

FEDERAL PUBLIC DEFENDER

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NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

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J. RICHARD SMOAK ASSUMES DUTIES AS DISTRICT JUDGE

J. Richard Smoak has been sworn-in and has begun presiding over federal cases as North Florida's newest District Court Judge. On October 27th, the Senate unanimously affirmed his nomination. Judge Smoak's investiture will take place tomorrow, January 19, at the Martin Theater in Panama City. He is filling the position held by Judge Vinson, who took senior status last year.

Judge Smoak is a 1965 graduate of West Point. He graduated from the University of Florida law school in 1972. He's a Board Certified Civil Trial Lawyer and was named in February 2004 by *Florida Trend* magazine as one of Florida's "Top Defense Lawyers." He's a certified Circuit Court mediator and has, in the past, served on a number of Florida Bar Committees, including the Fourteenth Circuit's Judicial Nominating Commission, the Civil Procedure Rules Committee, and the Fourteenth Circuit's Grievance Committee. Judge Smoak has been practicing law in Panama City since 1973.

A decorated Vietnam veteran, Judge Smoak had a distinguished career as an infantry and Special Forces Officer. During the Vietnam War, he was a combat commander with the Army's 101st Airborne Division. As an officer, he also led a team with the 5th Special Forces Group conducting long-range operations with, among others, the Montagnard tribesmen. For heroism in combat, the Army awarded him the Silver Star Medal. Included in his long list of decorations is the Bronze Star Medal for Valor, nine Air Medals, and the Combat Infantryman's Badge.

Judge Smoak will hear all the criminal cases in Panama City and most of the civil ones. He will preside over a small percentage of the civil cases in Pensacola.

STEPHEN BERNSTEIN ON THE AL-ARIAN VERDICT

Stephen Bernstein

Last month, all across the United States and much of the world, citizens read about the results in the Government's terrorism case

against former University of South Florida professor Sami Al-Arian. Mr. Al-Arian was acquitted of many of the charges, and the jury failed to reach a unanimous verdict on the remaining charges. A number of those tried along with Mr. Al-Arian were acquitted. Gainesville panel member Steve Bernstein represented one of those individuals, Sameeh Hammoudeh. Some of the details are covered later in this newsletter in the "Victories" column. At our request, Steve composed his take on the trial:

The Al-Arian verdict is a testimony that our system still works. There is a sports cliché that goes, "that's why they play the game." All the words spoken beforehand do not matter and at the end of the day it is who won and who lost. Despite all of the news conferences and the rhetoric over the Al-Arian case, sooner or later the United States Government had to present it's evidence to a jury composed of twelve American citizens.

Those citizens heard the evidence and did not find a single count of guilt. It was striking to hear the jurors afterward, how they had tried to follow the law and the standards given to them in reaching their verdict. It is a tribute, that says, as long as the power to decide guilt or innocence in the United States remains with the citizens and not with the Government, this is still a free country. You don't have to celebrate this verdict or even like it. We certainly thought that such a verdict was still possible in America, only four short years after 9/11. This verdict shows we don't have to sell America to the world or plant news stories or even pay people for public relations. We don't have to suspend our Constitution or try to get around it. All we have to do is follow the basic principles that our country was founded upon and tell the truth.

It is my opinion that this trial communicates to the rest of the world that the American people are alright and that they can be trusted. While the American government and our present administration is distrusted and even hated around the world, I think that the American people are regarded differently. I heard this from correspondents from London and Norway, not just the Middle East. I was very fortunate to be a participant in a trial that communicates so much politically to the rest of the world about the quality of justice in America.

The Federal Government did their job at presenting the case against Al-Arian. A jury not Al-Arian's peers, but ours, did not find the charges proven. There are many threats both in the rest of the world and here at home. I, for one, hope the Justice Department remains diligent, vigorous and unavowed, but does the job a little more cleanly. I also hope that the same Justice Department doesn't decide to simply throw the same up against a new jury and hope it will stick to the wall better next time. There certainly would be better uses of our time, our resources, and the efforts to make us more secure in our own homeland.

ETHICAL ISSUES FOR CJA COUNSEL

Part I: Solicitation

What ethical issues are involved when court-appointed CJA counsel accepts paid representation of the defendant outside the scope of the appointment? The short answer is that counsel is not prohibited from accepting such representation, but the better answer is that there are steps counsel can take to avoid ethical pitfalls.

This article is the first in a series which will address the relevance of The Florida Bar's Rules of Professional Conduct to this question. The full article is available on our website at www.fpd-fln.

Every criminal defendant faces multiple procedural options, both in challenging his conviction and sentence, and in enforcing his constitutional rights. Defendants face the gamut of direct appeals through state and federal courts (depending on the original jurisdiction); the multiple post-conviction procedural options; the possibility of post-sentence reductions and cooperation; the prospects of legal representation in prisoner administrative issues; obtaining release through executive clemency and parole eligibility; post-release charges of violation of supervision; and potential 1983 claims for prosecutorial or police misconduct or correctional abuse. This is an exhausting but not exhaustive list.

When counsel is appointed to represent a defendant in federal court, pursuant to the Criminal Justice Act (CJA), it might be for trial, direct appeal, an evidentiary hearing on a habeas petition which was filed *pro se* under 28 U.S.C. § 2254 (state prisoner) or § 2255 (federal prisoner), or even appeal from a district court's habeas decision. Because criminal charges and convictions complicate the life of a defendant and her family, counsel is often faced with not only the single proceeding for which counsel was appointed, but also multiple requests by the client and/or her family for advice on other legal and non-legal matters.

When a lawyer has been so appointed, what are the lawyer's responsibilities, rights, and options in advising the client about other legal

representation needs? The Florida Bar Ethics Department advises that there are no ethics opinions on this question, but several ethical considerations are relevant to the lawyer's conduct, as discussed below.

General Rules. First, there are some general parameters that newer attorneys might find helpful:

(1) The lawyer has no obligation to take on any other legal representation or advise the client about any other legal issue outside the scope of the appointment.

(2) If the lawyer decides to render such advice, it is not only free, but it carries with it the duty of being accurate. That is, if the lawyer provides incorrect advice that affirmatively damages the client, the lawyer could be sued for malpractice. Because a defendant's need for advice is frequent, and his options are slim to none, each attorney has to decide where to draw the line between compassion and paranoia.

(3) The appointed lawyer's obligation can end at different points. For example, a lawyer appointed for trial has a duty to advise the client about the right to appeal and other options (e.g., the potential value of foregoing a frivolous appeal when the client is attempting to earn a Rule 35 reduction). Appointed counsel remains obligated to the client through the direct appeal, unless the district court excuses the lawyer for some reason (the most common being a conflict with the client) and appoints other counsel for appeal. An appellate lawyer's obligation ends upon issuance of the mandate by the appeals court, unless counsel believes there are non-frivolous grounds for rehearing and/or certiorari. When appellate options are exhausted, counsel has a duty to advise the defendant about

a) those options, which include

- a motion for rehearing and/or rehearing en banc and a petition for writ of certiorari, and
- b) the time limits for pursuing those options.

Solicitation. This first potential ethical problem is unrealized because the Rules of Professional Conduct limit solicitation to those who have never been a client of the attorney. Rule 4-7.4 addresses direct contact with “prospective” clients, defined as one with whom the lawyer has no family or prior [or current] professional relationship. The Comment specifically concludes:

These rules apply to advertisements and written communications directed at prospective clients and concerning a lawyer's or law firm's availability to provide legal services. These rules do not apply to communications between lawyers, including brochures used for recruitment purposes.

Thus, communication with an existing or former client about potential representation, or with other attorneys about the availability of counsel's services, is not solicitation. The appointed attorney may ethically take the initiative and advise the client that he is available to handle such work, as retained counsel, if the defendant chooses to hire him.

Future editions of the Newsletter will contain articles on other aspects of the problems inherent in communications between appointed counsel and a client about potential retained services, e.g., the appropriate content of such communications about prospective

services, payment by third parties, avoiding the appearance of impropriety, and potential conflicts of interest.

IN MEMORIAM

Christopher Saxer, a valued member of the Pensacola panel and a colleague and friend to all that new him, passed away earlier this month. Chris was a 1986 graduate of the law school at the University of Washington in St. Louis. Since 1998 he has been a sole practitioner in Ft. Walton Beach. For three years in the late eighties, he served in Destin as an Assistant State Attorney. In 2004 he was Board Certified by the Florida Bar in Criminal Trials. Chris served on the Board of Directors of the Okaloosa-Walton chapter of the Florida Association of Criminal Defense Lawyers and served, as well, as the chapter representative. He will be missed.

PANEL SURVEY RESULTS

In October we sent out a survey that, for the most part, addressed panel training. We received 22 responses. The results were mixed. Ten agreed or strongly agreed that they would prefer a day-long training session, rather than relying on the monthly panel luncheons. Three wanted to do both. Thirteen strongly agreed or agreed that they would prefer to continue with the monthly luncheons. Only 3 agreed or strongly agreed that it was important to have any day-long training session at a motel along the Gulf Coast. Eleven agreed or strongly agreed that they didn't want to take the time to drive farther than the local courthouse for their training.

