

FEDERAL PUBLIC DEFENDER

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NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

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July 9, 2002

U.S. SENTENCING COMMISSION URGES CHANGES IN CRACK COCAINE PENALTIES

In a report issued in May, the United States Sentencing Commission recommended that Congress reduce the disparity between the penalties for crack and powder cocaine. The Commission says the task should be accomplished by reducing the penalties for crack cocaine and, in some instances and to a lesser degree, increasing the penalties for powder cocaine and other drug offenses.

Among the key findings by the Commission were the following:

- “After carefully considering all of the information currently available - some 16 years after the 100-to-1 drug quantity ratio was enacted - the Commission *firmly and unanimously believes that the current federal cocaine sentencing policy is unjustified and fails to meet the sentencing objectives set forth by Congress* in both the Sentencing
- Reform Act and the 1986 Act. The 100-to-1 drug quantity ratio was established based on a number of beliefs about the relative harmfulness of the two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution that more recent research and data no longer support.”
- “In 2000, almost *three-quarters (74.5%) of federal cocaine offenders had no weapon involvement*. Even when weapons were present, rarely were they actively used (2.3% of crack cocaine offenders).”
- “[I]n 1998 *the rate of powder cocaine use among young adults was almost seven times as high as the rate of use of crack cocaine.*”
- “In sum, instead of targeting serious and major traffickers in a manner similar to the articulated congressional design of penalties for major drugs of abuse, *crack cocaine mandatory*

minimum penalties currently apply most often to offenders who perform low-level trafficking functions, wield little decision-making authority, and have limited responsibility.”

- *“The overwhelming majority of offenders subject to the heightened crack cocaine penalties are black, about 85 percent in 2000. This has contributed to a widely held perception that the current penalty structure for federal cocaine offenses promotes unwarranted disparity based on race.”*

Although the Justice Department opposed any change from the current sentencing structure, the Commission is recommending:

- that the existing 100-to-1 ratio between crack and powder cocaine be reduced to a “ratio of not more than 20-to-1”;
- that the threshold for the five-year mandatory minimum penalty for crack be increased from 5 to 25 grams and that the threshold for the 10-year mandatory minimum be increased from 50 to 250 grams; and
- that the existing quantity-based penalties for powder cocaine remain unchanged.

The Commission estimates that these changes “would result in guideline sentencing ranges (based solely on drug quantity) for crack cocaine offenses approximately two to four times as long as powder cocaine offenses involving equivalent drug quantities, depending on the precise quantity involved.” That, in turn according to the Commission, should reduce the disparity between the

average crack and powder cocaine sentence from 44 months to a year. “Specifically, average sentences for crack cocaine would decrease from 118 months to 95 months, and the average sentences for powder cocaine offenses would increase from 74 months to 83 months.”

The Commission recommends that, in some instances, the penalties for powder cocaine and other drugs should increase. The Commission would have Congress accomplish the task by increasing the offense level upon a showing of a variety of circumstances: the brandishing or discharge of a gun; bodily injury other than that resulting from the use of the drugs; a prior felony drug conviction; distribution to a pregnant woman or a minor; or the involvement of a minor in the distribution.

Whether Congress will enact the recommendations is, of course, another matter. Congress has rejected or failed to act on 1995 and 1997 Commission Reports that had recommended a reduction in the penalties for crack cocaine. While you’re waiting to see what happens, you can view the Commission’s entire 112 page report at: http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm.

DRAYTON

As you have probably read and as mentioned in our Case Summaries, the United States Supreme Court, in a 6-3 decision, overturned the Eleventh Circuit’s decision in our Tallahassee bus station case, United States v. Drayton. Gwen Spivey, from our Tallahassee office, and Quincy panel member Steve Seliger had presented their case to the Court this past April.

Gwen, who gave the thirty minute argument, patiently and confidently parried with the justices. Justice Kennedy took the most aggressive tact. Justices Souter and Ginsburg asked the most sympathetic questions. Justice Scalia earned some ribbing from Justice Rehnquist and gave Gwen an opportunity for what the *New York Times* described as “an effective comeback,” with one of his questions. When he demanded to know what “innocent reasons” the two defendants may have had for wearing baggy clothes in “Tallahassee . . . in the summertime,” Gwen, politely and accurately answered: “It was February 4, 1999.” Justice Thomas, famous for not asking questions during oral arguments, even joined the questioning.

In a recent *New York Times* editorial, the writer described the Court’s decision as “mistaken,” noting that “we need [the protections of the Fourth Amendment] now more than ever.” Gwen and Steve are currently considering their remaining options.

NEW DECISIONS INTERPRETING APPRENDI

In the last month the Supreme Court has issued three major decisions that have defined much of the outline of the decision in Apprendi v. New Jersey, 530 U.S. 466 (2000). We’ve included in our Summary of Cases a brief summary of the three: United States v. Cotton, Ring v. Arizona, and Harris v. United States.

The best news comes out of the widely reported decision in Ring. In a stunning 7-2 decision that only the most optimistic could have hoped for, the Court rendered a decision that, by one media estimate, may overturn 150

death sentences in Arizona, Idaho, and Montana. The big question, for those of us in Florida, is whether the decision will affect the 383 people on Florida’s death row. Those on death row in Alabama, Indiana, and Delaware are in much the same position as Florida’s prisoners. The question is whether Florida’s process, where the judge must give weight to the jury’s sentencing recommendation, but must make the ultimate sentencing findings, is, for purposes of the Sixth Amendment, the equivalent of Arizona’s, where the judge has had the exclusive responsibility for making the sentencing findings and determining the sentence.

Cotton was the worst of the trio. There, in a 9-0 decision, the Court concluded that the Government’s failure to allege drug quantity in the indictment was not a “jurisdictional” defect. It seems to us that the decision pretty well forecloses any hope for post-conviction relief based on an indictment that omits drug quantity or similar element of the offense. It leaves, too, only the plain error route for those who failed to object in the trial court and are raising the issue on direct appeal.

Harris upholds the decision in McMillian v. Pennsylvania, 477 U.S. 79 (1986), one that many had hoped would fall to the logic of Apprendi. Accordingly, McMillian’s holding, that allows the sentencing court to impose mandatory minimum sentences based upon circumstances proven by a preponderance of the evidence at sentencing, remains the law. On a hopeful note, the decision was a close one, 5-4, and emphasizes the fact that the circumstance involved, that of brandishing a firearm in violation of 18 U.S.C. § 924(c), did not alter the maximum sentence. It leaves open to challenge the drug enhancements based on prior convictions that not only

establish a mandatory minimum sentence, but also provide for a higher maximum sentence. Clearly, too, the continued viability of Almendarez-Torres v. United States, 538 U.S. 224 (1998), that allows for increases to the maximum sentence on the basis of prior convictions, remains an open question.

The lesson provided by Cotton when coupled with the arguments left unresolved in Harris, reemphasizes the need for making these remaining challenges in the trial court. It seems clear that those who fail to do so, will lose whatever chance of success they might have had on appeal.

NEW ELECTRONIC BRIEF REQUIREMENT

If, lately, you've been involved with an appeal to the Eleventh Circuit you've been receiving a directive from the Court that reads: "In addition to providing the required number of paper copies of briefs, all parties (except pro se) are required to provide a brief in electronic format." The directive goes on to reference 11th Cir. R. 31-5(a) & (b) and to provide some specifics including the requirement that the electronic brief "be completely contained in a single Adobe Acrobat® PDF file." The briefs we've been receiving from the Government are in compliance, with a disk attached to the back of the brief.

The directive conflicts with the cited Eleventh Circuit Rules in that the rules do not require an electronic filing, but say instead that a party "may provide the court" with an electronic brief. We called the Clerk's office and were told that the Court was aware of the conflict and will, before long, resolve it with a revision of the rule. We were told, too, that

while the Court "strongly suggests" that parties submit a disc or CD rom with the written brief, that the Court will continue to accept written briefs without a disk or CD rom until such time as the rule is changed.

