The Zealous Advocate

Newsletter for the Defense
Fall 2007

The Defender's Message

This year we were pleased to be able to provide our District's panel attorneys with three seminars, an office website, and our newsletter. Our newest seminar was the Federal Appellate Practice Seminar, which was held at Poyner & Spruill's Raleigh office, on Friday, July 20, 2007. We would like to thank all those who attended as well as the speakers who contributed to this program. It was such a success that we plan to offer it again in the future.

Our next seminar is our annual Fall Federal Criminal Practice Seminar, which will once again be held at the Blockade Runner in Wrightsville Beach the second week in October. Along with our usual lineup of professionalism topics and case law updates, we will also cover trial techniques, client counseling, plea negotiations, and other issues. Also in the works is our annual Spring Seminar. I encourage you all to take advantage of these programs and hope they aid you in your federal practice. Remember, your feedback is always appreciated, so if you have input about any of our seminars, please contact our panel administrator, Donna Stiles.

In an effort to provide information about our office in an easily-accessible format, we recently launched our office website, which we hope you will visit and use as a resource.

This newsletter addresses some of the more recent topics we face in federal criminal court these days such as the effect of the Adam Walsh Act on clients, recent amendments to the Sentencing Guidelines, and the sentencing problems clients face when prosecuted both by the state and federal government. Of course, we have also included case law updates and local news.

I join the editors in hoping that this newsletter proves helpful to you, and I look forward to seeing you in October.

Thomas P. McNamara
Federal Public Defender

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Office of the Federal Public Defender, Eastern District of North Carolina
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Seminar BOLO

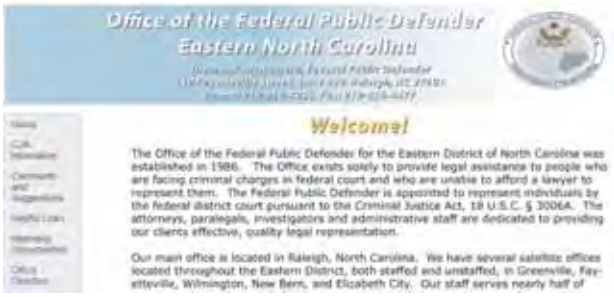
Be on the lookout for our annual Fall Federal Criminal Practice Seminar, which will be held in Wrightsville Beach at the Blockade Runner on Thursday and Friday, October 11 and 12, 2007. The deadline for registration for our Fall Seminar has already passed, and our capacity limit for registration has been reached. If you are interested in attending, please contact our Panel Administrator, Donna Stiles at donna_stiles@fd.org for information about being placed on our waiting list to attend the seminar. For information on any of our annual seminars, please see our website at http://nce.fd.org or contact Donna Stiles at donna_stiles@fd.org.

Panel Attorney Reminder

As I mentioned in an email dated September 25, 2007, those panel attorneys whose vouchers go over the statutory maximum must remember to write more detailed letters or memoranda explaining why the representation was extended and/or complex and that additional payment is necessary to provide fair compensation. I encourage you to use CJA form 26 to justify these claims. To download this form from the web, please go to: http://www.uscourts.gov/forms/CJA/CJA26.pdf .

EDNC Website

Check out our new website, dedicated to the Federal Defender for the Eastern District of North Carolina. The website is loaded with helpful information for panel attorneys, clients, families and friends of our clients, and other individuals seeking information about our office. The website contains our office directory (with addresses and telephone numbers), staff directory, CJA information, publications, seminar information, internship opportunities, and important links. The website may be accessed by visiting http://nce.fd.org. If you have comments or questions, or suggested topics to be included on our website, please contact Laura Wasco at laura_wasco@fd.org or Charles Washington at charles_washington@fd.org.



PRACTICE TIPS

Motions to Continue:

Please note that in the EDNC, if you file a motion to continue a hearing and have not heard back from the court, you may not assume that it was granted. In the event that the court does not rule on your motion, err on the side of the motion not being granted and make sure to go to court at the scheduled time.

Reminder to Check Judges' Preferences:

The judges' preferences section of the EDNC court website is frequently updated. Each judge has a separate page, therefore, please remember to check these before submitting motions or appearing in court.

Don't worry. Being eaten by a crocodile is like going to sleep. In a giant blender. - Homer Simpson

U.S.S.G. Amendments

On May 1, 2007, the United States Sentencing Commission sent proposed amendments to the Federal Sentencing Guidelines to Congress. Barring Congress' disapproval of the amendments during its review period, the amendments will take effect on November 1, 2007.

The proposed amendments involve these twelve areas:

- Reductions in term of imprisonment based on Bureau of Prisons motion
- Transportation
- Terrorism
- Sex Offenses
- Corrections to §§2B1.1 (Larceny, Embezzlement, and Other Forms of Theft...) and 2L1.1 (Smuggling, Transporting, or Harboring an Unlawful Alien)
- Miscellaneous Laws
- Repromulgation of Emergency Amendment on Intellectual Property
- Drugs
- Cocaine Base Sentencing
- Technical Amendments
- Repromulgation of Emergency Amendment on Pretexting
- Criminal History

The following are a few brief, but important highlights of these amendments to keep in mind in your criminal practice:

Reductions in term of imprisonment based on Bureau of Prisons motion–the amendment is intended to promote extraordinary and compelling reasons for sentence reduction. Specifically, the section provides four examples of circumstances where a defendant would not be a danger to the safety of any other person or the community and the extraordinary and compelling reasons that warrant the reduction consistent with the policy statement of 18 U.S.C. §3582(c)(1)(A).

Sex Offenses–the amendment was created in response to the Adam Walsh Child Protection and Safety Act of 2006 (the "Adam Walsh Act"), Pub. L. 109-248. The amendment creates new sexual offenses, specifically the Guidelines §§2A3.5 (Criminal Sexual Abuse and Offenses Related to Registration as a Sex Offender) and 2A3.6 (Aggravated Offenses Relating to Registration as a Sex Offender). Further, the amendment enhances penalties for existing sexual offenses. For example, there is an a new mandatory minimum term of imprisonment of 30 years for offenses related to the aggravated sexual abuse of a child under 12 years old, or a child between 12 and 16, if force, threat, or other means was used.

