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# The BACK BENCHER



Central District of Illinois Federal Defenders

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Vol. No. 24  
Winter 2001 Issue

## DEFENDER'S MESSAGE

I would like to extend my sincere thanks to all of the panel attorneys who traveled to Chicago on October 13, 2000 for the Panel Attorney Seminar, as well as those of you who stayed over to attend my roast at the hands of the IACDL. Your dedication to your clients as evidenced by your participation in the seminar, and your friendship to me as demonstrated by your attendance at the roast, are both greatly appreciated.

As in years past, 2001 is shaping-up to be a busy year, with many continuing legal education programs available from many different sources. Defender Services will again be offering programs for panel attorneys at the following times and locations: "Improving the Quality of Representation," February 23-26 in Los Angeles; and "New Approaches for the New Millennium," May 17-19 in Williamsburg, Virginia, July 19-21 in Minneapolis; and September 13-15 in San Francisco. If you would like more information or would like to sign up for any of these programs, please contact our panel administrator, Mary Kedzior, at 309/671-7891.

Along with the IACDL, my office will once again be hosting its own panel attorney seminar this year on May 3, 2001 at Starved Rock State Park. We will be addressing the very timely topic of

the electronic courtroom. Given the recent installation of the electronic courtroom in most of our courtrooms in the district, as well as the anticipated installations of the rest in the near future, familiarity with the technical and artistic uses of this equipment is a must for defense attorneys. Our current roster of speakers includes: Judge Jeanne E. Scott; United States District Judge; Dean Strang, Federal Defender for the Eastern District of Wisconsin; E.J. Hunt, Esquire; George Taseff, Senior Litigator for the Central District of Illinois; Jonathan Hawley, Appellate Division Chief for the Central District of Illinois; and Craig McCarley, Computer Systems Administrator for the Central District of Illinois. Not only will Mr. McCarley be part of the program at Starved Rock, but he will also be available to assist you in using the courtroom technology in upcoming federal criminal trials. This seminar will give you a valuable opportunity to ask questions and iron-out technical difficulties before you get to court for the real thing. Please plan to attend.

Lastly, as always, we will once again co-sponsor our informal get-together at the Den at Fox Creek in Bloomington, Illinois on July 30, 2001, to be followed by our annual dinner at Jumer's. This gathering will give us a chance to discuss current developments in criminal defense practice, tell old warhorse lawyer stories, play golf (optional), eat and drink refreshments (mandatory), and, most of all, to praise one another for jobs well

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done (no one else ever seems to do so). Save the date!

Now, as to this edition of *The Back Bencher*. Years ago, before the NACDL started taking itself too seriously, a series of short stories authored by Winston Schoonover appeared in each issue of *The Champion* heralding the never-ending saga of the fictional defense lawyer known as John Wilkes. Wilkes was a combination of Rumpole of the Bailey, Clarence Darrow, and other rapsallions at the bar. I am sure I wasn't the only defense lawyer who, upon receiving *The Champion*, flipped excitedly and expectantly to the "Wilkes World" section, and then and only then proceeded to those articles which attempted to unclutter my mind with some knowledgeable attorney's insight into the complexities of federal criminal practice. I still miss reading about the adventures of J. Wilkes, Esq., but take heart because all is not lost.

Having noticed recently in the "Remember When" part of the sports section of the *Peoria Journal Star* a retrospection on the days 50 years ago when the Bradley Braves basketball team was ranked first in the nation, ahead of such powerhouses as Kentucky, Indiana, and Oklahoma A & M, to name just a few, I thought it only fitting to reprint the fictionalized account of the infamous college basketball gambling scandal which occurred at the same time, and, unfortunately, involved our own Bradley Braves. I hope you enjoy this story as much as I did.

Many years later, I discovered that Winston Schoonover was the *nom de plume* for Charles Sevilla, a brother defense lawyer and former federal defender, who has graciously given us permission to re-print a portion of his

story in *The Back Bencher*. Mr. Sevilla is currently in private practice with his partner, John Cleary at the firm of Cleary and Sevilla in San Diego. After receiving a Masters of Law degree and serving in Washington D.C. as a Vista fellow in the criminal courts, Mr. Sevilla then went to San Diego in 1971 where he joined the Federal Defender's Office. He became Chief Trial Attorney and argued several cases before the United States Supreme Court. In 1976, he joined the State Public Defender Office, where he became First Assistant responsible for Southern California, until 1983 when he formed his current partnership with Mr. Cleary. They continue to focus on criminal law, both state and federal, at the trial and appellate levels.

His partner, John Cleary, also has a long record of service as a public defender. After the passage of the Criminal Justice Act in 1964, Mr. Cleary, as Deputy Director of the National Defender Program, was involved in establishing defender offices in Arizona, San Diego, and Chicago. He therefore bears at least part of the blame for unleashing Terry MacCarthy on the Northern District of Illinois. In 1971, Mr. Cleary became the Federal Defender in San Diego, where he served until 1983. He was the first chairman of the Defender Services Training Committee, and most recently spoke at the Defenders Conference in San Diego in January of 2000.

Another article appearing in this issue is local panel attorney Arthur Inman's "tongue in cheek" essay entitled "New Federal Sentencing Guidelines Rules Announced." It is reprinted here with his permission, as it first appeared in the Illinois State Bar Association's *Individual Rights and Responsibilities Newsletter*. When the article first appeared, a number of

attorneys actually believed that the new rules set forth in the essay regarding "discretionary pre-trial executions" were true. Sadly, with the irrational and draconian nature of the Guidelines, such beliefs are understandable, if also regrettable.

Finally, we have "Seventh Circuit *Apprendi* Update" by David Mote; another scintillating installment of Alan Ellis' "Let Judges Be Judges!"; the Seventh Circuit Case Digest compiled by Jonathan Hawley; and Reversible Errors compiled by Alex Bunin. All in all, it's a great issue.

Don't forget that you do not have to stand alone. Everyone in my office is available to assist you with all the resources available to us. You should not fail to call upon us when the need arises.

Continuing to fight the good fight with you, I remain . . . .

Yours very truly,

Richard H. Parsons  
Federal Public Defender  
Central District of Illinois

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the details of a witness' relationship to the government. See *United States v. Muscarella*, 585 F.2d 242, 248 (7th Cir. 1978); cf. *United States v. Boyd*, 55 F.3d 239, 245-46 (7th Cir. 1995) (ruling that testimony in exchange for special favors to a witness by the government or favorable treatment in the criminal justice system should be disclosed as impeachment evidence). this information includes the informant's relationship with the government outside of the particular case at issue. See *United States v. Williams*, 954 F.2d 668 -71-72 (11th Cir. 1992). "The jury has the right to know what may be motivating a witness, especially a government paid, regularly employed, informant-witness." *Id.* at 672.

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At sentencing, Eschman introduced testimony from Dr. Terry Martinez, a chemist and professor at the St. Louis. College of Pharmacy, who stated that a 100% conversion rate is merely theoretical and that professional chemists can only obtain a 90% yield using professional equipment. Based on a scientific study conducted by the Iowa Department of Public Safety ("Iowa study"), Dr. Martinez indicated that an average yield for a clandestine laboratory can, at most, obtain an 80% yield. He characterized Eschman's lab as "primitive" and testified that no expert, in his view, could determine the possible yield of methamphetamine for Eschman's lab.

### DICTUM DU JOUR

"Americans seem to love sporting metaphors and I have certainly rounded third base and am headed for home plate, which is a hole in the ground."

- Jim Harrison

*The Beast God Forgot to Invent*

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Neither give cherries to pigs, nor advice to a fool.

Old Irish Proverb



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"Anybody can sympathise with the sufferings of a friend, but it requires a very fine nature to sympathise with a friend's success."

- Oscar Wilde

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A jury is entitled to know all

- *United States v. Raul-Velasco*, 224 F.3d 654, 659-70 (7th Cir. 2000)(Williams, J. dissenting in part).

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This appeal is before us now principally because of a missing moustache. No one lost it; it was missing only in the sense that the defendant, Randy M. Downs, who had been accused of robbing the Heritage Bank in Peoria, was the only man in a lineup of five who lacked a moustache.

- *United States v. Downs*, 230 F.3d 272, 273 (7th Cir. 2000).

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From 1994 through 1996, Craig Smith illegally harvested fresh water mussels ("clams"). ... In 1995, as a result of poaching violations, Smith's Illinois clamming license was revoked. ... Heator informed the agents of how he "laundered" Smith's illegally harvested clams ....

In rebuttal, the government offered the testimony of Virginia Kleekamp, a chemist with the Drug Enforcement Administration (DEA). ... She explained that the DEA uses a one-to-one theoretical conversion ratio because it is difficult to obtain an accurate measure of the production capacity of a clandestine laboratory. She admitted, as a practical matter, that it is impossible to obtain a 100% yield. She indicated that an average yield for a clandestine laboratory is from 40% to 60%, but she has noted yields as high as 85%. However, she did not dispute the findings of the Iowa study.

After hearing testimony from these two experts, the district court found Dr. Martinez's testimony not credible and accepted the one-to-one conversion ratio as a means to determine the applicable base offense level. ....

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- *United States v. Smith*, 230 F.3d 300, 304 (7th Cir. 2000).

From our review of the record, the district court's finding

lacks an evidentiary basis. Both parties' experts testified that a 100% conversion is merely theoretical (in other words, unattainable). The experts also testified that although an 80-85% yield might be possible with a clandestine laboratory, yields in the range of 40%-60% were more probable. This data is confirmed by the Iowa study, which Eschman introduced at sentencing. While the government must prove the quantity of drugs attributable to Eschman only by a preponderance of the evidence ... the record is void of any evidence which would reasonably support the district court's decision to base its methamphetamine quantity calculation on a one-to-one conversion ratio.

- United States v. Eschman, 227 F.3d 886, 888-890 (7th Cir. 2000)(emphasis in original, citation omitted).

## CHURCHILLIANA

In 1942, when Churchill's leadership in the war effort was coming under attack, Churchill had this proposal for his critics:

"There was a custom in ancient China that anyone who wished to criticize the government had the right to memorialize the emperor, provided he followed up by committing suicide. Very great respect was paid to his words and no ulterior motive was assigned. That seems to me to have been from many points of view a very wise custom, but I certainly would be the last to suggest that it should be made retroactive."



## PANEL ATTORNEY RATE INCREASE

On December 21, 2000, President Clinton signed the FY 2001 Commerce-Justice-State-Judiciary appropriations bill (P.L. 106-553). The House-Senate Conference Report (Report 106-1005) provides for a \$5 increase to the \$70 in-court/\$50 out-of-court rates to \$75/\$55. The Administrative Office of the United States Courts is analyzing CJA expenditures to determine when the \$5 increase can be implemented. Although it is encouraging to finally see an increase, this amount is still woefully below anything close to adequate compensation. Hopefully, other increases will follow. We will keep you informed.



## THE BACK BENCHER VIA E-MAIL

We are pleased to offer optional delivery of future issues of *The Back Bencher* via e-mail. If you would like to take advantage of this service, please e-mail Mary Kedzior at [mary\\_kedzior@fd.org](mailto:mary_kedzior@fd.org) and she will place you on our list!



## REMEMBER ...

This issue of *The Back Bencher* - along with several past editions - can be accessed via the internet at [www.ca7.uscourts.gov](http://www.ca7.uscourts.gov). Click on the link marked "Federal Defenders".

## U CHECK IT OUT!

## SEVENTH CIRCUIT

## APPENDI UPDATE

By: David B. Mote  
Assistant Federal Public Defender  
Central District of Illinois

The Supreme Court's decision in Appendi v. New Jersey, 120 S. Ct. 2348 (2000), had more impact on criminal defendants than any case in the last several years. At this point, there should be few in the criminal defense bar who do not have some knowledge of the decision. The majority's holding was actually fairly narrow:

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Appendi, 120 S.Ct. at 2362-63.

Despite the limited scope of the majority's opinion, optimists among the criminal defense bar and criminal defendants saw hope for a broader interpretation, particularly in Justice Thomas' concurrence. Justice Thomas stated:

... I think it clear that the common-law rule would cover the *McMillan* situation of a mandatory minimum sentence .... But it is equally true that his expected punishment has increased as a result of the narrowed range and the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish. The mandatory minimum 'entitles the government' ... to more than it would otherwise be entitled .... Further ... it is likely that the change in the range available to the judge

affects his choice of sentence. Finally, in numerous cases ... the aggravating fact raised the whole range--both the top and the bottom. Those courts, in holding that such a fact was an element did not bother with any distinction between changes in the maximum and the minimum. What mattered was simply the overall increase in the punishment provided by law.

Apprendi, 120 S.Ct. at 2379 (Thomas, J. concurring).

Three views have emerged of the future application of Apprendi. The strict view is that Apprendi will only apply when a factor, other than a prior conviction, increases the sentence above what would otherwise be the statutory maximum. A second view, consistent with Justice Thomas' concurrence, is that factors which narrow the range of possible punishment by triggering a statutory mandatory minimum will also need to be charged in the indictment and submitted to the jury. A recent decision from the Sixth Circuit has adopted that position and U.S. Attorneys' offices seem to be drafting their indictments and jury instructions in contemplation of the possibility of this view being adopted. A third, wildly optimistic view, popular among criminal defendants, is that the federal sentencing guidelines, which base the sentencing range on the decision of the judge applying a preponderance of the evidence standard, are in jeopardy.

Since the Apprendi decision, the federal courts have been busy addressing the questions left unanswered in that decision. Significant cases in the Seventh Circuit addressing Apprendi issues are discussed below.

In United States v. Smith, 223 F.3d 554 (7th Cir. 2000), the Seventh Circuit held

that there was no Apprendi problem with the judge determining factors that called for a mandatory life sentence in a continuing criminal enterprise case because life was the maximum possible sentence under the statute. The fact that the judge's finding made the maximum possible sentence of life mandatory did not require it to be submitted to the jury under Apprendi. Thus, the Seventh Circuit has determined that Apprendi will be applied narrowly. In doing so, the Seventh Circuit acknowledged that it rejected the broader positions of the concurrences of Justices Scalia and Thomas in Apprendi, not discussed by the other justices in the majority, on the basis that it was unlikely the rest of the majority would have accepted the broader position.

In Hernandez v. United States, 226 F.3d 839 (7th Cir., 2000) and Talbott v. Indiana, 226 F.3d 866 (7th Cir., 2000), the Seventh Circuit held that Apprendi would not be applied retroactively until and unless the Supreme Court stated it was to be applied retroactively.

In United States v. Cavendar, 228 F.3d 792 (7th Cir. 2000), the Seventh Circuit left undecided the question of whether circuit precedent that drug quantities were sentencing enhancements, rather than elements of the offense, should be reconsidered in light of Apprendi, concluding that the reference in the indictment to "multiple kilograms of mixtures containing cocaine base" and the presentation of supporting evidence to the jury made any possible error harmless.

In United States v. Nance, 2000 WL 1880629 (slip op., 7th Cir. 2000), the Seventh Circuit finally overruled its precedent that stated that drug quantities under 21 U.S.C. § 841(b) are always a sentencing factor. However, the Nance court found the failure to charge a quantity of more than five grams of crack or to submit the issue of

drug quantity to the jury was not plain error since there was "simply no way on this record" that the jury would have found the amount of crack was less than five grams. Similarly, in United States v. Jackson, 2001 WL 21355 (slip op., 7th Cir. 2001), the Seventh Circuit, considering the case following remand from the Supreme Court in light of Apprendi, found that it was not plain error for the defendant to be sentenced to thirty years, despite the fact that the drug amount that increased the statutory maximum from twenty to thirty years had not been charged or submitted to the jury, since plain error requires a showing of prejudice and the evidence that the drug amount exceeded five grams was "overwhelming."

In United States v. Scott, 116 F. Supp. 2d 987 (C.D. Ill., 2000), the district court found that the failure to submit the question of drug quantities to the jury where the quantity affected the statutory maximum was subject to a harmless error analysis.

The law is in a state of flux on Apprendi-related issues and the decisions are not uniform from one circuit to the next. Thus, even if the Seventh Circuit appears to have closed the door on an issue, it may be worth raising, with acknowledgment of controlling contrary authority from the Seventh Circuit, to preserve the issue for appellate review in the future.

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## New Federal Sentencing Guidelines Rules Announced

By: Arthur J. Inman, Esq.

The following is an update on the new rules announced by the United States Sentencing Commission instituting new Federal Sentencing Guidelines and Rules. These new Guidelines and

Rules were first disclosed in the clarifying memorandum of January 26, 1990, revising the special sentencing bulletin of January 25, 1990, which bulletin was an amendment to the qualifying commentaries of January 24, 1990.

**I. Commentary On The Guideline Providing For Pre-Trial Execution of Certain Defendants**

The decision to leave pre-trial execution solely in the discretion of the Government is in line with long established practice and precedent, and consistent with due process principles recognized under the Guidelines. Permitting pre-trial execution on the initiative of the Government and in the sole discretion of the Assistant United States Attorney assigned to the case recognizes that the Government exercises discretion in sentencing. This discretion includes the original decision to bring a charge, U.S. v. Batchelder, 442 U.S. 114, the decision to enter into plea negotiations, and, more recently under the Guidelines, the decision on whether to reward a cooperating defendant by downward departure from the Guidelines. 18 U.S.C. §3551(e). As is now accepted, the motion for downward departure for cooperation can be made only by the Government and the Court can consider such downward departure only on motion of the Government. (Guideline §5K1.1) Obviously, pre-trial execution represents only a small extension of governmental discretion permitted under the cooperation guideline.

In any event, pre-trial execution is not solely a prosecutorial function. If the prosecutor files a redemption motion, the defendant may be relieved of the rigors of pre-trial execution. Such a motion will be addressed to the sound discretion of the Court. However, that discretion can be invoked only by the Government, not the defendant. This,

again, is consistent with the cooperation guideline, and with cases enforcing the Guidelines on the ground that a criminal defendant has no due process right to life, liberty, or property.

Of course, allowing the Government such discretion in a pre-trial execution program is for the purpose of permitting greater latitude in eliminating bad actors and other undesirable. As has been judicially recognized, the Government is in a better position to evaluate such factors than the court or the probation officer, and certainly than the defense attorney, who may be expected to hold prejudiced views on such matters. Moreover, the prosecutors have far greater expertise in identifying bad actors and deciding the appropriate steps to take in regard to such bad actors. It is expected that the Justice Department will draft Guidelines governing application of pre-trial execution. It is understood that the Attorney General has already approached various defense attorney organizations asking for their input in drafting standards for application of pre-trial execution.

Obviously, such Justice Department Guidelines do not rise to the dignity of law. They are, in any event, not binding on the Justice Department, which may in any particular case exercise its unlimited discretion to identify and extirpate defendant bad actors.

The Government decision to find a defendant fit for pre-trial execution will be one arrived at in the context of a particular guideline. Since sentences within a guideline are not appealable, it follows that there can be no appeal from a prosecutorial decision to execute a defendant pre-trial. A minority of the Commission argued that prosecutorial control over sentences violated the principal of separation of powers. It was asserted that pronouncing sentence in such an

irreversible manner would better be left to the judicial branch. However, prosecutorial control over sentences has already been firmly established in the case of cooperating defendants. §5K1.1.

The defense bar raised due process arguments. These were answered by judicial members of the Commission who noted that judges were unlikely to invalidate a law they had written.

**II. Commentary On Guideline Permitting Confiscation Of Fees Paid Appointed Counsel**

This Guideline arises from the now well-accepted doctrine that any property or income gained by a defendant as a result of his criminal wrongdoing belongs to the Government from the time of the wrongdoing. Obviously, the benefit of the efforts of appointed counsel are forfeitable by the Government. What could be a clearer application of the doctrine that the property was ours (the Government's) at the time of the commission of the crime for which the defendant is charged and will in due course be adjudged guilty? Internal Justice Department Guidelines for initiating forfeiture actions of appointed counsel fees indicate that likelihood of forfeiture action will be established by a table wherein the forfeiture prospects will rise in direct proportion to the benefits gained for the defendant. For example, action resulting in suppression of confession, or of evidence, or actions resulting in acquittals will automatically lead to forfeiture actions. If acquittals are obtained on only some of several counts, the amount forfeited would be in the same ratio as the acquittal counts have to the total number of counts in an indictment.

Other factors which would enhance the prospects of Governmental forfeiture of appointed counsel fees are: (1) effort expended by the appointed counsel and,

often related to this factor; (2) effort expended by the prosecutor to gain a conviction, or to lose an acquittal. A third factor, necessarily subjective but which the Commission believes can be measured by trial courts, is whether the defense attorney in fact took his client's needs seriously and actually asserted any rights or procedural remedies available to his client. Such actions, of course, would enhance the Government's opportunities for fee forfeiture.

*This article first appeared in "The Illinois State Bar Association Newsletter for the Individual Rights and Responsibility".*

*Special thanks to Arthur Inman and the Illinois State Bar Association for their permission to share this article with you.*



## LET JUDGES BE JUDGES!

### Downward Departures After *Koon*

By: Alan Ellis, Esq.

*[Editor's Note: This is a continuation of a series of articles on downward departures recognized by the courts since 1996 in light of the Supreme Court's decision in United States v. Koon. **Part One** discussed "Diminished Capacity"; **Part Two** discussed "Post-Offense Rehabilitation"; **Part Three** discussed "Aberrant Behavior"; **Part Four** discussed "Civic, Charitable, or Public Service; and **Part Five** discussed "Combination of Factors"; **Part Six** discussed "Substantial Assistance".]*

### Part 7 - Family ties and responsibilities

Most of our post-Koon downward departures series has primarily focused on factors of the "encouraged" or "unmentioned" variety. In Part 7, however, we once again turn to departures of the "discouraged" type and, in particular, to seldom given departures for family ties and responsibilities under U.S.S.G. §5H1.6.

The United States Sentencing Guidelines (U.S.S.G.) § 5H1.6 (Policy Statement) provides in relevant part:

Family ties and responsibilities . . . are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range.

Discouraged factors are not ordinarily relevant but may be relied upon as bases for departure in exceptional cases, such as where the factor is present to an exceptional degree, or in a way that makes the case different from an ordinary case where the factor is present. While it is clear that the Commission at least considered family circumstances, and that "ordinary" family circumstances are normally discouraged factors for departure, all the circuits have recognized that the presence of family circumstances to an unusual, special or extraordinary degree can serve to remove a case from the heartland. (See United States v. Rivera, 994 F.2d 942, 948 (1st Cir. 1993); United States v. Johnson, 964 F.2d 124, 129 (2d Cir. 1992); United States v. Monaco, 23 F.3d 793, 801 (3d Cir. 1994); United States v. Wilson, 114 F.3d 429, 433 (4th Cir. 1997); United States v. Thurman, et al., 29 F.3d 953, 961 (5th Cir. 1994); United States v. Brewer, 899 F.2d 503, 508 (6th Cir. 1990); United States v. Canoy, 38 F.3d 893, 906 (7th Cir. 1994); United States v. Bieri, 21 F.3d 811, 817 (8th Cir. 1994); United States v. Mondelo, 927 F.2d 1463, 1470 (9th Cir. 1991); United States v. Rodriguez-Velarde, 127 F.3d

966, 968-69 (10th Cir. 1997); United States v. Mogul, 956 F.2d 1555, 1565 (11th Cir.), cert. denied, 506 U.S. 857, 113 S. Ct. 167, 121 L. Ed. 2d 115 (1992); United States v. Dyce, 91 F.3d 1462, 1466 (D.C. Circuit 1996).) Other than the fact that the Commission was aware, in formulating the Guidelines, that incarceration may undermine family responsibilities, it remains unclear what the Commission believed to be the ordinary consequences of incarceration upon a family.

Despite the Supreme Court's decision in Koon, which gives judges wide berth in drawing the boundaries of the heartland with reference to both the specific guideline(s) at issue in a case and the structure and policies of the Guidelines as a whole, this departure still remains one of the few that is rarely granted. In fact, since the Koon decision, it is surprising that there are only three reported cases where courts have affirmed or granted a departure solely on this ground. (See United States v. Galante, 111 F.3d 1029, 1036 (2d Cir. 1997); United States v. Lopez, 28 F.Supp. 953 (E.D. Pa. 1998); United States v. Strong, No. 96-392-2, 1996 U.S. Dist. LEXIS 19322 (N.D. Ill. 1996).)

The often difficult task of identifying the dividing line between "ordinary" and "extraordinary" family circumstances is a fact-intensive inquiry that has been met by the federal courts with mixed results. The question is, what family circumstances are more exceptional than those in the heartland cases? In answering this question, a review of various district court decisions reveals departure inconsistencies under 5H1.6.

