

FEDERAL PUBLIC DEFENDER

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NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

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October 16, 2003

JUDGE RODGERS NOMINATED TO BECOME DISTRICT JUDGE

President Bush has nominated Pensacola Magistrate Judge Margaret “Casey” Rodgers to become a District Court Judge for the Northern District of Florida. She would fill the position held by Judge Lacey Collier, who is slated to take senior status next month. Congress held Judge Rodgers’ confirmation hearing at the end of September. Judge Rodgers enjoys bipartisan support, and it is anticipated that she may be officially confirmed even before Judge Collier takes senior status.

Judge Rodgers is a native of the Pensacola area, having been raised in Gulf Breeze. Following a two-year tour of duty with the Army, she earned her bachelor’s degree in political science from the University of West Florida. Subsequently, she graduated magna cum laude from the California Western School of Law. When she returned to north Florida, she worked as a law clerk for Judge Collier. Later she worked in private practice, specializing in general civil litigation, with an emphasis on employment law. She also served

several years as general counsel for a large multi-specialty physician group practice in Pensacola. She is an accomplished runner, having participated in a number of marathons.

WE NEED ANOTHER LAWYER

We’re looking for an enthusiastic, hard-working, talented lawyer with roughly 3 to 5 years of criminal trial experience to work alongside the three lawyers in our Pensacola office. Responsibilities will consist primarily of representing individuals in the Federal District Court in the Pensacola and Panama City divisions. Strong research and writing skills and a willingness to try cases are important considerations. The established salary range for someone with 3 to 5 years of criminal trial experience is \$47,356 to \$71,363, and the position enjoys the standard federal employment benefits. Resumes, including references, should be submitted to Randy Murrell, c/o Tom Keith, 41 N. Jefferson Street, Suite 301, Pensacola, FL 32502. The deadline for submitting resumes is now October 20th. We are an equal

opportunity employer.

SENTENCING COMMISSION PROMULGATES LIMITS TO DOWNWARD DEPARTURES

On October 8th the Sentencing Guidelines Commission adopted changes to the Sentencing Guidelines in response to the provision of the PROTECT Act that required the Commission to reduce the number of downward departures. The changes will become effective October 27, 2003. You can view the changes in their entirety by going to the Commission's web page at: www.ussc.gov. The primary modifications:

- prohibit departures based on acceptance of responsibility or a minor role in the offense (Note - this does not affect the adjustments for these circumstances, only *departures*);
- prohibit departures based on a gambling addiction or the payment of legally required restitution;
- limit the availability of departures on the basis of family ties and responsibilities, aberrant behavior, diminished capacity, and a combination of circumstances;
- prohibit downward departures for those classified as armed career criminals or repeat and dangerous sex offenders on the basis of an overstatement of the seriousness of their criminal history;
- limit departures for those classified as career offenders on the basis of an overstatement of the seriousness of their criminal history to one criminal history category; and
- limit, for everyone else, the extent of

the departure on the basis of an overstatement of the seriousness of the criminal history category I.

ATTORNEY GENERAL ISSUES NEW DIRECTIVES TO U.S. ATTORNEYS

Attorney General John Ashcroft has issued two directives over the last few months to United States Attorneys around the country. The first one came out on July 28, 2003, and was aimed primarily at sentencing. The second one, dated September 22, 2003, addresses more broadly the issues of charging decisions and plea negotiations.

The passage of the PROTECT Act receives prominent mention in the July directive and begins by stating that the Justice Department has a "duty that its future actions" "support the important reforms" of the Act. With that said, though, the gist of the memorandum is that "if readily provable facts are relevant to calculations under the Sentencing Guidelines, the prosecutor must disclose them to the court, including the Probation Office." It also prohibits prosecutors from entering plea agreements that are inconsistent with the facts. As an example, the memo explains that prosecutors may not agree to a reduction for the defendant's role in the offense when such an agreement "is not consistent with the readily provable facts." Similarly, the memo places an "affirmative obligation" upon prosecutors to oppose "sentencing adjustments that are not supported by the law." By amending a section of the U.S. Attorney's Manual, it reduces the discretion afforded U.S. Attorneys in deciding whether to report "adverse sentencing decisions" to the justice department.

While none of the provisions in the July 28

memorandum seem likely to affect us here in the Northern District, the provisions in the September memorandum could, contrary to the effect in many parts of the country, maybe even provide some help. The memorandum recites what has been the longstanding policy in the Northern District that “prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case.” It goes on to state that a “charge is not ‘readily provable’ if the prosecutor has a good faith doubt, for legal or evidentiary reasons, as to the Government’s ability readily to prove a charge at trial.” “Charges [however] should not be filed simply to exert leverage to induce a plea.”

The memo includes exceptions to the “readily provable” requirement: (1) if the “sentence would not be affected” (the only one we seem to see around here); (2) “‘fast-track’ programs” (something that exists primarily in the Southwest courts that are overburdened with immigration cases); (3) “post-indictment reassessment” (“*e.g.*, the unavailability of a witness or the need to protect the identity of a witness until he testifies against a more significant defendant”); (4) “substantial assistance;” and (5) “other exceptional circumstances” (“because the United States Attorney’s Office is particularly overburdened, the duration of the trial would be exceptionally long, and proceeding to trial would significantly reduce the total number of cases disposed by the office.”).

Within the memo is a discussion of the statutory enhancements found in 21 U.S.C. §§ 851 and 924(c). It is the discussion of the 851 enhancement that might do us some good if we could get the U.S. Attorney’s Office to follow it. While the Attorney General “says

the use of the enhancements is “strongly encouraged,” he notes that in “many cases . . . the filing of such enhancements will mean that the statutory sentence exceeds the applicable Sentencing Guideline range, thereby ensuring that the defendant will not receive any credit for acceptance of responsibility and will have no incentive to plead guilty. Requiring the pursuit of such enhancements to trial in every case could therefore have a significant effect on the allocation of prosecutorial resources within a given district.” As with all of these exceptions, the particular assistant who wishes to forego the enhancement must receive “written or otherwise documented approval” from, at least a “designated supervisory attorney.” As for the 851 enhancement there is language that might be viewed as almost charitable toward the individual who qualifies for enhancement on the basis of minimal prior drug offenses: “such authorization [from the supervising attorney] may be granted only after giving particular consideration to the nature, dates, and circumstances of the prior convictions, and the extent to which they are probative of criminal propensity.” The Attorney General provides a far more restricted option for the assistant who might want to forego the 924(c) enhancement, limiting that possibility, in all but “exceptional cases,” to those cases where there are multiple counts and, then, only after insisting on guilty pleas to the first two counts.

For those better jurisdictions where plea negotiations take place, the Attorney General states that there “are only two types of permissible sentencing bargains.” They consist of (1) agreements for a particular sentence within the Guideline range or an agreement to recommend a downward

adjustment for acceptance of responsibility or (2) an agreement for a departure in cases of substantial assistance, where there is a fast-track program, or where the departure is “supported by the facts and the law.”

JUDICIAL CONFERENCE VOTES FOR REPEAL OF KEY PARTS OF PROTECT ACT

On September 23rd the Judicial Conference of the United States voted to support the repeal of key provisions of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT Act). In a news release from the Administrative Office of the Courts, the Conference, expressed its concern that Congress failed to consult the Judiciary and the U.S. Sentencing Commission prior to the enactment of the legislation. Several of the provisions the Council wants repealed involve reporting requirements placed upon the Sentencing Commission and the Department of Justice. The Council is also seeking the repeal of the requirement that the Sentencing Commission promulgate guidelines and policy statements to limit departures; the requirement that the Sentencing Commission develop a policy statement limiting early disposition programs; and the provision that limits to three the number of judges on the seven-member Sentencing Commission. Judge Carolyn King of the 5th Circuit Court of Appeals addressed the media after the Conference decision, saying that “there just wasn’t enough spadework done by Congress,” and that “it’s not clear that there was any need for the bill, or that Congress had enough information to make an informed decision.”

JUSTICE DEPARTMENT SEEKS LIMITATIONS ON JUDGMENTS OF ACQUITTAL

The Department of Justice is seeking to modify the rule governing motions for judgments of acquittal, FRCrP 29. The Department presented its proposal to the United States Judicial Conference during the October 15th meeting of the Advisory Committee on Federal Rules of Criminal Procedure. The proposal would prohibit a judge from granting a motion for a judgment of acquittal at the close of the government’s case, only allowing the court to take the motion under advisement or grant it after the verdict. The change, besides sometimes placing the defense in a dilemma whether to present a case, would also mean that the government would always be able to pursue an appeal if the judge granted a judgment of acquittal.

MISDEMEANOR CONVICTIONS FOR VIOLATING NATIONAL PARK SERVICE TRAFFIC REGULATIONS MAY VIOLATE SEPARATION OF POWERS DOCTRINE

Chet Kaufman of our Tallahassee office has challenged the validity of a DUI conviction arising out of an incident in the Gulf Islands National Seashore. His client, like nearly all of those charged with traffic offenses on property falling under the authority of the Department of the Interior, was charged with the offense pursuant to the Code of Federal Regulations. Those traffic offenses are promulgated by the Secretary of the Department of the Interior. In his argument, Chet contends that the Secretary lacks the

authority to create criminal offenses and that the existing regulations violate the nondelegation doctrine of the separation of powers provided for by the United States Constitution. If you are interested in pursuing the issue or have questions, you can email Chet at Chet_Kaufman@fd.org or call him at (850) 942-8818.

PUBLIC ACCESS TO COURT ELECTRONIC RECORDS (PACER)

A Public Access to Court Electronic Records (PACER) account will allow you to access the docket for any federal court case anyplace in the country. In some jurisdictions, although not ours, the system will allow you to see and print documents from the court file.

Currently most courts, including the Northern District of Florida, are available on the Internet. Links to those courts are provided from the website. A few systems are not available on the Internet and must be dialed directly using communication software and a modem.

As a panel member, you can use PACER free of charge for any CJA case. You can register to use the service by visiting the website at <http://pacer.psc.uscourts.gov/index.html>. To register online as a CJA lawyer register just like any other lawyer by providing your name, address, etc. Then register a second time. On the form, put your name and then "CJA" in the next field. PACER will identify and link this information with the first registration form and will send you a password and two separate logins with instructions to use one for CJA work and the other for non-CJA work. If you're using PACER for something other than CJA work, there is a charge of 7 cents for each page accessed. The website also provides a demonstration and training feature. If you

have any questions, call (800) 676-6856.

