

FEDERAL PUBLIC DEFENDER

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## NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

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### **OUR WEBPAGE NOW HAS A BRIEF BANK AND A NEW ADDRESS**

We have a new webpage address: <[www.fpd-fln.org](http://www.fpd-fln.org)>. In addition to the existing archive of all our past newsletters and useful links, you'll now find our brief bank. You can access this directly at <http://www.fpd-fln.org/files/briefbank.pdf>. Gwen Spivey of our Tallahassee office has gone back over nearly ten years of briefs, deleted those that are out of date, and listed summaries of all the arguments that might be of use to those of you on the panel as well as to our lawyers here in the Public Defender's Office. On the webpage you'll find an index as well as a summary of each argument. When you find an argument you want to see, all you need do is call Margaret in our Tallahassee office. She will email (or mail) you the brief.

We will be updating the bank as we write briefs in the months and years to come. We encourage you to take a look at what we're convinced will be an invaluable source of legal research for all of us. And we encourage you to email us any briefs, memoranda, or

motions not included or updated on the bank.

### **CHANGES IN CRIMINAL PROCEDURE RULES, INCLUDING RULE 35, GO INTO EFFECT**

As of December 1<sup>st</sup>, the latest version of the Federal Rules of Criminal Procedure has taken effect. The biggest substantive change has been in the rule governing post-sentencing reductions for providing substantial assistance - **Rule 35**. The change has virtually done away with the one-year time limit. Up until now, the Government had to file its motion for a sentence reduction within one year of the imposition of the sentence. The new rule allows the Government, in three nearly all-encompassing circumstances, to file the motion after the year has passed. The Government may now file the motion after the year has passed if: (1) the defendant provides information he or she *learned after* the year had passed; (2) the defendant provided information within the year, but the Government uses the information after the year had passed; or (3) the defendant, who

failed to provide known information within the year, but could not have “reasonably” anticipated the “usefulness” of the information, “promptly” passes it on as soon as he or she learns of the information’s usefulness.

Here are the other substantive changes:

- **Rule 5.1** provides that the magistrate may continue a preliminary hearing even without the defendant’s consent upon a showing “that extraordinary circumstances exist and justice requires the delay.”
- **Rule 10**, in conjunction with changes to **Rule 43** and **Rule 5**, creates two exceptions to the requirement that the defendant be physically present in court for arraignment. First, it allows the court to hold an arraignment in the defendant’s absence when the defendant has waived that right in writing and the court consents to the waiver. Second, with the consent of the defendant, it allows the court to hold arraignments by video teleconferencing.
- **Rule 12.1** makes it clear that, once a defendant announces an intent to “introduce expert evidence relating to . . . a mental condition of the defendant bearing on . . . guilt or . . . the issue of punishment in a capital case,” the court may, if requested by the government, order a mental examination. The other changes are limited to the circumstances of the defendant in a capital case who intends to rely on expert mental health testimony - the court’s authority to order an examination, when the results of the exam may be disclosed, the timing of the disclosure of the results

of the defendant’s expert examination, and sanctions for the defendant’s failure to comply with the notice and examination requirements.

- **Rule 12.4** is a new rule that provides for certain disclosures when there is “any nongovernmental corporate” entity that is a party “to a proceeding” or when any “organization” is a victim, so as to assist judges in determining whether they must recuse themselves because of a conflict of interest.
- **Rule 30**, lest there be any doubt, allows the court to require that proposed jury instructions be provided to the court in advance of trial.

With the exception of the one sentence that makes up Rule 60, all the Criminal Rules have been rewritten, with a number of provisions having been moved from one rule to another. As explained in the Committee notes, this wholesale revision has been done to make the rules “more easily understood and to make style and terminology consistent throughout.” As explained in the notes, too, the changes “are intended to be stylistic only.”

Some commentators have suggested that the stylistic changes, though, might have a greater effect. Some of the rules they have mentioned are:

- Rule 16: the requirement that defendants disclose reports of examinations and tests they intend to “introduce” has been amended to require disclosure of reports and examinations they intend to “use.”
- Rule 32.1: provides considerably

more detail regarding the procedures involved in revoking or modifying supervised release or probation.

Rule 42: provides, in some circumstances, for the appointment of an attorney other than a member of the U. S. Attorney's Office to prosecute a contempt violation.

Rules 6 and 41 have been amended to reflect the provisions of the USA Patriot Act.

### **CATCH UP ON TRAINING REQUIREMENT**

The Criminal Justice Plan for the Northern District of Florida requires all panel members to participate in training each year. Under Judge Vinson's interpretation, the training requirement consists of either 8 hours in some sort of seminar that addresses issues of federal criminal defense or (only) 6 hours of our monthly luncheon seminars. Some panel members as of the end of 2002 have fallen short of the requirement. While the Panel Oversight Committee has not yet addressed the issue, it seems likely that, at some point, priority for case assignments will be given to those who have fulfilled the training requirement.

Please know that almost all the videos that have been shown over the past year are available in each of our three offices. If you would like to see any of them, just call ahead, and we'll arrange for you to watch them in our

offices. Please remember, too, that credit is not limited to the luncheon seminars. Clearly, any seminar in federal criminal law will earn you the requisite credit. In fact, because this is the first year that the requirement is being applied, the Oversight Committee is being particularly generous in awarding credit for most general criminal trial CLE courses. If during this past year you have attended a CLE course that you think might fulfill the training requirement, just write Randy Murrell in the Tallahassee office. Be sure to include information about the seminar.

