

FEDERAL PUBLIC DEFENDER

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NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

Volume V, Issue IV

September 24, 2004

Blakely Still Unresolved

As most of you know, the question of whether the Supreme Court's decision in Blakely v. Washington, 124 S. Ct. 2531 (2004) has undermined the United States Sentencing Guidelines is still essentially unresolved. The United States Supreme Court will visit the issue when in October it hears oral arguments in two cases: United States v. Booker, 375 F.3d 508 (7th Cir. 2004) and United States v. Fanfan, 2004 WL 1713655 (D. Me. August 2, 2004).

For now, the Eleventh Circuit Court of Appeals in United States v. Reese, Case No. 03-13117, 2004 WL 1946076 (11th Cir. Sept. 2, 2004) has decided that the Guidelines are unaffected by the Blakely decision. The Court's decision, much like the decision from the Fifth Circuit in United States v. Pineiro, 377 F.3d 464 (5th Cir. 2004), fell short of giving the Guidelines a strong endorsement, holding only that "district courts should continue to sentence pursuant to the Guidelines until such time as the Supreme Court rules on this issue"Reese, at *4.

The First, Third, Eighth, Tenth, and D.C. Circuits have not entered into the fray. The Seventh Circuit in Booker and the Ninth Circuit in United States v. Ameline, 376 F.3d 967 (9th Cir. 2004), have held that Blakely invalidated the Guidelines, with the Ninth concluding the Guidelines are severable and the Seventh unsure about severability. In addition to the Fifth and Eleventh Circuits, the Second (United States v. Mincey, 380 F.3d 102 (2d Cir. 2004)); the Fourth (United States v. Hammoud, 378 F.3d 426 (4th Cir. 2004)); and the Sixth Circuit (United States v. Koch, Case No.02-6278, 2004 WL 1899930 (6th Cir. August 26, 2004)); have, for now, upheld the Sentencing Guidelines.

For the latest on Blakely, call us or go to Ohio State University law professor Douglas Berman's blog, *Sentencing Law and Policy*, at <http://sentencing.typepad.com>.

Northern District has Longest Sentences in the Nation

Figures released by the United States Sentencing Commission this past July show

that the average sentence in the Northern District of Florida is longer than the average sentence imposed in any of the other 93 districts in the nation. The statistics, which are the most recent available, are from the government's 2002 fiscal year (October 1, 2001 through September 30, 2002).

At 115.5 months, the average sentence in North Florida was more than twice the national average of 54.7 months. By way of comparison, only three other districts broke the 100 month mark: Southern Illinois with 112.9 months, Eastern North Carolina with 101.8 months, and Wyoming with 100.9 months. The average sentence in the Middle District of Florida was 77 months. It was 65.2 months in the Southern District of Florida.

The 115.5 month average represents an increase over fiscal year 2001 when it was 110.5 months. It was 114.6 months in fiscal year 2000.

The greatest disparity between the Northern District and the rest of the nation can be found in drug trafficking offenses, with the length of the average sentence, nationwide, being 74.3 months and the average sentence in North Florida being almost twice that amount, 142.8 months. By way of contrast, the average sentence for drug trafficking in the Middle District of Florida is 99.1 months, and is 77 months in the Southern District.

There is a significant difference in firearm cases, too, with the national average being 71 months, and the North Florida average being 112.2 months. With the exception of the two categories of larceny and embezzlement, the average sentence in North Florida exceeded the national average in the nine categories of offenses listed by the Sentencing Commission.

Other statistics are similarly dismal. Nationwide, 9% of those sentenced received a period of probation without any incarceration. In North Florida only 4% managed to avoid incarceration. Excluding downward departures for substantial assistance, judges in the Northern District departed in only 4.4 % of the cases, compared with a nationwide average of 16.8%.

In fairness, the departure percentages are skewed because of the high percentage of departures in those parts of the country that handle immigration cases. Still, the departure rate in the Middle District of Florida was at 7.4% and at 6.1% in the Southern District. In cases involving departures for substantial assistance, however, the North Florida judges exceeded the national average of 17.4%. They departed in 25.5% of all cases on that basis.

North Florida, as has been the case over the years, had a relatively high percentage of cases proceed to trial. Of the 334 Guidelines cases resolved by a plea or trial, 19 of them or 5.7% went to trial. While that percentage is the 6th highest in the nation, it is a significant drop from fiscal year 2001 when 11.5% of the cases went to trial.

There were 335 Guidelines cases resolved in the Northern District of Florida in 2002. In the 2001 there were 331. You can view all of the statistics by going to the Sentencing Commission's website at www.ussc.gov.

Charles Lammers Joins Our Pensacola Staff

Tallahassee private practitioner Charles Lammers has joined our Pensacola office.

Charles is a 1996 graduate of the University of Florida Law School. Before opening his own practice, Charles worked as an assistant public defender in the Titusville area and in Tallahassee. He also served as an assistant state attorney in Tallahassee. Before going to law school he worked as a state probation officer in Gainesville and served with the 5th Squadron / 12th Cavalry of the United States Army. Charles is a talented and enthusiastic trial lawyer. We're most fortunate to have him join us.

Hurricane Ivan

The Pensacola Courthouse has been closed since Hurricane Ivan hit last week. The Courthouse has electrical power and will open for court personnel on September 27th. The courthouse is not scheduled to open for general business until October 11. Our Pensacola office is currently closed and without electrical power. We'll open as soon as the power returns, which we hope will be by the beginning of next week. The main probation office in Pensacola suffered significant damage and is being relocated.

Tallahassee Women Pretrial Detainees to Be Held at Wakulla County Jail

United States Marshall Dennis Williamson, in an August 4, 2004, letter to Randy Murrell, announced that women pretrial detainees will no longer be housed at the Federal Correctional Institution in Tallahassee, but will, instead, be held in the Wakulla County Jail. The Marshall changed the long standing policy to eliminate the difficult conditions faced by the women.

The women had been housed in the special housing unit of the prison, a space generally

reserved for those being held in disciplinary confinement. The restrictions included solitary confinement for most of the women, no access to television, limited phone calls, limitations on what the women could purchase from the commissary, and a requirement that the women be handcuffed when they were out of their cells. Exercise was limited to one hour five times a week.

Women who have been sentenced and are awaiting designation to the Bureau of Prison will be held at FCI, as will those who have special medical needs. If the prisoner proceeds to trial, she will be held at FCI for the duration of the trial.

Justice Kennedy Criticizes Sentencing Practices

In a speech he made over a year ago to the American Bar Association, United States Supreme Court Justice Anthony Kennedy criticized existing sentencing practices. Here are some of the high points:

- “The nationwide inmate population today is about 2.1 million people. . . In countries such as England, Italy, France, and Germany, the incarceration rate is about 1 in 1,000 persons. In the United States it is about 1 in 43.”
- “Nationwide, more than 40% of the prison population consists of African-American inmates. About 10% of African-American men in their mid-to-late 20s are behind bars. In some cities more than 50% of young African-American men are under the supervision of the criminal justice system.”
- “The cost of housing, feeding, and

caring for the inmate population in the United States is over 40 billion dollars per year.”

- “Our resources are misspent, our punishments too severe, our sentences too long.”
- “The Federal Sentencing Guidelines should be revised downward.”
- “By contrast to the guidelines, I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust.”
- “[I]n my view a transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant, is misguided. Often these attorneys try in good faith to be fair in the exercise of discretion. The policy, nonetheless, gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.”

You can view that entire text of the August 9, 2003, speech at the website of the United State Supreme Court at: http://www.supremecourtus.gov/publicinfor/speeches/sp_08-09-03.html.

No End of Year Delay in CJA Payments

In years past, shortages in the federal courts’ budget has resulted in delays in the payments to CJA panel members. With the fiscal year due to end this month, this year’s threat was

averted when President Bush signed off on a \$26 million supplemental funding bill.

