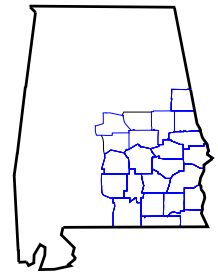


CJA NEWS



“WE DARE DEFEND OUR CLIENT’S RIGHTS”

L E T T E R

Published by the Office of the Federal Defenders
Middle District of Alabama, Jennifer A. Hart, Editor

Vol. VI No. 2
Summer 2002

INSIDE THIS ISSUE

Director’s Letter	1
New Assistant Defender	1
Supreme Court Cases	2
Eleventh Circuit Cases	9
Supreme Court Arguments	12
New FDO Website	12
Upcoming Events	12

LETTER FROM THE DIRECTOR

Dear CJA Panel Members, Friends and Colleagues:

Around twenty-nine and a half years ago, on March 18, 1963, the United States Supreme Court issued its landmark opinion in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). It is of course fitting that we, criminal defense attorneys with common experiences as court-appointed counsel, should reflect frequently on the significance and meaning of this opinion.

The National Association of Criminal Defense Lawyers has chosen one way to commemorate this important decision, by sponsoring a “*Gideon* Moment” column in its magazine, the *Champion*, beginning with the December 2002 issue. NACDL seeks three-page submissions for the column from people who have been court-appointed defense counsel. NACDL asks that the submissions describe “an experience with an individual client that is poignant and captures the essence of this landmark decision.” Submissions

should be sent to Gerald Lippert, NACDL’s Affiliate Organization Coordinator, at gerald@nacdl.org. Selected submissions will be published in the *Champion* column or posted on the *Gideon* page of NACDL’s website.

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

Sincerely,

Christine A. Freeman
Executive Director



NEW ASSISTANT FEDERAL DEFENDER

Please welcome to the Middle District of Alabama new Assistant Federal Defender LaJuana Davis. Ms. Davis received her undergraduate degree in Political Science from Georgia State University in 1987 and is a 1990 graduate of Harvard Law School. She was previously employed with the Equal Justice Initiative of Alabama where she provided legal representation to

CJA NEWS (published quarterly)
Middle District of Alabama
Federal Defender Program, Inc.
201 Monroe Street, Suite 1960
Montgomery, AL 36104
(334) 834-2099/Phone
(334) 834-0353/Fax

Executive Director:
Christine A. Freeman, Esq.

Assistant Federal Defenders:
Kevin L. Butler, Esq.
Yelanda R. Collins, Esq.
LaJuana Davis, Esq.
Joseph P. Van Heest, Esq.

Research & Writing Attorney:
Jennifer A. Hart, Esq.

Investigators:
Daniel H. Carmichael
Johnny L. Johnson

Computer Systems Administrator:
Jimmie Fisher

Administrative Assistant:
Alesia Smith

Legal Secretaries:
Lynn Marquess
Haneda Washington

capital clients in appellate and post-conviction proceedings.

Ms. Davis will be engaged primarily in capital habeas work with this office. We look forward to working with her in the future.



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

The Jury, Not the Trial Judge, Must Determine Whether Capital Defendant is Sentenced to Death

Ring v. Arizona, 122 S.Ct. 2428 (June 24, 2002).

◆ Sixth Amendment - right to trial by jury

Overruling its prior decision in *Walton v. Arizona*,

497 U.S. 639 (1990), the Supreme Court held unconstitutional an Arizona statute which permits trial judges, rather than juries, to determine the presence or absence of aggravating factors required for imposition of the death penalty. The statute, the Court held, violates a defendant's Sixth Amendment right to a jury trial in capital prosecutions.

After a jury finding that a defendant is guilty of first-degree murder, the Arizona statute in question permitted the trial judge, sitting alone, to determine the presence or absence of the aggravating factors Arizona law required for imposition of the death penalty.

In *Walton*, the Court had upheld this sentencing scheme as constitutional, reasoning that the additional facts found by the judge were sentencing factors, and not elements of the offense of capital murder.

Now reasoning that the *Walton* decision is irreconcilable with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court overruled *Walton* and declared the Arizona sentencing scheme unconstitutional.

Ring was tried on charges relating to the armed robbery and murder of a Wells Fargo armored van driver. Although there was evidence connecting Ring to the money stolen from the armored van, there was no evidence presented to the jury that placed Ring either at the scene of the robbery or that indicated that he personally, rather than the other individuals believed to be involved in the robbery, participated in the murder of the driver. The jury, therefore, deadlocked on premeditated murder and instead convicted Ring of felony

murder.

Because Ring was convicted of felony murder, he was eligible for the death penalty only if he were either the actual killer or a major participant in the robbery. The judge found that Ring was both the actual killer and a major participant in the robbery.

However, under the Arizona statute, the court could impose the death penalty only if the trial judge found certain aggravating factors. After finding the existence of two aggravating factors, and concluding that no mitigating factors called for leniency, the judge ordered Ring sentenced to death.