Drugs–this amendment was drafted in response to the new offenses that were created by the USA PATRIOT Improvement and Reauthorization Act of 2005 ("PATRIOT Reauthorization Act"), Pub. L. 109-177, and the Adam Walsh Act. To illustrate: (1) with regard to the PATRIOT Reauthorization Act, the amendment addresses section 731 of the Act, which created a new offense at 21 U.S.C. § 865 (smuggling of methamphetamine); and (2) with regard to the Adam Walsh Act, the amendment modifies §2D1.1 to address the new offense in 21 U.S.C. §841(g) with respect to the Internet sale of date rape drugs such as GHB, ketamine, flunitrazipam, or GBL.

Cocaine Base Sentencing–this amendment was drafted in an attempt to modify the crack-powder disparity. As a result, the amendment essentially reduces the crack penalties by two points. In the United States Sentencing Commission's press release, the Commission acknowledges that the rationale for the two point reduction is that it made the crack guidelines two points higher than necessary to reach the mandatory minimum level for a first time offender with no other adjustments. See http://www.ussc.gov/PRESS/rel0407.htm.

Criminal History–this amendment addresses the counting of multiple prior sentences and the use of minor offenses in determining a defendant's criminal history score. As to prior sentences, §4A1.2(a)(2) is modified: (a) prior sentences are counted separately if sentences were imposed for offenses separated by intervening arrest, (b) if there is no intervening arrest, prior sentences are counted separately unless the sentence resulted from an offense contained in the same charging document or the sentences were imposed on the same day. As to minor offenses, fish and game violations and local ordinance violations were moved to the "never counts" category under §4A1.2(c)(2); offenses under §4A1.2(c)(1) count only if the term of imprisonment was at least thirty days or the term of probation was "more than" one year (versus at least one year); and there is latitude given in application note 12 of subsection (c) to determine whether an unlisted offense is similar to an offense listed in subdivision (c)(1) or (c)(2).

One final note....remember that you can use these proposed amendments in your current arguments to sentencing courts as a basis for a lower sentence now.

You can find the United States Sentencing Commission's Amendments to the Sentencing Guidelines, as well as its report to Congress on the cocaine sentencing policy on its website, at http://www.ussc.gov/.

Civil Commitment Under the Adam Walsh Act: What You Need to Know

In July, 2006, President Bush signed the Adam Walsh Child Protection and Safety Act into law. A major component of the Act, codified at 18 U.S.C. § 4248, authorizes the federal government to seek indefinite commitment for those who it deems to be "sexually dangerous persons." For a law mandating indefinite-possibly lifetime–detention, the Act is surprisingly minimalist. It fails to define key terms such as "sexually violent conduct" and "child molestation" as well as the mental "abnormalities" that might subject one to commitment. Accordingly, the courts will have to fill in the glaring lacunae left by Congress–as well as rule on the Constitutionality of the Act in general.

To date, two district courts have weighed in on the Constitutionality of § 4248. A Massachusetts district court found this law constitutional while Judge Britt, sitting in the Eastern District of North Carolina, held that the federal government does not have the power to enact the law and further, § 4248 imposes an unconstitutional burden of proof as to the factual determination. With a split at the district court level, it is impossible to forecast how the appellate process will unfold.

Our role as defense attorneys obligates us to take action now to protect our clients from potential negative repercussions resulting from the Act–repercussions that may take place years in the future. We provide the following tips to alert you how best to understand the Act and how it might affect your clients.

First, the Act applies to anyone in the custody of the Bureau of Prisons. Unlike state sexual predator commitment schemes, indefinite commitment does not require prior convictions involving sexually violent conduct at either the state or the federal level. Our office currently represents clients whose underlying convictions-narcotics trafficking, felon-in-possession, and making a

[We] find it intolerable that one constitutional right should have to be surrendered in order to assert another - United States Supreme Court, Simmons, et al v. United States, 390 U.S. 377, 394 (1968)

false statement–have nothing to do with sex offenses. If the government has your client, it has the unfettered discretion to subject your client to sexually dangerous person commitment proceedings. Period. You must, therefore, consider the implications of the Act for every client that you have–not simply clients with a criminal history involving sexual conduct.

Second, the government initiates commitment proceedings days before individuals are due to be released. These release dates often occur years after your representation. You will not, therefore, be able to protect your client once commitment proceedings have been initiated. Indeed, you will not even be aware that commitment proceedings have been initiated because the Act creates a commitment process legally distinct from the conviction resulting in federal custody.

Warn clients and tell them not to discuss any past sexual misconduct. Advise each client that if anyone, at any time, asks about sexual conduct, remain silent and ask for an attorney. Remember, the government does not need proof of a criminal conviction or even criminal charges to commit an individual. Furthermore, the government intends to use information obtained from individuals in sex offender treatment programs. Accordingly, advise your clients to remain silent on all issues related to sexual misconduct–even if Bureau of Prisons Officials or Probation Officers promise to keep the information confidential.

Do not let your clients sign any blanket release forms that allow the government (including the probation office) to access any prior treatment records. That information can and will be used to determine whether to release your client or subject him to commitment proceedings.

Review Presentence Reports (PSR) with the Act in mind. Mini-factual descriptions of prior convictions that may have no bearing on your case could end up having a devastating effect on future commitment proceedings. Currently, we have clients subject to commitment right now based on information in PSRs that their trial attorneys had no idea would ever become relevant.

Finally, advise your clients that, because commitment under the Act is nominally for "treatment," the government does not have the authority to "plea bargain" away commitment proceedings. Your clients must be very wary of any government attempts to "make a deal" that involves a promise of forgoing commitment proceedings.

One newsletter article cannot, of course, provide you with all of the information that you may need in the face of this new and complicated statutory scheme. Please feel free to contact Jane Pearce at jane_pearce@fd.org or Eric Brignac at eric_brignac@fd.org in the Federal Public Defender's Office if you have any questions concerning the Adam Walsh Act.

Many thanks to Eric Brignac, Research and Writing Attorney, and Jane Pearce, Assistant Federal Public Defender, for this informative article.

Victory Column: Rule 29 Acquittal

Early this summer, our office obtained a great result in a challenging case. This case involved charges of interference with a flight crew (49 U.S.C. § 46504) stemming from allegations that our client and her co-defendant had behaved inappropriately and disrupted the duties of the flight attendants. As the trial team began to review discovery, it became apparent that the government only had evidence implicating the co-defendant. There was no evidence of our client having engaged in conduct that would violate the statute. To complicate matters, the allegations soon attracted the attention of tabloid media, and the office began receiving requests for interviews and statements.

