

FEDERAL PUBLIC DEFENDER

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NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

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NORTHERN FLORIDA, AGAIN, HAS THE LONGEST SENTENCES IN THE NATION

In fiscal year 2006, consistent with most years, the Northern District of Florida's average sentence was longer than that of any of the other 93 federal districts in the nation. For the year, our average sentence was 114.4 months. We just nosed-out the Southern District of Illinois, where the average sentence was 114.2 months. There was not, though, much other competition, with only two districts passing the century mark: Eastern Oklahoma at 101.5 months and Western Virginia at 102.9 months. With the national average at 59.1 months, North Florida's average sentence is 94 percent higher than the national average. By way of comparison, the average sentence in Florida's Middle District was 82.1 months, 69.3 months in South Florida, 70.4 months in the Southern District of Georgia, and 74.7 months in the Southern District of Alabama.

While Southern Illinois's average sentence for drug trafficking at 157 months beat the 153.3 month average sentence for drug trafficking in

North Florida, they were the only district in the nation to do so. With the national average sentence for drug trafficking at 84.4 months, North Florida's average sentence for drug trafficking was 82 percent higher than the national average and earned the District a second-place finish.

The sentences in North Florida were below the national average in some categories: our 11 fraud cases averaged 20.7 months compared to the national average of 26.2 months; our 44 immigration cases averaged 15.7 months while the national average was 23.5; and our 52 cases in the catch-all category of "all others" averaged 53.3 months with the rest of the nation averaging 57. In addition to the drug offenses, sentences were above the national average for our 5 robbery cases, 120.4 months vs. 91.5; our 11 larceny cases, 20.7 months vs. 18.3; and our 137 firearm cases, 137 months vs. 82.1.

There was some positive news in the category of departures for substantial assistance. In 2006, 91 North Florida

defendants benefitted from 5K1.1 motions filed by the Government, which represents 22 percent of all the cases filed. Nationwide, the Government filed 5K1.1 motions in 14.4 percent of all cases. The Government filed 5K1.1 motions at a higher rate than it did in North Florida in 28 districts across the nation. The Government filed 5K1.1 motions in 23.3 percent of the cases in the Middle District of Florida and in only 12.6 percent of the cases in South Florida.

Because of the relatively high number of substantial assistance departures, our North Florida judges imposed sentences outside the recommended Guidelines range in 29 percent of the cases. That is less than the national average of 38.3 percent and less than the average in Florida's Middle District where 35.2 of the sentences were outside of the recommended range. However, it is better than the Southern District of Florida where only 25.6 percent of the cases were outside the Guidelines range.

In North Florida, the judges sentenced only 6 defendants to above-Guidelines sentences, be it on the basis of Booker or a traditional Guidelines departure. The cases of those 6 individuals represent only 1.4 percent of the total, which is slightly below the 1.6 percent of all cases nationwide in which an above-Guidelines sentence was imposed.

Apart from departures based on substantial assistance, the statistics regarding below-Guidelines sentences are not encouraging. The Guidelines Commission groups the below-Guidelines cases in several categories, traditional downward departures, downward departures that include reference to Booker, below-Guidelines sentences justified solely on Booker, and a category labeled "Remaining

Below Range." Additionally, there are categories entitled "Other Government Sponsored" departures and "§5K3.1 Early Disposition" departures ("fast-track"). The North Florida U.S. Attorney's Office, however, doesn't sponsor departures other than for substantial assistance, and the Attorney General has not designated North Florida as a district eligible for "Early Disposition" or fast-track departures.

Even when those below-Guidelines sentences (i.e., for "Other Government Sponsored" and "§5K3.1 Early Disposition") are excluded from the calculations, North Florida judges imposed below-Guidelines sentences at a rate less than half the national average of 12 percent. Twenty-three defendants in North Florida received below-Guidelines sentences in fiscal year 2006, which represents 5.5 percent of all North Florida cases. That percentage represents the third lowest percentage of below-Guidelines sentences among the 94 districts. Only the Northern Mariana Islands, which had no below-Guidelines sentences, and the Middle District of Alabama, which had below-Guidelines cases in only 4 percent of their cases, had a lower percentage. If the Middle District of Alabama's "Other Government Sponsored" departures are added, they would have had a higher overall percentage of below-Guidelines sentences than North Florida, leaving us only behind those remote Pacific islands. In the Middle District of Florida, the rate is 9.9 percent; in the Southern District of Florida, it is at 10.4 percent.

The Sentencing Commission's statistics regarding trials exclude those cases where there was an acquittal, but count as a trial those cases where the defendant proceeded to trial and also entered a guilty plea on other

counts within the same indictment. The Commission reports 34 trials in North Florida, which represents 7.9 percent of the cases. The national average is 4.3 percent, with 4.4 percent of the cases going to trial in the Middle District of Florida and 6.4 percent going to trial in South Florida. We were tied with 3 other districts for the 13th highest percentage of cases proceeding to trial.

In fiscal year 2005, the number of cases in North Florida subject to the Sentencing Guidelines had dropped to 335 from the 415 in fiscal year 2004. This past year saw a return to the higher numbers, with 429 cases. There were 72,518 cases nationwide.

You can find all the sentencing statistics at the Sentencing Commission's webpage: www.ussc.gov. Those statistics regarding the number of below-Guidelines sentences are contained in a report entitled *Final FY06 Quarterly Sentencing Update*. The rest are in the *2006 Sourcebook of Federal Sentencing Statistics*.

JUSTICE KENNEDY: "OUR SENTENCES ARE TOO LONG"

Justice Anthony Kennedy appeared before the United States Senate Judiciary Committee on February 14th. Described by Chairman Patrick Leahy as the "first time in modern history" a sitting justice has testified before the Committee on legislative matters, the proceeding included some remarkable comments by Justice Kennedy regarding sentencing. Echoing what he had said in a 2003 speech at the American Bar Association Annual meeting, he said "[o]ur sentences are too long, our sentences are too severe, our sentences are too harsh." He went on to elaborate:

They will take away a kid who was 19 years old, well he was doing what he shouldn't have done, he was growing marijuana in the country at his parents' cabin and he had his father's .22, and he was giving it to a friend. Okay he's a distributor, he has a weapon and I think it's mandatory. It's 12-15 years. An 18-year-old doesn't know how long 15 years is! And the pardon power is not being used. They pardon a handful of people in the states and in the federal system. Because they are afraid of re-offense and so forth there is no compassion in the system. There is no mercy in the system. And when you are spending in the state of California \$30,000 a year on a prisoner and \$4,500 per student in elementary school there is something wrong . . . to have in the U.S. two million people behind bars for a lengthy time is just not working.

You can find a report of Justice Kennedy's appearance at: <http://blogs.abcnews.com/legalities/2007/02/insecurity.html>.

PENALTIES FOR CRACK COCAINE APPEAR HEADED FOR REDUCTION

On April 27th, the United States Sentencing Commission issued a press release advising that by May 15th it will submit to Congress a report on federal cocaine sentencing policy. According to the release:

The report will set forth current data and information that continue to support the Commission's consistently held position that the 100-to-1 crack-powder drug quantity ratio significantly undermines various congressional objectives set forth in the Sentencing Reform Act and elsewhere. The Commission also will make

recommendations to Congress in the report for modifications to the statutory penalties for crack cocaine offenses. At today's meeting, the Commission expressed its firm desire that this report will facilitate prompt congressional action addressing the 100-to-1 crack-powder drug quantity ratio.

