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NORTHERN DISTRICT OF FLORIDA

A NEWSLETTER FOR PANEL ATTORNEYS

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LONGEST SENTENCES IN THE COUNTRY ARE IN NORTH FLORIDA

In both 2004 and 2005 the average sentence in North Florida was twice the national average and the longest in any of the nation's 94 districts. Those statistics and a host of others appear in the United States Sentencing Commission's two recently released publications, the 2004 Sourcebook of Federal Sentencing Statistics and the 2005 Sourcebook of Federal Sentencing Statistics. The publications cover their respective federal fiscal years (FY) that run from October 1st through September 30th.

The 2004 Sourcebook breaks the statistics into two time periods, pre- and post-Blakely. In the cases where a sentence was imposed prior to the June 24, 2004, decision in Blakely v. Washington, 542 U.S. 296 (2004), the average sentence in North Florida was 120.3 months. It was more than twice the national average of 58.3 months. Of the 94 other districts in the country, Central Illinois was second, with an average of 111.4 months. By way of comparison, the average sentence in the Middle District of Florida was 86.6 months and the average in South Florida was 70.9 months.

The sentences that were imposed in North Florida during the three months after Blakely, from June 25, 2004, through September 30, 2004, were even longer. The average North Florida sentence increased to 123.9 months, while the national average dropped to 52.7 months.

The 2005 Sourcebook breaks the statistics into two time periods as well: the roughly three months before the January 12, 2005, decision in United States v. Booker, 543 U.S. 220 (2005) and the remaining nine months of the fiscal year. During those first three months of the year, the average sentence in North Florida was 115.9 months. After the Booker decision, the rest of the year saw an average sentence of 118 months. The national average during the same time periods was 53.4 months and 58.5 months respectively. No other district in the country had an average of 100 months or more during each of the two time periods. The Central District

of Illinois had an average sentence of 118.2 months during the last nine months of the fiscal year, but averaged only 65.3 during the first three months. Our neighbor, the Middle District of Florida, averaged 82.2 months prior to Booker and 76.8 after the decision.

The average sentence in North Florida for FY 2003 was 110.9 months. It was 115.5 months in FY 2002; 110.5 months in FY 2001; and 114.6 months in FY 2000.

In FY 2004, 40 or roughly 9% of the 415 cases in North Florida in which the sentence was subject to the Sentencing Guidelines were resolved by a trial. In FY 2005, 37 of the 335 cases were resolved by trial, a percentage of 11%. Both percentages represent some of the highest trial rates in the country, more than twice the national average in each instance. In FY 2004, the national average was 4.2%. It was 5.3% in FY 2005.

In FY 2004, other than those departures awarded for substantial assistance, downward departures played an almost non-existent role in North Florida. They occurred in only 9 cases or 2% of the total. There were nearly as many upward departures, 6 or 1.3% of the total. There were 3,271 departures nationwide for reasons other than substantial assistance, which represents 5% of the total. Additionally there were, across the country, government sponsored downward departures in nearly 7% of the cases. There were no government sponsored downward departures in the Northern District of Florida. Nationwide, there were upward departures in less than 1% of the cases.

In FY 2005 there was only a single downward departure in the three months prior to Booker. The picture is more complicated during the next nine months. During that time there were 2 departures under the Guidelines, plus even 3 "Government-Sponsored" departures. There are what appear to be 13 below-Guidelines sentences attributable to the Booker decision. Taken together those 13 cases represent 5.6% of the post-Booker cases in the District. The national average for that same time period was 10.7%.

In FY 2004 there were 134 departures based on substantial assistance in North Florida. Those departures represented 30% of the FY 2004 cases subject to the Guidelines in North Florida, twice the national average of 15%. In FY 2005 the substantial assistance departures in North Florida dropped significantly. There were only 63 substantial assistance departures for the year, dropping the percentage to 19.3%. The national average for FY 2005 was 14.7%.

There was a notable drop in the number of cases subject to the Guidelines in North Florida between FY 2004 and FY2005. With 415 cases in FY 2004 and only 335 in FY 2005, the 80 fewer cases represent a 19% decrease from one year to the next.

Both the 2004 Sourcebook and the 2005 Sourcebook are available online at the Sentencing Commission's website: www.ussc.gov.

DINNERS FOR PANEL MEMBERS

The judges for the Northern District of Florida have invited panel members to join them in a series of dinners. Panel members may invite a guest as well. The first dinner was held last month at the St. Andrews Bay Yacht Club in Panama City. Chief Judge Robert Hinkle, Judge Richard Smoak, and

Magistrate Judge Larry Bodiford were all present. Pensacola panel members have been invited to a dinner at the Skopelos on the Bay Restaurant this Thursday, July 13th. Clerk of the Court Bill McCool is currently in the process of scheduling dinners in Tallahassee and Gainesville over the next couple of months. Funds for the dinners come from the Bench and Bar Fund.

The judges initiated the dinners last year. They did so for the purpose of recognizing and thanking panel members for their representation of clients before the Court.

REDACTION

Many questions have come up since our district began participating in the pilot project that makes entire transcripts available through the online PACER or CM/ECF program. In hopes of providing some guidance, we have posted on our webpage, under the heading of "Redaction Requirements," the February 3, 2006, memo set out by the Clerk's Office to all members of the Federal Bar. That memo spells out both the process and the substance of the redaction requirement.

The process is straightforward. If you have ordered a transcript, you'll receive a notice from the Clerk's office. You'll typically receive it a day or two after you receive the transcript. The notice is full of odd symbols and notations, but if you look closely you'll see it tells you that a transcript has been filed and that you have 5 *business* days to file a notice of your intent to request redaction. At that point your obligation is only that of advising the court of your intentions regarding redaction; any actual request for redaction comes later. If there is nothing to be redacted, you're obligated to file a notice advising that you won't be requesting redaction. If there are items to be redacted, you, within 21 *calendar* days from your receipt of the notice, must file a notice with the court reporter advising of those portions of the transcript that contain any personal identifiers that should be redacted.

The February 3rd memo lists five specific items that must be redacted: social security numbers, financial account numbers, dates of birth, names of minor children, and home addresses. In requesting the redaction, you are to request that the listed items be redacted in a particular way, i.e. social security numbers should appear as: "xxx-xx-5678." The particulars as to the form of redaction are in the February 3rd memo.

You're only obligated to review and request redaction for the testimony of your witnesses and any argument or statements you made. That, of course, means you only have to look at that portion of the transcript that includes the testimony of your witnesses and your statements. The task of redaction has been made easier, too, because in most instances the court reporters are doing a preliminary review and making redactions before sending you the transcript. Nonetheless, please remember that the responsibility for redaction remains with the lawyer. The efforts of the court reporters are intended *only* to assist the lawyers. Remember, too, that as a panel member, you're entitled to be paid for the time spent in the redaction process.

If you have not ordered the transcript, you will still be responsible for redaction if one of the other parties have ordered it. The situation is most likely to occur where one of the co-defendants pursues an appeal and your

client does not. It can, of course, also happen where, during the course of the trial level litigation, one party orders a transcript for whatever reason. As a number of panel members have already noted, this, for the lawyer who hasn't ordered the transcript, can result in a trip to the courthouse to the review the transcript. It can be an especially time-consuming effort for those who work a long distance from the courthouse.

The solution, though, is to work with the lawyer who has ordered the transcript. So long as you don't have any reason for the transcript other than redaction, i.e. you're not trying to avoid paying the court reporter for a transcript you would have otherwise ordered, there shouldn't be any problem in getting the lawyer who ordered the transcript to send you an electronic copy. Our office, for one, will be glad to do so.

Once you've finished with the redaction, you still aren't quite done. The Administrative Office of the Courts is collecting information to assist in the decision of whether to make the pilot program a permanent one throughout the country. Accordingly, at the request of the Administrative Office, our office will be sending you a form that asks for the time spent and other information about what was involved in your redaction efforts in the case. We won't know you have a case involving redaction until we're advised of it by the Administrative Office, so we'll be sending you the Administrative Office's form a month or two after you receive the notice from the clerk. Once you've completed the form, email it or fax it back to our office.

ETHICAL ISSUES FOR CJA COUNSEL

Part III: Overreaching; and third-party payments.

This is the third, of four, installments in a series of articles on problems inherent in communications between appointed counsel and a client about potential retained services. The first installment, in our January 2006 Newsletter, addressed the issue of solicitation; the second installment, in our April 2006 Newsletter, addressed communications issues; this third article addresses payment by third parties, fair dealing, and avoiding the appearance of impropriety; the next and last issue will address potential conflicts of interest. The complete article is available on our website at http://www.fpd-fln.org/.

Fair dealing/overreaching. The Rules of Professional Conduct, specifically the Comment to Rule 4-7.1, Information About Legal Services, warns of practices "that are misleading or overreaching and can create unwarranted expectations by persons untrained in the law." It notes the potential negative impact on "the public's confidence and trust in our judicial system" from such practices.

Also relevant to this issue is Rule 4-7.4, Direct Contact with Prospective Clients; subsection (b)(1) controls written communications. It would be infringed, e.g., if the communication involves overreaching or misleading or unfair statements, or if the lawyer reasonably should know that the mental, physical, or emotional condition of the client makes it unlikely she would exercise reasonable judgment in retaining the attorney.

The appointed lawyer would be wise to consider other subsections of Rule 4-7.4(b),

which prohibit written communications with prospective clients where:

(D) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence;

* * *

(F) the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.

Similarly, the Comment to Rule 4-7.4 states in pertinent part:

. . . A prospective client often feels overwhelmed by the situation giving rise to the need for legal services and may have an impaired capacity for reason, judgment, and protective self-interest. Furthermore, the lawyer seeking the retainer is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect. The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. . . .

Because it can be seriously questioned whether the emotional desperation of the average prisoner allows him or his loved ones to make reasonable judgments about incurring debt to pursue high-risk legal options, counsel's conscience at least will be burdened with this decision.

