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NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

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Sentencing Memoranda

Randy Murrell

Sentencing will be harder now than it was just a few months ago. District Courts cannot just add up figures and pick a number within a narrow range. Rather, they must consider all of the applicable factors, listen carefully to defense and government counsel, and sentence the person before them as an individual. Booker is not an invitation to do business as usual.

United States v. Ranum, 353 F.Supp.2d 984, 987 (E.D. Wisc. 2005)

In the July panel training session, we presented a video on Booker that featured Jon Sands and Steven Kalar, the authors of an excellent article on the decision that appeared in NACDL's magazine, *The Champion*. In their presentation, they suggested that, in light of the Booker decision, lawyers should file a sentencing memorandum in every case.

Recently, I went back and looked at the cases our office had closed between the date of the Booker decision and the end of August. With

the exception of a handful that I had filed, we had filed only one sentencing memorandum. When those of us here at the office discussed that circumstance, several lawyers mentioned that in some cases they had addressed their issues in the letter sent to the probation officer in response to the PSR. There was some sentiment, too, that sentencing memoranda wouldn't help.

I've been looking, too, at the cases involving panel members. Much like the cases our office has handled, there is nearly a complete absence of sentencing memoranda.

Year in and year out, those we represent in the Northern District of Florida typically receive the longest average sentences in the country. And yes, the policies of our United States Attorney has much to do with it. Nonetheless, we still play a central role in the sentencing process, and we need to work toward better sentencing outcomes. With the sentencing discretion afforded district judges by the Booker decision, it is clear to me that sentencing memoranda need to be part of that effort.

With sentences that are twice the national average, we can't resign ourselves to the status quo. My advice, too, is to file a sentencing memorandum apart from the letter you might write to the probation officer. I think of the letter as a method for raising any objections to the Guidelines scoring and, more generally, the Presentence Report. I think of a sentencing memorandum primarily as a means of going beyond the Presentence Report and addressing those circumstances that would support a below-the-Guidelines sentence, be it a departure or a variance based upon Booker. If I have objections to the PSR and send a letter to the probation officer, I will typically mention in a sentence or two the grounds that I will be relying upon for a departure or a Booker, variance and state that I will be presenting the argument in a sentencing memorandum.

Then, too, a sentencing memorandum may give you the chance to elaborate upon some of the objections you've raised to the Guidelines calculations that you have set out in the letter. While you need to clearly state your objections in the letter and cite appropriate authority, a sentencing memorandum gives you the opportunity to present the objections in more detail and time to do more research. I think it appropriate to state in the letter that you'll be presenting the argument in more detail in a sentencing memorandum.

Having said all this, I can't agree with Mr. Sands and Mr. Kalar about filing a memorandum in every case. To my way of thinking, there will be cases where the Guidelines sentence is appropriate and the lawyer cannot credibly ask for something less. Then, too, there are cases where the sentence will be a mandatory minimum. If I were to pick a percentage, I'd say we can credibly file

them in half the cases.

In our soon-to-be-released updated office manual, we've included the following language about sentencing memoranda: "*Lawyers are encouraged to file a sentencing memorandum in appropriate cases. Judges address their sentencing decision prior to the sentencing date. A sentencing memorandum filed sufficiently in advance of the sentencing hearing will have a chance of influencing the sentencing at a critical point in the decision making process. By putting it in writing, you will have a chance to think through and organize your thoughts, as well.*" I urge you as panel members to follow this consideration, too.

We're here to help. On our webpage we've included several sample memoranda. Earlier this month we sent you an email with an article from the *National Law Journal* that discussed Booker sentences in crack cocaine cases. Included in the pages that follow are some citations that you might find useful in preparing a memorandum. We're also in the process of scheduling a panel training session on sentencing memoranda, probably in January. We're planning on presenting an investigator from the Federal Defender's Office in Orlando who has considerable experience in developing the sort of mitigation that the Booker decision has made so important. Finally, please know that all you need to do is pick up the phone or email me, and I'd be delighted to talk with you about any sentencing memorandum you're thinking about filing.

Case Authority for Booker Variances

Here's a list of circumstances we've found that have supported a Booker variance:

Age (old)

United States v. Nellum, No. 2:04-CR-30-PS, 2005 WL 300073, *3 (N.D. Ind. Feb. 3, 2005); United States v. Carmona-Rodruigez, No. 04 CR 667RWS, 2005 WL 840464, *4 (S.D.N.Y. 2005); United States v. Hernandez, No. 03 CR 1257RWS, 2005 WL 1242344, *5 (S.D.N.Y. May 24, 2005); United States v. Phillips, 368 F.Supp.2d 1259, 1260 (D.N.M. 2005)

Age (young)

United States v. Gall, 374 F.Supp.2d 758, 762 n. 2 (S.D. Iowa 2005)

Assistance to Government that fell short of qualifying for a 5K1.1 motion

United States v. Murray, No. 02 CR 1214(HB), 2005 WL 1200185, *4-5 (S.D.N.Y. May 20, 2005); United States v. Hubbard, 369 F.Supp.2d 146, 147-148 (D. Mass. 2005)

Career Offender Classification exceeded what was necessary to provide "just punishment"

United States v. Moreland, 366 F. Supp.2d 416, 420-422 (S.D.W.Va. 2005); United States v. Person, 377 F.Supp.2d 308, 310 (D. Mass. 2005); United States v. Carvajal, No. 04 CR 222AKH, 2005 WL 476125, *5-6 (D.D.N.Y. 2005)

Career Offender Classification based upon offenses committed when the defendant was under 18

United States v. Naylor, 359 F.Supp.2d 521, 523-525 (W.D.Va. 2005)

Collateral effects of conviction (loss of employment opportunities)

United States v. Ranum, 353 F.Supp.2d 984, 991 (E.D. Wisc. 2005)

Community involvement

United States v. Milne, 384 F.Supp.2d 1309 (E.D. Wisc. 2005)

Crack cocaine (disparity between powder and crack)

United States v. Clay, No. 2:03CR73, 2005 WL 1076243, *3-6 (E.D. Tenn May 6, 2005); United States v. Smith, 359 F.Supp.2d 771, 777-782 (E.D. Wisc. 2005); United States v. Simon, 361 F.Supp.2d 35, 44 (E.D. N.Y. 2005); United States v. Perry, No. 04-089S, 2005 U.S. Dist. LEXIS 20230 (D.R.I. Sept. 16, 2005); United States v. Leroy, 373 F.Supp.2d 887, 889-896 (E.D. Wis. 2005); *contra*: United States v. Tabor, 365 F.Supp.2d 1052 (D. Neb. 2005)

Crime not committed for personal gain or for improper personal gain of another

United States v. Ranum, 353 F.Supp.2d 984, 990 (E.D. Wisc. 2005)

Drug addiction

United States v. Nellum, No. 2:04-CR-30-PS, 2005 WL 300073, *4 (N.D. Ind. Feb. 3, 2005); United States v. Watson, No. Crim.A.04-392, 2005 WL 2159862 (E.D. Penn. Aug. 29, 2005)

Employment record

United States v. Milne, 384 F.Supp.2d 1309 (E.D. Wisc. 2005)

Family ties and responsibilities

United States v. Ranum, 353 F.Supp.2d 984, 990-991 (E.D. Wisc. 2005); United States v. Nellum, No. 2:04-CR-30-PS, 2005 WL 300073, *4 (N.D. Ind. Feb. 3, 2005); United States v. Ochoa-Suarez, No. 03 CR. 747, 2005 WL 287400, * 2 (S.D. NY. Feb. 7, 2005); United States v. Garcia, 416 F.3d 440, 441 (5th Cir. 2005); United States v. Milne,

384 F.Supp.2d 1309 (E.D. Wisc. 2005); United States v. Myers, 353 F.Supp.2d 1026, 1032 (S.D. Iowa 2005); United States v. Jaber, 362 F.Supp.2d 365, 383 (D.Mass. 2005); United States v. Perez-Chavez, No 2:05-CR-00003PGC, 2005 U.S. Dist. LEXIS 9252 (D. Utah May 16, 2005); United States v. Anderson, 365 F.Supp.2d 67 (D. Maine 2005)