### **PANEL ASSIGNMENTS**

The Panel Oversight Committee has recently taken a look at the number of cases assigned to each lawyer in our four divisions. It turns out that members of the Tallahassee Division panel, on average, are assigned the fewest number of cases; Panama City and Pensacola members the most. With the caveat that there

	<b>PNS</b>	<b>PC</b>	<b>TLH</b>	<b>GVL</b>
<b>Number of Cases Paneled FY 2000</b>	77	29	34	32
<b>Number of Cases Paneled FY 2001</b>	98	13	40	20
<b>Number of Cases Paneled FY 2002</b>	85	16	30	55
<b>Total Number of Cases Over 3 Year Period</b>	260	58	104	107
<b>Average Number of Cases Assigned Each Year</b>	86.6	19.3	34.6	35.6
<b>Number of Panel Members</b>	25	5	40	20
<b>Average Cases Per Year Per Panel Member</b>	3.46	3.86	.86	1.78

are some factors not included that would slightly alter these figures, here are the statistics covering the last three *fiscal* years: The Criminal Justice Act Plan contemplates that the judges will appoint panel members to

serve a three-year term. While that hasn't happened yet, the Oversight Committee is in the process of recommending to the judges which of the existing panel members should be reappointed to serve over the next three-year period. While the Oversight Committee has seen little need for change in the Pensacola, Panama City, or Gainesville panels, the Committee will be recommending to the judges that the size of the Tallahassee panel be reduced because Tallahassee lawyers are averaging less than a case a year. The Committee is doing so because it is of the view that there aren't enough cases in the Tallahassee Division to enable all forty Tallahassee panel members to maintain their proficiency. The final decision rests with the judges.

If you have any gripes, questions, or suggestions, please contact any of the members of the Oversight Committee: Gil Schafnit, Steve Seliger, Thom Cassidy, Ken Riddlehoover, Randy Murrell.

Here, too, is the list showing how many cases were assigned and to whom during *fiscal* year 2002:

**Pensacola Panel:**

FY 2002

Arnold, Glenn	4
Brooks, Ken	5
Corder, Dennis	1
Couch, Clinton	9
Dingus, John	0
Dubose, John	1
Ellis, Ed	2
Hammons, Joe	1
Jackson, Pat	5
Jenkins, James	10
Kypreos, Spiro	7
McCleary, Barry	1
McCrackin, Sid	4
McGraw, Kelly	0

Murphy, George	6
Owens, Kirk	3
Patterson, Chris	2
Pitts, Michael	1
Quinnell, Steve	3
Rabby, Chris	6
Riddlehoover, Ken	3
Rollo, Mike	1
Sheehan, Donald	4
Sutherland, Steve	6
Waters, Donna	0
White, David	0

**Panama City:**

FY 2002

Arnold, Glenn	0
Blow, George	0
Cassidy, Thomas	2
Clyatt, Rhonda	1
Dingus, John	4
Ellis, Ed	0
Garcia, Mandy	1
Higgins, Tonya	1
Kypreos, Spiro	0
Murphy, George	1
Patterson, Chris	2
Sanders, Barbara	2
Seliger, Steve	1
Sheehan, Donald	0
Taylor, Clyde	1
White, David	0

**Tallahassee:**

FY 2002

Andrews, Steve	0
Banks, James	0
Blow, George	2
Boothe, Dennis	1
Boyd, Robert	0
Bubsey, William	1
Bunton, Samuel	0
Cancio, Angela	3
Cassidy, Thomas	0
Conrad, Fred	0
Cummings, Greg	1
Daley, Bernie	1
Davis, Cliff	1
Dobson, Steve	0
Drumming, George	0

Findley, Thomas	0
Garcia, Mandy	2
Glazer, Steve	1
Gray, John	0
Greenberg, Richard	2
Harper, Bob	1
Haugdahl, Eric	2
Jansen, Tim	0
Kane, Mary	0
Levy, Loren	1
McMurry, Chuck	0
Morphonios, Dean	0
Printy, Gary	1
Rand, Bob	0
Sanders, Barbara	1
Savitz, Jason	1
Seliger, Steve	1
Senton, Bob	1
Sheffield, Frank	0
Smith, Richard	0
Stafman, Ed	1
Taylor, Clyde	2
Villeneuve, Paul	1
Walker, Mark	1
Whittington, Steve	1
Willard, Matthew	0
Williams, John	0
Woolfork, Robert	0

**Gainesville:**

FY 2002

Bacharach, Albert	1
Bernstein, Steve	7
Cushman, Stan	2
Dollinger, Jeff	1
Edwards, Tom	6
Hall, James	2
Hallman, David	0
Hannan, Brad	1
Harper, Bob (Appeals only)	2
Hatfield, Gene	8
Jarvis, Jim	1
Johnson, Steve	4
McClure, John	2
Miller, Shannon	1
Peterman, Jody	3
Schaffnit, Gil	1
Tunison, James	2
Uman, Jon	5
Vipperman, Lloyd	4
Warren, Robert	0

**I'M BACK FOR MORE**

This past November the Eleventh Circuit Court of Appeals reappointed me to another four-year term as the Federal Public Defender for the Northern District of Florida. I'm grateful they chose to do so. The job has been a wonderful opportunity for me, and it has been a pleasure working with those in our offices and with those of you on the panel.

After being here a year or so, I learned that if you, by district, calculate the average sentence imposed, our average sentence in the Northern District of Florida has, for years, been the longest in the country. As the Federal Public Defender, who is responsible for the overwhelming percentage of cases, it isn't a statistic I mention much at our national defender conferences. The other statistic that is out of the ordinary is the percentage of cases that go to trial. This past fiscal year we, as we often have in the past, had the highest percentage of cases in the country proceed to trial. Unlike that other statistic, it is one I'm happy to talk about. It seems to me, at least, all those trials show that, even if we are taking a beating, we still have the will to carry on the fight.

My goal, in these next four years, is to get us out of that top spot for sentences. One obvious path would be to increase the number of downward departures under the Guidelines. In hopes of helping all of us win more departures, we'll continue to publish in the newsletter the details of the downward departures in the district and will continue to present, whether it be through this newsletter or through our brown bag luncheons, the latest information about departures.

