The Rap Sheet

Issue No. 2 *January 1999*

NEWSLETTER TO THE CRIMINAL JUSTICE ACT PANEL OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Shelley Stark, Federal Public Defender

I. CJA PANEL ATTORNEY PAYMENT RATES

Having finally recovered from the LAW case and the seemingly endless mailings, faxes and phone calls to fifty lawyers, we now happily resume publication of this newsletter to Western District panel members. The impetus for this resumption is to spread some relatively good news. At the December 1998 National Defender Conference, the Federal Public and Community Defenders passed the following resolution:

Resolution of the
Federal Public and Community Defenders
December 1998

Preamble

Recognizing that the strength of a nation is measured in the fundamental fairness of its judicial system, our founders incorporated the concept of equal treatment before the law into the basic rights which our nation must provide. Essential to that equal treatment under the law is the Sixth Amendment right to effective assistance of counsel. To ensure the right to counsel guaranteed by the Sixth Amendment is applied equally to those who cannot afford to retain counsel or obtain criminal defense services, the Congress prescribed the Criminal Justice Act (18 U.S.C. § 3006A). Through the Criminal Justice Act, we maintain public confidence in the nation's commitment to equal justice under law and ensure the successful operation of the constitutionally based adversary system of justice by which both federal criminal laws and federally guaranteed rights are enforced.

With the increase in complexity of federal criminal practice, and the protracted litigation that such complexity generates, justice can no longer afford to depend on the *pro bono* efforts of a few dedicated individuals, or the voluntary contribution of a portion of the time and effort required to adequately represent defendants in federal

court. Indeed, in June, 1990, the Judicial Conference Committee on Defender Services recognized that, "equal access to justice is impaired when, for those with limited financial resources, that access depends upon mandatory *pro bono* legal services." The fundamental fairness so essential to our judicial system requires that court appointed counsel in federal court be compensated commensurate with the time and skill required to provide effective assistance of counsel.

Resolution

Whereas, the provision of effective assistance of counsel in federal court to defendants who are financially unable to obtain adequate representation requires experienced and effective counsel, and

Whereas, the provision of such experienced and effective counsel can only be achieved by providing for compensation of court appointed counsel commensurate with that level of experience and effectiveness, and

Whereas, the present CJA rates of $45 per hour for out of court work and $65 per hour for in court work is not sufficient to ensure the assistance of experienced and effective counsel, and

Whereas, rates of at least $75 per hour are necessary to ensure the assistance of experienced and effective counsel,

Be it hereby resolved:

That the provision of effective assistance of counsel in federal court to defendants who are financially unable to obtain adequate representation should be met by guaranteeing full and fair compensation to CJA panel attorneys, and that, toward that end, the judiciary is urged to seek and Congress is urged to adequately fund, the implementation of a rate of at least $75 per hour for CJA panel attorneys, with appropriate annual cost of living increases.

Unanimously approved by: The Federal Public and Community Defenders, December 1998.

* * *

The Defender Services Committee of the Judicial Conference approved the same across-the-board increase to $75 per hour for both in-court and out-of-court work. The Judicial Conference then approved the increase. The problem is the increase cannot be implemented until Congress approves it. Congress has not yet decided. (They are too busy trying the President.)

II. PUBLIC DISCLOSURE OF CJA ATTORNEY PAYMENT INFORMATION

By Act of Congress, all final CJA payment vouchers are now considered public records and are available for inspection. To avoid disclosure, counsel must file a motion asserting grounds for non-disclosure. It is within the court's discretion to grant such a motion.

The disclosure requirement became effective January 1, 1998. You should have received from the Clerk of Court a notice which included an acknowledgment of receipt. If you have not returned your signed acknowledgment to the Clerk's Office, please do so immediately.

III. "RECORDKEEPING" REQUIREMENT UNDER CJA

The *Guide to Judiciary Policies and Procedures*, Volume VII, Chapter II, which governs the appointment and payment of counsel under the Criminal Justice Act, contains the following language:

> ¶*2.32*: "Record Keeping.Appointed counsel must maintain contemporaneous time and attendance records for all workperformed, including work performed by associates, partners, and support staff, as well as expense records. Such records, which may be subject to audit, must be retained for three years after approval of the ***final*** voucher for an appointment [emphasis added]."

IV. SENTENCING GUIDELINES GROUP REORGANIZATION

The name of the Sentencing Guidelines Group has been changed to the **Federal Defender Training Group**. Barbara O'Connor, Esq., has been hired as the Director. The Training Group provides the following services to CJA Panel Attorneys:

advice and research via a "hotline";
planning and providing regional panel attorney seminars in conjunction with the Defender Services Division of the Administrative Office of the United States Courts;
analysis and advice regarding statutory and case law developments.

The Training Group's **new** address is 529 14th Street, NW, Suite 200, Washington, DC 20045, telephone 202/ 628-4083. Their toll-free "hotline" number remains the same: (800) 788-9908.

V. REGIONAL PANEL ATTORNEY TRAINING SEMINARS

The dates and locations of the 1999 Regional Panel Attorney Training Seminars are not yet available. As soon as we receive this information, we will pass it on to you.

VI. REAPPOINTMENT IN CJA CASES

When a magistrate judge appoints an attorney and the attorney then continues to represent the defendant in the district court, the district court need make no additional appointment, except on appeal from a judgment rendered by the magistrate judge in a misdemeanor case.

When appointed counsel files an appeal, the Circuit must issue a new order (CJA Form 20) extending the appointment to the appeal.

The District Court must complete a new appointment (CJA Form 20) in each of the following situations:

1. The granting of a new trial, whether after motion, mistrial, reversal or remand on appeal;

2. Probation, supervised release, or parole revocation proceedings;

3. Bail/detention appeals to the Court of Appeals;

4. Extraordinary writs;

5. Mental competency hearings;

6. Additional charges not related to the original appointment, e.g., a Rule 20 transfer from another district when not the basis for the original appointment; the filing of a subsequent or superseding indictment or information, etc.

See *Guide to Judiciary Policies and Procedures*, Volume VII, Chapter II, ¶ 2.13.

NOTE: To insure the accuracy of the record of your panel appointments, as well as the accuracy of our statistics, please notify the Federal Public Defender's Office of any subsequent appointment to the same client.

VII. CHANGES IN FEDERAL RULES

Enclosed is a summary of *some* of the changes in the Federal Rules of Appellate Procedure and the Federal Rules of Criminal Procedure, effective December 1, 1998. These summaries are intended to highlight only *some* of the changes in the rules and are not all-inclusive. Please rely on the complete text of the rules, and not the summaries alone.

VIII. CASE NOTES

Recent Third Circuit Slip Opinions. Enclosed is a summary of recent Third Circuit Opinions on criminal law published since March 29, 1996.

Guideline Grapevine. Enclosed are Issues 104 through 109 of the Guideline Grapevine, published by the Federal Defenders of San Diego, Inc.

IX. INCREASE IN MILEAGE RATES

Panel Attorneys and their experts may claim the following mileage rates for travel conducted ***on or after September 8, 1998****:*

32.5 cents for privately-owned automobile
26.0 cents for privately-owned motorcycle

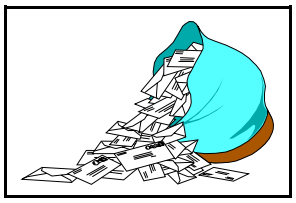
X. STAFF NEWS.

We welcome our newest staff members -

Elizabeth "Liz" Durkin is now the Legal Secretary in our Erie Branch Office. Liz replaced Ellie Whitsett who resigned to move to California. Welcome Liz.

Mark Ganley was hired as our first Computer Systems Administrator. Although Mark is stationed in the Pittsburgh Office, he regularly travels to the Erie and Johnstown offices. We're glad to have you, Mark.

XI. WHAT WOULD YOU LIKE ON YOUR RAP SHEET ?



Do you have suggestions for articles or items to appear in The Rap Sheet? What would you like to see included? Additionally, we encourage you to call or send us your success stories and strategies so that we can share them with others. Call ***Tina Famiglietti*** at the FPD's, to make suggestions. Consideration will be given to all suggestions.

Please send all address changes, new phone numbers, employer ID numbers, and intentions to withdraw as a member of the CJA Panel to Tina Famiglietti, Administrative Officer, Federal Public Defender, 960 Penn Avenue, Suite 415, Pittsburgh, PA 15222-3811, or FAX to (412) 644-4594.

Enclosures:

Summaries of changes in Federal Rules of Criminal Procedure and Federal Rules of Appellate Procedure

Summary of selected recent Third Circuit decisions

Guideline Grapevine - Issues 104 through 109

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AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

Rules 5.1, 26.2, 31, 33, 35 and 43 of the Federal Rules of Criminal Procedure have been amended effective December 1, 1998. Following is a summary of the changes.

RULE 5.1, Preliminary Examination. Paragraph (d), entitled Production of Statements, has been added to this rule. Subparagraph (1) of Paragraph (d) states that Federal Rule of Criminal Procedure 26.2, entitled Production of Witness Statements, applies to Preliminary Examinations. Subparagraph (2) of Paragraph (d) states that "if a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the moving party, the court may not consider the testimony of a witness whose statement is withheld."

RULE 26.2, Production of Witness Statements. The application of Rule 26.2 has been extended to preliminary examinations. See summary of amendments to Rule 5.1, supra. The amendments also make Rule 26.2 applicable at sentencing to the extent specified in Rule 32(c)(2); previously, this rule stated that it was applicable at sentencing to the extent specified in Rule 32(e).

RULE 31, Verdict. The amendments require that if the jury is polled, that the polling occur before the jury is discharged, and that the jurors be polled individually. Previously, the rule did not specify how the jurors should be polled, and required that the polling occur before the verdict was recorded. The amendments also allow the court to declare a mistrial if the polling reveals a lack of unanimity. Previously, the rule stated only that the jury could be discharged if their decision was not unanimous, but said nothing about a mistrial.

RULE 33, New Trial. The amendments change the time for filing a motion for new trial based upon newly discovered evidence. Previously, a motion for new trial based upon newly discovered evidence could be filed within two years from the time that the judgment became final (i.e. the date of the appellate court's final judgment). Now, a motion for new trial based upon newly discovered evidence may be made within three years of the verdict or finding of guilty.

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE, continued

RULE 35, Correction or Reduction of Sentence. The title of paragraph (b) has been changed from Reduction of Sentence for Changed Circumstances to Reduction of Sentence for Substantial Assistance. Paragraph (b) has been further amended to state that when "evaluating whether substantial assistance has been rendered, the court may consider the defendant's presentence assistance." The Committee Note to the rule states that this amendment is not meant to provide a "double benefit to the defendant." Thus, if a defendant has received a sentence reduction under U.S.S.G. § 5K1.1, that assistance may not be again considered in the disposition of a post-sentence Rule 35(b) motion.

RULE 43, Presence of the Defendant. Paragraph (c)(4) of the rule has been amended. Previously, this paragraph stated that a defendant need not be present for a correction of sentence under Rule 35. The current version of the rule states that a defendant need not be present for a reduction or correction of sentence under Rule 35(b) or (c) or 18 U.S.C. § 3582(c).

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

Several of the Federal Rules of Appellate Procedure have been amended effective December 1, 1998. Following is a summary which highlights some of the more significant changes. This summary is not exhaustive. All attorneys are therefore advised to read and to study a complete set of the amended rules.

FRAP 4(b)(4). When a party seeks to extend the time to file a notice of appeal in a criminal case, there must be a "finding" of excusable neglect *OR* good cause. Previously, the extension could be based only upon excusable neglect. This amendment makes the rule for criminal cases consistent with its civil counterpart which allows the deadline to be extended for excusable neglect *OR* good cause. The language of this rule was also changed from a "showing" of excusable neglect (or good cause) to a "finding." The rationale behind this change was that the rule authorizes the court to provide an extension without a motion. Thus, a showing by the parties is unnecessary; only a finding by the court is needed.

FRAP 4(c), and FRAP 25(a)(2)(C). When an inmate is confined to an institution and files a notice of appeal or other papers, the notice or other papers are deemed to be timely filed if they are deposited in the institution's internal mail system on or before the last day for filing. These rules have been amended to indicate that where an institution has a special internal system designed for legal mail, the inmate must use that particular system in order to receive the benefit of these rules.

FRAP 22(b). This is the rule governing certificates of appealability in habeas cases. The rule has been amended to include §2255 proceedings, as well as §2254 proceedings. The rule has also been amended to indicate that COA's can be issued by "a circuit justice or a circuit or district judge." This is intended to clarify the ambiguity in §2253, which states that a COA can be issued by "a circuit justice or judge." Finally, this rule was also amended to indicate that when a state or its representative or the United States or its representative appeals, a certificate of appealability is not required.

FRAP 26(a). This rule deals with the computation of time. The amendments indicate that where a local rule provides for a time limit, the computation of that time limit is governed by this national rule. In other words, one should look to FRAP 26 to determine how to compute time limits provided for under the Third Circuit's local rules. The amendments also explain that where the computation of a time period is described in terms of "calendar days," weekends and legal holidays should be INCLUDED.

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE, continued

FRAP 32(a)(5). The amendments to this rule require that briefs be printed in either a proportionally spaced or a monospaced typeface. If a proportionally spaced typeface is used, it must be 14-pt or larger. If a monospaced face is used, it may not contain more than 10 1/2 characters per inch.

FRAP 32(a)(7). The amendments to this rule have changed the page limitations for briefs. Under FRAP 32(a)(7)(A), a principal brief may not exceed 30 pages, and a reply brief may not exceed 15 pages. (Previously, the page limitations were 50 and 25 pages, respectively.) IN THE ALTERNATIVE, briefs are also acceptable under FRAP 32(a)(7)(B) if they meet the following type-volume limitations:

* a principal brief is acceptable if it contains no more than 14,000 words, OR, if it uses a monospaced typeface and contains no more than 1,300 lines of text;
* a reply brief is acceptable if it contains half of the type volume allowed for a principal brief; and
* in determining the type volume, headings, footnotes and quotations count toward the word and line limitations. The table of contents, table of citations, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

If counsel chooses to submit her brief according to the type-volume limitations, as opposed to the 30 or 15 page limitations, she must include in her brief a certificate indicating that the brief complies with the type-volume limitation. FRAP 32(a)(7)(C) indicates that counsel may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either the number of words in the brief, or the number of lines of monospaced type.

RECENT THIRD CIRCUIT OPINIONS ON CRIMINAL LAW

by Karen Sirianni Gerlach, AFPD

450. United States v. Ketcham, No. 95-5002 (D. N.J. 3/29/96) - Mr. Ketcham pled guilty to transporting child pornography in interstate commerce in violation of 18 U.S.C. § 2252(a)(1); receiving, distributing, and reproducing child pornography that had been shipped in interstate commerce in violation of 18 U.S.C. § 2252(a)(2); and possessing child pornography that had been shipped in interstate commerce in violation of 18 U.S.C. § 2252(a)(4)(B). Mr. Ketcham appealed his sentence, arguing that the district court had erred when it failed to group the four counts of his conviction pursuant to U.S.S.G. §§ 3D1.2(b), 3D1.2(c) and 3D1.2(d).

The Third Circuit agreed with the district court that grouping under U.S.S.G. § 3D1.2(b) was inappropriate in this case because the offenses charged in each count involved different victims; the primary victims were the children depicted in the pornographic materials, and the pornographic materials at issue depicted different children. The Third Circuit also agreed with the district court's ruling that grouping pursuant to U.S.S.G. § 3D1.2(c) was inappropriate; U.S.S.G. § 3D1.2(c) requires grouping where "one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts." The Third Circuit also agreed with the district court's conclusion that U.S.S.G. § 3D1.2(d), dealing with the grouping of offenses which are "ongoing or continuous," did not apply.

Finally, the Third Circuit found that the district court's rejection of U.S.S.G. § 3D1.2(c) was inconsistent with its interpretation and application of U.S.S.G. § 2G2.2(b)(4) which provides for a five level increase where the defendant has engaged in a pattern of activity involving the sexual abuse or exploitation of a minor. The Third Circuit thus ruled that in light of the district court's ruling that grouping under § 3D1.2(c) was inappropriate, there was no basis for the § 2G2.2(b)(4) enhancement The Third Circuit therefore REVERSED the judgment of the district court and REMANDED for resentencing. (Becker and Stapleton, C.J.; Lancaster, D.J.; opinion by Stapleton.) **80 F.3d 789**

451. United States v. MacLeod, No. 94-5561 (D. N.J. 4/10/96) - Mr. MacLeod pled guilty to inducing minors to engage in sexual activity for the purpose of producing child pornography, and transporting minors across state lines with the intent to engage in sexual activity. This appeal challenged the propriety under the sentencing guidelines of the district court's upward departure which was based upon the number of victims harmed by the defendant.

The applicable guideline, U.S.S.G. § 3D1.4, allowed only six victims to be taken into account in formulating the sentence. Mr. MacLeod's offense, however, involved at least ten minors. The district court therefore departed upward by four sentencing levels to account for these additional victims.

The Third Circuit found the presence of additional, uncounted victims to be an appropriate basis for upward departure. The Third Circuit also found that the facts of record in Mr. MacLeod's case supported the district court's decision to depart. However, the Third Circuit found that the extent of the district court's departure was unreasonable for two reasons.

First, the district court's departure violated the principle of "declining marginal punishment" as enunciated in the commentary to Chapter 3, Part D of the of sentencing guidelines. Second, the departure exceeded the pattern for upward adjustments in both the theft and fraud sections of the guidelines (see U.S.S.G. §§ 2B1.1 and 2F1.1). The Third Circuit therefore VACATED the judgment of the district court, and REMANDED for resentencing. (Becker and Stapleton, C.J., Lancaster, D.J.; opinion by Becker.) **80 F.3d 860**

452. United States v. Edmonds, No. 93-1890 (E.D. Pa. 4/18/95) - Mr. Edmonds was convicted by a jury of violating the Continuing Criminal Enterprise statute ("CCE"), 21 U.S.C. § 848, which makes it a crime to organize, supervise, or manage five or more persons in a "continuing series of violations" of the federal narcotics laws. Mr. Edmonds argued on appeal that the district court erred in failing to instruct the jurors that, in order to convict, they must agree unanimously on which violations of the eight alleged constituted the three related violations necessary to establish a "continuing series." The Third Circuit held that the CCE statute requires juror unamity as to the identity of the related violations comprising the continuing series, and that the district court therefore erred. In so holding, the Third Circuit reaffirmed its prior decision in **United States v. Echeverri**, 854 F.2d 638 (3d Cir. 1988), with which other courts of appeals have disagreed, and declined to overturn **Echeverri**. The Third Circuit went on, however, to find that the error of the district court was harmless, and AFFIRMED.

(NOTE: This case was before the Third Circuit previously. See **United States v. Edmonds**, 52 F.3d 1236, 1241 (3d Cir.), vacated in part, 52 F.3d 1251 (3d Cir. 1995).) (This case was heard by the Court in banc; opinion by Becker, C.J.; concurrence and dissent by Stapleton, C.J.; concurrence and dissent by Alito, C.J.; concurrence and dissent by Garth, C.J., joined in by Sloviter, Greenberg, Nygaard, Alito and Roth, C.J.) **80 F. 3d 810**

453. United States v. Sokolow, Nos. 95-1292, 95-1367 (E.D. Pa. 4/18/96) - Mr. Sokolow was charged with having defrauded persons from whom he had collected more than $34 million in health insurance premiums. Based upon these charges, Mr. Sokolow was convicted by a jury of 107 counts of mail fraud in violation of 18 U.S.C. § 1341, 17 counts of money laundering in violation of 18 U.S.C. § 1957, and one count of criminal forfeiture in violation of 18 U.S.C. § 982. Following his conviction, Mr. Sokolow received a sentence of 92 months in prison, three years of supervised release, a $ 50,000 fine, $6,200 in special assessments, $690,246.34 in restitution, and the forfeiture of $2.1 million.

On appeal, Mr. Sokolow challenged the conviction and the sentence. The challenges to the conviction fell into two categories: evidentiary challenges and challenges to the jury instructions. The sentencing challenges fell into three categories: challenges to the sentence itself, challenges to the forfeiture order and challenges to the restitution order.

The following specific issues were presented in this appeal:

A. Evidentiary Issues

1) Was government exhibit B-110, a compilation and summary of over $7 million in unpaid insurance claims, inadmissible hearsay?

2) Did the district court improperly allow evidence of the alleged operation of Mr. Sokolow's insurance company as an unlicensed insurance company?

3) Did the district court abuse its discretion in admitting irrelevant and highly prejudicial victim impact testimony.

B. Jury Instruction Issues

1) Did the district court improperly instruct the jury on the scienter element of 18 U.S.C. § 1957, which makes it unlawful for a person to "knowingly engage or attempt to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity"?

2) Did the district court commit plain error in its jury instruction regarding the element of 18 U.S.C. § 1957 that requires the criminally derived property in a monetary transaction to have a value in excess of $10,000.

3) Was the district court's instruction regarding Mr. Sokolow's responsibility for actions of his agents erroneous?

C. Sentencing Issues

1) Under U.S.S.G. §§ 1B1.3 and 2S1.2(b), did the district court incorrectly determine the value of the funds involved in the money laundering offenses?

2) Did the district court incorrectly impose an abuse of position of trust enhancement pursuant to U.S.S.G. § 3B1.3?

D. Restitution Issue

1) Do the factual findings of the district court support the restitution order imposed?

E. Forfeiture Issue

1) Did the special verdict forms constitute a proper basis for the forfeiture?

2) Did the district court commit plain error in instructing the jury to determine whether the $125,000 was the amount "involved in the violation of money laundering"?

The district court AFFIRMED with regard to all of the issues except the one regarding the restitution order imposed. With regard to the restitution issue, the Third Circuit VACATED the order and REMANDED to the district court so that it could make specific factual findings regarding the actual amount of recoverable loss sustained by the claimants.

NOTE: This opinion was later vacated by order of the Court dated 7/26/96, and replaced by a new opinion filed on 7/26/96.

(Mansmann and Scirica, C.J., Restani, Crt. of Intntl. Trade; opinion by Restani, J.) **91 F.3d 396**

***454. United States v. Various Computers and Computer Equipment, Nos. 95-3195, 95-3378, 95-3379 (W.D. Pa. 4/30/96) -** This was an appeal in a civil forfeiture case. The primary issue presented was whether the civil forfeiture of computers and computer equipment pursuant to 18 U.S.C. § 981(a)(1)(C) constitutes punishment for double jeopardy purposes, when, before the order of civil forfeiture was entered, the district court ordered the defendant to pay restitution for the value of the computers. The Third Circuit ruled that no double jeopardy violation occurred, and AFFIRMED the order of forfeiture entered by the district court. (Greenberg, Roth and Rosenn, C.J.; opinion by Rosenn.) **82 F.3d 582**

455. United States v. Spiers, Nos. 95-5335 and 95-5336 (D. N.J. 5/2/96) - In this case, the Third Circuit was called upon to clarify its recent holding in **United States v. Holifield**, 53 F.3d 11 (3d Cir. 1995), in which the Court addressed the question of a district court's discretion to impose a concurrent or consecutive sentence under U.S.S.G. § 5G1.3(c). **Holifield** held that "although the district court must calculate the `reasonable incremental punishment' according to the [sentencing guidelines'] methodology, it need not impose that penalty." 53 F.3d at 16-17. In this case, the Third Circuit reaffirmed **Holifield**'s holding that a district court must determine the suggested "reasonable incremental punishment" under § 5G1.3(c). The Court went on to hold, however, that the imposition of the commentary's suggested penalty remains within a district court's discretion. The Third Circuit also held that a court may impose a different penalty or employ a different method for determining what constitutes a reasonable incremental punishment, as long as it indicates its reasons for imposing the penalty in such a way as to show that it has considered the metodology.

In Mr. Spiers' case, the district court performed the calculations necessary to determine the suggested penalty under § 5G1.3(c), and provided sufficient reasons for imposing a different penalty. The Third Circuit therefore AFFIRMED the sentence imposed by the district court. (Roth, Lewis and McKee, C.J.; opinion by Lewis.) **82 F.3d 1274**

456. United States v. Smith, No. 95-5257 (D. N.J. 5/6/96) - Mr. Smith was charged in New Jersey for conspiring to defraud his employer through a kickback scheme. On the same day, he was also indicted in Kentucky for conspiring to defraud the same employer, but with a different co-conspirator. Mr. Smith was acquitted of the Kentucky charges, and then filed a motion to dismiss the New Jersey prosecution on grounds of double jeopardy and collateral estoppel. The district court denied the motion to dismiss, and the Third Circuit AFFIRMED. The Third Circuit reasoned that Mr. Smith had not proven that the New Jersey and Kentucky conspiracies were interdependent or mutually supportive in any way. (Stapleton, McKee and Gibson, C.J.; opinion by Stapleton.) **82 F.3d 1261**

457. Young v. Vaughn, No. 95-1561 (E.D. Pa. 5/8/96) - This was an appeal from a district court order dismissing a habeas corpus petition filed under 28 U.S.C. § 2254 for lack of subject matter jurisdiction.

The district court ruled that there was no jurisdiction under 28 U.S.C. § 2254 because Mr. Young had served the sentence he was challenging before he filed his petition, and therefore was not "in custody" as required by the statute. The Third Circuit REVERSED the order of the district court dismissing for lack of jurisdiction.

The basis of the Third Circuit's ruling was that Mr. Young was serving another sentence when he filed his petition. That other sentence was a collateral result of the conviction being challenged. As a result, the "in custody" requirement of 28 U.S.C. § 2254 was satisfied, and jurisdiction existed.

The Third Circuit also addressed the issue of whether, aside from the issue of jurisdiction, Mr. Young could attack his expired conviciton in the context of his habeas corpus petition. The Third Circuit ruled that because Mr. Young's current sentence was a collateral result of his expired conviction, he could attack his expired sentence. (Becker, McKee and McKay, C.J.; opinion by Becker.) **83 F.3d 72**

458. United States v. Friedland, Nos. 95-5582, 95-5583, 95-5584 (D. N.J. 5/17/96) - This was an appeal from the district court's denial of Mr. Friedland's request to have his sentence reduced. Mr. Friedland made this request pursuant to Federal Rule of Criminal Procedure 35(b), and through petitions filed under 28 U.S.C. § 2255 and 28 U.S.C. § 2241. The basis for the requested sentence reduction was Mr. Friedland's claim that his continued incarceration through the denial of parole contravened the intentions of the district court when it sentenced him. Mr. Friedland also claimed that his continued incarceration was not justified through the parole guidelines, and that his cooperation with government agents in furthering prosecutions and the interdiction of narcotics entitled him to have his sentence shortened. The Third Circuit AFFIRMED the district court. (Greenberg, Roth and Rosenn, C.J.; opinion by Greenberg; concurrence/dissent by Rosenn.) **83 F.3d 1531**

459. Duffey v. Lehman, No. 94-9003 (M.D. Pa. 5/22/96) - This case was before this Court previously on an appeal from the district court's denial of a motion for stay. (See 84 F.3d 668.) A panel of the Third Circuit remanded the case for entry of an order granting Mr. Duffey a stay pending the presentation of a petition for writ of habeas corpus after the state courts ruled on his post-conviction petition. The Third Circuit then entered an order on February 12, 1996, granting the Commonwealth's petition for rehearing in banc, and thus vacating the panel's judgment and withdrawing its opinion.

Prior to the in banc argument, Mr. Duffey filed a motion to dismiss the appeal as moot. Mr. Duffey claimed that the appeal was moot because the district court had recently appointed him counsel to assist him in the investigation, preparation and filing of a federal habeas petition; as a result, his entitlement to a stay was now governed by a different standard than it had been previously. After the in banc oral argument, the Third Circuit agreed with Mr. Duffey that his appeal was moot, and dismissed the appeal and VACATED the judgment of the district court on the motion for stay. (In Banc Order.) **84 F.3d 668**

460. United States v. Gateward, No. 95-1839 (E.D. Pa. 5/24/96) - Mr. Gateward was convicted under 18 U.S.C. § 922(g)(1) for possession of a firearm by a convicted felon. On appeal Mr. Gateward challenged the constitutionality of 18 U.S.C. § 922(g)(1). More specifically, he argued that the statute was beyond Congress' regulatory power under the Commerce Clause. In making this argument, Mr. Gateward relied exclusively upon the Supreme Court's recent decision in **United States v. Lopez**, 115 S.Ct. 1624 (1995).

The Third Circuit ruled that § 922(g) was not unconstitutional, and AFFIRMED Mr. Gateward's conviction. The Third Circuit reasoned that **Lopez** does not undermine the constitutionality of statutes such as § 922(g) which contain a jurisdictional element that must be proved in each case (i.e. a firearm "in or affecting commerce"). In upholding the constitutionality of § 922(g), the Third Circuit relied on **United States v. Bass**, 404 U.S. 336 (1971) and **Scarborough v. United States**, 431 U.S. 563 (1977) and joined eight other courts of appeals which also upheld the statute.

As an aside, Mr. Gateward failed to preserve this issue at trial. However, because **Lopez** was decided after Mr. Gateward's conviction, the Third Circuit noted that the plain error standard did not apply, and that it would address this issue on the merits. (Sloviter, Sarokin and Rosenn, C.J.; opinion by Sloviter.) **84 F.3d 670**

461. United States v. Tabares, No. 95-5509 (D. N.J. 6/19/96) - The appellant was charged with conspiracy to distribute and possession with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846, and conspiracy to distribute and possession with intent to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 846. Ms. Tabares pled guilty to the cocaine charge, and the district court dismissed the marijuana charge. At sentencing, the district court stated that Ms. Tabares had been previously convicted of a drug offense and sent to prison, and that as a result, the district court saw no reason to be merciful toward her. The district court then imposed the maximum sentence. Contrary to what the district court stated, Ms. Tabares had two prior arrests, but no convictions, and no jail time. Neither the defense attorney nor the prosecutor corrected this inaccuracy. Operating under a plain error standard of review, the Third Circuit VACATED Ms. Tabares' sentence, and remanded for resentencing based upon accurate information regarding her prior record. (Sloviter, Sarokin and Oakes, C.J.; opinion by Sloviter.) **86 F.3d 326**

462. United States v. Moskovits, Nos. 94-1990 and 95-1048 (E.D. Pa. 6/25/96) - Mr. Moskovits was convicted by a jury of various narcotics offenses related to the possession and distribution of cocaine. Following the conviction, the district court granted a § 2255 motion to vacate the conviction on the grounds that Mr. Moskovits' trial counsel was ineffective. The district court also granted Mr. Moskovits' request to represent himself at his new trial. Mr. Moskovits was subsequently convicted at his second trial, and sentenced to a term of imprisonment which was five years longer than the sentence imposed following the first trial. In giving Mr. Moskovits a higher sentence, the district court reasoned that his decision to go to trial, rather than accept the

government's plea offer, constituted an aggravating circumstance. Mr. Moskovits appealed his second conviction and sentence, and raised the following issues:
1) that his right to testify in his own defense was abridged by the conditions imposed on the format of his testimony;
2) that he did not knowingly and intelligently waive his Sixth Amendment right to counsel; and
3) that even if his conviction was affirmed, the case should be remanded for resentencing because the sentence was based upon impermissible considerations.
The Third Circuit AFFIRMED the conviction, but VACATED the sentence and REMANDED the case for resentencing. (Stapleton, McKee and Norris, C.J.; opinion by Norris; concurrence/dissent by Stapleton.) **86 F.3d 1303**

***463. United States v. Brady, No. 95-3660 (W.D. Pa. 6/28/96) -** Mr. Brady pled guilty to possessing cocaine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(c). The district court sentenced Mr. Brady to a 15 month term of imprisonment to be followed by five years of supervised release. During the period of supervised release, the probation office alleged that Mr. Brady had violated his supervised release by, among other things, testing positive for cocaine and being arrested for attempted burglary. During a probation violation hearing, Mr. Brady admitted to violating his supervised release, and agreed to its revocation and the imposition of a term of imprisonment of 12 months plus one day. The district court ordered, over Mr. Brady's objection, that the sentence of 12 months and one day be followed by 36 months of supervised release. Mr. Brady appealed, challenging solely the 36 month term of supervised release.