Sharing With Friends Isn’t Distribution

In a couple of cases over the summer, Chief Judge Robert Hinkle has ruled that the sharing of drugs with friends is not distribution. This past July, in a trial held in the Tallahassee Division, *United States v. Dwight Pratt*, Case No. 4:03cr8-RH, Judge Hinkle instructed the jury:

“To ‘possess with intent to distribute’ means to possess cocaine with intent to transfer to another person, with or without a financial interest. But the sharing of personal use amounts of cocaine among friends or associates, standing alone, not for financial reasons but solely to promote personal drug use, does not constitute possession with intent to distribute.”

Judge Hinkle based his conclusion on two cases: *United States v. Hardy*, 895 F.2d 1331 (11th Cir. 1990) and *United States v. Dekle*, 165 F.3d 826 (11th Cir. 1999). Be forewarned, though, Judge Hinkle’s view is not universally shared. *See, e.g., United States v. Washington*, 41 F.3d 917, 919 (4th Cir. 1994).

VICTORIES

In July, Pensacola attorneys **Joe Hammons** and **Barry Beroset** won acquittals for their clients in a well publicized trial involving charges of theft of records from the IRS regarding the investigation of Frank Patti. (Patti, himself, had been the subject of an earlier highly publicized trial that resulted in a conviction and a prison sentence.) Patti was the key government witness at the trial, but

Joe and Barry succeeded in discrediting him.

In July, **Tom Miller** of our Gainesville office, in a case involving fraudulent cattle deals, won an acquittal on a money laundering charge and a number of fraud counts. Two days before trial, the government dismissed three counts of the thirteen-count indictment. During the course of the trial, Judge Mickle found there had been no concealment and granted a judgment of acquittal on the money laundering charge. Tom challenged the accuracy of the record keeping of one of the Government's key witnesses, and after 7 hours of deliberation, the jury acquitted the client of 4 of the remaining 9 fraud counts. Judge Mickle instructed the jury pursuant to Blakely, and Tom succeeded in convincing the jury to return findings that his client had not obstructed justice and that, despite claims made by witnesses that the loss exceeded \$1.2 million, that the loss was \$256,000.

Pensacola panel member **Jim Jenkins** successfully represented the last of the "Operation Sandshaker" clients at a sentencing before Judge Vinson. His client was facing a mandatory minimum 10 years, having been found accountable for 14.5 kilograms of powder cocaine. Although there were forfeitures of a significant amount of real property, Jim convinced the government to set aside \$125,000 in a trust fund for the client's 9 year old child. Although Judge Vinson, at the initial sentencing hearing, declined to grant Jim's request for a downward departure on the basis of family responsibilities, voluntary forfeiture of property, post-arrest rehabilitation, and contributions to the community, the judge postponed the sentencing so as to allow the client to continue her efforts to win a substantial assistance departure. Ultimately, the government filed

the substantial assistance motion and that, coupled with adjustments for the safety valve and minor role, resulted in a much improved sentence of 2 years.

The last few months were good to **Randy Murrell** and some of his clients. After his client had entered guilty pleas to a number of related charges, Randy took his client to trial and won an acquittal on one of the two charges heard by the jury, use of a firearm in furtherance of a drug trafficking, and a conviction for a lesser included offense on the other - possession of cocaine rather than possession with intent to distribute. Essential to the acquittal was Judge Hinkle's decision, reported in this newsletter, to instruct the jury that the sharing of small amounts of drugs with friends did not amount to distribution.

Earlier in the summer, Randy won a motion to suppress in front of Judge Mickle. Having heard testimony from Quincy psychologist Harry McClaren, the judge concluded that the mentally retarded client did not knowingly waive her Miranda rights and suppressed the client's confession.

Randy was also before Judge Hinkle in the case where the Judge announced that the Blakely decision invalidated the Sentencing Guidelines. Finally, Randy convinced Judge Hinkle to grant a new sentencing proceeding and an appeal to a client who had, in her pro se 2255 motion, argued that her trial lawyer failed to honor her request to pursue an appeal. In reaching his decision, Judge Hinkle declined to follow Magistrate Judge Sherrill's recommendation to dismiss the claim.

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

Allen, Ronald Mickle, S. Atty: Chuck McMurry
 Docket: 4:04cr7-SPM
 Charge: Consp. to Dist. Crack Cocaine
 Range: Mandatory Life
 Sentence: 170 months BOP
 Date of Imposition of Sentence: 6/28/04
 Grounds: 5K1.1 motion

Bellamy, Thomas Mickle, S. Atty: Cliff Davis
 Docket: 4:03cr51-SPM
 Charge: Consp. to Dist. Crack Cocaine, Poss FA by CF
 Range: 262 - 327 months
 Sentence: 145 months
 Date of Imposition of Sentence: 6/28/04
 Grounds: 5K1.1 motion

Frosch, Bobby Rodgers, M. Atty: Bill Clark
 Docket: 5:04cr12-MCR
 Charge: Poss WITD Meth, Poss FA during a drug trafficking offense
 Range: 130 - 147 months
 Sentence: 30 months BOP
 Date of Imposition of Sentence: 8/04/04
 Grounds: 5K1.1 motion

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.

PANEL TRAINING

This month's video features former Clinton Administration Solicitor General Seth Waxman and his discussion of recent Supreme Court Miranda decisions. Mr. Waxman is one of the nation's best known lawyers, having been described by one legal

organization as "the dominant force in the Supreme Court Bar." He's argued 40 cases before the Court, 10 of which were in the last two terms. Much of his discussion centers on the three Miranda decisions from last year's term: United States v. Patane, 124 S. Ct. 2620 (2004); Missouri v. Seibert, 124 S. Ct. 2601 (2004); and Fellers v. United States, 124 S. Ct. 1019 (2004), which Mr. Waxman argued

We'll be sending out emails with the viewing schedule.

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 2004 term that are relevant to our practice and granted since our last newsletter:

U.S. v. BOOKER, No. 04-104,2004 WL 1713654, and U.S. v. FANFAN, No. 04-105, 2004 WL 1713655 (U.S. Aug. 2, 2004)

Blakely

These cases raise the issue of whether, and how, Blakely v. Washington, 124 S. Ct. 2531 (2004), applies to the U.S. Sentencing Guidelines. In Booker, sentencing occurred prior to issuance of Blakely. In a post-Blakely appeal, where no constitutional issue had been raised in the district court, the 7th Circuit reversed the sentence, holding that Blakely applies to enhancements, but concluding that there would be no 6th Amendment violation if there were no enhancements; declining to decide whether

the non-offending portions of the federal guidelines were severable; and declining to decide whether, if the guidelines are severable, the judge can impanel a sentencing jury. In Fanfan, the sentencing court found enhancements would have been applicable but for Blakely. The Government sought correction or modification under Rule 35(a), and lost. The case went to the 1st Circuit, but the USSC granted cert. before the 1st Circuit ruled.

WHITFIELD v. U.S., No. 03-1293, 124 S. Ct. 2871 (Mem), and **HALL v. U.S.**, No. 03-1294, 124 S. Ct. 2872 (Mem) (consolidated)(Jun 21, 2004)

Money laundering

The 11th Circuit held, in an unpublished decision in Whitfield, that a conviction for conspiracy to commit money laundering under 18 U.S.C. § 1956(h) does not require the jury to find proof of an overt act, and therefore the district court did not err in refusing to instruct the jury on this element. This issue involves a 3-2 circuit split. Questions presented: (1) Whether commission of an overt act is an essential element of a conviction under 18 U.S.C. § 1956(h), conspiracy to commit money laundering? (2) Whether the Supreme Court should resolve the split between the federal circuit courts on the issue of whether an overt act is an essential element of a conviction

under 18 U.S.C. § 1956(h)? (3) Whether the district court abused its discretion in omitting an "overt act" element from its instruction on money laundering conspiracy?

SHEPARD v. U.S., No. 03-9168, 124 S. Ct. 2871 (Mem)(Jun 21, 2004), reviewing 348 F.3d 308 (1st Cir.)

