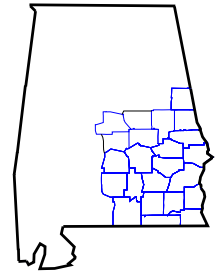


CJA NEWS



“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, Friends and Colleagues:

Ben Bruner is a member of this district’s CJA Panel and has served as the CJA Panel Attorney Representative from this district during the past year. Recently, Ben attended the National Panel Attorney’s Conference in Los Angeles. That conference is conducted each year by the Defender Services Division of the Administrative Office of the U.S. Courts to address concerns common to all CJA panels in every federal district court.

Ben agreed to let us share his thoughts with you on that conference. The following are some of Ben’s observations about the meeting:

“The overall theme seemed to be that now that the rates are reaching a significant rate (\$90.00 and \$113.00 for next year) the emphasis was on improving quality of representation through training, standards and proficiency goals. A great deal of emphasis was placed on bringing the “have not” districts (which include the Northern District

of Alabama) into a higher level of training and service. Seven districts in the nation have no Federal Defender or CJA resource counsel. A great deal of attention was given to, at a minimum, giving those districts resource counsel.

“A second part of the new emphasis on standards and competency was improvement in districts which have some sort of training and standards. While no consensus was reached, certain minimums were agreed upon. At a minimum, a Panel Attorney should have email at the office, a current federal criminal code, and a current guidelines manual. While these seem trivial, there were numerous “horror stories” of panel attorneys not having these resources and it effecting their representation. It was also agreed upon that some level of training should be required along with proficiency through actual practice. In the future, I expect CLE in the area of federal criminal defense will be required of all panel attorneys. The amount was not agreed upon and may be subject to local option. Additionally, I believe panel attorneys will be expected to handle at least four federal criminal cases per year to be considered proficient in the practice of federal criminal law and maintain panel membership without other

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circumstances being considered. Attorneys who continually refuse to accept appointments would be removed from panels. While exact standards or guidelines could not be agreed upon, these items were much discussed and appear to be coming in the next year or two.

“Regarding resources, one program that deserves mention is one which defender services is administering regarding procuring equipment for CJA counsel. If a panel attorney has need for specific equipment or software not normally available for use on a specific case, defender services may purchase that equipment for that attorney for use in the case. At the end of the case, the attorney would either send the equipment back to defender services or turn it over to the local federal defender officer. With the constant computerization of discovery, this could be a very valuable program in the near future.”

Thank you to Ben, and to all of you for your dedication on behalf of indigent persons who happen to become federal defendants.

Sincerely,

Christine A. Freeman
Executive Director



ROLE OF STANDBY COUNSEL

(by Christine Freeman, Esq.)

This district has had a number of defendants recently request to represent themselves, but with the ability to consult with “elbow” or “standby” counsel. We thought an article on the role of standby counsel might be helpful and timely.

The United States Supreme Court has held that a defendant has a Sixth Amendment right to explicitly waive counsel and conduct his own defense. *Faretta v. California*, 422 U.S. 806 (1975). Subsequent decisions of the Supreme Court and the appellate courts have set out the following consequences of this right:

Expanded conduct is permitted of *pro se* defendants.

The *pro se* defendant is allowed to control the organization and content of his own defense and to have “a fair chance to present his case in his own way.” *McKaskle v. Wiggins*, 104 S.Ct. 944, 949, 950 (1984). The *pro se* defendant is allowed to make motions, to argue points of law, to question witnesses, and to address the court “freely on his own behalf.” *McKaskle v. Wiggins*, 104 S.Ct. 944, 949 - 951 (1984).

An indigent pretrial detainee who is representing himself must be afforded unlimited mail access to the court, standby counsel, and the prosecution; no restrictions may be imposed unless this access is abused by the defendant. *United States v.*

Beckwith, 987 F. Supp. 1345, 1348 (D. Utah 1997).

The role of standby counsel is limited to technical assistance.

“The utility of assigning stand-by counsel to *pro se* litigants is to assist them with the technical complexities inherent in the law and in trying a case,” *U.S. v. Knowles*, 66 F.3d 1146, 1160 (11th Cir. 1995); cert. denied *Wright v. U.S.*, 517 U.S. 1149 (1996); appeal after remand for resentencing, *U.S. v. Knowles*, 117 F.3d 1430 (11th Cir.(Fla.) Jun 12, 1997) (TABLE, NO. 96-2165).

Standby counsel may “call the judge’s attention to matters favorable to the accused upon which the judge should rule on his or her motion.” ABA Standards for Criminal Justice 6-3.7 (2d ed. 1980), cited in *McKaskle v. Wiggins*, 104 S.Ct. 944, 951 at n. 10 (1984).

Standby counsel may assist the defendant in routine procedural or evidentiary matters in furtherance of the defendant’s clearly indicated goals, such as the introduction of evidence, objection to testimony, or matters of courtroom protocol. *McKaskle v. Wiggins*, 104 S.Ct. 944, 953 - 954 (1984).

Standby counsel must be available if and when the accused requests help. *United States v. Bertoli*, 994 F.2d 1002, 1018 - 1019 (3rd Cir. 1993). Where a *pro se* defendant has standby counsel, it may be assumed that he has adequate access to a library. *United States v. Beckwith*, 987 F.Supp. 1345, 1348 (D. Utah 1997).

Standby counsel is restricted in activity.

Since the case responsibility is limited, a standby attorney is actually restricted in his or her roles within the case. Standby counsel may not make significant tactical decisions, may not control the questioning of witnesses, and may not “speak *instead* of the defendant on any matter of importance.” *McKaskle v. Wiggins*, 104 S.Ct. 944, 951 (1984). Thus, standby counsel’s role is that of an “observer, an attorney who attends the proceeding and who may offer advice, but who does not speak for the defendant or bear responsibility for his defense.” *United States v. Taylor*, 933 F.2d 307 (5th Cir.), cert. denied, 502 U.S. 883 (1991).

Disagreements between the *pro se* defendant and standby counsel are to be resolved in the defendant’s favor whenever the decision is one that would normally be left to the discretion of counsel. *McKaskle v. Wiggins*, 104 S.Ct. 944, 951 (1984).

A *pro se* defendant may not insist on specific types of assistance from standby counsel.

A defendant does not have a constitutional right to insist on “hybrid” representation, in which the defendant and standby counsel each serve as co-counsel. *McKaskle v. Wiggins*, 104 S.Ct. 944, 953 (1984); *Cross v. United States*, 893 F.2d 1287,

1291-92 (11th Cir.), cert. denied, 498 U.S. 849, 111 S.Ct. 138, 112 L.Ed.2d 105 (1990); *United States v. Nivica*, 887 F.2d 1110, 1121 (1st Cir.1989), cert. denied, 494 U.S. 1005 (1990).

