

FEDERAL PUBLIC DEFENDER

<http://www.fpd-fln.org>

NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

Volume X, Issue II

July 10, 2009

REASON TO EXPECT SHORTER SENTENCES FOR CRACK COCAINE

After supporting for twenty years the 100-to-1 ratio between powder cocaine and crack cocaine, the United States Department of Justice has decided the right ratio should be 1-to-1. There remains, though, much uncertainty about how it will all play out and much work to be done, by the Department of Justice, Congress, the Sentencing Commission, and by defense lawyers.

On April 29th, speaking on behalf of the Department of Justice and before the United States Senate Judiciary Committee's Subcommittee on Crimes and Drugs, Assistant Attorney General Lanny Breuer testified that "The Administration believes Congress's goal should be to completely eliminate the sentencing disparity between crack cocaine and powder cocaine." Breuer went on to say that Attorney General Holder has formed a working group to "examine federal sentencing and corrections policy." Among the tasks to be performed by the group is that of "formulating a new federal cocaine

sentencing policy, one that completely eliminates the sentencing disparity between crack and powder cocaine but also fully accounts for violence, chronic offenders, weapon possession and other aggravating factors associated - in individual cases - with both crack and powder cocaine trafficking." According to Breuer, the "comprehensive solution" the Justice Department will be promoting is one that "embodies new quantity thresholds and perhaps new sentencing enhancements."

Two days later, on May 1st, Deputy Attorney General David Ogden issued a memorandum to all federal prosecutors. In it, he wrote: "Prosecutors should inform courts that the Administration believes Congress and the Commission should eliminate the crack/powder disparity, but that Congress has not yet determined whether or how to achieve a more appropriate sentencing scheme for crack and powder offenses. Until Congress acts, courts must exercise their discretion under existing case law to fashion a sentence that is consistent with the objectives of 18 U.S.C. § 3553(a). Prosecutors should be

governed by the facts and circumstances of individual cases and existing law. They may indicate that they will not object to a reasonable variance in an average case. As appropriate, prosecutors may oppose a variance based on case-specific aggravating facts (such as the use of violence, the presence of firearms, or recidivism) under the factors set out at 18 U.S.C. § 3553(a).” The memorandum does not provide any relief from the mandatory minimum sentencing scheme: “Prosecutors should continue to charge threshold quantities of crack cocaine required to trigger mandatory minimum (and higher maximum sentences) where those quantities are readily provable.”

United States Attorney Tom Kirwin sent letters to the District Court Judges in the Northern District. He largely tracks the memo from Ogden, saying “our AUSAs may not object to reasonable requests by the defense based on the cocaine base/powder cocaine in average cases.” As appropriate, we may oppose such requests based on case specific aggravating factors.”

All of this is good news, but there remains much uncertainty as to what will happen. Those serving sentences are already calling asking if they will benefit from the new policy. Nothing from the Justice Department, though, even hints at the Department’s view regarding retroactivity. Then, too, some have suggested that the disparity may be reduced by combining reduced penalties for crack with an increase in the penalties for powder cocaine. Until such time as the working group develops concrete proposals and Congress and the Sentencing Commission act, the guidance in David Ogden’s memo that “[p]rosecutors should be governed by the facts and circumstances of individual cases and existing

law,” leaves prosecutors with considerable latitude. The admonition that “prosecutors may indicate that they will not object to a reasonable variance in an average case,” is helpful, but falls short of a directive not to object to variances in the average case.

The suggestion that aggravating circumstances might justify a guidelines sentence adds to the uncertainty. As the sort of aggravating circumstances cited in Ogden’s memorandum - violence, firearms, recidivism - are generally already factored into the guidelines scoring, why is it they would justify a sentence based on the now discredited ratio?

In United States v. Gully, 2009 WL 1370898 (N.D. Iowa 5/18/09), District Court Judge Mark Bennett, rejected the “timid positions” of both the Government and the defense and struck out on his own. In a wonderfully thorough and compelling decision, he recounts the history of the disparity as set out in United States v. Kimbrough, 552 U.S. 85 (2007), cites Assistant Attorney General Breuer’s testimony before Congress, and concludes that “whether a defendant is an Eagle Scout or a street thug is irrelevant to the determination of the appropriate crack-to-powder ratio in a particular case, because that ratio should not be a proxy for factors that should properly be considered pursuant to 18 U.S.C. § 3553(a).” He found that “the appropriate methodology is to use a 1:1 crack-to-powder ratio not just in an individual case, but in all ‘crack’ cases, then to enhance sentences for individual defendants for trafficking offenses that actually involve weapons or bodily injury, or for other conduct warranting an enhancement under 18 U.S.C. § 3553(a).” In the end, Judge Bennett’s sentence of 84 months was greater

than the 30 to 37 months calculation based solely on a 1-to-1 ratio, but less than the 108 to 135 months sentence derived from a 100-to-1 ratio. True to his conclusions, Judge Bennett calculated the sentence using the 1-to-1 ratio, but then justified the greater sentence based upon a long list of aggravating circumstances: a history of assaultive conduct, continued drug dealing while on pretrial release, the defendant's role as a large supplier of crack cocaine, the defendant's irresponsible behavior of fathering six children by four women while having no employment history, evidence that the defendant had gotten his sister to "take the rap" for a prior assault, and a history of repeated offenses that suggested the defendant would continue to engage in criminal conduct.

In United States v. Lewis, 2009 WL 1591633 (D.D.C. 6/9/09), another opinion that refers to Breuer's testimony and also to Judge Bennett's decision in Gully, District Judge Paul Friedman makes his argument for adopting the 1-to-1 ratio. Judge Friedman, in rejecting the 188 to 235 month range derived from the 100-to-1 ratio, however, still imposed a sentence considerably higher than the range calculated on the basis of a 1-to-1 ratio. That ratio, which produced a range of 46 to 47 months, was trumped by the ten-year mandatory minimum. Judge Friedman added another 10 months to the ten years and imposed a sentence of 130 months. He justified the greater sentence on the defendant's long career of crime, some of which involved guns and some of which involved domestic violence.

Thus, much like the announcements from the Justice Department, these first two published decisions have much in them that is positive and that can be used to argue, here, in the

Northern District of Florida, for sentences based on a one-to-one ratio. Like the announcements, though, the opinions seemingly show an inclination to rely on circumstances that have not traditionally been used to justify above-guideline sentences, which has resulted in a less than full implementation of the new ratio.

There is, then, reason to believe that sentences will be shorter in crack cocaine cases. Reaching the lowest possible sentence, though, will require lawyers to convince judges that the one-to-one ratio is the right one. Lawyers, too, will also have to be prepared to address those circumstances that might be used to support longer sentences.

GOOD AND BAD NEWS IN NORTH FLORIDA SENTENCING STATISTICS

There is good and bad news in the fiscal year 2008 sentencing statistics for the Northern District of Florida. The good news is that there has been a slight trend toward lower sentences and that the average sentence of 104.7 months for 2008 is the decade's lowest. The bad news is that at 104.7 months, our average sentence is 84 percent higher than the national average of 56.9 months. Then, too, while no longer occupying the number one or two slot in the list of those districts across the country that have the longest average sentence, we are not far from the top. Of 94 federal districts, we have the 6th highest average sentence.

Our longest average sentence for the decade was in 2004 when it was at 121.4 months. Since then, it has decreased a few months each year, with the total decrease since then exceeding thirteen percent. The year's nearly seven-and-a-half month drop from last year's

112.1 months represents the biggest drop during the decade. This year's average, though, is not dramatically different from what had been the decade's previous low of 110.5 months back in 2001.

This year's leader was Southern Illinois at 113.79 months. They were followed by the Northern District of Alabama at 113.5 months, which had some unusually long child pornography sentences, and then Southern Indiana at 110.5 months, Central Illinois at 110.2, and Eastern North Carolina at 109.5 months. Other than the top six, there were no other districts that exceeded the century mark. In the Middle District of Florida, the average sentence was 74 months. It was 65.6 months in the Southern District of Florida. The lowest average sentence among the 94 federal districts was in New Mexico where the case statistics are dominated by immigration cases. There, the average sentence was an amazingly low 16 months.

In 2008, drug offenses represented 44.1 percent of all the cases filed in the Northern District. As they occupy such a large percentage of the total, the length of the average drug sentence contributes greatly to the overall average. North Florida is one of the few districts where the U.S. Attorney's Office seeks the statutory enhancements in every drug case. The result for 2008, was an average drug-trafficking sentence of 145 months, placing us second only to Northern Iowa, which averaged 156.8 months. The average for all of the 94 federal districts was 83.2 months. It was 102.7 months for the Middle District of Florida and 95.4 months for the Southern District of Florida.

We did do better than the national average in the filing of substantial assistance motions.

Motions filed pursuant to Section 5K1.1 of the Sentencing Guidelines were filed in 19.5 percent of all cases in the Northern District. The national average was 13.5 percent. There were 37 districts in which 5K1.1 motions were filed in a higher percentage of the cases. In the Middle District of Florida the prosecutors filed them in 19.7 percent of the cases. They filed them in only 9.2 percent of the cases in the Southern District of Florida.

We did not fare as well in other below-guideline sentences. Excluding fast-track departures in immigration cases, which are not given in the Northern District, and something called "other Government-sponsored departures," something else that does not occur in the Northern District, judges across the country imposed below-guideline sentences in 13.4 percent of all cases. Both the Southern and Middle Districts of Florida beat the national average, with a below-guideline rate of 15.5 percent and 14.8 percent respectively. Here, in North Florida, the rate was 8 percent. Overall, judges across the federal districts imposed within-guideline sentences in 59.4 percent of all cases. In North Florida, 70.7 percent of all sentences were within the guidelines.

The Sentencing Commission reported 37 trials in the Northern District, which represented 10.5 percent of all the cases sentenced pursuant to the Guidelines. Among all the federal districts, that was the fifth highest percentage for 2008. Two of the smaller districts, the Virgin Islands at 22 percent and the Northern Mariana Islands at 11.1 percent were in the top four. Northern Georgia at 11.4 percent and Eastern Pennsylvania at 12.9 percent were the other two districts that had higher trial rates than North Florida. The national average was 3.7

percent. In the Middle District of Florida, lawyers tried 5.9 percent of all cases. They tried 5.1 percent in the Southern District.

The number of cases fell notably in 2008. There were 351 in the Northern District, down from last year's total of 419, a 16-percent drop. The Middle District saw their case numbers increase from 1,604 to 1,669, a 4 percent increase. In the Southern District, the number decreased from 2,326 to 2,272, a 2 percent decline. The combined total for all of the federal districts in 2008 was 76,427, a 5 percent increase over 2007.

You can find all of these sentencing statistics and more at the Sentencing Commission's webpage: www.ussc.gov. They are in the *2008 Sourcebook of Federal Sentencing Statistics*.

PANEL TRAINING

This month Assistant Federal Public Defender Gwen Spivey will be making a live presentation in Panama City, Gainesville, Pensacola, and Tallahassee. She'll be discussing two recent important Supreme Court decisions, Begay v. United States, 128 S. Ct. 1581 (2008) and Chambers v. United States, 129 S Ct. 687 (2009) that will, at the very least, save many from being classified as armed career criminals or career offenders. More details of Gwen's presentation are available at our webpage, www.fpd.org. She'll be making her presentations at noon, and, with the exception of Gainesville, she will be at the federal courthouse. In Gainesville, she will be making her presentation in our office. The dates are:

Panama City: July 14

Gainesville: July 22

Tallahassee: July 23

Pensacola: July 30

In August, Federal Public Defender Randy Murrell will continue our hot summer brown bag luncheon series with another live presentation. He'll be talking about crack cocaine sentencing and the expected impact of the Attorney General's conclusion that the ratio between powder and crack cocaine should be 1-to-1. More details will soon be on our webpage.

