

FEDERAL PUBLIC DEFENDER

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NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

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REPORTS ON DOWNWARD DEPARTURES ISSUED

Both the United States Sentencing Commission and the United States General Accounting Office (GAO) have recently issued reports about the increase in downward departures from the Sentencing Guidelines. The issue became of interest to Congress and resulted in the PROTECT Act, which has as its stated aim, a reduction in the number of departures. As it turns out, a large percentage of the increase is due to decisions of prosecutors. Both reports discovered, too, a wide disparity in the rates of departures. The GAO report, which addressed only drug cases, shows as well the significant reduction in the length of sentences derived from downward departures and the heavy reliance in North Florida on substantial assistance departures.

The Sentencing Commission's report examined only those guideline departures for reasons other than substantial assistance. According to the Sentencing Commission's report, those departures increased from 5.8% in 1991 to 18.1% in 2001. If, however, "all the

government initiated downward departures are excluded, the remaining downward departure rate is estimated to be 10.9%."

The Sentencing Commission reported that the increase in immigration cases has also played a major role in the increase. "[I]f southwest border districts are excluded, the national departure rate was 10.4% in fiscal year 2001."

Among the other findings of the Commission:

- There is a wide variation across districts with downward departure rates ranging, in 2001, from 1.4% in the Eastern District of Kentucky to 62.6% in the District of Arizona.
- In 1991, 95% of the federal judicial districts had downward departure rates of 10% or less, while in 2001, 61% had downward departure rates of 10% or less.
- Six districts, Arizona, Eastern Washington, Southern California, New Mexico, Connecticut, and the Eastern New York accounted for

47% or all departures. Of the six, Arizona led the pack with departures in 63% of its cases.

- Six districts were mentioned in the report with particularly low departure rates: Eastern Kentucky, South Carolina, Virginia, Maine, Western Arkansas, and Southern West Virginia. Of the six, West Virginia had the highest rate at 3%. (Our rate in the Northern District of Florida was 4.7%.)

The United States General Accounting Office, in looking at drug cases in which sentencing took place between 1999 and 2001, reviewed departures from the Sentencing Guidelines and departures from the statutory minimum mandatory sentences. They found that of the 68,670 drug sentencings that took place during the three year period, only 56% involved sentences within the applicable Guideline range. Twenty-eight percent were due to substantial assistance. The GAO attributed the other 16% to “other reasons.” Of the 41,861 cases that carried a mandatory minimum term, 52% of the sentences fell below the mandatory minimum. Of those that fell below, half were due to substantial assistance, and the other half were due to the Safety Valve.

When judges departed downward from the Guidelines for substantial assistance, “departing sentences . . . were on average 49% of the average lowest sentence drug offenders would have received under the guidelines.” Departures for other reasons were nearly as generous - on average “57 percent of the average lowest sentence drug offenders otherwise would have received under the guidelines.”

Of all the circuits, the Third (Pennsylvania, New Jersey, Delaware, and the Virgin Islands) had the highest percent of departures from the Guidelines for substantial assistance, 45% of all the drug cases. The Ninth Circuit had the lowest percentage of departures for substantial assistance, 18%. They also, though, had the highest rate of departures for other reasons, 47%. The Fourth Circuit had the lowest rate of departures for other reasons, 4%, followed closely by the Eleventh Circuit at 5%. The Eleventh Circuit did better with substantial assistance departures, equaling the national average of 30% of all drug cases.

Here in the Northern District, the judges departed downward in 38% of drug cases on the basis of substantial assistance, a figure that compares favorably with the 37% figure from the Florida’s Middle District, and the 16% rate in Florida’s Southern District. The judges, however, departed for other reasons in a meager 1% of the cases, which compares poorly with the 6% rate in both the Middle and Southern Districts. It looks particularly anemic next to the national average of 13%.

In the Northern District, 59% of sentences in drug cases were at or above the mandatory minimum sentence, compared with only 35% in the Southern District and 54% in the Middle District. Of those sentences in North Florida that fell below the mandatory minimum, 81% were due to substantial assistance, while only 19% were due to the Safety Valve. In the Middle District, 60 % fell below due to substantial assistance, with 40% earning the benefit of the Safety Valve. In the Southern District, only 21% were due to substantial assistance, with 79% due to the Safety Valve.

NORTHERN DISTRICT PROSECUTORS WILLING TO FOREGO DRUG ENHANCEMENT IN THE “RARE” CASE

In a letter to Randy Murrell, United States Attorney Greg Miller has held out at least the possibility of sometimes foregoing the enhancement for drug trafficking cases based on prior felony drug convictions (21 U.S.C. § 841). While writing that, in his view, the Justice Department has “strongly encouraged” the use of the enhancement provisions, Mr. Miller went on to say that in some “rare” circumstances it might be appropriate not to file the enhancement. Here’s the essence of what he wrote:

“The [Justice Department’s] policy does give some leeway so that in certain, very limited circumstances, and only with supervisory approval an AUSA could decide not to seek an otherwise legally appropriate enhancement. I do agree that there would be some situations in which it might be proper to forgo seeking an enhancement. I would think those situations would be rare, but I am willing to consider not filing an enhancement under the appropriate circumstances.”

CRIMINAL CASE ASSIGNMENTS

In his administrative order of November 21, 2003, Judge Vinson has placed new district Judge, M. “Casey” Rodgers, into the rotation and altered the assignments of the existing judges. In Pensacola, 45% of the criminal cases now go to Judge Vinson, 45% to Judge Collier, and 10% to Judge Rodgers. All of the Panama City criminal cases will go to Judge Rodgers. Judge Hinkle will handle 80% of the Tallahassee criminal cases, with the remaining

20% going to Judge Mickle. Judge Paul will be responsible for 40% of the Gainesville criminal cases. Judge Mickle will take 60% of them.

IN MEMORIAM

One of our most talented panel members, Dennis Corder, died suddenly on December 30, 2003. He was 42 years old. Dennis practiced criminal defense in Pensacola. He was a good friend and trusted colleague of many of us. He will be terribly missed.

Dennis grew up in Carson City, Michigan. He attended Wayne State University on a Merit Scholarship and graduated with a degree in accounting. He met his future wife, Donna, while attending Wayne State University. They were both members of the debate team.

Dennis and Donna married near the end of college and Dennis began work as a computer systems analyst while Donna attended medical school at Wayne State University. When Donna completed medical school and her residency, she and Dennis moved to Tallahassee where Dennis, with a perfect LSAT score, enrolled in law school at Florida State University.

While Dennis was in law school, he attended class *and* ran a business. On Fridays, he either flew or drove to Kentucky to manage the company, then returned home to attend classes on Monday. He graduated first in his class. He received fourteen book awards, i.e., he made the highest grade in over half of the classes he took.

Upon graduating from law school, he worked for the Public Defender’s Office in

Tallahassee. In 1977, when his wife's career brought her to Pensacola, Dennis accepted a job with Jack Behr, the Public Defender for the 1st Judicial Circuit. Most recently, Dennis joined Sharon Potter and opened the law firm of Potter and Corder where he practiced both state and federal criminal defense. At the time of his death, he was the president of Pensacola's Society of the Criminal Defense Bar.

