

III. AN INTRODUCTION TO FEDERAL GUIDELINE SENTENCING

The Federal Public and Community Defenders issued the Fifth Edition of *An Introduction to Federal Guideline Sentencing* on January 1, 2001. A copy is enclosed.

IV. SYNOPSIS OF EMERGENCY GUIDELINE AMENDMENTS (eff. May 1, 2001)

Thomas W. Hutchison, Esq., of the Federal Defender Training Group, has written a synopsis of the **emergency** amendments to the United States sentencing guidelines, to take effect on May 1, 2001. A copy of the Synopsis is enclosed.

V. MY LITTLE RED RULES BOOK, 2001 EDITION

Also enclosed is your personal copy of the 2001 Edition of "My Little Red Rules Book" which this office bought for you. You may obtain additional copies of the Book from the Federal Defenders of Eastern Washington & Idaho by calling (509) 624-7606.

VI. REVERSIBLE ERRORS (1995-2000)

Also enclosed is the 2000 issue of *Reversible Errors 1995-2000*, compiled by the Federal Public Defender for the Districts of Northern New York & Vermont.

VII. CASES OF NOTE - by David Beneman

United States v. Jones (4th Cir. 03/01/01 - No. 99-4201) - 4th Amendment Suppression Win, unreliable tip: Where an anonymous tip proved to be unreliable and the driver of the car was obeying the rules of the road, the stop violated the Fourth Amendment, and evidence discovered on the person of one of the passengers in the case should have been excluded from trial.

<http://laws.lp.findlaw.com/4th/994201.html>

United States v. Harrison (2d Cir. 03/05/01 - No. 99-1642) - Rule 11: A court's incorrect statement of the mandatory minimum sentence during a plea colloquy makes the plea involuntary even if the actual sentence fell within the Sentencing Guidelines range.

<http://laws.lp.findlaw.com/2nd/991642.html>

United States v. Perez-Carrera (1st Cir. 03/16/01 - No. 98-1788) - Where defendant was incorrectly informed that his sentence would not exceed five years, and his plea of guilty resulted in a sentence of ten years, there is no need to set aside his guilty plea. Instead, the appropriate remedy is to modify the sentence to five years. <http://laws.lp.findlaw.com/1st/981788.html>

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Recent Third Circuit Slip Opinions. Enclosed is a summary of recent Third Circuit criminal Opinions compiled by Karen Sirianni Gerlach.

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United States Supreme Court Actions. Enclosed is a summary of recent U.S. Supreme Court decisions by David Beneman.

VIII. TRAINING OPPORTUNITIES

Enclosed are announcements for the following training sessions available to CJA panel attorneys:

1. ***“2001 New Approaches for the Millennium”***, a regional seminar sponsored by the Administrative Office of the United States Courts and the Federal Public and Community Defenders. The Seminars will be held in May (Williamsburg, VA), July (Minneapolis, MN) and in September, 2001 (San Francisco, CA).

2. **Reinventing Sentencing Workshop**, is sponsored by the Federal Defender Training Branch of the Defender Services Division, Administrative Office of the United States Courts. The workshop is open to CJA Panel Attorneys and Federal Public and Community Defenders. The seminar will be held June 8-10, 2001, in Birmingham, Alabama.

3. **National Seminar on the Federal Sentencing Guidelines**, co-sponsored by the U.S. Sentencing Commission and the Federal Bar Association, Tampa Bay Chapter. The seminar will be held May 16-18, 2001, in Palm Springs, California.

IX. KEEP US INFORMED ...

Do you have an e-mail address? Let us know. Please also 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.

X. STAFF NEWS

Lisa Freeland, Esq., was recently appointed as an Assistant Federal Public Defender. Lisa previously served this office as a Research & Writing Specialist, and most recently, as a temporary Assistant Federal Public Defender.

After five years of service, Janey Sarniak resigned her position as Administrative Assistant. Lisa Lewis has been promoted to Operations Administrator and will assume Janey's duties.

Enclosures:

An Introduction to Federal Guideline Sentencing, Fifth Edition
Synopsis of Emergency Guideline Amendments, effective May 1, 2001
My Little Red Rules Book, 2001 Edition
Reversible Errors (1995-2000)
Summary of Recent Third Circuit Opinions on Criminal Law
Summary of Selected U.S. Supreme Court Decisions
Training Opportunities/Seminar Announcements

**EMERGENCY AMENDMENTS TO THE
UNITED STATES SENTENCING GUIDELINES
(effective May 1, 2001)**

*Thomas Hutchison, Esq.
Federal Defender Training Group
Washington, D.C.*

The Sentencing Commission has voted to promulgate two temporary, emergency amendments, to take effect May 1. The amendments will remain in effect until November 1. The Commission is expected to repromulgate the amendments as part of the regular cycle, so that the amendments (or a revised version of them) will continue to be in effect beyond November 1. The amendments:

1. Amphetamine. Adds new entries for amphetamine to drug-quantity table of 2D1.1, treating amphetamine the same as meth. A congressional mandate required this action.

2. Human trafficking. Amends several guidelines, including 2G1.1 (promoting prostitution) and 2G2.1 (sexually exploiting a minor by production of sexually explicit visual or printed material) [new commentary regarding upward departure if the offense involved more than 10 victims or if defendant was convicted of new offense of sex trafficking of children by force and victims were less than 14 years old], and 2H4.1 (peonage) [separate base offense level for conviction of new offense of unlawful conduct with respect to documents in furtherance of peonage and an increase in the weapon enhancement]. Adds new guideline, 2H4.2 (willful violations of the Migrant and Seasonal Agricultural Worker Protection Act), with base offense level of 6 and two enhancements, for injury (2 or 4 levels) and for committing the offense after a civil or administrative adjudication for similar misconduct (2 levels).

The Commission has two other temporary, amendments under consideration and hopes to act on them at the March meeting. Those amendments, if promulgated, will also have a May 1 effective date. The amendments relate to ecstasy (proposed amendment 1 published in the Jan. 26 Federal Register) and to List I chemicals (proposed amendment 3 in the Jan. 26 Federal Register). The issue with ecstasy concerns the conversion ratio. The published amendment would equate ecstasy with heroin (1 g. equals 1 kg of marijuana). The issue with List I chemicals concerns mechanics. The goal of the amendment is to set for a given quantity of chemicals an offense level equivalent to the offense level for the meth that could be produced from that

quantity of chemicals, assuming that the quantity of meth produced would be 50% of the theoretical yield. Janet Hinton, a paralegal in E.D. Mo. on detail to the training group, discovered that the Commission was assuming a theoretical yield of 100% (that is, that 1 kg of chemicals would in a perfect reaction result in 1 kg of meth). The theoretical yield, however, is 92%, and she has a copy of a letter from DEA attesting to that. The consequence of the amendment is that List I chemicals are treated more severely than meth (for example, 3 kg of ephedrine results in an offense level of 38, on the assumption that the yield 1.5 kg of meth; under the DEA formula, however, 3 kg of ephedrine results in 1.38 kg of meth, for which the offense level is 36). The Commission postponed action on the List I chemicals amendment to discuss the matter with the DEA.

UNITED STATES SUPREME COURT DECISIONS

By David Beneman
CJA Resource Counsel
District of Maine

Ferguson v. Charleston, No. 99-936, 3/21/2001

SEARCH AND SEIZURE (Diagnostic Test without Consent Violates Fourth Amendment)

A state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure. 6-3 (opinion by Stevens; concurrence by Kennedy; dissent by Scalia)

Medical University of South Carolina (MUSC) ordered drug screens to be performed on urine samples from maternity patients who were suspected of using cocaine. Petitioners are ten women who received obstetrical care at MUSC and who were arrested after testing positive for cocaine. Petitioners' complaint challenged the validity of the policy under various theories, including the claim that warrantless and nonconsensual drug tests conducted for criminal investigatory purposes were unconstitutional searches. The Supreme Court held that the drug tests were unconstitutional. The Court reasoned that no departure from the Fourth Amendment's protections was justified in this case because the primary purpose of the Charleston program was to use the threat of arrest and prosecution in order to force women into treatment.

www.supremecourtus.gov/opinions/00pdf/99-936.pdf

Buford v. United States, No. 99-9073, 3/20/01

Deferential Review of Trial Court's Determination of Consolidated Prior Convictions

The United States Supreme Court held unanimously (opinion by Breyer) that a trial court's determination as to whether an offender's prior convictions were consolidated for purposes of sentencing guidelines is subject to deferential review.

The United States Sentencing Guidelines subject "career offenders" to severe punishment. Career offenders are those with at least two prior felony convictions for violent or drug-related crimes. The Guidelines require a sentencing judge to count as a single prior felony conviction all convictions that are related to one another. Prior convictions are related to one another when they were consolidated for sentencing. Paula Buford pleaded guilty to armed bank robbery, a crime of violence, in federal court. Buford had five prior state-court convictions. The trial court decided that Buford's drug and robbery convictions had not been consolidated for sentencing. The Supreme Court held that the trial court's determination was subject to deferential review. The Court reasoned that the fact-bound nature of the legal decision, the comparatively greater expertise of the trial court, and the limited value of uniform court of appeals precedent supported the conclusion that deferential review was appropriate.

<http://supct.law.cornell.edu/supct/html/99-9073.ZS.html>

Shafer v. South Carolina, No. 00-5250, 3/20/01
Right to Instruct Jury of Ineligibility for Parole in Capital Case

The United States Supreme Court held 7-2 (Opinion by Ginsburg; Dissents by Scalia and Thomas) that whenever future dangerousness is at issue, the defendant in a capital case has a right to inform the jury that he would not be eligible for parole if sentenced to life imprisonment.

Shafer shot and killed a convenience store cashier, and was indicted. The jury found Shafer guilty of murder, attempted armed robbery, and criminal conspiracy. The trial judge refused to instruct the jury that if Shafer was sentenced to life imprisonment, Shafer would be ineligible for parole. The jury unanimously found the existence of a statutory aggravator, and recommended a death sentence. The Supreme Court held that the trial judge was required to allow Shafer to inform the jury that he would be ineligible for parole if sentenced to life imprisonment. The Court reasoned that parole eligibility becomes critical when the jury endeavors the moral judgment whether to impose the death penalty. <http://supct.law.cornell.edu/supct/html/00-5250.ZS.html>

Ohio v. Reiner, No. 00-1028, 3/19/01
Privilege Against Self-Incrimination

The United States Supreme Court held in a per curium decision that a witness who denies all culpability may nonetheless claim the privilege against self-incrimination.

Reiner was charged with involuntary manslaughter in connection with the death of his 2-month old son, who died from the result of child abuse according to the coroner. The evidence revealed that the child suffered from physical injuries that could have been inflicted hours before he stopped breathing. Reiner's theory was that Batt, the babysitter, had caused the death. Batt asserted her Fifth Amendment privilege against self-incrimination, but testified after the trial court granted her immunity. Reiner was convicted. The Supreme Court of Ohio reversed and remanded the case, reasoning that Batt was not entitled to invoke the privilege, and that the grant of immunity to Batt prejudiced Reiner because it effectively told the jury that Batt did not cause the child's injuries. The United States Supreme Court reversed, reasoning that the privilege applies where a witness' answers could reasonably "furnish a link in the chain of evidence" against her, and that Batt had "reasonable cause" to apprehend danger from her answers at trial because of her extended periods of time alone with the child before his death.
<http://supct.law.cornell.edu/supct/html/00-1028.ZPC.html>

RECENT THIRD CIRCUIT OPINIONS ON CRIMINAL LAW

(August 1999 through December 1999)

By Karen Sirianni Gerlach, AFPD

700. United States v. Smith, Nos. 98-6377 and 98-6378 (D. N.J. 8/9/99) - The defendants were convicted in conjunction with an embezzlement/kickback scheme of four charges: conspiracy to defraud, interstate transportation of stolen property, causing unlawful interstate travel with intent to distribute stolen property, and money laundering. At sentencing, the district court grouped all of the offenses, and then applied the more severe money laundering guideline instead of the fraud guideline. The Third Circuit held, based upon pronouncements of the United States Sentencing Commission, that the money laundering guideline was drafted to cover conduct more egregious than the conduct at issue in this case, and thus VACATED the sentence and REMANDED for resentencing. The Third Circuit reasoned that the "outside the heartland analysis" which is usually applied in the context of downward departures, can also be applied to determine which guideline section applies to a specific count of conviction. (Mansmann, Weis and Gibson, C.J.; opinion by Weis.) **186 F.3d 290.**

701. Morris v. Horn, No. 98-9008 (E.D. Pa. 8/9/99) - This was an appeal by a death-sentenced prisoner, in a habeas corpus action filed under 28 U.S.C. § 2254. The appeal sought a certificate of appealability. The following is the relevant procedural history leading to this appeal.