INVESTIGATORS

Data released late last year by the Administrative Office of the Courts show a limited use of investigators by CJA panel members. For fiscal year 2007, panel members used investigators in 5.2 percent of all cases filed in the federal district courts. The practice varied dramatically, though, from one district to the next. In Oregon, panel members retained investigators in 32.8 percent of all cases. Panel members in Utah, where they were used in 29.5 percent of all cases, in California Eastern, where they were used in 25.4 percent of all cases, and in the Southern District of Florida, where they were hired in 22.9 percent of the cases, used investigators far more often than did panel members in the rest of the federal districts. There were six districts, including the Middle District of North Carolina and the Middle and Northern Districts of Alabama where panel members retained investigators in less than 1 percent of the cases. Here in the Northern District of Florida, panel members used investigators in 1.9 percent of all cases.

If you decide to hire an investigator, you are required to file a motion (*in camera*) and proposed order with the court asking for authorization to retain the expert and

authorization to expend a certain amount. Prudence dictates that in the motion you explain in detail the tasks you will be asking the investigator to perform, the justification for those tasks, the name of the investigator, the fee or hourly rate charged by the investigator, and information about the investigator's experience. The clerk will, in turn, send you a form, CJA 21, that you must fill out and return to get your investigator paid. Under the Criminal Justice Act, the district court judge can authorize an expenditure of up to \$1,600. Any claim in excess of \$1,600 must be approved prior to the performance of any investigative work by both the district court judge and the chief judge of the circuit.

In theory, you can incur up to \$500 worth of investigative services without first obtaining advance approval. Given the low cap, though, and the risk that the claim could ultimately be denied, it makes sense to always secure advance approval before putting the investigator to work.

A number of panel members recommended investigators. Those recommended are:

Charles Lance

L. Lance & Associates, LLC
P.O. Box 9985
Panama City Beach, FL 32417
(850) 960-5437

Bill Johnson

334 Hidden Island Drive
Panama City Beach, FL 32408
(850) 258-3848

John Krause

Private Investigator
P.O. Box 11678

Pensacola, FL 32524-1678
(850) 291-8540

Monica Jordan

Jordan Research and Consulting
610 N. Duval Street
Tallahassee, FL 32301
(850) 878-8308

Rick Fisher, Alison & Bill Blakeslee

Fisher and Blakeslee Investigations
204 W. University Avenue, Suite 5
Gainesville, FL 32601
(352) 375-0108

Donna Brown

Specialized Investigations Group
P.O. Box 14401
Tallahassee, FL 32317
888-235-7795

Hank Neal

Emerald I
5105 Highpointe Drive
Pensacola, FL 32505
(850) 484-4843

**NEW PLEA REQUIREMENTS FROM
JUDGE RODGERS**

In a letter sent to all Pensacola panel members on May 18th, Judge Rodgers announced her expectations regarding the review of plea agreements: "At a minimum, defense counsel should meet with defendants for a detailed review of the plea paperwork prior to the day of the hearing, but preferably several days prior, with counsel leaving a copy of the paperwork with the defendant for his continued consideration until the time of the hearing." In the letter, Judge Rodgers went on to state: "I will not accept a plea from a defendant who has seen the plea

paperwork for the first time on the day of the plea.” Judge Rodgers initiated this requirement because of “an increase in motions to withdraw pleas, most often based on a defendant’s contention he did not have adequate opportunity to review the plea paperwork with counsel prior to entry of the plea.”

SHARON WILSON APPOINTED TO THE PANEL OVERSIGHT COMMITTEE

Sharon Wilson of the Pensacola panel has joined the Panel Oversight Committee, having been appointed by Judge Rodgers this past April. She replaces Ken Ridlehoover who left private practice to join the state public defender office in Pensacola. Sharon joins panel members Thom Cassidy, Richard Greenberg, Gil Schaffnit, and Federal Public Defender Randy Murrell on the Committee. The Committee’s primary task is to review the applications of those who wish to join the panel and to make recommendations to the judges as to the suitability of those applicants.

OVERSIGHT COMMITTEE REVIEWING PANEL MEMBERSHIP

The term of all the current panel members expires this summer. The Panel Oversight Committee is currently in the process of reviewing the membership and will shortly be making recommendations to the judges as to the reappointment of those members. Recently, Federal Public Defender Randy Murrell emailed all the members to see if there were any who wanted to leave the panel. No one did.

This is only the second time the panel has been through this review. Prior to 2003, there

was no set term and no review. The last review took place in 2006 and nearly all panel members were reappointed. The Committee, though, will consider each members performance, success over time in complying with the training requirements, and willingness to accept appointments when called.

There is no need to reapply for membership. The Committee will review all of those who are now on the panel. The Committee expects the reappointment process to be complete by August.

TIME CHANGES TO FEDERAL RULES

Assuming no action on the part of Congress, the way time is calculated under the Federal Rules as well as many of the existing time limits will change as of December 1st of this year. The current rules exclude intervening weekends and holidays for those periods less than 11 days in appellate, civil, and criminal proceedings, and those periods less than 8 days in bankruptcy proceedings. With the change, a weekend day or a holiday will count just as any other day.

The shorter time limits, though, have been extended to offset the change in the time-computation rules. Five-day periods have become 7-day periods, and 10-day periods have become 14-day periods. Other time limits will be expressed in multiples of 7. For criminal practitioner’s, the most important change will be to Rule 4(b)(A) of the Appellate Rules. With the new rule, you will have 14 days to file a notice of appeal. The longest period of time that may pass before holding a preliminary hearing pursuant to Rule 5.1(c) of the Criminal Rules will be 14 rather than 10 days for those in custody and

21 days rather than 20 for those not in custody. Under Rule 35(a) of the Criminal Rules, courts will have 14 days instead of 7 to correct sentences. With the change in the calculation rules, all of these new time periods will include weekends and holidays.

The change will affect time periods for 91 federal rules and 28 federal laws.

MAYBE FIREARM SENTENCES DON'T HAVE TO RUN CONSECUTIVELY

In many parts of the country, including the Northern District of Florida, those being sentenced for carrying or using a firearm in connection with a crime of violence or a drug trafficking offense have always, pursuant to 18 U.S.C. § 924(c), received a consecutive sentence for the firearm. In imposing such sentences, the district courts have been following existing precedent from the 11th Circuit Court of Appeals. *See United States v. Wright*, 33 F.3d 1349 (11th Cir. 1994). Decisions from several circuits, however, have held that district courts are not always *required* to impose the sentence consecutively.

The opening clause in 18 U.S.C. § 924(c)(1)(A) states: “Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law . . .” Only after that “except” clause, does the statute set out the mandatory minimum sentences that have regularly been imposed. In *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008) and *United States v. Williams*, 558 F.3d 166 (2d Cir. 2009), the Second Circuit has held that the “except” clause excludes the imposition of the mandatory 5-year consecutive sentence (or in the case of brandishing or discharging

mandatory 7 and 10 years, respectively) if there is another greater mandatory sentence being imposed. That is, if, for example, a judge imposing a 15-year sentence under the Armed Career Criminal statute or a mandatory sentence for a drug trafficking offense that exceeds 5 years (or 7 or 10) is not required to impose a consecutive sentence for the firearm.

The Fifth and Eighth Circuits have acknowledged the “except” clause, although, they have limited its application to higher minimums contained in other firearms offenses. *See United States v. Collins*, 205 Fed.Appx. 196, 198 (5th Cir. 2006); *United States v. Alaniz*, 235 F.3d 386, 389 (8th Cir. 2000).

Thus, the issue is very much a live one. To pursue it, you need only to make the objection in your response to the presentence report and at the sentencing hearing.

VOUCHER PREPARATION SOFTWARE

At the recent panel training conference held in the Middle District of Florida, a number of panel members gave rave reviews to commercial software package for preparing CJA vouchers. You can buy it for \$49 or just try it out at: www.FedAtt.com.

DECISION IN MONTEJO V. LOUISIANA GIVES POLICE GREATER ACCESS TO QUESTION THOSE REPRESENTED BY LAWYERS

This past term, the Supreme Court, in *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088 (2009), concluded “it would be completely unjustified to presume that a defendant’s

consent to police-initiated interrogation was involuntary or coerced simply because he had previously been appointed a lawyer,” and held that law enforcement officers are free to question defendants after counsel has been appointed at the initial appearance. The Court suggested, too, that there was little value in attempting to invoke the right to counsel or the right to remain silent in anticipation of possible future questioning: “What matters for Miranda and Edwards is what happens when the defendant is approached for interrogation - not what happened at any preliminary hearing.” *Id.* at 2091.

Some defense counsel have suggested filing pleadings at the initial appearance in which the defendant invokes his right to remain silent or his right to have counsel present at any questioning. Others have suggested delivering or mailing a letter to the agent in which the client invokes those rights. Another suggestion, is that of handing the client a business card at the initial appearance with the invocation of those rights written on the back of the card and advising the client to hand the card to any officer who might subsequently approach the client for an interview.

Given the disparaging language in Montejo about anticipatory invocation of these rights, there is reason to be pessimistic about, at least, the first two suggestions. Maybe most importantly, defense counsel will need to emphasize to the new client that it is possible that he or she may subsequently be approached by law enforcement and stress the need not to talk to any law enforcement officers about anything.

NEW PANEL MEMBERS

Over the course of this year, we’ve added two

new panel members to the Pensacola division: James Messer and Christopher Klotz. Mr. Messer is a 1974 graduate of the West Virginia College of Law and holds an LLM degree from the George Washington School of Law. He maintains an active civil trial practice, was a former Judge Advocate Attorney with the United States Marines, and in the early nineties spent a year as a staff attorney for the Department of Justice in Washington, D.C. Mr. Klotz is a 1992 graduate of the Mississippi College School of Law. Mr. Klotz is an experienced criminal trial lawyer, having served as the Deputy Chief Defender in Hinds County Mississippi for six years. His practice is primarily criminal defense work, but he also represents clients in personal injury litigation.

INCREASE IN HOURLY RATE AND CASE MAXIMUMS

New hourly rates and case maximums went into effect on March 11th. The hourly rate was increased from \$100 an hour to \$110 an hour. The case maximums for felonies increased from \$7,800 to \$8,600, for felony appeals from \$5,600 to \$6,100, for misdemeanors from \$2,200 to \$2,400, and for violations of supervised release from \$1,700 to \$1,800.

DOWNWARD DEPARTURES

Miles, Dovico Mickle, S. Atty: Jerry Sanford
Docket: 1:08cr2
Charge: Conps. Dist > 50 g. crack
Range: Mandatory life
Sentence: 20 yrs BOP
Date of Imposition of Sentence: 12/8/08
Grounds: 5K1.1

Graves, Sonja Mickle, S. Atty: Gary Printy
Docket: 4:08cr29
Charge: Conps. Dist > 5 g. Meth

Range: 46 - 57 months w/5 yr min mand.
 Sentence: 24 months BOP
 Date of Imposition of Sentence: 3/23/09
 Grounds: Safety Valve and 5K1.1

Dice, Amy Mickle, S. Atty: Richard Greenberg
 Docket: 4:08cr29
 Charge: Conps. Dist > 50 g. substance
 containing Meth
 Range: 46 - 57 months w/5 yr min mand.
 Sentence: 24 months BOP
 Date of Imposition of Sentence: 3/23/09
 Grounds: Safety Valve and 5K1.1

Tompkins, Joseph Mickle, S. Atty: David Collins
 Docket: 4:08cr29
 Charge: Dist > 5 g. Meth
 Range: 37 - 46 months w/5 yr min mand.
 Sentence: 18 months BOP
 Date of Imposition of Sentence: 3/23/09
 Grounds: Safety Valve and 5K1.1

Quinn, Christopher Paul, M. Atty: Randy Murrell
 Docket: 1:07cr14
 Charge: Conps. to commit wire fraud & use of
 unauthorized access device
 Range: 27 - 33 months
 Sentence: 5 yrs Probation
 Date of Imposition of Sentence: 3/16/09
 Grounds: 5K1.1 and defendant had served one
 year on a related state charge

Thomas, Kinzie Paul, M. Atty: Randy Murrell
 Docket: 1:08cr4
 Charge: Conps. Dist > 50 g. crack
 Range: 262-327 months, mandatory life
 Sentence: 5 yrs Probation
 Date of Imposition of Sentence: 4/24/09
 Grounds: 5K1.1 (extensive)

Baher, John Rodgers, C. Atty: Randall Lockhart
 Docket: 3:08cr128
 Charge: Filing False Tax Return
 Range: 24 - 30 months
 Sentence: 5 yrs Probation w/6 mos. home
 detention
 Date of Imposition of Sentence: 4/28/09
 Grounds: 5K1.1 and significant health
 problems, reduced risk of recidivism

Hanson, Dana Hinkle, R. Atty: Alex Morris
 Docket: 4:08cr62

Charge: Conps. Dist >5 kilos cocaine &
 >100 kilos marijuana

Range: 70 - 87 months
 Sentence: 1 day BOP w/Supervised Release
 Date of Imposition of Sentence: 5/18/09
 Grounds: 5K1.1, limited role in the offense,
 and tragedies suffered by defendant - death of son, a
 soldier killed in Iraq, followed by the suicide of her
 husband.