The Commission stated, too, that they are promulgating an amendment that will reduce the ranges for crack cocaine. The amendment reduces by 2 levels the existing offense levels for any given quantity range established by the Guidelines. Thus for the defendant who has, for example, distributed “at least 5G but less than 20 G of Cocaine Base,” the offense level will be 24 rather than the existing level 26. According to the press release, the "Commission emphasized and expressed its strong view that the amendment is only a partial solution to some of the problems associated with the 100-to-1 drug quantity ratio" and that "any comprehensive solution to the 100-to-1 drug quantity ratio would require appropriate legislative action from Congress." In a press release from Families Against Mandatory Minimums, that organization predicted that the proposed amendment will affect 78 percent of defendants convicted of crack cocaine offenses and will reduce the average sentence by 16 months.

The amendment, which would not be effective until November 1st, is subject to review by Congress. Between now and then, though, it should be a useful tool in our efforts to convince judges to give more proportional sentences to those charged with crack cocaine offenses.

The press release is available on the Sentencing Commission's website: www.ussc.gov. Sometime in the next couple

of weeks the report to Congress, as well as the text of the amendment, will also be available on the website.

IMPROVED SENTENCING GUIDELINES

In addition to the proposed amendment to the crack cocaine Guidelines, the Sentencing Commission has proposed several new amendments that, absent rejection by Congress, will be effective November 1st.

Criminal History

Section 4A1.2(c) of the Guidelines contains a list of misdemeanor offenses that are often excluded from the criminal history calculation. Some are never counted, while some, including driving with a suspended license, resisting arrest, and insufficient funds checks, are currently counted if the defendant was sentenced to jail for 30 days or more or to “probation of at least one year.” The amendment will require that if the offense is included because of the length of probation that the probation must be “more than” one year.

The offenses of “fish and game violations” and “local ordinance violations” have been counted if the probation was a year or the jail sentence was 30 days. The amendment moves them to the “never counted” category.

Section 4A1.2(a)(3) provides that, in calculating the criminal history, “related cases” are to be treated as one offense. Thus, if there are two burglary convictions, but they are “related,” they only count as one. As the Career Offender Guideline refers back to §4A1.2(a)(3) in determining whether to count particular offenses as predicate offenses, §4A1.2(a)(3) can sometimes be used to

exclude a prior conviction from consideration. The amendment makes it clear that as long as there is not an intervening arrest, the prior offenses are related if the defendant was sentenced on the same day for them, undoing decisions in cases such as United States v. Hernandez-Martinez, 382 F.3d 1304 (11th Cir. 2004), and United States v. Smith, 385 F.3d 1342, *reinstated*, 416 F.3d 1350 (11th Cir. 2005).

As with the changes to the crack cocaine Guideline, these modifications to the criminal history rules should be of use immediately in these days of advisory Guidelines.

Compassionate Release

Title 18 U.S.C. § 3582(c)(1)(A) provides for the reduction of sentences for some prisoners if there are “extraordinary and compelling reasons.” The process, though, is initiated only when the Director of the Bureau of Prisons petitions the court. Traditionally, the Bureau has done so only when a prisoner is near death. The new Guideline has provided a list of “extraordinary and compelling reasons” that includes those prisoners (1) whose ability to “provide self-care within a correctional facility” is “substantially diminished” because of a “permanent physical or medical condition” or by “deteriorating physical or mental health because of the aging process,” so long as “conventional treatment promises no substantial improvement;” and (2) whose only family member capable of caring for the prisoner’s minor child has died or become incapacitated.

While the question remains as to how to get the Bureau of Prisons to seek relief for a prisoner, the reasons listed should surely have some bearing on sentencing for those who are already facing the circumstances contemplated

by the amendment.

ADVISING CLIENTS ABOUT APPELLATE RIGHTS

In the recently decided case of Thompson v. United States, No. 05-16970, 2007 U.S. App. LEXIS 6410 (11th Cir. March 20, 2007), the Court reminded all of us that the task of advising our clients of their appeal rights often involves more than a hurried 30-second conversation as the client is ushered out the courtroom. Included in the opinion was a quote Justice Souter made in Roe v. Flores-Ortega, 528 U.S. 470, 489 (2000): “If the crime is minor, the issues simple, and the defendant sophisticated, a 5-minute conversation with his lawyer may well suffice; if the charge is serious, the potential claims subtle, and a defendant uneducated, hours of counseling may be in order.”

As Judge Barkett wrote in Thompson: “adequate consultation requires informing a client about his right to appeal, advising the client about the advantages and disadvantages of taking an appeal, and making a reasonable effort to determine whether the client wishes to pursue an appeal, regardless of the merits of such an appeal.” She explained as well that “[s]imply asserting the view that an appeal would not be successful does not constitute ‘consultation’ in any meaningful sense.”

PAY RAISE MAY BE ON THE WAY

On March 15th the Administrative Office of the United States Courts submitted to Congress a cost-of-living adjustment to the Criminal Justice Act that would increase the hourly rate for panel members from \$92 to \$94. The proposal is still pending, but the

Administrative Office is optimistic it will become law within the next few weeks.

CONTEMPORANEOUS TRANSCRIPTION OF RECORDINGS

In United States v. Charles, 313 F.3d 1278, 1283 (11th Cir. 2002), the Court said that under 28 U.S.C. § 753(b), court reporters are obligated to transcribe recordings played to the jury during a trial, regardless of whether a transcript is produced before trial and introduced as an exhibit. Nonetheless, some of the appeal transcripts we've reviewed as of late do not include a transcription of tape recordings played during the trial. So as to insure a complete record, please be sure to see that any tape recordings are transcribed by the court reporter.

REASON TO RELEASE MORE DEFENDANTS PRETRIAL

According to a February report, submitted to the Administrative Office of the United States Courts by Chief U.S. Probation Officer Steve Townley, 61.2 percent of all defendants in North Florida were detained in fiscal year 2006. The pretrial officers recommended that 74 percent of all defendants be detained, a percentage just shy of the 75.2 percent of defendants that the Government asked to be detained.

Nationwide, 52.7 percent of defendants were detained.

In the summary to his report, Mr. Townley noted that in 2006 no one that was released failed to appear and that there were "a relatively small number of release violations." He went on to conclude: "*I believe there is room for an increase in the number of*

defendants released pending trial without an unacceptable increase to community safety."

Mr. Townley welcomes any recommendations from panel members.

GUIDELINES SEMINAR

The United States Sentencing Commission is holding its Annual National Seminar on the Federal Sentencing Guidelines in Salt Lake City, May 23rd - 25th. Details are available at the Commission's website: www.ussc.gov.

CONFIDENTIAL RULE 35 INFORMATION

The Clerk's office has advised that they are receiving an increasing number of calls from prisoners and their family members about the status of Rule 35 motions. Because such motions are under seal, those in the Clerks' office are limited to answering such calls by saying that they don't see such a document in the file. When some of the callers mention that they have the motion in front of them, neither the clerk nor the caller find the exchange very satisfactory. Thus, the Clerk's office has asked that we let our clients and their families know that the Clerk is prohibited from releasing any information about Rule 35 motions.

