

FEDERAL PUBLIC DEFENDER

<http://fpd.yourvillage.com>

NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

Volume III, Issue III

October 17, 2002

NORTH FLORIDA STILL LEADS NATION WITH LONGEST SENTENCES AND MOST TRIALS

As has been true for many years, North Florida continues to stand apart from the rest of the nation. In the most recent statistics made available from the United States Sentencing Commission, covering the fiscal year 2001 (October 1, 2000, through September 30, 2001), the Northern District leads the nation in both the percentage of cases that were resolved with a trial and in the length of the average sentence.

Of the cases that were resolved either by a trial or a plea, 11.5% of the cases were resolved by trial. The national average was 3.4%. Our neighbors to the south, the Middle and Southern Districts, respectively, saw 5.2% and 4.9% of their cases resolved by a trial. We shared the lead with the Northern District of Oklahoma. They had about a third of our 331 cases, but had the same 11.5% resolved by trial. The state of Arizona, one of the districts within the Ninth Circuit with a high percentage of immigration cases, had the

lowest percentage in the nation, .8%. A number of districts (Delaware, Eastern Kentucky, and Guam) shared the next lowest percentage, 1.2%. Our percentage is down from fiscal year 2000, when it was 13.6%.

The disparity between the average sentence in North Florida and the rest of the country is, unfortunately, a dramatic one. The length of the average sentence in the country as a whole was slightly over 4½ years (54.9 months). In North Florida, the average was over 9 years (110.5 months). By way of contrast, the average sentence in South Florida was about 5 years (59.8 months). In the Middle District it was slightly over 6 years (73.7 months). Of the 94 districts in the country, only three others, the Southern District of Illinois, and the Eastern Districts of North Carolina and Wisconsin are even over the 100-month mark. Those with the lowest sentences are primarily districts with a high percentage of immigration cases. Southern California looks the best, with an average sentence of 19.8 months. Arizona with 32.1 months and Texas Western, with 35.5 months, round out the top three. Eastern Kentucky, surely a district

without immigration cases, is next in line with an average of 38.5 months. Last year our average sentence was four months longer, 114.6 months.

At the end of this article is a chart that shows, by offense, where most of the disparity exists between the Northern District, the rest of the nation, and our nearest neighbor, the Middle District of Florida. Although, for some reason, we were way ahead on our 33 larceny cases, the biggest difference lies in our 168 drug trafficking cases. Presumably, the disparity, in at least the drug cases, is largely due to our U.S. Attorney's policy of always seeking, in drug cases, the statutory enhancements based on prior felony drug convictions. It's a policy that, nationwide, very few U.S. Attorneys follow, with most willing to forego the enhancement, particularly if the defendant enters a guilty plea.

In fiscal year 2000 we had 18 cases, representing 5% of the cases resolved through guilty pleas and trials, in which there was a downward departure for reasons other than substantial assistance. The figure for this past year remained essentially unchanged - 17 cases, representing 4.7% of the total.

With about a third of the cases in which there was a downward departure (for other than substantial assistance) being immigration cases, and with such cases being nearly non-existent in our district, the comparison between our departure rate and the departure rate in other districts may be skewed in favor of those districts with immigration cases. Nonetheless, as with the average sentence, there is a considerable disparity. Nationwide, there was, in 18.3% of the cases, a departure for reasons other than substantial assistance. In Florida's Middle district, there were such

departures in 6.6% of the cases; 6.4% in the Southern District.

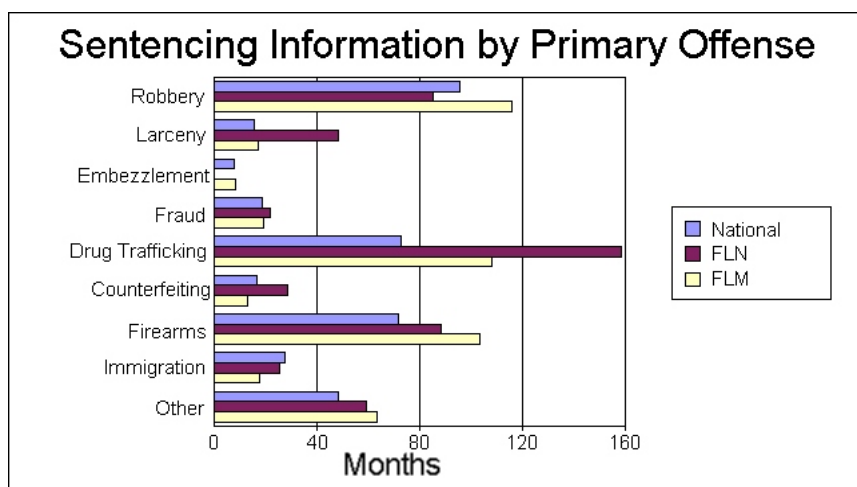
We do better in the substantial assistance departures. Nationwide it occurred in 17.1% of cases. In North Florida, the percentage was 25.4. It was 26.1% in Florida's Middle District, and a less than generous 13.3% in the Southern District of Florida.

The top three reasons, across the country for non-substantial assistance downward departures were: the unhelpfully vague category of "general mitigating reasons" - 19.9%; "pursuant to plea agreement" - 17.6%, and an overstated criminal history - 11.9%. The other categories representing more than 2% of the departures were: "offense behavior was an isolated incident" - 7.9%; "fast track" - 7.7%; "deportation" - 4.9%; "family ties and responsibilities" - 3.8%; "physical condition" - 2.6%; and "diminished capacity" - 2.6%.

The total number of cases subject to guideline sentencing remained the same. Last year in fiscal year 2001 there were, in North Florida, 371 cases. In fiscal year 2000 there were 374. Nationwide, there was, likewise, little change: 59,846 in fiscal year 2000; 59,897 in fiscal year 2001.

Nationwide, sentencing for those prosecuted in federal court remains an unhappy proposition. The percentage of those fortunate few who get only probation without any kind of incarceration is down slightly from last year. This past year 8.8% of defendants fell in that category. The year before it was 9.4%. The percentage going to prison this year, 81.9%, is much the same as last year's percentage, 81.3.

Drug offenses continue to represent the largest percentage of cases being prosecuted in the nation. They represent 41.2% of all the cases. Immigration offenses, representing 17.8%, come in a distant second. The immigration cases are followed by cases of fraud - 11.4%; “other” - 9.0%; firearms - 7.6%; and “non-fraud white collar” - 6.4%.



NEW GUIDELINE AMENDMENTS EFFECTIVE NOVEMBER 1

In May, pursuant to its annual amendment cycle, the United States Sentencing Commission sent another round of proposed amendments to Congress. Assuming that Congress does not reject them between now and the end of the month, the amendments will become effective as of November 1. There is a summary of the amendments in the Summer 2002 Edition of *The Liberty Legend*, the quarterly newsletter published by the National Association of Federal Defenders. It is available at the Association’s web page at: <www.federaldefenders.org>. The amendments are also available at the Sentencing Commission’s web page: <www.ussc.gov>. Just click on the “Guideline Manuals and Amendments”

section. Here’s our modified and condensed version of the highlights of the *Liberty Legend* summary:

I. Drug Amendments

Mitigating Role: The amendment to 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking . . .) caps the offense level at 30 (down from 38) for those with a minor or minimal role in the drug enterprise. The commentary explains that the existing mitigating role adjustment remains applicable even in those instances where the offense level is limited by the cap.

