

FEDERAL PUBLIC DEFENDER
227 NORTH BRONOUGH ST., SUITE 4200
TALLAHASSEE, FL 32301

CJA Panel Attorneys
Northern District of Florida

FEDERAL PUBLIC DEFENDER

NORTHERN DISTRICT OF FLORIDA

A Newsletter for Panel Attorneys

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PAY RAISE AND OTHER NEW LEGISLATION

A few weeks ago, on December 21st, President Clinton signed into law a \$5 an hour increase of the hourly rate for Panel Attorneys. The Act increases the out of court rates from \$50 to \$55, and the in court rates from \$70 to \$75. The Act is not yet implemented, and the last word we have is that the Courts' Administrative Office is analyzing existing expenditures to determine when the increase will take effect.

The Federal Courts Improvement Act of 2000, enacted on November 13, 2000, has increased the maximum amount of compensation provided to panel lawyers in any given case, and has allowed for reimbursement for those who successfully defend against a malpractice claim filed by a CJA client.

The maximum compensation for felony cases is up from \$3,500 to \$5,200. In misdemeanors it is up from \$1,500 from \$1,000, and for appeals up from \$2,500 to \$3,700. The "Other" category has been increased from \$750 to \$1,200. Non-capital habeas claims apparently used to fall under the "Other" category, but has been reclassified, so that the maximum is set at \$5,200, with an appeal from a habeas at \$3,700. The new limits are applicable to any existing case, so long as work is done on or after November 13, 2000.

The malpractice provision, an amendment to 18

U.S.C. § 3006A(1), reads: "Attorneys may be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate or the court, and the costs of defending actions alleging malpractice of counsel in furnishing representational services under this section. No reimbursement for expenses in defending malpractice claims shall be made if a judgment of malpractice is rendered . . ."

APPRENDI

The Circuit Courts are still working through the wake of the United State Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Eleventh Circuit has issued a number of decisions, with Tallahassee lawyer Gary Printy's *United States v. Swatzie*, 228 F.3d 1278 (11th Cir. 2000); *United States v. Rogers*, 228 F.3d 1318 (11th Cir. 2000); and, from our office, *United States v. Nealy*, 232 F.3d 825 (11th Cir. 2000) being the primary decisions. *Rogers*, incidentally, is the helpful one.

One issue that is very much alive is the application of the decision to drug conspiracy cases. Although there don't seem to be any cases that have directly addressed the issue, it's clear to us that defendants in drug conspiracy cases are entitled to have the jury make an individualized determination of the quantity of drugs for which they are responsible. The holding in *Apprendi* doesn't leave much room for any other

conclusion. There remains, though, the question of jury instructions. In at least one case recently tried in Tallahassee the Government was willing to concede that the test was that of foreseeability as generally enunciated in *Pinkerton v. United States*, 328 U.S. 640 (1946). See also, Offense Instruction 11.5 of the Eleventh Circuit's *Pattern Jury Instructions*. If the Government is right, foreseeability would, at least, limit the maximum penalty once sentencing arrived. Come sentencing, the judge should still be able to consider further limiting the quantity on the basis of the "scope of the agreement." See *United States v. Reese*, 67 F.3d 902, 905-908 (11th Cir. (1995); USSG § 1B1.3, comment (n.2).

It seems arguable that the jury's decision should incorporate both the concept of foreseeability and scope of the agreement. If that's the case the hard part may be that of coming up with a comprehensible jury instruction. If you'd like to take a look at one, Randy Murrell has taken a stab at it. Call him in our Tallahassee office at (850) 942-8818.

In at least the few occasions of which we are aware, our North Florida juries hearing drug conspiracy cases have not been asked to make the individualized finding that we think *Apprendi* requires. Instead of asking the jury to find the quantity of drugs for which each conspirator is responsible, the instructions given have asked the jury to determine the quantity of drugs involved in the entire conspiracy. Such an instruction, of course, allows the jury to find the defendant responsible for activities both unforeseeable to him and outside the scope of his agreement. The resulting verdict, then, is one that ignores the holding in *Apprendi* that requires "any fact that increases the penalty for a crime beyond the prescribed statutory maximum . . . [to] be submitted to a jury, and proved beyond a reasonable doubt."

Our office, in the not too distant future, is planning to make lunch time presentations in Pensacola, Panama City, Tallahassee, and Gainesville, on the latest *Apprendi* developments. We hope, in the next few weeks, to have a notice out to you with all of the details.

NEW BOOK

The Federal Judicial Center has published the newest edition of their outline of sentencing guideline cases,

Guideline Sentencing. The 484 page paperback book is surely the fastest and most convenient method of researching guideline issues. It's free too. All you need to do is send a written request for the book to: Federal Judicial Center, Information Services Office Room 6310, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, D.C. 20002-8003. If you have any questions or are interested in a list of other publications you can call the Federal Judicial Center at (202) 502-4153.

