

FEDERAL PUBLIC DEFENDER  
NORTHERN DISTRICT OF FLORIDA  
A NEWSLETTER FOR PANEL ATTORNEYS

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**ELEVENTH CIRCUIT APPROVES NEW CJA PLAN**

The Judicial Council of the Eleventh Circuit has approved a new Criminal Justice Act Plan for the Northern District of Florida. There are several provisions that alter standing practices. Under the Plan appointments to the panel will be for renewable two-year terms. It does not, however, require panel members to reapply. Instead, it requires a standing committee, which has already been appointed by Judge Vinson, to initiate a review process and make recommendations to the Chief Judge. The standing committee, which has met once thus far, is composed of a lawyer from each division: Gil Schaffnit from Gainesville, who is the chairman, Steve Seliger from Tallahassee, Thom Cassidy from Panama City, Ken Riddlehoover from Pensacola, and Federal Defender Randy Murrell. Members of the standing committee serve three-year terms. The Plan also provides, for the first time in North Florida, a requirement that panel members participate in some form of annual

continuing education. Attached, for those of you receiving e-mail, is a copy of the new Plan. For those of you who haven't joined the electronic age, a copy is enclosed.

**NEW INTERIM U.S. ATTORNEY**

With Republican George Bush in the White House, Clinton Appointee Michael Patterson, effective at the end of May 31<sup>st</sup>, resigned his position as the United States Attorney for the Northern District of Florida. Long-time Assistant United States Attorney Tom Kirwin, having been appointed by Attorney General Ashcroft, is now the Interim United States Attorney. Mr. Kirwin, who is based in the Tallahassee office, has been with the office for 9 and 1/2 years. Prior to joining the office he served as an Assistant Staff Judge Advocate General in the United States Army, and as an Assistant State Attorney for Florida's Second Judicial Circuit. Nine lawyers, including Michael Patterson, have applied for the permanent position and are scheduled to be interviewed by a selection committee on Friday, June 29th. Mr. Kirwin estimates that it will be somewhere between three to six



months before the new United States Attorney is appointed by President Bush.

### **MONTHLY TRAINING SEMINAR**

Our July brown bag training seminar will feature a video from last year's Florida Bar's Advanced Criminal Practice seminar. The video is entitled "Preserving Error on Appeal." It is a thorough discussion of the particular pitfalls that face the trial lawyer in federal court. The lecturer is Rosemary Cakmis. Ms. Cakmis is Board Certified by the Florida Bar in Criminal Appellate Law. She is the chief of the appellate division of Office of the Federal Defender for the Middle District of Florida. She has worked, as well, in the Middle District's trial division and in private practice. As usual the luncheon meeting will be conveniently held in the Federal Courthouse nearest to you. Each session begins at Noon and ends at 1:00. The dates are as follows:

Pensacola: July 19, 2001  
Panama City: July 26, 2001  
Tallahassee: July 16, 2001  
Gainesville: July 12, 2001

We hope to see you there. We're taking off the month of August, but will be back with another luncheon in September.

### **DEPARTURE IDEAS THAT MIGHT HELP**

At last month's National Seminar for Federal Defenders, many recent downward departure cases were mentioned, but there were two, in particular, that bore a noteworthy similarity to many of the cases we see here in North Florida: United States v. Lewis, 249 F.3d 793 (8th Cir. 2001), and United States v. Mishoe, 241 F.3d 214 (2d Cir. 2001).

In Lewis the defendant pled guilty to being a felon in possession of a firearm and making a false statement in an attempt to acquire a firearm. The gun involved was a family heirloom. Lewis, knowing he couldn't possess the gun, gave it to his son. Faced with dire financial problems and the imminent disconnection of his utilities, Lewis retrieved the gun from his son and pawned it. When he later returned to the pawn shop for the gun, Lewis, a convicted felon, filled out the ATF form denying he had been convicted of a felony. Thanks to the National Instant Check System, the pawnbroker refused to release the gun to Lewis, and Lewis was subsequently arrested and indicted. The trial court concluded it could have departed if it had only been the gun charge, but seemingly decided it could not depart from the other charge, the false statement. The Eighth Circuit, however, relying on U.S.S.G. 5K2.11, which permits a downward departure when the defendant's conduct does not "cause or threaten the harm or evil sought to be prevented by the law proscribing the offense at issue," held that the trial court could have departed for either of the charged offenses. According to the opinion, the harm or evil the statute sought to prevent was that of "violent crimes and loss of human life." 249 F.3d 796. [Be forewarned, the Eleventh Circuit in United States v. Bristow, 110 F.3d 754 (11th Cir. 1997) held that "the district judge correctly determined that he was without discretion to grant . . . a downward departure," under nearly identical circumstances. *Id.* at 758. There, though, the lesser harms claim wasn't addressed, as the defendant based his claim on that of an "innocent purpose." *Id.* at 757 n. 5.]

In Mishoe, the defendant pled guilty to distributing less than five grams of crack cocaine. The presentence report classified him as a Career Offender, although Mishoe would

have also qualified for a criminal history category of VI based on his criminal history points. The trial judge, feeling generous, made a "horizontal departure," i.e., she based Mishoe's sentence on a criminal history of V rather than VI because she thought the criminal history overrepresented the seriousness of Mishoe's criminal record. She stated she did so because she believed such a departure was appropriate for "street-level drug selling." 241 F.3d at 217. The Second Circuit disagreed, finding that the use of "such a general rule" to be contrary to established guideline principles. Significantly, though, the Court went on to state: "Nevertheless, although the District Court erred in applying a generalized 'street level' drug selling exception to CHC [criminal history category] VI designations (whether based on criminal history points or career offender status), we believe that the Court would be entitled on remand to consider whether to make a departure based on an individualized consideration of factors relevant to an assessment of whether CHC VI 'significantly over-represents the seriousness of [the] defendant's criminal history or the likelihood that the defendant will commit further crimes." USSG 4A1.3. *Such factors might include, for example, the amount of drugs involved in Mishoe's prior offenses, his role in those offenses, the sentences previously imposed, and the amount of time previously served compared to the sentencing range called for by the placement in CHC VI.*" Id. at 219. (Emphasis added).