Although not required, counsel might also wish to provide the defendant with contact information for other attorneys who handle such representation. If so, counsel should also be clear that he has no association with those attorneys, does not receive any referral fees or other funds for that referral, and does not make any form of recommendation; that is, it is strictly a referral for the client to consider alternate representation. Giving the client this option would remove any appearance of pressure on the client to retain counsel.

Retainer agreements. If the client chooses to hire appointed counsel for subsequent or ancillary representation, the terms of representation should be clearly set out in a written document, to be accepted by the client's signature. This protects all parties should disputes later arise about the terms of employment or should the client pursue grievances against the attorney.
Copies of the executed agreement, which can be in the form of a letter signed by all parties, should be given to all parties. The retainer could include provisions for third-party payment.

Third-party payments/communications. If the attorney's fees are paid by a third party - and they generally are with indigent defendants - the lawyer must make it clear, to both the client and the third party, that the financial contract is with that third party (so that it should be signed by that third party) but the professional duty is to the client and the third party has no right to confidential information. If the client wishes to provide copies of correspondence to that party, the attorney should first obtain written authorization.

The Comment to Rule 4-1.7 approves the scenario of third-party payments, "if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client."

However, the retainer agreement needs to clarify that it is the client, and not the third party, who will control all decisions about the representation.

Rule 4-1.6(a), Confidentiality of Information, requires the lawyer to disclose any proposed disclosure to third parties and obtain the client's consent, before divulging confidential information, except in the specific circumstances otherwise set out in that rule. This clearly include communications with such third parties, although there could be scenarios where the attorney is impliedly authorized to make such disclosures under Rule 4-1.6(c)(1)("to serve the client's interest unless it is information the client specifically requires not to be disclosed"), if it is essential to the representation, so long as the client has not told the attorney otherwise.

Right on point, conflict of interest Rule 4-1.8(f), Compensation by Third Party, provides:

A lawyer shall not accept compensation for representing a client from one other than the client unless:
(1) the client consents after consultation;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as required by rule 4-1.6.

MUST READS FROM THE SUPREME COURT

The Supreme Court has finished its term, and, as always, there are important decisions for those of us practicing criminal defense work. Between this newsletter and the last issue, you'll find a summary of all the criminal decisions. Panel members are welcome, too, to borrow from our libraries our video of the insightful review of the Supreme Court decisions by three talented lawyers, Erwin Chemerinsky, Susan Herman, and Paul Rashkind. We filmed the discussion the first of June at the Defender Conference in San Francisco. There are, too, any number of publications that have or will soon be providing a summary.

From the standpoint of day-to-day practice of criminal defense, though, there are three cases in particular that deserve to be read right away. In Davis v. Washington, 126 S. Ct 2266 (U.S. 2006) the Court considered two consolidated domestic battery cases, finding in one that a 911 call was not testimonial and that the admission of the recording of the call into evidence did not violate the Confrontation Clause. In the second of the two consolidated cases, the Court found that the alleged victim's statement made to an officer who reported to the scene were testimonial and should have been barred by the Confrontation Clause.

In the 5-4 decision in Hudson v. Michigan, 126 S. Ct. 2159 (U.S. 2006), the Court held that the exclusionary rule did not apply to violations of the knock-and-announce rule. In Zedner v. United States, 126 S. Ct. 1976 (2006), the Court held that, unlike the practice in the courts of Florida, defendants cannot prospectively waive speedy trial under the federal statute.

Take these three decisions to the beach this weekend if you must, but read them!

Eleventh Circuit Looks Favorably Upon Booker Below-Guidelines Sentences

More than any other appeals court in the nation, the Eleventh Circuit Court of Appeals has shown a willingness to uphold Booker below-guidelines sentences. In Professor Douglas Berman's blog, *Sentencing Law and Policy*, he has kept a running list of those decisions that have affirmed or reversed sentences on the basis of Booker's reasonableness review. Of the six decisions that have affirmed below-Guidelines sentences, four have come from the Eleventh Circuit.

The four cases are: United States v. Gray, No. 05-15209 (11th Cir. 6/28/06)(child pornography case where the district court imposed a 6 year sentence rather than the 12 ½ - 15 ½ year sentence called for by the Guidelines largely because of the 64 year old defendant's age and health problems); United States v. Halsema, No. 05-13016 (11th Cir. 5/9/06)(unpublished)(child pornography case where the district court imposed a 2 year sentence rather than the 5 to 6 year sentence called for by the Guidelines because of expert testimony that a longer sentence would negatively affect the defendant's rehabilitation, that the defendant had progressed in his rehabilitation, and that the defendant had suffered greatly from his post-arrest incarceration); United States v. Montgomery, No. 05-13935 (11th Cir. 2/7/06)(unpublished)(bank fraud case where in lieu of an unstated Guideline's range the district court imposed an 8 month sentence because of the need to facilitate restitution, the absence of a prior record indicated a reduced possibility of recidivism, and mental health problems); United States v. Williams, 435 F.3d 1350 (11th Cir. 2006)(crack cocaine case where the district court imposed a sentence of 7 ½ years instead of the 15 ½ year to 19 ½ year sentence called for by the career offender guidelines primarily because the defendant's criminal history didn't justify such a long sentence).

The rest of Professor Berman's scorecard shows that on the basis of the requisite reasonableness review there has been 1 Guidelines-sentence reversed, 4 reversals of above-Guidelines sentences, 20 above-Guidelines sentences affirmed, and 34 below-Guidelines sentences reversed. Of the below-Guidelines cases reversed, 2 came from the Eleventh Circuit: United States v. Crisp, No. 05-12304 (11th Cir. 7/7/06) and United States v. McVay, 447 F.3d 1346 (11th Cir. 2006).

Good Practices for Panel Attorney Programs

Pursuant to a contract with the Administrative Office of the U.S. Courts, the Vera Institute of Justice has reviewed the practices of the Circuit Courts throughout the country and has published, this past January, a study entitled "Good Practices for Panel Attorney Programs in the U.S. Courts of Appeals." The 36 page report is available through the Institute's webpage at www.vera.org. Among the issues discussed are two that are surely of interest to panel members: (1) the question of whether trial counsel should be required to pursue the appeal and (2) compensation review.

According to the report there is "considerable variation among the courts of appeals in continuity policy and practice." In the First Circuit, "new counsel was appointed in 73%

of CJA appellate representations," while in other circuits "the great majority of appellate appointments are of attorneys who has represented the defendant at trial." In the end, the study recommends that circuit rules "should provide for a flexible approach, rather than mandating that the CJA counsel appointed at the district level continue to represent the defendant on and through the appeal," and that "[t]here should be significant deference to the position of trial counsel regarding whether continuity is (1) in the best interests of the client and (2) consistent with counsel's professional skills and obligations."

The study reports a significant variation in the compensation of counsel: *"[C]ompensation practices among the courts of appeals are strikingly inconsistent. Among the 10 circuits for which we have data for fiscal year 2004, the average amount paid per attorney appellate representation varied by nearly 100 percent; the percentage of the total number of appellate vouchers that were reduced ranged from 5.5 percent to 58.2 percent (a variation of more than 1,000 percent); the average reduction ranged from $1,117 to $5,500 (a variation of nearly 500 percent); and the reductions measured as a percentage of the amount claimed ranged from 1.6 percent to 30.9 percent (a variation of more than 1,900 percent)."*

Among the recommendations for the compensation process was that of channeling all the vouchers through a qualified single individual or a coordinated team to ensure consistency. It is a practice that the report notes is followed by the Eleventh Circuit, where the chief judge has delegated approval authority to the chief executive for all vouchers that don't exceed the statutory maximum. In those claims that exceed the statutory cap, the chief executive reviews the voucher and makes recommendations to the judge that makes the compensation decision. The report mentions, too, that the Eleventh Circuit "has a policy of reviewing every voucher submission within 24 hours of receipt."

PANEL TRAINING

We're taking the month of August off. Make sure, though, to see this month's video that features Jeff Fisher the lawyer that argued Blakely, Crawford, and this year's Davis decision in the Supreme Court (the one about the 911 calls). Although we filmed his presentation the first of June before the Davis decision issued, Mr. Fisher gives a terrific review of the current debate that has followed the Crawford decision. The video, which we filmed at the Federal Defender Conference in San Francisco, will be shown **July 18** in **Panama City**, **July 20th** in **Pensacola** and on **July 26th** in **Tallahassee** and **Gainesville**. CLE credit has been approved.

VICTORIES

In a case that has received nation-wide attention because of a deadly shootout at the prison that resulted in the death of a government agent and one of the prison guards, five Tallahassee FCI guards were arrested for a scheme that allegedly involved trading contraband for sex. Of the five guards, none of whom were involved in the shootout, Magistrate Judge Sherrill granted the government's motion for detention and detained three of them. Tallahassee panel members **Tom Findley** and **Mandy Garcia** convinced Judge Hinkle to overturn Magistrate Judge Sherrill's detention order, and their clients were released this past week.

Tallahassee panel member **Bob Harper**, who had filed a Motion for Reconsideration of the Detention Order, followed Tom and Mandy's lead and secured the release of his client, as well.

In Panama City, panel member **Jonathan Dingus** won a judgment of acquittal before Magistrate Judge Bodiford in a misdemeanor case involving charges of domestic battery and driving with a suspended license. The judge found the alleged battery victim's testimony to be far less than credible. In the driving license offense, the government failed to produce a certified copy of the defendant's driving record.

Panel member **Pat Jackson** convinced a Pensacola jury that his client, Eric Smith, was responsible for less than 5 grams of cocaine, rather than the 5 kilograms or more charged in the indictment. Pat and his client are awaiting the judge's sentencing decision about the quantity.