NEW WEB PAGE

The Clerk's office for the Northern District of Florida has a new web page at www.flnd.uscourts.gov. It includes the local rules, information about PACER - electronic docket information, and the CJA handout.

CONGRATULATIONS

Please call us, send us a note, or e-mail us 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.

Here's some recent victories that we know about:

Assistant Federal Public Defender Bill Clark and Tallahassee lawyer Bill Bubsey won, in two stages, acquittals for their respective clients who were charged with possession of counterfeit bank securities, two counts of wire fraud, and conspiracy to commit wire fraud. In the first trial the jury acquitted the defendants of two counts, but could not reach a decision on the remaining counts. When this past December the Government brought the two unresolved counts back before a second jury, the Clark-Bubsey team won acquittals for both of their clients on the remaining counts.

Apalachicola's Barbara Sanders took the same two stage route in winning an acquittal for her client in a Panama City cocaine conspiracy case. The first trial resulted in a hung jury. The week of Thanksgiving, in the second trial, the jury returned the not guilty verdict.

In October, Gwen Spivey from our Tallahassee office

and Quincy lawyer Steve Seliger, representing codefendants, won their appeals of the trial court's denial of their motion to suppress. The Court in *United States v. Drayton and Brown*, 231 F.3d 787 (11th Cir. 2000), found that officers from the Tallahassee Police Department, in boarding a bus at the Greyhound Bus station, coerced Steve and Gwen's clients into consenting to a search. Both clients had been sentenced to lengthy prison sentences. As a result of the appeal, the trial court subsequently vacated the convictions and sentences.

Jo Deyo, from our Tallahassee office, had asked the United States Supreme Court to grant a certiorari petition in the case of *United States v. Wims* on the basis of the *Apprendi* decision. In October the Court granted her request and remanded the case back to the Eleventh Circuit. Tallahassee attorney Bob Senton similarly had a case, *United States v. Brown*, remanded to the Eleventh Circuit based on *Apprendi*.

In December, in a Panama City conspiracy case, in which Randy Murrell's client and others were charged with conspiring to distribute more than 1000 kg of marijuana, the jury returned a verdict finding Randy's client guilty of less than 100 kg of marijuana.

DOWNWARD DEPARTURES

Spence, Harvey Vinson, R. Atty: Thomas Keith
 Docket: 3:00cr35-RV
 Charge: Preparation of False Tax Returns (4 cts)
 Range: 24 - 30 months
 Sentence: 6 months (all counts concurrent)
 Date of Imposition of Sentence: 11/21/00
 Grounds: § 5H1.4 - Extraordinary physical impairment.

Williams, Arthur J. Hinkle, R. Atty: Bill Clark
 Docket: 4:00cr36-RH
 Charge: Making false statements on Firearm application
 (2 counts)
 Range: 15 - 21 months
 Sentence: 5 years probation (both counts concurrent)
 Date of Imposition of Sentence: 12/1/00
 Grounds: § 5K2.13 - Diminished capacity

Steele, William O. Vinson, R. Atty: Thomas Keith
 Docket: 3:94cr3055-RV
 Charge: Distribution of prescription drugs (4 cts)
 Range: 151 - 188 months
 Sentence: 6 months (each count concurrent)
 Date of Imposition of Sentence: 12/20/00

Grounds: § 5H1.1 - age, § 5H1.4 - physical condition
 and § 5K2.13 - diminished capacity

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.

SUPREME COURT UPDATE

CERT's GRANTED

The following cases were remanded back to the respective circuits courts for reconsideration in light of *Apprendi*.

Robinson v. United States, Case No. 00-287 (Nov. 27, 2000) (7th Circuit)

Twitty v. United States, Case No. 00-5760 (Nov. 27, 2000) (4th Circuit)

Potts v. United States, Case No. 00-5930 (Nov. 27, 2000) (11th Circuit)

Meais v. United States, Case No. 00-5942 (Nov. 27, 2000) (4th Circuit)

Humphrey v. United States, Case No. 00-5644 (Nov. 13, 2000) (6th Circuit)

Knight v. United States, Case No. 00-5719 (Nov. 13, 2000) (3rd Circuit)

Whitt v. United States, Case No. 00-183 (Nov. 6, 2000) (7th Circuit)

Hughes v. United States, Case No. 00-192 (Nov. 6, 2000) (7th Circuit)

Curry v. United States, Case No. 99-10265 (Oct. 30, 2000) (11th Circuit)

Jackson v. United States, Case No. 99-10055 (Oct. 30, 2000) (7th Circuit)

