
FEDERAL PUBLIC DEFENDER

NORTHERN DISTRICT OF FLORIDA

A Newsletter for Panel Attorneys

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GOVERNMENT OBLIGATED TO PROVE DRUG QUANTITY AT TRIAL ??

Included in our summary of cases is the United States Supreme Court opinion of *Apprendi v. New Jersey*. In her dissent, Justice O'Connor refers to the opinion as "a watershed change in constitutional law." Whether she's right about it or not, the holding of the case has already begun to play out.

The holding of the case is: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The decision is an affirmation of what was suggested in a footnote in *Jones v. United States*, 526 U.S. 227 (1999).

In, ironically, another "Jones" case, *Jones v. United States*, No. 99-8176, 2000 WL 21739 (June 29, 2000), considered just a few days after *Apprendi*, the Supreme Court granted certiorari and remanded to the Tenth Circuit for consideration in light of *Apprendi*. The Tenth Circuit had followed existing precedent and held that the drug quantity was not an element of the offense. If Mr. Jones wins, it may mean he'll receive twenty years, instead of the thirty he's now serving.

Locally, in a pending case, *United States v. Vaughn Moore*, 4:00cr2-RH, Judge Hinkle has tentatively ruled that the *Apprendi* holding requires the

Government, in most instances, to prove the quantity of drugs, not just at sentencing, but at trial.

A few words of caution. At least with regard to Judge Hinkle's decision, it was made on June 29th during a sentencing proceeding that isn't going to be completed until July 13th. Thus, it's conceivable he could even change his mind between now and then. While that is probably unlikely, the question of whether the error can be ignored under the harmless error doctrine is very much at issue.

In Mr. Moore's case, which was tried in March, Judge Hinkle denied Mr. Moore's request to instruct the jury that the Government was required to prove that more than 5 grams of crack cocaine was involved in each of the three drug transactions. Thus, the jury never made the determination that more than 5 grams of crack cocaine was involved. The argument at sentencing has been that the Government is limited to the 30 year sentence provided for in 21 USC § 841(b)(1)(C), the maximum sentence for someone who has one prior drug conviction and distributes less than 5 grams of crack cocaine. Because the Government is seeking career offender sentencing, a ruling favorable to Mr. Moore would also reduce the offense level from 37, which is reserved for offenses that carry a penalty of up to life in prison, to level 34. While the Government doesn't dispute the consequences that would follow from the application of *Apprendi* to Mr. Moore's case, they have, in addition to contesting that application, also argued

that because they, at trial, presented evidence showing that more than five grams was involved in each transaction, the error was harmless. The argument, thus far, seems to appeal to Judge Hinkle.

In considering *Apprendi*, too, it's worth noting that the holding doesn't ordinarily affect relevant conduct, or drug quantities that are proven, at sentencing, for guideline sentencing purposes. You can still be convicted at trial of selling a small quantity of drugs, and at sentencing see your offense level soar because of much larger quantities of drugs, which the government establishes, by a preponderance of the evidence, at the sentencing. Most mandatory minimum sentences would, likewise, be unaffected.

Still, the *Apprendi* decision seems likely to make a real difference. In making his tentative ruling, Judge Hinkle announced that he is now going to require the Government to prove the quantity in accord with § 841. He will be giving an appropriate instruction, and requiring the jury to make the requisite finding. The *Apprendi* opinion does carry with it a suggestion of an application broader than the immediate holding. That suggestion led Judge Hinkle to announce that in some cases he may, in a bifurcated proceeding, submit the issue of prior convictions to the jury. It seems, too, that the Government should also have to prove, and the jury find, the nature of the controlled substance. There are also, of course, offenses outside of § 841 that will be affected.

The biggest issue of all may be that of who will benefit from *Apprendi*. Assuming it applies retroactively the decision should spawn a terrific amount of litigation.

We're in the process of preparing a memorandum that you can adopt to your own purposes. We should have it available in the next week or two. Just call any one of our offices, and we'll email or fax you a copy. Please remember, too, that we're happy to answer any questions or assist you in any way we can. Just give any of our lawyers a call.

Our last newsletter included a discussion of the Florida Supreme Court case of *Wood v. State*, 750 So.2d 592 (Fla. 1999). *Wood*, while imposing a two year time limitation on the filing of challenges that had traditionally been raised in a coram nobis petition, provided a two year window, beginning from the date of the opinion, May 27, 1999, in which those that had existing claims could file them. In the article we noted that there was some question about whether coram nobis could be used to challenge involuntary pleas.

Not long after the newsletter was distributed the Florida Supreme Court issued two other opinions, *Peart v. State*, 756 So.2d 42 (Fla. 2000), and *Gregersen v. State*, 25 FLW S328 (April 27, 2000). Although *Peart* involved a plea in which the defendant was not advised of possible immigration consequences, Justice Anstead, in his concurring opinion clearly says coram nobis may be used to challenge any and all involuntary pleas: "The Court has held, as a general proposition, that a determination of the voluntariness of a plea is a fact-based issue to be raised and resolved in the trial court . . . Further, as least as far back as 1923, we have held that an issue of voluntariness may be raised as an issue of fact in a petition for writ of coram nobis." *Id. at 48*.