## PHARMACOLOGY

The list of drugs subject to prosecution in federal court is a long one. It seemingly has more appeal to a pharmacist, amateur or professional, than to those of us practicing

law. The list is the product of The Comprehensive Drug Abuse Prevention and Control Act of 1970. That Act established five schedules of controlled substances based on the potential for abuse and medical value of each substance. The "initial schedules" are found at 21 U.S.C. § 812(c). Recognizing the likelihood of change in the qualitative and quantitative data available on some substances, however, Congress permitted the Attorney General's Office to reclassify controlled substances among the schedules established by Congress.

Most of the drugs, of course, are still correctly located in the "initial schedules." Several, though, have been moved. Amphetamine, for example, is listed as a schedule III drug in the "initial schedules," but was, in 1971, reclassified as a schedule II substance. *See, United States v. Daniel*, 813 F.2d 661, 662 (5th Cir. 1987). Thus, to be sure of the schedule applicable to the controlled substance your client has been charged with distributing, and the resulting potential penalty, you'll need to look further than the "initial schedules," and consult the Code of Federal Regulations. You can locate the current drug schedules at the following locations:

Schedule I - 21 C.F.R. § 1308.11  
Schedule II - 21 C.F.R. § 1308.12  
Schedule III - 21 C.F.R. § 1308.13  
Schedule IV - 21 C.F.R. § 1308.14

Schedule V - 21 C.F.R. § 1308.15

## VICTORIES

In *Hall v. Moore*, 2001 U.S. App. LEXIS 11762 (11<sup>th</sup> Cir. 6/6/01), Gwen Spivey of our office, representing a state prisoner in a

habeas corpus claim, convinced the Eleventh Circuit Court of Appeals to grant her client a new sentencing hearing. Her client, who had been sentenced in Bay County back in 1985, had been seeking relief, pro se, since 1989. A Bay County judge had departed from the recommended range of 12 to 17 years and imposed a life sentence. That particular sentence was the last of several resentencings, and the judge imposing the sentence did so without providing Gwen's client with a lawyer. The Eleventh Circuit, contrary to the claim of the State, concluded that the sentencing was more than a ministerial act, and found a violation of the Sixth Amendment's right to counsel.

Earlier this month Bill Clark of our office won a motion to suppress before Judge Hinkle. Bill's client had been the subject of a traffic stop on I-10 in Madison County. The subsequent search of the car led to the discovery of 2 kilograms of cocaine. Judge Hinkle concluded that the officer lacked a founded suspicion to justify the stop. In light of the ruling the Government has filed a motion asking the Judge to dismiss the indictment.

**Please call us, send us a note, or e-mail us, here, 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.**

#### **EDUCATIONAL OPPORTUNITIES**

We have, in our Tallahassee office, audio tapes from 2001 Criminal Law Certification Review presented by the Florida Association of Criminal Defense Lawyers. Included are

two lectures that might be helpful: "Comparative Analysis of State and Federal Procedure," and "Comparative Analysis of State and Federal Sentencing Guidelines." If you would like to borrow one of the tapes, please call Margaret in our Tallahassee office at (850) 942-8818.

Dick Burr, who has become nationally prominent in defending against the death penalty and who serves as one of the Federal Death Penalty Resource Counsel for the Federal Defenders throughout the country, has recommended to us an on line series of lectures that is located at <http://www.trialtactics.com>. The lectures are entitled: "An Introduction to Wrongful Convictions" (Barry Scheck); Eyewitness Identification (Gary Wells); "False Confessions" (Richard Leo); "Jailhouse Snitches, Informants and Cooperators" (Ellen Yaroshefsky); "Government Misconduct and Wrongful Convictions" (Bennet Gershman); "Counsel for the Poor" (Stephen Bright); "Forensic Science and Wrongful Convictions" (Michael Saks); "DNA Testing and Innocence" (Barry Scheck and Peter Neufeld); "Habeas and Post-Conviction Remedies" (Mark Olive); "Innocence and the Death Penalty" (Michael Radlet); "Media and Investigative Journalism" (Robert Warden); "Lessons from the Case of Earl Washington" (Eric Freedman); "Innocence and Race" (Bryan Stephenson). Dick Burr gives the lecture series a glowing review saying: "there is nothing else like it on the internet (or for that matter in live seminars) in terms of quality of presentation, value of information, and accessibility." The lectures are also available on a CD. There is a fee for viewing the lectures.

## **DOWNWARD DEPARTURES**

Patino, Carlos      Mickle, S.      Atty: Randy Murrell  
Docket:            5:00cr34-SPM  
Charge:            Reentry after Deportation  
Range:             41 - 51 months  
Sentence:          15 months BOP  
Date of Imposition of Sentence: 5/20/01  
Grounds:          Proposed guideline amendment to §  
                         2L1.2, effective 11/1/01 should be  
                         applied to this case now.

**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.**

## **DAILY CASE SUMMARIES**

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

## **SUPREME COURT UPDATE**

**INS v. ST. CYR**, 2001 WL 703922 (June 25, 2001)

### **AEDPA; IIRIRA; 2241; Retroactivity of Statute**

Before the effective dates of AEDPA and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Section 212(c) of the Immigration and Nationality Act of 1952 was interpreted to give the Attorney General broad discretion to waive deportation of resident aliens. Section 212(c) relief was reduced in 1996 under the AEDPA, which excluded from the class anyone who was convicted of an aggravated felony. Prior to the effective date of AEDPA, St. Cyr pled guilty to an aggravated felony that made him

eligible for a waiver. The INS, however, began removal proceedings after AEDPA's effective date. The Supreme Court made the following holdings/findings: courts have jurisdiction under 2241 to decide the legal issue raised in St. Cyr's habeas petition; neither AEDPA nor IIRIRA expressed a clear and unambiguous statement of Congress' intent to bar 2241 petitions; Section 212(c) relief remains available for aliens whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for 212(c) relief at the time of their plea under the law then in effect.