Mr. Brady argued that by imposing a term of supervised release following the expiration of his term of imprisonment, the district court applied an amendment to the Sentencing Reform Act, 18 U.S.C. § 3551-86, that was not in effect when he was originally sentenced, and that the district court therefore violated the Ex Post Facto Clause of the United States Constitution. The law which was in effect before the amendment of 18 U.S.C. § 3582 provided that the district court could not impose a new term of supervised release when an original term of supervised release was revoked and imprisonment imposed as a sanction.

The Third Circuit found that no ex post facto violation had occurred, and AFFIRMED the district court's imposition of a 36 month term of supervised release. The Third Circuit reasoned that under the old law, Mr. Brady could have been sentenced to up to five years imprisonment for violation of his supervised release. Under the new law, Mr. Brady could have been sentenced to a combination of imprisonment and supervised release that was no greater than five years. Thus, the maximum period of time that Mr. Brady's freedom could be restrained under either the old law or the new law was five years. (Greenberg, Alito and McKee, C.J.; opinion by McKee.) **88 F.3d 225**

464. United States v. Jefferson, No. 95-7661 (M.D. Pa. 7/3/96) - Mr. Jefferson pled guilty to possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). The district court found that Mr. Jefferson had three previous convictions for serious drug offenses, and thus sentenced him under the Armed Career Criminal Act, 18 U.S.C. § 924(e) ("ACCA"). The ACCA provides that a person who violates 18 U.S.C. § 922(g) and has three previous convictions for a violent felony or a serious drug offense shall be imprisoned for not less than 15 years.

On appeal, Mr. Jefferson argued that he did not have the three prior convictions required for application of the ACCA. More specifically, Mr. Jefferson argued that with regard to two of the three previous offenses considered by the district court in applying the ACCA, he had pled guilty, but had not yet been sentenced at the time of the violation of § 922(g). As a result, Mr. Jefferson argued that these previous offenses did not amount to "previous convictions" for purposes of the

ACCA.

The Third Circuit ruled that the term "conviction" is defined by the jurisdiction in which the proceedings were held, and that under the laws of Pennsylvania and New Jersey, Jefferson's guilty pleas constituted convictions. AFFIRMED. (Stapleton, Greenberg and Aldisert, C.J.; opinion by Greenberg.) **88 F.3d 240**

465. United States v. Anderskow; United States v. Anchors, Nos. 95-5093, 95-5094 (D. N.J. 7/9/96) - The appellants were convicted for their participation in the Euro-American Money Fund Trust which was used to obtain fees from loan applicants and potential investors for nonexistent loans and investments. The appellants' convictions were for conspiracy to commit wire fraud, wire fraud and money laundering. The appellants raised two issues on appeal.

First, the appellants argued that the district court erred in allowing a coconspirator who had previously pled guilty to testify at trial and to give lay opinion testimony under Federal Rule of Evidence 701. The witness testified that the appellants had knowledge of the trust's fraudulent scheme. Second, the appellants argued that the district court erred in denying the appellants' post trial motions for judgments of acquittal. These motions contended that the government had failed to adduce sufficient evidence that the appellants were knowing participants in a scheme to defraud potential borrowers and/or investors.

AFFIRMED. (Cowen and Sarokin, C.J., Pollak, D.J.; opinion by Cowen.) **88 F.3d 245**

466. United States v. Voigt, No. 95-5092 (D. N.J. 7/9/96) - Mr. Voigt was convicted for his participation in the Euro-American Money Fund Trust and Financial International which were both used to obtain fees from loan applicants and potential investors for nonexistent loans and investments. Mr. Voigt's convictions were for conspiracy, wire fraud, money laundering and tax evasion.

Mr. Voigt raised the following issues on appeal:

1) Was the government's use of an acquitted codefendant, who Mr. Voigt alleges was counsel to the trust and to him personally, as a confidential informant against him "outrageous government conduct" in violation of the Fifth Amendment's Due Process Clause, and also a violation of Mr. Voigt's Sixth Amendment right to the effective assistance of counsel?

2) Did the district court violate Mr. Voigt's Sixth Amendment right to counsel of choice when, citing potential conflicts, it disqualified a third attorney whom Voigt sought to add to his defense team without holding a formal evidentiary hearing?

3) Was there sufficient evidence to support the money laundering convictions?

4) Do the money laundering statute (18 U.S.C. § 1956(a)(1)) and its forfeiture counterpart (18 U.S.C. § 982) require formal "tracing" where laundered funds have been commingled in a bank account with untainted funds?

5) Should the convictions on the tax evasion counts have been vacated because the government failed to prove an affirmative act of evasion as required by statute?

6) Did the district court err in ordering Mr. Voigt to pay restitution in the amount of $7,040,000.00 without first making findings of fact regarding his ability to pay?

7) Did the district court err in refusing to grant Mr. Voigt's motions for severance in light of the fact that his codefendants' defenses were antagonistic to his own?

The Third Circuit AFFIRMED Mr. Voigt's convictions and the order of restitution. The Third Circuit VACATED the judgment insofar as it incorporated an erroneous order of forfeiture, and REMANDED for further proceedings. (Cowen and Sarokin, C.J., Pollak, D.J.; opinion by Cowen.) **89 F.3d 1050**

***467. Burkett v. Love, No. 95-3525 (W.D. Pa. 7/12/96) -** Mr. Burkett filed a petition in the district court claiming that he was denied parole in retaliation for the successful pursuit of relief in various federal habeas corpus proceedings. The district court denied Mr. Burkett's petition on the merits and found a failure to exhaust state court remedies. Mr. Burkett argued on appeal that no corrective state process existed, and that the district court should have held an evidentiary hearing and conducted discovery.

The Third Circuit agreed with district court that Mr. Burkett had failed to exhaust state remedies. The Third Circuit also found that Mr. Burkett has available three potential ways of attacking the denial of parole in the Pennsylvania courts -- appeal, mandamus, or habeas corpus. The Third Circuit thus REMANDED the case to the district court with instructions to DISMISS Mr. Burkett's petition so that he may proceed in state court.
(Stapleton, Scirica and Weis, C.J.; opinion by Weis; concurrence by Stapleton.) **89 F.3d 135**

468. United States v. Roberson, No. 95-1827 (E.D. Pa. 7/16/96) - This was an appeal which challenged the district court's denial of the defendant's motion to suppress physical evidence seized by the police. The issue raised on appeal was whether an anonymous tip that contains only information readily observable at the time the tip is made may supply reasonable suspicion for a **Terry** stop in the absence of police observations of any suspicious conduct. The Third Circuit found that such a tip did not supply reasonable suspicion for a **Terry** stop, and thus REVERSED the judgment of the district court. (Becker, Nygaard and Lewis, C.J.; opinion by Becker.) **90 F.3d 75**

469. Dickerson v. Vaughn, Nos. 95-1525, 95-1353 (E.D. Pa. 7/24/96) - These were appeals from denials of habeas corpus relief in the district court. The petitioners argued that in the state court criminal proceedings, they would not have pleaded nolo contendere if they had known that their pleas would prevent them from appealing a pretrial ruling. The Pennsylvania Superior Court found that the pleas were induced by faulty legal advice by trial counsel, and that the petitioners were entitled to new trials. The Pennsylvania Supreme Court reversed, holding that the petitioners' responses during a plea colloquy in the state trial court barred them from challenging the voluntariness of their pleas.

On appeal to the Third Circuit from the district court's denial of habeas corpus relief, the Third Circuit found that established federal law prohibits giving such preclusive effect to plea colloquies, and thus concluded that habeas corpus relief was appropriate. The Third Circuit REVERSED the district court's denials of habeas coprus relief, and REMANDED the cases to the district court with instructions that the petitioners be released from custody within 120 days, unless within that time, the Commonwealth of Pennsylvania allows the petitioners to withdraw their pleas and grants new trials, or, in the alternative, petitioners are granted the right to file conditional appeals nunc pro tunc challenging the denial of their motions of acquittal on double jeopardy grounds. (Stapleton, Scirica and Weis, C.J.; opinion by Weis.) **90 F.3d 87**

470. United States v. Jenkins, No. 95-1606 (E.D. Pa. 7/26/96) - This was an appeal from a conviction on drug possession and related firearms charges The appellant challenged the sufficiency of the evidence to establish his constructive possession of drugs found near him. On appeal, the Third Circuit found that the evidence showed only that the appellant was in an acquaintance's apartment and was physically near the drugs and drug distribution paraphernalia; the evidence did not show that the appellant was in actual possession of the drugs or drug distribution paraphernalia, or that the appellant had dominion and control over the drugs. The Third Circuit therefore found that the evidence was insufficient, and REVERSED the conviction on all counts. (Stapleton, Scirica and

Cowen, C.J.; opinion by Stapleton; dissent by Cowen.)
CONGRATULATIONS TO THE PHILADELPHIA DEFENDER'S OFFICE!!!! **90 F.3d 814**

471. United States v. Sokolow, No. 95-1367 (consolidated with No. 95-1292) (E.D. Pa. 7/26/96) - Mr. Sokolow was charged with having defrauded persons from whom he had collected more than $34 million in health insurance premiums. Based upon these charges, Mr. Sokolow was convicted by a jury of 107 counts of mail fraud in violation of 18 U.S.C. § 1341, 17 counts of money laundering in violation of 18 U.S.C. § 1957, and one count of criminal forfeiture in violation of 18 U.S.C. § 982. Following his conviction, Mr. Sokolow received a sentence of 92 months in prison, three years of supervised release, a $ 50,000 fine, $6,200 in special assessments, $690,246.34 in restitution, and the forfeiture of $2.1 million.

On appeal, Mr. Sokolow challenged the conviction and the sentence. The challenges to the conviction fell into two categories: evidentiary challenges and challenges to the jury instructions. The sentencing challenges fell into three categories: challenges to the sentence itself, challenges to the forfeiture order and challenges to the restitution order.

The following specific issues were presented in this appeal:

A. Evidentiary Issues

1) Was government exhibit B-110, a compilation and summary of over $7 million in unpaid insurance claims, inadmissible hearsay?

2) Did the district court improperly allow evidence of the alleged operation of Mr. Sokolow's insurance company as an unlicensed insurance company?

3) Did the district court abuse its discretion in admitting irrelevant and highly prejudicial victim impact testimony.

B. Jury Instruction Issues

1) Did the district court improperly instruct the jury on the scienter element of 18 U.S.C. § 1957, which makes it unlawful for a person to "knowingly engage or attempt to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity"?

2) Did the district court commit plain error in its jury instruction regarding the element of 18 U.S.C. § 1957 that requires the criminally derived property in a monetary transaction to have a value in excess of $10,000.

3) Was the district court's instruction regarding Mr. Sokolow's responsibility for actions of his agents erroneous?

C. Sentencing Issues

1) Under U.S.S.G. §§ 1B1.3 and 2S1.2(b), did the district court incorrectly determine the value of the funds involved in the money laundering offenses?

2) Did the district court incorrectly impose an abuse of position of trust enhancement pursuant to U.S.S.G. § 3B1.3?

D. Restitution Issue

1) Do the factual findings of the district court support the restitution order imposed?

E. Forfeiture Issue

1) Did the special verdict forms constitute a proper basis for the forfeiture?

2) Did the government fail to demonstrate that the forfeiture of substitute assets was appropriate?

3) Did the district court commit plain error, and violate the Ex Post Facto clause of the Constitution, by instructing the jury to determine whether $125,000 was the amount "involved in the

violation of money laundering," in accordance with a provision of the forfeiture statute which took effect after the date of the money laundering?

The district court AFFIRMED with regard to all of the issues except the one regarding the restitution order imposed. With regard to the restitution issue, the Third Circuit VACATED the order and REMANDED to the district court so that it could make specific factual findings regarding the actual amount of recoverable loss sustained by the claimants.

NOTE: This opinion replaced another opinion by this Court which was filed on 4/18/96. (Mansmann and Scirica, C.J., Restani, Crt. of Intntl. Trade; opinion by Restani) **91 F.3d 396**

472. United States v. Balter; United States v. Cutler; United States v. DeJesus, Nos. 94-5593, 94-5625, 94-5626 (D. N.J. 7/29/96) - This was a consolidated appeal from the convictions of all three appellants for a murder-for-hire in violation of 18 U.S.C. §§ 1958 and 2. Two of the defendants were also convicted of mail fraud in violation of 18 U.S.C. §§ 1341 and 1342.

The appellants raised numerous issues:

1) Did the district court err in failing to grant a motion for severance in light of the fact that the defendants had mutually antagonistic defenses at trial?

2) Did the district court err in admitting taped pre-indictment telephone conversations which were admitted in violation of New Jersey Rule of Professional Conduct 4.2, which prohibits an attorney from contacting a represented party?

3) Did the district court violate Federal Rule of Evidence 404(b) by admitting certain statements that showed nothing more than a propensity to commit crimes?

4) Did the government violate the rule of **Doyle v. Ohio**, 426 U.S. 610 (1976) by commenting during summation on the post-arrest silence of one of the defendants, for the purpose of impeaching a subsequent exculpatory statement?

5) Did the government improperly shift the burden of proof in its closing argument by commenting on defense counsel's failure to explain why the defendant was at the scene of the crime at all if he was not the person who actually did the shooting?

6) Was a prejudicial variance created by the government's retreat from the theory contained in the indictment: i.e., that the defendant was the person who actually did the shooting?

7) Did the district court violate Federal Rule of Evidence 403 by admitting a high school yearbook photograph of the defendant?

8) Does the cumulative effect of the errors at trial require a new trial?

The Third Circuit AFFIRMED with regard to all issues. (Mansmann, Alito and Lewis, C.J.; opinion by Alito.) **91 F.3d 427**

473. United States v. Ernest D. Preate, Jr., PG Publishing, No. 95-7651 (M.D. Pa. 7/30/96) - This appeal presented the question of whether the district court abused its discretion in declining to continue a sentencing proceeding so that a newspaper could fully litigate its motion to unseal sentencing documents. The defendant was sentenced by the time of this appeal, and the district court had unsealed the requested material after sentencing; nonetheles, the Third Circuit addressed this appeal on the grounds that the continuance question was capable of repetition yet evading review, and that the appeal was therefore not moot. The Third Circuit concluded that the district court did not abuse its discretion in refusing to postpone the sentencing hearing, and therefore AFFIRMED the district court. (Becker and Mansmann, C.J., Brotman, D.J.; opinion by Becker.) **91 F.3d 10**

474. United States v. Conley, No. 95-3556 (W.D. Pa. 8/1/96) - This was an appeal from a judgment of conviction and sentence on charges of gambling and money laundering. The appellant raised three issues:

1) Is § 1B1.2(d) of the sentencing guidelines constitutional? Section 1B1.2(d) requires the sentencing court to determine beyond a reasonable doubt the objects of a multi-object conspiracy after a jury returns a general guilty verdict on the conspiracy charge which does not specify the objectives of the conspiracy. The appellant argued that permitting the court to determine the objectives of the conspiracy violated his Sixth Amendment right to a jury trial, and the Due Process Clause of the Fifth Amendment.

2) Did the district court err in limiting the cross-examination of government witnesses regarding information necessary to the appellant's claim that he lacked the knowledge sufficient to find him guilty of money laundering?

3) Did the district court err in admitting evidence that was obtained in violation of the Fourth Amendment when state police officers failed to knock and announce their presence and authority in executing a search warrant?

The Third Circuit AFFIRMED the district court with regard to all three issues. (Greenberg, Alito and McKee, C.J.; opinion by Greenberg.) (THIS CASE WAS HANDLED BY PANEL ATTORNEY BRUCE ANTKOWIAK.) **92 F.3d 157**

475. Meyers v. Gillis, No. 95-1850 (E.D. Pa. 8/23/96) - This is an appeal from the district court's grant of habeas corpus relief pursuant to 28 U.S.C. § 2254. In granting habeas corpus relief, the district court found that there was no factual basis developed prior to the entry of Mr. Meyers' guilty plea, and reasoned that the absence of an on-the-record factual basis violated Pennsylvania Rule of Criminal Procedure 319.

On appeal, the Third Circuit held that Mr. Meyers did not rebut, as required by 28 U.S.C. § 2254(d)(8), the statutory presumption of correctness regarding the state court factual findings. The Third Circuit further held that the Due Process Clause of the Fourteenth Amendment to the United States Constitution does not require an on-the-record development of the factual basis supporting a guilty plea before the entry of the plea; instead, due process requires only that the guilty plea be knowing and intelligent. Thus, the failure of a state court to elicit the factual basis for the plea on the record before it is entered does not in itself provide an independent ground for habeas corpus relief under 28 U.S.C. § 2254. The Third Circuit therefore REVERSED the district court's grant of habeas corpus relief, and REMANDED for a determination of whether Mr. Meyers' guilty plea was voluntary and intelligent. (Alito, McKee and Garth, C.J.; opinion by Alito.) **93 F.3d 1147**

476. Fowler v. United States Parole Commission, No. 95-5226 (D. N.J. 9/4/96) - This is an appeal from an order of the district court denying Mr. Fowler's petition for habeas corpus relief under 28 U.S.C. § 2241. The issue presented in this appeal was whether the United States Parole Commission has the authority to impose a new term of special parole under 21 U.S.C. § 841(c) following revocation of the special parole term. The Third Circuit concluded that the Parole Commission does maintain jurisdiction over Mr. Fowler under § 841(c), but that the nonincarcerative sanction that it can impose is not special parole, but traditional parole. To the extent that the Parole Commission's regulations at 28 C.F.R. §§ 2.52(b) and 2.57(c) allow a contrary result, the Third Circuit found them to be inconsistent with § 841(c). The Third Circuit thus VACATED the judgment of the district court and REMANDED for further proceedings. (Becker, Roth and McKee, C.J.; opinion by McKee.) **94 F.3d 835**

477. Sistrunk v. Vaughn, No. 95-1848 (E.D. Pa. 9/19/96) - This was an appeal by the Commonwealth from the district court's grant of habeas corpus relief. The habeas corpus petition filed in the district court alleged the following three grounds for relief:
1) that the prosecutor exercised peremptory challenges at trial to exclude black venire persons from the jury in violation of the Equal Protection Clause;
2) that the petitioner was denied effective assistance of counsel in violation of the Sixth Amendment because his appellate counsel failed to press his Equal Protection claim on direct appeal;
3) other misconduct of the prosecutor at trial deprived the petitioner of his liberty without due process of law.

The Third Circuit found that appellate counsel was not ineffective for failing to challenge the elimination of African-Americans from the jury; such a challenge would have required counsel to anticipate the Supreme Court's then upcoming decision in **Batson v. Kentucky**, 471 U.S. 1052 (1985). Counsel cannot be deemed ineffective for failing to anticipate a change in the law -- even where, as was the case with **Batson**, many lawyers were predicting that such a decision would occur. Furthermore, counsel will not be deemed ineffective where he makes a reasoned legal determination regarding which issues should be pursued. With regard to the actual **Batson** claim, the Third Circuit found that consideration of this issue was barred under **Coleman v. Thompson**, 501 U.S. 722 (1991). Finally, with regard to the prosecutorial misconduct claims, the Third Circuit noted that the district court did not reach these claims, but that it will have a chance to do so on remand.

The Third Circuit REVERSED the district court's order granting habeas corpus relief and REMANDED for further proceedings. (Stapleton, Greenberg and Aldisert, C.J.; opinion by Stapleton.) **96 F.3d 666.**

***478. Doctor v. Walters, No. 95-3484 (W.D. Pa. 9/24/96) -** This was an appeal from the dismissal of a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254.

Mr. Doctor was charged in state court with aggravated assault, and opted to be tried in a bench trial. After the presentation of the Commonwealth's case, a lunch recess was held, and Mr. Doctor fled. Approximately two months later, the trial court entered a guilty verdict against Mr. Doctor. The trial court entered this verdict without conducting any further proceedings or attempting to inform Mr. Doctor, his attorney or the Commonwealth about its intention to enter a verdict. Mr. Doctor remained at large for approximately five years before being apprehended.

After unsuccessful results in various state court proceedings, Mr. Doctor filed a federal habeas corpus petition pursuant to 28 U.S.C. § 2254. The primary issue raised in the § 2254 petition was that Mr. Doctor was convicted in absentia, and deprived of his Sixth Amendment right to a trial. The district court dismissed the petition on the grounds that Mr. Doctor had failed to exhaust his state remedies and that the Pennsylvania courts had refused to consider the merits of his direct appeals based on an independent and adequate state procedural rule.

On appeal, the Third Circuit agreed with the district court that Mr. Doctor did not exhaust his state remedies, and also found that it would not have been futile to require him to raise his unexhausted claims under Pennsylvania's Post Conviction Relief Act. The Third Circuit therefore AFFIRMED the district court's dismissal of Mr. Doctor's petition.

Because Mr. Doctor can resubmit his petition with the exhausted claims, the Third Circuit went on to address the district court's second basis for dismissing the petition. With regard to this second basis, the district court held that the fugitive forfeiture rule, as applied to Mr. Doctor, was not an independent and adequate state procedural rule which would bar federal habeas corpus review. (Scirica and Roth, C.J., O'Neill, D.J.; opinion by O'Neill; concurrence by Scirica.) **96 F.3d 675.**

479. United States v. Molina-Guevara, No. 94-5754 (D. N.J. 9/26/96) - The appellant was convicted of importing and conspiring to import, more than 500 grams of cocaine, and was sentenced to an 84 month term of imprisonment. On appeal, the appellant challenged both her conviction and sentence. The Third Circuit found two of the issues raised to be meritorious, and addressed only those two issues. Those two issues were the following:

1) Did the district court abuse its discretion by refusing to grant a mistrial when the government asserted during closing argument that a government agent, if called to testify, would have given inculpatory information about the defendant?

2) Did the district court abuse its discretion by refusing to grant a mistrial when the government, during closing argument, improperly vouched for the credibility of two government witnesses?

The Third Circuit REVERSED the judgment of conviction, and REMANDED for a new trial. (Stapleton, Mansmann and Lewis, C.J.; opinion by Stapleton.) **96 F.3d 698.**

480. United States v. McQuilkin, No. 95-2092 (E.D. Pa. 10/15/96) - Mr. McQuilkin sold methamphetamine within 1,000 feet of an elementary school in Philadelphia. A jury found him guilty of conspiracy to distribute methamphetamine in violation of 21 U.S.C. § 846; distribution of methamphetamine in violation of 21 U.S.C. § 841(a); distribution of methamphetamine within 1,000 feet of a school in violation of 21 U.S.C. § 860; and use of a communication facility in furtherance of a drug trafficking crime in violation of 21 U.S.C. § 843(b).

At sentencing, the district court determined that Mr. McQuilkin was a career offender under U.S.S.G. § 4B1.1. This career offender classification raised his criminal history category from III to VI, his offense level to 37, and the applicable guideline range to 360 months to life. Mr. McQuilkin ultimately received a total sentence of 360 months imprisonment.

On appeal, Mr. McQuilkin argued that he did not qualify as a career offender. He also argued that a downward departure was warranted because he suffered from a "severe medical impairment" and because the career offender designation overstated his criminal history. Finally, Mr. McQuilkin argued that the district court used an incorrect "offense statutory maximum" to calculate the offense level under U.S.S.G. § 4B1.1.

The basis of Mr. McQuilkin's argument that he did not qualify as a career offender was that one of the two predicate offenses which the district court used to designate him as a career offender was not a "crime of violence" as required by U.S.S.G. § 4B1.1. The prior offense which Mr. McQuilkin contested was an aggravated assault which occurred when, while under the influence of alcohol and drugs, he crashed a motorcycle and severely injured himself and a passenger. Mr. McQuilkin argued that this aggravated assault conviction resulted from "mere recklessness" and therefore did not amount to a crime of violence.

The Third Circuit agreed with Mr. McQuilkin that his aggravated assault conviction was based upon recklessness. Nonetheless, the Third Circuit found that aggravated assault is specifically enumerated in the Application Notes to the guidelines as a crime of violence, and that the district court's use of this conviction as a predicate offense for career offender status therefore had to be affirmed. The Third Circuit went on, however, to express its misgivings about the categorization of "purely reckless" crimes as crimes of violence, and asked the Sentencing Commission to reconsider its position on such crimes.

The Third Circuit also affirmed with regard to the departure issues. The Court found that the district court's refusal to depart downward on Mr. McQuilkin's criminal history category was not reviewable because it was a discretionary refusal to depart and because the district court did not misapprehend the law when it refused to depart. The Court also found that the district court's ruling that Mr. McQuilkin's physical and medical impairments were not sufficiently extraordinary to

warrant departure under U.S.S.G. § 5H1.4 was not clearly erroneous.

Finally, the Third Circuit rejected Mr. McQuilkin's argument that the district court used an incorrect "offense statutory maximum" to calculate the offense level under U.S.S.G. § 4B1.1. In reaching this conclusion, the Court found that Application Note 2 to U.S.S.G. § 4B1.1 and 28 U.S.C. § 994(h) are fatally inconsistent. AFFIRMED. (Scirica and Roth, C.J., Restani, Crt. of Intntl. Trade; opinion by Scirica.) **97 F.3d 723.**

481. Santana v. United States, No. 96-5276 (D. N.J. 10/18/96) - This opinion addressed Mr. Santana's request that the Third Circuit grant him a certificate of appealability so that he could challenge the district court's denial of habeas corpus relief under 28 U.S.C. § 2255.

The basis of Mr. Santana's § 2255 petition was that his counsel was ineffective in two ways. First, his counsel failed to object to an alleged miscalculation of a Sentencing Guideline range, and second, his counsel failed to correct the district court's alleged misconception of its ability to reduce his guideline level.

The district court found that Mr. Santana's habeas corpus petition lacked merit, and denied the petition for writ of habeas corpus. Mr. Santana then filed a notice of appeal to the Third Circuit. In light of the recent amendments to the habeas corpus law, the Third Circuit construed the notice of appeal as a request for a certificate of appealability. See 28 U.S.C. § 2253(c)(1)(B). In order to determine whether or not Mr. Santana was entitled to a certificate of appealability, the Court had to first determine whether the filing fee payment requirements of the Prison Litigation Reform Act ("PLRA") of 1995 apply to in forma pauperis habeas corpus petitions and appeals. The Third Circuit concluded that the payment requirements of the PLRA do not apply to habeas corpus cases or appeals brought under 28 U.S.C. §§ 2254 and 2255, and then went on to address the merits of Mr. Santana's request for a certificate of appealability.

The Third Circuit concluded that Mr. Santana's petition for a certificate of appealability was without merit, and thus denied his request for a certificate of appealability. In denying the certificate, the Third Circuit reasoned that the district court was required to impose the statutory minimum sentence, rather than the guideline sentence, because Mr. Santana's statutory minimum sentence exceeded his guideline sentence. Thus, the failure of Mr. Santana's counsel to object to the guideline sentence was of no consequence, and did not amount to ineffective assistance of counsel. (Becker, Alito and McKee, C.J.; opinion by Becker.) **98 F.3d 752**.

482. United States v. Orozco, No. 95-1572 (E.D. Pa. 10/18/96) - Mr. Orozco was convicted of distributing 1080 grams of cocaine within 1,000 feet of a school zone in violation of the Drug-Free School Zones Act, 21 U.S.C. § 845(a). On appeal, Mr. Orozco argued that Congress exceeded its authority under the Commerce Clause by enacting the Drug-Free School Zones Act. Mr. Orozco's argument was based upon the United States Supreme Court's recent decision in **United States v. Lopez**, 115 S.Ct. 1624 (1995), which struck down the Gun-Free School Zones Act as exceeding Congress' power under the Commerce Clause.

The Third Circuit held that Congress did not exceed its power under the Commerce Clause in enacting the Drug-Free School Zones Act. The Court reasoned that the Gun-Free School Zones Act which was struck down in **Lopez** was distinguishable from the Drug-Free School Zones Act which was at issue in this case. More specifically, the Court reasoned that the Gun-Free School Zones Act punished "mere possession of a firearm near a school," whereas the Drug-Free School Zones Act punished the sale of illegal drugs near a school. The Court found the sale of illegal drugs, unlike the mere possession of a firearm, to be "an inherently commercial activity," and "an economic activity that, through repetition, substantially affects interstate commerce." AFFIRMED.

(Greenberg, Nygaard and Lay, C.J.; opinion by Nygaard.) **98 F.3d 105.**

483. United States v. Sriyuth, No. 95-7598 (M.D. Pa. 10/18/96) - Mr. Sriyuth was convicted of kidnapping and use of a firearm in relation to a kidnapping in violation of 18 U.S.C. §§ 1201(a)(1) and 924(c). On appeal, Mr. Sriyuth argued that the district court erred in failing to exclude, under Federal Rules of Evidence 404(b) and 403, evidence that the purpose or motive for the kidnapping was the sexual assault of the victim. The Third Circuit found that the sexual assault evidence was probative of motive as well as the victim's nonconsent to the interstate transportation, and was therefore admissible under Rule 404(b). The Third Circuit also found that the probative value of the sexual assault evidence outweighed the risk of undue prejudice under Rule 403.

Mr. Sriyuth also challenged the district court's denial of his suppression motion which sought the suppression of his statement to the FBI. More specifically, Mr. Sriyuth argued that his statement was not made knowingly or intelligently, and that it was involuntary as the result of having been obtained through the exertion of promises or improper influence. The Third Circuit rejected these arguments and upheld the district court's denial of the suppression motion.

Mr. Sriyuth further argued on appeal that there was insufficient evidence for the jury to find that he had held the victim against her will at the time he transported her across state lines. The Third Circuit rejected this argument.

Finally, Mr. Sriyuth challenged two of the district court's jury instructions. First, Mr. Sriyuth argued that the district court had not properly defined the offense of kidnapping. Second, Mr. Sriyuth contested the district court's written response to a jury question which required a supplemental jury instruction; Mr. Sriyuth had no problem with the substance of the supplemental charge, but argued that it should have been read to the jury, rather than being given in writing. The Third Circuit upheld the validity of both jury instructions at issue. AFFIRMED. (Becker and Mansmann, C.J., Schwarzer, D.J.; opinion by Mansmann,) THIS CASE WAS HANDLED BY MELINDA GHILARDI, AFPD FOR THE M.D. OF PA. **98 F.3d 739.**

484. Moscato v. Federal Bureau of Prison; L.S.C.I. Allenwood, No. 95-7065 (10/22/96) - This was an appeal from the denial of a petition for habeas corpus relief which was filed pursuant to 28 U.S.C. § 2241. The petition for habeas corpus relief challenged the constitutionality of an institutional disciplinary hearing that resulted in certain adverse findings and the loss of Mr. Moscato's good-time credits.