In *Wood* the Court stated that future coram nobis claims would have to be filed as a Rule 3.850 petition. It wasn't entirely clear whether those coram nobis claims that existed prior to the *Wood* decision should be filed as a coram nobis petition or a 3.850 petition. In *Gregersen* the Court said that all coram nobis petitions, regardless of when the cause may have arisen, should be filed as a 3.850 petition.

So, if you have a client who is looking at an enhanced sentence on the basis of a state conviction, the state conviction was arguably based on an involuntary plea, and your client served less than two years in custody, you have, regardless of when he was sentenced, until May 26, 2001, to go to state court and file a 3.850 petition. After May 26, 2001, you will ordinarily be limited to two years from the date of the state conviction.

On April 17, 2000 the Chief Justice delivered to Congress a series of amendments to the Federal Rules of Evidence. Assuming Congress takes no further action, those amendments will be effective as of December 1, 2000. What follows is our summary of those amendments.

Rule 103. Rulings on Evidence: The new language reads: “Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.” It means, of course, that having lost a motion in limine or, presumably, a motion to suppress, you wouldn’t be required to object to the introduction of the evidence at trial.

Rule 404(a)(1). Character Evidence: Under existing Rule 404(a)(2) the defense can introduce evidence of “a pertinent trait of character” of the alleged victim. Thus, in a crime of violence, where the defendant’s claim is self-defense, the defendant may, for example, introduce evidence of the alleged victim’s violent nature. The amendment provides that, if the defense elects to do so, the government can introduce “evidence of the same trait or character of the accused.” In the words of the Committee Note, the amendment means that “the door is opened to an attack on the same character trait of the accused.”

Rule 701. Opinion Testimony by Lay Witnesses: The amendment adds another qualifier to the existing limitations applicable to lay witness opinion testimony. It requires that the opinion be based on something other than “scientific, technical, or otherwise specialized knowledge within the scope of Rule 702.” The Report of the Advisory Committee explains that the amendment “seeks to prevent parties from proffering an expert as a lay witness in an attempt to evade the gatekeeper and reliability requirements of Rule 702.”

Rule 702. Testimony by Experts: The amendment which is intended to provide some general standards consistent with *Daubert* and *Kumho Tire*, says that expert testimony is admissible if, in addition to meeting the requirements of the existing rule, “(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the

principles and methods reliably to the facts of the case.” The Committee Note, which goes on for pages, includes an excellent summary of *Daubert*, *Kumho Tire*, and some of the cases that have followed.

Rule 703. Bases of Opinion Testimony by Experts: Under the existing rule an expert can base his opinion on facts or data, which may, itself, be inadmissible. The rule, according to the Committee Report, has allowed litigants to “evade an exclusionary rule of evidence by having an expert rely on inadmissible evidence in forming an opinion.” The method, according to the Committee, has been to disclose the inadmissible information to the jury “in the guise of the expert’s basis.” The solution proposed by the amendment is to prohibit the disclosure of the inadmissible facts, by the party offering the expert opinion, “unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.”

Rule 803(6) Hearsay Exceptions; Records of Regularly Conducted Activity; Rule 902. Self Authentication: The amendment to these rules provides for the admission of all records of regularly conducted activity, be they foreign or domestic, so long as they are certified by a qualified person to meet the existing requirements of admissibility. Thus, so long as the procedures are followed, and the relevancy of the records is self-evident, there will be no need to call the custodian of the records as a witness to secure the admission of the records into evidence. The rule requires advance notice to the opposing party “sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.”

DOWNWARD DEPARTURES

Green, Milton B. Paul, M. Atty: Thomas Miller
 Docket: 1:00cr2-MMP
 Charge: Poss Machine Gun, Poss Unregistered Firearm
 (2 cts)
 Range: 21-27 months
 Sentence: 5 years probation
 Date of Imposition of Sentence: 5/19/00
 Grounds: Aberrant behavior, reduced mental capacity,
 and voluntarily disclosing the existence of and
 accepting responsibility for firearms that
 would have otherwise remained undiscovered.

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

NEW FORMAT

For the last year and a half we have been providing you with an edited version of the detailed summaries we receive from the public defender's office in the Southern District of Florida. Beginning with this issue of the newsletter we're using summaries prepared by three of our lawyers, Craig Crawford, Jo Deyo, and Gwen Spivey. Our thinking is that a more concise summary would be of more use to you.

These summaries are the same ones that are prepared daily, and that are available to you via email. If you're interested in receiving the summaries as the Supreme Court and the Eleventh Circuit issue their opinions, please call Margaret in our Tallahassee office, at (850) 942-8818.

