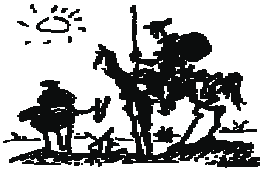
EFFECTIVE ASSISTANCE



Newsletter for CJA Panel Attorneys
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July - September 2000

The Big Buzz

Apprendi: What Does It Mean?

BY DAVID BENEMAN, ESQ.
MAINE CJA RESOURCE COUNSEL

How can you get twelve years on a case which carries a statutory maximum of ten years? The 5-4 majority of the Supreme Court, led by Justice Stevens, say you can't. On June 22nd, the Supreme Court issued a decision in Apprendi v. New Jersey, 530 U.S. ___, # 99-478, 2000 W.L. 807189 (June 26, 2000). In a 5-4 decision which runs over 100 pages, the majority held that the Constitution requires that; "**Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.**" *Id. 13.*

That makes sense. The facts are as follows. Defendant fired several rifle shots into the home of a neighbor. He eventually pled guilty to three counts, the most serious being possession of a firearm for an unlawful purpose. Under normal New Jersey law, the potential sentencing range is five to ten years. The sentencing judge, at a contested hearing, found by a preponderance of the evidence that the crime was motivated by "racial bias" and applied the New Jersey statute that increased the sentence for racially motivated crimes, sentencing the defendant to twelve years imprisonment.

The sentence was upheld by a divided New Jersey Supreme Court and accepted on *certiorari*.

Stick with Me, the History is Important.

Continued next page

Free CLE Credit!

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Topic of the Month

Evidence

August 16th - bring your lunch!

Held every third Wednesday at:
U.S. Probation Office
201 Saint Michael Street, Suite 200
Mobile, Alabama 36602

Guideline Amendments Scheduled to Take Effect November 1, 2000

BY KRISTEN GARTMAN ROGERS
ASSISTANT FEDERAL DEFENDER

On May 1, the Sentencing Commission promulgated and sent 15 amendments to the present Guidelines Manual to Congress. Absent enactment of legislation to the contrary, which appears unlikely at this time, these amendments will take effect on November 1 and will be numbered amendments 591-605. The information below is borrowed directly from the Sentencing Commission's website. A complete, down-loadable version of the amendments is available at http://www.ussc.gov. Of particular

Continued on page 4

C O N T E N T S

I hate to get all kinds of academic on you, but there is a lineage and a pattern we have to look at before we can focus on the future. Remember we are dealing with the Supreme Court, the law is what they say it is, and we are in a 5-4 quandary. The underlying tension stems from the concept of "sentencing enhancements" verses "elements of an offense", certainly an important distinction. How does the Constitution reconcile "elements of the offense" which are to be decided by juries from "sentencing enhancements" which are to be determined by the judge? That's still a little squishy. The court specifically did not overrule *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)(authored by Rehnquist, joined in by O'Connor, Stevens dissenting), which held that facts which increase a statutory minimum penalty, such as the defendant's possession of a firearm, are sentencing enhancements to be determined by the judge. *McMillan* in turn rested on *Patterson v. New York*, 432 U.S. 197 (1977) which rejected a claim that whenever a State links the "severity of punishment" to the "presence or absence of an identified fact" the State must prove that fact beyond a reasonable doubt.

So things sat for over ten years. In *Almendarez-Torres*, the defendant argued that an indictment must set forth all the elements of a crime. See *Hamling v. United States*, 418 U.S. 87, 117 (1974). His indictment had not mentioned his earlier aggravated felony convictions, consequently, the court could not sentence him to more than two years imprisonment, the maximum authorized for an offender without an earlier conviction. The Courts rejected this argument. In *Almendarez-Tores*, 523 U.S. 24 (1998) the Supreme Court court 5-4 held that the indictment did not need to reference section (b)(2) the 20 year portion of 8 U.S.C. § 1326, re-entry after deportation, for the basic two-year offense, to become a twenty-year offense. The court allowed the sentencing judge to find if the initial deportation was after a conviction for commission of an "aggravated felony" and apply the "enhancement." "In sum, we believe that Congress intended to set forth a sentencing factor in subsection (b)(2) and not a separate criminal offense." *Id*. The majority opinion in *Almendarez-Tores* was authored by Justice Breyer and joined by Rehnquist, O'Connor, Kennedy and Thomas. Scalia's dissent was joined by Stevens, Souter and Ginsburg. Note that Scalia had been the lone dissenter in *Mistretta*.

A year later, the issue was back before the Court in *United States v. (Nathaniel) Jones*, 119 S.Ct. 1215, 526 U.S. 227 (1999). In *Jones* the defendant was charged with car jacking, 18 U.S.C. § 2119. This statute has three different potential maximum sentences, a base maximum of fifteen years, a twenty-five year maximum if serious bodily injury, and a life maximum if a death results. The indictment in *Jones* did not specify which section was being applied, and at arraignment, the defendant was told that the maximum sentence was up to fifteen years. The jury instruction addressed solely the simple car jacking language of the fifteen-year portion of the sentence. Nevertheless, Jones was sentenced to twenty-five years after the sentencing judge determined that the victim suffered serious injury. The Ninth Circuit affirmed. On *certiorari,* the Supreme Court reversed finding that due process makes each subsection of § 219 a separate offense with differing elements. Because the government had charged the basic fifteen-year maximum language, 15 years was the maximum available sentence. The majority opinion was authored by Souter and joined by Stevens, Scalia, Thomas and Ginsburg. The dissent was filed by Kennedy, joined by Rehnquist, O'Connor and Breyer, (the same four who dissented in *Apprendi*). The dynamic here is somewhat intriguing, with Thomas becoming the swing vote. Personally, the distinction between *Jones* and *Almendarez-Tores* is pretty thin. Recidivism, *Almendarez-Tores*'s enhancer has been "traditionally" viewed as an enhancer, while Jones apparently benefits from poor Congressional drafting and the rule of lenity. Translation, the court was wrong in *Almendarez-Tores* but could not get the votes to reverse themselves.

