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CJA PANEL MEMBERS
Northern District of Florida

FEDERAL PUBLIC DEFENDER

NORTHERN DISTRICT OF FLORIDA

A Newsletter for Panel Attorneys

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WANTED: PANEL REPRESENTATIVES

Gil Schaffnit of Gainesville has been serving for some time as our de facto panel representative. Chief Judge Roger Vinson, though, has decided that the best way to ensure representation for our geographically dispersed district is for the appointment of four panel representatives, one from each district. The proposed Criminal Justice Act Plan, which has been submitted to the Eleventh Circuit for approval, provides for a member of each district, in conjunction with the Federal Public Defender, to play a role in recommending lawyers for membership in the panel. It seems likely, although not inevitable, that the four panel representatives appointed by Judge Vinson will, in addition to serving as panel representatives, also fulfill this new role. Beyond that the panel representatives serve to convey the concerns of the panel members to the judges, and will, hopefully, in conjunction with our office, help coordinate some form of continuing education to panel members. In the beginning of next year one of the panel representatives will represent our district at the annual national meeting of panel representatives.

Months ago, in this newsletter, we asked for volunteers for the position of panel representative. If you responded earlier, and are still interested, or if you have just now decided you would be interested in furthering the goal of providing high quality legal representation for those who can't afford it and

probably need it most, please call Randy Murrell at (850) 942-8818.

APPRENDI

The case of *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), continues to be a hot issue. That decision, of course, requires that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Locally, and apparently throughout the country, the Government has conceded that the requirement extends to drug prosecutions under 21 U.S.C. 841. The U.S. Attorney’s Office for the Northern District of Florida has, consequently, obtained a series of superceding indictments in which the indictment has been amended to allege that the quantity of drugs involved exceeds a particular threshold amount.

Several recent cases across the country have demonstrated the wisdom of the Government’s concessions: *United States v. Meshack*, 2000 WL 1218437 (5th Cir. August 28, 2000); *United States v. Nordby*, 2000 WL 1277211 (9th Cir. Sept. 11, 2000); and *United States v. Delgado*, 220 F.3d 926 (8th Cir. 2000).

Many questions, though, still remain unresolved. The list of offenses to which *Apprendi* applies is still being

compiled. There are also the hints in the *Apprendi* opinion that *McMillian v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411 (1986) (which held that factors used to justify mandatory minimum sentences need not be alleged or proven) and that *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219 (1998) (which held that prior convictions used to enhance the penalty need not be alleged or proven) were wrongly decided. (See *Apprendi* at 106 S.Ct. 2361 n. 13 and at 106 S.Ct. 2362). These are, of course, all issues that can be raised by challenges to the indictment, requests for appropriate jury instructions, and objections made at sentencing.

For those individuals who have already been sentenced, there are also many issues. As mentioned in the last newsletter there is the potential problem of harmless error or plain error review. [See this week's case of *U.S. v. Swatzie*, No. 00-10729 (11th Cir. Sept. 27, 2000)]. At the same time, though, *Apprendi* issues, particularly the failure to charge the requisite elements in the indictment, may, despite what appears to be the Eleventh Circuit's lack of enthusiasm for the claim, ultimately provide relief to some. It seems possible that may be the case even in the absence of objections at the trial level.

As with any issue, please call any of our lawyers if you have any questions or need assistance. In the Tallahassee office, both Randy Murrell and Jo Deyo have recently filed briefs addressing issues presented by *Apprendi*, and they are both eager to help. The phone number for the Tallahassee office is (850) 942-8818.

CHILDREN WITH PARENTS IN PRISON

According to a recently-released Bureau of Justice Statistics report, almost 1.5 million minor children, roughly two percent of the nation's 72 million children, had an imprisoned parent in 1999. This was an increase of more than 500,000 children since 1991. Fifty-eight percent of the children with imprisoned parents were younger than 10 years old. The average age was eight.

The report states that the number of minor children with an imprisoned father rose 58 percent from 1991 to 1999, while the number of children with an imprisoned mother increased 98 percent during the

same time period.

NORTHERN DISTRICT OF FLORIDA LEADS COUNTRY IN TRIALS

Statistics released by the United States Sentencing Commission show that of the 54,920 federal criminal cases that in 1999 were resolved by a plea or a trial, 5.4 percent went to trial. In the Eleventh Circuit 8.8 percent of the cases went to trial. In the Southern District of Florida 9.7 percent went to trial, while 7.8 percent went to trial in the Middle District. Here, in the Northern District of Florida, there were 59 trials, which represents 15.1 percent of the cases, the highest percentage in the country.

STATE SENTENCE TO RUN CONCURRENTLY?

It's a reoccurring problem. The federal judge sentences an individual to prison, and the individual is brought back to state court where the state judge imposes a state prison sentence to run concurrently. To the surprise of everyone the U.S. Marshals ignore the state judge's sentencing order, and simply lets the individual go on to state prison. If no one intervenes, the individual will complete the state sentence that was supposed to be running concurrently, and, only then will the Marshals retrieve the individual and deliver him to a federal prison. Once the individual arrives at the federal prison he will find out, too, that the Bureau of Prisons won't be giving him credit for the time he spent in state prison.

