange for her testimony, where the witness denied that she was arrested and further impeachment was prohibited by the bar against impeachment by extrinsic evidence, since it appeared that the docket sheets regarding the arrest were in error. “Rule 608(b) provides that the trial court may in its discretion permit questioning about a witness’ prior bad acts on cross-examination, if the acts bear on the witness’ character for truthfulness. If the witness denies the conduct, such acts may not be proved by extrinsic evidence and the questioning party must take the witness’ answer ... unless the evidence would be otherwise admissible as bearing on a material issue of the case.”

! **Venue in Conspiracy Case Based on Acts of One Conspirator.** The Court rejected a venue challenge, noting that a conspiracy prosecution can be brought, under 18 U.S.C. § 3237(a), in any district in which the offense was “begun, continued, or completed,” and that at least one co-conspirator’s acts occurred within the district in which the prosecution was brought. “The overt act need not be committed by a defendant in the case; the acts of accomplices and unindicted co-conspirators can also expose the defendant to jurisdiction.”

! **Downward Departure for Employment and Family Circumstances, U.S.S.G. §§ 5H1.5, 5H1.6; Minor Rather than Minimal Role Reduction Based on Repeated Involvement, U.S.S.G. § 3B1.2; Managerial Role for Drug Supplier Who Fronted Cocaine to Runners, U.S.S.G. § 3B1.1; Acceptance of Responsibility**

Where Defendant Went to Trial, U.S.S.G. § 3E1.1; Rejection of Equal Protection Challenge to Crack Cocaine Sentences. The Court affirmed the rejection of one defendant's employment as a truck driver (U.S.S.G. § 5H1.5 - employment) and 7-year old son (U.S.S.G. § 5H1.6 - family ties) as a basis for a downward departure, noting that these facts did not "distinguish him significantly from the rest of the population." The Court rejected the argument that certain defendants were minimal, not just minor, participants, and entitled to a further reduction under U.S.S.G. § 3B1.2, due to their "extensive involvement in numerous transactions." "The district court, considering a drug distribution conspiracy, is justified in denying a downward [adjustment] under these sections to any defendant who regularly sells or purchases drugs, ... or to any defendant who serves as a liaison between other co-conspirators or arranges transactions." The Court affirmed a § 3B1.1(b) supervisory role enhancement to a defendant who "fronted or directly sold cocaine to numerous 'runners.'" "[C]ontrol over co-conspirators is not required." The Court affirmed denial of a 2-level acceptance of responsibility reduction under U.S.S.G. § 3E1.1, where the defendant admitted at sentencing that he used marijuana while the trial was pending, and where he was given a 5-level downward departure based on his cooperation after conviction. Under U.S.S.G. § 3E1.1, "[t]here are rare circumstances in which the reduction is allowed for a tried and convicted defendant, such as where he went to trial only to assert and preserve constitutional and other issues that do not relate to factual guilt." And here the defendant already had received a 5-point reduction for cooperation. The Court rejected an equal protection attack on the constitutionality of the disparately longer sentences for crack cocaine than for powdered cocaine. The Court noted that the Supreme Court has not reviewed the Eleventh Circuit's rejection of this argument in prior cases, and that other circuits have found valid reasons for the disparity based on "crack's greater concentration and intensity, the youth of its users and sellers, the low per-dose cost resulting in easy distribution, and the violence frequently correlated with the use and dealing of the drug. ... These legitimate goals defeat challenges to the guidelines under the Equal Protection Clause."

U.S. v. LAIBEN, 167 F.3d 1364 (Feb. 18, 1999)

! U.S.S.G. § 2K2.1(a)(4)(A) - Enhancement of Firearm Sentence Based on Aggravated Felony Convictions. The Court held that U.S.S.G. § 2K2.1(a)(4)(A), which provides, for felon in possession and related firearm offenses, that a base offense of 20 is appropriate if the defendant "had one prior felony conviction of either a crime of violence or a controlled substance offense," applies even if the prior conviction occurred after the commission of the federal offense for which the defendant is being sentenced. Recognizing a circuit split on the interpretation of this guideline, the Court sided with the majority view.

