

FEDERAL PUBLIC DEFENDER

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NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

Volume IV, Issue III

July 10, 2003

**NEW LEGISLATION IMPOSES
GUIDELINE RESTRICTIONS AND
HARSHER PENALTIES, AND
PROMISES FEWER DOWNWARD
DEPARTURES**

Controversial new legislation that went into effect on April 30, 2003, will have a substantial effect on the Sentencing Guidelines. Much of the legislation aimed at the Guidelines was opposed by the United States Judicial Conference, the American Bar Association, and the United States Sentencing Commission. The primary changes consist of provisions that:

- Prohibit downward departures for a variety of sexual offenses and crimes against children on the basis of any factor not specifically listed in the Guidelines and even on the basis of listed ones of aberrant behavior, diminished capacity, family circumstances and community ties, and age.
- Prohibit a judge from granting a three-level reduction for timely acceptance of responsibility in the absence of a government motion making that request.
- Increase the offense level for child pornography from 2 to 5 levels on the basis of the number of images. (600 or more images earn the 5-level increase.)
- Increase the potential Guideline ranges for repeat child sexual offenders and those convicted of kidnaping.
- Require appellate courts to review downward departures from the Guidelines *de novo*.
- Prohibit district court judges from adding new reasons for a downward departure in any resentencing following a remand from the circuit court.
- Direct the Sentencing Commission to promulgate amendments to the Guidelines that will “ensure that the incidence of downward departures are (sic) substantially reduced.”
- Prohibit the Sentencing Commission, prior to May 1, 2005, from promulgating any amendments that

create new grounds for downward departures or modify any of the restrictions that are a part of this new legislation.

- Require that all downward departures and the names of the judges who granted them be reported to the House and Senate judiciary committees.
- Amend the federal criminal code by increasing the maximum period of supervised release to life for a series of offenses involving the abuse of children, creating harsher terms of imprisonment for a number of offenses involving children, and making it a federal offense to attempt to remove a child from the United States for the purpose of obstructing the exercise of parental rights.

The Sentencing Commission, within days of the enactment of the legislation, supplemented the 2002 Guidelines Manual with a publication that includes all the new provisions.

There are, of course, ex post facto considerations if the new amendment or legislation makes the punishment for the offense more burdensome after the offense was committed. *See Collins v. Youngblood*, 497 U.S. 37, 42 (1990). If it does, the Guideline in effect at the time of the incident must be used. *See United States v. Summers*, 176 F.3d 1328, 1330-1331 (11th Cir. 1999). For ex post facto purposes, the controlling date is the last date of the offense, as alleged in the indictment. *See United States v. Broderson*, 67 F.3d 452, 456 (2d Cir. 1995).

On a hopeful note, legislation that would repeal a number of the new provisions has been introduced into the United States House

of Representatives by Representative John Conyers, Jr., and into the Senate by Senator Ted Kennedy. In introducing the legislation, Representative Conyers told the House that “judges should be free to impose fair and just sentences completely devoid of the political process.” Senator Kennedy told his Senate colleagues: “These provisions . . . have nothing to do with protecting children and everything to do with handcuffing judges and eliminating fairness in our federal sentencing system.”

MORE (BUT LESS CONTROVERSIAL) GUIDELINE CHANGES

On May 1st, the Sentencing Commission sent to Congress proposed amendments to the Sentencing Guidelines that, unless altered or rejected by Congress, will become effective November 1, 2003. The changes include a modification of the Guideline provision regarding the imposition of concurrent or consecutive sentences (§ 5G1.3).

Under the current version of § 5G1.3, the court must impose the sentence concurrently to any undischarged sentence that the defendant is serving if the offense that led to the undischarged sentence is used to determine the offense level of the instant offense. The proposed modification specifically provides for a downward departure in the circumstance where the defendant would otherwise have been entitled to a concurrent sentence except for the fact that he had already completed the earlier sentence.

The modification to § 5G1.3 also resolves a split among the circuits. The split was over Application Note 6. Some courts had interpreted it to require the sentence to run

consecutively when the offense was committed while the defendant was on any sort of federal or state supervision that had been revoked prior to the instant sentencing. (The Eleventh Circuit had recognized the split but had not resolved it. *See United States v. Morales-Castillo*, 314 F.3d 561 (11th Cir. 2002)). The proposed modification states that, while the Commission recommends that the sentence be imposed consecutively, the court still has the option of imposing the sentence concurrently.

Other proposed changes address involuntary manslaughter, corporate fraud, cybersecurity, terrorism, campaign finance, oxycodone (changing the basis for calculating the sentence from the entire weight of the pills to the actual amount of oxycodone within the pills), immigration, and offenses including body armor.

NEW MAGISTRATE IN GAINESVILLE

The Gainesville division now has its first full-time magistrate. Allan N. Kornblum began work as of May 14.

Judge Kornblum graduated with a law degree in 1961 from the New York University School of Law. He went on to obtain a Ph.D. from Princeton University in 1973. In years past he's been a New York City police officer, an ATF investigator, an FBI agent, and the Director of Security at Princeton University. As a lawyer he has, most recently, been a legal advisor to the U.S. Foreign Intelligence Surveillance Court and, prior to that, served as the senior executive at the Office of Intelligence Policy and Review for the United States Department of Justice.

COSTS OF INCARCERATION AND

SUPERVISION INCREASE

The Administrative Office of the United States Courts, in a June 11 memorandum sent to probation and pretrial service officers, estimates that the cost of housing an individual in a federal prison facility has increased \$28 per month so that the Administrative office now estimates the monthly expense to be \$1,877. There was an increase of \$13 a month in the cost of supervising an individual on probation or supervised release, bringing the monthly total to \$282. The Administrative Office estimates the monthly cost of keeping someone at a community correction center has increased by \$92 per month, for a total monthly cost of \$1,476.

JURIES REJECTING GOVERNMENT'S DEATH PENALTY CASES

On June 15th, The New York Times reported that the Government has failed to obtain a death sentence in 15 of the last 16 capital cases that have proceeded to trial. During the two and a half years of the Bush administration, there have been a total of 34 capital trials. Defendants in five of those trials were sentenced to death. The rate is considerably lower than it was between 1998 and 2000, when, in 57 trials, judges imposed 26 death sentences. The Times reported that the rate varies among the states, with the prosecution securing death sentences in only 25% of the cases tried in the Northeast, but in 85% of the cases tried in Texas.