Dennis loved reading, golf, white water rafting, traveling, and snow skiing. Dennis and Donna skied in Montana, Colorado, Utah, California, Vermont, Pennsylvania, Michigan, Switzerland, British Columbia, and (the week before he died) France. They traveled to Italy, Switzerland, England, Hawaii, New York and other exciting destinations. He loved fine wine, gourmet meals, the opera, and the theater. He spoke French, was a private pilot, had recently begun running, and completed two marathons.

Dennis is survived by his father, two brothers, a sister, and his wife, Donna.

LITTLE RED BOOK AVAILABLE

The updated version of "My Little Red Book" is ready for distribution. It is that slim, bright red, pocket-sized booklet that includes the Federal Rules of Evidence including annotations, selected portions of the Federal Rules of Criminal Procedure, the drug quantity table and the sentencing table from the Sentencing Guidelines, and selected statutes. It is a wonderful quick reference that you can easily take to court or the local detention center. If you'd like a copy mail a check in the amount of \$5.50 to: Federal Defenders of Eastern Washington and Idaho,

10 North Post #700, Spokane, WA 99201.

LOOKING FOR A PROBATION OFFICER?

There is a website that includes the name, the office address, and office phone number of every federal probation officer in the country: <<http://216.152.235.217>>.

GULF ISLANDS NATIONAL SEASHORE

The Gulf Islands National Seashore areas of Santa Rosa and Escambia county have been fertile ground for federal misdemeanor cases - more than 70 last year. As of January 15, 2004, though, nearly all of those cases will be prosecuted in state court rather than federal court. Both the federal government and the state government have concurrent jurisdiction over the cases. The change is taking place as a result of an agreement recently reached between United States Attorney Greg Miller and the State Attorney for Florida's First Judicial Circuit.

CRIMINAL JUSTICE ACT SEMINARS AND WORKSHOPS

The Defender Services Division of the Administrative Office of the Courts will be presenting the following seminars and workshops during 2004:

- March 11-13 San Antonio, Texas
Sentencing Advocacy Workshop
- April 22-24 Santa Fe, N.M.
Winning Strategies 2004
- May 20-22 Boston, Mass.
Winning Strategies 2004
- June 24-26 Williamsburg, Va.

July 29-31 Trial Advocacy Workshop
 Memphis, Tenn.
 Winning Strategies 2004
 August 26-28 San Diego, Calif.
 Immigration Crimes Seminar

If you have questions or need an application, contact the Defender Services Division Training Branch at (800) 788-9908.

RESIDENTIAL DRUG ABUSE PROGRAMS

In the Southeast Region, the Bureau of prisons offers the residential drug treatment program (the one that can earn some up to a year off their sentence) in nine different facilities: FPC Montgomery (AL), FCI Marianna (FL), FPC Talladega (AL), FPC Eglin (FL), FCI Tallahassee (FL), FCI Miami (FL), FCI Jessup (GA), and FPC Edgefield (SC). We have copies of a two page hand-out, courtesy of the Federal Public Defender for the Eastern District of Illinois, that includes a summary of the eligibility requirements for and the structure of the drug treatment program, as well as a listing of all the facilities nationwide that provide it. Just call Margaret at (850) 942-8818 and she'll be delighted to send you a copy via e-mail or regular mail.

PANEL TRAINING

We're planning to present the following video tapes during our February and March luncheons:

Eleventh Circuit Update - Rosemary Cakmis, Chief Appellate Federal Public Defender from the Middle District of Florida

Panama City - February 20
 Gainesville - February 25

Tallahassee - February 26
 Pensacola - February 26

Practicing Criminal Law After the PROTECT Act and New Guideline Amendments - Jim Skuthan Chief Assistant Federal Public Defender for the Middle District and Adam Allen Assistant Federal Public Defender from the Middle District

Panama City - March 9
 Gainesville - March 24
 Tallahassee - March 25
 Pensacola - March 25

In Pensacola, Panama City, and Tallahassee the video presentation will be held in the federal courthouse. In Gainesville, we'll show the video in our office.

PANEL CASE ASSIGNMENTS

Here's the list of who got how many cases for 2003:

Gainesville

Bacharach, Albert	-0
Bernstein, Steve	-5
Cushman, Stan	-3
Curtis, Ted	-1
Dollinger, Jeff	-0
Edwards, Tom	-13
Hall, James	-4
Harper, Robert	-1
Hatfield, Anderson	-9
Jarvis, Jim	-4
Johnson, Huntley	-5
Johnson, Michael	-1
Johnson, Stephen	-2
McClure, Jon	-1
Peterman, Jody	-1
Schaffnit, Gil	-3
Tarquin, James	-1
Tunison, James	-2
Uman, Jon	-14
Vipperman, Lloyd	-4
Wilson, David	-2

Tallahassee

Banks, James C. - 4
 Blow, George - 2
 Boothe, Dennis E. - 2
 Bubsey, William E. - 4
 Cancio, Angela M. - 2
 Cummings, Gregory - 3
 Daley, Bernie - 2
 Davis, Clifford L. - 2
 Deyo, Josephine - 0
 Findley, Thomas M. - 1
 Garcia, Armando - 5
 Greenberg, Richard - 3
 Harper, Robert A. - 2
 Haugdahl, Eric J. - 1
 McMurry, Charles - 2
 Printy, Gary L. - 4
 Sanders, Barbara - 1
 Savitz, Jason - 1
 Seliger, Steven L. - 3
 Senton, Robert E. - 2
 Smith, Richard H. - 2
 Stafman, Edward S. - 0
 Taylor, Clyde M. - 2
 Ufferman, Michael - 0
 Villeneuve, Paul M. - 1
 Willard, Matthew - 1

Pensacola

Arnold, Glenn - 0
 Brooks, Ken - 4
 Corder, Dennis - 11
 Couch, Clint - 8
 Dubose, John - 4
 Ellis, Ed - 1
 Hammons, Joe - 0
 Hendrix, Michelle - 4
 Jackson, Patrick - 5
 Jenkins, James - 5
 Kypreos, Spiro - 10
 Lang, Brian - 10
 McCleary, Barry - 2
 McCrackin, Sid - 13
 McGraw, Kelly - 0
 Murphy, George - 7
 Owens, Kirk - 4
 Pitts, Mike - 0
 Quinnell, Steven - 0
 Rabby, Chris L. - 6
 Ridlehoover, Kenneth - 8
 Rollo, Mike - 0

Saxer, Chris - 3
 Sheehan, Donald - 5
 Sutherland, Steve - 8
 Waters, Donna - 0

Panama City

Blow, George - 2
 Bubsey, William - 1
 Cassidy, Thom - 2
 Clyatt, Rhonda - 5
 Dingus, Jonathan - 8
 Higgins, Tanya - 2
 Patterson, Chris - 9
 Sanders, Barbara - 3
 Seliger, Steven - 3
 Senton, Robert - 1
 Taylor, Clyde - 1

DOWNWARD DEPARTURES

WILHITE, Marcus Hinkle, R. Atty: Dingus, Jon
 Docket: 5:03cr21-RH
 Charge: Conspiracy to Dist. Meth
 Range: 174 - 204 months
 Sentence: 60 months
 Date of Imposition of Sentence: Nov. 10,
 2003
 Grounds: 5K1.1 motion filed by Gov.