The issue on appeal was what effect a procedural default of administrative remedies has upon a federal prisoner's request for habeas corpus relief under 28 U.S.C. § 2241. The Third Circuit held that a prisoner's procedural default of his administrative remedies bars judicial review of his habeas petition unless he can show cause for the default and prejudice attributable thereto. Thus, because Mr. Moscato committed a procedural default of his administrative remedies by filing an untimely appeal, and because he could not show cause for the default, the Third Circuit held that it was barred from reviewing the merits of his § 2241 petition. AFFIRMED. (Becker, Stapleton and Michel, C.J.; opinion by Becker.) **98 F.3d 757.**

485. United States v. Ceccarani, No. 96-7026 (M.D. Pa. 10/22/96) - In this appeal, the defendant challenged the sentencing court's refusal to grant a two-point reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a). The basis of the district court's refusal to grant the reduction was Mr. Ceccarani's failure to participate in a post-indictment drug rehabilitation program, as well as his positive drug tests while on pre-trial release. Mr. Ceccarani argued that despite his positive drug tests and failure to participate in drug rehabilitation, he was entitled to an acceptance

of responsibility reduction for several reasons: he cooperated with the federal government; he consented to the search of his residence; he offered full restitution; he promptly surrendered to authorities after the offense; and he assisted in the recovery of the firearms involved in the offense.

Agreeing with six other courts of appeal which have reviewed this issue, and disagreeing with one other court of appeal, the Third Circuit upheld the district court's denial of the reduction. The Court specifically held that "a sentencing judge may, in the exercise of his discretion, consider unlawful conduct committed by the defendant while on pre-trial release awaiting sentencing as well as any violations of the conditions of his pre-trial release in determining whether [to] grant a reduction in the offense level for acceptance of responsibility under U.S.S.G. § 3E1.1(a)." AFFIRMED. (Nygaard, Roth and Rosenn, C.J.; opinion by Rosenn.) **98 F.3d 126.**

***486. United States v. Taylor, No. 95-3675 (W.D. Pa. 10/25/96) -** This was an appeal from the district court's denial of a motion for modification of sentence. The sole issue presented was whether Mr. Taylor's criminal history contained the two predicate crimes of violence needed to sustain his classification as a career offender under U.S.S.G. § 4B1.1.

At the original sentencing hearing, the district court found that Mr. Taylor's prior conviction for aggravated assault and his two prior convictions for statutory rape constituted prior convictions for crimes of violence; the district court thus found that Mr. Taylor had at least two prior convictions for crimes of violence, and classified him as a career offender pursuant to U.S.S.G. § 4B1.1. Subsequent to Mr. Taylor's sentencing, the commentary to § 4B1.1 was amended. The amendments indicated that the determination of whether a prior conviction amounts to a crime of violence for career offender purposes should now be based upon an examination of the conduct charged in the count of conviction. The amendments were made retroactive.

Based upon these amendments, Mr. Taylor filed a motion for modification of sentence, arguing that his two prior convictions for statutory rape did not amount to crimes of violence under the recent amendments to the commentary. Mr. Taylor further argued that the disqualification of the statutory rape convictions meant that he had only one prior conviction for a crime of violence (the aggravated assault conviction which he was not contesting) and at least two were needed to sustain his career offender status. The district court rejected this argument, and Mr. Taylor filed the within appeal.

On appeal, the Third Circuit found that it need not determine whether or not the statutory rape convictions amounted to crimes of violence because an alternative means of affirming the district court existed. Specifically, the information charging the second statutory rape conviction also contained a charge of indecent exposure of which Mr. Taylor was convicted. Furthermore, the count of the information charging indecent exposure contained indicia of violence: "[t]he actor . . . forced [the victim] onto her bed and while holding her down opened his trousers and pulled out his penis." Thus, the Court found that the indecent exposure conviction, combined with the aggravated assault conviction which Mr. Taylor did not contest, amounted to the two predicate crimes of violence needed to classify Mr. Taylor as a career offender.

The Third Circuit had no problem substituting the indecent exposure conviction for the two statutory rape convictions upon which the district court had relied. The Third Circuit reasoned that one of the statutory rape convictions had been merged with the indecent exposure conviction for purposes of assessing criminal history points in the presentence report. Furthermore, the Court cited case law for the proposition that an "appellee may assert any ground in support of the judgment below, whether or not that ground was relied upon or even considered by the district court." AFFIRMED. (Scirica and Roth, C.J., Restani, Crt. of Intntl. Trade; opinion by Restani.) **98 F.3d 768.**

***487. United States v. Goggins, No. 96-3154 (W.D. Pa. 10/30/96) -** This case dealt with the issue of whether the district court properly imposed a sentence enhancement pursuant to U.S.S.G. § 2D1.1(b)(1), after a conviction under 18 U.S.C. § 924(c) was dismissed pursuant to **Bailey v. United States**, 116 S.Ct. 501 (1995). The Third Circuit upheld the district court's sentence enhancement. AFFIRMED. (Mansmann and Greenberg, C.J., Hillman, D.J.; opinion by Greenberg.) **99 F.3d 116.**

488. United States v. Beverly, No. 96-1420 (E.D. Pa. 11/7/96) - A jury convicted Mr. Beverly of one count of robbery of mail matter and property from a postal carrier in violation of 18 U.S.C. § 2114, and one count of use of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c). On appeal, Mr. Beverly challenged the sufficiency of the evidence regarding the § 924(c) conviction. More specifically, Mr. Beverly argued that the government failed to prove beyond a reasonable doubt that the device described by the robbery victim at trial as a gun met the statutory definition of "firearm." The only evidence at trial was the testimony of the victim who testified that Mr. Beverly threatened him with a gun during the course of the robbery, and that the gun was a chrome-plated revolver. Mr. Beverly argued that this testimony was inadequate because the witness did not testify as to the gun's weight, length, or to the fact that he had seen the gun for more than a "fleeting glance." The Third Circuit agreed with the district court that the witness' testimony regarding the gun was sufficient evidence from which a jury could conclude that Mr. Beverly utilized a firearm in the commission of the crime. AFFIRMED. (Sloviter, McKee and Rosenn, C.J.; opinion by Sloviter.) **99 F.3d 570.**

489. Berryman v. Morton, No. 95-5468 (D. N.J. 11/14/96) - This was an appeal from the district court's grant of habeas corpus relief pursuant to 28 U.S.C. § 2254. The district court granted habeas corpus relief on the grounds that Mr. Berryman had been denied effective assistance of counsel. On appeal, the Third Circuit found that counsel's errors at trial were not the result of any trial strategy, and amounted to ineffective assistance of counsel. The Third Circuit thus AFFIRMED the district court's grant of habeas corpus relief. **NOTE**: This case contains a discussion regarding the potential retroactivity of the new habeas law. (Becker, Roth and McKee, C.J.; opinion by McKee.) **100 F.3d 1089.**

490. United States v. Bennett, No. 95-2079 (E.D. Pa. 11/19/96) - This was an appeal which challenged only the sentence imposed. The appellant raised the following issues:

1) Did the district court err in using Mr. Bennett's three Pennsylvania burglary convictions as predicate offenses for purposes of sentencing him as an armed career criminal under 18 U.S.C. § 924(e)? More specifically, is Pennsylvania's burglary statute broader than the generic definition of burglary that Congress incorporated into § 924(e)? Also, could a conviction for which Mr. Bennett failed to appear for sentencing count as a predicate offense for purposes of sentence enhancement under § 924(e)?

2) Did the district court err in assuming for sentencing purposes that the cocaine base involved in this offense was crack cocaine?

3) Did the district court err by delegating to the probation officer the task of establishing the installment schedule by which Mr. Bennett was to pay the fine imposed as part of his sentence?

The Third Circuit concluded that Pennsylvania's burglary statute is broader than § 924(e)'s generic definition of burglary. Furthermore, the record indicates that Mr. Bennett's burglary convictions included all the elements of generic burglary. The Third Circuit further concluded that the adjudication of the burglary conviction for which Mr. Bennett failed to appear for sentencing occurred before the federal offense for which he was sentenced under § 924(e). As a result, that

conviction could be used as a predicate offense for purposes of sentence enhancement under § 924(e). The Third Circuit thus AFFIRMED the district court's application of § 924(e), and its use of the three burglary convictions as predicate offenses under § 924(e), to enhance Mr. Bennett's sentence.

The Third Circuit did, however, REMAND for an evidentiary hearing on the issue of whether the cocaine base involved in the case was crack. The Third Circuit also concluded that the probation officer was not the appropriate person to determine the repayment schedule for Mr. Bennett's fine. The Third Circuit thus REMANDED so that the district court could set the fine repayment schedule. (Stapleton and Nygaard, C.J., Mazzone, D.J.; opinion by Stapleton.) **100 F.3d 1105.**

491. United States v. Stansfield, No. 95-7529 (M.D. Pa. 12/2/96) - This was an appeal from a conviction by jury of mail fraud in violation of 18 U.S.C. § 1341, money laundering in violation of 18 U.S.C. § 1957, tampering with a witness in violation of 18 U.S.C. § 1512(a)(1)(C), and criminal forfeiture pursuant to 18 U.S.C. § 982. On appeal, the appellant raised three different grounds for relief.

First, Mr. Stansfield argued that his convictions on several of the counts should be reversed and remanded for a new trial due to irregularities during jury deliberations. More specifically, several female jurors indicated that certain male jurors had used gender-based insults and intimidation to pressure them into rendering guilty verdicts on several of the counts.

Second, Mr. Stansfield argued that his conviction for witness tampering should be reversed on grounds of insufficient evidence, or in the alternative, on the ground that the jury was not properly instructed. The basis of the insufficiency argument was that the evidence failed to prove that he intended to hinder future communications between the witness in question and federal law enforcement officials. The challenge to the jury instruction on the witness tampering charge was that the instruction failed to define the "attempt to kill" element of the offense as well as the "federal officer" element.

Finally, Mr. Stansfield argued that the district court erred in several respects in its application of the federal sentencing guidelines. The Third Circuit AFFIRMED the judgment of conviction on all counts except the witness tampering count. As to that count, the Third Circuit REVERSED and REMANDED for a new trial on the ground that the jury instruction regarding that count was flawed. In light of this disposition, the Third Circuit did not address the sentencing guideline issues. (Cowen, Lewis and Weis, C.J.; opinion by Cowen; concurrence/dissent by Lewis.) **101 F.3d 909.**

492. Madden v. Myers, No. 96-8046 (M.D. Pa. 12/3/96) - Mr. Madden petitioned the Third Circuit pursuant to 28 U.S.C. § 1651(a) for a writ of mandamus requiring the district court to promptly act upon his request for habeas corpus relief. In the petition for writ of habeas coprus which Mr. Madden filed in the district court, he challenged his extradition from Pennsylvania to Tennessee.

Before addressing the merits of Mr. Madden's petition for writ of mandamus, the Third Circuit first determined whether the filing fee payment requirements of the Prison Litigation Reform Act of 1996 ("PLRA") applied to mandamus petitions. The Court found that the fee requirements of the PLRA did not apply to mandamus petitions, and that Mr. Madden therefore did not have to pay a filing fee.

The Court next addressed the merits of the mandamus petition, and found no basis for granting it. The Court reasoned that mandamus is an appropriate remedy only in extraordinary circumstances where there are no other adequate means to obtain relief and where the right to relief is clear and indisputable. Here, Mr. Madden could appeal the decision of the district court upon the issuance of a final order; as a result, it cannot be said that no other adequate means of relief exist.

As for Mr. Madden's claim of delay in the disposition of his habeas corpus petition, the Court found that the delay did not yet rise to the level of a denial of due process. (Becker, Alito and McKee, C.J.; opinion by Becker.) **102 F.3d 74.**

493. United States v. Romualdi, No. 96-7113 (M.D. Pa. 12/11/96) - This was an appeal by the government from the district court's downward departure at sentencing. The basis of the district court's downward departure was its finding that U.S.S.G. § 3B1.2 applied by analogy so as to qualify the defendant's conduct for a mitigating role reduction. The district court also cited as authority for its departure the Third Circuit's decision in **United States v. Bierley**, 922 F.2d 1061 (3d Cir. 1990).

On appeal, the Third Circuit found that that the district court's downward departure had no legal basis because U.S.S.G. § 3B1.2 did not apply. The Third Circuit went on to note, however, that upon remand the district court was not precluded from considering other grounds for departure. The Third Circuit thus VACATED the judgment of sentence, and REMANDED for resentencing. (Sloviter, Cowen and Roth, C.J.; opinion by Sloviter.) **101 F.3d 971.**

494. United States v. Cocivera; United States v. U.S. Health Products, Inc; United States v. North American Health Industries, Inc.; United States v. American Health Products, Inc.; United States v. Beneficial Health Products, Inc.; United States v. Universal Medical Company, Inc.; United States v. Mid-Atlantic Health Products, Inc. Nos. 96-1071, 96-1072, 96-1073, 96-1074, 96-1075, 96-1076, 96-1077 (E.D. Pa. 12/26/96) - The convictions in this case resulted from a scheme to defraud Medicare. This appeal raised three issues. The first issue in this appeal was whether one of the defendants, Mr. Cocivera, had properly waived his right to counsel. Second, Mr. Cocivera raised the issue of ineffective assistance of counsel. Finally, the defendant corporations argued that Mr. Cocivera's representation of them was improper.

The Third Circuit rejected Mr. Cocivera'a argument that his waiver of his right to counsel was not knowing or voluntary. With regard to the ineffective assistance of counsel issue, the Third Circuit found that the record on this issue was sufficiently developed to warrant addressing the issue on direct appeal, rather than waiting for a collateral action. The Third Circuit then rejected the ineffective assistance of counsel claim. As a result, Mr. Cocivera's conviction was AFFIRMED.

Finally, with regard to Mr. Cocivera's representation of the defendant corporations, the Third Circuit held that such representation did not amount to representation by counsel as contemplated by the Sixth Amendment. More specifically, the Third Circuit found that the corporations had never authorized Mr. Cocivera to represent them, and had never properly waived their right to other counsel. As a result the corporation's convictions were VACATED and their cases REMANDED for a new trial. (Sloviter, Cowen and Roth, C.J.; opinion by Sloviter.) **104 F.3d 566.**

495. United States v. Rybar, No. 95-3185 (W.D. Pa. 12/30/96) - Mr. Rybar entered into a conditional guilty plea to two counts of violating 18 U.S.C. § 922(o), the statute which makes it unlawful for any person to transfer or possess a machine gun. On appeal, Mr. Rybar argued that Congress exceeded its power under the Commerce Clause in enacting § 922(o), and also that § 922(o) violated the Second Amendment. The Commerce Clause challenge relied primarily on **United States v. Lopez**, 115 S.Ct. 1624 (1995). The Third Circuit rejected both of these arguments. The Third Circuit noted that every other court of appeals which has considered the Commerce Clause challenge to § 922(o) has upheld the constitutionality of the provision. With regard to the Second Amendment argument, the Third Circuit found that Mr. Rybar had presented no authority in support of this claim. AFFIRMED. (Sloviter and Alito, C.J., Rendell, D.J.; opinion by Sloviter; dissent by Alito.) **103 F.3d 273.**

496. United States v. DeGovanni, No. 96-1333 (E.D. Pa. 1/2/97) - In this case, the Third Circuit was called upon to define a "supervisor" for purposes of U.S.S.G. § 3B1.1(c). This guideline section authorizes a two-level enhancement for a defendant who is characterized as a supervisor. The Third Circuit held that a defendant is a supervisor for purposes of § 3B1.1(c) when he is involved in, and connected to, the illegal activity of others to the point where he actually supervises the illegal conduct; a defendant is not a supervisor for purposes of U.S.S.G. § 3B1.1(c) simply by virtue of his position in the hierarchy of the organization for which he works. As a result of this holding, the Third Circuit VACATED the district court's sentence which included a two-level enhancement under U.S.S.G. § 3B1.1(c), and REMANDED for resentencing consistent with the Court's opinion. (Becker, McKee and Garth, C.J.; opinion by Garth.) **104 F.3d 43.**

497. United States v. Cornish, Nos. 95-2086 & 95-2101 (E.D. Pa. 1/3/97) - This case came before the Third Circuit on appeal by the government, and on cross-appeal by Mr. Cornish. The government challenged the determination that Mr. Cornish's third degree robbery conviction was not a "violent felony" for sentence enhancement purposes under 18 U.S.C. § 924(e).

Mr. Cornish challenged the jury instructions regarding the stipulated fact of his prior felony conviction. More specifically, Mr. Cornish argued that the district court violated his constitutional rights under the Fifth and Sixth Amendments when it instructed the jury to "accept" the stipulated fact of his prior felony conviction. Mr. Cornish further argued that such an instruction removed from the jury consideration of the prior crime element of the offense with which he was charged: violation of 18 U.S.C. § 922(g), or possession of a firearm by a convicted felon. The Third Circuit found no error in the jury instructions. However, it did find that Mr. Cornish's prior third degree robbery conviction was a violent felony, and that the district court had erred in failing to enhance his sentence under 18 U.S.C. § 924(e). The Third Circuit AFFIRMED the conviction, but VACATED the sentence and REMANDED for resentencing. (Scirica and Roth, C.J., Restani, Judge, Court of Intntl. Trade; opinion by Restani.) **103 F.3d 302.**

498. United States v. Murray, No. 96-7072 (M.D. Pa. 1/2/97) - Mr. Murray was convicted by a jury of an intentional killing in furtherance of a continuing criminal enterprise in violation of 21 U.S.C. § 848(e)(1)(A); conspiracy to distribute in excess of five kilograms of cocaine in violation of 21 U.S.C. §§ 846 and 841(a)(1); and distribution of, and possession with intent to distribute, cocaine in violation of 21 U.S.C. § 841(a)(1).

On appeal, Mr. Murray raised the following issues:

1) Did the district court err in admitting testimony under Federal Rules of Evidence 404(b) and 403 that he had committed a murder not charged in the indictment?

2) Did the district court err in admitting under Federal Rule of Evidence 608 evidence supporting the credibility of the only testifying eyewitness to the events immediately preceding the charged murder?

3) Did the district court err in denying Mr. Murray's motion to excuse for cause a juror who had read a newspaper article about the case?

4) Did the district court err in denying Mr. Murray's motion to suppress the testimony of a jailhouse informant?

The Third Circuit held that the district court erred under Federal Rules of Evidence 404(b)

and 403 in admitting testimony about the uncharged murder. The Third Circuit further held that the district court also erred under Federal Rule of Evidence 608(b) in admitting evidence about specific instances of conduct supporting the credibility of the eyewitnesses. The Third Circuit concluded that these errors required REVERSAL of Mr. Murray's murder conviction. The Third Circuit further concluded, however, that these errors were harmless with respect to the drug convictions, and thus AFFIRMED them. (Greenberg and Alito, C.J., Fisher, D.J.; opinion by Alito.) **103 F.3d 310.**

499. In re: Grand Jury, Nos. 95-7354, 96-7529/7530 (D. V.I., D. Del. 1/9/97) - This case was a consolidation of three appeals. The issue was whether or not the Third Circuit should recognize a parent-child privilege. The Third Circuit decided not to recognize such a privilege. AFFIRMED. (Mansmann, Greenberg and Garth, C.J.; opinion by Garth; concurrence/dissent by Mansmann.) **103 F.3d 1140.**

500. United States v. Pelullo, Nos. 95-1829 and 95-1856 (E. D. Pa. 1/9/97) - This case was previously before the Third Circuit as **United States v. Pelullo**, 964 F.2d 193 (3d Cir. 1992), and **United States v. Pelullo**, 14 F.3d 881 (3d Cir. 1994). The present appeal followed Mr. Pelullo's conviction after his fourth jury trial for 46 counts of wire fraud and one RICO count.

In this appeal, the Third Circuit addressed only four of the issues which Mr. Pelullo raised on appeal. Those four issues were the following:

1) Did the government's **Brady** violation entitle Mr. Pelullo to collateral relief on one of the counts of which he was convicted at the first trial?

2) Did the government's reliance during the fourth trial upon Mr. Pelullo's testimony from his first trial require reversal, in light of the fact that the government's **Brady** violation forced Mr. Pellulo to take the stand at his first trial?

3) Was Mr. Pelullo's right to a fair and impartial jury violated by a juror's failure to answer certain voir dire questions honestly?

4) Did the district court improperly increase Mr. Pelullo's sentence following his conviction at the fourth trial?

With regard to the first issue, the Third Circuit REVERSED the denial of Mr. Pelullo's motion for collateral relief under 28 U.S.C. § 2255 and REMANDED for a new trial on the count at issue. With regard to the second issue, the Third Circuit VACATED the district court's denial of Mr. Pelullo's Rule 33 motion for a new trial, and REMANDED for a new hearing. With regard to the third issue, the Third Circuit AFFIRMED. In light of the remand for a new trial, the Third Circuit found that there was no need to address the fourth issue, which pertained to sentencing. (Becker, Nygaard and Lewis, C.J.; opinion by Lewis.) **105 F.3d 117.**

501. Jackson v. Byrd, No. 95-2118 (E.D. Pa. 1/29/97) - This was an appeal from a denial of a petition for writ of habeas corpus. The appellant, Ms. Jackson, had been convicted and sentenced in the Court of Common Pleas of Philadelphia for possession of a controlled substance and possession of a controlled substance with the intent to deliver. The sole issue in this appeal was whether there was sufficient evidence to support Ms. Jackson's convictions. The parties agreed that Ms. Jackson did not have actual possession of the drugs. Thus, the prosecution sought to prove that she had constructive possession of them. The Third Circuit found that it was reasonable for the trial court as the trier of fact to conclude that Ms. Jackson had constructive possession of the drugs. AFFIRMED.

NOTE: In resolving this appeal, the Third Circuit opted not to consider the new Antiterrorism and Effective Death Ppenalty Act of 1996 which was enacted while this appeal was

pending. The Court reasoned that "even under prior law, which may have been less deferential to the state court proceedings than now would be the case . . . Jackson is not entitled to habeas relief." (Becker, Mansmann and Greenberg, C.J.; opinion by Greenberg; dissent by Becker.) **105 F.3d 145.**

502. United States v. Figueroa, No. 96-1421 (E.D. Pa. 1/30/97) - This was an appeal from a sentence imposed following a plea of guilty to bank robbery in violation of 18 U.S.C. § 2113(a). The sole issue presented on appeal was whether the district court erred by enhancing Mr. Figueroa's sentence by two levels pursuant to U.S.S.G. § 2B3.1(b)(2)(F) for making an express threat of death. The district court based the enhancement on a written statement which Mr. Figueroa presented to a bank teller during the robbery stating that he possessed a gun. Mr. Figueroa argued that he should not be subject to the enhancement because he never actually threatened to use the gun. The Third Circuit found that this written statement constituted an express threat of death which justified the two-level enhancement pursuant to U.S.S.G. § 2B3.1(b)(2)(F). AFFIRMED. (Becker, Mansmann and Greenberg, C.J.; opinion by Greenberg; dissent by Becker.) **105 F.3d 874.**

503. Death Row Prisoners v. Ridge, No. 96-1991 (1/31/97) - This was a published order of court stating, inter alia, that as of January 31, 1997, Pennsylvania did not meet, and had not previously met, the criteria of 28 U.S.C. § 2261, a section of the Anti-Terrorism and Effective Death Penalty Act. (Becker and Roth, C.J., Trump, D.J.; order signed by Becker.) **106 F.3d 35.**

504. United States v. Arnold, No. 96-1174 (E.D. Pa. 2/4/97) - Mr. Arnold was convicted of attempting to murder a witness, witness intimidation, bank theft and money laundering.

On appeal Mr. Arnold argued that the government had violated his Sixth Amendment right to counsel by eliciting uncounseled statements from him regarding the charge of attempting to murder a witness. The government elicited these statements after Mr. Arnold had already been indicted on this charge, and had retained counsel. The Third Circuit agreed and thus REVERSED this conviction. The Third Circuit REMANDED to the district court for retrial or for the charge to be dismissed.

Mr. Arnold also argued that the uncounseled statements warranted reversal of his witness intimidation conviction. Although the Third Circuit found that the admission of these statements was erroneous with regard to the witness intimidation charge, it found that the admission amounted to harmless error, and thus AFFIRMED that conviction.

Mr. Arnold also challenged his sentence, arguing that the district court had erred by enhancing his base offense level for perjury pursuant to U.S.S.G. § 3C1.1. The Third Circuit agreed and thus VACATED Mr. Arnold's sentence and REMANDED the matter for resentencing. Because Mr. Arnold's sentence was already being vacated and remanded for resentencing, the Third Circuit declined to address his challenge to the district court's upward departure at sentencing.

Mr. Arnold next challenged the district court's order of restitution on two grounds: first, that the district court failed to make proper findings regarding Mr. Arnold's ability to pay, and second that the district court erred by delegating the determination of the timing and the amount of the restitution payments to the probation officer. The government conceded error on both of these challenges to the restitution order. The Third Circuit thus VACATED the restitution order and REMANDED to the district court for further proceedings. (Becker, Nygaard and Roth, C.J.; opinion by Nygaard.) **106 F.3d 37.**

505. United States v. Cruz, No. 96-1325 (E.D. Pa. 2/13/97) - Mr. Cruz pled guilty to carjacking in violation of 18 U.S.C. § 2119. On appeal, he challenged the interpretation of the vulnerable

victim provision of the sentencing guidelines, § 3A1.1(b). Specifically, this appeal raised the following two questions regarding the vulnerable victim provision:
1) Whether the vulnerable victim enhancement applies to harm caused by the defendant to someone who was not the victim of the offense of conviction; and
2) Whether the vulnerable victim enhancement applies if the defendant did not target (or commit the offense because of) the vulnerable status of the victim.

The Third Circuit held that the vulnerable victim enhancement applied to a passenger who was not the victim of the offense of conviction. The Third Circuit also held that the vulnerable victim enhancement applied even though the crime was not committed with a view to the passenger's vulnerability. With regard to the latter holding, the Third Circuit noted that its decision in this case has little precedential value because the Sentencing Commission has recently amended the commentary to § 3A1.1 to make clear that there is no targeting requirement. AFFIRMED. (Becker, Mansmann and Greenberg, C.J.; opinion by Becker.) **106 F.3d 1134.**

506. United States v. Wilson, No. 95-7245 (D.Del. 2/14/97) - This was an appeal from the imposition of the mandatory minimum sentence for possession with intent to distribute a controlled substance. The specific issue raised on appeal was whether the district court had erred in refusing to apply U.S.S.G. § 5C1.2, which is the Safety Valve Provision of the Sentencing Guidelines. The Safety Valve provision is inapplicable where the defendant possessed a firearm "in connection with the offense." The district court found that the defendant's possession of a firearm in connection with prior drug dealing activities precluded the application of the Safety Valve Provision. The district court had reasoned that the defendant's past drug dealing constituted conduct relevant to the offense of conviction, and that his involvement with guns was connected to this relevant conduct. The Third Circuit agreed with the reasoning of the district court, and found that the Safety Valve did not apply. AFFIRMED. (Becker, Nygaard and Lewis, C.J.; opinion by Lewis.) **106 F.3d 1140.**

507. United States v. Johnstone, No. 95-5833 (D. N.J. 2/24/97) - This was an appeal from a conviction in a federal criminal civil rights case under 18 U.S.C. § 242. Mr. Johnstone raised two issues. First, Mr. Johnstone challenged the correctness of the jury instructions concerning the excessive force and intent elements of a federal criminal civil rights violation. Second, Mr. Johnstone challenged the propriety of a sentencing guideline enhancement for use of a dangerous weapon, pursuant to U.S.S.G. § 2A2.2(b)(2)(B).

With regard to the jury instruction on excessive force, Mr. Johnstone argued that the district court erred in charging the jury under a Fourth Amendment "objective reasonableness" standard, rather than a substantive due process "shocks the conscience" standard. In support of this position, Mr. Johnstone argued that the force used occurred after the "lawful restraint and arrest." The Third Circuit concluded that the excessive force took place during the arrests, and that the district court therefore correctly instructed the jury with a Fourth Amendment objective reasonableness standard.

With regard to the jury instruction on intent, the Third Circuit concluded that to convict a defendant under 18 U.S.C. § 242, the government must show that the defendant had the particular purpose of violating a protected right, or recklessly disregarded the risk that he would violate such a right. The Third Circuit further concluded that the government does not need to show that the defendant knowingly violated any right. Based upon these conclusions, the Third Circuit found that the district court had properly defined intent for the jury.

Finally, Mr. Johnstone argued that the district court improperly applied U.S.S.G. § 2A2.2(b)(2)(B) at sentencing. More specifically, Mr. Johnstone argued that double counting resulted because his sentence was enhanced for use of a dangerous weapon pursuant to § 2A2.2(b)(2)(B),

after the conduct underlying the convictions had been classified as aggravated assault within the meaning of § 2A2.2; the application of § 2A2.2 was based upon the fact that the offenses involved a dangerous weapon. The Third Circuit upheld the district court's application of U.S.S.G. § 2A2.2(b)(2)(B). Under the guidelines, a court must make all applicable mandatory adjustments unless the guidelines specifically exempt the particular conduct at issue; this must occur even if it would lead to counting a particular factor twice in calculating a defendant's sentence. Thus, because the Sentencing Commission has not expressly forbidden double counting in applying the guidelines at issue here, the district court properly applied U.S.S.G. § 2A2.2(b)(2)(B). AFFIRMED. (Becker and Mansmann, C.J., Schwarzer, D.J.; opinion by Becker.) **107 F.3d 200.**

508. United States v. Haut, Nos. 95-3673/3674 (W.D. Pa. 2/26/97) - This was a government appeal from convictions for conspiracy to commit malicious destruction of property by means of fire in violation of 18 U.S.C. § 371, and mail fraud in violation of 18 U.S.C. § 1341. The appeal challenged only the sentences imposed. The government challenged two aspects of the sentencings. First, the government challenged the district court's decrease in the defendants' offense levels by four points, based on a finding of minimal participation pursuant to U.S.S.G. § 3B1.2. Second, the government challenged the district court's downward departures by an additional six points for each defendant, based on a finding, pursuant to U.S.S.G. § 5K2.0, that the the government's witnesses were not credible. The Third Circuit AFFIRMED the district court's reductions for both defendants based upon findings of minimal participation pursuant to U.S.S.G. § 3B1.2. However, the Third Circuit REVERSED the district court's downward departures pursuant to U.S.S.G. § 5K2.0, finding that there was no legal justification for such departures in the guidelines. (Sloviter, Cowen and Roth, C.J.; opinion by Cowen.) **107 F.3d 213.**

509. United States v. Elmore, No. 96-3462 (W.D. Pa. 2/28/97) - Mr. Elmore pled guilty to possession with intent to distribute cocaine and cocaine base in violation of 21 U.S.C. § 841. On appeal, Mr. Elmore challenged only his sentence. More specifically, Mr. Elmore challenged his criminal history score and category.

U.S.S.G. § 4A1.2(c)(1) excludes from computation of a criminal history score convictions for disorderly conduct and convictions which are "similar" to disorderly conduct. Mr. Elmore argued that his convictions for harassment and for assault and possession of drug paraphernalia were similar to disorderly conduct, and should therefore have been excluded from the computation of his criminal history score. The Third Circuit disagreed and AFFIRMED.

