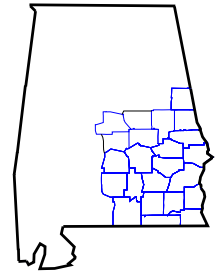


CJA NEWS



“WE DARE DEFEND OUR CLIENT’S RIGHTS”

L E T T E R

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LETTER FROM THE DIRECTOR

Dear CJA Panel Members and Friends:

Our Senior Litigator, John William Focke, II, died of pancreatic cancer on September 12, 2001. Many of you knew John as a federal defender, but since John has lived in Montgomery only since 1995, you might not have known the details of his life. We’d like to share those with you now.

John was born on May 11, 1949 in Ludlington, Michigan. His parents, John K. and Phyllis, had a farm. He had an older sister, Diane, who died in a car accident when John was a teenager. John’s father died from a heart attack while John was young.

After finishing high school, John obtained an associates degree from Northwestern Michigan Community College and, in 1971, a bachelors degree from Michigan State University in Lansing,

Michigan. He graduated from the Washburn University School of Law in Topeka, Kansas in 1974.

After graduation from law school, John worked as an associate in a law firm in Topeka until 1980, when he joined the Brock Hotel Corporation as a real estate site specialist. John worked in corporate real estate and investment for the next eight years, developing hundreds of Show-Biz Pizza, Chuckie Cheese and Golden Corral restaurant sites around the country and working for Brock, Howard Brothers Discount Stores, and Cardinal Industries.

John married, helped to raise his stepson Jesse Grinter, and, in 1988, his son, John K. Focke, II (Jack) was born. He moved his mother to his then-residence; and she died within the year.

In 1989, John returned to his favorite law practice: the practice of criminal law, and went into private practice in Monroe, Louisiana. His practice included a high percentage of work on behalf of indigent clients.

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He had a defense contract with the Ouichita Parish Indigent Defense Board in Louisiana and he was a member of the local federal court's CJA panel. John was one of the first attorneys certified by the Louisiana Supreme Court to handle a capital case.

After divorce from his first wife, John married Theresa Gallagher in Monroe. Their first child, Christine Anne, died shortly after her birth in 1994. John and Theresa moved to Montgomery when John joined this office in July 1995. Their son Christopher was born in April 1996 and their daughter Sara Beth was born in June 1997.

Over the years, John developed a superb level of expertise and advocacy for his clients, both in and out of the courtroom. He maintained his humor, embodied in what he called "Focke's Rules of Practice," a list of practical wisdom reflecting insight into the dilemmas faced by criminal defense attorneys. He would summarize the Sentencing Guidelines to all of us as reaching the conclusion "you're toast." One of his rules was that each client has the inalienable right to choose, despite all good legal advice, to follow the client's own

whims, even if the result is going to jail.

Frankly, it seems that every day brings a new recollection of John's skill and warmth: his effective understanding of and sensitivity to the individual interests of our bench; his emphasis on trying a case with persuasion and passion, and not just on "the law;" the fact that he listened to "Rocky's Theme" and the *Battle Hymn of the Republic* before trying a case; his insistence that our work was both righteous and fun; the warmth clients felt for him and from him; the common sense he brought to office discussions . . . Just today we received notice from the Eleventh Circuit that oral argument has been granted in one of John's last, and dear to his heart, cases.

John gave extraordinary wit, warmth, expertise and professional support to this office and our clients. We hope that we let him know that he and his many strengths would be missed.

Sincerely,

Christine A. Freeman
Executive Director



SUPREME COURT NEWS

Highlights from the current Supreme Court term. A comprehensive survey can be found in the Criminal Law Reporter, which panel attorneys are welcome to review in our library.

Recent Supreme Court Decisions:

Supreme Court Lacks Jurisdiction to Review Non-Final Judgment of Florida Supreme Court

Florida v. Thomas, 121 S.Ct. 1905 (2001).

◆ 28 U.S.C. § 1257(a) - Supreme Court Jurisdiction - final judgment

In a unanimous decision, the Supreme Court held that it did not have jurisdiction to hear the issue raised by the petitioner and dismissed its previously granted writ of certiorari. The Court had granted certiorari to consider whether the "bright-line" rule set forth in *New York v. Belton*, 453 U.S. 454 (1981), a rule which permits police officers who have lawfully arrested the occupant of a car to search the passenger compartment of the car

incident to the arrest, is limited to those situations in which the officer initiates contact with the suspect while the person remains inside the vehicle.

While officers were arresting suspects at a Florida home, the respondent pulled up to the residence, got out of his car and walked toward the back of the vehicle. After asking the respondent his name and obtaining his driver's license, the officer ran a check on the license, discovered there was an outstanding warrant for the respondent and arrested the respondent and took him inside the residence. The officer then went back outside and searched the respondent's car. The search revealed small bags of methamphetamine and the respondent was charged with possession.

The trial court granted the respondent's motion to suppress, but the district court of appeals, relying on *Belton*, reversed. The Florida Supreme Court in turn reversed, holding that *Belton* was inapplicable as it applied only to situations where the officer initiates contact with the defendant while he remains in the car. However, the Florida Supreme Court instructed the lower court to determine whether the search could be upheld pursuant to *Chimel v. California*, 395 U.S. 752 (1969). The State appealed this decision to the United States Supreme Court.

