

FEDERAL PUBLIC DEFENDER

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NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

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NEW RULES FOR SEX OFFENDERS

Much like the State of Florida with its Jimmy Ryce Act, the Federal Government is seeking civil commitment for sexual offenders. The Adam Walsh Act provides that the Director of the Bureau of Prisons or the Attorney General may now, pursuant to 18 U.S.C. § 4248, “certify” inmates as “sexually dangerous persons.” After certification, the individual is entitled to an adversarial hearing with the right to counsel, the opportunity to testify, present evidence, subpoena witnesses, and confront and cross-examine witnesses. 18 U.S.C. § 4246.

Thus far, the certification seems to have occurred in only a handful of cases from New Mexico, South Dakota, and Massachusetts. Just prior to release, those certified have been transferred to the Federal Medical Center at Butner, North Carolina, based on a caseworker’s review of records.

A “sexually dangerous person” is one who “has engaged or attempted to engage in sexually violent conduct or child molestation . . . [and] suffers from a serious mental illness,

abnormality or disorder resulting in serious difficulty refraining from sexually violent conduct or child molestation if released.” Thus, as is true with the Jimmy Ryce Act, the designation can be based upon past conduct and is not limited to those serving sentences for sexual offenses.

Those individuals with a history of sexual offenses run the risk of providing evidence that will lead to their own commitment. It seems likely that information provided in a presentence interview or in one of the Bureau of Prison’s sexual treatment programs could be used to justify a commitment. Those prisoners who have a choice about voluntarily participating in the Bureau’s treatment program will need to consider the possibility that information disclosed during the treatment could be used to certify the individual as a “sexually dangerous person.”

The Adam Walsh Act also includes the new Sexual Offender Registration and Notification Act, 42 U.S.C. §§ 16901 - 16962, and creates a new federal crime of Failing to Register, 18 U.S.C. § 2250. The new offense carries a penalty of up to 10 years of imprisonment

with harsher sanctions if an offense is committed during the period of time the individual failed to register. Professor Berman in his blog, *Sentencing Law and Policy*, in his post of January 18, 2007, includes a copy of an order in the case of United States v. Madera, No. 6:06cr202 (M.D. Fla. Jan 19, 2007) that rejects a number of constitutional challenges to the statute.

If you'd like a more detailed information about the civil commitment program or the registration requirements, contact Randy Murrell at Randolph_Murrell@fd.org or at (850) 942-8818.

PANEL CASE ASSIGNMENTS

Here's a list of who got how many cases in 2006:

Pensacola

Amond, Elizabeth	4
Couch, Clint	8
Downing, Jean	1
Ellis, Ed	1
Hammons, Joe	1
Hendrix, Michelle	4
Jackson, Patrick	7
Jenkins, James	1
Kypreos, Spiro	4
Lang, Brian	7
McCleary, Barry	1
Murphy, George	3
Rabby, Chris L.	3
Ridlehoover, Ken	8
Scroggins, James	1
Sheehan, Donald	5
Stevenson, Eric	4
Stopp, Harry	2
Sutherland, Steve	7
Wilson, Sharon	3

Panama City

Bubsey, Bill	1
Cassidy, Thom	3
Clyatt, Rhonda	4
Dingus, Jonathan	5
Downing, Jean	9
Garcia, Mandy	2
Kypreos, Spiro	9
Murphy, George	6
Patterson, Chris	10
Ramey, Russ	1
Ridlehoover, Ken	1
Sanders, Barbara	1
Sombathy, Robert	2
Truskoski, Ryan	1

Tallahassee

Banks, James	3
Bubsey, Bill	6
Cummings, Greg	1
Daley, Bernie	3
Davis, Cliff	0
Donaldson, Teri	6
Findley, Thomas	2
Garcia, Mandy	4
Greenberg, Richard	4
Harper, Bob	1
McMurry, Chuck	1
Printy, Gary	4
Sanders, Barbara	3
Taylor, Clyde	5
Ufferman, Michael	2
Villeneuve, Paul	1

Gainesville

Bernstein, Stephen	5
Blow, George	1
Broling, John	5
Curtis, Ted	1
Cushman, Stan	3
Daly, Daniel	5
Edwards, Thomas	2
Harper, Robert	1

Hatfield, Anderson	4
Johnson, Huntley	4
Johnson, Stephen	1
Mason, Geoffrey	0
Peterson, Jody	1
Schaffnit, Gilbert	1
Stokes, John	0
Trukowski, Ryan	1
Uman, Jon	2
Vipperman, Lloyd	2

WELCOME TO NEW PANEL MEMBERS

Over the last few months we've added four new panel members. **Maureen Duignan** has joined the Pensacola panel. Maureen is a veteran criminal defense lawyer, has been Board Certified in Criminal Trials by The Florida Bar, and maintains a family law and criminal trial practice. **Caridad Gonzalez**, who is a 1996 graduate of the Mercer University School of Law, has joined the Gainesville panel. She's a former assistant state public defender. **David Wilson**, who is a 1993 graduate of the Nova Law School, has also joined the Gainesville panel. David, who maintains his criminal defense and civil litigation practice in Ocala, is a member of the panel for the Middle District of Florida and will be eligible for CJA appointments when local Gainesville lawyers are unavailable. **Ed Quintana** is a long-time Panama City lawyer who has been Board Certified by The Florida Bar since 1989 in Civil Trials. Ed has an active civil litigation and personal injury practice and takes conflict cases from the state public defender.

TRAINING OPPORTUNITIES

The Office of Defender Services Training Branch is offering its popular Sentencing

Advocacy Skills Workshop in Phoenix, Arizona, March 8-10. The workshop is free for panel members, has been receiving rave reviews over the years, and provides invaluable guidance to panel members from all over the country. Contact Andrea Taylor at [Andrea Taylor@ao.uscourts.gov](mailto:Andrea.Taylor@ao.uscourts.gov) with any substantive questions about the program and **Karen Holsendorff** at [Karen W Holsendorff@ao.uscourts.gov](mailto:Karen.W.Holsendorff@ao.uscourts.gov) with any logistical questions.

