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NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

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**CHALLENGING THE GUIDELINES**

A talented group of lawyers has published their initial effort at, what they have described as, “deconstructing the Guidelines.” They have done the work to assist defense lawyers in convincing sentencing judges to impose below-guideline sentences. With the promise that has come from the Supreme Court’s decision in Kimbrough v. United States, 128 S. Ct. 558 (2008), they have published three articles over the course of this summer, with plans for more to come.

In last year’s decision in Rita v. United States, 127 S. Ct. 2456, 2463 (2007), Justice Breyer wrote that “the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve Section 3553(a)’s objectives.” Justice Breyer reached that conclusion largely because the United States Sentencing Commission “has the capacity. . . to ‘base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.’” Kimbrough, 128 S. Ct. at 574. (internal citation omitted). It is a capacity,

though, the Commission has not always used. In Kimbrough, the Supreme Court recognized that the crack cocaine “Guidelines do not exemplify the Commission’s exercise of its characteristic institutional role. In formulating Guidelines ranges for crack cocaine offenses, . . . the Commission looked to the mandatory maximum sentences set in the 1986 Act, and did not take account of ‘empirical data and national experience.’” (internal citation omitted).

Because of that, the Kimbrough Court went on to conclude that “it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence ‘greater than necessary’ to achieve § 3553(a)’s purposes, even in a mine-run case.” *Id.* That means, of course, that where it can be shown the Commission, in promulgating any given guideline, similarly failed to “exercise its characteristic institutional role,” it becomes that much easier for a sentencing judge to impose a sentence outside the advisory guideline range even in the “mine-run” case.

Thus far, Troy Stabenow, an Assistant Federal Public Defender from Missouri, and National Federal Defender Sentencing Resource Council, Amy Baron-Evans, Jennifer Coffin, and Sara Noonan, have taken on the guidelines for child pornography, career offenders, and relevant conduct. Their work is available at the Sentencing Resource Page of the Defenders Services Training Branch web page: [www.fd.org](http://www.fd.org).

In the introduction to his work, Stabenow explains that his “paper provides the tools for a defense presentation to the court that the child pornography guidelines, as applied to a particular defendant, are not based on sound research and reflective experience, and therefore fail to produce an appropriate sentence.” In reviewing the history of the child pornography guideline, Stabenow explains that the penalties have increased over the years, based, at least in part, on such things as: (a) Senator Jesse Helms’ incorrect claim that a proposed amendment creating a new guideline for the lesser harms of possession, receipt, and transportation of child pornography would result in “smut peddlers and pedophiles” receiving “at most, probation” and an incorrect claim that the proposed amendment would reduce the penalties for traffickers; (b) a 1996 report from the Sentencing Commission that based its conclusions on a small sample taken between 1994 and 1995 when the Federal Government prosecuted only the most egregious offenders, individuals who bear little resemblance to the vast majority of those being prosecuted today; (c) a two level enhancement for the use of a computer that applies to nearly every defendant even though the rationale justifying the increase is rarely present; and (d) dramatic changes to the

guideline resulting, not from study by the Commission or debate in Congress, but from the efforts of two unknown authors within the Department of Justice. Stabenow shows, too, that, as a result of the way the guideline was constructed, first-time offenders often find themselves near to or at the maximum penalty.

In her challenge to the career offender guidelines, Amy Baron-Evans describes the history of the provision: “The guideline was not based on past practice at its inception, the Commission’s one attempt to ameliorate its harshness and unwarranted disparity was struck down by the Supreme Court, and it has been greatly broadened beyond what Congress intended, without careful study, without apparent reason, and directly contrary to feedback from the courts.” Most of her argument is directed at showing that the Sentencing Commission has relied upon a definition of “crime of violence,” that was never intended by Congress. She explains, too, that Congress never intended to include inchoate drug offenses- aiding and abetting, attempting, conspiracy- in the guideline. Baron-Evans suggests that “it may be worth revisiting the Commission’s broadening of the statutory terms” to challenge the application of the guideline to a particular case. She goes on to note that while “courts may be reluctant to overturn prior precedent,” the same “arguments can be used to buttress arguments that the guideline does not exemplify the exercise of the Commission’s independent expert role and thus reflects unsound judgment.” Her article includes citations to cases that have questioned the wisdom of the career offender guideline and an appendix that lists “crimes of violence” that are included within the career offender definition of that term, but excluded by the

statutory definitions.

In her challenge to the relevant conduct provision, Baron-Evans outlines the content of her paper: “Part I of this paper recounts a history of the guideline provisions requiring district courts to calculate the guideline range based on uncharged, dismissed and acquitted crimes. It demonstrates that these provisions were not authorized by the Sentencing Reform Act or reviewed by Congress, and were adopted without empirical testing or support. Part II demonstrates that these provisions were not based on past practice, have not been revised in light of feedback or research, have failed to achieve their untested theoretical goals and, instead, transfer sentencing power to prosecutors, create hidden and unwarranted disparities, and promote disrespect for the law. Part III discusses open constitutional challenges to the provisions.”

Much as she did with her challenge to the career offender guideline, Baron-Evans argues that the Sentencing Commission, in creating its rules regarding relevant conduct, ignored the intent of Congress. She posits that much of what has become standard practice in applying the guideline is a product of the commentary, which has never been reviewed by Congress and which, since the decision in Booker, she says, is no longer binding upon the courts. She contends that the Commission’s unsupported expansion of the concept of relevant conduct can be used to argue that a sentence below the guideline is warranted in particular cases and suggests that the application of the guideline is subject to constitutional challenges as well.

The work done by these lawyers evidences a great deal of thought and research. If you have a client charged with child pornography,

who is classified as a career offender, or is looking at a longer sentence based on the relevant conduct provision of the Guidelines, take a look at and consider these papers. You will surely find, too, that there are other guidelines that are susceptible to the sort of analysis done by Stabenow and the National Sentencing Resource Counsel. Don’t be afraid to try some “deconstructing” research on your own. It can only help.

### **CARRYING A CONCEALED FIREARM NO LONGER A CRIME OF VIOLENCE**

In United States v. Archer, No. 07-11488, 2008 WL 2521969 (11<sup>th</sup> Cir. June 26, 2008), the Eleventh Circuit Court of Appeals reversed course and held that the Florida offense of carrying a concealed firearm was not a “crime of violence” for purposes of the career offender guideline (USSG § 4B1.1). It seems clear, too, that it cannot serve, either, as a predicate for armed career criminal classification.

In September of last year, the Court had decided the case the other way, holding consistent with its past decision in United States v. Gilbert, 138 F.3d 1371 (11<sup>th</sup> Cir. 1998), that carrying a concealed weapon was a crime of violence. That was before the Supreme Court rendered its decision in Begay v. United States, 128 S. Ct. 1581 (2008). In Begay, the Supreme Court held that driving under the influence was not a “crime of violence” within the meaning of the Armed Career Criminal Act. That was so because the offense lacked the sort of “purposeful, violent, and aggressive conduct” typical of burglary, arson, or extortion, the crimes listed just prior to the catch-all phrase “otherwise involves conduct that presents a

serious potential risk of physical injury to another.”