Twenty-one found the newsletter to be

invaluable or helpful. Eight, having read the article about sentencing memoranda, thought it was “likely” they’ll start filing memoranda; five thought it was “possible” they would do so. Four would like “a lot more cases” assigned to them, and nine would like “more cases.” Five reported getting “about the right number of cases.”

WELCOME TO NEW PANEL MEMBERS

We’ve recently added two new panel members: **Teri Donaldson** has joined the Tallahassee panel, and **Beth Amond** has joined the Pensacola panel. Teri is a 1988 graduate of the University of Florida and a former law clerk of Judge Vinson. She served nine years as an Assistant United States Attorney in Tampa, and has tried more than 45 jury trials in federal court. She practices with the Tew Cardenas law firm in Tallahassee and practices in the areas of commercial litigation, criminal defense, and environmental law and land use.

Beth practices law with the Pensacola firm of Amond and Oram. Her practice consists of criminal defense and general civil litigation. She’s a 1995 graduate of the University of Dayton Law School. She’s a veteran litigator, having worked in Pensacola’s state Public Defender Office from 2002 through 2005, and has tried more than 30 criminal cases before juries.

PANEL OVERSIGHT COMMITTEE REAPPOINTED

In a November 6, 2005 order, Judge Hinkle reappointed the existing members of the Panel Oversight Committee to another three-year term. Gil Schaffnit will continue to serve as the Chair of the Committee. The rest of the

Committee consists of Richard Greenberg, Thom Cassidy, Ken Riddlehoover, and Randy Murrell. The Committee makes recommendations to the district judges regarding the appointment of new members as well as other panel issues such as training and the size of the panel.

PANEL CASE ASSIGNMENTS

Here’s the list of who got how many cases in 2005:

Gainesville Panel

Blow, George	2
Broling, John	8
Curtis, Ted C.	2
Cushman, Stan	1
Daly, Daniel F.	4
Edwards, Thomas L.	4
Harper, Robert	3
Hatfield, Anderson E., III	8
Johnson, A. Huntley, Jr.	2
Johnson, Stephen	2
King, Corey	1
Mason, Geoffrey	1
Schaffnit, Gilbert A	3
Uman, Jon D.	9
Vipperman, Lloyd L.	6
Wilson, David	1

Tallahassee Panel

Banks, James	1
Blow, George	1
Bubsey, Bill	4
Cancio, Angela	1
Cummings, Greg	1
Daley, Bernie	0
Davis, Cliff	1
Findley, Tom	0
Garcia, Mandy	2
Greenberg, Richard	2
Harper, Robert	0
Haugdahl, Eric	0
McMurry, Charles	0
Printy, Gary	3
Sanders, Barbara	1
Stafman, Ed	0

Taylor, Clyde	1
Truskoski, Ryan	1
Ufferman, Michael	1
Villeneuve, Paul	1
Willard, Matt	0

Pensacola Panel

Arnold, Glenn	0
Brooks, Ken	0
Bubsey, William	1
Couch, Clint	2
Cowan, Tracy	1
Dingus, Jonathan	1
Ellis, Ed	0
Hammons, Joe	2
Hendrix, Michelle	7
Jackson, Patrick	8
Jenkins, James	1
Kypreos, Spiro	6
Lang, Brian	4
McCleary, Barry	0
McCrackin, Sid	0
McGraw, Kelly	0
Murphy, George	5
Owens, Kirk	0
Patterson, Chris	0
Pitts, Mike	0
Potter, Sharon	5
Quinnell, Steven	0
Rabby, Chris L.	3
Ridlehoover, Ken	7
Rollo, Mike	0
Saxer, Christopher	0
Sheehan, Donald	8
Stevenson, Eric	1
Stopp, G. Harry	0
Sutherland, Steve	3
Truskowski, Ryan	2
Ufferman, Michael	1
Waters, Donna	0
White, David	0
Wilkins, John	0

Panama City Panel

Blow, George	1
Cassidy, Thom	3
Clyatt, Rhonda	2
Dingus, Jonathan	6
Downing, Jean	6
Garcia, Armando	1

Higgins, Tanya	0
Jackson, Patrick	1
Kypreos, Spiro	4
Murphy, George	2
Patterson, Chris	6
Ramey, Russ	2
Ridlehoover, Ken	0
Sanders, Barbara	1
Sheehan, Donald	0
Taylor, Clyde	0

PAY RAISE

As of January 1st of this year, the hourly rate for work done on the basis of a CJA appointment will be increased by \$2, making the hourly rate \$92. The maximum capital hourly rate has been increased from \$160 an hour to \$163.

COMMUNITY DEFENDER OFFICE TO OPEN IN GEORGIA'S MIDDLE DISTRICT

The Middle District of Georgia, which stretches all the way to Valdosta and Thomasville, is slated to open a Community Defender Office in 2006. Much like a Federal Public Defender Office, a Community Defender Office differs to the extent that it has an Executive Director hired by a local board rather than a Federal Defender appointed by the Court of Appeals. The local board makes certain policy decisions, as well.

The soon-to-be-opened office will have a headquarters in Macon staffed with the Executive Director and two additional lawyers. There will be a branch office in Albany with one lawyer.

NATIONWIDE TRAINING

The Office of Defender Services has scheduled the following training sessions for

panel members:

Winning Strategies Series

Miami Beach, FL, February 9-11, 2006

San Diego, CA, June 8-10, 2006

Sentencing Advocacy Workshop

Miami Beach, FL, March 2-4, 2006

Law and Technology Workshops

Boston, MA, April 20-22, 2006

Chicago, IL, July 27-29, 2006

Complex Litigation Seminar

Atlanta, GA, Sept. 7-9, 2006

For details and registration, go to the Office of
Defender Services Training Branch website at

www.fd.org.

LOCAL PANEL TRAINING

Each presentation is at the federal courthouse,
except for Gainesville. Those presentations
are at the Federal Public Defender's Office.

*Rule 17 of the Federal Rules of Criminal
Procedure and Other Creative Discovery
Means and Pitfalls*

Panama City: Already presented

Gainesville: Already presented

Pensacola: January 26 at noon

Tallahassee: January 26 at noon

Road Map to Habeas Corpus

Panama City: February 11 at noon

Gainesville: February 22 at 9:00 and noon

Pensacola: February 23 at noon

Tallahassee: February 23 at noon

See our webpage at www.fpd-fln.org for
further details and the handouts.

BOOKER VARIANCES

Carter, Arlene Rodgers, M. Atty: Lammers, Charles

Docket: 5:05cr18

Charge: Consp to Steal from Gov't, Theft

Range: 12 - 18 months

Sentence: 5 years probation w/3 mos. home
detention

Date of Sentence: Nov. 29, 2005

Grounds: Defendant's age, financial
circumstances and circumstances of offense

Jones, Kariem Hinkle, R. Atty: Clark, Bill

Docket: 4:05cr32

Charge: Consp. to Dist. and Poss WITD
Cocaine

Range: 63 - 78 months

Sentence: 27 months BOP

Date of Sentence: Nov. 18, 2005

Grounds: Judge determined defendant
qualified for safety value and this sentence is
"sufficient."

Badger, Brian Hinkle, R. Atty: Murrell, Randy

Docket: 4:97cr14

Charge: VOSR (Consp. To Dist. Cocaine)

Range: 30 - 37 months

Sentence: 6 months consecutive to existing
sentence

Date of Sentence: Jan. 9, 2006

Grounds: Defendant's violation was based
primarily on a new federal drug offense. After three
years of successful supervision, he was solicited to
purchase cocaine by an old acquaintance who was
cooperating with law enforcement. Judge seemed to
think the nearly four years imposed for that offense
was adequate, and there wasn't a need to impose a
lengthy sentence for a violation based on the same
offense.

Martin, Melvin Mickle, S. Atty: Printy, Gary

Docket: 4:03cr61

Charge: Poss Firearm & Ammunition by
convicted felon

Range: 235 - 293 months

Sentence: 207 months BOP

Date of Sentence: Dec. 19, 2005

Grounds: Defendant's bi-polar disorder and
the fact that defendant's firearm possession did not
involve any criminal or threatening conduct.

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

In a highly publicized terrorism case with nationwide implications, Gainesville panel member **Steve Bernstein** won a spectacular acquittal in the case against Sameeh Hammoudeh. Mr. Hammoudeh was tried in Tampa along with former University of South Florida Professor Sami Al-Arian, who had even become a central issue in the 2004 senatorial race that pitted Betty Castor against Mel Martinez. The acquittal on all 11 counts faced by Mr. Hammoudeh came after a trial that lasted nearly 7 months and that involved 13 days of jury deliberation.

Steve relied largely upon Mr. Hammoudeh’s writings in a master’s thesis and a diary, as well as Mr. Hammoudeh’s oral statements to show that Mr. Hammoudeh was a moderate Palestinian who believed in the peace process and simply wasn’t a terrorist. In acquitting Mr. Hammoudeh, the jury rejected the government’s case that rested largely on Mr. Hammoudeh’s association with Mr. Al-Arian.