Hester v. United States, Case No. 99-10024 (Oct. 16, 2000) (11th Circuit)

Smith v. United States, Case No. 00-5198 (Oct. 16, 2000) (7th Circuit)

Brown v. United States, Case No. 99-9107 (Oct. 10, 2000) (11th Circuit)

Clinton v. United States, Case No. 00-5123 (Oct. 10, 2000) (5th Circuit)

DECISIONS

INDIANAPOLIS v. EDMOND, 121 S.Ct. 447 (Nov. 28, 2000)

Vehicle Checkpoints; Fourth Amendment

The Supreme Court struck down random roadblocks intended for drug searches. The Court reasoned that law enforcement in and of itself is not a good enough reason to stop innocent motorists: "Because the checkpoint program's primary purpose is indistinguishable from the general interest in crime control, the checkpoints contravened the Fourth Amendment" The Court stressed that the ruling did not affect other police roadblocks such as border checkpoints and drunk driving checkpoints. As expected, Chief Justice Rehnquist and Justices Scalia and Thomas dissented.

ARTUZ v. BENNETT, 121 S.Ct. 361 (Nov. 7, 2000)

Habeas -- Tolling

Application for state post-conviction relief is "properly filed," thus triggering tolling provision in 28 U.S.C. § 2244(d)(2), as long as its delivery to and acceptance by appropriate court officer comply with applicable laws and rules governing filings, regardless of whether claims in application are subject to mandatory procedural bar.

CLEVELAND v. U.S., 121 S.Ct. 365 (Nov. 7, 2000)

Mail Fraud

Unissued state license is not "property" within the meaning of mail fraud statute, 18 U.S.C. § 1341, undermining petitioner's conviction for making false representations in applications for licenses to operate video poker machines.

ELEVENTH CIRCUIT **CASE SUMMARIES**

BOZ v. U.S., 228 F.3d 1290 (Sept. 29, 2000)

Habeas Jurisdiction over Detention of Alien

The 11th held that the district court did have jurisdiction under 28 U.S.C. § 2241 to consider Boz's habeas petition. Immigration law, in particular 8 U.S.C. § 1252, did not limit review judicial review in this case because Boz was not attacking his removal but rather his indefinite, continued incarceration in the

U.S. pending that removal.

U.S. v. ROGERS, 228 F.3d 1318 (Sept. 29, 2000)
Apprendi Applies to Drug Cases -- 851 Enhancement Not Applied

The 11th here held that *Apprendi* does apply to drug cases, overruling *Hester* to the extent it is inconsistent with *Hester*. Since the drug quantity was not alleged in the indictment or proven to the jury, the verdict only convicted him of the subsection of § 841 which punishes for an undetermined amount of cocaine. Here the issue was preserved so it was properly before the court and plain error review did not apply. The 11th did not mention harmless error. Although the government had filed a notice of enhancement under § 851, the 11th found that Rogers had apparently not been sentenced under § 851 and the government had abandoned that request. Rogers was sentenced as a career offender but because *Apprendi* impacted the maximum sentence, the career offender guidelines changed, so the case was remanded for resentencing.

U.S. v. LINVILLE, 228 F.3d 1330 (Sept. 29, 2000)
Abuse-of-Trust Enhancement

Linville was convicted on one count of conspiracy to commit bank fraud and four counts of bank fraud. Linville presented two main issues on appeal: sufficiency of the evidence and a two-level enhancement for abuse of trust enhancement. The 11th dismissed the sufficiency of the evidence issue without discussion. On the sentencing issue, Linville argued that the two-level enhancement did not apply unless the victim bank conferred the position of trust, as similarly held in a medicare fraud case, *United States v. Mills*, 138 F.3d 928, 941 (11th Cir. 1998). Limiting *Mills* to Medicare fraud cases, the Linville panel concluded that the bank fraud statute contemplated a larger class of victims than the Medicare fraud statute. Thus, more than one person or entity could confer the position of trust.

U.S. v. SIMPSON, 228 F.3d 1294 (Sept. 29, 2000)

Sufficiency of the Evidence; Constructive amendment to indictment; Drug quantity; Government cross-appeal on downward departure
Simpson appeals his 352 month sentence on conspiracy and distribution of cocaine base, and two counts of carrying a firearm during a drug trafficking crime. On his sufficiency claim, the 11th concluded

that the factfinder's credibility choices should not ordinarily be tampered with on appeal. The government charged carrying **and** using a firearm, and the district court, over defense objection, instructed jury on carrying **or** using firearm. The 11th found no constructive amendment because if an indictment charges in the conjunctive several means of violating a statute, a conviction may be obtained on proof of only one of the means, and thus the jury instruction may properly be framed in the disjunctive.

