EFFECTIVE ASSISTANCE

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"The Past is Never Dead. It's Not Even Past."

By William Faulkner, from Requiem For A Nun

CARLOS WILLIAMS
EXECUTIVE DIRECTOR

"The past is never dead. It's not even past." Act I Scene III of **Requiem for a Nun**.

Faulkner's memorable quote is particularly appropriate to the mentally infirm defendant, and to the effective defense of the client's case. In a literal sense, the past is never dead for persons haunted by past trauma or for those whose infirmity may be due to genetics. The same is true for persons with developmental or cognitive problems, i.e. mental retardation -now renamed "Intellectual Disability."[1] For both the past remains, in varying degrees, very much a part of their present. It may influence reason, judgment, conduct and may explain, and therefore, mitigate any offense conduct.

Not long ago, one of our lawyers estimated that half of the clients coursing through our doors suffer from some mental infirmity. Data released by the U.S. Department of Justice Bureau of Justice Statistics in December of 2006, suggest she is not far off the mark:

> At mid year 2005 more than half of all prison and jail inmates had a mental health problem, including 705,600 inmates in State prisons, 78,800 in Federal prisons, and 479,900 in local jails. These estimates represented 56% of State prisoners, 45% of Federal prisoners, and 64% of jail inmates.

I, too, noticed the number of mentally infirm defendants, and wondered whether we were adequately prepared or staffed to respond to their unique problems. We had no one on staff qualified to identify mental health issues. When our office opened in 1995, I noticed that it was routine for attorneys to file notice of insanity at the first hint of some mental instability. The defendant would then be whisked off by the government for an evaluation. There are several problems with that approach. First, an adequate mental examination is difficult without a social history. Second, access to the client is lost to the government for three or four months and the social history investigation, the evaluation, or the case for the defense may be hampered as a result. See *Avoiding or Challenging a Diagnosis of Antisocial Personality Disorder*, by John Blume, **http://dpa.state.ky.us/library/manuals/mental/Ch05.html**.

Effective defense of the mentally infirm requires an intensive investigation into their past. It requires the discovery and review of school records, mental health records, military, jail, DHR and social security records. The investigation should also include interviews of friends, family, teachers, social workers and others. I know that many consider this type of investigation beyond the pale when defending non capital cases. Of course, the level of background investigation depends on the case. However, regardless of mental infirmity or intellectual disability, every client has a history which should be investigated and, at times, told. The past is, after all, life defining for us all. The duty to investigate and present mitigation evidence in non capital cases has now been formally restored by *U.S. v. Booker*, 125 S.Ct. 738, 760 (2005), "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court —-may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C § 3661.

Except in the most obvious cases, lawyers are typically unprepared by training to recognize mental infirmities. How then should we prepare for the needs of the mentally infirm defendant? First, we must learn from other disciplines how to incorporate into our practice methods designed to screen for mental health issues at the initial client interview. Second, we must increase our knowledge to better understand the effect of trauma (physical or psychological) on any individual. Many years ago, a friend suggested a book as an excellent starting point: *Trauma and Recovery by Judith Herman*. Third, we must attend seminars whose subject is the defense of the mentally infirm or Intellectually Disabled. Effective

[1] *The Renaming of Mental Retardation : Understanding the Change to the Term Intellectual Disability.*
http://www.aaidd.org/Reading_Room/pdf/renamingMRIDDApril2007.pdf

Significant Eleventh Circuit Case Summaries and Unpublished Reversals 1st Quarter 2007

CHRISTOPHER KNIGHT
ASSISTANT FEDERAL DEFENDER

During the first quarter of 2007, the Eleventh Circuit reviewed 239 criminal convictions or sentences and affirmed 228 of them. 219 opinions in criminal cases were unpublished, of which there were four reversals. Of the twenty (20) published cases, only four, Evans, Koblan, Campbell, and Watkins, were reversed, and these were remanded for resentencing.