Brian Lang of the Pensacola panel won an acquittal in a case where his client, Roberto Ramirez, was charged with a conspiracy involving more than 5 kilograms of cocaine. The case against Mr. Ramirez consisted of some unintelligible recordings of phone calls and the testimony of two of the alleged co-conspirators. Key to the case was a claim by the informants that Mr. Ramirez had used a particular car to transport the cocaine. Brian presented testimony that the car was inoperable during the relevant time period.

One witness, a retired FBI agent, testified that he regularly visited Mr. Ramirez and never saw any indication of the alleged involvement with what was a large distribution ring.

Nine defendants who found themselves in the Tallahassee Magistrate Court won a dismissal of their cases involving charges that they had driven a motorcycle or ATV across protected wetland areas in the Apalachicola National Forest. Because the wetland area was unmarked, **Tom Findley**, joined by the other lawyers involved in the case, moved to dismiss the citations. In the motion, Tom relied upon the Forest Services revision of the Code of Federal Regulations that had taken place after the alleged offense and that required that the protected area be designated on a “vehicle motor use map.” Tom argued that the revision simply clarified what had been intended all along. Although Magistrate Judge Kornblum denied the motion, he subsequently dismissed the citations on the motion of the government. The government, after consulting with officials in Washington, D.C., made the request on the morning of the scheduled trial. **Barbara Sanders, Eric Haugdahl, Mandy Garcia, Teri Donaldson, Bill Bubsey, Jim Banks, and Bill Clark** of our office, along with Tom, each represented one of the defendants.

Earlier this month, **Tom Miller** of our Gainesville office convinced Judge Paul to grant a motion to suppress in a case involving two counts of possession of a firearm by a convicted felon and a count of making a false statement in acquiring a firearm. The search warrant upon which the officers relied to search the residence of Tom’s client, Alejandro Cabezas, relied upon two incidents

where Mr. Cabezas had pawned one rifle and claimed another from the same pawnbroker several months before the warrant was secured. The warrant relied, too, on a claim that, less than 10 days before the warrant was obtained, there was a report of shots being fired at Cabezas' residence and suspects fleeing the scene. Judge Paul found an "insufficient nexus between any firearm and the defendant's residence," and found, too, that the warrant was too "stale" to support a finding of probable cause.

Gwen Spivey of our Tallahassee office won two Booker resentencings from the Eleventh Circuit for Jose Monsivais-Ortiz and Curtis Mango.

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 2002 term that are relevant to our practice and granted since our last newsletter:

BRIGHAM CITY v. STUART, 2006 WL 36749 (Mem), No. 05-502 (Jan. 6, 2006) (reviewing 122 P. 3d 506 (Utah 2005))

Fourth Amendment

Four Brigham City police officers responded to a complaint of a loud party. They arrived at the offending residence at about three o'clock in the morning. They traveled to the back of the house to investigate the noise. From a location in the driveway, the officers peered through a slat fence and observed two apparently underage males drinking alcohol. The officers then entered the backyard through a gate, thereby obtaining a clear view into the back of the house through a screen door and two windows. The officers saw four adults restraining one juvenile. The juvenile broke free, swung a fist and struck one of the adults in the face. Two officers then opened the screen door and "hollered" to identify themselves. When no one heard them, they entered the kitchen. After entering, one of the officers again shouted to identify and call attention to himself. As those present in the kitchen became aware of the officers, they became angry that the officers had entered the house without permission. The defendants were charged with contributing to the delinquency of a minor, disorderly conduct, and intoxication. They filed a motion to suppress evidence obtained during a warrantless entry into a home. The trial court held that the warrantless entry was not supported by exigent circumstances and was, therefore, unlawful, and the Utah Supreme Court

affirmed. **Questions presented:** 1. Does the “emergency aid exception” to the warrant requirement recognized in *Mincey v. Arizona*, 437 U.S. 385 (1978), turn on an officer’s subjective motivation for entering the home? 2. Was the gravity of the “emergency” or “exigency” sufficient to justify, under the Fourth Amendment, the officers’ entry into the home to stop the fight?

ZEDNER v. U.S., 2006 WL 36750, No. 05-5992 (Jan. 6, 2006)(reviewing 401 F.3d 36 (2nd Cir. 2005))

Speedy Trial Act

Zedner was convicted after a jury trial on six counts of attempting to defraud a financial institution in violation of 18 U.S.C. § 1344. On appeal, Zedner claimed that his rights under the Speedy Trial Act were violated based on two periods of delay: (1) January 31, 1997 until May 2, 1997, during which the district court entered no order of exclusion while postponing trial at Zedner’s request; and (2) August 11, 2000 until March 7, 2001, a period in which Zedner’s competence to stand trial was in question and Zedner’s attorney became unavailable because of pregnancy complications. Zedner claimed that lapses of time between the indictment and the start of trial violated his statutory and constitutional rights to a speedy trial, and the Circuit Court rejected his Speedy Trial Act claims. **Questions presented:** 1. Whether, in light of the statute’s text and Congress’s goal of protecting the public interest in prompt criminal trials, the requirements of the Speedy Trial Act may be waived only in the limited circumstances mentioned in the statute, the issue left open in *New York v. Hill*, 528 U.S. 110, 117 n.2 (2000). 2. Whether a violation of the Speedy Trial Act’s 70-day time limit for bringing a defendant to trial is subject to harmless error analysis, despite the statute’s

mandatory language stating that, in the event of a violation, the “indictment shall be dismissed.”

CLARK v. ARIZONA, 2005 WL 3272155 (Mem), No. 05-5966 (Dec. 5, 2005) (reviewing 1 CA-CR 03-0851, 1 CA-CR 03-0985, Ariz. Ct. App. 5/24/2005)

Insanity defense

An Arizona youth, at age 17, shot and killed a police officer who had stopped him for loudly playing the radio on his car. He contends he was mentally ill at the time of the incident. “This Court,” his appeal argues, “has never addressed this issue, and never held that a state may, consistent with due process, abolish the insanity defense as it existed at common law.” A second issue in the case is whether a state may strictly limit or eliminate the right of a defendant to offer evidence of mental defect in order to rebut prosecution evidence of intent. **Questions presented:** (1) Whether Arizona’s insanity law, as set forth in A.R.S. § 13-502 (1996) and applied in this case, violated Petitioner’s right to due process under the United States Constitution, Fourteenth Amendment? (2) Whether Arizona’s blanket exclusion of evidence and refusal to consider mental disease or defect to rebut the state’s evidence on the element of mens rea violated Petitioner’s right to due process under the United States Constitution, Fourteenth Amendment?

HAMDAN v. RUMSFELD, 126 S.Ct. 622 (Mem), No. 05-184 (Nov. 7, 2005) (reviewing D.C. Cir. No. 04-5393)

Special military tribunals

The Supreme Court agreed to rule on the constitutionality of the special military tribunals President Bush created to try war crimes charges against terrorist suspects who

are foreign nationals -- a major test of presidential wartime authority. The Chief Justice took no part in the consideration or decision of this petition. **Questions presented:** 1. Whether the military commission established by the President to try petitioner and others similarly situated for alleged war crimes in the “war on terror” is duly authorized under Congress’s Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224; the Uniform Code of Military Justice (UCMJ); or the inherent powers of the President? 2. Whether petitioner and others similarly situated can obtain judicial enforcement from an Article III court of rights protected under the 1949 Geneva Convention in an action for a writ of habeas corpus challenging the legality of their detention by the Executive branch?

SANCHEZ-LLAMAS v. OREGON, 126 S. Ct. 620 (Mem), No. 04-10566, & **BUSTILLO v. JOHNSON, DIR., VA D.O.C.**, 126 S. Ct. 621 (Mem), No. 05-51 (cert. granted & cases consolidated Nov. 7, 2005) (reviewing 108 P. 3d 573 (Or. 3/10/2005)) & No. 042023 (Va. 3/7/2005))

Vienna Convention

In *Sanchez-Llamas*, the defendant contended that the trial court committed reversible error by refusing to suppress his post-arrest statements to the police. He claimed that the police violated his right to consular notification and communication, as guaranteed by Article 36 of the Vienna Convention on Consular Relations (VCCR), and that suppression of his post-arrest statements is the necessary and appropriate remedy for that violation. The Oregon Supreme Court affirmed the conviction, holding that the Vienna Convention does not confer individual rights that a detained foreign

national may assert in a criminal proceeding.

Questions presented in *Sanchez-Llamas*:

1. Does the Vienna Convention convey individual rights of consular notification and access to a foreign detainee enforceable in the Courts of the United States? 2. Does the state’s failure to notify a foreign detainee of his rights under the Vienna Convention result in the suppression of his statements to police? In *Bustillo*, the Virginia Supreme Court’s decision was unreported. **Question presented in *Bustillo*:** Whether, contrary to the International Court of Justice’s interpretation of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 100-101, state courts may refuse to consider violations of Article 36 of that treaty because of a procedural bar or because the treaty does not create individually enforceable rights.