The only other path I see is what I think has been done all along - that of “fighting the good fight” and of continuing to sharpen our legal talents. The former is a matter of heart, something I think we’ve shown. Maybe, though, our office can help with the latter. As reported in this edition of the newsletter, we now have our brief bank available on the webpage. It makes available, literally, hundreds of written arguments on some of the most important issues that any of us will confront. Available, too, although largely unused, are our case summaries. By calling and making arrangements with Margaret in our Tallahassee office, you can receive our up-to-the-minute email summaries of new cases as they are issued by either the Eleventh Circuit or the United States Supreme Court. We will continue, too, to publish, in this newsletter, news of developments in the law. Our monthly luncheons will, in the months to come, feature video recordings of speakers from some of the national seminars that are presented for those of us in Federal Public Defender Offices. The featured speakers are some of the most knowledgeable and talented lawyers in the country and should help all of us become better at what we do.

Please know, too, that we are available to help. We’re fortunate to have talented and experienced lawyers in our three offices, and we stand ready to provide whatever help and assistance we can. All it takes is a phone call.

With best wishes for the New Year and for shorter sentences,

RPM

### **HALF-WAY HOUSES NO LONGER AVAILABLE AS ALTERNATIVE TO IMPRISONMENT**

In years past, federal judges would sometimes recommend that individuals be permitted to serve their sentences in a half-way house (community corrections center) in lieu of imprisonment in the Bureau of Prisons. Although it has honored such recommendations in the past, the Director of the Bureau of Prisons, Kathleen Hawk Sawyer, in a December 20, 2002, memorandum to federal judges, has announced that the Bureau will no longer do so. In the memorandum, Ms. Sawyer states that the Bureau has made the change following “recent guidance from the U.S. Department of Justice’s Office of Legal Counsel.” That guidance consists of an opinion “that the Bureau’s practice of using CCCs as a substitute for imprisonment contravenes well-established caselaw, and is inconsistent with U.S.S.G. § 5C1.1.” The new policy is now in effect. Those prisoners who were in a half-way house and had more than 150 days remaining to be served on their sentences are being sent to a Bureau of Prisons facility.

### **NEW GUIDELINE CASE OUTLINE AVAILABLE**

The Federal Judicial Center, the research and education agency of the federal courts, has just published the 2002 issue of *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues*. It is surely the fastest way to research almost any Sentencing Guideline issue. You can order this free and wonderfully helpful 556-page compilation of guideline case law by writing and requesting it from: Federal Judicial Center, Information

Services Office, One Columbus Circle NE, Washington, DC 20002-8003. The information is also available at the Center's webpage: <www.fjc.gov/>.

### LOOKING FOR BOP RECORDS?

If you're looking for records from the Bureau of Prisons, write to: Freedom of Information Act/Privacy Access Section, General Counsel, Room 841, Federal Bureau of Prisons, 320 1<sup>st</sup> St. N.W., Washington, D.C. 20534.

### PRISONERS PROHIBITED FROM POSSESSING PRESENTENCE REPORTS

As of November 2<sup>nd</sup>, those serving sentences in Bureau of Prison facilities are no longer permitted to obtain or keep copies of their presentence reports or the Statement of Reasons from their judgments. Prisoners found to possess either document are subject to disciplinary proceedings for possession of contraband. In creating the policy, which is set forth in the Bureau of Prisons' reissued Policy Statement No. 1351.05 (Part Two, ¶12(a)(2)(d)), the Bureau has cited what it sees as the problem of prisoners pressuring other prisoners for a copy of the document for purposes of learning whether an individual worked as an informant, is a member of a gang, or has financial resources. While not able to keep copies, prisoners do continue to have a right to access both documents. Prisoners also may arrange for copies of either document to be filed with a court in conjunction with legal proceedings. Copies of the documents will ordinarily be kept in the portion of the central file that is subject to disclosure and can be reviewed by following existing procedures. The new policy does not apply to those awaiting sentencing.

### NEARLY ALL OF THOSE GRANTED PRETRIAL RELEASE RETURN TO COURT

The available statistics, published in the November issue of *The Third Branch*, the newsletter of the Federal Courts, show that in fiscal year 2001, only 878 of the 38,050 (2.3 percent) defendants who were granted pretrial release, throughout the country, failed to appear. Since 1992, the figure has never exceeded 2.8 percent.

### DOWNWARD DEPARTURES

**Carver, Benton** Hinkle, R. Atty: Bill Clark  
 Docket: 4:02cr38-RH  
 Charge: Poss Explosives/False Statement  
 Range: 30 - 37 months  
 Sentence: 21 months  
 Date of Imposition of Sentence: 12/10/2002  
 Grounds: Criminal History overstated seriousness of criminal past.

**Restripo, Jorge** Vinson, R. Atty: Elizabeth Timothy  
 Docket: 3:93cr3159-RV  
 Charge: Escape  
 Range: 12 - 18 months  
 Sentence: 8 months  
 Date of Imposition of Sentence: 11/8/2002  
 Grounds: Extraordinary acceptance of responsibility.

**Please remember to let us know if any of your clients are the beneficiaries of a downward departure. We publish them in hopes of providing a "roadmap" of sorts to help guide others in securing sentence reductions.**

### VICTORIES

Last month, in a Pensacola cocaine case where his client was facing a sentence of twenty years to life, **Ken Riddlehoover** won a motion to suppress before Judge Collier.

Ken argued that the warrantless search of his client's car in the common area of a townhouse complex was not justified by a warrant to search a nearby townhouse. Judge Collier, finding the car was not readily mobile, agreed that, absent a warrant for the search of the car, it was not lawfully subject to a search and suppressed the only evidence of the client's guilt.

Just last week, **Bill Clark**, in our Tallahassee office, in a habeas corpus case challenging the U. S. Parole Commission's calculation of credit for time previously spent on parole, won for his client an order requiring the Parole Commission to recalculate the credit. In reaching the decision, Judge Stafford rejected the Parole Commission's position that those on special parole, upon revocation and reinstatement, were returned to special parole rather than regular parole. It's a policy the Parole Commission has used throughout the country to extend, seemingly indefinitely, the period of parole for many sentenced for drug offenses during the 1980's. The decision seems likely to get Bill's client out of prison now instead of 2004 and to prevent what would have been another round of parole.

