

FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF FLORIDA
A NEWSLETTER FOR PANEL ATTORNEYS

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PRETRIAL DETENTION RATES HAVE INCREASED

Between June 1995 and December 2000, the percentage of federal court defendants who were detained until their case was resolved increased more than 10 percent, from 41.4 percent to 51.8 percent. Over the same time period, the failure-to-appear rate stayed fairly constant: 2.7 percent in June 1995; 2.2 percent in June 2000.

Costs have increased as well. In 1989, the costs associated with pretrial detention were \$38.9 million. In fiscal year 2000, the costs had increased more than tenfold to \$426.8 million.



If immigration cases are excluded, the national average as of June 2001 stood at 44.9%. There is, however, a considerable difference from one district to the next.

The lowest percentage is in the middle district

of Georgia - 17.2 percent. The highest percentage is in the middle district of North Carolina, where 67.1 percent of defendants are detained until their case is resolved. Here in the Northern District of Florida the percentage is 50.3 percent. It is 47.3 percent in the Middle District of Florida, and 56.7 percent in the Southern District of Florida.

Within the Northern District, there were differences as well. Using slightly different figures, those detained at the initial appearance, and a time period between November 1, 1999, and October 31, 2000, 42 percent of the defendants in Gainesville were detained, 46 percent in Tallahassee, 55 percent in Panama City, and 61 percent in Pensacola.

In response to the increasing number of detentions and associated increase in costs, the Office of Probation and Pretrial Services, a section within the Administrative Office of the Courts, initiated in fiscal year 2000 a program designed to reduce the detention rate. Aptly named the Pretrial Services Detention Reduction Project, it is headed by Rene Green. It lists as its objectives: a reduction in the percentage of those detained through resolution of the case; continued low failure-

to-appear rates; continued low re-arrest rates; an increase in the use of community alternative programs and resources; an increase in the use of electronic monitoring as an alternative to detention; increased awareness throughout the judiciary of pretrial release and detention outcomes; and the creation of incentives for pretrial services rehabilitation. Money has been made available to pretrial services around the country in support of the Projects' goals.

In North Florida, as in most places throughout the country, there are alternatives to pretrial detention short of outright release. Home detention, often coupled with electronic monitoring, is occasionally used. One little used alternative is placement in a halfway house. Halfway houses are privately run and have a contract with the Bureau of Prisons. While there is not one in Panama City, there is one in both Pensacola and Tallahassee. There is one in nearby Ocala that is available to defendants in Gainesville. Outpatient treatment for mental health problems and substance abuse is also an option that might make the difference between detention and release.

PAY INCREASE!!

Your hourly rate is going to increase. As of, probably, May 2002, the rate for both in- and out-of-court work by Criminal Justice Act panel members will increase to \$90 per hour.

OUT-OF-STATE TRAINING OPPORTUNITIES

The Administrative Office of the Courts has announced the scheduling of several seminars designed for panel members during the coming year. Included at the end of this newsletter is a flyer describing the programs

and an application form.

MONTHLY BROWN BAG TRAINING SEMINAR

In January we will show a two-hour video presentation on the new amendments to the Sentencing Guidelines, a presentation of the Federal Judicial Television network. In February, we will present a two-hour video from the Sentencing Guideline Commission. It is a review of Sentencing Guideline Procedures. Aimed primarily at those new to the Guidelines, it is also an excellent refresher for those more experienced with the Guidelines. As usual, we will present these videos during the lunch hour, and you are invited to bring your own brown bag lunch. The dates will be sent to you in the next couple of weeks.

LITTLE RED BOOK

The Federal Defenders of Eastern Washington and Idaho publish each year "My Little Red Book." It's a handy 60-page booklet that measures 6x4 inches and contains such critical items as the Federal Rules of Evidence, selected Federal Rules of Criminal Procedure, a couple of statutes - pretrial detention and Jencks Act, citations to cases that you might need while standing on your feet in court, the drug quantity table, and the sentencing table from the Sentencing Guidelines. You can order this handy in-court reference guide by sending a \$5 check to: Federal Defenders of Eastern Washington and Idaho, 10 N. Post #700, Spokane, WA 99201.

YOU, TOO, CAN LOCATE YOUR CLIENTS IN THE BUREAU OF PRISONS

The Bureau of Prisons website now has information about the location of federal

prisoners. The website is: <http://bop.gov>. Once open, click on "Inmate Info." From there, select "BOP inmate locator." In conducting the search you can use either the register number or the individual's name.

SOME PROBATION OFFICES ORDERING SEXUAL PREDATOR EVALUATIONS

Although as far as we know the issue has not surfaced here in the Northern District, some probation offices around the country are conducting special testing and even polygraph testing of defendants convicted of pornography charges or other sexual offenses. In at least one district in North Carolina, as well as the Middle District of Florida, the probation offices have announced their intention to conduct, as part of the Presentence Investigation, a psychological sexual predator evaluation. The Federal Defender's Office in the Middle District of Florida has successfully prohibited such testing on the basis of the defendant's Fifth Amendment right to remain silent at sentencing. Should you find one of your clients being asked to submit to either a polygraph test or a sexual predator evaluation, please give us a call at our Tallahassee office, (850) 942-8818. We have copies of the pleadings used by the Middle District and will be happy to share them with you.