The district court dismissed Mr. Morris' habeas petition for failure to exhaust state court remedies; Mr. Morris had a PCRA petition still pending in state court. However, to ensure that any subsequent petition filed after the disposition of the PCRA would not be untimely, the district court appended to its order of dismissal a proviso permitting Mr. Morris to file an amended petition upon exhaustion of state court remedies, that would relate back to the filing date of the initial petition. The Commonwealth of Pennsylvania appealed the dismissal order, and the Third Circuit dismissed the Commonwealth's appeal for lack of standing. Mr. Morris then filed in the district court a motion to alter or amend the judgment under Federal Rule of Civil Procedure 60(b), asking that his habeas corpus petition be put on the district court's suspense docket, rather than being dismissed. The district court denied that motion, and the within appeal followed.

The Third Circuit found that the district court had not abused its discretion by denying the Rule 60(b) relief. The Court reasoned that Mr. Morris was no worse off after the dismissal of the Commonwealth's appeal for lack of standing, than

he was after the initial district court order. Furthermore, the appeal did not constitute a change justifying Rule 60(b) relief. The Third Circuit thus denied Mr. Morris's request for a certificate of appealability, and dismissed the appeal. (Becker, Greenberg and Cowen, C.J.; opinion by Becker.) **187 F.3d 333.**

702. United States v. Mitchell, No. 96-1605 (E.D. Pa. 8/10/99) - This case was before the Third Circuit on remand from the United States Supreme Court. The United States Supreme Court (see Mitchell v. United States, 119 S.Ct. 1307 (1999)) reversed the Third Circuit's previous holding in this case (see United States v. Mitchell, 122 F.3d 185 (3d Cir. 1997)), that a defendant who pleads guilty no longer retains a Fifth Amendment right not to testify during sentencing. The Supreme Court held that a defendant's guilty plea does not waive that defendant's Fifth Amendment privilege against self-incrimination for sentencing purposes, and that a sentencing court may not draw an adverse inference from the defendant's silence at sentencing. In the current case, the Third Circuit VACATED the sentence imposed upon the defendant, and REMANDED the matter to the district court for a new sentencing hearing to be conducted in accordance with the Supreme Court's opinion. (Sloviter, Roth and Michel, C.J.; opinion by Sloviter.) **187 F.3d 331.**

703. United States v. Lloyd, No. 98-7480 (M.D. Pa. 8/13/99) - This was an appeal from a dismissal of a petition filed pursuant to 28 U.S.C. § 2255, challenging the sentence which was imposed under 18 U.S.C. § 924(c)(1). The district court dismissed the § 2255 petition on the grounds that it was it was filed more than one year from the date of conviction and from the effective date of the Antiterrorism and Effective Death Penalty Act, and was thus time-barred. The district court also held that the claim made in the § 2255 petition, a challenge under Bailey v. United States, 516 U.S. 137 (1995), was procedurally defaulted because of the failure to raise it on direct review, and that Mr. Lloyd could not satisfy the requirement for excusing that procedural default: a showing of actual innocence.

The Third Circuit concluded that Mr. Lloyd's § 2255 petition was timely filed according to 28 U.S.C. § 2255(3) because it was filed within one year of the Supreme Court's decision in Bousley v. United States, 118 S.Ct. 1604 (1998), which found the Supreme Court's prior decision in Bailey to be retroactive. The Third Circuit also concluded that Mr. Lloyd had not procedurally defaulted because his § 2255 petition had sufficiently alleged actual innocence. (Mansmann, Weis and Gibson, C.J.; opinion by Mansmann.) **REVERSED. 188 F.3d 184.**

704. United States v. Garth, No. 97-1042 (E.D. Pa. 8/16/99) -

This appeal raised the issue of whether the defendant was procedurally barred from collaterally challenging his guilty plea to the charge of "using or carrying" a firearm "during and in relation to" a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). The district court held that Mr. Garth had waived his right to collaterally challenge the plea, and dismissed the petition without reaching the merits.

On appeal, the Third Circuit held that under Bousley v. United States, 118 S.Ct. 1604 (1998), Mr. Garth must be afforded the opportunity to demonstrate whether he can satisfy the "actual innocence" exception to the bar of procedural default. If he can meet that burden, then the district court must examine whether his plea was knowing and intelligent. REVERSED and REMANDED. (Roth, McKee and Rendell, C.J.; opinion by McKee; dissent by Roth.) **188 F.3d 99.**

705. United States v. Nathan, Nos. 98-6262, 98-6263, 98-6299 (D.

N.J. 8/18/99) - This case addressed sentencing issues. The first issue dealt with the proper definition of a "stipulation" under U.S.S.G. § 1B1.2. Specifically, a court must sentence a defendant to the guideline which is most applicable to the offense of conviction, unless, according to U.S.S.G. 1B1.2(a), the parties stipulated to a more serious offense. The issue here was whether the defendants' statements during the factual basis portion of the plea colloquies, which referenced a more serious offense, amounted to stipulations for purposes of U.S.S.G. § 1B1.2(a).

The Third Circuit concluded that such statements did not amount to stipulations for purposes of U.S.S.G. § 1B1.2(a) because they were made after the plea agreement, and were not part of the plea agreement. Because the district court deemed the defendants' statements to be stipulations to the greater offense of fraud, rather than the lesser offense of smuggling, the Third Circuit REVERSED the judgments of sentence to the extent that they relied upon the fraud guidelines in sentencing the defendants.

Other issues concerned whether an enhancement for abuse of a position of trust was properly applied at sentencing; whether fraud loss was properly computed for sentencing; and whether a defendant was able to pay a fine imposed. The Third Circuit concluded that the district court's application of the abuse of a position of trust enhancement was supported by the record and was legally correct. However, the Court found the district court's computation of fraud loss to be improper, and its method of computing the fine to be erroneous.

AFFIRMED in part and REVERSED in part and REMANDED to the district court for resentencing. (Becker, Rendell and Garth, C.J.; opinion by Becker; concurrence/dissent by Rendell.) **188 F.3d 190.**

706. Hull v. Kyler, No. 97-7551 (M.D. Pa. 8/23/99) - This was an appeal in a habeas corpus action filed under 28 U.S.C. § 2254. This case was before the Third Circuit two times previously. In its first review of this case (see Hull v. Freeman, 932 F.2d 159 (3d Cir. 1991)), the Third Circuit held that Mr. Hull's counsel was constitutionally ineffective. In its second review of this case (see Hull v. Freeman, 991 F.2d 86 (3d Cir. 1993)), the Third Circuit held that Mr. Hull had procedurally defaulted his ineffectiveness claim. In this third appeal, the Court addressed the issue of whether the Pennsylvania courts waived Mr. Hull's procedural default, and if they did, whether he had demonstrated that his counsel's deficient performance was prejudicial.

The Third Circuit concluded that the Pennsylvania courts waived Mr. Hull's procedural default. The Court noted that it had previously ruled that if Mr. Hull was given permission to file a notice of appeal nunc pro tunc, and the state supreme court then denied that petition, the state courts would be deemed to have waived Mr. Hull's procedural default. Thus, because both of these events occurred, a procedural default resulted, and Mr. Hull could bring his claim in federal court. The Third Circuit also held that Mr. Hull was prejudiced by his counsel's failure to present any of the numerous pieces of available evidence regarding his competency, or to challenge the government's single witness at his short competency hearing.

REVERSED and REMANDED with directions to issue a writ of habeas corpus conditioned on Mr. Hull's being retried by the Commonwealth. (Becker, Roth and Rendell, C.J.; opinion by Becker.) **190 F.3d 88.**

707. DeSousa v. Reno, No. 99-1115 (E.D. Pa. 8/25/99) - Mr. DeSousa committed certain federal crimes while a legal resident of the United States. Mr. DeSousa sought to avoid deportation for those crimes by applying for a discretionary waiver of inadmissibility under 8 U.S.C. § 1182(c). The Board of Immigration Appeals ("BIA") ruled that as a deportable alien, rather than an excludable alien, DeSousa was not eligible for a discretionary waiver. Mr. DeSousa then filed a petition for writ of habeas corpus under 28 U.S.C. § 2241 against the Attorney General and the Immigration and Naturalization Service; he argued that former § 1182(c), as applied by the BIA, violated the equal protection guarantee of the Fifth Amendment's Due Process Clause by irrationally distinguishing between aliens in deportation and in exclusion proceedings. The district court found that it had habeas corpus jurisdiction to hear Mr. DeSousa's claims, and then granted the writ based on his equal protection challenge. On

appeal, the Third Circuit agreed with the district court that it had jurisdiction, but disagreed with regard to the equal protection challenge, finding that § 1182(c), as applied by the BIA, does not violate the Fifth Amendment's equal protection guarantee. The Third Circuit REVERSED the district court's grant of the writ, and REMANDED to the district court with instructions to dismiss the habeas corpus petition. (Greenberg, Alito and Rosenn, C.J.; opinion by Greenberg.) **190 F.3d 175.**

708. United States v. Gibbs, Nos. 97-1374, 97-1736 and 97-1785 (E.D. Pa. 8/26/99) - The defendants were convicted of conspiring to distribute cocaine and to possess cocaine with the intent to distribute in violation of 21 U.S.C. § 846. The opinion focused upon four of the issues which the defendants raised on appeal.

The first issue dealt with the scope of conspiracy liability for a defendant whose sole involvement in a conspiracy is the purchase of drugs from another member of the conspiracy. In order to prove a defendant's membership in a conspiracy when that defendant has only been in a buyer-seller relationship with a member of the conspiracy, the government must prove that the defendant purchased drugs from the conspiracy, and that he knew that the individual from whom he purchased the drugs was part of a larger drug operation. Since the government produced sufficient evidence that the defendant was more than a one-time buyer of drugs from the conspiracy, and that in buying drugs, he was aware of part of the scope of the conspiracy, the evidence was sufficient to support the conspiracy conviction under 21 U.S.C. § 846.

The second issue addressed a government agent's testimony about the meaning of coded drug conversations. The Court concluded that some of the testimony of the government expert should have been excluded because, in interpreting language that the jury needed no assistance in interpreting, that testimony violated Federal Rule of Evidence 702. However, the Court rejected the argument that the agent's testimony violated Rule 704(b), reasoning that the testimony merely translated the coded drug language, and did not opine on intent. Because there was sufficient evidence of the defendant's role as an enforcer for the conspiracy without the improper testimony, the error in admitting the testimony was harmless.

The third issue dealt with whether the introduction of evidence of a conspiracy's use of violence violated Federal Rule of Evidence 404(b). The Court concluded that the introduction of this evidence did not violate Rule 404(b) because the violence did not constitute an act separate from the conspiracy itself.

The fourth issue addressed whether the district court erred in attributing various amounts of crack and powder cocaine to each defendant based upon a government agent's interpretation of coded drug conversations. The Third Circuit concluded that an enforcer for a drug conspiracy may be held responsible for the

amount of drugs transacted by the conspiracy during the time he acts in that capacity, and upheld the sentences of all the defendants.