Some district courts, for example, have found extraordinary family circumstances to be present in cases where:

- (1) the defendant was the sole

caretaker or provider for the children, see United States v. Strong, 1996 U.S. Dist. LEXIS 19322 (N.D. Ill. 1996) (defendant is sole financial provider for her sister's three children and her son); United States v. Moy, 1995 U.S. Dist. LEXIS 6732 (N.D. Ill. 1995) (defendant's wife is solely dependent on him because there is no other close relative who will be able to provide her with the same care); United States v. Chambers, 885 F.Supp. 12 (D.C. 1995) (single mother of two children, ages 12 and 15, is primary care provider); United States v. Lane, 790 F.Supp. 1063, 1064 (E.D. Wash. 1992) (defendant is the mother and sole provider of six children); United States v. Cohen, 782 F.Supp. 913, 914 (S.D.N.Y. 1992) (defendant is the mother and sole care provider for her two teenage children); United States v. Handy, 752 F.Supp. 561, 561 (E.D.N.Y. 1990) (defendant is the mother and solely responsible for rearing her three children and supporting them without public assistance); United States v. Floyd, 738 F.Supp. 1256, 1261 (D. Minn. 1990) (defendant is mother of four children and sole provider); United States v. Gonzalez, 1989 U.S. Dist. LEXIS 8538 (S.D.N.Y. 1989) (defendant's husband is in prison and the imprisonment of the defendant would place her four minor children at hazard);

(2) the incarceration of the defendant would lead to the destruction or disintegration of the family unit, see United States v. Rose, 885 F.Supp. 62, 66 (E.D.N.Y. 1995) (imprisoning the defendant would have grave and irreversible consequences for the extended family); United States v. Rodriguez, 1994 U.S. Dist. LEXIS 9825 (S.D.N.Y. 1994) (applying Guidelines sentence to both parents could deprive a medically disadvantaged child of the attention and care of both); United States v. Shabazz, 1993 U.S. Dist. LEXIS 14487 (S.D.N.Y. 1993) (defendant's

incarceration could result in the disintegration of the family); United States v. Calle, 796 F.Supp. 853 (D. Md. 1992) (incarceration of mother would wreak extraordinary destruction on dependents who rely solely on her for support);

(3) incarceration would terminate the defendant's parental rights, see United States v. Lopez, 28 F.Supp. 953 (E.D. Penn. 1998) (in addition to being the only care-giver, defendant ran a high risk of termination of parental rights if she were sentenced to the full Guidelines<sup>1</sup> range of incarceration); or

(4) The defendant's ability to procreate successfully would be impeded, see United States v. Lopez-Aguilar, 886 F.Supp. 305 (E.D.N.Y. 1995) (sentencing 29-year-old defendant without a Guidelines departure would reduce to near zero the chances that the defendant and his wife, who had undergone a complex fertility treatment, might have a child).

In other cases, however, similar sets of facts have led to opposite results. Nonetheless, a very distinctive pattern has emerged that is true of most cases at the district court level: In reported cases where district courts have chosen to depart under §5H1.6, they have been most inclined to grant such a departure

generally to female defendants, and primarily to female defendants who have been identified as "sole providers" for their children.

At the very least, each of the circuit courts has its own unique view of what family circumstances constitute the "ordinary". Very few circuits, however, are willing to plumb the depths and identify the extraordinary. A review of various circuit court decisions also reveals that they are as diverse as those of the lower courts.

(Compare, United States v. Gonzales, 933 F.2d 1117 (2d cir. 1991) (extraordinary circumstances are present where incarceration of defendant would lead to destruction of an otherwise strong family unit) with United States v. Canoy, 38 F.3d 893, 906 (7th Cir. 1994) (disintegration of existing family life is insufficient to warrant a departure).) As of yet, with the exception of the Second Circuit in Galante, *supra*, not one circuit court has tried to develop a departure standard that would serve to help the district courts differentiate between typical and atypical cases. With rare exceptions, the circuit courts have exhibited a reluctance to affirm district courts' decisions to depart downward for extraordinary family circumstances, a fact that is especially true in cases where the district court has not adequately articulated its reasons for departing.

Based on the number of departures under this guideline, the circuit courts themselves can essentially be divided into "the good, the bad, and the ugly." The "good," of course, are the circuits that stand above the rest in developing downward departure jurisprudence in this area. The "bad" are those circuits that rarely affirm departures for extraordinary family circumstances, and the "ugly" circuits consist of ones that have never affirmed such a departure.

### The Good

Among the circuits, the Second Circuit has been the most receptive to downward departures for family ties and responsibilities, in comparison with other circuit courts, it does not second-guess the factual findings of the lower courts concerning the extraordinary nature of the defendant's family circumstances. It is also one of the only circuits to realize that the disintegration of the family unit can do great harm to society. The Second

Circuit's unparalleled commitment to the maintenance of the family unit is best captured in United States v. Johnson, 964 F.2d 124 (2d Cir. 1992) where the Court of Appeals observed:

The United States Sentencing Guidelines do not require a judge to leave compassion and common sense at the door to the courtroom. The government asks us, on appeal, to reverse a sentencing judge's exercise of downward flexibility on behalf of an infant and three young children who depend entirely upon the defendant for their upbringing.

Id. at 124-25.

The Court rejected the government's request. The Second Circuit has upheld departures based on family circumstances: (1) where the family was uniquely dependent on the defendant's ability to maintain existing financial and emotional commitments; (2) where single parents have faced extraordinary responsibilities, see United States v. Johnson, 964 F.2d 124 (2d Cir. 1992) and United States v. Alba, 933 F.2d 1117 (2d Cir. 1991); (3) and where the defendant played a primary role in the upbringing and support of his wife and two children, see United States v. Galante, 111 F.3d 1029 (2d Cir. 1997). In addition, the Second Circuit has been unwilling to disturb the decision of the district court to depart in cases where the incarceration of the defendant would lead to the destruction of an otherwise strong family unit. (See United States v. Gonzalez, 933 F.2d 1117 (2d Cir. 1991).) Regardless of the Second Circuit's focus on the importance of the family unit, however, it has drawn the line on exceptional circumstances in cases where a departure was granted solely because of the defendant's stable family life. (See United States v. Tejada, 146 F.3d 84 (2d Cir. 1998) (stable family life is by no means extraordinary).) The Second Circuit has

also been unwilling to depart in cases where the departure benefitted the defendant rather than the family, see United States v. Sprei, 145 F.3d 528 (2d Cir. 1998); United States v. Londono, 76 F.3d 33 (2d Cir. 1996), or where there are other means of family support available to the incarcerated defendant's children, see United States v. Gardner, No. 97-1091, 1997 U.S. App. LEXIS 27295 (2d Cir. 1997 Oct. 7, 1997) (unpublished).

As has been noted in previous columns, United States v. Koon, 518 U.S. 81 (1996), teaches that appellate courts should give sentencing judges a wide berth and only reverse grants of departure for abuse of discretion since district courts have far more sentencing experience than do the reviewing courts:

Before a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing.

District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do. (Id. at 97.)

Most recently, in United States v. Galante, *supra*, which stands as an excellent example of the significant impact Koon can have on departures under this guideline, the Second Circuit reaffirmed its continued commitment to the development and encouragement of downward departures in this area. In Galante, the government appealed the district court's finding that the defendant's family circumstances were sufficiently "extraordinary" to merit a

downward departure. In departing, the district court noted that: Galante was the principal support of a family consisting of his wife and two children (ages eight and nine), who faced eviction if he were incarcerated; his father was hospitalized and on a life-support system in a chronic care facility; and his mother was a 66-year-old factory worker who might require assistance in the future. The district court also emphasized Galante's wife's limited earning capacity and her difficulty with English. The government argued that defendant's family responsibilities were ordinary in that his family would suffer the same type and degree of injury felt by any family when a parent or spouse is incarcerated. In affirming the lower court's decision to depart, the Second Circuit explained the difficulty in defining "exceptional" and, thus, the indispensable role the district court plays in making this determination:

What is exceptional is—like the beauty of Botticelli's "Venus Rising From the Sea"—a subjective question because the overall conclusion is one resting in the eye of the beholder. Because well over 90 percent of the Guidelines cases are not appealed, district courts—which see so many more—have an institutional advantage over appellate courts in comparing one sentencing case to another. Hence, the sentencing court serves as the "eye of the comparer" because it is in the best position to make comparisons and decide what combinations of circumstances take a case out of the ordinary and make it exceptional.

. . . The government's arguments overestimate our willingness to second-guess the sentencing court's fact-intensive determination. Prior to the advent of the Guidelines, the Supreme Court taught reviewing courts to "grant substantial deference to the . . . discretion that trial courts possess in sentencing convicted criminals." . . .

That is to say, we may not simply use our discretion to displace the discretion of the trial court. We are generally obliged to defer to a sentence imposed in district court, in light of that court's special competence regarding the exceptional circumstances present in a sentencing case. Such remains the rule today. See Koon, 116 S.Ct. At 2046-47. (Galante 111 F3d at 1034-35.)

The decision in Galante, taken together with the decisions in Johnson and Alba, demonstrates that the Second Circuit has set a threshold for the "extraordinary" that can be met by nonviolent criminal defendants who have fulfilled their roles as parents and providers for their extended families. While the Second Circuit's approach has had the effect of giving the district courts a great deal of latitude and support with respect to fashioning sentences that reflect departures for extraordinary family circumstances, other circuits have taken a more rigid approach.

### The Bad

The First Circuit has upheld only one departure based on family circumstances, a case in which a psychologist concluded that defendant's stepson, who had been abused by his biological father, had a unique relationship with defendant and needed defendant's presence to continue recovery. (See United States v. Sclamo, 997 F.2d 970, 972 (1st Cir. 1993).) In another case, it was unwilling to uphold a departure on the ground of a defendant's pregnancy, which it considered to be neither atypical nor unusual. (See United States v. Pozzy, 902 F.2d 133, 139 (1st Cir.), cert. denied, 112 L. Ed. 2d 316, 111 S. Ct. 353 (1990).)

The Third Circuit has upheld departures based on family circumstances where the defendant was the sole care-giver for his mentally ill wife, see United

States v. Gaskill, 991 F.2d 82, 85 (3d Cir. 1993), and where a defendant who unwittingly made a criminal of his child may suffer greater moral anguish and remorse than is typical, see United States v. Monaco, 23 F.3d 793 (3d Cir. 1994). On other hand, the Third Circuit also ruled that being a good father and regularly visiting with a son are family circumstances that are quite ordinary in nature. (See United States v. Shoupe, 929 F.2d 116, 121 (3d Cir. 1991).)

The Sixth Circuit, with the exception of one case, see United States v. Fletcher, 15 F.3d 553, 557 (6th Cir. 1994) (family responsibilities, in combination with other factors are sufficient basis for downward departure), also has a poor track record for affirming departures under this guideline. (See United States v. Cantrell, No. 97-5863, 1999 U.S. App. LEXIS 2026 (6th Cir. 1999 Feb. 12, 1999) (unpublished) (defendant is not entitled to departure because he helped care for his elderly mother and three children); United States v. Washington, Nos. 94-6190; 94-6192, 1995 U.S. App. LEXIS 20510 (6th Cir. 1995 Jul. 18, 1995) (unpublished) (circumstances are not extraordinary where the children live with their mother and have other means of support); United States v. Calhoun, 49 f.3d 231, 237 (6th Cir. 1995) ( fact that the defendant's infant child may suffer as a result of his incarceration does not give rise to an extraordinary circumstance); United States v. Brewer, 899 F.2d 503, 508 (6th Cir. 1990) (responsibility for young children will not justify departure where circumstances are not exceptional).

The Eight, Ninth, and Tenth Circuits are not far behind. The Eight Circuit, in United States v. Big Crow, 898 F.2d 1326, 1331 (8th Cir. 1990), held that defendant's support of his children in the difficult environment of an Indian reservation was an extraordinary circumstance supporting a downward

departure; and upheld, in United States v. Haverstat, 22 F.3d 790, 796-97 (8th Cir. 1994), a downward departure for a defendant who was an irreplaceable part of the psychiatric treatment plan for his wife. But it has been unwilling to find exceptional circumstances in all other cases. (See United States v. Bieri, 21 F.3d 811, 818 (8th Cir. 1994) (sentencing both parents is no different than sentencing a single parent, which many courts have held not to be extraordinary); United States v. Harrison, 970 F.2d 444, 447-48 (8th Cir. 1992) (defendant's status as single parent does not warrant downward departure); United States v. Garlich, 951 F.2d 161, 163 (8th Cir. 1991) (family responsibilities are not generally relevant); United states v. Shortt, 919 f.2d 1325, 1328 (8th Cir. 1990) (reversing downward departure for a defendant who was sole source of family income).) In fact, the Eight Circuit has indicated that departures under this guideline are intended to be quite rare. (See United States v. Tucker, 986 F.2d 278, 280 (8th Cir. 1993). Even the Ninth Circuit, which is known for leading the rest of the circuits in the development and encouragement of downward departure in general, has found extraordinary family circumstances to exist in only two cases. (See United States v. Cadle, No. 92-50387, 1993 U.S. App. LEXIS 4372 (9th Cir. Feb. 22, 1993) (unpublished) (wife's extreme emotional and psychological dependence on her husband may be grounds for downward departure); United States v. Garcia, 1992 U.S. App. LEXIS 148 (9th Cir. 1992 Jan. 6, 1992) (the defendant's family was unusually supportive in its commitment to shield him from gang-related influences).) Similarly, the Tenth Circuit has affirmed a downward departure in only one case. (United States v. Pena, 930 F.2d 1486, 1495 (10th Cir. 1991) (defendant's family responsibilities combined with the aberrational nature of Pena's conduct justify a departure).)

**The Ugly**

The Fourth, Fifth, Seventh, and Eleventh Circuits all have yet to affirm departures under this guideline. What is troubling about the decisions in each of these circuits is that they have provided very little guidance and incentive to the district courts to fashion a basis for granting such a departure. Of course, such decisions are little help to the development of jurisprudence in this area or, in particular, to the identification of circumstances that define the extraordinary.

Given the fact that each of these circuits has denied departures on the very same grounds that other circuits have affirmed, it remains unclear what circumstances they consider extraordinary in nature, and whether they are capable of granting similar departures. (See United States v. Wilson, 114 F.3d 429 (4th Cir. 1997) (21 year-old defendant's responsibility and attention to his four young children is not extraordinary); United States v. Rybicki, 96 F.3d 754, 759 (4th Cir. 1996) (district court abused its discretion in departing downward based on defendant's responsibilities for his wife and son, both of whom had medical problems); United States v. Maddox, 48 F.3d 791, 799 (4th Cir. 1995) (reversing downward departure for extraordinary family ties where the district court found that the defendant provided invaluable care for his mentally retarded sister and mother and was crucial to the structure and stability of his family); United States v. Bell, 974 F.2d 537, 538-39 (4th Cir. 1992) (defendant's responsibilities in a traditional two-parent family are not extraordinary, despite finding by the district court that an extended period of incarceration would lead to the destruction of the family); United States v. Brand, 907 F.2d 31, 33 (4th Cir. 1990) (separation of a mother, who was the sole custodial parent, from her two children is not extraordinary);

United States v. Winters, No. 98-60181, 1999 U.S. App. LEXIS 7853 (5th Cir. 1999) (there is no evidence that defendant's family will suffer any more than any family suffers when one member is sentenced to prison); United States v. Harrington, 82 F.3d 83, 90 (5th Cir. 1996) (imposition of prison sentences normally disrupts parental relationships); United States v. Brown, 29 F.3d 953, 960-61 (5th Cir.), cert. denied, U.S., 115 S. Ct. 587 (1994); United States v. Hendriex, 29 F.3d 953, 961 (5th Cir. 1994) (that defendant's three children would be left with their grandmother due to his incarceration is not extraordinary); United States v. Canoy, 38 F.3d 893, 906 (7th Cir. 1994) (disintegration of existing family life is insufficient to warrant a departure, as that is to be expected when a family member engages in criminal activity that results in incarceration); United States v. Allen, 87 F.3d 1224, 1225 (11th Cir. 1996) (incarceration of defendant who is primary caretaker of an infirm parent is not extraordinary); United States v. Gomez-Villa, 59 F.3d 1199, 1202 (11th Cir. 1995) (defendant's financial responsibilities to his college-age children is not extraordinary); United States v. Mogel, 956 F.2d 1555, 1564 (11th Cir. 1992) (that defendant has two minor children to support and a mother who lives with her is not extraordinary); United States v. Cacho, 951 F.2d 308, 311 (11th Cir. 1992) (district court properly refused a downward departure because imposition of prison sentences normally disrupts parental relationships).)

In light of Koon, however, we expect to see more departures on this ground in the future. Of course, the future development of departures under this guideline depend on the circuit courts themselves; those circuits that rarely or never grant such departures must stand back, let judges be judges, and adopt a fresh approach to departures in light of the U.S. Supreme Court's decision in Koon, the Second Circuit's decision in

Galante, and the circumstances under which other pre-Koon circuit court decisions have granted such departures.

*[The conclusion of this series will discuss "Answering the 'Why' Question: The Powerful Departure Grounds of Diminished Capacity, Aberrant Behavior, and Post-Offense Rehabilitation".]*

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*We extend our sincere thanks and gratitude to Mr. Ellis for sharing his expertise with us.*

**WILKES WORLD**  
**Part I**  
**Joe Guts**

By: Winston Schoonover

a/k/a Charles Sevilla

*[Editor's Note: This is a two-part excerpt from the book entitled "WILKES WORLD: His Life and Crimes".*

**\*An advocate who has been well paid in advance will find the cause he is pleading all the more just.**

- Pascal (1661)

**\*If you've got cancer, you don't go to the free clinic.**

- John Wilkes (1951)

The first time I saw Eddie "Pogo" Ridley was at the NIT finals in that Garden. Wilkes had been given two center-court seats by that most rare form of the human species, the grateful former client. Knowing of my love for the sport and curiosity about Pogo, basketball's latest sensation, he invited me along.

It took exactly six seconds to see what all the hoopla was about. Pogo got the opening tip ten feet in front of his own key, tore up the right side of the court weaving between defenders, dribbled behind his back to change direction, and curt to the top of the opponent's key. Only two forwards remained between him and the basket. He paused long enough to pound the ball three times into the hardwood and then made his final charge up the middle toward the basket.

### BACKPEDAL

The defenders backpedaled into the center of the key, hoping to jam his route and slap away the shot. They never got the chance. Seeing the tall timber planted under the bucket, Pogo instantly converted his lateral motion into a tremendous vertical leap, a jump so remarkable, he seemed to suspend himself in the air high above the two defenders. It was as if Pogo were excused from the laws of gravity. At

the peak of this leap, he arched a rainbow shot. The ball rotated slowly backward as it passed untouched through the iron rim and caught the net for a score.

For the rest of the game, Pogo put on a one-man show of helicopter dunks, rebounds, steals, no-look passes, twenty-five-foot one-hand set shots, and fast-break lay-ups. He fouled out late in the game with thirty-seven points, exactly half what his team eventually scored in winning the tournament.

He was a helluva ball player. And he was just a nineteen-year-old college sophomore.

### POGO NAMED

After the NIT, Pogo was named All-Big East at guard. His junior season he had an even more spectacular year and was an easy All-America selection. His final year, he was a consensus All-American - everyone named him on their all-star team. The People of the State of New York even got into the act.

They named him in an indictment.

The charge was point shaving. Pogo took racketeer money to make sure his team never beat an opponent by more than the posted odds. In the era of televised games, the hoods called point shaving "doing a Gillette job" - so named for the razor company which was the innocent sponsor of the TV games. A good many gamblers got very wealthy betting on Pogo to keep his team under the odds makers' point spread.

Pogo was the perfect man for the job. No one controls point production better than a play-making point guard who's also the team's high scorer. The fact that Pogo played on a good team made it easier on him since the point spread

was usually comfortable, at least six to ten points, so the shaves he gave his team's point production didn't have to be done so close as to risk losing games.

Pogo wouldn't have gone that far. He would later testify to his code of honor, "What counts is whether you win or lose, not whether you beat the Vegas spread." As he saw it, he was just a gentlemanly winner who never rubbed another team's nose in humiliating defeat. And actually, it was a sacrifice for Pogo to shave points, because doing the Gillettes cut into his point production. But Pogo's diminished point production led to one helluva income.

### STARTING FIVE

Named along with Pogo in the indictment were four small-time hoods from Jersey. Each had a record - for bookmaking, numbers racketeering, extortion, and the like - but there wasn't a big fish in the bunch.

Pogo's explanation for how he hooked up with such underworld sleaze was disarmingly forthright: "Some guy comes up to me before a game and says he's gonna give me a grand if we win by eight or less." We did. And he did. I hadn't even tried to make it happen, but the next time he says it, I think about it a lot on the floor and kind of unconsciously let it happen, and the money comes in, which I liked, and after that I began doing it purposefully. For the money."

Pogo wasn't alone. In the early fifties, so many ball players were doing Gillettes, it seemed every game was fixed. It was especially bad in New York. All the big B-ball colleges (Manhattan, NYU, Seton Hall, Long Island University) had kids taking money to beat the spread - or worse, the ultimate disgrace: to dump the game itself.

The scandal broke the year after City College of New York performed its miracle grand slam. In 1950, CCNY won both the NIT and NCAA championships, a feat never duplicated by any team before or since. When it was learned that during its magnificent grand slam season, three players on the team were actively doing Gillettes and dumps, the bottom fell out of college basketball.

### PRESIDENTS, COACHES, ALUMNI

The scandal hit the sports world like a gonorrhea epidemic. Players were called "contaminants to innocence," "defilers of the purity of college athletics," "pestilences to be quickly wiped out." University presidents demanded swift convictions; coaches called for maximum punishment; and alumni moved to make examples out of players by banning them from sports for life.

Players not involved in the fixes didn't say much. Especially quiet were the gifted ball players who were illegally recruited, or on undeserved academic scholarships - given to the gifted jocks with sixty-watt minds when the school ran out of the athletic variety - or riding around in "signing bonus" cars, or taking weekly checks for nonexistent jobs provided by university presidents, coaches, and alumni.

Such was the virginal sport that was now being defiled by the guys doing Gillettes.

Amid the uproar, the prosecuting attorney on Pogo's case, Miles Landish, said, "Twenty years in prison ought to give the basketball world the example it wants and Pogo enough time to think about what he's done."

### CAFE' TALK

Wilkes and I read Landish's ominous

words in the *Times* over a couple of bowls of greasy chicken noodle soup at the Guadalajara Cafe', our favorite dive near the Woolworth Building, which posed as a purveyor of edible food. Between spoonfuls, I recalled to Wilkes that it had been two years since we had seen Pogo at the Garden.

The article noted that Pogo had retained a defense attorney, Wilmot Finster, a red-nosed V-6 who pleaded clients guilty faster than most people shake hands. Pleading defendants guilty was like a religious rite to Finster. He raced to the DA's office to offer up his clients as a kind of human sacrifice.

The most odious part of the ritual was the bargains he got. For the defendant to earn his promised sentence reduction, not only must he give the prosecutor a soul-baring confession, and later a sworn guilty plea, but he also had to identify the next sacrificial lamb for slaughter. This is called "making" a case - naming names, snitching off a friend, becoming a stool pigeon. It was the price of dishonor all of Finster's clients paid for the privilege of committing hara-kiri in court - with Wilmot Finster holding the sword.

### CODE BLUE

Naturally, none of Pogo's four hoodlum codefendants even considered such a course. Their Code of Silence saved not only their personal dignity, but their lives as well. A violator of the Code, an informant, weaves himself into a snitch jacket, which invariably targets the wearer as a rat. The Code dictates the extermination of such chatty rodents.

Pogo knew none of this. He was just a naive, scared kid who made the fatal mistake of hiring the most dangerous - to his clients - criminal lawyer in the state. People in trouble spend more time looking for a place to park than investigating which lawyer to hire. The

only reason Pogo picked Finster was that he was listed first in the phone book. Wilmot had convinced the telephone company to run his name as "AAAFinster" in the attorney's section of the yellow pages. Being first got him a lot of business, and many a client went to his doom because of it.

### THE MAKING OF A CASE

With a few arm twists by his attorney, a frightened Pogo Ridley agreed to cop a plea and, after a little coaxing from Finster and the prosecutor, to "make" a case. DA Miles Landish convinced Pogo with the following words: "You can tell me now and walk away from this mess, or you can tell me later in Sing Sing on the front end of a twenty-year prison scholarship."

All over the world, this has been an accepted way of making cases - torturing a suspect physically or mentally until he comes up with what the interrogator wants. In India, the police have a way of doing this. They say, "It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the hot sun hunting up evidence."

In America, defendants are tortured with incompetent defense lawyers and extortionate plea-bargains.

### SPILED GUTS

Between slurps of soup at the counter of the Guadalajara Cafe', Wilkes talked about Pogo's predicament. He observed that the moment Pogo attached his fate to Wilmot Finster, he perfected his own destruction. Now he was probably in a small cubicle at the DA's office making a case.

My friend turned in his stool and looked at me. He was about to tell a story, "Did I ever tell you about the time Wilmot actually tried a case?"

I said no but thought that maybe he had told the story. It was a story I've heard lots of times since then. In fact, years later I happened to be doing some research in the *Times* archives and read about it. But Wilkes told it better, and here is how it went.