VICTORIES

In June, Gwen Spivey of our office won a new sentencing hearing for a state prisoner in the case of Hall v. Moore, 253 F.3d 624 (11th Cir. 2001). Last month Gwen's client, who had been sentenced in 1986 to life without parole for second-degree murder, was sentenced to time served and released.

Last month in a three-week trial, Tallahassee's Bob Harper won an acquittal for

his client, one of the managers of Panama City's Club La Vela. Bob's client was charged along with another manager and the corporation with conspiracy to knowingly and intentionally make the club available for the distribution of controlled substances, as well as the substantive offense.

Gainesville's Lloyd Viperman, representing an individual charged with possession of more than 100 marijuana plants, convinced Judge Mickle to apply the safety valve provision. (18 U.S.C. § 3553(f), USSG § 5C1.2) To do so, Lloyd successfully argued that (1) his client's Colorado conviction for possession of paraphernalia was a de minimis offense that shouldn't be awarded a criminal history point (USSG § 4A1.2(c)); and (2) that despite a post-plea reluctance to talk with law enforcement, the client's immediate post-arrest statement fulfilled the requirement that the individual truthfully provide the government with all information pertinent to the offense. (USSG § 5C1.2(5)). Judge Mickle's conclusion that the safety valve provision applied, allowed him to sentence Lloyd's client to 18 months rather than the five year minimum that, absent the safety valve, would have been required.

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

CASE ASSIGNMENTS

Here's a list showing the number of cases assigned to each of you over the last two years. In the not too distant future the Panel Oversight Committee consisting of Gil

Schaffnit, Thom Cassidy, Ken Riddlehoover, and Randy Murrell will be reviewing panel membership and the distribution of cases. If you have any concerns or suggestions, please contact one of the members of the committee.

Pensacola Panel:

	FY 2000	FY 2001
Rabby, Chris	8	10
Sheehan, Donald	6	3
Jenkins, James	1	6
Ammon, Reed	5	1
Arnold, Glenn	5	6
Ellis, Ed	3	0
Patterson, Chris	0	1
Couch, Clinton	4	5
Ridlehoover, Ken	5	14
Quinnell, Steve	3	3
Sutherland, Steve	9	5
Kypreos, Spiro	9	9
Murphy, George	4	8
McCleary, Barry	3	0
White, David	1	1
Hammons, Joe	1	0
Sanders, Barbara	0	1
Rollo, Mike	3	0
Higgins, Tanya	0	0
Taylor, Clyde	0	0
Seliger, Steven	0	0
Clyatt, Rhonda	0	0
Dubose, John	3	3
Wentz, Aaron	0	0
Pitts, Michael	2	2
Blow, George	0	1
Owens, Kirk	1	3
McGraw, Kelly	1	0
Waters, Donna	0	6
Jackson, Pat	0	3
Brooks, Ken	0	2
McCrackin, Sid	0	5
Cassidy, Tom	0	0
Dingus, John	0	0
Warner, Tim	0	0

Panama City:

	FY 2000	FY 2001
Patterson, Chris	13	6
Murphy, George	2	0

Sanders, Barbara	4	1
Blow, George	1	0
Clyatt, Rhonda	2	1
Higgins, Tonya	2	0
Taylor, Clyde	3	0
Seliger, Steve	1	1
Wentz, Aaron	1	0
Cassidy, Thomas	0	2
Dingus, John	0	1
Warner, Tim	0	1

Tallahassee:

	FY 2000	FY 2001
George Blow	2	1
Richard Smith	1	1
James Banks	1	1
Mary Kane	2	1
Angela Cancio	2	1
William Bubsey	2	1
Paul Villeneuve	2	1
Barbara Sanders	1	1
Greg Cummings	1	1
Fred Conrad	2	2
Bob Senton	1	2
Linda Bailey	0	0
Thomas Cassidy	0	0
Frank Sheffield	0	0
George Drumming	0	0
Steve Andrews	0	0
Chuck McMurry	0	0
Samuel Bunton	0	0
Loren Levy	1	0
Lynn Thompson	1	1
Mark Walker	1	1
Thomas Findley	1	0
Steve Dobson	1	0
Steve Glazer	1	2
Bob Rand	1	1
Gary Printy	1	2
Cliff Davis	1	0
Steve Seliger	1	2
Dennis Boothe	1	2
Mandy Garcia	1	2
John Gray	1	3
Clyde Taylor	1	1
Dean Morphonios	1	0
Richard Greenberg	1	2
Eric Haugdahl	1	1
John Williams	0	0
Bernie Daley	0	1

Ed Stafman	0	0
Tim Jansen	0	0
Robert Boyd	0	0
Matthew Willard	Not on Panel	1
Steve Whittington	Not on Panel	3
Bob Harper	0	1
Jason Savitz	Not on Panel	1

Gainesville:

