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NORTHERN DISTRICT OF FLORIDA

FEDERAL PUBLIC DEFENDER

NORTHERN DISTRICT OF FLORIDA

A Newsletter for Panel Attorneys

Volume 1, Number 3

August 1999

YOUR CHANCE TO HELP IMPROVE RATE OF DOWNWARD DEPARTURES

Downward departures are particularly rare in our district. According to the U.S. Sentencing Commission, for reasons other than that of providing substantial assistance, the judges of the Northern District of Florida departed, in fiscal year 1998, the year for which the most recent statistics are available, in only 2.6 percent of the cases. For the Middle District of Florida that figure is 7 percent; 5.2 percent for the entire 11th Circuit, and 13.6 percent nationwide. In hopes of improving the figures in our part of the world, we are going to collect and publish in this newsletter, as well as our web page, information about the departures in our district. Please help us with this project by letting us know of any downward departures you've obtained for your clients. Please just call Randy Murrell, at 850-942-8818, or send an email to us at fdpubdef@polaris.net. Here's the first one we know about:

Valdes, Roberto Collier, J. Atty: Elizabeth Timothy

Docket: 3:99cr16-LC
Charge: Assault
Range: 33-41 months
Sentence: 12 months

Date of Imposition of Sentence: 7/27/99

Grounds: "Aberrant behavior," prior good conduct while incarcerated, lack of criminal history, strong family ties.

UNPUBLISHED OPINIONS

Most of the Eleventh's Circuit's opinions are unpublished. They don't have any precedential value, but may have some persuasive value. From time to time the government will show up in court with one in support of their argument. So as to level the playing field, and gain the advantage of using these opinions, Public Defender offices throughout the Eleventh Circuit have begun collecting and indexing these opinions. The plan is to make them available, maybe on a website, to the defense bar. To succeed with this, we need your help. If you receive an unpublished opinion from the Eleventh Circuit please forward a copy to Craig Crawford in our Gainesville office. The mailing address is: 101 SE 2nd Place, Suite 112, Gainesville, FL 32601, and the fax number is (352) 373-7644.

LATEST ON HOURLY RATE INCREASE

Although it is not from a lack of effort, the push for increasing the hourly rate to \$75 for both your in court and out of court work has thus far met with only limited success. The Senate has passed a bill that

provides for \$75 an hour for in court work, and \$55 dollars an hour for out of court work. As we understand it, though, the funding allocated by the Senate is inadequate to cover the increase. The House has recently passed a bill that provides for \$70 an hour for in court work, and \$50 for work outside the courtroom. Oddly enough, the House funding is sufficient to cover even the higher rates passed by the Senate. The matter is headed for a conference committee.

QUANTITY OF DRUGS: MUST IT BE CHARGED AND PROVEN?

The maximum penalty for most drug offenses varies depending upon the quantity of drugs involved in the offense. For years the Eleventh Circuit, as well as all of the other circuits, however, have been telling us that the government need not charge or prove at trial any particular quantity of drug, e.g. U.S. v. Revel, 971 F.2d 656 (11th Cir. 1992). They may have been wrong. In a footnote in a case that has received a lot of attention by the defense bar, Jones v. U.S., 119 S.Ct. 1215, 1224 n. 6 (1999) Justice Souter wrote: "...under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." While Jones addressed not drug offenses, but the federal carjacking statute, many lawyers across the country have been filing motions to dismiss indictments or have been requesting jury instructions on the basis of the opinion. We have, in the Tallahassee office, some sample pleadings we'd be more than happy to provide to you. Just give us a call.

WEB PAGE

We're in the process of developing a web page that will include, among other things, a compilation of the briefs, motions, and memoranda, that we've filed. If you want to take a look at the project under construction the address is: www.pcola.gulf.net/~fedpubdef/. While there aren't any briefs or pleadings yet available, there are links to other sites and some miscellaneous information that may be helpful.

FPD KATHLEEN M. WILLIAMS ASSUMES ADDITIONAL DEFENDER DUTIES

In addition to serving as the Federal Public Defender for the Southern District of Florida, Kathy Williams has also been named by the United States Court of Appeals for the Eleventh Circuit to serve as Acting Federal Public Defender for the Middle District of Florida until a permanent replacement is selected for H. Jay Stevens, who recently retired.

SUPREME COURT UPDATE AND ELEVENTH CIRCUIT UPDATE

Recent Supreme Court Decisions

U.S. v. SUN-DIAMOND GROWERS, 119 S. Ct. 1402 (Apr. 27, 1999)

! **Statutory Interpretation - Gratuity/Bribery Statute, 18 U.S.C. § 201(c)(1)(A); Instructional Error Not Harmless.** The Supreme Court affirmed the reversal of a conviction for a violation of 18 U.S.C. § 201(c)(1)(A), a *gratuity/bribery statute*, because the trial court incorrectly instructed the jury that it was sufficient to show that compensation was given to the public official (the then-Agriculture Secretary) because of his "official position" and that there need not be a "*direct nexus*" between the value conferred to the public official and a specific official act for or because of which it was given. The Court rejected the government's broad reading of § 201(c)(1)(A), pointing out that the statutory language did not criminalize the mere building of a "reservoir of goodwill." The Court pointed out that some regulations did create *per se* liability for certain ethical violations, but that the careful limitations on those regulations would make no sense if § 201(c)(1)(A) were a "meat axe" rather than a "scalpel" within the regulatory scheme. The Court eschewed strained but "linguistically possible" interpretations of statutory text in favor of a "more natural meaning." The Court found the error was not harmless error, noting that the trial court repeatedly gave the jury an erroneous explanation of the statute.

STRICKLER v. GREENE, 119 S. Ct. 1936 (June 17, 1999)

! **Brady Violation: Harmless Error; Cause and Prejudice for Procedural Default.** The Supreme

Court held that the prosecution's failure to disclose, before trial, impeachment material concerning the witness who gave "the only disinterested, narrative [eyewitness] account" of events did not require vacating the defendant's murder conviction and death sentence under Brady v. Maryland, 373 U.S. 83 (1963). Even though the Court acknowledged a possibility the impeachment material could have discounted the witness's testimony and produced a different result at the guilt or sentencing phases, the Court held that the defendant failed to establish a "reasonable probability" of a different result. The Court defined "reasonable probability" to mean that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence" in the outcome. The Court did find that the defendant established cause for failure to raise a Brady claim prior to his federal habeas petition because "(a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (c) the Commonwealth confirmed petitioner's reliance on the open file policy by asserting that petitioner had already received 'everything known to the government.'"

JONES v. U.S., 119 S. Ct. 2090 (June 21, 1999)

! Federal Death Penalty Jury Instructions - Failure to Instruct Jury on Consequences of Failure to Vote for Death; Plain Error - Failure to Specifically Object to Court's Instruction. The Court affirmed a death sentence in its first case interpreting the Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 *et seq.* In a 5-4 decision, the Court rejected Jones' argument that the jury should have been instructed, as he requested, that if it was unable to agree on a sentence, under the FDPA the court was required to sentence the defendant to life without the possibility of release. The Court held that it had *never suggested that a jury must be instructed "as to the consequences of a breakdown in the deliberative process," and that to do so might undermine the purpose of the jury system*, which is to "secure unanimity" and to "express the conscience of the community on the ultimate question of life or death." The Court further declined to exercise its supervisory powers to require an instruction regarding the consequences of deadlock. The *instructions were*

reviewable for "plain error" because Jones did not object to the instructions; further, his request for an instruction did not preserve an objection to the instruction as given, because courts cannot speculate on what "sorts of objections might be implied through a request for an instruction." Finally, the Court rejected the argument that the nonstatutory aggravating factors given to the jury (victim's "personal characteristics" and her young age, slight stature, background and unfamiliarity with the area) were "duplicative, vague and overbroad so as to render their use in this case unconstitutional." The Court held that any duplicativeness was cured by the government's explanation and the court's instructions and that the jury would not have had difficulty comprehending these factors. Finally, even if the aggravating factors were overbroad, the error was harmless, given other valid aggravating factors.