"Finster was appointed to represent a hooker named Coreen North for plying her trade in the streets of New York. At this time in his career, Wilmot would not ever go see his jailed clients, as he found the surroundings too depressing. Going to see a slut in the slammer was an outrageous notion - out of the question for the urbane Wilmot Finster. But not going to see the woman in jail prior to the trial meant he couldn't arm-twist a plea of guilty out of her. Many of his clients thus had their right to jury trial preserved in this fashion.

"As the trial began, of course they brought out the defendant and sat her down next to Finster. Then the DA called two undercover cops to the stand, who both positively identified Coreen North as the hooker who propositioned them with the estimable goal of getting their rocks off. For money, of course. When the DA finished, Wilmot did not cross-examine. When the DA rested his case, Finster, already resting, rested, too.

"The DA argued for a finding of guilt on two counts. Wilmot told the jury, 'Ladies and gentlemen. The DA's done his job. Now I've done mine. The judge is about to do his, and then it's your turn. Good luck and thanks for your attention.'

"The jury came back in five minutes with guilty verdicts. The judge called the next case, and before Finster could leave the courtroom, the clerk called out, 'Yikes! Hold on, everybody! This one's Coreen North!'

"Turns out that the bailiffs mistakenly brought out a hooker from the harem of hookers in the hooker tank named

Charlotte Goins. She was up on the same charges, but with different cops, and Wilmot was not her attorney. So they just sat her down in the defendant's throne during Coreen North's twenty-minute little old trial, and Charlotte took two guilty verdicts without knowing what hit her.

"When Finster assessed what had happened - that he had represented the wrong person into a conviction - he bellowed out like W. C. Fields, 'Your Honor, another case of mistaken identification by the constabulary. I move for a judgment non obstante verdicto.'

"The judge asked Wilmot just how it was that he sat throughout the trial next to a woman who was not his client yet defended her as if she were. Wilmot answered quite truthfully, 'Judge, until I met the real Coreen North twenty seconds ago, I never laid eyes on her.'"

Wilkes laughed, "So not only does the hooker get her jury trial - albeit in absentia - she gets her case dismissed by the judge based on the perjury of the cops in identifying the wrong hooker as the defendant."

Wilkes handed me the newspaper and said, "That was Wilmot's finest hour as a trial attorney. Happened years ago. I think the experience frightened him so much that he became dedicated to never trying a case again. Now he's raised the cop-out race to the DA's office into an art form. Plead 'em and bleed 'em. Too many cases are made, not solved, in the DA's office with Wilmot leeching his clients for names of others to trade for a plea of guilty. Right now some poor slob's about to get clobbered 'cause Pogo Ridley has Finster steering him to make a case to save his butt. And Pogo's pretty good at putting the fix on things when properly motivated."

I folded the paper in half, swilled the

last of my coffee, which looked and tasted like it was retrieved from an oil slick, and wondered about the conversation in the prosecutor's office and on whom Eddie "Pogo" Ridley was spilling his guts.

### JOSEPH GUTZNIK

Basketball was played in the Olympics for the first time at the 1904 St. Louis games, but only as an exhibition. The sport first officially appeared in the games in Berlin in 1936. Joseph Diahgenov Gutznik was there. He saw Dr. Naismith, the American inventor of the game, throw up the first ball and then watched as the Americans easily won the tournament.

Gutznik was the twenty-four-year-old captain, center and star of the Rumanian National Basketball Team. But they weren't entered in the games, because as a team they couldn't beat a squad of blind pygmies. However, Gutznik was an able player and a fanatic about the game. He read every book about basketball. He followed the U.S. college games and taught basketball every day as a grade school coach in Bucharest. He attended the '36 Games at his own expense to see the world's best play the game he loved.

Gutznik was deeply affected by what he saw the American's do in Berlin. He had never dreamed basketball could be played so well. In routing their five opponents, the Americans routinely sank beautiful hooks and long sets that would have been declared miracles if made in his country. Gutznik was amazed by the patterned offense and pressing defense. Most impressive were the plays and the way the players moved without the ball to set picks and double screens to allow teammates unobstructed shots.

In the Olympic finals, played outdoors in a miserable, driving rainstorm which

kept the score low, the American guards were able to control the ball against their Canadian opponents. Final score: America 19, Canada 8.

Gutznik went home after the games and brooded about what he had seen in Berlin. The memory of the brilliant American team made him feel bad about the Stone Age level of the game played in Rumania. In 1938 he made the most important decision of his life: he would go to America, become a citizen, and play on the 1944 U.S. Olympic team.

### BEST-LAID PLANS

Joseph Diahgenov Gutznik arrived at Ellis Island in February of 1938 and was greeted by a representative of the Immigration and Naturalization Service. This gentleman, in the great tradition of the INS, was quite helpful to Mr. Joe Gutznik's entry into the United States. He took one look at his passport and immediately renamed him with the moniker he would carry for the rest of his life - Joe Guts.

Joe quickly found out that it wasn't so easy to become a basketball star in the United States. Most good players were in college, and Joe Guts had already been to college. College teams supplied the talent to play on the Olympic squad, and Joe marveled at the quantity of great college players as he watched double-header games held at the Garden in New York. He saw the first NIT games played there soon after he arrived in 1938, and also the first NCAA national tournament, which was played the following year in Evanston, Illinois.

### ONE-HAND SHOT

There was only one place where Joe could make it in America, learn English, play basketball every day, do no work, get fed and housed and paid, and most

important, perfect his considerable raw skills in time to play basketball for the 1944 Olympic team.

The United States Army.

After boot camp in 1939, Joe was assigned to a post at Fort Leonard Wood, Missouri, where he tried out for the base basketball squad. The coach must have been surprised when he saw the tall, skinny, sunken-cheeked Rumanian sink his first twenty-foot one-hand push shot. The shot had just been invented by Hank Luisetti at Stanford, but Joe Guts, a consummate student of the game, picked it up immediately and added it to his repertoire. It didn't take long before Joe was leading his team to a string of victories and eventually to the army championship.

His teammates nicknamed him "The Count," because when Joe started speaking the Queen's English, he sounded just like Bela Lugosi. What do you expect from a Transylvanian transplant?

When the war broke out, Joe's team became part of the Third Army. When he was informed he was headed for the European theater, Joe said to the base commander, "Dis is vonderfull news. I love the French stage."

Joe saw a lot of France, but no stage plays and no basketball. Instead, the Third Army under General Patton in late 1944 made a spectacular sweep across northern France straight into the Battle of the Bulge. Three miles south of Bastogne, Corporal Joe Guts took a burst right in the legs from a Nazi machine gun. He was saved by his size. Had he been shorter, this story would end here.

Joe Guts was captured by the Germans and sent to Poland, where he spent the rest of the war as a POW.

### HOMECOMING

After the war, Joe Guts returned to New York with a Purple Heart, a wooden leg, and a piece of paper that said he was now a U.S. citizen. But the dream was gone - there would be no Olympic games in his future, at least not as a player.

Joe set his mind to coach a future American Olympic basketball team. He was still a dreamer.

Thanks to his old army coach, Joe Guts got a teaching job at Iona College and because the assistant basketball coach. The team went winless that year, just as it had for the previous three seasons. The head coach quit after learning that the school planned to drop its basketball program. But Joe Guts pleaded for one more year to make the team competitive. The school relented only when Joe said he'd take the coaching duties for no pay and that no scholarships need be given to any player.

With no talented players, no scholarships, no "signing bonuses" to high school prospects, and no illegal gifts of cash or cars to stars on the team, Joe Guts still turned the Iona program around. The first year the team won seven games, the second year eleven, and the third year they won their conference title. It was a tremendous coaching achievement, a product of the unique way he taught, disciplined, conditioned, and motivated his scrappy players to win games.

Joe said there was no secret to his success. "You must teach the boys hard work, teamwork, and the vill to vin, that's all."

Joe Guts was a helluva coach.

### VILL TO VIN

Inevitably, a big New York basketball

school with a floundering record made him a Godfather offer he could not refuse, and soon Joe came to the Big Apple to continue his quest to become U.S. Olympic coach. Again he turned the school's program around.

He instituted two-a-day practices, weekend distance running, and preached discipline, fundamentals, and "the vill to vin." The players began playing together like parts of a fine machine. He tolerated no hotdogs or slouches, just kids who wanted to play team basketball.

Once his story got out, the New York media made a hero - and rightfully so, for a change - out of Joe Guts, the gimpy war hero who talked like the heavy in a horror movie and motivated kids to play great team basketball. The school loved him, because in his first four years, Guts's teams won three conference titles and one NIT championship. And he did it without the aid of a single All-American.

Until Eddie "Pogo" Ridley came along.

### WOOLWORTH INTERVIEW

A week after lunch at the Guadalajara Café, I got a call at the office from a man with a heavy East European accent. He didn't identify himself. He said only that he "vood like Mr. Vilkes" to represent him in a criminal matter. He said he would come to see us at the Woolworth Building that night around seven, and hung up.

I joked to Wilkes that Dracula just called, wanted him as his lawyer, and insisted on an interview that night. I said, "He's overdrawn at the blood bank again."

That evening at seven he came. Tall and thin, eyes sunken and black, his big nose leaking a bit, he looked worried and nervous - like a guy who'd just been indicted for seven counts of

murder. He sat down heavily and said, "Gentlemen, I am Coach Joe Guts. I tink I am vith beeg problem."

As he spoke, his big red tongue darted out serpentlike. He sounded like Dracula, all right, and the thought passed through my head that if we did get him as a client, he could never take the stand. He'd scare the hell out of the jury. Maybe the judge, too.

### SIXTH MAN

Guts said that DA Miles Landish had called him into his office that morning to say that his name was to be added to the five basketball point shavers who had been indicted the week before. Landish also said that one of the defendants had been secretly indicted a year ago and had been cooperating with the prosecution by making cases on the conspirators. In that effort, the informant had taped all his conversations with Guts. Landish said the tapes reveled his participation in the scheme. The prosecutor said he was giving him this chance to confess, hire a lawyer - Wilmot Finster was suggested - and work a deal. Otherwise, he'd get twenty years.

Guts said he told Landish that if he had tapes, they were phony, because he would never have had any part in fixing basketball games. Landish responded, "I have reels of tape of a man who talks funny, like you do, giving instructions to a player on the point spread. And I've got an All-American witness to verify that you made the statements. This case is a slam dunk."

Joe Guts asked, "Who vood say such tings?"

Landish answered, "Pogo Ridley."

### FEE SIMPLE

"Mr. Vilkes," said Coach Guts slowly,

"basketball is my life. I vood never do what they say. You vill help me?"

"Of course," said my friend, "but first there is the matter of my fee." Wilkes quoted a five-figure retainer, which for the time was big bucks. Hell, it's still big bucks. Guts looked like he'd just been hit with a technical foul and ejected from the game.

"Yes, it is a great deal of money, but in America you pay for what you get," said my friend. "Like if you've got cancer, you don't go to the free clinic." This was a line that always impressed clients with the seriousness of their plight and the need to fork out for self-protection.

"But I have family to feed," protested Coach Guts. "You vant more than year's salary."

Wilkes picked up a framed photo of a matronly woman cuddling four young children and held it out for Joe Guts to see. It was a picture of a former client's family presented to Wilkes during a similar haggle over fees to convince Wilkes to lower his price. Now my friend, a bachelor, regularly used it for the reverse effect. "I have my obligations, too," he said solemnly.

Joe Guts sat up a bit and forced a smile of defeat. "Okay, Mr. Vilkes, you vin. But I tink it misleadink for you to have office in dis buildink."

"Why's that?" asked Wilkes.

"Because Voolverth's is supposed to be for the discount, Mr. Vilkes."

\*\*\*\*\*

# WILKES WORLD

## Part II

### State v. Joe Guts

**\*Pain is transitory. A lost lasts forever!**

- Coach Joe Guts

**\*Extremism in the defense of a client is no vice, and moderation in examining a state's witness is no virtue.**

- John Wilkes

I had just come into the office after spending the entire week with Uriah Condo investigating our new client, Joe Guts. As with all of Wilkes's cases, this one had to be meticulously investigated, starting the moment the retainer check cleared the bank. He had given us one week to check out Guts's story. The balance of the pretrial time - and there was precious little of that - was to be spent on Pogo Ridley.

Wilkes, impatient and anxiously waiting at his desk, wanted the low-down on Coach Joe Guts. We found him leaning back in his chair, feet on his desk. On seeing us, he straightened up. "Well, come on, out with it. What have you got?" His voice was unusually apprehensive. He suspected what I was about to tell him and knew he would both love and loathe it. The news was going to make the next four months of his life miserable.

I started my report with the good-bad news. "Joe Guts is innocent or my name isn't Winston Alfred Schoonover."

Uriah Condo added, "I'll bet my home, the Condo condo, he's not guilty."

For the next hour, we gave Wilkes the details of our detective work, which had kept us nearly sleepless for the last seven days investigating every aspect

of the case.

#### RAVAGING INNOCENCE

"To sum it up," I said, "everyone we interviewed loves and respects the coach. They all want to testify for him."

Condo added, "Yeah, looks like you got one decent, honest-to-god innocent, fee-paying Transylvanian on your hands. He may talk like Bela Lugosi, but he's a better American than most Americans."

Wilkes looked across his messy desk at me. Pain showed in his face. He said, "Shit, I was afraid of that." He got up and left us, saying he was going for a walk.

I had seen the agony before. I understood the rising tide of terror filling my friend's soul. He had assumed responsibility for the defense of what we call in the business a "ravager" - a man wrongly accused and facing the probability that the false accusation would be confirmed in a court of law. Guts's entire future now depended on the ability of John Wilkes to right the wrong being done in the name of justice.

Innocents like Joe Guts are ravagers because their cases eat lawyers alive. You win their cases or you become an accomplice in a horrible crime, the ruin of an innocent man. Your job is to make sure that that never, ever, ever happens. But if it does, it means no peace or rest. It means you continue working the case through appeals and writs and clemency applications until the ravager is exonerated, or dies, or you die.

Wilkes defended all of his clients to the hilt, of course, but most were guilty, and he knew it, and they knew it, and they knew he knew it. It made representing them a pleasure. If the case was lost,

they knew they received the best defense money could buy and now had a bloody good appeal ready to go, with Wilkes again defending. If the client won, as often happened, so much the better.

Wilkes's motto was that no defendant should fall as long as the thinnest strand of reasonable doubt supported his innocence, and Wilkes was the master spinner of that delicate thread. His ability to tie prosecution cases in little knots earned my friend the enmity of his adversaries and the nickname "that devil Wilkes."

Doing absolutely everything in your power to defend a client is enough when it is clear enough he's guilty, but winning is the only acceptable result with a ravager. You can prepare a year for trial, file every conceivable motion, make all the right objections, put on credible witnesses, brilliantly argue like Daniel Webster to the jury, but it is not enough if the ravager falls to a guilty verdict.

You can't look a grief-stricken wife in the eyes after such a verdict and tell her of your superb presentations and add, "Oh, by the way, he'll be out of prison in about twenty years."

The hulks of many good trial lawyers are shipwrecked at the bottom of the dark watering holes and flophouses of the city today because they were destroyed by the agony of losing these cases. The human body, even the body of a defense lawyer, can be ravaged only so long by such losses before it crumbles.

#### WILKES IN MOTIONS

Wilkes came back from his walk in an hour. "Schoon," he said, "I want the following motions prepared tonight and filed tomorrow."

I had every right to protest that I hadn't

twenty hours sleep the last week investigating our client's illustrious life, but I knew Wilkes was in no mood for hearing it. He was preparing for war. It was a time for sacrifice.

"First motion. Move to dismiss the charge of bribing a participant in an amateur sport. Second motion. Move to strike the aliases from the indictment. Third motion. Move for a continuance."

Usually Wilkes didn't need to explain the reasons for the motions. After working a couple of years for him, they had all become self-evident. We would move to strike the aliases because the indictment charged our new client under the names of "Joe Guts, alias Joseph Gutznik, alias 'The Count.'" Aliases are things only guilty people use to hide their identity; prosecutors like to charge them to dirty up the defendant in the eyes of the jury. Because an immigration official renamed Joe Gutznik Joe Guts, I would argue that the state could not now use that as evidence of criminality. The nickname "The Count" was hung on Joe by his army basketball-playing buddies. It was irrelevant.

Actually, the state missed on the right alias. The indictment should have charged Joe Guts with the alias of "Coach."

By now you know the reason for the continuance motion. The DA had spent a year meticulously preparing this case and now insisted on the defendant getting his right to speedy trial jammed down his throat like a slam-dunked basketball. They prepare a year. We get a couple of weeks. No fair. We wanted more time.

### OLD WINE DEFENSE

Time is the defense's best witness, my friend would often say. Then he would recite his favorite Ralph Waldo

Emerson quote on the subject. "Ralph Waldo," he said, "captured the Old Wine Defense in one sentence when he wrote, 'Time turns to shining ether the solid angularity of fact.'"

Time. We were going to need plenty of it what with the mountain of tape-recorded evidence we had yet to review. I needed no coaching to implement Wilkes's Old Wine Defense motion.

But the one motion he insisted on that had me stumped was the motion to dismiss. I asked Wilkes, "What's our ground to dismiss the charge of bribing a participant in an amateur sport?"

"College basketball isn't an amateur sport," said Wilkes. "Hell, half the kids are on someone's payroll doing dumps or Gillettes. The other half are taking signing bonuses, cushy jobs, cash gifts, and phony grades. If that's amateur athletics, bribery's not a crime. It's part of the business."

Wilkes was only slightly exaggerating. Between 1947 and 1950, eighty-six college basketball games were known to be fixed. Seven colleges - CCNY, Manhattan, Long Island University, New York University, Bradley, Toledo, and (say it ain't so!) Kentucky! - were caught at it. These were the *known* fixes. How many others escaped detection - and there had to be plenty - we'll never know.

### JUDGE HENRY "RED" FOX

On Monday Wilkes and I walked to the court of Judge "Red" Fox. I must have looked pretty strange matching strides with my friend while pushing a bright red wheelbarrow in which we had dumped the motions I had written, the reel-to-reel tapes we had just received as discovery, and a number of relevant law books. We thought we needed a little show-and-tell if we were going to have a chance to get our continuance.

Prior to his timely suicide, Red Fox was a hate-filled judge whose only job-related pleasure was sentencing defendants to the maximum possible prison sentence. Since good lawyers were often an impediment to this joy, he hated them more than the clients they represented. Thus, he hated Wilkes more than any of us.

"What's this telephone book about, Wilkes?" asked Judge Fox when the session opened. He lifted my motions with his arm stuck straight out to keep them as far away from his face as possible, as if he were holding a plate of rotten fish. With his other hand he was rubbing the top of his skull, a tic that had given him a pink bald spot on the top of his head by age forty and the nickname "Red" from the lawyers he hated.

"Huh?" said Wilkes.

"I said, what's this all about?" repeated Red Fox.

"It's about time," answered my friend.

"Huh?"

"I need time to prepare this case. I need a reasonable continuance."

Fox dropped the motions onto the floor in front of his bench and said sarcastically, "What'll it be, Wilkes? Shall we set the trial in this or the next century?" - Fox was familiar with the Old Wine Defense - "By God, that's not a bad idea! Then I won't have to try it!"

"Look," said Wilkes, "the DA was kind enough to provide me - on Friday - with five hundred hours of tapes he says have my client's voice on them. If I do nothing else but listen to them for the next six weeks, which is what it will take, I won't have a chance to do anything else in preparing this case for trial."

**JUSTICE DELAYED**

Fox pulled out a handkerchief and wiped away a few invisible tears. “Oh, Mr. Wilkes, you poor, poor man.”

Wilkes shot back, “They’ve had a year to prepare their case. I’ve had these tapes one day and the case for a week. Just look at what’s to be reviewed.”

With that, I went out in the hall and wheeled in the tapes. I rolled them to the front of the court and tipped the wheelbarrow over so the tapes spilled onto the floor into a large mound. The gallery, especially the paper boys and girls, were amused. Even the DA gave us a wink. But not Fox.

“Well, well,” said Fox. He leaned over the bench and took a quick look at the tapes. Then he leaned back in his throne, stared at the ceiling while rubbing his head with both hands, and said, “Our system will break down unless the defendant and the People have their trials in the speedy fashion that the law says they’re entitled. Justice delayed is justice - “

“Denied the DA,” interjected Wilkes. “Fast justice is like fast food. It’s junk. I ask for one year.”

“That motion must be denied,” said Red Fox. The pink spot on his head grew redder than ever. “Mr. Clerk, pick a date in the normal course.”

“I ask for six months.”

“That’ll be denied.”

The clerk pushed a few pages of his calender while Wilkes continued peppering the judge with dates.

“I ask for four months.”

“That’ll be denied, as will any other request you may make.”

Finally the clerk said, “We have an opening in three weeks, Your Honor.”

“Wait,” shot Wilkes. “What about my other motions, the one to strike the aliases and the other to dismiss?”

“Those’ll be denied, counsel,” said the judge. “Trial in three weeks. Okay with you, Miles?”

**DA ELOQUENCE**

The DA, who had been enjoying the show in silence, was now moved to make an eloquent contribution to the hearing. He lifted his corpulent frame from his wooden chair to address the court, but as so often happened, his bulging hips caught the arms and he lifted it off the floor.

“Fine with me, Judge,” he said, half rising out of the chair. But he stopped midway when the back of the seat jammed into his spine. Ignoring his predicament, Landish turned his flat, almost featureless moon face to Wilkes, gave him a wide grin, and plopped back down.

Judge Fox spat out a “So ordered” and flew off the bench and back into chambers, leaving Wilkes angry and the floor strewn with unlistened-to tapes. It was bad enough that this was a ravager case, but now we had to review five hundred hours of tapes, investigate Pogo, and prepare a defense in three weeks. Wilkes walked over to Landish and stuck his face to within an inch of the DA’s. “See this puss, turkey?” Better learn to love it, ‘cause it’s gonna be in yours every day for the next six months! This is gonna be the slowest quick trial you ever mistried!”

And so we were off to trial.

The next three weeks were as crazy and hectic as any I ever spent working for my friend. By dividing the tapes between Wilkes, Condo, and myself, we managed to hear them all in time to spend a week chasing down leads on Pogo Ridley. One of those leads came as a result of Wilkes’s assigning Condo to pay a visit to all of Pogo’s teammates.

**LANDISH OPENS**

Landish’s opening argument was short and simple. This was a case of corruption and greed, he said. A coach

Opponent	Date of Game	Point Spread	Wager	Guts nr. Taps
Montezuma	12/21/51	-9	40	"Wile's Joe."
Dreadley	1/7/52	-7	15	"Seven's heaven."
COONY	1/14/52	-3	1	"Three's a squeeze."
Kasouky	1/21/52	+4	17	"Ten's the score."
...LU.	2/24/52	8	40	"Eight's great."

of a basketball team and his star player, Pogo Ridley, conspired to win games by keeping their margin of victory under the odds makers’ point spread. This way the crooks who paid them could bet a bundle on the underdog, take the points, and win big. He used a chart to illustrate the five games in which Coach Guts and Pogo did a Gillette on the score:

Landish said he had tapes of Coach Guts giving Pogo the spread just prior to tip-off before each game. “These,” he said, “would destroy any fabricated claims of innocence which the accused, Joe Guts, alias Joseph Diahgenov Gutznik, alias ‘The Count,’ may make.

We will show that in an effort to make a quick buck, Joe Guts corrupted a gifted athlete and helped kill big-time college ball in this city.”

When Landish sat down, Wilkes announced that he would postpone his opening until after the DA’s case was in. “In about six months,” he whispered to me.

The DA’s direct examination of Pogo Ridley took about an hour. Landish got Pogo to say that he and Guts agreed to do Gillettes on five games, the ones on the DA’s chart. Just before opening tip-off, said Pogo, Guts would find out the latest line of the game and pass it on to him in a rhyme like “Eight’s great.” This would be the number the team had to stay under.

“It wasn’t too difficult to do; the Gillettes, I mean,” explained Pogo. “We had a real good team, and I was the playmaker and high scorer. I also led in steals, assists, and rebounds, so I could easily control the tempo of every game. If we scored too much ‘cause someone else got a hot hand, Coach Guts could substitute one of the Pine Brothers like Snyder or Mowbry. They’d put our hot streaks in the icebox real quick.”

Pogo said he got paid a grand after each game by one of Sal Sollazzo’s men. He assumed Joe Guts got more, but he never saw him take money.

**GUTS ON TAPE**

“These little rhymes Coach Guts would give you before tipoff,” asked Landish. “Did you do anything to preserve them?”

“I recorded them at your request, sir,” said Pogo.

Landish pushed a button on a recorder he’d set up, and in the next thirty

seconds we heard the five rhymes in the voice of a man who sounded very much like Count Dracula.

“Can you identify the man whose voice that is?” asked Landish.

“Yes, it’s Coach Guts, sitting right over there.”