AFFIRMED. (Becker and Cowen, C.J., Stagg, D.J.; opinion by Becker.) **190 F.3d 188.**

709. United States v. Hunte, No. 97-1987 (E.D. Pa. 8/26/99) -

This appeal raised one issue. The appellant argued that the government had violated the "anti-gratuity statute," 18 U.S.C. § 201(c)(2), by making promises of leniency to several cooperating witnesses in exchange for their truthful testimony against him, and that the district court erred in not suppressing the testimony of these cooperating witnesses. The appellant based this argument exclusively upon the Tenth Circuit's decision in United States v. Singleton, 144 F.3d 1343 (19th Cir. 1998), which the en banc Tenth Circuit had vacated by the time of the Third Circuit's opinion in this case (see 165 F.3d 1297 (10th Cir. 1999)). The Third Circuit aligned itself with every other circuit to have addressed this issue, including the en banc Tenth Circuit in the second Singleton opinion, and rejected appellant's argument. AFFIRMED. (Becker and Cowen, C.J., Stagg, D.J.; opinion by Cowen.) **193 F.3d 173.**

710. United States v. Sharma, Nos. 98-7408, 98-7409, 98-7410 and

98-7454 (M.D. Pa. 8/30/99) - The principle issue addressed in this appeal was whether interest owed on a defaulted loan obtained by fraud can be included in the calculation of the amount of the victim's loss under the sentencing guidelines (see U.S.S.G. § 2F1.1). The district court held that the interest should be included in the guideline loss calculation, and the Third Circuit agreed. AFFIRMED. (Greenberg, Alito and Rosenn, C.J.; opinion by Rosenn.) **190 F.3d 220.**

***711. United States v. Loy, No. 98-3636 (W.D. Pa. 9/8/99) -** Mr.

Loy entered an unconditional plea of guilty to one count of knowingly receiving child pornography through the mail in violation of 18 U.S.C. § 2252(a)(2), and a conditional plea of guilty to one count of knowingly possessing three or more items of child pornography produced using materials transported in interstate commerce, in violation of 18 U.S.C. § 2252(a)(4)(B). The conditional plea preserved Mr. Loy's right to appeal the issue of whether the search warrant was supported by probable cause and whether the officers reasonably relied on the warrant in good faith. Mr. Loy received a sentence of 33 months imprisonment to be followed by three years of supervised release. The district court imposed special conditions of supervised release, requiring Mr. Loy to undergo testing and treatment for drugs and alcohol, prohibiting him from having unsupervised contact with minors, and forbidding him from possessing

pornography of any type.

On appeal, Mr. Loy raised three issues. First, Mr. Loy argued that the district court erred in failing to suppress the evidence obtained from his home pursuant to the anticipatory search warrant. Second, Mr. Loy argued that the search warrant did not describe the items to be seized with sufficient particularity and that its overbroad language could lead to the mistaken seizure of material protected by the First Amendment. Finally, Mr. Loy argued that the district court abused its discretion in imposing the special conditions of supervised release.

With regard to the first issue, the Court refused to rule that anticipatory warrants, or warrants that become effective upon the happening of a future event, are per se unconstitutional. The Court held that anticipatory warrants which meet the probable cause requirement and specifically identify the triggering event are not per se unconstitutional. The Court went on to find that the warrant in this case was not supported by probable cause. Based upon Mr. Loy's statement that he kept his pornographic materials in a storage facility, there was no nexus between the contraband and Mr. Loy's residence. Furthermore, there were no facts in the affidavit to indicate that Mr. Loy would take the contraband from his post office box to his home. Despite its finding that the warrant was not supported by probable cause, the Court upheld the search and the admission of the evidence under the good faith exception enunciated in United States v. Leon, 468 U.S. 897, 926 (1984).

With regard to the second issue, Mr. Loy argued that the phrase in the warrant "children under the age of 18" was overbroad. More specifically, he argued that because some adults look like minors, this phrase could lead to the seizure of legal adult pornography. The Court found that the search warrant was not overbroad; that it described the materials to be sought with all the particularity required by the constitution; and that the phrase "children under the age of 18" was not so uncertain as to make the warrant defective.

With regard to the third issue, the Court found that the district court did not abuse its discretion by imposing provisional drug treatment as a condition of supervised release. However, the Court found that because the district court did not properly explain its imposition of the other special conditions of supervised release (required alcohol testing and treatment; prohibition against unsupervised contact with minors; and prohibition against possession of any kind of pornography), the Court found that it could not properly review the imposition of these conditions. It therefore remanded the case back to the district court, so that the district court could state its reasons for these conditions. In doing so, the Third Circuit reminded the district court that under 18 U.S.C. §§ 3583(d)(1) and 3553(a)(2), the imposition of conditions of supervised

release must be reasonably related to the goals of deterrence, protection of the public and rehabilitation of the defendant, and that under 18 U.S.C. § 3583(d)(2), the conditions imposed could be no greater than necessary to meet those goals.

AFFIRMED in part, and REMANDED in part. (Sloviter and Mansmann, C.J., Ward, D.J.; opinion by Ward.) **191 F.3d 360.**
Congratulations to Assistant Federal Public Defender Markéta Sims who handled this case.

712. United States v. Harple, No. 99-1040 (E.D. Pa. 9/10/99) - Mr. Harple appealed his conviction for conspiracy to commit arson in violation of 18 U.S.C. § 371, arson in violation of 18 U.S.C. § 844(i), and aiding and abetting arson in violation of 18 U.S.C. § 2. The appeal raised two issues: (1) whether the police officers had reasonable suspicion under Terry v. Ohio, 392 U.S. 1 (1968) to effect a stop of the automobile in which Mr. Harple was a passenger; and (2) whether the officers subsequently had probable cause to arrest Mr. Harple and to conduct a search of the automobile and its occupants.

The Court held that the officers based their investigatory stop upon reasonable suspicion. The Court based its finding of reasonable suspicion on the following factors: the proximity of the car to the fire; the fact that the car was driving in an otherwise desolate area; the fact that the car matched a description received from another officer; and the fact that the car started moving in an unusually careful manner.

The Court also held that the officers had probable cause to arrest the occupants of the automobile, including Mr. Harple, and to conduct a search of the automobile and its occupants. The Court reasoned that the officers had knowledge of where the arson happened and that the officers stopped the car carrying Mr. Harple shortly after the arson occurred. Furthermore, the officers spotted the car moving in an abnormally cautious manner less than three blocks away from the fire, and after the stop, the officers discovered hand-held scanners tuned to police and fire department frequencies. AFFIRMED. (Greenberg and Alito, C.J., Stafford, D.J.; opinion by Alito.) **202 F.3d 514.**

713. United States v. Chambers, No. 97-5501 (D. N.J. 9/13/99) -

This appeal raised the issue of whether a motion for return of property filed pursuant to Federal Rule of Criminal Procedure 41(e) is moot because the government no longer possesses the property that was seized at the time of the appellant's arrest. The Court held that a motion for return of property does not become moot merely because the government no longer retains the seized property. The Court also concluded that the district court should have taken evidence to determine whether the government properly disposed of the property. The Court therefore VACATED the district court's order denying the motion,

and REMANDED for further proceedings. (Mansmann, Rendell and Stapleton, C.J.; opinion by Rendell.) **192 F.3d 374.**

714. United States v. McKenzie, No. 98-5490 (D. N.J. 9/22/99) - Mr. McKenzie pled guilty to violation of 8 U.S.C. §§ 1326(a) and (b)(2) by knowingly and willfully re-entering the United States after being deported subsequent to his conviction for an aggravated felony. The district court sentenced him under the applicable guideline, U.S.S.G. § 2L1.2, to a 41-month term of imprisonment. On appeal, Mr. McKenzie challenged the district court's refusal to give him a two-level downward departure pursuant to Application Note 5 to U.S.S.G. § 2L1.2.

At sentencing, Mr. McKenzie received a 16-level enhancement under U.S.S.G. § 2L1.2(b)(1)(A) for having a prior aggravated felony conviction. Application Note 5 to § 2L1.2 provides that defendants who receive that 16-level enhancement may receive a two-level downward departure if the prior aggravated felony conviction meets the following criteria: it is the defendant's only prior aggravated felony conviction; it was not a crime of violence or a firearms offense; and its term of imprisonment did not exceed one year.

Mr. McKenzie's prior felony conviction was for possession of crack cocaine with the intent to distribute it. He received a three-year sentence for this prior offense, but two years and three months of that sentence were suspended. Mr. McKenzie argued that, based upon the partial suspension of the sentence, his sentence did not exceed one year, and he was thus eligible for the departure. The district court, however, held that he was not eligible for the departure because, notwithstanding the partial suspension of the sentence, a term of imprisonment exceeding one year was actually imposed. The Third Circuit agreed with the district court. **AFFIRMED.** (Greenberg, Scirica and Rendell, C.J.; opinion by Greenberg.) **193 F.3d 740.**

715. Ngo v. Immigration and Naturalization Service, No. 97-1419 (E.D. Pa. 9/24/99) - This was an appeal in a habeas corpus action filed pursuant to 28 U.S.C. § 2241. The issue on appeal was whether aliens who have committed serious crimes in the United States may be detained in custody for a prolonged period when the country of origin refuses to allow the individual's return at the conclusion of their term of incarceration. The Third Circuit ruled that such detention is permitted by statute, and is constitutional if the government provides individualized periodic review of the alien's eligibility for release on parole. Because the petitioner in this case did not receive such review, the Court granted a writ of habeas corpus subject to the right of the Immigration and Naturalization Service to promptly institute appropriate administrative action. **REVERSED and REMANDED.** (Roth, Weis and Cowen, C.J.; opinion by Weis.) **192 F.3d 390.**

716. Wilson v. United States Parole Commission, No. 98-7452 (M.D. Pa, 9/29/99) - This was an appeal from the denial of a petition for writ of habeas corpus which was filed pursuant to 28 U.S.C. § 2241.

Mr. Wilson was in federal custody but had not yet been received by the penitentiary for service of his sentence, when he attempted to contract for the murders of several people. Several years later, Mr. Wilson was being considered for parole. Based upon his conduct while he was in federal custody but before he had begun to serve his sentence, the United States Parole Commission found that Mr. Wilson's incarceration should be prolonged and his parole eligibility delayed. The Parole Commission based this conclusion upon 28 C.F.R. § 2.36 which deals with "the sanctioning of disciplinary infractions or new criminal behavior committed by a prisoner *subsequent to the commencement of his sentence.*"

The district court held that the Parole Commission's interpretation of its own guidelines was reasonable because Mr. Wilson was in federal custody awaiting trial on another indictment at the time of the new criminal behavior, and denied the petition for a writ of habeas corpus. On appeal, the Third Circuit noted that 28 C.F. R. § 2.10 defines sentence commencement as "the date on which the person is received at the penitentiary." As a result, the Third Circuit found that Mr. Wilson's sentence had not yet commenced at the time when he attempted to contract for the murders of several people, and that the Parole Commission had contravened its regulation to which it is bound. The Court thus VACATED the district court's judgment and REMANDED the case with directions to the Parole Commission to recalculate Mr. Wilson's parole eligibility date. (Mansmann, Rendell and Stapleton, C.J.; opinion by Mansmann.) **193 F.3d 195.**

717. United States v. Holmes, No. 98-1703 (E.D. Pa. 9/29/99) -

The appellant in this case was a disbarred attorney and accountant, who pled guilty to conspiracy, bank fraud, wire fraud, mail fraud, interstate transportation of stolen property, income tax fraud and forgery of two federal judges' signatures. The district court sentenced him to 96 months in prison and ordered him to pay restitution in the amount of \$1,899,838.80 and a special assessment in the amount of \$8,650.00. On appeal, Mr. Holmes challenged the district court's upward departure from the sentencing guidelines by two levels for extraordinary abuse of a position of trust; the district court's imposition of restitution without formally determining his ability to pay; and the district court's calculation of the amount of the special assessment.

The Third Circuit held that the two-level upward departure for extraordinary abuse of a position of trust was not made on a legally impermissible basis, and was within the district court's discretion. However, the Court found that the district court did

not undertake the factual inquiry that is required of it before determining the amount of restitution, and that the district court had incorrectly computed the special assessment by including dismissed counts. The Court therefore vacated the restitution order and remanded the case so that the necessary factual findings could be made regarding the ability to pay restitution, and also remanded so that the district court could impose the correct special assessment.

AFFIRMED in part, and VACATED and REMANDED in part. (Sloviter and Roth, C.J., Pogue, Judge, Crt. of Intn'l Trade; opinion by Sloviter.)

718. United States v. Imenec, No. 98-1912 (E.D. Pa. 9/30/99) -

The sole issue in this appeal was whether the district court erred when it imposed a two-point upward departure for obstruction of justice, pursuant to U.S.S.G. § 3C1.1. The district court based the enhancement upon Mr. Imenec's failure to appear at a state court proceeding. Mr. Imenec argued that because his failure to appear occurred in a state court proceeding, rather than a federal court proceeding, it was outside of the ambit of U.S.S.G. § 3C1.1. The resolution of this appeal turned on whether the language "instant offense" in § 3C1.1 was interpreted to refer to criminal conduct underlying the specific offense of conviction, as the government contended, or if it is limited to the specific offense of conviction itself, as Mr. Imenec contended. The Court agreed with the government's interpretation of the guideline, and held that § 3C1.1 requires a two-level enhancement when a defendant fails to appear at a judicial proceeding, state or federal, relating to the conduct underlying the federal criminal charge. AFFIRMED. (Nygaard, Cowen and Stapleton, C.J.; opinion by Stapleton.) **193 F.3d 206.**

719. United States v. Pitt, Nos. 98-7383 and 98-7497 (M.D. Pa.

10/1/99) - The main issue in this appeal was the defendants' contention that they suffered prejudicial error as the result of the district court's refusal to give a jury instruction based on their defense of public authority. The Third Circuit found no error in the district court's refusal to give the public authority defense instruction.