Locally, we have the following training scheduled:

Defending Methamphetamine Cases

Gainesville: Jan. 24, 2007, 9:00 A.M.
and Noon
Pensacola: Jan. 25, 2007, at Noon
Tallahassee: Jan. 25, 2007, at Noon

Immigration Consequences of Criminal Activity

Gainesville: Feb. 21, 2007, 9:00 A.M.
and Noon
Pensacola: Feb. 22, 2007, at Noon
Tallahassee: Feb. 22, 2007, at Noon
Panama City: Feb. 13, 2007 at Noon

Issues and Strategies Regarding Impeachment With Bad Acts and Other Crimes

Gainesville: Mar. 21, 2007, 9:00 A.M.
and Noon
Pensacola: Mar. 29, 2007, at Noon
Tallahassee: Mar. 22, 2007, at Noon
Panama City: Mar. 13, 2007 at Noon

Using Studies and Statistics to Redefine the Purposes of Sentencing

Gainesville: Apr. 25, 2007, 9:00 A.M.
and Noon

Pensacola: Apr. 26, 2007, at Noon

Tallahassee: Apr. 26, 2007, at Noon

Panama City: Apr. 10, 2007 at Noon

CHANGES TO CRIMINAL PROCEDURE, EVIDENCE, AND APPELLATE RULES

On December 1st, a number of new rules went into effect:

Rules of Criminal Procedure

Several of the changes allow for the electronic transmission of documents. Rules 5 (initial appearances) and 32.1 (revocation or probation or supervised release) now allow the Government to electronically transmit to the courts a variety of documents: judgments, warrants, and warrant applications. The amendment to Rule 41 provides that the Government can electronically transmit a request for a search warrant and allows the court to transmit the search warrant electronically. A change to Rule 40 (arrest for failure to appear in another district) now makes it clear that a magistrate may set release conditions for a defendant from another district who has violated a condition of his pretrial release.

Evidence Rules

There are a couple of changes pertinent primarily to civil cases (Rules 404(a) and 408) and a change to Rule 606(b) regarding the use of juror testimony in some unusual circumstances. The change, though, to Rule 609(a)(2) regarding impeachment by prior convictions, will have more of an impact in day-to-day criminal practice. The amendment provides that a prior conviction of an offense involving “false statement” or “dishonesty” can be used for impeachment only if it “readily can be determined that establishing

the elements of the crime required proof or admission of an act of dishonesty or false statement of the witness.” The new provision also requires the party seeking to impeach the witness have ready proof of the nature of the conviction.

Appellate Rules

New Rule 32.1 permits the citation of unpublished decisions. It requires a party citing an unpublished decision to provide a copy to the court if it is not accessible in a publicly accessible database.

EMAIL PLUS

We email panel members whatever information we think will be of interest to most members. We don’t, though, send all the topical emails we distribute to the lawyers in our office. We recognize that some of what we distribute among the lawyers in the Federal Defender Office is of more interest to those who do nothing but federal criminal defense than it would be to those for whom federal criminal defense is only a part of a larger practice.

Not long ago, for example, we received two emails from the Defender Training Branch with a long and detailed analysis of the Adam Walsh legislation. As we thought it wasn’t something that had a lot of day-to-day value, we didn’t automatically distribute it to panel members, although it was sent to all the lawyers in the Federal Defender Office.

Recently we offered the full package, all the emails we distribute among ourselves, to panel members. A number of panel members took us up on our offer and are now getting all the topical emails we distribute among our lawyers. If you would like to be added to the list of those receiving “email plus,” please

contact Randy Murrell:
Randolph.Murrell@fd.org or at (850) 942-8818.

DOWNWARD DEPARTURES

Pierre, Irvens Mickle, S. Atty: Randy Murrell
 Docket: 4:02cr59
 Charge: Consp. Traffic Crack Cocaine
 Range: 135 - 168 months
 Sentence: 60 months
 Date of Imposition of Sentence: 11/20/06
 Grounds: Following a second 5K1.1 and a resentencing ordered by USCA (original sentence after first 5K1.1 was 126 months). Original guidelines were 210 - 262 months.

Knox, Jessie Collier, L. Atty: Bob Dennis
 Docket: 3:06cr88
 Charge: Poss WITD Crack Cocaine
 Range: 51 - 63 months w/10 yr min. mand.
 Sentence: 18 months
 Date of Imposition of Sentence: 9/20/06
 Grounds: 5K 1.1, plus health problems & many letters of recommendation

VARIANCES

Hood, Amber Collier, L. Atty: Pat Jackson
 Docket: 3:06cr66
 Charge: Consp. To Dist. Crack Cocaine
 Range: 78 - 97 months
 Sentence: Time Served, w/1 yr home det.
 Date of Imposition of Sentence: 9/20/06
 Grounds: Def's limited role was product of relationship with boyfriend, only 17 when she began participating in conspiracy, absence of any criminal history.

Lester, Donald Collier, L. Atty: Joe Hammons
 Docket: 3:06cr41
 Charge: Poss Child Pornography
 Range: 51 - 21 months
 Sentence: 1 day
 Date of Imposition of Sentence: 8/8/06
 Grounds: Defendant's age; circumstances of offense (weren't many pictures and had not been solicited by the defendant); otherwise law-abiding and productive life

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

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.

In a case where his client, Sylvester Wright, was facing a mandatory life sentence for trafficking in 50 or more grams of crack cocaine, **Tom Keith** of our Pensacola office convinced Judge Rodgers to suppress the cocaine seized from his client's car. Tom argued that the detention of Wright was unlawful and that the search of Wright's car based on the subsequent discovery that Wright was driving with a suspended license was the product of an unlawful detention. In an 11 page order, Judge Rodgers addressed the nighttime search and concluded that (1) the officer, by parking his car diagonally toward and a short distance from Wright's car, shining a spot light at Wright, and asking Wright to stay in the car, had detained Wright; and (2) that although the fact that Wright's temporary tag was obscured by moisture provided the officer with a legitimate basis to temporarily detain Wright, the officer exceeded his authority when, upon discovering the tag was current and properly displayed, he directed Wright to remain in the car and asked him for his driver's license. Subsequently, Judge Rodgers ordered Wright released from custody and then dismissed the indictment when, 5 weeks after the entry of

the suppression order, the Government filed its motion to dismiss.

