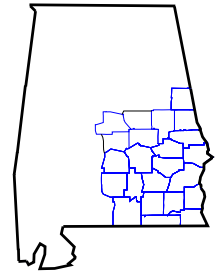


# CJA NEWS



“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

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## LETTER FROM THE DIRECTOR

Dear CJA Panel Members and Friends:

While there are many important decisions described in this newsletter, two recent decisions in particular affect consideration of plea agreements and sentencing promises.

In *United States v. Ruiz*, \_\_\_ F.3d \_\_\_, 2000 WL 33201189 (9<sup>th</sup> Cir. March 5, 2001), the Ninth Circuit vacated a sentence and remanded for resentencing, where the prosecution had refused to make a downward departure because the defendant had refused to waive her rights under *Brady v. Maryland*. The case arose in the context of a “fast track” plea bargain procedure used in the Southern District of California, in which the prosecution agrees to make a motion for a two-level downward departure for any defendant who pleads guilty, waives the rights to indictment and appeal,

agrees to file no motions, and waives the right to receive information pursuant to *Brady v. Maryland*.

The Ninth Circuit held that such *Brady* waivers would interfere with the requirement that guilty pleas be voluntary and intelligent; that such waivers are unconstitutional; and that it was therefore unconstitutional for prosecutors to withhold a downward departure recommendation based on a defendant’s refusal to accept such a waiver.

In another case, the Supreme Court upheld the Bureau of Prisons’ categorical denial of early release to prisoners who have completed BOP drug treatment programs but whose felony offenses involved use of a firearm. As you know, the sentencing reduction available to nonviolent offenders under 18 U.S.C. §3621(e)(2)(B) has created incentive for participation in drug treatment and has particularly raised the hopes of drug offenders for shorter actual sentences. In *Lopez v. Davis*, the Supreme Court held that the Bureau of Prisons has the

authority to promulgate regulations which deny such early release based on the defendant's prior record or the use of a firearm in the offense of conviction. This decision has resulted in the vacating of an Eleventh Circuit opinion which had held the BOP could not bar early release to a prisoner convicted of a nonviolent drug conspiracy offense whose codefendant possessed a firearm in connection with the drug conspiracy. *Houston v. Kilpatrick*, 121 S.Ct. 851 (2001), vacating *Kilpatrick v. Houston*, 197 F.3d 1134 (11<sup>th</sup> Cir. 1999) (which affirmed *Kilpatrick v. Houston*, 36 F.Supp. 2d 1328 (N.D.Fla. 1999).

The organization of the newsletter now includes division of habeas and *Apprendi* decisions. We hope this will make the newsletter more useful for quick reference. Please feel free to give us your thoughts and comments on how it can be most helpful to you.

As always, we thank you for the pleasure of working with us on behalf of our clients.

Sincerely,

Christine A. Freeman  
Executive Director



### CJA PANEL CONFERENCE

(Joe Van Heest, Glassroth & Van Heest, P.C.)

I attended the CJA Panel Representative Conference in Los Angeles on February 23 - 25, 2001, at the request of Bill Blanchard, the CJA Panel Representative for the Middle District of Alabama. The conference was very useful and I provide the following information for all CJA attorneys.

Bill Blanchard is on the Quality of Representation and Standards expert panel. I therefore attended this panel's discussion. The discussion was active and included debate concerning whether or not CLE should have a Federal Public Defender or Community Defender Organization, and when such a full-time organization will not be feasible. There was discussion concerning whether the needs of districts which do not have defender offices will be assisted by a CJA "Resource Counsel." The vast majority of the committee felt that the Resource Counsel is probably not equipped to do a job equivalent to a fully staffed defender organization. The Quality of Representation panel also discussed compensation of CJA attorneys and the proposed raise to \$113/hour. This will be addressed by the compensation committee.

The panel representatives voted overwhelmingly to adopt an expert panel system, by which committees of CJA attorneys are formed to address six areas and then report at the next annual CJA Panel Representative conference. As noted, Bill Blanchard has agreed to

participate on the Quality of Representation panel.

The new CJA panel attorney representative for the Eleventh Circuit will be John Lentine, the present CJA panel representative from the Northern District of Alabama.

Three regional CLE training conferences are scheduled. One is already filled, but space is available for CJA attorneys in Minneapolis on July 19-21 and in San Francisco on September 13-15, 2001. Also, a "Reinventing Sentencing Workshop" is scheduled from June 8-10 in Birmingham. Attendance is limited and applications must be submitted by April 2 by fax to 202-628-4094, attention Karen Harris, Federal Defender Training Branch.





## SUPREME COURT NEWS

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

### **Recent Supreme Court Decisions:**

#### **Additional 6 to 21 Month Increase in Defendant's Sentence Constitutes Prejudice Sufficient to Satisfy *Strickland's* Prejudice Prong - Increase in Sentence Need Not Meet a Baseline Standard of Significance**

*Glover v. United States*, 121 S.Ct. 696 (2001).