Allowing Premises to Be Used as a Drug Establishment: Anyone who maintains or manages a “place for the purpose of manufacturing,

distributing, or using any controlled substance,” is subject to criminal penalties pursuant to 21 USC § 856. For those who were not involved in the drugs, but allowed the premises to be used, the amendment to USSG 2D1.8 (Renting or Managing a Drug Establishment . . .) increases the highest permissible offense level from 16 to 26.

Ecstasy Weight Calculation: Application Note 11 to § 2D1.1 provides that if the weight of the controlled substance is unknown you multiply the number of pills by the “typical weight per unit” of a list of a number of controlled substances. The amendment increases the typical weight per unit for MDA from 100 to 250 milligrams. It adds MDMA to the list, setting the weight at 250 milligrams per pill.

Clarification of the Safety Valve Reduction: An additional application note is added to § 2D1.1. It provides that the 2-level safety valve reduction is not limited to offenses that carry a mandatory minimum penalty.

II. Career Offender Treatment for §§ 924(c) and 929(a) Convictions

Violations of 18 U.S.C. § 924(c) (carrying a firearm in relation to a crime of violence or drug trafficking offense) and 18 U.S.C. § 929(a) (possessing armor-piercing ammunition in relation to those same offenses), thanks to changes in USSG §§ 2K2.2 (Use of Firearm, Armor-Piercing Ammunition . . . in Relation to Certain Crimes) and 4B1.1 (Career Offender), will sometimes be eligible for career offender sentencing. A table added at the end of the career offender guideline outlines the penalty when the §§ 924(c) or 929(a) offense is the only count that qualifies for career offender sentencing. When there are other offenses, other than the 924(c) or 929(a) offenses, that also qualify the individual for career offender sentencing, two calculations are done: one using the table and one using the other qualifying offense(s). With that done, you then, naturally, pick the worst of the two sentencing ranges.

However, before a 924(c) or 929(a) offense qualifies the individual for career offender sentencing, he or she must still have the requisite two prior convictions of a “crime of violence” or a “controlled substance offense,” and, as explained in an amended application note to USSG §4B1.2 (Definitions of Terms Used in §4B1.1), the underlying offense must qualify as a “crime of violence” or a “controlled substance offense.” In most instances the underlying offense will qualify. After all, your client won’t be convicted of

924(c) or 929(a) unless he or she used the gun or possessed the armor-piercing ammunition in relation to either a “crime of violence” or a “drug trafficking” offense. Nonetheless, there is a difference between the definitions of “crime of violence” and “drug trafficking” found in the United States Code and, on the other hand, the definitions of “crime of violence” and “controlled substance offense” found in the Guidelines. The definitions in the statutes are broader. Accordingly, on rare occasions, the underlying crime might support a conviction for 924(c) or 929(a) and still not qualify under the guidelines as either a “crime of violence” or “controlled substance offense.” Two examples that come to mind are a commercial burglary and maintaining a drug establishment (21 U.S.C. § 924(c)). Both would support a conviction under 924(c) and 929(a), but neither would qualify an individual under the Guidelines as a career offender.

By adding 924(c) and 929(a) and their required consecutive sentences to the career offender guideline, consideration also needs to be given to fulfilling the consecutive sentence requirement. Guidance is given in the amendment to USSG §5G1.2.

III. Expanded Definition of “Official Victim”

The current version of USSG §3A1.2 (Official Victim) adds three offense levels for, among other things, assaulting a corrections officer in such a way as to expose the officer to a substantial risk of serious bodily injury. An amendment to the Application Notes provides for a broader group of victims: any individual, other than an inmate, “authorized to act on behalf of a prison or correctional facility.”

IV. DNA Samples

Amendments to USSG §§ 5B1.3(a) and 5D1.3(a), which address mandatory conditions

of probation and supervised release, respectively, require defendants to submit a DNA sample at the request of his or her probation officer, if the collection is authorized by (42 USC § 14135a). The statute lists a series of, essentially, violent offenses.

V. Downward Departure for Related Sentence Already Completed

Currently USSG 5G1.3 (Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment) gives a sentencing judge the option of imposing a concurrent sentence if the defendant is serving a sentence for an offense that has been “fully taken into account in the determination of the offense level for the instant offense.” An added application note allows the judge to similarly compensate the defendant via a downward departure if the sentence, instead of being “undischarged,” has already been completed (“discharged”).

VI. Cultural Heritage Resources

This amendment creates USSG § 2B1.5 to address theft or destruction of, damage to, or illicit trafficking in cultural heritage resources.

VII. Sexual Offenses Involving Minors

USSG § 2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct) addresses the promotion of prostitution, obscenity, and sexual exploitation of minors. The amendment broadens the guideline beyond prostitution so as to include such things as the production of child pornography. It also deletes an encouraged upward departure based on the age of the victim.

VIII. Terrorism

This amendment affects many different provisions within the Guidelines and responds to the USA Patriot Act of 2001. It

incorporates penalties or creates a new guideline for several new terrorism crimes or predicates, such as offenses against mass transportation systems, interfering with security screening personnel, possessing biological agents or toxins, or providing material support to foreign terrorist organizations. It increases penalties for conduct already covered in the guidelines but which is motivated by terrorist objectives. It amends USSG § 2S1.3 (Structuring Transactions to Evade Reporting Requirements . . .) to incorporate new money laundering provisions in the statute, and defines terrorism for purposes of the recidivist enhancement in the unlawful reentry guideline (USSG § 2L1.2).

GREG MILLER SWORN IN AS NEW UNITED STATES ATTORNEY

Greg Miller was sworn in on August 2nd in the federal courthouse in Tallahassee as the new United States Attorney for the Northern District of Florida. Mr. Miller, who is a graduate of the law school at Ohio Northern University, began his legal career with the Judge Advocate’s Office of the United States Marines in 1980. In 1983 he went to work in Clearwater, Florida, as an Assistant State Attorney. After four years there, he joined the United States Attorney’s Office in the Middle District. In May of 1989 he moved to Tallahassee, joining the United States Attorney’s office for the Northern District. With the exception of an eighteen-month stint in private practice with the Tallahassee law firm of Fowler and White, he has since been with the Northern District up until the time President Bush appointed him as the United States Attorney.

Mr. Miller is a veteran trial lawyer, having

tried over 150 cases. When he returned to the U.S. Attorney's office from Fowler and White, he spent most of his time in Panama City, trying 10 cases in his first six months. In years past, his efforts have included the prosecution of many large drug conspiracy cases, including United States v. Claude Duboc, et al., and related cases in what may be one of history's largest drug smuggling organizations. Two years ago he traveled to Thailand to instruct attorneys and judges from some 13 different countries about techniques for investigating and prosecuting money laundering offenses. He has defense experience, too, representing over 80 felony clients while in the Judge Advocate's Office, and while with Fowler and White, serving as a member of the Northern District's Criminal Justice Act Panel.

His administrative experience includes six months as the acting United States Attorney back in 1993. On two different occasions, he has served as the Chief Assistant United States Attorney and has served as Chief of the United States Attorney's Criminal Division.