Chet Kaufman of our Tallahassee office won his appeal before the 11th Circuit Court of Appeals in a case involving a felony DUI that occurred in the Gulf Islands National Seashore. The client, Braxton Yates, III, had been sentenced to 18 months in prison through the Assimilative Crimes Act. Chet, relying primarily on United States v. Lewis, 523 U.S. 155 (1998), argued that the Assimilative Crimes Act was inapplicable because, while the Act can be used to fill-in gaps in federal law, the Department of Interior had promulgated a comprehensive scheme for regulating drunk driving in National Parks. The Court agreed, finding that the Government should have prosecuted Yates pursuant to the rules of the Department of the Interior that provided for a maximum sentence of 6 months in DUI cases. While the appeal was pending, Chet secured Yates' release at the 6 month point in the sentence, so that when Yates is resentenced, it will be a sentence of time-served.

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 2006 term that are relevant to our practice and granted since our last newsletter:

PANETTI v. QUARTERMAN, 2007 WL 30552 (Mem), No. 06-6407 (cert. granted Jan.

5, 2007) (reviewing 448 F. 3d 815 (5th Cir. 2006))

Capital punishment. mental illness

Question Presented: Does the Eighth Amendment permit the execution of a death row inmate who has a factual awareness of the reason for his execution but who, because of severe mental illness, has a delusional belief as to why the state is executing him, and thus does not appreciate that his execution is intended to seek retribution for his capital crime?

ROPER v. WEAVER, 127 S. Ct. 763 (Mem), No. 06-313 (cert. granted 12/7/06) (reviewing Nos. 03-2880, 03-2938 (8th Cir. 2/16/06))

Capital habeas, prosecutorial misconduct, AEDPA

In closing argument, the prosecutor made statements quoted by the 9th Circuit and which it summarized as (1) an analogy that the role of a juror is like that of a soldier who must do his or her duty and have the courage to kill; (2) statements by the prosecutor about his personal belief in the death penalty; (3) statements that executing Weaver was necessary to sustain a societal effort as part of the "war on drugs"; (4) assertions that the prosecutor had a special position of authority and decided whether to seek the death penalty; and (5) arguments that were designed to appeal to the emotions of the jury (culminating in a statement that the jury should "kill [Weaver] now"). Trial counsel objected, the objections were overruled, and the Missouri Supreme Court found no error. But the federal district court granted habeas relief, finding the state court's decision unreasonable under AEDPA, and the 8th Circuit affirmed in a split panel opinion.

Question Presented: Since this court has neither held a prosecutor's penalty phase

closing argument to violate due process, nor articulated, in response to a penalty phase claim, what the standard of error and prejudice would be, does a court of appeals exceed its authority under 28 U.S.C. §2254(d)(1) by overturning a capital sentence on the ground that the prosecutor's penalty phase closing argument was "unfairly inflammatory?"

FRY. v. PLILER, 127 S. Ct. 763 (Mem), No. 06-5247 (cert. granted 12/7/06) (reviewing No. 04-16876 (9th Cir. 2/2/06))

Harmless error

After two mistrials on account of hung juries, Fry was convicted in a California state court of two counts of first degree murder. The trial court had excluded testimony of Pamela Maples, who overheard a conversation in which Anthony Hurtz said he— not Fry — committed the murders. The trial court also had excluded other evidence offered to show third-party guilt. The conviction was affirmed on appeal, the federal district court denied habeas, and the 9th circuit affirmed based on a scant harmless error analysis: "The exclusion of Pamela Maples' testimony involved an unreasonable application of clearly established federal law, because her testimony was 'material and would have substantially bolstered [Fry's] claims of innocence,' but the error was "harmless because it did not have 'a substantial and injurious effect or influence in determining the jury's verdict'" under *Brecht*.

Question Presented: If constitutional error in a state trial is not recognized by the judiciary until the case ends up in federal court under 28 U.S.C. § 2254, is the prejudicial impact of the error assessed under the standard set forth in *Chapman*, or that enunciated in *Brecht*? Does it matter which harmless error standard is employed? And, if the *Brecht* standard applies, does the petitioner or the State bear the burden of persuasion on the question of

prejudice?

BOWLES v. RUSSELL, 127 S. Ct. 763 (Mem), No. 06-5306 (cert. granted 12/7/06) (reviewing No. 04-3262 (6th Cir. 12/28/05))

Time to Appeal, Fed. R. App. P. 4(a)

Bowles was convicted in Ohio of murder, and when his appeal was denied, he sought federal habeas relief. The district court denied relief, but Bowles, who wanted to appeal, failed to receive timely notice of the order, effectively time-barring his appeal. He correctly sought relief under Fed. R. App. P. 4(a), which the district court granted. However, the district court inexplicably erred in miscalculating and then stating the cut-off date for the notice of appeal, giving him until February 27, even though the rule should have limited his time to February 24. Bowles filed his notice of appeal on February 26, timely under the judge's order, but not in compliance with the Rule. The Sixth Circuit dismissed his appeal, holding that "the fourteen-day period of Rule 4(a)(6) of the Federal Rules of Appellate Procedure is not sU.S.C.eptible to extension through mistake, courtesy, or grace," and therefore the court had no subject matter jurisdiction. **Question Presented:** Whether an appellate court may sua sponte dismiss an appeal which has been filed within the time limitations authorized by a district court after granting a motion to reopen the appeal time under Rule 4(a)(6) of the Federal Rules of Appellate Procedure.

CLAIBORNE v. U.S., 127 S. Ct. 551 (Mem), No. 06-5618 (cert. granted 11/3/06) (reviewing No. 05-2198 (8th Cir. 2/27/06))

Booker Reasonableness

A 21-year-old first offender, Mario Claiborne, was convicted of possessing a small quantity of crack cocaine. Mr. Claiborne's lawyer persuaded the trial judge to impose a sentence

of only 15 months, below the guidelines range of 37-46 months. The Eighth Circuit reversed, regarding deviations from the guidelines as inherently dubious and requiring special justification. “This is a sixty percent downward variance. ‘An extraordinary reduction must be supported by extraordinary circumstances.’ [cite omitted] We conclude that the sixty percent reduction granted to Claiborne was an extraordinary variance that is not supported by comparably extraordinary circumstances. Claiborne’s lack of criminal history was taken into account when the safety valve eliminated an otherwise applicable mandatory minimum sentence. The small amount of crack cocaine seized during his two offenses was taken into account in determining his guidelines range. Substantially reducing the resulting guidelines range sentence based upon drug quantity is unreasonable because it is a fair inference that Claiborne distributed additional quantities of cocaine during the six months between the two occasions interdicted by the police. Similarly, while the district court properly focused on the likelihood Claiborne would commit further crimes in the future, the fact that he committed a second serious drug offense six months after his first arrest demonstrates that Claiborne has not earned an extraordinary downward variance from a guidelines sentence that already reflects substantial leniency.”