The DA smiled and turned to Wilkes. “Your witness.” He lumbered over to his wooden chair and squeezed into it.

My friend approached Pogo’s cross-examination with the extremist zeal of a religious fanatic, and although he hadn’t had much time to prepare, he felt he could skewer Pogo with the tapes. The tapes were supposed to be the downfall of Joe Guts, but Wilkes embraced them as one does a keepsake from a lover. They would show Joe Guts to be framed.

Wilkes quickly got Pogo to admit he taped every practice lecture, pregame pep talk, halftime evangelical soliloquy, and post(game) mortem during the entire basketball season. It amounted to five hundred hours of tape, and Wilkes proceeded, after the inevitable objections from Miles Landish, to play every minute for the jury.

Wilkes explained to the judge that the thirty seconds the DA played were lifted out of context. The jury needed to listen to what came before and what after.

**COACH TALK**

It took three months. Coach Guts gave us a clinic on disciplining young men and molding them into a team. It was a rare opportunity to hear a jargon meant only for the jocks on the hardwood floor spoken by the most knowledgeable Transylvanian basketball coach in the world. Here are a few representative excerpts:

[Practice]: “Snyder! Where’d you play ball? School for the deaf, dumb, and blind? Look for picks, Snyder! Your man’s goink baseline ‘cause you’re gettink picked. Cover him like a rash, Snyder. Like a rash. If he goes to drinkink fountain, you turn water for him. If he goes to john, you hold his think. If he goes baseline, you block his ass off the court.

[Pregame]: “Vee vill not vin by just showink up, boys. You think like that and vee vill be in a world of hurt. Remember the three D’s out there - discipline, desire, and defense. They’re the key to winning.

[Halftime]: ‘Boys, I vant to congratulate you. You’re two points behind shittiest team in league. You, Snyder, you must love the floor out there. You never leave it! An you, Mowbry, vhat’s the matter? Rigor mortis set in? Show me you’re not dead out there, man, move! And you, Curtis, how many shots of yours vere blocked in your face? What a disgrace! Here’s a toothpick. Get the leather out of your teeth. You guys play like you’re unconscious. I vant to see desire out there. Hustle till it hurts, boys. Vake up or you get shipped! Remember, pain is transitory. A loss lasts forever!”

[Time out in game]: ‘Boys, boys, vhat is out there? Feelink sorry for the other side? What? This isn’t bullrink, boys. Stop with the matador defense! And you, Snyder, pick your opponent out there, not nose. Mowbry, spray your hands with glue. You drop balls too often. Now, listen up. Let me introduce you all to league’s leading scorer, Pogo Ridley. You boys play like you never saw him before. This is a five-on-five game, boys, so how’s about gettink ball to Pogo so he can shoot us back into the game? Now, let’s get out there and play ball!”

**TALE OF THE TAPE**

After three months of listening to Guts on tape exhorting his boys in every conceivable manner to victory, it seemed obvious, hopefully even to the jury, that Joe Guts was no crook. No one who cared so much about the success of his team would risk defeat and his personal ruin by doing Gillettes.

The endless tape playing clearly had an effect on Pogo. He seemed much less confident and ill at ease as Wilkes readied for the kill.

JW: "I see you were talking to Mr. Landish this morning."

POGO: "Yeah."

JW: "What'd he tell you to say?"

POGO: "Nothin' but the truth."

JW: "That would be refreshing. Wonder why he had to tell you that?"

It was a nasty little start, but Wilkes was out for blood. He next sought to bring out Pogo's motivation for turning on his coach.

JW: "Since you didn't mention it when Mr. Landish was questioning you, I assume you decided to secretly tape Coach Guts for a year and to testify against him out of a spirit of good citizenship?"

POGO: "That's part of it."

JW: "We're all anxious to hear about the other part."

POGO: "Yeah, well, I was doing Gillettes last year, and some coppers saw me meeting some of Sollazzo's men for the payoff, and they questioned me and I told 'em everything."

JW: "Everything? You told them you were going Gillettes on the scores and getting a grand per game from

Sollazzo?"

POGO: "Yeah."

JW: "And that was the whole truth?"

POGO: "So help me God."

JW: "And when those cops questioned you, you didn't mention a word about Joe Guts, did you?"

POGO: "I didn't want to get him in trouble."

JW: "But something changed your mind about that, obviously. What?"

POGO: "Mr. Landish. He said tell everything or I'd get twenty years. He said if I'd make a case on someone else, he'd let me go free."

JW: "So initially you lied to the cops by saying no one else on the team was involved, but when told to finger someone else or get twenty years, you told this fairy tale about Joe Guts!"

Wilkes yelled the last accusation, and it prompted Miles Landish to shout out an objection - "He's badgering the witness."

COURT: "Restrain yourself, Wilkes or it'll be contempt for you."

JW: "My apologies to the court and the jury, but it's difficult to be restrained when examining a man who's trying to perjure my client into prison."

This drew more venomous objections from the DA and threats from the judge, but Wilkes didn't care. He'd made a point with the jury.

#### MOVING IN ON POGO

Wilkes moved in on Pogo. He pulled from his pocket a photo of the team

and asked, "Who's your best friend on the team?"

POGO: "Ernie D., the other guard."

JW: "You've been seeing a lot of him lately, haven't you?"

Pogo squirmed a bit on the stand, uneasy with the notion that this change in direction of the questioning was leading somewhere he would regret going.

POGO: "Yeah. After court each day we been going to Toots Shor's to relax, Ernie, me, and Ernie's friend Uri."

Wilkes pulled another photo from his pocket and showed it to Pogo. He asked, "Do you recognize the people in this picture?"

POGO: "Yeah, that's me and Ernie and Uri at Toots. How'd you get that?"

JW: "You got to be pretty friendly with Uri, didn't you?"

POGO: "Just pals. Say, what's this all about?"

DA: "Yeah, I object. This seems irrelevant."

COURT: "That'll be denied."

JW: "I suppose you wouldn't mind telling us about the confession you made to Uri last night telling him that you decided to perjure yourself to save your lousy hide."

POGO: "That's a lie!"

JW: "Oh, is it? You sure? You know this man?"

Wilkes pointed to a man seated in the back row of the gallery. The man stood up, and my friend asked him to identify himself.

MAN: My name is Uriah Condo, known to the witness as Uri. I'm a private investigator for John Wilkes."

Pogo nearly fainted. The jig was up. Acting on Wilkes's plan to check out Pogo's teammates, Condo befriended Ernie D., Pogo's best friend, and convinced him to help us get Pogo to own up to the truth. Ernie believed in his coach's innocence and readily agreed to help. The rest was easy. Pogo was anxious for companionship after the endless hours on the witness stand listening to the tapes of the Knute Rockne of college basketball coaches imploring his team to excellence and victory. He welcomed the meetings with Ernie and Uri for free drinks and ball talk and more free drinks.

JW: "That's the man you knew as Uri?"

POGO: "Yeah, so what?"

### POGO'S LAST FOUL

Wilkes pulled from his coat another reel-to-reel tape and put it under Pogo's nose. "Mr. Condo knows how to operate a tape recorder, too, Pogo. Wanna hear it?"

Pogo sank in the witness chair. He was caught and he knew it. Suddenly he grabbed the tape out of Wilkes's hand and made a fast break for the doors to escape. Wilkes turned and yelled, "Stop the bastard!" I jumped up and set a perfect pick, which Pogo crashed into, sending both of us to the floor in a heap.

Wilkes picked up the tape and stood over a prostrate Pogo. "That's the worst charging foul I've seen in a year, Pogo. You must be losing it."

What Pogo lost was his credibility. Condo's tape revealed that Pogo set up his coach to make a case and get his

outlandish deal from the DA. The incriminating rhymes, it turns out, were a product of Pogo asking Guts if he thought the team could win by the posted point spread, and the coach innocently responding in rhyme that winning by such a margin would be fine.

After hearing the tape of Pogo's confession, the jurors stopped listening to the evidence. Their ears clogged and their eyes froze over, but the DA still made an effort to convince them that Pogo's confession was a defense trick played on a naive kid plied with drinks and overbearing pressure. He might as well have been talking to the wall.

Coach Joe Guts was acquitted by a jury that didn't even leave the room to deliberate. They just looked at each other, and when one said, "We've decided. He's innocent," they all nodded in agreement.

At this, the gallery jumped up and applauded Wilkes and his client for fifteen minutes. Joe Guts beamed. He looked like he'd just won the NCAA tournament.

Wilkes looked exhausted. He sat through the ovation smiling a little and shaking a lot. He had survived the ravages of four months of nonstop worry and work. As we left the courtroom, he said, "Thank God the cops catch a few guilty people every now and then. A few more Joe Gutses and I'm a goner."

*We extend our sincere thanks and appreciation to Mr. Charles Sevilla for allowing us to reprint this story for your reading pleasure.*

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## RECENT REVERSALS

### APPEAL WAIVERS

U.S. v. Behrman, No. 00-2563 (7<sup>th</sup> Cir. 12/22/00). Notwithstanding the defendant's waiver of his right to appeal any sentence within the statutory maximum provided in the statute of conviction, the Court of Appeals held that the defendant could still challenge the imposition of restitution at sentencing. First, the court rejected the defendant's argument that constitutional arguments could not be waived in a plea agreement. However, the court also noted that the defendant would only waive his right to appeal the imposition of restitution if it was a "sentence within the maximum provided in the statute(s) of conviction" as stated in the plea agreement. The court noted that there is a difference between the "statute of conviction" and the entire criminal code. Specifically, the statute of conviction here, 18 U.S.C. § 1344 (bank fraud), makes no mention of restitution. Rather, restitution is governed by a different section of Title 18. Accordingly, given the plain language of the waiver in this case, the right to challenge restitution on appeal was not waived, although the court noted that the result would have been different had the waiver contained language waiving the right to appeal "any sentence within the maximum provided in Title 18." Having therefore avoided the waiver as to the restitution issue, the Court of Appeals remanded the case to the district court for reconsideration on the restitution issue because the government and the district judge mistakenly believed that the defendant stipulated to the amount of restitution.

### EVIDENCE

10/3/00). In prosecution for conspiracy to distribute narcotics, the Court of Appeals reversed the defendant's conviction because the trial court refused to allow the defendant to impeach the government's star witness with a prior drug conviction which clearly demonstrated that the witness had lied on the stand. At trial, the primary witness against the defendant was a former co-conspirator who turned state's evidence. During his testimony, he stated that he had not used or sold drugs during the course of the conspiracy. On cross-examination, the defendant attempted to impeach this testimony with evidence of the witness's prior felony drug conviction. The district court, however, refused to allow its admission. On appeal, the court noted that while the exclusion did not violate the defendant's Sixth Amendment right to confront the witness, the exclusion was in clear violation of Federal Rule of Evidence 609(a)(1) which provides that "evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to Rule 403." Given the strong probative nature of the evidence showing that the witness lied on the stand, Rule 403 did not exclude its admission. Moving to the harmless error analysis, the court noted that the other government witnesses who testified against various other co-defendants did not name the defendant as a co-conspirator. Indeed, once the witness in question's testimony is excluded, the only evidence implicating the defendant was police testimony that the defendant rode in the car with a co-defendant a few times and that he was a crack addict who sometimes purchased drugs. Under these circumstances, the court could not conclude that the error was harmless, and accordingly reversed the defendant's conviction.

**HABEAS/2255**

U.S. v. Evans, No. 99-1187 (7<sup>th</sup> Cir.

08/18/00). On consideration of this 2255 petition, the Court of Appeals held that any post-judgment motion in a criminal proceeding that fits the description of § 2255 ¶1 is a motion under § 2255, and that the second (and all subsequent) of these requires appellate approval. In this case, the petitioner, after his direct appeal was concluded, filed a 2255 motion which was ultimately rejected. Thereafter, the petitioner filed a Rule 33 motion for a new trial based on what he called "newly discovered evidence" in the trial court, alleging a *Brady* violation. The Court of Appeals concluded that this motion was governed by the language contained in § 2255 ¶1, and therefore approval from the appellate court was required before such a motion could be filed. The court first noted that ¶8 of § 2255 says that appellate approval applies to a "second or successive motion." Thus, where a Rule 33 motion fits within the definitions as set forth in ¶1, it should literally be subject to the appellate approval provision of ¶8. Specifically, § 2255 ¶1 provides as follows: "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence." Accordingly, with the exception of a Rule 33 motion alleging a claim of actual innocence, Rule 33 motions based on alleged constitutional violations, even if the alleged constitutional violation is based on newly discovered evidence, are equivalent to 2255 petitions, thereby subject to its procedural restrictions. The court went on to note, however, that it did not have before it the

question of whether a Rule 33 motion filed *before* a 2255 petition could require appellate permission prior to the filing of the 2255 petition. But, the court did note that district judges, when faced with a defendant invoking Rule 33 which presents issues substantively within § 2255 ¶1, should alert the defendant that his Rule 33 motion could preclude any later collateral proceedings and ask whether the defendant wishes to withdraw the claim.

Cossel v. Miller, No. 98-1355 (7<sup>th</sup> Cir. 10/12/00). The petitioner filed this habeas corpus petition challenging his 1989 state convictions for several crimes, including rape, on the ground that his trial counsel rendered constitutionally ineffective assistance of counsel by failing to properly object to testimony by the victim relating to her identification of him as her attacker. The Court of Appeals reversed this district court's denial of the petition, holding that the Indiana Court of Appeals misapplied federal law. The Court of Appeals noted that there was no physical evidence linking the petitioner to the crime, thus making the victim's identification the pivotal piece of evidence in the case. However, counsel did not move to suppress any evidence regarding the out-of-court identification made by the victim, nor did he object to its introduction during the trial. Under these circumstances, the court found that counsel's failures were not a decision that might be considered sound trial strategy, or the result of reasonable professional judgment. Thus, the petitioner met his burden of showing that counsel's performance fell below an objective standard of reasonableness. Likewise, the petitioner showed that, but for trial counsel's errors, there was a reasonable probability that the result of the trial would have been different. The court first noted that the out of court single-photo line-up was unduly suggestive, and should have been

suppressed had such a motion been made. Secondly, although the victim also identified the petitioner in court, the circumstances in the present case did not support its reliability. In addition to having only 10 seconds to view the attacker by moonlight, the victim initially gave a different physical description of her attacker than that of the petitioner. Additionally, she did not recognize the petitioner's voice when he was presented to her in a line-up three years after the attack. Finally, the in-court identification of the defendant did not occur until six years after the crime. Accordingly, under the totality of the circumstances, the court concluded that the in-court identification lacked sufficient indicia of reliability, and granted the petitioner's writ of habeas corpus.

Lipson v. U.S., No. 98-4051 (7<sup>th</sup> Cir. 11/7/00). On consideration of this 2255 petition, the Court of Appeals remanded to the district court for a further evidentiary hearing on whether the petitioner was prejudiced by her attorney's conflict of interest. The petitioner and her boyfriend were charged with various narcotics offenses and each had separate attorneys. However, the petitioner's attorney was paid by her boyfriend, and she argued that this financial arrangement resulted in a conflict of interest. The court noted that defendants who wish to raise claims of ineffective assistance of counsel based on conflicts of interest may proceed under either of two theories. If the defendant can establish that the trial judge knew or should have known that a potential conflict of interest existed, then the court presumes that the defendant was prejudiced by that conflict if the judge made no inquiry into it. If, on the other hand, the trial judge was not put on notice of a potential conflict, the court will find prejudice only if the defendant demonstrates that her counsel actively represented conflicting interests and

that the conflict adversely affected the counsel's performance. The present case fell under the latter category, and the court remanded the case for further factual findings. Specifically, the petitioner argued that she was prejudiced because her attorney did not adequately pursue opportunities for a plea agreement contingent upon cooperation against her boyfriend. The court noted that almost half of the other codefendants entered into such agreements, and if the conflict of interest prevented her attorney from seeking such an agreement for the petitioner, she may have been adversely affected. Thus, the court remanded the case for further factual findings on this issue.

Wilkinson v. Cowan, No. 99-1220 (7<sup>th</sup> Cir. 11/01/00). In this state court habeas petition, the Court of Appeals reversed the district court's decision to dismiss the petitioner's petition based on its belief that the petitioner had procedurally defaulted his claim of ineffective assistance of counsel. After being convicted in Illinois State Court of murdering his wife, the petitioner filed a post-conviction petition in the Illinois State Courts. After the petition was summarily dismissed by the circuit court, the petitioner's appellate counsel filed a no merits brief which the Illinois Appellate Court upon review granted. When the petitioner later sought federal habeas relief, the district court determined that he had procedurally defaulted his ineffectiveness claim by failing to present the claim to the Illinois Appellate Court. The Seventh Circuit Court of Appeals, however, disagreed and held that the State Appellate Court when it elected to affirm the circuit court's judgment out right without inviting the petitioner to brief his appeal pro se implicitly reached the merits of all the issues that he had raised in his post-conviction petition. The Court of Appeals noted that the petitioner had raised the ineffectiveness claim in his

petition in the circuit court, the petition which the circuit court dismissed as frivolous. On appeal to the Illinois Appellate Court, the Anders Brief, although noting that there was no issue to be raised, was considered by the Court of Appeals. To grant such a motion necessarily implicates the merits of an appeal because the premise of the motion is that the appeal is frivolous. Thus, in deciding whether to allow the withdrawal, the court must examine the substance of the case to determine whether there are issues of arguable merit. Once the court has satisfied itself that there are no such issues, the court may not only release the appellant's counsel but proceed to dismiss the appeal or to affirm the judgment. That is precisely what happened in the present case and the affirmance was based on something less than full adversarial briefing, really no briefing at all, but its order leaves no doubt that after reviewing the record the court affirmed out-right the dismissal of Wilkinson's post-conviction petition. The Court of Appeals concluded that this can only be understood as a merits-based decision with respect to each of the claims raised in the petition, including the ineffectiveness claim. Accordingly, the claim was not procedurally defaulted.

#### INTERSTATE COMMERCE

U.S. v. Peterson, No. 99-3967 (7<sup>th</sup> Cir. 01/04/00). In prosecution for attempted robbery affecting interstate commerce, the Court of Appeals reversed the defendants' convictions. The defendants broke into a man's home and stole 30 pounds of bricked marijuana, \$18,000 in cash, and three guns. On appeal, the defendants argued that the government failed to prove beyond a reasonable doubt that the robberies had a substantial effect on interstate commerce, rather than merely a *de minimus* effect. Secondly, even under the *de minimus* standard, insufficient evidence was presented to

the jury. First, the court held that when determining the effect on interstate commerce, such effects may be viewed in the aggregate for Hobbs Act violations, notwithstanding recent Supreme Court precedent to the contrary for different statutes. Thus, the court upheld the *de minimus* standard for Hobbs Act violations. However, even under this standard, the court found the evidence to be insufficient. First, the court rejected the government's attempt to establish an effect on interstate commerce by showing that the money stolen was printed out-of-state. According to the court, establishing an effect on interstate commerce in this manner would require an overly expansive interpretation of the Hobbs Act because practically every robbery would fall under the Hobbs Act. Regarding the marijuana, the government's evidence failed to establish that the plants actually originated in a different state. Although the government's expert testified that the type of marijuana stolen did not "normally" come from Indiana, given that this was the only evidence regarding whether the person from whom the marijuana was stolen operated an interstate business, the evidence was too attenuated to establish the interstate commerce element. Moreover, the government could not meet the interstate commerce element by merely showing that the guns, money, and drugs had traveled in interstate commerce because the language of the Hobbs Act requires the government to show an effect on interstate commerce by demonstrating that the robbery depleted the assets of an interstate commerce business. Merely crossing state lines is not enough for this type of showing. Accordingly, the Court of Appeals reversed the defendants' convictions for insufficiency of evidence.

**JURY INSTRUCTIONS**

U.S. v. Swan, No. 98-3760 (7<sup>th</sup> Cir. 08/10/00). In prosecution for RICO violations, the Court of Appeals reversed the defendant's conviction under 18 U.S.C. § 1962(c) due to an improper jury instruction. The district court instructed the jury as follows on the requirement that in order to be convicted of substantive RICO violations, a defendant must have conducted or participated in the illicit enterprise's affairs: "The terms 'conduct' and 'participate in the conduct of the affairs of the enterprise' include the performance of acts, functions or duties which are necessary to or helpful in the operation of the enterprise." In rejecting this instruction, the Court of Appeals noted that in order to have conducted or participated in the enterprise's affairs, the defendant must have had some part in directing those affairs. In other words, he must have participated in the operation or management of the enterprise itself, and he must have asserted some control over the enterprise. Simply performing services for an enterprise, even with knowledge of the enterprise's illicit nature, is not enough to establish that the defendant participated in the enterprise's affairs. Given this law, the instruction given by the district court was deficient, for it required no finding of operation or management of the enterprise. Moreover, the Court of Appeals rejected the district court's conclusion that the operation or management test applied only to civil RICO prosecutions. Finally, the Court of Appeals concluded that the error in this case was not harmless because the record did not contain overwhelming evidence that the defendant managed or controlled the enterprise. After issuing this opinion, the Court of Appeals subsequently amended some of the language in the opinion. Specifically, the opinion in some places uses the phrase "management and control." The court changed those portions of the opinion containing this

language to "management *or* control," noting that the United States Supreme Court in Reves v. Ernst & Young, 507 U.S. 170 (1993), used the disjunctive rather than the conjunctive when describing the requirements for conviction under 18 U.S.C. § 1962(c).

**MISCELLANEOUS**

National Organization for Women v. Scheidler, No. 99-3076 (7<sup>th</sup> Cir. 07/31/00). In this civil case, the Court of Appeals set forth the standards it uses when determining whether to allow an *amicus curiae* brief to be filed. The court first noted that the caseloads of judges require them to read thousands of pages of briefs, and amicus briefs can therefore be a real burden on the court. Secondly, the court stated that amicus briefs are often sponsored by one of the parties and are an attempt to circumvent the page limitations on parties' briefs. Finally, the court stated that amicus briefs are "often attempts to inject interest-group politics into the federal appellate process by flaunting the interest of a trade association or other interest group in the outcome of the appeal. Thus, the court set forth the following guidelines it would use in the future when considering the request by a third-party to file an amicus brief. Specifically, the court stated, "The policy of this court is not to grant rote permission to file an amicus curiae brief; never to grant permission to file an amicus brief that essentially merely duplicates the brief of one of the parties; to grant permission to file an amicus brief only when (1) a party is not adequately represented (usually, is not represented at all); or (2) when the would-be amicus has a direct interest in another case, and the case in which he seeks permission to file an amicus curiae brief may, by operation of stare decisis or res judicata, materially affect that interest; or (3) when the amicus has a unique perspective, or information, that can assist the court of appeals beyond what

the parties are able to do.

In the Matter of Grand Jury Proceedings, Involving William Thullen, No. 99-3131 (7<sup>th</sup> Cir. 07/18/00). On appeal from a district court's order that certain documents be turned over to the government pursuant to a grand jury subpoena, the Court of Appeals vacated the judgment of the district court and remanded for more particularized factual findings. A grand jury subpoenaed numerous documents from accountants hired by the defendant's attorneys. The district court, after making an in camera review, ordered that some documents should be produced while others were protected by the attorney-client privilege. On appeal, the Court of Appeals noted that there is no accountant-client privilege. However, material transmitted to accountants may fall under the attorney-client privilege if the accountant is acting as an agent of an attorney for the purpose of assisting with the provision of legal advice. What is vital to the privilege is that the communication be made *in confidence* for the purpose of obtaining *legal* advice from the *lawyer*. If what is sought is not legal advice but only accounting service or if the advice sought is the accountant's rather than the lawyer's, then no privilege exists. In the present case, applying these principles, the Court of Appeals concluded that the factual findings made by the district court were inadequate to determine whether the privilege in fact attached to the documents, and, therefore, the case was remanded back to the district court.

U.S. v. Kramer, No. 99-2262 (7<sup>th</sup> Cir. 09/05/00). In prosecution for failure to pay past due child support, the Court of Appeals held that a defendant may offer as a defense that the underlying state court which entered the support order lacked personal jurisdiction. The district court rejected the defendant's

attempt to offer as a defense that the state court which entered the support order lacked personal jurisdiction because the defendant was never served with any papers and was unaware of the default judgment entered against him. On appeal, the government argued that the district court properly refused to consider the defense because it was an inappropriate attempt to collaterally attack the child support order. The Court of Appeals, however, disagreed. The court first noted that the general rule for default judgments in civil actions is that the judgment may be attacked collaterally on the narrow ground that the judgment was void because the rendering court lacked the requisite nexus with the defaulting party or gave inadequate notice of the support action to that party. After carefully reviewing the statutory history behind the federal child support statute, the court concluded that Congress did not intend to abrogate this general rule through the enactment of the act. Moreover, the court concluded that subjecting a defendant to criminal penalties for non-compliance with a state support judgement without allowing challenge to the state court's personal jurisdiction would permit federal criminal law to accomplish what states forbid in their own civil and criminal courts and, indeed, what Congress has forbidden in the civil remedies it has created.