Archer was pending certiorari review in the Supreme Court when the Court decided Begay, and upon handing down the decision in Begay, the Court remanded Archer to the Eleventh Circuit. It was then the Eleventh Circuit concluded that “the Supreme Court’s decision in Begay is clearly on point,” and held that carrying a concealed firearm was not a crime of violence.

In the opinion, the Eleventh Circuit, as it has in the past, recognized that the meaning of the phrase “crime of violence” as used in the career offender guideline and the phrase “violent felony” as used in the Armed Career Criminal Act are “virtually identical.” It noted, too, that the decision in Gilbert relied upon an earlier decision, United States v. Hall, 77 F.3d 398 F.3d 401 (11<sup>th</sup> Cir. 1996), which had held that carrying a concealed firearm qualified as a “violent felony.” Thus, while not saying so explicitly, Archer also clearly excludes the crime of carrying a concealed firearm from the list of predicates that will support the armed career criminal classification.

The decision also brings into question whether offenses such as walk-away escapes and, maybe, even some sex offenses will still serve as predicates for career offender or armed career criminal classification. You might note, too, that Archer ameliorates some of the concerns stated by Amy Baron-Evans in her article, mentioned above, about deconstructing the career offender guideline.

There are undoubtedly individuals now serving career-offender or armed-career-criminal sentences that are predicated upon a conviction for carrying a concealed firearm.

The next challenge will be that of trying to secure the benefits of Archer for them.

### **TOM KIRWIN NAMED INTERIM UNITED STATES ATTORNEY AS GREG MILLER HEADS FOR THE PRIVATE SECTOR**

Upon United States Attorney Greg Miller’s resignation, Attorney General Mukasey has named Tom Kirwin as the interim United States Attorney for the Northern District of Florida. Mr. Kirwin is a mainstay of the office, having begun working there in 1992. He has been the First Assistant since 2000. For over a year, beginning in June of 2001, Mr. Kirwin previously served as the interim United States Attorney. He formerly served as an assistant state attorney in Florida’s Second Judicial Circuit for nine years before joining the United States Attorney’s Office. He was also a JAG officer for the United States Army where he served in Germany for several years. Mr. Kirwin is a 1976 graduate of the Florida State University College of Law.

Greg Miller was confirmed by the United States Senate in July of 2002. His resignation became effective as of June 30<sup>th</sup> of this year. Mr. Miller has accepted a partnership with the Pensacola firm of Beggs and Lane and has opened a branch office for the firm in Tallahassee.

### **UNITED STATES ATTORNEY OPENS AN OFFICE IN PANAMA CITY**

Earlier this month the United States Attorney opened an office in Panama City. While they are looking for downtown space, they are using the space they have in the Federal Courthouse. They have hired two new

assistants to staff the office, Ryan Love and Gayle Littleton.

## PANEL TRAINING

Rita, Gall, and Kimbrough: A Chance for Real Sentencing Improvements. In the video we'll be showing in August, Federal Public Defender National Sentencing Resource Counsel Amy Baron Evans and Paul Hofer, who was the Senior Research Associate for the United States Sentencing Commission between 1995 and 2007, discuss the changes brought about by these three recent United States Supreme Court cases and review strategies for making the best use of them.

**Panama City: August 12**

**Gainesville: August 20**

**Pensacola: August 21**

**Tallahassee: August 28**

## DOWNWARD DEPARTURES

**Schneider, Nicholas** Collier, L. Atty: Murphy, G.  
 Docket: 3:08cr7  
 Charge: Consp. dist >500 g. cocaine, > 100 kilos marijuana  
 Range: 151 - 188 months (5 yr min. mand)  
 Sentence: 120 months  
 Date of Imposition of Sentence: 6/18/08  
 Grounds: 5K1.1

## VARIANCES

**Crossley, Alan** Paul, M. Atty: Edwards, Tom  
 Docket: 1:06cr38  
 Charge: Consp. to manufact. marijuana (> 100 plants)  
 Range: 24 - 30 months (5 yr min mand)  
 Sentence: 5 yrs probation  
 Date of Imposition of Sentence: 2/6/08  
 Grounds: Safety Valve, good work history, & efforts made toward providing substantial assistance

**Please remember to let us know if any of your clients are the beneficiaries of a downward**

**departure or a variance. We publish them in hopes of providing a "roadmap" of sorts to help guide others in securing sentence reductions.**

## VICTORIES

Gainesville panel members **Lloyd Vipperman** and **Stan Cushman**, in a week-long trial, won acquittals for their clients who, along with two others, were charged with growing more than 1,000 marijuana plants. The government accused **Lloyd's** client, Alejandro Valdes, of buying the house where the marijuana was grown and assisting in the operation, relying on documents found in the house and real estate records. **Stan's** client, Christina Renteria, was the sister of one of the two defendants who were arrested inside the house. She was charged, as well, with money laundering. **Lloyd** successfully argued that the defendants arrested in the house had stolen his client's identity and that his client had nothing to do with the grow-house operation. **Stan** was successful in convincing the jury that the assistance Ms. Renteria had provided her brother was done without any knowledge of the effort to grow marijuana. The jury found the other two defendants guilty of the offense.

**Elizabeth Amond** of the Pensacola panel won a not guilty verdict for her client, Edwin Morges-Fernandez, who was charged with robbery, possession of a firearm in furtherance of a violent felony, and arson. Two masked men had robbed a pay-day loan business, but there were no fingerprints and no one inside the business could make an identification. By chance an ATF agent was present and gave chase to the van occupied by the robbers as it left the scene. By the time the agent caught up with the van, it was abandoned and had been set ablaze. Local police using a dog followed a trail from the

van to a house where Mr. Morges was found along with \$700, a pair of tennis shoes that seemed to match footprints left at the scene, and a ski mask. At about the same time, the co-defendant, who lived in the house, was stopped in a car driven by his girlfriend. Police found a gun in the car. **Elizabeth** won her case by showing that her client was only visiting the house and that there was no evidence tying him to the robbery. The jury, which deliberated for 9 hours, found the co-defendant guilty of the offense. The State of Florida is now planning to try Mr. Morges, again, for the same robbery.

Alan Crossley, charged with growing more than 1,000 marijuana plants, was facing a 10 year minimum mandatory sentence. Thanks to the efforts of his lawyer, Gainesville panel member **Tom Edwards**, Mr. Crossley walked out of his sentencing hearing before Judge Paul with only 5 years of probation. **Tom** convinced the prosecutor and the probation officer that Mr. Crossley should only be held responsible for 183 plants and was eligible for the safety valve. **Tom** went on to convince the judge that Mr. Crossley's solid work history, his continued hard work during the pendency of the case, and the efforts he made in trying to provide substantial assistance, merited 5 years of probation rather than the 24 to 30 months suggested by the guidelines.

**Chet Kaufman** of our Tallahassee office convinced the Eleventh Circuit Court of Appeals to overturn the conviction and 15 month sentence of his client for violating the Sex Offender Registration and Notification Act (SORNA). Upon arriving in Florida, **Chet's** client had failed to register as required by SORNA. His failure to register occurred, however, between July of 2006, when Congress enacted SORNA, and February of

2007 when the Attorney General, pursuant to the delegation of authority granted to him by Congress, announced that the registration requirement applied to those who, like Chet's client, had committed the qualifying sex offense prior to the enactment of SORNA. In overturning the conviction, the Court followed its recent precedent in United States v. Madera, 528 F.3d 852 (11<sup>th</sup> Cir. 2008). **Charles Lammers**, also of our Tallahassee office, had, in the trial court before Judge Smoak, laid the groundwork for the appeal by moving to dismiss the indictment.