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

### **NEW VERSION OF *MY LITTLE RED RULES BOOK* AVAILABLE**

The latest version of the handy pocket-size reference book, *My Little Red Rules Book*, will be available at the end of this month.

Small enough to, literally, be carried in a pocket, there is a lot packed into it: key provisions of the Federal Rules of Evidence (along with annotations), selected rules from the Federal Rules of Criminal Procedure, copies of the Bail Reform Act and the Jencks Act, citations to primary Supreme Court cases, a copy of the Guidelines Sentencing Table, and a summary of the Guidelines offense levels associated with the drug quantities most often attributed to our clients. If you want to have this critical information at your fingertips the next time you go to court or visit your client in the lock-up, send \$5 and your request to: Federal Defenders of Eastern Washington, 10 North Post #70, Spokane, WA 99021. (They've ask that you wait until the end of this month to send your order).

### **PANEL TRAINING**

At this month's brown bag luncheons, we're presenting the first hour of a two-hour presentation on the **Federal Rules of Evidence**. The video features Fred Bennett, who was the Federal Public Defender for Maryland from 1980-1992, and a Law School Professor at Catholic University Law School from 1992-1997, and who is currently a partner in a Maryland law firm. We recorded the presentation this past November in Santa Fe, New Mexico, at a conference for Federal Defenders. If you can come, you'll be eligible for CLE credit and will receive Mr. Bennett's outline that is filled with lots of up-to-date citations.

As usual, the video will be shown at **noon** at the Federal Courthouses in:

**Pensacola on January 22**  
**Panama City on January 14**  
**Tallahassee on January 23**

We'll be showing the video in **Gainesville** at our office at 101 SE 2<sup>nd</sup> Place, Ste. 112, at **9:00 A.M.** and **Noon** on **January 22**.

## DAILY CASE SUMMARIES

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

### Certiorari Granted

The following are United States Supreme Court grants of certiorari for the 2002 term that are relevant to our practice and granted since our last newsletter:

**STOGNER v. CALIFORNIA**, 123 S. Ct. 658 (Dec. 2, 2002), reviewing 93 Cal. App. 4th 1229 (Cal. 2001)

#### **Ex Post Facto; Statute of Limitations for Prosecution to File Child Molestation Charges**

Questions presented: (1) Did California legislature violate Ex Post Facto Clause by abolishing statute of limitations requirement, which historically was element of crimes charged, so as to charge defendant retroactively? (2) Did California legislature's abolition of statute of limitations arbitrarily retract liberty interest state had conferred upon defendant? The issues concern whether the California Legislature's expressed intent to apply section 803(g) to offenses committed before January 1, 1994, and to revive any cause of action barred by other sections operates to allow prosecution of Marion Reynolds Stogner (Stogner) for offenses committed between 1955 and 1973.

**LAWRENCE v. TEXAS**, 123 S. Ct. 661 (Dec. 2, 2002), reviewing 41 S.W. 3d 349 (Texas Ct. App. 14th Dist. 2001)

#### **Facial Challenge to Sodomy Statute for Equal Protection and Right to Privacy Violations**

Questions presented: (1) Do defendants' criminal convictions under Texas "Homosexual Conduct" law--which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples--violate Fourteenth Amendment's guarantee of equal protection? (2) Do defendants' criminal convictions for adult consensual sexual intimacy in home violate their vital interests in liberty and privacy protected by Fourteenth Amendment's Due Process Clause? (3) Should *Bowers v. Hardwick* be overruled? The issue in this equal protection case presents a facial challenge to the Texas penal code prohibiting sodomy. The John Lawrence (Lawrence) also challenges the statute as violating privacy rights.

**OVERTON v. BAZZETTA**, 123 S. Ct. 658 (Dec. 2, 2002), reviewing 286 F.3d 311 (6th Cir. 2002)

#### **Constitutionality of Restricting Prisoners' Visitation Rights**

The Michigan Department of Corrections (Department) instituted a new visitation policy in 1995 that restricted the visitation rights inmates. The inmates challenged the visitation restrictions that: (1) banned visits from the inmates' minor brothers, sisters, nieces and nephews; (2) banned all visits by the inmates' children when parental rights had been terminated; (3) banned all visits by any former prisoners who were not immediately family; (4) required that visiting children be accompanied by a parent or legal

guardian; and (5) permanently banned visitors, apart from attorneys and clergy, for inmates that violated the Department's substance abuse policy twice. On cert., the questions presented are (1) Do prisoners have right to non-contact visitation protected by First and Fourteenth Amendments? (2) Are restrictions on non-contact prison visitation imposed by Michigan Department of Corrections reasonably related to legitimate penological interests? (3) Do restrictions on non-contact prison visitation imposed by Michigan Department of Corrections constitute cruel and unusual punishment in violation of Eighth Amendment?

**WIGGINS v. CORCORAN**, 123 S. Ct. 556 (Nov. 18, 2002), reviewing 288 F.3d 629 (4th Cir. 2002)

#### **Habeas, ineffective assistance**

In federal habeas review of a state murder conviction, the court granted certiorari as to the following question: "Does defense counsel in capital case violate requirements of Strickland v. Washington by failing to investigate available mitigation evidence that could have convinced a jury to impose life sentence, as this court concluded in Williams v. Taylor and as most courts of appeals have concluded, or is defense counsel's decision not to investigate such evidence 'virtually unchallengeable' so long as counsel knows rudimentary facts about defendant's background, as Fourth Circuit held in this case?"

**U.S. v. NGUYEN; U.S. v. PHAN**, 123 S. Ct. 512 and 123 S. Ct. 513 (consolidated) (Nov. 4, 2002), reviewing 284 F.3d 1086 (9th Cir. 2002)

#### **Non-Article III judge**

Convictions in U.S. District Court for District of Guam for various drug-related federal

offenses were affirmed by a panel that includes Chief District Judge for District of Northern Mariana Islands. The Question presented: Was Ninth Circuit's judgment vitiated by participation of non-Article III judge?

