

FEDERAL PUBLIC DEFENDER

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NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

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**BLAKELY APPLIES TO THE SENTENCING GUIDELINES**

As most know by now, the United States Supreme Court, in its decision in United States v. Booker, 2005 WL 50108 (U.S. Jan. 12, 2005), found that its earlier decision in Blakely v. Washington, 124 S. Ct. 2531 (2004), applies to the United States Sentencing Guidelines.

Given the remedy chosen by the Court, though, the Guidelines will remain as the most important consideration at sentencing and seem destined to control the vast majority of sentencings here in the Northern District and around the country. That remedy consists of making the Guidelines advisory and requiring sentencing judges to consider them along with the traditional sentencing goals set out in 18 U.S.C. § 3553(a).

Both defendants and the Government can still appeal a sentence, but the question will be only that of whether the sentence is “unreasonable.” Justice Breyer is confident courts will have little difficulty with the standard. Justice Scalia speculates that in

using the standard, courts might do anything from using it to “preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside Guideline ranges” to reducing the review of sentences to a “mere formality” only “to ensure that busy district judges say all the right things when they explain how they have exercised their newly restored discretion.”

In this period immediately after the decision, there remain many unanswered questions. The biggest may be Congress’ response. As Justice Breyer noted “[t]he ball now lies in Congress’ court.”

The question of retroactivity remains. Although there are arguments that the decision should be applied retroactively, most are pessimistic. Professor Douglas Berman, in his blog, “Sentencing Law and Policy,” writes that “especially since the lower courts have already been consistently resisting claims that Apprendi and/or Blakely are retroactive, I forecast a lot of litigation from, and little relief for, prisoners with final convictions.”

There is also the question of those who committed their crimes prior to the decision, but are now awaiting sentencing. Does the newly extended discretion allow judges to impose sentences greater than called for by the Guidelines? In anticipation of the Booker decision, we have, in our challenges to the Guidelines, been arguing that the judge would be limited to the maximum under the Guidelines. Our argument has been that the fair notice component of the Due Process Clause protects a defendant from a harsher result when a change in the law is brought about by a decision of the courts. See Bowie v. City of Columbia, 378 U.S. 347, 353-354, 84 S. Ct. 1697, 1702 (1964). We have posted the argument on our webpage under the heading of “Booker - Fair Notice.”

Regardless though, of what Congress might or might not do and regardless of how some of these open issues may play out, the defense bar is left with an opportunity to reinvigorate the sentencing process. As most sentences will probably still be based on the Sentencing Guidelines, it makes sense that we will need to continue to make any challenges to the Guideline scoring and still pursue any departure arguments. That, though, is only a starting point. Circumstances that may have been discouraged or rejected under the Guidelines - family hardship, a favorable employment history, mental health issues, the defendant’s poor health, the disparity between crack cocaine and powder cocaine, the minimal criminal history that sometimes triggers the harsh career offender sentencing, and any number of other circumstances - may now convince the judge to impose a sentence below the guidelines.

It’s worth noting, too, that the very first sentence in 18 U.S.C. § 3553(a) reads: “The

court shall impose a sentence sufficient, but *not greater than necessary*, to comply with the purposes set forth in paragraph (2) of this subsection.” Surely, many a guideline sentence is “greater than necessary” to achieve the goals of providing just punishment, deterrence, protecting the public, etc.. (See Jan. 12, 2005 post, *Sentencing Law and Policy*, “The power of parsimony” <http://sentencing.typepad.com> .)

We’ll need to think differently, too, about how to preserve the sentencing issue for appeal. Clearly, we’ll need to talk about the sentence being “unreasonable,” and, in most instances, “unreasonable” because it conflicts with the sentencing goals as set out in 18 U.S.C. § 3553(a).

Many of you will come up with innovative approaches to sentencing under these new rules. Please call any of our lawyers to talk about theories or approaches you think might be successful or about which you might have questions. In an effort to start this process, we’ve added a sentencing memo to our webpage under the heading of “Booker: New Sentencing Theories.” It was written back in August when Judge Hinkle had adopted a view similar to what has been decided in Booker, i.e. that the Guidelines were only advisory. In the memo, Randy Murrell argued that the Judge should use his new found discretion to correct (1) the unjustified disparity between powder and crack cocaine and (2) the unduly harsh career offender sentence that was based on minimal past criminal conduct.

## **COMPENSATION MAXIMUMS INCREASED**

Congress, in its Omnibus Appropriations Act, increased the case compensation maximums applicable to both panel lawyers and providers of investigative and expert services. The increases apply to all work done on or after December 8, 2004.

The maximum payments for felonies have increased from \$5,200 to \$7,000; from \$3,700 to \$5,000 for appeals; and from \$1,200 to \$1,500 for misdemeanors.

Without prior approval, but, as always, subject to later review, you may now spend up to \$500 on investigative and expert services. (The safer course is to *always* get prior approval.) The maximum for investigative and expert services absent certification from the trial court and authorization from the Eleventh Circuit has been increased from \$1,000 to \$1,600. (For a review of the procedures involved retaining these services, go to the newsletter archive of our webpage, [www.fpd-fln.org](http://www.fpd-fln.org), and review the article in our April, 2001, newsletter.)

Congress has increased the hourly rate in capital cases to \$160 an hour.

## **RICHARD GREENBERG APPOINTED TO THE PANEL OVERSIGHT COMMITTEE**

Chief Judge Hinkle recently appointed Tallahassee panel member Richard Greenberg to the panel oversight committee. The committee, which makes recommendations to the judges regarding panel applicants and such things as panel training, consists of the Federal Public Defender and a panel member

from each of the four divisions within the Northern District. Richard will be the representative from the Tallahassee division. He replaces Steve Seliger who recently retired from the practice of law.

Richard is a 1983 graduate of the University of Georgia School of Law. His practice consists of criminal defense, attorney discipline defense, and bar admission representation. Richard has been active in the Tallahassee chapter of FACDL, serving in a number of positions, including the president of the chapter and the chapter representative. Richard welcomes comments, suggestions, and questions from his fellow panel members.

## **BOP BOOT CAMP PROGRAM TERMINATED**

The last inmates for the Bureau of Prison's Intensive Confinement Center programs (Boot Camp) were received on Friday, January 7, 2005. When those classes graduate on June 28, 2005, the boot camp program will come to an end. The three prisons involved in the program, ICC Lompoc in California, ICC Lewisburg in Pennsylvania, and the women's program in Bryan, Texas will become minimum federal prison camps. The Bureau of Prisons says they are ending the programs because of a lack of cost effectiveness.

## **FEBRUARY PANEL TRAINING ON APPEAL BASICS**

Over the last few months, Judge Rodgers has expressed concern over requests by panel members to withdraw from cases in which the defendant wishes to pursue an appeal.

She has subsequently asked that our office assign to her cases only those panel members capable and willing to handle appeals. Most of the judges in our district similarly expect those panel members assigned at the trial level to be responsible for pursuing any appeal.

Accordingly, we'll be presenting a training seminar in February regarding the basics of pursuing an appeal in the Eleventh Circuit. Gwen Spivey of our office, accompanied by our appeals secretary, Margaret Clemons, will be making the presentation in Tallahassee and Panama City. As they will be discussing some points pertinent to the production and filing of briefs, you may want to bring your secretary along with you. While we *may* video-tape the presentation, we think this is the sort of presentation that you'll benefit the most from by being present and being able to ask questions. As we are currently planning to make the presentation *only in Tallahassee and Panama City*, we suggest those of you in Gainesville and Pensacola make plans to attend the presentation in either Tallahassee or Panama City.

Gwen will be making her presentation in **Tallahassee** at the **Federal Courthouse** at **noon** on **February 24<sup>th</sup>**. She'll be making her presentation in **Panama City** at **noon (CST)** at the **Federal Courthouse** on **February 22nd**.