ELECTRONIC FILING NEWS

Clerk of the Court William McCool, in an

April 11 news release, officially announced the arrival of the new electronic filing system that is labeled as the “Case Management/Electronic Case Files.” According to the release, the new technology is “Internet-based, user friendly, and offers numerous benefits to attorneys, the Court, and the public.” Mr. McCool reports that users will need only “a minimal amount of hardware and software to participate.”

The system will be operational as of January 1, 2004, and will feature: 24-hour access to case file documents over the Internet, the ability to serve and file pleadings electronically with the court and parties, automatic e-mail notification of case activity, and the ability to download and print documents.

We’re in the process of scheduling training for our offices and panel members and staff. We’ll notify you once the sessions are scheduled.

THIS MONTH’S BROWN BAG LUNCHEON

The Supreme Court has ended another term, finishing with some particularly dramatic decisions. This month we’ll be presenting a video review of the Court’s criminal law decisions. We don’t think you’ll find a better review anywhere.

For years, the trio of Erwin Chemerinsky, Susan Herman, and Paul Rashkind have made their insightful and thoughtful Supreme Court review one of the highlights of the annual Federal Public Defender conference. This year we recorded them during the week of June 9th at the conference in Portland, Oregon. Erwin Chemerinsky is a 1978 graduate of the

Harvard Law School and is a law professor at the University of Southern California. He regularly appears before the Supreme Court, having argued two cases just this term. Susan Herman is a 1974 graduate of the New York University School of Law and is a law professor at the Brooklyn Law School. Like Professor Chemerinsky, she has litigated many cases before the Supreme Court. Paul Rashkind is a 1975 graduate of the University of Miami School of Law. He’s been with the Federal Public Defender’s office in Miami since 1992, where he currently supervises the appellate section of that office.

As usual, the video will be shown at **Noon** in the federal courthouses in:

Panama City on Tuesday, July 15
Gainesville on Wednesday, July 23
Pensacola on (To Be Scheduled)
Tallahassee on Thursday, July 24

We’ll be showing the video at **9:00 AM** and at **Noon** in **Gainesville** at our office at 101 S.E. 2nd Place, Suite 112.

We’ll be taking off the month of August.

DOWNWARD DEPARTURES

Brown, Todd Hinkle, R. Atty: Bill Bubsey
Docket: 4:02cr53
Charge: Conspiracy to Poss WITD Crack
Range: Mandatory Life
Sentence: 36 months BOP
Date of Imposition of Sentence: 4/3/03
Grounds: 5K1.1

Reynolds, Christopher Hinkle, R. Atty: Bill Clark
Docket: 4:02cr53
Charge: Conspiracy to Poss WITD Crack

Range: 151 - 188 months BOP
 Sentence: 36 months BOP
 Date of Imposition of Sentence: 6/11/03
 Grounds: 5K1.1

Brooked, Lonnie Hinkle, R. Atty: Tom Findley
 Docket: 4:02cr53
 Charge: Conspiracy to Poss WITD Crack
 Range: 15 years BOP
 Sentence: 72 months BOP
 Date of Imposition of Sentence: 6/11/03
 Grounds: 5K1.1

Lamere, Darci Hinkle, R. Atty: Richard Smith
 Docket: 4:02cr53
 Charge: Conspiracy to Poss WITD Crack
 Range: 10 years minimum mandatory
 Sentence: 18 months BOP
 Date of Imposition of Sentence: 6/11/03
 Grounds: 5K1.1

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

VICTORIES

In May, Tallahassee panel member **Clyde Taylor** convinced Judge Hinkle that his client, Jerome Hamlet, should be sentenced for distributing 137 grams of powder cocaine rather than the 637 grams claimed by the Government. Clyde had raised an entrapment defense through a remarkable four trials in a case that included a conspiracy charge to distribute more than 500 grams of cocaine. The first trial ended with a hung jury. There was a guilty verdict in the second trial, but Judge Mickle granted a new trial because the prosecutor had improperly questioned Mr. Hamlet about a prior arrest. Trial three was another hung jury. In the fourth trial, which was before Judge Hinkle, the jury found Mr. Hamlet guilty, but of a conspiracy involving less than 500 grams. At sentencing, the

Government still sought to have Mr. Hamlet sentenced under the Guidelines for all the 637 grams. Judge Hinkle, however, rejected the Government's request, finding (1) that the testimony of the informant was "exaggerated" and in some instances "simply untrue;" (2) that there was no evidence that Mr. Hamlet had ever before participated in a transaction as large as the 500-gram one that was at issue; and (3) that the informant talked Mr. Hamlet into agreeing to a much larger transaction than he would have otherwise entered into. In imposing the 39-month sentence, Judge Hinkle also rejected the Government's request for a higher offense level based upon the firearm carried by the individual who had delivered the 500 grams to Mr. Hamlet. Judge Hinkle rejected the Government's claim that it was always foreseeable that a coconspirator who sold drugs would be carrying a firearm, and found it was, in this instance, not foreseeable to Mr. Hamlet.

In May, **Chet Kaufman**, in our Tallahassee office, convinced Judge Hinkle to vacate a \$1,000 fine imposed by the magistrate in Panama City in a possession of a controlled substance case. Section 844 of Title 21 provides for a fine of \$1,000 in possession cases. In Panama City, the magistrate and the probation office had, for some time, taken the position that the court was obligated to impose the fine in every case. Judge Hinkle, concluded differently, finding that the statute gave the court the ability to waive the fine upon a showing of inability to pay.

Last month, **Randy Murrell** won an acquittal in a case where his client, Heyward Bush, was charged with possessing a firearm in connection with a drug trafficking offense. Randy argued that, while his client had

possessed the firearm and sold drugs, the firearm possession had nothing to do with the drug sales.

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

REFUSAL TO SUBMIT TO PRESENTENCE INTERVIEW MAY RESULT IN THE IMPOSITION OF A FINE

In one of our recent appellate cases, the Eleventh Circuit Court of Appeals, in an unpublished opinion, upheld a \$20,000 fine imposed on a defendant who clearly lacked the ability to pay a fine. The client was an immigrant from Haiti and the father of five children. The Court found that, because the individual refused to consent to a presentence investigation interview, he had failed to establish his inability to pay the fine. His unsworn statement of no assets was inadequate.

