FEDERAL PUBLIC DEFENDER

NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

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TOM MILLER IS RETIRING

Tom Miller has announced that he will be retiring at the end of this month. Tom began working in our office in 1991. Tom was our first and has been our only lawyer to staff the Gainesville office. When he started, there was no Gainesville office, and he traveled from Tallahassee to represent clients in the Gainesville Division. In July 1992, Tom opened an office in the federal courthouse. Within a few months, he and the office moved to our current location in the Sun Center.

Since 1991, Tom has represented hundreds of clients in federal court and has, in the Northern District of Florida, become one of those most knowledgeable about the day-to-day workings of the federal court. Those that have worked with Tom know him to be especially cordial and likeable, and devoted to getting the best possible outcome for his clients. One of the most remarkable measures of his efforts is that, over the years, not one of his clients charged with a drug offense was sentenced to a mandatory life sentence.

In the nearly 18 years that Tom has been an assistant federal public defender, he has worked many wonders and helped countless numbers of clients. Those he represented have been the beneficiaries of his work, as has the quality of justice in the Northern District. Those of us in the Federal Defender Office have come to treasure Tom as a fine lawyer with a big heart and as a friend with a wonderful sense of humor. Tom's retirement is one that has been well earned, and we wish him well.

CLIENT CONFIDENTIALITY AND CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

What is the proper, professional response of a criminal defense attorney when a former client alleges that the attorney provided ineffective assistance of counsel, but the attorney's defense could require disclosure of confidential communications or of opinions that might hurt the client's claim? The following analysis, based on research by Gwen Spivey, forms the basis of our new office policy, and it could be helpful to any panel attorney faced with this dilemma.

An attorney who is the subject of a claim of ineffective assistance of counsel made by a former client in a motion to vacate under 28 U.S.C. § 2255 should consider that claim as a *waiver* of the attorney-client privilege *to the extent necessary to defend that claim*. This is provided by the applicable professional conduct rules, primarily Rule 4-1.6(c), Florida Rules of Professional Conduct:

> A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: . . . (4) to respond to allegations in any proceeding concerning the lawyer's representation of the client".

See also, Rule 1.6, Confidentiality of Information, ABA Model Rules of Professional Conduct ("(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary * * * (5) . . . to respond to allegations in any proceeding concerning the lawyer's representation of the client"); Ethics Opinion No. 70-40, The Florida Bar (responding to a request for advice on a subpoena, "the attorney must be able to defend himself if the client places into question the competency of the advice." "When the client has challenged a sentence claiming the same not to have been explained to him and his attorney is aware of what explanations, if any, were given, the attorney additionally must be in a position to defend himself as to competent advice having been given as well. From this latter point of view, the attorney-client privilege would not apply in the first instance." (Emphasis added.)).

These claims usually come to our attention upon receipt of a request for response to the claim from an Assistant United States Attorney. If the attorney anticipates making any disclosure, the attorney or his/her supervising attorney should immediately assess the claim and write the former client with the following standard advice:

> Our office has received notice from the United States Attorney's Office that you have filed a claim that legal representation provided by our office was deficient and prejudicial, i.e., that we provided ineffective assistance of counsel in violation of the Sixth Amendment to the U. S. Constitution. Our office has been asked to respond to this claim by [date].
>
> Out of an abundance of caution, and a desire to be fair to you, we are writing to make sure you understand that this claim waives attorney-client confidentiality, *but only to the extent necessary to respond*. That is, our office will have no choice under the Rules of Professional Conduct but to respond to your allegation(s), but that response will be as limited as possible. [Add something case-specific so the client does not fearfully and unnecessarily withdraw a claim, for example: "In your case, that means notes of our conversations about the potential sentence."]
>
> You are certainly free and entitled to maintain this

> claim, and this advice is in no way intended to discourage continuation of this claim, but only to advise you of the obligation on our part to respond.

Attorneys should also be cognizant of both the tension that can arise from a desire to be cooperative with the court, and any natural defensiveness about such a claim. We should make every effort to avoid doing the government's job for it and to avoid any unnecessary disclosures or gratuitous comments. That is, we should strive to do the *least harm possible* to the defendant consistent with a fair and honest response to the court. We should keep focused on our overriding duty to the client by only providing responses narrowly tailored to avoid excess disclosure, while always responding honestly with the tribunal. If the attorney has any doubt about the appropriate response, the matter should be resolved with the supervising attorney.

This policy avoids any requirement of a court subpoena and will be incorporated into our office's Personnel Manual shortly.

NOTEWORTHY CERT GRANT

One of the cases included in our case summaries below is the grant of certiorari in *Dean v. United States*, No. 08-5274, to decide whether under 18 U.S.C. § 924(c)(1)(A)(iii) the mere discharge of a firearm during a crime of violence or drug trafficking, even if accidental, unintentional or involuntary, is subject to a ten-year sentence enhancement. The defendant's gun accidentally discharged during a bank robbery, but the shot did not harm anyone. Nonetheless, the Eleventh Circuit joined the Tenth Circuit to hold that § 924(c)(1)(A)(iii) contains no intent requirement and thus is a strict liability enhancement. In so holding, the Court rejected the DC Circuit's reasoning that the three subsections of § 924(c)(1)(A) work in concert to impose increasingly severe penalties for increasingly egregious conduct.

Mr. Dean is represented by Scott T. Forester of Calhoun, Georgia, assisted by Sidley Austin. The Eleventh Circuit's opinion can be found at *United States v. Dean*, 517 F.3d 1224 (11th Cir. 2008), and all pleadings are available at www.scotusblog.com.

RECORDED INTERVIEWS AND CONFESSIONS

A recurring issue in many of our trials is the government's introduction of officer or agent testimony about an interrogation or confession of the defendant, as well as hearsay statements at sentencing of coconspirators. One judge in this district recently queried the prosecutor why the government was not presenting the best evidence, which would be a video recording of the interview. As will be reflected in some of the victories noted below, this situation can inure to the defendant's benefit, so attorneys should continue to emphasize this point via objection and argument.

ELECTRONIC CJA VOUCHERING SYSTEM AND NEW WEBSITE

The Director of the Administrative Office of the U.S. Courts has tasked ODS with leadership of a project to develop an Electronic CJA Vouchering System. This system will replace the current labor-intensive, paper-based CJA voucher process, reducing the time that claimants and judiciary

personnel spend in preparing, submitting, and processing CJA vouchers. In July 2008, a contract for this project was awarded to Data Networks Corporation (DNC) to develop a statement of requirements and to conduct an alternatives analysis. In September 2008, a working group of managers and staff from all circuits with knowledge of the CJA Panel Attorney Payment System and voucher submission, review, and approval process, was established. Work continued on this program throughout the fall.

Also, a new website (which provides information regarding the Defender Services program generally) includes information on the administration of the Criminal Justice Act (CJA). Http://infoweb.ao.dcn/bcastpdf/DIR8-098.pdf

PANEL TRAINING

Rule 806 of the Federal Rules of Evidence provides for the impeachment of hearsay declarants. Barbara Bergman, who is a professor at the University of New Mexico Law School and a former president of the National Association of Criminal Defense Lawyers, has lectured for years about the little-used rule. In this most recent version of her lecture, she gives a tour through the possibilities: impeachment by prior convictions, inconsistent statements, bias and prejudice, and even reputation. Along the way, she shows how to keep the government from introducing damaging hearsay under the guise of explaining the course of the police investigation, the importance of Rule 403 (weighing the unfair prejudice against the probative value), and how to use Rule 806 to expand discovery and even secure a severance from a co-defendant. She includes a warning about prosecutors using the rule against unwary defense counsel.

Professor Bergman has been teaching at the University of New Mexico Law School since 1987, after having practiced as a public defender in Washington, D.C. She teaches criminal law, evidence, and trial practice. She lectures and publishes extensively and is the co-author of Wharton's Criminal Evidence, 15th Edition. We filmed her last June at the Federal Defender Conference in New Orleans.

CLE approval has been requested.