NEW ASSISTANT U.S. ATTORNEYS

Over the last few months, the United States Attorney's Office has added one new lawyer to its Pensacola office and two to the Tallahassee Office. Dixie Morrow, who has joined the Pensacola office, comes from the U.S. Attorney's office in the Southern District of Texas. She had also served as an Assistant U.S. Attorney in the Middle District of Georgia. She is a Lieutenant Colonel in the Air Force reserve where she serves as a military judge. She received both her undergraduate and law degrees from the University of Florida.

Robert Davis joins the Tallahassee office from the Justice Department where he was a Deputy Counsel for the Office of Intelligence Policy and Review. Prior to that he served as Chief of the Litigation Division of the CIA. He earned his undergraduate degree from the University of Pennsylvania and his law degree from the Georgetown University Law School.

Winifred Nesmith, who has begun work in the Tallahassee office, worked for nearly five years as an Assistant Statewide Prosecutor, serving in the Jacksonville office. She had previously worked as an Assistant State Attorney in Lake City and Jasper. She earned both her undergraduate and law degrees from the University of Florida.

At the end of last month, Jerry Sanford, who has been in the Gainesville office for many years, was promoted to Managing Assistant U.S. Attorney in that office.

TRAINING SESSIONS FOR ELECTRONIC FILING

Electronic filing is nearly upon us, with the process scheduled to begin on January 1, 2004. The Clerk's office strongly encourages all attorneys to participate and has scheduled a long list of two hour training sessions for lawyers and staff. As Advanced registration is required, you'll need to call the Clerk's office prior to attending any of the sessions. Here's the schedule:

Pensacola:

1:00 p.m.-3:00 p.m. CST 9:00 a.m.-11:00 a.m. CST

November 4, 2003	November 6, 2003
November 12, 2003	November 13, 2003
November 18, 2003	November 20, 2003
December 2, 2003	December 4, 2003
December 9, 2003	December 11, 2003
December 16, 2003	December 18, 2003
January 6, 2004	January 8, 2004
January 13, 2004	January 15, 2004
January 20, 2004	January 22, 2004
January 27, 2004	January 29, 2004

Contact Jerry Marbut or Traci Abrams at 850/435-8440.

Panama City:

Beginning November 5, 2003, training will be held each Wednesday at 10:00 a.m. CST.

Contact Kathy Bono at 850/769-4556.

Tallahassee:

2:30 p.m.-4:30 p.m. EST 9:30 a.m.-11:30 a.m. EST

November 4, 2003(Full)	November 6, 2003(Full)
November 18, 2003(Full)	November 13, 2003(Full)
December 2, 2003	November 20, 2003(Full)

December 9, 2003	December 4, 2003
December 16, 2003	December 11, 2003
January 6, 2004	December 18, 2003
January 13, 2004	January 8, 2004
January 20, 2004	January 15, 2004
January 27, 2004	January 22, 2004
	January 29, 2004

Contact Sheila Hurst-Rayborn or Emmie Flanders at 850/521-3501.

Gainesville:

9:00 a.m.-11:00 a.m. EST 2:00 p.m.-4:00 p.m. EST

November 5, 2003	November 6, 2003
November 12, 2003	November 13, 2003
November 19, 2003	November 20, 2003
December 3, 2003	December 4, 2003
December 10, 2003	December 11, 2003
December 17, 2003	December 18, 2003
January 7, 2004	January 8, 2004
January 14, 2004	January 15, 2004
January 21, 2004	January 22, 2004
January 28, 2004	January 29, 2004

Contact TiAnn Stark or Louise Trautman at 352/380-2400.

CONSPIRACIES AND APPRENDI

In this newsletter, I've mentioned a couple of times over the last few years that I thought the Apprendi decision required the government, in a drug conspiracy case, to establish not only the drug quantity that was foreseeable to each defendant, but also that whatever quantity the government sought to prove was within "the scope of the criminal activity the particular defendant agreed to jointly undertake." USSG § 1B1.3, comment. (n.2). The concept of "scope of the agreement" has, since its inclusion in the Sentencing Guidelines commentary back in 1992 (*see United States v. Reese*, 67 F.3d 902 (11th Cir. 1995)), limited the liability of many a lower-level conspirator under the Guidelines. As recently as the newsletter that

went out this past April, I mentioned that a recent case, United States v. Banuelos, 322 F.3d 700 (9th Cir. 2003), supported the theory.

I take it all back. I finally had to quit theorizing and actually sit down and make the argument. When I did so, my theory deserted me. While Banuelos does contain some language that seemingly supports the claim, it is clearly dicta and not supported by the cited cases. Furthermore, the logic just doesn't hold up. The concept of "scope of the agreement" is clearly a Sentencing Guideline concept. There isn't any reason I can come up with that would justify using the Guideline rules to change the longstanding requirement that a conspirator's liability extends to the conduct of his fellow conspirators that is foreseeable to him. See Pinkerton v. United States, 328 U.S. 640, 647-648 (1946). And while Apprendi does require the government to prove which of the 21 U.S.C. § 841 threshold quantities each conspirator is responsible for, there is clearly nothing in the decision that requires juries to base that decision on the rules that determine the offense level under the Guidelines. It means, of course, that a conspirator might be responsible under the Guidelines, on the basis of "scope of the agreement," for a minimal quantity of drugs giving him a low offense level, but still receive a mandatory minimum sentence based on the fact that the larger quantity of drugs passing through the conspiracy was foreseeable to him. For clients like mine, who are Career Offenders, it means that, even though the "scope of the agreement" rule limits the quantity of drugs under the Chapter Two calculations, the larger quantity of drugs foreseeable to him establishes the maximum penalty under the statute, which in turn drives up his Guideline offense level under the Career Offender Guidelines, USSG 4B1.1.

Thus, contrary to what I've said in the past, there is no reason to argue for altering the Pattern Jury Instructions to include mention of "scope of the agreement." I'm sorry for the misdirection. Please know, too, that we do *try* and include in this newsletter only information you can rely upon. We'll keep working on it.

RPM

PANEL TRAINING

Supervised release and probation proceedings have their own requirements. The length of the initial period of supervision, the conditions of supervision, the revocation process, the method of proving a violation, the question of when supervised release and probation must be revoked, the consequences of a violation, and the applicable Sentencing Guidelines are the subject of a rule, a chapter in the Guidelines manual, and the United States Code. In this month's panel training, we're showing a video in which Assistant Federal Public Defender Jane Kelly sorts it all out and provides a review of the basics of supervised release and probation.

Jane Kelly is an Assistant Federal Public Defender in the Northern District of Iowa. She's a 1991 graduate of Harvard Law School. She made her presentation this past November at a Federal Defender conference held in New Mexico.

In November we'll be showing a video on defending firearm cases from the annual panel training presented by the Federal Defender in South Florida that we recorded earlier this year. In December we'll be showing a video broadcast this past March on

the Federal Judicial Network. It is a panel presentation entitled: “Sentencing and Guidelines: Economic Crimes and Money Laundering.”

Here’s the schedule:

Probation and Supervised Release

Gainesville: October 22 at 9:00 and Noon
Tallahassee: October 23 at Noon
Pensacola: October 30 at Noon

Defending Federal Firearm Cases

Panama City: November 12 at Noon
Gainesville: Nov. 19 at 9:00 and Noon
Pensacola: November 20 at Noon
Tallahassee: November 20 at Noon

Sentencing and Guidelines: Economic Crimes and Money Laundering

Panama City: December 9 at Noon
Gainesville: Dec. 17 at 9:00 and Noon
Pensacola: December 18 at Noon
Tallahassee: December 18 at Noon

In Pensacola, Panama City, and Tallahassee the video presentation will be held in the federal courthouse. In Gainesville, we’ll show the video in our office.

FEDERAL JUDGE MAY ORDER SENTENCE CONCURRENT WITH YET-TO-BE-IMPOSED STATE SENTENCE

In July, the Eleventh Circuit issued a decision that has important implications for those clients who have unresolved charges pending at the time they are sentenced in federal court. While many of us were of the view that a federal court lacked the authority to order a

federal sentence to run concurrently with a yet-to-be-imposed sentence, the Court held to the contrary in United States v. McDaniel, 338 F.3d 1287, 1288 (11th Cir. 2002). Accordingly, you’re free to ask the judge for a concurrent sentence, even if your client has yet to be sentenced in state court, or for that matter, another federal court.

DEADLINE FOR TRAINING CREDITS FAST APPROACHING

The end-of-the-year deadline is fast approaching for the accumulation of the continuing education training required of all panel members by our local Criminal Justice Act Plan. You will have met the requirement by attending six of our monthly luncheon training sessions. You can also qualify by attending any seminar anywhere that presents training in the area of federal criminal defense.

As last year was the first year the requirement had been implemented, the Panel Oversight Committee extended credit for nearly any criminal law training. This year the Committee will likely follow more closely the requirement of the CJA Plan. As of the beginning of next year, as was true this year, preference in the assignment of cases will to those who have met the training requirement.

In Pensacola, Gainesville, and Tallahassee, we have a collection of the monthly videos that you can check-out. We’ll also give you a copy of the handout. We can arrange to mail the tapes to you if our offices are not readily accessible to you. We ask only that you return the tapes within a day or two, as others may also need to watch them.

We'll be sending out letters in the next couple weeks advising you of the number of hours our records show you've accumulated. If you've attended a conference and haven't yet advised us of it, please contact Randy Murrell at Randolph.Murrell@fd.org or (850) 942-8818. Please contact Randy, too, if you have any questions.

DOWNWARD DEPARTURES

DICKINSON, William Collier, L Atty: Hendrix,
Michelle
Docket: 3:03cr68-LAC
Charge: Armed Robbery, brandishing FA
while committing felony, convicted
felon in possession of FA
Range: 121 - 130 months
Sentence: 79 months
Date of Imposition of Sentence: Sept. 23
Grounds: 5K1.1 motion filed by Gov.