	FY 2000	FY 2001
Africano, Victor	1	1
Bacharach, Albert	1	0
Bernstein, Steve	2	1
Cushman, Stan	1	0
Dollinger, Jeff	1	1
Edwards, Tom	3	3
Hall, James	0	0
Hallman, David	0	0
Hannan, Brad	2	1
Hatfield, Gene	5	4
Jarvis, Jim	1	0
Johnson, Steve	0	0
McClure, John	0	1
Miller, Shannon	4	0
Peterman, Jody	0	1
Schaffnit, Gil	0	1
Uman, Jon	5	3
Vipperman, Lloyd	3	3
Warren, Robert	3	0

DOWNWARD DEPARTURES

Elscott, Ronald W. Collier, L. Atty: E. Timothy
 Docket: 3:01cr56-LAC
 Charge: Poss FA by convicted felon, & false statement on firearms application
 Range: 51-63 months
 Sentence: 48months BOP
 Date of Imposition of Sentence:
 Grounds: Lesser harm, diminished capacity, physical infirmity.

(Original guideline range was 77-96 months. Ms. Timothy, however, successfully challenged classification of one of the prior convictions as a "crime of violence.")

Please remember to let us know if any of your clients are the beneficiaries of a downward departure. We publish them, here, in hopes of

providing a "roadmap" of sorts to help guide others in securing sentence reductions.

PROBATION TO BEGIN COLLECTING DNA SAMPLES IN CERTAIN CASES

Amendments to 18 U.S.C. § 3563(a), 18 U.S.C. § 3583(d), and 18 U.S.C. § 4209 require that, if a defendant has been convicted of any one of a number of sex offenses or violent offenses, he or she must, as a mandatory condition of probation, supervised release, and parole, "cooperate in the collection of a DNA sample". It applies to those who are being sentenced for one of the qualifying offenses or one who is currently under supervision and has in the past been convicted of a qualifying offenses. Only federal offenses qualify. A probationer who has, in the past been convicted of a state sex offense would not, for example, be required to provide a sample.

Last week the Administrative Office of the Courts directed probation offices to begin collecting, as soon as possible, blood samples in accord with the new legislation. Probation officers, too, in appropriate cases, will be asking the sentencing judge to order the defendant, as a condition of probation or supervised release, to cooperate in providing the sample.

CASES AWAITING SUPREME COURT ACTION

Here is a list of the cases currently awaiting a decision by the United States Supreme Court:

ALABAMA v. SHELTON, No. 00-1214, to be argued Feb. 19, 2002 (whether, in light of "actual imprisonment" standard established in *Argersinger v. Hamlin*, and refined in *Scott v. Illinois*, imposition of suspended or conditional sentence in misdemeanor case

invokes defendant's Sixth Amendment right to counsel) (case below: No. 1990031, 2000 WL 1603806 (Ala. May 19, 2000)).

ASHCROFT v. AMERICAN CIVIL LIBERTIES UNION, No. 00-1293, argued Nov. 28, 2001 (whether court of appeals properly barred enforcement of Child Online Protection Act, 47 U.S.C. § 231, on First Amendment grounds because it relies on community standards to identify material harmful to minors) (case below: 217 F.3d 162 (3d Cir. 2000)).

ASHCROFT v. FREE SPEECH COALITION, No. 00-795, argued Oct. 30, 2001 (whether First Amendment is violated by prohibitions in Child Pornography Prevention Act, 18 U.S.C. §§ 2252A and 2256(8), on visual depictions that appear to be of a minor engaged in sexually explicit conduct) (case below: 198 F.3d 1083 (9th Cir. 1999)).

ATKINS v. VIRGINIA, No. 00-8452, to be argued Feb. 20, 2002 (whether execution of mentally retarded individuals convicted of capital crimes violates Eighth Amendment) (case below: 534 S.E.2d 312 (Va. 2000)).

BELL v. CONE, 01-400, certiorari granted Dec. 10, 2001 ((1) whether appellate court's application of de novo standard of review to capital habeas petitioner's claim of ineffective assistance of counsel conflicts with *Williams v. Taylor*, which sets standard of review under 28 U.S.C. § 2254(d)(1) for granting habeas relief to state prisoners on claims that have been previously adjudicated on merits in state court; and (2) whether federal court of appeals may bypass prejudice prong of *Strickland v. Washington* and presume prejudice under *United States v. Cronic* to find violation of Sixth Amendment

right to counsel) (case below: 243 F.3d 961 (6th Cir. 2001)).

DUSENBERY v. U.S., No. 00-6567, argued Oct. 29, 2001 (whether prisoner must receive "actual notice" regarding forfeiture) (case below: 223 F.3d 422 (6th Cir. 2000)).

HARRIS v. U.S., No. 00-10666, certiorari granted Dec. 10, 2001 (whether fact of "brandishing," as term is used in 18 U.S.C. § 924(c)(1)(A), must be alleged in indictment and proved beyond a reasonable doubt where finding of "brandishing" results in increased mandatory minimum sentence) (case below: 243 F.3d 806 (4th Cir. 2001)).

KANSAS v. CRANE, No. 00-957, argued Oct. 30, 2001 (whether Fourteenth Amendment's Due Process Clause requires state to prove that sexually violent predator "cannot control" his criminal sexual behavior before state can civilly commit him for residential care and treatment) (case below: 7 P.3d 285 (Kan. 2000)).