Paul, Rhonda Hinkle, R. Atty: Bill Clark
 Docket: 4:08cr62
 Charge: Conps. Dist < 500 g. cocaine & <50
 kilo marijuana
 Range: 12 - 18 months
 Sentence: 4 yrs probation
 Date of Imposition of Sentence: 5/27/09
 Grounds: pursuant to 18 USC § 3553(a),
 court concludes this sentence is "sufficient"; defense
 motion for downward departure which Government
 did not object to

Rossel, Ashley Collier, L. Atty: Michelle Hendrix
 Docket: 3:09cr31
 Charge: Conps. PWITD > 500 g. meth
 Range: 121-151 months, 20 yr min mand
 Sentence: 60 months BOP
 Date of Imposition of Sentence: 6/26/09
 Grounds: 5K1.1

VARIANCES

Curry, LaFredrick Mickle, S. Atty: R. Murrell
 Docket: 4:08cr56
 Charge: Distribution of Ecstasy and BZP
 Range: 24 - 30 months
 Sentence: 15 months BOP
 Date of Imposition of Sentence: 3/23/09
 Grounds: While Judge Mickle found that
 BZP most resembled amphetamine for purposes of
 sentencing guidelines calculations, an expert opinion
 submitted by the defense showing that BZP was only
 1/10th as potent as amphetamine.

Woodham, Jon Collier, L. Atty: Jim Jenkins
 Docket: 3:08cr106
 Charge: Possession of Child Pornography
 Range: 78 - 97 months
 Sentence: 12 months BOP
 Date of Imposition of Sentence: 4/20/09
 Grounds: defendant immediately submitted to
 psychological evaluation and polygraph test; defendant

is in lowest group for reoffending; significant remorse; objective tests showing defendant not a pedophile; only involved in offense for a brief period of time; despite disadvantaged background defendant put himself through school and earned a doctorate degree; defendant's depression contributed to the offense; stability in employment; court recognized shortcomings in the applicable sentencing guideline.

Morado, Robert Collier, L. Atty: Randall Lockhart
 Docket: 3:08cr8
 Charge: Sexual Abuse of a Minor
 Range: 41 - 51 months
 Sentence: 24 months BOP
 Date of Imposition of Sentence: 6/1/09
 Grounds: Defendant was borderline mentally retarded

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

Lloyd Vipperman, Gene Hatfield, Steve Bernstein, and Steve Johnson came away with good outcomes in a recent five-day Gainesville marijuana grow case. **Lloyd** won for his client, Minerva Quintana, a judgment of acquittal from Judge Mickle for the charges of conspiring to grow more than 1,000 marijuana plants and possession with intent to grow more than 1,000 marijuana plants. Ms. Quintana had been facing a mandatory minimum 10 year sentence. **Steve Johnson**, whose client, Doreen Sager, was charged with obstructing an official proceeding by hiding forfeitable assets, likewise won a judgment of acquittal. **Steve Bernstein** and **Gene Hatfield** won lesser convictions for their respective clients, William Erickson and Lorenzo Sac. The jury acquitted Sac of conspiring to grow more than 1,000 plants and found him guilty of a lesser offense of growing less than 1,000 plants. The jury found Erickson guilty of the

lesser charges of conspiring to grow less than 1,000 plants and of growing less than 1,000 plants. As of the result of the verdicts against Erickson and Sac, the mandatory minimum sentence they are facing was reduced from ten years to five.

Randall Lockhart of our Pensacola office convinced the United States Attorney's Office to move to dismiss a misdemeanor case of theft of government property where his client, Anthony Mills, faced a loss of his job and pension. With a considerable amount of investigation, **Randall** was able to show the government that the "stolen" items were items that had been discarded and lacked any real value.

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

CASE SUMMARIES

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

Certiorari Granted

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

BRISCOE v. VIRGINIA, 2009 WL 1841615, No. 07-11191 (June 29, 2009)

(reviewing 657 S.E.2d 113 (Va. 2/29/09))

Confrontation Clause

Question presented: Whether statutes that provide for the admission of a forensic analysts' certificate of laboratory analysis without testimony from the analysts violate defendants' Confrontation Clause rights.

WEYHRAUCH v. U.S., 2009 WL 789239, No. 08-1196 (June 29, 2009) (reviewing No. 07-30339 (9th Cir. 11/26/08))

Fraud

Question presented: "Whether, to convict a state official for depriving the public of its right to the defendant's honest services through the non-disclosure of material information, in violation of the mail-fraud statute (18 U.S.C. §§ 1341 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law."

U.S. v. COMSTOCK, 2009 WL 908431 (Mem), No. 08-1224 (June 22, 2009) (reviewing 551 F.3d 274 (4th Cir. 2008))

Necessary and Proper Clause, Adam Walsh Act, civil commitment

Questions presented: Whether Congress had the constitutional authority to enact 18 U.S.C. 4248, which authorizes court-ordered civil commitment by the federal government of (1) "sexually dangerous" persons who are already in the custody of the Bureau of Prisons, but who are coming to the end of their federal prison sentences, and (2) "sexually dangerous" persons who are in the custody of the Attorney General because they have been found mentally incompetent to stand trial.

FLORIDA v. POWELL, 2009 WL 741877 (Mem), No. 08-1175 (June 22, 2009) (reviewing 998 So. 2d 531 (Fla. 2008))

Miranda

Questions presented: (1) Whether the decision of the Florida Supreme Court holding that a suspect must be expressly advised of his right to counsel during custodial interrogation, conflicts with *Miranda* and decisions of federal and state appellate courts. (2) And if so, does the failure to provide express advice of the right to the presence of counsel during questioning vitiate *Miranda* warnings which advise of both (a) the right to talk to a lawyer "before questioning" and (b) the "right to use" the right to consult a lawyer "at any time" during questioning?

BLACK v. U.S., 129 S. Ct. 2379 (Mem), No. 08-876 (May 18, 2009) (reviewing Nos. 07-4080, 08-1072, 08-1106 (7th Cir. 6/25/08))

Fraud

Question Presented: Whether the "honest services" clause of 18 U.S.C. § 1346 applies in cases where the jury did not find - nor did the district court instruct them that they had to find - that the defendants "reasonably contemplated identifiable economic harm," and if the defendants' reversal claim is preserved for review after they objected to the government's request for a special verdict.

BEARD v. KINDLER, 129 S. Ct. 2381 (Mem), No. 08-992 (May 18, 2009) (reviewing Nos. 03-9010, 03-9011 (3rd Cir. 9/3/08))

Habeas

Question Presented: Is a state procedural rule automatically "inadequate" under the adequate-state-grounds doctrine - and therefore unenforceable on federal habeas corpus review - because the state rule is discretionary rather than mandatory?

WOOD v. ALLEN, 129 S. Ct. 2389 (Mem),

No. 08-9156 (May 18, 2009) (reviewing No. 06-16412 (11th Cir. 9/16/08))

Habeas

Questions Presented: (1) Whether a state court's decision on post-conviction review is based on an unreasonable determination of the facts when it concludes that, during the sentencing phase of a capital case, the failure of a novice attorney with no criminal law experience to pursue or present evidence of defendant's severely impaired mental functioning was a strategic decision, while the court ignores evidence in the record before it that demonstrates otherwise? (2) Whether the rule followed by some circuits, including the majority in this case, abdicates the court's judicial review function under the Antiterrorism and Effective Death Penalty Act by failing to determine whether a state court decision was unreasonable in light of the entire state court record and instead focusing solely on whether there is clear and convincing evidence in that record to rebut certain subsidiary factual findings?

GRAHAM v. FLORIDA, 129 S. Ct. 2157 (Mem), No. 08-7412 (May 4, 2009) (reviewing No. 1D06-3190 (Fla. 1st DCA); and

SULLIVAN v. FLORIDA, 129 S. Ct. 2157 (Mem), No. 08-7621 (May 4, 2009) (reviewing No. 1D07-6433 (Fla. 1st DCA)

Eighth Amendment, juvenile life sentences

Question presented: Whether imposition of a life sentence on a juvenile for a non-capital offense violates the Eighth Amendment?

BLOATE v. U.S., 129 S. Ct. 1984 (Mem), No. 08-728, (Apr. 20, 2009) (reviewing No. 07-2357 (8th Cir. 7/25/08))

Speedy Trial Act

Questions presented: The Speedy Trial Act, 18 U.S.C. § 3161 et seq., requires that a

criminal defendant be tried within 70 days of indictment or the defendant's first appearance in court, whichever is later. In calculating the 70-day period, 18 U.S.C. § 3161(h)(1) automatically excludes "delay resulting from other proceedings concerning the defendant, including but not limited to * * * (D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion" (emphasis added). The question presented here is whether time granted to prepare pretrial motions is excludable under § 3161(h)(1).

U.S. v. STEVENS, 129 S. Ct. 1984 (Mem), No. 08-769 (Apr. 20, 2009) (reviewing No. 05-2497 (3rd Cir. 7/18/08))

First Amendment, depictions of animal cruelty

Question presented: Section 48 of Title 18 of the United States Code prohibits the knowing creation, sale, or possession of a depiction of a live animal being intentionally maimed, mutilated, tortured, wounded, or killed, with the intention of placing that depiction in interstate or foreign commerce for commercial gain, where the conduct depicted is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, and the depiction lacks serious religious, political, scientific, educational, journalistic, historical, or artistic value. The question presented is whether 18 U.S.C. 48 is facially invalid under the Free Speech Clause of the First Amendment.

POTTAWATTAMIE COUNTY, IA, ET AL. v. MCGHEE, CURTIS W., ET AL., 129 S. Ct. 2002 (Mem), No. 08-1065 (Apr. 20, 2009) (reviewing Nos. 07-1453, 07-1524 (8th Cir. 11/21/08))

Question presented: Whether a prosecutor

may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly violated a criminal defendant's "substantive due process" rights by procuring false testimony during the criminal investigation, and then introduced that same testimony against the criminal defendant at trial.

Supreme Court Cases

M E L E N D E Z - D I A Z v . MASSACHUSETTS, 2009 WL 1789468, No. 07-591 (June 25, 2009)

***Crawford*, Confrontation Clause violation found**

The Court held that it was a Sixth Amendment violation for the state to permit the prosecution, over objection, to introduce sworn certificates of state laboratory analysts stating that material seized by police and connected to petitioner was cocaine of a certain quantity. Those affidavits are "testimonial," rendering the affiants "witnesses" subject to the defendant's right of confrontation under the Sixth Amendment.