Panama City:	**March 10**
Gainesville:	**March 18**
Tallahassee:	**March 24**
Pensacola:	**March 26**

NUMBER OF PANEL APPOINTMENTS

Here's who got how many cases in 2008:

Pensacola

Amond, Elizabeth	7
Cassidy, Thomas	1
Couch, Clint	7
Duignan, Maureen	0
Garcia, Armando	2
Greenberg, Richard	1
Hammons, Joe	3
Hendrix, Michelle	6
Jackson, Patrick	4
Jenkins, James	1
Kypreos, Spiro	7
Lang, Brian	10
McCleary, Barry	2
Morris, Alex	1
Murphy, George	5
Oram, Albert	7
Patterson, Chris	1
Rabby, Chris L.	2
Reynolds, Shelley	5
Ridlehoover, Ken	7

Sheehan, Donald	9
Stevenson, Eric	0
Sutherland, Steve	4
Wilson, Sharon	1

Panama City

Cassidy, Thom	0
Clyatt, Rhonda	0
Dingus, Jonathan	2
Downing, Jean	4
Garcia, Armando	1
Higgins, Tanya	1
Jackson, Patrick	1
Kypreos, Spiro	2
Murphy, George	3
Patterson, Chris	4
Quintana, Edmund	4
Stevenson, Dustin	4
Sombathy, Robert	1

TALLAHASSEE

Bubsey, William	3
Cummings, Greg	0
Daley, Bernie	2
Davis, Cliff	2
Donaldson, Teri	0
Findley, Thomas	1
Garcia, Mandy	5
Greenberg, Richard	4
Harper, Bob	1
Mcmurry, Chuck	2
Morris, Alex	3
Printy, Gary	5
Sanders, Barbara	5
Shaw, Sean	0
Taylor, Clyde	3
Truskoski, Ryan	2
Ufferman, Michael	3
Villeneuve, Paul	1

GAINESVILLE

Bernstein, Steve	3
Curtis, Ted	1
Daley, Dan	2
Edwards, Tom	1
Harper, Robert	4
Hatfield, Anderson	3
Johnson, Stephen	4
Johnson, Huntley	3
Mason, Geoffrey	1
Rudenstine, Sonya	3
Sanford, Jerry	2
Schaffnit, Gilbert	4
Truskoski, Ryan	2
Uman, Jon	3
Vipperman, Lloyd	3

DOWNWARD DEPARTURES

Campbell, Andrea Hinkle, R. Atty: Murrell, R.
Docket No.: 4:08cr26-RH
Charge: Dist. More than 5 kg crack
Range: 84-105 months (10 yr. mand. min)
Sentence: 48 months
Date of Sentence: 10/15/08
Grounds: 5K1.1

VARIANCES

Crossley, Alan Paul, M. Atty: Tom Edwards
Docket No.: 1:06cr38-MP
Charge: Conspiracy to Manufacture Marijuana (More than 100 plants)
Range: 24-30 months' BOP
Sentence: 5 years' probation
Date of Sentence: 2/6/08
Grounds: Safety Valve, good work history, and efforts to provide substantial assistance

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

Tallahassee attorney **Charles Lammers** won an acquittal on March 4 in a Panama City jury trial in a felon-in-possession case. His winning strategy was to make the jury distrust the officers' failure to document the defendant's alleged admissions that the guns were his. In U.S. v. Troy Ray Brock, the government presented testimony of four officers/agents that defendant made multiple admissions after arrest that the guns were his.

The defendant, with several prior convictions against him, testified he did NOT tell them that, that he told them something slightly different, i.e., that the guns were his son's. **Charles** cross-examined the officers why they had not documented these alleged statements, pointing out that they had the time and equipment, e.g., "tell the jury why you didn't document this and we have to rely on only your memory," plus officers could not remember various things and agreed it was their job to gather evidence. **Charles** argued that the jury needs the best information possible so they can render a just and proper decision, yet the officers failed to bring them that. He told the jury that, if the officers had done their job, this case never would have been brought or it would not be a trial (because the defendant would have pleaded guilty).

Using a similar tactic, Tallahassee attorney **Bill Clark** last October succeeded in getting a verdict for a drastically reduced drug amount (6.5 grams v. "more than 50 grams" alleged). In U.S. v. Kevin Lamar Ratliff, the government's case was built solely on officer/agent testimony about defendant's possession and statements to them, but neither co-defendant who had pleaded guilty testified. In spite of 9 prior convictions, the defendant testified convincingly that he made no such statements and only signed the waiver form when told he could go home if he did; the jury returned a verdict of guilty of the drugs found in his possession but not guilty of the drugs in the driver's possession. That saved the client from a mandatory life sentence.

Lloyd Vipperman, a Gainesville panel member, convinced a jury to acquit his client, Joseph Williams, of bank robbery with a dangerous weapon and discharging a firearm in furtherance of a crime of violence. In convincing the jury that there was a reasonable doubt about Mr. Williams' guilt, **Lloyd** had to discredit the testimony of cooperating witnesses and overcome a recorded phone call in which Mr. Williams had attempted to secure false alibi testimony. Mr. Williams did not testify.

In U.S. v. Mikola Bowden, No. 08-11935 (11th Cir. 2009) (unpublished), Tallahassee attorney **Gwen Spivey** successfully challenged the defendant's mandatory life sentence because the enhancement notice under 21 U.S.C. § 851 did not strictly comply with the statute and thus failed to give the district court jurisdiction to impose an enhanced sentence. The § 851 notice had two errors: It cited 21 U.S.C. § 841(b)(1)(B) instead of (A); and it cited the wrong date for one of the alleged prior convictions. Without the enhancement, Mr. Bowden is subject to a guidelines sentence range of 262-327 months. (The government has just filed a petition for rehearing en banc, so this case may not be final for some time.)

Pensacola attorney **Randall Lockhart** succeeded in avoiding an enhanced sentence for his client, Joshua Hinsley. Hinsley was convicted of being a felon-in-possession and had several prior burglary convictions. **Randall** convinced Judge Rodgers last month that two prior burglaries had not occurred on separate occasions for purposes of § 924(e), and also that two other burglary convictions, of adjacent apartments, likewise only counted as one prior because the government failed to prove they were sequential given a lack of clarity about perpetrators. The resulting sentence range was 57-71 months. Even though the judge

varied upward to 84 months, this was far less than the enhanced sentence would have been.

Randy Murrell, in a crack retroactivity case, noticed that back in November of 1993, when his client, Gregory Sanders, was initially sentenced, the guidelines calculations had been based on the 1992 Guidelines Manual, which had been replaced with the 1993 version eight days earlier. By catching the error and successfully arguing that the correct manual should be used in determining the revised guideline range, **Randy** won his client a sentence reduction of 5 years and 5 months instead of the 8 months he would have otherwise received.

Tallahassee panel attorney **Chuck McMurry** had a recent case before Judge Hinkle, U.S. v. Raymond Goings, in which the only basis for holding the defendant responsible for *more than 100 kilos of crack cocaine* was the agent's testimony to defendant's alleged admission under interrogation. **Chuck** asked the agent, on cross-examination, why he didn't record "all these damning statements," and the agent's only defense was that it was not "policy." Consequently, the Court credited the agent's testimony as to the statement, but found the defendant did not really mean it, and held the defendant responsible for *only 86 grams* and still gave the defendant acceptance of responsibility.

Tallahassee attorney **Gwen Spivey** recently won a long-fought case in the Supreme Court. In U.S. v. Jason Daniel Taylor, No. 07-668 (U.S. Jan. 21, 2009), the Court granted Taylor's cert petition, vacated the judgment of the Eleventh Circuit, and remanded for reconsideration in light of *Chambers v. United States*, 129 S. Ct. 687 (2009).

This case began because **Bill Clark** argued before Judge Hinkle that Taylor's prior state escape conviction, which was based on his failure to return to a work release center, was not a crime of violence to qualify as a predicate offense for enhanced sentencing under the Armed Career Criminal Act. Judge Hinkle agreed in theory that such an offense posed only minimally more danger than any felony arrest, but he was bound by circuit precedent that all escapes are crimes of violence. **Gwen** then argued the distinction between escapes from actual custody and lesser forms of escape; the Eleventh Circuit affirmed, but two judges concurred "dubitante." 489 F.3d 1112, 1113-14 (11th Cir. 2007). Mr. Taylor's certiorari petition was first held pending decision in *Begay v. United States,* 128 S. Ct. 1581 (2008), and then subsequently held pending decision in *Chambers*.

On remand by the Supreme Court, the government agreed that *Chambers* required resentencing, and the Court just granted **Gwen's** motion for Mr. Taylor's immediate release to state custody, having served about 39 months in federal custody when a correct sentence without the enhancement would have been about 12 months.

