EFFECTIVE ASSISTANCE

Newsletter for CJA Panel Attorneys · Volume 3 Number 1 · 1st Quarter 2010

The Bail Reform Act: A Presumption For Release

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"Unless th[e] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle* 342 U.S.1, 4 (1951), (Vinson, Chief Justice).

I. BACKGROUND

A little over 25 years ago, Congress enacted the 1984 Bail Reform Act, 18 U.S.C. 3142 et. seq., (the "Act"). Though the Act sought to balance concerns regarding individual and community safety with fundamental constitutional rights, it was intended to favor release pending trial, except for capital and enumerated non-capital crimes. See *United States v. Salerno*, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."). The reality, however, is far from that described, and greater promotion and use of pretrial release programs can turn the tide.

While the Act was intended to favor release pending trial, in granting the court greater authority to detain in non-capital cases, the Act constituted a profound departure in American jurisprudence. For the majority of our history the only consideration for the court when deciding bail was the risk that the accused would fail to appear in court. However, the Act introduced several new considerations. First, in lieu of a cash bond, in almost all cases, the Act set forth a list of restrictive release conditions. Second, it authorized courts to consider the danger a defendant on pretrial release may pose to an individual or the community. Third, the Act established a rebuttable resumption that a defendant who falls within

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Shooting The Moon

In January and March of this year, the stars and the moon were in perfect alignment. Criminal defense lawyers beat long odds in federal criminal trials on behalf of eight different clients in four different cases. In January and February of this year, **Domingo Soto** won an acquittal

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Federal Rules Update

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New federal rules are in effect, effective December 1, 2009, particularly affecting time deadlines for filings in criminal cases. Generally, if the last day of a filing period ends on a Saturday, Sunday or legal holiday, the period continues to run until the end of the next day that is not a Saturday,

Sunday, or holiday. For electronic filing purposes, the deadline ends at midnight on that day. Fed.R.Crim.P.

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Federal Rules Update continued

45(a)(1). Three days will continue to be added to the period if the time to act in response to another party's filing is measured in days from service and service is not accomplished by hand. Fed.R.Crim.P. 45(c), Fed.R.App.P. 26(c).

Generally, time deadlines which were 10 days prior to December 1, 2009, are now 14 days under the new rule. Therefore, because of the old 11-day rule, the time for filing is the same as under the old rules because the 11-day rule has been abolished under the new rules. Fed.R.Crim.P. 45(a)(2 and Fed.R.App.P. 26(a)(2) both abrogated. Some important examples of the new time deadlines are:

Criminal Rules:

	Prior to 12/1/2009	After 12/1/2009
5.1: preliminary hearing	10 days after initial app. if in custody, 20 if not	14/21
7: motion for bill of part.	10 days	14 days
12.1: notice of alibi, Gov't discl. of witnesses	10 days	14 days
29: motion for judgment of acquittal	7 days after verdict	14 days
32: from final PSI to sentencing	7 working days	7 calendar days
33: motion for new trial	7 days after verdict	14 days
35: motion to correct sentence	7 days after sentencing	14 days
41: execution of search warrant	w/in 10 days	14 days
47: service of motion and hearing notice	5 days before hearing	7 days
58: app to USDC of USMJ or/jmt	10 days	14 days
59: obj to USMJ R&R/ord	10 days after service	14 days

Habeas and 2255 Rules:

	Prior to 12/1/2009	After 12/1/2009
8: objections to USMJ R&R	10 days after svc	14 days

Note that MJ is now required to either grant or deny COA when issuing a ruling adverse to applicant. Party may not appeal the denial of the COA but may seek COA from Ct. of Appeals. Rules, Section 2255 Proceedings, Rule 11(a).

Appellate Rules

	Prior to 12/1/2009	After 12/1/2009
4(b): defendant's NofA	10 days after entry of jmt	14 days
10: aplt to order transcripts	10 days after NofA	14 days
12: entry of app. in Ct. of App.	10 days after NofA	14 days
27(a)(3): time to resp. to mtn	8 days	10 days
28.1: latest d/l to file final rep in x-app	3 days before arg.	7 days before arg.
30: time to confer re: jt appx.	10 days after record filed	14 days after
31(a)(1): latest d/l to file rep br	3 days before arg.	7 days before

These changes are not exhaustive, and counsel should consult the appropriate rules for proper legal interpretation.

certain enumerated categories should be detained prior to trial. Fourth, the Act placed no explicit limit on the period of pretrial detention, save the operation of the Speedy Trial Act. In sum, the Act drastically changed prior law by including future dangerousness as a factor to be considered in determining conditions of pretrial release.

This change in the law was challenged in *United States v. Salerno* without success. In upholding the constitutionality of the Act, the Supreme Court reasoned that the Due Process clause did not preclude pretrial detention as a regulatory measure on grounds of community danger where the government proves, by clear and convincing evidence, that the person arrested presented an identifiable and articulable threat to an individual or the community. *Salerno,* like the Act, was a significant departure. As noted in Justice Marshall's dissent, quoting Justice Jackson in *Williamson v. United States*, 95 L.Ed. 1379, 1382 (1950):

> Grave public danger is said to result from what [the defendants] may be expected to do, in addition to what they have done since their conviction. If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is …unprecedented in this country and …fraught with danger of excesses and injustice.