MARYLAND v. DYSON, 119 S. Ct. 2013 (June 21, 1999) (per curiam)

! Fourth Amendment - Automobile Exception to Warrant Requirement. The Supreme Court reaffirmed the automobile exception to the warrant requirement: when the police have probable cause to search an automobile, there need not be exigent circumstances to justify the warrantless search if the car is readily mobile. See Pennsylvania v. Labron, 518 U.S. 938 (1996).

RECENT DECISIONS FROM THE ELEVENTH CIRCUIT

Case Summaries

U.S. v. WOODEN, 169 F.3d 674 (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 a defendant who pointed a .9 millimeter semi-automatic handgun about one-half inch from the victim's forehead, in the course of a carjacking, 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. The Court acknowledged that these cases involved an "explicit"

and “verbal” threat, but found that “Wooden’s conduct in pointing and holding a semi-automatic weapon one-half inch from his victim’s head is equally coercive and threatening.” The Court acknowledged contrary authority in other circuits which it “declined to follow,” and rejected as mere *dicta* the Supreme Court’s statement in Smith v. U.S., 508 U.S. 223 (1993) that the guideline covers uses “such as . . . bludgeoning.”

U.S. v. SIMMONS, 172 F.3d 775 (Apr. 14, 1999)

! Fourth Amendment - Legal Detention Following Traffic Stop; Reasonable Delay to Verify Pending Warrant. In a case that presented critically different facts than Pruitt, *supra*, the Court reversed the district court’s Fourth Amendment suppression order, holding that the *detention of a person during a traffic stop beyond the time necessary to write a traffic citation was justified because the police officers were running a computer check on an outstanding arrest warrant that appeared to be for the defendant.* The Court noted that, after a traffic stop for running a stop sign, the officers ran a computer check that disclosed an outstanding warrant for writing bad checks in another county. The arrest information closely matched the defendant’s actual name and his sex, race and physical description, but had a different date of birth. The officers attempted, unsuccessfully, to obtain more information regarding whether the driver was the subject of the warrant. The defendant was detained in his car for an hour, until a canine unit arrived and alerted for drugs. The car was then searched, drugs and a gun were found, and the defendant was arrested. The Court held that the officers’ conduct was reasonable. The Court rejected the argument that it was unreasonable for the officers to think that the warrant was for the defendant, simply because it was from a county on the other side of Florida, and because the birth date was four years off. Moreover, the Court found that the police acted “diligently” with respect to the warrant. Noting that in U.S. v. Hardy, 855 F.2d 753 (11th Cir. 1988), a 50-minute investigative stop was not held to be excessive, and recognizing that “longer traffic stops . . . usually require extenuating circumstances to be upheld,” the Court calculated that only 17-26 minutes elapsed after the “routine” portion of the traffic stop, a period “well within the bounds permitted by Terry v. Ohio], 392 U.S. 1 (1968),] and its progeny.”

Finally, the Court rejected the argument that the officers knew of Simmons’ earlier involvement in the sale of cocaine, and unreasonably “transformed the stop into an investigative detention for a drug search.” Reasonable suspicion for Terry purposes is determined by reference to objective criteria and nothing about the police’s suspicions undermined their reasonable belief that he was the subject of an arrest warrant.

U.S. v. ESPINOSA, 172 F.3d 795 (Apr. 15, 1999)

! Safety Valve Reduction - U.S.S.G. § 5C1.2: Opposition by Government and Burden of Proof. The Court *reversed the sentencing court’s denial of a safety valve reduction under U.S.S.G. § 5C1.2, because the court merely deferred to the government’s position that the defendant had not told the truth in his safety valve statement regarding the drug quantities involved in the offense.* At sentencing, the government contended that 300 kilograms of cocaine were involved, not just the 30 kilograms admitted by the defendant. The district court responded by saying that, since the defendant had not testified at trial, it had no way of knowing if he was telling the truth, and it therefore accepted the government’s position. Reversing, the Court explained that the district court erred in deferring to the government, because the court had the “responsibility” for determining the truthfulness of the information the defendant provided to the government. The Court added, however, that the burden of proof on the truthfulness issue lies with the defendant and remanded the case for further proceedings. [NOTE: See also Gallego, *supra*, holding that the mere lack of corroboration of a defendant’s testimony does not render it insufficiently reliable to establish a claim.]

U.S. v. CERCEDA, 172 F.3d 806 (Apr. 16, 1999) (*en banc*)

! Recusal - 28 U.S.C. § 455(a); Remedy in the Post-trial Context. Rejecting the panel ruling in U.S. v. Cerceda, 139 F.3d 847 (11th Cir. 1998), the *en banc* Court held that new trials and new sentencing hearings should not have resulted from the district judge’s failure to recuse from a number of criminal cases during a criminal investigation of the judge by the Department of Justice. *The Court split 6-6 on whether the district judge should have recused at all, thereby affirming, by an equally divided court, the*

district court's finding that there was a violation of 28 U.S.C. § 455(a) in failing to recuse. But the Court held that, even with a recusal violation established or assumed, the remedy was not vacatur of convictions or sentences. The Court summarized its holding as follows: "In sum, the three factors identified by the Supreme Court in [Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864 (1988),] weigh strongly against vacatur in regard to the defendants who received new trials. First, the defendants have failed to show a risk of injustice to themselves while the Government has demonstrated a significant risk of injustice to it should the defendants' convictions be vacated. Second, in light of the recently adopted protocol on the matter, there is little risk that failing to vacate the defendants' convictions in these cases will produce injustice in other cases. Finally, public confidence in the judicial process would be harmed if these convictions -- seemingly reached by fair procedures -- were vacated, and the Government was required to retry the defendants. The Court set out a two-part test. First, the reviewing court should consider whether the party seeking vacatur has pointed to particular circumstances that may indicate a risk of injustice to that party. Second, the court should consider the seriousness of the violation of section 455(a) that is involved." On the second part of that test, the Court emphasized that "we now hold that the violation thus established was neither egregious nor clear to the judge." Moreover, "the district court's ruling [finding a violation of] section 455(a), which we (albeit by an equally divided court) affirm, should sufficiently impress upon judges the need to identify and disclose potential grounds for disqualification."

U.S. v. CABRERA, 172 F.3d 1287 (Apr. 19, 1999)
! Fraud Loss Calculation - U.S.S.G. § 2F1.1: Government's Burden Not Met by Speculative Evidence; Requirement of Specific Sentencing Findings; Preserving Sentencing Issue for Review.
Reversing the defendant's sentence for fraudulent possession of cellular telephone cloning equipment under 18 U.S.C. § 1029(a)(4), the Court ruled that "*proof of the defendant's mere possession of [unauthorized cellular telephone numbers] is insufficient to satisfy the government's burden*" of providing "*reliable and specific evidence*" to support the amount of fraud loss attributable to the defendant. The Court rejected the government's argument that

the defendant was liable for all fraud reported by cellular service providers for the cellular telephone access numbers found on the defendant's computer software and hardware. Recognizing that stolen access numbers are a commodity that many individuals can utilize, since sellers provide the same access numbers to multiple buyers and multiple unauthorized users often use the same access numbers simultaneously, the Court held that the government "must provide proof to attribute the unauthorized calls . . . to the defendant." The Court clarified that evidence derived from a "cell site analysis," which attempts to identify the geographic area involved in the unlawful use of cell phone access numbers, would not be appropriate where, as in this case, the defendant was convicted not of unlawful use but rather of possessing equipment used to clone cellular phones. The Court rejected the 9th Circuit's decision in U.S. v. Clayton, 108 F.3d 1114 (9th Cir. 1997), to the extent that Clayton stands for "the proposition that the government can attribute the entire fraud loss associated with [access numbers] to the defendant solely because the defendant possessed those combinations." The Court also held that Cabrera's repeated objections both before and during sentencing to the fraud loss amounts proffered by the government adequately preserved this issue.