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

In Pensacola, **Ken Riddlehoover** began his client's sentencing hearing in a drug conspiracy case with the presentence report placing his client at offense level 38 and a range of 262-327 months. As a result of evidence presented at trial, though, Ken convinced Judge Vinson that his client was entitled to a two-level reduction for a mitigating role (USSG § 3B1.2). Even more importantly, Judge Vinson reduced the offense level to 30 on the basis of USSG § 2D1.1(a)(3) that sets a maximum offense level of 30 for those that receive a reduction for

mitigating role. In the end, Ken's client received the mandatory minimum 10 years, less than half what he initially faced.

Chet Kaufman, of our Tallahassee office, convinced Judge Vinson, in an appeal from a magistrate's decision in Pensacola, that there is, under 21 U.S.C. 844(a), no requirement for a mandatory \$1,000 fine for the offense of misdemeanor possession of a controlled substance. In Panama City and Pensacola, some of the magistrates had, for some time, read the statute to require the imposition of the fine. Chet had, in an earlier appeal, obtained the same result in a Panama City case considered by Judge Hinkle.

In Pensacola, **Lizy Timothy** of our Pensacola office went to trial with her client, who after waving his handgun at several police officers was charged in the indictment with being a felon in possession of a firearm, a violation of 18 U.S.C. 924(g). Charged under that statute, the client was facing a maximum penalty of 10 years. The indictment said nothing about the client being prosecuted as an armed career criminal (ACC) under 18 U.S.C. 924(e) or the maximum life sentence and mandatory minimum 15 years that come with that charge. The Presentence Report, ordered after the guilty verdict, listed five prior ACC qualifying offenses, classified the client as an armed career criminal, and listed the guideline range as 22 to 27 years. Lizy went to work and developed evidence showing that three of the listed offenses were not, in fact, qualifying offenses. A drug offense from Georgia had erroneously been classified as possession with intent to distribute when it was only a possession charge. In that instance, Lizy secured an amended judgment correcting the error. She convinced both probation and the prosecutor

that a conviction for distribution of an imitation controlled substance didn't qualify as a predicate offense. She did the same for the crime of using a communication facility (a telephone) in connection with the distribution of the imitation controlled substance. In the end, Lizy's client, without the requisite three qualifying offenses, and whose Guideline score even under 924(g) still exceeded ten years, received the ten-year 924(g) maximum. Had she not succeeded in eliminating the qualifying offenses, she was prepared to argue that any sentence in excess of the ten-year maximum would have violated the Apprendi decision.

Bill Clark of our Tallahassee office, in winning an appeal in the Eleventh Circuit Court of Appeals, has positioned one of his clients to receive a significantly reduced sentence. In 1994, a jury convicted LaRonald Spear of two counts of possession of a firearm by a convicted felon. Judge Stafford sentenced Laronald Spear to the maximum 10 years for the first count, but, although adjudicating Spear guilty of both offenses, chose not to impose a sentence on the second count. He chose not to because the same firearm formed the basis for both convictions. Nonetheless, because the second offense involved a carjacking, the Judge used the cross-reference provision of the Guidelines, which resulted in Mr. Spear being scored under the robbery section of the Guidelines. Had the second charge not entered into the Guideline calculations, the Guideline range, instead of exceeding the ten-year statutory maximum penalty, would have been 37 to 46 months. In the first appeal, the Eleventh Circuit Court of Appeals remanded the case, directing that the conviction for the second count be vacated. While Judge Stafford did that by entering an amended judgment, he did not order a new

presentence report, recalculate the Guideline range, or alter the ten-year sentence. In the second appeal, Bill argued that the Guidelines should have been recalculated and that a new sentence, reflecting the lower Guideline range, should have been imposed. In an unpublished decision, the Eleventh Circuit agreed, once again vacated the sentence, and remanded the case for the preparation of a new presentence report and new sentencing.

In August, Panel member **George Murphy** of Valparaiso convinced Judge Vinson to grant a judgment of acquittal in a case where the jury had convicted his client, Brenda Williams, of one count of bank fraud. While Williams had been charged with only a single count, her daughter, Tammy Neely, was charged with the remaining counts in the eleven-count indictment. Neely entered a guilty plea just before Williams' three-day trial. Neely had told Williams that she had arranged to sell two baseballs, one a home run ball signed by the 1962 World Champion New York Yankees, including Yogi Berra, Roger Maris, and Micky Mantle, and the other signed by the 1972 Detroit Tiger team. Neely told Williams that a buyer in Atlanta had agreed to pay eight million dollars for the two balls and asked Williams to open a bank account so that the money could be wired to the account. Williams, who Judge Vinson described both as a "farmer's wife" and "a prodigious baseball card collector," opened the account and obtained a book of starter checks. Neely obtained two of the checks from Williams ostensibly for the purpose of providing the routing and account numbers to the individual buying the baseballs. There was, though, in fact, never any buyer of the baseballs and no eight million dollars. The baseballs were worth, at best, a few thousand

dollars and had been left behind by Neely's ex-husband when he and Neely separated. Nonetheless, Neely ultimately used one of the starter checks to write a six-million dollar check that she deposited in her own bank account and then, in turn, wrote two checks to her boyfriend totaling \$150,000. In granting the judgment of acquittal, Judge Vinson concluded that Neely had duped her own mother and that Williams did nothing to assist in the fraudulent scheme.

Tallahassee panel members, **Michael Ufferman** and **Bob Harper**, won a victory in the Eleventh Circuit Court of Appeals in which the Court overturned a sentence imposed by Judge Paul. It was the second appellate victory in the case. In 1998, the Judge had sentenced Michael and Bob's client to a guideline sentence of 292 months for a number of offenses involving a drug conspiracy, witness tampering, and assaults on law enforcement officers. That sentence was vacated and the case remanded for a new sentencing because of a question about the firearm enhancement. At the resentencing, Judge Paul recognized that, under Apprendi, the government's failure to allege a drug quantity in the indictment and to prove the quantity at trial limited the maximum sentence on the drug conspiracy charge to 5 years. The recalculated presentence report noted that the guideline range had been reduced to 130-162 months. Nonetheless, by restructuring the sentence to include consecutive sentences rather than the concurrent sentences initially imposed, Judge Paul again imposed a sentence of 292 months. In imposing the sentence, the Judge did not expressly rule on the government's request for an upward departure, but said "the consecutive sentence is imposed in recognition of the severity of the counts dealing with witness tampering and

also assault on a law enforcement officer." In the Eleventh Circuit's unpublished decision, the Court, finding that Judge Paul departed upward without making the requisite findings, remanded the case for resentencing within the 130-162 month guideline range.

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 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 2003 term that are relevant to our practice and granted since our last newsletter:

U.S. v. FLORES-MONTANO, 2003 WL 21383188 (Oct 14, 2003) (reviewing summary decision of 9th Cir. Mar. 14, 2003) Question presented: Are Customs Service officers at international border required by Fourth Amendment to have reasonable suspicion to remove, disassemble, and search vehicle's fuel tank for contraband?

In a California border stop, officials removed a fuel tank and found marijuana. The district court suppressed the evidence on authority of United States v. Molina-Tarazon, 279 F.3d 709 (9th Cir. 2002) which held that "The use of force required to effect the tank's removal, coupled with the potential danger associated with driving a vehicle after a component vital to its proper functioning is dismantled and reassembled, and the consequent diminution in the driver's sense of personal security, results in a significant degree of intrusiveness. We conclude that the removal, disassembly and search of Molina's fuel tank was not a routine search," and that the Fourth Amendment therefore required the search to be supported by reasonable suspicion.

COCKRELL v. HALEY, 2003 WL 21456653 (Oct 14, 2003) (reviewing 306 F.3d 257, rehearing en banc denied, 325 F.3d 569 (5th Cir. 2003))

Question presented: Does the "actual innocence" exception to procedural default rule concerning federal habeas corpus claims apply to noncapital sentencing error?

A state noncapital prisoner won federal habeas relief, and the 5th circuit affirmed, concluding that the "actual innocence" exception to procedural default rule applies in noncapital cases; and though state prisoner serving enhanced sentence as habitual offender, upon theory that, at time of offense, he had two prior felony convictions, was procedurally barred from raising insufficiency-of-the-evidence claim as basis for federal habeas relief, "actual innocence" exception to procedural default rule applied, to permit prisoner to obtain relief from his improperly enhanced sentence.

TENNARD v. COCKRELL, 2003 WL 1878208, and **SMITH v. COCKRELL**, 2003

WL 2193763 (Oct. 14, 2003) (reviewing 317 F.3d 476 (5th Cir. 2002))

Questions presented: (1) Is Fifth Circuit rule requiring "nexus" to crime before evidence of impaired intellectual functioning can be considered as mitigation for purposes of determining whether there is violation of Penry v. Lynaugh inconsistent with rationale of Atkins v. Virginia? (2) Did Fifth Circuit err in resolving plainly substantial question of effect of Atkins on Fifth Circuit nexus rule by denying certificate of appealability, rather than granting COA and giving substantive issue merits consideration it deserves?

On remand from U.S. Supreme Court for reconsideration in light of Atkins v. Virginia, 536 U.S. 304 (2002), which held that Eighth Amendment prohibits application of death penalty to mentally retarded persons, the Fifth Circuit court observed that habeas petitioner did not raise claim that Eighth Amendment's prohibition of execution of mentally retarded barred his execution. It thereby reinstated its prior opinion, 284 F.3d 591 (2002), which denied certificate of appealability after concluding that (i) although petitioner introduced evidence during punishment phase of his state trial that his I.Q. is 67, petitioner never introduced evidence with respect to meaning of that score or argued to jury that he was mentally retarded and thus did not rebut presumption of correctness afforded state court's factual finding that there was "no evidence" of mental retardation, and (ii) even assuming that he has rebutted presumption, his failure to show that his criminal act was attributable to his alleged mental retardation precludes establishment of his claim under Penry v. Lynaugh, 492 U.S. 302 (1989), that special issues submitted to jury during punishment phase did not provide jury with vehicle for giving mitigating effect to his evidence of

retardation.