A *pro se* defendant does not have the right to receive personal instruction from the trial judge on courtroom procedure. *McKaskle v. Wiggins*, 104 S.Ct. 944, 954 (1984).

By waiver of counsel, a *pro se* defendant has also waived the right to complain that his own self-defense amounted to a denial of effective assistance of counsel. *McKaskle v. Wiggins*, 104 S.Ct. 944, 950 at n. 8 (1984); *Faretta v. California*, 422 U.S. 806, 835 at n. 46 (1975); *United States v. Nivica*, 887 F.2d 1110, 1121 (1st Cir. 1989), cert. denied 494 U.S. 1005 (1990); *Childress v. Johnson*, 103 F.3d 1221, 1231 (5th Cir. 1997); *United States v. Brown*, 591 F.2d 307, 310 (5th Cir. 1979).

The role of standby counsel is fundamentally different from full counsel duties.

“There can be no question that the roles of standby counsel and full-fledged defense counsel are fundamentally different. The very definition of full-fledged counsel includes the proposition that the counselor, and not the accused, bears the responsibility for the defense; by contrast, the key limitation on standby counsel is that such counsel not be responsible--and not be perceived to be responsible--for the accused's defense.” *Id.* at 312.

Thus, “(t)he legal role of standby counsel is ‘merely to be

available in case the court determines that the defendant is no longer able to represent himself or in case the defendant chooses to consult an attorney.” *United States v. Vlahos*, 884 F.Supp. 261, 264 (N.D. Ill. 1995), quoting *United States v. Windsor*, 981 F.2d 943, 947 (7th Cir.1992). Standby counsel should be willing to act to aid and assist defendant to the full extent reasonable and to fully assist defendant as time and circumstance allow and to act in a fully professional manner, but need not be available full time to respond immediately to every inquiry or request of defendant. See *United States v. Beckwith*. 987 F. Supp. 1345 (D. Utah 1997).

Pro se defendants may change their mind and request counsel.

The *pro se* defendant also retains the right to change his mind, “elevate standby counsel to a lead counsel role,” and waive his *Faretta* rights. *United States v. Taylor*, 933 F.2d 307, 311 (5th Cir. 1991) (district court erred in refusing to allow defendant to retract waiver of right to counsel). Indeed, “(o)nce a *pro se* defendant invites or agrees to any substantial participation by [standby] counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously . . . request[s] that standby counsel be silenced.” *McKaskle v. Wiggins*, 104 S.Ct. 944, 953 (1984); *United States v. Willis*, 970 F.2d 494, 497 (8th Cir. 1992).

Thus, standby counsel must be ready to step in if the accused

wishes to terminate his own representation. *United States v. Bertoli*, 994 F.2d 1002, 1018 - 1019 (3rd Cir. 1993).



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

State Seeking to Have Sexual Offender Civilly Committed Must Show Offender Has Serious, Rather Than Total, Inability to Control Behavior

Kansas v. Crane, 122 S.Ct. 867 (2002).

◆ **Due Process - civil commitment of sexual offenders**

In this case, the Supreme Court revisited its prior decision in *Kansas v. Hendricks*, 521 U.S. 346 (1997), holding the Kansas Sexually Violent Predator Act constitutional. In *Hendricks*, the Court ruled that the confinement of a person under the Act was

civil, not criminal, and that the Act's required showing of dangerousness linked with either a "mental abnormality or personality disorder" which makes it difficult, if not impossible, for the person to control his dangerous behavior, satisfied due process requirements.

After the State of Kansas sought the civil commitment of sex offender Michael Crane, the district court ordered commitment. However, the Kansas Supreme Court reversed that decision holding that *Hendricks* required a showing that Crane could not control his dangerous behavior, and that the district court had failed to make such a finding.

The Supreme Court of the United States reversed the decision of the Kansas Supreme Court, finding that it had read *Hendricks* too rigidly. What was required, the Court held, was not a showing that the defendant was completely unable to control his behavior, but rather a showing of an abnormal disorder that made it difficult for the person to control his behavior.

The Supreme Court rejected the State's argument that *Hendricks* permitted commitment without any lack of control determination, and held that, before a sex offender may be committed, there "must be proof of serious difficulty in controlling behavior." (Justices Scalia and Thomas dissented.)

Where Future Dangerousness at Issue, Capital Defendant Entitled to Parole Ineligibility Instruction

Kelly v. South Carolina, 122 S.Ct. 726 (2002).

◆ **Due Process - sentencing of capital defendant**

In a predictable 5-4 split, the Supreme Court reiterated its holding in *Simmons v. South Carolina*, that due process entitles a capital defendant to inform the jury of his parole ineligibility when the defendant's future dangerousness is at issue, and the only alternative to a death sentence is life without the possibility of parole. In doing so, the Court reversed William Kelly's death sentence because the trial court refused to instruct the jury regarding Kelly's parole ineligibility.

The Supreme Court of South Carolina had found *Simmons* inapplicable in this case because it believed that the jury had a third sentencing alternative and because it believed Kelly's future dangerousness was not at issue. The Supreme Court rejected both of these arguments.

The Court noted that, although there may be circumstances in which the judge may sentence the defendant to less than life, once the jury finds the existence of an aggravating factor, its only sentencing options are death or life without parole. Thus, the South Carolina Supreme Court's reasoning on this factor was "not to the point."

Additionally, the Court also rejected the argument that Kelly's future dangerousness had not been placed in issue. The prosecution presented evidence regarding Kelly's violent attempt to escape prison as well as evidence regarding his violent character. Therefore, the prosecution had raised future dangerousness, and Kelly was entitled to the instruction he had requested.

Moreover, the Court found it immaterial that the jury had not inquired about parole ineligibility, as

had the jury in *Simmons*. It noted, “[a] trial judge’s duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part.” The Court, therefore, vacated Kelly’s death sentence. (Justices Rehnquist, Kennedy, Thomas and Scalia dissented.)

To Satisfy Due Process Requirements in a Forfeiture Proceeding, the Government’s Efforts to Provide Notice Must be Reasonably Calculated to Apprise Interested Parties of Pending Action

Dusenberry v. United States, 122 S.Ct. 694 (2002).

◆ **Fifth Amendment - Due Process - notice in forfeiture cases**

The Supreme Court held that an inmate’s due process right to notice of the FBI’s intention to forfeit property was not violated when the FBI sent a letter by certified mail to the inmate, care of his prison, notifying him of the intended forfeiture.