SHIRAH, Billy Ray Hinkle, R. Atty: Clark, Bill
 Docket: 5:03cr21-RH
 Charge: Conspiracy to Dist. Meth, Poss
 Firearm by Convicted Felon
 Range: 120- 360 months
 Sentence: 144 months
 Date of Imposition of Sentence: Dec. 12,
 2003
 Grounds: 5K1.1 motion filed by Gov.

MEAGHER, Joseph Vinson, R. Atty: Timothy,
 Lizy
 Docket: 3:03cr85-RV
 Charge: Poss Firearm by Convicted Felon
 Range: 12 - 18 months
 Sentence: 5 years probation w/6 mos. house
 arrest
 Date of Imposition of Sentence: Nov. 18,
 2003
 Grounds: 5H1.5 Extraordinary employment
 record; 5K2.0 circumstances surrounding prior
 conviction; 5K2.11 lesser harms; 5H1.6 extraordinary
 family responsibilities

PIERRE, Irvens Mickle, S. Atty: Murrell, Randy
 Docket: 4:02cr59-SPM
 Charge: Conspiracy to Dist. Cocaine
 Range: 210 - 262 months
 Sentence: 126 months
 Date of Imposition of Sentence: Dec. 15, 2003
 Grounds: 5K1.1 motion filed by Gov.

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

Tallahassee panel member **Ed Stafman**, in a death penalty case pending in the federal court in Puerto Rico, convinced U.S. District Judge Jose Fuste to effectively strike the death penalty. The case involved an initial indictment that failed to include the requisite aggravating circumstances required for the imposition of the death penalty. When the government filed a superseding indictment to correct the omission, it did so almost four months after the client’s arrest. Ed argued that the four month delay violated the speedy trial act. The judge agreed and dismissed the superceding indictment. He did so with prejudice largely because of what the judge described as “the substantial and seemingly unending injustices” perpetrated by the government. That left the original indictment, which all recognize to be inadequate to support a death sentence. The case is still pending. It is one of the cases where the local U.S. Attorney offered a plea that excluded the death penalty only to have Attorney General Ashcroft reject the agreement and require a death penalty prosecution.

Pensacola panel member **Jim Jenkins** won an acquittal in a perjury case tried before Judge

Collier. The government argued that Jim’s client, Luis Bello, lied before the grand jury about \$100,000 he supposedly laundered for a Miguel Vega. Vega had admitted to laundering some 3 to 4 million dollars through a variety of different people. In the scheme, Vega handed out illegally obtained cash only to get it back ostensibly for the purchase of one or more of Vega’s prized cattle or for cattle feed. In fact, though, neither cattle nor cattle feed exchanged hands. Despite (1) testimony of Vega and his two sons who said Bello didn’t purchase cattle or feed or even visit the ranch, (2) testimony from an IRS agent that Bello had reported less than \$16,000 during the 7 years that Bello had paid Vega the \$100,000, and (3) testimony from others who had laundered money for Vega, the jury took just 50 minutes to find Bello not guilty of the perjury charge. Jim’s impeachment of the Vega family, his client’s testimony, and evidence that Bello had other sources of money carried the day. Bello was the only one of eleven charged with perjury in connection with the Vega case who refused to enter a guilty plea.

Lizy Timothy from our Pensacola office won a suppression hearing before Pensacola Magistrate Judge Miles Davis. Her client who had been charged with the misdemeanor offense of possession of marijuana had been stopped by a park ranger at the National Seashore. Although the ranger testified he stopped Lizy’s client for weaving within his own lane of traffic, the ranger’s own four minute video tape showed that, in Judge Davis’ words, the client “drove in a perfectly safe and careful manner.” With that evidence and the ranger failing to explain what he found suspicious about the client’s driving before the video camera began recording, Judge Davis concluded that the ranger lacked

a founded suspicion to justify the stop and suppressed the marijuana.

Lizy Timothy earned a downward departure from Judge Vinson that is mentioned in the Downward Departure section above. The circumstances, though, deserve further explanation. The case was the usual pawnshop case. Her client, Joseph Meagher, a convicted felon, pawned a gun. When Meagher tried to redeem the pawn, he lied on the form about being a convicted felon. Judge Vinson relied on a ground that many of us have hoped the judges would use in these cases, 5K2.11 (lesser harms). The idea being that the penalties were designed for those whose possession of the firearm presents some kind of a risk to the safety of the public and not for someone who does something as innocuous as pawning a firearm. *See U.S. v. Lewis*, 249 F.3d 793 (8th Cir. 2003).

The client's prior felony conviction involved a forged prescription for a painkiller. Lizy presented evidence that a physician had prescribed the painkiller for Meagher, that Meagher had taken the drug legally before and after the forgery, and that Meagher forged the prescription during a time when he could not renew the prescription. In the original investigation of the forged prescription, a sheriff's deputy had offered Meagher leniency in exchange for sexual favors from Meagher's wife. Meagher cooperated in an investigation of the deputy that led to the deputy's conviction. The deputy's case drew the attention of the media in Pinellas County. Lizy obtained and played for Judge Vinson a copy of one of the television newscasts that included a video of the liaisons between the deputy and Meagher's wife.

Chet Kaufman in our Tallahassee office won

an appeal in the Eleventh Circuit involving a federal habeas corpus review of a state case. His client had been convicted of aggravated battery and sentenced as an habitual offender in state court. In his federal habeas petition, the client argued that the conviction was invalid because his trial lawyer had been ineffective in failing to object to the state trial court's decision to instruct on aggravated battery as a lesser included offense of attempted sexual battery (with great force). Although Judge Mickle rejected the argument in the district court, Chet, who had an oral argument in the case, prevailed in the Eleventh Circuit. The Court remanded the case back to the state court with directions that the conviction be vacated.

In a money laundering case Tallahassee panel members **Bob Harper** and **Michael Ufferman** won their client a new sentencing hearing from the Eleventh Circuit. During the original sentencing hearing held before Judge Paul in Gainesville, there was a debate over the amount of the loss for purposes of the the Sentencing Guidelines calculations. Although, Judge Paul determined that the amount of the loss was nearly 6 million dollars, there was argument and testimony that the amount should have been roughly a million dollars. In the absence of any particularized findings from the trial court, the Eleventh Circuit found the record "sufficiently confused to warrant a remand for specific findings." With a concession from the government, the Eleventh Circuit concluded, too, that there should have been a 3 level reduction for acceptance of responsibility rather than the 2 level granted by Judge Paul.

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.

