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NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

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ANOTHER YEAR OF LONG SENTENCES FOR NORTH FLORIDA

Last April, the United States Sentencing Commission published the 2003 Sourcebook of Federal Sentencing Statistics, presenting the Commission's statistics for fiscal year 2003, which ran from October 1, 2002, through September 30, 2003. As has been true now for many years, the sentences in the Northern District of Florida are longer than they are in just about anyplace else in the country. The average sentence imposed nationwide in FY 2003 was 56 months. In North Florida, we nearly doubled that figure with an average of 110.9 months.

Of the 94 districts in the country, we did drop to second place, falling behind the 112.3 month average of the Western District of North Carolina. There was, though, only one other district that broke the 100 month mark - the Northern District of Iowa at 101.5 months. By way of comparison, the average sentence was 82.7 months in Florida's Middle District, 65.8 months in South Florida, 69.4 months in Alabama Southern, and 66.2 months in

Southern Georgia. Our average sentence hasn't changed much over the years. It was 114.6 months in FY 2000, 110.5 months in FY 2001, and 115.5 months in FY 2002.

Of the 372 Guidelines cases that were resolved in this district in FY 2003, 28 cases went to trial, which represents 8.2 percent of the cases. That percentage is the ninth highest percentage in the country, and is a high figure when compared to the national average of 4.3 percent. The percentage is an increase over FY 2002 when 5.7 percent of the cases were tried, but less than the 11.5 percent in FY 2001 and the 13.7 percent in FY 2000. In the Middle District of Florida 6.4 percent of the cases were tried in FY 2003. In Southern Florida, 7.3 percent were tried.

The 372 cases resolved represents an increase over the 335 resolved in FY 2002, the 331 resolved in FY 2001, and the 371 resolved in FY 2000.

As for departures from the Sentencing Guidelines, in FY 2003 there were 136 sentences imposed below the Guideline range

in North Florida, which translates into an overall departure rate of 37 percent. Departures for substantial assistance made up about 35 percent of all of the cases. There were only 9 cases in which there were downward departures for reasons other than substantial assistance, which translates into 2.5 percent of all the cases. Nationwide, there were departures for substantial assistance in 15.9 percent of the cases; 6.3 percent for other reasons. Nationwide, there were also departures in 7.5 percent of what is described as “Government Initiated Departures,” which are, for the most part, plea agreements. There were no Government Initiated Departures in North Florida.

J. RICHARD SMOAK, JR. NOMINATED TO FILL JUDGE VINSON’S POSITION

President Bush has appointed Panama City lawyer J. Richard Smoak, Jr., to become North Florida’s newest District Court judge. Upon confirmation by the Senate, Mr. Smoak would fill the vacancy created in Pensacola by Judge Vinson’s decision to take senior status.

Mr. Smoak has been practicing law in Bay County since he graduated from the University of Florida in 1973. He has had a general civil litigation practice, specializing in medical malpractice. The Florida Bar has extended Board Certification to him in the field of civil trial law.

Mr. Smoak was a highly decorated soldier in the U.S. Army Special Forces. He was awarded the Silver Star, the Bronze Star for Valor, and the Bronze Star for Meritorious Service.

BOOKER

There hasn’t been much in the way of dramatic change in the Booker status quo. The primary issues remain: (1) the amount of discretion available to the trial judges; (2) application of the plain error rule; (3) the question of what is an “unreasonable sentence”; and (4) the question of whether Booker allows for a sentence greater than the Guidelines permit when the individual committed the crime prior to the Booker decision.

The statistics compiled between the date of the Booker decision and May 5 show an increase in overall departures (be they based on Booker or traditional Guidelines reasoning) when compared with the statistics from Fiscal Year 2003. In FY 2003 there were, nationwide, downward departures in 30 percent of the cases. There have been below Guidelines sentences in roughly 37% of the cases since Booker was decided. In FY 2002, there had been departures in 35 percent of the cases.

We haven’t been able to keep up with all the cases being generated across the country, which means that the outline we had posted on our webpage is badly out of date. Accordingly, we will soon be replacing it with a link to the Defender Training website, www.fd.org, which includes an outline that was updated as of June 5. Included in that website, too, is a document entitled “Booker Litigation Strategies,” that is a thorough analysis of the issues. On our webpage, you’ll also find a sample sentencing memorandum that relies on Booker in asking for a sentence below the Guidelines.

If you’ll review the case summaries included

in this newsletter, you'll find many cases from the Eleventh Circuit that address Booker issues. Some, such as U.S. v. Petho, 409 F.3d 1277 (11th Cir. 2005), held that any error is harmless if the judge announced at sentencing that he or she would have imposed the same sentence regardless of whether the Guidelines were valid. U.S. v. Fields, 408 F.3d 1356 (11th Cir. 2005), held that a sentence imposed at the bottom of the Guidelines range isn't enough to show that the outcome would be different if the sentence had been imposed under an advisory system, and that such a sentence does not, therefore, establish plain error. On a more positive note, the Court has found that statements by the sentencing judge to the effect that he or she would have imposed a lesser sentence if not bound by the Guidelines was sufficient to establish plain error. *See* U.S. v. Henderson, 409 F.3d 1293 (11th Cir. 2005) and U.S. v. Martinez, 407 F.3d 1170 (11th Cir. 2005).

In June, the Supreme Court declined an opportunity to resolve the debate among the circuits over plain error in Booker cases, declining to review the decision issued in April by the Eleventh Circuit in U.S. v. Rodriguez, 406 F.3d 1261 (11th Cir. 2005).

If you have a client who committed his or her crime prior to the Booker decision and is facing a longer sentence under the now-advisory Guidelines, you should be aware of a new decision from the First Circuit Court of Appeals: U.S. v. Lata, 2005 WL 1491483 (1st Cir. June 24, 2005). It rejects the due process argument, but leaves open the question of whether it might still apply to a sentence that is "wildly different" than what could have been imposed under the mandatory Guidelines. We'd recommend that you also take a look at a recent brief Chet Kaufman

wrote in which he has addressed the issue. Just call Margaret in the Tallahassee office and ask for a copy of the initial brief in the case of U.S. v. Reeves.

ELIZABETH TIMOTHY SWORN IN AS NEW MAGISTRATE

With glitz, glamour, and pageantry, our own Elizabeth Marie Timothy formally ascended to the federal bench on April 29 with about two hundred persons attending her investiture as a U.S. Magistrate Judge at the Pensacola Little Theater.

Ms. Timothy was, until recently, an Assistant Federal Public Defender in our Pensacola office. Known to her friends and former co-workers as "Lizy," she beamed throughout the festivities while judges and lawyers showered her with compliments and affection.

She is a "person of great character, dignity, charm and fairness," said Senior District Judge Lacey A. Collier. Florida Circuit Judge Terry D. Terrell, who, like Ms. Timothy, worked as a public defender, said she is the kind of lawyer anyone would want as counsel. Her work showed "detail and craft" as she placed "attention to the individual," he said. He gave extraordinary praise to her skills as a cross-examiner, saying it was "a wonder to behold."

Assistant Federal Public Defender Thomas S. Keith, Ms. Timothy's former supervisor at the Pensacola branch of the Federal Public Defender's Office, called her "a special person" with "all the qualities" of a "great attorney." Mr. Keith got a chuckle from the judges on stage when he said he doubted Ms. Timothy would be appointed Magistrate

Judge because he thought the judges of the Northern District of Florida would fear “that she would do some crazy things, like let too many people out on bond.”

Magistrate Judge Timothy took the praise and ribbing in stride, saying she was “humbled by the number of people who turned out” for her investiture.” She promised to continue to be humble; to appreciate the seriousness of her job; never to let down the judges of the Northern District of Florida; and never to forget from where she came.

She then quoted from Robert Traver’s 1958 novel, “Anatomy of a Murder,” to make her final promise of the day. “Judges, like people, may be divided roughly into four classes: judges with neither head nor heart – they are to be avoided at all costs; judges with head but no heart – they are almost as bad; then judges with heart but no head – risky but better than the first two; and finally those rare judges who possess both head and a heart.” Her final promise, she said, was “to be a judge with both a head and a heart.”

After the investiture at the Pensacola Little Theater, the crowd headed across the street for refreshments and hors d’oeuvres on the second floor of the Pensacola Museum of Art, where works of the great French sculptor, Auguste Rodin, were on display, adding a unique touch of class to the festivities.

Magistrate Judge Timothy actually took office last summer, but her investiture was delayed after Hurricane Ivan smashed the Pensacola area.