DOWNWARD DEPARTURES

Troupe, Christopher Mickle, S. Atty: R. Murrell
Docket: 4:06cr20
Charge: Trafficking Cocaine
Range: 235 - 292 months (mand. life)
Sentence: 177 months
Date of Imposition of Sentence: 2/20/07
Grounds: 5K1.1

Allen, Paul Mickle, S. Atty: W. Bubsey
Docket: 4:06cr20

Charge: Trafficking Cocaine
 Range: 292 - 365 mos (mand. life)
 Sentence: 220 months
 Date of Imposition of Sentence: 2/20/07
 Grounds: 5K1.1

Dozier, Krystal Mickle, S. Atty: G. Printy
 Docket: 4:06cr20
 Charge: Trafficking Cocaine
 Range: 151 - 188 mos. (mand. 10 yrs)
 Sentence: 48 months
 Date of Imposition of Sentence: 2/20/07
 Grounds: 5K1.1, young children, good work
 history

Beard, GiGi Mickle, S. Atty: W. Bubsey
 Docket: 4:05cr39
 Charge: Consp. PWITD > 50 g. crack
 Range: 57 - 71 months (mand. 15 yrs)
 Sentence: 24 months
 Date of Imposition of Sentence: 10/16/06
 Grounds: 5K1.1

Robinson, Jeffrey Paul, M. Atty: T. Curtis
 Docket: 1:05cr17
 Charge: Consp. Dist > 50 g. crack
 Range: Mandatory life
 Sentence: 5 yrs probation w/1 yr house arrest
 Date of Imposition of Sentence: 3/22/07
 Grounds: 5K1.1, exceptional cooperation

Brown, Milton Paul, M. Atty: D. Wilson
 Docket: 1:05cr17
 Charge: Consp. Dist > 50 g. crack, > 5 kg
 cocaine
 Range: 108 - 135 months (10 yr min. mand)
 Sentence: 60 months
 Date of Imposition of Sentence: 4/4/07
 Grounds: 5K1.1

Williams, Christopher Hinkle, R. Atty: W. Clark
 Docket: 4:05cr28
 Charge: Criminal Infringement on copyrights
 Range: 21 - 27 months
 Sentence: 13 months
 Date of Imposition of Sentence: 4/9/07
 Grounds: Sentence is sufficient and greater
 sentence is not necessary to comply with statutorily-
 defined purposes of sentencing. 18 USC § 3553(a)

Bennett, Richard Hinkle, R. Atty: W. Clark
 Docket: 4:06cr63

Charge: Consp. PWITD Cocaine
 Range: 70 - 87 months
 Sentence: 13 months
 Date of Imposition of Sentence: 2/27/07
 Grounds: 5K1.1

Brown, Kimberly Collier, L. Atty: G. Murphy
 Docket: 3:06cr446
 Charge: PWITD > 5 g. Crack
 Range: 108 - 135 months (10 yr min. mand)
 Sentence: 60 months
 Date of Imposition of Sentence: 2/13/07
 Grounds: 5K1.1, difficult personal
 circumstances (single mother w/5 children, PTSD,
 drug and alcohol abuse)

VARIANCES

Dixon, Gregory Hinkle, R. Atty: T. Findley
 Docket: 4:06cr36
 Charge: Consp. To Defraud USA
 Range: 27 - 33 months
 Sentence: 12 months
 Date of Imposition of Sentence: 1/10/07
 Grounds: exemplary employment & military
 record, and need to avoid disparity with those more
 culpable

Spence, Lavon Hinkle, R. Atty: T. Donaldson
 Docket: 4:06cr36
 Charge: Consp. To Defraud USA
 Range: 12 - 18 months
 Sentence: 3 yrs probation
 Date of Imposition of Sentence: 2/21/07
 Grounds: impairment (pain killers) and health
 problems

Kornegay, Jason Hinkle, R. Atty: W. Clark
 Docket: 4:06cr60
 Charge: Dist. Marijuana, Poss Short-
 barrelled shotgun
 Range: 30 - 37 months
 Sentence: 13 months
 Date of Imposition of Sentence: 2/16/07
 Grounds: Nature and circumstances of the
 offense, characteristics of the defendant

Bell, Julius Smoak, R. Atty: C. Lammers
 Docket: 5:06cr85
 Charge: Dist. > 5 g. Crack
 Range: 262 - 327 months (10 yr. min. mand.)

Sentence: 120 months
 Date of Imposition of Sentence: 3/14/07
 Grounds: defendant's age (61), disabled, low-level trafficker, and career offender status overstated criminal history

Dixon, Vince Paul, M. Atty: T. Miller
 Docket: 1:06cr18
 Charge: Consp. Dist > 50 g.crack
 Range: 188-235 (mandatory life)
 Sentence: 5 yrs probation w/1 yr house arrest
 Date of Imposition of Sentence: 4/27/07
 Grounds: 5K1.1 and a variance: def. had quit dealing drugs and for 5 yrs had held same job when he was approached by an informant and, then, served only as a middleman in this offense, receiving no compensation; prior drug convictions involved only a gram of cocaine, low IQ, good conduct during the year the case was pending

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

Pensacola panel member, **Don Sheehan**, was appointed as CJA counsel in a Montgomery, Alabama, case to represent, at sentencing, George Salum, who had been a lieutenant in the Montgomery Police Department. Prior to Don's appointment, a Montgomery federal jury had found Mr. Salem guilty of obstruction of justice and computer fraud. The conviction was based on an allegation that Mr. Salum had provided a police file on a DEA agent to a defendant in a high-profile marijuana conspiracy case. That, in turn, resulted in a cross-reference to the drug Guidelines and a Guidelines range of 97-121 months. The case was a sensitive one, with most of the Alabama Bar opting out because a prominent member of the Bar faced possible criminal liability in the conspiracy. Don's effective sentencing memorandum and argument convinced Chief District Judge Mark Fuller that Mr. Salum's

limited role in the offense and his exemplary performance over the years as a police officer justified a below-Guidelines sentence of 30 months.

Gwen Spivey of our Tallahassee office convinced the 11th Circuit Court of Appeals to vacate a mandatory life sentence imposed pursuant to the federal "three-strikes" provision of 18 U.S.C. § 3559(c). Her client, Roger Evans, had entered a guilty plea before Judge Rodgers to, among other charges, threatening to use a weapon of mass destruction against federal property. The charges had been filed because Mr. Evans had sent the Clerk's Office in Pensacola a letter that made references to anthrax and that contained a white powder. The Court of Appeals concluded, however, that the indictment, which charged only a threat against federal property, did not allege a crime involving a "substantial risk that physical force against the person of another" and that the offense, therefore, was not subject to the "three-strikes" enhancement. The case is reported at 478 F.3d 1332 (11th Cir. 2007).

