

FEDERAL PUBLIC DEFENDER

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NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

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Elizabeth Timothy Is The New Magistrate

On Friday, June 12th, Assistant Federal Public Defender Elizabeth Timothy was sworn in as a United States Magistrate for the Pensacola Division of the United States District Court for the Northern District of Florida. She is filling the open magistrate position that had been held by Judge Casey Rodgers.

Ms. Timothy has spent the last six years as an Assistant Federal Public Defender in our Pensacola office. She is a 1989 graduate of the Catholic University's Columbus School of Law. Before joining us, she worked as an assistant state public defender in both West Palm Beach and Pensacola. She has served on the statewide board of directors of the Florida Association of Criminal Defense Lawyers. She's been active, as well, in the Pensacola FACDL chapter, holding a variety of offices and serving as the chapter's president. In 2001, The Florida Bar awarded her board certification in the area of criminal trials.

Those who know Ms. Timothy have long recognized her for her talented work in the

courtroom and her dedication to her clients. She's had many high points in her career, and her name regularly appears in the columns in this newsletter reserved for victories and downward departures. She won one of her most noteworthy victories in early 2001 when, after a six-week fraud trial, a Pensacola jury acquitted her client.

We'll miss having her in our Pensacola office, but look forward to appearing before her at the courthouse.

New Member Needed to Represent the Tallahassee Division of the Panel Oversight Committee

Tallahassee/Quincy lawyer Steve Seliger, after working nearly 27 years on the front line of criminal defense in North Florida, is moving to California and taking a well-deserved retirement. Steve has represented the Tallahassee Division of the Panel Oversight Committee since its inception several years ago. With Steve's departure, we need someone to fill his position on the Committee.

The Committee meets roughly four times a year. The meetings are typically conducted via telephone conference call, and most are completed in 20 minutes. The Committee consists of one panel member from each of the four divisions of the Northern District of Florida, plus the Federal Public Defender. The Committee exists primarily to review new applicants to the panel and recommend to the judges which applicants should be added. The Committee is also responsible for the general management of the panel. It has, in years past, recommended to the judges such things as the reduction in size of the list of panel lawyers for the Tallahassee Division; recommended what training would fulfill the continuing education requirement of the local Criminal Justice Act Plan; and decided what sanctions should be imposed upon those panel members who failed to fulfill the education requirement. In addition to Steve, the Committee is composed of Gil Schafnitt (who serves as the Chair), Thom Cassidy, Ken Riddlehoover, and Randy Murrell.

If you are interested in volunteering for the position, please call Randy Murrell at (850) 942-8818.

Don't Forget to Consult Your Client About the Appeal AND to Document Your File

Tallahassee Magistrate Judge William Sherrill recently granted a motion filed pursuant to 28 U.S.C. 2255, in which the defendant argued that his lawyer failed to honor his request to file an appeal. Judge Sherrill granted the request largely because the lawyer, like most of us, could not remember precisely what was said a few years earlier and, like many of us, did not have any notes in his file about the conversation.

In a subsequent case involving the same issue, Judge Sherrill, in his Report and Recommendation, wondered aloud why so many good lawyers failed to document their files regarding two critical stages of the case: *“The undersigned has conducted numerous evidentiary hearings with regard to the performance of counsel at two critical stages of a criminal case, the decision whether to testify and the decision whether to take a direct appeal. Why otherwise good attorneys who routinely represent defendants in this court also routinely do not keep a written record of what they did and did not do at these two critical stages of a criminal case truly puzzles the court.”*

In Roe v. Flores-Ortega, 528 U.S. 470, 478, 120 S. Ct. 1029, 1035 (2000), the Court held that the requirement that a lawyer consult with his client about the appeal means the lawyer should advise “the defendant about the advantages and disadvantages of taking an appeal,” and make “a reasonable effort to discover the defendant’s wishes.” Once you’ve had that discussion with your client, though, there remains the task, as noted by Judge Sherrill, of recording that information in the file. Our suggestion, as well as Judge Sherrill’s, is that you make it a habit to do so in every case.

Challenges to the Bureau of Prisons’ Halfway House Policy

In December 2002, the Office of Legal Counsel of the Department of Justice issued an opinion stating that, contrary to the existing practice, halfway houses did not constitute “imprisonment.” As a result, the Bureau of Prisons (the Bureau) changed its policies and sent a letter to all federal judges telling them that it would no longer honor

judicial recommendations for halfway house placement.

The conclusion that a halfway house no longer amounts to “imprisonment” has done two things: (1) eliminated the option of asking a judge at sentencing to recommend that the defendant serve a short sentence in a halfway house in lieu of a prison; and (2) barred those serving sentences from entering a halfway house for longer than the last six months of their sentence (or before they have served 90% of their sentence, whichever is less.)

Nationwide there have been a number of successful challenges to the decisions of the Bureau. Most have succeeded with the argument that, contrary to the claim of the Department of Justice, the controlling statute, 18 U.S.C. § 3621(b), unambiguously requires the Bureau to designate the place of the defendant’s “imprisonment” and directs the Bureau to consider “any available penal or correctional facility.” There are, as well, other grounds for challenging the Bureau’s position, including those based on the Administrative Procedures Act. *See Iacaboni v. United States*, 251 F. Supp. 2d 1015 (D. Mass. 2003), and *Zucker v. Menifee*, 2004 WL 102779 (S.D. N.Y. Jan. 21, 2004), both of which were decided in the defendants’ favor and present the various grounds that have been argued. As of yet, no circuit court has issued an opinion.

For more information, see the article, “Challenges to the Bureau of Prison’s Halfway House Policy,” in the Spring 2004 Edition of the publication of the National Association of Federal Defenders, *The Liberty Legend*. The article can be found at, <www.federaldefenders.org>. We’re indebted to Kelli McTaggart, the author of that article, for the content of this column.

Apprendi and Almendarez-Torres

As most are aware, the Court in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), held that the government was obligated to allege in the indictment and prove beyond a reasonable doubt to a jury any circumstance that increased the maximum potential penalty. In the decision, the Court left intact the earlier decision in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), where the Court had held that the government was not obligated to allege or prove one particular circumstance giving rise to a longer sentence - prior criminal convictions. Nonetheless, many have argued that there appears to be a majority of the Court willing to overturn *Almendarez-Torres*.

The Court, though, has not squarely faced *Almendarez-Torres*, and the Eleventh Circuit has continued to remind us that the decision still stands. *See, e.g., United States v. Thomas*, 242 F.3d 1028, 1035 (11th Cir. 2001). Still, it is worth remembering that it very much remains a live issue. The United States Supreme Court said as much last month in *Dretke v. Haley*, 124 S. Ct. 1847, 1853 (2004), where it recognized that the *Almendarez-Torres* exception to *Apprendi* presents a “difficult constitutional question[.]”

Retroactivity of Crawford v. Washington

We now have on our brief bank (or will when the next monthly update is done) a sample memorandum of law on various issues relating to the recent decision in *Crawford v. Washington*, 124 S. Ct. 1354 (2004) (reaffirming rule that requires unavailability and prior opportunity to cross-examine

before testimonial hearsay evidence may be admitted in a criminal trial). The four points addressed in the memo - as delineated by a Nevada district court in a recent case - are: (1) Whether the district court should apply *Crawford's* new constitutional rule retroactively to collateral proceedings? (2) Which, if any, hearsay accusations admitted at trial are admissible under *Crawford*? (3) Assuming a Confrontation Clause violation occurred, whether the Court should consider the error harmless? (4) Whether the court should remand to state court for reconsideration in light of *Crawford*? See Crawfordbrief.wpd.

