

FEDERAL PUBLIC DEFENDER

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NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

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CRACK COCAINE: GOOD NEWS

On May 1st, the United States Sentencing Commission proposed new lower Guidelines for those convicted of crack cocaine offenses. The revision will become effective on November 1st barring any unexpected Congressional action. The revision reduces the offense level for each sentencing range by two levels. Those trafficking in at least 4 grams, but less than 5 grams, of crack cocaine will, for example, find themselves at offense level 22, rather than the current offense level of 24.

The proposed change, of course, is good news as it will mean lower sentences, and it reduces the 100:1 disparity between powder and crack cocaine. Some have noted, though, that the lower offense levels have produced an odd range of ratios. For example, at offense level 38, the ratio between crack and powder cocaine will be 33:1, at offense level 30 it will be 70:1, and at offense level 26 will be 25:1. (If you'd like a more complete breakdown of the ratios by offense level, contact Randy Murrell.)

Both the reduced range and the variety of ratios can be used now to argue for lower sentences. Surely, if in November offense level 24 will produce a sentence that is sufficient to promote the goals of federal sentencing, it can hardly be that offense level 26 is necessary simply because it is September or October. Then, too, the wide range of ratios shows just how arbitrary the ratio is between crack and powder cocaine.

In promulgating the revision, the Sentencing Commission recognized that Congress needs to address the issue and that the two-level reduction is only a start. United States Sentencing Commission, "*Reader Friendly*" *Version of the 2007 Amendments to the Sentencing Guidelines (May 2007)*, at 66 ("The Commission's recommendation and strong desire for prompt legislative action notwithstanding the problems associated with 100-to-1 drug quantity ratio are so urgent and compelling that this amendment is promulgated as an interim measure to alleviate some of those problems.") <www.usc.gov/2007guid/may2007rf.pdf>. Indeed, along with the change to the existing Guidelines, the Commission published a new

report, *Cocaine and Federal Sentencing Policy* (May 2007) (available at www.ussc.gov/r_congress/cocaine2007.pdf). In that report, the Sentencing Commission reiterated what it has said before:

“Current data and information continue to support the core findings contained in the 2002 Commission Report, among them:

- (1) The current quantity-based penalties overstate the relative harmfulness of crack cocaine compared to powder cocaine.
- (2) The current quantity-based penalties sweep too broadly and apply most often to lower level offenders.
- (3) The current quantity-based penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality.
- (4) The current severity of crack cocaine penalties mostly impacts minorities.

Based on these findings, *the Commission maintains its consistently held position that the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act.*”

Id. at 7-8 (emphasis added).

The Commission has also asked for public comment as to whether the revised Guidelines ranges should be applied retroactively. Comments should be sent by October 1st to: United States Sentencing Commission, One Columbus Circle, N.E., Suite 2-500, South Lobby, Washington, D.C. 20002-8002, Attention: Public Affairs-Retroactivity Public Comment. If the Commission were to apply the revisions retroactively, those serving sentences for crack cocaine would be eligible

for a reduction in their sentence.

RITA, KIMBROUGH, AND GALL: NOW AVAILABLE FOR USE

This past summer, the United States Supreme Court held, in *Rita v. United States*, 127 S. Ct. 2456 (2007), that an appellate court, in reviewing a sentence, *may* presume a Guidelines sentence to be reasonable. It is not, however, a presumption upon which the Eleventh Circuit Court of Appeals has chosen to rely. *See United States v. Campbell*, 491 F.3d 1306, 1313 (11th Cir. 2007); *United States v. Hunt*, 459 F.3d 1180, 1185 (11th Cir. 2006). Maybe most importantly, though, Justice Breyer, in writing the majority opinion, stressed that the presumption is “an *appellate* court presumption.” 127 U.S. at 2465 (emphasis in the original). He wrote, too, that “the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.” *Id.* Justice Stevens, in his concurring opinion, may have said it most clearly: “I trust that those judges who had treated the Guidelines as virtually mandatory during the post-Booker interregnum will now recognize that the Guidelines are truly advisory.” *Rita*, 127 S. Ct. at 2474.

Two critical decisions are scheduled for oral argument before the Supreme Court on October 2nd. In *Gall v. United States*, the Court will decide whether extraordinary circumstances are necessary to support an extraordinary variance from the Guidelines. In *Kimbrough v. United States*, the Court will decide whether a sentencing court may impose a below-Guidelines sentence on the basis of the court’s disagreement with the crack cocaine Guidelines.

In Gall, the district court sentenced Michael Gall to probation when the Guidelines range was 30 to 37 months. The court did so largely because Gall, having made \$30,000 to \$40,000 from his participation in an ecstasy conspiracy, withdrew from it four years before being charged and, in the interim, rehabilitated himself, graduated from college, moved to another state, and started a successful construction business. In its appeal, the Government contends that the Guidelines should be used as a “benchmark” for judging the reasonableness of a sentence and argues for what it calls “proportionality” review to insure some consistency in sentencing. 2007 WL 2406805 (Brief for the United States) at *15-18. Gall contends that to rely on the Guidelines as a benchmark (1) improperly elevates the Guidelines above the other factors set out in 18 U.S.C. § 3553(a), which amounts to a presumption that sentences outside the Guidelines are unreasonable contrary to the holdings in Rita and Booker; (2) violates the command of 18 U.S.C. § 3553(a) that sentences be “sufficient but not greater than necessary;” and (3) ignores Booker’s requirement that the benchmark for its reasonableness review is § 3553(a), not the Guidelines.

Between now and the day the Court decides Gall, the most useful aspects of the case are the concessions made by the Government in its brief: (1) that most sentences outside the Guidelines do not require extraordinary reasons, and (2) that sentences outside the Guidelines range may be based on the sentencing court’s disagreement with the policy decisions of the Sentencing Commission:

“But modest (or ordinary) deviations from the Guidelines do not require extraordinary justifications. Proportionality review thus

does not demand an extraordinary justification for most non-Guidelines sentences. And even when it does demand a substantial justification - such as when a judge imposes probation where the Guidelines call for years of imprisonment - proportionality review does not require extraordinary *facts*. Persuasive policy judgments may satisfy the reviewing court that the variance, although dramatic, is nonetheless reasonable.”

Id. at *14-15. The Eleventh Circuit, like most of the circuit courts, has adopted the idea that extraordinary variances from the Guidelines require extraordinary reasons, *see United States v. Crisp*, 454 F.3d 1285, 1291 (11th Cir. 2006), and has held that policy disagreements with sentencing policy decisions of *Congress* will not support a variance. *See United States v. Williams*, 456 F.3d 1353 (11th Cir. 2006). Nonetheless, the idea that most variances don’t require anything extraordinary and that variances may be supported by disagreements with the policy of the *United States Sentencing Commission* are powerful ones that deserve play right away.

In Kimrough, Derrick Kimrough pled guilty to three drug offenses involving powder and crack cocaine and to a firearm offense. While the Guidelines range for the drug offenses was 168-210 months, the district court imposed a below-Guidelines sentence, the mandatory minimum sentence of 120 months. The Government argues that Congress intended for the 100:1 ratio to apply, citing the mandatory minimum sentences of 21 U.S.C. § 841 that reflect that ratio. Kimrough argues that all Congress did was to enact mandatory minimum sentences and that Congress has never directed the Sentencing Commission to

incorporate the 100:1 ratio in the Guidelines. He argues, too, that the sentence was justified by the Sentencing Commission's conclusions that there is no rational basis for the ratio and that the ratio undermines the goals of sentencing.