The Court found that this procedure was “reasonably calculated” to give the person notice. The Court held that the government satisfied due process because it attempted to provide actual notice, even if actual notice may not have been achieved.

In an asset forfeiture proceeding, where the government sends notice of forfeiture proceeding by certified mail to prisoner in a prison that

has a system for delivering mail to inmates, due process is satisfied.

Court of Appeals Erred in Determining Whether Police had Reasonable Suspicion for Stop by Analyzing Each Factor Separately Rather Than by Analyzing the Totality of the Circumstances

United States v. Arvizu, 122 S.Ct. 744 (2002).

◆ **Fourth Amendment - reasonable suspicion to stop**

In this case, The Supreme Court unanimously held that, based on the totality of the circumstances, a border patrol agent had reasonable suspicion to stop the defendant’s minivan as it traveled down a dirt road in a remote area of Arizona during the middle of the afternoon. It then reversed a decision of the Ninth Circuit suppressing over 100 pounds of marijuana which were seized as a result of the subsequent search of the vehicle.

The Court of Appeals had determined that the agent decided to stop the minivan based on ten separate factors, seven of which they found to carry either little or no weight in determining whether the agent had reasonable suspicion. It also found the other three factors insufficient to justify the stop. In finding this type of analysis inappropriate, the Supreme Court noted that the Ninth Circuit had erred in rejecting factors which, in isolation, were susceptible to reasonable explanations and attributing to them no weight. As the Court noted, “*Terry* precludes this type of divide-and-conquer analysis.”

In reversing the decision of the Ninth Circuit, the Court held that, in

determining whether reasonable suspicion for a stop exists, the reviewing court must evaluate the “totality of the circumstances” and must not consider each factor separately.

Federal Habeas Review Not Barred Due to Petitioner’s Failure to Comply with State Procedural Rule

Lee v. Kemna, 122 S.Ct. 877 (2002).

◆ **28 U.S.C. § 2544 - exception to procedural bar**

The Supreme Court held that a defendant’s failure to make a written motion for continuance as required by a state criminal procedure rule, did not constitute adequate state grounds to deny federal habeas review, where the original denial was not based on this ground and where the rule was not strictly observed.

The Court held that, although violation of firmly established and regularly followed state rules ordinarily bars federal habeas review of a claim, exorbitant application of a state rule is an inadequate ground to stop consideration of a federal question.

During trial, the defendant Lee planned to put on an alibi defense, and his mother, stepfather and sister voluntarily came to the courthouse to testify to his alibi. However, on the day the defense case was to begin, they inexplicably left the courthouse. Lee’s counsel moved for a continuance, but the trial judge denied the request, stating that it looked like the witnesses had abandoned Lee, and that the judge would be unavailable on the

following two days, due to a daughter's hospitalization, and another trial.

Lee's postconviction motion for relief was denied on the ground that counsel's motion for continuance failed to comply with the technical requirements for these motions under Missouri law.

Reversing, the Supreme Court noted that once counsel brought the alleged federal error to the attention of the trial court in time for it to take corrective action, he preserved the claim for federal review. The Court also noted that the technical rules invoked by the Missouri courts were never mentioned in the trial court, and that technical compliance with the rules was in effect achieved when counsel gave the trial court reason to believe that the witnesses could be located within a reasonable time and where the substance of their testimony was conspicuously apparent on the record.

District Court's Unobjected to Failure, During Plea Colloquy, to Advise Defendant of Right to Counsel at Trial Would be Reviewed for Clear Error

Court May Look to Entire Record to Determine if Substantial Rights Affected

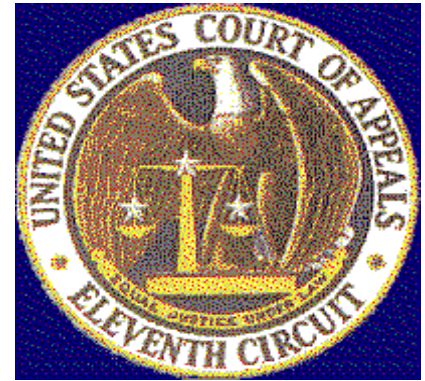
United States v. Vonn, 122 S.Ct. 1043 (2002).

◆ **Fed. R. Crim.P.11 - error in guilty plea colloquy**

The Supreme Court held that the "plain error" standard of review, not the "harmless error" standard, applies to the appeal of a district court's unobjected-to failure to advise a defendant of his right to assistance of counsel at trial, as required by Fed.R.Crim.P 11(c)(3).

The Court rejected Vonn's argument that Rule 11's failure to mention the plain error standard of Fed.R.Crim.P 52(b) meant that all Rule 11 errors were reviewable for harmless error. The Court also found no support for this position in the Advisory Committee Notes to Rule 11. The Court noted that the absence of a plain error standard of review would create an incentive for defendants to wait until after sentencing and then object to their plea as "mere sour grapes" about their sentence.

Finally, the Court noted that in determining whether a Rule 11 error affected substantial rights, an appellate court should consider the whole record in the case, not just the plea proceedings. In Vonn's case, he was advised of his right to counsel at his initial appearance and several times thereafter. Because, as the Court noted, there are circumstances in which defendants may be presumed to recall information provided to them prior to the plea proceedings, on remand, the court below should consider the pre-plea record in resolving Vonn's claimed Rule 11 violation.



Recent Eleventh Circuit Decisions:

Claim Filed Under 42 U.S.C. § 1983 After § 2254 Petition Has Been Denied, is Functional Equivalent of Second Habeas Petition Subject to the Requirements for Filing Second or Successive Habeas Petitions

Spivey v. State Board of Pardons and Paroles, 279 F.3d 1301 (11th Cir. 2002) (per curiam).

◆ **28 U.S.C. § 2244(b)(3)(A) - second or successive habeas petitions**

On the day before his scheduled execution, Spivey filed a 42 U.S.C. § 1983 action challenging his execution based on the investigation of members of the Georgia Board of Pardons and Paroles, as well as a motion seeking a stay of execution. The district court denied the stay of execution, and the Court of Appeals affirmed.

As the Court noted, Spivey had previously filed a 28 U.S.C. § 2254 petition in which he challenged

his sentence and conviction. That petition had already been denied. Citing *Felkner v. Turpin*, the Court held that Spivey's § 1983 claim was, therefore, the "functional equivalent" of a second habeas petition which was subject to the procedural requirements of 28 U.S.C. § 2244(b)(3)(A), the section which sets forth the procedural requirements for second or successive habeas petitions

Because Spivey's § 1983 claim was a second habeas petition, and because he had failed to apply to the Court of Appeals for permission to file the claim, the district court lacked jurisdiction to hear the claim, and thus had properly denied the motion for stay of execution.