Marshall's dissent went even further because he believed the problem lie with the Act itself. Reacting to that portion of the Act which states that "[n]othing in this section shall be construed as modifying or limiting the presumption of innocence," Marshall remarked, "But the very pith and purpose of this statute is an abhorrent limitation of the presumption of innocence." *Salerno* 481 U.S.

While Marshall's view was rejected in *Salerno*, history confirms that his concerns regarding the application of the Act were well founded.

II. THE CHALLENGE IN OUR TIME

That tension between fundamental individual liberties and the government's concern for individual and community safety, remains with us today. Looking back allows us to place these issues in context. The concerns expressed by Justices Vinson in *Stack* and Marshall in *Salerno* take on renewed vigor in view of the now established pattern of increasing detention rates. Contrary to the spirit and purpose of the Act, pretrial release rates have gradually decreased over the past 17 years, while the detention rates increased. Liberty is not the norm, and detention is not the carefully limited exception.

Defendants released awaiting trial averaged a high of 62 percent in 1992 and decreased to a low of 22.7 percent in 2005. Over the next three years to 2008, the pretrial release rate rose to 48.3 percent. While an improvement, it is still a far cry from the "norm" envisioned by Congress and "favored" by the Bail Reform Act. The average detention rate, however, does not tell the whole picture. The pretrial release rates (excluding immigration cases) varied by circuit and districts in 2008 (excluding immigration cases) and ranged from highs of: 85.5%(Guam),71.6% (W.D. WA), and 71.1% (N.D. WV) to lows of: 22% (N.D. IA), 28.1% (S.D. TX) and 31.1% (NM). In that same year, the Alabama pretrial re-

lease rates were as follows: 66.4% (N.D. AL), 68.3% (M.D. AL) and 54.1% (S.D. AL).[1]

The persistence of high national detention rates should be a matter of concern. If as the court remarked in *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978)(en banc) that the "[r]ules under which personal liberty is to be deprived are limited by the constitutional guarantees of us all," then, to the extent the "norm" is now detention, our constitutional guarantees may be imperiled. Moreover, more than pretrial liberty interests are at stake.

Seventeen years ago in Detaining For Danger Under The Bail Reform Act of 1984: Paradoxes of Procedure and Proof,35 Ariz. L. R. 1091 (1993), Michael Harwin described some of the fundamental problems the Bail Reform Act (BRA) presented for defendants:

> [S]tudies indicate that a defendant's statistical chances of gaining acquittal are significantly derogated by imposition of pretrial detention. (Citing Anne Rankin, The Effect of Pretrial Detention, 39 N.Y.Y.U.L.Rev. (1964) and U.S. Accounting Office, 25 (1987) Criminal Bail: How Bail Reform is Working in Selected Districts) (A Defendant is twice as likely to be incarcerated if detained during pretrial.) In fact, a first offender who is denied bail pending trial is now more likely to be convicted and severely sentenced than a career criminal with ten prior arrests who has obtained a pretrial release order. (Citing Marc Miller & Martin Guggenheim, Pretrial Detention and Punishment, 75 Minn.L.Rev. 335,339, n.33 (1990) Thus, pretrial detention determinations implicate not only a defendant's pretrial liberty interests, but also ultimate determinations of acquittal or conviction. Therefore, the procedural safeguards afforded by Congress in the BRA become vitally important to the defendant not only for purposes of obtaining pretrial release, but for the broader purpose of ultimately obtaining a favorable disposition of her case.

III. OPPORTUNITIES FOR CHANGE

The disparity in the districts' pretrial detention rates suggests widely uneven standards of justice, and that it is possible to raise the pretrial release rate consistent with the Act's preference for release pending trial. The first step in that direction is to insist on a strict adherence to due process, which rests at the core of the Bail Reform Act. A second option requires the promotion, and aggressive use, of pretrial drug, counseling, and diversion programs.

a. AN INSISTENCE ON DUE PROCESS

The Bail Reform Act was held constitutional largely in part because the court found that the limitations placed on the defendant's liberty interest were offset by the procedural due process requirements of the Act.

The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes…. The arrestee is entitled to a prompt detention hearing, *ibid.,* and the maximum

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[1] http://www.uscourts.gov/judbususc/judbus.html

length of pretrial detention is limited by the stringent time limitations of the Speedy Trial.

Salerno at 2101.

Under the Bail Reform Act, an accused person may be held without bail pending trial upon a judicial determination that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(e).

If a defendant is not remanded, he must be released on personal recognizance or on an unsecured bond unless the court determines that these conditions are insufficient. 18 U.S.C. § 3142(b). In that event, the court is obligated to fashion a bail package consisting of "the least restrictive further condition or conditions" that will reasonably assure the defendant's appearance and the safety of the community. 18 U.S.C. § 3142(c)(1)(B).

