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CJA PANEL MEMBERS  
NORTHERN DISTRICT OF FLORIDA

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FEDERAL PUBLIC DEFENDER

# NORTHERN DISTRICT OF FLORIDA

A Newsletter for Panel Attorneys

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## **PAY RAISE**

Many people devoted a great effort and spent a lot of time trying to convince Congress to increase the hourly rate for court appointed lawyers under the Criminal Justice Act. The goal was \$75 dollars an hour for both in court and out of court work. As it turns out, Congress and the President have signed off on a five dollar an hour increase, so that the in court rate will be \$70 an hour, and the out of court rate will be \$60 an hour. It isn't clear exactly when the increase will go into effect. It will be before April 1, 2000. There is a possibility it could be the first of the year.

## **SUBSTANTIAL ASSISTANCE: DOES IT WORK?**

For better or worse the option of providing "substantial assistance" to law enforcement in exchange for a lesser sentence is a common option for many of our clients. How often, though, do those of our clients who cooperate actually receive the requisite 5K1.1 motion from the Government? The answer is probably more often than many of us would have thought.

We looked at the cases filed in the Tallahassee division during fiscal year 1998. Of the 117 defendants prosecuted, 18 were beneficiaries of a 5K1.1 motion. Of the 117 defendants, 26 went to trial, seven cases were violations of probation, and some were still pending or not resolved for various reasons.

Consequently, only 75 or so individuals entered a guilty plea. Thus, nearly one in four, or twenty five percent of those that entered pleas in the Tallahassee Division during fiscal year 1998 obtained a sentence reduction by providing substantial assistance.

Many of the 75 who entered guilty pleas were, of course, not in a position to offer substantial assistance, or chose not to do so. Thus, of those who actively tried to secure the benefit of a sentence reduction, the odds of success were higher. How much higher? It's hard to know precisely. For starters, some of those that went to trial presumably did so only after their efforts at providing assistance were rejected. We looked at the docketing statements in which some entries are labeled "Plea and Cooperation Agreement," and some are only labeled "Plea Agreement." As we didn't examine each plea agreement, though, we don't know how many of the "Plea Agreements" might have included a clause regarding substantial assistance. Then, too, we know there are some who entered a guilty plea without any agreement regarding substantial assistance, but still made an effort to provide it prior to sentencing. We heard back from most of the lawyers who were involved in these cases, but not all. Thus, while it seems logical that those that gave it a try had a success rate of substantially greater than 25%, we can't tell you how much higher.

That is not to say that the lawyers involved necessarily believe their clients were treated fairly. While one lawyer wrote saying "we have had few problems in getting the 5K1.1," another wrote that his outcomes were "quite varied." Of the nineteen or so lawyers who wrote us about their experience, several managed to work the word "screwed" into their description of the outcome. Another wrote that "it appears that the government can find the slightest ground to justify not giving a 5K it will." Several others were clearly disappointed with the government's failure to file the motion. Five complained about one particular assistant U.S. attorney.

The statistics collected by the Guidelines Sentencing Commission also point to the overall success of the substantial assistance option. Of all of those sentenced, nationwide, in Fiscal Year 1998, slightly over 19 percent received a downward departure because they provided substantial assistance. For the Eleventh Circuit the figure was twenty two percent. In the Middle District of Florida the departure rate was 25 percent. It was 34 percent in the Southern District. Using the figures we have from our survey, which because of the data involves some guessing, the departure rate for the Tallahassee Division (again, here we're using the percentage of, neither the cases filed nor of those that entered pleas, but those sentenced) was about 19 percent, which is reasonably close to the departure rate of 23 percent calculated by the Commission for all of the divisions within the Northern District.

#### **PLEASE REMEMBER TO CALL AND TELL US ABOUT DOWNWARD DEPARTURES**

We're keeping track and publishing in the newsletter those downward departures from the sentencing guidelines for cases in the Northern District. The thinking is that we might be able to increase the very low downward departure rate if we have a better idea of what the judges in our District consider important in making that decision. Please just call Randy Murrell, at 850-942-8818, or send an email to us at fdpubdef@polaris.net.

#### **DOWNWARD DEPARTURES**

**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.

**Brown, John** Paul, J. Atty: Robert Warren  
Docket: 1:98cr45-MP  
Charge: Armed Bank Robbery  
Range: 30-60 months  
Sentence: Time served  
Date of Imposition of Sentence: 12/22/98  
Grounds: Single aberrant act.

**Campbell, Edward** Hinkle, J. Atty: William Clark  
Docket: 4:98cr16-RH  
Charge: Possession Firearm by Convicted Felon  
Range: 188-235 months  
Sentence: 180 months  
Date of Imposition of Sentence: 9/2/99  
Grounds: Medical condition of defendant

#### **UNPUBLISHED DECISIONS**

The Federal Public Defender for the Middle District is collecting and compiling the unpublished opinions of the Eleventh Circuit in hopes of making them available for whatever persuasive benefit they might have. If you receive one, please send a copy to Craig Crawford in our Gainesville office, 101 SE 2<sup>nd</sup> Place, Suite 112, Gainesville, FL 32601. Craig will be forwarding to the Middle District those opinions that those of use in the Northern District receive from the Court

#### **LOOKING FOR AN EXPERT?**

We've included on our web page, [www.pcola.gulf.net/~fedpubdef](http://www.pcola.gulf.net/~fedpubdef) a directory of experts jointly published by the Florida Public Defender Association and the Federal Public Defender from the Middle District of Florida.

#### **SUPREME COURT UPDATE**

**FIORE v. WHITE**, 120 S.Ct. 469 (Nov. 30, 1999)  
**! Validity of federal claim may depend on state court interpretation of statute.** Fiore and a co-defendant were convicted in state court of operating a hazardous waste facility without a permit because their operation deviated significantly from the terms of the permit which they possessed. Fiore's conviction was affirmed in state court, but the co-

defendant's was later reversed by the state's highest court based on its "first impression" interpretation of the statutory construction issue. Reviewing on habeas corpus whether affirmance of the defendant's conviction violated due process under the federal constitution on the basis that his conduct did not constitute a crime under the statute as interpreted, the Supreme Court certified to the state supreme court the question whether the statutory interpretation announced in the co-defendant's case was in effect at the time the intermediate state court had affirmed the defendant's conviction or was a change in the state law.

**FLIPPO V. WEST VIRGINIA, 120 S.C.T. 7 (OCT. 18, 1999) (PER CURIAM)**

**! Fourth Amendment: No "Crime Scene" Exception to Warrant Requirement.** The Supreme Court summarily reversed the denial of a motion to suppress evidence seized in a warrantless search of a "homicide crime scene," rejecting the state's argument that the warrant requirement was excused because the police were entitled to make a thorough search of any crime scene and of the objects found there. Following a 911 call, the police arrived at Flippo's cabin and found the body of his wife, with fatal wounds. The police, without a warrant, searched the cabin for 16 hours. The police found a briefcase containing photographs of a man who appeared to be taking off his jeans. At trial, the prosecution introduced the photographs as evidence of Flippo's relationship with the pictured man, and of his motive for killing his wife. The trial court denied a motion to suppress the photographs, reasoning that "anything and everything found within the crime scene area" was fair game for a warrantless search. Reversing, the Supreme Court pointed out that the state court's ruling was in direct conflict with Mincey v. Arizona, 437 U.S. 385 (1978) (police may make warrantless search of crime scene to come in "immediate" aid of other possible victims, but there is no "general" murder scene exception to the warrant requirement). "A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement, ... none of which the trial court invoked here. The trial court's position squarely conflicts with Mincey v. Arizona, ... where we rejected the contention that there is a 'murder scene exception' to the Warrant Clause of the

Fourth Amendment. We noted that police may make warrantless entries onto premises if they reasonably believe a person is in need of immediate aid and may make prompt warrantless searches of a homicide scene for possible other victims or a killer on the premises, 437 U.S. at 392, but we rejected any general 'murder scene exception' as 'inconsistent with the Fourth and Fourteenth Amendments.'"