Good character

United States v. Ranum, 353 F.Supp.2d 984, 991 (E.D. Wisc. 2005)

Health problems

United States v. Nellum, No. 2:04-CR-30-PS, 2005 WL 300073, *4 (N.D. Ind. Feb. 3, 2005); United States v. Carmona-Rodruigez, No. 04 CR 667RWS, 2005 WL 840464, *4 (S.D.N.Y. 2005); United States v. Hernandez, No. 03 CR 1257RWS, 2005 WL 1242344, *5-6 (S.D.N.Y. May 24, 2005)

Immigration - Defendant returned to the United States to support family rather than commit crimes

United States v. Galvez-Barrios, 355 F.Supp.2d 958, 963 (E.D. Wisc. 2005)

Immigration - Disparity in sentencing created by fast-track programs

United States v. Myers, 353 F.Supp.2d 1026, 1032 (S.D. Iowa 2005); United States v. Ramirez-Ramirez, 365 F.Supp.2d 728, 731-732 (E.D.Va. 2005); United States v. Galvez-Barrios, 355 F.Supp.2d 958, 963 (E.D.Wis. 2005); *contra*: United States v. Perez-Chavez, No 2:05-CR-00003PGC, 2005 U.S. Dist. LEXIS 9252 (D. Utah May 16, 2005)

Limited role in drug conspiracy

United States v. Jaber, 362 F.Supp.2d 365, 381-382 (D.Mass. 2005)

Mental health problems

United States v. Watson, No. Crim.A.04-392, 2005 WL 2159862 (E.D. Penn. Aug. 29, 2005); United States v. Roach, No. 00 CR 411, 2005 WL 2035653 (N.D. Ill. Aug. 25, 2005); United States v. Hubbard, 369 F.Supp.2d 146, 147-148 (D. Mass. 2005)

Mental health problems (border-line retardation)

United States v. Avilez, No. 02-CR999 FB, 2005 WL 1660621 (E.D.N.Y. July 12, 2005)

Military service

United States v. Nellum, No. 2:04-CR-30-PS, 2005 WL 300073, *4 (N.D. Ind. Feb. 3, 2005)

Multiple controlled buys (distorting effect on Guidelines)

United States v. Nellum, No. 2:04-CR-30-PS, 2005 WL 300073, *5 (N.D. Ind. Feb. 3, 2005)

Need for restitution

United States v. Ranum, 353 F.Supp.2d 984, 991 (E.D. Wisc. 2005)

Overstatement of criminal history

United States v. Person, 377 F.Supp.2d 308, 310 (D. Mass. 2005)

Post-offense conduct/rehabilitation

United States v. Gall, 374 F.Supp.2d 758, 763 (S.D. Iowa 2005); United States v. Hawkins, 380 F.Supp.2d 143 (E.D.N.Y. 2005)

Rehabilitation potential

United States v. Person, 377 F.Supp.2d 308, 310 (D. Mass. 2005)

Sole operator of a business that along with the employment of some 80 employees would be jeopardized by incarceration

United States v. Torback, No. 01 CR 410(RWS), 2005 WL 992004, *5-6 (S.D.N.Y. April 14, 2005)

Unwarranted sentencing disparity between codefendants

United States v. Jaber, 362 F.Supp.2d 365, 381 (D.Mass. 2005); United States v. Asiedu, No. 04 CR 424-12-RWS, 2005 WL 1423261 (S.D.N.Y. June 15, 2005)

Unwarranted sentencing disparity arising from Government's charging decision

United States v. Carey, 368 F.Supp.2d. 891, 895 (E.D. Wis. 2005)

Voluntary reporting of offense and significant efforts to ameliorate the harm

United States v. Milne, 384 F.Supp.2d 1309 (E.D. Wisc. 2005)

Sentencing Guidelines Changes Effective November 1st

As of the first of November, there are some mostly technical and conforming amendments that will apply to the United States Sentencing Guidelines. There are, however, some substantive changes:

Identity Theft - The Sentencing Commission has created a new section (2B1.6) for the crime of Aggravated Identity Theft (18 U.S.C. §1028A). The Guidelines sentence is "the term of imprisonment required by the statute." Beware of this statute, which provides for a two-year mandatory sentence that runs consecutively to any related offense. The Commentary recognizes the statutory authority the court has to run the sentences

concurrently if there are multiple counts of Aggravated Identity Theft. The Commentary also provides that, in cases where there is a related charge filed, the enhancement for "the transfer, possession, or means of identification" is inapplicable in determining the Guidelines sentence for the related charge. The Commentary to §3B1.3 (Abuse of Position of Trust) is modified to include instances of identity theft.

Bid Rigging, Price Fixing (§2R1.1) - Increases penalties for antitrust offenses.

BOP Begins Charging Prisoners for Health Care

Prisoners who are serving a sentence in the Bureau of Prisons or are in the Bureau's custody awaiting trial are, as of October 3rd, required to pay a \$2.00 fee if they seek medical treatment. Exceptions are provided for some circumstances including blood pressure monitoring, insulin injections, prenatal care, mental health care, and substance abuse treatment. The Bureau of Prisons Program Statement P6031.02 states that the fee is waived for those considered "indigent." If a prisoner has had a trust fund account balance of \$6.00 or more during the preceding 30 days, though, he or she is not considered to be "indigent." The fee will be deducted from the prisoner's trust fund account, and if there is less than \$2.00 in the account, the amount outstanding will be taken from money that arrives in the future.

New Rules

A variety of rules, criminal, evidence, civil, bankruptcy, and appellate, are slated to become effective on December 1st. Two of

note:

Evidence Rule 609 (Impeachment by Evidence of Conviction of Crime) - Rule 609(a)(2) permits impeachment of a witness by those prior convictions that “involved dishonesty or false statement.” Some courts have determined whether a crime “involved dishonesty or false statement” by looking at the elements of the offense. Others, such as the Eleventh Circuit, took a broader view, *see, e.g., United States v. Barnes*, 622 F.3d 107, 110 (11th Cir. 1980) (“It is necessary to look at the basis of the conviction to determine whether the crime embraces dishonesty.”) The rule amendment provides that a prior conviction may be used for impeachment if it can be “readily . . . determined to have been a crime of dishonesty or false statement.” The Committee Note says that “[o]rdinarily the elements of the crime will indicate whether it is one of dishonesty or false statement.” Additionally, though, the Committee Note, citing to *Taylor v. United States*, 495 U.S. 575, 602 (1990), provides that the crime may be used for impeachment if the proponent offers “information such as an indictment, a statement of admitted facts, or jury instructions to show that the witness was necessarily convicted of a crime of dishonesty or false statement.”

Criminal Rule 40 (Arrest for Failing to Appear in Another District) - The amendment expressly authorizes a magistrate judge in the district of arrest to set conditions of release for an arrestee who not only fails to appear but also violates any other condition of release.

Probation and Cost-Containment

The Judicial Conference of the United States provides written guidance to probation and

pretrial offices. In March and September of this year, the Conference adopted several recommendations to save costs. Those under supervision may benefit. Among the changes are provisions that:

- Discourage Presentence Investigation Reports for class B and C misdemeanors
- Provide for low-intensity pre-trial supervision, which limits the obligation of the defendant to monthly telephone calls, or eliminates pretrial supervision altogether, for most charged with class B and C misdemeanors
- Create a presumption in favor of termination of probation or supervised release after 18 months for those who are not career drug or violent offenders, not under supervision for a sex offense, and are free of significant violations
- Make it clear that an outstanding restitution balance does not, by itself, preclude early termination of the probation or supervised release served by otherwise suitable defendants

Immigration Help

Do you have a client that needs legal assistance to assist him or her with immigration problems? There is a listing of Florida based individuals and organizations that can provide assistance for free or for a limited fee at <http://www.usdoj.gov/eoir/probono/freelglchtFL.htm>.

