

CJA PANEL NEWSLETTER

FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF FLORIDA

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

Volume XII, Issue I

June 2, 2011

SENTENCES DROP IN NORTH FLORIDA - BREAK OUT THE CHAMPAGNE!

Statistics released the first week in April by the United States Sentencing Commission show an 18% drop in the average sentence handed out in North Florida for fiscal year 2010 (October 2009 through September 2010). Instead of being in contention for the longest average sentence in the country as we have been for more than a decade, we find ourselves behind 13 other districts and way behind this year's leader - Southern Indiana at 139.8 months. To be sure, our average sentence of 89.8 months is still far greater than the average of 51.1 months for all of the 94 districts in the country. Still, the national average is significantly reduced by the large number of immigration cases in the southwestern states. The average is far better, too, than the 109.6 months we had in 2009 and represents the first time since 1996, and probably the inception of the Guidelines, that we have been below the century mark.

The length of the average sentence in North

Florida, as is true in most of the districts with higher averages, is driven largely by the sentences in drug trafficking cases. About a third of all cases prosecuted in the district are for that offense, and the average sentence imposed on those convicted of drug trafficking is 121.3 months. As is true with the overall average, we have typically been in contention for the top spot for drug trafficking sentences. This year we dropped to number 12 on that list, behind first place Louisiana Western where the average sentence for drug trafficking was 148.4 months.

The data does not show the reason for the decrease, but suggests the credit goes to a greater willingness on the part of judges to rely on the discretion granted to them by the decision in United States v. Booker, 543 U.S. 220 (2005). In 2010, North Florida district judges imposed sentences within the Guidelines in 67.2% of the cases. In 2009 they did so in 68% of the cases. In 2010 there were below-Guideline sentences handed out in 16.7% of the cases on the basis of motions filed pursuant to USSG §5K1.1, a decrease

from the 21.4% in 2009. The judges, though, imposed below-Guideline sentences for reasons other than substantial assistance in 55 cases in 2010, which represents 14.2% of the total, an increase over the 34 cases in 2009, which amounted to 8.7% of the 2009 total.

Despite the progress, statistics from the Middle and Southern Districts of Florida show there remains room for improvement. In the Middle District, judges imposed below-Guideline sentences in 26.4% of the cases, excluding departures for 5K1.1 motions. The 5K1.1 departures accounted for below-Guideline sentences in another 19.3% of the cases. The average sentence was 75.4 months. In South Florida, judges imposed below-Guideline sentences in 26.6% of the cases and 5K1.1 departures in another 8.6%. The average sentence was 59.1 months.

Of those sentenced in North Florida, 40 were convicted at trial, which represents 10.1% of those sentenced. Excluding the island districts of the Northern Mariana Islands where the 5 trials represented 18% of those sentenced and the Virgin Islands where the 11 trials represented 14.5 percent of those sentenced, our 10.1% mark ties us with Western Louisiana for the highest trial percentage. The national average was 3.2%.

TEN DISTRICTS WITH THE LONGEST AVERAGE SENTENCE FOR 2010

1. Southern Indiana: 139.8 months
2. Eastern North Carolina: 105.9 months
3. Central Illinois: 103.8 months
4. Northern Texas: 103 months
5. Southern Iowa: 102.4 months
6. Maryland: 97.3 months
7. Middle North Carolina: 96.3 months
8. South Carolina: 93.6 months

9. Western Louisiana: 93.3 months
10. Southern Illinois: 92.7 months

TEN DISTRICTS WITH THE SHORTEST AVERAGE SENTENCE FOR 2010

1. New Mexico: 14.8 months
2. Arizona: 22.6 months
3. Southern California: 26.5 months
4. Western Texas: 28.8 months
5. Southern Texas: 28.9 months
6. Virgin Islands: 31.9 months
7. Vermont: 32.6 months
8. Northern Mariana Islands: 33.8 months
9. Utah: 40.3 months

GUIDELINE CHANGES

On April 6, 2011, the Sentencing Commission voted to add a series of amendments to the Sentencing Guidelines. They were submitted to Congress on May 1, 2011, and will take effect on November 1, 2011, unless Congress rejects them in the interim. The amendments include a provision that makes permanent the changes to the drug guideline, § 2D1.1, that went into effect last November as a result of an emergency temporary amendment. The amendments include, too, a number of changes that you can use now, even before they become effective, to argue for a below-guidelines sentence.

The temporary emergency amendment to the drug guideline came to be because of the passage of the Fair Sentencing Act of 2010 that directed the Commission to lower the guideline ranges for crack cocaine offenses. The lower range now requires, for example, 8.4 kilograms of crack cocaine to reach

offense level 38, instead of the previous threshold of 4.5 kilograms. Level 16 now requires 2.8 grams, instead of what was the threshold of 1 gram. The changes also eliminate the need to make the adjustment that had been the subject of Note 10(D) to the Commentary, which had been necessary when there were multiple drugs that included crack cocaine. The Commission will be meeting on June 1, 2011, to consider the possibility of making the changes retroactive.

Note, too, though that there are other changes to § 2D1.1 beyond just the change in quantities. There are reductions under a number of circumstances for the defendant who is deemed to be a “minimal participant.” The rest of the changes, though, will produce higher scores. They include:

- a 2-level increase for the use of “violence” or the making of a “credible threat to use violence.”
- a 2-level increase for “maintainin[ing] a premises for the purpose of manufacturing or distributing a controlled substance.” Take a look, though, at Note 28 to the Commentary, which excludes this adjustment for those for whom the distribution or manufacture of the drugs represents an “incidental or collateral use for the premises.”
- a 2-level increase for those receiving an adjustment for an aggravating role pursuant to § 3B1.1 if the defendant also meets one of five different circumstances including that

of committing the offense “as part of a pattern of criminal conduct engaged in as a livelihood.”

