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NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

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THE SENTENCING REVOLUTION CONTINUES

In Kimrough v. United States, 128 S. Ct. 558 (2007) and Gall v. United States, 128 S. Ct. 586 (2007), the Supreme Court continued its remarkable sentencing revolution that began with Apprendi v. New Jersey, 530 U.S. 466 (2000), confirming that district courts have real discretion in determining sentences. In doing so, it smashed another collection of precedent from the Courts of Appeal.

Court after court had held that district judges were prohibited from imposing below-Guidelines sentences based on what most, including the United States Sentencing Guidelines Commission, had concluded was the unsupportable 100-1 ratio between crack and powder cocaine. The Eleventh Circuit Court of Appeals was no exception. *See* United States v. Williams, 456 F.3d 1353 (11th Cir. 2006). In Kimrough, though, the Court stripped the underpinning from those cases, finding that Congress had not required the Sentencing Commission to implement the 100-1 ratio in the Guidelines. Instead, the Court held that “it would not be an abuse of

discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence ‘greater than necessary’ to achieve §3553(a)’s purposes, even in a mine-run case.” 128 S. Ct. at 575. The opinion includes a summary of the Sentencing Commission’s reasons that led it to conclude that the 100-1 ratio “fails to meet the sentencing objectives set forth by Congress.”

The Guidelines range for Kimrough had been 19 to 22½ years. The district judge, imposed, instead, the minimum required by statute, 15 years. (Kimrough had possessed 56 grams of crack cocaine and possessed a firearm in furtherance of the drug trafficking offense.) In imposing the below-Guidelines sentence, the judge relied upon the crack/powder disparity, Kimrough’s service in Operation Desert Storm, his honorable discharge from the Marine Corps, the absence of any prior felony convictions, and a history of steady employment. When the Fourth Circuit Court of Appeals overturned the sentence as “unreasonable,” the Supreme Court chose to review the case and ordered

the 15-year sentence reinstated.

The same day it issued the Kimbrough opinion, the Supreme Court, in Gall, rejected the view of a near consensus of Courts of Appeal that had held that an “extraordinary reduction must be supported by extraordinary circumstances.” United States v. Crisp, 454 F.3d 1285, 1291 (11th Cir. 2006). That view came “too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range.” Gall, 128 S. Ct. at 595. Instead, while acknowledging “the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant,” the Court disapproved percentage-based determinations and found it was more important that the Court of Appeals apply “a deferential abuse-of-discretion standard” in determining whether a sentence was reasonable. 128 S. Ct. at 591.

Gall had participated for some 7 months in a conspiracy to distribute ecstasy, making over \$30,000 in the process. Fearing he would be caught, though, he withdrew from the conspiracy, “self-rehabilitated” himself and stopped using drugs, graduated from college, and went on to start his own business. 128 S. Ct. at 592. He was indicted 3 ½ years after he had withdrawn from the conspiracy. Prior to sentencing, Gall provided the district judge with a “‘small flood’ of letters” praising his character and work ethic. The judge relied on these circumstances and sentenced Gall to 3 years of probation instead of the 30-37 months of imprisonment called for by the Guidelines. In his sentencing order, the judge also included a long footnote citing studies supporting his view that Gall’s immaturity was a factor deserving of consideration.

The Eighth Court of Appeals, which surely led the nation in vacating below-Guidelines sentences, found the sentence to be unreasonable because it was not supported by extraordinary circumstances. In overturning the Eighth Circuit’s decision, the Supreme Court found it failed to “reflect the requisite deference” to the district court, 128 S. Ct. at 598, and that “the § 3553(a) factors, on the whole, justified the sentence.” 128 S. Ct. at 602.

CRACK COCAINE AMENDMENT TO BE APPLIED RETROACTIVELY

On December 11th, The United States Sentencing Commission voted unanimously to retroactively apply the recent Guidelines amendment lowering the penalties for crack cocaine. It has been estimated that the amendment will result, on average, in a 27-month decrease in the sentences of some 19,500 people and that some 1,500 prisoners will be eligible for immediate release when the rule goes into effect on March 3rd. The Sentencing Commission estimates that 300 individuals sentenced in the Northern District of Florida will be eligible for a reduction in their sentence.

The applicable statute is 18 U.S.C. § 3582(c)(2), which provides that when the Sentencing Commission makes an amendment retroactive, “upon motion of the defendant, or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a).” Section 1B1.10 of the Sentencing Guidelines Manual provides that “the court *may* reduce the defendants term of imprisonment.” § 1B1.0(a)(1)(emphasis added). The rule states, too, that the resulting

proceeding does “not constitute a full resentencing of the defendant,” § 1B1.0(a)(3), and that except for those sentences that originally resulted in below-Guideline sentences, the court may not sentence the defendant to a term less than the amended Guideline range. *See* § 1B1.0(2)(A).

With one exception, the rule specifically authorizes a reduction for those sentences that were originally below the Guidelines range. The Commentary to § 1B1.10 provides the example of a defendant who initially received a sentence 20 percent below the bottom of the Guidelines. The Commentary concludes that a reduction 20 percent below the new bottom of the Guidelines “would amount to a comparable reduction and may be appropriate.” Commentary, n. 3. The exception noted in the rule is a “non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and United States v Booker, 543 U.S. 220 (2005).” § 1B1.0(a)(2)(B). In those instances, “a further reduction *generally* would not be appropriate.” *Id.* (emphasis added)

The Commentary also directs the court, in making its decision whether to grant a reduction and in deciding the extent of the reduction, to consider § 3553(a) factors, “the nature and seriousness of the danger to any person or the community that may be posed by a reduction,” and post-sentence conduct of the defendant. Commentary, n. 1(B). The Commentary holds out some hope for a reduction in the length of supervised release for those already serving supervised release who, had they not already finished their sentence, would have been eligible for a sentence reduction. While eligibility for a reduced sentence, “without more,” would not “provide a basis for early termination of

supervised release,” the court may reduce the amount of supervised release by considering “the totality of the circumstances relevant to a decision to terminate supervised release.” Commentary, n. 4(B).

There remain unanswered questions. While the Sentencing Commission will provide each district court with a list of those prisoners who might be affected, it isn’t clear who will have access to the list. Some within the Justice Department have argued that the list, at least in its entirety, should not be provided to Federal Public Defenders or other defense counsel.

There is the question of what role the panel lawyers will play. Will they be responsible for filing motions for those clients they represented and, if so, will the court authorize compensation? There is a question, too, about whether those eligible for a reduction are entitled to be represented by counsel. Some U.S. Attorneys have already taken the position that the right to counsel does not extend to the filing of §3582(c)(2) motions.

Despite the wording of USSG §1B1.10, the Ninth Circuit has held in United States v. Hicks, 472 F.3d 1167 (9th Cir. 2007) that, pursuant to United States v. Booker, those filing a § 3582(c)(2) motion are not limited to the two-level reduction. The holding is, essentially, that Booker made the Guidelines advisory and that the Sentencing Commission cannot make them mandatory, even in a proceeding involving §3582(c)(2).

The National Federal Defender Sentencing Resource Counsel, Amy Baron-Evans, has prepared an extensive memorandum, “Sentence Reductions Under the Retroactive

Crack Amendment.” The memo includes the Hicks argument, a related argument that prisoners should be able to seek reductions before the March 3rd date and that those crack offenders sentenced pursuant to the career criminal and armed career criminal act should be eligible for sentencing reductions, and an argument that those seeking relief pursuant to §3582(c)(2) are entitled to counsel. The memo is available at the Defender Training Website at [www. fd.org](http://www.fd.org).

Then, too, some judges have proposed, as authorized by §3582(c)(2), taking the matter into their own hands and, using the list prepared by the Sentencing Commission, entering orders reducing sentences based on the two-level reduction. The orders would be entered without any need for a motion to be filed by the prisoner or his or her lawyer.

There is a day-and-a-half meeting scheduled for January 18-19 in Charlotte, North Carolina, to consider implementation of the reductions. Representatives from 30 districts that have the most defendants affected have been invited to the meeting. Those invited are representatives from federal defender offices, probation, the United States Attorney offices, clerks, and the chief judge from the invited districts. The meeting will provide an opportunity for them to meet with staff from the Sentencing Commission, the Administrative Office, and the Bureau of Prisons. We’re in that top 30, and Chet Kaufman from our Tallahassee office will be attending. Randy Murrell will also soon meet with Judge Hinkle and U.S. Attorney Greg Miller, to discuss the matter.