KELLY v. SOUTH CAROLINA, No. 00-9280, argued Nov. 26, 2001 (whether South Carolina courts' refusal to inform petitioner's sentencing jury that he would never be eligible for parole if sentenced to life imprisonment rather than to death violated *Simmons v. South Carolina*) (case below: 540 S.E.2d 851 (S.C. 2001)).

LEE v. KEMNA, No. 00-6933, argued Oct. 29, 2001 (in case now on habeas review involving trial court's refusal to grant short continuance so that defendant could contact alibi witnesses who unexpectedly disappeared after lunch break during trial, whether denial of continuance constitutes violation of Fifth and Fourteenth Amendments; whether habeas

court should have held hearing to consider testimony of alibi witnesses; whether claim is barred on federal habeas; and whether petitioner has made substantial showing of actual innocence for his alibi witnesses to be explored further to prevent fundamental miscarriage of justice) (case below: 213 F.3d 1037 (8th Cir. 2000)).

McCARVER v. NORTH CAROLINA, No. 00-8727, certiorari granted Mar. 26, 2001 (whether significant objective evidence demonstrates that national standards have evolved such that executing mentally retarded person would violated Eighth Amendment) (case below: 353 N.C. 366 (2001)). Petition dismissed on Sept. 25, 2001, as improvidently granted. But see *Atkins v. Virginia*, *supra*.

McKUNE v. LILE, No. 00-1187, argued Nov. 28, 2001 (whether revocation of correctional institution privileges violates Fifth Amendment's privilege against self-incrimination when prisoner has no liberty interest in lost privileges and such revocation is based upon prisoner's failure to accept responsibility for his crimes as part of sex offender treatment program) (case below: 24 F.3d 1175 (10th Cir. 2000)).

MICKENS v. TAYLOR, No. 00-9285, argued Nov. 5, 2001 (whether defendant must show actual conflict of interest and adverse effect in order to establish Sixth Amendment violation where trial court fails to inquire into potential conflict of interest about which it reasonably should have known) (case below: 240 F.3d 348 (4th Cir. 2001) (en banc)).

NEWLAND v. SAFFOLD, No. 01-301, to be argued Feb. 27, 2002 (whether time during which petitioner failed to properly pursue state collateral remedies falls within meaning of

"pending" set forth in tolling provision in 28 U.S.C. § 2244(d)(2)) (case below: 224 F.3d 1087 (9th Cir. 2000)).

U.S. v. ARVIZU, No. 00-1519, argued Nov. 27, 2001 (whether court of appeals erroneously departed from totality-of-circumstances test governing reasonable-suspicion determinations under Fourth Amendment by holding that seven facts observed by law enforcement officer were entitled to no weight and could not be considered as a matter of law; whether, under totality-of-circumstances test, Border Patrol agent in this case has reasonable suspicion that justified stop of vehicle near Mexican border) (case below: 232 F.3d 1241 (9th Cir. 2000)).

U.S. v. VONN, No. 00-973, argued Nov. 6, 2001 (whether district court's failure to advise counseled defendant at guilty plea hearing of right to assistance of counsel at trial is subject to plain-error review rather than harmless-error review, on appeal in case in which defendant failed to preserve claim of error below; whether, in determining whether defendant's substantial rights were affected by district court's deviation from requirements of Rule 11(c)(3), court of appeals may review only transcripts of guilty plea colloquy, or may also consider other parts of official record) (case below: 224 F. 3d 1152 (9th Cir. 2000)).

STEWART v. SMITH, No. 01-339 (Dec. 12, 2001). Question: procedural issue relating to claims of ineffective assistance of trial and appellate counsel in capital case.

Cert. Denied

OVERTON v. OHIO, 122 S. Ct. 389 (Oct. 15, 2001)

Four justices (Breyer, Stevens, O'Connor, and Souter) dissented from the denial. Question: The validity of an arrest warrant that "was not based on probable cause" but was a form warrant in which the police simply inserted the defendant's name and address.

DAILY CASE SUMMARIES

The summaries that follow are prepared by our lawyers here in the Public Defender's Office. We prepare them daily as the opinions are issued. If you'd like to receive the daily summaries, via email, please call Margaret in our Tallahassee office at (850) 942-8818.

SUPREME COURT CASES

U.S. v. KNIGHTS, 2001 WL 1560882 (Dec. 10, 2001)

Search; warrantless; reasonable suspicion; probation

The unanimous Court held that a probationer whose terms of probation include the right to search him at any time, without or without a warrant or reasonable cause, may be searched where the probation officer had reasonable suspicion, regardless whether the search is for an investigatory rather than probationary purpose. The Court did not decide whether the defendant's acceptance of the search condition constituted consent, because the search was reasonable under the "totality of the circumstances" approach.

ELEVENTH CIRCUIT CASE SUMMARIES

U.S. v. OLIVEROS, 2001 WL 1601860 (Dec. 17, 2001)

Money laundering; jurisdiction; expert witness; exclusion of defense witness

Defendant lawyer was convicted of money laundering when he exchanged alleged "drug money" for a client for clean money from his trust account, charging 10% commission; the money was supplied by the FBI using its bank account. The Court affirmed. First, it rejected the argument that the government failed to prove the interstate commerce nexus necessary under 18 USC 1956(c)(4)(B) because the charges were based on financial transactions between client and attorney, not financial institutions, but the Court concluded this aspect was supplied by the fact that the FBI used a financial institution to withdraw and deposit the checks used by the informant.