The illegal reentry guideline, § 2L1.2, has provided for increases to the offense level based on prior felony convictions with greater increases based on the severity of the prior offense, regardless of whether the conviction was too old to be counted for purposes of criminal history. The amendment provides some relief, stating that if the conviction is too old to be counted for criminal history, both the 16-level increase and the 12-level increase are reduced to an 8-level increase.

Two changes to the Commentary to §3B1.2 (Mitigating Role) might help your client get a 4-level decrease for being a “minimal participant.” Noting that two particular sentences to the Commentary “may have had the unintended result of discouraging courts from applying the adjustment,” the Committee has deleted one sentence about not relying “solely on the defendant’s bare assertions” and another one that provided that the “downward adjustment for a minimal participant will be used infrequently.”

Changes to §§5D1.1 and 5D1.2 (Supervised Release) should eliminate supervised release for many who will be deported, result in shorter periods of supervised release for some, and might result in early termination or extensions for others. A new subsection in §5D1.1 provides that “supervised release ordinarily should not be imposed in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment.” Currently, the guideline

requires supervised release of at least three years for Class A or B felonies and two years for Class C or D felonies. The new rule substitutes respective periods of two years and one year. The Commentary to §5D1.2 states that courts are “encouraged to exercise” the authority to “terminate or extend a term of supervised release . . . in appropriate cases.”

There are amendments, too, under the firearm guideline (§2K2.1) that affect “straw purchasers” and for those transporting firearms outside the United States, an increase in the offense level for those who commit a federal health care offense, and a break for those convicted of failing to pay child support. You can find all of the proposed changes and a more detailed summary at www.fd.org.

ROBERT A. DENNIS, JR. REENTRY COURT

The inaugural class of the Robert A. Dennis Jr., (or "RAD") Reentry Court was honored at a graduation ceremony held at the U.S. District Court in Pensacola on March 22, 2011. Judge Rodgers presided over the ceremony. Representatives of the U.S. Attorney's Office, Federal Public Defender's Office, U.S. Probation Office, Cordova Counseling Center, and the Florida Department of Education were also on hand to address the graduates and honor their achievements. The ceremony was well attended by judges from the state and federal bench, local attorneys in the Pensacola area, employees of the Court, and family and friends of the graduates. Bob Dennis' wife, Sherry, was present as were many of his friends and members of Bob's family.

The Reentry Court started in Pensacola in April 2010, under the leadership of Judge

Rodgers. At Judge Rodgers' suggestion, the Reentry Court bears Bob's name, in recognition of his 20 years of distinguished service with the Federal Public Defender's Office in Pensacola.

The inaugural "RAD" class of 2011 consisted of 7 graduates: Douglas Warrington, Denise Barbaree, Tavares Clayborne, Donald McCrae, Michael S. Robinson, Robert Jimenez, and Angela Marie McCranie. Each graduate received a medallion from Judge Rogers to signify the importance of their achievements over the past year. The graduates also addressed the audience.

The Reentry Court is presently in session in Pensacola with 10 new participants. The Program is designed to assist in the reintegration into society of selected “at risk” individuals who have completed their prison sentence, which in some cases has amounted to decades, and who are on supervised release. The Program is a voluntary one on behalf of the participants and lasts a minimum of a year. Upon successful completion of the Program, participants earn up to a year early release from their supervised release terms. Participants in the Program are under the supervision of a Reentry Court Probation Officer and agree to abstain from alcohol and drug use, to participate in a drug and alcohol evaluation, and to undergo any treatment recommended. Sanctions for non-compliance by participants in the Reentry Program run the gamut depending on the infraction and may include termination from the Program and return to "regular" supervised release.

The Reentry participants meet once a month as a group in an informal setting at the Court in Pensacola to discuss their progress. At

those monthly Reentry Court sessions, participants are counseled and assisted by Judge Rogers and representatives from the U.S. Attorney's Office, Federal Public Defender's Office, U.S. Probation Office, Cordova Counseling Center, and the Division of Vocational Rehabilitation of the Florida Department of Education. The Program marshals resources from those participants and others from northwest Florida to provide assistance to the participants with focus on the areas of mental health and alcohol/drug treatment, job skills training, education, job placement, housing assistance, and life skills. The Program has been successful, and several of this year's graduates have already returned to assist the 2012 class.

If you have a client in Pensacola who would be interested in the Program, contact U.S. Probation Officer Brian Davis at 435-8430.

NEW UNITED STATES ATTORNEY

This past June, Pamela Marsh became the United States Attorney for the Northern District of Florida. She grew up in Tallahassee and had most recently been "of counsel" to the Akerman Senterfitt law firm in Tallahassee, practicing mainly appellate litigation and white-collar criminal defense. She is a 1995 graduate of the Georgetown University Law Center. From 1995-1996 she was a law clerk to Jane Roth of the United States Court of Appeals of the Third Circuit. She had been an assistant United States Attorney in Tampa from 1999 to 2006.

The management structure in the office now has Robert Davis as the First Assistant. Stephen Kunz is the Chief Criminal Assistant, Pamela Moine is the Civil Chief, and Robert Davies is the Appellate Chief. Nancy Hess

serves as the Supervisory Assistant in Pensacola with Chris Canova holding that position in Tallahassee.

