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# DEFENSE NEWSLETTER

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## SUPREME COURT UPDATE

**KENTUCKY v. KING**, No. 09-1272  
(May 16, 2011)

● **Fourth Amendment: Existence of Exigent Circumstances Following Officer Knock and Announce Supported Warrantless Search of Residence.** Local Police Officers followed a suspect to an apartment complex. Once there, police smelled marijuana coming from an apartment. The police knocked forcefully and announced their presence. In response, they heard noises coming from the apartment which they believed were consistent with the destruction of evidence. The officers, without a warrant, kicked the door in and entered the residence. A search revealed illegal drugs. The Court held that the officers' warrantless entry was justified under the exigent-circumstances exception to the warrant requirement of the Fourth Amendment. The Court further held that, although the exigency, destruction of evidence, was in response to the officers' forceful knocking, it was not an officer-created exigency which would have barred a warrantless entry.

**U.S. v. TINKLENBERG**, No. 09-1498  
(May 26, 2011)

● **Speedy Trial Act: Pretrial Motions Toll Speedy Trial Clock Regardless of**

**Whether Motion Caused or Was Expected to Cause a Delay in Trial.** A federal drug defendant was convicted following a jury trial that began 287 days after his arraignment on the federal indictment, well beyond the 70-day period mandated by the federal speedy trial act, 18 U.S.C. § 3161. The Supreme Court agreed with the district court that 218 of those days were excludable under the Act, including 9 days during which three pretrial motions were pending. The Court of Appeals had failed to exclude those days, reasoning that the three motions did not cause a delay nor the expectation of a delay of trial. However, the Court ruled that the time during which the motions were pending was excludable regardless of whether the motions had any impact, or were expected to have an impact, on the start of trial.

**FOWLER v. U.S.**, No. 10-5443 (May 26, 2011)

● **Federal Witness Tampering: A Federal Conviction for Witness Tampering Requires a Showing of a Reasonable Likelihood That a Relevant Communication Would Have Been Made to a Federal Officer.** The Supreme Court reversed the Eleventh Circuit and vacated a conviction under the Federal Witness Tampering Statute, 18 U.S.C. § 1512. The defendant killed a local

police officer who discovered the defendant and his co-defendants as they prepared to rob a bank. The Court held that where a defendant kills a person with an intent to prevent a communication with law enforcement officers generally, that intent would include an intent to prevent communication with a federal officer only where there was a reasonable likelihood that, absent the killing, a relevant communication would have been made to a federal officer.

### **DEFENSE HIGHLIGHTS**

This month's Eleventh Circuit highlights include: reversal of a sentence based on an improper enhancement for reckless endangerment (Matikainen); and reversal of an obstruction of justice conviction on sufficiency grounds (Friske).

### **ELEVENTH CIRCUIT CASE SUMMARIES**

U.S. v. LANZON, No. 09-14535 (May 4, 2011)

● **Conviction for Attempting to Entice Minor to Engage in Sexual Activity Proper Even Where State Predicate Crime Required Completed Act. Fourth Amendment: Police Had Probable Cause to Search Vehicle Subsequent to Arrest. Evidence: Copied Version of Instant Messages Admissible Where No Showing of Bad Faith in Transferring Instant Messages to Word Documents. Jury Instruction: No Error In Failing To Give Spoliation-of-Evidence Instruction Where No Bad**

**Faith Shown.** The Court affirmed a conviction for attempting to entice a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b). The Court rejected Lanzon's argument that he could not be convicted of attempt, because § 2422(b) required a State predicate crime, and his predicate crime was a Florida statute that required a completed sex offense, not just an attempt. The Court noted that the federal statute merely required an "attempt, and federal, not state, law governed this element of the offense. Moreover, the facts were sufficient to show an attempt: Lanzon conducted sexually explicit online conversations regarding a 14-year old, drove several miles to an arranged meeting place, and carried condoms and mint lubricant in his truck. The Court also rejected Lanzon's Fourth Amendment challenge to the warrantless seizure of materials from his truck, after his arrest. The Court found that the police had probable cause to believe the truck contained evidence of a crime. The Court rejected Lanzon's challenge to the police's failure to preserve computer evidence of his communications with undercover officers. The Court noted that Lanzon failed to show "bad faith" on the part of the detective who transferred the instant message conversations to Word documents. The Court also rejected Lanzon's challenge to the authentication of the messages, crediting the detective's testimony that he participated in the online chats, and accurately copied the transcripts of the conversations. Moreover, the use of copied transcripts did not violate the best evidence rule, because the originals were not destroyed in bad faith. Finally, the

Court found that the district court did not abuse its discretion in declining to give a “spoliation of evidence” jury instruction. Again, the Court noted the absence of bad faith in the detective’s actions.