**SELL v. U.S.**, 123 S. Ct. 512 (Nov. 4, 2002), reviewing 8th Cir., 282 F.3d 560 (2002)

#### **Forcible administration of antipsychotic medication**

Question presented: Did court of appeals err in rejecting petitioner's argument that allowing government to administer antipsychotic medication against his will solely to render him competent to stand trial for nonviolent offenses would violate his rights under First, Fifth, and Sixth Amendments?

#### **Certiorari Denied**

**ABDUR'RAHMAN v. BELL**, 123 S. Ct. 594 (Dec. 10, 2002)

#### **Habeas corpus (Certiorari Dismissed; FRCP 60(b) or 2d Habeas)**

The two issues for certiorari were whether Court of Appeals for the Sixth Circuit (Sixth Circuit) erred in holding that Abu-Ali Abdur'Rahman's Rule 60(b) motion was a prohibited "second or successive" habeas petition, and whether the Sixth Circuit abused its discretion in refusing to review his second petition. The Supreme Court stayed Abdur's execution and granted certiorari to decide whether Abdur's motion was a FRCP 60(b) motion that challenged the District Court's actions or a second habeas corpus motion. On December 10, 2002, the Supreme Court dismissed the writ of certiorari as "improvidently granted." Justice Stevens dissented.

### Supreme Court Cases

#### U.S. v. BEAN, 123 S. Ct. 584 (Dec. 10, 2002) **Firearms**

Because of Bean's felony conviction, he was prohibited by 18 U.S.C. § 922(g)(1) from possessing, distributing, or receiving firearms or ammunition. Relying on § 925(c), he applied to ATF for relief from his firearms disabilities. ATF returned the application on the ground that its annual appropriations law forbade it from expending any funds to investigate or act upon such applications. Invoking § 925(c)'s judicial review provision, Bean filed suit, asking the district court to conduct its own inquiry into his fitness to possess a gun and to issue a judicial order granting relief. The court granted the requested relief, and the Fifth Circuit affirmed. The USSC reversed. The Court unanimously (Thomas, J.) held that the absence of an actual denial by ATF of a felon's petition precludes judicial review under sect. 925(c).

#### WOODFORD v. VISCIOTTI, 123 S. Ct. 515 (Nov. 4, 2002)

##### **Habeas; ineffectiveness; prejudice**

The Court concluded, in this capital habeas case, the Ninth Circuit had not been sufficiently deferential to the California Supreme Court in the application and definition of the standard for proving prejudice under *Strickland v. Washington*.

#### EARLY v. PACKER, 123 S. Ct. 362 (Nov. 4, 2002)

##### **Habeas; jury; reinstruction; *Allen* charge; coercion**

A factually complex case regarding jury deliberations and conflict between one juror and the others. The judge conducted a hearing, learned the jury was split 11-1, and

reinstructed the jury, and the defense objected that the court was improperly instructing them as to the manner of deliberations. California law, unlike federal law, prohibits *Allen* instructions. The state appellate court affirmed, however, finding nothing that coerced a particular type of verdict. The Ninth Circuit reversed, finding jury coercion, and finding the state court decision contrary to established federal law for two or three reasons. The USSC reversed the Ninth Circuit, determining that it was reasonable for the state appellate court to conclude that there was no jury coercion; the state appellate court's decision was not contrary to established federal law. The Supreme Court rejected the federal appellate court's findings that the state appellate court (1) was required to cite Supreme Court cases and (2) failed to consider the totality of the circumstances. The federal appellate court also improperly applied two cases that were irrelevant to the 28 U.S.C.S. § 2254(d)(1) determination.

### Selected Eleventh Circuit Case Summaries

The following are selected opinions from the 11<sup>th</sup> Cir. that have been issued since our last newsletter:

#### U.S. v. ROMANO, 2002 WL 31845298 (Dec. 20, 2002)

##### **Plain Error from Prosecutor's Breach of Plea Agreement**

Romano contended that the Government breached a plea agreement by urging the court to consider information wholly unrelated to count Romano had agreed to plead to, and based on such information, to enhance the base offense level by a total of four levels. The Government properly

conceded on plain error review that Romano was denied the entire benefit of his plea agreement because it breached the agreement when the prosecutor strongly endorsed the probation officer's recommendation that the court enhance appellant's base offense level. The court reversed, finding the error was plain, it affected Romano's substantial rights, and it "seriously affected the fairness, integrity, or public reputation of the judicial proceedings."

**WELLINGTON v. MOORE**, 2002 WL 31831393 (Dec. 18, 2002)

**Habeas; ineffective assistance; alibi; prejudice; objectively unreasonable**

The Court (J. Dubina and DJ Hodges, MD FL) affirmed denial of habeas relief, concluding the defendant could not show prejudice from his attorney's failure to call his parents as alibi witnesses, because they would disclose that he had a prior conviction and was on probation. Note the Court granted a COA on this issue after the district court had denied one. Judge Barkett wrote a lengthy dissent, noting a lack of confidence that the jury would have returned a guilty verdict had it known of the alibi evidence, since the jury first reported a deadlock and then returned a guilty verdict after an Allen charge, and concluding that the lower court's application of the prejudice prong was objectively unreasonable. The defense attorney admitted that the only reason he did not call the parents as witnesses was his failure to meet the deadline for filing a notice of intent to raise an alibi defense.

**U.S. v. WHITESELL**, 2002 WL 31819541 (Dec. 17, 2002)

**“Causing” sexual conduct, USSG § 2G2.4(c)(1)**

The Court affirmed, rejecting the defendant's arguments (a) that his direct verbal requests or

suggestions did not "cause" a teenage girl to engage in sexual explicit conduct and videotape herself, and (b) that he did not know the victim was under 18. The Court rejected as too constrictive the First Circuit's definition of "causing," which requires a defendant to have physical contact with or personally photograph the victim. Evidence proved the defendant's bragging that he had manipulated the victim into conduct via the Internet and telephone. The Court also rejected the contention, made for the first time in his reply brief, that "offense" defined in 2G2.4(c)(1) includes only charged conduct, so the cross-reference to 2G2.1 2 was improper because the victim photographing herself was not an element of the charged offense. Thus, the Court applied the cross-reference to 2G2.4(c)(1).