SABRI v. U.S., 2003 WL 21692658 (Oct. 14, 2003) (reviewing 326 F. 3d 937 (8th Cir. 2003))

Question presented: Does 18 U.S.C. § 666 criminalize acts of bribery lacking nexus to federal interest and, if so, is statute in that respect constitutional exercise of Congress's powers?

A statute that makes it federal crime to bribe agents of state or local governmental entities that receive federal funds, 18 U.S.C. § 666(a)(2), does not require prosecution to prove connection between offense conduct and federal funds; Congress's authority to enact such statute comes from combination of Constitution's Spending Clause, Article I, Section 8, clause 1, and Necessary and Proper Clause, Article I, Section 8, clause 18.

ASHCROFT v. ACLU, 2003 WL 21938765 (Oct. 14, 2003) (reviewing 322 F.3d 240 (3d Cir. 2003))

Question presented: Does Child Online Protection Act violate First Amendment?

COPA proscribes the commercial use on the Internet of "any material that is harmful to minors." The case was remanded by Supreme Court in 2002 with instructions to consider the District Court's findings on issues other than the use of community standards to identify potentially harmful content. Upon rehearing, the Third Circuit reaffirmed its ruling that the Act is overbroad in violation of the First Amendment.

YARBOROUGH v. ALVARADO, 2003 WL 21229273 (Sept. 30, 2003) (reviewing 316 F. 3d 841 (9th Cir. 2002), amended, 2003 U.S. App. LEXIS 2392 (Feb. 11, 2003))

Questions Presented: 1. Whether, in applying the objective test for a "custody"

determination under Miranda v. Arizona, 384 U.S. 436 (1966), a court must consider the age and experience of a person if he or she is a juvenile; and 2. Whether a state court adjudication can be deemed an "objectively unreasonable" application of clearly established Supreme Court precedent, for purposes of 28 U.S.C. § 2254(d), because it declines to "extend" the rule of a Supreme Court precedent to a new context.

SMITH v. DRETKE, 2003 WL 21523869 (Sept. 30, 2003) (reviewing 311 F. 3d 661 (5th Cir. 2002))

Question Presented: Did the Court of Appeals misapply Penry v. Johnson, 532 U.S. 782 (2001) by imposing a requirement that evidence demonstrate a "uniquely severe permanent handicap" in order for a Texas capital murder defendant to claim that a "nullification" instruction was improper?

IOWA v. TOVAR, 2003 WL 1988590 (Sept. 30, 2003) (reviewing State v. Tovar, 656 N.W. 2d 112 (Iowa Sup. Ct. 2003))

Question Presented: Does the Sixth Amendment require a court to give a rigid and detailed admonishment to a pro se defendant pleading guilty of the usefulness of an attorney, that an attorney may provide an independent opinion whether it is wise to plead guilty and that without an attorney the defendant risks overlooking a defense?

BEARD v. BANKS, 2003 WL 21134032 (Sept. 30, 2003) (reviewing Banks v. Horn, 316 F. 3d 228 (3rd Cir. 2003))

Questions Presented: 1. Does this Court's decision in Mills v. Maryland, 486 U.S. 367 (1988) constitute a new rule of law that cannot be applied retroactively to award sentencing relief to a prisoner whose conviction became final before Mills was

announced? 2. If Mills applies retroactively, where a state supreme court has rejected a Mills challenge because neither the trial court's instructions nor the verdict form advised the jury that it must be unanimous as to the existence of mitigating circumstances and, to the contrary, made clear that unanimity was required only to find aggravating circumstances and to impose a sentence of death, is that decision a reasonable application of this Court's precedent?

U.S. v. LARA, 2003 WL 21704146 (Sept. 30, 2003) (reviewing 324 F. 3d 635 (8th Cir. 2003))

Question Presented: Whether Section 1301 of the Indian Civil Rights Act of 1968, 25 U.S.C. 1301, as amended, validly restored the Tribes' sovereign power to prosecute members of other Tribes (rather than delegates federal prosecutorial power to the Tribes), such that a federal prosecution following a tribal prosecution for an offense with the same elements is valid under the Double Jeopardy Clause of the Fifth Amendment.

Selected Eleventh Circuit Case Summaries

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

NELSON v. CAMPBELL, 2003 WL 22309895 (Oct. 8, 2003)

1983; cruel and unusual punishment; lethal injection

The capital defendant claimed via 1983 that the state's proposed procedure to perform his execution via lethal injection, given his medical problems, was cruel and unusual punishment, and he also asserted a state law claim, under 28 USC 1367, of denial of access

to his physician. The Court affirmed denial of the 1983 claim based on lack of jurisdiction, reasoning this was an attempt to circumvent rules on second or successive habeas petitions, and citing *Fugate*, 301-F.3d 1287, 1288. The state law claim was denied under *Pennhurst*, 465 U.S. 89 (1994).

Judge Wilson's dissent cited "clear authority indicating that Nelson's claim should be construed exclusively under 1983," and expressed "strong[] disagree[ment]." He argued that a request for a temporary stay of execution, especially where the defendant was not previously aware of the proposed execution procedure, was not relevant to the question whether the action was the equivalent of a habeas petition, only whether the defendant sought to attack his conviction and/or his sentence. The defendant here sought neither, only to avoid an unnecessarily painful method of execution: "Nelson asks not to be spared; he asks only that he be executed humanely in accordance with his constitutional rights."

U.S. v. DODDS, 2003 WL 22290325 (Oct. 7, 2003)

Evidence; FRE 403; photos; pornography; sentencing; 2G2.4, 2G2.2

The Court affirmed introduction under Rule 403, in a prosecution for knowingly possessing child pornography, 66 images (of 3,400 found) taken from the defendant's computer; they showed the images actually were child porn, tended to show the defendant knew they were, inferred the defendant's intent to collect them, and were relevant to jurisdictional element of 18 USC 1462. Also, the evidence was sufficient to prove the images came from the internet. 18 USC 1462's "interactive computer services" includes the internet; and evidence established that a number of the photos were

frequently traded on the internet, that photos of some of the children depicted were in multiple states and countries, that the defendant had previously been caught viewing child porn on the computer, and that the defendant was familiar with using the internet. Finally, as to sentencing, the Court held that, considering its plain text and history, 2G2.2 was meant to punish trafficking in child porn, while 2G2.4 was aimed at mere possession of same: "when a district court applies 2G3.1(c)(1)'s cross-reference, sentencing is appropriate under 2G2.2 only if the government can show receipt with the intent to traffic." The Court noted that mere possession of a large number will usually not be sufficient to imply an intent to traffic but remanded for a new sentencing hearing on "intent to traffic."

U.S. v. ARMSTRONG, 2003 WL 22290401 (Oct. 7, 2003)

18 USC 3582(c)(2); retroactive sentence reduction; Amendments 500, 599, 600, 635; 1B1.10

The Court agreed that (1) a 3582(c)(2) motion is not a successive 2255 motion, so prior habeas motions to amend sentence are not a bar to a motion under 18 USC 3582(c)(2), and (2) defendants are not entitled to sentence reductions based on the retroactive application of Guidelines Amendments 600 or 635. 3582 requires that retroactive sentence reductions be "consistent with applicable policy statements issued by the Sentencing Commission," and 1B1.10 includes the policy statement that retroactive reductions are authorized only under amendments listed in para. (c), which included 599 but not 600 or 635. The Court also rejected the argument that, because Am. 635 was passed to clarify 3B1.2's commentary, it was necessarily retroactive. Prior cases so holding were only

in the context of direct appeal and 2255 petitions, and Congress has allowed limited exception to the rule of finality pursuant to 3582(c)(2) only where a sentence was based on a range of imprisonment later lowered. "We agree with our sister circuits that have established the bright-line rule that amendments claimed in 3582(c)(2) motions may be retroactively applied solely where expressly listed under 1B1.10(c)." Clarifying amendments are no exception to this rule and may only be retroactively applied on direct appeal of a sentence or under a 2255 motion. Finally, this holding also applied to Amendment 500.

U.S. v. PLA, 2003 WL 22159466 (Sept. 19, 2003)

Supervised release

Curious opinion, affirming an Anders appeal, published I supposed to clarify these two points: 18 USC 3583(h) does not require the court to give credit for time previously served on supervised release when it revokes the initial term of supervised release and orders an additional prison term following by a new term of supervised release; **and** the original sentence of three years supervised release did not bind the court on revocation to a maximum three years, divided between additional supervised release and/or any prison term.

U.S. v. DUNN, 2003 WL 22158086 (Sept. 19, 2003)

Suppression; Speedy Trial Act; 18 USC 3161(h)(a)(F)

The defendant was handcuffed and detained by security guards (employed by the city and working at a public housing project) until police could arrive; the Court affirmed denial of his motion to suppress his pre-arrest statements, because whether or not his

seizure exceeded the bounds of a *Terry* stop and became a de facto arrest, there was probable cause to arrest him. The defendant's Speedy Trial Act claim revolved around the lengthy delay following his motion for stipulated bench trial on one count and whether an evidentiary hearing was required on that motion, making the six months between it and the hearing excludable, regardless of reasonableness. The defendant argued the district court's conclusion, after he moved for dismissal, that a hearing was necessary, was merely a "cover" to avoid dismissal. Not surprisingly, the Court affirmed the district court's conclusion that a hearing was "required," including that the motion for stipulated bench trial implicated basic rights and their waiver by the defendant and that the government had expressly reserved the right to introduce add'l evidence at the bench trial. The constitutional speedy trial claim was also rejected; though the 18-month delay was presumptively prejudicial, there was no prejudice shown.

Judge Barkett dissented in part, arguing the district court erred in concluding a hearing was required, because the facts did not support that conclusion, and the indictment should have been dismissed under the Speedy Trial Act.