The Third Circuit also made brief reference to Mr. Elmore's argument that he should not have been accorded two criminal history points pursuant to U.S.S.G. § 4A1.1(d) on the basis of a Florida warrant. Mr. Elmore based his argument upon the fact that the Florida authorities had no intention of executing the warrant. The Third Circuit rejected this argument, and upheld the assessment of the two criminal history points which were based upon the Florida warrant. AFFIRMED. (Greenberg, Cowen and McKee, C.J.; opinion by Cowen.) **108 F.3d 23.**

510. United States v. Askari, No. 95-1662 (E.D. Pa. 3/5/97) - Mr. Askari appealed the sentence imposed by the district court for his bank robbery conviction on the grounds that the district court erred in refusing to grant a downward departure for diminished capacity pursuant to U.S.S.G. § 5K2.13. Section 5K2.13 allows for a downward departure for diminished capacity if the defendant committed a "non-violent offense." Mr. Askari argued that his bank robbery was unarmed and non-violent, and that he has a well-documented history of serious psychiatric illness. The Third Circuit did not dispute Mr. Askari's history of mental illness, but nonetheless AFFIRMED the district court's

refusal to depart. The Third Circuit based its affirmance upon its prior decision in **United States v. Rosen**, 896 F.2d 789, 791 (3d Cir. 1990), which held that a district court does not have the authority to depart downward in a bank robbery case because bank robbery is not a "non-violent offense." (Becker, McKee and Garth, C.J.; Per Curiam opinion; concurrence by Becker.) **NOT REPORTED IN F.3D.** NOTE: THIS OPINION WAS LATER VACATED BY WAY OF AN ORDER DATED MARCH 27, 1997 IN WHICH THE COURT GRANTED REHEARING EN BANC.

511. United States v. Oser, Nos. 95-1107 and 95-1108 (E.D. Pa. 3/6/97) - This was an appeal which challenged the sentence imposed for Mr. Oser's role in two drug conspiracies. Mr. Oser argued that the district court erroneously interpreted U.S.S.G. § 5G1.3 when it ordered that his sentence should run consecutively with a term of imprisonment which he was currently serving for a currency reporting violation, rather than concurrently and/or coterminously. Mr. Oser also argued that the district court erred in determining his criminal history level. More specifically, Mr. Oser argued that the district court erred in imposing a criminal history point for the currency reporting violation for which he was currently imprisoned because it should have been regarded as "part of the instant offense" under U.S.S.G. § 4A1.2(a)(1). The district court rejected both of these arguments and AFFIRMED the district court's sentence. (Sloviter, Roth and Rosenn, C.J.; opinion by Sloviter; dissent by Rosenn.) **107 F.3d 1080.**

512. United States v. Parker, No. 95-2018 (E.D. Pa. 3/7/97) - This was an appeal from the dismissal of a criminal information which charged Mr. Parker with failure to pay past-due child support. The issue presented was whether the enactment of the Child Support Recovery Act of 1992, 18 U.S.C. § 228, was within the power granted to Congress under Article 1, Section 8, Clause 3 of the Constitution. The Third Circuit held that the Child Support Recovery Act was the product of a lawful exercise of congressional power under the commerce clause and does not transgress the Tenth Amendment. As a result, the Third Circuit ruled that the district court erred in holding the Act to be unconstitutional. The Third Circuit therefore REVERSED. (Stapleton and Mansmann, C.J. and Restani, J., Intntl. Crt. of Trade; opinion by Mansmann.) **108 F.3d 28.**

513. United States v. Anderson, No. 96-1496 (E.D. Pa. 3/10/97) - This was an appeal from a conviction for carjacking in violation of 18 U.S.C. § 2119, using and carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1), and possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). The issue raised in this appeal was the following: What is the quantum of evidence that the government must offer at trial for a jury to find beyond a reasonable doubt that the defendant had an "intent to cause death or serious bodily harm" within the meaning of the 1994 amendment to the carjacking statute? The Third Circuit held that it is sufficient for the government to establish beyond a reasonable doubt that a defendant possessed a conditional intent to cause death or serious bodily harm to the carjacking victim -- in other words, that the defendant intended to cause death or serious bodily harm if the victim resisted the defendant's efforts to obtain the victim's car. Based upon this holding, the Third Circuit concluded that there was sufficient evidence in this case to find that the defendant had such an intent to kill or cause serious bodily harm, if necessary, in order to obtain the victim's car. AFFIRMED. (Becker and Roth, C.J., Orlofsky, D.J.; opinion by Orlofsky.) **108 F.3d 478.**

***514. United States v. Gaydos, No. 95-3468 (W.D. Pa. 3/14/97) -** This was an appeal from a conviction and sentence for four counts of mail fraud in violation of 18 U.S.C. §§ 1341 and 1342, one count of use of fire to commit a felony in violation of 18 U.S.C. §§ 844(h)(1) and (2), and one

count of malicious destruction of property by means of fire in violation of 18 U.S.C. § 844(i). Mrs. Gaydos challenged her conviction for malicious destruction of property by means of fire in violation of 18 U.S.C. § 844(i). She argued that the government did not prove the jurisdictional element of the offense, the requirement that the burned building was involved in interstate commerce. Mrs. Gaydos based her argument upon the fact that the burned building, a rental property, was vacant and uninhabitable, and that she had neither the prospect, nor the intention, of returning it to the stream of commerce. The Third Circuit agreed with Mrs. Gaydos' argument, and held that the government had not proven the jurisdictional element. The Court thus REVERSED the § 844(i) conviction.

In a somewhat similar argument, Mrs. Gaydos challenged the district court's application of U.S.S.G. § 2K1.4(a)(1)(B) at her sentencing. Section 2K1.4(a)(1)(B) provides an increased sentence for the burning of a "dwelling." Mrs. Gaydos argued that because the building at issue was vacant, and in fact uninhabitable, that it could not be characterized as a "dwelling" for purposes of § 2K1.4(a)(1)(B). The Third Circuit noted that the reversal of the § 844(i) conviction warranted a resentencing hearing. Because Mrs. Gaydos would be resentenced, the Third Circuit found that it need not reach the merits of this issue.

Mrs. Gaydos also challenged the order of restitution entered by the district court. Mrs. Gaydos argued that before entering the restitution order, the district court should have made findings of fact regarding her ability to pay. The Third Circuit agreed. The Court thus VACATED the order of restitution and REMANDED the matter so that the district court could make specific factual findings regarding Mrs. Gaydos' ability to pay.

Finally, Mrs. Gaydos challenged the district court's refusal to address the merits of her untimely post-trial motions for judgment of acquittal and a new trial, and the district court's refusal to hold a factual hearing on her claims on ineffective assistance of counsel. The Third Circuit upheld the district court's refusal to address the post trial motions, and its refusal to grant a hearing on the claims of ineffective assistance of counsel. With regard to the post trial motions, the Third Circuit held that the time limit for filing post trial motions is jurisdictional, and that a district court is therefore powerless to entertain untimely post trial motions. With regard to Mrs. Gaydos' claims of ineffective assistance of counsel, the Third Circuit noted its stated preference that such claims be raised in a collateral proceeding under 28 U.S.C. § 2255. (Nygaard and Lewis, C.J., Schwarzer, D.J.; opinion by Nygaard.) **108 F.3d 505.** CONGRATULATIONS TO THE PGH. F.P.D.'S OFFICE!!

515. United States v. Rice, No. 96-7213 (D. V.I. 3/17/97) - While a member of the United States Army, the appellant possessed cocaine; as a result of this possession, she received a general discharge from the Army under honorable conditions. The government subsequently indicted Ms. Rice for conspiracy to distribute cocaine, possession with intent to distribute cocaine, and attempt to import cocaine. The issue on appeal was whether the general discharge barred the subsequent federal criminal prosecution on double jeopardy grounds. The Third Circuit held that Ms. Rice's general discharge under honorable conditions was not punishment, and that the Double Jeopardy Clause did not prohibit the government from prosecuting her for the related offenses. AFFIRMED. (Scirica, Nygaard and McKee, C.J.; opinion by Scirica.) **109 F. 3d 151.**

516. United States v. Baird, No. 96-1342 (E.D. Pa. 3/19/97) - This appeal stemmed from a prosecution of certain Philadelphia police officers for corruption. The appellant pled guilty to three of the seven counts of the indictment, and provided substantial assistance to the government which resulted in numerous arrests of his co-conspirators. Based upon Mr. Baird's cooperation, the government filed a motion under U.S.S.G. § 5K1.1. This motion could have been the basis of a downward departure at sentencing. The district court, however, departed upward, instead of

downward, and stated that if not for the cooperation and the § 5K motion, its upward departure would have been greater. The district court also stated that in fashioning the upward departure, it relied upon conduct underlying dismissed counts.

On appeal, Mr. Baird challenged the upward departure on three grounds. First, he argued that the district court erred by basing the upward departure upon the conduct underlying the counts dismissed under the plea agreement. Second, he argued that the upward departure was itself improper. Third, he challenged the extent of the upward departure as unreasonable in light of the treatment of analogous situations under the guidelines. The Third Circuit rejected all three of these arguments. AFFIRMED. (Becker, McKee and Garth, C.J.; opinion by Becker.) **109 F.3d 856.**

517. United States ex rel: Lolita Saroop v. Garcia, No. 96-7196 (D. V.I. 3/21/97) - This was an appeal in a habeas corpus case. The issue on appeal was whether or not a valid extradition treaty exists between the United States and Trinidad and Tobago. The district court found that there was a valid treaty permitting extradition. The Third Circuit AFFIRMED. (Scirica, Nygaard and McKee, C.J.; opinion by Scirica.) **109 F.3d 165.**

518. United States v. Kauffman, No. 96-7287 (M.D. Pa 3/28/97) - Mr. Kauffman appealed the district court's denial of his motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255. In this motion, Mr. Kauffman argued that he had suffered ineffective assistance of counsel based upon, inter alia, his counsel's failure to conduct any pre-trial investigation, or to contact potential witnesses, in connection with a possible insanity defense. The Third Circuit held that counsel was ineffective and that such ineffectiveness prejudiced Mr. Kauffman. The Third Circuit thus REVERSED the district court's denial of the motion under 28 U.S.C. § 2255, and REMANDED for a new trial. (Alito, Roth and Lewis, C.J.; opinion by Lewis; dissent by Alito.) **109 F.3d 186.**

519. United States v. Moorefield, No. 96-3563 (W.D. Pa. 4/4/97) - This was an appeal by the government from a pre-trial order granting a motion to suppress a firearm that was found in the possession of the defendant, when the car in which he was riding as a passenger was stopped for a routine traffic violation. The Third Circuit held that police officers may constitutionally order occupants of cars to remain in the vehicle with their hands up in the air. The Third Circuit also held that under the specific facts of this case, the officers were justified in conducting a pat-down search of the defendant for weapons. The Third Circuit thus REVERSED the district court's order granting the motion to suppress the firearm. (Cowen, McKee and Jones, C.J.; opinion by Cowen.) **111 F.3d 10.**

520. In re: Gary Heidnik, No. 97-9000 (E.D. Pa. 4/18/97) - This was an appeal from an order of the district court which 1) denied a requested stay of execution; 2) denied a request for the appointment of federal habeas corpus counsel on Mr. Heidnik's behalf; and 3) denied next friend standing to Mr. Heidnik's ex-wife and daughter. The Third Circuit VACATED the district court's order, and REMANDED for further proceedings. (Becker, Stapleton and Cowen, C.J.; Per Curiam Opinion.) **112 F.3d 105.**

521. United States v. Davis, No. 96-1721 (E.D. Pa. 4/23/97) - The defendant filed a motion under 28 U.S.C. § 2255 to vacate his conviction under 18 U.S.C. § 924(c). The basis for this motion was that his conviction under § 924(c) was inconsistent with the Supreme Court's ruling in **Bailey v. United States**, 116 S.Ct. 501 (1995). The district court agreed with this argument, and vacated the § 924(c) conviction.

In vacating the § 924(c) count, the district court ordered resentencing. At resentencing, the district court enhanced Mr. Davis' sentence on the remaining convictions pursuant to U.S.S.G. § 2D1.1. This sentence enhancement was unavailable in combination with the § 924(c) conviction, but in light of the elimination of that conviction, the district court found that it could now apply § 2D1.1 to the remaining convictions.

On appeal, Mr. Davis argued that the district court lacked jurisdiction to resentence him on the remaining convictions after the elimination of the § 924(c) conviction. More specifically, he argued that his § 2255 motion had challenged only the § 924(c) conviction, and that the sentences on the unchallenged convictions should therefore not be opened. Mr. Davis also argued that the resentencing violated his due process rights. The Third Circuit rejected both of these arguments and AFFIRMED the sentence imposed at the resentencing. (Stapleton and Mansmann, C.J., Restani, J., Intntl. Crt. of Trade; opinion by Restani.) **112 F.3d 118.**

522. In re: Grand Jury, No. 97-7018 (D. Del. 4/25/97) - This appeal presented the following issue: Does the government's grant of use and derivative use immunity to the spouse of a witness defeat the witness' privilege against adverse spousal testimony? The Third Circuit held that once the government grants immunity that eliminates the possibility that the testimony will be used to prosecute the witness' spouse, the witness may no longer invoke the testimonial privilege. AFFIRMED. (Sloviter, Stapleton and Aldisert, C.J.; opinion by Sloviter.) **111 F.3d 1083.**

523. In re: Grand Jury, Nos. 97-7016 and 97-7017 (D. Del. 4/25/97) - The issue presented in this appeal was the following: Can a victim of a privately executed wiretap successfully move to quash a subpoena duces tecum directing the perpetrator of the wiretap to convey recordings of unlawfully intercepted communications to a grand jury? The district court denied the motions to quash. The Third Circuit held that disclosure of the unlawfully intercepted communications to the grand jury would violate an explicit congressional prohibition, and that enforcement of the subpoena would involve the courts in a violation of the victims' statutory privacy rights. As a result, the Third Circuit REVERSED the district court and REMANDED with orders that the subpoena duces tecum be quashed. (Sloviter, Stapleton and Aldisert, C.J.; opinion by Stapleton.) **111 F.3d 1066.**

524. Love v. Morton, No. 96-5783 (D. N.J. 5/5/97) - This was an appeal from a judgment of the district court granting Mr. Love's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The central issue was whether the district court properly ruled that Mr. Love had been placed in former jeopardy prior to his trial and conviction for robbery in state court. More specifically, during Mr. Love's first trial, the judge declared a mistrial for personal reasons. The next day, a new trial began, and the trial judge denied Mr. Love's motion to dismiss the indictment on double jeopardy grounds. Following his conviction and sentencing, Mr. Love unsuccessfully appealed the denial of the motion to dismiss. Mr. Love then filed a habeas corpus petition which the district court granted. The district court ruled that Mr. Love's first trial was terminated without his consent and without manifest necessity, and that a double jeopardy violation resulted. The Third Circuit agreed. AFFIRMED. (Sloviter, Stapleton and Aldisert, C.J.; opinion by Aldisert.) **112 F.3d 131.**

525. United States v. Casiano, No. 96-1256 (E.D. Pa. 5/7/97) - The defendants pled guilty to carjacking and kidnapping. On appeal the defendants raised three issues which challenged their sentences.

First, the defendants challenged the sentencing enhancement mandated by 18 U.S.C. § 924(c)(1) for a second or subsequent conviction for using a firearm in relation to a crime of violence.

More specifically, the defendants argued that the enhancement is not applicable if the second § 924(c)(1) conviction arises from the same criminal episode and involves the same victim as the first § 924(c)(1) conviction. Second, one of the defendants argued on appeal that he was not liable under the standard enunciated in **Bailey v. United States**, 226 S.Ct. 501 (1995), for the "use and carrying" of a firearm under 18 U.S.C. § 924(c)(1). Third, both defendants contested the district court's rulings on their respective motions for downward departures.

The Third Circuit rejected all of these arguments and AFFIRMED. (Sloviter, McKee and Rosenn, C.J.; opinion by Sloviter.) **113 F.3d 420.**

526. United States v. McKie, Nos. 96-7010, 96-7011 and 96-7014 (D. V.I. 5/8/97) - The defendants were convicted of weapons offenses under both federal and Virgin Islands law. This appeal challenged the convictions under Virgin Islands law, but not the convictions under federal law. The appeal raised the following issues:

1) Did the government breach the plea agreement by withdrawing the plea offer?
2) Was the weapon under the defendant's control within the meaning of the relevant Virgin Islands statute?
3) Did the government meet its burden to prove that the possession of the guns was not "authorized by law" according to the relevant Virgin Islands statute?

The Third Circuit rejected the first two arguments, and thus AFFIRMED with regard to those two issues. The Third Circuit agreed with the third argument, and thus REVERSED the affected convictions, and REMANDED for resentencing. (Scirica, Nygaard and McKee, C.J.; opinion by Scirica.) **112 F.3d 626.**

527. United States v. Powell, Nos. 96-7242 and 96-7274 (M.D. Pa. 5/12/97) - Both defendants were indicted for distributing cocaine and conspiracy. One defendant pled guilty, and appealed only his sentence. More specifically, he challenged the increase in his offense level for obstruction of justice and for reliance on an allegedly incorrect laboratory report. The other defendant went to trial and was convicted. The second defendant appealed his conviction on grounds of insufficient evidence. The Third Circuit affirmed on all issues, and with regard to both defendants.

In its opinion, the Third Circuit discussed all of the issues raised by the defendants. However, the greatest part of the discussion focused upon the issue of the sentencing enhancement for obstruction of justice. The specific issue presented was whether an obstruction of justice enhancement applies where a defendant pleads guilty, and then testifies falsely at his co-defendant's trial. The Third Circuit held that the enhancement applies under such circumstances. (Becker, Scirica and Alito, C.J.; opinion by Scirica.) **113 F.3d 464.**

528. United States v. Bethancourt, No. 96-7743 (D. V.I. 5/14/97) - The defendant appealed his jury conviction for the federal offense of possession of a firearm with an obliterated serial number, 18 U.S.C. § 922(k), and the territorial offense of possession of a sawed-off shotgun, 14 V.I.C. § 2253(b). The sole issue on appeal was whether the defendant was entitled to vacatur of one of the convictions on the ground that the two offenses are multiplicitous, and that his conviction for both violated the Double Jeopardy Clause. The Third Circuit held that the two offenses were not multiplicitous since each requires proof of facts that the other does not. AFFIRMED. (Becker, Roth and Weis, C.J.; opinion by Becker.) **116 F.3d 74.**

529. United States v. Lewis, No. 96-1468 (E.D. Pa. 5/14/97) - Mr. Lewis was indicted and convicted for distribution of five grams of cocaine base in violation of 21 U.S.C. § 841(a)(1). The

district court sentenced Mr. Lewis to a mandatory minimum sentence of 120 months according to 21 U.S.C. § 841(b). Mr. Lewis appealed, challenging both the conviction and the sentence.

Mr. Lewis argued that he was entitled to a new trial because the district court instructed the jury that it could find him guilty whether he had distributed cocaine powder or cocaine base. Mr. Lewis argued that this instruction took away the jury's fact-finding function. Mr. Lewis also contended that because the district court instructed the jury that it could find him guilty whether he distributed cocaine powder or cocaine base, the basis for its finding of guilt cannot be determined. Mr. Lewis further argued that the district court erred in sentencing him for distribution of cocaine base rather than powder cocaine; he claimed that this error prejudiced him because the mandatory minimum penalties for distribution of cocaine base in § 841(b) are more severe than those for the distribution of powder cocaine. Finally, Mr. Lewis argued that he was entitled to a remand for resentencing because the government failed to prove by a preponderance of the evidence that the controlled substance he distributed was cocaine base. The Third Circuit rejected all of these arguments, and AFFIRMED. (Greenberg, Alito and Seitz, C.J.; opinion by Greenberg.) **113 F.3d 487.**

530. United States v. Eyer, No. 96-7310 (M.D. Pa. 5/14/97) - This was an appeal from the denial of a motion which was filed pursuant to 28 U.S.C. § 2255, and which argued that the defendant's previous conviction under 18 U.S.C. § 924(c)(1) should be vacated pursuant to **Bailey v. United States**, 116 S.Ct. 501 (1995). Following its denial of relief, the district court issued a certificate of appealability. This appeal presented several procedural issues and one substantive issue.

First, this appeal addressed the issue of whether a district court judge or a circuit court judge can issue a certificate of appealability under the new habeas corpus law, or whether only a circuit court judge can do so. The Third Circuit concluded that either a district court judge or a circuit court judge can issue a certificate of appealability. Thus, the district court judge in this case had the power to issue the certificate.

The Third Circuit went on to note that the district court judge failed to indicate in his certificate of appealability what issue or issues warranted the issuance of the certificate. The Third Circuit indicated that in some instances, such an omission could warrant the remand of the case so that the district court could specify the issue or issues. The Third Circuit declined to remand, however, because there was only one issue before the district court.

Next, the Third Circuit addressed the issue of whether the substantive issue in this case presented a question of statutory construction or a constitutional issue. According to 28 U.S.C. § 2253(c)(2), a certificate of appealability can issue "only if the applicant has made a substantial showing of the denial of a constitutional right." The Third Circuit avoided addressing this issue based upon a concession by the government at oral argument; at oral argument, the government took the position that if the Third Circuit held that the district court had the power to issue a certificate of appealability, then the case should be decided on the merits. Based upon this concession, the Third Circuit held that it need not determine the meaning of "constitutional right" according to § 2253(c)(2).

The defendant also challenged the new habeas corpus law as ex post facto when applied to crimes, such as his, which were committed before its effective date of April 24, 1996. He also argued that the new habeas corpus law unconstitutionally restricted the writ of habeas corpus and is void for vagueness. At oral argument, the defendant conceded that these issues would be moot if the Third Cicuit held that the district court properly issued the certificate of appealability; the Third Circuit made such a holding, and these issues were thus mooted. Furthermore, even if the Third Circuit accepted these constitutional arguments, the only relief would be a determination of the

appeal on the merits, and the Third Circuit had already agreed, based upon its review of the aforementioned issues, to make such a determination.

Finally, the Third Circuit reached the substantive issue. With regard to this issue, the Third Circuit held that **Bailey** was not implicated here because the defendant did not "use" the firearm. Instead, he had easy access to the loaded firearm and in fact transported it; this amounted to "carrying," not "use," and the "carry" prong of § 924(c)(1) was unaffected by **Bailey**. AFFIRMED. (Greenberg, Alito and Rosenn, C.J.; opinion by Greenberg.) **113 F.3d 470.**

531. United v. Bell, No. 96-7654 (M.D. Pa. 5/22/97) - Ms. Bell was convicted by a jury of conspiracy in violation of 18 U.S.C. § 371; murder of a witness in violation of 18 U.S.C. § 1512(a)(1)(A) and (C); use of physical force and threats against a witness in violation of 18 U.S.C. § 1512(b)(1), (2) and (3); and use of a firearm during the commission of a crime of violence in violation of 18 U.S.C. § 924(c)(1). These charges related to the killing of an informant for the Tri-County Drug Task Force. Before her federal indictment on these charges, Ms. Bell had been acquitted in the Court of Common Pleas for Adams County of murder and witness intimidation charges arising out of the same events.

On appeal, Ms. Bell argued that her convictions on the witness tampering charges should be reversed because there was insufficient evidence that she intended to interfere with a federal proceeding or to prevent the communication of information to federal law enforcement officers. The Third Circuit held that the jury was entitled to conclude (1) that Ms. Bell intended to prevent communications by the informant to law enforcement officers, and (2) that under **United States v. Stansfield**, 101 F.3d 909 (3d Cir. 1996), at least one of the communications would have been to a federal officer.

Ms. Bell also challenged the district court's jury instruction regarding the intent requirement of the tampering counts. The Third Circuit rejected this argument. The Third Circuit also rejected Ms. Bell's third and final argument that in sentencing her to life imprisonment, the district court erroneously applied U.S.S.G. § 2A1.1(a), the guideline for first-degree murder. AFFIRMED. (Greenberg, Alito and Seitz, C.J.; opinion by Alito.) **113 F.3d 1345.**

532. Virgin Islands v. Charleswell, No. 96-7469 (D. V.I. 5/23/97) - In this appeal, the appellant argued that the trial court erred in denying a continuance. The appellant also argued that the absence of a third judge on a panel of the Appellate Division of the District Court of the Virgin Islands deprived that court of the power to decide the appellant's intermediary appeal.

The Third Circuit found that the absence of the third judge did not deprive the district court of the power to decide the appeal. The Third Circuit also found the denial of the continuance to be error. The Third Circuit reasoned that the limited availability of courtrooms did not outweigh defense counsel's need for additional time, necessitated by a sudden family emergency, to prepare for trial. The Third Circuit thus granted a new trial. (Becker, Roth and Weis, C.J.; opinion by Weis.) **115 F.3d 171.**

533. United States v. Sally, No. 96-1864 (E.D. Pa. 5/28/97) - This appeal raised two issues and challenged only the sentence imposed. The Third Circuit held that the district court did not err by refusing to depart downward at sentencing under U.S.S.G. § 5H1.1 because of Mr. Sally's youth when he committed the offense, and his subsequent maturation. However, in light of the Supreme Court's recent decision in **Koon v. United States**, 116 S.Ct. 2035 (1996) and the Fourth Circuit's decision in **United States v. Brock**, 108 F.3d 31 (4th Cir. 1997), the Third Circuit VACATED Mr. Sally's sentence and REMANDED to the district court for a determination of whether he is entitled

to a downward departure based on his post-conviction rehabilitation efforts.

The issue of whether post-conviction rehabilitation could be the basis of a downward departure constituted an issue of first impression for the Third Circuit. The Third Circuit held that post-offense rehabilitation efforts may constitute a sufficient basis for downward departure provided that the efforts are so exceptional as to remove the particular case from the heartland in which the acceptance of responsibility guideline was intended to apply. (Scirica, Cowen and Nygaard, C.J.; opinion by Nygaard.) **116 F.3d 76.**

534. United States v. Thomas, No. 96-7476 (D. V.I. 5/29/97) - A jury convicted Mr. Thomas of conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846. On appeal, Mr. Thomas challenged the sufficiency of the evidence. The Third Circuit found that there was no evidence from which a jury could possibly infer that Mr. Thomas knew that the object of the conspiracy was to possess cocaine with the intent to distribute. As a result, the Third Circuit held that the evidence could not support Mr. Thomas' conspiracy conviction. The Third Circuit thus REVERSED the judgment of conviction and directed that the district court enter a judgment of acquittal. (Becker, Roth and Weis, C.J.; opinion Becker.) **114 F.3d 403.**

535. Christy v. Horn, No. 96-9004 (W.D. Pa. 6/5/97) - The district court granted Mr. Christy a stay of execution and held his federal habeas petition in abeyance pending exhaustion of a particular issue in state court. The Commonwealth of Pennsylvania appealed, arguing that the district court did not have the authority to hold the petition in abeyance.

The Third Circuit first addressed the issue of whether the district court order staying the execution was a final appealable order. The Court found that this was not a final appealable order because it did not resolve the habeas case and was not dispositive of any issue raised in the habeas petition. The Court went on, however, to find that the order was reviewable as a collateral order.

Turning to the merits of the appeal, the Third Circuit found that Mr. Christy had not demonstrated any unusual circumstances which would warrant excusing exhaustion. More specifically, Mr. Christy's execution was not imminent, as he had argued. The Court thus VACATED the district court's order and REMANDED the case to the district court with instructions to DISMISS the habeas corpus petition. (Becker, Nygaard and Roth, C.J.; opinion Nygaard.) **115 F.3d 201.**

536. Johnson v. Rosemeyer, No. 96-1861 (E.D. Pa. 6/13/97) - Mr. Johnson was convicted in the Court of Common Pleas of Philadelphia County of aggravated assault. Mr. Johnson subsequently filed a petition for writ of habeas corpus which the district court denied. Mr. Johnson appealed this denial.

On appeal, Mr. Johnson raised two issues. First, he argued that the district court erred in failing to grant habeas relief on the grounds that the state trial court's jury instructions on justification were erroneous and thus violated his right to due process. Second, he argued that he was denied due process because of the trial court's incomplete and erroneous jury instructions on aggravated assault.

The Third Circuit AFFIRMED the district court's denial of habeas corpus relief. (Greenberg, Roth and Weis, C.J.; opinion by Greenberg.) **117 F.3d 104.**

537. United States v. Martin, No. 96-7373 (M.D. Pa. 6/18/97) - The appellant filed a motion to vacate sentence pursuant to 28 U.S.C. § 2255; he asked that his conviction under 18 U.S.C. § 924(c)(1) be vacated based upon the Supreme Court's recent decision in **Bailey v. United States**, 116 S.Ct. 501 (1995). The government and the appellant agreed regarding the vacatur of the §

924(c)(1) conviction, but disagreed regarding whether there should be resentencing on the remaining conviction which was not challenged in the § 2255 motion. The appellant argued against resentencing on jurisdictional and constitutional grounds. The district court rejected these arguments and resentenced Mr. Martin on the remaining count of conviction. On appeal, Mr. Martin reiterated his challenges to the district court's ability to resentence him under the circumstances. The Third Circuit AFFIRMED reasoning that it was bound by its prior decision in **United States v. Davis**, 112 F.3d 118 (3d Cir. 1997).

Judge Sloviter filed a concurrence in which she expressed her disagreement with the **Davis** opinion. Judge Sloviter believes that when a conviction is overturned as the result of a § 2255 motion, the district court has no jurisdiction to resentence on the convictions which were not challenged in the § 2255 motion. Judge Sloviter suggested that this issue might be appropriate for Supreme Court review. (Sloviter, Scirica and Seitz, C.J.; Per Curiam Opinion; concurrence by Sloviter.) JIM WADE, F.P.D. FOR THE M.D Pa. HANDLED THIS CASE. **116 F.3d 702.**

538. United States v. Sabir, No. 96-5626 (D. N.J. 6/30/97) - Mr. Sabir challenged the district court's refusal to apply at sentencing the safety valve provision of 18 U.S.C. § 3553(f). The district court refused to apply this provision on the grounds that Mr. Sabir had not satisfied its fifth and final requirement: that he provide the government with "all information and evidence [he] has concerning the offense or offenses." More specifically, the district court found that Mr. Sabir had minimized his role in the offense and had thus failed to satisfy this requirement.

On appeal, Mr. Sabir made two arguments. First, he argued that because he was deemed to have accepted responsibility for purposes of U.S.S.G. § 3E1.1, it was contradictory to say that he minimized his role and thus did not satisfy the fifth element of the safety valve provision. Second, Mr. Sabir argued that he had complied with the fifth element of the safety valve provision.

The Third Circuit held that just because a defendant is entitled to a reduction of his offense level for acceptance of responsibility, he has not necessarily satisfied the requirements of the safety valve provision. The Third Circuit also found that Mr. Sabir had not in fact satisfied the fifth and final requirement of the safety valve provision. AFFIRMED. (Greenberg, McKee and Wellford, C.J.; opinion by Greenberg.) **117 F.3d 750.**

539. Impounded (Juvenile R.G., Appellant), No. 96-7781 (D. V.I. 6/30/97) - In this appeal, the appellant challenged the federal government's prosecution of him as an adult in federal court pursuant to 18 U.S.C. § 5032.

This appeal first presented the question of whether the prosecutor's decision to certify a juvenile as an adult in order to transfer the juvenile's case from federal to state court is reviewable by a federal court. A split of authorities exists among the courts of appeals on this issue. The Third Circuit sided with the majority view and held that only limited aspects of the certification decision can be reviewed: specifically, whether the certification is proper in form; whether the certification decision was made in bad faith; and whether the juvenile has been charged with a crime of violence. The Court's decision regarding the limited review of an adult certification decision effectively precluded the appellant's challenge to his certification.