In U.S. v. Victor Edgar Harrison, 21 Fla. L. Weekly Fed. C1546, No. 08-12636 (11th Cir. Feb. 19, 2009), the Eleventh Circuit agreed with **Gwen Spivey's** argument and vacated the enhanced ACCA sentence based on Mr. Harrison's prior state conviction for Fleeing and Eluding, which was *without high speed*. This reduced Mr. Harrison's sentence from 180 months to a range of 77-96 months. Again, this success was possible only because **Bill Clark** identified and preserved the argument in the district court. [**Note**:

Gwen Spivey believes that a prior conviction for Fleeing and Eluding *With* High Speed may not survive as an ACCA predicate given the multi-level analysis now required under *Begay*.]

Alan Crossley was charged with growing more than 1,000 marijuana plants and facing a 10-year minimum mandatory sentence. Thanks to the efforts of his lawyer, Gainesville panel member **Tom Edwards**, Mr. Crossley walked out of his sentencing hearing before Judge Paul with 5 years of probation. **Tom** convinced the prosecutor and the probation officer that Mr. Crossley should only be held responsible for 183 plants and was eligible for the safety valve. **Tom** went on to convince the judge that Mr. Crossley's solid work history, his continued hard work during the pendency of the case, and the efforts he made in trying to provide substantial assistance merited 5 years of probation rather than the 24-30 months suggested by the guidelines.

In U.S. v. Mont Lee Beamon, Pensacola attorney **Tom Keith** laid the groundwork by objecting to the district court's imposition of consecutive terms of supervised release. On appeal, **Gwen Spivey's** brief was met with a government concession of error. [The client dismissed the appeal based on concern about the outcome of resentencing because he could have received a longer prison sentence.]

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:

PADILLA v. KENTUCKY, 2009 WL 425077 (Mem), No. 08-651 (Feb. 23, 2009)
Counsel; Sixth Amendment; advice regarding consequences of plea; deportation
Padilla is a legal permanent resident, not a citizen, but has lived in this country nearly 40 years. He was indicted for trafficking in marijuana - an offense designated as an "aggravated felony" under the Immigration and Naturalization Act (INA). Prior to entering a plea of guilty, Padilla was incorrectly advised by his counsel that the plea would not affect his immigration status. Because the offense is considered an aggravated felony, deportation is mandatory. Upon discovery of this fact, Padilla sought state post-conviction relief on the basis that his attorney had improperly advised him. The state supreme court denied relief, holding that Padilla was not entitled to accurate

advice from his attorney on immigration consequences because he had no Sixth Amendment right to counsel in the immigration proceeding.
Questions Presented: (1) Whether the mandatory deportation consequences that stem from a plea to trafficking in marijuana, an "aggravated felony" under the INA, is a "collateral consequence" of a criminal conviction which relieves counsel from any affirmative duty to investigate and advise?
(2) Assuming immigration consequences are "collateral", whether counsel's gross mis-advice as to the collateral consequence of deportation can constitute a ground for setting aside a guilty plea which was induced by that faulty advice?

JOHNSON v. U.S., 2009 WL 425080 (Mem), No. 08-6925 (Feb. 23, 2009)
ACCA; felony (simple) battery; guilty plea
Johnson was convicted of possession of ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g). He was sentenced under 18 U.S.C. § 924(e), the Armed Career Criminal Act (ACCA), because he had three earlier convictions that the district court determined to be for violent felonies. One of them was for battery in Florida, which would have been a misdemeanor had it not been elevated to felony status under state law because Johnson had an earlier battery conviction.
Questions Presented: (1) Whether, when a state's highest court holds that a given offense of that state does not have as an element the use or threatened use of physical force [*State v. Hearns*, 961 So. 2d 211 (Fla. 2007) (holding that battery was not a "forcible felony" under Florida's violent career criminal statute], that holding is binding on federal courts in determining whether that same offense qualifies as a "violent felony" under ACCA, which defines "violent felony" as, inter alia, any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another"?
(2) Whether this court should resolve a circuit split on whether a prior state conviction for simple battery is in all cases a "violent felony" - a prior offense that has as an element the use, attempted use, or threatened use of physical force against the person of another? Further, whether this court should resolve a circuit split on whether the physical force required is a de minimis touching in the sense of "Newtonian mechanics" or whether the physical force required must be in some way violent in nature - that is the sort of force that is intended to cause bodily injury, or at a minimum likely to do so.
[Ed. note: The Court declined to grant cert to consider overruling *Almendarez-Torres*]

MARYLAND v. SHATZER, 129 S. Ct. 1043 (Mem), No. 08-680 (Jan. 26, 2009)
Fifth Amendment; right to counsel; break in custody; reinterrogation
Question Presented: Is the *Edwards v. Arizona* prohibition against interrogation of a suspect who has invoked the Fifth Amendment right to counsel inapplicable if, after the suspect asks for counsel, there is a break in custody or a substantial lapse in time (more than two years and six months) before commencing reinterrogation pursuant to *Miranda*?

McDANIEL v. BROWN, 129 S. Ct. 1038 (Mem), No. 08-559 (Jan. 26, 2009)
AEDPA; standard of review; sufficiency of evidence; nonrecord evidence
Questions Presented: (1) What is the standard of review for a federal habeas court

for analyzing a sufficiency-of-the-evidence claim under the AEDPA?
(2) Does analysis of a sufficiency-of-the-evidence claim pursuant to *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979), under 28 U.S.C. § 2254(d)(1), permit a federal habeas court to expand the record or consider nonrecord evidence to determine the reliability of testimony and evidence given at trial?

DEAN v. U.S., 129 S. Ct. 593 (Mem), No. 08-5274 (Nov. 14, 2008)
Intent; 18 U.S.C. § 924(c)(1)(A)(iii); discharging a firearm
Question Presented: Whether 18 U.S.C. § 924(c)(1)(A)(iii), establishing a ten-year mandatory minimum sentence for a defendant who "discharge[s]" a firearm during a crime of violence, requires proof the discharge was volitional, and not merely accidental, unintentional, or involuntary?

YEAGER v. U.S., 129 S. Ct. 593 (Mem), No. 08-67 (Nov. 14, 2008)
Collateral estoppel; double jeopardy; mixed verdict; common elements
Question Presented: Whether, when a jury acquits a defendant on multiple counts but fails to reach a verdict on other counts that share a common element, and, after a complete review of the record, the court of appeals determines that the only rational basis for the acquittals is that an essential element of the hung counts was determined in the defendant's favor, collateral estoppel bars a retrial on the hung counts?

ABUELHAWA v. U.S., 129 S. Ct. 593 (Mem), No. 08-192 (Nov. 14, 2008)
Facilitation; 21 U.S.C. § 843(b); buying drugs for personal use; misdemeanor v. felony
Question Presented: Whether the use of a telephone to buy drugs for personal use "facilitates" the commission of a drug "felony," in violation of 21 U.S.C. § 843(b), on the theory that the crime facilitated by the buyer is not his purchase of drugs for personal use (a misdemeanor), but is the seller's distribution of the drugs to him (a felony)?

FLORES-FIGUEROA v. U.S., 129 S. Ct. 457 (Mem), No. 08-108 (Oct. 20, 2008)
Aggravated identity theft
Question Presented: Whether, to prove aggravated identity theft under 18 U.S.C. § 1028A(a)(1), the government must show that the defendant knew that the means of identification he used belonged to another person?

VERMONT v. BRILLON, 129 S. Ct. 30 (Mem), No. 08-88 (Oct. 1, 2008)
Right to speedy trial; indigent clients; public defender delays
Questions Presented: (1) Whether continuances and delays caused solely by an indigent defendant's public defender can arise to a speedy trial violation, and be charged against the State pursuant to the test in *Barker v. Wingo*, 407 U.S. 514 (1972), on the theory that public defenders are paid by the state?
(2) Whether the right to counsel, as established in *Gideon v. Wainwright*, 372 U.S. 335 (1963), should result in broader speedy trial rights for indigent defendants than defendants who are able to retain private counsel, such that only delays by private counsel get charged against the defendant under the *Barker v. Wingo* test?