There are any number of reported decisions where the problem has surfaced. For a few examples see: *Colon-Morales*, 743 So.2d 161 (Fla. 1st DCA 1999); *Taylor v. State*, 710 So.2d 636 (Fla. 3rd DCA 1998); *Williams v. State*, 710 So.2d 85 (Fla. 5th DCA 1998); *Perkins v. State*, 696 So.2d 1343 (Fla. 2nd DCA 1997).

Contrary to what might be your first thought, it isn't a matter of an arrogant federal bureaucracy, unlawfully ignoring the order of a wise and good hearted state judge. Instead, it's a matter of comity. "Determination of priority of custody and service of sentence between state and federal sovereigns is a matter of comity to be resolved by the executive branches of the two sovereigns. Normally, the sovereign which first arrests an individual acquires

priority of jurisdiction for purposes of trial, sentencing, and incarceration.” *United States v. Warren*, 610 F.2d 680, 684 (9th Cir. 1980). See also: *In re Libereatore*, 574 F.2d 78, 89 (2nd Cir. 1978); *Ponzi v. Fessenden*, 258 U.S. 254, 259-261 (1922); *Shumate v. United States*, 893 F.Supp. 137, 139 (N.D. N.Y. 1995). As a member of, not the executive, but the judicial branch, the state judge who is trying to run the sentence concurrently doesn’t have any say in the matter. The Marshals and the Bureau of Prisons, then, in subjecting your client to such a grave injustice, are simply preserving that constitutionally recognized balance between state and federal government.

To avoid the problem, begin by asking the question: who made the initial arrest? If, as is usually the case, state law enforcement officers first arrested your client, and your client has remained in state custody, you’ll need to be creative, because, as in the example above, the Marshals aren’t going to pick up the individual until the state sentence is over. Should it be the unusual case, where federal officials initially arrested the individual, or should your client have had the good fortune to secure his release from state custody prior to the imposition of the federal sentence, the state judge’s concurrently imposed sentence should be given effect.

If the state authorities made the first arrest, your client was never able to secure his release from custody, and the federal sentence has already been imposed, there is the obvious solution of a plea in state court to time served. If that route isn’t available, there is the alternative of intervening early in the case, and trying to arrange for the state sentence to be imposed first. If you have the foresight to do so, the federal judge will at least have the option of successfully imposing a concurrent sentence. Unfortunately, even though the federal judge, in relatively rare circumstances, is sometimes required to impose a concurrent sentence [see: USSG §5G1.3(b)], the option, typically, isn’t very promising. That’s the case, primarily, because the judges in the Northern District have generally been reluctant to impose concurrent sentences for unrelated criminal convictions. Then, too, there are also a few situations where federal law prohibits the imposition of a concurrent sentence. [see USSG §5G1.3(a)].

What may be the best solution is found in an

exception to the general rule of the priority of arrest: “As a general rule, the first sovereign to arrest an offender has priority of jurisdiction over him for trial, sentencing and incarceration. (auth. omitted). This jurisdiction continues until the first sovereign relinquishes its priority by, for example, *bail release*, dismissal of the state charges, parole release, or expiration of the sentence.” *United States v. Smith*, 812 F.Supp. 368, 371 n.2 (E.D. N.Y. 1993) (emphasis added); see also *Strand v. Schmittroth*, 251 F.2d 590 (9th Cir. 1957).

Thus, if your client has already been sentenced in federal court, the first step, assuming the state prosecutor and the state judge are willing to agree, is to secure your clients release, presumably on his or her recognizance. Once that happens, of course, the federal authorities will retrieve your client and he or she will, for the moment, be held in whatever local facility is designated to hold federal prisoners. Next, the state attorney’s office will need to secure your client’s return via a petition for writ of habeas corpus ad prosequendum. Upon your client’s return to state court, the initial arrest will, under the rules of comity, no longer be given priority. The client can enter a plea, and the state judge can, therefore, successfully impose a sentence that will run concurrently to the federal sentence, all of which will be served in a federal prison.

Good luck. Call us if we can help.

SUCCESS IN “LY’N AND BUY’N” CASE

Just this week Bill Clark of our Tallahassee office won an acquittal in a case which in which the government had charged his client with making a false statement in connection with an attempted purchase of a firearm, 18 U.S.C. §922(a)(6). Bill’s defense to the charge of “ly’n and buy’n” was that his client couldn’t read well enough to understand the form in which the client had incorrectly denied having been convicted of a felony. Critical to the defense was expert testimony from a psychologist regarding the client’s poor reading ability.

DOWNWARD DEPARTURES

Cooper, Barry L. Hinkle, R. Atty: Mary Kane
Docket: 4:99cr37-RH
Charge: Attp Bank Robbery, Poss Firearm during

crime of violence, Poss Unregistered FA
 Range: 210 - 262 months
 Sentence: 168 months (Cts. 1 & 3), 120 months (Ct. 2)
 consecutive to Cts. 1 and 3. (Total 288 months)
 Date of Imposition of Sentence: 1/13/00
 Grounds: Criminal History Category over-
 represents defendant's prior criminal
 history.

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

ELEVENTH CIRCUIT **CASE SUMMARIES**

The following summaries are the same ones that are prepared daily, and that are available to you via email. If you're interested in receiving the summaries as the Supreme Court and the Eleventh Circuit issue their opinions, please call Margaret in our Tallahassee office, at (850) 942-8818.