Jones was followed by *Castillo v. United States*, 530 U.S. ___ (June 5, 2000), holding 9-0 that word "machine gun" in 18 U.S.C. 924(c)(1) states an element of a separate, aggravated crime. Machine gun goes to the jury as an element, it is not for the court. Listen to Justice Breyer, "to ask a jury, rather than a judge, to decide whether a defendant used or carried a machine gun would rarely complicate a trial or risk unfairness. Cf. *Almendarez-Torres*, supra, at 234-235 (pointing to potential unfairness of placing fact of recidivism before jury). As a practical matter, in determining whether a defendant used or carried a "firearm," the jury ordinarily will be asked to assess the particular weapon at issue as well as the circumstances under which it was allegedly used. What is he talking about ? Element verses sentencing enhancer should be decided based on "unfairness to the defendant" ? Please, be a little more unfair and let me take this to a jury. Not too much press on this decision but what a blockbuster ! By the way, what good is "cf", especially in a Supreme Court case ? Does cf mean we were wrong before but don't want to admit it ? Of passing interest, the Castillo defendants were surviving members of the Waco debacle.

Justice Thomas, Is this for Real ?

Seventeen days latter we get the *Apprendi* decision. **Other than a prior conviction, any factor that increases the penalty beyond the statutory maximum must be submitted to the jury and proved beyond a reasonable doubt.** Unlike *Castillo*, *Apprendi* is 5-4 with some bitter dissents. Stevens wrote the majority opinion joined by Scalia, Souter, Thomas and Ginsburg. Scalia and Thomas added concurring opinions. O'Connor authored the major dissent joined by Rehnquist, Kennedy and Breyer with Breyer adding a separate dissent. Remember Justice Scalia, joined by Justices Stevens, Souter and Ginsburg, dissented from the Court's holding in *Almendarez-Torres*. Thomas's changed vote from *Almendarez-Torres* carried the majority. Who would have expected Clarence Thomas to be our man ?

"I join the opinion of the Court in full. I write separately to explain my view that the Constitution requires a **broader rule** than the Court adopts. "The consequence of the above discussion for our decisions in *Almendarez-Torres* and *McMillan* should be plain enough, [i.e. to over-rule them] but a few points merit special mention." 2000 WL 807189, at *29

1.abFirst, it is irrelevant to the question of which facts are elements that legislatures have allowed sentencing judges discretion in determining punishment.

2.abSecond, and related, one of the chief errors of *Almendarez-Torres* - an error to which I succumbed- was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence. For the reasons I have given, it should be clear that this approach just defines away the real issue. **What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment - for establishing or increasing the prosecution's entitlement - it is an element. When one considers the question from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute.**

3.abThird, I think it clear that the common-law rule would cover the McMillan situation of a mandatory minimum sentence. His expected punishment **has increased as a result of the narrowed range** and that the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish, ie. minimum mandatory triggers are elements of the offense. (Internal citations and some surplusage omitted).

Remember our head counting, we are now 5-4 to get rid of "sentencing enhancements" as judicially decided. Thomas, our

swing vote says minimum mandatories, recidivism and any other fact which boosts a sentence is an element. He concludes, "Today's decision, far from being a sharp break with the past, marks nothing more than a return to the status quo ante - the status quo that reflected the original meaning of the Fifth and Sixth Amendments." I really like this. Justice O'Connor *strongly disagrees*, "Our Court has long recognized that not every fact that bears on a defendant's punishment need be charged in an indictment, submitted to a jury, and proved by the government beyond a reasonable doubt. Rather, we have held that the "legislature's definition of the elements of the offense is usually disposative." *Apprendi* dissent. OK, with the history ,holding and ongoing 5-4 dispute under our belt, we move now to the future. How does *Apprendi* effect the defense ?

The Future Is .....

The *Apprendi* decision, leaves three potential interpretations, which is why all that history was needed. Not surprisingly *Apprendi* can be read for a narrow holding, the middle ground, and the broad or potential holding.

1.ab The narrow approach would be to take *Apprendi* at face value. The maximum sentence imposeable for any given offense would be the lowest "basic offense" maximum. Anything which might enhance that potential maximum sentence would have to be pled and proved as an element of the offense, with the exception of prior convictions. See *U.S. v. Aguayo-Delgado*, No. 99-4098, 2000 WL 988128 (8th Cir. July 18, 2000)(applying narrow view of *Apprendi* to case facts.)

2.abThe middle holding, would expand the category of what must be pled and proven to include minimum mandatory sentences as those arguably create a higher sentencing level, by increasing the low end of the sentencing range, even if they do not increase the high end of the range. For example, an offense which carries a potential maximum sentence of ten years, and certain conduct kicks in a minimum mandatory so that the sentencing range moves from zero to ten years to five to ten years, arguably *Apprendi* requires that the trigger for the minimum mandatory (other than prior convictions) must be pled and proven as an element of the offense. See *U.S. v. Sheppard*, No. 00-1218, 2000 WL 988127 (8th Cir. July 18, 2000)(Indictment alleged both type and quantity of drugs. Jury not instructed that quantity was an element but jury was given a special interrogatory and found more than 500 grams of meth. Defendant sentenced to 20 years which is within the range allowed by 841(b)(1)(C).