QUESTIONS PRESENTED: (1) Was the district court’s choice of below-Guidelines sentence reasonable? (2) In making that determination, is it consistent with *Booker*, to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?

RITA v. U.S., 127 S. Ct. 551 (Mem), No. 06-5754 (cert. granted 11/3/06) (reviewing No.

05-4674 (4th Cir. 5/1/06) (per curiam))

***Booker* Reasonableness**

A 57-year-old retired marine named Victor A. Rita Jr., was convicted of making false statements in connection with a federal investigation into the sale of kits for making machine guns. While Mr. Rita’s sentence, 33 months, was within the range provided by the sentencing guidelines, he argued on appeal to the Fourth Circuit that the sentence was unreasonably long, given his poor health and unblemished record of federal service, both as a marine and in two civilian agencies. The Court affirmed, saying “We find that the district court properly calculated the guideline range and appropriately treated the guidelines as advisory. The court sentenced Rita only after considering the factors set forth in § 3553(a). Based on these factors, and because the court sentenced Rita within the applicable guideline range and the statutory maximum, we find that Rita’s sentence of thirty-three months’ imprisonment is reasonable.”

QUESTIONS PRESENTED: (1) Was the district court’s choice of within-Guidelines sentence reasonable? (2) In making that determination, is it consistent with *Booker*, to accord a presumption of reasonableness to within-Guidelines sentences? (3) If so, can that presumption justify a sentence imposed without an explicit analysis by the district court of the 18 U.S.C. Sec. 3553(a) factors and any other factors that might justify a lesser sentence?

Supreme Court Cases

GONZALES v. DUENAS-ALVAREZ, 2007 WL 98723, No. 05-1629 (Jan. 17, 2007)

Generic “theft” includes aiding and abetting; qualifying conviction for removal
This is the most recent decision in the line of cases beginning with *Taylor* (U.S. 1990)

regarding the use of prior convictions for sentence enhancements or alien removals. The issue here was whether California's definition of vehicle theft – which includes aiding and abetting – is a generic “theft” offense within the meaning of the alien removal statute, 8 U.S.C. §§ 1101(a)(43)(G) & 1127(a)(2)(A). The Court analyzed California law and compared it to aiding and abetting theft in other states, concluding that California's statute is much the same as other states use, making it a generic theft within the meaning of Congress's intent. In so holding, the Court (Breyer, 9-0 as to judgment) rejected Gonzales' attempt to argue that California's statute was non-generic: “[I]n our view, to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic possibility, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.”

U.S. v. RESENDIZ-PONCE, 2007 WL 43827, No. 05-998 (Jan. 9, 2007)

Indictment; illegal reentry; overt act; structural error

The Court (Stevens, 8-1) reversed the Ninth Circuit and held that an indictment sufficiently charges illegal reentry under 8 U.S.C. 1326(a) by alleging a defendant “attempted to reenter the U.S. after having been deported.” It need not allege a specific overt act in furtherance of illegal reentry or any other “component part”

of the offense. Scalia dissented, arguing that the Court created an exception to the normal rule that an attempt allegation must include both intent and overt act to accomplish, as well as noting his position that a constitutionally deficient indictment is structural error (the issue on which cert was granted).

BURTON v. STEWART, 2007 WL 43832, No. 05-9222 (Jan. 9, 2007)

Habeas; 2254; Blakely; retroactivity

The Court dismissed this § 2254 habeas petition, declining to address the questions for which it was granted, i.e., the retroactivity of *Blakely*, because the Court concluded the petition was an improper second/successive habeas petition, filed without permission, depriving the district court of jurisdiction under 2244(b).

CAREY v. MUSLADIN, 127 S. Ct. 649, No. 05-785 (Dec. 11, 2006)

Fair trial; spectators' courtroom behavior

The Court (Thomas, 9-0 as to judgment) upheld the conviction and death sentence, reversing the Ninth Circuit, despite of the fact that courtroom spectators - members of the victim's family sitting in the front row - wore buttons with photos of the victim. The Court distinguished this spectator behavior from prior cases involving “state-sponsored courtroom practices.” Given the lack of a prior clear decision from the Court on this issue, and divergent opinions among circuits, the court of appeals erred in reversing the state court's decision on the issue.

LOPEZ v. GONZALES, 127 S. Ct. 625, No. 05-547 (Dec. 5, 2006)

Aggravated felony for deportation

Lopez, a legal permanent resident of the U.S., was arrested in 1997 in South Dakota and

pleaded guilty to a state law violation of aiding and abetting another person's possession of cocaine. He was sentenced to five years' imprisonment. INS later began removal proceedings, based in part on its contention that he had committed an aggravated felony as defined in the Immigration and Nationality Act (INA), which would disqualify him from discretionary cancellation of removal. The Court (Souter, 8-1) held that conduct made a felony under state law but a misdemeanor under the Controlled Substances Act (CSA) is not a felony punishable under the CSA, 18 U. S. C. § 924(c)(2), and therefore is not an aggravated felony under the INA. [Ed.: In resolving a circuit split, the decision implicitly overrules *Simon*, 168 F. 3d 1271 (11th Cir. 1999)]. At the same time, the Court dismissed the petition it had granted in **TOLEDO-FLORES v. U.S.**, No. 05-7664 (U.S. Dec. 5, 2006), to consider the same question, determining, without expressing its reasons, that cert. had been improvidently granted.

AYERS v. BELMONTES, 127 S. Ct. 469, No. 05-493 (Nov. 13, 2006)

Capital sentencing; jury instruction on mitigating circumstances

The Court (Kennedy, 5-4 as to judgment), reversed the Ninth Circuit and held that one of that state's mitigating circumstance jury instructions in capital sentencing ("any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" aka "factor (k)") did not violate the defendant's Eighth Amendment rights, as it did not prevent the jury from considering evidence of the defendant's precrime mitigation or postcrime rehabilitation (here that he would be constructive if incarcerated for life).