#### ◆ **Sixth Amendment - Ineffective Assistance of Counsel**

In a unanimous decision, the Supreme Court held that an increase in a defendant's sentence due to counsel's ineffective failure to object to an improper sentence calculation constituted "prejudice" under *Strickland v. Washington*,

466 U.S. 668 (1984), and rejected the analysis of the Seventh Circuit, which had held that an increase of 6-21 months was not "significant enough" to constitute prejudice.

After defense counsel had failed to object to the district court's arguably incorrect refusal to group his offenses for Sentencing Guidelines computation purposes, and appellate counsel failed to raise this issue on direct appeal, the defendant, proceeding *pro se*, sought relief under 28 U.S.C. §2255, claiming that his sentence was too long. This petition was rejected because, without reaching whether counsel's assistance was incompetent, it was determined that an error of 6-21 months was not consequential enough under *Strickland* to constitute "prejudice."

On appeal to the Supreme Court, the Court held, and the government conceded, that this reasoning was incorrect, pointing out that language in *Lockhart v. Fretwell*, 506 U.S. 364 (1993), to the effect that a mere change in outcome is not necessarily "prejudice," does not supplant *Strickland*. "Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance."

The Court added that the Seventh Circuit's rule was not well considered because "there is no obvious dividing line" for determining how much time of incarceration is significant. The Court stated that the amount of the

increase "may be a factor to consider in determining whether counsel's performance in failing to argue the point constitutes ineffective assistance, [but] under a determinate system of constrained discretion such as the Sentencing Guidelines it cannot serve as a bar to a showing of prejudice."

The court further noted that the prejudice could not be viewed as the result of a trial strategy, since it involved only a sentencing calculation - a calculation "resulting from a ruling which, if it had been error, would have been correctable on appeal." The Supreme Court declined to reach other arguments raised for the first time on appeal by the government and not yet addressed in the courts below.

#### **Due Process Clause Violated Where Defendant Convicted for Conduct that Criminal Statute, Properly Interpreted, Did Not Prohibit**

*Fiore v. White*, 121 S.Ct. 712 (2001).

#### ◆ **Fourteenth Amendment - Due Process Clause**

Reversing the denial of habeas corpus relief under 28 U.S.C. § 2254, the Supreme Court held that the Due Process Clause prohibits a state from convicting and incarcerating a person when subsequent case law makes clear that the government had failed to prove a necessary element of the offense at trial. Defendant *Fiore* had been convicted of an environmental crime, and although his case was not

reviewed on appeal in the state supreme court, a co-defendant’s conviction was overturned on appeal by the state’s highest court on the ground that a necessary element of the offense had not been proven.

Because this same element had not been proven at his own trial, Fiore sought to have his conviction reversed. After unsuccessful attempts in the state courts, Fiore brought a federal habeas action which reached the U.S. Supreme Court. Having originally granted certiorari to decide whether due process mandated a retroactive application of the co-defendant’s case to overturn the conviction, the Supreme Court, in order to determine if the question was actually presented, certified to the state supreme court the question whether in fact the co-defendant’s case was “new” law. The state court responded that it was not a new rule of law, thereby removing the retroactivity question.

The Supreme Court, citing *Jackson v. Virginia*, 443 U.S. 307, 316 (1979), then held that due process required overturning the conviction because an essential element of the offense had not been proven.

**BOP May Categorically Deny Drug Program Sentence Reduction to Prisoners Convicted of Nonviolent Offenses if Those Offense Involved the Carrying, Possession or Use of a Firearm.**

*Lopez v. Davis*, 121 S.Ct. 714 (2001).

◆ **18 U.S.C. §3621(e)(2)(B) - reduction of prison sentence for successful completion of substance abuse treatment program**

The Supreme Court upheld a regulation promulgated by the Bureau of Prisons (BOP) which provided that inmates whose current offense was a felony attended by “the carrying, possession, or use of a firearm” would be categorically ineligible for a sentence reduction for having successfully completed a substance abuse treatment program. The Court explained that, beyond instructing that the BOP has discretion to reduce the period of imprisonment for a nonviolent offender who successfully completes drug treatment, Congress has not identified any further circumstance in which the BOP is either required to grant the reduction or forbidden to do so.

In this “familiar situation,” where Congress has enacted a law that does not answer the precise question at issue, all the courts must decide is whether the BOP, the agency empowered to administer the early release program, has filled the statutory gap in a way that is reasonable in light of the legislature’s revealed design. The Court rejected Lopez’ argument that the BOP was required to make

“individualized” case-by-case determinations of sentence reduction ineligibility, finding that the statute authorized the BOP to engage in “rulemaking.”

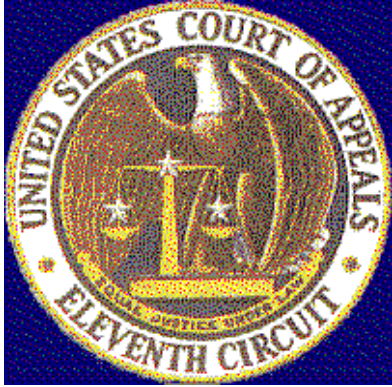
**Supreme Court Remands Case for Reconsideration**

*Weekley v. Moore*, 121 S.Ct. 751(2001)

◆ **28 U.S.C. §2254 - Tolling of Filing Deadline.**

The Court vacated and remanded *Weekly v. Moore*, 204 F.3d 1083 (11<sup>th</sup> Cir. 2000) (holding that a state habeas claim dismissed by state courts on successive petition grounds did not toll federal habeas time limit), for further consideration in light of *Artuz v. Bennett*, 121 S.Ct. 361 (2000) (holding that any timely and properly filed state habeas claim meets the tolling requirement of 28 U.S.C. §2254).