ATTORNEY GENERAL GONZALEZ CALLS FOR SYSTEM OF “TOPLESS GUIDELINES”

In June 21st speech at a conference of the National Center for Victims of Crime, Attorney General Alberto Gonzalez called for a sentencing scheme in which “the sentencing court would be bound by the guidelines minimum, just as it was before the Booker decision,” but that would leave the “guidelines maximum . . . advisory just as it is today under Booker.” He told his audience that with the current advisory system “we risk losing a sentencing system that requires serious sentences for serious offenders and helps prevent disparate sentences for equally serious crimes.”

Mr. Gonzalez did take a take a conciliatory approach, saying that under the advisory system “judges are trying to do the right thing” and are “acting in good faith as they perform one of the toughest – and most important – jobs in our society with great skill and integrity.” He said, too: “I have an open mind about how to best restore fairness and consistency in sentencing and I look forward to hearing the views of other interested parties about the best way ahead.”

Many have already criticized the proposal. *See* Professor Berman’s posts of July 5, June 27, June 23, and June 23 at <http://sentencing.typepad.com>.

WELCOME TO NEW PANEL MEMBERS

Daniel Daly, Geoffrey Mason, and Matthew Wells have just this past month been added to the Gainesville CJA Panel. Daniel Daly is a veteran criminal defense lawyer, having tried more than 25 federal criminal cases and is a 1986 graduate of the Creighton University School of Law. Geoffrey Mason is a 1997 graduate of the University of Florida

and practices with Gainesville panel member Tom Edwards. Matthew Wells is a former state assistant public defender and is a 1995 graduate of the University of Florida.

Several months ago Eric Stevenson and G. Harry Stopp, Jr. and were added to the Pensacola Panel. Eric Stevenson is a former assistant state attorney who graduated from the Cumberland Law School in 1998. Harry Stopp is also a former assistant state attorney. He graduated from FSU in 1999.

JUDGES HAVE NEW ASSIGNMENTS

In an order entered June 1st, Chief Judge Hinkle has changed the case assignments of the judges. In Pensacola, 20 percent of the criminal cases now go to Judge Rodgers, with 35 percent going to Judge Vinson and 45 percent to Judge Collier. In Panama City, 45 percent go to Judge Hinkle and 55 percent to Judge Rodgers. The cases in Gainesville are split almost evenly between Judge Paul and Judge Mickle, with 48 percent going to Judge Mickle and 52 percent to Judge Paul. In Tallahassee, 48 percent of the cases go to Judge Hinkle and 52 percent to Judge Mickle.

All cases are assigned on a random basis.

PANEL TRAINING

July: Booker. We'll be presenting a video from last month's Federal Defender Conference that features a presentation on the Booker decision by the authors of one of the best articles yet written on the subject.

Panama City - July 22
Gainesville - July 27
Tallahassee - July 28
Pensacola - July 28

August: Ethics and Booker. For those of you looking for your Florida Bar ethics credit, here's your chance. We'll be presenting another video from the Federal Defender Conference. It's a panel discussion of some of the ethical problems created by the uncertainty generated by Booker. Dates will be set soon.

DOWNWARD DEPARTURES

Book, Joe B. Rodgers, C. Atty: Ridlehoover, K.
Docket: 3:04cr30-MCR
Charge: Consp. to Dist. Marijuana
Range: 120 mos. minimum mandatory
Sentence: 1 day BOP w/2 yrs SR
Date of Imposition of Sentence: 6/10/05
Grounds: 5K2.23 (prior discharged sentence - defendant served 4 years in Arizona on related charge) and 5K1.1

Palmer, Angela Hinkle, R. Atty: Murrell, R.
Docket: 4:04cr46-RH
Charge: Theft of Mail and Failure to Appear
Range: 15 - 21 months
Sentence: 9 mos. BOP followed by 6 mos residential drug treatment as condition of SR
Date of Imposition of Sentence: 6/21/05
Grounds: 5K2.13 (diminished capacity)
(Judge Hinkle announced that the same reason would have supported a variance)

VARIANCES

Halsema, Kevin Mickle, S. Atty: Uman, J.
Docket: 1:04cr27-SPM
Charge: Poss Child Pornography
Range: 57 -71 months
Sentence: 24 mos.
Date of Imposition of Sentence: 5/23/05
Grounds: A longer sentence would have had a detrimental effect upon Halsema's rehabilitation efforts and would have further alienated him from his support network, employment, and family. Court also considered Halsema's continuing cooperation, his acknowledgment of his criminality, his remorse, and his efforts toward rehabilitation. Finally, the court considered and found that 24 months was an adequate punishment and deterrent, especially in light of the fact that, because of his various medical conditions, a large

portion of his first 9 months was served in solitary confinement.

Abulaban, Walid Mickle, S. Atty: Findley, T. and Davis, B.

Docket: 4:04cr67-SPM

Charge: Filing false income tax returns

Range: 18 - 24 months

Sentence: 3 years probation w/1 year of home confinement

Date of Imposition of Sentence: 5/2/05

Grounds: extraordinary acceptance, including quick (pre-sentencing) restitution, and reform of accounting practices.

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

VICTORIES

In Gainesville, **Robert Rush** won a bench trial before Judge Paul. His client George Allen, having been the subject of two controlled buys and having admitted to Alachua County Sheriff's deputies that he had been regularly selling cocaine, entered guilty pleas to two cocaine charges. Allen, though, denied that the nine firearms found on his property had anything to do with the cocaine transactions, explaining that he had inherited many of the guns from family members. Judge Paul, apparently finding Allen's explanation credible, entered an acquittal. Allen is currently awaiting sentencing on the cocaine offenses.

Gwen Spivey of our Tallahassee office won a resentencing for William Cash. Judge Hinkle sentenced Cash after the Blakely decision, but before Booker. Because there had been an objection in the trial court raised on the basis of Blakely, the Eleventh Circuit reviewed the case for harmless error. With Judge Hinkle

announcing at the sentencing hearing that he had not made a determination whether he would have imposed a different sentence had he not been bound by the Guidelines, the Court found the Government was unable to show an absence of prejudice, and remanded the case for resentencing.

Please call us, send us a note, or e-mail us at the Tallahassee office with news of any victories you've won. Be it a not guilty verdict or any favorable trial outcome, an appellate victory, a winning pre-trial motion, or a particularly successful sentencing outcome, we'd like to mention it in this newsletter. Please don't be modest. Think of it as contributing to the esprit de corps of an embattled group of fellow warriors.

CASE SUMMARIES

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

Certiorari Granted

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

HOUSE v. BELL, 2005 WL 556991 (Mem) (cert. granted June 28, 2005) reviewing 386 F. 3d 668 (en banc) (6th Cir. 2004)

DNA, actual innocence

In the 6th Circuit, Bell, pursued a federal habeas petitioner after having been convicted of murder in state court in Tennessee based on circumstantial evidence including semen stains on victim's clothing and blood stains on his clothing. He established a colorable claim of innocence, but, the Court rule, he failed to show that it

was more likely than not that no reasonable juror would have convicted him of murder given new evidence that he had not been donor of semen in question and that blood stains may have come from laboratory spillage, precluding consideration of procedurally barred arguments; strong inculpatory evidence remained including petitioner's lying to investigators about many facts such as his whereabouts on night of murder, and indications that he had lured victim from her home on same night, there was lack of physical evidence for petitioner's theory that victim's husband had killed her, and district court found that witnesses to husband's alleged confession lacked credibility. Upon the filing of an amicus brief by the Innocence Project (2005 WL 779581), the Supreme Court granted review, asking the Court to revisit *Schlup v. Delo* in light of the scores of exonerations demonstrating "that wrongful convictions are far less "rare" than anyone - including advocates for the innocent - ever imagined." QUESTIONS PRESENTED: (1) Did majority below err in applying this court's decision in *Schlup v. Delo* to hold that petitioner's compelling new evidence, though presenting at very least colorable claim of actual innocence, was as matter of law insufficient to excuse his failure to present that evidence before state courts merely because he had failed to negate each and every item of circumstantial evidence that had been offered against him at original trial? (2) What constitutes "truly persuasive showing of actual innocence" pursuant to *Herrera v. Collins* sufficient to warrant freestanding habeas relief?