Second, it rejected the argument that the defense should have been allowed to present expert testimony from an immigration attorney that the informant had received much more benefit from his cooperation with the FBI than the prosecution witnesses had admitted; rather, the defense should have asked the court to instruct the jury on these questions of law, which it failed to do. Also, because the defense could not prove that the informant or his law enforcement handler knew that he faced more severe immigration consequences than that to which they testified, the Court grounded its ruling on its opinion that the only relevant issue was what they believed. For this same reason, there was no *Giglio* violation because any false statements to the jury were not material.

U.S. v. BLAYLOCK, 2001 WL 1575650 (Dec. 11, 2001)

Methamphetamine; precursor chemicals; drug quantity

The earlier panel decision in this case held that defendants may be sentenced based on 100% theoretical yield despite undisputed evidence that it was not an accurate basis for estimating actual yield. 249 F.3d 1298 (11th

Cir. 2001). Judge Cox dissented, arguing it lightened the government's burden of proof regarding defendants sentenced before 5/1/01, when an amendment to the guidelines regarding precursor chemicals became effective. *See* Amendment 611, pp. 93-113 (2001). The Court then granted rehearing en banc. However, this opinion withdrew that grant and reinstated the panel opinion. Judges Barkett and Cox dissented, noting that every other circuit addressing the question had disagreed with the panel opinion and that the case involved a constitutional error that a guidelines amendment could not cure.

U.S. v. WARD, 2001 WL 1538059 (Dec. 4, 2001)

Motion for new trial; judgment of acquittal

The Court - as a matter of first impression - agreed with the Ninth and Fourth Circuits that a district court has authority on appellate remand to rule on a motion for new trial timely made but not previously addressed. The Court distinguished between a district court's authority to grant motions for JOA and motions for new trial. (If the district court had initially denied the motion for new trial, the defendant would have failed, because a motion for reconsideration or "renewed motion" would then have been untimely.) **(Practice Note: This highlights the importance of (1) making both motions; (2) getting both motions ruled upon, so the appellate court can resolve the case entirely; and (3) urging motions for new trial in appropriate cases due to the lesser burden on the defendant.)**

PRUITT v. U.S., 2001 WL 1528399 (Dec. 3, 2001)

Habeas; amendment; timeliness; relation back

Applying my earlier loss in *Davenport*, 217

F.3d 1341 (holding that amendments to habeas petitions under the AEDPA are timely if they relate back under Fed.R.Civ.P. 15(c)), the Court held that, when a habeas petition is filed prior to the AEDPA, an amendment filed more than a year after AEDPA's effective date is timely only if it "relates back" under Federal Rule of Civil Procedure 15(c).

NAJJAR v. ASHCROFT, 2001 WL 1509683 (Nov. 28, 2001)

Detention; deportation; terrorists

The district court had granted habeas corpus to an alleged member of a terrorist organization, ruling the government could not detain him pending judicial review of the order of deportation on the basis of undisclosed, classified information, and the government appealed. In the interim, however, another panel of the Court affirmed the deportation order on other grounds. On that basis, the Court ruled that the AG now possesses the unquestioned authority to detain Najjar without bond as he executes the deportation, and the instant appeal was moot.

OCHRAN v. U.S., 2001 WL 1509576 (Nov. 28, 2001)

Prosecutor; witness; Federal Tort Claims Act

The Court affirmed the district court's grant of summary judgment to the government. The plaintiff was a witness who sought protection from the prosecutor and sued after being severely injured by the defendant. Because the complaint failed to allege facts which support a violation of a *state law duty* on the part of the prosecutor to take further action to protect the witness, however, the complaint was insufficient.

U.S. v. RENICK, et al., 2001 WL 1471661 (Nov. 20, 2001)

Motion for judgment of acquittal; Fed.R.Crim.P. 29(b); double jeopardy; motion for new trial; timeliness; tolling; Fed.R.Crim.P. 33; notice of appeal; loss calculation

The district court had granted judgments of acquittal after guilty verdicts, but the Court had reversed, and this appeal followed sentencing. The Court rejected the two defense arguments that the district had abused its discretion in delaying its ruling on the motions for judgment of acquittal until after the verdicts and that the rule violated the double jeopardy clause by allowing the court's delay in ruling and thereby allowing an appellate reversal. The Court also disagreed with the government's argument that the total CHAMPUS billings were "loss," affirming the district court's conclusion that there was no actual or intended loss to any entity. However, the Court found an abuse of discretion in the district court's arbitrary assignment of a loss figure with no factual basis either stated or in the record, noting Application Note 8(b) to 2F1.1. (Note the Court "presumed" the government intended to cite the correct statutory basis for jurisdiction in their notice of appeal.)