Bill Clark of our office convinced a Tallahassee jury to acquit his client, Deshawn Bunion, of the charge of being a felon in possession of a firearm and saved Mr. Bunion at least the 15 years he would have received as an armed career criminal. The firearm was found in a car occupied by Mr. Bunion and three others. Mr. Bunion, as well as the other three in the car, testified. Bill convinced the jury that there was a reasonable doubt as to who possessed the firearm.

Judge Collier dismissed the charge of possession of a firearm with an obliterated serial number in a case against a 72 year-old retired military man, Buford Rice, when **Bob Dennis** of our Pensacola office convinced the government to move for a dismissal. Mr. Rice had found the gun in a chest of drawers on some rental property he owned. He was found with the handgun as he was on the way to the police department to find out what to do with the it.

Judge Vinson dismissed a violation of supervised release case against Pascual Rodriguez at the urging of **Tom Keith** of our Pensacola office. Mr. Rodriguez had been sentenced back in 1995 to 3 years of imprisonment followed by a year of supervised release. Mr. Rodriguez, a Cuban who had arrived during the Mariel boat-lift, was transferred into the custody of the immigration authorities immediately after sentencing and was held by them until 2002 when he was transferred into the custody of the Bureau of Prisons to ostensibly begin serving his sentence. Tom, though, convinced Judge Vinson that Mr. Rodriguez had, in fact, begun serving his sentence back in 1995, and that the supervised release had expired before the petition was filed in 2005.

Randy Murrell, in a case tried before a Panama City jury, won an acquittal in a case involving two charges of possession of a firearm in furtherance of a drug trafficking offense. Randy's client, Jeffrey Stanley, entered a guilty plea to the two methamphetamine charges in the indictment, but went to trial on the firearm charges that, collectively, carried a 30 year mandatory consecutive sentence. Randy successfully argued that the husband and wife informant team were not credible, and that their claims that Mr. Stanley carried firearms to the two drug transactions did not prove Mr. Stanley's guilt beyond a reasonable doubt. Randy argued, as well, that even if the jury assumed Mr. Stanley did carry firearms at the time of the transactions, they were not used to

facilitate the transaction.

Over the objection of the government, Judge Mickle granted a motion filed by **Randy Murrell** in which Randy had asked that his client's supervised release be modified to allow the client to have access to the internet at work. The initial judgement in the child pornography case had prohibited the client from any access to the internet. On the basis of United States v. Zinn, 321 F.2d 1084 (11th Cir. 2003), as well as a number of more generous cases from other circuits, Randy argued that the blanket prohibition was a greater depravation of liberty than necessary to achieve the goals of supervised release.

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.

BOOKER VARIANCES

Ferguson, Jeffrey Vinson, R. Atty: K. Nkrumah
Docket: 3:05cr105
Charge: Making False Statement on Firearms application
Range: 30 - 37 months
Sentence: 1 year and a day
Date of Imposition of Sentence: 4/5/2006
Grounds: criminal history overstated the likelihood of recidivism, defendant's attempted purchase of the firearm was for legitimate sporting purpose, and family responsibilities.

DOWNWARD DEPARTURES

Stepherson, Brandon Mickle, S. Atty: B. Bubsey
Docket: 4:06cr9
Charge: Consp. Poss WITD Crack
Range: 87 - 108 months, 10 yr min. mandatory
Sentence: 53 months BOP
Date of Imposition of Sentence: 6/26/2006
Grounds: 5K1.1

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.

CASE SUMMARIES

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

Certiorari Granted

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

WALLACE v. CHICAGO, 2006 WL 776675 (Mem), No.05-1240 (cert. granted 6/19/06) (reviewing 440 F.3d 421 (7th Cir. 2006))

42 U.S.C. § 1983; statute of limitations; accrual; false arrest claim

Question presented: Does a claim for damages arising out of a false arrest or other search or seizure forbidden by the Fourth Amendment accrue when the fruits of the search were introduced in the claimant's criminal trial and he was convicted? Defendants were granted summary judgment against arrestee's 1983 action against city and detectives, alleging unlawful arrest, and the Seventh Circuit affirmed, overruling its prior precedent to hold that a claim for unlawful arrest accrued, for limitations purposes, at the time of arrest, not when the criminal

conviction was overturned.

JAMES (ALPHONSO) v. U.S., 2006 WL 394993 (Mem), No. 05-9264 (cert. granted June 12, 2006) (reviewing 430 F.3d 1150 (11th Cir. 2005))

Attempted burglary; ACCA

Question presented: Whether the Eleventh Circuit erred by holding that all convictions in Florida for attempted burglary qualify as a violent felony under 18 U.S.C. § 924(e), creating a circuit conflict on the issue? The 11th Circuit held that defendant's prior Florida conviction of attempted burglary presented a potential risk of physical injury and thus qualified as a "violent felony" under ACCA.

(Note: The Court declined to hear two other issues in James' petition, a commerce clause challenge to the constitutionality of the federal "felon-in-possession" law, and a challenge to the use of a state drug conviction for possession of between 200-400 grams of cocaine as a serious drug offense under 18 U.S.C. § 924(e).) (Note also this petition was filed by Assistant FPD Craig Crawford, formerly AFPD in Tallahassee and Gainesville, and presently AFPD of the Middle District of Florida in Orlando.)

BURTON v. WADDINGTON, SUPERINTENDENT, 126 S. Ct. 2352 (Mem), No. 05-9222 (cert. granted June 5, 2006) (reviewing 142 Fed. Appx. 297, 2005 WL 1793351 (9th Cir. 7/28/05))

***Blakely* retroactivity**

Questions presented: (1) Is the holding in *Blakely* a new rule or is it dictated by *Apprendi*?

(2) If *Blakely* is a new rule, does its requirement that facts resulting in an enhanced statutory maximum be proved beyond a reasonable doubt apply retroactively?

Burton, convicted in Washington for rape, robbery, and burglary, was sentenced to 562 months' imprisonment, 258 months above the state guidelines' maximum. The sentence became final after *Apprendi* but before *Blakely*. His Sixth Amendment challenge was rejected by the Ninth Circuit, which hold that *Blakely* created a new rule of law that does not apply retroactively on collateral review under *Teague*.

WHORTON V. BOCKTING, 126 S. Ct. 2017 (Mem), No. 05-595 (cert. granted May 15, 2006) (reviewing 399 F.3d 1010 & 408 F.3d 1127 (9th Cir. February 22, 2005)

Crawford retroactivity

Questions presented: (1) Whether *Crawford v. Washington* applies retroactively to state convictions on collateral review; and (2) If so, whether *Teague v. Lane* applies. The Ninth Circuit held that *Crawford* announced a "new rule" under *Teague* and did apply retroactively.

ORNASKI, WARDEN v. BELMONTES, 126 S. Ct. 1909 (Mem), No. 05-493 (cert. granted May 1, 2006) (reviewing 414 F. 3d 1094 (9th Cir. 2005))

Death penalty; mitigation; jury instructions

Questions Presented: (1) Does *Boyde v. California* (U.S. 1990) confirm the constitutional sufficiency of California's "unadorned factor (k)" jury penalty instruction where a defendant presents mitigating evidence of his background and character which relates to, or has a bearing on, his future prospects as a life prisoner? (2) Does the Ninth Circuit's holding, that California's "unadorned factor (k)" instruction is constitutionally inadequate to inform jurors they may consider "forward-looking" mitigation evidence, constitute a

"new rule" under *Teague*?

The Ninth Circuit reversed a death sentence, finding a jury penalty instruction (allowing the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime") created a reasonable probability the jury did not consider mitigating circumstances unrelated to the defendant's culpability, namely, likelihood that the defendant would live a constructive life in prison and make positive contributions to others if granted life without possibility of parole; and thus, the instruction was insufficient under the Eighth Amendment.

Supreme Court Cases

CLARK v. ARIZONA, 2006 WL 1764372, No. 05-5966 (June 29, 2006)

Insanity; due process

The Court (6-3 in part, 5-4 in part) held that Arizona may bar psychiatric evidence of a mental disorder short of insanity to offset prosecution evidence of criminal intent. The Court also upheld Arizona's definition of the insanity defense, which omits part of the McNaughten rule. The first part of McNaughten asks about cognitive capacity: whether a mental defect leaves a defendant unable to understand what he was doing. The second, alternative test of McNaughten asks whether a mental disease or defect leaves a defendant unable to understand that his action was wrong. Arizona eliminated the first test, and the Court approved the definition of insanity that a defendant must demonstrate that at the time of the crime, he was afflicted with a mental disease or defect of such severity that he did not know the criminal act was wrong.

HAMDAN v. RUMSFELD, 2006 WL 1764793, No. 05-184 (June 29, 2006)

Special military tribunals; abstention; Presidential authority; military law; Geneva Convention

The Court held (5-3, splintered opinions) that (1) Congress did not take away the Court's authority to rule on the military commissions' validity; (2) there is no legitimate reason to abstain and not wait to decide the case; (3) President Bush did not have authority to set up the tribunals at Guantanamo Bay, Cuba; (4) the "military commissions" are illegal under both military justice law and the Geneva Convention; (5) the commissions were not authorized when Congress enacted the post-9/11 resolution authorizing a response to the terrorist attacks, and were not authorized by last year's Detainee Treatment Act. Because Hamdan had not challenged it, the Court did not resolve the question of the Government's authority to hold him "for the duration of active hostilities" to prevent harm to innocent civilians. But, "in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction." (Stevens, J.) Kennedy wrote separately, in an opinion partly joined by Breyer, Ginsburg and Souter., saying that while he did not support all of Stevens' discussion of the Geneva Convention, he did find that the commissions were not authorized by military law or that Convention. Kennedy expressed no view, however, on whether Hamdan could be charged with conspiracy or whether the accused has a right under the Convention to be present in all commission proceedings. Breyer, joined by Ginsburg, Kennedy and Souter, wrote separately to answer the dissenters' complaint that the ruling would hamper the President's ability to deal with a new and deadly enemy. Breyer noted that

"Congress has not issued the Executive a 'blank check.' [but] Nothing prevents the President from returning to Congress to seek the authority he believes necessary." Alito, Scalia and Thomas dissented.