**Tom Keith** of our Pensacola office persuaded the United States Attorney's Office that his client, Darryl Lee, was not an armed career criminal. Tom, relying on the decision in Begay v. United States, 128 S. Ct. 1581 (2008), convinced the prosecutor that his client's walk-away escape was not a "violent felony" for purposes of the armed career criminal act. In doing so, he secured a reduction from what was an offense with a mandatory minimum sentence of 15 years with a maximum penalty of life, to an offense with a maximum sentence of 10 years without any mandatory minimum. If he had been sentenced as an armed career criminal, Mr. Lee's projected guideline range would have been in the vicinity of 25 years.

**Tom Keith** also won a bench trial before Magistrate Judge Davis. His argument that his client, Nashia Jackson, had struck her husband in self-defense convinced the Judge to return a verdict of not guilty.

In Pensacola, Judge Collier reviewed the criminal history of **George Murphy's** client, Nicholas Schneider, and announced that Mr. Schneider had the second highest criminal history score he had ever seen. Nonetheless,

**George**, still persuaded the Judge to give Mr. Schneider the benefit of the government's substantial assistance motion, and Judge Collier imposed a 120 month sentence instead of a sentence within the guideline range of 151 to 188 months.

**Randall Lockhart** of our Pensacola office convinced Judge Collier that Charles Ward had not violated his supervised release. **Randall** challenged the credibility of the alleged victim, explained away the seemingly incriminating statement of Mr. Ward, and successfully argued that Mr. Ward had not committed the domestic battery that was the basis for the violation. Mr. Ward's guideline range for the violation was 30 to 37 months. In another case, **Randall**, in a bench trial before Magistrate Judge Davis, won an acquittal for his client, Amanda Mackey, by arguing that his client had not purposely ignored an order not to enter the Pensacola Naval Air Station base.

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

### Certiorari Granted

The following are United States Supreme Court grants of certiorari for the 2008 term that are relevant to our practice and granted since our last newsletter:

**KNOWLES v. MIRZAYANCE**, 2008 WL 1781014 (Mem), No. 07-1315 (June 27, 2008) (reviewing No. 04-57102 (9<sup>th</sup> Cir. Jan. 17, 2008))

#### **Habeas; 2254(d); ineffective assistance of counsel; deference to state courts**

*Questions presented:* "Concluding that defense counsel was ineffective in advising petitioner to withdraw his not-guilty-by-reason-of-insanity plea, the Ninth Circuit Court of Appeals granted habeas relief to petitioner without analyzing the state-court adjudication deferentially under 'clearly established' law as required by 28 U.S.C. § 2254(d) and by supplanting the district court's factual findings and credibility determinations with its own, opposite factual findings. This Court vacated the Ninth Circuit decision and remanded the case for further consideration in light of *Carey v. Musladin*, 127 S. Ct. 649 (2006). On remand, the Ninth Circuit conceded that 'no Supreme Court case has specifically addressed a counsel's failure to advance the defendant's only affirmative defense' but nonetheless concluded that its original decision was 'unaffected' by *Musladin* and subsequent § 2254(d) decisions of this Court. The questions presented are: 1. Did the Ninth Circuit again exceed its authority under § 2254(d) by granting habeas relief without considering whether the state-court adjudication of the claim was 'unreasonable' under 'clearly established Federal law' based on its previous conclusion that trial counsel was required to proceed with an affirmative insanity defense because it was the only defense available and despite the absence of a Supreme Court decision addressing the

point? 2. May a federal appellate court substitute its own factual findings and credibility determinations for those of a district court without determining whether the district court's findings were 'clearly erroneous?'"

**CONE v. BELL**, 2008 WL 533541 (Mem), No. 07-1114 (June 23, 2008) (reviewing No. 99-5279 (6th Cir. 2007))

**Habeas; 2254; procedural default; Brady**  
On state post-conviction review, the Tennessee courts refused to consider petitioner's claim under *Brady v. Maryland*, 373 U.S. 83 (1963), on the ground that the claim had already been "previously determined" in the state system. On federal habeas, a divided panel of the Sixth Circuit held that the state courts' ruling precluded consideration of the *Brady* claim. The court of appeals reasoned that the claim had been "procedurally defaulted." The court of appeals further reasoned that the state courts' ruling was unreviewable. *Questions presented*: Whether petitioner is entitled to federal habeas review of his claim that the State suppressed material evidence in violation of *Brady v. Maryland*, which encompasses two subquestions: 1. Is a federal habeas claim "procedurally defaulted" because it has been presented twice to the state courts? 2. Is a federal habeas court powerless to recognize that a state court erred in holding that state law precludes reviewing a claim?

**ARIZONA v. JOHNSON**, 2008 WL 593768 (Mem), No. 07-1122 (June 23, 2008) (reviewing 170 P.3d 667 (Ariz. Ct. App. 2007))

**Fourth Amendment; vehicle stop; minor traffic infraction; pat-down search; armed and presently dangerous passenger**  
*Question presented*: In the context of a

vehicular stop for a minor traffic infraction, may an officer conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense?

**HARBISON v. BELL**, 2008 WL 2484732 (Mem), No. 07-8521 (June 23, 2008) (reviewing 503 F.3d 566 (6th Cir. 2007))

**Appointed counsel for clemency; federal funds; 18 U.S.C. § 3599; COA**

*Questions presented*: (1) Does 18 U.S.C. § 3599(a)(2) & (e) permit federally-funded habeas counsel to represent a condemned inmate in state clemency proceedings when the state has denied a state-funded counsel for that purposes? (2) Is a certificate of appealability required to appeal an order denying a request for federally-funded counsel under 18 U.S.C. § 3599(a)(2) and (e)?

**ASHCROFT v. IQBAL**, 2008 WL 336310 (Mem), No. 07-1015 (June 16, 2008) (reviewing 490 F.3d 143 (2<sup>nd</sup> Cir. 2007))

**Discrimination; 1983; Bivens**

*Questions presented*: 1. Whether a conclusory allegation that a cabinet level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*. 2. Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried

out by such subordinate officials.

**HAYWOOD v. DROWN**, 2008 WL 1740084 (Mem), No. 07-10374 (June 16, 2008) (reviewing 881 N.E.2d 180 (NY 2007))  
**Corrections officers; 1983; jurisdiction; Supremacy Clause**

Pursuant to New York State’s Correction Law § 24, New York courts lack jurisdiction under state or federal law to entertain civil actions seeking money damages against correction officers. The New York court held that the statute does not violate the Supremacy Clause of the United States Constitution even though its bar means state courts cannot adjudicate federal 42 U.S.C. § 1983 causes of action alleging violations of civil rights. *Question presented*: Whether a state’s withdrawal of jurisdiction over certain damages claims against state corrections employees — from state courts of general jurisdiction — may be constitutionally applied to exclude federal claims under Section 1983, especially when, as here, the state legislature withdrew jurisdiction because it concluded that permitting such lawsuits is bad policy?