The appellant also challenged his transfer to adult status under the mandatory transfer provisions of 18 U.S.C. § 5032; under those provisions, the offense with which the defendant was charged must involve a substantial risk that physical force will be used against the person of another in the commission of the offense. The Third Circuit found that the offense with which the appellant was charged, possession of a dangerous weapon, does involve a substantial risk of the use of physical force, and therefore satisfies this requirement.

The Third Circuit thus AFFIRMED the appellant's adult certification and his transfer from juvenile to adult status in federal court. (Becker, Roth and Weis, C.J.; opinion by Becker; concurrence by Weis.) **117 F.3d 730.**

540. Virgin Islands v. Blake, No. 96-7769 (D. V.I. 7/8/97) - This case involved the interpretation of a Virgin Islands statute which allows the government to file an appeal during a criminal trial of a ruling which involves a "substantial and recurring question of law which requires appellate resolution." The district court correctly found that the ruling at issue here, a ruling to exclude certain evidence, did not involve such a "recurring question of law." The Third Circuit therefore AFFIRMED the district court's order refusing to allow the government to appeal, and REMANDED the case for further proceedings. (Becker, Roth and Weis, C.J.; opinion by Roth.) **118 F.3d 972.**

541. United States v. Rosario, No. 96-5286 (D. N.J. 7/10/97) - In this appeal, the appellant challenged his conviction for passing a United States Treasury check in violation of 18 U.S.C. § 510(a) on grounds of insufficient evidence. More specifically, the issue was whether a conviction for passing a treasury check can be sustained based solely on evidence establishing that the defendant possessed the check, and that it was "probable" that he had signed the check. The Third Circuit concluded that such evidence was sufficient, and AFFIRMED. (Nygaard and Lewis, C.J., Cohill, D.J.; opinion by Lewis; dissent by Nygaard.) **118 F.3d 160.**

542. United States v. Coney, No. 96-1740 (E.D. Pa. 7/16/97) - The Court held in this case that an attorney appointed to represent a criminal defendant under the Criminal Justice Act is under no obligation to file a petition for rehearing if, according to the professional judgment of the attorney, it would be inappropriate to do so. Such a filing is not required by the Criminal Justice Act, or the Guide to Judiciary Policies and Procedures which implement the Act. Rather than file a meritless petition for rehearing, counsel should file a motion to withdraw, with notice to the appellant that he or she may file a pro se petition for rehearing. Sloviter, Stapleton and Aldisert, C.J.; opinion by Sloviter.) **120 F.3d 26.**

543. United States v. Dozier, No. 96-5785 (D. N.J. 7/18/97) - The issue in this case was whether the Ex Post Facto Clause of the Constitution is violated when, upon revocation of supervised release, a defendant is sentenced to a new term of supervised release, even though a new term was not authorized at the time the defendant committed his underlying offense. Title 18 U.S.C. § 3583(h), the section which authorizes imposition of a new term of supervised release following revocation of a prior term of supervised release, was enacted in September of 1994. The Third Circuit held that the application of 18 U.S.C. § 3583(h) to defendants whose underlying offense is a Class B, C or D felony which was committed before September of 1994, increases the potential punishment for violations of supervised release, and therefore violates the Ex Post Facto Clause of the Constitution. The Third Circuit VACATED the sentence and REMANDED to the district court for resentencing. (Stapleton, Lewis and Aldisert, C.J.; opinion by Stapleton.) **119 F.3d 239.**

544. Roussos v. Menifee, No. 97-7011 (M.D. Pa. 7/18/97) - This was an appeal from the denial of a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241. Mr. Roussos is a federal prison inmate who was convicted of conspiracy to distribute a controlled substance in violation of 21 U.S.C. § 846. Mr. Roussos completed a rigorous 500-hour drug treatment program sponsored by the Federal Bureau of Prisons. Federal legislation located at 18 U.S.C. § 3621(e)(2)(B) indicates that completion of this drug treatment program renders an inmate who was "convicted of a

nonviolent offense" eligible for a one-year sentence reduction. Despite Mr. Roussos' completion of the drug treatment program, the Bureau of Prisons denied him the sentence reduction.

The basis for the denial was that at sentencing, Mr. Roussos received a sentence enhancement pursuant to U.S.S.G. § 2D1.1; this enhancement was based upon a finding that he possessed a firearm in conjunction with a drug trafficking offense. According to a Bureau of Prisons' Program Statement, all inmates with two-level sentencing enhancements for firearm possession have committed crimes of violence and are thus ineligible for the one-year sentence reduction.

This appeal presented two issues. First, this appeal presented the issue of whether the sentence enhancement under U.S.S.G. § 2D1.1 for possession of a weapon renders Mr. Roussos' conviction for conspiracy to distribute a controlled substance a crime of violence so that he was ineligible for the sentence reduction under 18 U.S.C. § 3621(e)(2)(B). Second, this appeal presented the issue of whether the Bureau of Prisons' Program Statement is inconsistent with 18 U.S.C. § 3621(e)(2)(B) which authorizes early release for completion of the drug treatment program.

The Third Circuit held that the Bureau of Prisons' Program Statement was inconsistent with, and in conflict with, both 18 U.S.C. § 3621(e)(2)(B), and the Bureau of Prisons' own regulation (28 C.F.R. § 550.58). The Court further held that the Bureau of Prisons cannot rely upon Mr. Roussos' sentence enhancement to classify his conviction as a crime of violence and thus deny him eligibility for the sentence reduction. The Third Circuit VACATED the district court's order denying habeas corpus relief, and REMANDED to the district court with instructions that the district court remand to the Bureau of Prisons for further proceedings consistent with the opinion. (Becker and Scirica, C.J., Kelly, D.J.; opinion by Becker.) **122 F.3d 159.**

545. In re: Ocsulis Dorsainvil, No. 96-8074 (M.D. Pa. 7/23/97) - Mr. Dorsainvil filed a habeas corpus petition pursuant to 28 U.S.C. § 2255 and the district court denied it. After that denial the Supreme Court issued its opinion in **Bailey v. United States**, 116 S.Ct. 501 (1995). Mr. Dorsainvil argued that the **Bailey** opinion invalidated his conviction under 18 U.S.C. § 924(c). Mr. Dorsainvil therefore filed a second habeas corpus petition under 28 U.S.C. § 2255.

The district court denied this second habeas corpus petition, reasoning that it did not have jurisdiction to address it due to recent changes in § 2255 procedure promulgated by the recent enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The district court further ruled that only the Third Circuit could give the necessary certificate which would allow Mr. Dorsainvil's second § 2255 action to proceed. Mr. Dorsainvil therefore filed a motion with the Third Circuit asking for certification of his second § 2225 petition.

The Third Circuit declined to certify Mr. Dorsainvil's second § 2255 petition. There are two circumstances under which the AEDPA allows the filing of a successive § 2255 petition: newly discovered evidence which would prove the defendant's innocence, and a new rule of constitutional law which the Supreme Court makes retroactive to cases on collateral review. The Third Circuit found neither of these circumstances to be present here.

The Third Circuit went on, however, to find that Mr. Dorsainvil was not precluded from pursuing his claim for habeas corpus relief in a petition filed pursuant to 28 U.S.C. § 2241. The Third Circuit therefore suggested that Mr. Dorsainvil pursue his claim under that provision. (Sloviter, Stapleton and Cowen, C.J.; opinion by Sloviter; concurrence by Stapleton.) **119 F.3d 245.**

546. Smith v. Horn, Nos. 96-9001 and 96-9002 (E.D. Pa. 7/24/97) - This was an appeal from a judgment of the district court granting in part, and denying in part, Mr. Smith's petition for writ of habeas corpus. Mr. Smith filed a petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 challenging his conviction in state court for first-degree murder.

The district court held that certain comments made by the prosecutor during the penalty phase of Mr. Smith's trial violated his rights pursuant to the Eighth and Fourteenth Amendments. The district court further held that the failure of Mr. Smith's attorney to object to these comments violated his right to effective assistance of counsel pursuant to the Sixth and Fourteenth Amendments. The district court rejected Mr. Smith's claim that the jury instructions during the guilt phase of the trial concerning the elements of first-degree murder under Pennsylvania law violated the Due Process Clause of the Fourteenth Amendment. The district court also rejected Mr. Smith's arguments that other constitutional errors occurred at the penalty phase.

Both the Commonwealth and Mr. Smith appealed. The Third Circuit agreed with Mr. Smith that errors in the jury instructions at the guilt phase of his trial violated his rights pursuant to the Due Process Clause of the Fourteenth Amendment. The Third Circuit therefore did not reach the district court's holding that errors at the penalty phase violated his rights pursuant to the Sixth, Eighth and Fourteenth Amendments. The Third Circuit also did not reach Mr. Smith's arguments concerning other claims of error during the penalty phase.

The Third Circuit thus VACATED the judgment of the district court in part, REVERSED in part, and REMANDED with directions to grant habeas relief. (Mansmann, Cowen and Alito; opinion by Cowen; dissent by Alito.) **120 F.3d 400.**

547. United States v. Isaac, No. 96-7109 (D. V.I. 7/30/97) - This was an appeal from a conviction for conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. § 846, and possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1). On appeal, Mr. Isaac challenged the district court's jury instruction on reasonable doubt; the district court's failure to caution the jury regarding the credibility of witnesses who were accomplices or immunized witnesses; the district court's failure to take judicial notice of the fact that charges against certain witnesses were dropped upon motion by the government; and the fact that the district court allowed the prosecutor to intimate that Mr. Isaac's decision not to testify was evidence against him. The Third Circuit rejected all of these arguments, and AFFIRMED both convictions. (Scirica, Nygaard and McKee, C.J.; opinion by Nygaard; concurrence by McKee.) **NOT REPORTED IN F.3D**. THIS OPINION WAS SUBSEQUENTLY VACATED, AND A PETITION FOR REHEARING WAS GRANTED, BY WAY OF AN ORDER DATED AUGUST 27, 1997.

548. United States v. Palma-Ruedas, Nos. 95-5554, 95-5601, 96-5160, 96-5161, 96-5162 and 96-5163 (D. N.J. 7/30/97) - This was an appeal from convictions for kidnapping and conspiracy to commit kidnapping in violation of 18 U.S.C. § 1201(a)(1) and (c); conspiracy to distribute and possess cocaine in violation of 21 U.S.C. § 846; and using and carrying a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1).

On appeal, the appellants raised a total of 13 issues. Although the Court discussed each of those issues in turn, the bulk of the discussion was devoted to the following issue: Whether the district court erred in refusing to dismiss the § 924(c)(1) conviction for lack of venue based upon the fact that the firearm in question was never "used" or "carried" outside of Maryland, and prosecution of this case occurred in New Jersey.

The Third Circuit REVERSED the § 924(c)(1) conviction for lack of venue, but AFFIRMED with regard to all of the other issues raised. With regard to the venue issue, the Third Circuit held that one commits a § 924(c)(1) violation in the district where one "uses" or "carries" the firearm. Thus, because the firearm at issue here was "used" or "carried" in Maryland, the trial on this charge should have occurred there. (Alito, Roth and Lewis, C.J.; opinion by Lewis; concurrence/dissent by Alito.) **121 F.3d 841.**

549. United States v. Richmond, No. 95-5764 (D. N.J. 8/1/97) - Mr. Richmond appealed the sentence imposed, arguing that because he was only 18 years old at the time of the offense, the district court abused its discretion when it ordered the maximum penalty within the guideline sentencing range. The government challenged the Third Circuit's jurisdiction over the appeal on two grounds: first, that the notice of appeal was untimely, and second, that a court of appeals has no jurisdiction to review a sentence within the guideline range. With regard to the government's first jurisdictional challenge, the Third Circuit found that a remand to the district court was appropriate for a determination regarding "excusable neglect" under Federal Rule of Appellate Procedure 4(b), the rule governing late filings of notices of appeal. However, the Third Circuit found that no such remand was necessary because it agreed with the government's second jurisdictional challenge. The Court therefore DISMISSED the appeal without reaching the merits. (Sloviter and Roth, C.J., Ludwig, D.J.; opinion by Sloviter.) **120 F.3d 434.**

550. United States v. DeJulius, No. 96-2046 (E.D. Pa. 8/5/97) - Mr. DeJulius pleaded guilty to federal charges relating to a conspiracy to distribute 19 pounds of methamphetamine. The quantity of methamphetamine to which Mr. DeJulius pled guilty triggered a 10-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A)(viii). Nonetheless, the district court sentenced Mr. DeJulius to a 70-month term of imprisonment. In arriving at this sentence, the district court noted that there are two kinds of methamphetamine: D-methamphetamine and L-methamphetamine. Here, however, Mr. DeJulius pled guilty to offenses involving DL-methamphetamine which is a combination of the two types of methamphetamine. The district court concluded that only D-methamphetamine triggers the mandatory minimum sentencing provisions. For purposes of sentencing, the district court therefore broke the quantity of DL-methamphetamine involved in this offense down into equal parts of D-methamphetamine and L-methamphetamine. Then, concluding that the amount of D-methamphetamine alone was insufficient for the application of the mandatory minimum sentencing provisions, the district court conducted a guidelines calculation that produced a sentencing range of 70-87 months.

The government appealed on the grounds that the district court erred by failing to sentence Mr. DeJulius to the 10-year mandatory minimum sentence. The government argued that there is no distinction between D-, L- or DL-methamphetamine for purposes of the 10-year mandatory minimum sentencing provision. The Third Circuit analyzed the relevant statute, 21 U.S.C. § 841(b)(1)(A)(viii), and concluded that the statute makes no distinction between the various forms of methamphetamine. Thus, the mandatory minimum sentencing provisions apply regardless of whether the methamphetamine in question is D-methamphetamine, L-methamphetamine or DL-methamphetamine. The Third Circuit REVERSED the judgment of the district court, and REMANDED for resentencing. (Stapleton and Lewis, C.J., Walls, D.J.; opinion by Lewis.) **121 F.3d 891.**

551. United States v. Igbonwa, Nos. 96-1848 and 97-1054 (E.D. Pa. 8/7/97) - This was an appeal from the district court's grant of habeas corpus relief to Mr. Igbonwa. More specifically, the district court ordered the government to take steps to prevent Mr. Igbonwa's deportation to Nigeria.

Mr. Igbonwa, a Nigerian citizen, entered the United States as a "non-immigrant visitor for pleasure." The Immigration and Naturalization Service ("INS") adjusted Mr. Igbonwa's status to that of conditional permanent resident following his marriage to a United States citizen. Mr. Igbonwa later petitioned to remove the conditional element of his immigration status; the INS denied this petition after determining that the marriage was a sham marriage entered into solely for the purpose of securing permanent resident status. The INS began proceedings to terminate Mr. Igbonwa's

conditional permanent resident status, but the proceedings were halted as the result of Mr. Igbonwa's federal criminal charges.

Mr. Igbonwa pled guilty to the federal drug violations with which he was charged. Mr. Igbonwa alleged that as part of the plea bargain, the Assistant United States Attorney orally promised that he would not be deported.

While Mr. Igbonwa was incarcerated, the INS began an investigation to determine whether he was subject to deportation, and initiated deportation hearings. An immigration judge eventually issued an order of deportation. Mr. Igbonwa completed his sentence of imprisonment, but remained incarcerated pending his deportation pursuant to the INS detainer notice.

Mr. Igbonwa filed a habeas corpus action pursuant to 28 U.S.C. § 2255. The district court conducted hearings and found that the government had promised Mr. Igbonwa that he would not be deported. The district court therefore entered an order that the United States take measures to prevent Mr. Igbonwa's deportation. The government timely appealed. The Third Circuit REVERSED the district court's order preventing deportation.

The Third Circuit reasoned that the district court relied upon no evidence other than Mr. Igbonwa's own testimony. That testimony was marred with inconsistencies. Thus, the district court's factual findings based upon this testimony were clearly erroneous. The Third Circuit further held that an individual Assistant United States Attorney does not have the authority to make a promise pertaining to deportation that will bind the INS without express authorization from the INS. (Greenberg, Alito and Rosenn, C.J.; opinion by Rosenn; dissent by Alito.) **120 F.3d 437.**

552. Government of the Virgin Islands, in the Interest of: M.B., a Minor, No. 96-7077 (D. V.I. 8/8/97) - This was an appeal from an order of the District Court of the Virgin Islands. That order affirmed the Territorial Court's transfer of the prosecution of a minor from the Family Division to the Criminal Division of the Territorial Court so that he could be tried as an adult. M.B. argued that the Territorial Court's reliance on the probable cause findings made at the "advice of rights" hearing violated his right to counsel because he was unrepresented at that hearing and therefore could not exercise his right to cross-examine the government witness who testified. The Third Circuit agreed with this argument and ruled that the transfer to the jurisdiction of the adult court was improper. The Third Circuit therefore REVERSED the judgment of the district court and REMANDED. (Scirica, Nygaard and McKee, C.J.; opinion by McKee.) **122 F.3d 164.**

553. United States v. Cooper, No. 96-1763 (E.D. Pa. 8/11/97) - Mr. Cooper was convicted of tampering with a government informant. The Third Circuit REVERSED his conviction on grounds of insufficient evidence. The Third Circuit also noted that retrial was barred by the Double Jeopardy Clause. (Stapleton and Lewis, C.J., Walls, D.J.; opinion by Lewis.) **121 F.3d 130.**

554. Impounded, No. 96-7545 (D. V.I. 8/13/97) - The appellant appealed the district court's order transferring him from juvenile to adult status for criminal prosecution pursuant to the federal Juvenile Delinquency Act, 18 U.S.C. § 5032. The appellant argued that the district court did not have jurisdiction over the transfer procedure, and that the district court's factual findings were insufficient to support its decision to transfer him. The Third Circuit agreed that the district court lacked jurisdiction to begin the transfer procedure. The government failed to comply with the record certification requirement of § 5032, and this requirement is jurisdictional in nature. Because the district court found jurisdiction to be lacking, it declined to reach the issue of the sufficiency of the district court's factual findings. The Third Circuit VACATED the district court's transfer order and REMANDED for further proceedings. (Scirica, Nygaard and McKee, C.J.; opinion by McKee.) **120**

F.3d 457.

555. United States v. Roman, Nos. 96-1962 and 96-1963 (E.D. Pa. 8/15/97) - This appeal challenged only the sentences of both defendants, and raised the following issues:
1) Did the district court err by imposing sentencing enhancements for crack cocaine?
2) Did the district court err by concluding that the government had not breached the plea agreements by refusing to file a downward departure motion?
3) Did the district court err by refusing a request for funds to retain a psychologist to testify on behalf of one of the appellants at sentencing?

The Third Circuit rejected all three of these arguments, and AFFIRMED the sentences imposed. With regard to the first issue, the Court found that the government had met its burden of proving that the substance in question was crack cocaine. That burden was satisfied through the testimony of a police officer who testified that the substance was packaged in the same manner as crack cocaine. With regard to the second issue, the Court found that the district court did not err in finding that the government did not breach the plea agreement. The district court had grounds for concluding that the appellants did not provide sufficient information to justify a downward departure motion. With regard to the third issue, the Court upheld the district court's refusal of funds for a psychiatrist to testify at sentencing. The testimony which would have been presented was irrelevant. (Greenberg and McKee, C.J., Greenaway, D.J.; opinion by McKee.) **121 F.3d 136.**

556. Orban v. Vaughn, No. 96-2116 (E.D. Pa. 8/18/97) - This was an appeal by the Commonwealth from an order of the district court granting habeas corpus relief to the petitioner, Mr. Orban. The basis for the grant of habeas corpus relief was the district court's conclusion that Mr. Orban's state court convictions for aggravated assault and recklessly endangering another person, which resulted from a motor vehicle accident, were not supported by sufficient evidence. The effect of the district court's order granting habeas corpus relief was to vacate the convictions and sentences at issue. Mr. Orban's habeas corpus petition also challenged other convictions. The district court rejected those additional arguments, and denied the remaining requests for habeas corpus relief.

On appeal, the Third Circuit rejected the district court's conclusion that the aggravated assault and reckless endangerment convictions were not supported by sufficient evidence. The Third Circuit thus REVERSED the district court to the extent that it granted habeas corpus relief and vacated the aggravated assault and reckless endangerment convictions. (Greenberg and McKee, C.J., Greenaway, D.J.; opinion by Greenberg.) **123 F.3d 727.**

557. United States v. Smith, No. 97-5176 (D. N.J. 8/19/97) - In this case, the Third Circuit held that a newspaper does not have a First Amendment or common law right of access to sealed court filings and closed hearings which divulge grand jury material that is protected under Federal Rule of Criminal Procedure 6(e). The Third Circuit thus AFFIRMED the district court's order sealing the documents and hearings in question. The Third Circuit also REMANDED so that a hearing which had been stayed pending appeal could proceed. Finally, the Third Circuit noted that if at some point the district court determines that the documents and hearings in question are not secret, that it can open them to the public. (Becker and Scirica, C.J., Kelly, D.J.; opinion by Becker.) **123 F.3d 140.**

558. United States v. Williams, Nos. 96-3629, 96-3661 and 96-3666 (W.D. Pa. 8/26/97) - The defendants entered conditional pleas of guilty to offenses related to the operation of an illegal gambling business. On appeal, the defendants raised the following issues:
1) the district court erred in refusing to suppress video surveillance evidence which was obtained

in violation of the Fourth Amendment;
2) the evidence seized from the home of one of the defendants should have been suppressed because the warrant was not supported by probable cause;
3) the charges brought under 18 U.S.C. § 1955, the statute which prohibits illegal gambling businesses, should have been dismissed because those charges were based on violations of Pennsylvania gambling statutes that violate the Equal Protection Clause;
4) the district court erred in refusing to suppress the electronically intercepted oral evidence because the Pennsylvania wiretapping statute does not comply with certain requirements of the federal Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510-2520;
5) the district court erred in refusing to suppress the electronically intercepted oral evidence because it was disclosed in violation of 18 Pa. Cons. Stat. Ann. §§ 5718 and 5717(a);
6) the district court erred in refusing to suppress the electronically intercepted oral evidence because there was no necessity for the use of this investigative technique, as is required by 18 Pa. Cons. Stat. Ann. § 5709(3)(vii) and 18 U.S.C. § 2518(1)(c);
7) the extension of the period of electronic surveillance was unjustified and the evidence obtained as a result should have been suppressed;
8) the district court erred in refusing to suppress the electronically intercepted oral evidence because the tapes were not timely sealed as required by 18 U.S.C. § 2510-2520 and the state wiretapping statute.

The Third Circuit AFFIRMED with regard to all issues. (Cowen, Alito and Seitz, C.J.; opinion by Alito.) **124 F.3d 411.**

559. Bey v. Morton, No. 95-5608 (D. N.J. 8/28/97) - This was an appeal from a denial of a petition for writ of habeas corpus. The main issue presented was whether the admission at trial of the defendant's confession violated his Sixth Amendment right to counsel. The defendant confessed to the murder of two women while conversing with a corrections officer at the prison where he was incarcerated. This case also presented a challenge to the sufficiency of the evidence.

The Third Circuit held that no Sixth Amendment violation occurred because the corrections officer made no deliberate attempt to elicit incriminating information for use in a prosecution. The Third Circuit also held that there was sufficient evidence to support the jury's finding of guilt. The Third Circuit thus AFFIRMED the district court's denial of the petition for writ of habeas corpus. (Stapleton and Mansmann, C.J., Pollak, D.J.; opinion by Stapleton.) **124 F.3d 524.**

560. United States v. McBroom, No. 96-5719 (D. N.J. 8/28/97) - Mr. McBroom pled guilty to one count of possession of child pornography in violation of 18 U.S.C. § 2252(a)(4). At sentencing, Mr. McBroom moved for a downward departure pursuant to U.S.S.G. § 5K2.13 on the ground that he suffered from a significantly reduced mental capacity. The district court concluded that Mr. McBroom was ineligible for a downward departure, reasoning that he was able at the time of the offense to absorb information in the usual way and to exercise the power of reason.

On appeal, the Third Circuit held that the district court could have considered the possibility that Mr. McBroom suffered from a volitional impairment which prevented him from controlling his behavior or conforming it to the law. The Third Circuit therefore VACATED Mr. McBroom's sentence and REMANDED for resentencing so that the district court could consider whether Mr. McBroom suffered from a volitional impairment which caused his illegal conduct, and whether such impairment warranted a downward departure. (Mansmann, Nygaard and Rosenn, C.J.; opinion by Mansmann.) **124 F.3d 533.**

561. United States v. Mitchell, No. 96-1605 (E.D. Pa. 9/9/97) - Ms. Mitchell pled guilty to engaging in a conspiracy to distribute cocaine. On appeal, Ms. Mitchell raised two issues. The first issue on appeal was whether a defendant who pleads guilty to distributing cocaine, but reserves the right to contest the amount of cocaine for which she should be held responsible for sentencing, has a Fifth Amendment right not to testify during sentencing. The second issue was whether the district court erred in finding that the government proved by the preponderance of the evidence that Ms. Mitchell had sold thirteen kilograms of cocaine. With regard to the first issue, the Third Circuit held that once Ms. Mitchell pled guilty to the substantive offense, she lost her Fifth Amendment privilege as to that offense. The Third Circuit reasoned that Ms. Mitchell had not demonstrated that her testimony at sentencing would subject her to future federal or state prosecutions; the mere possibility of a more harsh sentence was not sufficient for her to avail herself of the protection of the Fifth Amendment, and her refusal to testify at sentencing could be the basis of adverse inferences against her. With regard to the second issue, the Third Circuit ruled that the district court's findings of fact regarding drug quantity were not clearly erroneous. AFFIRMED. (Sloviter, Roth and Michel, C.J.; opinion by Sloviter; concurrence by Michel.) **122 F.3d 185.**

562. United States v. McLaughlin, Nos. 96-1982 and 96-2000 (E.D. Pa. 9/11/97) - The defendants appealed their convictions and sentences for tax evasion. The defendants raised several issues on appeal.

The defendants first argued that the Fifth Amendment privilege applied to their refusal to produce certain subpoenaed documents. The defendants raised this issue as the result of the government's repeated references to the incomplete production of subpoenaed documents, and the government's argument that this incomplete production was evidence of culpability. The Third Circuit found that such references violated the defendants' Fifth Amendment rights, and warranted VACATING the affected convictions and REMANDING for a new trial.

The defendants' second argument was that the indictment charged evasion of payment of taxes, rather than evasion of assessment of taxes, and that there was therefore a failure of proof at trial. The Third Circuit rejected this argument, providing the following reasons in support of its conclusion: 1) a reading of the entire indictment makes clear that the government intended to proceed on a theory of evasion of assessment; 2) at trial, the defense attorney addressed the evasion-of-assessment theory; and 3) Count Two of the indictment specified conduct relevant only to an evasion-of-assessment theory. As a result, the Third Circuit concluded that it was clear at trial that the government was proceeding on an evasion-of-assessment theory.

Third, the defendants argued that by receiving records from the defendants' accountant without first giving the defendants notice or issuing a summons, the IRS violated 26 U.S.C. § 7609(a). The Third Circuit rejected this argument, and held that the government did not need to issue a summons or give notice.

The defendants' fourth argument was that the district court's intervention during defense counsel's re-cross examination of a government witness warranted a new trial. The Third Circuit noted that the district court had given a curative instruction regarding this intervention, and found that the intervention did not warrant the granting of a new trial.

Finally, the defendants challenged the computation of their sentences under the guidelines. The defendants raised three specific challenges to the guideline computation. First, the defendants argued that the tax loss upon which they were sentenced was artificially inflated by including income on which taxes were already being paid. Second, the defendants argued that the Sentencing Commission exceeded its authority by including interest in the computation of tax loss. Third, the defendants argued that an upward adjustment for obstruction of justice was not warranted. The Third

Circuit rejected the first and second of these arguments. However, the Third Circuit agreed with the third argument, and found that the imposition of a sentencing enhancement under U.S.S.G. § 3C1.1 was clear error. The Third Circuit thus VACATED the sentence and REMANDED for resentencing. (Becker and Scirica, C.J., Schwarzer, D.J.; opinion by Schwarzer; concurrence by Becker.) **126 F.3d 130.**

563. United States v. Mosley, No. 96-832 (D. N.J. 9/18/97) - Mr. Mosley appealed from a judgment of conviction and sentence entered in the district court on two counts of bank robbery. Mr. Mosley argued that the district court erred in failing to instruct the jury that it could convict him of bank larceny as a lesser included offense of bank robbery. This argument presented an issue of first impression for the Third Circuit: whether bank larceny, 18 U.S.C. § 2113(b), is a lesser included offense of bank robbery, 18 U.S.C. § 2113(a). Rejecting the majority view, the Third Circuit held that bank larceny is not a lesser included offense of bank robbery, and that the district court did not err by refusing the requested jury instruction. The Third Circuit thus AFFIRMED the conviction. (Stapleton, Greenberg and Cowen, C.J.; opinion by Greenberg.) **126 F.3d 200.**

564. Banks v. Horn, No. 96-9003 (M.D. Pa. 9/19/97) - This was an appeal from an order denying Mr. Banks' petition for writ of habeas corpus which was filed pursuant to 28 U.S.C. § 2254. Mr. Banks' underlying convictions in the Pennsylvania state courts were for murder, and he received death sentences as well as terms of imprisonment.

Mr. Banks' habeas corpus petition contained both exhausted and unexhausted claims and was therefore mixed. Mr. Banks filed a motion to remand the petition to the state courts and to stay the proceedings in the district court pending exhaustion of the unexhausted claims. The Commonwealth opposed the motion, and asked the district court to dismiss the petition as mixed under **Rose v. Lundy**, 455 U.S. 509, 102 S.Ct. 1198 (1982).

The district court refused to dismiss the petition as mixed; the district court reasoned that Pennsylvania state law foreclosed the review of the unexhausted claims, and that those claims were therefore procedurally barred. The district court thus concluded that the petition was not mixed.

The district court ultimately addressed the petition on the merits, dismissing all of the exhausted claims on the merits and refusing to address the unexhausted claims on the grounds that they were procedurally barred. Mr. Banks then appealed the denial of habeas corpus relief to the Third Circuit.

The issue on appeal focused upon whether or not review of Mr. Banks' unexhausted claims by the Pennsylvania state courts was foreclosed under Pennsylvania state law. Mr. Banks argued that the Pennsylvania state courts would address his unexhausted claims, and that his petition was therefore mixed and should have been dismissed under **Rose v. Lundy**.

The Third Circuit concluded that it could not find that review of Mr. Banks' unexhausted claims by the Pennsylvania state courts was foreclosed. The Third Circuit therefore VACATED the district court's order and REMANDED the case to the district court to dismiss the petition without prejudice as mixed. (Sloviter, Greenberg and McKee, C.J.; opinion by Greenberg.) **126 F.3d 206.**

565. United States v. Skandier, No. 97-3129 (W.D. Pa. 9/22/97) - In this appeal, the Third Circuit held that if a defendant filed a motion pursuant to 28 U.S.C. § 2255 before April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), § 2253(c), as amended by the AEDPA, does not apply to the appeal from the denial of that motion. As a result, defendants who filed their § 2255 motions before April 24, 1996 are therefore not required to obtain certificates of appealability before their appeals can be considered on the merits. This is true even

where, as was the case here, the notice of appeal was filed after April 24, 1996.