SANCHEZ-LLAMAS v. OREGON, 2006 WL 1749688, No. 04–10566, and **BUSTILLO v. JOHNSON**, No. 05-51 (June 28, 2006)
Vienna Convention
The Court (6-3) effectively gutted the Vienna Convention's application to criminal cases by holding, without deciding whether the Convention creates judicially enforceable rights, that suppression of a statement is not an appropriate remedy for a violation even if you assume the Convention is enforceable, and that a State may apply its regular procedural default rules to Convention claims.

BEARD v. BANKS, 2006 WL 1749604, No. 04-1739 (June 28, 2006)
Prisoner rights; First Amendment
The Court (6-2), without fully agreeing on an analysis, reversed the Third Circuit ruling holding that a prison regulation violated the First Amendment by forbidding high security inmates access to newspapers, magazines, and photographs. The plurality concluded that prison officials set forth adequate legal support for the policy and Banks failed to show specific facts warranting relief.

WASHINGTON v. RECUENCO, 2006 WL 1725561, No. 05-83 (June 26, 2006)
***Blakely/Apprendi*; structural error**
The Court reversed (7-2) the state court's finding of a structural Blakely error based on the trial court imposition of an enhanced sentence based on its finding the deadly weapon alleged was a firearm. The Court held the Blakely error was subject to harmless error analysis under *Neder*, noting the jury failed to return a complete verdict of guilt beyond a reasonable doubt and remanding to the state court.

U.S. v. GONZALEZ-LOPEZ, 2006 WL 1725573, No. 05-352 (June 26, 2006)
Counsel of choice; structural error
The Court affirmed (5-4) the Eighth Circuit holding that the district court had violated the defendant's Sixth Amendment right to (retained) counsel of his choosing by denying counsel's motion to appear *pro hac vice* based on violation of a minor disciplinary rule. The Court rejected the government's argument that *Strickland* prejudice must be proven and held this was structural error which required no showing of prejudice: "[T]he Sixth Amendment right to counsel of choice . . . commands, not that a trial be fair, but that a particular guarantee of fairness be provided — to wit, that the accused be defended by the counsel he believes to be best. . . . In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation 'complete.'" The Court noted that "here, as we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error." Alito's dissent was joined by Roberts, Kennedy and Thomas.

KANSAS v. MARSH, 2006 WL 1725515, No. 04–1170 (June 26, 2006)
Death penalty; weighing; aggravators
Under Kansas law, a jury's weighing of aggravators and mitigators in a death case, when in equipoise, produces a death sentence; finding three aggravators not outweighed by mitigators, the jury sentenced

Marsh to death. The state court reversed, but the Supreme Court upheld the death sentence (5-4), holding that Kansas' death penalty statute, consistent with the Constitution, may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the two are in equipoise. "Weighing is not an end; it is merely a means to reaching a decision. The decision the jury must reach is whether life or death is the appropriate punishment. The Kansas jury instructions clearly inform the jury that a determination that the evidence is in equipoise is a decision for—not a presumption in favor of—death." Scalia's concurrence defended even wrongful death sentences.

DIXON v. U.S., 2006 WL 1698998, No. 05-7053 (June 22, 2006)

Due process; duress; jury instruction

The Court (7-2) held that due process permits a jury to be instructed that the defense must prove the duress defense by a preponderance of the evidence. The Court noted the existence of duress normally does not controvert any of the elements, which the government must prove.

WOODFORD v. NGO, 2006 WL 1698937, No. 05-416 (June 22, 2006)

Prison Litigation Reform Act; exhaustion; administrative remedies

The Court (6-3) held that the Prison Litigation Reform Act requires "proper" exhaustion of administrative remedies before suit is permitted in federal court to challenge prison officials about prison conditions. Prisoners must exhaust all "available" remedies, not just those that meet federal standards, and this includes those where relief sought cannot be granted by the administrative process. Stevens' dissent opined there might be exceptions, although the majority noted none.

FERNANDEZ-VARGAS v. GONZALES, 2006 WL 1698970, No. 04-1376 (June 22, 2006)

Immigration; retroactivity

Fernandez-Vargas, a Mexican citizen, illegally reentered the US in 1982, after having been ordered deported in 1981; he remained undetected for over 20 years, fathering a son and marrying the boy's mother, a US citizen. After he applied for lawful permanent residency, the government initiated proceedings to reinstate his 1981 deportation order, and he argued that the 1996 amendment enlarging the class of illegal reentrants whose orders may be reinstated did not retroactively apply to him. The Court (8-1) held that the 1996 amendment to the Immigration and Nationality Act (INA) applies to those who reentered the US before its effective date, and it does not unconstitutionally affect the continuing violator.

DAVIS v. WASHINGTON, 126 S. Ct. 2266, No. 05-5224, & **HAMMON v. INDIANA**, No.05-5705 (June 19, 2006)

Confrontation Clause; testimonial; 911 calls; forfeiture by wrongdoing

Without attempting an exhaustive classification of statements as testimonial or nontestimonial, the Court held in *Davis* (9-0): "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially

relevant to later criminal prosecution." In *Davis*, Scalia upheld admission of a domestic violence victim's 911 call to police that contemporaneously reported an ongoing assault; in *Hammon*, over Thomas's lone dissent, he wrote that a statement by a domestic violence victim to a police officer at a crime scene immediately after an assault was "testimonial" and not admissible absent an opportunity for cross-examination. The Court remanded *Hammon* for a determination whether the forfeiture by wrongdoing doctrine applied.

SAMSON v. CALIFORNIA, 126 S. Ct. 2193, No.04-9728 (June 19, 2006)
Search; parolee; warrantless; suspicionless
The Court (6-3) held that the Fourth Amendment does not prohibit a police officer from searching a parolee without a warrant or reasonable suspicion. Samson had been paroled under a California statute that requires parolees to agree to any search, with or without a search warrant, with or without cause. He was searched without suspicion and found carrying meth, for which he got a 7-year sentence and a state appellate court affirmance. The Court answered the question left open in *Knights* (2001) (holding probationer was subject to search based on reasonable suspicion), i.e., whether a condition of release can eliminate a person's reasonable expectation of privacy against a suspicionless search. The Court noted that parolees have fewer expectations of privacy than probationers. Stevens' dissent, joined by Souter and Breyer, said Fourth Amendment cases do not "support[] a regime of suspicionless searches, conducted pursuant to a blanket grant of discretion untethered by any procedural safeguards, by law enforcement personnel who have no special interest in the welfare of the parolee or probationer. . . .[T]he Court for the first time upholds an entirely suspicionless search unsupported by any special need."

YOUNGBLOOD v. WEST VIRGINIA, 126 S. Ct. 2188, No 05-6997 (June 19, 2006)
Brady
For some unknown reason, the West Virginia Supreme Court of Appeals failed to examine Youngblood's "clearly presented [] federal constitutional *Brady* claim" in affirming the denial of a motion for new trial based on newly discovered exculpatory evidence. In a brief per curiam reversal, the Supreme Court said "to reach the merits of this case, it would be better to have the benefit of the views of the full Supreme Court of Appeals of West Virginia on the *Brady* issue."

HUDSON v. MICHIGAN, 126 S. Ct. 2159, No. 04-1360 (June 15, 2006)
Search; warrant; knock and announce; exclusionary rule
The Court ruled (5-4) that the evidence seized in a warrant search of a home where the police failed to knock and announce did not necessarily have to be suppressed. The question remains whether it essentially eviscerated in practice the knock and announce rule, even though Kennedy's concurrence said it did not.

HILL v. MCDONOUGH, 126 S. Ct. 2096, No. 05-8794 (June 12, 2006)
Lethal injection; 42 U.S.C. § 1983
The Court followed its prior *Nelson* decision to hold that death row inmate Hill's claim (that the three-drug lethal injection procedure that Florida likely would use to kill him could cause him severe pain and thereby violate the Eighth Amendment's prohibition of cruel and unusual punishments) is cognizable under 42 U.S.C.§1983. The Eleventh Circuit erred by categorizing his

claim as a successive habeas petition barred by 28 U. S. C. §2244. The Court said that a grant of injunctive relief could not be seen as barring the execution of Hill's sentence because other execution alternatives are available. Further, filing a §1983 action does not entitle him to an automatic stay of execution, because a stay is equitable relief which must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from federal courts. Thus, inmates seeking time to challenge the manner of their execution must satisfy all the requirements for a stay, including showing a significant possibility of success on the merits. A court considering a stay must also apply a strong equitable presumption against granting relief where the claim could have been brought at such a time as to allow consideration of the merits without requiring a stay.

HOUSE v. BELL, 126 S. Ct. 2064, No. 04-8990 (June 12, 2006)

Habeas; capital; actual innocence; DNA

The Court reversed the denial of habeas relief and an evidentiary hearing, holding that the inquiry whether the defendant met the "actual innocence" exception to procedural default rules requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record, and not the AEDPA's more strict standards. In direct contradiction of trial evidence, DNA testing established that semen on the victim's clothing came from her husband, not defendant. While the State claimed the evidence was immaterial, since neither sexual contact nor motive were elements, the Court considered the new disclosure of central importance and noted that other forensic evidence was in disarray. "[A]lthough the issue is close, we conclude that this is the rare case where—had the jury heard all the conflicting testimony—it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt." House also argued the question left open in *Herrera* but the Court declined: "whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it."

