
The BACK BENCHER



Central District of Illinois Federal Defenders

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DEFENDER'S MESSAGE

I am pleased to present another "Reversible Error" issue of *The Back Bencher*. Similar to past "Reversible Error" issues, Alex Bunin, Federal Public Defender for the Districts of Northern New York and Vermont, has graciously provided us with his complete listing of cases finding reversible error, dating as far back as 1995. This growing compilation of cases is a valuable tool when searching for favorable case law on appeal, and I encourage you to refer to it when looking for issues to either create for, or raise on, appeal. Also contained in this issue is Jonathan Hawley's Seventh Circuit Case Digest—another valuable tool for identifying issues and staying current with Seventh Circuit law.

We are especially proud to republish a Comment authored by Ronald L. Hanna, Jr. in this issue. This Comment first appeared in the *Southern Illinois University Law Journal*, and is titled, "Current Application of the Vienna Convention in Criminal Practice." In addition to being an insightful treatment of the issues surrounding the Vienna Convention, the Comment also contains a number of citations to cases which may be useful to you should a case arise where the Convention is implicated. The Comment is also significant due to the fact that its author was our summer intern for the last two summers. All of us at the Federal Defender's office are proud of Ron and relieved that finally one of our own "got published."

You will find attached to the back of this issue

the Application Form for attendance at this year's Annual CJA Panel Attorney Seminar at Starved Rock State Park on Thursday, May 3, 2001. This year's seminar, entitled, "The Electronic Courtroom: Defending Your Clients in the Modern Age," addresses a topic with which every attorney who practices in federal court should become familiar. With all of the courtrooms in the district either "electronic" or soon to be so, every federal practitioner will at some point be confronted with this new technology. Given that the prosecutors in this district are trained in the use of this equipment, we owe it to our clients to be proficient in its use as well. As one of our panel attorneys put it, going to trial against the government without the ability to use the electronic courtroom is like trying to play golf against Tiger Woods with a croquet mallet.

To help familiarize you with the equipment and how to use it to your advantage, we have lined up a number of exceptional speakers: Judge Jeanne E. Scott, as the designated "electronic judge" for our district, will discuss evidentiary issues related to the electronic courtroom; George Taseff and Tate Chambers will demonstrate the electronic courtroom via a mock direct and cross-examination; E.J. Hunt, Esquire from Milwaukee, Wisconsin, will discuss and demonstrate effective opening statement; Dean Strang, Community Defender for the Eastern District of Wisconsin, will discuss what the electronic courtroom can and cannot do for you and your clients; and, finally, our Computer Systems Administrator, Craig McCarley, will discuss the technical requirements of using the electronic courtroom.

Attendance at this seminar will provide you with a good start on becoming “electronic courtroom” literate, and I strongly encourage you to attend. Registration will be from 8:30 to 9:30 at the Starved Rock Lodge in Utica, Illinois, and the seminar will go until around 5:00 p.m. Lunch is included in the admission fee, and the co-host of the seminar, the Illinois Association of Criminal Defense Lawyers will sponsor a cocktail party at the lodge immediately following the seminar. Please fill-in the attached application form and send it in today. Other members of your office who may need familiarity with the electronic courtroom, *i.e.*, paralegals, secretaries, etc, are more than welcome to attend as well.

And remember, if an old war-horse lawyer like myself (who remembers what it was like to look up cases in books and have his briefs typed with a typewriter) can become computer and electronic courtroom literate, so can you.

Yours very truly,

Richard H. Parsons
Federal Public Defender
Central District of Illinois

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“In hypothetical sentences introduced by “if” and referring to past time, where conditions are deemed to be “unfulfilled,” the verb will regularly be found in the pluperfect subjunctive, in both protasis and apodosis.”

- Donet, *Principles of Elementary Latin Syntax*

Disciple (weeping): O Master, I disturb thy meditations.

Master: Thy tears are plural; the Divine Will is one.

Disciple: I seek wisdom and truth, yet my thoughts are ever of lust and the necessary pleasures of a woman.

Master: Seek not wisdom and truth, my son; seek rather forgiveness. Now go in peace, for verily hast thou disturbed my meditations - of lust and of the necessary pleasures of a woman.

- K’ung-Fu-Tsu, from *Analecets XXIII*

“A well-tied tie is the first serious step in life.”

- Oscar Wilde

DICTUM DU JOUR

“Quickly, bring me a beaker of wine, so that I may wet my mind and say something clever.”

- Aristophanes

“I’m a neurotic man. I’m really basically just like a 260-pound Woody Allen.”

- James Gandolfini
a/k/a Tony Soprano
Rolling Stone Magazine

motion to vacate his guilty plea and continuing at his sentencing hearing after the motion was denied, that he intended to defraud anyone; and without such intent he cannot be guilty. Given the nature of his conduct, the denial is unbelievable, and he further lied about what his lawyers told him when he decided to plead guilty. The judge gave him a sentencing bonus for obstruction of justice by repeatedly perjuring himself at the post-plea hearings, and Lopinski does not challenge the ruling. He not only is not repentant, which we have suggested should perhaps not be a condition precedent for the grant of the acceptance of responsibility (despite the language of the cases); he is brazen or deluded.

- United States v. Lopinski, 240 F.3d 574, 576 (7th Cir. 2001)

In light of its purpose and context, we think “sophistication” must refer not to the elegance, the “class,” the “style” of the defrauder – the degree to which he approximates Cary Grant – but to the presence of efforts at concealment that go beyond (not necessarily far beyond, for it is only a two-level enhancement that is at issue, which in this case added roughly six months to the defendants’ sentences) the concealment inherent in tax fraud.

- United States v. Kontny 238 F.3d 815, 821 (7th Cir. 2001).

Mr. Lopinski, to put it as charitably as possible, is in the condition that psychologists call “denial”; he is also a liar. Far from acknowledging his violation of the wire-fraud statute, he has denied, beginning with his

Defendants, of course, have a Fifth Amendment right not testify in their cases, but they must live with the consequences of their decisions. Here, Folami did not testify, so the

jury, other than a little bit of conjecture in closing argument by her attorney, heard no reasonable – and innocent – explanation for her presence at the door to room 620. Therefore, in the real world, a “mere presence” defense was going to be a hard sell to any rational jury. And apparently it was in this case.

- United States v. Folami, 236 f.3d 860, 863 (7th Cir. 2001).

Proving again how important bad timing is in drug cases, Gardner had the misfortune of arriving at the house a minute before officers arrived to execute the warrant.

- United States v. Gardner, 238 F.3d 878, 880 (7th Cir. 2001)(citation omitted).

At trial Hand's defense was that he was a small fish in a big pond. Aramabula, however, testified that the pond was actually rather small (comprised of himself, Hand, Inecencio, and Gonzales), but that Hand was definitely a fish.

- United States v. Arambula, 238 F.3d 865, 867-68 (7th Cir. 2001).

When the appellate standard is plain error (as opposed to harmless error), even the clearest of blunders never requires reversal; it just permits reversal. Unless the error also causes a miscarriage of justice, in the sense of “seriously affecting the fairness, integrity or public reputation of judicial proceedings,” a court of appeals retains the discretion to affirm the judgment.

- United States v. Patterson, slip op. (7th Cir. March 2, 2001)(citations omitted).

ADM could amend its complaint only with the judge’s leave, and it was sensible for the judge to take into account the improbability that Hartford would prevail on the revised claims– for if the destination is fated, it is best to avoid the travail of the journey.

- Archer Daniels Midland v. Hartford Fire Ins., slip op. (7th Cir. March 14, 2001).



CHURCHILLIANA

The eighty-year-old prime minister, in a political debate, was besieged by a Socialist who tested the aged warrior with a series of eight long questions, each beginning with “Is it not a fact . . .?”

Maintaining his composure, Churchill replied, “The gentleman seems more interested in imparting information than securing it.”



A NOTE ABOUT PLEAS

In a meeting with members of the Federal Defender’s Office and the U.S. Attorney’s Office, Judge Mihm expressed concern about his docket in cases where a plea is anticipated. Specifically, he was displeased with the number of continuances requested before a plea agreement is reached in some cases.

We discussed a number of possible reasons for these continuances, including late delivery of proposed plea agreements to defense counsel. In order to rectify this circumstance, the U.S. Attorney’s Office indicated that it would deliver proposed plea agreements to defense counsel in a more timely manner, along with a cover letter for the record indicating the date on which the proposed agreement was delivered. However, once such an agreement is delivered, the U.S. Attorney’s Office will not agree to any continuances.

Additionally, in order to prevent delays arising from difficulties in scheduling proffers with case agents, defense counsel are encouraged to schedule such appointments directly with the Assistant U.S. Attorney assigned to the case, rather than through direct contact with the agents.

Hopefully, these procedures will eliminate unnecessary delays. Your cooperation is appreciated.



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 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. Click on the link marked "Federal Defenders".

U CHECK IT OUT!

CONSULAR ACCESS TO DETAINED FOREIGN NATIONALS: AN OVERVIEW OF THE CURRENT APPLICATION OF THE VIENNA CONVENTION IN CRIMINAL PRACTICE

By: Ronald L. Hanna, Jr.

I. INTRODUCTION

As improvements in transportation make international travel easier and more affordable, the United States has an increasing responsibility to assure the safety of all of its citizens who travel abroad. Nothing could be worse for foreign travelers than to find themselves detained in a strange country for alleged criminal conduct and to be denied access to representatives from their home State. There are several factors that make this situation especially dangerous. Namely, language barriers and a lack of understanding of foreign legal systems can make travelers vulnerable to harsh penalties on foreign soil. The inherent danger in

such a situation increases when the detainee lacks economic and social resources that could assist in their defense. In such cases, an opportunity to consult with a consul could significantly affect the legal situation of travelers and aliens arrested and imprisoned in foreign countries. The United States has an obligation under the Vienna Convention on Consular Relations¹ to inform foreign nationals detained in the United States of their right to consular notification and access.² When U.S. citizens are arrested and detained abroad, the United States Department of State³ seeks to ensure that they are treated in a manner consistent with obligations under the Vienna Convention and that U.S. consular officers can assist them.⁴ Despite extensive efforts to enforce those rights abroad, the United States has failed to implement the obligations at home.

Specifically, the United States has failed to comply with the Vienna Convention's provision obligating law enforcement officers to notify foreign nationals of their right to consular access when detained by state and local officials. If consular officials are not promptly contacted when foreign nationals are detained, they are unable to converse with their nationals and provide them with effective assistance. While an increasing number of foreign nationals have raised this treaty

violation as a basis for challenging criminal proceedings, U.S. courts have routinely dismissed these claims on the grounds that the defendants were not prejudiced by the failure to adhere to the Vienna Convention or that they failed to raise the claim in a timely manner.

This Article addresses the failure of U.S. law enforcement officers to inform foreign national detainees of their right to notify and consult with their country's consular representatives. Specifically, it will examine current judicial treatment of the failure to give notification to foreign nationals charged with criminal conduct. Section II provides a brief history and explanation of the terms and obligations of the Vienna Convention. Section III discusses how the Vienna Convention is applied in practice in the United States and abroad. Section IV reviews several key cases that indicate how the Vienna Convention is interpreted in U.S. courts generally. Section V reviews recent cases in the U.S. district courts. Section VI provides recommendations to help ensure future compliance with obligations under the Vienna Convention.

II. THE VIENNA CONVENTION ON CONSULAR RELATIONS

On April 24, 1962, ninety two nations, including the United States, adopted the Vienna Convention on Consular Relations.⁵ The Vienna Convention to a large extent codified customary international law and thus represents the most basic principles pertaining to the performance of

1. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77. [hereinafter *Vienna Convention*].
 2. Vienna Convention, *supra* note 1, at 100-01.
 3. [hereinafter *State Department*].
 4. U.S. DEP'T OF STATE, PUB. No. 10518, at 13 (1998). This booklet sets out steps to follow when a foreign national is arrested or detained, and lists mandatory notification countries and jurisdictions.