## RECENT ELEVENTH CIRCUIT DECISIONS

### **Appointing Temporary/Interim United States Attorney Does Not Affect Government's Power to Prosecute Nor District Court's Jurisdiction, Thus Failure to Raise Objections Involving Such Appointment Prior to Trial Constitutes Waiver of Any Such Objections**

*United States v. Suescun*, 237 F.3d 1284 (11<sup>th</sup> Cir. 2001).

◆ **Fed.R.Crim.P. 12(b) - objections based "on defects in the institution of prosecution" or "on defects in the indictment"**

**U.S. Const. art. II, § 2, cl. 2 - "Appointments Clause"**

Pablo Suescun challenged his conviction on drug charges by claiming that the indictment by which he was charged was a nullity as it had been obtained by a temporary United States Attorney who had neither been appointed by the President nor confirmed by the Senate as required by the Appointments Clause.

Suescun argued further that, even if the indictment were valid, his conviction was a nullity because both the Appointments Clause and Separation of Powers principle precluded the district court from appointing the previously designated "temporary" U.S. Attorney to serve as an "interim" U.S. attorney during the term during which Suescun was convicted.

The Court of Appeals rejected both of these arguments. The Court reasoned that, as Suescun's challenges were based either upon "defects in the institution of the prosecution" or upon "defects in the indictment," Suescun was required, pursuant to Federal Rule of Criminal Procedure 12(b), to raise such challenges prior to trial. Because he had not, the Court held, such objections had been waived.

The Court did note that Suescun may have been able to obtain relief from the waiver pursuant to Rule 12(f), but as Suescun had failed to request such relief, the Court declined to decide the issue.

The Court also rejected Suescun's argument that his challenges were actually based upon a lack of jurisdiction. Suescun had claimed that the district court lacked jurisdiction to hear the case because the indictment was returned while the U.S. Attorney was serving in a temporary capacity. Furthermore, he argued that, even if the district court had jurisdiction, his conviction should be vacated because he was tried by an AUSA acting under the supervision of an interim U.S.

Attorney.

In rejecting these arguments, the Court held that the appointment of a United States Attorney, even if made without compliance with the Appointments Clause, does not affect the government's power to prosecute and does not deprive a district court of jurisdiction. Thus, because there was no jurisdictional issue presented in this case, Suescun's challenges to the validity of the indictment and to the authority of the AUSA were waived, as Suescun had failed to present them as required by Rule 12(b).

Finally, the Court rejected Suescun's argument that the complained of errors constituted "structural defects" requiring reversal despite their having been waived, and held that "structural defects do not absolve a defendant's waiver of a defense or objection."

### **Summons to Appear Issued by Probation Officer Constituted a Lawful Order By the Court**

*United States v. Bernardine*, 237 F.3d 1279 (11<sup>th</sup> Cir. 2001).

◆ **18 U.S.C.A. § 401(3) - criminal contempt**

In this case of first impression, the Eleventh Circuit considered whether a court can lawfully delegate to a probation officer the task of issuing a summons. The Court held that a district court may properly delegate such a task.

While Dominic Bernardine was on supervised release, his

probation officer petitioned the district court for a summons for an offender under supervision which would require that Bernardine appear for a supervised release violation hearing. The district court judge signed the bottom of the petition, placing an "X" in the space next to "The Issuance of a Summons."

Although the probation officer presented Bernardine with a copy of a written "Summons to Appear" which indicated the time and place he was to appear, Bernardine failed to appear at the scheduled hearing. A bench warrant was issued for Bernardine and he was later indicted for criminal contempt for violating 18 U.S.C. § 401(3) by failing to appear in court as scheduled.

On appeal, Bernardine claimed that the government failed to prove an element of the offense; that the court had entered a lawful order of reasonable specificity. He claimed that the court's "order" could not support his contempt charge because it did not specify a date, time and place of appearance, and that, as the "summons to appear" was issued by the probation officer rather than the court, it failed to comply with Federal Rules of Criminal Procedure 4 and 9, was not signed by a judicial officer, and therefore was not a lawful court order.

The Court agreed with Bernardine that the order issued by the district court did not meet the "reasonable specificity" requirement of an 18 U.S.C. § 401(3) offense as it did not contain

the time or place or any other details of the appearance. However, because the summons issued by the probation officer clearly stated the date, time and place of appearance, the Court of Appeals found that it did meet the reasonable specificity requirement and upheld the conviction.

The summons issued by the probation officer constituted a lawful order, the Court reasoned, because the district court, by signing the probation officer's petition and ordering the issuance of a summons, implicitly directed the probation officer to issue the summons.