If in the meantime you have questions or have clients that have questions, you’ll find helpful advice at the website for the organization

Families Against Mandatory Minimums at www.famm.org or the Defender Training website. Those of us at the Federal Defender’s Office are, of course, happy to discuss the issue with anyone who has questions.

CHANGES TO CRIMINAL HISTORY GUIDELINES

Along with the changes to the crack cocaine Guidelines that went into effect November 1st, came some change to the Chapter 4 criminal history Guidelines. USSG §4B1.2(a)(2) now makes it clear that so long as there is not an intervening arrest, separate cases for which sentencing takes place on the same day count only as one offense. In adopting this bright-line rule, the Guidelines Commission abandoned all together the test of whether the offenses were related, i.e. “part of a single scheme or plan.”

USSG §4A1.2(c)(1) had permitted a list of relatively minor offenses (reckless driving, disorderly conduct, driving with a suspended license, insufficient funds check, etc.) to be counted for criminal history purposes only if the court had sentenced the defendant to either 30 days or more in jail or at least a year of probation. The amended version of the rule retains the 30 day jail requirement, but requires *more* than a year of probation before the offense can be counted.

PAY RAISE: \$100 AN HOUR

As of January 1st, the hourly rate for CJA work is now \$100 an hour. It applies to any cases to which you are appointed as of that date and to work done on existing cases as of that date.

APPELLATE MANUEL AVAILABLE

Rosemary Cakmis, the Chief of the Appellate Section of the Federal Defender Office in the Middle District of Florida, maintains an appellate manual designed to guide panel members through the appellate process. She has provided us with a copy of it. Just call Margaret in our Tallahassee office, and she will email it to you.

LITTLE RED BOOK

The latest version of “My Little Red Book” is available from the Federal Public Defender Office in Spokane. It is a pocket-sized book that includes various statutes and rules applicable to federal criminal practice, as well as a tiny version of the Sentencing Table from the Guidelines Manual. It costs \$6, and can be purchased directly from: Federal Defenders of EWA and ID, 10 North Post #700, Spokane, WA 99201. If you have questions about purchasing the book, call or email Lisa Werner at lisa_werner@fd.org or (509) 624-7606.

BEHIND ON TRAINING?

Those panel members who have not met the training requirement for 2007 will soon be receiving letters advising that they will be placed at the end of the panel list and will be eligible to receive new case assignments only if no one who has met the requirement is available. If you’re one of those slated to receive that letter, please know that tapes of our training sessions are available in each of our offices. The tapes can be checked out with only a promise of a prompt return of the tape.

TRAINING

The Winning Strategies Seminar is being held February 14th-16th in New Orleans. It offers both new and experienced panel attorneys the opportunity to attend presentations on criminal defense topics of interest in both large- and small-group settings. The presentations focus on the nuts and bolts of federal criminal practice including the sentencing guidelines, sentencing mitigation, and the Federal Rules of Criminal Procedure. Sessions focusing on the impact of cases such as Rita, Booker and Crawford, and Fourth, Fifth and Sixth Amendment issues are also included. In addition, participants can expect presentations on trial skills such as cross examination, defending gang cases and attacking wiretap evidence. Also included are presentations on the use of technology in the courtroom and an explanation of CJA guidelines and procedures.

The Sentencing Advocacy Seminar is being held in Chicago on March 13th-15th. The program presents a comprehensive approach to sentencing advocacy. Participants will learn a process for the development of a persuasive, fact-based sentencing theory and the advocacy skills necessary to advance that theory in writing and during sentencing hearings. Among other subjects, presentations and demonstrations will address changes in federal sentencing law, judging at sentencing, use of a mitigation specialist, storytelling and persuasive writing. The workshop consists of plenary sessions and small-group breakout sessions. In the small-group breakout sessions, participants will use a case of their own to brainstorm facts, develop a theory and theme, tell a story, and persuasively write a portion of

their downward departure motion or sentencing memo.

You can register for the seminars at www.fd.org.

Locally we've scheduled the following training sessions:

Booker: Three Years Later

Gainesville: Jan. 23

Tallahassee: Jan. 24

Pensacola: Jan. 24

Preserving Sentencing Error

Panama City: Feb. 12

Pensacola: Feb. 21

Gainesville: Feb. 27

Tallahassee: Feb. 28

Details about both sessions are available at our webpage: www.fpd-fln.org.

NUMBER OF PANEL APPOINTMENTS

Here's who got how many cases in 2007:

Pensacola

Amond, Elizabeth	8
Couch, Clint	0
Duignan, Maureen	0
Hammons, Joe	2
Hendrix, Michelle	2
Jackson, Patrick	5
Jenkins, James	0
Kypreos, Spiro	5
Lang, Brian	6
McGuire, Thomas	2
Murphy, George	6
Oram, Albert	1
Rabby, Chris L.	1
Ridlehoover, Ken	6
Sheehan, Donald	7
Stevenson, Eric	2

Sutherland, Steve	2
Wilkins, John	0
Wilson, Sharon	1

Panama City

Cassidy, Thom	4
Clyatt, Rhonda	0
Dingus, Jonathan	3
Downing, Jean	5
Kypreos, Spiro	5
Murphy, George	4
Patterson, Chris	4
Quintana, Edward	4
Sombathy, Robert	0
Stevenson, Dustin	1

Tallahassee

Banks, James	2
Bubsey, William E.	7
Cummings, Greg	0
Daley, Bernie	2
Davis, Cliff	1
Donaldson, Teri	0
Findley, Thomas	0
Garcia, Mandy	5
Greenberg, Richard	6
Harper, Bob	3
McMurry, Chuck	3
Morris, Alex	2
Printy, Gary	5
Sanders, Barbara	2
Shaw, Sean	0
Taylor, Clyde	4
Truskoski, Ryan	3
Ufferman, Michael	3
Villeneuve, Paul	1

Gainesville

Bernstein, Stephen	4
Broling, John	5
Curtis, Ted	0
Cushman, Stan	0
Daly, Daniel	4
Edwards, Thomas	0

Gonzalez, Cary	6
Harper, Robert	2
Hatfield, Anderson	6
Johnson, Huntley	3
Johnson, Stephen	0
Mason, Geoffrey	0
Rudenshtein, Sonya	0
Sanford, Jerry	1
Schaffnit, Gilbert	4
Stokes, John	0
Trukowski, Ryan	1
Uman, Jon	4
Vipperman, Lloyd	6
Wilson, David	2

Sentence: 120 months
Date of Imposition of Sentence: 6/27/07
Grounds: 5K1.1

VARIANCES

Bishop, Israel Mickle, S. Atty: Miller, Tom
Docket: 1:05cr18
Charge: Conspiracy to Distribute More Than 100 kg of Marijuana
Range: 262-327 months (10 yr. min. man.)
Sentence: Probation
Grounds: def's career offender classification overstated seriousness of criminal history, defendant had started a successful business since his arrest, 5K1.1

Harris, Theodore Mickle, S. Atty: Murrell, Randy
Docket: 4:07cr34
Charge: Obstructing Justice, Making False Statements, Perjury
Range: 15 - 21 months
Sentence: Probation
Date of Imposition of Sentence: 11/19/07
Grounds: def. limited intellectual abilities, otherwise good reputation, concerns about involvement of lawyer in perjury

Daniels, John Mickle, S. Atty: Greenberg, R.
Docket: 4:07cr24
Charge: Obstructing Justice, Making False Statements, Perjury
Range: 15 - 21 months
Sentence: Probation
Date of Imposition of Sentence: 11/19/07
Grounds: def. limited intellectual abilities, otherwise good reputation, concerns about involvement of lawyer in perjury

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

VICTORIES

In state court, Panama City panel members **Jon Dingus** and **Bob Sombathy** won acquittals for their clients in the nationally publicized case involving the death of Martin

DOWNWARD DEPARTURES

Robinson, O'Neal Hinkle, R. Atty: Bubsey, Bill
Docket: 4:07cr4
Charge: Poss Stolen FA, Poss Unregistered FA
Range: 140 - 175 months BOP
Sentence: 84 months
Date of Imposition of Sentence: 10/15/07
Grounds: 5K1.1

Shoates, Jason Mickle, S. Atty: Donaldson, Teri
Docket: 4:06cr48
Charge: Consp. Dist > 5 kilos coke and > 50 g. crack
Range: 262 - 327 months BOP
Sentence: 100 months
Date of Imposition of Sentence: 10/15/07
Grounds: 5K1.1

Chambers, Jesse Mickle, S. Atty: McMurry, Chuck
Docket: 4:07cr35
Charge: Consp. Dist. > 5 kilos cocaine
Range: 324 - 405 months BOP (20 yr min. mand.)
Sentence: 100 months
Date of Imposition of Sentence: 10/15/07
Grounds: 5K1.1

Randolph, Randall Smoak, R. Atty: Greenberg, R.
Docket: 5:07cr10
Charge: Consp. Dist. > 5 kilos cocaine
Range: 151 188 months (20 yr min. mand)

Lee Anderson. The Panama City jury returned not guilty verdicts for all eight defendants. **Jon** and **Bob** both represented drill instructors from the Bay County Sheriff's Office Boot Camp. **Jon** won another state case just last month over in Escambia County where in a bench trial he convinced Circuit Court Judge Jan Shackelford to return a verdict of not guilty by reason of insanity in a case of attempted first degree murder.