HUDSON v. MICHIGAN, 2005 WL 854315 (Mem) (cert. granted June 27, 2005) reviewing No. 126791, 692 N.W.2d 385 (Mich. Ct. App. Jan 31, 2005) (Table)

Fourth Amendment, inevitable discovery, "knock and announce" rule

QUESTION PRESENTED: Does inevitable discovery doctrine create *per se* exception to exclusionary rule for evidence seized after Fourth Amendment "knock and announce" violation, as Seventh Circuit and Michigan Supreme Court have held, or is evidence subject to suppression after such violations, as Sixth and Eighth Circuits, Arkansas Supreme Court, and Maryland Court of Appeals have held?

KANSAS v. MARSH, 125 S. Ct. 2517 (Mem) (cert. granted May 31, 2005) (reviewing 102 P.3d 445 (Kan. 2004))

Capital sentencing

QUESTION PRESENTED: Does it violate the Constitution for a state capital sentencing statute to provide for the imposition of the death penalty when the sentencing jury determines that the mitigating and aggravating evidence is in equipoise? In addition to the Question presented by the petition, the parties are directed to brief and argue the following Questions: Does this Court have jurisdiction to review the judgment of the Kansas Supreme Court under 28 U.S.C. Sec. 1257, as construed by *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)? Was the Kansas Supreme Court's judgment adequately supported by a ground independent of federal law?

LAMARQUE v. CHAVIS, 125 S. Ct. 1969 (Mem) (cert. granted May 2, 2005) (reviewing 382 F.3d 921 (9th Cir. 2004))

Habeas

QUESTION PRESENTED: Did the Ninth Circuit contravene this Court's decision in *Carey v. Saffold* when it held that a prisoner who delayed more than three years before filing a habeas petition with the California

Supreme Court did not “unreasonably” delay in filing the petition -- and therefore was entitled to tolling during that entire period -- because the California Supreme Court summarily denied the petition without comment or citation, which the Ninth Circuit construes as a denial “on the merits”?

OREGON v. GUZEK, 125 S. Ct. 1929 (Mem) (cert. granted Apr. 24, 2005) (reviewing 86 P.3d 1106 (Or. Mar 04, 2004))
Death Penalty Mitigation, Residual Doubt QUESTION PRESENTED: Does a capital defendant have a right under the Eighth and Fourteenth Amendments to the United States Constitution to offer evidence and argument in support of a residual-doubt claim - that is, that the jury in a penalty-phase proceeding should consider doubt about the defendant's guilt in deciding whether to impose the death penalty?

Supreme Court Cases

BELL v. THOMPSON, 2005 WL 1499791 (June 27, 2005)

Stay of a mandate following a denial of certiorari, Fed. R. Civ. P 60(b)

In an opinion written by Kennedy, the Court (5-4), held that assuming Federal Rule of Appellate Procedure 41 authorizes a stay of a mandate following a denial of certiorari and that a court may stay the mandate without entering an order, the Sixth Circuit’s decision to do so here was an abuse of discretion. Breyer dissented, joined by Stevens, Souter and Ginsburg. This was a fact-intensive analysis in a capital case where the defendant ultimately won some relief from the Sixth Circuit, but the Supreme Court reversed.

GONZALEZ v. CROSBY, 2005 WL 1469516 (June 23, 2005)

60(b) motion not an AEDPA-barred successive habeas petition

The Court (9-0 on essential analysis, 7-2 on result) held that a habeas petitioner can bring a motion under Fed. R. Civ. P. 60(b) which challenges not the substance of a federal court’s prior resolution of a habeas petition on the merits of the claim, but “some defect in the integrity of the federal habeas proceedings.” The Court rejected the Eleventh Circuit’s blanket rule that all Rule 60(b) motions were prohibited because of their inconsistency with the policies of AEDPA. However, on the facts of this case, the Court found that Gonzalez had failed to show “extraordinary circumstances.” His only basis for reopening the judgment was that the statute of limitations ground for denying him habeas relief was incorrect in light of a subsequent Supreme Court interpretation of this limitations provision. The Court explained that “not every interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final.” The Court further concluded that the petitioner’s lack of diligence in seeking appellate review of the adverse limitations ruling worked against any finding of extraordinary circumstances.

HALBERT v. MICHIGAN, 2005 WL 1469183 (June 23, 2005)

Constitutional right to appointed counsel in indigent guilty plea appeals

Halbert, convicted on his plea of nolo contendere of criminal sexual conduct, submitted a handwritten motion to withdraw his plea the day after sentencing. The trial court denied the motion and told him his proper remedy was to appeal to the Michigan Court of Appeals. But, relying on its discretion to appoint appellant counsel in

appeals of guilty and no contest pleas, the trial court refused the appointment of counsel, as did the Michigan Court of Appeals, and the Michigan Supreme Court declined review. Halbert argued that his appeal to the Michigan Court of Appeals ranks as a first-tier appellate proceeding requiring appointment of counsel under *Douglas v. California*, 372 U. S. 353 (1963). Michigan urged that appeal to the State Court of Appeals is discretionary and, for an appeal of that order, counsel need not be appointed. In an opinion by Ginsburg, the Court (6-3) vacated that judgment and held “that the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals.” The Court distinguished *Ross v. Moffitt*, 417 U. S. 600 (1974), which held that a State need not appoint counsel to aid a poor person in *discretionary* appeals to the State’s *highest court*, or in *petitioning for review in this Court*. “The question before us is essentially one of classif[ying]” the initial appeal and the appellate court responsibilities under Michigan law. The Court’s analysis showed the Court of Appeals to be an “error-correction court,” and he needed a lawyer. Thomas, writing for Scalia and Rehnquist dissented, arguing that “[t]he majority substitutes its own policy preference for that of Michigan voters, and it does so based on an untenable reading of *Douglas*.”

MAYLE v. FELIX, 2005 WL 1469153 (June 23, 2005)

New fact-claims under AEDPA barred by relation back doctrine

In an opinion by Ginsburg, the Court (7-2) held that an amended habeas petition does not relate back (and thereby escape AEDPA’s one-year time limit) when it asserts a new ground for relief supported by facts that differ

in both time and type from those the original pleading set forth.” “So long as the original and amended petitions state claims that are tied to a common core of operative facts, relation back will be in order.” Felix had timely filed a *pro se* 28 U.S.C. § 2254 petition, arguing, among others, that the admission of videotaped testimony violated the Confrontation Clause. Five months after the expiration of AEDPA’s time limit, and eight months after the federal court appointed counsel to represent him, Felix filed an amended petition in which he added a new claim for relief: He asserted that, in the course of pretrial interrogation, the police used coercive tactics to obtain damaging statements from him, violating his Fifth Amendment rights. The Court barred that claim.

ROMPILLA V. BEARD, 125 S. Ct. 2456 (June 20, 2005)

Ineffective assistance of counsel

In a 5-4 decision authored by Souter, the Supreme Court reversed the Third Circuit, finding ineffective assistance for the third time in recent years (following *Williams v. Taylor* (2000) and *Wiggins v. Smith* (2003)). “This case calls for specific application of the standard of reasonable competence required on the part of defense counsel by the Sixth Amendment. We hold that even when a capital defendant’s family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial.” O’Connor wrote a separate concurrence. Kennedy dissented in an opinion joined by Rehnquist, Scalia, and Thomas.

DODD V. U.S., 125 S. Ct. 2478 (June 20, 2005)

Habeas, statute of limitations

In a 5-4 decision written by O'Connor, the Court held that the one-year limitation period for filing motion to vacate based on a right that was newly recognized by the Supreme Court ran from the date on which the Supreme Court initially recognized the right asserted, not from the date on which the right asserted was made retroactively applicable. Stevens filed a dissenting opinion in which Souter, Ginsburg, and Breyer joined as to most

BRADSHAW v. STUMPF, 125 S. Ct. 2398 (June 13, 2005)

Pleas; knowing; sufficiency of evidence; conflicting prosecution theories with co-defendants

Stumpf and his codefendant committed an armed robbery that wounded the husband and killed the wife; Stumpf admitted shooting the husband but consistently denied shooting the wife. He plead to aggravated murder but argued against the death penalty on the ground that he had not shot the wife and had a minor role in her murder; the state claimed Stumpf shot her or, alternatively, his specific intent could be inferred. The jury concluded he had shot her and a death sentence was imposed. At the codefendant's trial, however, the prosecution presented evidence the codefendant had admitted shooting the wife, but the codefendant successfully relied on the prosecution's contrary argument in Stumpf's earlier case and received a life sentence. Stumpf then moved to withdraw his plea, and the prosecution then emphasized other evidence pointing to him as the shooter. The Sixth Circuit ultimately reversed on two grounds, first that he had not understood the specific intent to cause death element, making his plea invalid, and second the conviction and

sentence could not stand because the state had secured two convictions for the same crime based on inconsistent theories. In a unanimous opinion by O'Connor, the Court reversed. First, the Sixth Circuit erred in holding the defendant should be allowed to withdraw his plea because the trial court is not required to explain the elements to the defendant as long as the record shows the defendant understood them. Second, prosecutorial inconsistencies as to guilt were tolerable because the shooter's identity was immaterial to the aggravated murder conviction and did not affect the knowing nature of the plea. However, the prosecutor's use of allegedly inconsistent theories may have affected Stumpf's sentence. Because the Sixth Circuit opinion left some ambiguity how it handled the distinction between the effect of this inconsistency on the sentence as opposed to the conviction, the Court remanded for further consideration.