SUPREME COURT UPDATE

APPRENDI v. NEW JERSEY, 2000 WL 807189 (June 26, 2000)

! Element of Offense or Sentencing Factor

Here the Supreme Court considered New Jersey's "hate crime" law and whether the defendant's racially biased purpose was an element of the offense or a sentencing factor. The Court plainly held what Jones said in a footnote: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a

reasonable doubt." The Court did not engage in the multifactor review of the statute, as it did in *Castillo v. United States*, 2000 WL 712805 (June 5, 2000) and *Jones v. United States*, 526 U.S. 227 (1999). Instead the Court here expanded, at length, on *Jones'* recognition of the historical importance of due process and a jury trial. The Court found these "constitutional protections of surpassing importance" mandated its holding. The Court did not overrule but instead explained and limited its somewhat incongruous holdings in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (visible possession gun is sentencing factor) and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (prior conviction is sentencing factor).

DICKERSON v. U.S., 2000 WL 807223 (June 26, 2000)

! Miranda Survives

The Court held that the *Miranda* decision was a constitutional decision arising out of the self-incrimination and due process clauses. Therefore, Congress could not legislatively overrule *Miranda*, as it tried to do in 18 U.S.C. § 3501, which provides that voluntariness determines admissibility of statements regardless of whether *Miranda* warnings given. The Court applied *stare decisis* and found no reason to overrule *Miranda*.

MILLER v. FRENCH, 2000 WL 775572 (June 19, 2000)

! Prisoner Litigation Reform Act

The Supreme Court held that the automatic stay provision of the PLRA, 18 U.S.C. § 3626(e)(2), was mandatory, and that the stay provision was not an unconstitutional separation of powers.

RAMDASS v. ANGELONE, 120 S.Ct. 2113 (June 12, 2000)

! Habeas -- Whether Capital Sentencing Jury Should Know Defendant Will Be Ineligible for Parole

Although a jury considering a death sentence should be told if the defendant is parole ineligible under state law, the Supreme Court found that this principle did not apply to Ramdass. At the time of his sentencing, he had several other cases, including armed robbery and possible murder, pending in various stages. However, since he had not been sentenced on those he was technically not yet parole ineligible under state

law. The dissent chided the majority for permitting the state to use the pending case offenses to show future dangerousness yet not permitting the defendant to use those cases to argue parole ineligibility.

CARTER v. U.S., 120 S.Ct. 2159 (June 12, 2000)

! Bank Larceny is Not a Lesser Included Offense of Bank Robbery

Considering the textual elements of 18 U.S.C. § 2113(a) and (b), the Supreme Court found that bank larceny (b) was not a lesser included offense of bank robbery (a). The Court found that larceny (b) included three elements not present in (a) -- specific intent to steal, asportation, and valuation exceeding \$1,000. The Court noted that bank robbery (a) only requires general intent. The Court found that valuation was an element and not a sentencing factor. The dissent felt that § 2113 was meant to codify traditional common-law definitions of bank robbery and bank larceny, and thus a jury instruction on the lesser included should be permitted.

CASTILLO v. U.S., 120 S.Ct. 2090 (June 5, 2000)

! Element of the Crime or Sentencing Factor

The Court considered this issue again, this time looking at 18 U.S.C. § 924(c) and its provision that if the firearm is a machinegun the sentence is 30 years. As it did in *Jones v. United States*, 526 U.S. 227 (1999), the Supreme Court considered several factors, such as language, structure, history and severity of sentence. Here the Court found that the provision created a separate crime rather than merely a sentencing factor. The Court found the interpretation of this statute so clear that it did not have to resort to the rule of constitutional doubt.

U.S. v. HUBBELL, 120 S.Ct. 2037 (June 5, 2000)

! Fifth Amendment Privilege with Regard to Testimony about Documents, and Government's Use of Such Information

In a thorough discussion about the privilege against self-incrimination, and its application to documents, the Court considered the scope of a grant of immunity in production of documents. The Supreme Court held that the Fifth Amendment protects a grand jury target from being compelled to answer questions designed to elicit information about existence of sources of potentially incriminating evidence. The Fifth Amendment also applies to the testimonial aspect of

a response to a subpoena seeking the documents. Hubbell, under court order and with a grant of immunity, responded to a subpoena duces tecum with documents and answered questions about them. The government used that information to bring another case against Hubbell. Hubbell's motion to dismiss the second indictment must be granted because the government could not show that it brought the indictment on evidence "wholly independent" of his production of the documents.

OHLER v. U.S., 120 S.Ct. 1851 (May 22, 2000)

! Evidence

In the trial of this case, the district court granted the government's motion in limine to admit evidence of the petitioner's prior conviction as impeachment. The petitioner testified and on direct examination admitted the prior conviction, presumably to take the sting out of the government's use of the prior. The Supreme Court held that the petitioner could not appeal the admission of the prior because she introduced the evidence. The Court found that no evidence rule supported any different result, and found nothing unfair about this result.

JONES v. U.S., 120 S.Ct. 1904 (May 22, 2000)

! Commerce Clause and Arson

The Supreme Court held that the federal arson statute, 18 U.S.C. § 844(i), does not cover arson of an owner-occupied private residence that is not used for any commercial activity. Use means active employment, not a passive or past connection to commerce. Having a mortgage lender in another state or obtaining home fuel from another state does not bring the home within the statute. Conversely, a rental home is used in commerce. The Court noted that the rule of constitutional doubt supported its holding. The Court again noted the concerns of *United States v. Lopez*, 514 U.S. 549 (1995) about maintaining the federal-state balance and avoiding federal usurping of traditionally local criminal conduct.