#### OFFENSE ELEMENTS

U.S. v. Williams, No. 99-1943 (7<sup>th</sup> Cir. 08/15/00). In prosecution for a 922(g) violation, the Court of Appeals reversed the defendant's conviction. At trial, the government sought to prove that the defendant possessed a weapon under a vicarious liability theory premised on *Pinkerton v. United States*, 328 U.S. 640 (1946). Specifically, the government argued that the defendant could be found guilty of possessing the firearm as a felon

even if she lacked either actual or constructive possession, as long as another member of the conspiracy possessed a gun. In rejecting the government's approach, the Court of Appeals first noted that the government sought *Pinkerton* liability for acts by a co-conspirator that did not constitute a crime. Specifically, the government attempted to "cut-and-paste" by taking the firearm possession by one conspirator, adding to the felon status of another conspirator, and thereby creating a substantive offense for that second conspirator. Under such an expansion of the *Pinkerton* doctrine, even lawful possession of a firearm by a co-conspirator could be used to establish a 922(g) violation for a co-conspirator who is a felon. Additionally, allowing such a vicarious liability theory is contrary to the rationale justifying 922(g). Indeed, because 922(g) defines the offense in terms of the status of the individual possessing the firearm, the vicarious liability provisions of *Pinkerton* are inappropriate for such an offense. Thus, after noting that the record did not contain evidence sufficient to show that the defendant either actually or constructively possessed a weapon, the Court of Appeals reversed and ordered a new trial.

U.S. v. Gee, No. 99-2348 (7<sup>th</sup> Cir. 09/11/00). In prosecution for mail and wire fraud, the Court of Appeals reversed the defendants' convictions, finding that the government failed to produce evidence that the defendants made a "material falsehood." The prosecution arose out of the defendants' activity whereby they sold cable boxes which were capable of descrambling encrypted cable programming. The Court of Appeals noted that not only did the indictment fail to allege that this scheme involved any material misrepresentations, but also that the government failed to produce any evidence of such misrepresentations at trial. Indeed, the

only evidence produced at trial showed that the *customers* of the defendants made misrepresentations to the cable companies. However, the defendants themselves never made any such misrepresentations, nor did they induce their customers to do so. In sum, although the devices sold by the defendants clearly allowed the illegal interception of scrambled signals, the capabilities of the cable boxes did not demonstrate that the defendants ever made material falsehoods. Secondly, the Court of Appeals reversed the defendants' convictions for conspiracy. Although never requested in the district court, the Court of Appeals held that the district court committed reversible error when it failed to *sua sponte* give the jury a buyer-seller instruction. In the present case, the evidence showed that one defendant sold component parts to the other defendant, who in turn sold the completed cable boxes to customers. No direct evidence, however, showed that the two defendants ever entered into an agreement to commit a crime. Thus, under such circumstances, the buyer-seller instruction was warranted. Moreover, the error warranted reversal given the slim evidence presented regarding any criminal agreement.

### SEARCH AND SEIZURE

U.S. v. Husband, No. 99-2881 (7<sup>th</sup> Cir. 08/22/00). In prosecution for distribution of crack cocaine, the Court of Appeals reversed the district court's denial of the defendant's motion to suppress evidence. After arresting the defendant, the officers noticed that he had something in his mouth, and the defendant refused to open his mouth for inspection. The officers then noticed that the defendant appeared to be experiencing a seizure. Thus, the officers escorted the defendant to the hospital and requested a warrant to search his body for illegal drugs, weapons, or contraband. Before the officers were aware that the warrant

issued, however, the doctor administered a drug through an I.V. which enabled the police to recover the items in his mouth. Specifically, the drug rendered the defendant unconscious, thereby allowing the police to open his mouth and recover some narcotics. The defendant argued that the police acted unreasonably in the execution of the warrant by rendering the defendant unconscious through the administration of drugs. In reversing the district court's decision, the Court of Appeals applied a balancing test which considered the extent to which the procedure may threaten the safety or health of the individual; the extent of the intrusion upon the individual's dignity interests in personal privacy and bodily integrity; and the community's interest in fairly and accurately determining guilt or innocence. After weighing these factors, the court concluded that a remand for further factual findings was necessary. Specifically, the court concluded as follows: "First, while there is no evidence in the record that the drug administered to the defendant was in any way dangerous, there is also no assurance that the drug was completely safe, nor any indication of the precise magnitude of the risk faced by the defendant. Second, the record below does not clearly indicate how imminent the police regarded the potential loss of evidence to be. Lastly, the record is ambiguous as to the extent of the medical emergency faced by the defendant at the time he was administered the anesthetic." Accordingly, because the factual record was insufficient for the court to evaluate the reasonableness of the search, a remand was necessary. Judge Easterbrook dissented, arguing that the good faith exception to the warrant requirement supported the district court's denial of the motion to suppress.

### SENTENCING

U.S. v. Jones, No. 00-2358 (7<sup>th</sup> Cir. 12/15/00). In prosecution for bank robbery, the Court of Appeals reversed the defendant's sentence. The district court determined that the defendant was a career offender in part based upon a Massachusetts assault and battery conviction, concluding that the conviction was both a felony and a crime of violence. The district court reasoned that although the conviction was classified by the state as a misdemeanor, a crime punishable by a term of imprisonment exceeding one year (as this crime was) qualifies as a felony for career offender purposes, regardless of how the state classifies the crime. With this conclusion, the Court of Appeals agreed, noting that "whether a conviction is a felony for purposes of the career offender guideline is whether the offense "is punishable by death or imprisonment for a term exceeding one year." However, the court concluded that the conviction was not for a "crime of violence." The court initially noted that the defendant's conviction was not a crime of violence because actual, attempted, or threatened physical violence was not a necessary element of the crime, nor was the crime specifically enumerated as a crime of violence in subsection two of U.S.S.G. § 4B1.2(a). Accordingly, the only other means by which the crime could qualify was if it involved a "serious potential risk of physical injury to another." The court noted that a district court may ordinarily only look to the charging document to answer this question, unless it is impossible to answer the question from the charging document alone and looking beyond the charging document will not require a hearing to resolve contested factual issues. In the present case, the language of the charging document alone was insufficient to establish a serious potential risk of physical injury to another. Moreover, looking beyond the charging document would require a hearing to resolve contested issues of fact because the underlying facts of the

charge were vigorously contested by both sides. Under these circumstances, the court vacated the defendant's sentence and found that the defendant was not a career offender.

U.S. v. Eschman, No. 00-1395 (7<sup>th</sup> Cir. 09/14/00). In prosecution for manufacture of methamphetamine, the Court of Appeals reversed the district court's determination of drug quantity. Based on the discovery of 6,400 30-milligram pseudoephedrine pills in the defendant's bedroom, the government's DEA expert estimated that these pills could produce 177 grams of actual methamphetamine. The expert based this opinion on the assumption that the production process had a 100% yield. The expert, however, admitted that a 100% yield was impossible and was only a "theoretical figure." The defense expert testified that the average yield for a clandestine laboratory was from 40% to 50%. Indeed, at most, he testified that an 80% yield could be obtained. The district judge, however, found the defense expert's testimony to be incredible, and, accordingly, used the 100% theoretical yield figure. The Court of Appeals reversed, holding that district courts cannot quantify yield figures without regard for a particular defendant's capabilities when viewed in light of the drug laboratory involved. In the present case, the record contained no evidence regarding the sorts of yields the defendant could, with his equipment and recipe, obtain in his methamphetamine laboratory (or, for that matter, even evidence regarding yield of similarly situated defendants). Moreover, both experts agreed that the 100% yield ratio used by the district court was only theoretical and impossible to achieve. Accordingly, the Court of Appeals reversed the defendant's sentence and ordered the district court to make a more precise inquiry into the quantity of methamphetamine attributable to the

defendant.

U.S. v. Hollis, No. 99-3136 (7<sup>th</sup> Cir. 10/19/00). In prosecution for affecting interstate commerce by extortion, the Court of Appeals reversed the district court's denial of a downward adjustment for acceptance of responsibility. The district judge at sentencing noted that the defendant was required to accept responsibility for not only the conduct related to his offense of conviction, but also his relevant conduct. On appeal, the court noted that although the old guideline section required such acceptance, the current version which applied in the present case does not require a defendant to accept responsibility for relevant conduct. Rather, he need only not falsely deny or frivolously contest relevant conduct to receive the adjustment. Moreover, the court held that it could affirm the sentence under the harmless error rules only if the "error did not affect the district court's selection of the sentence imposed." Under the facts of the case, the court could not conclude that the error was harmless, and it therefore remanded to the district court.

U.S. v. Guzman, No. 99-2169 (7<sup>th</sup> Cir. 01/03/00). In prosecution for narcotics offenses, the Court of Appeals, upon appeal by the government, reversed the district court's 25-level downward departure based on the defendant's "cultural heritage" and because her conviction of a serious drug offense made her deportable as a non-citizen. The government argued that "cultural heritage" could never constitute a permissible basis for departure, but the Court of Appeals refused to make such a broad holding. After expressing much doubt about the permissibility of a departure on such grounds, the court nevertheless expressly refused to exclude all possibility of consideration of cultural factors in cases that it could not yet foresee. Rather, based on the facts of this case, the court found that

the departure was an abuse of discretion because what the district court regarded as a matter of cultural heritage was really just a joinder of gender and national origin, two expressly forbidden considerations in sentencing where, as here, the court departed based on a theory that a Mexican woman may be more likely to participate in her boyfriend's criminal activity than if she had been an Anglo male. Regarding deportable alien status, the court rejected such status as a ground for departure where the argument is that deportation constitutes a "second" form of punishment not present for citizens. However, the court did note that a defendant's status as a deportable alien is relevant *only* insofar as it may lead to conditions of confinement more onerous than the framers of the guidelines contemplated in fixing the punishment range for the defendant's offense. Notwithstanding this permissible consideration, in the present case, such a possibility of more onerous conditions of confinement could not justify a 25-level departure.

U.S. v. Vargas, No. 99-2058 (7<sup>th</sup> Cir. 10/16/00). In prosecution for distribution of one kilogram of cocaine, the Court of Appeals vacated the defendant's sentence and remanded it to the district court for further proceedings due to an error in the defendant's criminal history category computation. The defendant's PSR described an incident where the defendant was arrested for possession of marijuana in violation of a municipal ordinance. The PSR described the disposition only as "bond forfeiture" in the amount of \$75.00. At sentencing the defendant objected to the assessment of a criminal history point based on the disposition arguing that it reflected only his failure to appear in court and not an adjudication of guilt on the underlying drug charge. Although the government never produced the judgment relating to the incident, the district court construed the forfeiture as

a prior sentence and assessed the defendant a criminal history point. The Court of Appeals noted that the government offered no authority to suggest that an Illinois bond forfeiture was the equivalent to a default judgment of conviction on the underlying charge or that the defendant's failure to appear constituted a nolo contendere plea to the ordinance violation. Moreover, the government never produced a judgment from the case. Additionally, the court noted that even if a judgment had been entered against the defendant based on his failure to appear, it was not clear that such a judgment would satisfy the "adjudication of guilt" element of Section 4A1.2(a)(1), or under Illinois law when an accused has failed to surrender within 30 days of notice of the forfeiture of his bail, a civil judgment in lieu of criminal prosecution is entered. Finally, the Court of Appeals noted that although the single point addition to the defendant's criminal history score could not change his criminal history category, remand was nevertheless necessary because the district court below had denied the defendant's motion for downward departure based on the fact that his criminal history category over-represented his actual criminal history. Given an erroneous conclusion of law that led to the assessment of an extra point, such an assessment may have affected the district court's departure decision, because the defendant would have had one fewer conviction than the district court assumed. Thus, because the court could not be certain that the error that led to the assessment of the extra point did not also affect the district court's departure decision, it remanded the case for re-sentencing.

**SUPERVISED RELEASE**

U.S. v. Angle No. 99-3349 (7<sup>th</sup> Cir. 12/06/00). In prosecution for possession of child pornography, the

Court of Appeals reversed the district court's requirement as a special condition of supervised release that the defendant register as sex offender. The Court of Appeals noted that a district court may impose a special condition of supervised release that it deems appropriate so long as the condition (1) is related to the specified sentencing factors, namely the nature and circumstances of the offence and the history and characteristics of the defendant; (2) is reasonably related to the need to afford adequate deterrence to protect the public from further crimes of the defendant and to provide the defendant with needed education or vocational training, medical care, or other correctional treatment in the most effective manner; (3) involves no greater deprivation of liberty than is reasonably necessary to achieve these goals; and (4) is consistent with any pertinent policy statements issued by the sentencing commission. The Court of Appeals, looking to Federal Rule of Criminal Procedure 32(c)(1), noted that reasonable presentence notice must be given to criminal defendants either by their presentence report, a pre-hearing submission, or the district court itself when the court is considering imposing sex offender registration as a special condition of supervised release. Indeed, because such a requirement is an analogous to an upward departure, Rule 32 requires presentence notice. Thus, in the present case, because the defendant was given no notice that the court was contemplating imposing such a special condition, the Court of Appeals vacated the defendant's sentence and remanded to the district court, noting that the district court should reconsider the issue on remand after providing the parties with an opportunity to comment on the appropriateness of the sex offender registration requirement as a special condition of supervised release.

U.S. v. Shabazz, No. 99-3948 (7<sup>th</sup> Cir. 10/06/00). The defendant was

originally convicted of misprision of a felony, a crime punishable by a term of imprisonment not to exceed 3 years, thus making it a class E Felony. By statute, the term of supervised release for a Class E Felony is not more than one year. However, upon revocation of the defendant's supervised release term, the district court sentenced him to a term of 3 years of supervised release. The Court of Appeals, therefore, vacated the sentence imposed by the district court and remanded the case to the district court with directions that it impose a sentence of supervised release that does not exceed the statutory maximum level of one year under 18 U.S.C. § 3583(b)(3).

**RECENT AFFIRMANCES**

**APPEAL WAVERS**

Bridgeman v. U.S., No. 99-1877 (7<sup>th</sup> Cir. 10/2/00). Upon consideration of the district court's denial of a 2255 petition, the Court of Appeals held that the petitioner's waiver of his right to appeal his sentence on direct appeal or collaterally did not deprive the court of jurisdiction to hear an appeal challenging the conviction, rather than the sentence. In the petitioner's plea agreement, the petitioner explicitly waived his right to appeal his sentence or collaterally attack it. The district court dismissed his subsequent 2255 petition based on this waiver. The Court of Appeals first noted that the appeal waiver addressed only the petitioner's right to challenge his sentence. The petitioner's challenge, however, was to the voluntariness of his plea based on ineffective assistance of counsel. Thus, this challenge to the conviction itself was not precluded by the appeal waiver. Notwithstanding this finding, the Court of Appeals nonetheless affirmed the denial of the petition because the petitioner's claim was patently without merit. First, the petitioner's claim that counsel

miscalculated his guideline range “could never suffice to demonstrate deficient performance unless the inaccurate advice resulted from the attorney’s failure to undertake a good-faith analysis of all of the relevant facts and applicable legal principles.” No such showing was made in this case. Moreover, the petitioner’s claim was belied by his own statements at the change of plea hearing.

**APPRENDI**

U.S. v. Nance, No. 00-1836 (7<sup>th</sup> Cir. 12/29/00). In prosecution for the distribution of crack, the Court of Appeals reversed its previous holding in United States v. Jackson, 207 F.3d 910 (7<sup>th</sup> Cir. 2000), and held that drug quantity is an element of the offense which must be pled in the indictment and proved to a jury beyond a reasonable doubt before a defendant may be subjected to an enhanced statutory maximum sentence. In so holding, the Court noted that where a defendant receives a sentence less than the default statutory maximum sentence set forth at 21 U.S.C. § 841(b)(1)(C), Apprendi does not require drug quantity be pled and proved as an element. In the present case, despite the fact that the defendant received an enhanced statutory maximum without drug quantity being either pled or proven, the court nonetheless affirmed the defendant’s sentence upon application of the plain error rule. Although Apprendi had not been decided when the case was in the district court, the Court of Appeals surmised that, notwithstanding clear and binding circuit authority to the contrary, a “responsible lawyer could have preserved the right to argue on appeal that Jackson was inconsistent with” the Supreme Court’s earlier decision in Jones v. United States.” Under this standard, assuming an error and assuming it was plain, the court

concluded that it was clear beyond a reasonable doubt that a properly worded indictment and a properly instructed jury would still have found the defendant guilty. The court concluded that under the facts of the case, the jury could not have believed that the defendant was guilty of the narcotics offense without having also concluded that at least five grams of crack were involved. Thus, the court affirmed the defendant’s sentence, notwithstanding the error.

U.S. v. Jackson, No.98-2696A (7<sup>th</sup> Cir. 01/10/00). On remand from the United States Supreme Court for reconsideration in light of Apprendi, the Court of Appeals, relying upon U.S. v. Nance, No. 00-1836 (7<sup>th</sup> Cir. 12/29/00), held that the defendant’s enhanced statutory maximum based on drug quantity violated Apprendi, but nevertheless affirmed the defendant’s conviction under a plain error standard of review. Specifically, the court held that on one occasion alone, the evidence showed that the defendant distributed over 50 grams of crack cocaine, and that the defendant was an official in the Gangster Disciples. Based on the evidence presented at trial, the court concluded that no reasonable jury could have failed to convict the defendant of being involved in the sale of hundreds, if not thousands, of grams of crack.

U.S. v. Smith, No. 98-1501 (7<sup>th</sup> Cir. 08/17/00). In the Seventh Circuit’s first case addressing the impact of the Supreme Court’s recent decision in Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), the Court of Appeals held that the subsection requiring a mandatory life sentence for certain violators of the continuing criminal enterprise statute (21 U.S.C. § 848(b)) was not an element of the offense which required a jury finding beyond a reasonable doubt. The court first noted that the underlying statute, 21 U.S.C. § 848(a), authorized a range of

imprisonment from 30 years to life imprisonment. Thus, unlike the situation in Apprendi where the possible maximum sentence increased, here the possible maximum sentence was always life. The enhancement merely narrowed the range and required life imprisonment. Thus, on these facts, the determination for the court was whether the literal fact that the defendants faced at least a risk of a life term under subsection (a) was enough to make subsection (b) a sentencing statute under Apprendi. The court concluded that it was, for the language in Apprendi refers not to the defendant’s expected punishment, but rather to the “prescribed statutory maximum.” Thus, in this case, a life sentence was *possible* under subsection (a), even if it was not a certainty. Apprendi, therefore, did not directly apply to the facts of the case.

Talbott v. Indiana, No. 00-3080 (7<sup>th</sup> Cir. 09/07/00). On application for permission to file a successive collateral attack to his state convictions based on Apprendi v. New Jersey, the Court of Appeals denied the application and held that no such applications would be approved until the Supreme Court explicitly makes Apprendi retroactive to cases on collateral review. In denying the application, the court also noted that many applicants for such relief seem to misapprehend the impact of Apprendi. Specifically, the court noted that Apprendi may apply where a fact increases a defendant’s statutory maximum sentence. However, Apprendi does not affect application of the relevant-conduct rules under the Sentencing Guidelines to sentences that fall within a statutory cap. By way of example, the court stated that “when a drug dealer is sentenced to less than 20 years’ imprisonment . . . Apprendi is irrelevant even if” drug quantity and type are elements of an 841 offense.

U.S. v. Cavender, No. 98-3449 (7<sup>th</sup> Cir. 10/3/00). In prosecution for narcotics

offenses, the Court of Appeals rejected the defendant's argument that he was denied due process because his indictment under 21 U.S.C. §§ 846 & 841 did not list the specific quantity of cocaine base which he was ultimately convicted of possessing. The court noted that, in an opinion decided before Apprendi, the Court of Appeals in United States v. Jackson, 207 F.3d 910, 920 (7<sup>th</sup> Cir. 2000), concluded that the quantity of a drug is a sentencing factor which need not be included in an indictment charging an 841 offense. Although noting that Apprendi might apply in a future case, the court noted that, in the present case, the indictment charged that the defendant handled "multiple kilograms of mixtures containing cocaine base," and evidence was put before the jury to this effect. Thus, according to the court, that is all that Apprendi requires, and even assuming Apprendi applied in this case, any error was harmless.

### DOUBLE JEOPARDY

U.S. v. Combs, No. 99-2109 (7<sup>th</sup> Cir. 07/25/00). In prosecution for possession with intent to distribute methamphetamine, the Court of Appeals affirmed the district court's *sua sponte* grant of a mistrial. During the defendant's first trial, it became apparent that the defendant's attorney had previously represented the government's key witness. The district court then asked if the defendant wished to waive the conflict, an offer which he declined. However, the defendant also refused to consent to the appointment of new counsel. Thus, under these circumstances, the district court concluded that a mistrial was necessary. Thereafter, the defendant was convicted after his second trial. On appeal, the defendant argued that his second trial violated the double jeopardy clause of the Fifth Amendment because the mistrial was not "manifestly necessary." The Court of Appeals, in rejecting this argument,

noted that the double jeopardy clause bars retrial unless the district court's mistrial declaration was occasioned by manifest necessity or consented to by the defendant. In this case, manifest necessity was present because the validity of the verdict would have been in question no matter how the district court chose to proceed. Specifically, if the court dismissed the attorney, the defendant could complain that he was denied the counsel of his choosing. Alternatively, if the court accepted the defendant's waiver of his right to conflict-free representation, the defendant could complain that the waiver was invalid and his counsel was ineffective. Thus, the only appropriate course was a mistrial and, accordingly, the double jeopardy clause did not bar retrial.

### EFFECTIVE ASSISTANCE OF COUNSEL

Howard v. Gramley, No. 97-1881 (7<sup>th</sup> Cir. 08/23/00). In this action brought pursuant to a habeas corpus petition, the Court of Appeals held that, although appellate counsel's performance was deficient, the defendant was not prejudiced, and, therefore, the court affirmed his conviction. The petitioner claimed that his appellate counsel chose the wrong issues for appeal. The court initially noted that it deems counsel's performance deficient when counsel omits a "significant and obvious issue without a legitimate strategic reason for doing so." Secondly, the court finds prejudice "when that omitted issue may have resulted in a reversal of the conviction, or an order for a new trial." In the present case, appellate counsel chose to appeal only one issue, although his client had called his attention to four other issues which, according to the district and appellate courts, had a better factual and legal basis than the issue counsel chose to present. Notwithstanding the deficient performance, after reviewing each of

the omitted four issues, the Court of Appeals concluded that the petitioner would not have obtained a reversal on any of the issues, and, therefore, he could not meet the *Strickland* prejudice standard.

Kitchen v. U.S., No. 97-3808 (7<sup>th</sup> Cir. 09/14/00). On appeal from the denial of a § 2255 petition, the Court of Appeals considered the following question: Whether petitioner was denied effective assistance of counsel due to his attorney's admitted failure "through inadvertence" to file a notice of appeal from the district court's denial of a post-trial, as opposed to a post-appeal, motion for a new trial. While the petitioner's direct appeal was pending, he filed a Rule 33 motion for a new trial, which the district court denied. His counsel inadvertently failed to file a notice of appeal from that denial. Thus, in this 2255 petition, he alleged his counsel was ineffective due to this failure. The Court of Appeals first noted that the petitioner had a right to counsel as it related to the appeal of the denial of the motion for new trial. Specifically, a criminal defendant has a right to counsel at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected. This right to counsel is enjoyed through his first appeal of right. Thus, because the petitioner's first appeal had not been concluded and the motion for new trial would potentially have a substantial impact on the course of the criminal proceedings, the right to counsel attached. Moreover, counsel's performance was deficient in failing to file the notice of appeal because he admitted that the failure was the result of inadvertence, not some strategic reason. However, the court ultimately denied the petition because the petitioner could not show prejudice. Looking to see if the filing of the notice of appeal "may have resulted in a reversal of the conviction, or an order for a new trial," the court concluded that the petitioner's claim that the

government threatened a potential defense witness was unfounded.

### EVIDENCE

U.S. v. Wesela, No. 99-3307 (7<sup>th</sup> Cir. 08/03/00). In prosecution for being a felon in possession of a firearm (18 U.S.C. § 922(g)), the Court of Appeals affirmed the defendant's conviction over his argument that the district court erred in introducing hearsay statements made by his wife under Federal Rule of Evidence 803(2) (excited utterance). The defendant's wife, after having an argument with her husband, called to police and stated that her husband was in possession of a firearm and had shot the family cat. Two days after the event in question, the defendant's wife described the events that had transpired. At trial, the government introduced these hearsay statements through one of the investigating officers, arguing that her statements were excited utterances. The Court of Appeals noted that the two day time interval in this case prevented her statements from being excited utterances. On the day she gave her statement, she had regained her composure and control enough to return to her employment, and therefore she was not "under the stress of excitement caused by the startling event." However, notwithstanding this error, the court concluded that it was harmless because the evidence against the defendant was overwhelming. Specifically, not only was a gun and ammunition seized from the defendant's residence, but he also admitted to firing the gun.