DOWNWARD DEPARTURES

Franklin, Julia Marie Vinson, R. Atty: S. Kypreos
 Docket: 3:05cr17-RV
 Charge: Consp. Manuf & Poss WITD 500 g.
 Meth
 Range: 87 - 108 months (20 yr min. mand.)
 Sentence: 24 months
 Date of Imposition of Sentence: 6/14/05
 Grounds: 5K1.1

Brown, Daryl Paul, M. Atty: J. Uman
 Docket: 1:05cr12-MMP
 Charge: Consp. Poss WITD > 50 g. crack
 Range: 210 - 262 (scored mand. Life)
 Sentence: 105 months
 Date of Imposition of Sentence: 10/13/05
 Grounds: 5K1.1

Williams, Leroy Mickle, S. Atty: J. Uman
 Docket: 1:04cr33-SPM
 Charge: Consp. Poss WITD Cocaine
 Range: Mandatory life
 Sentence: 5 years probation w/one year house
 arrest.
 Date of Imposition of Sentence: 8/9/05
 Grounds: 5K1.1, over-representation of
 criminal history, voluntary withdrawal from the
 conspiracy, extraordinary pre-arrest rehabilitation

BOOKER VARIANCES

Cash, William Hinkle, R. Atty: R. Murrell
 Docket: 4:00cr8-RH
 Charge: Consp to Poss WITD Cocaine
 Range: 100 - 125 months
 Sentence: 82 months
 Date of Imposition of Sentence: 7/27/05
 Grounds: Booker - post-sentence rehabilitation
 (this case was back after an appeal for resentencing and
 the defendant had done well in prison, doing extensive
 tutoring with other prisoners)

Halsema, Kevin Mickle, S. Atty: J. Uman
 Docket: 1:04cr27-SPM
 Charge: Poss of Child Pornography
 Range: 57 - 71 months
 Sentence: 24 months
 Date of Imposition of Sentence: 5/23/05
 Grounds: longer sentence would have a
 detrimental effect on rehabilitation, defendant's medical

problems, fact that defendant served a large portion of his first nine months of incarceration in solitary confinement, 24 months served as an adequate punishment and deterrent

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

VICTORIES

Tom Keith of our Pensacola office convinced a jury to acquit his client, Marvin Bighom, of the charge of being a convicted felon in possession of a firearm. Bighom's girlfriend had notified ATF agents that Bighom was in possession of a handgun, and agents found a handgun at the residence Bighom and his girlfriend shared. At trial, though, Bighom denied possessing the handgun, testifying that the gun was one the girlfriend had owned and that he thought she had removed from the residence. He told the jury, too, that the girlfriend called ATF because he had told her he was moving in with a new girlfriend.

A few months earlier, **Tom Keith** won a bench trial in a battery case. The client, Query Williamceau, testified that he had struck his wife accidentally while trying to keep her from throwing a telephone at him. Coupled with Tom's effort, it convinced Magistrate Judge Davis that there was at least a reasonable doubt about Williamceau's guilt.

Bob Harper of the Tallahassee panel won a new sentencing for his client, Kathy Lee, in a mail fraud case that had been tried before Judge Hinkle. In a long published opinion that is covered in the summary of cases that follows, the Eleventh Circuit addressed a list

of challenges Bob had raised in regard to both the conviction and sentence. In the end, the Court granted Lee a new sentencing hearing on the basis of an error made in the loss calculation.

Kafahni Nkrumah of our Pensacola office, convinced the Government to move for a dismissal in a case in which his client, Osumane Kone, was charged with possession of a counterfeit resident alien card. Kone had said that he believed the card to be legitimate. He explained he had spoken with a relative about renewing his immigration paperwork and that a man, after overhearing the conversation, had offered to help. Kone said he had given the man a money order payable to immigration services and later received what turned out to be a counterfeit card in the mail. Kafahni obtained a copy of the money order from the bank. "United States Immigration Services" had been lined out and replaced with a name that, presumably, belonged to the man that had offered to help. The altered money order was enough to convince the Government that Kone had been duped.

Gainesville panel member **Jon Uman** won an extraordinary departure from Judge Mickle. His client, Leroy Williams, Jr., was facing a mandatory life sentence in a cocaine conspiracy case and ended up with a year of house arrest as a condition of probation. His client earned a substantial assistance motion, but Williams did dramatically better than most thanks to the showing and argument Jon made at sentencing. Jon presented evidence that Williams had withdrawn from the conspiracy years before the indictment, that Williams had started a legitimate shop and hair salon, and had become a role model in the community, speaking out against drugs, giving money to

various religious organizations, and being actively involved in the church.

The Eleventh Circuit Court of Appeals vacated a number of sentences and remanded the cases for resentencing on the basis of Booker v. United States. **Gwen Spivey** and **Chet Kaufman** of our Tallahassee office each won one for their clients, Gwen for Marcel Joseph and Chet for Richard Nunes. Pensacola panel member **Chris Rabby** won one for his client, Cheryl Cowan. **Bob Harper**, of the Tallahassee panel, won one for James Rush.

In 1996, a state jury in Escambia County found Joe Fred Ransom guilty of multiple counts of attempted first-degree murder with a weapon, kidnaping with a weapon, and armed robbery. The judge sentenced him to life in prison. During the trial, Ransom's lawyer, Pensacola panel member **Spiro Kypreos**, had argued that Mr. Ransom, while present, did not participate in the crimes. He argued, as well, that the admission of the hearsay testimony of a mentally retarded man, who was one of the two victims, would violate the 6th Amendment's confrontation clause. The trial judge, relying on a new Florida statute that, under some circumstances, permitted the admission of hearsay statements of mentally retarded and elderly individuals, overruled the objection and admitted the hearsay testimony into evidence. The assistant public defender appointed to pursue the appeal filed an Anders brief. On his own, Mr. Ransom pursued his case into federal court on a number of grounds, including Spiro's confrontation clause argument. When then-Magistrate Judge Rodgers filed a Report and Recommendation in which she recommended that Mr. Ransom's petition be dismissed,

Judge Hinkle appointed **Randy Murrell** to file a written argument on Mr. Ransom's behalf. Judge Hinkle, upon reviewing the pleadings, entered an order granting Mr. Ransom's petition on the basis of the confrontation clause argument and directing that the State of Florida either retry Mr. Ransom or release him from custody.

Pensacola panel member, **Stephen Sutherland**, won a dismissal for his client, Clarence Parnell. Parnell, an employee of the Corps of Army Engineers, was assigned to Pensacola in the wake of Hurricane Ivan, to assist in the FEMA funded "Operation Blue Roof." The government charged Parnell with accepting bribes in conjunction with the work. Just before trial was scheduled to begin, Judge Vinson, upon the Government's motion, granted the dismissal. The Government filed the motion apparently on the basis of flaws uncovered in the testimony presented to the Grand Jury.

In December of last year, Pensacola panel member **Chris Rabby**, representing Maurice Cawthon, filed an objection challenging the validity of one of the prior drug convictions upon which the Government relied to enhance the crack cocaine charge that was pending sentencing before Judge Vinson. The government argued that Cawthon was prohibited from challenging the conviction because he had not challenged it in state court. Judge Vinson agreed and imposed a mandatory ten-year sentence on the basis of the enhancement. Last month, Jacksonville lawyer Bill Kent convinced the Eleventh Circuit Court of Appeals to overturn the sentence. The Court did so, recognizing Cawthon's right to challenge the prior conviction and recognizing that the trial court is obligated to hold a hearing if the defendant

makes such a challenge.

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.

Panel Training

Professors Douglas Berman and Susan Herman: Sentencing: *The View from the Academic World*

Pensacola: October 27
Tallahassee: October 27
Gainesville: October 27

Professor Barbara Bergman (who currently serves as the President of the National Association of Criminal Defense Lawyers): *Creative Ways to Use The Federal Rules of Evidence*

Pensacola: November 17
Panama City: November 9
Tallahassee: November 17
Gainesville: November 16

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 2002 term that are relevant to our practice and granted since our last newsletter:

DAY v. CROSBY, 2005 WL 753908 (Mem), No. 04-1324 (Sept. 27, 2005), reviewing 391 F.3d 1192 (11th Cir. 2004) (affirming authority, indeed obligation, of district court to *sua sponte* dismiss pro se habeas petition as untimely, in spite of state's concession that it was timely). Questions Presented:

(1) Does the State waive a limitations defense to a habeas corpus petition when it fails to plead or otherwise raise that defense and expressly concedes that the petition was timely? (2) Does Habeas Rule 4 permit a district court to dismiss a habeas petition *sua sponte* after the State has filed an answer based on a ground not raised in the answer?