BOYLE V. U.S., 129 S. Ct. 29 (Mem), No. 07-1309 (Oct. 1, 2008)

RICO; association-in-fact enterprise; ascertainable structure

Question Presented: Does proof of an association-in-fact enterprise under the RICO statute, 18 U.S.C. §§ 1962(c)-(d), require at least some showing of an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages – an exceptionally important question in the administration of federal justice, civil and criminal, that has spawned a three-way circuit split?

KANSAS v. VENTRIS, 129 S. Ct. 29 (Mem), No. 07-1356 (Oct. 1, 2008)

Sixth Amendment; impeachment; voluntary statement without waiver of counsel

Question Presented: Whether a criminal defendant's "voluntary statement obtained in the absence of a knowing and voluntary waiver of the [Sixth Amendment] right to counsel," *Michigan v. Harvey*, 494 U.S. 344, 354 (1990), is admissible for impeachment purposes -- a question the Court expressly left open in *Harvey* and which has resulted in a deep and enduring spilt of authority in the Circuits and state courts of last resort?

MONTEJO v. LOUISIANA , 129 S. Ct. 30 (Mem), No. 07-1529 (Oct. 1, 2008)

Sixth Amendment; police-initiated interrogation without counsel

Question Presented: When an indigent defendant's right to counsel has attached and counsel has been appointed, must the defendant take additional affirmative steps to "accept" the appointment in order to secure the protections of the Sixth Amendment and preclude police-initiated interrogation without counsel present?

PUCKETT v. U.S., 129 S. Ct. 29 (Mem), No. 07-9712 (Oct. 1, 2008)

Plea agreement; breach; forfeiture; plain error

Question Presented: "Whether a forfeited claim that the government breached a plea agreement is subject to the plain-error standard of Rule 52(b) of the Federal Rules of Criminal Procedure"?

RIVERA v. ILLINOIS, 129 S. Ct. 29 (Mem), No. 07-9995 (Oct. 1, 2008)

Jury; peremptory challenge; structural v. harmless error

The state court held that, even though the defendant was improperly denied a peremptory challenge, it was harmless error and did not require per se reversal for structural error.

Question Presented: Whether the erroneous denial of a criminal defendant's peremptory challenge that resulted in the challenged juror being seated requires automatic reversal of a conviction?

CORLEY v. U.S., 129 S. Ct. 29 (Mem), No. 07-10441 (Oct. 1, 2008)

Confessions; first appearance; unreasonable delay; 18 U.S.C. § 3501; Fed. R. Crim. P. 5(a)

The only evidence introduced at trial identifying Corley as a participant in a robbery consisted of two statements he gave law enforcement more than six hours after his arrest, and before he was brought to a federal magistrate (which occurred nearly 30 hours after his arrest).

Question Presented: Whether 18 U.S.C. § 3501 – read together with Fed. R. Crim. P. 5(a); *McNabb v. United States*, 318 U.S. 332 (1943); and *Mallory v. United States*, 354 U.S. 449 (1957) – requires that a confession taken more than six hours after arrest and

before presentment be suppressed if there was unreasonable or unnecessary delay in bringing the defendant before the magistrate judge?

Supreme Court Cases

HUNTER v. U.S., 129 S. Ct. 594 (Mem), No. 07-11550 (Nov. 17, 2008)

ACCA; carrying a concealed firearm; habeas relief

Hunter was sentenced under ACCA based on two prior convictions for carrying a concealed firearm. His motion under 28 U.S.C. § 2255 was denied, and both the district court and the Eleventh Circuit denied motions for a certificate of appealability. The Supreme Court granted the petition, vacated the judgment, and remanded for reconsideration in light of *Begay v. United States*, which held that felony DUI is not a violent felony under the ACCA.

[Ed. Note: The Eleventh Circuit has since denied relief. *Infra*, at 17.]

U.S. v. BRUNSON, 129 S. Ct. 996 (Mem) (Jan. 21, 2009)

ACCA; fleeing and eluding; high speed

The Court granted the cert petition, vacated the judgment, and remanded to the 11th Circuit for reconsideration in light of *Chambers*, the circuit's affirmance of an ACCA enhancement based on the defendant's prior Florida conviction for fleeing and eluding with high speed.

[Ed. Note: The Eleventh Circuit has since held, in *Harrison*, *see infra* at 17, that a prior Florida conviction for fleeing and eluding WITHOUT high speed does not qualify as an ACCA predicate. Trial attorneys should still challenge a prior F&E conviction, even WITH high speed, on the basis that it is not "similar" to the enumerated crimes. Post-Begay, a prior must meet both prongs: (1) typically involve a serious potential risk of personal injury (arguably based on empirical evidence by the government); and (2) be "similar" to the enumerated crimes in that it involves purposeful, violent, and aggressive conduct. Attorneys should also look at recent closed cases involving this prior to make sure the defendant is advised he might be able to get some relief, if Brunson prevails on remand; although this would probably not be retroactive for purposes of a 2255, we could write to ask the BOP Warden to seek a sentence reduction.]

U.S. v. HAYES, 2009 WL 436680 (Feb. 24, 2009)

Firearms; felon-in-possession; misdemeanor domestic violence

Reversing the Fourth Circuit, the Court held that a "domestic relationship" need not be an element of a prior misdemeanor domestic violence conviction in order for it to be a predicate offense to support a conviction for possession of a firearm by a convicted felon under 18 U.S.C. § 922(g)(9), but the fact of a "domestic relationship" must be proven in the instant federal conviction. A "misdemeanor crime of domestic violence," as defined in 18 U.S.C. § 921(a)(33)(A), imposes only two requirements: an element of the use or attempted use of physical force, or the threatened use of a deadly weapon; and it must be committed by one with a specified domestic relationship with the victim.

[Ed. note: This opinion is worth reading for its statutory construction analysis, in terms of future challenges.]

NELSON v. U.S., 129 S. Ct. 890 (Jan. 26, 2009)

***Rita* means what it says**

The Fourth Circuit had reaffirmed a sentence (on remand by the Supreme Court for reconsideration in light of *Rita*) based on the Fourth Circuit's conclusion that the district court properly applied advisory guidelines when the district court said "'the Guidelines are considered presumptively reasonable,' so that 'unless there's a good reason in the [statutory sentencing] factors . . . , the Guideline sentence is the reasonable sentence.'"

The Solicitor General conceded error, and the Court reversed, saying *Rita* and *Gall* "do not allow a sentencing court to presume that a sentence within the applicable Guidelines range is reasonable. . . . In this case, the Court of Appeals quoted . . . *Rita* but affirmed the sentence anyway after finding that the District Judge did not treat the Guidelines as mandatory. That is true, but beside the point. The Guidelines are not only not mandatory on sentencing courts; they are also not to be presumed reasonable. We think it plain from the comments of the sentencing judge that he did apply a presumption of reasonableness to Nelson's Guidelines range. Under our recent precedents, that constitutes error." (Emphasis added.)

ARIZONA v. JOHNSON, 129 S. Ct. 781 (Jan. 26, 2009)

Search; Fourth Amendment; Terry; traffic stop; patdown; passenger

The Court held that, in a traffic stop, the first *Terry* condition—a lawful investigatory stop—is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation. The police need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity. To justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous. In this case, police reasonably patted down Johnson. Nothing occurred in this case that would have conveyed to Johnson that, prior to the frisk, the traffic stop had ended or that he was otherwise free to depart without police permission. The officer was not required by the Fourth Amendment to give Johnson an opportunity to depart without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her.

SPEARS v. U.S., 129 S. Ct. 840 (Jan. 21, 2009)

District court may categorically reject 100:1 crack ratio

The Court summarily reversed the Eighth Circuit's holding that the 100:1 crack ratio can be rejected on only an individual, case-by-case basis. The only fact necessary to justify categorical rejection of, and variance from, the 100:1 crack ratio is the sentencing court's policy disagreement with the guidelines. Moreover, the sentencing court may substitute a replacement ratio. For a district court to continue to vary from the 100:1 because of its policy disagreement, but to mask that variance as being done based on "individualized determinations," "is institutionalized subterfuge," not an "acceptable sentencing practice."