NEW MAGISTRATE

On May 9th, Casey Rodgers began serving as one of the two Magistrate Judges in Pensacola. She replaces Susan Novotny who recently retired.

Judge Rodgers is a native of the Pensacola area, having been raised in Gulf Breeze. Following a two year tour of duty with the U.S. Army, she earned her bachelors degree in political science from the University of West Florida. Subsequently, she graduated magna cum laude from the California Western School of Law. As a law student, she interned with Judge David Thompson of the United States Circuit Court of Appeals for the Ninth Circuit. When she returned home to northwest Florida, she worked as a law clerk for Judge Lacey Collier. Later, she worked in private practice, specializing in general civil litigation, with an emphasis on employment law. She also served several years as general counsel for a large multi-specialty physician group practice in Pensacola.

In one respect she has already raised the bar for those of us in the Northern District. Since 1999, she's run in a variety of marathons, including the Atlanta Marathon, the Blue Angel Marathon, the Mobile Marathon, the Mississippi Gulf Coast Marathon, the Boston Marathon, and the Pittsburgh Marathon. She is currently training for this fall's Marine Corps Marathon.

NEW CLERK OF COURT

In June, William McCool assumed the job of Clerk of Court for the District Court of the Northern District of Florida. Mr. McCool, who will be based in Tallahassee, had served the preceding six years as the Chief Deputy Clerk in the Tucson Division of the District Court of Arizona. Before assuming that position, he had, in the years since 1983, served as a court administrator or clerk in various courts in Oregon, Colorado, and Arizona. He earned his masters degree in Judicial Administration from the University of Denver College of Law. After having studied in West Germany and Oregon, he had earlier been awarded a bachelors degree in German Studies by the University of Oregon. In a swearing in ceremony held last month, Judges Stafford, Hinkle, and Sherrill, welcomed Mr. McCool, advised they were looking forward to working with him, and lauded his qualifications.

NEW ASSISTANT FEDERAL PUBLIC DEFENDER

By now well settled in our Tallahassee office, Chet Kaufman began working as one of our appellate attorneys this past January. Chet had, for the preceding seven years, been an assistant public defender for Florida's Second Judicial Circuit. There, he was primarily responsible for litigating capital appeals. He has been active in Florida's Public Defender Association filing a variety of amicus curiae briefs on behalf of the organization, including one in Lynch v. Mathis, 519 U.S. 433 (1997). Prior to joining the state public defender's office he had served as a clerk and executive assistant for, then, Florida Supreme Court Justice Rosemary Barkett. He was one of the top students in his

1990 FSU College of Law class, served as the Executive Editor of the Law Review, and was a member of the Order of the Coif. Before going to law school he worked as a newspaper reporter working in Pensacola, Baton Rouge, and Clearwater. He's a graduate of Queens College of the City University of New York having earned a degree in journalism and having distinguished himself as a manager of the school's ice hockey team. We're fortunate and delighted to have him join us.

CHANGES TO RULE 35 AND OTHER RULES OF CRIMINAL PROCEDURE

The Supreme Court has approved changes to the Federal Rules of Criminal Procedure. Those changes were submitted to Congress in April. Unless Congress takes further action, the changes will become effective December 1st. Among the changes are what is described as a "comprehensive 'style' revision" of all of the rules. There are also a number of substantive changes.

The biggest change is to Rule 35. Under the current rule, the Government has to file its motion for a sentence reduction within one year of the imposition of the sentence. The proposed rule dramatically increases the post-sentencing possibilities for sentence reductions, allowing the Government, in three circumstances, to file the motion after the year has passed. The rule provides that the Government may file the motion after the year if: (1) the defendant provides information he or she *learns after* the year had passed; (2) the defendant provides information within the year, but the Government uses the information after the year had passed; or (3) the defendant, who fails to provide known information within the year, could not have "reasonably" anticipated the "usefulness" of the

information, and, as soon as he or she learns of the information's usefulness, "promptly" passes it on to the Government.

One of the more controversial changes involved Rules 5 and 10. That change allows for video teleconferencing for the initial appearance and arraignment *if* the defendant consents.

The other substantive changes have a lesser impact and we'll wait until our next newsletter to summarize them for you. If in the meantime, you would like to see all of the changes, the proposed rules in their entirety are available at the website of the Administrative Office of the United State Courts, <<http://www.uscourts.gov/rules>>.

IN THE ARENA: IMPROPER CORROBORATION OF INFORMANTS

The Government often, of course, relies on informants in their cases. At trial, many a prosecutor has pursued the same line of questioning as the Government did in United States v. Martinez, 253 F.3d 251, 253 (6th Cir. 2001). The following exchange took place as the prosecutor questioned a narcotics deputy about the informant, "Mr. Carboni":

- Q: Now, you've had the occasion to work with Mr. Carboni not only on this case but on some other cases?
- A: Yes, Ma'am.
- Q: Approximately how many?
- A: Seven other cases.
- Q: And what did you find out about the information he had provided to you?
- A: That the information he's provided has always been credible, it's been accurate and truthful.

What's wrong with the questioning? As pointed out in an article by law professor Stephen A. Saltzburg in the Spring 2002 American Bar Association Publication, Criminal Justice, the performance of the informant in unrelated cases is irrelevant. Federal Rule of Evidence 608 allows a party to support the credibility of a witness only if the credibility of the witness was attacked and then only by opinion and reputation evidence. Specific instances of conduct, such as the informants efforts in other cases, may not be used.

The article contains a thoughtful analysis of the issue and argues that the Sixth Circuit in Martinez got part of the issue wrong in a way that "is certain to get lawyers on both sides of the case in trouble with the trial courts." With the permission of the professor and the ABA we've posted the article on our website: <<http://fdp.yourvillage.com/>>. All you have to do is click on trial tactics. If you would prefer a copy of the article, just call Margaret in our Tallahassee office at (850) 942-8818 and she'll be glad to mail you or fax you a copy of it.

PANEL TRAINING

You should already have notice of this month's panel training. As announced, we're revealing the thus far closely held secret of how to make a profit on CJA cases. Included, as well, will be some useful information on billing and securing the services of investigators and expert witnesses. In Pensacola, Panama City, and Tallahassee we will, as always, be showing the video from noon to 1 o'clock in the respective federal courthouse on the following dates:

Panama City: July 10

Pensacola: July 18
Tallahassee: July 30

In **Gainesville**, we are going to try something different. We'll be showing the video on **July 24**, but in the friendly confines of our office and at two different times, from **9:00 to 10:00** in the morning and then from **noon to 1:00**. The office address is: **101 S.E. Second Place, Suite 112**.

Please note that we've changed the date of the **Tallahassee** training. We had scheduled it and sent out notices saying it would be held on July 25th. So as not to create a conflict with the Federal Bar Association's seminar, we've moved our training session to July 30th.

We will be taking the month of August off and there will be no training session. We'll begin again in September.

SEMINAR FOR CRIMINAL AND IMMIGRATION ATTORNEYS

The Tallahassee Chapter of the Federal Bar Association will be presenting, on July 25th, from 11:45 to 4:55, a seminar for criminal defense and immigration attorneys. It will be held at the Double Tree Hotel, in Tallahassee, at 101 S. Adams Street. The seminar will include an overview of the Patriot Act by acting United States Attorney Tom Kirwin, an ethics presentation by Tallahassee lawyer Everett Anderson, and a panel discussion led by the Honorable William Strasser, an immigration judge from Newark, New Jersey. The panel discussion will address three topics: (1) Criminal Sentencing Guidelines in State Courts and the Effect on Aliens; (2) Convictions, Crimes Involving Moral Turpitude, and Aggravated Felonies; and (3) Pointers on Plea Bargaining

Relating to Aliens Facing Criminal Convictions. The fee of \$65 includes lunch and written materials. Registration forms, which we will be emailing or faxing to you within the next day or so, must be submitted to the Chapter President, Bill Bubsey, 210 S. Monroe St., Tallahassee, FL 32302, by July 24th. If you have any questions, please call Bill Bubsey at 224-2600.

