

FEDERAL PUBLIC DEFENDER

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NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

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**ELEVENTH CIRCUIT CLARIFIES ROLE OF GUIDELINES IN SENTENCING**

Since the decision in United States v. Booker, 543 U.S. 220 (2005), courts across the country have differed over the role of the United States Sentencing Guidelines. This past August, in the case of United States v. Hunt, 459 F.3d 1180 (11<sup>th</sup> Cir. 2006), the Eleventh Circuit Court of Appeals staked out its position, one that limits the role of the Guidelines.

In writing the opinion in Hunt, Judge Tjoflat noted that “[m]uch has been written about the amount of weight to accord the Guidelines in light of Booker, and virtually every position has been adopted by one court or another.” 459 F.3d at 1183. Judge Tjoflat cited examples in which courts gave preferential weight to the Guidelines: United States v. Williams, 436 F.3d 706, 708 (6<sup>th</sup> Cir. 2006) (“a rebuttable presumption of reasonableness”); United States v. Wilson, 355 F. Supp. 2d 1269, 1271 (D. Utah 2005) (great weight should be given to the Guidelines); United States v. Terrell, 445 F.3d 1261, 1264 (10<sup>th</sup>

Cir. 2006) (“deference to the Guidelines is essential”). He gave examples, too, of decisions giving no special weight to the Guidelines: United States v. Zavala, 443 F.3d 1165, 1169 (9<sup>th</sup> Cir. 2006) and United States v. Jaber, 362 F. Supp. 2d 365, 371 (D. Mass. 2005).

Judge Tjoflat, in his opinion, much like those courts that gave no preferential weight to the Guidelines, rejected “any across-the-board prescription regarding the appropriate deference to give the guidelines.” Hunt, 459 F.3d at 1184. Instead, he concluded that a “district court may determine, on a case-by-case basis, the weight to give the Guidelines, so long as that determination is made with reference to the remaining section 3553(a) factors that the court must also consider in calculating the defendant’s sentence.” 459 F.3d at 1185.

Thus, here in the North Florida, as well the rest of the Eleventh Circuit, it is as Justice Stevens wrote in his dissenting opinion in Booker: while “judges must still consider the sentencing range contained in the Guidelines,

. . . that range is now nothing more than a suggestion that may or may not be persuasive . . . when weighed against the numerous other considerations listed in [§ 3553(a)].” Booker, 533 U.S. at 200. *See also* United States v. Glover, 431 F.3d 744, 752 (11<sup>th</sup> Cir. 2005)(Tjoflat, J. concurring). Therefore, whatever the advisory Guidelines range might be for any given individual, it is only a *suggestion* to be considered just like the other statutory factors, including the history and circumstances of the defendant.

In some cases, then, the Guidelines should play a significant role; in others they should not. Our job as defense lawyers is to make sure the court has all the facts necessary to decide what role the Guidelines should play in any given case. The training video we are presenting this month, “Developing a Comprehensive Case for Mitigation,” as well as one we presented in May, “Sentencing Mitigation,” discuss how to present those facts and how to do so convincingly. If you missed the videos, you can check them out from our libraries. There’s also a recent sentencing memorandum posted on our web page, “Booker Sample Sentencing Memo IV,” that incorporates the Hunt decision.

While the Hunt decision is an encouraging one, there is still more to come. Earlier this month, the United States Supreme Court heard oral arguments in Cunningham v California (No. 056551). Many predict the outcome will determine how much weight the 6<sup>th</sup> Amendment allows to be given to sentencing guidelines when, as is true with the United States Sentencing Guidelines, the factors used in determining the guidelines need not be proved beyond a reasonable doubt or presented to a jury. Stay tuned.

## ADAM WALSH ACT

The Adam Walsh Child Protection and Safety Act of 2006 was signed into law on July 27, 2006. It is a broad reaching piece of legislation that makes significant changes in the existing law. Contact Randy Murrell if you’d like a detailed summary that includes mention of potential challenges. Here are some of the primary provisions:

- Expands federal jurisdiction to include any kidnaping that involves an instrumentality of interstate commerce (the phone or the internet) and the production of obscene material with the intent to transport it in interstate commerce;
- Expands the list of circumstances that entitle the government to a detention hearing to include: the fact that the defendant is charged with a crime that involves “a minor victim or a controlled substance, firearm, explosive or destructive device.” *See* 18 U.S.C. § 3142(f)(1)(E) [Insofar as the legislation now allows a detention hearing if the offense involves a firearm, it effectively overrules the decision in United States v. Johnson, 399 F.3d 1297 (11<sup>th</sup> Cir. 2005), which had held that the offense of possession of a firearm was not a crime of violence that, by itself, justified a detention hearing];
- Creates five new federal crimes relating to the sexual exploitation of children, including failure to register as a sex offender;
- Increases the maximum sentence and adds new or higher mandatory minimum sentences for a list of offenses including a 10-year mandatory

minimum for crimes of violence against a minor that results in serious bodily injury or that involves the use of a dangerous weapon, and doubles the mandatory minimum from 5 to 10 years for using a facility of interstate commerce to induce a minor to engage in sexual activity (18 U.S.C. § 2422(b)) or to transport a minor for that purpose (18 U.S.C. § 2423(a)), and increases the maximum penalty for those offenses from 30 years to life;

- Eliminates the statute of limitations for most offenses listed in Chapter 109A (Sexual Abuse) and Chapter 110 (Sexual Exploitation and Other Abuse of Children);
- In conjunction with the January 5, 2006, Violence Against Women Act, apparently provides that the Government may collect DNA samples from nearly any individual who has been arrested for a federal offense or is facing federal charges;
- Requires that any material that “constitutes” child pornography “remain in the care, custody, and control of either the Government or the court,” prohibits the reproduction of the material for defense counsel, and requires that the Government provide “ample opportunity for inspection, viewing, and examination;”
- Establishes a complex national sex offender registry law; and
- Provides for a civil commitment of those in the custody of the Bureau of Prisons who are “sexually dangerous.”

### **ETHICAL OBLIGATIONS OF LAWYERS WHO REPRESENT INDIGENT CRIMINAL DEFENDANTS**

In May, the American Bar Association’s Standing Committee on Ethics and Professional Responsibility promulgated Formal Opinion 06-441, which addresses the “Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation.” Here’s the pertinent section:

*All lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation. If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once a lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation. If the court denies the lawyer’s motion to withdraw, and any available means of appealing such ruling is unsuccessful, the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to competently and diligently represent the defendant.*

### **AMENDMENTS TO THE SENTENCING GUIDELINES**

As of May 18<sup>th</sup> of this year, a number of Sentencing Guidelines went into effect. Most

are not changes that you'll see often. There are, though, significant changes to the provision applicable to firearms (USSG § 2K2.1). The key amendments to that section are:

- A change in the definition of a semiautomatic assault weapon due to the demise of the semiautomatic assault weapon ban (§2K2.1(a)(1)-(4));
- A 4-level increase in the offense level if the defendant "engaged in the trafficking of firearms (giving just two firearms to someone who cannot legally possess a firearm qualifies as "trafficking") (§2K2.1(b)(5));
- An increase from 2 offense levels to 4 if the offense involves either a stolen firearm or a firearm with an altered or obliterated serial number (§2K2.1(b)(4));
- The addition of commentary that explains that in determining whether the 4-level upward adjustment for possession a firearm or ammunition "in connection with another felony offense" applies (§2K2.1(b)(5)) or whether the cross reference provision applies for using a firearm or ammunition "in connection with" another offense (§2K2.1(c)(1), the test is whether the firearm "facilitated, or had the potential of facilitating" the offense (§2K2.1, comment. (n.14)). Reflecting existing case law, that same commentary provides that "in connection with" includes the taking of a firearm during a burglary or, in conjunction with a felony drug offense, the discovery of a firearm in "close proximity to drugs, drug-manufacturing materials or drug

paraphernalia."

You'll find all the changes to the Guidelines at the Sentencing Commission's web page: [www.ussc.gov](http://www.ussc.gov). Just scroll down to "Amendments to the Sentencing Guidelines (May 18, 2006)."

#### **END OF THE YEAR TRAINING REQUIREMENTS**

Letters will be going out in the next few weeks to all panel members advising each member how many hours of training has been completed in 2006. Each panel member will need the requisite 6 hours of our training (or 8 hours if obtained elsewhere) to remain a member in good standing. Those who fail to meet the requirement by the end of the year will, at the beginning of 2007, be placed at the bottom of the list and be called only if the list of those in good standing is exhausted. If you're behind on the hours, check out the videos we've shown in our training sessions. They are available in each of our three offices.