FISHER v. U.S., 120 S.Ct. 1780 (May 15, 2000)

! Federal Bribery Statute Covers Medicare Providers

The federal bribery statute, 18 U.S.C. § 666(b), which prohibits defrauding organizations that receive benefits of \$10,000 a year under a federal program, covers fraud perpetrated on health care provider organizations participating in the Medicare program.

U.S. v. MORRISON, 120 S.Ct. 1740 (May 15, 2000)

! Commerce Clause and the Violence Against Women Act

In a lengthy (and 5-4) opinion the Supreme Court held that 42 U.S.C. § 13981, which provides for a federal civil remedy for victims of gender-motivated violence, was unconstitutional. Quoting and relying heavily on *United States v. Lopez*, 514 U.S. 549 (1995), the Court found that the conduct regulated here was non-economic. Also, as in *Lopez*, there was no jurisdictional element to save the statute. The Court continued to stress the need for separate local and federal authority, and the fact that criminal conduct is generally under state authority. The Court also held that this civil remedy could not be upheld under section 5 of the Fourteenth Amendment.

JOHNSON v. U.S., 120 S.Ct. 1795 (May 15, 2000)

! Ex Post Facto and Reimprisonment after Supervised Release Revocation

The petitioner here violated supervised release and the district court imposed a prison term with supervised release to follow. The Supreme Court found that the previous version of 18 U.S.C. § 3582(e)(3) permitted additional supervised release after imprisonment on a revocation. The petitioner had challenged retroactive application of 18 U.S.C. § 3583(h), which permits a district court to impose an additional term of supervised release after reimprisonment on a violation. The Supreme Court disposed of the ex post facto question by finding that Congress didn't intend 3583(h) to be applied retroactively; since (h) did not apply there was no ex post facto violation. In the course of this decision the Court pointed out that punishment after revocation is actually part of the penalty for the initial offense.

CARMELL v. TEXAS, 120 S.Ct. 1620 (May 1, 2000)

! Ex Post Facto

A Texas statute provides that a victim's testimony about a sexual offense cannot support a conviction

unless corroborated. An exception permits conviction solely on a victim's testimony if the victim is under a certain age; that age was 14 but an amendment to the statute in 1993 changed the age to 18. Some of Carmell's convictions involved conduct that occurred before the amendment but were based on the testimony of the victim, who was not under 14 at the time of the offenses. In a lengthy historical discussion of ex post facto, the Court found that applying the amended statute to obtain those convictions violated ex post facto.

SLACK v. McDANIEL, 120 S.Ct. 1595 (April 26, 2000)

! Habeas - Pre-AEDPA Review of State Court Denial on Procedural Grounds

The court held that under the AEDPA, an appellate case is commenced when the application for a certificate of appealability (COA) is filed. If that occurs after 4/24/96, the AEDPA applies to the appellate proceedings. A notice of appeal filed after this date should be treated as an application for a COA. Slack's § 2254 appeal was governed by pre-AEDPA law. When the district court denies a habeas petition on procedural grounds without reaching an underlying constitutional claim, a COA should issue if it is debatable whether the petition states a valid constitutional claim, and if it is debatable whether the district court was correct in its procedural ruling. A habeas petition filed after an initial petition was dismissed without adjudication on the merits for failure to exhaust state remedies is not a "second or successive" petition.

EDWARDS v. CARPENTER, 120 S.Ct. 1587 (April 25, 2000)

! Habeas -- When Can a Procedurally Defaulted Ineffective-Assistance Claim Serve as Cause to Excuse the Procedural Default of Another Habeas Claim.

The defendant tendered an Alford plea to aggravated murder and aggravated robbery. His appellate counsel failed to raise a challenge to the sufficiency of the evidence. The defendant unsuccessfully pursued state postconviction relief. The Supreme Court held that a procedurally defaulted IAC claim can serve as cause to excuse the procedural default of another habeas claim only if the habeas petitioner can satisfy the "cause and prejudice" standard with respect to the

IAC itself. Counsel's ineffectiveness in failing properly to preserve a claim for state-court review will suffice as cause, but only if that ineffectiveness itself constitutes an independent constitutional claim. The Supreme Court reversed because the lower federal courts had used an incorrect legal standard.

(Terry) WILLIAMS v. TAYLOR, 120 S.Ct. 1495 (April 18, 2000)

! Habeas - Standard for Review of State Cases.

Here the Court reversed Williams' death sentence, explaining the ability of the federal courts to grant relief from state court rulings under the Anti-Terrorism and Effective Death Penalty Act of 1996. Under 28 U.S.C. § 2254(d)(1), the habeas writ may issue only if the state-court adjudication (1) was contrary to, or (2) involved an unreasonable application of clearly established Federal law.

The first clause, "contrary," means that a federal habeas court may grant relief if the state court (a) arrives at a conclusion opposite to that reached by the Court on a question of law or (b) decides a case differently than the Court has on a set of materially indistinguishable facts.