Bill Clark of our Tallahassee office successfully argued that his client, Shamun Reese, was not an armed career criminal, which resulted in an 87-month sentence rather than the 18 years Mr. Reese would have received as an armed career criminal. The outcome depended upon whether a prior conviction for carrying a concealed firearm counted as a predicate offense. That, in turn, was dependent upon whether the prior conviction was a "violent felony" as that term is defined by the armed career criminal act. Bill explained to Judge Hinkle that Florida's definition of "firearm" is, like that of many other states and the federal government, a

broad one, including starter guns, the frame or receiver of a gun, and a silencer. Bill continued by citing to the categorical approach required by Taylor v. United States, 495 U.S. 575 (1990), and taking the position that Florida's offense of carrying a concealed firearm, because it was so broad, did not always qualify as a "violent felony." Relying on Shepard v. United States, 544 U.S. 13 (2005), Bill reminded the Judge that in making the categorical determination of whether Mr. Reese had, in his prior case, carried a gun and committed what all would agree was a violent offense or had, rather, carried a starter gun, a frame of a gun, or a silencer and had committed something less than a violent offense, the Court was limited to an examination of certain documents such as the indictment or information and the judgment. Judge Hinkle agreed with the analysis and when, upon examining the information and the judgment in Mr. Reese's prior offense, found that they contained only what was then clear to be the ambiguous term, "firearm," concluded the Government had failed to establish that Mr. Reese's conviction for carrying a concealed firearm could be counted as a predicate offense under the armed career criminal statute. The case involved a team effort with assistance from **Chet Kaufman** and **Randy Murrell**.

Bill Clark also convinced Judge Hinkle to reduce the Guidelines range for another of his clients from 135-168 months to 57-71 months, resulting in a sentence of 60 months. The client, who had pled guilty to traveling in interstate commerce to engage in sexual activity with a minor, was arrested when he drove from Georgia to meet what turned out to be an undercover FDLE agent posing as an underage girl. When the agents arrested the client, they discovered a camera in the car.

Relying on United States v. Bohannon, 476 F.3d 1246 (11th Cir. 2007), and the cross-reference provision in USSG § 2G1.3(c)(1), the probation officer cross-referenced another separate harsher Guidelines provision, § 2G2.1, because she was of the view the client's possession of the camera evidenced his intent to convince the "child" to participate in "sexually explicit conduct for the purpose of producing a visual depiction." Bill, though, successfully distinguished the decision in Bohannon, arguing that there was more evidence of the defendant's intentions in that case and that the discovery of the camera in his client's case fell short of showing any intent to photograph sexual conduct.

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:

U.S. v. SANTOS, 2007 WL 173657 (Mem), No.06-1005 (cert. granted Apr. 23, 2007) (reviewing 461 F.3d 886 (7th Cir. 2006))

Money laundering, “proceeds” in 18 U.S.C. § 1956(a)(1)

According to the Circuit Court’s opinion, Santos and Diaz ran an illicit lottery, which landed them in federal prison on money laundering charges. The conviction was premised on the meaning of the word “proceeds” in 18 U.S.C. § 1956(a)(1). which at the time was understood to be gross income of unlawful activity. The 7th Circuit in habeas proceedings vacated the conviction because it had held in an intervening case, *Scialabba*, 282 F.3d 475 (7th Cir.2002), that “proceeds” mean net income, as opposed to gross income. The Government filed this cert. petition.

Question presented: The principal federal money laundering statute, 18 U.S.C. 1956(a)(1), makes it a crime to engage in a financial transaction using the “proceeds” of certain specified unlawful activities with the intent to promote those activities or to conceal the proceeds. The question presented is whether “proceeds” means the gross receipts from the unlawful activities or only the profits, i.e., gross receipts less expenses.

U.S. v. WILLIAMS, 2007 WL 879579 (Mem), No. 06-694 (cert. granted Mar. 26, 2007) (reviewing 444 F. 3d 1286 (11th Cir. 2006))

PROTECT Act

Question presented: Section 2252A(a)(3)(B) of Title 18 (Supp. IV 2004) prohibits “knowingly * * * advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing] * * * any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material” is illegal child pornography. The question presented is

whether Section 2252A(a)(3)(B) is overly broad and impermissibly vague, and thus facially unconstitutional.

WATSON v. U.S., 127 S. Ct. 1371 (Mem), No. 06-571 (cert. granted Feb. 26, 2007) (reviewing 191 Fed.Appx. 326 (5th Cir. 2006))

Firearms and Drugs

Watson traded a quantity of drugs to an undercover agent in exchange for a handgun. The Circuit Court held that such trading constituted use of a firearm during and in relation to a drug trafficking crime under 18 U.S.C. § 924(c)(1)(A). **Question presented:** Does mere receipt of unloaded firearm as payment for drugs constitutes “use” of firearm during and in relation to drug trafficking offense within meaning of 18 U.S.C. §924(c)(1)(A) and this Court’s decision in *Bailey v. United States*, 516 U.S. 137 (1995)?

LOGAN v. U.S., 127 S. Ct. 1251 (Mem), No. 06-6911 (cert granted Feb. 20, 2007) (reviewing 453 F.3d 804 (7th Cir. 2006))

Sentencing; ACCA; prior conviction; civil rights; restored

Granting cert petition to resolve circuit conflict on whether convictions which do not result in the loss of civil rights can serve as a prior conviction for enhancement purposes under the Armed Career Criminal Act (which exempts priors where civil rights have been “restored”) **Question presented:** Whether the “civil rights restored” provision of 18 U.S.C. §921(a)(20) applies to a conviction for which a defendant was not deprived of his civil rights thereby precluding such a conviction as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. §924(e)(1)?

BRENDLIN v. CALIFORNIA, 127 S. Ct. 1145 (Mem), No. 06-8120 (cert granted Jan. 19, 2007) (reviewing 136 P.3d 845 (Cal. 2006))

Question Presented: Whether a passenger in a vehicle subject to a traffic stop is thereby “detained” for purposes of the Fourth Amendment, thus allowing the passenger to contest the legality of the traffic stop?

Supreme Court Cases

SMITH v. TEXAS, 2007 WL 1201586, No. 05-11304 (Apr. 25, 2007)

Capital punishment

The Court held that the Texas Court of Criminal Appeals wrongly put up a new legal barrier to a death row inmate’s challenge to jury instructions in his sentencing. The Supreme Court thereby reversed a state post-conviction ruling that had reinstated the death sentence of a Dallas man after the death sentence had been vacated and remanded by the Supreme Court in 2004. After the Supreme Court’s 2004 decision, the Texas court in 2006 held, for the first time, that Smith’s pretrial objections did not preserve the claim of constitutional error he asserted. Under the Texas framework for determining whether an instructional error merits reversal, the state court explained, this procedural default required Smith to show egregious harm—a burden the court held he did not meet. The Supreme Court reversed that state post-conviction decision, holding that the requirement that Smith show egregious harm was predicated “on a misunderstanding of the federal right Smith asserts.” Kennedy was joined by Stevens, Souter, Ginsburg, and Breyer.

BREWER v. QUARTERMAN, 2007 WL 1201609, No. 05-11287 (Apr. 25, 2007)

Capital punishment, habeas

The Court reversed a death sentence because the Texas capital sentencing statute, as interpreted by the Texas courts, impermissibly prevented Brewer’s jury from giving meaningful consideration and effect to constitutionally relevant mitigating evidence. The state court decision to deny relief under *Penry I* was both “contrary to” and “involved an unreasonable application of, clearly established Federal law, as determined [this] Court.” Stevens was joined by Kennedy, Souter, Ginsburg, and Breyer.