**ELEVENTH CIRCUIT**  
**CASE SUMMARIES**

**LE v. INS**, No. 98-3609, 1999 WL 1092112 (Dec. 3, 1999)

**! Jurisdiction: Appellate Court barred from review of removal order where alien convicted of aggravated felony.** The Immigration and Nationality Act § 242(a)(2)(C) provides that appellate courts have no jurisdiction to review any final order of removal against an alien convicted of an aggravated felony. Defendant, a Vietnamese citizen, was convicted of DUI with serious bodily injury, and sentenced to 33 months incarceration. INA § 101(a)(43)(F) defines aggravated felony as "a crime of violence . . . for which the term of imprisonment is at least one year." Limiting its *de novo* review to whether the INS interpretation was "reasonable," the court considered that "crime of violence" is defined in 18 U.S.C. § 16 to include an offense that involves physical force against another person, and the particular DUI conviction here includes serious bodily injury as an element. On that basis, the Court expressed no qualms with the INS conclusion that this conviction satisfied the statutory definition, depriving the Court of jurisdiction.

**KING v. MOORE**, No. 98-2928, 1999 WL 1075112 (Nov. 30, 1999)

**! Peremptory challenges of two out of three black jurors proper where supported by nonracial motives; procedural bar to claim of appellate court error.** The Court found procedurally barred the claim that the state court had failed to properly reweigh sentencing factors after striking one aggravator. On claims of racial discrimination in the state's use of its peremptory challenges against two out of three black venire members, the Court found that the state had accepted the first black juror and the record undermined the claim that its strike of a black

minister was racially based where the minister was in the process of establishing a prison ministry and the defendant had listed prison ministers as potential witnesses. As to the second strike, the Court found that the state had mixed motives but that the nonracial motives, including the venire member's equivocation on death-penalty views, independently sufficed.

**U. S. v. SIGMA INTERNAT'L**, No. 97-2618, 1999 WL 1075111 (Nov. 30, 1999)

**! Indictment: prosecutorial misconduct; dismissal only if defendant prejudiced. Sentencing: no error if loss calculation based on intended loss to victims rather than gain to offender.** Defendants were convicted of crimes arising out of a scheme to fraudulently import frozen shrimp. First, the Court found inappropriate the prosecutor's conduct in setting the grand jury's schedule for considering a case and suggesting that the grand jury had a limited amount of time to make a decision, his suggestion of inferences to be drawn from the evidence, and his suggestion of other crimes he thought the defendants had committed, including perjury by one defendant to a prior grand jury. The Court concluded that, "as condemnable as Rubinstein's conduct before the grand jury was," the grand jury here had ultimately made an independent decision to indict. In conclusion, the Court reiterated that the prosecutor's conduct was unacceptable and should be sanctioned, noting in a footnote that "this AUSA has been the subject of a previous prosecutorial misconduct case" in which the conviction had been reversed, but the Court stopped short of imposing any sanction beyond the strong language of its opinion.

As to the defendant's sentencing claim, the Court reversed the district court's ten-level increase based on the inclusion of both the weight and the value of shrimp washed after government supervision began, finding it "simply ridiculous" to punish the defendants based on speculation that they would have continued criminal conduct but for government intervention. However, the court affirmed the district court's method of calculating loss based on the intended harm to victims, not the cost to the defendants.

**U.S. v. ALAS**, No. 99-4184, 1999 WL 1066455 (Nov. 24, 1999)

**! Coconspirators have joint and several liability**

**for restitution.** Conspirator liability for all reasonable consequences of a conspiracy applies to restitution, even for coconspirators acts for which individual conspirator does not participate. Alas was part of a "check washing" conspiracy in which the conspirators stole checks and modified them to be payable to themselves. The Court found that he was joint and severally liable for restitution even for counts of check theft that occurred during a time that he was incarcerated for an unrelated charge. He never withdrew from the conspiracy and so was responsible for all reasonably foreseeable consequences.

**U.S. v. MAJORS**, No. 97-2803, 1999 WL 1049696 (Nov. 19, 1999)

**! In appeal by father and son from convictions of conspiracy to commit mail fraud, conspiracy to commit securities fraud, conspiracy to commit money laundering, mail fraud and money laundering, evidence of son's various activities showed general knowledge of scheme and knowing participation and was sufficient to establish fraud.**

**! Money laundering conviction was supported because evidence of financial transactions showed structuring to conceal nature and source of funds.**

**! FBI financial analyst was properly permitted to testify as expert despite lack of accounting license.**

**! Search warrant was not overbroad because evidence of pervasive fraud justified seizure of all corporate records.** The government alleged that the defendants F.O. Majors and Gareth Majors conspired to defraud investors by representing that they (or their corporations) had patented a special formula for a synthetic fuel additive, that they were building a blending plant for that additive, and that they were marketing a cleaning fluid that kill the HIV virus. The Court found that Gareth Majors' involvement, such as being an officer in two of the four corporations at issue and undertaking various office and corporate duties, demonstrated that he knew the scheme and its purpose and that he voluntarily participated.

The Court next found that the money laundering conviction should stand because the defendants' deposited investors' monies into corporate business accounts, transferred money into another corporate account and then transferred money from that account to their own personal use. The Court felt that the

evidence supported a finding that the defendants structured these transactions with the intent to conceal the true nature and source of the funds.

The Court also found that an FBI agent, who had only an associate's degree in accounting and who was not a CPA, was properly permitted to testify as an expert in financial analysis. Although recognizing that a trial judge is required to perform a gatekeeping function to screen the reliability of all experts, the Court found that the agent's eight years' experience in analyzing cases and testifying at trials demonstrated special knowledge and skill that qualified him as an expert under Federal Rule of Evidence 702.

In the final issue discussed, the Court found that the search warrant and search was supported by probable cause and was not overbroad, because the nature of the fraud involving a corporation permitted a search for general business records.

**U.S. v. PELAEZ**, No. 93-00483, 1999 WL 1043695 (Nov. 18, 1999)

**! Safety valve provision does not apply to sentence imposed prior to effective date.**

Safety valve provision does not apply to sentence imposed prior to effective date of safety valve provision, and for this purpose the date sentence was imposed means when district court entered final judgment, not when the appeal became final.

**U.S. v. GALLO**, No. 98-4381, 1999 WL 1040121 (Nov. 17, 1999)

**! Enhancement under U.S.S.G. § 2D1.1(b)(1) for co-conspirator's possession of firearm requires factual finding of reasonable foreseeability.** The Court held that the reasonable foreseeability requirement of U.S.S.G. § 1B1.3 applied to an enhancement under § 2D1.1(b)(1), which provides for a two level increase in drug conspiracies if a dangerous weapon was possessed. The Court found that its previous three-part test for enhancement based on coconspirator's firearm possession was consistent with the theory of coconspirator liability as set forth in *Pinkerton* and § 1B1.3, even though reasonable foreseeability was not an express part of that test. The Court concluded that to apply a § 2D1.1(b)(1) enhancement for a coconspirator's possession of firearm, the government must prove by a preponderance that 1) the possession of firearm was by a coconspirator; 2) the possession was in

furtherance of the conspiracy; 3) the defendant was a member of the conspiracy at the time of the possession; and 4) the coconspirator's possession was reasonably foreseeable by the defendant.