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. IVORY, 2007 WL 101190 (Jan. 17, 2007)

Statutory rape is "crime of violence" under USSG § 2K2.1(a)(4)(A) § 4B1.2(a)(1)

Ivory, convicted of felon-in-possession of ammunition, had a sentence enhancement applied under USSG § 2K2.1(a)(4)(A) and its definitional component, USSG § 4B1.2(a)(1) (defining "crime of violence") based on his prior guilty plea to second degree rape in Alabama, which, he said, was statutory rape for having sex with one under 16. The Court (per curiam with Dubina, Hull, Wilson) found the Alabama statutory rape crime categorically fits the "crime of violence" definition both because it "must involve the 'use of physical force against the person of another,' § 4B1.2(a)(1)," and because "at a minimum it 'presents a serious potential risk of physical injury to another,' as provided under § 4B1.2(a)(2)." The Court recognized a circuit split (6th and 7th vs. 9th, 4th, and now 11th) in holding "that the offense inherently poses a serious potential risk of physical injury to another." [Ed. note: There appear to be numerous circuit splits coming out of the 11th Circuit over the categorical application of "crimes of violence" under the ACCA and guidelines, e.g., attempted burglary, carrying a concealed firearm, felony escape, felony DUI. One was argued this term, James, USSC No. 05-9264 (attempted burglary). Others are awaiting cert. decisions, e.g., Williams, USSC No. 06-7734 (carrying a concealed firearm).]

U.S. v. NEWSOME, 2007 WL 88716 (Jan. 16, 2007)

Firearm possession, Fifth amendment, *Quarles*

Newsome was arrested as a suspect in the non-fatal shooting of his wife and child that had occurred three days before. Officers knocked on the hotel room door and entered with their guns drawn and ordered Newsome to get down on the ground. They secured him with handcuffs, and one officer asked him if there was “anything or anyone in the room that [he] should know about.” Newsome told the officer that he had a gun “over there,” motioning with his head in the direction of the nightstand by the bed. When the officer did not immediately see the gun he asked where it was and Newsome directed the officer to a black bag where the pistol in question was located. This interrogation occurred prior to officers reading Newsome his *Miranda* rights. The officers secured the bag but waited for a forensics officer to arrive to allow him to remove the gun from the bag. Newsome was escorted from the motel room and read his rights en route to police headquarters. Newsome was charged with possession of a firearm by a convicted felon. He argued on appeal that the admission at trial of the statements made during his arrest violated his Fifth Amendment rights; that the pistol found during the warrantless search of his motel room should have been suppressed under both the Fourth and Fifth Amendments; and prosecutorial misconduct. The Court affirmed (per curiam with Birch, Pryor, Convington), relying on the public safety exception to *Miranda* under *Quarles*; exigent circumstances, and that a curative instruction was sufficient to remedy any prejudice against the prosecutor’s single improper statement made in opening remarks.

U.S. v. TURNER, 2007 WL 64430 (Jan. 11, 2007)

Hearsay; *Bruton*; sentencing; upward departure; reasonableness; standard of review

The defendant, a postal employee, was charged with her boyfriend and his uncle in a theft of postal property conspiracy and related counts; she was jointly tried with her boyfriend, and the government’s evidence included testimony from two witnesses, who with much encouragement from the prosecutor, testified as to post-offense statements in which the boyfriend admitted his involvement and identified her as the organizer of the offense. Defense counsel did not object or move for a curative instruction, only requested *Jencks Act* material at the end of their direct examination. The district court raised the issue at the end of the day, heard argument the next morning, but withheld ruling on the motion for severance, which it denied later. It did give in jury instructions a limited *Bruton* instruction. After a guilty verdict, the district court eventually denied a motion for new trial, finding clear *Bruton* error was harmless given the circumstantial evidence. The Court affirmed (Marcus, with Carnes, Kravitch) because she could not meet the third prong given the overwhelming independent evidence of her guilt. With a sentencing range of 51-63 months, Turner was sentenced to 240 months in part based on her post-offense statements to her boyfriend agreeing that he would have killed federal agents had he been home when they came to search. The Court did not consider it unreasonable.

ODILI v. U. S. PAROLE COMMISSION, 2007 WL 57937 (Jan. 10, 2007)

Parole; *Booker*

In a case focusing primarily on issues

regarding a treaty transfer prisoner, the Court (Steele, with Pryor, Fay) affirmed, agreeing that the Commission is bound by *Booker* to give the sentencing guidelines only advisory weight under 18 U.S.C. 4106A and to consider the 3553(a) factors because 4106 procedure is akin to a sentencing proceeding, but the Commission had met those requirements here.

U.S. v. CAMPBELL, 2007 WL 9324 (Jan. 3, 2007)

VOSR sentencing proceedings

The Court held that after revoking supervised release and imposing sentence, the district court should elicit fully-articulated objections to the court's findings of fact, conclusions of law, and the manner in which the sentence was imposed. In this case, after imposing the sentence, the district court informed Campbell of his right to appeal, and asked "Is there anything further?" The Government responded that it had nothing further, while defense counsel requested that the court recommend a drug treatment program. The Court (per curiam with Tjoflat, Hull, Kravitch) found that to be error, extending to VOSR proceedings the rule it set for sentencing in *Jones*, 899 F.2d 1097 (11th Cir. 1990), *overruled on other grounds*, *Morrill*, 984 F.2d 1136 (11th Cir. 1993). The Court then addressed harmfulness and concluded that the error was harmful because district court apparently failed to consider the Guidelines and Campbell's advisory sentencing range under the Guidelines.

U.S. v. PEREZ, 2006 WL 3802933 (Dec. 28, 2006)

18 U.S.C. § 3153(c); scope; testimony by pretrial services officer; harmless errors

The defendant's first trial resulted in a hung jury, while his jointly tried wife was

convicted. She flipped; he was convicted; and she was sentenced to time served. The Court affirmed (per curiam with Tjoflat, Anderson, Barkett). The one novel issue - reviewed for plain error - was whether the testimony of his pretrial services officer, identifying his cellular phone number and voice on recordings, violated the 18 U.S.C. § 3153(c) limitations on the use of information collected in the course of pretrial services. The Court found error, but because other trial witnesses also identified defendant's phone number and voice, the error was harmless. The Court also found the record was insufficient to address ineffective assistance; his *Brady* plain error argument loses because government's failure to turn over evidence was not material/harmless; and denial of a continuance shortly before trial to examine additional discovery material was harmless.

