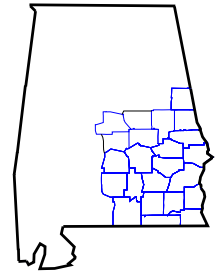


CJA NEWS



“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:

In *Arkansas v. Sullivan*, 121 S.Ct. 1876 (May 29, 2001), the U.S. Supreme Court clarified its decision in *Whren v. United States*, 116 S.Ct. 1769 (1996), that “(s)ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,” 116 S.Ct. at 1774, and held that the Fourth Amendment offers no suppression remedy for a stop based on objective law violations but inspired by an improper motive.

One reaction might be that the constitutional weapons available for obtaining criminal justice have been reduced. But alternative approaches are underway. New Jersey’s change of its state police procedures arose in part from motions to suppress brought by lawyers in a small law office in Woodbury, New Jersey. In *State of New Jersey v. Soto, et al.*, 324 N.J.

Super. 66, 734 A.2d 350 (1996), the trial judge held that the defendants had established the state police policy of targeting African Americans for investigation and arrest and were entitled, by their rights to equal protection and due process, to suppression of all evidence seized.

In “Safeguarding Equal Protection Rights: the Search for an Exclusionary Rule under the Equal Protection Clause,” 37 Am. Crim. L. Rev. 1107 (Summer 2000), the author argues that “the Equal Protection Clause operates independently to prevent and remedy racial and other invidious discrimination by governmental actors,” and that “the exclusionary rule represents [the] substantive remedy that the law needs to recognize to give the Equal Protection Clause meaning and effect during criminal investigations.” In *State of New Jersey v. Maryland*, 771 A.2d 1220 (2001), the New Jersey Supreme Court held that “(t)he Equal Protection Clause of the Fourteenth Amendment requires that the

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selection of a person for a field inquiry, referred to as a consensual encounter with the police in some of the federal cases, may not be based solely on that person's race absent some compelling justification that pre-existed the police approaching the individual." 771 A.2d at 1228.

We plan to address how to effectively challenge "racial profiling" in the context of a criminal case at our upcoming six hour seminar. Scheduled for the Alabama Bar Center on September 28, the seminar will again have speakers addressing a range of topics helpful to federal defense practitioners.

As always, we thank you for your dedication on behalf of indigent persons who happen to become federal defendants.

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:

Fifth Amendment Privilege Extends to Witness Who Claims Innocence if Witness Has Reasonable Cause to Apprehend Danger From Her Answers

Ohio v. Reiner, 121 S.Ct. 1252 (2001).

◆ Fifth Amendment - privilege against self-incrimination

In a per curiam opinion, the United States Supreme Court held that a babysitter called as a witness in the prosecution of a father whose baby had died of shaken-baby syndrome, could assert her Fifth Amendment privilege against self-incrimination in spite of the fact that

she denied any involvement in the baby's death.

Matthew Reiner had been convicted of involuntary manslaughter in the death of his two-month-old son. During the trial, Susan Batt, the child's babysitter, testified on behalf of the prosecution. Because Batt had informed the prosecution of her intent to assert her Fifth Amendment privilege, the State requested, and the trial court granted, Batt transactional immunity in exchange for her testimony. During her testimony, Batt denied any involvement in the child's death.

In affirming the reversal of Reiner's conviction, the Ohio Supreme Court had held that "a witness who denies all culpability does not have a valid Fifth Amendment privilege against self-incrimination," and that therefore the trial court's grant of immunity was unlawful. Holding that this decision conflicted with prior Supreme Court precedents, the Supreme Court reversed.

In *Hoffman v. United States*, 71 S.Ct. 814 (1951), the Court had held that the privilege extends to witnesses who have "reasonable cause to apprehend danger from a direct answer." *Id.* at 814. Additionally, in *Grunewald v. United States*, 77 S.Ct. 963 (1957), the Court had stated that one of the Fifth Amendment's "basic functions. . . is to protect *innocent* men . . . who otherwise might be ensnared by ambiguous circumstances." *Id.* (internal quotes omitted). Therefore, the Court noted, it had never held, as the Ohio

Supreme Court did, that the privilege is not available to those witnesses who claim innocence. Thus, the Ohio Supreme Court's decision conflicted with both of these prior decisions.

The Court reasoned that Batt did have "reasonable cause" to apprehend danger from her answers because Batt had spent extended periods of time alone with the child in the weeks prior to his death. Additionally, the theory of the defense was that Batt was responsible for the child's death. "In this setting, it was reasonable for Batt to fear that answers to possible questions might tend to incriminate her. Batt therefore had a valid Fifth Amendment privilege against self-incrimination." The judgment of the Ohio Supreme Court was therefore reversed.

Whether Alleged Career Offender's Prior Convictions Were "Functionally Consolidated" for Sentencing Purposes is Subject to Deferential, Rather than *De Novo*, Standard of Review

Buford v. United States, 121 S.Ct. 1276 (2001).

◆ **U.S.S.G. §§ 4A1.2(a)(2), 4B1.1, 4B1.2(c) - determination of the number of prior offenses for purposes of career offender application**

In a unanimous decision, the Supreme Court held that a deferential standard of review applies when a court of appeals reviews a trial court's Sentencing

Guidelines determination as to whether a defendant's prior convictions were consolidated for purposes of sentencing. In this case, the defendant challenged her sentence as a career offender following her conviction for armed bank robbery. At issue was whether the defendant's five prior state court convictions had been "functionally consolidated" for purposes of sentencing so that they counted as simply one prior conviction, thus making the career offender designation, which requires "at least two prior felony convictions," improper.

The Government had conceded that four of the prior convictions were "related" to one another as they involved four prior robberies which were the subject of a single indictment to which the defendant had previously pled guilty. However, they argued that a prior drug conviction was unrelated to the robberies, and should therefore be counted separately. Although the defendant claimed that the robberies were motivated by her drug addiction, the only connection between the crimes was that the police discovered the drugs while searching the defendant's home after her robbery arrest. The drug charge was contained in a separate indictment, was handled by a different prosecutor, and the defendant's guilty plea to this charge was taken by a different judge.

The defendant argued, however, that this conviction had been consolidated with the robbery convictions because the same judge sentenced her for all five crimes, at the same sentencing hearing, and

because he ordered the defendant's sentences to run concurrently. In considering the district court's rejection of this argument, the Court of Appeals held that the issue of whether the sentences had been "functionally consolidated" was a close one which might turn on the appropriate standard of review. The Court of Appeals applied a deferential standard of review and held that the district court had properly concluded that the offenses had not been consolidated.

The Supreme Court, resolving a circuit split on the issue, affirmed the Court of Appeals' decision and held that a deferential, rather than a *de novo*, standard of review is the appropriate one. The Court reasoned that a district court is in a better position than an appellate court to determine whether the particular circumstances demonstrate "functional consolidation" because a district court judge sees more "consolidations" than does an appellate judge and is more likely to be familiar with trial and sentencing practices.

Additionally, the Court rejected the argument that a *de novo* standard of review would provide heightened uniformity of decisions. Because the issue was not one of a generally recurring legal matter, but rather, grows out of case-specific detailed factual considerations, the value of any appellate court precedent would be only minimal when "other courts consider other procedural circumstances, other state systems, and other crimes." Thus, based upon the "fact-bound nature of the legal decision, the

comparatively greater expertise of the District Court, and the limited value of uniform court of appeals precedent,” the Supreme Court affirmed the Court of Appeals deferential review of the lower court’s decision.

Sixth Amendment Right to Counsel is Offense Specific and Does Not Necessarily Extend to Offenses “Factually Related” to Offenses Actually Charged

Texas v. Cobb, 121 S.Ct. 1335 (2001).

◆ Sixth Amendment - right to counsel

The Supreme Court reversed a decision of the Texas Court of Criminal Appeals which held that the defendant’s murder confession had been obtained in violation of his Sixth Amendment right to counsel. While under arrest on an unrelated charge, the defendant, Raymond Levi Cobb, was questioned about a burglary. Cobb confessed to the burglary but denied having any knowledge concerning two persons missing from the burglarized home. After Cobb was appointed counsel, investigators again questioned Cobb about the disappearances, and again Cobb denied any involvement. Then, while on bond in the burglary case, Cobb confessed to his father that he had murdered one of the missing persons. After Cobb’s father conveyed this information to the police, Cobb was arrested, taken into custody and advised of his *Miranda* rights, which he waived. Cobb then confessed to the murder

of both of the missing individuals.