#### **2005 DEFENDER SERVICES TRAINING EVENTS FOR CJA PANEL MEMBERS**

We sent out a notice a couple of weeks ago advising you of the schedule for the panel training provided by the Office of Defender Services. If you missed it, here's the schedule:

#### **Winning Strategies Series**

Seattle, WA, March 31-April, 2, 2005  
 Minneapolis, MN, July 21-23, 2005  
 Philadelphia, PA, September 15-17, 2005

#### **Sentencing Advocacy Workshop**

April 29-May 1, 2005  
 Location TBD

#### **Trial Advocacy Workshop**

June 23-25, 2005  
 San Francisco, CA

#### **Complex Litigation Seminar**

August 18-20, 2005  
 Location TBD

Contact [Bob\\_Burke@ao.uscourts.gov](mailto:Bob_Burke@ao.uscourts.gov) for substantive information regarding either the Winning Strategies Series or the Complex Litigation Seminar; [Andrea\\_Taylor@ao.uscourts.gov](mailto:Andrea_Taylor@ao.uscourts.gov) for substantive information on the other training sessions. Contact [Karen\\_Holsendorff@ao.uscourts.gov](mailto:Karen_Holsendorff@ao.uscourts.gov) for registration information regarding all of the training sessions.

#### **PACER**

As of November 1<sup>st</sup> of last year, all criminal documents filed with the district court, absent an order for sealing, are available to the public through Pacer. The availability of the documents has raised privacy concerns. There is on the Northern District's webpage a privacy notice that gives guidelines about the use of sensitive information in pleadings. In our April, 2004 newsletter, there is a discussion of the privacy requirements. You

can find that newsletter in our newsletter archive on our webpage.

### **LOOKING FOR EXPERT WITNESSES?**

We have for some time had a forensic directory on our webpage that had been put together by Florida's Public Defender Association and the Public Defender for Florida's Sixth Judicial Circuit. We updated it last month with the edition that was published in August of last year.

### **LITTLE RED BOOK**

The updated version of the My Little Red Rules Books will be ready for distribution by the end of February at the latest. It is a pocket-sized book about a 1/4 inch thick. It has an annotated version of the Rules of Evidence, selected rules of procedure, the bail statute and the Jencks Act, a drug quantity table, and the sentencing table. If you would like to order a copy, send \$5.50 to:

Federal Defenders of Eastern Washington and Idaho  
10 North Post #700  
Spokane, WA 99201

### **CASE ASSIGNMENTS FOR FISCAL YEAR 2004**

Here's a list of the number of cases assigned to each member of the panel for fiscal year 2004 (Oct. 2003 - Sept. 2004). They are listed by division:

#### **Gainesville**

Bacharach, Albert	2
Bernstein, Steve	8
Blow, George	4
Broling, John	1

Curtis, Ted	1
Cushman, Stan	3
Edwards, Tom	9
Fletcher, Charles	1
Hall, James	2
Hatfield, Gene	8
Hernandez, Jim	1
Jarvis, Jim	2
Johnson, Huntley	4
Johnson, Stephen	2
Schaffnit, Gil	3
Stokes, John	1
Till, Quentin	1
Uman, Jon	6
Vipperman, Lloyd	10
Wells, Michael	1
Wilson, David	1

#### **Pensacola**

Arnold, Glenn	0
Brooks, Ken	0
Corder, Dennis	1
Couch, Clint	8
Ellis, Ed	0
Hammons, Joe	0
Harper, Robert	1
Hendrix, Michelle	8
Jackson, Patrick	6
Jenkins, James	1
Kypreos, Spiro	7
Lang, Brian	11
McCleary, Barry	2
McCrackin, Sid	6
McGraw, Kelly	0
Murphy, George	2
Owens, Kirk	3
Patterson, Chris	1
Pitts, Mike	0
Potter, Sharon	0
Printy, Gary	1
Quinnell, Steven	0
Rabby, Chris L.	6
Ridlehoover, Ken	2
Rollo, Mike	0
Saxer, Christopher	4
Sheehan, Donald	5

Sutherland, Steve	7
Waters, Donna	0
White, David	0
Wilkins, John	0

### Panama City

Bubsey, William	3
Cassidy, Thom	7
Clyatt, Rhonda	3
Dingus, Jonathan	10
Downing, Jean	0
Garcia, Armando	5
Higgins, Tanya	1
Jackson, Patrick	1
Kypreos, Spiro	5
Murphy, George	2
Patterson, Chris	6
Printy, Gary	1
Ramey, Russ	7
Ridlehoover, Ken	1
Sanders, Barbara	3
Saxer, Christopher	1
Seliger, Steven	0
Sheehan, Donald	1
Taylor, Clyde	2

### Tallahassee

Banks, James C.	3
Blow, George	2
Broling, John	1
Bubsey, William E.	2
Cancio, Angela M.	1
Cummings, Gregory J.	1
Daley, Bernie	0
Davis, Clifford L.	2
Findley, Thomas M.	0
Garcia, Armando	2
Greenberg, Richard A.	3
Harper, Robert A., Jr.	3
Haugdahl, Eric J.	0
McMurry, Charles A.	2
Printy, Gary L.	6
Sanders, Barbara	1

Seliger, Steve	2
Smith, Richard	1
Stafman, Edward S.	0
Taylor, Clyde M., Jr.	3
Truskoski, Ryan	2
Ufferman, Michael	3
Villeneuve, Paul M.	0
Willard, Matthew	0

### DOWNWARD DEPARTURES

**McGavan, Tara**    Rodgers, M.    Atty: Clyatt, R.  
Docket: 5:03cr59-MCR  
Charge: Consp. to Dist. Controlled Sub.  
Range: 135 - 168 months BOP  
Sentence: 24 months BOP  
Date of Imposition of Sentence: 8/19/2004  
Grounds: 5K1.1 Motion

**Rizo, Johnny**    Collier, L.    Atty: Hendrix, M.  
Docket: 3:04cr47-LAC  
Charge: Consp. Dist. Controlled Substance  
Range: 120 - 121 months BOP  
Sentence: 60 months BOP  
Date of Imposition of Sentence: 1/11/2005  
Grounds: 5K1.1 Motion

**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

Pensacola panel member **Jim Jenkins**, in an *eight day* sentencing hearing before Judge Vinson in a bank fraud and conspiracy case, started off with a Guidelines score sheet calling for 70 to 87 months. Jim, who called a financial expert and a number of other witnesses to challenge the facts, convinced Judge Vinson that, contrary to the probation office's claim of an \$880,000 loss, there was none. He persuaded the Judge, too, that, even

though there was obstruction of justice, the client was entitled to credit for acceptance of responsibility. At Jim's urging, Judge Vinson also rejected the government's request for an additional 4-level increase in the offense level on the basis of USSG § 3B1.1(a) (an organizer or leader of criminal activity involving 5 or more participants). End result: instead of the 70 to 87 months, Jim's client received 30 days and supervised release.

In November, Tallahassee panel members **Greg Cummings** and **Clyde Taylor** saved their husband and wife clients from a 10 year minimum mandatory sentence. In a case tried before Judge Rodgers in Panama City, the jury found Greg and Clyde's clients not guilty of both a conspiracy to manufacture more than a 100 marijuana plants and the substantive offense of possession with intent to distribute more than 100 plants. The plants were in the vicinity of the residence where the defendants lived, but Greg and Clyde succeeded in convincing the jury that the government's informant was not credible. With the wife conceding possession of ammunition, both she and her husband were convicted of possession of ammunition by a convicted felon. Clyde's client was convicted as well of a marijuana charge involving a lesser quantity. With the acquittal of the primary charges, though, both the husband and wife are looking at significantly less time than they were under the 10 year minimum mandatory. The jury took 10 minutes to reject the government's effort at seizing property owned by the two defendants.

Panama City panel member **Thom Cassidy** convinced Judge Rodgers that his client should not be classified as an armed career criminal, which led to a sentence of 32 months rather than the 30 years the client was facing

as an armed career criminal. Thom successfully argued that his client's prior robbery and kidnaping charges, which were committed simultaneously, were not "separate and distinct criminal episodes" and, therefore, counted as only a single offense. With those two offenses counted as one, Judge Rodgers found there were not the requisite three prior violent felonies.

In a methamphetamine case, **Thom Cassidy**, convinced Panama City Magistrate Judge Bodiford to grant his client pretrial release, and then convinced Judge Rodgers to reject the government's request to overturn the order.

An obviously busy **Thom Cassidy** won a significantly reduced sentence for a woman charged in a cocaine conspiracy case by arguing that the quantity of drugs sold by her boyfriend from her house was not foreseeable to her. Instead, Judge Hinkle found Thom's client to be responsible only for the cocaine found in the house and that she had sold herself.

A Pensacola jury considering charges of conspiracy to traffic in more than 1000 kilograms of powder cocaine, found Pensacola panel member, **Patrick Jackson's** client guilty of the substantive charge, but acquitted the client of the conspiracy charge.