(Practice Note: Defendants should at least file conditional motions for new trial, regardless of the granting of motions for judgments of acquittal. The Court ruled, on an issue of first impression (in any federal court), that Rule 33's requirement that a motion for new trial be filed within 7 days after the verdict is not tolled by the district court's granting of a motion for judgment of acquittal within those 7 days.)

U.S. v. ARDLEY, 2001 WL 1471574 (Nov. 20, 2001); **U.S. v. GARCIA**, 2001 WL 1471617 (Nov. 20, 2001)

Apprendi; procedural default;

retroactivity; ineffectiveness; Supreme Court remands

Denying rehearing en banc, Judge Carnes (joined by Judges Black, Hull, and Marcus) wrote a concurring opinion defending the plain error standard for *Apprendi* claims, defending the application of a procedural bar to *Apprendi* claims not raised in the initial brief, and noting the "wall of binding precedent" that an attorney's failure to preserve *Apprendi* claims prior to issuance of that decision is not ineffectiveness means that district courts should not even conduct evidentiary hearings on such claims. Finally, the concurrence noted its position was not disobedient to the Supreme Court's remand, noting such "boilerplate orders come out in bushel baskets full" and suggest no disposition by the court of appeals. Briefly stated, the dissent argued that the panel narrowed the retroactivity rule by invoking the procedural rule that the defendant had abandoned the claim by failing to raise it in the initial brief and noted an intra-circuit split on retroactive application of intervening Supreme Court decisions.

GILREATH v. STATE BOARD OF PARDONS, 2001 WL 147657 (Nov. 15, 2001)

Clemency; due process; jurisdiction

Denying a stay of execution, the Court held that federal courts lack jurisdiction to stay executions under 28 USC 1983, that no equal protection violation was involved because clemency board members missed oral presentations, that no federal due process violation occurred based on the member's absence, and that no federal due process violation occurred based on the state attorney general's pending investigation of two clemency board members where the attorney general did not participate in the clemency

process and there was no evidence in the record of his/her position on the application for clemency.

BROWN v. HEAD, 2001 WL 1433409 (Nov. 15, 2001)

Habeas; ineffectiveness; Brady; Giglio; Ford v. Wainwright

Denying relief in this Georgia capital habeas, the Court rejected a claim of ineffectiveness of trial counsel, as well as *Brady* and *Giglio* claims. J. Barkett's concurrence notes the decision does not address whether the defendant could still raise a claim under *Ford v. Wainwright*, 477 U.S. 399 (1986).

U.S. v. COFIELD, 2001 WL 1422144 (Nov. 14, 2001)

Suppression; search; luggage; abandonment; judicial notice; racial profiling

The Court vacated and remanded, on interlocutory appeal, the district court's order (108 F. Supp. 2d 1374, S.D. Fla., Judge Wilkie Ferguson) suppressing evidence from the search of luggage at a train station. First, the judge's substitution of his own credibility determinations for those of the magistrate, without rehearing the witnesses, was error. Second, the Court reversed the finding that the defendant did not abandon his bags (which would have left him with no reasonable expectation of privacy in them). The individual whose property is searched bears the burden of proving a legitimate expectation of privacy, while the government bears the burden of proving abandonment. Ramos, 12 F.3d at 1023. In making this determination, the Court noted that he was not in custody when he abandoned the bags, "nor were there any other conditions that would have led [him] to believe that he was not free to refuse consent." [This distinguishes this case from

the cases involving searches of passengers on buses.] In footnote 4, the Court rejected the district court's reliance on judicial notice of a report suggesting the search may have been based on racial profiling, **noting that the parties had not raised that issue** nor referenced that report to the court. (**Practice Note:** This would be a great issue to raise if/when we get another bus/train/airport search case.)

U.S. v. WEAVER, 2001 WL 1408389 (Nov. 13, 2001)

Plea; voluntariness; withdrawal; waiver of appeal; intent to defraud; conversion; 20 USC 1097(a)

The Court affirmed denial of the defendant's motion to withdraw her guilty plea because, under Fed.R.Crim.P. 32(e), the "close assistance of counsel" was available to the defendant. A school financial officer entered a guilty plea under 20 USC 1097(a) to having failed to repay federal student loan funds for withdrawn students. She then changed lawyers before sentencing and moved to withdraw her plea, claiming she had understood that the offense was a strict liability crime and that her lack of intent was irrelevant. Also, there was no evidence of conversion of the loan proceeds to the defendant's personal use or benefit of another, and conversion is an element of criminal *misapplication* under 20 USC 1097(a). *Kammer*, 1 F.3d 1161. Here, however, the allegation was not misapplication but failure to refund. The Court held that "fails to refund" is an independent ground of criminal liability under 1097(a) and conversion is not an element of that offense. Also, the Court concluded that *Kammer's* conversion holding survived the Supreme Court's intervening decision in *Bates v. United States*. However, *Kammer's* holding that intent to defraud is an

element did not.

U.S. v. CARCIONE, 2001 WL 1408390 (Nov. 13, 2001)

Hobbs Act; robbery; interstate commerce; money laundering; sufficiency of evidence

The Court affirmed the Hobbs Act and money laundering convictions - and life sentence - of a defendant who was hired to rob a rich elderly woman and who killed her in the process. The Court held that the effect on interstate commerce was sufficient, noting the killer's interstate travel to commit the offense, interstate telephone calls, and interstate transportation and sale of stolen jewelry. The Court also rejected the argument that, because the victim was an individual and not a business, Diaz, 248 F.3d 1065, 1085, required proof of one of three elements. (**Practice Note:** Don't open your door for strangers purportedly delivering flowers.)