Armed Career Criminal

The court refused to apply the Armed Career

Criminal Act to a conviction under 18 U.S.C. 922(g) where the defendant's three prior burglary convictions were evidenced by complaints written in boilerplate language not specifying the nature of the structure burglarized, and thus not excluding the possibility it could have been a car or boat, and refusing to consider other documents evidencing the facts of the prior cases where those facts were not read to and admitted by the defendant prior to his pleas. Questions presented: (1) Whether, where the defendant has pleaded guilty to a nongeneric charge of burglary brought under a nongeneric statute, there is no contemporaneous record of the guilty plea proceedings and the judgment of conviction reflects a general finding of guilty, the sentencing court is still bound by United States v. Taylor, 495 U.S. 575 (1990), a categorical method of application or may instead be required to conduct an inquiry - including an evidentiary hearing - into the facts underlying the conviction, to determine whether, in the guilty plea proceeding, both the defendant and the government believed that generic burglary was at issue? (2) If so, whether the sentencing court may be required to consider a version of these underlying facts found in any document in the court file such as an investigative police report or a complaint application and, if the facts alleged in the document are not challenged by the defendant, regard them as sufficiently reliable evidence that the defendant was convicted of a crime including all of the elements of generic burglary to support an Armed Career Criminal Act enhancement?

Supreme Court Cases

BLAKELY v. WASHINGTON, 124 S. Ct. 2531 (Jun 24, 2004)

6th Amendment limits on guidelines

sentencing

The Supreme Court held that the imposition at sentencing by a Washington State judge of a sentence enhancement in the state's guidelines scheme, above the otherwise applicable statutory maximum, violated the Sixth Amendment. In a footnote the Court stated: "The Federal [Sentencing] Guidelines' are not before us, and we express no opinion on them."

ASHCROFT v. AMERICAN CIVIL LIBERTIES UNION, 124 S. Ct. 2783 (Jun 29, 2004)

Child Online Protection Act (COPA)

COPA is the second attempt by Congress to make the Internet safe for minors by criminalizing certain Internet speech. The first attempt was the Communications Decency Act of 1996, which the Court struck down on First Amendment grounds in Reno v. American Civil Liberties Union (1997). In response to Reno, Congress passed COPA, which imposes criminal penalties of a \$50,000 fine and six months in prison for the knowing posting, for "commercial purposes," of World Wide Web content that is "harmful to minors."

The ACLU won a preliminary injunction against the enforcement of COPA on First Amendment grounds, and the Third Circuit affirmed. The Court here, by a 5-4 vote, with Kennedy writing the majority opinion, joined by Stevens, Souter, Thomas, and Ginsburg, affirmed, holding that Internet content providers and civil liberties groups were likely to prevail on claim that COPA at trial because the Government failed to rebut the plaintiffs' contention that there are plausible less restrictive alternatives to the statute.

U.S. v. PATANE, 124 S. Ct. 2620 (Jun 28, 2004)

Miranda fruits

The Court held that physical evidence obtained as the result of a Miranda violation through an otherwise voluntary statement need not be suppressed. Thomas, with Rehnquist & Scalia wrote the plurality opinion, saying "the Miranda rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause. The Self-Incrimination Clause, however, is not implicated by the admission into evidence of the physical fruit of a voluntary statement. Accordingly, there is no justification for extending the Miranda rule to this context. And just as the Self-Incrimination Clause primarily focuses on the criminal trial, so too does the Miranda rule. The Miranda rule is not a code of police conduct, and police do not violate the Constitution (or even the Miranda rule, for that matter) by mere failures to warn. For this reason, the exclusionary rule articulated in cases such as Wong Sun does not apply. "

Kennedy, with O'Connor, concurred in the judgment, saying that they "find it unnecessary to decide whether the detective's failure to give Patane the full Miranda warnings should be characterized as a violation of the Miranda rule itself, or whether there is '[any]thing to deter' so long as the unwarned statements are not later introduced at trial." Souter and Breyer authored dissents.

MISSOURI v. SEIBERT, 124 S. Ct. 2601 (Jun 28, 2004)

Midstream Miranda warnings

The Court struck down a police protocol for that calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession, followed by Miranda warnings and a second confession. Souter, writing for Stevens, Ginsburg, and Breyer, concluded that "Because this midstream

recitation of warnings after interrogation and unwarned confession could not effectively comply with Miranda's constitutional requirement, we hold that a statement repeated after a warning in such circumstances is inadmissible." Kennedy concurred but said "I would apply a narrower test applicable only in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the Miranda warning. The admissibility of postwarning statements should continue to be governed by the principles of Elstad unless the deliberate two-step strategy was employed."

HOLLAND v. JACKSON, 124 S. Ct. 2736 (Jun 28, 2004)

28 U.S.C. § 2254, Strickland

In a brief per curiam 5-4 opinion, the Court reversed the 6th Circuit's grant of habeas relief under 28 U.S.C. § 2254 by finding the state court's decision to deny a Strickland claim based on failure to investigate was not unreasonable, when it in essence reargued a prior claim that had been rejected; and that the proper standard is a reasonable probability, i.e., a probability sufficient to undermine confidence in the outcome, not "proof of prejudice by a preponderance of the evidence."

HAMDI v. RUMSFELD, 124 S. Ct. 2633 (Jun 28, 2004)

Enemy combatants, 28 U.S.C § 2241

In a split decision, the Court held that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker." The plurality opinion was authored by O'Connor, joined by Rehnquist, Kennedy, and Breyer. They said Congress authorized the detention of combatants in the

narrow circumstances alleged here, but due process was not followed. They emphasized that the detention must be "to prevent a combatant's return to the battlefield," which the plurality views as "a fundamental incident of waging war." This means that Hamdi can be held, the plurality concludes, not until the end of the "war on terror," which the plurality acknowledges may not come in Hamdi's lifetime, but instead only until the end of the "active combat operations in Afghanistan."

RASUL v. BUSH, 124 S. Ct. 2686 (Jun 28, 2004)

Jurisdiction, 28 U.S.C § 2241

The issue here was whether any U.S. courts have jurisdiction to consider challenges under 28 U.S.C. § 2241 brought by the "enemy combatants" detained at Guantanamo Bay, Cuba, notwithstanding that the U.S. does not wield "ultimate sovereignty" over the base there. The Court ruled in the affirmative by a 5-1-3 split. In the majority opinion by Stevens, joined by O'Connor, Souter, Ginsburg, and Breyer, the Court, addressing some of its own precedent, said "because 'the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody,' a district court acts 'within [its] respective jurisdiction' within the meaning of § 2241 as long as 'the custodian can be reached by service of process.'" The Court rejected the U.S.'s efforts to rely on the presumption against extraterritoriality on the ground that the base was in fact within the U.S.'s "territorial jurisdiction." The Court noted that the U.S. had conceded that U.S. courts would have jurisdiction over a habeas petitioner filed by a U.S. prisoner held at the base; it found "little reason to think that Congress intended the geographical coverage of the statute to

vary depending on the detainee's citizenship." Kennedy concurred separately. Scalia authored the dissent.

RUMSFELD v. PADILLA, 124 S. Ct. 2711 (Jun 28, 2004)

Procedure, 28 U.S.C § 2241

In a 5-4 decision authored by Rehnquist, joined by O'Connor, Scalia, Kennedy, and Thomas, the Court declined to reach the merits of Padilla's case on the ground that he failed to name the proper respondent - Commander Melanie Marr, the commander of the South Carolina naval brig where Padilla is being held. "Whenever a § 2241 habeas petitioner seeks to challenge his present physical custody within the United States, he should name his warden as respondent and file the petition in the district of confinement." Such a rule is necessary, the Court continued, to prevent "rampant forum-shopping, district courts with overlapping jurisdiction, and the very inconvenience, expense, and embarrassment Congress sought to avoid when it added the jurisdictional limitation 137 years ago." Kennedy, with O'Connor, filed a concurring opinion. Stevens authored the dissent.