**Gwen Spivey**, of our Tallahassee office, convinced the Eleventh Circuit Court of Appeals to grant her client a new trial on an ineffective assistance of counsel claim. The client, in his pro se habeas petition (28 U.S.C. § 2255), argued that his trial lawyer had failed to advise him of his right to testify during the trial. Although, the trial lawyer testified at the evidentiary hearing that he

could not recall whether he had told the client about the right to testify and could not state with certainty what his practice was at the time, the district court denied the petition. The Eleventh Circuit found there was clear error and reversed the lower court's decision. The decision is an unpublished one, Brown v. United States, Case No. 02-15187 (11<sup>th</sup> Cir. Nov. 5, 2004).

This past week, **Gwen Spivey** saved her client from a 15-year sentence for being a felon in possession of a firearm by persuading the Eleventh Circuit Court of Appeals that the client had been the subject of an illegal detention. In the trial court, **Tom Keith** of our Pensacola office had filed a motion to suppress. The Escambia County Sheriff's deputies had, in the course of a "citizen encounter," detained the client because they believed he had given them a false name. During the course of the detention the client had consented to the search of his residence, which led to the discovery of the firearm. Tom had argued that under Florida law, in the absence of a lawful detention, the giving of a false name was not a crime and that there were no other circumstances that supported the detention. Judge Vinson, however, rejected the argument and, following a conditional plea, sentenced the client as an armed career criminal. In an unpublished decision, the Eleventh Circuit disagreed, finding the deputies lacked a reasonable suspicion to justify the detention. The case is United States v. Mansell, Case No. 04-10944 (11<sup>th</sup> Cir. Jan. 11, 2005).

**Bill Clark** of our Tallahassee office, found the Clerk's office's concern about privacy issues had led them to begin handing out at initial appearances copies of the indictment that had the foreman of the grand jury's name and

signature removed. Bill raised an objection at the arraignment, arguing that an indictment was to be returned in "open" court and to be signed by the foreman. Judge Sherrill sustained the objection, ordering that he and his client be provided a copy of the indictment that included the name and signature of the foreman.

**Kafahni Nkrumah** of our Pensacola office convinced a Pensacola jury that his client, who was charged with conspiracy to distribute methamphetamine as well as the substantive charge, was guilty of only the misdemeanor charges of conspiring to possess methamphetamine and attempted possession. Kafahni had argued that his client was a user rather than someone who distributed the drug.

Earlier, **Kafahni Nkrumah** had won a misdemeanor trial where his client was charged with resisting arrest without violence. Kafahni, who called his client as a witness, argued that the officer's account, which included a claim that the client was attempting to get the officer's gun, was not credible.

Last month, after three trials, Judge Hinkle, at the request of the Government, dismissed the indictment against one of **Randy Murrell's** clients who had been charged with possession of a firearm by a convicted felon. One of the three trials ended in a mistrial after several hours of deliberation because of problems with the jury. The other two trials, including the last one, resulted in hung juries. Law enforcement officers had found a loaded shotgun under the client's bed. The client, though, had contended that his girlfriend, who he had asked to remove the gun from the residence, had instead put the gun under the

bed without telling him.

In another case that also involved the charge of possession of a firearm by a convicted felon, Judge Hinkle granted **Randy Murrell's** motion to suppress. After arresting Randy's client on an unrelated charge, officers, including an investigator from the U.S. Army, who had reason to believe the client had two handguns in his residence, gained entry into the residence and retrieved the guns. As explained by the client's girlfriend, the officers did so by telling her that they were there for the guns and that they could get a warrant if she refused. She went on to testify that she had never given the officers her permission to enter, and Randy argued that the girlfriend had only acquiesced to the officers' show of authority. Judge Hinkle granted the motion largely because he accepted the girlfriend's testimony over the testimony of the Army investigator who had disputed much of the girlfriend's testimony. With the firearms excluded from the case, Judge Hinkle, at the Government's request, dismissed the indictment.

**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 2004 term that are relevant to our practice and granted since our last newsletter:

**BELL v. THOMPSON**, No. 04-514, 2005 WL 32974 (Jan. 7, 2005), reviewing 315 F.3d 566 (6<sup>th</sup> Cir. 2003), superseded by 373 F.3d 688 (6<sup>th</sup> Cir. 2004).

### **Equitable exception for supplementing appellate record; withholding mandate**

In a capital habeas proceeding from a state court, the 6<sup>th</sup> Circuit withheld mandate for more than 6 months after affirming summary judgment of a habeas case in favor of the Government. The court then issued a new decision, exercising "its inherent power to reconsider opinion prior to issuance of mandate and its equitable power to supplement record on appeal [citing, among others, Ross v. Kemp, 785 F.2d 1467, 1474 (11th Cir.1986)] and, upon consideration of extremely probative evidence negligently omitted below, vacates the district court's grant of summary judgment to state and remands case to district court for full evidentiary hearing on petition for writ of habeas corpus." **QUESTIONS PRESENTED:** (1) By withholding issuance of its mandate affirming denial of habeas corpus relief for more than six months beyond time for mandatory issuance under Fed. R. App. P. 41(d)(2)(D) and then by issuing new opinion and judgment remanding case to district court for further proceedings in light of materials contained in post-judgment motion filed by petitioner under Fed. R. Civ. P. 60(b), did Sixth Circuit violate terms of federal habeas statute, 28 U.S.C. § 2244(b)? (2) Did Sixth Circuit abuse its discretion by withdrawing its

opinion affirming denial of habeas corpus relief six months after Fed.R.App.P. 41(d)(2)(D) made issuance of mandate mandatory, without notice to parties or any finding that court's action was necessary to prevent miscarriage of justice, particularly where state judicial proceedings to enforce inmate's death sentence had progressed in reliance upon finality of judgment in federal habeas proceedings? (3) By remanding case for "full evidentiary hearing" on initial habeas corpus petition without any determination that conditions prescribed in 28 U.S.C. § 2254(e)(2) were met, did Sixth Circuit violate terms of Antiterrorism and Effective Death Penalty Act and this court's decision in Williams v. Taylor, 529 U.S. 420 (2000)?

**HALBERT v. MICHIGAN**, No. 03-10198, 2005 WL 32971 (Jan. 7, 2005)

**Right to counsel in discretionary guilty plea appeals**

**QUESTIONS PRESENTED:** (1) Does Michigan's law and practice of not appointing counsel to indigent defendants convicted by guilty plea, violate Petitioner's Fourteenth Amendment right to due process? (2) Is Petitioner entitled to resentencing, where counsel failed to render effective assistance by not objecting to improper scoring under Michigan's sentencing guidelines which resulted in Petitioner receiving a considerably longer sentence? [Ed. Note: The Court had agreed to confront that issue in Kowalski v. Tesmer last term, held instead that attorneys raising the issue there had no standing to assert the rights of indigent clients. 125 S. Ct. 564, 569 (Dec. 13, 2004) (holding that attorneys lacked third-party standing to bring action on behalf of hypothetical future clients). That problem apparently does not exist in the new appeal, since it was filed by a defendant who had pleaded no contest but

then sought to withdraw his plea and appeal.]

**MAYLE v. FELIX**, No. 04-563, 2005 WL 32975 (Jan. 7, 2005), reviewing 379 F.3d 612 (9<sup>th</sup> Cir. 2004)

**Relation back of amended claim in habeas proceeding**

A state prisoner in federal habeas amended his federal petition to include a new claim regarding a coerced confession. The question in the 9<sup>th</sup> Circuit was whether the amendment related back to the date of filing of his petition, thus avoiding the one-year limitation of the AEDPA, 28 U.S.C. § 2244(d)(1)? The 9<sup>th</sup> Circuit, agreeing with the 7<sup>th</sup> Circuit, applied Federal Rule of Civil Procedure 15(c)(2) to conclude that a prisoner's new claim arises out of the same transaction or occurrence as his original petition because the transaction or occurrence in issue is his state trial and conviction. This decision conflicted with various circuits, including the 11<sup>th</sup>. See Davenport v. United States, 217 F.3d 1341, 1344-45 (11<sup>th</sup> Cir.2000). **QUESTION PRESENTED:** When habeas petitioner challenging state judgment amends his petition to include new claim, does amendment relate back to date of filing of his petition and thus avoid one-year statute of limitations, 28 U.S.C. § 2244(d)(1), so long as new claim stems from prisoner's trial, conviction, or sentence?