The Court held that the district court could properly delegate the task to the probation officer because a probation officer, in addition to being an "arm of the court," is required, pursuant to 18 U.S.C. § 3603(10), "to perform any other duty that the court may designate." This language, the Court noted, was to be construed broadly and, while it is not all encompassing, it "encompasses the express or implied authorization by a district court to a probation officer to issue a defendant a summons to appear at a supervised release violation hearing."

Because the task delegated to the probation officer was merely ministerial, it did not violate Article III of the Constitution which prohibits a court from delegating a judicial function to a probation officer. Therefore the summons issued by the probation officer was a lawful order, and Bernardine was properly convicted of violating it.

### **Court Did Not Abuse its Discretion in Continuing Trial in Defendant's Absence**

*United States v. Bradford*, 237 F.3d 1306 (11<sup>th</sup> Cir. 2001)

#### **◆ Fed.R.Crim.P. 43 - voluntary absence of defendant after trial has commenced**

The Eleventh Circuit affirmed Bridgette Bradford's conviction for assaulting a federal officer, in violation of 18 U.S.C. § 111(a)(1), and rejected her claim that she was improperly tried in absentia, in violation of Federal Rule of Criminal Procedure 43.

Bradford, after being found competent to stand trial, refused to come to court for the commencement of her case. The trial was rescheduled for a later date and this time Bradford was present for jury selection, although she was not present when the jury was sworn. However, on the day the actual trial was commenced, Bradford refused to leave her cell. The district court concluded that, because Bradford was present for jury selection, she had been present when the trial commenced, and thus, pursuant to Federal Rule 43(b), the court decided to hold the trial in her absence.

On appeal, Bradford argued that Rule 43 prohibited the court from commencing the trial in her absence. The Court of Appeals, however, rejected this argument. The Court, citing *Crosby v. United States*, 506 U.S. 255 (1993), noted that Rule 43 prohibits the trial in absentia of a defendant who is not

present at the beginning of a trial, but permits the trial to proceed if the defendant voluntarily absents himself after the trial has commenced. The Court held that the trial in this case had commenced when the jury selection process had begun. Thus, Bradford's later voluntary absence did not prevent the court from going forward with the trial in her absence.

The Court also noted that double jeopardy cases, which hold that jeopardy attaches when the jury is empaneled and sworn, did not apply in determining "the commencement of trial" for purposes of Rule 43, distinguishing *United States v. Arias*, 984 F.2d 1139 (11<sup>th</sup> Cir. 1993).

The Court further found that Bradford had waived her right to be present, noting that she was told that the trial would continue in her absence and yet she indicated that she did not want to attend. The Court stated that a defendant's "obstructionist and willful behavior" could be considered in the trial court's decision whether to continue or postpone the trial.

Finally, the Court found that the trial court did not abuse its discretion in balancing the interests of the defendant with those of the public, noting that both the government and the defense had witnesses who would have been inconvenienced by a sudden postponement of the trial. The judgment of the district court was affirmed.

### ***ELEVENTH CIRCUIT APPRENDI DECISIONS***

#### **Failure to Submit Drug Quantity Amount to Jury Is Neither Plain Error Nor Structural Error Where Defendants Subject to Same Sentence Even Without a Specific Drug Quantity Finding**

*United States v. Smith*, 240 F.3d 927 (11th Cir. 2001).

#### **◆ 21 U.S.C. §841(b)(1)(A-C)-determination of drug quantity amount for sentencing purposes**

The defendants were convicted of multiple counts involving the manufacture of methamphetamine. During the sentencing hearing, an expert for the government testified that, based upon the most abundant precursor chemical found at the home of the defendants, 2,011 grams of methamphetamine could be made. Based on this drug quantity amount, the district court judge sentenced the defendants to 30 years in prison.

On appeal, the defendants asked the Court to reconsider their sentences based on the Supreme Court's *Apprendi* decision. The Court noted, however, that because the defendants had not objected to the drug quantity finding at the sentencing hearing, review was limited to the plain error standard.

The Court acknowledged that an error had occurred. The defendants had been sentenced to 30 years under §841(b)(1)(A) on each count of conviction, but the Court noted, in the absence of a finding as

to drug quantity, the maximum statutory sentence the defendants could receive was 20 years for each count.

Although the Court held that this was an error, it also held that the error did not affect the defendants' substantial rights. Because the defendants could have been sentenced to 20 years on each of their three separate counts, they each faced a possible maximum sentence of 60 years, and thus they were not prejudiced by the district court's error. "When the ultimate sentence does not exceed the aggregate statutory maximum for the multiple convictions, no effect on substantial rights has occurred that must be remedied." The Court affirmed the defendant's sentences.

The Court also rejected the defendants' argument that the district court erred in determining the drug quantity amount based on the most abundant precursor chemical found in their home. (The government's expert testified that 91 grams of methamphetamine could be made using the least abundant precursor.) In finding no error in the use of the most abundant precursor, the Court noted that, under U.S.S.G. §201.1(n.12), a district court may approximate the quantity of drugs when no drugs are actually seized, and that nothing requires the court "to disregard calculations based on the most abundant precursor in favor of a lesser abundant precursor." Thus, the Court held, there was no error in attributing 2,011 grams of methamphetamine to the defendants for sentencing purposes.