**LAZO v. U.S.**, 2002 WL 31809847 (Dec. 16, 2002)

**Habeas; successive; Rule 60(b); certificate of appealability**

The Court denied a federal prisoner's pro se motion under 28 USC § 2255 as successive and denied a certificate of appealability which was necessary to file a successive habeas motion. The defendant filed his motion under Fed. R. Crim. P. 12(b)(2) and Civ. P. 60(b)(4),(6), seeking relief from denial of a 2255 motion. However, both the motion and brief attacked his conviction and sentence based on lack of jurisdiction. The Court distinguished the relief requested by a proper Rule 60(b) motion and concluded a COA must be obtained before appealing denial of motions ostensibly filed under these rules.

**U.S. v. HALL**, 2002 WL 31780721 (Dec. 13, 2002)

**Fair trial; cumulative error; plain error**

The Court rejected the arguments that the trial court (Judge Mickle) committed cumulative unobjected-to errors denying a fair drug trial. As to the agents' testimony regarding code words used in telephone calls and post-arrest statements by a coconspirator, and the prosecutor's closing argument that the defense argument was a "damn lie" which made the prosecutor "mad," there was no defense objection or motion for new trial; the Court concluded the district court did not abuse its discretion for not *sua sponte* intervening and instructing the jury to disregard; even if the testimony were error, there was no precedent for the district court to take action; even if the alleged errors were plain, they did not meet the test of plain error because the evidence was overwhelming. The Court noted that such action by the court would have implicated the double jeopardy clause. Slip op. at 4 n. 2-3.

**U.S. v. MORALES-CASTILLA**, 2002 WL 31761125 (Dec. 11, 2002)

**Sentencing; consecutive; undischarged term; 5G1.3**

The Court held that a sentence for illegal reentry could run consecutive to a state sentence for violation of probation, even though his BOL was increased 16 levels because of his prior aggravated felony conviction. The Court concluded the undischarged state sentence was NOT fully taken into account in the BOL; the adjustment under 5G1.3(b) was not dependent upon revocation of the state probation but would have applied under 2L1.2(b)(1)(A) regardless of the revocation. Rather, his sentence was properly determined under 5G1.3(c) and Appl. Note 6 and made to run consecutive. The Court also rejected the alternative argument

that the district court failed to exercise its discretion, because there was no evidence the district court believed it was required to impose a consecutive sentence (i.e., the court knew it had the discretion).

**Note:** The Court noted a circuit split whether Note 6 imposes a mandatory obligation. Slip op. at 7 n. 2.

**U.S. v. WILLIAMS**, 2002 WL 31760947 (Dec. 11, 2002)

**Rehearing granted; speedy indictment; Speedy Trial Act**

The Court granted the government's petition for rehearing, vacated its opinion published at 309 F.3d 762, and reached the same conclusion - the district court should have dismissed the indictment without prejudice for violation of the speedy trial act.

**NAPIER v. PRESLICKA**, 2002 WL 31749309 (Dec. 10, 2002)

**PLRA**

42 U.S.C. § 1997e(e), a provision of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) ("PLRA"), applies to claims that arise out of the arrest of an imprisoned plaintiff and claims unrelated to the current incarceration of that plaintiff.

**U.S. v. DAVIS**, 2002 WL 31720715 (Dec. 5, 2002)

**Emergency exception to Fourth Amendment, Independent Source Doctrine**

Officers entered a trailer based on their view that an emergency may have existed based on a DCFS report fearing for a girl's safety, even though details of the reports were not confirmed. They found no girl nor any emergency. But based on their observations, they obtained a warrant and reentered; based on their observations, they obtained yet a

second warrant; and based on the above plus a reported burglary of the same trailer, they obtained yet a third warrant. The court's dictum suggested that the initial entry was not valid based on its precedent in Holloway, but affirmed all the convictions anyway based on its conclusion that the third and final warrant had been derived independently of any possible constitutional violation. [Ed. Note: This is on rehearing.] The Court also rejected the argument that the district court not rely on a state VOP warrant to find the instant offenses were committed while the defendant was under "a criminal justice sentence," under 4A1.1(d) and 4A1.2.

**U.S. v. CHARLES**, 2002 WL 31687584 (Dec. 3, 2002)

**Drug conspiracy; insufficient evidence; knowledge**

After affirming as to three defendants, the Court found insufficient evidence as to one defendant, whose only role was driving the car to a purported home burglary/theft, because there was no evidence he knew the object of the theft was drugs (which was the basis of the federal conviction). The Court also found error in the court reporter's failure to transcribe the contents of tapes that were played to the jury, noting the evidence consisted almost exclusively of taped conversations and advising court reporters on minimal requirements under 28 USC 753(b). At least some, if not all, of the taped conversations were in Creole, but the Government provided a Creole-to-English translation in writing to the jurors, which was introduced into evidence. The Court held under these circumstances no reversible error had occurred from omission of the verbatim, contemporaneous reporting of the tapes as they were played to jurors.

**U.S. v. SUAREZ**, 2002 WL 31687604 (Dec. 3, 2002)

**Drug conspiracy; separate conspiracies; material variance; sufficiency; 924(c)(1)(A); firearms; possession "in furtherance of"; sentencing; role enhancement; firearm enhancement; criminal history; stale prior conviction; plain error; no manifest injustice**

The Court affirmed on all points, rejecting arguments (a) that the evidence supported two conspiracies, one of which did not involve the defendants; and (b) that the evidence of conspiracy was insufficient. The only discussion of note was that surrounding the defense argument that the evidence was insufficient under 18 USC 924(c)(1)(A) because the firearm possession was incidental and not in furtherance of the conspiracy. The Court noted that, following *Bailey*, the Court had adopted the Fifth Circuit's approach in *Timmons*, 283 F.3d 1246 (2002), concluding that Congress' purpose in adding the "in furtherance" language of 924(c)(1)(A) was to broaden the reach of the statute following *Bailey*. Although "mere presence of a firearm at a site of the drug activity" is not enough, several factors are relevant: type of drug activity conducted, accessibility of the firearm, type of firearm, whether stolen, whether possessed legally, whether loaded, proximity to drugs or profits, and the time and circumstances under which the gun was found. *Timmons* defined "furtherance" as meaning the firearm "helped, furthered, promoted, or advanced the drug trafficking" and the showing of some nexus between the firearm and the drug operation. Finally, the court found no plain error in defendant's complaint that a prior conviction entered more than 15 years prior to commencement of the instant conspiracy should not have

been counted.