2a.A twist on this middle ground is to read Justice Thomas' dissent and "changed vote" in *Almendarez-Tores* to indicate that prior convictions will become elements of the offense as well.

3.abThe most exciting potential application of the *Apprendi* holding, is that any sentencing modifier becomes an element of the offense. From this vantage point, all of the guideline adjustments would be viewed as elements which the jury would need to decide. Within this approach, some adjustments may apply, such as relevant conduct, while others, such as role in the offense or obstruction, might remain sentencing factors. The permutations are almost limitless.

Drug Cases, It Might Be a Whole New Ball Game

The application of *Apprendi* to drug cases is probably creating the largest stir. The primary federal drug statute, 21 U.S.C. § 841 (b) (1) has three subsections. Subsection A sets a ten-year minimum mandatory sentence with a maximum of life, unless there is death or serious bodily injury, or a prior felony drug conviction, in which case the minimum mandatory becomes twenty years with a maximum of life. Subsection B establishes a five-year minimum mandatory and a maximum of forty years, and with death or serious bodily injury, twenty years to life, and with a prior felony

interest to panel attorneys in this circuit are amendments 599 and 603. Amendment 599 rejects existing circuit precedent, and Amendment 603 modifies existing precedent.

Amendment 591. **Protected Locations & Protected Individuals.** – This amendment addresses a circuit conflict regarding whether the enhanced penalties in §2D1.2 apply only in a case in which the defendant was convicted of an offense referenced to that guideline or, alternatively, in any case in which the defendant's relevant conduct included drug sales in a protected location or involving a protected individual. The amendment clarifies that the court must apply the offense guideline referenced in the Statutory Index (Appendix A) unless the case falls within the limited stipulation exception set forth in §1B1.2(a). Accordingly, the defendant must be convicted of an offense referenced to §2D1.2 in order for the enhanced penalties of that guideline to apply.

This amendment adopts the position taken by the Eleventh Circuit in *United States v. Saavedra*, 148 F.3d 1311 (11th Cir. 1998)(defendant's uncharged but relevant conduct is actually irrelevant to determining the sentencing guideline applicable to the defendant's offense; such conduct is properly considered only after the applicable guideline has been selected when the court is analyzing the various sentencing considerations within the guideline chosen, such as the base offense level, specific offense characteristics, and any cross-references).

Amendment 592. **Implementation of the Sexual Predators Act. —** This six-part amendment responds to directives contained in the Act. The amendment: (A) provides enhancements to §§2A3.1, 2A3.2, 2A3.3, 2A3.4, 2G1.1, and 2G2.1 for (i) the use of a computer or Internet-access device with the intent to persuade, induce, entice, coerce, or facilitate the transport of a minor to engage in any prohibited sexual activity; and (ii) the misrepresentation of a criminally responsible person's identity with such intent; (B) provides an enhancement in §§2A3.2 and 2G1.1 for offenses under chapter 117 of title 18, United States Code (relating to the transportation of minors for illegal sexual activity), and makes other related modifications to these guidelines; (C) clarifies, in §§2G2.2 and 2G3.1, that "distribution of pornography" applies to distribution of pornography for both monetary remuneration and a non-pecuniary interest; (D) clarifies the meaning of the term "item" in §2G2.4(b)(2) by indicating that a computer file qualifies as an item and invites an upward departure in any case that involves an unusually large number of pornographic images involving children; (E) references the new offense at 18 U.S.C. § 1470 (relating to transferring obscene matter to a minor) in the Statutory Index (Appendix A) to §2G3.1; and (F) references the new offense at 18 U.S.C. § 2425 (relating to prohibiting the knowing transmittal of identifying information about minors for criminal purposes) in the Statutory Index (Appendix A) to §2G1.1.

Amendment 593. **Implementation of the No Electronic Theft Act.—**This amendment re-promulgates the temporary, emergency amendment effective May 1, 2000, as a permanent amendment. The amendment: (A) changes the monetary calculation in §2B5.3 to use the retail value of the infringed item, multiplied by the number of infringing items, except in certain other cases for reasons of impracticality; (B) increases the base offense level in §2B5.3 from level 6 to level 8; (C) provides a two-level enhancement and a minimum offense level of 12 if the offense involved the manufacture, importation, or uploading of infringing items; (D) provides a two-level downward adjustment if the offense was not committed for commercial advantages or private financial gain; (E) provides a two-level enhancement and a minimum offense level of level 13 if the offense involved the conscious or reckless risk of serious bodily injury or possession of a dangerous weapon in connection with the offense; (F) provides that the adjustment in §3B1.3 shall apply if the defendant de-encrypted or otherwise circumvented a technological security measure to gain initial

access to an infringed item; and (G) provides encouraged upward departures if (i) the infringement caused substantial harm to the reputation of the copyright or trademark owner that is not accounted for in the monetary calculation; and (ii) the offense was committed in connection with, or in furtherance of, the criminal activities of certain organized crime enterprises.

Amendment 594. **Offenses Relating to Methamphetamine.—**Implements the Methamphetamine Trafficking Penalty Enhancement Act of 1998 by conforming the quantities in the Drug Equivalency Table of §2D1.1 for methamphetamine-actual and "Ice" to quantities that trigger the statutory 5- and 10-year mandatory minimum penalties.

Amendment 595. **Re-promulgation of Temporary, Emergency Telemarketing Fraud Amendment.—**This amendment re-promulgates the temporary, emergency telemarketing fraud amendment as a permanent amendment.