ZEDNER v. U.S., 126 S. Ct. 1976, No. 05-5992 (June 6, 2006)

Speedy Trial Act; waiver

The Speedy Trial Act generally requires a federal criminal trial to begin within 70 days after a defendant is charged or makes an initial appearance, 18 U.S.C. §3161(c)(1); it contains a detailed scheme under which certain specified periods of delay are excluded. Here, Zedner acceded to the trial judge's suggestion and signed a blanket, prospective "for all time" waiver of his rights under the Act. More than four years later, Zedner's motion to dismiss under the Act was denied; more than seven years after indictment, Zedner was convicted. The Second Circuit affirmed, but the Supreme Court reversed, unanimously holding that a defendant may not prospectively waive the application of the Speedy Trial Act, and therefore Zedner's waiver "for all time" was ineffective. Allowing prospective waivers would seriously undermine the Act because, in many cases, the prosecution, defense, and court would all like to opt out, to the detriment of the public interest. The trial judge's failure to make findings required by the Act to exclude a period of delay was not subject to harmless error. The district court on remand must dismiss, and may decide whether to dismiss with or without prejudice.

BRIGHAM CITY, UTAH v. STUART,

126 S. Ct. 1943, No. 05-502 (May 22, 2006)
Search; residence; warrantless; imminent danger; emergency aid; reasonableness
The Court held that police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with an injury. Upon arriving at a house, the police heard shouting from inside, saw an altercation in which one person was struck by another, and entered the house. The Utah Supreme Court reversed for lack of probable cause, finding the circumstances insufficient to trigger the "emergency aid doctrine." Reversing, the Supreme Court held that the state of mind of police is irrelevant to the reasonableness of their search, and the entry was reasonable under the circumstances. The police had an objective, reasonable basis for believing that an injured adult needed help and that the violence was just beginning. The police were not required to wait at the door while the fight "brawled on" and the injuries got more serious. (Note: This sounds a lot like approval of "preemptive" searches).

HOLMES v. SOUTH CAROLINA, 126 S. Ct. 1727, No. 04-1327 (May 1, 2006)
Exculpatory evidence; third-party guilt; due process; confrontation
The Court (9-0) held that South Carolina had improperly barred evidence of third-party guilt where the prosecution has presented forensic evidence that strongly supports a guilty verdict. In this capital trial, the state court excluded third-party guilt evidence by holding that "where there is strong evidence of an appellant's guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt [can be excluded if it] does not raise a reasonable inference as to the appellant's own innocence. The Supreme Court cited the rule that "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense." "[By] evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence." The state's rule was "arbitrary." "Nor has the State identified any other legitimate end that the rule serves. It follows that the rule applied in this case by the State Supreme Court violates a criminal defendant's right to have "'a meaningful opportunity to present a complete defense.'"

DAY v. McDONOUGH, 126 S. Ct. 1675, No. 04-1324 (Apr. 25, 2006)
Habeas; limitations; timeliness; invalidity of government concession
The Court (5-4) affirmed the authority of a district court to *sua sponte* deny a habeas petition as untimely, even though the government had erroneously calculated the time frame and conceded that the petition was timely. The Court noted that a statute of limitations defense is not jurisdictional, so courts are under no obligation to raise the matter *sua sponte*. And generally a defendant forfeits a limitations defense not timely raised under Fed. R. Civ. P. 8(c), 23(b), and 15(a). And the Court would count it an abuse of discretion to override a State's deliberate waiver of the limitations defense. But there are some "appropriate circumstances" for a district court to raise this on its own, including the situation here where the State's waiver was not "intelligent" but rather "an evident miscalculation" of time. Rejecting both an inflexible rule requiring dismissal and a rule treating the State's failure as an absolute bar, the Court held that the district

court has discretion to decide how the administration of justice is better served in the individual case. (Note the Court's unusual alignment; the four justices dissenting from Ginsburg's opinion were Stevens, Breyer, Scalia, and Thomas).

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. MARTINELLI, 2006 WL 1881882 (July 10, 2006)

Sentencing; Booker; search; warrant; probable cause; overbroad; *Franks* hearing; taint from state warrants; standing; jury instructions; materiality; good faith defense; knowingly; mere puffing; lawful business expenses; concealment;

The Court affirmed the money laundering conspiracy conviction but remanded for resentencing. The Court rejected both challenges to the conviction, starting with the six bases for the denial of his suppression motion: (1) The warrant's foundational information came from victims identified by Better Business Bureau and who were neither anonymous nor confidential, so the analogy to a CI was rejected, noting the high degree of corroboration by these victims; (2) The warrant was not overbroad in allowing seizure of all records of the business which had been abandoned in an old office location, because the allegations of a "pervasive scheme" to defraud allowed seizure of all records; likewise, it was not overbroad for failure to identify alleged crimes because the supporting affidavit clearly alleged fraud. The other Fourth Amendment grounds were disposed of by footnote 6, slip op. 14: Defendant failed to make a sufficient showing for a *Franks* hearing; he did not have a constitutionally protected interest ("standing") because his building lease had expired, and he had essentially abandoned this property there; and there was no taint from the state warrants.

Second, the Court agreed the district court had not erred in failing to give certain jury instructions: (1) Under the plain error standard, there was no error in the district court's failure to give the pattern jury instruction on mail fraud, because the defendant was not charged with mail fraud and the government did not have to prove it to convict on the money laundering conspiracy charge, because the defendant need only have knowledge the funds were derived from mail fraud; (2) There was no abuse of discretion in denying the requested instruction on materiality because, again, defendant was not charged with mail fraud; the conspiracy conviction did not require proof defendant actually committed the specified unlawful activity (mail fraud), and the court told the jury at least four times the defendant had to know the proceeds were derived from mail fraud; in any event, defendant had not shown that this omission seriously impaired his ability to defend himself; (3) The Court disagreed with the district court's finding that there were no facts to support a jury instruction on a good faith defense; noting the threshold is "extremely low," the Court recited testimony of good faith efforts and said it would have been "wiser" to include this instruction; however, the court's other instructions defining "knowingly" adequately covered this issue; and finally defendant could not show this seriously impaired his ability to defend himself. (4) The Court affirmed denial of an instruction on "mere puffery," because the evidence in no way supported such a construction; defendant's "factual statements

[were] verifiably refutable." (5) Affirming denial of an instruction that payment of lawful business expenses does not constitute a specific criminal activity, and another instruction on concealment, the Court simply found that these issues were adequately covered in other instructions.
As to sentencing, the Court summarily found reversible Booker error and remanded for resentencing.
J. Cox concurred specially to discuss the mail fraud jury instruction.
(Note: This was an appeal from Judge Rodger's sentence.)

U.S. v. POYATO, 2006 WL 1880497 (July 10, 2006)
Sentencing; jury acquittal; safety valve; mandatory minimum; Booker; Apprendi
The Court held that a jury's acquittal on the court of being a felon in possession of a firearm did not affect a sentencing court determination whether a defendant is eligible for a safety valve sentence reduction below the mandatory minimum. The defendant's drug trafficking convictions subjected him to a minimum mandatory sentence of 36 months; he would have been eligible for a safety valve sentence reduction below this minimum if, inter alia, he did not possess a firearm in connection with the offense. The district court stated that if it were the fact-finder, it would find that the defendant failed to satisfy this condition because it concluded by a preponderance of the evidence that the defendant possessed a firearm in connection with his drug trafficking. However, the court felt precluded, post-Booker, from making this finding because the jury had acquitted the defendant of the firearm count.

Reversing, the Court stated that the safety valve statute instructs the district court to make the relevant findings, and Booker did not affect this. Further, the safety valve involves sentencing below a minimum, not sentencing above a maximum, and therefore did not trigger the Apprendi principle. Finally, the safety valve statute instruction to sentence pursuant to the Guidelines did not trigger a maximum sentence, but an advisory sentence.

U.S, v. CRISP, 2006 WL 1867754 (July 7, 2006)
Sentencing; 5K1.1; improper and excessive downward departure; 3553(a); restitution; reasonableness
The government won its appeal. Following comptroller defendant's conviction of financial fraud, the government filed a 5K1.1 motion based on his assistance in convicting the company president; it sought a 50% reduction, from the 24-30 months range to a 12-15 month range, and a sentence of 12 months; the district court departed to a 6-12 month range; it first imposed probation with 12 months' house arrest, based on its primary concern for restitution of the $480,000 loss to a small bank; the court believed its sentence was "reasonable" based on all factors of 3553(a) and specifically referred to those factors in its findings. Then "[p]ersuaded of the legal correctness of the government's position [that some incarceration was required for this Class B felony], although not caught up in the spirit of it, the court modified the sentence to one of incarceration, or something meant to resemble it." or 5 hours in the marshals' custody, to which the government objected "in a burst of startled candor" as being "farcical."
The Court reviewed for reasonableness the court's post-departure imposition of probation in a 6-12 month range. Noting that 5K1.1 authorizes a downward departure, for the 5 listed factors as well as other factors *related to the assistance*, the Court

reaffirmed *Davis*, 407 F.3d 1269, 1271 (11th Cir. 2005) (holding that sentencing court may not consider 3553(a) factors in 5K1.1 departure decision), and reversed because of the district court's consideration of restitution in the departure decision. Additionally, the Court noted that the departure from a 6-12 month range to 5 hours was reversible error because it was not "reasonable" in light of 3553(a) factors; although the Court's review is "deferential," that does not include "abdication." Noting the sentence also violated 18 USC 3561(a), the Court nevertheless otherwise confined its discussion to that of reasonableness, because the government did not object under 3561. The Court then set out "a number of reasons" a 5-hr. sentence was not reasonable. "five hours for a crime that caused $484,137.38 in harm" did not meet the purposes of 3553(a) but turned its policy on its head by equating a greater loss with a lesser punishment, albeit supposedly to obtain restitution. Finally, the circumstances were not "extraordinary enough to justify the extremely lenient sentence." and the court's "unjustified reliance" upon any one 3553(a) factor is a symptom of an unreasonable sentence. "An unreasonable approach produced an unreasonable sentence."

