

FEDERAL PUBLIC DEFENDER
NORTHERN DISTRICT OF FLORIDA
A NEWSLETTER FOR PANEL ATTORNEYS

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**NORTH FLORIDA HAS MOST TRIALS AND
LONGEST SENTENCES IN THE COUNTRY**

As was true for fiscal year 1999, the Northern District of Florida has led the nation's 94 districts in the percentage of cases decided by juries, in fiscal year 2000. Nationwide, 4.5 percent of cases went to trial. In North Florida, the figure was 13.6%. In Florida's Southern District, 9.6 percent of the cases went to trial, while 4.9 percent proceeded to trial in Florida's Middle District.

One of the most startling statistics shows the length of our North Florida prison sentences are more than twice the national average. Nationally, the average federal prison sentence is 55.2 months, with the median being 33 months. Our average sentence in North Florida is nearly 10 years - 114.6 months. Our median sentence is 60 months. The average sentence of 114.6 is the highest in the country, with only five other districts averaging more than 100 months. There are four other districts with a higher median sentence, and a total of

twelve districts with a median equal to or higher than our 60 months. The disparity exists even when comparing our sentences with those of Florida's Middle and Southern Districts. In the Southern District, the average sentence is 73.7 months, with the median 46 months. In the Middle District, the average is 68.7 months, with a median of 46 months.

These trial statistics and a host of others are contained in the recently published 2000 Sourcebook of Federal Sentencing Statistics, an annual publication of the United States Sentencing Commission.

Among some of the other statistics worth noting is a nationwide breakdown of the types of cases prosecuted by the Government: 40% drugs, 20% immigration, 11% fraud, 7% non-fraud white collar, 6% firearms, and 3% robbery. A breakdown of drug prosecutions shows that 31% of the cases involved marijuana, 23% powder cocaine, 21% crack cocaine, 15% methamphetamine, and 8% heroin..



Of those sentenced in federal court in fiscal year 2000, 81.3% went to prison; 9.4% received probation; 5.4% received a sentence of probation and either community confinement (treatment center or halfway house) or home detention; and 3.9% received a split sentence of prison with community confinement or home detention.

For fiscal year 2000, 371 North Florida defendants were sentenced under the Sentencing Guidelines. That is down from 402 in the preceding year. The comparable number was 1,485 in Florida's Middle District, and 2,162 in the Southern District.

DOWNWARD DEPARTURE STATISTICS

Locally, there was some good news regarding downward departures. Departures for reasons other than substantial assistance have almost caught up with Florida's Middle and Southern Districts. In fiscal year 2000, there were 18 downward departure sentences, which represents 5% of the total. The percentage in the Southern District is 5.6%, in the Middle District it is 6.6%.

As small a number as 18 may seem, it still represents a significant improvement over last year's rate. In fiscal year 1999, the downward departure rate, for reasons other than substantial assistance, was at only 1.9%. At 5% for fiscal year 2000, we're up over 250%.

We're still, though, significantly behind the national average. For reasons other than substantial assistance, that average is 17%. Objectively, though, some of the leading reasons given are inapplicable here. The leading reason nationwide is, for example, "pursuant to plea agreement." That reason alone accounted for 18.3% of the departures.

The other reasons that reached double digit percentages were a vague "general mitigating circumstances" (14.9%) and "criminal history over-represents defendant's involvement" (11.2%). Two of the other leading reasons either are not applicable here or involve kinds of cases we seldom see: "fast track" (7.7%) and "deportation" (6.9%). The only other reasons that accounted for more than 3% of the departures were "offense behavior was an isolated incident" (8%) and "family ties and responsibilities" (4.3%).

The national average of departures for reasons other than substantial assistance has increased steadily over the years. It was 10.3% in 1996, 12.1% in 1997, 13.6% in 1998, 15.8% in 1999, and 17% in 2000.

We are, with 105 defendants receiving a downward departure for providing substantial assistance, one of the leading districts for substantial assistance departures. Nationwide, 17.9% receive downward departures for substantial assistance. We in North Florida had such departures in 29.3% of our cases.

In the end, considering both substantial assistance and non-substantial assistance downward departures, we're essentially at the national average for downward departures. The national average for fiscal year 2000 was 34.9%; our percentage was 34.3%. In South Florida, the figure was only 9.6%, while it was 32.8% in the Middle District.

MONTHLY TRAINING SEMINAR

With the United States Probation Office presenting their day-and-a-half seminar on the Sentencing Guidelines last week, we opted to forego our monthly luncheon for October.

We'll be up and running, though, next month. We'll be presenting Gainesville's own Lloyd Vipperman, via a videotaped presentation that was originally shown as part of the Bar's seminar on Advanced Federal Criminal Law. Lloyd provides an informative and useful talk on the ins and outs of the Bureau of Prisons, and tells us what we need to do before the client goes off to the big house. The schedule for November is:

November 1 - Panama City
 November 8 - Pensacola
 November 15 - Gainesville
 November 29 - Tallahassee

As usual, all of the showings are held in the respective federal courthouses during the lunch hour, noon to 1:00. As usual, too, you're invited to bring a brown bag lunch.

In December, we'll be presenting a two hour video from the Sentencing Guideline Commission. It's a review of the November 1, 2001, amendments relating to offenses involving money laundering, fraud and theft, drugs, immigration, and sexual abuse.