**FORD v. HALEY**, 195 F.3d 603 (Nov. 8, 1999)

**! Competency of Defendant to Dismiss Habeas Petition; Third-party, "Best Friend" Standing to Pursue Habeas Petition; Article III Case and Controversy.**

Reviewing the district court competency findings for clear error and reviewing *de novo* its application of the *Lonchar v. Zant*, 978 F.2d 637 (11<sup>th</sup> Cir. 1993), test for determination of a defendant's competency to represent himself, the Court affirmed a finding that the death-sentenced petitioner was competent to dismiss his federal habeas (28 U.S.C. § 2254) petition, noting, *inter alia*, the district court's finding that the opinion of one psychiatric expert – that choosing to proceed to be executed, rather than trying to avoid execution, is in itself an irrational choice – was implicitly contrary to precedent allowing a death-sentenced prisoner such latitude. Applying the three-part test of *Lonchar* the Court found that the first prong was met, because Ford suffered from depression and a personality disorder. But the Court found that the mental disorders did not prevent Ford from understanding his legal position, noting that at both evidentiary hearings and in 14 letters to the court he "express[ed] a consistent desire to have proceedings ended and for his execution to proceed." Finally, the Court found that "Ford desires to dismiss his petition because he is weary of languishing in prison [and] believes a new trial will only result at best in a conviction and life in prison ... [and] will be happier 'in his afterlife in Heaven.'" Because it found that Ford was competent, the Court held that Ford's counsel no longer had standing to pursue the remaining claims in Ford's habeas petition.

**U.S. v. CUNNINGHAM**, 194 F.3d 1186 (Nov. 2, 1999)

**! Admission of Evidence: Expert Testimony (Fed. R. Evid. 702), Hearsay (Fed. R. Evid. 801), Relevance of Remedial Changes and Subsequent Conditions (Fed. R. Evid. 402); Hearsay Exculpatory Statement by Defendant – State-of-mind Hearsay Exception Not Applicable to Opinions (Fed. R. Evid. 803(3)).** The Court affirmed

a conviction and sentence for a defendant convicted of conspiring to transport hazardous waste, illegally transporting hazardous waste, and illegally disposing of hazardous waste, in violation of 18 U.S.C. §§ 371 and 2, and 42 U.S.C. §§ 6928(d)(1) & (d)(2). The Court rejected Cunningham's various evidentiary arguments, finding no abuse of discretion. First, the Court concluded that the testimony of a non-expert on the chemical composition of waste, regarding the composition of RD-344 was justifiably excluded; he was not a toxicologist and had no knowledge of the chemical composition at issue. Second, the court did not err in precluding evidence contained in a letter by a firm to a state environmental official that RD-344 was not likely to leach into the ground, because the letter was plainly hearsay for which the defendant suggested no exception. Third, the court did not err in precluding the defendant from presenting evidence regarding the present condition of his property to rebut the prosecution's evidence that his property was "the worst site [regulators] ever saw"; defense counsel failed to proffer a sufficient connection between the evidence of the condition of the defendant's property several years after the criminal incidents and the nature of the hazardous material at the time of the charged offenses. Fourth, the Court held that the trial judge properly applied the Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999), reliability standards to exclude testimony of a witness regarding the harmfulness of RD-344, when the witness only had an undergraduate degree in chemistry, had based his opinion on "an unproven testing method," was unfamiliar with relevant regulations, and disagreed with such regulations. Fifth, the district court did not err in preventing Cunningham from challenging the validity of an EPA testing method solely because a new testing method was later used, because the later method did not demonstrate that the prior test was invalid, only that the environmental laws had become more strict. Finally, the court did not err in excluding an exculpatory post-arrest statement, because a defendant cannot attempt to introduce a hearsay exculpatory statement made at the time of arrest without subjecting himself to cross-examination (citing U.S. v. Willis, 759 F.2d 1486 (11<sup>th</sup> Cir. 1985)).

**! Fed. R. Crim. P. 30 - Failure to Submit Written Request for Instruction; Discretion in Framing Jury Instructions; Propriety of Limited Answer to**

**Jury Question in Supplemental Jury Instructions.**

The Court rejected Cunningham's attacks on supplemental jury instructions, noting that the instructions were "accurately" given, and that the trial court "took pains to ensure that it did not present a misleading picture." The Court also affirmed the district court's failure to give a definitional instruction suggested by the defense where defense counsel failed to submit a written request for a clarifying instruction, as required by Fed. R. Crim. P. 30, and because the subject matter of the defense instruction was substantially covered by other instructions.

**! Environmental Crimes Sentencing Enhancements under U.S.S.G. §§ 2Q1.2(1) and 2Q1.2(b)(3): Non-contaminating Hazardous Waste Discharge and Costly Cleanup.**

The Court rejected Cunningham's challenges to his sentence. Addressing an enhancement under U.S.S.G. § 2Q1.2(b)(1) of the Sentencing Guidelines, the Court acknowledged a circuit split but held that this section did not require proof of actual environmental contamination, but only a continuous discharge, release or emission of a hazardous substance. The Court also held that § 2Q1.2(b)(3) did not require that costs of a cleanup of a "contamination" be incurred, but only that substantial costs be properly incurred in disposing of hazardous material.

**CHANDLER v. U.S.**, 193 F.3d 1297 (Oct. 29, 1999)

**! Ineffective Assistance of Sentencing Counsel in Failing to Try to Prepare for Sentencing and in Presenting Incomplete Picture of Defendant as Person; Counsel's "Strategic" Decision Must Be Reasonable to Be Effective Assistance.**

The Court held that counsel for the defendant in a 1993 federal CCE-murder trial, under 21 U.S.C. § 848(e)(1)(A), provided ineffective assistance in the death penalty phase; the Court granted the defendant's motion to vacate his death sentence under 28 U.S.C. § 2255 and remanded for resentencing. The Court held that counsel failed to conduct a reasonable investigation of available mitigation evidence, including dozens of witnesses who could testify to the defendant's acts of kindness and generosity in the small Alabama community where he lived. The Court rejected the argument that counsel's failure to call mitigation witnesses was an acceptable strategy, because the attorney failed to investigate his options and make a

reasonable choice between them. “Indeed, counsel's testimony at the evidentiary hearing bears out the fact that nobody was interviewed or contacted with respect to the penalty phase of the trial.” The failure to present mitigation evidence satisfied the prejudice prong of the Strickland 2-part inquiry, where the only testimony offered by counsel at sentencing consisted of the defendant’s mother and wife testifying largely about the defendant’s accomplishments as a homebuilder, with no attempt to truly humanize the defendant. The additional available mitigation evidence, from numerous witnesses, was such as to undermine the reliability of the death sentence, particularly where the murder in this case was not heinous and there were few aggravating factors.

