The Rap Sheet

Issue No. 5 *September 1999*

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

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I. CJA PANEL MEMBER TRAINING SEMINAR

A training seminar for CJA Panel Members in the Western District of Pennsylvania is scheduled for ***Friday, September 24, 1999***, at the Moorhead Federal Building, 22nd Floor Conference Room, Pittsburgh. The Agenda and Registration form were mailed to all current Panel Members in the Pittsburgh, Erie and Johnstown Divisions of the District in August. We have been approved to certify up to six CLE credits for Panel Members who attend the Seminar and who submit at the close of the Seminar a personal or business check in the amount of $1.50 for each CLE credit earned (cash cannot be accepted). There is no other charge for this Seminar.

If you have **not** registered for the Seminar and plan to attend, please fax your Registration Form immediately to 412/ 644-4594, or register by calling Janey Sarniak, Administrative Assistant, at 412/ 644-6565.

II. *THE DEFENDER'S ADVOCATE*

Enclosed is the Summer Issue of *The Defender's Advocate*, the newsletter of the Federal Defender Training Group. The Federal Public Defender's Office will continue to send you future issues.

III. *AN INTRODUCTION TO FEDERAL GUIDELINE SENTENCING*

Enclosed is a copy of *An Introduction to Federal Guideline Sentencing*, Fourth Edition, which is published by the Administrative Office of the United States Courts, and distributed to Panel Members free of charge through the Federal Defender Training Group. This publication is a starting point for a thorough understanding of the guideline sentencing process, and also includes a reprint of the Guidelines Worksheets and Sentencing Table.

IV. NEW PANEL ATTORNEY REPRESENTATIVE

Pittsburgh CJA Panel Member Sally Frick is the new National Panel Attorney Representative for the Western District of Pennsylvania. She succeeds Joel Johnston, whose term expired in June. Panel Attorney Representatives meet annually to discuss issues of concern and maintain communication among panel attorneys and between panel attorneys and the Judicial Conference of the United States, acting through the Defender Services Committee. Panel Attorney Representatives also serve as the liaison between panel attorneys in their district and the Defender Services Advisory Group, which provides practitioner perspectives to the Judicial Conference and the Administrative Office of the United States Courts. You can reach Sally at 1510 Frick Building, Pittsburgh, Pennsylvania 15219, telephone 412/ 361-3340.

Many thanks to Joel for his great service as this District's representative for the past four years. Joel generously gave his time and efforts on behalf of his fellow panel members with great humor and gusto, as only Joel can.

V. CASE NOTES

Recent Third Circuit Slip Opinions. Enclosed is a summary of recent Third Circuit Opinions on criminal law published since October 15, 1998.

Riddle:

Q: What is more rare than a Pennant in Pittsburgh?
A: A "not guilty" verdict in Federal Court.
Q: What is more rare than a "not guilty" verdict in Federal Court?
A: A walk from the Third Circuit.

Cause for celebration. Thanks to Joe McGuire for giving it to us at the Federal Public Defender's Office.

VI. STAFF NEWS.

We welcome our newest staff member -

Lisa Freeland, Esq., recently joined our staff as Research & Writing Specialist. Welcome, Lisa.

Enclosures:

The Defender's Advocate Newsletter, Vol. 1, Issue 2
An Introduction to Federal Guideline Sentencing, Fourth Edition
Summary of recent Third Circuit Opinions on Criminal Law

RECENT THIRD CIRCUIT OPINIONS ON CRIMINAL LAW
(October 1998 through March 1999)
By Karen Sirianni Gerlach, AFPD

643. United States v. Lynch, No. 98-1029 (E.D. Pa. 10/15/98) - This appeal dealt with the interpretation of 21 U.S.C. § 851(a), which provides for an enhanced sentence if the offender has a prior drug-related conviction, and if the government files an information listing the previous convictions relied upon for the enhancement. The statute provides that the information cannot be filed "unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed." The issue was whether this language requires an indictment on the prior convictions, or on the instant offense.

Mr. Lynch argued that the statute allows enhancement only if the prior convictions proceeded by indictment, or if the defendant waived indictment on the prior convictions. The government, on the other hand, argued that this language refers to the instant offense, so that enhancement is allowed under §851 no matter how the prior convictions were charged, as long as the present offense has been charged by indictment, or if an indictment has been waived.

The Third Circuit agreed with the government, and held that the government may file an information under 21 U.S.C. § 851(a) regardless of whether the defendant waived indictment in the prior offenses. The government may file an information under 21 U.S.C. § 851 as long as the current offense was charged by indictment, or if the defendant waived indictment for the current offense. AFFIRMED. (Becker, Weis and Garth, C.J.; opinion by Garth.) **158 F.3d 195.**

644. United States v. Williams, No. 98-1381 (E.D.Pa. 10/16/98)- Mr. Williams entered into a plea agreement which allowed him to receive credit against his federal sentence for time served in state custody. The district court accepted the agreement, and sentenced Mr. Williams, stipulating that he should receive credit against his federal sentence for time served in state custody, in accordance with the terms of the plea agreement. The Bureau of Prisons subsequently wrote letters to Mr. Williams and to the Assistant United States Attorney explaining that under 18 U.S.C. § 3585(b), it was required to deny the credit.