SCHRIRO v. SUMMERLIN, 124 S. Ct. 2519 (Jun 24, 2004)

Capital sentencing; Ring; nonretroactivity

The Court (5-4) held that Ring v. Arizona, 536 U.S. 584 (2002) (in capital sentencing proceedings, the existence of an aggravating factor must be proved to a judge rather than a jury) does not apply retroactively in federal habeas. The Court noted that retroactive application is necessary only for new "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." The Court found that Ring did not involve such a

rule. It did not alter the range of conduct or the class of persons subject to the death penalty, but only the method of determining whether the defendant engaged in that conduct. Judicial factfinding, moreover, while now unconstitutional under Ring, did not seriously diminish the accuracy of the death sentence determinations.

TENNARD v. DRETKE, 124 S. Ct. 2562 (Jun 24, 2004)

Capital sentencing; mental mitigation; COA

The Court reversed the Fifth Circuit's denial of habeas relief because reasonable jurists could have concluded that Tennard's low IQ (67) evidence was relevant mitigation and that the Texas' Court of Criminal Appeals' application of Penry was unreasonable. "Impaired intellectual functioning has mitigating dimension beyond the impact it has on the ability to act deliberately."

BEARD v. BANKS, 124 S. Ct. 2504 (Jun 24, 2004)

Nonretroactivity, death penalty mitigation

The Court held that Mills v. Maryland, 486 U.S. 367 (1988) and McKoy v. North Carolina, 494 U.S. 433 (1990), which held that a State cannot require juries to unanimously agree on mitigating factors in death sentencing proceedings, does not apply retroactively.

PLILER v. FORD, 124 S. Ct. 2441 (Jun 21, 2004)

Habeas; exhaustion; limitations; court's duty; pro se litigants

The Court, rejecting a rule requiring district courts to warn pro se habeas litigants of the AEDPA statute-of-limitations dangers of voluntarily dismissing a timely petition, nevertheless remanded to the court of appeals

to determine whether the limitations period should be deemed equitably tolled where the petitioner claimed he was affirmatively misled by the district court's choice of options in dealing with a partially unexhausted habeas petition.

HIIBEL v. SIXTH JUDICIAL DIST. CT. OF NEV., HUMBOLDT CTY., 124 S. Ct. 2451 (June 21, 2004)

Stop; arrest; identity; Fourth & Fifth Amendments; self-incrimination

The Court unanimously affirmed Hiibel's conviction under a state "stop and identify" statute that requires a citizen, stopped under what an officer considers suspicious circumstances, to identify himself, finding it violated neither the Fourth Amendment nor the Fifth Amendment prohibition against self-incrimination.

Selected Eleventh Circuit Case Summaries

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

RUTHERFORD v. CROSBY, 2004 WL 2093447 (Sept. 21, 2004)

Habeas, death penalty, AEDPA (per curiam by Carnes, Hull and Wilson)

In a lengthy, fact-intensive opinion, the Court rejected constitutional claims made by a Florida death row inmate, holding: (1) His second trial did not violate Double Jeopardy after first getting a post-verdict mistrial at the conclusion of the penalty phase of the first trial based on prosecutorial misconduct in failing to produce discovery; (2) He was properly denied relief on his penalty phase ineffective assistance of counsel claim based on allegations that counsel failed to adequately investigate and present evidence about Rutherford's alcoholism, childhood,

marital difficulties, and experiences in Vietnam; obtain and present expert mitigating evidence about his mental health; and object to the testimony of three witnesses who repeated statements that had been made by the victim about Rutherford; and (3) He was not entitled to relief for an attorney conflict of interest based on Rutherford's claim that his trial counsel was ineffective for revealing to the judge that Rutherford had rejected a plea offer. While the jury deliberated Rutherford's sentence, one of his attorneys told the court: "I did inform the defendant of the possibility of if [sic] he did enter a plea in this case that he would receive, in my opinion, a life sentence from Your Honor and a recommendation of a life sentence from the State Attorney's Office" Rutherford contends that his attorneys revealed this information in order to protect themselves from an ineffective assistance claim, thereby placing their own interests above his and making it possible for the judge to consider Rutherford's refusal to enter a guilty plea when imposing sentence.

U.S. v. STUART, 2004 WL 2032318 (Sept. 14, 2004)

Downward departure; preindictment delay; extraordinary postoffense rehabilitative efforts

In a government appeal, the Court vacated and remanded for resentencing. On a question of first impression, the Court ruled that the downward departure for preindictment delay (2-1/2 years from first interview until indictment) was error because the defendant was not prejudiced by the delay; further, the defendant had not shown the delay was unreasonable or caused by bad faith. The Court held that "at a minimum, a downward departure for preindictment delay would have to be predicated on some

prejudice to the defendant, and there is no evidence of prejudice to Stuart from any delay." Second, binding precedent precluded any downward departure for extraordinary postoffense rehabilitative efforts. Although such efforts may justify a downward departure, it can only be effectuated by a reduction in criminal history category, so that a CHC I defendant such as here is ineligible for such a departure.

RECENDIZ-ALCARAZ v. ASHCROFT, 2004 WL 2009447 (Sept. 10, 2004)

Immigration; removal; conviction

The Court held that even an expunged state court conviction is a "conviction" for purposes of 8 U.S.C. 1252(a)(2)(C), therefore depriving the Court of subject matter jurisdiction to review a removal decision of the Bureau of Immigration Appeals.

U.S. v. REESE, 2004 WL 1946076 (Sept. 2, 2004)

Blakely; 2K2.1(b)(5); firearm

The Court held that Blakely v. Washington does not apply to the Federal Sentencing Guidelines and affirmed a four-level enhancement for possessing a firearm in connection with another felony, under USSG 2K2.1(b)(5).

U.S. v. HERNANDEZ-MARTINEZ, 2004 WL 1946072 (Sept. 2, 2004)

Sentencing; illegal reentry; criminal history; 4A1.2; prior convictions

Limiting its decision to the facts of this case, the Court held that the defendant's two prior state convictions should not count as one conviction for determining his criminal history where the only basis for counting them as one was that they received concurrent sentences on the same day before the same judge. Otherwise, they were committed on different

days, involved different victims, were charged in separate indictments, and resulted in separate judgments, but they were not separated by an intervening arrest.

JEFFERSON v. FOUNTAIN, 2004 WL 1941106 (Sept. 1, 2004)

Habeas; traffic stop; ineffectiveness; suppression; inevitable discovery

In a fact-intensive opinion, the Court reversed the grant of habeas relief to a state prisoner. A state appellate court had granted relief in related cases on the basis that trial counsel had been ineffective for failing to move to suppress the fruits of an illegal traffic stop, but then another state trial court had denied relief in this case, when both cases addressed the same legal/factual question. The district court had granted relief under 28 U.S.C. § 2254, finding that the state court's denial of relief was predicated on an unreasonable application of both the performance and prejudice prongs of Strickland. The Court assumed both that the traffic stop was illegal and that trial counsel was ineffective for failing to move to suppress. Nevertheless, the defendant was not entitled to relief because of the inevitable discovery exception to the exclusionary rule.

ESTES v. CHAPMAN, 2004 WL 1925605 (Aug. 31, 2004)

Habeas; limitations; tolling

The Court held that a Georgia state-court motion to vacate an allegedly void sentence was "properly filed," such that it tolled the limitations period for filing federal habeas petitions under 28 U.S.C. 2244(d)(1), because Georgia law at the time provided for resentencing a defendant "at any time" "where a sentence is void." The Court rejected the state's various attempts to avoid relief at all costs

U.S. v. COPELAND, 2004 WL 1870558 (Aug. 23, 2004)

Government's breach of plea agreement

Copeland was charged with conspiracy to distribute crack (the drug charge). He pleaded guilty in a plea agreement in which the government agreed not to prosecute him for matters which he related to the government. The plea agreement also contained Copeland's waiver of the right to appeal his sentence in the drug charge. Copeland was subsequently charged in a one-count indictment with carrying a firearm in connection with a drug trafficking crime, 18 U.S.C. § 924(c) (the gun charge). Copeland claimed that this gun charge was barred by the plea agreement for the drug charge, but the district court ruled that the plea agreement had not been breached. The Eleventh Circuit reversed, holding that the "district court erred in finding that the language of the plea agreement required Copeland to provide information about the gun charge prior to signing the plea agreement.