**TOMPKINS v. MOORE**, 193 F.3d 1327 (Oct. 29, 1999)

! **Limited Certificate of Probable Cause under Pre-AEDPA Versions of 28 U.S.C. §§ 2253 and 2254.** The Court held that a district court may limit the issues to be reviewed on appeal in a pre-AEDPA habeas case under 28 U.S.C. § 2253 and 2254. Thus, if the district court grants a certificate of probable cause as to a limited number of issues, the appellant must file a motion with the appellate court to expand the issues on appeal; counsel should not merely file a brief containing non-certified issues and then ask the court to review them on the merits.

! **Ineffective Assistance of Capital Sentencing Counsel in Failing to Present Mitigation Evidence; No Ineffective Assistance of Trial Counsel in Failing to Offer Inadmissible Evidence; Giglio Claim Not Proven by Mere Ambiguous Discrepancy in Testimony of Government Witness; Cause and Prejudice for Failure to Make Evidentiary Record in State Habeas Proceedings.** The Court also held that trial counsel for the death-sentenced defendant in this case was not shown to be ineffective for failing to offer inadmissible hearsay evidence that the victim was seen alive after the alleged time of death. Likewise, sentencing counsel was not ineffective for failing to present various mitigating evidence because the new psychological evidence offered by the petitioner was unreliable. The Court also rejected the petitioner’s claim under Giglio v. U.S., 405 U.S. 150 (1972), that the state had presented materially false testimony concerning the dental identification of the victim, where at most a

slight ambiguity in testimony by the state’s witness was established. The Court affirmed the denial of a federal evidentiary hearing in which the petitioner proposed to present additional evidence, where the state court had conducted such an evidentiary hearing and the petitioner failed to show cause and prejudice for failing to present the evidence in the state court hearing.

**PEDDIE v. HOBBS**, No. 98-2994, 1999 WL 976242 (Oct. 27, 1999)

! **28 U.S.C. § 2241 Relief Not Available Merely Because of Time Bar Under 28 U.S.C. § 2255.** The Court held that a federal prisoner whose 28 U.S.C. § 2255 challenge to his sentence was barred by the one-year statute of limitation and the successive petition rules of the AEDPA could not pursue his claim as a habeas action under 28 U.S.C. § 2241. The Court noted that § 2241 can be used only if "the remedy provided under § 2255 is inadequate or ineffective to test the legality" of detention (citing McGhee v. Hanberry, 604 F.2d 9 (5th Cir. 1979)). The Court said that “[N]othing in § 2255 made its remedy inadequate to test the validity of Peddie's sentence; his own failure to properly raise the issue barred such remedy.” The Court left for another day the question of what factors, other than bare procedural default, would affirmatively render a § 2255 petition inadequate or ineffective.

**U.S. v. ASKEW**, 193 F.3d 1181 (Oct. 25, 1999)

! **Sentencing Enhancement under U.S.S.G. § 2K2.1(b)(5) for Illegal Possession of Firearms with Knowledge That They Will Be Used in a Felony; Government’s Preponderance Proof Burden at Sentencing Not Toothless: Mere Possible Guilty Inference of Evidentiary Equipose Insufficient.** Askew was convicted for stealing firearms from a licensed firearm dealer in violation of 18 U.S.C. § 922(u), and his sentence was enhanced four levels pursuant to U.S.S.G. § 2K2.1(b)(5) on the ground that he had reason to believe the firearms, once sold, would be used in another felony. Vacating this portion of the sentence, the Court held that the evidence did not establish that Askew knew how the weapons would be used. At sentencing, the government presented evidence that 54 guns were stolen at one time and that some of the stolen weapons were of a type commonly used in street crimes, but

failed to show the particular defendant's knowledge of how the firearms were to be used. The Court held that when a defendant is not the actual seller and knows nothing about the circumstances surrounding the sales--as is the case with Askew--the government must present evidence that permits the sentencing court to infer that the non-seller knew or had reason to believe the guns would be used to commit another felony. In this case, the inferences pointed equally toward guilt or innocence of the subsequent use of the guns. Since the evidence was in equipoise the enhancement was clearly erroneous.

**HEARN V. BOARD OF PUBLIC EDUCATION, 191 F.3D 1329 (OCT. 6, 1999)**

**! Dog Sniff of Property in Public Place Is Not a Search and May Provide Probable Cause for Search; Automobile Exception to Warrant Requirement.** "A dog sniff of a person's property located in a public place is not a search within the meaning of the Fourth Amendment. . . . the alerting of a drug-sniffing dog to a person's property supplies not only reasonable suspicion, but probable cause to search that property. . . . When the property alerted to is in a vehicle, the Constitution permits a search of the vehicle immediately, without resort to a warrant."

**U.S. v. McCLENDON, 195 F.3d 598 (Oct. 6, 1999)**

**! Multiple Count Grouping under U.S.S.G. § 3D1.2(d): Fraud and Money Laundering Counts Where Offenses "Closely Related."** The Court affirmed the sentencing court's decision not to group fraud and money laundering counts under U.S.S.G. § 3D1.2(d). The defendant (convicted of Medicaid fraud, under 18 U.S.C. § 341, and of conducting transactions of more than \$10,000 in unlawful proceeds, under 18 U.S.C. § 1957) had argued that the offenses were "closely related" as required for grouping of such offenses under § 3D1.2(d). The Court observed that the "law of this circuit ... tells us that fraud and money laundering 'otherwise meet the criteria for grouping' and the remaining question is whether, under the particular facts in this case, are the offenses closely related." The Court characterized the question as whether the money laundering transactions constitute an "integral part of the fraud scheme." Here the laundering activity was not "integral." [NOTE: The Court did not address

grouping of these counts under other subsections of § 3D1.2, because the defendant made no grouping argument other than as to § 3D1.2(d).]

**! Plain Error Review of Forfeited Sentencing Claim; Criminal History Scoring of Bad Check Conviction under U.S.S.G. § 4A1.2(c)(1).** Reviewing the issue solely for manifest injustice (under the plain error standard), the Court held found no plain error in the district court's assigning a criminal history point for the defendant's prior misdemeanor convictions of three counts of bad checks, for which he received concurrent sentences of twelve months' probation.

**HOLLINS v. DEPARTMENT OF CORRECTIONS, 191 F.3d 1324 (Oct. 5, 1999)**

**! Exception to Jurisdictional Bar to Untimely Appeal; Equitable Tolling Based on Counsel's Reasonable Reliance on Electronic Docket and Clerk's Representations.** The Court held that a habeas petitioner could proceed with his appeal of the district court's denial of his petition, despite having filed his notice of appeal more than 14 months after the order had been entered, well after the 30-day deadline of Fed. R. App. P. 4(a)(1)(A), because his counsel did not receive a mailed copy of the final order and reasonably relied on the PACER electronic docket which did not reflect entry of the order. [NOTE: Habeas counsel had retained in his files copies of computer printouts of the PACER docket sheet at various times showing "no entry reflecting the district court's final order."] These "*unique circumstances*" which justified applying the exception to the "*strict jurisdictional requirements for the timely filing of appeals,*" due to "judicial action" which "lulled [petitioner] into inactivity."

**U.S. v. DIAZ, 190 F.3d 1247 (Sept. 30, 1999)**

**! Constructive Amendment - Changing Drug Distribution Offense to Drug Possession with Intent to Distribute.** The Court rejected (2-1) the defendant's argument that his conviction for conspiracy to distribute cocaine was invalid due to a constructive amendment of the indictment because the trial court instructed the jury regarding conspiracy to possess cocaine with intent to distribute, and the court's judgment convicted him of that crime, even though the indictment charged him with conspiracy to distribute cocaine. Reviewing the mistake for plain

error, the Court noted that the verdict form referenced the correct charge and the evidence of guilt was overwhelming. Moreover, the difference between the two crimes was a “non-issue,” because it is “difficult to hypothesize a conspiracy to distribute cocaine where the conspiracy does not include an agreement that at least one of the conspirators will in fact possess the cocaine that is to be distributed.” [NOTE: The dissenting judge argued that the Fifth Amendment prohibits convicting the defendant of an unindicted offense that contains an element not authorized by the grand jury.]