**CALCANO-MARTINEZ v. INS.**, 2001 WL 703943 (June 25, 2001)

### **IIRIRA**

The Supreme Court held that IIRIRA precludes courts of appeals from exercising jurisdiction to review a final removal order against an alien removable by reason of a conviction for an aggravated felony. However, because Congress did not speak with sufficiently clarity to strip the district courts of jurisdiction to hear habeas petitions raising identical claims, petitioners may pursue their claims in a 2241 action.

**DUNCAN v. WALKER**, 2001 WL 672270 (June 18, 2001)

### **Tolling of limitation period under 28 U.S.C. 2244(d)(2)**

The Supreme Court held that a federal habeas petition was not an application for state post-conviction or other collateral review within the meaning of 28 U.S.C. § 2244(d)(2) for tolling the one-year period under AEDPA.

**ALABAMA v. BOZEMAN**, 2001 WL 636198 (June 11, 2001)

### **Interstate Agreement on Detainers; dismissal; speedy trial**

The Court unanimously rejected Alabama's argument for an exception to the literal language of the statute (that once returned to a state, the defendant must stay there until trial, which had to occur within 120 days); the state argued that, because defendant was only brought from federal prison (in Florida) to Alabama for one day (and then returned to Florida), he had not really "arrived" and the violation was "trivial." The Court rejected both arguments, affirming the Alabama Supreme Court and barring further prosecution.

**KYLLO v. U.S.**, 2001 WL 636207 (June 11, 2001)

**Search; suppression; thermal-imaging; expectation of privacy**

The Supreme Court held that, where the government uses a device (thermal imaging) that is not in general public use to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment "search," and is presumptively unreasonable without a warrant.

**PENRY v. JOHNSON**, 121 S. Ct. 1910 (June 4, 2001)

**Death Penalty**

In a prelude to deciding whether the mentally retarded can be executed, the Supreme Court overturned the death sentence of a Texas man because the jury lacked clear instructions on how to weigh his mental condition. The Court stated that the Texas trial court ignored the jury instruction guidelines set by the Court when it previously overturned Penry's death sentence. According to the Court, the key to *Penry I* was that the jury be able to "consider and give effect to a defendant's mitigating evidence in imposing sentence." In the fall the Court will hear arguments on the question

whether the mentally retarded can be executed.

**FLORIDA v. THOMAS**, 121 S. Ct. 1905 (June 4, 2001)

**Jurisdiction; search; finality of judgments**

The Court held that it lacked jurisdiction to decide whether *New York v. Belton's* (453 U.S. 454) bright-line rule (permitting an officer who has made a lawful custodial arrest of a car's occupant to search the car's passenger compartment as a contemporaneous incident of the arrest) is limited to situations where the officer initiates contact with a vehicle's occupant while that person remains in the vehicle. Although the Florida Supreme Court held that *Belton* did not apply to a situation where the officer contacted the occupant outside the vehicle, the Florida Supreme Court remanded with instructions to determine whether *Chimel v. California*, 395 U.S. 752, applied, and for further fact-finding. According to the U.S. Supreme Court, the judgment was therefore not final. The Court examined four categories of cases where state-court judgments are treated as final for jurisdictional purposes even though further proceedings were to take place in state court. The Court found that this case did not fall into one of the four categories.

**BOOTH v. CHURNER, et al.**, 121 S. Ct. 1819 (May 29, 2001)

**Prison Litigation Reform Act; exhaustion; administrative remedies**

The Prison Litigation Reform Act of 1995 amended 42 U.S.C. 1997e(a), requiring a prisoner to exhaust "such administrative remedies as are available" before suing over prison conditions. The petitioner filed an administrative grievance but failed to appeal administratively, arguing that the only relief he sought, monetary damages, was not

"available" administratively. However, the Court disagreed, interpreting the statutory phrase to mean any and all administrative remedies in place.

**BECKER v. MONTGOMERY**, 121 S. Ct. 1801 (May 29, 2001)

**Notice of Appeal; signature; civil rights action; 1983**

The Supreme Court held that, when a party timely files a notice of appeal, the failure to sign the notice does not require the appellate court to dismiss. While Rules 3 and 4 are linked jurisdictional provisions, Rule 3(c)(1), which contains the requirements of a notice of appeal, does not include a signature requirement; only Rule 11(a) calls for the signature, and this renders it nonjurisdictional. Rather, given the requirement of Civil Rule 11(a) of a signature on filed papers, and its provision for prompt correction after the omission is called to the attention of the party or his/her attorney, the Court construed the Rule to apply to notices of appeal. The Court noted that the appellate court should have accepted the petitioner's proffered duplicate containing his signature.

**ARKANSAS v. SULLIVAN**, 121 S. Ct. 1876 (May 29, 2001)

**Fourth Amendment; traffic stop; search; pretextual; subjective intention**

The Court spent little time reversing the Arkansas Supreme Court's affirmance of a suppression ruling; the trial court had suppressed the fruits of a vehicle search, though supported by probable cause, because the officer had an improper subjective intention in making the arrest, and the Arkansas Supreme Court had expressly relied on its ability to reach a broader interpretation of a federal constitutional provision than that of the Supreme Court, specifically referring to

the ruling in *Whren*, 517 U.S. 806, precluding reliance on the arresting officer's subjective intention.

**ROGERS v. TENNESSEE**, 121 S. Ct. 1693 (May 14, 2001)

**Ex post facto; due process; murder; year-and-a-day rule; *Bouie***

The Court rejected the defendant's claim that the state court's affirmance of his murder conviction violated the ex post facto clause. Tennessee had followed the year-and-a-day rule of common law that a person cannot be convicted of murder where the victim's death did not occur until more than that long after the causative act. On his direct appeal, the state court abolished that rule and disagreed that his conviction violated the ex post facto clause. The Supreme Court essentially agreed with the state court analysis that the Ex Post Facto Clause's clear text expressly applies only to legislative acts and would unduly impair common law judging under the rubric of due process. It held that *Bouie v. City of Columbia*, 378 U.S. 347, restricted due process limitations on the retroactive application of judicial interpretations of criminal statutes to those that are unexpected and indefensible, but it found that the Tennessee court's abolition of the year-and-a-day rule was not in that category, because nothing indicated its abolition represented unfair and arbitrary judicial action against which due process aims to protect.