CASE SUMMARIES

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

Certiorari Granted

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

newsletter:

MUHAMMAD v. CLOSE, 2003 WL 548900 (Jun. 16, 2003) (reviewing 47 Fed. Appx. 738)

Muhammad, a prisoner, filed a 42 U.S.C. § 1983 complaint alleging that a corrections officer falsely charged him with major misconduct threatening behavior in retaliation for filing prior lawsuits and grievances. He sought compensatory and punitive damages and expungement of the resulting misconduct conviction on a reduced charge of insolence. The court dismissed his case as barred under Heck v. Humphrey (U.S. 1994) (barring a 1983 claim that essentially attacked the conviction or sentence). The USSC granted cert. "limited to the following Questions: 1. Whether a plaintiff who wishes to bring a § 1983 suit challenging only the conditions, rather than the fact or duration, of his confinement, must satisfy the favorable termination requirement of Heck v. Humphrey; and 2. Whether a prison inmate who has been, but is no longer, in administrative segregation may bring a § 1983 suit challenging the conditions of his confinement (i.e. his prior placement in administrative segregation) without first satisfying the favorable termination requirement of Heck v. Humphrey."

CRAWFORD v. WASHINGTON, 123 S. Ct. 2275 (Mem) (Jun. 9, 2003)(reviewing 54 P. 3d 656)

Confrontation Clause, interlocking confessions, marital privilege

Crawford stabbed Lee. Police arrested Crawford and collected two taped statements from both Crawford and his wife, Sylvia, who had been present at the time of the assault. The statements contained roughly the same account of the attack. Several hours after police taped the first statements, they

again questioned the Crawfords independently. Their stories were again similar to each other, but distinctly different from the earlier version of the encounter. At trial, Crawford invoked the marital privilege to prevent his wife from testifying against him. The trial court admitted both of Sylvia's statements on the grounds that the statements would not violate the marital privilege and because the court determined that the statements were sufficiently reliable to alleviate confrontation clause concerns. The Washington Supreme Court affirmed and held that a defendant does not waive his confrontation rights when he invokes the marital privilege, but the statements were admissible because they interlock. Questions: (1) Does Sixth Amendment's Confrontation Clause permit admission against criminal defendant of custodial statement of potential accomplice on ground that parts of statement "interlock" with defendant's custodial statement? (2) Should this court re-evaluate Confrontation Clause framework established in *Ohio v. Roberts*, 448 U.S. 56 (1980), and hold that clause unequivocally prohibits admission of out-of-court statements insofar as they are contained in "testimonial" materials, such as tape-recorded custodial statements?

BALDWIN v. REESE, 123 S. Ct. 2213 (Mem)(May 27, 2003)(reviewing 282 F.3d 1184 (9th Cir. 2002))

Habeas exhaustion

Even though habeas corpus petitioner's petition for discretionary review by state's highest court did not specify federal nature of claim he now seeks to assert in federal court, claim was "fairly presented" to state court, within meaning of U.S. Supreme Court precedents on exhaustion of remedies, by way of decision of state intermediate court, which,

when read by state supreme court, would have alerted it that claim of ineffective assistance of appellate counsel was decided on basis of federal law. Question: For the purposes of exhausting all available state court remedies to seek federal habeas corpus relief, does a state prisoner "alert" the State's highest court that he is raising a federal claim when, in that court, he neither cites a specific provision of the federal constitution nor cites at least one authority that has decided the claim on a federal basis?

MISSOURI v. SEIBERT, 123 S. Ct. 2091 (Mem)(May 19, 2003)(reviewing 93 S.W. 3d 700 (Mo. 2002))

Dancing the two-step: Intentional failure to give Miranda warnings

Seibert, accused of murdering her seventeen-year-old son by setting fire to their trailer, was taken into police custody for interrogation, and was questioned without a Miranda warning. After she confessed, the officer gave her a twenty-minute break. Then he turned on a tape recorder, gave Miranda, and referred to her previous incriminating statements. The police admitted that they used this two-step interrogation technique routinely in the hope of getting suspects to confess first without knowing their rights, and then confess a second time in a form that would be usable in court. The confession was introduced, but the Missouri Supreme Court reversed. Question: "Is the rule of Oregon v. Elstad, that suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given requisite Miranda warnings, abrogated when initial failure to give Miranda warnings was intentional?"

ILLINOIS v. LIDSTER, 123 S. Ct. 1928

(Mem)(May 5, 2003)(reviewing 779 NE 2d 855 (Ill. 2002))

Fourth Amendment, Roadblock

A hit-and-run accident occurred in Lombard, Illinois. There was no indication that the unknown motorist involved posed any further danger to local residents or, indeed, that the motorist remained in the vicinity. There was also no indication that the motorist had been driving recklessly or was driving under the influence of alcohol. Nonetheless, a week later, police in Lombard set up a roadblock, ostensibly looking for information related to the hit and run accident. Along came Lidster, who almost hit a police officer directing the roadblock and was asked out of his van. Lidster failed several field sobriety tests and was arrested. He was tried and found guilty DU, but the Illinois SC reversed. Question: "Does City of Indianapolis v. Edmond, 531 U.S. 32 (2000), prohibit police officers from conducting checkpoint organized to investigate prior offense, at which checkpoint law enforcement officers briefly stopped all oncoming motorists to hand out flyers about - and look for witnesses to - offense, under circumstances in which checkpoint was conducted exactly one week after - and at approximately same time of day as - offense, and checkpoint otherwise met reasonableness standard articulated in Brown v. Texas, 443 U.S. 47 (1979)?"

OFFICE OF INDEP. COUNSEL v. FAVISH, 123 S. Ct. 1928 (May 5, 2003)(reviewing 217 F.3d 1168 (9th Cir. 2000))

Privacy, Freedom of Information Act, Public Release of Photographs Used in a Government Agency Investigation

Question: The Freedom of Information Act's Exemption 7(C) protects from disclosure "records or information compiled for law

enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). Question: Whether the Office of Independent Counsel properly withheld, under Exemption 7(C), photographs relating to the death of former Deputy White House Counsel Vincent Foster.

U.S. v. PATANE, 123 S. Ct. 1788 (Mem)(Apr. 21, 2003)(reviewing 304 F. 3d 1013 (10th Cir. 2002))

Fruits of Miranda Violation

Police took Patane into custody for harassing and menacing his girlfriend, and released him subject to a temporary restraining order that forbade him from contacting O'Donnell in the 72 hours after his release on bond. Two independent investigations - one for gun possession, and another for violation of a restraining order - resulted in Patane's subsequent rearrest at his house for violating the restraining order. The arresting officer began reading him his Miranda rights, only getting as far as the right to silence when Patane said he knew his rights and the officer went no further. However, the officers proceeded to question Patane about his gun possession and managed to illicit the location of his weapon. After receiving his permission, the officers seized the gun. His statement was suppressed under Miranda. Question: Does failure to give suspect warnings prescribed by Miranda require suppression of physical evidence derived from suspect's unwarned but voluntary statement?