U.S. v. SWATZIE, 2000 WL 1421337 (Sept. 27, 2000)

! Type and Quantity of Drugs - Plain Error

The 11th considered a claim under *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), that the district court erred in sentencing Swatzie (to LIFE) based on its finding, by a preponderance of the evidence, of the type and quantity of drugs. Since Swatzie did not object to the indictment or the jury instructions, and apparently conceded on appeal that plain error review applied, the 11th reviewed for plain error. The 11th assumed *arguendo* (but expressly declined to decide) that there was error and it was plain. However, the 11th noted that there was no serious dispute about the amount, the indictment cited the appropriate statutory subsection, and Swatzie had notice of what the government believed was the maximum sentence. Citing *Neder v. Illinois*, 119 S. Ct. 1827 (1999) and *Johnson v. United States*, 520 U.S. 461 (1997), the 11th rejected Swatzie's argument that prejudice should be presumed, and in light of overwhelming evidence about the amount and type, declined to notice any plain error.

U.S. v. WALKER, 2000 WL 1392758 (Sept. 26, 2000)

! Sentencing Under 21 USC 846 - Mandatory Life

The 11th held that the mandatory Life punishment of 21 U.S.C. § 841(b)(1)(A) applies to conspiracies

under § 846. Walker pled guilty to one count of conspiracy to distribute crack. The PSR attributed to him 2-1/2 kilograms of cocaine base and 300 grams of powder. At sentencing, he objected to the application of the mandatory Life provisions to 846, since 846 is not one of the sections listed in 841(b)(1)(A). Joining three other circuits, the 11th held that the mandatory Life penalty does apply to 846 conspiracies to commit 841 substantive offenses.

In a footnote, the 11th dismissed Walker's argument that *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000) applied to his case.

PEOPLES v. HALEY, 2000 WL 1339506 (Sept. 18, 2000)

! Habeas - Certificate of Appealability (COA)

Vacating the previous opinion dated Sept. 7, 2000, the 11th found that this appeal, filed after April 24, 1996, should be governed by AEDPA, following the recent Supreme Court case of *Slack v. McDaniel*, 120 S. Ct. 1595 (2000). Thus a COA rather than a CPC was necessary for the appeal to proceed. In this situation, the appellate court has discretion to either apply the COA standards itself or to remand to the district court. Here the 11th remanded for the district court to specify issues for a COA.

U.S. v. BERVALDI, 2000 WL 1299557 (Sept. 14, 2000)

! Suppression of statement and evidence; execution of arrest warrant; staleness

Reversing the grant of a motion to suppress, the 11th approved the forced entry and ensuing search of Bervaldi's home pursuant to an arrest warrant for a prior resident named Deridder. During the search law enforcement officers found marijuana in the home. Deridder had sold the home three months earlier, property and utility records confirmed the change in occupants, and the last evidence of Deridder's residence at the home was six months earlier. Nonetheless, the 11th held that officers had a reasonable belief that Deridder was in the home when they forcibly entered. The 11th also found a protective sweep of the entire home justified because a gun was found near the entry. Even though Bervaldi was detained 11 hours while officers obtained a search warrant, the 11th noted that no evidence was seized until the warrant was obtained.

U.S. v. DOMINGUEZ, 2000 WL 1288679 (Sept. 13, 2000)

! Joinder of offenses under Rule 8(a); Premature jury deliberations

Dominguez was charged with multiple counts of drug conspiracies, money laundering and mortgage fraud. Although nothing on the face of the indictment tied the mortgage fraud charges with the drug charges, the 11th found joinder proper because the government's proffer against severance and the trial evidence showed that the charged offenses were connected together or were parts of a common scheme. The 11th reached that conclusion with full awareness that the Court has repeatedly said that whether joinder is proper under Rule 8 is to be determined by examining the allegations in the indictment alone. The 11th limited the indictment only rule to situations where the evidence adduced during trial showed that joinder was improper even though under the allegations of the indictment alone joinder would have been proper.

Also in this case, one juror said that the jurors had been talking about the case, even before the government had rested. However, the juror did not state that the other jurors had reached a verdict. The juror assured the district court that she could wait until the conclusion of the case and after deliberations to reach a decision. In light of the broad discretion a trial court has in such matters, the 11th held that the district court's decision not to grant a mistrial was not clear error.

WYZKOWSKI v. DEPT. OF CORRECTIONS, 13 FLWFed C1131 (11th Cir. Sept. 11, 2000)

! Habeas – Capital Case -- Constitutionality of Limitations Period

The 11th, joining other circuits, concluded that the one-year limitations period of AEDPA is not, as a general matter, an unconstitutional suspension of the writ of habeas corpus. However, the 11th found there to be a “troubling and difficult constitutional question” if a petitioner can show actual innocence, when the limitations period has expired. The 11th declined to resolve the question here, though, remanding the case to the district court to consider whether Wyzkowski made a showing of actual innocence.

U.S. v. MUEGGE, 2000 WL 1269696 (Sept. 7, 2000)

! Suppression of statement; non-custodial

interview.

Reversing the grant of a motion to suppress, the 11th concluded that an interview conducted in connection with an internal military investigation was non-custodial interrogation, and thus *Miranda* did not apply. The 11th found that the fact that the defendant was advised that he was free to leave, as well as the fact that he was never arrested or physically restrained “in any significant way,” outweighed the facts that the supervisor of his civilian employment on a military base had instructed him to report for the interview, that the building in which he was questioned was locked at all times, that the interview room door was kept closed at all times when not in use, and that he was accompanied outside for two smoke breaks by an interviewer who did not smoke. “Under the totality of the circumstances, an innocent individual in Muegge's position who was told he was free to stop answering questions and leave at any time would have actually felt free to do so.”