Where the issue is the safety of a person or the community, the burden is on the Government to demonstrate by clear and convincing evidence that the defendant poses a danger. 18 U.S.C. § 3142(f)(2). In cases involving crimes of violence, an offense for which the maximum sentence is life imprisonment or death; a drug offense punishable by a maximum term of ten years or more; and any felony committed after a prior conviction of two or more of the above offenses (state or federal) including crimes against minor victims such as receipt, possession or distribution of child pornography, there is a rebuttable presumption that the defendant presents a danger to the community. 18 U.S.C. § 3142(e). While the Government retains its burden of proving dangerousness by clear and convincing evidence, the presumption continues to carry weight even when the defendant comes forth with rebuttal evidence. *See United States v. King,* 849 F.2d 485, 488 (11th Cir.1991).

In *U.S. v Jeffries*, 679 F.Supp. 1114, 1115 (M.D. Ga., 1988) the court emphasized that determinations of dangerousness and decisions regarding detention must be made on a case-by-case basis:

> "[T]he fact that the defendant is charged with an offense described in subsection (f)(1)(A) through (C) is not, in itself, sufficient to support a detention order." *Hurtado*, 779 F.2d at 1477, quoting 1984 Code Cong. & Ad.News at 3182, 3204. The burden of persuasion remains on the government. Id. at 1478. "[T]he government may not merely come before the trial court, present its indictment, and thereby send the defendant off to jail, foreclosing any further discussion. Rather, the defendant still must be afforded the opportunity for a hearing at which he may come forward with evidence to meet his burden of production...." Id.; see also *Knight*, 636 F.Supp. at 1465. At such hearing, the government must establish by clear and convincing evidence that the defendant is one of the rare individuals warranting detention. 18 U.S.C. § 3142(f); see *Knight*, 636 F.Supp. at 1465; *United States v. Ridinger*, 623 F.Supp. 1386, 1394-95 (W.D.Mo.1985); *Acevedo-Ramos*, 755 F.2d at 208-09. *Delker*, 757 F.2d at 1397; *Leon*, 766 F.2d at 81.

Jeffries noted further that the dangerousness of a defendant is not the only factor which a judicial officer must consider when deciding the detention question. Section 3142(g) includes three other factors which are relevant when evaluating whether a defendant has rebutted the presumption of dangerousness

arising from the indictment and when determining whether the government has met its burden of persuasion. These factors include:

> (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;
>
> (2) the weight of the evidence against the person; and
>
> (3) the history and characteristics of the person, including (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
> (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law.....

Only when the court adheres to these requirements of the Act, are defendants provided the due process protections to which they are entitled under *Salerno*.

That *Salerno* continues to provide vital due process protections of pretrial liberty interests is demonstrated by the fact that in the last three years, defendants have successfully challenged the 2006 Adam Walsh Amendments on due process grounds. These Amendments, which mandate specific release conditions for persons charged with child pornography offenses, require, among other things, electronic monitoring, a curfew and specified restrictions on personal associations.

In *United States v. Smedley*, 611 F. Supp2d 971 (E.D. Missouri) the court identified the interests at stake and outlined the due process analysis and procedure necessary in cases raising these challenges:

> The Due Process Clause of the Fifth Amendment guarantees that "No person shall ... be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. This guarantee protects individuals against two types of government action. *United States v. Salerno,* 481 U.S. 739, 747, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Substantive due process prevents the government from engaging in conduct that shocks the conscience or that interferes with "rights implicit in the concept of ordered liberty." *Id.* Procedural due process insures that any government action that deprives a person of life, liberty, or property is implemented in a fair manner. *Id.* Procedural due process is the "opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge,* 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).
>
> Due process is not a technical conception, nor a fixed rule, unrelated to time, place, and circumstances. *Id.* Rather, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.* Three distinct factors speak to the amount of process due in a particular situation: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of that interest through the procedures used, and the probable

value, if any, of additional or substitute procedural safeguards; and 3) the government's interest, including the burdens that any additional or substitute procedural requirements would entail. *Id.* at 334-35, 96 S.Ct. 893.

To date, nine cases have found the mandatory conditions of release of the Adam Walsh Act unconstitutional where it forecloses a fair opportunity to challenge restriction and forecloses an individualized judicial assessment. *United States v. Stepens*[2] (Adam Walsh provision requiring electronic requirement and curfew violates procedural due process); *United States v. Smedley*[3] (statute violates procedural due process where defendant is not afforded the right to or opportunity to challenge the required pretrial conditions of release and where the conditions are mandatory and foreclose any individualized judicial determination); *United States v. Merritt*[4] (statute violates procedural due process under the Fifth Amendment); *United States v. Rueb*[5] (same); *United States v. Arzberger*[6] (statute violates procedural due process under the Fifth Amendment, but does not violate, on its face, the Excessive Bail Clause under the Eighth Amendment, or violate the separation of powers principle of the Constitution); *United States v. Kennedy*[7] (statute violates procedural due process under the Fifth Amendment, the Excessive Bail Clause under the Eighth Amendment, and the separation of powers principle of the Constitution); *United States v. Torres*[8] (statute violates procedural due process under the Fifth Amendment and the Excessive Bail Clause under the Eighth Amendment); *United States v. Vujnovich*[9] (statute violates procedural due process under the Fifth Amendment, the Excessive Bail Clause under the Eighth Amendment, and the separation of powers principle of the Constitution); *United States v. Crowell*[10] (same). Only one case has upheld the provisions against a constitutional attack. *United States v. Gardner*[11] (statute does not violate procedural due process under the Fifth Amendment, the Excessive Bail Clause under the Eighth Amendment, or the separation of powers principle of the Constitution).