DAVIS v. WASHINGTON, 126 S. Ct. 547 (Mem), No. 05-5224 (Oct. 31, 2005) (reviewing 111 P. 3d 844 (Wash. 2005)) & **HAMMON v. INDIANA**, 126 S. Ct. 552 (Mem), No. 05-5705 (reviewing 829 N.E.2d 444 (Ind. 2005))

***Crawford*; confrontation clause**

In *Davis*, the Washington Supreme Court held (1) “emergency 911 calls should be assessed on a case by-case basis and that the statements made should be individually evaluated for admissibility in light of the confrontation clause.” (2) McCottry called 911 because of an immediate danger, not to “bear witness” in contemplation of legal proceedings, but certain statements in the call could be deemed to be testimonial to the extent they were not concerned with seeking assistance and protection from peril. (3) However, the portion of McCottry’s 911 call that identified Davis as her assailant was nontestimonial and properly admitted.

Question presented in *Davis*: Whether an alleged victim's statements to a 911 operator naming her assailant - admitted as "excited utterances" under a jurisdiction's hearsay law - constitute "testimonial" statements subject to the Confrontation Clause restrictions enunciated in *Crawford v. Washington*, 541 U.S. 36 (2004). In *Hammon*, Amy and Hershel Hammon were reportedly engaged in a domestic dispute, and in response to a call to police, police arrived, took Amy's statement and affidavit, and charged Hershel with Domestic Battery and VOP. The Indiana Supreme Court held that (1) Amy's oral statement was properly admitted as non-testimonial; and (2) the affidavit was testimonial and its admission violated *Crawford*. **Question presented in *Hammon*:** Whether an oral accusation made to an investigating officer at the scene of an alleged crime is a testimonial statement within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004).

FERNANDEZ-VARGAS v. GONZALES, ATT'Y GEN., 126 S. Ct. 544 (Mem), No. 04-1376 (Oct. 31, 2005) (reviewing 394 F. 3d 881(10th Cir. 2005))

Alien rights

Fernandez, a Mexican, has been deported from and reentered the United States on several occasions. Shortly after his last deportation in October of 1981, Fernandez reentered the United States and has lived in this country ever since. On March 30, 2001, Fernandez married Rita Fernandez, a United States citizen and, on May 30, 2001, he applied for Permission to Reapply for Admission Into the United States After Deportation or Removal. But in April 1, 1997, the "reinstatement statute" took effect. That statute, 8 U.S.C. § 1231(a)(5), provides that a prior order of removal may be reinstated

against an alien who has illegally re-entered the United States, and bars that alien from applying for any form of "relief" under Chapter 12 of U.S.C. Title 8. The 10th Circuit held that "the reinstatement statute barred Fernandez' application to adjust his immigration status, and that the bar is not an impermissible retroactive effect on Fernandez." **Question presented:** Whether and under what circumstances INA § 241 (a)(5) applies to an alien who reentered the United States illegally before the effective date of IIRIRA, April 1, 1997.

WASHINGTON v. RECUENCO, 126 S. Ct. 478 (Mem), No. 05-83 (Oct. 17, 2005) (reviewing 110 P.3d 188 (Wash 2005)).

***Blakely/Apprendi* structural error**

Based on allegations that Recuenco became upset with his wife for not cooking for his relatives, smashed their stove, and threatened her with a gun, the State of Washington charged Recuenco with second degree assault, interfering with domestic violence reporting, and third degree malicious mischief. The information further charged Recuenco with "being armed with a deadly weapon, to-wit: a handgun." Recuenco was convicted of second degree assault, interfering with domestic violence reporting, and third degree malicious mischief. With respect to the assault charge, the trial court submitted the following special verdict form to the jury: "Was the defendant ... armed with a deadly weapon at the time of the commission of the crime of Assault in the Second Degree?" The jury said yes. The prosecutor said he omitted firearm from the special verdict request because deadly weapon, not firearm, was an element of the enhancement. But the trial court imposed a sentence enhancement based on Recuenco's being armed with a firearm. The standard

range sentence for count I, the assault, was three to nine months. The deadly weapon enhancement would have added one mandatory year, while a firearm enhancement would have added three mandatory years. At the sentencing hearing, the prosecutor requested the low end of the standard range sentence for count I: 3 months, with a 36-month enhancement for use of a firearm. Defense counsel agreed with a base sentence at the low end of the standard range for count I, but refuted the proposed 36-month enhancement, arguing that the prosecutor would have had to allege and prove that Recuenco was armed with a firearm, and that the jury would have had to return a firearm special verdict. The court imposed a 39-month sentence for the assault conviction, including 36 months for being armed with a firearm, reasoning that it had “no discretion but to impose the statutorily mandated term with regard to the deadly weapon enhancement.” On appeal, the Washington Supreme Court reversed, finding (1) imposition of firearm enhancement, absent jury finding, violated defendant’s Sixth Amendment jury trial right as defined by *Blakely*; (2) the error was not invited; and (3) *Blakely* error can never be deemed harmless. **Question presented:** Whether error as to the definition of a sentencing enhancement should be subject to harmless error analysis where it is shown beyond a reasonable doubt that the error did not contribute to the verdict on the enhancement.

Supreme Court Cases

BROWN v. SANDERS, 2006 WL 47402, No. 04-980 (Jan. 11, 2006)

Jury instruction; capital sentencing

The Supreme Court held that a death penalty jury’s consideration of aggravating factors

which were later invalidated by the State’s Supreme Court did not unconstitutionally deprive the defendant of an individualized death sentence. The Court noted that the (new) test for such issues is that an invalidated sentencing factor will render a death sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process, unless one of the other sentencing factors enabled the sentencer to give aggravating weight to the same facts and circumstances. In this case, even though two factors were invalidated, the broad instruction to give weight to the “circumstances of the crime” enabled the sentencer to give weight to the same facts and circumstances. Hence, the sentence was valid.

EVANS v. CHAVIS, 2006 WL 42398, No. 04-721 (Jan. 10, 2006)

AEDPA tolling, 28 U.S.C. §§ 2241, 2254

The AEDPA requires a state prisoner whose conviction has become final to seek federal habeas corpus relief within one year, tolled for the “time during which a properly filed application for State post-conviction or other collateral review ... is pending.” § 2244(d)(2). “Pending” includes the period between (1) a lower court’s adverse determination, and (2) the prisoner’s filing of a notice of appeal, provided that the filing of the notice of appeal is timely under state law. *Carey v. Saffold*. California law allows a notice of appeal for habeas purposes to be filed within a “reasonable time.” Chavis filed notice of appeal to the California Supreme Court three years after the California Court of Appeal issued its opinion. The Ninth Circuit found that to be timely, having tolled the one-year statute of limitations for three years. The Warden appealed, and the Supreme Court reversed (Breyer, in 8-0-1 opinion; Stevens

separately concurred in judgment). The Court said the Ninth Circuit misunderstood *Carey*. Absent (1) clear direction or explanation from the California Supreme Court about the meaning of "reasonable time" in the present context, or (2) clear indication that a particular request for appellate review was timely or untimely, the Ninth Circuit must itself examine the delay in each case and determine what the state courts would have held in respect to timeliness. This is what *Carey* asked and the Circuit should have done here.

U.S. v. GEORGIA, 2006 WL 43973, Nos. 04-1203, 04-1236 (Jan. 10, 2006)

Prisoner rights

Goodman, a paraplegic Georgia state prison inmate, brought a *pro se* action against Georgia, the Georgia Department of Corrections, and state prison officials, asserting claims under Title II of the Americans With Disabilities Act (ADA). Among his more serious allegations, he claimed that he was confined for 23-to-24 hours per day in a 12-by-3-foot cell in which he could not turn his wheelchair around. He alleged that the lack of accessible facilities rendered him unable to use the toilet and shower without assistance, which was often denied. On multiple occasions, he asserted, he had injured himself in attempting to transfer from his wheelchair to the shower or toilet on his own, and, on several other occasions, he had been forced to sit in his own feces and urine while prison officials refused to assist him in cleaning up the waste. He also claimed that he had been denied physical therapy and medical treatment, and denied access to virtually all prison programs and services on account of his disability. The district court dismissed the Title II claims against the individual defendants, and granted summary judgment to the state defendants on the Title

II claims for money damages. Goodman appealed, and the United States intervened to defend the constitutionality of Title II's abrogation of state sovereign immunity. The Eleventh Circuit did not address the sufficiency of Goodman's allegations. Instead, in an unpublished decision relying on its prior decision in *Miller v. King*, 384 F. 3d 1248 (11th Cir. 2004) (Hull, with Hill & Carnes), the Eleventh Circuit held that the Title II claims for money damages against the State were barred by sovereign immunity. The Supreme Court reversed (Scalia, 9-0, with Stevens & Ginsburg separately concurring), holding that Title II of the ADA validly abrogates state sovereign immunity insofar as it creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment. The lower court will have to decide on remand, after pleadings are amended, which wrongs allege *actual* Fourteenth Amendment violations.