***Apprendi* Not Implicated Where Defendant's Sentence on Drug Charges Enhanced Because Offense Resulted in Death of Heroin Customer**

United States v. Rodriguez, 279 F.3d 947 (11th Cir. 2002).

◆ **18 U.S.C. § 841(b)(1)(C) - enhanced sentence where offense results in death**

The Court of Appeals affirmed the defendant's twenty year sentence on charges related to heroin distribution. The defendant's sentence had been enhanced pursuant to 21 U.S.C. § 841(b)(1)(C) based on the death of one of the defendant's customers.

The defendant had sold heroin to a man who mistakenly

snorted the drug. The man was later found unconscious in the hallway of a hotel, and then dragged inside the hotel room and placed on the bed by two other men. An hour later, one of these men returned to the hotel room and found the customer without a pulse. The man was taken to the hospital where he was pronounced dead.

The Court rejected the defendant's argument that his due process rights and right to trial by jury were violated when the district court found, by a preponderance of the evidence, that the victim's death was the result of his offense, and then enhanced his sentence pursuant to 21 U.S.C. § 841(b)(1)(C) and U.S.S.G. § 2D1.1.

Citing *Apprendi*, the defendant argued that the court was required to find, beyond a reasonable doubt, that the victim died as a result of using heroin sold to him by the defendant. However, the Court held there was no *Apprendi* error because the defendant's twenty year sentence did not exceed the statutory maximum sentence under § 841(b)(1)(C) for a heroin offense without reference to death.

The Court also rejected the defendant's argument that there was insufficient evidence to connect his offense with the death. The defendant argued that the failure of the two men who found the victim in the hallway to immediately call the paramedics, was as intervening factor that severed the causal connection between the offense and the death.

The Court stated that it need not address whether the statute or the guidelines allow for an "intervening factor defense" because no evidence pointed to the death being caused solely by the gross negligence of the two men who found the victim in the hallway. There was also no evidence

that the victim would have lived had the men called the paramedics immediately. Additionally, the actions of the two men "were foreseeable and naturally resulted" from the defendant's conduct. Therefore, "their actions did not break the chain of legal causation."

The defendant's sentence was affirmed.

Plain Error to Impose Sentencing Enhancement Without a Supporting Factual Basis

United States v. Dunlap, 279 F.3d 965 (11th Cir. 2002) (per curiam).

◆ **18 U.S.C. § 2252A(a)(1) - transportation of child pornography; U.S.S.G. § 2G2.2(b)(3) - enhancement for sadistic depictions; U.S.S.G. § 2G2.2(b)(2) - enhancement for distribution of child pornography**

The Eleventh Circuit vacated Hollowell Dunlap's sentence for transporting child pornography. After being convicted of violating 18 U.S.C. § 2252A(a)(1), the district court enhanced Dunlap's sentence 4 levels pursuant to U.S.S.G. § 2G2.2(b)(3) because the offense involved sadistic images, and 5 levels pursuant to U.S.S.G. § 2G2.2(b)(2) for distribution of the offending materials.

Dunlap had pled guilty to the charge which was based on one electronic transmission made in May of 1998. He argued, however, that his sentence should not be enhanced under § 2G2.2(b)(3) because the sadistic images were discovered on a computer in Dunlap's office after the date of the offense and they had nothing to do with the May

transmission. Therefore, he argued, the images were not relevant conduct.

The Court rejected this argument, stating that as long as Dunlap possessed the images when he made the May transmission, then his possession was “during the commission of the offense of conviction,” and thus, pursuant to U.S.S.G. § 1B1.1(3), it was relevant conduct. The Court also noted that the government need not prove that the images were ever transmitted.

However, on appeal, Dunlap claimed for the first time that the evidence was insufficient to support the imposition of this enhancement. The Court of Appeal agreed. Although Dunlap had not objected on this basis at sentencing, the imposition of this enhancement, the Court held, was plain error because the government had presented no evidence that Dunlap possessed the sadistic materials at the same time he transmitted the pornography. The Court remanded the case to the district court to allow the government to present additional evidence on the issue of timing.

The Court rejected, as contrary to established law, Dunlap’s further argument that he should not have been enhanced pursuant to § U.S.S.G. 2G2.2(b)(2) because he was not motivated by pecuniary gain.

No *Apprendi* Error in Sentencing Defendants to 20 Years or Less Without Jury Determination of Drug Quantity

United States v. Acevado, ___ F.3d ___ (11th Cir. 2002) (per curiam).

◆ **21 U.S.C. §§ 841 and 846 - sentence in conspiracy case where no jury determination of drug quantity**

During their sentencing hearing for conspiracy to possess with intent to distribute cocaine, the district court found each defendant responsible for 50 kilograms of cocaine, the entire amount of drugs involved in the conspiracy. The court then sentenced one defendant to 235 months, and the other defendant, who had a previous drug conviction, to 240 months. The defendants appealed.

The Court of Appeals found no error in either sentence. If no specific drug quantity is charged or found by the jury, then under § 841(b)(1)(C), a defendant may be sentenced to a maximum of twenty years, 30 years with a prior drug conviction. As each of the defendants in this case was sentenced in accordance with § 841(b)(1)(C), there was no error. The defendants’ sentences were affirmed.

Statute of Limitations is Affirmative Defense Which is Waived if Not Asserted Prior to Plea

No Abuse of Discretion in Denying Defendant’s Motion to Withdraw Guilty Plea

United States v. Najjar, ___ F.3d ___ (11th Cir. 2002) (per curiam).

◆ **Statute of Limitations - affirmative defense; Fed.R.Crim.P. 32(e) - withdrawal of guilty plea**

The Court of Appeals found no

error in the district court’s denial of Najjar’s motion to dismiss the information for lack of jurisdiction or the denial of his motion to withdraw his guilty plea.

Najjar was charged by information with making a false statement to a department of the United States. He waived indictment and entered a guilty plea to the charge. Six months later, Najjar moved to dismiss the information on grounds that, because the statute of limitations had expired, there was a lack of jurisdiction which could not be waived in a plea agreement. The district court denied the motion, and the Eleventh Circuit affirmed, holding that the statute of limitations is a defense which must be asserted at trial, and not a jurisdictional bar.