While arguing what no one disputes, that sentencing courts cannot reject Congressional sentencing directives, the Government makes the same concession that it made in Gall: “[t]he Sentencing Guidelines are now advisory, and courts may vary based solely on policy considerations, including disagreements with the Guidelines.” 2007 WL 2461473 (Brief for the United States) at *16. The Government, too, seems to have opened the door to below-Guidelines sentences in some crack cocaine cases based on the reports of the Sentencing Commission that have been so critical of the 100:1 ratio:

“While courts could not rely on those reports as a basis for *categorically* disagreeing with the 100:1 ratio, courts could properly consider those reports in determining whether a *particular defendant's* commission of a crack-cocaine offense implicates the policy reasons underlying Congress's harsher treatment of crack offenses. . . . For example, one of the justifications for the 100:1 ratio was that crack cocaine is more closely correlated with the commission of other serious crimes (based on the greater propensity of individuals trafficking in crack to carry weapons). . . . Accordingly, it would not be inconsistent with congressional policy for a court to conclude that, based on the individualized circumstance that a crack offender did not carry a weapon or otherwise threaten violence in connection with the offense, a downward variance would be appropriate.”

Id. at *44-45. As many, if not most, crack cocaine cases do not involve weapons, it is a

concession that can play a role in many cases. That might be especially true if it can be coupled with another claim such as the Guidelines tendency to ignore the individual's role in the offense in favor of reliance on drug quantity.

In the 12/5/06 sentencing memo on our webpage, one of a group you'll find under the heading of “Sample Booker Sentencing Memos,” there is a listing of the five assumptions upon which the Sentencing Commission concluded that Congress relied. The high correlation between crack and violence is the only one that seems to readily be available to distinguish one case from another. For the most part, the remaining four are more generalized: dangerous physiological effects, potency and price lead to widespread distribution, the addictive nature of crack, and the especial attraction crack has to young people. While the claims have largely been debunked, it is hard to see how they might be used to distinguish a particular case. Maybe another reading of the reports, including the one issued this past May, *Cocaine and Federal Sentencing Policy*, might generate some ideas.

Rita, then, can be used to remind sentencing judges that there is no presumption in favor of the Guidelines. It may be even more important to rely right away on Kimbrough and Gall. If you can make the argument that significant variances from the Guidelines *do not* require extraordinary reasons or make the argument that sentencing courts are not and should not be bound by the 100:1 ratio, your client will be well positioned to benefit from any favorable analysis in Kimbrough and Gall. Needless to say, the contrary it true, too: if you don't make those challenges, your client will not be well positioned. And while you'll have to wait for the Supreme Court to

benefit from those head-on challenges, the concessions the Government has made in their arguments can be put to good use today.

NO, YOU CAN'T PROSPECTIVELY WAIVE SPEEDY TRIAL

In the state courts of Florida, it is common place for defendants and their lawyers to prospectively waive the defendant's right to a speedy trial. In federal court, though, neither you nor your client can prospectively waive the client's right to a speedy trial. United States v. Zedner, 126 S. Ct. 1976, 1985 (2006). It means, too, that the Court can't very well condition a continuance on a defendant waiving speedy trial.

The Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174, governs speedy trial in federal court. As explained in Zedner:

“Instead of simply allowing defendants to opt out of the Act, the Act demands that defense continuance requests fit within one of the specific exclusions set out in subsection (h). Subsection (h)(8), which permits ends-of-justice continuances, was plainly meant to cover many of these requests. Among the factors that a district court must consider in deciding whether to grant an ends-of-justice continuance are a defendant's need for ‘reasonable time to obtain counsel,’ ‘continuity of counsel,’ and ‘effective preparation’ of counsel. §3161(h)(8)(B)(iv). If a defendant could simply waive the application of the Act whenever he or she wanted more time, no defendant would ever need to put such considerations before the court under the rubric of an ends-of-justice exclusion.”

126 S. Ct. at 1985. The ends-of-justice test is compelled by the purposes of the Act:

“The purposes of the Act also cut against exclusion on the grounds of mere consent or waiver. If the Act were designed solely to protect a defendant's right to a speedy trial, it would make sense to allow a defendant to waive the application of the Act. But the Act was designed with the public interest firmly in mind. . . . That public interest cannot be served, the Act recognizes, if defendants may opt out of the Act entirely.”

Id. Accordingly, “[a]llowing prospective waivers would seriously undermine the Act because there are many cases . . . in which the prosecution, the defense, and the court would all be happy to opt out of the Act, to the detriment of the public interest.” 126 S. Ct. at 1990.

PAY RAISE

As of May 20th of this year, the hourly pay rate for panel work increased from \$92 to \$94. For capital cases, the hourly rate increased from \$163 to \$165.

CASE SUMMARY ADDED TO WEBPAGE

We've added to our webpage a 284 page summary of federal criminal cases. It's all indexed and contains summaries of primarily 11th Circuit and Supreme Court cases that should be of use to anyone practicing federal criminal defense. You'll find it under the heading “Useful Points of Federal Law.” We'll be updating it on a regular basis.

RANDALL LOCKHART JOINS OUR PENSACOLA OFFICE

Randall Lockhart became a member of our Pensacola office this past June. Before joining us, he had worked since 2003 as an Assistant Federal Public Defender in both El

Paso and in the Capital Habeas Unit in Las Vegas. He is a former law clerk for a United States Magistrate Judge in Detroit. Randall is a 1998 graduate of the University of Detroit School of Law where he was a member of the law review. He has assumed responsibility for the magistrate court cases in Panama City and carries a felony caseload in Pensacola. Randall is a bright, motivated, and capable lawyer. We're delighted he has joined our staff.

NEW PANEL MEMBERS

We've added six new panel members this past year. **Albert Oram**, **Michelle Hendrix**, and **Eugene Polk** have all joined the Pensacola division. Albert is a former state public defender and a 1992 graduate of the California Western School of Law. Michelle, who is rejoining the panel, is a 1999 graduate of the Tulane University Law School. Eugene has been on active duty with the United States Marines for the last four years and is a 1993 graduate of the University of Florida College of Law.

Sean Shaw and **Alex Morris** have been added to the Tallahassee panel. Alex takes the place of his partner, Jim Banks, and is a 1998 graduate of the Florida State College of Law. Sean is a member of the Tallahassee firm, Messer, Caparelo, and Self, and is a 2003 graduate of the University of Florida College of Law. **Sonya Rudenstine**, who maintains her practice in Gainesville, has joined the panel to handle appeals. She is a 1998 graduate of the New York University School of Law.

PANEL TRAINING

For the next two months we're putting aside the videos. In October, Randy Murrell will

appear in each division to present "Guidelines 101." The presentation will cover the basics of the United States Sentencing Guidelines. In November, Randy will hit the road again, holding workshops that will address specific issues and allow those present to work through some different case scenarios. Here's the schedule:

Guidelines 101

Panama City - Oct 10
Tallahassee - October 23
Gainesville - October 24
Pensacola - October 25

Guidelines Workshop

Panama City - November 14
Tallahassee - November 27
Gainesville - November 28
Pensacola - November 29

DEPARTURES

Wimberly, Darrious Mickle, S. Atty: **Tom Miller**

Docket: 1:06cr42

Charge: Poss WITD > 50 g. Crack, Poss FA
in furtherance of trafficking offense

Range: Mandatory Min. 25 yrs

Sentence: 24 months

Date of Imposition of Sentence: 9/4/07

Grounds: 5K1.1

Ring, Daniel Hinkle, R. Atty: **Bill Clark**

Docket: 4:06cr72

Charge: Poss Unreg. Firearm

Range: 51 - 63 months

Sentence: 120 months BOP

Date of Imposition of Sentence: 5/18/07

Grounds: Inadequacy of Criminal History
Category (USSG § 4A1.3(a)), Variance, too, based on same reason.