In this case, a certificate of appealability was requested and denied. Following that denial, the defendant filed a motion to recall the mandate and for rehearing. In light of its ruling that there was never a need for a certificate of appealability in the first place, the Third Circuit recalled the mandate and also VACATED the order denying the request for a certificate of appealability. (Becker, Alito and McKee, C.J.; opinion by Becker.) **125 F.3d 178.**

ON OCTOBER 24, 1997, THE THIRD CIRCUIT ISSUED AN ORDER INDICATING THAT CASES ADVERSELY AFFECTED BY THE **SKANDIER** DECISION SHOULD BE BROUGHT TO THE COURT'S ATTENTION FOR EXPEDITIOUS ACTION BY MOTION TO RECALL THE MANDATE, OR, BY PETITION FOR REHEARING. THE ORDER FURTHER STATED THAT WHERE A MOTION TO RECALL THE MANDATE IS FILED IN A CASE GOVERNED BY **SKANDIER**, THE CLERK WILL ISSUE AN ORDER RECALLING THE MANDATE AND SETTING A BRIEFING SCHEDULE REQUIRING THE APPELLANT TO FILE ARGUMENT ON THE MERITS BY INFORMAL BRIEF OR LETTER MEMORANDUM WITHIN 21 DAYS OF THE DATE OF THE ORDER, AND REQUIRING THE APPELLEE TO FILE A RESPONSE WITHIN 21 DAYS OF SERVICE OF APPELLANT'S BRIEF OR MEMORANDUM, AND REQUIRING THAT A REPLY BE FILED WITH 10 DAYS AFTER SERVICE OF THE APPELLEE'S BRIEF OR MEMORANDUM. FAILURE OF THE APPELANT TO FILE A BRIEF OR MEMORANDUM ON THE MERITS WILL RESULT IN THE DISMISSAL OF THE APPEAL FOR FAILURE TO PROSECUTE UNDER LAR MIS. 107.2(b).

566. United States v. Farrell, No. 96-1860 (E.D. Pa. 9/24/97) - Mr. Farrell was charged with attempting to dissuade a coconspirator from providing information to investigators of the United States Department of Agriculture regarding Mr. Farrell's involvement in a conspiracy to sell adulterated meat, and was convicted under 18 U.S.C. § 1512(b)(3), the federal witness tampering statute. Mr. Farrell appealed his conviction on the ground that the conduct for which he was convicted did not constitute "corrupt persuasion" within the meaning of the statute. The Third Circuit agreed and REVERSED Mr. Farrell's conviction and REMANDED for further proceedings. (Stapleton, Lewis and Campbell, C.J.; opinion by Stapleton; dissent by Campbell.) **126 F.3d 484.**

567. United States v. Monostra, No. 96-2050 (E.D. Pa. 9/25/97) - Mr. Monostra appealed his conviction on one count of bank fraud, arguing that he was indicted under the wrong subsection of 18 U.S.C. § 1344. In support of this position, Mr. Monostra argued that he did not intend to defraud the banks in question; instead, he intended to defraud the company for which he worked of money held in their accounts. Noting that money deposited in a bank becomes the property of that bank, the Third Circuit rejected this argument and found that the indictment of Mr. Monostra under subsection (1) of 18 U.S.C. § 1344 was not erroneous. The Third Circuit therefore AFFIRMED the conviction.

Mr. Monostra also challenged the two-point enhancement of his sentence under U.S.S.G. § 3A1.1(b). The district court based this enhancement upon the visual impairment of the president of the company which employed Mr. Monostra. The Third Circuit agreed with Mr. Monostra that the record lacked any evidence that the company president was a "vulnerable victim" under U.S.S.G. § 3A1.1. The Third Circuit therefore VACATED the sentence and REMANDED for further factfinding to determine if Mr. Monostra had taken advantage of the company president's visual impairment. (Scirica and Nygaard, C.J., Debevoise, D.J.; opinion by Nygaard.) **125 F.3d 183.**

568. United States v. Schwegel, No. 97-1082 (E.D. Pa. 10/7/97) - This appeal posed the issue of whether the sentencing ranges set forth in U.S.S.G. § 7B1.4 (Policy Statement) are merely advisory or whether they are mandatory and binding; this guideline policy statement deals with the imposition of sentence upon revocation of supervised release. The Third Circuit held that the guideline ranges set forth in § 7B1.4 are merely advisory despite the 1994 amendments to 18 U.S.C. § 3553(a)(4). Those amendments only require that a sentencing court "consider" the applicable guidelines or policy statements established for violations of probation of supervised release. Here, the district court properly considered the policy statement sentencing range. As a result, the district court did not abuse its discretion by imposing a sentence in excess of the policy statement's range. AFFIRMED. (Alito, Lewis and McKee, C.J.; Per Curiam Opinion.) **126 F.3d 551.**

569. United States v. West Indies Transport, Inc., Nos. 96-7063, 96-7064, 96-7065 (D. V.I. 10/15/97) - In this case, the defendants appealed their convictions and sentences for visa fraud, environmental crimes, conspiracy and racketeering.

The defendants first argued that their convictions for aiding and abetting visa fraud must be reversed because of an error in the jury instructions. At trial, the defendants requested a jury instruction which did not allow the jury to consider the element of materiality. This requested jury instruction was in accordance with Third Circuit law at that time. Between the time of verdict and sentencing, the Supreme Court issued a decision which held that the issue of materiality must be submitted to the jury. Thus, on appeal, the defendants argued that the jury instruction was error because it violated the new Supreme Court case law, which was retroactive. The Third Circuit found that the error in the jury instruction did not amount to plain error because it did not affect the outcome of the proceedings.

The defendants next argued that their convictions for aiding and abetting visa fraud should be reversed because the district court did not instruct the jury that it must find "knowing subscription" or "knowing presentation" of false material. The Third Circuit held that the defendants had failed to request such an instruction, and that any error in this regard was therefore invited error.

Third, the defendants argued that they could not be convicted of aiding and abetting visa fraud because the government conceded that the immigrant workers lacked criminal intent. The Third Circuit held that whether the immigrant workers lacked criminal intent is irrelevant so long as the defendants intentionally caused them to submit false information. Furthermore, when a defendant uses an innocent intermediary to present false claims or make false statements to the government, the criminal intent of the intermediary is not an element of the offense under 18 U.S.C. § 2(b).

The defendants' next several arguments dealt with the environmental convictions. Specifically, the defendants' fourth argument was that their conduct did not amount to discharge of a pollutant from a point source as required 33 U.S.C. §§ 1311(a) and 1362(12). The Third Circuit rejected this argument. The Third Circuit also rejected the defendants' fifth argument that their barge did not amount to a "vessel" as required by the statute under which they were charged and convicted. Similarly, the Third Circuit rejected the defendants' sixth argument that the district court had failed to properly instruct the jurors on the meaning of the term "knowingly" from 33 U.S.C. § 1311, and their seventh argument that the district court should have dismissed one of the counts because the government did not prove that the defendants had knowingly built a pier, wharf, or other structure, as required by 33 U.S.C. § 403. Finally, the Third Circuit also rejected the defendants' argument that they had not built structures "outside established harbor lines, or where no harbor lines have been established," as required under 33 U.S.C. § 403.

The defendants' ninth argument focused upon a local labor official's testimony regarding the

costs the defendants would have incurred had they employed workers through legal means. The defendants argued that the district court erred in refusing to grant a mistrial on the basis of this testimony, because it caused prejudice among union workers on the jury. The Third Circuit found no abuse of discretion in the denial of the mistrial.

The defendants' tenth and eleventh arguments focused upon their position that they were denied a fair trial when the district court prevented them from presenting evidence relevant to, and failed to instruct the jury on, two entrapment by estoppel defenses. The Third Circuit held that the entrapment by estopped defense applies where the defendant establishes by a preponderance of the evidence that a government official told the defendant that certain criminal conduct was legal; the defendant actually relied on the government officials' statements; and the defendant's reliance was in good faith and reasonable in light of the identity of the government official, the point of law represented, and the substance of the official's statement. The Third Circuit then found that the defendants had failed to meet these elements.

The defendants' twelfth argument was that their racketeering convictions should be overturned because of the absence of a predicate act. The Third Circuit saw no merit in this argument.

The defendants' last arguments focused upon their sentences. The Third Circuit rejected the defendants' argument that their fine was excessive. The Third Circuit also rejected the defendants' argument that untreated human sewage or fully biodegradable pollution warrants different treatment under the guidelines than other pollutants. The Third Circuit found the defendants' argument that district court erred by ordering restitution to be meritless, and also found, contrary to the defendants' arguments, that the amount of restitution was not excessive. AFFIRMED. (Scirica, Nygaard and McKee, C.J.; opinion by Scirica;concurrence/dissent by Nygaard.) **127 F.3d 299.**

570. United States v. Higgins, No. 97-5006 (D. N.J. 10/17/97) - This was an appeal by the government which challenged only the sentence imposed upon the defendant. In this case, the defendant committed a crime while serving a term of imprisonment for another crime. At sentencing, the district court ordered a portion of the sentence to run concurrently with the previously imposed sentence which the defendant was serving at the time of sentencing. The issue on appeal was whether the district court properly construed its discretion to order concurrent sentencing under U.S.S.G. § 5G1.3(a). On appeal, the Third Circuit found that the district court employed an erroneous legal standard.

In running the sentence concurrently, the district court had relied upon **United States v. Nottingham**, 898 F.2d 390 (3d Cir. 1990). Based upon **Nottingham**, the district court concluded that § 5G1.3(a), which mandates a consecutive sentence, is invalid because it conflicts with 18 U.S.C. § 3584(a), which provides generally that a district court has discretion to order either a concurrent or consecutive sentence.

The Third Circuit found that the amendments to § 5G1.3(a) which had occurred subsequent to the **Nottingham** opinion rendered that opinion inapposite here. The Third Circuit further found that § 5G1.3(a) does not conflict with 18 U.S.C. § 3584. Based upon these conclusions, the Third Circuit VACATED the sentence and REMANDED for resentencing. (Cowen, Roth and Lewis, C.J.; opinion by Roth.) **128 F.3d 138.**

571. United States v. Cross, Nos. 96-3239, 96-3240, 96-3241 (W.D. Pa. 10/21/97) - The defendants were convicted of conspiracy to deprive Pennsylvania residents of their civil right to fair and impartial trials in violation of 18 U.S.C. § 241, and conspiracy to commit mail fraud in violation of 18 U.S.C. §§ 371 and 1341. The basis of the convictions was a scheme to "fix" cases coming

before the Statutory Appeals Division of the Court of Common Pleas of Allegheny County, Pennsylvania. The defendants were all court personnel. On appeal, the defendants argued that their civil rights convictions were based on a vague and undefined theory that could not support criminal convictions, and that the mailings relied upon by the government were not sufficiently connected to the scheme to bring them within the federal mail fraud statute.

With regard to the civil rights convictions, the Third Circuit noted that under the relevant statute, 18 U.S.C. § 241, it is a crime to deprive a person of the "free exercise or enjoyment of any right or privilege secured . . . by the Constitution or laws of the United States." The Third Circuit held that the defendants in this case had deprived certain individuals of their right to a fair adjudication of their guilt before an impartial tribunal, and that this right was protected under § 241. The Third Circuit thus rejected the defendants' challenge to their civil rights convictions.

The Third Circuit did, however, accept the defendants' argument with regard to their conviction for conspiracy to commit mail fraud. The Third Circuit found that the mailings relied upon by the government, specifically, the notifications of the results of the legal proceedings, did not further the charged conspiracy to commit mail fraud. Instead, the mailings of the results were required by law as a part of the court's exercise of its responsibilities.

The Third Circuit AFFIRMED the civil rights convictions, but REVERSED the convictions for conspiracy to commit mail fraud, and REMANDED for resentencing. (Stapleton, Greenberg and Cowen, C.J.; opinion by Stapleton.) **128 F.3d 145.**

572. Barry v. Bergen County Probation Department, No. 96-5577 (D. N.J. 10/22/97) - This was an appeal from a judgment of the district court granting Mr. Barry's petition for writ of habeas corpus which was filed pursuant to 28 U.S.C. § 2254(a). On appeal, the appellants challenged the following rulings by the district court: a) that it had subject matter jurisdiction to consider Mr. Barry's habeas corpus petition because his community service obligation constituted custody for purposes of 28 U.S.C. § 2254; b) that because the media coverage at issue had the potential to prejudice one or more jurors, the trial judge's failure to voir dire the jurors violated Mr. Barry's Sixth Amendment right to a fair trial; and c) that Mr. Barry be released from his community service obligation with no provision being made for retrial.

The Third Circuit held that Mr. Barry was "in custody" for purposes of 28 U.S.C. § 2254(a) when he was resentenced in 1993 to 500 hours of community service. The Third Circuit also held that the media coverage at issue did not have the potential to prejudice the jury. As a result, the Third Circuit REVERSED the district court's judgment and REMANDED to the district court with instructions to dismiss the habeas corpus petition. In light of this ruling, the Third Circuit found that it need not consider whether the district court erred by failing to provide the State with an opportunity for retrial. (Stapleton, Greenberg and Cowen, C.J.; opinion by Cowen; dissent by Stapleton.) **128 F.3d 152.**

573. United States v. Ward, Nos. 96-5789, 97-5082 (D. N.J. 11/13/97) - This appeal raised the issue of whether a district court may order a criminal defendant who sexually assaulted his victim to undergo blood testing to determine the presence of the AIDS virus. The district court in this case ordered the defendant to undergo such testing but limited disclosure of the test results to the defendant, the victim of the sexual assault, and their respective doctors. The district court based its order on its "inherent authority" to shield the criminal justice system from "abuses, oppression and injustice," and to "protect witnesses." The Third Circuit rejected the district court's reasons for ordering the test, but held that a district court can order such testing under the recently amended federal Violence Against Women Act. Here, the district court did not apply that Act, and did not

make the findings required by the Act. As a result, the Third Circuit VACATED the order requiring a blood test for AIDS, and REMANDED so that the district court could make the requisite findings under the Violence Against Women Act.

This appeal also raised a challenge to the district court's increase of his offense level by two levels because his "criminal history includes a prior sentence for conduct that is similar to the instant offense." See U.S.S.G. § 2A3.1, application note 7. The Third Circuit rejected this argument. (Stapleton, Alito and Rosenn, C.J.; opinion by Rosenn.) **131 F.3d 335.**

574. United States v. Gollapudi, No. 97-5137 (D. N.J. 11/17/97) - The defendant was charged with violating two provisions of the Internal Revenue Code. Specifically, the defendant was charged with failing to account for and pay over to the Internal Revenue Service federal income taxes deducted and collected from the total taxable wages of his employees between 1989 and 1991 in violation of 26 U.S.C. § 7202. Additionally, the defendant was indicted for filing a false personal income tax return (Form 1040) for the years 1989 through 1991 in violation of 26 U.S.C. § 7206(1).

On appeal, the defendant raised two issues. First, he argued that his prosecution for violating 26 U.S.C. § 7202 was barred by the three-year statute of limitations of § 6531. Second, the defendant argued that because the responses on the 1040 form he filed were truthful, he should not have been found guilty of filing a false statement under §7206(1). The Third Circuit rejected both of these arguments, and AFFIRMED. (Cowen, Roth and Lewis, C.J.; opinion by Roth; dissent by Cowen.) **130 F.3d 66.**

***575. Stiver v. Meko, No. 96-3400 (W.D. Pa. 11/28/97) -** Federal prisoners who successfully complete a drug treatment program and who are "convicted of a nonviolent offense" are eligible for a one-year sentence reduction under 18 U.S.C. § 3621(e)(2)(B). Mr. Stiver successfully completed the drug treatment program and thus applied for the sentence reduction. His current offense of incarceration, possession of heroin with intent ot distribute, was a nonviolent offense. However, Mr. Stiver's criminal history included convictions for robbery and aggravated assault, both of which are violent offenses. Thus, the issue in this appeal was whether "convicted of a nonviolent offense," under § 3621(e)(2)(B) referred only to the current offense of conviction, or whether it also included prior offenses of conviction.

The Third Circuit found that § 3621(e)(2)(B) is silent as to whether only the current offense of conviction, or also the prior offenses of conviction, can be considered. As a result, the Bureau of Prisons' construction of the statute, as codified in 28 C.F.R. § 550.58, which allows consideration of prior offenses, was a proper exercise of the Bureau of Prisons' discretion. The Third Circuit thus AFFIRMED the Bureau of Prisons' denial of Mr. Stiver's request for a one-year sentence reduction. (Cowen, Roth and Lewis, C.J.; opinion by Lewis.) **130 F.3d 574.**

576. United States v. Gilchrist, No. 97-7224 (M.D. Pa. 12/2/97) - Mr. Gilchrist entered into a binding plea agreement under Federal Rule of Criminal Procedure 11(e)(1)(C). The terms of the plea agreement called for a sentence of nine months in prison and a one-month term of home confinement. At sentencing, the district court imposed a sentence of nine months in prison, a one-month term of home confinement, and a one-year period of supervised release. Mr. Gilchrist did not object to this sentence when it was imposed, but later filed a motion to correct sentence pursuant to Federal Rule of Criminal Procedure 35(c). The government responded that the sentence was not in accordance with the plea agreement, and suggested that the term of supervised release be limited to one month. The district court, however, failed to rule upon the Rule 35 motion within seven days of sentencing, and thus lost its authority under Rule 35 to correct an excessive sentence. Mr.

Gilchrist then appealed.

On appeal Mr. Gilchrist argued that the sentence breached the plea agreement, and asked that his case be remanded so that he could withdraw his guilty plea and plead anew under the remedial provision in the plea agreement. The Third Circuit found that the plea agreement had in fact been breached by the increased sentence. The Third Circuit therefore VACATED the judgment and sentence of the district court and REMANDED for the district court to determine whether the appropriate remedy is to require specific performance of the agreement or to permit Mr. Gilchrist to withdraw his plea. The Court noted that unless the district court would impose the sentence agreed to by the parties, Mr. Gilchrist should be permitted to withdraw his plea and plead anew. (Becker and Mansmann, C.J., Hoeveler, D.J.; opinion by Hoeveler; concurrence by Becker.) **130 F.3d 1131.**

577. United States v. Knobloch, No. 96-3022 (W.D. Pa. 12/10/97) - This appeal raised three issues. First, Mr. Knobloch argued that his guilty plea to one of the counts of the indictment was not voluntary, knowing and intelligent because during the plea colloquy, the district court misdescribed the elements of the offense. Second, Mr. Knobloch argued that the district court erred by imposing a role in the offense enhancement to this sentence under U.S.S.G. § 3B1.1(c) based upon testimonial evidence from a related trial. Third, Mr. Knobloch argued that the district court erred by enhancing his sentence for possession of a firearm under U.S.S.G. § 2D1.1(b)(1).

All three of these issues were reviewed under a plain error standard of review. The Third Circuit rejected the first two arguments, but granted Mr. Knobloch relief on the third argument.

With regard to the first argument, the Third Circuit found that the district court's error in describing the elements of the offense at the plea colloquy was inadvertent. The Third Circuit also reasoned that Mr. Knobloch did not argue that he would have pleaded differently had the error not occurred.

With regard to the second argument, the Third Circuit found that the use of testimony from another related trial as the basis for a role in the offense enhancement was permissible. No rule of law prohibited the district court from making its factual conclusions at sentencing based on testimony from a separate proceeding. Furthermore, no prejudice to Mr. Knobloch resulted from this alleged error.

With regard to the third argument, the Third Circuit found that the enhancement of Mr. Knobloch's sentence under U.S.S.G. § 2D1.1 was not permissible because he had been sentenced under 18 U.S.C. § 924(c) for carrying a firearm during and in relation to a drug crime. According to Application Note 2 to U.S.S.G. § 2K2.4, such an enhancement cannot be combined with a sentence under 18 U.S.C. § 924(c).

AFFIRMED in part, and REVERSED and REMANDED in part. (Stapleton, Alito and Rosenn, C.J.; opinion by Stapleton; concurrence by Rosenn.) **131 F.3d 366.**

578. United States v. Khalil, No. 96-1695 (E.D. Pa. 12/17/97) - In this appeal, the defendant raised only one issue, and challenged the extent of the district court's downward departure at sentencing. The Third Circuit held that it had no jurisdiction to review the extent of a district court's downward departure, and therefore DISMISSED the appeal. (Cowen, McKee and Rosenn, C.J.; opinion by Rosenn.) **132 F.3d 897.**

579. United States v. Vaulin, No. 97-1333 (E.D. Pa. 12/23/97) - This was an appeal from the district court's denial of a motion for mistrial based upon prosecutorial misconduct. The prosecutorial misconduct occurred during redirect examination of a cooperating government witness

when the prosecutor questioned the witness regarding threats that had been made against him in jail. The line of questioning implied that the defendant was somehow involved with the threats, when in reality, this was not the case. Although the Third Circuit condemned the prosecutor's actions, it reasoned that the district court's curative instructions cured any prejudice. The Third Circuit therefore AFFIRMED the district court's denial of the motion for mistrial. (Cowen, McKee and Weis, C.J.; Per Curiam Opinion.) **132 F.3d 898 (3d Cir. 1997).**

580. Lambert v. Blackwell, Nos. 97-1281, 97-1283 and 97-1287 (E.D. Pa. 12/29/97) - This was an appeal in a habeas corpus action under 28 U.S.C. § 2254. The district court granted an unconditional release of the petitioner who was convicted in state court of first degree murder, and the Commonwealth appealed. On appeal, the Third Circuit found that the habeas corpus petition contained both unexhausted and exhausted claims. The Third Circuit therefore REMANDED the case to the district court with an order to DISMISS the petition WITHOUT PREJUDICE, so that the petitioner could present her unexhausted claims to the appropriate Pennsylvania state court. (Mansmann, Greenberg and Alarcon, C.J.; opinion by Mansmann.) **134 F.3d 506.**
ON JANUARY 26, 1998, THE THIRD CIRCUIT ISSUED AN ORDER DENYING A PETITION FOR REHEARING IN THIS CASE. JUDGE ROTH WROTE AN OPINION SUR DENIAL OF THE PETITION FOR REHEARING, INDICATING HER REASONS FOR VOTING IN FAVOR OF REHEARING. JUDGES NYGAARD, LEWIS AND McKEE JOINED IN THIS OPINION.

581. Frey v. Fulcomer, No. 95-9007 (E.D. Pa. 12/30/97) - The petitioner was convicted in the Pennsylvania state court system of murder in the first degree and was sentenced to death. The district court denied his petition for a writ of habeas corpus, which was filed pursuant to 28 U.S.C. § 2254 and he appealed.

The central issue in the habeas corpus petition was whether the jury charge at the penalty phase of the trial violated the Eighth Amendment as construed in **Mills v. Maryland**, 486 U.S. 367 (1988) and **McKoy v. North Carolina**, 494 U.S. 433 (1990). These cases hold that a death sentence should be vacated if the jury, upon receiving the judge's instructions, may have thought that it could only consider those mitigating factors which it unanimously found to exist.

The Third Circuit concluded that the jury instruction in this case may have had the effect which is prohibited under **Mills** and **McKoy**. The Court therefore REVERSED the order of the district court, and directed it to grant a conditional writ of habeas corpus permitting Pennsylvania to conduct a new sentencing proceeding or to sentence Frey to life imprisonment. (Becker, Roth and McKee, C.J.; opinion by Becker.) **132 F.3d 916.**

582. United States v. Fiorelli, No. 94-2210 (E.D. Pa. 1/6/98) - Mr. Fiorelli served as the business representative of the Drywall Finishers Local Union 1955 of the International Brotherhood of Painters and Allied Trades. As business representative, Mr. Fiorelli was responsible for overseeing the daily operation of the union, whose members were employed by contractors and construction companies engaged in drywall finishing. A grand jury charged Mr. Fiorelli with demanding and accepting illegal payments and gifts from contractors during his service as the union's business representative.

A petit jury in the Eastern District of Pennsylvania found Mr. Fiorelli guilty of racketeering, conspiracy to violate the Taft-Hartley Act, unlawful request and receipt of money by a union official, extortion, embezzlement, and obstruction of justice. The jury also ordered forfeiture of $68,984 in racketeering proceeds. The district court sentenced Mr. Fiorelli to 121 months of imprisonment, followed by three years of supervised release, a fine of $12,500, and special assessments totaling $600. On appeal, Mr. Fiorelli raised several issues; all issues challenged the sentence imposed.

Mr. Fiorelli first challenged the district court's failure to grant a downward departure on the basis of his role in the life of his granddaughter who suffers from cerebral palsy. Because the district court heard extensive evidence on this issue, and clearly exercised its discretion not to depart, the Third Circuit found that it had no jurisdiction to review the district court's decision not to depart. The Third Circuit also rejected Mr. Fiorelli's arguments that the district court erred in failing to group certain offenses under U.S.S.G. § 3D1.2, and that the district court had failed to make specific factual findings to support enhancements
for threatening bodily injury under U.S.S.G. § 2B3.2(b)(1), for being an organizer or leader under U.S.S.G. § 3B1.1(c), and for abuse of a position of trust under U.S.S.G. § 3B1.3.

The bulk of the Third Circuit's opinion discussed the district court's imposition of a two-level enhancement under U.S.S.G. § 3C1.1 for obstruction of justice. The district court based this enhancement on the conclusion that Mr. Fiorelli had provided perjured testimony at trial.

Under the Supreme Court's decision in **United States v. Dunnigan**, 507 U.S. 87 (1993), an enhancement under U.S.S.G. § 3C1.1 based upon perjured testimony can occur only where the trial court has made findings to support all the elements of a perjury violation. Those elements are the following: 1) the defendant gave false testimony; 2) the false testimony concerned a material matter; and 3) there was a willful intent to provide false testimony.

In **United States v. Boggi**, 74 F.3d 470 (3d Cir. 1996), the Third Circuit had the opportunity to apply and to interpret **Dunnigan**. In **Boggi**, the Third Circuit held that explicit findings were unnecessary where the record "necessarily included a finding as to the elements of perjury." Later, in **United States v. Arnold**, 106 F.3d 37 (3d Cir. 1997), the Third Circuit again interpreted and applied **Dunnigan**. In **Arnold**, the Third Circuit held that in proving perjury as the basis for an obstruction of justice enhancement under U.S.S.G. § 3C1.1, the burden of proof should be placed upon the government, and a clear and convincing evidence standard of proof should apply. Finally, in **United States v. McLaughlin**, 126 F.3d 130 (3d Cir. 1997), the Third Circuit held that even if the falsity of the defendant's testimony at trial is necessarily inherent in the jury's verdict, the jury's disbelief is not alone enough to support a finding that the defendant had a willful intent to provide false testimony and thus commit perjury. Applying **Dunnigan** and its progeny, the Third Circuit reasoned that it was "hesitant to conclude that the falsity of Fiorelli's testimony . . . is necessarily inherent in the jury's verdict." The Third Circuit also noted that it was unclear whether or not the

government had been held to its burden of proving falsity and willfulness by clear and convincing evidence, as required by **Arnold**. The Court therefore REVERSED the judgment of the district court and REMANDED for resentencing, with instructions that on remand, the district court should determine whether the government met its burden of proving each of the elements of perjury, and should make appropriate specific findings. (Stapleton, Alito and Rosenn, C.J.; opinion by Stapleton.) **133 F.3d 218.**

583. Govt. of Virgin Islands v. Moolenaar, No. 96-7766 (D. V.I. 1/8/98) - The government of the Virgin Islands appealed a decision of the District Court for the Virgin Islands Appellate Division holding that the information charging Mr. Moolenaar with burglary in the second degree was insufficient and reversing his conviction. The Third Circuit held that the Appellate Division erred in reversing Mr. Moolenaar's conviction. The Court reasoned that despite the substitution of the word "theft" for "larceny," the information sufficiently charged the Virgin Islands offense of burglary in the second degree. REVERSED and REMANDED. (Sloviter, Stapleton and Mansmann, C.J.; opinion by Sloviter.) **133 F.3d 246.**

584. Govt. Of Virgin Islands v. Steven, No. 97-7299 (D. V.I. 1/9/98) - Mr. Steven appealed from an order of the Appellate Division of the District Court affirming a judgment entered against him for driving under the influence of an intoxicating liquor in violation of 20 V.I.C. § 493(a)(1). Mr. Steven challenged this provision of the Virgin Islands Code on the grounds that it was unconstitutionally vague. The Third Circuit found 20 V.I.C. § 493(a)(1) to be constitutional, and AFFIRMED. (Sloviter, Stapleton and Mansmann, C.J.; opinion by Mansmann.) **134 F.3d 526.**

585. Burns v. Morton, No. 97-5568 (D. N.J. 1/9/98) - The district court dismissed Mr. Burns' petition for writ of habeas corpus which he filed pursuant to 28 U.S.C. § 2254. The basis for the dismissal was the district court's finding that the petition was untimely filed according to 28 U.S.C. § 2244(d)(1). The district court granted a certificate of appealability to appeal the dismissal.

On appeal, the Third Circuit concluded that Mr. Burns' petition was timely filed under the principles set forth in **Houston v. Lack**, 487 U.S. 266 (1988), and summarily REVERSED the dismissal and REMANDED to the district court for consideration of the petition on the merits. **Houston v. Lack** holds that a pro se prisoner's notice of appeal is considered filed at the time he submits it to prison officials for mailing. The Third Circuit held that the holding of **Houston v. Lack** extends to habeas corpus petitions under both § 2254 and § 2255. Thus, because Mr. Burns submitted his habeas corpus petition to prison officials for filing one day before the one year statute of limitations set forth in 28 U.S.C. § 2244(d), his habeas corpus petition was timely filed. (Becker, Nygaard and Roth, C.J.; opinion by Nygaard.) **134 F.3d 109.**

586. United States v. Kithcart, No. 97-1168 (E.D. Pa. 1/12/98) - Mr. Kithcart pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), but reserved his right to appeal the district court's denial of his motion to suppress the firearm. On appeal, Mr. Kithcart argued that there was no probable cause to arrest and to search him. The Third Circuit agreed that probable cause did not exist, and REVERSED and REMANDED. The Court reasoned that the mere fact that two African-American males had committed armed robberies earlier in the evening, without more, did not amount to probable cause to stop Mr. Kithcart's car, which also contained two African-American males. The Third Circuit instructed that upon remand, the district court should consider whether the officers had reasonable suspicion for a **Terry** stop. (Alito, Lewis and McKee, C.J.; opinion by Alito; dissent/concurrence by McKee.) **134 F.3d 529.**

587. Lovasz v. Vaughn, No. 97-3505 (W.D. Pa. 1/14/98) - This case, a habeas corpus action under 28 U.S.C. § 2254, was before the Court on an application for a certificate of appealability. The district court dismissed the petition as untimely under 28 U.S.C. § 2244(d). At issue was whether a second or subsequent petition for post-conviction relief, filed according to the procedural rules of Pennsylvania, triggers the tolling mechanism of 28 U.S.C. § 2244(d)(2). The Third Circuit held that a second or subsequent petition for post-conviction relief does toll the statute of limitations under 28 U.S.C. § 2244(d), regardless of whether the subsequent petition is frivolous or meritorious. Thus, the Court found that Mr. Lovasz's habeas corpus petition was timely filed under §§ 2244(d)(1) and (2), and therefore granted the certificate of appealability, and REVERSED the dismissal of the petition and REMANDED for further proceedings. (Becker, Nygaard and Roth, C.J.; opinion by Becker.) **134 F.3d 146.**

588. Gambino v. Morris, No. 96-5299 (D. N.J. 1/15/98) - This case presented the issue of whether the United States Parole Commission improperly denied Mr. Gambino parole on the grounds that he was affiliated with an organized crime family. Mr. Gambino argued that there was not sufficient evidence to support this conclusion, and also, that an affiliation with organized crime is not a sufficient basis for denying parole.