ORLANDO PANEL TRAINING

The Federal Public Defender's Office in Florida's Middle District, in conjunction with Orlando's chapter of the Florida Association of Criminal Defense Lawyers, is presenting a day-long seminar on October 26 at the Embassy Suites Hotel in downtown Orlando. There will be a number of excellent speakers addressing a variety of topics: the new Sentencing Guideline Amendments that go into effect in November; a review of the current status of *Apprendi v. New Jersey*; creative ideas for seeking downward departures; ethics guidelines and closing arguments; ways to build and keep a profitable

federal criminal practice; a review of criminal histories and sentencing enhancements under the Guidelines; and a judicial perspective presented by United States Magistrate Judge James Glazebrook as to the most effective way to represent an individual in federal court. If you wish to attend, call Margaret in our Tallahassee office (850) 942-8818, and she'll send you a registration form.

GUIDELINE CHANGES

November 1st a host of changes in the Sentencing Guidelines go into effect. These can be found on the Commission's web site at www.ussc.gov. Here are some highlights:

Fraud & Theft: Significant changes. While the 2-level enhancement for more than minimal planning has been eliminated, the loss tables have been adjusted to increase penalties for moderate and higher loss amounts.

Immigration: In many instances the changes will reduce the length of the sentence. Seemingly overrules some existing Eleventh Circuit law, *United States v. Marin-Navarette*, 244 F.3d 1284 (11th Cir. 2001), and *United States v. Christoher*, 239 F.3d 1191 (11th Cir. 2001) that had held that some misdemeanors could, oddly enough, be considered an "aggravated felony."

Money Laundering: Consolidates § 2S1.1 and § 2S1.2 into one guideline. Separates money laundering defendants into two categories: direct and third-party money launders. Provides an enhancement designed to reflect the seriousness of the underlying conduct from which the money was derived.

Sex Crimes: Generally increases penalties in a variety of ways. Overrules *United States v. Tillmon*, 195 F.3d 640 (11th Cir. 1999), in that the sentencing court is directed to group

multiple counts of child pornography distribution, receipt, and possession pursuant to § 3D1.2(d).

Ecstasy: Penalties are significantly increased.

Gun Crimes: Some modification in the definition of “prohibited person.” Overrules *United States v. Laihben*, 167 F.3d 1364 (11th Cir. 1999), by providing that an offense committed after the commission of any part of the instant offense cannot be counted as a prior felony conviction.

Counterfeiting: Some penalties increased.

Safety Valve: Expands eligibility for the 2-level reduction contained in § 2D1.1(b)(6). Instead of being limited to those with only an offense level of 26 and higher, it applies to those with an offense of 17 and higher and for whom the statutorily authorized minimum sentence is 5 years.

Drug Couriers & Minor Role: Amends the commentary to § 3B1.2 to clarify that a courier is eligible for a mitigating role adjustment even if the courier is held accountable for only the drugs he personally handled.

GOOD LUCK, CRAIG!

Craig Crawford, who has done a superb job of handling appeals with our office since 1996, left at the end of last month to begin working for the Federal Defender in the Middle District. Craig has done a wonderful job for us and our clients. We’ll miss him. We wish him all the best and know he’ll continue to make important contributions in the criminal defense arena.

DRESS FOR SUCCESS

Anyone that represents indigent criminal defendants will, sooner or later, find themselves representing the client who is

locked up in the jail and needs clothes for trial. We have an excellent wardrobe in our Tallahassee office, and lesser collections of clothes in both the Gainesville and Pensacola offices. If you’re having difficulty finding clothes for your client, come see us. We do ask, though, that you have the clothes cleaned before you return them to us.

ONE OF EVERY 32 ADULTS IS EITHER LOCKED UP OR UNDER SUPERVISION

According to statistics of the Bureau of Prisons, the total number of adults in the United States incarcerated or being supervised as a probationer or parolee was, as of December 31, 2000, nearly 6.5 million. That figure represents 3.1 percent of the nation’s adult population, or 1 in every 32 adults. The statistics were compiled from all of the country’s federal, state, and local jurisdictions. Georgia (5.8%) and Texas (5%) occupied the top two spots. Florida was slightly above the national average with 3.4%.

VICTORIES

Between the two of them, two small-town, north Florida police chiefs recently found themselves facing 12 counts of selling stolen firearms from the police evidence locker. Before the first trial, the Court, at the government’s request, dismissed all but five charges. In June, Tallahassee lawyers **Bob Harper** and **Gary Roberts** went to trial with their respective clients, and came away with acquittals on two counts, and a hung jury on the other three. Subsequently, Judge Hinkle granted a severance, and in September Bob Harper and his client went through a second trial. The jury returned a not guilty verdict on one count, and a guilty verdict on the other. The other chief, with a new lawyer, Federal

Public Defender **Randy Murrell**, went through jury selection only to have the Court, at the government's request, dismiss the one remaining count the afternoon before the government was scheduled to begin presenting its case.

In Gainesville this past May, the government tried three defendants for harboring illegal aliens "for purpose of commercial advantage or private financial gain." Gainesville lawyers **Lloyd Viperman** and **Steve Bernstein**, along with a third lawyer from south Florida, represented the three individuals. Although the jury returned a guilty verdict, the lawyers convinced Judge Paul to grant a renewed judgement of acquittal. In his 32-page order, Judge Paul concluded that the government had failed to prove that the defendants had exploited the aliens for financial gain and had, therefore, failed to prove the alleged offense.

In Tallahassee this past week, on the Friday before the scheduled Monday trial, Judge Mickle, at the government's request, dismissed six counts of passing forged treasury checks against a young Mexican woman represented by **Randy Murrell**. The young woman had said she was duped into coming to the United States, held captive, abused and threatened by her captors, and forced to pass the checks out of fear of what would happen to her and her family in Mexico.