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 2003 term that are relevant to our practice and granted since our last newsletter:

HAMDI v. RUMSFELD, 2004 WL 42546 (cert. granted Jan. 9, 2004) (reviewing 316 F. 3d 450 (4th Cir.), reh'g and reh'g en banc den., 337 F. 3d 335 (2003))

Military detention of American citizen as "enemy combatant"

The Court granted certiorari in a habeas case filed on behalf of an American citizen who is being held without charges by the military based on the assertion that he is an "enemy combatant," that is, a soldier affiliated with the Taliban, the former government of Afghanistan. The detainee was born in Louisiana but moved to Saudi Arabia as a small child. He was apparently seized by Northern Alliance forces and turned over to the United States military in the fall of 2001. Although he was initially detained in

Afghanistan and then Guantanamo Bay, he was transferred to the Norfolk Naval Station Brig after it was discovered that he might not have renounced his American citizenship. The petition for certiorari presented three questions. The first was whether the Constitution permits executive officials to detain an American citizen indefinitely in military custody in the United States, hold him essentially incommunicado, and deny him access to counsel, with no opportunity to question the factual basis for his detention before any impartial tribunal, on the sole ground that he was seized abroad in a theater of the War on Terrorism and declared by the executive to be an "enemy combatant." The second question was whether such a detention is permissible under applicable congressional statutes and treaty provisions. The third was whether, in a habeas proceeding challenging such a detention, the separation of powers doctrine precludes a federal court from following ordinary statutory procedures and conducting an inquiry into the factual basis for the executive branch's asserted justification of the detention.

PLILER v. FORD, 2004 WL 42545 (cert. granted Jan. 9, 2004) (reviewing Ford v. Hubbard, 330 F. 3d 1086 (9th Cir. 2003))

Dismissal of mixed habeas petition

The questions presented are: (1) whether the dismissal of a mixed petition is improper unless the habeas court informs the petitioner of the possibility of a stay of the proceeding pending exhaustion of state remedies and advises the petitioner with respect to the statute of limitations, and (2) whether a second, untimely petition may relate back to the first habeas petition, if the first petition has been dismissed and the first proceeding is no longer pending.

U.S. v. BENITEZ, 2003 WL 21803256 (cert. granted December 8, 2003) (reviewing 310 F. 3d 1221 (9th Cir. 2002))

Plain error under Federal Rule of Criminal Procedure 11

Two cert. questions were presented: (1) In order to show that violation of Fed. R. Crim. P. 11 constitutes reversible plain error, must defendant demonstrate that he would not have pleaded guilty if violation had not occurred? (2) In deciding whether violation of Rule 11 constitutes reversible plain error, may appellate court consider terms of written plea agreement? The Court granted cert. only as to Question 1.

SCHRIRO v. SUMMERLIN, 124 S. Ct. 833 (cert. granted December 1, 2003) (reviewing Summerlin v. Stewart, 341 F. 3d 1082 (9th Cir. 2003))

Retroactivity of Ring

Questions Presented: 1) Is the rule announced in Ring v. Arizona, 536 U.S. 584, that it is a violation of the 6th Amendment to have a judge, as opposed to a jury, impose a death sentence, substantive or procedural? 2) Does the rule announced in Ring apply retroactively to cases being reviewed according to Teague v. Lane's, 489 U.S. 288 (1989), exception for "watershed rules of criminal procedure that alter bedrock principles and seriously enhance accuracy of proceedings"?

JOHNSON v. CALIFORNIA, 124 S. Ct. 817 (cert. granted December 1, 2003) (reviewing 71 P. 3d 270 (Cal. 2003))

Batson

The California Supreme Court held that the standard for establishing a prima facie case of discriminatory use of preemptory challenges "merely means that to state a prima facie case, the objector must show that it is more likely

than not the other party's preemptory challenges, if unexplained, were based on impermissible group bias." Question Presented: Whether to establish a prima facie case under Batson v. Kentucky, 476 U.S. 79 (1986), the objector must show that it is more likely than not the other party's preemptory challenges, if unexplained, were based on impermissible group bias?

NELSON v. CAMPBELL, 124 S. Ct. 835 (cert. granted December 1, 2003) (reviewing 347 F. 3d 910 (11th Cir. 2003))

Recharacterizing § 1983 action as habeas petition in death penalty case

Question Presented: Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254?

SOSA v. ALVAREZ-MACHAIN, 124 S. Ct. 807 (cert. granted December 1, 2003) (reviewing 331 F. 3d 604 (9th Cir. 2003))

Right to sue after wrongful arrest of foreign national

A Mexican national, acquitted of murder after being abducted and transported to U.S. to face prosecution, brought suit. Questions Presented: (1) Whether federal law enforcement officers, and agents of the Drug Enforcement Administration in particular, have authority to enforce a federal criminal statute that applies to acts perpetrated against a United States Official in a foreign country by arresting an indicted criminal suspect on probable cause in a foreign country; (2) Whether an individual arrested in a foreign country may bring an action under the FTCA for false arrest, notwithstanding the

FTCA's exclusion of "[a]ny claim arising in a foreign country," because the arrest was planned in the United States; (3) Whether the Alien Tort Statute (ATS), creates a private cause of action for aliens for torts committed anywhere in violation of the law of nations or treaties of the United States or, instead, is a jurisdiction-granting provision that does not establish private rights of action; (4) Whether, if the ATS does provide a cause of action, it does so only for violations of jus cogens - e.g. non-derogable - norms; and (5) Whether a detention that lasts less than 24 hours, results in no physical harm to the detainee, and is undertaken by a private individual under instructions from senior United States law enforcement officials constitutes a violation of the law of nations and is therefore actionable under the ATS.

THORNTON v. U.S., 124 S. Ct. 463 (cert. granted Nov. 3, 2003) (reviewing 325 F.3d 189 (4th Cir. 2003))

Car searches

The Fourth Circuit refused to adopt limitations that some state and federal courts have placed on the Fourth Amendment rule from New York v. Belton, 453 U.S. 454 (1981), which permits police officers to search the entire passenger compartment of an automobile incident to the arrest of an occupant. The court held that the Belton rule applies even when an arrestee has voluntarily exited his car and walked away before being contacted by the police. The question on cert: Is the bright-line rule announced in Belton confined to situations in which police initiate contact with occupant of vehicle while that person is in vehicle?

BLAKELY v. WASHINGTON, 124 S. Ct. 429 (cert. granted Oct. 20, 2003)(reviewing 47 P.3d 149 (Wash. App. 2002))

Apprendi as applied to non-capital sentencing enhancements

Question Presented: Whether a fact (other than a prior conviction) necessary for an upward departure from a statutory standard sentencing range must be proved according to the procedures mandated by Apprendi v. New Jersey, 530 U.S. 466 (2000).

Facts: Blakely pleaded guilty to one count of second degree kidnapping and one count of second degree assault. Consistent with the plea agreement, the State recommended the high end of the standard range. After a sentencing evidentiary hearing, where the State presented testimony from the victims and mental health professionals, the trial court imposed an "exceptional sentence" upward. To justify the "exceptional sentence," the trial court found two aggravating factors, one of which was affirmed on appeal: the offense involved domestic violence plus deliberate cruelty and commission within sight or sound of the victim's minor child. Mr. Blakely contended on appeal that Apprendi required the factual basis for an exceptional sentence upward must have been submitted to a jury and proved beyond a reasonable doubt. The appellate court rejected that argument by relying on State v. Gore, 21 P.3d 262 (Wash. 2001), which held that Apprendi does not apply to factual determinations that support reasons for exceptional sentences upward because it neither increases the maximum sentence nor defines a separate offense calling for separate penalties.