VICTORIES

In a case we should have included in our last newsletter, **Bob Dennis**, of our Pensacola office, won an acquittal for a client charged with possession of a firearm by a convicted felon.

In June, **Randy Murrell**, representing a client charged with two counts of using a deadly weapon to assault a federal officer, won an acquittal on one count and earned a hung jury on the other.

DOWNWARD DEPARTURES

Washington, Terrence	Judge: Mickle, S.
Atty:	Steven Glazer
Docket:	4:01cr48-SPM
Charge:	Ct. I Consp WITD cocaine, Ct II Poss WITD cocaine
Range:	135-168 months
Sentence:	60 months BOP
Date of Imposition of Sentence:	2/11/02
Grounds:	5k1.1

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.

PACER

PACER is a web-based electronic database of court dockets. In some areas of the country, it also includes scanned images of all the pleadings, a feature that will, eventually, come to North Florida. With or without the scanned pleadings, though, it is a useful tool for keeping abreast of your own cases, and it is an investigative tool for finding out about other people's cases. If you don't already have an account, you can arrange for a free CJA account by calling the PACER Service Center at 800-676-6856. Pacer homepage is <<http://pacer.psc.uscourts.gov/>>. The service is free so long as you are using it in connection with a pending CJA case. Accordingly, you may want to consider signing up for two accounts; the free CJA account and a second account for civil and retained cases. The fee for the latter is seven cents per page accessed. For imaged documents the charge is capped at a maximum of \$2.10 per document.

For those of you that have been using PACER, you may want to note one minor improvement. Effective as of May 17, fees for work that is performed on CJA cases in all federal courts are automatically exempt from payment of the electronic public access fee. Although you have been exempt since 1994 from the fees for work related to CJA cases in the jurisdictions where the case is pending, you have had to apply for credit to the PACER Service Center for charges incurred when accessing other jurisdictions. You don't have to any more.

DAILY 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

CLAY v. U.S., 2002 WL 704373 (cert. granted June 28, 2002)

§§ 2255 & 2244, Time Limit on Motion to Vacate Conviction

Clay, in an attempt to collect on a crack debt, set fire to debtor's home. Clay was convicted of federal arson and narcotics trafficking charges. Mandate was issued December 15, 1998. February 2, 2000, Clay pro se filed a § 2255 motion arguing ineffectiveness, but it was time barred. § 2244 under the AEDPA allows filing up to one year after the termination of the 90-day period to petition for writ, yet § 2255 makes federal convictions final one year after the conclusion of the appellate proceedings. Thus, federal prisoners who do not seek certiorari do not receive the 90-day extension, which made Clay's motion filed untimely. The cert. grant is concerns whether under § 2255 a judgment becomes 'final' one year after a court of appeals mandate is issued on direct appeal or one year after the potential ninety days of additional time for filing a petition for writ of certiorari.

DEMORE v. KIM, 2002 WL 704365 (cert. granted June 28, 2002)

Constitutionality of No-Bail Hearings for Lawful Permanent Resident Aliens

Kim, a Korean citizen and lawful permanent resident alien, was convicted of burglary in 1996, and of petty theft with priors in 1997. Upon his release, the INS detained Kim pursuant to 8 U.S.C. § 1226(c)(1)(B), which includes a no-bail provision. Kim sought habeas relief arguing that the no-bail provision violates due process. The district court agreed, as did the 9th Circuit which held that

the government did not provide strong "special justification" to rationalize detaining Kim. The cert. issue is whether due process required the INS to hold a bail hearing for a lawful permanent resident alien to determine the flight risk and danger to the community.

MARTINEZ v. CHAVEZ, 122 S. Ct. 2326 (Mem) (cert. granted June 3, 2002)

Interrogation of severely injured suspect

Police shot Martinez five times. Without informing him of his Miranda rights, Officer Chavez interrogated Martinez in the hospital trauma room while emergency personnel were treating him. Martinez was not prosecuted. Martinez sued under 42 U.S.C. 1983 alleging that the officers violated his constitutional rights during his arrest and interrogation. The district court granted summary judgment for Martinez on the interrogation claim, and the 9th Cir. affirmed, 270 F.3d 852 (9th Cir. 2001). The Ninth Circuit found an unconstitutional coercive interrogation of Martinez, and that qualified immunity does not apply because a reasonable officer could not have found these actions in harmony with the Fifth and Fourteenth Amendments.

VIRGINIA v. BLACK, 122 S. Ct. 2288 (Mem) (cert. granted May 28, 2002)

Constitutionality of state statute criminalizing cross burning

Black led a group's KKK rally on private property, with permission, and after spewing his scum, burned a 30-foot cross. Black was prosecuted and fined \$2,500 under Virginia law that says "It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place." The Virginia Supreme Court said the statute violated the First Amendment because

it selectively regulated the content of symbolic speech and is overbroad.

CONNECTICUT DEPT. OF PUBLIC SAFETY v. DOE, 122 S. Ct. 1959 (Mem) (cert. granted May 20, 2002)

Due Process; Sex Offender Registration Law

The Court agreed to consider the issue of whether Connecticut's version of "Megan's Law," requiring sex offenders to register and providing for the dissemination of that information to the public. a sex offender registration law violates, procedural due process if an offender is not given an opportunity to be heard to determine the likelihood of current dangerousness before being included in the registry.

SUPREME COURT CASES

U.S. v. BASS, 2002 WL 1393948 (June 28, 2002) (Per Curiam)

Discovery made difficult to prove race-based selective prosecution

The feds indicted Bass, who is black, on capital murder with intent to seek the death penalty. Bass alleged that the Government's decision to seek death was racially motivated, and he sought discovery relating to Government's charging practices. The District Court agreed, and when the Government refused to cooperate, the district court struck the death penalty notice. The 6th Cir. affirmed, but the USSC reversed, holding that a defendant must show evidence that similarly situated persons were treated differently to entitle him to discovery on a claim of selective prosecution. The Court said raw statistics regarding overall charges say nothing about charges brought against 'similarly situated defendants. Shades of McCleskey.

STEWART V. SMITH, 2002 WL 1393891 (June 28, 2002) (Per Curiam)

Habeas Precluded When State Procedural Law Question is Independent of Federal Jurisdiction

In Arizona in 1982, Smith was convicted and sentenced to death. The Arizona courts denied his successive petition for state postconviction relief because he failed to comply with Arizona Rule 32.2(a)(3) due to the fact that his ineffectiveness assistance claim had been previously raised. Smith argued that the bar should be excused because of counsel conflict: his trial and postconviction lawyers were the same public defender's office. The Arizona court refused, and Smith sought federal habeas under 28 U.S.C. §§ 2241 & 2254. The 9th Cir. reversed, holding that although the state court's procedural default ruling was regularly followed and therefore adequate, Rule 32.2(a)(3) required knowing and voluntary waiver of claims of sufficient constitutional magnitude. The USSC asked the Arizona court for a proper interpretation of 32.2(a)(3), and Arizona responded that the waiver depended not on the merits of the claim but on the right alleged to have been violated. Relying on that answer, the USSC reversed the 9th Circuit because state law did not require an examination of whether the right was actually violated. They need only identify what type of claim it is, and there is no indication that this identification is based on an interpretation of what federal law requires.

ALLEN (BILLIE J.) v. U.S., 2002 WL 1393602 (June 28, 2002)

Ring applied to federal death penalty

The Court granted cert, vacated, and remanded to the Eighth Circuit for further consideration in light of Ring v. Arizona. (The U.S. Supreme Court on June 28 summarily denied cert. on Florida death

penalty cases pending review based on Apprendi/Ring, including King (01-7804) & Bottoson (01-8099), while issuing GVR's based on Ring in pending Arizona death penalty cases.)