BAILEY v. NAGLE, 172 F.3d 1299 (Apr. 20, 1999)
! 28 U.S.C. § 2254 - Procedural Default. The Court affirmed a district court's ruling that all of a § 2254 habeas petitioner's claims were procedurally defaulted. As to those that had been previously raised, the Court noted that the state courts had held that Bailey's successive petition claims were now procedurally barred, a state court determination that rested on "adequate and independent state procedural ground" and that could not be reviewed by a federal court. Citing Harris v. Reed, 489 U.S. 260 (1989), the Court noted that the fact that one state court had added that Bailey's claim was without merit, in addition to being procedurally barred, did not alter the analysis. As to claims not previously raised in state court, the Court observed that they would clearly be barred under state rules governing successive petitions or the statute of limitations. Hence, they are procedurally barred. Finding no "cause or prejudice" for the default, and no "fundamental miscarriage of justice," the Court affirmed the dismissal of the petition.

U.S. v HUNTER, 172 F.3d 1307 (Apr. 20, 1999)

! U.S.S.G. § 2D1.1(b)(1) Firearm Possession Sentence Enhancement. The Court upheld a U.S.S.G. § 2D1.1(b)(1) firearm possession sentence enhancement for a defendant convicted of narcotics trafficking, even though the firearm was found in his home 100 miles from the scene of his arrest. The Court did not apply U.S. v. Cooper, 111 F.3d 845 (11th Cir. 1997) (§ 2D1.1(b)(1) “requires . . . that the firearm [be] present at the site of the charged conduct”), concluding that Cooper was “recently clarified” in U.S. v. Smith, 127 F.3d 1388 (11th Cir. 1997), which held that a *firearm enhancement could be imposed whenever a firearm “is possessed during conduct relevant to the offense of conviction.”* In this case, Hunter used his home to distribute drugs and the gun possession was relevant conduct under the Guideline enhancement. [NOTE: A concurring opinion of one judge explained that the site-specific comment in Cooper was mere *dicta*.]

U.S. v. LEE, 173 F.3d 809 (Apr. 21, 1999)

! Commerce Clause - Operation of Illegal Casino, 18 U.S.C. § 1955. Affirming convictions for operating an illegal gambling casino, in violation of 18 U.S.C. § 1955, the Court rejected the defendants’ claim that the statute was unconstitutional because it exceeded Congress’ power under the Commerce Clause. The Court said that reliance on U.S. v. Lopez, 514 U.S. 549 (1995), was misplaced, because Lopez involved possession of a gun in a school zone with no commercial implications, whereas gambling has a commercial impact; indeed, the commercial impact of gambling was highlighted in the gambling statute’s legislative history.

U.S. v. MARSHALL, 173 F.3d 1312 (Apr. 26, 1999)

! Personal Knowledge Foundation for Testimony; Government Agent’s Opinion of Defendant’s Guilt; Fed. R. Evid. 404(b) - Mere Arrests, Evidence of Bad Character. The Court reversed convictions for possession of drugs with intent to distribute, based on improperly admitted testimony (1) of a DEA agent that, in his opinion, the informant had no source of drugs other than the defendants from whom he claimed to have purchased drugs, and (2) as to prior arrests of the defendants on drug charges at which they gave false names. The case was based largely on the testimony of an

informant who said he bought crack cocaine from the defendants. Recorded bills given to the informant and drug paraphernalia were found at the defendants’ home; however, no drugs were found there. The Court explained that the *DEA agent was not testifying as an expert and that his opinion testimony was therefore not admissible on that basis. In addition, the agent had no personal knowledge of the transactions.* The agent’s answer was *prejudicial since it tended to bolster the otherwise impeached credibility of the informant -- who had been a drug dealer, convicted of beating his ex-wife, granted immunity in exchange for his testimony, and had a reputation for not being truthful.* The Court found that, coupled with the *improperly admitted Fed. R. Evid. 404(b) evidence*, a new trial was required. The Court noted that the *evidence of the prior arrests was unduly prejudicial because it suggested “guilt by association” with those who were convicted of drug charges.* It also functioned “as impermissible character evidence” because the giving of false names suggested that their “lawlessness might also extend to drug dealing.”

U.S. v. MOSLEY, 173 F.3d 1318 (Apr. 26, 1999)

! Fed. R. Crim. P. 11 - Sufficiency of Plea Colloquy, Notice of Offense Elements; Plain Error. The Court held that the *district court did not commit plain error in accepting the guilty plea of a defendant on charges of gun possession in violation of 18 U.S.C. § 922(g) despite the fact that the trial court failed to fully advise the defendant of the interstate commerce nexus element of the offense.* The Court noted that the *defendant decided to plead guilty during trial, after the government had presented sufficient evidence to establish the interstate commerce nexus.* The district court could take account of the “point at which the plea[] occurred” rather than focusing on the plea colloquy in a “vacuum.”

ADAMS v. U.S., 173 F.3d 1339 (Apr. 27, 1999)

! Prison Mailbox Rule for Pro Se Habeas Petitions; Calculation of AEDPA 1-Year Statute of Limitations. The Court held that, *for purposes of determining whether an inmate filed a motion under 28 U.S.C. § 2255 within the one-year deadline of the AEDPA, the relevant filing date is the date on which the inmate delivers his papers for mailing to prison authorities.* The Court rejected the inmate’s argument that the delay which put him over the one-year

deadline was attributable to the three days it took prison authorities to photocopy his documents, stating that the applicable deadline was a “mailbox rule,” not a “photocopying rule.” The AEDPA provides that the one-year period begins to run when the judgement of conviction “becomes final.” The Court declined to decide whether this means the date of the issuance of the Court of Appeals’ mandate or the date of the Supreme Court’s denial of certiorari. The Court held that the one-year period did not begin to run from the later date when the Court of Appeals communicated the denial of certiorari to the district court.

GUENTHER v. HOLT, 173 F.3d 1328 (Apr. 27, 1999)

! **Successive 28 U.S.C. § 2254 Petitions.** The Court declined to reach whether second or successive 28 U.S.C. § 2254 petitions, which can be filed only with permission of the Court of Appeals under 28 U.S.C. § 2244(b)(3)(A), could be deemed timely if filed mistakenly in the district court within the AEDPA’s one-year deadline and then transferred to the Court of Appeals under 28 U.S.C. § 1631, or deemed stayed after the district court filing, because the petitions at issue were not even timely filed in the district court. The Court therefore dismissed the petitions due to their untimeliness and *noted that it would be helpful if the forms in district courts for pro se § 2254 petitioners informed them of the new requirements of the AEDPA.*

U.S. v. BATTLE, 173 F.3d 1343 (Apr. 28, 1999)

! **18 U.S.C. § 1118 - Imposition of Death Sentence for Killing Prison Guard; Due Process - Shackling of Defendant at Trial; Death Penalty Notice under 18 U.S.C. § 3593(a); Admission of “Deterrent Effect” Evidence at Sentencing; Delegation of Execution Methodology to the States.** The Court affirmed the imposition of the death sentence on an inmate for violating 18 U.S.C. § 1118 by murdering a correctional officer while serving a life sentence. The Court rejected Battle’s argument that the court erred in ordering him to wear shackles and arm restraints in court during the trial. The Court noted that “Battle had committed not only two brutal homicides, but -- since the last homicide -- three separate attacks on correctional officers.” The Court noted that the trial court had conducted a hearing on the shackles question and “rightfully feared for the safety of her courtroom.” The Court noted that cloth

was draped from the table to hide the leg shackles and that Battle was given a black sweater to disguise the arm restraints. The Court also rejected Battle’s argument that it was improper to allow the government before sentencing to amend its notice of intent to seek the death penalty, under 18 U.S.C. § 3593(a), to allege future dangerousness. The Court noted that the amendment could be regarded as merely referring to an intent to show evidence of future dangerousness, not an additional aggravating factor. Even if the notice involved a factor, the Court found “good cause” in the late notice because one incident occurred after the government’s original filing of its notice, and the amended notice gave Battle 30 days’ notice that it would rely on other acts of violence. The Court rejected Battle’s attack on testimony by prison guards about the impact of a life without parole sentence on conditions in the prison. This testimony was not impermissible expert evidence about the deterrent effect of the death penalty: “No studies were shown; no data was introduced; no professors spoke.” Rather, it was evidence about the “harmful effects” of the murder of an on-duty correctional officer. The Court acknowledged that counsel did not receive the required notice about the testimony, but found that counsel failed to request a continuance. Finally, the Court rejected the argument that it was an improper delegation of federal power to allow Georgia, the state in which the defendant was sentenced, to choose the method of imposition of sentence -- electrocution.