U.S. v. Castelan, No. 99-3352 (7<sup>th</sup> Cir. 07/27/00). In prosecution for various drug offenses, the Court of Appeals rejected the defendant's argument that the district court violated his Confrontation Clause rights when it allowed the introduction of statements made by a non-testifying co-defendant during a custodial interview which

inculcated the defendant. The Court of Appeals initially held that under Lilly v. Virginia, 527 U.S. 116 (1999), a presumption of unreliability attaches to such statements when the government is involved in the statement's production. Thus, given this presumption combined with the fact that the co-defendant inquired as to the benefits of his cooperation when giving his statements, the court concluded that the statements lacked inherent particularized guarantees of trustworthiness sufficient to satisfy the Confrontation Clause given the plurality decision in Lilly. Nevertheless, the court refused to reverse the defendant's conviction, finding that the error was harmless. Looking to the facts of the case, the court noted that all but one insignificant fact contained in the co-defendant's statement were corroborated by other evidence and, thus, it was clear beyond a reasonable doubt that the decision to admit the post-arrest statements did not affect the jury's overall verdict.

U.S. v. Lightfoot, No. 99-2003 (7<sup>th</sup> Cir. 08/09/00). In prosecution for drug distribution, the Court of Appeals affirmed over the defendant's argument that the prosecution improperly introduced evidence regarding his abuse of his girlfriend. The defendant was arrested after his girlfriend called the police and stated that the defendant had a large quantity of drugs in their apartment. When officers arrived, she let them in and they discovered the drugs. At trial, the defendant asserted a defense that he was innocent and his girlfriend, the real drug dealer, had set him up. To refute this assertion, the government introduced evidence that the defendant beat his girlfriend once a day with fists, hangers, belts or a bat, and, when he suspected that she tried to contact the police, he urinated all over her, including in her mouth. The defendant argued that this evidence was improper 404(b) evidence because it served only

to suggest that he was a bad man. Moreover, its probative value was substantially outweighed by its prejudice, *i.e.*, Rule 403. The Court of Appeals disagreed, and held that had the jury believed this evidence, it would have been strong circumstantial evidence that the defendant was the one in control, not the girlfriend. Moreover, the evidence was properly allowed notwithstanding the Rule 403 objection, for, according to the court, it was important for the jury to have some way of assessing the defendant's defense, and this evidence helped it to do so.

U.S. v. Cuevas, No. 99-2425 (7<sup>th</sup> Cir. 08/17/00). In prosecution for conspiracy to distribute narcotics, the Court of Appeals affirmed the defendant's conviction over his argument that the government failed to comply with Brady v. Maryland. At trial, the government called a rebuttal witness, previously undisclosed, who testified that he traveled with the defendant for purposes of obtaining drugs, thereby undermining the defendant's testimony indicating that the trip was for legitimate business reasons. Additionally, the government introduced a flight manifest, also previously undisclosed, which showed that the witness in fact was on the flight with the defendant, contrary to his testimony. The defendant first argued that the testimony of the witness unfairly surprised him. However, the Court of Appeals rejected this argument, noting that there is no constitutional right to discovery of rebuttal witnesses and that the government had no legal duty to disclose the identity of its potential rebuttal witnesses. Moreover, because the defendant put his credibility at issue by testifying in his own defense, the district court properly allowed the surprise witness to testify. The court did hold, however, that, given the "open file policy" in the district concerned, the government's failure to provide the

flight manifest to the defense constituted a discovery violation. However, reversal was not warranted because the district court, finding such a violation, refused to allow the government to introduce the manifest at trial. Thus, the remedy chosen by the district court was sufficient. Judge Williams dissented, and noted that the discovery violations in this case resulted in a loss of a potential defense strategy requiring a new trial. Judge Williams noted that because the government possessed the flight manifest prior to the defendant's testimony, it knew that its rebuttal case would be built upon the knowledge gained from those records, including the identity of the surprise witness. Had the defense also been privy to this information, the defendant may not have testified or, at a minimum, had the opportunity to properly investigate and prepare a cross-examination strategy.

U.S. v. Reed, No. 99-3618 (7<sup>th</sup> Cir. 09/11/00). In prosecution for bank robbery, the Court of Appeals affirmed the defendant's conviction despite the fact that the government introduced the entire transcript of the defendant's testimony from his first trial. The defendant's first trial, at which he testified, resulted in a hung jury. At his second trial, he decided not to testify. The government then introduced the defendant's prior trial testimony under Federal Rule of Evidence 801(d)(2)(A), which provides that a statement is not hearsay and may be admitted when the statement in question is offered against a party and is the party's own statement. Notwithstanding the defendant's argument that his prior testimony was not inculpatory, the Court of Appeals noted that statements under 801(d)(2)(A) need not be inculpatory, incriminating, against interest, or otherwise inherently damaging to the declarant's case. Rather all that is required is that the statements were

made by one party and offered by the other. Thus, the fact that the statements offered in this case were the defendant's own testimony from the first trial did not alter the operation of the rule.

Anderson v. Cowan, No. 99-3485 (7<sup>th</sup> Cir. 09/15/00). The Court of Appeals, on consideration of this habeas corpus petition, affirmed the district court's denial where the court concluded that the admission of a non-testifying co-defendant's confession was harmless error. Although noting that the admission violated the defendant's Confrontation Clause rights as discussed in Bruton v. United States, 391 U.S. 123 (1968), the court also noted that such errors were subject to a harmless review. In the present case, the defendant made two separate confessions to the crime in question, both of which corroborated the confession of the co-defendant. Moreover, a great deal of physical and circumstantial evidence also linked the defendant to the crime. Accordingly, the court refused to grant the habeas corpus petition, notwithstanding the clear violation of Bruton.

U.S. v. Rhodes, No. 00-1362 (7<sup>th</sup> Cir. 10/13/00). In prosecution for conspiring to distribute cocaine, the Court of Appeals affirmed the district court's admission of evidence showing that the defendant owned a gun. At trial, defense counsel objected under Fed. R. Evid. 402 and argued that gun ownership was irrelevant to a charge of drug distribution. The Court of Appeals, however, noted that guns are among the tools of the drug trade. As the court stated it, "A person who lacks wrenches probably is not a plumber; a person who lacks scales and guns is less likely to be a drug dealer than one who possesses these items." Thus, if lack of such ownership is relevant to disprove the charge, so too is it relevant to prove the charge. Although the court noted that

Rule 403 may allow exclusion for substantial prejudice, defense counsel failed to explicitly reference this rule when objecting. Thus, under a plain error standard of review, the court held that the district judge did not abuse her discretion in admitting the evidence. Judge Wood concurred, disagreeing with the majority's analysis, but concluding that the error was harmless.

U.S. v. Ochoa, No. 00-1794 (7<sup>th</sup> Cir. 10/12/00). In prosecution for conspiracy to commit mail fraud, the Court of Appeals held that the district court improperly introduced hearsay at trial, but held that the error was harmless. At trial, the government introduced through the testimony of the interviewing agent the hearsay statements of a co-conspirator. These statements were elicited by a government agent during a conversation with the co-conspirator prior to trial. However, the witness disappeared and was unavailable at the time of trial. The defendant argued that the testimony was inadmissible under any Rule of evidence, and the Court of Appeals agreed. First, under Rule 804(b)(3), hearsay may be admissible if the declarant is unavailable, the statement is against the declarant's penal interest, and corroborating circumstances indicate the trustworthiness of the statement. The Court of Appeals held that a high presumption of unreliability applied because the statements were elicited by a government agent. Moreover, the agent informed the declarant that he might not be charged if he cooperated. Under such circumstances, there was insufficient evidence to support the statement's trustworthiness. This finding also precluded admission of the statements under Rule 807, which also has a trustworthiness component. Finally, the court rejected the government's argument that the statements were admissible under Rule 806(b)(6) because the defendant played a part in making the declarant

unavailable. The court found that insufficient evidence existed to show that the defendant had any part in the declarant's disappearance. Ultimately, however, the court concluded that the error was harmless because, in like so many cases where evidentiary errors occur, the court found that the overall strength of the prosecution's case showed beyond a reasonable doubt that the jury would have convicted the defendant even if the evidence had not been admitted.

U.S. v. Moreno, No. 99-2422 (7<sup>th</sup> Cir. 11/6/00). In prosecution for narcotics offenses, the Court of Appeals affirmed the defendant's conviction over her argument that the government introduced hearsay at trial. After the defendant's spouse initially consented to a search of the defendant's residence, the defendant shouted something to him in Spanish which resulted in the spouse's attempt to withdraw his consent. Although the government did not know what the defendant shouted, they introduced at trial the fact that her husband withdrew his consent to search after hearing her words. On appeal, the Court held that the introduction of this evidence was not hearsay, but rather a verbal act. Specifically, statements that grant or withhold permission to authorities to conduct a search carry legal significance independent of the assertive content of the words used. That having been said, however, the court doubted that the evidence had much probative value. Indeed, the court stated that the content of the defendant's words were unknown, and it was unclear whether her statement tended to show she knew drugs were in the residence. Moreover, assuming that her words were an urging to withdraw the consent, then the use of that evidence at trial may have violated her constitutional rights. Specifically, the court indicated that some courts have held that the government may not cite a defendant's refusal to consent to

a search as evidence that he or she knew the search would produce incriminating evidence, for such evidence would violate due process. Regardless, the court concluded that any error in this case was harmless given the overwhelming weight of the evidence.

#### HABEAS/2255

Henry v. Page, No. 00-1164 (7<sup>th</sup> Cir. 08/04/00). On consideration of a certificate of appealability in this 2254 petition, the Court of Appeals rejected the petitioner's argument that the destruction of evidence prior to his trial for possession with intent to distribute narcotics violated his constitutional right to present a meaningful defense which includes access to evidence which is material to guilt or punishment. When the petitioner was originally charged in state court, he filed a motion seeking leave to inspect and test the narcotics recovered in relation to his case. The trial court granted this motion, but the petitioner did not seek to test the evidence until a year after the motion had been granted. By that time, the state had inadvertently destroyed the evidence. Thus, in his habeas petition, the petitioner argued that he was denied access to evidence which was material to his guilt. In rejecting this claim, the Court of Appeals first noted that Supreme Court authority on the issue indicated that, prior to establishing a constitutional violation, a defendant must demonstrate some bad faith on the part of the state in relation to the destruction of evidence. In this case, the innocent mistake of the state precluded the finding of a constitutional violation. Moreover, nothing in the record demonstrated that the substances seized and destroyed were material to the petitioner's defense. Indeed, all the evidence in the record demonstrated that the evidence was in

fact illegal narcotics.

Warren v. Litscher, No. 99-3560 (7<sup>th</sup> Cir. 99-3560). In this appeal from the district court's denial of the petitioner's motion under 28 U.S.C. § 2254, the Court of Appeals rejected the petitioner's argument that the Wisconsin Department of Corrections violated his Fourteenth Amendment right to due process when it revoked his probation. In the state court proceedings, the petitioner was charged with two counts of sexually assaulting a minor. The petitioner eventually entered an *Alford* plea to the charge and was placed on probation. One condition of his probation was that he complete sex offender treatment programs. During the course of these treatments, the program required that the petitioner in fact admit that he had committed a sexual offense. When he refused to do so, his probation was revoked for failure to complete treatment. In his habeas petition, he argued that his *Alford* plea was constitutionally defective because the trial court did not advise him that he would not be able to maintain his claim of innocence during counseling and that his ignorance of that fact rendered his plea unknowing and involuntary. The Court of Appeals, however, held that the trial court need not inform him that his probation could be revoked if he did not admit his guilt, for such a consequence was "collateral" to his plea and a defendant is not entitled to be informed of such consequences.

Levine v. U.S., No. 99-1153 (7<sup>th</sup> Cir. 07/19/00). In this appeal brought upon the district court's denial of a 2255 petition, the Court of Appeals considered the following question: Whether the district court that tried the petitioner lacked jurisdiction due to the fact that the prosecuting Assistant U.S. Attorney resided outside the judicial district of Indiana. As provided by 28 U.S.C. § 545(a), "each United States attorney and assistant United States

Attorney shall reside in the district for which he is appointed.” Noting that this was an issue of first impression within this circuit, the court concluded that a violation of this statute does not amount to the type of defect that warrants upsetting a conviction. Indeed, the court held that the residency requirement concerns a matter of governmental administration and, while it did not condone violations of the statute, a violation does not deprive the district court of jurisdiction.

Mendiola v. Schomig, No. 98-4031 (7<sup>th</sup> Cir. 08/10/00). In this habeas petition, the Court of Appeals rejected the petitioner’s claim that his due process rights as defined by *Brady v. Maryland* were violated when the prosecutor withheld material exculpatory evidence. At the petitioner’s murder trial, the only government eyewitness willing to testify stated that she could not identify the shooter. After the petitioner was convicted but prior to sentencing, the petitioner filed a motion for new trial based upon a transcript of an interview which defense counsel had with the witness two weeks after she testified. That transcript indicated that the witness told the defense attorney as follows: While on the stand she came to believe that the petitioner was not in fact the shooter. When she told the prosecutors this after her testimony, they told her not to tell defense counsel. No one ever informed defense counsel. After being presented with this version of events, the trial court denied the petitioner’s motion for an evidentiary hearing, and concluded that, no matter what the witness had later said, she had not exculpated the petitioner immediately after leaving the stand. Thus, the prosecutor had not committed a *Brady* violation. The state court of appeals affirmed, noting that it was entitled to draw inferences from the record and concluded that the witness’ post-trial statement regarding the assistant

State’s attorney was “highly incredible.” Moreover, the state court concluded that, assuming the statements were true, the information was not material exculpatory evidence because the witness denied seeing the shooter’s face. Upon consideration of the habeas petition in federal court, the district judge concluded that the state court’s decision on the materiality issue did not constitute an unreasonable application of clearly established federal law. On appeal, the Court of Appeals affirmed, noting that the finding of fact by both the trial and appellate court’s must be presumed to be correct pursuant to 28 U.S.C. § 2254(e)(1). Moreover, on this record, the court found support for this credibility determination because the trial judge heard the witness’ testimony at trial which supplied an ample basis for the judge to disbelieve the later inconsistent story. Finally, the court noted that four state judges chose to believe the prosecutor rather than the witness and that decision had not been undercut by any clear and convincing evidence. Judge Rovner filed a vigorous dissent, arguing that an evidentiary hearing was necessary prior to making such a credibility determination. In her words, “With all due respect to my colleagues on the Illinois courts, it would not matter if 100 of them had [chosen to disbelieve the witness’ post-trial statement], since not one has actually heard what the witness has to say . . . [The petitioner] cannot possibly marshal the clear and convincing evidence needed to show that the state courts’ credibility assessment is wrong unless and until he is given the chance to rebut the witness on the stand.”

Kapada v. Tally, No. 98-1654 (7<sup>th</sup> Cir. 10/12/00). In this case, the petitioner was convicted in state court of burglary and arson of a Jewish community center. The trial court gave the defendant the harshest allowable sentence under state law,

after a courtroom deputy testified that the petitioner uttered a number of anti-Semitic slurs on his way out of the court after being convicted. The petitioner argued that enhancing his sentence because he professes vile beliefs violates his First Amendment rights. The Court of Appeals noted that there was no evidence that the petitioner’s beliefs were a motivating factor in the crime. Moreover, the First Amendment prevents a state “from employing evidence of a defendant’s abstract beliefs at a sentencing hearing when those beliefs have no bearing on the issue being tried.” Nevertheless, the court held that the state court did not err in the instant case, because the comments of the district court at sentencing revealed that the district court viewed the statement as providing insight into the petitioner’s character, lack of remorse, and rehabilitative potential. Therefore, no error occurred because the Constitution does not prevent a sentencing court from factoring a defendant’s statements into sentencing when those statements are relevant to the crime or to legitimate sentencing considerations.

Fernandez v. Sternes, No. 99-2887 (7<sup>th</sup> Cir. 10/21/00). This case presented a variation on the question of whether time spent pursuing state collateral remedies is excluded from the one year provided by 28 U.S.C. § 2244(d) for commencing a federal collateral attack. Previous authority held that time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under the subsection. However, whether a petition is “properly filed” depends on state law, so that if a state court accepts and entertains it on the merits it has been properly filed, but if the state court rejects it as procedurally irregular, then it has not been properly filed. Likewise, a petition that fails to comply with state

procedural requirements is still “properly filed” if the state court accepts it and issues a decision on the merits and does not also clearly rest its decision based on the failure to comply with the procedural rules. Given this background, this case considered the following question: “What is the period during which habeas petition was pending when it became “properly filed” because the state court excused a delay?” After much discussion of various alternative methods for computing the excludable time, the Court of Appeals concluded that the period of exclusion is all time between the filing of a request to excuse the default and the state court’s decision on the merits (if it elects to excuse the default). The court left undecided whether time provided for filing a petition or appeal to a higher court is treated as time during which an application is pending, if the time expires without a filing, for, in the present case, even assuming that it was excludable, the extra time period would still not make the petitioner’s petition timely.

Gutierrez v. Schomig, No. 00-1384 (7<sup>th</sup> Cir. 11/30/00). On appeal from the district court’s dismissal as untimely of a petition for habeas corpus, the Court of Appeals affirmed the dismissal and addressed the issue of whether the time during which a state prisoner can but does not file a petition for a writ of certiorari from the denial of his state post-conviction petition tolls the one year statute of limitations under § 2244(d)(2). The petitioner argued that the 90 days during which he could have filed a certiorari petition to the United States Supreme Court from the denial of his state post-conviction petition tolls the limitations period, and thus his petition was timely. Section 2244(d)(1) imposes a 1 year statute of limitations on a state prisoner seeking habeas corpus release. That section however provides that the limitation period is tolled during the time “a properly filed

application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” Thus, the court had to decide whether the 90 days during which a certiorari petition could be filed falls within the language of the statute. The Court of Appeals held that the use of the words “properly filed” in the statute would reveal Congress’ explicit intention of requiring that the document actually be filed before taking advantage of the statutes tolling provisions. Accordingly, under this reasoning, the petitioner did not properly file a petition for certiorari and thus the 1 year limitations period was not tolled during the time which he could have filed such a petition.

Rutledge v. U.S., No. 99-1686 (7<sup>th</sup> Cir. 10/24/00). The petitioner was originally convicted of conducting a continuing criminal enterprise and conspiracy to distribute cocaine. However, on direct appeal to the Supreme Court, the Supreme Court remanded the defendant’s case and held that conspiracy to distribute drugs was a lesser included offense of CCE, therefore, the defendant could not be convicted of both. Accordingly, on remand from the Supreme Court, the Court of Appeals remanded the case to the district court with directions to vacate either the CCE or conspiracy conviction. The district court then vacated the conspiracy conviction and re-sentenced the defendant on the remaining count. The petitioner then filed a motion under 28 U.S.C. § 2255. Upon consideration of this motion, the district court vacated the CCE conviction but then reinstated the earlier vacated conspiracy conviction. Upon certification for an issue on appeal by the district court, the Court of Appeals considered the issue of whether the district court had jurisdiction to reinstate the previously vacated conspiracy conviction. The Court of Appeals concluded that the district court in fact had such

jurisdiction. The Court of Appeals first noted that relevant language of § 2255 allows the district court upon granting relief to re-sentence a petitioner or grant a new trial or correct the sentence as it may deem appropriate. Although this language does not explicitly state that a vacated conviction may be reinstated, the Court of Appeals determined that this language should be interpreted broadly and flexibly. Reinstatement in this case was appropriate because the conviction does not suffer from any procedural or substantive defect, but was vacated only because it was an included offense of the CCE conviction. If a defendant successfully challenges some of his or her convictions under a 2255 motion, the district court may adjust the remainder of the package by re-sentencing the defendant on the remaining convictions, which include increasing the sentences on those counts. At least in circumstances where a conviction was vacated only because it is an included offense of another conviction, this vacated conviction should be considered part of the sentencing package which the defendant has challenged and so be subject to reinstatement if the conviction in which it is included also is vacated.

**INTERSTATE COMMERCE**

U.S. v. Angle No. 99-3349 (7<sup>th</sup> Cir. 12/06/00). In prosecution for possession of child pornography, the defendant argued that Congress exceed its authority under the Commerce Clause by making the interstate possession of child pornography a federal crime. Specifically, the defendant claimed that simple possession of child pornography does not involve an economic activity that substantially affects interstate commerce. Although the Court of Appeal doubted whether the federal statute guaranteed that the activity regulated substantially affected

interstate commerce, the court nevertheless upheld the statute under a market theory. Applying the rational basis test, the court looked to see whether Congress could have had a rational basis for believing that the interstate possession of child pornography had a substantial effect on Interstate Commerce and further that the regulatory means chosen were reasonably adapted to the end permitted by the Constitution. The court noted that the federal statute prohibiting the possession of child pornography was part of a regulatory scheme to combat child pornography where Congress found that child pornography and child prostitution have become highly organized multi-million dollar industries that operate on a nationwide scale and that such prostitution and the sale and distribution of such pornographic materials are carried on to a substantial extent through the mail and other instrumentalities of interstate and foreign commerce. Given its regulatory scheme, the Court of Appeals opined that Congress could have rationally reasoned as follows:

“Some pornographers manufacture, possess and use child pornography exclusively within the boundaries of a state and often within the boundaries of their own property. It is unrealistic to think that pornographers will be content with their own supply, hence they would likely wish to explore new or additional pornographic photographs of children. Many of those pornographers will look to the interstate market as a source of new material, whether through mail or the catalogs or through the Internet. Therefore, the possession of home grown pornography will stimulate a further interest in pornography that immediately or eventually animates demands for interstate pornography. It is also reasonable to believe the related proposition that discouraging the interstate possession of pornography

will cause some of these child pornographers to leave the realm of child pornography completely which in turn will reduce the interstate demand for pornography.”

Accordingly, given this rationale, the Court of Appeals concluded that there is a nexus via market theory between interstate commerce and the intrastate possession of child pornography.

On a related argument, the defendant also argued that the government failed to show that the child pornography found in his residence satisfied the jurisdictional element of §2252(a)(4)(B). In relevant part, that statute prohibits the knowing possession of media which contain any visual depiction which was produced using materials which had been mailed or shipped or transported in interstate or foreign commerce by any means including computer. According to the defendant, there is a question of whether a computer graphic file is “produced” or created prior to being recorded on a computer diskette or whether instead it only comes to being at or after the point it is recorded on the storage media. The Court of Appeals, however, rejected this argument and held that computerized visual depictions, i.e. computer graphic files are “produced” when computer equipment including computer diskettes are used to copy the depictions onto the diskettes that have traveled in interstate commerce. Thus, in the present case because it was undisputed that the computer diskettes traveled at interstate commerce, a reasonable fact finder could find that the defendant produced the pornographic files by downloading or copying images onto the computer diskette that traveled interstate. The court found that the government had satisfied the jurisdictional element.

**JURIES/JURY INSTRUCTIONS**

U.S. v. Irorere, No. 99-3671 (7<sup>th</sup> Cir. 9/26/00). In prosecution for importation of heroin, the Court of Appeals rejected the defendant’s argument that the district court improperly refused his theory-of-defense instruction. As part of the defendant’s defense, he posited that he was unaware of the origin of the heroin involved in his case, thereby negating the mental state requirement for conviction. When the defendant moved to have the jury specifically instructed that it had to find that he knew that the heroin in question originated outside of the United States in order to convict, the district judge refused on the basis that the mental state requirement was already contained within the 7<sup>th</sup> Circuit Pattern instruction. The Court of Appeals, however, noted that there are circumstances where a pattern jury instruction may be inadequate, and that the pattern instruction did not, in fact, reflect the requisite mens rea requirement. In the present case, however, the defendant failed to make a specific “theory of defense” objection to the district court, and instead merely submitted his proposed instruction without making the argument. Under these circumstances, the Court of Appeals would only review the issue for plain error. Under this standard of review, although noting that the district court might have been better served by giving the instruction on the mental state element, the court concluded that the defendant could not show that the alleged defect deprived him of a fair trial, especially where defense counsel argued his theory to the jury.

U.S. v. Paneras, No. 99-3754 (7<sup>th</sup> Cir. 07/28/00). In prosecution for mail fraud, the Court of Appeals rejected the defendant’s argument that a cartoon drawn by one of the jurors which depicted his perception of the defendant and the events described at trial and was circulated among the jurors constituted juror misconduct by introducing extraneous and prejudicial

material into the deliberation process. First, the Court of Appeals noted that, even assuming the circulation of the cartoon was improper, the cartoon was a humorous depiction of the defendant's activities as they were described at trial, and it did not make any reference to events that were not part of the evidentiary record nor expose the jury to any new evidence. Secondly, the cartoon expressed one juror's view of the case and was subject to the scrutiny and questioning of other jurors. Finally, the evidence of the defendant's guilt was overwhelming which militated against a finding that the cartoon affected the jury's verdict.