5. See Vienna Convention, *supra* note 1.

consular relations.⁶ Although entered into force on March 19, 1967, the United States did not ratify the multilateral treaty until 1969.⁷ This delay in ratification was not due to concerns over the obligations the treaty would impose, but rather it existed because the Executive Branch felt the treaty did not go far enough by establishing only “minimum standards” for consular relations.⁸

Because of its comprehensive nature and near universal applicability, the Vienna Convention now establishes the “baseline” for most obligations with respect to the treatment of foreign nationals in the United States, and for treatment of U.S. citizens abroad by foreign governments.⁹ In particular, Article 36 of the Vienna Convention governs the communication and contact between consuls and nationals of their country.¹⁰ The

language of Article 36(1)(b) requires authorities of the receiving

State to inform detained or arrested foreign nationals of their right to contact their national consul.¹¹ Specifically, Article 36(b) states *inter alia*:

(1) With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

(2) The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Vienna Convention, *supra* note 1, art. 36, 21 U.S.T. at 100–01.

[i]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph¹²

The obligations of consular notification and access are binding on states and local governments as well as the federal government, primarily by virtue of the Supremacy Clause in Article VI of the United States Constitution,¹³ which provides that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”¹⁴

Despite the clear language and obligations set forth under Article 36 of the Vienna Convention, law enforcement agencies at the federal, state, and local level have continually

6. See Mark J. Kadish, *Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul*, 18 MICH. J. INT’L L. 565, 568 (1997).

7. See Vienna Convention, *supra* note 1.

8. See Kadish, *supra* note 6, at 568–69 n.14 (quoting 115 CONG. REC. 530, 997 (daily ed. Oct. 22, 1969) (statement of Sen. Fulbright)). Senator Fulbright stated:

The committee was told that the delay was largely due to a disagreement within the executive branch between those who advocated continuing the traditional U.S. bilateral approach to consular conventions or following the multilateral one represented by the Vienna Convention The multilateral versus bilateral argument points up a basic characteristic of the Vienna Convention. It embodies those standards—not has high as those embodied in our bilateral treaties.

9. See *supra* note 4, at 42.

10. Article 36 of the Vienna Convention, entitled “Communication and contact with nationals of the sending State,” provides:

11. *Id.*

12. *Id.*

13. U.S. CONST. art. VI, cl. 2.

14. See also *United States v. Arlington*, 669 F.2d 925 (4th Cir. 1982), *cert. denied*, 459 U.S. 801 (1982).

failed to comply with the provision's instructions on notifying appropriate authorities and informing foreign national detainees of their rights under the treaty.

III. APPLICATION OF THE VIENNA CONVENTION IN PRACTICE

A. Enforcement Demands by the United States

Since U.S. ratification of the Vienna Convention in 1969, the State Department on numerous occasions has referred to Article 36 and insisted on compliance with its terms when American citizens have been detained by foreign governments.¹⁵ On one occasion in 1975, two American citizens were detained by Syrian security forces and Syrian officials refused to allow consular access or communication.¹⁶ The State Department instructed the U.S. embassy in Damascus to inform the Syrian government of the rights under the Vienna Convention and the importance of consular access.¹⁷ The State Department declared that:

The recognition of these rights is prompted in part by considerations of reciprocity. States accord these rights to other states in the confident expectation that if the situation were to be reversed they would be accorded

equivalent rights to protect their nationals. The Government of Syrian Arab Republic can be confident that if its nationals were detained in the United States the appropriate Syrian officials would be promptly notified and allowed prompt access to these nationals.¹⁸

Prompted by the embassy's formal request to the Syrian government, U.S. consular officials were subsequently permitted to communicate with the detained American citizens.

On another occasion in 1979, Iranian students occupied the U.S. embassy in Tehran and detained a number of U.S. citizens.¹⁹ Again, U.S. consular and diplomatic officials were prevented from communicating with the detained U.S. nationals. The United States repeatedly condemned the Iranian actions and referred to the Vienna Convention in requesting consular access. The United States then instituted proceedings against Iran in the International Court of Justice (ICJ), claiming that the Iranian government had violated the Vienna Convention by failing to allow U.S. consular personnel to communicate with the detainees.²⁰ The ICJ held that Iran had violated several international conventions, including the Vienna Convention, as well as customary international law.²¹

B. Codification by the Immigration and Naturalization Service

The Immigration and Naturalization Service (INS) recognized the importance of consular notification and compliance with the Vienna Convention and codified its obligations under Article 36 of the treaty.²² 8 C.F.R. § 236.1(e)²³ states that "[e]very detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States."²⁴ The first decisions involving the right to consul were, in fact, reviews of deportation hearings conducted by the INS.²⁵ None of these cases required direct interpretation of the Vienna Convention though because the issue was raised in the context of implementing the applicable INS regulation.

1. *United States v. Calderon-Medina*

In *United States v. Calderon-Medina*,²⁶ the defendant aliens sought dismissal of an indictment for illegal reentry following deportation in violation of 8 U.S.C. § 1326.²⁷ The defendants challenged the lawfulness of their deportation on the basis that the INS violated its own regulation by not advising them of their right to contact their national consul.²⁸ The court held that the "[v]iolation of a regulation renders a deportation unlawful only if the violation prejudiced interests of the alien which were protected by the

15. See William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT'L L. 257, 270 (1998).

16. *Id.* (citing U.S. Dep't of State telegram 40298 to Embassy Damascus, Feb. 21, 1975, reprinted in Eleanor McDowell, U.S. Dep't of State, DIG. U.S. PRAC. INT'L L. 249 (1975)).

17. *Id.*

18. *Id.* (citing U.S. Dep't of State telegram 40298 to Embassy Damascus, Feb. 21, 1975, reprinted in Eleanor McDowell, U.S. Dep't of State, DIG. U.S. PRAC. INT'L L. 249 (1975)).

19. *Id.*

20. *Id.*

21. *Id.*

22. *United States v. Calderon-Medina*, 591 F.2d 529, 531 n.6 (9th Cir. 1979).

23. 8 C.F.R. § 242.2(g) was the predecessor regulation to current 8 C.F.R. § 236.1(e).

24. 8 C.F.R. § 236.1(e) (1999).

25. Kadish, *supra* note 6, at 571.

26. 591 F.2d 529 (9th Cir. 1979).

27. *Id.*

28. *Id.* at 530.

regulation.²⁹ Because the district court had made no finding of specific harm to the aliens resulting from lack of notice of their right to communicate with the Mexican Consul, the court reversed and remanded the case for a determination of prejudice.³⁰ The court also established the following procedure for determining whether prejudice existed:

On remand the aliens should be allowed the opportunity to demonstrate prejudice resulting from the INS regulation violations. The district courts will determine whether violation of 8 C.F.R. § 242.2(e) harmed the aliens' interest in such a way as to affect potentially the outcome of their deportation proceedings. Any such harm should be identified specifically.³¹

In a dissenting opinion, district judge Takasugi ordered an affirmance of the district court's dismissal of the indictment or, in the alternative, that the case be remanded to the district court imposing the burden on the government to establish the lack of prejudice. He stated that:

To honor the provisions of Article 36 of the Vienna Convention on Consular Relations, as noted in footnote 6 of the majority opinion, mandates a sense of justice and decency. To do anything less is a severe erosive compromise of our very essence equal if not greater than a Constitutional violation.³²

2. *United States v. Rangel-*

Gonzales

In *United States v. Rangel-Gonzales*,³³ a companion case to *Calderon-Medina*, the Ninth Circuit more fully addressed the prejudice requirement.³⁴ Noting that the burden of production is on the defendant to show prejudice, the court considered several affidavits produced by the defendant himself, family members of the defendant, and various legal and social services groups that indicated that had the regulation been followed his defense and the conduct of the hearing would have been materially affected.³⁵ As such, the court found that the requisite showing of prejudice had been satisfied.³⁶

Only one case since *Calderon-Medina* has even discussed the Vienna Convention.³⁷ In that case, *Waldron v. INS*, the Second Circuit Court of Appeals expressly rejected the notion that rights granted by a treaty could be equated with fundamental constitutional rights or statutory rights.³⁸

In sum, federal courts have

consistently held that a violation of INS regulations requiring consular access will invalidate challenged proceedings only if the requisite showing of prejudice is satisfied.³⁹

C. The State Department's Position

Recognizing the importance of state and local law enforcement compliance with the Vienna Convention, the State Department began issuing periodic notices and manuals on consular access to these agencies.⁴⁰ The most recent publication issued in January 1998⁴¹ contains instructions and guidance relating to the arrest and detention of foreign nationals, death of foreign nationals, and related issues pertaining to the provision of consular services to foreign nationals in the United States.⁴² The foreword points out that cooperation of federal, state, and local law enforcement agencies in ensuring treatment of foreign nationals in accordance with the instructions not only will permit the United States to comply with its consular legal obligations domestically, but will also help ensure that the United States can insist upon rigorous compliance by foreign governments with respect to United States citizens abroad.⁴³

While the State Department manual itself is not binding upon state or local officials, the publication notes that the

29. *Id.* at 531.

30. *Id.* at 532.

31. *Id.*

32. *Id.*

33. 617 F.2d 529 (9th Cir. 1980).

34. *Id.*

35. *Id.* at 531.

36. The court stated that:

The appellant showed he did not know of his right to contact the consular officials, that he would have done so had he known, and that such consultation may well have led not merely to appointment of counsel, but also to community assistance in creating a more favorable record to present to the immigration judge on the question of deportation. *Id.*

37. Kadish, *supra* note 6, at 575.

38. 17 F.3d 511, 518 (2d Cir. 1993) ("[a]lthough compliance with our treaty obligations clearly is required, we decline to equate such a provision with fundamental rights, such as the right to counsel, which traces its origins to concepts of due process.").

39. Aceves, *supra* note 15, at 277.

40. U.S. DEP'T OF STATE, PUB. No. 10518, at 13 (1998) (entitled *Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them*).

41. *Id.*

42. *Id.* at i.

43. *Id.*

obligations of consular notification and access are binding on states and local governments as well as the federal government, primarily by virtue of the Supremacy Clause in Article VI of the United States Constitution.⁴⁴ The State Department further encourages law enforcement agencies to implement the obligations of consular notification and access by incorporating instructions on consular notification into their manuals.⁴⁵

According to the State Department, Article 36 obligations under the Vienna Convention "are of the highest order and should not be dealt with lightly."⁴⁶ Despite the State Department's efforts to make consular notification customary practice by U.S. law enforcement, foreign national detainees are seldom advised of their rights at the state and local level. In response, several criminal defendants have challenged state criminal proceedings claiming violations of the Vienna Convention as a defense.

**IV. JUDICIAL
INTERPRETATION OF
RIGHTS UNDER THE
VIENNA CONVENTION:
APPELLATE PRECEDENT**

United States courts have

recognized and enforced the right to contact a consul, although not in the context of criminal justice.⁴⁷ At a time when the presence of aliens in the United States is increasing it is a reasonable assumption that there will be a corresponding increase in the number aliens that are charged with criminal offenses. The Vienna Convention has recently become the focus of several state capital cases. The following cases are examples of how U.S. courts have consistently treated these challenges to violations under Article 36(b).