HOLMES v. SOUTH CAROLINA, 2005 WL 770216 (Mem), No. 04-1327 (Sept. 27, 2005), reviewing State v. Holmes, 605 S.E.2d 19 (S.C. 2004) (affirming exclusion in capital case of defense evidence of third-party guilt and overruling objection to prosecutor's closing argument relying on absence of such evidence). Question Presented: Whether state's rule excluding evidence of third-party guilt violates defendant's constitutional right to present a complete defense under the due process, confrontation, and compulsory process clauses?

U.S. v. GRUBBS, 2005 WL 943674 (Mem), No. 04-1414 (Sept. 27, 2005), reviewing 377 F.3d 1072 (9th Cir. 2004) (holding that anticipatory search warrant which was facially invalid was not cured by supporting affidavit when it was not presented to target at time of search). Question Presented:

Whether the Fourth Amendment requires suppression of evidence when officers conduct a search under an anticipatory warrant *after*

the warrant's triggering condition is satisfied, but the triggering condition is not set forth either in the warrant itself or in an affidavit that is both incorporated into the warrant and shown to the person whose property is being searched?

SAMSON v. CALIFORNIA, 2005 WL 916785 (Mem), No. 04-9728 (Sept. 27, 2005), reviewing People v. Samson, 2004 Cal. App. Unpub. LEXIS 9304 (Cal. Ct. App. 2004). Question Presented: Does the Fourth Amendment prevent police from conducting warrantless search of person, who is subject to parole search condition, absent any suspicion of criminal wrongdoing and solely because person is on parole?

Supreme Court Cases

DYE v. HOFBAUER, 2005 WL 2493855, No. 04-8384 (Oct. 11, 2005)

Appeals; habeas; preservation; exhaustion
Per Curiam grant of cert petition and summary reversal of People v. Dye, 111 Fed. Appx. 363 (6th Cir. 2004), on two grounds: (1) The appeals court erred in concluding the petitioner had failed to raise the federal claim in state court, noting the failure of the state appellate court's opinion to mention the federal claim was not dispositive ("It is too obvious to merit extended discussion that the exhaustion requirement . . . cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court . . ."), and noting the brief set out the federal claim both in the argument heading and text citation of the federal constitution and federal cases; (2) The appeals court also erred in concluding the habeas petition presented the claim in "too vague and general a form" because the "clear

and repeated references to an appended supporting brief" was more than sufficient.

**Selected Eleventh Circuit Case
Summaries**

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

TOVAR-ALVAREZ v. ATTY. GEN., 2005 WL 2561503 (Oct. 13, 2005)

Immigration; removal; jurisdiction; naturalization; equitable estoppel against government

The Court affirmed the BIA removal decision because it comported with law and was supported by substantial evidence. Petitioner had almost completed the naturalization process when he was convicted of a state drug offense. It first concluded that it had jurisdiction to review these legal questions under the REAL ID Act. The Court rejected the argument that he was not removable (because he had become a citizen at the time he took the oath of citizenship before an INS officer, before his conviction) because the regulations require the oath be taken "in a public ceremony." Likewise, he had not become a national, based on his 20 years of residence/allegiance, including registration for Selective Service, based on Sebastian-Soler, 409 F.3d 1280, 1283 (11th Cir. 2005). The sole method of demonstrating allegiance is by birth or completion of the naturalization process. The Court also rejected the argument that the INS should be equitably estopped because it had not completed its naturalization process within the 120 days required by its own regulations, during which he had not sustained a conviction, but instead unreasonably delayed two years; the Court noted the Supreme Court has implied that equitable estoppel cannot be applied against the government, Tefel v. Reno, 180 F.3d

1286, 1302 (11th Cir. 1999), citing Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 422 (1990), and even if it could it would require a showing of affirmative misconduct, Miranda, 459 U.S. 14 (1982), which was not present here.

CALLAHAN v. CAMPBELL, 2005 WL 2446088 (Oct. 5, 2005)

Capital habeas; judge; impartiality; recusal; Sixth Amendment; witness; ineffectiveness; sentencing

The Court rejected challenges based on the fact that the trial judge had earlier stepped into the police interrogation room, after Callahan's arrest, to ensure his right to counsel was being respected. The Court found no Supreme Court case directly on point, and noted that Court has merely held that a judge cannot adjudicate a case where he was also an investigator for the government. Further, the judge's failure to recuse himself did not violate Callahan's Sixth Amendment right to call witnesses. Others testified about it, and a defendant does not have a right to call "a witness he perceives as most credible." The Court also rejected the argument that Callahan's trial lawyer was constitutionally ineffective for failing to object to the admission of some of Callahan's incriminating statements to police. The state courts had found these statements admissible under state law, and a lawyer is not ineffective for not objecting to admissible statements. Also, the lawyer, who had since died, was not ineffective at the penalty phase. For one, when a lawyer is dead, the Court presumes he was not ineffective. For another, there was overwhelming evidence the defendant committed a premeditated kidnapping, rape, and murder of a random victim, confessed, fabricated a prior sexual relationship with the

victim, and insinuated his ex-wife was the real murderer; the defendant's last two wives left him partly because he was physically abusive; he had two previous convictions for assault with intent to murder, one involving shooting his own minor niece in the foot; his lack of compelling mitigation; and he had previously been sentenced to death but the sentence was overturned and remanded. Under those circumstances, a decision to focus on mercy instead of mitigation was not unreasonable.

U.S. v. LEE, 2005 WL 2446229 (Oct. 5, 2005)

Sentencing; Booker; mail fraud; sufficiency; hearsay

The Court affirmed, but it remanded for Lee's resentencing due to the double counting of one check in the loss calculation. Even though she was sentenced pre-Blakely and made no Apprendi objection, the government agreed that resentencing was required. The defendants were convicted of mail fraud arising out of a bad check scheme based on their theory that the U. S. Treasury holds millions of dollars for each taxpayer. The Court found the evidence sufficient to prove mail fraud, where the defendants' letters to their banks and in connection with foreclosure proceedings were part of their scheme to defraud. The Court distinguished Pendergraft, 297 F.3d 1198 (11th Cir. 2002), which dealt with legal mailings. The constitutional error in Wyman's sentence was harmless based on the district court's statement of alternative sentence.

U.S. v. RAMIREZ, 2005 WL 2402925 (Sept. 30, 2005)

Booker; plain error; severance; prior arrest; cross-examination; jury instructions; question; double counting;

The Court affirmed the cocaine-trafficking

convictions, but vacated the sentences. The Court found plain error under Booker, given the district court's sentencing statement that it might have imposed a different sentence had it had "any discretion" but that it felt bound by the guidelines and imposed sentences of 235 months and life. Defendants were arrested on a go-fast boat with 400+ kilos of cocaine. The Court found the evidence sufficient, given the defendant's proximity to a large drug quantity in clear view, coupled with his changing account of events. The Court held the district court properly admitted evidence of one defendant's prior arrest for a similar offense, during his cross-examination, as it was relevant to his denial of knowing an accomplice and to his intent; and the other defendant's case should not have been severed, because of the prejudicial impact of this evidence, given the judge's limiting instruction. Also, there was no basis for a mistrial in the trial court's instruction to the jury, in response to a question during deliberations, not to concern itself with that issue.

The Court rejected the "double-counting" challenge to the guideline increase for being a boat captain as well as the "leader and organizer" of the offense, citing approval of both enhancements in Rendon, 354 F.3d 1320 (11th Cir. 2003); it also pointed out that Rendon did not require "specific facts" for application of both enhancements. However, in light of the Booker remand, and because the Court "cannot be certain" the district court would have given both enhancements post-Booker, the district court should also revisit that issue.

U.S. v. CHAU, 2005 WL 2347210 (Sept. 27, 2005)

Sentencing; hearsay; Sixth Amendment;

Crawford; Booker

The defendant pled guilty to drug charges, including conspiracy, without a plea agreement; he agreed the government could prove the essential elements but disputed the drug quantity and firearm possession for sentencing purposes. An officer testified at sentencing to the defendant's traffic stop and admissions to drug quantity and firearm possession; the defendant objected on hearsay but not Confrontation Clause grounds. Reviewing the Confrontation Clause issue for plain error, the Court concluded that the Crawford rule did not clearly apply in the sentencing context such that the failure to follow it could be considered plain error, since Crawford did not refer to sentencing and had not otherwise been extended to sentencing. Three circuits have declined to extend it.