! **Improper Closing Argument.** Exercising plenary review, the Court rejected (2-1) the argument that the prosecutor engaged in improper vouching when he asked a cooperating witness during redirect examination whether “he would lie before the judge in front of whom he plead guilty and who would sentence him at a later date.” The Court found that this question was merely “indiscreet” and held the question was justified by defense counsel’s vigorous cross-examination on the witness’ motives for testifying. The Court also rejected, on factual grounds, the claim that the prosecutor had attributed the entire drug problem in the Northern Florida area to the defendant. The Court further rejected, as a logical inference from the evidence, the claim that the prosecutor’s closing argument, “Where else would \$12,000 come from?”, shifted the burden of proof. [NOTE: The dissenting judge concluded that the prosecutor’s comments invoked the prestige of the court itself as a guarantee of the truthfulness of the witness’s testimony. The dissenter also found error, albeit harmless, in the prosecutor’s reference to the defendant as the Miami source of cocaine in Northern Florida.]

! **Due Process: Notice of Property to Be Forfeited.** Reviewing for plain error, the Court upheld (2-1) a judgment of forfeiture of the defendant’s home, finding that **sufficient notice of forfeiture**, under 21 U.S.C. § 853 and Fed. R. Crim. P. 7(c)(2), **was given**, for purposes of due process, **when the indictment identified the asset** to be forfeited as the house that he had put up as collateral for his pre-trial bond.

! **Non-jury Resolution of Date of Offense for Determination of Statutory Penalties.** The Court rejected the argument that the jury should have decided the date the drug conspiracy concluded,

where there was no evidence the conspiracy terminated before the date mandatory minimums went into effect.

**U.S. v. ALLEN**, 190 F.3d 1208 (Sept. 29, 1999)

! **Offense Elements v. Sentence Enhancers - Intent Element of Possession by an Inmate of a “Prohibited Object”; Doctrine of Constitutional Doubt.** The Court reversed a conviction for possession by an inmate of a “prohibited object” – statutorily defined as an object “intended to be used as a weapon,” because the district court determined pretrial that it “would decide intent at sentencing.” Relying on the “language and structure” of the statute, the Court explained that *intent was an element of the offense to be determined by the jury*, not a sentencing factor. Citing McMillan v. Pennsylvania, 477 U.S. 79, 87-88 (1986), the Court also noted that the range of punishment increased if “intent” to use the object as a weapon was shown and that the burden of proof at sentencing is less. The Court stated that *depriving the jury of authority to resolve this question would raise “serious constitutional questions,”* citing Jones v. U.S., 119 S. Ct. 1215 (1999).

**U.S. v. GARRETT**, 190 F.3D 1220 (Sept. 29, 1999)

! **“Distribution” of Pornography Enhancement for Exchange of Pornography for Sex; Enhancement for Portrayal of Sadistic or Masochistic Acts.** The Court affirmed a 60-month sentence for convictions for sexual exploitation of a minor and transporting child pornography. The Court rejected the argument that a five-level enhancement for “distribution” of pornography under U.S.S.G. § 2G2.2(b)(2) was unjustified because the defendant received no “pecuniary gain” from transmitting the material to a minor (in reality, an undercover agent posing as a minor). The Court reasoned that Garrett transmitted the material for the purpose of enticing the minor “to engage in deviant sexual acts,” which would have been a valuable gain, even though not commercial and even though Garrett never traveled to Florida, where the minor lived. The Court also approved an enhancement for “sadistic or masochistic” conduct, even though U.S.S.G. § 2G2.2(b)(3) does not define these terms, finding that photographs of an adult male having sexual intercourse with children ages 8 to 11, and another depicting a sexual act involving a glass bottle,

satisfied the guideline. This evidence also supported the sentencing court's imposition of a two-level upward departure.

**U.S. V. MARAGH, 189 F.3D 1315 (SEPT. 21, 1999)**

**! Plain Error Restrictions on Appellate Review Not Strictly Applied Where the Issue Affects Judicial Administration and Would Otherwise Escape Review.** The Court denied the government petition for rehearing of the earlier decision (174 F.3d 1202), holding that plain error occurred when a magistrate judge was permitted to conduct voir dire without the defendant's consent on the record. The Court cited Justice Scalia's concurring opinion in Peretz v. U.S., 501 U.S. 923 (1991), which explained that this type of error, by definition, can only arise where the defendant failed to make an objection (since the defendant's consent was not sought by the court, he did not object). The Court noted that *holding that the magistrate's presiding over voir dire could not constitute plain error would make the issue unreviewable.* **THE COURT OBSERVED: "THE SUPREME COURT HAS CONSISTENTLY ENDORSED APPELLATE JURISDICTION TO CONSIDER FUNDAMENTAL JUDICIAL ADMINISTRATION WITHOUT REGARD TO THE CONTEMPORANEOUS OBJECTION RULE."**

**U.S. v. CERCEDA, 188 F.3d 1291 (Sept. 17, 1999)**

**! Recusal - No Basis for Recusal Where Trial Judge Has No Knowledge of Possible Grounds.** The Court rejected as mere "conjecture and speculation" Cerceda's claim that the district judge had advance notice of a grand jury investigation into allegation of receipt of unlawful gratuities, before being initially questioned by the FBI -- the date by which a court later found the judge should have recused himself from cases involving the federal government; the judge consequently could not have erred in failing to recuse himself at the earlier date. The issue of recusal does not arise where the district judge does not know of the grounds for recusal. [NOTE: The Eleventh Circuit ordered briefing of the issue whether Cerceda was entitled to a new trial; the

separate issue of whether Cerceda is entitled to a resentencing due to the failure to recuse is pending on writ of certiorari to the Supreme Court, U.S. v. Cerceda, 68 U.S.L.W. 3080 (U.S. July 15, 1999) (No. 99-125), following the Eleventh Circuit's denial of relief in U.S. v. Cerceda, 172 F.3d 806 (11th Cir. 1999) (en banc).]

**U.S. v. MILLER, 188 F.3d 1312 (Sept. 17, 1999)**

**! Fraud Loss Calculation under U.S.S.G. § 2F1.1 - Reasonable Estimation Based on Available Information.** The Court affirmed a loss calculation for defendants convicted of a fraudulent scheme involving letters of credit, which imputed a loss for sentencing purposes under U.S.S.G. § 2F1.1 in excess of \$39 million. Because documentation regarding the transactions was missing, and because the records did not always indicate whether they involved letters of credit that were part of the fraud, the sentencing court had to estimate a portion of the loss. The district court determined the loss by applying the actual percentage of fraudulent letters of credit to one creditor to the other creditor whose records were unclear. Approving this method of estimating the loss, the Court noted that losses "need not be determined with precision," citing § 2F1.1, comment. (n.9), and found the estimate reasonable in view of the limited information available to the sentencing court.