As to the drug quantity, the 11th found plain error. The district court improperly attributed 600 grams of cocaine that Simpson purchased from an unrelated conspirator several years before the charged start of the conspiracy. The district court also improperly used vague and uncertain testimony from one of the participants in the conspiracy in calculating drug quantity.

The district court departed below the mandatory minimum on the firearms counts on the grounds that the sentence was disproportionate to the gravity of Simpson's offenses. The 11th stated that only two circumstances exist for a court to depart downward from a statutorily authorized mandatory minimum sentence: a government-filed substantial assistance motion and the safety valve. Neither occurred in this case, and thus, the 11th held that the district court was bound to impose at least 240 months for the drug convictions, plus 300 months for the two firearms convictions for a total mandatory minimum sentence of 540 months.

U.S. v. BUTER, 229 F.3d 1077 (Oct. 6, 2000)

Prior convictions for Guidelines

The 11th held that Buter's two prior state court sentences of 27 months, imposed to run concurrently with a federal sentence that he had already completed, did not constitute "imprisonment" under the guidelines. The 11th remanded for resentencing, finding that he should have only been assessed one criminal history point for each of those sentences, under U.S.S.G. 4A1.1(c), rather than three points each under 4A1.1(a).

OKONGWU v. RENO, 229 F.3d 1327 (Oct. 12, 2000)

Habeas–Deportation

The 11th reversed the district court's dismissal of a petition for writ of habeas corpus under 28 U.S.C. § 2241 and complaint for declaratory and injunctive

relief. Okongwu, a Nigerian who obtained permanent resident status here in 1985, was seized in the Middle District of Georgia for deportation based upon drug and other convictions in the Northern District of Georgia. Okongwu conceded his deportability but applied for relief under 8 U.S.C. § 1182(c). Okongwu was denied relief in immigration courts and eventually filed suit in the Southern District of Georgia. The district court dismissed the petition on the ground that the IIRIRA (Illegal Immigration Reform and Immigrant Responsibility Act) had deprived it of subject matter jurisdiction and then denied a COA.

The 11th granted preliminary injunctive relief to stay deportation. First, the 11th concluded that Okongwu's failure to file a direct appeal from the BIA's decision did not deprive the district court of subject matter jurisdiction. Second, the 11th remanded for the district court to determine whether it had venue and personal jurisdiction over Okongwu's custodian, noting that an INS detainee may have more than one custodian.

WILLIAMS v. PRYOR, 229 F.3d 1331 (Oct. 12, 2000)

Constitutional Challenge to Statute

An Alabama statute criminalized the sale of certain "sexual devices," and vendors and users filed a constitutional challenge. The district court held the statute unconstitutional because it lacked a rational basis, primarily in its failure to distinguish between medical and therapeutic uses of such devices and other sexual products, the distribution of which is not prohibited.

The 11th disagreed and held that the statute had a rational basis in the "State's interest in public morality," a legitimate State interest. As to the constitutionality issues, the Court remanded for the district court to reconsider the as-applied challenges by the "user" plaintiffs, specifically whether or to what extent the statute infringes a fundamental right to sexual privacy of the plaintiffs, both married and unmarried women.

U.S. v. RICHARDSON, 230 F.3d 1297 (Oct. 17, 2000)

Armed Career Criminal—Whether Priors were Committed on Different Occasions

Richardson pled guilty to felon in possession (18 U.S.C. § 922(g)). The district court concluded that Richardson qualified as armed career criminal (18

U.S.C. § 924(e)(1)). The 11th vacated and remanded for resentencing because the district court erroneously relied upon a conviction obtained after Richardson's violation of § 922(g). *See, United States v. Richardson*, 166 F.3d 1360, 1361-62 (11th Cir. 1999). On remand, the district court again sentenced Richardson as an armed career criminal. This time, the district court used two 1990 burglary convictions, which were listed as two counts in a state indictment. The 11th held that the district court was permitted to use information beyond the judgment and conviction to determine whether the convictions were committed on different occasions. After reviewing arrest reports, it was clear that the burglaries occurred on different days and at different locations.

U.S. v. POUNDS, 230 F.3d 1317 (Oct. 20, 2000)

Element v. Sentencing Enhancement; 924(c); Application of *Apprendi*

Pounds was convicted for using or carrying a firearm in the commission of a crime of violence. The district court sentenced Pounds under 18 U.S.C. § 924(c)(1)(A)(iii), which requires a sentence of not less than ten years if a firearm is discharged during the offense. Pounds argued that discharging a firearm under 18 U.S.C. § 924(c)(1)(A)(iii) is a separate element of the offense which requires a jury determination and must be included in the indictment. The 11th disagreed. The Court concluded that the language and structure of the statute demonstrated that Congress intended the fact of the discharge of a firearm to be a sentencing factor and not an element of the offense. The Court also concluded that *Apprendi* was inapplicable because the discharge of the firearm did not increase the statutory maximum; rather, the factor only increased the mandatory minimum.