U.S. v. TAMARI, 2006 WL 1843007 (July 6, 2006)

Fourth amendment, search warrant, vehicle search

Officers obtained a warrant to search a parcel of property including "[v]ehicles or vessels or trailers registered to or owned by the occupants of the place to be searched, or under the care, custody or control or on the property on which the place to be searched is situated." Agents searched the residence and a truck, and while searching, Tamari drove up in a yellow Hummer. He produced no ID, said the Hummer belonged to a family member; later claimed it belonged to "Humberto"; and said he came to see a man about some animals (which officers did not see). Agents searched the car and used a drug dog, finding $45,000 in cash and other items. His motion to suppress was denied, and the Court affirmed (Black, with Barkett & Cox), holding that the valid search warrant encompassed the search of a vehicle arriving on that property during the course of the search, and even if outside the warrant, the automobile exception applied.

U.S. v. STICKLE, 2006 WL 1843365 (July 6, 2006)

Deliberate pollution, regulation of freight vessels, indictment, venue

Stickle was the Chairman and Owner of Sabine Transportation Company, operator of the S.S. Juneau, which discharged contaminated wheat and diesel fuel into the sea. He was charged with conspiracy and knowingly discharging an oily mixture into the sea without an oil discharge monitoring system. Stickle argued that the indictment should have been dismissed because the Juneau was not a freight vessel as defined in the charged statutes, the Government was required to prove venue beyond a reasonable doubt, and the evidence was insufficient to establish venue in the Southern District of Florida. The Court affirmed (Anderson, with Fay & Siler), finding that he was properly charged as a freight vessel under 33 C.F.R. § 151.10(a) instead of as an oil tanker under 33 C.F.R. § 157.37; when the government is proving a non-essential element of a crime, like venue, the prosecution is not required to meet the reasonable doubt standard; and the evidence of venue was sufficient because "Here, it is evident that the *locus delicti* of count II is the high seas. The evidence

presented at trial clearly established that the laborers of the S.S. Juneau illegally discharged more than 440 metric tons of contaminated grain in to the South China Sea. Since no offender was arrested or brought into any other district, this court looks to the last known residence of any offender. Here, the last known residence of one of the joint offenders was Hitchens, who lived in the Southern District of Florida."

U.S. v. GRAY, 2006 WL 1752372 (June 28, 2006)

Sentence; reasonableness; downward departure

Rejecting this government appeal of a downward departure as unreasonable, the Court affirmed a 72-month sentence, imposed in a statutory range of 5-20 years and a guideline range of 151-188 months; it noted the district court did not depart downward out of disagreement with the guidelines range, but because it considered all the 18 U.S.C. § 3553(a) factors and gave specific, valid reasons for a below-guidelines sentence. *See Williams*, 435 F.3d 1350 (11th Cir. 2006).

U.S. v. ESTUPINAN, 2006 WL 1752333 (June 28, 2006)

Constitutionality; 46 U.S.C. § 1903; Maritime Drug Law Enforcement Act (MDLEA)

The Court rejected two arguments, as lacking merit, that 46 USC app. 1903, the Maritime Drug Law Enforcement Act (MDLEA) was unconstitutional, (1) because Congress exceeded its authority under the "Piracies and Felonies Clause" - Art. I, Sec. 8, Clause 10, U.S. Const., in enacting the MDLEA, and (2) because the MDLEA removes the element of jurisdiction from the jury's consideration.

U.S. v. NORRIS, 2006 WL 1716912 (June 23, 2006)

Endangered species; "market value"; 2Q2.1; Booker

The Court affirmed defendant's sentence for violations of the Endangered Species Act based on orchid imports, specifically the assessment of an enhanced sentence under U.S.S.G. § 2Q2.1 based on the market value of the entire shipments, not just those portions which were illegal, because the illegally included plants rendered the entire shipment illegal. Under § 1B1.3, the legally imported orchids were relevant conduct because used to conceal the illegal plants. The Booker argument was rejected because the district court made no factual findings as to value but only adopted the government's theory of valuation and the corresponding monetary value stipulated by the parties.

U.S. v. MITSVEN, 2006 WL 1703628 (June 22, 2006)

VOP; supervised release; 18 U.S.C. § 3565(b), § 3583(a)

The Court held that 18 U.S.C. §§ 3551-3586 require a district court to impose a term of supervised release following a sentence of imprisonment imposed for a probation violation. "[T]he crux of Mitsven's appeal is whether the term 'statute,' referenced in § 3583(a)'s requirement that a term of supervised release be imposed where 'required by statute,' includes the statute of the underlying conviction. We conclude that it does."

ARTHUR v. ALLEN, 2006 WL 1687574 (June 21, 2006)

Habeas; AEDPA; statute of limitations; tolling

The Court affirmed denial of a capital habeas petition, concluding the defendant "has not shown . . . any legal grounds excusing the

untimeliness of his habeas petition [e.g.] that he is actually innocent or that the district court erred in denying him discovery and an evidentiary hearing on his claim of actual innocence [nor that] statutory tolling [or] equitable tolling should be applied to the statute of limitations governing his claims or that the district court abused its discretion in denying discovery on his equitable tolling claim."

U.S. v. WILK, 2006 WL 1685798 (June 20, 2006)

Death penalty

Wilk appealed the district court's denial of his motion to strike the government's Notice of Intent to Seek the Death Penalty and to bar the government from seeking the death penalty in his trial for the murder of a deputy sheriff. Wilk argued that the notice was not provided to him "a reasonable time before the trial" as required by 18 U.S.C. § 3593(a). The 11th Circuit affirmed, holding that six months before the trial is reasonable notice under § 3593(a). The 37-page opinion "spared no expense in the factual and procedural history."

U.S. v. McGUINNESS, 2006 WL 1644024 (June 15, 2006)

Sentencing; obstruction of justice; 3C1.1; escape; fine; inability to pay

The defendant, with prior escapes, was released on unescorted furlough but failed to report as directed to the community corrections center. His sentence was enhanced for obstruction of justice under USSG 3C1.1, and McGuinness appealed, arguing that an obstruction of justice enhancement was not intended to apply to escape which is itself an obstruction of justice offense. The Court affirmed, saying he gave a false name when first encountered, triggering a massive manhunt. The Court also upheld a $4,000 fine, despite the fact that he was saddled with a with a $140,000 fine from a prior drug trafficking conviction, because when found in the woods near 3 suitcases of marijuana he possessed $12,500 cash which he claimed he had hidden before his last term of imprisonment.

SCHWAB v. CROSBY, 2006 WL 1642757 (June 15, 2006)

Capital habeas; conflict of interest

The Court rejected all claims of a death-sentenced habitual child rapist. Primarily, the Court affirmed the finding there was no conflict of interest sufficient to allow defense counsel to withdraw shortly before trial; the conflict arose because defendant's letter to counsel, pretending to be a third party accepting culpability for the crime and threatening a similar rape/murder of one of the victim's younger brothers, was turned over to police and admitted into evidence, with staff from counsel's office called as witnesses, and counsel declining to cross-examine them; the trial judge questioned two witnesses. The Court said *Cuyler* has not been extended beyond the multiple concurrent representation scenario.

U.S. v. BASCOMB, 2006 WL 1629154 (June 14, 2006)

Appeal; waiver; grounds; plea colloquy; cruel and unusual; improper delegation; separation of powers

The Court granted the government's motion to dismiss the appeal because the defendant's plea agreement (in exchange for, *inter alia,* dismissing charges against his wife) included a voluntary and knowing waiver of his right to appeal the 8th Ament. grounds actually raised on appeal. Even after the parties had acknowledged the waiver, the district court at sentencing addressed the merits of

Bascomb's 8th Amendment, said it was bound by the minimum mandatory, and encouraged Bascomb to appeal. When he did appeal, the Government did not raise the appeal waiver, but the Court applied it anyway. However, the Court acknowledged the statement in *Howle* that due process may allow an appeal, despite a waiver, in extreme circumstances such as a sentence to public flogging.

U.S. v. JOHNSON, 2006 WL 1594154 (June 13, 2006)
Sentencing; cruel and unusual punishment; reasonableness
The Court rejected Johnson's arguments contesting his 140-year sentence, based on consecutive statutory maximum sentences on 3 counts, for producing and distributing child pornography. The Court found it reasonable and not disproportional. Also, the Court reviewed his 8th Amendment claim *de novo* despite the lack of objection below, because the district court had failed to follow the *Jones* procedure requiring the court to ask if there were any objections.

U.S. v. DOWD, 2006 WL 1594190 (June 13, 2006)
Severance; double jeopardy; ACCA; substitution of judges; reasonableness
Affirming the 65-year-old defendant's 305-month sentence for robbing a postmaster with a firearm, the Court first rejected his argument that the felon-in-possession count (based on having sold a gun days before the robbery and attempting to regain it the day of the robbery) prejudiced him because his prior felony convictions thereby became admissible. The Court concluded the firearms evidence would have been admitted in a separate robbery trial to rebut the defense that the gun involved was a toy; the defendant's stipulation to his convicted felon status precluded details of that past and it was barely mentioned at trial, and the evidence of guilt was overwhelming. The Court found consecutive sentences (for robbery with a dangerous weapon under 18 U.S.C. 2114 and using a firearm in a crime of violence under 924(c)) were legislatively mandated and therefore did not violate double jeopardy. The Court also rejected a *Shepard* attack on ACCA sentencing, a challenge of the substitution of a new judge for sentencing; and found his sentence reasonable.

ATWATER v. CROSBY, 2006 WL 1586390 (June 12, 2006)
Capital habeas; *Batson*; ineffectiveness; default
The Court denied habeas relief to a Florida inmate sentenced to death for a 1989 murder. The Court recognized that the Florida Supreme Court incorrectly applied *Batson* when it concluded that there was no error in the striking of the sole black juror on the venire. However, given the great deference owed to the Florida courts, and defense counsel's failure in the Florida state trial court to present evidence of how similarly situated white jurors had been treated differently by the prosecution, the Court concluded that the error was not unreasonable, and therefore unworthy of habeas relief. The Court also found no grounds for habeas relief in the Florida Supreme Court's conclusion that Atwater's counsel was not ineffective in seeking to spare Atwater's life on the ground that he was guilty of second-degree murder only. The Court noted that this was a plausible defense strategy in light of the overwhelming evidence of guilt. The Court found that Atwater had defaulted his claim that counsel was ineffective for failing to allow him to testify, and that, in any event, Atwater was

not prejudiced by his failure to testify in light of the overwhelming proof of guilt. The Court also found no error in the denial of an evidentiary hearing on Atwater's claim that counsel was ineffective in failing to put on mitigation evidence at the penalty phase. The Court noted that this was virtually the same evidence, through other witnesses, as the evidence which was presented.