**U.S. V. RODRIGUEZ-MATOS, 188 F.3D 1300 (SEPT. 17, 1999)**

The Court affirmed sentencing enhancements for firearm possession and reckless endangerment as to a defendant convicted of making and selling counterfeit currency and of assaulting a Secret Service agent with a dangerous weapon (a vehicle). Federal agents arranged a transaction of counterfeit currency with the defendant. When the police closed in, the defendant bounced one policeman off the hood of his car and then led police on a high-speed chase, throwing a firearm out the window.

**! SENTENCE ENHANCEMENT FOR FIREARM POSSESSION. THE COURT AFFIRMED A 2-LEVEL INCREASE IN THE DEFENDANT'S SENTENCE FOR POSSESSION OF A FIREARM "IN CONNECTION WITH" THE OFFENSE, PURSUANT TO U.S.S.G. 2B5.1(B)(3). THE COURT NOTED THAT THE**

DEFENDANT WAS "QUITE AWARE" THAT HE WAS DEALING WITH SOMEONE WHO WAS WILLING TO BREAK THE LAW AND PURCHASE COUNTERFEIT SECURITIES AND INFERRED THAT THE DEFENDANT POSSESSED A GUN "TO PROTECT HIS MERCHANDISE, IF YOU WILL." THE COURT DISTINGUISHED U.S. v. FADIPE, 43 F.3D 993 (5TH CIR. 1995), WHICH DECLINED TO IMPOSE THE ENHANCEMENT, ON THE GROUND THAT THE BANK FRAUD OFFENSE WAS COMPLETED AT THE TIME THE GUN WAS FOUND (IN THE CAR WITH THE BANK CHECKS), AND THE GUN THEREFORE "WAS NOT CONNECTED WITH THAT ACT." HERE, BY CONTRAST, "*IT IS REASONABLE TO ASSUME THAT THE DEFENDANT HAD THE GUN PRESENT TO PREVENT [THE] THEFT [OF HIS COUNTERFEIT CURRENCY].*" UNITED STATES v. YOUNG, 115 F.3D 834 (11TH CIR. 1997), HAD FOUND THAT A PERSON WHO POSSESSED A RIFLE ONE YEAR AFTER HAVING STOLEN IT POSSESSED THAT RIFLE "IN CONNECTION WITH" THE BURGLARY; YOUNG HAD REJECTED THE MORE RESTRICTIVE TEST ADOPTED BY SISTER CIRCUITS AND HELD THAT "THE PHRASE 'IN CONNECTION WITH' SHOULD BE GIVEN AN EXPANSIVE INTERPRETATION."

! Sentence Enhancement for Reckless Endangerment, U.S.S.G. § 3C1.2; Double Counting of Enhancements for Reckless Endangerment and Assaulting Police Officer, U.S.S.G. § 3A1.2(b). The Court held that the *district court did not err in finding reckless endangerment due to the high-speed urban car chase*, citing U.S. v. Gonzalez, 71 F.3d 819, 836-37 (11th Cir. 1996) (operating vehicle in reverse, at a high rate of speed, on a residential street); U.S. v. Jones, 32 F.3d 1512, 1520 (11th Cir. 1994) (high speed chase on highway); U.S. v. Conley, 131 F.3d 1387, 1390 (10th Cir. 1997)

(rejecting contention that the government must prove imminent danger of injury or death to another person before § 3C1.2 applies). THE COURT ALSO UPHELD AN ADDITIONAL 3-LEVEL ENHANCEMENT UNDER 3A1.2(B) FOR ASSAULTING AN OFFICER DURING FLIGHT. THE COURT NOTED THAT 3C1.2, COMMENT. (N.1), PROHIBITS APPLICATION OF A 3C1.1 ENHANCEMENT "SOLELY ON THE BASIS OF THE SAME CONDUCT" COVERED BY ANOTHER ENHANCEMENT. THE COURT DISTINGUISHED A CASE WHICH REJECTED A DOUBLE ENHANCEMENT BASED ON SIMULTANEOUS INJURY TO A POLICE OFFICER AND TO A PASSENGER, BECAUSE BOTH RISKS OF HARM AROSE FROM A "SINGLE, UNINTERRUPTED ACT." HERE, THE COURT NOTED, THE DEFENDANT'S "ASSAULT OF [THE ARRESTING OFFICER] WAS SEPARATED TEMPORALLY AND SPATIALLY FROM HIS SUBSEQUENT, RECKLESS CONDUCT IN LEADING POLICE OFFICERS ON A HIGH SPEED CHASE."

CROSBY V. PAULK, 187 F.3d 1339 (SEPT. 10, 1999)

! Fourth Amendment: Permissibility of Warrantless Administrative Searches of Regulated Business Premises. The Court found "valid [a] statute permitting a warrantless search [of regulated commercial premises (nightclubs)] to investigate for violations of the Georgia laws relating to alcohol sales," specifically, sales to minors and after hours sales. The Court also rejected the bar owners' claim regarding the law enforcement officers' stopping of customers for identification **AND PROOF OF AGE, BECAUSE THE BAR OWNERS OWN RIGHTS WERE NOT AFFECTED BY SUCH SEIZURES.**

U.S. v. MELVIN, 187 F.3d 1316 (Sept. 7, 1999)

! Upward Departure for Multiple, Vulnerable Indirect Victims; Reasonableness of Unguided Departure. The Court affirmed an upward departure that enhanced the defendant's sentence from a range

of 21 to 27 months to a range of 108 to 135 months for credit card fraud and social security fraud. The defendant, a hospital employee, obtained false credit cards through the use of personal information from the records of hospitalized children. In imposing the upward departure, the sentencing judge noted that the hospitalized children were “especially vulnerable . . . captive victims.”

The Court rejected the argument that the upward departure could not be based on the multiple victims because this sentencing factor was already taken into account in the upward adjustment imposed on the defendant for an offense that involved more than one victim -- the financial institutions that were actually defrauded -- under U.S.S.G. § 2F1.1(b)(2). The multiple victim enhancement was based on the direct victims of the fraud (financial institutions), not on the numerous “indirect” victims (the children and their parents). The Court noted that a factor not taken into account by the guidelines could be the basis for a departure if it takes the case out of the “heartland” of guidelines cases. The Court also rejected the argument that the departure based on the vulnerable nature of the victims was unwarranted due to an enhancement under U.S.S.G. § 3A1.1. “Inclusion of a factor in the Guidelines calculation does not proscribe departure based on consideration of the factor,” the Court explained, noting that under Koon v. U.S., 518 U.S. 81 (1996), a sentencing court may depart if a factor is present “to an exceptional degree or in some other way makes the case distinguishable from an ordinary case.” [NOTE: The enhancement based on the collateral consequences of the fraud on erroneous credit reports for the children appears to reflect “consequential damages,” a type of harm that the Guidelines expressly exclude from consideration in fraud cases, see U.S.S.G. § 2F1.1 comment. (n.8(c)), and which a district court therefore cannot use to depart. See Koon, 518 U.S. at 96-97. This is particularly so where the credit reporting firms themselves should not have maintained the erroneous reports.] Finally, the Court rejected the argument that the enhancement was excessive, **NOTING THAT THE SENTENCE IS BELOW THE STATUTORY MAXIMUM AND NOTING THE GROUPING RULES OF THE GUIDELINES DO NOT APPLY WHEN CONSIDERING CUMULATIVE STATUTORY MAXIMUMS. THE COURT OBSERVED THAT NO “MATHEMATICAL FORMULA” IS NEEDED TO JUSTIFY THE SIZE OF A**