Earlier this week **Bill Clark** of our Tallahassee office won an acquittal for his client who had been charged with providing false information in conjunction with the purchase of a firearm. Bill's client had denied on the ATF form that he had been convicted of a "domestic battery." Bill's defense was that the client was unaware, at least in part because

of the complexity of the ATF form, that his "battery" conviction qualified as a "domestic battery."

Please call us, send us a note, or e-mail us, here, 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.

DOWNWARD DEPARTURES

Wiggins, Felicia	Mickle, S.	Atty: Bill Clark
Docket:	4:01cr27-SPM	
Charge:	Poss WITD Crack	
Range:	120 - 121 months	
Sentence:	1 day BOP, 5 years SR	
Date of Imposition of Sentence:	10/15/01	
Grounds:	Substantial Assistance, which allowed Judge to consider family situation and health.	

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

DAILY CASE SUMMARIES

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

SUPREME COURT CASES

TYLER v. CAIN, 121 S.Ct. 2478 (June 28, 2001)

2244; Cage rule has not been made retroactive

Cage v. Louisiana, 498 U.S. 39 (1990), held that a jury instruction is unconstitutional if

there is a reasonable likelihood the jury understood it to allow conviction without proof beyond a reasonable doubt. Tyler received permission to file a second habeas petition, but the Fifth Circuit denied relief. The Supreme Court affirmed (5-4), holding that the *Cage* rule was not "made retroactive to cases on collateral review by the Supreme Court," within the meaning of 2244(b)(2)(A). It was emphatic that only the Court can, by itself, lay out and construct a rule's retroactive effect. Interestingly, the Court declined to make *Cage* retroactive "today" because Tyler's habeas application was his second, and the district court was required to dismiss it unless Tyler showed that the Supreme Court had already made *Cage* retroactive.

ELEVENTH CIRCUIT CASE SUMMARIES

PUTMAN v. HEAD, 2001 WL 1193894 (Oct. 9, 2001)

COA; ineffectiveness; sentencing

The Court granted a COA. The defendant truck driver, charged with sequential murders, received a life sentence in the first case but a death sentence in the second case. The ineffectiveness claim was based on the fact that his legal team in the second case did not adhere to the same sentencing strategy as the first case. The Court disagreed. Interestingly, Judge Wilson's lengthy dissent found the defense failed to present a credible mitigation case. The defense failed to follow the successful mitigation strategy of the first case and would not have had any relevant evidence but for the fact that two witnesses just happened to be present for corraling into testifying. "If this performance is rationalized as something a reasonable attorney might have done, we have rendered the word 'reasonable' meaningless."

MOBLEY v. HEAD, 2001 WL 1172694

(Oct. 4, 2001)

Ineffectiveness

Counsel was not ineffective for advancing a "genetic deficiency" theory without an expert.

MASSENGALE v. RAY, 2001 WL 1172691 (Oct. 4, 2001)

Pro se litigant; attorneys' fees

As a matter of first impression, Rule 11 sanctions can be imposed against a *pro se* litigant, but attorney's fees cannot be one of them.

U.S. v. CROMARTIE, 2001 WL 1167785 (Oct. 3, 2001)

Apprendi; Fifth Amendment; indictment

Relying on its recent (2-1) decision in *McCoy*, 2001 WL 1131653 (11th Cir. 9/25/01), the district court had jurisdiction to sentence him under 21 USC 841(b)(1)(A) despite the indictment's omission of drug type or quantity.

U.S. v. FULFORD, et al., 2001 WL 1159772 (Oct. 2, 2001)

Three strikes law; carjacking; specific intent; jury instruction; supplemental instruction

Fulford was convicted of various offenses arising from a carjacking and Gage of conspiracy to commit carjacking. The Court quickly rejected a challenge to the sufficiency of the evidence of specific intent under the carjacking statute and a *Bruton* challenge. The jury instruction on specific intent was adequate where it substantially covered the requested defense instruction and did not substantially impair the ability to present an effective defense. A challenge to the supplemental instruction given after a jury question was waived/invited by his attorney's indication the instruction was acceptable, and counsel's later request of additional instruction was not relevant.

Reversing its earlier opinion, 2001 WL 958980, which had affirmed an increase in sentence from 60 months to life, the Court rejected the Government's cross-appeal of the district court's failure to sentence Gage to life under the three strikes law, 18 USC 3559. Relying on the language of 3559(c)(2)(D), which distinguished this case from precedent, the Court affirmed the district court's conclusion that it could not look beyond the face of the judgment of conviction "[B]ecause 3559(c)(2)(D) refers only to the elements of the offense on which the enhanced statute is to be predicated, the sentencing court may not look past the conviction to the charging document." Because firearms use is not an element of aggravated assault under the Florida statute under which Gage was convicted, it is not a qualifying crime.

HAGINS v. U.S., 2001 WL 1149059 (Sept. 28, 2001)

Ineffectiveness; finality of prior conviction
A challenge to the finality of a prior Georgia conviction for sentencing purposes was rejected as "specious."

U.S. v. La MATA, et al., 2001 WL 1141810 (Sept. 27, 2001)

Ex post facto; statute of limitations; 18 USC 3293; bank fraud; continuing offense
The Court **reversed** the bank fraud convictions of three bank officers and a real estate speculator as violative of the ex post facto prohibition but otherwise affirmed.