SAFFORD UNIFIED SCHOOL DISTRICT #1 ET AL. v. REDDING, 2009 WL 1789472, No. 08-479 (June 25, 2009)

School strip search, Fourth Amendment violation found

The Court held that a 13-year-old student's Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school. "Because there were no reasons to suspect the drugs presented a danger or were concealed in her underwear, we hold that the search did violate the Constitution. But, the Court (Souter, 6-3) said

" because there is reason to question the clarity with which the right was established, the official who ordered the unconstitutional search is entitled to qualified immunity from liability."

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT v. OSBORNE, 129 S. Ct. 2308, No. 08-6 (June 18, 2009)

No constitutional right to DNA testing

The Court held that there is no free-standing constitutional right for convicted felons in post-conviction proceedings to access DNA testing of evidence.

YEAGER v. U.S., 129 S. Ct. 2360, No. 08-67 (June 18, 2009)

Double jeopardy, hung jury

The Court held that "that the consideration of hung counts has no place in the issue-preclusion analysis [of the Double Jeopardy Clause]. . . Thus, if the possession of insider information was a critical issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element."

NIJHAWAN v. HOLDER, 129 S. Ct. 2294, No. 08-495 (June 15, 2009)

***Taylor/Shepard* categorical approach inapplicable to 8 U.S.C. § 1101(a)(43)(M)(i)**

The Court held that because 8 U.S.C. § 1101(a)(43)(M)(i) is worded substantially different than the ACCA, the categorical approach applied to the ACCA in *Taylor*, *Shepard*, and their progeny does not apply, thereby permitting an offense-specific inquiry into a prior conviction.

BOYLE v. U.S., 129 S. Ct. 2237, No. 07–1309 (June 8, 2009)

RICO

The Court held that an association-in-fact enterprise under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §1961 et seq., must have a “structure,” but that it need not be an “ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages.”

CAPERTON v. A. T. MASSEY COAL COMPANY, INC., 129 S. Ct. 2252, No. 08-22 (June 8, 2009)

Due Process, Recusal of judge

The Court held that the Due Process Clause of the Fourteenth Amendment was violated when a state justice participated in a case over objection after having received extraordinary campaign contributions from the board chairman and principal officer of the corporation found liable for the damages in the case under review.

U.S. v. DENEDO, 129 S. Ct. 2213, No. 08-267 (June 8, 2009)

Military courts

The Court held that an Article I military appellate court has jurisdiction to entertain a petition for a writ of error coram nobis based on ineffective assistance of counsel to challenge its earlier, and final, decision affirming a criminal conviction.

BOBBY v. BIES, 129 S. Ct. 2145, No. 08-598 (June 1, 2009)

Double jeopardy; issue preclusion doctrine; capital post-conviction

The Court held that, post-*Adkins*, the issue preclusion doctrine of the Double Jeopardy Clause did not bar the state of Ohio from conducting a full hearing on a capital defendant’s mental retardation.

ABUELHAWA v. U.S., 129 S. Ct. 2102, No. 08-192 (May 26, 2009)

Facilitating felony drug distribution

The Court held that making a misdemeanor drug purchase by using a phone to call the drug dealer is not facilitating the felony of drug distribution under 21 U. S. C. §843(b).

MONTEJO v. LOUISIANA, 129 S. Ct. 2079, No. 07-1529 (May 26, 2009)

Sixth Amendment waivers, *Michigan v. Jackson* overruled

The Court held that the Sixth Amendment does not require law enforcement to refrain from initiating interrogation of suspects even though their Sixth Amendment rights attached, so long as there is a valid *Miranda* rights waiver. The prophylactic purpose of *Edwards*, “to preclude the State from badgering defendants into waiving their previously asserted rights,” and *Minnick*, which held that no subsequent interrogation may take place until counsel is present whether or not the accused has consulted with his attorney,” is sufficiently served without the aid of *Jackson* once the right to counsel has attached.

FLORES-FIGUEROA v. U.S., 129 S. Ct. 1886, No. 08-108 (May 4, 2009)

Aggravated identity theft

The Court held 18 U.S.C. 1028(a)(1) requires that the government prove the defendant convicted of aggravated identity theft knew that the means of identification used belonged to another person.

CONE v. BELL, WARDEN, 129 S. Ct. 1769, No. 07–1114 (Apr. 28, 2009)

Capital Habeas, state bars to federal review, *Brady*

The Court held that *Brady* claims in state capital post-conviction proceedings were not

procedurally barred despite the state's claim that the decisions had been based on an independent and adequate state ground to deny federal review.

KANSAS v. VENTRIS, 129 S. Ct. 1841, No. 07-1356 (Apr. 29, 2009)

Impeachment admissible despite Sixth Amendment Right to Counsel violation

The Court held that a prisoner's statement to an informant, concededly elicited in violation of the Sixth Amendment, was nonetheless admissible to impeach his inconsistent testimony at trial.

DEAN v. U.S., 129 S. Ct. 1849, No. 08-5274 (Apr. 29, 2009)

Accidental discharge of firearm, 18 U.S.C. § 924(c)(1)(A)(iii)

The Court held that a 10-year mandatory minimum for the discharge of a firearm during or in relation to a drug crime is permissible even where the discharge is accidental.

ARIZONA v. GANT, 129 S. Ct. 1710, No. 07-542 (Apr. 21, 2009)

4th Amendment, *Belton* limited

The Court held that *Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle," although circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle."

CORLEY v. U.S., 129 S. Ct. 1558, No. 07-10441 (Apr. 6, 2009)

Inadmissible confessions, *McNabb-Mallory* exclusionary rule retained

The Court held that under 18 U.S.C. § 3501(c), a district court must to "find whether

the defendant confessed within six hours of arrest (unless a longer delay was 'reasonable considering the means of transportation and the distance to be traveled to the nearest available [magistrate]'). If the confession came within that period, it is admissible, subject to the other Rules of Evidence, so long as it was 'made voluntarily and . . . the weight to be given [it] is left to the jury.' If the confession occurred before presentment and beyond six hours, however, the court must decide whether delaying that long was unreasonable or unnecessary under the *McNabb-Mallory* cases, and if it was, the confession is to be suppressed."

HARBISON v. BELL, 129 S. Ct. 1481, No. 07-8521 (Apr. 1, 2009)

Appointment of federal counsel in state clemency, certificate of appealability

The Court held (1) denial of counsel's motion to enlarge the scope of representation, as with an order denying appointment of counsel, is an appealable order under 28 U.S.C. § 1291, requiring no Certificate of Appealability under 28 U.S.C. § 2253(c)(1)(A); and (2) 18 U.S.C. § 3599(e) authorizes federally appointed counsel to represent clients in state clemency proceedings.

RIVERA v. ILLINOIS, 129 S. Ct. 1446, No. 07-9995 (Mar. 31, 2009)

Peremptory challenges, no automatic reversal

The Court held that provided all jurors seated in a criminal case are qualified and unbiased, the Due Process Clause does not require automatic reversal of a conviction because of the trial court's good-faith error in denying the defendant's peremptory challenge to a juror.

PUCKETT v. U.S., 129 S. Ct. 1423, No. 07-9712 (Mar. 25, 2009)

Violation of plea bargain is not plain error

The Court held that a prosecution's violation of sentencing terms of a plea bargain must be objected to in the trial court, and if, not, it must be subjected to the plain error standard of review under Federal Rule of Criminal Procedure 52(b).

KNOWLES v. MIRZAYANCE, 129 S. Ct. 1411, No. 07-1315 (Mar. 24, 2009)

Review standards for state habeas, ineffective assistance

The Court held that under § 2254(d)(1), the Ninth Circuit applied “an improper standard of review—it blamed counsel for abandoning the [not guilty by reason of insanity (NGI)] claim because there was nothing to lose by pursuing it. But this Court has held on numerous occasions that it is not “an unreasonable application of clearly established Federal law” for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.” Alternatively, the Court concluded under *de novo* review that Mirzayance could not establish deficient performance and prejudice as required by *Strickland* when he simultaneously pleaded not guilty and not guilty by reason of insanity to 1st degree murder.

VERMONT v. BRILLON, 129 S. Ct. 1283, No. 08-88 (Mar. 9, 2009)

Speedy trial, delays attributable to appointed counsel

The Court held that delays attributable to State-appointed defense counsel, just as delays attributable to privately retained defense counsel, are attributable to the defendant and cannot be counted against the State in a Sixth Amendment speedy trial balancing analysis

under *Barker v. Wingo* (1972) so long as they are not result of a systemic breakdown in the public defender's system.

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. VALENCIA-TRUJILLO, 2009 WL 1929257 (July 7, 2009)

Standing to raise rule of specialty, Grand Jury Clause, *Franks*, *Batson*, sufficiency

Judge Carnes, in yet another of his growing literary efforts, summed up this case by saying “Valencia-Trujillo was not railroaded but was fairly caught and convicted. He enjoyed a wild ride but was overtaken by the Panama Express, which may be his earthly version of ‘The Hell-Bound Train.’” Law enforcement operated the “Panama Express,” an infiltration and investigation of an international drug smuggling and distribution ring in South and Central America. Valencia-Trujillo, the purported leader, was convicted of drug and money laundering crimes. The Court affirmed, holding (1) No error in prosecuting him for offenses beyond those Colombia authorized in his extradition papers (Rule of Specialty) because he had no standing to raise claim as he did not prove under what treaty under he was extradited; (2) No Grand Jury Clause violation in CCE conviction because he had ample notice of the predicate acts; (3) no *Franks* violation principally because “a criminal defendant does not have the right to challenge how he came to be within the jurisdiction of the prosecuting country.” (4) No *Batson* error due to race-neutral exclusions; (5) evidence was sufficient.

U.S. v. GOINGS, 2009 WL 1927455 (July 7, 2009)

Fourth Amendment, *Virginia v. Moore*

Officers of the Thomas County, Georgia – Thomasville Narcotics/Vice Squad engaged in a high-speed chase of Goings and crossed into Leon County, Florida, to make the arrest. Goings moved to suppress evidence found at the time of his arrest. He argued that although Florida law allowed officers to arrest an individual outside of their jurisdiction when in fresh pursuit, that law was inapplicable because there was no interstate compact between Thomas County, Georgia, and Leon County, Florida. The Court affirmed, relying on *Virginia v. Moore* (2008), to hold that “it was irrelevant for purposes of the Fourth Amendment whether Goings’s arrest violated state law, so long as it was supported by probable cause.”

U.S. v. BARNER, 2009 WL 1842564 (June 29, 2009)

Suppression; statements; sentencing; 5K1.1; withdrawal; vindictiveness; downward departure; AUSA misleading court?; acceptance of responsibility

The Court affirmed the conviction for possession of MDMA under 21 USC 841 but remanded for resentencing on two grounds. (1) The 12-day delay between the Miranda warnings and a subsequent interrogation gave the Court pause, the second meeting was initiated by defendant and under circumstances (visitors' room, glass divider, and brief meeting during which defendant merely gave officer list requested earlier) that removed the need for repeated warnings. Also, because adversarial proceedings had not been initiated, there was no Sixth Amendment right to counsel. (2) The Court avoided deciding whether the government had improperly withdrawn its 5K1.1 motion, after defendant

was allowed to withdraw his plea, was reindicted on additional counts, offered to plead guilty to part of them, and then proceeded to trial; it was arguably harmless because the plea agreement obligated the government to recommend a 144-month sentence and only 87 months was imposed. "Indeed, after *Booker*, a judge basing a sentence under the considerations outlined in 18 U.S.C. 3553 may take a defendant's substantial assistance into account even if a prosecutor withdraws (or does not file) a 5K1.1 motion. *United States v. Fernandez*, 443 F.3d 19, 33 (2d Cir. 2006)." The Court expressed concern that the AUSA "may have misled the district judge as to the nature and extent of Barner's cooperation," noting that "The record, however, flatly contradicts the representations upon which the district judge relied" in declining to give credit for defendant's cooperation. Because the sentence was based on clearly erroneous facts, it was remanded for reconsideration, citing *Gall* for the proposition that this was significant procedural error. Likewise, the Court remanded for resentencing because denial of the 3-point reduction for acceptance was error his withdrawal of his guilty plea and proceeding to trial was not inconsistent with his prior admissions of guilt and cooperation, and the PSI's recommendation of acceptance credit; also, he offered to plead guilty to the sole count of the fifth superseding indictment on which he was later convicted. The district court had failed to consider the reasons for defendant's decision and the apparent validity of those reasons.