**MITCHELL v. STUMPF**, No. 04-637, 2005 WL 32977 (Jan. 7, 2005), reviewing 367 F.3d 594 (6<sup>th</sup> Cir. Apr 28, 2004), rehearing en banc granted (Aug 09, 2004)

**Guilty Pleas; due process**

A panel of the 6<sup>th</sup> Circuit reversed a state murder conviction, holding in habeas proceedings that petitioner's guilty plea was invalid because he was not aware that specific intent was an element of the crime to

which he pleaded guilty, and the prosecutor's use of two conflicting theories concerning the identity of the shooter to convict both petitioner and accomplice of aggravated murder constituted a due process violation. **QUESTIONS PRESENTED:**(1) Is representation on record from defendant's counsel and/or defendant that defense counsel has explained elements of charge to defendant sufficient to show voluntariness of guilty plea under Henderson v. Morgan, 426 U.S. 637 (1976)? (2) Does Due Process Clause require that defendant's guilty plea be vacated when state subsequently prosecutes another person in connection with crime and allegedly presents evidence at second defendant's trial that is inconsistent with first defendant's guilt?

**JOHNSON v. CALIFORNIA**, No. 04-6964, 2005 WL 32978 (Jan. 7, 2005), reviewing 71 P.3d 270 (Cal. 2003) & 2004 WL 1770615 (Cal. Ct. App. 2004) (on remand)

#### **Batson**

A lower California appellate court initially reversed a murder conviction, holding that the defendant had established a prima facie case of a Batson violation. The California Supreme Court reversed, holding that the standard for establishing a prima facie case of discriminatory use of peremptory 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 peremptory challenges, if unexplained, were based on impermissible group bias." The Supreme Court initially granted cert., but, in a per curiam opinion, No. 03-6539 (2004), dismissed cert. as untimely because there had not yet been a final disposition given that potentially dispositive issues remained to be decided below. On remand, the lower state appellate court followed the Cal. S.C.'s order to conclude that no prima facie Batson claim

had been established, and finding no other reversible error, disposed of the appeal. The Supreme Court again granted cert. to review the Batson holding. **QUESTION PRESENTED:** Whether to establish a prima facie case under Batson, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias? [Ed.: This is the question from the original petition, No. 03-6539. The precise question in the new petition was unavailable when this summary was prepared.]

**WILKINSON v. AUSTIN**, No. 04-495, 2004 WL 2330718 (Dec. 10, 2004) reviewing 372 F.3d 346 (6<sup>th</sup> Cir. 2004)

#### **Prisoner litigation; due process**

**QUESTION PRESENTED:** Where state prison officials decide to place a prisoner in a "super-maximum security" facility based on a predictive assessment of the security risk the prisoner presents, but prison regulations create a liberty interest for the prisoner in avoiding such placement, do procedures meeting the requirements specified in Hewitt v. Helms, 459 U.S. 460 (1983), satisfy the prisoner's due process rights'?

**MEDELLIN v. DRETKE**, No. 03-20687, 2004 WL 2075039 (Dec. 10, 2004), reviewing 371 F.3d 270 (5<sup>th</sup> Cir. 2004)

#### **International law**

**QUESTIONS PRESENTED:** (1) In a case brought by a Mexican national whose rights were adjudicated in the Avena Judgment, must a court in the United States apply as the rule of decision, notwithstanding any inconsistent United States precedent, the Avena holding that the United States courts must review and reconsider the national's conviction and sentence, without resort to

procedural default doctrines? (2) In a case brought by a foreign national of a State party to the Vienna Convention, should a court in the United States give effect to the LaGrand and Avena Judgments as a matter of international judicial comity and in the interest of uniform treaty interpretation?

**DODD v. U.S.**, No. 04-5286, 125 S. Ct. 607 (Mem) (Nov. 29, 2004), reviewing 365 F.3d 1273 (11th Cir. Apr. 16, 2004)

**28 U.S.C. § 2255; statute of limitations**

**QUESTION PRESENTED:** Does the one-year limitations period in 28 U.S.C. § 2255 ¶ 6(3) begin to run (i) when either the Court or the controlling circuit court has held that the relevant right applies retroactively to cases on collateral review (as the Third, Fourth, Sixth, Seventh, and Ninth Circuits hold), or instead (ii) when the Court recognizes a new right, whether or not it is made retroactively applicable to cases on collateral review (as the Fifth and Eleventh Circuits hold, and the Second and Eighth Circuits have stated in dicta)?

**DECK v. MISSOURI**, No. 04-5293, 125 S. Ct. 360 (Mem) (Oct. 18, 2004), reviewing State v. Deck, 136 S.W.3d 481 (Mo. 2004).

**Prisoner restraints during jury trial**

**QUESTION PRESENTED:** Are the Fifth, Sixth, Eighth, and Fourteenth Amendments violated by forcing a capital defendant to proceed through penalty phase while shackled and handcuffed to a belly chain in full view of the jury, and if so, doesn't the burden fall on the state to show that the error was harmless beyond a reasonable doubt, rather than on the defendant to show that he was prejudiced?

**ROMPILLA v. BEARD, SECY., PA DOC**, No. 04-5462, 125 S. Ct. 27 (Mem) (Sep. 28, 2004), reviewing 355 F.3d 233 (3d Cir. 2004)

**Death penalty jury instructions; ineffectiveness**

**QUESTIONS PRESENTED RELATED TO SIMMONS V. SOUTH CAROLINA,**

**512 U.S. 154 (1994):** (1) Does Simmons require a life-without-parole instruction where: the only alternative to a death sentence under state law is life without possibility of parole; the jury asks the court three questions about parole and rehabilitation during eleven hours of penalty-phase deliberations; the prosecution's evidence is that the defendant is a violent recidivist who functions poorly outside prison and who killed someone three months after being paroled from a lengthy prison term; and the prosecutor argues that the defendant is a frightening repeat offender and cold-blooded killer who learned from prior convictions that he should kill anyone who might identify him? (2) Is the state court decision denying the Simmons claim "contrary to" and/or an "unreasonable application" of clearly established Supreme Court law where the state court held that, a history of violent convictions is irrelevant to the jury's assessment of future dangerousness, while ignoring the jury's questions about paroleeligibility and rehabilitation and the prosecution's actual evidence and argument? **QUESTIONS PRESENTED RELATED TO THE INEFFECTIVE ASSISTANCE CLAIM:** (3) Has a defendant received effective representation at capital sentencing where counsel does not review prior conviction records counsel knows the prosecution will use in aggravation, and where those records would have provided mitigating evidence regarding the defendant's traumatic childhood and mental health impairments? (4) Has a defendant received effective representation at capital sentencing where

counsel's background mitigation investigation is limited to conversations with a few family members; where the few people with whom counsel spoke indicated to counsel that they did not know much about the defendant and could not help with background mitigation; where other sources of background information, including other family members, prior conviction records, prison records, juvenile court records and school records, were available but ignored by counsel; and where the records and other family members would have provided compelling mitigating evidence about the defendant's traumatic childhood, mental retardation and psychological disturbances?

**JOHNSON v. U.S.**, No. 03-9685, 125 S. Ct. 26 (Mem) (Sep. 28, 2004), reviewing 340 F.3d 1219 (11th Cir. 2003)

**28 U.S.C. § 2255**

The lower court affirmed dismissal of a petition to vacate as untimely, holding that the vacatur of the prisoner's prior state convictions was not a "fact" within the meaning of the AEDPA from which the limitations period would run. **QUESTION PRESENTED:** When a federal court bases an enhanced sentence on a vacated state conviction, is the vacatur of the state conviction a "fact" supporting a prisoner's 28 U.S.C. § 2255 claim requiring reduction of the prisoner's sentence?