It was not error under Rodriguez in the post-Booker sentencing hearing for the court to make factual findings beyond or contrary to those admitted by the defendant since the sentence was imposed in an advisory range.

U.S. v. SCOTT, 2005 WL 2351020 (Sept. 27, 2005)

Sentencing; post-Booker; unreasonable

The Court rejected the argument that the 135-month sentence at the bottom of the advisory range was unreasonable. The statutory maximums were 30 years and life. The Court squarely held that nothing in Booker required a district court to specifically address each 3553(a) factor, and the failure to do so was not error. The Court also found the sentence reasonable, noting the district court had engaged in the "inescapable" consultation of the guidelines, and rejecting the defendant's argument that a downward departure would be just punishment and adequate deterrence.

ZAFAR v. ATTY. GEN., 2005 WL 2367526

(Sept. 27, 2005)

Immigration; removal; expired visas; jurisdiction; continuances

The Court held it had jurisdiction to review the immigration judges' denial of motions to continue removal proceedings. The Court affirmed, however, the immigration judges' denial of the continuances under the abuse of discretion standard. The Court also noted that, even without jurisdiction, it would still have jurisdiction to review substantial constitutional claims, but it found no due process or equal protection violations in the denial of additional time to delay removal proceedings.

THOMPSON v. SECY., DOC., 2005 WL 2335550 (Sept. 26, 2005)

Habeas; mixed petitions

On remand following Rhines v. Weber, 125 S. Ct. 1528 (2005), the Court likewise remanded to the district court. The district court had offered the petitioner a choice, later approved in Rhines, of deleting the unexhausted claims and proceeding with exhausted claims if dismissal of the entire petition would unreasonably impair his right to federal relief. On remand, that "that choice should only be offered if a stay is unwarranted."

BALOGUN v. ATTY. GEN., 2005 WL 2333840 (Sept. 26, 2005)

Removal; immigration; REAL ID Act; appeals; pardon; 8 U.S.C. § 1227; jurisdiction

The Court denied relief. The defendant had argued that, although he was removable, his "inadmissible" status should be waived because (1) the crime he committed was more than 15 years before his application for admission; (2) his four children are US citizens who would suffer extreme hardship

were he not admitted; and (3) he had been pardoned for his crime. (1) and (2) had been determined inapplicable; the embezzlement convictions were aggravated felonies under 8 U.S.C. § 1182(h). Also, the pardon was not "full and unconditional" as required under 8 U.S.C. § 1227(a)(2)(A)(v), because it restricted his right to own a firearm and stated his conviction was subject to the habitual offender act. (Note also that the state had subsequently granted a "full and unconditional" pardon, but the BIA still held the pardon was inadequate because it did not release him from "all legal consequences imposed under federal, rather than state, law.")

The Court noted that, under the REAL ID Act, effective 5/11/05, it now has jurisdiction to decide questions of law raised by an alien in a petition to review a final order of removal. The Act replaced the two levels of review previously available to a criminal alien with one; she must now petition the court of appeals for review of all claimed legal errors related to the removal order.

The Court held the U.S. government is as much a "victim" of a fraud than a person or corporation. The pardon exception was inapplicable, also, because it only applies to "deportable" aliens, whereas the petitioner was charged as an "inadmissible" alien because he had left the country and then come back and asked for readmission as a returning resident, which triggered the removal proceedings.

U.S. v. WILLIAMS, 2005 WL 2266016 (Sept. 19, 2005)

Supervised Release; sentencing; maximum; 18 U.S.C. § 3583

Williams was sentenced to 21 months' imprisonment upon his second violation of supervised release from his original bank robbery conviction. The Court reversed,

holding that the statutory caps in 18 U.S.C. § 3583(e)(3) (1991) apply to the aggregate of sentences imposed on multiple revocations of supervised release. Because he was on supervised release for a Class C felony, the maximum aggregate sentence was two years under 18 U.S.C. § 3583(e)(3) (1991); the government conceded that, because defendant had already been sentenced to a year and a day in prison upon his first revocation, the maximum sentence upon the second revocation was 364 days. The Court rejected the argument that the district court erred by imposing two years of supervised release for Williams's first revocation, because this issue had not been preserved by a timely appeal. Likewise, defendant had failed to exhaust his administrative appeals regarding credit for time served. The final issue as to maximum issue was held to be moot.

U.S. v. HOWELL, 2005 WL 2234654 (Sept. 15, 2005)

Rule 41; return of property; firearms

The Court affirmed denial of the defendant's Rule 41 motion for return of \$140,000 seized at arrest and three firearms seized from his residence. The \$140,000 was government cash used in a sting operation to purchase drugs from defendant. Further, the Court rejected the argument that a court, not the government, should decide to whom the cash belonged. Also, a felon is not entitled to return of firearms, but the Court declined even to allow them to go to a relative to be sold on the grounds this would be constructive possession by the felon.

U.S. v. MIRANDA, 2005 WL 2217071 (Sept. 14, 2005)

Judgment of acquittal; conspiracy; Rule 29; prosecutorial misconduct

The Court reversed a judgment of acquittal granted to a defendant convicted of conspiracy to distribute methamphetamine. The district court had found the evidence insufficient, concluding it only showed that Miranda was present in an apartment containing meth and fled to a back room when police stormed the premises. Reversing, the Court pointed to facts with incriminating inferences. Further, the district court had erroneously relied on exculpatory evidence not presented to the jury.

The Court also rejected the alternative argument that the judgment of acquittal should be upheld based on prosecutorial misconduct; Rule 29 refers only to the insufficiency of the evidence.

However, the Court noted that, on remand, the district court was free to reconsider its denial of Miranda's motion for new trial, despite his failure to cross-appeal this issue.

BENNETT v. HENDRIX, 2005 WL 2174056 (Sept. 9, 2005)

42 U.S.C. § 1983, police intimidation; First Amendment

The Court denied qualified immunity to a sheriff and some officers who allegedly conducted a vicious campaign to undermine a referendum to establish a county-wide police force and diminish the power of the county sheriff's department. The Court adopted an objective test for the claim that the defendant's retaliatory conduct adversely affected the protected speech.

U.S. v. KLOPF, 2005 WL 2139373 (Sept. 7, 2005)

Identity theft; intent; 18 U.S.C. § 1028-29; interstate commerce; Booker

The Court rejected challenges to convictions for identity theft involving fraudulent driver's

licenses, under 18 U.S.C. § 1028(a)(3), and credit cards, under 18 U.S.C. § 1029(a)(2). The Court clarified the intent element under § 1028(a)(3) as well as the effect on interstate or foreign commerce required under both statutes. The government is not required under § 1028(a)(3) to prove the particular intended use for which defendant possessed the fraudulent ID or that the intended use would have violated a particular federal, state, or local law. The jury is permitted to rely on common sense to determine whether the intended use was unlawful and need not be told precisely which law the intended conduct would have violated. The Court did remand under Booker, however.

U.S. v. ELSO, 2005 WL 2108090 (Sept. 2, 2005)

Money laundering; conspiracy; jury instruction; affirmative defense; attorney fees

The Court held that the jury was properly instructed, and the defendant-lawyer was not prevented from advancing the "affirmative defense" that the money he removed from the home of a drug dealing client represented an attorney's fee. Elso had gone to the client's home and retrieved \$266,800 in drug money after the client came to his office, claimed he was being followed by law enforcement, and expressed concern that agents would discover and seize more drug money that was hidden in a floor safe at his home. He argued unsuccessfully that the jury should have been instructed to "consider that an attorney may lawfully receive money as fees for representing persons charged with crimes as long as he does not violate Title 18, United States Code, Section 1956(a)(1)(B)(i)."