**U.S. v. CLARKE**, 2002 WL 31640773 (Nov. 22, 2002)

**Deportee "found in" the United States must be "found" by the INS**

Clarke was convicted of being a deported alien later "found in" the U.S. under 8 U.S.C. § 1326(a)(2). He was positively identified by state officials upon his arrest around July 3, 1996, but the INS did not actually learn he was back in the country until 1999. The U.S. filed against him in October 2001, and Clarke asserted the indictment was brought after expiration of the 5-year statute of limitations under 18 U.S.C. § 3282. The 11<sup>th</sup> Circuit agreed with other circuits to "conclude that the phrase 'found in' contained in § 1326 refers to the actions of federal immigration officials, not those of state law enforcement officials. In other words, the defendant must be 'found in' the United States by federal immigration officials for the § 1326 crime to be complete and for the statute of limitations in 18 U.S.C. § 3282 to begin to run." Also, INS had no "constructive knowledge" of his presence because the state did not send notice to INS, and there is no indication that INS had some sort of pre-trial immigration status screening procedure in place in Florida that should have discovered Clarke's presence when he was arrested by Florida law enforcement officials.

**U.S. v. ROGERS**, 312 F.3d 1284 (Nov. 21, 2002)

**Restitution**

Rogers appealed the order of restitution to the bank he robbed. In an issue of first impression in this circuit, the Court held that, because the robbery which caused the loss is an element of the 924(c)(1) offense for which the defendant was convicted, restitution for the loss may be ordered.

**U.S. v. BALLINGER**, 312 F.3d 1264 (Nov. 21, 2002)

**Arson; Commerce Clause**

Ballinger pleaded guilty to church arson in violation of 18 U.S.C. § 247. The Court held that (1) Congress did not exceed its authority under the Commerce Clause when it enacted 18 U.S.C. § 247, and the statute is constitutional on its face; (2) § 247 regulates the activity of arson and applies to the church arson, which, by itself, substantially affects interstate commerce; (3) Since the Constitution requires a substantial interstate commerce nexus before Congress can regulate an intrastate activity, § 247(b) requires the government to prove that *each* church arson had a *substantial* effect on interstate commerce; (4) Taken separately, the connections of each church to interstate commerce are too insubstantial to satisfy the jurisdictional element of § 247, nor could the Court aggregate the effects of all arsons to reach the required effect on interstate commerce. "While Ballinger's crimes are heinous, they are state crimes. To allow the government to prosecute him for these arsons would be to obliterate the distinction between national and local authority that undergirds our federal system of government."

**U.S. v. HALL**, 312 F.3d 1250 (Nov. 20, 2002)

**Child pornography; Fed. R. Evid. 404(b); jury instruction; sadistic enhancement**

Hall appealed convictions and forfeiture of his computer; the government cross-appealed denial of the 4-level sentencing enhancement under U.S.S.G. § 2G2.2(b)(3) (2001) for the trafficking of materials that portray sadistic or masochistic conduct. The Court affirmed the convictions but agreed with the government's cross-appeal. (1) The court

extended Luce v. United States, 469 U.S. 38 (1984), to hold that the district court, in denying Hall's pre-trial motion to exclude a videotape under Fed. R. Evid. 404(b), rendered an unreviewable advisory ruling because the tape was never introduced; (2) There was an unobjected to instruction error under Ashcroft v. Free Speech Coalition, 122 S. Ct. 1389 (2002), but it did not rise to plain error; (3) The government was entitled to a § 2G2.2(b)(3) enhancement because an image portraying an adult male having intercourse with a child under twelve necessarily portrays "sadistic or masochistic conduct or other depictions of violence."

**DAHL v. HOLLEY**, 312 F.3d 1228 (Nov. 19, 2002)

**Fourth Amendment; civil rights violation**

Probable cause and a sufficient warrant affidavit defeated § 1983 claims for false arrest, unlawful search, and retaliatory prosecution. Very fact-specific, so read the opinion for details.

**CRAWFORD v. HEAD**, 311 F.3d 1288 (Nov. 12, 2002)

**Habeas; Brady; jury misconduct; ineffective assistance of counsel**

In a 100-page opinion, the Court affirmed denial of habeas relief to this capital defendant. The Court ultimately deferred to the state habeas court. On the Brady claim, the state habeas court had applied a standard "contrary to" federal law and thus was not entitled to deference; however, as to his procedural default on this point, he showed cause but failed to show prejudice and had failed to exercise "due diligence" in seeking testing of the alleged exculpatory evidence. The juror misconduct issue centered around an allegation that one juror, a nursing student, had improperly explained scientific evidence

in the case, but the Court distinguished this from a juror introducing external evidence or applying undue influence but found this was instead a juror bringing her own experience to bear upon the evidence.

**U.S. v. PETER**, 310 F.3d 709 (11th Cir. 2002)

**Coram nobis; retroactivity**

Peter pleaded guilty to a racketeering conspiracy based on predicate acts of mail fraud in connection with his application for a liquor license. After he served his sentence, Cleveland v. United States, 531 U.S. 12 (2000), was decided and completely undermined the basis of the charge. Peter filed a petition for writ of error coram nobis, arguing that Cleveland applied and should be applied retroactively. The government in the district court stood mute, and on appeal did not challenge on the merits but rather argued procedural default in that Peter abandoned pretrial challenges, pled guilty, and declined to appeal. The Court reversed the denial of Peter's petition because: (1) "the district court had no jurisdiction to accept a plea to conduct that does not constitute mail fraud, and the doctrine of procedural default therefore does not bar Peter's present challenge"; (2) "an error of law is an abuse of discretion per se"; and (3) "the error demonstrated by Peter is of a kind that warrants relief despite his decision not to contest the government's charge at the time of his plea."