Since being sworn in, Mr. Miller has begun a reorganization effort with the goal of decentralizing some of the office's authority. Long-time Assistant United States Attorney and immediate former Acting United States Attorney Tom Kirwin returns to his position as the First Assistant. In Pensacola, Len Register, a former State Attorney for Florida's Eighth Judicial Circuit (Gainesville), is, for the Pensacola office, the new Chief of the Criminal Division. Monte Richardson, a former Assistant United States Attorney for the Middle District of Florida, who has in years past served as a law clerk for Judge Hatchett, as a lawyer for the Office of the Independent Counsel in Washington, D.C.,

and as the Justice Department's representative to the United States Sentencing Commission, is the Chief of the Criminal Division for the Tallahassee, Panama City, and Gainesville offices. In serving in those capacities, Mr. Register and Mr. Richardson have primary responsibility for approving 5K1 and Rule 35 sentencing departures/reductions.

Three veteran assistants also have new assignments. Randy Hensel in the Pensacola office is in charge of the Organized Crime and Drug Enforcement Task Force. Alan Sprows in the Tallahassee office has the responsibility for overseeing all criminal financial litigation and anti-terrorism efforts. Pamela Moine, in Pensacola, directs the civil and appellate litigation.

Mr. Miller and the 34 Assistant United States Attorneys are reviewing existing policies. Monte Richardson has been assigned the task of reviewing existing plea policies. At the behest of the Justice Department and other government agencies, Mr. Miller expects to direct more resources to prosecuting large drug organizations rather than the smaller street-level operations that in years past have so often been targeted. He plans to emphasize, too, large-scale fraud, violent crime involving those with long criminal histories, child pornography cases, and organized money-laundering operations.

**PRETRIAL RELEASE -
DANGEROUSNESS, BY ITSELF,
DOESN'T JUSTIFY DETENTION
HEARING**

In a 1999 law review article addressing pretrial detention, the authors addressed a long-running debate "over whether or not community safety alone justifies . . . setting a

detention hearing under the Bail Reform Act of 1984.” Krista Ward & Todd R. Wright, *Pretrial Detention Based Solely on Community Danger: A Practical Dilemma*, 1999 Fed. Cts. L Rev. 2, *1.1 (1999). At least according to our informal survey, the magistrates in North Florida, with one recent exception, have been on what, legally, has been the wrong side of the split - they have erroneously concluded that the Government’s claim of dangerousness, by itself, justified a detention hearing.

In a decision in August, the magistrate in the Tallahassee Division of our District, William Sherrill, relying on the unanimous view of the five circuits that have addressed the issue, recently rejected what seems to have been the existing view. In United States v. Maxey, Case No. 4:02cr41-RH, Judge Sherrill ultimately decided that the unique circumstances in Mr. Maxey’s case justified a detention hearing. Nonetheless, in his written order, Judge Sherrill found the precedent to be on point and stated that he was persuaded by the case law upon which Mr. Maxey relied.

The cases are: United States v. Ploof, 851 F.2d 7, 11 (1st Cir. 1988); United States v. Dillard, 214 F.3d 88, 91 (2^d Cir. 2002); United States v. Himler, 797 F.2d 156, 160 (3^d Cir. 1986); United States v. Byrd, 969 F.2d 106, 109 (5th Cir. 1992); United States v. Singleton, 182 F.3d 7, 9 (D.C. Cir. 1999).

As explained in the cases, the issue rests upon the interpretation of 18 U.S.C. § 3142. It is a long and confusing statute sprinkled throughout with references to the safety of any person or the community. The cases, though, uniformly hold that the statute “does not authorize a detention hearing whenever the government thinks detention would be

desirable.” Ploof, 851 F.2d at 10. Note that the issue *is not* whether the individual should be detained. It is a question of *whether the government is even entitled to a hearing on their request for detention*.

The existing case law that Judge Sherrill accepted provides for a detention hearing in only the six circumstances listed in subsection (f) of § 3141: (1) when the defendant is charged with a crime of violence; (2) when the defendant is charged with an offense that carries a maximum penalty of life; (3) when the defendant is charged with a drug offense with a penalty of at least ten years; (4) when the defendant has two or more prior convictions of the sorts just listed - violent crimes, drug offenses with a potential ten-year penalty, or offenses with a potential life sentence; (5) when there is a serious risk that the defendant will flee; or (6) when there is a serious risk that the defendant will obstruct justice. *See, e.g., United States v. Ploof*, 851 F.2d at 9-10. Significantly, as the cases recognize, the statute does not permit the court to hold a detention hearing for the defendant who, although he or she may present some kind of a risk to the safety of another individual or the community, does not fall within the six circumstances of subsection (f).

We have a motion and memorandum on the issue. Please call Randy Murrell in the Tallahassee office if you would like a copy.

PANEL TRAINING

This month’s brown bag luncheon panel training is a video from last spring’s National Seminar for Federal Defenders that was held in Philadelphia. Carmen Hernandez of the Defender Training Branch in Washington, D.C., Andrea Taylor, an Assistant Federal

Defender from Chicago, and Jim Tibensky, an investigator in the office with Ms. Taylor, do the presenting. The video features Ms. Taylor's discussion of her efforts at winning downward departures. Drawing on some of her own cases, she explains her methods of fitting the unique hardships faced by an individual or an individual's unique qualities into the departure scheme of the Guidelines. We think her creative approach is sure to inspire you to try something new. We've requested CLE credit. Hope you can come.

In **Pensacola, Panama City, and Tallahassee**, the video, as usual, will be presented in each city's respective **federal courthouse** at **Noon** on **October 24th**. In **Gainesville**, the video will be shown twice, once at **9:00 A.M.** and once at **Noon** at our Gainesville office at **101 S.E. Second Place, Suite 112**.

VICTORIES

Dennis Corder, from the Pensacola panel, won a post-trial judgment of acquittal in a case tried last month before Judge Vinson. Dennis' client was charged with unlawfully making a "firearm" and possessing an unregistered "firearm." The "firearm" was a 13 inch cardboard tube with a fuse and filled with black powder and smokeless gunpowder. Although, the jury found Dennis' client guilty, Judge Vinson entered a post-verdict judgment of acquittal finding the tube was not a "*destructive device*," but instead merely an "*explosive device* made of cardboard, glue, candle wax and tape."

Pensacola panel members, **Jim Jenkins** and **Steve Quinnell**, along with **Tom Keith** of our Pensacola office, won a hard-fought victory when Judge Vinson, this past July, granted a

post-trial judgment of acquittal. In a complicated three week-long trial involving viatical settlement agreements, the government had convicted the defendants of some 24 counts of mail fraud, wire fraud, and transferring money taken by fraud. In his order granting the judgment of acquittal, Judge Vinson concluded that, although the company selling the viatical agreements had made fraudulent representations, the defendants made their representations to investors in good faith reliance upon what they thought were the legitimate claims of the company.

In July, in a Tallahassee Division case transferred to Gainesville for trial, Tallahassee panel member **Dennis Boothe** won a not guilty verdict in what was called the biggest methamphetamine case in the Big Bend area. Dennis successfully argued that his client, who admitted being paid \$1,500 to travel to Atlanta, was unaware that her traveling companion, who had pled guilty and testified against Dennis' client, possessed 13 pounds of methamphetamine.

Tallahassee panel member **Ed Stafman**, in a bench trial before Judge Hinkle in August, won a not guilty verdict in a case in which the Government had charged his client, a 49-year-old Maryland man, with crossing state lines for the purpose of engaging in sex with a minor. Ed's client had participated for months in an internet relationship with a 14-year-old Florida girl. The man, who had an IQ in the seventies and brought along his own teenage daughter when he came to Florida, testified that in coming to the state to meet the girl, he never intended to initiate a sexual relationship.