McCOY v. U.S., 2001 WL 1131653 (Sept. 25, 2001)

Apprendi; 2255; jurisdictional; procedural bar; Fifth Amendment; grand jury clause; mandatory minimum; COA

With Judge Barkett dissenting, the Court held that *Apprendi* claims are not jurisdictional and are barred by *Teague*'s non-retroactivity

standard. The Court squarely addressed the Fifth Amendment Grand Jury Clause issue, as well as the defendant's argument that it deprived the court of jurisdiction to impose a minimum mandatory term under 841 USC (b)(1)(A). (*See also* the Court's discussion of the breadth of a COA, slip op. at 4 n. 2.) The Court concluded that *Apprendi* claims not raised on direct appeal are procedurally barred; thus his 2255 was denied. This very long opinion is a **must read** if *Apprendi* is a live issue to you.

U.S. v. MAUNG, 2001 WL 1131647 (Sept. 25, 2001)

Restitution; 2B6.1(b)(2); sentencing; equitable tolling

The Court affirmed the conviction for receiving and possessing with intent to sell cars with altered ID numbers and of exporting stolen cars. The two-level enhancement under 2B6.1(b)(2) is applicable where the defendant was in the business of buying and selling stolen property. As a matter of first impression on an issue on which the circuits are split, the Court adopted neither test, suggested the need for a clarifying amendment or commentary, and based its conclusion on the statutory language. Where the defendant was not the actual thief and did not "sell" the property but merely transported it, this enhancement can not apply. Also, the restitution order was **vacated** because it was imposed more than 90 days after sentencing, in violation of 18 USC 3664(d)(5). Negotiations between the parties as to the amount did not waive this limit; rather, the district court should have continued sentencing. The Court rejected the Government's argument in favor of equitable tolling in the absence of any evidence the defendant was negotiating the restitution amount in bad faith.

U.S. v. LISS, et al., 2001 WL 1110292 (Sept. 21, 2001)

Abuse of trust; 3B1.3; restitution; unpublished precedent

Doctors Liss and Spuza entered illegal kick-back "consulting doctor" agreements with a laboratory for a monthly payment based on referrals to the lab, and Spuza also received the benefit of direct payments by the lab for equipment and office rent. The Court rejected their arguments on severance. The defendants argued, as an issue of first impression in this circuit, that their enhancement for abuse of a position of trust under 3B1.3 was error, that they could not have breached the trust of Medicare because they had no relationship with the agency. Relying on *Garrison*, 133 F.3d 831 (holding that defendant must be in position of trust with victim and position must have contributed in some significant way to facilitating commission or concealment of the crime), and noting that the six other circuits addressing the issue had held against the doctor, the Court upheld the enhancement. *Garcia*, 211 F.3d 128, an unpublished decision directly on point upholding the enhancement, was persuasive authority but not binding precedent. The inclusion of in-kind payments to Spuza was not clearly erroneous, but the Court remanded for additional findings regarding the amount of loss. The Court agreed with Spuza's argument that there was no basis for the restitution order, since the payments to him were in no way a loss to Medicare.

U.S. v. SCOTT, 263 F.3d 1270 (Aug. 28, 2001)

Commerce clause; felon in possession

Scott appealed his conviction for felon in possession of a firearm, arguing that the statute was an invalid exercise of Congress' Commerce Clause power because such

possession is not conduct that has a substantial impact on interstate commerce. Scott argued that the Supreme Court opinions in *Jones v. United States*, 120 S. Ct. 1904 (2000), and *United States v. Morrison*, 120 S. Ct. 1740 (2000), effectively overruled the Eleventh Circuit's opinion in *United States v. McAllister*, 77 F.3d 549 (11th Cir. 1996). The Court disagreed; the firearm must only have a minimal nexus to interstate commerce. Thus, the government need only show that the firearm was manufactured in California and Scott was caught with it in Georgia.

U.S. v. HANSEN, et al., 262 F.3d 1217 (Aug. 24, 2001)

Environmental crimes

The Court affirmed convictions for conspiracy to violate several environmental acts, rejecting issues dealing with expert testimony, jury instructions, and sufficiency of the evidence.

HUBBARD, et al. v. HALEY, et al., 262 F.3d 1194 (Aug. 21, 2001)

Prison Litigation Reform Act of 1995; filing fee

The Court held that multiple prisoners bringing a civil action in forma pauperis must each pay the full filing fee, declining to prorate the fees.

DORSEY v. CHAPMAN, 262 F.3d 1181 (Aug. 20, 2001)

2254; confrontation clause; dissociative state; ineffectiveness

The victim in this sexual battery case suffered from multiple personality disorder and was the only real witness against the defendant. During her testimony, "three personalities" provided conflicting stories. Two other personalities were not brought out, including one with "full recollection." The defense refused to cross-examine the other

personalities or cause the witness to dissociate. In his 2254 petition, the defendant claimed he was deprived of his right to confront the key witness, but the majority found no confrontation clause violation. Dissenting, visiting Ninth Circuit Judge Noonan focused on the defense inability to cross-examine all personalities, particularly the one with full recollection. "It was a travesty of justice for the state of Georgia to convict a man on the testimony of less than one person."

U.S. v. STRICKLAND, 261 F.3d 1271 (Aug. 17, 2001)

Consecutive sentences; double jeopardy

Strickland was convicted of multiple counts of transportation of and use of an explosive device in violation of 18 USC 844(d) and 924(c). He argued that consecutive sentences for the multiple counts, based on a single course of conduct, violated the Double Jeopardy Clause. The Eleventh Circuit disagreed. (The Court did **vacate** the conviction on one count which the government conceded failed to state an offense.)

FUGATE v. HEAD, 261 F.3d 1206 (Aug. 16, 2001)

Ineffectiveness

The Court thoroughly examined the case law on ineffective assistance of counsel at both the guilt and penalty stages of trial but affirmed denial of the petition.