Amendment 596. **Implementation of the Identity Theft and Assumption Deterrence Act of 1998 and the Wireless Telephone Protection Act.—**This five-part amendment responds to the directives contained in these Acts. The amendment: (A) provides a two-level increase and a minimum offense level of level 12 for offenses involving (i) the possession or use of device-making equipment; (ii) the production of, or trafficking in, unauthorized or counterfeit access devices; or (iii) affirmative identity theft; (B) provides a rebuttable presumption that the offense involved more than minimal planning and contains a rule to avoid double counting for sophisticated means based on the same conduct; (C) revises the minimum loss rule and adds the rule to §2F1.1; (D) provides an encouraged upward departure if the offense level does not adequately reflect the seriousness of the offense; and (E) incorporates into §2F1.1 some of the statutory definitions of 18 U.S.C. §§ 1028 and 1029 and broadens some of those definitions for guideline purposes.

Amendment 597. **Bankruptcy Fraud.—**This amendment addresses a circuit conflict regarding whether the enhancement in §2F1.1 for a "violation of any judicial or administrative order, injunction, decree, or process" applies to false statements made during bankruptcy proceedings. The amendment: (A) provides a separate enhancement for false statements made during a bankruptcy proceeding; and (B) clarifies that in non-bankruptcy proceedings, the false statement must have been made in violation of a specific, prior order.

The Commission recognized that a majority of circuits, including the Eleventh Circuit, held that the current enhancement applies to a defendant who conceals assets in a bankruptcy case because the conduct violates a judicial order or violates judicial process. See *United States v. Saacks*, 131 F.3d 540 (5th Cir. 1997); *United States v. Michalek*, 54 F.3d 325 (7th Cir. 1995); *United States v. Lloyd*, 947 F.2d 339 (8th Cir. 1991); *United States v. Welch*, 103 F.3d 906 (9th Cir. 1996); *United States v. Messner*, 107 F.3d 1448 (10th Cir. 1997); *United States v. Bellew*, 35 F.3d 518 (1994). But see *United States v. Shadduck*, 112 F.3d 523 (1st Cir. 1997).

Amendment 598. **Offenses Relating to Firearms.—**This amendment addresses statutory changes made to 18 U.S.C. § 924(c) by the Act to Throttle the Criminal Use of Guns. The amendment: (A) clarifies, in §2K2.4, that the guideline sentence for 18 U.S.C. §§ 924(c) and 929(a) convictions is the minimum term of imprisonment required by the statute and any sentence greater than the minimum is an upward departure; (B) clarifies that the guideline sentence for 18 U.S.C. § 844 convictions is the term of imprisonment required by statute; and (C) makes technical and conforming changes in §§3D1.1 and 5G1.2.

Amendment 599. **§2K2.4 and Weapon Enhancements for Underlying Offense.—**This amendment addresses a circuit conflict regarding whether a defendant sentenced for a conviction of 18 U.S.C. § 924(c) in conjunction with a conviction for other offenses may receive weapon enhancements in the

guidelines for those other offenses. The amendment: (A) clarifies that no weapon enhancement should be applied when determining the sentence for the underlying crime of violence or drug trafficking offense, or for any conduct with respect to that offense for which the defendant is accountable under §1B1.3; and (B) clarifies that defendants who are sentenced pursuant to §2K2.4 should not receive enhancements under §2K1.3(b)(3) or §2K2.1(b)(5) with respect to any weapon, ammunition, or explosive connected to the offense underlying the 18 U.S.C. § 924(c) conviction. The amendment also makes technical and conforming changes to reflect the addition of "brandishing" to 18 U.S.C. § 924(c) by the Act to Throttle the Criminal Use of Guns.

☞ **This amendment expressly rejects the position taken by the Eleventh Circuit in *United States v. Flennory*, 145 F.3d 1264, 1268-69 (11th Cir.)(interpreting "underlying offense" in §2K2.4 narrowly to mean only the "crime of violence" or "drug trafficking offense" that forms the basis for the §924(c) conviction), *cert. denied*, 119 S. Ct. 1130 (1999), and in *United States v. Gonzalez*, 183 F.3d 1315, 1325-26 (11th Cir.)(both statutory and guideline increases may be imposed if defendant and accomplice used different weapons as part of a joint undertaking), *cert. denied*, 120 S. Ct. 996 (2000).**

Amendment 600. **Career Offenders and Offenses Relating to Firearms.—**This amendment clarifies guideline application for offenders convicted under 18 U.S.C. §§ 924(c) and 929(a) who might also qualify as a career offender under §4B1.1. The Commission deferred a decision on whether any or all convictions for violations of §924(c) should be considered "instant offenses" for purposes of the career offender guideline. The amendment adds new Application Note 3 to §2K2.4 directing courts not to apply Chapter Three (Adjustments) or Chapter Four (Criminal History and Livelihood) to any offense sentenced under §2K2.4. This effectively prohibits the use of §924(c) convictions either to trigger application of the career offender guideline, §4B1.1, or to determine the appropriate offense level under that guideline. Application Note 1 of §4B1.2 also is amended to clarify, however, that prior convictions for violating §924(c) will continue to qualify as "prior felony convictions" under the career offender guideline in most circumstances.

Amendment 601. **"Brandishing" and Dangerous Weapon.—**This amendment: (A) conforms the guideline definition of "brandishing" to the statutory definition codified at 18 U.S.C. § 924(c), which was added by the Act to Throttle the Criminal Use of Guns, and makes conforming changes to relevant guidelines; and (B) clarifies under what circumstances an object that is not an actual, dangerous weapon should be treated as one for guideline application purposes.