Eleventh Circuit Published Cases

United States v. Lindsey (Case No. 05-11273): Police had reasonable suspicion to stop defendant's vehicle where evidence proved that he and three other black males in an SUV were near a bank in an area where several other robberies had occurred, that an anonymous tip indicated that the black males were loading guns into the SUV across from the bank, and that the SUV moved suddenly to a gas pump near that location when the police vehicle came into view. Police also had probable cause to arrest the defendant because he was a convicted felon, officers observed an armored car pulling up to the bank and guards loading money into the armored car, and an officer observed binoculars and what appeared to be a "rifle bag" inside the SUV. [Judge Barkett dissented from

approaches to mitigation and their presentation have been developed in the defense of capital cases. Mitigation materials developed in that context may be equally applicable in the non-capital context. A very good example is an article by Russell Stetler, *Mental Disabilities and Mitigation,* which is posted at the NACDL Champion web-site, **http://www.nacdl.org/public.nsf/941a6d5b3ad55cd485256b05008143fd/1f190a60788274dd8525674b00597b54?OpenDocument** Fourth, we must hire persons (i.e. investigator or paralegal) trained to recognize mental health issues into our practice. While it may not be possible for all solo practitioners to hire such personnel, our experience in this regard has proven fruitful. Our initial assessment improved, our search of records became more thorough, and that dimension of our practice deepened in understanding and effectiveness.

Representation of the mentally infirm or intellectually disabled presents unique problems and challenges from one case to the next. While some of our efforts failed to reach their desired results, we also had favorable resolutions. Key to success in these cases was the early identification of a mental infirmity, the social history investigation, an evaluation and a sentencing memorandum informed by that investigation.

The competent, but infirm, client presents the most difficult challenges. In one case, we represented an individual charged with possession of child pornography. He faced a guideline sentence of eight to ten-years. His possession of the contraband was incidental to his interests in an on-line dialogue. The porn on his computer was neither solicited nor distributed. The client sought on the web the affection and intimacy he believed he could not otherwise have. He found refuge in the make-believe world of the internet. His childhood fears, forced him into a personal retreat, away from most real-life interactions with others. The social history investigation, mental health records, and interviews with family members, revealed a compelling story of relentless domestic abuse of his mother spanning thirty years. The violence was witnessed by the client and his siblings throughout their childhood. It was traumatic and defining. All were affected, albeit to varying degrees. That social history became the core of the case. It fed into the evaluation and testimony of our psychologist and the sentencing memorandum. The social history made all the difference as the court imposed a probationary sentence. There are other similar cases and similar successes but each case deepens our understanding of the frailty and limits of the human condition and equips us to better defend our clients.

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Eleventh Circuit Published Cases continued

the finding of reasonable suspicion.].

United States v. Smith (Case No. 06-14077): Evidence sufficient under preponderance standard to support enhancement under U.S.S.G. § 2K2.1(b)(5) for possessing firearm in connection with another felony offense. Officer saw Smith attempting to conceal white powdery substance (cocaine) in his sock and saw him reach under seat where he had seen him drop a firearm before he began fighting with the officer. Evidence sufficient to support enhancement based on either possession of cocaine or resisting arrest.

United States v. Taylor (Case No. 05-14562) : The Court held that the object of the conspiracy, cocaine, did not have to exist in order to prove a Hobbs Act conspiracy.