The Court also found that the district court had not abused its discretion in denying Najjar’s alternative motion to withdraw his guilty plea. Although, pursuant to Fed.R.Crim.P. 32(e), a defendant may be permitted to withdraw his plea for “any fair and just reason,” Najjar failed to meet this requirement. The district court had determined that Najjar had the close assistance of counsel during plea negotiations, that his plea was knowing and voluntary, that judicial resources would not be conserved by permitting the plea to be withdrawn, and that the government would be highly prejudiced if withdrawal were permitted.

Because the district court had made these factual findings and had concluded that Najjar did not satisfy the requirement of Rule 32(e), it did not abuse its discretion in denying Najjar’s motion to withdraw.

Government's Motion Requesting Trial Date Did Not Result in Exclusion of Time Under Speedy Trial Act

United States v. Brown, _____ F.3d ____ (11th Cir. 2002) (per curiam).

◆ **18 U.S.C. § 3161 et seq. - Speedy Trial Act - exclusion of time**

The Eleventh Circuit reversed the district court's denial of Dexter Brown's motion to dismiss indictment based on a violation of The Speedy Trial Act, 18 U.S.C. § 3161 et seq.

Several weeks after Brown's initial appearance on charges of being a felon in possession of a firearm, the government filed a motion entitled "Motion for Determination of Speedy Trial Status and/or Trial Setting," in which it asked the court to either hold a hearing regarding the Speedy Trial Act status of the case, or to set a trial date in accordance with the Act. Two weeks later, the court set a trial date beyond the 70 day time limitation provided for in § 3161(c) of the Act.

In denying the defendant's subsequently filed motion to dismiss, the district court concluded that the government's motion had resulted in excludable time pursuant to 18 U.S.C. § 3161(h)(1)(F) which provides for the exclusion of time for "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt

disposition of, such motion."

The Court of Appeals reversed, holding that the government's motion was not a motion within the meaning of § 3161(h)(1)(F). Therefore, the defendant's trial should have been held within 70 days of the defendant's initial appearance, pursuant to § 3161(c). The document, the Court noted, was simply a reminder to the court to set a trial date, and if such a document could extend the seventy-day period there would be "no teeth in the Speedy Trial Act as a whole."

The case was remanded and the trial court directed to dismiss the indictment, either with or without prejudice.

Court Erred in Sentencing Defendant to High End of Guideline Range Based on Her Refusal to Cooperate in Unrelated Prosecution of Her Husband

United States v. Burgos, 276 F.3d 1284 (11th Cir. 2001).

◆ **U.S.S.G. § 1B1.4, 18 U.S.C. § 3661 - determination of sentence within the guideline range**

The Court of Appeals held that the district court incorrectly applied the Sentencing Guidelines when it imposed a sentence at the high end of the applicable guideline range based on the defendant's unwillingness to cooperate in the government's investigation of unrelated criminal charges against her husband.

The defendant was convicted of violating currency reporting requirements while her husband was charged with money laundering. The Court acknowledged that the text of 18 U.S.C. § 3661 and U.S.S. G. § 1B1.4 "appear to give the district

court wide discretion in sentencing a defendant." The statute provides that "no limitation" is placed on the information a court may consider; the guideline (citing the statute) states that the court may consider "any information concerning the background, character, and conduct of the defendant unless otherwise prohibited by law."

Nevertheless, the Court found that 18 U.S.C. § 3553(a)(2) limited the sentencing objectives of the Guidelines to punishment, general deterrence, specific deterrence and rehabilitation. The Court stated that "if a district court gives weight to a factor irrelevant to these purposes, then the imposed sentence necessarily exceeds the court's sentencing discretion." The Court recognized that § 3661 and § 3553 "appear inconsistent" but ruled that the information allowed by § 3661 "is subject to the limitations of section 3553."

The Court found that punishing the defendant for her failure to cooperate in her husband's unrelated prosecution did not achieve any of the § 3553 guidelines goals. The Court also noted that the law contemplated that the sentence be related to the crime, and that it could not imagine how the defendant's failure to cooperate in an unrelated case against her husband could bear on her sentence. The Court remanded the case for resentencing.

AEDPA Bar to Filing Successive Habeas Petitions Not Applicable Where Court Converts Rule 33 Motion into § 2255 Petition Without Notice to the Petitioner

Castro v. United States, 277 F.3d 1300 (11th Cir. 2002).

◆ **28 U.S.C § 2255 -
habeas corpus petitions**

The Court held that for purposes of determining whether an inmate's motion was a "successive" filing, and therefore subject to the strict limitations of the AEDPA, prior Rule 33 motion which the district court had "converted" into a § 2255 motion without obtaining the defendant's consent would not count as a prior § 2255 motion.

The Court reasoned that, unless the defendant was made aware of the consequences of conversion, he would not know that his motion was collaterally barring him from making future filings. "Whether a petitioner's initial postconviction motion was filed before or after the AEDPA's effective date or whether the district court's recharacterization of that motion was *sua sponte* or upon the government's motion, a district court's recharacterization of a petitioner's initial postconviction motion will not be considered a "first" habeas petition for AEDPA purposes unless the petitioner is given notice of the consequences of such recharacterization. Requiring a district court to ensure that a petitioner realizes the ramifications of a court's decision to convert his postconviction motion is an appropriate means of apprising all defendants of the circumstances that may impair or preserve their right to habeas review."

**No Right of Allocution Upon
Revocation of Supervised Release**

United States. v. Frazier, ____ F.3d ____ (11th Cir. 2002).

◆ **Fed.R.Crim.P. 32.1 -
revocation of supervised release**

The Court, on plain error review, found no basis for invalidating a revocation of supervised release where the sentencing court failed to give the defendant an opportunity to allocute prior to imposing sentence. The Court noted that Fed.R.Crim.P. 32.1, which governs revocations of supervised release, did not expressly require giving the defendant an opportunity to allocute.

The Court added that Rule 32.1 did not incorporate all the requirements of Rule 32, which governs sentencing hearings, and which does require giving the defendant an opportunity to allocute. The Court noted, however, that its case law had recognized "the importance of the right to allocute and the fundamental nature of such in the process of imposing any sentence of incarceration."

Hence, although the Court found no legal error in the failure to allow Frazier to allocute, it urged the Rules Committee to consider amending Rule 32.1 to confer this right, and stated that "the better practice is for district courts to provide defendants with an opportunity to allocute prior to the imposition of a sentence based upon a violation of supervised release."

**AEDPA Statute of Limitations
under 28 U.S.C. § 2255 Commences
Upon Expiration of Time for
Seeking Certiorari**

Kaufmann v. United States, 282 F.3d 1336 (11th Cir. 2002).