U.S. v. PRESSLEY, 2003 WL 22132497 (Sept. 16, 2003)

Consecutive sentencing, downward depart based on confinement conditions

Pressley appealed a 360-month sentence for drug-related offenses. (1) The guidelines range without the downward departure was 360 months to life. Because no count on which Pressley was convicted carried a 360-month sentence, to achieve the guidelines target sentence, U.S.S.G. § 5G1.2 required the court to run two of the sentences

consecutively, and Apprendi is not violated thereby. (2) The district court did not err in concluding that it had no authority to depart from imposing consecutive sentences to the extent required by section 5G1.2. (3) The district court did not err in holding that it was not authorized to depart on the ground that Pressley possessed the drugs included in the calculation at various times, rather than all at once. (4) Whether or not it is possible to receive an aggravating role adjustment and mitigating role adjustment in the same case, the district court did not err in holding that the Sentencing Commission has already adequately accounted for the defendant's role, and a section 5K2.0 departure is not available on this ground. (5) Conditions of confinement could provide a basis for departure, since this factor was apparently not taken into account by the Sentencing Commission and could be unusual enough to take a case out of the heartland of the applicable guideline. "Pressley testified that he spent six years in presentence confinement, of which five years were spent in USP Atlanta in 23-hour-a-day lockdown. He testified that he had not been outside in five years. These facts are extraordinary, both in the length of presentence confinement and in the conditions. We cannot say that they are insufficient, as a matter of law, to support the two and a half year downward departure the district court said it would consider appropriate if it had the power to depart."

MOORE v. CAMPBELL, 2003 WL 22120078 (Sept. 15, 2003)

Habeas. 28 U.S.C. § 2254

(1) Fed.R.Civ.P. 6(a) applies to calculating the one-year grace period after the effective date of the AEDPA, thus keeping alive a petition filed on April 24, 1997, one day later than previously had been generally thought to

be the end of the grace period. (2) The state court's determination that Moore "undertook a calculated and concerted effort to disrupt his capital murder trial," thereby forfeiting his right to be competent at the trial, was not an unreasonable determination of the facts or an unreasonable application of clearly established Supreme Court law. (3) Moore was, in effect, competent, so the failure of lawyers to ask for or of the trial court to hold a competency hearing cannot be prejudicial enough to justify habeas relief.

U.S. v. FRAZIER, 2003 WL 22137249 (Sept. 12, 2003)

Opinion testimony

In United States v. Frazier, 322 F. 3d 1262 (11th Cir. Feb. 26, 2003), the Court reversed the defendant's conviction for kidnaping in violation of 18 U.S.C. § 1201(a)(1) because the trial court erroneously refused, under Federal Rule of Evidence 702, to allow Frazier's forensic expert to opine, from the absence of sperm, that "there is no forensic evidence to substantiate the claim of rape in this case." The Court has now vacated the decision for en banc review.

U.S. v. ETTINGER, 2003 WL 22053829 (Sept. 4, 2003)

Inflicting bodily injury on a federal officer; specific intent; prior consistent statement, conflict of interest

The Court affirmed a conviction for inflicting bodily injury on a federal officer in violation of 18 U.S.C. § 111(a) & (b). The Court rejected the argument that the defendant should have been permitted to introduce evidence of his diminished mental capacity. The Court noted that this evidence would have been relevant, only as an affirmative defense, if the offense had been a "specific intent" crime. However, § 111 states a "general

intent" crime. The offense requires merely a showing that the defendant intended to assault a federal officer while the officer was performing his duties. Citing U.S. v. Feola, 420 U.S. 671 (1974), the Court noted that to be guilty of assaulting a federal officer one need not know the federal identity of the officer. The Court also noted that U.S. v. Gonzalez, 122 F.3d 1383 (11th Cir. 1997), held that driving a van into a blockade of U.S. Marshals was a "general intent" offense. The Court recognized that its pattern jury instructions defined the state of mind as acting "knowingly and wilfully," and that the term "wilfully" is defined as "with a specific intent to do something the law forbids." However, the Court found that these words do not indicate a "specific intent" mens rea. "There is no need to under § 111 to show specific intent to commit an assault, in fact, the assault is a breach of the law." The Court noted that the evidence clearly showed that Ettinger's assault was not the product of mistake or accident, foreclosing a defense based on these circumstances.

The Court also rejected the argument that the district court should not have allowed the prosecution to introduce testimony regarding a prosecution witness' prior consistent statement. A corrections officer testified that the defendant told him, after the assault, that he was "going to get" the officer whom the defendant assaulted. On cross-examination, Ettinger implied that this statement was a fabrication. Under FRE 801(d)(1)(B), the prosecution was permitted to put on a witness to corroborate the corrections officer's testimony about the statement by testifying that the officer had told the witness the same thing after the incident.

The Court also rejected the argument that a mistrial should have been granted after defense counsel moved to withdraw during

the trial, when counsel [Vince Farina] witnessed the defendant assault a deputy marshal in the courtroom [and, although not stated in the opinion, came to the marshal's rescue and restrained the defendant]. The Court noted that only an "actual" conflict of interest would have justified a mistrial. At the time, no actual conflict had manifested itself. [Vince didn't rough up the defendant too much.]

U.S. v. EVANS, 2003 WL 22053449 (Sept. 4, 2003)

Bribery of public officials

The Court reversed certain fraud convictions arising out of a scheme to defraud the government of "Section 8" housing subsidy moneys. The Court noted that some fraud convictions were based on the theory that the head of the private agency who received Section 8 federal subsidies on behalf of a Tampa housing authority was a "public official." The Court noted that being a mere recipient of federal funds does not qualify a person as a "public official" for purposes of 18 U.S.C. § 201(a)(1). The Court further noted that even in his role with the Tampa authority the defendant held no "official responsibility," as the defendant had no responsibility for "carrying out" a federal program or policy.

U.S. v. DRURY, 2003 WL 22038921 (Sept. 2, 2003)

Murder for hire, 18 U.S.C. § 1958(a)

In affirming (among other things) a conviction of using a facility in interstate commerce to effect a murder-for-hire scheme under 18 U.S.C. § 1958(a), the Court engaged in a lengthy discussion of statutory construction to "conclude that 18 U.S.C. § 1958(a)'s jurisdictional element requires that a defendant must actually use a facility in a manner that implicates interstate commerce,

not just that the facility itself possess the capability of affecting interstate commerce." The Court held that this element, though narrowly construed, was satisfied where Drury, in Georgia, made calls to a person whose cell phone was registered in Georgia but where the calls were routed out of Georgia to the carrier Jacksonville, Florida switching center. "[I]t is of no moment that Drury's telephone calls [] only incidentally and unintentionally ventured out of state. The undisputed fact is that they did." Drury was entitled to have the jury determine whether § 1958(a)'s jurisdictional element was satisfied, and an instruction telling jurors that the use of a pay or cellular phone is per se interstate commerce under § 1958(a) was error, but harmless.

VAUGHAN v. COX, 2003 WL 22025451 (Aug. 29, 2003)

4th Amendment

This qualified immunity decision is notable because the panel began by saying "We grant rehearing sua sponte." The panel then reversed its two prior decisions in which it had granted summary judgment of qualified immunity, finding this time that a jury trial was in order. The panel did not explain why it sua sponte turned itself around.

U.S. v. CHANTHASOUXAT, 342 F.3d 1271 (Aug. 22, 2003)

4th Amend, officer's mistake of law cannot establish PC

Chanthasouxat was driving a van in which Xayasane was a passenger, traveling from Texas to North Carolina. Alabama Officer Carter testified that he stopped the van in Alabama for failure to have an inside rear-view mirror. The citation he wrote charged a violation of the Birmingham City Code, stating "No person shall drive on any street of

the city a motor vehicle which is so constructed or loaded as to prevent the driver from obtaining a view of the street to the rear by looking backward from the driver's position unless that vehicle is equipped with a mirror so located as to reflect to the driver a view of the streets for a distance of at least 200 feet of the rear of the vehicle." Officer Carter acknowledged that this section did not specify that vehicles must have inside rear-view mirrors, but a city magistrate had told him that the failure to have an inside rear-view mirror is a violation. He further acknowledged that there were no state statutes that specifically required that vehicles have inside rear-view mirrors. The trial court denied the suppression motion, but the 11th Circuit reversed holding an officer's mistake of law - no matter how reasonable or understandable - as opposed to a reasonable mistake of fact, cannot provide the objective grounds for reasonable suspicion or probable cause required to justify a traffic stop. The traffic laws at issue were not ambiguous, and even if they were, "we decline to use the vagueness of a statute against a defendant."

U.S. v. BROWN, 342 F.3d 1245 (Aug. 21, 2003)

Appeal; jurisdiction; magistrate; scope of review

This case was on remand from the Supreme Court for reconsideration of the Court's earlier opinion, 299 F.3d 1252 (11th Cir. 2002), in light of a split in the circuits which was pointed out by the Solicitor General (SG) in their response to the defendant's cert petition. The Court had relied on a former Fifth Circuit case to hold that the defendant could not raise on appeal a ruling of the magistrate court on a pretrial motion when the defendant had not first appealed that ruling to the district court. The SG then argued that it was subject to

plain error review, as opposed to a jurisdictional bar. The Court rather tersely reinstated its opinion, noting it was bound by circuit precedent absent an en banc ruling or reversal by the Supreme Court.

Judge Carnes' concurrence noted this was a "no-brainer" and disagreed with Judge Hill's special concurrence suggesting en banc review (noting that the Supremes expected the circuit court to resolve the issue, which can only be done en banc). Judge Carnes also cited the "**fickleness of the government's positions in criminal cases**," citing *Hunter*, 101 F.3d 1565, 1574 (11th Cir. 1996) (en banc), noting the government argued one position to the Court and then the reverse in the Supreme Court: "Any other litigant might be embarrassed, but in litigation the government never blushes." Carnes argued that en banc review would be an imprudent use of the judges' time.

HALIBURTON v. DOC, 342 F.3d 1233 (Aug. 21, 2003)

Brady; ineffective assistance of counsel; sentencing

The Court affirmed the denial of relief in this capital habeas. The defendant argued that the state's failure to disclose fingerprint test results from a different case, nolle prossed 6 years earlier, was a Brady violation. The defendant argued he could have used the results to impeach testimony at his murder trial by the alleged victim of the earlier charge. The Court disagreed, because he could have discovered it with due diligence, since there was an open file policy in place in the police department.