MARYLAND v. BLAKE, 126 S. Ct. 602 (Mem), No. 04-373 (Nov. 14, 2005) (reviewing 849 A.2d 410)

***Miranda*, Cert. dismissed**

The Supreme Court summarily dismissed the cert. petition it had granted in April, saying only that cert. had been "improvidently granted." The question presented had been, "When a police officer improperly communicates with a suspect after invocation of the suspect's right to counsel, does *Edwards* permit consideration of curative measures by the police, or other intervening circumstances, to conclude that a suspect later initiated communication with the police?"

BRADSHAW v. RICHEY, 126 S. Ct. 602, No. 05-101 (Nov. 28, 2005)

Habeas, 28 U.S.C. S. 2254, Bouie doctrine

The Supreme Court reversed the Sixth Circuit's decision that had granted habeas relief to a death sentenced state inmate, placing its focus on the Circuit Court's misapplication of Ohio law. Richey set fire to an apartment intending to kill his ex-girlfriend and her boyfriend, but instead, he killed a 2-year-old girl. On federal habeas review, the Sixth Circuit said he was entitled to habeas on two grounds: First, that transferred intent was not a permissible theory for aggravated felony murder under Ohio law, and that the evidence of direct intent was constitutionally insufficient to support conviction. Second, that the performance of Richey's trial counsel had been constitutionally deficient in his retaining and mishandling of his arson expert and in his inadequate treatment of the State's expert testimony. The Supreme Court rejected the first ground by saying that Ohio state law did in fact permit transfer of intent, and that such was not an unconstitutional unforeseeable enlargement of a criminal statute under the *Bouie* due process/notice doctrine (which is similar to, but not the same as the Ex Post Facto Clauses). As to the second ground for relief, the Court said "the Sixth Circuit erred in its adjudication of this claim by relying on evidence that was not properly presented to the state habeas courts without making necessary determinations.

KANE v. ESPITIA, 126 S. Ct. 407, No. 04-1538 (Oct. 31, 2005)

Habeas, prison library access

The Supreme Court reversed the Ninth Circuit's grant of habeas corpus relief to a California inmate who chose to proceed pro se but who was denied access to a law library in preparation for trial. The Court pointed out that its precedent, including *Farretta*, had not clearly established whether a pro se defendant

is entitled to library access, and in the absence of such case law one could not say that the California state rulings were contrary to clearly established law, as required by 28 U.S.C. § 2254(d)(1).

EBERHART v. U.S., 126 S. Ct. 403, No. 04-9949 (Oct. 31, 2005)

Motion for new trial, jurisdictional rules

The Supreme Court held that the time limit of Fed. R. Crim. P. 33(a) for motions for a new trial, which requires such motions to be filed "within 7 days after the verdict or finding of guilty, or within such further time as the court sets during the 7-day period," is not jurisdictional. Instead, it is a "claim processing rule." Such rules are forfeitable by the party opposing the untimely motion if they are not properly invoked. The Court acknowledge confusion in its precedent which led Circuit Courts to treat Rule 33(a) as jurisdictional.

SCHRIRO v. SMITH, 126 S. Ct. 7, No. 04-1475 (Oct. 17, 2005)

Execution of mentally retarded

In a brief Per Curiam opinion, the Supreme Court reversed a Ninth Circuit state habeas decision that had ordered Arizona to conduct a jury trial to determine whether Smith was mentally retarded, and thereby immune from execution under *Atkins v. Virginia*. The Court said it had explicitly left to the states the decision as to how to implement *Atkins*. Here, the Ninth Circuit deprived Arizona of the opportunity to implement its post-*Atkins* remedy. "While those measures might, in their application, be subject to constitutional challenge, Arizona had not even had a chance to apply its chosen procedures when the Ninth Circuit preemptively imposed its jury trial condition."

**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. GREER, 2006 WL 44055 (Jan. 10, 2006)

ACCA, Almendarez-Torres

Greer was convicted after trial of violating 18 U.S.C. § 922(g)(1), which prohibits a felon from possessing ammunition, and qualified for ACCA sentencing, but the district court declined to apply the ACCA based on *Apprendi*. The Court (Carnes, with Black & Pryor) affirmed the conviction, rejecting claims of insufficient evidence, venue raised for the first time on appeal, and ineffective assistance of counsel. The court reversed the sentence and remanded for a stiffer ACCA sentence, saying *Almendarez-Torres* is still good law.

U.S. v. MARTINEZ, 2006 WL 39541 (Jan. 9, 2006)

Booker reasonableness, due process

Martinez appealed his sentence imposed after pleading guilty to being an alien found in the United States without permission after having previously been convicted of an aggravated felony and removed from the United States. He argued that his 87-month sentence, within the guidelines range, was unreasonable and was imposed in violation of the Due Process Clause and *Apprendi*. The Court (per curiam by Tjoflat, Carnes and Hull) affirmed, and in so doing again rejected the claim of the Government that it had no jurisdiction to review a guidelines sentence. The Court also held that *Almendarez-Torres* is still good law, and rejected a due process argument, relying on *Duncan*.

U.S. v. WASHINGTON, 2006 WL 27208 (Jan. 6, 2006)

Reckless endangerment, restitution

Washington appeals his sentence for bank robbery including an order to make restitution to the Ormond Beach Police Department and Ormond Heritage Condominium Association. His appeal presents two issues, the second of which presents a question of first impression for this Circuit: (1) whether Washington's sentence should have been enhanced two levels for reckless endangerment during flight under U.S.S.G. § 3C1.2; and (2) whether the Police Department and Condominium Association were "victims" of the bank robbery under the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A. The Court (Pryor, with Carnes & Hull) affirmed, concluding that Washington's high-speed flight by automobile into a parking garage for a condominium association warranted an enhancement of his sentence for reckless endangerment; and that because the Police Department and Condominium Association were damaged by Washington's flight, as a direct and proximate result of the bank robbery, both the Department and Association were victims under the Restitution Act.

U.S. v. NDIAYE, 2006 WL 27623 (Jan. 6, 2006)

Conspiracy, fraud, evidence, sentencing

Multiple defendants were convicted of some or all of the following: conspiracy to commit identification documentation fraud and Social Security fraud; conspiracy to encourage and induce aliens to unlawfully enter and reside illegally in the United States; encouraging and inducing aliens to reside illegally in the United States; and making false statements in an application for a Social Security number.

The Court rejected arguments that the district court abused its discretion in refusing to allow the defense to call a co-conspirator to the stand. The Court agreed with the district court's conclusion that much of the proffered testimony was irrelevant or "collateral" to the proceedings.

The Court also rejected the argument that a "deliberate indifference" instruction should not have been given. The Court recognized that such an instruction is appropriate only when there is evidence in the record showing the defendant purposely contrived to avoid learning the truth, but found that the giving of the instruction was harmless error where it does not affect the burden of proof beyond a reasonable doubt.

The Court also rejected the argument that the instructions concerning "knowingly and willfully" did not adequately inform the jury of the defense to these charges.

The Court further rejected challenges to the sufficiency of the evidence, noting that the jury "obviously" found the government witnesses credible. The Court rejected the argument that the offense of inducing an alien to enter or reside in the United States, 8 U.S.C. § 1324(a)(1)(A)(iv), could not involve aliens who had already entered the country. The Court noted that helping an alien obtain a (fraudulent) Social Security card "encourages" an alien to enter the United States, and noted that helping an illegal alien obtain a Social Security card was sufficient to support a conviction.

Turning to sentencing issues, the Court affirmed the imposition of an obstruction of justice sentence enhancement, based on the defense obtaining two false affidavits from witnesses. The Court noted that it did not matter that the defense never introduced these affidavits at trial because the enhancement applies to obstruction "during the course of

the investigation." The Court noted that the witnesses were "influenced" by the defendant to make false statements in the affidavits. Alternatively, the enhancements were supported by one defendant telling his wife not to testify. In a lengthy and fact-specific opinion, the Court (Mills, with Tjoflat and Kravitch) affirmed.

U.S. v. GIBSON, 2006 WL 12894 (Jan. 4, 2006)

Sentencing; career offender; 4B1.1; Booker; downward departures

The Court granted the government's appeal and remanded for resentencing, outlining the procedure for district court's downward departures post-*Booker*, and concluding that *Blakely* and *Booker* did not prevent the district court from considering Gibson's prior convictions, determining his age at the time he committed the instant offense, and designating him a career offender.

ARBOLEDA v. ATTORNEY GENERAL, 2006 WL 9556 (Jan. 3, 2006)

Immigration; appeal; asylum

The Court reversed the BIA's denial of asylum/order of removal to a Colombian family because the government (Dept. of Homeland Security) failed to prove they could safely relocate to another area of Colombia. Because the danger of persecution by a guerilla group was "country-wide," asylum was appropriate. Case remanded for further proceedings.