U.S. v. HEMBREE, 2004 WL 1873773 (Aug. 23, 2004)

Blakely motions

The Court held that it will not allow appellants the opportunity to even move to file new initial briefs to argue Blakely.

U.S. v. FRASIER, 2004 WL 1858234 (Aug. 20, 2004)

U.S.S.G. § 3C1.1, obstructing a state investigation

The Court rejected Frasier's claim that the court clearly erred in adjusting his base offense levels upward by two levels for obstruction pursuant to U.S.S.G. § 3C1.1. Frasier was being held in the Orange County jail as a pretrial detainee, having been charged

by the State of Florida for committing the bank robberies at issue here. An FBI agent came to the jail and informed Frasier that the federal government was investigating the robberies and that he was a target of the investigation. The agent hoped that Frasier, once indicted by a federal grand jury, would cooperate and assist the government in recovering the stolen money. Following the agent's visit, Frasier attempted to escape from the jail. The Court agreed with other circuits to hold that enhancement for obstruction of justice is applicable where the defendant's conduct obstructed a state investigation, which later turned into a federal investigation.

U.S. v. DUNCAN, 2004 WL 1838020 (Aug. 18, 2004)

Blakely Sentencing; plain error; drug quantity; special verdict

The Court rejected the argument that the jury's special verdict on drug quantity, which found powder cocaine, precluded the district court's sentence on the basis of crack cocaine, which it had found by a preponderance. Although this Apprendi challenge was raised in the initial brief, and followed by supplemental briefs after Blakely, it was not raised in the district court. "The fact that Blakely was decided subsequent to the judgment in the district court does not alter our use of the plain error standard." The Court concluded that the error was not plain, because it was not obvious from Blakely that it would apply to the federal sentencing guidelines, noting that a majority of circuits now appear to be leaning the other way.

GIVENS v. ALABAMA DEPT OF CORRECTIONS, 2004 WL 1838569 (Aug. 18, 2004)

1983; work release income; unlawful

taking

The Court affirmed the district court's dismissal of a 1983 action, for failure to state a claim, where a former work release participant challenged the state department of corrections' practice and policy of prohibiting inmates from receiving the interest on their bank accounts, in their own names, where the department deposits their work release earnings. The Court agreed, in part, that the inmate had no property interest in the bank account interest and therefore the policy did not constitute an unlawful taking.

U.S. v. CURTIS, 2004 WL 1784746 (Aug. 10, 2004)

Blakely motions, plain error

The Court made it nearly impossible for parties who filed pre-Blakely briefs to raise Blakely prior to post-conviction review, even in pending cases. The Court held that a party will not be allowed to file supplemental briefs to raise Blakely for the first time on appeal. The Court in a footnote indicated that Blakely claims not raised timely in the trial court will be reviewed only for plain error, and found as an alternative basis of decision, that no plain error exists because "we discern no miscarriage of justice in the case, nor do we believe this case presents a situation that seriously affects the fairness, integrity or public reputation of judicial proceedings" even though "Curtis received enhancements based upon two facts found by the sentencing judge - obstruction of justice and vulnerable witness."

HUBBARD v. CAMPBELL, 2004 WL 1737545 (Aug. 4, 2004)

Habeas; COA

The Court affirmed dismissal of a death row inmate's "amended habeas corpus petition" for lack of jurisdiction, with Barkett dissenting as

to the denial of stay of execution. Note the Court ruled the district court's dismissal was not a final habeas order but just a final order of the district court and thus did not require a certificate of appealability (COA). Also, Barkett noted the procedural catch-22 that entangled Mr. Hubbard, preventing earlier filing of the claim, and that the claim might have been viable in a § 1983 proceeding.

U.S. v. LEVY, 2004 WL 1725406 (Aug. 3, 2004)

Blakely; rehearing; supplemental briefs

The Court denied Appellant's motion for rehearing under Blakely because not raised in his initial brief on appeal, citing McGinnis, 918 F.2d 1491, 1495-97 (11th Cir. 1990) (en banc) (rejecting argument based on intervening Supreme Court decision), a civil case finding no miscarriage of justice. The Court did not distinguish Singer, No. 03-15801-FF (Order of July 30, 2004 denying leave to file supplemental briefs but on its own motion striking the briefs already filed and ordering the appeal rebriefed on an abbreviated schedule).

U.S. v. PIPKINS, 378 F.3d 1281 (Aug. 2, 2004)

RICO; sufficiency; agreement; interstate commerce; instruction; extortion; involuntary servitude; sentencing; 2G1.1; 2H4.1(b)(4)

The Court rejected sufficiency challenges to convictions for RICO violations, extortion, involuntary servitude, and unlawful transfer of false ID documents, and affirmed a sentence cross-reference under 2G1.1 and application of 2H4.1(b)(4).

U.S. v. SALMAN, 378 F.3d 1266 (Jul 29, 2004)

Indictment; dismissal; 18 USC 922(g)(5)(A); possession of firearm; illegal

alien

Salman, a Syrian citizen, entered the United States on a student visa and stayed 14 years, failing to maintain student status. He admitted possessing firearms and ammunition and was convicted of six counts of possession of firearms and ammunition by an illegal alien under 18 U.S.C. § 922(g)(5)(A). The district court granted Salman's motion to dismiss the indictment, finding that he was not "illegally or unlawfully" in the U.S., as a matter of law, because he (1) had an application for adjustment of status pending; (2) was eligible to file for permanent residency under the Legal Immigration Family Equity Act of 2000; and (3) was not unlawfully present solely by virtue of his failure to maintain student status.

The Court reversed for procedural reasons; "by looking beyond the face of the indictment and ruling on the merits of the charges against Salman, the district court in effect granted summary judgment in favor of the defendant ... In so doing, the district court overlooked binding precedent from this court," which holds that "the sufficiency of a criminal indictment is determined from its face. The indictment is sufficient if it charges in the language of the statute." In n.4, the Court noted a possible intra-circuit with United States v. Zayas-Morales, 685 F.2d 1272 (11th Cir. 1982). The Court also noted that its view contrasts with that of the 6th Circuit, which has held that Federal Rule of Criminal Procedure 12 provides a basis for granting a pre-trial motion to dismiss a criminal indictment.

WILLIAMS v. ATTORNEY GENERAL OF ALABAMA, 378 F.3d 1232 (Jul 28, 2004)

Constitutionality; obscenity; sex toys

Alabama's Anti-Obscenity Enforcement Act prohibits the commercial distribution of "any

device designed or marketed as useful primarily for the stimulation of human genital organs for any thing of pecuniary value." The district court enjoined the statute's enforcement under a strict scrutiny analysis. The Court, Barkett dissenting, reversed, concluding there is no "right to sexual privacy" in the Constitution and Lawrence v. Texas did not apply.

O'ROURKE v. HAYES, 378 F.3d 1201 (Jul 27, 2004)

Search; Fourth Amendment

A probation and other officers were denied entry to a business to look for a probationer. They had an arrest warrant but no reason to believe he was inside; they were rude and abusive and pounded on the door, demanding entry, then arrested the office manager for resisting arrest, which was later changed to obstruction of justice, which a county court judge dismissed.

The office manager sued for a 4th Amendment violation, and the officers argued there was no "search" and qualified immunity. The district court found a search and denied qualified immunity, and the Court affirmed, holding that the entry itself constituted a "search" requiring a warrant and that qualified immunity was not warranted: "Had he taken even a moment to consider the clearly established law of this circuit, he would not have followed the lead of the other officers in entering O'Rourke's office. Indeed, had the officers he accompanied displayed the courtesy, professionalism, and respect citizens have the right to expect, they would not have acted with the unbridled arrogance of those who believe they will never be held accountable for their behavior. The facts in the record, interpreted in the light most favorable to O'Rourke, make out a violation of her clearly established Fourth Amendment

right to be free of warrantless searches and seizures. Consequently, her suit against Hayes may proceed."