IN RE JOSHUA, 2000 WL 1227966 (Aug. 30, 2000)

! Habeas - Successive Motions and Retroactivity of Apprendi

The 11th denied Joshua's application for a successive § 2255 motion, ruling that an *Apprendi* claim was not “a claim that relies on a new rule of constitutional law made retroactive to cases on collateral review.” The 11th relied on a First Circuit decision holding that the Supreme Court had not made *Apprendi* retroactive to cases on collateral review. See *Sustache-Rivera v. United States*, No. 99-2128 (1st Cir. July 25, 2000). Also citing its own earlier decision in *In re Hill*, 113 F.3d 181, 184 (11th Cir. 1997), the 11th concluded that it was not enough to satisfy *Teague v. Lane*, 489 U.S. 288 (1989); rather for a new rule to be retroactive in this situation, the Supreme Court must make it retroactive to cases on collateral review. In a footnote, the 11th declined to address (1) whether *Apprendi* would be applicable since the sentence imposed (240 months) did not exceed the statutory maximum authorized by 21 U.S.C. § 841(b)(1)(C); or (2) whether *Apprendi* would be limited to cases “involving the interaction of two separate statutes.”

U.S. v. PHILLIPS, 2000 WL 1264651 (Aug. 30, 2000)

! Remedy for Out-of-time Appeals

Phillips sought a late appeal through a § 2255

petition; the district court granted relief, but he did not file his notice of appeal until 16 days after the district court entered its order. The 11th adopted the procedural approach of two other circuits, holding that when a district court wants to grant an out-of-time appeal on a § 2255, 1) the original judgment should be vacated, 2) the same sentence should be reimposed, 3) with the court advising the defendant of all criminal appeal rights, and 4) the defendant should be advised that the time for filing a notice of appeal is 10 days from that reimposed sentence. Since this procedure was not followed in this case, the 11th had no jurisdiction and dismissed the appeal. However, the 11th suggested that Phillips could file a motion under F.R.Civ.P. Rule 60(b)(6) to save his out-of-time appeal.

JONES v. U.S., 2000 WL 1224637 (Aug. 29, 2000)
! Habeas - Certificate of Appealability (COA); Ineffective Assistance of Counsel; Suppression of Wiretap Evidence based on Sealing Requirements; Imposing General Sentence

In this § 2255 case, the district court granted a COA as to two of the three issues petitioner requested. Jones asked the 11th Circuit to grant a COA on the remaining issue. A single 11th Circuit judge declined to expand the COA to include the remaining issue, and a renewed motion by Jones remained pending. The 11th ruled that the motion panel's denial did not bind the panel hearing the case on the merits. The merits panel granted Jones's request to expand the scope of his certificate.

On the merits of the issues, the 11th found that Jones's trial counsel had been ineffective for failing to move to suppress the wiretap evidence based on sealing requirements of 18 U.S.C. § 2518(8)(a). The sealing requirements were the subject of a Supreme Court case pending at the time of the suppression hearing, with a decision issued on the day Jones's notice of appeal was filed. The 11th remanded the case to the district court to determine whether Jones's conviction could stand without the use of the wiretap evidence.

As to the sentencing issues, the 11th found that Jones's trial counsel was ineffective for failing to object to a general sentence which was illegal. The Court remanded to the district court for resentencing. The 11th found no prejudice from trial counsel's failure to object to a finding about the type of methamphetamine.

U.S. v. JIMINEZ, 2000 WL 1224586 (Aug. 29, 2000)
! Motion to Suppress; Evidence of Uncharged Marijuana and Firearm Possession; Evidence of Domestic Physical Abuse; 2-level Enhancement Under 3B1.1(c)

The 11th held that an application for a search warrant established a sufficient nexus between Jiminez and the residence to be searched, the affidavit was too conclusory, and the "stale information" in the affidavit was not fatal because the government's affidavit updated, substantiated, or corroborated the stale material. The 11th also found that the admission of evidence about a car arrest during which Jiminez was found in possession of marijuana and firearms was not an abuse of discretion. In considering evidence of physical abuse of Jiminez's girlfriend, the 11th did not decide whether its admission was error but found that any possible error was harmless. The 11th also approved a supervisory role increase under the guidelines.

HAUSER v. MOORE, 2000 WL 1205825 (Aug. 24, 2000)

! Habeas – Capital Case – Stay Requested by “Next Friends”

After the district court had entered a stay of execution based on an application by "next friends" of the death row inmate, the state appealed, and the defendant also personally moved to vacate the stay. Hauser argued the "next friends" were just death-penalty opponents who had no standing to file on his behalf. The 11th reviewed the history, particularly the fact that at three procedural junctures Hauser had been found competent to represent himself and had been allowed to dismiss court-appointed counsel. Noting this was a "first petition case," the 11th distinguished *Lonchar v. Thomas*, 517 U.S. 314 (1996), on the basis that there were no merits to the case here but only the question whether the defendant was competent to waive federal habeas review and proceed to be executed. Finding ample evidence in the record of Hauser's competency and the movants' lack of standing, and notwithstanding its understanding of the position in which the district court found itself, the 11th vacated the stay.