These cases clearly establish that an insistence on a faithful application of the due process standard is necessary in order to ensure pretrial release, fairness, and the least restrictive conditions.

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[2] 2009 WL 3823964, _F.Supp.2d _(N.D. Iowa November 2009)

[3] 611 _F. Supp2d_ 971 (E.D. Missouri 2009)

[4] 612 F. Supp.2d 1074 (D.Neb., 2009)

[5] 612 F.Supp.2d 1068 (D.Neb., 2009)

[6] 592 F.Supp.2d 590 (S.D.N.Y. 2008)

[7] 593 F.Supp.2d 1221 (W.D.Wash. 2008)

[8] 566 F.Supp.2d 591 (W.D.Tex. 2008)

[9] 2007 WL 4125901(D.Kan. Nov.20, 2007).

[10] No. 06-CR-291E(F), 2006 WL 3541736 (W.D.N.Y. Dec.7, 2006)

[11] 523 F.Supp.2d 1025 (N.D.Cal. 2007)

b. INCREASE PRETRIAL RELEASE OPTIONS

A reduction in pretrial reduction rate must include aggressive attempts where possible to enroll our clients in available pretrial diversion, drug, or counseling programs. It should also include efforts to obtain a Drug Treatment Court which could affect a significant number of defendants charged in drug cases.

In an article entitled The First 20 Years of Drug Treatment Courts:A Brief Description of Their History and Impact by Arthur J Lurigio, the following selected paragraphs describes the program and their impact:

> Dade County 's Felony Drug Court (Miami) was the first DTC in the nation. —[T]he court began hearing cases in 1989 and was widely touted for its innovative procedures and emphasis on team-work, cooperation, and collaboration among members of the courtroom work group (Davis et al., 1994). ---
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> -- Like the Miami Dade Court , most DTCs present defendants with the option of pleading guilty and participating in mandatory treatment or going to trial and risking incarceration or other criminal justice sanctions. Failure to comply with program requirements can culminate in various judicial sanctions, ranging from a verbal reprimand to a probation sentence to confinement in jail or prison (Canadian Centre on Substance Abuse, 2007; Mugford & Weekes, 2006).---
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> -- In 1997, more than 370 drug courts were operational or being planned in the United States. By April 2007, more than 1,000 specialized drug courts were operational in all 50 states as well as the District of Columbia, Guam, and Puerto Rico. A total of 41 states, the District of Columbia , Guam , and Puerto Rico have enacted legislation that supports the planning and operations of DTCs (American University , 2007).
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> -- Thorough reviews of a large number of evaluations have found that rates of client retention in DTCs were much higher than those of offenders and non-offenders in other types of drug treatment programs (Belenko, 1998; 1999; 2001). Studies demonstrate that a substantial percentage of drug court participants have lengthy criminal and substance abuse histories. In addition, research shows that DTCs more closely monitor and test clients for drug use than do other types of community supervision programs. Investigations also indicate that DTCs generate savings — at least in the short term — accruing from reduced jail and prison use, diminished criminality, and lower criminal justice costs. Research also finds that retention in treatment is significantly higher among DTC participants than among offenders in outpatient drug treatment programs. Most important, studies demonstrate that drug use and criminal behavior are substantially reduced while clients are participating in and after graduating from DTC.

Since drug courts have proven effective in addressing drug addiction and recidivism and in lowering criminal justice costs, it makes sense to advocate for the implementation of similar programs in the Southern District of Ala-

bama. These courts also may counter the tendency to order pretrial detention rather than release.

In conclusion, increasing pretrial release rates is essential not merely for our clients. It affects, in part, the notion that liberty is the norm in this country. It is an assurance that the constitutional rights and liberties we all enjoy remain. In fighting for pretrial release it is not overstatement to say, if we don't fight for it we will lose it. We must work to increase the availability of pretrial programs, while aggressively challenging pretrial detention.

11th Circuit Unpublished Appellate Decisions

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Following are selected unpublished decisions on appeals to the Eleventh Circuit from the Southern District of Alabama grouped by topic area for the year 2009. The list does not include decisions in crack reduction and habeas cases. Starting April 1, 2010, we will be sending out biweekly summaries of published and unpublished criminal opinions issued by the Eleventh Circuit.

Summaries of all published decisions on criminal matters, including habeas cases, issued by the Eleventh Circuit can be found at http://defensenewsletter.blogspot.com. This Eleventh Circuit blog is maintained by Paul Rashkind and Tim Cone in the Office of the Federal Defender for the Southern District of Florida.