Brewer, Craig Paul, M. Atty: **Daniel Daly**

Docket: 1:05cr33

Charge: Consp Dist > 50 Kg Cocaine & > 50
g. crack

Range: Mandatory Life

Sentence: 120 months
 Date of Imposition of Sentence: 11/30/06
 Grounds: 5K1.1

Ross, Doris Hinkle, R. Atty: **Randy Murrell**
 Docket: 4:07cr8
 Charge: Dist. < 5 g. crack
 Range: 10 - 16 months
 Sentence: 3 yrs probation
 Date of Imposition of Sentence: 8/28/07
 Grounds: 5K1.1 & variance based on
 defendant's rehabilitation and limited role

Fields, Kristy Hinkle, R. Atty: **Bill Clark**
 Docket: 4:07cr11
 Charge: Poss Counterfeit Securities
 Range: 63 - 78 months
 Sentence: 36 months BOP
 Date of Imposition of Sentence: 7/30/07
 Grounds: 5K1.1

Jones, Ennis Hinkle, R. Atty: **Bill Clark**
 Docket: 4:07cr2
 Charge: Poss WITD > 5 g. crack
 Range: 262 - 327 months
 Sentence: 132 months BOP
 Date of Imposition of Sentence: 5/16/07
 Grounds: 5K1.1

Williams, Demetrius Smoak, R. Atty: **C. Lammers**
 Docket: 5:06cr88
 Charge: Consp Dist > 5 g. crack
 Range: 92 - 115 months
 Sentence: 60 months BOP
 Date of Imposition of Sentence: 6/26/07
 Grounds: 5K1.1

DeLoach, Michael Smoak, R. Atty: **C. Lammers**
 Docket: 5:07cr14
 Charge: Consp Dist. > 500 g. Meth
 Range: 97 - 121 months
 Sentence: 60 months BOP
 Date of Imposition of Sentence: 6/18/07
 Grounds: 5K1.1

VARIANCES

Ham, Mary Rodgers, M. Atty: **D. Sheehan**
 Docket: 3:06cr107
 Charge: Consp to Defraud IRS
 Range: 51 - 60 months

Sentence: 24 months
 Date of Imposition of Sentence: 5/30/07
 Grounds: primary caregiver of 18 yr old
 daughter, sister and sister's daughter (who both suffer
 from significant learning disabilities), defendant's
 health problems, contributing member of community,
 payment of significant amount in restitution, lack of
 criminal history, defendant's role in the offense
 stemmed from her relationship w/codefendant who is
 primarily responsible for the offense, and the presence
 of a significant support system in the community.

Watson, Linda Mickle, S. Atty: **Jon Uman**
 Docket: 1:05cr34
 Charge: 2 counts bank robbery
 Range: 37 - 46 months
 Sentence: 5 yrs probation
 Date of Imposition of Sentence: 8/6/07
 Grounds: crimes were largely result of
 husband's manipulation, which defendant was
 especially susceptible due to drug addiction and
 mental health problems; absence of criminal history,
 acceptance of responsibility, and limited role.

Jones, Willie Buck Hinkle, R. Atty: **Bill Clark**
 Docket: 4:07cr12
 Charge: Destruction of Mail
 Range: 10 - 16 months
 Sentence: Probation w/10 months home det.

Date of Imposition of Sentence: 6/13/07
 Grounds: Character and history of defendant,
 circumstances of offense.

Milton, Bettye Hinkle, R. Atty: **Clyde Taylor**
 Docket: 4:07cr18
 Charge: Consp Dist >50 g. crack & >5 Kg of
 cocaine
 Range: 70 - 87 months
 Sentence: 48 months
 Date of Imposition of Sentence: 8/23/07
 Grounds: history and character of defendant,
 circumstances of the offense

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

VICTORIES

Jonathan Dingus of the Panama City panel convinced Magistrate Judge Bodiford to grant a judgment of acquittal in the DUI trial of Deana Tooney. Jonathan successfully excluded the breathalyzer results when the government failed to produce a witness who could authenticate a copy of the initial certification of the Intoxilyzer 8000 and went on to convince the judge that the remaining evidence failed to establish that Ms. Tooney was impaired.

In Tallahassee, **Clyde Taylor** started the sentencing hearing with his client, Bettye Milton, facing a 10-year minimum mandatory sentence and a Guidelines range of 135 to 168 months for a conspiracy case involving more than 50 grams of crack cocaine and 5 kilograms of powder cocaine. Ms. Milton ended the day with a 48-month sentence. Clyde succeeded in convincing Judge Hinkle that the firearm found in the house was not connected to the offense, which lowered the Guidelines score, and, once Judge Hinkle decided Ms. Milton was being truthful when she denied getting some of the cocaine from a cooperating defendant, also made Ms. Milton eligible for the safety valve. With the range, then down to 70-87 months, Judge Hinkle went on to find a sentence of 48 months was “sufficient, but not greater than necessary.”

Tallahassee panel member **Gary Printy** convinced Judge Stafford that the Government failed to prove his client had violated supervised release by committing two new state offenses of Aggravated Battery of a Law Enforcement Officer and Fleeing and Eluding. The client, Darryl Vaughn, was charged with violating his supervised release on the basis of the new offenses as well as some technical failings. Although Mr. Vaughn had rammed his car into an unmarked police van full of law enforcement officers during a botched

drug transaction, Gary argued that his client did not know those in the van were officers. At the conclusion of the hearing, Judge Stafford found that the Government had established only the technical violations resulting in a 30-month sentence rather than what was expected to be a 5-year sentence based on the alleged new offenses.

Randy Murrell won an acquittal before a Tallahassee jury for his client, Jorge Guillen-Perez. The Government had indicted Mr. Guillen for identity theft - using a social security card of another in connection with the crime of unlawful reentry. Mr. Guillen, who had entered a guilty plea to the unlawful reentry offense, testified at the trial and admitted to possessing the social security card. He told the jury, though, that he had obtained the card thinking he might need it to rent an apartment, obtain medical care, or even enroll his children in school. He went on to say that, in fact, he had never used the card. Randy successfully argued Mr. Guillen was not guilty of the offense because he had not intended to or used the card to avoid detection.

Tom Miller of our Gainesville office convinced Judge Paul to dismiss the charge of using the telephone to make threats to blow up a building that was pending against Karlo Laforteza. Mr. Laforteza had been evaluated for competency at the Bureau of Prisons facility in Butner, North Carolina. When the mental health professionals concluded that Mr. Laforteza was not likely to regain competency in the foreseeable future and did not present a substantial risk to others or to property, Tom successfully moved for discharge pursuant to 18 U.S.C. § 4246.

Please call us, send us a note, or e-mail us

at the Tallahassee office with news of any victories you've won. Be it a not guilty verdict or any favorable trial outcome, an appellate victory, a winning pre-trial motion, or a particularly successful sentencing outcome, we'd like to mention it in this newsletter. Please don't be modest. Think of it as contributing to the esprit de corps of an embattled group of fellow warriors.

CASE SUMMARIES

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

Certiorari Granted

The following are United States Supreme Court grants of certiorari for the 2006 term that are relevant to our practice and granted since our last newsletter:

BOUMEDIENE et al. v. BUSH, 127 S. Ct. 3078 (Mem), No. 06-1195 and **AL-ODAH et al. v. U.S., et al.**, 127 S. Ct. 3067 (Mem), No. 06-1196 (cert granted June 29, 2007)

Guantanamo Bay

Questions Presented: (1) Whether the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, validly stripped federal court jurisdiction over habeas corpus petitions filed by foreign citizens imprisoned indefinitely at the United States Naval Station at Guantanamo Bay. (2) Whether Petitioners' habeas corpus petitions, which establish that the United States government has imprisoned Petitioners for over five years, demonstrate unlawful confinement requiring the grant of

habeas relief or, at least, a hearing on the merits.

SNYDER v. LOUISIANA, 127 S. Ct. 3004 (Mem), No. 06-10119 (cert granted June 25, 2007)

Jury Selection

Questions Presented: (1) Did the majority below ignore the plain import of *Miller-El* by failing to consider highly probative evidence of discriminatory intent, including the prosecutor's repeated comparisons of this case to the O.J. Simpson case, the prosecutor's use of peremptory challenges to purge all African Americans from the jury, the prosecutor's disparate questioning of white and black prospective jurors, and documented evidence of a pattern of practice by the prosecutor's office to dilute minority presence in petit juries? (2) Did the majority err when, in order to shore up its holding that Mr. Snyder had failed to prove discriminatory intent, it imported into a direct appeal case the standard of review this Court applied in *Rice v. Collins*, an AEDPA habeas case? (3) Did the majority err in refusing to consider the prosecutor's first two suspicious strikes on the ground that defense counsel's failure to object could not constitute ineffective assistance of counsel because *Batson* error does not render the trial unfair or the verdict suspect – i.e., that failure to raise a *Batson* objection can never result in prejudice under *Strickland v. Washington* – a holding directly conflicting with decisions from inter alia the Third Circuit Court of Appeals and the Alabama and Mississippi Supreme Courts?