**PACE v. DIGUGLIELMO, SUPT.**, No. 03-9627, 125 S. Ct. 26 (Mem) (Sep. 28, 2004), reviewing 71 Fed. Appx. 127, 2003 WL 21754982 (3d Cir. 2003)

**28 U.S.C. § 2244(d)(2)**

The Court held that (1) petitioner's state postconviction relief petition was not properly filed as required to statutorily toll the federal habeas limitations period, and (2) uncertainty

under state law as to the time limit for filing a state postconviction relief petition was not an extraordinary circumstance so as to warrant equitable tolling of the federal habeas limitations period, in the case of a mandatory life sentence without the possibility of parole. **QUESTIONS PRESENTED:** (1) Should this Court grant the writ to resolve a conflict between the Courts of Appeal regarding an important question that this Court explicitly reserved in Artuz v. Bennett, 531 U.S. 4 (2000) - whether an untimely state postconviction petition may be "properly filed" under § 2244(d)(2)? (2) Should this Court grant the writ to resolve a conflict between the Courts of Appeal regarding whether Carey v. Saffold, 536 U.S. 214 (2002) answered the question about "properly filed" that Artuz reserved? (3) Should this Court grant the writ to answer the question about "properly filed" which was reserved by Artuz and which the Third Circuit decided erroneously? (4) Should this Court grant the writ and review the Third Circuit's denial of equitable tolling, where the Third Circuit denies all federal habeas review to petitioners who act appropriately, reasonably and diligently, and as demanded by the exhaustion requirement, in seeking state court remedies?

**Supreme Court Cases**

**BOOKER v. UNITED STATES, FANFAN v. UNITED STATES**, 2005 WL 50108 (Jan. 12, 2005)

**Blakely applies; Guidelines still the law, but no longer mandatory; Decision applies to all cases not yet final**

Booker's guidelines sentence was determined, prior to Blakely, with upward base level drug quantity and ch. 3 adjustments. After briefing, and upon

issuance of Blakely, the circuit court sua sponte remanded for rebriefing and held the sentence unconstitutional. Fanfan's guidelines also were increased for in a similar manner, but when Blakely came out, the district court applied Blakely to withhold applying any increases that had not been determined by a jury BRD.

**I. Blakely applies:** JUSTICE STEVENS (with SCALIA, SOUTER, THOMAS, and GINSBURG) delivered a 5-4 opinion of the Court in part, concluding that the Sixth Amendment as construed in Blakely applies to the Federal Sentencing Guidelines. That majority opinion concluded by saying "we reaffirm our holding in Apprendi: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."

**II. Guidelines are now advisory:** JUSTICE BREYER (with REHNQUIST, O'CONNOR, KENNEDY, and GINSBURG) delivered a 5-4 opinion of the Court in part, concluding that 18 U. S. C. A. §3553(b)(1), which makes the Federal Sentencing Guidelines mandatory, is incompatible with today's Sixth Amendment 'jury trial' holding and therefore must be severed and excised from the Sentencing Reform Act of 1984 (Act). Section 3742(e), which depends upon the Guidelines' mandatory nature, also must be severed and excised. So modified, the Act makes the Guidelines effectively advisory, requiring a sentencing court to consider Guidelines ranges, see §3553(a)(4), but permitting it to tailor the sentence in light of other statutory concerns, see §3553(a).

**III. Appellate review:** JUSTICE BREYER's majority opinion said appellate review is preserved, with sentences subject to

review for "reasonableness," whatever that means.

**IV. Remedy:** On remand in Booker, the District Court should impose a sentence in accordance with today's opinions, and, if the sentence comes before the Court of Appeals for review, the Court of Appeals should apply the review standards set forth in this opinion. On remand in Fanfan, the Government (and the defendant should he so choose) may seek resentencing under the system set forth in today's opinions.

**V. Retroactivity/Harmless Error/Plain Error/"Ordinary Prudential Doctrines":** "As these dispositions indicate, we must apply today's holdings--both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act--to all cases on direct review. See Griffith v. Kentucky, 479 U. S. 314, 328 (1987) ('[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past'). See also Reynoldsville Casket Co. v. Hyde, 514 U. S. 749, 752 (1995) (civil case); Harper v. Virginia Dept. of Taxation, 509 U. S. 86, 97 (1993) (same). That fact does not mean that we believe that every sentence gives rise to a Sixth Amendment violation. Nor do we believe that every appeal will lead to a new sentencing hearing. That is because we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test. It is also because, in cases not involving a Sixth Amendment violation, whether resentencing is warranted or whether it will instead be sufficient to review a sentence for reasonableness may depend upon application

of the harmless-error doctrine." No mention was made regarding applying the rule to postconviction cases. Nor did the Court expressly say when the "rule" was created, i.e., in Appendi, Blakely, or Booker.

**JAMA v. I.C.E.**, 2005 WL 49257 (Jan. 12, 2005)

**Immigration removal; 8 U.S.C. § 1231(b)(2)(E)(iv)**

The defendant, a Somalian citizen admitted to the U.S. as a refugee, was convicted of felony assault in Minnesota, received a suspended sentence, violated probation, and served his sentence. INS commenced removal proceedings, charging that the assault conviction was a "crime of moral turpitude" under 8 U.S.C. § 1182(a)(2)(A)(i)(I). He conceded this but applied for asylum and other forms of protection from removal under § 1231(b)(2)(E), arguing that he would be persecuted if deported. Because the defendant declined to designate a country of removal and the immigration judge determined that Jama is not eligible for relief from removal to Somalia, the judge designated Somalia as the country of removal. The Board of Immigration Appeals (BIA) affirmed. Before his planned removal, the defendant filed a habeas petition under 28 U.S.C. § 2241, arguing that INS lacks authority to remove him to Somalia in the absence of a functioning Somalian central government able to accept his return. The district court granted the petition, but the Eighth Circuit reversed, holding that § 1231(b)(2)(E)(iv) establishes that acceptance is not required for removal under that clause. The Supreme Court today held that a refugee living in the U.S. may be deported after a criminal conviction to his home country, even without the consent of that country's government. Souter, Stevens, Ginsburg, and Breyer, dissented.

**CLARK v. MARTINEZ**, 2005 WL 50099 (Jan. 12, 2005)

**Alien removal**

If an alien is found inadmissible and ordered removed, the Secretary of Homeland Security (Secretary) ordinarily must remove the alien from the country within 90 days. 8 U. S. C. §1231(a)(1)(A). Here, Martinez, respondent in No. 03-878, and Benitez, petitioner in No. 03-7434, Cuban nationals who are both inadmissible under §1182, were ordered removed, but were detained beyond the 90-day removal period. Each filed a habeas corpus petition challenging his continued detention. In Martinez's case, the District Court found that removal was not reasonably foreseeable and ordered that Martinez be released under appropriate conditions. The Ninth Circuit affirmed. In Benitez's case, the District Court also accepted that removal would not occur in the foreseeable future, but nonetheless denied the petition. The Eleventh Circuit affirmed. The Supreme Court today held that under §1231(a)(6), the Secretary may detain inadmissible aliens beyond the 90-day removal period, but only for so long as is reasonably necessary to achieve removal. In Zadvydas v. Davis, 533 U.S. 678 (2001), the Court previously held that the presumptive period during which an alien's detention is reasonably necessary to effectuate removal is six months, and that he must be conditionally released after that time if he can demonstrate that there is 'no significant likelihood of removal in the reasonably foreseeable future.' The Government having suggested no reason that the time reasonably necessary for removal is longer for an inadmissible alien, this same 6-month presumptive detention period applies in these cases. Because both Martinez and Benitez were detained well beyond six months after their removal orders became

final, the Government has brought forward nothing to indicate that a substantial likelihood of removal subsists, and the District Court in each case has determined that removal to Cuba is not reasonably foreseeable, the habeas petitions should have been granted. Thomas and Rehnquist dissented.

**WHITFIELD v. U.S.**, 2005 WL 41281 (Jan. 11, 2004)

**Conspiracy to money launder**

The Supreme Court held, unanimously in an opinion by O'Connor, that a conviction for conspiracy to commit money laundering, in violation of 18 U. S. C. §1956(h), does not require proof of an overt act in furtherance of the conspiracy. In so holding, the Court affirmed an Eleventh Circuit decision reported at 349 F. 3d 1320 (11<sup>th</sup> Cir. 2003). The Court reached its result "because the meaning of §1956(h)'s text is plain and unambiguous."

**KOWALSKI v. TESMER**, 125 S. Ct. 564 (Dec.13, 2004)

**Counsel; appointed; standard**

The Court held that state public defenders, as co-plaintiffs with indigent defendants challenging the state's denial of appointed appellate counsel after defendants' guilty pleas, did not have third-party standing to raise the rights of potential future defendants to appointed counsel as a violation of due process.

