

CJA PANEL NEWSLETTER

FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF FLORIDA

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IN MEMORIAM

Bob Dennis of our Pensacola office passed away in September. He had been diagnosed with melanoma cancer nine months earlier. He is sorely missed by his friends and colleagues.

Bob, who had several doctorate degrees, began working in our office in 1989. He did a wonderful job for us and our clients. He was a convincing advocate whether at trial or sentencing. He was respected and liked by everyone in the court system. His good friend, Joe Hammons, described Bob's approach to his work this way: "Bob was the kind of lawyer who cared about his clients . . . He worked hard for them and would be upset and concerned whenever he felt that the criminal justice system didn't work as he knew it should . . . Bob recognized the system requires constant and diligent representation of those accused in order for there possibly to be fairness and justice." Another good friend, Russ Edgar, noted one of the qualities that made Bob's career so successful: "I think the thing that is so uniquely Bob is that he had friends on both sides of the courtroom who

greatly appreciated and respected Bob's professionalism, collegiality, and service." Over the years, Bob handled a long list of difficult cases, one of which involved a six-month trial, the longest trial in the history of our office. Bob won an acquittal for his client.

All of us who worked with Bob feel fortunate to have been able to do so and to have known him as a friend. For a number of years, now Magistrate Judge Timothy worked with us, and she and Bob were the closest of friends. Just after Bob's death, she wrote Bob's wife Sherry with what she would have liked to have said to Bob: "Thank you for always giving of yourself and never asking for anything in return . . . Thank you for never saying an unkind word about anyone . . . thank you, in your quiet and humble way, for setting an example for me - that is, of a kind, caring, selfless, and compassionate person . . . you were a true gentleman in every sense of the word, and although you were taken away too soon, you have touched more lives than you will ever know . . . may you rest in peace." Amen.

IMPORTANT CHANGE IN RULES REGARDING RECORD EXCERPTS FOR APPEALS

In February 2006, the Eleventh Circuit Court of Appeals issued General Order 32, which established an electronic-records-on-appeal pilot program in the Southern District of Alabama. That program has now been extended to a number of districts, including the Northern District of Florida. While the program is intended to increase efficiency and reduce the paperwork, it has, at least for now, *significantly* increased the burden for appellate counsel by expanding what is required in the way of record excerpts.

Eleventh Circuit Rule 30-1 requires the filing of record excerpts along with the brief. The rule requires counsel to include in the excerpts the docket entries, the indictment, relevant portions of pleadings, relevant orders, and portions of transcripts or other parts of the record that counsel wants the court to consider. Now, under the new program, the expanded record excerpts must include *all* pleadings, transcripts, and documentary exhibits “referenced in the brief.” There is a requirement, too, for a “Table of Record References in the Brief,” which must list every reference to the record.

Since the project’s inception in the Southern District of Alabama, lawyers in that district have found that the Court of Appeals expects extensive record excerpts. Almost any trial error requires that the error be considered in the context of the trial as a whole, so the lawyers in southern Alabama routinely include the entire trial transcript in the record excerpts. Also, as the lawyers in southern Alabama have on occasion been reminded by the Court, it is not a matter of including just those documents *relied upon* in the argument.

If the item is *referenced* in the brief, it must be included in the record excerpts.

Counsel for indigent defendants are obligated to provide two sets of the excerpts to the Court of Appeals and one set to the Government. Other counsel are required to file five sets.

The new instructions apply to any case where the notice of appeal was filed on or after October 1, 2009. The Court of Appeals will send those instructions to you along with the briefing schedule.

DARREN JOHNSON JOINS OUR GAINESVILLE OFFICE

This past July, Darren Johnson began working in our Gainesville office, filling the position that opened upon Tom Miller’s retirement. Darren is a 2001 graduate of the Albany Law School in Albany, New York. He was a member of the Air Force’s Judge Advocate General Corps from 2002 through 2007. We hired him from the Federal Public Defender’s Office in Alexandria, Virginia, where he had worked since 2007. Darren is a talented lawyer who brings with him the kind of enthusiasm that must have its roots in his time as the captain of his college lacrosse team. We are fortunate to have him join our staff.

MIRACLES

In 2003, Judge Mickle, following a trial, sentenced Natalie Peters to 188 months imprisonment for the offense of making her residence available for drug trafficking (21 U.S.C. § 856(a)(2)). All had agreed that the applicable guideline range was 188 to 235 months. Her conviction and sentence were

affirmed on appeal.

Peters subsequently filed a motion asking for a reduction in her sentence based on the amendment to the crack cocaine guidelines. When that was rejected, Peters filed her own appeal and, for the first time, argued that her original guideline range had been incorrectly calculated. While her claim about the calculations was correct, it did not provide the court of appeals with an avenue to provide her relief. Nonetheless, Assistant United States Attorney Terry Flynn recognized the validity of Peters' claim and advised the court she would ask the district court to correct the error.

Subsequently, Flynn filed, on behalf of the defendant and pursuant to 18 U.S.C. § 1651, a Petition for Writ of Error Coram Nobis. In the Petition, Flynn explained that the correct guideline range should have been, not 188 to 235 months, but 78 to 97 months. At the time of the initial sentencing, Peters had been awarded a decrease in the offense level pursuant to USSG § 3B1.2 for being a minimal participant. What had been overlooked was the provision found at USSG § 2D1.1(3), which limits the offense level of those who receive the decrease. The 2003 version of the provision limited the base offense level to 30, instead of the base offense level of 38, upon which Peters' sentence was calculated.

Last month, on December 22nd, Judge Mickle sentenced Peters to time served.

PAY RAISE

Congress has authorized an increase in the hourly rate for panel attorneys that is effective for all work done on or after January 1, 2010.

Hourly rates for non-capital cases have increased from \$110 to \$125 an hour. Compensation maximums have gone up, too. Among the new caps: felonies at the trial court level are up to \$9,700 from \$8,600; felony appeals up to \$6,900 from \$6,100; and misdemeanors at the trial level are up to \$2,800 from \$2,400.

Questions concerning the CJA hourly rates or case compensation maximums may be directed to the Office of Defender Services, Legal and Policy Branch Duty Attorney at (202) 502-3030 or via email at: ods_lpb@ao.uscourts.gov.

NEW TIME LIMITS

New rules governing a variety of time limits for appellate, civil, and criminal proceedings took effect on December 1, 2009. The longstanding earlier version of these rules excluded intervening weekends and holidays for periods of less than eleven days. Under the new rules a day is a day, and weekend days or a holidays will count. Time limits, though, have been extended to offset the change in the time-computation rules. Five-day periods have become seven-day periods, and ten-day periods have become fourteen-day periods. Other time limits are now expressed in multiples of seven. For criminal practitioners, the most important change is the one to Rule 4(b)(A) of the appellate rules. With the new rule, you now have fourteen days to file a notice of appeal. The longest period of time that may pass before holding a preliminary hearing pursuant to Rule 5.1(c) of the criminal rules is now fourteen rather than ten days for those in custody and twenty-one days rather than twenty for those not in custody. Under Rule 35(a) of the criminal rules, courts have fourteen days

instead of seven to correct sentences.

The change affects time periods for 91 federal rules and 28 federal laws.

NATIONAL LITIGATION SUPPORT

The Office of Defender Services provides support to panel members in organizing, analyzing, and presenting case materials through computer systems. Here's a paragraph from the webpage of the National Litigation Support Team that addresses the electronic data that often comes with more complex cases: *"You walk into your office and on your desk sit a few hard drives and a stack of DVDs and CDs. On your floor and down your hallway sit what seems to be an endless number of boxes filled with paper. You are told that there is more coming, yet you have no idea what you already have. Now what? This is an increasingly common dilemma being faced by trial teams and we hope that we can help you answer that question easily and efficiently. We want to be part of your team . . ."*

The webpage includes links to several articles, among them are: the "Initial Discovery Assessment Checklist," "Recommended E-Discovery Practices for FPD/CJA Attorneys," and the "CJA Panel Attorney Resources: A Guide to Litigation Support Software & How to Obtain Resources in the CJA System."