1. *Faulder v. Johnson*

In *Faulder v. Johnson*, Joseph Stanley Faulder was twice convicted⁴⁸ and sentenced to death for the murder of an elderly woman during the armed robbery of her home.⁴⁹ Faulder, a Canadian citizen living in Texas, filed a petition for habeas corpus and a motion for stay of execution in state court following unsuccessful appeals at the state level.⁵⁰ The petition claimed that Faulder's rights to compulsory and due process were violated when law enforcement officials violated the Vienna Convention by failing to inform him that he could contact his Canadian Consul.⁵¹

Despite the admission that the Vienna Convention had been violated, the Fifth Circuit Court of Appeals held that the violation did not merit reversal.⁵² In affirming the district court's findings, the court of appeals found that Faulder or Faulder's attorney had access to all the information that could have been obtained by the Canadian government and therefore no prejudice existed.⁵³

2. *Murphy v. Netherland*

In *Murphy v. Netherland*, Mario Benjamin Murphy sought habeas corpus relief from his Virginia convictions of murder-for-hire, conspiracy to commit murder, and his death sentence.⁵⁴ Murphy, a Mexican national, had plead guilty to a murder charge involving five accomplices.⁵⁵ He filed his federal habeas petition claiming, among other things, that both his conviction and his death sentence were constitutionally invalid because the Virginia Beach authorities failed to notify him that he had a right under the Vienna Convention to contact the consulate of Mexico.⁵⁶ The district court rejected all of his claims, holding that his Vienna Convention claim was procedurally defaulted because it was not raised at the state level.⁵⁷ On appeal, the Fourth Circuit dismissed the petition on several grounds.

First, the court found that Murphy had failed to establish a substantial denial of a constitutional right required in order to obtain a

44. *Id.* at 44. Article VI of the United States Constitution provides that, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI. cl. 2.

45. *Id.*
46. Arthur W. Rovine, U.S. DEP'T OF STATE, DIG. U.S. PRAC. INT'L L. 1973, 161 (1973).

47. *See* United States v. Calderon-Medina, 591 F.2d 529, 532 (9th Cir. 1979) (remanding the case to the district court to allow a foreign national the opportunity to demonstrate that violation of a consular access provision harmed his interests so as to prejudice his deportation proceedings).

48. The first conviction was reversed by the Texas Court of Criminal Appeals because Faulder's confession, which was admitted into evidence, was obtained in violation of the Fifth Amendment. *Faulder v. State*, 611 S.W.2d 630 (Tex. Crim. App. 1979), cert. denied, 449 U.S. 874 (1980).

49. *See* Faulder v. Johnson, 81 F.3d 515, 517 (5th Cir. 1996).

50. *Id.*

51. *Id.*

52. *Id.* at 520.

53. *Id.*

54. *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997).

55. *Id.*

56. *Id.* at 99.

57. *Id.*

certificate of appealability.⁵⁸ The court reasoned that although states may have an obligation under the Supremacy Clause to comply with the provisions of the Vienna Convention, the Supremacy Clause does not convert violations of treaty provisions into violations of constitutional rights.⁵⁹

Second, the Fourth Circuit affirmed the district court's finding that the Vienna Convention claim was procedurally defaulted because it was not raised in state court.⁶⁰ Murphy argued that there was cause for his failure to raise the Vienna Convention in state court because the novelty of the claim and because the state failed to advise him of his rights under the treaty.⁶¹ The court disagreed and held that the legal basis for the Vienna Convention claim could have been discovered by the investigation of a reasonably diligent attorney.⁶² Finally, the court rejected Murphy's argument that he was prejudiced by the Commonwealth's failure to

notify him of the right to contact the Mexican consulate because the consulate could have helped him either obtain a plea bargain⁶³ or obtain mitigating evidence for the sentencing hearing.⁶⁴ Murphy had failed to show any additional evidence the consulate would have produced had it been notified of his arrest.⁶⁵

Following an unsuccessful petition to the Supreme Court and after his plea for clemency was denied by the governor of Virginia, Murphy was executed on September 17, 1997.⁶⁶

3. *Breard v. Netherland*

In 1992 Angel Breard, a dual citizen of Paraguay and Argentina, was arrested for attempted rape and capital murder in Virginia.⁶⁷ After a jury trial, he was found guilty and sentenced to ten years and a

\$100,000 fine for the rape and sentenced to death for the capital murder.⁶⁸ Throughout his detention, Breard was never notified of his right to communicate with Paraguayan consular officials, nor was Paraguay notified of Breard's detention.⁶⁹ On August 30, 1996, after exhausting his state appeals, Breard filed a petition for habeas corpus relief with the federal district court alleging for the first time that his rights under the Vienna Convention had been violated.⁷⁰

The district court held that the Vienna Convention claim was defaulted and therefore not reviewable because it was not raised in the state court.⁷¹ Further, the district court held that Breard had not shown just cause for the default,⁷² noting that attorney ignorance or inadvertance is not cause and the petitioner must bear the risk of any attorney in failing to recognize the claim.⁷³ After the Fourth Circuit affirmed the judgment of the trial court,⁷⁴ Breard was denied certiorari by the Supreme Court.⁷⁵ In sum, these primary cases have established precedent

58. In order to obtain a certificate of appealability, a petitioner whose habeas petition was denied in a district court must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (West 1999).

59. "Just as a state does not violate a constitutional right merely by violating a federal statute, it does not violate a constitutional right merely by violating a treaty." *Murphy*, 116 F.3d at 100. See *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (stating that a treaty must be "regarded in courts of justice as equivalent to an act of the legislature.").

60. *Murphy*, 116 F.3d at 100.

61. *Id.*

62. The court stated that, "[t]he Vienna Convention, which is codified at 21 U.S.T. 77, has been in effect since 1969, and a reasonably diligent search by Murphy's counsel, who was retained shortly after Murphy's arrest and who represented Murphy throughout the state proceedings, would have revealed the existence and applicability (if any) of the Vienna Convention." *Id.*

63. All of the defendants except Murphy were offered a negotiated plea. Murphy argued that because his cohorts did not receive the death penalty, his death sentence must have been the result of ethnic discrimination which somehow could have been avoided by help from the Mexican consulate. The court found that the prosecutor's refusal to plea bargain was attributed to Murphy's culpability and therefore reasonable and nondiscriminatory. *Id.* at 101.

64. There was no evidence to support Murphy's generalized assertion that the Mexican consulate could have helped him obtain mitigating evidence from Mexico that would have affected his sentencing hearing. Also, the court found that Murphy's assertion that the Mexican consulate could have helped him obtain character testimony from his relatives in Mexico did not establish prejudice because he failed to show how the consulate was necessary to obtain that evidence and because the testimony would have been largely duplicative of that which was actually presented at the sentencing hearing. *Id.* at 100-01.

65. *Id.*

66. Aceves, *supra* note 15, at 277.

67. *Breard v. Netherland*, 949 F. Supp. 1255, 1259 (E.D. Va. 1996).

68. *Id.*

69. *Id.* at 1263.

70. *Id.*

71. *Id.*

72. The court stated that:

[T]he Commonwealth's failure to comply with the Vienna Convention did not prevent Breard's counsel from raising the issue during state proceedings. The only predicate fact required to raise the claim was the knowledge of Breard's foreign nationality. The legal knowledge required to raise the claim is imputed to Breard through the various attorneys who represented him during the trial, direct appeal, and state habeas proceedings. *Id.*

73. *Id.*

74. See *Breard v. Pruett*, 134 F.3d 615, 620 (4th Cir. 1998).

75. See *Breard v. Green*, 118 S. Ct. 1352, 1354 (1998).

indicating that no remedy is warranted for violations of the Vienna Convention unless the defendant can demonstrate that the violation resulted in some form of prejudice.

**V. UNITED STATES
DISTRICT COURT
TREATMENT OF VIENNA
CONVENTION VIOLATIONS**

While Vienna Convention claims in the previous cases were all raised in federal courts in habeas corpus petitions following conviction and sentencing, the issue is also frequently raised in the district courts in pretrial motions to suppress evidence. The majority of courts considering this issue agree that no remedy is warranted unless the defendant can demonstrate that the Convention violation resulted in some kind of prejudice.⁷⁶ Even if it

is determined that the defendant has been prejudiced, the courts have found nothing in the Vienna Convention that provides for the exclusionary rule as a remedy for violation of its provisions.⁷⁷

1. Rejection of an Exclusionary Rule as a Remedy

In October 1998, Maria Alvarado Torres was arrested when U.S. Customs inspectors discovered 130.3 pounds of marijuana in her car at the Calexico Port of Entry to the United States.⁷⁸ Torres was informed in Spanish of her Miranda rights and she agreed to waive those rights and speak with agents. At no time, however, was Torres asked whether she wished for the authorities to notify the Mexican consulate of her arrest.⁷⁹ Thereafter, upon being questioned, Torres proceeded to make incriminating and inconsistent statements.⁸⁰ When confronted with those inconsistencies, she invoked her right to an attorney and the questioning ceased.⁸¹

Following a two count indictment charging her with importing marijuana and possession with intent to distribute, Torres filed a motion to suppress as well as a motion to dismiss the indictment.⁸² The motion to suppress evidence contended that the interrogation had violated her rights under the Vienna Convention and that her right to be

informed of her right to contact the consul was analogous to her Miranda right to be informed of her right to contact an attorney.⁸³

The court rejected this argument emphasizing that suppression of her statements would not be an appropriate remedy even assuming that Torres were able to establish prejudice.⁸⁴ Citing previous federal court decisions, the court recognized that the Vienna Convention does not create any fundamental constitutional rights.⁸⁵ As a result, if the remedy of suppression is to be available, the Convention must expressly provide for that remedy.⁸⁶ After reviewing the pertinent Convention Articles,⁸⁷ the court found nothing in the Convention's text that suggested application of the exclusionary rule as a remedy for a violation.⁸⁸

In addition, the court found that Torres had, in fact, not been

76. *United States v. Miranda*, 65 F. Supp. 2d 1002, 1006 (D. Minn. 1999). See *United States v. Lombera-Camorlinga*, 170 F.3d 1241, 1244 (9th Cir. 1999) ("Upon a showing that the Vienna Convention was violated . . . the defendant in a criminal proceeding has the initial burden of producing evidence showing prejudice from the violation of the Convention."); *United States v. Kevin*, 1999 WL 194749, at *4 (S.D.N.Y. 1999) (holding that the defendants in the case at bar could obtain relief only by establishing prejudice caused by a violation of their rights under the Convention); *United States v. Esparza-Ponce*, 7 F. Supp. 2d 1084, 1097 (S.D. Cal. 1998) (holding that, "to have his statements suppressed, Defendant must show prejudice."); see also *Breard*, 118 S. Ct. at 1355 (stating that even if the habeas petitioner's Vienna Convention claim had been "properly raised and proven, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on trial"); *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996) (rejecting habeas petitioner's claim under the Convention on the ground that any

assistance he might have obtained from his consulate would have had no effect on his defense).

77. See *United States v. Chaparro-Alcantara*, 37 F. Supp. 2d 1122, 1125-26 (C.D. Ill. 1999).
78. *United States v. Alvarado-Torres*, 45 F. Supp. 2d 986, 987 (S.D. Cal. 1999).
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*

83. To support her motions, Torres filed an affidavit alleging that had agents advised her of her right to contact the Mexican Consul, she would have availed herself to that right. Furthermore, she alleged that had the consular officials advised her not to answer the questions, that she would have indeed invoked her right to remain silent and would not have answered the agents' questions. *Id.* at 987.
84. *Id.* at 994.
85. *Id.*
86. *Id.*
87. *Id.* See *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997) (emphasizing that while the Convention might create individual rights, "it certainly does not create constitutional rights"), *cert. denied*, 521 U.S. 1144 (1997); *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1993) (finding that the right to communicate with consular officials, enumerated in the Convention, did not create any fundamental constitutional right); *United States v. Esparza-Ponce*, 7 F. Supp. 2d 1084, 1097 (S.D. Cal. 1998) (holding that a violation of the Convention does not rise to the level of a Miranda violation).
88. *Id.*

prejudiced by the law enforcement officer's failure to advise her of her rights under the Convention.⁸⁹

While agents may not have informed Torres of her rights under the Vienna Convention, they did inform her of her Miranda rights which she subsequently waived.⁹⁰ Therefore, the consular official's advisal of virtually the same rights—the right to remain silent and the right to contact an attorney—would have been cumulative.⁹¹ Moreover, the fact

that Torres invoked her right to remain silent once she suspected that she was making incriminating statements strongly suggested that she fully understood the scope of the Miranda rights.⁹² The Central District of Illinois was confronted with similar circumstances in *United States v. Chaparro-Alcantara*.⁹³ In that case, two Mexican citizens were arrested in South Jacksonville, Illinois, after law enforcement agents discovered that the van they were driving was filled with 13 Mexican nationals that were illegally in the United States.⁹⁴ After their arrest, Chaparro-Alcantara and Romero-Bautista were transported to the INS office in Springfield, Illinois, where they were each advised of their Miranda rights in Spanish, their native language.⁹⁵ However, neither of the detainees were advised of their right to contact Mexican consular officials and they both made inculpatory statements which they later wished to suppress from evidence.⁹⁶

As in the previous case, the court found nothing in the Vienna Convention that provides for the exclusionary rule as a remedy for violation of its provisions.⁹⁷ The defendants also failed to show that had they been advised of their right to speak with the consulate, they would have stopped answering questions and would not have waived their Fifth Amendment rights.⁹⁸ Therefore, the requisite showing of prejudice had not been satisfied.