#### **ETHICAL ISSUES FOR CJA COUNSEL**

##### **Part IV: Avoiding Conflicts of Interest.**

*This is the last of four installments in a series of articles on problems inherent in communications between appointed counsel and a client about potential retained services. The first installment, in our January 2006 Newsletter, addressed the issue of solicitation; the second installment, in our April 2006 Newsletter, addressed communications issues; the third article addressed payment by third parties, fair dealing, and avoiding the appearance of impropriety; and this last issue addresses*

*potential conflicts of interest. The complete article is available on our website at <http://www.fpd-fln.org/>.*

**Conflicts of Interest.** Rule 4-1.7 sets out the general rule on conflict of interest. In pertinent part, subsection (b) cautions the attorney of her duty to avoid any limitation on her independent professional judgment, including that caused “by the lawyer’s own interest.” The most obvious is the lawyer’s desire for retained employment, which could color the lawyer’s recommended courses of action to the client. In fact, the Comment gives the specific example that “a lawyer’s need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee.” Each attorney will need to decide if subsection (b) applies and requires the client’s consultation and consent. Attorneys should be careful not to advise a client to pursue matters that are hopeless or to give a client unfounded hope for success.

An appointed lawyer should advise a client if other legal options may be available, but the lawyer has no obligation to conduct the investigation and research necessary to express an opinion on the merits of those options. The appointed attorney, by virtue of his position of trust conferred by that appointment, has a duty to give the client good advice, and that advice should as accurately as possible assess legal options under consideration and scrupulously avoid encouraging a client to pursue - and his family to pay for - legal efforts that are either doomed or highly risky. This is especially true if the advising attorney might be hired to conduct this work. The odds must be clearly and accurately communicated to the client, or the inevitable failure will come back to haunt the

attorney who recommended that course of action.

Rule 4-1.8 provides other conflict of interest rules which may be relevant, and fee agreements with clients should be written with recognition of these provisions. Subsection (a) prohibits a lawyer from “knowingly acquir[ing] an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer’s fee or expenses,” unless the client consents in writing, after full disclosure, to fair terms, and after reasonable opportunity to consult independent counsel. Subsection (c) prohibits lawyers from preparing any instrument giving the lawyer or her family any substantial gift from the client. Finally, subsection (d) prohibits, prior to the conclusion of representation, making or negotiating “an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.”

An apparent potential conflict of interest in this situation exists where appointed *trial* or *appellate* counsel is hired to handle post-conviction claims. The lawyer would be well-advised to inform the client in writing that potential claims of ineffective assistance of counsel which involve the same attorney **will be waived** by such representation and that consultation with other counsel as to those matters, before a decision is made, would be wise. In fact, the attorney would be wise to insist on the client’s prior consultation to avoid or at least defend a future grievance complaint.

## MENTAL HEALTH ODYSSEY

**Charles Lammers** of our Tallahassee office won a unique sort of victory in a case where his client, Bina Lucchesi, was charged with participating in a cocaine conspiracy. Judge Rodgers committed Ms. Lucchesi to the custody of the Attorney General for a competency evaluation, which resulted in Ms. Lucchesi being hospitalized in a Bureau of Prisons facility in Ft. Worth, Texas, FCI Carswell.

When Ms. Lucchesi refused to take the psychotropic medication prescribed by the prison psychiatrist, Judge Rodgers, Charles, and Assistant United States Attorney Mike Simpson flew to Ft. Worth for a hearing on the hospital's request to forcibly medicate Ms. Lucchesi. Upon considering the testimony of the mental health professionals that Ms. Lucchesi did not present a risk to others, that she was most likely insane at the time of the offense, and that, at least from a management perspective, the only reason to forcibly medicate her was to render her competent to stand trial, Judge Rodgers denied the request. Judge Rodgers did so, recognizing the significant liberty interest individuals like Ms. Lucchesi had in avoiding unwanted forced medication and the Supreme Court's recognition that instances of forced medication solely for the purpose of restoring competency would probably be "rare." Sell v. United States, 539 U.S. 166, 180 (2003).

Within weeks of Judge Rodgers' decision, she directed the doctors at the Carswell to send her a formal report. They did so and in the report included their findings that Ms. Lucchesi did not present a threat of danger to others and that it was unlikely that she would become competent in the foreseeable future.

Charles followed with a pleading in which he argued that, under federal law, Ms. Lucchesi was entitled to immediate release. He argued that, while 18 U.S.C. § 4246, in some circumstances, provides for the continued commitment of those that present a risk of danger to others, federal law does not provide for the commitment or continued detention of those like Ms. Lucchesi who are neither dangerous nor likely to become competent. Judge Rodgers agreed and ordered Ms. Lucchesi released.

Ms. Lucchesi is now out of custody with plans to return home in south Florida. Charles expects that the Government will eventually move to dismiss the charges.

## PANEL TRAINING

In November, we'll be presenting a video, "The Constitutional Rules of Evidence." We filmed it at the Winning Strategies training session held earlier this year in Miami. Brent Newton, as assistant federal public defender from Texas, makes the presentation. Our web page includes more details as well as the handout for the presentation.

Here's the schedule:

Pensacola: November 30 at noon  
Panama City: November 14 at noon  
Tallahassee: November 30 at noon  
Gainesville: November 29 at 9:00 and

noon

We'll be taking the month of December off, but will be back in January with a presentation: "Defending Methamphetamine Cases."

**DOWNWARD DEPARTURES**

**Horne, Eric** Mickle, S. Atty: Randy Murrell  
 Docket: 4:06cr9  
 Charge: Conspiracy to Dist. Cocaine  
 Range: 262-327 months  
 Sentence: 176 months BOP  
 Date of Imposition of Sentence: 7/10/06  
 Grounds: 5K1.1

**Alvarado, Gumaro** Hinkle, R. Atty: Clyde Taylor  
 Docket: 4:06cr10  
 Charge: Conspiracy to Dist. Cocaine & Marijuana  
 Range: Mandatory 20 years  
 Sentence: 84 months BOP  
 Date of Imposition of Sentence: 10/12/06  
 Grounds: 5K1.1

**Mangaroo, Jenise** Mickle, S. Atty: Tom Miller  
 Docket: 1:05cr39  
 Charge: Conspiracy to Commit Robbery, Robbery, Poss FA in furtherance of crime of violence  
 Range: 97-121 mos, plus 5 year mand. min.  
 Sentence: 4 yrs prob with 1 yr home det.  
 Date of Imposition of Sentence: 8/14/06  
 Grounds: 5K1.1, aberrant conduct, little chance of recidivism

**Johnson, Keara** Mickle, S. Atty: Huntley Johnson  
 Docket: 1:05cr39  
 Charge: Conspiracy to Commit Robbery, Robbery, Poss FA in furtherance of crime of violence  
 Range: 97-121 mos, plus 5 year mand. min.  
 Sentence: 4 yrs prob with 1 yr home det.  
 Date of Imposition of Sentence: 8/14/06  
 Grounds: 5K1.1, aberrant conduct, little chance of recidivism

**Gunn, Louis** Mickle, S. Atty: Bill Clark  
 Docket: 4:06cr7  
 Charge: Poss Firearm by Convicted Felon  
 Range: 70-87 months  
 Sentence: 12 months BOP  
 Date of Imposition of Sentence: 8/23/06  
 Grounds: 5K1.1, mental health difficulties

**Adetona, Stephen** Mickle, S. Atty: Bill Clark  
 Docket: 4:05cr24

Charge: Bank Fraud  
 Range: 108-135 mos  
 Sentence: 72 months BOP  
 Date of Imposition of Sentence: 10/16/06  
 Grounds: 5K1.1

**Beard, Gigi** Mickle, S. Atty: Bill Bubsey  
 Docket: 4:05cr39  
 Charge: Conspiracy to Dist. Cocaine, Poss FA in furtherance of drug trafficking offense  
 Range: 4-10 mos, plus 5 year mand. min.  
 Sentence: 24 months BOP  
 Date of Imposition of Sentence: 10/16/06  
 Grounds: 5K1.1, aberrant conduct, defendant's otherwise good character

**VARIANCES**

**Jack, Stanley** Hinkle, R. Atty: Bill Clark  
 Docket: 4:05cr38  
 Charge: Making False statement on Loan Application, Bank Fraud  
 Range: 15-21 mos  
 Sentence: 7 days, w/5 yrs SR w/6 mos. home detention  
 Date of Imposition of Sentence: 5/5/06  
 Grounds: Defendant's intent to repay loan, lack of sophistication, long history of leading a law-abiding life and working hard.

**Messick, John** Mickle, S. Atty: Randy Murrell  
 Docket: 4:06cr18  
 Charge: Possession Child Pornography  
 Range: 78-97 mos  
 Sentence: 60 months BOP  
 Date of Imposition of Sentence: 10/16/06  
 Grounds: Defendant's age (79), poor health, military service, long law-abiding life and steady employment

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

**VICTORIES**

Tallahassee panel member, **Clyde Taylor**, successfully argued to Judge Hinkle that his

client, Maurico Juri, was entitled to a reduction in the offense level for being a minor participant in a scheme that led to 6 charges of transporting illegal aliens. With the reduction in the offense level, Juri, who had been paid to transport individuals from Texas to Florida, was sentenced to 12 months of incarceration.