New Tallahassee panel member, **Alex Morris**, won his first federal trial in a case where his client, Christopher Dantzler, was charged with trafficking in crack and powder cocaine. Mr. Dantzler was a passenger in a car in which the cocaine was found. The driver of the car and a fellow in Orlando who was slated to receive the cocaine were also arrested. **Alex** won important skirmishes leading up to the trial. He convinced Judge Hinkle to exclude evidence of prior criminal activity that the Government sought to introduce as 404(B) evidence. Even before the trial began, **Alex** developed alibi testimony that was so successful in discrediting the driver of the car that the Government decided not to call the driver as a witness. Mr. Dantzler's testimony denying knowledge of the cocaine and **Alex's** challenge to the credibility of the Orlando co-defendant led the jury to conclude the Government failed to prove its case, and the jury returned a verdict of "not guilty."

Steve Bernstein of the Gainesville panel convinced a Gainesville jury that his client, Yaima Gonzalez, was responsible for something less than the 1,000 marijuana plants she was charged with conspiring to manufacture. As a result, Judge Mickle sentenced Ms. Gonzalez to the mandatory 5 years rather than the 10 year mandatory sentence Ms. Gonzalez would have received

had she been found guilty of the greater charge. Before the trial, **Steve** had convinced Judge Mickle to allow Ms. Gonzalez to withdraw a previously entered guilty plea. **Steve**, who was retained after Ms. Gonzalez had entered the guilty plea, argued that Ms. Gonzalez had not entered her guilty plea knowingly and intelligently because of information developed by the Government after the entry of the plea. That new information had convinced the Government to forego a substantial assistance motion and, in the view of the Government, tended to prove that Ms. Gonzalez had knowledge that more than 1,000 plants were being grown. **Steve** successfully argued that Ms. Gonzalez had entered her guilty plea with the understanding that she would not be held responsible for 1,000 plants.

In another case, **Steve Bernstein** battled to a hung jury in a case where his client was charged in a marijuana conspiracy involving more than 1,000 kilograms of marijuana. His client, Luis Mata-Moreno, had been seen entering, as a passenger, the van that contained the marijuana. The Government argued that when, following his arrest, Mr. Mata-Moreno asked "how much was it," he was asking about the quantity of marijuana and, therefore, knew of its presence. **Steve** explained that Mr. Mata-Moreno was asking, not about the quantity of marijuana, which had been sealed in a way that concealed the odor, but about the amount cash taken from the wallets of Mr. Mata-Moreno and the driver.

Tallahassee panel member, **Bob Harper**, won a new sentencing hearing from the Eleventh Circuit Court of Appeals for his client, Roderick Stevenson. Mr. Stevenson had entered a guilty plea in a crack cocaine

conspiracy case and been sentenced to 292 months of imprisonment. When on appeal, **Bob** argued that the sentence was unreasonable, the Court remanded the case for resentencing. The Court did so because Judge Paul, after imposing sentence, had failed to give the parties an opportunity to object to the court's ultimate findings of fact, conclusions of law, and the manner in which the sentence is pronounced, as required by United States v. Jones, 899 F.2d 1097, (11th Cir. 1990).

Bill Bubsey of the Tallahassee panel won a favorable outcome for his client, Todd Brown, at a violation of supervised release hearing before Judge Hinkle. Mr. Brown, who was on supervised release for manufacturing methamphetamine, admitted to violating his supervised release on the basis of pending drug charges in Georgia. **Bill**, though, presented two drug counselors who were able to testify about Brown's recent progress in overcoming his addiction. Coupled with **Bill's** sparkling advocacy, the testimony was enough to convince Judge Hinkle to impose a new period of supervised release following a one-day jail sentence.

Tom Miller of our Gainesville office came away with a remarkable sentencing outcome before Judge Paul. **Tom's** client, Israel Bishop, had entered a guilty plea to a conspiracy to distribute more than 100 kilograms of marijuana. Because of convictions for two prior sales of small quantities of marijuana, Mr. Bishop, as a career offender, faced a Guidelines range of 262-327 months and a 10 year mandatory minimum. In a sentencing memo, **Tom** argued that the career offender classification overstated the seriousness of Mr. Bishop's criminal history, that Mr. Bishop had quit selling marijuana 5 months before his arrest,

and that he had started a successful business since the arrest. That argument, coupled with a substantial assistance motion filed by the Government, kept Mr. Bishop out of prison altogether, and he received, instead, 5 years of probation.

Randall Lockhart of our Pensacola office convinced Judge Vinson not to apply the cross-reference provision found in the Guideline applicable to firearms (USSG §2K2.1). **Randall's** client, Herbert Ryan, was linked to several burglaries including one in which the victim was shot and suffered serious injuries. When Mr. Ryan entered a guilty plea to three firearm charges, the probation officer, relying on the cross-reference provision and the shooting incident, calculated the guidelines range on the basis of the guideline applicable to attempted murder. Relying in large part on the concurring and dissenting opinions in a case from the Third Circuit, United States v. Grier, 475 F.3d 566 (3rd Cir. 2007), **Randall** argued that to sentence Mr. Ryan on the basis of a crime that had not been charged or proven would violate the due process guarantee of the 5th Amendment that requires the Government to prove guilt beyond a reasonable doubt. Judge Vinson agreed with the argument, rejected the probation officer's Guidelines calculation of 188-235 months, and sentenced Ryan to 120 months of imprisonment.

Tom Keith of our Pensacola office won a motion to suppress for his client, Emanuel Gracia, which led to the dismissal of the charge of possession of a firearm by a convicted felon. Mr. Gracia, who was driving a moped, was stopped by an Escambia County Sheriff's Deputy for traffic violations. The deputy detained Mr. Gracia

for some 50 minutes waiting for the arrival of a drug dog. When the dog alerted to a small quantity of marijuana concealed in a compartment of the moped, the deputies also found a firearm. In an extensive written order that detailed the facts and the law, Judge Rodgers concluded that the deputy unreasonably prolonged the detention and granted the motion to suppress.

In a case that arose on the Eglin Air Force Base, **Tom Keith** also won a bench trial before Magistrate Judge Timothy. **Tom** successfully argued that his client, Angie Figueroa, was defending herself against her husband, and Judge Timothy found Figueroa not guilty of assault.

In a case where Judge Rodgers chose not to follow the Guidelines range of 0-6 months, but imposed an 18-month prison sentence, **Randy Murrell** convinced the Judge to allow his client, Rhonda Fenwick, to remain at liberty pending her appeal.

