

**EIGHTH CIRCUIT CRIMINAL
CASE REVIEW 2002-03
UPDATE TO OUTLINE**

A. Criminal Acts

1. Virginia v. Black, ____ S. Ct. ____, 2003 WL 1791218 (April 7, 2003). A state statute which bans cross burning carried out with the intent to intimidate is not inconsistent with the First Amendment; however, a prima facie evidence provision of the statute which indicated any such burning was prima facie evidence of that intent was unconstitutional on its face.

2. United States v. Hatcher, ____ F.3d ____, 2003 WL 1448372 (8th Cir. March 24, 2003). Proof that jewelry stores purchased inventory from out-of-state vendors was sufficient to satisfy interstate commerce element of armed robbery counts. Also of note in this case, prison recordings of conversations between attorneys and cooperating co-conspirators, taped with their knowledge, were not protected by attorney-client privilege -- knowledge of presence of recorder was "functional equivalent of the presence of a third party."

3. United States v. Fletcher, 322 F.3d 508 (8th Cir. 2003). In case involving conviction for conspiracy to defraud the IRS, evidence that defendant, who claimed to be an independent contractor conducting seminars to promote the tax consultation/preparation and audit representation services of a California company, effectively controlled the California company, told seminar participants how to convert personal expenses into business expenses (such as deducting a cat as a "rodent control device," dog food expenses as a "security device," or a parakeet as "aerial surveillance") and instructed one client to create a phony invoice to support a \$1,275 deduction, was sufficient to support conviction.

B. Procedure

1. United States v. Ferro, 321 F.3d 756 (8th Cir. 2003). Order determining defendant was incompetent to stand trial and committing him to custody of Attorney General for treatment for reasonable period was mandated, even though defendant's prognosis was that his condition (dementia secondary to a stroke) was incapable of being improved.

C. Search and Seizure

1. United States v. Wallace, ___ F.3d ___, 2003 WL 1618542 (8th Cir. March 31, 2003). During search of premises of ambulance service company being investigated for submitting fraudulent Medicare/Medicaid claims, employees were allowed to use restrooms, take smoke breaks, go to lunch or shopping, although initially they were directed to move away from their desks by agents entering the building. Where only one agent using a preprinted questionnaire interviewed defendant in an employee lounge, without physical restraint or placing defendant under arrest, Miranda warnings were not required and defendant's statements should not have been suppressed in subsequent prosecution.

D. Due Process/Evidence

1. United States v. Munoz, ___ F.3d ___, 2003 WL 1740483 (8th Cir. April 3, 2003). Although videotape of post-Miranda interview of defendant was of poor quality, where it was "audible and intelligible" and otherwise met the seven foundational requirements of United States v. McMillan, 508 F.2d 101, 104 (8th Cir. 1974), trial court did not abuse discretion in admitting it into evidence.

2. United States v. Schnapp, 322 F.3d 564 (8th Cir. 2003). Where defense counsel could have asked witness about alleged prior inconsistent statement while witness was on stand during cross-examination, it was not an abuse of the court's discretion to disallow defendant's subsequent testimony concerning the alleged statement even though government could have recalled witness.

F. Sentencing

1. United States v. Fields, ___ F.3d ___, 2003 WL 1798976 (8th Cir. April 8, 2008). Defendant who pled guilty to charge of selling child pornography over the internet challenged the conditions of his release, which prohibited him from owning or operating photographic equipment or computers for photographic use, or having internet service in his residence, as being unconstitutionally vague and violative of the Eighth Amendment Cruel and Unusual Punishment clause. Conditions held to be reasonably related to the factors for supervised release and were no greater than necessary-- he was able to use and possess a computer with the permission of his probation officer.

2. United States v. Harris, ___ F.3d ___, 2003 WL 1798975 (8th Cir. April 8, 2003). Section 5G1.3(b) in the Sentencing Guidelines (which indicates a federal sentence will run concurrently with any prior sentence) only applies "when a defendant has been sentenced in state or federal court for the same criminal conduct or for criminal conduct necessarily included in the later federal charges." As a footnote (literally), defendant withdrew from a plea agreement in which the government stipulated to concurrent sentences.

3. United States v. Blahowski, ___ F.3d ___, 2003 WL 1786641 (8th Cir. April 4, 2003). Amendment to Sentencing Guidelines did not affect holding of United States v. Hascall, 76 F.3d 902 (8th Cir. 1996), that burglary of a commercial building is a "crime of violence."

4. United States v. Johnson, ___ F.3d ___, 2003 WL 1786662 (8th Cir. April 4, 2003). Crime of theft from the person of another is a "crime of violence" under Sentencing Guidelines; because of corresponding offense level obtained, reduction for possession of firearms "solely for lawful sporting purposes" was not applicable.

5. United States v. Hart, ___ F.3d ___, 2003 WL 1726167 (8th Cir. April 2, 2003). Defendant's failure to keep records of commission checks received by his corporation was not "sophisticated means" sufficient to justify sentencing enhancement after defendant pled guilty to one count of income tax evasion, particularly where defendant provided corporation's tax identification number to company which paid commissions and that company reported all payments -- no concealment could be found from these circumstances as government had notice of potential offense through receipt of 1099's from paying company and lack of tax returns from receiving company.

6. United States v. Touche, ___ F.3d ___, 2003 WL 1618539 (8th Cir. March 31, 2003). In revoking defendant's supervised release and sentencing him to fifteen months in prison (which sentence exceeded the suggested range), court did not abuse its discretion -- Ch. 7 of the Sentencing Guidelines are only policy statements or "non-binding recommendations" to courts considering sentences for violation of conditions of supervised release.

7. United States v. Calderon-Avila, 322 F.3d 505 (8th Cir. 2003). Sentence of defendant who lied about his age and got his sister to lie about the subject was properly enhanced for obstruction of justice and also properly not reduced for acceptance of responsibility in light of the obstructive conduct.

G. Habeas

1. Woodford v. Garceau, 123 S. Ct. 1398, 2003 WL 1477291 (March 25, 2003). A habeas case is not "pending" under the rule of Lindh v. Murphy, 521 U.S. 320 (1997) (which applied the amendments to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) to cases pending on the effective date of the Act), until the application for writ of habeas corpus is filed; therefore, where motion for appointment of counsel/stay of execution was filed before the effective date of AEDPA but actual application for writ was not filed until after AEDPA's effective date, the application was subject to AEDPA's amendments.

2. Lockyer v. Andrade, 123 S. Ct. 1166 (2003). In assessing whether a state court's decision was an unreasonable application of clearly established federal law under 28 U.S.C. §2254(d) (1), "objectively unreasonable" does not mean "clear error" -- for example, if a legal principle is applied to a set of facts which differ from those of the case in which the legal principle is announced. Here, the contours of sentence proportionality analysis are not clear and the state court's determination fit within those contours which existed.

3. Miller-El v. Cockrell, 123 S. Ct. 1029 (2003). In denying a certificate of appealability under 28 U.S.C. § 2253, the appellate court failed to give threshold consideration to defendant's Batson argument based on prosecutorial strikes of ten out of eleven eligible African-American jurors -- all defendant had to show was that reasonable jurists could disagree with how the district court resolved his case.