### **Plain Error in Sentencing Defendant to Enhanced Term Based on Drug Quantity Did Not Affect Defendant's Substantial Rights**

*United States v. Pease*, 240 F.3d 938 (11<sup>th</sup> Cir. 2001).

#### ◆ **21 U.S.C. §841(b)(1)(A-C) - determination of drug quantity**

The defendant challenged his 30 year sentence for conspiracy to distribute cocaine, claiming that it violated *Apprendi*. Because the indictment did not allege a specific drug quantity, the defendant argued, the maximum sentence which he could receive was 20 years. Because the defendant raised the issue for the first time on appeal, it was reviewed for plain error.

The Court concluded that the defendant's 30 year sentence did constitute plain error, yet it held that the error did not affect the defendants' substantial rights. The Court noted that the defendant never argued that he conspired to distribute less than 500 grams of cocaine, and he admitted accepting three kilograms of cocaine during his plea colloquy. Because, under §841(b)(1)(B), the defendant could be sentenced up to a maximum of 40 years, a sentence of 30 years, the Court held, could not be shown to affect the defendant's substantial rights.

### **Eleventh Circuit Will Not Address *Apprendi* Issue Following Remand by Supreme Court Where *Apprendi* Issue Not Raised in Defendant's Prior Eleventh Circuit Briefs**

*United States v. Ardley*, \_\_\_\_\_ F.3d \_\_\_\_\_ (11<sup>th</sup> Cir. 2001).

2001 WL 166376 (11<sup>th</sup> Cir. (Ala.)).

#### ◆ **Appellate Review Following Remand by Supreme Court**

After the Supreme Court vacated the Eleventh Circuit's prior judgment in this case and remanded the case back to the Court for reconsideration in light of *Apprendi*, the Eleventh Circuit once again affirmed Barry Ardley's conviction and sentence.

The Eleventh Circuit noted that Ardley had not raised the *Apprendi* issue in his prior appeal to that Court, and that he raised it for the first time in his certiorari petition. Because the Supreme Court did not instruct the Court of Appeals to do otherwise, the Court simply applied its rule that issues not timely raised in the briefs are deemed abandoned, and reinstated its original ruling.

### **Court Affirms Defendant's Sentence Where Plain Error at Sentencing Does Not Affect Defendant's Substantial Rights**

*United States v. Candelario*, 240 F.3d 1300 (11<sup>th</sup> Cir. 2001).

#### ◆ **Preservation of Alleged *Apprendi* Errors**

The Eleventh Circuit rejected the defendant's claim that his 30 year sentence for trafficking in cocaine violated *Apprendi*. As an initial matter, the Court noted, it had to be determined whether the defendant raised a constitutional objection, and whether the objection was timely, in order to determine the appropriate standard of review. While a constitutional objection which is timely made receives the benefit of preserved error review, objections which are neither constitutional nor timely receive only plain error review.

The Court stated that a "constitutional objection" is one that invokes either *Apprendi* or *Jones v. United States*, 526 U.S. 227 (1999), or that contends that the issue of drug quantity should go to the jury, that an element of the offense was not proved, that the judge cannot determine quantity, or that quantity must be proved beyond a reasonable doubt, not by a preponderance of the evidence.

"However, a defendant's objection to the quantity of drugs that the Government attributes to him is not, on its own, a constitutional objection. Such an objection is properly characterized

as either an evidentiary objection or a sufficiency of the evidence objection. Furthermore, an objection to the indictment is not a constitutional objection if the indictment properly charges a crime.” The Court also added that an objection that the indictment fails to provide adequate notice concerning the extent of the penalty to which the defendant will be subjected “likely will not carry the day.”

With regard to timeliness, the Court held that a constitutional objection for *Apprendi* purposes is timely if a defendant makes the objection at sentencing. The Court noted that it is not necessary for a defendant to object prior to sentencing, pointing out that it would “run contrary to a defendant’s interest” to insist on an objection to the indictment, because this would force the defendant to claim that the government had undercharged him. Similarly, the Court held that a defendant need not insist at trial on a jury instruction on drug quantity in order to preserve the objection.

The Court then went on to analyze its *Apprendi* cases in which the Court utilized preserved error review. In *United States v. Rodgers*, 228 F.3d 1318 (11<sup>th</sup> Cir. 2000), the defendant was entitled to preserved error review because, relying on *Jones*, the defendant raised a timely constitutional objection to the drug quantity determination. Likewise, in *United States v. Nealy*, 232 F.3d 825, 829 (11<sup>th</sup> Cir. 2000), the defendant raised a timely

constitutional objection and thus was entitled to preserved error review. In such cases, the Court noted, the “court applies a de novo standard of review when determining whether a defendant’s sentence violated *Apprendi* by exceeding the statutory maximum.” If the Court finds such an error, however, it is nonetheless subject to harmless error analysis. If the error is harmless, the sentence stands, if it affects the defendant’s substantial rights, a new sentence must be imposed.