U.S. v. GUZMAN, 167 F.3d 1350 (Feb. 12, 1999)

! Improper Hypothetical Guilt Question Posed to Character Witness, Fed. R. Evid. 405(a); Harmless Error. In a cocaine conspiracy and money laundering prosecution, the Court held that the question asked of a defense character witness -- "Mr. Borras, would your opinion change if you learned that, in the summer of 1993 Ms. Guzman was involved in transporting multi-kilogram quantities of cocaine?" -- was improper, since it was a hypothetical question that assumed the guilt of the accused. Fed. R. Evid. 405(a) "allows the government to cross-examine that witness regarding their knowledge of specific instances of the defendant's misconduct in order to help the jury evaluate the quality of the character testimony. The government may not, however, pose hypothetical questions that assume the guilt of the accused in the very case at bar." The error, however, was harmless.

U.S. v. RICHARDSON, 166 F.3d 1360 (Feb. 11, 1999)

! Armed Career Criminal Act -- 18 U.S.C. §§ 922(g), 924(e): "Previous Convictions"; Plain Error at Sentencing. The Court joined the unanimous view of other circuits that under the Armed Career Criminal Act, 18 U.S.C. § 924(e), a predicate prior "conviction is 'previous' to a § 922(g) offense only if the conviction occurred before the violation of § 922(g), not simply prior to conviction or sentencing for that violation." The Court reversed the defendant's sentence and remanded for resentencing, finding plain error in the district court's reliance on a prior drug conviction as a predicate for ACCA enhancement where the prior offense had not resulted in conviction by the time

that the defendant committed the underlying federal firearm offense.

U.S. v. EDWARDS, 166 F.3d 1362 (Feb. 11, 1999)

! **Sufficiency of Evidence of Possession - 21 U.S.C. § 841: Mere Temporary Inspection of Contraband Not Actual Possession, Lack of Control Over Contraband Precludes Constructive Possession; Aiding and Abetting, 18 U.S.C. § 2: Existence of Agency Relationship.**

The Court reversed a conviction for possession with intent to distribute crack cocaine, in violation of 21 U.S.C. § 841(a)(1) based on insufficiency of the evidence of possession despite the defendant's physical handling of a package containing the drugs. "The only point at which [the defendant] had physical control over the cocaine was when he picked up the manila envelope and briefly inspected its contents . . . [but] mere inspection of contraband, standing alone, is not sufficient to establish possession." The sale transaction was not consummated. Nor was constructive possession established, since the narcotics officer was not under the defendant's control. The Court also held that an aiding and abetting conviction under 18 U.S.C. § 2 could not stand, because the defendant "had the intent to distribute, but never had the possession; [and the DEA agent] had possession, but never had the intent to distribute."

U.S. v. GAMBOA, 166 F.3d 1327 (Feb. 10, 1999)

! **District Court's Discretion to Refuse to Accept Plea Agreement.** The Court held that the district court did not abuse its discretion in refusing to accept a guilty plea to lesser charges, when the defendant failed to meet a plea deadline by forty minutes, because of the absence of an interpreter, who was "stuck in traffic." The trial court justifiably was prepared to reject the plea because it did not reflect the seriousness of the offense, given the "substantial quantity of drugs . . . a total of 2134 grams of methamphetamine and 442 grams of marijuana."

! **Sufficiency of Evidence -- Drug Distribution Conspiracy, 21 U.S.C. §§ 841, 846; Repeated Presence and Association Combined with Exercise of Access to Drug's Storage Place and Prior Bad Act Evidence.** The Court rejected the defendant's mere presence argument, finding that there was sufficient evidence on which to convict the defendant of a drug conspiracy. While mere

presence is insufficient to establish guilt, "it is material, highly probative and not to be discounted."

DUDLEY v. WAL-MART STORES, INC., 166 F.3d 1317 (Feb. 9, 1999)

! **Batson Challenge Procedures.** "The district court committed no errors in its application of the Batson procedures, interrogating counsel and making determinations where necessary including whether a proffered nondiscriminatory rationale was mere pretext. We do not agree with Wal-Mart that a district court must always allow the challenging party a chance to rebut the proffered rationale of the striking party. Neither the Supreme Court nor this Court has ever held this step to be an essential element of Batson. See Hernandez v. New York, 500 U.S. 352, 358-59 (1991) (plurality opinion) (setting forth three-step Batson process, which does not include challenging party's opportunity to rebut).