After being sentenced to death, Cobb, relying on *Michigan v. Jackson*, 106 S.Ct. 1404 (1986), appealed his conviction on the grounds that his confession had been obtained in violation of the Sixth Amendment, which he claimed had attached when Cobb was appointed counsel in the burglary case. Cobb claimed police violated this right when they questioned him about the murders without first obtaining the permission of his previously appointed counsel. Holding that “once the right to counsel attaches to the offense charged, it also attaches to any other offense that is very closely factually related to the offense charged,” the court reversed Cobb’s conviction and remanded the case for a new trial. The court reasoned that, because the murder charge was factually interwoven with the burglary charge, Cobb’s right to counsel on the murder charge attached even though he had yet to be charged with that offense, and that Cobb had asserted this right by accepting appointed counsel in the burglary case.

The State appealed and the Supreme Court reversed, holding that the Sixth Amendment right to counsel does not extend to crimes that are “factually related” to those which have actually been charged. Citing its prior decision in *McNeil v. Wisconsin*, 111 S.Ct. 2204 (1991), the Court ruled that the Sixth Amendment right to counsel is offense specific, and that therefore a defendant’s statements concerning offenses for which he has not been charged are inadmissible “notwithstanding the attachment of

his Sixth Amendment right to counsel on other charged offenses.” Furthermore, the Court specifically rejected opinions of other state and federal courts finding an exception to *McNeil’s* offense specific limitation for crimes which are “factually related” to the charged offense.

The Court did note, however, that even though the Sixth Amendment attaches only to charged offenses, the definition of “offense” was not necessarily limited to the four corners of the charging document. Under the Court’s prior holding in *Blockburger v. United States*, 52 S.Ct. 180 (1932), “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” Therefore, the Sixth Amendment does extend to offenses which, although not formally charged, would be considered the same offense under *Blockburger*. As defined by Texas law, the Court noted, burglary and capital murder do not constitute the same offense under the *Blockburger* test. Therefore, the Sixth Amendment did not prohibit police from questioning Cobb about the murders and Cobb’s confession was admissible. The Court thus reversed the judgment of the Texas Court of Criminal Appeals.

Death Sentence Reversed Where Court Refused to Instruct Jury That Life Sentence Carries No Possibility of Parole

Shafer v. South Carolina, 121 S.Ct. 1263 (2001).

◆ Fourteenth Amendment - Due Process at capital sentencing

In *Simmons v. South Carolina*, 111 S.Ct. 2187 (1994) the United States Supreme Court held that, where a capital defendant's future dangerousness is at issue, and the only alternative to death available to the jury is life without the possibility of parole, due process requires that the jury be informed of the defendant's parole ineligibility.

In this case, the Court considered whether the Supreme Court of South Carolina had improperly limited the *Simmons* holding by holding that the case was inapplicable to South Carolina's new sentencing scheme which provides for the judge to impose a thirty-year sentence in capital cases under certain circumstances. The Court held that South Carolina had misapplied *Simmons* and reversed the defendant's death sentence.

Wesley Shafer was convicted of killing a convenience store clerk. At the time of Shafer's sentencing, South Carolina law required that the jury first make a determination as to the presence of any statutory aggravating circumstance. If the jury unanimously agreed that such

a factor was proved beyond a reasonable doubt, it could sentence the defendant either to death or to life without parole. If, on the other hand, the jury could not unanimously agree, the jury would not make a sentencing recommendation. It would then be left up to the trial judge to decide whether to sentence the defendant to life without parole or to a mandatory minimum thirty-year sentence.

Counsel for Shafer requested that, pursuant to *Simmons*, the jury be instructed that a life sentence carried no possibility of parole. The prosecutor opposed such an instruction on the grounds that because he had not, as the defense claimed, argued future dangerousness to the jury at sentencing, the defendant was not entitled to a *Simmons* instruction. The judge denied the request for the instruction and also refused to allow defense counsel to read relevant portions of the sentencing statute to the jury during closing arguments.

While charging the jury, the judge instructed them that "life imprisonment means until the death of the defendant." However, after deliberating a few hours, the jury asked whether there was any possibility the defendant could become eligible for parole. The judge responded to this inquiry by stating, "parole eligibility is not for your consideration." A little over an hour later, the jury recommended that Shafer be sentenced to death.

On appeal to the South Carolina Supreme Court, Shafer argued that he was entitled to the instruction because the only

sentencing options the jury faced were death or life without parole. The South Carolina Supreme Court disagreed, holding that *Simmons* did not apply in this case because there was another sentence *legally* available to the defendant, i.e., it was possible that the trial judge could sentence the defendant to thirty years.

The United States Supreme Court reversed holding that whenever future dangerousness is at issue in a capital sentencing, due process requires that the jury be instructed that a life sentence carries no possibility of parole. The Court reasoned that *Simmons* was only implicated when the jury, after finding a statutory aggravating factor, was forced to choose between death and life without parole. Therefore, the jury had no other sentencing option available to it and the court should have given the parole ineligibility instruction.

The Court also rejected the State's argument that the jury had in effect been informed of the parole ineligibility due to both defense counsel's argument and portions from the judge's instructions. It noted that the jury's question regarding parole left no doubt that it lacked a clear understanding on the point of parole ineligibility.

The Court left open for consideration on remand the State's argument that future dangerousness had not in fact been placed at issue during the sentencing proceedings, and that therefore a parole ineligibility instruction was not required.

Hospital Policy of Drug Testing Expectant Mothers and Reporting Results to the Police Constitutes Unreasonable Search Absent Patient Consent

Ferguson v. City of Charleston, 121 S.Ct. 1281 (2001).

◆ Fourth Amendment - Search and Seizure

Concerned about the increase in cocaine use among expectant mothers, a South Carolina hospital began to conduct drug screens on urine samples provided by mothers receiving prenatal care at the hospital. Initially, the hospital responded to positive results by reporting the patient to the county substance abuse commission for counseling. However, when that practice proved unsuccessful in reducing the number of expectant mothers who tested positive for cocaine, the hospital joined forces with the local police to develop a policy for dealing with the problem.

The result of the collaboration was the adoption by the hospital of a 12-page policy for dealing with expectant mothers suspected of drug abuse. If a woman met one of nine specified criteria, her urine was tested for cocaine. The policy also established a procedure for maintaining a chain of custody after collecting the samples. Although the new policy retained the former practice of referring women who tested positive to drug treatment clinics, it added a new policy by which women who tested positive following labor

were reported to police and promptly arrested, while those who tested positive while still pregnant were not reported to the police or arrested unless they tested positive a second time or if they missed an appointment with a substance abuse counselor. The policy also set forth the crimes with which a woman could be charged, depending on the stage of her pregnancy. The policy made no mention of how such positive results should effect prenatal care.

Ten women arrested following positive drug screens sued the hospital, the City of Charleston and certain law enforcement officials, claiming that the warrantless and non-consensual drug tests constituted unconstitutional searches. The Respondents defended the charges by claiming that the women had actually consented and that, as a matter of law, the searches were reasonable because they were justified by special non-law-enforcement purposes. The jury found that the patients had consented to the search and ruled in the defendants favor.

The Fourth Circuit, without addressing the consent issue, affirmed, holding that the searches were valid under the "special needs" exception to the warrant requirement. Under that exception, "special needs" may justify a search policy which is designed to serve non-law-enforcement ends. After concluding that the hospital conducted the tests for medical purposes independent of an intent to aid law enforcement, the Court of Appeals held that, "the interest in curtailing the pregnancy

complications and medical costs associated with material cocaine use" outweighed "the minimal intrusion on the privacy of the patient." The Court, therefore, affirmed the verdict for the defendants.