KELLEY v. SECRETARY, DOC, 377 F.3d 1317 (July 23, 2004)

Capital habeas; ineffectiveness; failure to investigate; Brady

The Court reversed a grant of habeas relief to a Florida capital defendant, fingering the district court erred in granting an evidentiary hearing on new matters and noting the thorough review of the 3.850 proceeding in state court. Kelley failed to show "cause and prejudice" to justify an evidentiary hearing to develop matters not developed in state court.

The Court found no support for any of the grounds on which habeas relief was granted. The ineffective assistance of counsel claim had not been presented at his prior 3.850 hearing and could not "fundamentally alter" a claim in federal court from what was previously argued in state court. The Court also rejected the Brady-based grounds for habeas relief, finding no reasonable probability the materials at issue affected the trial's outcome.

BOONE v. SECRETARY, DOC, 377 F.3d 1315 (Jul 22, 2004)

Jurisdiction; Rule 60(b); fraud on court; intervening law; habeas

The Court vacated its 6/4/04 decision and affirmed the denial of 2254 habeas relief on the ground that the district court lacked jurisdiction to consider Boone's motion to reconsider the denial of relief under Fed. R. Civ. P. 60(b). Citing Gonzalez, 366 F.3d 1253 (11th Cir. 2004) (en banc), the Court noted that district courts do not have jurisdiction to consider Rule 60(b) motions to reconsider the denial of habeas relief except under 60(b)(3) to prevent fraud on the court.

Here, Boone was seeking reconsideration to rely on intervening law.

U.S. v. JONES, 377 F.3d 1313 (Jul 22, 2004)

Search; warrant; delay in execution; subjective intent

The Court reversed the grant of a suppression motion. Police found firearms in Jones' home pursuant to a search warrant based on Jones' statements following his arrest on a child support warrant; the district court granted the motion, finding that police had delayed enforcing the child support warrant to "catch Jones in a drug offense." The Court reversed, noting that the subjective intent of the police is not relevant, citing Whren, 116 S.Ct. 1769 (1996), and Arkansas v. Sullivan, 121 S.Ct. 1876 (2001). The arrest warrant was executed within 30 days of issuance, was supported by probable cause, and the delay in execution was not unlawful.

U.S. v. MARSEILLE, 377 F.3d 1249 (Jul 21, 2004)

Blakely; sentencing; career offender

The Court affirmed concurrent sentences as a "career offender," rejecting the argument that the career offender guideline was inapplicable because his two offenses had been "grouped" under § 3D1.2, and once grouped, his ammunition possession offense became the sole predicate offense, and such possession is not a crime of violence. The Court explained that grouping rules "do not control" Chapter Four enhancements. Thus, the sentencing court properly considered the witness threatening conviction, a crime of violence, in deciding whether he was a career offender. Otherwise, that conviction would have no importance or effect on the sentence.

The Court also rejected Marseille's argument that he should not have been classified as a

Category VI offender, because the district court had not in fact applied the offense level table in the subsection that made offenders eligible for Category VI. The Court noted that the guidelines anticipate this "contingency" and provide for an "override."

In a final footnote, the Court rejected a Blakely challenge to his sentence enhancements based on obstruction of justice and prior convictions. Marseille had admitted to obstructing justice by pleading guilty to witness threatening, and Blakely did not take such prior conviction fact-finding out of the hands of the courts. (Note: Although Blakely was raised in a supplemental authority notice, not briefs or oral argument, the Court addressed it **on the merits**. While it found Blakely inapposite, it implicitly acknowledges Blakely's application to the federal guidelines and impliedly concludes Blakely does not render the entire scheme unconstitutional.)

SIBLEY v. CULLIVER, 377 F.3d 1196 (Jul 21, 2004)

Habeas; timeliness; 2254; equitable tolling; Ring retroactivity

The Court affirmed the district court's dismissal of a 2254 habeas petition as untimely. The petition was filed several months after the one-year deadline. The Court found a "Notice" filed in the Alabama courts (stating: "This Notice may not be construed as a motion or pleading." and filed in the wrong court at that, thus never properly "filed") concerning his efforts to attack his death sentence in Congress did not, in the absence of any other legitimate post-conviction filing, constitute a properly filed pleading which extended the statute of limitations. The Court rejected the argument that the Alabama Supreme Court had a legal duty to forward the document to the correct court, pointing out that the tolling provision of the federal statute-of-limitations did not invite inquiry into who

was at fault for the non-filing. Further, the Notice was not "properly filed" because no filing fee was paid.

The Court also rejected an equitable tolling argument because Sibley had presented no evidence of actual innocence, mere generalized allegations, and was not entitled to an evidentiary hearing to develop this evidence.

Finally, the Court rejected the attempt to invoke Ring v. Arizona retroactively.

PEOPLES v. CAMPBELL, 377 F.3d 1208 (Jul 21, 2004)

Habeas; search; Miranda; voluntariness; ineffectiveness

The Court affirmed the denial of capital habeas relief, rejecting a Fourth Amendment claim under Stone v. Powell, 428 U.S. 465 (1976), because defendant was not denied "an opportunity for full and fair litigation" in the state courts. The Court also rejected a Miranda argument; the defendant was not "in custody" when, having gone voluntarily to the police station and been told he was not under arrest, but without having been advised of his rights, he gave information to the police. The Court noted he had defaulted his ineffective assistance of counsel claim in the state courts, but since the state appellate courts had reached the merits, the Court addressed but rejected the claim because he had presented nothing more than "conclusory allegations." The Court declined to consider new factual bases for the ineffectiveness claim. The Court also rejected a claim that counsel should have advised the defendant not to speak to the police, noting that even if the claim survived Texas v. Cobb (appointment of counsel is "case specific" - counsel appointed for one case cannot be charged with ineffectiveness in another), the overwhelming evidence of guilt undermined

any showing of "prejudice" as a result of subpar lawyering.

U.S. v. TRAINOR, 376 F.3d 1325 (Jul 19, 2004)

Statute of limitations; suspension; foreign evidence; indictment; 18 USC 3292

The Court affirmed dismissal of an indictment because the government had not satisfied the requirement of 18 U.S.C. § 3292(a)(1) -- a provision allowing suspension of the statute of limitations to allow the U.S. to obtain foreign evidence -- to come forward with **some evidence** to support a "preponderance of the evidence" finding that evidence concerning a charged offense was located in a foreign country. The Court pointed out that the government supplied no evidence, merely a summary of the evidence it believed existed. Such a proffer was not evidence, noting that the summary was not sworn or verified, and that no referenced documents were attached. Further, the ex parte proffer proceeding required more than "mere assertions" by the government. The Court rejected the government's arguments (a) that its request for documents, standing alone, established that evidence was located in the foreign country; (b) that future prosecutions would be jeopardized; and (c) an equitable tolling argument because it was not raised in the district court and thus waived. Finally, the Court rejected the claim regarding the "burden" imposed by the decision, noting that the government was able, albeit belatedly, to produce a four-page declaration describing the evidence, which would have provided an evidentiary basis for tolling, and could have done so at the proper time if it had followed the statute. [NOTE: In a special concurring opinion, one judge concluded that the question of whether hearsay might be reliable enough to satisfy the evidentiary threshold could only

be decided in the specific context of a given case.]

U.S. v. CHANDLER, 376 F.3d 1303 (Jul 19, 2004)

Sufficiency; mail fraud conspiracy; breach of contract

The Court found the evidence failed to prove essential elements to establish criminal conspiracy liability; the scheme was devised by a single person, who embezzled winning stamps in a McDonald's game, but there was no proof that the persons who redeemed the winning stamps knew they had been embezzled. Although the indictment claimed the winning stamps were "illegitimate" under the game rules, those rules did not prohibit transfer of these stamps, and they were in fact publicly traded on Ebay. The case became one of a "roaming theory of prosecution."