The trial team began to formulate their trial strategy. Rather than defend the case by cross-examining witnesses about what happened, their strategy was aptly termed, "flying under the radar." Their goal was to demonstrate, via the lack of evidence, that the client should never have been charged, let alone hailed into court for the events that transpired on the plane. Essentially, they wanted the jury and judge to wonder why the client was even in the courtroom.

One of the main obstacles the team confronted was the client's relationship with her co-defendant and the court's refusal to sever their cases. Although they unequivocally told the client that the trial team would be making the strategic decisions on how to try the case, their strategy made it easy to avoid finger-pointing, as they could rely on the lack of evidence to exculpate the client. At trial, the opening statement suggested to the jury that, although two defendants were being tried on the similar charges, they were in fact trying two unique trials and should do so with blinders on with respect to each defendant.

In accordance with the flying below the radar theme, the team often refrained from cross-examining or questioning witnesses. Although the temptation is always to question witnesses, if opposing counsel does not elicit any incriminating information against your client, the prudent route is to forego questioning that may open the door to bad information. Here, the trial team only asked questions when issues about the client were raised on cross by co-defendant's counsel, whose theory of the case differed from the team's. Such instances were also followed-up with renewed motions to sever, which reminded the judge about the conflicts in this case.

When confronted with a case like this make sure to avoid making statements to the media. Most courts have rules proscribing parties from doing so, including our district. See Local R. 61.1. Moreover, make sure you assemble a good defense team as a lawyer can always use a second pair of eyes. Team members talked with nearly every passenger on the plane, enabling the trial team to know ahead of time who saw what and whether they would be a witness at trial. The team further was able to inspect a similar model plane, which helped to reconstruct the alleged crime scene.

Another lesson learned in this case is that defense attorneys often have to dig for evidence as the government may not have the inclination or time to provide the discovery needed. Although the team immediately sent a letter demanding that the government preserve all recorded communications, it was the team's investigation that led to their uncovering communications between the pilot and the airline's ground operations regarding what was happening in the passenger cabin. These were exculpatory for the client. Because they continued to dig, they obtained these communications directly from the airline. In short, you cannot depend on the government to obtain these things for you, particularly when it is not evidence traditionally disclosed during discovery. The team's combined effort led to an acquittal at the close of the prosecutor's case.

Many thanks to trial team members Chris Locascio, Devon Donahue, Ken Hall, Melanie Fisher, Diana Pereira, Paddi Rollins, and Charles Washington for contributing these helpful tips. If you have a success story to share or know of someone who does, please email your submissions to vidalia_patterson@fd.org or laura_wasco@fd.org. Your submission should include a brief description of the victory and identify any tips or lessons learned.

You know what the trouble with real life is? There is no danger music. – Jim Carrey

Website Recommendations

Can't get enough public defense blog info? Then, click on the various links at "Public Defender Blog," home of the public defender blog guide: http://pdstuff.apublicdefender.com/ .

Described as "the author's online supplement" to the publication, Search and Seizure, http://www.fourthamendment.com/blog/ is an interesting blog discussing the latest Fourth Amendment issues from around the country.

For anyone interested in doing pro bono work on death penalty cases, be sure to check out http://fairtrial.org/program.html .

The Department of Justice has recently made available its manual on prosecuting computer crimes, which can be downloaded as a .pdf at: http://www.cybercrime.gov/ccmanual/index.html.

Looking for drug rehab options and can't seem to find anything? Check out this website: http://www.usnodrugs.com/. The website has options for every state, separated into various treatment plans for alcohol and drug addictions.

SPOTLIGHT ON THE...
Fourth Circuit Update

United States v. Stephens, 482 F.3d 669 (4th Cir. 2007)(J. Widener)(W.D. Va) [Sufficiency of Evidence] Defendant pled guilty to being a felon in possession, but went to trial on charges of conspiracy to distribute narcotics and possession of a firearm in connection with a drug trafficking offense. Stephens was arrested after firing gunshots, and thereafter told police officers that he was involved in drug activities and possessed the gun to protect himself from a dealer whom he owed money. At trial, he testified that his statements to ATF were lies and moved for acquittal based on insufficiency of the evidence, which the district court denied. The Fourth Circuit reversed after finding there was insufficient evidence beyond Stephens's initial statement to police to link him to a drug conspiracy and held that "a criminal defendant's conviction cannot rest entirely on an uncorroborated extrajudicial confession."

United States v. Pyles, 482 F.3d 282 (4th Cir. 2007) (J. Williams) (N.D.W.V.) [Sentencing; downward variance] Defendant was a drug user who obtained drugs for others, keeping a portion for himself as payment. After several controlled buys, defendant was indicted on charges of conspiracy to distribute more than 5 grams of crack and delivery charges. However, at sentencing, he was responsible for more than 26 grams as relevant conduct. Before sentencing, the district court allowed him to get drug treatment. His counselor reported his great success in the program which prompted the court to give him a variance sentence of just probation supported by a 22-page order detailing the sentence's fitting the 3553(a) factors. Finding the sentence too lenient, the Fourth Circuit reversed stating that the district court viewed Pyles' rehabilitation as the decisive factor, thereby failing to properly consider the factors that call for incarceration including the significant amount of crack attributed to him.

United States v. Blatstein, 482 F.3d 725 (4th Cir. 2007) (J. King) (E.D. Va.) [Search warrant; sentencing; downward variance; Rule 32 notice] Blatstein was a podiatrist who created a scheme to bill insurance providers for surgical procedures taking place in a facility that did not exist. In a motion to suppress, Blatstein claimed that a search warrant obtained by federal agents failed to include a Virginia statutory provision that would show he was legally permitted to perform surgery in his office. The motion was denied. At sentencing, both parties agreed that 24 months was a reasonable sentence. However, the district judge, sua sponte, imposed a 12-month variance sentence. Holding the search warrant valid, the Fourth Circuit

found defendant's billing practices, and not the locale of the surgeries, to support probable cause. As for sentencing, the Court reversed, finding that even on plain error review, the district court's sentencing was plainly erroneous as the court failed to provide notice of the variance.