The latter portion of the amendment is in accord with the Eleventh Circuit's decision in *United States v. Shores*, 966 F.2d 1383 (11th Cir. 1992)(toy gun carried but never used by a defendant qualifies as a dangerous weapon because of its potential, if it were used, to arouse fear in victims and dangerous reactions by police or security personnel).

Amendment 602. **Post-Sentencing Rehabilitation.—**This amendment addresses a circuit conflict regarding whether a sentencing court may consider an offender's post-offense rehabilitation efforts while in prison or on probation as a basis for a downward departure at re-sentencing following an appeal. The amendment prohibits post-sentencing rehabilitation as a downward departure basis, but it does not restrict departures based on extraordinary post-offense rehabilitation prior to sentencing.

Amendment 603. **Aberrant Behavior.—**This amendment addresses a circuit conflict regarding whether a "single act of aberrant behavior" includes multiple acts occurring over a period of time. The amendment defines the parameters of conduct that may warrant a downward departure based on aberrant behavior.

☞ The Eleventh Circuit precedent on this issue, see *United States v. Withrow*, 85 F.3d 527 (11th Cir. 1996)(a single act of aberrant behavior is not established unless the defendant is a first-time offender and the crime was a thoughtless act rather

than one that was the result of substantial planning), was the majority view (7 circuits in accord). A minority of circuits held that "a single act of aberrant behavior" could include multiple acts occurring over a period of time which lead up to the commission of the crime and applied a "totality of the circumstances" test. See, e.g., *United States v. Takai*, 941 F.2d 738 (9th Cir. 1991)("single act" refers to the particular action that is criminal, even though a whole series of acts lead up to the commission of the crime). The Commission did not adopt either position in toto, concluding that the majority position was too narrow and the minority position too broad.

As a threshold matter, the new amendment provides that the departure is available only in an extraordinary case. A new policy statement provides, in pertinent part: "aberrant behavior" means a single criminal occurrence or single criminal transaction. The phrases "single criminal occurrence" and "single criminal transaction" are intended to be broader than the meaning of "single act," but will be limited in potential applicability to offenses (1) committed without significant planning; (2) of limited duration; and (3) that represent a marked deviation by the defendant from an otherwise law-abiding life.

Amendment 604. **Dismissed and Uncharged Conduct.—**This amendment addresses a circuit conflict regarding whether a sentencing court can base an upward departure on conduct that was dismissed or not charged as part of a plea agreement. The amendment permits the sentencing court to consider such conduct for departure purposes.

Amendment 605. **Technical Amendments Package.—**This amendment makes various technical and conforming changes. The amendment: (A) inserts a missing word in §2B5.1; (B) corrects typographical error in the Chemical Quantity Table of §2D1.11 regarding quantities of Isosafrole and Safrole; (C) corrects an omission made during prior Commission's deliberations on the Comprehensive Methamphetamine Control Act of 1996 by adding a 2-level enhancement in §§2D1.11 and 2D1.12 for environmental damage, and makes conforming changes to §2D1.1; (D) updates the Statutory Provisions of §2K2.1; and (E) updates §5B1.3 and §5D1.3 by including new sex offender condition as a specific mandatory condition rather than in a footnote. ∵ ∵ ∵

PROCEDURES FOR APPEALING A §2255

BY K. LYN HILLMAN CAMPBELL

ASSISTANT FEDERAL DEFENDER

In case you are lucky (?) enough to engage in habeas practice under 28 U.S.C. §2255, and you are unlucky enough to lose a case, your client will probably want to appeal the ruling of the Court. Under the new version of §2255, the rules for appealing an adverse ruling have radically changed, and the strangest part is that most of the procedures are not in the rule books.

Pursuant to statute, in order to appeal an adverse ruling, a certificate of appealability ("COA"), the newly revamped version of the old certificate of probable cause, must issue. Although the statute plainly states that the COA must issue from the circuit court, the circuit courts promptly held that Congress intended for the district courts to first address this issue.

So, your client lost. What now? First you file a request for a certificate of appealability with the district court. You have 60 days to do this under Rule 11 of the Rules for Section 2255 Proceedings. Contemporaneously therewith, you file a notice of appeal. In your request for COA, you must clearly define which issues you believe are worthy of appeal and why. If you are lucky, the district court will completely agree with you, and will grant a COA for all issues presented to it in your pleadings. However, you may not receive such blanket permission to appeal, or you may receive no permission at all. Only those issues that are identified in the COA may be appealed.

If the district court does not grant a COA, what then? Are you and your client out of luck? Of course not! While no authority appears to exist for this proposition, the Eleventh Circuit treats a district court's denial of a COA as an automatic request for a COA from the circuit court. The Eleventh Circuit will then

send counsel of record (or the petitioner, if pro se) a letter detailing the time for filing an additional COA request, if desired. Typically, the time period is 35 days. In the letter, the Court explains that further paperwork is not required, but is encouraged.

If the Eleventh Circuit disagrees with the lower court, which on occasion it has, and grants a COA you can then proceed with the appeal. But if the COA is denied, is there any further recourse? Sure there is: it's called a suggestion for rehearing. Under 11th Cir. I. O. P. 27-1, any action taken by a single judge, including the denial of a COA, is subject to review by the Court. An appeal can be taken asking the Court to review the decision to deny a COA pursuant to 11th Cir. I. O. P. 27-1(d). While a specific time period is not defined by rule 27-1, the time period for a suggestion for rehearing, 21 days (with the pleading at the Court of appeals by the 21st day) seems to present the most analogous time period.