## DEPARTURE.

### U.S. V. HUNT, 187 F.3d 1269 (SEPT. 3, 1999)

**! Sufficiency of Evidence of Firearm: Lay Witness Identification of Gun.** The Court rejected the argument that insufficient evidence supported a conviction for using a firearm in the commission of a crime where the evidence consisted only of lay witness testimony that the defendant held a gun during his bank robbery. The government need not prove the existence of the firearm by producing the weapon or by presenting expert testimony; **LAY WITNESS TESTIMONY THAT THE DEFENDANT HAD A GUN IS SUFFICIENT TO CREATE A JURY QUESTION.**

### U.S. V. RUDISILL, 187 F.3D 1260 (SEPT. 3, 1999)

**! Sufficiency of Evidence - Money Laundering Conspiracy and Fraud Conspiracy: Direct Evidence of Defendant’s Knowledge and Jury’s Disbelief of Defendant’s Testimony.** Affirming the defendant’s convictions of conspiracy to violate 18 U.S.C. § 2314 (interstate transportation of securities taken by fraud) and conspiracy to commit money laundering, the Court found sufficient evidence of the defendant’s “knowledge” of the underlying scheme in light of: his presence during some of the telemarketing fraud activity that produced the laundered funds, his participation in the concealment of evidence from the government, and his actions and statements reflecting guilty knowledge during the course of the conspiracy. [NOTE: The Court did not specifically address the interstate transportation element of the fraud conspiracy.]

**! Obstruction of Justice, U.S.S.G. § 3C1.1: Grand Jury Subpoena.** The Court affirmed a sentence enhancement for obstruction of justice pursuant to U.S.S.G. § 3C1.1 as to a defendant who encouraged a subpoenaed grand jury witness to flee. The Court recognized that a defendant’s flight from police in order to avoid arrest could not give rise to an enhancement, citing U.S. v. Alpert, 28 F.3d 1104 (11th Cir. 1994), but distinguished Alpert on the ground that the defendant had not simply encouraged a codefendant’s flight, but sought to ensure noncompliance with a grand jury subpoena which sought fingerprints and handwriting exemplars. See U.S.S.G. § 3C1.1, comment, (n.3(d)). Noting that the defendant’s conduct in obstructing the grand jury subpoena was unlawful, the Court did not reach “the

question of the applicability of the enhancement in a context in which the 'unlawful' aspect is missing."

**! Appealability of Failure to Downward Depart; Sentencing Departure Based on Sentence Disparity.** The Court affirmed the sentencing court's refusal to grant a downward departure based on the disparity in sentences between the two defendants; since the court had recognized its authority to depart on this basis, its refusal was unreviewable on appeal. The Court thus rejected the argument that the Supreme Court's decision in Koon "eroded our prior decision in U.S. v. Chotas, 968 F.2d 1193 (11th Cir. 1992), which held that a district court could not depart simply because of a disparity in sentence between codefendants."

**! U.S.S.G. § 3A1.1: Vulnerable Victim Enhancement for a Fraud Targeting the Elderly.** The Court affirmed a sentence enhancement based on the "unusually vulnerable" nature of the victims, under U.S.S.G. § 3A1.1(b), finding that the defendant knew that his fraudulent telemarketing scheme -- falsely offering elderly people a windfall from the federal government if they paid a transactional fee -- had targeted the elderly.

**ALLISON v. MCGHAN MEDICAL CORPORATION**, 184 F.3d 1300 (11<sup>th</sup> Cir. August 18, 1999)

**Daubert.** In this breast implant products liability case the trial court excluded the plaintiff's three expert witnesses, and granted a summary judgment in favor of the defendant. In upholding the trial court, the Court conducted a thorough analysis of Daubert. Included in the opinion is mention, with approval, of the practice of some trial judges to enlist outside scientific experts to aid the court in its evidentiary decision; recognition that the four factors mentioned in Daubert serve as a "starting point for the trial court's analysis;" a discussion of the difficulties inherent in extrapolating animal studies to human patients; recognition that peer review is only a component of good science; an admonition that while the trial courts are directed to examine methodology and principles, the conclusions of the wider medical establishment still play an important role; an examination of the distinction between evidence that is genuinely scientific and unscientific speculation offered by a genuine scientist; and notice that the views of an expert in the general field at issue, even if

inapplicable to the particular case being heard, may, as in this instance, be considered in judging the value of an expert's testimony.

**U.S. v. HANDS**, No. 97-6718, 1999 WL 993107 (Oct. 27, 1999), modifying, U.S. v. Hands, 184 F.3d 1322 (11th Cir. 1999)

**Evidence of Wife Beating Inadmissible; Improper Argument by the Prosecutor.** Hands appealed his convictions for conspiracy to distribute cocaine, and possessing with intent to distribute cocaine, as well as a forfeiture. The testimony against Hands consisted primarily of others facing criminal charges who had motives to testify falsely. Hands presented the testimony of his wife who, among other things, said that she had never witnessed any drug dealing. When Hands testified the trial court, over the objections of the defense, allowed the prosecutor to question Hands about "beating" his wife, and allowed the prosecutor to introduce into evidence photographs of Hands' wife showing her to be bruised and beaten. The court rejected the government's claims that the evidence was relevant for purposes of discrediting the wife's testimony, and granted Hands a new trial. In doing so the court also criticized the prosecutor's closing argument in which she "used inflammatory language to describe Hands," ("wicked and vicious drug dealer. . . monster. . . cold-hearted, money-driven maniac") made material mis-statements of the facts, and told the jury what an uncalled witness would have said.

**U.S. v. MIGNOTT**, 184 F.3d 1288 (11<sup>th</sup> Cir. August 16, 1999)

**Sentencing Guidelines Departure: Consent to Deportation; District Courts Lack Jurisdiction to Enter Orders of Deportation.** In sentencing Mignott the trial court declined to grant him a downward departure based on his willingness to consent to deportation. Recognizing that there is a conflict between the circuits, the court adopted the position of four other circuits and held that a defendant must proffer a non-frivolous defense to deportation before the court can recognize consent to deportation as a basis for a downward departure. The court also vacated the trial court's deportation order, recognizing that pursuant to 8 USC § 1219(a)(3) the jurisdiction to enter deportation orders has been removed from the district courts, and that a hearing before an immigration judge is the exclusive procedure for deportation.

**U.S. v. BROWN**, 183 F.3d 1306 (11<sup>th</sup> Cir. August 13, 1999)

**Speedy Trial: Determination of Whether Order of Dismissal was With or Without Prejudice; Government Free to File New Offenses Arising Out of Same Underlying Facts.**

Following Brown's arrest for conspiracy to possess with intent to distribute cocaine, the government indicted him for that offense. Then, however, nothing happened, and after a twenty-five month delay, the court granted Brown's motion to dismiss on the basis of the speedy trial act. 18 USC § 3161. Two weeks later the government re-indicted Brown for the same offense and added another ten counts. According to the trial judge that, then, dismissed all eleven counts, the additional ten counts were "simply a more detailed version of crimes described in the initial complaint." When the government appealed, the court upheld the dismissal of the first count but overturned the dismissal of what had been the additional ten counts. The court addressed the fact that the original order of dismissal omitted any mention of whether it was entered with or without prejudice. According to the Court when such an omission occurs the subsequent indictment should be dismissed only if, under the various factors set forth in § 3162(a)(2), the initial indictment should have been dismissed with prejudice. While that was the case, that finding had no impact on the remaining ten counts. The Court held that even after an indictment is dismissed with prejudice, a defendant may be prosecuted for offenses other than those in the dismissed indictment, even if those offenses all arose out of the same underlying facts.