**Tom Miller**, of our Gainesville office, won an acquittal for Michael Akridge on a charge of possession of a firearm in furtherance of a drug trafficking offense. Officers executed a search warrant at the mobile home of Akridge and found marijuana plants growing in a shed about 100 feet from the mobile home. Inside the mobile home, the officers found a loaded rifle inside a closet in a locked storage room. A receipt showed that Akridge purchased the gun in 1997. Another receipt showed that Akridge purchased the indoor growing equipment some 8 years later. Tom convinced the jury that his client's gun possession had nothing to do with the marijuana plants.

A Gainesville also jury found another one of **Tom Miller's** clients, Dale Bowdoin, not guilty of the charge of being a felon in possession of a firearm. The firearm had been found in the mobile home of Bowdoin's girlfriend.

**Tom Keith** of our Pensacola office, in a bench trial, convinced Magistrate Judge Timothy to acquit his client, Misty Jones, of two misdemeanor offenses: assaulting her boyfriend and failure to appear. With conflicting versions of the assault presented during the trial, Judge Timothy concluded the Government had failed to prove Jones' guilt beyond a reasonable doubt. Tom successfully argued that while Jones failed to appear, she had not been released pursuant to the Bail

Reform Act, and was, therefore, not guilty of violating the statute, 18 U.S.C. § 3146.

**Randy Murrell**, before Judge Smoak, convinced a Panama City jury to acquit his client, Paul Mobley, of four charges involving an alleged scheme to murder a federal agent. While there were recorded phone conversations and notes allegedly written by Mobley, Randy argued that the only individuals who could prove it was Mobley who participated in the recorded phone conversation and wrote the notes were two jail house informants who were not credible witnesses. The jury returned with their not guilty verdict in exactly 6 minutes!

Judge Mickle granted a motion to suppress filed by **Randy Murrell** in the case against Mario Sanchez-Florio and then granted the Government's Motion to Dismiss the case, in which Sanchez had been charged with possession of a counterfeit alien registration card. Immigration agents in conducting what they referred to as a "work site inspection," arrested a number of illegal immigrants, including Sanchez. The officers had information that established a reasonable suspicion that Sanchez was in the country illegally, and, when asked, Sanchez confirmed the officers' suspicion. The officers, however, handcuffed Sanchez before they asked him about his immigration status. Judge Mickle held that the officers, in handcuffing Sanchez, effectively arrested him without probable cause. Judge Mickle went on to find that the discovery of the counterfeit card was the product of the illegal arrest.

**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 2006 term that are relevant to our practice and granted since our last newsletter:

**ABDUL-KABIR v. QUARTERMAN**, No. 05-11284 (reviewing 418 F. 3d 494 (5<sup>th</sup> Cir)., & **BREWER v. QUARTERMAN**, No. 05-11287 (reviewing 442 F. 3d 273 (5<sup>th</sup> Cir.) (U.S. cert. granted and cases consolidated 10/13/06)

#### **Capital sentencing**

**QUESTIONS PRESENTED:** 1. Do the former Texas "special issue" capital sentencing jury instructions — which permit jurors to register only a "yes" or "no" answer to two questions, inquiring whether the defendant killed "deliberately" and probably would constitute a "continuing threat to society" — permit constitutionally adequate consideration of mitigating evidence about a defendant's mental impairment and childhood mistreatment and deprivation, in light of this Court's emphatic statement in *Smith v. Texas*, 543 U.S. 37, 48 (2004), that those same two questions "had little, if anything, to do with" Smith's evidence of mental impairment and childhood mistreatment)? 2. Do this Court's

recent opinions in *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*") and *Smith*, both of which require instructions that permit jurors to give "full consideration and full effect" to a defendant's mitigating evidence in choosing the appropriate sentence, preclude the Fifth Circuit from adhering to its prior decisions — antedating *Penry II* and *Smith* — that reject *Penry* error whenever the former special issues might have afforded some indirect consideration of the defendant's mitigating evidence? 3. Has the Fifth Circuit, in insisting that a defendant show as a predicate to relief under *Penry* that he suffers from a mental disorder that is severe, permanent or untreatable, simply resurrected the threshold test for "constitutional relevance" that this Court emphatically rejected in *Tennard v. Dretke*, 542 U.S. 274 (2004)? 4. Where the prosecution, as it did here, repeatedly implores jurors to "follow the law" and "do their duty" by answering the former Texas special issues on their own terms and abjuring any attempt to use their answers to effect an appropriate sentence, is it reasonably likely that jurors applied their instructions in a way that prevented them from fully considering and giving effect to the defendant's mitigating evidence?

**SCHIRO v. LANDRIGAN**, No. 05-1575 (U.S. Cert. granted Sept. 26, 2006) (reviewing 441 F. 3d 638 (9<sup>th</sup> Cir.))

#### **Capital habeas, mitigating evidence, ineffective assistance**

**QUESTIONS PRESENTED:** Respondent Jeffrey Landrigan actively thwarted his attorney's efforts to develop and present mitigation evidence in his capital sentencing proceeding. Landrigan told the trial judge that he did not want his attorney to present any mitigation evidence, including proposed

testimony from witnesses whom his attorney had subpoenaed to testify. On post-conviction review, the state court rejected as frivolous an ineffective assistance of counsel claim in which Landrigan asserted that if counsel had raised the issue of Landrigan's alleged genetic predisposition to violence, he would have cooperated in presenting that type of mitigating evidence. 1. In light of the highly deferential standard of review required in this case pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), did the Ninth Circuit err by holding that the state court unreasonably determined the facts when it found that Landrigan "instructed his attorney not to present any mitigating evidence at the sentencing hearing"? 2. Did the Ninth Circuit err by finding that the state court's analysis of Landrigan's ineffective assistance of counsel claim was objectively unreasonable under *Strickland v. Washington*, 466 U.S. 668 (1984), notwithstanding the absence of any contrary authority from this Court in cases in which (a) the defendant waives presentation of mitigation and impedes counsel's attempts to do so, or (b) the evidence the defendant subsequently claims should have been presented is not mitigating?

**GONZALES, ATTY. GEN. v. DUENAS-ALVAREZ**, No. 05-1629 (Cert. granted Sept. 26, 2006) (reviewing 176 Fed. Appx. 820 (9<sup>th</sup> Cir.))

**Qualifying conviction for removal**

**QUESTION PRESENTED:** Whether a "theft offense," which is an "aggravated felony" under the Immigration and Nationality Act, 8 U.S.C. 1101 (a)(43)(G), includes aiding and abetting.

**Selected Eleventh Circuit Case  
Summaries**

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

**U.S. v. REVOLORIO-RAMO**, 2006 WL 3026542 (Oct. 26, 2006)

**Destruction of potentially exculpatory evidence**

A U.S. Navy frigate intercepted a Guatemalan fishing boat, boarded her, and recovered cocaine that was being thrown overboard. The boat had serious problems, and the Navy determined it was no longer a seaworthy vessel. The Navy video-taped the vessel and contents (the tape turned out poorly) and then destroyed the boat. Defendants were accused of conspiracy to possess cocaine with intent to distribute. Their defense was that the vessel was a legitimate fishing vessel, properly equipped to fish, and they did not discover the drug nature of the trip until they were at sea when it was met by go-fast boat containing bales of cocaine. They claimed a due process violation as a result of the destruction of the vessel with her potentially exculpatory evidence. The district court denied the motion to dismiss, and the Eleventh Circuit affirmed (Granade, with Tjoflat & Hill), reasoning that the defendants were not prejudiced simply because they could not establish, to bolster their argument, the quantity and quality of commercial fishing equipment and supplies aboard. The defendants were not prevented from making any arguments; they were able to testify, present evidence of the boat's contents, and cross-examine the officers; and no bad faith was involved in production of the poor videotape.

**SWEET v. SECRETARY, DOC**, 2006 WL 3000958 (Oct. 23, 2006)

**Capital habeas; statute of limitations;**

**“properly filed”**

Sweet’s Florida conviction and sentence were affirmed on direct appeal, and state post-conviction relief was denied in 2002. On May 8, 2003, Sweet filed a second state motion for post-conviction relief under *Ring*, and that too was denied as both untimely and on the merits, with the denial affirmed by opinion on December 20, 2004. Sweet filed the instant petition on January 18, 2005. The Court affirmed the district court conclusion that the petition was barred by the one-year statute of limitations found in 28 U.S.C. § 2244(d), holding that his one-year period to file a federal habeas petition had expired on June 14, 2003, and his state *Ring* motion did not toll that period because it was not “properly filed” in the state court.

**U.S. v. WEISS**, 2006 WL 2959446 (Oct. 18, 2006)

**Forfeiture; standing**

The Court dismissed for lack of jurisdiction an appeal of the district court's ruling that a third-party mortgagor of property, who was knowingly involved as a nominee to aid the defendant's money laundering fraud, lacked standing under 18 U.S.C. § 1963 to file a claim to defeat the government's forfeiture of real property for restitution of a criminal defendant.

**OSBORNE v. TERRY**, 2006 WL 2938696 (Oct. 16, 2006)

**Habeas; ineffective assistance; caseload conflict; counsel's racial animus**

The Court affirmed the conviction and capital sentence, rejecting all three arguments that trial counsel was ineffective in both trial and penalty phases. The alleged ineffectiveness due to a conflict arising from excessive caseload was procedurally defaulted, but the court footnoted the defendant produced no

evidence but "vague statistics." Defendant presented testimony by another client of defense counsel that he had directed a racial comment toward defendant in the context of defendant deserving the death penalty and had failed to convey a plea offer to him due to this racial animus; however, the Court found this claim procedurally barred.