After the parole commission denied Mr. Gambino parole, he filed a habeas corpus petition pursuant to 28 U.S.C. § 2241. The district court denied the petition, and Mr. Gambino appealed.

The Third Circuit concluded that the United States Parole Commission abused its discretion by denying parole, and therefore REVERSED the district court and REMANDED for further proceedings. The Third Circuit instructed the district court to VACATE its judgment and order, and also to REMAND the case to the Parole Commission with directions that it conduct another panel hearing within 60 days. (Roth, Lewis and McKee, C.J.; opinion by Lewis; concurrence by Roth.) **134 F.3d 156.**

589. United States v. Russell, No. 96-7760 (M.D. Pa. 1/16/98) - Mr. Russell was convicted of conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846, and conducting a continuing criminal enterprise (CCE) in violation of 21 U.S.C. § 848. He was sentenced to two concurrent life terms.

The CCE statute, 21 U.S.C. § 848, requires that the defendant have committed a drug-related felony under U.S.C. Title 21, Chapter 13, subchapter I or II, and that this violation was part of a "continuing series of violations" of that subchapter. Mr. Russell challenged the district court's jury instruction regarding the "continuing series of violations" requirement. Specifically, Mr. Russell argued that the district court's instruction failed to advise the jury of the requirement that they unanimously agree as to the identity of the three related drug offenses constituting the criminal enterprise. The Third Circuit agreed with Mr. Russell, and found that the jury instruction had violated his Sixth Amendment right to a unanimous verdict. The Third Circuit also found that the error was not harmless; REVERSED the CCE conviction; and REMANDED for further proceedings.

Mr. Russell also raised four other issues. The Third Circuit dismissed each of these other issues with minimal discussion. Those four issues were the following:

1) Were Mr. Russell's rights prejudiced by the admission of evidence of multiple conspiracies which were at variance with the single conspiracy alleged in the indictment?

2) Did the district court err by admitting evidence of a 1991 arrest, as well as evidence of handgun purchases made on behalf of Mr. Russell by his girlfriend?

3) Did the district court err in enhancing Mr. Russell's sentence under U.S.S.G. § 2D1.1(b)(1) by two levels for possession of a dangerous weapon, based upon his possession of a knife?

4) Did the district court err by determining the amount of drugs for sentencing purposes based upon the stipulations of the co-conspirators? (Alito, Lewis and McKee, C.J.; opinion by Lewis; concurrence/dissent by Alito.) **134 F.3d 171.**

590. United States v. Isaac, No. 96-7109 (D. V.I. 1/20/98) - A jury found Mr. Isaac guilty of conspiracy to possess marijuana with intent to distribute, in violation of 21 U.S.C. § 846, and possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1). The jury acquitted Mr. Isaac of possession of marijuana on board a vessel arriving in the United States, in violation of 21 U.S.C. § 955. On appeal, Mr. Isaac challenged his convictions by raising the following issues:
1) Did the district court inaccurately instruct the jury on the reasonable-doubt standard?
2) Did the district court violate Mr. Isaac's Fifth Amendment right to due process and a fair trial, and his Sixth Amendment right to confrontation, by denying his request that the jury be instructed to weigh the testimony of two witnesses with greater care because they were immunized witnesses and accomplices?
3) Did the district court violate Mr. Isaac's Fifth Amendment right to due process when it took judicial notice of the fact that all charges against two of the government's witnesses were dismissed, but did not add that this was done "in response to the government's motion"?
4) Did the district court violate Mr. Isaac's Fifth Amendment right not to testify when the prosecutor intimated that Mr. Isaac's decision not to testify was evidence against him?

The Third Circuit rejected all four of these arguments and AFFIRMED. (Scirica, Nygaard and McKee, C.J.; opinion by Nygaard; concurrence by McKee.) **134 F.3d 199.**

591. United States v. Haddy, Nos. 96-5589 and 96-5622 (D. N.J. 1/21/98) - The defendants were convicted of conspiracy to commit securities fraud; substantive crimes relating to manipulation of the stock market; and wire fraud. On appeal, the defendants raised several issues. However, the Third Circuit found only two of those issues to be worthy of discussion: whether the indictment contained duplicitous counts, and whether proof of investor reliance is a requisite for conviction under section 10(b) of the Securities Act of 1934.

The Third Circuit concluded that the indictment did not contain duplicitous counts, or distinct and separate offenses which are improperly joined in a single count. The Court also concluded that criminal liability under section 10(b) of the Securities Exchange Act does not require reliance by an identifiable buyer or seller of securities; the statute's objective of maintaining the integrity of the stock market forbids deceitful practices without mention of whether investors relied upon the manipulative devices in connection with a securities transaction. AFFIRMED. (Mansmann, Greenberg and Alarcon, C.J.; opinion by Mansmann.) **134 F.3d 542.**

592. United States v. Marin-Castaneda, No. 97-5252 (D. N.J. 1/22/98) - The appellant, a Colombian national, pleaded guilty to importing 1,227 grams of heroin into the United States in violation of 21 U.S.C. §§ 952(a) and 960(a)(1), (b)(1). On appeal, he challenged only the sentence imposed, and argued that the district court erred in holding that it did not have the authority to depart based on the following factors: 1) his willingness not to oppose deportation; 2) his age (67); and 3) the deterrent effect of being hospitalized as a result of attempting to smuggle heroin in his stomach. The Third Circuit found no error in the district court's ruling, and AFFIRMED. (Scirica and Lewis, C.J., Pollack, D.J.; opinion by Lewis.) **134 F.3d 551.**

593. Hess v. Mazurkiewicz, No. 96-3350 (W.D. Pa. 2/9/98) - This is an appeal from the district court's denial of a habeas corpus petition which was filed pursuant to 28 U.S.C. § 2254. The appeal raised two claims. First, Mr. Hess argued that trial counsel was ineffective because he decided not to call certain witnesses. Second, Mr. Hess argued that this lawyer labored under a conflict of interest caused by his simultaneous representation of the victims' father in another case, and that this conflict impermissibly tainted counsel's performance during the trial.

The Third Circuit concluded that Mr. Hess' attorney did not violate professional standards by not calling additional witnesses at trial. The Third Circuit further concluded that the record was not clear regarding whether Mr. Hess preserved his conflict of interest claim, and therefore remanded the remainder of the case to the district court for a determination of whether this claim was exhausted. AFFIRMED in part and VACATED and REMANDED in part. (Scirica and Lewis, C.J., Pollak, D.J.; opinion by Lewis.) **135 F.3d 905.**

594. United States v. Cottman, No. 96-5492 (D. N.J. 2/18/98 -- amended 4/21/98) - Mr. Cottman pled guilty to conspiracy to possess, sell and dispose of stolen property in violation of 18 U.S.C. § 371. He received a sentence of 10 months in prison, a three year term of supervised release, and restitution in the amount of $32,420 payable to the FBI. On appeal, Mr. Cottman raised two issues.

First, Mr. Cottman argued that the district court incorrectly imposed a four-point upward adjustment under U.S.S.G. § 2B1.1(b)(4)(B) on the basis that he was "in the business of" receiving and selling stolen cable equipment. Second, Mr. Cottman argued that the district court had no authority to order him to pay restitution to the FBI for funds it spent as part of an undercover sting operation to acquire the stolen cable equipment from him.

The Third Circuit AFFIRMED the imposition of the four-point enhancement under § 2B1.1(b)(4)(B). However, the Third Circuit VACATED the portion of the sentence imposing restitution, and REMANDED the case for resentencing, reasoning that the FBI was not a victim of the offense. (Sloviter and Roth, C.J., Ludwig, D.J.; opinion by Roth; concurrence/dissent by Ludwig.) **142 F.3d 160.**

595. United States v. Rudolph, No. 96-5726 (D. N.J. 2/23/98) - Mr. Rudolph pled guilty to bribery and sale of government property. On appeal, Mr. Rudolph raised two challenges to his sentence. First, he argued that the district court had improperly enhanced his sentence pursuant to U.S.S.G. § 2C1.1(b)(1), the sentencing guideline on offering, giving, soliciting or receiving a bribe. Second, he argued that the district court had improperly failed to group his two convictions under U.S.S.G. § 3D1.2.

With regard to the first issue, the Third Circuit found that it was not improper for the district court to increase Mr. Rudolph's base offense level by two levels under U.S.S.G. § 2C1.1(b)(1), based on his admissions to the probation department that he had accepted two additional bribes that were not the subject of a charge. With regard to the second issue, the Third Circuit found that the district court had committed no error in failing to group the offenses under U.S.S.G. § 3D1.2. AFFIRMED. (Becker, Sloviter and Scirica, C.J.; opinion by Sloviter; concurrence by Becker.) **137 F.3d 173.**

596. In re: Grand Jury (Impounded), No. 97-7347 (D.Del. 3/13/98) - This was an appeal by Thomas J. Capano from a district court order holding that he had waived the attorney work product privilege with respect to certain documents he created. The government seized these documents from a third party pursuant to a subpoena.

Mr. Capano, an attorney, was the major target of a kidnapping investigation. Because he was a target he retained attorneys, and one of those attorneys directed him to prepare a timeline of his

activities during the relevant time period. He also directed Mr.Capano to write down his recollections of his relationship with the kidnapping victim. Mr. Capano complied with this request, and then put the materials in a file which he placed in the law office of one of his partners. The government eventually issued a subpoena for the file and seized it.

Mr. Capano filed a motion in the district court citing both attorney-client privilege and attorney work product privilege, and seeking an order compelling the government to return the file. The district court found that attorney-client privilege did not apply, but that attorney work product privilege did. Nonetheless, the district court determined that Mr. Capano had waived the work product protection based on grounds of disclosure and timeliness. More specifically, the district court found that by storing the file in a colleague's office where it was accessible to others, Mr. Capano disregarded the risk that an adversary might obtain it; the district court found that this amounted to a disclosure. The district court also held that by waiting nearly four months to file a motion to compel the return of the seized materials, Mr. Capano waived the work product privilege. And finally, the district court noted in a footnote that even if Mr. Capano did not waive the attorney work product protection of the file, the United States had demonstrated sufficient cause to overcome that protection.

Mr. Capano appealed the district court's ruling to the Third Circuit. On appeal, neither party challenged the district court's determination that attorney-client privilege did not apply. Thus, the only issue on appeal was whether the attorney work product privilege applied.

The Third Circuit affirmed the district court's holding that Mr. Capano waived his attorney work product privilege with regard to the seized file based on his delay in seeking a judicial review. Therefore, the Court did not review the district court's determinations that Mr.Capano waived the privilege by disclosing the documents and that the government had demonstrated sufficient cause to overcome the work product protection. AFFIRMED. (Greenberg, Nygaard and McKee, C.J.; opinion by Greenberg; concurrence by McKee.) **138 F.3d 978.**

597. United States v. Urban, No. 97-7107 (M.D. Pa. 3/20/98) - Mr. Urban appealed his conviction and sentence for possession of an unregistered destructive device in violation of 26 U.S.C. §§ 5841, 5861(d) and 5971. He argued that the district court committed prejudicial error in refusing to instruct the jury that the intent to use the components as a weapon is an element of the crime charged in the indictment. Mr. Urban also arged that because he had no special training or formal education, that the district court erred as a matter of law in applying the special skill enhancement under U.S.S.G. § 3B1.2. The Third Circuit concluded that the district court properly instructed the jury. The Third Circuit also concluded that despite Mr. Urban's lack of formal education or training, the district court properly applied a two-level sentence enhancement for the use of a special skill in a manner that significantly aided the commission of the crime. The Third Circuit reasoned that Mr. Urban's use of his mechanical skills, life experience and self education were sufficient to justify the enhancement. AFFIRMED. (Mansmann, Greenberg and Alarcon, C.J.; opinion by Alarcon.) **140 F.3d 229.**

598. United States v. Marmolejos, No. 96-1735 (E.D. Pa. 4/2/98) - This was an appeal of the district court's denial of a motion filed pursuant to 28 U.S.C. § 2255. The defendant was convicted in the district court of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846, but acquitted of possession with intent to distribute cocaine under 21 U.S.C. § 841. The evidence showed that he had negotiated a purchase of 5.00 kg of cocaine, but had delivered only 4.96 kg at the time of the sale. The district court used the 5.00 kg figure, and sentenced the defendant to 126 months in prison. The district court based this sentence upon the Application Note 12 to U.S.S.G. § 2D1.1.

The Third Circuit affirmed the conviction on direct appeal. The defendant then filed a motion under 28 U.S.C. § 2255 which the district court denied; the defendant appealed again, and the Third Circuit again affirmed. The defendant then filed a second § 2255 motion contending that his sentencing offense level should be based solely on the 4.96 kg of cocaine that he actually distributed, rather than on the 5.00 kg that he intended to distribute as a member of the conspiracy. The defendant based his argument on Amendment 518 to the guidelines, which changed Application Note 12, effective November 1, 1995. The amendment indicated that the amount actually sold, rather than the amount negotiated, should control. The difference in his sentence if the amendment applied was anywhere from five to 29 months. The district court denied the § 2255 motion, and this appeal followed.

The Third Circuit held that because the amendment clarified the existing application note the defendant was entitled to its benefit. The Court noted that if the amendment had instead effected a substantive change in the law, rather than a clarification, it could not be given retroactive effect, and the defendant would not be entitled to relief. REVERSED and REMANDED for resentencing. (Scirica, Roth and Rendell, C.J.; opinion by Rendell.) **140 F.3d 488.**

599. United States v. Askari, No. 95-1662 (E.D. Pa. 4/8/98) - This was an en banc appeal which addressed the meaning of a "non-violent" offense under U.S.S.G. § 5K2.13, the guideline section which permits a downward departure based on diminished capacity where the crime is non-violent. Mr. Askari argued that his unarmed bank robbery was a non-violent offense because he did not use force or violence, or verbally threaten or harm anyone during the robbery.

The Third Circuit found that in defining "non-violent" offense under U.S.S.G. § 5K2.13, it would be inappropriate to apply the "crime of violence" definition from U.S.S.G. § 4B1.2. The Third Circuit also found that in defining "non-violent" offense, it was appropriate to look at the facts and circumstances of the crime, but that this should be done within the context of the Sentencing Reform Act and the underlying statute defining criminal culpability. Looking at the statutory elements of the crime at issue here, bank robbery under 18 U.S.C. § 2113(a), the Third Circuit concluded that the defendant's bank robbery was not "non-violent," despite the fact that it was unarmed. The Third Circuit thus concluded that the defendant was ineligible for a departure under § 5K2.13. In reaching these conclusions, the Third Circuit rejected the reasoning of its previous decision in **United States v. Rosen**, 896 F.2d 789 (3d Cir. 1990). AFFIRMED. (En Banc opinion by Scirica; concurrence by Stapleton; concurrence by McKee; concurrence by Garth; dissent by Becker.) **140 F.3d 536.**

600. United States v. Isaac, No. 97-7139 (D. V.I. 4/10/98) - This was an appeal from a denial of a motion to enforce a plea agreement. The defendant argued that he had pled guilty in reliance upon the government's promise to reward him for his cooperation by filing a sentence reduction motion under U.S.S.G. § 5K1.1. The defendant also argued that the government had demonstrated bad faith by failing to file a § 5K motion. In denying the motion to enforce the plea agreement, the district court held that it had no power to review the government's refusal to file a § 5K motion, and that the government had "sole discretion" to decide whether a substantial assistance motion was warranted. On appeal the Third Circuit held that a district court has jurisdiction to determine whether the government's refusal to file a § 5K motion is attributable to bad faith, and whether the failure to file the § 5K motion is in violation of the plea agreement. REVERSED and REMANDED. (Sloviter, Stapleton and Mansmann, C.J.; opinion by Stapleton.) **141 F.3d 477.**

601. United States v. Sain, Nos. 97-3114 & 97-3115 (W.D. Pa. 4/10/98) - This was an appeal from a conviction under the Major Fraud Act of 1988 (the "Act"), 18 U.S.C. § 1031. The Act makes it a federal crime to defraud the United States in connection with a government contract that is valued in excess of $1 million.

This appeal raised a challenge to the sufficiency of the evidence, a challenge to the exclusion of certain expert testimony, the question of whether an individual can be convicted of aiding and abetting a corporation he owns and controls, and challenges to the sentence. The appeal also contained the following two questions of first impression in the Third Circuit regarding the interpretation of the Act:

1) Are modifications of the original government contract, each of which has a value of less than $1 million, within the purview of the Act when the underlying government contract has a value in excess of $1 million?

2) Can a defendant be charged with a separate violation of the Act for each of numerous executions of a single fraudulent scheme?

With regard to the issues dealing with the interpretation of the Act, the Third Circuit found that the modifications were not separate contracts which stood on their own; instead they merely changed some of the terms of the original underlying contract. As a result the Third Circuit held that the total value of the contract exceeded $1 million. The Third Circuit also held that each execution of the fraudulent scheme and each false claim constituted a chronologically and substantially separate execution of the fraudulent scheme, each of which was separately punishable under the Act.

The Third Circuit rejected the challenge to the sufficiency of the evidence, finding that the evidence was sufficient to support the conviction. The Court also found that an individual can aid or abet a corporation which he owned, and that there was no error in the district court's refusal to admit certain expert testimony. Finally, the district court rejected the sentencing issues which dealt with the amount of loss for sentencing purposes and the amount of restitution, as well as an enhancement under U.S.S.G. § 3B1.3 for use of a special skill. AFFIRMED.
(Sloviter, Lewis and Rosenn, C.J.; opinion by Rosenn.) **141 F.3d 463.**

602. United States v. Midgley, No. 97-7402 (M.D. Pa. 4/23/98) - This was an appeal by the government from an order of the district court denying a motion to reinstate dismissed counts of an indictment.

The government had dismissed the counts in question after Mr. Midgley entered into a plea agreement and pled guilty to one count of violating 18 U.S.C. § 924(c). Mr. Midgley then made a successful collateral attack on his § 924(c) conviction pursuant to **Bailey v. United States**, 516 U.S. 137 (1995), a decision which came down after he had pled guilty and been sentenced. Following the successful collateral attack, the district court refused the government's request to reinstate the dismissed counts, reasoning that the statute of limitations had run.

On appeal the Third Circuit agreed with the district court, and held that there were no grounds for refusing to apply the statute of limitations. AFFIRMED. (Scirica, Roth and Rendell, C.J.; opinion by Roth.) CONGRATULATIONS TO DAN SIEGEL, AFPD, M.D. PA.!!!! **142 F.3d 174.**

603. Meyers v. Gillis, No. 97-1750 (E.D. Pa. 4/27/98) - Mr. Meyers filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 and the district court granted it. The district court reasoned that Mr. Meyers' trial counsel was ineffective for giving him incorrect advise regarding his parole eligibility, and that Mr. Meyers had relied upon this advice to his detriment. The Commonwealth appealed, arguing that the district court had erred in granting relief. The Third

Circuit rejected the Commonwealth's argument and AFFIRMED, reasoning that Mr. Meyers was prejudiced by the erroneous advice his trial counsel gave him. (Mansmann, Roth and McKee, C.J.; opinion by McKee.) **142 F.3d 664.**

604. United States v. Faulks, No. 96-2056 (E.D. Pa. 4/29/98) - Mr. Faulks pled guilty to charges of cocaine distribution, money laundering and criminal forfeiture of real property. On appeal he raised three issues. First, he argued that the district court misapplied the Sentencing Guidelines because it granted the government's § 5K motion for downward departure based upon cooperation, but nevertheless imposed a sentence within the applicable guideline range. Second, he argued that the district court erred in refusing to depart under U.S.S.G. § 5K2.0 based upon his agreement not to oppose certain administrative forfeitures. Finally, Mr. Faulks argued that the district court erred in finding that the controlled substance he distributed was crack cocaine.

The Third Circuit rejected Mr. Faulks' first and third arguments. With regard to the second issue, however, the Third Circuit found that this issue amounted to a request for departure on the basis of extraordinary acceptance of responsibility. The Court found that extraordinary acceptance of responsibility was an accepted basis for departure, and that the district court therefore should have given Mr. Faulks an opportunity to create a record in support of this argument. The Court therefore REVERSED and REMANDED for further proceedings, so that Mr. Faulks could attempt to prove his entitlement to a downward departure under U.S.S.G. § 5K2.0 on grounds of extraordinary acceptance of responsibility. (Stapleton, Alito and Seitz, C.J.; opinion by Stapleton.) **143 F.3d 133.**

605. United States v. Murray, No. 97-7196 (M.D. Pa. 5/13/98) - Mr. Murray appealed to the Third Circuit from his conviction and sentence for an intentional killing in furtherance of a Continuing Criminal Enterprise in violation of 21 U.S.C. § 848(e)(1)(A); conspiracy to distribute in excess of five kilograms of cocaine in violation of 21 U.S.C. § 846 and 841(a)(1); and distribution of and possession with the intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1). The Third Circuit vacated the murder conviction and remanded for a new trial; affirmed the drug convictions; and remanded for resentencing. See **United States v. Murray**, 103 F.3d 310 (3d Cir. 1997). On this, his second appeal, Mr. Murray challenged the sentence imposed upon remand.

Mr. Murray challenged the fact that upon remand, the district court vacated the ten-year sentences imposed on the affirmed counts of convictions, and imposed life sentences. The Third Circuit rejected Mr. Murray's arguments in opposition to this action, and held that the district court had the authority to resentence on the affirmed counts; that there is no constitutional barrier to the district court imposing life sentences on those counts; that the district court did not abuse its discretion by departing from the applicable guideline range; and that the extent of the departure was reasonable. In reaching its decision, the Third Circuit considered the possible impact of the Sentencing Package Doctrine. Also, the Third Circuit noted that the revised presentence report characterized the murder as relevant conduct, and that the government had agreed to not retry Mr. Murray on the murder charge if the resentencing on the affirmed drug counts were affirmed. AFFIRMED. (Becker and Roth, C.J., Diamond, D.J.; opinion by Becker.) **144 F.3d 270.**

606. United States v. Mitchell, No. 97-1295 (E.D. Pa. 5/14/98) - Mr. Mitchell was convicted in the district court of conspiracy; commission of a Hobbs Act robbery in violation of 18 U.S.C. § 1951; and use of and carrying a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). On appeal Mr. Mitchell argued that the district court had committed reversible error by permitting an anonymous note linking him to the getaway car to be admitted into evidence. Although the note constituted hearsay, the district court admitted it under Federal Rule of Evidence 803(1) as a present

sense impression or an excited utterance, or as a statement containing sufficient indicia of reliability under the residual catch all exception of former Federal Rule of Evidence 803(24) (current Federal Rule of Evidence 807). The Third Circuit held that the admission of the anonymous note was not warranted under either Rule 803(1) or Rule 803(24), and therefore amounted to error. Furthermore, the error was not harmless. The Third Circuit VACATED the judgment of conviction and REMANDED to the district court for a new trial. (Sloviter, Lewis and Garth, C.J.; opinion by Sloviter.) CONGRATULATIONS TO PHILA. ASSISTANT DEFENDER ROBERT EPSTEIN!!! **145 F.3d 572.**

607. United States v. Taftsiou, No. 97-5409 (D. N.J. 5/19/98) - One of the defendants was convicted of possessing, delivering, passing and conspiring to pass approximately $1 million in counterfeit Federal Reserve notes. The other defendant was convicted of dealing and conspiring to pass approximately $1 million in counterfeit Federal Reserve Notes. In this consolidated appeal, the defendants challenged both their convictions and their sentences.

With regard to the convictions, the defendants argued that the district court erred in denying their motions for acquittal. In support of this position, the defendants argued that there was no evidence that they intended to pass the counterfeit notes to any *person* (they passed them to slot machines), and that the notes did not appear sufficiently genuine to be considered "counterfeit" within the meaning of 18 U.S.C. §§ 472 and 473. The defendants also challenged the convictions on the ground that the district court erred in refusing to charge a misdemeanor violation of 18 U.S.C. § 491 as a lesser included offense of the counterfeiting charges. The Third Circuit rejected both of these arguments.

With regard to the sentences, the defendants argued that the district court erred in enhancing their sentences by 11 levels pursuant to U.S.S.G. § 2B5.1(b)(1) on the grounds that the "amount of loss" was allegedly unsubstantiated by the evidence. The defendants also argued that the 11-level enhancement was improper in light of the poor quality of the notes. The Third Circuit also rejected these arguments. AFFIRMED. (Sloviter and Greenberg, C.J., Pollack, D.J.; opinion by Sloviter.) **144 F.3d 287.**

608. United States v. Navarro, Nos. 96-5779 and 96-5780 (D. N.J. 5/20/98) - The central issue in this case was whether 18 U.S.C. § 1956(a)(1) entitled "Laundering of monetary instruments" sets forth three separate offenses, each of which could be a basis for criminal conviction, or three alternative mental states by which the statute could be violated. The Third Circuit adopted the later conclusion: that § 1956(a)(1) sets forth three separate ways of committing a single offense. AFFIRMED. (Becker and Stapleton, C.J., Feikens, D.J.; opinion by Feikens.) **145 F.3d 580.**

609. Miller v. New Jersey Department of Corrections, No. 97-5611 (D. N.J. 5/26/98) - This was an appeal of the district court's denial of a motion for an extension of time to file a petition for writ of habeas corpus. The district court denied the motion because it was filed after the one year limitation period of 28 U.S.C. § 2244(d)(1). The Third Circuit construed this appeal as an application for a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(1).

Mr. Miller argued that the one year limitation period set forth in 28 U.S.C. § 2244(d)(1) should be subject to equitable tolling. More specifically, he argued that because he was in transit between various institutions and did not have access to his legal documents, and because he did not immediately learn of the new limitations period, the limitations period should be equitably tolled.

The Third Circuit agreed, and thus GRANTED the certificate of appealability; VACATED the order of the district court dismissing the motion; and REMANDED for further consideration.

(Becker, Nygaard and Roth, C.J.; opinion by Becker.) **145 F.3d 616.**

*** 610. United States v. Weadon, No. 97-3256 (W.D. Pa. 5/27/98) -** Section 2B3.1(b)(2)(C) of the sentencing guidelines calls for a five-level enhancement of a sentence for a robbery conviction "if a firearm was brandished, displayed, or possessed." The issue in this appeal was whether a firearm is "possessed" within the meaning of § 2B3.1(b)(2)(C) if the firearm is concealed on the robber's person, and is neither visible nor used to further the crime.

In this case, the defendant admitted, after his arrest, to having carried the gun during three out of four bank robberies that he committed. But for the defendant's own admission, no one would have ever known about the presence of the gun during the bank robberies; the gun played no part in the commission of the bank robberies and was in no way visible. Nonetheless, the district court imposed the five-level enhancement under U.S.S.G. 2B3.1(b)(2)(C), and Mr. Weadon appealed.

The Third Circuit upheld the sentencing enhancement, holding that despite the fact that the gun was not involved in the bank robberies, Mr. Weadon had "possessed" it within the meaning of the guideline. AFFIRMED. (Becker and Stapleton, C.J., Pollak, D.J.; opinion by Pollak.) **145 F.3d 158 (3d Cir. 1998).**

611. Royce v. Hahn, No. 97-3266 (W.D. Pa. 5/29/98) - THIS OPINION IS NOT REPORTED IN F.3D BECAUSE IT WAS LATER VACATED FOR PANEL REHEARING. SEE 151 F.3D 116.

612. United States v. Muhammad, No. 97-5230 (D. N.J. 6/4/98) - Mr. Muhammad was convicted for failure to appear for trial in violation of 18 U.S.C. § 3146. On appeal, he argued that the district court improperly applied the relevant sentencing guideline for failure to appear for trial, U.S.S.G. § 2J1.6, and also that the district court erred in refusing to reduce his offense level for acceptance of responsibility. The Third Circuit rejected both of these arguments and AFFIRMED. (Becker and Stapleton, C.J., Pollak, D.J.; opinion by Becker.) **146 F.3d 161.**

613. United States v. Isaza-Zapata, No. 97-5443 (D. N.J. 6/8/98) - The defendant served as a drug courier or "mule" in a drug deal. At sentencing, the district court refused to grant the defendant a downward adjustment for minor participation under U.S.S.G. § 3B1.2. The district court reasoned that the defendant's role as a drug courier was essential to the commission of the crime, and that a minor participant reduction under § 3B1.2 was therefore not warranted. On appeal, the Third Circuit found that it could not determine whether this conclusion was a factual finding, or whether it was based on an interpretation of the sentencing guidelines. The Third Circuit therefore VACATED the sentence and REMANDED to allow the district court to state the basis for its ruling.

The Third Circuit also took this opportunity to review the standards for determining minor participation. The Court noted that the roles of drug couriers vary widely, and that there is no per se rule regarding the applicability of minor participant reductions to drug couriers. (Becker, Rendell and Heaney, C.J.; opinion by Rendell.) **148 F.3d 236.**

614. United States v. Electrodyne Systems Corporation, No. 97-5366 (D. N.J. 6/10/98) - Electrodyne Systems Corporation pled guilty to impermissibly exporting defense related equipment in violation of 22 U.S.C. § 2778(b)(2) and 18 U.S.C. § 2, and to making a false statement in violation of 18 U.S.C. §§ 1001 and 2. On appeal, Electrodyne challenged only the imposition of a $1 million fine at sentencing.

Electrodyne asserted five arguments in support of its challenge to the fine imposed:

1) The district court failed to consider or make findings with respect to Electrodyne's ability to pay the fine;
2) The district court failed to make findings where matters were disputed in the presentence report, as required by Federal Rule of Criminal Procedure 32(c)(1);
3) The district court improperly calculated the applicable guideline fine range regarding the conviction for making a false statement for two reasons. First, the district court failed to determine accurately the amount of loss under U.S.S.G. § 8C2.3(a). Second the district court erroneously applied a 50 or more employees enhancement under U.S.S.G. § 8C2.5(b)(4);
4) During the plea colloquy, the district court understated the maximum fine to which Electrodyne was exposed for its conviction for the making a false statement;
5) The district court ordered the fine payable immediately when the plea agreement provided that Electrodyne would have six months to pay the fine.