BANKS v. COCKRELL, 123 S. Ct. 1784 (Mem) (Apr. 21, 2003)(reviewing unpublished decision, 48 Fed. Appx. 104 (5th Cir. 2002))

Texas-Style Justice; Death Penalty; Right to Counsel

Banks was convicted in 1980 for murder and was sentenced to death. Banks claimed that his trial counsel was incompetent and that court testimony from witnesses was not strong enough to convict. A Texas district judge ordered the state to reduce Banks' sentence or give him a new hearing, but the 5th Circuit reversed (of course). Questions: 1. Did the 5th Circuit err in rejecting Banks' claim under Brady v. Maryland that the prosecution suppressed material witness impeachment evidence that prejudiced him in the penalty phase of his trial, on the grounds that: (a) the evidence supporting the claim was procedurally defaulted, notwithstanding the fact that there was no reasonable basis for concluding that counsel for Banks could have discovered the suppressed evidence prior to or during that trial or state post-conviction proceedings; and (b) the suppressed evidence was immaterial to Banks' death sentence, where the panel neglected to consider that the trial prosecutors viewed the evidence to be of "utmost importance" to showing a capital sentence was appropriate? 2. Did the 5th Circuit act contrary to Strickland v. Washington, and Williams v. Taylor, when it weighed each item of mitigating evidence separately and concluded that no single category would have brought a different result at sentencing without weighing the impact of the evidence collectively? 3. Did the 5th Circuit act contrary to Harris v. Nelsen and Withrow v. Williams in holding that Fed. R. Civ. P. 15(b) does not apply to habeas proceedings because "evidentiary hearings" in those proceedings are not similar to civil trials?

ARIZONA v. GANT, 123 S. Ct. 1784 (Mem)(Apr. 21, 2003)(reviewing 43 P.3d 188)

The Arizona appellate court held that the rule that officers may search the entire passenger compartment of a vehicle, and all containers therein, as a contemporaneous incident of a lawful arrest applies only when the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation, while the defendant is still in the automobile, and the officer subsequently arrests the defendant. Question: When police arrest recent occupant of vehicle outside vehicle, are they precluded from searching vehicle pursuant to New York v. Belton unless arrestee was actually or constructively aware of police before getting out of vehicle?

Supreme Court Cases

LAWRENCE v. TEXAS, 2003 WL 21467086 (Jun. 26, 2003)

Due Process; Laws against Sodomy

The Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause. "Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. Bowers v. Hardwick should be and now is overruled." KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined. THOMAS, J., filed a dissenting opinion.

WIGGINS v. SMITH, 2003 WL 21467222 (Jun. 26, 2003)

Ineffective assistance, habeas

Public defenders violated Strickland under

the Williams standard by not investigating mitigating evidence in support of Wiggins, who ultimately was convicted of capital murder by a Maryland judge and subsequently sentenced by a jury to death. O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined.

STOGNER v. CALIFORNIA, 2003 WL 21467073 (Jun. 26, 2003)

Ex Post Facto Clause

The Court held that a new statute of limitations enacted after expiration of a previously applicable limitations period cannot be applied to revive a previously time-barred prosecution under the Ex Post Facto Clause. BREYER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SOUTER, and GINSBURG, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined.

OVERTON v. BAZZETTA, 123 S. Ct. 2162 (Jun. 16, 2003)

Great Leeway for Prisons to Regulate Visitation Rights

States have extremely broad leeway to regulate the visitation rights of prisoners, though an individual claim that visitation rights had been indefinitely withdrawn absent procedural safeguards might be subject to a valid claim.

VIRGINIA v. HICKS, 123 S. Ct. 2191 (Jun. 16, 2003)

Trespass conviction sustained under 1st Amendment

The Court upheld, under a 1st

amendment/overbreadth attack, a housing authority policy that authorized police to serve notice on any person lacking "a legitimate business or social purpose" for being on the premises and to arrest for trespassing any person who remains or returns after having been so notified.

SELL v. U.S., 123 S. Ct. 2174 (Jun. 16, 2003)

Involuntary administration of antipsychotic drugs given limited approval

Due Process "permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests. This standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances. But those instances may be rare."

NGUYEN v. U.S., 123 S. Ct. 2130 (Jun. 9, 2003)

USSC's Supervisory Power, Art. IV judges, Plain Error

It is plain and prejudicial error for an article IV judge to serve on an Article III appellate court panel. Stevens delivered the opinion in which O'Connor, Kennedy, Souter, and Thomas joined. Rehnquist filed a dissent in which Scalia, Ginsburg, and Breyer joined.

ROELL v. WITHROW, 123 S. Ct. 1696 (Apr. 29, 2003)

Implied Consent to Magistrate Judge's Civil Jurisdiction

The Court held, 5-4 (opinion by Stevens; dissent by Thomas) that a party to a civil action can impliedly consent to the jurisdiction of a Magistrate when the proceeding is directed to a Magistrate from a district court, consistent with 28 U.S.C. § 636(c)(1) of the Federal Magistrate Act (FMA).

MASSARO v. U.S., 123 S. Ct. 1690 (Apr. 23, 2003)

28 U.S.C. § 2255; Ineffective assistance; no procedurally bar

An ineffective-assistance-of-counsel claim may be brought in a collateral proceeding whether or not the petitioner could have raised the claim on direct appeal.

CHAVEZ v. MARTINEZ, 123 S. Ct. 1994 (May 27, 2003)

Coercive interrogation, self-incrimination, due process, 42 U.S.C. § 1983

No Fifth Amendment self-incrimination privilege is violated when statements taken in violation of Miranda are not used in a criminal proceeding. But, an independent substantive due process claim for a violation of the right to be free from coercive questioning could be cognizable in a civil suit.

BUNKLEY v. FLORIDA, 123 S. Ct. 2020 (May 27, 2003)

Due Process vs. Retroactivity

In a Per Curiam reversal of a Florida Supreme Court decision (reported at 833 So. 2d 739), the Court, 6-3, held that due process under Fiore v. White (1999) requires that when a prisoner in post-conviction seeks to benefit from a new judicial interpretation of a criminal statute casting sufficiency of the evidence into doubt, the state court must determine the statute's meaning at the time the offense was committed, i.e. whether the

evidence was sufficient at that time, which is not a question of mere retroactivity.