U.S. v. NOLAN, 2000 WL 1205824 (Aug. 24, 2000)
! Fraud; Money Laundering

The 11th affirmed convictions of Nolan, a contractor,

for major fraud against the U.S., theft of public money, and money laundering; he was hired by the Army Corps of Engineers (ACOE) to help clean up debris from a Miami area after Hurricane Andrew, and instead of hauling the debris directly to the landfill, the company hired subcontractors to first sort out the recyclable material for resale, with the knowledge of the ACOE. The problem arose when the ACOE learned that Nolan and his partner were diverting funds from the weekly payments, in excess of \$3 million, to personal use instead of completion of the contract. The money laundering charge was based on the transfer of funds, which Nolan knew was a duplicate payment by ACOE, to another wholly owned company. The 11th rejected challenges to the sufficiency of the evidence of money laundering and a jury instruction on major fraud.

U.S. v. CAMPBELL, 2000 WL 1190796 (Aug. 22, 2000)

! Plain Error; Hearsay Opinion Testimony; Prosecutorial Misconduct; Manufactured Evidence

Campbell arrived at Miami International Airport on a flight from Jamaica. Customs agents searched his luggage and found 2 packages of cocaine. When Campbell waived his *Miranda* rights, an agent wrote out Campbell's statement for him, in the third person, and included Campbell's comment that no one could have put anything in his suitcase. The agent also asserted his personal opinion in the statement, commenting that he had told Campbell that "nobody gives this amount of cocaine to someone they don't trust." At trial, the principal issue was whether Campbell knew that the cocaine was in his suitcase before it was discovered by Customs. Reviewing for plain error, the 11th found no reversible error from admission of the agent's hearsay opinion, because the agent testified and was cross-examined, the agent could have stated the opinion as an expert witness, and other evidence of Campbell's guilt precluded the 11th from finding error. On a prosecutorial misconduct claim, the 11th concluded that because the government simply made explicit an inference that the jury could have drawn from the evidence, no substantial rights were affected. In dissent, one judge characterized the hearsay opinion as manufactured evidence, its repeated use depriving Campbell of a fair trial and presenting an error of constitutional dimension.

U.S. v. BROWN, 2000 WL 1224635 (Aug. 18, 2000)

! Sentence on Revocation of Supervised Release

In this corrected opinion, the 11th held that a sentencing court may consider the rehabilitative needs of a defendant when imposing a prison term on a supervised release revocation. Therefore the district court did not err when it imposed a 24-month prison term, an upward departure from the Chapter 7 guideline range, in an effort to get Brown into a BOP residential drug program.

CADE v. HALEY, 2000 WL 1166023 (Aug. 17, 2000)

! Habeas -- Capital Case – Ineffective Assistance of Counsel; Mitigating Factors

The 11th denied relief in this § 2254 petition by a capital defendant, rejecting both claims. The 11th found no prejudice from any ineffective assistance at sentencing, in part because the "life profile" painted by the 2254 witnesses was not significantly better than that painted at the sentencing. Cade admitted that his second claim, that the trial judge failed to give sufficient consideration or weight to his mitigating factors, was procedurally defaulted; he argued it was excused under *Sawyer v. Whitley*, 505 U.S. 333, 112 S. Ct. 2514 (1992), because, but for constitutional error in the sentencing process, no reasonable jury would have found him eligible for the death penalty. The 11th disagreed, finding that *Sawyer* applied only to death penalty requirements such as the elements of the capital crime and minimum required aggravating factors, and here the petitioner did not challenge either of the two aggravating factors.

U.S. v. POWELL, 222 F.3d 913 (Aug. 15, 2000)

! Search and Seizure; Reasonable Suspicion

Law enforcement observed Powell and her friend (Smiley) arrive at the home of a known drug dealer. Powell got out of the car carrying a backpack, walked into the garage, and spoke with a man who might have been the dealer. A few minutes later, Powell returned to her car still carrying the backpack. Powell and Smiley drove around the neighborhood for a few minutes, then returned to the drug dealer's home. Powell got out of the car, and again carrying the backpack, walked into the garage, and emerged a few minutes later without the backpack. She got into the driver's seat and drove away. Law enforcement stopped her a few blocks away, although Powell had

not committed any traffic violations. Ultimately, the car was searched, money was found, and incriminating statements were made. The district court granted Powell's motion to suppress, but the 11th reversed, finding reasonable suspicion to stop the car based on the totality of the circumstances.

U.S. v. WARD, JR., 222 F.3d 909 (Aug. 15, 2000)

! Sentencing Issues: More than Minimal Planning and Abuse of Position of Trust

Ward, an armed security guard for Brinks, Inc, stole money on two occasions, 20 days apart. The second time Ward obtained a crimper and used it to place an unbroken seal on a money bag. The 11th held that his repetitive acts and the fact that he obtained an unbroken seal for the second theft indicated that an guideline increase for more than minimal planning was appropriate. The 11th reversed an abuse of trust guideline increase, finding that the position of armed guard was similar to an ordinary bank teller or hotel clerk.