Here's how they describe their services: *"The National Litigation Support Team is your consultant, your resource center, and your sounding board for all litigation support aspects of your case from beginning to end. We are here to support both federal defender offices and CJA panel attorneys throughout the country. Whether you are considering*

what data to request, how to manage the discovery you have received, or what type of presentation you would like to use in the courtroom, we can provide assistance and guidance based on our own experiences, industry standards, and general guidelines and principles we have developed that focus not only on document management but overall case management."

For details and assistance, go to the Defender Training Webpage at www.fd.org and select "Litigation Support."

PANEL TRAINING

Topic: Sentencing Guidelines - Relevant Conduct

Gainesville: January 27

Pensacola: January 27

Tallahassee: January 28

Topic: Sentencing Guidelines - Multiple Counts

Panama City: February 9

Gainesville: February 24

Pensacola: February 24

Tallahassee: February 25

Topic: Sentencing Guidelines - Firearms

Panama City: March 9

Gainesville: March 24

Tallahassee: March 25

Pensacola: March 31

TRAINING OPPORTUNITIES

Winning Strategies is presented by the Office of Defender Services. It emphasizes broad-based instruction on all stages of various federal prosecutions. The course curriculum covers the most commonly-faced federal

prosecutions for drugs, firearms, computer offenses, child pornography, and immigration, as well as some of the prosecutions for offenses that are becoming more common: identity theft and mortgage fraud. The first day of the session has a separate track designed for those new to federal court: Fundamentals of Federal Criminal Practice. The seminar is being presented this year in San Francisco from February 4-6 and again in Chicago from June 10-12. The Fundamentals of Federal Criminal Practice is being offered only in San Francisco. You can register at www.fd.org.

The Tampa Bay Chapter of the Federal Bar Association and the National Association of Criminal Defense Lawyers are presenting the 19th Annual Federal Sentencing Guidelines Conference in St. Petersburg from May 12-14. Tuition for CJA Panel Attorneys and Federal Defenders is \$300 if postmarked on or before April 12. Details and registration are at: <http://www.fedbar.org/tampabay.html>.

TRIAL COURTS FREE TO IMPOSE BELOW-GUIDELINE SENTENCES IN CAREER OFFENDER CASES

In February of last year, in United States v. Vasquez, 558 F.3d 1224 (11th Cir. 2009), the Eleventh Circuit Court of Appeals held that a trial court could not impose a below-guidelines sentence in career offender cases on the basis of a disagreement with the career offender guideline (USSG §4B1.1). In doing so, the Court vacated a sentence from the Middle District of Florida's Judge Presnell where he had imposed a 110-month sentence, below the guideline range of 210 to 262 months. Last week, though, after the Solicitor General agreed with Vasquez and took the position that the district court had the

authority to impose a below-guidelines sentence, the United States Supreme Court granted Vasquez's certiorari petition, vacated the Eleventh Circuit's opinion, and remanded the case for reconsideration in light of the Solicitor General's position.

GUIDANCE FOR U.S. ATTORNEYS REGARDING CRIMINAL DISCOVERY

In a January 4, 2010, memorandum from Deputy Attorney General David W. Ogden to all of the United States Attorneys, the Department of Justice emphasized the need for careful compliance with the requirements of discovery. Here are some of the points most relevant from the defense perspective:

- In determining who is a member of the "prosecution team" from whom the prosecutor has an obligation to seek exculpatory, impeachment, or Jencks Act material, "[p]rosecutors are encouraged to err on the side of inclusiveness . . ."
- "[T]he format of information does not determine whether it is discoverable," so that, for example, "material exculpatory information the prosecutor receives during a conversation with an agent or witness is no less discoverable than if the same information were contained in an email."
- "Although not required by law, generally speaking witness interviews should be memorialized by the agent. Agent and prosecutor notes and original recordings should be preserved, and prosecutors should confirm with agents that substantive interviews should be memorialized."
- "Material variances in a witness's

statements should be memorialized, even if they are within the same interview, and they should be provided to the defense as *Giglio* information.”

- While trial preparation meetings with witnesses “need not be memorialized,” “[n]ew information that is exculpatory or impeachment should be disclosed . . . even if the information is first disclosed in a witness preparation session.”
- “In cases involving voluminous evidence obtained from third parties, prosecutors should consider providing defense access to the voluminous documents to avoid the possibility that a well-intentioned review process nonetheless fails to identify material discoverable evidence.”
- “Prosecutors are also encouraged to provide discovery broader and more comprehensive than the discovery obligations [under Fed.R.Crim.P. 16 and the Jencks Act].”
- “In most jurisdictions, reports of interview (ROIs) of testifying witnesses are not considered Jencks material unless the report reflects the statement of the witness substantially verbatim or the witness has adopted it. “
- Largely because of the ambiguities in the term and the process, “[p]rosecutors should never describe the discovery being provided as ‘open file.’”
- “Exculpatory information, regardless of whether the information is memorialized, must be disclosed to the defendant reasonably promptly after discovery. Impeachment

information, which depends on the prosecutor’s decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently.”

- “Prosecutors should make a record of when and how information is disclosed or otherwise made available.”

The complete memorandum is available at: <http://www.justice.gov/dag/discovery-guidance.pdf>.

BEST BOOK FOR GUIDELINES RESEARCH

The most helpful book we’ve ever found for doing Sentencing Guideline research is a Thomson-West publication, the Federal Sentencing Guidelines Handbook. Guideline issues are notoriously hard to research, but in the Handbook you’ll find easily accessible research on seemingly even the finest of points. Rusty Burress, the Principal Training Advisor for the United States Sentencing Commission, says he uses it when he has a question about the Guidelines. The fat paperback is expensive at \$498, but worth it if you do much federal work.

We have a copy of the book in the library of our Pensacola, Tallahassee, and Gainesville offices. While we cannot lend it out, you are welcome to visit any of our offices to use the book. You’ll save yourself research time and come up with the right answer, too.

VICTORIES

In a Tallahassee drug conspiracy case, the probation officer who calculated Tyrun Cook’s presentence report concluded that Cook’s guideline range was 360 months to

life. Tallahassee panel member **Mandy Garcia**, however, successfully argued that Cook was entitled to credit for acceptance of responsibility, that Cook was responsible for a lesser quantity of cocaine than had been calculated by the probation officer, and that there was no basis for concluding that Cook was an organizer or leader. Having upheld Mandy's objections, Judge Hinkle found the correct guideline range to be 160 to 210 months and imposed a 168-month sentence.

In what **Mandy** describes as a "small victory," he won an acquittal for his client, Zebedia Kyler, of one of three bank robbery charges considered by a Tallahassee jury before Judge Hinkle. The count of which Kyler was acquitted alleged that he had taken \$69,000 in the robbery of a credit union.

In Panama City, **Dustin Stephenson's** client, Hector Malara, entered a guilty plea to conspiring to distribute more than 5 kilograms of cocaine. The Government attributed 13.1 kilograms to him. Dustin convinced Judge Smoak that Malara was not an organizer, which meant that Malara was eligible for the safety valve and reduced the guideline range from 135 - 168 months to 70 - 87 months. With that and a substantial assistance motion, Judge Smoak sentenced Malara to 57 months.

Assistant Federal Public Defender **Bill Clark** won an acquittal from a Tallahassee jury for his client, Michael Estell, Jr. Estell was charged along with his father with possession with intent to distribute cocaine, but his only role was to count the \$16,000 his father had agreed to pay the confidential informant. Bill successfully argued that whatever assistance Estelle gave his father fell short of aiding in the commission of the crime.

Bill also persuaded Judge Hinkle to vacate the state sentence of another client, Daven

Bowden. In 2005, Bowden admitted to violating his Washington County probation, electing to reject a seven-year plea offer from the prosecutor and choosing, instead, to take his chances with the judge. The judge imposed a ten-year sentence. When the state courts failed to grant him any relief, Bowden filed a pro se 2254 claim in federal district court, claiming trial counsel had rendered ineffective assistance by failing to advise him of the fifteen-year maximum penalty. Subsequently, Judge Hinkle appointed Bill to represent Bowden at an evidentiary hearing. During the hearing, the former trial counsel conceded that he may not have advised Bowden of the maximum penalty. Relying on that testimony, Judge Hinkle concluded that Bowden had received ineffective assistance and, because of it, had been unable to fairly evaluate the seven-year offer made by the prosecutor.