United States v. Yost (Case No. 05-00233): Travel is not necessary to sustain a conviction of attempt under 18 U.S.C. § 2242(b) as long as defendant made arrangements to meet with the child. Yost was charged with three counts of violating section 18 U.S.C. § 2242(b) in that, using the internet, he attempted to knowingly persuade, induce, entice or coerce three minors to engage in criminal sexual activity. The minors were actually an adult FBI undercover agent. One, who called herself Lynn, represented herself to be a 13-year-old girl, and the other, Candi, represented herself to be 15. The defendant was found not guilty with respect to a third, Mandy. Significant in this case is that the defendant did not actually travel to try to meet Lynn, but did travel to try to meet Mandy. The Eleventh Circuit found, rejecting a sufficiency challenge, that the defendant performed a substantial step toward the commission of the offense with respect to both girls. First, relying on its 2002 decision in United States v. Root, 296 F.3d 1222, 1227 (11th Cir. 2002), it reaffirmed it was not necessary for an actual minor to be the victim in order to prove an attempt. Secondly, it found that the elements of an attempt to violate the statute were established as to both girls. With respect to Lynn, the defendant sent sexually explicit e-mails to her, described how to perform oral sex, posted pictures of his genitalia and asked if she "wanted it in her mouth," and called her on the telephone and made arrangements to meet her. After sexually explicit chat with Candi on the internet, he made arrangements to meet her and actually traveled to meet her but was arrested before the meeting. The Eleventh Circuit found that, despite the lack of travel, Yost committed a substantial step toward persuading, inducing, enticing or coercing a minor to engage in criminal sexual activity with respect to Lynn. For the first time, the 11th Circuit has held that travel is not an essential element of an attempt to commit this crime, following the Sixth Circuit in **United States v. Bailey**, 228 F.3d 637, 639-40 (6th Cir. 2000)(suggestive e-mails plus making arrangements to meet minor sufficient to establish attempt) and the Tenth Circuit in **United States v. Thomas**, 410 F.3d 1235, 1246 (10th Cir. 2005)(defendant crosses line from "harmless banter" to inducement when he makes arrangements to meet minor, despite lack of travel). Apparently, some sort of arrangements to meet between the defendant and the undercover agent are still necessary in the Eleventh Circuit to support a charge of attempt

United States v. Perez-Oliveros (Case No. 06-12757): It is not necessary in a conspiracy prosecution for defendant himself to actually import methamphetamine to receive enhancement under U.S.S.G. § 2D1.1(b)(4) for importation. In a prosecution under 21 U.S.C. § 846 for conspiracy to possess with intent to distribute methamphetamine, the Eleventh Circuit held that the two-level enhancement under U.S.S.G. § 2D1.1(b)(4) for importation of methamphetamine applied to this defendant notwithstanding the fact that he himself did not import the methamphetamine but picked up a truck containing the methamphetamine in San Antonio, Texas, and was driving it to Atlanta, Georgia. Because importation has been held to be a continuing offense, it does not apply only to the act of crossing the border. The Court also rejected a motion for a new trial on the grounds that there was a Rule 16 discovery violation because the statement was discovered during cross-examination of a government witness and was not used by the Government as evidence at trial.

United States v. Evans (Case No. 05-14498): Threatening to use a weapon of mass destruction (anthrax) is not a "serious violent felony" so as to justify an enhancement to a life sentence. In a prosecution under 18 U.S.C. § 2332a (a)(3) for threatening to use a weapon of mass destruction (anthrax) against government property, the Government sought an enhancement to life under 18 U.S.C. § 3559 because the charged conduct constituted a "serious violent felony." The Eleventh Circuit vacated that life sentence imposed after application of the enhancement, holding that this crime did not constitute a "serious violent felony" within the meaning of 18 U.S.C. § 3559(c)(2)(F). "'Because we find that an anthrax threat to a federal building does not "by its nature involve[] a substantial risk that physical force against the person of another may be used in the course of committing the offense,' we conclude that the district court erred in applying the enhancement under the first count of the indictment."

United States v. Koblan (Case No. 05-13038): Circuit precedent requires that when a defendant dies during the pendency of an appeal, the sentence be vacated and the cause remanded to the district court for a dismissal of the indictment. This precedent applies regardless of the fact that the defendant was convicted of murder and was ordered to pay $274, 336 in restitution.

United States v. Madison (Case No. 06-11914): The Court held that it was proper to cross-reference in U.S.S.G. 2G1.3(c)(3) to U.S.S.G. 2A3.1 after the defendant pled guilty to sex trafficking in children by force, violence or coercion in violation of 18 U.S.C. § 1591(a)(2). The evidence proved that one of the child prostitutes, age 16, was thinking of working for another pimp. The defendant threatened her with a bottle and chased her down in his car and beat her while she was being restrained. The court held that this qualified for the criminal sexual abuse cross-reference to 2A3.1.