**BELL v. KELLY**, 128 S. Ct. 2108 (Mem), No. 07-1223 (May 12, 2008) (reviewing 2008 WL 59946 (4<sup>th</sup> Cir. 2008))

**Habeas; 2254(d); inadequate state fact-finding procedures; deference**

Bell, sentenced to death for murder, asserted in federal habeas proceedings ineffective assistance of counsel at sentencing. The district court found that he had diligently attempted to develop and present the factual basis of this claim in state court, on habeas, but that the state court’s fact-finding procedures were inadequate to afford a full and fair hearing. After an evidentiary hearing, the district court found deficient performance but no prejudice and denied relief. The Fourth

Circuit affirmed. The Supreme Court granted cert. on only the first of Bell’s four questions. *Question presented*: Did the Fourth Circuit err when, in conflict with decisions of the Ninth and Tenth Circuits, it applied the deferential standard of 28 U.S.C. § 2254(d), which is reserved for claims “adjudicated on the merits” in state court, to evaluate a claim predicated on evidence of prejudice the state court refused to consider and that was properly received for the first time in a federal evidentiary hearing?

**Supreme Court Cases**

**DISTRICT OF COLUMBIA v. HELLER**, 128 S. Ct. 2783 (June 26, 2008)

**Second Amendment**

The Court affirmed the D.C. Circuit’s decision that struck down prohibitions on the possession of handguns and requires shotguns and rifles to be kept disassembled or under trigger lock. The Court held that the right in the Second Amendment is an individual right to bear arms. Breyer dissented, joined by Justices Stevens, Souter and Ginsburg.

**GILES v. CALIFORNIA**, 128 S. Ct. 2678 (June 25, 2008)

**Confrontation clause; forfeiture by wrongdoing**

At Giles’ murder trial, the court allowed prosecutors to introduce statements that the murder victim had made to a police officer responding to a domestic violence call. The state appellate court affirmed, holding that the Confrontation Clause permitted the trial court to admit into evidence the unconfronted testimony under a doctrine of forfeiture by wrongdoing, concluding that Giles had forfeited his right to confront the victim’s testimony because it found Giles had

committed the murder for which he was on trial—an intentional criminal act that made the victim unavailable to testify. The Supreme Court reversed, holding that forfeiture by wrongdoing is not an exception to the Sixth Amendment’s confrontation requirement because it was not an exception established at the founding. Breyer, Stevens & Kennedy dissented.

**KENNEDY v. LOUISIANA**, 128 S. Ct. 2641 (June 25, 2008)

**No death penalty for child rape**

The Court held that the Eighth Amendment bars Louisiana from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim’s death. “Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule. [] As we shall discuss, punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution. [] It is the last of these, retribution, that most often can contradict the law’s own ends. This is of particular concern when the Court interprets the meaning of the Eighth Amendment in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.” Roberts, Alito, Scalia, and Thomas dissented.

**ROTHGERY v. GILLESPIE COUNTY, TEX.**, 128 S. Ct. 2578 (June 23, 2008)

**Sixth amendment; right to counsel; initial appearance**

The Court held that a criminal defendant’s initial appearance before a magistrate judge, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary judicial proceedings

that trigger attachment of the Sixth Amendment right to counsel. Attachment does not also require that a prosecutor (as distinct from a police officer) be aware of that initial proceeding or involved in its conduct.

**GREENLAW v. U.S.**, 128 S. Ct. 2559 (June 23, 2008)

**No appellate court authority to increase sentence sua sponte; plain error; Rule 52(b)**

Greenlaw was convicted of seven drug and firearms charges and was sentenced to imprisonment for 442 months. In calculating this sentence, the district court made an error and imposed a 10-year sentence on a count that carried a 25-year mandatory minimum term. Greenlaw appealed urging, *inter alia*, that the appropriate sentence for all his convictions was 15 years. The government neither appealed nor cross-appealed. The Eighth Circuit found no merit in any of Greenlaw’s arguments, but went on to consider whether his sentence was too low. The Court acknowledged that the government, while it had objected to the trial court’s error at sentencing, had elected not to seek alteration of Greenlaw’s sentence on appeal. Nonetheless, relying on the “plain-error rule” stated in Federal Rule of Criminal Procedure 52(b), the Court of Appeals ordered the district court to enlarge Greenlaw’s sentence by 15 years, yielding a total prison term of 662 months. The Supreme Court reversed, holding that absent a government appeal or cross-appeal, the Eighth Circuit could not, on its own initiative, order an increase in Greenlaw’s sentence. The Court relied on the “party presentation principle” and the “cross-appeal rule.”

**IRIZARRY v. U.S.**, 128 S. Ct. 2198 (June 12, 2008)

**Sentencing; variance; notice not required; Rule 32(h)**

The Court held that Federal Rule of Criminal Procedure Rule 32(h) does not apply to a variance from a recommended guidelines range because any constitutionally protected expectation that a defendant will receive a sentence within the presumptively applicable guidelines range did not survive *Booker*. The Court thus upheld a decision by the Eleventh Circuit.

**BOUMEDIENE v. BUSH**, 128 S. Ct. 2229 (June 12, 2008)

**Habeas; Guantanamo detainees; enemy combatants**

Guantanamo detainees classified as enemy combatants have the constitutional privilege of habeas corpus and are not barred from seeking the writ or invoking the Suspension Clause's protections. The Court did not authorize the release of the prisoners, but said they may challenge their detention in the U.S. district courts. The Court did not decide the question of whether the president has the authority to detain individuals during the war on terrorism. But the Court said detainees do not have to go through the special civilian court review process that Congress created in 2005, since that is not an adequate substitute for habeas rights. The Court also found serious defects in the process that the Pentagon set up in 2004 to decide which prisoners are to be designated as "enemy combatants" — the status that leads to their continued confinement.

**MUNAF v. GEREN**, 128 S. Ct. 2207 (June 12, 2008)

**Habeas; federal jurisdiction; citizens held overseas by American forces; 2241**

The Court held that (1) the federal habeas statute, 28 U. S. C. § 2241(c)(1), extends to American citizens held overseas by American forces operating subject to an American chain of command. The Court rejected the government's claim that the federal courts lack jurisdiction over the detainees' habeas petitions in such circumstances. (2) However, federal district courts may not exercise their habeas jurisdiction to enjoin the United States from transferring individuals alleged to have committed crimes and detained within the territory of a foreign sovereign to that sovereign for criminal prosecution.

**NUNEZ-VIRRAIZABAL v. U.S.**, 128 S. Ct. 2901 (Mem), No. 06-11863 (June 9, 2008); and

**MORENO-GONZALEZ v. U.S.**, 128 S. Ct. 2901 (Mem), No. 07-400 (June 9, 2008)

**Money laundering; transportation; purpose v. effect**

*United States v. Garcia-Jaimes*, 484 F.3d 1311 (11<sup>th</sup> Cir. 2007), was vacated, the petition for cert. granted, and the cases remanded for further consideration in light of *Regalado Cuellar v. United States*, (U.S. 2008), which held that money laundering under 18 U.S.C. § 1956(a)(2)(B)(i) requires proof that the transportation's purpose—not merely its effect—was to conceal or disguise one of the listed attributes: the funds' nature, location, source, ownership, or control.