MILLER-EL v. DRETKE, 125 S. Ct. 2317 (June 13, 2005)

***Batson*, habeas**

In a 6-3 decision written Souter, the Court reversed the 5th Circuit's decision that had denied habeas relief to a death-sentenced inmate despite a record that showed racial discrimination in jury selection. "[W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. Thomas wrote a dissent, joined by Rehnquist and Scalia.

JOHNSON v. CALIFORNIA, 125 S. Ct. 2410 (June 13, 2005)

Batson

In an 8-1 decision authored by Stevens, the Court held that under the first part of the *Batson* test, where the defendant must make out a *prima facie* case of racial discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose, “a defendant satisfies the requirements of *Batson*’s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.” *Batson* “did not intend the first step to be so onerous that a defendant would have to persuade the judge--on the basis of all the facts, some of which are impossible for the defendant to know with certainty--that the challenge was more likely than not the product of purposeful discrimination. Breyer concurred with the same reservation he stated in *Miller-El*. Thomas dissented.

WILKINSON v. AUSTIN, 125 S. Ct. 2384 (June 13, 2005)

Supermax prisons, procedural due process

In a unanimous opinion authored by Justice Kennedy, the Court refused to impose stricter procedural limits on decisions by state officials to place a prisoner in a “super-maximum security” prison.

GONZALES v. RAICH, 125 S. Ct. 2195 (June 6, 2005)

Commerce clause, medical marijuana

By a 6-3 vote, the Court held that Congress’ Commerce Clause authority includes the power to prohibit the local cultivation and use of marijuana as authorized by California law. Stevens, joined by Kennedy, Souter, Ginsburg, and Breyer; Scalia Concurred in the judgment. O’Connor dissented, joined by

Rehnquist and Thomas (in part).

CUTTER v. WILKINSON, 125 S. Ct. 2113 (May 31, 2005)

Prisoner rights

The Court held that the section of the Religious Land Use and Institutionalized Persons Act (RLUIPA), increasing level of protection of prisoners’ and other incarcerated persons’ religious rights, did not violate Establishment Clause. Ginsburg wrote the opinion for a unanimous court.

ARTHUR ANDERSEN LLP v. U.S., 125 S. Ct. 2129 (May 31, 2005)

Obstruction of justice, jury instructions

Andersen LLP destroyed documents pertaining to its auditing responsibilities for Enron while Enron was being investigated for SEC and criminal violations. Andersen was indicted under 18 U.S.C. §§ 1512(b)(2)(A) and (B), which make it a crime to “knowingly ... corruptly persuad[e] another person ... with intent to ... cause” that person to “withhold” documents from, or “alter” documents for use in, an “official proceeding.” The Fifth Circuit affirmed, holding that the District Court’s jury instructions properly conveyed the meaning of “corruptly persuades” and “official proceeding” in § 1512(b) in that the jury need not find any consciousness of wrongdoing in order to convict. The Supreme Court (Rehnquist, 9-0) reversed, reading the statute to hold that “[o]nly persons conscious of wrongdoing can be said to “knowingly ... corruptly persuad[e].”

DECK v. MISSOURI, 125 S. Ct. 2007 (May 23, 2005)

No shackling during penalty phase

Deck was convicted of capital murder and sentenced to death, but the Missouri Supreme

Court set aside the sentence. At his new sentencing proceeding, he was shackled with leg irons, handcuffs, and a belly chain. The trial court overruled counsel's objections to the shackles, and Deck was again sentenced to death. Affirming, the State Supreme Court rejected Deck's claim that his shackling violated the Federal Constitution. The Supreme Court (Breyer, for a 7-2 majority) held that "Due Process" forbids the use of visible shackles during a capital trial's penalty phase, as it does during the guilt phase, unless that use is "justified by an essential state interest"—such as courtroom security—specific to the defendant on trial. Importantly, no prejudice need be demonstrated because "shackling is 'inherently prejudicial.'"

MEDELLIN v. DRETKE, 125 S. Ct. 2088 (May 23, 2005)

Vienna Convention cert. dismissed as improvidently granted

The Court initially granted the petition to decide (1) whether a federal court is bound by the International Court of Justice's (ICJ) ruling that United States courts must reconsider Medellín's claim for relief under the Vienna Convention on Consular Relations without regard to procedural default doctrines; and (2) whether a federal court should give effect, as a matter of judicial comity and uniform treaty interpretation, to the ICJ's judgment. Since granting cert., however, Medellín's petitioned the Texas Court of Criminal Appeals for relief in a proceeding that "may provide Medellín with the very reconsideration of his Vienna Convention claim that he now seeks in the present proceeding." This, among other factors, led the Court (PC, 5-4) to dismiss cert. as improvidently granted. In dissent, O'Connor (joined by Stevens, Souter and Breyer), argued

that the petition was dismissed "on the basis of speculation" that Medellín might obtain relief in new state court proceedings," thereby unsoundly"avoid[ing] questions of national importance when they are bound to recur."

PACE v. DIGUGLIELMO, 125 S. Ct. 1807 (Apr. 27, 2005)

Habeas tolling

In a 5-4 opinion by Rehnquist, the Court held that a state post-conviction motion is not "properly filed," within the meaning of the tolling provision of the AEDPA's statute of limitations, when that motion was denied by the state courts for being untimely under state law. The Court distinguished Artuz v. Bennett, 531 U.S. 4 (2000), which had found that a state petition was "properly filed." The Court pointed out that Artuz involved a state dismissal for procedural default, not, with Pace, a state dismissal for untimeliness.

SMALL v. U.S., 125 S. Ct. 1752 (Apr. 26, 2005)

18 U. S. C. §922(g)(1), foreign convictions

Small was convicted in a Japanese Court of trying to smuggle firearms and ammunition into that country. He served five years in prison and then returned to the United States, where he bought a gun. Federal authorities subsequently charged Small under 18 U. S. C. §922(g)(1), which forbids "any person ... convicted in any court ... of a crime punishable by imprisonment for a term exceeding one year ... to ... possess ... any firearm." Small pleaded guilty while reserving the right to challenge his conviction on the ground that his earlier conviction, being foreign, fell outside §922(g)(1)'s scope. The District Court and the Third Circuit rejected his argument, but the Supreme Court reversed (5-3), holding that §

922(g)(1)'s phrase "convicted in any court" encompasses only domestic – not foreign – convictions. Breyer wrote for the 5-3 Court, joined by Stevens, O'Connor, Souter and Ginsburg.

PASQUANTINO v. U.S., 125 S. Ct. 1766 (Apr. 26, 2005)

Wire fraud, *Blakely/Booker* (footnoted)

The Court (5-4) held that a plot to defraud a foreign government of tax revenue violates the U.S. federal wire fraud law. Thomas, writing for the majority, said "It may seem an odd use of the Federal Government's resources to prosecute a U. S. citizen for smuggling cheap liquor into Canada. But the broad language of the wire fraud statute authorizes it to do so and no canon of statutory construction permits us to read the statute more narrowly." This prosecution "creates little risk of causing international friction through judicial evaluation of the policies of foreign sovereigns" -- the problem on which the revenue rule was based. The Executive Branch brought this case, according to the opinion, and it thus could be assumed that "the Executive has assessed this prosecution's impact on this nation's relationship with Canada, and concluded that it poses little danger of causing international friction." Thomas was joined by Rehnquist, Stevens, O'Connor and Kennedy. Ginsburg wrote a dissent joined by Breyer and partially joined by Scalia and Souter. With regard to *Blakely/Booker*, Thomas said in a footnote that the issue had not been raised "before the Court of Appeals or in their petition for certiorari. We therefore decline to address it." Ginsburg countered in a footnote that they may be entitled to resentencing. The fact that the issue arose late in the game "was no fault of the defendants, however, as the petition in this case was filed and granted well before the

Court decided *Blakely*. Petitioners thus raised *Blakely* at the earliest possible point: in their merits briefing. The rule that we do not consider issues not raised in the petition is prudential, not jurisdictional ... and a remand on the *Blakely-Booker* question would neither prejudice the Government nor require this Court to delve into complex issues not passed on below."