GALL v. U.S., 127 S. Ct. 2933 (Mem), No. 06-7949 (cert granted June 11, 2007) (reviewing 446 F.3d 884 (8th Cir. 2006))

Extraordinary circumstances in post-Booker variance reasonableness review

Question presented: Whether, when determining the “reasonableness” of a district court sentence under *Booker* it is appropriate to require district courts to justify a deviation from the United States Sentencing Guidelines with a finding of extraordinary circumstances.

KIMBROUGH v. U.S., 127 S. Ct. 2933 (Mem), No. 06-6330 (cert granted June 11, 2007)

Crack/powder disparity in reasonableness review of post-*Booker* variance

Questions presented: In [light of *Booker*], (1) In carrying out the mandate of § 3553(a) to impose a sentence that is “sufficient but not greater than necessary” on a defendant, may a district court consider either the impact of the so-called “100:1 crack/powder ratio” implemented in the U.S. Sentencing Guidelines or the reports and recommendations of the U.S. Sentencing Commission in 1995, 1997, and 2002 regarding the ratio? (2) In carrying out the mandate of § 3553(a) to impose a sentence that is “sufficient but not greater than necessary” upon a defendant, how is a district court to consider and balance the various factors spelled out in the statute, and in particular, subsection (a)(6), which addresses “the need to avoid unwarranted disparity among defendants with similar records who have been found guilty of similar conduct”?

DANFORTH v. MINNESOTA, 127 S. Ct. 2427 (Mem), No. 06-8273 (cert. granted May 21, 2007)

Retroactivity

Questions Presented: (1) Are state supreme courts required to use the standard announced in *Teague v. Lane*, to determine whether United States Supreme Court decisions apply retroactively to state-court criminal cases, or may a state court apply state-law- or state-constitution-based retroactivity tests that

afford application of Supreme Court decisions to a broader class of criminal defendants than the class defined by *Teague*? (2) Did *Crawford v. Washington* announce a “new rule of constitutional criminal procedure,” as *Teague* defines that phrase and ,if it did, was it a watershed rule of procedure subject to full retroactive application?

MEDELLIN v. TEXAS, 127 S. Ct. 2129 (Mem), No. 06-984 (cert. granted Apr. 30, 2007),

International obligations

Questions presented: (1) Did the President act within his constitutional and statutory foreign affairs authority when he determined that the states must comply with the U.S. treaty obligation to give effect to the judgment of the International Court of Justice in the cases of 51 Mexican nationals named in the judgment? (2) Are state courts bound by the constitution to honor the undisputed international obligation of the U.S., under treaties duly ratified by the President with the advice and consent of the Senate, to give effect to that judgment?

Supreme Court Cases

PANETTI v. QUARTERMAN, 127 S. Ct. 2842, No. 06-6407 (June 28, 2007)

Capital punishment

The Court (5-4, Kennedy) held that a prisoner's inability to rationally understand that he is being executed as a punishment for a crime is relevant to a determination of whether he is incompetent under *Ford v. Wainwright*.

RITA v. U.S., 127 S. Ct. 2456, No. 06-5754 (June 21, 2007)

***Booker* permits appellate presumption of**

reasonableness to within-range sentence

The Court (8-1, Breyer) held that a court of appeals may apply a presumption of reasonableness when reviewing a sentence within the Guidelines.

BRENDLIN v. CALIFORNIA, 127 S. Ct. 2400, No. 06-8120 (June 18, 2007)

Fourth Amendment

The Court (9-0, Souter) held that a vehicle's passenger is seized within the meaning of the Fourth Amendment when the car is stopped by an officer, and thus the passenger may contest the constitutionality of the stop.

BOWLES v. RUSSELL, 127 S. Ct. 2360, No. 06-5306 (June 14, 2007)

Jurisdiction to hear appeals

The Court (5-4, Thomas) held that an appeals court has no jurisdiction to hear an appeal filed outside the applicable statutory period, even if the appeal was filed within the time period allowed by the district court's erroneous order.

FRY v. PLILER, 127 S. Ct. 2321, No. 06-5247 (June 11, 2007)

28 U.S.C. § 2254; harmless standard

The Court (Scalia, 9-0 on issue but 5-4 on relief), held that on federal habeas review of a state judgment, the federal court assesses prejudicial impact of state court's constitutional error under *Brecht's* more forgiving "substantial and injurious effect" standard, and not under *Chapman's* "harmless beyond reasonable doubt" standard, regardless of whether state courts recognized the error and reviewed for harmless beyond reasonable doubt under *Chapman*.

UTTECHT v. BROWN, 127 S. Ct. 2218, No. 06-413 (June 4, 2007)

Death qualification of jurors in capital trials, AEDPA

The Court (5-4, Kennedy) held there is no requirement that a state appellate court make particular reference to the excusal of each juror in a case involving the *Witherspoon-Witt* rule regarding excusal for cause of a juror who is substantially impaired in the ability to impose the death penalty.

ROPER v. WEAVER, 127 S. Ct. 2022, No. 06-313 (May 21, 2007)

Habeas; 2254; AEDPA

The Court (6-3, per curiam) dismissed as improvidently granted the State of Missouri's cert. petition, concluding that a defendant's habeas petition was fully exhausted and did not become unexhausted upon his decision to seek certiorari review of state denial of postconviction relief.

LOS ANGELES COUNTY v. RETTELE, 127 S. Ct. 1989, No. 06-605 (May 21, 2007)

42 U.S.C. § 1983; Fourth Amendment

The Court (9-0, per curiam) held that when executing a valid search warrant regarding suspects believed to be armed, deputies reasonably ordered residents out of the bed to ascertain whether they were armed – even though the residents turned out not to be the suspects, were innocent, and were of a different race than the suspects.

SCOTT v. HARRIS, 127 S. Ct. 1769, No. 05-1631 (April 30, 2007)

42 U.S.C. § 1983; Fourth Amendment

The Court (8-1, Scalia), relied on videotaped evidence to hold that a deputy acted reasonably when he violently terminated a high-speed car chase.

SCHRIRO v. LANDRIGAN, 127 S. Ct. 1933, No. 05-1575 (May 14, 2007)

Capital habeas; 2254; AEDPA; evidentiary hearing; ineffectiveness

The Court (5-4, Thomas) held that a district

court had not abused its discretion in denying an evidentiary hearing where the defendant could not even make out a colorable claim of ineffective assistance of counsel, based on failure to investigate mitigating circumstances, where the record established the defendant had instructed counsel not to present any mitigating evidence at the penalty phase, interrupted counsel when he attempted to, and asked the court for a death sentence (which he got).

Selected Eleventh Circuit Case Summaries

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

U.S. v. VALDES, 2007 WL 2700598 (Sept. 18, 2007)

Insufficient grounds to support above-guidelines sentence

Valdes pleaded guilty of bank fraud, which involved at least the counterfeiting of a district court check. His guidelines range was 41 to 51; the Government argued for a history-based departure to the range to 57 to 71; and the district court imposed 108 months. The Court (per curiam with Birch, Barkett & Korman) reversed for resentencing. If it was an upward departure, it wholly failed to specifically consider or even mention the next criminal history level. And if it was a § 3553(a) variance, the reasons discussed were inadequate because many of the bases for the district court's sentence were already accounted for in calculating the Guidelines range and there was nothing extraordinary here.

U.S. v. OTERO, 2007 WL 2694612 (Sept. 17, 2007)

Failure to discuss appeal w/client NOT

ineffective if reasonable person would not appeal

Otero pleaded guilty, agreed to an appeal waiver, and got a guidelines sentence within the ballpark his lawyer told him to expect. However, the lawyer did not consult with Otero about appealing, and Otero never directed his lawyer to appeal. Otero claimed the lawyer was ineffective, but the 11th Circuit per curiam (Tjoflat, Anderson, Hull) found the failure to discuss a possible appeal was *not* ineffective assistance despite *Flores-Ortega* (U.S. 2000), because “no rational defendant in Otero’s position would have sought to appeal in light of the broad appeal waiver.”