PRICE v. VINCENT, 123 S. Ct. 1848 (May 19, 2003)

Habeas, 28 U.S.C. § 2254

At Vincent's trial on an open murder charge, defense counsel moved, at the close of the prosecution's case in chief and outside the jury's hearing, for a directed verdict of acquittal as to first-degree murder. The trial judge stated that second-degree murder was "an appropriate charge," but agreed to hear the prosecutor's statement on first-degree murder the next morning. When the prosecution made the statement, defense counsel objected, arguing that the court had granted its directed verdict motion the previous day, and that further prosecution on first-degree murder would violate the Double Jeopardy Clause. The judge responded that he had granted the motion but had not directed a verdict, and noted that the jury had not been told of his statement. He subsequently submitted the first-degree murder charge to the jury, which convicted respondent on that charge. In this federal attack, the Court held that Vincent's collateral double jeopardy claim did not meet the statutory requirements for habeas relief because Sixth Circuit did a de novo review rather than deciding whether claimant was entitled to relief only if he can demonstrate that the state court's adjudication of his claim was "contrary to" or an "unreasonable application of" this Court's clearly established precedents. The state court's decision that the judge's comments were not sufficiently final to terminate jeopardy not an objectively unreasonable application of clearly established Supreme Court law. Even if this Court agreed with the Sixth Circuit that the Double Jeopardy Clause should be read to prevent continued

prosecution under these circumstances, it was at least reasonable for the state court to conclude otherwise.

KAUPP v. TEXAS, 123 S. Ct. 1843 (May 5, 2003)

Suppression of Custodial Confessions Required When Suspect Illegally Seized

In a unanimous Per Curiam reversal, the Court held that a confession obtained by police after a person's illegal seizure must be suppressed unless there is a sufficient showing that the confession was an act of free will, evidence absent on the facts in this case.

DEMORE v. KIM, 123 S. Ct. 1708 (Apr. 29, 2003)

Mandatory detention for deportable aliens, 8 U.S.C. § 1226(c)

Kim (Kim), a Korean citizen and lawful permanent resident alien, of first-degree burglary in 1996. In 1997, he received a three-year sentence for petty theft. Upon Kim's release, the INS detained Kim pursuant to 8 U.S.C. § 1226(c) (1) (B), which includes a no-bail provision. Kim filed a writ of habeas corpus arguing that the no-bail provision violates due process. Each court below found the statute unconstitutional, but the USSC reversed, holding that authorities may detain lawful permanent aliens during removal proceedings.

VIRGINIA v. BLACK, 123 S. Ct. 1536 (Apr. 7, 2003)

Cross-Burning ban OK'd in principle

O'Connor delivered the opinion of the Court concluding that a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate. But, O'Connor, joined by Rehnquist, Stevens and Breyer, concluded that the Virginia statute's provision specifying that "[a]ny such burning

... shall be *prima facie* evidence of an intent to intimidate a person or group," as construed under state law, is unconstitutional on its face. Scalia agreed that the Court should vacate and remand the judgment of the Virginia Supreme Court so that that court can have an opportunity authoritatively to construe the cross-burning statute's prima-facie-evidence provision. Souter, joined by Kennedy and Ginsburg, concluded that the Virginia statute is unconstitutional.

Selected Eleventh Circuit Case Summaries

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

ADEFEMI v. ASHCROFT, 2003 WL 21488868 (Jun. 30, 2003)

Deportation; sufficiency; prior conviction

An immigration judge and BIA found Adefemi, a permanent resident alien, had a 1991 firearms conviction. A transitional INS rule purports to place strict limits on the judicial review available to such aliens, but the Court concluded it has "jurisdiction to grant relief if the government failed to prove that Adefemi was convicted of a firearms offense." The INS relied solely "on a two-sided, preprinted document that would be colloquially termed a traffic 'ticket,'" which alleged that he "had a 22 cal RG10 in console between seats." However, nowhere did it reflect he had been convicted. The court found the evidence insufficient under the standard of review "whether the BIA could reasonably conclude that the government has shown Adefemi deportable by clear and convincing evidence."

U.S. v. \$242,484.00 and DEBORAH STANFORD, 2003 WL 21488882 (Jun. 30,

2003)

Forfeiture; probable cause; sufficiency; 21 USC 881

A new opinion, on rehearing, affirming an earlier decision in Stanford's favor, 318 F. 3d 1240. The Court concluded "the circumstances are insufficient to establish the needed probable cause," so the court reversed the forfeiture order issued under the pre-2000 amended version of 21 U.S.C. 881(a)(6).

U.S. v. WILLIAMS, 2003 WL 21448817 (Jun. 24, 2003)

Sentencing; 924(c); indictment; firearms; co-defendant's use of firearm

The Court rejected the defendant's argument that he could not be sentenced to the ten-year mandatory term under 18 U.S.C. 924(c)(1) based on his codefendant's use or discharge of a semiautomatic assault weapon. 924(c)(1)(A) provides that "any person who . . . uses or carries a firearm or . . . possesses a firearm, shall . . . if the firearm is discharged, be sentenced to a term of imprisonment of not less than ten (10) years." 924(c)(1)(B)(i) provides that, if "the firearm possessed . . . is a . . . semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than ten (10) years". The Court concluded the defendant could be held accountable for his co-defendant's use or discharge of a semiautomatic assault weapon.

First, although the indictment erroneously alleged Williams carried a "firearm, that is, a handgun" (he should have been charged either with just carrying a firearm, or additionally with aiding and abetting his co-defendant's carrying and discharge of a semiautomatic assault weapon), those are not elements, *Harris*, 536 U.S. at 552-56 (2002), so "handgun" was mere surplusage that did not mislead or substantially prejudice him.

Second, citing 18 USC 2; Simpson, 979 F.2d 1282 (8th Cir. 1992); and *Basic*, 446 US 398 (1980), the Court concluded a defendant is liable for conduct he aided and abetted, which included the entirety of his co-defendant's conduct, even if the defendant had carried no weapon. "As an aider and abettor, Williams, in essence, possessed the assault rifle. We find nothing in the language of 924(c)(1) indicating that Congress intended to vitiate ordinary principles of aiding and abetting liability for purposes of sentencing under that subsection."

[Comment: Of course, this overlooks common rules of statutory construction; Congress **said** any person who uses, not any person who aids and abets.]