United States v. Watkins (Case No. 05-15444): The Court held that the district court improperly failed to reduce the defendant's sentence by 3 levels under U.S.S.G. 2X1.1(b) `for soliciting arson (a crime of violence) in violation of 18 U.S.C. § 373(a). The Court held that the application of the reduction depends on whether the person solicited had taken all the "crucial steps" necessary to demonstrate to the defendant that the offense was about to be completed. The person solicited was an ATF undercover agent. Under the guideline, the solicitation reduction applies unless (a) the person solicited completed all of the acts he believed necessary for the successful completion of the substantive offense or (b) the solicitation occurred under circumstances that the person was about to complete all of the acts but for apprehension or interruption. The rejection of the reduction applies if it appears to the defendant that the person solicited was about to complete all of the acts necessary for the substantive offense. In this case there was no evidence that the undercover agent had obtained all of the devices necessary to complete the arson, so the case was remanded for resentencing.

United States v. Bohannon (Case No. 05-16492): The court found that a preponderance of the evidence supported a cross-reference to U.S.S.G. 2G1.3(c)(1) because the offense involved offering a minor to engage in sexually explicit conduct for the purpose of make visual depictions of such conduct. Defendant was prosecuted under 18 U.S.C. § 2242(b) for use of the internet to entice a minor into sexual activity. A government agent posed as a 15 year old girl and engaged in sexually explicit chat on the internet with the defendant. The defendant attempted to meet the "girl" but was intercepted and arrested by agents. The defendant's computer was seized. On the computer were found digital photographs of numerous women with whom the defendant had had sex. The defendant had in his possession a digital camera. The Court also rejected a contention that the statement by the undercover agent that the girl was 15 was a "sentencing manipulation." Because Bohannon knew he was dealing with a 15-year-old girl and attempted to hide that fact by stating to her that he had to be careful not get caught, the Court found the sentencing manipulation argument to be unavailing.

United States v. Ramirez (Case No. 05-12765): If a reasonable person would feel free to terminate a consensual encounter with the police which had become such after a Terry stop, then there is no Fourth Amendment violation. Ramirez was stopped on the interstate for a routine traffic violation. He did not contest the initial stop, but argued that his continued detention by the police beyond the initial purpose of the stop violated the Fourth Amendment and Terry v. Ohio. The officers issued Ramirez a ticket and returned his registration documentation to him. Immediately thereafter, they asked if there was any illegal contraband in his vehicle. He responded that they could go ahead and search the vehicle. The police found 7 kilograms of cocaine. The Court found that the initial detention had segued into a consensual encounter unprotected by the Fourth Amendment. However, it established no bright line test regarding this. The Court must examine the totality of the circumstances in each case, including factors such as coerciveness by the police, whether the exchange was cooperative in nature, and whether the defendant had everything he needed reasonably to proceed on his journey. The ultimate inquiry is whether a reasonable person would feel free to terminate the encounter.

United States v. Hassoun (Case No. 06-15845): If a hypothetical defendant might by his conduct under some scenario violate one statute without necessarily violating the others, then the double jeopardy clause is not implicated. The Defendants were charged with violation of 18 U.S.C. § 956(a)(1)(conspiring outside the United States to commit murder, kidnapping and maiming, one overt of which occurred within the United States), 18 U.S.C. § 2339A(a) (providing material support and resources and concealing and disguising the nature thereof for the purpose of violating 18 U.S.C. § 956(a) and 18 U.S.C. § 371 (conspiracy to commit an offense against the United States). The district court sustained a multiplicity challenge to Count 1, stating that the three counts all sought to punish the same conduct thrice, and dismissed Count 1. The Government appealed. The Court of Appeals, conducting a traditional analysis under Blockburger v. United States, 284 U.S. 299 (1932), concluded that the district court erred because the defendant's one act does not necessarily satisfy the elements of all three offenses, and because, as stated in Blockburger, a hypothetical defendant might under some scenario violate one statute without necessarily violating the others.