Mr. Williams responded with a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. The district court entered an order partially granting, and partially denying, Mr. Williams' motion under 28 U.S.C. § 2255. The court issued an amended judgment of conviction giving him credit for the state time served; the district court accomplished this by reducing his sentence under U.S.S.G. § 5G1.3(b). However, the court denied Mr. Williams' motion to vacate his conviction, on the grounds that the government did not breach the plea agreement. In its orders ruling on these matters, the district court made no reference to a certificate of appealability.

Mr. Williams appealed the reduction of his sentence, asking that his conviction and sentence be vacated, or, in the alternative, that the matter be remanded to the district court for entry of an amended judgment that complies with the form and language required by the Bureau of Prisons.

The government argued that the district court lacked jurisdiction to consider the appeal because neither the district court nor the court of appeals issued a certificate of appealability as required by 28 U.S.C. § 2253(c)(1)(B), and that a court of appeals cannot issue a certificate of appealability unless the petitioner first applies to the district court for the certificate. The government also argued that the district court's order was not ambiguous and complied with the plea agreement, and that Mr. Williams' real concern was not with the district court's order, but with the possibility that the Bureau of Prisons might not carry out the order. The government asserted that should this issue actually arise, it should be the basis of a petition for habeas corpus

under 28 U.S.C. § 2241.

The Third Circuit declined to resolve the issue of whether a certificate of appealability must first be obtained from the district court, or whether it can first be obtained from a circuit court. However, in a footnote, the Court suggested that the better practice would be to first apply to the district court for a certificate of appealability. Nonetheless, the Court dismissed the appeal for lack of jurisdiction, reasoning that in either event, Mr. Williams had not made "a substantial showing of the denial of a constitutional right," as required for the granting of a certificate of appealability. The Court also agreed with the government that Mr. Williams' position as to what may happen in the future is completely speculative, and that if the Bureau of Prisons does not honor the district court's order, Mr. Williams will be free to seek relief under 28 U.S.C. § 2241. (Greenberg, Nygaard and Noonan, C.J.; opinion by Greenberg.) **158 F.3d 736.**

645. United States v. Parise, No. 97-1740 (E.D. Pa. 10/28/98) - The appellant was convicted under the RICO statute, 18 U.S.C. § 1962(c). His RICO conviction was predicated upon the violation of the Pennsylvania commercial bribery statute, 18 Pa. C.S.A. § 4108(c). On appeal, Mr. Parise argued that there was insufficient evidence to support his RICO conviction, and that his actions did not constitute commercial bribery under Pennsylvania law. He also challenged the district court's exclusion of certain testimony relating to the commercial bribery charge. The Third Circuit rejected all of Mr. Parise's arguments. AFFIRMED. (Alito, Garth and Rendell, C.J.; opinion by Rendell.)

646. United States v. Brown, No. 98-7057 (M.D. Pa. 10/29/98) - This was an appeal from the district court's denial of Mr. Brown's motion to suppress evidence discovered during a stop and frisk. The district court reasoned that the stop was justified under **Terry v. Ohio**, 392 U.S. 1, 88 S.Ct. 1868 (1968). Mr. Brown argued that the officers lacked the reasonable suspicion required under **Terry** to conduct a warrantless stop and frisk.

The Third Circuit held that the facts of this case were sufficient to support an investigatory stop under **Terry**. Specifically, Mr. Brown was seen in the middle of the night and in the dead of winter near the area of the crime; the area in question was known as a high-crime area. Furthermore, Mr. Brown failed to heed the officer's request to stop, and later attempted to elude police. And finally, the officer who conducted the **Terry** stop had the benefit of radioed information describing Mr. Brown. AFFIRMED. (Nygaard, Alito and Rendell, C.J.; opinion by Nygaard; dissent by Rendell.) **159 F.3d 147.**

647. United States v. Askari, No. 95-1662 (E.D. Pa. 11/5/98) - This was the third published opinion in this case. The other opinions are reported at 140 F.3d 536 and 151 F.3d 131. The issue in all three opinions has been whether Mr. Askari, a convicted bank robber who suffers from mental illness, was entitled to a downward departure under U.S.S.G. § 5K2.13 for diminished capacity. The district court denied the departure on the grounds that downward departures can only be granted under § 5K2.13 for non-violent offenses, and that bank robbery is not a non-violent offense. The Third Circuit affirmed the district court at 140 F.3d 536.