**U.S. v. SIEGELMAN**, No. 09-13163 (May 10, 2011)

● **Jury Instruction, Bribery: No Error in Failing to Instruct That Bribery Requires an Express Quid Pro Quo Agreement. Honest Services Conviction Proper Where Quid Pro Quo Charged and Found by Jury. Evidence Insufficient to Support Self-Dealing Convictions. Obstruction of Justice Conviction Proper Where Defendant Tried to Cover Up Receipt of Moneys Through False Motorcycle Transaction. Exposure to Extrinsic Evidence Was Harmless. No Error in Failing to Inquire Regarding Exchange of Emails Among Jurors. Sentencing: No Error in Upward Departure Based on Loss of Confidence in Elected Officials Suffered by Citizens in Alabama.** On remand from the Supreme Court, the Court, in a 65-page opinion, affirmed some convictions and reversed others, in a case involving bribery and fraud charges against the former Governor of Alabama. The Court affirmed convictions for violating 18 U.S.C. § 666(a)(1)(B), the federal bribery statute. The Court rejected the argument that the jury should have been instructed that bribery only occurs when payments are made in exchange for an “express” quid pro quo agreement. The Court found that this instruction would allow defendants to escape bribery liability by “knowing winks

and nods.” Turning to the honest services fraud convictions, the Court found that these convictions were unaffected by the Supreme Court’s recent decision in Skilling requiring a quid pro quo, because the offenses already charged a quid pro quo, and the jury were so instructed. The Court found insufficient evidence to support Siegelman’s conviction of self-dealing in connection with the conduct of co-defendant Scrusby on an Alabama Board. The Court found that Siegelman had no awareness of Scrusby’s self-dealing. The Court also found insufficient evidence to support Scrusby’s self-dealing convictions. Post-Skilling, these convictions required a showing that Scrusby bribed someone, but there was insufficient evidence of such a bribe. The Court affirmed a conviction of Siegelman for obstruction of justice, noting evidence showing that he tried to cover-up his receipt moneys through a false motorcycle transaction. The Court noted the jury’s split verdict on two obstruction counts, indicating that the jurors had carefully drawn inferences from circumstantial evidence. The Court agreed with the district court’s finding that while the jury was exposed to extrinsic evidence, this exposure was harmless. The Court rejected the argument that there were premature jury deliberations, as evidenced by an exchange of emails among jurors. The Court noted that Fed. R. Evid. 606(b) precludes inquiry of an individual juror into the validity of a verdict. Thus, although the emails would have been juror misconduct, the trial court was precluded from directly inquiring by interrogating jurors. In view of the length of deliberations, and the split verdict, the

Court found no reversible error. Finally, the Court found no error in the district court's upward sentencing departure based on the loss of confidence suffered by the people of the state of Alabama in the integrity of its elected officials.

**U.S. v. MARTIKAINEN**, No. 10-13337 (May 10, 2011)

● **Sentencing: Enhancement for Recklessly Endangering Another in the Course of Fleeing Law Enforcement Not Proper Where Defendant Unaware of Pursuit by Coast Guard.** The Court reversed the imposition of a two-level enhancement under U.S.S.G. § 3C1.2 for recklessly endangering another in the course of fleeing from a law enforcement officer. After a divorce and a visitation rights order, Martikainen absconded with his son by getting on a sailboat, and sailing into the Gulf of Mexico, where his sailboat was located and ultimately boarded by the Coast Guard. Martikainen cooperated with the boarding agents. The Court noted that § 3C1.2 does not apply when there is no officer around. Here, law enforcement officers were tracking Martikainen's sailboat but Martikainen was not fleeing any particular law enforcement officer, and was unaware of the Coast Guard pursuit until it was over, at which point he cooperated. The sentencing court's imposition of the § 3C1.2 enhancement was not harmless error, because the court stated that it was sentencing Martikainen in the middle of the guideline range, and this sentence exceeded the applicable range without the enhancement.