United States v. Banks, 482 F.3d 733 (4th Cir. 2007) (J. Duncan) (D. Md.) [Fourth Amendment Search; Confrontation Clause; Abuse of discretion] Defendant was involved in a scheme in which prescriptions for controlled medications were written using the names of legitimate physicians and under the guise of false medical clinics. After a pharmacist became suspicious and contacted the police, defendant and his cohort were arrested in the pharmacy parking lot. When asked whether he wanted to take anything from his car to the police station, Defendant asked that his two bags be brought. During an inventory search of the bags, the police uncovered evidence of the scheme. Thereafter, a search warrant was obtained and one of the fake clinics was investigated during which fingerprints were collected on fingerprint cards taken by an evidence technician. Defendant tried to suppress the evidence collected from his bags, fire his public defender whom he claimed "worked for the government," and claimed that the district court had not jurisdiction over his case and should have moved to evaluate his competency. On appeal, the Fourth Circuit found that the although the inventory search of the bags was not in accordance with internal police department policy, the search generally conformed with the protocol required by the Fourth Amendment. Moreover, to the extent the admission of the evidence technician's notes on the fingerprint card, alleged to be hearsay and in violation of the Confrontation Clause, was erroneous, such error was harmless. Finally, the district court did not abuse its discretion in failing to order a competency hearing sua sponte where the defendant's behavior was simply a disruptive trial tactic.

United States v. Mathias, 482 F.3d 743 (4th Cir. 2007)(J. Wilkinson) (E.D.N.C.) [Escape; Violent felony; ACCA] Defendant, after committing armed robbery of a check-cashing establishment, pled guilty to being a felon in possession of a firearm. At sentencing, the trial judge determined that two prior burglary convictions and a prior conviction for felony escape constituted the requisite three violent felonies for an armed career criminal enhancement. The escape had consisted of Mathias having walked away from a work-release program. The Fourth Circuit affirmed, finding that under the categorical approach, the escape statute involved conduct which presented a serious potential risk of physical injury to another, even though violence is not an element of the offense. Every escape is a "volatile enterprise," and there is always the chance that the escape will be interrupted by a citizen or prison employee.

United States v. Hayes, 482 F.3d 749 (4th Cir. 2007) (J. King) (W.D. Va.) [Misdemeanor Crime of Domestic Violence (MCDV); 18 U.S.C. § 921(a)(33)] Hayes had a prior conviction for misdemeanor battery for an incident involving his then wife. After responding to a 911 domestic dispute call, police searched Hayes' home and arrested him for possessing a firearm after having been convicted of a MCDV. Hayes unsuccessfully sought dismissal of his indictment claiming that his prior battery conviction did not qualify as a MCDV under federal law. The Fourth Circuit (in a 2-1 opinion) agreed, noting that the battery conviction did not contain an element regarding the relationship of the victim to the defendant. The court explained that the statutory definition of MCDV "plainly require[s] that a predicate offense have as an element one of the specific domestic relationships between the offender and the victim" and that if there is any ambiguity, the rule of lenity requires the same result.

United States v. Nelson, 484 F.3d 257 (4th Cir. 2007) (J. Hamilton) (E.D. Va.) [924(c); Drug felony offense] In 1998, Defendant was charged with possession of crack with intent to distribute (841(a)(1)) and carrying a firearm during and in relation to a drug trafficking offense, (924(c)). He pled guilty and served sixty month in prison. After his release, he was caught urinating in public, was frisked, and crack cocaine was

You need only reflect that one of the best ways to get yourself a reputation as a dangerous citizen these days is to go about repeating the very phrases which our founding fathers used in the struggle for independence.
– Charles Austin Beard

found on his person. He was charged with and pled guilty to two counts of possession of cocaine with intent to distribute. The district court determined that a prior 924 (c) conviction constituted a felony drug offense and applied the 10-year mandatory minimum sentence pursuant to 841(b)(1)(B). The Fourth Circuit affirmed (2-1), holding that a prior conviction for carrying a firearm during and in relation to a drug trafficking crime is a prior conviction for a drug felony offense.

United States v. Wilson, 484 F.3d 267 (4th Cir. 2007) (J. Williams) (D. Md.) [Evidence; Jury instructions; Sufficiency of evidence] –Wilson, Murray, and Powell appealed their convictions for conspiracy to distribute 5 or more kilograms of cocaine and 50 grams or more of cocaine base. The codefendants raised five arguments on appeal. First, the court ruled that the district court erred in failing to exclude the officer's testimony, but found the net effect to be harmless error, not affecting the appellants' substantial rights, because the majority of the expert testimony was properly admitted, which alone was sufficient to show the appellants' guilt as to the conspiracy charges and any prejudice from the improper testimony was outweighed by properly admitted expert testimony and corroborative testimony of coconspirators. Second, the court concluded there were no errors committed by the district court's (a) instructing the jury that it was the only jury that would ever decide the question of whether the government proved its case, and (b) by not having an instruction that required the jury to find the existence of unlawful agreement before determining who was a part of the agreement, and (c) instructing the jury with examples of conspiracies that closely resembled the facts of the case. Third, the court ruled that the government affidavits and other filings were a sufficient showing in support of the warrants, upholding the district court's suppression ruling. The final two arguments related to the lack of sufficiency of evidence, which the court rejected finding the evidence sufficient to support the convictions.

United States v. McClung, 483 F.3d 273 (4th Cir. 2007) (J. Williams) (S.D.W.V.) [Sentencing; Rule 32 Notice; Upward Variance] –McClung appealed his sentence imposed by the court after his plea of guilty to extortion and filing a false tax return. Appellant argued that the district court erred by failing to provide a notice of its intent to vary upwardly from the guideline range, thereby violating his right to allocution, and that the sentence imposed was unreasonable. As to the first argument, the court found that the appellant's substantial rights were not affected and that the error did not affect the outcome of his sentencing proceedings, as he was given an opportunity to allocute both in his presentence memorandum and at his sentencing hearing, and that he was permitted to present argument regarding all of the relevant sentencing factors under §3553(a). As to the second argument, the court disagreed that the sentence imposed was unreasonable, concluding that the district court sufficiently articulated its reasons justifying the variance sentence imposed.