**BRIDGERS v. TEXAS**, 121 S. Ct. 1995 (May 14, 2001)

**Miranda warnings; right to counsel; interrogation**

Although the Court unanimously denied the petition for writ of certiorari which argued that the *Miranda* warnings read to him at arrest were inadequate for omission of advice that he had a right to consult an attorney not only

prior to, but also during, questioning. Notably, three justices issued a statement that the statement at issue is an "essential Miranda element," that the denial of the petition "expresses no view about the merits" of the claim, and that if the problem "proves to be a recurring one . . . it may well warrant this Court's attention."

**DANIELS v. U.S.**, 121 S. Ct. 1578 (Apr. 25, 2001)

**2255; challenge of prior state conviction**

Daniels was convicted of being a felon in possession of a firearm and his sentence was enhanced under the Armed Career Criminal Act (ACCA). After an unsuccessful direct appeal, Daniels filed his § 2255 motion, asserting that his sentence violated the Constitution because it was based in part on two prior convictions that were themselves unconstitutional. Both prior convictions, he claimed, were based on inadequate guilty pleas and one was the product of ineffective assistance of counsel. The Supreme Court held that with the sole exception of convictions obtained in violation of the right to counsel, a defendant has no right under the ACCA or the Constitution to collaterally attack prior convictions at his federal sentencing proceeding. The Court did leave open the possibility that there may be some rare cases in which no channel of review was actually available to a defendant with respect to the prior conviction, due to no fault of his own, where a § 2255 motion might be appropriate.

**LACKAWANNA COUNTY DISTRICT ATTORNEY v. COSS**, 121 S. Ct. 1567 (Apr. 25, 2001)

**2254; challenge of prior conviction**

In 1986, Coss was convicted in state court of simple assault, institutional vandalism, and

criminal mischief. Coss filed a petition for state postconviction relief with respect to those convictions, but the state courts have never ruled on the petition (for over 14 years). In 1990, after Coss had served the full sentences for his 1986 convictions, he was convicted in state court of aggravated assault. The court did not use the 1986 convictions to determine Coss' sentencing range, but the court did use the 1986 convictions in determining the actual sentence within that range. Coss filed a § 2254 petition claiming that his counsel was ineffective in the 1986 convictions, in relation to his 1990 sentence. The Third Circuit found a reasonable probability that but for his counsel's ineffectiveness, Coss would not have been convicted in 1986. The Supreme Court held that the holding of *Daniels* (also reported on 4/25/2001) was extended to cover § 2254 petitions directed at enhanced state sentences. Specifically, the Court concluded that § 2254 does not provide a remedy when a state prisoner challenges a current sentence on the ground that it was enhanced based on an allegedly unconstitutional prior conviction for which the petitioner is no longer in custody. The Court did recognize one exception: where there was a failure to appoint counsel on the prior conviction used to enhance the sentence.

**ATWATER v. LAGO VISTA**, 121 S. Ct. 1536 (Apr. 24, 2001)

**Fourth Amendment**

The Court held that it was constitutionally permissible for law enforcement to arrest Atwater for a minor traffic offense (failing to wear a seat belt), punishable by only a \$50.00 fine. The Court refused to create a "new rule of constitutional law forbidding custodial arrest, even upon probable cause, when conviction could not ultimately carry any jail time and government can show no compelling

need for immediate detention."

**SHAW v. MURPHY**, 121 S. Ct. 1475 (Apr. 18, 2001)

### **Inmate Rights**

Court held that inmates do not possess special First Amendment right to provide legal assistance to fellow inmates that enhances the protections otherwise available under *Turner v. Safley*, 482 U.S. 78 (1987). Under *Turner*, restrictions on prisoners' communications to other inmates are constitutional if the restrictions are reasonably related to legitimate penological interests. The Court remanded on the question whether the prison regulations, as applied to Murphy, were reasonably related to legitimate penological interests. To prevail, the Court stated that Murphy must overcome the presumption that the prison officials acted within their broad discretion.

**MICKENS v. TAYLOR**, 121 S. Ct. 1651 (Apr. 16, 2001)

### **Sixth Amendment**

The Supreme Court granted the application for a stay of execution of sentence of death and granted the petition for a writ of certiorari on the following question: Did the Court of Appeals err in holding that a defendant must show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known?

## **ELEVENTH CIRCUIT CASE SUMMARIES**

**ROMINE v. HEAD**, 2001 WL 672836 (June 15, 2001)

**2254; Conflict of interest; prosecutorial misconduct; biblical references during closing**

Romine, killed his parents and was sentenced to death. The Georgia Supreme Court reversed the death sentences because the trial court had improperly denied a continuance, but Romine was again sentenced to death. He eventually filed a 2254 petition raising two issues of merit. First the Court held that Romine failed to satisfy his burden in showing a constitutional violation based on a conflict of interest because of his trial counsel's former representation of Romine's wife and failure to impeach her prosecution testimony with her prison conviction. The Court noted that Supreme Court precedent on simultaneous representation was not dispositive.

As to the second issue, however, the Court granted Romine a new resentencing based on the prosecution's improper use of religion in the resentencing proceeding. The prosecutor repeatedly brought up religion, and in closing, along with other impermissible arguments, the prosecutor implicitly asked the jury to ignore the law and to return a verdict of death based on biblical law. Easily finding error, the Court had to address three hurdles (lack of objection, procedural default which the Government had neglected to raise and thus waived, and 2254(d)(1)'s restriction).

**U.S. v. AUDAIN**, 2001 WL 708707 (June 25, 2001)

**Firearm enhancement; clearly improbable** Audain, an immigration inspector at Miami International Airport, assisted traffickers smuggling drugs into the United States. Audain escorted a drug courier through the airport to avoid Customs and INS agents. Audain was in his INS uniform and carried a firearm, and the district court imposed a two-level firearm enhancement. The Eleventh Circuit affirmed. Pursuant to USSG 2D1.1(b)(1) and the commentary, the firearm enhancement should be applied if the weapon

was present, unless it is clearly improbable that the weapon was connected with the offense. The Court found that, given the indisputable fact that a personal escort by an armed INS agent greatly increases the chances for successful drug trafficking, it was not clearly improbable. Additionally, because Audain was not required to be armed, his use of the firearm lended considerable weight to the finding that it was not clearly improbable that it was connected to the drug offense.