One day before the Third Circuit's decision at 140 F.3d 536 was filed, the Sentencing Commission amended § 5K2.13. The amendment eliminated the provision of § 5K2.13 which prohibited downward departures in cases of "non-violent offense[s]." The amendment instead prohibited downward departures where "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." Based upon this amendment, the Third Circuit granted a motion for reconsideration at 151 F.3d 131.

Because this amendment constituted a clarification, rather than a substantive change, the

Third Circuit held that the amendment must be given effect in this case. The Third Circuit therefore VACATED its en banc opinion (140 F.3d 536), and REMANDED to the district court for factfinding regarding the following two issues: (1) whether Mr. Askari's offense involved "actual violence or a serious threat of violence"; and (2) whether Mr. Askari's criminal history indicates a need to incarcerate him in order to protect the public. (En Banc; opinion by Becker, C.J.; dissent by Garth, C.J.) **159 F.3d 774.**

648. United States v. Vitale, No. 98-5072 (D. N.J. 11/6/98) - This appeal raised the issue of whether the offenses of wire fraud and tax evasion should be grouped together for sentencing purposes under U.S.S.G. § 3D1.2. The Third Circuit held that the wire fraud and tax evasion counts involved different victims, different harms, and different types of conduct. The Court thus AFFIRMED the district court's refusal to group the counts for sentencing purposes under U.S.S.G. § 3D1.2.

This appeal also raised the issue of whether the defendant was entitled to a downward departure under U.S.S.G. § 5K2.13 for diminished mental capacity. Specifically, Mr. Vitale argued that his compulsion to purchase antique clocks caused him to commit the offenses, amounted to diminished mental capacity, and warranted a departure. The Third Circuit AFFIRMED the district court's refusal to depart downward under § 5K2.13, reasoning that the district court understood its authority to depart under that section and committed no error of law in refusing to depart. As a result, the Third Circuit lacked jurisdiction to review the district court's decision not to depart on grounds of diminished mental capacity. (Sloviter and Roth, C.J., Fullam, D.J.; opinion by Sloviter; concurrence by Fullam.) **159 F.3d 810.**

649. Hassine v. Zimmerman, No. 97-1969 (E.D. Pa. 11/9/98) - This was an appeal from a denial of relief on a habeas corpus petition filed pursuant to 28 U.S.C. § 2254. The petitioner was convicted of first degree murder, attempted murder, criminal conspiracy and criminal solicitation.

The petitioner argued that he was entitled to habeas corpus relief because the prosecutor attempted to elicit trial testimony regarding his post-arrest silence, in violation of **Doyle v. Ohio**, 426 U.S. 610 (1976). The Third Circuit agreed with the district court, and held that although a **Doyle** violation had occurred, any constitutional error was harmless according to **Brecht v. Abrahamson**, 507 U.S. 619 (1993). AFFIRMED. (Nygaard, Alito and Rendell, C.J.; opinion by Rendell; concurrence by Nygaard.) **160 F.3d 941.**

650. United States v. Sherman, No. 97-5514 (D. N.J. 11/16/98) - Dr. Sherman pled guilty to mail fraud for mailing bills to a health insurance company for medical services that were never rendered. At sentencing, the trial court found that Dr. Sherman occupied and abused a position of trust vis-a-vis the insurance company, and thus imposed a two-level sentence enhancement pursuant to U.S.S.G. § 3B1.3. Dr. Sherman challenged that enhancement on appeal.

The determination of whether a § 3B1.3 enhancement applies is two-fold. First it must be determined whether a defendant was placed in a position of trust. Second, if the defendant was in a position of trust, it must be determined whether or not he abused that position.

Dr. Sherman argued that the mere fact that he was a physician did not mandate an increase for abuse of a position of trust. The Third Circuit noted that the mere possession of a professional license by a defrauder does not mandate a § 3B1.3 enhancement. However, where a defendant obtains a minimally-supervised position by virtue of a professional license, and then takes advantage of the discretion granted to him in a way which significantly facilitates the fraud, an abuse of a position of trust has occurred.

The Third Circuit concluded that Dr. Sherman had occupied a position of trust, and also

that he had abused the position of trust in way which facilitated the crime. The Third Circuit therefore AFFIRMED the district court's application of the § 3B1.3 enhancement. (Sloviter and Roth, C.J., Fullam, D.J.; opinion by Roth.) **160 F.3d 967.**

651. United States v. Bennett, No. 97-1816 (E.D. Pa. 11/16/98) - This was an appeal from a judgment of sentence and certain pretrial rulings on a nolo contendere plea entered in a case which involved the largest charity fraud in history. The indictment in this case contained 82 counts, and charged the defendant with the following offenses: bank fraud in violation of 18 U.S.C. § 1344; mail fraud in violation of 18 U.S.C. § 1341; wire fraud in violation of 18 U.S.C. § 1343; making false statements to the government in violation of 18 U.S.C. § 1001; filing false tax returns in violation of 26 U.S.C. § 7206; impeding the administration of revenue laws in violation of 26 U.S.C. & 7212; money laundering in violation of 18 U.S.C. § 1957; and money laundering to promote unlawful activity, in violation of 18 U.S.C. § 1956(a)(1)(A)(1).