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REVERSED AND REMANDED

BY CHRISTOPHER KNIGHT
ASSISTANT FEDERAL DEFENDER

The opinions cited below were reversed either in whole or in part for the reasons stated. These opinions are contained in the Federal Reporter and Supreme Court Reporter Advance Sheets. They are published opinions, including significant habeas decisions, with official citations. Opinions of the United States Court of Appeals for the Eleventh Circuit are summarized in **bold face type** for your convenience. The opinions themselves should be consulted for detailed rationale and supporting authority. The official reporters consulted are 206 F.3d to 212 F.3d and 120 S. Ct.

United States Supreme Court

Williams v. Taylor, ___U.S.___, 120 S. Ct. 1479 (2000)(On issue of whether prisoner is entitled to evidentiary hearing on claim for which prisoner has failed to develop factual basis in state court proceedings, failure to develop factual basis is not established and prisoner is entitled to evidentiary hearing unless there is lack of diligence or some greater fault attributable to prisoner or prisoner's counsel; petitioner was entitled to evidentiary hearing on his claims of juror bias and prosecutorial misconduct.).

Slack v. McDaniel, ___U.S. ___, 120 S. Ct. 1595 (2000)(When district court denies habeas petition on procedural grounds without reaching merits of underlying constitutional claim, a COA should issue if the petitioner shows, at least, that jurists of reason would find it debatable whether the petition states a claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling; a habeas petition filed after

an initial petition was dismissed without adjudication on the merits for failure to exhaust state remedies is not a "second or successive petition" under the AEDPA.).

Carmell v. Texas, ___U.S. ___, 120 S. Ct. 1620 (2000)(Convictions that rested solely on the testimony of victim who was 14 or 15 years at the time of the offense were barred by the ex post facto clause because conviction on testimony of victim's testimony alone was not previously permitted.).

Johnson v. United States, ___U.S. ___, 120 S. Ct. 1795 (2000)(18 U.S.C. § 3583(h) applies only to cases in which the initial offense occurred after September 13, 1994, the date of its enactment. At the time of defendant's conviction, 18 U.S.C. § 3583(e)(3) gave the district court the authority to reimpose supervise release upon recommitment after revocation. Therefore, the district court was authorized to impose another term of supervised release after recommitment.).

Jones v. United States, ___U.S. ___, 120 S. Ct. 1904 (2000)(An owner-occupied residence not used for any commercial purpose does not qualify as "prop-

erty used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce" within the meaning of the federal arson statute, and arson of such a dwelling is not subject to prosecution under that statute.).

Castillo v. United States, ___U.S. ___, 120 S. Ct. 2090 (2000)(Statute which increases penalty for using or carrying a firearm in relation to a crime of violence when that firearm is a "machinegun"

states element of a separate, aggravated crime, requiring proof of that element beyond a reasonable doubt, relying on Jones v. United States, 526 U.S. 227, 234 (1999).).

United States Courts of Appeal

United States v. Rhynes, 206 F.3d 349 (4th Cir. 1999)(Sentences exceeded statutory maximum for drug carrying lowest penalty.).

United States v. Simon, 206 F.3d 392 (4th Cir. 2000)(Failure of executors of search warrant to leave notice or receipt in violation of rule required remand.).

United States v. Angeles-Mascote, 206 F.3d 529 (5th Cir. 2000)(Alien stopped at port of entry had not illegally entered United States; plain error found in acceptance of guilty plea.).

United States v. Tribble, 206 F.3d 634 (6th Cir. 2000)(Postal window clerk did not hold position of trust.).

Romandine v. United States, 206 F.3d 731 (7th Cir. 2000)(District court may not require sentence to run consecutive to a state sentence that will be imposed in the future.).

White v. Bowersox, 206 F.3d 776 (8th Cir. 2000)(New state procedural rules limiting remedies available to defendant abandoned by counsel in state post-conviction proceeding did not bar federal habeas review of claims procedurally defaulted under state rules.).

United States v. Sandoval-Barajas, 206 F.3d 853 (9th Cir. 2000)(improper 16-level enhancement for possession of firearm by non-citizen–not an "aggravated felony").

United States v. Stephens, 206 F.3d 915 (9th Cir. 2000)(Abandonment of container with cocaine was involuntary because defendant was unlawfully seized.).

United States v. Prentiss, 206 F.3d 960 (10th Cir. 2000)(Indian status of defendant and victim must be alleged in indictment charging violation of Indian Country Crimes Act—failure to do so deprives

defendant of Fifth Amendment right to be tried only on charges presented in indictment returned by a grand jury.).

Pickens v. Gibson, 206 F.3d 988 (10th Cir. 2000)(Admission of involuntary confession was not harmless error.).

United States v. Hardeman, 206 F.3d 1320 (9th Cir. 2000)(Speedy Trial Act was violated where

no identifiable pre-trial motion pending.).

United States v. Bradstreet, 207 F.3d 76 (1st Cir. 2000)(Post-sentencing rehabilitation may be used to grant downward departure in a sufficiently exceptional case, citing *Koon* – first impression.).

United States v. Rome, 207 F.3d 251 (5th Cir. 2000)(Speculation that defendant would have stolen all 87 guns on display in store he broke into was insufficient basis for 6-level enhancement for crime involving 50 guns or more.).

United States v. Buchanan, 207 F.3d 344 (6th Cir. 2000)(District court required to consider alleged withdrawal from conspiracy as ground for downward departure; and, per concurring justice, dog sniff

evidence inadmissible as unreliable.).

United States v. Saikaly, 207 F.3d 363 (6th Cir. 2000)(District court must consider defendant's objections to new presentence report after defendant prevailed on motion to vacate.).

United States v. Gomez-Lepe, 207 F.3d 623 (9th Cir. 2000)(Polling of jurors is critical stage of trial which requires consent by defendant before Magistrate Judge can preside–first impression.).