On appeal, the United States Supreme Court reversed. Noting initially that, because the hospital is operated by the state, its staff are government actors subject to the Fourth Amendment, the Court held that the urine tests were "indisputably searches within the meaning of the Fourth Amendment."

This case differed from prior Supreme Court cases in which drug testing was upheld because, in the earlier cases, "the 'special need' that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement." In this case, however, the central feature of the policy was "the use of law enforcement to coerce the patients into substance abuse treatment." The purpose of the policy, the Court found, was not protecting the health of the mother and the baby, as the Respondents urged, but rather a general interest in crime control.

The Court found telling the fact that the policy incorporated police guidelines regarding chain of custody, possible criminal charges, and the logistics of police notification and arrests, while omitting any reference to the appropriate course of medical treatment for either the mother or the infant.

The Court reasoned that, while the ultimate goal of the policy may have been to get women into drug treatment, “the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal.” The distinction, the Court held, was a critical one. Law enforcement involvement always serves some social purpose. Thus, any nonconsensual suspicionless search could fall within the “special needs” exception simply by defining the search in terms of its ultimate goal rather than its primary purpose. Such an approach, the Court held, is inconsistent with the Fourth Amendment.

In reversing the Fourth Circuit, the Court held that, “[g]iven the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of ‘special needs.’” The case was remanded to the Fourth Circuit for consideration of whether the patients had given consent to the warrantless search generated by the drug testing policy.

Retroactive Application of Decision Abolishing “Year and a Day Rule” Does Not Violate Fourteenth Amendment- Murder Conviction Upheld

Rogers v. Tennessee, ____ S.Ct. ____ (2001).

◆ Fourteenth Amendment - Due Process Clause; U.S.C.A. Const. Art. 1, § 10, cl. 1. - Ex Post Facto Clause

The Supreme Court held that Wilbert Rogers’ due process rights had not been violated when the Supreme Court of Tennessee abolished the common law “year and a day rule” and applied its decision retroactively to Rogers in order to uphold his murder conviction.

Rogers had been convicted in state court in Tennessee of second degree murder. The victim did not die immediately, but rather remained in a coma for fifteen months after being stabbed by Rogers. His death, according to the medical examiner, was the result of a stab wound to the heart inflicted by Rogers.

The state statute under which Rogers was convicted did not mention the year and a day rule (murder conviction requires that victim die within a year and a day of the defendant’s act), but Rogers argued that the rule persisted as part of Tennessee’s common law, and therefore precluded his conviction. The Tennessee Court of Criminal Appeals disagreed and affirmed Rogers’ conviction.

The Tennessee Supreme Court affirmed this ruling, noting

that, not only had the vast majority of jurisdictions abolished the rule, but also that the reasons for first recognizing the rule no longer existed. The Court, therefore, abolished the rule. The Tennessee Court rejected Rogers’ argument that retroactive application of its decision abolishing the rule violated the Ex Post Facto Clause, reasoning that the provision applies only to legislative acts.

The Tennessee Supreme Court also noted that in *Bowie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), the Supreme Court had held that “due process prohibits retroactive application of any ‘judicial construction of a criminal statute [that] is unexpected and indefensible by reference to the law which has been expressed prior to the conduct in issue.’” (citations omitted). The retroactive application of its decision in this case, the Tennessee Court held, did not offend this principle.

In a 5 to 4 decision, the United States Supreme Court affirmed the decision and adopted the reasoning of the Supreme Court of Tennessee. The Court pointed out that, although the Ex Post Facto Clause limits only the power of the Legislature, and does not apply to the Judicial Branch, the Supreme Court had in the past observed that “limitations on ex post facto judicial decisionmaking are inherent in the notion of due process.”

Citing the *Bowie* decision, Rogers argued that the Tennessee courts had violated his due process rights by retroactively applying its

decision abolishing the year and a day rule to his case. Because such retroactive application would violate the Ex Post Facto Clause if accomplished by the Tennessee Legislature, then it followed, Rogers argued, that the Tennessee Supreme Court was prohibited from doing the same thing by judicial decree.

In rejecting this argument the Supreme Court noted that Rogers had misread *Bouie* to the extent that he argued that the Due Process Clause incorporates the specific prohibitions of the Ex Post Facto Clause. The *Bouie* decision, the Court noted, “was rooted firmly in well established notions of due process. Its rationale rested on core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct.”

If, as Rogers urged, the Ex Post Facto Clause were extended to courts through the rubric of due process, the Court reasoned, the clear constitutional text of the Clause would be circumvented, and would “evince too little regard for the important institutional and contextual differences between legislating, on the one hand, and common law decisionmaking, on the other.” This, the Court concluded, it would not do.

Instead, the Court held that the judicial alteration of a common law doctrine of criminal law

violates the principle of fair warning, and must not be given retroactive effect only, as *Bouie* indicated, when it is “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.” The Court found that the Tennessee court’s abolition of the year and a day rule was not unexpected or indefensible. There were no good reasons for retaining the rule, and it was widely viewed as a commonlaw relic. Moreover, the rule had never once been enforced by the state of Tennessee. Thus, abolishing the rule did not offend “the due process principle of fair warning articulated in *Bouie* and its progeny.” Because Rogers’ due process rights had not been violated, the Court affirmed the judgment of the Supreme Court of Tennessee.

28 U.S.C. § 2255 Motion Not Appropriate Vehicle for Challenging Conviction Later Used to Enhance Federal Sentence Under Armed Career Criminal Act - Exception Allows Challenge of Convictions Obtained in Violation of Right to Counsel

Daniels v. United States, 121 S.Ct. 1578 (2001).

◆ **28 U.S.C. § 2255 - challenge to prior conviction used to enhance federal sentence**

In a 5 to 4 decision, the Supreme Court held that, apart from challenges to jurisdictional defects, a motion to vacate, set aside, or correct sentence is not the appropriate vehicle for determining whether a prior conviction used to

enhance a federal sentence under 18 U.S.C. § 924(e), the Armed Career Criminal Act, was unconstitutionally obtained, and if the prior conviction is no longer open to a direct or collateral attack because the defendant failed to pursue those remedies or did so unsuccessfully, the defendant may not collaterally attack the prior conviction under 28 U.S.C. § 2255.

Daniels had been sentenced under § 924(e) based on four prior state convictions. In his § 2255 motion, he claimed that two of his prior convictions were based on inadequate guilty pleas and on ineffective assistance of counsel. The Court, citing *Custis v. United States*, 511 U.S. 485 (1994), pointed out that a defendant is not ordinarily permitted to challenge prior state convictions in a subsequent federal sentencing proceeding. The Court found that the rationale for this rule - ease of administration and the interest in promoting the finality of judgments - was also present in § 2255 proceedings, and noted that a defendant has “numerous opportunities” to challenge prior state convictions before initiating a § 2255 proceeding.

The court held that a defendant could still pursue channels of direct or collateral review that might be available to overturn the prior conviction, but if these avenues were no longer available, the defendant is without recourse. The Court did, however, recognize an exception: the defendant could attack a prior conviction if he claimed that the conviction was obtained in violation of the right to counsel and he raised

the claim at his federal sentencing proceeding.

The Court also observed: “We recognize that there may be rare cases in which no channel of review was actually available to a defendant with respect to a prior conviction, due to no fault of his own. The circumstances of this case do not require us to determine whether a defendant could use a motion under § 2255 to challenge a federal sentence based on such a conviction.”

28 U.S.C. § 2254 Motion Not Appropriate Vehicle for Challenging Conviction Later Used to Enhance State Sentence

Lackawanna County District Attorney v. Coss, 121 S.Ct. 1567 (2001).

◆ 28 U.S.C. § 2254 - challenge to prior conviction used to enhance state sentence

Coss was convicted in 1986 of several Pennsylvania offenses. He had finished serving his sentence for this conviction in 1990 when he was convicted of another state offense. After being sentenced, and after successfully appealing and being resentenced, Coss brought a federal habeas petition in which he claimed that the state sentencing court improperly took account of the allegedly unconstitutional 1986 conviction when imposing sentence for the 1990 offense.