U.S. v. EUBANKS, 1999 WL 133014 (Feb. 8, 1999)

! **Fed. R. Crim. P. 41(e): Motion for Return of Non-evidentiary Property Seized by the Government.** The Court affirmed the denial of a motion under Fed. Crim. P. 41(e) to recover \$34,166.00 that was seized and forfeited by the Drug Enforcement Agency from Eubanks' suitcase after the cash was found in his suitcase following a traffic stop that led to a companion's arrest and conviction for possession of a firearm. The Court held that Rule 41(e) applies to property retained for use as evidence, not property seized for a civil forfeiture, and that whatever equitable jurisdiction the federal courts could exercise over forfeitures could not be invoked here, because notice of the forfeiture was given in 1992 by certified mail, and Eubanks did not seek return of the money from the DEA, and waited five years before filing this forfeiture motion in court.

U.S. v. HOWLE, 166 F.3d 1166 (Feb. 5, 1999)

! **Waiver of Right to Appeal -- Ineffectiveness of District Court's Attempt to Excise Appeal Waiver Provision after Accepting Plea.** The Court held that the defendant's waiver of his right to appeal as part of his plea agreement barred him from appealing the district court's refusal to grant him a downward departure at sentencing, even

though the sentencing court encouraged the defendant at sentencing to appeal to the Eleventh Circuit if he disagreed with the court that it had no authority to depart.

U.S. v. MILLER, 166 F.3d 1153 (Feb. 4, 1999)

! **Relevant Conduct, U.S.S.G. § 1B1.3 --**

Application to Electronic Transportation of

Obscene Images. The Court affirmed the district court's application of cross-referencing U.S.S.G. § 2G2.2(c)(1) to an offense involving the use of electronic mail to solicit teenage boys to engage in sexual activity. The defendant argued that this guideline should not be applied, because the offense of conviction was merely the transportation or possession of computer disks depicting minors in sexually explicit conduct, and the use of electronic mail was not part of the offense of conviction.

Rejecting this argument, the Court noted that the defendant had stipulated to the use of the Internet in the plea agreement, and that this uncharged, "relevant conduct" could properly be considered at sentencing. The Court also noted that the posting of information on the Internet "amounted to a notice or advertisement."

U.S. v. LOWERY, 166 F.3d 1119 (Feb. 3, 1999)

! **"Singleton" Issue -- Government-Provided**

Incentives for Witness Testimony;

Inapplicability of Legal Ethics Rules to the

Admissibility of Evidence. The Court reversed the district court's order suppressing co-conspirator testimony on the ground that the testimony had been obtained in exchange for promised recommendations of lighter sentences, in violation of 18 U.S.C. § 201(c)(2), which makes it a crime to give or promise anything of value for testimony.

The court adopted the reasoning of the "cavalcade" of courts which have rejected the original panel decision in U.S. v. Singleton, 144 F.3d 1343 (10th Cir. 1998), rev'd en banc, 1999 WL 6469 (10th Cir. Jan. 8, 1999), holding "that agreements in which the government trades sentencing recommendations or other official action or consideration for cooperation, including testimony, do not violate 18 U.S.C. § 210(c)(2)." The Court found it significant that such arguments and testimony have been employed, without challenge, for many years.

The Court also rejected the district court's suppression of the statements based on the plea

agreements' violation of Florida Bar Rule of Professional Conduct 4-3.4(b), which forbids lawyers from "offer[ing] an inducement to a witness." The Court explained that, assuming that government attorneys are covered by the Florida Bar rules (as they appear to be under recent legislation as of April 21, 1999), and even assuming that this rule prohibits substantial assistance plea agreements, the rule would not authorize the trial court to suppress evidence. "State rules of professional conduct, or state rules on any subject, cannot trump the Federal Rules of Evidence...."