**U.S. v. GONZALEZ**, 183 F.3d 1315 (11<sup>th</sup> Cir. August 13, 1999)

**Bruton Violation: No Sixth Amendment Violation Because Defendant Initiated Conversation; Trial Court Erred in Denying Motion for Judgment of Acquittal; USSG § 2D1.1(b)(1) Enhancements Even with 924(c) Conviction; USSG § 3A1.1 Enhancement for Vulnerable Victim; USSG §3A1.3 Enhancement for Physical Restraint of Victim; Notice of Drug Enhancement Inadequate; Firearm Conviction Admissible Pursuant to 404(b).** Defendants Buitrago, Diaz, Gonzalez, Santiago, and Claudio stood trial on three charges, conspiracy to import cocaine, conspiracy to possess

with intent to distribute cocaine, and using or carrying a firearm in relation to a drug trafficking crime. They appealed their convictions and raised a series of issues. Gonzalez confessed to a home invasion incident that led to the firearms charge. In the confession he implicated two of his co-defendants. Although the government redacted the most obvious references to the co-defendants, the government's efforts were inadequate to protect those co-defendants named in the statement. Relying on Bruton v. United States, 392 U.S. 123 (1968), the Court granted the two co-defendants a new trial. The defendant that confessed, Gonzalez, challenged the admission of his confession. Following his arrest Gonzalez was given a first appearance, and the state public defender was appointed to represent him. Sometime later Gonzalez's wife contacted a DEA agent and told the agent that Gonzalez wanted to speak to him. The Court held the confession was properly admitted because Gonzalez, through his wife, had initiated the conversation that led to the confession.

The Court held that the trial court should have granted Santiago and Claudio a judgment of acquittal on the conspiracy to distribute charge. Although Santiago testified, there was no corroborative evidence to support a finding of guilt. Likewise, the trial court should have granted Diaz a judgment of acquittal with regard to the firearm charge, as there was no evidence that Diaz aided and abetted the other defendants. At sentencing the judge, pursuant to USSG § 2D1.1(b)(1), enhanced the sentences by two levels for possession of a dangerous weapon during the drug offense. The defendants argued that the enhancement was inappropriate because they had been convicted of the substantive firearm charge, 18 USC § 924(c). The Court, however, rejected their argument because there were multiple guns and multiple participants. The theory apparently was that, although one firearm possessed by a single defendant would not justify a 924(c) conviction and a guideline enhancement, in cases where there are multiple firearms and multiple participants one firearm could justify the enhancement while another firearm would justify the conviction for 924(c).

In the home invasion incident the intended victim, unbeknownst to the defendants, lived with her seventy-two year old aunt and her eleven year old son. Buitrago and Gonzalez challenged the USSG § 3A1.1 enhancement for vulnerable victims arguing that it was inapplicable because the aunt and the son were

not “targeted,” as required by existing case law. The Court rejected the claim, though, finding that while the defendants may not have initially intended to threaten all those present in the house, they made the decision to do so once the crime was underway. The court also rejected Buitrago’s and Gonzalez’s challenge to an enhancement pursuant to USSG § 3A1.3 for the physical restraint of the victims. The Court did so holding that the act of holding the victims at gun point during the home invasion qualified as “restraint.”

Diaz received a harsher sentence because of his prior drug convictions pursuant to the statutory enhancement provisions of 21 USC § 841. He, however, successfully challenged the enhancement because the government’s notice required by 21 USC § 851 failed to list Diaz’s prior drug convictions. The Court rejected the government’s argument that a supplemental discovery response that listed the convictions remedied the omission. Finally, the Court rejected Gonzalez’s challenge to the introduction into evidence of his 1982 conviction in the State of New York for possession of a weapon. The court held that under Fed.R.Evid. 404(b) that even though the conviction had occurred many years earlier, it was relevant to the issue of whether Gonzalez possessed a gun during the home invasion incident.

**U.S. v. WILSON**, 183 F.3d 1291 (11<sup>th</sup> Cir. August 12, 1999)

**Court’s Ability to Divine Jury’s Reasoning; Sufficiency of the Evidence to Establish Intent to Distribute and Knowledge of Presence of Cocaine; Quantum of Proof Necessary to Establish Prior Conviction for Sentencing Purposes.** Wilson and Herndon were convicted of conspiracy to possess with intent to distribute crack cocaine, two counts of possession with intent to distribute crack cocaine, and using or carrying a firearm in relation to a drug trafficking crime. At the time 18 USC § 924(c)(1) authorized a conviction for the firearm offense if it was “used” or “carried.” After their trial, but before their sentencing, the Supreme Court in Bailey v. U.S., 516 US 137 (1995) narrowed the meaning of the word “use” by requiring “active employment” of the firearm. The police had found Wilson and Herndon in a car with cocaine. On the dash of the car, the police found the firearm. The jury instruction given during the trial was the instruction rejected by Bailey.

Nevertheless, because the Court, in its view, was able to “determine with absolute certainty” that the jury based its verdict on the “carry” prong of the jury instruction, rather than the erroneous instruction on “use,” the Court with one dissenting opinion, rejected the claim of the defendants. The court, likewise, rejected Herndon’s claim that the evidence was insufficient to show that he intended to distribute the cocaine. The court found that the presence of seven grams of crack cocaine, with an estimated street value of \$800, along with a razor blade, and testimony about an unrelated controlled buy of \$50 worth of crack cocaine from someone other than Herndon, from which, according to the court, the jury could reasonably have inferred that consumers purchase only \$50 worth, was sufficient to support the conviction.

The court also rejected Herndon’s claim that with regard to the other possession with intent to distribute charge, that he was entitled to a judgment of acquittal because the government had failed to prove Herndon knew the cocaine was in the car in which Herndon was a passenger. The court found that the presence of the cocaine in “plain view” between the passenger’s seat and the door, in addition to evidence linking Herndon to an incident where he had possessed crack cocaine with intent to distribute some nine months earlier, and evidence that “linked” Herndon to a crack house a short distance from where the car stopped, was sufficient to prove knowledge. Finally, Herndon objected to a claim in the PSI that he had a particular prior conviction. Although Herndon objected at sentencing, the court held that the testimony of the probation officer who was present at sentencing, but who had not prepared the PSI, about the notes of the probation officer who had prepared the PSI, in conjunction with the PSI itself, was sufficient to establish the conviction.

**U.S. v. YOST**, 185 F.3d 1178 (11<sup>th</sup> Cir. August 11, 1999)

**Fed.R.Crim.P. 35(c) - Court’s Authority to Correct Sentencing Error.** Yost entered a plea and was sentenced. Within the seven days provided for by Rule 35(c) the district judge discovered an error and resentenced Mr. Yost. At the time of the resentencing the judge, contrary to the decision he made at the first sentencing, concluded that the defendant had engaged in a conspiracy to commit bank fraud. That offense,

because it produced the harshest outcome, was the one used to calculate the guideline sentence at the second sentencing. On appeal Yost argued that the sentencing judge was not free to reconsider his ruling about the charge of conspiracy to commit bank fraud. The Eleventh Circuit rejected Yost's claim holding that because there had been "clear error," in the initial sentencing, the initial sentence was "void in its entirety" and that the district court was "free to revisit any rulings it made at the initial sentence."

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