U.S. v. GIORDANO, et. al., 261 F.3d 1134 (Aug. 15, 2001)

Indictment; 404(b) evidence; antitrust sentencing guideline

The defendants were convicted of conspiring to restrain competition in the scrap metal industry in the wake of Hurricane Andrew.

Although the indictment was not grammatically clear, it sufficiently pled both a flow theory and effects theory for jurisdiction. The district court's limiting instruction was sufficient to alert the jury that it was to consider the 404(b) evidence only in relation to those defendants who were involved. Given Supreme Court precedent and the long-established rule that a horizontal price-fixing agreement is per se illegal, the reasonableness of the price-fixing agreement was not an issue for the jury. Finally, the district court did not err in including in the volume of commerce affected (under 2R1.1), all sales of the affected products over a time span longer than that alleged in the indictment.

U.S. v. CAMACHO, 261 F.3d 1071 (Aug. 14, 2001)

Sentencing guidelines; LSD drug weight calculation

Camacho pled guilty to conspiracy to possess with intent to distribute LSD and methamphetamine. He argued that the district court erred by including the entire weight of the liquid solution, as opposed to the weight of the pure LSD alone. In a case of first impression, the Eleventh Circuit agreed. In liquid LSD cases, the district court must determine the amount of pure LSD involved and then consider whether an upward departure to reflect the seriousness of the offense is necessary.

U.S. v. RAMIREZ, 260 F.3d 1310 (Aug. 10, 2001)

Notice of appeal; return of property; Fed.R.Crim.P. 41(e)

Four years after pleading guilty, Ramirez filed a motion under Fed.R.Crim.P. 41(e) for the return of property seized at arrest. The government responded that the items were destroyed by the DEA. On appeal, the Court

held that a motion for return of property filed after criminal proceedings have terminated is a civil proceeding for equitable relief subject to the 60-day appeal period. Because the government's response was not verified nor any affidavits attached, it did not meet its burden. On remand, if the property was destroyed, the court may impose some equitable remedy, but not money damages under Rule 41(e).

U.S. v. HESTER, 2001 WL 896897 (Aug. 9, 2001)

***Apprendi*; marijuana**

Pre-*Apprendi*, the Court had rejected the argument that the number of marijuana plants constituted an element of the offense. *See United States v. Hester*, 199 F.3d 1287 (11th Cir.), *vacated*, 121 S. Ct. 336 (2000)(vacating for further consideration). The Court remanded the case to the district court for resentencing in light of *Apprendi*. [Then, however, this opinion was vacated on August 24, 2001, pending the Court's *en banc* decision in *Sanchez*. 262 F.3d 1258.]

SINGLETON v. U.S., 260 F.3d 1295 (Aug. 8, 2001)

Marital confidential communications privilege

The Court held that the marital confidential communications privilege is not available when the parties are permanently separated, outlining three objective factors: (1) Was the couple cohabiting? (2) How long had they been living apart? (3) Had either filed for divorce? A district court may consider other objective evidence of the parties' intent or lack of intent to reconcile. A district court may also consider testimony of the spouses' subjective intent, but objective factors may undermine their credibility.

U.S. v. GRAY, 260 F.3d 1267 (Aug. 7, 2001)
Hobbs Act; indictment; mens rea; interstate commerce; three strikes; brandishing firearm

The Court held that a prosecution under the Hobbs Act merely requires a minimal effect on commerce, rejecting the argument that two Supreme Court cases required a substantial effect.

The Three Strikes statute, 18 USC 3559(c)(1), provides an affirmative defense if the defendant can establish by clear and convincing evidence that no firearm or dangerous weapon was used in a robbery conviction. The Court rejected the arguments that the statute unconstitutionally shifted the burden to him and that the high standard was unconstitutional. The Court also held that brandishing a firearm under 924(c)(1)(A)(ii) was a sentencing factor; although it increased the minimum mandatory sentence, it did not increase the statutory maximum. Finally, acknowledging that the Ninth Circuit had **reversed** a Hobbs Act extortion conviction because the indictment did not allege mens rea, the Court refused to reverse here because the issue was not raised in the district court. When raised for the first time on appeal, the standard is whether the indictment was so defective that it did not, by any reasonable construction, charge the offense for which the defendant was convicted, and the indictment was sufficient under this type of review.

U.S. v. BLAYLOCK, 259 F.3d 1320 (Aug. 1, 2001)

Drug quantity under guidelines; shifting of burden; en banc review

The Court vacated its earlier decision of May 2, 2001, pending review *en banc*. [Defendant pled guilty to possession of precursor chemicals with the intent to manufacture methamphetamine. The district court had

accepted the 100% theoretical yield calculation theory, and the Court affirmed. (Also, the Court interpreted the district court's (mistaken) use of the term "burden of proof" as failure to come forward with rebuttal evidence.) One judge dissented, citing ample evidence to cast doubt upon the theoretical yield figure.]

HELTON v. DOC, 259 F.3d 1310 (July 31, 2001)

Equitable tolling; 2254; actual innocence

In its previous opinion, 233 F.3d 1322 (11th Cir. Nov. 21, 2000), the Court held that equitable tolling of the AEDPA's statute of limitations was warranted for three basic reasons: Helton's diligent pursuit of his legal rights on appeal; (2) misinformation provided by Helton's counsel regarding the expiration of the applicable statute of limitations; and (3) the strange nature of the case. (The Court also granted the habeas on the basis of ineffective assistance of trial counsel for failure to investigate gastric evidence in the case.)