Richard Greenberg, a member of the Tallahassee panel, won a not guilty verdict for

a client charged with a conspiracy to possess with intent to distribute more than 500 grams of methamphetamine. When Richard first tried the case in May, the jury was unable to reach a verdict in the case, which involved three pounds of methamphetamine. On his second try in August, with the three co-defendants having already pled guilty, Richard succeeded with his entrapment defense. He successfully argued that his client's uncle, who testified for the Government, had, by exploiting the client's poor financial circumstances and sense of family loyalty, ensnared the client.

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.

DOWNWARD DEPARTURES

None reported.

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.

DAILY CASE SUMMARIES

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

Certiorari Granted

The following are United States Supreme Court grants of certiorari for the 2002 term that are relevant to our practice and granted since our last

newsletter:

Massaro v. United States, 2002 WL 799846 (10/01/02, reviewing 27 Fed. Appx. 26 (2d Cir. 2001))

Ineffective Assistance of Counsel, Procedural Bar, 28 U.S.C. § 2255

Massaro was convicted of racketeering and sentenced to life. He was represented on appeal, unsuccessfully, by a different lawyer. He argued under § 2255 that his trial counsel acted ineffectively by refusing a continuance and refusing to allow Massaro to testify. Those arguments, according to the 2d Circuit, were solely based on the trial record available to appellate counsel. The district court and the 2d Circuit procedurally barred his petition because appellate counsel failed to raise the issues on direct appeal, thus failing to satisfy "cause" under the "cause and prejudice" test.

Woodford v. Garceau, 2002 WL 1424825 (10/01/02, reviewing 275 F.3d 769 (9th Cir. 2001))

Propensity"other crimes" jury instruction, due process, 28 U.S.C. § 2255

California convicted Garceau of murder and sentenced him to die. Almost all prosecution witnesses had some connection to the murder or some other self-interested reason for testifying. The State introduced two types of evidence of other crimes committed by Garceau: evidence that he manufactured illegal drugs; and evidence of a subsequent murder for which he had already been convicted. He objected to the jury instruction that said: "Evidence has been introduced for the purpose of showing that the defendant committed other crimes other than that for which he is on trial....Such evidence, if believed, may be considered by you for any purpose, including but not limited to any of the following His character or any trait of his character....His conduct on a specific

occasion....” He asked for a modified instruction saying such evidence “may not be considered by you to prove...bad character or...disposition to commit crimes.” On appeal, the California SC held the instruction was error, but harmless. In his § 2255 petition, the 9th Circuit ordered a new trial, holding that “the other crimes jury instruction rendered Garceau's trial so fundamentally unfair as to constitute a violation of the Due Process Clause,” thereby causing the trial to be “infected with constitutional error which had a substantial and harmful effect on the jury's verdict.”

United States v. Bean, 122 S. Ct. 917 (1/22/02, reviewing 253 F.3d 234 (5th Cir. 2001))

Granting relief from firearms disabilities

Under federal law, a person who is convicted of a felony is prohibited from possessing firearms. The Secretary of the Treasury, acting through the Bureau of Alcohol, Tobacco, and Firearms (ATF), may grant relief from that prohibition if it is established to his/her satisfaction that certain preconditions are met. See 18 U.S.C. 925(c). Since 1992, however, every appropriations law for ATF has specified that ATF may not expend any appropriated funds to act upon applications for such relief. The question presented is whether, despite that appropriations provision barring ATF from acting on such applications, a federal district court has authority to grant relief from firearms disabilities to persons convicted of a felony.

Smith v. Doe, 122 S.Ct. 1062 (2/19/02, reviewing 259 F.3d 979 (9th Cir. 2001))

Retroactivity of internet posting of sex offender registration

The question presented is whether it is constitutional to apply retroactively a law that

requires convicted sex offenders to register with the state and that puts the information on the Internet.

Scheidler v. NOW, Inc., 122 S.Ct. 1604, and **Operation Rescue v. NOW, Inc.**, 122 S.Ct. 1605, (4/22/02, reviewing 267 F.3d 687 (7th Cir. 2001))

RICO

The question presented is whether RICO authorizes a private group to seek a nationwide injunction against blockades denying access to abortion clinics, and whether the protesters' denial of access to the clinics qualifies as extortion under federal law.

Chavez v. Martinez, 122 S.Ct. 2326 (6/3/02, reviewing 270 F.3d 852 (9th Cir.))

Fifth Amendment

In a civil case with potential criminal law reach, the following questions are presented: (1) Was the 9th Circuit correct in characterizing the Supreme Court's 5th Amendment discussion in U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990), as non-binding dicta and ignoring its holding favorable to a civil rights defendant? (2) Does violation of 5th Amendment, potentially resulting in an award of civil damages, occur at the time of the purported coercive interview or only when and if the state introduces the constitutionally violative statement in a criminal proceeding? (3) Was the 9th Circuit correct in holding that the conduct of the investigating officer in this case was so offensive as to deny him qualified immunity?

Supreme Court Cases

None reported.

Selected Eleventh Circuit Case

Summaries

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

Bond v. Moore, 2002 WL 31261026 (Oct. 10, 2002)

Habeas; statute of limitations; § 2244(d)

The Court agreed with the prisoner that the district court had erroneously dismissed as time-barred his habeas petition; the limitations period under 28 U.S.C. § 2244(d) did not begin to run until expiration of the 90-day window during which he could have petitioned for certiorari. The Court extended its recent decision in Kaufmann v. United States, 282 F.3d 1335, 1339 (11th Cir. 2002) (stating that a judgment of conviction becomes final under 28 U.S.C. § 2255 when the Supreme Court denies a timely filed petition for writ of certiorari or when the time for filing such a petition expires), to a § 2254 petition, the statute of limitations for which is provided by § 2244(d). In n. 5, the Court also refused to consider an argument the State first raised at oral argument.

United States v. Williams, 2002 WL 31261030 (Oct. 10, 2002)

Speedy Trial Act; indictment

The Court agreed that the Speedy Trial Act was violated because the indictment was not filed within 30 days of arrest. (In its discussion, the court noted the distinction between the right to speedy indictment and the right to speedy trial; a 60-day waiver related only to the latter; the Court did not decide whether a defendant can ever waive the right to speedy indictment.) However, balancing the statutory factors in 3162(a)(1), the Court concluded that the 68-day violation was not so substantial per se s to require dismissal with prejudice.

United States v. Roberts, 2002 WL 31209227 (Oct. 4, 2002)

Perjury; § 2255; venue; literal truth doctrine; jury instruction; self-incrimination

The defendant was indicted for perjury under 18 U.S.C. 1621(2) and 1746 after Judge Hinkle agreed with the magistrate's recommendation that his petition, which was denied as a successive § 2255, should be referred to the USA for prosecution for stating under penalty of perjury that he had never filed a previous § 2255. He was convicted and sentenced to a consecutive 15 months. The Court rejected the argument that venue was only proper where the false statement was made, i.e., where he was confined, because the objection was waived for failure to make it prior to trial. As to his defense and motion for JOA based on the literal truth doctrine, which provides that a perjury conviction cannot be based upon a statement that is misleading or incomplete if it is the literal truth, he argued that he had not personally filed a § 2255 motion (an attorney had filed the previous one) and that he was a layperson unfamiliar with complex habeas rules. He lost, because he knew the first § 2255 motion was exactly that, as he admitted to the FBI that he had previously signed and filed a § 2255 motion, and because he had also previously filed a motion for leave to file a second or successive § 2255, which was denied. No jury instruction on this defense was required because it was unsupported by the evidence. As to the Fifth Amendment issue, the court noted that, instead of responding to the magistrate's show cause order by asserting the privilege against self-incrimination, the defendant responded and admitted his perjury; since he had not timely asserted the privilege, the Fifth Amendment was of no help to you.