The United States Supreme Court concluded that it

lacked jurisdiction to hear a challenge to the Florida Supreme Court's ruling, as the judgment of that court was not final. Whether or not the evidence was to be suppressed had not yet been decided by the state court. The Court noted that, if the evidence is admitted pursuant to *Chimel*, the *Belton* issue will be moot, and the State can not seek review of the decision. If, on the other hand, the evidence was suppressed, the State could appeal the decision prior to trial in the Florida courts. Therefore, the ruling could not be considered "final" for purposes of Supreme Court review under the final judgment requirement of 28 U.S.C. § 1257(a), and since the case did not fall within the limited exceptions to the final judgment rule, the Court dismissed the writ for want of jurisdiction.

Violation of Provision of IAD, Which Prohibit Return of Inmate to Sending State Prior to Trial in Receiving State, Requires Dismissal of Charges in Receiving State

Alabama v. Bozeman, 121 S.Ct. 2079 (2001).

◆ 18 U.S.C. App. § 2 - Interstate Agreement on Detainers

The Court held that Article IV of the Interstate Agreement on Detainers Act barred any further proceedings against a defendant who was returned to his original place of imprisonment before being put to trial after he had been sent to the receiving State for one day for purposes of arraignment.

Pursuant to Article IV, the jurisdiction in which an indictment is pending, the receiving State, is required to put the individual against whom a detainer has been lodged to trial within 120 days after the prisoner's arrival. The Article also states that the trial must be had before the prisoner is returned to his original place of imprisonment, otherwise the charges "shall" be dismissed with prejudice.

While Michael Bozeman was serving a federal sentence in a Florida prison, an Alabama district attorney, who had previously lodged a detainer against Bozeman, sought temporary custody of Bozeman in order to arraign him on state firearms charges. Bozeman was transported to Alabama by federal officials, spent the night in county jail, appeared in court the following morning where he received appointed counsel, and was transported back to the federal prison that evening. Bozeman was not brought back to Alabama for trial until one month later.

The Alabama Supreme Court reversed Michael Bozeman's subsequent conviction, holding that the literal language of Article IV(e) required dismissal of the charges. The United States Supreme Court agreed. The Court rejected the State of Alabama's argument that the one-day interruption was *de minimis* and did not interfere with the basic purpose of the article, the prevention of prisoner shuttling that would interrupt the prisoner's rehabilitation. Pointing out that the Article states that, when a prisoner is returned before trial, the indictment, information, or complaint, "shall not be of any further force or effect, and

the court *shall* enter an order dismissing the same with prejudice,” the Court reasoned that the word *shall* is ordinarily the language of command and does not permit a distinction between short arrivals for the purpose of arraignment and other types of arrivals. The Court unanimously agreed to affirm the judgment of the Alabama Supreme Court.

Rule of *Cage v. Louisiana* Has Not Been “Made” Retroactive to Cases on Collateral Review Because the Supreme Court Has Not Held That the Decision Applies Retroactively

Tyler v. Cain, 121 S.Ct. 2478 (2001).

◆ **28 U.S.C. § 2244(b)(2)(A) - second or successive petitions based on new rule of constitutional law made retroactive to cases on collateral review**

In a five to four decision, the Supreme Court held that its previous decision in *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam), that a jury instruction is unconstitutional if there is a reasonable likelihood that the jury understood the instruction to allow conviction without proof beyond a reasonable doubt, has not been made retroactive to cases on collateral review.

During Melvin Tyler’s murder trial, the jury instruction regarding reasonable doubt was

substantially similar to the instruction held improper in *Cage*. After the decision, therefore, Tyler filed his sixth state postconviction petition in which he raised a *Cage* claim. The State of Louisiana denied relief.

Tyler then sought permission to file a second habeas petition in federal court to pursue the *Cage* claim. The Fifth Circuit granted Tyler’s request to file a second petition, holding that Tyler had made a prima facie showing that his “claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” as required by 28 U.S.C. §§ 2244(b)(2)(A) and (3)(C).

After considering the merits of the claim, the district court held that Tyler was not entitled to relief as the state court decision was neither “contrary to” nor “involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). The Fifth Circuit affirmed, holding that Tyler had failed to show that the *Cage* decision had in fact been made retroactive to cases on collateral review by the Supreme Court.

The Supreme Court affirmed. Noting that 2244(b)(2)(A) establishes three prerequisites to obtaining relief; (1) the rule on which the claim relies must be a new rule of constitutional law; (2) made retroactive by the Supreme Court; and (3) the claim must have been previously unavailable, the Court

held that Tyler had failed to satisfy the second requirement. The Court stated that the word “made” means “held” and that the “requirement is satisfied only if this Court has held that the new rule is retroactively applicable to cases on collateral review.”

Only the Supreme Court can “make” a new rule retroactive, and the only way it can do so, the Court reasoned, is through a holding. “The Supreme Court does not make a rule retroactive when it merely establishes principles of retroactivity and leaves the application of those principles to lower courts.” Thus, a new rule is not made retroactive unless the Supreme Court has held that it is retroactive.

The *Cage* decision did not hold that its rule was made retroactive, and subsequent Supreme Court decisions have not declared it so. The Court rejected Tyler’s argument that the *Cage* holding was made retroactive by *Sullivan v. Louisiana*, 508 U.S. 275 (1993). *Sullivan* held that a *Cage* error is a structural one, not subject to harmless error analysis. Tyler argued that the *Sullivan* reasoning made the *Cage* rule retroactive under the principles of *Teague v. Lane*, 489 U.S. 288 (1989) which excepts from the rule of nonretroactivity “watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceedings.” The Court rejected Tyler’s argument, however, claiming that while, based on *Teague*, the Court *should* make *Cage* retroactive, the Court had not already made the rule retroactive to cases on collateral review.