Mr. Bennett pled not guilty, and prepared to go to trial. Before trial, the district court ruled to exclude certain questions which defense counsel planned to ask an expert regarding Mr. Bennett's mental capacity. Mr. Bennett then decided to enter a conditional plea of nolo contendere to all the charges; the conditional plea preserved his right to appeal the pretrial ruling regarding the admissibility of his expert's testimony regarding his mental health. In a press release, Mr. Bennett emphasized that he did not admit guilt or agree to the government's version of the facts. At sentencing, the district court departed downward by 91 months on the basis of Mr. Bennett's significantly reduced mental capacity, and imposed a sentence of 144 months imprisonment.

On appeal, Mr. Bennett raised the following issues:

1.) Did the district court err in ruling that the proffered psychiatric evidence was inadmissable under Federal Rule of Evidence 704(b), which forbids experts from stating an "opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto"?

2.) Did the district court err by imposing a two-level increase in the offense level under U.S.S.G. § 2F1.1(b)(3)(A) on the basis of Mr. Bennett's misrepresentation that he was acting on behalf of a charity?

3.) Did the district court err by imposing a four-level increase at sentencing pursuant to U.S.S.G. § 2F1.1(b)(6)(B) for deriving more than $1 million from a fraud offense that affected a financial institution?

4.) Did the district court err by imposing a four-level increase under U.S.S.G. § 3B1.1(a) for Mr. Bennett's leadership role in the offense?

5.) Did the district court err by increasing Mr. Bennett's offense level by two levels under U.S.S.G. § 3B1.3 for his abuse of a position of trust?

6.) Did the district court err by refusing to reduce Mr. Bennett's offense level under U.S.S.G. § 3E1.1 for acceptance of responsibility?

The Third Circuit rejected all of these arguments. AFFIRMED. (Scirica, Nygaard and Seitz, C.J.; opinion by Scirica.) **161 F.3d 171.**

652. United States v. Abuhouran, No. 97-1662 (E.D. Pa. 11/19/98) - The issue in this appeal was whether the district court had the authority to depart downward at sentencing under U.S.S.G. § 5K2.0 on the basis of substantial assistance offered to the government, when the government did not move for such a departure under U.S.S.G. § 5K1.1. The Third Circuit held that the district court did not have the authority to depart downward under U.S.S.G. § 5K2.0 for substantial assistance. District courts can depart downward for substantial assistance only where the prosecutor has filed a motion under U.S.S.G. § 5K1.1, or where the prosecutor has failed to file a substantial assistance motion based upon unconstitutional motives, or where the government's

refusal to file the motion is based upon bad faith. (Becker, Nygaard and Noonan, C.J.; opinion by Becker.) **161 F.3d 206.**

653. United States v. Edwards, No. 98-1055 (E.D. Pa. 11/27/98) - This appeal posed the issue of whether the Mandatory Victims Restitution Act of 1996 ("MVRA"), applies to a defendant who committed his offenses prior to the effective date of the statute, but is convicted on or after its effective date. The Third Circuit held that the district court's application of the MVRA to Mr. Edwards constituted an ex post facto violation. The Court therefore REVERSED and REMANDED for a determination of whether restitution would be appropriate under the prior restitution statute, the Victim and Witness Protection Act ("VWPA"). (McKee and Rendell, C.J., Debevoise, D.J.; opinion by Rendell.) **162 F.3d 87.**

654. United States v. Mortimer, No. 97-2058 (E.D. Pa. 11/27/98) - During defense counsel's closing argument, the prosecutor made an objection, and then withdrew it with the exclamation "The judge is not here." Although the judge had been present during the prosecutor's closing argument, he left the bench without notice during the defense's argument. He returned in time to thank defense counsel for her argument, and to call on the prosecutor for her rebuttal. The judge never explained his absence. The Third Circuit held that the judge's absence from the bench amounted to a structural error in the trial, and REVERSED and REMANDED for a new trial. (Becker, Nygaard and Noonan, C.J.; opinion by Noonan.) **161 F.3d 240.**

655. United States v. Abuhouran, No. 97-1668 (E.D. Pa. 11/27/98) - This was an appeal from a conviction for crimes against the Bank of Brandywine Valley of West Chester, Pennsylvania. The issues raised on appeal included the following:
1.) Whether a jury instruction amended the indictment with regard to the aiding and abetting charge;
2.) Whether the evidence was sufficient for the jury to find that the defendant knowingly abetted the fraud against the bank;
3.) Whether the evidence was sufficient for the jury to find that the defendant had committed conspiracy to make false statements and to commit perjury;
4.) Whether the act charged as money laundering was distinct from one of the acts charged as aiding and abetting bank fraud;
5.) Whether the district court properly enhanced the defendant's sentence under U.S.S.G. § 3C1.1 for obstruction of justice;
6.) Whether there was any impropriety in the fact that a juror knew the wife of a government witness, the son of the United States Attorney, and the fiancee of the indicted president of the bank;
7.) Whether the government established that the bank in question was federally insured.