United States v. Butler, 207 F.3d 839 (6th Cir. 2000)(Sentence enhancement not warranted for defendant's participation in robbery with minor; concurring opinion holds guideline authorizing enhancement for using or attempting to use a minor in an offense contrary to statute because it applied to defendants regardless of their age.).

United States v. Morrison, 207 F.3d 962 (7th Cir. 2000)(clear error in calculation of drug quantities).

United States v. Standard, 207 F.3d 1136 (9th Cir. 2000)(failure to make necessary findings as to proportion of deductions based on illegal payments in false tax return case).

United States v. Chang, 207 F.3d 1169 (9th Cir. 2000)(reversal for sentencing above statutory maximum).

United States v. Gigley, 207 F.3d 1208 (10th Cir. 2000)(District court failed to group failure to appear and underlying drug offenses and should have imposed consecutive sentences.).

United States v. Gigley, 207 F.3d 1212 (10th Cir. 2000)(Offense level should have been based on quantity of pure methamphetamine, not mixture.).

United States v. Wood, 207 F.3d 1222 (10th Cir. 2000)(insufficient evidence to prove premeditation or malice aforethought in murder prosecution; Rule 403 violation in admission of expert testimony on use of potassium chloride in execution of animals; reversed for cumulative evidentiary errors and error in denying motion for judgment of acquittal).

United States v. Asch, 207 F.3d 1238 (10th Cir. 2000)(Drugs possessed for personal consumption cannot be considered when determining statutory sentencing range.).

United States v. Beckett, 208 F.3d 140 (3rd Cir. 2000)(Restitution determined without considering defendant's ability to pay; sentencing concurrently on charge of armed bank robbery and on lesser included charge of robbery violated Double Jeopardy Clause.).

United States v. Bryce, 208 F.3d 346 (2nd Cir. 2000)(Defendant's uncorroborated admissions insufficient to support possession and distribution convictions and did not fall under special circumstances exception to corroboration requirement.).

Walker v. Artuz, 208 F.3d 357 (2nd Cir. 2000)(Tolling of one-year limitations period for habeas petitions under AEDPA during the pendency of "other collateral review" applies to federal habeas petitions as well as applications for state review.).

United States v. Gamble, 208 F.3d 537 (5th Cir. 2000)(One year limitations period for filling motion to vacate begins to run upon expiration of time for seeking certiorari in the Supreme Court.).

United States v. Byrd, 208 F.3d 592 (7th Cir. 2000)(Refusing to allow defendant to show jury shackles and restraints in which he was held at time of alleged assault was abuse of discretion and not harmless.).

United States v. Felici, 208 F.3d 667 (8th Cir. 2000)(Petitioner entitled to evidentiary hearing on issue of whether intended drug related materials were in

fact utilized or intended to be utilized for manufacture, storage, or transportation of controlled substances.).

United States v. Coleman, 208 F.3d 786 (9th Cir. 2000)(involuntary statement evidenced by inducement to cooperate; evidence sufficient to convict for bank robbery but not for armed bank robbery).

United States v. Wald, 208 F.3d 903 (10th Cir. 2000)(Odor of burnt methamphetamine did not provide probable cause to search trunk of car; suspicion of contraband possession based on smelling burnt methamphetamine not sufficiently corroborated by other circumstances; consent to search did not extend to trunk.).

United States v. Hernandez-Fraire, 208 F.3d 945 (11th Cir. 2000)(plain error for district court to fail to ensure that defendant understood his rights before accepting plea).

United States v. Chacon-Palomares, 208 F.3d 1157 (9th Cir. 2000)(Evidentiary hearing required on claim of ineffective assistance of counsel.).

United States v. Humphrey, 208 F.3d 1190 (10th Cir. 2000)(Abuse of discretion in limiting investigation into whether jurors were exposed to extraneous information; defendant entitled to instruction on simple possession in 21 U.S.C. § 841(a) case; evidence did not support enhancement for use of a minor.).

United States v. Harris, 209 F.3d 156 (2nd Cir. 2000)(Resentencing as result of district court's previous failure to advise defendant of his right to appeal should have been de novo.).

Amiel v. United States, 209 F.3d 195 (2nd Cir. 2000)(hearing required on petitioner's motion to vacate due to alleged conflict of interest).

Smith v. Ward, 209 F.3d 383 (5th Cir. 2000)(One year period for seeking federal habeas relief was tolled during pendency of petitioner's application for state relief.).

United States v. Freeman, 209 F.3d 464 (6th Cir. 2000)(Motor home's weaving into emergency lane did not establish probable cause of traffic violation and probable cause that driver was intoxicated.).

United States v. Whitman, 209 F.3d 619 (6th Cir. 2000)(remand for resentencing on issue of acceptance of responsibility).

United States v. Jackson, 209 F.3d 1103 (9th Cir. 2000)(evidentiary hearing warranted on juror bias claim).

United States v. Zanghi, 209 F.3d 1201 (10th Cir. 2000)(remanded for district court to explain why supervised release and home confinement imposed).

United States v. Bazile, 209 F.3d 1205 (10th Cir. 2000)(Guidelines permitted only 25 year sentence, not life imprisonment.).

United States v. Reliford, 210 F.3d 285 (5th Cir. 2000)(insufficient evidence of attempted distribution of crack cocaine).

United States v. Taylor, 210 F.3d 311 (5th Cir. 2000)(error to admit chart showing organization of alleged conspiracy where chart was misleading as to state of evidence; prior drug convictions of co-conspirators inadmissible).

Mata v. Johnson, 210 F.3d 324 (5th Cir. 2000)(minimal due process not met where petitioner sought to abandon review in federal habeas case and his competency was questioned).