Summaries of criminal cases pending in the United States Supreme Court and the Court's criminal decisions from the present term can be found at http://www.rashkind.com/supct.pdf. Additional information on the United States Supreme Court can be found at http://www.scotusblog.com.

SENTENCING:

United States v. Fisher, No. 08-12196
At sentencing, the district court found that Fisher was responsible for distributing "ice," methamphetamine that is of at least 80% purity, and sentenced Fisher to 262 months imprisonment, the top of the sentencing range established by the court's purity finding. On appeal, Fisher argued that the district court erred in its purity finding and that his sentencing range should be reduced accordingly. Assuming that the district court erred, the Eleventh Circuit nonetheless found that Fisher's ultimate sentence was reasonable because it was substantially less than the statutory maximum of life imprisonment, the district court stated that the sentence was appropriate based upon Fisher's disrespect for the law and the need to protect the public, and the district stated that it would have imposed the same sentence regardless of the guidelines calculation.

United States v. Story, No. 08-14140
Story pleaded guilty to possession of pseudoephedrine with intent to manufacture methamphetamine and possession with intent to distribute methamphetamine. The district court sentenced Story to concurrent 85-month terms of imprisonment, just below the low end of the advisory guideline range. On appeal, Story challenged his sen-

tence as substantively unreasonable because his criminal record was overstated by his criminal history category and the conversion of pseudoephedrine to its marijuana equivalency overstated his ability to manufacture methamphetamine. The Eleventh Circuit disagreed, stating that the district court acted within its discretion in finding that the seriousness of the offense and need to protect the public outweighed Story's arguments regarding his criminal history and that Story's assertion that the formula for converting pseudoephedrine to marijuana was unfair to him was merely speculative, given his failure to present any evidence to support it.

United States v. Woodyard, No. 08-15898

Upon remand for a resentencing, Woodyard challenged an enhancement information filed by the government pursuant to 21 U.S.C. § 851 stating that Woods was subject to a mandatory life sentence under 21 U.S.C. § 841(b)(1)(A) based upon as a result of four prior drug conviction set forth therein. Before the district court and on appeal, Woodyard argued in pertinent part that the government could not prove that he knowingly and voluntarily pled guilty to the charges resulting in his 1982 and 1985 drug convictions. The Eleventh Circuit affirmed the sentence on the grounds that the two convictions were more than five years old at the time that the government filed the information and thus could not be challenged and that the two convictions by themselves were sufficient to trigger the mandatory life sentence.

United States v. Davis, No. 09-11628

Davis, who was on supervised release, was arrested after three ounces of marijuana was found in the car that he was driving. Although the advisory sentencing range for Davis' grade of offense was 4-10 months imprisonment, the district court sentenced Davis to 24 months imprisonment. On appeal, Davis argued that: (1) the district court failed to consider the § 3553(a) sentencing factors; (2) failed to identify the proper sentencing range; (3) failed to treat the guidelines as advisory; (4) clearly erred in finding that Davis knew the marijuana was in his car; and (5) imposed a substantively unreasonable sentence. The Eleventh Circuit rejected all five arguments on the grounds that: (1) there was no need for the district court to consider the § 3553(a) factors because revocation was mandated by 18 U.S.C. § 3583(g); (2) there was ample evidence that the district court was aware of the guidelines range though the court did not explicitly identify the range at the hearing, including evidence that the petition for revocation properly calculated the guidelines range and was given to the court; (3) the court could not have treated the guidelines as mandatory given his explicit statement that the high end of the guideline range was too low; (4) district court's credibility finding regarding Davis' knowledge of the marijuana were not clearly erroneous; and (5) the sentence was reasonable in light of the fact that Davis was found in the company of a convicted felon and in possession of high grade marijuana and then testified falsely at his revocation hearing.

United States v. Myers, No. 08-14809

Myers, who was on supervised release, entered an unconditional guilty plea to conspiracy to commit bank fraud and making or possessing counterfeit securities. At sentencing, Myers requesting that he be sentenced at the low end of the guidelines on the grounds that the presentence investigation report overstated his criminal history. Although Myers' guidelines range was 51-63 months of imprisonment, the district court imposed a sentence of 96 months imprisonment and ordered that it run consecutively to any future imposed sentence. The district court stated that the high end of the guidelines range was inadequate given the fact that Myers previously had committed new of-

fenses while on supervised release, committed his current offenses while on supervised release, and organized and perpetrated a large scale fraud that injured numerous victims. On appeal, Myers argued that his sentence was substantively unreasonable and, for the first time, that the district court lacked authority to order his sentence run consecutively to any future federal sentence. The Eleventh Circuit rejected both arguments. As to Myers' sentence, the Court held that the district court had adequately considered the § 3553 factors and was in its discretion to conclude that an above guidelines sentence was necessary to deter criminal behavior and promote respect for the law. As to the district court's ability to order Myers' sentence, the Court noted that it had not yet decided that issue and, therefore, Myers' could not establish that the district court plainly erred.