In an appeal before the Eleventh Circuit Court of Appeals, Assistant Federal Public Defender **Gwen Spivey** won a new sentencing for her client, Joseph Oliver. Gwen successfully argued that the district court had failed to make adequate factual findings when it found Oliver had violated his supervised release.

Gwen also preserved one of her earlier victories by convincing the United States Supreme Court to deny the Solicitor General's Petition for Writ of Certiorari in the case against Mikola Bowden. She had, earlier, convinced the Eleventh Circuit Court of Appeals to overturn Bowen's mandatory life sentence because the information filed pursuant to 18 U.S.C. § 851 failed to include the correct date of one of Bowden's prior convictions and cited the wrong portion of the statute. This remains the only Eleventh Circuit decision granting relief under § 851.

Seven years ago, Judge Hinkle sentenced Billy Buchanan as a career offender to 30 years of imprisonment for trafficking in methamphetamine. Last month, at a new sentencing hearing, Judge Hinkle found Buchanan did not qualify for career offender sentencing and reduced the sentence to a few months more than 11 years. Assistant Federal Public Defender **Chet Kaufman** won Buchanan a new sentencing hearing by filing a complex habeas corpus petition pursuant to 28 U.S.C. § 2241 and convincing Judge Hinkle and Assistant United States Attorney Mike Simpson that recent decisions of the United States Supreme Court and the Eleventh Circuit Court of Appeals entitled Buchanan to relief. Chet's argument was that the decisions in Begay v. United States, 128 S. Ct. 1581 (2008), and such cases as United States v. Harrison, 558 F.3d 1280 (11th Cir. 2009), and United States v. Lee, 586 F.3d 859 (11th Cir. 2009), meant that Buchanan's prior conviction for escape could not be used as a predicate conviction for the career offender classification.

Over the objection of the Government, **Randy Murrell** convinced Judge Mickle that his client, Francisco Sac, had been truthful about the relevant conduct and was, therefore, entitled to the benefits of the safety valve and a reduction for acceptance of responsibility. Judge Mickle made the decision after considering the testimony Sac gave at the sentencing hearing. In the end, instead of being sentenced to a 10-year minimum mandatory for conspiring to grow more than 1,000 marijuana plants, Mr. Sac received a prison sentence of two years.

Assistant United States Attorney Michael Simpson chose to request a dismissal of the

case against another of **Randy's** clients, Oscar Faulk, rather than wait for Judge Mickle to rule on a motion to suppress. Faulk, who was indicted for being a felon in possession of a firearm, was a passenger in a car stopped by a Florida Highway Patrol officer midmorning on I-10 because, according to the Trooper, there had been a light rain and the driver of the car had failed to turn on her headlights. The Trooper discovered the firearm in the course of what he reported as a consensual search of the car. During the hearing of the motion to suppress, several other Troopers also testified that it had been raining. Randy, though, presented the testimony of a Florida State University meteorology professor, who, armed with radar images and data from nearby weather stations, explained that a front had passed through the area hours before the Trooper stopped Faulk and that it had stopped raining long before the stop. At the conclusion of the hearing Judge Mickle took the matter under advisement, but upon the request of the Government, dismissed the indictment before ruling on the motion.

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.

VARIANCES

Conklin, Rose Paul, M. Atty: Darren Johnson
 Docket: 1:09cr26
 Charge: Destruction of Mail
 Range: 24 - 36 months
 Sentence: Probation
 Date of Imposition of Sentence: 12/16/09
 Grounds: the toll exacted upon the defendant by personal tragedies and the burden of caring for a

husband in declining health, the otherwise good work history of the 60-year-old defendant, and the lesser sentences typically given to others who have committed this kind of offense

Gard, Glen Rodgers, M. Atty: Tom Keith
Docket: 3:08cr121
Charge: Theft of Funds from a Labor Org.
Range: 12 - 18 months
Sentence: 90 days in jail
Date of Imposition of Sentence: 7/16/09
Grounds: Defendant's age and poor physical and mental health

Mejia-Aguilar, Carlos Hinkle, R. Atty: R. Murrell
Docket: 4:09cr33
Charge: Illegal ReEntry
Range: 57 - 71 months
Sentence: 48 months
Date of Imposition of Sentence: 11/24/09
Grounds: lesser sentences based upon plea negotiations in other jurisdictions and finding that sentence would provide adequate deterrence

Travis, Roosevelt Hinkle, R. Atty: Bill Bubsey
Docket: 4:09cr17
Charge: Dist. Marijuana & >5 g. Crack
Range: 262 - 327 months (Career Offender)
Sentence: 180 months BOP
Date of Imposition of Sentence: 10/16/09
Grounds: Defendant's efforts at providing assistance to the government and the relatively minor nature of his prior criminal history

Bradham, Dietra Mickle, S. Atty: Bill Bubsey
Docket: 4:09cr28
Charge: Bank Fraud
Range: 8 - 14 months
Sentence: 1 day BOP, w/SR & home detention
Date of Imposition of Sentence: 1/19/10
Grounds: Defendant's responsibilities for her two young children, defendant's health problems, and complete restitution

Preacher, Ronald Mickle, S. Atty: Randy Murrell
Docket: 4:09cr54
Charge: use of facility of interstate commerce with intent that a murder be committed
Range: 121 - 151 months (10 yr stat. max)
Sentence: 36 months
Date of Imposition of Sentence: 1/19/10
Grounds: Defendant's voluntary withdrawal

from the offense, lack of a significant criminal history, emotional stress at time of the offense

Lyde, Devonne Hinkle, R. Atty: Bill Clark
Docket: 4:09cr61
Charge: Counterfeit Securities
Range: 21 - 27 months
Sentence: 18 months
Date of Imposition of Sentence: 1/14/10
Grounds: Amount of money involved grossly overstated seriousness of offense

DOWNWARD DEPARTURES

Lugo, Anthony Hinkle, R. Atty: Bill Clark
Docket: 4:09cr5
Charge: Bank Fraud
Range: 21 to 27 months
Sentence: 6 months
Date of Imposition of Sentence: 9/4/09
Grounds: 5K1.1 motion

Sapp, Jerry Mickle, S. Atty: Paul Villeneuve
Docket: 4:08cr29
Charge: Consp Dist > 500 g. meth
Range: 168 - 210 months (10 yr min mand)
Sentence: 75 months
Date of Imposition of Sentence: 12/21/09
Grounds: 5K1.1 motion

Cook Charles Mickle, S. Atty: Bernard Daley
Docket: 4:08cr29
Charge: Consp Dist > 500 g. meth
Range: 188 - 235 months (Mand. Life)
Sentence: 120 months
Date of Imposition of Sentence: 12/21/09
Grounds: 5K1.1 motion

Messick, Luther Mickle, S. Atty: Mitchell Stone
Docket: 4:08cr29
Charge: Consp Dist > 500 g. meth
Range: 70 - 87 months (w/safety valve)
Sentence: 1 day w/SR including 1 yr home det.

Date of Imposition of Sentence: 12/21/09
Grounds: 5K1.1 motion, prior to his arrest, defendant had ended his involvement w/drugs and had become a valued employee

Glanton, Robert Hinkle, R. Atty: R. Greenberg
Docket: 4:08cr58
Charge: Consp Dist > 50 g. crack

Range: 262 - 327 months (mand. Life)
 Sentence: 119 months
 Date of Imposition of Sentence: 9/30/09
 Grounds: 5K1.1 motion

Malara, Hector Smoak, R. Atty: D. Stephenson
 Docket: 5:09cr30
 Charge: Consp Dist > 5 kilos cocaine
 Range: 70 - 87 months
 Sentence: 57 months
 Date of Imposition of Sentence: 12/9/09
 Grounds: 5K1.1 motion

Please remember to let us know if any of your clients are the beneficiaries of a downward departure. We publish them in hopes of providing a “roadmap” of sorts to help guide others in securing sentence reductions.

CASE SUMMARIES

The summaries that follow are prepared by our lawyers here in the Federal Public Defender’s Office. We prepare them daily as the opinions are issued. If you’d like to receive the daily summaries, via e-mail, please call Margaret in our Tallahassee office at (850) 942-8818.