DAVIS v. WILLIAMS, 2006 WL 1541458 (June 7, 2006)

42 U.S.C. § 1983, probable cause, obstruction of justice, disorderly conduct

Deputies arrested Davis when Davis, concerned about police lights flashing outside his house, went over to the officers to inquire what was going on and thereafter attempted to direct traffic around the police cars so as to avoid a potentially dangerous situation. The deputies arrested Davis for disorderly conduct and obstruction of justice, and in the process, wrenched Davis's arm so severely that he required surgery. The district court granted summary judgment to the deputies, but the 11th Circuit reversed, holding that the facts cannot support a finding of even arguable probable cause for either obstruction of justice or disorderly conduct. The Court also permitted the excessive force claim to proceed.

U.S. v. ORTIZ-DELGADO, 2006 WL 1540261 (June 7, 2006)

Crime of violence, USSG § 2L1.2(b)(1)(A)(ii)

Ortiz-Delgado pleaded guilty to unlawful reentry of a deported alien and was sentenced to 60 months based in part on a 16-level "crime of violence" enhancement, USSG§ 2L1.2(b)(1)(A)(ii), for California priors of attempted lewd acts upon a child and lewd acts upon a child. The Court affirmed, construing the California statutory definitions to fit the federal crime of violence standard. The Court also found reasonable the 60-month sentence, which fell within the guidelines range.

U.S. v. VALNOR, 2006 WL 1529118 (June 6, 2006)

Reasonable upward variance

Valnor pleaded to conspiracy to produce identification documents without lawful authority arising from a scheme involving the issuance of fraudulent driver's licenses to illegal immigrants in the South Florida area. He faced an advisory Guidelines sentencing range of 15 to 21 months, a statutory max of 15 years, and the Government filed a 5K motion. The district court nonetheless used 42 months as a starting point, saying national security warranted it, and applied the 5K to justify a so-called reduction, ending up with a 28-month sentence. Valnor appealed as unreasonable. The Court affirmed, saying the district court "properly fulfilled its role in considering the Guidelines, but found the Guidelines range to be inadequate to accomplish the statutory goals of providing adequate deterrence and protecting the public from further crimes. Accordingly, we conclude that the district court's 28- month sentence was reasonable."

PURVIS v. CROSBY, 2006 WL 1525931 (June 6, 2006)

Habeas, ineffective assistance,

The Court affirmed the denial of a 28 U.S.C. § 2254 petition of "a convicted child molester seeking to have his conviction set aside . . . because his trial counsel did not object when the state trial court cleared the courtroom of most of the public during the young victim's testimony." The Court held that "to prevail on his ineffective assistance

claim stemming from the failure of his trial counsel to raise an objection to the closing of the courtroom, Purvis must show a reasonable probability of a different result in the trial if counsel had objected. Because he has not done that, his claim was properly denied."

U.S. v. MCGILL, 2006 WL 1491187 (June 1, 2006)

Crime of violence, USSG § 2K2.1(a)(2)

The Court held that prior Alabama DUI convictions qualified as "crimes of violence" for the purpose of assigning a higher base offense level under USSG § 2K2.1(a)(2) to a sentence for being a felon in possession of a firearm. The Court distinguished *Leocal* (U.S. 2004), which did not involve a DUI categorization under the "crime of violence" definition in the Guidelines. The Court also noted that Alabama makes the fourth and subsequent DUIs felonies, and thus McGill's prior DUIs counted as qualifying felonies because he had five prior DUIs. The Court also rejected the argument that mere control over the vehicle, without its operation, would make a DUI less of a "crime of violence" for sentence-enhancement purposes.

U.S. v. ARBOLAEZ, 2006 WL 1493833 (June 1, 2006)

Hearsay, *Miranda*, *Crawford*, harmless errors, *Franks* hearing, drug conspiracy, forfeiture

The Court affirmed convictions of conspiracy to possess with intent to distribute marijuana, and corrupt alteration, destruction, and mutilation of a cellular telephone with the intent to impair that phone's integrity and use in an official proceeding (18 U.S.C. § 1512(c)(1)). The Court found merit in Arbolaez's arguments that district court erred by admitting statements from a non-testifying co-conspirator under Fed. R. Evid. 801(c) as background evidence, but found it harmless. The Court also deemed it a *Crawford* violation, but found the unobjected-to confrontation clause violation to be plain error of the non-reversible variety. The Court also found merit in the argument that the district court erred by admitting a statement made to police in the course of the search of Arbolaez's home without first requiring the Government to establish that Arbolaez had affirmatively waived his *Miranda* rights. However, that too was ruled harmless. No Franks error was found in the district court's decision not to hold an evidentiary hearing to challenge the veracity of an affidavit in support of a search warrant "because Arbolaez failed to make the 'substantial preliminary showing' that would have entitled him to a hearing." Finally, the Court reversed a forfeiture order: "Arbolaez's counsel was denied the opportunity to argue, with respect to the forfeiture phase of the trial, even that the existing record evidence did not satisfy the additional elements required for forfeiture. He was denied the opportunity to present any evidence on the issue or to do anything to challenge the forfeiture."

VALDES v. CROSBY, 2006 WL 1474726 (May 31, 2006)

28 U.S.C. § 1983, 8th Amendment

The father of Florida death row inmate Valdez sued DOC officials charging 8th amendment violations that caused Frank Valdes' death on Florida State Prison's X wing. The district court denied Crosby's summary judgment claim of supervisory qualified immunity, and the Eleventh Circuit affirmed. All evidence taken together "is more than adequate to entitle Mario Valdes to proceed to trial and show that inmate abuse at the hands of guards was not an

isolated occurrence, but rather occurred with sufficient regularity as to demonstrate a history of widespread abuse at FSP. Whether Crosby actually drew the inference of widespread abuse and was therefore 'on notice of the need to correct or to stop' abuse by officers then becomes a factual question for the jury. [] We also agree with the district court that this evidence, again taken together and in the light most favorable to Valdes, is sufficient to allow a jury to consider whether Crosby had established customs and policies that resulted in deliberate indifference to constitutional violations and whether Crosby failed to take reasonable measures to correct the alleged deprivations."

GAMBLE v. SEC'Y, DEP'T CORRECTIONS, 2006 WL 1469782 (May 31, 2006)
AEDPA, capital sentence
The Court denied habeas relief to a Florida inmate sentenced to death for a 1991 murder. Applying the deferential AEDPA standard of review, the Court found no error in the Florida Supreme Court's determination that there was no *Farretta* violation in the trial court's failure to conduct an inquiry into the defendant's wish to represent himself, because the defendant, in fact, never asked to represent himself. Instead, he asked for substitute counsel. The Court agreed with the Florida Supreme Court that since there was no merit to the *Farretta* issue, appellate counsel had not been ineffective in failing to raise it on direct appeal. Finally, the Court found no ineffectiveness in counsel's failure, at the penalty phase, to argue against the aggravator that the murder was committed for pecuniary gain. The Court pointed out that the jury's contrary verdict on this point at the guilt phase made such an argument "preposterous."

U.S. v. AGUILAR-ORTIZ, 2006 WL 1479596 (May 31, 2006)
USSG § 2L1.2(b)(1)(B), prior drug trafficking offense, solicitation, *Shepard*
The Court held that the district court erred in its analysis of USSG § 2L1.2(b)(1)(B) when it treated the defendant's prior Florida state conviction for solicitation to deliver cocaine as a "drug trafficking offense" for purposes of imposing a 12-level enhancement for being found guilty in the United States after deportation. Whether solicitation constitutes a drug trafficking offense for purposes of § 2L1.2(b)(1)(B) is a question of first impression. Not all Florida solicitation offenses qualify as drug trafficking offenses, because some involve a small amount of drugs for personal use. Examining the prior conviction under *Shepard* (U.S. 2005), the Court concluded that his solicitation offense, which involved the attempted purchase of $30 of crack cocaine from an undercover agent, was akin to attempted possession without intent to distribute. Hence, the conviction did not qualify as a drug trafficking offense, and was not a correct basis for imposing the 12-level enhancement.

U.S. v. ARIAS-IZQUIERDO, 449 F.3d 1168 (May 22, 2006)
Evidence; sufficiency; air piracy; misconduct; FRE 902(12), 803(6) & 1006
This case arose when a group of Cuban defendants hijacked a commercial airliner to the U.S. The Court rejected one defendant's two arguments, first that the evidence was insufficient; even though the government did not prove one element of air piracy, that the defendant seized or exercised control over the aircraft, he was guilty by virtue of being an aider and abettor. Another defendant's sufficiency argument was rejected on the basis of the Court's distinction between air

piracy and interference with a flight crew member. The Court rejected the arguments there was prosecutorial misconduct in closing argument; that the district court had abused its discretion by improperly restricting their cross-examination of government witnesses (to show their bias based on Community Party allegiance). The Court agreed a summary of records, prepared by airlines for government for litigation, should not have been admitted under FRE 803(6); they did not meet the requirements of FRE 1006 for admission of a summary because the underlying records on which it was based were not disclosed. However, the error was harmless.