U.S.v. CAIN, 2005 WL 3542892 (Dec. 29, 2005)

Booker

In what the Court called an issue of first impression, it addressed whether a district court's preserved constitutional error under *Booker* is harmless beyond a reasonable

doubt where the district court (1) sentences the defendant to the maximum Guidelines range but (2) provides no indication of whether its sentence would have been the same or higher in an advisory Guidelines system. The Court (Black, with Anderson & Carnes) reversed the sentence, finding the error not harmless beyond a reasonable doubt. The Court rejected the Government's contention that imposition of a sentence at the top of the Guidelines range creates an inference the district court would have imposed the same or a higher sentence under an advisory Guidelines system.

U.S. v. HERNANDEZ, 2005 WL 3525613 (Dec. 27, 2005)

Evidentiary sufficiency, motion for new trial, *Booker*

Hernandez was convicted of conspiracy to possess with intent to distribute two kilograms of cocaine hydrochloride, and possession with intent to distribute two kilograms of cocaine hydrochloride. On appeal, he argued that the evidence was insufficient to support his convictions, the district court erroneously denied his motion for a new trial, and his sentence violated *Booker*. The Court (Pryor, with Hull and Carnes), affirmed the conviction but remanded for resentencing based on *Booker* error. The Court also said the district court applied an incorrect standard when it considered Hernandez's motion for a new trial. The appropriate standard on a motion for a new trial based on the weight of the evidence is that the court need not view the evidence in the light most favorable to the verdict. It may weigh the evidence and consider the credibility of the witnesses. If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a

serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.

U. S. v. GOMEZ-DIAZ, 2005 WL 3465538 (Dec. 20, 2005)

Appeal; ineffectiveness; timely notice of appeal; plea agreement; appeal waiver

The Court held that a defendant, whose appointed counsel fails to file a requested notice of appeal, comes within the general rule that this failure is ineffectiveness for which prejudice is presumed under *Roe v. Flores-Ortega* (U.S. 2000), even though his plea agreement contained a limited waiver of his right to appeal his sentence. The Court construed *Flores-Ortega* as a suggestion that the defendant had no duty to identify meritorious grounds for appeal, only that he would have appealed; that applied with equal force where the defendant had waived many, but not all, appellate rights.

JAGGERNAUTH v. U.S. ATTY. GEN., 2005 WL 3454321 (Dec. 19, 2005)

Immigration; removal; jurisdiction; conviction; aggravated felony; grand theft

The defendant won on both counts: The Court agreed that it had jurisdiction (denying the government's motion to dismiss which argued the removal order was no longer "final" because defendant's motion for reconsideration was granted and defendant had not appealed it) because the finality of the BIA's removal order was unaffected by the reconsideration order. The Court also agreed that Florida Statutes 812.014(1) is a divisible statute encompassing some offenses that constitute deportable aggravated felonies (812.014(1)(a), which carries the necessary intent) and some that do not (1)(b); and because the record did not provide "clear,

unequivocal, and convincing evidence” where her conviction fell under that statute, the BIA erred in finding her removable.

MAHARAJ v. SECRETARY FOR DEPT. OF CORRECTIONS, 2005 WL 3435506 (Dec. 15, 2005)

Capital state habeas, Vienna Convention

In a federal habeas appeal in a Florida capital case, the Court (Marcus with Hull and Hill) affirmed denial of relief on a multitude of grounds, holding, in part, that: (1) it would decline to stay consideration of petitioner’s appeal pending resolution of petitioner’s recently filed state court motion seeking post-conviction relief on ground that his rights under *Vienna Convention on Consular Relations* were violated; (2) state postconviction relief court’s findings that no *Brady* violation occurred were neither contrary to nor an unreasonable application of clearly established federal law so as to warrant federal habeas relief; (3) state postconviction relief court’s conclusion that counsel’s advice against petitioner testifying at trial was not deficient performance was neither contrary to nor an unreasonable application of clearly established federal law so as to warrant federal habeas relief; and (4) state postconviction relief court’s finding that petitioner was procedurally barred from raising claim that his rights under *Vienna Convention on Consular Relations* were violated was neither contrary to nor an unreasonable application of clearly established federal law so as to warrant federal habeas relief.

U.S. v. DIAZ-BOYZO, 2005 WL 3416317 (Dec. 14, 2005)

Sufficiency, meth distribution, firearm in relation to felony

The Court (PC by Birch, Hull, Bowman) held the evidence was sufficient to affirm

convictions of aiding and abetting distribution of methamphetamine and carrying a firearm in relation to a drug-trafficking crime. Diaz-Boyzo’s presence in Eustolio Villa-Gamino’s truck, where Eustolio Villa-Gamino had drugs hidden in a beer box inside a white bag, is insufficient by itself to support his conviction. However, there is more than mere presence in this case. First, Diaz-Boyzo rode with Eustolio Villa-Gamino to the initial meeting, the two apartment complexes for the drug pick-up, and the final delivery meeting. Second, when Agent Beard approached the car, Diaz-Boyzo was sitting in the passenger side of the truck and looking back toward Eustolio Villa-Gamino during the delivery of the drugs. Third, Diaz-Boyzo possessed a loaded firearm, which rested near his hands and in his lap, also during the delivery of the drugs. Also, Diaz-Boyzo’s arrival at the Waffle House as a passenger in the targeted truck and his possession of a gun just moments after the five-pound delivery of methamphetamine are sufficiently linked to each other to establish the “carrying” prong of § 924(c).

U.S. v. BAKER, 2005 WL 3369204 (Dec. 13, 2005)

Conspiracy; hearsay; confrontation; Fed. R. Evid. 404(b); 802; harmless & plain error

Eleven defendants appealed drug trafficking convictions (and seven appealed their sentences) after a 31-day jury trial involving more than 100 witnesses. The opinion is enormous – 137 pages. The thrust of the case was that Williams and Casado, who had been operating their own, independent drug distribution networks with their friends in the Miami area, met in prison in 1992 and combined forces to create a massive drug

distribution operation based in South Florida, in which the remaining defendants played a part. The evidence showed also that Williams, Casado, Leonard Brown, Baptiste, Harper, Pless, Johnson, and Hawthorne committed murders in furtherance of this conspiracy. The Court (Barkett, with Marcus and George) found numerous errors, and some plain errors, in the admissibility of testimony, with the grounds varying depending on the issues, but found most harmless despite the severe nature of the testimony improperly introduced.

U.S. v. ARIAS et al., 2005 WL 3354934 (Dec. 12, 2005)

Medicare fraud conspiracy, Fed. R. Evid. 408, instruction on withdrawal from conspiracy

One of the seven co-defendants, Iheagwara, a licensed pharmacist, objected to the introduction of a statement he had made arising from a state administrative complaint against him, arguing that the statement was prohibited by Fed. R. Evid. 408. The district court held that the rule does not apply to criminal proceedings, but the Eleventh Circuit (Barkett, with Tjoflat and Mills), disagreed, holding that Rule 408 does apply to criminal proceedings and the district court erred by admitting the evidence; but the error was harmless. In another issue, co-defendant Sarduy, a medical doctor, was denied his requested jury instruction that he be acquitted if the jury were to find that he withdrew from the conspiracy. After a fact-intensive analysis, the Court reversed Sarduy's conviction, holding that he had a minimal burden to support that instruction, that he had adduced sufficient evidence supporting his valid theory of defense, and that he was entitled to the instruction.

U.S. v. MATTHEWS, 2005 WL 3291400 (Dec. 6, 2005)

Evidence; FRE 404(b); prior arrest; harmless

The Court reversed their original decision, 411 F.3d 1210, in which a Tjoflat opinion had reversed convictions because improper admission of evidence of defendant's prior drug arrest in the instant drug conspiracy case was not harmless. On rehearing, the Court (PC: Tjoflat, Hill, & DJ Granade) affirmed the convictions. It relied on Roberts, 619 F.2d 379 (5th Cir. 1980), which held that extrinsic evidence of intent can always be introduced in conspiracy cases unless the defendant affirmatively admits that element. Tjoflat's special concurrence repeated his criticism and argued that the current circuit position turns Rule 404(b) on its head; he distinguished between the intent to conspire (the mental state regarding an agreement to conspire) and the intent to traffic in drugs; he strongly urged en banc review. Stayed tuned for rehearing en banc.

U.S. v. CALDWELL, 2005 WL 3272408 (Dec. 5, 2005)

Sentencing; firearms; 2K2.1(b)(2); pawning; sporting purposes; necessity defense

The Court rejected the defendant's argument that he was entitled to the reduction under 2K2.1(b)(2), for possession of a firearm solely for sporting purposes, because his possession of his brother's sporting rifle was solely to pawn it, i.e., to dispossess it. Defendant argued that the required intent was disproven by his possession solely for purposes of dispossession. The defendant lived with two brothers; unbeknownst to defendant, who was on supervised release, one brother took the .22 rifle as collateral for a loan and used it for "plinking" (shooting at

cans) which at least one court has held to be a “sporting” use under 2K2.1(b)(2). Defendant found the rifle stored behind the kitchen cabinets, called his brother to retrieve it, but when he was unable due to out-of-town work, defendant took it and pawned it. The Court noted he could have asked his other brother or his probation officer to pawn it. Defendant informed his probation officer about the incident, resulting in the ATF’s involvement and his indictment (no good deed goes unpunished). Noting that two circuits have allowed this reduction, the Court chose to go with three other circuits and held that a defendant must possess the gun solely for sporting purposes and not pawning it; it did not address whether a third person’s possession for sporting purposes could be imputed to the defendant. The Court also noted the lower court’s credibility determinations that the defendant’s testimony was unconvincing. In a footnote, the Court also found the evidence sufficient and the rejection of a necessity defense jury instruction proper.