Certiorari Granted

The following are United States Supreme Court grants of certiorari for the 2002 term that are relevant to our practice and granted since our last newsletter:

ABBOTT v. U.S., 2010 WL 250514 (Mem), No. 09-479 (cert. granted Jan. 25, 2010), & **GOULD v. U.S.**, 2010 WL 250523 (Mem), No. 09-7073 (cert. granted Jan. 25, 2010)

18 U.S.C. § 924(c); mandatory consecutive sentencing; underlying offense

Questions Presented: (1) Whether the prefatory phrase “any other provision of law” in 18 U.S.C. § 924(c)(1)(A) includes the underlying drug trafficking offense or crime of violence; and (2) if not, whether it includes another offense for possessing the same firearm in the same transaction?

DOLAN v. U.S., 2010 WL 46509 (Mem), No. 09-367 (cert. granted Jan. 8, 2010)

Restitution; jurisdiction; 18 U.S.C. § 3664(d)(5)

Question Presented: Whether the 90-day deadline for a restitution order under 18 U.S.C. § 3664(d)(5) is jurisdictional, rendering a later order void?

CARACHURI-ROSENDO v. HOLDER, ATTY. GEN., 2009 WL 2058154 (Mem), No. 09-60 (cert. granted Dec. 14, 2009)

Sentencing; prior conviction; aggravated felony; recidivist statute

Question Presented: Whether a person convicted under state law for simple drug possession (a federal misdemeanor) has been “convicted” of an “aggravated felony” on the theory that he could have been prosecuted for recidivist simple possession (a federal felony), even though there was no charge or finding of a prior conviction in his prosecution for possession?

ROBERTSON V. U.S., EX REL. WATSON, 2009 WL 4748708 (Mem), No. 08-6261 (cert. granted Dec. 14, 2009)

Contempt; criminal; private action

Question Presented: Whether an action for criminal contempt in a congressionally-created court may constitutionally be brought in the name of and pursuant to the power of a private person, rather than in the name of and pursuant to the power of the United States?

DILLON v. U.S., 2009 WL 2899562 (Mem), No. 09-6338 (cert. granted Dec. 7, 2009)

Booker; § 3582(c)(2)

Questions Presented: I. Whether the Federal Sentencing Guidelines are binding when a district court imposes a new sentence

pursuant to a revised guideline range under 18 U.S.C. § 3582; and

II. Whether during a § 3582(c)(2) sentencing, a district court is required to impose sentence based on an admittedly incorrectly calculated guideline range.

RENICO, WARDEN v. LETT, 2009 WL 2984058 (Mem), No.09-338 (cert. granted Nov. 30, 2009)

Double jeopardy; habeas; 2254; mistrial; hung jury

Question Presented: Whether the Sixth Circuit erred in holding that the Michigan Supreme Court failed to apply clearly established precedent under 28 U.S.C. § 2254 by denying habeas relief on double jeopardy grounds when the state trial court declared a mistrial after the foreperson said that the jury was not going to be able to reach a verdict.

BARBER v. THOMAS, WARDEN, 2009 WL 1983760 (Mem), No. 09-5201 (cert. granted Nov. 30, 2009)

Good time computations

Question Presented: Does “term of imprisonment” in Section 212(a)(2) of the Sentencing Reform Act, enacting 18 U.S.C. § 3624(b), unambiguously require the computation of good time credits on the basis of the sentence imposed [versus sentence actually served]?

MAGWOOD v. CULLIVER, 130 S. Ct. 624 (Mem), No. 09-158 (cert. granted Nov. 16, 2009)

Habeas; 2255; “second or successive”

Question Presented: When a person is resentenced after having obtained federal habeas relief from an earlier sentence, is a claim in a federal habeas petition challenging that new sentencing judgment a “second or successive” claim under 28 U.S.C. § 2244(b)

if the petitioner could have challenged his previous sentence on the same constitutional grounds?

KIYEMBA, ET AL., v. OBAMA, ET AL., 130 S. Ct. 458 (Mem), No. 08-1234 (cert. granted Oct. 20, 2009)

Release and detention of Guantanamo prisoners

Question Presented: Whether judges may require the release of Guantanamo prisoners to live in the U.S. itself?

SKILLING v. U.S., 130 S. Ct. 293 (Mem), No. 08-1394 (cert. granted Oct. 13, 2009)

Fraud; honest services; private gain; pretrial publicity; presumption of prejudice; rebuttal

Questions Presented: (1) Whether the federal “honest services” fraud statute, 18 U.S.C. § 1346, requires the government to prove that the defendant’s conduct was intended to achieve “private gain” rather than to advance the employer’s interests, and, if not, whether § 1346 is unconstitutionally vague? (2) When a presumption of jury prejudice arises because of the widespread community impact of the defendant’s alleged conduct and massive, inflammatory pretrial publicity, whether the government may rebut the presumption of prejudice, and, if so, whether the government must prove beyond a reasonable doubt that no juror was actually prejudiced?

U.S. v. MARCUS, 130 S. Ct. 393 (Mem), No. 08-1341 (cert. granted Oct. 13, 2009)

Appeal; standard of review; plain error; Rule 52; ex post facto

Question Presented: Whether the court of appeals departed from this Court’s

interpretation of Rule 52(b) of the Federal Rules of Criminal Procedure by adopting as the appropriate standard for plain-error review of an asserted *ex post facto* violation whether “there is any possibility, no matter how unlikely, that the jury could have convicted based exclusively on pre-enactment conduct”?

McDONALD v. CHICAGO, 130 S. Ct. 48 (Mem), No. 08-1521 (cert. granted Sept. 30, 2009)

Second Amendment

Question Presented: Whether the Second Amendment right to keep and bear arms is incorporated as against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses?

U.S. v. O'BRIEN, 130 S. Ct. 49 (Mem), No. 08-1569 (cert. granted Sept. 30, 2009)

Apprendi/McMillan; 18 U.S.C. § 924(c)

Question Presented: Whether the sentence enhancement under 18 U.S.C. § 924(c)(1) to a 30-year minimum when the firearm is a machinegun is an element of the offense that must be charged and proved to a jury beyond a reasonable doubt, or instead a sentencing factor that may be found by a judge by the preponderance of the evidence.

BERGHUIS v. THOMPKINS, 130 S. Ct. 48 (Mem), No. 08-1470 (cert. granted Sept. 30, 2009)

Miranda; waiver; persuasion; habeas; deference; ineffectiveness; prejudice

Questions Presented: I. Whether the Sixth Circuit expanded the Miranda rule to prevent an officer from attempting to non-coercively persuade a defendant to cooperate where the officer informed the defendant of his rights, the defendant acknowledged that he understood them, and the defendant did not invoke them but did not waive them.

II. Whether the Court of Appeals failed to afford the State court the deference it was entitled to under 28 U.S.C. §2254(d), when it granted habeas relief with respect to an ineffective assistance of counsel claim where the substantial evidence of Thompkin's guilt allowed the State court to reasonably reject the claim.

CARR v. U.S., 130 S. Ct. 47 (Mem), No. 08-1301 (cert. granted Sept. 30, 2009)

SORNA; Ex Post Facto Clause

The question before the Court is whether it was unconstitutional for the United States Attorney General to apply the law retroactively to an individual whose underlying crime occurred before the law was enacted by Congress.

BERGHUIS v. SMITH, 130 S. Ct. 48 (Mem), No. 08-1402 (cert. granted Sept. 30, 2009)

Jury; fair cross-section

Question Presented: What is the proper test for determining what constitutes a fair and reasonable representation of a distinct group from the community within the venires under the second prong of Duren v. Missouri? The Michigan Supreme Court found no violation when a jury pool was 6 % black and the population was 7.28%.

HOLDER v. HUMANITARIAN LAW PROJECT, 130 S. Ct. 48 (Mem), No. 08-1498, & **HUMANITARIAN LAW PROJECT v. HOLDER**, 130 S. Ct. 49 (Mem), No. 09-89 (cert. granted Sept. 30, 2009)

Terrorism; material support; 18 USC 2339B

Question Presented: Whether 18 U.S.C. 2339B(a)(1), which prohibits the knowing provision of "any * * * service, * * *

training, [or] expert advice or assistance," 18 U.S.C. § 2339A(b)(1), to a designated foreign terrorist organization, is unconstitutionally vague.