U.S. v. THOMPSON, 2006 WL 3784913 (Dec. 27, 2006)

Notice; § 851 enhancement; evidence; sufficiency; possession

After the government filed its § 851 enhancement notice and the defendant's trial ended in a hung jury, a superseding indictment adding five counts was returned, and defendant was convicted on all 11 counts. The superseding indictment exposed defendant to two sentences, as the new charges were based on a separate incident. The § 851 notice indicated defendant's four prior convictions and specifically advised that he would face an enhanced sentence of mandatory life on one count of the original indictment. After conviction on all counts, including the additional counts, the government refiled the § 851 notice with a new date, citing the "superseding" indictment, and noting the enhanced life sentence applied to "two" counts. The district court then

overruled his objection the notice was inadequate and imposed an enhanced sentence on all 11 counts, including mandatory life on two counts, to be served concurrently. The Court affirmed (Carnes with Marcus, Jordan). It said the evidence was sufficient and the § 851 issue had been decided adversely in *Williams*, 59 F. 3d 1180, 1185 (11th Cir. 1995). Defendant here did not allege any prejudice or anything he would have done differently. The fact that government had exceeded its duty by including in the § 851 notice the maximum sentence on one of the original counts did not impose upon it any duty to do the same after additional counts were added.

U.S. v. EVANS, 2006 WL 3770786 (Dec. 26, 2006)

Lulling doctrine of fraud

Evans was convicted of wire fraud under 18 U.S.C. § 1343, based on a May 22, 1997 telefax from the victim to Evans. The sole issue presented is whether the jury was entitled to find that Evans caused this telefax to be sent “for the purpose of executing” the scheme within the contemplation of Section 1343. The Government conceded Evans had received the full benefit of his fraud as of April 25, so Evans argued that the telefax of May 22 could not have been for the purpose of executing the scheme. In a factually detailed opinion, the Court held that “when the scheme includes not only obtaining the benefit of the fraud but also delaying detection of the fraud by lulling the victim after the benefit has been obtained, the scheme is not fully consummated, and does not reach fruition, until the lulling portion of the scheme concludes.” The narrow issue became whether the May 22 telefax fell within this lulling doctrine, and the Court (Steele, with Fay & Pryor) affirmed, concluding that it did.

The doctrine applies equally to a Ponzi scheme and “when, as here, there is but a single victim, as to whom the defendant has received the full benefit of the fraud before the lulling communication.”

U.S. v. BOHANNON, 2006 WL 3771047 (Dec. 26, 2006)

Sex-with-minor sentencing, sentencing manipulation, reasonableness

Bohannon pleaded guilty to using the internet to entice a minor into sexual activity. The district court calculated his offense level when it (1) applied USSG § 2G1.3(c)(1)’s cross-reference to USSG § 2G2.1, which yielded a higher base offense level than the one recommended in the PSR, based on the court’s finding that Bohannon intended to produce a visual depiction of sexually explicit conduct with a minor, and (2) applied a 2-level enhancement because the victim was between 12 and 16 years old, pursuant to USSG § 2G2.1(b)(1)(B). He also argued that his sentence, which was below the 135-to-168-month advisory range, was unreasonable in light of the factors outlined in 18 U.S.C. § 3553(a). The Court (Marcus, with Anderson & Barkett) affirmed. “The district court was careful to note that the mere presence of the camera itself would not have been sufficient [to apply the cross-reference] but that the camera, in concert with the evidence of Bohannon’s propensity to take pictures of his sexual encounters, enabled the government to meet its burden.” By posing as a 15-year-old, the Government agent did not improperly engage in sentencing manipulation; Bohannon just got stung as in any sting operation. The court properly considered all of the statutory sentencing factors, and the sentence was reasonable.

U.S. v. YATES, 2006 WL 3771943 (Dec. 22, 2006) (unpublished)

Assimilative Crimes Act, Felony DUI on National Park property

Yates had been previously convicted of two DUIs. He committed another DUI, this time in the Perdido Key area of Pensacola, part of the Gulf Islands National Seashore, a national park governed by rules established by the Secretary of the Interior for the National Park Service. He was charged in federal court with violating the Florida Felony DUI law (subjecting him to 5 years maximum) through the Assimilative Crimes Act (ACA), 18 U.S.C. § 13, and got 18 months. Though not raised below, his appeal argued that the district court had no subject matter jurisdiction. He argued that the ACA can only bring state law into play when there is a gap in federal law, but here there was no gap to fill because the national parks traffic regulations, 36 C.F.R. §§ 4.23 & 1.3, fully addressed DUI and established only a 6-month maximum. He relied principally on *Lewis*, 523 U.S. 155 (1998), which he said changed the way the Eleventh Circuit and other Circuits had been construing the ACA. The Government conceded error, and the 11th Circuit (per curiam with Birch, Barkett, Pryor) agreed that reversible error had been committed. “Section 4.23 provides for comprehensive and detailed regulation of drunk driving in national parks. It defines the offense, delineates the tests for impairment, and, in section 1.3, provides punishment. When federal statutes “reveal an intent to occupy so much of a field as would exclude use of the particular state statute at issue,” such as “where Congress has covered the field with uniform federal legislation,” assimilation is not proper. . . Yates should have been charged with a violation of section 4.23.” The result will be a new sentencing where the district court already said she will

impose 6 months (which is time served; he was released on appellate bond when his 6 months was served). [Ed. note: This opinion was unpublished despite making new law in this Circuit; a motion to publish is pending.]

U.S. v. STREET, 2006 WL 3734533 (Dec. 20, 2006)

Detention, questioning, probable cause, Miranda, venue

Street, formerly a cop for 22 years, was tried for three bank robberies with a firearm. He moved to suppress his incriminating statements, and asserted that the Government failed to offer evidence of proper venue. The Court (Carnes, with Marcus and Jordan) affirmed the convictions and sentence of 771 months. The Court said that evidence gave police reasonable suspicion to pull over his car at 5 p.m., and had sufficient cause to question him until probable cause to arrest Street was firmly established by 6 p.m., before they got Street to sign a consent to search and before Street made self-inculpatory statements. During that one hour, Street chose to permit the officers to question him inside his home instead of on the street. He was neither personally searched nor was he handcuffed or otherwise confined. He was told he was not under arrest. The agents did not perform a protective sweep of the house. Street was free to move about it. The agents asked for his permission before searching any parts of the house or the cars. Street’s parents were in the house undisturbed during the entire investigation. Street thereafter consented to a general search of his bedroom and its contents. The abbreviated *Miranda* warnings he got were not adequate, but statements he gave after a full *Miranda* warning were voluntary and admissible, so the error was harmless. The Court said the *Miranda* issue was controlled by *Elstad*

rather than an exception under *Siebert*. Also, the Government was permitted to put in additional evidence to establish venue.