On appeal, Ring argued that the Arizona sentencing scheme violated the 6th and 14th Amendments because it allowed the judge to find a fact which raised his maximum penalty. The Arizona Supreme Court recognized that the sentencing scheme conflicted with *Apprendi*. However, bound by *Walton*, the Court held that Ring's constitutional claim must fail and affirmed his death sentence.

The United Supreme Court reversed. The Court first noted that, based on the jury's verdict alone, the maximum sentence Ring could receive was life imprisonment. It then reasoned that Arizona's enumerated aggravating factors operate as the equivalent of an element of a greater offense than that of which the defendant was convicted. Therefore, under *Apprendi*, the Sixth Amendment requires that these facts be found by a jury.

The Court rejected the argument that the aggravating factors were merely "sentencing considerations" guiding the choice

between life and death. As the Court pointed out, *Apprendi* focused on the “effect” of a finding, not on how it could be labeled, and if Arizona prevailed on this argument, *Apprendi*, would be reduced to a formalistic rule of statutory drafting.

Despite the State’s argument that “death is different,” the Court also found no reason to exempt capital defendants from *Apprendi*’s holding. The Court also rejected the argument that judicial fact-finding was a better way to impose the death penalty, finding this argument contrary to the requirements of the Sixth Amendment, and, in addition, unsupported by reality, since a majority of states entrust death determinations to a jury, not a judge.

Execution of Mentally Retarded is Cruel and Unusual Punishment

Atkins v. Virginia, 122 S.Ct. 2242 (2002).

◆ Eighth Amendment - Cruel and Unusual Punishment

In a 6 to 3 decision authored by Justice Stevens, the Supreme Court held that the execution of mentally retarded defendants constitutes cruel and unusual punishment prohibited by the Eighth Amendment and overturned the death sentence of Daryl Renard Atkins. Chief Justice Rehnquist and Justices Scalia and Thomas dissented.

Atkins had been convicted

of capital murder and sentenced to death for the shooting death of a man he and a co-defendant had abducted, robbed and killed. The Virginia Supreme Court had upheld Atkins’ death sentence although Atkins had an IQ of 59 and was diagnosed as being “mildly mentally retarded.” The Virginia courts had rejected Atkins’ argument that, due to his mental retardation, he could not be sentenced to death.

While noting that mentally retarded persons should be punished for their crimes, the United States Supreme Court reversed the Virginia Supreme Court. The Eighth Amendment prohibits, the Court noted, all excessive punishments, and whether a punishment is excessive is to be judged by currently prevailing standards. Those current standards are evidenced by legislation enacted by the country’s legislatures. The Court, after reviewing that legislation, however, then must bring its on judgment to bear on the suitability of the death penalty in such circumstances before determining whether it agrees or disagrees with the judgment of the state legislatures.

In *Penry v. Lynaugh*, 109 S.Ct. 2934 (1989), the Supreme Court had held that the execution of mentally retarded persons was not prohibited by the Eighth Amendment. However, at the time *Penry* was decided, only two states had statutes prohibiting such executions. Thus, the Court in *Penry* concluded that, even in combination with the 14 states which completely rejected the death penalty, those two state statutes did not provide sufficient evidence of a national consensus regarding

banning such executions.

In response to the *Penry* decision, however, states across the country began enacting legislation which prohibited the execution of the mentally retarded. The court reasoned that this “large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.” The Court also added that in the states where such executions are permitted, the practice is uncommon, and that only five states (including Alabama) had executed a person with a known IQ of less than 70 since the *Penry* decision. Therefore, the Court concluded, a national consensus had developed against the execution of the mentally retarded.

Moreover, The court reasoned, the imposition of the death penalty on those with mental retardation does not contribute to either of the justifications for the death penalty - retribution and deterrence of capital crimes. With regard to retribution, the severity of the punishment is to be determined by the culpability of the offender. Thus, the Court noted, if the culpability of the average murderer does not warrant imposition of the death penalty, “the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.”

Additionally, such executions would not deter future capital crimes. Such punishment is a deterrent only when the crime is the result of premeditation and deliberation.

Because mentally retarded persons have a diminished ability to understand and process information, to engage in logical reasoning, or to control impulses, not only are they less morally culpable, they are also less likely to be able to “process the information of the possibility of execution as a penalty, and, as a result, control their conduct based on that information.”

The Court also concluded that the reduced mental capacity of such offenders justified a categorical rule prohibiting the execution of the mentally retarded. The risk that the penalty may be imposed when not warranted is enhanced by both the possibility of false confessions and the inability of these offenders to make a persuasive showing of mitigation in the face of one or more aggravating factors. Such offenders often cannot provide meaningful assistance to their counsel, are typically poor and their demeanor may create the impression of a lack of remorse. “Mentally retarded defendants,” the Court noted, “in the aggregate face a special risk of wrongful execution.”