Supreme Court Cases

BRISCOE v. VIRGINIA, 2010 WL 246152 (Mem), No. 07-11191 (Jan. 25, 2010)

Confrontation Clause

The question presented was whether the state could avoid a Confrontation Clause violation under Melendez-Diaz v. Massachusetts (2009), after introducing a forensic laboratory analysis report without the analyst's testimony, by providing that the accused has a right to call the analyst as his own witness. The Court summarily vacated the judgment of the Supreme Court of Virginia and remanded the case for further proceedings not inconsistent with Melendez-Diaz.

WOOD v. ALLEN, 2010 WL 173369, No. 08-9156 (Jan. 20, 2010)

Capital habeas; ineffective assistance

Wood, a state capital defendant, challenged the key factual finding made by the Alabama state court that denied his application for postconviction relief: that his attorneys' failure to pursue and present mitigating evidence of his borderline mental retardation was a strategic decision rather than a negligent omission. The Court affirmed the Eleventh Circuit's reversal of the grant of habeas relief because "the state court's conclusion that Wood's counsel made a strategic decision not to pursue or present evidence of his mental deficiencies was not an unreasonable determination of the facts" under §2254(d)(2). "Although we granted certiorari to resolve the question of how §§2254(d)(2) and (e)(1) fit together, we find once more that we need not reach this question, because our view of the

reasonable-ness of the state court's factual determination in this case does not turn on any interpretive difference regarding the relationship between these provisions." The Court did not decide whether the state court's decision involved an unreasonable application of *Strickland* under §2254(d)(1) due to counsel's failure to reasonably investigate Wood's mental deficiencies before deciding not to pursue or present such evidence. That question, the Court said, was outside the scope of the cert. question presented. [Ed. note: The decision affirmed was by Hull, with Dubina; dissent by Barkett]

VAZQUEZ v. U.S., 2010 WL 154871 (Mem), No. 09-5370 (Jan. 19, 2010)

Sentencing; career offender guidelines; downward departure

The Court GVR'd a case to the Eleventh Circuit for reconsideration in light of the Solicitor General's opinion (that the circuit position, in conflict with all other circuits, was wrong). The SG agreed with an initial decision by M.D. Fla. D.J. Presnell that he had authority to depart downward from the guidelines based on his policy disagreement with the career offender guidelines. The Eleventh Circuit, citing *Williams*, 456 F.3d 1353, had held that the sentence was procedurally unreasonable and that district courts could not disagree with the CO guidelines.

HUNTER v. U.S., 2010 WL 154867 (Mem), No. 09-122 (Jan. 19, 2010)

Sentencing; Armed Career Criminal; violent felony; carrying concealed weapon; COA

The Court GVR'd another case to the

Eleventh Circuit, which had denied a Certificate of Appealability from denial of defendant's 2255, for reconsideration in light of the Solicitor General's agreement that his 2255 claim made a "substantial showing" that his enhanced ACCA sentence violated due process because it exceeded the 10-year statutory maximum under 18 U.S.C. 922(g).

PRESLEY v. GEORGIA, 2010 WL 154813, No. 09-5270 (Jan. 9, 2010)

Jury selection; public; defendant's right; Sixth Amendment

The Court held that an accused in a criminal trial has a Sixth & Fourteenth Amendment right to have jury selection open to the public, just as the public and press do under the First Amendment.

WELLONS v. HALL, 2010 WL 154825, No. 09-5731 (Jan. 19, 2010)

Capital habeas; federal appellate review

The Court GVR'd a habeas denial [Wilson, w/ Tjoflat & Black] and remanded for reconsideration in light of *Cone v. Bell*, (2009) (reversing a death sentence because the improper suppression of mitigating evidence was erroneously barred from habeas review when the state court had declined to review the merits.) "From beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect. . . . this petition raises a serious question about whether the [Eleventh Circuit] Court of Appeals carefully reviewed those ["disturbing facts" concerning the trial] before addressing petitioner's constitutional claims." "Unlike JUSTICE SCALIA, [] we do not believe that a 'self-respecting' court of appeals would or should respond to our remand order with a 'summary reissuance' of essentially the same opinion, absent the

procedural default discussion." The Court admonished the Eleventh Circuit for not even purporting to address the relief the habeas petition sought, jumping instead to the assumption that a new trial would not result no matter what evidence might come to light.

HOLLINGSWORTH v. PERRY, 2010 WL 105264, No. 09A648 (Jan. 13, 2010)

Rules; amendment; notice; due process; fair trial; appeal; stay; certiorari; mandamus

The Court (per curiam, 5-4) granted a stay of a district court decision to broadcast a trial because it had failed to follow proper procedures and violated a federal statute in amending a local rule of court and thereby failed to provide adequate notice and time for comment.

McDANIEL v. BROWN, 2010 WL 58361, No. 08-559 (Jan. 11, 2010)

Habeas; 2254; evidence; sufficiency; Jackson v. Virginia; DNA

The Court (per curiam, 9-0) reversed the grant of federal habeas relief, holding the district court misapplied *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). Even though a DNA expert post-conviction exonerated the defendant, the trial record included DNA evidence matching defendant's profile "and other convincing evidence of guilt."

BEARD v. KINDLER, 130 S. Ct. 612, No. 08-992 (Dec. 8, 2009)

Habeas; state procedural rule; discretionary v. mandatory; procedural bar

The Court (Roberts, 8-0) held that a state procedural rule is not automatically "inadequate" under the adequate-state-grounds doctrine – and therefore unenforceable on federal habeas corpus

review – because the state rule is discretionary rather than mandatory.

MICHIGAN v. FISHER, 130 S. Ct. 546, No. 09-91 (Dec. 7, 2009)

Fourth Amendment; search; home; warrantless; emergency aid exception; objective

The Court summarily reversed for not having applied an objective standard to the emergency aid exception. There need be no ironclad proof of “a likely serious, life-threatening” injury. The test whether there was an objectively reasonable basis for believing “that medical assistance was needed, or persons were in danger.

PORTER v. McCOLLUM, 130 S. Ct. 447, No. 10537 (Nov. 30, 2009)

Ineffective assistance; state capital habeas

The Court reversed the Eleventh Circuit’s decision (per curiam; Carnes, Wilson, Pryor), which had reversed M.D. Fla. D.J. Presnell’s decision to grant capital habeas. The Supreme Court held the trial attorney *was* ineffective for failing to sufficiently investigate and present mitigation evidence, rejecting both the Florida Supreme Court and Eleventh Circuit decisions.

BOBBY v. VAN HOOK, 130 S. Ct. 13, No. 09-144 (Nov. 9, 2009)

Sentencing; capital habeas; ineffective assistance; penalty phase

The Court reversed the Sixth Circuit’s grant of habeas relief to this capital defendant based on the ABA 2003 guidelines, but noted those guidelines could be useful “guides” to the extent they describe the professional norms prevailing when the presentation took place.

SCHWARZENEGGER v. COLEMAN, 130 S. Ct. 46 (Mem), No. 09A234 (Sept. 11, 2009)

Stay; state prisoners; mandatory release; overcrowding

The Court refused to stay a federal district court order requiring California to draw up a plan for the mandatory release of up to 46,000 prisoners to relieve overcrowding in state prisons.

IN RE DAVIS, 130 S. Ct. 1 (Mem), No. 08–1443 (Aug. 17, 2009)

Actual Innocence

The Court ordered an evidentiary hearing for death row inmate Troy Davis, defying the Eleventh Circuit’s decision refusing to grant an evidentiary hearing on his claim of actual innocence.

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. BERNAL-BENITEZ, 2010 WL 254463 (Jan. 25, 2010)

Appeal; adoption of co-appellant’s brief; waiver; Batson; closing argument; confession; sentencing; role reduction

The Court (Tjoflat w/Black & Cox) rejected one defendant’s attempt to “adopt” a codefendant’s argument on appeal via a “statement of adoption,” explaining in a lengthy footnote 20 that a brief cannot present an issue by such a simple statement, especially when the co-defendant’s brief adopted does not argue as error the ruling in the instant defendant’s case or develop facts pertinent to the instant defendant’s appellate claim. The Court rejected multiple other arguments based on application of settled law to the facts of this case.