**CUELLAR v. U.S.**, 128 S. Ct. 1994 (June 2, 2008)

**Money laundering; purpose**

The Court held that a conviction for money laundering under 18 U.S.C. § 1956(a)(2)(B)(i) requires proof that the transportation's purpose—not merely its effect—was to conceal or disguise one of the

listed attributes: the funds’ nature, location, source, ownership, or control. It cannot be satisfied solely by evidence that the funds were concealed during transport or that defendant attempted to create the appearance of legitimate wealth. Alito, Roberts & Kennedy separately concurred, opining that their vote was based on the fact that no inference could be drawn beyond a reasonable doubt that a person like Cuellar knew that taking the funds to Mexico would have had one of the relevant effects required by the statute.

**U.S. v. SANTOS**, 128 S. Ct. 2020 (June, 2, 2008)

**Money laundering; “proceeds” are “profits”; precedential effect of split decision**

The Court held that the word “proceeds” in the federal money-laundering statute, 18 U.S.C. § 1956(a)(1)(A)(i), applies only to transactions involving criminal profits, not criminal receipts. Based on that statutory construction, the Court affirmed the partial grant of habeas relief to Santos, who ran an illegal lottery, and Diaz, one of the runners Santos employed, because there was no evidence that the transactions on which the money-laundering convictions were based involved profits, as opposed to receipts, of the illegal lottery. Scalia, joined by Souter, Thomas, and Ginsburg, wrote the plurality opinion. Stevens wrote a separate concurrence, while the others dissented.

**U.S. v. RODRIQUEZ**, 128 S. Ct. 1783 (May 19, 2008)

**ACCA; state recidivist sentencing laws**

The Court was asked to determine whether a state’s recidivist sentencing law that increased the sentence for a state crime was applicable under the ACCA to determine the “maximum

term of imprisonment . . . prescribed by law.”

The Court held that it was, i.e., the state’s recidivist law does get calculated under federal law when considering whether a prior state offense qualifies for ACCA enhancement. The Court held that its reading is compelled by a straightforward application of 18 U.S.C. § 924(e)(2)(A)(ii)’s three key terms: “offense,” “law,” and “maximum term.” Souter, Stevens, and Ginsburg dissented.

**U.S. v. WILLIAMS**, 128 S. Ct. 1830 (May 19, 2008)

**Upholding crime for material pandered as child pornography**

The Court upheld the constitutionality of 18 U.S.C. § 2252A(a)(3)(B), part of the PROTECT Act, thereby rejecting a First Amendment overbreadth and a due process vagueness challenge to the statute criminalizing the possession and distribution of material pandered as child pornography, regardless of whether it actually was that. (The decision reversed the Eleventh Circuit.) The statute was passed after the Court struck down two provisions of the federal Child Pornography Protection Act of 1996 (CPPA) in *Ashcroft v. Free Speech Coalition*. (1) The first word of § 2252A(a)(3) – “knowingly” – applies to every element of the immediately following subdivisions. (2) The statute’s string of operative verbs – “advertises, promotes, presents, distributes, or solicits” – is reasonably read to have a transactional connotation. (3) The phrase “in a manner that reflects the belief” in subsection (B) includes both subjective and objective components, (4) while the other key phrase in subsection (B), “in a manner . . . that is intended to cause another to believe,” contains only a subjective element: The defendant must “intend” that the listener believe the material

to be child pornography, and must select a manner of “advertising, promoting, presenting, distributing, or soliciting” the material that he thinks will engender that belief—whether or not a reasonable person would think the same. (5) “sexually explicit conduct” (the visual depiction of which, engaged in by an actual minor, is covered by the Act’s pandering and soliciting prohibition even when it is not obscene) is even more immune from attack than definition of “sexual conduct” approved in *Ferber*. This construction of the statute means it is not overbroad. Stevens and Breyer separately concurred; Ginsburg and Souter dissented.

**U.S. v. RESSAM**, 128 S. Ct. 1858 (May 19, 2008)

**18 U.S.C. § 844(h)(2); carrying explosive during underlying felony**

Ressam gave false information on his customs form while attempting to enter the United States. A search of his car revealed explosives that he intended to detonate in this country. He was convicted of (1) feloniously making a false statement to a customs official in violation of 18 U. S. C. § 1001, and (2) carrying an explosive “during the commission of” that felony in violation of 18 U.S.C. § 844(h)(2). The Court upheld his “carrying” conviction since he was carrying explosives when he violated § 1001. “During” need not have been “in relation to” the other felony, as the Ninth Circuit had held. Breyer dissented, saying a mere temporal link is not enough.

**GONZALEZ v. U.S.**, 128 S. Ct. 1765 (May 12, 2008)

**Client’s consent expressed through counsel to Magistrate Judge**

Before Gonzales’ federal drug trial, his counsel consented to the Magistrate Judge’s presiding over jury selection. Gonzales

argued for the first time on appeal that not getting his personal on-the-record waiver was error. The Fifth Circuit affirmed the resulting conviction, as did the Supreme Court, holding that express consent by counsel suffices to permit a magistrate judge to preside over jury selection in a felony trial, pursuant to the Federal Magistrates Act, 28 U.S.C. § 636(b)(3).

**Selected Eleventh Circuit Case Summaries**

The following are selected opinions from the 11<sup>th</sup> Cir. that have been issued since our last newsletter:

**TROTTER v. SECRETARY, D.O.C.**, 2008 WL 2813862 (July 23, 2008)

**Ex post facto, capital habeas**

Trotter, convicted of capital murder, was subjected to a sentencing phase where the court and jury found, as one of several aggravating circumstances, that Trotter was serving a “sentence of imprisonment” because he was serving a sentence of community control when he committed the murder. On appeal, the Supreme Court of Florida held that community control is not “imprisonment” and remanded for resentencing. Before Trotter was resentenced, the Florida Legislature amended the statute of aggravating factors to include serving a sentence of community control. Florida also enacted a statute that permitted the introduction of victim-impact evidence at sentencing. The jury at Trotter’s resentencing heard evidence under both of these new statutes, and the court again imposed a sentence of death. On appeal of his second sentence, the Supreme Court of Florida overruled its earlier decision that community control is not “imprisonment,” concluded that Trotter’s original trial had been error-free, and rejected Trotter’s

argument about the Ex Post Facto Clause. The court also rejected Trotter's challenge of the victim-impact evidence. The Eleventh Circuit affirmed (Pryor, with Birch & Black), holding that the state court's decision did not unreasonably apply clearly established federal Ex Post Facto Clause law.

**U.S. v. DE LA MATA**, 2008 WL 2796724 (July 22, 2008)

**Forfeiture quagmire**

The Government deviated from the procedural and substantive rules governing criminal forfeiture, after the defendants (individuals and their corporations) were convicted at trial, by obtaining the stipulations of the individual defendants that they defendants would convey certain interests in property to the United States in lieu of a forfeiture trial and sentence. The district court accepted the stipulations but did not make the forfeiture part of the criminal judgment. The Government also got a restraining order to make sure the defendants did not seize their own assets, but it did not enable the Government to take title to those assets, absent amending the criminal judgment to expressly include forfeiture. Upon the Government's motion the district court entered a "final order of forfeiture," later deemed to be a civil case order. The individual defendants, however, claimed that the district court's order was no good because the court lacked subject matter jurisdiction, arguing that the Government's motion for a final order of forfeiture sought relief in a criminal case via amended sentences. The Court (Tjoflat, with Carnes & Hodges), affirmed the unorthodox order as to the individual defendants, but not as to the corporate defendants. "[The Government's [] motion, which sought, in essence, the specific enforcement of promises the defendants had made in those agreements did not, and could

not, have involved the corporate defendants. The corporate defendants, then, still have possession of their interests in the their bank accounts, subject, of course to the district court's extant restraining order." The Court remanded for the trial court to "balance the equities" under Rule 41(g) to determine whether the Government must return the corporate defendants property interests.