WADDINGTON v. SARAUSAD, 129 S. Ct. 823 (Jan. 21, 2009)

Habeas; jury instructions; accomplice

Sarausad drove a car from which Ronquillo fatally shot Melissa Fernandes; tried for first-degree premeditated murder as an accomplice, Sarausad argued that he could not have been an accomplice to murder

because he expected only a fistfight and had no idea Ronquillo was armed. The jury was instructed to find him guilty as an accomplice if it found that, "with knowledge that it will promote or facilitate the commission of *the crime*, he or she either solicits, commands, encourages, or requests another person to commit the crime; or aids or agrees to aid another person in planning or committing the crime." (Emphasis supplied by USSC). After the jury raised numerous questions about the instructions and was reinstructed, the jury convicted Sarausad of lesser included crimes. Another person in the car, Reyes, was similarly charged and tried but no verdict was reached; Ronquillo was convicted as charged. On appeal, Sarausad argued that the instructions were ambiguous because the jury may have thought it could find him guilty on the theory that he assisted in what he expected would be a fist fight.

After the state courts affirmed, and the Ninth Circuit granted habeas relief, the Supreme Court reversed, finding that the state court reasonably concluded the instruction was not ambiguous in using the phrase "the crime," which, in this context, had to mean "the murder." "It was not objectively unreasonable for the Washington courts to conclude that the jury convicted Sarausad only because it believed that he, unlike Reyes, had knowledge of more than just a fistfight."

OREGON v. ICE, 129 S. Ct. 711 (Jan. 14, 2009)

***Apprendi*; consecutive sentences**

The Court held that, in light of historical practice and the States' authority over administration of their criminal justice systems, the Sixth Amendment does not inhibit States from assigning to judges, rather than to juries, the finding of facts necessary to the imposition of consecutive, rather than concurrent, sentences for multiple offenses. The Court characterized Oregon's rule as more defendant-oriented than the common law, which gives judges unfettered discretion, and the rule of some states, which presumes consecutive sentences for multiple offenses. Oregon, it said, constrains judges' discretion by requiring them to find certain facts before imposing consecutive sentences.

HERRING v. U.S., 129 S. Ct. 695 (Jan. 14, 2009)

Exclusionary rule; isolated negligence v. deliberate, reckless, or grossly negligent conduct

The Court affirmed the Eleventh Circuit and held that, when police mistakes leading to an unlawful search are the result of isolated negligence attenuated from the search, rather than systemic error or reckless disregard of constitutional requirements, the exclusionary rule does not apply. "The extent to which the exclusionary rule is justified by [] deterrence principles varies with the culpability of the law enforcement conduct.... To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. Here, an officer reasonably believed there was an outstanding arrest warrant, but that belief turned out to be wrong because of a negligent bookkeeping error by another police employee.

Ginsburg's dissent expressed concern about the impact on innocent persons 'wrongfully arrested based on erroneous information [carelessly maintained] in a computer data base,'" noting that the exclusionary rule

"creates an incentive to act with greater care." Breyer's dissent would distinguish *police* record-keeping errors from *judicial* clerical errors.

JIMENEZ v. QUARTERMAN , 129 S. Ct. 681 (Jan. 13, 2009)

Habeas; AEDPA; statute of limitations; state prisoner; certificate of appealability

The Court held that, when the state courts reopen the state direct appellate process in collateral proceedings to permit an out-of-time brief, they effectively extend the date of finality of the state court judgment for purposes of AEDPA's 1-year limitations period. The Court reversed the ruling below, finding that the certificate of appealability had been denied based on the district court's erroneous reading of the statute. "We do not decide whether petitioner is entitled to a certificate of appealability on remand because we are presented solely with the Court of Appeals' decision on the timeliness of the petition under 28 U.S.C. § 2244(d). 'When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim,' as here, a certificate of appealability should issue only when the prisoner shows both 'that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right **and** that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'"

CHAMBERS v. U.S., 129 S. Ct. 687 (Jan. 13, 2009)

ACCA; escape

The Court held that failure to report to prison is not a "violent felony" for purposes of an enhanced sentence under ACCA. Applying the categorical approach adopted in *Taylor v. United States*, 495 U.S. 575 (1990), the Court held that failure to report does not involve "conduct that presents a serious potential risk of physical injury to another" under ACCA's residual clause, 18 U.S.C. § 924(e)(2)(B)(ii); rather, "the crime amounts to a form of inaction, a far cry from the 'purposeful,' 'violent,' and 'aggressive' conduct' potentially at issue when an offender uses explosives against property, commits arson, burgles a dwelling or residence, or engages in certain forms of extortion," quoting *Begay v. United States*, 128 S. Ct. 1581, 1586-1588 (2008)). The Court also cited a Sentencing Commission report indicating that of 160 failure-to-report cases sentenced in 2006 and 2007, "none at all involved violence" either "during commission of the offense itself" or "during the offender's later apprehension." Justice Alito, concurring in the judgment, urged Congress to "rescue the federal courts from the mire into which ACCA's draftsmanship and *Taylor*'s 'categorical approach' have pushed us" by "formulat[ing] a specific list of expressly defined crimes that are deemed to be worthy of ACCA's sentencing enhancement."

HEDGPETH v. PULIDO, 129 S. Ct. 530 (Dec. 2, 2008)

Habeas; jury instructions; multiple theories of guilt; harmless error

The Court unanimously held that the *Brecht* harmless error standard – not structural error – applies to a federal habeas court's review of a state conviction based on jury instructions containing more than one theory of guilt where one of those theories may have been invalid. Three justices would have held that the Ninth Circuit already conducted harmless error review that came out in Pulido's favor.

MOORE v. U.S., 129 S. Ct. 4 (Mem), No. 07–10689 (Oct. 14, 2008)

Sentencing; crack cocaine; appeal; *Kimbrough*

The Court reversed the Eighth Circuit for disregarding the record in a crack cocaine retroactivity appeal even after the Supreme Court had already reversed and remanded in light of *Kimbrough*. Without remanding to the district court, the Eighth Circuit had reaffirmed, *presuming* that the district court knew it had discretion but chose not to exercise it -- directly contrary to the Eighth Circuit's own reading of the record the first time around. The Court agreed with the defense and the government that the Eighth Circuit was wrong.

HOLMAN v. U.S., 129 S. Ct. 86 (Mem), No. 07-10984 (Oct. 6, 2008)

Sentencing; career offender; carrying concealed firearm

The Court granted certiorari, vacated the judgment, and remanded for reconsideration in light of *Begay*, 128 S. Ct. 1581 (2008).

[Ed. note: The Eleventh Circuit, 265 Fed. Appx. 812 (11th Cir. Feb. 15, 2008), affirmed Holman's career offender enhancement for a prior conviction of carrying a concealed firearm. After *Begay* struck down the ACCA enhancement for felony DUI, the Eleventh Circuit applied Begay in *Archer,* 531 F.3d 1347 (11th Cir. 2008), to strike down a career offender enhancement for the prior of carrying a concealed weapon. Thus, this GVR in *Holman* is consistent with *Archer*.]

Selected Eleventh Circuit Case Summaries

The following are selected opinions from the Eleventh Circuit that have been issued since our last newsletter:

U.S. v. WILLIS, 2009 WL 514313 (Mar. 3, 2009)

Loss calculation; reasonableness; diminished capacity

Willis was convicted of theft of government property and filing false Katrina-related claims for Federal Emergency Management Agency ("FEMA") aid, as well as threatening a witness, brandishing a weapon in a violent crime, and distributing marijuana. The Court rejected her challenge to the loss calculation, holding that it was not clear error to calculate as intended loss the cumulative total of the maximum recovery for each fraudulent application filed, even though the actual loss was far less. The Court also affirmed as reasonable her sentence to the high end of the guideline range, served consecutive to a 34-year mandatory prison term.

U.S. v. SHAW, 2009 WL 510323 (Mar. 3, 2009)

Reasonable upward variance

The Court affirmed as reasonable an upward variance to 120 months – the statutory maximum – from a guidelines range of 30-37 months, for the offense of felon in possession of firearm and ammunition. The Court's view, based on defendant's egregious criminal history starting at age 13 and including 27 arrests: "it seems as though he is determined to serve a life sentence, albeit on the installment plan. The question this appeal presents is whether the current installment is a reasonable one."

MCCLOUD v. HOOKS, 2009 WL 500857 (Mar. 2, 2009)

AEDPA; statute of limitations; separate cases; severance

The Alabama trial court consolidated charges of burglary and capital murder. Separate state court judgments were entered. He did not directly appeal the burglary conviction but sought state post-conviction relief. He lost his direct appeal of the murder conviction and later sought state post-conviction relief. In federal court he sought relief from the burglary conviction but listed both convictions and did not distinguish them. The Court held that the cases against McCloud were severed as a matter of law when two judgments were entered against him by the state trial court. "For McCloud's petition for a writ of habeas corpus to be considered timely, this Court would have to determine that his burglary and capital murder cases remained consolidated beyond his sentencing for each crime."