U.S. v. MAZARKY, 2007 WL 2609496 (Sept. 12, 2007)

Sentencing; supervised release; revocation; multiple terms; maximum; 18 USC 3583(h)

The Court (Restani, with Dubina and Black), held that the maximum allowable supervised release following multiple revocations of supervised release must be reduced by aggregate length of any terms of imprisonment that have been imposed upon revocation.

U.S. v. MATURIN, 2007 WL 2593617 (Sept. 11, 2007)

Sentencing; illegal reentry; 8 U.S.C. § 1101

The Court (per curiam by Anderson, Pryor and Albritton) held that held that the 15-year temporal restriction in 8 U.S.C. 1101(a)(43), for excluding from the aggravated felony category a prior conviction where the term of imprisonment ended more than 15 years before his reentry, does not apply to prior domestic convictions; it only applies to prior foreign convictions.

BRUCE v. BEARY, 2007 WL 2492101 (Sept. 6, 2007)

Unreasonable execution of administrative search

The sheriff's office conducted a para-military-type administrative search of a body shop, blocking exits, tearing apart vehicles, placing an automatic shotgun into an employee's back, lining up employees along a fence, patting them down, and depriving them of their IDs. In a civil action under 42 U.S.C. §1983, the Court (Hill, with Wilson, and with Carnes separately concurring) held that although sufficient cause to search had been shown, the method used was unconstitutional.

U.S. v. FLEET, 2007 WL 2480543 (Sept. 5, 2007)

Criminal forfeiture

The Court (Carnes, with Pryor & Farris), held that the substitute property provision of the federal criminal forfeiture statute, 21 U.S.C. § 853(p), preempts the homestead exemption contained in the Florida Constitution and Florida's tenancy by the entireties law, which together protect such property from forfeiture.

U.S. v. DORSEY, 2007 WL 2456611 (Aug. 31, 2007)

Prosecutorial vindictiveness, USSG § 5K1.1

The Court (Wilson, with Tjoflat & Birch) reversed a sentence, joining two other circuits to hold that "the government's refusal to file a § 5K1.1 motion because the defendant exercised his right to a jury trial constitutes an unconstitutional motive." The Court remanded because "we are unable to determine whether that is what took place in this case because of insufficient fact-finding at the district court." On remand, Dorsey has the burden to prove prosecutorial vindictiveness by either showing facts that give rise to a presumption of vindictiveness or by offering evidence of a prosecutor's actual

vindictiveness.

U.S. v. TABER, 2007 WL 2428317 (Aug. 29, 2007)

Sentencing; 3B1.4; use of minor

The Court (per curiam, with Burch, Pryor, Fay), held that when a defendant commits a crime with a minor, there need not be anything more than equal partnering to support a sentencing enhancement under USSG § 3B1.4 for use of a minor in the commission of the offenses, even when, as here, the minor is the more culpable party.

GORDON v. U.S., 2007 WL 2385078 (Aug. 23, 2007)

Ineffective assistance; failure to object; allocution

The Court (Pryor, with Kravitch and Alcaron) held that counsel was no ineffective in failing to object to the district court's failure at the plea hearing to advise defendant as to the nature of the charges and to ask defendant personally if he wanted to speak. No evidentiary hearing was required because the Court could conceive of a reasonable explanation for counsel's failures.

JONES v. WALKER, 2007 WL 2376275 (Aug. 22, 2007)

Faretta; unreasonable fact determination by state court

Charged with murder and child cruelty, the defendant repeatedly insisted that he be appointed different counsel, but the trial court gave him a choice between the "fine" public defender he had, or self-representation. The defendant never asserted his desire to represent himself. The Court (Brunetti, with Birch and Carnes) held that defendant had successfully shown "clearly and convincingly" that the state supreme court's decision to find no Sixth Amendment

error was based on an "unreasonable determination" of fact, i.e., that defendant was "made aware of the dangers of self-representation." The Court noted that neither defense counsel nor the court ever specifically advised him about the "dangers of self-representation" other than generalizations.

U.S. v. GAREY, 2007 WL 2377329 (Aug. 14, 2007)

Sixth Amendment

On *en banc* rehearing, the Court vacated its previous decision, reported at 483 F.3d 1159, in which the Court had reversed a conviction of 27 counts arising out of a series of bomb threats made in September 2003. Garey represented himself at trial after the district court said he had invoked his Sixth Amendment *Faretta* right. A 2-1 appellate panel decision (Birch, with Presnell, Black dissenting) disagreed, concluding that Garey's actions in attempting to obtain the dismissal of his court appointed counsel, whom he believed to be ineffective and impermissibly conflicted, were insufficient to invoke his Sixth Amendment right of self-representation.

FERREIRA v. SECY, DOC, 494 F.3d 1286 (Aug. 7, 2007)

Habeas; statute of limitations

On remand from the Supreme pursuant to *Burton v. Stewart*, 127 S. Ct. 793 (2007), the Court (Black, with Pryor & Cox) changed its tune and held that the AEDPA statute of limitations runs from the date the judgment pursuant to which the petitioner is in custody becomes final, which is the date both the conviction AND sentence the petitioner is serving become final.

U.S. v. HAUN, 494 F.3d 1006 (Aug. 6, 2007)

Coast Guard; specific v. general intent

The Court (Dubina, with Black & Restani)

affirmed the conviction of a man who faked his disappearance in the Gulf to avoid a state court date, holding that 14 U.S.C. 88(c) required only a general intent to violate any law, and not the specific intent to, as the statute says, knowingly and willfully cause the Coast Guard to attempt to save his life and property when no help was needed.

U.S. v. LOPEZ-VANEGAS, 493 F.3d 1305 (July 26, 2007)

21 U.S.C. §§ 841 and 846 do not apply extraterritorially

The Court (Walter, with Carnes & Wilson) held that "Congress has not stated its intent to reach discussions held in the United States in furtherance of a conspiracy to possess controlled substances outside the territorial jurisdiction of the United States, with intent to distribute those controlled substances outside of the territorial jurisdiction of the United States." Accordingly, it vacated cocaine distribution conspiracy convictions of two persons alleged to have met in Miami to broker a deal between a Colombian drug trafficking organization and a Saudi Arabian Prince to transport cocaine on the Prince's airplane from Caracas, Venezuela to Paris, France, for distribution in Europe.

U.S. v. TAMPAS, 493 F.3d 1291 (July 26, 2007)

Conspiracy; embezzlement; indictment; constructive amendment; FRE 404(b); restitution

The Court found the evidence sufficient to affirm convictions of the head of the Valdosta YMCA for unauthorized use of YMCA money. The Court held the indictment was not constructively amended by jury instructions which did not require the jury to find the amounts charged in the indictment to convict. The court instructed the jury that the government had to prove

that Tampas converted at least \$5,000 on each count, whereas the indictment charged a conspiracy to embezzle \$864,000 and embezzlement of about \$50,000. The Court remanded the restitution order based on unpaid payroll taxes, because “[t]he government never sought to prove that Tampas’s embezzlement scheme caused the YMCA’s failure to pay its payroll taxes.”

U.S. v. CISZKOWSKI, 492 F.3d 1264 (July 20, 2007)

Firearm; sufficiency; silencer; knowledge; sting; jury instruction; sentencing; outrageous government conduct; sentencing entrapment

The Court affirmed the defendant's convictions and 30-year minimum mandatory sentence, arising out of a sting in which the undercover informant provided him with a gun whose barrel contained a silencer; this was not readily observable, and the defendant only glanced inside the bag containing the gun and other items before being arrested. First, the Court held that the government did not have to prove beyond a reasonable doubt that he knew the gun had a silencer because the firearm characteristics are sentencing elements to be determined by the court. The jury returned a special verdict that the firearm contained a silencer. Second, the Court rejected the argument that the sentence was unreasonable because the district court failed to recognize that it could impose a downward variance because of outrageous governmental conduct or sentencing manipulation. Sentencing factor manipulation is not available when a mandatory minimum sentence is involved, because Congress recognized only substantial assistance and safety valve options. The Court noted the manipulation could be filtered out of the sentencing equation if the government's acts were so objectionable, but the defendant had

not proven the government's behavior was "sufficiently reprehensible."