U.S. v. WILK, 2009 WL 1842523 (June 29, 2009)

Evidence; victim's steroid use; proper police procedure; defendant's medical records (defendant's HIV); privileges;

Fourth Amendment; FRE 501; privacy; jury instruction; modification; self-defense

The Court rejected all arguments from this defendant convicted of killing federal officers who entered his home: (1) There was no abuse of discretion in excluding evidence of the slain officer's steroid use and of improper procedure in entering the defendant's home, in support of defendant's self-defense argument that the steroid use supported argument that officers entered his home acting like armed invaders; while the officers' actions were relevant, the reasons underlying those actions tended to neither prove nor disprove any material fact at issue. The Court noted the defendant testified for six days, undermining his claim he was unable to present his version of events to the jury. Even if the steroid use had some relevance, it was not crucial or necessary to the defense. Likewise, expert testimony about proper police procedure during entry was correctly excluded, as it had no relevance and would not assist the jury. (2) The Court noted the defendant did not object to the admission of his medical records under the Fourth Amendment, but only under FRE 501, so review was only for abuse of discretion. The records of psychologists at FDC were excluded under the psychiatrist-patient privilege, but it was inapplicable to other medical, non-psychological records, and defendant had signed an Informed Consent Form allowing release "as specifically required by law," which included a grand jury subpoena. As for defendant's HIV status and treatment, records were admissible because defendant relied on his mental status from AIDS dementia as central to his defense. Also, HIPAA authorizes their disclosure. And, there is no physician-patient privilege in federal criminal trials. (3) The district court's modification of the self-defense jury instruction (to add "the defendant knew or had

reason to know were federal officers") was not error.

U.S. v. FLORES, 2009 WL 1842652 (June 29, 2009)

Jury selection; cause; ADD; panel challenge; presumption of innocence; defendant's incarceration; due process; evidence; sufficiency; murder; hearsay; coconspirator; FRE 801(d)(2)(E); furthering interests of conspiracy; identity of CI; jury instruction; justification; interstate commerce; sentencing; 8th Amendment; cruel and unusual; RICO & VICAR; Juvenile Delinquency Act; 18 USC 5031, 1963; age at indictment

The Court affirmed the RICO- and murder-related convictions and sentences of 5 members of a nationwide Hispanic gang, Surenos 13 (Sur-13), with chapters in several cities. (1) The cause excusal of a veniremember, who said her untreated Attention Deficit Disorder (ADD) might cause her mind to wander, without further inquiry, was not an abuse of discretion, particularly in such a complicated, lengthy case. (2) The affirmative answer of a veniremember who was employed as a correctional officer, to the court's question whether he had "dealt with" any of the defendants, did not require striking of the whole panel instead of just the juror; the brief reference to the accused's incarceration, in context, was "unlikely to prejudice the jury sufficiently" to rise to the level of a due process violation. It did not create a danger of a continuing influence throughout the trial and did not point to any particular defendant. (3) The evidence of Flores' involvement in one murder was sufficient, in spite of testimony by co-conspirator gang members, one of whom had previously lied to police, resulting in 2 innocent gang members being

charged (and convicted after guilty pleas) of the murder; the testifying members confirmed each other, and the jury was free to believe them; (4) The admission of testimony from another gang member, about a third member's hearsay statement to him regarding defendant's involvement in a charged murder, Flores argued the statements were not in furtherance of the conspiracy, and therefore not admissible, because the gang leader had instructed members not to talk about the shooting. The factual finding was not clearly erroneous; the statement further the conspiracy's interests by increasing Flores' stature in the gang and so was admissible. (5) After a former gang member testified for the government that he had acted as a CI, an agent bolstered his testimony by saying he had a second CI source; the district court declined to compel the government to identify the second CI, but instructed the jury to disregard that testimony; this ruling was not an abuse of discretion, applying the three-part test. (6) The district court did not abuse its discretion in denying defendant's proposed jury instruction on justification (to murder charge) and related issues, because defendant did not establish the elements of this affirmative defense to require this instruction. (7) The Court declined to decide whether *Bernard*, 47 F.3d 1101 (11th Cir. 1995) (holding that, in light of congressional findings in the Controlled Substances Act, the interstate commerce element has been proven by definition in a drug possession and sale case), has been abrogated by *Booker* and its progeny, even though the Second Circuit has so concluded, because; the jury instruction here was harmless in any event. (8) A life sentence for RICO and VICAR (violent crime in aid of racketeering) convictions, based on aiding and abetting a murder (including ordering it) is not cruel and unusual in violation of the Eighth

Amendment. (9) The district court had dismissed VICAR and conspiracy charges against one co-defendant who was a juvenile at the time of one of the murders, because the court did not have jurisdiction, because the government failed to get the approval of the DOJ as required by the Juvenile Delinquency Act (JDA), 18 USC 5031, to prosecute him. That defendant argued that the use of that murder (racketeering act) to impose an enhanced sentence violated the JDA. 18 USC 1963(a). However (isn't there always a "however"?), the crucial date is the defendant's age on the date the indictment was filed. The Court concluded that defendant's conduct both pre- and post-majority are admissible in a conspiracy both to prove guilt and as relevant conduct to impose sentence. (10) The (formerly) juvenile defendant's life sentence, within the guidelines range, was reasonable.

DOORBAL v. FLORIDA DOC, 2009 WL 1842665 (June 29, 2009)

Capital habeas; bar to federal review; state rule of procedure; ineffective assistance

J. Pryor described the defendant's crime spree as one "of murder and mayhem so neihous and bizarre that one would expect to see it only in a crime drama on televison, but the only issue of law . . . borders on frivolous." The district court correctly ruled that federal review was barred because the Florida Supreme Court had applied a state rule of procedure (post-conviction counsel's failure to adequately state the claim initially) to refuse to adjudicate his claim.

U.S. v. SARRAS, 2009 WL 1661152 (June 16, 2009)

Evidence; *Daubert*; ID methodology; FRE 412, 701; computer search; *Franks*

hearing; sentencing

The Court, in a physiologically explicit opinion, rejected numerous evidentiary and sentencing claims and affirmed the 1,200-month sentence, for involving his minor daughter in sexual conduct for child pornography production, which he also possessed. (1) No *Daubert* violation in excluding penis vein expert testimony; (2) FRE 412 prohibited defense questions about victim's sexual relationship with her boyfriend; (3) The government had no duty to disclose or allow access to computers of the victim or her mother, or of the victim's medical records, as it did not possess them; (4) The defense "invited" the officer's testimony she believed the victim with its question asking exactly that; (5) No harmful error in permitting officer to offer lay testimony that it was not unusual for 13-year-olds to fail to remember exacts dates of abuse; (6) No error in denying a *Franks* hearing; and (7) sentence was entirely reasonable.

U.S. v. DOCAMPO, 2009 WL 1652910 (June 15, 2009)

Sentencing reasonableness; disparity with codefendants; hearsay

The Court found nothing unreasonable in sentencing DoCampo to 270 months, 75% higher than the ringleader, where the defendant, barely an adult and no criminal record, was drawn into the fringe of a conspiracy with an undercover officer in a sting to rob a fictional stash house. The panel also agreed that the introduction of hearsay testimony by a coconspirator, about a threat by the defendant to the witness' girlfriend that the witness should not testify, was harmless.

U.S. v. KAPORDELIS, 2009 WL 1508342 (June 1, 2009)

18 U.S.C. § 2251; sex

tourism;"undeveloped" arguments waived; sentencing reasonableness

The Court affirmed the convictions and 420-month sentence of a globe-trotting anesthesiologist for producing, receiving and possessing child porn (1) based on allegations of sexual conduct with minors outside the territorial US; (2) it was a continuing offense, making jurisdiction in Georgia proper; (3) no error in denying *Franks* hearing; (4) Underdeveloped appellate arguments referencing the argument in the trial court constituted waivers; (5) No error for the district court to admit the testimony of two witnesses as to defendant's actions in soliciting sex from juvenile males for money; (6) No procedural error by applying the wrong edition of the guidelines manual, because the record established the district court would have departed upwards to the statutory maximum sentence regardless which edition was used; (7) Vulnerable victim enhancements based on the fact that the boys were asleep when the photographs were taken (likely as a result of being drugged by the defendant) were proper; (8) The 420-month, statutory maximum sentence was not substantively unreasonable.

U.S. v. HOFFMAN-VAILE, 2009 WL 1458567 (May 27, 2009)

Medicare fraud, obstruction, plain error

The Court affirmed the convictions of a dermatologist charged with Medicare fraud and obstruction of justice. (1) Applying plain error review, the Court rejected a challenge to the admission of reports prepared by a private administrator that processes and reviews claims for Medicare. (2) The Court also rejected the challenge to the conviction under 18 U.S.C. § 1519, which criminalizes destruction of documents in response to a federal investigation, holding that it includes

responses to a grand jury investigation. (3) The Court also affirmed the loss calculation that accounted for patients and private insurers as victims, and it affirmed the forfeiture order, finding the amount need not be reduced by the amount that Hoffman-Vaile paid in restitution to victims other than Medicare.

U.S. v. SPOERKE, 2009 WL 1424042 (May 22, 2009)

Destructive device, public safety *Miranda* exception

The Court held (1) a homemade explosive device made of polyvinyl chloride (PVC) pipe that could propel shrapnel was a “destructive device” under 26 U.S.C. §§ 5801 et seq. (2) No error denying motion to suppress physical evidence obtained after the vehicle Spoerke was riding in was stopped for littering. Once police spotted gloves, goggles, a face mask and a flashlight in plain view, and noted other suspicious circumstances, the police had an articulable suspicion that the occupants of the vehicle were engaged in a burglary, and reasonably prolonged the traffic stop to investigate further; (3) Statements Spoerke gave during the traffic stop fell within the “public safety” exception to *Miranda*, which allows officers to question a suspect without first giving *Miranda* warnings when necessary to protect themselves or the general public.

U.S. v. SMITH, 568 F.3d 923 (May 19, 2009)

Crack amendments; 18 U.S.C. 3582(c)(2); amount of reduction; 18 U.S.C. 3553(a)

The Court rejected the defendant's argument that the amount of sentence reduction he received under 18 U.S.C. 3582(c)(2) was inadequate or failed to adequately consider the 3553(a) factors, and reaffirmed *Melvin*, 556 F.3d 1190 (11th Cir. 2009) (*Booker* and *Kimbrough* do not apply to 3582(c)(2) proceedings), *pet. for cert filed*, (U.S. Feb. 10,

2009) (No. 08-8664).

OWEN v. SEC’, DOC, 568 F.3d 894 (May 18, 2009)

Capital habeas; 2254; procedural bar; ineffective assistance of counsel

The Court reversed the district court's ruling that two groups of claims were procedurally barred, but it denied relief on the merits.

U.S. v. BAUTISTA-SILVA, 567 F.3d 1266 (May 11, 2009)

Search; traffic stop; reasonable suspicion

A veteran border patrol agent, on patrol in a marked vehicle in a corridor known for human smuggling, suspected that an SUV with California license plates, and carrying six adult males of apparently Hispanic descent, was transporting illegal aliens; the driver changed speeds erratically on a slippery road, and the passengers appeared nervous and refused to acknowledge the agent's attempts to gain their attention. The Court reversed the district court's ruling that the agent lacked reasonable suspicion to stop the vehicle. Specific and articulable facts, viewed cumulatively and in the light of the agent's extensive experience, created a reasonable suspicion of illegal activity. Barkett dissented, saying this was “nothing more than impermissible racial profiling that should never be used.”