U.S. v. LOUIS, 2009 WL 485239 (Feb. 27, 2009)

Abuse of public trust

The Court held that a federally licensed firearms dealer who sells a firearm to a convicted felon is not subject to a sentence enhancement for abusing a position of public trust under U.S.S.G. § 3B1.3, "[b]ecause [they] are closely regulated and do not exercise the substantial discretion necessary for a position of public trust . . .."

MAMONE v. U.S., 2009 WL 484669 (Feb. 27, 2009)

Habeas; 2255; restitution

The Court held that a restitution claim can not be made under 28 U.S.C. § 2255, even with other claims challenging the defendant's custody.

HUNTER v. U.S., 2009 WL 453464 (Feb. 24, 2009)

Appeal; certificate of appealability; ACCA; carrying a concealed weapon

On remand for reconsideration after *Begay*, *supra* at 11, the Court again denied a Certificate of Appealability (COA) on two claims: First, the claim that defendant's due process rights were violated by his ACCA sentence, based on two prior convictions for carrying a concealed weapon, failed because "a sentencing error alone" is not sufficient to prove denial of a constitutional versus a federal right. Second, the claim that his Sixth Amendment rights were violated by appellate counsel's failure to challenge the sentence failed also, because circuit precedent at the time of direct appeal had settled the issue adversely to defendant.

U.S. v. HARRISON, 2009 WL 395237 (Feb. 19, 2009)

Sentencing; ACCA; fleeing & eluding

The Court, in a lengthy analysis applying recent Supreme Court decisions, vacated the enhanced ACCA sentence. The Court agreed that defendant's prior Florida conviction for Fleeing and Eluding, *without high speed*, under Florida Statutes § 316.1935(2), was not a violent felony.

U.S. v. VAZQUEZ, 2009 WL 331014 (Feb. 12, 2009)

Sentencing; appeal waiver; reasonableness; policy disagreement with career offender range

The Court agreed the defendant could appeal, in spite of the appeal waiver in his plea agreement, because the provision was ambiguous, and thus must be construed against the government. But the Court rejected the defendant's argument that his sentence was procedurally unreasonable under *Kimbrough* on the basis that the district court refused to consider its policy disagreement with the career offender guidelines. The Court differentiated between

the career offender guidelines from the crack guidelines on the basis that the former were specifically directed by Congress.

WILLIAMS v. McNEIL, 2009 WL 311298 (Feb. 10, 2009)

Habeas; 2254; timeliness; 28 USC 2244 statute of limitations; tolling; discretion; de novo review; Federal Magistrate Act

Answering a question of first impression, the Court held that a district court has the discretion not to consider a defendant's arguments regarding the timeliness of his federal habeas petition when raised for the first time in objections to the magistrate's R&R. Further, that discretion was not abused here. The defendant contended in his initial petition that it was timely, and the state's response disagreed. The defendant failed to comply with the magistrate's order to file a reply to the state's argument by a certain date (for which counsel claimed responsibility, stating she misread the district court's order). After the R&R recommended dismissal of the petition as time-barred, defendant objected and gave a fuller explanation. The district court adopted the R&R, stating that it did not consider the additional reply. Because the COA did not include, and the Court did not expand it to include, the merits of the timeliness issue, it was not considered. The Court discusses other circuit precedent on the scope of a district court's *de novo* review under the Federal Magistrate Act.

U.S. v. (MAURICE) WILLIAMS, 2009 WL 294325 (Feb. 9, 2009)

Crack cocaine amendments; 18 U.S.C. § 3582; 3553(a) factors

The Court granted and liberally construed this *pro se* appeal and vacated the sentence, which had reduced the defendant's sentence "only" 3 months under 18 U.S.C. § 3582(c)(2), "[b]ecause the record does not make clear whether the district court considered the 18 U.S.C. § 3553(a) factors when resentencing" Williams.

U.S. v. MELVIN, 2009 WL 236053 (Feb. 3, 2009)

Sentencing; below guidelines; 18 U.S.C. § 3582(c)(2)

The Court held that *Booker* and *Kimbrough* do not apply to 18 U.S.C. § 3582(c)(2) proceedings, and that a district court is bound by the limitations on its discretion imposed by § 3582(c)(2) and the applicable policy statements by the Sentencing Commission. The Court recognized a circuit split and sided with the majority.

U.S. v. FARIAS-GONZALEZ, 2009 WL 232328 (Feb. 3, 2009)

Search; exclusionary rule; balancing test; identity-related evidence; tattoos

Immigration and Customs Enforcement special agents saw a man whose physical characteristics made them suspect he was a gang member. They demonstrated their authority by identifying themselves and showing their badge, with their gun plainly visible. One of the agents lifted the man's shirt sleeve to determine if he had any tattoos on his upper arm. They went to his apartment where the suspect retrieved his ID. The agents suspected he was in the country illegally based on his answers and asked him to take off his shirt so they could take pictures of his tattoos, and he agreed. They fingerprinted him, got his alien file, and found out he had been previously deported. The district court found a Fourth Amendment violation but said the identity information was not excludable. The Eleventh Circuit applied a balancing test and held that the exclusionary rule does not apply to "identity-

related evidence" obtained after an allegedly unconstitutional search and seizure. The Court did not address the substance of the Fourth Amendment violation.

U.S. v. SVETE, 2009 WL 225254 (Feb. 2, 2009)
Scheme to defraud
The en banc Court overruled a portion of its prior panel decision of March 26, 2008, as well as a 1996 circuit precedent, to affirm mail fraud convictions and the district court's decision not to give the defendant's requested jury instructions. In *Brown*, 79 F.3d 1550, the Court had held that mail fraud requires the government to prove that the defendant intended to create a scheme "reasonably calculated to deceive persons of ordinary prudence and comprehension," i.e., that "federal criminal fraud requires proof that a person of ordinary prudence would rely on a representation or a deception." The prior panel decision in *Svete* found *Brown* was violated in the standard instruction, but the en banc Court overruled *Brown* and held that the mail fraud statute does not differentiate between investors. "Mail fraud does not require proof that a scheme to defraud would deceive persons of ordinary prudence."

HOLLADAY v. ALLEN, 2009 WL 214546 (Jan. 30, 2009)
Capital habeas; proof of retardation
The Court affirmed the grant of habeas relief based on defendant's proof by a preponderance of the evidence that he was mentally retarded. The Alabama legislature had not set a standard; the standard based on case law has three components: (1) significantly sub-average intellectual functioning (i.e., an IQ of 70 or below); (2) significant or substantial deficits in adaptive behavior; and (3) the manifestation of these problems during the defendant's developmental period (i.e., before age 18).

U.S. v. SWEAT, 2009 WL 213206 (Jan. 30, 2009)
Private contact by judge with jurors
The Court affirmed a conviction where the district judge went into the jury room during deliberations to have a brief conversation with jurors without prior knowledge or consent of the lawyers in the case. The district judge reported that he wanted to determine if the jurors wanted to return on Saturday, was informed the jury was about to conclude deliberations, and immediately left without further discussion. The Court said this was error but not reversible because the parties accepted the district court's factual report of the event.

U.S. v. DUMONT, 2009 WL 161864 (Jan. 26, 2009)
SORNA; failure to register; 18 U.S.C. § 2250(a); ex post facto
The Court affirmed a failure-to-register conviction on a sex offender who was charged after the Attorney General made SORNA retroactive, even though defendant's act of travel occurred before SORNA applied to persons in his position.

MAGWOOD v. CULLIVER, 2009 WL 152656 (Jan. 23, 2009)
Capital habeas; sentence; fair warning; due process
The Court reversed the district court's grant of habeas relief, holding that the defendant's death sentence did not violate the fair warning requirement of the due process clause, even though it was based on the fact that a state supreme court decision making the death sentence applicable to him was

decided after the offense; this claim was also a prohibited "successive" habeas.