U.S. v. ABBELL, et al., 2001 WL 1379725 (Nov. 7, 2001)

Appeal; timeliness; money laundering; jury; misconduct; nullification

The defendants, attorneys accused of doing the bidding of the Cali Cartel, had been convicted of RICO and money laundering conspiracies, on which the Court granted a post-trial judgment of acquittal. Also, the district court had dismissed one juror mid-deliberations for not applying the law to the case. Both sides appealed; the Court declined to dismiss the government's appeal, on the basis that 18 USC 3742(b) is not jurisdictional.

First, the Court noted that dismissal of a juror is generally reviewed for abuse of discretion in finding evidence of "just cause" under Fed.R.Crim.P. 23(b). However, acknowledging the risk that a majority of jurors will try to get rid of a juror who

conscientiously disagrees, the Court cautioned district courts to "be careful not to dismiss jurors too lightly. . . . Federal defendants have some right (be it statutory or perhaps constitutional) to a unanimous verdict by, normally, twelve jurors." Thus, the Court concluded that "we must apply a tough legal standard . . . a juror should be excused only when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the evidence." Following the Ninth and Second circuits, the Court concluded that the factual finding whether the juror is purposely not following the law should be reviewed for clear error. Second, the Court concluded that another juror's plan to write a book, where there is no evidence the juror shared outside information with the jury, did not, by itself, constitute the kind of allegation requiring court investigation. Finally, the Court also reversed the judgment of acquittal on the RICO conspiracy charge, finding the attorneys had committed the requisite predicate acts, including obtaining multiple false affidavits and false deposition testimony.

U.S. v. ZLATOGUR, 271 F.3d 1025 (Oct. 31, 2001)

Hearsay; Fed.R.Evid. 804(b)(6); jury instructions on "reckless disregard" and "good faith"; theory of defense instruction; obstruction of justice enhancement; 3C1.1

The Court held that a district court may admit hearsay when it finds by a preponderance that the defendant caused the witness' unavailability. The Court adopted the district court's definition of "reckless disregard," previously approved by the Tenth Circuit, given the absence of an approved definition of that term as used in 8 USC 1324(a)(1)(A)(ii). "Reckless disregard of the fact" was defined as "deliberate indifference to facts which, if considered and weighed in a reasonable

manner, indicate the highest probability” that the fact in question was true. The Court disagreed with the defendant that the district court should have given no definition.

U.S. v. SABRETECH, INC., 271 F.3d 1018 (Oct. 31, 2001)

Indictment; dismissal; restitution

This appeal follows conviction of an aviation repair station and several employees for violations regarding transportation of hazardous materials following the 1996 ValuJet crash in the Everglades. The Court, however, held that the hazardous materials regulations relied upon to support the allegations of reckless violations had not been authorized by the FAA to support the counts, making them a legal nullity; the indictment should have been dismissed by the district court. The Court affirmed the conviction of the company for willfully failing to train its employees in the hazardous materials regulations but found no statutory basis for an award of restitution and remanded for resentencing.

U.S. v. NOVATON, et al., 271 F.3d 968 (Oct. 30, 2001)

Absence from trial; confrontation; due process, Fed.R.Crim.P. 43; record on appeal; evidence of defendants' "code words"; Fed.R.Evid. 701; wiretaps; severance; sufficiency of 924(c) evidence; 851 notice; timeliness

The Court reversed the conviction of one defendant based on his involuntary absence due to health problems from critical portions of the trial, including his defense. The Court found clearly erroneous any finding by the district court that the absence was voluntary and found the district court committed constitutional and statutory errors by denying his right to be present under both the due

process clause, the confrontation clause, and the even stricter Rule 43. Finding the government had not met its burden of proving the error harmless, the Court reversed for new trial.

The Court also remanded another defendant's case for reconstruction of missing exhibits that relate to one of the issues on appeal, since their omission from the record on appeal was through no fault of his; counsel had requested the clerk to send the complete record, but the clerk had returned the necessary exhibits to the Government, where many were lost.

The Court rejected a claim that the wiretap evidence should have been suppressed because there was no probable cause absent material misrepresentations in the affidavit. It rejected a challenge to the sufficiency of the evidence to support a 924(c) conviction of a defendant police officer who argued that possession of his service revolver was merely coincidental. The Court concluded that the Government's service of notice under 21 USC 851 was timely under Fed.R.Civ.P. 5(b) given that it was filed, and a copy mailed to the defense, the day before trial, rejecting the defense argument that Fed.R. Crim.P. 49 controlled.

(**Practice Note:** Although the Court upheld the lay witness testimony of agents interpreting the defendants' code words, noting the jury was instructed they were not experts and the jury should independently determine the statements' meanings, the Court noted that the 2000 Amendments to Rule 701 might require a different result.)