SIEBERT v. CAMPBELL, et al., 2003 WL 21436312 (Jun. 23, 2003)

Habeas; 2254; timeliness; statute of limitations; AEDPA; tolling; "properly filed"

Noting that in 11 years courts had yet to address the merits of this capital defendants' claims, the Court concluded the defendant's Alabama post-conviction petitions, which were accepted but ultimately found to have been filed late, were "properly filed" within AEDPA's tolling provision and *Artuz v. Bennett*, 531 U.S. 4 (2000). The petitions were filed in 1992, and the state conceded entitlement to an evidentiary hearing. The defendant filed amendments, and an evidentiary hearing began, in 1995. Not until the next day did the state first assert the statute of limitations, with which the state courts ultimately agreed. *Artuz* defined "properly filed" as when "delivery and acceptance are in compliance with the applicable laws and rules governing filings." (emphasis added) However, neither *Artuz* nor the 11th Cir's *Weekley* decision directly

addressed non-compliance with a state post-conviction statute of limitations. The Court held, because this state rule was not "firmly established" at the time of the state proceedings but was then within the state court's discretion, this compelled the conclusion that timeliness was not a prerequisite to filing *per se*, only a condition to relief.

HICKS v. HEAD, 2003 WL 21373174 (Jun. 16, 2003)

Ake error; habeas; harmless error

In *Ake v. Oklahoma* (1985), the Supreme Court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one." In a matter of first impression in this circuit, the Court held that an *Ake* violation is a trial error subject to harmless error analysis, and the error in denying an expert shortly before trial was harmless under *Brecht v. Abrahamson*.

U.S. v. FLORENCE, 2003 WL 21374544 (Jun. 16, 2003)

Sentencing; 2D1.1(b)(5)(C); substantial risk of harm to the life of a minor

Addressing an issue of first impression, the Court held (1) a district court is not required to identify a specific minor placed at risk of harm before imposing the six-level sentencing enhancement under U.S.S.G. § 2D1.1(b)(5)(C), which is applicable when the offense involved the manufacture of methamphetamine and created a substantial risk of harm to the life of a minor; (2) application of the six-level enhancement was justified by the district court's findings that minors were staying at the hotel where

defendant was manufacturing meth and that the fire occurred in the early morning when guests were normally in their rooms; and (3) the government need only prove the supporting facts by a preponderance of the evidence.

U.S. v. HASSON, 2003 WL 21356096 (Jun. 12, 2003)

Conspiracy; wire fraud; money laundering; restitution; forfeiture

Hasson, a Palm Beach jeweler, was convicted of fraud and conspiracy to launder money and obstruct justice. The jury found that the objects of the conspiracies were violations of 18 U.S.C. §§ 1956(a)(1), 1957, and 1503, and forfeited \$40 million cash, seven bank and brokerage accounts, and two real estate parcels. The Court rejected arguments the evidence was insufficient, the restitution failed to consider amounts paid victims in civil settlements, and the forfeiture and restitution were excessive fines. [Note the panel adhered to the mail fraud interpretation in *Brown*, 79 F.3d 1550, 1557 (11th Cir.1996), which has been attacked by another panel in *Yeager*, No. 02-11265, and is being litigated in *Gray*, No. 02-15462, set for oral argument in September.]

U.S. v. MACHADO, 2003 WL 21338625 (Jun. 10, 2003)

Sentencing; 2B1.1(b)(1); loss value; note: circuit conflict!

The Court held, for computing loss amount under USSG § 2B1.1(b)(1), the value of stolen goods should be measured from the victim's perspective. It reversed the calculation based on retail value, where the goods were stolen from a wholesale dealer and were going to be resold wholesale. (The sentencing court had reasoned that using market value would avoid disparate

sentencing for similar criminal acts and involved a simpler inquiry.) The Court noted a circuit conflict on the issue and sided with those circuits which reason that "market value" is "that closest to the factual context of a case." The Court noted the Guidelines expressly state that market value is to be measured from the victim's perspective, not one uniform retail measure, but "the market in which the property was at the time of the offense." The Court agreed "Uniformity is no doubt a goal of the sentencing guidelines, but so too are the principles of fairness and accuracy. . . . Utilizing a retail value approach without considering the factual context of the case increases the possibility that some defendants may be over-sentenced for an offense."

U.S. v. MADERA-MADERA, 2003 WL 21338877 (Jun. 10, 2003)

Sentencing; illegal reentry; prior drug conviction; 2L1.2(b)(1)(A)(i); 2001 Amendment

2L1.2(b)(1)(A)(i) provides a 16-level enhancement if a defendant convicted of illegal reentry has a prior felony drug trafficking conviction for which sentence exceeded 13 months. The defendant argued his prior conviction for possession of 87 grams of meth was not a "trafficking" offense. The Court disagreed given the state statutory scheme, including a presumption that possession of that amount indicated an intent to distribute. Likewise, Appl. Note 1(B)(iii) defines "drug trafficking offense" to include a state offense of possession with intent to distribute, regardless whether the "intent to distribute" is an element of the offense. Finally, the Court noted that 2L1.2 previously mandated the 16-level enhancement for any "aggravated felony," while the 2001 amendment imposed a sliding scale of

enhancements based on the seriousness of the prior conviction and the dangerousness of the defendant.

U.S. v. FREIXAS, 2003 WL 21267121 (Jun. 3, 2003)

Withdrawal of guilty plea

Freixas was charged with four counts, shared retained counsel with a co-defendant, and filed a waiver of potential conflict. A magistrate conducted a hearing and concluded her waiver was valid. She pleaded guilty to two counts but later moved to withdraw her plea, alleging she was not guilty, retained counsel failed to discuss the evidence or possible defenses with her, told her her sentence would be less than she received, and met with her only three times, which was insufficient to permit a valid plea decision. The district court held a hearing and denied the motion, and the Court found no abuse of discretion. The Court also found the magistrate had authority to determine her waiver was valid and was amply supported by the record. Her *Strickland* claim and sentencing challenges were also rejected on the merits.

U.S. v. KRAWCZAK, 331 F.3d 1302 (Jun. 2, 2003)

Sentencing; 2L1.2; enhancements; prior conviction

The defendant had a prior conviction for aiding and abetting transportation of illegal aliens and did not seek a reduction for having committed it "other than for profit" because it would not have affected his guidelines range; he had not been convicted under a separate subsection that encompassed smuggling for profit. In 2002, he pleaded guilty to attempted reentry and received a 16-level enhancement under U.S.S.G. § 2L1.2(b)(1)(A)(vii) because his past

conviction for an alien-smuggling offense was committed for profit. The district court decided the prior judgment and statute were ambiguous on this point and so looked to the PSI for the facts. The Court reversed, holding that a district court's ability in sentencing enhancements to look behind a state conviction is limited to where the judgment and statute are ambiguous, and here there were no ambiguities.