U.S. v. MARQUEZ, 2010 WL 199396 (Jan. 22, 2010)

Extradition; timeliness; Fed.R.Crim.P. 12

The Court rejected multiple challenges to defendant's extradition from Spain, finding them untimely under Federal Rule of Criminal Procedure 12(b) (covering "a motion alleging a defect in instituting the prosecution"), which includes a challenge to personal jurisdiction. The extradition rules of speciality and dual criminality relate to the court's personal jurisdiction over the defendant. The Court summarily dispensed with other challenges to post-verdict rulings.

U.S. v. WHITE, 2010 WL 59127 (Jan. 11, 2010)

Firearm; 18 USC 922(g)(9); misdemeanor domestic violence; constitutionality

The Court (VCJ Siler w/Dubina & Birch) affirmed the brief detention of the vehicle occupants and the limited patdown of defendant (for a weapon for officer safety) based on several factors, particularly that one officer recognized defendant as someone who had given him trouble in the past. White's prior Alabama misdemeanor conviction for harassment, which the state defines as a domestic violence offense, was a proper predicate, citing Hayes, 129 S.Ct. 1079, 1087 (2009). The Government must prove the defendant had a specified domestic relationship with the victim, but § 922(g)(9) does not require that the predicate offense have the specified domestic relationship as an element. The Court also rejected a Second Amendment challenge to 922(g)(9).

BOYD v. ALLEN, 2010 WL 46907 (Jan. 8, 2010)

Capital habeas; ineffectiveness; penalty phase; prejudice

The Court (Marcus w/Birch, Barkett dissenting) reversed the district court's grant of habeas relief to this capital defendant on the

ground that penalty phase counsel was ineffective for failing to investigate and use mitigation evidence about defendant's abusive childhood; the Court concluded there was no reasonable probability the performance, even if deficient, prejudiced the outcome. Even though the jury had recommended life even without this evidence, the judge overrode it, and much of the new evidence was on the same mitigation theme already presented.

WARD v. HALL, 2010 WL 6761 (Jan. 4, 2010)

Capital habeas; improper bailiff-jury communication

The Court (Birch w/Edmondson & Barkett) reversed the district court's denial of penalty relief to a death row inmate, concluding that a juror's penalty-phase question and bailiff's response about life without parole violated Ward's constitutional right to a fair trial and a reliable sentence.

U.S. v. ROBERSON, 2009 WL 5125492 (Dec. 30, 2009)

Sentencing; crime of violence; career offender; 4B1.2; walkaway escape

The Court, with a Government concession, held that defendant was not a career offender because his prior Georgia conviction for walkaway escape was not a crime of violence after *Chambers*.

U.S. v. BANJOKO, 2009 WL 4928411 (Dec. 23, 2009)

18 U.S.C. § 2199; element; intent

The Court (per curiam w/Edmondson, Birch & Black) affirmed a conviction for stowing away on a vessel that entered United States jurisdiction, in violation of 18 U.S.C. § 2199.

The Court held that intent to be transported to the United States is not an element of the offense, and it may be applied despite a general presumption against applying a statute extraterritorially.

U.S. v. LOPEZ, 2009 WL 4912117 (Dec. 22, 2009)

Jury instructions; supplemental; “encourage”; 8 U.S.C. § 1324; no temporal requirement in 8 U.S.C. § 1327

The district court accepted the Government’s reliance on Black’s Law Dictionary in giving supplemental jury instruction defining “encourage” in 8 U.S.C. § 1324(a)(1)(A)(iv) to mean, inter alia, “to help.” The Court (Hull w/ Schlesinger), affirmed over Barkett’s dissent. However, the panel unanimously held that it was proper to give the jury another supplemental instruction telling jurors that 8 U.S.C. § 1327 has no temporal requirement, rejecting the defendant’s argument that he had to know the aliens were illegal at the time they boarded the boat.

U.S. v. LANGSTON, 2009 WL 4907047 (Dec. 22, 2009)

18 U.S.C. § 666; state agent; sufficiency; reasonableness

The Court (Dubina w/Birch & Siler) reversed 17 of the 36 counts Langston was convicted of because “the Government erroneously indicted Langston as an agent of the State of Alabama under 18 U.S.C. § 666, instead of an agent of the Alabama Fire College.” The Court held that Langston’s role as Executive Director of the Fire College was insufficient to convict him as an agent of the State. However, the Court found evidence sufficient to support the remaining counts of conviction, including those that charged him under § 666 as an agent of the Alabama Poison Control Center. And even though he was being sent back for

resentencing, the Court found his 125-month sentence reasonable.

U.S. v. WHITE, 2009 WL 4892534 (Dec. 21, 2009)

Waiver of venue

The Eleventh Circuit (Siler, w/ Dubina & Birch) held that White knowingly and voluntarily waived (by silence) his constitutional right to be tried in the district in which his offense occurred.

U.S. v. ENGLISH, 2009 WL 4827505 (Dec. 16, 2009)

Assimilated Crimes Act; sentencing; revocation; supervised release

The Court held that a defendant who has been convicted under the Assimilated Crimes Act, who has already served the maximum sentence of imprisonment allowed by state law for the offense, CAN nevertheless be sentenced to more time in prison for violating supervised release, in spite of the ACA’s “like punishment” provision.

U.S. v. DAVIS, 587 F.3d 1300 (Nov. 18, 2009)

Drug quantity finding for 3582(c)(2) resentencing proceeding

“The central issue in this case is whether the district court’s adoption at sentencing of the facts stated in Appellant Emerson Davis’s Presentence Investigation Report (PSI) constituted a finding that Davis was responsible for conduct involving more than 4.5 kilograms of cocaine base. During the sentencing hearing, the district court only expressly found Davis responsible for more than 1.5 kilograms of cocaine base. The undisputed facts contained in the PSI, however, establish Davis was responsible for at least eight kilograms of cocaine base. After review, we [(per curiam by Black, Wilson,

Cox)] conclude that in adopting the facts in the PSI the sentencing court found Appellant was responsible for more than 4.5 kilograms, even though the court did not expressly specify the exact quantity in excess of 1.5 kilograms.”

U.S. v. LIVESAY, 587 F.3d 1274 (Nov. 16, 2009)

No probation for while collar fraud

For the third time, the Court (Dubina w/Birch & Siler) reversed the probation sentence for Livesay’s participation in an illegal scheme to artificially inflate HealthSouth’s earnings and to falsely report HealthSouth’s financial condition. This time, however, the Court said it won’t even allow the sentencing court to consider a probation sentence on remand. “Not only do we hold that the particular sentence imposed below is unreasonable, but we also hold that any sentence of probation would be unreasonable given the magnitude and seriousness of Livesay’s criminal conduct. As we stated in *Martin*, only the imposition of a meaningful period of incarceration will meet the goals that Congress laid out in the sentencing statute.”

U.S. v. BROWN, 587 F.3d 1082 (Nov. 10, 2009)

Appeal; effective assistance of appellate counsel; forfeiture; conspiracy; sufficiency

Among a host of issues raised by two codefendants convicted of cocaine/crack conspiracy, the Court (VCJ Alarcon w/Carnes & Fay) rejected a challenge to denial of the severance motion, because the appellate attorney's different argument on appeal was *forfeited* by virtue of not being presented to the DC. Also, the Court noted repeatedly that one defendant's brief "failed to support his contention with any citation to the record." A couple arguments seemed frivolous on their

face, but the opinion makes no mention of that. The only readily apparent reason for publishing the opinion, if any, is to reiterate settled law that defendants can be convicted of conspiracy based on a pattern of interaction/codependence with each other and others in multiple drug sales in a common area, even though there was no overt "agreement" between the two of them and no sale between the two of them.

U.S. v. HARRIS, 586 F.3d 1283 (Nov. 3, 2009)

Career Offender; crime of violence; fleeing and eluding; high speed or wanton disregard

The Court (Marcus w/Hill & Voorhees) reaffirmed *United States v. Orisnord*, 483 F.3d 1169 (11th Cir. 2007), which had held, pre-*Begay*, that the career offender prior felony “crime of violence” conviction predicate is satisfied by a prior conviction under Fla. Stat. § 316.1935(3)(a) for willfully fleeing or eluding a police officer at high speed or with wanton disregard for the safety of persons or property.