U.S. v. PLUMMER, 221 F.3d 1298 (Aug. 11, 2000)

! Smuggling -- Conduct Occurring Outside U.S. Territory

After Plummer's boat containing Cuban cigars was stopped off the Florida coast, Plummer was charged with attempting to smuggle cigars into the U.S. (18 U.S.C. 545) and a violation of the Trading with the Enemy Act (18 U.S.C. Appendix 5 and 16). Reversing the district court's dismissal of the indictment, the 11th found that Plummer's actions could be sufficient to constitute attempted smuggling, and that the statutes at issue could cover activity outside the territory of the U.S.

U.S. v. NELSON, 221 F.3d 1206 (Aug. 10, 2000)

! Firearms - "straw purchases"; statutory construction.

Nelson was convicted of one count of conspiracy to make false statements in the records of federally licensed firearms dealers, in violation of 18 U.S.C. 371 and 924(a)(1)(A), based on making "straw purchases" of firearms. Nelson challenged the "straw purchase" theory of liability as a usurpation of legislative authority by the ATF, as unconstitutionally vague, and as a violation of the Administrative Procedures Act, 5 U.S.C. 552(a). The 11th concluded that the identity of the actual buyer of a firearm is the

type of "information" referred to in 18 U.S.C. § 924(a)(1)(A), then rejected each of the claims on appeal.

U.S. v. BOWE, 221 F.3d 1183 (Aug. 8, 2000)

! Continuance Motion; Doctrine of Specialty; Evidentiary Issues

Bowe, a Bahamian citizen, was charged with conspiracy to import cocaine into the United States, along with several other charges. The government of the Bahamas granted extradition only for the conspiracy count, and Bowe was ultimately found guilty of that charge. On appeal, the 11th found no error in denial of a motion for continuance. The 11th also found no error in admission of evidence regarding other charges because the doctrine of specialty limits only the charges on which an extradited defendant can be tried; it does not affect the scope of proof admissible at trial for the charges for which extradition was granted, and it does not alter the forum country's evidentiary rules. As for other evidentiary issues, the 11th held that the uncorroborated word of an accomplice provides a sufficient basis for concluding that the defendant committed extrinsic acts admissible under Rule 404(b). The 11th also dealt with evidentiary issues under Rules 701 and 801(d)(2)(E) of the Federal Rules of Evidence.

U.S. v. MILLS, 221 F.3d 1201 (Aug. 8, 2000)

! Writ of Coram Nobis

The writ of error coram nobis is an extraordinary remedy of last resort available only in compelling circumstances where necessary to achieve justice. The 11th found that the writ was not available to a claim that the jurors in the criminal trial considered extrinsic evidence in reaching a verdict.

WILLIAMSON v. MOORE, 221 F.3d 1177 (Aug. 8, 2000)

! Habeas -- Ineffective Assistance of Counsel; Brady Violation

Williamson raised three points of ineffective assistance. The 11th noted that the reasonableness of a counsel's performance is an objective inquiry, and found that Williamson did not prove that his trial counsel's performance was deficient. As to a Brady claim, the 11th declined to address whether *Brady* never reaches attorney work product. But, for

impeachment purposes, the 11th stated that opinion work product enjoys almost absolute immunity, and no extraordinary circumstances existed here to justify a departure from this protection. The 11th also found no *Brady* violation with regard to non-verbatim, non-adopted witness statements, because the defense failed to show how the evidence, itself inadmissible, would have led to some admissible evidence.

U.S. v. LAND; HOWELL UPTAIN, CLAIMANT, 221 F.3d 1194 (Aug. 8, 2000)

! Forfeiture; Abatement upon the death of the alleged wrongdoer

The 11th addressed whether the forfeiture of real estate used for cockfighting (illegal gambling) was remedial or penal in nature. Forfeiture laws which are penal in nature abate upon the death of the alleged wrongdoer. Forfeiture laws which are remedial in nature do not. The 11th found that forfeiture in this case served a remedial purpose. Thus, the forfeiture did not abate due to the death of the alleged wrongdoer.

U.S. v. WIGGINS, 220 F.3d 1248 (Aug. 2, 2000)

! Revocation of Supervised Release – Sentence Based on Drug Treatment Program

The 11th approved a sentence, on revocation of supervised release, that exceeded the Chapter 7 guidelines. The 11th approved the sentence even though the district court imposed it for the purpose of having Wiggins complete a residential substance abuse program in BOP.

U.S. v. GOLDIN INDUSTRIES, 219 F.3d 1271 (July 27, 2000)

! RICO

The defendants' corporate structures in three separate states were charged independently with RICO violations based on defrauding customers as to the weights and values of truckloads of scrap metal. The defendants appealed their convictions for racketeering activities and conspiracy, as well as substantial forfeiture and restitution amounts. (The individual defendants were acquitted.)

The corporations challenged their convictions on the basis that they constituted both the "person" and the "enterprise" under 18 U.S.C. 1962(c). The 11th held that a § 1962(c) defendant may be simultaneously a RICO person and a member of the RICO enterprise,

because to find otherwise would undermine the purposes of the RICO statute. The court also rejected the defendant's secondary argument that, because the three corporations were simply offshoots in different states of the original corporation, they were in reality only one entity. The defendants' other arguments as to the forfeiture and restitution amounts were rejected.