**GROSSMAN v. McDONOUGH**, 2006 WL 2940713 (Oct. 16, 2006)

**Habeas; severance; confrontation; Crawford; codefendant's confession; Brady; ineffective assistance at penalty phase**

The Court affirmed the denial of relief. First, defendant claimed the admission of his codefendant's confession which implicated both of them, in their joint trial and after denial of numerous motions to sever, violated the Sixth Amendment because his codefendant did not testify and thereby present himself for cross-examination. The Court agreed with the Florida Supreme Court holding (pre-*Crawford*) that this was error, but that it was harmless under the *Brecht* standard, and further it was not an unreasonable application of federal law. *Crawford* is not retroactive, and AEDPA compelled consideration of pre-*Crawford* law. Thus, *Crawford* was irrelevant. The rejection of the *Brady* claims were fact-specific; and the penalty phase representation was not deficient.

**U.S. v. MATTHEWS**, 2006 WL 2884040 (Oct. 12, 2006)

**Sentencing; ACCA; burglary**

The Court held that a prior Florida conviction for burglary of the *curtilage* of a building is a violent felony for purposes of sentencing under the Armed Career Criminal Act, because even if not convictions for "generic

burglary," they were offenses that "otherwise involves conduct that presents a serious potential risk of physical injury to another." Defendant argued that, under the Florida statute, the prior third-degree burglary convictions were for burglary of a structure *or the curtilage thereof*, and therefore they were not convictions for generic burglary. The convictions did not specify whether the defendant had actually entered the "roofed area of a structure" or just the curtilage, but the Court concluded that either scenario was sufficient.

**U.S. v. BRADBERRY**, 2006 WL 2873628 (Oct. 11, 2006)

**Evidence; FRE 403; gangs; sentencing; obstruction; 3C1.1; suborning perjury**

The Court rejected both arguments and affirmed defendant's sentence. First, the Court concluded that the district court did not abuse its discretion in admitting evidence of defendant's gang membership to help explain his presence at the crime scene, because the "close question" whether its potential for prejudice outweighed its probative value placed it squarely within the district court's discretion. Second, the Court held that a defendant can be enhanced for obstruction of justice, under U.S.S.G. § 3C1.1, for suborning perjury, if he or she calls a witness, *knowing* that the witness will testify falsely; it rejected the argument that a defendant must do more, e.g., *encourage* the witness to testify falsely. The Court restricted its holding to the facts of this case, noting that the defense witness had given the same false testimony at a pretrial hearing, that defendant was present during the event at issue so had first-hand knowledge it was false, and then chose to call the witness at trial.

**U.S. v. ECKHARDT**, 2006 WL 2820908 (Oct. 4, 2006)

The Court upheld convictions for violating the Communications Decency Act (47 U.S.C. § 223, *et seq.*) - for making harassing and obscene phone calls. The Court held the statute was not vague and overbroad. The trial court had properly denied Eckhardt's judgment of acquittal motion because the words he used in the phone calls at issue were obscene under the standard of *Miller v. California*, 413 U.S. 15 (1973). The Court rejected, as well, (1) Eckhardt's challenges to Rule 404(b) evidence of calls made years earlier; (2) his claim of prosecutorial misconduct based on the prosecutor's closing arguments; (3) his challenge to the jury instructions; and (4) his objection to a sentencing guidelines upward adjustment based on the number of calls.

**U.S. v. MACHADO**, 2006 WL 2796474 (Oct. 2, 2006)

**Forfeiture; appellate jurisdiction; Rule 41; return of property; All Writs Act**

In this much-litigated case, the Court held it was without jurisdiction under Fed. R. App. P. 4 to hear the appeal (challenging the final order of forfeiture of \$12 million pursuant to a plea agreement), because filing a timely notice of appeal was "mandatory and jurisdictional" and, even with excusable neglect (which was not present here), the latest a defendant may wait before appealing a final order is 40 days after entry. Here, defendant never filed a notice of appeal from the final order of forfeiture entered July 1998, but instead later filed a motion for return of property under Rule 41(e) in 2004. Although the Court was without jurisdiction to review whether the district court had jurisdiction to enter the final order of forfeiture, it had jurisdiction to review the denial of his Rule 41(g) motion for return of property. However, it held that the motion

was properly denied, because the exercise of equitable jurisdiction in defendant's favor would have been inequitable, by returning to a criminal the fruits of his crimes and giving him an illicit multi-million dollar windfall. Judge Carnes: "A legal claim is not like a fine wine that gets better with age. It is more like milk, which spoils after its expiration date." Further, the district court did not abuse its discretion in refusing to utilize the All Writs Act, 28 U.S.C. § 1651(a), because this case did not present "extraordinary circumstances."

**PUGH v. SMITH**, 2006 WL 2788639 (Sept. 29, 2006)

**Habeas; timeliness; finality of GA conviction**

The Court affirmed denial of the federal habeas petition as untimely, under 28 U.S.C. § 2244(d)(1)(A), because the petitioner had 10 days after the Georgia intermediate appeals court affirmed his conviction to appeal to the state supreme court; he did not have the 90 days within which to file a petition for cert to the U. S. Supreme Court, because the cert petition required that he first appeal to the state supreme court, which he failed to do. Where a petitioner does not file a petition for cert, his conviction becomes final when his time for filing it expires. In the absence of a clear statutory or constitutional bar to higher state court review, the Supreme Court requires petitioners to seek review in the state's highest court before filing a petition for certiorari. The petitioner here was entitled to seek review in the state supreme court, but failed to; therefore, his conviction became final when he failed to seek review by the state supreme court in the 10 days allowed.

**U.S. v. DAY**, 2006 WL 2739348 (Sept. 27, 2006)

**Armed Career Criminal; prior conviction**

The Court held that the district court should not have relied on a prior Florida third-degree burglary conviction as a basis for sentencing the defendant as an armed career criminal, and vacated the sentence. Three prior "violent felonies" qualify a defendant for sentencing as an armed career criminal under 18 U.S.C. § 924(e)(1). One of Day's prior convictions arose out of a Florida state case where he was charged with second-degree burglary, but pled guilty only to a lesser offense, third-degree burglary, which could not have involved a dwelling or qualified as a violent felony. The guilty plea to third-degree burglary contained insufficient information to determine whether Day was convicted of burglarizing a structure or a conveyance. The district court relied on the charging document, which charged a second-degree felony.

Reversing, the Court recognized that charging documents are among the materials a court can ordinarily look at to determine whether a prior offense is the type of burglary that qualifies as a violent felony. Here, however, reliance on the charging document was improper, because the defendant pled guilty to a different offense than the one with which he was charged.

**DAVIS v. TERRY**, 2006 WL 2729606 (Sept. 26, 2006)

**Capital habeas; newly discovered evidence; fair trial; actual innocence**

The Court rejected both claims. The defendant could not complain that the proper test for a procedural claim of actual innocence was not applied, or was applied improperly, when in fact the district court had given substantive consideration to the claim. Second, the district court did not err in its conclusion that defendant's constitutional claims of unfair trial must be rejected as a

matter of law, because (1) there was no allegation the state *knew* the testimony was false when presented; (2) there was no *Brady* violation because the defense knew of the impeachment evidence and declined an opportunity to recall the witness, because it had already sufficiently impeached her; and (3) counsel was not ineffective.

**U.S. v. AREVALO-SUAREZ**, 464 F.3d 1246 (Sept. 15, 2006)

**Fast-track sentencing disparity; 3553(a)**

On a government sentencing appeal, the Court (Marcus, with Wilson & Cox) reversed the district court's grant of a four-level sentence reduction based on the sentencing disparity resulting from the unavailability of a fast-track sentencing departure in the Southern District of Georgia. The fast-track program makes defendants who plead guilty early eligible for a sentence reduction, but only in districts designated by the Attorney General. Citing *Anaya-Castro*, 455 F. 3d 1249 (11th Cir. 2006), which held that a district court was not required to depart based on the disparity caused by the fast-track program, and citing case law in other circuits, the Court held that the fast-track program disparity was not "unwarranted" because it was adopted pursuant to Congressional authorization. Hence, the district court erred in relying on the disparity as a basis for its sentence reduction under 18 U.S.C. § 3553(a).

**U.S. v. OWENS**, 464 F.3d 1252 (Sept. 15, 2006)

**Unreasonableness in sentencing**

The Court (Dubina, with Tjoflat & Marcus) rejected an argument that a sentence was unreasonable because the district court failed to consider the sentences given to other defendants in the case. The Court noted that the district court had stated that it thought the sentence was reasonable, and that it had

consulted the 18 U.S.C. § 3553(a) factors. The district court acknowledged that Owens' sentence was longer than some others arising out of the same fraudulent scheme, but specifically found that other § 3553(a) factors outweighed this problem. The Court found the sentence reasonable, noting that Owens' cooperation, while "admirable," did not "undo the harm he had caused."