U.S. v. ALMEIDA, 341 F.3d 1318 (Aug. 18, 2003)

Joint defense agreement; conflict of interest; privilege; waiver; prosecutorial

misconduct

The defendant and a coconspirator charged in multiple conspiracies entered a joint defense agreement which resulted in hours of meetings with each other's attorneys. A month before trial, the coconspirator defected to the government's camp. At trial, the prosecutor moved, and the district court ordered that the coconspirator had an attorney-client privilege with Almeida's attorney, resulting in a conflict of interest, and prohibited Almeida's lawyer from using any confidential information from the coconspirator during the two years while the joint defense agreement was in operation, as well as any derivative use of those communications. Rejecting the suggestion that Almeida's lawyer had a conflict of interest, the district court declined to conduct a Rule 44(c) hearing to obtain a conflicts waiver from Almeida or require his counsel's withdrawal from cross-examination of the coconspirator.

Ordinarily, such a ruling would have prevented any proffer or record from which a reviewing court could ascertain prejudice. Here, however, shortly after Almeida was convicted, the coconspirator signed a waiver of his attorney-client privilege, and the district court granted the motion to lift the earlier restrictions it had imposed on counsel. The court also indicated its earlier ruling had been mistaken and that, once he flipped, no privilege remained with respect to Almeida's counsel; however, it believed this ruling was harmless given the "withering" cross of the coconspirator. Much evidence was subsequently obtained that could have been used at trial to impeach the coconspirator and defend Almeida.

The Court held the district court had abused its discretion when it precluded Almeida from utilizing the communications that Fainberg made to Almeida's attorneys

under the joint defense agreement. Confidential communications made during joint defense strategy sessions are privileged, but they create no duty of loyalty; if one defendant then flips, however, a conflict arises, and the other defendant's attorney must respect the privilege and not reveal confidential communications. A potential conflict of interest stems from the deleterious impact on the defendant's representation by his attorney's efforts to avoid the problem. Here, however, the coconspirator waived the privilege when he defected and agreed to testify, thereby removing any possible conflict of interest. Not only had the district court erred, but the error was not harmless. [Note: The Court noted that, in the future, defense attorneys should insist such agreements be written and contain a clear statement of this waiver rule. Fn. 21]

In footnote 15, the Court noted that the government "would be guilty of misconduct if this threat [to prosecute for perjury another defendant if he testified for the defense] were made."

U.S. v. JERNIGAN, et al., 341 F.3d 1273 (Aug. 15, 2003)

Sufficiency; possession of firearm; 404(b); 403 & gang membership; Speedy Trial; newly discovered evidence; Bruton; joinder; GREAT concurrence by visiting judge

The Court rejected both defendants' challenge that the government failed to prove that they knowingly possessed a firearm found stuffed in the back of the seat of the vehicle in which they were riding; one defendant was the owner/operator of the truck, the pistol was hidden immediately adjacent to his seat, he gave false ID, and passenger implicated him; the passenger had prior similar convictions, and other evidence connected him to the gun.

The Court rejected the plain error challenge to admission of prior crimes evidence under Rule 404(b), as both involved the knowing possession of a firearm in a vehicle, and thus were clearly probative of knowledge here. The Rule 403 challenge to evidence of gang membership was rejected; the co-defendant sought to disprove his possession by proving the other's gang membership, that the color red was a membership symbol, that the gun was wrapped in a red bandanna, a habit of gang members; the Court recognized the prejudicial impact of evidence of gang membership and found it a close issue so not an abuse of discretion to have admitted it. The Court rejected the speedy trial claim, noting that a district court may properly exclude all time between a motion in limine to exclude 404(b) evidence and trial, because such motions often cannot be resolved until trial and the strength of the government's case is known. The Court rejected one defendant's motion for new trial based on newly discovered evidence of a witness to a statement by the co-defendant that he had admitted possession of the gun; the Court found the defendant failed to prove the statement was trustworthy and would probably have been inadmissible. Finally, the Court rejected the driver's (plain error) argument that the passenger's pre- and post-arrest statements implicating him violated *Bruton*, concluding it was invited by the defendant's stipulation.

A visiting district judge reluctantly concurred. Although he was "convinced that neither appellant received a fundamentally fair trial," noting it should have been obvious that a joint trial was impossible, the controlling precedent of this circuit precluded relief on direct appeal. He noted that neither defendant appealed the denial of severance and that both defendants must "await collateral attack via a 2255 motion." He also opined that NONE of

the 404(b) evidence should have been admitted and found it "mind-boggling." He then found the "most egregious error" to be one not raised by either appellant, the government's closing argument on the 404(b) issue, which clearly showed it introduced the evidence to prove propensity.

DAVIS v. DEP'T OF CORRECTIONS, 341 F.3d 1310 (Aug. 15, 2003), the Court granted habeas relief to a Florida inmate sentenced to life in prison, on the basis of Batson v. Kentucky, 476 U.S. 79 (1980).

During Davis' Florida trial, his lawyer objected to a Batson violation during jury selection. However, the Florida courts found that the issue was not preserved on direct appeal, and then denied post-conviction ineffective assistance of counsel relief.

The Court noted that it owed no deference to the state courts because they never reached the merits of the Batson claim. The Court found that there was "no question" that counsel performed deficiently by failing to preserve the Batson objection before accepting the jury. Citing Roe v. Flores-Ortega, 528 U.S. 470 (2000), the Court noted that the prejudice to Davis was the loss of an appeal. The deficiency was not in the failure to raise the Batson issue - trial counsel had done so - but in failing to preserve it for appeal. The Court reasoned that the impact of the ineffective assistance should not be measured against the result at trial, but against the result on appeal, where the issue was lost. Here, the issue was "meritorious" (as the Florida appellate court had expressly noted). Hence, there was a reasonable probability that a reversal would have resulted on appeal, but for the defective performance. The Court noted that Batson errors require automatic reversal. The Court remanded the case with instructions to give

Davis either a new trial or a new appeal.

U.S. v. BOWMAN, 341 F.3d 1228 (Aug. 13, 2003)

Forfeiture, interlocutory appeal, remedies

Property owners appealed an order granting the government's ex parte seizure of property, prior to entry of forfeiture order, via an in rem civil forfeiture proceeding; they claimed the government failed to establish exigent circumstances. The Court dismissed the appeal, holding the order was interlocutory, over which it lacked jurisdiction, because the seizure was effectively reviewable on appeal following final judgment. "A real property owner who successfully challenges an ex parte seizure on the ground that there was no probable cause to believe the property is connected to crime may regain possession of his property. But if the real property owner is only contending that there were no exigent circumstances to justify the ex parte nature of the seizure (as in this case), the owner is not entitled to regain possession, but may recover lost rents or profits."

WALKER v. CROSBY, 341 F.3d 1240 (Aug. 13, 2003)

Habeas, 2254

Walker's noncapital habeas application raised claims arising from the original state judgment as well as the judgment imposed upon resentencing. The district court held the application time-barred under the one-year statute of limitations contained in the AEDPA. On appeal, the Court held: (1) individual claims within a single habeas petition may not be reviewed separately for timeliness in light of Artuz v. Bennett (2000); but (2) the district court did not properly dismiss the 2254 petition as untimely but erroneously applied the statute of limitations from the date of the original state judgment rather than the

resentencing judgment. The "limitations period in § 2244(d)(1) must run from the 'latest' of the several possible triggering dates" provided.

IN RE: DEAN, 341 F.3d 1247 (Aug. 13, 2003)

Successive habeas, 2255, sentence relief not permitted

After Dean's initial 2255 motion was denied, he applied for permission to file a second or successive motion under AEDPA's newly discovered evidence exception. He asserted that two uncounseled state convictions, used to compute his criminal history category for calculating his federal sentence, were later reversed. The Court denied relief. "As Dean's application challenges his sentence and not whether he is guilty of the offense, we find that it does not satisfy the newly discovered evidence exception for filing a successive § 2255 motion."

U.S. v. HASNER, 340 F.3d 1261 (Aug. 8, 2003)

Mail fraud, "honest services," 18 USC 1346, sentencing, 2B1.1, § 2C1.3, 2C1.7, 3C1.1, obstruction

The conspiracy, mail fraud, money laundering, and false statements convictions arose from a conflict of interest in contracts with a housing finance authority. Among many issues, the Court rejected a sufficiency challenge under 18 USC 1346, the "honest services amendment" to the mail fraud statute; even though he "filed conflict of interest forms and refrained from voting . . . Hasner concealed material information (his financial stake) from the HFA." Fisher concealed Hasner's interest, and made false statements to the FBI about it. As to sentencing, the district court erred by enhancing Fisher's sentence under 2B1.1

because the base offense guideline applicable to honest services offenses, 2C1.3, provides no cross-reference to 2B1.1. Also, the Court rejected the government's cross-appeal of the trial court's refusal to add an obstruction-of-justice enhancement under 3C1.1.

U.S. v. PERRY, 340 F.3d 1216 (Aug. 5, 2003)

Sentencing; role; 3B1.1(c); 3B1.2; appeal

The Court affirmed the two-level role enhancement under 3B1.1(c) because the defendant actively recruited two individuals, arranged for one to transport drugs, directly paid at least one, and was paid for his recruitment and supervision of them. The defendant also argued he was simultaneously entitled to a minimal or minor role reduction under 3B1.2, based on contrasting his role with other participants. In a tone bluntly critical of the government's failure to address this issue, or two cases cited by the appellant, the Court remanded for resentencing and initial decision by the district court of this matter.

U.S. v. WILLIAMS, 340 F.3d 1231 (Aug. 5, 2003)

Appeal; standard of review; "due deference"; 18 USC 3742(e); sentencing; grouping; 3D1.2

In a lengthy opinion, the Court reviewed the variant interpretations in this circuit of the "due deference" language of 18 USC 3742(e) ("The court of appeals . . . shall give due deference to the district court's application of the guidelines to the facts."), concluding that the proper interpretation is not a fixed quantum of review but varying degrees of deference depending on which guideline provision is at issue, outlining cases where *de novo* review and clear error review are appropriate. The proper standard of review

for grouping under 3D1.2, is *de novo*. The Court concluded that conspiring to rob an armored car under one count and the attempt to rob it under another count, based on the same robbery involving two victims, should not be grouped under 3D1.2(a), because a conspiracy is formed on a different day and at a different place than the actual attempt, but should be grouped under 3D1.2(b), because both counts involved a "common plan or scheme" and the same victim, the armored car. This result was essentially mandated by Appl. N. 4. The Court rejected the arbitrary assignment of one victim to each count without a clear basis; both were victims of both offenses. To assess additional punishment, the government would have to charge separate assault or murder counts.