Under the second clause, "unreasonable application," a federal habeas court may grant relief if the state court identifies the correct governing legal principle from the Supreme Court's decision but unreasonably applies that principle to the facts of the prisoner's case. The reasonableness inquiry is not a subjective one but looks at whether the state court decision was objectively unreasonable.

(Michael Wayne) WILLIAMS v. TAYLOR, 120 S.Ct. 1479 (April 18, 2000)

! Habeas - Factual Basis in State Proceedings

Under 28 U.S.C. § 2254(e)(2), "[i]f the applicant has failed to develop the factual basis of a claim in state court proceedings, the [federal habeas] court shall not hold an evidentiary hearing on the claim unless the applicant" makes specified showings. The Court held that failure to develop a claim's factual basis in state court proceedings is not clearly established unless there is lack of diligence, or some greater fault, attributable to the prisoner or his counsel. The Court found that an evidentiary hearing on a Brady claim here was barred since state habeas counsel should

have been aware of the material at issue, but the two remaining claims (juror bias and prosecutorial misconduct) warranted an evidentiary hearing since Williams was diligent in developing the facts in state collateral proceedings.

BOND v. U.S., 120 S.Ct. 1462 (April 17, 2000)

! Search of Bus Luggage

A border patrol agent boarded a bus at an established border checkpoint to check the immigration status of the passengers. While on the bus the agent squeezed the soft luggage in the overhead bin, finding a brick of methamphetamine in petitioner's luggage. The Supreme Court found that this physical manipulation of the luggage violated the Fourth Amendment. The luggage was a personal effect in which the passenger had a privacy interest. Although it was exposed to public view, visual observation is less intrusive than the tactile intrusion here. Even casual handling by other customers or bus employees, which a passenger might expect, would not have been as intrusive as the probing examination by the agent.

ELEVENTH CIRCUIT
CASE SUMMARIES

U.S. v. GUZMAN-BERA, Case No. 99-4140 (June 27, 2000)

Aggravated Felony Enhancement Under 2L1.2(b)(1)(A) and 8 U.S.C. 1101(a)(43)

A 16-level enhancement applies when a defendant reenters the United States after being previously deported after a criminal conviction for an "aggravated felony." The 11th found that "aggravated felony" is defined in terms of the sentence imposed, not the authorized term of imprisonment. Thus, Guzman-Bera's five year probation sentence for grand theft, was held not to be an "aggravated felony" for purposes of the enhancement. Further, the fact that Guzman-Bera violated his probation and received an 18-month sentence did not make the grand theft conviction an "aggravated felony," because the violation sentence was imposed after Guzman-Bera had been deported and illegally reentered the United States.

MEEKS v. MOORE, 2000 WL 827317 (June 27, 2000)

Habeas; Ineffective Assistance of Counsel; Venue; Suggestive Line-Up; Jury Instruction

In a pre-AEDPA case, the 11th affirmed the district court's denial of Meeks' § 2254 petition. In a lengthy decision, the 11th addressed Meeks' claim of IAC based on three grounds: counsel failing to move for a change of venue because of racial bias, counsel failing to object to a suggestive line-up, and counsel failing to object to the trial court's jury instruction on attempted robbery. The 11th had a lengthy discussion on actual or presumed prejudice in context to the venue challenge.

HARRIS, CHADWICK, et. al. v. GARNER, THOMAS, et.al., Case No. 98-8899 (June 27, 2000)

Prison Litigation Reform Act; Meaning of Confined Prisoner

One of the provisions of the PLRA states that: "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." The 11th, en banc, addressed whether the provision applies to lawsuits that are filed while the plaintiff is a confined prisoner but not decided until after he is released. The Court held that the provision does apply in such cases. Interestingly, the Court noted that the provision does not prevent a former prisoner from filing, after release, a monetary damages claim for mental and emotional injury suffered while confined, without a prior showing of physical injury.

U.S. v. MALDONADO-RAMIREZ, 2000 WL 825671 (June 26, 2000)

! Guidelines for Illegal Entry

Deportation in Supervised Release Section 2L2.2(b)(1)(A) of the Sentencing Guidelines provides for a 16-level increase to a sentence for illegal entry if the alien was previously removed after conviction of an aggravated felony. The 11th held that the definition of aggravated felony - including felonies for theft or violence with sentences of at least a year - referred to sentences imposed not sentences served. The 11th thus approved the 16-level increase. The 11th also held that the district court erred in imposing a condition of supervised release that the defendant not contest deportation.

IN RE: THOMAS HARRISON PROVENZANO, 2000 WL 796749 (June 21, 2000)

! Habeas – Second or Successive Petitions

The 11th held that *In re Medina*, 109 F.3d 1556 (11th Cir. 1997) foreclosed the Court from granting Provenzano authorization to file a second or successive petition on four claims: competency to be executed, whether lethal injection as administered by Florida is cruel and unusual punishment, insanity at the time of the offense, and newly discovered evidence concerning his mental state at the time of the crime.