The Third Circuit rejected all of these arguments. AFFIRMED. (Becker, Nygaard and Noonan, C.J.; opinion by Noonan.) **162 F.3d 230.**

656. United States v. Leggett, No. 96-7772 (M.D. Pa. 12/3/98) - This was an appeal from a judgment of conviction and sentence for assaulting a prison official in violation of 18 U.S.C. § 111. On appeal, the appellant raised three arguments. First, Mr. Leggett argued that the district court erred by not ordering, *sua sponte*, a competency hearing before the commencement of the trial. Second, Mr. Leggett argued that the district court failed to ensure that he had validly waived his right to testify. And finally, Mr. Leggett argued that the district court improperly concluded that he forfeited his right to counsel at sentencing when he physically attacked his attorney. The Third Circuit rejected all three of these arguments. AFFIRMED. (Roth and McKee, C.J., O'Neill, D.J.; opinion by Roth; dissent/concurrence by McKee.) **162 F.3d 237.**

657. United States v. Tyler, No. 96-7776 (M.D. Pa. 12/15/98) - This appeal originated from the killing of a government witness who was scheduled to testify against the appellant's brother. The appellant was prosecuted in state court and was acquitted of murder, but convicted of conspiracy to intimidate a witness. Mr. Tyler was then prosecuted in federal court, and was convicted of conspiracy, witness tampering, and a related firearms offense. On appeal Mr. Tyler challenged the district court's refusal to suppress certain custodial statements which he gave after receiving **Miranda** warnings.

The facts surrounding the suppression issue are as follows. Mr. Tyler was arrested and given his **Miranda** warnings; he then indicated that he did not want to make a statement. The arresting office refrained from further interrogation, and Mr. Tyler was then transported to the state police barracks for processing. At the police barracks, the officer who was assigned to guard and process Mr. Tyler engaged in a discussion regarding hunting, Mr. Tyler's education and Mr. Tyler's mother's health. After 55 minutes of this discussion, Mr. Tyler began to cry, and the police again read him his **Miranda** warnings. Mr. Tyler then gave an inculpatory statement which was introduced against him at trial. In this statement, Mr. Tyler stated that his brother had wanted to kill the deceased witness.

Eleven days later, police obtained another statement from Mr. Tyler. In this second statement, Mr. Tyler stated that his brother had only wanted to scare the deceased witness. The government maintained that Mr. Tyler received **Miranda** warnings before his second statement, and that he had understood them.

Reasoning that the interrogating officers did not scrupulously honor Mr. Tyler's right to cut off questioning, the Third Circuit held that the district court erred in refusing to suppress the first statement, and REVERSED in that regard. The Court further held that on the basis of the record presented, it could not make a determination as to the second statement. It therefore REMANDED so that the district court could make an appropriate inquiry as to the admissibility of the second statement. The Court noted that if the district court found that the second statement was properly admitted, it would have to determine whether or not the error of admitting the first statement was harmless. (Cowen, Alito and McKee, C.J.; opinion by McKee; concurrence by Alito.) **164 F.3d 150.** CONGRATULATIONS TO DAN SIEGEL, ASST. FED. PUBLIC DEF., M.D. PA.!!

658. United States v. Kole, No. 96-5457 (D. N.J. 12/29/98) - The appellant was indicted in conjunction with a conspiracy to import heroin from Thailand, and pled guilty to violating 21 U.S.C. §§ 952(a), 960(a)(1), and 963. The government filed an enhanced penalty information under 21 U.S.C. § 851(a) in an effort to enhance her sentence based upon a prior felony conviction in the Philippines. The district court granted the requested enhancement, and sentenced the appellant to a mandatory minimum sentence of 20 years pursuant to 21 U.S.C. § 960(b)(1). This appeal challenged that enhancement as improper on the grounds that the appellant did not have effective assistance of counsel in the Philippine legal system, and also that the Philippine legal system does not recognize the right to a jury trial. The Third Circuit rejected these arguments, and AFFIRMED the sentence enhancement. (Greenberg, Alito and McKee, C.J.; opinion by McKee.) **164 F.3d 164.**