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 2007 term that are relevant to our practice and granted since our last newsletter:

STRATTON v. U.S., 2008 WL 59210 (Mem), No.06-1311 (cert. granted Jan. 7, 2008) (reviewing 205 Fed.Appx. 791, 2006 WL 3298406 (11th Cir. 2006))

Crack-Powder cocaine sentence vacated under *Kimbrough*

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Kimbrough*

McGOWAN v. U.S., 2008 WL 59235 (Mem), No. 06-10277 (cert. granted Jan. 7, 2008) (reviewing 211 Fed.Appx. 886, 2006 WL 3741564 (11th Cir. 2006))

Crack-Powder cocaine sentence vacated under *Kimbrough*

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Kimbrough*

PETERSON v. U.S., 2008 WL 59271 (Mem), No. 07-6429 (cert. granted Jan. 7, 2008) (reviewing 237 Fed.Appx. 439, 2007 WL 1624316 (11th Cir. 2007))

Crack-Powder cocaine sentence vacated under *Kimbrough*

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Kimbrough*

LIVESAY v. U.S., 2008 WL 59244 (Mem), No. 07-294 (cert. granted Jan. 7, 2008) (reviewing 484 F.3d 1324 (11th Cir. 2007))

Successful Government securities fraud sentencing appeal vacated under *Gall*

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Gall*

IRIZARRY v. U.S., 2008 WL 54345 (Mem), No. 06-7517 (cert. granted Jan. 4, 2008) (reviewing 458 F.3d 1208, 1212 (11th Cir. 2006))

Notice of enhancement

Question presented: Whether Fed. Rule. Crim. P. 32(h) has any continuing application after *Booker*. The Eleventh Circuit had held an above-guidelines sentence imposed by the district court in exercise of its post-*Booker* discretion was a variance based on the court's consideration of the statutory sentencing factors, not a guidelines departure, and so the rule of criminal procedure governing notice of possible departure from sentencing guidelines was inapplicable.

GREENLAW v. U.S., 2008 WL 54348 (Mem), No. 07-330 (cert. granted Jan. 4, 2008) (reviewing 481 F.3d 601 (8th Cir. 2007))

Question presented: Whether a federal court of appeals may increase a criminal defendant's sentence *sua sponte* and in the absence of a cross-appeal by the Government. In the district court, Greenlaw got a cumulative sentence of 442 months' imprisonment based on a number of counts, which included two firearms offenses on Counts 4 and 10. He got a consecutive 5 years on Count 4 and 10 years' imprisonment on Count 10. The Government objected but did not appeal. The Eighth Circuit *sua sponte* said the district court

should have sentenced Count 4 to be served consecutively to the 262-month sentence, and a 25-year sentence on Count 10 to be served consecutively to the total sentence after factoring in Count 4, under 18 U.S.C. § 924(c)(1)(A)(i) and (C)(i). This "error" shortened Greenlaw's sentence by a statutorily mandated additional 180 months. "Because this error seriously affects substantial rights and the fairness, integrity, and public reputation of judicial proceedings and because we think it is judicially efficient for us to address the error, we exercise our discretion under Fed.R.Crim.P. 52(b)[] and find the district court plainly erred in excluding the statutory mandatory sentence under Count 10."

KENNEDY v. LOUISIANA, 2008 WL 54349 (Mem), No. 07-343 (cert. granted Jan. 4, 2008) (reviewing 957 So.2d 757 (LA. 2007))

Death sentence for juvenile rape

Kennedy was convicted of aggravated rape for raping his eight-year-old stepdaughter, and was sentenced to death. This Petition presented the question under the Eighth Amendment as to whether the restriction of *Coker v. Georgia* (1977) applies to juvenile rape.

ROTHGERY v. GILLESPIE COUNTY, TEXAS, 2007 WL 2858139 (Mem), No. 07-440 (cert. granted Dec. 3, 2007) (reviewing 491 F.3d 293 (5th Cir.))

Right to counsel

Question Presented: "The Sixth Amendment right to counsel attaches when "adversary judicial proceedings have been initiated." *Kirby v. Illinois*, 406 U.S. 682, 688 (1972). This Court has held that when a defendant is arrested, "arraigned on [an arrest] warrant before a judge," and "committed by the court

to confinement,” “[t]here can be no doubt . . . that judicial proceedings ha[ve] been initiated.” *Brewer v. Williams*, 430 U.S. 387, 399 (1977). In this case, petitioner was arrested and brought before a magistrate judge who informed petitioner of the accusation against him, found probable cause that he had committed the offense based on a police officer’s sworn affidavit, and committed him to jail pending trial or the posting of bail. The question presented is whether the Fifth Circuit correctly held—in a decision that conflicts with those of other federal courts of appeals and state courts of last resort—that adversary judicial proceedings nevertheless had not commenced, and petitioner’s Sixth Amendment rights had not attached, because no prosecutor was involved in petitioner’s arrest or appearance before the magistrate.”

DISTRICT OF COLUMBIA v. HELLER, 128 S. Ct. 645 (Mem), No. 07-290 (cert. granted Nov. 20, 2007) (reviewing 478 F.3d 370 (D.C. Cir. 2007))

Second Amendment

Question presented: “Whether the following provisions, D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02, violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?” The D.C. Circuit held that (1) statutory prohibition the registration of a pistol not registered in the District of Columbia by the applicant prior to 1976 was unconstitutional under the Second Amendment; (2) statutory ban on carrying a pistol was unconstitutional under the Second Amendment insofar as the statute could be interpreted to prohibit the keeping of a handgun in the home and preventing it from being moved throughout one’s house; and (3) statutory requirement that a registered firearm

be kept unloaded and disassembled or bound by trigger lock or similar device, unless such firearm is kept at a place of business, or while being used for lawful recreational purposes within the District of Columbia was unconstitutional under the Second Amendment.

ARAVE v. HOFFMAN, 128 S. Ct. 532 (Mem), No. 07-110 (cert. granted Nov. 5, 2007) (reviewing 455 F.3d 926 (9th Cir.))

Ineffective assistance, plea bargaining

Questions presented: “Five weeks before his trial, Respondent Maxwell Hoffman rejected an offer by the state to recommend a life sentence if he would plead guilty to first-degree murder. Hoffman’s attorney, William Wellman, recommended Hoffman reject the offer because the Ninth Circuit had earlier determined the Constitution required juries to find statutory aggravating factors, while in Idaho, judges made such findings. Wellman believed if Hoffman received a death sentence it would be reversed on appeal. However, in *Walton v. Arizona*, 497 U.S. 639 (1990), the Supreme Court determined the Constitution permits judges to find statutory aggravating factors. Nevertheless, the Ninth Circuit determined Wellman’s representation was ineffective during plea negotiations because he ‘based his advice on incomplete research, and second, Wellman recommended that his client risk much in exchange for very little.’ The Ninth Circuit also concluded, ‘Hoffman’s desire to have the State prove its case was not a principled stand against accepting a plea agreement,’ but ‘a misunderstanding of aiding and abetting liability led him to believe that the State was not likely to prove a first-degree murder charge against him.’ (1) Because the Ninth Circuit did not require Hoffman to prove

Wellman’s recommendation constituted ‘gross error’ and mandated Wellman ‘be prescient about the direction the law will take,’ did the Ninth Circuit err by rejecting this Court’s prohibition regarding the use of hindsight to conclude Hoffman established deficient performance? (2) Because Hoffman failed to allege he would have accepted the state’s plea offer but for Wellman’s advice and the Ninth Circuit determined Hoffman’s decision to reject the offer was not a ‘principled stand,’ did the Ninth Circuit err by concluding Hoffman established prejudice? (3) [added by the Court] ‘What, if any, remedy should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to a fair trial?’”

CUELLAR v. U.S., 128 S. Ct. 436 (Mem), No. 06-1456 (cert granted Oct. 15, 2007) (reviewing 478 F.3d 282 (5th Cir.))

Money laundering

Question Presented: “Whether merely hiding funds with no design to create the appearance of legitimate wealth is sufficient to support a money laundering conviction [under 18 U.S.C. 1956(a)(2)(B)(i)]?”

U.S. v. RODRIQUEZ, 128 S. Ct. 33 (Mem), No. 06-1646 (cert. granted Sept. 25, 2007) (reviewing 464 F. 3d 1072 (9th Cir.))

State recidivism under ACCA

Question presented: “Whether a state drug-trafficking offense, for which state law authorized a ten-year sentence because the defendant was a recidivist, qualifies as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. 924(e) (2000 & Supp. IV 2004).” Rodriguez was convicted in federal court of being a felon in possession of a firearm, 18 U.S.C. § 922(g)(1). Rodriguez had prior state burglary and controlled

substance convictions. Under Washington law, the controlled substance offenses to which he pleaded were 5-year offenses, and thereby not, on their face, ACCA predicates. But Washington has a recidivist law that doubles the penalty exposure for repeat offenders. The Government argued that because of Washington’s recidivist statute, the predicates were 10-year felonies and thus qualified as predicates for the 15-year-ACCA mandatory minimum. The Ninth Circuit disagreed, but noted conflict.