U.S. v. VELEZ, 586 F.3d 875 (Oct. 26, 2009)

Money laundering; 18 U.S.C. 1956 & 1957; attorneys’ fees; exemption

The Court (Barkett, w/Hull & Quist) rejected the Government’s appeal of the dismissal of a count charging 2 attorneys (including Ben Kuehne) and one accountant with money laundering in connection with efforts to identify and secure certain client funds for attorneys’ fees for criminal defense. The Court held the defendants were exempt from prosecution under 1957(f)(1)’s protection of “any transaction necessary to preserve a person’s right to representation as guaranteed by the sixth amendment.”

U.S. v. LEE, 586 F.3d 859 (Oct. 26, 2009)

Walkaway escape not violent felony

The Court (Birch w/Edmondson & Cox) held that a prior NJ conviction for walkaway escape was not a violent felony to support an ACCA sentence under 18 U.S.C. 924(e).

U.S. v. QUINTANA, 585 F.3d 1407 (Oct. 22, 2009)

Racial/ethnic profiling

Quintana, charged with illegal reentry, moved to dismiss on the grounds that equal protection was violated because the sole reason the arresting officers initiated a consensual encounter with him in a public place was their belief that he appeared to be of Middle Eastern ethnicity. The district court denied the motion, and the Eleventh Circuit affirmed (Alarcon w/Carnes & Fay) because “the record shows that the consensual encounter in this matter was not based on Mr. Quintana’s apparent race or ethnicity.”

U.S. v. CHAVEZ, 584 F.3d 1354 (Oct. 16, 2009)

Severance, sentencing

Several drug trafficking defendants were indicted. One pled not guilty and four pled guilty but reserved the right to have a bench trial requiring proof beyond a reasonable doubt as to the drug quantities. The five went to trial together. The trial court did not disclose to the jury that some defendants had pled guilty, and the verdict form ultimately only sought a verdict as to one defendant. The Court affirmed (Hodges w/ Edmondson & Birch). The Court rejected the argument that the one who pleaded not guilty should have been served from the others. The Court also found a mistrial was correctly denied, the evidence was sufficient, and a life sentence was reasonable.

U.S. v. MYERS, 584 F.3d 1349 (Oct. 13, 2009)

SORNA

The Court (per curiam w/Birch, Black, Hull) summarily reversed the dismissal of a SORNA indictment on Commerce Clause grounds, relying on its recent decision in *Ambert*, 561 F.3d 1202.

U.S. v. MARTINEZ, 584 F.3d 1022 (Oct. 5, 2009)

Sentencing; organizer/leader; USSG 3B1.1; clearly erroneous; Government’s burden of proof; 7 factors; “orchestrate”

The Court (Marcus, w/Hill & Voorhees) vacated as clear error the organizer/leader enhancement under USSG 3B1.1, because the facts were disputed and Government put on no evidence beyond PSI. It noted that this enhancement requires proof of both leadership role and more than five participants or is otherwise extensive; that there are 7 factors in comment 4; and that the management of assets standing alone is insufficient.

CAMPBELL v. JOHNSON, 586 F.3d 835 (Sept. 30, 2009)

Eighth Amendment Excessive Bail Clause

In a civil rights action, the Court (per curiam w/ Birch, Kravitch, Hodges) reversed dismissal of an excessive bail claim where the Walton County Sheriff refused to honor a Walton County Court-approved property bond for property that was located in Okaloosa County. The district court had found no Eighth Amendment error.

U.S. v. COHN, 586 F.3d 844 (Sept. 30, 2009)

Criminal contempt

The Court (per curiam with Tjoflat, Black, Evans) held that criminal contempt, 18

U.S.C. § 401, is a sui generis offense, it is neither a felony nor a misdemeanor, and the district court erred in classifying it for sentencing as a Class A Felony.

U.S. v. ROBINSON, 583 F.3d 1292 (Sept. 30, 2009)

ACCA

The Court (per curiam with Hull, Pryor, Kravitch) held that an Alabama state offense for possession of marijuana for other than personal use is a qualifying predicate offense for purposes of the ACCA enhancement.

U.S. v. FARIS, 583 F.3d 756 (Sept. 23, 2009)
18 U.S.C. 2422(b); Commerce Clause; Necessary & Proper Clause; undue influence; USSG 2G1.3

The Court(per curiam w/Marcus, Wilson & Anderson) held that in a “traveler” case that even though all actions were local, internet signals crossing state lines were enough to invoke Commerce Clause jurisdiction and did not violate Necessary & Proper Clause. The Court also declined to reconsider its prior holding that the “undue influence”analysis of USSG 2A3.2 applies to fictitious minors because the Sentencing Commission’s overruling of that holding had not yet taken effect. [Ed. note: the latter ruling has been challenged in a pending unopposed motion to vacate mandate because Sentencing Commission’s clarification amendment has since become effective.]

RHODE v. HALL, 582 F.3d 1273 (Sept. 17, 2009)

Capital habeas

The Court(per curiam w/Carnes Hull & Wilson) affirmed the district court’s denial of relief on claims that penalty phase counsel was ineffective in investigating and presenting

mitigation and that the state court decision on this claim was contrary to clearly established federal law.

U.S. v. SEGARRA, 582 F.3d 1269 (Sept. 15, 2009)

Sentencing; 924(c); consecutive v. concurrent; appeal; waiver

The Court(per curiam w/Carnes Pryor & Kravitch) held (1) the appeal was barred by the waiver provisions of the plea agreement; but nevertheless (2) in a circuit split, the plain language of 924(c) *requires* a district court to impose consecutive sentences. This leaves only the Second Circuit holding that concurrent sentences are proper in this scenario. The “except” clause is intended to prevent consecutive mandatory sentences for multiple firearm counts.

U.S. v. JORDAN, ET AL., 582 F.3d 1239 (Sept. 11, 2009)

Downward variance; reasonableness; misdemeanor v. felony; 18 U.S.C. 3559(a)(6)

The Court rejected the Government’s argument that downward departure sentences imposed on the former Republican Sheriff of Birmingham, Alabama, and the lawyer he hired to challenge his narrow defeat, were unreasonable; the guideline range was 27 to 33 months, but that was reduced to a maximum 12 months as the convictions were properly treated as misdemeanors which carried a one-year statutory maximum sentence.

U.S. v. GARCIA-BERCOVICH, 582 F.3d 1234 (Sept. 10, 2009)

Sufficiency; knowledge of drug’s presence; private search; standing; multiple boxes

A shipping terminal opened a single box on a pallet of many boxes, all shrink-wrapped

together and under a single manifest, after the addressee had not shown up for several days; discovering marijuana in that one box, they called police. Defendant showed up the next day to accept delivery and was arrested. This was his fourth pickup/delivery around the US; he alleged he was paid \$800 to pick up the load but had no knowledge of the contents; he also failed to discover another delivery that was established by documents seized in the search. The Court (Goldberg w/ Wilson & Anderson) found the evidence was sufficient. As to the search, defendant had standing because the box was addressed to “Angel at Natural Heat Systems,” and Angel was his first name; nothing was said about the business name or any connection between it and defendant. The Court rejected defendant’s argument that the officers had to obtain a warrant to open boxes other than the single box opened by the terminal employee. Judge Mickle’s determination that “it was all one package” was a factual finding that was not clearly erroneous.

U.S. v. JOHNSON, 581 F.3d 1310 (Sept. 2, 2009)

Jurisdiction; supervised release; 18 U.S.C. 3624; pretrial detention; tolling

The Court (per curiam w/Tjoflat, Wilson & Pryor) agreed with the Fifth and Sixth Circuits that pretrial detention lasting more than 30 days is “imprisonment” within the meaning of 18 U.S.C. 3624(e), and tolls the period of supervised release, if a conviction results.

U.S. v. McINTOSH, 580 F.3d 1222 (Aug. 27, 2009)

Double jeopardy; dismissal of indictment after plea

After acceptance of an unconditional plea to a drug offense in possession of firearm

conviction., the Government noticed that the indictment contained the wrong offense date (by 14 months), so it obtained a new indictment and successfully moved to dismiss the first indictment. The defendant moved to dismiss the second indictment on double jeopardy grounds. The district court denied relief but the Eleventh Circuit reversed (Pryor, w/ Carnes & Dowd) because the flaw was not fatal and the district court could have vacated the plea and set aside the conviction before the second plea.