U.S. v. CANI, 331 F.3d 1210 (May 29, 2003)
Restitution; habeas; 18 USC 3664; change in economic circumstances

Cani filed a pro se petition for recalculation of the amount and manner of payment of restitution under 18 USC 3663, which the district court recharacterized as a petition under 28 USC 2255 and denied. The Court held that a petition to modify a restitution payment schedule based on changed economic circumstances is cognizable under 18 USC 3664(k), which governs the issuance and enforcement of orders of restitution. But the defendant failed to demonstrate changed economic circumstances since sentencing, so the district court result was correct.

U.S. v. YEAGER, 331 F.3d 1216 (May 29, 2003)(revised opinion)

Mail fraud

In a previous opinion issued March 12, 2003, the panel had overruled *Brown*, 79 F. 3d 1550, 1557 (11th Cir.1996), by holding the mail fraud statute does not require proof that a reasonable person would have relied on the false representations and no crime is committed if the victim easily could have determined the representations to be false. On rehearing, the Court receded from its earlier decision, suggesting that while the panel still does not like *Brown*, the issue whether the mail fraud statute requires reasonable reliance

need not be reached on the present facts, because this was a case of actual reliance, and the reliance was reasonable under *Brown* anyway.

IN RE: GLENN HOLLADAY, 331 F.3d 1169 (May 26, 2003)

Habeas; successive petitions; executing the retarded

The Court granted a stay of execution and authorized a successive habeas petition by an Alabama capital defendant claiming that retardation barred his execution under *Atkins v. Virginia*. The Court held (1) clearly the defendant was relying "on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" under 28 USC 2244(b)(2)(A); and (2) contradictory evidence of retardation was sufficient to show "a reasonable likelihood that he is in fact mentally retarded" and "make a prima facie showing" justifying a successive petition under 2244(b)(3)(C).

U.S. v. PEASE, 331 F.3d 809 (May 22, 2003)

Forfeiture; 21 USC 853; cross-appeal; clerical mistake; jurisdiction; Fed. R. Crim. P. 36

Pease pleaded guilty and agreed to forfeit his interest in certain property. Before sentencing, the court entered a preliminary order of forfeiture. At his later sentencing, however, the court failed to make the preliminary order part of its judgment. Pease thereafter appealed, but the government failed to cross-appeal this failure; the judgment was affirmed. While the appeal was pending, the government, based on the preliminary order of forfeiture, published a notice to third parties of the forfeiture and their right to petition the court to claim a

superior interest. Pease and relatives filed petitions; the government moved to strike Pease's, arguing that 21 USC 853(n)(2) prohibits a convicted defendant from claiming an interest; the petitioners moved to dismiss because no final order of forfeiture had been entered. So awakened, the government moved to amend the judgment to add a final order, and its motion was granted. On appeal, the Court held the law requires that a criminal forfeiture be made part of the final judgment, and the district court's failure to include in its judgment a forfeiture order could not be corrected as a "clerical mistake" under Fed. R. Crim. P. 36, because here it was a substantive alteration to a criminal sentence (which was conceded). Moreover, "the court acted without jurisdiction" because an appeal of the final judgment was pending, and the government failed to timely cross-appeal.

OFFICE OF THE CAPITAL COLLATERAL COUNSEL, NORTHERN REGION OF FLORIDA V. DEPARTMENT OF JUSTICE, 331 F.3d 799 (May 20, 2003)

Dismissal; prosecutorial misconduct; FOIA

In a 1998 trial, AUSA Karen Cox called a witness identified as "Gracie Greggs," which was a pseudonym for Internet use; the witness' real name was Adria Jackson. Cox failed to inform the court of this, but it subsequently came to light. The court concluded the prosecutor had either manufactured or accepted a plan to employ the fictitious name to conceal the witness' potential credibility problems and thereby further the goal of a conviction. The court dismissed the indictment. *Sterba*, 22 F. Supp. 2d 1333. The USA later referred the misconduct to DOJ's Ofc. of Prof. Respon., which suspended her. *See also Florida Bar v. Cox*, 794 So. 2d 1278 (Fla. 2001). Cox subsequently resigned.

Pursuant to FOIA, CCRC requested from the USA all records concerning the disciplinary proceedings, which it believed might be relevant to another death row inmate Cox had prosecuted. The district court exempted two documents that revealed her thoughts and feelings concerning her misconduct in *Sterba*. The Court affirmed, holding the privacy interests of her and third parties outweighed the public interest in disclosure.

JACKSON v. BD. OF PARDONS AND PAROLES, 331 F.3d 790 (May 20, 2003)

PLRA; attorney's fees

Jackson won an ex post facto claim against Georgia prison authorities and sought attorney's fees under 42 USC 1988(b) and the Prison Litigation Reform Act of 1995 (PLRA), 42 USC 1997e(d), which the district court granted in part and denied in part. Jackson argued 1997e(d) did not control because his 1983 action challenged the length of his confinement and not "prison conditions" within the meaning of 1997e(a). Alternatively, he argued 1997e(d) violated his right to equal protection under the Due Process Clause of the Fifth Amendment. The State Board of Pardons and Paroles cross-appealed, contending the court erroneously awarded Jackson fees-on-fees, or attorney's fees incurred in litigating his petition for attorney's fees. The Court affirmed, all on issues of first impression in this circuit.

PARKER v. FLA. DEP'T OF CORRECTIONS, 331 F.3d 764 (May 20, 2003)

Habeas; jury instruction; general verdict
Parker claimed the trial court gave a constitutionally-deficient jury instruction on first-degree felony murder. The State had pursued theories of both premeditated and

felony murder. The trial court's oral instructions failed to instruct the jury on the elements of felony murder - and trial counsel failed to object - but written instructions given the jury included the felony murder instruction, and the jury returned a general verdict of first-degree murder. The Court found the district court erred in finding procedural bar, but denied relief on the merits. The Florida Supreme Court had applied the wrong analysis but was correct that it was harmless error.