U.S. v. Freitag, No. 00-1013 (7<sup>th</sup> Cir. 10/31/00). In prosecution for several crimes relating to a scheme to defraud the federal government, the Court of Appeals affirmed the defendant's conviction over her argument that the district erred when it refused to excuse a sleeping juror. At trial one of the jurors fell asleep though the parties disputed the extent of the juror's slumber. Late in the trial when a question regarding another juror was raised, defense counsel asked the court to remove the juror that had been sleeping. The district court declined, noting that she had only twice noticed the juror's inattentiveness and she did not think it was necessary to excuse the juror. The Court of Appeals noted that if sleep by a juror makes it impossible for that juror to perform his or her duties or would otherwise deny the defendant a fair trial, the sleeping juror should be removed from the jury. However, a court is not invariably required to remove sleeping jurors. Reversal is appropriate only if the defendant was deprived of his fifth amendment due process rights or sixth amendment right to an impartial jury. In the present case, the court noted that there was no evidence that the sleeping juror missed large portions of the trial or that the portions missed

were particularly critical. Moreover, counsel for both sides, although noticing the juror's inattentiveness, failed to raise an objection at the time thereby allowing the district court to take corrective action. Under these circumstances, and on the slight record concerning the juror's inattentiveness in the present case, the court found no basis for concluding that the defendant was deprived of due process and impartial jury, or for that matter a fair trial.

### MISCELLANEOUS

Sharp v. United Airlines, No. 00-1875 (7<sup>th</sup> Cir. 01/02/01). In this civil case, the Court of Appeals admonished lawyers in the circuit to be careful when filing disclosure statements under Circuit Rule 26.1. When originally completing the statement, counsel listed only one attorney in the statement, and neglected to list the fact that the firm of Mayer, Brown, and Platt had also briefly represented their client. The Court of Appeals eventually discovered the omission, and entered a rule to show cause why the attorney who filed the statement should not be sanctioned. The court discharged the rule to show cause upon adequate explanation, but in doing so made the following statement for the benefit of practitioners in the Seventh Circuit: "Modern technology affords the practicing bar significant tools to record the history of a case and to retrieve expeditiously that history when it is needed in order to comply with the requirements such as those contained in Circuit Rule 3. We have every confidence that, in the future, counsel will afford themselves of the advantages of this technology to ensure that a repetition does not occur and, indeed, we commend such a practice to the rest of the practicing bar."

### OFFENSE ELEMENTS

U.S. v. Taylor, No. 99-2608 (7<sup>th</sup> Cir.

08/21/00). In prosecution for carjacking where serious bodily injury results in violation of 18 U.S.C. § 2119(2), the Court of Appeals affirmed the defendant's conviction despite the fact that the jury was never instructed on the element of serious bodily injury.

In Jones v. United States, 526 U.S. 227 (1999), the Supreme Court held that 18 U.S.C. §§ 2119(1)-(3) comprised three separate offenses by the specification of distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict. Moreover, the Court stated that "serious bodily injury" was an essential element of the offense, not a mere sentencing enhancement. Given this case, decided after the defendant's trial, it was clear that the failure to instruct the jury as to this element was error. The Court of Appeals, however, refused to reverse, finding that the error was not "plain." Specifically, the court concluded that a rational jury would have found beyond a reasonable doubt that the gunshot wounds to the victim constituted serious bodily injury that inflicted extreme physical pain, given that the undisputed evidence showed that the pregnant victim was shot through the arm and chest with a .38 caliber revolver at close range.

U.S. v. Clark, No. 99-3529 (7<sup>th</sup> Cir. 09/11/00). In prosecution for bank robbery, the Court of Appeals affirmed the defendant's conviction over his argument that the evidence was insufficient to show that he robbed the bank through "intimidation." The defendant entered the bank and stated to the teller, "It is important that you remain calm and place all of your twenties, fifties and hundred dollar bills on the counter and act normal for the next fifteen minutes. This is a hold-up." At no time did the defendant display a weapon or physically indicate that he possessed one. Under these circumstances, the defendant argued that he did not rob the bank through

“intimidation.” In rejecting this argument, the Court of Appeals noted that the intimidation element has an objective test: would the defendant’s acts cause an ordinary person to reasonably feel threatened. The defendant’s mere demand that the teller give him money not belonging to him is behavior that may rise to the level of intimidation, and the element was therefore satisfied.

**PROSECUTORIAL  
MISCONDUCT**

Aliwoli v. Carter, No. 99-2314 (7<sup>th</sup> Cir. 08/29/00). On consideration of a habeas corpus petition arising out of the petitioner’s conviction for attempted murder, the Court of Appeals affirmed the district court’s denial of the petition. The petitioner claimed that he was denied his right to a fair trial when, in reference to the petitioner’s insanity defense, the prosecutor stated in closing argument that “what they are trying to do ladies and gentlemen is flimflam you so that he can go laughing out that door of this courtroom.” Although noting that the comment was inappropriate as a reference to sentencing considerations, the court held that the error was harmless because the district judge gave the jurors a cautionary instruction, defense counsel had an opportunity to rebut the statement, and the weight of the evidence was “very convincing.” Judge Rovner, dissenting, stated that not only was the comment an improper reference to sentencing, but it was also a misstatement of the law, because the petitioner would not necessarily go free upon a finding of insanity. Moreover, although defense counsel had the opportunity to rebut the statement, the government was allowed to reiterate its inappropriate comment again in rebuttal. Finally, there was considerable evidence presented to show that the petitioner was mentally disturbed, and therefore Judge Rovner could not say with confidence that the

error was harmless.

U.S. v. Cornett, No. 00-2083 (7<sup>th</sup> Cir. 11/13/00). In prosecution for being a felon in possession of a firearm, the Court of Appeals affirmed the defendant’s conviction over his arguments that the prosecutor misstated the burden of proof when she stated that in order to acquit, the jury must find that certain witnesses lied and improperly vouched for the credibility of government witnesses when she mentioned that police officers take an oath to uphold the law. Although the Court of Appeals found the comments to be improper, it also found that the comments did not deprive the defendant of a fair trial. Regarding the statement as to the burden of proof, the Court of Appeals found that the prosecutor’s improper comments were clearly “out of bounds”. Indeed, the prosecutor altered the burden of proof when she argued that the defendant had to prove certain witnesses lied to be acquitted. Moreover, the statement was not an isolated comment, rather it was repeated several times during her rebuttal argument. Nevertheless, defense counsel never objected to the prosecutor’s misstatements of the burden of proof, therefore depriving the court of an opportunity to give a curative instruction. Moreover, the weight of the evidence in the government’s favor mitigated against reversing, based upon this misstatement by the prosecutor. The same analysis applied to the government’s improper vouching for the police officers. In the present case, the prosecutor bolstered the credibility of the police officers by commenting on their occupational integrity, and the Court of Appeals has generally held that it is improper for a prosecutor to vouch for the credibility of witnesses by referring to facts outside the record. Moreover, in this case, the Assistant United States Attorney also invoked her own oath as

a prosecutor, thus implying that she would not present perjured testimony to the jury. Both of these statements were improper. In this instance, however, the court’s general instructions effectively addressed any prejudice that might have resulted in the improper vouching, for the court noted that the jury was the sole judges of the credibility of the witnesses. Moreover, review of the record as a whole did not reveal that the prosecutor’s comments prejudiced the defendant, and therefore the court affirmed the defendant’s conviction.

**RIGHT TO COUNSEL**

U.S. v. Irorere, No. 99-3671 (7<sup>th</sup> Cir. 09/26/00). In prosecution for importation of heroin, the Court of Appeals rejected the defendant’s claim that the district court’s refusal to appoint him an attorney for sentencing violated his Sixth Amendment guarantee to the right to counsel during all critical stages of the prosecution. The defendant had had repeated difficulties with his prior court-appointed attorneys, having gone through four different lawyers throughout the course of his case. When his last appointed attorney moved to withdraw before sentencing, the district court informed the defendant that it would not appoint another lawyer to represent him and that he had the choice of either proceeding with current counsel or going *pro se*. The defendant refused to accept the services of his lawyer, and the district court proceeded under the assumption that the defendant wished to proceed *pro se*. The Court of Appeals noted that a defendant may waive his right to counsel through his own contumacious conduct, and whether the defendant waived his right is a practical determination that depends on the particular facts and circumstances of each case, including the conduct of the accused. In the present case, all of the defendant’s prior attorneys either requested to withdraw because of the

defendant's lack of cooperation or were discharged by the defendant, and the district court clearly advised the defendant of the difficulties and dangers of proceeding without the assistance of counsel. Accordingly, the district court did not abuse its discretion in refusing to substitute counsel.

### SEARCH AND SEIZURE

U.S. v. Basinski, No. 99-3933 (7<sup>th</sup> Cir. 09/05/00). In prosecution for obstruction of justice and related offenses, the Court of Appeals affirmed the district court's order suppressing evidence obtained by authorities through a warrantless search of a briefcase. While interrogating the defendant in connection with a jewelry theft, the government learned that his friend was storing the defendant's locked briefcase, and that the briefcase probably contained incriminating documents. The defendant had previously instructed his friend to burn the briefcase, but never gave him the combination for the lock nor explicit permission to open it. The friend, however, never destroyed the briefcase, but instead gave it to FBI agents who pried it open with a screwdriver. The government argued on appeal that the defendant's friend had apparent authority to consent to a search of the briefcase. However, the Court of Appeals noted that the friend did not have the combination to the briefcase. Moreover, the government knew that the friend had no possessory interest in the contents of the briefcase and that it had been locked since the moment it came into the third-party's possession. Additionally, the court rejected the government's argument that the briefcase had been abandoned. The defendant never disclaimed a privacy interest in the briefcase and never placed the briefcase in an area readily accessible to the public. Moreover, the defendant's instruction

to burn the briefcase did not invite "all the world to rummage through it at will," but rather the command manifested a desire that nobody possess or examine the contents of the briefcase. Accordingly, the government's warrantless search of the briefcase was illegal, and the fruits of that search were properly suppressed.

U.S. v. Chaparro-Alcantara, No. 99-2721 (7<sup>th</sup> Cir. 08/21/00). In prosecution for transportation of illegal aliens, the Court of Appeals rejected the defendants' argument that their inculpatory statements should have been suppressed because they were not informed of their right to contact the Mexican Consulate as set forth in Article 36 of the Vienna Convention. Assuming a violation had occurred, the court addressed whether suppression was an appropriate sanction under the treaty. The court initially noted that there is no exclusionary rule generally applicable to international law violations, and the treaty at issue in this case did not explicitly provide for such a remedy. The court concluded that only the legislature could require that the exclusionary rule be applied to protect a statutory or treaty-based right and judicially imposing such a "drastic remedy" would promote disharmony in the interpretation of an international agreement. Thus, the Court of Appeals essentially held that no remedy existed for a violation of the treaty, although it stated that "compliance with Article 36 is an important responsibility."

U.S. v. Lawal, No. 00-1104 (7<sup>th</sup> Cir. 10/12/00). In prosecution for narcotics violations, the Court of Appeals rejected the defendant's argument that his post-arrest statements should be suppressed because the government did not comply with the Vienna Convention. Although noting that the treaty had been violated, as in Chaparro-Alcantara, the court held that

suppression was not an appropriate remedy. Judge Williams dissented.

### SENTENCING

U.S. v. White, No. 99-3470 (7<sup>th</sup> Cir. 07/25/00). In prosecution for armed bank robbery and 924(c), the Court of Appeals affirmed over the defendant's argument that the district court improperly sentenced him for the 924(c) offense and enhanced his sentence under U.S.S.G. § 2B3.1(b)(2)(E) (use of a fake bomb during the robbery). At sentencing, the district court sentenced the defendant for armed bank robbery and enhanced his sentence under the guideline section for using a fake bomb during the robbery. Additionally, the district court sentenced the defendant to a five-year consecutive sentence for the 924(c) violation related to his use of a gun during the robbery. Although noting that a defendant cannot ordinarily receive a sentence for a 924(c) violation and an enhancement under § 2B3.1(b)(2)(E), such a sentence is appropriate where the enhancement and the statutory sentence are imposed for different underlying conduct. For example, where a defendant is sentenced under § 924(c) for use of a gun in committing a crime, he may have his sentence enhanced for a co-defendant's use of a different gun in committing the same crime. Likewise, where a defendant uses the same gun, or different guns, in the commission of two different crimes, he may receive a § 924(c) penalty for one of the underlying crimes and a guidelines enhancement for the other. However, imposing multiple § 924(c) penalties for the use of more than one gun in a single underlying offense is not permitted because sentencing in this fashion would violate the Double Jeopardy Clause. Notwithstanding these principles, the Court of Appeals held that the defendant in this case could be

sentenced for the 924(c) gun violation and receive a sentencing enhancement for the use of the bomb. The court noted that 924(c)(1)(A) (use of a gun) and 924(c)(1)(B)(ii) (use of a bomb) are separate offenses, not differing penalties for the same criminal conduct of using a “firearm” to commit a crime. Thus, the defendant’s 924(c) sentence did not punish him for the use of the bomb, and the enhancement therefore did not violate the Double Jeopardy Clause.

U.S. v. Coe, No. 99-3627 (7<sup>th</sup> Cir. 07/18/00). In prosecution for mail fraud arising out of the defendants’ telemarketing scheme directed at elderly persons, the Court of Appeals affirmed the district court’s upward departures based on the fact that the defendants used mass marketing to commit their fraud. On appeal, the defendants argued that the district judge improperly upwardly departed for use of mass marketing techniques because their conduct preceded the guideline amendment allowing an enhancement for mass marketing fraud. Thus, upwardly departing for this conduct constituted an impermissible violation of the Ex Post Facto Clause by effectively punishing the defendants for an amendment which post-dated their offense conduct. The Court of Appeals, however, noted that while retroactive application of amendments is prohibited, a sentencing court may consider subsequent Guideline amendments for two purposes. First, a court may interpret the Commission’s later addition of an aggravating element as a sentencing factor as evidence that a previous version of the Guidelines did not adequately consider the factor in the sentencing scheme. Second, a court may also consider later amendments as guides for determining how much of a departure is warranted for the aggravating conduct in question. However, out of concern that these permissible uses of subsequent

amendments may “gut” the prohibitions imposed by the Ex Post Facto Clause in this area of law, the court requires well-reasoned, individualized determinations of whether to impose an upward departure in a particular case or to determine the degree of departure that is warranted. In this case, the Court of Appeals held that the district court engaged in such careful analysis. When departing upward, the court specifically noted that it was considering the guidelines subsequent mass marketing amendment only as evidence that the Commission had not adequately considered the factor in earlier versions of the Guidelines. Thus, the reference to the guideline amendment was appropriate.

U.S. v. Hart, No. 99-3846 (7<sup>th</sup> Cir. 08/21/00). In prosecution for bank robbery, the Court of Appeals affirmed the defendant’s sentence which was enhanced pursuant to U.S.S.G. § 2B3.1(b)(2)(E) (brandishing, displaying or possessing a dangerous weapon). The defendant, during the robbery, displayed bags and shoe boxes accompanied by the express threat that the items contained a bomb. The court first noted that although the language of the guideline section refers only to weapons that are dangerous, the commentary references harmless objects that “appeared to be a dangerous weapon.” In other words, “the Commission equates the image of a dangerous weapon with its reality for purposes of the sentencing enhancement.” Moreover, the court held for the first time in this circuit that the standard for determining whether the object appeared to be a dangerous weapon was an objective one—specifically, whether a reasonable person, under the circumstances of the robbery, would have regarded the object that the defendant brandished, displayed, or possessed as a dangerous weapon capable of inflicting death or serious bodily injury. Applying this test, the court concluded that a reasonable

teller, seeing the bags and shoeboxes, when combined with the express threat, would have concluded that they were in fact dangerous weapons.

U.S. v. Payne, No. 99-3458 (7<sup>th</sup> Cir. 09/01/00). In prosecution for conspiracy to manufacture marijuana, the Court of Appeals affirmed the district court’s relevant conduct determination. In determining relevant conduct, the district court determined that 2000 empty pots discovered in a room intended for growing marijuana would have produced 2000 plants. Pursuant to U.S.S.G. § 2D1.1, he converted the estimated 2000 plants to 200 kilograms of marijuana. The Court of Appeals affirmed this method of relevant conduct calculation, and noted that Application Note 12 of § 2D1.1 provides that a district court may approximate drug quantity where the amount of narcotic seized does not reflect the scale of the offense. In the present case, the large scale growing operation discovered by authorities presented just such a situation. Indeed, the area where the 2000 pots were seized contained a myriad of growing equipment evidencing preparations for a large scale growing enterprise.

U.S. v. Tomasino, No. 99-2796 (7<sup>th</sup> Cir. 10/26/00). In a previous opinion in this case, the Court of Appeals concluded that because the 1991 amendment to U.S.S.G. § 2F1.1(b) may have reflected confusion by the Sentencing Commission about the extent of its discretion, the defendant’s sentence could not be enhanced under that guideline. Also in that opinion, the Court of Appeals invited the Commission to clarify its understanding. In response to the opinion, the Commission wrote the Solicitor General in a letter attached to the petition for rehearing. In that letter, the Commission declined the court’s offer, noting that adopting such a practice would inundate them with judicial requests and create a substantial

burden. Rather, the Guidelines and notes must speak for themselves. Given this rebuff by the Commission, the court withdrew the relevant portion of its previous opinion.

U.S. v. Duncan, No. 00-1346 (7<sup>th</sup> Cir. 10/24/00). In prosecution for mail fraud, the Court of Appeals affirmed the district court's upward departure under U.S.S.G. § 4A1.3, allowing such a departure where the defendant's criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes. In the present case, the district court upwardly departed under this guideline provision because the defendant, after conviction, continued to conduct her criminal activities prior to sentencing. The defendant argued that the upward departure was not warranted because she had not been sentenced prior to her additional fraudulent conduct. She argued that the Court of Appeals had previously noted that Congress rationally determined that defendants who offend after previously being sentenced are more dangerous than those who offend before they have been sentenced. Accordingly, under this rationale, because she was not under a sentence yet, she should not receive additional criminal history points for conduct which occurred after her conviction but prior to sentencing. The Court of Appeals rejected this argument and noted that the district court properly enhanced the defendant's sentence. First of all, the court noted that the defendant engaged in additional fraudulent conduct between the time of her conviction and her sentencing. Accordingly, the district court found that based on this additional conduct, her initial criminal history category did not reflect the seriousness of her crime or the likelihood that she would commit other crimes in the future. Moreover, a factual basis existed in the record for

this determination. Specifically, the government presented evidence through testimony at sentencing that this additional fraudulent activity in fact occurred. Under these circumstances the upward departure was proper.

U.S. v. Cruz, No. 00-2188 (7<sup>th</sup> Cir. 11/30/00). In prosecution for possession with intent to distribute heroin, the Court of Appeals affirmed the defendant's sentence over his argument that he was eligible for a sentencing discount as a minor or minimal participant in the conduct that resulted in his arrest and conviction. Although it appeared that the defendant was part of a larger operation and he may have only been a courier; no one else involved in his offense was arrested and as a result he was charged only with possession with intent to distribute the drug quantity which he was arrested with. The Court of Appeals noted that when no conduct of other participants of a criminal scheme is attributed to a defendant for purposes of sentencing, the circuit authority holds that the defendant is not entitled to a sentencing discount because he is a minor or minimal participant in some larger criminal activity. Accordingly, because the defendant was held responsible for only those drugs attributable to him, he was not entitled to a reduction.

U.S. v. Harris, No. 00-1058 (7<sup>th</sup> Cir. 10/25/00). In prosecution for conspiracy to distribute crack, the defendant argued that his base offense level was improperly adjusted upward under U.S.S.G. § 2D1.1(b)(1) for possessing a firearm during the course of his offense. Specifically, the defendant argued that he did not actually or constructively possess a weapon. Although he conceded that firearms were present in the drug houses where he worked the table, he contended that presence of the weapons proves only mere proximity, not constructive possession. While the

government conceded that the defendant never personally carried a gun, it asserted that the defendant constructively possessed the firearms carried by his co-conspirators or those discovered in the drug houses. The Court of Appeals rejected the government's constructive possession theory, noting that in order to prove the defendant constructively possessed the weapons, the government had to show that the defendant demonstrated ownership, dominion, authority, or control over at least one of the weapons. However, the only suggestion in the record of such factors came, in the court's words, "entirely from the mouth of the government's attorney." Nevertheless, the court affirmed the enhancement under a co-conspirator liability theory. The court noted that it is well settled that a participant in a joint criminal activity can be liable for the foreseeable criminal acts of another in furtherance of the joint criminal activity. The presentence report, unobjected to by the defendant, regarding the factual basis recounted numerous instances in which firearms were possessed by co-conspirators. According to the Court of Appeals, this association under co-conspirator liability theory was enough for the enhancement.

## NON-SUMMARIZED CASES

U.S. v. Renner, No. 00-1409 (7<sup>th</sup> Cir. 01/02/2001) (affirming the defendant's conviction for bank fraud over his argument that a jury instruction improperly defined the scheme with which the defendant was charged).

Valona v. U.S. Parole Commission, No. 00-2971 (7<sup>th</sup> Cir. 12/22/00) (affirming the district court's conclusion that the Parole Commission's decision to keep the petitioner under supervision was neither arbitrary nor capricious).

U.S. v. Linton, No. 98-3799 (7<sup>th</sup> Cir.

12/15/00) (affirming the defendants' narcotics conviction over his argument that the government failed to prove that the narcotic in question was crack as opposed to a different form of cocaine base).

Owens v. Boyd, No. 00-1521 (7<sup>th</sup> Cir. 12/19/00) (holding that a question of whether a given petition is timely is a question under § 2244, not under the Constitution, and therefore cannot support the issuance of a certificate of appealability).

U.S. v. Folks, No. 00-1808 (7<sup>th</sup> Cir. 01/05/01) (affirming the defendant's narcotics conviction over his arguments that evidence should have been suppressed, the jury instructions were not supported by the evidence, and the prosecution constructively amended the indictment).

United States v. Perry, No. 99-4249 (7<sup>th</sup> Cir. 08/01/00) (affirming the defendant's sentence enhancement for possession of a gun in connection with felony criminal recklessness (U.S.S.G. § 2K2.1(b)(5)) where the defendant, a convicted felon, violated Indiana's felony criminal recklessness statute by pointing a gun at someone).

United States v. Johnson, No. 99-1327 (7<sup>th</sup> Cir. 08/03/00) (affirming the first federal death sentence in the Northern District of Illinois since the reinstatement of the death penalty, rejecting arguments that (1) his right to self-representation was infringed; (2) that an alternate juror should not have been substituted for an absent juror during the sentencing phase; (3) that testimony by a prison official during the sentencing phase regarding prison security was false and prejudicially surprising; (4) that he was denied *Brady* material during the sentencing phase; and (5) the jury's verdict forms contained inconsistent findings).

U.S. v. Collins, No. 98-3530 (7<sup>th</sup> Cir. 08/04/00) (affirming the defendant's

distribution of methamphetamine conviction, finding that: (1) the district court's jury instruction which misstated the evidence was harmless error; (2) the defendant had waived his right to protest the district court's giving of an impermissible *Silvern*, or "dynamite" instruction; (3) the government's introduction of the cooperating witnesses' plea agreements was not improper bolstering; and (4) the government's references to the witnesses' agreement to testify truthfully was not improper vouching).

U.S. v. Adeniji, No. 98-3821 (7<sup>th</sup> Cir. 07/26/00) (affirming the defendants' mail fraud convictions over their arguments that: (1) the evidence was insufficient; (2) the district court improperly refused an instruction directing the jury not to consider any of the evidence offered against co-defendants; (3) incorrectly determined the amount of loss under U.S.S.G. § 2F1.1(b)(1); (4) improperly ordered restitution; and (5) the prosecutor committed prosecutorial misconduct during opening statement).

U.S. v. Belwood, No. 00-1403 (7<sup>th</sup> Cir. 07/25/00) (affirming the district court's enhancement under U.S.S.G. § 3B1.3 (abuse of position of trust) where the defendant, an employee of the Bureau of Prisons, was involved in a scheme to smuggle drugs into a federal correctional institution).

U.S. v. Richmond, No. 99-3675 (7<sup>th</sup> Cir. 07/24/00) (affirming the defendant's conviction arising out of illegal straw purchases of firearms over his objection that the trial court improperly denied him a continuance due to pre-trial publicity and that the district court improperly allowed irrelevant evidence at trial).

U.S. v. Swift, No. 00-1028 (7<sup>th</sup> Cir. 07/17/00) (reversing the district court's grant of a motion to suppress in a very fact intensive opinion, finding that the

evidence suppressed by the district court would have been inevitably discovered, even assuming that the defendant's arrest was initially illegal).

U.S. v. Jones, No. 00-1199 (7<sup>th</sup> Cir. 07/21/00) (affirming the defendant's 922(g) conviction over his objection that the district court improperly admitted ammunition at trial as demonstrative evidence in an effort to refute the defendant's claim that he thought his rifle was a BB gun).