The Court also rejected Tyler's invitation to hold the *Cage* rule retroactive in the instant case. Because Tyler's petition was his second, the Court reasoned, the district court was required to dismiss it unless Tyler could show that the Supreme Court had already made *Cage* retroactive. Any decision regarding the retroactivity of the rule in the present case would be dictum and would not help Tyler. Therefore, the Court affirmed the decision of the Court of Appeals that the petition was properly dismissed.

Use of Thermal-Imaging Device to Measure Heat Emanating from Home is a Search for Fourth Amendment Purposes

Kyllo v. United States, 121 S.Ct. 2038 (2001).

◆ Fourth Amendment - warrantless search

In a 5 to 4 decision, the Supreme Court held that the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a "search" within the meaning of the Fourth Amendment.

Suspecting that marijuana was being grown in the home of Danny Kyllo, federal agents used a thermal imager to scan Kyllo's home to determine whether the level of heat emanating from the house was consistent with the use of high-intensity lamps typically

used to grow marijuana. Agents scanned the home from the agents' vehicle parked across the street from Kyllo's home and from a street behind the house. The scan revealed that Kyllo's home was substantially warmer than neighboring homes and that a particular wall of the home was hot when compared with the rest of the house. Based on this as well as other information, a search warrant was obtained for Kyllo's home. During the search, agents discovered more than 100 marijuana plants growing inside Kyllo's home.

Following a remand from the Ninth Circuit to determine the intrusiveness of thermal imaging, the district court found that the thermal imager was a "non-intrusive" device which revealed nothing about either people or activity within the home, and thus upheld the validity of the search warrant and denied Kyllo's motion to suppress. The Court of Appeal affirmed, holding that there was no objectively reasonable expectation of privacy in the heat emanating from one's home.

In reversing the Court of Appeals, the Supreme Court distinguished this case from those cases involving "naked-eye surveillance of a home." This case involved "sense-enhancing technology" which, the Court reasoned, should not be used to "erode the privacy guaranteed by the Fourth Amendment. The Court held, "obtaining by sense-enhancing technology any information regarding the interior of the home that could not have otherwise been obtained without 'physical intrusion into a constitutionally protected area,' . . . constitutes a search - - at

least where (as here) the technology in question is not in general public use." Such a search, the Court added, is presumptively unreasonable without a warrant. Thus, the information obtained in this case was the product of a search.

The majority rejected the distinction the dissenters drew between "off-the-wall" and through-the-wall" observations, noting that such a rule disregards potential advances in technology which could discern all human activity within the home from such off-the-wall observations. The Court also rejected the argument that the search did not uncover any "intimate details" about the homeowner, noting that in the sanctity of the home, all details are intimate ones.

The Court thus found the use of the thermal imaging device to be an unlawful search and remanded the case to the district court to determine whether, without this information, the warrant was supported by probable cause.

AEDPA's Limitation Period Not Tolled During Pendency of Previously Filed Federal Habeas Petition

Duncan v. Walker, 121 S.Ct. 2120 (2001).

◆ 28 U.S.C. § 2244(d)(2) - tolling AEDPA's statute of limitations

Pursuant to 28 U.S.C. section 2244(d)(2), "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent

judgment or claim is pending shall not be counted toward any period of limitation under this subsection.” In this case, the Court held that a federal habeas petition does not qualify as an “application for State post-conviction or other collateral review,” and thus does not toll the AEDPA’s statute of limitations.

Following several convictions on state robbery charges, the respondent unsuccessfully challenged his convictions in state court. He then filed a federal habeas petition in district court which was dismissed, without prejudice, for failure to exhaust state court remedies. The AEDPA became effective shortly thereafter, and on May 20, 1997, or more than a year after AEDPA’s effective date, the respondent filed another federal habeas corpus petition. The district court dismissed this petition as untimely as it had not been filed within a “reasonable time” from the AEDPA’s effective date.

The Second Circuit reversed and reinstated the petition holding that, as respondent’s conviction was final before the AEDPA’s effective date of April 24, 1996, he had until April 24, 1997 to file his federal habeas petition, and that exclusion of the time during which his first federal habeas petition was pending, rendered the instant petition timely. According to the Court of Appeals, the first federal petition constituted an application for

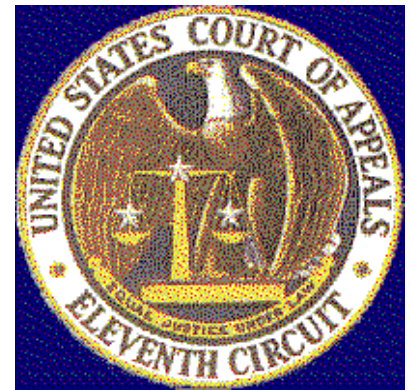
“other collateral review” which tolled the limitation period. The Supreme Court rejected this reasoning and reversed.

The Court adopted the petitioner’s interpretation of the statute that the word “State” referred to the entire phrase “post-conviction or other collateral relief” and not just to the phrase “post-conviction” as urged by the respondent. The Court reasoned that, had Congress intended to include federal habeas petitions within the tolling provisions of § 2244(d), it would have expressly done so, as it had in other provisions of the AEDPA. Additionally, the Court noted that adopting the respondent’s view would render the use of the word “State” in the provision insignificant and thus contrary to the Court’s duty to give effect, if possible, to every clause and word of a statute.

Furthermore, the Court found that by interpreting the word “State” as applicable to the entire phrase, the provision was consistent with the purpose of the AEDPA of furthering the principles of comity, finality and federalism, noting that, “if the statute were construed so as to give applications for federal review the same tolling effect as applications for state collateral review, then § 2244(d)(2) would furnish little incentive for individuals to seek relief from the state courts before filing federal habeas petitions. The tolling provision instead would be indifferent between state and federal filings.”