The defendants also argued that the evidence was insufficient to support some of the convictions; that the district court erred in refusing to dismiss the indictment based upon outrageous government conduct; that the government failed to meet its burden of proving the venue of the alleged offenses; that a mistrial should have been granted on the basis of certain statements which the government made during its closing argument; that the district court erred in applying a sentence enhancement under U.S.S.G. § 2D1.1; and that the district court's molding of the jury's special verdict on forfeiture violated the right to have the jury determine the issue and the amount of forfeiture.

The Court rejected all of these issues and AFFIRMED. (Greenberg and Alito, C.J., Dowd, D.J.; opinion by Dowd.) **193 F.3d 751.**

720. United States v. Amster, No. 98-7625 (M.D. Pa. 10/7/99) - The appellant's prior criminal history included two pleas of *nolo contendere* for which he received sentences of probation. Both of these cases were eventually dismissed. The issue presented in this appeal was whether the district court correctly treated those two *nolo contendere* cases as sentences under U.S.S.G. § 4A1.2(f) when calculating his criminal history score under U.S.S.G. § 4A1.1(c). The Third Circuit held that the district court did not err by including the *nolo contendere* pleas in the computation of the appellant's criminal history score. U.S.S.G. § 4A1.2(f) unequivocally states that such cases are properly included in the criminal history computation. (Scirica and McKee, C.J., Schwarzer, D.J.; opinion by Scirica.) **193 F.3d 779.**

721. United States v. Medford, Nos. 98-1647 and 98-1648 (E.D. Pa. 7/2/99) - The defendants pled guilty to conspiracy in violation of 18 U.S.C. § 371, theft of objects of cultural heritage in violation of 18 U.S.C. § 668(b)(1), and receipt and concealment of stolen objects of cultural heritage in violation of 18 U.S.C. § 668(b)(2). Under the terms of the plea agreement, the government promised to file a motion for sentence reduction under U.S.S.G. § 5K1.1, if the defendants provided substantial assistance. At sentencing, the district court considered appraisals from two experts regarding the valuation of the stolen objects, and selected a valuation which was the midpoint of the two appraisals. Also at sentencing, the government declared that its § 5K1.1 motion gave the district court "permission" to depart, but did not constitute a recommendation that departure should occur. In imposing the sentence, the district court found that the sentencing range computed in the Presentence Report did not "sufficiently encompass the egregiousness of the offenses," and departed upwards by four levels. The defendants had no prior warning of the possibility of such a departure.

On appeal, the defendants argued that the government violated the plea agreement by filing a § 5K1.1 motion for departure and then refusing to recommend such a departure at sentencing, and that the government acted in bad faith by failing to make a stronger § 5K1.1 motion at sentencing. The defendants also argued that the district court misapplied the Sentencing Guidelines by arbitrarily selecting the middle value for the high and low estimates of the fair market value of the stolen items as the amount of loss sustained for sentencing guideline purposes; by departing upward without providing sufficient advance notice of its intentions; by departing upward based on a ground that had already been taken into consideration by the sentencing guidelines; and by departing upward without articulating its

reason for the extent of the departure.

The Court of Appeals interpreted the plain language of the plea agreement to require only that the government file a § 5K1.1 motion allowing the district court to depart. The plea agreement did not require the government to recommend a downward departure at the sentencing, and it also did not require the government to recommend departure. As a result, the Court found no violation of the plea agreement. The Court also found that because the government complied with the terms of the plea agreement, it did not act in bad faith by failing to make a stronger § 5K1.1 motion at sentencing.

The Court of Appeals found that the district court's selection of the midpoint of the two appraisals of the stolen goods as the valuation for sentencing purposes violated the Court's prior decision in United States v. Miele, 989 F.2d 659 (3d Cir. 1993). Miele held that where the fair market value of loss sustained ranges between two equally plausible estimates, courts should generally adopt the lower end of the estimated range, unless there is evidence to support the higher end of the range. Furthermore, the evidence supporting the higher end of the range must be supported by "sufficient indicia or reliability," and the court must explain on the record why it relied on the estimate at the higher end of the range. The Court of Appeals also found that district court should have given advance notice of its intention to depart upward, and that a district court which departs upward should state on the record its reason for the extent of the departure. However, the Court of Appeals found that the district court's reason for the upward departure, that the intangible effects of the crime committed were not sufficiently addressed by the applicable sentencing range, was not a factor already considered by the sentencing guidelines. See U.S.S.G. § 2B1.1, commentary note 5.

The Court of Appeals thus VACATED the sentence and REMANDED for resentencing. (Greenberg and Alito, C.J., Ackerman, D.J.; opinion by Alito.) **194 F.3d 419.**

722. United States v. Roberson, No. 97-7309 (M.D. Pa. 10/14/99)

- The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") contains "gatekeeping" provisions requiring that an applicant who wants to file a second or successive § 2255 motion obtain from the court of appeals "an order authorizing the district court to consider the application." See 28 U.S.C. §§ 2244(b)(3)(A) and 2255. The court of appeals may grant such an order only if the motion contains newly discovered evidence sufficient to establish that no reasonable factfinder would have found the movant guilty of the offense, or a previously unavailable rule of constitutional law which the Supreme Court has made retroactive to cases on collateral review.

This case raised the issue of whether the application of AEDPA's gatekeeping provisions to a second § 2255 motion filed

after AEDPA's effective date, produces an impermissible retroactive result if the applicant filed his first § 2255 motion before AEDPA's enactment. The Third Circuit concluded that a district court would have precluded Mr. Roberson from filing his second § 2255 motion under pre-AEDPA law. Therefore, the application of AEDPA's gatekeeping provisions did not have an impermissible retroactive effect. The Court thus denied Mr. Roberson's request for authorization to proceed with his second § 2255 motion. (Greenberg, Alito and Godbold, C.J.; opinion by Alito.) **194 F.3d 408.**

723. United States v. Yeaman, Nos. 98-1102 and 98-1146 (E.D. Pa. 10/15/99) - The defendant was convicted of conspiracy, wire fraud and securities fraud, and appealed the jury's verdict as well as his sentence. On cross appeal, the government challenged the sentence.

The defendant argued that the district court erred in concluding that he had a duty to disclose an SEC investigation which resulted in a cease and desist order being entered against him, and by admitting at trial evidence which allowed the jury to consider the nondisclosure of this information in the determination of guilt. The defendant argued that his conviction should be reversed based upon the admission of such evidence; a new trial granted; and the evidence in question excluded upon retrial. The Third Circuit rejected this argument.

The defendant also challenged the jury instructions, and the Third Circuit also rejected those challenges. The Court reasoned that the principle of jury unanimity applies to the offense committed, and not to the means by which the offense was committed, and that the district court's unanimity instruction was therefore sound. The Court also reasoned that the district court did not err by instructing the jury that it could find a Securities Act violation based solely on the defendant having held and transferred restricted stock.

With regard to the sentence, the defendant raised one challenge, and the government raised three. The defendant challenged the district court's upward departure based on its finding that his fraudulent acts caused the loss of confidence in an important institution. The government challenged the district court's finding of no loss under U.S.S.G. § 2F1.1; the district court's failure to impose a four-level increase under U.S.S.G. § 2F1.1(b)(6) for a substantial effect on a financial institution; and the district court's refusal to impose a special skills enhancement under U.S.S.G. § 3B1.3.

The Court found that the district court's limited factual findings did not support its conclusion that no actual loss was occasioned, and also that the district court's findings do not support its holding that the defendant did not jeopardize the safety and soundness of an important institution. The Court therefore REMANDED for application of U.S.S.G. §§ 2F1.1 and

2F1.1(b)(6). The Third Circuit also REMANDED for the district court to reevaluate its decision to impose a one-level upward departure. And finally, the Third Circuit found that the district court had misconstrued the applicable law, and REMANDED for the district court to apply U.S.S.G. § 3B1.3. (Sloviter, Nygaard and Stapleton, C.J.; opinion by Stapleton.) **194 F.3d 442.**

724. United States v. Rodia, No. 98-5522 (D. N.J. 10/20/99) - Title 18 U.S.C. § 2252(a)(4)(B) criminalizes the possession of child pornography that has not itself traveled in interstate commerce, but was created with materials that had traveled in interstate commerce. This appeal addressed the question of whether it was within Congress' power under the Commerce Clause to enact § 2252. In this case, the Polaroid film used to create the child pornography had traveled in interstate commerce.

The statute at issue in this case has a jurisdictional element or "hook," which is a clause aimed at limiting the application of the statute to activity substantially affecting interstate commerce. The Third Circuit concluded that the jurisdictional element in § 2252(a)(4)(B) does not ensure that only activity with a substantial effect on interstate commerce comes within the ambit of the statute. Thus, the Court considered whether Congress could reasonably have believed that the *intrastate* possession of child pornography made with materials that traveled interstate has a substantial effect on the interstate commerce of child pornography. The Court noted that it had misgivings because of the breadth of § 2252, but still held that Congress could have rationally believed that the *intrastate* possession of pornography substantially affects interstate commerce. *Intrastate* possession likely fosters the possessor's demand for additional child pornography, some of which will come from interstate sources. Thus, discouraging the *intrastate* possession of pornography will cause some child pornographers to leave the realm of child pornography completely, which in turn will reduce the interstate demand for pornography. Furthermore, Congress has historically regulated interstate commerce in child pornography, and Congress hoped to close a remaining loophole in the law by criminalizing *intrastate* possession of the same. **AFFIRMED.** (Becker, Roth and Rendell, C.J.; opinion by Becker.) **194 F.3d 465.**

725. Jones v. Morton, No. 98-5230 (D. N.J. 10/25/99) - This was an appeal from the denial of a petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. The Third Circuit agreed with the district court that the petition was time-barred under the AEDPA's one-year statute of limitations (28 U.S.C. § 2244(d)(1)), and **AFFIRMED** the denial of the petition. (Scirica and Stapleton, C.J., Green, D.J.; opinion by Scirica.) **195 F.3d 153.**

726. United States v. Applewhaite, Nos. 98-7541 and 98-7624 (D. V.I. 11/2/99) - The defendants were convicted of conspiracy in violation of 18 U.S.C. § 371; carjacking in violation of 18 U.S.C. § 2119(2); hindering the communication of information relating to the commission of a federal offenses in violation of 18 U.S.C. § 1512(b)(3); destruction of evidence in violation of 18 U.S.C. § 1512(b)(2)(B); attempted first degree murder in violation of 14 V.I.C. §§ 922(a)(1), 331 and 11; and kidnaping in violation of 14 V.I.C. §§ 1051 and 11. On appeal, the defendants argued that the evidence was insufficient to sustain the jury's verdict. The Third Circuit agreed that the evidence was insufficient to support the conviction for carjacking under 18 U.S.C. § 2119(2), and REVERSED that conviction. However, the Court AFFIRMED all of the other convictions. (Nygaard, McKee and Rendell, C.J.; opinion by McKee.) **195 F.3d 679.**

727. United States v. Miller, No. 97-7438 (M.D. Pa. 11/30/99) -

The defendant pled guilty to conspiring to distribute crack cocaine and then filed a direct appeal challenging the voluntariness of his appeal; the Third Circuit affirmed the conviction. After the direct appeal, the defendant filed two *pro se* post conviction motions in the district court challenging his indictment. The district court, acting *sua sponte*, recharacterized the two motions as a single 28 U.S.C. § 2255 motion and dismissed them on their merits.

On appeal from the dismissal, the Third Circuit noted that over the years district courts have commonly recharacterized defendants' *pro se* post-conviction motions as § 2255 motions. However, this practice poses a potential problem under the new Antiterrorism and Effective Death Penalty Act ("AEDPA") which bars federal prisoners from attacking their convictions through second or successive habeas corpus petitions, except in very limited circumstances. To prevent this problem, the Third Circuit held that before characterizing *pro se* post convictions motions as § 2255 motions, district courts must take certain prophylactic measures. Specifically, upon receipt of a *pro se* pleading challenging an inmate's conviction or incarceration - whether the motion is styled as a § 2255 motion or not - a district court should issue a form notice regarding the effect of such pleading in light of the AEDPA. The notice should advise the petitioner that he can (1) have his motion ruled upon as filed; (2) have his motion recharacterized as a § 2255 motion and heard as such, but lose his ability to file a second or successive petition absent certification by the court of appeals; or (3) withdraw his petition and file one all-inclusive § 2255 petition within the one-year statutory period prescribed by the AEDPA.