U.S. v. KENT, 175 F.3d 870 (May 4, 1999)

! **Sufficiency of Evidence: Possession of an Unregistered Firearm, 26 U.S.C. § 5861(d).** The Court affirmed a conviction for possession of an unregistered firearm in violation of 26 U.S.C. § 5861(d), holding that *possession of an upper receiver unit and of a lower receiver unit constituted possession of a “rifle,” even though those two units were not fastened together.* The Court noted that the upper receiver unit was “compatible” with the other unit, that when put together the units would constitute a weapon capable of discharging a shot through a rifle bore, and that the units were located in the same small apartment and could easily and quickly be connected. The Court found Kent’s situation analogous to the “paradigm” assembly analysis of U.S. v. Thompson/Center Arms, 504 U.S. 505 (1992) (plurality opinion).

U.S. v. CHASE, 174 F.3d 1193 (May 5, 1999)

! **Appellate Jurisdiction on Appeal of Denial of Downward Departure: Assumption that District Court Understood its Authority.** The sentencing court stated that it “looked at each one of the bases for a downward departure to see if it is justified either under the [G]uideline provisions as well as under the case law interpreting those provisions,” and found that they would not support departure. On appeal, defendant claimed that the sentencing court erroneously held that it had no authority to depart. Rejecting that argument, the Court held that *a sentencing court does not misapprehend its authority to grant a downward departure where it does not “express any ambivalence regarding its authority to depart and the evidence does not otherwise reflect [that] the district court misapprehended its authority.*

GALLEGO v. U.S., 174 F.3d 1196 (May 5, 1999)

! **Testimony of Defendant Needs No Corroboration If Credible; Court must explain why counsel’s contrary testimony more credible.** The Court reversed the denial of a defendant’s 28 U.S.C. § 2255 challenge to his drug conviction based on counsel’s failure to properly advise defendant that he had a constitutional right to testify that only he could waive. The district court found that the case boiled down to “the defendant’s word against that of counsel,” and ruled against the petitioner. Reversing, the Eleventh Circuit *declined to adopt a per se “credit counsel in case of conflict rule,” and remanded for a new evidentiary hearing.* The Court pointed out that the magistrate judge failed to make a finding about the defendant’s lack of credibility, having said “nothing about the internal inconsistency of the defendant’s testimony, or his candor or demeanor on the stand. Indeed, the magistrate [did] not even state simply why the defendant’s lawyer is the more credible witness in this case.” The magistrate judge here, however, . . . incorrectly found as a matter of law that defendant could not carry his burden without presenting some evidence in addition to his own word, . . . *The fact that the defendant’s testimony is uncorroborated is not enough standing alone to support a credibility finding.*” The Court noted that defense counsel’s testimony “was also unsubstantiated by other evidence” (such as documentation of his discussions with his client).

U.S. v. ORTEGA-TORRES, 174 F.3d 1199 (May 5, 1999)

! **8 U.S.C. § 1324(a)(1)(B)(I) and (a)(2)(b)(iii) - Calculation of Sentence Where Defendant Convicted of Bringing In Multiple Aliens; Rule of Lenity.** The Court affirmed the imposition of a five-year sentence imposed concurrently for several counts of illegally smuggling aliens into the United States, in violation of 8 U.S.C. § 1324(a)(1)(B)(I) and (a)(2)(b)(iii), where *each substantive count related to a different alien brought into the country by the defendant on one alien smuggling voyage.* The Court noted that the five-year minimum mandatory sentence of section 1324(a)(2)(B)(iii), applicable for violations other than a first or second, “was intended to be applied ‘for each alien in respect to whom a violation of this paragraph occurs.’” The Court found this “plain language” conclusive that *each alien counts as a separate violation for sentencing purposes.* The legislative history of the statute, which substituted “per alien” language for “per transaction” language, confirmed this reading. Thus, because the law was unambiguous, the rule of lenity did not apply.

U.S. v. MARAGH, 174 F.3d 1202 (May 6, 1999)

! **28 U.S.C. § 636, Jurisdiction of Magistrate Judges - Jury Selection; Plain Error; New Rule of Waiver for Magistrate Judge Jury Selection.** The Court held that it is plain error for the trial judge to fail to obtain a defendant’s express consent to having a magistrate judge conduct voir dire, but remanded the case to the district court for an evidentiary hearing on whether Maragh did, in fact, so consent since the record was unclear. Although her attorney consented, it was unclear whether Maragh personally consented. The Court noted that *magistrates are authorized to supervise voir dire -- “an important and critical stage in a criminal proceeding” -- only if the defendant consents to not having the trial judge conduct it. Further, the Court announced a “supervisory rule” for the Eleventh Circuit: “To effectuate appropriate consent when a magistrate judge is delegated the district court’s authority to conduct voir dire, the magistrate judge or the district court must obtain, on the record, explicit and personal consent from all parties involved, particularly from the defendant.”* However, the Court immediately went on to say: “We do not insist that the defendant must be personally addressed by the court, but the record must be such as to clearly show that the defendant has consented

personally to the procedure.”

U.S. v. PRUITT, 174 F.3d 1215 (May 10, 1999)

! Fourth Amendment - Illegal Detention Following Traffic Stop; No Reasonable Suspicion of Criminal Activity. Defendants were stopped for speeding in Tennessee while driving a van from California to Alabama. The arresting officer asked them many questions unrelated to the traffic stop, e.g., what kind of work one did and how much money the van cost. “[H]aving no reasonable suspicion of criminal activity,” the officer handed one arrestee a written consent form for a search of the vehicle. When the person refused, the officer called in a drug-sniffing dog that, fifteen minutes later, indicated the presence of drugs. Citing the Supreme Court’s recent decision in *Knowles v. Iowa*, 119 S.Ct. 484 (1998) (search of vehicle not justified by traffic stop), and its seminal ruling in *Terry v. Ohio*, 392 U.S. 1 (1968) (police must be able to point to specific and articulable facts to justify brief detention), the Court held that *the questioning, detention, and search of the vehicle were not justified by the routine traffic stop*. The officer was “acting on an unsupported hunch instead of a reasonable suspicion that [defendants] had broken anything other than the speeding laws.” The fact that the hunch “ultimately turned out to be correct” was “irrelevant.” The Court noted that “*this appears to be yet another case in which a driver, once stopped, is unreasonably detained because of his/her race or national origin* ([defendants] are both Hispanic) or because the driver is from out-of-state.”

FLORIDA BRECKENRIDGE, INC. v. SOLVAY PHARMACEUTICALS, INC., 1999 WL 292667 (11th Cir. (Fla.))(May 11, 1999)

! Legal Ethics: Duty of Honesty to Court Not Subservient to Duty to Represent Client. The Court referred attorneys for both parties in a civil case to the Court’s disciplinary committee. In arguing their respective positions in the district court and on appeal, the attorneys affirmatively misrepresented the lawfulness, under FDA regulations, of their clients’ plainly unlawful conduct in marketing unapproved prescription drugs. The Court observed: “Unfortunately, *we must remind these attorneys that they are officers of the court. As such, they owe duties of complete candor and primary loyalty to the court before which they practice. . . . These duties are never subservient to a lawyer’s duty to advocate zealously*

for his or her client. In this case, the attorneys for both parties have frustrated the system of justice, which depends on their candor and loyalty to the court, because they wanted to avoid an unpleasant truth about their clients’ conduct. In short, they have sold out to the client.”