BD. OF EDUC. OF INDEP. SCH. DIST. NO. 92 OF POTTAWATOMIE COUNTY v. EARLS, 2002 WL 1378649 (June 27, 2002)

Suspicionless School Drug Testing Policy Approved

Thomas, writing for a 5-4 majority, held that an Oklahoma High School's suspicionless drug testing policy that applies to nonathletes is reasonable under the Fourth Amendment in preventing and deterring drug use among schoolchildren.

HOPE v. PELZER, 2002 WL 1378412 (June 27, 2002)

Eighth Amendment

Stevens, writing for a 6-3 majority, wrote Alabama prison guards should have known (for qualified immunity purposes) that they were violating a prisoner's Eighth Amendment rights when they tied a prisoner to a hitching post and left him in the sun to bake with little water and no bathroom breaks.

RING v. ARIZONA, 2002 WL 1357257 (June 24, 2002)

DEATH SENTENCE INVALIDATED UNDER APPRENDI!!!!!!!!!!!!!!!!!!!!!!

In a 7-2 decision authored by Ginsburg, the Court overruled Walton v. Arizona in light of Apprendi v. New Jersey and held a the Sixth Amendment jury trial guarantee is violated when a judge, rather than a jury, determines whether aggravating circumstances exit to sentence a murderer to death. Breyer concurred by reasoning that the Eight Amendment requires jury trials in capital

sentencing. O'Connor and Rehnquist dissented, arguing that Apprendi - not Walton should have been overruled. Under the majority's ruling, at least five state death penalty systems are invalid, and possibly four more "hybrid" states, including Florida, where the jury merely recommends a penalty but the judge makes the findings and the decision.

HARRIS v. U.S., 2002 WL 1357277 (June 24, 2002)

McMillan survives Apprendi

In a 5-4 decision authored by Kennedy, the Court held that 18 U.S.C. § 924(c)(1)(A)(ii), is constitutional under the Fifth and Sixth Amendments in increasing a defendant's minimum sentence based on a judicial finding of brandishing a firearm. As a matter of statutory interpretation, § 924(c)(1)(A) defines a single offense, in which brandishing and discharging are sentencing factors to be found by the judge, not offense elements to be found by the jury. Congress simply dictated the precise weight to be given to one traditional sentencing factor. Thomas filed a dissenting opinion in which Stevens, Souter, and Ginsburg, joined.

KIRK v. LOUISIANA, 2002 WL 1359438 (June 24, 2002)(Per Curiam)

Exigent Circumstances [Still] Needed to Enter Home Without Warrant Or Consent

In a unanimous decision, the Court reaffirmed Payton v. New York and reversed a Louisiana decision that erroneously had held there was no need to determine whether exigent circumstances existed for police, with probable cause but no warrant, to enter a home, arrest a suspect, and seize contraband from the person's body.

U.S. v. RUIZ, 2002 WL 1357244 (June 24, 2002)

No discovery required before reaching plea agreements

In a unanimous decision authored by Breyer, the Court held that the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant. A guilty plea can be entered "voluntarily" without the prosecutors first disclosing material impeachment information that they would have had to make had the defendant insisted upon a trial. The Constitution permits courts to accept plea despite various forms of misapprehension under which a defendant might labor.

CHRISTOPHER v. HARBURY, 122 S. Ct. 2179 (June 20, 2002)

No denial of access to courts by government deception

Harbury alleged that federal government officials intentionally deceived her in concealing information that her husband, a foreign dissident, was being detained and tortured in his own country by military officers of his government, who were paid by the Central Intelligence Agency. One count of the complaint, brought after the husband's death, charges that the official deception denied respondent access to the courts by leaving her without information, or reason to seek information, with which she could have brought a lawsuit that might have saved her husband's life. The Court held that she did not state an actionable claim.

ATKINS v. VIRGINIA, 122 S. Ct. 2242 (June 20, 2002)

DEATH PENALTY FOR RETARDED IS UNCONSTITUTIONAL!!!!

Much has changed since Penry, and the Court found no reason to disagree with the legislative consensus. STEVENS, J.,

delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined.

U.S. v. DRAYTON, 122 S. Ct. 2105 (June 17, 2002)

Fourth Amendment

Kennedy, writing for a 6-3 majority, rejected AFPD Gwen Spivey's argument and reversed the 11th Circuit, holding that officers accosting individuals on a bus and asking for their consent to be body-searched, without advising them that they had the choice to decline, is permissible police conduct that does not amount to either a seizure or coerced consent. Souter, Stevens and Ginsburg got it right (in dissent, of course).

WATCHTOWER BIBLE & TRACT SOC'Y. OF N.Y., INC. v. VILLAGE OF STRATTON, 122 S. Ct. 2080 (June 17, 2002)

First Amendment

The Court held, 8-1 (by Kennedy), that a local ordinance making it a misdemeanor to engage in door-to-door advocacy without a permit violates the First Amendment. Rehnquist was the dissenter.

CAREY v. SAFFOLD, 122 S. Ct. 2134 (June 17, 2002)

"Pending" under § 2244 of the AEDPA

Saffold filed a state habeas petition seven days before the federal deadline. Five days after the state trial court denied his petition, he filed a further petition in the State Court of Appeal. Four and one-half months after that petition was denied, he filed a further petition in the

State Supreme Court, which denied the petition on the merits and for lack of diligence. The Federal District Court dismissed his subsequent federal habeas petition as untimely, finding that the federal statute of limitations was not tolled during the intervals between the denial of one state petition and the filing of the next because no application was "pending" during that time. The USSC disagreed and held that as used in § 2244(d)(2), "pending" does cover and toll the time between a lower state court's decision and the filing of a notice of appeal to a higher state court.

MCKUNE, WARDEN, v. LILE, 122 S. Ct. 2017 (June 10, 2002)

Self-incrimination privilege protecting prisoners

Before Lile's release on sex charges, prison officials ordered him to participate in a Sexual Abuse Treatment Program (SATP), that required inmates to complete and sign a non-privileged "Admission of Responsibility" form in which they accept responsibility for the crimes for which they have been sentenced, and complete a sexual history form detailing all prior sexual activities, regardless of whether the activities constitute uncharged criminal offenses. Lile refused to participate on the ground that the required disclosures of his criminal history would violate his Fifth Amendment privilege against compelled self-incrimination. **Plurality of 4:** The predictable four (by Kennedy) concluded that the SATP serves a vital penological purpose, and that offering inmates minimal incentives to participate does not amount to compelled self-incrimination prohibited by the 5th amendment. **Dissent of 4:** The other predictable four (by Stevens), concluded that the SATP's legitimate therapeutic purposes do not justify reduced 5th amendment protection

for prisoners ordered to participate. **O'Connor:** Agreeing with the dissent, she says the 5th amendment compulsion standard is broader than the 'atypical and significant hardship' standard for evaluating due process claims in prisons; but agreeing with the plurality, she says the alterations in Lile's prison conditions as a result of his failure to participate in SATP were not so great as to constitute compulsion.

ALABAMA v. SHELTON, 122 S. Ct. 1764 (May 20, 2002)

Right to counsel in any offense that may result in prison time

Writing for a 5-4 majority, Ginsburg said the Sixth Amendment bars the imposition of suspended sentence that may "end up in the actual deprivation of a person's liberty," even when imprisonment is not imminent, if the indigent defendant had not been offered "the guiding hand of counsel" in the prosecution for the crime charged.

U.S. v. COTTON, 122 S. Ct. 1781 (May 20, 2002)

No Apprendi defect in indictment

In the first progeny of Apprendi, the Court held, unanimously (Rehnquist), that no jurisdictional error was created in an indictment charging drug conspiracy but failing to allege the drug quantity found by a judge and used to increase the sentence beyond the statutory maximum. The Court had to overrule a 19th century case to reach that result. The Court then applied the plain-error test and held the sentencing did not seriously affect the fairness, integrity, or public reputation of judicial proceedings because the evidence of the required drug amounts was overwhelming.