In sum, the district courts

require a showing of prejudice for claims arising under the Vienna Convention. This prejudice requirement is difficult, if not impossible, to meet where the arresting law enforcement officer has advised the foreign nationals of their Miranda rights in their native language and the detainees waive those rights. More importantly, the district courts have refused to apply an exclusionary rule as a remedy for violations of the Convention. As such, motions to suppress evidence obtained under such circumstances are routinely dismissed.

VI. RECOMMENDATIONS

The main cause of Vienna Convention violations in the United States is a lack of awareness of obligations under Article 36 and a lack of effective procedure to inform foreigners of their right to consular access. In light of the fact that there is currently no remedy available in the judicial system for failure to comply with the Vienna Convention, the United States has a compelling interest and obligation to address the problem at its source, federal and state law enforcement agencies. The United States legal system currently requires police officers to inform individuals of their Miranda rights when they are arrested. It has been suggested that the incorporation of the right of detained aliens to contact a consular officer into Miranda warnings would significantly improve the situation.⁹⁹ It would prove particularly helpful in areas of high alien populations to provide police officers with pocket-sized cards summarizing consular

89. Torres also contended that she was prejudiced because the Mexican Consulate was not available to assist her in deciding whether or not she should exercise her rights under Miranda during the interrogation by arresting officers. The court found that the Vienna Convention does not confer upon foreign nationals the right to speak with a consular representative before agents begin interrogation. Rather, the Convention merely states that agents must notify a national "without delay" of his right to contact consul. The court stated that:

Again, the State Department indicates that officers must contact the consul 'as soon as reasonably possible under the circumstances,' indicating that officers would comply with the Convention by contacting the consulate within 24 hours, or even as late as 72 hours, of the foreign national's request. Furthermore, the State Department notes that the Convention does not require that the consul be notified outside of its regular working hours. Thus, nothing in the Convention requires officers to delay interrogation even if a foreign national requests that officers notify the consul of his arrest.

Id. at 991. See also *id.* at n.10.

90. *Id.* at 990.

91. *Id.*

92. *Id.*

93. 37 F. Supp. 2d 1122 (C.D. Ill. 1999).

94. *Id.* at 1123.

95. *Id.*

96. *Id.*

97. *Id.* at 1126.

98. *Id.*

99. Victor M. Uribe, *Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice*, 19 Hous. J. Int'l L. 375, 423 (1997).

rights much like the Miranda cards that are currently used.

Greater efforts must also be made by the State Department to ensure that federal and state agencies are aware of these obligations and adhere to them. The State Department must increase the frequency and distribution areas of its educational publications. Regular training programs for state and local law enforcement agencies should also be established to ensure that officials are familiar with consular notification.¹⁰⁰

If the United States wishes foreign countries to honor the rights of its citizens under the Vienna Convention, it must honor the rights of foreign nationals in the American judicial system as well. Justice cannot be achieved where, simply as a result of a defendant's nationality and lack of familiarity with our legal principles, the state or federal courts deny him the occasion to fully participate in the judicial proceedings against him. When determining whether a foreign national defendant has been prejudiced by law enforcement's failure to notify him of his rights under Article 36, courts should give greater weight to the existence of language barriers and a lack of economic and social resources.

Additionally, while Vienna Convention claims are increasingly being addressed in United State's courts, many attorneys representing foreign nationals are unaware that the right to contact a foreign consulate even exists. It should be the affirmative duty of the court to inform defense attorneys representing foreign nationals as to the procedural aspects of raising a

Vienna Convention claim. Until this happens, claims of this nature will invariably fail and the violation of rights of foreign nationals will be continue to be disguised behind procedure.

VII. CONCLUSION

The United States has an obligation under Article 36 of the Vienna Convention to inform foreign nationals detained in the United States of their right to consular notification and access.¹⁰¹ Despite the Constitution's declaration that a Treaty is the "supreme Law of the Land,"¹⁰² the United States is continually allowing the noncompliance with Article 36 to go unpunished. The appellate courts have clearly established a prejudice requirement on foreign detainees that is difficult, if not impossible to meet. The district courts have implemented this prejudice requirement as well. In addition, the district courts are consistently refusing to apply an exclusionary rule as a remedy for violations.

As an increasing number of cases of this nature come before U.S. courts, violations of the Vienna Convention increase the threat to the reciprocal principle of consular relations. If the United States wishes foreign countries to honor the rights of its citizens abroad under the Vienna Convention, it must comply with its obligations at home. Honoring Article 36 of the Vienna Convention and ensuring convictions without the taint of treaty violations will ensure that the United States does not compromise its integrity in the realm of international law.

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LET JUDGES BE JUDGES!

Downward Departures After Koon

By: Alan Ellis, Esq.

*[Editor's Note: This is the conclusion 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 Seven** discussed "Family Ties and Responsibilities.]*

Part 8 -

Answering the 'Why' Question:

The Powerful Departure Grounds of Diminished Capacity, Aberrant Behavior, and Post-Offense Rehabilitation.

100. Aceves, *supra* note 15, at 314.

101. Vienna Convention, *supra* note 1, at 100-01.

102. U.S. CONST. art. VI, cl. 2.

At sentencing, most judges want —

and too frequently never receive — an answer to two "why" questions: why did the defendant do what he did and why is he unlikely to do it again? This is no less true under the Federal Sentencing Guidelines than it was before the Sentence Reform Act of 1984 which gave rise to the guidelines. Indeed, before the guidelines, defense counsel usually addressed the "why" questions, but counsel now tend to erroneously and detrimentally believe these questions are not germane to guideline sentencing.

For example, diminished capacity and aberrant behavior are two grounds for downward departure that humanize a defendant, make him more sympathetic and help to explain why he did what he did. Extraordinary post-offense rehabilitation is a factor that can additionally provide a persuasive indicator that the criminal conduct is unlikely to reoccur. This article reviews these three powerful grounds for departure to highlight the opportunity and the importance for defense attorneys to still answer the "why" questions under the guidelines.

I. Diminished Capacity

In some instances, leaving why the defendant did what he did unanswered at sentencing may be wise, because the answer is greed and malice. For a substantial number of offenders, however, a mental disorder may have contributed to the commission of the offense. In those cases, the sentencing guidelines may provide a vehicle for a mitigated sentence. Section 5K2.13 (p.s.) has long provided for a "diminished capacity" departure when a defendant's "significantly reduced mental capacity ... contributed to the commission of the offense." Prior to a recent amendment, however, a

circuit conflict existed whether this departure was available to certain "violent offenders" because § 5K2.13 made reference only to defendants who committed "a non-violent offense." Based on this language, the Seventh Circuit sitting en banc in *United States v. Poff*, 926 F.2d 588 (7th Cir. 1991), had held, for example, that a diminished capacity departure was entirely precluded if the defendant committed a "crime of violence" as that term is defined in § 4B1.2. In contrast, other courts, such as the D.C. Circuit *United States v. Chatman*, 986 F.2d 1446 (D.C. Cir.1993), had held that § 4B1.2 should not govern the application of § 5K2.13 and that a sentencing court should examine all the facts and circumstances of a case to determine whether a particular offense was in fact "non-violent" when contemplating a diminished capacity departure. Effective November 1, 1998, § 5K2.13 no longer makes reference to "a non-violent offense" and now provides:

A sentence below the applicable guideline range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity. However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. If a departure is warranted, the extent of the departure should reflect the extent to which the reduced mental

capacity contributed to the commission of the offense. The amendment represents a compromise approach to the circuit conflict. The new policy statement allows a diminished capacity departure in any case if there is sufficient evidence that the defendant committed the offense while suffering from a significantly reduced mental capacity except under the three specified circumstances. Rather than focus on whether the offense qualifies as "violent," the new version of § 5K2.13 appears to make the "need to protect the public" the key consideration in the departure inquiry. The recent amendment of § 5K2.13 also added an application note that defines "significantly reduced mental capacity" in accord with the Third Circuit's decision in *United States v. McBroom*, 124 F.3d 533 (3d Cir. 1997).

McBroom, a practicing lawyer and recovering alcoholic and cocaine addict, pled guilty to one count of possession of child pornography. He recounted a traumatic history of child sexual abuse, alcohol and cocaine addiction, and obsession with pornography. While McBroom managed to practice law, he continuously abused alcohol and cocaine, frequented "peep shows," called 900 sex lines and viewed pornographic pictures. Due to his addictions, his marriage dissolved after seven years, and he went through at least four stays in drug and alcohol treatment facilities. Although McBroom managed to stop drinking and taking drugs, he soon discovered the vast array of pornography, including child pornography, available on the Internet. In reviewing the initial denial of McBroom's request for a diminished capacity departure, the Third Circuit concluded that "significantly reduced mental

capacity" under § 5K2.13 included both cognitive impairments (i.e., an inability to understand the wrongfulness of the conduct or to exercise the power of reason) and volitional impairments (i.e., an inability to control behavior that the person knows is wrongful). Upon remand, the sentencing court found that McBroom's situation justified a diminished capacity downward departure based on the Third Circuit's "volitional impairment test" because his significant obsessive compulsive disorder led him to obtain Internet child pornography even though he knew he was committing a criminal offense and would soon be caught. (Indeed, even when he learned that the FBI was investigating him, he could not bring himself to simply delete the pornographic pictures from his computer.) Adopting the Third Circuit's approach, the commentary to § 5K2.13 now expressly defines "significantly reduced mental capacity" as a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to emphasize the power of reason; or (B) control behavior that the defendant knows is wrongful. Cases from both before and after this amendment have found "significantly reduced mental capacity" to include bipolar disorder (or manic-depressive disorder), schizophrenic disorder, major depression disorder, obsessive compulsive disorder, post-traumatic stress disorder, and even just "psychological problems."

My firm recently represented a client who received a substantial diminished capacity departure for suffering from body dysmorphia - a "bigger is better" body disorder sometimes seen in weight-lifters. In order to get bigger, our client took

steroids to which he became addicted. In order to support his habit, he sold marijuana. *United States v. Knobloch*, CR96-3022 (W.D. Pa., 1998). Notably, this case also raised a question as to whether the defendant was precluded from receiving a diminished capacity downward departure because, arguably, the significantly reduced mental capacity was caused by the voluntary use of drugs. The court found, however, that the "chicken came before the egg" in that the use of drugs was caused by the mental disorder, thus qualifying the defendant for the departure. Because diminished capacity is an encouraged departure, see, e.g., *McBroom*, supra, and because the amended policy statement seems to remove a potential categorical exclusion, more defendants should come to qualify. Notably, the new version of § 5K2.13 still provides that the extent of the departure is a matter of the court's discretion and "should reflect the extent to which the reduced mental capacity contributes to the commission of the offense." Thus, a defendant whose significantly reduced mental capacity contributed only slightly to the offense's commission may merit only a small sentence reduction. Nonetheless, the defendant still qualifies for a departure.