U.S. v. HILL, 177 F.3d 1251 (June 14, 1999)

! Fed. R. Crim P. 33: 7-day Jurisdictional Time Limit for Motion for New Trial. The Court *reversed a district court’s order granting a new trial because the court allowed the defendant’s motion for a new trial to be filed one day after the seven-day deadline for such motions expired under Fed. R. Crim P. 33*. The 7-day deadline, which runs from the verdict or finding of guilty, is jurisdictional: After the seven days have expired, the district court no longer has jurisdiction to hear a motion for new trial [based on grounds other than newly discovered evidence] or to extend the period during which a motion for new trial may be made. [NOTE: While holding that the jury’s consideration of a forfeiture claim does not toll the Rule 33 time limit, the Court did not address the seemingly contrary language in Fed. R. Crim. P. 29, where the seven-day window for filing a post-trial motion for judgment of acquittal runs from the date the “jury is discharged.” When a forfeiture count is being considered, the jury is not discharged. Apparently, the Court’s ruling thus creates different time limits under Rules 29 and 33 where a forfeiture count is heard by the jury.]

WOFFORD v. SCOTT, 177 F.3d 1236 (June 14, 1999)

! 28 U.S.C. §§ 2241, 2255: Avoiding Successive Petition Bar of § 2255 by Filing § 2241 Habeas Petition. The Court held that a prisoner barred from filing another motion under 28 U.S.C. § 2255 by the AEDPA limitations on second and successive petitions could circumvent those limitations by filing for habeas relief under 28 U.S.C. § 2241 only if: (1) the § 2241 claim is based upon a retroactively applicable Supreme Court decision; (2) the holding of that Supreme Court decision establishes the petitioner was convicted for a non-existent offense; and (3) circuit law squarely foreclosed such a claim at the time it otherwise should have been raised in the petitioner’s trial, appeal, or first § 2255 motion. *Once a prisoner had “an unobstructed procedural shot” at*

getting relief, the habeas remedy does not give the prisoner anything more, regardless of whether the prisoner “took the shot, or even that he or his attorney recognized the shot was there for the taking.” This appeal presented interesting questions concerning the language in § 2255 that a habeas application shall not be entertained if a § 2255 motion has been denied, ‘unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.’ [NOTE: The Court recognized that its rule was in conflict with the Second Circuit’s rule, which allows § 2241 claims to go forward when barring them under the AEDPA would raise “serious constitutional questions,” and also differed from the Seventh Circuit’s rule, which allows § 2241 claims to go forward when defendant asserted a “fundamental defect” in the conviction or sentence.]

SANDVIK v. U.S., 177 F.3d 1269 (June 15, 1999)
! **28 U.S.C. §§ 2254 & 2255: Equitable Tolling of 1-Year Statute of Limitations, Grace Period for Retroactive Application.** The Court held that *the one-year limitations period for § 2255 motions is subject to “equitable tolling.”* The Court found no obvious cause why the equitable tolling permitted under § 2244 for § 2254 petitions should not be equally valid for § 2255. “[L]ike § 2244(d), there is every indication that § 2255’s deadline is a garden-variety statute of limitations, and not a jurisdictional bar that would escape equitable tolling. . . . Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.” . . . However, here the motion was late because the lawyer sent it by ordinary mail less than a week before it was due. *Thus, the problem was one that could have been avoided by mailing the motion earlier or using a private delivery service so there was no ground for equitable tolling.* The Court also reiterated that a grace period applies so that “§ 2255’s period of limitations should be construed to provide those convicted before April 24, 1996 . . . a full year after that date to file motions under § 2255.”

U.S. v. KIMBLE, 178 F.3d 1163 (June 22, 1999)
! **Carjacking, 18 U.S.C. § 2119: Sufficiency of Evidence of Conditional Intent to Kill and Taking “From the Person or Presence of Another.”** The

Court affirmed multiple convictions arising out of the armed robbery of a restaurant, including convictions for carjacking based on the defendants’ demand of the restaurant manager’s car keys at gunpoint inside and taking of the car parked outside the restaurant for their escape. The Court noted that, under the recent decision in *Holloway v. U.S.*, 119 S. Ct. 966 (1999), the government need only show “conditional intent” -- *i.e.*, that defendants “would have attempted” to harm their victims “if that action had been necessary to complete the taking of the car.” Here, the *defendants’ actions -- including: pointing of loaded guns at the restaurant employees, forcing them to lie on the floor, and hitting of one employee with a gun when he failed to comply with their orders -- showed that the defendants would have at least attempted to inflict serious harm if necessary.* The Court also rejected the defendants’ arguments that, because the car was parked outside and the keys were taken from the owner inside, the carjacking statute’s requirement of the taking of a car “from the person or presence of another” was not satisfied. The Court held that *the presence requirement is satisfied when the victim is close enough to the car to have prevented it from being taken had the victim not feared being harmed or killed, i.e., where the car is “accessible.”*

FDIC v. PHARAOAN, 178 F.3d 1159 (June 22, 1999)
! **Fugitive Disentitlement Doctrine.** The fugitive disentitlement doctrine, for which a multi-factor test applies to civil plaintiffs and criminal defendant appellants, may not be applied to strike a civil *defendant’s* answer and enter judgment against him. “If such application of the doctrine were permitted, virtually anyone might be able to obtain a judgment against a fugitive simply by filing a claim and moving for judgment based on the fugitive disentitlement doctrine.”

U.S. v. HEAD, 178 F.3d 1205 (June 25, 1999)
! **Downward Departure for Substantial Assistance, U.S.S.G. § 5K1.1: Using Mandatory Minimum as Starting Point for Departure; Appellate Jurisdiction to Review Legal Analysis for Downward Departure Decision.** The Court reaffirmed that *the starting point for calculating a sentence reduction based on a downward departure for substantial assistance pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e) is not the guidelines*

range but the statutory mandatory minimum. The Court recognized a “fleeting” tension between its holding and application note 7 of U.S.S.G. § 2D1.1 (which provides for imposition of “a lower sentence [based on substantial assistance] . . . including a sentence below the applicable guidelines range”). Although the Court generally may not review a district court’s refusal to grant a § 5K1.1 downward departure or the extent to which the court departs, Head’s appeal concerned the legal interpretation of the relevant guidelines and statutes, which the Court reviews *de novo*. [T]he Guidelines do not contemplate a downward departure for substantial assistance until after the court applies section 5G1.1(b), which establishes that the applicable guideline sentence shall be the mandatory minimum sentence. . . . The district court’s decision to use 120 months as the starting point for its downward departure did not transgress section 3553(e)’s direction to make departure decisions in accordance with the applicable guidelines. . . . Note 7 merely foreshadows a downward departure that the court cannot perform until after the court has considered and applied § 5G1.1(b).”