United States v. Phillips, 210 F.3d 345 (5th Cir. 2000)(ineffective assistance not to challenge obstruction of justice enhance-

ment on appeal where challenge was meritorious).

United States v. Shumpert Hood, 210 F.3d 660 (6th Cir. 2000)("minor assault" guidelines provision applied, not "aggravated assault" provision).

United States v. Smith, 210 F.3d 760 (7th Cir. 2000)(enhancement for reckless endangerment not supported by the evidence where defendants dumped anhydrous ammonia out of window during chase but there was no showing as to amount, concentration, and length of time officers were exposed).

United States v. Hill, 210 F.3d 861 (8th Cir. 2000)(In prosecution for receiving a firearm shipped in interstate commerce while under indictment, defendant was not "under indictment" at time of alleged offense.).

United States v. Ross, 210 F.3d 916 (8th Cir. 2000)(additional findings necessary on issue of role in offense; downward departure not supported by finding that not all wire fraud proceeds were put to fraudulent use or by perceived sentencing guidelines disparity).

United States v. Corona-Garcia, 210 F.3d 973 (9th Cir. 2000)(vacated to give defendant additional point for acceptance of responsibility).

Coleman v. Calderon, 210 F.3d 1047 (9th Cir. 2000)(Instruction on governor's power to commute sentence in death case was unconstitutional, and error was not harmless.).

United States v. Garcia, 210 F.3d 1058 (9th Cir. 2000)(One year limitations period for filing motion to vacate runs from time for filing petition for certiorari with Supreme Court, not from date of judgment of Court of Appeals.).

United States v. Depew, 210 F.3d 1061 (9th Cir. 2000)(remand to determine if agents were within curtilage of defendant's home when making imager scan).

Mayes v. Gibson, 210 F.3d 1284 (10th Cir. 2000)(Evidentiary hearing required on issue of ineffective assistance of counsel.).

United States v. James, 210 F.3d 1342 (11th Cir. 2000)(Plea colloquy did not adequately establish that defendant understood the nature of the charge.).

United States v. Naiman, 211 F.3d 40 (2nd Cir. 2000)(Government failed to prove jurisdictional element for offense of bribery with respect to program receiving federal funds.).

United States v. Brock, 211 F.3d 88 (4th Cir. 2000)(two-level enhancement for threats to injure person in prosecution for interstate harassing communications incompatible with base offense level of six which did not involve threat to injure person or property).

United States v. Ortiz-Santiago, 211 F.3d 146 (1st Cir. 2000)(Plea agreement did not block application of safety valve.).

United States v. Thomas, 211 F.3d 316 (6th Cir. 2000)(Defendant's rapes of two women constituted one predicate episode for purpose of sentencing under ACCA.).

La Crosse v. Kernan, 211 F.3d 468 (9th Cir. 2000)(Federal habeas claim not defaulted because state court decision was based on adequate and independent state law ground; petitioner was entitled to evidentiary hearing.).

United States v. Cherry, 211 F.3d 575 (10th Cir. 2000)(remand to determine if co-defendant who drove to murder scene was part of conspiracy to murder and responsible under *Pinkerton* theory).

United States v. Shea, 211 F.3d 658 (1st Cir. 2000)(remand in order to merge drug-user-in-possession sentence with that imposed for felon-in-possession count).

United States v. Barnette, 211 F.3d 803 (4th Cir. 2000)(Reversible error committed in death penalty case when district court refused to allow defense expert to testify in surrebuttal to contest prosecution expert's rebuttal testimony diagnosing defendant as a psychopath.).

United States v. Orozco-Ramirez, 211 F.3d 862 (Claims of ineffective assistance arising from representation in out-of-time appeal were not second or successive under AEDPA.).

United States v. Castano, 211 F.3d 871 (5th Cir. 2000)(Defense counsel ineffective for failing to file notice of appeal even though defendant waived appeal in plea agreement.).

United States v. Patterson, 211 F.3d 927 (5th Cir. 2000)(Equitable tolling of statute of limitations for filing motion to vacate occurred where district court dismissed defendant's motion without prejudice and led defendant to believe he could refile.).

United States v. Wells, 211 F.3d 988 (6th Cir. 2000)(remanded for district court to determine whether defendant fulfilled obligations under plea agreement).

United States v. Vonn, 211 F.3d 1109 (9th Cir. 2000)(District court's failure to advise defendant at plea hearing of right to counsel at trial was not harmless error.).

United States v. Calderon, 211 F.3d 1148 (9th Cir. 2000)(Petitioner denied of effective counsel at penalty phase of death penalty case because counsel did not prepare and investigate.).

United States v. Thomas, 211 F.3d 1186 (9th Cir. 2000)(Tip from federal agent, activity at house, and agent's claimed auditory perception did not support finding of reasonable suspicion to stop vehicle leaving from house under surveillance.).

United States v.Smithers, 212 F.3d 306 (6th Cir. 2000)(District court erred in excluding expert testimony regarding eye-witness identification in bank robbery case without *Daubert* analysis where principal evidence was eye-witness testimony.).

United States v. Szakacs, 212 F.3d 344 (7th Cir. 2000)(Defendant's offense levels were not subject to enhancement for use of weapon in another felony offense where indictment charged conspiracy to steal firearms from licensed firearms dealer.).

United States v. Moore, 212 F.3d 441 (8th Cir. 2000)(31.8 grams of cocaine base improperly included in determining base level).

United States v. Hunt, 212 F.3d 539 (10th Cir. 2000)(Double jeopardy barred appeal by United States where district court entered judgment of acquittal.).

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