With Ms. Marsh's arrival, the United States Attorney's Office has added a pretrial diversion program, something the District has never had in the past.

Acting United States Attorney Tom Kirwin retired from the Office this past February, and Florida Chief Financial Officer Jeff Atwater appointed him as a Deputy Chief Financial Officer. In his new position, Mr. Kirwin is responsible for overseeing the Department's three law enforcement areas: the Division of Insurance Fraud, the Bureau of Fire and Arson Investigations, and the Office of Fiscal Integrity.

NEW CLERK OF COURT

Jessica Lyublanovits is the new Clerk of Court for the Northern District of Florida. Her first day was January 3rd. Ms. Lyublanovits is a graduate of the University of South Florida and earned a law degree from the Stetson University College of Law. She started her career with the courts as a law clerk to Judge Elizabeth Kovachevich in the Middle District of Florida. She began her work in the Clerk's office in the Middle District as an Environmental Quality Manager. She held that position until she was promoted to the position of Chief Deputy Clerk in June 2004, where she served until becoming the Clerk for the Northern District.

Ms. Lyublanovits replaces Bill McCool who had served since 1992. Mr. McCool left for Seattle to become the Clerk for the United States District Court for the Western District of Washington.

EDDIE MCFARLAND - INVESTIGATOR OF THE YEAR

The National Defender Investigator Association is the only national organization dedicated to the training and support of investigators working in the area of indigent defense. Each year they select one investigator across the country as the recipient of the Ed Turner Investigator of the Year Award. This year's winner was our own Eddie McFarland. The Association announced the award this past April at the annual conference in Huntington Beach, California.

Eddie has worked out of our Tallahassee office for 25 years. Assistant Federal Public Defender Bill Clark nominated Eddie for the award, in part for Eddie's work in helping produce a recent sentencing video, but also in recognition of the countless number of investigations in which Eddie has played a critical role and Eddie's diplomacy in his day to day interactions with the Court and the rest of the legal community.

FAIR SENTENCING ACT

The Fair Sentencing Act, Pub. L. No. 111-220, 124 Stat. 2372 (2010), became effective on August 3, 2010. It raised the mandatory minimum threshold amounts for trafficking in crack cocaine and directed the United States Sentencing Commission to make the crack cocaine sentencing guidelines consistent with the new mandatory minimum scheme. The guideline changes took effect on November 1, 2010, and apply to all who were sentenced after that date. There has, however, been a debate about who gets the benefit of the reduced mandatory minimum penalties.

In more than 30 cases around the country,

district court judges have held that the provisions of the Act apply to those who were sentenced after August 3, 2010, regardless of when the individual committed the crime. Here, in the Northern District of Florida, Judge Mickle has done so in at least two cases: U.S. v. Shahiid Maxwell, Case No. 4:10cr1, and U.S. v. Rodney Jackson, Case No. 1:10cr20.

The track record in the courts of appeal has so far not been encouraging. In United States v. Fisher, 635 F.3d 336, 338 (7th Cir. 2011), the court held that the Act did not apply to those who committed their offense prior to the enactment of the Fair Sentencing Act, regardless of when they were sentenced. The court went on to suggest that a better name for the Act would have been "the Not Quite as Fair as it could be Sentencing Act of 2010." In an unpublished decision, United States v. Hudson, 2011 WL 1810500 (11th Cir. May 11, 2011), the Eleventh Circuit reached the same conclusion as did the court in Fisher. The court rejected the argument that consistent language in an earlier published decision, United States v. Gomes, 621 F.3d 1343 (11th Cir. 2010), was only *dicta*. Some eight other circuits have declined to apply the Act to cases on appeal where the defendant committed the crime and was sentenced prior to the enactment of the legislation.

The debate revolves around the application of the general savings statute, 1 U.S.C. § 109. The argument advanced by the Government has been that the statute ties the punishment to the date of the crime, i.e. the penalty in effect at the time of the commission of the crime determines the sentence. In some of the district court cases, though, defendants have successfully argued that the general savings

statue is “not the straightjacket some courts have supposed it to be.” United States v. Watts, 2011 WL 1282542 *11 (D.Mass. April 5, 2011). The argument is that the intent of Congress to apply the Fair Sentencing Act to anyone sentenced after its enactment is apparent from Congress’s emergency directive to the Sentencing Commission to immediately amend the guidelines and the widespread recognition that crack cocaine sentences were disproportionately harsh. *Id.* at *11-*17.

With the passage of the Fair Sentencing Act, the 10 year mandatory minimum sentence, which, depending on criminal history, can also be 20 years or life (21 U.S.C. § 841(b)(1)(A)), requires 280 grams of crack cocaine, up from 50 grams. The 5 year minimum mandatory, which can be, depending on criminal history, 10 years (21 U.S.C. § 841(b)(1)(B)), requires 28 grams of crack, up from 5 grams.

STATE SENTENCE TO RUN CONCURRENTLY??

It’s a reoccurring problem. The federal judge sentences an individual to prison, and the individual is brought back to state court where the state judge imposes a state prison sentence to run concurrently. To the surprise of everyone, though, the U.S. Marshals ignore the state judge’s order and let the individual go on to state prison. If no one intervenes, the Marshals will eventually retrieve the individual and transport him to federal prison, but only after the state sentence is completed. Once the individual arrives at the federal prison, he will find out, too, that the Bureau of Prisons won’t give any credit for the time spent in state prison.