Budgeting Requirements For Big Cases

In a May 25, 2004, memorandum, Ralph Mecham, the Director of the Administrative Office of the United States Courts, advised federal judges around the country of a new Criminal Justice Act Guideline that encourages courts to use specific budgeting techniques in those cases where a panel lawyer is expected to expend more than 300 hours on a case or where total expenditures for a case are expected to exceed \$30,000. In the memorandum, Mr. Mecham wrote that the "use of case budgets should help ensure that defense counsel receive the resources necessary to represent the accused effectively while at the same time providing the court with sufficient information to assess and monitor the expenditure of public funds."

The procedure would require the panel lawyer to submit an initial estimate as to the expected hours and expenditures, with recognition that additional requests may be needed beyond what was first estimated. The procedure involves four worksheets for each of the four types of services: attorney, investigative,

expert, and "other." The budgets would be submitted *ex parte* and kept under seal.

The particular Guideline is found at subparagraph 2.22B(4) of Volume VII of *The Guidelines for the Administration of the Criminal Justice Act and Related Statutes*. The forms, as well as a statement regarding the need for budgeting, can be found at <<http://www.fd.org/cja>>.

Panel Training

This month's video, the annual Supreme Court Update, comes from the Federal Defender Conference in Boston that was held two weeks ago. The presentation was, as always, one of the highlights of the conference. It is a panel discussion that features Erwin Chemerinsky, Susan Herman, and Paul Rashkind. Erwin Chemerinsky is a 1978 graduate of the Harvard Law School and a professor at the Duke University School of Law who has argued a number of cases before the United States Supreme Court. Susan Herman is a 1974 graduate of the New York University School of Law and is a professor at the Brooklyn Law School. Paul Rashkind is a 1975 graduate of the University of Miami School of Law and is Chief of Appeals in the Federal Public Defender's Office for the Southern District of Florida. The three of them offer an insightful view of those cases already decided this term, those cases still pending, and the trends expected to play out in future years.

Gainesville:	June 23, 2004
Pensacola:	June 24, 2004
Tallahassee:	June 29, 2004
Panama City:	June 30, 2004

CJA 20 Form

Once you're appointed to a case, the Clerk's office is supposed to send you the voucher form (CJA 20) and related material. Apparently, there are times when, for one reason or another, the notice does not get sent. The Clerk's office asks that you contact them if you haven't received the paperwork within a few days of your appointment.

Electronic Delivery of Presentence Reports

The judges for the Northern District have authorized the probation office to begin sending presentence reports via email. Chief Probation Officer Steve Townley intends to begin doing so as of July 1st. Before sending you that first report, the probation officer will contact you and ask for your email address.

DOWNWARD DEPARTURES

Weaver, Ruth Hinkle, R. Atty: Steve Seliger
 Docket: 4:04cr5-RH
 Charge: Consp. Poss WITD Crack
 Range: 135 - 168 months, mandatory 20 yrs
 Sentence: 84 months
 Date of Imposition of Sentence: 6/14/04
 Grounds: 5K1.1

Martinez, Mark Hinkle, R. Atty: Bill Bubsey
 Docket: 5:03cr37-RH
 Charge: Consp. Poss WITD Meth
 Range: 188 - 235 months
 Sentence: 48 months
 Date of Imposition of Sentence: 5/14/04
 Grounds: 5K1.1

Hooks, Clarence Mickle, S. Atty: Randy Murrell
 Docket: 4:03cr28-SPM
 Charge: Dist. of Crack
 Range: 262 - 327 months
 Sentence: 168 months
 Date of Imposition of Sentence: 3/15/04
 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

After Assistant Federal Public Defender **Gwen Spivey** won the appeal in United States v. Omar Lee Zion, No. 03-13447 (11th Cir. Jan. 30, 2004) (unpublished decision) (concluding that the judge had improperly included the waste or byproduct of manufacturing in arriving at the quantity of methamphetamine), Assistant Federal Public Defender **Bob Dennis** successfully handled the resentencing that resulted in a reduced sentence of 189 months (from the original imposed 236 months).

Gainesville lawyer **Lloyd Vipperman**, in a case where his client was facing a mandatory minimum sentence of 20 years for more than 1,000 marijuana plants, recently convinced Judge Paul to grant a motion to suppress. Lloyd successfully argued that the warrantless entry into the fenced area within the curtilage of his client's home was not justified by exigent circumstances. Judge Paul's ruling led to the dismissal of the marijuana charge, leaving Lloyd's client with the much improved circumstance of a 36-month sentence for being a felon in possession of a firearm.

In a case involving the charge of conspiracy to defraud the U. S. Government, **Lloyd Vipperman**, filed a motion to dismiss based upon the claim that the statute of limitations had run. While the motion was still pending, the government - rather than waiting for Judge Paul's decision - thought better of their position and moved to dismiss the charge.

Tom Findley convinced a Tallahassee jury to acquit his client of four felony charges: conspiracy to commit money laundering, conspiracy to distribute cocaine, perjury, and making a false statement to an IRS agent. The jury found Tom's client guilty of the one remaining charge, the misdemeanor offense of possession of cocaine. Instead of the 10 to 12 years Tom's client faced under the Sentencing Guidelines, the client faces a maximum one-year penalty for the misdemeanor.

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

CASE SUMMARIES

The summaries that follow are prepared by our lawyers here in the Public Defender's Office. We prepare them daily as the opinions are issued. If you'd like to receive the daily summaries, via email, 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 2004 term that are relevant to our practice and granted since our last newsletter:

SMITH v. MASSACHUSETTS, ___ S. Ct. ___ (Mem), 2004 WL 1300177 (Cert. Granted June 14, 2004) (reviewing 788 N.E.2d 977 (Mass. App. Ct. May 21, 2003))

Double jeopardy

Question presented: whether a judge violates the double jeopardy clause by granting a defense motion that the defendant be deemed

"not guilty" with regard to one charge because of deficiencies in the government's proof but then changing that ruling before closing arguments in the case.

MUEHLER v. MENA, ___ S. Ct. ___ (Mem), 2004 WL 817138 (Cert. Granted June 14, 2004) (reviewing 332 F.2d 1255 (9th Cir. 2003))

Reasonableness of seizure, qualified immunity

Question presented: whether police officers executing a search warrant exceeded their authority when they handcuffed an occupant of the premises being searched, detained her for over two hours, and -- without having probable cause -- questioned her about criminal activity.

GOUGHNOUR v. PAYTON, ___ S. Ct. ___ (Mem), 2004 WL 102831 (Cert. Granted May 24, 2004) (reviewing 346 F.3d 1204 (9th Cir. 2003))

Habeas, catch-all mitigating instruction, unreasonable application of fed law

Question Presented: Did the 9th Circuit violate 28 U.S.C. §2254(d) when it found the California Supreme Court objectively unreasonable in holding that California's "catch-all" mitigation instruction in capital cases is constitutional as applied to post-crime evidence in mitigation?