U.S. v. BENNETT, 2009 WL 130181 (Jan. 21, 2009)

Search; arrest warrant; residence v. overnight guest; "grab area"; weapons v. people

The Court held (1) officers' belief that defendant was residing in his mother's apartment was not unreasonable under the totality of the circumstances, and justified their warrantless entry into apartment in order to execute an arrest warrant; and (2) police did not improperly expand the scope of their protective sweep, beyond the front bedroom where defendant was found, because other officers who were not yet aware he had been found in the other end of the apartment searched between the mattress and box springs in a bedroom occupied by another resident and outside the defendant's "grab area."

U.S. v. DODGE, 2009 WL 80979 (Jan. 14, 2009)

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

The Court held 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. BETANCOURTH , 2009 WL 66420 (Jan. 13, 2009)

Jurisdiction; subject matter jurisdiction; conditional guilty plea; waiver; preservation; dicta

The Court held (1) that defendant's guilty plea was unconditional, because counsel's mere statement on the record that the defendant desired to reserve the issue of jurisdiction for appeal was insufficient; (2) the unconditional guilty plea did not waive his challenge to the district court's subject matter jurisdiction. (3) the federal court did have subject matter jurisdiction under the Maritime Drug Law Enforcement Act, 46 U.S.C. § 70501, et seq. (2008), because Ecuador consented to enforcement of US laws against Ecuadorian vessels the US apprehended, for the purpose of prosecuting Colombian nationals on board.

U.S. v. DORSEY, 554 F.3d 958 (Jan. 9, 2009)

Due process; jury trial; bad faith; 5K1.1

The Court held, in part, that the government's refusal to file a motion for downward departure based on defendant's substantial assistance was not in retaliation for defendant's exercise of his right to jury trial, and thus did not violate due process.

U.S. v. SHEFTON, 548 F.3d 1360 (Nov. 17, 2008)

Forfeiture; constructive trust

Shefton fraudulently obtained loan proceeds from Long Beach Mortgage Company ("Long Beach") by presenting fraudulent documents. He used those proceeds to buy property that was later ordered forfeited under 21 U.S.C. § 853. Long Beach was entitled to a constructive trust in the property bought with its money. Long Beach's interests were assumed by Attorney's Title Insurance Fund. The Fund asserted its interest in the forfeiture proceedings, but the district court dismissed the Fund's claim. The Eleventh Circuit reversed, holding that a constructive trust can serve as a superior legal interest under 21 U.S.C. § 853(n)(6)(A) and thus can serve as grounds for invalidating a criminal forfeiture order.

MELSON v. ALLEN, 548 F.3d 993 (Nov. 14, 2008)

Capital habeas; statute of limitations

The Court held that Melson's federal habeas petition was untimely under both § 2244(d)(1)(A) and (D). Neither triggering date was statutorily tolled by his Rule 32 proceedings. Also, Melson failed to show that AEDPA's one-year statute of limitations should be equitably tolled based on the conduct of his state post-conviction attorneys or his claims of actual innocence.

U.S. v. JAMES, 548 F.3d 983 (Nov. 12, 2008)
18 U.S.C. § 3582(c)(2)
The Court held that offenders who were responsible for more that 4.5 kilograms of crack did not have a guideline range change within the meaning of 18 U.S.C. § 3582(c)(2) to qualify for retroactive sentencing relief.

U.S. v. STEED, 548 F.3d 961 (Nov. 10, 2008)
Leon*; administrative inspection; FRE 703, 704(b); deliberate ignorance; *Almendarez-Torres
The Court held that (1) the officer's good faith reliance on an Alabama statute regulating inspections of commercial trucks was objectively reasonable to permit search; (2) the district court did not abuse its discretion in admitting agent's expert testimony regarding his participation in unrelated searches and arrests; (3) an officer's expert testimony about defendant's behavior during traffic stop was not impermissible opinion as to defendant's state of mind; and (4) any error in giving an unwarranted deliberate ignorance instruction was harmless. The Court also outlined but rejected the defendant's multiple attacks on *Almendarez-Torres*, providing a good review of the circuit's caselaw on the issue.

U.S. v. McNEESE, 547 F.3d 1307 (Nov. 3, 2008)
Rule 35(b)
The Court held that the government has the discretionary authority to ask for Rule 35(b) relief on only a portion of a judgment. McNeese was sentenced on two counts to life on one and 240 months on the other. The government's Rule 35(b) motion for relief on only the first count was granted. The Eleventh Circuit affirmed; absent an unconstitutional motive, the government can do what it wants.

U.S. v. ANTON, 546 F.3d 1355 (Oct. 30, 2008)
Prior conviction; withheld adjudication; sentencing findings; burden shifting
The Court affirmed a conviction for possession of a firearm by a convicted felon, holding that a prior Florida conviction where adjudication was entered was a "conviction," in spite of the fact that the defendant received a suspended sentence and had successfully completed the five-year probationary sentence. Florida Statute § 948.01(2) had not automatically restored his right to possess a firearm upon successful completion of probation; because no evidence was offered on this point, and the government was still required to prove a prior conviction, the district court's exclusion of this defense did not improperly shift the burden to defendant or deny his right to present a defense. However, the base offense level and "stolen firearm" calculations were incorrect as the district court failed to make factual findings regarding the number of firearms (more than 300 alleged) and did not make credibility finding as to hearsay.

U.S. v. THOMAS, 545 F.3d 1300 (Oct. 23, 2008)
18 U.S.C. § 3582(c)(2)

A defendant sentenced under the Armed Career Criminal guideline did not have a sentence range reduction within the meaning of 18 U.S.C. § 3582(c)(2), extending *Moore*, which applied the same ruling to career criminal guidelines.

U.S. v. SINGLETON, 545 F.3d 932 (Oct. 16, 2008)
Sentencing; drug quantity; conversion
The Court remanded for resentencing on drug quantity because the government's evidence was insufficient to prove the defendant intended to convert all the powder cocaine seized into crack cocaine, where it failed to prove he possessed, or had ever possessed, enough baking powder to convert it all. The district court could only rely on the conversion based on the amount of materials available for that purpose, and it must rely on a "conservative" estimate of the yield.

U.S. v. VALLADARES, 544 F.3d 1257 (Oct. 9, 2008)
Continuance; sentencing; bribery; USSG § 2B4.1; role enhancement; USSG § 3B1.1; restitution; forfeiture; 18 U.S.C. § 982; ex post facto
The Court rejected all claims by defendant challenging convictions related to Medicare fraud: (1) The denial of her unopposed motion for continuance of trial was not an abuse of discretion, as defendant had shown no "specific, substantial" prejudice, discussing precedent; (2) Discussing the different base offense guidelines applicable here, the district court had not erred in using the commercial bribery guideline, USSG § 2B4.1, where the fraud was achieved through bribery; (3) the 4-level role enhancement, and restitution, were properly based on a finding of relevant conduct; (4) the district court had authority under 18 U.S.C. § 982(a)(7) to impose forfeiture based on conspiracy convictions, and there was no ex post facto violation.

ANTONELLI v. WARDEN, U.S.P. ATLANTA, 542 F.3d 1348 (Sept. 17, 2008)
18 U.S.C. § 2241; successive; parole credits
A federal prisoner need not obtain permission from the Court to file a second or successive habeas petition pursuant to 28 U.S.C. § 2241.

WILLIAMS v. ALLEN, 542 F.3d 1326 (Sept. 17, 2008)
Capital habeas; ineffective penalty phase assistance; *Batson*
Trial counsels' performance was deficient because they had unreasonably failed to investigate mitigating evidence in defendant's background even after being put on notice of such evidence; the state court had failed to address whether counsel's investigation into this area was adequate. Also, the Court reversed the district court's rejection of the *Batson* claim, agreeing that defendant had presented the substance of all three steps of this claim to the state court.

WOOD v. ALLEN, 542 F.3d 1281 (Sept. 16, 2008)
Capital habeas; ineffective assistance; penalty phase; failure to investigate and present mitigation
The Court reversed the grant of habeas relief and affirmed (on the state's cross-appeal) the denial of relief on his two claims that (a) he is mentally retarded and ineligible for the death penalty under *Atkins v. Virginia*, and (b) a *Batson* claim. Barkett dissented solely from the reversal of the grant of habeas relief on the basis that the record contained nothing but "pure speculation" that the failure to investigate and present mitigating evidence of low intellectual functioning was a strategic decision.

U.S. v. MOORE, 541 F.3d 1323 (Sept. 5, 2008)
18 U.S.C. § 3582(c)(2)
Defendants sentenced under the Career Offender guideline did not have a sentence range reduction within the meaning of 18 U.S.C. § 3582(c)(2).