U.S. v. RICE, 2000 WL 774913 (June 16, 2000)

! Justification Defense to Felon-In-Possession

Although acknowledging that a justification defense exists for felon in possession charges, the 11th stressed that the defense is only permissible in extraordinary circumstances of immediate danger. Possessing a gun in advance of danger is not a defense unless extreme circumstances exist. Here Rice alleged numerous beatings and threats by a gang, but the 11th found that he was not under an imminent threat of serious injury when he had the gun.

U.S. v. BELL, 2000 WL 774959 (June 16, 2000)

! Justification Defense to Felon-in-Possession

The court's opinion here is virtually identical to that of *Rice*. Bell obtained and kept a gun for several days after a group of assailants fired upon him and others at his home. Again the court found that his possession of a gun four days later was not justified because he did not face a imminent threat of injury at that point.

U.S. v. ONE PARCEL OF REAL ESTATE AT 10380 SW 28th St., 2000 WL 770157 (June 15, 2000)

! Forfeiture

After her husband's conviction, wife challenged civil forfeiture of their home. While an appeal in her challenge was pending, she died. The 11th declined to decide whether the abatement rule would ever apply to a civil forfeiture procedure, but found no reason to apply the rule in this case. The Court also held that since the value of the forfeited property was within the range of the authorized guideline and statutory fine in Mr. Burroto's case, the forfeiture did not violate the Eighth Amendment excessive fines prohibition.

U.S. v. PROBEL, 2000 WL 763347 (June 13, 2000)

! Guideline Increase for Distributing Child Pornography

The 11th, joining the majority of circuits, held that the five-level sentence enhancement for distribution of child pornography, U.S.S.G. § 2G2.2(b)(2), does not require pecuniary or other gain.

U.S. v. BULL, 2000 WL 754942 (June 12, 2000)

! Supervised Release Conditions

The 11th approved mental health treatment for anger control as a condition of supervised release for a defendant who pled guilty to use of an unauthorized charge card, because the mental health condition was reasonably related to his extensive history of domestic violence.

IN RE: BENNIE DEMPS, 2000 WL 728022 (June 7, 2000)

! Habeas – Second or Successive Petition in Capital Case

Demps presented a recently discovered memorandum that he alleged would show he is innocent. The 11th was unconvinced and found that he failed to make the showing necessary for leave to file a successive petition.

U.S. v. SMITHEN, 2000 WL 725445 (June 6, 2000)

! Assault with Intent to Rob U.S. Property

Defendants were targets of a sting operation but robbed undercover agents of cash that was to be used in the sting. The 11th held that 18 U.S.C. § 2114(a) does not require proof that the defendant knew the property belonged to the U.S.

U.S. v. BATES, 2000 WL 725337 (June 6, 2000)

! Guidelines Enhancements: for brandishing weapon and for carjacking

Bates was unarmed but reached into his pants waist band area during a bank robbery. The 11th approved the three-level enhancement under U.S.S.G. § 2B3.1(b)(2)(E), finding the focus to be the appearance of a dangerous weapon, not the presence of an object that could be perceived to be a weapon.

After the robbery, Bates ran onto a porch where a man was sitting, demanded car keys, and forced that man inside the house. Once inside, the man got a handgun, and Bates left. The 11th approved an enhancement under U.S.S.G. § 2B3.1(b)(5) for carjacking, finding

that it did not matter that the carjacking statute had been amended to require specific intent and that anyway his conduct met the definition of carjacking under either the amended statute or the guidelines section.

IN RE: MATTHEW GREEN, 2000 WL 796765 (June 5, 2000)

! Habeas -- Second or Successive Petitions

In 1997, Green filed a § 2255 motion alleging, among other things, that *Bailey v. United States*, 516 U.S. 137 (1995) invalidated his § 924(c) firearms conviction. The district court held a resentencing. In February 2000, Green filed a second 2255 motion, alleging that his counsel rendered ineffective assistance at re-sentencing. The 11th found that this 2255 motion was not "second or successive" because Green could not have challenged his counsel's effectiveness at re-sentencing at the time he filed his first 2255 motion.

U.S. v. GROSS, 2000 WL 684802 (May 26, 2000)

! Forfeiture

A district court's preliminary order of forfeiture is final and immediately appealable. Here the 11th remanded for a hearing because the record did not show any factual nexus between the offense and the property sought to be forfeited.

U.S. v. FRANSEN, 2000 WL 679170 (May 25, 2000)

! Regulation Requiring Permits for Park Protests Violated First Amendment

Reversing defendant's convictions, the 11th held that 36 C.F.R. § 2.51, which required permits to be obtained prior to a protest in a national park, is unconstitutional on its face. The regulation was invalid because it failed to adequately limit the time within which the decisionmaker had to act in issuing a permit.