Finally, the Court added that its own independent evaluation of the issue revealed no reason why it should disagree with those state legislatures which have recently concluded that the death penalty was not a suitable punishment for a mentally retarded defendant. Accordingly, the Court then reversed the decision of the Virginia Supreme Court.

A Suspended Sentence May Not be Activated When Defendant Violates Probation Where the State Did Not Provide Counsel to the Defendant During the Prosecution of the Offense

Alabama v. Shelton, 122 S.Ct. 1764 (2002).

◆ Sixth Amendment - right to counsel

In a 5 to 4 decision, the Supreme Court affirmed a decision of the Supreme Court of Alabama and held that “a suspended sentence that may ‘end up in the actual deprivation of a person’s liberty’ may not be imposed unless the defendant was accorded the ‘guiding had of counsel’ in the prosecution of the crime charged.” (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972)).

The Court reasoned that because a suspended sentence may result in the actual deprivation of a person’s liberty, this sentence may not be imposed unless the defendant had the assistance of counsel.

The Court rejected the argument that *Nichols v. United States*, 511 U.S. 738 (1994) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) stand for the proposition that the right to counsel is triggered only in proceedings that result in immediate actual imprisonment. The Court held that the dispositive factor is not whether incarceration occurs immediately or after some delay. Rather, the critical point is that the defendant had a recognized right to counsel when adjudicated guilty of the felony for which he was imprisoned.

The Court further noted that

Nichols applied a relaxed standard to the absence of counsel in a prior proceeding because the question was whether a sentence could be enhanced based on a prior conviction. The standards governing sentencing, it noted, are less exacting than those governing adjudications of guilt.

The Court also rejected the argument that it was impractical to require counsel in all cases that produced conditional sentences. The Court noted that waiting until incarceration was imminent would unduly reduce protections in the “informal” proceedings at which probation was revoked; proceedings in which defendants may no longer challenge the validity of the underlying conviction.

The Court suggested that jurisdictions which cannot afford to appoint counsel under its Order can use the option of “pretrial probation” in which a defendant participates in a pretrial rehabilitation program, and an adjudication of guilt and imposition of sentence for the underlying offense occurs only if the defendant breaches the condition of probation. This system reserves the appointment of counsel for the few cases in which incarceration proves necessary.

The Court remanded the case to the Alabama Supreme Court for consideration of the State’s new position that the probation sentence could be freestanding and independently effective, separate from the conditional prison term to which it was tethered.

Prosecutors Not Required to Disclose Impeachment Information Before Entering Into a Plea Agreement With Criminal Defendant

United States v. Ruiz, 122 S.Ct. 2450 (2002).

◆ 5th and 6th Amendments - right to fair trial - defendant who pleads guilty forgoes some constitutional guarantees

Reversing a decision of the Ninth Circuit, the Supreme Court held that the Constitution does not require the Government to disclose impeachment evidence prior to entering into a plea agreement with a criminal defendant.

After federal agents found 30 kilograms of marijuana in her luggage, federal prosecutors offered Angela Ruiz its standard “fast track” plea bargain whereby the Government would recommend a two-level departure from the applicable guideline range in exchange for Ruiz’s agreement to waive indictment, trial and appeal. The agreement also required Ruiz to waive the right to receive impeachment information relating to any informant or witness as well as the right to receive information which would support any affirmative defense which Ruiz might raise at trial. Because Ruiz would not agree to the last waiver, the Government withdrew their offer.

Ruiz was then indicted on drug possession charges, pled guilty, and was sentenced within the applicable guideline range.

The court denied Ruiz’s request to be to be granted the same two-level departure the Government would have recommended pursuant to the “fast track” plea offer.

On appeal, the Ninth Circuit vacated Ruiz’s sentence, holding that the Constitution requires prosecutors to make certain impeachment information available to a defendant before trial and that this obligation entitles defendants to receive the information before they enter into a plea agreement. The Ninth Circuit also held that the Constitution prohibits defendants from waiving their right to this information, and therefore the Government’s standard plea agreement was unlawful. The Government appealed.

The Supreme Court, with all Justices concurring in the result, reversed. The Court found that the Ninth Circuit had, in effect, held that the defendant’s guilty plea was not voluntary unless the prosecutors had disclosed the same material impeachment information it would have been required to disclose if the defendant had gone to trial. The Court held, however, that the Constitution does not require pre-guilty plea disclosure of impeachment information.

First the Court reasoned that impeachment information relates to the fairness of a trial and not to whether a plea is voluntary. While noting that this additional information could lead to a heightened awareness of the consequences of a plea, and therefore a wiser decision, the Court nevertheless stated that the Constitution does not require the Government to share all useful information with a defendant.