United States v. McNeill, 484 F.3d 301 (4th Cir. 2007) (J. Niemeyer) (D. Md.) [Interlocutory Appeals; Fourth Am.] –McNeill was indicted for two bank robberies based on statements he made in state custody. He filed a motion to suppress the statements, arguing they were given following an illegal arrest by police. The district court granted the motion whereupon the government filed an interlocutory appeal under 18 U.S.C. §3731 and the defendant filed a cross appeal challenging the district court order granting the government's motion for extension of time. The court denied McNeill's cross appeal, ruling that the district court acted within its discretion to grant an extension of time and rejected his other jurisdictional arguments. Although the court harshly criticized the government's failure to timely file the certification required for the interlocutory appeal under §3731, the court imposed no penalty for the government continued failure to file the certification despite "repeated warnings [] [since] 2004." The court went on to reverse the district court's grant of the defendant's motion to suppress, ruling that the facts were sufficient for the officer to conclude that the defendant was committing the crime of harassment in his presence and that the officer had probable cause to believe he witnessed the ongoing misdemeanor offense of harassment, therefore the arrest did not violate the Fourth Amendment. Thus, the court found

McNeill's statements were not made as a result of an illegal arrest.

United States v. Dugger, 485 F.3d 236 (4th Cir. 2007) (J. Gregory) (S.D.W.V.) [Sentencing; Acceptance of Responsibility] –Dugger was charged with distribution of crack cocaine due to a controlled buy that was made in Huntington, West Virginia. While awaiting trial, he was housed in Carter County Detention Center in Kentucky, where he became involved in a scheme where he dealt marijuana and Xanax with inmates and guards at the facility. Ultimately, the scheme was uncovered, and Dugger admitted his role in the scheme, but at the time of the instant case there was no indication that he was charged with the conduct related to the scheme. At sentencing, Dugger was denied acceptance of responsibility because of his participation in the scheme and assessed a two-level enhancement under §2D1.1(b)(3) because of distribution of a controlled substance in a prison; as a result, Dugger appealed his 121 month sentence arguing that the district court erred by refusing to allow a reduction for acceptance of responsibility under §3E1.1 of the Guidelines and by increasing his offense level under §2D1.1(b)(3) of the Guidelines. As to the appellant's first argument, the court held that Dugger's actions of continued drug dealing after his indictment and incarceration pending trial demonstrated that he did not truly accept responsibility for his offense, and that he was "merely going through the motions of contrition," therefore the district court did not err in denying the reduction for acceptance of responsibility. As to the appellant's second argument, the court held that the sentencing court misapplied the two level enhancement under §2D1.1(b)(3) because Dugger's sales of drugs (Xanax and marijuana) during his incarceration while awaiting trial at the Carter County Detention Center did not qualify as relevant conduct to be included with the charged offense under §1B1.3 and because the object of his charged offense was to sell crack in Huntington, West Virginia, not prison.

United States v. Shortt, 485 F.3d 243 (4th Cir. 2007) (J. Niemeyer) (Dist..S.C.) [Sentencing; Upward Variance] –Shortt was indicted for a 7 year conspiracy to dispense anabolic steroids and human growth hormone not for legitimate medical purposes and outside the usual course of professional practice. He appealed the variance sentence imposed of 12 months and 1 day as unreasonable, arguing that the factors the district court considered were already accounted for in the sentence recommended by the Guidelines or should not have been considered. The court ruled that the district court did not abuse its discretion in imposing a variance sentence, as the Guideline sentence failed to reflect the severity of Shortt's offense due to: the duration and scope of the offense, the lack of the appellant's contrition, the extent that the appellant went to conceal his scheme, the appellant's role in undermining professional sports, and the Guideline's failure to account for illegal distribution of human growth hormone and some form of steroids involved in the case.

United States v. Baucom, et al., 486 F.3d 822 (4th Cir. 2007) (J. Wilkins) (W.D.N.C.) [Sixth Am.; Sentencing; Acceptance of Responsibility] –Baucom and Davis appealed their convictions for conspiracy to defraud the United States and willful failure to file tax returns. The appellants maintained their Sixth Amendment right to counsel was violated by the district court's refusal to grant further continuances to allow them to obtain counsel. The government challenged the variance sentences imposed, arguing that the court improperly calculated the advisory guideline range and that the sentences imposed were unreasonable. As to appellants' argument, the court ruled that appellants were given a fair opportunity to obtain counsel, noting the near 15 months that elapsed between the initial indictment and the date of trial, thus affirming the convictions. Next, the court addressed the government's three arguments related to unreasonable sentences and improperly calculated Guideline ranges. First, the government argued that the district court erred by excluding the state tax amounts from appellants' relevant conduct. The court found that the appellants' failed to file state tax returns as part of the course of conduct for which they were convicted, therefore the district court erred in refusing to include the state tax amount when calculat-

You might have seen a housefly, maybe even a superfly, but I bet you ain't never seen a donkey fly! – Donkey, from the Motion Picture, Shrek

ing the advisory Guideline range. Second, the government argued the district court erred in granting appellants a 2-level reduction for acceptance of responsibility. The court ruled that the district court erred in granting the appellants a reduction for acceptance of responsibility, finding that the appellants went to trial only for purposes of preserving the constitutional challenge to the validity of the tax code, but rather they challenged factual guilt by contesting the element of willfulness. Finally, the government argued that the sentences were unreasonable. The court noted that it had ruled that the district court improperly calculated the advisory Guidelines, that the district court improperly discounted deterrence as a consideration in imposing the sentences, and that the district court sentences failed to reflect the seriousness of the offenses. Thus, the sentences were vacated and remanded for resentencing.