U.S. v. KINARD, 2006 WL 3731298 (Dec. 20, 2006)

USSG § 2D1.1(b)(6)(A)

Kinard was given a 120-month sentence for conspiracy to manufacture methamphetamine. Schmitz was sentenced to and 87 months for possession of pseudoephedrine with intent to manufacture methamphetamine. The Court (per curiam with Anderson, Barkett, Goldberg) reversed the sentences because the district court erred in enhancing their offense levels under USSG § 2D1.1(b)(6)(A) (redesignated as USSG § 2D1.1(b)(8)(A) in 2006) for unlawfully discharging anhydrous ammonia. The government presented no evidence and the district court made no findings, as required, as to whether their release of anhydrous ammonia violated the four statutes referenced in the guidelines – the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(d), the Federal Water Pollution Control Act, 33 U.S.C. § 1319(c), the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9603(b), and 49 U.S.C. § 5124.

U.S. v. CAMPOS-DIAZ, 2006 WL 3716567 (Dec. 19, 2006)

Illegal reentry

The Court (per curiam with Dubina, Wilson, Corrigan), found no error in the claim that the absence of a fast-track, or early disposition sentencing program in that district, which would have allowed the district judge to apply a downward departure to his sentence under USSG § 5K3.1, violates the Fifth Amendment Equal Protection Clause.

CHANDLER v. MCDONOUGH, 2006 WL

3702736 (Dec. 18, 2006)

Capital habeas, procedural bar, ineffective assistance, change of venue

Chandler claimed that his trial counsel rendered ineffective assistance by failing to move a second time for a change of venue. The Court (per curiam with Anderson, Carnes, Barkett) first held that his ineffective assistance claim was not barred due to having previously raised non-ineffectiveness claims arising from the same facts. But he loses on the merits. “Chandler has not even come close to the sort of evidentiary showing necessary to establish that his defense was prejudiced by [trial counsel’s] failure to file a second change of venue motion,” and the court did not err in denying him an evidentiary hearing.

U.S. v. KENNARD, 2006 WL 3691512 (Dec. 15, 2006)

Conspiracy, post-indictment flight, evidence & instruction

The Court (Carnes, with Marcus, Kravitch) affirmed the convictions of two brothers for bilking hundreds of churches and other non-profit organizations out of millions of dollars. Evidence and instruction on post-indictment flight was permissible. There was no error in excluding the exculpatory testimony of the defendants’ attorney, taken during an SEC investigation of the case because defendants’ failed to meet their burden of showing that the SEC lawyers who took the lawyer’s deposition had a sufficient similarity of motives to that of the prosecutors in the brothers’ criminal case. The Court also rejected an insufficient evidence challenge; a challenge to a deliberate ignorance jury instruction; and a sentencing challenge, noting that since the actual 38-month sentence was within the Guideline range, no “substantial rights” were violated, and no “plain error” therefore occurred.

U.S. v. BENNETT, 2006 WL 3613242 (Dec. 13, 2006)

ACCA, *Shepard*, plain error in guidelines miscalculation

(1) Bennett accepted his PSI as true, and the court relied on that to sentence him under the ACCA. Bennett's appeal relied on *Shepard* to say the district court erred by relying on facts in his PSI which he did not admit. The Court (per curiam with Black, Hull, Conway) rejected his appeal, saying he admitted the qualifying priors in pleading guilty to the indictment. Furthermore, "While Bennett objected to the probation officer's use of police reports, as non-*Shepard* materials, in preparation of the PSI, Bennett did not object to the underlying facts of his prior convictions as set forth in the court documents referenced in the PSI." He waived his argument to complain on appeal that "the district court should not have accepted the probation officer's statement that he derived the information about Bennett's prior convictions from court documents." (2) "At sentencing, the district court found by a preponderance of the evidence that Bennett's possession of the firearm was not in connection with a violent felony. The government did not cross-appeal that finding. Thus, Bennett's base offense level should have been 33, and his total offense level should have been 31 after his assigned two-level acceptance of responsibility reduction. However, the district court miscalculated Bennett's total offense level as 32. This miscalculation of the offense level was plain error."

DIAZ v. McDONOUGH, 2006 WL 3624999 (Dec. 13, 2006)

Lethal injection

Following recent precedent, the Court (per curiam with Tjoflat, Marcus, Pryor) denied Diaz's stay of execution based on his claim

that lethal injection violates the Eighth Amendment.

U.S. v. WILLIAMS, 2006 WL 3615300 (Dec. 13, 2006)

Powder vs crack cocaine

The Court summarily rejected Judge Barkett's plea to review en banc the holding that a district court must, despite *Booker*, apply the 100-1 crack-powder ratio in the guidelines in every case where it arises. Four judges signed an opinion supporting the majority, and Barkett wrote a dissent.

U.S. v. LORENZO, 471 F.3d 1219 (Dec. 8, 2006)

Sentencing; Booker; post-sentence rehabilitation impermissible factor

The district court agreed with defendant's *Blakely* objection and imposed a top-of-the-range sentence *without enhancements* to which the defendant had not admitted; however, the court stated that, but for *Blakely*, it would have sentenced to 27 months. The case was remanded post-*Booker* because the court could have imposed the enhancements under an advisory scheme. By then, though, defendant had been released from prison. Over government objection, the district court sentenced defendant to time served and 3 years' supervised release based on his compliance with supervision, employment, etc., after sentencing. The Court (per curiam with Pryor, Fay, Reavley) *vacated* this sentence because it was not based on any § 3553 factor, holding that post-sentencing behavior does not fall within § 3553(a)(1), and directly contravenes (a)(6) and (a)(5)(A), and policy statement 5K2.19. Therefore, the sentence was unreasonable.

BARBOUR v. HALEY, 471 F.3d 1222 (Dec. 8, 2006)

Habeas; appointed counsel

The Court (Dubina, with Anderson, Vinson) held there is no right to appointed counsel for death-sentenced individuals in postconviction claims, or some lesser form of legal assistance, denying the 42 U.S.C. § 1983 action.