STEED v. HEAD, 219 F.3d 1298 (July 26, 2000)

! Habeas - Tolling of Limitations Period

The Court affirmed the denial of this § 2254 petition, holding first that the AEDPA statute of limitations is not tolled to include the 90-day time period during which he could have, but did not, petition for certiorari, based on the plain language of section 2244(d)(2) and its recent ruling in *Coates v. Byrd*, 211 F.3d 1225 (11th Cir. 2000). Second, the Court reaffirmed the standard for equitable tolling issues, rejecting the argument that equitable tolling applied, because his attorney's "miscalculation or misinterpretation . . . of the plain language of the statute does not constitute an extraordinary circumstance sufficient to warrant equitable tolling."

CHANDLER v. U.S., 218 F.3d 1305 (July 21, 2000)

! Habeas -- Capital Case -- Trial Counsel's Performance at Sentencing

This is a VERY long opinion, on rehearing en banc, on the first federal capital case under the 1988 statute authorizing the death penalty for federal offenses. The opinion contains much discussion of the standards for ineffective assistance of counsel.

The petitioner was convicted of murder in furtherance of CCE. The majority found that he had not proved that his counsel's performance at sentencing -- focusing on lingering doubt of guilt and not investigating or presenting mitigating character witnesses -- was unreasonable. Five judges in a concurring opinion also found that he had not shown prejudice. Tjoflat dissented, finding that the appellate court should not have taken over the district court's role of fact-finding concerning the trial counsel's investigation and presentation of mitigating evidence. Barkett, in a thorough dissent, found both that trial counsel's performance was deficient and that there was prejudice from that poor performance.

U.S. v. HARPER, 218 F.3d 1285 (July 20, 2000)

! Child Pornography - Guideline Increase for

Multiple Items

In this child pornography case, the 11th approved a two-level increase under U.S.S.G. § 2G2.4(b)(2), relying on the plain language of the guideline that "the offense involved possessing ten or more . . . items, containing a visual depiction involving the sexual exploitation of a minor," and holding "that the separate computer files on one computer disk count as discrete 'items' under § 2G2.4(b)(2)." The 11th noted that four circuits have reached the same conclusion.

MEDEROS v. U.S., 218 F.3d 1252 (July 17, 2000)

! Habeas - Relation Back of Amended Petition

Mederos filed a pro se § 2255 petition but omitted the proper signature. When the district court denied the petition he promptly filed an identical petition with the proper signature. The 11th held that the second petition should be treated as an amendment that cured a technical deficiency of the initial petition, and as such it related back to the filing date of the initial petition.

U.S. v. RODRIGUEZ, 218 F.3d 1243 (July 14, 2000)

! Hobbs Act

Rodriguez was convicted under the Hobbs Act, 18 U.S.C. 1951(a) for six motel robberies, stealing a total of \$2,090. The 11th held that evidence that those motels had guests from out-of-state was sufficient to establish the interstate commerce nexus.

U.S. v. DAVENPORT, 217 F.3d 1341 (July 13, 2000)

! Habeas – Relation Back of Amendments

In a case of first impression in this Circuit, the Court ruled that a petitioner who files a timely petition under 28 U.S.C. § 2255 may not be allowed to file an untimely amendment under Rule 15(c), if that amendment attempts to raise claims that did not arise "from the same set of facts as his original claim, but arose from separate conduct and occurrences in both time and type." In Davenport's case, that meant that claims of ineffectiveness based on discreet acts would not be allowed in an untimely amendment petition if they were not based on the "same set of facts as his original claim." The Court followed the lead of the 8th, 3rd and 4th circuits on this issue, all rejecting the argument that the "trial" is one occurrence for purposes of the AEDPA statute of limitation.

The 11th avoided the issue of whether the court may sua sponte raise an affirmative defense on behalf of a

party, because the COA, which issued when Mr. Davenport was pro se, did not include this as an issue.

ROBERTS v. SUTTON, 217 F.3d 1337 (July 11, 2000)

! Habeas -- Procedural Default, Cause and Prejudice

Roberts was convicted of first-degree robbery and sentenced to life in prison. He sought postconviction relief under Ala. R. Crim. P. 32, and filed numerous appeals. Each time, the clerk issued a letter stating that the record on appeal was complete. Ultimately, the state appellate court affirmed Roberts' conviction because the record was insufficient, and that sufficiency was Roberts' fault. In the § 2254 case, the district court found that Roberts' petition was procedurally barred because Roberts failed to ensure the transmittal of a proper record on appeal. The 11th reversed, finding that cause ("some objective factor external to the defense impeded petitioner's efforts to comply with the state's procedural rule") existed to excuse his default. The 11th remanded to the district court to determine whether Roberts could establish that he had been prejudiced.

CABBERIZA v. MOORE, 217 F.3d 1329 (July 11, 2000)

! Habeas -- Capital Case -- Sixth Amendment Right to 12 Person Jury (Capital Crime); Waiver of Right

Cabberiza's trial counsel initially requested that the trial court empanel 12 jurors. However, during selection, Cabberiza's trial counsel announced (in Cabberiza's presence) that his client would accept a six-person jury. Cabberiza was convicted of first degree murder and sentenced to life. The 11th found that Florida's 12-juror requirement is not an indispensable component of the Sixth Amendment and that the writ of habeas corpus was not enacted to enforce state-created rights. The 11th also refused to adopt a per se rule that 12 jurors is always better than having 6 jurors. The 11th determined that the failure to poll the sixth juror was likely a clerical error on the part of the court reporter. Additionally, the 11th found no constitutional right to have a poll conducted.