JOHNSON v. U.S., 340 F.3d 1219 (Aug. 5, 2003)

Habeas; 2255 para. 6(4); statute of limitations; timeliness; prior convictions; equitable tolling

On direct appeal, appellant challenged his career offender status, arguing his prior state convictions were obtained in violation of his right to counsel. Denying relief, a footnote stated, "should appellant obtain at some future date" relief from the prior convictions, he could seek relief under 2255. Cert was denied 4/22/96. Just over one year later, on 4/25/97, he filed a motion to extend time to file a 2255 petition, which was denied as untimely, without prejudice in case something transpired to avail him of a later accrual date under 2255 para. 6. On 2/6/98, he challenged his prior convictions in state court, and on 10/24/00, the state court vacated those convictions. On 2/13/01, the present 2255 was filed but denied as untimely.

The Court addressed whether the

vacatur of a state conviction constitutes a "fact" within the meaning of 2255 para. 6(4) ("the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence"). The Court agreed it was "at least plausible to argue that a petitioner has one year from the date his prior convictions were set aside. . . . Common sense, however, dictates that we distinguish legal propositions and results from the 'facts' referred to in 2255." It concluded the vacatur of the state convictions was not a fact "discovered" but rather caused by the defendant. Judge Roney dissented, agreeing with the 4th Circuit that this was a "fact" and thus that the statute of limitations did not begin to run until 10/24/00, the date his state convictions were vacated. (Note circuit split: 11th & 1st v. 4th.)

The Court also refused to apply equitable tolling, opining the defendant could have attacked the state convictions sooner.

U.S. v. WILLIAMSON, 339 F.3d 1295 (July 30, 2003)

Conspiracy, mail fraud, money laundering, Bruton

The Court held there was sufficient evidence to affirm convictions for conspiracy, mail fraud, and money laundering. The government introduced, through a Special Agent, admissions of a nontestifying codefendant. The Court found no Bruton error because the statements did not implicate them "directly or otherwise;" and because, even though the statement did implicate one codefendant, it was solicited through cross-examination and no objection was made.

U.S. v. TORREALBA, 339 F.3d 1238 (July 29, 2003)

Sentencing

After a violent, botched kidnapping of three

members of a family, Torrealba pleaded guilty to hostage taking, conspiracy, and carrying a firearm during a crime of violence. The Court affirmed dividing his conspiracy conviction into 3 groups for sentencing based on the 3 victims under 1B1.2(d) and 3D1.2, applying a 6-level enhancement for making a ransom demand under 2A4.1(b)(1), applying a 4-level enhancement for infliction of "permanent or life-threatening" injuries on one victim under 2A4.1(b)(2), and denying a downward departure under 5K2.0.

TURNER v. CROSBY, 339 F.3d 1247 (July 29, 2003)

Capital habeas, 28 USC 2254, ineffective assistance, Ring

The Court held the district court did not err in denying an evidentiary hearing on the ineffectiveness claim; the argument that Florida's capital sentencing procedure violates Ring was procedurally barred because defendant never raised a Sixth Amendment jury trial claim in state court; and Ring does not apply retroactively.

U.S. v. TAYLOR, 338 F.3d 1280 (July 25, 2003)

Sex offender treatment, polygraphs, internet, supervised release conditions

Taylor was convicted of use of interstate facilities to transmit information about a minor "with the intent to entice, encourage, offer, or solicit any person to engage in [criminal] sexual activity" with the minor, 18 USC 2425, and possession of a firearm by a convicted felon. The Court affirmed conditions of supervised release requiring defendant to "participate in a mental health program specializing in sexual offender treatment approved by the probation officer, and abide by the rules, requirements and conditions of the treatment program,

including submitting to polygraph testing to aid in the treatment and supervision process," as well as restrictions on internet access.

U.S. v. PANFIL, 338 F.3d 1299 (July 25, 2003)

18 USC 2422, internet and sex with minors, 2A3.2

Panfil used an internet chatroom to contact and offer oral sex to a Secret Service Agent pretending to be a minor girl. He pleaded guilty but challenged the constitutionality of 18 USC 2422 as overbroad or vague. The Court rejected that claim, finding Reno does not control. The Court also affirmed application of 2A3.2 ("Criminal Sexual Abuse of a Minor . . .") rather than 2A3.4 ("Abusive Sexual Contact"). Attempted oral sex was an attempted "sexual act" and not merely attempted "sexual contact."

U.S. v. MCDANIEL, 338 F.3d 1287 (July 25, 2003)

Sentencing; federal sentence concurrent to state sentence

McDaniel was convicted of possession of a firearm by a convicted felon. The district court ruled that it did not have authority to order his sentence to run concurrently with an unimposed sentence on pending state charges. The Court reversed under Andrews, 330 F.3d 1305 (11th Cir. 2003), which held a district court has authority to make such a sentence consecutive.

U.S. v. DICKS, 338 F.3d 1256 (July, 23, 2003)

A f f i r m a t i v e d e f e n s e s ; justification/necessity; illegal reentry; standard of review

The district court denied the defendant's attempt to argue the affirmative defense of justification or necessity to his illegal reentry

for the purpose of receiving effective AIDS treatment. The Court reviews *de novo* whether a defendant made a sufficient proffer, under a preponderance standard, to permit the defense of necessity. Agreeing with the Ninth Circuit, the Court held that, for a defendant to prove he availed himself of "a viable legal alternative" requires as a sufficient proffer a petition to the AG for temporary admission; speculation the petition had no chance of success would not avoid this requirement. Applying Deleveaux, 205 F.3d 1292, 1296-1301 (11th Cir. 2000) (setting four conditions for application of this defense in the 922(g) setting), the defendant argued this petition was not a *reasonable* legal alternative given his life-threatening condition. Importantly, the Court did not reject that alternative on its face, only under the facts of this case, but without much elaboration and with a vague conclusion cautioning that even denial of such a petition would not necessarily be a defense.

McGRIFF v. FLA. DOC, 338 F.3d 1231 (July 23, 2003)

Habeas; 2254; Habeas Rule 8(c); ineffective assistance; right to counsel & impeachment at evidentiary hearing

The right to counsel at a 2254 evidentiary hearing, under Rule 8(c) of the Rules Governing Section 2254 Cases, is a limited right, not a constitutional right or purely statutory right, but "a non-constitutional procedural right." Nevertheless, "[t]he importance of [this right] must not be underestimated." Shepherd, 253 F.3d 585, 587 (11th Cir. 2001), held that this statutory right "is a mandatory right" and rejected the government's harmless error argument. Applying this rule to 2254 cases, the district court's failure to appoint counsel at the first evidentiary hearing was structural error.

Here, however, the Court concluded the district court did not err at the second evidentiary hearing by allowing the state to impeach petitioner with his uncounseled testimony from the first hearing. Finding "no authority construing the admissibility of statements given in violation of a *non-constitutional procedural* right to counsel," the Court concluded that the defendant's voluntary statements taken in violation of the 5th and 6th amendment could be used to impeach him. The Court affirmed the denial of relief because the trial attorney testified her normal practice was to advise clients of the right to testify and the defendant's credibility was undermined by several changes in his testimony.

U.S. v. PATTI, 337 F.3d 1317 (July 18, 2003)

Recusal; standard of review; plea; appeal; sentencing; tax loss; aggregation; 2T1.1; obstruction

The opinion is worth reading for the Court's discussion of the standards for recusal under both subsections of 28 USC 455. The Court concluded a party can waive a motion under subsection (a) but not (b), which makes recusal mandatory. The defendant had waived the right to appeal denial of his motion for recusal of Judge Collier, under 455(a), when he entered an unconditional plea of guilty. The defendant had failed also to pursue any review of the denial of his recusal motion (such as a mandamus action or request to enter a conditional guilty plea reserving this issue for appeal); the Court rejected his claim such options would have been futile when neither was attempted.

(**Note circuit split:** On issue of first impression, the Court agreed with the 6th Circuit (and disagreed with the 2d and 7th) and held that personal and corporate tax losses may be aggregated. A guidelines amendment

in 2001 adopting this view, 2T1.1, cmt. n.7, clarified rather than changed the rule.

Finally, the Court affirmed the obstruction enhancement because the defendant feigned amnesia and was involved in attempted arson of his accountant's office.

U.S. v. ROBINSON, 336 F.3d 1293 (July 9, 2003)

Search; home; warrant; probable cause; Leon good faith exception

The Court affirmed denial of suppression of evidence seized during a search of the defendant's residence. It did not address whether the warrant was issued without probable cause, based on the "good faith" exception to the exclusionary rule under *Leon*, 468 U.S. 897 (1984) (suppression is necessary "only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause."). The defendant contended the affidavit for warrant was based on stale information, unverified hearsay, and "trash pulls" from a multi-family trash receptacle. The district court agreed but still found the detective's reliance on the warrant was objectively reasonable because his affidavit was not so lacking in indicia of probable cause that it would render his belief in its existence unreasonable. *Leon* noted that this question "will rarely require any deep inquiry into reasonableness." The good faith exception does not apply if (1) the affiant knew information was false or would have known but for reckless disregard of truth; (2) magistrate wholly abandoned judicial role; (3) affidavit so lacking in indicia of probable cause to render official belief entirely unreasonable; (4) warrant is so facially deficient in failing to particularize place to be searched or things to be seized that officers

cannot reasonably presume it to be valid. *Martin*, 297 F.3d 1308, 1313 (11th Cir.), *cert. denied*, 123 S. Ct. 667 (2002). Here the defendant argued the third exception, but the Court disagreed. Further, the government must present evidence beyond the four corners of the affidavit to establish the affiant reasonably relied on the warrant; *Martin* held a reviewing court "can" look beyond the four corners, not that it must.