U.S. v. RAMIREZ-PEREZ, 166 F.3d 1106 (Feb. 2, 1999)

! **Bruton Error - Statements Linked to Defendant by Other Evidence; Non-Harmless Error; Sufficiency of Evidence -- Drug Conspiracy; Deportation Order as Part of**

Supervised Release. The Court found a Bruton v. U.S., 391 U.S. 123 (1968), violation in the admission of a codefendant's post-arrest statement that, although it did not name the defendant or even substitute an unknown name or generic identity for the defendant, left the jury with the impression that the codefendant told interrogating police officers that he asked the defendant to bring a gun to a drug transaction for protection. It is necessary to consider the inferences the jury may have drawn from the Bruton statement and the other evidence.

! **Fed. R. Crim. P. 106-- Completeness Rule and Alternative Documentary Impeachment on Cross-Examination, Fed. R. Evid. 612;**

Hearsay Exception - Declaration Against Penal Interest, Fed. R. Evid. 804(b)(3). The Court held that the district court did not err in precluding the defendant from introducing his own written post-arrest statement to complete the picture created by an agent's testimony about the defendant's oral post-arrest statement, made before the written statement. Fed. R. Crim. P. 106's rule of completeness -- which allows introduction of omitted parts of a statement where a document or recording is introduced or used in a way that is tantamount to introduction -- does not apply to testimony about purely oral statements.

U.S. v. CLAVIJO, 165 F.3d 1341 (Jan. 29, 1999)

! **Safety Valve, U.S.S.G. § 5C1.2 -- Applicable**

Despite Codefendant's Gun Possession and Although 2-Point Reduction of U.S.S.G. § 2D1.1(b)(6) Inapplicable.

The Court reversed the district court's denial of application of the safety valve under U.S.S.G. § 5C1.2 where a codefendant possessed a firearm in relation to the drug offense, even though that possession was reasonably foreseeable to the defendant and even though the defendant received a 2-level enhancement under U.S.S.G. § 2D1.1(b)(1) for the codefendant's gun. The Court considered commenting to U.S.S.G. § 1B1.3 and the plain language of § 5C1.2 in deciding that the co-conspirator's firearm possession did not preclude the safety valve.

The Court also reversed the district court's conclusion that because the base offense level under the guidelines was below 26, the safety valve was inapplicable. The Court explained that only the 2-level safety valve reduction (U.S.S.G. § 2D1.1(b)(6)) is conditioned on an offense level of at least 26. The safety valve itself, § 5C1.2, which eliminates the mandatory minimum sentence, does not depend on the guideline offense level.

U.S. v. MERCER, 165 F.3d 1331 (Jan. 26, 1999)

! Sufficiency of Evidence -- Drug Distribution Conspiracy, 21 U.S.C. §§ 841, 846; Buyer-Seller Relationship; Relationship with "Introducer" or "Referrer." The Court reversed a cocaine distribution conspiracy conviction, holding that the mere fact the defendant who sold crack cocaine to an undercover agent had made reference to one of his suppliers as "his partner" did not make this unknown supplier a co-conspirator in the sale to the agent or even establish a continuing sales relationship between the defendant and this supplier. "We must determine whether, when examined *de novo* in the light most favorable to the government, there is substantial evidence to support the conspiracy verdict as to ... Mercer. See U.S. v. Toler, 144 F.3d 1423, 1428 (11th Cir. 1998). ... To properly decide this case, we must make the critical distinction between a conspiratorial agreement and a buyer-seller transaction. ... Some indicia of a conspiracy involving unknown persons include numerous references to other conspirators and details regarding the conspiratorial agreement. ... Here the evidence is legally insufficient, however, to show a conspiratorial agreement to distribute drugs. ... [T]he mere fact that [prior] sales took place cannot alone support an inference of

conspiracy."