DEVENPECK v. ALFORD, 124 S. Ct. 2014 (Mem) (Cert. Granted Apr. 19, 2004) (reviewing 333 F. 3d 972 (9th Cir. 2003))

Fourth Amendment

Questions presented: (1) Does an arrest violate the Fourth Amendment when a police officer has probable cause to make an arrest for one offense, if that offense is not closely related to the offense articulated by the officer at the time of the arrest? (2) For the

purpose of qualified immunity, was the law clearly established when there was a split in the circuits regarding the application of the “closely related offense doctrine”, the Ninth Circuit had no controlling authority applying the doctrine, and Washington state law did not apply the doctrine?

ILLINOIS v. CABALLES, 124 S. Ct. 1875 (Mem) (Cert. Granted Apr. 5, 2004) (reviewing 802 N.E.2d 202 (Ill. 2003))

Dog Sniff Searches

Question presented: Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.

PASQUANTINO, ET AL. V. U.S., 124 S. Ct. 1875 (Mem) (Cert. Granted Apr. 5, 2004) (reviewing 336 F. 3d 321 (4th Cir. 2003))

Wire Fraud

Question presented: Whether the federal wire fraud statute (18 U.S.C. § 1343) authorizes criminal prosecution of an alleged fraudulent scheme to avoid payment of taxes potentially owed to a foreign sovereign, given the lack of any clear statement by Congress to override the common law revenue rule, the interests of both the Legislative and Executive Branches in guiding foreign affairs, and this Court’s prior rulings concerning the limited scope of the term “property” as used in the wire fraud statute.

Supreme Court Cases

U.S. v. BENITEZ, ___ S. Ct. ___, 2004 WL 1300161 (June 14, 2004)

Plain error under Federal Rule of Criminal Procedure 11

The U.S.S.C., in a unanimous decision authored by Justice Souter, reversed the 9th

Circuit and held that to obtain relief for an unpreserved Rule 11 failing, a defendant must show a reasonable probability that, but for the error, he would not have pleaded guilty. “A defendant must thus satisfy the judgment of the reviewing court, **informed by the entire record**, that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding.” “The reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different.” Instead, the reasonable probability standard is that applied in post-conviction challenges to ineffective assistance or Brady violations

YARBOROUGH v. ALVARADO, 124 S. Ct. 2140 (June 1, 2004)

Habeas, "clearly established law," youth and inexperience not for custody under *Miranda*

The USSC reversed the 9th Circuit, holding that it was not unreasonable under habeas law for a state court to state court to refuse to suppress unwarned statements under Miranda where the statements were made by a 17-year-old after 2 hours of interrogation. It was not unreasonable to conclude that he was not in custody since the law as applied to his facts could go either way; and age and experience are not factors that need to be considered for the objective Miranda test in determining whether the juvenile thought he was free to leave.

NELSON v. CAMPBELL, 124 S. Ct. 2117 (May 24, 2004)

AEDPA, 42 U.S.C. § 1983 challenges to manner of execution

The Court held that a prisoner may bring a 42 U.S.C. § 1983 action to contend that a

particular execution procedure is unnecessary and unconstitutional.

THORNTON v. U.S., 124 S. Ct. 2127 (May 24, 2004)

4th Amendment, car former-occupant searches

A plurality opinion extended New York v. Belton (1981) to hold that a search of an individual who exited a lawfully stopped automobile even though the officer first makes contact with the arrestee after the arrestee has stepped out of his vehicle. Scalia, Ginsberg, and O'Connor did not fully accept the plurality's view : O'Connor: " I write separately to express my dissatisfaction with the state of the law in this area. As Justice Scalia forcefully argues ... lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of Chimel ... That erosion is a direct consequence of Belton's shaky foundation." Scalia favored a general rule permitting searches for evidence of a crime upon seizure where the officer reasonably believes s/he is likely to find evidence.

SABRI v. U.S., 124 S. Ct. 1941 (U.S. May 17, 2004)

Necessary & Proper Clause, Bribery, Facial attacks on statutes

The Court held that (1) 18 U. S. C. §666(a)(2), which proscribes bribery of state and local officials of entities, need not require proof of connection with federal money as an element of the offense; (2) the statute was constitutional under the Necessary and Proper Clause; and (3) The Court disapproved of Sabri's technique for challenging his indictment by facial attack on the underlying statute. If Sabri was making any substantive

constitutional claim, it had to be seen as an overbreadth challenge; the most he could seriously say was that the statute could not be enforced against him, because it could not be enforced against someone else whose behavior would be outside the scope of Congress's Article I authority to legislate.

JOHNSON v. CALIFORNIA, 124 S. Ct. 1833 (May 3, 2004)

Supreme Court Jurisdiction

The California Court of Appeal reversed Johnson's conviction, holding that he was entitled to relief under Batson v. Kentucky, and noting the existence of separate evidentiary and prosecutorial misconduct claims without determining whether those claims would independently support reversal of Johnson's conviction. The California Supreme Court reversed, addressing only the Batson claim, and remanding "for further proceedings consistent with [its] opinion." The Supreme Court granted certiorari and heard argument to review the application of Batson, but ultimately decided to dismiss for lack of jurisdiction under 28 U.S.C. § 1257. Supreme Court jurisdiction is limited to review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had," with 4 exceptions stated in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), and no exception applies here. The Court was particularly miffed at the fact that the parties had not revealed to the Court, until the joint appendix was filed, that more than Batson had been contested in the appeal.

MIDDLETON v. McNEIL, 124 S. Ct. 1830 (May 3, 2004)

Habeas deference to "reasonable" state court judgments

McNeil killed her husband after an argument

over his infidelity and spending habits, and her Battered Women's Syndrome defense was rejected by the jury, which convicted her of second-degree murder. She challenged the jury instruction in the California Court of Appeal, which found harmless error. The district court denied habeas relief under 28 U.S.C. § 2254, but the 9th Circuit reversed. The Supreme Court reversed the 9th Circuit [yes, again], holding that the court erred by not considering all the instructions as a whole to determine whether the state court's determination of harmlessness was "reasonable."

DRETKE v. HALEY, 124 S. Ct. 1847 (May 3, 2004)

Innocence exception to habeas procedural default rules are last resort

Haley was wrongfully sentenced as an habitual offender after the trial court, without objection, erroneously took a non-final prior conviction into account. Haley lost every round of appeal and state postconviction where he argued ineffective assistance and insufficiency. In federal habeas, the federal court granted relief on the insufficiency ground, forgiving the procedural default on grounds of an "actual innocence" exception, and without addressing the ineffectiveness claim. The question in this case is whether the "actual innocence" exception to procedural default rules in capital punishment federal habeas petitions applies where an applicant asserts "actual innocence" of a noncapital sentence. The Court dodged the issue, and instead held that "a federal court faced with allegations of actual innocence, whether of the sentence or of the crime charged, must first address all nondefaulted claims for comparable relief and other grounds for cause to excuse the procedural default." The Court thus reversed and remanded for the lower court to

consider the non-defaulted ineffectiveness claim, which the State of Texas conceded was "viable and "significant."