**U.S. v. HARRISON**, 2008 WL 2743934 (July 16, 2008)

**Motion in limine; exclusion of defense; copyright; 18 U.S.C. § 2318; first-sale doctrine**

The Court declined to reverse the district court's grant of the government's motion in limine, which excluded defendant's intended defense, or at least defense evidence, related to the "first-sale doctrine" in his prosecution for trafficking in illicit Microsoft labels, called certificates of authenticity, which are packaged with software to ensure its authenticity. Defendant wanted to argue that, because he legitimately owned the certificates, his distribution of them did not violate federal law. The Court held that the first-sale doctrine is not available in an 18 U.S.C. § 2318 prosecution.

**U.S. v. WILLIAMS**, 2008 WL 2736654 (July 15, 2008)

**Free speech; pandering child pornography**

After the Supreme Court reversed its prior decision, 128 S. Ct. 1830 (2007), reversing 444 F.3d 1286 (11th Cir. 2006) (reversing conviction under PROTECT Act for pandering by finding it in conflict with free speech), the Court on remand affirmed the defendant's conviction under 18 U.S.C. § 2252A(a)(3)(B), for pandering child pornography.

**PETERKA v. McNEIL**, 2008 WL 2600671 (July 2, 2008)

**Capital habeas; ineffective assistance of counsel; penalty phase**

The sole issue for which a Certificate of Appealability was issued was whether his trial counsel were ineffective in the penalty phase for failing to investigate and present mitigating evidence, including his military record, good prison record including failure to participate in an escape attempt by cellmates while in pretrial detention, and his family relationships and good character. The Court affirmed the finding that counsel's performance was not deficient.

**MIZE v. HALL**, 2008 WL 2600625 (July 2, 2008)

**Capital habeas; prosecutorial misconduct; Brady; actual innocence**

The Court affirmed denial of this capital defendant's federal habeas on three claims. First, the prosecutorial misconduct claim was procedurally defaulted; although counsel who advised the defendant to withdraw the claim in a state proceeding was probably ineffective, there was no right to counsel in that proceeding and so the ineffectiveness would not save the claim; further, the defendant himself had also caused the claim to be defaulted by its omission from his third habeas petition when he had competent counsel. Second, although the prosecutor should have disclosed notes from the initial interview of defendant's girlfriend who testified against him at trial, and although those notes had some impeachment value, it was not material impeachment evidence because of its weak value that would not have improved upon the impeachment that occurred anyway. Finally, the Court discussed the difference between a freestanding actual innocence claim and its use as a defense to

avoid procedural default of an independent constitutional claim; in any event, the defendant here had not even come close.

**U.S. v. SMITH**, 2008 WL 2571241 (June 30, 2008)

**Double jeopardy; statutory maximum; 18 U.S.C. § 922; waiver**

The Court rejected, under the plain error standard of review, an argument that it violated double jeopardy for a defendant to get sentenced in separate counts for violating different subsections of the same statute, here 18 U.S.C. § 922(g)(1) and (j). The argument was also waived by defendant's guilty plea, because the government had the power to prosecute both offenses. Although legislative intent was unclear whether a single act could be prosecuted under multiple subsections, as here, the *Blockburger* test showed they were separate offenses because of differing elements. Nor was it plain error that his total sentence of 210 months exceeded the 10-year statutory maximum set out in 18 U.S.C. § 924(a)(2), as the maximum was in actuality 240 months as separate offenses.

**U.S. v. MORSE**, 2008 WL 2570824 (June 30, 2008)

**Tax; summons; frivolous appeal; sanctions**

The Court rejected this *pro se* appeal of a taxpayer seeking to overturn the district court's grant of a petition to enforce an IRS summons for documents and testimony under 26 U.S.C. § 7402(b) and 7604(a). The court also granted the government's motion for sanctions for a frivolous appeal, about which the defendant had been warned; his position was that the IRS lacked authority to issue the summons because he is not a taxpayer and because his income derived from private sector employment is not subject to federal taxation.

**U.S. v. WOODARD**, 2008 WL 2548973 (June 27, 2008)

**Sufficiency; knowledge of possession; mere presence; *Miranda*; comment on silence**

First, the Court affirmed the sufficiency of proof (“extensive circumstantial evidence”) that Woodard *knew* there were drugs in the packages for which he signed and accepted delivery. He signed (using a false name) to accept delivery of packages at a house where he did not live, moved the packages into his own truck, and started to drive off with the packages before being arrested. Second, even though the defendant had a permit to possess the firearm and an arguably lawful reason for carrying it (the neighbor was dangerous), he failed to show the guilty verdict was not reasonable; he had the loaded pistol tucked into his waistband while taking delivery of 100 pounds of marijuana. Third, the Court held the officer’s testimony that the defendant’s statement upon arrest did not include “any reason for having the weapon” was not plain error, as a pretrial hearing resulted in a ruling that the defendant had freely and voluntarily waived his right to remain silent before speaking to the officer. Fourth, the district court had modified its *Allen* charge only to take into account suggestions by defense counsel and *Rey*, 811 F.2d 1453, 1460 (11th Cir. 1987), and it was not remotely coercive. Fifth, the district court did not abuse its discretion in failing to give his requested instruction on mere presence, as the one given substantially covered the proposed instruction. Lastly, the pattern instruction on possession was proper.

**U.S. v. ARCHER**, 2008 WL 2521969 (June 26, 2008)

**Carrying concealed weapon; ACCA; panel precedent rule**

The Court (Kravitch, with Tjoflat and Hull)

applied *Begay*, the recent USSC decision holding that DWI is not a predicate offense under the ACCA, to reverse its prior holdings and now hold “that the crime of carrying a concealed weapon in violation of Florida law is not a “crime of violence” within the meaning of the Sentencing Guidelines.” The Court thus reconsidered and overruled *United States v. Gilbert*, 138 F.3d 1371, 1372 (11<sup>th</sup> Cir. 1998), which had relied on *United States v. Hall*, 77 F.3d 398, 401 (11<sup>th</sup> Cir. 1996).

**BROWN v. SEC’Y, DOC**, 2008 WL 244573 (June 19, 2008)

**Habeas; statute of limitations; tolling; “properly filed”; DNA testing**

The defendant’s state court Motion for DNA Testing under Florida Rule of Criminal Procedure 3.853 did not toll the statute of limitations. First, the motion was “properly filed” under 28 U.S.C. § 2244(d)(1)-(2) because it satisfied all the “mechanical rules that are enforceable by clerks,” as the parties agreed its lack of specificity was an issue that required a judicial ruling. However, the motion was not an “application for post-conviction or other collateral review” under the AEDPA tolling statute because it is an application for discovery only, “pursuant to which the court lacks authority to order relief from the movant’s sentence or conviction.”