**REYNOLDS v. CHAPMAN**, 2001 WL 672835 (June 15, 2001)

**Attorney conflict of interest; 2254**

Of four defendants, Reynolds, and another defendant proceeded to trial. Both were found guilty. Post trial, Reynolds' attorney was appointed to represent both him and the other defendant in post-trial proceedings. Motions for new trials were filed on behalf of both defendants. On appeal, the other defendant retained new counsel. In his 2254 petition, Reynolds argued that his attorney labored under conflicts of interest at both pre-trial and post-trial stages. The Eleventh Circuit acknowledged that the pre-trial stage created a substantial risk of conflict of interest but held that Reynolds failed to show that this potential conflict ever blossomed into an actual conflict. As to the post-trial stage, however, the Eleventh Circuit found an actual conflict of interest, and that Reynolds had demonstrated that the conflict adversely affected his attorney's performance, because the attorney could have used different theories in his motion for a new trial. The Court remanded, for new-post trial proceedings.

**PEGG v. U.S.**, 2001 WL 649493 (June 12, 2001)

**2255; ineffective assistance of counsel; conflict of interest**

The defendant, knowing his attorney had a conflict of interest, begged his attorney not to abandon him. Just before trial, when a second coconspirator decided to plea, the defendant did the same, upon the advice that he was likely to get time served if he fully cooperated. Represented by different counsel than the original one with the conflict, he entered a plea, but the government never filed a motion for downward departure because they thought he was not truthful. At sentencing, the defendant moved to withdraw his plea. In this 2255, the defendant claimed that he should have been allowed to withdraw the plea because of the conflict of interest. The defendant met the first prong, showing that his original counsel labored under an actual conflict of interest after a coconspirator alleged the attorney had engaged in criminal and ethical misconduct in connection with the defendant's representation. However, the Court concluded that the defendant, advised by all three of his attorneys, voluntarily chose to plead guilty. Finally, the Court rejected the proposed application of the Second Circuit's *per se* rule of prejudice, finding it inapplicable here, but did not slam the door on that theory when an attorney has engaged in the defendant's crimes.

**U.S. v. RUIZ**, 2001 WL 636927 (June 8, 2001)

**Mens rea requirement; sufficiency of evidence; prejudicial evidence**

Ruiz appealed his conviction for violating 18 U.S.C. 922(g) and 26 U.S.C. 5861(i), possession of a silencer without a serial number. On appeal, Ruiz argued that mens rea (knowledge that silencer does not have serial number) is required for 5861(i) conviction; prejudicial evidence was admitted at trial; and insufficient evidence was presented to support 5861(i) conviction. First,

the Eleventh Circuit held that, in a prosecution under 5861(i), the government does not need to prove that the defendant knew that the silencer did not have a serial number. Second, the Court found that the probative value of the evidence (that the defendant intended to use a knife and slit the victim's throat) was not substantially outweighed by the danger of unfair prejudice. Third, the Court held that the defendant did know that he possessed a silencer by the testimony that he told the victim that he could kill her and "nobody would hear."

**SHEPHERD v. U.S.**, 2001 WL 618252 (June 6, 2001)

**2255 appointment of counsel**

The Eleventh Circuit held that Rule 8(c) of the rules governing 2255 motions mandates appointment of counsel at an evidentiary hearing. Failure to appoint counsel is not subject to harmless error review.

**HALL v. MOORE**, 2001 WL 618279 (June 6, 2001)

**Counsel at resentencing**

Hall was convicted in state court of various offenses. On appeal, the appellate court reversed one of the convictions and remanded for resentencing. At resentencing the trial court refused to appoint counsel. In a 2254 petition, the Eleventh Circuit held that the trial court had improperly resentenced Hall without the assistance of counsel or without a proper *Faretta* hearing. The Court held that the resentencing was not a ministerial act.

**U.S. v. CHUBBUCK**, 2001 WL 589088 (June 1, 2001)

**Felon in possession; meaning of conviction; plea; plain error**

The Eleventh Circuit reaffirmed its previous holding that a plea of guilty in Florida state

court, even where adjudication has been withheld, is a conviction for purposes of 922(g).

However, the Court did state that it "has become increasingly clear that perhaps our interpretation of Florida law was either in error or has since changed, but given defendant's failure to object and without any definitive authority from the Florida Supreme Court that contradicts our precedent, we decline to, and in fact cannot, find that the district court committed plain error."

**U.S. v. McCLAIN**, 2001 WL 585707 (May 31, 2001)

**3B1.4, USSG; using a minor enhancement; scienter; knowledge; co-conspirator**

Relying on the enabling statute and the plain language of the Sentencing Guidelines enhancement provision at issue, the Court rejected the argument that a requirement of knowledge - that the person used in the crime was a minor - be written into this provision. The Court noted that broad application of section 3B1.4 would deter adult criminals from committing crimes with even those persons who, although over seventeen, appear to be minors, rather than the suggested interpretation which would encourage willful blindness to one's age. Additionally, disagreeing with the Sixth Circuit's "strict liability" approach, the Court concluded that this enhancement could not be applied to a co-conspirator who could not have reasonably foreseen the use of a minor, under 3B1.4 and 1B1.3(a)(1)(B). In this case, however, given that the counterfeit check-cashing scheme involved the recruitment of young females to cash the checks, the use of a minor was reasonably foreseeable.

**U.S. v. ODOM**, *et al.*, 2001 WL 585710 (May 31, 2001)

**Sufficiency; arson; interstate commerce; restitution**

The Eleventh Circuit held that a conviction under 18 U.S.C. § 844(i) required the destruction of buildings used in interstate commerce, not merely the destruction of buildings whose damage might affect interstate commerce. Therefore, the arson of a church, with a minimal connection with interstate commerce, did not constitute a conviction under 844(i).