U.S. v. LARA, 124 S. Ct. 1628 (Apr. 19, 2004)

Double jeopardy, Indian sovereignty

Following denial of his motion to dismiss on basis of prior tribal court conviction, Lara, an Indian nonmember of the tribe, pleaded guilty in the District Court to assault on a federal officer occurring in Indian country. Lara appealed and won in the Circuit Court. The Supremes reversed, (Breyer, writing for a 7-2 Court) holding (1) source of tribe's power to prosecute and punish defendant for violence to a policeman was inherent tribal sovereignty rather than delegated federal authority; (2) Congress possessed constitutional power to lift or relax restrictions on Indian tribes' criminal jurisdiction over nonmember Indians that political branches of government had previously imposed; and (3) the Double Jeopardy Clause could not bar federal prosecution of defendant for assaulting a federal officer after Indian tribe's prosecution and punishment of him for violence to a policeman, absent any showing that the source of the tribal prosecution was federal power.

Selected Eleventh Circuit Case Summaries

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

U.S. v. NAROG, 2004 WL 1299872 (June 10, 2004)

Possessing pseudoephedrine

The Court (Wilson, Fay, Meskill) reversed convictions for possessing pseudoephedrine

while knowing and having reasonable knowledge to believe that this listed chemical would be used to manufacture a controlled substance, methamphetamine, in violation of 21 U.S.C. §§ 846, 841(a)(1), 841(d)(2), and 841(d)(1). The court held that a jury instruction telling the jury it could convict upon proof that only the manufacture of “some controlled substance” needed to be foreseen, constructively amended the indictment— the essential elements alleged were altered to broaden the possible bases for conviction, and constitutes per se reversible error, whereas a mere variance does not.

BOONE v. FLA. DEP'T OF CORRECTIONS, 2004 WL 1232033 (June 4, 2004)

Habeas; Rule 60(b); statute of limitations; commencement

The Court rejected the defendant’s argument that his resentencing, five years after his original conviction and subsequent to a state post-conviction motion, was the operative date for commencement of the statute of limitations under AEDPA. After the district court denied the § 2254 petition as time-barred, the defendant moved for reconsideration under Rule 60(b), citing Walker v. Crosby, 341 F.3d 1240, 1246 (11th Cir. 2003) (holding that statute of limitations for a § 2254 petition which challenged both original judgment and resentencing judgment began to run on date resentencing judgment became final). The Court held that Walker was inapplicable because the instant § 2254 petition challenged only the validity of the underlying conviction, rejecting the defendant’s attempt to expand Walker to include other claims.

DILL v. HOLT, 2004 WL 1209461 (June 3, 2004)

Habeas exhaustion

In the third case on this subject, the 11th Circuit reaffirmed the ruling it made in Medberry last year that a state prisoner filing a habeas action challenging only the execution of his sentence - not the judgment itself - must satisfy the exhaustion rules corresponding to § 2254 petitions. The second case is Thomas v. Crosby, *infra*.

U.S. v. OLSHAN, 2004 WL 1209570 (June 3, 2004)

Mail fraud sentencing enhancements

Olshan was convicted of mail fraud and filing a false income tax return. He contended that he should not have received the two-level mass-marketing enhancement under U.S.S.G. § 2F1.1(b)(3) (2000), because he solicited only those within his existing client base and not the general public. He also contended that application of the two-level mass-marketing enhancement amounted to impermissible double counting because it overlapped with the § 2F1.1(b)(2)(B) two-level enhancement he received for defrauding more than one victim. The 11th Circuit rejected both claims, saying the latter was an issue of first impression in this Circuit.

U.S. v. DICKERSON, 2004 WL 1178458 (May 28, 2004)

18 U.S.C. § 3663A, mandatory restitution for victims of crimes involving schemes

The Court held “that where a defendant is convicted of a crime of which a scheme is an element, the district court must, under 18 U.S.C. § 3663A, order the defendant to pay restitution to all victims for the losses they suffered from the defendant’s conduct in the course of the scheme, even where such losses were caused by conduct outside of the statute of limitations. The district court must find that the victims’ losses resulted “directly” from the defendant’s criminal conduct in the

course of the scheme. The “harm to the victim [must be] closely related to the scheme, rather than tangentially linked.”

U.S. v. AMEDEO, 2004 WL 1178462 (May 28, 2004)

Upward departure unsupported

A pretty disgusting tale of a lawyer, Amedeo, using drugs and having sex with a younger guy entrusted to his care until the younger guy died of a drug overdose in Amedeo’s home. After enhancing the sentence for abuse of trust, vulnerable victim, and obstruction of justice (all of which were affirmed), the court departed upward on several grounds: (1) that Amedeo committed the offense to facilitate a sexual assault on Rozelle, pursuant to U.S.S.G. § 5K2.9; (2) that Amedeo’s offense resulted in death, pursuant to § 5K2.1; (3) that he engaged in extreme conduct by failing to seek medical help and by having unprotected sex despite his illness with hepatitis C, pursuant to § 5K2.8; and (4) that Amedeo distributed drugs to multiple minors, pursuant to § 5K2.0. The 11th Circuit applied the PROTECT Act and reversed the departure. Stahl, with Black and Barkett. (1) Even though a videotaped sexual encounter was not consensual, the district court clearly erred in concluding the offense of conviction was committed to facilitate the sexual assault because there is no evidence to support it. (2) The youth death’s in January did not directly result from the conduct involved in the offense of conviction, which took place two full months earlier, and the relevant conduct doctrine does not permit Amedeo’s sentence to encompass the events of January. (3) Amedeo’s sexual encounters with the youth in January are beyond the relevant scope of conduct for sentencing purposes. (4) Marijuana smoking with other minors was not relevant conduct and thus should not be

incorporated into Amedeo’s sentence. None of the minors at issue here consumed cocaine, the drug that formed the offense of conviction.

GASKINS v. CROSBY, 2004 WL 1178461 (May 28, 2004)

Early release, habeas

A state prisoner filed for habeas under 28 U.S.C. § 2254 charging ex post facto violation for having forfeited gain-time and provisional credits statute after he was reincarcerated for violating control release. His petition was denied, and the 11th Circuit (PC) affirmed. “Neither the Ex Post Facto Clause nor any other part of the Constitution prevents a state from permitting a prisoner to bargain away earned release credits, any more than it prohibits a state from permitting a defendant to bargain away all of his trial rights or his right to appeal once convicted. And bargain is what Gaskins did. He struck a deal with the State of Florida concerning his release date. In return for the State permitting him to participate in a more generous early release program, Gaskins bargained away any right he had to have release credits he had earned earlier under other statutes forfeited only under the terms of those earlier statutes.”

THOMAS v. CROSBY, 2004 WL 1162208 (May 26, 2004)

Habeas; parole; 2241 & 2254

In a lengthy opinion 2-1, the Court applied last year’s Medberry decision to hold that a state prisoner’s § 2241 petition challenging the state parole board’s refusal to grant an effective parole release date was subject to the exhaustion requirement of § 2254. Judge Tjoflat rejected Medberry but affirmed anyway by applying common law exhaustion. [A rehearing en banc petition is pending.]