PAYNE v. U.S., 566 F.3d 1276 (May 7, 2009)

Appeal; ineffective assistance; appellate counsel; deficient performance

The Court held that appellate counsel was not ineffective for failing to challenge defendant-pastor's sentence enhancement for abuse of a position of trust. The panel concluded that, even though this claim had succeeded for a co-defendant, also a pastor, that case had not

yet been decided when the instant appeal was filed, and counsel had performed reasonably, choosing what he believed were stronger issues on appeal.

CLARKE v. SEC'Y, DOC, 566 F.3d 1278 (May 7, 2009)

Habeas; 2254; belated direct appeal; tolling

The Court agreed with the pro se state prisoner's habeas petition and remanded for further consideration whether the defendant's 2254 petition was time-barred, in light of *Jimenez v. Quarterman*, 129 S. Ct. 681 (2009) (holding that, where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not yet "final" for purposes of 2244(d)(1)(A)).

U.S. v. CARTER, 566 F.3d 970 (Apr. 27, 2009)

Search; warrantless; probationer

Warrantless searches of defendant's person or property were not authorized by a condition of his state probation or by state law. Nonetheless, ten officers entered and searched his home without consent or a warrant, finding contraband. The Court approved, finding that officers had reasonable suspicion, even though the Georgia Supreme Court found a similar warrantless search unreasonable in a 4-homicide capital case. (Ed. note: AFD Chet Kaufman's case; cert petition likely, as issue was expressly left open by USSC in *Griffin v. Wisconsin*.)

U.S. v. ALDRICH, 566 F.3d 976 (Apr. 27, 2009)

Sentencing; USSG § 2G2.1(b)(2)(A)

The Court held that USSG § 2G2.1(b)(2)(A) applies to enhance a sentence for one who masturbates in front of a minor via a video

camera, and that "[t]here is no constitutionally significant difference between masturbating in front of a minor in person versus doing so via web camera."

U.S. v. DODGE, 566 F.3d 976 (Apr. 27, 2009) (EN BANC)

SORNA; 18 U.S.C. 1470; transferring obscene material to minor

The Court ordered en banc rehearing of the panel decision, 554 F.3d 1357 (11th Cir. 2009) (holding that SORNA's registration requirement does not apply to one convicted under 18 U.S.C. § 1470 for transferring obscene material to a minor).

U.S. v. COVINGTON, 565 F.3d 1336 (Apr. 22, 2009)

Evidence; admissibility; sufficiency; "use" of telephones; sentencing; grouping; reasonableness; consecutive

The Court affirmed defendant's convictions under 18 U.S.C. § 1958 for using an interstate facility with the intent that a murder for hire occur and 480-month sentence. Before trial on the § 1958 counts, the defendant pled guilty to the firearm possession/ACCA count, in the express hope it would lead to exclusion of evidence at trial of the gun possession, prior domestic abuse incident with the intended victim, and communications to the victim from jail attempting to avoid a 2005 domestic violence charge, but the district court admitted it under Rules 404(b) and 403 with a limiting instruction. The Court agreed this evidence was integral to the current charges and relevant to show the defendant's motive to avoid the original domestic violence charge; it was not improper propensity evidence or unduly prejudicial. The Court distinguished the domestic abuse evidence underlying reversal in *Hands*, as it was an ordinary drug

case whereas this was a murder for hire arising out of the domestic violence case and intended to avoid the consequences of that case. The Court provided an interesting analysis of the "use" of a telephone to support the federal jurisdiction, noting its "active employment" even though defendant *answered* the phone. Also, the "interstate" nexus was not manufactured; an interstate scheme was well underway before the FBI became involved. As to sentencing, grouping was proper because the gun count had a different "victim" (society) than the conspiracy and use of interstate facility counts (ex-girlfriend); also, there was no "common criminal objective" because the § 1958 counts did not arise until after the pistol-waving offense underlying the domestic violence charge.

U.S. v. SCHULTZ, 565 F.3d 1353 (Apr. 22, 2009)

Sixth Amendment; self-representation; jurisdiction; magistrate; Art. I; 28 U.S.C. 636; waiver; FRCrimP 59(a); appeal; adoption of argument; FRAP 28(i)

The defendant-lawyer appealed the magistrate's denial of his motion to represent himself at his second trial; he had represented himself during the first trial but collapsed during the 4th week, requiring hospitalization and severance of his case. Appointed standby counsel then moved to withdraw after defendant filed a civil action against him. The magistrate denied the motion, finding defendant had repeatedly manipulated the system to obstruct proceedings. On appeal, defendant argued the magistrate had no jurisdiction under Art. I. Reviewing for plain error, the Court found none; 28 U.S.C. § 636(b)(1)(A) authorized the magistrate to hear "any pretrial matter," this was not among the listed exceptions, and caselaw supported the

ruling. Also, the Court found it had no jurisdiction on this point, because defendant had failed to file timely objections under Federal Rule of Criminal Procedure 59(a) to the magistrate ruling and appeal it to the district court; simply renewing the request orally at the beginning of the second trial was inadequate because it did not give the district court an opportunity to "effectively review" the magistrate's decision. The defendant's final argument was not properly presented, because **the defendant's adoption by reference of a codefendant's argument under Federal Rule of Appellate Procedure 28(i) requires the making and granting of a motion for adoption**, which was not done here.

U.S. v. MITCHELL, 565 F.3d 1347 (Apr. 22, 2009)

Suppression; seizure; computer hard drive; reasonableness of 21-day delay; warrant

The Court **reversed** the denial of a suppression motion and agreed with the defendant's argument that the 21-day delay in obtaining a search warrant was unreasonable. Defendant consented to agents entering his home, and admitted the computer contained child pornography, but defendant did not consent to the search of his computers. Agents seized the computer hard drives after the search warrant was issued; it contained child pornography. The defendant conceded probable cause, and the Court rejected his distinction between the hard drive and entire CPU. However, the Court found the defendant had a substantial possessory interest in the hard drive, given all the personal/business info stored there; and the government provided no compelling justification for the 3-week delay in getting the warrant and searching it. (The agent went

away to a 2-week training shortly after the search and was the only qualified agent locally to do the forensic examination.) Agents simply believed there was no rush, making the delay unreasonable and unacceptable to the Court.

U.S. v. EMMANUEL, 565 F.3d 1324 (Apr. 21, 2009)

Suppression; foreign wiretap; exceptions to US admissibility; non-citizen; hearsay; attorney's objection must state "Confrontation Clause"; mistrial; fleeting reference to defendant's unrelated case; expert witness; drug codes; FRE 702

First, the Court affirmed denial of the suppression motion; although generally courts will not exclude evidence from a foreign court, even though otherwise inadmissible here or even in that country. Two exceptions are (1) where the foreign conduct "shocks the judicial conscience" and (2) where the US authorities substantially participated in the search or the foreign authorities were acting as agents for US law enforcement (*Behety*, 32 F.3d 503 (11th Cir. 1994)). The wiretap approval here met international norms of decency, as it went through four levels of review and had to be renewed every 14 days; the second exception could not be applied because the defendant was not a citizen entitled to Fourth Amendment protection. Second, the Court did not address whether documentary evidence was inadmissible hearsay because it did not affect the defendant's substantial rights given other evidence; the defendant's failure to mention the Sixth Amendment's Confrontation Clause instead of just his "hearsay" objection resulted in plain error review (i.e., failure) of that claim. Third, the defense motion for mistrial, based on a government witness' explanation that he knew the defendant's voice on wiretaps

based on his prior reporting as a condition of bail, did not establish a reasonable probability that, but for that error, the trial's outcome would have been different; the mere mention of this matter in passing does not constitute reversible error per se. No curative instruction was requested, and the failure to give one sua sponte was not an abuse of discretion. Finally, it was not an abuse of discretion to admit the officer's testimony translating "drug code" during wiretapped conversations. Even though his testimony extended to interpreting entire conversations, not just words or phrases, it did not affect the defendant's substantial rights, and the jury was instructed to decide for themselves if such testimony was credible.

U.S. v. LOPEZ-GARCIA, 565 F.3d 1306 (Apr. 21, 2009)

Suppression; statements; unrelated arrest; Miranda; alien's A-file; sentencing; 16-level enhancement; prior firearms conviction

In this immigration case, an officer stopped the defendant because he observed what appeared to be a drug transaction - someone leaning into the defendant's car and then walking away upon the approach of an officer, all in an area known for hand-to-hand drug transactions. The officer arrested the defendant after finding a small quantity of methamphetamine in the defendant's car. Subsequently, the defendant moved to suppress two statements about his illegal immigration status: one, which the defendant made a day after his arrest to an officer who was checking into the defendant's immigration status and a second one made to the same officer 10 days later. The Court of Appeals, upheld the district court's denial of the motion finding the stop was lawful and that there was no need to advise the

defendant of his Miranda warnings prior to the first statement because the defendant was not being questioned about a criminal matter. In the opinion, the Court reaffirmed that a alien defendant's A-File is never suppressible when introduced to prove identity. The Court also upheld the 16-level enhancement under USSG 2L1.2 because the defendant's prior state conviction (for possession of a firearm during commission of a crime) qualified as a prior firearms offense as an analogue to 18 U.S.C. § 924(c). In doing so, the Court rejected the defendant's *Shepard* claim because the enhancement was based on facts set forth in PSI to which the defendant had not objected.

**U.S. v. WEBB, 565 F.3d 789 (April 13, 2009)
Crack cocaine guidelines amendment; 18 USC 3582(c)(2); right to counsel**

The Court rejected the *pro se* appeal of denial of relief for this career offender, sentenced to the bottom of the guideline range, and further reduced for substantial assistance. Addressing a matter of first impression, the Court joined other circuits and held that a defendant has no constitutional (5th Amendment due process or Sixth Amendment) or statutory (18 USC 3006A) right to counsel in 3582(c)(2) proceedings.

**KIMBROUGH V. SEC'Y, FLORIDA DOC, 565 F.3d 796 (Apr. 13, 2009)
Capital habeas**

The Court rejected the capital defendant's claim that his penalty phase attorneys were ineffective for failing to present mental health mitigation, when there was no evidence of any favorable such evidence other than possibly low IQ, and it would have opened the door to prosecution evidence that was damaging.

U.S. v. JIMINEZ, 564 F.3d 1280 (Apr. 7, 2009)

Evidence; sufficiency; hearsay; Sixth Amendment; cautionary instruction; relevancy

The Court rejected all challenges to defendant's convictions surrounding the manufacture and distribution of marijuana plants in a "grow house" he shared with his brother and upheld the jury's verdict. The only significant issue was a Confrontation Clause challenge to a detective's testimony that the defendant's brother had said the defendant was a participant in the crime. The objection at trial, however, was a claim that the testimony was hearsay, making the Sixth Amendment Confrontation Clause challenge on appeal subject to plain error review. The Court further concluded that the testimony was not hearsay, and therefore not "testimonial" under *Crawford*, because it was elicited on redirect in response to an extensive cross examination that suggested the officer was testifying falsely. In the view of the Court, the brother's statement was not admitted for the truth of the matter asserted (i.e., defendant's involvement), but rather for the purpose of rehabilitating the officer's credibility by explaining why the officer acted as he did. DJ Quist concurred, suggesting that the it would have been better practice for the district court to give a limiting/cautionary jury instruction to avoid the danger that a typical jury would improperly consider the testimony for the truth of the matter asserted.