United States v. Lugo-Valdez, No. 09-12967

At sentencing, Lugo-Valdez objected to a four-level enhance under U.S.S.G. § 2L1.2(b)(1)(E) arguing that some of the misdemeanor drug convictions were obtained without counsel or an interpreter. The district court overruled the objection and stated it would have imposed the same sentence even if it was wrong about the enhancement. On appeal, the Eleventh Circuit noted that when the district states that it would have imposed the same sentence regardless of a challenged guidelines calculation, it would only consider whether the sentence was substantively reasonable. Based upon the district court's finding regarding Lugo-Valdez' recidivism and disrespect for the law and the fact that the sentence was well below the statutory maximum, the Court affirmed.

United States v. Sellers, No. 08-16721

On appeal, Sellers challenged the district court's drug quantity calculation. Because the district stated that it would have imposed the same sentence regardless of its drug quantity calculation, the Eleventh reviewed Sellers' sentence only for substantive reasonableness and affirmed.

United States v. Grider, No. 08-15727

At sentencing, Grider challenged the application of U.S.S.G. § 2K2.1, arguing that it unfairly created equal offense levels for possession of a firearm by a felon and possession of ammunition by a felon. Alternatively, Grider argued that the district court should grant him a downward variance given the unfairness created by § 2K2.1. Although the district court acknowledged that there was a difference between possession of firearms and ammunition, it rejected both of Grider's arguments. On appeal, the Eleventh Circuit rejected Grider's argument that the district court could have disagreed with the policy of treating possession of firearms and ammunition the same and, thus, must have applied a presumption of reasonableness to the sentencing guidelines. The Court noted that it was Congressional policy to treat possession of firearms and ammunition by a felon. As for the district court's failure to give Grider a downward departure or variance, the Court held that it lacked jurisdiction to review the district court's decision because there was nothing in the record to suggest that the district court mistakenly believed that it lacked the authority to grant a downward departure or variance.

United States v. Chappell, No. 08-15453

The Eleventh Circuit held that it was not error for the district court to deny Chappell points for acceptance of responsibility where Chappell disavowed his offense conduct after pleading guilty.

United States v. Pettaway, No. 08-14142

After Pettaway assaulted a man a gun, he was pursued and arrested by police officers. A quantity of crack consistent with distribution, a small amount of powder cocaine, and a handgun were found in and around a jacket Pettway discarded while being chased. Pettway was convicted of possession with intent to distribute crack cocaine and possession of a firearm during and in relation to or in furtherance of the crack offense. At sentencing, the government sought a five year enhancement for brandishing the gun under 18 U.S.C. § 924(c). Pettway objected on the grounds that his altercation with the victim was not related to crack distribution but was instead based upon his failed attempt to purchase a personal use amount of powder cocaine for his own use. Thus, the gun was not brandished "in relation to" or "in furtherance of" the predicate drug offense of possession with intent to distribute crack cocaine. Citing Dean v. United States, 129 S.Ct. 1849 (2009), the Eleventh Circuit held that Pettaway's intent was irrelevant.

SEARCH & SEIZURE:

United States v. Tennis, No. 08-11913

Officers responded to a call at Tennis' home. Upon approaching the front door, the officers saw a broken window to the left of the door and heard yelling inside. In response to the officers' knock, Tennis came to the broken window. He told officers that he had lost his key and had to break in. Tennis who appeared agitated and impair also muttered something about having had an argument with his girlfriend, whom the officers could not see. When asked for some identification, Tennis retreated into his home, refusing the officers' demands that he come back. Officers him followed him in and found a firearm. Tennis, who was charged with being a felon in possession of weapon, challenged the warrantless entry into his home. On appeal, the Eleventh Circuit affirmed, finding that the district court was entitled to credit the testimony of the officers and that that testimony established exigent circumstances justifying the officers' entry.

United States v. Washington, No. 08-13821

Officers arrested Washington for smoking marijuana. When Washington admitted owning a nearby Dodge Magnum, one of the officers asked for permission to search. Washington stated that the officer could search if he had a key. When the officer asked Wright for the key, he said he girlfriend had left with the keys and he had no idea when she would return. A minute later, the officer found the key on the ground for a Dodge, which he used to unlock Wright's car. Inside, the officer found some drugs. When Washington heard the officer tell another officer what he found, Washington told the officer to get out of his car. Washington challenged the warrantless search, but the district found that Washington had given voluntary consent for the search. On appeal, Wright argued that his consent was equivocal and therefore constituted no consent at all. The Eleventh Circuit disagreed, stating that the unchallenged factual findings of the district court established that Washington's consent was conditional, not equivocal.

United States v. Wright, No. 08-14640

Wright was arrested outside of his home, wearing only a pair of pants. Officers escorted a handcuffed Wright inside to obtain shoes and clothes. While inside, one of the officers noticed some pink pills that turned out to be

Lortab in the corner of a cabinet. Upon opening the cabinet, the officer found Lortab, crack, and cash. Wright challenged the entry into his home and search on appeal, arguing that there was no reason for the officers to enter the home and incriminating nature of the pink pills was not immediately apparent as required by the plain view doctrine. The Eleventh Circuit affirmed the denial of Wright's motion to suppress on the grounds that Wright gave officers permission to enter his home to get his clothing, which allowed the officers to conduct a protective sweep, and that the officers had a reasonable basis to believe the pink pills were contraband based upon their experience and training.