**U.S. v. DAVIS, 329 F.3d 1250 (May 8, 2003)
Resentencing; 5G1.2(d); due process;
Appendi; ineffectiveness of appellate
counsel**

Three drug defendants challenged their sentences. The district court had earlier granted their 2255 motions, finding appellate counsel ineffective for failing to ensure the district court made individualized findings on the scope of the conspiracy and the drug quantity attributable to each defendant. After the district court resentenced, the Court reversed in part, noting the defendants had not received the benefit of *Apprendi*. The Court found no error in the district court's resentencing without an evidentiary hearing because of its limited mandate. Regarding the challenge to the district court stacking their sentences, the Court held 5G1.2(d) requires consecutive sentences where the sentence under 841 was less than the total punishment for their aggregate convictions, and that no *Apprendi* error resulted. Finally, the Court acknowledged that due process rights may be violated "when a sentence is enhanced after the defendant has served so much of his sentence that his expectations as to finality have crystallized and it would be fundamentally unfair to defeat them," but that did not apply on these facts because their new

sentences were either significantly shorter or substantially similar.

U.S. v. WATTS, 329 F.3d 1282 (May 8, 2003)

Automobile search; government appeal

Agents had a search warrant for the residence, but not the automobile. A drug dog gave a positive response at the center console area, and agents disassembled it and discovered cocaine. The trial court suppressed it because (a) the car was not parked within the curtilage of the townhouse, and thus not covered by the warrant; and (b) although probable cause existed, exigent circumstances did not justify a warrantless search. The Court reversed because there are only two prerequisites to conduct a warrantless search of an automobile: whether the automobile is readily mobile (operational), *Nixon*, 918 F.2d 895, 903; and whether probable cause exists, which it did here based on the drug dogs' multiple positive responses, *Banks*, 3 F.3d 399, 402.

U.S. v. JETER, 329 F.3d 1229 (May 6, 2003)

Sentencing; 4B1.1

The Court clarified "that minor role adjustments are not available to defendants sentenced under § 4B1.1." It rejected a rule of lenity argument and held that minor role adjustments are not available to defendants sentenced as "career offenders." "Because § 4B1.1, by its express terms, only authorizes an adjustment based on acceptance of responsibility, and does not mention the minor role adjustment, and since 'the inclusion of one implies the exclusion of others,' the guideline is not ambiguous and the rule of lenity does not apply."

U.S. v. ADAMS, 329 F.3d 802 (Apr. 28,

2003)

Sentencing; 2K2.1; double counting

The Court rejected the argument that the two-level enhancement under 2K2.1(b)(4) for offenses involving stolen firearms constituted impermissible double counting. The Court joined the majority of circuits holding that the enhancement is appropriate unless the defendant's base offense level is determined under subsection (a)(7). Here, the BOL was set by 2K2.1(a)(2), because he committed the offense after sustaining at least two felony convictions. "Although the sentencing guidelines create an exception for defendants whose offense level is determined under subsection (a)(7), no such exception is created for defendants whose base offense level is determined under subsection (a)(2)." Also, subsection (a)(2) does not account for whether a firearm was stolen, but only for the defendant's criminal history. Consequently, the "plain language" of the sentencing guidelines undercut the defendant's double-counting argument.

U.S. v. ANDREWS, 330 F.3d 1305 (Apr. 25, 2003)

Sentencing; consecutive

The Court decided an issue on which the circuits were evenly (3-3) split, holding that a district court may impose its sentence consecutive to a sentence which might be imposed in the future. The Court decided the issue was controlled by one of its prior cases, declining to limit it to its facts.

SAWYER v. HOLDER, 326 F.3d 1363 (Apr. 14, 2003)

Habeas; 2255 savings clause; Richardson claim; CCE; 2241; COA & SOR

The defendant was convicted of drug offenses, including CCE under 21 USC 848; it was affirmed on direct appeal. Then, *Richardson*

was decided, holding that a jury must agree unanimously on which specific predicate violations supported the CCE conviction. 526 U.S. 813, 815 (1999). The Court declined to authorize the district court to consider a successive 2255 raising a *Richardson* claim. The defendant then filed a 2241 action, which the district court denied under *Wofford v. Scott*, 177 F.3d 1236, finding the claim was not within the savings clause and, in any event, he could not demonstrate cause and prejudice or actual innocence to excuse his procedural default. The savings clause applies when (1) a claim is based upon a retroactively applicable Supreme Court decision; (2) the holding of that decision establishes petitioner was convicted of an offense that is now nonexistent; and (3) circuit law squarely foreclosed that claim when it otherwise should have been raised. *Wofford* at 1244. Although the Court has acknowledged that *Richardson* is retroactive, it rejected his argument that *Richardson* established, by changing the CCE elements, that those convicted under the prior statutory interpretation were convicted of an act that the law does not make criminal. Thus, a *Richardson* claim does not open the portal to 2241. The jury instructions were also found adequate. [Fn. 3: a federal prisoner does not need a COA in a 2241 appeal and the standard of review under 2241 is *de novo*.]

U.S. v. ANDERSON, 326 F.3d 1319 (Apr. 11, 2003)

Sentencing; 2F1.1 v. 2R1.1; heartland departure; 18 USC 3553

Construction companies were involved in a conspiracy to rig bids and defraud the US by inflating their profits on foreign construction projects. After rejecting arguments relating to sufficiency of the evidence, the Court held the district court's use of 2F1.1 (fraud), rather

than 2R1.1 (bid-rigging), was proper, since the bid-rigging was simply the means to commit the fraud; these guidelines at least applied equally, so the provision resulting in the greater offense level applied, which is 2F1.1. The Court agreed no prima facie case for downward departure under 18 USC 3553(a) had been made, but the district court erred in stating it lacked authority to grant such a departure, resulting in a remand.

U.S. v. PRITCHETT, 327 F.3d 1183 (Apr. 9, 2003) (Dubina + Fay & DJ Dowd)

18 USC 922(j); Commerce Clause; firearms
18 USC 922(j) makes it unlawful to knowingly "receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition," which is or has moved in interstate or foreign commerce. In an issue of first impression in this circuit, the Court held that 922(j) is a proper exercise of Congress's power under the Commerce Clause. This was an extension of *Dupree*, 258 F. 3d 1258, which held that possession of a firearm that had previously traveled in interstate commerce was sufficient under a similar statute.

U.S. v. FAIR, 326 F.3d 1317 (Apr. 8, 2003)
Habeas; 2255; 18 USC 3582(c)(2); Fed. R. Civ. P. 60(b)

After losing a 2255 motion, the defendant lost a challenge to his sentence under 18 USC 3582(c)(2) (modification of sentence based on subsequent changes in guidelines). He filed a notice of appeal and then another motion under Fed. R. Civ. P. 60(b)(4) restating the same claims. The district court denied the Rule 60(b)(4) motion, which the defendant also appealed. The Court held that Rule 60(b)(4) is a civil motion not available to challenge a sentence under 3582(c)(2).

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