U.S. v. FELTS, 579 F.3d 1341 (Aug. 21, 2009)

Jury instructions; 18 U.S.C. 1956(a)(2); transportation money laundering; unanimity

The Court (per curiam w/ Dubina, Tjoflat & Walton) affirmed a money laundering conviction, noting that either of two different theories can be argued to support the mens rea element, and they fit within the Eleventh Circuit Pattern Jury Instruction.

DE LA ROSA v. ATTY. GEN., 579 F.3d 1327 (Aug. 20, 2009)

Deportation waiver for conviction

Answering a question of first impression in this circuit, the Court (per curiam w/ Dubina, Birch & Wilson) held that a conviction for the aggravated felony of sexual abuse of a minor does not qualify a defendant to apply for a waiver of deportation under the former INA, sec. 212(c), 8 U.S.C. 1182(c).

U.S. v. CERTAIN REAL PROPERTY, 579 F.3d 1315 (Aug. 19, 2009)

Attorneys’ fees; criminal defense; civil forfeiture

The Court (2-1 Dubina & Edmondson; d by Hill) held, in a case of first impression, that

attorneys who were defending a civil forfeiture case, which the Government interrupted with criminal charges and which required defense because they were inextricably tied in with the civil forfeiture, were not entitled to attorney's fees in the forfeiture proceeding for the criminal defense, under the Civil Asset Forfeiture Reform Act of 2000, because of the Hyde Amendment, 18 U.S.C. 3006A even though ignoring the criminal case would have been malpractice, and even though the forfeiture was won by successful defense of the criminal charges.

U.S. v. MAXWELL, 579 F.3d 1282 (Aug. 19, 2009)

Cross-examination, sufficiency, “good faith” defense, loss calculation

The Court (Marcus, w/Birch & Forrester) affirmed convictions of mail fraud, wire fraud, conspiracy to commit mail and wire fraud, money laundering, and conspiracy to commit money laundering, along with the 5-year sentence, finding, among other things, (1) there was no unlawful restriction on the cross-examination of witnesses because the cross “exposed facts that were more than sufficient to allow the jury to draw inferences about their reliability and to allow Maxwell to fully argue that they were indeed biased.”; (2) evidence was sufficient, (3) The district court did not abuse its discretion in denying Maxwell's proposed jury instructions on his “good faith” defense; and (4) no clear error in loss calculation where Government Benefits are involved, where court should have found more loss and Government did not cross-appeal.

U.S. v. BONILLA, 579 F.3d 1233 (Aug. 18, 2009)

Double jeopardy, Identify theft, aggravated identity theft, multiplicitous indictment

The Court (Fay, w/ Barkett & Trager), on plain error review, found a Double Jeopardy violation existed for convicting him Bonilla of identity theft, § 1028(a)(7) & aggravated identity theft, 1028A(a)(1), because “regardless of the predicate offense, any conduct that would constitute a crime under § 1028A(a)(1) would also be a crime covered by the provisions of § 1028(a)(7). This is a clear example of one act violating two distinct statutory provisions and therefore violating the protection against double jeopardy,” and “the record does not establish two distinct offenses.” The court otherwise affirmed his convictions and sentences, finding no reversible error in the plea colloquy, loss calculation, consecutive sentences, oral vs. written judgment.

U.S. v. KALEY, 579 F.3d 1246 (Aug. 18, 2009)

Right to hearing on pre-trial forfeiture

The Kaleys unsuccessfully moved to vacate an order enjoining them from encumbering property listed in a criminal forfeiture count, and they were denied a hearing. The Eleventh Circuit, upon an interlocutory appeal, reversed. (Marcus, w/Wilson). The Court said they had a right to hearing if they satisfied the *Wingo* balance test weighing the length of the delay before the defendants received their post-restraint hearing; (2) the reason for the delay; (3) the defendants' assertion of the right to such a hearing pretrial; and (4) the prejudice the defendants suffered due to the delay weighed against the strength of the United States's interest in the subject property. Tjoflat specially concurred, saying he would have applied *Mathews v. Eldridge*.

U.S. v. PONCE-ALDONA, 579 F.3d 1218 (Aug. 12, 2009)

Search; suppression; administrative exception; safety checkpoint at interstate exit; initial stop

The Court (Anderson w/ Tjoflat & Stapleton) rejected the sole challenge to the initial stop at an interstate checkpoint of commercial vehicles, holding that Georgia's regulatory scheme for safety inspections of commercial motor vehicles provided a constitutionally adequate substitute for a warrant.

U.S. v. BOBB, 577 F.3d 1366 (Aug. 6, 2009)

Double jeopardy

The Court (Tjoflat, with Carnes & Bowen) held that convictions for both “receiving” and “possessing” child pornography do not violate the Double Jeopardy Clause of the Fifth Amendment because the indictment charged and the Government proved at trial that Bobb had committed two distinct offenses, occurring on two different dates, in breach of two different statutes. However, the Court agreed that “possession” is a lesser included offense of “receipt” and under other circumstances, there would be a double jeopardy violation.

DASHER v. ATTY. GEN., FLORIDA, 574 F.3d 1310 (July 13, 2009)

Ineffective assistance; bad plea advice

The Court (Korman w/ Birch & Barkett) granted § 2254 habeas relief to defendant who had rejected a plea offer for a 13-month sentence, based on his attorney's (foolishly rotten) advice that he would get nothing worse if he pleaded straight up; he did, and was sentenced to 10 years, half of what the PSI reported due to his criminal history.

U.S. v. MORAN, 573 F.3d 1132 (July 1, 2009)

Supervised release; conditions; prior notice; reasonable relationship to offense of

conviction

The Court (Pryor, w/ Birch & Hull) held that a district court does not abuse its discretion when it imposes a special condition of supervised release on a defendant to address his proclivity to sexual misconduct, without prior notice, and even though there was no sex offense in the instant offense of conviction, but based on a prior sex offense conviction.

U.S. v. TAGG, 572 F.3d 1320 (June 30, 2009)

Destructive device; 26 U.S.C. 5841, 5861(d), 5871; sufficiency; Second Amendment

The Court (Fay w/ Hull & Pryor) affirmed conviction of aiding and abetting unlawful possession of firearms, specifically, unregistered pipe bombs, rejecting arguments (1) that the evidence was insufficient to support his conviction for aiding and abetting (his stepson's manufacture and) possession of unregistered pipe bombs, and (2) that his possession was protected by the Second Amendment. The recent *Heller* decision did not help the defendant, because it expressly excluded weapons “not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”

U.S. v. GARI, 572 F.3d 1352 (June 30, 2009)

Alien smuggling; evidence; sufficiency; Sixth Amendment; Confrontation Clause; I-213 forms; prior bad acts; severance

The Court (Cox, w/ Tjoflat & Black) affirmed the two defendants' convictions for crewing a go-fast boat which smuggled 34 Cuban aliens into S. Florida, but it vacated their conviction on one count and remanded for resentencing as to all. The Court held: (1) The evidence was insufficient on one count,

because the government failed to prove that alien did not have prior authorization to enter the U.S., an element of the offense; even though codefendant Rodriguez did not raise this issue, the Court exercised its discretion to recognize plain error in the denial of his JOA motion on that count. (2) It declined to reach the question whether the I-213 forms contained inadmissible testimonial hearsay in violation of the Sixth Amendment because the first of 34 identical forms was introduced without objection, making harmless any error to overruling the objection made to the other 33 forms. (3) The district court did not abuse its discretion in denying the severance motion made on the morning of trial, before jury selection; the 404(b) evidence about Gari did not prejudice co-defendant Rodriguez.

THOMAS v. U.S., 572 F.3d 1300 (June 30, 2009)

Appeal; *Anders*; pro se brief; subsequent post-conviction motion; law of the case doctrine

The Court (Wilson w/Anderson & Goldberg) reversed denial of a § 2255 claim that had ineffective assistance of counsel and that the district court used an invalid state court judgment to enhance his federal sentence. The affirmance of Thomas's conviction on direct appeal after filing an *Anders* brief did not operate as an implied bar via the law of the case doctrine, to preclude a subsequent post-conviction motion raising some of the same issues.

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