Holding that § 2244(d)(2) does not toll the limitation period during the pendency of a federal

habeas petition, the Court concluded that the limitation period had not been tolled during the pendency of the respondent’s first federal habeas petition, and thus reversed the decision of the Court of Appeals.



RECENT ELEVENTH CIRCUIT DECISIONS

28 U.S.C. § 5861(d) Conviction Requires Proof Defendant Knew of Features of Firearm Which Brought it Within Scope of National Firearms Act

United States v. Moore, 253 F.3d 607 (11th Cir. 2001).

◆ 26 U.S.C. § 5861(d) - possession of an unregistered silencer

While conducting a search of the defendant’s home, narcotics investigators located and seized what they believed to be a silencer. The

defendant was later charged and convicted of violating 26 U.S.C. § 5861(d), possession of a silencer not registered in the National Firearms Registration and Transfer Record.

On appeal, the defendant argued that the jury had been improperly instructed on the *mens rea* element of the offense. The district court instructed the jury that it must find that the defendant “knowingly possessed a silencer.” However, as the Court noted, to support a § 5861(d) conviction, “the government need not prove that the defendant knew that the ‘firearm’ was not registered, but must prove beyond a reasonable doubt that the defendant knew of the features of the ‘firearm’ that brought it within the scope of the National Firearms Act.”

According to the defendant, the court’s instruction required the jury to find only that the defendant knowingly possessed the instrument. The court erred, he claimed, because it should have instructed the jury that the government was required to prove, beyond a reasonable doubt, that he knew the characteristics of the object seized which brought it within the statutory definition of a silencer. The Court of Appeals disagreed. Although the language “knowingly possessed a silencer” was somewhat ambiguous, the trial court also instructed the jury that “the Government must prove beyond a reasonable doubt that the Defendant knew he possessed a silencer.” This additional

language, the Court held, properly instructed the jury that the government must prove the defendant knew of the characteristics of the item which brought it within the scope of the Act.

Additionally, the Court held that there was sufficient evidence to support the conviction. When asked by officers where he got the silencer, the defendant responded that he purchased it in Georgia. He neither denied that it was a silencer nor indicated he did not know what object the officers were referring to. Moreover, the jury could have inferred that the defendant had the requisite knowledge based on the condition of the object. The defendant’s § 5861(d) conviction was therefore affirmed.

Imposition of Consecutive Sentences Under 18 U.S.C. §§ 844(d) and 924(c) Does Not Violate Double Jeopardy Clause

United States v. Strickland, 261 F.3d 1271(11th Cir. 2001).

◆ Fifth Amendment - Double Jeopardy; 18 U.S.C. § 844(d)-transportation of explosive materials; 18 U.S.C. § 924(c)(1) - using/carrying a pipe bomb during a crime of violence

The Eleventh Circuit affirmed the conviction and sentence of Robert Strickland who was found guilty of offenses involving his placing of a pipe bomb on his ex-wife’s new husband’s car. In addition to his sentences for other offenses, Strickland received 100 months imprisonment for violating

18 U.S.C. § 844(d), transporting explosive materials in interstate commerce, and 360 months imprisonment for violating 18 U.S.C. § 924(c)(1), knowingly using and carrying a pipe bomb during and in relation to a crime of violence. These sentences were to be served consecutively.

Strickland argued that the convictions and sentences violated the Double Jeopardy Clause because the counts of conviction involved a single course of conduct, i.e. carrying the same explosive. In rejecting this argument, the Court noted that “there is no case law that prohibits a single course of conduct from serving as the basis for both a predicate offense and its enhancement.” The Court pointed out that § 924(c)(1) expressly states that punishments for the use of a dangerous weapon are imposed in addition to the punishment imposed for the predicate violent offense. Because Congress clearly intended to impose cumulative punishments under the two statutes, the trial court was required to impose cumulative punishments.

In affirming the convictions and sentences the Court stated, “Although it may seem an unintended consequence of the statutory scheme to enhance a penalty for using explosives based on a predicate crime involving those same explosives, the language is clear, thus, this Court’s statutory interpretation inquiry is at an end.”

Decision to Request Mistrial Not a Fundamental One Reserved to Defendant Thus Tactical Decision Not to Seek Mistrial Not Ineffective Assistance

United States v. Burke, 257 F.3d 1321(11th Cir. 2001).

◆ **Sixth Amendment-ineffective assistance of counsel**

James Burke was convicted of one of several charges involving the receipt of a bribe from a government agent. After deliberating for 5 days, the jury informed the court it had reached a verdict on all but two of the charged counts. The government requested that the verdict be accepted and a mistrial be declared on the remaining counts. Although Burke told his attorney he wanted to accept the verdict, the attorney instead requested the court to instruct the jury with a modified Allen charge. The district court granted defense's counsel request and two hours later, the jury returned a guilty verdict with regard to one of the counts on which they had previously been unable to reach a decision.

On appeal, Burke claimed his counsel was ineffective for disregarding his request to consent to a mistrial. The Eleventh Circuit disagreed. The choice of whether to accept a mistrial, the court held, was not one of the fundamental decisions regarding the case about which the defendant has the ultimate decision-making authority. The

Supreme Court has listed only four such decisions: whether to plead guilty, waive a jury, testify in his or her own behalf or take an appeal, and the Eleventh Circuit declined to add to the list. The decision of whether to request a mistrial, it held, is a tactical one entrusted to defense counsel and it binds the defendant even when he expresses a contrary wish to his lawyer.

Court's Failure to Appoint Counsel after Concluding that Evidentiary Hearing was Required was Error Requiring Reversal - Harmless Error Analysis Not Applicable

United States v. Shepherd, 253 F.3d 585 (11th Cir. 2001) (per curiam).