**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. VANORDEN, 2005 WL 1531151 (June 30, 2005)

Booker

In this *Booker* remand from the Supreme Court, the Court (PC by Marcus and Musgrave, with Tjoflat specially concurring) reinstated its earlier affirmance by relying on the *Ardley/Dockery* rule, unique to the 11th Circuit, holding that a *Blakely/Booker* claim cannot be raised outside the principal brief. In this case, the Court had rejected the appeal in which no such claim was made, and the Supreme Court granted cert, vacated, and remanded in light of *Booker*. The Court found that the GVR did not require the Court to disregard *Ardley/Dockery*. Tjoflat said "If we were writing on a clean slate, I would consider the merits of Vanorden's *Booker* claim."

U.S. v. KING, 2005 WL 1531068 (June 30, 2005)

***Booker* restitution not plain error**

The Court (PC by Tjoflat, Kravitch, Mills) partially vacated a restitution order where the Government confessed error with respect to the portion of the order representing the bank's (i.e., the victim's) cost of providing

grief counseling to its employees because restitution for that cost is not authorized by the Mandatory Victims Restitution Act (“MVRA”), 18 U.S.C. § 3663A. However, King challenged the remainder of the order, under *Booker* for the first time on appeal. The Court said because the circuits “are, at best (from appellant’s point of view), split” on whether *Booker* applies, and the 11th Circuit has not yet decided the issue, there can have been no “plain error.”

U.S. v. CARTWRIGHT, 2005 WL 1488416 (June 24, 2005)

U.S.S.G. § 2D1.1(b)(2)(B)

Cartwright appealed his 87-month sentence, imposed after pleading guilty to conspiracy to possess with intent to distribute one thousand kilograms or more of marijuana and a detectable amount of hashish, in violation of 42 U.S.C. section 1903(j). Among other things, Cartwright appealed the application of an enhancement for acting as a “pilot, copilot, captain, navigator, . . . or any other operation officer” on a boat carrying controlled substances. U.S.S.G. § 2D1.1(b)(2)(B). The Court affirmed, Per Curiam (Anderson, Carnes and Pryor), holding that “Although we decline to adopt a rigid definition of the terms in the enhancement, we conclude that Cartwright’s admission that he navigated the vessel established that the enhancement was warranted.”

U.S. v. PHILLIPS, 2005 WL 1459431 (June 22, 2005)

Sentencing; attempted sale; 2L1.2; early parole termination by deportation; *Booker*; harmless error

The Court (PC by Carnes, Marcus, Kravitch) held that a prior conviction for *attempted sale*

of a controlled substance qualifies for the 16-level enhancement under U.S.S.G. § 2L1.2(b)(1)(A). The Court also rejected Phillips’ argument that the 2-level enhancement under § 4A1.1(d) for committing an offense while still under parole supervision was inapplicable because his deportation following release from confinement for the prior offense effected an early termination of his parole. Finally, the Court concluded the claimed *Booker* error arising from the 16-level enhancement for prior convictions under § 2L1.2(b)(1)(A)(I) did not implicate *Booker*, and further the statutory error was harmless because the district court articulated an alternate sentence using the 18 U.S.C. § 3553(a) factors.

U.S. v. PIPKINS, 2005 WL 1421449 (June 20, 2005)

Booker; Levy; abandonment

Following the Supreme Court’s remand for reconsideration in light of *Booker*, the Court (PC: Edmondson, Dubina, Cox) again denied relief on the basis that the issue had not been raised in the initial brief on appeal, citing *Levy*, but failing to note that the Supreme Court on June 6th granted, vacated and remanded *Levy*, which presented the identical question.

U.S. v. KELLEY, 2005 WL 1403400 (June 16, 2005)

Robbery; intimidation

The Court (Pryor, Carnes, Forrester) rejected the defense argument that the defendant’s actions in jumping onto a bank teller’s counter (when she briefly walked away and was on the phone) and reaching into her drawer were sufficient to constitute the elements of bank robbery, and were not merely larceny; even though the robbers said and did nothing directly toward the teller; the

elements of intimidation (based on an adjoining teller's testimony to her fear) and "from the person or presence of another" (based on the adjoining teller being within arm's length of the men) were satisfied.

U.S. v. MCGOUGH, 2005 WL 3389374 (June 15, 2005)

Home warrantless search; community caretaking exception?; no good faith applicable

The Court (Cox + Edmondson & Birch) reversed the district court's denial of a suppression motion, assuming arguendo that there even is a "community caretaking exception" to the Fourth Amendment, because that exception did not extend to the entry here where there was no warrant and no consent. The defendant locked his five-year-old daughter in the apartment while he went to pick up dinner; she tried to call her aunt but accidentally dialed 911, then hung up; police arrived, said she looked scared and could not open burglar barred door; police called fire rescue; defendant returned and said it was his apartment; police arrested him for reckless conduct (in leaving daughter locked inside), handcuffed him, and put him in police car. He answered the officers' questions that there was nothing inside the apartment they needed to know about and they could NOT go inside to look. Child's aunt arrived to take care of her, but police then "accompanied" child to get shoes and clothes inside by picking her up and carrying her; while putting on her shoes, she allegedly pointed out to them a bag of marijuana and gun and said her father used it to kill people; they left and then secured the apartment while they got a warrant.

U.S. v. MATTHEWS, 2005 WL 1334341 (June 8, 2005)

Fed. R. Evid. 404(b) error not harmless

Co-conspirators in a cocaine trafficking conspiracy trial testified that Matthews was part of a significant, though somewhat informal and irregular, conspiracy to distribute cocaine in Jacksonville and Miami, which came under investigation in July 2000. After the conspirators testified, two officers were permitted to testify, under Rule 404(b), about a 1991 incident, establishing that Matthews had been involved in street-level drug sales for some time but was still near the bottom of the drug-trade hierarchy, merely resupplying street-level sellers. In a long, multi-part, multi-issue, fact-intensive opinion, the Court (Tjoflat, with Hill and Granade), reversed his convictions under Rule 404(b). The Court said the officers' testimony was admitted under the theory that it was admissible to prove his intent to join the conspiracy. However, "by the time the Government put on its 404(b) evidence, it should have been clear that the Government's case would rise or fall based on whether the jury believed Matthews had committed the charged acts at all, not on whether he possessed the requisite guilty intent." The Court also "disagree[d]" with a prior 11th Cir. panel decision, *Diaz-Lizaraza*, 981 F.2d at 1224-25, to the extent that it suggested that even when intent is not realistically at issue, it is necessary for the defendant to specifically stipulate to intent in order to avoid the introduction of Rule 404(b) evidence. The Court further applied the *Kotteakos* standard to find the Rule 404(b) error was not harmless because "There is at least a 'reasonable likelihood' that it had an effect on the jury verdict. Consequently, we are 'left in grave doubt' as to whether the error influenced the jury, and we certainly 'cannot say, with fair assurance,' that it did not."

U.S. v. SEARS, 2005 WL 1334892 (June 8, 2005)

***Booker*, stay of mandate needed to divest jurisdiction of the lower court** In September 2004, between publication of the *Blakely* and *Booker* decisions, Sears won a sentence reversal from the 11th Circuit on grounds unrelated to those decisions. He simultaneously filed a cert. petition under *Blakely* and sought resentencing in the district court per the 11th Circuit's mandate. The district court did not know that he had a cert. petition pending. In a post-*Booker* resentencing, the district court expressly gave him a choice to be sentenced under pre-or post-*Booker* regimes. He expressly waived his right to be sentenced under *Booker*, and the district court resentencing him in compliance with the 11th Circuit's mandate. The Supreme Court then vacated the 11th Circuit's initial judgment and reversed in light of *Booker*. The Court (PC by Anderson, Carnes and Wilson), concluded that Sears is stuck with the sentence he got because (1) he waived his *Booker* rights; and (2) he failed to seek a stay of the 11th Circuit's mandate for prosecution of the cert. petition, which would have been necessary to divest the district court of jurisdiction while the petition was pending.