**GILBERT v. U.S.**, No. 09-12513 (May 19, 2011) (en banc)

● **Habeas Corpus: Federal Prisoner Could Not Challenge Career Offender Classification under 28 U.S.C. § 2241 or Fed. R. Civ. P. 60(b) to Avoid Bar Against Second or Successive § 2255 Motions. Actual Innocence Doctrine Does Not Apply To Sentencing Enhancement.** The Court held that Gilbert could not invoke 28 U.S.C. §§ 2241 to avoid the bar against "second or successive" 2255 petitions as a way to challenge his sentence. Gilbert argued that his classification as a career offender under the Guidelines was invalid post-Begay. But the Court found that the importance of finality of judgments trumped Gilbert's interest in reopening his sentence. The Court stated: "We believe that for claims of sentence error, at least where the statutory maximum was not exceeded, the point where finality holds its own against error correction is reached not later than the end of the first round of collateral review." The Court noted that the "actual innocence" doctrine did not apply to Gilbert, because he did not claim to be "actually innocent" of any crime, but merely not subject to a sentence as a career offender. The Court also held that Gilbert could not invoke Fed. R. Civ. P. 60(b) to avoid the 2255 finality bar.

**U.S. v. FRISKE**, No. 09-14915 (May 18, 2011)

● **Evidence Insufficient to Support Conviction for Obstruction of Official Proceeding Where No Proof That Defendant Knew of or Could Have Foreseen Forfeiture Proceeding.** The

Court reversed a conviction for attempting to obstruct an official proceeding by attempting to dispose of and hide assets involved in a forfeiture proceeding, in violation of 18 U.S.C. § 1512(c)(2). The Court found that the evidence was insufficient. The evidence showed that Friske “was certainly acting suspiciously” in his attempts to recover sealed PVC pipes from under the pool deck of a person indicted for marihuana production. However, the offense required proof of a “nexus” between a person’s actions and the judicial proceedings he was attempting to obstruct. Here, no evidence showed that Friske was aware of, or could have foreseen, the forfeiture proceeding at issue. Speculation that Friske knew his actions would obstruct the forfeiture proceeding could not suffice to sustain his conviction.

**PIETRI v. FLA. DEP’T OF CORR.**, No. 09-11750 (May 25, 2011)

● **Habeas Corpus, Death Penalty: Counsel Not Ineffective for Failing to Put On Metabolic Intoxication Defense or for Failing to Present Mitigating Evidence at Penalty Phase.** The Court affirmed the denial of habeas relief to a Florida inmate sentenced to death for a 1988 murder. The Court rejected the argument that counsel were ineffective for failing to put on an “metabolic intoxication” defense. The Court noted that Pietri did not show that he was intoxicated at the time of the murder, and that “metabolic intoxication” was not a cognizable under Florida law at the time of Pietri’s trial. The Court also rejected the argument that counsel were ineffective at the penalty phase for failing to present

mitigating evidence. The Court found that trial counsel strategically decided not to present some of the mental health experts they consulted.

**DUKE v. ALLEN**, No. 09-16011 (May 26, 2011)

● **Habeas Corpus: No Error Denying Sixth Amendment Claim That Was Not Properly Preserved on the Record.** The Court affirmed the denial of habeas relief to an Alabama inmate. During the prosecution’s closing argument, defense counsel objected to an apparent reference to the defendant’s failure to testify, and asked the trial court to note that the prosecutor was pointing at the defendant when he made the statement. The trial court, however, did not so note. The Court found that defense counsel therefore failed to preserve a record adequate to allow a reviewing court to review the claimed gesture by the prosecutor. Moreover, the “he” whom the prosecutor may have been commenting on might not have been the defendant, but the blood of a victim.

#### **Updated Case Citations**

**Cave v. Sec’y for Dep’t of Corr.**, 638 F.3d 739 (11<sup>th</sup> Cir. April 12, 2011)

**Franqui v. Florida**, 638 F.3d 1368 (11<sup>th</sup> Cir. April 22, 2011)

**In Re Turner**, 637 F.3d 1200 (11<sup>th</sup> Cir. April 5, 2011)

**U.S. v. Pantle**, 637 F.3d 1172 (11<sup>th</sup> Cir. April 4, 2011)

**U.S. v. Proch**, 637 F.3d 1212 (11<sup>th</sup> Cir. April 26, 2011)

**U.S. v. Pruitt**, 638 F.3d 763 (11<sup>th</sup> Cir. April 13, 2011)

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