◆ **28 U.S.C. § 2255(1) - date
judgment of conviction becomes
final**

In affirming the denial of 28 U.S.C. § 2255 relief, the Court reaffirmed that *Apprendi*-based review is not available retroactively. Although the Court affirmed the denial of § 2255 relief predicated on *Apprendi v. New Jersey*, reaffirming that an *Apprendi*-based claim may not be raised retroactively for habeas review, it reversed the dismissal of the § 2255 motion on timeliness grounds, finding that the one-year statute of limitations for these motions extends not just to one-year after the issuance of the mandate for the decision of the court of appeals, but to the expiration of the 90-day period defendants have to file a certiorari petition in the United States Supreme Court after the affirmance of a conviction.

After his conviction was affirmed on appeal in the Eleventh Circuit, Kaufmann did not seek certiorari review, but filed a § 2255 motion alleging ineffective assistance of counsel. He filed his motion more than a year after the issuance of the court of appeals mandate, but less than a year after the expiration of the 90-day period to seek certiorari review. The Court noted a circuit split on the question of whether the motion was timely in these circumstances, but noted uniform agreement that the motion would have been timely if Kaufmann had sought certiorari review.

The Court reasoned that it would be "anomalous" for the statute of limitations to commence running

at different times for different defendants, depending on whether or not they sought certiorari review. The Court further noted that its interpretation was consistent with the Supreme Court's definition of the word "final." It also noted that a contrary interpretation would create an incentive for filing frivolous certiorari petitions just to extend the limitations period.

Finally, it found the analysis of sister circuits unpersuasive. "The circuit courts that have addressed the question are split, with the Third, Fifth, Ninth and Tenth Circuits agreeing that AEDPA's one-year limitation period begins to run at the expiration of the 90-day period for seeking certiorari, and the Fourth and Seventh Circuits holding that the period runs from the issuance of the mandate on direct appeal.

AEDPA Statute of Limitations Not Tolled by Filing of Georgia "Application for Sentence Review."

Bridges v. Johnson, ____ F.3d ____ (11th Cir. 2002).

◆ **28 U.S.C. § 2244 - tolling the statute of limitations**

The Court held that the one-year statute of limitations for habeas petitions under 28 U.S.C. § 2254 is not tolled when a Georgia state prisoner, after his conviction becomes final, applies for "sentence review" under Georgia Code § 17-10-6. The

Court explained that sentence review is merely a means to obtain a reduction in sentence, "viewing it as a means to toll the limitations period would not enhance exhaustion of state review or finality of state court judgments." The Court found that the sentence review process is "separate" from state habeas proceedings (which do toll the federal limitations period).

Magistrates Judges Lack the Authority to Conduct Evidentiary Sentencing Hearings

United States v. Ruiz-Rodriguez, 277 F.3d 1281 (11th Cir. 2002).

◆ **28 U.S.C. § 636 - Federal Magistrates Act**

The Court held that a magistrate judge is not authorized to conduct a sentencing hearing, and it remanded for resentencing the case of a defendant convicted of alien smuggling after the sentencing hearing had been delegated to a magistrate judge by a district court.

Over the defendants' repeated objections, the magistrate judge conducted a hearing regarding the facts set forth in the Presentence Investigation Report, and issued a Report and Recommendation with findings of fact in support of a Guideline sentence. The district court adopted the Recommendation after a brief hearing, and entered judgment.

The Court of Appeals reversed, holding that the Federal Magistrates Act, 28 U.S.C. § 636, does not grant magistrates the authority to conduct evidentiary sentencing hearings. After reviewing the law's specific grants of authority, the Court concluded that "notably absent in this statutory scheme is any specific grant of

authority for a district court to delegate in a felony case the evidentiary and fact-finding portion of an initial sentencing hearing on a report and recommendation basis."

The Court then considered the portion of the statute which permits magistrate judges to take on "additional duties as are not inconsistent with the Constitution and laws of the United States." The Court noted that in *Gomez v. U.S.*, 490 U.S. 858(1989), and *Peretz v. U.S.*, 501 U.S. 923 (1991), the Supreme Court required that parties consent to the magistrate judge taking on "additional duties" which were not contemplated by Congress. The Court noted that in this case "the district court merely delegated a portion of the defendants' sentencing hearing to the magistrate judge and only for a report and recommendation subject to the district court's subsequent review." Nonetheless, the Court found that the delegation was unauthorized.

The Court emphasized that: (i) sentencing is a "critical stage" in criminal proceedings; (ii) potential constitutional problems would arise if a non-Article III judge were permitted to conduct fact-finding, even if this fact-finding were ultimately reviewable by a district court; (iii) caselaw from other circuits found no authority for magistrate judges to conduct evidentiary hearings in the absence of a defendant's consent; and (iv) the "additional duties" clause should be narrowly interpreted. The Court found no need to address whether the error was harmless, because it held that harmless error does not apply. The Court remanded the case for resentencing.

U.S.S.G. § 2K2.1(b)(5) Sentence Enhancement Applies Where Defendant Unsuccessfully Reached for His Gun While Resisting Arrest and Assaulting Arresting Officers.

No Double Counting in Imposing Additional Enhancement for Risk of Injury to Law Enforcement Officer

United States v. Jackson, 276 F.3d 1231 (11th Cir.2001).

◆ **U.S.S.G. § 2K2.1(b)(5) - enhancement for possessing firearm in connection with another felony; U.S.S.G. § 3A1.2(b) - enhancement for risk of injury to law enforcement officer**

The Court affirmed a 4-level sentence enhancement under U.S.S.G. § 2K2.1(b)(5) for using or possessing a firearm in connection with a different felony offense than the offense of conviction, and found that the district court permissibly counted the same conduct in applying two separate enhancements at sentencing.

Jackson resisted arrest after being stopped by the police, and during the scuffle reached repeatedly into his pocket. After being handcuffed, the police found a firearm in his pocket. He was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), but objected at sentencing to a 4-level enhancement for use of a firearm “in connection with another

felony offense.”

Jackson argued that there was no other felony offense. The Court rejected the argument, finding that Jackson's resisting arrest was separate from his § 922 offense, and that Jackson used the firearm for the former offense. The Court found that even contemporaneous offenses can be the “other” offense which supports the 4-level enhancement. The Court further found that even though Jackson never succeeded in using the firearm, he meant to use it while resisting arrest, and this sufficed to support the enhancement.