**U.S. v. CARRELL**, 2001 WL 575486 (May 29, 2001)

**Forfeiture; drug proceeds; civil in rem proceeding; statute of limitations**

In a lengthy civil forfeiture case, the Eleventh Circuit concluded that Carrell failed to rebut the government's proof that the properties were purchased with drug proceedings and failed to prove the affirmative defense of innocent ownership under 21 U.S.C. 881(a)(6) [deleted by Congress in 2000] because he failed to prove that he did not have actual knowledge that the property was purchased with drug proceeds. Additionally, the Court held that the government action was not barred based on the five-year statute of limitations under 19 U.S.C. § 1621 because the link with the subject properties was not discovered until the government's later investigation.

**U.S. v. NAVES**, 2001 WL 567708 (May 25, 2001)

**Sentencing Guidelines; double counting; carjacking**

Naves argued, for the first time on appeal, that the district court engaged in impermissible "double counting" by adding a two-point enhancement under 2B3.1(b)(5) because the offense involved carjacking. The Eleventh Circuit found no error. Basically, when

Congress made robbery involving carjacking a federal crime in 1992, the Sentencing Commission amended the robbery guideline to provide for a two-level enhancement for carjacking. The Court found a rational relationship between the enhancement and a legitimate governmental objective.

**WILSON v. JONES, Sheriff**, 2001 WL 543452 (May 23, 2001)

**Strip search; qualified immunity**

Wilson was arrested for DUI (at a license checkpoint) and was detained overnight at the Shelby County Jail. Pursuant to a policy of the jail, Wilson was strip searched. Wilson challenged the constitutionality of the search. On appeal, the Eleventh Circuit found that the search was unconstitutional, because the search was conducted without reasonable suspicion. The Court, however, held that the sheriff was entitled to qualified immunity. The Court stated that no preexisting case law gave the sheriff fair warning that strip searching Wilson without reasonable suspicion violated the Fourth Amendment. The Court declined to consider case law from other circuits in determining whether the sheriff should have been on notice that his policy was unconstitutional.

**BILAL v. DRIVER**, 2001 WL 543454 (May 23, 2001)

**Frivolous 1983 complaint; abandonment of issues**

Bilal, a pro se prisoner, filed suit under 42 USC 1983. Bilal filed several amended complaints. Although an allegation in one of the earlier amended complaints might have had merit, the Eleventh Circuit accepted a local rule - matters not set forth in the amended pleading are deemed to have been abandoned - in affirming the district court's dismissal of the complaint. Additionally, the

Court noted that the district court could consider Bilal's previous civil rights case (43 cases, 28 dismissed as frivolous or malicious) in determining the merits of the present claim.

**U.S. v. 1461 WEST 42nd STREET**, 2001 WL 539585 (May 22, 2001)

**Complex forfeiture action**

The government seized in civil forfeiture proceedings property, in anticipation of criminal forfeiture in connection with a drug trafficking indictment. The government failed to properly hold the property, based in part on its failure to pay the mortgage. The property was sold at a Sheriff's sale. The government failed to provide notice and a meaningful opportunity to be heard to the owners of the real property. The owners of the property were subsequently acquitted of the drug trafficking charge. The owners filed a motion under *Good* for damages and reimbursement for the illegal seizure of the property. Unfortunately, based on the concept of sovereign immunity, the claimants were entitled to very little. It is best to read the case for the details.

**U.S. v. KLOESS**, 2001 WL 531108 (May 18, 2001)

**Element v. affirmative defense; obstruction of justice**

Kloess, an attorney, represented Easterling in a criminal case. Easterling was placed on probation. Easterling was stopped and found in possession of a pistol, in violation of probation. However, he used an alias. Kloess represented Easterling in the new case and entered a plea of guilty in absentia under the alias.

The government then charged Kloess with obstruction of justice by knowingly misleading the court with respect to the defendant's true identity in order to conceal

his probation violation. Kloess moved to dismiss, contending that the government must plead and prove that his conduct was not protected by the safe harbor in the statute. Title 18 USC 1515(c) provides an exception for the providing of lawful, bona fide, legal services. The district court granted the motion to dismiss, but the Eleventh Circuit reversed. The Court held that the safe harbor was not an element but an affirmative defense. The Court held that, once Kloess made a showing that he was entitled to the safe harbor defense (by showing he was a licensed attorney validly retained to perform legal representation), the government had the burden of proving that the charged conduct did not constitute lawful, bona fide representation.

**U.S. v. GAY**, 2001 WL 531111 (May 18, 2001)

**Escape as violent felony under career offender**

Gay was convicted of possession with intent to distribute methamphetamine. At sentencing, Gay argued that he should be entitled to a hearing to determine whether his prior state escape conviction, which merely involved walking away from a non-secure community corrections facility, constituted a violent crime for purposes of sentencing him as a career offender. The district court denied the hearing and held the escape conviction to be a violent felony. The Eleventh Circuit affirmed. The Court held that the offense of escape always presents the potential risk of violence, even when it involves a walk-away from an unsecured facility, and therefore the district court had not erred in holding that the escape conviction qualified as a crime of violence under the career offender guideline.

**HARRELL v. BUTTERWORTH, et al.**, 2001 WL 520485 (May 16, 2001)

**2254; confrontation; satellite testimony**

The Court affirmed the denial of this 2254 claiming that the Sixth Amendment right of confrontation was violated by testimony by the robbery victims via satellite transmission. On direct appeal the Florida Supreme Court concluded that, based on policy reasons, the transmission qualified as an exception to the Confrontation Clause.

In the 2254, the defendant argued that the technical difficulties denied a full opportunity for cross-examination and prevented the jury from determining the witnesses' credibility. Reviewing *de novo*, the Court could not find that the state court's decision was "contrary to, or involved an objectively unreasonable application of, the governing Federal law set forth by Supreme Court cases." The Eleventh Circuit noted that the Supreme Court has never held that defendants have the absolute right to a face-to-face meeting with witnesses against them at trial.

**U.S. v. McDOWELL, et al.**, 250 F.3d 1354 (May 11, 2001)

**Miranda; pre-arrest statements**

Rejecting the claim that, because his pre-arrest detention and interrogation lasted four hours, it was custodial and thus required *Miranda* warnings, the Court was not persuaded that four hours "converted this inquiry into a custodial interrogation," as "there is no fixed limit to the length of questioning." The Court also found it important that the events took place at a "border" or its equivalent and that the defendant's own actions increased the length of the "inquiry."