ASHCROFT v. A.C.L.U., 122 S. Ct. 1700 (May 13, 2002)

First Amendment; Child Online Protection Act

In a fractured decision with four opinions, the Court (Thomas) held that the Child Online Protection Act (COPA) reference to "contemporary community standards" in defining what was harmful to minors did not alone render the Act unconstitutionally overbroad under the First Amendment. However, the Court apparently had some doubt as to whether the Act can otherwise withstand constitutional scrutiny, so the Government is enjoined from enforcing the Act while the Third Circuit on remand considers whether the statute is unconstitutionally vague, or whether the statute survives strict scrutiny.

ASHCROFT v. THE FREE SPEECH COALITION, 122 S. Ct. 1389 (Apr. 16, 2002)

First Amendment, Child Pornography Act

The Court struck down as unconstitutionally broad sections of the Child Pornography Prevention Act of 1996 (CPPA), which prohibit computer-generated images that appear to be minors engaging in sexually explicit conduct. The CPPA bans any explicit material produced or distributed that panders child pornography. The CPPA expanded the Ferber prohibition on child pornography to include computer-generated images that appear to be minors engaging in sexually explicit conduct. The Court held that two CPPA provisions were too broad because they unconstitutionally banned a substantial amount of protected speech without regard to whether it appealed to the prurient interest, was patently offensive, or had any serious redeeming value. Ferber was distinguished because it proscribed exploitation of actual

children in production of the “speech.” The Court also held that the section that made knowingly possessing mislabeled prohibited material a crime was overbroad.

SELECTED ELEVENTH CIRCUIT CASE SUMMARIES

In the past we've included summaries of all of the Eleventh Circuit opinions that have issued since our last newsletter. Concerned that our newsletter is getting to be too long and unwieldy, we've decided to no longer include summaries of all of the opinions; opting instead to include those we think will be most helpful. We'll continue to issue our daily summaries of all the opinions via email.

U.S. v. WOODRUFF, 2002 WL 1446932 (July 3, 2002)

Hobbs Act; Apprendi

Woodruff asserted at trial that Hobbs Act robbery charges were fatally infirm because it failed to allege criminal intent, i.e., "knowingly." The 11th Cir. rejected that claim, holding that if an indictment alleges that a defendant violated the Hobbs Act by unlawfully threatening or using force, violence, or fear of immediate injury to take property against the victim's will, the indictment necessarily imparts an allegation that the defendant acted knowingly; and there is no more strict review standard to be applied when the matter is raised at trial, as it was here, than when it was not raised at trial, as occurred in *United States v. Gray*, 260 F.3d 1267, 1283 (11th Cir. 2001), where the court also found no reversible error on a similar claim. The evidence was sufficient to show the robberies affected interstate commerce. Also, no Apprendi error in imposing a 25 year statutory minimum under § 924(c)(1)(C)(i) even though the indictment failed to allege that it was a second or subsequent conviction under 18 U.S.C. § 924(c), because that was a "sentencing factor" and not an "element."

FORD v. MOORE, 2002 WL 1426556 (July 2, 2002)

§ 2254, AEDPA, Tolling Time Limits

The issue in this state prisoner's habeas petition was whether the AEDPA's one-year statute of limitations is tolled when a state collateral attack does not present a federally cognizable claim. Ford was convicted, exhausted his state appeals, lost a Fla. R. App. P. 3.850 motion, and then lost a Fla. R. App. P. 3.800 motion before filing under § 2254. The district court dismissed as untimely, holding that although AEDPA's one-year statute of limitations was tolled during the 3.850 proceedings, it was not tolled during the 3.800 proceedings because his claim that the sentence exceeded statutory limits did not present a federally cognizable claim. Noting as an aside that Ford did appear to raise a federal claim in his 3.800 motion, the 11th Cir. reversed, concluding that "we now join with the Ninth and Seventh Circuits and conclude, based on the plain language of AEDPA's tolling provision, the federal habeas statutory limitations period is tolled regardless of whether a properly filed state post-conviction petition or other collateral review raises a federally cognizable claim."

U.S. v. MCCARRICK, 2002 WL 1331543 (June 18, 2002)

Insufficient evidence of specific intent

The Court held that the government failed to prove the necessary element of specific intent to defraud on convictions of one count of bank fraud and one count of making a false statement to a government agency.

BAKER v. GEARINGER, WARDEN, 2002 WL 1305993 (June 14, 2002)

§ 2254, Double Jeopardy

Convictions of child molestation and aggravated child molestation under Georgia

law, arising out of a single episode, did not violate double jeopardy.

U.S. v. ZELAYA, 2002 WL 1283407 (June 11, 2002)

Re-entry after being deported for conviction

Zelaya was convicted of illegally re-entering the U.S. after having been deported subsequent to a conviction for an aggravated felony. He argued that the order pursuant to which he was deported was invalid, and that the instruction erroneously defined "deportation" to mean physical removal from this country, which was subsequent to his conviction, rather than the issuance of the deportation order, which was prior to his conviction. The 11th Cir. affirmed, holding that he failed to exhaust administrative remedies in collaterally attacking the deportation order, and for purposes of 8 U.S.C. § 1326(b)(2), deportation was subsequent to a conviction when the alien is physically removed from the United States after the conviction even if the warrant for the deportation was issued before the conviction.

U.S. v. GUERRA, 2002 WL 1283405 (June 11, 2002)

Cigar counterfeiting; valuation under guidelines

Guerra and others were convicted of trafficking, conspiracy to traffic in, and aiding and abetting the trafficking of, counterfeit cigars arising from a scheme to print counterfeit bands and labels of premium cigars and affix them to inferior cigars. The district court found no errors as to sufficiency, instructions, or comment on silence. As to valuation, the district court (1) correctly considered "infringing items" to be cigars rather than labels because they are intertwined on these facts; (2) erred by relying in part on

the value of genuine cigars where there is sufficient evidence of the value of the counterfeit items and no findings as to the quality of the counterfeit goods; and (3) erred in increasing the sentencing levels under USSG §§ 2B5.3 & 1B1.3 by assigning the number of "infringing items" according to the number of labels while at the same time basing value on the retail value of cigars.

U. S. v. DIAZ-CLARK, 2002 WL 1204785 (June 5, 2002)

Limit on court's authority to reduce sentence

A district court has no jurisdiction, after the expiration of the time provided by Rule 35 and without any federal habeas corpus petition before it, to reduce a prisoner's sentence based upon its conclusion that the sentence it had originally imposed was erroneous due to a grouping error under the Sentencing Guidelines. "After a thorough review of the pleadings, the record, and the briefs on appeal, we conclude that the district court erred in concluding that aside from the specific parameters set forth by the federal statutory provisions controlling sentencing, as well as the Federal Rules of Criminal Procedure, it could invoke an "inherent power" to correct what it viewed as the illegal sentence it had imposed in the Miami Case. "

JACKSON v. SECRETARY OF DOC, 2002 WL 1270178 (June 7, 2002)

District Court can sua sponte find § 2254 time bar

After Jackson filed a § 2254 motion, the state failed to assert a time bar under the AEDPA, but the district court sua sponte raised and relied on the time bar. The 11th Circuit held, consistent with other circuits, that the district court had such authority even though the time bar is an affirmative defense. "Jackson

allowed 395 days of untolled time to lapse from his one-year statute of limitations even with the benefit of the additional 90-day period. Consequently, the statute of limitations bars Jackson's petition, and, for that reason, the district court properly denied the petition."