U.S. v. QUINTERO, 165 F.3d 831 (Jan. 22, 1999)

! Collateral Estoppel - Partial Verdict of Acquittal; Money Laundering - 18 U.S.C. § 1956(a)(1), Substantive and Conspiracy Charges. Following a trial that resulted in the defendant's acquittal on some counts, and a hung jury on others, the Court held that collateral estoppel did not bar retrial on a new, post-trial superseding indictment. The Court explained that collateral estoppel requires dismissal of counts of an indictment only when the defendant can show that there is a "factual identity" between the counts of acquittal and the remaining counts and that a subsequent verdict of conviction would be "rationally inconsistent" with the prior acquittal. "Thus, an analysis under collateral estoppel principles is necessary to determine what facts, if any, were necessarily determined in the acquittal at the first trial such that those issues are not relitigated on retrial."

FREUND v. BUTTERWORTH, 165 F.3d 839 (Jan. 22, 1999) (*en banc*)

! Conflict of Interest; Prior Representation - Ineffective Assistance of Counsel. Reversing the panel decision, 117 F.3d 1543 (11th Cir. 1997), the Court rejected the murder defendant's § 2254 argument that his trial counsel's law firm's prior representation of a non-testifying, separately-tried, co-defendant created a conflict of interest that undermined his counsel's effectiveness. In order to establish an impairment of counsel due to a conflict, the defendant had to show that (1) a prior representation was "substantially and particularly" related to counsel's representation of the defendant, or (2) counsel actually learned particular confidential information during the prior representation of the witness that was relevant to the defendant's case. In addition, other proof of inconsistent interests "may" be necessary. Finally, the defendant must prove that the conflict had an "adverse effect" on the defense due to the conflict. The Court found that defendant Freund failed to meet this test.

U.S. v. DEKLE, 165 F.3d 826 (Jan. 21, 1999)

! Sufficiency of Evidence -- Drug Distribution Conspiracy; 21 U.S.C. §§ 841, 846; Knowledge of Multiple Separate Drug Transactions. The Court reversed the 21 U.S.C. § 846 drug distribution conspiracy conviction of a physician who distributed controlled substances through medically unwarranted

prescriptions to several women in exchange for sexual favors. The Court explained that in order for an agreement to rise to the level of a criminal conspiracy, the alleged conspirators must share “the same joint criminal objective -- here the joint objective of distributing drugs.” Here the government merely established a series of buyer-seller transactions which revealed nothing more than isolated purchases for personal consumption. In addition, the mere fact that different women customers were “aware” of the illegal prescription writing “did not give rise to an inference” that a distribution conspiracy existed.

! **Fed. R. Evid. 403 - Prejudicial Photographic Evidence.** The Court affirmed, however, the defendant’s conviction of 129 substantive counts of distributing drugs to the women, finding that any error in admitting sexually explicit photographs taken of them by the doctor was harmless, because testimony described that activity and there was no reasonable likelihood that admission of the photos affected the defendant’s substantial rights.

U.S. v. PENA-COREA, 165 F.3d 819 (Jan. 20, 1999)

! **Speedy Trial Act; Interstate Agreement on Detainers Act; Simmons Exclusionary Rule.** The Court rejected the defendant’s claim for dismissal based on the fact that defendant was tried after the expiration of the 180-day deadline of the Interstate Agreement on Detainers Act. Though a detainer was lodged with the Florida state prison authorities, they failed to notify the defendant of the detainer or of his rights under the IADA. The Court explained that the delay was due to the negligence of the state prison custodian to inform the defendant of his right to trial, and that this was not among the situations for which the IADA mandated dismissal of a criminal case.

Under the Speedy Trial Act, where a defendant serving another sentence is indicted, 18 U.S.C. § 3161(j) “gives the prosecutor two choices. He may pursue an immediate trial or he may let the defendant call the shot - that is, the defendant may demand an immediate trial or he may simply bide his time and hope for the best. In the instant case, the prosecutor chose the latter course. ... [T]he Government should [not] be held responsible for the state custodian’s failure to serve Pena with the federal detainer and to advise him of his right to demand a trial.”

U.S. v. HITT, 164 F.3d 1370 (Jan. 15, 1999)

! **Improper Ultimate-Issue Questions - Using Witnesses to Give Summation; Plain Error.** The

Court held that it was “clearly inappropriate” for the prosecutor to question witnesses about the validity of the disability claims Hitt made to the V.A., because this called for opinion testimony on “the very questions the jury would be called upon to answer; the questions constituted nothing more than lawyer argument -- the prosecutor’s summation to the jury in advance.” The questions were not grounds for reversal, however, due to the lack of proper objection, and the other overwhelming evidence of guilt.