United States v. Midgett, 488 F.3d 288 (4th Cir. 2007) (J. King) (W.D.N.C.) [Sentencing; Plea agreements; Evidence; Double Jeopardy; Etc.] –In October, 1999, Midgett and his girlfriend, Russell, drove onto a work site in Charlotte, NC. Midgette got out of his vehicle and approached Shaw, a construction worker who was eating lunch on the work site. Midgette doused Shaw with gasoline from a fast-food drink cup and demanded that he hand over his wallet. Shaw did so, but Midgette proceeded to ignite the gasoline, setting Shaw on fire. Midgette and Russell fled the scene, and decided to rob a bank. They stopped at a gas station, filled an empty Dr. Pepper bottle with gasoline, and drove to a BB&T bank in Indian Trail, NC. Midgette entered the bank, demanded money from the teller, and planned to douse the teller with the gasoline and ignite it if the demand was refused. The couple retrieved $3000 from the robbery. Midgette was subsequently convicted and appealed his convictions of malicious damage to property used in interstate commerce resulting in personal injury (count I), bank robbery by force or violence (count II), and putting in jeopardy the life of another by use of a dangerous weapon or device in committing a bank robbery by force or violence (count III). He also appeals his sentences of 360 months on count I and concurrent life sentences on counts II and III. On appeal, Midgette alleges numerous errors. First, the court found no error in the district court's declining the appellant's offer to plead guilty to count I, stating that in absence of a plea agreement by the government, the refusal to accept a plea to a lesser charge is not an abuse of discretion. Second, the court found no error in appellant's denial not to be placed in leg restraints during trial, finding the district court reasonably balanced the competing interests of courtroom safety with prejudice to the appellant by concealing his shackles. Next, the court rejected appellant's argument that the court erred in declining to order he receive injections of Nubain, finding that his condition was not a painful one that required the strong narcotic painkiller and that the evidence demonstrated that the appellant could not receive and did not receive this medication despite his claim that he had in the recent past, therefore there was no basis upon which to grant his motion. Fourth, the court found no error in limiting appellant's use of letters by Russell to impeach only and in excluding one of those letters from evidence. The court determined the letters were hearsay, thus inadmissible to prove the matters that they asserted. Further, the court found the excluded letter was proved to be an unreliable document therefore the district court committed no abuse of discretion in excluding it and concluding its potential to create unfair prejudice or to mislead the jury substantially outweighed its probative value. Fifth, the court rejected appellant's argument that his lawyer complete his direct examination and Russell's cross examination within limited time periods improperly interrupted the flow of testimony and signaled to the jury that the testimony was unimportant, finding the district court did not abuse its discretion in controlling the mode of interrogation of the witnesses. Sixth, the court found no error in appellant's assertion that the district court erred in denying his motion for judgment of acquittal on count III finding the trial evidence more than adequate for the jury to make the requisite findings. Finally, the appellant alleged that the district court committed errors at sentencing, and the court concluded that because count II was a lesser included offense of count III, and as it is a violation of the double jeopardy clause to be subject to separate sentences, the court vacated the sentence on count II, remanding the

the case for entry of an amended judgment.

United States v. Allen, 491 F.3d 178 (4th Cir. 2007)(Gregory)(D.Md.) [Sufficiency of the Evidence; Mens Rea; Omitted Jury Instruction; Right to Confrontation (Burton); Severance; Sixth Amendment Right to Compulsory Process; Government Misconduct with a Witness; Ineffective Assistance of Counsel; Attorney Work Product; Sentencing and Ineffective Assistance of Counsel] Defendants Allen and Reinhardt were found guilty on multiple counts of wire fraud. Reinhardt's company, Tech Com, acting as a purported equipment vendor, arranged through financing companies, equipment-lease financing for customers, but never delivered any equipment. The Fourth Circuit rejected the defendants' claim that, as purported unknowing participants, there was insufficient evidence to convict them of wire fraud. The court also rejected the defendants' claim that the requisite mens rea to commit fraud was lacking due to the defendants' purported belief that the leases would be paid back. The court held that a mistakenly omitted clause from a jury instruction did not misstate the controlling law or mislead the jury. The court held that Allen's right to confrontation under Burton was not violated by Reinhardt's production of corporate documents. The court rejected Allen's claim that the district court's denial of his severance motion constituted reversible error. The court rejected Reinhardt's claims that the court failed to adequately inquire into a defense witness's refusal to testify based on the privilege against self incrimination, that the court should remand the case so that Reinhardt may develop evidence showing Government misconduct with the witness, and that Reinhardt's counsel's acceptance of the witness's invocation of the privilege against self incrimination constituted ineffective assistance of counsel. The court rejected the defendant's claim that the district court's disclosure to the Government of a document containing the defense's intended cross-examination violated their Sixth Amendment right to effective counsel and intruded on attorney work product. The court rejected Reinhardt's claims that the district court erred by not granting a downward departure because of his sons's affliction with rare genetic disorders, erred in applying a one level enhancement for identity theft under § 2F1.1(b)(5)(C)(I), and improperly "stacked" two counts consecutively to achieve a sentence within the Guidelines range. Finally, the court rejected Reinhardt's claim that his attorney provided ineffective counsel by submitting too many claims, arguing every conceivable point, and introducing evidence the judge called "flimflam".

United States v. Johnson, 492 F.3d 254 (4th Cir. 2007)(Michael)(E.D. Va.)
[Sentencing; Physical Restraint Enhancement] Defendant pled guilty to two counts of aggravated sexual abuse (U.S.C. § 2241(a)(1)). Defendant raped the victim while another man held her down. The men then switched places and the victim was raped again. At sentencing, the Defendant received a four-level enhancement because his offense involved forcible rape (U.S.S.G. § 2A3.1(b)(1)) and a two-level enhancement because the victim was physically restrained (U.S.S.G. § 3A1.3). On appeal of his sentence, the Defendant argued that physical restraint was taken into account by the four-level enhancement imposed for forcible rape. The Fourth Circuit disagreed. The court held that, while force is an element of aggravated sexual abuse, "forcible rape may be committed without resort to physical restraint, as defined in the guidelines."

United States v. Poindexter, 492 F.3d 263 (4th Cir. 2007)(Hamilton)(D. Md.)
[Ineffective Assistance of Counsel; Waiver of the Right to Appeal] Defendant pled guilty to three counts of distributing heroin. In the plea agreement the defendant agreed not to appeal his sentence. However, after being sentenced, the defendant instructed his attorney to file an appeal. The defendant's attorney failed to file a timely notice of appeal. The defendant then filed a motion pursuant to § 2255 in which he claimed that he was denied effective assistance of counsel. The district court held that the defendant's ineffective assistance of counsel claim lacked merit because he had waived his right to appeal in the plea agreement. The Fourth Circuit reversed, holding that "an attorney is required to file a notice of appeal when unequivocally instructed to

Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. - Justice Jackson, dissenting, Brinegar v. United States, 338 U.S. 160, 180 (1949)

do so by his client, even if doing so would be contrary to the plea agreement and harmful to the client's interests."