McIver v. United States, 2002 WL 31160004 (Sept. 30, 2002)

Belated Appeals & Collateral Review

McIver, a federal prisoner, appealed the dismissal of his § 2255 motion as a second or successive motion filed without the permission of the court of appeals. “Because his prior motion was a successful motion to file an out-of-time notice of appeal – in other words, one that simply protected his right to a direct appeal – he argues that it should not count against him in subsequent collateral proceedings. We agree, and therefore join the majority of our sister circuits in holding that a successful motion to file an out-of-time notice of appeal is not to be counted as a first petition for the purposes of subsequent collateral proceedings.”

United States v. White, 2002 WL 31086910 (Sept. 19, 2002)

Guidelines § 2K2.4

While serving a 1992 sentence for use of a firearm during a crime of violence, armed assault and attempted robbery of a United States Postal Service worker, White filed a *pro se* 18 U.S.C. § 3582(c)(2) motion to modify his sentence. He claimed that U.S.S.G. Amend. 599 (effective November 1, 2000, and applicable retroactively), should be applied to remove his seven-level enhancement for discharge of a firearm and enable him to argue to the sentencing court that no upward departure should be imposed under the current commentary to U.S.S.G. § 2K2.4. The district court denied relief and the 11th Cir. affirmed, holding that “Amendment 599 did not materially change the relevant language of § 2K2.4's application note two.”

United States v. Murphy, 2002 WL 31057014 (Sept. 17, 2002)

Guidelines, “threat of death”

U.S.S.G. § 2B3.1(b)(2)(F), as amended in 1997, provides for a sentence enhancement if a robbery defendant made a “threat of death.” Under that amended guideline, the written note given to the bank teller – “You have ten seconds to hand me all the money in your top drawer. I have a gun. Give me the note back now.” – constituted a ‘threat of death’ even though no express threat to use the gun was made. Contrary decisions of the 11th Cir., United States v. Moore, 6 F.3d 715, 722 (11th Cir. 1993); United States v. Canzater, 994 F.2d 773, 775 (11th Cir. 1993), were issued under the pre-amendment guidelines, which could only be applied if an *express* threat of death was made.

United States v. Chang Qin Zheng, 2002 WL 31057021 (Sept. 17, 2002)

Harboring aliens for personal financial gain

The 11th Cir. reversed the district court's grant of a Motion for Judgment of Acquittal on substantive and conspiracy charges to conceal, harbor, and shield from detection aliens in buildings and motor vehicles for the purpose of commercial advantage and private financial gain, knowing and in reckless disregard of the aliens' illegal status, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii), (a)(1)(A)(v)(I), (a)(1)(A)(v)(II), and (a)(1)(B)(i). “Applying a common meaning to the plain language of the terms Congress used in § 1324 to the Government's evidence presented at trial, a rational jury could conclude beyond a reasonable doubt that the Appellees harbored the illegal aliens for their private financial gain.”

United States v. Kapelushnik, 2002 WL 31057016 (Sept. 17, 2002)

Jurisdiction over appeal filed before restitution set; downward departure

(1) The district court refrained from setting the amount of restitution within the 90-day limitations period because it believed that the Government's notice of appeal – which was filed prematurely before the expiration of the 90-day limitations period – divested it of the jurisdiction to do so. That was error, because a premature notice of appeal does not divest the district court of jurisdiction over the case. Since the judgments of conviction are now final, and since the Government's notice of appeal ripened into a timely notice, the 11th Cir. has jurisdiction to address the merits.

(2) Before the court sentenced Kapelushnik and Volis, some of the stolen coins were returned to a New York City police station by a person or persons unknown. Subsequently, Kapelushnik and Volis filed motions for downward sentencing departures under U.S.S.G. § 5K2.0, claiming that they were responsible for arranging the return of the coins via a third party, and that their efforts were so extraordinary that they took the case out of the heartland of the guidelines and warranted downward departures. The district court departed, but the 11th Cir. reversed, holding there is no evidence in the record that the D's were responsible for the return of those coins.

Brownlee v. Haley, 2002 WL 31050882 (Sept. 16, 2002)

§ 2254 granted to vacate capital sentence under Strickland

Brownlee's lawyers, “Dunn and Kendrick, acknowledged that they had conducted no pre-trial discovery, but they explained that such actions would have been unnecessary since they had full access to all of the district

attorney's files, including witness statements. The attorneys also acknowledged that they conducted virtually no investigation into Brownlee's personal history.... The lawyers did not have Brownlee examined by a psychologist until the court suggested it after the jury sentencing phase because they did not believe that Brownlee had any mental problems. In fact, Dunn observed his client to be of 'above average intelligence.' Furthermore, counsel did not probe Brownlee's drug problems because they believed that a Jefferson County jury would not be sympathetic to an account of voluntary drug use.” Accordingly, defense counsel presented no mitigation to the jury, made a few meager transcript pages worth of argument, and got an 11-1 death recommendation, followed by a death sentence. In state postconviction proceedings, substantial mental mitigation was presented, including “mild mental retardation or borderline intellectual functioning and suffering from various mental disorders, including schizotypal personality disorder, antisocial personality disorder, multiple drug dependencies, and seizure disorder or epilepsy.” The state court denied relief, as did the federal district court in § 2254 proceedings, but the 11th Cir. reversed as to the sentence, saying “Brownlee plainly received ineffective assistance of counsel at sentencing in light of his attorneys' failure to investigate, obtain, or present to the jury any evidence in mitigation of the death penalty.”

Maharaj v. Secretary, DOC (Fla.), 2002 WL 31043274 (Sept. 13, 2002)

AEDPA, Ripeness challenging guilt and punishment in capital case

Death-sentenced inmate filed § 2254 petition before state court had resentenced him one of the multiple counts in state court judgment.

The 11th Circuit held that “Because Maharaj’s resentencing had not occurred at the time he filed his habeas petition, his state court judgment had not become final, and thus his habeas petition, which challenged all of his convictions and sentences, was not ripe for review at that time. Accordingly, the district court’s dismissal without prejudice, which will allow Maharaj to refile his habeas petition now that the state court has completed its resentencing, was not in error.”

United States v. Edgar, 2002 WL 31028287 (Sept. 12, 2002)

18 U.S.C. § 666, Spending Clause

The Court affirmed the convictions and sentences of former hospital officers who converted hospital funds to their own benefit. It affirmed the constitutionality of 18 U.S.C. § 666, rejecting arguments that it was facially unconstitutional because Congress lacks the power to enact criminal laws under the Spending Clause and because of vagueness, and the argument that it was unconstitutional as applied because there was no continuing federal interest in the Medicare, Part A funds after their distribution to the hospital. The Court also rejected arguments that the indictment was flawed for failure to allege the inapplicability of the exception in § 666(c) and failure to allege facts establishing federal jurisdiction under § 666.