U.S. v. HERRING, 492 F.3d 1212 (July 17, 2007)

Good faith trumps exclusionary rule

The Court held that the good faith exception to the exclusionary rule permitted admissibility of evidence found during arrest on a warrant from another jurisdiction when officers were mistakenly not told the warrant had been recalled. Systemic faulty record-keeping in the issuing jurisdiction might support an argument that the officers’ reliance was objectively unreasonable.

U.S. v. LEWIS, 492 F.3d 1219 (July 17, 2007) (*en banc*)

Double jeopardy; waiver vs. forfeiture of claims; plain error

Lewis argued that trial on the 924(c) brandishing-a-firearm count violated double jeopardy because the robbery charge was a lesser-included offense of the firearm charge. A panel held the double jeopardy claim had been waived because not raised below. On rehearing *en banc*, Lewis argued his failure was a forfeiture, not a waiver, and his client was entitled to plain error review under *Olano*. The whole Court agreed, because “Lewis took no affirmative steps to waive his right against double jeopardy; he simply failed to assert his right.” However, he lost on the merits because the Court found no error at all, treating the plea and trial as a single prosecution.

U.S. v. CAMPBELL, 491 F.3d 1306 (July 13, 2007)

Lawyer disqualification; sentencing; procedural/substantive reasonableness

The Court affirmed the convictions of tax fraud and the 30-month, bottom-of-the-range sentences of the former Atlanta mayor. The

Court affirmed the district court's disqualification of the original retained counsel. The Court accepted the distinction between procedural and substantive reasonableness in sentencing, but rejected both claims. It recognized that *Rita* calls Circuit precedent into question, but it chose not to alter its view against a presumption of reasonableness of within-range sentences. It also continued to adhere to the notion that relevant conduct includes acquitted conduct.

U.S. v. LOZANO, 490 F.3d 1317 (July 9, 2007)

Sentencing; 2B5.3; counterfeiting or infringement; loss amount; American v. foreign value; 3B1.1; role; reasonableness

The Court affirmed the 18-level enhancement under U.S.S.G. § 2B5.3, holding that the loss resulting from the defendants' sales of counterfeit cell phone parts should be based on the MSRP value in the United States, since some sales clearly occurred there, not the retail value in Latin America where defendants contended most of the parts were sold. The Court also affirmed the 2-level enhancement under § 3B1.1(c) because the brother who acted as sales manager was intricately involved in the offense. Finally, the mid-range sentences were reasonable, even if the district court had erred, given its expressed intention to reimpose the same sentence, and the extensiveness of the offense.

U.S. v. WALKER, 490 F.3d 1282 (July 6, 2007)

Jury selection; Batson; remedy; honest services mail fraud; loss amount; abuse of trust; supervisory role; upward variance

The Court affirmed this conviction of a Georgia state legislator arising out of abuse of his position to obtain benefits for his businesses. First, the Court affirmed the district court rulings which sustained the

government's challenges to four defense peremptories of white males as pretextual because similar non-white-male jurors had not been struck, remedied it by reinstating those four jurors, and denying the defense four additional peremptories. (Although the Supreme Court has not addressed race-gender groups, the Court agreed with the Ninth Circuit that *Batson's* application to race-gender groups deserves resolution.) The defense use of all strikes against white males was sufficient to meet the first *Batson* prong that the challenging party prove *prima facie* discrimination in the challenged strike; the district court did not treat white males as a cognizable group but treated the strikes as race-based discrimination and considered the "totality of the circumstances"; and (c) the defendant's reasons clearly met their burden under the second step of offering race-neutral explanations for their strikes. The Court was troubled about the third *Batson* step, finding it difficult to understand how the government met its burden of showing that four were pretextual when similar evidence was rejected for other strikes; however, it was "constrained to defer" under *Purkett v. Elem*, even on *de novo* review, to the district court's assessment of the defense attorneys' demeanor in determining that the strikes were not "genuine". As to the remedy, the Court refused to craft any bright-line rule about remedies and found only that the remedy here was defensible, noting the affected jurors were unaware of the strikes, it avoided redoing all of jury selection, and giving additional strikes would have rewarded the inappropriate strikes.

The Court held the district court had clearly erred in finding the supervisory role enhancement under the "otherwise extensive" prong of § 3B1.1(b) when it simultaneously found there were no other participants; however, even though not recognized by the

district court, the Court affirmed based on its conclusion there were others who participated in the scheme.

U.S. v. KNIGHT, 490 F.3d 1268 (July 3, 2007)

Improperly voting; general intent crimes; Fifth Amendment; grand jury instructions

Knight, an alien resident attempted to become a citizen, was convicted of improperly voting in a federal election, 18 U.S.C. § 611(a), a misdemeanor. On appeal, he argued that § 611 is unconstitutional because it fails to incorporate a mens rea. The Court held that § 611 is a constitutional general intent crime requiring that the government prove the defendant knowingly engaged in the conduct prohibited by § 611. The Court also held that his Fifth Amendment rights were not violated because the grand jury instructions did not (1) improperly limit its duty to determine probable cause by telling them a magistrate judge already found probable cause, or (2) deprive it of the option not to indict by requiring indictment where the evidence supported it.

ZAKRZEWSKI v. MCDONOUGH, 490 F.3d 1264 (July 3, 2007)

Fraud on the court; Fed. R. Civ. P. 60(b); successive habeas petitions

A capital defendant sought post-judgment relief under Fed. R. Civ. P. 60(b) on the basis that his former retained habeas counsel perpetrated a fraud on the court. The Court reversed the district court ruling that the motion was a second or successive habeas petition; the Court remanded for consideration whether defendant “has established ‘sufficiently extraordinary’ circumstances . . . that would entitle him to relief under Rule 60(b)”, i.e., proof of “fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the

judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.”

WILLIAMS v. U.S., 491 F.3d 1282 (July 2, 2007)

Castro; retroactivity; pre-AEDPA habeas; statute of limitations; equitable tolling

The Court applied the equitable tolling prescription set out in *Outler*, 485 F.3d 1273, to deny relief; it chose not to decide whether *Castro* (setting procedural limitations on district court’s ability to recharacterize petitions) is retroactive.

OGLE v. JOHNSON, 488 F.3d 1364 (June 15, 2007)

Habeas; exhaustion; pleading

The district court held that Ogle’s pro se state habeas petition, which included a bare allegation of ineffective assistance of counsel, failed to present the more specific claims later alleged in a federal habeas petition. The Court reversed, concluding he fairly presented seven of his eight allegations to the state habeas court, even though it did not address each.

DILL v. ALLEN, 488 F.3d 1344 (June 13, 2007)

Capital habeas; ineffective assistance of counsel; failure to uncover evidence that shooting was not cause of death

The Court affirmed denial of the capital habeas petition, based on state court findings below, that were not unreasonable, that (1) trial counsel could not be held ineffective for failing to present the testimony of a doctor that the victim ultimately died not from the gunshot wound but from dehydration caused by his wife, partly because there was no prejudice where the other two doctors called by the state had the third doctor’s notes and still opined the victim died from the gunshot,

and partly because it was not unreasonable for trial counsel to have elected the defense of innocence.

U.S. v. TAYLOR, 489 F.3d 1112 (June 13, 2007)

Escape; crime of violence; ACCA

Although the Court affirmed the district court's conclusion it was bound by *Gay*, 251 F.3d 950 (11th Cir. 2001), and Supreme Court precedent (*Taylor* and *Shepard*) to conclude that ALL escapes, even the failure to return to a work release center after an authorized departure, are crimes of violence for sentencing guideline purposes and, here, ACCA sentencing purposes. Excellent "concurring *dubitante*" opinion by Judges Hill and Wilson laying out a basis for Congress and/or the Sentencing Commission to allow a distinction between prior escape convictions that were from actual custody versus walkaways and failures to report or to return.