! **Obstruction of Justice Enhancement under U.S.S.G. § 3C1.1. for Threats and False Statements.** The Court upheld the 2-level sentence enhancement for obstruction under U.S.S.G. § 3C1.1. The defense argued that false statements about ownership of real estate made to a magistrate at a hearing regarding eligibility for appointed counsel should not be considered obstruction, because they were irrelevant to the offense of conviction, citing U.S. v. Ruff, 79 F.3d 123 (11th Cir. 1996), and also argued that Hitt’s statement that he “would like to blow [the investigating FBI agent’s] brains out” did not justify the obstruction enhancement, because Hitt did not intend, or anticipate, that the statement would be communicated to the agent. The court rejected both arguments.

U.S. v. GUERRA, 164 F.3d 1358 (Jan. 14, 1999)

! **Hobbs Act - Interstate Commerce Nexus: Minimal Effect of Business Robbery.** The Court rejected an attack on the interstate nexus foundation of a Hobbs Act conviction. The Court pointed out that the jurisdictional requirement may be met simply by showing that the offense affected commerce to a “minimal degree.” Here, the Amoco station robbed by the defendant was part of a nationwide network of gas stations and sold fuel products from outside the state; additionally, the defendant stole \$300 in cash, and the station lost business for over two days.

U.S. v. GOMEZ, 164 F.3d 1354 (Jan. 14, 1999)

! **Buyer-Seller Defense Jury Instruction.** The court rejected the argument that the jury should have been instructed that “[m]ere proof of the existence of a Buyer-Seller relationship is not enough to convict one as a co-conspirator on drug conspiracy charges” where (1) the defense was not buyer-seller but rather that the defendant made no sales at all; and (2) the government’s evidence showed “repeated sales of substantial quantities,” (rather than, e.g., a single transaction of personal use amounts) which showed

that the defendant necessarily knew that he was facilitating drug distribution.

! **U.S.S.G. § 1B1.3 - Relevant Conduct; Separate Drug Transactions Not Part of Charged Conspiracy.** Reversing the defendant's sentence for including unrelated drug transactions in the guideline score, the Court stated that "relevant conduct" under U.S.S.G. § 1B1.3 encompasses acts that were part of the "same course of conduct," but that evidence of Gomez' distribution of two kilograms of cocaine, introduced to show his knowledge and intent, could not be the basis for increasing guideline drug quantity calculation, since the indictment and the trial focused on an unrelated (though contemporaneous) cocaine distribution conspiracy.

U.S. v. HUMPHREY, 164 F.3d 585 (Jan. 6, 1999)

! **Fed. R. Crim. P. 11 - Notice of Mandatory Consecutive Sentence - Plain Error.** The Court held that no plain error occurred at the defendant's plea colloquy when the court failed to advise the defendant that he faced mandatory consecutive sentences on the two counts as to which he was admitting guilt. The court noted that the error could not be "plain" where circuits were at best split on requiring a defendant to be advised of the mandatory consecutiveness of his sentences. The court distinguished its prior reversal in U.S. v. Siegel, 102 F.3d 477 (11th Cir. 1996), because that case involved the failure of a district court to advise the defendant of the mandatory minimum sentence for multiple counts and the mandatory consecutiveness of several of these sentences, whereas this case involved only the mandatory consecutiveness of two counts. The court noted that it was only deciding that no "plain error" occurred and that it was not reaching the issue of whether the failure to advise a defendant that his sentences must be consecutive is, in fact, an error.