**HILL v. McDONOUGH**, 462 F.3d 1313 (Aug. 29, 2006)

**Capital habeas; 1983; successive habeas; lethal injection; cruel and unusual punishment**

On remand from the Supreme Court, the Court tersely remanded to the district court (Judge Mickle) to consider "the equities and the merits" of defendant's § 1983 claim - initially denied on the basis it was substantively a successive habeas - that execution by lethal injection is cruel and unusual punishment because the initial drug administered does not render the inmate unconscious or unable to feel the pain caused by the subsequent drugs administered.

**HILL v. MCDONOUGH**, 464 F.3d 1256 (Sept. 15, 2006)

Despite Hill's earlier success, the district court dismissed Hill's complaint, and the Court (per curiam with Tjoflat, Hull, Pryor) denied what it recharacterized as his request for an order temporarily enjoining the State from carrying out his execution until his appeal in this case is decided. "Were we to grant a preliminary injunction in order to allow time to hear Hill's appeal, we would be doing so to protect our appellate jurisdiction from the impending act of the State of Florida to execute Hill. We find, however, that the equities do not support Hill's request. Simply put, Hill was the architect of the very

trap from which he now seeks relief. . . . In light of Hill's actions in this case, which can only be described as dilatory, we join our sister circuits in declining to allow further litigation of a § 1983 case filed essentially on the eve of execution."

**U.S. v. WILKS**, 464 F.3d 1240 (Sept. 13, 2006)

**Sentencing; 4B1.1; youthful offender; related priors; intervening arrest; reasonableness**

The Court rejected the defendant's argument that, following *Roper v. Simmons*, 543 U.S. 551 (2005) (holding Eighth Amendment prohibits execution of individuals who committed capital murders under age 18), a district court must not count youthful offender convictions in career offender calculations under U.S.S.G. § 4B1.1 or 18 U.S.C. § 924(e). Because *Pinion*, 4 F.3d 941 (11th Cir. 1993), and *Spears*, 443 F.3d 1358 (11th Cir. 2006), had not been overruled by *Roper*, as it did not deal even tangentially with sentence enhancement, that precedent precluded relief. The Court also rejected his argument that prior convictions sentenced on the same day were "related" for criminal history purposes, as they were based on offenses committed on separate dates and separated by intervening arrests. *Delvecchio*, 920 F.2d 810 (11th Cir. 1991), did not hold otherwise, because the defendant here was not sentenced under Rule 20 but under state law, and it involved the 1990 sentencing guidelines with a different version of "related cases." Finally, the defendant's argument that his below-guidelines sentence was unreasonable was, predictably, unsuccessful.

**U.S. v. DUDLEY**, 463 F.3d 1221 (Sept. 8, 2006)

**Sentencing; 2A6.1(b)(4); threatening letter;**

**downward departure; jurisdiction**

The Court affirmed a 60-month sentence imposed on a state inmate convicted under 18 U.S.C. § 876(c) for sending a threatening letter to a Georgia state judge. The Court rejected claims that the district court erred when it enhanced his sentence pursuant to U.S.S.G. § 2A6.1(b)(4) for substantially disrupting public or governmental functions and that the district court erred when it denied his request for a downward departure based on his HIV-positive status.

The substantial disruption enhancement was affirmed because "the disorder and turmoil caused by Dudley's letter was, in the terms of the dictionary definition, 'of ample and considerable amount.'" The judge and staff were exposed to the powder, and the courthouse was evacuated. The Court also held that the enhancement did not constitute double counting in that "the harm resulting from the victim's status as a judge . . . differs from the harm resulting from the substantial disruption to government functions." The Court further held that it was not plain error for the district court to rely on hearsay at sentencing. Finally, the Court held that it was plain error for the district court to sentence Mr. Dudley to the statutory maximum based on facts that were neither charged in the indictment nor proven to a jury beyond a reasonable doubt. As to the denial of a downward departure, the Court held that it lacked jurisdiction to review the sentencing court's decision.

**U.S. v. PHAM**, 463 F.3d 1239 (Sept. 11, 2006)

**Sentencing; drug quantity; plea agreement; 1B1.8; coconspirator's firearm; 2D1.1**

The Court rejected both defense arguments. On an issue of first impression, the Court

held that a district court must make factual findings on a claim under U.S.S.G. § 1B1.8, which prohibits a court from relying on evidence at sentencing that was provided to the government as a means of cooperation under a plea agreement. The Court, reviewing for clear error, rejected defendant's argument that the drug quantity was based on information obtained either from his debriefings, or from a codefendant identified solely from that debriefing. The defendant specifically argued that any corroboration of his debriefing statements must have been before the agreement's entry and that the government must prove its evidence was derived independently. (In concluding that the district court "obviously" found the agent's testimony of independent info from the codefendant credible, it did not mention the fact that the government had later filed a notice that the agent had falsely/incorrectly testified as to another fact.) Second, the Court affirmed the firearm enhancement under § 2D1.1(b)(1), where both the defendant and coconspirator were involved at the time when the coconspirator expressed an intent to use a firearm, found in a safe with marijuana, to settle disputes related to the conspiracy.

**U.S. v. STALLINGS**, 463 F.3d 1218 (Sept. 7, 2006)

**Sentencing; firearm enhancement; possession in drug case; 2D1.1(b)(1)**

Johnson was a co-defendant in a conspiracy involving possession with intent to distribute cocaine hydrochloride and heroin. When police searched his home, they found three pistols. Johnson shared that home with at least three other adults; the government introduced no evidence that possession of the pistols was somehow unlawful. Additionally, the police found no evidence of drug paraphernalia in Johnson's home. Johnson argued that the

district court erred in enhancing his sentence for possession of a firearm under U.S.S.G. § 2D1.1(b)(1), and the Court agreed (Cudahay, with Anderson & Barkett), reversing his sentence. There was no evidence defendant used or carried a firearm during any of the drug transactions or other conduct associated with drug-trafficking activities. The only evidence was that the police found three handguns in Johnson's home—where no one suggested that any activities related to the conspiracy ever took place, but the government did not address whether the guns belonged to him or the other adult residents. "Although '[e]xperience on the trial and appellate benches has taught that substantial dealers in narcotics keep firearms on their premises as tools of the trade,' [] the mere fact that a drug offender possesses a firearm does not necessarily give rise to the firearms enhancement. The government must show some nexus beyond mere possession between the firearms and the drug crime. . . . Applying the firearms enhancement on these facts is therefore clearly erroneous."

**U.S. v. BONILLA**, 463 F.3d 1176 (Sept. 5, 2006)

**Sentencing; reasonableness**

Bonilla got a *Booker* remand, after which the district court re-imposed his 108-month sentence (bottom of the guidelines) for possessing with intent to distribute five kilograms or more of cocaine while on board a vessel subject to the jurisdiction of the United States. The Court affirmed (Marcus, with Anderson and Birch), finding that § 3553(a) had been complied with, the sentence was reasonable, and the district court's statement of reasons under 18 U.S.C. § 3553(c)(1) was adequate. "The reasonableness review is 'deferential' and focuses on whether the sentence imposed

fails to achieve the purposes of sentencing as stated in § 3553(a). *United States v. Talley*, 431 F.3d 784, 788 (11<sup>th</sup> Cir. 2005). Moreover, we recognize that a range of reasonable sentences exists from which the district court may choose. *Id.* “[T]he party who challenges the sentence bears the burden of establishing that the sentence is unreasonable in the light of both [the] record and the factors in section 3553(a).” *Id.*”

**U.S. v. GUPTA, ET AL.**, 463 F.3d 1182 (Sept. 5, 2006)

**Sentencing; extensive scheme; 3B1.1(a); loss; 2F1.1(b)(1)**

Gupta, a private health care consultant, and several corporate defendants operating as home health care agencies, were convicted for conspiracy to submit false claims to the United States, and Gupta was also convicted of mail fraud. The district court sentenced Gupta to three years’ probation on each conviction to run concurrently and fined him \$10,000. It sentenced several corporate defendants to three years’ probation; it also fined two of them but not the defendants no longer in business. The sentences also resulted in all defendants’ exclusion from Medicare programs for a period of five years.

The Court (Siler, with Anderson & Fay) affirmed all convictions, but granted the government’s cross-appeal to remand for resentencing “because the court clearly erred in its application of guidelines.” The government had objected to the district court’s finding of no loss and lack of enhancement under U.S.S.G. § 2F1.1(b)(1), contending that the loss was at least \$3.4 million; the Court agreed the district court’s finding of no loss was not a reasonable estimate. “The amount the Government paid in response to the false claims is an appropriate measure of damages.” The government also had objected to the

district court’s rejection of a four-level leader enhancement under § 3B1.1(a) for Gupta after finding that the scheme was not otherwise extensive; the Court found the scheme extensive because, among other things, it billed millions of dollars for consulting.