U.S. v. VIRDEN, 488 F.3d 1317 (June 12, 2007)

Search; vehicle; Fourth Amendment; seizure; inevitable discovery

The Court affirmed the district court's suppression grant and denied the government appeal. There was no probable cause to believe the driver's car contained drugs, and the inevitable discovery doctrine did not apply. The Court held that the officers' moving of Appellant's rental vehicle to another location, without his consent, was a seizure which exceeded the bounds of a *Terry* stop, was unreasonable given its scope and intrusiveness, and thus violated the Fourth Amendment because there was no probable cause. The Court again "frowned upon the movement of individuals" for investigatory purposes. Further, the Court found it significant that neither the driver nor the vehicle were known to police after more than

a year's investigation, distinguishing *Tamari*, 454 F.3d 1259 (11th Cir. 2006) (finding probable cause where defendant arrived at drug scene driving a car known to belong to target). The suspicious facts known to officers (defendant left a known drug location; he appeared to have ability to close garage door as he left; and he misstated where he had been when stopped) were insufficient.

Second, the inevitable discovery doctrine did not apply because the government failed to show both that it would have been inevitably discovered and, more importantly, that "the lawful means which made discovery inevitable were being *actively pursued* prior to the occurrence of the illegal conduct." The Court emphasized the importance of this second prong of the government's burden and its strict application of this prong. It was inapplicable here because police could not have brought the drug dog to the scene in a reasonable amount of time. The officers' choice of an unlawful option, when they learned that lawful one was unavailable, was precisely what the exclusionary rule was designed to prevent.

U.S. v. DORMAN, 488 F.3d 936 (June 8, 2007)

Sentencing; allocution; due process; competency; Free-men; reasonableness; codefendant's sentence

The Court first remanded for a competency evaluation, where defendant's sentencing transcript reflected statements the district court found to be "nonsensical jibberish," after which it held he was competent but simply held "Free-men" type theories about government authority over him. The Court held that the district court did not deny his right of allocution by interrupting his deliberately disruptive statements when there was no basis to find they were a product of

mental illness. The district court addressed defendant personally and gave him a chance to speak, but he chose to be non-responsive. Second, the district court did not violate due process at sentencing, because there was no evidence the district court (a) had a materially false understanding of defendant's mental condition; and (b) relied on his mental condition in sentencing. Finally, the codefendant's lesser sentence did not make defendant's sentence unreasonable under § 3553(a)(6) because the government had filed a substantial assistance motion for the codefendant.

U.S. v. PRESLEY, 487 F.3d 1346 (May 31, 2007)

Supervised release; revocation; 18 USC 3583(i); jurisdiction; warrant; 18 USC 921(g); possession; jury instruction; necessity

The Court first affirmed the revocation of supervised release; it rejected arguments under the Fourth Amendment's Warrant Clause that the district court was without jurisdiction, under 18 U.S.C. § 3583(i), either because the warrant was served after the term of supervision was over or because the allegations were unsworn. Both summons and warrant were based on unsworn allegations and were issued before expiration of the term of supervision, but were served after. *Compare Vargas-Amaya*, 389 F.3d 901 (9th Cir. 2004) (holding that warrant must be based on sworn facts), *with Garcia-Avalino*, 444 F.3d 444 (5th Cir. 2006) (holding warrant must not be sworn). The Court noted the statute says nothing about the allegation being sworn and the circuit split does not extend to a summons. The Court also rejected the argument that the various federal criminal rules provisions about summons being sworn are "constitutionally compelled," noting also that those rules were not "necessarily"

applicable to a supervised releasee. Also, once properly before the district court, it had authority to revoke for any violation, not just those specified in the summons, noting § 3583(i) extends to "matters arising before its expiration."

Lastly, the district court properly refused to instruct the jury on the necessity defense to the felon-in-possession charge, because when defendant took the gun away from some children and then hid it under his mother's home he had the reasonable alternative of using his cell phone to get help. Thus, the necessity defense did not apply under *Deleveaux*, 205 F.3d 1292, 1297.

U.S. v. THOMAS, 487 F.3d 1358 (June 1, 2007)

Sentencing; argument; plea agreement; consecutive

Noting that this circuit "has not determined whether a recommendation of consecutive sentences or a sentence range amounts to a recommendation of a specific sentence," the Court held that it did not. The government argued at sentencing that the district court should give "serious consideration to the imposition of consecutive penalties," which the court did impose, and the Court agreed this did not violate its plea agreement promise "not to recommend a specific sentence" but was instead within the scope of its reservation of right to "make arguments pertaining to the application of the sentencing guidelines," etc. The Court concluded that the defendant's understanding of the plea agreement to preclude this was not an objective reading of the agreement. The Court distinguished *Hayes*, 949 F.2d 230, 232 (3d Cir. 1991) (concluding that argument in favor of range of incarceration recommended a specific sentence), because

the government there had not reserved the right to make arguments about sentencing considerations but only to provide the district court with accurate information.

U.S. v. AMEDEO, 487 F.3d 823 (May 24, 2007)

Sentencing; recusal; mandate rule; "law of the case"; departure v. variance; 18 USC 3742(g)(2); retroactivity; due process; ex post facto; Booker; reasonableness; permissible factors

The Court held the district court had not abused its discretion in failing to recuse itself from the resentencing under 28 U.S.C. § 455; neither the judge's application of new reasons for imposing an upward departure under § 3553(a) nor other facts showed the requisite appearance or actuality of bias. Nothing showed a personal or extrajudicial bias against the defendant, under § 455(b)(1), or that a fully-informed lay observer would entertain a significant doubt about the judge's impartiality, under § 455(a). The district court had not violated the mandate in *Amedeo I*, 370 F.3d 1305, or "law of the case doctrine" by considering conduct beyond the offense of conviction and imposing a sentence above the guideline range, because one of the three exceptions applied, as "Booker constituted an intervening change in the law of sentencing that made a contrary decision of law applicable." The Court agreed that a guidelines *departure* based on acts beyond the scope of relevant conduct under § 1B1.3 would have violated the *Amedeo I* mandate, but under *Booker* the district court on remand had discretion to impose a *variance* under § 3553(a), even based on the same facts. Third, the Court rejected his argument that an above-the-guidelines sentence imposed on resentencing, based on facts not considered in his original sentence, violated 18 U.S.C. § 3742(g)(2); because both § 3742(g)(2) and §

3553(c) were enacted after the original sentencing, the Court held that § 3742(g)(2), and its requirement of written reasons, does not apply to sentences imposed before its passage. Fourth, the Court rejected his argument that the *ex post facto* application of *Booker* to his detriment at resentencing violated due process, relying on *Duncan*, 400 F.3d 1297. Finally, his 120-month sentence, in a range of 37-46 months, was not unreasonable. The district court's failure to mention mitigating evidence did not prove it was ignored or not considered.

U.S. v. QUIRANTE, 486 F.3d 1273 (May 21, 2007)

Sentencing; safety valve; 18 USC 3553(f); 5C1.2; mandatory v. discretionary; Booker; 3553(a); "shall"

The Court held that application of the safety valve is mandatory and not discretionary, reversing the district court's rejection of all parties' recommendation of a 70-month sentence, where the defendant qualified for the safety valve. The Court held that the term "shall" in 18 U.S.C. § 3553(f) did "not convey discretion. It is not a leeway word." However, that said, the Court noted that, after a district court has properly applied the guidelines, including the application of the safety valve provision, it may still impose a sentence at or even above the mandatory minimum under § 3553(a). Note: "Because a mandatory minimum sentence that must be disregarded under § 3553(f) is not a § 3553(a) factor, it cannot be considered in any part of the sentencing decision when the safety valve applies."