The Supreme Court pointed out that a § 2254

petitioner must first show that he is in custody pursuant to the judgment of a state court, but that § 2254 could be construed as a challenge to the petitioner’s 1990 conviction because it was enhanced by the allegedly invalid 1986 sentence.

Although the petitioner’s claim did satisfy the “in custody” requirement for federal habeas corpus jurisdiction, relief is generally unavailable, the Court noted, to a state prisoner through a petition for a writ of habeas corpus when the prisoner challenges a current sentence on the ground that it was enhanced based on an allegedly unconstitutional prior conviction for which the petitioner is no longer in custody. The Supreme Court therefore held that the petitioner could not obtain habeas relief under 28 U.S.C. § 2254 for a conviction which was used to enhance another sentence.

The Court noted that it had just decided in *Daniels* that a § 2255 movant could not challenge an enhanced federal sentence based on the invalidity of prior convictions. The Court extended that holding to cover § 2254 petitions, finding the considerations in *Daniels* to be equally present in the § 2254 context. The Court preserved the exception of *Daniels*: if there is a failure to appoint counsel in contravention of *Gideon*, a unique constitutional defect rising to the level of a jurisdictional defect has occurred, and relief may be obtained.

No Fourth Amendment Violation in the Warrantless Arrest of a Suspect for a Misdemeanor Seatbelt Violation

Atwater v. Lago Vista, 121 S.Ct. 1536 (2001).

◆ Fourth Amendment - search and seizure

Petitioners sued respondents under 42 U.S.C. §1983, alleging that a city police officer violated petitioner’s Fourth Amendment rights by arresting her for a misdemeanor seatbelt violation without a warrant. In a 5-4 decision, the Supreme Court held that the Fourth Amendment does not limit a police officer’s authority to arrest, without a warrant, a person who commits, or he has reason to believe committed, a misdemeanor in his presence.

Texas law makes it a misdemeanor, punishable only by a fine, for a front-seat passenger or small child riding in the front of a car equipped with safety belts not to wear one and authorizes the arrest of anyone violating these provisions. The police may, however, issue citations in lieu of arrest. Petitioner Atwater drove her truck in Lago Vista, Texas, with her small children in the front seat. None of them were wearing a seatbelt. Respondent Turek, then a Lago Vista policeman who had previously but mistakenly stopped Atwater for a seatbelt violation, observed the seatbelt violations, pulled Atwater over, verbally berated her, refused to let her take her crying children to a neighbor’s house (the neighbor did come to the scene and take custody

of the children), handcuffed her, placed her in his squad car, and drove her to the local police station, where she was made to remove her shoes, jewelry, and eyeglasses, and empty her pockets. Officers took her "mug shot" and placed her, alone, in a jail cell for about an hour, after which she was taken before a magistrate and released on bond. She was charged with, inter alia, violating the seatbelt law. She pleaded no contest to the seatbelt misdemeanors and paid a \$ 50 fine. She and her husband filed suit alleging, inter alia, that the actions of respondent had violated her Fourth Amendment right to be free from unreasonable seizure.

The court rejected petitioners' argument that peace officers' authority to make warrantless arrests for misdemeanors was restricted at common law to instances of breach of the peace. After a lengthy discussion of pre-founding English common law and founding-era common law, the court stated that there is "no evidence that the Framers sought to limit peace officers' warrantless misdemeanor arrest authority to instances of breaches of the peace"; to the contrary, the court observed, numerous colonial and 19th century era legislatures had statutes that permitted warrantless arrests for misdemeanors, as do all 50 states today.

Even so, the court said that the petitioner's arrest was "gratuitous humiliations imposed by a police officer who was (at

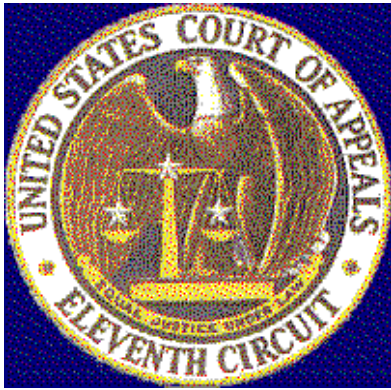
best) exercising extremely poor judgment. [Petitioner's] claim to live free of pointless indignity and confinement clearly outweighs anything [City of Lago Vista] can raise against it specific to her case". However, since the police officer had probable cause under the Texas seatbelt statute, to believe that the petitioner had committed a crime in his presence, and there was no evidence the arrest was conducted in an extraordinary manner that was unusually harmful to petitioner's interests, he was authorized to make a custodial arrest without balancing costs and benefits or determining whether or not the arrest was in some sense necessary as generally required under the Fourth Amendment.

The majority also rejected petitioners' alternative argument for a modern arrest rule forbidding custodial arrest when a conviction can not carry any jail time, saying such a rule would give the police a "systematic disincentive to arrest" where important societal interests would be served by it.

In her dissent, Justice O'Connor argued that Atwater's arrest was the "quintessential seizure" clearly violating the "express language of the Fourth Amendment", and that "the touchstone of our analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." After acknowledging that the majority gives a "brief nod" to this bedrock principle of Fourth Amendment

jurisprudence, Justice O'Connor points out that instead of remedying the imbalance the majority points out between Atwater's "claim to live free of pointless indignity and confinement" weighed against the interests of the City of Lago Vista, the majority allows itself to be swayed by the worry that "every discretionary judgment in the field [will] be converted into an occasion for constitutional review." As a result, the majority has minted a new rule that "if an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."





RECENT ELEVENTH CIRCUIT DECISIONS

Hotel Room is a “Dwelling” Whether or Not Room Occupied and Thus Robbery of Room is a Crime of Violence

United States v. Ray, 245 F.3d 1256 (11th Cir. 2001).

◆ **U.S.S.G. § 2K2.1(a)(4)(A) - base offense level of 20 for firearms conviction if defendant has prior felony conviction for crime of violence; U.S.S.G. § 4B1.2(a)(2) - burglary of a dwelling is a crime of violence**

The Eleventh Circuit Court affirmed Melvin Ray’s 37-month sentence for possession of a firearm by a convicted felon. At sentencing, the court adopted the PSI recommendation that Ray receive a base offense level of 20 pursuant to U.S.S.G. § 2K2.1(a)(4)(A) because he had previously been convicted of a violent crime, the burglary of an unoccupied hotel room.

The Court rejected Ray’s argument that the offense did not constitute a crime of violence within the meaning of U.S.S.G. § 4B1.2(a)(2) because a hotel room is not a “dwelling”. Citing *United States v. McClenton*, 53 F.3d 584 (3d Cir. 1995), the Court held that a hotel room, whether occupied or unoccupied, is a “dwelling” under the relevant Guidelines.

Plain Error Found Where District Court Failed to Advise Defendant of Nature of Offense at Plea Colloquy

United States v. Telemaque, 244 F.3d 1247 (11th Cir. 2001) (per curiam).

◆ **Fed.R.Crim.P. 11(e)(1) - court shall not participate in discussions concerning plea agreements;**

◆ **Fed.R.Crim.P. 11(c) - advice to defendant during plea colloquy**

After pleading guilty to charges of possession with intent to distribute crack cocaine and conspiracy to do the same, the defendant argued that the district court had violated Rule 11(e)(1) by intermeddling in the plea negotiations.

The defendant had entered into a written plea agreement with the government that only obligated the government not to challenge a two-level reduction for acceptance of responsibility. Because the defendant believed he was entitled

to a three-level reduction, defense counsel asked the district court to advise the defendant during the plea colloquy that the reduction for acceptance was up to the court and had not yet been decided.

The Court held that the district court had not violated Rule 11(e)(1) by so advising the defendant because the plea agreement had already been executed, and because the court’s statement was proper and was not potentially coercive.

The Court, however, did find plain error in the district court’s failure to advise the defendant of the nature of the offense, as required by Rule 11(c), holding that “any failure to address one of Rule 11(c)’s three ‘core concerns,’ of which informing the defendant of the nature of the offense is one, is prejudicial plain error.”

The court pointed out that whether a court has complied with the Rule “turns on a variety of factors, including the complexity of the offense and the defendant’s intelligence and education.” At the change-of-plea hearing the only reference to the nature of the offense was when the district court asked the defendant if he had read the indictment and understood what the government would have to prove to convict him, to which the defendant answered, “Yes.”