There are any number of reported decisions where the problem has surfaced. *See, e.g.,*

Sadler v. State, 980 So.2d 567 (5th DCA 2008); Hutchinson v. State, 845 So.2d 1019 (3d DCA 2003); Taylor v. State, 710 So.2d 636 (3d DCA 1998).

It’s a matter of comity: “*Determination of priority of custody and service of sentence between state and federal sovereigns is a matter of comity to be resolved by the executive branches of the two sovereigns. Normally, the sovereign which first arrests an individual acquires priority of jurisdiction for purpose of trial, sentencing, and incarceration.*” United States v. Warren, 610 F.2d 680, 684 (9th Cir. 1980). *See also In re: Libereatore*, 574 F.2d 78, 89 (2d Cir. 1978); Ponzi v. Fessenden, 258 U.S. 254, 259-261 (1922); Shumate v. United States, 893 F.Supp. 137, 139 (N.D.N.Y. 1995). As a member of, not the executive branch, but the judicial branch, the state judge who is trying to run the sentence concurrently does not have any say in the matter.

In assessing the situation, the key is to determine who made the initial arrest - state or federal authorities. If, as is usually the case, it was the state authorities, a state sentence imposed subsequent to the federal sentence will take priority and will not run concurrently to the federal sentence regardless of whether the state judge orders it to do so. If, however, the initial arrest was made by the federal authorities, the state judge should be successful in ordering a concurrent state sentence imposed subsequent to the federal sentence.

There is an exception to the rule about the priority of custody. If, for example, the individual is first arrested by state authorities, but then secures his release by posting bond, “the first sovereign relinquishes its priority.”

United States v. Smith, 812 F.Supp. 368, 371 n. 2 (E.D.N.Y. 1993). *See also* Strand v. Schmittroth, 251 F.2d 590 (9th Cir. 1957). It means that if you anticipate the problem, you can solve it by getting the state judge to release the defendant on his or her recognizance before the federal sentence is imposed. The net effect will be that the defendant will be released to the federal hold, the sentence imposed by the federal judge will have priority, and the subsequently imposed state sentence will run concurrently. The problem, though, is that the state prosecutor will need to secure a writ (habeas corpus ad prosequendum) to get the defendant back to resolve the state case. It's something most assistant state attorneys don't know how to do and more trouble than most are willing to go to.

Assume, though, an initial state arrest for the client who never gets released from state custody. He goes to federal court pursuant to a writ (habeas corpus ad prosequendum), gets his federal sentence, and then goes back to state court where he gets a sentence that the state judge intends to run concurrently. Is there any way to save the client from serving his federal sentence only after he finishes the state one?

He can go back to state court as the defendant did in those state cases cited earlier and ask to withdraw his plea or somehow gain the benefit of the concurrent sentence for which he had bargained - maybe a sentence to time served. Another option, though, would be to get the Bureau of Prisons to designate the state prison as the place of confinement for the service of the federal sentence. It will normally make that designation if the federal judge makes the recommendation in the federal judgment or states in the judgement

that he or she wants the federal sentence to "begin immediately." You can ask the judge to make those recommendations at the time of the sentencing in anticipation of the expected state concurrent sentence. You can also ask the federal judge to do so after both the federal and state sentence have been imposed. You can make the request in a letter to the judge or in a motion. If the Bureau does designate the state prison as the place of confinement, it will do so *nunc pro tunc* to the date of the imposition of the federal sentence. It will not, however, normally award jail time credit prior to the federal sentencing if, as is likely, that time was credited to the state sentence.

If you are unsure about who has primary jurisdiction over your client, you can check the federal docket or check with the Marshal's Office to see if a writ was issued to get him to federal court. If there was, the state has primary jurisdiction.

We have on our webpage, under the heading of "Concurrent State Sentence - BOP memorandum," a memorandum prepared by the Bureau of Prison's regional counsel that addresses this issue in some detail. Please know, too, you can call us if you need help navigating through all of this.

NEWSLETTER CHANGES

We have fallen down on the job with this newsletter. While we used to get it out every quarter, this is the first edition since April of 2010. Nonetheless, we're going to try and get back to more regular issues.

In this issue, we've left out the case summaries that have routinely been part of the publication. Our thinking was that the

summaries made the newsletter so big and overwhelming that many panel members may have consigned the newsletter the “to be read eventually” category. If you’d like to register a vote to have the summaries back in the newsletter, just call or email Randy Murrell: (850) 942-8818 or [Randolph Murrell@fd.org](mailto:Randolph.Murrell@fd.org).

TRAINING OPPORTUNITIES

We’ve taken an hiatus from our monthly luncheon training sessions, but as of last month we’re back on track. This month we’ll be showing our annual video recording of the review of the year’s Supreme Court decisions. It comes from the Federal Public Defender Conference and features Brooklyn Law School professor Susan Herman and Paul Rashkind, the Appellate Chief from the Federal Public Defender’s Office in South Florida.

The dates are:

Panama City - June 21st

Tallahassee - June 23rd

Gainesville - June 29th

Pensacola - June 29th

The Training Branch of the Office of Defender Services has a number of training programs scheduled for this summer: Winning Strategies in Indianapolis, Indiana, from June 9-11; Law and Technology Series: Electronic Courtroom Presentation Workshop, Providence Rhode Island, from July 21-23; and the Multi-Track Program, which provides an in-depth instruction in a variety of substantive criminal defense topics, in Seattle, Washington, from August 18-20. You can find the details and registration procedures at the Training Branch’s website, www.fd.org.