United States v. Paul, 2002 WL 31018291 (Sept. 11, 2002)

Forfeiture; excessive fine; RICO

Mr. Paul was indicted in 1992 based on his operation of an S&L; convictions were entered on numerous counts. He was ordered to pay a fine and restitution in the millions. In a subsequent forfeiture proceeding, he was ordered under 18 U.S.C. § 1963 to forfeit the value of his pending claims, and appeals

resulted in remands for redetermination of the value of that forfeiture. After appealing, however, the Federal Claims Court had ruled against Mr. Paul in a related case, finding he had forfeited his claims under 28 U.S.C. § 2514. Because that judgment was not yet appealable, and because it was clearly correct, this appeal was held to be moot. “The district court, at our direction, valued an asset which Paul no longer possesses; we need not reevaluate that painstaking decision. Because the forfeiture ordered no longer has any value, the Order of Forfeiture cannot be grossly disproportional or in violation of the Eighth Amendment.”

Hunter v. Moore, 2002 WL 2013266 (Sept. 4, 2002)

Bench trial, closing argument waiver, 28 U.S.C. § 2254

After losing PCAs in the Florida 1st DCA on direct appeal and post-conviction proceedings, a federal district court granted habeas relief and the 11th Circuit affirmed that grant, saying “we hold that counsel does not waive closing argument in a bench trial when the trial judge immediately announces his guilty decision on the heels of the close of evidence and provides no opportunity for any objection prior to the guilty verdict.” The court applied Cronic, not Strickland, to say Hunter was denied counsel at a critical stage in his trial when his lawyer was not afforded the opportunity to make a closing argument.

United States v. Richardson, 2002 WL 2012676 (Sept. 4, 2002)

No plain error under Ashcroft v. Free Speech Coalition (U.S. 2002)

The trial court gave an instruction, without objection, defining child pornography to include so-called virtual children, i.e., using the phrase “or appears to be” held

unconstitutional “Ashcroft v. Free Speech Coalition, 122 S.Ct. 1389 (2002). However, “We conclude that, notwithstanding the error, affirming appellant's convictions would neither work a miscarriage of justice nor seriously affect the fairness, integrity or public reputation of this judicial proceeding. We reach this conclusion because the evidence clearly established that the children depicted in the images or pictures were actual children.”

United States v. Tinoco, 2002 WL 2013777 (Sept. 4, 2002)

Maritime Drug Law Enforcement Act, Apprendi, Gaudin, etc.

(1) The court rejected a facial Apprendi attack on the Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. app. § 1903, which incorporates the penalties framework set forth in 21 U.S.C. § 960 (2000). “In so far as the appellants attack § 1903 as unconstitutional because it incorporates 21 U.S.C. § 960, they cannot demonstrate “that no set of circumstances exist under which the Act would be valid.” (2) The court also rejected a Gaudin attack on the MDLEA's jurisdiction and venue provisions, but had to abrogate precedent to get there. (3) Lots of other issues re: evidence, sentencing, but far too many to list here.

United States v. Prouty, 303 F.3d 1249 (Aug. 27, 2002)

Allocution; plain error; restitution; standard of review

The Court reversed on two grounds: First, the parties agreed that the defendant was denied the right of allocution at sentencing, and the Court reversed even under the plain error standard because the sentence imposed was not the lowest possible (but was at the top of the range, and a downward departure was

denied). Second, the Court agreed that the district court had erred both in delegating to probation the setting of a payment schedule for restitution (here, in excess of \$5 million, on a destitute defendant), and in ordering payment “immediately.” Because the statute requires the court in the restitution order to set the schedule, the Court held that the statute precludes the court from delegating duties expressly delineated therein. Interestingly, the Court applied the *de novo* standard of review, without discussing the fact that other cases have applied abuse of discretion.

United States v. Duty, 302 F.3d 1240 (August 20, 2002)

Career offender sentencing, intervening arrests

Duty pleaded guilty to cocaine distribution and was sentenced as a career offender under U.S.S.G. § 4B1.1. Duty contended that his guilty pleas on four prior drug-related felony charges in Georgia state court, which involved intervening arrests, should be counted as a single conviction pursuant to Georgia law, and therefore, the district court erred in finding that he had at least two prior felony drug convictions under § 4B1.1. The Eleventh Circuit disagreed because (1) federal law controls, and (2) USSG § 4A1.2. says that “prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense).”

United States v. Sutton, 302 F.3d 1226 (August 20, 2002)

“the” vs. “any” in guidelines sentencing

Sutton was convicted of firearms offenses, but certain .357-caliber ammunition not included in the indictment had been used to enhance his sentence under U.S.S.G. § 4B1.4(b)(3)(A)

and § 4B1.4(c)(2) because it was found to be connected with a drug transaction. The Government confessed error, agreeing that, for firearms or ammunition to qualify under U.S.S.G. § 4B1.4(b)(3)(A) and § 4B1.4(c)(2), they must be charged in the indictment. The Court distinguished the word “the” from “any” as used in the guidelines to hold that “§ 4B1.4(b)(3)(A) is applicable only if the firearms or ammunition *for which the felon was convicted* were used in connection with a drug offense. The .357 ammunition did not qualify under § 4B1.4(b)(3)(A) because Sutton was not convicted of possessing it. Since none of the firearms for which Sutton was convicted were used in connection with Sutton's drug transaction, § 4B1.4(b)(3)(A) was improperly applied to Sutton. Moreover, Sutton should not have received a criminal history category of VI because the .357 ammunition does not qualify as 'the firearm or ammunition' under § 4B1.4(c)(2).”

United States v. Bowman, 302 F.3d 1228 (August 20, 2002)

“Outlaws” motorcycle club, innominate jury

Bowman, the international president of the Outlaws Motorcycle Club, was convicted of racketeering, conspiracy to murder, and various drug and firearm offenses. Interesting reading, heavily fact-bound opinion. The Eleventh Circuit affirmed, finding (1) evidence was overwhelming; (2) no abuse of discretion in the trial court's sua sponte decision to empanel an innominate (known but unnamed) jury, even without specially instructing the jurors to avoid prejudice; and (3) that introduction of the Outlaw's “whites only” policy was error but as “a brief flicker in Bowman's month-long trial,” its admission “did not affect Bowman's substantial rights.”

Tucker v. DOC (Fla.), 301 F.3d 1281 (Aug. 13, 2002)

Narrow Exclusion of O'Sullivan v. Boerckel exhaustion bar to Florida

The 11th Cir. held that when multiple issues are presented in a criminal appeal to a Florida District Court of Appeal (DCA), but only one of those multiple issues is certified by the DCA as a question of “great public importance” meriting Florida Supreme Court discretionary review under Article V, § 3(b)(4), Fla. Const., the prisoner need not have raised the non-certified issues in the Florida Supreme Court to have exhausted those issues for purposes of 28 U.S.C. § 2254 habeas review under O'Sullivan v. Boerckel. The 11th Cir. did not decide whether its rule in this case applies to appeals brought *after Feller v. State*, 637 So. 2d 911, 914 (Fla. 1994), where the Court said it had jurisdiction over noncertified issues when it took a certified question for review. The 11th Cir. also expressly reserved ruling on how/whether O'Sullivan exhaustion applies to the Florida Supreme Court's “conflict” jurisdiction under Article V, § 3(b)(3), Fla. Const. (which, by the way, constitutes the bulk of the Florida Supreme Court's discretionary review docket).