U.S. v. GORDON, 231 F.3d 750 (Oct. 23, 2000)

Reasonable Suspicion; Probable Cause; Hearsay Statements at Sentencing

A jury convicted Gordon of robbery and firearms offenses in connection with an attack on a gun store clerk. On appeal, Gordon challenged the district court's denial of his motion to suppress evidence seized by law enforcement after an investigatory stop on the night of the robbery. The 11th found that the Supreme Court case of *Illinois v. Wardlow*, 528 U.S. 119, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000) was controlling. Specifically, the Court found that reasonable suspicion for an investigatory stop existed

when law enforcement noticed Gordon and his co-defendants in a high crime area, Gordon and his co-defendants' "eyes lit up" when they saw law enforcement, and Gordon and his co-defendants immediately took flight from law enforcement. The 11th also had no trouble in concluding that law enforcement had probable cause to arrest Gordon and his co-defendants for violating Florida's anti-loitering statute, especially since law enforcement saw ammunition in plain view in the car.

Gordon also contended that the district court improperly relied on his co-defendants' hearsay statements to support a role enhancement and an upward departure. The 11th concluded that the co-defendants' hearsay statements were not unreliable for sentencing purposes because the hearsay statements were consistent and because the co-defendants were prepared to testify at the sentencing hearing.

U.S. v. DRAYTON and BROWN, 231 F.3d 787 (Oct. 24, 2000)

Bus Search

Finding this bus search case materially indistinguishable from its prior decision in Washington, the 11th reversed the district court's denial of the motion to suppress. The 11th did not consider it favorable to the Government that the officers, instead of a general announcement from the front of the bus, made individual announcements as they approached passengers. The 11th also noted the testimony at the suppression hearing (of the searching officer, the only witness) that of hundreds of passengers he had encountered in the past year, no more than a few had actually refused to be searched.

U.S. v. NOEL, 231 F.3d 833 (Oct. 25, 2000)

Detention for Deportation – Speedy Trial and Due Process

The 11th considered the question of first impression in this circuit, whether a civil detention preceding deportation triggered rights under the Speedy Trial Act, and also whether this civil detention violated Fed. R. Crim. P. 5(a) or due process. All three questions were answered in the negative. The Court concluded there was no Speedy Trial violation because the time period only begins to run after an individual is accused, either by arrest/charge or indictment, not from the date INS custody began. The 11th agreed with the other circuits (5th, 8th & 9th) that have addressed this issue. However, the Court

noted that "a contrary result may be warranted when detentions are used by the government, not to effectuate deportation, but rather as 'mere ruses to detain a defendant for later criminal prosecution,'" agreeing with the 5th's decision in *United States v. De La Pena-Juarez*, 214 F.3d 594 (5th Cir. 2000), that this exception will protect deported aliens when "the defendant demonstrates that the primary or exclusive purpose of the civil detention was to hold him for future criminal prosecution."

U.S. v. SMITH and TYREE, 231 F.3d 800 (Oct. 25, 2000)

Absentee Voter Violations – Selective Prosecution and Other Challenges

The 11th affirmed the defendant's convictions for violations of absentee voter laws, specifically voting in a race for U. S. House of Representatives more than once via absentee ballot for numerous other voters, except that Tyree's conviction on one count was reversed for insufficient evidence, requiring resentencing. The 11th extensively analyzed, but rejected, claims that the prosecutions were selectively based on race and political affiliation. The 11th also rejected a number of other claims regarding issues of allegedly multiplicitous counts, jury instructions on the substantive counts, and exclusion of defense testimony based on the prosecution's inability to cross-examine the witness who had taken the Fifth Amendment after direct examination.

U.S. v. DOHERTY, 2000 WL 1610321 (Oct 27, 2000)

Bruton error

The defendants in this case were a manager and two drivers of fuel trucks for a marine business, and the main charge against them was conspiracy to defraud IRS, 18 U.S.C. section 371, in connection with avoiding fuel excise taxes.

The 11th held that the admission of one defendant's statement which facially incriminated another defendant was a Bruton violation. The error was not harmless because the evidence against the defendants was mostly circumstantial, and was not overwhelming.

Before the defense case began, Agent Zavadil threatened Agent Moritz, who was going to testify for the defense. The district court thus struck Zavadil's testimony but did not permit Moritz's testimony either, and denied motions for mistrial. The 11th

found the exclusion of Moritz's testimony about the threat was reversible error as to one defendant.