United States v. Gray, 491 F.3d 138 (4th Cir. 2007)(Wilkinson)(S.D.W.V.)[Fourth Amendment Standing; Review of Presentence Report and Sentencing Hearing to Confirm Lower Courts Ruling; Fruit of an Illegal Search] Officers entered defendant Gray's home and found multiple pieces of evidence indicating a conspiracy to distribute drugs. Defendants Gray and Askew were in the home at the time of the search. The district court found that this initial search was illegal because Gray had not provided consent. Askew contends that he has Fourth Amendment standing to contest the physical evidence found in Gray's home. The court also held that nothing prevents it from reviewing Askew's presentence report and sentencing hearing for facts that confirm the district court's suppression order. Gray contends that the testimony provided by Askew and two other witnesses who arrived while the officers were waiting outside Gray's home after the illegal search is the fruit of an illegal search. The court disagreed, holding that because the testimony was given voluntarily its causal connection to the illegal search was too attenuated.

United States v. Sweets, --- F.3d ---, 2007 WL 1893590(4th Cir. 2007)(Niemeyer)(D.Md.) [Fifth Amendment right Against Self-incrimination] Police officers went to the defendant's house to determine the whereabouts of the defendant's co-conspirator Long. The police officers threatened to arrest everyone present (the defendant, his girlfriend, and his girlfriend's nephew) for obstruction of justice if the defendant did not lead the police to Long. The defendant cooperated and the officers arrested Long. Subsequently, Long's testimony and the evidence recovered during Long's arrest were used to convict the defendant. The defendant claimed that by coercing him to disclose Long's location, the police had compelled him to be a witness against himself. The Fourth Circuit disagreed. The court held that the defendant's "disclosure of Long's location, even if testimonial in nature, was not incriminating." The court explained that the latent testimony in the defendant's production of Long was (1) that he knew Long; and/or (2) that he knew Long's location. Neither admission is incriminating.

United States v. Washington, --- F.3d ---, 2007 WL 2378024 (4th Cir. 2007)(Niemeyer)(D.Md.) [Sixth Amendment Confrontation Clause] The defendant was convicted of driving under the influence and unsafe operation of a vehicle. A sample of blood was taken from the defendant on the night of his arrest and tested at Dr. Levine's lab. Pursuant to the test results, and over the defendant's objection, Dr. Levine testified that the defendant's unsafe driving on the night of his arrest was the result of alcohol and PCP. The defendant contends that the data Dr. Levine relied on when testifying amounted to testimonial hearsay statements of the lab technicians who actually ran the blood tests. The Fourth Circuit disagreed, holding that "the data on which Dr. Levine relied (1) did not constitute statements of the lab technicians; (2) were not hearsay statements; and (3) were not testimonial."

United States v. Harris, --- F.3d ---, 2007 WL 2378524 (4th Cir. 2007)(Traxler)(D.Md) [Witness Tampering; Improper Argument] Victim McAbier often reported drug activity that took place in her neighborhood to local law enforcement. Defendant's Harris, Royal, and Smith were convicted of several crimes, including federal witness tampering, as a result of the firebombing of McAiber's home. The defendant's contend that the government failed to prove the federal nexus required to establish witness tampering because the government had not proven that McAbier had contacted federal authorities or that she was likely to do so. The Fourth Circuit disagreed, holding that if the "information the defendant seeks to suppress actually relates to the commission or possible commission of a federal offense" the federal nexus is established. Drug trafficking is a federal offense. The court further concluded that the government need not prove that the defendants had knowledge that "the potential investigation they sought to affect would be conducted by federal officers." Finally, the defendant's claim that the government improperly

highlighted the defendant's drug dealing. The court disagreed, holding that drug dealing was an important part of the trial, despite the fact that no drug offenses were charged.

Many thanks to Eric Iverson, Fall Extern at the Office of the Federal Public Defender, for his contributions to the Fourth Circuit Update column. This update includes summaries for opinions published between the beginning of April and end of August 2007. Comprehensive summaries for cases published before this time were presented during the 2007 Spring Criminal Practice Seminar by Vidalia Patterson. If you would like to obtain an electronic copy of those summaries, please send your request to vidalia_patterson@fd.org .

U.S. Supreme Court Update

James v. United States, 550 U.S. —, 127 S.Ct. 2968 (2007)(J. Alito)–Petitioner plead guilty to felon in possession and admitted to three prior felony convictions, including a Florida conviction for attempted burglary. The government argued that the three convictions subjected petitioner to the 15 year mandatory minimum under the Armed Career Criminal Act ("ACCA"). The petitioner objected, arguing that the attempted burglary conviction was not a "violent felony" for purposes of the ACCA. The Court held that attempted burglary, as defined by Florida law, is a "violent felony" under the Armed Career Criminal Act. In making its ruling, the Court rejected petitioner's arguments that the ACCA excluded attempt offenses, that the scope of Florida's underlying burglary statute precludes treating attempted burglary as an ACCA predicate offense, and that because the Court is engaging in statutory interpretation construing attempted burglary as a violent felony raises Sixth Amendment issues under Apprendi. The Court found that Florida's definition of attempted burglary "involved conduct that presented a serious potential risk of physical injury to another" under the residual provision of the ACCA.

Brendlin v. California, 551 U.S. — , 127 S.Ct. 2400 (2007)(J. Souter)–Officers pulled over a vehicle without probable cause or reasonable suspicion to believe it was being operated unlawfully. The petitioner, a passenger in the vehicle, was subsequently arrested on charges of possession and manufacture of methamphetamine as a result of the search of the vehicle. The petitioner filed a motion to suppress, challenging the evidence obtained in the search of the vehicle and his person. The Court ruled that when police make a traffic stop, a passenger in the car, like the driver, is seized for Fourth Amendment purposes and so may challenge the stop's constitutionality. In making its ruling, the Court noted that the petitioner was seized because no reasonable person in his position when the vehicle was stopped would have felt free to terminate the encounter, and any reasonable passenger would have understood that officers were exercising control to the point that no one in the vehicle was free to leave without police permission. The Court rejected the argument that officers only intended to investigate the driver of the vehicle, and not the passenger and that the proper analysis for Fourth Amendment purposes is the objective Mendenhall test, which is the objective inquiry of a reasonable passenger.