On this rehearing, however, the Court **reversed** its position on all three findings. As to diligence, he was not sufficiently specific in his allegations that the library was inadequate; e.g., he should have stated that he requested the new statutes and the library refused to get them. As to his counsel's misinformation, counsel put Helton on notice that the information might be wrong, and counsel misinformation was not an extraordinary circumstance warranting equitable tolling. Finally, for the "strange nature of the case" to warrant equitable tolling, it must refer to the circumstances surrounding the late filing of the petition, not the circumstances surrounding the underlying conviction. Because there was no equitable tolling, the petition was procedurally barred.

A footnote stated that the circuit had yet to

decide whether there was an "actual innocence" exception to AEDPA's statute of limitations, but the circumstantial evidence here was insufficient to support such a claim.

U.S. v. HUNERLACH, 258 F.3d 1282 (July 27, 2001)

Upward CHC departure; upward fine departure

In 1988 and 1994, Hunerlach was convicted of tax related charges. At sentencing in 1994, the district court granted two upward departures. First, because the 1988 conviction was used as relevant conduct to determine his base offense level and therefore could not be used as a prior sentence under his criminal history category, the district court granted an upward departure from CHC I to CHC III. The Court **vacated**; when a district court determines that underlying conduct is relevant to the instant offense, and considers it in calculating the base offense level, it cannot also be considered as a prior sentence under 4A1.3. Second, the district court had granted an upward departure on his fine from the guideline range to the statutory maximum (\$250,000). The Court found no plain error, even if the district court had failed to provide the proper notice.

UNGER v. MOORE, 258 F.3d 1260 (July 26, 2001)

2254; proper party in suit

Unger, a state prisoner, was sentenced to life in Maryland, escaped, and committed new crimes in Florida; he was sentenced to 30 years in Florida, concurrent with his Maryland sentence. In 1990, he completed his Florida sentence and was returned to Maryland, which refused to give any credit towards that sentence for the time spent in Florida. He filed a 2254 petition, but the district court refused to entertain it, stating it lacked

jurisdiction since he was no longer "in custody." On appeal, the Court defined "in custody" to include incarcerated under a current sentence that has been enhanced by an expired conviction. However, because the validity of Unger's Florida conviction was only an issue to the extent that Maryland law and the Maryland sentence may turn on them, the proper respondent was Maryland.

U.S. v. DUPREE, 258 F.3d 1258 (July 25, 2001)

Commerce clause; 922(g)

The Court rejected the argument that *Morrison* overruled *McAllister*. (In *United States v. McAllister*, 77 F.3d 387 (11th Cir. 1996), the Court held that 18 U.S.C. 922(g) did not violate the Commerce Clause because 922(g) required only a minimal nexus to interstate commerce. Subsequently, in *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740 (2000), the Supreme Court struck down the Violence Against Women Act because gender-motivated crimes against women did not involve an economic activity and the Act did not contain any jurisdictional element that established that the federal cause of action was pursuant to the Commerce Clause.)

U.S. v. CABEZA, 258 F.3d 1256 (July 25, 2001)

***Apprendi*; burden of proof**

Because criminal forfeiture is a punishment and not an element, it does not fall under *Apprendi*. Therefore, the burden of proof is preponderance of the evidence.

U.S. v. DESIR, 257 F.3d 1233 (July 17, 2001)
Magistrate; jury question; Article III

When court adjourned on Thursday evening mid-deliberations, the district court told the jury, in the presence of the defendant and his counsel, that he might not be available to

return on Friday, but that a magistrate judge would be present to do whatever was necessary. During continued deliberations on Friday, the jury asked to rehear some testimony, and the magistrate ruled that it would not be read back. Desir did not object. On appeal, Desir argued that he was entitled to a new trial because, without his consent, a magistrate judge stood in for a district judge during jury deliberations and responded to a jury question, and then instructed the jury. The Court held the magistrate inappropriately exercised the authority of an Article III judge at a critical state of the proceeding by responding to the jury's question, which went beyond the simple performance of a ministerial task (such as receiving the verdict or polling the jury). Because the district court did not direct the magistrate's response to the jury's question, in the absence of express consent from all parties, Desir was entitled to a new trial.

GRAYSON v. THOMPSON, 257 F.3d 1194 (July 16, 2001)

2254; ineffectiveness; nonpsychiatric expert assistance to indigent defendant; due process

Due process requires psychiatric assistance for indigent defendants where a defendant's mental condition is seriously in question. However, neither the Supreme Court nor this circuit has held that the Constitution requires a state to provide an indigent defendant with nonpsychiatric experts. However, even if due process does require this, Grayson's trial was not fundamentally unfair.

Note: In federal prosecutions, the Criminal Justice Act requires the district court to authorize "investigative, expert, or other services" when the defendant shows that (1) he is financially unable to provide the services, and (2) the services of the expert are

necessary for adequate representation. A defendant must show reasonable probability that the expert would be of assistance to the defense and that denial of the expert would result in a fundamentally unfair trial.

RINALDO v. CORBETT, 256 F.3d 1276 (July 13, 2001)

Notice of appeal; extension of time; Fed.R.App.P. 3; 1983

Within 30 days of the judgment in this 1983 action, Rinaldo filed a motion for extension of time to file his notice of appeal. Well after the 30-day time period, he filed a notice of appeal. The extension motion should be construed as a notice of appeal, where the motion was objectively clear that the party intended to appeal, and where each prong of Rule 3(c)(1) was fulfilled.