**JUDD v. HALEY**, 250 F.3d 1308 (May 9, 2001)

**2254; procedural default; right to public trial**

The defendant was convicted in Alabama and

sentenced to 30 years. In a pretrial conference in chambers, following the court reporter's departure to commence trial, the prosecutor asked, and the court agreed, over defense objection, to close the courtroom during the minor victim's testimony; the defense objected again on the record when the courtroom was cleared. On direct appeal, the Alabama Supreme Court adopted the Supreme Court test in *Waller v. Georgia*, 467 U.S. 39 (1984), for determining when a defendant's right to a public trial has been violated under the Alabama Constitution in the event of a total closure of a courtroom. However, the Court did not reach the merits but resolved the case on a procedural ground, holding that defense counsel had failed to make an adequate record when the in-chambers proceedings occurred. On federal habeas, the district court found procedural default and dismissed the petition. The Eleventh Circuit reversed. It concluded that, while a state court's rejection of a constitutional claim on state procedural grounds will generally preclude federal habeas review, that is only if the state procedural ruling rests upon "independent and adequate" state ground. Applying the three-part test of *Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1990), the Court concluded that the Alabama Supreme Court's opinion failed the third prong (whether the state procedural rule was applied arbitrarily or manifestly unfairly) because of its root concern that the state court's conclusion was based on a misreading of federal law on this issue. Specifically, the state court had placed the burden of proof on the defendant, whereas *Waller* clearly places it on the party requesting closure and the trial court to make a record supporting the closure. (The opinion also includes a lengthy analysis of the public trial issue.)

**U.S. v. RILEY**, 250 F.3d 1303 (May 8, 2001)

***Castillo*; 924(c); element v. sentencing factor; harmless error**

On rehearing, the Court again affirmed Riley's enhanced sentence for having used a semiautomatic assault weapon during a robbery. The Court declined to decide whether it had to apply the version of 924(c) in effect when the offense was committed and the indictment issued, which was the same version considered in *Castillo*, or whether it need only construe and apply the changed version of the statute in effect at sentencing. Noting that the defendant had made timely, constitutional objections, the Court applied *Nealy* and *Neder* to find that, given the overwhelming evidence of the type of firearm, the error was harmless.

**U.S. v. BEJARANO**, 249 F.3d 1304 (May 3, 2001)

**Rule 11 plea hearing**

On petition for rehearing, the Court vacated its unpublished opinion and found that the facts of the case were indistinguishable from another panel decision (unpublished), decided less than 1 month prior to the original *Bejarano* opinion. In the new opinion, the Court held that the district court's omission of the statutory minimum term of supervised release during the plea hearing did not affect the defendant's substantial rights. Thus, the defendant's motion to withdraw his guilty plea was denied, and the Court affirmed his conviction and sentence.

**U.S. v. BLAYLOCK**, 249 F.3d 1298 (May 2, 2001)

**Drug quantity under Guidelines; shifting of burden**

Defendant pled guilty to possession of precursor chemicals with the intent to manufacture methamphetamine. At sentencing, government lab analyst testified

that under a 100% theoretical yield theory, she estimated that the defendant's lab could have produced 25.6 grams of meth. She also testified that the theoretical yield calculation does not and cannot account for the many factors that determine actual yield. The district court accepted the theoretical yield calculation, and implicitly stated that the defendant had not met his burden of coming forward with evidence to rebut the government's evidence of drug quantity. On appeal, the defendant raised two issues: drug quantity and impermissible burden shifting. As to drug quantity, the Court held that the district court had not erred in accepting the theoretical yield calculation. As to the burden shifting argument, the Court held that the district court's mistaken use of the term "burden of proof" actually meant that the defendant had failed to come forward with rebuttal evidence concerning his relative skill in making meth. As the government's evidence was essentially un rebutted, the Court affirmed.

**PEREZ v. U.S.**, 249 F.3d 1261 (Apr. 30, 2001)

**851; enhancement; timeliness; amendment; filing; 2255**

The Court affirmed the district court's denial of the 2255 motion, rejecting the claim that the district court lacked jurisdiction to enhance his sentence because the Government had failed to file a timely, correct 851 notice. A corrected notice was sent to counsel a week before the plea was entered. The only defect in the notice was a typo reflecting that the prior conviction occurred in 1991, not 1992, and the notice was not actually filed until after sentencing. Also, it was clear from the plea colloquy that the defendant understood what prior conviction was involved. The Court concluded that the original notice met the

statutory requirements; despite the incorrect last digit, it "unambiguously signaled" the Government's intent "to rely upon a specific prior cocaine conviction." Because the defendant alleged no confusion, it complied with due process requirements. Alternatively, the Court held that the incorrect digit was a clerical mistake adequately corrected by the later amendment. The Court limited its holding to the facts of that case.

**ARTHUR v. HALEY** (*Ala. DOC*), 248 F.3d 1302 (Apr. 26, 2001)

**Stay of execution; COA; state appeal**

The district court issued a stay of execution on a threshold jurisdictional question under AEDPA, the resolution of which might require an evidentiary hearing. The government appealed to the 11th Circuit. With little discussion, the 11th Circuit held that the district court had not abused its discretion, and therefore refused to vacate or dissolve the stay. The reason the opinion was published dealt with whether the government (state) was required to obtain a Certificate of Appealability (COA) before appealing to the 11th Circuit. The Court stated that under Appellate Rule 22, a COA is not required when a state or its representative or the United States or its representative appeals a final order. Therefore, the Court had no difficulty in "logically" extending the rule to interlocutory appeals. Thus, a petitioner for habeas relief must obtain a COA before appealing an order, but the government (state) does not need to obtain one for either an interlocutory appeal or an appeal of a final order.

**BOZ v. U.S.**, 248 F.3d 1299 (Apr. 24, 2001)

**Deportation; INS**

The Court vacated its opinion in 228 F.3d 1290 (11th Cir. 2000) and substituted this

opinion in its place. Boz filed a habeas corpus petition in which he claimed that his continued and indefinite detention after a removal order violated his due process rights. The Court held that Boz had not exhausted all of the available administrative remedies, and therefore affirmed the district court's dismissal of the petition.