◆ **Rule 8(c), Rules Governing § 2255 Proceedings - appointment of counsel required if petitioner entitled to evidentiary hearing**

The Court of Appeals reversed the district court's denial of Mark Shepherd's § 2255 petition because, after determining that an evidentiary hearing was required, the district court failed to appoint counsel to represent Shepherd.

Shepherd had filed a § 2255 motion challenging his conviction and sentence for bank robbery. In spite of the fact that the district court ordered an evidentiary hearing on the motion, the court denied Shepherd's request for appointed counsel. During the hearing, the court placed Shepherd under oath and questioned him regarding his claims. The court then denied the motion as frivolous.

Relying on Rule 8 of the Rules Governing § 2255 Motions, the Court of Appeals reversed. Pursuant to Rule 8(c), "[i]f an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g)." Because Shepherd qualified for representation under § 3006(A), the district court was obligated to appoint counsel to represent Shepherd at the evidentiary hearing.

Additionally, the Court rejected the Government's argument that the district court's error in failing to appoint counsel was harmless because Shepherd was not entitled to an evidentiary hearing. Joining other circuits which have considered the issue, the Court held that "the failure to appoint counsel under Rule 8 of the Rules Governing § 2255 Motions is not subject to harmless error analysis," noting that the language of the rule is mandatory. The Court remanded the case to the district court for appointment of counsel and an evidentiary hearing.

Magistrate Judge Exceeds His Authority By Conducting Critical Stage of Trial Without Parties' Consent

United States v. Desir, 257 F.3d 1233 (11th Cir. 2001).

Article III; Federal Magistrates Act- duties of magistrate judges during felony trials

The Eleventh Circuit held that a magistrate judge had exceeded his authority by presiding over a

critical stage of the defendant's trial without the defendant's consent. The defendant's possession with intent to distribute crack cocaine conviction was therefore reversed.

During the defendant's trial, the district court judge advised the jury that he might be unable to be present during the second day of jury deliberations, but that a magistrate judge would be present, if he could not, to take the verdict or do whatever was necessary. The parties did not object. During deliberations, the jury requested to have a portion of a witness's testimony read back to them. Without consulting the district court judge, the magistrate judge decided to deny the jury's request, instructing the jury to rely on their collective memory. The defendant objected to the decision but not to the making of it by the magistrate judge.

Citing *Pertez v. United States*, 501 U.S. 923 (1991) and *United States v. Maragh*, 174 F.3d 1202 (11th Cir.), supplemented on denial of rehearing, 189 F.3d 1315 (11th Cir. 1999), the Court noted that both the Supreme Court and the Eleventh Circuit had "established a bright line rule that a magistrate judge exceeds his or her jurisdiction by presiding at a felony trial during a critical stage of the proceeding without the defendant's consent." While noting that the mere acceptance of a verdict and the polling of a jury are ministerial tasks which a

magistrate judge may properly perform, instructing the jury, as the magistrate judge in this case had done, does not constitute one of these acceptable duties.

Because the defendant had not consented to the magistrate judge's actions, and because the magistrate judge failed to consult with the district court judge regarding the jury's request, the Court held that "the magistrate judge inappropriately exercised the authority of an Article III judge at a critical stage of the proceeding by responding to the jury's question that went beyond the simple performance of a ministerial task." The defendant's conviction was therefore reversed.

Amount of Intended Loss for Credit Card Theft Properly Fixed at Total Amount of Credit Limits on Cards Applied for by Defendant Even Though Actual Charges Were Less

United States v. Manoocher Nosrati-Shamloo, 255 F.3d 1290 (11th Cir. 2001) (per curiam).

◆ **18 U.S.C. §1708- theft of mail**

The Eleventh Circuit upheld the defendant's conviction and sentence for knowingly and willfully stealing mail from the United States mail, in violation of 18 U.S.C. §1708. The defendant took credit card applications from the mailboxes of several Miami residents and opened credit card accounts in the residents' names. At sentencing, the judge determined the amount of loss to be \$43,000, the combined amount

of the credit limits on the cards the defendant had obtained by stealing the victims' mail.

The Court of Appeals rejected the defendant's argument that his sentence should have been based on the actual charges made against the cards. Instead, the Court held that "once a defendant has gained access to a certain credit line by fraudulently applying for credit cards, a district court does not err in determining the amount of the intended loss as the total line of credit to which Defendant could have access, especially when Defendant presents no evidence that he did not intend to utilize all of the credit available on the cards." In this case, the defendant presented no evidence that he did not intend to use all of the available credit on the cards. Therefore, the district judge did not err in determining that the defendant intended a loss of \$43,000. The defendant's sentence was affirmed.

The Jurisdictional Element of § 922(g), which Requires That Firearm be Possessed "In or Affecting Commerce," Brings Statute Within Powers of Congress Under the Commerce Clause

United States v. Dupree, 258 F.3d 1258 (11th Cir. 2001).

◆ **18 U.S.C. §922(g)(1) - felon in possession of firearm**

The Eleventh Circuit held that the Supreme Court's decision in *United States v. Morrison*, 529 U.S. 598 (2000) does not overrule the Court of Appeals' previous holding in *United States v. McAllister*, 77 F.3d 387 (11th Cir. 1996) that 18

U.S.C. §922(g) does not violate the Commerce Clause.

Myron Dupree argued that his §922(g)(1), felon in possession, conviction should be reversed because the statute was unconstitutional both on its face and as it applied to his case. The Court rejected these arguments. In *McAllister*, the Court had considered a challenge to § 922(g) based upon *United States v. Lopez*, 514 U.S. 549 (1995). In upholding the statute, the Court noted that § 922(g) criminalizes the possession of a firearm “in or affecting commerce,” thus the statute explicitly requires a connection to interstate commerce.