Secondly, the Court noted that, not only was there no legal authority for the Ninth Circuit’s ruling, but also that the Supreme Court had previously held that the Constitution does not require the defendant to have complete knowledge of the relevant circumstances of his case, and that his guilty plea and waiver of his constitutional rights may be accepted despite the defendant’s misapprehension.

Thirdly, due process considerations support the argument that pre-plea disclosure is not required. Such disclosure, the Court surmised, would be of limited value to the defendant because the value of the information depends on the defendant’s independent knowledge of the details of the Government’s case. Additionally, the fact that the Government agreed to provide any information establishing the factual innocence of the defendant, coupled with Rule 11’s procedural safeguards, diminishes the possibility that innocent people will pled guilty.

The Court also noted that pre-plea disclosure could “seriously interfere with the Government’s interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice,” by prematurely disclosing Government witnesses, thereby disrupting ongoing investigations and exposing the witnesses to serious harm. It would also require the Government to devote more resources to trial preparation prior to plea bargaining and thus would deprive plea bargaining of its “resource-saving advantages.” Thus, the Court concluded, this “radical change in the criminal justice

process,” was not constitutionally required “in order to achieve so comparatively small a constitutional benefit.”

Finally, the Court also held that the Constitution does not require the Government to provide to the defendant information it had regarding affirmative defenses which may be raised at trial prior to plea bargaining. Such information, the Court reasoned, was “more closely related to the *fairness* of a trial than to the *voluntariness* of the plea.” Thus, the Court upheld the provision of the plea agreement which requires a defendant to waive her right to receive such information.

Absent Exigent Circumstances Warrantless Entry Into Home Violates Fourth Amendment

Kirk v. Louisiana, 122 S.Ct. 2458 (2002).

◆ Fourth Amendment - warrantless entry into home

In a per curiam opinion, the Supreme Court held that police officers violated the Fourth Amendment when they entered the defendant’s home without a warrant.

Operating on an anonymous tip, police observed the defendant’s apartment for evidence of drug activity. After observing what they believed to be several drug sales, the police, with neither an arrest warrant nor a search warrant, entered the defendant’s home, arrested him, and searched his person. The

officers found cocaine on his body and other contraband in plain view.

The defendant argued to the Louisiana Court of Appeals that the trial court should have suppressed the evidence because the police, in the absence of exigent circumstances, were not justified in entering his home without a warrant. The Louisiana Court, however, found that because the officers had probable cause to arrest the defendant, the search was proper as incident to that arrest. Therefore, it held, the motion to suppress had been properly denied. The Louisiana Court, after concluding that such an inquiry was irrelevant, declined to decide whether exigent circumstances were present.

The Supreme Court held that the appellate court clearly erred in concluding that the search was permissible. As the Court had stated in *Payton v. New York*, 445 U.S. 573, 590 (1980), “[a]bsent exigent circumstances,” the “firm line at the entrance to the house . . . may not reasonably be crossed without a warrant.” Because the Louisiana Court of Appeals did not determine whether exigent circumstances were present, its decision, the Court held, was contrary to *Payton*.

Although both parties had argued whether exigent circumstances were present, the Court declined to express its own opinion on the issue and instead reversed the lower court’s decision and remanded the case for further proceedings.

No Fourth Amendment Requirement That Police Advise Bus Passengers of Their Right Not to Cooperate and to Refuse Consent to Search

United States v. Drayton, 122 S.Ct. 2105 (2002).

◆ Fourth Amendment - bus searches

Reversing a decision of the Eleventh Circuit, the Supreme Court held that the Fourth Amendment does not require police officers to advise bus passengers of their right not to cooperate and to refuse consent to searches.

The two defendants were traveling by bus from Ft. Lauderdale to Detroit. When the bus made a scheduled stop in Tallahassee, three plain clothes police officers boarded the bus as part of a routine drug and weapon interdiction effort. While one officer knelt on the driver’s seat, facing the rear of the bus, the other two officers went to the back. While one officer remained in the back, facing the front of the bus, the other officer made his way from the back of the bus to the front, speaking with individual passengers and matching them with the luggage in the overhead racks. He did not inform the passengers of their right to refuse to cooperate.

When the officer approached the seat shared by the two defendants, he showed them his badge and requested permission to search the single bag both men had identified as theirs. The bag contained no contraband. However, the officer then asked one of the defendants “Do you mind if I check your person?” The man consented and a pat-down

search revealed hard objects, later determined to be packages of cocaine, in the man's thigh area. The man was placed under arrest. The officer then asked the other defendant if he could search him. The man responded simply by raising his arms. The search of this second defendant also revealed packages of cocaine, and this man was also arrested.

The district court denied the defendants' subsequently filed motions to suppress. However, relying on its previous decisions in *United States v. Washington*, 151 F.3d 1354 (1998) and *United States v. Guapi*, 144 F.3d 1393 (1998), the Eleventh Circuit reversed. In those cases, the Court of Appeals had held that, absent some indication that they can refuse to consent, bus passengers do not feel free to disregard police requests to search. Rejecting that reasoning, the Supreme Court reversed, finding that the defendants were not seized and that their consent to search was voluntary.