MCDANIEL v. MOORE, 2002 WL 1173434 (June 4, 2002)

"notice of the entry" under FRAP 4(a)(6)

The district court dismissed McDaniel's § 2254 motion with prejudice based on procedural default. McDaniel then filed a motion for relief from judgment under Federal Rule 60(b), which the court denied on Feb 16, 2000, but which McDaniel did not receive at the time. The court on March 15 finally sent McDaniel a letter advising that his motion had been denied but, offering no reasons. McDaniel requested a copy of the order on March 28, and then in a motion dated April 4, 2000 and file stamped on April 7, he moved to reopen the time to file notice of appeal, claiming he filed within 7 days of receiving "notice of the entry" under FRAP 4(a)(6). The court denied the motion to reopen the time to file notice of appeal as untimely, and the 11th Circuit affirmed. The Court acknowledged a split of authority on the meaning of "notice of the entry" but held that "We need not address this conflict here, because even if we were to agree with McDaniel that only written notice is sufficient, the clerk's letter dated March 15 satisfies this requirement."

NELSON v. ALABAMA, 2002 WL 1162188 (June 3, 2002)

Faretta

In a 1987 capital collateral proceeding, a state judge held a Faretta hearing and allowed Nelson to proceed pro se then and in future collateral proceedings. Before a resentencing

proceeding before the same judge in 1994, Nelson sent a letter to the judge saying "I would appreciate if your honor will allow me to represent myself at the proceedings. If it's necessary for me to have an attorney present at said proceedings, I would appreciate if your honor will appoint me an attorney to serve in the capacity as stand-by counsel only." Without conducting a new Faretta hearing, the judge allowed him to proceed pro se. Nelson asked for the death sentence and got it. On 2254 review, the 11th Circuit held that the absence of a Faretta hearing immediately prior to Nelson's 1994 sentencing hearing did not result in "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," under the AEDPA.

BROADWATER v. U.S., 2002 WL 1162190 (June 3, 2002)

Summary denial of 2255 improper where potentially valid claims exist

Broadwater filed a § 2255 motion alleging ineffective assistance of counsel on a variety of grounds. The district court summarily denied relief, but the 11th Circuit remanded because it found some potentially meritorious allegations if supported in a lengthy record. "[A]n adequate appellate review of the basis for the district court's decision requires something more than a mere summary denial of the § 2255 motion by the district court."

U.S. v. DESCENT, 2002 WL 1058156 (May 28, 2002)

Can't revise jury instructions after deliberations begin; grouping laundering under USSG not retroactive

After the jury commenced deliberations on money laundering/mail fraud/conspiracy case, the court modified its forfeiture jury

instructions to permit a forfeiture judgment of up to \$1,688,845, rather than the \$1,288,140 permitted under the court's original instructions. The appellate court found this to be reversible under Fed. R. Crim. P. 30, depriving Descent of opportunity to argue the amended instruction to the jury, and ordered a new judgment of forfeiture in the amount of \$ 1,288,140. Also, appellate court found that amend. 634, revising USSG § 2S1.1, to require grouping of closely related money laundering and fraud counts, effects a non-retroactive substantive change, of course depriving defendant of any benefit in this case.

U.S. v. COOK, 291 F.3d 1297 (May 21, 2002)

Probation revocation; policy statements; sentencing tables; drug treatment

The Court agreed with three other circuits that, under the version of 18 USC 3565(a)(2) after the 1994 amendment, "a court is authorized to resentence a defendant without being restricted to the guideline range applicable at the time of the initial sentencing hearing; instead a court must only comply with subchapter A in sentencing the defendant." The Court also rejected the defense argument that, although the Chapter Seven policy statements and sentencing ranges are not binding, the sentence was erroneous because well above the range recommended by the Chapter Seven table. The Court stated that 3553 requires the court only to consider those policy statements. In this case, the district court had imposed the longer sentence to meet the defendant's demonstrated need for drug rehab and treatment.

U.S. v. SNYDER, et al., 291 F.3d 1291 (May 21, 2002)

Comments; fair trial; fraud; 2F1.1(b)(6)(A); victims' loss

The Court rejected all arguments on behalf of this doctor and wife team convicted for fraudulently reporting favorable results from clinical trials to boost their interest in stock. The comments by the judge and prosecutor were found innocuous. The two-level enhancement under 2F1.1(b)(6)(A) for knowingly endangering clinical-trial volunteers, since deleted and consolidated into 2B1.1, was affirmed. On the bigger issue, the Court held that a district court may base its loss calculation on the "loss to victims" as opposed to "gain to defendants" standard but must employ a reasonable method for calculating that loss, given the available information.

U.S. v. HUNTER, 291 F.3d 1302 (May 21, 2002)

Suppression; Terry stop; reasonable suspicion

The Court **reversed** the grant of a motion to suppress, disagreeing with the conclusion of both the magistrate and the district court that the officers did not have reasonable suspicion. Officers patrolling a high crime area, known for drugs and firearms, saw men engaged in illegal gambling in a convenience store parking lot, a known "hot spot" for criminal activity. When Hunter, who was standing over and watching the gambling, saw the officers, he started to walk away very quickly. One of the officers saw a bulge in his waistband, caught up with him from behind, and frisked him, finding a firearm with an obliterated serial number. The questionable part of this opinion was its conclusion that the officer had reasonable suspicion that Hunter "was engaged in illegal gambling activity" as opposed to just watching the other men.)

U.S. v. BOYD, 291 F.3d 1274 (May 20, 2002)
Drugs; importation; minor role

adjustment; 3B1.2(b); USSG Amend. 635

The Court construed Amendment 635 to the Guidelines and affirmed denial of a minor role adjustment. The defendant was caught smuggling cocaine, but the two coconspirators who hired him and handled all arrangements were not charged; the PSI held him accountable only for his own conduct. Amendment 635 to the Guidelines specifically approved the decision in *De Varon*, 173 F.3d 930 (11th Cir. 1999) (en banc), and provides that a defendant "whose role . . . was limited to transporting or storing drugs and who is accountable under 1B1.3 only for the quantity of drugs the defendant personally transported or stored is not precluded from consideration for a adjustment under this guideline." Appl. n. 3(A). The district court denied the minor role adjustment because he was a "but for" defendant (i.e., but for his conduct, the drugs would not have been imported)

U.S. v. SINGH, 291 F.3d 756 (May 15, 2002)**Guidelines**

Singh pleaded guilty to two counts of conspiracy to commit wire fraud based on a "call sell" scheme involving co-conspirators in Kuwait. A defendant need not personally commit a substantial part of the fraudulent scheme from outside of the United States to qualify for a two-level enhancement pursuant to U.S.S.G. § 2F1.1(b)(6)(B). That section requires only that a substantial portion of the scheme be committed from outside of the United States; it does not require that the scheme originate from outside of the United States. Facts also support finding that Singh committed perjury when he testified during his sentencing hearing, warranting enhancement for obstructing justice.

BEJACMAR v. ASHCROFT, et al., 291 F.3d 735 (May 14, 2002)

Habeas; removal; jurisdiction

Noting the Supreme Court had abrogated the Eleventh Circuit's earlier decision in *Richardson I*, 162 F.3d 1338 (1998), and *Richardson II*, 180 F.3d 1311 (1999), and had held that 8 USC 1252(b)(9) does not bar habeas jurisdiction over final removal orders which are not subject to judicial review under 1252(a)(1), *INS v. St. Cyr*, 533 U.S. 289, 312-13 (2001), the Court reversed its prior order and remanded to the district court to address the merits of the case.

U.S. v. KIMBALL, 291 F.3d 726 (May 14, 2002)

Right to counsel; self-representation; standard of review; sentencing; 2F1.1; upward departure

The Court affirmed the district court's order granting the defendant's motion to represent himself, applying *de novo* review to the mixed question of law and fact underlying a district court's conclusion that a defendant's waiver is knowing, intelligent, and voluntary. The Court also rejected the argument that he should not have been sentenced under 2F1.1, finding that section proper given the clear basis of fraud underlying the charges (e.g., distribution a prescription drug without a prescription with the intent to defraud or mislead). That the fraud was against a government agency made no difference. Likewise, neither the basis nor the calculation method of the upward departure were erroneous. The guidelines specifically identify the risk of nonmonetary harm to the public by the scheme to defraud the government, and the sentence was increased using the fraud table from 2F1.1(b)(1), and the amount of the departure was reasonable.