Given that the defendant graduated near the bottom of his high school class and that he had no

prior involvement in the court system, a simple yes-no question as to whether he understood the charges against him was insufficient to satisfy the requirements of Rule 11(c). Therefore, the court vacated the defendant's conviction.

Misdemeanor Conviction for Attempted Child Molestation Qualifies as Aggravated Felony for Purposes of U.S.S.G. § 2L1.2(b)(1)(A) Sixteen-Level Enhancement

United States v. Marin-Navarette
244 F.3d 1284 (11th Cir. 2001).

◆ **U.S.S.G. § 2L1.2(b)(1)(A), 8 U.S.C. § 1326 - enhancement for illegal reentry following conviction of aggravated felony**

Marin-Navarette pled guilty to entering the United States illegally in violation of 8 U.S.C. § 1326. At sentencing the district court applied a 16-level enhancement to Marin-Navarette's offense level, concluding that a prior state conviction for Attempted Child Molestation qualified as an "aggravated felony" under U.S.S.G. § 2L1.2(b)(1)(A).

Marin-Navarette appealed the enhancement on two grounds. First, he argued that the conviction was only a misdemeanor under state law and as such could not qualify as a felony under the "aggravated felony" enhancement.

Alternatively, he argued that since he was sentenced to only nine months incarceration, the state conviction was not a felony under Congress' rule that only crimes with penalties over one year are felonies.

The court rejected both of these contentions, holding that the Attempted Child Molestation conviction is an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(A) even though it is only a misdemeanor under state law. Congress clearly intended to include such offenses in the definition of "aggravated felony" in 8 U.S.C. § 1101(a)(43) without reference to any term of imprisonment. As such, "aggravated felony" is a term of art and it does not matter that the crime is a misdemeanor under state law or that it otherwise would not be considered a felony under the traditional one-year rule.

Evidence Supports Four-Level Leader/Organizer Enhancement; Additional One-Point Reduction for Acceptance Not Warranted; No Offense Level Departure for Post-Sentencing Rehabilitation and Good Behavior

United States v. Mesa, ____ F.3d ____ (11th Cir. 2001).

◆ **U.S.S.G. § 3B1.1(a) - organizer/leader enhancement; U.S.S.G. § 3E1.1(b)(2) - additional one level decrease for timely notification of intent to plead guilty**

Following his guilty plea to drug trafficking conspiracy charges,

the defendant was sentenced to 188 months imprisonment. The sentence included a four-level increase in his offense level under § 3B1.1(a) based on the defendant's managerial role in the offense.

Because defense counsel failed to file a timely notice of appeal from the sentence, the district court granted the defendant's 28 U.S.C. § 2255 motion on the grounds of ineffective assistance of counsel and vacated the defendant's sentence. Upon re-sentencing, the district court again found the defendant eligible for the four-level enhancement and sentenced the defendant to the exact term of imprisonment he had previously received.

On appeal to the Eleventh Circuit, the Court vacated the leader/organizer enhancement and remanded the case to the district court with instructions that it make specific factual findings regarding the defendant's role in the offense. The Court noted that although the evidence did establish a buyer/seller relationship between the defendant and the government's witness, the evidence "was exceedingly sparse with respect to any control, influence, or leadership exercised by [the defendant] over [the witness or his] associates."

The defendant was sentenced a third time, and again the court, after making a series of specific findings of fact, imposed the leader/organizer enhancement. The defendant then initiated this appeal in which he argued that the district

court had ignored the law of the case in finding that the defendant had organized or led the government's witness and his associates, and that the court's findings of facts regarding his role in the offense were clearly erroneous.

In rejecting both of these arguments, the Court held that its previous comment that the evidence had established a buyer/seller relationship between the defendant and the witness did not establish the law of the case that only such a relationship existed, and did not preclude the district court from finding that the defendant was in a leadership role. Additionally, the Court held that the district court's factual findings were not clearly erroneous because the evidence established that the defendant directed and controlled the acts of several other people involved in the conspiracy. Thus, the Court held, the enhancement was warranted.

The Court also rejected the defendant's argument that he should have received an additional one-level reduction in his offense level under § 3E1.1(b)(1) for entering a timely plea. Because this issue was not covered by the remand (which did not vacate the defendant's sentence entirely), and because the defendant raised the issue for the first time during his second re-sentencing, the Court held that there was no error in denying the additional offense level reduction.

Finally, the Court held that the defendant was not entitled to a downward adjustment in his offense level based upon his post-sentencing rehabilitation and good behavior while incarcerated. Citing *United States v. Pickering*, 178 F.3d 1168 (11th Cir. 1999), the Court held that any such departure was to be made not from the defendant's offense level, but rather along the criminal history axis. Because the defendant in this case had a criminal history category of I, he was not eligible for an adjustment for post-offense rehabilitation. The Court affirmed the defendant's sentence.

ELEVENTH CIRCUIT APPRENDI DECISIONS

Apprendi Decision Did Not Affect Holding in Almendarez-Torres

United States v. Guadamuz-Solis, 232 F.3d 1363 (11th Cir. 2000).

◆ 8 U.S.C. § 1326(a), (b)(2) - illegal reentry

The Eleventh Circuit rejected the appellant's argument that the *Apprendi* decision called into question the Supreme Court's prior decision in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). Until the Supreme Court decides otherwise, the Court held, *Almendarez-Torres* remains good law.

Apprendi Violated Where Court Sentenced Defendant Pursuant to § 841(b)(1)(B) Yet Indictment Alleged No Drug Quantity - However, Reversal Not Warranted Where Defendant Sentenced to Less Than 20 Years

United States v. Shepard, 235 F.3d 1295 (11th Cir. 2000).

◆ 21 U.S.C. §§ 841(b)(1)(A)-(C) - determination of sentence based on drug quantity

Shepard was sentenced to 188 months for possession with intent to distribute crack. He argued that his sentence violated *Apprendi* because no drug quantity was alleged in the indictment. Although the Court agreed that the district court had violated *Apprendi* in sentencing Shepard, because the Court found that the error was not prejudicial, the Court affirmed Shepard's sentence.

After determining that Shepard had properly preserved this issue for appellate review by objecting at sentencing to the enhancement of his sentence on the basis of drug quantity, the Court held that Shepard's *Apprendi* issue did not warrant reversal. The district court sentenced Shepard pursuant to § 841(b)(1)(B) based on Shepard's PSI which indicated he was responsible for at least 50 grams of cocaine base. Section 841(b)(1)(B) provides for an applicable sentencing range of 5 to 40 years. Shepard, however, argued

that the sentencing range in that section was inapplicable to him because the indictment failed to allege a quantity of cocaine which would place him under section 841(b)(1)(B). Because no quantity had been alleged, Shepard argued, the applicable sentencing range was that set forth in section 841(b)(1)(C) which provides for a sentence of up to 20 years but contains no mandatory minimum.

The Court of Appeals agreed with Shepard that the district court did violate *Apprendi* by sentencing him pursuant to section 841(b)(1)(B) where the indictment did not allege a drug quantity. As the Court noted, because no drug quantity was alleged, Shepard should have been sentenced under section 841(b)(1)(C). Nevertheless, the Court affirmed Shepard's sentence, holding that, because Shepard was sentenced below the 20 year maximum sentence he faced under § 841(b)(1)(C), Shepard had not been prejudiced by the district court's error.

Eleventh Circuit Bound to Follow *Almendarez-Torres* Until Decision is Overruled by Supreme Court

United States v. Thomas, 242 F.3d 1028 (11th Cir. 2001).