U.S. v. LOVE, 449 F.3d 1154 (May 18, 2006)
Invited error
Love pleaded guilty to contempt for violating a temporary restraining order, 18 U.S.C. § 401(3). He asked for probation if possible, and if not, for time served followed by supervised release. Probation was not applicable, and the court sentenced him to 45 days' incarceration followed by 5 years' supervised release. On appeal, he argued that supervised release was not statutorily authorized for contempt, and even if it were, 1 year was the maximum permitted. The Court affirmed, not reaching those arguments, and holding instead that he had invited the error. Barkett specially concurred to suggest that on the merits, the Court should have reached the question and held that criminal contempt should be classified for sentencing according to the applicable Guidelines range for the most nearly analogous offense.

U.S. v. SHANNON, 449 F.3d 1146 (May 16, 2006)
Career offender, plain error
Shannon was sentenced as a career offender upon a finding that he had "two prior felony convictions of either a crime of violence or a controlled substance offense" within 15 years of the instant offense. Although Shannon committed the prior offenses outside the 15-year window preceding the instant offense, the convictions were counted because the sentences imposed for those convictions resulted in Shannon being incarcerated during some part of the 15-year window. See USSG § 4A1.2(e)(1). Shannon admitted at sentencing that he "technically" qualified as a career offender, but now argues that his sentence is erroneous and unconstitutional. The Court affirmed. There is no exception to counting prior convictions where the prior convictions fell within the relevant window solely because conviction and sentencing were delayed.

U.S. v. SEGURA-BALTAZAR, 448 F.3d 1281 (May 12, 2006)
Fourth Amendment, trash pulls, no-knock warrant
In the course of a drug investigation, police surveiled a home and decided to inspect its trash, contacting the city's sanitation department for assistance. Trash was normally collected from the home on Wednesdays, so an officer drove with the sanitation driver in an empty garbage truck and found garbage left for collection in front of the house to the left of a mailbox, in an area that was not enclosed by a fence and that was approximately fifty-five to sixty-five feet from the residence and three to six feet from the curb. The garbage was contained in bags which, in turn, were found inside large garbage cans that were covered with lids. The bags were seized and contents inspected. The same procedure was repeated on other normal collection days for three months. On two other occasions, the trash-pull procedures were slightly different, where part

of the garbage was located in the garbage cans at the curb, and other cans were sitting on the left side of the residence near the garage. With the permission of a female who answered a knock on the door, those cans were picked up. Evidence of illegal drug activity and firearm use was found, and based on the above, a "no-knock" search warrant was issued and executed. The district court declined to suppress the evidence, and the Eleventh Circuit affirmed.

U.S. v. CENNA, 448 F.3d 1279 (May 11, 2006)

Supervised release; 21 U.S.C. 844; maximum term

The Court rejected the argument that the imposition of a one-year term of supervised release in addition to the maximum term of one-year incarceration under 21 U.S.C. § 844(a), for misdemeanor possession of marihuana and heroin, was illegal. The Court noted that caselaw prior to *Johnson* (U.S. 2000) held that courts can order supervised release in addition to the maximum term of imprisonment available by statute. The Court rejected Cenna's argument that *Johnson* changed this result, joining other circuits to have so held.

U.S. v. IZQUIERDO, 448 F.3d 1269 (May 10, 2006)

Plea; withdrawal; incompetency

The Court affirmed denial of the defendant's motion to withdraw his plea based on incompetency. The plea colloquy fully supported the district court's finding he was "fully competent and capable of entering an informed plea." A psychological evaluation was conducted two months later, by a psychologist working for the co-defendant (also defendant's brother) who used the report to support his motion to have the defendant declared incompetent, arguing he could not have conspired with an incompetent. Following the report's conclusion of retardation, suggestion of incompetency, and recommendation of a formal competency exam, a mistrial was declared in the brother's case, and defendant moved for an independent exam pre-sentencing. A BOP exam confirmed he was incompetent and not likely to become competent but recommended a 6-month effort to restore competency. After another inmate testified defendant was malingering, and further BOP evaluation, a second report concluded he was competent and malingering. The original psychologist then reevaluated him and concluded he was neither malingering nor competent to enter a plea and never would be.

U.S. v. SCOTT, 447 F.3d 1365 (May 8, 2006)

Criminal history; 4A1.1(e); sentence of imprisonment; illegal reentry; 8 U.S.C. 1326

The Court interpreted the phrase "found in" of 8 U.S.C. 1326, holding that an alien is constructively "found in" the U.S. when the government either knows of or, "with the exercised of diligence typical of law enforcement authorities, could have discovered the illegality of the defendant's presence." Neither the government's factual basis for the plea nor the PSR correctly reflected the government's first "notice" of defendant's presence and correct identity. The Court concluded the most likely factual scenario was that the initial interview of the defendant, where he was completely honest with the agent about his identity, etc., had accidentially not been followed up on, and it was unfair to penalize the defendant for a delay that was no fault of his own. Thus, the

defendant was "found in" the U.S. during that initial interview, and the government's failure to act promptly meant that the one-point addition under 4A1.1(e) was inapplicable.

U.S. v. McVAY, 447 F.3d 1348 (May 5, 2006)
Sentencing; 5K1.1; downward departure; exemplary record
The Court, on a government appeal, reversed the sentence of probation only imposed on a former financial officer of HealthSouth, who pled guilty to fraud charges that resulted in losses of $400 million. The Government filed a 5K motion reduction, the guidelines range was 87 months, but the court imposed 60 months' probation with no jail. McVay's "exemplary record" before he committed the offense, and the circumstances surrounding his daughter, were not relevant under the guidelines. The Court further noted that, under advisory Guidelines, the farther the court diverges from the advisory guideline sentence, the more compelling the reasons for its divergence must be. The Court concluded that, in the absence of truly compelling reasons, a probation sentence for a multi-billion dollar securities fraud at the expense of the investing public was "not easily reconcilable" with the purposes of punishment set forth in 18 U.S.C. § 3553(a).

U.S. v. ALVAREZ-CORIA, 447 F.3d 1340 (May 4, 2006)
Relevant conduct, personal knowledge of drug type, minor role
Alvarez-Coria pleaded guilty to conspiracy to possess with the intent to distribute at least 500 grams of meth and at least 500 grams of cocaine; attempting to possess with the intent to distribute at least 500 grams of meth; and attempting to possess with the intent to distribute at least 500 grams of cocaine. The Circuit Court's fact-based analysis held (1) the district court did not clearly err in failing to grant him a minor role reduction; and (2) the district court did not err in holding him responsible for meth found in three containers because "Whether the presence of methamphetamine was reasonably foreseeable to Alvarez-Coria is immaterial because Alvarez-Coria is being held accountable for his own conduct, not the conduct of his co-conspirators. Alvarez-Coria knowingly participated in a plan to transport three drug-filled containers to Atlanta. The fact that Alvarez-Coria did not know the type or quantity of the drugs did not preclude the district court from attributing the drugs to him for sentencing purposes."

U.S. v. OWENS, 447 F.3d 1345 (May 4, 2006)
Firearm possession, crime of violence
The Court held that possession of an unregistered firearm, 26 U.S.C. § 5861(d), is a crime of violence for purposes of enhancing a criminal sentence under USSG § 2K2.1(a)(4)(A). "We agree with our sister circuits that the possession of certain kinds of weapons categorically presents the potential risk of physical injury warranting sentence enhancement for being a crime of violence." This is another in a line of "categorical approach" cases involving the definition of "crimes of violence."

U.S. v. GARCIA, 447 F.3d 1327 (May 3, 2006)
***Crawford*, conflict**
The Court held that the Sixth Amendment under *Crawford* does not prohibit the admission of an out-of-court statement when the declarant testifies at trial to the same statement. The Court also held that the district court did not abuse its discretion in

admitting the testimony of the expert witness whose expertise included debriefing drug traffickers about their use of coded language, that the evidence was sufficient, and that the trial court was not required to hold a second hearing to determine whether Garcia's lawyer should have been disqualified due to a conflict of interest.

U.S. v. THOMAS, 446 F.3d 1348 (Apr. 26, 2006)
Booker
The Eleventh Circuit once again rejected a due process/ex post facto attack on the detrimental application of the *Booker* remedy. The Court also rejected a Fifth Amendment Indictment Clause argument that sought to invoke *Blakely*, and found reasonable the 121-month sentence imposed for being the ring-leader in an attempted robbery, which fell at the bottom of the advisory range and well below the 240-month permissible statutory maximum.

U.S. v. UNDERWOOD, 446 F.3d 1340 (Apr. 25, 2006)
Constitutionality; 21 U.S.C. 841; *Crawford*; coconspirator statements; ; FRE 801
The Court, on plain error review, rejected the argument that 21 U.S.C. § 841 is unconstitutional in light of *Apprendi* because the statute contains sentencing factors which direct judges to make factual findings; the Court noted that an *Apprendi* issue only arises if a judge makes findings which cause a sentence to go above the applicable statutory maximum. The Court likewise rejected a plain error *Booker* challenge to the sentence, saying the defendant's low-end sentence under a mandatory system did not meet his burden of showing it would have been lower under an advisory system. The Court also held that the admission of co-conspirator statements under FRE 801(d)(2)(E) does not violate *Crawford* because the statements were not "testimonial." The incriminating statements caught on tape were not made to police with a view to prosecution; indeed, Underwood's brother likely would not have said anything had he known he was talking with a police informant who was wired.

U.S. v. INGRAM, 446 F.3d 1332 (Apr. 25, 2006)
Sixth Amendment; speedy trial; pretrial delay; dismissal; fair trial
The Court **reversed** the conviction and remanded with instructions to dismiss the indictment, finding that the delay of over two years between indictment and trial deprived Ingram of his Sixth Amendment right to a fair trial. In February 2000, Ingram, a convicted felon, while purchasing a firearm from a pawn shop, answered "no" to the question on the BATF form asking whether he had ever been convicted of a felony. It was not until October 2002, that the government indicted Ingram for making a false statement. The indictment was sealed, and a warrant was issued. However, between October 2002 and July 2004, the ATF agent made "minimal efforts" to contact Ingram. When Ingram finally learned he was indicted, he surrendered and moved to dismiss on speedy trial grounds.

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