The 11th reversed the conspiracy convictions as to the two drivers, finding the evidence insufficient. As to the manager defendant, the 11th vacated the conviction for the Bruton error but found the evidence sufficient to permit retrial if the government so chose.

The 11th also affirmed the conviction of one driver for false statements to a grand jury.

U.S. v. RICHARDSON, 2000 WL 1651028 (Nov. 3, 2000)

Juror Questions to Witnesses -- Jury Instruction on Power of Attorney -- Summary Chart Evidence

Richardson was convicted of embezzlement, money laundering and mail fraud. During the lengthy trial, the district court permitted jurors to submit questions to be asked of witnesses, permitting a total of 23 sets of questions. The district court took various precautions such as requiring written submissions, providing counsel opportunity to object, and warning the jury not to reach premature conclusions. Given these precautions, and because this was a factually complex case aided somewhat by the questions, the 11th found no abuse of discretion.

The 11th also found no error in a jury instruction about a power of attorney granted from one of the victims to the defendant. Although Richardson first used, then abandoned, that theory of defense, the jury instruction did not misstate the law or misguide the jury.

Finally, the 11th found no error in a summary chart that contained one column labeled "unauthorized activity." The government expert testified that this label was his opinion, and testified about the evidence contained in the chart.

U.S. v. PRIETO, 232 F.3d 816 (Nov. 6, 2000)

Hearsay exception -- codefendant jury instruction

The district court permitted the government to introduce a codefendant's prior consistent statement, to rebut a charge of recent fabrication or improper motive, pursuant to F.R.E 801(d)(1)(B). The 11th rejected any per se rule that a motive to lie, in order to gain favor with the government, attaches with arrest. The trial court did not abuse its discretion in finding no motive to lie and admitting the testimony. Reviewing for plain error the use of the pattern jury instruction regarding codefendant's guilty pleas (plea

bargaining approved but perhaps consider testimony with caution), the 11th approved this instruction.

U.S. v. NEALY, 232 F.3d 825 (Nov. 7, 2000)

***Apprendi* decision; Initial v. Supplemental Briefs; Substantial Assistance**

The 11th held that *Apprendi* error is harmless if the enhancing fact was proved at trial, as here where the amount was uncontested at trial and sentencing. Moreover, the 11th refused to entertain the defendant's claim that the enhancing fact was not included in the indictment, since that argument was not made in the initial brief on appeal - it was made in a supplemental brief (which the court requested). The court stated that parties cannot raise new issues at supplemental briefing, even if the issues arise based on intervening decisions. Finally, the 11th held that it would limit its review of a government's refusal to file substantial assistance motions to claims of unconstitutional motive (such as race or religion).

U.S. v. GERROW, 232 F.3d 831 (Nov. 8, 2000)

Allocute claim; *Apprendi* issue

The defendants were convicted of conspiracy to possess with intent to distribute cocaine, attempting to possess with intent to distribute cocaine, carrying a firearm during a drug trafficking crime, and assaulting a special agent of the DEA engaged in the performance of his official duties. As to allocution, the 11th found that the district court's failure to address personally one of the defendants at sentencing did not result in manifest injustice because the district court asked the defendant's attorney whether his client wished to address the court. Considering *Apprendi*, the 11th found that the terms of incarceration were below the statutory maximum (20 years) for a cocaine offense without reference to drug quantity. The defendants, however, also argued that the five-year terms of supervised release imposed were in excess of the statutory maximum. Reviewing under plain error analysis, the 11th found that most circuits have concluded that §841(b)(1)(C) provides only a minimum term of supervised release, and that any term over that minimum may be imposed notwithstanding the provisions of §3583(b)(2). Since the defendants had not raised the issue in the district court, the 11th found there could be no plain error because there was no Supreme Court or Eleventh Circuit precedent.

U.S. v. RILEY, 232 F.3d 844 (Nov. 8, 2000)

Rehearing -- 924(c) Sentence Enhanced for Type of Weapon

The 11th vacated their previous opinion published at 211 F.3d 1207 in consideration of the Supreme Court's decision in *Castillo v. United States*, 120 S. Ct. 2090 (2000). Specifically, the Court vacated the part of the opinion which addressed whether the district court erred by imposing an enhanced penalty under 18 U.S.C. §924(c)(1) based on its finding, at sentencing, that the defendant carried a **semiautomatic assault** weapon. Motion for rehearing was granted; opinion vacated in part; and oral argument granted in part.

JOEL v. CITY OF ORLANDO, 232 F.3d 1353 (Nov. 13, 2000)

Constitutionality of city code prohibiting "camping" on public property

A homeless person attacked the constitutionality of a city code prohibiting "camping" on public property. The 11th found that the city code did not violate Joel's rights under the 5th, 8th, and 14th amendments in a somewhat detailed analysis of Joel's equal protection, due process, and cruel and unusual punishment claims. Important to the Court's decision was the fact that the Coalition for the Homeless of Central Florida, a large homeless shelter, had never reached its capacity and that no individual had ever been turned away because there was no space available or for failure to pay the one dollar nightly fee.