◆ 18 U.S.C. §§ 922(g), 924(e)(1) - enhancement penalty for felon in possession with three prior violent felony/serious drug offense convictions

Byron Thomas challenged the sentence he received after being convicted of being a felon in

possession of a firearm, in violation of 18 U.S.C. § 922(g). Although a 922(g) conviction ordinarily carries a ten-year statutory maximum, Thomas had been sentenced to 295 months imprisonment pursuant to 18 U.S.C. § 924(e)(1). Under section 924(e)(1), a defendant convicted of violating 922(g) faces a statutory mandatory minimum sentence of fifteen years if the defendant has been previously convicted of three violent felonies or serious drug offenses. Because his indictment failed to allege that he had been convicted of the necessary three prior offenses, and because the jury had not found, beyond a reasonable doubt, that he had committed such offenses, Thomas argued that his sentence in excess of the ten-year maximum sentence provided for in § 924(a)(2) violated *Apprendi*. The Court rejected this argument. As Thomas admitted, his argument was contrary to the holding in *Almendarez-Torres*, and the Court declined Thomas's invitation to overrule that decision, holding that it was "bound to follow *Almendarez-Torres*, unless and until the Supreme Court itself overrules that decision."

Though Indictment Failed to Allege Drug Quantity, No *Apprendi* Violation Where Defendants Sentenced Below Twenty-Year Maximum For Conspiracy to Distribute and Possess with Intent to Distribute Methamphetamine and Amphetamine

United States v. Sanchez, 242 F.3d 1294 (11th Cir. 2001).

◆ 21 U.S.C. § 841(b)(1)(A-C) - sentence based on drug quantity; Fed.R.Crim.P. 11 - acceptance of guilty plea

The defendants argued that their convictions for conspiracy to distribute and possess with intent to distribute methamphetamine and amphetamine violated *Apprendi* and should be vacated because the indictment failed to allege drug quantity. They also argued that their sentence enhancement pursuant to U.S.S.G. § 2D1.1 for possession of a firearm during a drug transaction also violated *Apprendi* because the enhancement was not proved beyond a reasonable doubt. Finally, each of the defendants argued that his plea was not intelligent and voluntary because the drug quantity was not alleged in the indictment and thus he was denied proper notice. The Court rejected all of these arguments.

After the defendants were indicted, one of the defendants filed a motion to dismiss the indictment on the grounds that it failed to include a drug quantity. This motion was denied by the district court. This defendant then entered a conditional plea while reserving the right to appeal the dismissal issue. The other defendant also pled guilty without a plea agreement but later adopted his codefendant's motion to dismiss. At sentencing, the defendants were held accountable for the equivalent of 2,903.04 kilos of marijuana, (based on 2 pounds of methamphetamine and 12 pounds of

amphetamine), and after applying a two-point gun enhancement to each defendant, the court sentenced one of the defendants to 87 months and the other to 108 months.

The defendants argued that the district court erred in failing to dismiss their indictment for failure to allege drug quantity. The Court, citing to *Rogers*, held that while “drug quantity in sections 841(b)(1)(A) and 841(b)(1)(B) cases must be charged in the indictment and proven to a jury beyond a reasonable doubt,” under the Court’s holding in *Shepard*, where a defendant’s indictment fails to allege drug quantity, there is no prejudice if the defendant is sentenced below the twenty-year maximum provided for in 841(b)(1)(C). Because the defendants’ sentences in this case were below the twenty-year maximum, they suffered no prejudice under *Apprendi*, and if in fact an error had occurred, it was harmless.

The defendants also claimed that their pleas were not knowing and voluntary because there was no drug quantity alleged in the indictment. Had they been advised of the amounts of drugs attributable to them and the corresponding sentencing ranges, they argued, they might have chosen to go to trial. They also argued that they should receive proper notice via a superseding indictment and be allowed to plead anew. Although the Court found that the plea colloquy was

technically inadequate because the defendants may have failed to understand the nature of the charges against them, the defendants were nevertheless advised during the colloquy that they faced sentences up to forty years, or even life, depending upon the quantity of drugs for which they would be held responsible. In spite of this, the defendants agreed to plead guilty. Also during the plea colloquy, the government provided a factual basis for the plea which indicated that the defendants had been involved with approximately one kilogram of methamphetamine, and neither defendant contradicted this information. Thus, the Court held, their rights were not substantially affected, and if any error was committed, it was harmless.

The defendants also argued that *Apprendi* required that their firearm enhancement be proved beyond a reasonable doubt. The Court rejected this argument. Under the commentary to 2D1.1(b)(1), the two-level enhancement “should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.” During the sentencing hearing, a witness for the government testified that he had delivered guns to the defendants as partial payments for the drugs he received during various drug transactions. The defendants, the Court noted, did not present any evidence that a connection between the firearms and the drug conspiracy was clearly improbable, therefore the enhancement was proper.

Additionally, the defendants’ argument that *Apprendi* required proof of the applicability of the enhancement beyond a reasonable doubt, the Court held, was without merit. “The Sentencing Guidelines are not subject to the *Apprendi* rule. Because a finding under the Sentencing Guidelines determines the sentence within the statutory range rather than outside it, the decision in *Apprendi*, which addresses any increase in penalty for a crime outside the statutory maximum, has no application to the Guidelines.”

[NOTE: The Eleventh Circuit has granted rehearing en banc in this case.]

***Apprendi* Does Not Apply to Relevant Conduct Provision of the Sentencing Guidelines**

United States v. Harris, 244 F.3d 828 (11th Cir. 2001).

◆ U.S.S.G. § 1B1.3 - relevant conduct

The government appealed the district court’s holding that *Apprendi* precluded it from considering the defendants’ relevant conduct in determining their sentences. The Eleventh Circuit agreed with the government that the district court had erred and vacated the defendants’ sentences.

Both defendants pled guilty to various counts of a twelve-count

indictment which included violations of § 841. It was undisputed that the counts of conviction for one defendant involved 17.8 grams of powder cocaine, which yielded an offense level of 12. However, the probation officer calculated the total amount of cocaine base, powder cocaine and cocaine hydrochloride attributable to the defendant based on all of the transactions in the indictment and calculated a base offense level of 32. However, because the district court ruled that *Apprendi* prohibited consideration of drug quantities other than those involved in the offense of conviction, the defendant was sentenced based on an offense level of 12.

The other defendant pled guilty to only one count of the indictment which involved 13.2 grams of cocaine base, and a corresponding offense level of 26. The probation officer, again basing the offense level on the total amount of drugs involved in all the counts in the indictment, calculated the offense level at 36. Again, the court refused to consider the relevant conduct and sentenced the defendant on the basis of an offense level of 26.

Citing its recent decision in *United States v. Sanchez*, 242 F.3d 1294, (11th Cir. 2001), the Eleventh Circuit reversed. In *Sanchez*, the Court held that *Apprendi* does not apply to the sentencing guidelines, stating that, “[b]ecause a finding under the

Sentencing Guidelines determines the sentence within the statutory range rather than outside it, the decision in *Apprendi*, which addresses any increase in penalty for a crime outside the statutory maximum, has no application to the Guidelines.” Under § 841(a)(1)(C), the maximum sentence the defendants in this case were facing was twenty years. Although the Court noted that consideration of the defendants’ relevant conduct increased their sentencing ranges under the Guidelines, the ranges would not have exceeded the statutory maximum. Therefore, the Court held, *Apprendi* did not require the district court to disregard the relevant conduct. The defendants’ sentences were vacated and the case remanded to the district court for specific factual findings regarding drug quantity.

No Plain Error in Sentencing Defendant in Excess of Statutory Maximum Where Only Evidence As to Drug Quantity was Uncontested

United States v. Wims, 245 F.3d 1269 (11th Cir. 2001).

◆ **21 U.S.C. § 841 (b)(1)(A)**

On remand from the Supreme Court, the Eleventh Circuit affirmed John Wims’ sentence for possession with intent to distribute cocaine, holding that there was no plain error where the only evidence regarding the amount of drugs involved was uncontested. Wims had been charged with conspiracy to

distribute cocaine and cocaine base and with five counts of distribution of cocaine, all in violation of §§841(a) and 841(b)(1)(A). After a jury trial, Wims was found guilty and sentenced to life imprisonment on the conspiracy count and on one of the substantive counts. Wims was also sentenced to 40 years on each of the remaining substantive counts.

Because Wims had not raised a constitutional objection to the drug quantity determination either at or before sentencing, his claim was reviewed for plain error. The Court agreed with Wims that his sentence was in error as it exceeded the 20 year maximum sentence provided for in §841(b)(1)(C) for drug convictions without reference to drug quantity. The Court also held that the error was plain.