U.S. v. CARPA, et al., 271 F.3d 962 (Oct. 29, 2001)

Juror misconduct; voir dire; juror qualifications; “innominate” jury

In a lengthy 1997 criminal trial, the district

court had empaneled an "innominate" jury (names, addresses, and other identifying information not disclosed) given that the charges were obstruction for having threatened witnesses in other cases. The first alternate juror, who was elevated to the petit jury before deliberations began, had provided an incomplete, and possibly deceptive, answer on voir dire regarding his prior record. This was innocently disclosed post-trial, an investigation was held, and the district court denied the motion for new trial. The juror had also had his 60-day state jail sentence suspended based on his service on the jury in this case.

The Court remanded for an evidentiary hearing. One reason for the remand was the district court's failure to question the juror directly and the involvement of the prosecution in the FBI's interviews of the juror, without the defense being represented. Specific questions on remand were whether the juror was actually qualified to serve under 28 USC 1865(b)(5) and whether his answers on voir dire were deliberately intended to deceive to permit his service on the jury.

U.S. v. FORD, 270 F.3d 1346 (Oct. 25, 2001)
Apprendi; supplemental briefs; preservation; indictment

The defendant had raised, on his direct appeal, drug quantity calculation. On rehearing, he had raised an *Apprendi* issue and requested leave to file a supplemental brief; the Court had denied that request. The Supreme Court then granted, vacated, and remanded in light of *Apprendi*. Following supplemental briefing on remand, the Court reaffirmed the life sentence: (1) He had not properly raised the issue in his direct appeal; and (2) even if the issue had been properly raised, the argument that the indictment failed to confer jurisdiction held no merit under *McCoy*.

U.S. v. CLECKLER, 270 F.3d 1331 (Oct. 24, 2001)

Forfeiture; summary judgment

The Court reversed summary judgment in a forfeiture proceeding because a material issue of fact did exist. The Court first agreed that the government had established probable cause to believe the property was used to facilitate transactions involving controlling substances, because it was undisputed that one drug sale was negotiated on that property and another drug sale was negotiated and consummated there. However, as to the innocent-owner defense raised by claimants in rebuttal under 82 USC 881(a)(7) ("without the knowledge or consent of that owner"), the district court read that language conjunctively, thus requiring that the claimants prove that they neither had knowledge nor gave consent. The Court acknowledged that the law in this circuit is "less than clear" but still gave no definitive statement. It did clarify precedent as supporting "the proposition that a claimant with actual knowledge who seeks the benefit of the innocent-owner defense must prove the absence of consent: all reasonable steps were taken to extricate funds (in section 881(a)(6) cases) . . . or to prevent the illegal use of the property (in section 881(a)(7) cases)."

U.S. v. SANCHEZ, 269 F.3d 1250 (Oct. 17, 2001)

Apprendi; indictment; jurisdiction

The Court, broadly addressing *Apprendi* issues, held that omissions of drug quantity from an indictment does not violate the Grand Jury Clause of the Fifth Amendment and is not jurisdictional error. Rather, it is subject to harmless-and plain-error review. A special concurrence by Tjoflat, joined by Wilson, noted that *Apprendi* simply did not apply because the sentences were below 20 years: "Dicta, especially erroneous dicta, creates a

potential for mischief." Barkett issued an opinion concurring in the result, because the sentences, which followed pleas, were (substantially) less than 20 years, but disagreed that omission of the element of drug quantity from the indictment is not a jurisdictional defect.

EAGLE v. LINAHAN, 268 F.3d 1306 (Oct. 12, 2001)

Ineffectiveness of appellate counsel; Batson; COA/CPC; unclean hands

The Court reversed denial of habeas relief, finding that appellate counsel was ineffective for failing to raise a *Batson* claim. The state trial court had clearly misunderstood *Batson*, as indicated by the prosecutor's statement that it had struck black veniremembers so that the petit jury composition would reflect the racial composition of the venire, and by the court's statement acknowledging that both the prosecutor and the defense had used peremptories on a racial basis. A habeas petitioner need not always present testimonial evidence that counsel's performance was unreasonable but may rely on the "cold record" where it is sufficient, as it was here. It was presumed that appellate counsel had considered and rejected, not overlooked, the *Batson* claim. At the time of Eagle's direct appeal, *Batson* "had been embedded in our constitutional jurisprudence for seven years and . . . applied by the Supreme Court and the courts of this circuit many times." The prohibition on striking jurors based on their race serves not just to protect the defendant but also the juror as well as the integrity of the system. In *David*, 803 F.2d at 1571, the Court held "the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown. . . .

Since the trial judge stated on the record that he believed . . . the prosecution had used peremptory strikes to remove blacks on account of their race, Eagle had established a Batson violation and the trial court should have required the prosecution to produce 'a neutral explanation for challenging black jurors.'" That Eagle had similarly used his peremptories was troubling, but the Government's argument that he had "unclean hands" did not justify its constitutional violation. In sum, because counsel had failed to appeal an issue "that is so obviously valid that any competent lawyer would have raised it, no further evidence is needed to determine whether counsel was ineffective for not having done so." (The Court addressed at length its conflict with *Jackson v. Herring*, 42 F.3d 1350, 1362 (11th Cir. 1995).)

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