ABDUL-KABIR v. QUARTERMAN, 2007 WL 1201582, No. 05-11284 (Apr. 25, 2007)

Capital punishment, habeas

The Court reversed a death sentence because there is a reasonable likelihood that the state trial court’s instructions prevented jurors from giving meaningful consideration to constitutionally relevant mitigating evidence. The Texas court’s merits adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by [this] Court,” and thereby warranted federal habeas relief. Stevens was joined by Kennedy, Souter, Ginsburg, and Breyer.

JAMES v. U.S., 127 S. Ct. 1586, No. 05-9264 (Apr. 18, 2007)

Attempted burglary as violent felony under ACCA

The Court held that a Florida conviction of attempted burglary was properly classified as a “violent felony” predicate for sentence enhancement under the residual clause of the ACCA.

Alito delivered the opinion of the Court, with Roberts, Kennedy, Souter, and Breyer; Scalia filed a dissent joined by Stevens and

Ginsburg. Thomas filed a separate dissent.

WHORTON v. BOCKTING, 127 S. Ct. 1173, No. 05-595 (Feb. 28, 2007)

***Crawford* not retroactivity on post-conviction review**

In a unanimous Alito opinion the Court held that the Confrontation Clause decision in *Crawford v. Washington* does not apply retroactively to convictions already final and on collateral review. *Crawford* announced a “new rule” that is procedural, not substantive, and it does not rise to “watershed status.”

WALLACE v. KATO, 127 S. Ct. 1091, No. 05-1240 (Feb. 21, 2007)

Statute of limitations; 1983; false arrest

The Court held that the statute of limitations for a 1983 action based on false arrest, where it is followed by criminal proceedings, starts to run upon the plaintiff’s detention.

LAWRENCE v. FLORIDA, 127 S. Ct. 1079, No. 05-8820 (Feb. 20, 2007)

Habeas; 2255; timeliness; certiorari; tolling

The Supreme Court affirmed the Eleventh Circuit’s holding that a federal habeas petitioner’s habeas petition was untimely, because the time after the final determination of the Florida state courts, during which the petitioner was seeking (unsuccessfully) certiorari review in the United States Supreme Court, did not toll the one-year statute of limitations for federal habeas petitions. The Court held that once a State’s highest court has denied, as here, the final appeal of a state court’s denial of state post-conviction relief, the state courts have conclusively spoken on the matter. The subsequent federal certiorari proceeding is a separate proceeding. The final resolution in the state courts has occurred, and the tolling period does not continue to run because no state proceeding is “pending.”

CUNNINGHAM v. CALIFORNIA, 127 S. Ct. 856, No. 05-6551 (Jan. 22, 2007)

Sentencing; fact-finding, *Apprendi*

The Court reversed the ruling of the California Supreme Court, holding that California’s “determinate sentencing law” is unconstitutional because it allows judges, not juries, to find facts that lead to higher criminal sentences, and by a preponderance of the evidence. The opinion contains a good discussion of *Apprendi-Blakely-Booker* and the Sixth Amendment jury trial right.

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. GARCIA-JAIMES, 2007 WL 1150034 (Apr. 19, 2007)

Evidence; sufficiency; money laundering; possession; firearm; 924(c); suppression; search; consent; authority; wiretap; duplicates; sealing

In a “huge, complex, multi-defendant criminal drug case” that involved 3 trials and consolidated appeals, and 16 main issues, the Court reversed one gun conviction and sentence and discussed a couple others. First, the Court held the evidence of money laundering conspiracy sufficient, based on drug money that was hidden inside cars that were purchased with drug money and titled to third parties on a car hauler headed to Mexico, and intercepted phone calls confirming a million dollars sent to Mexico on a car hauler, rejecting the argument that the government had to prove defendants had actually sent money to Mexico. Second, the Court reversed one defendant’s conviction for possession of a firearm in furtherance of a drug trafficking crime, because the

government presented no evidence he exercised any ownership, dominion, or control over any firearms during the conspiracy. Third, the Court affirmed denial of the suppression motion, agreeing with the district court that consent from the third party to search the house was valid because she either possessed common authority over the premises OR the officer had an objectively reasonable, though mistaken, good-faith belief the consent was valid. The manager told officers he saw the woman move into the apartment, and she told them that, though she did not live there, she had rented it for a relative and went there often; she also was present during the search and did not testify officers threatened her.

U.S. v. LIVESAY, 2007 WL 1150187 (Apr. 19, 2007)

Sentencing; USSG § 5K1.1; reasonableness
On this second government appeal of the sentence imposed upon this HealthSouth defendant, the Court again reversed, holding that both the USSG § 5K1.1 departure and the ultimate sentence were unreasonable. As to 5K1.1, the Court acknowledged that, once the motion is made, the government “has no control over whether and to what extent the district court will depart from the guidelines. The only constraint is that the district court’s departure must be reasonable.” The Court held it “patently unreasonable” in this case, given the statutory maximum and advisory range, his “key role in this massive fraud,” the loss amount, the length of the fraud, his supervision of others. Departing 18 levels to permit a sentence of brief home confinement and no jail time was essentially a get-out-of-jail-free card. The district court also erred in considering factors besides those listed in 5K1.1(a) or related to the assistance provided. The sentence allowed “effectively no jail time

for a \$1.4 billion prolonged securities fraud that significantly injured many individuals, institutions, and companies.” The Court held the ultimate sentence unreasonable, noting the district court stated it would have imposed the same sentence even if the 5K1.1 departure were unreasonable, because it “wholly fails to serve the purposes of sentencing set forth by Congress in 3553(a).” It was “utterly disproportionate to Livesay’s serious crimes in light of the factors.”

U.S. v. OHAYON, 2007 WL 1079999 (Apr. 12, 2007)

Double jeopardy/collateral estoppel, drug conspiracy

Pryor, with Birch & Nangle, wrote: “This appeal by the United States involves the application of collateral estoppel to a partial verdict, which is an issue that has divided not only our sister circuits but panels of our circuit as well. The question presented is whether an acquittal on a charge of an attempted drug offense requires, under the Double Jeopardy Clause of the Fifth Amendment, the dismissal of a charge of a drug conspiracy on which the jury was unable to reach a verdict. Binyamin Ohayon was tried on charges of conspiracy to possess with intent to distribute and attempt to possess with intent to distribute MDMA, or ecstasy. 21 U.S.C. §§ 841(a)(1), 846. Ohayon is an Israeli citizen who has difficulty communicating in English and was in the United States on a valid visa. Ohayon was arrested after he took a bag of drugs from a hotel room occupied by a confidential informant and placed the bag in the trunk of a car. At trial, Ohayon’s only defense was that he was unaware of the contents of the bags. A jury acquitted Ohayon of the attempt count but was unable to reach a unanimous verdict on the conspiracy count. The United

States sought to retry Ohayon for conspiracy, but the district court concluded that Ohayon's acquittal of attempt collaterally estopped the government from retrying him on the conspiracy charge. Because it is clear that the jury found reasonable doubt that Ohayon knew that he was acquiring drugs, and a conviction for conspiracy would require the government to prove beyond a reasonable doubt that Ohayon knew that he was acquiring drugs, we hold that the government is collaterally estopped from retrying Ohayon for conspiracy to possess with intent to distribute those drugs. We affirm the dismissal of the conspiracy charge against Ohayon."