Because the district court did not provide such notification in this case, the Third Circuit set aside its decision to recharacterize his two post-conviction motions, VACATED the

district court's order of dismissal, and REMANDED for further proceedings. (Becker and Garth, C.J., Pollak, D.J.; opinion by Becker.)

728. United States v. Johnson, No. 98-2012 (E.D. Pa. 12/2/99) -

The appellant was convicted of two counts of conspiracy to interfere with interstate commerce by robbery in violation of 18 U.S.C. § 1951, and one count of use of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1). On appeal, the appellant argued that the district court had erred by (1) enhancing his sentence by four levels for use of a dangerous weapon during a robbery (see U.S.S.G. § 2B3.1(b)(2)(D)); (2) declining to conduct an *in camera* review of the presentence reports of two cooperating government witnesses to check for impeachment material; (3) restricting defense questioning of the cooperating government witnesses regarding other robberies they have participated in; (4) ruling the government's failure to disclose certain exculpatory material under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) until after trial was harmless error; (5) admitting testimony of the cooperating government witnesses when special treatment they received might amount to payment in violation of the criminal gratuity statute, 18 U.S.C. § 201(c)(2); (6) allowing testimony of an uncharged robbery allegedly involving the appellant; and (7) instructing the jury that it could consider the appellant's "immediate flight" following his indictment. The Third Circuit rejected all of these arguments, and AFFIRMED. (Nygaard, Alito and Rosenn, C.J.; opinion by Nygaard.) **199 F.3d 123.**

729. United States v. Morley, No. 98-1894 (E.D. Pa. 12/8/99) -

The defendant was tried on charges of criminal conspiracy, bank fraud, mail fraud and wire fraud; the charges arose from his attestation to a forged signature on a fake will. This appeal raised the issue of whether the district court abused its discretion by allowing the prosecution to introduce during the trial "prior bad acts" evidence pertaining to an incident that occurred 14 months prior to the events charged in the indictment. That evidence was that the defendant had asked his parents, both of whom were notaries, to notarize signatures on bonds that had been signed out of their presence. The signatures were forgeries, but the government did not contend that the defendant knew that when he asked his parents to notarize the bonds; instead, the government contended that the evidence was relevant to his "intent, knowledge and absence of mistake" in the signing of the fake will of a dead man he had never met. The Third Circuit held that the district court abused its discretion by allowing the prosecution to introduce the evidence about the improperly notarized bonds, and thus VACATED the defendant's conviction and ordered a new trial. (Mansmann, McKee and Stapleton, C.J.; opinion by McKee.) **199 F.3d 129.**

730. United States v. Zwick, No. 98-3641 (W.D. Pa. 12/15/99) -

The appellant was convicted of bribery under 18 U.S.C. § 666 which is entitled Theft or bribery concerning programs receiving Federal funds. The appellant argued that the evidence was insufficient to support his conviction under this statute, because the government failed to prove the existence of any connection between his conduct and federal funds or programming. The Third Circuit agreed, and VACATED the conviction and REMANDED for a new trial.

The appellant also argued that the district court erred in failing to award him a third point reduction in his offense level for acceptance of responsibility under U.S.S.G. § 3E1.1. The district court did not fully address, let alone resolve, whether the appellant's pre-trial activity entitled him to the third point under § 3E1.1(b). The Third Circuit therefore VACATED the sentence and REMANDED to the district court for consideration of whether the appellant timely provided complete information to the government, or, whether his expression of his intent to plead guilty was sufficiently timely to permit the conservation of government and court resources, thus entitling him to the third point under § 3E1.1(b).

The appellant raised three other issues which the Third Circuit rejected as meritless. Those issues included the following: (1) that there was insufficient evidence establishing that the appellant acted as an agent of an entity that received the requisite amount of federal funds as 18 U.S.C. § 666 requires; (2) that the government failed to establish that the appellant intended to be influenced "in connection with any business transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more" as 18 U.S.C. § 666(a)(1)(B) requires; and (3) that the district court improperly instructed the jury that the future value of the transaction can be taken into account. (Roth and Rendell, C.J., Pollak, D.J.; opinion by Rendell.) **199 F.3d 672. CONGRATULATIONS TO SHELLEY STARK, F.P.D. FOR THE W.D. OF PA., WHO HANDLED THIS CASE!!!**

731. United States v. Santiago, No. 99-1158 (E.D. Pa. 12/20/99)

- The appellant was convicted in the district court of possession of a controlled substance with intent to distribute in violation of 21 U.S.C. § 841(a)(1), and sentenced to the mandatory minimum sentence of ten years imprisonment. At sentencing the appellant moved under U.S.S.G. § 5K2.0 for a downward departure from the mandatory minimum sentence. He argued that he had been the victim of a shooting accident that initially left him paralyzed, and although he regained the use of his legs, he continued to experience medical difficulties.

The district court refused to grant the departure, and on appeal, the appellant challenged that refusal. The Third Circuit AFFIRMED, reasoning that district courts lack the authority under

§ 5K2.0 to depart downward from a statutory mandatory minimum; 5K2.0 provides for a departure only from *the guidelines*. Furthermore, departures from statutory mandatory minimums can only occur pursuant to 18 U.S.C. §§ 3553(e) and 3553(f), which did not apply in this case. (Nygaard, McKee and Garth, C.J.; opinion by Garth.) **201 F.3d 185.**

732. United States v. Akande, No. 98-5526 (D. N.J. 12/28/99) -

In this appeal, the Third Circuit held that an order of restitution imposed in a criminal case may not include losses caused by conduct that falls outside the limits established by a guilty plea. Thus, because the district court in this case added restitution for fraudulent conduct that occurred before the date of the offense as established in the plea agreement and plea colloquy, the Third Circuit REMANDED for a reduction of the amount of restitution assessed. (Roth and Weis, C.J., Shadur, D.J.; opinion by Weis.) **200 F.3d 136.**

733. United States v. Stephens, No. 99-5309 (D. N.J. 12/28/99) -

In this appeal, the defendant challenged the district court's imposition of a relevant conduct enhancement at sentencing pursuant to U.S.S.G. § 1B1.3(a)(1)(A), based upon conduct which could not have been charged because the statute of limitations had expired. The Third Circuit held, in accordance with seven other courts of appeals, that conduct that is not chargeable because the statute of limitations has expired may be considered in determining the appropriate sentence under the guidelines. AFFIRMED. (Alito and Stapleton, C.J., Feikens, D.J.; opinion by Alito.) **198 F.3d 389.**

734. United States v. Thayer, No. 98-1750 (E.D. Pa. 12/28/99) -

The appellant was convicted of willful failure to pay federal withholding and F.I.C.A. taxes in violation of 26 U.S.C. § 7202 and 18 U.S.C. § 2; willful filing of false claims against the government, in violation of 18 U.S.C. §§ 2 and 152; and willful concealment of bankruptcy-estate assets, in violation of 18 U.S.C. §§ 2 and 152. On appeal he challenged both his convictions and his sentence.

The appeal presented the issues of whether a "person" required to pay withholding taxes according to 26 U.S.C. § 7202 encompasses corporate officers and part-owners of corporations, and whether a person has met all of the elements for conviction under § 7202 when he collects withholding taxes and accounts for them on corporate tax returns, but does not actually pay the taxes. The Third Circuit held that corporate officers and part-owners of corporations are "person[s]" for purposes of 26 U.S.C. § 7202, and can thus be criminally liable for the failure to pay withholding taxes. The Court further held that a person can be properly convicted under § 7202 even if he collects and accounts

for withholding taxes before failing to pay them.

The appellant also challenged the sufficiency of the evidence regarding his bankruptcy fraud conviction, as well as the jury instructions. The Third Circuit held that there was sufficient evidence from which the jury could have concluded that the defendant's use of corporate funds to make payments on a condominium held in his name was an attempt to hide corporate assets from the bankruptcy court and from creditors. The Court also held that the district court's jury instructions were accurate, non-prejudicial and not confusing, and that the instructions properly described the elements of the offenses and correctly stated the law.

Finally, the appellant challenged his sentence. The Third Circuit rejected the argument that the district court had erred in failing to group the offenses under U.S.S.G. § 3D1.2(b). Because the offenses had different victims, the Third Circuit held that the district court had correctly refused to group. However, the Third Circuit agreed with the appellant's argument that the district court erred in enhancing the sentence for his bankruptcy fraud conviction under U.S.S.G. § 2F1.1(b)(4)(B) for violation of a judicial process; nothing in the guidelines suggests that the drafters intended as a general matter to sentence bankruptcy fraud more strictly than other types of fraud.

The Third Circuit AFFIRMED the convictions, but VACATED the judgment of sentence and REMANDED for further proceedings. (Scirica and McKee, C.J., Brotman, D.J.; opinion by Scirica.)
201 F.3d 214.

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735. Rios v. Wiley, No. 99-3297 (M.D. Pa. 1/4/00) - This was an appeal from an order granting a petition for writ of habeas corpus which had been filed pursuant to 28 U.S.C. § 2241. The sole issue on appeal was whether the district court erroneously determined that the petitioner was entitled to credit on his federal sentence for a pre-sentence period of 22 months during which he was in federal detention pursuant to a writ of habeas corpus ad prosequendum. The Third Circuit held that the petitioner was entitled to such credit, and AFFIRMED the district court's order. (Greenberg, Scirica and Rendell, C.J.; opinion by Greenberg.) **201 F.3d 257.**

736. United States v. Faulks, No. 98-2061 (E.D. Pa. 1/18/00) - The defendant appealed his sentence and the Third Circuit reversed and remanded for resentencing. Upon remand, the district court imposed the new sentence by a written judgment in the defendant's absence. In this, the second appeal, the Third Circuit addressed the issue of whether the case needed to again

be remanded for resentencing because the district court imposed the new sentence by a written judgment, and in the defendant's absence. The Third Circuit held that the defendant had to be resentenced in person, despite the fact that in an ancillary proceeding after the new sentence was imposed, the district court informed the defendant of the new sentence it had already imposed. The sentence was thus VACATED and the case REMANDED to the district court for resentencing. (Becker, Greenberg and Cudahy, C.J.; opinion by Becker.) **201 F.3d 208.**

737. United States v. Walker, No. 99-3071 (M.D. Pa. 1/20/00) -

The was an appeal from a sentence received for assaulting a prison employee. The issue raised was whether a prison cook supervisor is a "corrections officer" for purposes of a three-level "Official Victim" enhancement under U.S.S.G. § 3A1.2(b). This was the second time that the Court addressed this issue in this case. See United States v. Walker, 149 F.3d 238 (3d Cir. 1998).

The Third Circuit ruled that the district court erred in enhancing the sentence under § 3A1.2(b). The prison cook supervisor did not spend significant time guarding prisoners, and was not engaged in the act of guarding prisoners when he was struck. The Court thus VACATED the judgment of the district court and REMANDED with instructions to resentence without an enhancement under § 3A1.2(b). (Becker and Garth, C.J., Pollak, D.J.; opinion by Becker; dissent by Garth.) **202 F.3d 181.**

738. United States v. McGlory, No. 97-3057 (W.D. Pa. 2/1/00) -

This appeal raised the issue of whether the appellant received constitutionally adequate notice for the administrative forfeiture of certain property seized by DEA officers. More specifically, this appeal raised the issue of whether a pretrial detainee in custody of the marshals has a due process right to have notice of administrative forfeiture proceedings mailed by the forfeiting agency directly to the pretrial detainee at the institution where he is housed. The Third Circuit held that due process requires, at minimum, that a person in the government's custody and detained at a place of its choosing should be mailed notice of a pending administrative forfeiture proceeding at his place of confinement. The Court thus VACATED the district court's order granting summary judgment to the government with regard to the DEA seizure, and REMANDED to the district court for further proceedings. (En Banc; opinion by Sloviter; dissent by Alito.) **202 F.3d 664.**

739. United States v. Duliga, No. 99-5251 (D. N.J. 2/10/00) -

The defendant was convicted and sentenced for conspiracy to commit mail and wire fraud in connection with telemarketing operations. On appeal, he argued that the district court erred

by determining his base offense level under the sentencing guidelines based upon the entire amount of loss generated by the conspiracy, rather than only the amount of loss which he generated through his own telemarketing efforts. The Third Circuit rejected this argument, reasoning that the defendant was a key player in the telemarketing scam; that the losses generated by the entire scam were reasonably foreseeable in connection with the scope of the criminal activity he agreed to jointly undertake; and that he was well aware of the scope of the entire operation and of its fraudulent character. AFFIRMED. (Greenberg, Roth and Rosenn, C.J.; opinion by Rosenn.) **204 F.3d 97.**

740. West v. Vaughn, No. 98-1820 (E.D. Pa. 2/15/00) - This was an appeal in a habeas corpus action under 28 U.S.C. § 2254.