U.S. v. THOMPSON, 422 F.3d 1285 (Sept. 1, 2005)

Evidence; sufficiency; conspiracy; severance; Bruton; new evidence; voluntariness of confession; comment on silence; Booker; prejudice

The Court rejected numerous attacks on the convictions but remanded for resentencing under the plain error standard. Tjoflat's dissent regarding Rodriguez is noteworthy.

BOZEMAN v. ORUM, 422 F.3d 1265 (Aug. 31, 2005)

42 U.S.C. § 1983; excessive force

The Court affirmed the district court's (a) denial of qualified immunity to officers who struggled with a pretrial detainee who went berserk and who suffocated during their restraint, and (b) grant of qualified immunity to the jail supervisors and nurses.

HICKS v. MOORE, 422 F.3d 1246 (Aug. 31, 2005)

Strip searches; pretrial detainees; reasonable suspicion; violent crimes

The Court, bound by circuit precedent, reluctantly agreed it is unconstitutional to strip search every jail pretrial detainee when no reasonable suspicion exists. However: "We personally question that such a practice violates the Fourth Amendment." However, a prisoner charged with a "violent" crime – including, in this case, domestic battery – provides per se "reasonable suspicion" to justify the strip search.

U.S. v. WININGEAR, 422 F.3d 1241 (Aug. 30, 2005)

Sentencing; reasonableness; time served; Booker

The Court rejected the argument that a sentence was unreasonable because it should have been subjected to a downward departure to reflect the amount of time he had already spent in state prison. Booker did not change

the prior rule that a district court's discretionary denial of a downward departure was unappealable. The district court recognized its authority to depart but declined to do so; hence, its ruling was unappealable. It declined to reach the government's claim that sentences within the guidelines are per se reasonable. It noted the sentence was one-tenth the 20-year maximum. Further, defendant defrauded victims of \$19,600, had multiple prior convictions, committed his crime while still under sentence for a previous crime, violated his bond, and threatened to murder arresting officers as he fled. The district court took care that its sentence provided him with needed medical care.

LECROY v. SECY., DOC, 421 F.3d 1237 (Aug. 29, 2005)

Ineffective assistance of counsel; Brady; third-party guilt

Lengthy habeas appeal in capital case; various claims were procedurally barred. Given overwhelming evidence of guilt, counsel was not ineffective in failing to introduce additional evidence; district court properly excluded brother's failed polygraph results pointing to his guilt; state's alleged Brady violations unproven and harmless.

LAWRENCE v. FLORIDA, 421 F.3d 1221 (Aug. 26, 2005)

Statute of limitations; 2244(d)(1); certiorari review; equitable tolling; stay; COA

The Court affirmed the district court's holding that the pro se capital habeas petition was untimely. The Court rejected arguments that equitable tolling was appropriate because the attorney who mis-advised about the habeas filing deadline was selected and prequalified by the state's registry statute (this

was not a ‘state impediment’ exception to the statute of limitations, nor an “extraordinary circumstance” to warrant equitable tolling); his mental abilities prohibited him from meaningfully cooperating with counsel; and he had a facially strong constitutional claim. Although this circuit had clearly held that the time for filing a habeas petition is not tolled during the pendency of a cert petition challenging the denial of post-conviction relief, there was a circuit split on the issue. The Court also criticized the district court’s grant of a stay and issuance of a COA.

U.S. v. MORENO, 421 F.3d 1217 (Aug. 26, 2005)

Sentencing; post-sentence reduction; 18 U.S.C. § 3582; Booker; rehabilitation; Amend. 591

The Court held that a defendant was not eligible for a post-conviction reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2) to invoke the benefit of Amendment 591 of the Sentencing Guidelines, or to take account, in accord with Booker, of his post-sentencing rehabilitative efforts. Amend. 591 requires that the initial selection of the offense guideline be based only on the statute of conviction rather than on non-jury findings of actual conduct. Moreno claimed that this Amendment prohibited the district court from selecting a base offense level based on drug quantity not found by a jury. The Court rejected this argument, holding that Amendment 591 only applies to the selection of the relevant offense guideline, not to the selection of an offense level within the applicable offense guideline. The Court also found no plain error in the district court’s determination that it lacked a jurisdictional basis to reduce Moreno’s conduct based on his post-sentencing rehabilitative conduct. § 3582 does not contemplate a de novo sentencing.

Further, Booker does not apply retroactively to cases on collateral review and is inapplicable to § 3582(c)(2) motions.

U.S. v. ACOSTA, 421 F.3d 1195 (Aug. 24, 2005)

Interstate commerce; pornography; JOA; 18 U.S.C. §§ 2252,2256; jurisdiction

Acosta was charged with attempting to receive and possess child pornography “that had been mailed, shipped or transported in interstate commerce by any means,” in violation of 18 U.S.C. § 2252A and § 2256. The Court rejected the claim that he was entitled to a judgment of acquittal on the jurisdictional element of the statutes, because the videotape had been mailed and traveled through interstate commerce. The fact argued by defendant - that the videotape was not delivered by the mailman or picked up by defendant at the post office, but was delivered by a postal inspector, was immaterial.

U.S. v. BORDON, 421 F.3d 1202 (Aug. 25, 2005)

Sentencing; Feeney Amendment; Ex Post Facto Clause; U.S.S.G. § 2S1.1; Booker

The Court affirmed the district court’s rejection of all arguments. This was the third appeal of gambling and money laundering conspiracy convictions. Before the Court had issued its decision on the second appeal, reversing a guidelines sentence, two things happened: Congress approved a revised version of the money laundering guideline, U.S.S.G. § 2S1.1, that probably would have indicated a significantly reduced guideline range had defendants been sentenced in 2001 or after; and Congress adopted the Feeney Amendment providing that, when resentencing after appellate remand, a district court should apply the pre-appeal

guidelines. So, at their third sentencing, defendants had argued (a) that the guidelines as amended in 2001, not the 1998 guidelines, applied; (b) that the Feeney Amendment should not apply because their sentences were vacated, in addition to being remanded; (c) and that imposition of the 1998 guidelines violated the Ex Post Facto Clause.

The Court disagreed, holding that “the Amendment does not impose a greater sentence on the Bordons, but merely declines to grant them a favorable change in the law that occurred after they committed their crime.”

J. Hill concurred “with lack of enthusiasm,” saying Booker should be applied, that the proper rule should be “Let justice be done though the heavens will fall,” but that precedent controlled.

U.S. v. HEATH, 419 F.3d 1312 (Aug. 12, 2005)

Supervised release; conditions; improper delegation; mental health treatment; Art. III, U. S. Const.; plain error

The defendant's supervised release was modified to provide that he participate as directed by the probation office in mental health programs recommended by a professional, to include residential and outpatient treatment and psychotropic medications. The government conceded that the condition violated Article III because the court delegated decision whether the defendant would be required to participate, and the Court noted that all circuits addressing this issue have reached the same conclusion. Because no objection was made in the district court, the claim was reviewed for plain error. The Court agreed it was plain error and it affected the defendant's substantial rights, because his sentence "certainly would have been different but for the error." Finally, the

Court found the fourth prong of the plain error standard was met because it was a violation of Article III via an improper delegation.

U.S. v. YUKNAVICH, 419 F.3d 1302 (Aug. 11, 2005)

Search; warrantless; probationers; reasonable suspicion

The Court upheld the warrantless search of defendant's home computers conducted by state probation officers, citing Knights, 534 U.S. 112 (2001). The Court rejected the factual distinction that, unlike Knights, the terms of defendant's probation did not require him to submit to searches. The probation officers had a reasonable suspicion that a search of his computers would produce incriminating evidence: defendant was on state probation for child sexual abuse; he acted suspiciously - including accessing the Internet in violation of probation, moving into a neighborhood crowded with children, placing himself in church settings where children were present, and admitting sexual fantasies involving his prior victim; and he acted nervous when probation officers arrived at his house.

BATTLE v. U.S., 419 F.3d 1292 (Aug. 10, 2005)

Capital habeas; competency; insanity defense; defendant's objection; indictment

The Court replaced its initial opinion but affirmed the denial of defendant's 2255 motion and upheld his death sentence. Noting there was a 12-day pretrial competency hearing, the Court held the district court did not err in finding him competent or in denying another hearing at the start of trial. The Court also held that there was no due process violation, because defendant failed to show his trial lawyers had

pursued the insanity defense over his objections; that the indictment was not deficient because, even if current law required that the aggravating circumstances be alleged in the indictment, that law is not retroactive; and that the trial court did not err in dismissing two jurors and seating alternates for the penalty phase, because there is no requirement that the penalty jury be the same jury.