COMPUTER HARDWARE, SOFTWARE, AND LITIGATION SUPPORT SERVICES

In order to provide an adequate defense to defendants charged in complex cases and represented by members of the Criminal Justice Act panel, a provision in the Guide to Judiciary Policy, §320.70.40, allows panel counsel to obtain litigation support software, hardware, or services that are not typically available in a law office. If a procurement will exceed certain financial thresholds (\$800 for hardware or software; \$10,000 for combined cost of computer systems, litigation support products, services, personnel, or experts), panel lawyers must consult with, and obtain a recommendation from, the National Litigation Support Administrator in the Office of Defender Services regarding the technological and budgetary soundness of the request before any purchase is approved. The consultation should take place as early in the case as reasonably possible. Panel lawyers may pay for the product or service and obtain reimbursement by the use of CJA form 21 or 31 (for capital representation) or arrange for the vendor to directly bill the court through a CJA 21 or 31 form.

To allow for proper tracking of property, panel lawyers are required to provide documentation to the National Litigation Support Administrator after they purchase the hardware or software. The documents that need to be submitted are (1) a copy of the completed CJA 21 or 31 form, (2) the purchase order from the vendor, and (3) any receiving documents such as a copy of the packing slip or an invoice. Upon completion of the case, since any product purchased with Criminal Justice Act funds is the property of

the United States, counsel must contact the National Litigation Support Team about how to delete case-related materials and where to send the hardware or software for future use.

The National Litigation Support Administrator is Sean Broderick. He can be reached at (510) 637-1950 or Sean_Broderick@fd.org. On our webpage at www.fpd-fln.org, you'll find a link to the webpage of the National Litigation Support team.

DOWNWARD DEPARTURES

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

Emanuel, Timothy Collier, L. Atty: Tom Keith
Docket: 3:09cr107
Charge: 4 cts Poss FA by Convicted Felon
Range: 92 - 115 months
Sentence: 51 months
Date of Imposition of Sentence: 6/22/10
Grounds: 5K1.1

Greyy, Lane Paul, M. Atty: Darren Johnson
Docket: 1:09cr24
Charge: Consp. Dist. Controlled Substance & Consp to commit Health Care Fraud
Range: 188 - 235 months
Sentence: Probation
Date of Imposition of Sentence: 7/29/10
Grounds: 5K1.1, defendant's health difficulties; avoidance of unwarranted disparities with co-defendants sentenced in state court

Hampton, Jamil Collier, L. Atty: Randall Lockhart
Docket: 3:10cr47
Charge: Consp Dist >500 g. cocaine
Range: 263 - 327 months
Sentence: 120 months
Date of Imposition of Sentence: 8/25/10
Grounds: 5K1.1

McGriff, Dock Mickle, S. Atty: Randy Murrell

Docket: 4:10cr1
Charge: Consp dist >500 g. cocaine
Range: 262 - 327 months
Sentence: 157 months
Date of Imposition of Sentence: 9/20/10
Grounds: 5K1.1

Bryant, Alvin Mickle, S. Atty: Randy Murrell
Docket: 4:08cr36
Charge: Consp dist ecstasy, PWIT ecstasy
Range: 92 - 115 months
Sentence: 62 months
Date of Imposition of Sentence: 9/20/10
Grounds: 5K1.1

Buchanan, Shannon Rodgers, M. Atty: M. Hendrix
Docket: 3:10cr6
Charge: Consp to Manufacture and Dist 500 g. Meth, Consp PWITD Psuedoephedrine
Range: 151 - 188 months
Sentence: 70 months
Date of Imposition of Sentence: 9/22/10
Grounds: 5K1.1

White, Amanda Rodgers, M. Atty: Randy Murrell
Docket: 1:08cr12
Charge: Consp Dist. > 1,000 k. Marijuana
Range: 70 - 87 months
Sentence: 18 months
Date of Imposition of Sentence: 10/1/10
Grounds: 5K1.1

Harmon, Donald Vinson, R. Atty: Michelle Hendrix
Docket: 3:10cr82
Charge: Consp to Manufacture and Dist 500 g. Meth, Consp PWITD Psuedoephedrine
Range: 151 - 188 months
Sentence: 60 months
Date of Imposition of Sentence: 10/19/10
Grounds: 5K1.1

Rodriguez, Lionel Hinkle, R. Atty: Randy Murrell
Docket: 4:10cr54
Charge: Consp Dist. Cocaine
Range: 108 - 135 month
Sentence: 27 months
Date of Imposition of Sentence: 1/13/11
Grounds: 5K1.1 and limited role

VARIANCES

Butler, Gabrielle Hinkle, R. Atty: Bill Clark
 Docket: 4:09cr73
 Charge: Credit Card Fraud, Agg. Identity Theft
 Range: 48 - 54 months
 Sentence: 30 months
 Date of Imposition of Sentence: 5/13/10
 Grounds: avoidance of unwarranted sentencing disparity with co-defendant

Keen, Dennis Collier, L. Atty: Tom Keith
 Docket: 3:10cr23
 Charge: Receipt of Child Porn
 Range: 78 - 97 months
 Sentence: 60 months
 Date of Imposition of Sentence: 6/22/10
 Grounds: psychological exam showing little risk that defendant would reoffend, exemplary military career and otherwise good background