If possible, defense counsel would be well advised to have clients evaluated by a mental health professional to determine whether a client was suffering from a significant mental disorder which may have contributed, in any manner, to the commission of his offense. Criminal Justice Act funds should be available for this purpose even when the lawyer is retained by friends or family of the indigent client. When possible, it is helpful to get the probation officer and the prosecutor on board. This does not

necessarily mean that they have to wholeheartedly agree that your client is entitled to a downward departure, but merely that your position is not unreasonable.

To this end, I have recently begun to sit down with the probation officer, the prosecutor and the case agents, accompanied by my forensic mental health professional, to explain his findings and answer their questions. This, coupled with an offer to have your client evaluated by an expert of the government's choice, can go a long way particularly if that expert agrees with yours.

Too many defense attorneys do not recognize that a white-collar criminal client may have been suffering from a significant mental disorder that contributed to the commission of the offense. How can a securities fraud offender who bilked investors out of millions of dollars in a sophisticated scheme have been mentally ill? Remember that, as noted above, *McBroom* had a law degree and practiced law. Abraham Lincoln, it is reported, suffered from a bipolar disorder, manic depression. Fortunately, he did not need a downward departure. In short, bright, competent people can suffer from significant mental disorders. In those cases where it contributes to criminal behavior, such individuals should be considered for a diminished capacity downward departure.

II. Aberrant Behavior

Another departure that can be considered in combination with diminished capacity and post-offense rehabilitation is "aberrant behavior." "Aberrant behavior" can be a particularly effective argument because it can bridge the two "why"

questions by simultaneously giving an account for why the defendant did what he did and suggesting exactly why is he unlikely to do it again. The guidelines refer to "single acts of aberrant behavior" in a manner that seems to permit a downward departure on this basis, and yet neither defines the phrase nor provides any insight into what the Commission might have meant when it used it. Specifically, all the Commission says in Chapter 1, Part A, Introduction section 4(d), is simply the following:

The Commission, of course, has not dealt with the single acts of aberrant behavior that still may justify probation at higher offense levels through departures.

This unclear reference has, unsurprisingly, produced a disagreement among the circuits as to what type of conduct constitutes aberrant behavior allowing departure. Two cases establish what have come to be recognized as the outer boundaries of the aberrant behavior spectrum. *United States v. Carey*, 895 F.2d 318 (7th Cir. 1990), stands at one end of the spectrum, and *United States v. Grandmaison*, 77 F.3d 555 (1st Cir. 1996), stands at the other.

United States v. Carey involved a premeditated criminal scheme carried out over a long period of time. Carey, a trucking company president, engaged in a check-kiting scheme over a 15 month period. Each work day during this period Carey concealed his two over-drawn bank accounts by having his bookkeeper prepare checks to cover the fund shortage. He signed each check and frequently deposited them himself. The Seventh Circuit held that this behavior was not "aberrant." The Court held that:

[a] single act of aberrant behavior . . . generally contemplates a spontaneous and seemingly thoughtless act rather than one which was the result of substantial planning because an act which occurs suddenly and is not the result of a continued reflective process is one for which the defendant may be arguably less accountable. Thus, for the Seventh Circuit in *Carey*, spontaneity and thoughtlessness were the key criteria for an aberrant behavior departure.

Yet, in *United States v. Grandmaison*, a departure was allowed even when the crime involved a scheme carried out over an extended period of time. During a six-month period, Grandmaison, a member on his town's Board of Aldermen, lobbied three of his aldermanic colleagues to award a lucrative contract for the renovation of a local junior high school to a construction company of which he was an employee. At the behest of the construction company, Grandmaison gave gratuities, gifts, and other things of value to his three colleagues before and after major contract selection votes. These lobbying efforts eventually bore fruit when the Board awarded the project to the construction company for which Grandmaison worked. Grandmaison pled guilty to a one-count information charging him with utilizing the mail system to defraud his town's citizens of their right to the honest services of their public officials.

At the sentencing hearing, Grandmaison requested a downward departure based on a combination of factors that included aberrant behavior within the meaning of Chapter 1, Part A, Introduction section 4(d). The district court declined to depart downward because it felt that a departure

based on aberrant behavior, though generally available under the guidelines, required not only a showing of first offender status and behavior inconsistent with otherwise good or exemplary character, but also spontaneity or thoughtlessness.

The First Circuit, however, reversed and held that determinations about whether an offense constitutes a single act of aberrant behavior should be made by reviewing the "totality of the circumstances" including, inter alia, factors such as pecuniary gain to the defendant, charitable activities, prior good deeds, and efforts to mitigate the effects of the crime. While spontaneity and thoughtlessness may be among the factors considered, they are not prerequisites for departure: We think the Commission intended the word "single" to refer to the crime committed and not to the various acts involved. As a result, we read the Guidelines' reference to "single acts of aberrant behavior" to include multiple acts leading up to the commission of a crime. . . . Any other reading would produce an absurd result. The district courts would be reduced to counting the number of acts involved in the commission of a crime to determine whether departure is warranted. Moreover, the practical effect of such an interpretation would be to make aberrant behavior departures virtually unavailable to most defendants because every other crime involves a series of criminal acts.

Addressing the concern that this test ensures every first offender a downward departure, the First Circuit made it clear that aberrant behavior and first offense status are not synonymous and stated that, without more, first-offender status is not enough to warrant a downward departure.

The Second, Ninth and Tenth Circuits have joined the First in eschewing a limited focus on spontaneity and thoughtlessness, opting instead for a broader view of aberrant behavior. They require reviewing courts to consider the totality of the circumstances in making aberrant behavior determinations, including but not limited to, the following factors:

- Absence of pecuniary gain to the defendant
- Prior charitable and good deeds
- Efforts to mitigate the effects of the crime
- Long-term employment coupled possibly with recent unemployment
- No prior criminal conduct
- No abuse of controlled substances
- Economic support of one's family
- Conduct of a government agent influencing the defendant to commit the crime
- A marked departure from the past
- Unlikelihood of recurrence
- Defendant's motivation for committing the crime
- The singular nature of the criminal act
- The spontaneity and lack of planning of the crime
- Extreme pressures under which the defendant was operating including
- The pressure of losing one's job
- Psychological disorders of the defendant
- Letters from friends and family expressing shock as to the defendant's behavior.

Arguably, in these four circuits if the conduct at issue is both a short-lived divergence from an otherwise

law-abiding life — possibly caused by a mental disorder which, because it's being successfully treated, is unlikely to reoccur — a downward departure based on aberrant behavior may very well be in order even if the criminal conduct was not a single, spontaneous thoughtless act.

A defendant's brief meander into criminal activity, if it stands in stark contrast to his posture as a responsible, hard-working, fully employed, contributing member of the community and can be coupled with appropriate post-offense rehabilitative efforts, may very well lead to an aberrant behavior downward departure. Moreover, especially if combined with diminished capacity and extraordinary post-offense rehabilitation, it may enable the defendant to receive a substantial downward departure even if not all the way to a sentence of probation.

III. Extraordinary Post-Offense Rehabilitation and Extreme Remorse

McBroom, and others like him, managed to get help for their mental disorders and thus qualified for both a diminished capacity downward departure and a departure based on extraordinary post-offense rehabilitative efforts.

Evidence of extraordinary post-offense rehabilitative efforts is particularly effective in suggesting why a defendant is unlikely to reoffend.

This, too, answers another "why" question: Why should the sentencing judge take a chance on your client?

In *United States v. Barton*, 76 F.3d 449 (2d Cir. 1996), the defendant pleaded guilty to child pornography

charges, and the sentencing court departed from the sentencing guideline range of 15-21 months in light of Barton's psychological condition, his limited involvement with child pornography, his non-predatory nature, and his efforts towards rehabilitation. He was sentenced to a term of probation subject to electronically monitored home confinement, psychiatric and/or psychological counseling, and community service.

The Second Circuit agreed that truly extraordinary rehabilitation efforts could justify departure, but held that the evidence in Barton's case did not justify such a finding. The court of appeals stated that the mere fact that Barton had sought rehabilitation did not of itself justify a reduction in sentence because a tentative step towards rehabilitation is not usually enough to warrant a downward departure. Barton's psychotherapist had not cited any objective indications of his patient's progress towards overcoming his condition. Thus, the court of appeals vacated Barton's sentence and remanded for resentencing. Significantly, however, the Barton court invited the district court, on remand, to allow the government and Barton full opportunity to offer any further relevant evidence substantiating Barton's rehabilitation. The opinion ended by stating that if the sentencing judge then found support in the record for a conclusion that Barton's rehabilitative efforts were extraordinary, reducing his sentence from a minimum of 15 months to probation would not be unreasonable. On remand, the sentencing judge did just that. In another child pornography case, the Eighth Circuit also recognized that exceptional post-offense rehabilitation may warrant a downward departure. In *United States v. Kapitzke*, 130 F.3d 820 (8th

Cir. 1997), the defendant had exposed himself in front of a 13-year-old girl. In his truck and at home, police found pictures and computer files of child pornography from the Internet. The district court departed downward based on the financial burden of the defendant's imprisonment on his family, his susceptibility to abuse in prison, and his post-offense rehabilitation efforts. After eight months of sex offender and chemical dependency treatment, the director of the sex offender treatment program was "extremely impressed" with Kapitcke's efforts and believed that he had a high probability of success. His chemical dependency counselor had never had a client

work harder than Kapitcke and believed his prognosis was "very good." Finally, a doctor experienced in addiction medicine described the defendant's recovery up to that point as "truly outstanding." Based on this evidence, the Eighth Circuit, while finding that the other stated reasons did not justify a departure, approved one on the ground of post-offense rehabilitation efforts. Because the appellate court did not know if the district court would have imposed the same sentence absent the invalid departure factors (probation conditioned upon nine months of community confinement with work release) it remanded for resentencing. On remand, the sentence was identical to the prior sentence. Downward departures for extraordinary post-offense rehabilitation have also been recognized in the area of chemical dependency. In *United States v. Maier*, 975 F.2d 944 (2d Cir. 1992), the defendant pled guilty to distribution of heroin and possession of heroin with intent to distribute. At her request, sentencing was delayed three months to permit her to enter a residential drug treatment program. Subsequently, sentencing

was further postponed for more than a year to allow her the opportunity to pursue additional rehabilitative programs. This included a methadone maintenance program at St. Luke's-Roosevelt Hospital in New York City, a three-week, in-patient detoxification program in Newark, and treatment by a psychoanalyst specializing in addition disorders. The sentencing court, taking note of his departure power as well as the statutory command that the sentencing judge shall consider "the history and characteristics of the defendant" and the need for the sentence imposed to provide the defendant with needed medical care in the most effective manner, departed downward from the applicable guideline range and imposed a sentence of three years probation conditioned upon Maier participating in a community drug treatment program.

In affirming, the Second Circuit discussed at length whether efforts at rehabilitation could permit a downward departure from the applicable sentencing guideline range, noting that one of the arguments espoused by the government against awarding such a departure rested in large part on the view that "rehabilitation is no longer a direct goal of sentencing." The Maier court disagreed, noting that the Sentencing Reform Act only rejects imprisonment as a means of promoting rehabilitation. Congress wanted to make sure that no defendant was locked up in order to put him in a place where it was hoped that rehabilitation would occur. Incarceration would have to be justified by the traditional penological purposes of incapacitation, general deterrence, specific deterrence, or retribution. But Congress expressed no hostility

to rehabilitation as an objective of sentencing and required sentencing judges to consider, among other things, "providing the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner":

Since rehabilitation may not be a basis for incarceration but must be considered as a basis for a sentence, Congress must have anticipated that sentencing judges would use their authority, in appropriate cases, to place a defendant on probation in order to enable him to obtain "needed . . . medical care or other correctional treatment in the most effective manner."