BEGAY v. U.S., 128 S. Ct. 32 (Mem), No. 06-11543 (cert. granted Sept. 25, 2007) (reviewing 470 F.3d 964 (10th Cir.))

Felony DUI under ACCA

Question presented: “Is felony driving while intoxicated a ‘violent felony’ for purposes of the Armed Career Criminal Act?” The Tenth Circuit held that it is.

VIRGINIA v. MOORE, 128 S. Ct. 28 (Mem), No. 06-1082 (cert. granted Sept, 25, 2007) (reviewing 636 S.E.2d 395 (Va. 2006))

Fourth Amendment

Question presented: “Does the Fourth Amendment require the suppression of evidence obtained incident to an arrest that is based upon probable cause, where the arrest violates a provision of state law?” Moore conceded that the traffic stop itself was proper, but contended that, because he should not have been arrested under Virginia law, any evidence derived from the search incident to arrest should have been suppressed. The Virginia Supreme Court observed that Virginia Code § 19.2-74, unlike the statutory provision at issue in *Atwater v. City of Lago Vista* (U.S. 2001), did not authorize the officers to make a custodial arrest of Moore; it authorized them to issue only a summons for the offense of

operating a vehicle on a suspended license, and no exceptions applied. Thus, the officers could not lawfully conduct a full field type search, and the search was therefore not consistent with the Fourth Amendment.

BAZE v. REES, 128 S. Ct. 34 (Mem), No. 07-5439 (cert. granted Sept. 25, 2007) (reviewing 217 S.W.3d 207 (Ky. 2006))

Lethal injection

Questions presented: (1) Does the Eighth Amendment to the United States Constitution prohibit means for carrying out a method of execution that create an unnecessary risk of pain and suffering as opposed to only a substantial risk of the wanton infliction of pain? (2) Do the means for carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that readily available alternatives that pose less risk of pain and suffering could be used? (3) Does the continued use of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, violate the cruel and unusual punishment clause of the Eighth Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering? (4) When it is known that the effects of the chemicals could be reversed if the proper actions are taken, does substantive due process require a state to be prepared to maintain life in case a stay of execution is granted after the lethal injection chemicals are injected?

GONZALEZ v. U.S., 128 S. Ct. 32 (Mem), No. 06-11612 (cert. granted Sept. 25, 2007) (reviewing 483 F.3d 390 (5th Cir. 2007))

Waiver of Article III judge, plain error

Questions presented: (1) “Must a federal criminal defendant explicitly and personally

waive his right to have an Article III judge preside over voir dire?” (2) “Did the court of appeals err when it reviewed petitioner’s objection for plain error?”

ALI v. ACHIM, 128 S. Ct. 29 (Mem), No. 06-1346 (cert. granted Sept. 25, 2007) (reviewing 468 F. 3d 462 (7th Cir.))

Predicate “particularly serious crime” for deportation

Questions presented: (1) “Whether the Seventh Circuit erred in concluding – in direct conflict with the Third Circuit – that an offense need not be an aggravated felony to be classified as a “particularly serious crime” that bars eligibility for withholding of removal under 8 U.S.C. § 1231(b)(3)(B)?” (2) Whether the Seventh Circuit erred in narrowly construing the scope of its jurisdiction to review particularly serious crime determinations of the Board of Immigration Appeals under 8 U.S.C. § 1252(a)(2)(B)(ii) and (a)(2)(D), by treating non-discretionary denials of asylum and withholding of removal as discretionary in nature, by refusing to consider arguments that the agency applied an incorrect legal standard, in direct conflict with the construction of those statutes by the Third, Ninth, and Tenth Circuits?”

Supreme Court Cases

ARAVE v. HOFFMAN, 2008 WL 60013 (Jan. 7, 2008) (per curiam)

Mootness of ineffectiveness claim

The Court previously granted cert to consider ineffective assistance of counsel during plea bargain negotiations. However, Hoffman just abandoned that claim and asked to dismiss in the Supreme Court. The Government agreed; the question is moot; so the cases is remanded.

WRIGHT v. VAN PATTEN, 2008 WL 59980 (Jan. 7, 2008) (per curiam)

Clearly established law under § 2255, participation of counsel by speakerphone

The Seventh Circuit held that Van Patten was entitled to relief under 28 U.S.C. §2254, reasoning that his lawyer’s assistance was presumptively ineffective owing to his participation in a plea hearing by speaker phone. The Supreme Court reversed, saying that no decision of the Court had squarely addressed the issue or clearly established that *Cronic* should replace *Strickland* in this novel factual context. “Our precedents do not clearly hold that counsel’s participation by speaker phone should be treated as a ‘complete denial of counsel,’ on par with total absence. Even if we agree with Van Patten that a lawyer physically present will tend to perform better than one on the phone contact amounted to total absence or ‘prevented [counsel] from assisting the accused,’ so as to entail application of *Cronic*. . . . Because our cases give no clear answer to the question presented, let alone one in Van Patten’s favor, “it cannot be said that the state court ‘unreasonabl[y] appli[ed] clearly established Federal law.’” Stevens separately concurred, saying that *Cronic* should be read to hold that the constitutional right at stake was the right to have counsel by one’s side at all critical stages of the proceeding, but, because of “[a]n unfortunate drafting error” in *Cronic*, it did not firmly establish that rule.

WATSON v. U.S., 128 S. Ct. 579 (Dec. 10, 2007) (Souter, 9-0)

Use of firearm under 18 U.S.C. § 924(c)

The Court held, unanimously, that trading drugs for a gun is not “use of a firearm” under 18 U.S.C. § 924(c), which criminalizes use of a firearm during and in connection with a drug trafficking offense, whereas trading a firearm

for drugs is “use” as previously held in *Smith* (U.S. 1993).

KIMBROUGH v. U.S., 128 S. Ct. 558 (Dec. 10, 2007) (Ginsburg, 7-2)

Crack guidelines are non Congressionally mandated

The Court held that the 100-1 crack-powder cocaine ratio was not a congressionally mandated policy, so district courts are free to consider the disparity in imposing sentence, and the Sentencing Commission is free to employ its own policy.

GALL v. U.S., 128 S. Ct. 586 (Dec. 10, 2007) (Stevens, 7-2)

Abuse of discretion guides post-Booker sentences

The Supreme Court held that while the extent of the difference between a particular sentence and the recommended Guideline range is relevant, courts of appeal must review all sentences – whether inside, just outside, or significantly outside the Guidelines range – under a deferential abuse of discretion standard.

LOGAN v. U.S., 128 S. Ct. 475 (Dec. 4, 2007) (Ginsburg, 9-0)

Civil rights restored under the ACCA

The Court held that under the Armed Career Criminal Act (ACCA), Congress exempted from sentence enhancement those whose prior convictions resulted in the deprivation and subsequent restoration of their civil rights, but it did not exempt from enhancement those whose prior convictions carried no loss of civil rights to begin with.

ALLEN v. SIEBERT, 128 S. Ct. 2 (U.S. Nov. 5, 2007) (per curiam, 7-2)

Capital habeas

Siebert, sentenced to death in an Alabama state court, failed to adhere to the time limits

for state post-convictions under an Alabama rule. The state argued in federal habeas that he had not “properly filed,” but the 11th Circuit ruled that non-adherence to the Alabama rule was an affirmative defense the State had to argue and establish, rather than a prerequisite to a “properly filed” habeas petition. The Supreme Court summarily reversed, applying *Pace v. DiGuglielmo* (2000) to hold that because Siebert’s petition for state postconviction relief was rejected as untimely by the Alabama courts, it was not “properly filed” under §2244(d)(2). Stevens and Ginsburg dissented.

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. SNIPES, 2008 WL 73631 (Jan. 8, 2008)

Interlocutory venue appeals

In a published order, the Court (Anderson, Hull and Marcus) held that a district court’s venue decision cannot be reviewed as an interlocutory order. “We conclude that this Court lacks jurisdiction over this appeal under the collateral order doctrine. We conclude that an order pertaining to venue is effectively reviewable after entry of judgment.”

AL-AMIN v. SMITH, 2008 WL 60018 (Jan. 7, 2008)

Prison mail, 28 U.S.C. § 1983

Al-Amin, a Georgia state prisoner, alleged that jailers repeatedly opened his privileged attorney mail outside of his presence and thereby violated his constitutional rights to access to the courts and free speech. The Court (Hull, with Tjoflat & Wilson) held that (1) the alleged opening of his legal mail did

state a valid constitutional claim for an access to courts violation, and that a prisoner’s constitutional right to have his attorney mail opened only in his presence is “well established law in this circuit.” However, he had to allege “actual injury” and he failed to do so. (2) He did validly present a claim that by repeatedly opening his legal mail outside his presence, jailers violated his First Amendment right to free speech, a right that is well established in this circuit and one for which he need not show any actual injury beyond the free speech violation itself.