U.S. v. HAMMOND, 2004 WL 1153297 (May 25, 2004)

Judgment of Acquittal; government appeal; knowledge; making & possessing firearm; destructive device; 26 USC 5845

The government proved at trial that the defendant had made numerous tube-shaped, explosive devices, only a few of which ever created even a small explosion. One expert opined the defendant made it as a weapon. The basis of the charge was the defendant's failure to first register, pay taxes on, and obtain approval to make the firearm. After the district court reserved ruling on the JOA, the defense expert testified the ends of the device would have failed and prevented any serious explosion. The JOA motion was renewed and again reserved. After a guilty verdict, the court granted the JOA under Rule 29(b) based on all the evidence, ruling there was no evidence to objectively prove it was a destructive device" under 26 U.S.C. § 5845. The 11th Circuit affirmed: (1) Because the motion was renewed at the close of evidence, the court treated it as a new motion and not just renewed motion); (2) Although the statute's definition of firearm includes any explosive device, it also explicitly excludes from coverage any explosive device not designed for use as a weapon. "It is clearly insufficient proof under the statute to opine that an explosive device is designed as a weapon because it is an explosive device. Without some other evidence that a device was specifically designed as a weapon – the plus factor – the statutory requirement that a device be so designed is reduced to surplusage.

NELSON v. SCHOFELD, 2004 WL 1152033 (May 25, 2004)

Habeas; exhaustion; certiorari; waiver

The Court held that O'Sullivan v.

Boerckel, (U.S. 1999) (holding under 28 U.S.C. § 2254, that state prisoners must petition for discretionary review in the state supreme court in order to exhaust state remedies **IF** that review is part of the "ordinary appellate review procedure"), requires a petitioner challenging a Georgia conviction on direct appeal to petition the Ga. Sup. Ct. for certiorari to exhaust his state remedies. There was nothing "extraordinary" as defined in Boerckel about that state procedure. The Court rejected the defendant's argument that the government had waived the exhaustion defense, stating that "Waiver must be express and explicit . . ."

DAKANE v. U.S. ATTORNEY GENERAL, 2004 WL 1153300 (May 25, 2004)

Removal; ineffective assistance of appellate counsel

The Court rejected the immigrant's argument, in his motion to reopen his removal proceedings, that he did not have to show that his retained counsel's ineffectiveness prejudiced his removal proceedings. The argument was that counsel's actions deprived him of an appeal to the BIA. The Court recognized that, in this circuit, an alien in civil deportation proceedings has a constitutional right under the Due Process Clause to a fundamentally fair hearing and to effective assistance of counsel where counsel has been obtained. To establish ineffectiveness, the alien must show that counsel was so deficient that it "impinged upon the fundamental fairness of the hearing such that the alien was unable to reasonably present his or her case."

KINGSLAND v. CITY OF MIAMI, 2004 WL 1050743 (May 11, 2004)

Fourth Amendment: Probable Cause

Analysis Requires Consideration of Reasonableness of Police Investigation.

The Court held that the determination of whether there was probable cause for an arrest must include consideration not only of whether a quantum of facts existed that is independently sufficient – apart from other circumstances – to warrant an arrest, but must also consider surrounding factors, including not only the integrity of the evidence and the officers, but also the reasonableness of the investigation or lack of investigation by the police. Thus, in the context of an arrest for driving under the influence, “an officer may not exclusively rely on the outward signs that an individual is exhibiting, without considering them in the context of their surrounding circumstances. ... [I]f the investigating officers are fully aware that the person who exhibits [slurred speech, bloodshot eyes, and motor-skill symptoms of impairment] has, just moments before, been involved in a forceful automobile collision and has been crying, the presence or absence of probable cause is more ambiguous.” Where officers have “failed to conduct a reasonable investigation” of facts that might undermine probable cause, there may be failure to meet the probable cause standard of “reasonably trustworthy information [that] would cause a prudent person to believe, under the circumstances shown,” that the suspect committed an offense. Here, the officers’ claim that a recent accident victim appeared to be under the influence of marijuana was debatable where the officers performed no drug-related searches and sought no other corroboration of their asserted opinion that the smell of marijuana was present on the person of, or in the car driven by, the arrestee.

DRAPER v. REYNOLDS, 2004 WL 1086852 (May 17, 2004)

Fourth Amendment; probable cause to arrest; reasonable grounds for traffic stop; excessive force; pretextual stop

The Court affirmed under Whren (U.S. 1996) the grant of summary judgment in favor of the officer’s qualified immunity claim because a Georgia police officer had probable cause to stop a truck on I-85 for a defective tag light. After the valid stop, the subsequent arrest of Draper for obstructing an officer was supported by probable cause, where Draper belligerently disputed with the officer the appropriateness of the officer’s request that Draper retrieve his bill of lading and other relevant documents from the truck. Finally, due to Draper’s being “hostile, belligerent, and uncooperative,” the officer did not use excessive force in arresting Draper by shooting him in the chest with a taser gun, rather than simply telling Draper he was under arrest and letting the back-up unit on the scene apply handcuffs, without inflicting violence. “Because Draper repeatedly refused to comply with Reynolds’s verbal comments, starting with a verbal arrest command was not required in these particular factual circumstances.”

U.S. v. POLAR, 2004 WL 1067786 (May 13, 2004)

Immigration; ID documents; 18 USC 1546; jury instruction; willfulness; juror excusal

The Court affirmed the 18 USC 1546(a) conviction and sentence for possession of forged/counterfeit ID documents based on the passports bearing fraudulent ADIT stamp marks. (FYI: An ADIT stamp is placed in an alien's passport at a port of entry or INS office and serves as temporary proof of lawful permanent residence and INS authorization for employment, and it can be used to obtain a valid Social Security card.) The Court

rejected the defendant's argument that the offense required proof of willfulness, so the failure to instruct the jury on this point was not error. The defendant also challenged the district court's individual interview of a single juror who was holding out for an acquittal, and the court's *Allen* charge. The district court's juror interview was not an abuse of discretion, as it had reason to investigate potential misconduct based on three notes from the jury that this juror was refusing to vote based on a bias against the government and court system. A juror should be excused only when the district court satisfies itself, beyond a reasonable doubt, that no "substantial possibility" exists that the juror is basing his or her decision on the sufficiency of the evidence. Also, the court's discussion with the juror was not an *Allen* charge, did not suggest a particular outcome, and was not inherently coercive; rather, it merely reminded the juror to follow the instructions and the law, whether or not he agreed with it.

U.S. v. GUNN, 2004 WL 1057879 (May 12, 2004)

Firearms; felon-in-possession; co-conspirator liability; constructive possession; knowledge; gang membership; entrapment; *Massiah*

The Court reversed one defendant's felon-in-possession conviction arising out of a sting/robbery of a supposed cocaine stash house; guns were found post-arrest in a vehicle some defendants drove to the scene. The Court affirmed the § 924(c) convictions, because firearm possession can be constructive and one conspirator may be liable for a co-conspirator's possession that was reasonably foreseeable.