U.S. v. CAMPA, 419 F.3d 1219 (Aug. 9, 2005)

Change of venue; improper closing argument

In a lengthy opinion, the Court vacated the convictions (after a 7-month trial) of three defendants for spying for Cuba, conspiracy to murder, and possession of false ID. The Court held the district court should have granted a change of venue based on pre- and mid-trial publicity and improper prosecutorial statements during trial. Among the "prosecutorial references" criticized was one in which the prosecutor told "the jurors they would be abandoning their community unless they convicted the 'Cuban sp[ies] sent to . . . destroy the United States.'"

U.S. v. BOBO, 419 F.3d 1264 (Aug. 9, 2005)

Double jeopardy

The defendant physician won his initial appeal based on an inadequate indictment; a footnote in that opinion suggested the evidence at the first trial was insufficient. On remand, the defendant moved to dismiss arguing the appellate court had concluded the evidence was insufficient and thus retrial would violate double jeopardy. On the defendant's interlocutory appeal of the district court's denial of that motion, the Court held that it had not decided the sufficiency issue and, therefore, the initial opinion did not justify

dismissal.

U.S. v. ELLIS, 419 F.3d 1189 (Aug. 5, 2005)

Upward departure; U.S.S.G. § 5K2.7

The Court followed up its earlier reversal of the 18-month prison sentence of a former state prosecutor for lying to federal agents about an improper sexual relationship with a drug suspect, based on his guilty plea under 18 U.S.C. § 1001. The Court explained that the district court's 9-level upward departure under U.S.S.G. § 5K2.7 was based on its determination that "a local court postponed prosecuting criminal cases in order to assess the impact and repercussions and ramifications of [Ellis's] conduct and acts," and that "the integrity of the [] district attorney's office and the public perception of the criminal justice system were adversely affected." The Court said the false statement to the FBI did not actually disrupt any governmental function; rather, any delay in the disposition of criminal cases and any disgrace Ellis brought to his office or the criminal justice system are the result of Ellis's conduct toward the suspect and of his subsequent indictment, not his false statement.

U.S. v. JORDI, 418 F.3d 1212 (Aug. 1, 2005)

Sentencing; upward departure; U.S.S.G. § 3A1.4; terrorism

In a case of first impression, the Court reversed the district court's denial of an upward departure, holding that an upward departure pursuant to U.S.S.G. § 3A1.4, Application Note 4, does not require a showing that the conduct transcended national boundaries. The government argued the crime involved planned terrorist acts intending to intimidate or coerce a civilian

population, but the district court had, erroneously it turns out, denied the departure because the crime did not transcend national boundaries.

U.S. v. HERNANDEZ, 418 F.3d 1206 (July 29, 2005)

Government appeal; Fourth Amendment

The Court reversed the district court's suppression order, concluding that objective reasonable suspicion existed that defendant was engaged in other criminal activity and that reasonable suspicion justified the detention up to the point of consent to the search. A state trooper stopped a pickup going 78 in a 70-mph zone at 3:02 a.m. He questioned the driver outside the car, then the female passenger; they presented innocent but inconsistent answers, and the passenger had trouble answering. The trooper contacted Customs to check the license, vehicle registration, warrants for the driver or passenger, and whether the vehicle had crossed national borders. The Trooper contacts Customs in over two-thirds of his stops and generally does not conclude a stop until a response. Ten minutes after the stop, having written a warning but not having heard back from Customs, the trooper testified he perceived nervousness in the passenger and, on that basis, called for a canine unit and asked permission to search the car. The canine arrived, and about 20 minutes after the search started, the canine alerted, yielding cocaine. The district court had held the Trooper's interrogation went beyond the strict limits allowed at a traffic stop, and (either because such questions were asked at all or because asking the questions prolonged the duration and enlarged the scope of Defendant's detention) the stop was unconstitutional before consent.

U.S. v. SEARCY, 418 F.3d 1193 (July 28, 2005)

18 U.S.C. § 2422(b); persuading minor to engage in sexual activity; crime of violence; career offender; 4B1.1

The Court agreed with the district court that an 18 U.S.C. § 2422(b) conviction (using a means of interstate commerce, here the Internet) to persuade, etc. a minor to engage in unlawful sexual activity) is a crime of violence for purposes of classifying the offender as a career offender under U.S.S.G. § 4B1.1, because it carries an inherent risk of physical injury to the minor victim. His two prior convictions were a 1988 Florida conviction for sexual activity with a child and L&L assault on a child, and a 1997 Kansas conviction for sexual exploitation of a child.

U.S. v. MAGLUTA, 418 F.3d 1166 (July 27, 2005)

Collateral estoppel; money laundering; evidence; sufficiency; obstruction of justice; juror bribery; hearsay; FRE 801; seizure; Fourth Amendment; sentencing; Booker; 5G1.2; consecutive

First, the Court held the defendant's 1996 acquittal on drug charges did not collaterally estop the government's use of the same evidence in the instant money laundering case; the element the proof specifically rejected by the earlier acquittals, commission of drug offenses, was not an element in the instant charges, only that the money was the proceeds of drug offenses. Second, the Court found the evidence sufficient to prove money laundering; the defendant argued that the money lost its illegal character because the FBI had control of it at some point, but the Court disagreed that "the level of government involvement" was sufficient. Also, this did not make the money laundering "sting"

statute, 18 U.S.C. § 1956(a)(3), superfluous. Further, the money was not "legal" by virtue of the fact that it had already been laundered by the time the defendant possessed it; thus the Court distinguished Majors, 196 F.3d at 1213. Third, the obstruction via juror bribery conviction was reversed; the district court erred in admitting, as non-hearsay coconspirator statements under FRE 801(d)(2)(E), out-of-court statements by the 1996 jury foreman (which acquitted defendant of some counts) made unknowingly to an undercover FBI agent, and admitting accepting the bribe and promising not to squeal. The Court agreed that, under Grunewald, 353 U.S. 391, 401-01 (1957), the juror's post-acquittal statements were not in furtherance of the conspiracy, as it ended with the acquittals. Because the government had not met its burden of proving harmlessness, the conviction for obstruction was **reversed**. The Court rejected the Fourth Amendment challenge to the seizure of documents from the trunk of a car driven by an associate of the defendant, because it was based on probable cause to conduct a search of an operational vehicle; even though based on an anonymous tip, it was entitled to substantial weight and supported by other evidence, and the tipster was previously reliable. Not addressed was the issue of the documents being protected by attorney-client privilege, which was the basis of the driver's objection to officers when they started to search. Finally, remand was necessary for the district court to strike the 120-month sentence for obstruction, which left the defendant with a 195-month sentence. The Court rejected other challenges to the sentence as harmless because the district court made it abundantly clear that it would, in any event, depart upward to impose a life sentence; the Court held that Davis, 329 F.3d 1250 (holding 5G1.2(d) requires consecutive

sentences to reach punishment set by guidelines), was not invalidated by Booker.

JOHNSON v. MEADOWS, 418 F.3d 1152 (July 26, 2005)

Prisoner; PLRA; exhaustion; 28 U.S.C. § 1997e(a); administrative deadlines; good cause

The Court held, as an issue of first impression in this circuit, that "an untimely administrative grievance does not satisfy the exhaustion requirement of the PLRA," or show a good cause for that failure, and reversed the district court's order and remanded with directions to dismiss the complaint. The Court also discussed the distinction between simple exhaustion or "proper exhaustion."

AFANASJEV v. HURLBURT, 418 F.3d 1159 (July 26, 2005)

Extradition; 18 U.S.C. § 3184; probable cause; unsworn bill of indictment

The Court affirmed the district court, rejecting the Petitioners' argument that the investigator's unsworn bill of indictment was not competent evidence to establish probable cause to support their extradition to Lithuania to face criminal charges of fraudulent business practices.