U.S. v. PICKERING, 178 F.3d 1168 (June 25, 1999)

! Downward Departure: Aberrant Behavior, Diminished Capacity, Family Circumstances, Plea Bargain Issues, Post-Offense Rehabilitation, Combination of Factors - § 5K2.0; Waiver of Departure Grounds. The Court remanded for resentencing where the district court imposed a downward departure for a defendant who pled guilty to three counts of armed robbery and three counts of using a firearm during the robberies, 18 U.S.C. §§ 924 (c) and 2113. The sentencing court, relying on U.S.S.G. § 5K2.0, relied on a combination of factors: (1) “aberrant behavior”; (2) diminished capacity caused by narcotics; (3) abusive family circumstances; (4) the prosecutor had offered a much lower plea bargain, which the defendant did not have an opportunity to consider adequately before it expired; and (5) post-offense rehabilitation. The Court found no error with the sentencing judge’s conclusion that the first three grounds standing alone did not support a downward departure in this case, but held, on the question of whether a combination of otherwise singly insufficient grounds warranted departure under U.S.S.G. § 5K2.0, p.s., comment., that “the *district court made no findings and provided no reasoning to*

support the conclusion that Pickering presented the type of extremely rare case contemplated by the Commission,” thus necessitating a remand. As to the individual grounds, the Court observed that: (1) “Pickering’s armed robberies of four banks in four months clearly do not constitute a single spontaneous and thoughtless act,” and therefore could not be considered “aberrant;” (2) diminished capacity due to use of narcotics cannot be a basis for departure; and (3) Pickering did not present his mental or emotional condition argument precisely enough to the sentencing court to qualify for a departure (if a departure on this basis is available, something the Court found “highly questionable”). The Court rejected any reliance on an expired plea offer for departure purposes, as this would be modifying the parties’ later plea agreement. However, the Court *approved the grant of a downward departure for post-offense rehabilitation, but held that since rehabilitation only relates to the defendant’s recidivism, a downward departure on this basis could only be accomplished through a “horizontal axis” modification of the defendant’s criminal history category.* Here, the sentencing court erred by departing downward along the offense level (vertical) axis of the sentencing table, thus requiring a remand for resentencing. “[P]ost-offense rehabilitation” may warrant departure where truly extraordinary and may exceed the usual level taken into account by U.S.S.G. § 3E1.1. The Court cited with approval: U.S. v. Jones, 158 F.3d 492, 503 (10th Cir. 1998); U.S. v. Rhodes, 145 F.3d 1375, 1383 (D.C. Cir. 1998); U.S. v. Sally, 116 F.3d 76, 80-82 (3d Cir. 1997); U.S. v. Brock, 108 F.3d 31, 35 (4th Cir. 1997). *The Court declined to address the alternative theory that, in light of Koon v. U.S., 116 S.Ct. 2035 (1996), a sentencing court also has discretion to depart downward on the basis of multiple acts that constitute ‘aberrant behavior in general,’ as it was not presented to the district court. Likewise, the issue whether the defendant’s mental or emotional condition provided the district court with a ‘discouraged’ basis for departure under U.S.S.G. § 5H1.3, p.s was not preserved.*

U.S. v. STEELE, 178 F.3d 1230 (June 25, 1999)

! Sufficiency of Indictment - Failure to State Dates, Places, Drug Amounts, and Other Participants; Double Jeopardy Clause; Batson Challenge to Striking of Female Prospective Jurors; Sufficiency of Evidence - Challenge to

Inconsistent Testimony of Government Witness.

The panel disposed of the issues left open after U.S. v. Steele, 117 F.3d 1231 (1997) (*en banc*) (indictment of pharmacist for violation of 21 U.S.C. §§ 841(a)(1), 885(a)(1) for dispensing controlled substances to person with phony prescriptions valid notwithstanding indictment's omission of "professional practice" exception). Rejecting the defendant's argument that the indictment failed to permit him to prepare his defense and failed to protect him against a second prosecution for the same offenses, the Court held *the indictment was sufficient even though it did not specify "the precise dates, locations, drug amounts and purchasers" for each violation.* "[U]nder the statute, time, location, drug amount, and purchaser are not essential elements. . . ." The Court concluded that the four-month period specified in the indictment does not expose Steele to double jeopardy concerns because a court may refer to the entire record of the prior proceeding and would not be bound by the indictment alone. The Court also held that the prosecutor did not use her peremptory challenges impermissibly to exclude women. The Court noted that the prosecutor's justification for the use of the challenges was not pretextual, when she excluded elementary school teachers because she was "leery" of school teachers, struck prospective jurors who worked in the medical industry because the defendant was a pharmacist, and struck a hair stylist because she feared that the juror would hear "gossip" about the case. "The government rationally could believe that the accepted jurors held jobs that feature entirely different skills and responsibilities than that of an elementary school teacher. At any rate, *a legitimate reason is not a reason that makes sense, but a reason that does not deny equal protection.*" The fact that the jury consisted of ten women and four men undercut the inference of impermissible discrimination. The Court also rejected Steele's challenge to the sufficiency of the evidence, even though the government's case was primarily based on the testimony of an alleged accomplice whose testimony was inconsistent. "We have held that, for testimony of a government witness to be incredible as a matter of law, it must be unbelievable on its face and must relate to facts that the witness physically could not have possibly observed or events that could not have occurred under the laws of nature."

! Downward Departure - Non-heartland Drug Prosecution, Collateral Penalties Suffered by

Professionals, Minimal Amount of Financial Benefit to Defendant, Diminished Capacity, and Calculation of Drug Weight. The Court agreed with the government's cross-appeal of the sentencing court's downward departure. Rejecting the first four bases for the departure, the Court held that (1) filling phony prescriptions falls within the "heartland" of drug trafficking offenses; (2) "loss of a medical license may not serve as a ground for departure when the offense for which the defendant is convicted reflects an abuse of the trust inherent in the granting of the license to the defendant" (citing U.S. v. Hoffer, 129 F.3d 1196 (11th Cir. 1997)); (3) the Guidelines require that substances mixed with drugs be included in the total drug weight (citing U.S. v. Lazarchik, 924 F.2d 211 (11th Cir. 1991)); and (4) defendants often "have experienced difficulties in turning profits and [have] even incurred losses for their efforts" in drug cases. As to the final ground for departure, the Court *remanded for resentencing given the absence of "specific findings whether Steele's diminished mental capacity contributed to the commission of the crime."* The Court instructed the district court to consider the argument in light of post-sentencing amendments to U.S.S.G. § 5K2.13, which permits a downward departure if the defendant "has a significantly impaired ability to (A) understand the wrongfulness of the behavior . . . or (B) control behavior that the defendant knows is wrongful." [NOTE: In relying on the 1991 decision in Lazarchik (holding that sentencing court must use the total weight of the pills distributed by the defendant -- rather than just the weight of the drug itself), the Court failed to address a seeming contradiction with the November 1993 amendment to the drug quantity table, which expressly excludes the weight of the carrier medium for LSD from the drug weight calculation. See U.S.S.G. § 2D1.1(c), Drug Quantity Table, Note (H).] [NOTE: Occasionally, an issue arises at a resentencing whether the guidelines in effect at the original sentencing or those in effect at resentencing are applicable. The holding in Steele that the amended guidelines apply at resentencing, seems to resolve the issue, assuming that law-of-the-case or ex post facto considerations do not obviate reliance on the new guidelines at resentencing.]

U.S. v. KING, 178 F.3d 1376 (June 29, 1999)

! Sufficiency of Evidence, Bank Theft - 18 U.S.C. § 2113(b): Property of the Bank. The Court

affirmed a conviction for stealing money insured by the FDIC, in violation of 18 U.S.C. § 2113(b). The Court *rejected the argument that the bank theft statute did not apply because the money was stolen from a Loomis Fargo armored vehicle, not directly from the bank. At the time the money was stolen, the bank still had “legal title” to the cash, and the transportation carrier merely had “custody” of the bank’s money.*

! Restitution - Not Available for Unindicted Offenses. The Court agreed with the defendant’s (unopposed) argument that the *sentencing court should not have ordered him to pay restitution for additional monies stolen by him from the armored truck, as these additional stolen monies did not belong to the bank but to a local governmental agency. Because the defendant was not charged with or convicted of that theft (and hence Loomis Fargo was not a victim of an offense of which the defendant was charged and convicted), no restitution could be ordered.*

U.S. v. DUFFY, 179 F.3d 1304 (June 30, 1999)

! Notice of Sentence Enhancement under 21 U.S.C. § 851: Timeliness of Notice Filed at Plea Hearing. The Court held that *the government filed a timely notice regarding the previous convictions that were the basis for enhancing the defendant’s sentence to a mandatory minimum life sentence under 21 U.S.C. § 841(b)(1)(A), where the government filed its notice during the guilty plea hearing. This satisfied the requirement of 21 U.S.C. § 851(a)(1) that the notice be filed before “entry” of a plea of guilty. The filing of a “Notice of Entry of Plea of Guilty” a few days before the plea hearing did not count as “entry” under the statute, because a plea is only entered once the trial court “takes” the plea at the plea hearing.*

U.S. v. GLOVER, 179 F.3d 1300 (June 30, 1999)

! Aggravating Role in the Offense - U.S.S.G. § 3B1.1: Management of Assets Insufficient. The Court *reversed the sentencing court’s aggravating role enhancement of a sentence for conspiracy to distribute cocaine. The Court explained that a § 3B1.1 enhancement “is proper only if a defendant was the organizer or leader of at least one other participant in the crime, asserting control or influence over at least that one participant.”* While a defendant’s control over the assets of a conspiracy can be considered on the question of an upward departure, it is expressly not a ground for role enhancement. See

U.S.S.G. § 3B1.1, comment. (n.2). Reversing, the Court stated: “While sufficient evidence exists to support a finding that [the defendant] managed an asset (the cocaine) of the conspiracy, no evidence (as the government concedes) shows that [the defendant] exercised control over another participant.”