In *United States v. Williams*, 65 F.3d 301 (2d Cir. 1996), the Second Circuit took the highly unusual step of granting a downward departure not to reward a defendant's post-offense rehabilitation, but rather to allow the defendant to enter a particular Bureau of Prisons drug treatment program.

The Second Circuit approved the district court's use of its departure power to facilitate /V rather than to reward — rehabilitation by noting that 18 U.S.C. § 3553(a)(2)(D) mandates a sentencing court to take account of the defendant's need for "medical care or treatment" in the most effective manner.

The Williams court recognized that the sentencing judge did not grant departure from the sentencing range of 130-162 months simply because Williams had entered a drug treatment program. Rather, it departed because, under the facts of the case, there was effectively no other sentence that would accord with the requirements of 18 U.S.C. § 3553(a)(2)(D):

The district court determined that Williams was an excellent candidate for rehabilitation given his prior history, demeanor, post-arrest resolve, and acceptance into a "special and selective" treatment program based on criteria appraised by experts in the field. However, the only program available to Williams would not take him unless he were within 18 to 36 months of release. To sentence him to even the minimum term of 130 months, the district court reasoned, would require Williams to wait some six or seven years to begin treatment. If in the interim . . . the program was terminated for budgetary or other reasons or Williams' resolve weakened under the pressures of prison life, the chances of curing him of his addiction and perhaps his criminal ways would vanish.

Recognizing that the sentence reasonably accounted for Williams's rehabilitative needs as described by 18 U.S.C. § 3553(a)(2)(D) and that if Williams was cured of his addiction, it might ultimately serve to protect the public from future criminal acts that he might otherwise commit, the court of appeals approved a lengthy supervised release term to allow the district court to sentence Williams to a prison term within his guideline range should he fail to meet the requirements of supervised release. The court of appeals, however, took the unprecedented step of then vacating the sentence and remanding for resentencing so the court could amend its sentence to ensure that, if Williams entered and then abandoned drug treatment, he would be returned to prison.

Akin to post-offense rehabilitation is the concept of a defendant's extreme remorse. Sincere and honest remorse is another indicator that defendant is unlikely to get in

trouble again. Although the guidelines may discourage the consideration of a defendant's remorse as a basis for a downward departure in most cases, they do not contain an absolute ban on a district court's indulging in such a consideration. Hence, the Seventh Circuit remanded a case for resentencing because the district court incorrectly believed that it could not base a downward departure on extraordinary post-offense remorse.

Since the unlikelihood of recidivism is a factor that can be argued in support of a downward departure for extraordinary post offense rehabilitative efforts, remorse can be highly persuasive by itself or in connection with post-offense rehabilitative efforts. Moreover, it has the extra added advantage of often being true.

Conclusion

Defense attorneys, because of their perspective and particular role in the criminal justice system, have a unique opportunity to place an offender's background within a proper psycho-sociological context. Taking advantage of that opportunity can be an invaluable step towards presenting a human picture of an individual defendants, and thereby provide insight into the key "why" questions that a judge, even under the federal guideline system, is necessarily concerned with at sentencing.

Alan Ellis is a former president of the NACDL and has offices in both San Francisco and Philadelphia. He is a nationally recognized expert on sentencing issues and specializes and consults with other lawyers throughout the United States in the area of federal sentencing.

He has graciously allowed us to reproduce articles he has written for his quarterly federal sentencing column for the ABA's Criminal Justice magazine.

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

CA-7 Case Digest

Compiled by: Jonathan Hawley
Appellate Division Chief
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RECENT REVERSALS

APPEAL WAIVERS

U.S. v. Vega, No. 99-1409 (7th Cir. 03/02/01). In the defendant's plea agreement, she waived her right to appeal "any sentence within the maximum provided in the statute(s) of conviction on any ground whatsoever." Thereafter, at sentencing, the district court granted the defendant a two-level minor-role reduction. Five days after the sentencing hearing, the government moved for reconsideration of this decision. The court in fact did reconsider, and took the two-level reduction away. The defendant then appealed, and the government argued that her appeal waiver deprived the Court of Appeals of jurisdiction. The Court of Appeals, however, initially noted that the district court amended the defendant's sentence outside the 7-day limit for "correcting" a sentence as provided in Rule 35, and the court was therefore without legal authority to do so. Looking to the language of the waiver, the court concluded that the term "sentence" as used in the plea agreement was intended to

include only the events of the original sentencing hearing, and not any attempt by the court to amend the defendant's sentence absent jurisdiction. Moreover, any attempt to waive this jurisdictional issue in a plea agreement would have been ineffectual because a defendant cannot confer jurisdiction on a court by way of plea agreement. Accordingly, the court vacated the district court's judgment and remanded with instructions for the court to re-impose the original sentence.

APPENDI

U.S. v. Westmorland, No. 99-1491 (7th Cir. 02/15/01). In prosecution for narcotics offense, the Court of Appeals vacated the defendant's sentence based on a violation of Appendi. In this case, the defendant went to trial. Although the drug quantity was pled in the indictment, it was not determined by the jury beyond a reasonable doubt, and the defendant received a sentence in excess of the 20 year default sentence set forth in 21 U.S.C. 841(b)(1)(C). Indeed, he received a sentence of life imprisonment. Applying a plain error analysis because the defendant raised the argument for the first time on appeal, the court first noted that an "error" which was "plain" occurred because the defendant received an enhanced sentence based on a determination of drug quantity by the judge rather than the jury. Next, the court considered whether the error affected the defendant's substantial rights such that the error "affected the outcome of the district court proceedings." The court concluded that it did. Specifically, the only evidence regarding drug quantity was the 559 grams of cocaine found on the defendant at the time he was arrested and another eight kilograms

attributed to him through hearsay testimony. Because the hearsay testimony was improperly introduced at trial regarding drug quantity, the only evidence available to the jury for sentencing purposes was the 559 grams, an amount insufficient to make the defendant eligible for a sentence of life imprisonment. Thus, because the jury could not have concluded that the defendant was responsible for more than 559 grams, the outcome of the district court proceedings was affected. Finally, the court concluded that the error seriously affected the fairness, integrity, and public reputation of the judicial proceedings because the issue of drug quantity was closely contested and supported only by limited evidence. Thus, the district court's failure to charge the jury with a quantity determination resulted in a substantially longer sentence than would have likely resulted if the jury had been properly charged. Having satisfied all four of the plain error factors, the court concluded that the Appendi error was plain and reversible.

HABEAS CORPUS

Redmond v. Kingston, No. 99-2333 (7th Cir. 02/14/01). Upon consideration of a habeas corpus petition arising out of the petitioner's state court conviction for statutory rape, the Court of Appeals granted the petition on the ground that the Wisconsin courts unreasonably applied the federal doctrine relating to the constitutional right to confrontation. The alleged victim of the rape originally claimed that she had been forcibly raped. However, she thereafter admitted that she fabricated the story in order to get attention from her mother. She maintained, however, that she had consensual sex with the petitioner. Because she was a minor, the

petitioner was charged with statutory rape. At trial, the petitioner sought to introduce the alleged victim's prior fabrication in order to attack her credibility. The trial court refused to allow the testimony, finding that the testimony was cumulative and would "confuse the issue." The Wisconsin appellate courts affirmed. In reversing, the Court of Appeals noted that the alleged victim's testimony was the only evidence implicating the petitioner. Moreover, the fact that the girl had lied to her mother, nurse, and the police supplied a powerful reason for disbelieving her testimony by showing she had a motive for fabrication. Likewise, the fabricated rape story was not protected by Wisconsin's rape-shield law prohibiting questioning about prior sexual conduct, for a false charge of rape is not sexual conduct. Thus, under these circumstances, the court concluded that the petitioner's confrontation rights had been violated.

Betts v. Litscher, No. 00-3072 (7th Cir. 02/22/01). In this habeas corpus case, the Court of Appeals held that the petitioner was improperly denied the assistance of counsel on direct appeal. After the petitioner's state court conviction, the petitioner's public defender wrote a letter to the court stating that the petitioner had declined the opportunity to have a no-merit brief filed and had elected to proceed on appeal *pro se*. However, the petitioner repeatedly requested the appointment of counsel, all of which were denied by the appellate court. Thus, the petitioner attempted to proceed *pro se* through the procedural morass, until finally ending up in the Seventh Circuit Court of Appeals. The court concluded that the petitioner was constitutionally entitled to the assistance of counsel on direct appeal, but the state of Wisconsin

gave him “the runaround.” It allowed counsel to withdraw unilaterally, then used the ensuing procedural shortcomings to block all avenues of relief. Yet, according to the court, one principal reason why defendants are entitled to counsel on direct appeal is so that they will not make the kind of procedural errors that unrepresented defendants tend to commit. The Constitution does not permit a state to ensnare an unrepresented defendant in his own errors and thus foreclose access to counsel. Thus, the court concluded that his is one of those rare cases where a state procedural ground not only is inadequate, but also contravenes rules articulated by the Supreme Court, therefore supporting a writ of habeas corpus. Moreover, the state’s argument that the error was nevertheless harmless was without merit, for federal law holds that when a state court allows appellate counsel to withdraw without an independent judicial determination of the appeal’s merit, the defendant is entitled to a fresh appeal without demonstrating that the initial appeal was non-frivolous.

JURY TRIAL ISSUES

U.S. v. Centracchio, No. 00-1363 (7th Cir. 01/11/01). On consideration of an interlocutory appeal by the government from a district court’s order excluding certain evidence from being presented at trial, the Court of Appeals, as a matter of first impression, held that the filing of a notice of appeal under 18 U.S.C. § 3731 precludes a district judge’s empaneling the jury. The section at issue allows to the government to seek an interlocutory appeal from adverse evidentiary rulings, as the government did in this case. Despite the appeal, however, the district court informed the parties that he intended to empanel the jury,

although not swear them in. The government argued to the Court of Appeals, that the interlocutory appeal deprived the district court of its ability to empanel the jury. The Court of Appeals agreed and noted that empaneling a jury is not the type of pre-trial preparation which should be allowed during the pendency of an interlocutory appeal. Specifically, the decision in such an appeal could take months and the jurors would be in “limbo” during that time, creating an unwarranted risk of jury tampering.

SENTENCING

U.S. v. Lopinski, No. 00-2591 (7th Cir. 01/08/01). In prosecution for wire fraud, the Court of Appeals reversed the district court’s reduction in the defendant’s sentence for acceptance of responsibility, upon cross-appeal by the government. The court noted that the defendant, although pleading guilty, thereafter sought to withdraw his guilty plea and contended during the hearing on that motion and at sentencing that he did not intend to defraud anyone. Notwithstanding this assertion, the district court gave him acceptance of responsibility because he believed that “ultimately, somewhere in his psyche he has accepted some form of moral responsibility” for his actions. The Court of Appeals rejected this as a basis for granting acceptance of responsibility, noting that “acceptance of responsibility is not regret for the consequences of innocent mistakes, but recognition that one has violated the law.” The court continued, “The law cannot tolerate a situation in which a criminal defendant plays heads I win tails you lose by combining a perjurious attack on his guilty plea with a plea for mercy if the attack fails.”