U.S. v. PALMA, 2008 WL 48447 (Jan. 4, 2008)

Temporary, innocent possession defense

The Court per curiam (Edmondson, Dubina and Story) held that the district court did not err in refusing to instruct the jury on a “temporary, innocent possession defense” in his trial for possession of a firearm and ammunition after being convicted of a felony, 18 U.S.C. § 922(g)(1). “We have never before recognized the availability of an ‘innocent transitory possession’ defense in a firearm possession case, and we need not decide that issue today. Even assuming arguendo that such a defense were available, it was not supported by the evidence in this case. At trial the government presented uncontroverted evidence that Appellant entered the gun shop and shooting range on two occasions, that he physically picked up the Kimber .45 caliber firearm, that he repeatedly referred to the firearm as ‘my gun,’ and that he requested, purchased, and carried away ammunition for the firearm. Furthermore, the very reason why Appellant’s possession of the ammunition did not extend for a longer period of time was his arrest upon exiting Ace’s and the officers’ seizure of the box of bullets.

Indeed, Appellant presented no affirmative evidence whatsoever that he attempted to rid himself of the ammunition.”

U.S. v. McBRIDE, 2007 WL 4555205 (Dec. 28, 2007)

Sentencing; downward variance; substantive reasonableness; standard of review; lifetime supervision

In an opinion that portends well for defendants, the Court (Edmondson & DJ Story, Dubina dissent) rejected the government's appeal of a downward variance. This child pornography defendant received numerous enhancements, a CHC I, a TOL 34, and range of 151-188 months, with a statutory range of 5-20 years, but the district court imposed 84 months and 10 years' supervised release (life supervision was the maximum allowed) to allow the defendant - who had a terribly victimized childhood and honestly sought treatment for his pedophilia - to enter and complete BOP's 2-year program. The Court imposed a clearly erroneous standard of review and held that it could not say that this procedurally reasonable sentence was outside the range of reasonableness, distinguishing prior sentences of no incarceration (Crisp, Martin) from a prior similar case with a 7-year sentence (Gray).

J. Dubina dissented, arguing that the second step of required procedure under *Gall* is whether the sentence was substantively unreasonable under an abuse-of-discretion standard, and he considered both the 84-month term of incarceration and the 10-year term of supervised release (less than the life recommended by the guidelines) to be substantively unreasonable. He argued the district court was "unjustly fixated on the defendant's horrific childhood," just one 3553(a) factor, to the detriment of the other factors. He noted that several other factors

supported a sentence higher than 50% below the bottom of the range. He noted he had a bigger problem with the supervised release term because it did not comply with the "shall" of 3553(a) that the district court "shall" impose a sentence sufficient" The dissent wrote: "the **only way** to satisfy the 3553(a) requirement of protecting the public is to impose a sentence that includes lifetime supervision." (Emphasis added.) "Allowing someone who will unquestionably continue to remain a danger to society's most vulnerable citizens - its children - to live free of any restrictions at any age, let alone at such a young age [45], in my view, is substantively unreasonable."

Note: This was a Middle District of Florida case, I think Judge David Baker, a recently elevated former magistrate.

ALEXANDER v. DEP'T OF CORRECTIONS, 2007 WL 4462196 (Dec. 21, 2007)

Habeas; statute of limitations

The Court held that a Florida post-conviction motion to reduce a sentence based on mercy or leniency did not constitute an application for collateral review sufficient to toll the one-year statute of limitations period for federal habeas corpus relief. The Court noted that such a motion assumed that the sentence was "legal." Consequently, the interest of comity did not require tolling federal review, as did other motions in which state courts were asked to review the legality of a judgment. The Court therefore held that Alexander's habeas petition was time-barred under the AEDPA.

U.S. v. KING, 2007 WL 4356293 (Dec. 14, 2007)

Child pornography, search of computer, "prior conviction"

While serving as a civilian contractor on an air force base, King kept porn files on his personal laptop computer, which had been connected to the base network. Files were “shared” over the entire base network, and everyone on the network had access to all of his files. An enlisted airman inadvertently found the porn files while searching the network. He notified the authorities who located King’s computer and hard drive on the base network and verified the presence of pornographic videos and explicit text files. Authorities got a warrant and seized his computer. The seizure was found to be proper, and the Court affirmed (per curiam with Anderson, Carnes & Pryor), finding, under these circumstances, that “King has not shown a legitimate expectation of privacy in his computer files.” He was convicted of transportation of child pornography 18 U.S.C. § 2252A(a)(1), and possession of child pornography, 18 U.S.C. § 2252A(a)(5)(B). The Court also held that King’s conviction for transporting child pornography did not constitute a “prior conviction” for the purpose of imposing a mandatory minimum sentence of ten years imprisonment for the possession conviction, under 18 U.S.C. § 2252A(b)(2), refusing to extend *Deal* (U.S. 1993).

U.S. v. STRAUB, 2007 WL 4198340 (Nov. 29, 2007)

Criminal contempt; 18 U.S.C. § 401(3); subject matter jurisdiction

The Court affirmed the defendant’s conviction for criminal contempt for violating an order prohibiting his presence on his business’s commercial property during the removal of a boat hull pursuant to court order following a dispute over payment due from the hull’s owner. The Court *sua sponte* considered and held that the district court had jurisdiction over the criminal contempt, even though the

underlying controversy was dismissed for lack of subject matter jurisdiction.

U.S. v. DOHAN, 2007 WL 4179396 (Nov. 28, 2007)

Jury instruction; money laundering; 18 U.S.C. § 1956(h); intent; evidence; religious remarks; vouching; FRE 610; chart comparing defendant's profits to witness's

The Court (Anderson, Pryor and DJ Albritton) affirmed the money laundering jury instruction under the 18 U.S.C. § 1956(h) count as requiring proof the defendant acted “knowingly and voluntarily.” Even though it omitted the “willfully” language of the pattern jury instruction, it was consistent with subsequent case law. Pattern Jury Instruction 70.5 “should not be used.” The Court rejected arguments that the unsolicited testimony of a cooperating codefendant that he was a “moral, Christian man” violated FRE 610 and that the government had improperly vouched for its witness. The Court also affirmed exclusion of a proffered defense chart showing the defendant had profited far less than the cooperating codefendant as cumulative evidence, where its admission would require extensive cross-examination.

U.S. v. FOLEY, 508 F.3d 627 (Nov. 21, 2007)

Sentencing; loss amount; independent judicial findings required

The Court (Pryor, Anderson and Vining) agreed with the government and reversed the district court’s loss amount for sentencing, holding that it erred in deferring to the jury’s forfeiture verdict of \$2,000,000, over the government’s objection, and where the government presented evidence of a much greater loss at the later restitution hearing.

The district court should make an independent finding about loss amount (as well as, here, the obstruction of justice enhancement which the PSI had left unresolved). The Court simultaneously rejected Foley's cross-appeal that the forfeiture order was defective for including restitution for acquitted conduct and for harm not proven by a preponderance.

U.S. v. HURTADO, 508 F.3d 603 (Nov. 21, 2007)

Aggravated identity theft; 18 U.S.C. § 1028A(a)(1)

Hurtado was convicted, *inter alia*, of aggravated identity theft, 18 U.S.C. § 1028A(a)(1), after he submitted a passport application in another person's name and used a birth certificate and driver's license in that name. He argued on appeal that § 1028A(a)(1) requires the government to prove (1) that he stole the identification of another person, in order to show the possession or use was "without lawful authority," and (2) that he knew that the identification he was using "belonged to another actual person." The Court (Birch, Hull and Pryor) affirmed, holding that "without lawful authority" does not require proof that the identification was "stolen," and that the word "knowingly" in § 1028A(a)(1) modifies only "transfers, possesses, or uses" so the defendant did not need to know that the stolen identity was a real person.