United States v. Evans (Case No. 06-10907): Conduct, though occurring solely within one state, provides basis for federal jurisdiction under the commerce clause where trafficking in persons has an aggregate impact on interstate commerce, and hotels and condoms were used which regularly were used in interstate commerce. Defendant challenged federal jurisdiction under the commerce clause to prosecute him for violation of 18 U.S.C. § 1591(a)(1)(knowingly in or affecting interstate commerce recruiting, enticing, harboring, transporting, providing or obtaining by any means a person knowing that the person is under 18 and will be caused to engage in a commercial sex act) and 18 U.S.C. § 2242(b)(knowingly using a facility of interstate commerce to persuade, induce, entice or coerce anyone under age 18 to engage in prostitution). The commerce clause element is met in this case even though the conduct occurred solely within the state of Florida. Finding that the trafficking of persons has an aggregate impact on interstate commerce, that the defendant used condoms which traveled in interstate commerce, and used hotels which regularly engage in interstate commerce, it held that the interstate commerce element was met as to the charge under § 1591. The Court also held that Evans' use of telephones and cellular phones alone was enough to satisfy the nexus requirement with interstate commerce as to the § 2242(b) count.

United States v. Ivory (Case No. 06-1095): Violation of Alabama's second degree rape statute is a "crime of violence" within the meaning of U.S.S.G. §2K2.1 and §4B1.2.

United States v. Turner (Case No. 05-14388): Unpreserved Bruton error was held not to be reversible error, applying plain error standard and not harmless error standard of review, and finding that the Defendant failed to meet his heavy burden of establishing violation of his substantial rights. (Good discussion by Judge Marcus of different standards of review).

United States v. Campbell (Case No. 06-12578): The court holds that the rule stated in United States v. Jones, 899 F.2d 1097 (11th Cir. 1990) overruled on other grounds by United States v. Morrill, 984 F.2d 1136 (11th Cir. 1993), that the district court should, after imposing sentence, elicit fully articulated objections to findings of fact, conclusions of law, and the manner in which the sentence was imposed, applies to supervised release revocation hearings.

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Carlos A. Williams, Executive Director
Southern District of Alabama Federal Defenders
2 South Water Street, Second Floor
Mobile, Alabama 36602

No phone calls please.

Eleventh Circuit Unpublished Reversals

United States v. Anderson (Case No. 06-14165): In a prosecution under 18 U.S.C. § 1028(a) for possession of counterfeit identification documents, the Eleventh Circuit remanded the case because the district court failed to make factual findings regarding its calculation of victim impact and the amount of loss.

United States v. Boone (Case No. 06-12016): District Court sentenced defendant to 210 months in a prosecution under 18 U.S.C. § 2252A(b)(2)(possession and distribution of child pornography). Since the statutory maximum was 10 years, the 210 month sentence exceeded the 120 month statutory maximum, and the judgment was vacated.

Nunez v. Secretary for Dep't of Corrections (Case No. 06-13475): The appeals court vacated and remanded the dismissal of part of a 28 U.S.C. § 2254 petition wherein the petitioner alleged his counsel was ineffective for failing to negotiate a plea agreement.

United States v. Arroya (Case No. 02-10368): Government did not meet its burden of showing that Booker error was harmless. Error was preserved at sentencing and on direct appeal by raising Apprendi. After U.S. Supreme Court vacated in light of Booker, Eleventh Circuit affirmed convictions but remanded for resentencing because Government could not show error was harmless.

United States v. Porter (Case No. 04-15638): Case remanded in part because district court engaged in judicial factfinding to determine quantities of cocaine and cocaine base for which defendant would be held accountable, which resulted in Booker constitutional error. Error was not harmless beyond a reasonable doubt because district court stated that if Guidelines were not mandatory it would not have imposed 188 month sentence as required.

United States v. Spangler (Case No. 06-13881): Consecutive terms of supervised release for tax fraud violations alleged in four counts involving four tax years was improper.

Bolton v. United States (Case No. 06-14207): It was error for district court not to grant evidentiary hearing in proceeding under 28 U.S.C. § 2255 where petitioner claimed he instructed his counsel to appeal but counsel filed affidavit disputing this. Since these contentions were in dispute, an evidentiary hearing was necessary.

Effective Assistance published by:
Carlos A. Williams, Executive Director

Southern District of Alabama
Federal Defenders Organization
2 South Water Street, 2nd Floor
Mobile, Alabama 36602
(251) 433-0910 / 433-0686 Fax
E-mail: **info@federaldefender.org**
web-site: **http://www.federaldefender.org**