**U.S. v. CAMACHO**, 248 F.3d 1286 (Apr. 23, 2001)

**Apprendi; Rogers error**

On petition for rehearing, the Court recognized a new type of *Apprendi* error: *Rogers* error. Camacho was convicted of possession with intent to distribute cocaine. At trial, Camacho stipulated that the seized cocaine weighed 39.77 kilograms. Camacho objected at sentencing that the quantity of drugs attributable to him was an element of the offense, relying on *Jones*. The district court found *Jones* to be inapplicable and sentenced Camacho under the mandatory minimum sentence provisions of § 841(b)(1)(A) to 120 months imprisonment.

The Eleventh Circuit found no *Apprendi* error because Camacho's sentence of 120 months' imprisonment was less than the 20-year maximum prescribed by § 841(b)(1)(C). However, the Court did find a "*Rogers* error." According to the Court, *Rogers* went beyond *Apprendi* to hold that drug quantity in § 841(b)(1)(A) and § 841(b)(1)(B) cases must be charged in the indictment and proven to the jury beyond a reasonable doubt. By sentencing Camacho to the mandatory minimum sentence, the district court necessarily used § 841(b)(1)(A) for sentencing; "we cannot employ any legal fiction to think otherwise." Thus, the Court found error. Unfortunately, for Camacho, the error was harmless because Camacho stipulated to the quantity of drugs involved

during trial. The Court held that the stipulation acted as the equivalent of a jury finding on drug quantity.

**U.S. v. ADKINSON, et al.**, 247 F.3d 1289 (Apr. 19, 2001)

**Attorney's fees; Hyde Amendment; prevailing criminal defendant**

The Court reversed the district court's denial of attorney's fees and costs to defendants who were acquitted, remanding for a determination as to the amount due each. The Hyde Amendment provides that an award of reasonable attorney's fees shall be granted to a prevailing criminal defendant, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, if the defendant establishes that the government's prosecution was vexatious, frivolous, or in bad faith. The Court concluded that the district court had abused its discretion in denying the fees, relying on its holding in *Atkinson*, 135 F.3d 1363 (11th Cir. 1998), that the government "with full knowledge that it was contrary to recent and controlling precedent" had induced the grand jury to indict and then persuaded the district court to deny the defendants' motion to dismiss the indictment, on the hope that the Eleventh Circuit would reverse the then-existing precedent. Thus, the Court said, the Government "willfully ignored Appellants' rights." The Court distinguished this from a case where the law was unclear and the district court accepted a viable legal argument on an issue "debatable among reasonable lawyers and jurists." Rather, the law was clear, and the district court "knew that controlling precedent precluded prosecution." "Prosecuting appellants in defiance of controlling authority constitutes 'vexatious', 'frivolous', and 'bad faith' prosecutions."

**BRENT v. ASHLEY, et al.**, 247 F.3d 1294

(Apr. 19, 2001)

**Search and seizure; customs; x-ray; summary judgment; Fed. Tort Claims Act**

The Court affirmed denial of summary judgment against two Customs inspectors who engaged in outrageous behavior in the search (strip search, handcuffing, hospital x-ray) of a United States citizen returning from a vacation in Nigeria; when the only other black person on the flight, a Black Nigerian man, was searched, Brent shook her head in disapproval, which resulted in her detention, examination, and interrogation.

**U.S. v. FRANK**, 247 F.3d 1257 (Apr. 18, 2001)

**Vulnerable victim; acceptance of responsibility**

Frank was tried (by jury), convicted, and sentenced for carjacking and carrying/using a firearm during a crime of violence. The district court gave a two-level increase in offense level for committing a crime against a "vulnerable victim" under 3A1.1(b) and declined to award a two-level downward adjustment for acceptance of responsibility. Frank appealed both issues.

As to vulnerable victim, the Eleventh Circuit stated that the adjustment focuses chiefly on the conduct of the defendant and should be applied only where the defendant selects the victim due to the victim's perceived vulnerability to the offense. The Eleventh Circuit agreed the victim was vulnerable partly because Frank summoned the taxi for the express purpose of carjacking it (and in Mobile, Alabama, taxis are required to respond to every phone call). Thus, his plan to carjack was made easier by his calling of a cab which was required to respond. As for acceptance, noting that it is not typically awarded after trial, the Court had no trouble affirming the district court's rejection of

acceptance.

**U.S. v. DIAZ, et al.**, 248 F.3d 1065 (Apr. 17, 2001)

**Carjacking; intent; 924(c); double counting; 18 U.S.C. § 2119**

Six appellants challenged convictions for Hobbs Act violations, carjackings, and 924(c) offenses arising from three kidnapping and extortion episodes in the Miami area. The Court granted relief to one appellant, finding the evidence insufficient to support his Hobbs Act convictions and discharging him. All other claims were rejected; most addressed the sufficiency of the evidence of carjacking, specifically the element of intent. The Court rejected the argument that their intent was not to steal the cars, but to kidnap and rob the victims, and that taking the cars was simply a means to that end; the court distinguished this case from *Applewhaite*, 195 F.3d at 684 (3d Cir. 1999) (holding that scienter was not established where defendants took victim's van as afterthought to remove victim's body, with no nexus to their clear intent to seriously harm or kill the victim), because here the carjacking was an important nexus in the extortion scheme, not a mere afterthought.

The Court agreed with the suggestion in the Government's supplemental brief and found that two appellants were improperly sentenced to 25 years under 18 USC 2119(2), when they were only charged under subsection (1), which has a 15-year sentence limitation. The Court rejected the argument that *Apprendi* applies to sentencing guidelines issues.

The Court also agreed that the sentences on the 924(c) counts involved "double counting," noting that, "when a defendant is convicted of a § 924(c) violation and an underlying offense, the *defendant's* possession of a weapon cannot be used to enhance the level of the underlying offense." Likewise, however, based on the

amendment, "relevant conduct cannot be used to enhance the offense level of the underlying offense." "With the retroactivity of Amendment 599 established, the provisions of U.S.S.G. § 1B1.10 and 18 U.S.C. § 3582(c)(2) apply, resulting in a possible reduction of appellants' previously properly imposed sentence."

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