**ANDERSON v. SECY., DOC.**, 462 F.3d 1319 (Aug. 31, 2006)

**Appeals; COA**

The Court denied a Certificate of Appealability, on five grounds, in this capital habeas because defendant failed to make a substantial showing of denial of a constitutional right. The Court briefly discussed the standard for granting a COA. Otherwise, the opinion focuses on defendant’s failure to make a sufficient showing to even get an evidentiary hearing below, and the lack of clearly established law supporting two claims (the materiality of perjured testimony before a grand jury rather than at trial; the lack of prejudice from a single brief glimpse of defendant in prison clothes in videotape seen by trial jury).

**CRAMER v. SECY., DOC.**, 461 F.3d 1380 (Aug. 28, 2006)

**Habeas; timeliness; tolling; statute of limitations; 2254**

The Court agreed with the pro se defendant and held that the time during which the state habeas petitioner *could have* appealed the denial of his state 3.800 motion, even though he did not appeal, tolled the limitations period for filing his federal habeas under 28 U.S.C. § 2254.

**U.S. v. SOREIDE**, 461 F.3d 1351 (Aug. 24, 2006)

**Forfeiture**

The Court affirmed the grant of summary

judgment to the United States against Lynn Soreide in an ancillary action following a preliminary order of criminal forfeiture, under 18 U.S.C. § 982(a)(1) and 21 U.S.C. § 853, of her former husband's interest in certain property after he was convicted of various federal crimes in which she was not implicated. All of the subject properties were purchased in her name or the name of a company of which she was president, and all were purchased with the proceeds of her ex's fraudulent business, or loans secured by mortgages on properties that were purchased with those proceeds. The Court rejected her claims (1) that her interests were superior to those of her husband, concluding her claim was made too late; (2) that she was a bona fide purchaser for value, concluding she did not qualify as a bona fide purchaser of his interests; and (3) that her due process rights were violated with respect to a vacant lot forfeiture, concluding that she did have notice and presented arguments in the district court.

**U.S. v. O'KEEFE**, 461 F.3d 1338 (Aug. 22, 2006)

**Fifth Amendment; post-arrest silence; *Doyle v. Ohio*; prosecutorial misconduct**

The Court affirmed child pornography convictions, holding that the government did not improperly use his post-arrest silence for impeachment purposes in violation of his Fifth Amendment right to due process under *Doyle v. Ohio* (1976), and/or engage in prosecutorial misconduct. In his cross-examination, the government elicited testimony, over objection, that he had not reported his alleged anti-child pornography activities to law enforcement. The Court found no evidence he was ever arrested or given his *Miranda* warnings, the situation that implicates *Doyle*; he failed to properly raise a *Doyle* objection; and post-arrest silence can be

used by the prosecutor to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest.

**U.S. v. POPE**, 461 F.3d 1331 (Aug. 22, 2006)

**100:1 crack:powder ratio; Booker; separation of powers**

The Court (Marcus, with Carnes & Pryor) affirmed a sentence of 262-months' imprisonment imposed after a 2-count jury trial for possession with intent to distribute 50 grams or more of crack and 5 grams or more of crack. The Court rejected his claim that judicial determination of drug quantity in excess of 50 grams, and the resulting mandatory 100:1 disparity, violated *Booker*. The Court also rejected his claim that mandatory application of the ratio violates separation of powers doctrine by encroaching on the judiciary's sentencing role and vesting the prosecutor with the power to punish.

**GRAYSON v. KING**, 460 F.3d 1328 (Aug. 18, 2006)

**Evidence; exculpatory; DNA; § 1983**

Grayson, an Alabama prisoner sentenced to death, filed a 42 U.S.C. § 1983 action seeking post-habeas access to biological evidence presented at his 1982 capital murder trial for a 1980 murder so that he could subject the evidence to DNA testing. The Court (Hull, with Anderson & Birch) agreed in theory but not in application here: "Our circuit has held that claims seeking post-conviction access to biological evidence for DNA testing purposes may be brought as a § 1983 action. *Bradley v. Pryor*, 305 F.3d 1287, 1290 (11th Cir. 2002). . . . Our circuit, however, has not addressed the merits of such claims. Accordingly, this appeal now presents the issue of whether a defendant has

a federal constitutional right to post-conviction access to biological evidence for DNA testing.” Grayson argued the denial was a due process violation, but the Court disagreed based on multiple and testimonial confessions, his failure to argue that he was actually innocent, and the fact that the DNA testing he sought would not prove him actually innocent. “We simply conclude that under the particular circumstances of this case, Grayson cannot show [a constitutional] entitlement. We decline Grayson’s invitation to create under his various theories a new, broad constitutional right of post-conviction access of all convicts to the evidence used to convict them.”

**HALLFORD v. CULLIVER, WARDEN**, 459 F.3d 1193 (Aug. 11, 2006)

**Plea agreement; ineffectiveness; *Brady*; *Strickland***

State repeatedly failed to disclose a plea agreement it had with defendant’s daughter, who was key witness in trial and testified she had incestuous relationship with him before he killed her boyfriend. The Court found this *Brady* violation non-prejudicial. Counsel was not ineffective by opening the door for presentation of the incest evidence, by failing to request a limiting instruction, or by failing to present certain mitigation.

**U.S. v. SMITH**, 459 F.3d 1276 (Aug. 11, 2006) (on remand)

**Commerce clause; plain error; child pornography**

In its first panel decision, *Smith*, 402 F.3d 1303 (11<sup>th</sup> Cir. 2005), the Court held under the commerce clause that failure to find 18 U.S.C. §§ 2251(a), 2252A(a)(5)(B) unconstitutional as applied to this case amounted to plain error. *Smith* was based on the panel decision in *Maxwell I*. But the Court subsequently

reconsidered, based on *Gonzalez v. Raich*, 545 U.S. 1 (2005), and affirmed a conviction in *Maxwell II*, 446 F.3d 1210 (11<sup>th</sup> Cir. 2006).

Here, following *Maxwell II*, the Court reversed its panel decision and affirmed the conviction. Judge Tjoflat special concurrence explained that appellate courts should only rarely notice plain evidentiary errors in criminal cases; although he has “no illusions of infallibility with respect to the legal profession,” the distinction between counsel’s failure and strategy decisions should be sorted out by district courts via claims of ineffective assistance of counsel.

**VALLE v. SECRETARY, DOC**, 459 F.3d 1206 (Aug. 11, 2006)

**Capital habeas; *Strickland*; *Batson*; *Castineda***

The Court affirmed denial of a state capital habeas petition, concluding that Valle was not denied the effective assistance of counsel at resentencing due to counsels’ presentation of model prisoner evidence; (2) no *Batson* violation; (3) no constitutional error in the trial court’s denial of motions to suppress incriminating statements; and (4) no due process and equal protection violation based on the manner in which the grand and petit juries were selected.

**HENYARD v. McDONOUGH** 459 F.3d 1217 (Aug. 11, 2006)

**Capital habeas; AEDPA; change of venue; *Strickland*; mental age**

The Court affirmed denial of a state capital habeas petition by applying the AEDPA standards and holding that (1) the state trial court’s denial of petitioner’s motion to suppress statements did not violate his right against self-incrimination; (2) the trial court’s denial of his request for a change of venue

did not deny him a fair trial by an impartial jury; and (3) trial counsel's failure to present certain mitigating evidence during the penalty phase did not constitute ineffective assistance of counsel. Barkett wrote a separate concurrence to address Henyard's mental age of 13: "The mere fact of a defendant's chronological age should not qualify a defendant for death where the measures of capacity render him lacking in culpability. Although it may not be directly before us, at some juncture this issue must be addressed."

**U.S. v. HUNT**, 459 F.3d 1180 (Aug. 10, 2006)

**Post-Booker non-deferential treatment of guidelines, crack v. powder**

The Court rejected the defendant's argument that the district court gave too much weight to the guidelines (in crack v. powder cocaine issue) in violation of the remedial provisions of *Booker*. "We do not believe that any across-the-board prescription regarding the appropriate deference to give the Guidelines is in order. . . . There are many reasons a district court may choose to follow the Guidelines in a particular case . . . . There are, however, many instances where [sic] the Guidelines range will not yield a reasonable sentence. . . . If *Booker* is to mean anything, it must be that district courts are obligated to impose a reasonable sentence, regardless of the Guidelines range, so long as the Guidelines have been considered. \* \* \* So long as the district court considers the Guidelines, we do not believe it is appropriate to dictate a 'strength' of consideration applicable in every case." [Ed. note: This view was endorsed by Fed. Pub. Def. in 9<sup>th</sup> Cir. rehearing en banc in *U.S. v. Carty et al.*, Nos. 05-10200 & 05-30120, an excellent explication of appropriate post-*Booker* sentencing and review standards]

**U.S. v. CAMPA, et al.**, 459 F.3d 1121 (Aug. 9, 2006) (en banc)

**Venue; pretrial publicity; fair trial**

The Court reversed the panel grant of new trial and affirmed the district court's discretion in denying defendants' (charged with conspiring to act as unregistered Cuban intelligence agents and to commit murder) motions for change of venue, based on pretrial publicity, and for new trial; the Court remanded to the panel to decide other outstanding issues. The district court concluded the pretrial publicity was not sufficiently pervasive and inflammatory to raise a presumption of prejudice, and also found the defense expert's evidence insufficient. After thorough voir dire, the jury was empaneled without objection or renewal of change of venue motions; mid-trial motions were denied; and the court took extreme precautions to protect the jury deliberations. Post-trial motions were denied. Birch dissented, joined by Kravitch, arguing this "is one of those rare, exceptional cases that warrants a change of venue . . ." and disagreeing with the majority's failure to independently review the totality of the circumstances. He concluded that "the *trial evidence itself* created safety concerns for the jury which mandate venue considerations" (the evidence strongly suggested adverse economic consequences for jurors voting acquittal and violent prospects from a community possessing firearms and bombs) and argued that the standard of venue change needs revision in this high-tech age of instant communications and the plethora of media extant today.