The Court also rejected the argument that it was double-counting to impose a 4-level enhancement for the firearm and a 3-level enhancement under U.S.S.G. § 3A1.2(b) for having created a substantial risk of serious bodily injury to a person the defendant knew or had reason to believe was a law enforcement officer. The Court noted that under *U. S . v. Matos-Rodriguez*, 188 F.3d 1300, 1309 (11th Cir.1999), “[i]mpermissible double counting occurs only when one part of the Guidelines is applied to increase a defendant's punishment for a kind of harm that has already been fully accounted for by application of another part of the Guidelines.”

Further, the Court presumes the Sentencing Commission intended to apply separate guideline sections cumulatively unless specifically directed otherwise (citing U.S.S.G. § 1B1.1, comment. (n.4) (2000) (“Absent an instruction to the contrary, the adjustments from different guideline sections are applied cumulatively (added together).”).

Here, the Court noted, the firearm enhancement arose under Chapter 2 of the guidelines, which addresses the offense's characteristics,

whereas the risk of injury guideline arose out of Chapter 3, which addresses victim-related adjustments. In view of the U.S.S.G. 1B1.1 instruction to apply Chapter 2 and 3 Guidelines sequentially, the Court found no impermissible double counting.

State Court Two-Sentence Decision Denying Petitioner's Pate Claim Entitled to Deference on Federal Habeas Review

◆ **Petitioner's Substantive Due Process Claim Could Not Be Procedurally Defaulted**

Wright v. Secretary for Dept. of Corrections, 278 F.3d 1245 (11th Cir.2002).

◆ **28 U.S.C. § 2254(d) - federal court deference to state court decision**

The Eleventh Circuit affirmed the denial of habeas corpus relief to a state inmate who claimed to have been tried while mentally incompetent. The Court noted that the claim that the trial court violated procedural due process because it failed to inquire into Wright's mental competency (a *Pate* claim) had been raised and decided against the petitioner in his original state appeal of his conviction. Even though this two-sentence decision rejecting the federal constitutional issue did not explain its rationale, it was entitled to deference under the AEDPA, 28 U.S.C. § 2254(d). Thus, it was reversible only if it involved an “objectively unreasonable” application of existing Federal law.

The Court found that the state court finding that Wright was

competent was not unreasonable, because, although as a teenager he had been found to have suffered from mental illness, there was evidence this illness was in remission, and furthermore, Wright had been found competent to stand trial on more recent occasions.

The Court also rejected Wright's claim that trying him while incompetent violated substantive due process. The Court noted that this type of claim cannot, contrary to the district court's ruling, be dismissed for procedural default, and therefore reached its merits. The Court found that Wright's evidence did not meet the "high standard" required to show "legitimate doubt" that he was tried while incompetent. "The fact that he suffers from chronic schizophrenia the effects of which have come and gone over the years is not enough. . . . The un rebutted evidence at trial is that in the days and weeks leading up to the trial Wright behaved in a perfectly normal fashion, related well to others, and had no problem at all communicating with them. There is no evidence that he behaved abnormally at trial, nor is there any evidence that he had any problem understanding the charges against him or communicating with his counsel. This claim fails on the merits."

No Sentence Reduction for Returning to Non-Secure Facility Within 96 Hours Where Defendant Committed Other Offenses While on Escape

Obstruction of Justice Enhancement Proper Even Though Threat Never Communicated to Person Threatened

United States v. Bradford, 277 F.3d 1311 (11th Cir. 2002).

U.S.S.G. § 2P1.1 (b)(2) -reduction for voluntary return to non-secure custody; U.S.S.G. § 3C1.1 -obstruction of justice enhancement.

The Court rejected challenges to guidelines sentence enhancements and the imposition of a consecutive sentence as to a defendant convicted of escape from a federal prison institution. Contrary to the defendant's claim, he was not entitled to a 7-level reduction applicable where a defendant escapes from non-secure custody and returns voluntarily within ninety-six hours. U.S.S.G. §2P1.1(b)(2). The reduction does not apply where the defendant commits other offenses while on escape, and the district court did not err in finding that such other offenses were committed. Also, binding commentary shows that Bradford's tactical returns to the institution were not within the contemplation of the guideline, which looks to an indication that the inmate "has reconsidered his actions and intends to surrender," rather than simply escaping and re-escaping as Bradford did.

Deciding an issue of first impression, and acknowledging a circuit split on the issue, the Court rejected the defendant's argument that an obstruction of justice enhancement under U.S.S.G. §3C1.1 for threatening a witness cannot be applied if the threat, made indirectly to a third party, was not actually conveyed to the target of the threat.

The Court also rejected the defendant's argument for "grouping" of his escape offenses under U.S.S.G. § 3D1.2. The district court did not clearly err in finding that the offenses were separate transactions that were not part of a common criminal objective. The Court found that the district court did not abuse its discretion under U.S.S.G. §5G1.3(a) and 18 U.S.C. §3553(a) by ordering that Bradford's sentence be served consecutively to a prior sentence for another escape. "In this case, because Bradford committed the instant offenses while he was serving a term of imprisonment, but before his conviction and sentence for the Marsh 3rd escape, §5G1.3 (a) does not apply. Because the March 3rd escape was not fully taken into account in the determination of the offense level for the instant offense, §5G1.3(b) does not apply. Where, as in this case, neither subsection (a) or (b) of § 5G1.3 applies, the district court has discretion to impose a consecutive sentence to achieve a reasonable punishment. U.S.S.G. §5G1.3(c).

The record indicates that the court considered the other factors set forth in 18 U.S.C. §3553(a), including the nature and circumstances of the escapes and the history and characteristics of Bradford, in determining that a consecutive sentence was appropriate. Therefore, the district court did not err in declining to run Bradford's sentence concurrently with the sentence imposed on his prior escape conviction."



Please Welcome Our New Assistant Federal Defender

We're pleased to announce that Yelanda Collins joined us as an Assistant Federal Defender on January 14, 2002. She was previously staff attorney to the Hon. Sharon Yates, Presiding Judge of the Alabama Court of Civil Appeals. She is a 1996 graduate of the University of Alabama School of Law and received a Masters in Public Administration from Auburn University at Montgomery, in 1987.

Staff Changes at the U.S. Attorneys Office

Welcome to the Middle District of Alabama new Assistant United States Attorney Matt Minor. After receiving his law degree from the University of Michigan in 1997, Matt clerked for Judge Richard Vollmer in Mobile. Matt then moved to Philadelphia where he practiced civil litigation with the law firm of Dechert, Price and Rhoads until his recent return to Alabama with his wife, Julianna, a public health care professional.