Lopez on the other hand, involved a statute, the Gun Free Schools Act, which had nothing to do with commerce or any economic enterprise. “It is this jurisdictional element to § 922(g),” the Court noted, “that distinguishes it from the Gun Free Schools Act and, accordingly, the holding in *Lopez*.” The Supreme Court’s decision in *Morrison*, which struck down the Violence Against Women Act, like its decision in *Lopez*, was based on the fact that the statute neither involved economic activity nor contained any jurisdictional element which brought it within the Commerce Clause. Thus, the Court concluded, the *Morrison* decision did not overrule the holding in *McAllister* that the jurisdictional element of § 922(g) brings it within Congress’s commerce powers.

Enhancing Defendant’s Sentence Based Upon Both More than Minimal Planning and Use of Sophisticated Means is Not Impermissible Double Counting

United States v. Humber, 255 F.3d 1308 (11th Cir. 2001).

◆ U.S.S.G. § 2F1.1(b)(2)(A) - two-level enhancement for fraud offense involving more than minimal planning; U.S.S.G. § 2F1.1(b)(5)(C) - two-level enhancement for fraud offense involving use of sophisticated means (U.S.S.G., 1998 ed.)

In a case of first impression, the Court held that a defendant may receive both a two-point enhancement under U.S.S.G. § 2F1.1(b)(2)(A) for more than minimal planning and an additional two-point enhancement under U.S.S.G. § 2F1.1(b)(5)(C) for the use of sophisticated means, as the two sections are to be applied cumulatively, rather than in the alternative.

Robert Humber pled guilty to 83 counts of bank fraud, money laundering, forfeiture and tax evasion involving more than 18 million dollars. At sentencing, Humber received enhancements to his base offense level for both more than minimal planning and use of sophisticated means. Humber argued that the two enhancement sections must be imposed in the alternative otherwise their cumulative imposition would result in impermissible double counting for the same conduct.

Although Humber admitted

that his conduct involved the use of sophisticated means, he argued that the conduct contemplated by the more than minimal planning enhancement was subsumed within the sophisticated means enhancement. In rejecting this argument, the Court held that, while more than minimal planning may not necessarily involve sophisticated means, a defendant who uses sophisticated means will always receive an additional enhancement for more than minimal planning. Humber’s crimes continued over a 7 year period and were of a particularly complex nature. Therefore, the Court affirmed the district court’s imposition of both enhancements.

***Apprendi* Does Not Apply to Forfeiture Proceedings Following a Criminal Conviction – Burden of Proof is Preponderance of the Evidence.**

United States v. Cabeza, 258 F.3d 1256 (11th Cir. 2001) (per curiam).

◆ Criminal Forfeiture - punishment, not an element of the offense

Joining the other circuits which have considered the issue, the Eleventh Circuit held that criminal forfeiture is a punishment, not an element of the offense, and thus it falls outside the reach of *Apprendi*. A jury found Ileana Cabeza guilty of conspiracy to possess with intent to distribute cocaine and returned a verdict of forfeiture against her real property. The district court rejected Cabeza’s argument, based on *Apprendi*, that the jury was required to find, beyond a reasonable doubt,

that her house was used to facilitate the conspiracy.

The Court of Appeals agreed that the district court properly instructed the jury that the appropriate standard of proof was a preponderance of the evidence. Relying on *Libretti v. United States*, 516 U.S. 29, 116 S. Ct. 356, 363, 133 L.Ed.2d 271 (1995), the Court held that “forfeiture is not a separate offense, but is instead ‘an aspect of punishment imposed following conviction of a substantive criminal offense.’” Thus, *Apprendi* is inapplicable and the appropriate burden of proof is a preponderance of the evidence.

ELEVENTH CIRCUIT HABEAS DECISIONS

Absence of Counsel at Resentencing Violates Sixth Amendment - Habeas Petition Granted

Hall v. Moore, 253 F. 3d 624 (11th Cir. 2001).

◆ **Sixth Amendment - right to counsel at critical state of proceeding**

Darrial Hall was convicted of second-degree murder and other offenses. After successfully appealing his sentence and one of his convictions in state court, Hall filed a § 2254 petition in federal court claiming that his Sixth Amendment rights had been violated when the trial court

resentenced him without the assistance of counsel. The Eleventh Circuit agreed and granted the petition.

The district court had found that Hall’s resentencing was simply a “ministerial act” and thus Hall was not entitled to counsel. The Court of Appeals rejected this conclusion. The state courts had reversed one of Hall’s convictions. Thus, the Court noted, Hall’s entire sentence had become void and the district court had the discretion to reconstruct the entire sentence. In such cases, the Court held, “Hall’s presence and his counsel’s presence were a necessity, not a ‘luxury.’” (citing *United States v. Cronin*, 466 U.S. 648, 653 (1984)).

Additionally, although a defendant may waive his right to counsel at such a critical stage, the court must first conduct a hearing to determine whether the defendant is aware of the dangers of self-representation. Moreover, the defendant must clearly and unequivocally assert his right to proceed *pro se*. In this case, there was neither a hearing nor a clear assertion that Hall wished to proceed without counsel. Thus, there was a presumption of prejudice. Because Hall’s resentencing constituted a critical stage of the proceeding, and because Hall’s rights were prejudiced, the Court granted his § 2254 petition and ordered that Hall be resentenced with counsel present.

State Motion for Post-conviction Relief, Filed One Year and Four Months After Conviction Became Final, Did Not Toll AEDPA’S One-Year Statute of Limitations

Tinker v. Moore, 255 F.3d 1331 (11th Cir. 2001).