659. United States v. Berry, No. 98-1140 (E.D. Pa. 1/13/99) - This case raised the issue of whether a plea and sentence in state court on charges arising from a drug transaction, barred a subsequent federal prosecution arising from the same transaction. The defendant filed a motion to dismiss arguing that the subsequent federal prosecution was barred on double jeopardy grounds. The district court rejected this argument, and Mr. Berry filed an interlocutory appeal to the Third Circuit. On appeal, the Third Circuit found that the district court did not err in denying the motion to dismiss, and AFFIRMED. (Becker, Nygaard and Noonan, C.J.; opinion by Nygaard.) **164 F.3d 844.**

660. Buehl v. Vaughn, No. 97-1241 (E.D. Pa. 1/20/99) - This was an appeal from a denial of a petition for writ of habeas corpus filed pursuant to 28 U.S.C. §2255. Mr. Buehl was convicted in state court for a triple homicide. In his habeas corpus petition, Mr. Buehl claimed that his due process rights were violated, and that he received ineffective assistance of counsel at trial and on direct appeal. The Third Circuit rejected both of these arguments, and AFFIRMED the district court's denial of habeas corpus relief. (Mansmann, Cowen and Alito, C.J.; opinion by Alito.) **166 F.3d 163.**

661. United States v. Sanders, No. 98-7278 (M.D. Pa. 1/21/99) - This was an appeal from the denial of a motion to vacate sentence filed pursuant to 28 U.S.C. § 2255.

Mr. Sanders pled guilty to trafficking and conspiring to traffic in stolen firearms in violation of 18 U.S.C. § 922(j). This statute makes it unlawful to sell or to dispose of a stolen firearm which has been shipped or transported in interstate commerce. The guns at issue in this case entered the stream of interstate commerce before their theft by Mr. Sanders, but because he disposed of them within the state of Pennsylvania, they did not enter the stream of interstate commerce after he obtained them.

Mr. Sanders argued that his counsel was ineffective for advising him to plead guilty to the trafficking charges. More specifically, Mr. Sanders argued that the applicable version of § 922(j) (the pre-amendment version) did not prohibit his conduct, since the firearms at issue had entered the stream of commerce before their theft, but not after. Thus, the issue on appeal was whether the pre-amendment version of § 922(j) applies to transactions in stolen firearms where the weapons moved in interstate commerce only prior to their being stolen, and not after their theft. The Third Circuit held that the pre-amendment version of § 922(j) does apply to such weapons, and AFFIRMED the district court's denial of the § 2255 motion. (Becker and Greenberg, C.J., McLaughlin, D.J.; opinion by McLaughlin.) **165 F.3d 248.**

662. United States v. Iasiello, No. 97-7339 (M.D. Pa. 1/22/99) - The district court conducted an evidentiary hearing on a motion to vacate sentence filed under 28 U.S.C. § 2255. The issue on appeal was whether the district court erred in conducting the hearing without appointing counsel to represent the appellant.

The Third Circuit held that the appointment of counsel for an indigent movant at an evidentiary hearing is required pursuant to Rule 8(c) of the Rules Governing Section 2255 Proceedings, and that harm to the appellant must be presumed. The Court therefore VACATED the judgment and REMANDED to the district court for the appointment of counsel and for a new evidentiary hearing. (Nygaard, Roth and Weis, C.J.; opinion by Roth.) **166 F.3d 212.**

663. Sandoval v. Reno, Nos. 98-1099 and 98-1547 (E.D. Pa. 1/26/99) - The issue in this appeal was whether, in enacting the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress stripped the district courts of habeas jurisdiction over deportation proceedings. This appeal also raised the question of whether AEDPA § 440(d), a statutory change that occurred while the petitioner's case was pending and that makes aliens who have been found guilty of drug offenses ineligible for discretionary relief under §212(c) of the Immigration and Nationality Act (8 U.S.C. § 1182), applied to the petitioner. The Third Circuit held that the district court did not lack jurisdiction, and that §212(c) did not apply. (Sloviter, Scirica and Alito, C.J.; opinion by Sloviter; concurrence/dissent by Alito.) **166 F.3d 225.**

664. United States v. Dorsey, No. 98-5250 (D. N.J. 1/29/99) - The issue in this appeal was whether the district court erred in refusing to follow the commentary in application note 2 to U.S.S.G. § 5G1.3(b). This commentary would have allowed a reduction in the appellant's federal

sentence, by giving him credit for the amount of time he spent in state custody for charges stemming from the same occurrence that caused his federal charges. The Third Circuit found that the district court erred in deciding that only the Bureau of Prisons has the authority to grant sentencing credit, and therefore REVERSED and REMANDED for resentencing. The Third Circuit directed that upon remand, the district court comply with the procedure set forth in the application note to the guideline. (Stapleton and Lewis, C.J., Caldwell, D.J.; opinion by Caldwell; concurrence by Stapleton.) **166 F.3d 558.**

665. Kapral v. United States, No. 97-5545 (D. N.J. 2/2/99) - This appeal raised the issue of when a criminal conviction becomes final for purposes of the statute of limitations in 28 U.S.C. § 2255; under § 2255, a motion must be filed within one year of "the date on which the judgment of conviction becomes final". The Third Circuit held that a conviction becomes final for purposes of § 2255 when the Supreme Court affirms the conviction or denies the writ of certiorari, or when the 90 day time period for filing a petition for writ of certiorari expires.