However, the law of co-conspirator liability applicable to 924(c) offenses does not immediately translate to felon-in-possession

offenses under 922(g), which rest on individual prohibitions on possession. They are "separate statutes with separate and distinct elements, and evidence sufficient to support a conviction under one statute may not be sufficient for conviction under the other." The Court did not decide whether co-conspirator liability also exists for 922(g)(1) offenses, because the government "expressly disavowed reliance upon that theory of liability." The Court sustained the convictions of two defendants based on their own acts. One was "the leader of the conspiracy," while another was a "key player" and an occupant of the gun-filled car with knowledge of the firearms in it.

Significantly, however, the evidence was insufficient as to a third defendant who "was not a principal player in the conspiracy" and did not arrive in the car with the guns. While he had knowledge of the firearms, knowledge alone is not enough to establish constructive possession.

The district court did not err in admitting evidence of defendants' gang membership; as to some defendants, the error was harmless because the government did not argue the point and the district court gave a limiting instruction; as to another defendant, any error was harmless because of his extensive participation in the offense. The defendants were not entitled to an entrapment jury instruction; no evidence suggested that any part of the conspiracy was pushed upon defendants, it began with the defendants' invitation, and "[a]lthough the government may have suggested the amount [of cocaine available to be taken], the defendants did not object to stealing 10 kilograms." The Court also found no Sixth Amendment violation, *see Massiah*, 84 S. Ct. 1199, 1203 (1964), in the secret taping of the defendants' conversation in a squad car post-arrest; police only listened

and did not elicit statements. Finally, under U.S.S.G. § 4B1.2, a prior conviction for *attempted* burglary qualifies.

U.S. v. USCINSKI, 2004 WL 1066605 (May 12, 2004)

Sentencing; obstruction; excessive fine

Uscinski, a lawyer investigated for money laundering, lied to government agents about transfers to an overseas bank account and later pled guilty to tax evasion under 26 U.S.C. 7201. The Court affirmed the obstruction enhancement, based on the misstatement, distinguishing a simple denial of guilt from the defendant's concocting a false, exculpatory story that misled the government. The Court accepted the government's concession that the district court erred in imposing a \$250,000 fine, which was above the guideline range.

U.S. v. BALLINGER, 2004 WL 32502310 (May 12, 2004) (en banc)

Arson; commerce clause; churches

The Court set for rehearing en banc its earlier decision, 312 F.3d 1264 (applying the Federal Damage to Religious Real Property Statute, 18 U.S.C. § 247(a)(1); holding statute not facially unconstitutional under Commerce Clause, but unconstitutional as applied where connections of churches to interstate commerce too insubstantial to satisfy statute's jurisdictional element; finding Ballinger's setting fire to churches in Georgia did not "substantially affect" interstate commerce; and rejecting argument that interstate travel sufficed).

U.S. v. BENNETT, 368 F.3d 1343 (May 7, 2004)

Severance; felon-in-possession; Rule 14; voir dire; search; knock and announce; 18 USC 3109; Rule 404(b); remoteness; 18 USC 115; sufficiency; protected class

The Court held that denial of the defense

motion to sever the felon-in-possession count was not an abuse of discretion; the defendant failed to "carry the heavy burden of establishing that the denial of the motion resulted in 'compelling prejudice against which the district court could offer no protection.' *United States v. Walser*, 3F.3d at 385." Two factors mitigated any prejudice from refusing to bifurcate the trial: the parties' stipulation avoided the jury hearing any details of the prior bad act; and the district court's instruction to consider it only as evidence on that count and not other counts. Similarly, addressing an issue of first impression, the Court held that 18 USC 115(a)(1) protects only the families of those listed in the statute, not the officials themselves. However, although the evidence was clearly insufficient, reversal was not mandated because Rule 7(c)(3) and an 1897 S. Ct. decision allowed sustaining the indictment on the basis of a statute other than the one cited in the indictment, the indictment clearly alleged facts constituting a crime under 18 USC 1114, and the government's error in misreading section 115 would not void the defendant's conviction. The Court also rejected the defendant's challenge to the credibility of law enforcement officers that they both knocked and announced their purpose (and saw subsequent movement inside) before using a battering ram to knock down the door; the district court finding the officers were credible, which was not based on "unbelievable" facts, was not clearly erroneous. Finally, the Court rejected other challenges to the experience of the expert drug witness, the relevant conduct for fixing drug quantity, his role enhancement, and the obstruction enhancement for perjured testimony on suppression issues; and the Court agreed that evidence of prior similar activity four months previous to the instant

charges was not too remote.

U.S. v. SIMMONS, 368 F.3d 1335 (May 7, 2004)

Upward departure; prior criminal history; extent of departure; applicable guidelines

The Court affirmed the defendant's 160-month sentence for carrying a firearm in relation to a drug offense, including the 100-month upward departure based on two prior felony convictions that could have resulted in career offender sentencing. The opinion includes an analysis of upward departures, concluding that the upward departure was based on encouraged grounds, not taken into account by the guideline, and was therefore appropriate. Applying the earlier explication of the "due deference" standard of review in *Williams*, 340 F.3d at 1239, the Court concluded the *de novo* standard was appropriate. The career offender guideline, which was not applicable, would have increased the sentence by at least 200 months. "The sentence to which an offender would have been subject under a patently inapplicable guideline is of no relevance to determining the sentence which should be imposed. Moreover, the Guidelines implicitly prohibit district courts from considering subsequent Guidelines amendments that result in substantive changes to the law." "By applying an incorrect legal standard in determining an appropriate sentence, the district court necessarily abused its discretion." Nevertheless, the sentence was succinctly affirmed as reasonable to incapacitate the defendant for an extended period of time given the extensiveness of his prior history. Also, the district court did not err in considering the 2002 guidelines, since the PSI was based on and the judge applied the 2001 guidelines, which were more lenient.

U.S. v. HURN, 368 F.3d 1359 (May 7, 2004)

Workers' compensation fraud; 18 USC 1920; sufficiency; preservation; plain error; jury instructions; causation; fair trial; excluding defense witness; compulsory process

The Court agreed the jury must find the defendant's false statements in her federal workers' compensation application actually led to her receiving over \$1,000 in benefits, but found the instructions given adequate on the "falsely obtained" and causation issue. The Court affirmed exclusion of a defense (attorney) witness that her benefits would not have been reduced even if she had reported her painting income as required. The Court extensively analyzed the four circumstances in which exclusion of defense evidence violates the compulsory process and due process guarantees, concluding that none were involved here. Finally, the Court rejected the defendant's argument that her painting was a hobby and not a "business enterprise" whose income must be reported. The Court was "quite sympathetic to this argument," but it was not raised as grounds for the JOA motion and did not constitute plain error.

BUTCHER v. U.S., 368 F.3d 1290 (May 5, 2004)

28 U.S.C. 2255; ineffective assistance; government appeal

The Court reversed the grant of a JOA to the CEO of a hospital corporation and a psychiatrist employed there as a physician and medical director; both aware that the latter was excluded from billing due to a prior mail fraud conviction, they were charged with various crimes including conspiracy to commit money laundering and conspiracy to defraud the United States by submitting false medical claims. Defendants alleged ineffective assistance of trial counsel in filing untimely motions for new trial; and the

district court grant of relief was reversed based on the lack of *Strickland* prejudice. "[W]hen the performance that is being challenged occurred in a proceeding from which the government would have had the right to appeal, [] "the result of the proceeding" mean[s] the result ... after appeal ... [if] what would have happened on appeal . . . can be ascertained with reasonable confidence." The Court said it had no doubt that the district court would have granted a new trial had the counsel acted effectively by properly filing the motion for a new trial. However, the government surely would have appealed that order, and the government's appeal would have been successful. Thus, no prejudice.