**U.S. v. CASTAING-SOSA**, 2008 WL 2446815 (June 19, 2008)

**Mandatory minimum; downward departure; disparity with codefendants; separation of powers; Eighth Amendment**

The Court vacated 80-month sentence for conspiracy to distribute and possess with intent to distribute one or more kilograms of heroin. The guidelines range was 97-121 months, but a 10-year minimum mandatory raised that to 120-121 months. The government did not file a 5K1.1 motion

because the defendant's information was insufficient. The defendant objected at sentencing that the minimum mandatory violated the separation of powers doctrine and the Eighth Amendment. The district court imposed the lesser sentence on this courier to avoid a sentencing disparity with codefendants. First, the Eleventh Circuit rejected defendant's argument that the combination of his 80-month sentence and his 60-month supervised release term satisfied the 120-month minimum, as this ignored the plain language of 21 U.S.C. § 841(b)(1)(A)(i). Second, the Court rejected the argument that 18 U.S.C. § 3553(a) authorized this below-minimum sentence, as only 3553(e) and (f) authorized such sentences. Third, concern for avoiding sentence disparity did not provide a legal basis for imposing a sentence below the statutory mandatory minimum.

**U.S. v. CAMPA, 529 F.3d 980 (June 4, 2008)**  
**Foreign Intelligence Surveillance Act; USSG §§ 3B1.1 & 2M3.1(a)(1)**

The Court affirmed the convictions of five Cuban intelligence agents but remanded three for resentencing. The Court, en banc, had previously affirmed denial of their motions for change of venue and new trial and remanded the remaining issues to the panel. The Court rejected numerous issues (a suppression ruling on a search under the Foreign Intelligence Surveillance Act, sovereign immunity, discovery under the Classified Information Procedures Act, peremptory challenges, prosecutorial and witness misconduct, and jury instructions) as "meritless" or even one as "specious." The Court vacated one sentence because the enhancement under USSG 3B1.1(b) for being a manager or supervisor was not factually supported because it was based solely on evidence the defendant had managed assets of the conspiracy. The Court vacated another defendant's sentence because the base

offense level was improperly identified as 42 under 2M3.1(a)(1) when the district court had not made the required finding that top secret information was "gathered or transmitted."

**U.S. v. JOHNSON, 528 F.3d 1318 (May 30, 2008)**

**ACCA; battery; misdemeanor**

The Court held that defendant was properly classified as an Armed Career Criminal based on his prior Florida battery conviction, which was a misdemeanor elevated to felony status solely because of a prior battery conviction.

**DAY v. HALL, WARDEN, 528 F.3d 1315 (May 29, 2008)**

**28 U.S.C. § 2244**

Day, convicted in state court of non-capital offenses, was first denied parole in 1996, and again in 2004 for the same reason. He sought administrative and judicial review in Georgia of the 2004 decision, and when judicial review was denied, he filed a habeas petition under 28 U.S.C. § 2254. The district court dismissed his habeas petition as untimely, but the Eleventh Circuit reversed (per curiam by Barkett, Fay, Antoon), applying the rule of liberal construction for *pro se* pleadings to treat Day's early state petition for judicial review as a procedurally valid Georgia petition for a writ of mandamus, and concluding that the district court erred in its choice of the starting date for measuring whether the federal action had been timely.

**U.S. v. YOUNG, 528 F.3d 1294 (May 27, 2008)**

**Speedy Trial Act, superseding indictments**  
 Young successfully argued that the Speedy Trial Act, 18 U.S.C. § 3161(c)(1), had been violated when he was prosecuted in a superseding indictment under 26 U.S.C. §

5861(d) for possession of an unregistered silencer. Barkett (with Dubina & Schlesinger), wrote that “neither the filing of a superseding indictment, nor the dismissal of an original indictment followed by the filing of a new indictment, resets the speedy-trial clock.”

**U.S. v. MADERA**, 528 F.3d 852 (May 23, 2008)

**Sex offender registration law inapplicable before AG issued rules**

The Court (per curiam by Fay, Barkett, Stapleton) held that a prosecution under 18 U.S.C. § 2250(a), – SORNA, the federal sex offender registration law – cannot be maintained against a person who failed “to register during the gap period between SORNA’s enactment and the Attorney General’s retroactivity determination.” SORNA became effective July 26, 2007, but, the Court said, it had not become retroactively applicable to a person who failed to register before February 28, 2007, when the Attorney General exercised his discretionary authority by issuing an interim rule. The case was decided on a statutory basis and left unanswered many constitutional questions.

**U.S. v. CARRUTH**, 528 F.3d 845 (May 22, 2008)

**Allocution; supervised release revocation hearing; plain error; Rule 32.1(b)(2)(E); appeal waiver**

The Court held that the district court plainly erred by not personally addressing the defendant at his revocation of supervised release hearing, at which he was sentenced to prison, and by not giving him the opportunity to personally speak to the court, as required by Federal Rule of Criminal Procedure 32.1(b)(2)(E). Prejudice is presumed because there existed the possibility of a lesser

sentence. Also, the appeal waiver in the original plea agreement did not extend to the later revocation.

**GANDARA v. BENNETT**, 528 F.3d 823 (May 22, 2008)

**Vienna Convention; notice to consul; 1983**

The Court held that a foreigner who has been arrested and detained in this country, and who alleges a violation of the consular notification provisions of the Vienna Convention on Consular Relations cannot maintain an action under 42 U.S.C. 1983.

**U.S. v. MENDEZ**, 528 F.3d 811 (May 21, 2008)

**Intent for conspiracy to defraud; interstate commerce**

The Court overruled *Sorrow*, 732 F.3d 176 (11th Cir. 1984) to reverse a conviction under 18 U.S.C. § 371 because there was no evidence the defendant had the requisite intent to defraud the U.S. Dept. of Transp. but only that he knew the state DMV was involved. The Court also rejected an argument that proof of defendant’s driving on public roads, even if only intrastate, was sufficient to establish the minimal interstate commerce nexus to support his conviction under 18 U.S.C. § 1028 for unlawful production of ID document when that production is in or affects interstate or foreign commerce.

**U.S. v. YOUNG**, 527 F.3d 1274 (May 19, 2008)

**Sentencing; career offender; crime of violence; battery**

The Court rejected the defendant’s argument that his prior Florida conviction for Battery of a Child Involving Bodily Fluids (based on having had intercourse at age 19 with a 13-year-old) was not categorically a crime of

violence because the Florida Supreme Court had held that use of force is not an essential element of battery. The Court concluded that the state statute required a physical act directed against a person, and additionally found the remaining requirement of physical force in the “power, violence or pressure” against the victim. “The impact of the fluids against the child creates pressure and this minimal contact satisfies the requirement of physical force.”

**NEWLAND v. HALL**, 527 F.3d 1162 (May 14, 2008)

**Capital habeas; ineffective assistance of counsel; trial; appeal; confession**

In a very long opinion, the Court rejected his arguments that the district court erred in concluding that state courts misapplied precedent by holding that trial counsel was not ineffective for failing to convince the trial court to suppress his confession, or for failing to present mental health evidence in the penalty phase, or for failure to pursue the confession issue on appeal.