◆ **28 U.S.C. § 2244 (d) - one-year period of limitation for filing § 2254 petition**

The Eleventh Circuit upheld the dismissal of Gerald Tinker’s § 2254 petition as time barred. Section 2244(d) establishes a one-year filing limitation period for § 2254 petitions. However, pursuant to § 2244(d)(2), during the time a properly filed state post-conviction petition is pending, the one-year limitations period is tolled.

Tinker’s conviction became final in February 1997, thus absent tolling, he had until February of 1998 to file his § 2254 petition. In June of 1998, or after the one-year period had run, Tinker filed a state post-conviction petition in Florida. Because Florida allows such petitions to be filed within 2 years of the date a petitioner’s conviction becomes final, Tinker argued, his state petition was timely filed and tolled the limitations period on his federal petition. The Court rejected this argument. Because Tinker’s state petition was not filed until 4 months after the time for filing a federal petition has expired, there was no remaining limitation period to be tolled. Thus, the Court held, the district court properly concluded that the petition was time barred under § 2244(d).

The Court also rejected as meritless Tinker’s argument that, if his petition is time barred, § 2244(d) as applied to him is unconstitutional because it violates the Suspension

Clause.

Neither Attorney's Misinformation Regarding Filing Deadline Nor Prison Library's Lack of AEDPA Amendments Constitute "Extraordinary Circumstances" Warranting Equitable Tolling of One-Year Limitation Period

Helton v. Secretary for the Dept. of Corrections, 259 F.3d 1310 (11th Cir. 2001) (per curiam).

◆ **28 U.S.C.A. § 2244(d)(1)(A) - equitable tolling for extraordinary circumstances**

On rehearing, the Eleventh Circuit reversed the grant of Kris Helton's habeas corpus petition in which he claimed to have received ineffective assistance of counsel at his second-degree murder trial due to his counsel's failure to challenge the prosecution's theory regarding the victim's time of death. Helton admitted that his § 2254 petition was untimely filed, but the district court had held that equitable tolling of the statute of limitations was warranted based on Helton's diligent pursuit of his appellate rights, the fact that his attorney misinformed him regarding the filing deadlines, and the strange history of the case. The district court then granted the writ.

The AEDPA's one-year statute of limitations may be equitably tolled when "extraordinary circumstances" have prevented an otherwise

diligent petitioner from timely filing his petition. The Court of Appeals found that the circumstances advanced by Helton were not so extraordinary as to excuse his untimely filing. Helton had filed his petition by the date his attorney advised him such a petition must be filed. He argued that his attorney's erroneous advice warranted equitable tolling. The Court disagreed, citing *Steed v. Head*, 219 F.3d 1298 (11th Cir. 2000), in which the Court had held that an attorney's miscalculation of the filing deadline does not constitute "extraordinary circumstances." Additionally, Helton's attorney had advised him that he needed to check the filing deadlines himself. Therefore, Helton was not diligent in "ascertaining the applicable limitations period" and cannot now claim "extraordinary circumstances."

The Court also rejected Helton's argument that his failure to timely file the petition was based on the inadequacies of the prison library which did not contain the AEDPA's provisions creating a one-year statute of limitations. The Court noted that Helton had been put on notice of confusion of possible filing dates by his attorney, that he did not show whether he did anything to remedy the library's deficiency, or that there was any connection between his untimely filing and the alleged inadequacies of the prison library.

Finally, the Court held that the "strange history of the case" was not, as relied upon by the district court, a proper basis for finding extraordinary circumstances. Such a finding is not, the Court noted, to be based on the merits of the case.

Holding that "the 'extraordinary circumstances' standard . . . focuses on the circumstances surrounding the underlying conviction," the Court rejected Helton's argument that the nature of the case justified his untimely filing, and reversed the decision of the district court.

Defense Counsel's Conflict of Interest Did Not Deprive Defendant of Effective Assistance of Counsel in Connection with Defendant's Entry of Guilty Plea

Pegg v. United States, 253 F.3d 1274 (11th Cir. 2001).

◆ **Sixth Amendment - ineffective assistance based on counsel's conflict of interest**

The Eleventh Circuit affirmed the denial of Joe Pegg's § 2255 petition in which he argued that, due to his attorney's conflict of interest, he was deprived of the effective assistance of counsel and that therefore the trial court erred in not allowing him to withdraw his guilty plea. In order for a defendant to prevail on such a claim, the Court noted, he must show both that his attorney had an actual conflict of interest and that this conflict adversely affected his counsel's performance.

Pegg had been charged with conspiracy to import marijuana in Florida, and he hired two Washington D.C. attorneys to represent him. One of these attorneys, James Sharp, had represented Pegg for years and the two were close friends. These

attorneys associated a Florida attorney to serve as local counsel in the case. Before trial, one of Pegg's co-conspirators became a government witness. According to this witness, Sharp had had privileged conversations with the witness during which the attorney helped him fabricate a story to help exculpate Pegg. Recognizing this potential conflict, Pegg's attorneys agreed that if Sharp ended up testifying at trial, the Florida attorney would become lead attorney in the case. In addition, the attorneys discussed the situation with Pegg who begged Sharp not to withdraw from the case.

Although Pegg had planned to go to trial, during a pretrial hearing, another codefendant decided to plead guilty and during his plea colloquy, gave incriminating testimony against Pegg. In light of this change in circumstances, Pegg's attorneys negotiated a written plea agreement with the government after deciding it was in Pegg's best interest to plead guilty. Because Pegg had failed to provide truthful information to federal agents, the government did not move for a downward departure. Pegg then tried to withdraw his guilty plea but the court denied his request.