MCCLISH v. NUGENT, 2007 WL 1063337 (Apr. 11, 2007)

Fourth Amendment

In a § 1983 action, the Court held, in relevant part, that officers violated the Fourth Amendment under *Payton* (U.S. 1980) when they arrested a person who, while standing firmly inside the house, opened the door in response to a knock from the police and was then pulled outside the unambiguous physical dimensions of the home. However, the Court said the officer is nonetheless entitled to qualified immunity because the law was unclear, citing tension between *Payton* and *Santana* (U.S. 1976).

U.S. v. GAREY, 2007 WL 1059097 (Apr. 11, 2007)

Sixth Amendment waiver

The Court (Birch, with Presnell; Black dissenting) reversed convictions on 27 counts arising from a series of bomb threats made in September 2003, holding that the district court committed reversible error in finding that Garey voluntarily, knowingly, and intelligently waived his Sixth Amendment right to counsel. Three days before trial, after

having been found competent, Garey moved to disqualify appointed counsel, asserting that he had a conflict because "the law office where his court-appointed counsel engaged in business was a target of the alleged crimes," among other grounds. The court denied the motion and offered the self-representation option. "When Garey insisted that he did not want to represent himself but that he would not tolerate his appointed counsel, the trial judge informed Garey that *if he would not allow himself to be represented by his appointed counsel, then it was the court's understanding that Garey wanted to represent himself.*" The district court said Garey was voluntarily proceeding *pro se* despite the fact that Garey said that was neither his desire nor intent. The Circuit Court felt compelled to reverse because he had not voluntarily waived the right to counsel. Black dissented with an opinion.

U.S. v. ORISNORD, 2007 WL 1062529 (Apr. 11, 2007)

Sufficiency, entrapment, Confrontation Clause, juror interviews, "crime of violence"

Four defendants were convicted of a series of charges arising from a conspiracy to rob a narcotics stash house, which officers prevented from occurring due to a CI's information. Without any analysis, and stating the Government conceded error, the Court (Kravitch, with Black & Marcus) vacated as insufficient one of the defendant's firearms convictions under 18 U.S.C. § 924(c)(1)(A) & 18 U.S.C. § 922(g). The Court otherwise affirmed all defendants' convictions of drug charges, gun charges, and a Hobbs Act conspiracy. The district court did not err in denying a JOA on entrapment defense because they could not prove inducement, and the government was not

required to prove predisposition beyond a reasonable doubt. The court found there had been no Confrontation Clause error in the district court's decision to restrict cross-examination of Agent Connors regarding SWAT team arrest methods. The Court also found no abuse of discretion in the district court's refusal to permit post-verdict juror interviews based on allegations that a juror had been overheard at lunch discussing the case before the verdict was reached, and another juror hesitated before agreeing with the verdict's announcement in court. The Court found no sentencing errors, expanding the "crime of violence" definition in USSG § 4B1.2(a) to hold that a Florida violation for "fleeing and eluding law enforcement," Fla. Stat. § 316.1935(3), is a crime of violence to qualify for career offender sentencing, *contra* a Ninth Circuit decision applying Washington State law. The Court also affirmed as reasonable two 420-month sentences, which represented the bottom of the guidelines calculations for those offenders.

U.S. v. LETT, 2007 WL 1028777 (Apr. 6, 2007)

Fed. R. Crim. P. 35(a)

The Eleventh Circuit relied on a highly technical interpretation of Rule 35(a) to do what the Court itself seemed to recognize was an injustice, striking down a sentence of time served and compelling a five-year sentence on a street-level drug-dealing charge for man despite his limited role in the offense, his voluntary withdrawal from the criminal enterprise followed by his re-enlistment in the Army where he remained on active duty until his arrest, his lack of criminal history, and his unblemished and significant seventeen-year career in the military, including two tours of duty in Iraq. Opinion by Carnes (with Pryor & Farris).

ROBBINS v. SECY., DOC, 2007 WL 968394 (Apr. 3, 2007)

Habeas; timeliness; direct review

The Court agreed with the pro se petitioner, noting the State's "forthright[] acknowledg[ment]" of the error, finding that the triggering date for AEDPA's one-year statute of limitations was the date the resentencing judgment became final, not the date the original conviction became final, and the one-year period began running 90 days after the appellate court affirmed the sentence imposed at resentencing.

U.S. v. CLAY, 2007 WL 968837 (Apr. 3, 2007)

Sentence; downward departure; post-offense rehabilitation; reasonableness; enhancement for acquitted conduct; due process; suppression; Terry

The Court rejected the government's appeal and upheld a downward departure sentence of 60 months (from 188-months at bottom of guidelines), based on extraordinary post-offense rehabilitation. The Government was wrong to assert that the sentencing court considered the defendant's religion; the district court did not give too much or too little weight to other factors; and it adequately explained the substantial variance. The Court affirmed denial of defendant's suppression motion, joining other circuits to hold that a *Terry* search may continue when an officer feels a concealed object he reasonably believes may be a weapon. Also, the court affirmed the enhancement based on drug quantity, even though the jury acquitted on the conspiracy count, finding the evidence sufficient under the preponderance standard. Likewise, the Court rejected the argument that this enhancement increased his sentence so much it violated due process.

U.S. v. LINDSEY, 2007 WL 894366 (Mar. 27, 2007)

Fourth Amendment

An anonymous tip that several black men were loading guns into an SUV parked adjacent to a bank, coupled with police officers' knowledge that the bank was one of several where armed robberies had recently been carried out by a group of black men driving large vehicles, gave the officers the reasonable suspicion necessary to subject the men to an investigative detention, the Eleventh Circuit concluded. Although the tipster offered no predictions as to the group's future conduct that the police could attempt to verify, the court says the officers' awareness of an ongoing investigation into the recent robberies made the tip reliable enough to support the stop. The Court affirmed denial of the suppression motion 2-1 (Edmondson, with Cox; Barkett dissenting), holding that "[t]he totality of the circumstances in this case demonstrates that the police had more than an 'inchoate and unparticularized suspicion' based on an 'anonymous' tip. . . . [R]ather than reacting to a mere 'hunch,' the officers engaged in 'a method of investigation that was likely to confirm or dispel their suspicions quickly, and with a minimum of interference,' as dictated by a potentially dangerous situation." Barkett dissented, relying on *Florida v. J.L.*, 529 U.S. 266 (2000), to argue that "police lacked reasonable suspicion to seize Anthony Lindsey at gunpoint, and that his extended, handcuffed detention thus amounted to an unlawful search and seizure."