CADERNO v. U.S., 256 F.3d 1213 (July 11, 2001)

Ineffectiveness; new trial; improper juror contact; retainer

The Court addressed two issues of first impression in this circuit. First, a court security officer or marshal had commented to a juror during a mid-deliberation break that the defendants were "pigs." The comments had been brought to the district court's attention, and it had cautioned both the juror and officer about not communicating. The Court concluded that, because counsel did not overhear the conversation, counsel's failure to timely move for new trial on that basis was not unreasonable. (The Court did not address whether counsel was ineffective for failure to ask the court to conduct an inquiry into the substance of the conversation, or whether the court erred by failing to make an adequate record.) Second, the defendant's failure to pay counsel the full retainer fee did not create an actual conflict of interest which was

evidenced by deficient performance.

U.S. v. LE, 256 F.3d 1229 (July 11, 2001), *modified* 14 Fla. L. Weekly Fed. C1250 (11th Cir. Sept. 6, 2001)

Hobbs Act; interstate commerce; post-arrest statement; translation of transcripts; 2B3.1(b)(5); Apprendi; consecutive sentences; firearm enhancement; 942(c)

The Court affirmed the convictions under the Hobbs Act for a home invasion robbery. The interstate commerce nexus was sufficient given the fact that the money sought to be stolen during the home invasion robbery was the homeowners' profit from a nail salon which bought supplies from Georgia. This circuit's precedent requires only a "minimal impact" on interstate commerce if the offense charged is a substantive Hobbs Act violation. *Kaplan*, 171 F.3d at 1354 (11th Cir. 1999). The fact that the target was a private home rather than the victim's business location did not attenuate the nexus. Reviewing for plain error, the Court also rejected the defendant's claim that his post-arrest statements were inadmissible because the Government knew or should have known of his ongoing representation by counsel. Next, the Court rejected the defendant's claim that the court should have, in addition to English transcripts, played the original Vietnamese language tapes for the jury, finding it waived for lack of objection or prejudice. The Court rejected the *Apprendi* challenge to the two-level increase for carjacking under 2B3.1(b)(5); although his 262-month total sentence exceeded the statutory maximum of 20 years, the individual sentences did not exceed the statutory maximum, only their consecutive total. However, the Court **vacated** the district court's imposition of a seven-level increase for discharge of a firearm, because Amendment 599 to the Guidelines retroactively precluded

this enhancement when a defendant is also convicted and sentenced under 924(c) for the firearms.

JOHNSON v. ALABAMA, 256 F.3d 1156 (July 10, 2001)

2254; ineffectiveness; sufficiency of the evidence; *Brady*; procedural default

The Court rejected numerous claims of ineffectiveness in this capital habeas. The Court also found the challenge to the sufficiency of the evidence was procedurally barred.

U.S. v. GRANT, 256 F.3d 1146 (July 10, 2001)

Notice of appeal; sufficiency; Fed.R.Evid. 806; Fed.R.App.P. 3

Grant was convicted on drug and firearm counts (Case A) and failure to appear (Case B), which were consolidated for sentencing. A timely notice of appeal was filed but only listed the Case B case number. An amended notice of appeal (actually titled an out-of-time appeal) listing both case numbers was filed several months later. The Court held that the notice of appeal was timely for both cases under Appellate Rule 3(c)(4), which provides that an appeal must not be dismissed for informality of form or title of the notice of appeal. As to the claim under Fed.R.Evid. 806, however, the Court **reversed** Grant's convictions. At trial, the government agent testified as to the statements of a co-conspirator who had since been deported; the statements implicitly connected Grant to the conspiracy and never identified Grant except briefly on cross-examination. The district court had refused to let Grant impeach the statements with an affidavit from the co-conspirator, and this required **reversal**.

U.S. v. FALLEN, 256 F.3d 1082 (July 9,

2001)

Forcible assault; jury instructions; evidentiary issues

Fallen, who had three prior gun-related incidents, reported a threat against the President. When agents arrived, Fallen refused to open his door, and stated that he had a gun and would shoot the agents if they did not leave. He never used a gun, and the agents never saw a gun. The Court held that forcible assault is defined as "any willful threat or attempt to inflict bodily injury . . . when coupled with an apparent present ability to do so" Further, the incident was more than a simple assault based on the potential for serious bodily injury. The jury instruction was a correct statement of the law. As to the evidentiary challenges, the district court's admission of the three gun-related incidents was inextricably intertwined. Although the district court incorrectly allowed the prosecutor to ask the agent how many times previously he had been shot at, the court receded from that ruling and instructed the jury to disregard it. The questions were improper and the jury instruction was inadequate, but the error was harmless. District Judge Propst dissented because Fallen had not committed an act, and mere words cannot constitute an assault; some amount of force must be used.

U.S. v. NGUYEN, et al., 255 F.3d 1335 (July 6, 2001)

RICO; jury instruction; grouping; *Apprendi*; deportation

The defendants were convicted on RICO conspiracy and substantive conspiracy counts. First, the Court held the district court did not err in refusing to instruct the jury on lesser included offenses of certain RICO predicate acts. Second, the district court can only enhance sentences using conduct of which the

jury had convicted them or conduct found beyond a reasonable doubt; therefore, some sentences were **reversed**. Third, a RICO action is punishable by a maximum 20 years imprisonment unless the predicate acts provide for a greater punishment. Because the jury failed to find that any defendant committed a predicate act with a greater sentence than 20 years, the Court **vacated** all sentences in excess of 20 years. Fourth, the guidelines require that grouping rules apply. Finally, the district court had no authority to order deportation as a condition of supervised release but could order deportation at sentencing under 8 U.S.C. 1228(c). Although the government failed to comply with the explicit requirements of the statute, the Court found no plain error.