DRURY v. U.S., 507 F.3d 1295 (Nov. 13, 2007)

Habeas; 2255; statute of limitations; certiorari; rehearing

The Court (Marcus, Carnes and Pryor) joined six other circuits and held that the one-year time limit for filing a federal habeas petition begins running on the date the Supreme Court denies certiorari, *Clay*, 537 U.S. 522, 527

(2003), not the later date on which it denies rehearing. The Court cited S. Ct. R. 16.3, which states in part that "The order of denial will not be suspended pending disposition of a petition for rehearing except by Order of the Court or a Justice." Thus, future defendants who petition for rehearing when a cert petition is denied (hopefully a rare occasion) must also seek an Order suspending the order of denial until the rehearing is ruled upon.

U.S. v. MINTMIRE, 507 F.3d 1273 (Nov. 13, 2007)

Evidence; sufficiency; obstruction; safe harbor; burden shifting; "acting as lawyers" instruction; improper joinder; prejudicial spillover; Ex Post Facto

The Court (DJ Proctor, Dubina and Marcus) affirmed the conviction of an attorney of obstruction related to grand jury and SEC investigations, under 18 U.S.C. §§ 1505 and 1512. The Court affirmed precedent that the safe harbor provision of § 1515, which is designed to protect attorneys providing bona fide legal representation, is an affirmative defense, and that the jury was properly instructed that the government had to disprove this affirmative defense beyond a reasonable doubt.

U.S. v. JACKSON, 506 F.3d 1358 (Nov. 9, 2007)

Search; suppression; physical evidence; Miranda

The Court (Pryor, Marcus and DJ Hancock) joined other circuits and construed *United States v. Patane*, 542 U.S. 630 (2004), as holding (1) that Miranda does not require the exclusion of physical evidence which is discovered on the basis of a voluntary, though unwarned, statement; and (2) that no violation of an obligation to warn which

produces a voluntary statement is severe enough that the deterrence value of suppression outweighs "the important probative value of reliable physical evidence." *Patane*, 542 U.S. at 645 (Kennedy, J., concurring in the judgment). This holding was not qualified by *Missouri v. Seibert*, 542 U.S. 600 (2004) (holding inadmissible a statement obtained by interrogation techniques calculated to undermine Miranda warnings). Interestingly, the Court noted that, because *Patane* was so "fragmented," it concluded: "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds" *Marks*, 430 U.S. 188, 193.

HODGES v. ATTY GEN., FLORIDA, 506 F.3d 1337 (Nov. 9, 2007)

Habeas; COA; FRAP 22; motion to expand; confrontation; victim hearsay; forfeiture by wrongdoing; sentence stage; defendant's absence; reinstruction; attempted suicide

After this capital defendant was denied a COA by the district court, he filed a motion under Federal Rule of Appellate Procedure 22 asking the Court (Carnes, Anderson and Marcus) to grant a COA on 4 issues. A single judge, under 11th Cir. R. 22-1(d), granted a COA as to only 2 issues. He then briefed 3 issues and argued that the order denying the COA on the third issue was covered by 11th Cir. R. 27-a(g) ("ruling on a motion or other interlocutory matter" which is not binding upon the merits panel), and asked the merits panel to overrule the original order denying a COA on that ground. The defendant *should have* moved for reconsideration by asking the Court to expand the COA, under that same rule, and that motion would have gone to a 3-judge panel. 11th Cir. R. 27-1(d). The Court noted this position would eviscerate the

requirement in 28 U.S.C. § 2253(c) that a COA specify the issues to be considered at the merits stage, and cited *Gonzalez*, 366 F.3d 1253, 1267 (11th Cir. 2004) (en banc). The Court first denied the Confrontation Clause claim based on the testimony of detectives and the victim's sister about the victim's hearsay statements to them about the defendant. This penalty phase evidence was not error, as the statement's proponent was unavailable because the defendant had murdered her, citing *Crawford*, 541 U.S. 36, 62 ("the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds."), and *Davis v. Washington*, 126 S. Ct. 2266, 2280, which affirmed this.

The Court also denied the Sixth Amendment claim that defendant's right to be present during the jury's penalty phase re-instruction was violated, because this right was waived since his absence was due to his own suicide attempt.

DAVIS v. JONES, 506 F.3d 1325 (Nov. 8, 2007)

Due process; appearance of partiality; judges; attorney relationships

The Court (Hull, Tjoflat and Wilson) held the capital defendant's right to due process was not violated by the appearance of partiality that existed when the judge in his original juvenile court proceedings, in which he was transferred into adult court and sentenced to death, was the brother of one of the prosecutors. The judge did not have to *sua sponte* recuse himself, where there was no evidence of *actual* bias. The Court noted that, although a federal judge would undoubtedly have to recuse himself under those circumstances, no Supreme Court case has established that an appearance problem violates due process.

SIEBERT v. ALLEN, 506 F.3d 1050 (Nov. 5, 2007)

Lethal injection; as-applied 8th amendment claim; injunctive relief

The panel (Tjoflat, Barkett and Wilson) had granted a stay of execution, pending the Supreme Court's resolution of *Baze v. Rees*, based on defendant's as-applied 8th Amendment challenge to the chemical cocktail used for execution, "claiming substantial complications likely to arise due to his serious illnesses" including pancreatic cancer, severe jaundice, and hepatitis C. Following the Supreme Court's remand, *see infra* at 4, the en banc Court then returned the case to the panel, which remanded to the district court, which had erred in holding the defendant failed to show a substantial likelihood of success on the merits of his "as-applied" claim.

U.S. v. MANGAROO, ET AL., 504 F.3d 1350 (Oct. 29, 2007)

Sentencing; preservation; plain error; 924(c); probation; downward departures; 3553(e); 3553(a)

The Court (Cox, Birch and Barkett) remanded for resentencing in this government appeal: (1) It rejected the government's argument that its general objections at sentencing preserved the argument that the probationary sentence violated 18 U.S.C. § 924(c). However, it vacated this sentence under the plain error standard because § 924(c) prohibits probation. See also § 3561(a)(2).

(2) It went "no further than to remind the district court that, on resentencing, it must rely only on substantial assistance factors in § 3553(e) downward departures." The court had made a detailed statement to support the sentence, but it lumped together the § 3553(e) substantial assistance motion and the §

3553(a) factors instead of first specifically addressing the § 3553(e) departure and the § 5K1.1 factors.

(3) The Court declined the government's attempt to address whether the overall sentence (4 years supervised release with the first being on home confinement, now completed) was reasonable.

U.S. v. MOORE, 504 F.3d 1345 (Oct. 26, 2007)

Evidence; insufficiency; Fed. R. Crim P. 29(b); 18 U.S.C. § 641

Walter and Deborah Moore were charged under 18 U.S.C. § 641 with receiving and converting to their own use the monthly VA benefits that had been payable to Walter's mother, Verlon. Their defense was that they did not know that Walter was not entitled to the benefits after his mother died, thereby forcing the government to prove that they knew the funds belonged to the government. At the close of the government's case, each defendant moved for JOA, pinpointing the willful, knowing, and intentional requirements of the offense. The district court reserved ruling. The husband testified he believed he was entitled to the funds, and his wife rested without presenting evidence. They again moved for JOA, and the court again reserved ruling. The jury convicted both on all counts, and the district court denied their JOA motions without discussion.

The Court (Carnes, Barkett and Hill) reversed on the basis that the district court should have considered only the government's evidence at the time the JOA motion was made, which was insufficient for a reasonable jury to have found beyond a reasonable doubt that either defendant knew they were not entitled to continue receiving the VA benefits.

U.S. v. BROWNE, 505 F.3d 1229 (Oct. 25, 2007)

Taft-Hartley Act; RICO

The Court (Tjoflat, Hull and Restani) affirmed the convictions and sentences of labor union officials were prosecuted for abusing their union positions in violation of RICO, the Taft-Hartley Act, and other federal statutes proscribing embezzlement and fraud. The Court held that the term “would admit to membership” in Taft-Hartley, 29 U.S.C. § 186 (which generally prohibits employers in industries affecting commerce from paying anything of value to labor organizations or their officials, and conversely prohibits labor representatives from receiving anything of value from employers), does not require that the existing employment relationship must be between the employer and current union members. The Court also addressed RICO, severance, and other issues.