Citing *Neder v. United States*, 527 U.S. 1 (1999) (failure to instruct jury on an element of the offense is subject to harmless error analysis), the Court stated that “a court reviewing a defendant’s sentence in which it finds an *Apprendi* error must look to whether the omitted element is supported by uncontroverted evidence, and also ask whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.”

The Court then contrasted its preserved error cases with its plain error line of cases including: *Swatzie*, *Gerrow*, *Smith* and *Pease*, in which all of the defendants failed to raise a constitutional objection in a timely fashion. The Court noted that in these plain error cases, the defendant had merely placed the amount of drugs “in controversy,” but had not made a “constitutional objection.” In such cases, the defendant must meet the four pronged test set forth in *Olano*: (1) there must be an error; (2) that is plain, and (3) that affects substantial rights. If these conditions are met,

the Court may notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

With regard to whether the error is plain, the Court stated that an *Apprendi* error may be considered “‘plain’ even though the law was different at the time of the defendant’s conviction and sentencing,” noting that under *Johnson v. United States*, 520 U.S. 461 (1997), “it is enough that an error be ‘plain’ at the time of appellate consideration.”

Turning to the third prong of “plain error” analysis - whether the error affected the defendant’s substantial rights - the Court noted that this “is akin to the harmless error analysis employed in preserved error cases, which asks whether a rational jury would have found the defendant guilty absent the error.” However, unlike the “preserved error” test, the defendant bears the burden of showing “that the error did affect his substantial rights.” This burden is not met if a change in drug quantity would not have affected the sentence, or if the drug quantity issue was uncontested.

Finally, as to the fourth prong of “plain error” review - whether the error seriously affects the fairness, integrity or public reputation of judicial proceedings - the Court noted that it could not be satisfied if there was “overwhelming” evidence against the defendant.

In this case, the Court found that the defendant’s *Apprendi*

objection was neither constitutional nor timely, because in the court below he had contested only the amount of cocaine attributable to him, and did not raise the *Apprendi* issue until filing a petition for rehearing in the Court of Appeals. Therefore, the Court reviewed his claim under the plain error standard of review.

Applying the first two prongs on the plain error test, the Court found that there was error and that the error was plain. The jury had not made explicit findings of drug quantity, yet the defendant was sentenced to 30 years on each count, a sentence higher than the 20 year maximum sentenced permitted under §841(b)(1)(C) for each count.

However, the Court did not reverse the defendant's sentence because it found that the error did not affect the defendant's substantial rights, and thus failed the third prong of the plain error test. The Court reasoned that, as there was only one witness against the defendant with regard to the possession count, the jury, in light of its guilty verdict, necessarily had believed the witness. Because this witness testified that the defendant delivered 9 ounces of crack to him for distribution, the jury therefore could not have believed that the drug quantity was less than the 5 grams that supported up to a 40-year sentence under §841(b)(1)(B)(iii).

Additionally, with regard to the conspiracy count, the Court reasoned that the sentence was

also valid because this count necessarily subsumed the quantity in the possession count. Because the defendant failed to satisfy the third prong of the plain error analysis, the Court did not discuss the fourth prong and affirmed the defendant's sentence.

### ELEVENTH CIRCUIT HABEAS CORPUS DECISIONS

#### **District Court Lacks Jurisdiction to Hear §2255 Motion While Direct Appeal is Pending**

*United States v. Dunham*, 240 F.3d 1328 (11<sup>th</sup> Cir. 2001).

#### ◆ **28 U.S.C.A. §2255 - motion for post-conviction relief**

The Court of Appeals dismissed without prejudice Bonnie Dunham's appeal of the denial of her §2255 motion in which she challenged the imposition of a twenty-four month sentence following the revocation of her probation. The Court held that, because Dunham's direct appeal of her sentence was still pending, the district court had lacked jurisdiction to hear the §2255 motion.

The Court of Appeals did, however, address the merits of Dunham's direct appeal which had been consolidated with her appeal of the denial of her §2255 petition. Dunham argued that the district court erred in lengthening her sentence for the sole purpose of drug rehabilitation treatment. The Court

of Appeals, citing its recent decision in *United States v. Brown*, 224 F.3d 1237 (11<sup>th</sup> Cir. 2000), held that the district court had not abused its discretion in imposing a sentence based upon the need for drug rehabilitation.

In *Brown*, the court had held that, in cases involving the revocation of supervised release, a district court may properly consider the availability of drug treatment in exceeding the Chapter 7 recommended guidelines. The Court rejected Dunham's argument that the *Brown* holding should not extend to cases such as hers because cases involving the revocation of probation were distinguishable from those involving the revocation of supervised release.

In rejecting Dunham's argument, the Court reasoned that, because both the statute governing the revocation of supervised release and the statute governing the revocation of probation direct a district court to consider the factors outlined in §3553 when sentencing a defendant, the *Brown* decision properly applied to both types of cases. Therefore, because there had been no abuse of discretion in the imposition of the twenty-four month term of imprisonment, the Court affirmed Dunham's sentence.