**FERGUSON v. CULLIVER**, 527 F.3d 1144 (May 13, 2008)

**28 U.S.C. § 2254; self-representation; waiver; lack of transcript**

After concluding that the state court’s summary rejection of the defendant’s state post-conviction motion was an adjudication on the merits, the Court concluded: “To review the actions of a state trial court with respect to self-representation claims, federal habeas courts must examine the state trial record, rather than rely solely on the state appellate court’s findings as to what the state trial record contains.” The Court remanded for reconsideration, giving the state an opportunity to produce the state trial transcript.

**HENDRIX v. SECY., DOC**, 527 F.3d 1149 (May 13, 2008)

**Recusal; *Gardner*; sentencing; ineffective assistance; *Brady***

First, the Court held that the state trial judge in this capital case did not violate *Gardner* by refusing to recuse himself where the judge stated that he considered only record information in imposing sentence. Also, this circuit does not require recusal of an unbiased judge just because there is some appearance of bias. Second, the state court decision that counsel’s failure to call a mental health witness at the penalty phase was not unreasonable, given that that witness had no exculpatory and only damaging information for the defense. Third, the state court decision that the state’s failure to disclose that a witness had been a CI several years earlier, did not violate *Brady*, was also not unreasonable given all the impeachment introduced against the witness and the “vast” evidence of the defendant’s guilt.

**U.S. v. PADRON**, 527 F.3d 1156 (May 13, 2008)

**Entrapment; Rule 404(b); loss amount; forfeiture money judgment; 28 U.S.C. § 2461(c)**

First, the Court affirmed that the defendant had not produced sufficient evidence of inducement to support an entrapment defense, and the government produced evidence of defendant’s predisposition to commit fraud. Second, there was no valid claim under Rule 404(b): (a) The evidence of a prior uncharged act, a staged accident to support a personal injury claim, was properly introduced under FRE 404(b) to prove motive, plan, and intent, and the minor error in date on the notice of intention to introduce this evidence was cured by a jury instruction. (b) Although the Court agreed that demand

letters from attorneys regarding personal injury claims should not have been admitted, no prejudice was shown. (c) The police reports on staged accidents were not hearsay. Third, the Court found no error in holding defendant fully accountable for the foreseeable/intended loss caused by his and his coconspirator's fraud. Finally, on an issue of first impression, the Court agreed with other circuits that the district court had statutory authority under 18 U.S.C. § 2461(c) to order criminal forfeiture of specified property in general mail fraud cases.

**U.S. v. HARRIS**, 526 F.3d 1334 (May 8, 2008)

**Sixth Amendment, evidence suppression, dual sovereignty doctrine**

An officer observed Harris walking in a high crime area, retrieve what looked like a gun from behind a bush, and place it in his pocket. Harris was picked up by a taxi and was driven off. The officer followed, saw a traffic violation (change lane w/o signaling), pulled over the cab, got the driver's consent to search the passenger compartment of the cab where Harris had been sitting, and found a .357 magnum there under the floor mat. The Court (per curiam by Tjoflat, Anderson, Hull) affirmed denial of Harris's suppression motion, finding the officer had probable cause to stop the vehicle; reasonable suspicion to do a *Terry* stop and frisk of Harris; and reasonably relied on the taxi driver's consent to search the passenger compartment. The Court also found statements made to ATF while Harris was in state jail on state charges were properly admitted into evidence under the dual sovereignty doctrine.

**U.S. v. HUNT**, 526 F.3d 729 (May 5, 2008)  
**18 U.S.C. § 1519, false entry in police incident report, vagueness, reasonable**

**sentencing**

Hunt was a detective in the narcotics unit of the Pritchard, Ala. police when he conducted an arrest. He later filled out an arrest report falsely describing the arrestee's conduct, but later testified that he simply made an error in the heat of the moment. The Eleventh Circuit (Black, w/Carnes & Restani) rejected Hunt's due process vagueness challenge to 18 U.S.C. § 1519 based on the statute's plain language. The Court also said the evidence was sufficient and the 10-month (downward variance) sentence was reasonable.

**U.S. v. EDWARDS**, 526 F.3d 747 (May 5, 2008)

**Preserving sufficiency claim; sentencing on each count**

Edwards was the Chairman of the Board and sole owner of ETS Payphones, Inc., a privately owned Georgia corporation that provided management services to payphone owners. He was convicted after a jury trial of wire fraud, money laundering, conspiracy, and a forfeiture provision, was sentenced to 156 months, ordered to pay restitution of \$320,397,837, and forfeit several properties. The Court (Tjoflat w/Black & Ebel) affirmed the convictions, holding (1) where defendant put on a case and the prosecution presented rebuttal evidence, the district court would only be required to consider the sufficiency of the evidence if the defendant moved for a judgment of acquittal at "the close of all the evidence," and failure to so move means sufficiency claim not preserved. (2) No manifest injustice based on the evidence; (3) He had no right to exclude a victim/witness from the courtroom proceedings; (4) No error in denial of suppression of SEC documents; (5) Jury instructions properly stated mens rea; (6) But his one sentence of 156 months must be reversed because he should have been

sentenced as to each count of conviction, some of which have a 120-month maximum.

**U.S. v. BROWN**, 526 F.3d 691 (Apr. 29, 2008)

**Plea colloquy; due process retroactivity; *Shepard*; disparity in sentencing**

Defendant was caught in an Internet sting of men trying to trade sex with each other's minor daughters. The Court first rejected several challenges to the guilty plea: (1) It rejected argument, under the plain error standard, the argument that the district court did not adequately explain the charges along the lines of a jury instruction because of defendant's mental health and medication; the defendant had been found competent both at the time of the offense and time of the plea; both defendant and retained counsel assured the court his medication would not affect his ability to understand the plea proceedings. The colloquy was not ideal but not plain error; defendant had failed to convincingly argue he would not have entered the plea otherwise, especially given the weakness of potential defenses of entrapment and lack of intent based on lack of a real minor. (2) It held the plea colloquy was not undermined by the lack of advice that he could, and as it turned out was, sentenced as a career offender. (3) The Court declined to resolve the argument that the prosecutor and probation officer had violated due process by inducing the plea by misrepresentation to the defense attorney that defendant would not be classified as a career offender, as it was based on an extra-judicial affidavit of defense counsel.

The Court rejected four sentencing arguments: (1) The retroactive application of *Searcy*, 418 F.3d 1193 (11th Cir. 2005) (holding that § 2422 conviction was "crime of violence" for career offender sentencing), did not violate due process; defendant had fair warning of the

30-year statutory maximum sentence, more than his actual sentence, and that was all that was required; (2) Use of Ohio court docket sheets to establish the fact of the prior convictions did not violate Sixth Amendment, and they were not used to classify those priors as crimes of violence for career offender purposes, so *Shepard* was not implicated; (3) Congress would not have intended that "unwarranted disparities" be interpreted to include protecting defendants from subsequent court decisions solely because pre-decision defendants had gotten off lighter; and the court had acknowledged the mitigating evidence, but simply found it unpersuasive in imposing a top-of-the-guideline sentence; (4) defendant did not prove fundamental error required from the pervasive bias he alleged was demonstrated by district court at sentencing in responding to legal arguments by counsel.

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