Matt filed the vacancy left by former AUSA Mike Kanarick who left the U.S. Attorneys Office to take a position as a deputy press secretary for Governor Don Siegleman. We'd like to thank Mike for the opportunity to work with him and we wish him the best of luck in the future.

Visit Our New Federal Defender Website

Our office has established a website on the Internet. The website can be reached at www.almfd.org.

It is best viewed with 800 x 600 resolution monitor settings and using Internet Explorer version 4.x and higher. Netscape Navigator will work partially at this time, but the coding requires many changes to work with Navigator. It is recommended using the Internet Explorer at this time.

A comment form on the web is available for any future suggestions. A secured List Server is planned for CJA panel attorneys to post articles, bulletins, reference materials, etc. in the near future. Any suggestions would be welcomed.



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.

☛ **April 10, 2002 (Montgomery) and April 11, 2002 (Dothan):**

Mail Fraud
Speaker: Ellen Podgor

This seminar will provide 60 minutes of instruction on the evidentiary and appellate issues concerning the prosecution and defense of federal mail and wire fraud charges. The speaker is a law school professor at Georgia State University, a regular columnist in *The Champion*, and author of numerous legal articles and texts.

☛ **May 8, 2002 (Montgomery) and May 9, 2002 (Dothan):**

Pretrial Diversion
Speaker: Jennifer A. Hart

This session will outline and discuss prerequisites and possibilities for pretrial diversion. What it is, when might it be worth a try and why we should be applying clients more often. The speaker is the Research and Writing Attorney with the Federal Defender Office.

☛ **June 12, 2002 (Montgomery) and June 13, 2002 (Dothan)**

Habeas Procedure
Speaker: Joseph P. Van Heest

This session will provide 60 minutes of discussion on habeas corpus practice and procedure. Topics covered will include: overcoming procedural bars, obtaining an evidentiary hearing, and applicable standards of review. Discussion topics will cover both 2254 and 2255 federal habeas corpus petitions. An outline and other handout materials will be provided. The speaker is an Assistant Federal Defender.

☛ **July 10, 2002 (Montgomery) and July 11, 2002 (Dothan):**

Presentation of Evidence in Federal Court

Speaker: Judge Charles S. Coody and CJA Panel Attorney Tommy Goggans

This session will provide 60 minutes of instruction on the appropriate and effective methods of introducing various types of evidence in federal court, including laying foundations for introduction of exhibits, establishing a witness' basis of knowledge as to the subject of his or her testimony, creation of a record of evidence, and maintaining the distinctions between the roles of attorney/advocate and attorney/officer-of-the-court. The speakers are, respectively, the Chief U.S. Magistrate Judge for the Middle District of Alabama and an experienced criminal defense attorney; both speakers have made prior CLE presentations.

☛ **August 14, 2002 (Montgomery) and August 15, 2002(Dothan):**

Ethical Issues and Professional Responsibility in Federal Criminal Defense Cases

Speaker: not yet determined

This session will provide 60 minutes of instruction on the ethical and professional obligations to provide "total client advocacy" and to consider the impact that apparently non-case-related matters can have on a client's ability to exercise full judgment in his/her case and effect the client's future success.

☛ **September 11, 2002 (Montgomery) and September 12, 2002 (Dothan):**

Effective Trial Pleadings: Motions in Limine, Voir Dire, Rule 29 Motions and Jury Instructions

Speaker: Kevin L. Butler

This session will outline and discuss ways of using trial pleading to place the defense at a strategic advantage during trial. Specifically, (1) using motions in limine to limit the introduction of potentially damaging evidence and the introduction of exculpatory evidence, (2) using voir dire to effectively and persuasively introduce your case to the jury venire, (3) using Fed.R.Crim.P. 29 to win an acquittal and (4) drafting defense oriented and persuasive jury instructions. The speaker is an Assistant Federal Defender.

☛ **October 9, 2002 (Montgomery) and October 10, 2002 (Dothan):**

Answers to Your Client's Questions about Jail and Prison Conditions

Speaker: Marion Chartoff

This session will provide 60 minutes of instruction concerning requirements under the 5th and 8th Amendments for conditions of pretrial detention and conditions of punitive incarceration. The speaker is a staff attorney with the Southern Center for Human Rights in Atlanta, Georgia and was recently lead counsel in successful lawsuits concerning various conditions in the Elmore County Work Release Center and the Marion County Jail.

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 Second Thursday of each month at Shoney's restaurant (unless otherwise indicated).

2002 CJA Seminars and Workshops Announcement

Following are the dates and locations of three "Winning Strategies," seminars and the Advanced Trial Skills and Reinventing Sentencing Workshops for CJA Panel Attorneys.

"Winning Strategies"

April 28-30, 2001 - Santa Fe, NM

July 11-13, 2002 - Chicago, IL

Sept 12-14, 2002 - New Orleans, LA

"Advanced Trial Skills"

June 6-8, 2002 - Memphis, TN

"Reinventing Sentencing"

August 22-25, 2002 - Boston, MA

Mentoree Review Sessions

May 14, 2002: Federal Pre-Trial Procedure and Trial Preparation - Kevin L. Butler & Joe Van Heest

This session will provide 90 minutes of instruction on the rules of court and the procedures for the handling of federal criminal trials in the United States District Court for the Middle District of Alabama. The speaker will discuss the procedures set forth in the Arraignment Orders, the Standing Order on Discovery, the

pretrial conference, and related pretrial issues. Handout materials will include copies of the applicable orders, and citation of applicable case law.

May 21, 2002: Federal Sentencing - Christine A. Freeman

This session will include 90 minutes of practical exercise for the participants, using a prepared hypothetical scenario, to identify the factors which would be mathematically significant in the ultimate sentencing determination under the U.S. Sentencing Guidelines. The speaker will discuss actual calculation of the hypothetical defendant's sentencing guidelines, issues which may be open to dispute, possible grounds for departure from the guideline range, and applicable case law. Handout materials will include the hypothetical, pertinent guidelines and the sentencing range chart, and a brief outline of applicable case law.

May 28, 2002:11th Circuit Appellate Procedure - Jennifer Hart & Joe Van Heest

This session will provide 90 minutes of instruction on issues to be addressed in the handling of federal criminal appeals in the United States Court of Appeals for the Eleventh Circuit. Handout materials will include sample pleadings, applicable rules of procedure and court rules, and citation of applicable case law. The speaker is an experienced attorney and a full-

time staff member of the Office of the Federal Defender for the Middle District of Alabama, whose primary staff duties include preparation of appellate pleadings.

[NOTE: this sessions will be held from 3:30 to 5:00 p.m. on each scheduled date.]