SUFFICIENCY OF THE EVIDENCE/MOTION FOR A NEW TRIAL

United States v. Hooks, No. 09-11275
Following a jury trial, Hooks was convicted of traveling in interstate commerce for the purpose of engaging in illicit sexual conduct with a person under the age of 18 and using facilities of interstate commerce to knowingly attempt to persuade, induce, entice, or coerce a minor to engage in criminal sexual activity. Hooks filed a motion for judgment of acquittal arguing that it was unreasonable for the jury to convict him given based upon testimony regarding how old "Kaitlyn," the fictitious victim, appeared in the photo sent to Hooks and Hooks' own testimony that it was not his intention to have sex with anyone underage. The district court denied the motion, and the Eleventh Circuit affirmed citing evidence that Hooks traveled across state lines to meet Kaitlyn and chat logs indicating that Hooks thought that Kaitlyn was 13 years old.

United States v. Nelson, No. 08-16489
Nelson was found guilty of enticing a minor to engage in criminal sexual activity and commission of a felony offense involving a minor by a registered sex offender. On appeal, Nelson argued that the criminal sex act charged in the indictment, second degree rape, applied only to those who are over 12, that is at least 13 years of age, and that the district court constructively amended the indictment by instructing the jury that it was second degree rape under Alabama law to have intercourse with someone who was 12 years old. Nelson further argued that the district court erred in denying his motion for judgment of acquittal because his offense involved a minor who was only 11 years of age. The Eleventh Circuit affirmed, stating that the district court properly interpreted the Alabama statute and evidence supported the jury's finding that Nelson intended to entice a 12 year old to have sexual intercourse and took substantial steps toward realizing that intent.

United States v. Schmitz, No. 08-13648
A jury found Schmitz guilty of using an interstate facility to entice a juvenile to engage in a criminal sexual act. On appeal, Schmitz argued that the fact that she sent texts and instant messages to the minor was insufficient to establish that she actually attempted to persuade, induce, entice, or coerce the minor to engage in sexual acts. The Eleventh Circuit disagreed, finding that the jury's disbelief of Schmitz's testimony together with corroborating evidence sufficed to establish her intent and the fact that she drove 25-30 miles to pick up the minor constituted a sufficiently substantial step to completing the attempt.

United States v. White, No. 09-11141
A jury convicted White of various drug offenses based, in part, on the testimony of cooperating co-conspirators

who admitted that they were testifying against White in return for recommendations from the government for sentence reductions. White then filed a motion for a new trial pursuant to Fed. R. Crim. P. 33 based upon newly discovered evidence, arguing that the government violated the anti-bribery statute by offering sentencing reduction recommendations to his co-conspirators in return for their testimony and that the government failed to provide required discovery. The district court denied the motion. On appeal, White raised only the bribery issue. The Eleventh Circuit affirmed the district court on the grounds that Circuit precedent to the contrary foreclosed White's bribery argument.

United States v. Fields, No. 08-13592
On appeal, Fields charged her conviction for stealing from the United States' government, in violation of 18 U.S.C. § 641, arguing that the district court improperly excluded evidence that she had made partial repayment and expressed her willingness to repay the remainder. The Eleventh Circuit affirmed on the grounds that neither repayment nor intent to repay were defenses because they did not negate the intent to defraud at the time the monies were stolen.

United States v. Addison, No. 09-10189
After a rifle was found in a shed behind his mother's home, Addison was convicted of possession of firearm by a felon. He appealed, arguing that there was insufficient evidence to show that he actually or constructively possessed the firearm at the time of the search or had control over the shed. The Eleventh Circuit disagreed. Citing testimony by a witness who stated that Addison had shown him the rifle a few days before the rifle was seized, the Court held that the evidence was sufficient for the jury to have concluded that Addison actually possessed the rifle. The Court further concluded that a jury could have found that Addison constructively possessed the rifle given evidence that Addison had a room at his mother's home and access to the shed.

PLEA AGREEMENTS:

United States v. Ray, No. 08-16488
On appeal, Ray argued for the first time that the government breached its obligations under his plea agreement because it argued for a ten year mandatory minimum sentence rather than the five year mandatory minimum set forth in the plea agreement; that his decision to continue with sentencing instead of withdrawing his plea was involuntary because the government threatened to withdraw its motion for a sentence reduction; and the district court improperly participated in plea negotiations by stating that it was its intention to sentence Ray to at least ten years imprisonment regardless of the statutory mandatory minimum. Reviewing for plain error, the Eleventh Circuit rejected all three arguments on the grounds that the district court stated that it would have sentenced Ray to at least 10 years imprisonment no matter the statutory mandatory minimum; the government's mere statement that withdrawal of Ray's guilty plea might preclude a future motion for sentence reduction, and the district court's comments were made at sentencing rather than at the plea hearing.