Supreme Court Decisions

ILLINOIS v. LIDSTER, 2004 WL 51006 (U.S. Jan. 13, 2004)

Police Roadblocks

The Court ruled, 6-3, that police roadblocks

aimed at soliciting information about unsolved felonies do not violate the Fourth Amendment rights of motorists who are stopped. The Edmond rule, which presumes unconstitutionality of a suspicionless roadblock conducted for general crime control purposes, does not apply to a brief stop where the "primary law enforcement purpose was not to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The police expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals." Accordingly, the reasonableness of the stop must be analyzed, and this roadblock passes the test because it was merely a brief stop to seek information about a hit-and-run accident the week before, and Lidster almost hit an officer with his car and was arrested for driving under the influence of alcohol. Breyer, writing for the majority, said that because the prior accident caused a death, the state had a substantial interest in seeking information about it. "The stop advanced this grave public concern to a significant degree," he wrote, adding that the stop "interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect." Stevens, joined by Souter and Ginsburg, dissented, agreeing that they would have sent the case back to Illinois courts for further factual determinations -- such as whether the same information could have been solicited in a less intrusive way.

MARYLAND v. PRINGLE, 124 S. Ct. 795 (Dec. 15, 2003)

Search; arrest; automobile; passengers

The Court held that police could arrest all occupants of a car in which drugs were found,

when none claimed possession. The state appellate court had held that, absent specific facts tending to show the passenger's knowledge and dominion or control over the drugs, the mere finding of drugs in the back armrest when the defendant was a front-seat passenger in a car driven by its owner was insufficient to establish probable cause for arrest for possession. The Supreme Court reasoned that the officer had probable cause to believe a felony had been or was being committed. Since it was an entirely reasonable inference from these facts that any or all occupants had knowledge of, and control over, the drugs, a reasonable officer could conclude that there was probable cause to believe the passenger committed the crime of possession either solely or jointly. The Court rejected the guilt-by-association defense argument.

CASTRO v. U.S., 124 S. Ct. 786 (Dec. 15, 2003)

Habeas; successive; § 2255; certiorari review; 28 USC § 2244(b)(3)(E)

The Supreme Court held that a federal court cannot recharacterize a pro se litigant's motion as a first § 2255 motion unless it first informs the litigant of its intent to do so, warns that this means a second would be subject to the statutory restricts, and allows an opportunity to withdraw or amend the motion to include all § 2255 claims the litigant has. The Court reversed the **11th circuit**. The petitioner had first filed a pro se motion for new trial under Fed.R.Crim.P. 33, which was denied on the merits as both a Rule 33 and § 2255 motion; that characterization was not challenged on appeal, and the 11th Cir. affirmed. Subsequently, the defendant filed a pro se motion under 28 USC § 2255. After the district court denial, the 11th remanded for

consideration whether this was a second § 2255 motion. The district court concluded it was and dismissed for failure to obtain the 11th circuit's permission to file a "second or successive" motion, and the 11th affirmed.

U.S. v. BANKS, 124 S. Ct. 521 (Dec. 2, 2003)

Search; warrant; knock and announce; exigency; reasonableness

The Supreme Court held that police officers' 15-20 second wait before forcible entry after rapping on the front door did not violate the Fourth Amendment where they were executing a felony warrant to search for cocaine in a suspect's home. The standards bearing on whether officers can legitimately enter after knocking are the same as those for requiring or dispensing with the knock and announce requirement in the first place. The reasonableness determination involves a case-by-case inquiry. The obligation to knock and announce before entering gives way when officers have reasonable grounds to expect futility or to suspect that an exigency, such as evidence destruction, will occur in connection with a felony offense such as that in this case. The Court reiterated that a different rule applies to warrantless entries of a home for purposes of arrest or search for minor offenses, and also noted that its opinion did not address warrants for search or arrest in non-felony-offense cases.

MITCHELL v. ESPARZA, 124 S. Ct. 7 (Nov. 3, 2003)

Harmless error, habeas review

Esparza shot and killed an employee while robbing a store by himself. Although the indictment charged Esparza with aggravated murder in the course of committing aggravated robbery, it did not charge him as a "principal offender," as required for a death

sentence under Ohio law. Esparza argued that he had not been convicted of an offense for which a death sentence could be imposed. The state court rejected Esparza's claim, finding that any error was harmless. The federal appellate court found that the state court's application of harmless-error review was inappropriate. The United States Supreme Court determined that the federal appellate court exceeded its authority under 28 U.S.C. § 2254(d)(1) because the state court's decision did not conflict with clearly established federal law. The Supreme Court also determined that Esparza was not entitled to habeas relief, because the state court's harmless-error determination was not an unreasonable application of clearly established federal law. The jury verdict would surely have been the same had it been instructed to find as well that Esparza was a "principal" in the offense.

YARBOROUGH v. GENTRY, 124 S. Ct. 1 (Oct. 20, 2003)

Ineffectiveness; closing argument; habeas

The Court reversed, per curiam, the Ninth Circuit's grant of habeas relief based on its conclusion that the state court's decision was "objectively unreasonable." Counsel's failure to highlight some of the exculpatory evidence did not render his argument ineffective or render the state court decision unreasonable. "Even if some of the arguments would unquestionably have supported the defense, it does not follow that counsel was incompetent for failing to include them." The Court noted that focusing on a small number of key points may be more successful than a shotgun approach and that there is a strong presumption that counsel's focus on some issues to the exclusion of others was for tactical reasons. Counsel's use of derogatory

terminology for his client could be a reasonable strategy. The Court essentially countered the Ninth Circuit's assault on numerous deficiencies in counsel's argument.

Selected Eleventh Circuit Case Summaries

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

U.S. v. MARTE, 2004 WL 57227 (Jan. 13, 2004)

Illegal reentry, 8 U.S.C. § 1326

Marte, a permanent resident, was convicted of a felony in 1994, imprisoned, and deported in 1996. In 2001, Marte arrived in Miami on a one-way ticket from the Dominican Republic and presented himself to an immigration officer. Marte showed the primary immigration inspector his valid Dominican passport, his genuine but expired "green card," and his one-way ticket from Santo Domingo to Miami. He also presented a customs declaration form listing his country of citizenship as the Dominican Republic, his country of residence as the United States, and his address in the United States as "Kissimmee, Orlando, Florida." Marte never disclosed that he had been deported or that he did not have permission to apply for reentry. After the primary immigration inspector scanned Marte's green card into the computer and discovered that he was a prior deported felon, he sent Marte for a secondary inspection. At that point, a senior inspector confirmed Marte's history as a convict/deportee and his lack of permission to reenter. He was charged and convicted of illegally attempted reentry under 8 U.S.C. § 1326, and argued that 8 C.F.R. § 212.2 either authorized his conduct

or rendered § 1326 unconstitutionally vague. The Court rejected the claim. The C.F.R. rules mean that if an alien files a Form I-212 at a port of entry and is granted permission to apply for reentry, § 212.2(i) operates to make that permission retroactive to the time of the alien's "reembarkation at a place outside the United States," so that the alien does not violate § 1326 when he goes through the authorized procedure to apply for entry. Marte's problem is he made no attempt to file a Form I-212. The regulation does not authorize a deported alien to come to a port of entry and attempt to enter the United States without filing a Form I-212. The codes and statute provided sufficiently clear notice. Marte's other claims were also denied.