U.S. v. (ANTHONY F.) MURRELL, 368 F.3d 1283 (May 4, 2004)

Online sex deal; 2G1.1(b)(2)(B); fictitious victim; 2G1.1(b)(5)

The Court affirmed the conviction under 18 U.S.C. 2422(b) for using a facility of interstate commerce to attempt to knowingly persuade, induce, entice, or coerce a minor to engage in unlawful sexual activity, based on the defendant's online deal with a purported adult father to have sex with the father's minor daughter. The Court also concluded that (1) a two-level enhancement under 2G1.1(b)(2)(B) can apply to an offense involving a fictitious "victim"; and (2) a two-level enhancement under 2G1.1(b)(5) (2003) applies even the defendant's inducement was not directly expressed to a minor.

U.S. v. GRAY, 367 F.3d 1263 (Apr. 30, 2004)

Mail fraud; believability

The defendant offered to ensure that a defendant in an unrelated case would either not be convicted or would serve no time if he were. The target realized it was a scam, and

his lawyer called federal agents, who arrested the defendant. Gray's defense was based on *Brown*, 79 F.3d 1550 (holding that no mail fraud is committed if the act is not proved to have been "intended to create a scheme 'reasonably calculated to deceive persons of ordinary prudence and comprehension,'" and that the material misrepresentation must be such that "a reasonable person would have acted on" it). Gray thus argued that he had not committed mail fraud because no reasonable person would have acted upon the ridiculous averments. The Court disagreed, distinguishing *Brown* by holding that the initial letter, which was not preposterous on its face, constituted the completed crime of mail fraud under 18 U.S.C. 1341, regardless of the subsequent ridiculous averments that undermined the believability of the whole plot. BARKETT dissented on the ground that *Brown* controlled.

U.S. v. HEARD, 367 F.3d 1275 (Apr. 30, 2004)

Fourth Amendment; anonymous tip; reliability

An officer settled a public dispute, after which one of the parties told him that the other had a weapon. The officer initiated a stop and frisk, and the initial tipster fled. The officer discovered a handgun in the man's waistband. The Court distinguished *Florida v. J.L.* (holding that an anonymous tip, without sufficient indicia of reliability, will not establish reasonable suspicion), concluding that a tip given by a face-to-face informant, with sufficient indicia of reliability, may provide an officer with a reasonable suspicion sufficient to permit a protective pat-down.

U.S. v. CHAVARRIYA-MEJIA, 367 F.3d 1249 (Apr. 29, 2004)

Illegal reentry; crime of violence; statutory

rape; 2L1.2

The Court rejected the defendant's argument, holding that statutory rape is a crime of violence under the plain language of 2L1.2 and thus appropriate for the 16-level enhancement. The Court declined to decide whether amendments to 2L1.2's application notes made subsequent to sentencing applied to this defendant.

GONZALEZ v. DEP'T OF CORRECTIONS, 366 F.3d 1253 (Apr. 26, 2004) (en banc)

Rule 60; appeal; COA; habeas; fraud on the court

In three consolidated cases, under 28 U.S.C. 2254 & 2255, the en banc Court held (7-4) that a certificate of appealability is required to appeal from the denial of a motion for relief from judgment filed in the district court under Fed. R. Civ. P. 60(b), even where the motion is not a mere subterfuge for a successive habeas petition. Although the COA requirement in 28 U.S.C. 2253 applies only to "the final order" in habeas cases, this includes subsequent orders denying Rule 60(b) motions. This decision "serves to filter out from the appellate process cases in which the possibility of reversal is too unlikely to justify the cost to the system of a full appellate examination." Turning to the scope of Rule 60(b) in habeas cases, the Court held that given the successive petition limitations of 28 U.S.C. 2244 (applicable to both 2254 & 2255), the full scope of Rule 60(b) is not available to petitioners, and only a Rule 60(b)(3) motion alleging fraud affecting the judgment or a motion alleging clerical errors can be addressed by the district court. "Most of the provisions of Rule 60(b), which vest courts with broad discretion on a wide variety of grounds, are inconsistent and irreconcilable with the AEDPA's purpose" of restricting

federal relief for successive petitions by state prisoners. All other grounds should be presented in a § 2244 motion to file a successive petition. [NOTE: Of the four dissenters on the main legal issues, Chief Judge Edmondson and Judges Tjoflat, Barkett, and Wilson could not accept the Court's expansion of the COA requirement and limitation of Rule 60(b); Judge Tjoflat's opinion concluded that Gonzalez's intervening change in law claim deserved merits consideration in the district court.

U.S. v. PEREZ, 366 F.3d 1178 (Apr. 20, 2004)

Sentencing; environmental damage; double counting

Perez was convicted of numerous counts, mostly of environmental offenses under 33 U.S.C. 1311(a), 1319(c)(2)(A), and 1344. He was sentenced under 2Q1.3(b)(1)(A) and 2Q1.3(b)(4), the guidelines governing the mishandling of nontoxic environmental pollutants. The Court concluded the government does not have to prove actual environmental contamination under 2Q1.3; and there is no indication the Commission rejected double counting based on his failure to obtain a permit under these circumstances, and it is permitted if the Sentencing Commission intended the result while the applicable sentence enhancements concern conceptually separate notions related to sentencing.

DODD v. U.S., 365 F.3d 1273 (Apr. 16, 2004)

2255; statute of limitations; equitable tolling

The defendant sought relief under *Richardson*, 526 U.S. 813 (1999) (holding that a CCE conviction requires that the jury find the defendant guilty by a unanimous vote

of each of the constituent violations of the CCE); *see also Ross*, 289 F.3d 677 (11th Cir. 2002) (holding *Richardson* established a newly created right under 2255(3) and is retroactively applicable on collateral review). The Court held that, for purposes of 2255(3), the one-year statute of limitations begins to run on the date the Supreme Court initially recognizes the right. Because the instant 2255 motion was filed nearly two years afterwards, it was barred by the applicable one-year limitations period. Moreover, he was not entitled to equitable tolling of the limitations period because he had shown neither extraordinary circumstances nor the diligence necessary to toll the statute.

LYNN v. U.S., 365 F.3d 1225 (Apr. 14, 2004)

Appeal; fugitive disentitlement doctrine; 2255; procedural default; amendment; relation back; newly discovered evidence; due process; prosecutorial misconduct; sequestration violations

While the defendant's direct appeal was pending, his counsel filed a motion to adopt issues raised by a co-defendant. The appeal was dismissed because he escaped from custody, and the Court returned unfiled his motion to adopt issues and denied his motion for reconsideration. He was recaptured shortly afterwards. The Supreme Court denied a cert petition challenging the dismissal, but a few months later, the Eleventh Court reversed the convictions of two codefendants based on the prosecutor's improper vouching for a government witness, one of the issues raised in defendant's motion to adopt.

In 1997, the defendant filed a timely 2255 motion, raising this same issue. He later filed motions to amend the 2255 motion and to raise a "newly discovered claim" about government complicity in the witnesses'

tailoring of their testimony.