**U.S. v. WOODARD**, 459 F.3d 1078 (Aug. 8, 2006)

**Conspiracy to defraud**

The Court rejected all arguments raised by a

City of Atlanta Police Dept. captain and his wife for conspiring to defraud the City and citizens of money and property, and his honest services, in a scheme to get unclaimed property. First, the motion for judgment of acquittal was properly denied, because deprivation of honest services can be an object of a conspiracy, and evidence (including the captain's exculpatory testimony) supported his guilt; the wife's guilt was sufficiency proven, because even though a private citizen owes no duty of honesty services to the City or its citizens, conspiracy to commit honest services mail fraud requires only one conspirator have such a duty: "private citizens, acting in conjunction with a public official, may be adjudged guilty of violating 18 U.S.C. § 1346 if the official collaborates with the citizen to use his public office."

**HIGHTOWER v. TERRY**, 459 F.3d 1067 (Aug. 8, 2006)

***Batson***

On remand from the Supreme Court for further consideration in light of *Miller-El*, the Court reinstated its earlier decision. It concluded that *Miller-El* did not control because it had reached the S. Ct. via different procedures than *Hightower*. That is, in *Miller-El*, the district court based its decision on an augmented record and evidentiary hearing, with the state's agreement (the S. Ct. noted that it expressed no opinion on whether a state *could* waive the limitation of 28 U.S.C. § 2254(d)(2) to the "evidence presented in the State court proceeding"); here the Court is limited to the evidentiary record developed in the state trial court, the parties' briefs to the state supreme court, and that court's opinion. Federal courts could not entertain the argument Hightower had failed to make in the Georgia Supreme Court - evidence tending to discredit the persuasiveness of the

prosecutor's stated reasons for striking black jurors - because he had not establish caused and prejudice for counsel's failure to present it. Judge Wilson's dissent argued this case presented an even more compelling argument than *Miller-El* that *Batson* was violated.

**SULLIVAN v. DELOACH**, 459 F.3d 1097 (Aug. 8, 2006)

**Habeas; Ineffective assistance**

The Court affirmed denial of capital habeas relief because the defendant had "so clearly" failed to prove prejudice that it did not even address the deficient performance prong regarding trial counsel's failure to call defendant's 5-year-old daughter, who had given conflicting statements but allegedly could support a self-defense claim, when numerous other witnesses present at the scene testified about defendant's stabbing of his estranged wife's new boyfriend.

**U.S. v. WADE**, 458 F.3d 1273 (Aug. 4, 2006)

**18 U.S.C. § 924(e); pre-charge conduct**

The Court vacated and remanded the defendant's 235-month sentence, for possession of a firearm by a convicted felony under 18 U.S.C. § 922(g) and 924(e), holding that a defendant cannot be denied acceptance of responsibility based on behavior **prior** to the federal charges "at least where that conduct occurred before he knew that federal charges were forthcoming"; here the defendant was arrested twice in state court, then later in federal court, for firearm possession, and the district court denied acceptance in spite of his timely plea based on the second state arrest.

**WILLIAMS v. ALLEN**, 458 F.3d 1233 (Aug. 2, 2006)

**Capital state habeas, ineffective assistance**

The district court denied habeas relief to

Alabama death row inmate Williams, who raised a series of ineffective assistance of counsel claims. The Court affirmed, holding (1) no *Strickland* prejudice where counsel allegedly failed to review a file before trial; (2) the state courts did not unreasonably apply the *Strickland* standard to Williams's claim of ineffective assistance for failing to investigate and present sufficient mitigation evidence at the sentencing phase; and (3) the state court correctly found that counsel did not fail to adequately investigate and present evidence to support Williams's reasonable doubt defense. Barkett specially concurred to note an issue that Williams had not, but perhaps should have, raised.

**U.S. v. IRIZARRY**, 458 F.3d 1208 (Aug. 1, 2006)

**Sentence variances do not need to be noticed under Fed. R. Crim. P. 32(h)**

Irizarry pleaded guilty to making a threatening interstate communication to his ex-wife. The district court issued a sentence six months longer than the advisory guidelines range because of the likelihood he would continue to threaten his wife. Irizarry argued that the district court violated Fed. R. Crim. P. 32(h) by not giving advance notice that it was considering a ground for departure not identified in the presentence report or a prehearing government submission. The district court concluded that Rule 32(h) was not applicable under the circumstances, and the Eleventh Circuit affirmed, because “we conclude that the above-guidelines sentence imposed by the district court in this case was a variance, not a guidelines departure. . . . After *Booker*, parties are inherently on notice that the sentencing guidelines range is advisory and that the district court must consider the factors expressly set out in section 3553(a) when selecting a reasonable sentence between

the statutory minimum and maximum.”

**U.S. v. TAYLOR**, 458 F.3d 1201 (July 28, 2006)

**Fourth Amendment curtilage**

Deputies responded to a 911 call to a rural location that included a house, barn, and pond. Taylor walked out from the barn to the house and told a deputy he had made the call because he and his girlfriend had gotten into an argument. According to Taylor, the girlfriend had become violent, so he had call 911 “to get her off of him,” at which point she left. He said “she could be a couple of different places.” With consent, deputies checked the house and barn. Deputy Robinson saw a camper trailer nearby, with footprints leading from the trailer to the pond, where he saw a pack. He found a knife nearby and shotgun shells inside the pack. Then, conducting a more thorough search, he found a shotgun lying in the pond in a foot of water. Taylor was convicted of being a felon in possession of a firearm under 18 U.S.C. §§ 922(g)(1) and 924(e). Prior to trial, the district court denied his motion to suppress the gun and his statements upon arrest to the law enforcement officers. The Circuit Court affirmed, holding that Taylor had no protected privacy interest in the pond area, and therefore no consent was required to search it.

**U.S. v. FAUST**, 456 F.3d 1342 (July 21, 2006)

**Acquitted conduct in sentencing, sufficiency, 404(b) notice**

The Court reaffirmed its post-*Booker* adherence to *Watts* by holding that the district court did not violate Faust's Sixth Amendment right to a jury trial by enhancing his sentence based on conduct for which he was acquitted. Barkett said she was bound

by circuit precedent but “I strongly believe this precedent is incorrect, and that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment.” The decision affirmed a conviction and 210-month sentence for possession with intent to distribute cocaine, finding the evidence was sufficient and there was no notice error prior to introduction of evidence under Federal Rule of Evidence 404(b).

**U.S. v. WILLIAMS**, 456 F.3d 1353 (July 21, 2006)

**Reasonableness of sentence, crack-power cocaine differential**

The Eleventh Circuit granted a Government appeal of a sentence, holding that “the district court erred in mitigating Williams’ sentence based on (1) its generalized disagreement with Congress’s policy of punishing crack cocaine offenders more severely than powder cocaine offenders through the 100-to-1 crack-to-powder drug quantity ratio, (2) its generalized disagreement with the Guidelines career offender enhancement, U.S.S.G. § 4B1.1, and (3) its belief that the Government manipulated Williams’ sentence by arranging to purchase crack cocaine instead of powder cocaine.” The Court found the “errors” were not harmless because Williams failed to meet his burden of showing that, considering the record as a whole, the errors did not have a substantial effect on the court’s choice of sentence. In reaching its conclusion, the Court expanded the reasonableness inquiry to include not just the result but also the factors the court considered in reaching the sentence. “[W]e agree that a sentence can be unreasonable, regardless of length, if the district court’s selection of the sentence was substantially affected by its consideration of

impermissible factors. This is so, because our reasonableness inquiry is not confined to reviewing whether there are facts and circumstances found in the record that would justify the length of the sentence imposed. [] The reasons given by the district court for its selection of a sentence are important to assessing reasonableness. [] A sentence based on an improper factor fails to achieve the purposes of § 3553(a) and may be unreasonable, regardless of length.” (Citations omitted.)