United States v. Schlaen, 300 F.3d 1313 (August 8, 2002)

Lesser included offenses, downward departure

Guillermo was convicted of money laundering and acquitted of failing to file Form 8300. He argued that because intent to avoid a reporting requirement is an element of money laundering, and because failing to file Form 8300 is a means of avoiding a reporting requirement, then failing to file is a lesser-included offense. The court said no: no double jeopardy problem, no consistency problem. Court also found an erroneous six-

level departure, rejecting trial court's finding that the money laundering was incidental to failure to file Form 8300.

Knight v. Jacobson, 300 F.3d 1278 (August 6, 2002)

Fourth Amendment

Miami cop Jacobson investigated a report from Knight's ex-girlfriend that Knight had called and threatened to kill her, said he would enjoy it, she was in fear, and there had been other incidents that had caused her to bring criminal charges against Knight. Officer Jacobson knocked on Knight's door, told him to step outside, and arrested him on the spot without a warrant at 2 a.m. No prosecution resulted, and Knight sued, claiming an unconstitutional arrest. The Court held (1) Jacobson had probable cause of misdemeanor assault; (2) non-compliance with a state law permitting arrests for misdemeanors only when they occurred in officer's presence is itself enough to violate the Fourth Amendment; and (3) no Payton violation when an officer arrests a suspect who has stepped outside his home at the officer's command.

United States v. Sigma International, Inc., 300 F.3d 1278 (August 6, 2002) (en banc)

AUSA Michael Rubinstein denied name-clearing hearing

After this much-traveled appellate case concluded, AUSA Michael Rubinstein asked the 11th Cir. for a hearing to clear his name, which the 11th Cir. tarnished in two panel opinions, chastising his conduct in the district court. The 11th Cir. said no need for a hearing because the critical panel opinions were withdrawn, and he showed no due process right to a hearing because he had no evidence of losing more than his reputation.

The court avoided a lot of sticky procedural issues.

United States v. Brown, 299 F.3d 1252 (July 31, 2002)

Batson, Fed R. Evid 703, Confrontation Clause, withdrawal of counsel

(1) No error in Batson claim. (2) Federal Rule of Evidence 703 allows experts to rely upon data which itself would not have been admissible, if this data is “of a type reasonably relied upon by experts in the particular field in forming opinions..” That rule permitted a government expert to testify that his opinion of the value of narcotics was based on his experience and expertise, in conjunction with the information he received from a DEA intelligence agent and Bermudan authorities, and that such sources of information were regularly relied upon in valuating narcotics. (3) Hearsay evidence relied upon by an expert in forming his opinion, as long as it is of a type regularly relied upon by experts in that field, is a “firmly rooted” exception to the general rule of exclusion of hearsay statements, and therefore is not violative of a criminal defendant's confrontation rights. (4) An appeal from a magistrate judge's order denying withdrawal of counsel must be taken to the district court, and if not reviewed by the district court, it cannot be reviewed in the circuit court.

United States v. Hersh, 297 F.3d 1233 (July 17, 2002)

“Sordid story of sexual predation”; joinder & severance; ex post facto, grouping under U.S.S.G. §§ 1B1.2(d) and 3D1.2

The evidence in this “sordid story of sexual predation” depicted the elaborate efforts of Hersh, a college professor, to engage in multiple sexual encounters with young, poverty-stricken boys, mainly from Third

World countries. (1) No error in allowing joinder of the child pornography counts and counts charging transporting a minor in foreign commerce with the intent to engage in criminal sexual activity, and the motion to sever was not wrongly denied; (2) No ex post facto violation in conspiracy to travel in foreign commerce for the purpose of engaging in sexual acts with minors because the act of travel accompanied by the intent to engage in sexual activity with a minor constitutes the requisite overt act in furtherance of this conspiracy; and (3) there was error in treating the travel count as eight separate sentencing guidelines groups under U.S.S.G. §§1B1.2(d) and 3D1.2, but it didn't matter under the circumstances.

Drew v. DOC (Florida), 297 F.3d 1278 (July 18, 2002)

§ 2254, AEDPA, time bar, equitable tolling

The court rejected Drew's claims that his petition was not time-barred under the AEDPA one-year statute of limitations because the statutory period should have been tolled during the pendency of his third motion for post-conviction relief in the state court; and, alternatively, that the time bar should have been disregarded under the doctrine of equitable tolling. The court recognized that “a lengthy delay between the issuance of a necessary order and an inmate's receipt of it might provide a basis for equitable tolling if the petitioner has diligently attempted to ascertain the status of that order and if the delay prevented the inmate from filing a timely federal habeas corpus petition.” But that did not apply here because Drew “provided no evidence supporting his claim that he repeatedly attempted to ascertain the status of his case from the Clerk's office, a burden necessary to sustaining his claim of extraordinary circumstances.” Barkett wrote

a lengthy dissent.

United States v. Martin, 297 F.3d 1308 (July 18, 2002)

Stretching the Leon good faith exception

In affirming an order that denied a motion to suppress, the 11th Cir. held that “a reviewing court may look outside the four corners of the affidavit in determining whether an officer acted in good faith when relying upon an invalid warrant.” The affidavit, though apparently insufficient as to probable cause, contains enough indicia of probable cause that the officer's reliance upon the warrant was not entirely unreasonable; all the information was not stale; and the judge did not abandon his role. The question thus posed is whether the court, in deciding whether the execution of the search warrant was reasonable, may consider information known to the officers that was not presented in the initial search warrant application or affidavit. The Court held that doing so was proper, going with the majority of courts. [Ed. Note: Possible conflict may exist for cert.]

United States v. Pendergraft, 297 F.3d 1198 (July 16, 2002)

Hobbs Act, mail fraud, conspiracy, perjury, prosecutorial misconduct

Pendergraft, an abortion doctor in the Ocala area, received a letter from the Board of County Commissioners asking that he not reopen a burned down clinic. Pendergraft showed the letter to business associate Spielvogel, who contacted the County to discuss the possibility of Pendergraft withdrawing from Ocala if the County would purchase the clinic building for a good price. The County instigated an extortion investigation. After a clinic opened, the clinic claimed the county resisted its operation. Charges against Pendergraft and Spielvogel

arose out of their threat to seek damages in a lawsuit against Marion County, Florida, and to use false evidence in support of the lawsuit. The 11th Circuit vacated the convictions of extortion under the Hobbs Act, mail fraud, and conspiracy because their threat was neither “wrongful” within the meaning of the Hobbs Act nor a “scheme to defraud” within the meaning of the mail-fraud statute. But the court affirmed Spielvogel's convictions for perjury and making false statements. Also, no plain error found in unobjected to closing argument in which Government twice stated that Pendergraft, who is black, “shucked and jived” on the witness stand.

United States v. Venske, 296 F.3d 1284 (July 12, 2002)

Extrinsic influence on jurors, multiple-object conspiracy,

Four defendants appeal convictions arising from fraudulent telemarketing “infomercial” scheme. (1) District court had authority to exclude affidavit containing facially sufficient allegation of jury misconduct because affidavit had been “presented” improperly, i.e., defendants were involved indirectly in interviewing the jury foreman without court approval in clear violation of M.D. Fla. Local Rule 5.01(d). No error in denying new trial and hearing motions juror misconduct and extrinsic influence on jurors. (2) The court erred in sentencing on a count charging a multiple-object conspiracy without determining beyond a reasonable doubt which offense was the object of the conspiracy.