**HALL v. HEAD**, 310 F.3d 683 (11th Cir. 2002)

**§ 2254; habeas; ineffective assistance**

The district court granted habeas relief as to the penalty phase, finding that Hall's counsel was constitutionally ineffective. The Court reversed: "Even if we assume arguendo that

the state court's ruling as to the performance prong of Strickland was "contrary to" or an "unreasonable application" of federal law, "we nonetheless conclude that the state court properly found that Hall's sentence was not prejudiced by counsel's purportedly deficient performance."

**U.S. v. CARO**, 309 F.3d 1348 (11th Cir. 2002)

**Child pornography; sadistic images; 2G2.2(b)(3); downward departure; diminished capacity**

The Court granted the government's appeal and remanded for resentencing, agreeing that the district court had erred (1) in refusing to impose the four-level enhancement under 2G2.2(b)(3) (offenses involved material portraying sadistic or masochistic conduct or other depictions of violence) absent the government's presentation of medical evidence, clarifying that this enhancement does not require medical testimony to prove the images necessarily involved pain to the minors involved; and (2) in granting a 50% downward departure based on testimony the defendant suffered diminished capacity as a result of his sexual addiction (pedophilia).

**LAGNIAPPE**

**Second Circuit Upholds Federal Death Penalty**

The Second Circuit Court of Appeals found that the fact that innocent people have been sentenced to die does not render the Federal Death Penalty Act unconstitutional. See U.S. v. Quinones, 2002 WL 31750181 (2d Cir. Dec. 10, 2002). In overturning a New York district court ruling, the Court said the Supreme Court has already settled the question whether the application of the death penalty violates the Due Process Clause of the

Fifth Amendment.

**Proposed Rule Would Allow Citation of Unpublished Opinions**

A federal rules advisory committee has approved a proposal to allow the citation of unpublished decisions in all federal appellate courts.

Although the precise wording is yet to be decided, the measure would allow the citation of unpublished opinions solely for persuasive value.

The rule still has several hurdles to go through before it is written into the Federal Rules of Appellate Procedure.

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**TABLE OF CASES IN THIS ISSUE**

**Supreme Court**

<b><u>ABDUR'RAHMAN v. BELL</u></b> , 123 S. Ct. 594 (Dec. 10, 2002) .....	10
<b><u>EARLY v. PACKER</u></b> , 123 S. Ct. 362 (Nov. 4, 2002) .....	11
<b><u>LAWRENCE v. TEXAS</u></b> , 123 S. Ct. 661 (Dec. 2, 2002) .....	9
<b><u>OVERTON v. BAZZETTA</u></b> , 123 S. Ct. 658 (Dec. 2, 2002) .....	9
<b><u>SELL v. U.S.</u></b> , 123 S. Ct. 512 (Nov. 4, 2002) ..	10
<b><u>STOGNER v. CALIFORNIA</u></b> , 123 S. Ct. 658 (Dec. 2, 2002) .....	9
<b><u>U.S. v. BEAN</u></b> , 123 S. Ct. 584 (Dec. 10, 2002) .	11
<b><u>U.S. v. NGUYEN; U.S. v. PHAN</u></b> , 123 S. Ct. 512 and 123 S. Ct. 513 (consolidated) (Nov. 4, 2002) .....	10

**WIGGINS v. CORCORAN**, 123 S. Ct. 556  
(Nov. 18, 2002) ..... 10

**WOODFORD v. VISCIOTTI**, 123 S. Ct. 515  
(Nov. 4, 2002) ..... 11

### **Eleventh Circuit**

**DAHL v. HOLLEY**, 312 F.3d 1228  
(Nov. 19, 2002) ..... 16

**CRAWFORD v. HEAD**, 311 F.3d 1288  
(Nov. 12, 2002) ..... 16

**HALL v. HEAD**, 310 F.3d 683 (11th Cir. 2002) . 16

**LAZO v. U.S.**, 2002 WL 31809847  
(Dec. 16, 2002) ..... 12

**NAPIER v. PRESLICKA**, 2002 WL 31749309  
(Dec. 10, 2002) ..... 13

**U.S. v. BALLINGER**, 312 F.3d 1264  
(Nov. 21, 2002) ..... 15

**U.S. v. CARO**, 309 F.3d 1348 (11th Cir. 2002) . 17

**U.S. v. CHARLES**, 2002 WL 31687584  
(Dec. 3, 2002) ..... 14

**U.S. v. CLARKE**, 2002 WL 31640773  
(Nov. 22, 2002) ..... 15

**U.S. v. DAVIS**, 2002 WL 31720715  
(Dec. 5, 2002) ..... 13

**U.S. v. HALL**, 312 F.3d 1250 (Nov. 20, 2002) . 15

**U.S. v. HALL**, 2002 WL 31780721  
(Dec. 13, 2002) ..... 13

**U.S. v. MORALES-CASTILLA**, 2002 WL 31761125  
(Dec. 11, 2002) ..... 13

**U.S. v. PETER**, 310 F.3d 709 (11th Cir. 2002) . 16

**U.S. v. ROGERS**, 312 F.3d 1284  
(Nov. 21, 2002) ..... 15

**U.S. v. ROMANO**, 2002 WL 31845298  
(Dec. 20, 2002) ..... 12

**U.S. v. SUAREZ**, 2002 WL 31687604  
(Dec. 3, 2002) ..... 14

**U.S. v. WHITESELL**, 2002 WL 31819541  
(Dec. 17, 2002) ..... 12

**U.S. v. WILLIAMS**, 2002 WL 31760947  
(Dec. 11, 2002) ..... 13

**WELLINGTON v. MOORE**, 2002 WL 31831393  
(Dec. 18, 2002) ..... 12