U.S. v. CLAY, 2003 WL 23112373 (Jan. 7, 2004)

Fourth Amendment; aggregating drug quantity; special verdict; interstate commerce

The Court held that (1) a state court's findings of fact in a Fourth Amendment suppression hearing were not clearly erroneous, so the warrants were supported by probable cause. Alternatively, Georgia's rejection of the Leon good faith exception to the Fourth Amendment is irrelevant to the federal court's independent evaluation of the state search. (2) two constructive possessions only a few blocks apart were a single, simultaneous possession; (3) the district court properly submitted a special verdict form to the jury to determine whether the government proved the 50 grams necessary to support the 24-year mandatory sentence; and (4) the barrel inscription "Colt Manufacturing Company, Hartford, Ct." was sufficient proof of interstate commerce to satisfy federal jurisdiction.

U.S. v. RENDON, 2003 WL 23096499 (Dec. 31, 2003)

Maritime Drug Law Enforcement Act (“MDLEA”), USSG

Rendon was charged with conspiracy to distribute and possession with intent to distribute five kilograms or more of cocaine, in violation of the Maritime Drug Law Enforcement Act (“MDLEA”). Rendon challenged the MDLEA as to subject matter jurisdiction as well as an Apprendi violation by incorporating the penalty provisions of 21 U.S.C. § 960. He also contended that the district court erred in giving him upward adjustments for being the captain of the subject go-fast boat as well as being an organizer or leader of the drug conspiracy. The Court (Hull, with Tjoflat and Fay) held that (1) Rendon appropriately was tried in the Middle District of Florida, (2) there is no Apprendi violation with respect to his sentence, and (3) because the testimony revealed that Rendon was both the captain of the go-fast boat carrying a controlled substance as well as an organizer and leader of the drug conspiracy, the district judge correctly gave him upward adjustments in his sentence under U.S.S.G. § 2D1.1(b)(2)(B) and § 3B1.1(a).

U.S. v. MONROE, 2003 WL 23005180 (Dec. 24, 2003)

No reversible plain error during Rule 11 plea colloquy

Monroe pleaded guilty to a drug charge. For the first time on appeal, Monroe objected to the plea colloquy and contended that the district court erred under Rule 11 by not expressly informing him of his right against compelled self-incrimination. The Court rejected his argument. “The record shows that the district court expressly referenced each item in Rule 11(c)(1)-(4) except for “the right

against compelled self-incrimination” in Rule 11(c)(3).” “In light of the thorough nature of the overall colloquy, the Advisory Committee Notes, and our own precedent that does not require in haec verba recitation, it is arguable that there was no Rule 11 error in this case and that in any event, any error was not plain. However, we need not and do not decide either of these two questions because it is absolutely clear in this record that Monroe failed to carry his burden of establishing that any alleged error affected or prejudiced his substantial rights or that any alleged error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.”

PAGAN v. U.S., 2003 WL 22999492 (Dec. 23, 2003)

28 U.S.C. § 2255, post-conviction appellate bond; certificate of appealability (COA)

Pagan filed a 28 U.S.C. § 2255 motion alleging ineffective assistance of counsel at trial and on appeal, and moved unsuccessfully for an appellate bond. The Eleventh Circuit held that the collateral order doctrine permits interlocutory review of a bond order in a pending post-conviction relief proceeding. However, a certificate of appealability (COA) is required. The district court denied Pagan a COA. The 11th Circuit construed Pagan’s notice of appeal as a request for a COA. A COA may issue only if the applicant has made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). He failed to show that here, so his appeal was dismissed.

HENDERSON v. HALEY, 2003 WL 22952570 (Dec. 16, 2003)

Habeas; § 2254; procedural default; cause; voluntary waiver; advice by conflicted atty
The Court rejected the defendant’s two

arguments for “cause” to avoid the procedural default resulting from his earlier dismissal of his state post-conviction proceedings prior to adjudication on the merits. First, the Court rejected the defendant’s argument that his dismissal was not a knowing, intelligent, and voluntary waiver, because the defendant knew the “bottom line” that dismissal meant he could not raise those claims again and would probably be executed sooner, given the extensive colloquy by the judge who allowed the dismissal. Second, the Court rejected the defendant’s argument that his waiver was involuntary because his counsel was saddled by conflicting interests, i.e., his brother had prosecuted the defendant in the death case and that he was a close friend of the murder victim’s brother, and the attorney exercised undue influence in his decision to dismiss. Because this argument had not been presented in the state court, the Court held that it, too, was defaulted.

U.S. v. BOYCE, 351 F.3d 1102 (Nov. 28, 2003)

Traffic stop; prolonged detention; refusal to consent cannot form reasonable suspicion

The Court reversed denial of a suppression motion, agreeing with the defendant (1) that the police detained him longer than necessary to process the original traffic violation without a reasonable, articulable suspicion to justify prolonging his detention, and (2) that the detention and search were unconstitutional because the decision to detain the vehicle was based solely on the driver’s refusal to consent to a search. Citing *United States v. Williams*, 271 F.3d 1262, 1271 (10th Cir. 2001); *United States v. Wood*, 106 F.3d 942, 946 (10th Cir. 1997), the Court said that refusal to consent to a search cannot be considered a basis for reasonable suspicion.

“The police cannot base their decision to prolong a traffic stop on the detainee’s refusal to consent to a search. Such a refusal may only be considered when the police have already observed, before asking for permission to search, facts sufficient to raise a reasonable suspicion. *Id.* (holding that the officer could choose to detain defendant after he refused to consent to a search of his car “if the officer already had sufficient reasonable suspicion to detain [the defendant] for the purpose of the canine drug search”). In this case, Edwards had not observed facts sufficient to raise a reasonable suspicion when he asked for consent. Therefore, Edwards could not consider Boyce’s refusal to consent in making his decision to detain Boyce. Because the tape shows that Edwards did unlawfully base his decision on Boyce’s refusal to consent, the detention and search were unconstitutional.”