Black, Paul Rodgers, M. Atty: Tom Keith
 Docket: 3:09cr67
 Charge: Poss of Child Porn
 Range: 97 - 121 months
 Sentence: 40 months
 Date of Imposition of Sentence: 7/28/10
 Grounds: defendant had completed year long sexual offender treatment program, had served 22 years in the National Guard and had served in Iraq; defendant served as a volunteer fire fighter and family ties

Strickland, Keith Hinkle, R. Atty: Randy Murrell
 Docket: 4:10cr31
 Charge: Receipt of Child Porn
 Range: 151 - 188 months
 Sentence: 72 months
 Date of Imposition of Sentence: 8/11/10
 Grounds: guideline score overstated seriousness of offense; lack of any criminal history; defendant presented little risk to others

Dementry, James Collier, L. Atty: Randall Lockhart
 Docket: 3:10cr21
 Charge: Production of Short Barreled shotgun, unlawful transfer of firearm
 Range: 37 - 46 months
 Sentence: 24 months
 Date of Imposition of Sentence: 8/12/10
 Grounds: avoidance of unwarranted sentencing disparity with co-defendant

Cozzaglio, Jon Rodgers, M. Atty: Tom Keith
 Docket: 3:10cr45
 Charge: Poss FA by Convicted Felon
 Range: 30 - 37 months
 Sentence: 24 months
 Date of Imposition of Sentence: 8/26/10
 Grounds: defendant possessed the firearm for a short period of time, the firearm was a shotgun rather than a handgun, no evidence that the firearm was loaded or used for unlawful purposes, no previous history of unlawful firearm use.

Ridgeway, Tora Hinkle, R. Atty: Barbara Sanders
 Docket: 4:09cr59
 Charge: Consp Dist. Cocaine
 Range: 262 - 327 months
 Sentence: 120 months (min. mandatory)
 Date of Imposition of Sentence: 9/1/10
 Grounds: defendant's efforts at cooperation, offenses qualifying defendant for career offender classification were minor; defendant's involvement in drug trafficking was the result of influence of an abusive spouse.

Gonzalez, Pedro Rodgers, M. Atty: Jennifer Hart
 Docket: 3:10cr25
 Charge: Theft of Government Property
 Range: 6 - 12 months
 Sentence: Probation
 Date of Imposition of Sentence: 9/27/10
 Grounds: defendant's mental health difficulties

Johnson, Michael Hinkle, R. Atty: Bill Clark
 Docket: 4:10cr26
 Charge: Poss FA by Convicted Felon
 Range: 108 - 135 months
 Sentence: 78 months
 Date of Imposition of Sentence: 10/15/10
 Grounds: the, then, soon-to-be-implemented change in the guidelines eliminating recency points

Knight, Frank Rodgers, M. Atty: Randall Lockhart
 Docket: 3:10cr14
 Charge: Poss and Transportation of Child Porn
 Range: 121 - 151 months
 Sentence: 78 months
 Date of Imposition of Sentence: 11/17/10
 Grounds: exemplary military record, absence of any criminal history

Green, Lonnie Rodgers, M. Atty: Tom Keith
 Docket: 3:10cr77
 Charge: Poss FA by Convicted Felon
 Range: 15 - 21 months
 Sentence: 12 months
 Date of Imposition of Sentence: 12/3/10
 Grounds: defendant only possessed the two firearms briefly and, then, only to pawn them

Odom, Justin Rodgers, M. Atty: Don Sheehan
 Docket: 3:10cr43
 Charge: Consp to Traffic Cocaine
 Range: 108 - 135 months
 Sentence: 18 months
 Date of Imposition of Sentence: 12/22/10
 Grounds: 19 year old defendant, who was eligible for the safety valve, played a minor role in the conspiracy and was led into the offense by his father

Peterson, Adam Vinson, R. Atty: Jennifer Hart
 Docket: 3:10cr92
 Charge: Receipt of Child Porn
 Range: 168 - 210 months
 Sentence: 121 months
 Date of Imposition of Sentence: 1/10/11
 Grounds: Judge's reservations about the basis for the child porn guidelines and conclusion that a lesser sentence was sufficient

Roberts, Scott Rodgers, M. Atty: Tom Keith
 Docket: 3:09cr64
 Charge: Poss FA by Convicted Felon
 Range: 46 - 57 months
 Sentence: 36 months
 Date of Imposition of Sentence: 2/3/11
 Grounds: criminal history score overstated the seriousness of defendant's record; defendant used the firearm for hunting

Fisher, David Mickle, S. Atty: Aaron Baker
 Docket: 1:10cr40
 Charge: Fraud and making false statements
 Range: 33 - 41 months
 Sentence: Probation
 Date of Imposition of Sentence: 2/7/11
 Grounds: avoidance of unwarranted sentencing disparity with co-defendant

Wright, Darnell Rodgers, M. Atty: Tom Keith
 Docket: 3:09cr7
 Charge: PWITD Marijuana & Poss FA by Convicted Felon

Range: 46 - 57 months
 Sentence: 36 months
 Date of Imposition of Sentence: 3/28/11
 Grounds: defendant's efforts at cooperation; post-sentencing rehabilitation (defendant's original sentence had been vacated)

Howard, Courtney Hinkle, R. Atty: Richard Smith
 Docket: 4:10cr74
 Charge: Consp Dist. Cocaine
 Range: 24 - 30 months
 Sentence: Time Served (about 5 months)
 Date of Imposition of Sentence: 4/1/11
 Grounds: 18 USC § 3553(a)

VICTORIES

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.