U.S. v. ROBISON, 505 F.3d 1208 (Oct. 24, 2007)

Clean Water Act; false statement

The Court (Hull, Edmondson and Forrester) reversed defendants’ convictions of conspiracy and substantive violations of the Clean Water Act, based on the intervening decision in *Rapanos* in which the Supreme Court invalidated the “navigable waters” definition used in their jury instructions. The Court also held one defendant was entitled to a JOA on the charge of making a false statement to the EPA concerning certifications that defendant signed on behalf of another defendant who submitted them to the EPA, as there was no evidence of the requisite knowledge of the contents of the documents or their falsity.

U.S. v. JONES, 504 F.3d 1218 (Oct. 22,

2007)

Jury; deadlock; coercive jury instructions; plain error

The Court reversed (per curiam: Birch, Barkett and Cox) because, even under the plain error standard, the jury had been coerced. The original jury twice announced deadlock, but the judge told them to return and continue deliberations the next day, adding “[w]e will do this until you reach a verdict.” The next morning, one juror who called in sick was replaced by an alternate, and the court instructed the jury to begin deliberating anew, adding that “there is no need of sending [the court] any notes that [the jury] can’t agree, because you are going to stay here for a long time.” The jury convicted within an hour. At no point had the court reemphasized that no juror should abandon an honestly held belief.

U.S. v. DELANCY, 502 F.3d 1297 (Oct. 3, 2007)

Search; protective sweep; consent

Police went to defendant’s girlfriend’s home to talk to him but did not have a warrant or probable cause to search or arrest. As officers approached with weapons drawn, the door was opened and immediately shut, but an officer managed to see defendant hiding something. The door reopened, and the girlfriend exited; defendant followed, and officers handcuffed him outside. Several officers then entered the home to conduct a protective sweep for individuals who might pose a danger to the officers. Defendant’s girlfriend then consented to a search, which turned up her infant and toddler as well as drugs, weapons, and cash used to convicted defendant.

The Court affirmed (Marcus, Dubina and Proctor); declining to decide whether the protective sweep was illegal, it held the

subsequent search was the product of voluntary consent.

U.S. v. KHANANI, 502 F.3d 1281 (Oct. 2, 2007)

8 U.S.C. § 1324; employment of illegal aliens; harboring; jury instruction

Defendants were indicted on scores of offenses relating to Khanani's employment of aliens not authorized to work in the U.S. and related failures to pay taxes. The district court denied defendants' requested jury instruction, to support the primary defense, that "employment of an illegal alien in and of itself does not constitute" encouragement or harboring under 8 U.S.C. § 1324(a).

The Court (Birch, Edmondson and Wilson) affirmed, concluding that failure to give the requested instruction did not seriously impair the defendants' ability to conduct their defense.

U.S. v. FIELDS, 500 F.3d 1327 (Sept. 21, 2007)

Willful failure to pay child support debt; Child Support Recovery Act; sufficiency; out-of-state; 18 U.S.C. § 228

The Court reversed, agreeing the evidence was insufficient to prove the required element that defendant knew his child was out of the state (the custodial mother kept moving, mostly to other states, but never provided him with any address other than her Atlanta address listed with the Georgia bar association). The CSRA criminalizes the willful failure to pay the past due child support of a child who lives in another state. The Court rejected the district court's conclusion that the child's residence in another state is only jurisdictional, allowing Congress to regulate it, and not an element of proof for conviction. The statute was facially ambiguous, but legislative history showed a clear intent to require the same specific intent

as in tax statutes. The Court "assumed" the defendant did not know his child resided in another state (facts necessary to prove willfulness), and therefore he could not have known the facts necessary to convict. J. Carnes' concurrence disputed the equation of a House committee report with the intent of Congress.

U.S. v. RAMIREZ, 501 F.3d 1237 (Sept. 11, 2007)

Sentencing; enhancement; notice; 21 U.S.C. § 851

After filing the enhancement notice required by 21 U.S.C. § 851, the government corrected a minor error in the indictment by, with defendant's consent, filing a new information containing the same charges but a different case number. It did not refile the § 851(a)(1) notice. At the plea hearing, all agreed the guilty plea exposed defendant to a mandatory life sentence. At sentencing, however, the district court concluded that the government's failure to timely refile the § 851(a)(1) notice deprived it of jurisdiction to impose the enhanced sentence.

The Court (Anderson, Birch and Hull) reversed, agreeing with the government that the new notice filed after the guilty plea was plainly ineffective under *Harris*, 149 F.3d 1304 (11th Cir. 1998). However, although statutory text does not answer the question, the statutory purposes were satisfied, so the original notice sufficed. The only difference with *Thompson*, 473 F.3d 1137 (11th Cir. 2006) (holding original notice filed before the superseding indictment was effective, as the new indictment did not interfere with the statutory purposes), was between a superseding indictment and a new case, a "procedural peculiarity" that should not "lead to a different result." The statutory purposes were met, because the notice was filed before

the plea, and the defendant "had no reason to doubt that the original notice applied to the new [] charge." He had ample time and opportunity to contest the accuracy of the information and determine whether to plead or go to trial. However, the Court included a caveat: "We expressly **do not hold** that a notice involving the same charges filed under a different case number is **always** sufficient so long as it is filed with the court 'before trial, or before entry of a plea of guilty.'" [Emphasis added.] "[T]he government would be well advised to file a duplicate section 851(a)(1) notice."

TABLE OF CASES IN THIS ISSUE

Supreme Court

ALLEN v. SIEBERT, 128 S. Ct. 2
(Nov. 5, 2007). 15

ARAVE v. HOFFMAN, 2008 WL 60013
(Jan. 7, 2008). 14

GALL v. U.S., 128 S. Ct. 586 (Dec. 10, 2007). . . 15

KIMBROUGH v. U.S., 128 S. Ct. 558
(Dec. 10, 2007). 15

LOGAN v. U.S., 128 S. Ct. 475 (Dec. 4, 2007). . 15

WATSON v. U.S., 128 S. Ct. 579
(Dec. 10, 2007). 15

WRIGHT v. VAN PATTEN, 2008 WL 59980
(Jan. 7, 2008). 15

Eleventh Circuit

AL-AMIN v. SMITH, 2008 WL 60018
(Jan. 7, 2008). 16

ALEXANDER v. DEP'T OF CORRECTIONS,

2007 WL 4462196 (Dec. 21, 2007). . . 17

DAVIS v. JONES, 506 F.3d 1325
(Nov. 8, 2007). 20

DRURY v. U.S., 507 F.3d 1295
(Nov. 13, 2007). 19

HODGES v. ATTY GEN., FLORIDA,
506 F.3d 1337 (Nov. 9, 2007). 20

SIEBERT v. ALLEN, 506 F.3d 1050
(Nov. 5, 2007). 21

U.S. v. BROWNE, 505 F.3d 1229
(Oct. 25, 2007). 22

U.S. v. DELANCY, 502 F.3d 1297
(Oct. 3, 2007). 22

U.S. v. DOHAN, 2007 WL 4179396
(Nov. 28, 2007). 18

U.S. v. FIELDS, 500 F.3d 1327
(Sept. 21, 2007). 23

U.S. v. FOLEY, 508 F.3d 627
(Nov. 21, 2007). 18

U.S. v. HURTADO, 508 F.3d 603
(Nov. 21, 2007). 19

U.S. v. JACKSON, 506 F.3d 1358
(Nov. 9, 2007). 19

U.S. v. JONES, 504 F.3d 1218
(Oct. 22, 2007). 22

U.S. v. KHANANI, 502 F.3d 1281
(Oct. 2, 2007). 23

U.S. v. KING, 2007 WL 4356293
(Dec. 14, 2007). 17

U.S. v. MANGAROO, ET AL., 504 F.3d 1350
(Oct. 29, 2007). 21

U.S. v. McBRIDE, 2007 WL 4555205
(Dec. 28, 2007). 17

U.S. v. MINTMIRE, 507 F.3d 1273
(Nov. 13, 2007). 19

<u>U.S. v. MOORE</u> , 504 F.3d 1345 (Oct. 26, 2007).....	21
<u>U.S. v. PALMA</u> , 2008 WL 48447 (Jan. 4, 2008).....	16
<u>U.S. v. RAMIREZ</u> , 501 F.3d 1237 (Sept. 11, 2007).	23
<u>U.S. v. ROBISON</u> , 505 F.3d 1208 (Oct. 24, 2007).....	22
<u>U.S. v. SNIPES</u> , 2008 WL 73631 (Jan. 8, 2008).....	16
<u>U.S. v. STRAUB</u> , 2007 WL 4198340 (Nov. 29, 2007).	18