JONES v. GARNER, 164 F.3d 589 (Jan. 6, 1999)

! **Ex Post Facto Clause - Parole Review Intervals.** The Court reaffirmed its decision in Akins v. Snow, 922 F.2d 1558 (11th Cir. 1991), which had struck down as violative of the Ex Post Facto Clause Georgia's 1986 regulations which increased from 3 years to 8 years the interval during which a prisoner's parole could be reconsidered, even if the prisoner was initially incarcerated before the new regulations took effect. The Court explained that the Georgia regulations more closely resembled the Florida law which was struck down on ex post facto grounds in

Lynce v. Mathis, 519 U.S. 433 (1996) than the California regulations which were upheld in California Dept. of Corrections v. Morales, 514 U.S. 499 (1995). The Court noted that the Georgia regulations applied to a broad range of prisoners, not just those unlikely ever to be paroled, that they left the prisoners without any procedure to obtain a hearing for 8 years, and that "[e]ight years is a long time."

NAGEL v. OSBORNE, 164 F.3d 582 (Jan. 4, 1999)

! **Commitment Based on Finding of Not Guilty by Reason of Insanity.** The Court affirmed the denial of habeas relief to a person who had been committed as mentally ill after he was found not guilty of murder by reason of insanity. Medical experts testified that the petitioner was not, and indeed had never been, mentally ill. The Court held that this evidence was insufficient for habeas relief, because the Georgia law under which he was committed required a showing of a change in the person's mental condition, and the experts said his condition was unchanged.

U.S. v. SPENCE, 1998 WL 909969 (Dec. 31, 1998)

! **Fed. R. Crim. P. 23(b) - Excusal of 12th Juror Due to Illness.** The Court reversed a § 922(g) conviction because the trial judge dismissed a 12th juror who had taken ill during deliberations following a three-day trial. The juror suffered a reaction to antibiotic medication, and the trial court failed to conduct a sufficient inquiry into the juror's health to establish that the juror would be unable to resume deliberations the following morning.

U.S. v. BRAND, 1998 WL 909968 (Dec. 31, 1998)

! **Restitution under Child Support Recovery Act, 18 U.S.C. § 228.** The Court affirmed a \$4 million dollar restitution order against a father convicted under the Child Support Recovery Act, 18 U.S.C. § 228. The father had failed to pay this lump sum to the wife as required by the state divorce decree. The Court held that restitution can be ordered not only for child support but also for a support obligation that includes alimony-like payments to the custodial parent. The Court also upheld the district court's factual conclusion that the defendant had the ability to pay, given his past net worth and suspect financial dealings.

! **Willful Violation of Court Order under Child Support Recovery Act, 18 U.S.C. § 228.** The Court rejected the defendant's argument that his conduct

was not “willful” because the state decree did not delineate how much of the lump sum award was meant for support. “Although Brand may not have known the exact amount of his total ‘support obligation,’ this did not relieve Brand of his duty to pay what he did know to be the minimum amount owing in child support - \$2,500 per month.”

! **Challenge to Predicate Support Order under Child Support Recovery Act, 18 U.S.C. § 228; Due Process.** Acknowledging at least one conflicting decision, the Court rejected the defendant’s “collateral attack” on the vagueness and conditional nature of the underlying state court child support order, finding such a claim not to be cognizable in a federal prosecution. [The Court also rejected the arguments on the merits, finding that the order was not vague and was not in any way conditioned in the defendant’s favor.] Moreover, because the defendant failed to challenge the state order in the state courts, the failure to consider such a challenge in the federal criminal case does not violate due process.

U.S. v. LAND, WINSTON COUNTY, 163 F.3d 1295 (Dec. 31, 1998)

! **Forfeiture; Due Process - Notice of Warrant Arresting Property; Probable Cause Standard of Proof; Excessive Fines - Eighth Amendment.** Reaching an issue left unresolved by the recent en banc decision in U.S. v. 408 Peyton Road, S.W., 162 F.3d 644 (11th Cir. 1998) (en banc), the Court held that here, even though there was no seizure warrant, but merely an arrest warrant, “the arrest warrant and attendant circumstances in this case [including the posting of a “No Trespassing” sign] create[d] a constitutionally cognizable seizure” requiring pre-seizure notice. “Our holding in this case does not signify that in every situation an ‘arrest warrant’ will constitute a cognizable seizure. ... However, in this case, the government did not simply ‘post notice’ on the property. The Notice of Warrant of Arrest contained language of ‘seizure’ which would leave the property owner with the impression that she does not have full custody or control over the property. Additionally, a ‘No Trespassing’ sign remained posted on the property. It does not satisfy the Due Process Clause to tell the property owner she has full control over the property, yet leave her with documents indicating the property has been seized and there is to be no trespassing.” The Court also reaffirmed that “probable cause” is the standard of proof the government must meet in a forfeiture case

and that where the defendant raises the affirmative defense of an excessive fine under the Eighth Amendment, the district court must determine whether the forfeiture under 18 U.S.C. § 1955 constitutes an excessive fine.