Applying the framework of *Florida v. Bostick*, 501 U.S. 429 (1991), the Court noted that police may pose questions and request consent to search, even of persons they do not suspect, so long as they do not induce cooperation by coercive means. The Court noted that, contrary to Eleventh Circuit precedent, it had not adopted a *per se* rule requiring police to warn passengers that they may refuse to cooperate.

The court found that the officer gave the defendants no reason to believe that they were

required to answer his questions. The officer did not brandish his weapon or make any intimidating movements. He left the aisle free so that the defendants could exit and he spoke to the passengers one by one, in a "polite, quiet voice." "The fact that an encounter takes place on a bus does not on its own transform standard police questioning of citizens into an illegal seizure."

The Court found no significance in the officer's display of his badge, or in the fact that an officer was positioned at the front of the bus. The Court also noted the police testimony that it was common in such situations for passengers to leave the bus for a cigarette or a snack while the officers were questioning passengers. Additionally, it noted that passengers cooperate with police not because of coercion, but out of concern for their own safety.

The Court also found it insignificant that the arrest of one defendant preceded the search of the second defendant, finding that, if anything, it put the second defendant "on notice" of the consequences of answering police questions.

Turning from the seizure to the search, the Court found that the consent to search was voluntary. The Court noted that the police asked one defendant, "Mind if I check you?" and found no requirement to advise the person of his right to refuse.

A Defective Indictment Does Not Deprive a Court of Jurisdiction

Coconspirators' Enhanced Sentences, While Erroneous Under *Apprendi*, Did Not Satisfy the Fourth Prong of Plain Error

Analysis in that, Due to the Overwhelming Evidence as to Drug Quantity Presented at Trial, the Error Did Not Seriously Affect the Fairness, Integrity, or Public Reputation of Judicial Proceedings.

United States v. Cotton, 122 S.Ct. 1781 (2002).

◆ Fed.R.Crim.P. 52(b) - plain error

Reversing a decision of the Fourth Circuit, the Supreme Court held that, while the respondents' enhanced sentences were plain error under *Apprendi*, their sentences, nevertheless, would not be vacated, where, due to the overwhelming evidence in support of the enhanced penalties, the error did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

Seven respondents were charged with conspiracy to distribute and possess with intent to distribute a "detectable amount" of cocaine and cocaine base. The jury, after being instructed that it need not consider drug quantity, found the respondents guilty.

In spite of the fact that the indictment failed to allege drug quantities, the respondents were sentenced pursuant to § 841(b)(1)(A) for offenses involving at least 50 grams of cocaine base. While two of the respondents received 30 years sentences, the remaining five were sentenced to life.

The respondents had not objected in the district court that their sentences were based on a drug quantity not alleged in the indictment. However, while their appeals were pending, the Supreme Court decided *Apprendi v. New Jersey*. Thereafter,

the respondents argued in the Fourth Circuit Court of Appeals that their sentences were invalid under *Apprendi* because drug quantity was neither alleged in the indictment nor submitted to the jury. Reviewing for plain error, a divided Fourth Circuit vacated the respondents' sentences holding that "because an indictment setting forth all the essential elements of an offense is both mandatory and jurisdictional, . . . a court is without jurisdiction to . . . impose a sentence for an offense not charged in the indictment." This *Apprendi* error, the court concluded, seriously affected the fairness, integrity or public reputation of judicial proceedings.

A unanimous Supreme Court reversed. As an initial matter, the Court, overruling *ex parte Bain*, 121 U.S. 1 (1887) to the extent it held otherwise, held that the failure to allege drug quantity in the indictment was not a jurisdictional defect. *Bain*, the Court noted, was the "product of an era in which the Court's authority to review criminal convictions was greatly circumscribed." At that time, defendant's could not seek direct review of their convictions in the Supreme Court. Therefore, the only way the Court could review constitutional errors at trial was through a writ of habeas corpus, which the Court had the authority to issue only if the error were jurisdictional. Thus, because the Court desired to correct constitutional violations, the notion of jurisdiction was given an expansive interpretation.

Today, on the other hand, jurisdiction simply means the court's power to adjudicate a case, and as post-*Bain* cases show, defects in an indictment do not deprive a court of its power to adjudicate a case. However, the Court did say that it "need not retreat" from the settled proposition that "an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form."

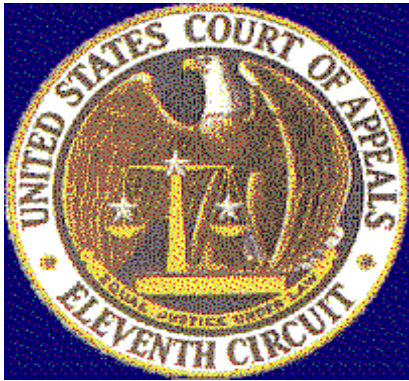
Then, because the respondents had not objected to their sentences in the district court, the Court considered whether their sentences in excess of the 20 year maximum provided for in § 841(b)(1)(C) met the plain error standard for correction and concluded that they did not.