Aaron Baker convinced a Gainesville jury that his client, Richard Miter, was not responsible for trafficking in any crack cocaine and trafficked in less than 5 kilograms of powder cocaine. In doing so, he successfully challenged the testimony of a number of cooperating defendants who were presented by the Government to support the charge in the indictment, trafficking in more than 5 kilograms of powder cocaine and more than 50 grams of crack cocaine. The net result was that Miter received a 10-year mandatory minimum sentence instead of the 20-year mandatory minimum he was facing if he had been convicted as charged.

The Eleventh Circuit Court of Appeals agreed with **Jon Uman's** argument that Judge Mickle should have granted Jon's

client, Dennis Friske, a judgment of acquittal during Friske's trial on the charge of interfering in an official proceeding. Law enforcement officials caught Friske apparently trying to dig up \$375,000 in drug proceeds that had been hidden by his friend and incarcerated codefendant, William Erickson. The Government's theory was that, by trying to retrieve the money for Erickson, Friske had been interfering with the forfeiture of the money. The Eleventh Circuit, however, held that Judge Mickle should have granted Jon's motion for a judgment of acquittal because the Government had failed to establish that Friske knew of the forfeiture proceeding.

In the Eleventh Circuit Court of Appeals, **Bob Harper** won his client, Seth Jerchow, a 2-level reduction in the Guideline range. Bob successfully argued that a 2009 amendment to the Sentencing Guideline Commentary, which took effect after Jerchow was sentenced, was a clarifying amendment that should be applied to cases on appeal. The amendment provided that the increase in USSG §2G1.3 for unduly influencing a minor requires that there be an actual child, not a law enforcement officer posing as a child.

In a complicated case involving a scheme to fraudulently promote and sell various tax- and debt-elimination products and nine defendants, which was prosecuted by lawyers from the Department of Justice's Tax Division, the Government sought restitution in the amount of 22 million dollars. **Randall Lockhart** of our Pensacola office and Pensacola Panel member **Sharon Wilson** persuaded Judge Rodgers that she should *deny altogether* the Government's request. In doing so, Judge Rodgers held (1) that rather than

trying to base the restitution amount on the gross receipts of the defendants, the Government could have and should have established the tax liability of the defendants; and (2) that, given the requirement that the Government give priority, not to recouping the loss the Government, but to other victims, the Government was not entitled to restitution because it failed to show it was impracticable to seek restitution for the 11,000 customers of the products sold by the defendants.

In the Eleventh Circuit Court of Appeals, **Chet Kaufman** of our Tallahassee office preserved his earlier trial court habeas victory for his client, Willie Baker. In the trial court, Judge Hinkle had agreed with Chet's argument that the state court judge had improperly excluded from Baker's sexual battery trial evidence of false accusations made by the alleged victim and had ordered his release or a new trial.

Randy Murrell convinced a Tallahassee jury that his client, Joe Glow, conspired to grow less than the 100 marijuana plants charged in the indictment. He relied heavily upon the government's video showing that many of the plants were dead and probably lacked leaves and maybe even roots. Glow, because of his criminal history, was facing a mandatory minimum 10-year sentence. Judge Mickle sentenced Glow to 21 months of imprisonment.

Charles Lammers of our Tallahassee office won a remarkable acquittal from a Panama City jury for his client, Ossie Davis. Davis was facing at least a fifteen-year mandatory minimum sentence as an armed career criminal. Charles successfully argued that the Government had failed to prove Davis knew

the gun was in the car that Davis had been driving. He did so despite evidence that Davis, at the time of the arrest, had said something to the effect of “I forgot it was there,” and photographic evidence showing the gun adjacent to the driver’s seat and plainly visible.

In a case that went to trial on the claim that the defendant and her husband had made a fraudulent claim for life insurance proceeds, **Jennifer Hart**, of our Pensacola office, persuaded Judge Vinson to grant her client, Maria Rodriguez, a rare 3-level decrease in the offense level for a minor role and an even rarer guideline departure based on family ties. The probation office had recommended a guideline range of 57 to 71 months, but Judge Vinson, after considering Jennifer’s sentencing memorandum and argument, imposed a sentence of 30 months. With both Rodriguez and her husband facing a prison sentence, Judge Vinson granted the departure because Rodriguez was the mother of three young children.

Christopher Rabby and **Brian Lang** won an acquittal in a bench trial before Magistrate Judge Davis for their father/son clients, Michael Anderson and Michael Anderson, Jr. The Andersons had been charged with interfering or resisting a park ranger at the Fort Pickens area of the Gulf Islands National Seashore. Judge Davis wrote a detailed 13 page order setting forth his findings and ultimately concluded that “Nobody . . . was innocent here. But the issue is not whether, in hindsight, the defendants acted in a civil or appropriate manner, which they did not, but whether the government proved beyond a reasonable doubt that they had violated the regulation as charged.” Judge Davis concluded it had not.

Gwen Spivey of our Tallahassee office won two cases on the same day before the Eleventh Circuit Court of Appeals. The court agreed with Gwen’s argument in the possession-of-a-firearm-by-a-convicted-felon case against Robert Denmark, finding that Judge Mickle had erroneously assessed an additional four offense levels for possession of the firearm in connection with another felony offense. The court agreed, too, that in holding Justin Swaine in contempt for refusing to testify, Judge Hinkle should have included in his order a statement that the maximum period of incarceration was 18 months.