CAMACHO-IBARQUEN v. U.S., 2005 WL 1297236 (June 2, 2005) (on rehearing)

Booker

Camacho-Ibarquen objected to footnote four in the opinion published at 404 F.3d 1283, 1290 n.4 (11th Cir. 2005), where the Court said that because Camacho's argument was that there was *Booker* constitutional error and as a result he should be resentenced without the extra-verdict enhancement, the Court would not force upon him a remand on *Booker* statutory grounds which would involve resentencing with the enhancement and might

lead to a higher sentence. According to his rehearing petition, Camacho prefers a remand for resentencing on *Booker* statutory grounds to none at all. In that light, the Court, Per Curiam (Tjoflat, Dubina, Carnes) revised the opinion to hold that Camacho failed to pass the third prong of the plain error *Booker* test in *Rodriguez*. All other holdings of the original opinion remain.

U.S. v. MATHENIA, 409 F.3d 1289 (May 23, 2005)

***Booker* harmless error**

The Court (PC by Black, Carnes, Pryor) distinguished harmless error for constitutional errors and for non-constitutional errors, holding that a *Booker* remedial opinion error is a nonconstitutional error subject to the lesser *Kotteakos* standard of review. The Court applied that analysis to find the *Booker* remedial opinion error harmless where the district court, in a pre-*Booker* sentencing, said it would impose the same sentence even if the guidelines were to be held advisory.

U.S. v. HENDERSON, 409 F.3d 1293 (May 23, 2005)

Evidence, polygraph, cross-section jury selection, *Booker* plain error found

The charges against Henderson stem from accusations that he unlawfully pistol-whipped an arrestee, Christopher Grant, while a corporal with the Charlotte County, Florida, Sheriff's Department and then falsified the report of the incident. Henderson was convicted by a jury of use of excessive force under color of law, submitting a misleading and incomplete incident report, and providing a false statement of material fact to an FBI agent. The Court (Barkett, with Farris separately concurring; Hill dissented) affirmed the

conviction but reversed the sentence in a fact-intensive opinion. As to evidentiary issues, the Court, among other things, found no abuse of discretion in the district court's decision to exclude polygraph evidence favorable to Henderson under Daubert and Rule 702. [Hill's dissent argues that the polygraph ruling conflicts with *United States v. Piccinonna*, 885 F. 2d 1529 (11th Cir. 1989) (en banc).] As to jury selection, Henderson argued a Sixth Amendment cross-section violation in that the Middle District's Juror Questionnaire Form exempts federal law enforcement officers. The Court rejected his claim, saying "federal, part-time, and private law enforcement officers would only compose a fraction of the 0.55% of eligible jurors in the pool. It thus 'may be fairly said that the jury lists or panels are representative of the community.' Moreover, 'a significant state interest is manifestly and primarily advanced' by this somewhat broader exemption, particularly with respect to federal law enforcement officers." As to sentencing, the Court found plain constitutional *Booker* error: "The judge imposed a sentence of 87 months, but remarked that she '[thought] that probably under the circumstances, that's a little high...but that's what the guidelines call for and that's what I'm obligated to sentence him.' This 87-month sentence exceeded the maximum authorized by the facts established by the jury verdict, and facts necessary to support that sentence -- namely, those supporting the firearm-related enhancements-- were not found by a jury beyond a reasonable doubt or admitted by the defendant, and did not constitute prior convictions."

U.S. v. SILVESTRI, 409 F.3d 1311 (May 23, 2005)

Conspiracy/ laundering proceeds of mail and wire fraud, invited error

Silvestri was convicted after a jury trial for conspiring to launder the proceeds of mail and wire fraud, and for 30 substantive counts of laundering the proceeds of mail and wire fraud, in connection with Silvestri's involvement in a fraudulent investment program based in South Carolina. The jury specified as part of its verdict that Silvestri was guilty of both of the purposes and objects of the conspiracy. Currently 73 years old, Silvestri is presently serving his 122-month prison sentence. The Court (Marcus, with Black and Smith) affirmed the conviction in lengthy, a fact-intensive opinion, finding that the evidence was sufficient, and that Silvestri invited any alleged errors in the jury instructions.

U.S. v. PETHO, 409 F.3d 1277 (May 18, 2005)

Harmless *Booker* error, U.S.S.G. § 2B3.1(b)(2)(F) "threat of death" enhancement

Petho entered the Hancock Bank and handed a teller a note that said, "I have an explosive device. Please give me all your 100's, 50's and 20's." The teller gave him \$4,140.00, and Petho left the bank. He turned himself in to the FBI and provided a written statement admitting to the robbery. He later pleaded guilty to one count of bank robbery. Over objection, the district court imposed an enhancement under U.S.S.G. § 2B3.1(b)(2)(F) for a threat of death. The Court affirmed (PC by Barkett, Hull and Wilson) concluding that precedent controlled. Petho also had a preserved *Booker* error, but the Court found it to be a non-constitutional error that was harmless because the district court commented "[t]he sentence I'm going to impose of 37 months is the same sentence that I would impose if *Blakely* were applied to the Federal

Sentencing Guidelines so that the guidelines were non-binding.” [Ed. note: See also *United States v. Robles*]

U.S. v. ROBLES, 408 F.3d 1324 (May 10, 2005)

***Booker* harmless error; prior statement as justification for same sentence**

The Court affirmed the defendant’s pre-*Booker* sentence, based on drug quantity which the defendant disputed, concluding the government had proven beyond a reasonable doubt the error was harmless. The district court stated at sentencing, in response to the *Blakely* objection, that if the guidelines were only advisory it would still impose the same sentence and that it “meets the goals of punishment and” deterrence. Based on that statement, the Court concluded: “we can conclusively say the error did not affect Robles’ substantial rights.” Rejecting the defendants arguments about facts not previously relevant or permissible, such as those under 3553(a), the Court concluded that the district court’s statements “make clear that it did not feel limited in what evidence it could consider,” and that it could not “see how specific consideration of [those facts] could possibly change the result.” It went on that it “would not expect the district court in every case to conduct an accounting of every 3553(a) factor.” The Court suggested that would be the better procedure if the sentence is outside the guidelines. [Ed. note: See also *United States v. Petho*.]

U.S. v. GALLEGOS-AGUERO, 409 F.3d 1274 (May 18, 2005)

***Booker*, *Almendarez-Torres*, U.S.S.G. § 2L1.2(b)(1)(A)(vii)**

Gallegos-Aguero appealed his 96-month sentence for illegal re-entry into the United States following a conviction for an

aggravated felony. The proceedings were marred by some confusion, which the Court resolved by construing his argument as a challenge to a 16-level enhancement pursuant to U.S.S.G. § 2L1.2(b)(1)(A)(vii), based upon his prior conviction. Gallegos-Aguero argued that *Almendarez-Torres* is no longer good law, and that in any event it is distinguishable because he never stipulated to the characterization of his prior offense as a qualifying offense under § 2L1.2(b)(1)(A)(vii) and because he objected to the court’s use of the preponderance of the evidence standard to find the existence of that aggravating factor. The Court affirmed (PC by Barkett, Hull and Wilson) concluding that the post-*Booker* *Almendarez-Torres* claim has been decided against him in *United States v. Orduno-Mireles*, 2005 WL 768134 (11th Cir. 2005). The Court also rejected his preserved *Booker* error claim for having been sentenced under mandatory guidelines, finding it harmless.

U.S. v. FIELDS, 408 F.3d 1356 (May 16, 2005)

***Booker* plain error, U.S.S.G. § 2D.1(b)(1)**

The Court (Carnes, with Pryor and Forrester) held that the fact that a pre-*Booker* sentence was imposed at the bottom of the mandatory guidelines range is not sufficient for the defendant to overcome his/her burden of the third prong of plain error analysis. This case extends *Rodriguez*, where the same was held to be true with a sentence imposed in the middle of the guidelines range. The Court also held that the district court did not clearly err in finding that it was reasonably foreseeable to Fields that his co-conspirators would possess firearms in furtherance of their conspiracy to warrant application of U.S.S.G. § 2D.1(b)(1).

U.S. v. WILLIAMS, 408 F.3d 745 (May 6, 2005)

***Booker*; plain error; brandishing firearm; clear error; acceptance of responsibility**

The defendant pled guilty to six counts of commercial business robbery under 18 U.S.C. § 1951 based on the fact he had robbed several jewelry counters at mall department stores; the charging document did not allege firearm possession. Most victims stated he possessed a firearm, but the defendant denied possessing a firearm. The Base Offense Level was enhanced for brandishing or possessing a firearm. He was also denied acceptance of responsibility based on his denial of possessing a firearm. The evidence included two witnesses' testimony about the gun; a videotape of a subsequent robbery showing a gun; prior record for robbery with a gun; and possession of similar gun at arrest. No *Booker*-type objection was made in the district court to the sentence at the top of the guideline range. Applying plain error and *Rodriguez*, the Court affirmed the firearm enhancement. Further, the denial of acceptance based on defendant's denial of firearm possession was not error, much less clear error.