The Court, however, affirmed Wims’ sentence because it found that Wims was unable to show that the error affected his substantial rights. With regard to the four substantive counts for which he received four sentences of 40 years, the Court noted that a cooperating codefendant testified at trial that he had delivered two kilograms of cocaine to Wims on four separate occasions. Wims did not contest this testimony at either the trial or at sentencing, therefore, the Court reasoned, the jury must have found that Wims possessed 500 grams or more of cocaine. Because §841(b)(1)(B) provides for a five to forty year sentence for offenses involving such a quantity of cocaine,

Wims' forty year sentence for each of these counts did not exceed the statutory maximum and did not violate *Apprendi*. Thus, these sentences did not affect Wims' substantial rights.

Wims received a life sentence with regard to the remaining substantive count, but the Court affirmed this sentence as well. The undisputed testimony at trial was that this count involved six kilograms of cocaine. Therefore, the jury's guilty verdict on this count suggests that they attributed the six kilograms of cocaine to Wims. Wims did not object to this drug quantity amount either. Under §841(b)(1)(A), a defendant found to have possessed at least 5 kilograms of cocaine is subject to a sentence of between 10 years and life. Thus, Wims' life sentence on this count did not exceed the statutory maximum and Wims' substantial rights were not affected.

Wims had also received a life sentence for the conspiracy count. To uphold such a sentence, a finding of at least 5 kilograms of cocaine was required under §841(b)(1)(A). Because the jury had convicted Wims of the five substantive counts, the jury necessarily found that Wims was responsible for at least 5 kilograms of cocaine, and as these substantive offenses formed part of the conspiracy, Wims' life sentence on this count did not affect Wims' substantial rights. Therefore, each of Wims' sentences was affirmed.

***Apprendi* Issue Raised for the First Time in Supplemental Brief Deemed Waived**

United States v. Padilla-Reyes, 247 F.3d 1158 (11th Cir. 2001).

◆ 8 U.S.C. § 1326 - illegal reentry after deportation

The defendant challenged his 90 month sentence for illegal reentry, in violation of 8 U.S.C. § 1326, on the grounds that his sentence violated *Apprendi*. The defendant had received a sixteen-level enhancement to his base offense level pursuant to U.S.S.G. § 2L1.2(b)(1)(A) because he had previously been convicted of an aggravated felony. The defendant argued that § 1326 actually creates two separate offenses: an offense under § 1326(a) which makes it illegal for a deported alien to reenter the United States and carries a statutory maximum of 2 years, and an offense under § 1326(b)(2) which makes it illegal for a previously deported alien with a prior aggravated felony conviction to enter the United States and carries a statutory maximum of 20 years. The defendant argued that, as the indictment simply charged him with illegal reentry after deportation, it necessarily charged a violation of § 1326(a), and thus his 90 month sentence violated *Apprendi* because it exceeded the 2 year statutory maximum for that offense.

The defendant conceded that his position was contrary to the Supreme Court's holding in

Almendarez-Torres, 523 U.S. 224 (1998), but he also pointed to a sentence in the *Apprendi* decision that suggests that *Almendarez-Torres* was incorrectly decided. What the defendant was doing, the Court noted, was asking the Court to "anticipate the death knell of *Almendarez-Torres*, and extend the logic of *Apprendi* to cases where the omitted fact is a prior conviction." However, because the defendant raised this issue for the first time in a supplemental brief, the Court deemed the issue waived. The Court held that "parties cannot properly raise new issues at supplemental briefing, even if the issues arise based on intervening decisions or new developments cited in supplemental authority."

***Apprendi* Error Harmless Where Defendant Stipulated to Drug Quantity**

United States v. Camacho, 248 F.3d 1286 (11th Cir. 2001).

◆ 21 U.S.C. § 841(b)(1)(C)-determination of drug quantity and *Rogers* error

In this petition for rehearing, the Eleventh Circuit considered whether Miguel Camacho's ten year sentence for possession with intent to distribute cocaine violated *Apprendi*. At his trial, Camacho stipulated that the seized cocaine weighed 39.77 kilograms. However, at sentencing Camacho objected that the quantity of drugs attributable to him was, under *Jones*, an element of the offense. The District Court held

that *Jones* was inapplicable and sentenced Camacho to ten years under the mandatory minimum sentence provisions of 21 U.S.C. § 841(b)(1)(A).

Because Camacho had timely raised a constitutional objection, he was entitled to preserved error review. Under such review, the court first determines whether there was an error, and if so, it then undertakes a harmless error analysis. Camacho argued that, under *Apprendi*, he could not be sentenced under § 841(b)(1)(A), but rather must be sentenced under § 841(b)(1)(C). The Court of Appeals agreed, however it noted that “[n]ormally, a defendant may obtain re-sentencing under *Apprendi* only if the sentence he actually receives exceeds the maximum allowable sentence he should have received under section 841(b)(1)(C), i.e., twenty years imprisonment, without regard to quantity.” Thus, because Camacho’s sentence was less than the 20 year maximum, there was arguably no *Apprendi* error.

However, the Court held that regardless of whether there was an *Apprendi* error, Camacho’s sentence was error under *United States v. Rogers*, 228 F.3d 1318 (11th Cir.2000), which went beyond *Apprendi* and held that “drug quantity in section 841(b)(1)(A) and section 841(b)(1)(B) cases must be charged in the indictment and proven to a jury beyond a reasonable doubt.” *Rogers* was violated, the Court

reasoned, because by sentencing Camacho to the mandatory minimum sentence, “the district court necessarily used section 841(b)(1)(A) for sentencing.” Because quantity was not charged in the indictment and proven to the jury, there was a *Rogers* error in this case.

The Court then considered whether the error was harmless. Because prior cases have held that an *Apprendi* error is harmless where there is undisputed testimony as to drug quantity, a *Rogers* error is harmless in cases such as this one where the defendant stipulated to drug quantity. Such a stipulation acts as the equivalent of a jury finding on drug quantity. Therefore, the Court held, although there was error, the error was harmless. Camacho’s sentence was affirmed.

ELEVENTH CIRCUIT HABEAS CORPUS DECISIONS

No Abuse of Discretion in Granting Stay of Execution on Grounds Which Include Jurisdictional Question Under the AEDPA

Arthur v. Haley, 248 F.3d 1302 (11th Cir. 2001).

◆ Stay of Execution - AEDPA Jurisdictional Question

The Eleventh Circuit held

that the district court had not abused its discretion in granting the petitioner a stay of execution. The district court had granted the stay based in part upon a threshold jurisdictional question under the AEDPA, the resolution of which, the district court had found, might require an evidentiary hearing. The Court, therefore, denied that State’s motion to vacate the stay of execution.

[NOTE: In a footnote, the Court also pointed out that, pursuant to Federal Rule of Appellate Procedure 22(b)(3), the State was not required to obtain a certificate of appealability in order to appeal the district court’s decision.]

District Court That Dismisses Habeas Petition as Time-Barred May Not Grant a Certificate of Appealability on Petitioner’s Constitutional Claim

Ross v. Moore, 246 F.3d 1299 (11th Cir. 2001).

◆ 28 U.S.C. § 2254 - appealability of issues dismissed as time-barred

The Eleventh Circuit Court of Appeals vacated the district court’s grant of a certificate of appealability to petitioner Bobby Ross. In his § 2254 petition, Ross argued that he had been denied his right to due process under the Fifth and Fourteenth Amendments, but the district court dismissed the petition as time-barred. The Court of appeals held that it was

inappropriate for the district court to grant Ross a COA with respect to this issue and vacated the district court's order doing so.

The Court, however, did remand the case to the district court for the limited purpose of determining whether Ross should be granted a COA with respect to whether his petition was time-barred.

Under Mailbox Rule, Prisoner's Pro Se Habeas Petition is Deemed Filed on Date Delivered to Prison Authorities for Mailing

Washington v. United States, 243 F.3d 1299 (11th Cir. 2001).