The Government had conceded the first two prongs of the plain error analysis - there was error and the error was plain - agreeing that, due to the indictment's failure to allege drug quantity, the respondents' enhanced sentences were erroneous under *Apprendi*. While not resolving the issue of whether this error affected the respondents' substantial rights, the third prong of the plain error analysis, the Court held that the error did not satisfy the fourth prong, i.e., the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. This was so, the Court reasoned, because the evidence that the conspiracy involved at least 50 grams of cocaine base was "overwhelming" and "uncontroverted."

The Court then added that the "real threat" to the fairness, integrity and public reputation of

judicial proceedings would be if the respondents, despite overwhelming evidence to the contrary, were to receive a sentence prescribed for lesser drug offenses because of an error to which they failed to object. Therefore, the judgment of the Court of Appeals was reversed.





Recent Eleventh Circuit Decisions:

Conviction for Conspiracy to Commit Robbery is Violent Felony Under 18 U.S.C. § 924(e)(2)(B)(ii) Warranting Enhanced Sentence

United States v. Wilkerson, 286 F.3d 1324 (11th Cir. 2002).

◆ 18 U.S.C. § 924(e)(2)(B) - “violent felony”

After being convicted of being a felon in possession of a firearm, Wilkerson received an enhanced sentence of 235 months pursuant to 18 U.S.C. § 924(e). Under that section, a defendant with three prior convictions for violent felonies faces a mandatory minimum sentence of 15 years. Wilkerson argued that his prior conviction for conspiracy to commit robbery did not constitute a “violent felony” under § 924(e)(2)(B). The Eleventh Circuit disagreed and affirmed Wilkerson’s sentence.

Trial courts, the Court noted, are required to look only at

the statutory definition of offenses, and not to the facts underlying the prior convictions, in determining whether the offense is a violent felony.

The Court held that the robbery conviction constituted a violent felony as defined in section 924(e)(2)(B)(ii). Under that section, a violent felony is any felony that “involves conduct that presents a serious potential risk of physical injury to another.” Under Florida law, robbery is defined as the taking of another’s property by “the use of force, violence, assault or putting in fear.” Thus, the offense involves conduct that “presents a serious potential risk of physical injury to another,” and it constitutes a violent felony.

The Court rejected Wilkerson’s argument that, because Florida law does not require an overt act in furtherance of the conspiracy, the conviction was not a violent felony. Once the agreement to commit the robbery was reached, the Court reasoned, the conduct presented at least a potential risk of physical injury within the meaning of § 924(e)(2)(B)(ii).

Failure to Give *Richardson* Instruction Requiring Juror Unanimity as to Offenses Comprising CCE Subject to Harmless Error Analysis; *Richardson* Rule Applies Retroactively to Cases on Collateral Review

Ross v. United States, 289 F.3d 677 (11th Cir. 2002).

◆ 21 U.S.C. § 848 - continuing criminal enterprise

During his trial, Allen Ross requested that the jury be instructed that it must unanimously agree on which offenses constituted the continuing series of violations before it could convict Ross of engaging in a continuing criminal enterprise. The district court denied the request. Ross challenged this decision on direct appeal, and the Eleventh Circuit affirmed.

Ross then filed a § 2255 petition for habeas relief. While this petition was pending, the Supreme Court decided *Richardson v. United States*, 526 U.S. 813 (1999) in which it held that “a jury has to agree unanimously about which specific violations make up the ‘continuing series of violations’” of a CCE charge. While concluding that *Richardson* does apply retroactively, the district court, nevertheless, denied the petition concluding that the failure to give the instruction constituted harmless error.

The Eleventh Circuit affirmed. The Court rejected the Government’s argument that *Teague* barred retroactive application of the *Richardson* rule, noting that *Teague* applies only to new procedural rules, and not to new substantive rules of criminal law.

A new rule is substantive, the Court noted, “when it interprets ‘the meaning of a criminal statute enacted by Congress’ so that the conduct for which a defendant was convicted may no longer be illegal.” As the Court in *Richardson* changed the elements of a CCE offense, it changed the meaning of the statute. Therefore, the *Richardson* rule is substantive and it applies retroactively to cases on collateral review.

The Court then concluded that harmless error analysis applies to a

claim of a *Richardson* error. Joining the Sixth Circuit, the Court held that the appropriate harmless error analysis in such cases is that set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993): A defendant is entitled to habeas relief when an error results in actual prejudice because it “had a substantial and injurious effect or influence in determining the jury’s verdict.” (The Court rejected Ross’ argument that the case should be analyzed under the *Chapman v. California*, 386 U.S. 18 (1967) “harmless-beyond-a-reasonable-doubt” standard.)