Rita v. United States, 551 U.S.—, 127 S.Ct. 2456 (2007)(J. Breyer)–Petitioner was convicted of making two false statements under oath to a federal grand jury. The petitioner's Guideline range was 33 to 41 months, and he was sentenced to 33 months imprisonment. The petitioner appealed, arguing that the sentence was unreasonable because it did not adequately account for his history and characteristics and because it was greater than necessary to comply with the purposes of sentencing set forth in §3553(a)(2). The Fourth Circuit upheld the sentence, stating that a sentence imposed within the properly calculated Guidelines range is presumptively reasonable. The United States Supreme Court agreed, holding that a court of appeals may apply a presumption of reasonableness to a district court sentence within the Guidelines. In its ruling, the Court noted that the presumption is not binding, and does not reflect strong judicial deference of the kind that leads appeals courts to grant greater

fact-finding leeway to an expert agency than to a district judge, but rather, it reflects the nature of the Guidelines writing task that Congress set for the U.S.S.C. and how the Commission carries out the task. The presumption does not violate the Sixth Amendment because it does not require nor does it forbid a Guideline sentence. The Court found that the sentencing court properly analyzed the relevant sentencing factors in the petitioner's case, noting that the brevity or length, conciseness or detail, when to write, what to say when pronouncing a sentence is left to a district judge's professional judgment. A judge may say less when the decision rests upon a Guideline sentence, but should go further in explanation when rejecting nonfrivolous reasons for imposing a different sentence.

Claiborne v. United States, — U.S. — 127 S.Ct. 2245,(2007) –petitioner filed an appeal seeking the Court's guidance on whether a sentence below the guideline range is presumed to be reasonable. On June 4, 2007, the Supreme Court vacated as moot the decision of the Eighth Circuit Court of Appeals due to the death of the petitioner on May 30. Although the Court never reached this issue in the Claiborne case, the Court recently granted cert in another Eighth Circuit case on the same issue raised in Claiborne. In Gall v. United States, 06-7949, the petitioner seeks the answer to whether a court must have "extraordinary justifications" in order to impose an "extraordinary" below-range sentence. United States v. Gall, 446 F.3d 884 (8th Cir. 2006). UPDATE: Gall was argued before the Supreme Court on October 2.

Recent Cert Grants

United States v. Watson – On February 26, 2007, the United States Supreme Court granted cert in Watson, case no. 06-571, from the Fifth Circuit. The appellant appealed his guilty plea for use of a firearm during and in relation to a drug trafficking crime. Watson traded drugs to an undercover agent for a handgun. Watson appealed whether this factual basis is sufficient to support his conviction, specifically, he argued that the government agents proposed trading drugs for the firearm and that he controlled the firearm for only moments before his arrest and he could not have used it because it was unloaded. He asked the Fifth Circuit court to reconsider the decisions in Zuniga and Ulloa, on the determination of "use," which it declined to do.

United States v. Kimbrough – On June 11, 2007, the United States Supreme Court granted cert in Kimbrough, case no. 05-4554, a case out of our northern woods, specifically the Eastern District of Virginia. The government appealed the district court's sentence below the advisory Guideline range due to its disagreement with the disparity between the sentences for crack and powder cocaine offenses. The Fourth Circuit reversed the sentence and remanded it for resentencing, stating that according to its recent decision in United States v. Eura, 440 F.3d 625 (4th Cir. 2006), "a sentence that is outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses." United States v. Kimbrough, 174 Fed. Appx. 798, 799 (4th Cir. 2006). UPDATE: This case was argued before the Supreme Court on October 2 by attorneys with the Federal Public Defender's Office for the Eastern District of Virginia.

Snyder v. Louisiana – On June 25, 2007, the United States Supreme Court granted cert in Snyder v. Louisiana, case no. 06-10119. The defendant was convicted of the first degree murder of his estranged wife's new boyfriend and sentenced to death based on the murder and the accompanying attack on his estranged wife. The defendant made several arguments on appeal. One argument was the trial court erred in allowing the State to exercise peremptory challenges against black prospective jurors in violation of Batson v. Kentucky where the prosecutor struck all of the black jurors called as jurors who survived challenges for cause, resulting in an all-white jury for the black defendant. Another argument was based on the defendant's alleged mental disturbance at the time of his arrest and trial, that the trial court erred in failing to continue the trial to allow counsel adequate time to prepare and develop a defense of insanity.

Local News

Eastern District News

The FPD welcomes Dennis P. Iavarone, the newly appointed Clerk of Court for our district. Mr. Iavarone came to the Eastern District in February after serving as Chief Deputy Clerk for the Middle District of North Carolina. We extend a warm welcome on behalf of this office and the panel attorneys from this district.

Monday, September 24, 2007 marked Chief Judge Flanagan's opening of the newly-renovated and tech-friendly New Bern courthouse. If you have the opportunity to go, make sure to take a look around this stately building.

We extend our congratulations to Dee Davis and James Corpening on their Deputy Chief Probation Officer appointments. Dee Davis now serves as the Court Services Unit Deputy and James Corpening serves as the Supervision Services Unit Deputy.

We also encourage you to check out the newly-installed courtroom technology at the Wilmington Courthouse. Most of the courthouses are now outfitted with the latest in computer and audio technology, which is meant to facilitate your courtroom presentations. If you are interested in learning more about the court computer systems and how they operate, go to http://www.nced.uscourts.gov/html/CourtroomTech.htm .

FPD Office News

Congratulations to Robert Bell who was recognized as a member of North Carolina's "Legal Elite" in 2007 by Business North Carolina magazine.

Congratulations to:

- John and Laura (Sutton) Wasco on their June 16 wedding.
- J.D. and Myra (deGrasse) Dymock on their June 16 wedding.
- Our newest Research and Writing Attorney, former intern, Lauren Brennan on passing the bar and the birth of her baby girl, Hannah Grey born on July 10, 2007.

Panel News

We are pleased to welcome the following attorneys who are training to become panel attorneys: in Durham, J. Andrew Fine; in Greenville, Christopher L. Beacham; in Raleigh, Kelly Tillotson Ensslin, James Hawes, David Lybrook Neal, and Juanita Twyford Bolton; and in New Bern, Robert Lewis, Jr. The following are new panel attorneys: in Durham, Curtis Scott Holmes; and in Raleigh, Kearns Davis, Daniel J. Dolan and Walter Schmidlin.

A special thanks goes out to Stephanie Britt and Melanie Fisher for contributions to our quotes for this edition of The Zealous Advocate.

The Zealous Advocate

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A house divided against itself cannot stand. I believe this government cannot endure permanently half-slave and half-free. I do not expect the union to be disolved - I do not expect the house to fall - but I do expect it will cease to be divided. it will become all one thing or all the other.
- Abraham Lincoln's "House Divided" speech given in Springfield, Illinois on June 16, 1868