This was the petitioner's second habeas corpus petition. In between the filing of his first and second petitions, the Supreme Court issued its ruling in Cage v. Louisiana, 498 U.S. 39 (1990), holding that criminal convictions based on jury instructions that equate reasonable doubt with substantial doubt and grave uncertainty may suggest a lower standard of proof than that required by the Due Process Clause of the Fourteenth Amendment. In his second habeas corpus petition, the petitioner claimed that the jury charge in his Pennsylvania state court murder trial violated the Cage decision.

The district court dismissed the second petition for violation of the Antiterrorism and Effective Death Penalty Act provision which mandates that a new rule of law can be the basis of a successive petition only if it has been "made retroactive to cases on collateral review" by the Supreme Court. See 28 U.S.C. § 2244(b)(2)(A). On appeal, the Third Circuit held that the Supreme Court made its constitutional rule in Cage v. Louisiana retroactive to cases on collateral review, within the meaning of 28 U.S.C. § 2244(b)(2)(A). However, the Court also held that, despite his survival of the gatekeeping hurdle, the petitioner could not obtain relief because he could not prevail on the merits of his claim. The Court found that the jury instruction at issue did not differ significantly from language previously approved by the Third Circuit and by the Supreme Court. AFFIRMED. (Becker, McKee and Noonan, C.J.; opinion by Becker.) **204 F.3d 53.**

741. Swartz v. Meyers, No. 98-7283 (M.D. Pa. 2/25/00) - This was an appeal from a district court order dismissing as untimely a petition for writ of habeas corpus filed under 28 U.S.C. § 2254. The Antiterrorism and Effective Death Penalty Act of 1996 provides for a one year period of limitation; that limitation period is tolled during the time when "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." See

28 U.S.C. § 2244(d)(2). On appeal, the Third Circuit found that a petition brought under the Pennsylvania Post Conviction Relief Act was "properly filed" and "pending" during the time between the Pennsylvania Superior Court's ruling, and the expiration of the time for seeking an allowance of appeal from the Pennsylvania Supreme Court, despite the fact that the petitioner did not file a timely request for allowance of appeal. As a result, the Court held that the habeas corpus petition was timely filed. The district court's judgment was thus VACATED, and the case REMANDED. (Greenberg, Scirica and Rendell, C.J.; opinion by Scirica.) **204 F.3d 417.**

742. Coss v. Lackawanna County District Attorney, No. 98-7416 (M.D. Pa. 2/29/00) - This was an appeal from the denial of a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The petitioner argued that a former conviction was tainted by a constitutional infirmity, and that the consideration of that conviction during the sentencing for the offense which was the subject of the within case, rendered his incarceration unconstitutional.

The Third Circuit agreed that the prior conviction was constitutionally infirm, and that it had been taken into consideration at the sentencing for the later conviction. As a result, the Court concluded that the district court had erred in denying the petition for writ of habeas corpus.

The Court therefore REVERSED and REMANDED with instructions that the district court issue a writ conditioned upon extending to the Commonwealth the option of conducting a new trial on the first conviction. The Third Circuit further instructed that if the new trial produced a different verdict, then the state should resentence the petitioner on the second conviction to account for any enhancement due to the first guilty verdict. The Court also noted that the Commonwealth also had the option of not affording a new trial on the first conviction, and merely resentencing on the second conviction. (en banc; opinion by Aldisert; dissent by Nygaard; concurrence/dissent by Rendell.) **204 F.3d 453.**

743. United States v. Hecht, No. 99-1543 (E.D. Pa. 2/29/00) - The appeal challenged a sentence enhancement under U.S.S.G. § 2J1.7. More specifically, this appeal questioned whether a defendant's sentence can be enhanced on the ground that the crime was committed while the defendant was on release from another federal offense, even though the defendant was not notified of the possibility of enhancement at the time of release on the first offense. The Third Circuit held that pre-release notice of the possibility of enhancement is not required, and that only pre-sentence notice is required. Because the defendant received such pre-sentence notice, the Third Circuit upheld the district court's imposition of the enhancement. AFFIRMED. (Becker, Alito and Barry, C.J.; opinion by Alito.) **212 F.3d 847.**

744. Liang v. Immigration & Naturalization Service, No. 99-5053 (3/9/00) - In this appeal, the Third Circuit addressed the issue of whether it had jurisdiction over a petition for review filed by an alien with a criminal conviction, challenging a final order of removal entered by the Board of Immigration Appeals based upon the commission of one or more crimes specified in the Immigration and Nationality Act ("INA"). The Court held that it lacked jurisdiction under INA § 242(a)(2)(C) over the petitions for review challenging the final orders of removal, and therefore dismissed the petitions without prejudice to a pending habeas corpus petition under 28 U.S.C. § 2241 which one of the petitioners filed. (Sloviter, Roth and Cowen, C.J.; opinion by Sloviter.) **206 F.3d 308.**

745. United States v. Universal Rehabilitation Services, Nos. 97-1412 and 97-1414 (E.D. Pa. 3/14/00) - This appeal challenged the district court's admission of the guilty pleas and plea agreements of co-conspirators. The district court admitted these items despite the representation of defense counsel that they would not challenge the credibility of these witnesses. The en banc Court held that the district court properly admitted the guilty pleas and plea agreements, and overruled the Third Circuit cases to the contrary, thus resolving a conflict within the circuit on this issue. (en banc; opinion by Garth; dissent by Roth; dissent by Becker; dissent by Sloviter.) **205 F.3d 657.**

746. United States v. Helbling, No. 99-5051 (D. N.J. 3/14/00) - The appellant was charged in a 35-count indictment with charges of conspiracy to embezzle employee pension plan funds and falsify ERISA documents in violation of 18 U.S.C. § 371; embezzlement of employee pension plan funds from an ERISA covered plan in violation of 18 U.S.C. § 664; falsifying documents required by ERISA in violation of 18 U.S.C. §1027; wire fraud in violation of 18 U.S.C. § 1343; and mail fraud in violation of 18 U.S.C. § 1341. The mail fraud counts were dismissed during the trial, and the jury convicted him of the remaining counts.

On appeal, the appellant argued that the district court erred in upholding the validity of waiver of the statute of limitations which he filed, and that his indictment was therefore not timely filed. He also argued that statements which the prosecutor made in his opening and closing statements warranted a new trial, and that the evidence was insufficient to support his convictions. Finally, he challenged his sentence on the grounds that the district court erred by increasing his offense level by four levels for "aggravating role" pursuant to U.S.S.G. § 3B1.1(a), by increase his offense level two levels for obstruction of justice pursuant to U.S.S.G. § 3C1.1, and by departing upwards by two levels for psychological harm pursuant to U.S.S.G. § 5K2.3. The Court of Appeals rejected all of these arguments, and AFFIRMED the conviction and the sentence. (Becker,

747. Mason v. Meyers, No. 98-7078 (M.D. Pa. 3/20/00) -

This appeal from the denial of a petition for habeas corpus filed pursuant to 28 U.S.C. § 2254 raised two issues.

The first issue was whether a state court's inordinate delay of four years in processing a petition for collateral relief under Pennsylvania's Post Conviction Relief Act, 42 Pa. Cons. Stat. §§ 9541 *et seq.*, constitutes a due process violation cognizable in a federal habeas corpus proceeding. The Third Circuit found that this issue had already been resolved by Hassine v. Zimmerman, 160 F.3d 941 (3d Cir. 1998), which held that a delay in processing a collateral proceeding is not cognizable in federal habeas corpus, even if the delay amounts to a constitutional violation. See also Heiser v. Ryan, 15 F.3d 299 (3d Cir. 1994).

The second issue raised was whether, in light of the two-strike provision of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244, which precludes petitioners from filing second or subsequent habeas petitions except in unusual circumstances, the district court should have permitted the petitioner to amend his § 2254 petition to include a second claim. The Third Circuit noted that under its ruling in United States v. Miller, 197 F.3d 644 (3d Cir. 1999), a federal defendant who files a *pro se* post conviction motion must be advised that he can (1) have his motion ruled upon as filed; (2) if his motion is not styled as § 2255 motion have it recharacterized and ruled upon as such, but lose his ability to file successive petitions absent certification by the court of appeals; or (3) withdraw the motion, and file one all inclusive § 2255 petition within the one-year statutory period. The Third Circuit held that although the Miller case involved a § 2255 petition, the prophylactic warnings it requires are also warranted in § 2254 cases. Thus, because the petitioner in this case was *pro se* and did not receive the benefit of such warnings, the Third Circuit VACATED the district court orders dismissing the § 2254 petition and denying the motion for reconsideration, and directed the district court to provide the warnings required by Miller. Furthermore, the Third Circuit held that the statute of limitations should be tolled to allow the petitioner an opportunity to file all of his claims in the correct manner. (Becker and Garth, C.J., Pollak, D.J.; opinion by Garth.)

748. United States v. Beckett, No. 99-1135 (E.D. Pa. 3/21/00) -

The appellant was found guilty of robbery and armed bank robbery in violation of 18 U.S.C. §§ 2113(a) & (d).

On appeal he argued that the district court erred by determining that he was a career offender; by failing to provide him with his right of allocution; by permitting ineffective

assistance of counsel and allowing reversible error to go uncorrected when the Assistant United States Attorney referred to the defendant as a "repeat offender" at trial and his counsel did not object; by giving the jury an erroneous and confusing instruction; by violating his speedy trial rights through the nine month delay between his arrest by local authorities and his federal trial; by allowing the guilty verdicts to stand when the evidence was insufficient to support them. The Third Circuit rejected all of these arguments.

However, the appellant successfully argued that the district court erred when it imposed restitution without determining his ability to pay and delegated the restitution issue to the Bureau of Corrections to be dealt with at a later date, and by sentencing him on both charges of armed bank robbery under 18 U.S.C. § 2113(d) and robbery under 18 U.S.C. § 2113(a). The Court REVERSED and REMANDED for factual findings on the question of the appellant's ability to pay restitution, and VACATED the sentence imposed as to the lesser included offenses of bank robbery, but AFFIRMED in all other respects. (Mansmann, Nygaard and Rendell, C.J.; opinion by Nygaard.) **208 F.3d 140.**

749. Lines v. Larkins, No. 97-2050 (E.D. Pa. 3/21/00) - This was an appeal from the dismissal of a petition for writ of habeas corpus which was filed pursuant to 28 U.S.C. § 2254. The district court found that the petitioner had not exhausted his state court remedies, and dismissed without prejudice on the grounds that the petitioner could return to state court to properly present his claims there.

On appeal, the Third Circuit agreed with the district court's finding that the petitioner had not exhausted his state court remedies. However, the Court concluded that returning to state court would be futile and that his claims were all procedurally defaulted, and that he could not establish cause and prejudice for the default. The Court therefore held that the petition should be dismissed with prejudice, and AFFIRMED, but modified, the district court's order dismissing the petition. (McKee and Rendell, C.J., Debevoise, D.J.; opinion by McKee; dissent by Debevoise.) **208 F.3d 153.**

750. United States v. Greene, No. 99-1625 (E.D. Pa. 3/27/00) - The defendant pled guilty to RICO and to RICO conspiracy in violation of 18 U.S.C. §§ 1962(c) and (d), relating to his conduct in running a large-scale criminal ring that passed stolen and counterfeited checks in several states. Through this conduct, the defendant was responsible for defrauding 14 banks and other financial institutions out of more than \$6 million. At sentencing, the district court imposed a four-point enhancement under U.S.S.G. § 2F1.1(b)(7)(B) which applies when the offense affected a financial institution, and the defendant received more than \$1 million in gross receipts from the offense.