U.S. v. VALDERRAMA, 417 F.3d 1189 (July 22, 2005)

Administrative forfeiture; 18 U.S.C. § 983(c); due process; jurisdiction

The Court affirmed dismissal of appellant's motion to set aside an administrative forfeiture of an administrative forfeiture of a \$100,000 check payable to him seized by Customs in the mail. The district court did not have subject matter or equitable jurisdiction to review the merits of administrative or nonjudicial forfeitures, only

the procedural issues.

U.S. v. TAYLOR, 417 F.3d 1176 (July 19, 2005)

Evidence; FRE 404(b), 608

The Court affirmed the exclusion of defense evidence of the arresting officer's bad character, and of prior complaints of police misconduct against him, under FRE 404(b) or 608, because the complaints had been found (by police) to be unfounded. Taylor argued the arresting officer lied about finding drugs on him. The Court also affirmed exclusion of the hearsay testimony of a hospital physician, who examined defendant after his arrest, that defendant told her his head injury was caused when arresting officers "stepped on" him.

U.S. v. HOLT, 417 F.3d 1172 (July 19, 2005)

Writ of audita querela; Blakely

The Court affirmed, holding a prisoner is not entitled to a writ of audita querela when relief is cognizable under 28 U.S.C. § 2255. Moreover, even construed as a § 2255 motion, it was properly denied as an unauthorized successive motion. Defendant had argued that the district court violated Blakely because, while the jury found him guilty of a Class "C" felony, the district court applied 18 U.S.C. § 924(e)(1) ("ACCA"), which changed his offense to a Class "A" felony.

U.S. v. SMITH, 416 F.3d 1350 (July 18, 2005)

Booker/Dockery

On Booker remand, the Court refused to apply Booker based on the procedural bar in Dockery, precisely as in Levy, for failure to raise the claim in an opening brief.

U.S. v. MEJIA-GIOVANI, 416 F.3d 1323 (July 15, 2005)

Booker; harmlessness

The Court held that any Booker error in a mid-range sentence was harmless, when the judge stated at sentencing that its patience was running thin with the defendant's pattern of illegal re-entry and warned of a possible upward departure.

RIVERS v. U.S., 416 F.3d 1319 (July 14, 2005)

Habeas; statute of limitations; AEDPA

On remand pursuant to Johnson v. U.S., 125 S. Ct. 1571 (2005), the Court reaffirmed its prior decision. The Court recognized that Johnson had undermined some of the prior basis for its denial of habeas relief under the AEDPA statute of limitations; however, Johnson required habeas petitioners relying on the vacatur of a state conviction to show due diligence in obtaining the vacatur. Petitioner's delay in seeking relief, until more than four years after entry of the enhanced federal sentence, precluded relief.

U.S. v. WHITE, 416 F.3d 1313 (July 14, 2005)

Booker; revocation of supervised release; plain error

The Court rejected a Booker challenge to a sentence imposed for revocation of supervised release. Almand, 992 F.2d 316 (11 th Cir. 1993) precluded a challenge to an underlying sentence in a revocation context; and Varela, 400 F.3d 864 (11 th Cir. 2005), precluded Booker application in a 2255. The Supreme Court has yet to address whether Booker applies in such revocation proceedings, thus there could be no plain error; even if it does, there was no constitutional Booker error, because defendant admitted the facts used to enhance sentence; and there was no Booker statutory error because the district court did not treat the guideline policy statements for revocation

proceedings as binding.

IN RE: CONKLIN, 416 F.3d 1281 (July 12, 2005)

Habeas; successive; Sixth Amendment; defense funds; expert; self-defense

A capital defendant lost an attempt to get leave to file a successive habeas application. He argued that the prosecutor improperly prevented witness testimony which in turn prevented him from discovering evidence which would have demonstrated his innocence.

The Court had serious misgivings about the trial proceedings but felt jurisdictionally constrained, suggesting further guidance from the Supreme Court was needed as to the limits of Ake v. Oklahoma, 470 U.S. 68 (1985), particularly whether the Sixth Amendment guarantees the right to a non-psychiatric expert crucial to prove the only defense, self-defense.

J. Barkett wrote a passionate dissent because she could not "concur in the execution of someone whose conviction and sentencing . . . demonstrated a total absence of due process." She opined no attorney could have competently defended a capital murder case with only 37 days to prepare for a trial involving complex evidence and no additional time to prepare for sentencing.

McNAIR v. CAMPBELL, 416 F.3d 1291 (July 13, 2005)

Habeas; ineffective assistance; penalty; collateral counsel; Bible in jury room as extraneous evidence; procedural default; evidentiary hearing; Batson

Reversing as clearly erroneous the district court's grant of habeas sentence relief (based on counsel's presentation of evidence about drug use without evidence to explain its effects or potential mitigation), or even an

evidentiary hearing in a capital case, the Court concluded there was no excuse for collateral counsel's failure to diligently pursue the issue in the state appellate court, waiting until rehearing to raise it. The district court erred in not deferring to the state court's determination that trial counsel was not ineffective.

The Court agreed the claim regarding the jurors' use of the Bible was procedurally defaulted, because it was not framed as a federal constitutional claim initially, even though defendant had cited a federal decision and closed his argument by relying on the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution" as well as state law. These were "needles in a haystack" insufficient to exhaust the federal claim. The Court held that, if the state does not expressly waive a procedural default on a state remedy, 28 U.S.C. § 2254(b)(3) procedurally bars the claim. Also, even if the claim had been properly presented and therefore exhausted, it would lose on the merits.

Finally, the Court rejected the claimed Batson violation, finding no basis to reject the state court's conclusion there was no purposeful discrimination. The list of cases from the same prosecutor's office which had received relief under Batson was insufficient to carry the defense burden.

U.S. v. LEVY, 416 F.3d 1273 (July 12, 2005)

Booker; abandonment

On remand post-Booker, the Court again denied relief. In addition to prior reasons, the Court added that Booker itself recognized that retroactivity is subject to ordinary prudential doctrines; explained that Griffith v. Kentucky, 479 U.S. 314, is consistent with the abandonment rule because the defendant

in Griffith had timely raised the error in both district and appellate courts; and distinguished between the independent rules of retroactivity and the Court's prudential rule on abandonment, that requiring parties to have raised the issue in the initial brief was not unduly harsh or overly burdensome because attorneys were on notice after Apprendi and many in fact preserved the issue at every level. The Court noted that it has liberally construed the question of preservation of Booker claims and that there was nothing in the Supreme Court's boilerplate remand order affecting these prudential rules.

BROWN v. McFADDEN, 416 F.3d 1271 (July 12, 2005)

Prisoner; gain time; statutory construction; rule of lenity; 2241; 18 U.S.C. § 3264

The Court rejected the defendant's 2241 habeas argument that, under 18 U.S.C. § 3624(b)(1) (referring to "term of imprisonment"), BOP was required to give him 54 days credit for each year of sentence *imposed*, not just each year *served*. The Court held that, although the plain text is ambiguous, the BOP's interpretation is reasonable; although the district court's decision that the statute was not ambiguous was arguably correct, the Court chose to follow the decisions of five other circuits which all hold in unanimous opinions that the statutory language is ambiguous but the BOP interpretation is reasonable. Additionally, the rule of lenity does not apply because of the BOP's reasonable interpretation.

U.S. v. BROWN, 415 F.3d 1257 (July 8, 2005)

Controlled substance analogue; 21 U.S.C. § 846; expert testimony; sufficiency

The Court held the chemical structure of 1,4-butanediol, an alleged controlled substance

analogue, is not "substantially similar" to the chemical structure of the schedule I controlled substance gamma hydroxybutyric acid (GHB), such that it is a "controlled substance analogue" as defined by 21 U.S.C. § 802(32)(A); that the analogue theory in 21 U.S.C. §§ 802(32)(A) and 813 is constitutional; that the constitutional question had been waived; that the district court did not err in rulings on admissibility of expert testimony under Daubert; and that the evidence was sufficient.

U.S. v. BAKER, 415 F.3d 1273 (July 11, 2005)

Prisoner's name change; effective date; dual name policy; prospective recognition

The Court held that an inmate is entitled to prospective recognition of a legal name change, by means of a "dual-name policy," but an inmate is not entitled to have documents that pre-dated his legal name change altered.

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