**U.S. v. HOUSTON**, 456 F.3d 1328 (July 19, 2006)

***Batson*, disparate impact theory in jury selection, *Booker***

Houston was convicted of armed robbery of a credit union and brandishing a firearm during the commission of a crime. The case went to trial with a jury consisting of seven whites and five blacks. In voir dire, the Government struck 6 peremptorily, 5 of whom were black, and in each case the reason given was the venire members’ respective statements that they had relatives convicted of crimes. Houston argued that that reason was “facially invalid due to its disparate impact on blacks,” and “when coupled with the fact that it was disparately applied to white and black venire members, reveals that the prosecutor acted out of purposeful intent to discriminate.” The Court rejected Houston’s preserved *Batson* claim to affirm. “[A] disparate impact theory cannot be used by itself to invalidate the prosecution’s stated reasons at step two of the *Batson* inquiry,” and deference was owed to the district court’s determination of no intentional discrimination. Also, “Houston never alerted the court to the existence of white venire members whom he now contends were similarly situated and whom

the prosecution did not strike despite their familial criminal histories. We find no error in the court’s failure to draw comparisons that no party asked it to draw.” However, the Court vacated the sentence because of a statutory *Booker* violation that the Government could not prove was harmless where the court imposed the statutory maximum term of 300 months’ imprisonment on Count I, and a consecutive sentence of 84 months’ imprisonment, the statutory minimum for Count II.

**U.S. v. GRIFFITH**, 455 F.3d 1339 (July 17, 2006)

**ACCA, “physical force” under § 922(g)(9), circuit split**

Griffith was convicted of possession of a firearm, 18 U.S.C. § 922(g)(9), the provision of the Armed Career Criminal Act (ACCA) that makes it a crime for anyone who has been convicted of a “misdemeanor crime of domestic violence” to possess a firearm. Griffith contends that his Georgia simple battery conviction does not qualify as a predicate offense for § 922(g)(9) purposes because its contact element does not require physical force. That was the sole basis of his motion to dismiss the indictment, which the district court denied. The Eleventh Circuit affirmed, acknowledging a circuit split and applying a categorical approach to review the elements of the Georgia statute to hold that it does qualify. “[U]nder the plain meaning rule, the “physical contact of an insulting or provoking nature” made illegal by the Georgia battery statute satisfies the “physical force” requirement of § 921(a)(33)(A)(ii), which is defined into § 921(g)(9).” Moreover, “a domestic relationship must exist as part of the facts giving rise to the prior offense, but it need not be an element of that offense.”

**OCCHICONE v. CROSBY**, 455 F.3d 1306 (July 14, 2006)

**Capital habeas, 28 U.S.C. § 2254, Giglio materiality**

Baker, a cellmate, claimed Occhicone had made an incriminating statement to him, and Baker made a deal to testify against Occhicone in exchange for the prosecution’s recommendation that he receive probation on a recent grand theft charge. Baker testified, however, that he had no such deal, when public records later revealed that he had. The issue in the state collateral proceeding, as well as the issue in this appeal, boiled down to whether the State’s failure to correct this untruthful testimony was material under *Giglio*. The Eleventh Circuit affirmed denial of the capital habeas petition, holding that it was not material under *Giglio*, whether or not the Florida Supreme Court used the correct standard to evaluate materiality, because “there is no reasonable likelihood that the State’s failure in this regard could have affected the verdict.”

**U.S. v. HAMAKER**, 455 F.3d 1316 (July 14, 2006)

**Bank fraud, apparent authority instruction, cross-appeal, loss calculation**

Dewey & Linda Hamaker, and Morgan City Construction, Inc. (“MCC”), were convicted of bank fraud and related offenses that arose out their fraudulent billing of Community Bank for hundreds of thousands of dollars worth of construction services MCC performed as personal services for Patterson, CEO of Community Bank. The Court affirmed the convictions, concluding that (1) the district court’s decision not to instruct on apparent authority, but rather to instruct regarding a good faith defense to allegations of fraud, was entirely correct; (2) Appellants

failed to show prejudice regarding documents that were withheld from them by the Government; (3) Appellants failed to establish any prejudice arising from the Government's omission to disclose that one of its witnesses was a government informant in an unrelated matter; (4) Government had no obligation to present a summary of expected testimony of FBI financial analyst; and (5) evidence was sufficient. As to the Government's sentencing cross-appeal, the Court reversed because the district court improperly relied only upon the amount of the jury's verdict on the forfeiture count as a limit when calculating the loss under U.S.S.G. § 2F1.1(b)(1)(M) and § 2F1.1(b)(7)(B).

**U.S. v. RONDA, et al.**, 455 F.3d 1273 (July 13, 2006)

**Conspiracy to obstruct justice**

The Court affirmed convictions of seven Miami police officers for fabricating evidence (planting guns) to make four shootings in which officers shot unarmed suspects appear justified, and for making false and misleading statements to investigators. (1) There was a sufficient federal nexus between their misleading conduct and the investigation they obstructed; the charge under 18 U.S.C. 1512(b)(3) requires proof the defendant knowingly and willfully engaged in misleading conduct toward another person, with intent to hinder, delay or prevent the communication of information to a federal official, about the commission or possible commission of a federal crime. The possible federal crime at issue was violation of the victims' federal rights. (2) Florida's fleeing felon statute did not authorize the shootings. (3) The evidence was sufficient; (4) No error in dismissal of three jurors during deliberations

**ZAKRZEWSKI v. McDONOUGH**, 455 F.3d 1254 (July 13, 2006)

**Habeas; ineffectiveness; closing argument; suppression**

The Court affirmed denial of relief in this capital habeas on both issues on which a COA were granted. Trial counsel was not ineffective for failing to object to closing argument by the prosecutor regarding defendant's beliefs against Christianity, because it was part of reasonable trial strategy; in response to defense evidence that defendant had become Christian post-offense, the prosecution introduced evidence of his negative views on Christianity, to which a defense objection had been overruled, so the defense had no basis to believe that objection to the closing argument would be sustained. Nor was trial counsel ineffective for failing to move to suppress evidence seized from the crime scene, because there was no meritorious basis for such a motion (it would have been futile, because the evidence was observed during emergency entry - exigent circumstances - and later seized pursuant to warrant; also defendant had abandoned the house and thus any reasonable expectation of privacy, and discovery of the dead bodies of his family members was inevitable) and there was no prejudice from the failure.

**SIEBERT v. ALLEN**, 455 F.3d 1269 (July 13, 2006)

**Habeas; procedural default; cause; personal notice**

The Court affirmed denial of habeas relief to this capital defendant. The district court had correctly determined that *Hurth v. Mitchem*, 400 F.3d 857 (11th Cir. 2005), was binding precedent, and thus the claims were procedurally defaulted because the state post-conviction petition had not been timely filed.

The secondary argument - that there was cause for the default because defendant did not receive *personal* notice that his state statute of limitations had begun to run) was meritless; only counsel was required to be notified, and nothing justified the lawyer's failure to comply with the state procedural rule.

**U.S. v. CASTRO**, 455 F.3d 1249 (July 12, 2006)

**Early disposition (“fast track”) program**

The Court found no statutory error under *Booker* or 18 U.S.C. § 3553(a)(6) (avoiding unwarranted disparity) in the district court's denial of defendant's motion to grant a four-level departure equal to that available in districts which have “fast-track” programs under U.S.S.G. § 5K3.1; this did not make the bottom-of-the-range sentence “unreasonable.” “Any disparity created by section 5K3.1 does not fall within the scope of section 3553(a)(6),” because Congress had approved it. Reviewing only for plain error, the Court rejected the secondary argument this was an equal protection violation.

**U.S. v. MARTIN**, 455 F.3d 1227 (July 11, 2006)

**U.S.S.G. § 5K1.1; downward departure; reasonableness; judicial reassignment**

This was the government's second appeal of Martin's sentence following his conviction in the HealthSouth prosecution, and a 5K1.1 substantial assistance reduction from the range of 108-135 months. The first appeal from a sentence of 60 months probation was vacated for lack of a sufficient record for review because the court had given no reasons other than 5K1.1 for the extent of its departure. On resentencing, the government's recommended 42-month sentence (a 9-level departure, or more than 60%), the court imposed a **7-day** sentence (a 23-level departure).

Not surprisingly, the Court vacated again. Despite the district court's extensive explanation for the sentence, the Court asked whether a 23-level departure and 7-day sentence “for this multi-billion-dollar securities fraud are reasonable. The answer is easy: they are not. . . . The “shockingly short” and “wildly disproportionate” 7-day sentence “wholly fails to serve the purposes of sentencing” under 3553(a), particularly deterrence for such lucrative white-collar fraud. In closing, the Court *sua sponte* directed reassignment to another judge for resentencing, citing reversals of the same judge's extraordinary downward departures in 3 other cases. Since this was the chief judge, it directed the most active senior judge to make the reassignment.

**U.S. v. NUNEZ**, 455 F.3d 1223 (July 11, 2006)

**Search; automobile; reasonable suspicion**

The Court reversed the district court's grant of suppression of evidence, finding that “reasonable suspicion” supported the police's stop of a vehicle found to contain marijuana. An officer was conducting surveillance of a residence believed to be a marijuana grow house and was told a search warrant had been obtained. The officer observed Nunez carry a black garbage bag from the residence to a vehicle. When it drove away, the officer stopped it and smelled cannabis, because the bag contained 7.4 pounds of marijuana. The Court held the officer had reasonable suspicion for the stop, noting he had reason to believe the bag contained marijuana or related contraband.

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