U.S. v. CEDENO, 471 F.3d 1193 (Dec. 6, 2006)

Loss calculation

Cedeno & Concepcion broke into jewelry store and made off with \$1,485,000 worth of expensive watches. The store said repairs of watches cost \$13,929, and damages to premises was \$2,501. The district court calculated loss as the sum of those three figures. The defendants said adding the cost of watch repairs to the market value of the watches was too much and elevated their guidelines range unlawfully. The 11th Circuit reversed (Carnes, with Black & Barkett), holding that under Amendment 617 of the guidelines, “the former definition of loss contained in the commentary to the old § 2B1.1 should be used in calculating loss under § 2B3.1,” and that provision says do not add the value of the repairs to the full market value of the loss. “The largest amount of damage that Cedeno and Concepcion could have reasonably foreseen doing to the watches was 100% of their fair market value. There is no damage that can be done beyond total destruction. The district court had already included the entire fair market value of the watches at the time of the crime in its calculation of the loss before adding the cost of repairs.”

U.S. v. MILKINTAS, 470 F.3d 1339 (Nov. 30, 2006) (**Important safety valve & JOA**

case)

Evidence; knowledge; accomplice testimony; JOA motion; sentencing; safety valve; USSG 2D1.1(b)(7); continuance request; timeliness of proffer

Defendant was the only one of 16 not acquitted in the first trial, based on the testimony of one alleged coconspirator; he was convicted in the retrial which added a second snitch and agent testimony. The Court affirmed. (per curiam with Dubina, Black, Hull). First, because defense counsel did not renew his JOA motion at the close of all the evidence, the defendant had a stringent standard of review on appeal, providing for reversal “only to prevent a manifest miscarriage of justice.” The court noted the one accomplice’s testimony was sufficient in itself because “not on its face incredible or otherwise insubstantial.” But here there was the additional cellmate’s testimony as well as agent testimony. Second, in an issue of first impression in this circuit, the Court affirmed the 235-month sentence and denial of the two-level safety valve reduction because the defendant admitted he had not made any proffer, much less a full and truthful proffer, and the Court agreed with other circuits and rejected his argument that the government had any obligation to solicit that information from a defendant who has merely given notice of his willingness. The Court distinguished *Garcia*, 405 F. 3d at 1275, noting that the defendant, who had not notified the government of his willingness to be interviewed until the day before sentencing, did not ask for a continuance of sentencing to have time to make a full proffer. The Court rejected the argument that the need for a translator to prepare the proffer excused the defendant/counsel from getting it done before sentencing. The Court also noted there is a circuit split regarding whether, once a

defendant submits a written proffer and offers to provide additional information if needed, the government then has a duty to seek that additional information.

U.S. v. KEENE, 470 F.3d 1347 (Nov. 30, 2006)

Sentencing; “assumed error harmless”

The Court (Carnes, with Anderson, Birch) avoided the defendant’s argument that the threat of injury contained in the robbery note he helped write (“Give me all the money, and no one will get hurt!”), even without the robber brandishing a weapon, stating or suggesting he had one, or making a menacing gesture, is insufficient for enhancement as a threat of death. The Court noted that one circuit has held such circumstances are sufficient for this enhancement but declined to decide the issue because it would not affect the outcome given the district court’s statement that it would impose the same sentence regardless. Carnes noted the district court “essentially accepted the invitation” of his concurring opinion in another case, advising that district courts could avoid “pointless reversals and unnecessary do-overs of sentence proceedings” by stating, if the district judge so chose, whether or not the guidelines decision would change the outcome of the sentence imposed, after consideration of the 3553(a) factors. The Court noted this “assumed error harmless inquiry” has two parts: knowledge the district court would have reached the same result even if the guidelines issue were decided otherwise; and determination that the sentence would be reasonable either way. The Court then determined, in this second component, that defendant could not show that the sentence, which was above the lower of the guidelines ranges, was nevertheless unreasonable.

LYND v. TERRY, 470 F.3d 1308 (Nov. 28, 2006)

Capital habeas; competency experts; ineffective assistance

The Court (per curiam with Edmondson, Carnes, Barkett) denied relief to this § 2254 capital habeas petitioner. First, the Court rejected his argument he was denied the assistance of experts, in violation of *Ake v. Oklahoma*, because the trial court’s exclusion of the expert’s testimony was proper given the defendant’s refusal to submit to a state mental health evaluation. Second, the Court affirmed the finding below that counsel was not ineffective, in part because the defendant failed to show what other mitigation evidence counsel could have presented.

U.S. v. WILLIAMS, 469 F.3d 963 (Nov. 13, 2006)

Sentencing; 841(b)(1)(A)(ii); mandatory life

The Court (per curiam by Wilson, Pryor, Fay) affirmed a mandatory life term under 18 U.S.C. § 841(b)(1)(A)(ii); it rejected the argument that, in order to be subject to the mandatory minimum life term, a defendant has to be involved in a transaction involving five or more kilos of cocaine after his second prior conviction became final. It agreed with the Sixth Circuit that this argument “has a certain appeal, as a plausible means to avoid what is a Draconian sentence [but would] ignore the logic of a conspiracy charge,” because it would “give unwarranted legal significance to the date of each overt act.” The Court concluded the mandatory term “is triggered by Williams’s continued participation in the conspiracy and not by the amount” Also, the Court rejected his unpreserved argument that one of his prior convictions could not be used because if any error existed it was not plain. The focus was not on the amount of time which had passed

(here, two months) since the prior conviction was final and the arrest on the instant charge, but rather the “degree of criminal activity.”

CHAVERS v. SECY., FLA. DOC, 468 F.3d 1273 (Oct. 31, 2006)

Habeas; statute of limitations

The Court (per curiam with Wilson, Pryor, Fay) affirmed dismissal of the § 2254 petition, holding that the statute of limitations began running upon entry of the Florida DCA judgment, not issuance of the mandate later. [Ed. note: Unlike Lawrence v. Florida, presently pending in the U.S. Supreme Court, which involves the AEDPA statute of limitations after collateral review in the State courts, Chavers’ case involves the limitations period after direct review in the State courts].

ALDERMAN v. TERRY, 468 F.3d 775 (Oct. 30, 2006)

Capital habeas; ineffective assistance; penalty phase; social history background

The Court (Tjoflat, with Anderson, Carnes) affirmed denial of this capital habeas, agreeing with the district court that counsel’s failure to present defendant’s social history background in the penalty phase (at resentencing) was not ineffective assistance of counsel. Counsel had elected strategically to present a lingering doubt theory that the codefendant was the murderer, severely impeaching his testimony, and had also put on testimony about defendant being a good citizen and employee, a good prisoner, and his early life struggles to succeed.

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