U.S. v. GREGG, 179 F.3d 1312 (July 2, 1999)

! Materiality under Bank Fraud Statute, 18 U.S.C. § 1344: Actual Reliance Not Needed to Prove Offense. In its first post-Neder decision on the sufficiency of the evidence to prove the materiality of the defendant’s statements in a bank fraud prosecution under 18 U.S.C. § 1344, the Court held that *the defendant’s statement to a bank teller that the bank manager had approved the deposit of a check was material, even though the teller was not the final decision-maker in allowing the deposit and thus did not rely on the defendant’s statement. Gregg argued that his statement to the teller was not material because the check was finally deposited to his account only after actual approval by the manager. The Court held that reliance is not necessary to make the false statement material. ‘In general, a false statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decision making body to which it was addressed.’ [Neder v. U.S., 119 S.Ct. 1827 (June 10, 1999)] (quoting U.S. v. Gaudin, 515 U.S. 506, 509 (1995)).* In other words, the statement need not have exerted actual influence, so long as it was intended to do so and had the capacity to do so. . . .

! Money Laundering, 18 U.S.C. § 1957: Completion of Offense That Produced the Funds.

The Court also affirmed the defendant’s money laundering conviction under 18 U.S.C. § 1957 for withdrawing the illegally deposited funds. The Court distinguished U.S. v. Christo, 129 F.3d 578 (11th Cir. 1997), because *here, the defendant first fraudulently deposited the appropriated funds, completing the bank fraud offense, and thereafter withdrew them, which constituted money laundering.*

! Obstruction of Justice for Perjurious Trial Testimony - Sufficiency of District Court’s Findings; Waived Restitution Issue. The district court did not clearly err in finding the defendant’s testimony “unbelievable and incredible” based not only on the bank manager’s contrary testimony, but also on the defendant’s post-arrest statements. Rejecting the defendants’ argument that the district

court abused its discretion and violated his Fifth Amendment right to due process by ordering him to pay \$156,029.51 in restitution without considering his financial situation and ability to pay, the Court held that *the defendant waived any objection to restitution “[b]y expressly agreeing to the amount.”*

U.S. v. SHAZIER, 179 F.3d 1317 (July 2, 1999)

! Pardon Does Not Change Criminal History Category - § 4A1.2; Managerial Role Enhancement, § 3B1.1(c) - No Reliance on Defendant’s Debriefing Statements; Due Process Notice Requirements. The Court rejected the argument that a defendant who had served a six-month sentence as well as a probationary term for a drug conviction, but thereafter received a “first-offender pardon” and a partial restoration of rights, should have received one criminal history point rather than two, given that under U.S.S.G. § 4A1.2(c) & (f), “diversionary dispositions” receive only one criminal history point. The Court held that Section 4A1.1(c) only applies to sentences not already counted in subsection (a) or (b), and, since the six-month sentence was already counted under (b), subsection (c) is inapplicable. Further, U.S.S.G. § 4A1.2(f) does not suggest treating pardons as diversionary dispositions where the defendant has actually served his sentence. “There was no diversion from the judicial process as far as the six-months imprisonment was concerned.” U.S.S.G. § 4A1.2, comment. (n.10), specifically states that sentences resulting from pardons unrelated to innocence or errors of law are to be counted under criminal history. On the defendant’s 2-level enhancement for managerial role under U.S.S.G. § 3B1.1(c), the district court did not err in concluding that other members of the drug conspiracy “were recruited by and were delivering drugs for” the defendant. The district court -- by resting its decision on the statements of the coconspirators made prior to the defendant’s arrest -- did not violate the government’s agreement not to use self-incriminating information provided by the defendant upon his guilty plea.

IN RE: PROVENZANO, 179 F.3d 1326 (July 6, 1999)

! Application for Leave to File Successive Habeas Petition - 28 U.S.C. § 2244(b), Abuse of the Writ. The Court rejected the death-sentenced petitioner’s argument (in his proposed second federal

habeas petition) that an exception to the successive petition bar allowed him to raise new claims that “execution by electrocution, as practiced in Florida, constitutes cruel and unusual punishment” and “that the failure of Florida to provide [him] in a more timely fashion with adequate counsel to pursue the latest round of collateral proceedings violates his Fourteenth Amendment right to due process.” The Court held that neither of the two exceptions under § 2244(b)(2) -- new retroactive rule of constitutional law announced by the Supreme Court or a claim based on a factual predicate not discoverable previously through reasonable diligence, which, if proven, would establish that no reasonable factfinder would have convicted the petitioner of the underlying offense but for the constitutional error -- applies to the petitioner’s claims.

U.S. v. RAMSDALE, 179 F.3d 1320 (July 6, 1999)

! Joint Representation at Sentencing; Waiver of Allocution; Drug Quantity Calculation, U.S.S.G. § 2D1.1: Estimation of Methamphetamine and Conversion Ratio. The Court rejected one defendant’s argument that he was denied his right to counsel when his attorney left the resentencing hearing early. Neither the attorney nor the defendant had objected. The attorney had proposed that the hearing go forward in his absence and had stated that his client, who was present and did not demur, was agreeable. Also, the defendant admitted that the other defendant’s attorney represented him at the resentencing, and there was no conflict of interest between the two defendants. The omission of allocution at the resentencing was not fatal since the defendant did not object and no “manifest injustice” occurred because of the “limited nature” of the resentencing. Finally, the Court found sufficient evidence to sustain a sentence based on 42 kilograms of D-methamphetamine, where the defendants expected to have 21 kilograms in the very near future in addition to the 21 kilograms ordered earlier and where an accomplice testified defendants would “probably” buy 15 kilograms every three weeks, since even 36 kilograms would result in the same sentence. The Court further affirmed the trial court’s reliance on a 1:1 conversion ratio of phenylacetic acid to methamphetamine.

U.S. v. EATON, 179 F.3d 1328 (July 7, 1999)

! Entrapment by Estoppel - Theory of Defense

Jury Instruction. The Court affirmed convictions for importing red tail boa constrictors and other snakes into the United States from Peru, rejecting the defendant's argument that the court incorrectly instructed the jury on "entrapment by estoppel." The Court explained that entrapment by estoppel is a "narrow exception" to the general rule that ignorance of the law is no excuse; it allows a defendant to rely on a point of law misrepresented by an official of the state "made directly to the defendant." However, the *defendant's reliance on a custom agent's statement made to him was not "objectively reasonable," because the statement dealt with the importation of plants, not snakes.* Finally, Eaton's reliance was not reasonable in light of the "overwhelming evidence" that he was aware of the ban on importation of snakes from Peru.