TINKER v. MOORE, 255 F.3d 1331 (July 6, 2001)

2254; tolling; statute of limitations

Tinker's state conviction was affirmed, and the mandate issued February 14, 1997. Pursuant to Florida law, Tinker had two years to file his state post-conviction motion, which he filed on June 11, 1998. Upon its denial, Tinker filed his 2254 motion. The motion was time barred, because the one-year limitation period to file his federal habeas expired February 13, 1998, and that controlled in spite of the state's two-year limit.

U.S. v. HUMBER, 255 F.3d 1308 (July 5, 2001)

Double counting; 2F1.1(b)(2)(A), (b)(5)(c)

The Court held, in an issue of first impression, that the cumulative imposition of 2F1.1(b)(2)(A) [enhancement for more than minimal planning] and 2F1.1(b)(5)(C) [enhancement for sophisticated means] for the same conduct did not result in double counting.

U.S. v. AYALA-GOMEZ, 255 F.3d 1314 (July 5, 2001)

Aggravated felony; suspended or probated sentence

Ayala was convicted for being found in the United States without permission after removal. The district court enhanced his sentence because he committed an "aggravated felony" before his removal. According to the statutes and guidelines, his prior offenses can constitute aggravated felonies only if they resulted in a term of imprisonment of at least one year. In his prior case, the Georgia state court had sentenced him to eight months time served and four years/four months probation. The Court affirmed; under a federal interpretation of the Georgia conviction and sentence, his sentence was akin to a suspended sentence which may be used in calculating the sentence imposed. A strong dissent disagreed with this interpretation and also noted that the statute was ambiguous and therefore the rule of lenity should apply.

U.S. v. NOSRATI-SHAMLOO, 255 F.3d 1290 (July 3, 2001)

Fraud; loss determination

Based on his theft of mail, Shamloo applied for and received several credit cards in others' names. In determining the amount of loss, the district court combined the credit limits on the cards, rather than just the actual amount of loss. The Court affirmed; the amount of the intended loss can be the total line of credit to which a defendant could have access, especially when the defendant presents no evidence that he did not intend to utilize all credit available.

U.S. v. MILLER, 255 F.3d 1282 (July 3, 2001)

Post-Miranda silence; severance; mens rea;

possessing unregistered firearm

Miller was convicted of felon in possession and possession of an unregistered firearm. He claimed the district court improperly denied his motion to sever, but his general allegation of prejudice was insufficient to meet his heavy burden of demonstrating specific and compelling prejudice. Second, the prosecutor elicited testimony from two officers regarding what Miller said after he invoked his *Miranda* rights. The Court was upset that prosecutors continue to indulge themselves in this improper line of questioning, but concluded that the questioning was harmless. Finally, the Court found that the instruction (that the defendant knowingly possessed a firearm having a barrel less than 18 inches) may have been inadequate; it should have been that the government must prove that the defendant knew that the weapon he possessed had the characteristics that brought it within the statutory definition of a firearm. However, Miller did not object, and it was not plain error where the jury found predicate facts which are so closely related to the omitted element that no rational jury could find those facts without finding the element.

THOMPSON v. HALEY, 255 F.3d 1292 (July 3, 2001)

2254; coerced confession; ineffectiveness

Thompson was convicted of murder and sentenced to death. The Court rejected the 2254 claim that his confession was coerced. Thompson was told that if he did not confess, his girlfriend would also be prosecuted; however, because she had participated in the crime and had already implicated herself, the alleged statement did not constitute coercion. The only ineffectiveness claim deemed to have merit was the defense attorney's closing argument, where he told the jury he was court appointed and dehumanized Thompson. The

Court noted that a lawyer does not serve his client by telling the jury that he has been court appointed. However, the Court found no reasonable probability that counsel's performance affected either the jury's verdict or the jury's death recommendation.

BROWN v. JONES, 255 F.3d 1273 (June 29, 2001)

2254; ineffectiveness; prosecutorial misconduct

The Court rejected the claimed ineffectiveness, accepting trial counsel's testimony that he believed jurors in the area were prejudiced against defendants who used drugs, and therefore his failure to investigate and present evidence of Brown's drug and alcohol abuse was sound trial strategy. The Court also found it reasonable that the attorney failed to question and identify jurors who were biased in favor of the death penalty, because counsel may have thought it better to avoid any focus on the death penalty. Although the Court is concerned when intimidation tactics are used by the prosecution, the Court found that the witness' testimony was both voluntary and truthful, that defense counsel had a sufficient opportunity to cross-examine the witness regarding trial preparation, and that the entire event had been taped and provided to defense counsel.

U.S. v. DESCALLY, 254 F.3d 1328 (June 28, 2001)

5G1.3; concurrent state sentence; concurrent sentence doctrine

Descally's federal sentence for conspiring to violate the Hobbs Act was concurrent with a 30-year state sentence, and the district court refused to reduce Descally's federal sentence by the full 73 months he had spent in state custody, before the federal sentence, on a

related crime. On appeal, the Court agreed that Application Note 2 of 5G1.3(b) mandates a 73-month credit. First, the Court rejected the Government’s argument that the plea agreement waived the right to appeal, because the district court stated unequivocally that Descally could appeal his sentence if it was more severe than he expected. Second, in rejecting the collateral sentence doctrine, the Court held that the government failed to demonstrate that there was no likelihood of any collateral effect on his time incarcerated under his state sentence. Finally, the Court held that Application Note 2 was applicable even when the federal sentence does not exceed that imposed by the state, thus mandating a credit to Descally's federal sentence. The Court noted that the district court should have related Descally's sentence back to the time his state imprisonment began.

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