U.S. v. BALLESTERO, 2005 WL 1038769 (May 4, 2005)

***Booker* plain error found**

The Court vacated and remanded under *Booker*. The Court (PC: Barkett, Hull, Wilson) found the third prong of the plain error test met by the district court's bottom-of-the-range sentence, granting of PSI recommendation of 3-level reduction for acceptance and two-level safety valve reduction, and statement in sentencing at the bottom of the range: "I intend, of course, to sentence him at the lowest end of the guideline, the lowest I can give him."

U.S. v. DACUS, 408 F.3d 686 (May 3, 2005)

***Booker* plain error, *Levy/Dockery* concession exception**

Dacus appealed his sentence for attempt to possess with intent to distribute marijuana. In his initial brief, he argued that the district court erred when it denied him a downward departure based on his substantial rehabilitation efforts after the offense. The government did not respond to this argument, but conceded error under *Booker*. Dacus then adopted the argument of the government in his reply brief. The Court (PC by Carnes, Marcus and Pryor) vacated and remanded for resentencing. "Although we ordinarily refuse to consider an argument not raised in an initial brief, we consider the argument that Dacus's sentence was erroneous under *Booker* because both parties have joined the issue without objection. The district court stated at sentencing that if it had the authority to do so, it would have granted a downward departure from the guideline range for the rehabilitation efforts of Dacus. Because the district court committed plain error when it applied the Sentencing Guidelines as mandatory, we vacate and remand for resentencing."

U.S. v. CRAWFORD, 407 F.3d 1174 (May 2, 2005)

Guidelines, minimal planning, invalid downward departure

Crawford owned and operated a store where a large volume of business came from the WIC program. Crawford was approached in 1996 by Kelley, who offered to sell to Crawford WIC vouchers that Kelley had purchased from residents of public housing projects in Atlanta. Crawford and Kelley agreed that Crawford would pay Kelley for the vouchers in an amount close to the face

value of the vouchers, Crawford would then redeem the vouchers, and Kelley would keep 60 percent of the profits and give Crawford 40 percent. Crawford and Kelley engaged in over 100 transactions over a five year period involving vouchers with a total face value of \$434,032. The district court refused to apply the more than minimal planning enhancement, but the Eleventh Circuit (Pryor, with Marcus; Edmondson concurred in result that the sentence should be vacated and the case remanded for resentencing) reversed in favor of the Government “Because both the large number of transactions and the deliberate steps Crawford took to complete those transactions compel a finding that Crawford did not merely take advantage of a sudden opportunity.” The Court also found, in favor of the Government, that the district court committed several legal errors in its decision that a downward departure was warranted. “We cannot presume that, in the absence of those errors, the district court would have decided that a downward departure was warranted in calculating an advisory guideline range....On remand, the district court must calculate an advisory guideline range that includes the more than minimal planning enhancement and considers whether to grant a downward departure from that advisory guideline range consistent with this opinion.”

U.S. v. BURGE, 407 F.3d 1183 (May 2, 2005)

ACCA, prior juvenile adjudication, Booker
Burge pleaded guilty to illegal possession of a firearm by a previously convicted felon, 18 U.S.C. § 922(g)(1), and was sentenced under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e), to 190 months’ imprisonment. Burge challenged the constitutionality of his sentence under the ACCA and *Booker*. The Court (Dubina, with

Edmondson and Hull), affirmed, holding (1) Burge’s juvenile charge of burglary adjudicated by the Juvenile Court of Mobile County, Alabama, based on the statutory language of Ala.Code § 13A-7-5, the juvenile petition, and the juvenile judgment of delinquency, was a qualifying prior offense under 924(e); (2) as a question of first impression in this Court, “a prior nonjury juvenile adjudication that was afforded all constitutionally-required procedural safeguards can properly be characterized as a prior conviction for *Apprendi* purposes”; (3) No plain error under *Booker*.

STEPHENS v. HALL, 407 F.3d 1195 (May 2, 2005)

Capital Habeas, Brady

The issue presented in this habeas appeal is whether the Georgia Supreme Court unreasonably applied clearly established federal law when it affirmed, on direct appeal, Stephens’ murder convictions on two grounds: first, that the suppression of arrest warrants for other suspects who were known to the defense did not deprive Stephens of due process of law under *Brady*; and second, that the false testimony of a detective, who was cross-examined regarding his alleged falsehoods, did not deprive Stephens of a fair trial. In a detailed opinion, the Court (Pryor, with Tjoflat and Dubina) affirmed, saying that “although we do not condone either the suppression of the arrest warrants or the misleading testimony of the detective, the decision of the Georgia Supreme Court was not objectively unreasonable, and we, therefore, affirm the denial of the petition for a writ of habeas corpus.”

MERCADO v. CITY OF ORLANDO, 407 F.3d 1152 (Apr. 29, 2005)

Fourth Amendment, excessive force, “Sage

Launcher” 42 U.S.C. § 1983

The Court (Siler, with Marcus and Fay) affirmed in part and reversed in part the grant of summary judgment in an excessive force case, concluding that (1) if police officer aimed a “Sage Launcher” at a detainee’s head, he used excessive force, however, the officer who was in another room during the incident did not violate detainee’s Fourth Amendment rights under a supervisory liability theory; (2) police officer who utilized deadly force to subdue subject in non-deadly situation violated detainee’s clearly established Fourth Amendment rights, and therefore was not entitled to qualified immunity; and (3) detainee could not establish a claim against city.

U.S. v. MARTINEZ, 407 F.3d 1170 (Apr. 29, 2005)

***Booker* plain error found**

Martinez pleaded guilty to conspiracy to possess with intent to distribute at least five kilograms of cocaine and using or carrying a firearm in furtherance of a violent and drug-related crime, and was sentenced as a career offender to 235 months for the cocaine charge and 60 months for the firearms charge after receiving a CHC downward departure. Martinez filed a notice of appeal on January 18, 2005, but before filing his initial brief, he filed a “Motion for Temporary Relinquishment of Jurisdiction to the Trial Court,” in which he requested “that we return his case to the district court for reconsideration of his sentence in the light of the decision of the Supreme Court in *Booker*. Martinez’s unconventional motion is now before us, and we construe it as a motion for summary reversal...We then directed the government to file a letter brief regarding the merits of Martinez’s appeal.” The Court (Pryor, with Carnes and Anderson), granted

the motion and reversed because the government conceded plain error where the district court expressed an unequivocal desire to impose a sentence lower than the minimum sentence mandated by the Guidelines.

CENTOBIE v. CAMPBELL, 407 F.3d 1149 (Apr. 27, 2005)

Certificate of Appealability, “next friend” standing, death penalty, habeas

Centobie, sentenced to death in Alabama, waived habeas review but attorney Puzone of the Federal Defenders of Alabama filed a “next friend” habeas petition arguing incompetence to be executed. It was dismissed for lack of standing. Puzone sought a certificate of appealability, but the 11th Circuit denied the certificate, holding (per curiam, with Tjoflat, Black, Wilson) that Puzone lacks standing to litigate on Centobie’s behalf because “Puzone is not ‘truly dedicated to the best interests of the person on whose behalf [s]he seeks to litigate,’ and she does not have ‘some significant relationship with the party in interest.’” Even if she had standing, she has not made a “substantial showing that Centobie is in fact incompetent.”

U.S. v. VERBITSKAYA, 406 F.3d 1324 (Apr. 21, 2005)

Hobbs Act, affecting commerce, ineffective assistance, *Booker* procedural bar

In 2000, Vika Verbitskaya threatened to tell the authorities that Khazanov had raped her if he did not give her money that he acquired from insurance claims settlement resulting from Khazanov’s wife’s 1999 fatal automobile accident. The Court (Kravitch, with Birch and Cudahy), affirmed, holding (1) evidence was sufficient to support finding that theft of victim’s paintings interfered with

their potential sale into interstate commerce because even after Lopez a conviction under the Hobbs Act requires proof of a minimal, not substantial, effect on commerce”; (2) district court’s failure to require a unanimous verdict on the government’s four alternative theories on how interstate commerce was affected by defendants’ extortion scheme did not violate Sixth Amendment; (3) prosecutor’s statements during opening arguments was not plain error; (4) district judge’s interruptions of the defense did not deny defendant the right to an impartial trial; (5) defense counsel’s failure to be present in court during closing arguments did not amount to ineffective assistance of counsel (which court reviewed on direct appeal, finding the record sufficiently developed); (6) six-level enhancement for use of a firearm was warranted; and (7) Booker claim barred because it was raised via supplemental authority notice after initial brief was filed.