U.S. v. CORDOBA-MOSQUERA, 2000 WL 669659 (May 23, 2000)

! Various Trial Issues: Vienna Convention; Brady; Prosecutorial Misconduct; Batson

Several defendants were convicted of conspiracy to import cocaine and other cocaine offenses. They crewed a boat from Columbia, which allegedly received cocaine in a high-seas transfer. The 11th

disposed of a number of issues in short order. The Court found that if there was a violation of Article 36 of the Vienna Convention, the remedies would not include evidence suppression or dismissal of the indictment, and furthermore the defendants did not show prejudice from any Vienna violation. The Court found no Brady problem with regard to a report that Columbian police may have permitted the boat to carry cocaine. The prosecutor's explanation that a juror's body language suggested disinterest and inattentiveness was specific enough, and inattentiveness is a proper race-neutral reason for striking a juror. Prosecutor's comments that the defendants failed to explain some of the evidence resulted in no prejudice of substantial rights; the trial court gave a curative instruction.

The Court did reverse the district court's order of deportation as a condition of supervised release.

U.S. v. EDWARDS, 2000 WL 642676 (May 19, 2000)

! Speedy Trial

Edwards' trial began less than thirty days after his first appearance. Joining the 5th and 6th Circuits, the 11th held that a defendant must show prejudice in order to get a new trial under 18 U.S.C. § 3161(c)(2). The 11th did not find such prejudice here.

U.S. v. GOLDEN INDUSTRIES, INC., 2000 WL 633022 (May 17, 2000)

! Indictment for Racketeering

This is an order granting rehearing en banc to reconsider the holding in *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), that the person named in an indictment need not be distinct from the enterprise named therein for purposes of 18 U.S.C. § 1962(c), a racketeering statute.

U.S. v. NYHUIS, 2000 WL 633027 (May 17, 2000)

! Habeas - Certificate of Appealability; Postconviction Claim for Credit of Time Served

In this § 2255 case, the 11th granted a certificate of appealability as to two (of eight original) issues only, but a third issue was added when a panel granted the Nyhuis' Motion to Review Action of a Single Judge. The Court noted even if a COA is granted, the court will not pass upon a constitutional question if there is

some other ground upon which the case may be disposed. With regard to his first two claims, prosecutorial misconduct underlying his prosecution and breach of his Michigan plea agreement by his Florida prosecution, the Court found both procedurally barred. The third claim was that counsel was ineffective for not challenging the application of U.S.S.G. § 5G1.3 at sentencing or on appeal, thus depriving Nyhuis of credit for fourteen months he had served on the Michigan sentence before imposition of the concurrent Florida sentence. The Court concluded that § 2255 does not authorize a district court to grant credit for time served; that claim must be brought under 28 U.S.C. § 2241 after exhaustion of administrative remedies.

BRADLEY v. NAGLE, 2000 WL 628704 (May 16, 2000)

! Habeas – Various Claims Denied

In this capital case, the 11th rejected Nagle's claims. The 11th could not review his Fourth Amendment claim because the state court had provided an opportunity for full and fair litigation. The 11th found that his statement to police was not coerced. The 11th also rejected Nagle's challenges to the sufficiency of the evidence. Likewise the 11th rejected his claims that the death sentence was invalid because evidence did not support the two aggravating circumstances found.

MINCEY v. HEAD, 206 F.3d 1106 (May 16, 2000)

! Habeas – Various Claims Denied

In this lengthy opinion, the Court denied habeas relief for a Georgia capital defendant, rejecting claims that the prosecution withheld exculpatory evidence (notes prosecutor made during meeting with forensic team following its evaluation of defendant), that trial counsel was ineffective, that the trial court erred in refusing to suppress the defendant's statements (made after request for lawyer was denied), and that the trial court erred in refusing to suppress statements and evidence seized pursuant to warrant obtained after warrantless arrest. Footnote 58 contains an analysis of whether pre- or post-AEDPA law applies in this case.

U.S. v. JAMES, 210 F.3d 1342 (April 27, 2000)

! Rule 11 Violation

James pleaded guilty to one Travel Act count. The 11th rejected an *Anders* brief and found plain error in a Rule 11 violation. The Court noted that for simple charges a reading of the indictment might be sufficient, but that for more complex charges, the plea colloquy would require more explication. Noting that a Travel Act charge is a complex charge, the Court found that the neither the plea agreement nor the defendant's admissions established elements or sufficient supporting facts.

U.S. v. YEAGER, 210 F.3d 1315 (April 25, 2000)

! Guideline Sentencing Enhancement for Aggravating Role

A district court may consider a RICO defendant's role in the overall RICO conspiracy in imposing a increase for a leadership role pursuant to U.S.S.G. § 3B1.1.

BISHOP v. RENO, 210 F.3d 1295 (April 24, 2000)

! Treaty Transfer Cases - Jurisdiction for Habeas Challenge

Bishop received a criminal sentence in Bahama and consented to a treaty transfer to the US. He then filed a habeas petition here in the U.S., challenging part of the sentence as unconstitutional punishment. The 11th held that under the treaty and the implementing statute, 18 U.S.C. § 3244, only the sentencing country could review the legal nature and duration of the sentence, so the district court had no jurisdiction to entertain the habeas relief requested here.

U.S. v. FUTRELL, 209 F.3d 1286 (April 20, 2000)

! Mandatory Victims Restitution Act

The MVRA does apply to straddle conspiracies that began before the statute's effective date but concluded after the statute's effective date. A sentencing court may estimate the restitution amount imposed pursuant to the MVRA. However, the district court is not required to, and does not have discretion to, consider the defendant's ability to pay.