CLOSE v. U.S. & ESTES v. U.S., 336 F.3d 1283 (July 8, 2003)

Habeas; timeliness; judgment v. mandate; tolling

The Court affirmed dismissal of 2255 actions as time-barred under AEDPA. Since neither defendant petitioned for cert, their judgments of conviction became final when the time expired for filing such a petition. *Clay*, 537 U.S. 522 (2003). The cert petition is due within 90 days of the court of appeals' entry of judgment or its denial of a timely filed motion for rehearing. Judgment was entered 8/1/97, so appellants had until 10/30/97 to petition for cert. The Court rejected the argument that the appellants had 90 days from the date of issuance of the mandate to petition for cert and thus one year from then to file a post-conviction motion. Under Sup. Ct. R 13(3), the date of the mandate's issuance is irrelevant for determining when a cert pet is due. Similarly, the appellants' untimely motions for rehearing did not toll the time.

U.S. v. McPHEE, 336 F.3d 1269 (July 8, 2003)

Jurisdiction; vessels; Maritime Drug Law Enf. Act (MDLEA); 46 USC 1903; "island"

The Court affirmed denial of a motion to dismiss for lack of subject matter jurisdiction, finding that the vessel was subject to US jurisdiction. A high-speed ocean chase ended

in the boat's seizure; the defendant claimed Bahamian nationality, and the boat's master claimed Bahamian registration. When the Bahamian government did not respond with an affirmative and unequivocal assertion of Bahamian registry, the Coast Guard declared the boat "stateless," seized it and the crew, and brought all to Key West. The motion to dismiss claimed the US government had no authority to seize the boat, since it had never left Bahamian territorial waters, and thus the US had no subject matter jurisdiction under 46 USC 1903(c)(1)(E), because Bahama had not consented to enforcement of US law in its territorial waters. The government argued the vehicle was seized subject to an agreement that stateless vessels could be seized if more than 3 miles from Bahamian land. The Court affirmatively answered only the question whether, at the time of seizure, the boat was stateless and within international waters, thereby avoiding "the more difficult question" whether Bahama had consented or whether the US had jurisdiction to seize it without Bahamian consent. This territorial limit is generally considered 12 miles from the nearest land, and this applied here. Although different sources disputed the government's evidence as to the location of the seizure, the Court declined to find clear error in the DC's adoption of this fact. The defendant argued, alternatively, that the government's evidence showed the seizure was within 12 miles of Saint Vincent Rock, but the Court disagreed it is an island (v. a rock) as defined by the Bahamian Archipelagic Act. (Note J. Marcus' fn. 9, quoting Simon & Garfunkel at length, is a hoot.)

U.S. v. SINGH, 335 F.3d 1321 (July 3, 2003)

Sentencing; 2L2.1; "documents"; title v.

text of guideline; 18 USC 1028

The Court rejected the argument that driver's licenses, military ID cards, and US government ID cards are not "documents" under 2L2.1(b)(2) and, thus, should not have been counted to increase his offense level. 2L2.1(b)(2) provides an increase based on the number of "documents or passports," but neither 2L2.1 nor the application notes defines "documents." The defendant wanted to limit the definition to those documents relating to naturalization, citizenship, or legal resident status, relying on the title of 2L2.1 ("Trafficking in a Document Relating to Naturalization, Citizenship, or Legal Resident Status"). The government relied on the language of 2L2.1(b)(2) ("if *the offense involved* six or more documents or passports"), arguing it refers to any documents "involved" in the offense of conviction, and the defendant had plead guilty under 18 USC 1028, which defines and criminalizes activities involving "identification documents." The Court agreed with the government: "The Court will not look to the title of a guideline to explain what is quite clear in its text." *Chastain*, 198 F.3d 1338, 1353 (11th Cir. 1999).

GRECH v. CLAYTON COUNTY, GEORGIA, 335 F.3d 1326 (July 7, 2003) (en banc)

1983

The en banc Court concluded the county had no 1983 liability for policy decisions of the Sheriff, over whom it had no control.

U.S. v. WHITE, 335 F.3d 1314 (July 2, 2003)
Sentencing; 4A1.2

The Court reversed the categorization of the defendant as a criminal history category III offender.

The defendant was convicted of being found

in the U.S. following deportation, 8 USC 1326(b). The district court increased his criminal score based on his state conviction for giving false identification when arrested. The Court noted caselaw is unclear whether a de novo or clear error standard of review applied to a sentencing court's criminal category determination, under 4A1.2. Also, Buford, 532 U.S. 29 (2001) (holding that district court's determination of where prior offenses were "related" under 4A1.2 was reviewed deferentially), did not clarify what "due deference" to a district court entailed. The Court chose the "clear error" standard, noting the relevant conduct analysis was largely fact-based, but held the sentencing court clearly erred when it found that White's use of a false name was not an act taken "in the course of attempting to avoid detection or responsibility" for the offense of illegally being in the United States. The false identification was therefore part of the "relevant conduct" for the offense of conviction, and should not have been independently relied on as a basis for increasing White's criminal history.

CLARK v. CROSBY, 335 F.3d 1303 (July 2, 2003)

Ineffectiveness, appellate counsel, due process

The Court remanded for evidentiary hearing a claim that a Florida inmate received ineffective assistance of appellate counsel when his lawyer failed bring to a Florida appellate court's attention -- by way of supplemental authority or a petition for rehearing -- the fact that his offense of conviction, attempted felony murder, was no longer a recognized crime under Florida law. The Court found the record inadequately developed and rejected the dissent's claim that the overwhelming evidence of guilt

under the valid basis of conviction rendered the error non-prejudicial. The issue of prejudice as to appellate counsel is solely whether there was a reasonable probability of reversal, not whether the defendant would have been convicted at a hypothetical retrial. The Court also affirmed the denial of relief on due process grounds, finding that even if Clark's conviction was "legally inadequate" under Florida law, the Supreme Court's decisions in this area of the law -- concerning the impermissibility of general verdicts where one theory of conviction, on which the jury may have relied, was defective, but was not, in and of itself, a constitutionally prohibited theory -- are unclear as to whether a mere defective general verdict rises to the level of a constitutional violation under the Due Process Clause or is, instead, merely an error requiring reversal under the federal courts' supervisory powers. The Court conceded that such an error may be constitutional in nature, but given the Supreme Court's expression of uncertainty, the state habeas court could not, under AEDPA, be found to have violated "clearly established federal law" in finding no due process violation.

TABLE OF CASES IN THIS ISSUE

Eleventh Circuit

CLARK v. CROSBY, 335 F.3d 1303
(July 2, 2003) 28

CLOSE v. U.S. & ESTES v. U.S., 336 F.3d 1283
(July 8, 2003) 27

DAVIS v. DEP'T OF CORRECTIONS,
341 F.3d 1310 (Aug. 15, 2003) 21

GRECH v. CLAYTON COUNTY, GEORGIA,
335 F.3d 1326 (July 7, 2003) (en banc) . 28

HALIBURTON v. DOC, 342 F.3d 1233

(Aug. 21, 2003) 19

IN RE: DEAN, 341 F.3d 1247 (Aug. 13, 2003) 22

JOHNSON v. U.S., 340 F.3d 1219
(Aug. 5, 2003) 23

McGRIFF v. FLA. DOC, 338 F.3d 1231
(July 23, 2003) 25

MOORE v. CAMPBELL, 2003 WL 22120078
(Sept. 15, 2003) 16

NELSON v. CAMPBELL, 2003 WL 22309895
(Oct. 8, 2003) 14

TURNER v. CROSBY, 339 F.3d 1247
(July 29, 2003) 24

U.S. v. ALMEIDA, 341 F.3d 1318
(Aug. 18, 2003) 19

U.S. v. ARMSTRONG, 2003 WL 22290401
(Oct. 7, 2003) 15

U.S. v. BOWMAN, 341 F.3d 1228
(Aug. 13, 2003) 22

U.S. v. BROWN, 342 F.3d 1245
(Aug. 21, 2003) 19

U.S. v. CHANTHASOUXAT, 342 F.3d 1271
(Aug. 22, 2003) 18

U.S. v. DICKS, 338 F.3d 1256 (July, 23, 2003) 25

U.S. v. DODDS, 2003 WL 22290325
(Oct. 7, 2003) 14

U.S. v. DRURY, 2003 WL 22038921
(Sept. 2, 2003) 18

U.S. v. DUNN, 2003 WL 22158086
(Sept. 19, 2003) 15

U.S. v. ETTINGER, 2003 WL 22053829
(Sept. 4, 2003) 17

U.S. v. EVANS, 2003 WL 22053449
(Sept. 4, 2003) 18

U.S. v. FRAZIER, 2003 WL 22137249

(Sept. 12, 2003)	17
<u>U.S. v. HASNER</u> , 340 F.3d 1261 (Aug. 8, 2003)	22
<u>U.S. v. JERNIGAN, et al.</u> , 341 F.3d 1273 (Aug. 15, 2003)	20
<u>U.S. v. McDANIEL</u> , 338 F.3d 1287 (July 25, 2003)	25
<u>U.S. v. McPHEE</u> , 336 F.3d 1269 (July 8, 2003) .	27
<u>U.S. v. PANFIL</u> , 338 F.3d 1299 (July 25, 2003)	25
<u>U.S. v. PATTI</u> , 337 F.3d 1317 (July 18, 2003) .	26
<u>U.S. v. PERRY</u> , 340 F.3d 1216 (Aug. 5, 2003) .	23
<u>U.S. v. PLA</u> , 2003 WL 22159466 (Sept. 19, 2003)	15
<u>U.S. v. PRESSLEY</u> , 2003 WL 22132497 (Sept. 16, 2003)	16
<u>U.S. v. ROBINSON</u> , 336 F.3d 1293 (July 9, 2003)	26
<u>U.S. v. SINGH</u> , 335 F.3d 1321 (July 3, 2003) . .	27
<u>U.S. v. TAYLOR</u> , 338 F.3d 1280 (July 25, 2003)	24
<u>U.S. v. TORREALBA</u> , 339 F.3d 1238 (July 29, 2003)	24
<u>U.S. v. WHITE</u> , 335 F.3d 1314 (July 2, 2003) . .	28
<u>U.S. v. WILLIAMS</u> , 340 F.3d 1231 (Aug. 5, 2003)	23
<u>U.S. v. WILLIAMSON</u> , 339 F.3d 1295 (July 30, 2003)	24
<u>VAUGHAN v. COX</u> , 2003 WL 22025451 (Aug. 29, 2003)	18
<u>WALKER v. CROSBY</u> , 341 F.3d 1240 (Aug. 13, 2003)	22