THOMPSON v. U.S., 2007 WL 824118 (Mar. 20, 2007)

Ineffective advice regarding appellate rights

The Court (Barkett, with Tjoflat & Kravitch), modified the opinion it issued a week earlier,

maintaining its holding that a lawyer is ineffective for failing to adequately consult with his client about the client's appellate rights. "Simply asserting the view that an appeal would not be successful does not constitute 'consultation' in any meaningful sense. No information was provided to Thompson from which he could have intelligently and knowingly either asserted or waived his right to an appeal. This record is clear that no reasonable effort was made to discover Thompson's informed wishes regarding an appeal. Under these circumstances, any waiver by Thompson of his right to appeal was not knowing and voluntary." [Ed. note: It appears the only reason for reissuing the opinion was the clarify who the ineffective attorney had been so as to distinguish him from another similarly named attorney. See fn.3 & associated text in the new opinion.]

U.S. v. SMITH, 480 F.3d 1277 (Mar. 19, 2007)

18 U.S.C. §§ 922(g)(1), 924(e), USSG 2K2.1(b)(5)

A deputy conducted a routine traffic stop of a vehicle in which Smith was a passenger. The deputy saw Smith attempting to conceal a firearm and cocaine. Smith resisted arrest and fled, but was captured in a foot chase. The deputy saw Smith throw an object to the ground and recovered a .38 caliber bullet. Searches of Smith turned up two more bullets. No gun was recovered. The district court found he possessed ammunition in connection with a drug felony, resisting arrest, or both, and the Circuit Court affirmed (Marcus, with Tjoflat & Hull). The Court summarily rejected Smith's attack on the deputy's credibility, and said the district court correctly understood and applied the guidelines as advisory to produce a

reasonable sentence of 294 months' imprisonment.

U.S. v. LEWIS, 2007 WL 840084 (Mar. 15, 2007)

Double jeopardy; 18 U.S.C. § 924(c)(1)(A)(ii); appeal; waiver; forfeiture

The Court granted rehearing *en banc* of its panel decision of Nov. 1, 2006 (holding that defendant *waived* his double jeopardy claim, challenging his conviction for both interference with commerce by robbery and brandishing a firearm in furtherance of a crime of violence). The issue for *en banc* review is whether the failure to raise a double jeopardy claim in the district court constituted a waiver (not reviewable on appeal) or a forfeiture (reviewable for plain error on appeal) pursuant to the Supreme Court's decision in *Olano*. There is a conflict in post-*Olano* cases between the Eleventh Circuit's position that this results in a waiver and the position of other circuits that it is not a knowing waiver but rather a forfeiture which is reviewed for plain error review on appeal.

DINGLE v. SECY, DOC, 480 F.3d 1092 (Mar. 8, 2007)

Habeas; ineffective assistance

The Court affirmed the state court ruling that counsel was not ineffective because his failure to call any expert witnesses, in the retrial following an earlier reversal for ineffectiveness, was a tactical decision in which the defendant knowingly acquiesced.

U.S. v. TAYLOR, 480 F.3d 1025 (Mar. 6, 2007)

Evidence; sufficiency; Hobbs Act; object

The Court held that the object of the robbery (cocaine in a reverse sting operation) need not exist to support a conspiracy conviction under the Hobbs Act. Thus, the Hobbs Act

jurisdictional requirement is met even though the cocaine and traffickers are fictitious, agreeing with *Rodriguez*, 360 F.3d 949 (9th Cir. 2004).

GILLIAM v. SECY., DOC, 480 F.3d 1027 (Mar. 6, 2007)

Evidence; Brady; ineffectiveness; prejudice

The Court affirmed denial of this capital habeas; the defendant failed to show the state supreme court unreasonably applied *Brady* in rejecting his claim the police had suppressed evidence the victim was a prostitute, or his multiple claims of trial counsel ineffectiveness in both phases.

GORDON v. SECY., DOC, 479 F.3d 1299 (Mar. 1, 2007)

Habeas; certificate of appealability; statute of limitations; Lawrence

The Court denied this capital defendant a certificate of appealability to review his 28 U.S.C. § 2254 petition on statute of limitations grounds as set forth in the recent Supreme Court *Lawrence* decision.

U.S. v. YOST, 479 F.3d 815 (Feb. 26, 2007)

Evidence; sufficiency; 18 U.S.C. 2422(b); email; Internet; solicitation

The Court affirmed, finding the evidence sufficient to prove both intent and commission of a substantial step in furtherance, to support convictions for using the Internet to knowingly attempt to persuade, induce, entice or coerce a minor to engage in criminal sexual activity, in violation of 18 U.S.C. § 2422(b).

U.S. v. PEREZ-OLIVEROS, 479 F.3d 779 (Feb. 22, 2007)

Discovery; Fed.R.Crim.P. 16; defendant's statements; evidence; FRE 106;

sentencing; minor role adjustment; importation enhancement

First, the Court held it was not a discovery violation under Rule 16 for the government not to have provided him with alleged statements he made at the time of arrest, because Rule 16 did not apply given that the government did not intend to use the statements at trial but only arose during defense cross-examination of agents. Second, the district court did not abuse its discretion by refusing to allow him, under F.R.E. 106's doctrine of completeness, to introduce all his wallet's contents but correctly limited introduction of only relevant contents, eliminating family photos and religious items. Third, the minor role adjustment was properly denied because defendant failed to identify discernible additional participants in the relevant conduct after being stopped driving a truck with hidden panels holding 30 kilos of "ice." Fourth, he was properly enhanced for importing the drugs from Mexico; he was stopped 14 hours after the truck (w/o him in it) crossed the border, and government evidence showed it was a 12-1/2 hour drive from where he was stopped. Even though he testified the drugs were put into his truck in Texas, after the truck crossed the border, the Court held he could be held responsible even though he had nothing to do with putting the drugs into the truck or actually transporting them across the border because the jury concluded that he *knew* the drugs were in the truck. The different language of subsection (b)(2) ("the defendant unlawfully imported or exported") and (b)(4) ("involved the importation") of 2D1.1 supported this conclusion. Also, precedent that importation does not end until the drugs reach their destination foreclosed his argument that the importation was over before he assumed control of the truck. The Court declined to

further define the precise contours of "involved the importation of methamphetamine."

U.S. v. PATRICK, 479 F.3d 760 (Feb. 20, 2007)

Sentencing; restitution

The Court reversed the restitution order because the district court had based it on the victim's tax liability which bore no proven relationship to the actual loss and also included amounts legitimately paid to defendant for work performed.

U.S. v. EVANS, 478 F.3d 1332 (Feb. 16, 2007)

Sentencing; Three Strikes; 18 U.S.C. 3559(c); anthrax threat; serious violent felony; 18 U.S.C. 2332a; plea; factual basis; *Faretta*

The Court vacated the life sentence and agreed that the Three Strikes enhancement to mandatory life, under 18 U.S.C. 3559(c), did not apply to his conviction under 18 U.S.C. 2332a(a)(3) (threatening to use weapon of mass destruction against federal property), because the threat to property did not "by its nature, involve[] a substantial risk that physical force against the person of another may be used in the course of committing the offense," relying on *Leocal v. Ashcroft*, 543 U.S. 1 (2004). However, the Court applied plain error review and rejected the (alternative) argument that the statutory language of threatening "to use" was not limited to future threats and another argument that the defendant should not have been allowed to proceed *pro se* at sentencing. (**Note:** Rehearing argued the Court had ignored the primary argument that the conviction under 2332a lacked a factual basis given clear congressional intent that anthrax hoax threats were not covered in that statute

but only in the subsequently enacted 18 U.S.C. 1038, the correctness of which was later acknowledged in the opinion; that has since been denied, but a petition for writ of certiorari will be filed.