U.S. v. PERKINS, 348 F.3d 965 (Oct. 22, 2003)

Traffic stop; reasonable suspicion

The Court affirmed the grant of motions to suppress statements and evidence obtained during traffic stop for issuance of a warning. An Alabama state trooper on the interstate saw a car with a Florida plate cross the white fault line and veer onto the shoulder. Fearing the driver was impaired, the officer stopped it and approached the passenger side and explained his concern. After inspecting driver’s license and insurance info, the officer asked him to exit “so he could give [him] a warning ticket for a lane violation, assuring him that, after the issuance of the warning citation, he would be free to leave.” The passenger remained in the vehicle. The officer briefly searched the driver and asked him to sit in the patrol car while he wrote the ticket. Noticing the Tampa address on the

license, the officer asked if that was the driver's ultimate destination; the negative response prompted a series of questions about residency, employment, and destination. The officer testified that the driver, who was not free to leave during this questioning, was extremely nervous, breathed rapidly, and repeated the questions before answering. The officer then radioed for a license check and, while waiting, asked more detailed questions about his length of residence, when he was going to get an Alabama license, and who he was visiting on this trip. After being told the license was valid and there were no outstanding warrants, the officer gave the driver the ticket to sign. The officer testified he was then finished with that portion of his investigation. However, he continued to detain the driver because of his nervousness, his perceived evasiveness to questioning, and a hunch he was untruthful about his destination, deciding to question the passenger about the destination. After questioning the passenger and again the driver whether the car contained any contraband, the officer asked the driver's permission to search the vehicle, which was denied. The officer called dispatch to send a drug dog, waited its arrival, removed the passenger from the vehicle, patted him down, and put him in the patrol car. Unaware their conversation was being taped, Scott disavowed any knowledge that narcotics were in the car and both debated whether the dog would find any drugs. The officer returned and asked both again if contraband was in the car. After repeated denials, the driver acquiesced to the officer's pointed question how much narcotics were in the car and showed the officer where they were hidden. The officer did not have reasonable suspicion for continued detention after the warning ticket was issued. The officer's hunches did not rise to the "minimal level of objective

justification."

MEDBERRY v. CROSBY, 351 F.3d 1049 (Nov. 25, 2003)

Habeas, 28 U.S.C. §§ 2241, 2254, 2255

In a long opinion based mostly on historical development of habeas law, the Court held that there is really no such thing as a claim for habeas relief under 28 U.S.C. § 2254. Instead, § 2254 is merely a restriction on the writ, which is more generally defined under 28 U.S.C. § 2241. Therefore, a state prisoner seeking relief from an administrative prison determination as to, e.g., gain time, who ordinarily filed under § 2241, must now, in most circumstances, comply with all the restrictive requirements of § 2254.

U.S. v. \$242,484.00, 351 F.3d 499 (Nov. 20, 2003)

Forfeiture; probable cause; factual findings by appellate court; 21 U.S.C. 881

The Court denied the government's motion on rehearing, but substituted a new opinion in this civil forfeiture case, reversing because the facts did not support the district court's finding of probable cause, which it had admitted was a close question. There is a large amount of dicta, essentially, about the role of an appellate court in making additional factual findings.

U.S. v. YOUNG, 350 F.3d 1302 (Nov. 18, 2003)

Search; warrantless; Fed Ex package; expectation of privacy; invitation; x-ray

In this multi-count tax case, Fed Ex employees had allowed IRS to take packages off-site and x-ray them. The Court affirmed denial of the motion to suppress, holding that when the defendants elected to ship cash through Fed Ex – despite explicit warnings on the airbill and envelopes “do not send

cash”; and Fed Ex retained the right to inspect any package for any reason – defendants had no legitimate expectation of privacy in the contents of the packages. Alternatively, consent to search could be found through the “bailment relationship.” The right to inspect notice to shippers authorized Fed Ex as bailee, to consent to a search. “Certainly one with full possession and control along with the right to inspect has the authority to consent to a search by law enforcement officials.”

U.S. v. PRINGLE, 350 F.3d 1172 (Nov. 14, 2003)

Sentencing; U.S.S.G. § 1B1.3; reasonably foreseeable; § 2K2.4; Amendment 599

The Court affirmed denial of the pro se motion for reduction under 18 U.S.C. § 3582(c)(2). Pringle was convicted of three counts based upon a bank robbery and firearm possession, after which his involvement ended, and one count of conspiracy to commit the robbery. Pringle’s sentence was enhanced under U.S.S.G. § 2K2.4 based on his co-defendant’s discharge of a firearm in a subsequent robbery in which Pringle did not participate. Pringle’s co-conspirator’s acts committed in three robberies several months later, and on which his sentence was greatly enhanced, were “reasonably foreseeable” to him under U.S.S.G. § 1B1.3, because the jury and the sentencing court had so found. He had knowingly joined a group which had committed prior robberies using firearms. Also, he was not entitled to the retroactive sentence reduction under Amendment 599 to § 2K2.4. Because the purpose of the amendment was to avoid double counting or punishment for the same behavior, the Court concluded that Amendment 599 did not retroactively prohibit the enhancement on these facts.

U.S. v. PUCHE, 350 F.3d 1137 (Nov. 12, 2003)

Conspiracy to commit money laundering, U.S.S.G. § 2X1.1(b)(2)

Enrique, Mauricio and Orlando Puche owned and operated Gloria Exchange Corporation (GEC), a money transmittal company in Miami. They were busted in a DEA sting operation. In a fact-intensive opinion, the Court rejected a sufficiency argument as to conspiracy to commit money laundering, as well as jury, instruction, evidence, and forfeiture challenges. But as to sentencing, the Court reversed in part, finding that U.S.S.G. § 2X1.1(b)(2) mandates a three-level reduction in sentencing because defendants had not completed or were not close to completing all the acts they believed necessary to launder six million dollars in future transactions.

U.S. v. HALL, 349 F.3d 1320 (Nov. 10, 2003)

Conspiracy to money launder; abuse of position of trust in sentencing

Hall was convicted of offenses arising from the promotion of a fraudulent investment scheme, and he appealed. The Court held that (1) an overt act was not an essential element for conviction of conspiracy to commit money laundering under 18 U.S.C. § 1956(h) (but noting split among circuits), and (2) defendant’s status as a pastor of church which managed and promoted a fraudulent investment scheme, and his involvement in road show meetings preaching about the scheme, did not create a personal trust relationship between himself and the victims so as to warrant a 2 level enhancement under U.S.S.G. § 3B1.3 for abuse of position of trust.

JONES v. NAGLE, 349 F.3d 1305 (Nov. 6, 2003)

Habeas; timeliness; statute of limitations; tolling; waiver applied against state

A fact-specific application of timeliness rules under AEDPA. On *de novo* review, the state agreed that the lower court erred in not tolling the clock during the time the defendant could have appealed the denial of his second state post-conviction petition. The Court agreed that AEDPA should have been tolled during the period in which the defendant “could have filed a notice of appeal” from the state court decision. That would have made the petition timely. However, the state then argued, for the first time on appeal, that the lower court erred in tolling his claim for a six-month period, based on equitable tolling, because he claimed not to have received timely notice that his first state petition had been denied. The court held the state had waived this argument.

U.S. v. BACKUS, 349 F.3d 1298 (Nov. 5, 2003)

Search; consent; common authority doctrine; estranged spouse; domestic violence

The Court rejected the defense argument that the defendant’s wife, a joint owner of the home, had abandoned it the property and thus would not have had authority to consent to search. Her abandonment was not voluntary – it was a consequence of the defendant’s long-term abusive behavior. She left the home and lived in shelters for six months, and he began threatening her family. She went to the police and gave them permission to enter the home and gun safe to recover guns which he, as a convicted felon, had no right to possess. Therefore, she had as much ownership interest as he and common authority to consent to the police’s search. The Court also rejected his argument that he

had a reasonable expectation of privacy, since she had been gone six months and was not expected to return, because the law would not honor an argument grounded in the defendant’s misconduct. Quoting *Matlock*, 415 U.S. at 171, and citing five other circuits, her husband “assumed the risk” she might permit a search. “We are not willing to extend to violently abusive husbands something akin to a rule of repose against the authority of their wives to consent to a search of jointly owned property.”