U.S. v. Jaderany, No. 99-2059 (7<sup>th</sup> Cir. 07/21/00) (affirming the defendant's fraud convictions over his argument that the evidence was insufficient and that the district court made an error of law when refusing to downwardly depart).

U.S. v. Jones, No. 99-2515 (7<sup>th</sup> Cir. 08/11/00) (affirming the defendant's extortion convictions over his argument that the government exercised its peremptory challenges in a racially discriminatory way and improperly limited the scope of cross-examination).

U.S. v. Gallagher, No. 99-2879 (7<sup>th</sup> Cir. 08/07/00) (affirming the defendant's arson conviction over his argument that the evidence was insufficient to show that the horse barn he was alleged to have burned was in interstate commerce and that the district court improperly departed at sentencing based on a finding by a preponderance of the evidence that the defendant had committed a murder, a crime for which he was never prosecuted in any jurisdiction).

U.S. v. Suarez, No. 99-2150 (7<sup>th</sup> Cir. 08/15/00) (affirming the defendant's sentence enhancement pursuant to U.S.S.G. § 2S1.3(B)(1) (transportation of funds known or believed to be proceeds of illegal activity) where, when confronted by customs agents, the defendant lied about possessing the proceeds and failed to account for where she obtained the money).

Webb v. Anderson, No. 97-3264 (7<sup>th</sup> Cir. 08/16/00) (affirming the district court's denial of the petitioner's habeas corpus petition which alleged that his loss of good time credit for smoking marijuana was not supported by "some evidence," where sufficient evidence existed to show that the petitioner in fact committed the violation).

U.S. v. Jordan, No. 99-3171 (7<sup>th</sup> Cir. 08/17/00) (affirming the defendant's conviction stemming from the bombing of a military recruitment center, over his ten arguments on appeal).

U.S. v. Sawyer, No. 99-3687 (7<sup>th</sup> Cir. 08/18/00) (reversing the district court's suppression order and finding that probable cause existed to search the defendant where the defendant was observed during flight discarding an object which the pursuing officer believed to be a gun, thereby constituting a violation of Illinois' illegal use/carry gun statute).

U.S. v. Lopez, No. 99-1724 (7<sup>th</sup> Cir. 08/17/00) (affirming the defendant's sentence for embezzlement and fraud over numerous sentencing objections, noting that most of the issues rested on credibility determinations made by the district judge).

U.S. v. Scanga, No. 99-3964 (7<sup>th</sup> Cir. 08/21/00) (affirming the defendant's sentence over his objection that his counsel was ineffective for failing to recognize that drugs purchased for personal use could not be used to determine the defendant's relevant conduct).

Alvarez v. Boyd, No. 99-3175 (7<sup>th</sup> Cir. 08/29/00) (rejecting a habeas corpus petition where, although there existed conflicting evidence concerning the petitioner's guilt, a jury resolved this conflict and the court would not disturb that resolution).

U.S. v. Galati, No. 99-3667 (7<sup>th</sup> Cir.

08/29/00) (affirming the defendant's bank robbery conviction over his sufficiency of the evidence argument, his argument that the district court should have suppressed the out-of-court identifications made by two bank tellers, and his argument that the district judge improperly refused to allow the defendant to impeach government witnesses with their prior convictions).

Lowery v. Anderson, No. 99-3227 (7<sup>th</sup> Cir. 08/29/00) (affirming the denial of a capital habeas petition).

U.S. v. Almanza, No. 99-1560 (7<sup>th</sup> Cir. 08/30/00) (discussing the difference between a minimal participant (4-level reduction) and a minor participant (2-level reduction), pursuant to U.S.S.G. § 3B1.2).

Hernandez v. U.S., No. 00-3048 (7<sup>th</sup> Cir. 09/01/00) (denying an application to file a successive collateral attack based on Apprendi because the case has not been made retroactive to cases on collateral review by the Supreme Court).

U.S. v. Bailey, No. 99-2933 (7<sup>th</sup> Cir. 09/12/00) (affirming the defendant's robbery conviction under the Hobbs Act over his argument that the government failed to establish a connection to interstate commerce).

U.S. v. Johnson, No. 99-2691 (7<sup>th</sup> Cir. 09/13/00) (affirming the defendant's crack distribution conviction over numerous objections to his sentence).

U.S. v. Clarke, No. 99-3602 (7<sup>th</sup> Cir. 09/14/00) (affirming the defendant's drug distribution conviction over his numerous argument regarding evidentiary rulings made by the district court, as well as an allegation of prosecutorial misconduct during closing argument).

U.S. v. Haehle, No. 99-4077 (7<sup>th</sup> Cir.

09/14/00) (affirming the defendant's sentence for fraud over his objection that the amount of loss was improperly calculated and that the district court used the wrong base offense level).

U.S. v. Smith, No. 99-4059 (7<sup>th</sup> Cir. 10/13/00) (affirming a conviction for witness retaliation over arguments that the indictment was insufficient as a matter of law; the district court erred by excluding from evidence the victim's misdemeanor convictions, and by substituting a juror outside of the defendant's presence).

U.S. v. Barnes, No. 99-3583 (7<sup>th</sup> Cir. 10/13/00) (affirming a money laundering conviction over an argument that the statute of limitations had run).

U.S. v. Downs, No. 99-3760 (7<sup>th</sup> Cir. 10/12/00) (affirming the defendant's bank robbery conviction over his argument that the district court should have suppressed an out of court identification by a victim teller, and finding that although the line-up was unduly suggestive because the defendant was the only person in the line-up without a mustache, the totality of the circumstances showed that the testimony was reliable).

U.S. v. Lemmons, No. 99-2078 (7<sup>th</sup> Cir. 10/5/00) (affirming the defendant's narcotics conviction over his objection to a leader/organizer enhancement).

U.S. v. Baker, No. 99-3840 (7<sup>th</sup> Cir. 9/20/00) (affirming a money laundering conviction over arguments of constructive amendment of the indictment and numerous challenges to sentencing enhancements).

U.S. v. Melgar, No. 99-3322 (7<sup>th</sup> Cir. 9/19/00) (affirming the denial of a motion to suppress evidence obtained from the search of a purse where a third-party consented to a search of the apartment and had apparent authority to

consent to a search of the purse contained therein).

Braun v. Powell, No. 00-1096 (7<sup>th</sup> Cir. 9/18/00) (reversing the district court's grant of a habeas petition, and concluding that the exclusion of a person from watching the trial, a former juror, did not violate the petitioner's right to a public trial, and that the prosecutor's failure to inform the jury of an agreement with a cooperating witness was not material where the jury heard numerous attacks on the witness's credibility).

U.S. v. Lee, No. 97-4027 (7<sup>th</sup> Cir. 11/7/00) (affirming the defendant's money laundering conviction).

U.S. v. Hernandez, No. 00-1537 (7<sup>th</sup> Cir. 11/9/00) (affirming the defendant's sentence enhancement for abusing a position of trust).

U.S. v. Bond, No. 99-4113 (7<sup>th</sup> Cir. 11/3/00) (affirming defendant's fraud convictions over his sufficiency of the evidence argument).

U.S. v. Wash, No. 00-1217 (7<sup>th</sup> Cir. 11/2/00) (affirming the defendant's narcotics convictions over his arguments that 404(b) evidence regarding previous drug transactions was improper, the use of the term "crack cocaine" by testifying police officers was improper lay opinion, and the drug quantity determination at sentencing was erroneous).

U.S. v. Lawal, No. 00-1104 (7<sup>th</sup> Cir. 11/1/00) (affirming the district court's denial of a motion to suppress based on a violation of the Vienna Convention).

U.S. v. Rosario, No. 99-2733 (7<sup>th</sup> Cir. 12/07/00) (affirming the defendant's conviction for conspiracy to distribute cocaine over his argument that he was arrested without probable cause).

U.S. v. Pergler, No. 99-3879 (7<sup>th</sup> Cir.

12/04/00) (affirming the defendant's conviction over his argument that his lawyer labored under a conflict of interest).

U.S. v. Meyer, No. 99-1919 (7<sup>th</sup> Cir. 12/04/00) (affirming the defendant's conviction for conspiracy to distribute a controlled substance over his argument that his counsel was ineffective for failing to seek a mistrial when a government witness alluded to the fact that the defendant was involved in a murder).

Outlaw v. Sternes, No. 00-3758 (7<sup>th</sup> Cir. 11/21/00) (denying petitioner's request to commence a second federal collateral attack which argued that the defendant was deprived due process of law where the judge who tried him had been convicted in an unrelated case of taking bribes).

U.S. v. Woods, No. 00-2287 (7<sup>th</sup> Cir. 11/27/00) (affirming the defendant's conviction for being a felon in possession of a firearm over his argument that police officers illegally searched him, that he was improperly sentenced under the Armed Career Criminal Act, and that his counsel was ineffective).

U.S. v. Albarran, No. 00-1719 (7<sup>th</sup> Cir. 11/30/00) (affirming the defendant's drug convictions over his argument that the evidence was insufficient to sustain his conviction, that the district court erred when it denied his request for a downward departure, and that the district court erred in the calculation of the amount of drugs attributable to the defendant for sentencing purposes).

U.S. v. Berthiaume, No. 00-1553 (7<sup>th</sup> Cir. 12/01/00) (affirming the defendant's conviction for distributing methamphetamine over his argument that the district court improperly determined the drug quantity in the case, that the district court improperly

denied him a downward adjustment for acceptance and responsibility, and that the district court improperly imposed a 2-level upward adjustment for the possession of a firearm).

U.S. v. Bass, No. 00-2540 (7<sup>th</sup> Cir. 12/01/00) (affirming the defendant's supervised release revocation).

Morgan v. Krenke, No. 99-4160 (7<sup>th</sup> Cir. 11/13/00) (reversing the district court's grant of a state court habeas petition where the Court of Appeals concluded that the Wisconsin courts did not conduct an unreasonable application federal law).

U.S. v. Harvey, No. 00-2086 (7<sup>th</sup> Cir. 11/14/00) (affirming the district court's sentence upon revocation of supervised release to the statutory maximum where the sentence was not clearly unreasonable and the district court considered the guideline range set forth in Section 7 in the Guidelines, but exercised its discretion to not sentence the defendant within that range).

U.S. v. Brown, No. 99-2991 (7<sup>th</sup> Cir. 11/14/00) (affirming the defendant's conviction for possession of two sawed-off shot guns over the defendant's argument that police officers improperly patted him down without having an articulable suspicion that he was armed and dangerous).

U.S. v. Lopeztegui, No. 99-4230 (7<sup>th</sup> Cir. 10/25/00) (affirming the defendant's conviction over his argument that he was entitled to a new trial based on new evidence presenting an entrapment defense where it came to light that the government attempted to keep him out of prison on a state charge so that he could complete the drug deal for which he was ultimately charged federally, and rejecting his ineffectiveness assistance of counsel claim made on direct appeal).

U.S. v. Montenegro, No. 99-3382 (7<sup>th</sup>

Cir. 10/25/00) (affirming the defendant's conviction under the Hostage Taking Act over his argument that the district court committed plain error in failing to inquire of prospective jurors regarding bias against foreign citizens, that the Hostage Taking Act unconstitutionally discriminates against aliens, and finally that the district court erred in refusing to downwardly adjust the sentence of one of the defendants for being a minor participant).

## Reversible Error

[**Caveat:** For those who have not previously seen this column, it is a collection of federal appellate decisions in which a defendant received relief. The summaries are no substitute for reading the opinions. They are merely to draw your attention to cases that may help your own research.]

United States v. Sandoval, 200 F.3d 659 (9<sup>th</sup> Cir. 2000) (Defendant had reasonable expectation of privacy in tent on public land).

United States v. Tank, 200 F.3d 627 (9<sup>th</sup> Cir. 2000) (Insufficient evidence of defendant's leadership role).

United States v. Hall, 200 F.3d 962 (6<sup>th</sup> Cir. 2000) (Despite waiver, dual representation denied effective assistance of counsel).

United States v. Faulks, 201 F.3d 208 (3<sup>rd</sup> Cir. 2000) (3<sup>rd</sup> Cir. 2000) (Defendant could not be resentenced in abstentia).

United States v. Ahmad, 202 F.3d 588 (2<sup>nd</sup> Cir. 2000) (Firearms that were not prohibited cannot be counted toward specific offense characteristic).

United States v. Brown, 202 F.3d 691 (4<sup>th</sup> Cir. 2000) (Omission of instruction requiring unanimity on specific violations reversed CCE conviction)

United States v. Leon-Delfis, 203 F.3d 103 (1<sup>st</sup> Cir. 2000) (Questioning after polygraph violated right to counsel).

United States v. Swiney, 203 F.3d 397 (6<sup>th</sup> Cir. 2000) (Application of mandatory minimum is controlled by guidelines definition of relevant conduct, not *Pinkerton* doctrine).

United States v. McKelvey, 203 F.3d 66 (1<sup>st</sup> Cir. 2000) (A single film strip with three images was not "3 or more matters" under child porn statute).

United States v. Guess, 203 F.3d 1143 (9<sup>th</sup> Cir. 2000) (Record did not support guilty plea to firearm charge).

Coss v. Lackawanna County District Attorney, 204 F.3d 453 (3<sup>rd</sup> Cir. 2000) (Defendant was prejudiced by attorney's failure to subpoena witnesses).

United States v. Hernandez, 203 F.3d 614 (9<sup>th</sup> Cir. 2000) (Denial of self-representation at plea).

United States v. Principe, 203 F.3d 849 (5<sup>th</sup> Cir. 2000) (Possession of counterfeit document should not have been sentenced under trafficking guidelines).

United States v. Bad Wound, 203 F.3d 1072 (8<sup>th</sup> Cir. 2000) (Defendant not liable for acts of coconspirators prior to entering conspiracy).

United States v. Sumner, 204 F.3d 1182 (8<sup>th</sup> Cir. 2000) (Child's statement to psychologist was hearsay).

Hughes v. Booker, 203 F.3d 894 (5<sup>th</sup> Cir. 2000) (Ineffective assistance of counsel on appeal).

Combs v. Coyle, 205 F.3d 269 (6<sup>th</sup> Cir. 2000) (Counsel failed to object to post arrest statement, or to investigate defense expert witness).

Bond v. United States, 120 S.Ct. 1462 (2000) (Manipulation of bag found on bus was illegal search).

United States v. Hardeman, 206 F.3d (9<sup>th</sup> Cir. 2000) (Speedy trial was violated).

United States v. Gomez-Lepe, 207 F.3d 623 (9<sup>th</sup> Cir. 2000) (Magistrate Judge could not preside over polling jury in felony case).

United States v. Wood, 207 F.3d 1222 (10<sup>th</sup> Cir. 2000) (Doctor's injection of drug to treat patient did not prove premeditated murder).

United States v. Asch, 207 F.3d 1238 (10<sup>th</sup> Cir. 2000) (Drugs for personal use could not be used to calculate range for distribution).

United States v. Beckett, 208 F.3d 140 (3<sup>rd</sup> Cir. 2000) (1. Restitution should not have been ordered without determining ability to pay; 2. Sentences for robbery and armed robbery violated double jeopardy).

United States v. Lopez-Soto, 205 F.3d 1101 (9<sup>th</sup> Cir. 2000) (No good faith mistake to warrantless car search).

Roney v. United States, 205 F.3d 1061 (8<sup>th</sup> Cir. 2000) (Petitioner was entitled to counsel on motion to vacate sentence).

United States v. Prather, 205 F.3d 1265 (11<sup>th</sup> Cir. 2000) (Amount of special assessment governed by date of offense).

United States v. Takahashi, 205 F.3d 1161 (9<sup>th</sup> Cir. 2000) (Enhancement for drug crime in protected area must be pleaded and proven before a finding of guilt).

United States v. Russell, 205 F.3d 768 (5<sup>th</sup> Cir. 2000) (Absence of lawyer due

to illness did not waive right to counsel).

United States v. Weston, 206 F.3d 9 (D.C. Cir. 2000) (Use of anti-psychotic medication was not supported by evidence of danger to defendant or others).

United States v. Stephens, 206 F.3d 914 (9<sup>th</sup> Cir. 2000) (Defendant was illegally seized and searched on bus).

United States v. Tribble, 206 F.3d 634 (6<sup>th</sup> Cir. 2000) (Postal window clerk did not hold position of trust).

Smith v. Goose, 205 F.3d 1045 (8<sup>th</sup> Cir. 2000) (Prosecution argued contradictory facts in two different but related trials).

Perrillo v. Johnson, 205 F.3d 775 (5<sup>th</sup> Cir. 2000) (An actual conflict in successive prosecutions of co-defendants).

Jordan v. Lefevre, 206 F.3d 196 (2<sup>nd</sup> Cir. 2000) (Merely finding strike of juror was rational does not determine whether there was purposeful discrimination).

Pickens v. Gibson, 206 F.3d 988 (10<sup>th</sup> Cir. 2000) (Admission of confession was not harmless).

United States v. Coleman, 208 F.3d 786 (9<sup>th</sup> Cir. 2000) (Insufficient evidence that defendant knew co-defendant had a firearm for armed bank robbery conviction).

United States v. Byrd, 208 F.3d 592 (7<sup>th</sup> Cir. 2000) (Defendant was prevented from introducing shackles and restraints in which he was held during alleged assault on officers).

United States v. Bryce, 208 F.3d 346 (2<sup>nd</sup> Cir. 2000) (Uncorroborated admissions were insufficient to establish possession or distribution).

United States v. Freeman, 209 F.3d 464 (6<sup>th</sup> Cir. 2000) (Crossing lane-divider did not create probable cause for traffic stop).

Ma v. Reno, 208 F.3d 815 (9<sup>th</sup> Cir. 2000) (INS lacks authority to indefinitely detain aliens who cannot be removed to their native land); *see also* Yong v. I.N.S., 208 F.3d 1116 (9<sup>th</sup> Cir. 2000).

United States v. Charles, 209 F.3d 1088 (8<sup>th</sup> Cir. 2000) (Two convictions, sentenced simultaneously, should only count as one prior crime of violence).

United States v. Kent, 209 F.3d 1073 (8<sup>th</sup> Cir. 2000) (Sentence with mental health counseling was improper when there was no history of mental condition).

United States v. Reliford, 210 F.3d 285 (5<sup>th</sup> Cir. 2000) (Mere presence at scene of transaction did not support conviction for distribution).

United States v. James, 210 F.3d 1342 (11<sup>th</sup> Cir. 2000) (Plea colloquy did not cover elements of offense).

United States v. Naiman, 211 F.3d 40 (2<sup>nd</sup> Cir. 2000) (Receipt of the funds is a jurisdictional element of commercial bribery).

United States v. Hill, 210 F.3d 881 (8<sup>th</sup> Cir. 2000) (Defendant who had already pled guilty was not "under indictment" when he received firearm).

Jones v. United States, 120 S.Ct. 1904 (2000) (Residence that was not used for commercial purpose did not involve interstate commerce in arson case).

United States v. Hood, 210 F.3d 973 (6<sup>th</sup> Cir. 2000) (Assault without verbal threat was minor rather than aggravated).

United States v. Smith, 210 F.3d 760

(7<sup>th</sup> Cir. 2000) (Tossing drugs out window during chase was not reckless endangerment).

United States v. Corona-Garcia, 210 F.3d 973 (9<sup>th</sup> Cir. 2000) (Even after trial, defendant could receive full credit for acceptance when he confessed fully and immediately upon arrest).

United States v. Brock, 211 F.3d 88 (4<sup>th</sup> Cir. 2000) (Enhancement for multiple threats was incompatible with base level for no threats).

United States v. Ortiz-Santiago, 211 F.3d 146 (1<sup>st</sup> Cir. 2000) (Plea agreement prohibiting further adjustments did not preclude safety valve).

United States v. Thomas, 211 F.3d 316 (6<sup>th</sup> Cir. 2000) (Two prior rapes were a single transaction).

United States v. Thomas, 211 F.3d 1186 (9<sup>th</sup> Cir. 2000) (Tip did not provide reasonable suspicion for stop).

United States v. Castano, 211 F.3d 871 (5<sup>th</sup> Cir. 2000) (Refusal to file appeal was ineffective assistance of counsel).

Dickerson v. United States, 120 S.Ct. 2326 (2000) (*Miranda* warnings are constitutionally based).

Castillo v. United States, 120 S.Ct. 2090 (2000) (In order to get aggravated sentence for carrying a firearm during crime of violence, use of a machinegun must be proven as element of offense).

United States v. Barnette, 211 F.3d 803 (4<sup>th</sup> Cir. 2000) (Defendant was prevented from presenting expert to answer government's rebuttal expert testimony).

United States v. Wells, 211 F.3d 988 (6<sup>th</sup> Cir. 2000) (Plea agreement required only full cooperation, not substantial assistance).

United States v. Vonn, 211 F.3d 1109 (9<sup>th</sup> Cir. 2000) (Defendant was not properly admonished at plea).

United States v. Frandsen, 212 F.3d 1231 (11<sup>th</sup> Cir. 2000) (Requiring permit to make public expression of views was illegal prior restraint).

United States v. Frazier, 213 F.3d 409 (7<sup>th</sup> Cir. 2000) (Government cannot unilaterally retreat from plea agreement without hearing).

United States v. Pacheco-Medina, 212 F.3d 1162 (9<sup>th</sup> Cir. 2000) (Defendant who was captured a few yards from border did not enter United States).

United States v. Smithers, 212 F.3d 306 (6<sup>th</sup> Cir. 2000) (Court excluded expert on identification without a hearing).

United States v. Gray, 213 F.3d 998 (8<sup>th</sup> Cir. 2000) (No reasonable suspicion to stop defendant for protective frisk).

United States v. Torres-Ramirez, 213 F.3d 978 (7<sup>th</sup> Cir. 2000) (Purchase of drugs and knowledge of conspiracy did not make defendant a co-conspirator).

United States v. Giles, 213 F.3d 1247 (10<sup>th</sup> Cir. 2000) (Counterfeit labels were not goods within meaning of statute).

United States v. Wald, 216 F.3d 1222 (10<sup>th</sup> Cir. 2000) (Odor of burnt methamphetamine in passenger compartment did not provide probable cause to search trunk).

United States v. Smith, 217 F.3d 746 (9<sup>th</sup> Cir. 2000) (Court failed to instruct upon defendant's theory of the case).

United States v. Moss, 217 F.3d 426 (6<sup>th</sup> Cir. 2000) (Speedy Trial violation required dismissal with prejudice).

United States v. Poehlman, 217 F.3d 692 (9<sup>th</sup> Cir. 2000) (Defendant was entrapped as matter of law).

United States v. Norris, 217 F.3d 262 (5<sup>th</sup> Cir. 2000) (Restitution was not for actual loss).

United States v. Mezas De Jesus, 217 F.3d 638 (9<sup>th</sup> Cir. 2000) (Kidnaping, used to enhance sentence, needed to be proven by clear and convincing evidence).

United States v. Walton, 217 F.3d 443 (7<sup>th</sup> Cir. 2000) (Evidence of prior unsolved theft was irrelevant).

United States v. Griffin, 215 F.3d 866 (8<sup>th</sup> Cir. 2000) (Loss from food stamp fraud was limited to actual benefits diverted).

United States v. Brooks, 215 F.3d 842 (8<sup>th</sup> Cir. 2000) (Drug defendant was entrapped as matter of law).

United States v. Herron, 215 F.3d 812 (8<sup>th</sup> Cir. 2000) (No reasonable officer would have relied on such a deficient warrant).

United States v. Patterson, 215 F.3d 812 (8<sup>th</sup> Cir. 2000) (Absences of counsel during trial denied effective assistance).

United States v. Gonzalez, 214 F.3d 1109 (9<sup>th</sup> Cir. 2000) (Juror who equivocated about fairness to sit in drug case should have been excused).

United States v. Howard, 214 F. 3d 361 (2<sup>nd</sup> Cir. 2000) ( Jury could not infer defendant knew firearm was stolen merely because he was felon, or that firearm was found next to one with obliterated serial number).

United States v. Jimenez, 214 F.3d 1095 (9<sup>th</sup> Cir. 2000) (Description of defendant's prior conviction involving firearm was not harmless).

United States v. Velvarde, 214 F.3d 1204 (10<sup>th</sup> Cir. 2000) (Court failed to make reliability determination about government's expert testimony).

United States v. Adams, 214 F.3d 724 (6<sup>th</sup> Cir. 2000) (Simultaneous possession of firearm and ammunition may result in only one conviction).

Lajoie v. Thompson, 217 F.3d 663 (9<sup>th</sup> Cir. 2000) (Notice requirement of rape shield law violated right of confrontation).

*Our thanks to Alexander Bunin Federal Public Defender for the Districts of Northern New York and Vermont who allows us to reproduce and distribute these cases in our newsletter.*

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***The Back Bencher***

Published by: The Federal Public Defender's Office for the Central District of Illinois

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