## **Court Rejects Arguments that Prosecutor Made Improper Comments at Trial and Sentencing and that Defendant's Confrontation Clause Rights Were Violated - Death Sentence Affirmed**

*Chandler v. Moore*, 240 F.3d 907 (11<sup>th</sup> Cir. 2001).

### **◆ Prosecutorial Misconduct; Sixth Amendment - Confrontation Clause**

The Eleventh Circuit affirmed the denial of Jim Chandler's §2254 petition for habeas relief in which he challenged his conviction and death sentence for two counts of first degree murder. The Court, concluding that several of the issues raised by Chandler were procedurally defaulted, and that he had not shown either "cause and prejudice" or "actual innocence," rejected these claims without further review.

One of the issues the Court did address, however, was whether the Court's comment during jury selection that it was obvious that the defendant was "in trouble," relieved the State of its burden of proof and violated due process. The Court held that it did not, stating that "[t]his one comment, standing alone, did not deprive Chandler of his presumption of innocence, especially in light of the court's several explanations regarding the concepts of presumption of innocence and the State's burden of proof."

The Court also rejected Chandler's argument that the prosecutor had made several improper comments which had rendered his trial fundamentally unfair. Because the Florida Supreme Court had already found that Chandler's substantive challenges to these comments were procedurally barred, the Eleventh Circuit considered only whether Chandler's counsel was ineffective in failing to object to the allegedly improper comments.

The Court found that the prosecutor's comment to a prospective juror that "if the case didn't hold water, you would never get to hear it and make a deliberation," was not improper and that therefore Chandler's counsel was not ineffective for failing to object to it. The Court also found that the prosecutor's comments during jury selection regarding the presumption of innocence, and the fact that the defendant need not say anything, should not have been objected to - as the comments were not improper. Finally, the Court concluded that the prosecution had merely stated an accurate fact when it referred to a witness as "the biggest liar in Indian River County," and thus the statement was not improper either.

The Court also rejected Chandler's claim that he was denied due process at sentencing when the State introduced "bogus" evidence regarding his involvement in a conspiracy to escape from jail. Chandler had argued that, due to the State's use of this evidence, he was prevented from presenting mitigating evidence through

correctional officers that he could remain in prison for life without causing harm to anyone. The Court noted, however, that Chandler was not prevented from presenting such evidence, and that he had in fact presented such evidence through the testimony of several witnesses who supported his claim that the State's case on the conspiracy charge was weak.

The Court also rejected Chandler's claim that the State had violated *Brady* by failing to turn over conflicting evidence regarding the conspiracy charge. The Court reasoned that, because Chandler could not show that the allegedly withheld evidence was material, and because he could have obtained such evidence through the exercise of due diligence, there had been no *Brady* violation.

Chandler also argued that his Confrontation Clause rights were violated when the State presented hearsay evidence at his sentencing hearing. Under Florida law, the Court noted, such evidence was admissible as long as the defendant has an opportunity to rebut any hearsay statements. The fact that Chandler chose not to rebut such testimony at his sentencing, the Court held, did not render the introduction of this testimony erroneous. Thus, there was no Confrontation Clause violation. [The Court also held that hearsay evidence is admissible at a capital sentencing.]

**Counsel at Capital Sentencing Not Ineffective for Failing to Present Evidence of Defendant's Difficult Childhood, Brain Damage, History of Drug Abuse or Intoxication on the Night of the Offense**

*Housel v. Head*, 238 F.3d 1289 (11<sup>th</sup> Cir. 2001).

◆ **Sixth Amendment - Ineffective Assistance of Counsel - duty to investigate; Eighth Amendment - proof of unadjudicated crimes at sentencing; Fifth Amendment - voluntariness of confession**

The Eleventh Circuit affirmed the district court's denial of Terry Housel's § 2254 petition for post-conviction relief in which he challenged his murder conviction and death sentence. Housel argued that his counsel was ineffective because he had failed to discover and present evidence during his sentencing hearing, evidence later discovered by collateral counsel, regarding Housel's dysfunctional family life, brain injuries he suffered during childhood, the fact that Housel is hypoglycemic and susceptible to extreme periods of irritability, and the fact that Housel was drunk at the time of the offense and had a long history of drug abuse.

While noting that "[a] failure to investigate can be deficient performance in a capital case when counsel totally fails to inquire into the defendant's past or present behavior or life history," the Court also stated that "a failure to investigate is not a unique

category of counsel omission that automatically satisfy's *Strickland's* deficient performance prong; rather, like all counsel conduct, it enjoys a presumption of reasonableness that the petitioner must rebut to prevail." In this case, Housel had not overcome this presumption, and thus he was not entitled to relief.

With regard to evidence of Housel's upbringing, the Court found two reasons why counsel's conduct was not deficient. First, counsel had asked Housel to prepare a life history to aid him in his investigation, and counsel could reasonably rely on such representations as to matters within Housel's personal knowledge. Additionally, counsel did contact the people named by Housel, including his mother, who confirmed Housel's own testimony that his childhood had been normal. Secondly, the Court noted, counsel may abandon one defense in favor of another he believes to be more meritorious without performing deficiently. For instance, counsel may have determined that remorse would play better with the jury than would making excuses for Housel's behavior, and the district court had in fact found that counsel had made a strategic decision to accept responsibility, to "humanize" Housel and to ask for mercy.