United States v. Johnson, No. 09-11136
Pursuant to a written plea agreement, Johnson pled guilty to conspiracy to possess with intent to distribute more than 500 grams of cocaine and possession of a firearm by a felon. In return, the government agreed to recommend that two other charges, including a charge of possessing a firearm to traffic drugs be dismissed and to move for a downward departure if Johnson provided substantial assistance. In the factual resume, Johnson

agreed that the government could prove that he was responsible for more than a kilogram of cocaine. At the plea hearing, the district court informed Johnson that he faced a minimum sentence of 10 years imprisonment on the conspiracy charge, which Johnson acknowledged. Johnson later moved to withdraw his plea on the grounds that his counsel had not informed him: (1) that the government had no duty to move for a downward departure; and (2) that the government would have to prove beyond a reasonable doubt that he was responsible for at least 500 grams of cocaine in order to obtain a 10 year mandatory minimum sentence. Following a hearing at which Johnson and his counsel testified, the district court denied Johnson's motion to withdraw his plea, finding that Johnson was aware of the mandatory minimum sentence and, given his criminal history, was well versed in the guilty plea process. Citing the district court's prerogative to credit the testimony of Johnson's attorney and discredit Johnson's testimony, the Eleventh Circuit held that the district court did not abuse its discretion in denying the motion to withdraw.

COMPETENCY:

United States v. Lindsey, No. 08-14916
At sentencing, defense counsel presented evidence that Lindsey suffered from significant mental problems in mitigation of Lindsey's sentence. On appeal, Lindsey argued that the district court should have ordered a competency evaluation sua sponte pursuant to 18 U.S.C. § 4241(a). Rejecting the government's argument that Lindsey's claim was subject to plain error review, The Eleventh Circuit affirmed nonetheless, finding that the district court did not abuse its discretion in failing to order a competency examination because nothing in Lindsey's demeanor at his plea or sentencing hearings suggested that he did not understand the proceedings or lacked the ability to consult with counsel.

Shooting The Moon continued

and a Rule 29 dismissal in two separate drug cases. In the first case the defense had to overcome videotape recordings and incriminating pictures. The second case involved charges stemming from the discovery of marijuana grow rooms in several houses. **Domingo Soto**'s client was charged along with her husband, despite evidence she was not present and was no longer part of the marital home.

The third action was a complex multi defendant case where the government alleged that the defendants were involved in a scheme to wrongfully prescribe drugs. **Sid Harrell** "shot the moon" by achieving something very difficult for any lawyer. He won a Rule 29 dismissal without asking a single question during the trial. **Neil Hanley, Richard Alexander, Bruce Harvey** of Atlanta Georgia and **Doug Trant** of Knoxville, Tennessee won acquittals for their clients.

Peter Madden was the victor in the fourth case. He won an acquittal for a defendant charged with negotiating a counterfeit one hundred dollar bill. Kudos to these lawyers for the rash of acquittals. It upends, at least temporarily, the usual statistics in federal criminal cases.

Defense lawyers rarely win back to back cases in federal court, but it happens. Not long ago, **Arthur Madden** had an extraordinary run in federal and state cases. We ought to honor such special achievement with an award. In that spirit, we sought to honor **Domingo Soto** at a meeting of Mobile Criminal Defense Lawyers, but he was not in attendance. Nonetheless, he was later honored with the

"Jesus Malverde" award. The award is a tongue in cheek poke at the prosecution for suggesting in a trial that the possession of card with likeness of "Jesus Malverde" is evidence of drug distribution. Malverde is known in Mexico as the patron saint of the poor. Recently internet sources claimed he is also the patron of drug dealers. Well, this article will stand as proof that **Domingo Soto** came into possession of Malverde's likeness legitimately.

Finally, **Greg Hughes** also deserves special mention. His client Brent Pugh won two extraordinary reversals wiping out two convictions and an eighteen-year sentence for two armed robberies. Mr. Pugh was exonerated on the first robbery when two others confessed to the crime. **Greg Hughes** won a reversal of the second robbery because the government failed to turn over DNA evidence pointing to other suspects. Once again, congratulations !!!

Useful Links

11th Circuit blog:
http://defensenewsletter.blogspot.com/

Defender Services Training Branch:
http://www.fd.org
(a wealth of resources for defense practitioners)

Federal Convictions Reversed (Alex Bunin)
http://www.nynd-fpd.org/links.htm

Scotus Blog (Supreme Court blog)
http://www.scotusblog.com/

Berman Blog (Sentencing Law & Policy)
http://sentencing.typepad.com/

Defense Newsletter Blog (11th Circuit / Paul Rashkind)
http://defensenewsletter.blogspot.com/

Federal Defender Organization (Southern Alabama)
http://www.federaldefender.org

Training Opportunities

Visit the Defender Services Training Branch web-site at www.fd.org for agendas, registration and financial assistance information.

Winning Strategies Seminar
June 17-19, 2010 | Location: Chicago, Ill.

Law and Technology Workshop Series: Electronic Courtroom Presentation
July 22-24, 2010 | Location: Miami, FL

Trial Skills Academy
April 25-30, 2010 | Location: San Diego, CA
REGISTRATION CLOSED

Sentencing Advocacy Workshop
July 29-31, 2010 | Location: San Francisco, CA

EFFECTIVE ASSISTANCE

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