The Court also noted the indictment was insufficient, because in the absence of a prohibition on the transfer of game stamps, it was not "fraud" for persons to represent themselves as "legitimate" winners when they acquired their game stamps by transfer from someone else. The Court added that, even if the transfers had been against the game rules, no crime would have existed, because "game stamps constitute an offer for a unilateral contract that can be accepted by performing all the terms and conditions of the game. A violation of these rules, therefore, is, at most, a breach of contract. It is not a crime." Citing U.S. v. Handakas, 286 F.3d 92 (2d Cir. 2002), the Court found "very troubling" the implications of the government's theory that a false representation that one has performed as required by a contract makes one guilty of mail fraud. "The federal conspiracy statute proscribes an agreement to violate the law. . . . The essential element of a conspiracy is that the object of the agreement must be

illegal. Breach of contract, however, even fraudulent breach of contract, is not a crime. Nor does use of the mails, as the government apparently believes, make it a crime." Turning to the embezzlement ground for the prosecution, the government may have proved several conspiracies instead of one, but the Court found the government failed to prove others knew of the scheme. In the absence of knowledge of the overall conspiracy, under Kotteakos v. U.S., 328 U.S. 750 (1946), the government could have proved "interdependence" among the conspirators who constituted the "spokes" in the conspiracy. But there was no interdependence, "no rim to connect the spokes into a single scheme." Instead, there were "as many conspiracies as there [were] spokes." "The spokes knew nothing about each other." There was no evidence of an overlap of membership between the spokes, except for Jacobson, who alone could not constitute a "conspiracy."

Consequently, when the government took the position that there were a series of conspiracies, not a single hub and spoke, it effected a variance, and this error was not "harmless." The defendants stood convicted of multiple conspiracies "not charged in the indictment," and clearly not guilty (because they did not know the game stamps were stolen) of the single conspiracy charged in the indictment - as to which a judgment of acquittal should have been entered.

**U.S. v. CLAY, 376 F.3d 1296 (Jul 15, 2004)
Sufficiency; special verdict; drug quantity/type; sentencing; firearm; foreseeability**

The Court affirmed the drug-trafficking conspiracy conviction, despite the jury's inability to agree on the amount of drugs that should be attributed to the defendant. The Court rejected an Apprendi-related challenge

to the elements of the offense that the jury is required to consider under 21 U.S.C. § 841(b)(1)(D), for an offense involving a detectable amount of marijuana. Here, the indictment charged a 21 U.S.C. § 846 conspiracy offense involving more than 4 kilograms of cocaine, 50 grams of crack cocaine, and 1000 kilograms of marijuana. The indictment was submitted to the jury with a special verdict form; the jury convicted but did not agree on any drug type or quantity. Rejecting his argument that the conviction was invalid under Apprendi because the jury could not agree on drug quantity, the Court stated "the specific quantity of drugs for which he was accountable is not an element of the crime charged." Addressing the 5-year statutory maximum for a no-quantity marijuana conviction, the Court found the conviction must stand and observed that the sentence did not exceed this statutory maximum. [NOTE: The defendant did not raise any sentencing issue; thus, no Blakely issue was discussed. He could have argued that his guideline maximum increased based on findings made solely by the district judge, who sentenced the defendant to 50 months, several months above the level authorized for no-quantity drug offenses under U.S.S.G. § 2D1.1.

However, the Court rejected the government's cross-appeal challenging the defendant's sentence; the district court did not clearly err in finding a drug co-conspirator's possession of a gun was not reasonably foreseeable to the defendant and that guns in a closet in the defendant's residence were not related to the drug offense. The government relied on defendant's home telephone use to discuss drugs, but no evidence existed that drug-related objects were found in proximity of the firearms.

U.S. v. HARRIS, 376 F.3d 1282 (Jul 15,

2004)

Pretrial diversion agreement; enforcement; speedy trial; sufficiency; 42 U.S.C. § 408(a)(7)(B)

The Court affirmed the conviction of fraudulent use of a Social Security number under 42 U.S.C. § 408(a)(7)(B). The defendant, arrested for emitting annoying smoke from his vehicle, possessed false identification with the Social Security number of then-President William Jefferson Clinton. The government and defendant entered a one-year pretrial diversion agreement with conditions, but the government then initiated prosecution, after that period, based on claimed violations.

The Court rejected Harris' argument that the government had to initiate prosecution within the one-year period. The language of the pretrial diversion agreement contemplated a prosecution decision following completion of the diversion term if the defendant failed to **successfully** terminate diversion. The Court applied plea agreement and "contractual interpretation" principles, not a hyper-technical or rigidly literal reading, so as not to contradict an oral understanding; all ambiguities were "construed against the government."

Even though more than the 70-day statutory limit elapsed between Harris' filing of a motion to suppress and the hearing, the Court found no Speedy Trial Act violation because, the Court held, the Act, subsection (h), requires exclusion of "all time between the filing of the motion and the conclusion of the hearing at which it is addressed," regardless of "reasonableness." That 18-month delay was presumptively prejudicial under the Sixth Amendment, but the government was reasonably diligent and there was no actual prejudice to the defendant; none of the relevant speedy trial factors weighed

against the government. Thus, even if Harris did not waive the "actual prejudice" issue, by not raising it in the district court or on appeal, his speedy trial claim fails on the merits.

On the sufficiency of the evidence of misrepresentation of a Social Security number, the Court noted a circuit split over whether the statute requires an intent to obtain something of value but sided with those courts finding no such element and held that, whenever a person falsely represents a Social Security number as his or her own, with the intent to deceive "for any purpose," a violation of the statute is shown.

U.S. v. JOHNSON, 375 F.3d 1300 (July 12, 2004)

Safety valve

A search of Johnson's home turned up 273 live marijuana plants and grow equipment. He pleaded guilty to cultivation and voluntarily debriefed officers. While he gave them a detailed analysis of cultivating marijuana, he refused to tell them what he had planned to do with it. The Court affirmed the denial of a safety valve, inferring from the number of marijuana plants seized that he intended to distribute the marijuana, and finding that he had failed to fully disclose all the circumstances of his offense. Johnson got the statutory minimum of 60 months' imprisonment.

IN RE DEAN, 375 F.3d 1287 (July 9, 2004)
Habeas; 2255; successive; Blakely; retroactivity; actual innocence

The Court, doubting without deciding the retroactivity of Blakely, denied an application under 28 U.S.C. § 2255 for "an order authorizing the district court to consider a second or successive motion to vacate. Such authorization may be granted only if this Court certifies that the second or successive

motion contains a claim involving: (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Here, Dean did not claim that he was actually innocent of any of the elements but merely argued that Blakely had been made retroactive, an assertion the Court rejected. Citing Tyler v. Cain, 533 U.S. 656, 662-63 (2001), the Court held that movants must show that the Supreme Court has expressly or necessarily made the case retroactive. "In fact, the Supreme Court has strongly implied that Blakely is not to be applied retroactively." (Citing Schriro v. Summerlin, No. 03-526 (U.S. June 24, 2004) (holding that Ring v. Arizona, 536 U.S. 584 (2002), which extended application of Apprendi to facts increasing a defendant's sentence from life imprisonment to death, is not retroactive to cases on collateral review), and McCoy v. United States, 266 F.3d 1245, 1256-58 (11th Cir.2001) (holding that Apprendi is not retroactive to cases on collateral review)). [NOTE: There are substantial grounds on which to distinguish the Shriro decision from the retroactivity analysis as to Blakely, principal among which is the reduced accuracy resulting from clear error review of decisions made on a preponderance of evidence standard by the district court.]

SPERO v. U.S., 375 F.3d 1285 (July 8, 2004)
Resentencing; government appeal; Apprendi; minimum mandatory

The Court reversed the district court's grant of 2255 motions and resentencing to time served,

and required reimposition of the 20-year statutory maximum sentences. Their sentences for distribution of heroin were enhanced based on the district court's finding by a preponderance that their conduct had caused the death of a drug user. "Because the Apprendi rule does not apply in minimum mandatory circumstances where the enhanced minimum mandatory sentence does not exceed the non-enhanced maximum sentence, we reverse."

The district court had reasoned that Apprendi should apply because the court might have sentenced the defendants to less than 20 years had there not been the 20-year statutory minimum based on the death-enhancement, but "statutory sentencing factors that trigger a statutory minimum and limit the judge's discretion in imposing sentence are permissible and need not be found by a jury, 'provided that the mandatory minimum term does not exceed the otherwise applicable statutory maximum.'" citing Sanchez, 269 F.3d at 1269, and Harris, 536 U.S. at 567.