U.S. v. GUADAMUZ-SOLIS, 232 F.3d 1363 (Nov. 14, 2000)

Almendarez-Torres* decision after *Apprendi

Guadamuz-Solis argued that *Apprendi* called into question the decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). The 11th held that *Almendarez-Torres* remains the law until the Supreme Court decides otherwise.

HURLEY v. MOORE, 2000 WL 1724917 (Nov. 17, 2000)

Habeas – Tolling

Harley's state post-conviction motion was not properly filed and so could not toll the one-year statute of limitations for § 2254 petitions. Harley's claim of equitable tolling was not raised below but equitable tolling was not warranted because the state instructed Harley how to cure the defect in his state

motion.

U.S. v. DOHERTY, 2000 WL 1724916 (Nov. 20, 2000)

Bruton Error -- Sufficiency of Evidence for Conspiracy

This is an amended opinion from a decision issued 10/27/2000. The holdings remain the same. The case involves conspiracy to defraud IRS and related charges arising out of evasion of federal excise tax on diesel fuel. The 11th found Bruton error that was not harmless, and found the evidence insufficient to convict two of the defendants of conspiracy.

HELTON v. DOC, 2000 WL 1726581 (Nov. 21, 2000)

Habeas; Equitable tolling of statute of limitations; IAC

Helton was convicted of second-degree murder. Helton alleged ineffective assistance of counsel in this 2254 focusing on the trial attorney's failure to investigate and employ a time of death argument based on the gastric evidence in the case. The state's reply focused mainly on the claim that the petition was untimely. The district court found Helton's counsel ineffective and found that equitable tolling was warranted in the case because: (1) Helton diligently pursued his legal rights on appeal; (2) Helton was misinformed by counsel as to the expiration of the statute of limitations; (3) the prison library was inadequate; and (4) the "strange history of the case."

The 11th agreed with the district court, using a totality of circumstances to conclude that equitable tolling was appropriate. Also, in a somewhat lengthy review, the Court concluded that the attorney was ineffective because the attorney did not even investigate the gastric evidence in the case.

U.S. v. CAMACHO, 2000 WL 1726579 (Nov. 21, 2000)

Rule 11 Plea Hearing

Camacho entered a negotiated plea with the government. The parties agreed to the offense level, various other sentencing issues, and the government agreed to file a 5K1 motion if Camacho provided substantial assistance. At sentencing, the district court followed the sentencing recommendations and the government filed a 5K1 motion; Camacho was sentenced below the guideline range.

On appeal, Camacho raised several challenges to the plea. First, she alleged that the district court failed to explain the nature of the charge, by failing to explain the aiding and abetting theory on which the charge was partially based. The 11th found that the aiding and abetting theory was not an essential element of the underlying offense. Therefore, it could not be plain error. Second, Camacho argued that the district court committed plain error by misstating the maximum period of incarceration she faced and by failing to inform her that if the district court rejected the sentencing recommendations contained in the plea agreement, she would not have the opportunity to withdraw the plea. As to the maximum penalty issue, the 11th stated that since the plea agreement was part of the record (and the plea agreement correctly listed the maximum penalties), and the fact the Camacho never expressed any confusion, the error was inadvertent and did not impair her substantial rights. As to the fact that the district court failed to inform her that if the district court rejected the sentencing recommendations contained in the plea agreement, she would not have the opportunity to withdraw the plea, the 11th found that the error did not affect substantial rights because: the statement was in the plea agreement, the district court did inform her that it was not bound by the sentencing recommendations in the plea agreement, and all of the sentencing recommendations were accepted by the district court at sentencing. In short, Camacho received the full benefit of the bargain she made with the government.

U.S. v. TRAVERS, 2000 WL 1726582 (Nov. 21, 2000)

Search Warrant Overbroad; Leon "good faith" Exception

Travers challenged the government's search of his home based on the fact that the search warrant was overbroad. Applying Leon's "good faith" exception, the 11th found that the executing officers could have reasonably presumed the warrant to be valid. Since the executing officers acted in good faith, Travers' conviction and sentence were affirmed.