U.S. v. BORNSCHEUER, 563 F.3d 1228 (Mar. 31, 2009)

Hobbs Act

Bornscheuer was prosecuted under the Hobbs Act, 18 U.S.C. § 1951, for extortion, and under the Travel Act, 18 U.S.C. § 1952(a)(3), for traveling from Germany to the United States to carry out the extortion. The Court

affirmed, concluding (1) there was no error in the district court's refusal to delete the words "fear of economic loss" from the jury instruction on the elements of the Hobbs Act; (2) prosecutor need not be bound by the theory of the crime relied upon in opening statement; (3) evidentiary rulings were not erroneous; (4) motion for new trial was properly denied.

U.S. v. IREY, 563 F.3d 1223 (Mar. 30, 2009)
Reasonableness, rejection of Government sentencing appeal

Irey, age 50, pleaded guilty to using minors to engage in sexually explicit conduct outside the United States for the purpose of producing visual depictions of such conduct and transporting those images to the United States. He was sentenced to 210 months' imprisonment followed by a life term of supervised release. On appeal, the Government argued the sentence was substantially unreasonable as, in its view, the sentence was too lenient. The Court affirmed the sentence because the district court considered everything appropriate within its discretion. "[C]ourts never should see the imprisonment in this country of a person for 17-1/2 years as light punishment: although even longer terms of imprisonment can be lawfully imposed in cases, this many years is a substantial portion of a human life -- and no serious person should regard it as a trifle. Furthermore, when the defendant is 50 at the time the sentence is imposed, the consequences must be seen as severe. Moreover, upon Defendant's release from imprisonment, he will not be free in the way that most Americans are free. He will be subject to rigorous conditions of supervised release by federal authorities. Given the terms of his sentence, never will Defendant be a truly free man again."

U.S. v. SEHER, ET AL., 562 F.3d 1344 (Mar. 26, 2009)

Forfeiture; findings; indictment; Fifth Amendment; 18 USC 1956; 31 USC 5324; duplicity; Blockburger; waiver by government; sufficiency of evidence; material variance; excessive fine; Eighth Amendment; personal money judgments; substitute assets

In a lengthy opinion, the Court affirmed the convictions and sentences of the defendant and his two jewelry businesses for money laundering and for violating the federal transaction reporting requirements. It, however, remanded the case to the district court because of that court had omitted necessary factual and legal findings to support portions of the forfeiture order. It reversed as clearly erroneous the forfeiture of one of the jewelry store's bank account, because the record contained no evidence that bank account was involved in the criminal activity. It also remanded the excessive fine claim, which was raised below but on which the district court made no factual or legal finding.

Affirming the convictions, the Court found the indictment sufficiently alleged the element of intent by including the word "intentionally" and by citation of the specific statutory subsections containing the intent element, also noting that the jury charge adequately covered the intent. The opinion also provides an analysis of whether the defendants had waived this claim (probably) by not moving to dismiss the indictment prior to trial and waiting to raise the claim in a motion for a judgment of acquittal. While the government had, at oral argument, contended the defendant had waived the issue, the Court declined to consider the Government's claim *sua sponte* as the government had failed to

preserve or brief it. In the opinion, the Court concluded the counts charging offenses under 18 USC 1956(a)(3)(B) & (C) of the indictment were not duplicitous, even if charging separate offenses under the *Blockburger* test, because, as has been held by six other circuits, Congress intended that the three subsections of the statute outline a single offense with three alternative mental states, not multiple separate offenses, contrary to *dicta* in *Calderon*, 169 F.3d at 720. Finally, the Court affirmed forfeiture of the inventories of the two jewelry stores, and the bank account of one, concluding they had been used to aid in the commission and concealment of the offenses, and it affirmed the determination that the defendant's real property was properly forfeited as a substitute asset.

U.S. v. POWERS, 562 F.3d 1342 (Mar. 26, 2009)

SORNA; constitutionality

The Court reversed, in this government appeal, the district court's ruling that SORNA is unconstitutional under the Commerce Clause, following *Ambert*, No. 08-13139, 2009 WL 564677 (11th Cir. Mar. 6, 2009).

U.S. v. KNIGHT, 562 F.3d 1314 (Mar. 25, 2009)

Speedy trial; detainers; Sixth Amendment; FRCP 48(b); Fifth Amendment; due process; harmless; unique circumstance; jail time credit; 5G1.3(b); clear error

In a procedurally complicated case, which serves as an excellent primer on speedy trial, the Court held that a violation of the Interstate Agreement on Detainers Act, 18 U.S.C. App. 2 sec. 2, Art. IV(c), can be harmless when the U. S. is the receiving state. The primary reason for delay was vacillation in defendant's cooperation efforts. The Court held that defendant's pretrial detention in a maximum

custody federal facility, where he suffered depression and alleged abuse, was not a "unique circumstance" that required dismissal of the indictment with prejudice, because the defendant would otherwise have been returned to a state prison and secure custody was required by his earlier escape. Here, the defendant could not show any prejudice to his ability to defend himself; the most critical factor under the Sixth Amendment speedy trial test, because he had no defense; he stipulated to all elements of the charge. Although dismissal with prejudice is the normal rule, the IADA provides an exception when the U.S. is the receiving "state." Although the Court agreed with Knight that the government had technically violated the anti-shuttling provisions of the Act, Art. IV(e), by not returning him to state custody between the initial dismissal without prejudice and his reindictment (and it disagreed with the district court reasoning that the dismissal reset the 120-day clock), the Court reasoned that denial of defendant's second motion to dismiss the indictment for speedy trial delay was harmless for two reasons: good cause (time to get second indictment) and the fact the district court could have granted the motion to dismiss without prejudice and the government could have then reindicted. Further, the Court rejected defendant's argument that no technical or *de minimis* exception existed under the IADA, pursuant to *Alabama v. Bozeman*, 533 U.S. 146, 153-54, because that does not apply to the federal government; the Act explicitly exempts the U.S. as the receiving state in section 9(1). Denial of the Sixth Amendment claim dictated denial of the Rule 48(b) claim. Finally, with the government's concession, the Court agreed the failure to award jail time credit was clearly erroneous and remanded

for resentencing.

U.S. v. LOPEZ, 562 F.3d 1309 (Mar. 25, 2009)

Notice of appeal; timeliness; FRAP 4(b); statutory mandates v. other rules; forfeiture

In his initial appeal, the district court granted defendant's motion for extension of time to file his notice of appeal, but the 11th Circuit had *sua sponte* dismissed his appeal for lack of jurisdiction under Federal Rule of Appellate Procedure 4(b) because his notice was untimely. The Supreme Court granted his cert petition and remanded for reconsideration under *Bowles v. Russell*, 127 S. Ct. 2360. The Court agreed with both parties that the time limits of Rule 4(b) are not jurisdictional (*Bowles* had abrogated *Machado*, 465 F.3d 1301, 1305 (11th Cir. 2006), which held to the contrary) because it is not based on a federal statute. The Court noted that the Supreme Court has made clear that only rules of limitation that implement a statutory directive may be mandatory and jurisdictional, distinguishing time limitations in court-adopted rules of procedure. However, the Court nevertheless granted the government's motion to dismiss the appeal as untimely because defendant's pro se motion for an appeal was dated even after the 30-day extension of time allowed by Rule 4(b)(4). It rejected defendant's argument the government had forfeited this objection by not raising it in the district court, because an "appellee may object to the timeliness of an appeal for the first time in its merits brief." The Court distinguished *Eberhart*, 546 U.S. at 13-14, because it involved a motion for new trial, over which the district court was arbiter, unlike the timeliness of a notice of appeal.

U.S. v. BRANNAN, 562 F.3d 1300 (Mar. 23, 2009)

Information; omitted element; invited error; evidence; FRE 404(b)

The Court affirmed defendant's convictions under the Assimilated Crimes Act for state law offenses of indecent exposure and public lewdness on federal property in Alabama. The Court first rejected the argument that the information was fatally flawed for omission of an element of the state crime, concluding that defense counsel had invited the error by failing to move to dismiss the information, failing to renew the JOA motion at the close of evidence, and failing to object to omission of jury instructions on this element. Second, the Court affirmed the cross-examination of defendant as to prior similar sexual acts in the same park (which he admitted) to rebut his claim that the undercover officer solicited him and to show predisposition to rebut his claimed entrapment.

U.S. v. CLARKE, 562 F.3d 1158 (Mar. 20, 2009)

Jury venire; systematic exclusion; Sixth Amendment; evidence; sufficiency; sentencing; tax loss; sophisticated means

The Court affirmed on all points the conviction and sentence of a pastor for tax fraud: (1) The Court rejected the challenge to the jury pool in the Northern District of Alabama based on an under representation of African-Americans because the defendant failed to present evidence showing the under representation was due to systematic exclusion as required for a prima facie case. (2) The defendant did not dispute receiving over \$110,000 from the church and other sources during the three-year period, but argued his failure to report it as income was not willful. However, he had reported it as income on other documents where it benefitted him, provided figures for his tax preparers, and reviewed the returns before

signing them. (3) The Court joined the majority of other circuits and held that "tax loss" under U.S.S.G. 2T1.1(c)(1) is "the amount of loss the defendant intends to create when he falsifies his tax return and must therefore be calculated based upon the fraudulent return." It rejected as irrelevant his argument that the loss amount should have been based upon what his tax would have been had he filed married, filing jointly. (4) The Court affirmed the sophisticated means enhancement under U.S.S.G. 2T1.1(b)(2), finding "no material difference between concealing income and transactions through the use of third-party accounts, as was the case here, and using a corporate shell or a fictitious entity to hide assets."

HANNON v. SECRETARY, FLA. DOC,
562 F.3d 1146 (Mar. 19, 2009)

Capital habeas, ineffective assistance

The Court held that Florida courts did not unreasonably deny relief to Hannon, who had sentenced to death, on his claims of ineffective assistance of counsel during the penalty phase of his trial. Joe Episcopo, trial counsel, testified in the postconviction hearing that his strategy was to not present any evidence in mitigation that would detract from Hannon's insistence that he was not present at the crime scene and that he did not commit the murders. The trial court referenced Episcopo's testimony that he did not investigate any possible drug or alcohol abuse because it did not relate to the alibi/innocence defense maintained by Hannon. The trial court also noted that Episcopo's strategy at the penalty phase was to show that Hannon did not have the type of character to commit the murders. The Supreme Court of Florida concluded that "trial counsel's limited investigation into mitigation under the specific facts of the instant case, which was based on the express

wishes of Hannon, was within the level of reasonable performance that is required by *Strickland* and *Wiggins*." The district court found the state courts' resolution of this issue to be reasonable, and the Eleventh Circuit agreed. Even assuming that Hannon's penalty phase counsel was deficient, Hannon cannot satisfy the prejudice prong of *Strickland*.

U.S. v. AMBERT, 561 F.3d 1202 (Mar. 6, 2009)

SORNA; 18 USC 2250; constitutionality; commerce clause; improper delegation; s. 16913(d); facial; as applied

Most of defendant's constitutional claims were controlled by precedent, but the Court considered and rejected his claim that his SORNA failure-to-register conviction violated the Commerce Clause because it contains neither a sufficient nexus to commerce nor has a substantial effect on commerce. The Court applied *Lopez*, 514 U.S. 549 (1995), as explicated in *Ballinger*, 395 F.3d 1218 (11th Cir. 2005) (en banc), to conclude that 18 USC 2250 is a proper regulation falling under either of the first two *Lopez* categories, because it regulates the use of channels of interstate commerce and the instrumentalities of interstate commerce. The Court also found that Section 16913(d) was not an improper delegation of legislative authority to the AG because Congress provided "intelligible principles" to guide the AG's discretion in determining the retroactive application of SORNA.