Thus, because the appellant's § 2255 motion was filed within one year of the expiration of the 90-day period for filing a petition for writ of certiorari, his § 2255 motion was timely filed. The district court's order dismissing the §2255 motion was therefore VACATED, and the case REMANDED for further proceedings. (Greenberg, Alito and McKee, C.J.; opinion by McKee; concurrence by Alito.) **166 F.3d 565.**

666. In re: John Paul Minarik, No. 97-8146 (W.D. Pa. 2/3/99) - This appeal dealt with second or successive petitions for habeas corpus relief under 28 U.S.C. § 2254, and the application of the "gatekeeping" provisions of 28 U.S.C. § 2244 to such petitions. The Third Circuit held that anyone seeking to file a second § 2254 petition after April 24, 1996, must move in the court of appeals for an order authorizing the district court to consider it. The court of appeals must apply the substantive gatekeeping standard of 28 U.S.C. § 2244(b), unless it would bar a successive petition that could have been considered by the district court under the law existing at the time the previous petition was filed. Because the second petition in this case was barred by both § 2244(b) and the preexisting law, the Third Circuit ruled that the permission to proceed in the district court should be denied, and that there was no impermissible retroactive effect from this result. (Stapleton, Scirica and McKee, C.J.; opinion by Stapleton.) **166 F.3d 591.**

667. United States v. Jacobs, No. 97-5786 (D. N.J. 2/8/99) - Mr. Jacobs pled guilty to aggravated assault on federal property in violation of 18 U.S. C. § 113(a)(3). On appeal he raised three issues. First, Mr. Jacobs argued that the district court erred in imposing a six-level enhancement pursuant to U.S.S.G. § 2A2.2(b)(3)(C) for infliction of permanent or life-threatening injury. Second, he argued that the district court erred in departing upward by five levels for "extreme psychological injury" to the victim pursuant to U.S.S.G. § 5K2.3. Third, Mr. Jacobs argued that the district court should not have ordered him to pay full restitution pursuant to the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A.

The Third Circuit upheld the order of restitution on the grounds that the clear and unambiguous language of the statute makes restitution mandatory, and that the district court's conclusions as to the amount and causation of loss were a proper exercise of its discretion. The Third Circuit also upheld the six-level enhancement under U.S.S.G. § 2A2.2(b)(3)(C), for a permanent and life-threatening illness, reasoning that the district court made sufficient factual findings to support the enhancement. However, the Third Circuit VACATED the sentence and REMANDED because of the district court's failure to make specific factual findings to support the departure under U.S.S.G. § 5K2.3 for "extreme psychological injury," or to specifically articulate the reasons for the degree of the departure. (Stapleton and Roth, C.J., Hoeveler, D.J.; opinion by Hoeveler.) **167 F.3d 792.**

668. United States v. Serafini, No. 98-7250 (M.D. Pa. 2/10/99) - This was an interlocutory appeal by the government from an order granting in part a motion to dismiss one count of a 140-count indictment. The count in question charged the defendant with making six allegedly false statements to a grand jury. The district court dismissed one of the six charges in the count. The district court reasoned that the question which prompted the allegedly false answer could not support an allegation that the defendant had made a "false material declaration" before the grand jury in violation of 18 U.S.C. § 1623(a).

The Third Circuit rejected the defendant's claim that it lacked appellate jurisdiction to review the district court's order. However, the Third Circuit agreed with the district court that the questioning which prompted the allegedly statement was not sufficiently precise to support a finding of perjury. AFFIRMED. (Sloviter and Cowen, C.J., Pollak, D.J.; opinion by Pollak.) **167 F.3d 812.**

669. United States v. Universal Rehabilitation Services, No. 97-1412 (E.D. Pa. 2/11/99) - The defendants in this case were charged with mail fraud and false claims in a 39-count indictment connected to a Medicare fraud scheme. The jury convicted on only one count of mail fraud. On appeal, the defendants argued that the evidence was insufficient to support the one count of conviction. The government responded that evidence of illegal activity which occurred after the date of the offense charged in the count at issue, but still within the three-year period of the originally charged scheme, could be used to sustain the verdict of guilty.

Thus, the Third Circuit was left to address the issue of whether post-offense evidence can be considered to support a conviction. The Third Circuit also addressed the issue of whether the district court erred in admitting into evidence the guilty pleas of two witnesses, after the defendants represented to the court that they would not challenge the credibility of these witnesses on cross examination, or otherwise make the pleas admissible.