GALLO-CHAMORRO v. U.S., 2000 WL 1726577 (Nov. 21, 2000)

IAC; Pinkerton instruction; Specialty doctrine; Dual or double criminality doctrine

Gallo appealed the district court's denial of his 2255 petition raising two issues: (1) he received ineffective

assistance of counsel; and (2) the district court erred in giving a *Pinkerton* instruction to the jury. This long and complicated case discusses the *Pinkerton* instruction, the specialty doctrine, and the dual or double criminality doctrine. Dual criminality mandates that a prisoner be extradited only for conduct that constitutes a serious offense in both the requesting and surrendering country, for example, one country (the requesting country) may recognize the crime of conspiracy while the other country (the surrendering country) does not.

BOTTOSON v. MOORE, 2000 WL 1752180 (Nov. 29, 2000)

Death Penalty 2254 petition; IAC

Bottoson challenged his sentencing hearing on the basis of *Hitchcock v. Dugger*, 481 U.S. 393 (1987), in which the Supreme Court held that instructions to a jury and a sentencing judge not to consider nonstatutory mitigating factors rendered the resulting death sentence invalid. The 11th distinguished *Hitchcock* because in Bottoson's case, the court allowed the presentation of non-statutory mitigating evidence and did not expressly tell the jury that it could not consider such evidence. As to IAC claim, 11th found that the state court finding that Bottoson had failed to show that there was a reasonable probability that, but for counsel's deficient performance, the result of the sentencing phase would have been different, was not an unreasonable application of *Strickland's* "reasonable probability" standard.

GILREATH v. HEAD, 2000 WL 1769572 (Dec. 1, 2000)

Capital Habeas - Ineffective Assistance of Counsel

Petitioner claimed ineffective assistance at sentencing. But during trial he had signed a statement that he did not want counsel to present any mitigation at sentencing, even though witnesses were available. In affirming the denial of relief, the 11th found no evidence that petitioner would have made a different decision if he had been more fully informed, and found that the mitigation petitioner claimed he would have permitted counsel to present would not have made a difference in the sentence.

U.S. v. FERNANDEZ, 2000 WL 1807917 (Dec. 11, 2000)

Conviction under §2K2.1(a)(2)

The 11th held that a *nolo contendere* plea, where adjudication has been withheld, qualifies as a conviction for purposes of U.S.S.G. §2K2.1(a)(2). The 11th stated that the guidelines are clear that, if a prior conviction results in a criminal history point under 4A1.1, then the conviction is to be considered a conviction under section 2K2.1(a)(2) as well.

U.S. v. SIDDIQUI, 2000 WL 1843447 (Dec. 15, 2000)

Admission of E-mail and Foreign Depositions

In this case involving false statements to a federal agency, the 11th found e-mails sufficiently authenticated by circumstances such as content that corroborated the identity of the sender and the sender's use of a known nickname. The 11th found no hearsay problem with the e-mails either. The 11th also found foreign depositions properly admitted, the government having shown that the deponents were not reasonably available to come to trial in the U.S. The defendant's inability to be in telephone contact with his counsel during one of the depositions was not a Sixth Amendment confrontation error.

U.S. v. SANTA, 2000 WL 1880171 (Dec. 28, 2000)

Suppression; controlled buy; warrantless entry; probable cause; exigent circumstances; consent

The 11th reversed the district court's denial of a motion to suppress a kilogram of heroin found in a warrantless search of an apartment. Law enforcement agents entered an apartment shortly after delivery of a kilo of heroin to the occupants; they had no arrest or search warrants. They justified their entry on the basis of their desire to arrest the defendants and their fear of destruction of the heroin. One defendant gave verbal consent to the initial search, and then signed a consent form after the search, writing in consent to search his vehicle.

Initially, the Court noted the requirement of both probable cause and exigent circumstances to justify a warrantless entry, and noted further that the mere presence of contraband does not create exigent circumstances, especially when the occupants are unaware of the police presence. "Without more, an inability to maintain effective surveillance will not suffice to overcome the warrant requirement." Although the agents here possessed probable cause, they could not properly create exigent circumstances to justify a warrantless entry.

The 11th also noted that the agents could have

obtained an anticipatory search warrant and, based on the reasoning of now-Justice Breyer in United States v. Gendron, 18 F.3d 955, 965 (1st Cir. 1994), held that "anticipatory search warrants are not per se unconstitutional."

Concluding that authorities could have obtained an anticipatory search warrant, the 11th rejected the Government's argument that the warrantless search was justified by their lack of time to obtain a warrant. Now on a roll, the 11th found no merit to the Government's argument that agents were justified in the warrantless entry for purposes of arresting the suspects because they might escape before a warrant could be obtained.

As to the final issue of the defendant's consent, the 11th considered whether it was not only voluntary but also whether it was a product of the illegal seizure. The 11th assumed without deciding that the consent was voluntary. However, applying three factors to determine whether the consent was the product of free will - the temporal proximity of the seizure and consent, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct - the 11th concluded that it did not purge the primary taint of the illegal entry and arrest.

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