U.S. v. SIEGELMAN, 561 F.3d 1215 (Mar. 6, 2009)

Mail fraud; jurors; extrinsic fraud; media exposure; Rule 606; recusal; post-trial; sentencing; upward departure

The Court reversed two of Siegelman's

convictions, vacated his sentence, and remanded for resentencing; it affirmed all of codefendant Richard Scrushy's convictions. The Court reversed Siegelman's convictions on two counts of mail fraud, because the evidence was insufficient to prove that he knew that Scrushy intended to cheat the public of honest services while serving on a hospital board, to which he was appointed by Siegelman, and there was absolutely no evidence on the other required prong, that he personally intended to participate in that broader fraud. The "limited and incidental" juror exposure to media coverage was insufficient to support a new trial. A challenge to the verdict based on purported emails from jurors did not establish the kind of extrinsic misconduct required by Rule 606, and the split verdict supported the conclusion the jury fairly decided the case. The claim based on a post-trial recusal motion had no merit. The Court found no error in the upward departure to preserve public confidence in the system.

U.S. v. CARMICHAEL, 560 F.3d 1270 (March 5, 2009)

Jury Selection and Service Act of 1968; fair cross-section requirement

The Court found no violation of the Jury Selection & Service Act (JSSA) in the way in which juries were selected in the Middle District of Alabama at the time Carmichael's case came to trial in June 2005. The Court also found the composition of his jury pool satisfied the Sixth Amendment's fair cross-section requirement.

MCGAHEE v. ALA. D.O.C., 560 F.3d 1252 (Mar. 4, 2009)

Capital habeas, *Batson*

The Court reversed the district court's denial of habeas relief, ordering a new trial for a

death-sentenced defendant tried in 1986 because of *Batson* violations committed in the state trial and appellate courts, both of which unreasonably applied established federal law. The State had removed all of the 24 African-American potential jurors from the venire, 8 for cause and 16 of its 22 by peremptory challenges. Among the many *Batson* errors were that the appellate court failed to consider among all relevant circumstances the State's "explicitly racial reason for striking" juror Jones; that all 24 African Americans had been struck by the State; and that the State had proffered as an explanation that it removed multiple African-American jurors because of their "low intelligence" when the intelligence of the jurors was unsupported by any evidence in the record. "In reviewing 'all relevant circumstances' in this record, including the astonishing pattern resulting from the total exclusion of African-Americans in this county in which they comprised fifty-five percent and the strong evidence of race-based decision-making both generally and especially with respect to jurors Jones and Carpenter, we find that it 'blinks reality' to deny that the State struck Jones, and perhaps Carpenter, because they were African-American."

TABLE OF CASES IN THIS ISSUE

Supreme Court

<u>ABUELHAWA v. U.S.</u> , 129 S. Ct. 2102, No. 08-192 (May 26, 2009).....	15
<u>ARIZONA v. GANT</u> , 129 S. Ct. 1710, No. 07-542 (Apr. 21, 2009).....	16
<u>BEARD v. KINDLER</u> , 129 S. Ct. 2381 (Mem), No. 08-992 (May 18, 2009).....	12

<u>BLACK v. U.S.</u> , 129 S. Ct. 2379 (Mem), No. 08-876 (May 18, 2009).....	12	2009 WL 1789468, No. 07-591 (June 25, 2009).	14
<u>BLOATE v. U.S.</u> , 129 S. Ct. 1984 (Mem), No. 08-728, (Apr. 20, 2009).	13	<u>MONTEJO v. LOUISIANA</u> , 129 S. Ct. 2079, No. 07-1529 (May 26, 2009).....	15
<u>BOBBY v. BIES</u> , 129 S. Ct. 2145, No. 08-598 (June 1, 2009).	15	<u>NIJHAWAN v. HOLDER</u> , 129 S. Ct. 2294, No. 08-495 (June 15, 2009).....	14
<u>BOYLE v. U.S.</u> , 129 S. Ct. 2237, No. 07-1309 (June 8, 2009).	14	<u>POTTAWATTAMIE COUNTY, IA, ET AL. v. MCGHEE, CURTIS W., ET AL.</u> , 129 S. Ct. 2002 (Mem), No. 08-1065 (Apr. 20, 2009).	13
<u>BRISCOE v. VIRGINIA</u> , 2009 WL 1841615 (Mem), No. 07-11191 (June 29, 2009) ..	11	<u>PUCKETT v. U.S.</u> , 129 S. Ct. 1423, No. 07-9712 (Mar. 25, 2009).....	16
<u>CAPERTON v. A. T. MASSEY COAL COMPANY, INC.</u> , 129 S. Ct. 2252, No. 08-22 (June 8, 2009).	15	<u>RIVERA v. ILLINOIS</u> , 129 S. Ct. 1446, No. 07-9995 (Mar. 31, 2009).....	16
<u>CONE v. BELL, WARDEN</u> , 129 S. Ct. 1769, No. 07-1114 (Apr. 28, 2009).....	15	<u>SAFFORD UNIFIED SCHOOL DISTRICT #1 ET AL. v. REDDING</u> , 2009 WL 1789472, No. 08-479 (June 25, 2009).....	14
<u>CORLEY v. U.S.</u> , 129 S. Ct. 1558, No. 07-10441 (Apr. 6, 2009).....	16	<u>SULLIVAN v. FLORIDA</u> , 129 S. Ct. 2157 (Mem), No. 08-7621 (May 4, 2009).....	13
<u>DEAN v. U.S.</u> , 129 S. Ct. 1849, No. 08-5274 (Apr. 29, 2009).	16	<u>U.S. v. COMSTOCK</u> , 2009 WL 908431 (Mem), No. 08-1224 (June 22, 2009).....	12
<u>DISTRICT ATTORNEY’S OFFICE FOR THE THIRD JUDICIAL DISTRICT v. OSBORNE</u> , 129 S. Ct. 2308, No. 08-6 (June 18, 2009).....	14	<u>U.S. v. DENEDO</u> , 129 S. Ct. 2213, No. 08-267 (June 8, 2009).	15
<u>FLORES-FIGUEROA v. U.S.</u> , 129 S. Ct. 1886, No. 08-108 (May 4, 2009).....	15	<u>U.S. v. STEVENS</u> , 129 S. Ct. 1984 (Mem), No. 08-769 (Apr. 20, 2009).....	13
<u>FLORIDA v. POWELL</u> , 2009 WL 741877 (Mem), No. 08-1175 (June 22, 2009)	12	<u>VERMONT v. BRILLON</u> , 129 S. Ct. 1283, No. 08-88 (Mar. 9, 2009).	17
<u>GRAHAM v. FLORIDA</u> , 129 S. Ct. 2157 (Mem), No. 08-7412 (May 4, 2009)	13	<u>WEYHRAUCH v. U.S.</u> , 2009 WL 789239 (Mem), No. 08-1196 (June 29, 2009).....	12
<u>HARBISON v. BELL</u> , 129 S. Ct. 1481, No. 07-8521 (Apr. 1, 2009).....	16	<u>WOOD v. ALLEN</u> , 129 S. Ct. 2389 (Mem), No. 08-9156 (May 18, 2009).....	12
<u>KANSAS v. VENTRIS</u> , 129 S. Ct. 1841, No. 07-1356 (Apr. 29, 2009).....	16	<u>YEAGER v. U.S.</u> , 129 S. Ct. 2360, No. 08-67 (June 18, 2009).	14
<u>KNOWLES v. MIRZAYANCE</u> , 129 S. Ct. 1411, No. 07-1315 (Mar. 24, 2009).....	17		
<u>MELLENDEZ-DIAZ v. MASSACHUSETTS</u> ,		<u>Eleventh Circuit</u>	
		<u>CLARKE v. SEC’Y, DOC</u> , 566 F.3d 1278	

(May 7, 2009).	23	(Apr. 27, 2009) (EN BANC).	23
<u>DOORBAL v. FLORIDA DOC</u> , 2009 WL 1842665 (June 29, 2009).	20	<u>U.S. v. EMMANUEL</u> , 565 F.3d 1324 (Apr. 21, 2009)	25
<u>HANNON v. SECRETARY, FLA. DOC.</u> , 562 F.3d 1146 (Mar. 19, 2009).	30	<u>U.S. v. FLORES</u> , 2009 WL 1842652 (June 29, 2009).	19
<u>KIMBROUGH V. SEC'Y, FLORIDA DOC.</u> , 565 F.3d 796 (Apr. 13, 2009).	26	<u>U.S. v. GOINGS</u> , 2009 WL 1927455 (July 7, 2009).	17
<u>MCGAHEE v. ALA. D.O.C.</u> , 560 F.3d 1252 (Mar. 4, 2009).	31	<u>U.S. v. HOFFMAN-VAILE</u> , 2009 WL 1458567 (May 27, 2009).	21
<u>OWEN v. SEC', DOC</u> , 568 F.3d 894 (May 18, 2009).	22	<u>U.S. v. IREY</u> , 563 F.3d 1223 (Mar. 30, 2009).	27
<u>PAYNE v. U.S.</u> , 566 F.3d 1276 (May 7, 2009).	22	<u>U.S. v. JIMINEZ</u> , 564 F.3d 1280 (Apr. 7, 2009).	26
<u>U.S. v. ALDRICH</u> , 566 F.3d 976 (Apr. 27, 2009).	23	<u>U.S. v. KAPORDELIS</u> , 2009 WL 1508342 (June 1, 2009).	21
<u>U.S. v. AMBERT</u> , 561 F.3d 1202 (Mar. 6, 2009).	30	<u>U.S. v. KNIGHT</u> , 562 F.3d 1314 (Mar. 25, 2009).	28
<u>U.S. v. BARNER</u> , 2009 WL 1842564 (June 29, 2009).	18	<u>U.S. v. LOPEZ</u> , 562 F.3d. 1309 (Mar. 25, 2009).	29
<u>U.S. v. BAUTISTA-SILVA</u> , 567 F.3d 1266 (May 11, 2009).	22	<u>U.S. v. LOPEZ-GARCIA</u> , 565 F.3d 1306 (Apr. 21, 2009).	25
<u>U.S. v. BORNSCHEUER</u> , 563 F.3d 1228 (Mar. 31, 2009)	26	<u>U.S. v. MITCHELL</u> , 565 F.3d 1347 (Apr. 22, 2009)	24
<u>U.S. v. BRANNAN</u> , 562 F.3d 1300 (Mar. 23, 2009).	29	<u>U.S. v. POWERS</u> , 562 F.3d 1342 (Mar. 26, 2009).	28
<u>U.S. v. CARMICHAEL</u> , 560 F.3d 1270 (March 5, 2009).	31	<u>U.S. v. SARRAS</u> , 2009 WL 1661152 (June 16, 2009).	20
<u>U.S. v. CARTER</u> , 566 F.3d 970 (Apr. 27, 2009).	23	<u>U.S. v. SCHULTZ</u> , 565 F.3d 1353 (Apr. 22, 2009).	24
<u>U.S. v. CLARKE</u> , 562 F.3d 1158 (Mar. 20, 2009).	29	<u>U.S. v. SEHER, ET AL.</u> , 562 F.3d 1344 (Mar. 26, 2009).	27
<u>U.S. v. COVINGTON</u> , 565 F.3d 1336 (Apr. 22, 2009).	23	<u>U.S. v. SIEGELMAN</u> , 561 F.3d 1215 (Mar. 6, 2009).	30
<u>U.S. v. DOCAMPO</u> , 2009 WL 1652910 (June 15, 2009).	21	<u>U.S. v. SMITH</u> , 568 F.3d 923 (May 19, 2009).	22
<u>U.S. v. DODGE</u> , 566 F.3d 976		<u>U.S. v. SPOERKE</u> , 2009 WL 1424042	

(May 22, 2009).	22
<u>U.S. v. VALENCIA-TRUJILLO</u> , 2009 WL 1929257 (July 7, 2009).	17
<u>U.S. v. WEBB</u> , 565 F.3d 789 (April 13, 2009).	26
<u>U.S. v. WILK</u> , 2009 WL 1842523 (June 29, 2009).	18