U.S. v. MANDHAI, 375 F.3d 1243 (July 2, 2004)

Separation of Powers; Downward Departure for Excessively High Guideline Range; 3A1.4; Terrorism Enhancement; 3B1.1; Role Enhancement - Supervising One Other Participant; 5K2.0; Downward Departure Based on Categorical Disagreement with Scope of Guideline.

The Court affirmed the application of the terrorism enhancement under 3A1.4 to a defendant convicted of conspiracy to destroy buildings affecting interstate commerce, finding that although conspiracies are not listed in 18 U.S.C. 2332b(g)(5)'s definition of terrorism offenses, the guideline extends also to offenses that involved or were intended to

promote a federal crime of terrorism. 3A1.4(a) and (b). Thus, Mandhai's conspiracy - which involved an Islamic jihadist effort to harm the U.S. government - was a terrorism offense under the plain meaning of the non-redundant terms of the guideline. The Court also affirmed an aggravating role enhancement under § 3B1.1 where the evidence showed Mandhai's recruitment and supervision of another participant.

On the government's cross-appeal, the Court reversed a 3-level downward departure under 5K2.0, rejecting the district court's categorical analysis of uncompleted conspiracies.

Although finding the district court's ground of departure invalid, the Court "agreed ... that the 12 level increase ... required by the terrorism enhancement prevents the penalty from fitting the crime, based on the facts of this record," which included: the failure to indict other participants, including the one who recruited Mandhai and the fact that Mandhai was not the driving engine behind the conspiracy. "We cannot and do not require the prosecutor to give reasons for his exercise of discretion to charge, but we properly consider the full record as we rule upon the appropriate sentence. It is easy to forget that the Sentencing Guidelines are merely that-guidelines. Any attempt to remove all judicial discretion in sentencing would raise serious concerns about the separation of powers. **Any sound legal basis, justified by the facts and not inconsistent with the sentencing statutes, can be a proper ground for departure.** ... A court that reasonably granted a downward departure, even for a wrong reason, should be entitled to consider whether there are proper grounds for departure, especially on a record that suggests there is. **Ours is a rule of law. We can and must keep our traditional democratic principles in place as we deal with terrorism and its**

threat. On this record, a sentence range of 188 to 235 months is excessive for the crime Mandhai committed." "We ... remand for a new sentencing hearing, at which the district court should consider new grounds for the downward departure."

IN RE HICKS, 375 F.3d 1237 (Jul 2, 2004)

Habeas; successive; 28 USC 2244(b)

Hicks, about to be executed, filed a 28 USC 2244(b) Motion for Authorization to file a Successive Petition for a Writ of Habeas Corpus, and a Stay of Execution based on Atkins v. Virginia, which forbids execution of the mentally retarded. By a split vote (Edmondson and Dubina; Birch dissents), the court denied relief because prior to Atkins, he had raised the issue of retardation, got a hearing, had a pre-trial IQ score of 94, and never was able to establish retardation such that it could prevail under Atkins.

U.S. v. BERGER, 375 F.3d 1223 (Jun 30, 2004)

Post-conviction; no right to counsel

Berger's bank-robbery-related convictions and sentence were affirmed on appeal. Berger then pro se filed a Rule 33 motion for a new trial based on newly discovered evidence, at which the district court refused to appoint counsel even for the evidentiary hearing. The Court affirmed (Anderson, Birch and Wilson), finding no Sixth Amendment right to counsel and no abuse of discretion.

U.S. v. LEVY, 374 F.3d 1023 (Jun 23, 2004)

Sentencing; plea agreement; due process; upward departure

The Court affirmed a fraud defendant's sentence, applied an appeal waiver to a claim of constitutional error in the sentencing process, and rejected defense arguments that

(1) the government breached the plea agreement by failing to recommend concurrent sentences, and (2) the district court violated due process at sentencing by *sua sponte* calling on a private attorney to argue for a guideline enhancement and calling victim witness to testify in support of the enhancement when the U.S. Attorney refused to call such witnesses.

The Court rejected Levy's challenge to the government's conduct; providing factual information to the probation officer did not conflict with the government's contractual obligation to recommend concurrent sentences. ... In Levy's plea agreement, there was no [such] restriction on the government.

The Court also concluded that Levy, having waived his right to appeal "the manner in which sentence was imposed," was not entitled to raise the due process issue, and, in any event, there was no violation.

U.S. v. BRACCIALE, 374 F.3d 998 (Jun 22, 2004)

Sentencing; loss; 2F1.1; abuse of trust; 3B1.3; resentencing

The Court reversed the loss calculation determination underlying a fraud defendant's sentence enhancement under USSG 2F1.1 and affirmed the imposition of a two-level "abuse of trust" sentence enhancement under 3B1.3. The defendant, regional sales manager for a national food company, had improperly diverted discount-price foods to a middleman unauthorized to receive the discount. The defendant pled guilty to the charge of wire fraud in depriving his employer of honest services and in taking property by fraud. The district court concluded the exact amount of loss was "difficult to define," and determined it to be the gain to the defendant and his ally, approximately \$700,000.

The Court reversed, noting that

"precision is unnecessary under § 2F1.1," and that the government's analysis was not "speculative." Since the actual loss was ascertainable, using the substitute of the defendant's gain was error. The Court instructed the district court to use the \$1 million as its starting point and stated the defendant could challenge the specific factual underpinnings for this amount.

The Court affirmed the abuse of trust enhancement because the "breach of fiduciary duty" element of the defendant's offense (depriving his employer of the right to honest services), was not specifically taken into account in the base offense level or specific offense characteristics but was captured only in the enhancement and was supported by 3B1.3's commentary citing a bank executive's fraud. For the same reason, the Court found no impermissible double counting.

[NOTE: The Court reiterated circuit precedent that resentencing after sentence vacation allows the district court to "reconsider [all of] its various sentencing decisions."]

BLACK v. U.S., 373 F.3d 1140 (Jun 16, 2004)

§2255; ineffectiveness of appellate counsel; dicta

The Court denied 2255 relief, holding that appellate counsel was not constitutionally defective when he failed to make an argument based on dicta in Supreme Court and Eleventh Circuit caselaw. Dictum, the court observed, is "a statement that neither constitutes the holding of the case, nor arises from a part of the opinion that is necessary to the holding of the case." The issue was whether a reasonable attorney could have construed it as such.

Black was sentenced to life

imprisonment based on a general verdict which failed to specify whether the conspiracy conviction was based on marijuana or methamphetamine.

Only the methamphetamine carried a life sentence, with the maximum for the marijuana not more than 10 years. Black claimed that his trial lawyer was ineffective for failing to seek a special verdict on drug type and appellate counsel was ineffective for failing to raise this issue on appeal.

Rejecting these arguments, the Court pointed out that, at the time of Black's appeal, the law of the circuit would not have permitted Black to prevail on the special verdict claims, as it required an additional showing that the evidence would support a construction of the jury verdict limited to the drug which carried the lower statutory maximum. Although the Supreme Court (Edwards, 523 U.S. 511 (1998)) and the Eleventh Circuit (Riley, 142 F.3d 1254 (11th Cir. 1998)), had strongly indicated in dicta that a general verdict in this context would not support a sentence above the statutory maximum for the lesser drug, nevertheless it was dicta, because in those cases the sole issue actually before the courts was the guideline sentence, not the statutory maximum. The Court recognized that Apprendi and post-Apprendi caselaw in the circuit gave credence to the special verdict argument and even suggested that the apparent dicta in Edwards was a holding. However, this interpretation of Edwards was not yet the law at the time of Black's trial or appeal. Black's counsel could not be faulted for failing to recognize that this dicta might (as Apprendi later expressly noted) have been part of the case's holding, "[g]iven the strong indications from the face of the opinions that the language . . . was dicta." Nor was Black prejudiced by the failure in any event where the jury

convicted on substantive methamphetamine charges and was instructed that it could convict on the conspiracy count only if both marijuana and methamphetamine were involved, leaving no ambiguity in the verdict.

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