**SMITH v. TEXAS**, 125 S. Ct. 400 (Nov. 15, 2004)

**Capital sentencing; instructions**

The Court reversed the Texas appellate court for denying relief, under Penry v. Johnson, 532 U.S. 782 (2001) (Penry II), based on the trial court's giving of a supplemental "nullification instruction" before the jury reached a verdict on sentence. That instruction directed the jury to give effect to

mitigation evidence, but allowed it to do so only by negating what would otherwise be affirmative responses to two special issues. Penry II held a similar instruction constitutionally inadequate because it did not allow the jury to give "*full* consideration and *full* effect to mitigating circumstances" in choosing the appropriate sentence.

**LEOCAL v. ASHCROFT**, 125 S. Ct. 377 (Nov. 9, 2004)

**DUI; "crime of violence;" 18 U.S.C. § 16(a); 8 U.S.C. § 1227(a)(2)(A)(iii)**

The defendant, a Haitian who became a permanent resident alien in 1987, was convicted in 2000 of DUI causing serious bodily injury under § 316.193(3)(c)(2), Fla. Stat., and was sentenced to 2.5 years' imprisonment. INS commenced removal, alleging the conviction was a "crime of violence" under 18 U.S.C. § 16(a)), and therefore constituted an aggravated felony supporting removal under 8 U.S.C. § 1227(a)(2)(A)(iii). The removal order was sustained by the Board of Immigration Appeals and the Eleventh Circuit, but reversed by the Supreme Court, which held, unanimously, that a conviction for drunk driving that results in serious bodily injury does not qualify as a "crime of violence" that can lead to deportation of a permanent resident involved in the incident. That phrase, Rehnquist wrote, does not cover all negligent conduct, such as negligent operation of a vehicle. "It simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense." The ordinary meaning of crime of violence, the opinion added, "suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses."

**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. BALLINGER**, 2005 WL 39136 (Jan. 10, 2004) (en banc overruling of earlier panel decision, 312 F. 3d 1264 (11th Cir. 2003))

**Church burning; Commerce Clause**

Ballinger criss-crossed state lines and burned 11 churches during his spree. He pleaded guilty to church arson in violation of 18 U.S.C. § 247, but reserved the right to appeal the constitutionality of the statute on its face and as applied. A divided panel of the Eleventh Circuit previously held that although § 247 was a constitutional exercise of the commerce power, Ballinger's conduct did not fall within the ambit of the statute. 312 F. 3d 1264 (11th Cir. 2003). On en banc review before 13 judges, the Court reaffirmed its finding that the statute is constitutional, but reversed the as-applied holding and concluded that as a constitutional matter, and as a matter of statutory construction, Ballinger's activities "fall squarely within the scope of the statute." Marcus wrote for majority, with Edmonson concurring in result; Tjoflat wrote a dissent, joined by Birch and Hill; Birch wrote a dissent, joined by Hill. The majority held that Ballinger used interstate commerce as an agency to promote criminal acts of arson. "The central question this appeal raises is whether § 247 is properly interpreted as prohibiting the use of the channels and instrumentalities of commerce to commit church arson, or whether the statute merely proscribes arsons in which the burning of the church itself occurs in commerce or affects commerce."

**HUNTER v. SECRETARY, D.O.C.**, 2005 WL 17741 (Jan. 5, 2005)

**Ineffective assistance; conflict of counsel; capital habeas**

Fact specific opinion in a capital case, affirming denial of relief. (Carnes, with Barkett and Hull). Hunter, Anderson, Boyd, and Pope went on a robbery/murder spree in 1992, shooting Cooley, Howard, Troutman, and fatally shooting Simpson. At trial, Hunter was represented by AFPD George Burden, whose office also had represented surviving victim/key state witness Cooley on a number of unrelated criminal charges. Burden did not attempt to use Cooley's criminal history or any charges that may have been pending against Cooley to impeach his testimony, and Burden did not present photographs of the suspects taken shortly after the shooting, which Hunter claimed might have cast some doubt on the identity of the shooter. (1) Hunter argued that he was deprived of his 6th amend. right to counsel as a result of his trial counsel laboring under a conflict of interest. Burden testified in the state Court post-conviction proceeding that at the time of trial, he was unaware of any past or pending criminal charges against Cooley. From that fact the state Court reasoned that Burden's representation of Hunter could not have been adversely affected by any conflict of interest stemming from his office having represented Cooley in regard to any prior criminal matters. The 11th Circuit affirmed denial of the claim, finding state Court factfinding reasonable and the decision neither contrary to, nor an unreasonable application of, clearly established federal law as delineated in Supreme Court precedents under 28 U.S.C. § 2254(d)(1). There also was no presumed or actual or prejudicial conflict. (2) The 11th Circuit rejected Hunter's claim that trial counsel was ineffective for failing to present the jury with certain color photographs that showed the clothing Hunter

and his codefendants were wearing a short time after the robberies and murder, which could have undermined the testimony of the surviving victims who identified Hunter as the shooter. The Court found no error in the state court's determination that no Strickland prejudice had been established because, even though Burden knew of the photos, Hunter had not shown a reasonable probability of a different result if Burden had used the photographs to the fullest possible extent, a determination that was not contrary to, or an unreasonable application of, clearly established federal law set out in Supreme Court decisions. 28 U.S.C. § 2254(d)(1).

**U.S. v. ELDICK**, 2004 WL 2930817 (Dec. 20, 2004)

**Plain error**

In an opinion with practically no facts, the Court held it was plain error to sentence based on a PSR that calculated the sentence on Count Two as if the drug was a Schedule 2 opiate, which carries a 20-year statutory maximum, whereas in a plea agreement, the parties stipulated that the drug involved in Count Two was a Schedule 3 opiate, which carried a five-year statutory maximum. “The sentence rendered was plain error because it exceeded the statutory maximum.” The Court vacated for resentencing, and implied that the district court is free to revisit any rulings it made at the initial sentencing.

**PEOPLES v. CHATMAN**, 2004 WL 2930825 (Dec. 20, 2004)

**28 U.S.C. §§ 2241, 2254**

In about the fourth case in a recent line of cases led by Medberry v. Crosby, 351 F.3d 1049 (11 Cir. 2003), the Court addressed whether a state prisoner petitioning for habeas relief based on administrative incarceration determinations should be filed as a 28 U.S.C.

§ 2241 petition or as a 28 U.S.C. § 2254 petition. The Court (PC by Anderson and Wilson, Owens) held that Peoples’ petition was “properly brought under § 2241 but it was governed by and subject to the rules and restrictions found in § 2254.” Thus, the statute of limitations associated with § 2254 petitions applied to bar his case.

**NIX v. SECRETARY D.O.C.**, 2004 WL 2914217 (Dec. 17, 2004)

**28 U.S.C. §§ 2254, 2244(d)(1)(A)**

Nix, a Florida state prisoner, filed a federal habeas petition during the pendency of his state court appeal of the denial of his motion to correct illegal sentence. The Court held (1) the district court correctly concluded that appellant’s convictions became final, for limitations purposes, 28 U.S.C. §2244(d)(1)(A), only after the expiration of the 90-day period during which appellant could have sought certiorari review in the United States Supreme Court, even though the Florida DOC argued that the ninety-day window did not apply because appellant raised no federal issue on direct appeal, see Bond v. Moore, 309 F. 3d 770, 774 (11th Cir. 2002); and (2) the district court erred in failing to toll the statute of limitations during Nix’s state appeal of the denial of his state motion to correct sentence.

**U.S. v. BIDWELL**, 2004 WL 2877316 (Dec. 15, 2004)

**Sentencing; consecutive; § 5G1.3(b)**

The Court affirmed the district court’s imposition of a consecutive 15-year sentence, for three counts including sexual exploitation of a child and transporting child pornography, to a previously-imposed, 30-year, undischarged state court sentence, for defendant’s sexual battery of his daughter which was the subject of pornographic films

he made. The post-sentencing amendment to 5G1.3 did not apply. The Court concluded under 5G1.3(b) that the state sentence did not take into account fully the conduct covered by the federal sentence. The defendant's argument that two facts (his federal mandatory minimum was increased because of the state conduct and application of the higher guideline level by cross-reference to 2G2.1 based on state conduct) made application of 5G1.3(b) inappropriate was rejected, because the plain language was that subsection (b) applied only when the "undischarged term of imprisonment resulted from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense." (Court's emphasis).