U.S. v. MARTINEZ, 486 F.3d 1239 (May 17, 2007)

Assaulting federal officer; 18 USC 111(a); "all other cases"; jury instruction;

sufficiency; closing argument; absence of evidence; restitution; pecuniary loss; medical testing and examination

The Court affirmed the district court's jury instruction on the elements of a forcible assault under 18 U.S.C. § 111(a), noting the statute includes 3 categories with different penalties. The Court agreed with other circuits and held that, where the offense charged included actual physical contact, it falls within the middle "all other cases" category and not the "simple assault" category. Also, the physical contact need not have resulted in actual bodily injury, and here the throwing of urine onto the officer was sufficient. In addition, this category need not always require a threat to inflict serious bodily injury. An "all other cases" assault can be either a threat to inflict serious bodily injury without any actual physical contact, or an assault with actual physical contact with no resulting injury. The court properly instructed the jury that a forcible assault in his case was "an assault which results in physical contact which does not involve a deadly weapon or bodily harm."

The Court also affirmed the district court's prohibition of defense closing argument on the absence of evidence of a videotape of the alleged assault; although there were videocameras there was no evidence they were connected to a recorder or that a tape actually existed.

Finally, the Court affirmed the award of restitution for medical consultations and check-ups for uninjured victims, as necessary to confirm the lack of injury.

U.S. v. WARD, 486 F.3d 1212 (May 16, 2007)

Evidence; sufficiency; mail fraud; causation; indictment; jury instruction; constructive amendment; sentencing; constitutional claims; Booker

The Court affirmed the convictions arising out of this Ponzi scheme, finding the evidence on the substantive fraud counts sufficient even though defendant may not have personally caused the mailings. It was enough that defendant knowingly and willfully participated in the scheme without personally committing each element. Second, the Fifth Amendment was not violated by the judge's instruction to the jury that, even if it did not return a verdict on the conspiracy count, it could still convict on the substantive counts. Finally, the district court's sentence above the guidelines based on Booker did not violate the Ex Post Facto Clause, or Fifth or Sixth Amendment, or due process, by allowing a higher sentence than the guideline one in place when the offense was committed.

U.S. v. LLANOS-AGOSTADERO, 486 F.3d 1194 (May 15, 2007)

Sentencing; crime of violence; 2L1.2

A prior Florida conviction for aggravated battery of a pregnant woman, under § 784045(1)(b), Florida Statutes, IS a crime of violence under § 2L1.2 of the sentencing guidelines.

JORDAN v. SECY., DOC, 485 F.3d 1351 (May 14, 2007)

Habeas; 2254; COA; newly discovered; actual innocence; second or successive

Having obtained leave to file a second or successive 2254 petition, the defendant's claim (I'm-innocent-and-have-evidence-to-prove-it) still needed some substantive constitutional violation. Unfortunately, the teenage defendant's allegation that police had coerced his confession by threatened to prosecute his mother was never made in earlier proceedings. The Court addressed a number of procedural issues relating to second or successive petitions and the scope

of a COA.

U.S. v. EDOUARD, 485 F.3d 1324 (May 11, 2007)

Court Interpreters Act; court's duty to inquire; jury; Batson; 404(b); conspiracy; multiple v. single; material variance; money laundering; sufficiency; sentencing; continuance; PSI objections

First, the Court held that there was no abuse of discretion in the district court's failure to conduct an inquiry into defendant's need for an interpreter or to appoint one; under the Court Interpreters Act, a district court has a mandatory duty "to inquire as to the need for an interpreter when a defendant has difficulty with English" or the court is on notice that he speaks only *or primarily* another language. As a constitutional matter, the court must balance the defendant's constitutional trial rights against the efficient administration of justice, and several things can put a court on notice that it should inquire. The defendant never requested an interpreter; the court construed an early colloquy as evidence of his English abilities; interpreters were available throughout the trial and assisted with several witnesses; and witnesses testified the defendant and coconspirators communicated in both English and Creole. Likewise, nothing in the record demonstrated that the lack of an interpreter rendered the trial fundamentally unfair.

Second, although the government peremptorily struck 4/5 black venirepersons, the defense Batson objection failed to establish a prima facie case; although the district court improperly condensed the second and third steps of the inquiry by summarily overruling the objections, the Court could not say the district court clearly erred in concluding the peremptory strikes were strategic and non-discriminatory.

Third, the Court affirmed, under the plain

error standard, the introduction of 404(b) evidence in the form of (a) pre-conspiracy drug importations was relevant to intent and a cautionary instruction was given, and (b) a threat to kill a legitimate business associate and her employees was inextricably intertwined with the money laundering evidence because it explained why and the manner in which she returned his deposit via multiple checks to different parties.

Fourth, there was no material variance between the indictment charging one conspiracy and the evidence, because there was substantial evidence from which the jury could have found one overarching conspiracy to import cocaine from Haiti to the US, there were participants aware of the various schemes, and there was no prejudice even if error. Thus, there was no error in not giving a jury instruction on multiple conspiracies.

Fifth, the Court affirmed denial of the motion to continue sentencing, as there was no explanation why it was filed so late.

Finally, the Court affirmed denial of the motion to accept untimely PSI objections, the defendant failed to adequately explain his failure to timely object, plus the district court indicated it had reviewed the objections and found them to cover virtually the entire factual basis of the PSI.

U.S. v. JOHNSON, 485 F.3d 1264 (May 11, 2007)

Evidence; sufficiency; material false statements; sentencing; 2J1.3(b)(2); perjury; interference with administration of justice; reasonableness

The defendant-consultant was convicted of obstruction and false statements to a grand jury and to the US based on his representation of a customer in construction of a dock in Florida Bay and false statements to EPA officials. The Court found the evidence sufficient on all counts. As to

sentencing, the Court construed as a matter of first impression Application Note 1 to U.S.S.G. § 2J1.3(b)(2), which provides that "substantially interfering with the administration of justice" includes causing "the unnecessary expenditure of substantial governmental or court resources." This does not include government expenditures prior to the false statement or prosecution costs for the underlying perjury case, and the government need not prove a specific number of employee hours resulting from the interference. The district court's enhancement focusing only on the government hours resulting from the defendant's initial false grand jury testimony was not clearly erroneous. Finally, the district court's bottom-of-the-range 24-month sentence, and denial of a downward departure based on defendant's age and health, was not unreasonable.

U.S. v. MEDINA, 485 F.3d 1291 (May 11, 2007)

Health care fraud; Medicare kickbacks; defrauding; knowingly; money laundering; sentencing; loss amount;

The Court vacated most counts of conviction, addressing the requirements for finding a defendant "defrauded" the government; it held that, in a health care fraud, the conviction requires proof of the defendant's knowledge the claims were false. The Court concluded that evidence the defendants' company representatives paid kickbacks does not in itself prove health care fraud without some false or fraudulent statement to Medicare. The Court noted evidence that patients received the treatment prescribed and needed the medications supplied. The Court remanded for resentencing of two defendants because, even though a court can make reasonable estimates of loss, it cannot rely on a speculative amount which results in a more severe sentence. The district court clearly

erred when it failed to make specific factual findings of the loss amount and instead used the total amount of Medicare claims which included legitimate amounts.

OUTLER v. U.S., 485 F.3d 1273 (May 11, 2007)

Habeas; 2255; timeliness; successive; Rule 33

The case was earlier remanded to the district court, relying on Castro, 540 U.S. 375 (2003), because it had improperly characterized his initial Rule 33 motion as a 2255 post-conviction motion and denied it, without warning him that it would be so renamed or giving him an opportunity to amend or withdraw it to avoid the consequences. On remand, the district court concluded the 2255 was time-barred and rejected the defendant's arguments that the petition only had to be filed within one year of Castro.

First, the Court held that the district court's original recharacterization of defendant's Rule 33 motion was not the type of governmental impediment recognized under § 2255(6)(2), because the Court's prior remand under Castro removed the adverse consequences contemplated by it. Second, the Court held that the exception provided in § 2255(6)(3) did not apply because Castro involved a procedural and not substantive rule. Third, equitable tolling was not appropriate because, even though the defendant might be able to show due diligence given all his efforts, he could not make the required showing that his circumstances were extraordinary, based solely on Castro, noting additionally that he had not timely identified any new substantive challenge to his conviction but had only done so seven years after the statute of limitations had run.

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