ARON v. U.S., 291 F.3d 708 (May 13, 2002)
Due diligence under AEDPA, § 2255(4)

Aron's failure to exercise due diligence before AEDPA was enacted cannot support a finding that a petition fails to satisfy the timeliness requirement of § 2255(4). Due diligence under the AEDPA does not require a prisoner to undertake repeated exercises in futility or to exhaust every imaginable option, but rather to make reasonable efforts. Moreover, the due diligence inquiry is an individualized one that must take into account the conditions of confinement and the reality of the prison system. On the facts presented, he was entitled to an evidentiary hearing as to those claims he made that would be timely if due diligence is found.

U.S. v. HOLLOWAY, 290 F.3d 1331 (May 10, 2002)

Search; warrantless; home; anonymous 911 call; exigent circumstances

Answering a question of first impression, the Court ruled that, when exigent circumstances (anonymous 911 call reporting shots fired and arguing at residence; officers observed evidence of alcohol and unsecured firearm outside home; unsupervised child inside home; defendant's wife refusing officers' commands) demand an immediate response, particularly where there is danger to human life, protection of the public can justify a limited, warrantless intrusion into the home. Here, the officers needed to check the home immediately to ensure that no gunshot victims were inside. The Court distinguished *Florida v. J.L.*, 529 U.S. 266 (2000), because it did not involve an emergency situation, but one statement is troubling: "In light of the nature of the 911 call, a lesser showing of reliability than demanded in *J.L.* was appropriate in order to justify the search of Appellant's home." (Emphasis added.)

U.S. v. MILES, 290 F.3d 1341 (May 10,

2002)

Armed Career Criminal; remand for factual findings; Apprendi; prior convictions; Speedy Trial Act; essential witness unavailable; hearsay; coconspirator; instruction; good-faith reliance on advice of counsel; sufficient evidence of money laundering

The Court remanded, upon agreed recommendation of the parties, because the district court had not made any factual findings on the defendant's challenge to his sentence as an Armed Career Criminal; he alleged his prior conviction for possession of an unregistered firearm was not a violent felony under the Court's precedent and his burglary convictions did not qualify under state law and in any event were to be treated as one prior. The Court rejected the Speedy Trial Act claim based on the unavailability of an essential witness, even though the defendant was convicted based on that witness' prior testimony. The Court rejected a hearsay claim and a claimed error in admitting former testimony of a second witness. The defendant challenged his money laundering conviction on the ground that the district court erred in refusing to instruct the jury on the defense of good-faith reliance on counsel's advice. This defense requires the defendant to show full closure of all material facts to the attorney and good faith reliance on the attorney's advice. This claim was rejected, because the record did not show any advice was sought or given but rather that the attorney acted as a coconspirator. Finally, the Court rejected the claimed insufficiency of evidence of money laundering, finding his knowledge that the purpose of the real estate transaction was to conceal the nature of his drug proceeds was established.

U.S. v. BAKER, 290 F.3d 1276 (May 8,

2002)

Seizure of vehicle neither moving nor parked

"The issue of first impression in this circuit is whether the interaction between the police and the individuals in the car that was neither parked nor moving was a consensual encounter under the Fourth Amendment." The Court found no violation. Baker and others were in a vehicle attempting to exit Tallahassee's Greyhound Bus Terminal parking lot. The engine was running and car had been moving but was momentarily paused at the exit because its egress was blocked by traffic. At that moment, a drug interdiction officer, without reasonable suspicion or probable cause but acting on a hunch, approached vehicle with badge displayed. Officer asked driver to roll down his window, which driver did, and officer asked if he could speak with rear seat passenger, who officers had observed exit a bus. Passenger, without being asked, got out of the car and proceeded to the rear of the car, leaving the jacket and bag on the back seat. Occupants of vehicle denied knowledge of jacket and bag, so officers obtained consent to search those articles and found drugs.

U.S. v. BENDER, 290 F.3d 1279 (May 8, 2002)

Sentencing Guidelines in child porn case

Summarily affirming child pornography convictions and sentences, but discussing and deciding: (1) No plain error in applying § 2G2.2 (trafficking in material involving the sexual exploitation of a minor), rather than § 2G2.4 (possession of materials depicting a minor engaged in sexually explicit conduct) because evidence showed that Bender received and transmitted the child pornography by computer; (2) No error in applying the four-level "sadistic" enhancement

of § 2G2.2(b)(3) because several of the pornographic photographs clearly depict the subjection of a young child to sexual acts that would have to be painful, i.e., vaginal or anal penetration of a minor by an adult male; and (3) "when a defendant trades child pornography in exchange for other child pornography, the defendant has engaged in "distribution for the receipt, or expectation of receipt, of a thing of value" as provided in the 1999 version of USSG § 2G2.2(b)(2)."

U.S. v. CASTRO, 290 F.3d 1270 (May 7, 2002)

Habeas; 2255; successive

Reversing its earlier decision :), 277 F.3d 1300, the Court held that the district court's recharacterization of a petitioner's motion for new trial under Fed. R. Crim. P. 33 (in 1994, pre-AEDPA) as a motion for post-conviction relief WOULD be considered his first 2255 post-conviction motion, so that any subsequent motion would be barred as successive. "However, due to the strict limitations the AEDPA imposes on petitioners who wish to file successive 2255 petitions, we suggest that in the future, when a district court unilaterally recharacterizes a prisoner's pleading as a 2255 petition, the judge should also warn the petitioner of the consequences of this recharacterization - that this recharacterized petition may be his first and only chance to seek relief under 2255." Although the Court noted it had "substantial fairness concerns with the result in this case," it noted the defendant was aware of the ineffectiveness claims raised in the 2255 motion at the time of the Rule 33 motion.

U.S. v. CANO, 289 F.3d 1354 (May 3, 2002)
Lay interpretation of drug ledgers permissible, but not as impermissible opinion testimony; plain error found as to

sufficiency

Cano and Matos charged in numerous counts arising from investigation into operation of a nationwide cocaine trafficking and money laundering network. Court held: (1) no abuse of discretion in permitting a police detective to interpret drug ledgers, a personal phone book and date book while testifying as a lay, rather than expert, witness, because his deciphering of the "hieroglyphics" was not based on "scientific, technical or otherwise specialized knowledge", noting that in "distinguishable" cases courts have held that police officers had to qualify as experts to so testify; however, offering that testimony as lay opinion was error, albeit not plain error because of overwhelming evidence of guilt; (2) prosecutor did not impermissibly vouch for the credibility of government witnesses; and (3) plain error was committed as to count 13 charging possession with intent to distribute marijuana because, even though Cano's defense counsel did not raise this issue on appeal, and the Government ignored the point, there was no evidence to show he possessed marijuana during the period alleged.

U.S. v. FISHER, 289 F.3d 1329 (May 2, 2002)

GBL satisfies Analogue Act as analogue of date rape drug GHB

Fisher owns and operates Gold's Gym, which, among other things, sells commercial fitness-related products including one called "Verve." Verve, a common industrial chemical, contained gamma-butyrolactone ("GBL"). GBL is not a controlled substance. The Government, however, alleged under the Analogue Act, 21 U.S.C. § 813, that GBL is a controlled substance analogue because it metabolizes into a Schedule I controlled substance called gamma-hydroxybutyrate acid ("GHB"), more commonly known as the

"date-rape drug." The Government charged Fisher with misprision of a felony, 18 U.S.C. § 4, for having knowledge of the commission of a felony involving GBL. The 11th Circuit held (1) notice was given that all GHB analogues were illegal; (2) no clear error in district court's finding that GBL is an analogue of GHB; and (3) persons of ordinary intelligence would easily be able to determine that a substance, which is converted upon ingestion into a metabolite with a substantially similar chemical structure and effect on the central nervous system as a schedule I controlled substance, would meet the definition of a controlled substance analogue.