VALLE v. SECY., DOC, 478 F.3d 1326 (Feb. 16, 2007)

Jury; composition; cognizable class; Latin American

The Court denied rehearing en banc, but Judge Wilson's concurrence concluded that defendant's challenge to the composition of his grand and petit juries, as underrepresenting Latin Americans in a way that violated due process and equal protection, would be a valid claim today, citing *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). Judge Barkett's dissent also clarified that Latin Americans are now a constitutionally protected cognizable class.

U.S. v. KOBLAN, 478 F.3d 1324 (Feb. 15, 2007)

Appeal; mootness by death

Applying circuit precedent, but recognizing an inter-circuit conflict, the Court dismissed a criminal appeal because the appellant had died; it remanded to vacate the judgment (including a restitution order of \$274,336) and dismiss the indictment.

U.S. v. MADISON, 477 F.3d 1312 (Feb. 12, 2007)

Sentencing; USSG § 2G1.3(c)(3), § 2A3.1; criminal sexual abuse; minors

Affirming a sentence for conspiracy and sex trafficking of children, under 18 U.S.C. § 1591(a)(2) and § 2423(e), the Court approved the application of a cross-reference provision in USSG 2G1.3(c)(3), addressing prostitution of a minor, which caused it to apply § 2A3.1, addressing criminal sexual abuse. The Court rejected his argument that the cross-reference

does not apply where the offense conduct was a pimp threatening a prostitute to coerce her into remaining in his employ where he clearly used violence to compel the victim to continue working for him.

U.S. v. WATKINS, 477 F.3d 1277 (Feb. 8, 2007)

Sentencing; 2X1.1(b)(3)(A); solicitation attempt; undercover agent

In a case of first impression, the Court vacated the sentence, holding that the three-level reduction under USSG § 2X1.1(b)(3)(A) is available where the person solicited was an undercover agent, and the substantive act would never have been completed. The guideline's first prong explicitly provides that the court consider whether the *person solicited* had completed all the acts *he believed necessary* to complete the offense. The Court declined to adopt a *per se* rule involving undercover agents, though, noting that a district court must determine whether the agent had gone far enough, had taken *all* the "crucial steps," to demonstrate to the solicitor that the agent was about to complete the act. The Court held that the second prong, however, focuses on the *defendant's* perspective, so that the reduction will not apply where the circumstances demonstrated *to the defendant* that the person was about to complete all acts necessary to the substantive offense.

U.S. v. MALOL, 476 F.3d 1283 (Feb. 2, 2007)

Evidence; summary chart; sentencing; loss amount; 2B1.1(b)(7)(B); DOT Notice of Claim

The Court affirmed the government's introduction of a summary chart containing both admissible and inadmissible evidence; without deciding whether it was an abuse of

discretion, the Court held it was harmless. The Court also held the evidence fully supported the jury's finding of a loss amount in excess of \$1 million and the resulting 16-level enhancement. The Court reversed the increase to the Base Offense Level under 2B1.1(b)(7)(C), holding that the DOT Notice of Claim was not a "prior, specific judicial or administrative order, injunction, decree, or process." DOT had never held a hearing, so there was no final agency action.

U.S. v. BOHANNON, 476 F.3d 1246 (Feb. 1, 2007)

Sentencing; USSG § 2G1.1, § 2G1.3, § 2G2.1; Internet sex; victim's age; reasonable

The Court vacated its opinion of Dec. 26, 2006, without explanation, but still affirmed its holding that there was no error in enhancing the offense level pursuant to the cross-reference concerning sexually explicit conduct engaged in for the purpose of producing a visual depiction of such conduct, and that the enhancement based on the age of the "victim" did not constitute impermissible sentencing manipulation despite fact that undercover officer selected the victim's age in the context of a sting operation. The facts supported application of U.S.S.G. § 2G1.3(c)(1)'s cross-reference to § 2G2.1 based on the court's finding the defendant intended to produce a visual depiction of sexually explicit conduct with a minor, as well as the 2-level enhancement under § 2G2.1(b)(1)(B) based on the victim's age (between 12 and 16), as there had been no sentence manipulation by the agent in representing the age of the "minor," and the below-guidelines sentence of 120 months' imprisonment was reasonable.

SPOTTSVILLE v. TERRY, 476 F.3d 1241

(Feb. 1, 2007)

Habeas; equitable tolling; misleading court directive

The Court held that equitable tolling should have been applied because the reason defendant's papers were filed in the wrong court was "[t]he instructions of the state habeas court for filing Spottsville's appeal were misleading. . . . The instructions of the state habeas court affirmatively misled" him as to where to file critical documents.

U.S. v. RAMIREZ, 476 F.3d 1231 (Feb. 1, 2007)

Search; Fourth Amendment; consensual; traffic stop

The Court affirmed a search based on the driver's consent, given after his papers had been returned, the warning citation had been issued, and the stop was deemed over, concluding that a reasonable person in his position would have felt free to terminate the encounter with the officer.

STEWART v. SECY, DOC, 476 F.3d 1193 (Jan. 31, 2007)

Habeas; ineffective assistance

The Court affirmed, finding trial counsel was not ineffective for failing to provide the mental health expert witness with all available information to identify possible mitigating circumstances, or to adequately investigate and prepare mitigating evidence for the penalty phase.

U.S. v. EVANS, 476 F.3d 1176 (Jan. 30, 2007)

Commerce Clause; 18 U.S.C. § 1591(a)(1), § 2422(b); telephones

The Court affirmed convictions for enticing a minor to engage in a commercial sex act, 18 U.S.C. § 1591(a)(1), and enticing a minor to engage in prostitution, 18 U.S.C. §

2422(b). The Court affirmed the constitutionality of both statutes as applied on Commerce Clause grounds, both under precedent (Raich, Maxwell, and Smith) and because defendant’s “use of these instrumentalities of interstate commerce alone, even without evidence that the calls he made were routed through an interstate system, [were] sufficient to satisfy § 2422(b)’s interstate-commerce element.”

U.S. v. HASSOUN, 476 F.3d 1181 (Jan. 30, 2007)

Terrorism; multiplicity; double jeopardy
Granting the government’s appeal, the Court reversed the dismissal of Count One of an indictment that charged the defendants with various crimes arising from their alleged participation in a “support cell” with the aim of “promot[ing] violent jihad” as espoused by a “radical Islamic fundamentalist movement.” Count One charged conspiracy to commit acts of murder, etc outside of the U.S. under 18 U.S.C. § 956(a)(1); Count Two charged conspiracy to commit an offense against the U. S. under 18 U.S.C. § 371; and Count Three charged a violation of 18 U.S.C. § 2339A(a) by providing material support and resources. The Court rejected the district court’s holding that Count One was multiplicitous and violated double jeopardy; the Court applied *Blockburger*, examined only the elements, and concluded that “none of the charges could merge into another as a lesser-included offense. . . .[E]ach charge stands alone from the others and requires proof of independent elements.”

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