**U.S. v. HORNADAY**, 2004 WL 2848997 (Dec. 13, 2004)

**Evidence; sufficiency; 18 U.S.C. § 2422(b); 18 U.S.C. § 2; aiding; jury instructions**

After communicating and attempting to arrange sex with minors via Internet communications with an undercover agent posing as an adult willing to arrange such activities for pedophiles, the defendant was convicted under 18 U.S.C. §§ 2422(b) and 2, the first charging the substantive offense and the second charging aiding and abetting. The Court rejected his argument that because he never communicated directly with a minor, holding that use of adult intermediary does not remove the defendant's actions from the scope of 2422(b). Likewise, it rejected his argument that the conviction violated free speech. However, it agreed with his second argument that he could not be convicted under section 2 when the only one with whom he acted was a government agent, and thus the court erred by instructing the jury under section 2 and the jury's general verdict of guilt could have been based on that improper theory. Nevertheless,

distinguishing precedent, the Court found the error was harmless.

**U.S. v. VEGA**, 2004 WL 2809206 (Dec. 8, 2004)

**Rehearing granted to affirm semi-automatic weapons sentencing**

In August 2004, this panel unanimously reversed a sentence and held that Sentencing Commission exceeded its statutory authority in providing for a sentencing enhancement for crimes involving semi-automatic weapons legally possessed under "grandfather" provision of assault weapons ban. Now, the panel reversed itself by granting rehearing and unanimously affirming the sentence. "The question before the court is simply whether the Sentencing Commission could rationally have decided to increase the penalty for supplying false information in connection with a firearms purchase when semiautomatic firearms are the object of purchase. This it could have done..." In short, whatever dissonance may be produced by reading 18 U.S.C. § 922(v)(2) with U.S.S.G. § 2K2.1(a)(5), we are satisfied that the sentencing enhancement is in harmony with 18 U.S.C. § 924(a)(1)(A) and 18 U.S.C. § 921(a)(30)(A)(ii), the statutes that actually form the basis for the charges to which Vega pleaded guilty in this case."

**U.S. v. WRIGHT**, 2004 WL 2809225 (Dec. 8, 2004)

**Evidence; jury instructions; ex parte communications**

A jury convicted Wright of one count of possession of a firearm by a felon. The government alleged that Wright was in knowing possession of the weapon when Mulberry, Florida, police officers arrested him for driving under the influence. As part of its case, the government used Wright's

resistance to arrest as evidence of knowing possession. The Court affirmed, holding (1) the circumstantial evidence was sufficient;(2) the district court did not dispense with its neutral role by informing the prosecution that a witness needed to identify the defendant and directing a government witness to describe the defendant's hand gesture in detail for the record; (3) no error in admitting evidence of the defendant's uncharged resistance to arrest and instructing the jury that such evidence could be considered as consciousness of guilt; (4) the district court improperly engaged in ex parte communications with the jury when the court decided to give the jury a ruler without the presence of Wright and his counsel, but the error was harmless; (5) reaffirmed earlier decisions that 18 U.S.C. § 922(g) is constitutional.

**U.S. v. WILSON**, 2004 WL 2796550 (Dec. 7, 2004)

**U.S.S.G. § 3C1.2; U.S.S.G. § 2L1.2(b)(1)(A)(ii)**

Wilson, a deported Jamaican national, reentered, and got found out. Law enforcement officials approached Wilson's residence in Hollywood and knocked on his door. Wilson refused to answer, although agents could hear his movements inside the apartment. After approximately 45 minutes, agents saw Wilson lowering himself from his third floor apartment using bed sheets that had been tied together. After the sheets separated, Wilson fell two stories, stumbling into a fence. In the course of attempting to subdue Wilson, Lampkins tackled him, injuring Lampkins' finger. The district court (1) imposed a sixteen-point enhancement, pursuant to U.S.S.G. § 2L1.2(b)(1)(A)(ii), because his prior conviction for aggravated child abuse does not qualify as a "crime of violence" within the meaning of this

guideline; and (2) imposed a two-level enhancement under U.S.S.G. § 3C1.2 for reckless endangerment during flight. The Court (1) affirmed the 16-points, holding "that a prior conviction constitutes a 'crime of violence' if it either includes as an element of the offense 'the use, attempted use, or threatened use of physical force against the person of another' or is listed as one of the offenses detailed in subpart (II). Since Wilson concedes that he plead guilty to a crime that includes a physical-force element, he committed a 'crime of violence' under U.S.S.G. § 2L1.2(b)(1)(A)(ii)." (2) Reversed the 2-point enhancement, holding that "It is the defendant's conduct, not that of the pursuing officers, which must recklessly create the substantial risk of death or serious bodily injury to others."

**U.S. v. AUGUSTE**, 2004 WL 2976852 (Dec. 7, 2004)

**U.S.S.G. § 2B1.1(b)(9)(C)(i)**

In April 2002, AMEX employee Lawson provided Auguste with the account number of AMEX customers, and Auguste arranged to add herself to the accounts and obtained new credit cards, thereupon making thousands of dollars of transactions. Auguste pleaded guilty to one count of conspiracy to commit credit card fraud and one count of credit card fraud. In sentencing, the district court added a two-level enhancement under U.S.S.G. § 2B1.1(b)(9)(C)(i) because Auguste's offense involved "the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification." The Court affirmed, applying a plain meaning analysis in a case of first impression. It found "crucial" the fact that even though she used existing lines of credit, she used the victims' account information to obtain new credit

cards.

**U.S. v. LEVY**, 2004 WL 2755633 (Dec. 3, 2004)

**Blakely**

The Court summarily denied rehearing en banc to reconsider its handling of Blakely claims raised for the first time on appeal. The order spawned three lengthy opinions: HULL, concurring in the denial of rehearing en banc, in which ANDERSON, CARNES and PRYOR joined; TJOFLAT, dissenting from the denial of rehearing en banc, in which WILSON joined; and BARKETT, dissenting from the denial of rehearing en banc. As 12 judges considered the petition, there is no clear statement of majority view.

**DAY v. CROSBY**, 391 F.3d 1192 (Nov. 29, 2004)

**Habeas; timeliness; district court authority**

The Court held that a state's concession of timeliness that is patently erroneous does not compromise the authority of a district court to dismiss sua sponte a 28 U.S.C. § 2254 habeas petition that is untimely under AEDPA, which was enacted to promote finality of state criminal judgments.

**U.S. v. YATES**, 391 F.3d 1182 (Nov. 24, 2004)

**Confrontation Clause**

Pusztai and Yates were charged with mail fraud, conspiracy and other offenses regarding an internet pharmacy. Before trial, the Government moved to allow two witnesses in Australia to testify at trial by means of two-way video teleconference, arguing that Christian (who allegedly processed customer internet payments for the Defendants) and Konkoly (whose name the Defendants allegedly used on internet drug prescriptions) were "essential witnesses to the government's

case-in-chief," but are "unwilling" to travel to the United States and are "beyond the government's subpoena powers." The Court applied Crawford v. Washington and held that testimony at trial of witnesses by two-way video teleconference from Australia violated defendants' Sixth Amendment right to confrontation.

**U.S. v. CESAL**, 391 F.3d 1172 (Nov. 23, 2004)

**F.R.Cr.P. 11**

Cesal appealed his conviction and sentence for being a participant in a conspiracy to distribute marijuana. In a fact-intensive opinion, the Court, Per Curiam, held that there had been no Rule 11 violation; that the district court properly denied his motion to withdraw a guilty plea; that Cesal failed to comply with the plea agreement; that Cesal had vacillated regarding his Faretta motion thus permitting its denial; and that Cesal knowingly and voluntarily waived his right to appeal his sentence.

**U.S. v. WILLIAMS**, 390 F.3d 1319 (Nov. 16, 2004)

**Grant of JOA revered; bank fraud; sufficiency**

The district court erred, in granting the JOA, by viewing the evidence in the light most favorable to the Defendant and by crediting her testimony that conflicted with government evidence.

**U.S. v. PINEIRO**, 389 F.3d 1359 (Nov. 15, 2004)

**18 U.S.C. § 856; maintaining a place for purpose of manufacturing controlled substance**

The Court found sufficient the evidence supporting a conviction of 21 U.S.C. 856 for maintaining a place for manufacturing a

controlled substance, here a marijuana grow house. The defendant presented evidence he had recently moved into the house and hired someone to clean it up and argued the government failed to establish when the dismantled grow house was functional, i.e., before or after he moved in. Also, he had admitted to officers that he had constructed the grow areas, officers found photos confirming this, and neighbors gave confirming testimony. The Court noted this offense requires two mental elements, both knowledge and purpose.