U.S. v. RAMOS, 179 F.3d 1333 (July 7, 1999)

! Fed. R. Crim. P. 15 - Denial of the Right to Take Deposition of Material Witness; Harmless Error Standard on Appeal Less Restrictive than on Motion for New Trial. The Court reversed a conviction for possession of cocaine with intent to distribute and remanded for a new trial, because the district court erroneously ruled that the *failure to permit a deposition of a key defense witness in Colombia* did not warrant a new trial. Following the trial and a first appeal (U.S. v. Ramos, 45 F.3d 1519 (11th Cir. 1995) ("Ramos I") (remanding for determination of materiality of deposition testimony sought by defendant), the witness testified on deposition that he delivered three sealed boxes to Ramos, his friend in Miami, in order to do another friend a favor, and without knowing that they contained cocaine. The district court had ruled that, even though the testimony was material, exculpatory, and admissible, a new trial was not warranted because the testimony was not credible, applying Fed. R. Crim. P. 33, which governs new trials based on newly discovered evidence. The Court of Appeals found that, "*had portions of [the] deposition testimony been credible to the jury, the evidence would have been exculpatory, and material to Ramos' defense in that "it would have corroborated, at least in part, Ramos' principal defense"* that he too did not know the boxes contained cocaine. The Court held that *the district court should have applied the harmless error standard of Fed. R. Crim. P. 52, not Rule 33.* Applying the Rule 52 standard, the error was not

harmless, because the testimony "relate[d] to the determinative issue of intent," "it is impossible to conclude that substantial rights were not affected," citing Kotteakos v. U.S., 328 U.S. 750 (1946).

U.S. v. HARNESS, No. 98-6157, 1999 WL 485039 (July 12, 1999)

! Sentencing Guidelines - Managerial or supervisory role requires supervision of another participant. In this case involving the embezzlement of federal funds, the district court erred when, pursuant to U.S.S.G. § 3B1.1(c), it increased Harness' offense level two levels because he was "an organizer, leader, manager, or supervisor." While Harness managed assets, he did not supervise "another participant," as required by the guidelines. Harness' victory, however, may be short lived as the Court invited the government to, at the resentencing, introduce additional evidence, and suggested a discretionary upward departure

U.S. v. ZAPATA, No. 98-8609, 1999 WL 493447 (July 13, 1999)

! Search and Seizure - Consent; Scope of consent to search. Following a traffic accident officers secured the consent of the defendants to search their rental van, and discovered a quantity of cocaine. Neither the officer's failure to advise the defendants of their right to refuse the officer's request to search, nor the defendants' limited understanding of English overcame the government's showing of voluntariness. In analyzing the issue of the language barrier, courts look to the defendant's ability to interact with the officers. Court held the officers did not exceed the scope of the consent to search by prying back an interior door panel of the van. Consideration is given to the nature of the object (drugs) for which the officer says he is looking, and the test is what an officer could reasonably interpret the consent to encompass.

U.S. v. DEMPSEY, No. 98-5459, 1999 WL 496247 (July 14, 1999)

! Supervised Release - Probation officer lacked authority to impose occupational restriction. While Dempsey was serving his conditional release, his probation officer imposed upon him an additional condition which prohibited him from engaging in the rare coin business. Relying upon 18 U.S.C. § 3583(d), which, while authorizing the court to impose occupational restrictions, says nothing about

probation officers, the Court held that the District Court erred when it refused to grant Dempsey's motion to set aside the restriction.

U.S. v. SAWYER, No. 97-6849, 1999 WL 496245 (July 14, 1999)

! Sentencing Guidelines - "Reckless Endangerment During Flight" requires law enforcement officer to be a target; extreme psychological injury. Pursuant to U.S.S.G. § 3C1.2, the district court increased the offense level because, after robbing the bank, Sawyer fired at his pursuers. Noting that the guidelines require that a law enforcement officer be among those fired upon, and that not even a "meter reader" was among those that pursued Sawyer, the Court, remanded the case for resentencing. In doing so, though, the Court instructed the district court to consider Sawyer's conduct as grounds for a possible discretionary upward departure from the guidelines. Pointing to the testimony of one of the bank employees that she did not feel safe at work, was still especially cautious entering and leaving the bank, and had restricted her daily activities some two and a half years after the robbery, the Court found the District Court did not abuse its discretion in departing upward two levels for extreme psychological injury, U.S.S.G. § 5K2.3.

U.S. v. COOK, No. 98-2581, 1999 WL 509836 (July 20, 1999)

Sentencing Guidelines - "Reckless Endangerment During Flight" requires direct involvement of the defendant. In a case from our District, where the defendants were passengers of a car which, following a robbery, was involved in a high speed police pursuit, the trial court erroneously increased the offense level under the theory of reckless endangerment. Application Note Five under U.S.S.G. 3C1.2 provides that a defendant is responsible only for his conduct or conduct which he aided and abetted

U.S. v. GARCIA, No. 98-4860, 1999 WL 528216 (July 22, 1999)

! Coram Nobis. Because Garcia was still in custody, the Court denied his coram nobis petition. Because Garcia had previously sought relief pursuant to 28 USC § 2255, and failed, pursuant to the Antiterrorism and Effective Death Penalty Act, to request leave of court to file a successive 2255 motion, the court declined to treat the petition as one, and denied Garcia

all relief.

U.S. V. PEDRICK, No. 98-8870, 1999 WL 528215 (July 22, 1999)

! Severance - District Court properly granted a new trial when defendant suffered compelling prejudice because of the quantity and nature of the evidence against the co-defendant. Pedrick, a therapist, was convicted along with her employer, who was a psychiatrist and owner of the practice, of some 90 counts of medicaid fraud, wire fraud, and mail fraud. Because the case against the psychiatrist was so strong, and the case against Pedrick relatively weak, the District Court did not abuse its discretion in granting Pedrick a new trial when it found Pedrick suffered compelling "spillover" prejudice as a result of being tried with the psychiatrist.

MANSO V. FEDERAL DETENTION CENTER, MIAMI, No. 97-5570, 1999 WL 551159 (July 29, 1999)

! Special parole can't be reimposed following revocation. Although, special parole, a sentencing option available to federal judges into the late 1980s, cannot be reimposed following a revocation of parole, the Parole Commission is authorized to release an individual on regular parole following the revocation of special parole. While here, the Parole Commission erroneously awarded Manso special parole, the Court concluded Manso suffered no prejudice, and denied his habeas petition. Had the Parole Commission awarded him regular parole he would not have been entitled to an accelerated or early release, so the Parole Commission would still have had jurisdiction over Manso, and could have revoked the regular parole for the same reasons it relied upon to revoke the special parole.

U.S. V. REGISTER, No. 96-2599, 1999 WL 551160 (July 29, 1999)

! Speedy trial; Disqualification of counsel; Notices of Lis Pendens; Juror Misconduct. Although conceding that 38 months "is an extraordinary period of time to force a defendant to wait for trial, the court found the delay was caused in part by the actions of the defendants and the complexity of the case, and held that there had not been a violation of the defendant's constitutional right to a speedy trial. The court held too that even if the defendant had a claim under the speedy trial statute, 18 USC § 3162(a)(2),

the seventy day rule, he waived that claim by failing to move for a dismissal of the indictment. The Court upheld the district court's decision to, over the objection of the defendant, disqualify defense counsel. In doing so the Court rejected the defendant's claims that the law requires direct evidence of counsel's conflict of interest, and that the government manufactured the conflict for the purpose of disqualifying counsel. In reaching its conclusions the court acknowledged that the government's actions raised questions about its motivation, but held that evidence of defense counsel's criminal conduct with the defendant justified the decision of the district court. Recognizing that the Eleventh Circuit is the only circuit that has held that there is no need for a pre-trial hearing when assets are seized prior to the trial, and stating that the Court might re-examine its position in the appropriate case, the Court, nevertheless, held that the filing of a lis pendens pursuant to Florida law did not constitute a "seizure," and, therefore, did not implicate the Due Process Clause. Because the district could have reasonably concluded that one of the jurors had an improper communication with her husband about the case, and had also improperly done her own legal research, the district court did not abuse its discretion in dismissing the juror during deliberations.

[NOTE: These summaries are, for the most part, edited versions of those prepared by the Federal Public Defender's Office for the Southern District of Florida.]

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