JOHNSON ENTERPRISES OF JACKSONVILLE, INC. v. FPL GROUP, INC., 1998 WL 886794 (Dec. 18, 1998)

! **Mail/Wire Fraud: Breach of Contract Not a Scheme to Defraud.** In a civil RICO case premised on federal mail and wire fraud allegations, the Court held that a breach of contract does not constitute a scheme to defraud. “[T]he acts of nonpayment could not serve as acts of racketeering.”

BECK v. PRUPIS, 162 F.3d 1090 (Dec. 15, 1998)

! **Mail/Wire Fraud: No Intent to Deceive an Individual Who Suffered Consequential Damages as a Result of a Fraud.** The Court first observed that the “substantive elements” of mail fraud and wire fraud are identical. The Court reiterated its recent holding that proof of a scheme to defraud requires a showing of “the making of misrepresentations intended and reasonably calculated to deceive persons of ordinary prudence and comprehension. ... This means, inter alia, that the plaintiff must prove that a reasonable person would have relied on the misrepresentations. See U.S. v. Brown, 79 F.3d 1550, 1557 (11th Cir. 1996). ... [M]aterial omissions can be the basis for a claim of fraud if they are intended to create a fraudulent representation.” Defendants who hired an employee but who failed to tell him about the illegal activities in which their company was engaged and about their intent to terminate his employment contract lacked “fraudulent intent” to induce reliance on those omissions by the employee who made investments in the company. Similarly, the defendants’ false financial statements did not prove “that the someone to be deceived was” the employee. Whatever the merits of this claim at common law, it is different from a federal statutory claim that the defendants committed mail and wire fraud in firing the employee.

U.S. v. SCHEER, 168 F.3d 445 (Feb. 25, 1998)

! **Brady Violation: Undisclosed Prosecutorial Intimidation of a Witness.** The Court, addressing the prosecutor’s failure to disclose statements made to a government witness during trial, before the witness’s testimony, which statements could

reasonably have been interpreted as a threat of incarceration if the witness did not provide testimony that incriminated the defendant, held that the government's failure to disclose the statements required reversal of the defendant's convictions.

U.S. v. BATTLE, 163 F.3d 1 (Feb. 18, 1998) (published on Dec. 17, 1998)

! Lengthy Appellate Briefs; Brevity - Soul of Wit. The Court denied a motion to accept a 75-page brief of a death-penalty defendant. Quoting Justice Story, the court stated: "Who's a great lawyer? He who aims to say the least his cause requires, not all he may." "Most cases present only one, two, or three significant questions. Usually if you cannot win on a few major points, the others are not likely to help."

CASES REVIEWED

Beck v. Prupis, 162 F.3d 1090 (Dec. 15, 1998)
Calderon v. Coleman, 119 S.Ct. 500 (Dec. 14, 1999)
Collier v. Turpin, 12 FLW Fed. C657 (11th Cir. Mar. 29, 1999)
Conn v. Gabbert, 1999 WL 181181 (April 5, 1999)
Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317 (Feb. 9, 1999)
Freund v. Butterworth, 165 F.3d 839 (Jan. 22, 1999)(en banc)
Holloway v. U.S., 119 S.Ct. 966 (Mar. 2, 1999)
Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc., 1998 WL 886794 (Dec. 18, 1998)
Jones v. Garner, 164 F.3d 589 (Jan. 6, 1999)
Jones v. U.S., 119 S.Ct. 1215 (Mar. 24, 1999)
Kumho Tire Co., Ltd. v. Carmichael, 119 S.Ct. 1167 (Mar. 23, 1999)
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Nagel v. Osborne, 164 F.3d 582 (Jan. 4, 1999)
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