United States v. Duarte-Acero, 296 F.3d 1237 (July 12, 2002)

Rights without remedies under Vienna Convention & International Covenant, Apprendi

(1) Court rejects Duarte's assertion that a 1982

indictment should be dismissed because the circumstances of his 1997 arrest in Ecuador violated the Vienna Convention on Consular Relations because “Dismissal of the indictment is simply unavailable under the Vienna Convention” for a violation of Article 36. Also, violations of the International Covenant on Civil and Political Rights “do not appear to afford him any relief.” (2) No reversible error under Apprendi for failing to allege in indictment, and for jury not finding, that his attempted murder was either premeditated or malicious.

Soliman v. United States, 296 F.3d 1237 (July 11, 2002)

Alien removal, mootness

Soliman appealed an alien removal order, arguing that his lengthy detention violated due process and 8 U.S.C. § 1231(a)(6); and that INS violated his constitutional privacy and free expression rights by force-feeding him during hunger strikes undertaken to protest his detention. The 11th Circuit mooted the case because he was returned to Egypt on June 11, 2002, and the court refused to exercise any exception to the doctrine to address the issues.

United States v. Wattleton, 296 F.3d 1184 (July 9, 2002)

Insanity Acquittal

The defendant filed a notice of intent to raise an insanity defense, and the Government conceded insanity from the beginning of trial, presenting evidence insanity without objection. After testimony closed, the defense asked that jurors not be given an insanity option, arguing that no criminal intent was shown and therefore a plain vanilla guilty-not guilty choice was proper. The district court gave the insanity option to jurors over defense's objection, and the 11th Cir. affirmed finding that Wattleton filed a Rule 12.2 notice

of his insanity defense and his intent to rely on expert testimony to support that defense, and he never withdrew that notice. Also affirmed was the decision not to release Wattleton after a “dangerousness hearing,” 18 U.S.C. § 4243(a)-(e), finding the statute constitutional and the evidence supported the commitment order.

United States v. Root, 296 F.3d 1222 (July 10, 2002)

No real “victim” needed to convict and sentence arising from sexual e-chats with agent posing as a minor

On an AOL chat room, Agent Howell, posing as 13-year-old “Jenny,” got into chats with Root, and after a few days of sending graphic explicit sexual messages, Root traveled from his home in North Carolina to meet Jenny in Georgia, where he was arrested. Root was convicted of attempting to persuade a minor to engage in criminal sexual activity (18 U.S.C. § 2422(b)), and traveling in interstate commerce for the purpose of engaging in a criminal sexual act with a minor (18 U.S.C. § 2423(b)). The court rejected Root's claim that an actual minor was required for both his convictions. As to a sentencing issue of first impression, the court found no error in the district court's application of U.S.S.G. § 2A3.2(b)(2)(B) providing a two-level enhancement if “a participant otherwise unduly influenced the victim to engage in prohibited sexual conduct.”

Lagniappe

Federal Death Act Gets Second Strike

New York Law Journal

For the second time in three months, a district court judge has declared the Federal Death Penalty Act unconstitutional. Judge William K. Sessions III in Vermont ruled Tuesday that

the act violated due process because of “relaxed evidentiary standards” in the penalty phase of federal capital cases. The key to Sessions' opinion was a line of U.S. Supreme Court cases issued since the Death Penalty Act was passed. Read full text <<http://www.law.com/jsp/article.jsp?id=1032128607753>>

Secret Court Says F.B.I. Aides Misled Judges in 75 Cases

By PHILIP SHENON The New York Times, August 23, 2002

The nation's secret intelligence court has identified more than 75 cases in which it says it was misled by the Federal Bureau of Investigation in documents in which the bureau attempted to justify its need for wiretaps and other electronic surveillance, according to the first of the court's rulings to be released publicly.

Defendants Fighting Gun Charges Cite New View of Second Amendment

By ADAM LIPTAK, The New York Times July 23, 2002

Scores of criminal defendants around the nation have asked federal courts to dismiss gun charges against them based on the Justice Department's recently revised position on the scope of the Second Amendment.

TABLE OF CASES IN THIS ISSUE

Eleventh Circuit

Bond v. Moore, 2002 WL 31261026 (Oct. 10, 2002) 11

Brownlee v. Haley, 2002 WL 31050882 (Sept. 16, 2002) 13

<u>Drew v. DOC (Florida)</u> , 297 F.3d 1278 (July 18, 2002)	18	31057016 (Sept. 17, 2002)	13
<u>Hunter v. Moore</u> , 2002 WL 2013266 (Sept. 4, 2002)	14	<u>United States v. Martin</u> , 297 F.3d 1308 (July 18, 2002)	18
<u>Knight v. Jacobson</u> , 300 F.3d 1278 (August 6, 2002)	17	<u>United States v. Murphy</u> , 2002 WL 31057014 (Sept. 17, 2002)	12
<u>Maharaj v. Secretary, DOC (Fla.)</u> , 2002 WL 31043274 (Sept. 13, 2002)	13	<u>United States v. Paul</u> , 2002 WL 31018291 (Sept. 11, 2002)	14
<u>McIver v. United States</u> , 2002 WL 31160004 (Sept. 30, 2002)	12	<u>United States v. Pendergraft</u> , 297 F.3d 1198 (July 16, 2002)	18
<u>Soliman v. United States</u> , 296 F.3d 1237 (July 11, 2002)	19	<u>United States v. Prouty</u> , 303 F.3d 1249 (Aug. 27, 2002)	15
<u>Tucker v. DOC (Fla.)</u> , 301 F.3d 1281 (Aug. 13, 2002)	16	<u>United States v. Richardson</u> , 2002 WL 2012676 (Sept. 4, 2002)	14
<u>United States v. Bowman</u> , 302 F.3d 1228 (August 20, 2002)	16	<u>United States v. Roberts</u> , 2002 WL 31209227 (Oct. 4, 2002)	11
<u>United States v. Brown</u> , 299 F.3d 1252 (July 31, 2002)	17	<u>United States v. Root</u> , 296 F.3d 1222 (July 10, 2002)	20
<u>United States v. Chang Qin Zheng</u> , 2002 WL 31057021 (Sept. 17, 2002)	12	<u>United States v. Schlaen</u> , 300 F.3d 1313 (August 8, 2002)	16
<u>United States v. Duarte-Acero</u> , 296 F.3d 1237 (July 12, 2002)	19	<u>United States v. Sigma International, Inc.</u> , 300 F.3d 1278 (August 6, 2002)	17
<u>United States v. Duty</u> , 302 F.3d 1240 (August 20, 2002)	15	<u>United States v. Sutton</u> , 302 F.3d 1226 (August 20, 2002)	15
<u>United States v. Edgar</u> , 2002 WL 31028287 (Sept. 12, 2002)	14	<u>United States v. Tinoco</u> , 2002 WL 2013777 (Sept. 4, 2002)	15
<u>United States v. Hersh</u> , 297 F.3d 1233 (July 17, 2002)	17	<u>United States v. Venske</u> , 296 F.3d 1284 (July 12, 2002)	19
<u>United States v. Kapelushnik</u> , 2002 WL		<u>United States v. Wattleton</u> , 296 F.3d 1184 (July 9, 2002)	19

United States v. White, 2002 WL 31086910
(Sept. 19, 2002) 12

United States v. Williams, 2002 WL
31261030 (Oct. 10, 2002) 11