Randy Murrell won a judgment of acquittal in a bench trial where the defense and the Government had stipulated to a set of facts. Randy’s client, Amari Griffiths, was a mailman who stole checks from the mail and passed them on to a friend who forged them, deposited them in various accounts, and then withdrew the money. The Government, on the theory that Griffiths had aided his friend in committing bank fraud by stealing the victim’s name, bank account number, and routing number, charged Griffiths with aggravated identity theft. Judge Mickle, however, agreed with Randy’s argument that what amounted to aiding a forgery was not the same as aiding aggravated identity theft.

In Pensacola, the Government waited until just days before the trial to move to dismiss charges against Alice Washington in a case where it had charged her with unlawfully receiving more than \$19,000 in Social Security disability payments. The Government did so only after **Jennifer Hart** convinced them that Washington, who was ineligible for the payments because she had left the country, would not have known she

was ineligible. Washington had been in Trinidad doing volunteer work for her church.

Despite defense counsel's argument to the contrary and conflicting testimony at the violation hearing, Judge Smoak, concluded that Phynerrian Manning had violated his supervised release. **Chet Kaufman** won Manning a remand back to the trial court by successfully arguing to the Eleventh Circuit Court of Appeals that Judge Smoak, in failing to explain his finding that Manning had violated his supervised release, had failed to satisfy the requirements of due process.

Bill Clark, in our Tallahassee office, convinced Judge Hinkle that his client, Linda Gaines, was not a career offender. He did so by convincingly arguing that escaping from a patrol car in handcuffs was not a crime of violence, which meant that the guidelines range was 6-12 months, rather than 188 - 235-month calculation of the career offender provision. Judge Hinkle imposed a sentence of 1 day in jail followed by a period of supervised release.

In a case involving the retroactive application of the reduced crack cocaine guidelines, **Gwen Spivey**, won a reversal of an order from Judge Hinkle denying the reduction. In his order in the case against Edward Taylor, Judge Hinkle had concluded that, despite the absence of an explicit finding that the quantity of crack cocaine exceeded 4.5 kilograms, he believed it was apparent from the record that he would have made that finding had it been necessary to do so, and, therefore, lacked the authority to reduce Taylor's sentence. The Eleventh Circuit, however, recognizing that district courts cannot make new findings in a proceeding where a defendant seeks the retroactive application a guideline

amendment, held that Taylor was eligible for a reduced sentence. When the case was remanded, Judge Hinkle reduced Taylor's 1998 sentence from 235 months to 188 months.

Bill Clark, in representing his client, Ralph Stengel, used one of the first videos that has been produced for a sentencing in the Northern District. He used it as part of his successful effort to convince Judge Hinkle to give a below-guidelines sentence of 6 months. The 12 minute video consisted of interviews of friends and family in Steinhatchee who spoke favorably of Stengel. The guideline range had been 57 to 71 months.

Jennifer Hart office won a judgment of acquittal for her client, Cynthia Bedell, before Magistrate Judge Timothy. Bedell had been charged with disorderly intoxication.

In Panama City, panel member **Barbara Sanders** won a motion to suppress for her client, Samuel Taratoot, in a hearing before Magistrate Judge Bodiford. She convinced the judge that there was no probable cause to support the traffic stop. Her success led the Government to move for the dismissal of the marijuana possession charge.

Joe Hammons convinced a Pensacola jury to acquit his client, Caleb Glover, of the charge of possession of a machine gun in furtherance of a drug trafficking offense. Because of a related charge of possession of a firearm in furtherance of a robbery, Glover would have received a mandatory life sentence had he been convicted of the machine gun charge. Joe also successfully argued some points regarding the guideline calculations on the related charges and convinced Judge Rodgers

that the probation office had overstated the Guideline score. Judge Rodgers sentenced Glover to 154 months, a sentence far better than the life sentence he would have received absent the acquittal.

Randy Murrell successfully argued against the Government's request to forcibly medicate his mentally ill client, Jerry Sledge, for purposes of sentencing. With no objection from the Government, Judge Smoak also granted Sledge a new trial, acknowledging that Sledge was incompetent during his 2008 trial for growing more than 100 marijuana plants. Sledge was facing a mandatory 10 years because of a 1994 prior drug conviction, but between the time of the verdict and sentencing, Judge Smoak found him incompetent. Recently, Judge Smoak ordered Sledge released, finding that Sledge did not represent a danger to others.

In Panama City, **Jean Downing**, won an acquittal in a jury trial over which Judge Smoak presided. Jean's client, Daymane Rosa, had been charged with being part of a conspiracy to arrange a fraudulent marriage to evade the immigration laws. Having done her research, Jean knew that it was a defense to the crime if one of the marriage partners acted, at least in part, out of a legitimate desire to get married. Jean successfully argued that despite the money that had been exchanged at a higher level of the conspiracy, the bride's motivation included a genuine wish to be married.

In a Gainesville marijuana conspiracy case, **Steve Bernstein** successfully challenged a list of factors that increased the sentencing range of his client, Dannie Reaves. He persuaded Judge Mickle (1) that a prior felony drug conviction could not be used to enhance the penalties because it was part of the instant

case; (2) that Reaves' participation in cocaine conspiracy was not relevant conduct; and (3) that Reaves was not a leader or organizer and should not receive an increase in the offense level based upon his role in the offense. In the end, Judge Mickle found that the guideline range, instead of being 360 months to life, was 62 to 74 months. Judge Mickle sentenced Reaves to 70 months.