U.S. v. GONZALEZ, 541 F.3d 1250 (Sept. 2, 2008)
Sentencing; fine; sufficiency of evidence
The Court remanded for resentencing because the evidence was insufficient to support the fine; it was clearly erroneous in light of the PSI conclusion that he lacked the ability to pay a fine in addition to restitution, the fine exceeded the applicable range after the Court granted defense scoring objections, and the district court failed to address the factors relevant to imposing a fine. The record reflected no reasoned basis to support the fine.

U.S. v. WILLIAMS, 541 F.3d 1087 (Aug. 29, 2008)
Flight instruction; lifetime ban on federal benefits; possession v. trafficking or distribution
The Court held that the flight instruction was proper, as the jury could properly infer a consciousness of guilt about the charges for which convicted as opposed to a general consciousness that he had outstanding warrants. A conviction for drug possession with intent to distribute is NOT a drug trafficking or distribution offense, but a mere possession offense, and therefore it did not suffice as one of the three required distribution or trafficking offenses required for purposes of denying federal benefits under 21 U.S.C. § 862.

U.S. v. MERCER, 541 F.3d 1070 (Aug. 28, 2008)
Warrantless motel room search
The warrantless search of Mercer's motel room in Mercer's absence at about 4:00 a.m., well before the motel's typical checkout time of 12:00 p.m., was justified based on the officer's objectively reasonable, good-faith belief that the motel manager had authority to consent to the search.

U.S. v. JOHNSON, 541 F.3d 1064 (Aug. 28, 2008)
Appeal waiver
Johnson's plea agreement included a limited waiver of appeal that excepted a restitution award exceeding $30,000. At sentencing, the restitution amount was left to be determined. More than three years later, the court amended the judgment to include a restitution amount of $21,593.70. Johnson appealed because 18 U.S.C. § 3664(d)(5) prohibits a district court from "impos[ing] a sentence and then delay[ing] determination of the amount of losses more than 90 days from sentencing." The Court dismissed his appeal, holding that he waived his right to challenge the restitution order despite its untimeliness.

U.S. v. DIAZ, 540 F.3d 1316 (Aug. 22, 2008)
Insufficient jury trial waiver
Diaz was a defendant whose competency was seriously in question. Acting with only stand-by counsel, he stated he did not want a jury. The court explained his jury trial right and said it would swear in a jury unless it was waived. Diaz responded that he did not recognize the district court's authority. Standby counsel said Diaz would be willing to give up his right to a jury, but Diaz did not want his waiver to be misconstrued as an acquiescence to the authority of the district

court, and he wanted a hearing by the International World Court. Asked again whether he wanted to have a jury, Diaz replied that he did not recognize the jury or the jurisdiction of the district court, and further stated, "I don't recognize the jury. I'm not saying I don't want to have a jury." The district court found a waiver, but the Eleventh Circuit reversed: "When considered as a whole, the court's discussion with Diaz about his right to jury trial reflects that Diaz was unsatisfied with the persons that would form the jury, not that he wanted a bench trial."

JONES v. WALKER, 540 F.3d 1277 (Aug. 20, 2008)

Right to counsel; waiver; Sixth Amendment; self-representation; 18 U.S.C. § 2254

The Court (en banc) held that no reversible error was committed when a trial court compelled defendant to choose between his initial appointed counsel, with whom he was dissatisfied, or self-representation, which was not based on a valid, knowing waiver of the right to counsel. Because there were no warnings about proceeding pro se, and the government bears the burden of proving a valid waiver, which it cannot do on a silent record, the ruling would be different if the case were a direct appeal. However, because this was a habeas case, the burden was on the defendant to prove that his waiver was not knowing and intelligent, he had failed because his habeas counsel had failed to ask the pertinent questions to make a record in habeas proceedings that he did not understand these dangers.

U.S. v. GAREY, 540 F.3d 1253 (Aug. 20, 2008)

Right to counsel; waiver; Sixth Amendment; self-representation; direct appeal

The Court (en banc) affirmed defendant's conviction in spite of being compelled to choose between appointed counsel, with whom he was dissatisfied, and self-representation, and in spite of clearly indicating he did not want to represent himself. The Court concluded he was clearly warned of the dangers of self-representation but "chose" that over keeping counsel he had; and the trial judge retained appointed counsel as trial standby.

U.S. v. VEGA-CASTILLO, 540 F.3d 1235 (Aug. 19, 2008)

Sentencing; 3553(a)(6); unwarranted sentencing disparity; illegal reentry; fast-track; prior precedent rule

The Court held that it was bound to adhere to circuit precedent holding that a district court may not, under 3553(a)(6), consider disparities caused by fast-track sentencing in non-fast-track districts. *Kimbrough* did not directly alter that precedent. [Ed. Note: A separate published opinion was issued on denial of rehearing en banc, and a *certiorari* petition is pending.]

HOLLAND v. FLORIDA, 539 F.3d 1334 (Aug. 18, 2008)

Capital habeas; 2254; statute of limitations; equitable tolling

The Court rejected the capital defendant's argument that he was entitled to equitable tolling because of the egregious conduct by his post-conviction counsel. "No allegation of lawyer negligence or of failure to meet a lawyer's standard of care -- in the absence of an allegation and proof of bad faith,

dishonesty, divided loyalty, mental impairment or so forth on the lawyers' part -- can rise to the level of egregious attorney misconduct" to support equitable tolling.

U.S. v. BENBOW, 539 F.3d 1327 (Aug. 18, 2008)

Sufficiency; drug distribution conspiracy

The defendant appealed the denial of his motions for judgment of acquittal and jury instruction request (that the government was required to prove that the object of the conspiracy was either possession or distribution of cocaine in the U.S.) (versus Europe). The government conceded reversible error based on the intervening decision in *Lopez-Vanegas*, 493 F.3d 1305 (11th Cir. 2007). The Court found there was sufficient evidence of a valid theory to permit a retrial, in that there was evidence of possession in this country with the intent to distribute it outside the US.

SHERE v. FLORIDA DOC, 537 F.3d 1304 (Aug. 7, 2008)

Capital habeas; ineffective assistance of counsel; Biblical references

The capital defendant argued that the prosecutor's use of Biblical references to cross-examine mitigation witnesses who testified about the defendant's religiosity should have been challenged by his direct appeal attorney. The Florida Supreme Court had held that (a) many of the questions were not objected to (and had previously held that such questioning is not fundamental error), and (b) the defense had opened the door. The Eleventh Circuit concluded defendant had not properly framed his claim in post-AEDPA terms, but even if he had there was no Supreme Court case holding that such appellate omissions were ineffective assistance of counsel. The Court distinguished *Romine v. Head*, 253 F.3d 1349 (11th Cir. 2001), noting that the reversible error there was the prosecutor's unilateral use of religion to argue in closing that the Bible required a death sentence; there was nothing wrong with the cross-examination of a witness on a subject raised on direct, even if it involved religion. In any event, *Rominie* was not the Supreme Court authority required for AEDPA relief.

U.S. v. $125,938.62, 537 F.3d 1287 (Aug. 6, 2008)

Civil forfeiture

The Court reversed the order of forfeiture as to several Certificates of Deposit, because the government had failed as a matter of law in a bench trial to meet its burden of proving by a preponderance of the evidence that the funds were embezzled from the Nicaraguan treasury. But the Court affirmed as to two CDs where it found the evidence "minimally sufficient."

FREEMAN v. FLA. DOC, 536 F.3d 1225 (July 31, 2008)

Capital habeas; racial discrimination in seeking death sentence

The Court affirmed denial of a claim that the State, through its prosecutors, impermissibly chose to pursue a capital sentence because he is white and his victims were black.

U.S. v. $291,828, 536 F.3d 1234 (July 31, 2008)

Search; civil in rem forfeiture

The Court affirmed the district court's grant of summary judgment to the government flowing from a civil in rem proceeding following the seizure of money and property from defendant's home. The homeowner, out of town, called police to respond to activation of his home's burglar alarm. He

argued that the first officer, after making an initial cursory sweep of his 3-story home, did not have the right to re-enter when a backup officer had arrived to make certain no intruder was inside. The Court decided that the exigent circumstances still existed, and noted this could also be construed as consent (without so holding).

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