U.S. v. Arambula, No. 99-4302 (7th Cir. 01/26/01). In prosecution for a narcotics offense, the Court of Appeals reversed the district court’s enhancement of the defendant’s sentence for obstruction of justice. The defendant had testified for the government in another case, but the district court determined that that testimony was perjurious. Thus, the district court enhanced his sentence for obstruction of justice. On appeal, the defendant argued that his prior testimony was not “false testimony of a material matter.” The Court of Appeals noted that not all false testimony is necessarily perjurious, for it is material only if it is designed to substantially affect the outcome of the case. Using this standard, the proper inquiry is whether the defendant’s false testimony could tend to influence the issue under determination at the proceeding in which he testified—namely, whether the defendant in the other case conspired to possess cocaine with intent to distribute it. Under the circumstances of the present case, the false testimony was not material. The defendant here in fact testified that the defendant in question was guilty of conspiracy. The fact that he did not finger as many other co-defendants as the district judge desired was not material to the issue of guilt or innocence in the case in question. According to the court, such testimony regarding other conspirators “seems a needless complication to lead [the defendant] on a wild goose chase about individuals not seated at the defense table.”

U.S. v. Houltz, No. 00-3257 (7th Cir. 02/15/01). In this case, the Court of Appeals reversed the district court’s determination that the defendant was a career offender based upon a prior Illinois burglary conviction. The defendant was originally charged with “residential burglary,” but that

charge was reduced to “burglary of a dwelling.” However, the information to which the defendant pled noted that the burglary was to that of an “apartment.” Based on this reference to an apartment, the district court concluded that the defendant not only committed residential burglary, but that, alternatively, the burglary also involved “serious potential risk of physical injury” to another. The Court of Appeals reversed. First, the court noted that the district court was required to confine its inquiry to the face of the charging instrument. Both the facts contained in the charging document and the statutory definition of the charged offense may be considered. However, the district court may not assume additional facts and what the defendant “really” did is irrelevant. “The only question is what he was convicted of, and the only thing that answers this question is the charging document.” Using this standard, the court noted that the “burglary of a dwelling” statute to which the defendant pled explicitly excludes “residential burglary.” Thus, looking only to the charging instrument, the defendant did not have a prior conviction for residential burglary. Moreover, the district court’s conclusion that the burglary involved a serious risk of injury was in error as well. The record made clear that the only reasons the district court believed this condition to exist was because the district judge believed that the defendant “really” burglarized a dwelling. This presumption was impermissible given that the charging instrument excluded this possibility. Thus, the court vacated the defendant’s sentence.

RECENT AFFIRMANCES

APPRENDI

U.S. v. Jackson, No. 98-2696 (7th Cir. 01/10/01). Upon remand from the United States Supreme Court, the Court of Appeals re-affirmed the defendant’s sentence for a 21 U.S.C. § 841 offense. The defendant received a 30-year sentence based on the district judge’s determination that his offense involved at least 5 grams of crack cocaine. Because the jury was not asked to determine the quantity of drugs, the sentence beyond the default sentence of 20-years violated Apprendi, and the Supreme Court therefore remanded the case to the Seventh Circuit for reconsideration. The Court of Appeals noted that the defendant did not raise an Apprendi-like argument in the district court, and therefore the error would be reviewed only for “plain error.” Under this standard, the defendant must show that there is some likelihood that the judgment would have been different had the error not been made. Using this standard, the Court concluded that Mr. Jackson’s sentence would not have been different even without the Apprendi error because the evidence at trial showed that on one occasion alone, the defendant sold 51.7 grams of crack, more than 10 times the amount required to make the defendant eligible for the sentence he received.

U.S. v. Mietus, No. 99-3535 (7th Cir. 01/22/01). In prosecution for conspiracy to distribute marijuana, the Court of Appeals affirmed the defendant’s sentence. The defendant received a sentence of 151 months’ imprisonment, while the default maximum sentence for an unspecified amount of marijuana is five years. Thus, because the drug quantity, although pled in the indictment, was not presented to the jury for a finding, an Apprendi error was committed. Nevertheless, the court applied a plain error standard

of review, notwithstanding the fact that Apprendi had not been decided at the time of trial. Indeed, according to the court, arguments had been circulating similar to those made in Apprendi long before his trial, and thus the argument was forfeited. Applying the plain error standard, the defendant could not prevail because the 1,000 kilograms seized from him at the time of arrest alone was an amount sufficient to trigger the enhanced statutory maximum sentence.

Garrot v. U.S., No. 99-2921 (7th Cir. 01/30/01). On consideration of whether a certificate of appealability should issue, the Court of Appeals considered whether the presentation of an Apprendi issue can meet the “cause and prejudice” standard for presenting the claim for the first time in a collateral proceeding. The court noted that although the lack of *any* reasonable legal basis for a claim may constitute “cause,” the foundation for Apprendi was laid long before the petitioner’s original trial in 1992. According to the court, other defendants began making Apprendi-like arguments soon after the Sentencing Guidelines came into being, and in McMillian v. Pennsylvania, 477 U.S. 79 (1986), the Supreme Court addressed on the merits an argument along similar lines. Thus, the petitioner could have invoked the themes in McMillian, and for that matter In re Winship, 397 U.S. 358 (1970), just as the Justices did in Apprendi. Accordingly, the petitioner could not establish cause and no certificate issued.

U.S. v. Smith, 99-4253 (7th Cir. 02/08/01). Upon remand from the United States Supreme Court, the Court of Appeals rejected the defendant’s Apprendi claim. The defendant was originally tried for distribution of crack in 1992.

Although the over 50 grams of crack were pled in the indictment, the issue of drug quantity was not presented to the jury, and the defendant received a sentence in excess of 20 years. After exhausting his direct appeal, the defendant filed a petition to lower his sentence due to a retroactive amendment in the guidelines. The district court granted this petition. At the hearing, however, the defendant argued that Jones v. United States required the government to present the issue of drug quantity to the jury. The district court disagreed, and the Court of Appeals affirmed. However, after the appellate court's decision, the Supreme Court decided Apprendi, and the defendant argued in his petition to the Supreme Court that Apprendi required that drug quantity be presented to the jury. The Supreme Court remanded the defendant's case for reconsideration in light of Apprendi. Upon reconsideration, the court first noted that the defendant's motion for a reduction of his sentence pursuant to a retroactive change in the sentencing guidelines constituted a collateral attack upon his sentence. Thus, the law governing 2255 motions should govern the case. Applying these standards, the court held that the petitioner had to show "cause and prejudice" for failing to object to the determination of drug quantity at the time of trial in 1992. The court concluded that he could not establish cause. Specifically, the court concluded that although the lack of any reasonable basis for a legal claim may constitute "cause," the foundation for Apprendi was laid long before 1992. According to the court, "Other defendants had been making Apprendi-like arguments ever since the Sentencing Guidelines came into being, and in McMillian v. Pennsylvania, the Court addressed on the merits an argument along

similar lines. Smith could have invoked the themes in McMillian, and for that matter In re Winship, just as the Justices themselves did in Apprendi. Thus, Smith has not established cause."

U.S. v. Sandoval, No. 99-4223 (7th Cir. 02/20/01). In this case, the Court of Appeals considered the question of whether under 18 U.S.C. 924(c)(1)(B)(i), the classification of a firearm as a "semi-automatic assault weapon" is a sentencing factor or an element of the offense. The court concluded that it is a sentencing factor. Under 924(c), the possession of a semi-automatic weapon increases a defendant's mandatory minimum sentence from 5 to 10 years. However, this increase involves the mandatory minimum sentence, not the statutory maximum. The court noted that the Supreme Court in McMillian v. Pennsylvania, held that a mandatory minimum sentence could be imposed based upon a finding by the judge rather than the jury. Apprendi did not eliminate this holding of McMillian, but rather limited it to the extent that a jury finding is required to increase a defendant's maximum statutory sentence. In the present case, because the statutory maximum sentence for all subsections of 924(c) is life-imprisonment, Apprendi does not apply. Moreover, conducting an analysis of the structure of 924(c), the court concluded that Congress did not intend for the various weapon classifications contained within the statute to constitute separate offenses. Rather, they are merely sentencing factors which need not be proven to a jury beyond a reasonable doubt.

U.S. v. Patterson, No. 97-3159 (7th Cir. 03/02/01). Upon remand from

the Supreme Court for reconsideration in light of Apprendi, the Seventh Circuit held that although Apprendi was violated due to the failure of the district judge to submit the question of drug quantity to the jury, the error was not "plain." Indeed, the defendants' failure to object at trial required a plain error analysis, and, under this standard, it would have been impossible for the jury to believe that the defendants were responsible for less than 50 grams of crack where the conspiracy to distribute crack lasted at least a decade and involved \$40,000 in retail sales per day.

U.S. v. Brough, No. 00-2695 (7th Cir. 03/02/01). Upon conviction for narcotics offenses after a bench trial, the defendant argued on appeal that Apprendi required reversal because the district judge determined drug quantity using a preponderance of the evidence, rather than a beyond the reasonable doubt, standard. In considering this argument, the court first noted that although Apprendi deals with the division of responsibility between judge and jury, it also addresses the burden of persuasion as well. Accordingly, although the defendant waived his right to a jury, Apprendi still required that the drug quantity be determined beyond a reasonable doubt prior to making a defendant eligible for an enhanced statutory maximum sentence. In this case, the district judge made the drug quantity determination using the lower burden of proof, but the defendant failed to object. Thus, the Court of Appeals applied a plain error analysis. Under this standard, the drug quantity was based upon the testimony of the very same witnesses who established the defendant's guilt. Thus, it was unlikely that the same judge who credited these witnesses' testimony in the guilt phase would not do so for the drug quantity as well.

EVIDENCE

U.S. v. Wilson, No. 98-4224 (7th Cir. 01/17/01). In prosecution for CCE, the Court of Appeals rejected the defendants' argument that their convictions should be reversed because of a Brady violation. A month after the trial of the defendants, they received a memorandum from the Department of Justice indicating that the government's star snitch witness had been terminated from the witness protection program because he had tested positive for drug use three times prior to his testimony in the case. Although the prosecutors immediately disclosed the information upon receiving it, the defendants argued that because the information was in the possession of the U.S. Marshal Service prior to trial, their knowledge of this information should be imputed to the government. The court agreed on this point, noting that the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police. The court concluded that the U.S. Marshal Service was "part of the team." Nevertheless, the court also noted that in order to require reversal, the withheld information must be "material," which means that it was evidence (if disclosed in a timely way) would have created a reasonable probability of a different result. In the present case, even had the information been disclosed, it would have been merely cumulative of the extensive evidence of the witness's drug use, and therefore not material under Brady.

U.S. v. Utecht, No. 00-2285 (7th Cir. 01/26/01). In prosecution for tax fraud, the Court of Appeals considered the following question of first impression: what standard a

defendant must satisfy to engage in discovery to gather evidence that the IRS may have illegally used its civil summons power after it decided to recommend charges be brought against the defendant. In resolving this question, the Court of Appeals analogized to the standards used when seeking discovery to show vindictive prosecution and selective prosecution, *i.e.*, a defendant must show a colorable basis for his or her claim before discovery against the government is permitted. Applying this standard, the defendant failed to make a proper showing, for the only evidence he presented on the issue was that he never received a tax bill as a result of the civil audit.

GUILTY PLEAS

U.S. v. Driver, No. 00-2263 (7th Cir. 03/09/01). In this case, the Court of Appeals rejected the defendant's effort to set aside his guilty plea. When taking the defendant's plea, the district judge failed to inform the defendant of the maximum penalty, failed to explain that imprisonment would be followed by supervised release, failed to advise the defendant that he would have the right to cross-examine witnesses should he go to trial, to name but a few of the Rule 11 omissions. Notwithstanding these omissions, the defendant did not move to withdraw his plea in the district court, but rather made the argument for the first time on appeal. Giving this failure to make a motion in the district court, the court concluded that plain error review, rather than harmless error review, was appropriate. Applying this standard, although the district court's errors were obvious, the court concluded they were not plain. To establish plain error, the defendant would have to show that the errors affected the "fairness,

integrity, or public reputation of judicial proceedings." However, the defendant failed to even argue that absent the errors, he would not have pled guilty. Nor did he assert that he had any plausible defense to advance at trial. Moreover, the record beyond the change of plea hearing, such as the plea agreement itself, demonstrate that the defendant was in fact aware of many of the items omitted during the Rule 11 colloquy. Accordingly, the court affirmed the defendant's conviction.