Under these circumstances, the Court found that Sharp did have an actual conflict of interest created by the accusations of the government's witness that he engaged in unethical and criminal activity in connection with his

representation of Pegg. However, the Court also found that there was no evidence in the record that Sharp's performance had been adversely affect by this conflict. Thus, there was no 6th Amendment violation.

In situations involving guilty pleas, the Court "looks at whether the attorney's actual conflict adversely affected the defendant's decision to plead guilty." Here, Pegg's plea agreement had been devised by his Florida attorney, an attorney who had no conflict of interest. Additionally, the Court noted, had Pegg gone to trial, the testimony of his co-conspirator would have been devastating to his case. Thus, the attorneys' recommendation that Pegg plead guilty was a sound one and in Pegg's best interest.

Finally, the Court rejected a per se rule that this type of conflict creates a Sixth Amendment violation without the need to show an adverse effect. Although such a rule may be acceptable in some circumstances, it would not be applicable here. In this case, the district court held an evidentiary hearing in which it found the allegations against Sharp to be false. Moreover, unlike the case cited by Pegg, this case did not involve allegations that counsel was involved in the charged crime and did not involve a case where the defendant chose to go to trial. This case was still at a stage at which Pegg's interest outweighed those Sharp may have had if the case had gone to trial. Under these circumstances, the defendant did not suffer a violation of his Sixth Amendment rights and the district

court properly denied his petition.



Staff Changes at the Federal Defender's Office

Jimmie Fisher began work with this office on August 20, 2001 as our Computer Systems Administrator. Ms. Fisher was born and raised in Prattville and is a graduate of Auburn University at Montgomery. She is married and has one son. She was formerly Information Technology Project Manager for the Alabama appellate courts. In that position, Ms. Fisher designed, established and maintained the local and wide area networks for all Alabama appellate courts. Since joining this office, Ms. Fisher has completed a review and inventory of our computer equipment, software, and computer usage; has made recommendations for related purchases and begun upgrades of software and installation of the new purchases; and has accompanied lawyers during investigation of computer-related issues in our cases. She has also researched the computer systems which have been or will be installed in the new federal court house. She will be giving a presentation on courtroom technology at our November 9, 2001 six-hour seminar in Montgomery.

**Assistant Federal Defender
Position Available**

We have begun advertising the permanent opening created by John Focke's passing. The Defender Services Division has imposed a hiring freeze on all programs, because the national budget process has not yet been completed and there is a substantial gap between the pending Senate and House committee proposals for DSD. However, the freeze is not expected to last long and we can still advertise and screen candidates for vacant positions. We are accepting applications through October 26, 2001.

Schedule of Upcoming Events

The following is a list of Brown Bag Seminar topics scheduled for the next few months. If you wish to attend any or all of these seminars but have not received an application form, please contact Lynn Marquess at (334)834-2099 to register.

☛ **October 10, 2001 (Montgomery) and October 18, 2001 (Dothan):**

Litigation Strategy: How to Win at Sentencing

This session will provide 60 minutes of panel discussion with judges from the Middle District of Alabama on effective presentation of sentencing issues, including the information and arguments helpful to the court in sentencing memoranda and at the sentencing hearing, necessary

contents of motions for downward departure, the impact of facts asserted in the presentence report and the report's description of contested issues, and how determination may be made as to the selection of the penalty within the guideline range.

☛ **November 14, 2001 (Montgomery) and November 15, 2001 (Dothan) (*note that this is the second Thursday of the month):**

"Meth" - How to Defend a Methamphetamine Case

This session will provide 60 minutes of discussion on effective defense of federal methamphetamine charges, including statutory issues, evaluation of lab reports and estimates concerning potential drug quantities and sentencing issues.

☛ **December 12, 2001 (Montgomery) and December 20, 2001 (Dothan):**

"Guns" - How to Defend a Federal Firearms Charge

This session will provide 60 minutes of discussion on effective defense of federal firearm offense charges, including statutory issues, evaluation of ATF reports, sentencing issues under the firearms guidelines and potential sentencing issues presented by the allegation of the presence of a firearm during the commission of other offenses.

☛ **January 9, 2002 (Montgomery) and January 17, 2002 (Dothan):**

Impact of State Sentences

This session will provide 60 minutes of discussion on the impact of state sentences on the calculation of criminal history for federal sentencing, the effect of judgments holding that sentences are to be consecutive or concurrent, and steps to take to minimize the impact of dual sentencing on the client.

☛ **February 13, 2002 (Montgomery) and February 21, 2002 (Dothan):**

Mediating Criminal Cases

This session will provide 60 minutes of discussion on the mediation of federal criminal cases: how to request mediation, how mediation is conducted, and the pros and cons of having mediation.

NOTE: Brown Bag Seminars in Montgomery are held at the Farmer's Market Café, 315 N. McDonough Street from 11:30 to 1:00 p.m. on the second Wednesday of each month, and in Dothan on the third Thursday of each month at Shoney's restaurant (unless otherwise indicated).



CJA TRAINING SEMINAR

In addition to the above

mentioned brown bag seminars, the Federal Defender Office for the Middle District of Alabama will be holding its annual all-day seminar on Friday, November 9, 2001. Registration begins at 8:00 and the seminar will be held at the Alabama State Bar Center, 415 Dexter Avenue in Montgomery.

The seminar will cover a variety of topics such as racial profiling, federal weapons offenses and use of computers in the courtroom, and will feature speakers from all over the country.

For more information or to register, contact Lynn Marquess at (334)834-2099.

(This seminar has been approved for 6 hours MCLE credit.)