◆ 28 U.S.C. § 2255 -statute of limitations; mailbox rule

The Eleventh circuit reversed the district court's dismissal of Ronald Washington's § 2255 petition dated October 6, 1998. The district court had agreed with the Government that Washington's petition was untimely as it had not been received by the clerk's office until October 21, 1998, a date the Government argued was outside § 2255's one-year statute of limitations.

As an initial matter, the Court had to determine the date on which Washington's conviction became final, and thus the date on which the statute of limitations

began to run. Agreeing with the other circuits which have considered the issue, the Court held that Washington's conviction had become final on October 6, 1997, the day the Supreme Court denied Washington's petition for certiorari. Then, citing Federal Rule of Civil Procedure 6(a), the Court held that the statute of limitations period began to run on the day following the Supreme Court's decision, and therefore Washington had until October 7, 1998 to file his § 2255 petition.

The Court then concluded, and the Government conceded, that the district court had erred in dismissing the petition because it had not been received by the clerk's office until October 21, 1998. As the Court noted, "a prisoner's *pro se* § 2255 motion is deemed filed the date it is delivered to prison authorities for mailing." Under this "mailbox rule" the burden is on the prison authorities to prove the date the prisoner delivered the documents for mailing. Because the Government failed to offer any evidence to the contrary, the court should have assumed that Washington's petition had been delivered to prison authorities on the date he signed it, October 6, 1998. Therefore, the petition was filed within the one-year time limit, and the district court erred in granting the motion to dismiss.

Successive State Postconviction Petitions are "Properly Filed Applications" Which, Under § 2244(d)(2), Toll AEDPA's Statute of Limitations

Weekley v. Moore, 244 F.3d 874 (11th Cir. 2001).

◆ 28 U.S.C. § 2244(d)(2) - statute of limitations tolled while "properly filed" state postconviction motion is pending

Following remand by the Supreme Court for further consideration in light of *Artuz v. Bennett*, 121 S.Ct. 361 (2000), the Eleventh Circuit reversed its previous opinion (*Weekley v. Moore*, 204 F.3d 1083 (11th Cir. 2001), and held that successive state postconviction petitions are "properly filed applications" which, pursuant to 28 U.S.C. § 2244(d)(2), toll the AEDPA's limitations period for federal habeas petitions. The Court then remanded the case to the district court for further proceedings.

Where Alien Fails to Exhaust Available Administrative Remedies, District Court is Without Jurisdiction to Hear Habeas Petition

Boz v. United States, 248 F.3d 1299 (11th Cir. 2001).

◆ Immigration and Nationality Act, § 241, as amended, 8 U.S.C. § 1231

The Eleventh Circuit affirmed the district court's dismissal of petitioner's habeas corpus petition. The district court had held that it was without

jurisdiction to consider the petitioner’s habeas corpus petition in which he claimed that his continued and indefinite detention after a final removal order violated his due process rights. The Court of Appeals agreed.

After Ivan Boz, an alien, served a 120-day sentence for car theft, he was taken into the custody of the INS who, because Boz was convicted of a crime involving moral turpitude, began deportation proceedings against him. Boz was ordered removed and the Board of Immigration Appeals affirmed.

After remaining in U.S. custody for more than a year after his removal order became final, Boz filed a § 2241 petition in which he challenged his indefinite, continued incarceration in the U.S. The district court dismissed the petition for lack of subject matter jurisdiction.

The Court of Appeals agreed that the district court was without jurisdiction to hear the case; although it came to this conclusion based on different grounds. The district court did not have jurisdiction, the Court held, because Boz had failed to exhaust the administrative remedies available to him and because those administrative remedies may have provided the relief Boz sought.

Boz could have made a written request to the District Director that he be released. Had

he done so, the District Director would have been required to “review the status of the [the] alien to determine whether there had been a change in circumstances that would support a release decision.” The detainee could then appeal this decision to the Board of Immigration Appeals. Because Boz had not begun the administrative review process at the time he filed his habeas petition, he had not exhausted his administrative remedies and thus the district court lacked jurisdiction to hear the petition.



Staff Changes at the Federal Defender’s Office

The Federal Defender’s Office is pleased to welcome its newest Assistant Federal Defender, Joseph P. Van Heest. As most of you know, Mr. Van Heest formerly served as a CJA panel attorney in the Middle District of Alabama and was engaged in the private practice of law in Montgomery. Please join us in welcoming Joe to the Federal Defender staff.

The Federal Defender’s Office also wishes to announce that John W. Focke, formerly an Assistant Federal Defender, has been named Senior Litigator.



Alabama Criminal Defense Lawyers Association Annual Meeting at the Beach

The Alabama Criminal Defense Lawyers Association is holding its 2001 Summer Seminar and Annual Meeting at Windmere Condos & Conference Center & Hampton Inn, in Orange Beach, Alabama, on June 28 - 30, 2001. This year the Association celebrates its 20th anniversary. It promises to be a useful and interesting program with a wide variety of topics within the realm of criminal defense. The keynote speaker, Dennis Balske, an Assistant Federal Defender in Portland, Oregon, was ACDLA’s first president. All panel attorneys should make an effort to attend and, if you have not done so, to join ACDLA.

Defenders Victorious in Probation Office Golf Tournament

(by Kevin, Butler, AFD)

After finishing third in last year’s competition, the Defenders, powered by Joe Van Heest, John Focke, Kevin Bulter and Keith Marquess stormed back to take this year’s competition by a stroke.

Leading the charge were Focke and Van Heest, both of whom could not miss a putt and gave the team an edge by keeping the ball within 10 feet of the hole on chips. When reached for comment while shooting a Wheaties commercial, Mr. Focke stated, “the hole just looked like a manhole cover. I felt I

couldn't miss." When asked about the victory making him a favorite at next month's U.S. Open, Mr. Van Heest responded, "Tiger's been playing well, however, if my short game stays this solid, I think I can give him a run."

Joe and John's deadly short game was set up by outstanding tee to green play by Marquess and Butler. Taking a break from a junior golf clinic, Mr. Marquess stated, "I know if I could keep the ball in the fairway and put a few close to the pin, Focke and Van Heest would clean things up - man they were in the zone." Mr. Butler added, "the other guys' steady play made it easy, all I had to do was grip it and rip it."

_____The Defenders, who have been ensnared in an ongoing endorsement dispute with Titleist were able to put the legal rankling behind them and focus on the tournament. Butler stated, "just before the tournament we signed with Nike, so we were focused and it showed. If we stay this focused, we'll be tough next year as well."



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.

☛ **July 11, 2001 (Montgomery) and July 19, 2001 (Dothan):**

Dealing with the Mentally Ill Client

This session will provide 60 minutes of discussion on the issues presented in federal criminal defense representation of a mentally ill or mentally retarded person, including: identification of possible illness; determination of when to request an evaluation for competence to stand trial and/or for insanity defense; evaluation of a forensic evaluation; effective communication with the mentally ill or mentally retarded client; and statutory and sentencing issues centered around mental illness and diminished capacity.

☛ **August 8, 2001 (Montgomery) and August 16, 2001 (Dothan):**

Trial Advocacy: Exposing a Witness's Lies

This session will provide 60 minutes of discussion on various techniques for effective exposure of a witness's incredibility and falsehoods, including cross-examination, impeachment, presentation of evidence of acts of dishonesty, and presentation of bad character for truthfulness.

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

"Don't Plead Him Yet!" - The Impact of State Sentences on Federal Sentencing Calculations

This session will provide 60 minutes of discussion on the relationship between and impact on each other of state and federal sentences. The seminar will include coverage of the assessment of state adult convictions, Youthful Offender convictions, *nolo contendere* pleas, and juvenile adjudications in calculating criminal history and potential sentences under the federal sentencing guidelines, and the coverage and impact of federal convictions on state obligations under felon registration laws and the Community Notification Act ("Megan's Law").

☛ **September 28, 2001 (Montgomery)**

Six Hour All-Day Seminar

A schedule of topics and

speakers will be provided to all panel attorneys later in the summer.

☛ **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 determinations may be made as to the selection of the penalty within the guideline range.

☛ **November 14, 2001 (Montgomery) and November 15 19, 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 offense 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 firearms 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.

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).