On appeal, the defendant argued that the enhancement was improperly applied to him because he did not defraud any *single* financial institution of more than \$1 million, even though he was admittedly responsible for losses to several financial institutions exceeding that amount. The Third Circuit rejected this argument; the plain meaning of the guideline indicates that the defendant must have derived a million dollars *from the offense*, and not from the financial institutions. The Court AFFIRMED the district court's application of the enhancement. (Becker, Nygaard and Garwood, C.J.; opinion by Nygaard.) **212 F.3d 758.**

751. United States v. Torres, No. 99-1149 (E.D. Pa. 4/6/00) - The defendant pled guilty to one count of bank fraud in violation of 18 U.S.C. § 1344. On appeal he raised three issues.

First, the defendant argued that the amount of loss under U.S.S.G. § 2F1.1 should be the amount which he attempted to withdraw from his fraudulent bank account, rather than the entire amount of the stolen check deposited into his fraudulent account. The Third Circuit rejected this argument on the basis of guideline commentary as well as existing case law, both of which state that if the amount of the intended loss can be determined, and if it is greater than the actual loss, that amount should be used.

Second, the defendant argued that even if the loss figure was properly calculated based upon the entire amount of the stolen check, his actions constituted only an incomplete attempt to defraud the bank of the full amount of the loss, thus warranting a three-level reduction under U.S.S.G. § 2X1.1. The Court rejected this argument, reasoning that the defendant had pled guilty to the completed offense of bank fraud and not to a mere attempt; that as to the attempted withdrawal, the defendant had completed all of the acts which he believed were necessary; and that as to the balance of the fraudulently deposited funds, the defendant was about to complete all the necessary acts but was unsuccessful only because the bank suspected fraudulent activity, and not because of any event within the defendant's control.

Third, the defendant challenged the district court's imposition of a fine, arguing that the record before the district court did not establish whether he had the earning capacity to pay a fine. The Third Circuit rejected this argument on the grounds that at sentencing the defendant did not argue his inability to pay, and because the district court adopted the facts in the PSR which supported the imposition of the fine. AFFIRMED. (Becker, Alito and Barry, C.J.; opinion by Barry.) **209 F.3d 308.**

752. Campbell v. Vaughn, No. 98-1744 (E.D. Pa. 4/12/00) - This was an appeal from the denial of a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The basis of the habeas petition was a claim that trial counsel interfered with the petitioner's constitutional right to testify and provided ineffective assistance of counsel by failing to properly inform him of his right to testify at trial. The petitioner also sought a new evidentiary hearing pursuant to 28 U.S.C. § 2254(e)(2); the petitioner argued that such a hearing was necessary because the state court failed to make a finding of fact as to whether trial counsel informed him of his right to testify on his own behalf, and that without such a finding, the merits of his substantive claim could not be addressed. The Third Circuit rejected the petitioner's arguments, reasoning that the state court had made sufficient findings of fact, and that trial counsel did not violate his constitutional right to testify when he informed the petitioner that testifying on his own behalf might be unwise. AFFIRMED. (Becker, Alito and Barry, C.J.; opinion by Becker.) **209 F.3d 280.**

753. United States v. Harris, No. 99-1026 (E.D. Pa. 4/13/00) - The issue in this appeal was whether the government violated the "antigratuity statute," 18 U.S.C. § 201(c)(2), when it paid several confidential informants to gather information and later had them testify at trial. The antigratuity statute prohibits the giving of "anything of value to any person, for or because of the testimony under oath . . . by such persons as a witness upon a trial. . ." The Third Circuit agreed with the three other circuits which have addressed this issue, and held that the use of a paid informant's testimony does not violate the antigratuity statute. AFFIRMED. (Scirica, Aldisert and Cowen, C.J.; opinion by Cowen.) **210 F.3d 165.**

754. United States v. Hodge, No. 99-3247 (D. V.I. 4/25/00) - The appellant was charged with and convicted of interference with commerce in violation of 18 U.S.C. §§ 1951-52; possession of a firearm during the commission of a crime of violence in violation of 18 U.S.C. § 924(c)(1); and robbery in the first degree in violation of 14 V.I.C. § 1862(2). On appeal, the appellant raised three issues.

The appellant first argued that because his indictment for robbery in violation of 14 V.I.C. § 1862 failed to allege the material element of specific intent, his conviction should have been dismissed. The appellant next argued that he could not be convicted for aiding and abetting a principal in the commission of a crime if the principal is either acquitted or not charged. Finally, the appellant argued that his convictions for interference with commerce in violation of 18 U.S.C. §§ 1951 and robbery in the first degree in violation of 14 V.I.C. § 1862(2) violated the Double Jeopardy Clause of the United States Constitution. The Court

rejected all three of these arguments and AFFIRMED. (Becker, Scirica and Garth, C.J.; opinion by Garth.) **211 F.3d 74.**

755. United States v. Sweeting, No. 99-3774 (M.D. Pa. 5/3/00) - This government appeal presented the issue of whether the district court abused its discretion by awarding the defendant a 12-level downward departure under U.S.S.G. § 5H1.6 for extraordinary family ties and responsibilities. The basis for the departure was that the defendant, a single mother, was solely responsible for the care and support of her five children, one of whom had been diagnosed with Tourette's Syndrome. The Third Circuit agreed with the government and found that the defendant's family ties and responsibilities were not "extraordinary" so as to warrant a departure under § 5H1.6, and that the district court thus abused its discretion in departing downward. The Court VACATED the sentence and REMANDED to the district court for resentencing. (Mansmann, Greenberg and Barry, C.J.; opinion by Greenberg.) **213 F.3d 95.**

756. United States v. Marvin, No. 98-2086 (E.D. Pa. 5/8/00) - The defendant pled guilty to conspiracy, robbery and the use of a firearm during a crime of violence, and was sentenced. He then sought to appeal certain aspects of his sentencing, and his counsel filed a motion requesting leave to withdraw and an Anders brief expressing his belief that there were no nonfrivolous arguments for appeal. The Third Circuit found that counsel had "not provided . . . sufficient indicia that he has explored all possible issues for appeal." The Court therefore rejected the Anders brief filed by counsel, and denied counsel's motion for leave to withdraw. The Court noted that it was expressing no opinion as to the merits of the underlying appeal, but was simply not yet ready to find the case "rudderless" without further guidance from counsel. (Becker, Greenberg and Cudahy, C.J.; opinion by Becker.) **211 F.3d 778.**

757. United States v. Saada, Nos. 99-5126 and 99-5148 (D. N.J. 5/15/00) - A jury convicted the defendants of conspiracy to defraud an insurance company in violation of 18 U.S.C. § 371, mail fraud in violation of 18 U.S.C. § 1341, and wire fraud in violation of 18 U.S.C. § 1343. On appeal, the defendants challenged the district court's denial of their motion for a new trial under Federal Rule of Criminal Procedure 33. The Third Circuit held that the new evidence was merely cumulative and impeaching, and would not have led to an acquittal, and thus AFFIRMED the district court's denial of the motion for new trial. The defendants also challenged the admission of two pieces of evidence at trial: evidence of prior misconduct by a witness, and evidence of participation by one of the defendants in another fraudulent insurance scheme. The Court found error in the admission of the first piece of evidence, but found that error to be harmless, but found no error in the admission of the second

piece of evidence. The Court thus AFFIRMED with regard to the admission of the evidence in question.

Finally, the defendants argued that during rebuttal argument, the prosecutor improperly vouched for the credibility of witnesses. The Court held that the comments in question constituted proper argument, rather than improper vouching, and thus AFFIRMED with regard to this issue as well. (Nygaard and Rendell, C.J., Harris, D.J.; opinion by Harris.) **212 F.3d 210.**

758. United States v. Mannino, No. 98-1748 (E.D. Pa. 5/15/00) -

This was an appeal from the denial of petitions filed under 28 U.S.C. § 2255; the petitions sought to vacate, set aside or correct sentences imposed following convictions for a heroin distribution conspiracy. On appeal the Third Circuit held that the defendants' sentencings did not conform to Amendment 78 of the United States Sentencing Guidelines or the Court's previous holding in United States v. Collado, 975 F.2d 985 (3d Cir. 1992). Amendment 78 amended Application Note 1 of U.S.S.G. § 1B1.3, the relevant conduct guideline. Amendment 78 and the Collado decision both deal with liability for the conduct of co-conspirators, and provide that a defendant is not responsible for the conduct of a co-conspirator which was outside of the agreement or was not reasonably foreseeable. The Court VACATED the sentences and REMANDED for resentencing. (Nygaard, McKee and Rosenn, C.J.; opinion by McKee.) **212 F.3d 835.**

759. Hameen v. Delaware, No. 96-9007 (D. Del. 5/17/00) - This was an appeal from the denial of a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The petitioner was convicted of first-degree murder and sentenced to death.

In the habeas corpus proceedings, the petitioner argued that the trial court violated the Ex Post Facto Clause of the United States Constitution by sentencing him under an amendment to the capital sentencing statute which the Delaware legislature enacted after the murder took place. The petitioner also argued that during the penalty phase of the proceedings, the prosecution advanced duplicative aggravating statutory circumstances. The Third Circuit rejected both of these arguments. AFFIRMED. (Mansmann, Greenberg and McKee, C.J.; opinion by Greenberg; concurrence by McKee.) **212 F.3d 226.**

760. United States v. One Toshiba Color Television, Nos. 98-3578 and 98-3579 (W.D. Pa. 5/24/00) -

This forfeiture case presented two issues. The first was the question of what notice the United States must provide when it pursues forfeiture proceedings against the property of an incarcerated defendant in its custody. The second issue dealt with whether the doctrine of laches can be used to prevent a defendant from challenging a forfeiture proceeding in which the notice given is constitutionally

inadequate.

With regard to the first issue, the Third Circuit held that if the government wishes to rely on direct mail, it bears the burden of demonstrating that procedures at the receiving facility were reasonably calculated to deliver the notice to the intended recipient. Because the Court could not determine, based on the record in this case, whether such a system was in place in the defendant's facility, it VACATED the judgment and REMANDED to the district court for further factual findings on the sufficiency of the notice.

With regard to the second issue, the Court noted that because the government made no effort to serve the defendant in jail, the notice given was constitutionally deficient, and thus, the forfeiture judgment rendered was void. The Court then held that the doctrine of laches is not available to preclude a claimant from attacking a judgment as void. The Court therefore VACATED the district court's judgment that the defendant's action was barred by laches. (Becker, Roth and Rendell, C.J.; opinion by Becker; concurrence/dissent by Alito.) **213 F.3d 147.**

761. United States v. Bein, No. 99-3822 (W.D. Pa. 6/5/00) -

This was an appeal from the district court's ruling on a motion filed pursuant to Federal Rule of Criminal Procedure 41(e). The motion sought the return of property seized pursuant to a search warrant issued as part of a criminal investigation and prosecution.

The appellants alleged that the government had wrongfully destroyed or failed to return their property, and sought to recover compensatory damages or the return of the property. The district court granted the motion in part, awarding damages in the amount of \$2,450, and ordering the government to return a cart in its possession. However, the district court denied the motion with respect to the claim for losses of other property. The appellants then appealed seeking additional damages.

The Third Circuit agreed with the government's argument that the district court did not have jurisdiction to entertain the Rule 41(e) motion to the extent that it sought compensatory damages. The Court reasoned that sovereign immunity bars a claim against the government seeking money damages under Rule 41(e). The Court therefore VACATED the order of the district insofar as it awarded money damages, and refused to consider on the merits the appellants' claim that they were entitled to additional money damages. The Court AFFIRMED the district court's refusal to grant the additional money damages, and also AFFIRMED the district court's order to return the cart. (Greenberg, McKee and Garth, C.J.; opinion by Greenberg.) **214 F.3d 408.**

762. United States v. Gilchrist, No. 99-3052 (M.D. Pa. 6/6/00)

- This was an appeal by the government from a district court order denying a motion to reinstate a dismissed indictment.

The government had originally moved to dismiss the indictment pursuant to a plea agreement and in exchange for the appellee's plea of guilty to a lesser count. After sentencing the appellee successfully withdrew his guilty plea, and the government then filed a motion to reinstate the dismissed indictment. The district court denied the government's motion to reinstate the dismissed indictment on the grounds that the statute of limitations had expired.

On appeal the Third Circuit found that the government failed to offer sufficient reason why the statute of limitations should not be applied, and therefore AFFIRMED the order of the district court refusing to reinstate the indictment. (Roth and Weis, C.J., Shadur, D.J.; opinion by Roth.) **215 F.3d 333.**

***763. United States v. Dees, No. 99-4054 (W.D. Pa. 6/12/00) -**

This was an appeal by the government from an order of the district court dismissing an indictment. The defendant was charged with unauthorized use of access devices to obtain money, goods, and services aggregating more than \$1,000 in value in a one-year period, in violation of 18 U.S.C. § 1029(a)(2). The indictment was based upon three separate credit card purchases.