The Third Circuit concluded that Electrodyne was not entitled to withdraw its plea, as requested in the fourth and fifth arguments, but that the sentence should be VACATED and the case REMANDED. The Third Circuit instructed that upon remand, the district court should make factual findings on both the ability to pay a fine and the time within which the fine can be paid. The Third Circuit also instructed the district court to resolve all dispute factual matters as required by Federal Rule of Criminal Procedure 32(c)(1), and to make factual findings regarding the number of employees and the amount of loss for purposes of determining the fine. (Stapleton and Nygaard, C.J., Schwartz, D.J.; opinion by Schwartz.) **147 F.3d 250.**

615. United States v. Ramos, No. 96-7356 (M.D. Pa. 6/26/98) - This was an appeal from the district court's denial of a motion filed pursuant 28 U.S.C. § 2255. The § 2255 motion argued that in light of the Supreme Court's decision in **United States v. Bailey**, 116 S.Ct. 501 (1995), the evidence presented at trial was insufficient to support the conviction under 18 U.S.C. § 924(c)(1). The Third Circuit found the evidence to be sufficient to support the § 924(c)(1) conviction, and AFFIRMED. The Third Circuit reasoned that the evidence presented at trial was sufficient to prove "use" as established in **Bailey**, and that the evidence was also sufficient to establish the defendant's criminal liability for the "use." (Mansmann, Cowen and Alito, C.J.; opinion by Alito.) **147 F.3d 281.**

616. United States v. Dent, No. 97-1666 (E.D. Pa. 7/6/98) - Mr. Dent challenged his conviction for conspiracy to distribute crack cocaine in violation of 21 U.S.C. § 841(b). He raised the following issues on appeal:
1) The government's delay of nearly five years in bringing the case to trial violated the Sixth Amendment's speedy trial provision and the Interstate Agreement on Detainers Act;
2) The testimony of the arresting officer was insufficient to prove participation in a conspiracy to distribute crack because the officer could not recall seeing Mr. Dent personally handle any drugs or drug paraphernalia;
3) The district court should not have admitted the cocaine base at trial because the government failed to establish a reliable chain of custody for it;
4) The government failed to demonstrate that the drugs were crack rather than another form of cocaine base, and as a result, Mr. Dent should not have been sentenced under U.S.S.G. § 2D1.1 which imposes a harsher penalty for crack offenses than for crimes involving equal quantities of cocaine in other forms;
5) The district court should have permitted an examination of the arresting officer's personnel file, so that doubt could have been cast upon him as a witness; and

6) The government used an unreliable method to determine the amount of crack for sentencing purposes.

The Third Circuit rejected all of these arguments, and AFFIRMED. (Sloviter, Nygaard and Kravitch, C.J.; opinion by Nygaard.) **149 F.3d 180.**

617. United States v. DeReyes, No. 97-7328 (D. V.I. 7/8/98) - This was an appeal from a conviction for marriage fraud under 8 U.S.C. § 1325(b) (now 1325(c)). The issue on appeal was whether the district court erred by admitting, under the inevitable discovery doctrine, testimonial evidence acquired as the result of an unlawful stop.

The district court found that the stop was illegal, and no one contested that ruling on appeal. However, after ruling that the stop was illegal, the district court found that the statements obtained through the illegal stop were admissible because they would have been inevitably discovered through an INS investigation of the marriage. It is this latter ruling which was contested on appeal.

Reasoning that it required an unacceptable degree of assumption and speculation to find that the incriminating evidence of marriage fraud would have been inevitably discovered, the Third Circuit rejected the district court's holding and REMANDED with instructions to VACATE the conviction. (Sloviter, Stapleton and Mansmann, C.J.; opinion by Sloviter.) **149 F.3d 192.**

618. United States v. Boynes, No. 97-7490 (D. V.I. 7/9/98) - The defendants were charged with discharging oil into U.S. Waters in violation of 33 U.S.C. §§ 1319(c)(2)(A) and 1321(b)(3). The district court entered an order suppressing evidence obtained from a warrantless search of the defendants' boat in the British Virgin Islands, and the government appealed. The government argued that the district court erred in suppressing the evidence obtained from the warrantless search because, *inter alia*, a warrantless search in a foreign country does not violate the Fourth Amendment.

The Third Circuit ruled that the Coast Guard possessed probable cause to search the boat, and that no warrant was required since searches of ships fall within the exigent circumstances exception to the Fourth Amendment's warrant requirement. Because of this ruling, the Third Circuit concluded that it need not determine whether the Fourth Amendment applies to searches by U.S. law enforcement agents of U.S. citizens' property in foreign countries; whether a lower standard is required for such searches; and whether such searches require a warrant.

Thus, the Third Circuit found the evidence obtained through the warrantless search to be admissible, and REVERSED the order of the district court and REMANDED for further proceedings. (Stapleton, Cowen and Alito, C.J.; opinion by Cowen.) **149 F.3d 208.**

619. United States v. Varlack Ventures, No. 97-7489 (D. V.I. 7/9/98) - The defendants were indicted for knowingly discharging oil into U.S. waters in violation of 33 U.S.C. §§ 1319(c)(2)(A) and 1321(b)(3); failing to report an oil spill in violation of 33 U.S.C. § 1321(b)(5); aiding and abetting in violation of 18 U.S.C. § 2; and negligently discharging oil into U.S. waters in violation of 33 U.S.C. § 1319(c)(1). The district court suppressed certain evidence seized during a warrantless search of the boat in question, and the government appealed. The Third Circuit held that because the boat was situated in U.S. territorial waters while undergoing repair, and because the government possessed reasonable suspicion that a search would produce further evidence that the boat had violated U.S. environmental laws, the search of the boat was authorized by 14 U.S.C. § 89(a). Title 14 § 89(a) permits warrantless searches of vessels in U.S. territorial waters based solely upon a reasonable suspicion of criminal activity. REVERSED and REMANDED. (Stapleton, Cowen and Alito, C.J.; opinion by Cowen.) **149 F.3d 212.**

620. United States v. Moses, No. 96-3632 (W.D. Pa. 7/9/98) - Mr. Moses was charged with willfully failing to file corporate tax returns in violation of 26 U.S.C. § 7206(1); willfully filing false personal tax returns in violation of 26 U.S.C. § 7203; and conspiring to defraud the United States by obstructing the lawful functions of the Internal Revenue Service in violation of 18 U.S.C. § 371. On appeal Mr. Moses argued that the district court erred in denying his post-trial motion for a judgment of acquittal which argued that there was insufficient evidence to convict him of failing to file corporate tax returns. Mr. Moses also argued that the district court erred in admitting certain hearsay statements. In admitting these statements, the district court reasoned that their admission did not violate the Confrontation Clause; were admissible under Federal Rule of Evidence 804(b)(3) as declarations against the declarants' penal interests; and were also admissible under Federal Rule of Evidence 801(d)(2)(E) as declarations in furtherance of the conspiracy. AFFIRMED. (Mansmann, Cowen and Alito, C.J.; opinion by Alito.) **148 F.3d 277.**

621. Fiore v. White, No. 97-3288 (W.D. Pa. 7/21/98) - This was an appeal by the Commonwealth from the district court's grant of a writ of habeas corpus. The district court granted the writ after concluding that the Pennsylvania Supreme Court violated Mr. Fiore's constitutional rights by failing to apply one of its decisions retroactively. The decision which the Pennsylvania Supreme Court refused to apply retroactively to Mr. Fiore's benefit was the decision in the case of his co-defendant; the co-defendant's decision involved the same facts as Mr. Fiore's case. Finding that state courts are under no constitutional obligation to apply their decisions retroactively, the Third Circuit REVERSED the district court's grant of the writ of habeas corpus. (Stapleton and Alito, C.J., Shadur, D.J.; opinion by Alito.) **149 F.3d 221.**

622. United States v. Lake, No. 97-7462 (D. V.I. 7/21/98) - Mr. Lake was charged with using or carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1), and carjacking in violation of 18 U.S.C. § 2119. The jury convicted Mr. Lake of carrying a firearm in relation to a crime of violence, but acquitted him of the carjacking charge.

On appeal, Mr. Lake argued that the evidence was insufficient to support his § 924(c) conviction because the evidence did not show that he used or carried a "firearm" within the meaning of 18 U.S.C. § 921(a)(3). In support of this position, Mr. Lake argued that the evidence failed to establish that the gun was not a toy. The Third Circuit concluded that based upon the evidence presented, a rational jury could find that the gun was real.

Mr. Lake next argued that the evidence was insufficient to show that he violated the carjacking statute, 18 U.S.C. § 2119, and thus committed the predicate offense needed to support his conviction under 18 U.S.C. § 924(c)(1). The Third Circuit concluded that the evidence was sufficient to establish all of the elements of the carjacking statute.

Mr. Lake also challenged the district court's jury instruction on the § 924(c) charge, arguing that it was erroneous because it did not contain all of the elements of the predicate carjacking offense. The Third Circuit found that because the district court's instruction on the carjacking charge set out all of the elements of carjacking, and because the § 924(c)(1) instruction referred to the carjacking instruction, the § 924(c)(1) instruction was not erroneous.

Mr. Lake also argued that the district court erred in sentencing him under 18 U.S.C. § 924(c)(1) for using or carrying a firearm during a carjacking since he was acquitted of the carjacking charge. The Third Circuit rejected this argument, holding that under § 924(c)(1), the government must prove that the defendant committed a qualifying predicate offense, but it is not necessary that the defendant be separately charged with or convicted of such an offense.

Finally, Mr. Lake argued that he was entitled to a new trial or to the suppression of the

testimony regarding his statement to the police because the rough notes of the interview were not preserved. The Third Circuit held that because the discarded notes did not contain Brady material and were discarded in good faith, the destruction of the notes did not amount to reversible error. AFFIRMED (Becker, Cowen and Alito, C.J.; opinion by Alito.) **150 F.3d 269.**

623. United States v. Walker, No. 97-7368 (M.D. Pa. 7/24/98) - Mr. Walker pled guilty to possession of a prohibited object by an inmate in violation of 18 U.S.C. § 1791, and impeding a federal officer in violation of 19 U.S.C. § 111. On appeal he argued that the district court erred by applying U.S.S.G. § 3A1.2(b) to impose a three-level enhancement to his sentence for assaulting a "corrections officer." The Third Circuit found that the current state of the record did not support the conclusion that the person assaulted, a cook/supervisor, was a "corrections officer." The Court thus concluded that although the district court used the appropriate guideline, it misconstrued the phrase "corrections officer." The Court therefore REVERSED and REMANDED for further fact-finding as the district court deemed appropriate, and for resentencing. (Stapleton, Nygaard and Weis, C.J.; opinion by Nygaard.) **149 F.3d 238.**

624. United States v. Sherman, No. 97-7073 (M.D. Pa. 7/30/98) - The government charged Mr. Sherman with committing perjury in violation of 18 U.S.C. § 1621. The district court dismissed the indictment, holding that the prosecution improperly charged Mr. Sherman under the general perjury statute rather than the more specific false declarations statute, 18 U.S.C. § 1623; the district court reasoned that this error denied Mr. Sherman the ability to assert the recantation defense available under 18 U.S.C. § 1623(d). The Third Circuit REVERSED the district court and REMANDED for further proceedings. (Alito, Lewis and McKee, C.J.; opinion by McKee.) **150 F.3d 306.**

625. Parrish v. Fulcomer, No. 98-1010 (E.D. Pa. 7/31/98) - This was an appeal from the district court's denial of a habeas corpus petition which was filed under 28 U.S.C. § 2254.

In state court, Mr. Parrish waived his right to a jury trial in return for the Commonwealth's agreement not to seek the death penalty. He was convicted of first degree murder and criminal conspiracy and was sentenced to life in prison. After exhausting all of his state court remedies, Mr. Parrish filed a habeas corpus petition arguing that waiver of his federal constitutional right to a jury trial, induced by the prosecution's pledge not to seek the death penalty, violated his federal constitutional right to due process. He also argued that his trial counsel was ineffective for failing to secure a valid constitutional waiver of a jury trial colloquy; for participating in the negotiations on the waiver; and for allowing the "trade-off" to be a factor in the decision of whether or not to waive the jury trial. The district court rejected these arguments, and denied habeas corpus relief.

On appeal, the Third Circuit noted that there was no allegation that the Commonwealth had threatened prosecution on a charge not justified by the evidence, or had threatened a more onerous penalty than warranted by the facts for the purpose of obtaining an unfair advantage in negotiations with Mr. Parish. As a result, the Third Circuit rejected Mr. Parish's arguments and found that his counsel was not ineffective. (Scirica, Nygaard and Seitz, C.J.; opinion by Nygaard.) **150 F.3d 326.**

626. Royce v. Hahn, No. 97-3266 (W.D. Pa. 8/5/98) - This case was before the Court on panel rehearing. The issue in this habeas corpus case was whether mere possession of a firearm by a previously convicted felon is a "crime of violence" that triggers an obligation of federal prison authorities to notify local authorities upon an inmate's release. The Third Circuit answered this question in the negative, and held that a Bureau of Prisons Program Statement to the contrary (Program Statement No. 5162.02(7)) represented an incorrect interpretation of the relevant

notification statute (18 U.S.C. §§ 4042(b)). REVERSED and REMANDED. (Stapleton, Roth and Weis, C.J.; opinion by Weis.) **151 F.3d 116.**

*** 627. Henderson v. Frank, No. 97-3041 (W.D. Pa. 8/6/98) -** After being charged in state court, Mr. Henderson signed and filed a standard waiver of counsel form at a preliminary hearing before a district justice. He then petitioned the court for permission to proceed pro se. The state court granted him permission to proceed pro se, but without any recorded colloquy regarding the dangers of self-representation. Mr. Henderson represented himself at a subsequent suppression hearing, but was later represented by counsel at his trial. The jury found him guilty of burglary, criminal conspiracy, criminal attempt to commit burglary and criminal mischief.

After exhausting his possible remedies in the state court system, Mr. Henderson filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. His petition alleged that his invalid waiver of counsel and subsequent lack of representation at the suppression hearing violated the Sixth Amendment. The district court denied relief, and the Third Circuit granted a certificate of appealability.

On appeal, the Third Circuit considered three issues. First, did signing a standard waiver of counsel form at the preliminary hearing, and petitioning the court for permission to proceed pro se, constitute a knowing, voluntary and intelligent waiver of his right to counsel at a subsequent suppression hearing? Second, if the signing of the waiver did not satisfy Sixth Amendment waiver requirements so that the writ of habeas corpus should be granted, should the writ be conditioned on Mr. Henderson receiving a new trial, or merely a new suppression hearing? Third, was the habeas corpus petition time-barred, and did Mr. Henderson exhaust his state remedies?

The Third Circuit found that the habeas corpus petition was timely filed, and that Mr. Henderson properly exhausted all of his state court remedies. The Third Circuit then held that Mr. Henderson did not make a valid waiver of his right to counsel at the suppression hearing; that the writ of habeas corpus should therefore have been granted; and that the granting of the writ should be conditioned upon the granting of a new hearing on the motion to suppress, and, if the Commonwealth still wishes to pursue the charges, a new trial. REVERSED AND REMANDED. (Becker, Aldisert and Garth, C.J.; opinion by Aldisert; dissent by Garth.) CONGRATULATIONS TO SHELLEY STARK, FEDERAL PUBLIC DEFENDER FOR THE WESTERN DISTRICT OF PENNSYLVANIA !!! **155 F.3d 159.**

628. United States v. Askari, No. 95-1662 (E.D. Pa. 8/7/98) - This was an Order Sur Petition for Reconsideration of *En Banc* Opinion. In its previous *en banc* decision in this case, **United States v. Askari**,140 F.3d 536 (3d Cir. 1998), the Court held that the defendant's conviction for unarmed bank robbery did not constitute a "non-violent offense," and that Mr. Askari was therefore not entitled to a downward departure under U.S.S.G. § 5K2.13. Section 5K2.13 permits a downward departure based on diminished capacity where the crime is "non-violent."

Mr. Askari filed a timely petition for reconsideration. The basis of the petition was a proposed amendment to § 5K2.13 which substituted the following language for "non-violent offense": if "the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence." Mr. Askari argued that his appeal needed to be reconsidered in light of this proposed amendment.

A majority of the *en banc* court voted to grant the motion for reconsideration. However, the Court noted that the premise of reconsideration was the enactment of the proposed amendment. The Court therefore stayed the mandate until November 1, 1998, the date by which Congress must act to prevent the amendment from taking effect. The Court further ordered that if Congress should

reject the amendment, the original *en banc* opinion shall take effect, and the mandate shall be issued. However, if Congress does not act by November 1, 1998, thus rendering the amendment effective, the *en banc* opinion shall be formally vacated, and the Court will then decide whether to remand the case to the district court for further proceedings. (*En Banc*; order by Becker, C.J.) **151 F.3d 131.**

*** 629. United States v. Walker, No. 97-3531 (W.D. Pa. 8/19/98) -** Mr. Walker appealed his conviction under 18 U.S.C. § 1791(a)(2) for possession of contraband in a prison. On appeal, Mr. Walker argued that during closing arguments, the prosecutor had vouched for the credibility of three government witnesses. Although the court found that the prosecutor's remarks did not amount to vouching, it did note that "it is poor practice for federal prosecutors to frequently use rhetorical statements punctuated with excessive use of the personal pronoun `I.' Such a practice runs the risk that the words that follow will convey the personal view of the prosecutor to the jurors." AFFIRMED. (Becker and Weis, C.J., Dowd, D.J.; opinion by Dowd.) **155 F.3d 180.**

630. United States v. Cianci, No. 97-5619 (D. N.J. 8/21/98) - Mr. Cianci pled guilty to two counts of tax evasion. On appeal, he challenged the district court's imposition of a two-level sentencing enhancement under U.S.S.G. 2T1.1(b)(2) for the use of sophisticated means, and a two-level enhancement pursuant to U.S.S.G. § 3B1.3 for abuse of a position of trust; he argued that these enhancements were improperly based upon uncharged conduct. He also argued that his counsel at the sentencing proceeding provided ineffective assistance of counsel. The Third Circuit rejected all of these arguments, and AFFIRMED. (Sloviter and Roth, C.J., Fullam, D.J.; opinion by Sloviter.)

631. United States v. Tobin, No. 97-5304 (D. N.J. 8/25/98) -The appellant was charged in a 14-count indictment with one count of interfering with interstate commerce by extortion and threatened physical violence in violation of the Hobbs Act, 18 U.S.C. § 1951; three counts of making interstate telephone calls threatening to injure the person of another, in violation of 18 U.S.C. § 875(c); two counts of making threatening interstate telephone calls with the intent of extorting a thing of value from another person, in violation of 18 U.S.C. § 875(d); seven counts of trafficking in and using unauthorized telephone calling cards with the intent to defraud and thereby obtaining services valued in excess of $1,000 within a one-year period, in violation of 18 U.S.C. § 1029(a)(1); and one count of possessing 15 or more unauthorized calling cards with the intent to defraud, in violation of 18 U.S.C. § 1029(a)(3). Ms. Tobin was tried before a jury and was convicted on all counts except those charging the making of interstate telephone calls that threatened to injure the person of another.

On appeal, the appellant raised the following issues:

1) The district court erroneously denied her request for a "claim-of-right" jury instruction to the alleged violation of the Hobbs Act, 18 U.S.C. § 1951; a claim of right defense applies when the defendant had a legitimate claim to the thing of value that is the subject of the alleged extortionate act.

2) The indictment should have been dismissed pursuant to the Speedy Trial Act, 18 U.S.C. § 3161(c)(1).

3) The district court erred in admitting certain tape recordings.

4) Trial counsel was ineffective.

5) The district court sentenced the appellant under U.S.S.G. § 2B3.2 (Extortion by Force or Threat of Injury or Serious Damage), when it should have sentenced her under U.S.S.G. § 2B3.3 (Blackmail and Similar Forms of Extortion).

The Third Circuit rejected all of these claims and AFFIRMED. (Stapleton and Alito, C.J., Shadur, D.J.; opinion by Alito.) **155 F.3d 636.**

*** 632. United States v. Williamson, No. 97-3692 (W.D. Pa. 8/26/98) -** This appeal presented the narrow issue of whether the two-level upward adjustment for obstruction of justice under U.S.S.G. § 3C1.1 is mandatory once the sentencing court has determined that the defendant has committed perjury. The Third Circuit held that the obstruction of justice enhancement is mandatory once there is a finding of perjury. AFFIRMED. (Becker, Stapleton and Weis, C.J.; opinion by Becker.) **154 F.3d 504.**

633. United States v. Hsu, No. 97-1965 (E.D. Pa. 8/26/98) - The indictment charged the defendants with six counts of wire fraud in violation of 18 U.S.C. § 1343, one count of general federal conspiracy in violation of 18 U.S.C. § 371, two counts of foreign and interstate travel to facilitate commercial bribery in violation of 18 U.S.C. § 1952(a)(3), one count of aiding and abetting in violation of 18 U.S.C. § 2, two counts of criminal activity under the Economic Espionage Act of 1996 ("EEA"), including attempted theft of trade secrets, and a conspiracy to steal trade secrets, in violation of 18 U.S.C. §§ 1832(a)(4) and (a)(5). It is the charges under the EEA which were relevant for purposes of this appeal.

The district court issued an order allowing the disclosure to the defense of certain documents regarding trade secrets. The defendants had sought disclosure of the documents on the grounds that they needed them in order to prove their defense of legal impossibility. The government filed an interlocutory appeal from this order; the appeal was authorized by a section in the EEA providing that "[a]n interlocutory appeal by the United States shall lie from a decision or order of a district court authorizing or directing the disclosure of any trade secret." 18 U.S.C. § 1835.

The Third Circuit held that legal impossibility was not a defense to the charges in question, and REVERSED the district court's order allowing disclosure of the documents. (Stapleton, Cowen and Rendell, C.J.; opinion by Rendell.)

634. United States v. Nolan-Cooper, Nos. 97-1171 and 97-1298 (E.D. Pa. 9/2/98) - This was a case in which the defendant was investigated by the IRS, and eventually prosecuted, for laundering illicit drug proceeds. During the course of the investigation, one of the government agents who was involved engaged in a close personal relationship with the defendant which eventually became sexual in nature. On the basis of these facts, the defendant filed a motion to dismiss based upon governmental misconduct, and the district court denied that motion. On appeal, the Third Circuit AFFIRMED the denial of the motion to dismiss. However, the Third Circuit did find that the government's misconduct could be grounds for a downward departure at sentencing, even though such misconduct was unrelated to the guilt of the defendant. The Third Circuit therefore VACATED the sentence, and REMANDED so that the district court could consider whether the facts of the government's misconduct take the case outside of the heartland of the Guidelines, and thereby warrant a downward departure.

On appeal, the defendant also argued that the government had breached his plea agreement. In return for her conditional guilty plea to 13 counts of conspiracy and money laundering, the government had agreed that it would recommend a term of incarceration within the stipulated range of 41 to 51 months, and that it would not oppose the defendant's position on the applicability of certain Sentencing Guideline provisions. At sentencing, the government failed to follow through on these promises. The Third Circuit agreed that the plea agreement had been breached, VACATED the sentence, and REMANDED for resentencing before a different district court judge. (Becker, Rendell and Heaney, C.J.; opinion by Becker.) **155 F.3d 221.**

*** 635. United States v. Evans, No. 97-3445 (W.D. Pa. 9/3/98) -** This case centered upon a fraud scheme which entailed the staging of automobile accidents followed by submitting insurance claims for non-existent medical treatment. On appeal, the Third Circuit held that the district court committed plain error by conditioning the defendant's supervised release on reimbursement of the cost of court-appointed counsel, since the terms of the supervised release statute do not allow for such a condition. See 18 U.S.C. § 3583(d). The Third Circuit therefore VACATED the portion of the sentence which imposed that condition. The Third Circuit also found the district court's findings with regard to the amount of fraudulent loss for sentencing purposes to be inadequate, see U.S.S.G. § 2F1.1(b)(1), and thus REMANDED for further sentencing proceedings. More specifically, it was unclear whether the findings on the amount of loss erroneously included legitimate fees for non-fraudulent medical care, or whether all of the fraud loss for which Mr. Evans was held accountable was foreseeable to him. (Becker and Weis, C.J., Dowd, D.J.; opinion by Becker.) **155 F.3d 245.**

636. United States v. Haywood, No. 97-1652 (E.D. Pa. 9/9/98) - Mr. Haywood was convicted of conspiring to distribute heroin, and distributing heroin within 1000 yards of a school. On direct appeal, Mr. Haywood sought a new trial on the grounds that he was denied effective assistance of counsel. He also argued that the government failed in its burden of proof concerning the amount of drugs attributable to him, and that the court erred by failing to order a hearing *sua sponte* on his competence to stand trial.

The Third Circuit AFFIRMED with respect to the ineffective assistance of counsel and sufficiency of the evidence claims; the Third Circuit reasoned that ineffectiveness claims are not normally reviewed on direct appeal, and that there was sufficient indicia of reliability to support the Presentence Report's finding on the amount of drugs, and the district court's reliance upon that finding. However, the Court REMANDED based on the district court's failure to order a competency hearing; because there was evidence indicating that Mr. Haywood might not be mentally competent to stand trial, the district court was required under 18 U.S.C. § 4241 to hold a competency hearing. (Stapleton, Cowen and Rendell, C.J.; opinion by Stapleton.) **155 F.3d 674.**

637. United States v. Johnson, No. 97-5574 (D. N.J. 9/9/98) - This appeal presented the issue of whether a defendant who is classified as a career offender under the sentencing guidelines can be eligible for a downward adjustment for minor role in the offense. The Third Circuit held that based upon the plain language of the sentencing guidelines, their legislative history, and the sequence of the relevant provisions, downward adjustments for minor role in the offense do not apply to career offenders. AFFIRMED. (Stapleton and Rosenn, C.J., Restani, Crt. of Intnl. Trade; opinion by Restani.) **155 F.3d 682.**

638. Hollman v. Wilson, No. 97-2062 (E.D. Pa. 9/11/98) - This was an appeal from the district court's denial of a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The habeas corpus petition alleged that a violation of **Brady v. Maryland**, 373 U.S. 83 (1963) undermined the petitioner's murder conviction. More specifically, the prosecution failed to discover, and thus to turn over to the defense, a full and accurate criminal history of the only witness to the crime.

The Third Circuit noted that the issue presented was clearly adjudicated in state court, and found that the state court's decision was not contrary to clearly established federal law, or based upon an unreasonable application of clearly established federal law. There was no record evidence to indicate that the government's failure to produce the criminal records was the result of anything more than an administrative mistake. Furthermore, earlier disclosure of the criminal records would not have made any difference in the outcome of the trial. As a result, no **Brady** violation occurred.

Thus, the Third Circuit concluded that because the state court relied upon a reasonable interpretation of state law in finding that no **Brady** violation had occurred, habeas corpus relief was not warranted under the Antiterrorism and Effective Death Penalty Act. AFFIRMED. (Stapleton, Cowen and Rendell, C.J.; opinion by Rendell.) **158 F.3d 177.**

639. United States v. Milner, No. 97-7605 (M.D. Pa. 9/15/98) - Mr. Milner pled guilty to a charge of possession with the intent to distribute in excess of 100 grams of heroin pursuant to 21 U.S.C. § 841(a)(1). Under the terms of the plea agreement, the government agreed to recommend the applicable mandatory minimum sentence of five years imprisonment. However, in the presentence investigation report, the probation office determined, based upon information unknown to the government at the time of the plea negotiations, that Mr. Milner qualified as a career offender under § 4B1.1 of the sentencing guidelines, and was thus eligible for a sentence of 188-235 months in prison. The district court adopted the findings of the presentence report, and thus determined Mr. Milner's guideline sentencing range to be 188-235 months in prison. The government then recommended a sentence at the bottom of that range.

On appeal, Mr. Milner objected to the government's recommendation of a sentence at the bottom of the career offender sentencing range (188-235 months). Specifically, Mr. Milner argued that this recommendation constituted a breach of the plea agreement, since the government had agreed to recommend the mandatory minimum sentence of five years. Mr. Milner requested that his sentence be vacated, and his case remanded for resentencing. The Third Circuit held that in light of the fact that the circumstances had changed at the time of the sentencing, the government did not breach the plea agreement by recommending a sentence at the bottom of the career offender guideline range, and AFFIRMED. (Becker, Stapleton and Weis, C.J.; opinion by Becker.) **155 F.3d 697.**

640. United States v. Ellis, Nos. 97-1368 and 97-1369 (E.D. Pa. 9/21/98) - This was an appeal from a judgment of conviction for one count of conspiracy to launder drug trafficking proceeds in violation of 18 U.S.C. § 1956(h), and two counts of money laundering in violation of 18 U.S.C. § 1956(a)(3)(b). The following three issues were raised in this appeal:

1) Did the district court commit prejudicial error pursuant to Federal Rule of Evidence 801(d)(2)(E) when it admitted two tape-recorded statements by the appellant's attorney who was also an alleged coconspirator?

2) Did the district court err by failing to charge the jury with the appellant's proposed money laundering instruction?

3) Did the district court err by limiting the appellant's cross-examination of an IRS special agent?

The Third Circuit rejected all three of these issues, and AFFIRMED. (Becker, Rendell and Heaney, C.J.; opinion by Becker.) **156 F.3d 493.**

641. United States v. Riddick, Nos. 97-1367 and 97-1433 (E.D. Pa. 9/25/98) - In this appeal, 23 defendants were charged with engaging in a drug distribution conspiracy. The indictment charged the appellant, Mr. Riddick, with one count of engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848(a); conspiring to distribute more than five kilograms of cocaine in violation of 21 U.S.C. § 846; distributing cocaine in or near a school in violation of 21 U.S.C. § 860(a); and distribution of cocaine in violation of 21 U.S.C. § 841(a)(1). A jury convicted Mr. Riddick of all the counts with which he was charged. Mr. Riddick appealed the conviction, and the government cross-appealed the sentence.

In his appeal Mr. Riddick raised the following issues:

1) Was there a variance between the single conspiracy charged and the evidence produced at trial?
2) Was the evidence insufficient to support the continuing criminal enterprise conviction?
3) Did the government improperly disclose and improperly present misleading grand jury testimony?
4) Did the district court err in denying the suppression motion?
5) Did the government conduct an unauthorized wiretap?
The Third Circuit rejected all of these issues, and AFFIRMED the conviction.

In its cross-appeal, the government argued that the district court erred in sentencing Mr. Riddick to a 33-year term of imprisonment based upon an offense level of 42 under U.S.S.G. § 2D1.5, the guideline for continuing criminal enterprise convictions. The government argued that U.S.S.G. § 2D1.2, the guideline applicable to Mr. Riddick's conviction for distribution of cocaine near a school required an offense level of 43, and a mandatory life sentence. Noting that distributing cocaine within the vicinity of a school is not a lesser included offense of a continuing criminal enterprise conviction, the Third Circuit agreed with the government; the Third Circuit VACATED the sentence and REMANDED for resentencing. (Stapleton and Rosenn, C.J., Restani, Judge, Intn'l Crt. of Trade; opinion by Restani.) **156 F.3d 505.**

642. United States v. Idowu, No. 98-5076 (D.N.J. 10/14/98) - The defendant was tried before a jury and convicted of conspiracy to possess with intent to distribute more than one kilogram of heroin in violation of 21 U.S.C. § 846. The evidence produced at trial indicated that the defendant knew that he was involved in an illicit transaction of some sort. The sole issue on appeal was whether there was sufficient evidence that the defendant knew that the subject matter of the illicit transaction was a controlled substance, rather than some other form of contraband such as stolen jewels, computer chips or currency.

The Third Circuit held that it is not enough for the government to prove that the defendant knew that he was involved in an illicit activity, and that there was some form of contraband involved in the scheme in which he was participating. Instead, the government is obliged to prove beyond a reasonable doubt that the defendant had knowledge of the particular illegal objective contemplated by the conspiracy. In the absence of such proof, a guilty verdict on a conspiracy charge cannot be sustained.

The Third Circuit found that in this case, there was evidence that the defendant knew he was involved in some form of illicit activity. However, there was no evidence that the defendant knew that heroin, or some other controlled substance, was involved. As a result, the Third Circuit REVERSED the conviction. (Becker, Stapleton and Weis, C.J.; opinion by Becker; dissent by Stapleton.) **157 F.3d 265.**