The Third Circuit held that in order for the evidence to be sufficient to sustain the mail fraud conviction, there had to be substantial evidence of participation in the scheme before the mailing. The Court noted, however, that subsequent words and deeds might bear upon whether a defendant was participating in the scheme. The Court then found that the evidence was sufficient to sustain the conviction of two of the defendants, but insufficient to support the conviction of the third defendant. The Court further held that the admission of the guilty pleas of two co-defendants was error because the prejudicial value of the evidence outweighed the probative value under Federal Rule of Evidence 403. In sum, the Third Circuit REVERSED the conviction of one of the defendants on grounds of insufficient evidence, and REVERSED the convictions of the remaining two defendants and REMANDED for a new trial. (Roth, McKee and Garth, C.J.; opinion by Roth; dissent by Garth.) **Opinion vacated because rehearing granted by order dated April 15, 1999.**

670. United States v. Robinson, No. 98-3304 (W.D. Pa. 2/12/99) - A jury convicted Mr. Robinson of conspiring to distribute heroin in violation of 21 U.S.C. § 846 and 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). At sentencing, the district court sentenced Mr. Robinson to the mandatory minimum 20-year term required by 21 U.S.C. § 841(b)(1)(C) where "death or serious bodily injury results from the use of" the substance the defendant was convicted of distributing.

On appeal Mr. Robinson argued that venue (the Western District of Pennsylvania) was improper because the jury could have convicted him for participating in a conspiracy in Ohio without finding that he or any co-conspirator committed an overt act in furtherance of the conspiracy in the Western District of Pennsylvania. He also challenged the imposition of the 20-year mandatory minimum sentence, on the grounds that § 841(b)(1)(C) requires a 20-year mandatory minimum only if a court finds that the distribution of the substance was, in the common law sense, the proximate cause of death or serious bodily injury. Specifically, Mr.

Robinson argued that it was not foreseeable to him that the person to whom he distributed would in turn distribute to the person who died, and that his conduct was therefore not a proximate cause of the user's death.

The Third Circuit concluded that Mr. Robinson waived his objection to venue by failing to raise the issue before the jury reached a verdict, and also, that venue was in fact proper. The Court also concluded that Congress did not intend the phrase "if death or serious bodily harm results from the use of such substance" in § 841(b)(1)(C) to require a showing that the defendant's distribution of the substance proximately caused a death, in a common law sense. The Court also concluded that there was a sufficient nexus between the substance and the death to require the imposition of the mandatory minimum sentence. AFFIRMED. (Greenberg and Scirica, C.J., Carman, Intntl. Crt. of Trade; opinion by Greenberg.) **167 F.3d 824.** This case was handled by panel attorney Thomas "Skip" Livingston.

671. United States v. Holman, No. 98-1307 (E.D. Pa. 2/19/99) - This was an appeal from the denial of a motion to vacate sentence filed pursuant to 28 U.S.C. § 2255. On appeal the appellant argued that the government had not proven that the drug at issue was "crack," rather than cocaine. The appellant also argued that he was entitled to a decrease in his offense level for a mitigating role in the offense pursuant to U.S.S. G. § 3B1.2; that he was entitled to a decrease in his offense level under the "safety valve" provision, U.S.S.G. § 5C1.2; and that he was entitled to a decrease in his offense level pursuant to U.S.S.G. § 5K1.1 for allegedly providing the government with substantial evidence in the investigation and prosecution of others. The Third Circuit rejected all of these arguments. AFFIRMED. (Becker, Nygaard and Wood, C.J.; opinion by Wood.) **168 F.3d 655.**

672. United States v. Cohen, Nos. 97-1888 and 98-1004 (E.D. Pa. 2/19/99) - A jury convicted Mr. Cohen of mail fraud for paying kickbacks to a grocery store's purchasing agents. On appeal Mr. Cohen argued that the evidence was insufficient to support his conviction; that the district court improperly admitted evidence that his co-conspirators had pleaded guilty; that the district court wrongfully denied judicial immunity to a defense witness; and that the government had impermissibly used his post-conviction immunized testimony. The Third Circuit rejected these arguments, and AFFIRMED the conviction. The government also appealed the sentence, arguing that the district court erred in calculating the enhancement under U.S.S.G. § 2B4.1 by using the dollar value of the bribes, rather than the benefit conferred by the bribes, and by grating a reduction for acceptance of responsibility under U.S.S.G. § 3E1.1. The Third Circuit found that the district court had misinterpreted U.S.S.G. §§ 2B4.1 and 3E1.1 and therefore VACATED Mr. Cohen's sentence and REMANDED for resentencing. (Scirica, Nygaard and Roth, C.J.; opinion by Nygaard.) **171 F.3d 796.**