The district court found that the statute of limitations was violated because the first two of the three credit card purchases charged occurred more than five years prior to the date of the indictment. (See 18 U.S.C. § 3282.) Furthermore, the third purchase, which did occur within the five-year statute of limitations, did not meet the \$1,000 jurisdictional requirement of the statute. The district court therefore dismissed the indictment.

On appeal the Third Circuit REVERSED the district court's dismissal of the indictment. The Court reasoned that § 1029(a)(2) defines an offense based upon the unauthorized use of an access device "during any one-year period" to obtain anything of value aggregating \$1,000 or more. Thus, an offense for purposes of § 1029(a)(2) will be completed, and the statute of limitations will start to run, on the last day of a one-year period during which an unauthorized access device is used to obtain items whose aggregated value equals or exceeds \$1,000. (Greenberg and McKee, C.J., Shadur, D.J.; opinion by Greenberg.) **215 F.3d 378.**

764. United States v. Baird, No. 99-1305 (E.D. Pa. 6/26/00) -

This was an appeal from the district court's denial of a § 2255 motion in which the defendant argued that his trial counsel erred in failing to object to the use at sentencing of incriminating admissions made as part of a cooperation agreement. U.S.S.G. § 1B1.8 generally excludes information provided pursuant to an applicable cooperation agreement from consideration at sentencing.

On appeal, the Third Circuit concluded that the government had promised that such information would not be used to increase the defendant's punishment, and that the information should not have been considered at sentencing. The Court thus REMANDED for a hearing to determine whether counsel's inaction at the sentencing hearing with respect to this information amounted to ineffective assistance of counsel. (Becker, Weis and Oakes, C.J.; opinion by Weis.) **218 F.3d 221.**

765. United States v. Kithcart, No. 99-1082 (E.D. Pa. 6/28/00)

- This was the second time that this case went before the Third Circuit. The relevant procedural history of this case is as follows.

Mr. Kithcart filed a motion to suppress evidence which the district court denied. Mr. Kithcart then entered a conditional plea of guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g), and appealed the denial of the suppression motion to the Third Circuit. In its first review of this case, the Third Circuit found that the district court erred in finding that the police had probable cause to search, and reversed the denial of the suppression motion and remanded for further proceedings. The Third Circuit instructed that upon remand the district court should consider whether the officers had reasonable suspicion for an investigative stop and weapons search. (See 134 F.3d 529 (3d Cir. 1998)).

On remand the district court allowed the government to reopen the suppression hearing and present additional testimony; the district court neither requested nor received any explanation as to why this new evidence had not been introduced originally. At the conclusion of the reopened hearing, the district court upheld the search based upon its finding that the car in which the defendant was riding ran a red light, and that the search and initial stop were therefore justified and reasonable under the Terry exception to the Fourth Amendment's warrant requirement. This appeal followed.

In its second review of this case, the Third Circuit held that the district court erred in allowing the prosecution to open the record and present additional testimony. The Court therefore REVERSED once again and REMANDED, with instructions that upon remand the district court resolve the suppression motion based only upon the evidence presented at the first suppression hearing which occurred prior to the Third Circuit's initial remand.

(Mansmann, McKee and Stapleton, C.J.; opinion by McKee.) **218 F.3d 213.**

766. United States v. Hernandez, No. 99-5577 (D. N.J. 6/29/00)

- The defendant pled guilty to a one-count indictment charging him with conspiracy to distribute more than 500 grams of cocaine, and the government sought to enhance his sentence pursuant to the

career offender guideline, U.S.S.G. § 4B1.1. To support the defendant's status as a career offender, the government offered two certificates of disposition from the county clerk of a state court, certifying that the defendant had two prior convictions for possession of a narcotic with intent to sell. The defendant challenged the accuracy of these certificates, arguing that the convictions were actually for mere possession and could therefore not be used to qualify him as a career offender. To support his argument, the defendant sought to introduce the transcript of his plea colloquy in state court for the offenses in question.

Although the district court accepted the certificates of disposition into evidence, it refused to consider the transcript of the plea colloquy. Thus, relying solely on the certificates of disposition, the district court classified the defendant as a career offender and sentenced him to 220 months of imprisonment.

On appeal the Third Circuit held that the district court erred in refusing to consider the transcript of the plea colloquy. However, the district court rejected the defendant's argument that the district court erred in declining to grant an additional one-level downward adjustment under U.S.S.G. § 3E1.1(b) for acceptance of responsibility, and also the defendant's argument that the district court erred in failing to make sufficient findings to support its refusal to depart downward for an extraordinary physical impairment under U.S.S.G. § 5H1.4. The Court thus VACATED the defendant's sentence and REMANDED for resentencing solely on the career offender issue, but AFFIRMED in all other respects.

(Becker, Roth and Rosenn, C.J.; opinion by Rosenn.) **218 F.3d 272.**

767. United States v. Saintville, No. 00-3113 (M.D. Pa. 7/6/00)

- This appeal dealt with the application of U.S.S.G. § 5G1.3(c) in a situation in which a court sentences a defendant already subject to an undischarged term of imprisonment for a separate offense. More specifically, this appeal addressed the issue of whether the district court erred as a matter of law when it failed to consider the hypothetical combined sentencing range which would have been applied if the United States had prosecuted both the unrelated state drug offenses and the illegal entry offense in the district court. The Third Circuit held that the district court did not err because the amendments to §5G1.3(c), which were in effect during the sentencing in this case, indicate that the sentencing court must no longer make a hypothetical calculation of the combined sentencing range. AFFIRMED.

(Greenberg and Barry, C.J., Oberdorfer, D.J.; opinion by Greenberg.) **218 F.3d 246.**

768. Furnari v. Warden, No. 99-3701 (M.D. Pa. 7/12/00) - This was an appeal from a district court order denying a petition for writ of habeas corpus. The petition challenged the United States Parole Commission's initial determination, affirmed by its National Appeals Board, designating the petitioner to offense Category Eight, which is the most severe category under the parole regulations. The designation was based upon the petitioner's alleged ties to several murders, and meant a 15-year postponement of the petitioner's parole consideration. On appeal the Third Circuit found that the Parole Commission abused its discretion by failing to follow its regulation requiring a statement of reasons for denying parole. The Court therefore VACATED the order of the district court and REMANDED with instructions to grant the petition conditionally and order the Parole Commission to provide a new statement of reasons. (Becker, Barry and Bright, C.J.; opinion by Becker; concurrence/dissent by Bright.) **218 F.3d 250.**

769. United States v. Escobales, No. 99-5997 (D. Del. 7/10/00) - This appeal raised the issue of whether, at sentencing, a defendant can collaterally challenge a state-court conviction used to calculate his criminal history category under U.S.S.G. § 4A1.1, on the grounds that he was denied his Sixth Amendment right to a jury trial. The Third Circuit found that there are only two circumstances under which such attacks may be brought: where the statute or guideline under which the defendant is sentenced provides for the right to bring such a collateral attack at sentencing, or where the collateral attack is based upon the denial of the right to counsel, as described in Gideon v. Wainwright, 372 U.S. 335 (1963). Here, neither 21 U.S.C. § 841 nor U.S.S.G. § 4A1.1 explicitly provide the right to make a collateral challenge during federal sentencing proceedings. Furthermore, the constitutional challenge was not based upon Gideon. Thus, the district court properly refused to entertain the defendant's collateral attack. AFFIRMED. (Becker and Aldisert, C.J., O'Kelley, D.J.; opinion by Becker.) **218 F.3d 259.**

770. Watterson v. United States, No. 98-1596 (E.D. Pa. 7/10/00) - In this appeal the Third Circuit found that the district court erred in sentencing the defendant as if she had been convicted of, or had stipulated to, distributing a controlled substance within 1000 feet of a school zone, when she had not. The defendant was not charged with violating or conspiring to violate 21 U.S.C. § 860, which prohibits drug distribution "in or near" schools, and she did not stipulate to such conduct. The defendant pled guilty to conspiracy to distribute cocaine and marijuana and forfeiture. The statutory index of the guidelines indicates that § 2D1.1 is the applicable section where, as here, there was a 21 U.S.C. § 846 conspiracy to violate only 21 U.S.C.

§ 841(a)(1), and not 21 U.S.C. § 860. Nonetheless, at sentencing the district court applied U.S.S.G. § 2D1.2 which deals with drug offenses committed near "protected locations" such as schools. The application of § 2D1.2 resulted in a base offense level two levels higher than if U.S.S.G. § 2D1.1 had been applied.

The district court never explained its reasons for applying § 2D1.2, but apparently believed that it was applicable on the theory that it could consider all relevant conduct in determining which offense guideline section should be selected, and because the drug conspiracy operated in a school zone. The Third Circuit disagreed, reasoning that relevant conduct should be factored in, if at all, only after the appropriate offense guideline section is selected. The Third Circuit also noted that § 2D1.2 could not apply because the defendant did not stipulate to the more serious offense. The Third Circuit therefore VACATED the sentence and REMANDED for resentencing. (Roth, Barry and Stapleton, C.J.; opinion by Barry.) **219 F.3d 232.**

771. United States v. Mackins, No. 99-4021 (M.D. Pa. 7/12/00) -

The principal issue raised in this appeal was whether a prior sentence imposed as the result of an *Alford* plea qualifies as a "prior sentence" under U.S.S.G. § 4A1.2(a)(1) for purposes of computing a defendant's criminal history category under § 4A1.1. The Third Circuit held that the answer to this question is "yes," and AFFIRMED the district court. (Becker, Barry and Bright, C.J.; opinion by Barry; dissent by Bright.) **218 F.3d 263.**

772. Weeks v. Snyder, No. 98-9005 (D. Del. 7/17/00) - This was an appeal from the district court's denial of a petition for writ of habeas corpus which was filed pursuant to 28 U.S.C. § 2254. The appeal raised only one issue: whether trial counsel afforded constitutionally ineffective assistance of counsel in connection with the petitioner's guilty plea. More specifically, the petitioner argued that he did not receive critical legal advice that was essential to making an informed and conscious decision on whether to plead guilty or go to trial, when his attorney told him simply that a witness would not testify, but did not discuss the legal implications of that fact. The Third Circuit held that the petitioner failed to demonstrate that he received ineffective assistance of counsel, and therefore AFFIRMED the district court's denial of the petition for writ of habeas corpus. (Sloviter, McKee and Rendell, C.J.; opinion by Sloviter.) **219 F.3d 245.**

773. United States v. Loney, No. 99-5774 (D. N.J. 7/18/00) -

The facts of this case are that the defendant was present when police arrived to investigate the scene of a reported burglary. Police frisked the defendant and found 29 packets of heroin and a .380 caliber semiautomatic pistol loaded with one round of

ammunition. At sentencing, the district court applied U.S.S.G. § 2K2.1(b)(5) and increased the offense level by four points for possessing a firearm "in connection with" the drug offense. On appeal, the defendant challenged the application of § 2K2.1(b)(5), arguing that the government had no further evidence tying the gun to his drug trafficking, and that he carried the gun only because he felt he needed protection. After a lengthy discussion and analysis of the phrase "in connection with," the Third Circuit rejected the defendant's position, and AFFIRMED. (Scirica, Nygaard and Cowen, C.J.; opinion by Cowen.) **219 F.3d 281.**

774. United States v. Whitner, No. 00-3068 (W.D. Pa. 7/20/00) -

This was an appeal by the government from the district court's grant of a motion to suppress. The district court held that the search warrant was not supported by probable cause due to a lack of evidence linking criminal activity to the location to be searched. The district court also found the search warrant to be so lacking in probable cause as to render official belief in its existence entirely unreasonable. The district court therefore held that the good-faith exception did not apply and ordered the fruits of the search suppressed from evidence.

On appeal the Third Circuit held that the magistrate judge who issued the warrant had a substantial basis for concluding that there was probable cause to search the apartment in question. The Court based this conclusion on the following information contained in the affidavit which the magistrate judge reviewed: the defendant had been arrested as the result of a controlled delivery of 5.75 pounds of methamphetamine; the defendant had told officers he was associated with a known drug dealer and was deceptive in his answers about the location of his residence; and there was evidence that the apartment to be searched was rented and occupied by the defendant. REVERSED and REMANDED. (Greenberg and Weis, C.J., Schwartz, D.J.; opinion by Greenberg.) **219 F.3d 289.**