With regard to evidence concerning Housel's intoxication on the night of the offense, his hypoglycemia and his alleged brain damage, the Court also found that counsel's performance was not deficient. As counsel knew much about Housel's mental condition, he could reasonably conclude that

further investigation would have proved fruitless. Additionally, Housel had never mentioned that he suffered from hypoglycemia and there is no reason to believe that all reasonable attorneys would have inquired about such a condition. Moreover, although counsel knew Housel suffered a childhood head injury, counsel had observed nothing unusual about Housel's behavior and two psychological evaluations did not indicate a need to proceed further with any mental health investigation.

Housel challenged counsel's failure to raise the issue of his intoxication on the night of his offense both during his sentencing hearing and during the trial stage of his case. The Court held that counsel's decision not to present such evidence was not deficient in either setting. As the Court noted, "[e]vidence of drug and alcohol abuse is a 'two-edged sword,' and a lawyer may reasonably decide that it could hurt as much as help the defense." Counsel in this case, the Court reasoned, had reasonably concluded that this jury would not have considered Housel's drug and alcohol abuse to be a mitigating factor. The decision not to present such evidence during sentencing, the Court held, was a reasonable one.

It was also reasonable for counsel to chose not to raise an intoxication defense during the trial stage of Housel's case. Housel had agreed to plead guilty in exchange for the government dropping a potentially highly prejudicial sexual assault charge. It was reasonable for counsel to conclude that an intoxication defense had little

chance of success and to forego such a defense in exchange for keeping the rape charge undisclosed. This choice, the Court held, was also reasonable.

The Court also rejected Housel's argument that the Eighth Amendment prohibited the jury from considering his prior unadjudicated crimes as nonstatutory aggravators unless they found, beyond a reasonable doubt, that he had actually committed those offenses. Although his argument was not a novel one, the Court noted that it had not been accepted by the Eleventh Circuit or by the Supreme Court. However, the Court also stated that "[p]erhaps since last a court visited the question Eighth Amendment jurisprudence has evolved to recognize the right Housel espouses."

The Court reasoned though that it need not decide the issue because, under *Teague v. Lane*, 489 U.S. 288 (1989), "new rules of constitutional law are not a proper ground for relief in collateral proceedings." The rule that Housel advocated was new, the Court held, because, as of the date Housel's conviction became final, "the legal landscape was barren of all but the most general support for the rule Housel urges." The Court also held that the rule did not fall within the *Teague* exception for "watershed rules of criminal procedure."

Finally, the Court rejected Housel's argument that the prosecution improperly used

Housel's confession to another murder during his sentencing hearing. Housel argued that his confession was involuntary because he had received unusually bad treatment at the jail. He claimed that the police officer schemed to get a statement from him by responding to his complaints about prison conditions by allowing Housel to leave his cell and offering him bribes such as hamburgers and cigarettes. The Court however, held that the statement had been given voluntarily.

The Court reasoned that the poor conditions Housel suffered while at the jail did not contribute to Housel's confession as Housel had actually confessed to the murder prior to being subjected to improper treatment at the jail, and that there was no evidence that the police officer offered Housel anything in exchange for his statement. Additionally, Housel had initiated the contact with the officer and waived his right to have his counsel present. The Court affirmed the denial of habeas relief.



### CJA Mileage Reimbursement Increase

Effective January 22, 2001, the mileage reimbursement rate has increased to 34.5 cents per mile.

### Staff Changes at the U.S. Attorneys Office

After seven years of service, Redding Pitt has resigned as the United States Attorney for the Middle District of Alabama. Charles Niven has been named to serve as the new United States Attorney.

### 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.

#### ☛ **March 22, 2001 (Dothan):**

##### *Presentation of Evidence:*

Presented by Judge John Carroll, Chief United States Magistrate Judge, Middle District of Alabama and panel attorney Steve Glassroth of Glassroth and Van Heest, this session will provide instruction on evidentiary issues including proper evidentiary fundamentals and handling of exhibits and physical evidence.

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

##### *Defense of Criminal Conspiracy Charges:*

This session will provide instruction on the defense of criminal conspiracy charges in

federal court. Issues covered will include evidentiary issues unique to conspiracy cases, coconspirator hearsay and pretrial motions.

☛ **May 9, 2001 (Montgomery) and May 17, 2001 (Dothan):**

*Apprendi Update and Habeas Procedure:*

This session will provide instruction on the application of the Supreme Court's decision in *Apprendi v. New Jersey* to federal post-conviction practice.

☛ **June 13, 2001 (Montgomery) and June 21, 2001 (Dothan):**

*Supreme Court Decisions:*

This session will provide instruction on recent decisions of the Supreme Court relevant to federal criminal practice. Handout materials will include discussions of and citations to recent decisions.

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