The Court then concluded that the error in this case constituted harmless error under the *Brecht* standard. Ross had been charged not only with the CCE offense, but also with two controlled substance conspiracy offenses. Those offense, the Court noted, could count as two of the three required controlled substance violations. As to the third, the Court had to “determine whether grave doubt exists on whether the jury would have unanimously found that Ross committed a third connected violation of the controlled substances laws if a *Richardson* instruction had been given.”

The Court stated it had no doubt that the jury would have unanimously found that Ross had committed a third connected offense. More than 15 witnesses testified about Ross’ participation in hundreds of such offenses, and the jury must have believed at least some of these witnesses because it convicted Ross of the two conspiracy charges.

Therefore, the Court reasoned, it was inconceivable that the jury could not have unanimously agreed on a third. Because there was no evidence that the *Richardson* error had a “substantial and injurious effect” on the jury’s verdict, the Court affirmed the district court’s order denying habeas relief.

Court Upholds Both Vulnerable Victim and Aggravating Role Enhancements in Bank Robbery Case

United States v. Phillips, 287 F.3d 1053 (11th Cir. 2002).

◆ U.S.S.G. § 3B1.1 - aggravating role enhancement; U.S.S.G. § 3A1.1-vulnerable victim enhancement

The Eleventh Circuit affirmed Gary Phillips’ sentence on bank robbery charges which had been enhanced two-levels pursuant to U.S.S.G. § 3B1.1 based on his role as a leader or organizer of the offense, and two-levels pursuant to § 3A1.1 after the trial court found that the bank tellers involved were vulnerable victims.

Phillips and two co-defendants robbed a bank in a rural Alabama town. The co-defendants entered the bank armed and threatened to kill everyone inside if they heard the police coming. Phillips, a former Chief-of-Police, sat in the get-away car monitoring a police scanner. After their arrest, the two co-defendants pled guilty and testified against Phillips at trial. They claimed that Phillips had planned the robbery in the small town because he knew that the town had only one police officer. After

being found guilty of all charges, Phillips was sentenced to 151 months. His sentence included an enhancement for vulnerable victims and an enhancement for his aggravating role in the offense. Phillips objected only to the aggravating role enhancement.

The Court affirmed the two-level enhancement pursuant to § 3A1.1 based on a finding that the bank tellers were vulnerable victims. The enhancement, the Court noted, focuses on “the defendant’s perception of the victim’s vulnerability to the offense.” Although, in *U.S. v. Morrill*, 984 F.2d 1136 (11th Cir. 1993), the Court had previously held that bank tellers are not automatically presumed to be vulnerable victims, it did not hold that bank tellers were never vulnerable victims.

In determining whether the enhancement applies, the trial court must make a fact-specific determination as to which factors, if any, distinguish the teller involved from other bank tellers and as to how the defendant targeted the teller based on those factors.

There was no plain error in applying the enhancement, the Court held, because Phillips had selected the particular bank based on the small size of the town and his knowledge that the town’s one police officer would not be in the area at the time of the robbery. Because these tellers had the “unique characteristics” of being in a remote location with little or no police protection, they were vulnerable victims within the meaning of § 3A1.1.

The Court also upheld Phillips’ two-level enhancement under § 3B1.1(c) for his role as a leader or organizer in the offense.

Phillips had, the Court noted, planned and prepared for the robbery. He selected the bank, provided the guns and “agreed to take care of all the details.” Phillips even provided his co-defendants with ski masks and gym bags, taught one of them how to use a gun, and he purchased the police scanner and drew a diagram of the bank. Phillips also waited in the get-away car and monitored the police scanner. Thus, the Court held, there was no clear error in applying this enhancement.

Defendant Must Request to Proceed *Pro Se* Before the Jury is Empaneled

United States v. Young, 287 F.3d 1352 (11th Cir. 2002).

◆ **Sixth Amendment - right of self-representation**

In an issue of first impression, the Eleventh Circuit held that a defendant’s right to proceed *pro se* is unqualified if he asserts the request before the jury is empaneled, absent any indication that he is attempting to delay the proceedings. The right to self-representation cannot be forfeited, the Court held, before “meaningful trial proceedings have commenced.”

In this case, because the defendant had not asserted his request until after the jury had been selected, “the meaningful trial proceedings” had already commenced. Thus, the district court properly denied the defendant’s request to proceed *pro se* as untimely.

Court Properly Considered Evidence During Capital Sentencing That Defendant Was Faking Mental Illness

Brown v. Head, 285 F.3d 1325 (11th Cir. 2002).

◆ **28 U.S.C. § 2254 - federal habeas corpus challenge to use of evidence at sentencing**

The Eleventh Circuit denied James Brown’s request for a petition for rehearing, and suggestion for rehearing *en banc*, in which he challenged the use of certain evidence during his sentencing hearing on murder charges.