U.S. v. RYAN, 289 F.3d 1339 (May 2, 2002)
Impact of Apprendi on the availability of "sentencing entrapment" not reached because facts did not warrant instruction on defense

Ryan appealed district court's refusal to instruct jury on his claim of "sentencing entrapment," that is, his claim that the government entrapped him into agreeing to purchase a greater quantity of drugs than he was predisposed to purchase, and that he should not be held accountable for the larger quantity to which he was entrapped. Eleventh Circuit previously rejected such a claim, See United States v. Williams, 954 F.2d 668, 672-73 (11th Cir. 1992, but Ryan urged court to overrule Williams based on Apprendi. The Court held "The impact of Apprendi on the availability of the sentencing entrapment defense has not yet been addressed in any published federal appellate opinion. We do not reach the question here because even if the defense were available, instructions on the defense were clearly not warranted on the evidence presented in this case."

U.S. v. RAMIREZ-CHILEL, 289 F.3d 744

(Apr. 25, 2002)

Consent to warrantless midnight entry and search of home

Officers go to suspect's home at midnight based on tip with no reasonable suspicion, hoping to gain consent to enter and search. Accounts of what happened conflicted, but Court affirmed credibility determinations that favored Government, effectively giving blind deference to trial court unless that court's "understanding of the facts appears to be 'unbelievable.'" The entry was also permissible because fact that suspect "yielded the right-of-way" does not, alone, "suggest that he was overwhelmed by a show of official authority" where officers did not have guns drawn. Court found the Government's tactics suspect but not unconstitutional under totality of circumstances. Also, in n.5, the Court restated the questionable rule that it may consider evidence presented at trial when reviewing the decision on a pretrial motion to suppress.

U.S. v. RHIND, et al., 289 F.3d 690 (Apr. 23, 2002)

Search; suppression; inevitable discovery; harmless; sentencing; firearm; 2K2.1(b)(5)

The Court affirmed denial of motions to suppress the bag carried by one defendant when he was arrested, finding the officer's had reasonable suspicion and the contents would have inevitably been discovered in an inventory search, and the motel room vacated by the defendants immediately prior to their arrests, finding again it would have been inevitably discovered and/or any error was harmless because the evidence properly seized from the defendants' stolen vehicle was overwhelming. The Court also rejected the defendants' argument that two firearms in the vehicle were not possessed "in connection with" the counterfeiting offenses under

2K2.1(b)(5), noting they committed the offenses with the use of the car containing the firearms, they could have easily obtained ammunition for the second firearm, and the mere availability of the guns could have promoted the criminal episode. In this case of first impression, the Court adopted the definition of "in connection with" from other cases interpreting the same language in other guideline provisions. The facts that the guns were not loaded (shotgun hidden in trunk) or operable (handgun inside car) was not dispositive, and the length of time over which the defendants possessed the guns on their extended crime spree supported this conclusion.

U.S. v. SMITH, 289 F.3d 696 (Apr. 23, 2002)

Downward departure rejected

The Court agreed with this government appeal, vacating the downward departure sentence of 120 months, and remanding with directions to impose the 210-month sentence the district court had indicated it would have imposed if the downward departure were reversed. The Court did reject the government contention that 841(b)(1)(C) required a minimum mandatory term, not simply a maximum term, of 30 years (the government's reasoning was not explained). However, the Court concluded it was error to reduce downward the offense level, as no factual circumstances relied upon (criminal history, diminished capacity, and circumstances of case and disparity between co-defendants) were permissible grounds. The Court concluded that a criminal history departure must be under 4A1.3, not 5K2.0; 4A1.3 departures based on criminal history must proceed only on the horizontal axis (except upward departures above CHC VI); and CHC VI did not overrepresent the defendant's five prior felony drug convictions and one armed

robbery conviction. Further, the Court concluded that none of the special circumstances alone or in combination under 5K2.0 made the case sufficiently rare or extraordinary to justify a downward departure, but the reasoning at slip op. 40-41 seems to effectively erase any "combined circumstances" downward departure under 5K2.0.

U.S. v. DAVIS, 288 F.3d 1263 (Apr. 19, 2002)

Search; vehicle roadblock

The Court affirmed the denial of suppression for an individual stopped at a roadblock designed to help a drug task force apprehend six other individuals sought under an indictment.

ROSS v. U.S., 289 F.3d 677 (Apr. 19, 2002)
Habeas; 2255; Richardson jury unanimity rule retroactive;

The Court first joined other circuits and affirmed the district court ruling that *Richardson v. United States*, 526 U.S. 813 (1999) (requiring jury to agree unanimously on specific violations making up a continuing criminal enterprise charge), is retroactive to cases pending on collateral review. The Court also agreed with four other circuits and affirmed the district court ruling that *Richardson* error is subject to review for harmlessness under *Neder*. Finally, as to the defendant's argument that the *Chapman* harmless-error standard should prevail, the Court disagreed and applied the *Brecht* standard. A clear circuit split exists on this issue. Applying that standard, the Court denied relief.

U.S. v. ARBELO, 288 F.3d 1262 (Apr. 15, 2002)

Nonretroactivity of Child Citizenship Act of 2000

D apparently had been the child of a parent who became a naturalized citizen while D was in parent's custody, and had the Child Citizenship Act of 2000 applied, D automatically would have become a "citizen." D was found guilty of being found in U.S. after having been removed as result of a felony conviction, without having obtained the AG's permission to re-enter. D sought refuge as a "citizen" under the Act, but the court held the act not to be retroactive, thereby depriving D of its benefit.

U.S. v. JONES, 289 F.3d 1260 (Apr. 8, 2002)
Fact-finding in restitution order, upward departure

Jones filed false tax returns on behalf of a number of third parties, persuaded others to forge endorsements on the refund checks, and deposited the checks into his accounts at two federally-insured credit unions. He pleaded guilty in a plea bargain and challenged the sentence. The Court found: (1) information in the PSR sufficiently sustains the district court's decision that Jones should make restitution in an immediate lump sum payment, and the court did not plainly err when it ordered such payment without making factual findings on the record as to Jones' financial status; and (2) juvenile and other minor convictions, though not similar to the convictions in this case and too remote to use in calculating Jones' criminal history category, represent serious criminal conduct and justify a two-category upward departure.

Lagniappe

THE FLORIDA BAR v. ROSE, No. SC00-1792 (6/27/2002)
Criminal Defense Lawyer Did Not Violate

Disciplinary Rules in Representation

The Florida Supreme Court unanimously rejected The Florida Bar's petition to discipline a defense attorney for his representation of a client in a criminal case where referee found that Rose failed to report several alleged incidents involving improper contact with jurors; Rose did not thoroughly interview approximately fifteen defense witnesses; and that Rose referred to his client in jury selection as a "child molester."

UNITED STATES v. FIOR D'ITALIA, INC., 2002 WL 1305728 (June 17, 2002)

Unreported tip income for tax purposes

The tax law authorizes the IRS to use the aggregate estimation method to calculate the employer's total FICA tax liability when the amount of tips reported is not readily ascertainable.

C O N G R E S S T O S T U D Y "UNPUBLISHED OPINIONS"

The U.S. House Subcommittee on Courts, the Internet and Intellectual Property has tentatively scheduled a hearing to gauge whether and how much "unpublished opinions" presents a problem, and what Congress might do about it. The U.S. Judicial Conference claims that about 80 percent of federal appellate decisions are unpublished. The practice is common among the states, with some, such as Texas and California, publishing fewer than 10 percent of appellate cases. Some have attacked the policy as unconstitutional.

WIRETAPS ON THE RISE

Court-ordered wiretaps from in 2001 rose by 25 percent from 2000, according to the Administrative Office of the U.S. Courts. New York (425) led the list. Others included California (130), Illinois (128), New

Jersey(99), Pennsylvania (54), Florida (51), and Maryland (49). Read article at: <<http://www.law.com/jsp/article.jsp?id=1022954269859>>

Criminal Procedure 6(c).

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