U.S. v. TALLEY, 2005 WL 3235409 (Dec. 2, 2005)

Booker; reasonableness of sentence

The Court affirmed the sentence (PC: Tjoflat, Dubina, Pryor). It first rejected the argument that the bottom-of-the-range sentence was unreasonable under Booker because the district court failed to discuss each factor of section 3553(a). The Court held that an acknowledgment that the district court has considered defendant’s arguments and the 3553(a) factors is sufficient. Second, the Court joined several other circuits to “reject the argument of the United States that a sentence within the Guidelines range is per se reasonable, [but] we agree that the use of the Guidelines remains central to the sentencing

process.” The party challenging a sentence bears the burden of proving it unreasonable in light of both the record and the 3553(a) factors; review for reasonableness is deferential. The Court “must evaluate whether the sentence imposed by the district court fails to achieve the purposes of sentencing as stated in section 3553(a). . . . there is a range of reasonable sentences from which the district court may choose,” and a guideline sentence will “ordinarily” be considered reasonable.

U.S. v. WILLIAMS, 2005 WL 3193855 (Nov. 30, 2005)

Sentencing; § 2K2.1(c)(1); “any”

When arrested for a shooting, officers found two guns in Williams’s car. He was charged in state court for assault, and in federal court for being a felon in possession of a firearm. He pleaded guilty to possessing one of the firearms. The government did not prove the firearm was the same one used in the state assault. U.S.S.G. § 2K2.1(c)(1) says “If the defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition with knowledge or intent that it would be used or possessed in connection with another offense, apply” what in this case was the aggravated assault guideline, § 2A2.2. Williams argued that the district court erroneously cross-referenced the aggravated assault guideline, which did not involve the firearm in the federal charge. The Government countered that “any” must mean any firearm the defendant possessed, be it the ones charged or not. The Court reversed (PC: Anderson, Carnes, Black): (1) Recognizing a circuit split, the Court held that “any firearm” means that subsection (c)(1) can apply to firearms not named in the

indictment. (2) Recognizing another circuit split, the Court held "that the cross-referenced conduct must fall under the definitions of relevant conduct found in § 1B1.3. (3) Reversal was required here because, contrary to the district court's finding, the definition of relevant conduct in 1B1.3(a)(2) was not available because it applies to "offenses of a character for which § 3D1.2(d) would require grouping of multiple counts," and "§ 3D1.2(d) specifically excludes assault from being grouped." Carnes wrote a separate concurrence "to offer a suggestion to the district courts which may help avoid unnecessary resentencing proceedings."

U.S. v. GRANT, 2005 WL 3163861 (Nov. 29, 2005)

Sentencing; 2B1.1(b)(1)(G); loss calculation

The Court (Black + Wilson & Cox) affirmed the sentence enhancement under 2B1.1(b)(1)(G): "[W]e hold when an individual possesses a stolen check, or a photocopy of a stolen check, for the purpose of counterfeiting, the district court does not clearly err when it uses the full face value of that stolen check in making a reasonable calculation of the intended loss." It cannot do so "as a matter of law in every case," but can "[w]here the Government presents evidence indicating the defendant intended to utilize the full face value of the checks, and the defendant fails to present countervailing evidence."

U.S. v. RAHIM, 2005 WL 3163857 (Nov. 29, 2005)

Multiple convictions; 18 U.S.C. § 924(c); double jeopardy; commerce clause; competency

The Court (PC: Black, Barkett, Pryor) affirmed; it (1) rejected defendant's double jeopardy argument and held, as an issue of

first impression in this circuit, that 18 U.S.C. 924(c) permits multiple convictions arising out of the same course of conduct; (2) the government presented sufficient evidence that defendant's carjacking subsequent to the robbery affected interstate commerce; and (3) the district court did not err in finding him competent to be sentenced.

U.S. v. GLOVER, 2005 WL 3159228 (Nov. 29, 2005)

Sentencing; Miranda; Booker; harmful error

The Court (PC: Tjoflat, Anderson, Pryor) remanded for resentencing, holding (1) the district court properly upheld defendant's written Miranda waiver and admitted his statement; (2) the evidence was sufficient; and (3) the district court error in sentencing under a mandatory guidelines scheme was not harmless.

U.S. v. MUNOZ, 430 F.3d 1357 (Nov. 23, 2005)

Indictment; sufficiency; mail fraud; sentencing; loss calculation = loss or gain; Booker

The Court first rejected indictment and sufficiency challenges to the mail fraud conviction based on defendants' conspiracy to sell prescription drugs without a prescription; even though a urologist had written the drug prescriptions, and a pharmacist had filled them, the defendants knowingly sold the drugs to users who did not have prescriptions. It was "irrelevant whether or not appellants personally knew of, communicated with, or directed activities toward the six named victims." The Court also upheld the loss calculation of \$1.5 to \$2.5 million, noting that loss may be calculated based on either the victims' actual loss or the defendants' actual gain, and noting

that both figures were within the calculated range; the district court's hybrid system which calculated defendants' gain and reduced it by 30% based on testimony that the placebo effect alone would have helped 30% of users. Finally, the Court held that, despite a Booker plain error, appellants failed to prove an advisory sentencing scheme would have yielded a lower sentence.

U.S. v. WOOD, 430 F.3d 1323 (Nov. 21, 2005)

Booker; ambiguous sentencing comments

On defendant's first appeal, the Court had vacated his conviction and 97-month sentence and remanded for dismissal of the indictment with prejudice because of violations of the Speedy Trial Act. After re-indictment and reconviction, the PSI recommended a sentence range of 78-97 months; the government objected that he should be enhanced for obstruction based on his testimony at his first trial (he did not testify at the second trial). The district court agreed and sentenced at the bottom of the new range, 97 months. On plain error review, defendant lost because of the bottom-of-the-range sentence and ambiguous court comments. The district court's statement that the enhancement "unfortunately" put him at a higher offense level was outweighed by its statement that the sentence was "appropriate."

MICHAEL v. CROSBY, 430 F.3d 1310 (Nov. 21, 2005)

Habeas; ineffective assistance; Battered Spouse Syndrome; self-defense; failure to discover

The defendant was sentenced to life for second-degree murder of her ex-husband. The state court rejected her claim that her trial attorney (Natale) was ineffective for failing to discover (from the expert hired by the initial

defense counsel, who moved out of state and turned the defense over to Natale) and properly use evidence that she suffered from Battered Spouse Syndrome (BSS), which would have supported her self-defense claim at trial and mitigation at sentencing.

The Court held this was not contrary to, or an unreasonable application of, clearly established federal law. The proffered defense expert had concluded there was insufficient evidence of physical abuse to support a BSS-based defense but there was evidence of learned helplessness, as well as evidence asymptomatic of PTSD. Two other psychologists had opined to defense counsel that the defendant exhibited symptoms of PTSD, but did not suffer BSS, and he did not proffer their testimony. None of these experts were given the report of the expert hired by initial counsel. The state court had departed upward at sentencing to the statutory maximum of life. Because PTSD was not yet admissible in Florida at the time of defendant's 1992 trial, counsel focused on learned helplessness as a defense. The Court concluded that it could not say that Natale's failure to discover the favorable expert opinion report, in the initial counsel's files, was deficient performance.

U.S. v. JAMES, 430 F.3d 1150 (Nov. 17, 2005)

Sentencing; Armed Career Criminal Act (ACCA); serious drug offense; inferring intent

The Court (Wilson + Black & Cox) granted the government's appeal, and reversed, holding that trafficking in cocaine, by possession of 200-400 grams, was a predicate conviction under ACCA. The district court had rejected use of the prior Florida conviction because it did not have as an element the intent to distribute, and thus did

not qualify under the ACCA definition of a serious drug offense as one “involving” the intent to distribute. Reversing, the Court held that Florida law “infers an intent to distribute once a defendant possesses a certain amount of drugs.”

ABDI v. ATTY. GEN., 430 F.3d 1148 (Nov. 15, 2005)

Immigration; removal; appeal; motion to reopen

The attorney for an alien subject to removal failed to file an appellate brief contesting his removal, so the appeal was dismissed; a year and half later, new counsel's motion to reopen was denied. The Court affirmed, noting that motions to reopen are disfavored and subject to a 180-day time limit; ineffective assistance of counsel is not grounds for equitable estoppel to avoid that limit. Thus, the BIA did not abuse its discretion in denying the motion to reopen.