PRUITT v. JONES, 348 F.3d 1355 (Oct. 31, 2003)

Habeas; 28 U.S.C. § 2254; preservation; discretionary review; post-conviction

The prisoner unsuccessfully appealed to the Alabama Court of Criminal Appeals, and sought a writ of certiorari to the Alabama Supreme Court, which was denied. The prisoner then petitioned for post-conviction relief, under Ala. R. Crim. P. 32, asserting for the first time that he received ineffective assistance of counsel at trial. The state habeas court dismissed the petition. The Alabama Court of Criminal Appeals affirmed the denial of habeas relief, and the prisoner did not petition the Alabama Supreme Court for discretionary review, and instead brought the instant federal action. The court of appeals upheld the district court’s decision. The prisoner failed to petition the Alabama Supreme Court for discretionary review of the dismissal of his Rule 32 petition, as he could have within 14 days, pursuant to Ala. R. App. P. 39(c)(2). Nothing in the United States Supreme Court’s reasoning in *O’Sullivan v. Boerckel* suggested that a different rule should apply in state post-conviction appeals as opposed to direct appeals. Accordingly, the prisoner failed to exhaust his state remedies by not petitioning

the Alabama Supreme Court for discretionary review of the denial of his state habeas petition.

U.S. v. MIRANDA, 348 F.3d 1322 (Oct. 29, 2003)

18 U.S.C. § 2422(b), U.S.S.G. § 2A3.2, § 2A3.4, standards of review

The Court (1) affirmed, on clear error review, the district court's refusal to impose a two-level sentence enhancement based on Miranda's misrepresentation of his age in online enticement of a minor to have sex, i.e., using a computer to attempt to persuade a minor to engage in criminal sexual conduct, in violation of 18 U.S.C. § 2422(b). During his online exchanges, Miranda stated that he was 35. In reality, Miranda was 40. Although the district court could have found that Miranda intended to induce a meeting by misrepresenting his age, the contrary finding was not clearly erroneous. (2) The Court held that the attempted sexual assault penalties provided in U.S.S.G. § 2A3.2, not the attempted sexual contact penalties provided in § 2A3.4, applied to the conduct of defendant Miranda. § 2A3.2 applies to offenses involving the "sexual abuse" of a minor, while § 2A3.4 applies of offenses involving "sexual contact not amounting to sexual abuse." However, the Court noted a dispute regarding the appropriate standard of review -- and, although the Court stated that intent is a fact issue reviewed for clear error, it is not clear whether the panel afforded the district court any deference at all on this issue, as called for in Panfil. The panel took issue with U.S. v. Williams, 340 F.3d 1231 (11th Cir. 2003), in which the Court explained the that the district court is entitled to due deference even in the application of the guidelines to the facts. The panel deemed this statement in Williams to be dicta and contended that the de novo review

standard applies to the application of guidelines to facts. Obviously, the panel's de novo review view would in some cases, such as this one, be more appellant-favorable.

U.S. v. STOSSEL, 348 F.3d 1320 (Oct. 29, 2003)

18 U.S.C. § 3582(b), sentence modification

The Court held that 18 U.S.C. § 3582(b) does not confer jurisdiction on a district court to modify a sentence nine years after it was imposed. That statute provides: "Notwithstanding the fact that a sentence to imprisonment can subsequently be . . . appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742[,] a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes." The Court held that this provision merely defines a "final judgment" and is not a vehicle for sentence modification. The provision does not grant a district court jurisdiction to do anything, let alone correct an illegal sentence.

U.S. v. ELLINGTON, 348 F.3d 984 (Oct. 24, 2002)

Mail fraud, conspiracy

In a fact-specific opinion, the Court reversed a trial court's judgment of acquittal for a lawyer convicted of conspiracy to commit mail fraud, and of mail fraud, in connection with the concealment of a "referral fee" paid to the chairman of a county housing authority (a governmental entity chartered to fund low-cost housing).

U.S. v. EDMONDS, 348 F.3d 950 (Oct. 21, 2003)

Sentencing; enhanced base offense level; drug user; U.S.S.G. § 2K2.1

The Court affirmed an enhanced base offense level of 14 under U.S.S.G. 2K2.1(a)(6) where

the government presented reliable and specific evidence that defendant's unlawful use of marijuana was regular, ongoing, and contemporaneous with the possession of a firearm with an obliterated serial number. The Court assumed that "unlawful user of" a controlled substance refers to the ingestion and consumption, not sale, of drugs. "Unlawful user" means use that is "ongoing and contemporaneous with the commission of the offense." The Court clarified this to mean that the drug use need not be simultaneous with the firearm possession, and the government need not prove the defendant was under the influence at arrest, only that the unlawful use was during the "same time period" as the firearm offense.

U.S. v. ALABOUD, 347 F.3d 1293 (Oct. 20, 2003)

Sufficiency; 18 U.S.C. § 875(c); evidence; victim's belief; threats

The defendant was a naturalized citizen from Iraq who had hired a lawyer to present claims of perceived injustice flowing from his ethnic origin. After much legal work and learning the lawyer was Jewish, their relationship ended, and the defendant two years later started placing numerous calls to the law office demanding refund of all his retainer. The lawyer understood the calls to be physical threats and contacted the FBI and took many security precautions. He was allowed, over objection at Alaboud's trial, to testify that he perceived the calls as threats. The Court held the evidence was sufficient that Alaboud had transmitted a communication containing a "threat to injure the person of another," the central question being whether a reasonable person would construe the threats as a serious expression of an intention to inflict bodily harm. As for the defense that his communications were more akin to fire and

brimstone proclamations and not sufficiently specific, the Court concluded that the combination, context, tenor, and number of his statements, were sufficient. As for the defense argument that 18 U.S.C. § 875(c) requires an objective standard of how a reasonable person would construe the communications, the Court agreed with other circuits that evidence of the target's reaction is relevant and admissible.

U.S. v. BANKS, 347 F.3d 1266 (Oct. 20, 2003)

Sentencing; Obstruction of justice enhancement; U.S.S.G. § 3C1.1

The Court remanded for resentencing *without* the U.S.S.G. § 3C1.1 enhancement for obstruction of justice, because the district court failed to make a finding that the defendant's "mendacity at arrest," i.e., giving a false name and identification document, following which he was released on bond, "actually resulted in a significant hindrance to the investigation or prosecution of the instant offense," which is required by § 3C1.1, cmt. n.5(a). Because of this "actually resulted" language, neither a defendant's intent to obstruct justice, nor the potential that he may have evaded investigation or prosecution, can constitute a significant hindrance. To prevail, the government must show how it fruitlessly spent investigation or prosecution resources due to the defendant's untruthfulness, or what action it took that it would not have taken but for the deceit.

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