During the hearing, the trial court considered evidence that Brown had sufficient possession of his mental faculties a day or two after the murder to change the tires on his car in order to avoid detection, as proof that Brown had been faking mental illness.

Two psychiatrists, testifying for the defense, claimed that Brown was irrational and completely out of touch with reality when they examined him. Both doctors diagnosed Brown with paranoid schizophrenia.

The Court held that it was “entirely fair and proper to consider the evidence that strongly contradicts that diagnosis.” It reasoned that the fact that Brown knew what was going on and engaged in behavior to minimize his chances of capture was evidence that Brown was not out of touch with reality. The evidence showed that Brown was faking being delusional and hearing voices and being unable to think clearly.

This evidence of detection-

avoiding behavior, the Court found, undermined the diagnosis of the psychiatrists and indicated that Brown was faking his symptoms. James Brown’s death sentence, therefore, would stand.

In a special concurrence, Judge Barkett disagreed with the Court’s conclusion that this evidence contradicted the doctors’ diagnosis. She stated, “there is no basis in the record for the assumption that a person suffering from paranoid schizophrenia does not have the cognitive ability to have tires changed on a car, and it appears to be medically inaccurate. . . . In my view, the majority’s reasoning is unmindful of the realities of paranoid schizophrenia.”

Defendant’s Prior Felony Drug Adjudication Under Youthful Offender Statute Counts as Prior Conviction for Purposes of Sentence Enhancement

United States v. Acosta, 287 F.3d 1034 (11th Cir. 2002).

◆ **21 U.S.C. § 841(b)(1)(A) - sentence enhancement for prior felony drug conviction**

The Eleventh Circuit held that a prior adjudication for a felony drug offense under New York’s youthful offender statute could be used to enhance the defendant’s sentence for conspiracy to possess with intent to distribute cocaine.

Acosta was convicted of conspiracy to possess with intent to distribute cocaine, and the Government sought to enhance his sentence, pursuant to 21 U.S.C. § 841(b)(1)(A), based on his prior felony drug adjudication in New

York.

When Acosta was 16, he was prosecuted for selling drugs to an undercover police officer. He pled guilty and was adjudicated under New York's youthful offender statute. Under that statute, a youthful offender adjudication is not a conviction.


Before holding that the adjudication was a conviction for purposes of the enhancement, the Court first noted that whether the adjudication would count as a prior conviction would be defined according to federal, rather than state, law. Thus, the Court held, it was not bound by the fact that the adjudication was not considered a conviction in New York.

The Court then analogized this case to those cases which held that a prior plea of *nolo contendere*, with adjudication withheld, is a conviction which supports an enhanced sentence. The Court then reasoned that "[i]f a defendant who is not even adjudicated guilty is considered to have suffered a conviction within the meaning of section 841, then a youthful offender who pleads guilty and is adjudicated must also be considered to have suffered a prior conviction, even if the state law does not consider him 'convicted' and his record is sealed."

The Court further noted that the purpose of youthful offender statutes is to provide youthful, first time offenders with a chance to learn from their mistakes, and that they are not meant to provide a technical advantage to those who, having not learned their lesson, continue

to engage in criminal conduct. Moreover, the purpose of the enhanced penalty is to punish and deter recidivism and this purpose would be frustrated if such offenders were excused from enhanced sentences because their prior offenses were not deemed convictions under state law.

The Court also rejected Acosta's argument that the prior adjudication had not been properly proven because the record of his adjudication was sealed. The Court found that the Government had proved the prior conviction, beyond a reasonable doubt, by introducing an uncertified copy of the adjudication. Additionally, the Court noted, Acosta's attorney admitted that Acosta was the defendant named in the adjudication. Therefore, the Court affirmed Acosta's enhanced sentence.



Alabama Supreme Court to Hear Oral Arguments Challenging Death Sentence Following *Ring*

CJA panel attorney Richard Keith represents a capital defendant in the case of *State v. Bobby Wayne Waldrop* which is scheduled for oral arguments Tuesday, September 10th, 2002 at 9:00 a.m. at the Alabama Supreme Court.

Following his conviction for murder, the jury voted 10 to 2 to sentence Waldrop to life without parole. The judge, however, found

an additional aggravating factor, held that the aggravating factors outweighed the mitigating factors, and order Mr. Waldrop sentenced to death.

Mr. Waldrop is challenging his death sentence as being in violation of *Ring v. Arizona*. Amicus briefs were filed by both ACDLA and EJI.

The case will be argued by Bryan Stevenson with the Equal Justice Initiative of Alabama.



Visit Our New Federal Defender Website

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



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.

☛ **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.

☛ **November 13, 2002 (Montgomery) and November 14, 2002 (Dothan):**

Mail Fraud

Speaker: Ellen Podgor

This session 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.

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).