METHENY v. HAMMONDS, 216 F.3d 1307 (July 7, 2000)

! Ex Post Facto -- Parole

A 1953 Georgia statute provided that a person convicted of 3 felonies would not be eligible for parole. Georgia AG advisory opinions first stated that the statute was unconstitutional, so the parole board did not apply this provision until 1995, after the Georgia Supreme Court found a similar provision constitutional. The 11th found no problem in the application of the statute to the inmates here, because the ex post facto clause does not prohibit the retroactive application of a new parole regulation to correct a prior erroneous interpretation of a valid statute. The 11th also found no due process violation.

U.S. v. AGUILLARD, 217 F.3d 1319 (July 5, 2000)

! Revocation of Supervised Release - Drug Treatment Program

In a case of first impression, Aguillard argued that the district court abused its discretion by imposing the maximum 24-month sentence upon revocation of her supervised release by basing the length of sentence upon the prospect of her receiving drug rehab treatment. Despite "some broad dicta" in *U.S. v. Harris*, 990 F.2d 594, 597 (11th Cir. 1993), the Court followed six other circuits in holding that "it is not improper to take the availability of rehabilitative programs into account in deciding the length of sentence up to the maximum upon revocation of supervised release."

NYLAND v. MOORE, 216 F.3d 1264 (June 30, 2000)

! Habeas -- relation back of second 2254 petition; whether petition was time barred

Relying on AEDPA, other types of civil cases, and another circuit's decision, the 11th held that Nyland's second § 2254 petition could not relate back to his first petition, which was dismissed without prejudice because state actions were still pending.

However, the 11th found that the district court erred in its calculation of the AEDPA's one-year limitation period for Nyland's second petition. Looking to state law, the 11th found that his state court postconviction proceedings were pending until the mandates issued in those cases, and therefore the AEDPA limitation period should have been tolled during that time.

The 11th declined to consider whether Nyland's petition was tolled during the time in which he could have filed a cert petition, because he did not raise that argument below.

McINTYRE v. WILLIAMS, 216 F.3d 1254 (June 30, 2000)

! Habeas -- Substitution of Trial Judge

The 11th held that the substitution of the judge during his murder trial was not a constitutional error. The 11th found that the substitution was not a structural error requiring automatic reversal, and that McIntyre was not prejudiced by the substitution.

AKINWALE v. RENO, 216 F.3d 1273 (June 29, 2000)

! Habeas - Jurisdiction in Deportation Case

The 11th found that this case was subject to transitional immigration rules (phasing in AEDPA and 1996 amendments to the Immigration Act). The 11th then held that the district court had jurisdiction to consider Akinwale's § 2241 petition challenging retroactive application of an AEDPA provision's effect on deportation waiver.

U.S. v. JORDAN, 216 F.3d 1248 (June 29, 2000)

! Sentence in Absentia

The 11th approved, under Rule 43, Fed. R. Crim. P., the imposition of Jordan's sentence in absentia after he escaped from custody, where he had notice of the sentencing date and filed objections to the PSI prior to his escape. Jordan's flight constituted a waiver of the right to be present at sentencing.

The 11th rejected Jordan's argument that the district court erred by sentencing him without giving him the ten days allowed under 18 U.S.C. § 3552(d) to review the revisions of his PSI, holding that his flight also waived this right. Distinguishing its earlier decision in *U.S. v. Davenport*, 151 F.3d 1325, 1329 (11th Cir. 1998) (concluding that "a defendant does not waive his right to review his PSI at least ten days prior to sentencing solely by absconding"), the Court noted that the defendant in *Davenport* was apprehended before and was present for his sentencing, whereas here the defendant was voluntarily absent from his sentencing. The district court's finding that the defendant was voluntarily absent and waived his right to be present at sentencing constituted an implicit finding that he also waived his right to have ten days to review his PSI.

U.S. v. McINTOSH, 216 F.3d 1251 (June 29, 2000)

! Child Pornography - Grouping under Guidelines

McIntosh admitted downloading images of child pornography and posting them on an internet bulletin board, and he pled to nine counts of shipping child pornography in interstate commerce, 18 U.S.C. § 2252. The 11th found that grouping under U.S.S.G. § 3D1.2(a) was not required because his distribution of many pictures of different children victimized each child separately. The 11th also found grouping unnecessary under § 3D1.2(d), which requires grouping when the offense behavior is continuous in nature and the offense guideline covers such behavior. Since the guideline commentary to § 2G2.2, in its definition of sexual abuse or exploitation, excluded trafficking in such material, the 11th concluded that the guidelines did not contemplate grouping for McIntosh’s offenses.

U.S. v. DEVILA, 216 F.3d 1009 (June 27, 2000)

! Jurisdiction over Vessel

The defendants in this case were crew members of a vessel and were charged with conspiracy and possession of marijuana with intent to distribute, under maritime drug laws 46 U.S.C. App. § (a), (g) and (j). The 11th agreed with the district court that the government had jurisdiction over the vessel.

U.S. v. GROSS, 2000 WL 1059529 (May 26, 2000) (on rehearing)

! Forfeiture

On rehearing, the 11th issued a revised opinion (hence the older date) addressing a question of first impression in this Court: whether a preliminary order of forfeiture is final and thus immediately appealable. The 11th held that it is. Further, the 11th set aside the forfeiture and remanded this case for a hearing because the government conceded that the record failed to establish any factual nexus between the offense of conviction and the property forfeited.

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