U.S. v. TYNDALE, 209 F.3d 1292 (April 20, 2000)

! Ineffective Assistance of Counsel; No Plain Error in Failure to Notify Defendant at Plea of Sentence Enhancement

Claims of IAC are not considered on direct appeal, unless the record is sufficiently developed, and the record was not sufficient to consider that claim here. The 11th found no harm to Tyndale's substantial

rights from the district court's failure to specifically inform him of the automatic enhancement to his sentence, pursuant to guidelines and statute, for commission of the instant offense while on bond for other offenses.

HOLLODAY v. HALEY, 209 F.3d 1243 (April 19, 2000)

! Habeas Challenge to State Conviction - Ineffective Assistance and Excessive Security Claims Rejected.

In this § 2254 appeal, the 11th found no deficiency in Holloday's attorneys' investigation or presentation of mental health mitigation for the capital sentencing phase. The 11th also found that the challenge to excessive courtroom security was procedurally barred because it was not raised on direct appeal and Holloday had not shown cause and prejudice or a fundamental miscarriage of justice.

HIGH v. HEAD, 209 F.3d 1257 (April 19, 2000)

! Habeas - Abuse of the Writ

In this case involving a second § 2254 petition filed prior to AEDPA, the 11th Circuit held that if abuse of the writ is pleaded as a defense, a district court may not reach the merits of new claims unless a habeas petitioner shows either cause and prejudice or a fundamental miscarriage of justice. The miscarriage of justice standard differs depending on the nature of the challenge. If the petitioner claims actual innocence of the underlying crime, he must show that, because of constitutional violation, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." If, however, a capital petitioner challenges his death sentence, he must show by clear and convincing evidence that no reasonable juror would have found him eligible for the death penalty in light of the new evidence. After a long factual analysis of all the issues, the court affirmed the district court's judgment denying relief.

MEANS v. STATE, 209 F.3d 1241 (April 18, 2000)

! Habeas - Challenge By a Federal Prisoner to a Prior State Conviction

Means, a federal prisoner, filed a habeas corpus petition under 28 U.S.C. § 2254, attacking a prior state conviction that was used to enhance his current federal sentence. The 11th held that when a prisoner

challenges an expired state sentence that was used to enhance his current federal sentence, he must bring suit under 28 U.S.C. § 2255, not § 2254.

COOK v. WILEY, 208 F.3d 1314 (April 14, 2000)
! BOP’s Administrative Regulations Regarding Drug Program.

Here the 11th considered the 1995 version of 28 C.F.R. §550.58 and the corresponding program statement 5162.02, which deny the one-year drug program reduction to inmates serving sentences for felon-in-possession. Giving BOP "some deference," the 11th found that 550.58, as interpreted by PS 5162.02, was a reasonable implementation of 18 U.S.C. § 3621(e)(2)(B). The 11th also found that § 3621 did not create a constitutionally protected liberty interest, so there was no due process violation. The BOP reg and PS also did not violate equal protection because they survived rational basis review.

U.S. v. LEE, 208 F.3d 1306 (April 13, 2000)
! Armed Career Criminal Act

Considering whether two priors committed on the same day are a single episode or two separate convictions for purposes of 18 U.S.C. § 924(e), the 11th found no conflict between prior panel decisions in *United States v. Sweeting*, 933 F.3d 962 (11th Cir. 1991), and *United States v. Pope*, 132 F.3d 684 (11th Cir. 1998). The 11th found a way to distinguish these cases on the degree of break between the first and second crimes and whether the defendant had the opportunity to desist criminal activity. Here Lee robbed a bank and made a getaway in a car. However, a police officer stopped him two miles from the bank, and he broke into a shed to hide. The 11th found that he successfully completed the robbery and that there was enough of a break to make the robbery and the burglary of the shed two separate crimes for § 924(e).

U.S. v. DUARTE-ACERO, 208 F.3d 1282 (April 13, 2000)

! Prosecution in U.S. and Foreign Country

The 11th found that the double jeopardy provisions of the International Covenant on Civil and Political Rights (ICCPR) does not bar a criminal prosecution in the U.S. despite earlier prosecution for same conduct in Colombia, because the clear language of the ICCPR governs relationships between defendant and country, not affairs between nations.

U.S. v. GARCIA, 208 F.3d 1258 (April 10, 2000)
! Extradition and Doctrine of Specialty; Obstruction of Justice; Acceptance of Responsibility.

Garcia pled guilty to conspiracy to distribute marijuana and to possess it with the intent to distribute it and to using and carrying a firearm in connection with the marijuana conspiracy.

Although the extradition treaty only permits a person to be tried for the offense for which extradition was granted, the 11th approved use of other marijuana dealings for an upward departure from the guideline sentence.

The 11th approved an obstruction of justice increase even though the defendant’s obstructive conduct occurred before any federal investigation.

The 11th also approved denial of an acceptance of responsibility reduction because of various actions by the defendant, such as living under an assumed name in Canada.

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