The district court granted the motions to amend but denied relief. A COA was granted on 3 issues: (1) application of the procedural bar to the 2255 motions; (2) the improper vouching claim; and (3) violation of the sequestration of witnesses.

The Court affirmed, holding that the improper vouching and witness sequestration claims were trial errors only cognizable on direct appeal, because unlike his two codefendants the evidence against him was sufficiently great to prevent the claim rising to the level of a constitutional error. He had not shown cause and prejudice for failure to raise the claims on direct appeal, because there was not really any "new evidence," and the argument about the government's complicity was not new; it had been mentioned in the published decision in the codefendant's case. Neither had he shown that any "objective factor external to the defense" prevented him from raising the sequestration claim on direct appeal. Instead, what prevented him was his own escape. Further, to the extent the defendant raised a pure, but stronger, witness sequestration claim, the applicable standard was that for a motion for new trial based on newly discovered evidence, set in *Jernigan*, 341 F.3d 1273, 1287 (11th Cir. 2003), which has five requirements, and which he did not meet.

To the extent the defendant raised a new and separate claim of prosecutorial misconduct based on complicity in the witness sequestration violations and tailoring of testimony, the Court doubted but did not question the relation back of the 1999 amendment because the government did not challenge it. Nevertheless, even if this newly discovered evidence satisfied the five *Jernigan* requirements, it failed on the merits because it contained only conclusory

allegations.

Finally, the Court rejected his argument that the usual procedural default rules should not apply because his direct appeal had been denied under the fugitive disenfranchisement doctrine; *Ortega-Rodriguez*, 507 U.S. 234 (1993), concluded the doctrine had been applied too broadly. The Court rejected the government's argument that the doctrine should preclude the 2255 entirely, but also rejected the defendant's argument that it should excuse his procedural default, as that would nullify the doctrine. Traditional habeas rules controlled once fugitive status ended.

HIGHTOWER v. SCHOFIELD, 365 F.3d 1008 (Apr. 12, 2004)

Capital habeas; psychiatric exam; ex parte hearing; Batson; death-prone jury; ineffective assistance

The Court affirmed the denial of relief to a death row defendant. The Court denied the defendant's claims (a) that he was improperly denied a psychiatric exam because he failed to make the requisite showing under *Ake v. Oklahoma* to trigger his rights and also received defense funds he could have used for such an exam; (b) that prosecutors should not have been allowed to attend all hearings regarding requests for psychiatric assistance, an issue properly reviewed for harmless error and on which there is no clear Supreme Court precedent stating that a higher standard is required; (c) that the *Batson* claim was without merit, even though the Court had previously criticized this particular prosecutor for past discriminatory practices, but could not say given the constraints of 2254 that the state court's conclusion in this case runs afoul of federal law; (d) that his claim that the jury was unconstitutionally predisposed to impose death was procedurally defaulted, not as the district

court had concluded because the defendant had erroneously framed the issue on direct appeal as a *Witherspoon* claim, when that standard had been replaced by *Adams-Witt*, but because the two jurors at issue were not the ones challenged on direct appeal; and (e) that counsel were not ineffective at either trial or sentencing.

Judge Wilson wrote a separate concurrence, outlining in note 1 the history of this prosecutor and emphasizing the proper *Batson* procedure out of concern that state courts had not applied it properly in this case.

KASTNEROVA v. U.S., 365 F.3d 980 (Apr. 8, 2004)

Extradition; habeas

The Court affirmed the denial of a habeas petition contesting a magistrate judge's issuance of a certificate permitting extradition to the Czech Republic. A valid extradition treaty exists between the Czech Republic and the United States, and there was sufficient evidence warranting the magistrate's finding that reasonable grounds exist to believe Kastnerova guilty of the charges. The district court had properly limited its review of the magistrate's certification to whether the magistrate judge had jurisdiction, whether the offense charged was within the treaty, and whether the government presented competent evidence upon which the magistrate could find there were reasonable grounds upon which to believe Kastnerova guilty of the charged offenses.

U.S. v. VEGA, 365 F.3d 988 (Apr. 8, 2004)
2K2.1(a)(5) cannot coexist with 18 U.S.C. 922(v)(2)

The Court reversed the defendant's sentence. Vega pleaded guilty to three counts of making false statements in connection with the purchase of firearms in violation of 18

U.S.C. 924(a)(1)(A). At sentencing, the court set his base offense level at 18 because, under 2K2.1(a)(5), his offense "involved a firearm described in . . . 18 U.S.C. § 921(a)(30)" - namely, an Action Arms UZI (listed in 18 U.S.C. § 921(a)(30)(A)(ii)) - and the firearm was not of the type "exempted under the provisions of 18 U.S.C. § 922(v)(3)." 2K2.1, comment. (n.3) (2003). However, because 922(v)(2) exempts all weapons purchased or transferred before Congress enacted the assault weapons ban in 1994, Vega objected on the ground that the enhanced offense level (18, as opposed to 12) should not apply because the government had not proved that the UZI was an *illegal* UZI, i.e., one manufactured after the semiautomatic assault weapons ban. The Court held that the Sentencing Commission "exceeded its authority" in providing for a sentencing enhancement for crimes involving semi-automatic weapons *legally* possessed under the grandfather provision of the 1994 assault weapons ban.

U.S. v. OKOKO, 365 F.3d 962 (Apr. 6, 2004)

Jurisdiction; supervised release; violation

The Court held that a district court did not have jurisdiction to find that Okoko violated his supervised release term because it had expired. The government had argued that the term of supervised release was tolled during the period the defendant had been deported, but the Court noted that deportation is not listed among the contexts which Congress provided for tolling of a supervised release period in 18 U.S.C. 3624(e) and 3583(i). Nor is tolling while a releasee is out of the country a condition which a court is authorized to impose under 3583(d). The Court recognized a district court's authority to impose "any other condition" for supervised release, but

pointed out that these conditions must relate to factors set forth in 3553(a)(1) and (a)(2)(B)-(D), and held that tolling while a probationer is out of the country does not relate to any of these factors. The Court also noted that an order of supervised release can require a defendant to remain outside the country, and reasoned that this condition logically precludes the tolling of a release: "A supervised release order cannot simultaneously be suspended and actively in effect." The Court noted that the supervised release goal of easing transition into everyday life would be thwarted if the supervised release were tolled and then reinstated several years or decades after the original imprisonment. [NOTE: There is a circuit split on this issue.]

U.S. v. STEPHENS, 365 F.3d 967 (Apr. 6, 2004)

Evidence; exculpatory; Rule 404(b); defense theory

The Court reversed the district court's exclusion of the defendant's exculpatory evidence, via three witnesses, that the cooperating defendant who he alleged had framed him had other sources of drugs and was actively involved with drugs while acting as an informant. The government failed to produce any evidence of directly incriminating conversations or transactions. Rule 404(b) did not permit or require the exclusion of this evidence. However, the conviction based on a search of the defendant, disclosing drugs and marked bills, was affirmed. Also, the defendant articulated reasons why he needed to introduce the evidence other than simply to portray the informant as a bad person. Consequently, Rule 404(a) did not require or permit the exclusion of this evidence.

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