**U.S. v. \$242,484**, 389 F.3d 1149 (Nov. 2, 2004)

**Forfeiture; appeals; standard of review; factual findings; search; probable cause**

In this forfeiture challenge, the *en banc* Court vacated a panel decision and affirmed a forfeiture. It used the opinion to on two questions: the way the appeals court reviews district court factual findings, implicit or express, but particularly implicit findings, and the meaning of probable cause. (1) The Court will infer from a district court's explicit factual findings and conclusion implied but unstated factual findings consistent with the judgment. "The[se] principles . . . are party-neutral and have an importance larger than the result in any specific case. . . . our system has decided that it is not worth the resources or the time it would require to remand every judgment accompanied by any findings that are incomplete or ambiguous for further specification by the district court before appellate review is completed." (2) The forfeiture statute at issue has been superseded, so that probable cause is no longer central to forfeiture cases; however, it stated that it considered the issue of probable cause important because of its meaning in search and seizure cases. The Court discussed the

probable cause definitions and applied them to the facts of this case.

**U.S. v. BRITT**, 388 F.3d 1369 (Oct. 26, 2004)

**Abuse of position of trust enhancement under U.S.S.G. § 3B1.3**

Britt, a Social Security Administration clerk, appealed her sentence imposed for conspiracy to unlawfully produce S.S. cards, 18 U.S.C. § 1028(a)(1), (f), challenging her two-level enhancement for abuse of a position of trust, U.S.S.G. § 3B1.3. She argued the enhancement was inappropriate because: (1) she did not hold a position of trust with the S.S.A., as there was no identifiable victim of her offense; (2) the abuse-of-trust enhancement only applies to offenders who have exercised managerial judgment and discretion, which necessarily excludes a mere data clerk or forms processor such as herself; (3) her position as part-time clerk did not give her the "freedom to commit or conceal a difficult-to-detect wrong;" (4) not every employment position constitutes a position of trust, for such a position is generally a type of "fiduciary relationship" that did not exist between herself and the SSA; and (5) the abuse-of-trust enhancement is inappropriate when, as here, the conduct comprising her offense of conviction was itself the abuse of trust. The Eleventh Circuit affirmed.

**U.S. v. WOODARD**, 387 F.3d 1329 (Oct. 18, 2004)

**Magistrate; 28 U.S.C. § 636 (FMA); guilty plea; felony; constitutional**

Reviewing for plain error, the Court joined six other circuits and held that there was no error, constitutional or statutory, in the magistrate judge accepting a guilty plea to a felony and adjudicating the defendant guilty,

after the defendant consented to this procedure. The statute did not violate the principles of Article III, U.S. Constitution, in authorizing this procedure.

**U.S. v. FRAZIER**, 387 F.3d 1244 (Oct. 15, 2004)

**Evidence; expert witness; scientific evidence; rebuttal; defense theory; Sixth Amendment**

In a 127-page opinion, the *en banc* Court reversed the earlier panel decision, 322 F.3d 1262 (11th Cir. 2003) (Birch + 7th CJ Cudahy, Marcus dissenting), to affirm a conviction for a kidnapping which resulted in an aggravated sexual battery and flight from police flowing from the defendant's capture with the victim still in tow. The *en banc* Court upheld the exclusion of a defense forensic investigator that had been proffered to counter the government's forensic investigator; the Court concluded that the district court's ruling was neither an abuse of discretion nor "manifestly erroneous." The Court also affirmed the district court's allowance of the government's rebuttal evidence from two of the defense fact witnesses (law enforcement officers/agents) which provided essentially the same type evidence the excluded defense witness would have provided.

**U.S. v. ABRAHAM**, 386 F.3d 1033 (Sept. 30, 2004)

**Prosecutorial misconduct; 911 call; ex post facto; 18 U.S.C. § 3559; Three Strikes Law; serious violent felony; escape; appeal; conclusory argument**

The Court rejected, under the plain error standard, the claim that the prosecutor erred by presenting evidence and argument that his defense explanation for his acts were an after-the-fact invention, as well as other

prosecutorial statements. The Court also rejected under the plain error standard the claim that the district court erred by admitted the recording of a 911 call, finding no error at all. Likewise, the Court found no plain error in the claim that the mandatory life sentence under the Three Strikes Law, 18 U.S.C. 3559(c), violated the Ex Post Facto Clause because his prior escape offense was "innocent and not a violent offense" and the district court's categorization of it as violent made the punishment for that prior more burdensome than at the time of its commission.

**U.S. v. NJAU**, 386 F.3d 1039 (Sept. 30, 2004)

**Sentencing; role adjustment; § 3B1.1(b); supervisor**

The Court affirmed this conviction for Social Security fraud in the immigration context, rejecting the argument that the district court erred in applying a three-level enhancement under 3B1.1(b) on the basis the defendant was the supervisor of at least one person in the conspiracy. The Court rejected his argument that the individuals he recruited to receive the false cards were not "participants" because their role was passive; the Court found they were "criminally responsible for the commission of the offense, 3B1.1 cmt. n. 1, as evidenced by the supporting role they played." The Court rejected his attempted analogy to purchasers in a drug conspiracy, as here the individuals assisted in carrying out the fraud, receiving false cards to distribute to the defendant's customers and helping him avoid detection, and one also referring customers to him.

**ADEFEMI v. ASHCROFT**, 386 F.3d 1022 (Sept. 28, 2004)

**Immigration; standard of review**

The *en banc* Court reversed the panel (Barkett + DJ Fullam, Kravitch dissenting in part) and held that the Court’s review of a BIA decision for substantial evidence remains exactly the same (highly deferential) when the government had the burden below to show a conviction by clear and convincing evidence.

**U.S. v. SIMMS**, 385 F.3d 1347 (Sept. 27, 2004)

**Ex parte hearing; vehicle search; government misconduct; videotape; F.R.E. 106; discovery; tracking device**

The Court affirmed as to all issues: The government met its “heavy” burden of proving lack of prejudice from the *ex parte* discussion the first day of trial regarding the government’s duty to disclose certain evidence regarding the CI and a continuing investigation of the kingpin; the defense argued the court advised the government regarding objections to testimony and Simms’ defense, but the Court found “no discussion which could have prejudiced” Simms. Further, there was no evidence the tribunal was anything but “full and fair.” The Court disagreed that consent to search a vehicle was invalid as a result of an illegal detention after the traffic stop had – or should have – ended; the videotape showed that his consent came after the warning was issued and all checks had come back clean. The Court did not believe that the 30-second gap between the end of this stop and the request for and granting of consent to search was long enough to turn the completed traffic stop into an illegal detention, and further that the officer had ample reasonable suspicion at that point to continue questioning and that the consent was voluntary. The Court rejected the argument that the wrongful use of a tracking device tainted the search because the search would have occurred even without the BOLO. The Court affirmed the district court’s refusal

to conduct an evidentiary hearing on officers’ and AUSA’s misconduct in suppressing the tracking device and refused to issue subpoenas for those persons as trial witnesses; the issue was not proper for trial and “[t]o the extent there was any government misconduct, it was rectified well before trial.” (Emphasis added.) The Court affirmed the district court’s refusal to allow the defense to play the entire videotape of the stop, as cumulative, under the plain error standard. Finally, the Court affirmed the denial of disclosure of the actual tracking device to the defense pursuant to a protective order given the government.

**U.S. v. SMITH**, 385 F.3d 1342 (Sept. 27, 2004)

**Sentencing; career offender; § 4B1.1(a); related cases; § 4A1.2**

The Court affirmed the Career Offender sentence, based on the defendant’s convictions of several prior crimes of violence committed in the same area over the course of three days. Even though all were adjudicated on the same day, sentencing was handled by the same defense counsel, prosecutor, and judge, and all sentences were concurrent, there was no formal order of consolidation, each case had a separate docket number, and each involved different dates and victims. The defendant’s argument that they were functionally consolidated and/or part of a common scheme or plan was rejected. The Court, reviewing for clear error, affirmed the district court’s determination that the joint sentencing was for the administrative convenience of the court, citing similar cases from three other circuits.

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