**U.S. v. RAAD, 406 F.3d 1322 (Apr. 21, 2005)
Mandatory Minimum Sentencing, Eighth Amendment**

Raad appealed his sixty-month sentence, imposed following his guilty plea for three counts of smuggling aliens for financial gain, in violation of 8 U.S.C. § 1324. The district court calculated Raad’s sentencing range to be 51-63 months, but he was facing a statutory minimum mandatory 60 months. He argued, as a plain error issue, that mandatory minimum sentence prescribed under § 1324 violates the Eighth Amendment’s prohibition against cruel and unusual punishment. The Court (Per Curiam by Tjoflat, Dubina and Kravitch), affirmed, saying “Raad cannot show that his five-year mandatory minimum sentence was grossly disproportionate to his offenses of smuggling three people into the United States simply because the statutory

minimum sentence fell at the high end of the guidelines range.”

U.S. v. ABREU, 406 F.3d 1304 (Apr. 20, 2005)

Fingerprint evidence under *Daubert*

Abreu was convicted of possession with intent to distribute marijuana, 21 U.S.C. § 841. He argued that the district court erred in affirming the magistrate judge’s order denying his motion to preclude expert testimony regarding fingerprint evidence, because the government failed to demonstrate that the testimony met the requirements of Rule 702 of the Federal Rules of Evidence. The Court (per curiam by Dubina, Hull and Wilson) held that fingerprint evidence admitted in defendant’s case satisfied *Daubert* and Rule 702.

**HARRIS v. COWETA COUNTY, GEORGIA, 406 F.3d 1307 (Apr. 20, 2005)
High Speed Chase, Fourth Amendment, § 1983, qualified immunity**

Harris sued the county and its law enforcement officers under § 1983 alleging use of excessive force in violation of his Fourth Amendment rights when he was seized in a high-speed chase after first being clocked at 73 MPH in a 55 MPH zone, and where there were no warrants out for his arrest. Barkett, joined by Birch and with Cox specially concurring, held (1) officers were acting within the scope of their discretionary authority; (2) motorist was “seized,” within the meaning of the Fourth Amendment, when officer used his vehicle to ram into motorist’s vehicle; (3) Feninger’s authorization did not sanction the use of deadly force and he is therefore immune; and (4) it was clearly established that reasonable officer would know that conduct of engaging in high-speed chase and ramming vehicle to stop fleeing

motorist was unconstitutional, barring Scott's entitlement to qualified immunity.

U.S. v. CUSTER, 407 F.3d 1267 (Apr. 13, 2005)

***Booker*; 2G2.2(b)**

The Court granted rehearing under *Booker*, where the defendant had timely raised the claim in both the district and appellate courts. Granting the defendant's challenge to the four-level enhancement under 2G2.2(b)(3) and five-level enhancement under (b)(4), the Court remanded for resentencing.

TABLE OF CASES IN THIS ISSUE

Supreme Court

<u>ARTHUR ANDERSEN LLP v. U.S.</u> , 125 S. Ct. 2129 (May 31, 2005)	11
<u>BELL v. THOMPSON</u> , 2005 WL 1499791 (June 27, 2005)	8
<u>BRADSHAW v. STUMPF</u> , 125 S. Ct. 2398 (June 13, 2005)	10
<u>CUTTER v. WILKINSON</u> , 125 S. Ct. 2113 (May 31, 2005)	11
<u>DECK v. MISSOURI</u> , 125 S. Ct. 2007 (May 23, 2005)	11
<u>DODD v. U.S.</u> , 125 S. Ct. 2478 (June 20, 2005)	9
<u>GONZALES v. RAICH</u> , 125 S. Ct. 2195 (June 6, 2005)	11
<u>GONZALEZ v. CROSBY</u> , 2005 WL 1469516 (June 23, 2005)	8
<u>HALBERT v. MICHIGAN</u> , 2005 WL 1469183 (June 23, 2005)	8
<u>JOHNSON v. CALIFORNIA</u> , 125 S. Ct. 2410	

(June 13, 2005)	11
<u>MAYLE v. FELIX</u> , 2005 WL 1469153 (June 23, 2005)	9
<u>MEDELLIN v. DRETKE</u> , 125 S. Ct. 2088 (May 23, 2005)	12
<u>MILLER-EL v. DRETKE</u> , 125 S. Ct. 2317 (June 13, 2005)	10
<u>PACE v. DIGUGLIELMO</u> , 125 S. Ct. 1807 (Apr. 27, 2005)	12
<u>PASQUANTINO v. U.S.</u> , 125 S. Ct. 1766 (Apr. 26, 2005)	13
<u>ROMPILLA v. BEARD</u> , 125 S. Ct. 2456 (June 20, 2005)	9
<u>SMALL v. U.S.</u> , 125 S. Ct. 1752 (Apr. 26, 2005)	12
<u>WILKINSON v. AUSTIN</u> , 125 S. Ct. 2384 (June 13, 2005)	11

Eleventh Circuit

<u>CAMACHO-IBARQUEN v. U.S.</u> , 2005 WL 1297236 (June 2, 2005) (on rehearing)	16
<u>CENTOBIE v. CAMPBELL</u> , 407 F.3d 1149 (Apr. 27, 2005)	21
<u>HARRIS v. COWETA COUNTY, GEORGIA</u> , 406 F.3d 1307 (Apr. 20, 2005)	22
<u>MERCADO v. CITY OF ORLANDO</u> , 407 F.3d 1152 (Apr. 29, 2005)	20
<u>STEPHENS v. HALL</u> , 407 F.3d 1195 (May 2, 2005)	20
<u>U.S. v. ABREU</u> , 406 F.3d 1304 (Apr. 20, 2005)	22
<u>U.S. v. BALLESTERO</u> , 2005 WL 1038769 (May 4, 2005)	19
<u>U.S. v. BURGE</u> , 407 F.3d 1183 (May 2, 2005)	20

<u>U.S. v. CARTWRIGHT</u> , 2005 WL 1488416 (June 24, 2005)	14	<u>U.S. v. SILVESTRI</u> , 409 F.3d 1311 (May 23, 2005)	17
<u>U.S. v. CRAWFORD</u> , 407 F.3d 1174 (May 2, 2005)	19	<u>U.S. v. VANORDEN</u> , 2005 WL 1531151 (June 30, 2005)	13
<u>U.S. v. CUSTER</u> , 407 F.3d 1267 (Apr. 13, 2005)	22	<u>U.S. v. VERBITSKAYA</u> , 406 F.3d 1324 (Apr. 21, 2005)	21
<u>U.S. v. DACUS</u> , 408 F.3d 686 (May 3, 2005)	19	<u>U.S. v. WILLIAMS</u> , 408 F.3d 745 (May 6, 2005)	18
<u>U.S. v. FIELDS</u> , 408 F.3d 1356 (May 16, 2005)	18		
<u>U.S. v. GALLEGOS-AGUERO</u> , 409 F.3d 1274 (May 18, 2005)	18		
<u>U.S. v. HENDERSON</u> , 409 F.3d 1293 (May 23, 2005)	16		
<u>U.S. v. KELLEY</u> , 2005 WL 1403400 (June 16, 2005)	14		
<u>U.S. v. KING</u> , 2005 WL 1531068 (June 30, 2005)	13		
<u>U.S. v. MARTINEZ</u> , 407 F.3d 1170 (Apr. 29, 2005)	21		
<u>U.S. v. MATHENIA</u> , 409 F.3d 1289 (May 23, 2005)	16		
<u>U.S. v. MATTHEWS</u> , 2005 WL 1334341 (June 8, 2005)	15		
<u>U.S. v. MCGOUGH</u> , 2005 WL 3389374 (June 15, 2005)	15		
<u>U.S. v. PETHO</u> , 409 F.3d 1277 (May 18, 2005)	17		
<u>U.S. v. PHILLIPS</u> , 2005 WL 1459431 (June 22, 2005)	14		
<u>U.S. v. PIPKINS</u> , 2005 WL 1421449 (June 20, 2005)	14		
<u>U.S. v. RAAD</u> , 406 F.3d 1322 (Apr. 21, 2005)	22		
<u>U.S. v. ROBLES</u> , 408 F.3d 1324 (May 10, 2005)	18		
<u>U.S. v. SEARS</u> , 2005 WL 1334892 (June 8, 2005)	15		