U.S. v. CANTELLANO, 430 F.3d 1142 (Nov. 15, 2005)

Crawford; confrontation clause Shepard; reentry of deported alien

Cantellano, charged with illegal reentry, objected on confrontation clause grounds to both the government's introduction of a 2003 warrant of deportation, because the witness had no personal knowledge, and to the PSR's reliance on prior convictions not proved at trial and only linked to defendant by hearsay documents. The appeal involved several issues of first impression. First, the Court (PC: Anderson, Wilson, Pryor) held: (1) under Crawford v. Washington, 541 U.S. 36 (2004), a warrant of deportation is not testimonial evidence subject to confrontation at trial; (2) a defendant does not have a right to confrontation, at non-capital sentencing, under Crawford; (3) Shepard v. United States, 125

S. Ct. 1254 (2005), does not preclude a sentencing court from using documents other than court records to identify a defendant's conviction; and (4) Almendarez-Torres is still the law.

U.S. v. ROJAS, 429 F.3d 1317 (Nov. 10, 2005)

Bail; bonds; jurisdiction

The Court (Carnes + Birch & Roney) reversed, holding that a district court acting in its criminal capacity lacked jurisdiction over a contractual dispute between the bail bond company and a third party who had signed an indemnification agreement with the bondsman, pledging her house as collateral to get defendant's bail. (History: When defendant skipped, the bond was revoked, and the collateral was ordered forfeited, even though the government never attempted to enforce the judgment against the bondsman. After the bondsman moved for foreclosure, the obligor obtained a second mortgage and paid the bondsman. The defendant was later captured, so she sought to set aside the bond forfeiture of that bond and an order of repayment from the bondsman. The district court had ordered him to repay it, less what it actually spent in the case.)

MARQUARD v. SECY., D.O.C., 429 F.3d 1278 (Nov. 10, 2005)

Habeas; capital sentencing; heinous; jury instruction; shackling; Deck; retroactivity

The Court affirmed denial of 28 U.S.C. § 2254 relief to a death-sentenced Florida inmate. In a fact-intensive opinion, the Court (Hull + Edmondson & Carnes) held that (1) state court's decision, that counsel did not provide ineffective assistance in failing to present certain mitigation evidence, was not contrary to clearly established federal law; (2) such decision was not unreasonable

application of federal law; (3) due process claim based on shackling during penalty phase of capital murder trial was procedurally barred; (4) the shackling prohibition of Deck v. Missouri did not apply retroactively; (5) state court's decision that petitioner was not prejudiced by any ineffective assistance provided by counsel in failing to object to petitioner being shackled was not contrary to and did not involve unreasonable application of federal law; and (6) "heinous, atrocious, or cruel" (HAC) jury instruction did not violate the Eighth Amendment.

U.S. v. JORDAN, 429 F.3d 1032 (Nov. 3, 2005)

Mistrial; double jeopardy; law of the case
The Court previously held, 316 F. 3d 1215, that the prosecutor had not been guilty of any misconduct, and on that basis reversed the district court's dismissal of the indictment. On remand, a newly assigned judge denied another motion to dismiss as well as defendants' request for an evidentiary hearing, which they said would prove their theory that the prosecutor had intentionally caused them to seek the dismissal of the indictment that led to the mistrial. The district court believed the prosecutor's intent irrelevant given the 11th Circuit's holding that there had been no misconduct. In a sharply worded opinion, the Court (Carnes + Anderson & Black) rejected the interlocutory appeal by Jordan and Woodward from the district court's denial of their new motion to dismiss the indictment on double jeopardy grounds. "What they seek [] is new law. They want us to hold that improper intent behind proper prosecutorial conduct combined with a meritless defense motion that procures an unjustified mistrial entitles the defendant to a get out of jeopardy free card. We will not be giving these defendants that card" because of the law-of-

the-case doctrine and because their theory of the prosecutor's intent is bogus.

U.S. v. MORIARTY, 429 F.3d 1012 (Nov. 1, 2005)

Rule 11; child porn; supervised release; life term

The Court (PC: Black, Wilson, Cox) disapproved the district court's handling of the plea, because it omitted asking for and receiving a plea of guilty and failed to inform defendant of numerous rights. Nevertheless, the Court held the plea was knowing and voluntary, because defendant did not even attempt to carry his plain error burden of showing a reasonable probability that, but for the error, he would not have entered the plea. The Court also affirmed the sentence (in all but one respect, for which it required clarification on remand) and rejected the Eighth Amendment claim to the life term of supervised release; based on "the connection between Moriarty's possession of child pornography and his apparent propensity for engaging in the sexual abuse of children, . . . a lifetime term of supervised release [was] not grossly disproportionate to his child pornography offenses under 18 U.S.C. § 2552A."

U.S. v. OCHOA-VASQUEZ, 428 F.3d 1015 (Oct. 20, 2005)

Constitution; First, Fifth & Sixth Amendments; secret docketing; sealed records; Batson; anonymous jury

The Court (Edenfield + Hull; Barkett dissented in part) reversed the orders denying defendant access to sealed records; he had argued the secret docket and improperly sealed files (in both his and Bergonzoli's case) violated his First Amendment rights and "trial rights" under the Fifth and Sixth Amendments. However, the Court affirmed

the order striking his motion to unseal records in Bergonzoli. It rejected defendant's Batson argument, finding no discriminatory pattern of jury strikes and thus no prima facie case. Barkett dissented as to both the Batson and anonymous jury claims. Defendant had sought to admit evidence at trial about an illegal scheme called the "Rehabilitation Program of Narcotics Traffickers" (the "Program"), a scheme in which DEA informant Baruch Vega solicited drug traffickers to surrender to the U.S. Government (and surrender money and drugs) for a promise to arrange what were apparently phony cooperation deals. Prosecutors disavowed any pre-indictment knowledge of Vega's scheme. Ochoa had also argued issues as to constructive amendment of the indictment or material variance in proof; refusal to disqualify Bergonzoli's attorney; (3) exclusion of evidence about government witnesses' participation in the Program; (4) refusal to permit an investigation of potential juror misconduct; (5) an improper venue issue; and (6) trying and sentencing him for offenses other than those for which he was extradited. (Note that, in the consolidated Bergonzoli case, Ochoa intervened and appealed, as a member of the public, alleged violations of his First Amendment right of access to judicial proceedings and records.)

U. S. v. YORK, 428 F.3d 1325 (Oct. 27, 2005)

Indictment; dismissal; pretrial publicity; misjoinder; severance; sentencing; Booker; ex post facto

The Court affirmed the convictions and 1,620-month sentence based on consecutive maximum sentences. York was the alleged leader of the Nuwaubian tribe/nation, founded in Brooklyn in the 60's on religious grounds, relocated in 1990 on a NY farm, and relocated in 1993 to a farm in Eatonton, GA, where he

engaged in a pattern of polygamy and sexual exploitation of minors; he also operated stores which sold religious and other items. York was initially indicted for conspiracy to engage in interstate transportation of a minor for sexual activity; after his plea was rejected, he was re-indicted and convicted at trial of RICO, conspiracy, interstate transportation of minors for sex and to engage in sex with minors, and structuring cash transactions. The Court affirmed the district court's denial of the motion to dismiss; although defendant was indicted by the original grand jury, after the district court had determined that a change of venue should be granted based on the unlikelihood of selecting a fair trial jury due to pretrial publicity, the Court agreed with the district court that defendant failed to show actual prejudice from the preindictment publicity. The Court noted, under Waldon, 363 F.3d 1103, 1109-10 (11th Cir. 2004), the district court's decision was not even error, as publicity is generally not a ground for dismissal, and he had failed to prove the publicity "substantially influenced" the indictment decision and thereby caused him actual prejudice under Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1988). Severance was properly denied, because the sex charges and financial structuring were sufficiently related and defendant failed to show actual prejudice from any misjoinder; further, dated counts were properly included given RICO umbrella; the Court noted that the jury acquitted two counts. The Court affirmed the district court's sentence structure, imposing consecutive maximum statutory sentences to reach the guidelines sentence of life imprisonment. Reviewing the Booker claims for plain error, the defendant failed to pass the Rodriguez test by showing any reasonable probability the

sentence would have been different under an advisory scheme. Finally, the defendant claimed an ex post facto violation by the reliance on the 2000 guidelines' cross-reference that was not in the 1993 guidelines, when the last sex offense occurred in 1993. The Court disagreed, first because the district court did not err in refusing to sever the sex charges, and thus properly refused to apply 1993 guidelines because financial crimes continued well past that year; and second because both editions contain applicable cross-references.

U.S. v. CAMPA, 429 F.3d 1011 (Oct. 31, 2005 Order), vacating 419 F.3d 1219 (11th Cir. 2005)

Change of venue; improper closing argument

The en banc Court voted to vacate and re-hear en banc the panel decision (PC: Birch, Kravitch, Oakes) which had held that “the pervasive community prejudice against Fidel Castro and the Cuban government and its agents and the publicity surrounding the trial and other community events combined to create a situation where they were unable to obtain a fair and impartial trial.”

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