HABEAS CORPUS

Wilson v. Briley, No. 00-1277 (7th Cir. 03/05/01). Upon consideration of the district court's denial of a habeas petition, the Court of Appeals held that the petitioner had procedurally defaulted his constitutional claims. The court noted that a petitioner may not resort to the federal courts without first giving the state courts a fair opportunity to address his claims and to correct any error of constitutional magnitude. Four factors bear upon whether the petitioner has fairly presented the claim in state court: (1) whether the petitioner relied on federal cases that engage in constitutional analysis; (2) whether the petitioner relied on state cases which apply a constitutional analysis to similar facts; (3) whether the petitioner framed the claim in terms so particular as to call to mind a specific constitutional right; and (4) whether the petitioner alleged a pattern of facts that is well within the mainstream of constitutional litigation. Looking to these factors, the court concluded that the petitioner did not fairly present his claim to the state court. Specifically, he relied exclusively upon state cases which did not employ federal constitutional analysis and did not frame his issues in such a way as to call to mind the constitutional rights

he asserted in federal court. Rather, the petitioner's claims in state court amounted to a claim that the trial judge "abused his discretion,"--a type of argument "most often having little or nothing to do with constitutional safeguards." Finally, although the petitioner did frame his claims with greater particularity in his petition for leave to appeal to the Illinois Supreme Court, presenting a federal claim for the first time in such a petition does not satisfy the fair presentment requirement. Thus, the petitioner had procedurally defaulted his claims.

MISCELLANEOUS

U.S. v. Ross, No. 99-4035 (7th Cir. 03/14/01). In prosecution for being a felon in possession of a firearm, the Court of Appeals rejected the defendant's argument that the indictment should have been dismissed due to the government's violation of the Interstate Agreement on Detainers. The defendant argued that the IAD is violated whenever a prisoner is removed from one jurisdiction (in this case, the State of Illinois) to face charges in another jurisdiction (in this case, the federal government), and the charges in the receiving jurisdiction (the federal government) are not disposed of prior to the prisoner being returned to the original jurisdiction (Illinois). In the present case, the defendant was transferred from state to federal custody on six separate occasions without trial of the pending federal charges before being returned to state custody. In rejecting the defendant's challenge, the court noted that the IAD was meant to protect the prisoner against endless interruption of the rehabilitation programs because of criminal proceedings in other jurisdictions. In this case, the six day trips did not disrupt any

rehabilitation of the defendant and other circuits have held that brief interruptions in prison confinement for the purpose of attending proceedings in federal court do not violate the IAD, particularly where the prisoner is returned to state custody on the same or following day.

OFFENSE ELEMENTS

U.S. v. Wilson, No. 98-4224 (7th Cir. 01/17/01). In prosecution for CCE, the Court of Appeals held that a jury unanimously concluded that the defendant committed two predicate offenses in order to sustain a conviction. The Court of Appeals noted that some circuits define a "continuing series of violations" as three or more offenses. However, the Seventh Circuit has previously held that a CCE charge may be established by two or more predicate offenses, even when the jury instructions require three. Accordingly, because the jury found that the defendant committed two predicate offenses, the district court's failure to instruct the jury that it must unanimously find the defendants guilty of each predicate act was harmless error.

U.S. v. Ray, No. 99-1290 (7th Cir. 01/24/01). In prosecution for murder in furtherance of a CCE, the Court of Appeals affirmed the defendant's conviction. Although the defendant was charged with committing the murder in furtherance of the CCE, he was not actually charged with being a member of the enterprise. Accordingly, the defendant argued that he could not be convicted of committing a murder in furtherance of the CCE without also being convicted of being a member thereof. The Court of Appeals, however, rejected this argument. The court noted that engrafting such

a requirement is in conflict with the clear language of the statute in question. In effect, accepting the defendant's argument would require that every person charged with a murder in furtherance of the CCE would also have to be charged with engaging in the CCE. The language of the statute, however, was meant to encompass hired henchmen who commit murder to further the goals of the CCE, although they are not otherwise intimately involved therein.

SEARCH AND SEIZURE

U.S. v. Kontny, No. 00-3004 (7th Cir. 01/04/01). In prosecution for nonpayment of federal payroll taxes, the defendant argued on appeal that his admissions to an IRS agent should be suppressed because the agent violated IRS regulations which require that a civil investigation cease when the investigator develops firm indications of fraud. The defendant argued in the district court and on appeal that the IRS agent obtained the incriminating statements during the course of a civil investigation, when the agent in fact had firm indications of fraud. The Court of Appeals, however, rejected the claim, noting first that the federal exclusionary rule does not extend to violations of statutes and regulations. Thus, because the defendant did not claim to have relied on the existence of the IRS regulation at issue, there was no causal relation between the alleged violation and the defendant's decision to make incriminating statements. In other words, according to the court, "A failure to terminate a civil investigation when the revenue agent has obtained firm indications of fraud does not without more establish the inadmissibility of evidence obtained by him in continuing to pursue the investigation." Because the court

determined that “there is nothing more here,” the court affirmed the defendant’s conviction.

U.S. v. Walker, No. 99-4022 (7th Cir. 01/17/01). In prosecution for drug and firearm offenses, the Court of Appeals held that a person listed on a rental agreement as an authorized driver has a protected Fourth Amendment interest in the vehicle and may challenge a search of the rental vehicle. In the present case, the defendant’s girlfriend rented the vehicle which was ultimately searched, but the rental agreement listed the defendant as an authorized driver. At the time the vehicle was stopped, only Mr. Walker and another individual were present in the car. The Court of Appeals, after reviewing the law in other circuits, concluded that the listing of the defendant as an authorized driver was enough to give him a privacy interest in the vehicle. Nevertheless, the Court concluded that officers had probable cause to search the vehicle. Moreover, the Court of Appeals held that search warrant issuing judge’s failure to designate an expiration date for the warrant did not invalidate it. In so holding, the court concluded that the lack of an expiration date on the a search warrant does not destroy the good-faith exception when the warrant was executed mere hours after it was issued and the police had no reason to believe the warrant was stale.

SENTENCING

U.S. v. Kontny, No. 00-3004 (7th Cir. 01/04/01). In prosecution for nonpayment of federal payroll taxes, the defendant argued that the district court improperly enhanced his sentence for “sophisticated concealment” pursuant to U.S.S.G. § 2T1.4(b)(2). The defendant’s

scheme consisted of failing to report overtime work of his employees, thereby avoiding the payroll taxes and allowing his employees to not claim the pay as income. In articulating the appropriate standard to use when applying this enhancement, the court stated, “We think ‘sophistication’ must refer not to the elegance, the ‘class,’ the ‘style’ of the defrauder—the degree to which he approximates Cary Grant—but to the presence of efforts at concealment that go beyond (not necessarily far beyond, for it is only a two-level enhancement that is at issue, which in this case added roughly six months to the defendant’s sentence) the concealment inherent in tax fraud.” Applying this standard, the court concluded that the tax fraud here was sophisticated enough to warrant the enhancement. In doing so, the court compared the fraud in this case with a truly “simple” fraud case where the owner of a shop evades taxes by emptying the drawer of the cash register before counting the day’s cash receipts and puts the cash thus skimmed into a shoebox and slides it under his bed.

U.S. v. Ramsey, No. 00-2316 (7th Cir. 01/18/01). In prosecution for narcotics offenses, the Court of Appeals affirmed the district court’s enhancement of the defendant’s sentence under U.S.S.G. § 3B1.4 (use of a minor to commit crimes). The court initially addressed the issue of whether the enhancement could properly apply to a defendant who has not attained the age of 21 because the Sixth Circuit had held that the section was inapplicable under such circumstances. The Seventh Circuit, however, concluded otherwise. After a lengthy review of guideline amendments and legislative history, the court concluded that the current version of the guidelines which provides for

the enhancement for “a defendant,” as opposed to previous version which limited the section to persons 21 and older, was meant to apply to any appropriate defendant. Next, the court formulated the proper test for the enhancement as follows: whether the defendant affirmatively involved a minor in the commission of an offense, regardless of whether the minor is a partner to the offense or is in a subordinate position. In the present case, the enhancement was properly applied because the defendant recruited the minor into the drug offense by asking him to supply additional drugs to complete a sale, and asked the minor to show the drugs to the potential customer.

U.S. v. Brazeau, No. 99-4093 (7th Cir. 01/17/01). In prosecution for being a felon in possession of a firearm, the Court of Appeals affirmed the defendant’s sentence, holding that possession of a short-barreled shotgun was a crime of violence. In the district court, the defendant’s base offense level was selected based upon his prior state conviction for possession of a short-barreled shotgun. The district court concluded that this offense constituted a crime of violence, and the Court of Appeals agreed. The court noted that a crime of violence is defined as one that “involves conduct that presents a serious potential risk of physical injury to another.” The court concluded that possession of a sawed-off shotgun—by the very nature of the weapon—always creates a serious potential risk of physical injury to another under the Sentencing Guidelines.

U.S. v. Ofckey, No. 00-1420 (7th Cir. 00-1420). In prosecution for being a felon in possession of a firearm, the Court of Appeals affirmed the district court’s enhancement of the defendant’s

sentence based on his possession of an automatic weapon. The defendant argued that the district court should have used a “clear and convincing evidence standard” because the automatic weapon enhancement increased his base offense level by 6. In rejecting the claim, the Court of Appeals noted that a heightened standard may be required where the enhancement can be characterized as “a tail which wags the dog of the substantive offense.” Additionally, the court noted that it has not yet determined when the increase in a defendant’s sentence is so great as to require a more demanding standard of proof. However, given previous rejections of the same argument where the sentence enhancement was even greater than the present case, this case clearly did not constitute the type of case where a higher standard of proof would be required.

U.S. v. Richardson, No. 99-4309 (7th Cir. 01/25/01). In prosecution for receiving and possessing child pornography, the Court of Appeals affirmed the defendant’s sentence over his arguments that his sentence was improperly enhanced because the pornography in question depicted “sadistic or masochistic conduct” (U.S.S.G. § 2G2.2(b)(3)) and because “a computer was used for the transmission of” the photographs (U.S.S.G. 2G2.2(b)(5)). The defendant downloaded the sadistic photographs as part of large news group files, and there was no evidence that he ordered such photographs or wanted to receive them. Nevertheless, the court held that liability for receiving such photographs is strict. In so holding, the court noted that the guidelines contain numerous enhancements where the defendant causes additional harm that the offense inflicts, without regard to whether

unusual harm was intended. The sadism enhancement is one of those provisions. Regarding transmission, there was no evidence that the defendant himself ever “transmitted” the photographs, but rather only “received” them. Thus, according to the defendant, he should not receive an enhancement for “transmission.” In rejecting this argument as well, the court noted that the guidelines do not require that *the defendant* transmit the photographs, but rather only that someone do so. Here, because the photographs were transmitted to the defendant via computer, the enhancement properly applied.

U.S. v. Tweig, No. 00-1451 (7th Cir. 02/01/01). In prosecution for filing false income tax returns, the Court of Appeals considered whether the district court erred in including self-employment taxes in calculation of the “tax loss” under the sentencing guidelines. The defendants failed to report both income taxes and self-employment taxes, and the district court used both in determining the tax loss. The Court of Appeals concluded that the inclusion of the self-employment tax loss was appropriate. In so concluding, the Court noted that Application Note 2 to U.S.S.G. § 2T1.1 clearly states that when determining the total tax loss for sentencing purposes, “all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan.” Accordingly, because the failure to pay self-employment tax violated the tax laws, it was properly included in the loss calculation.

U.S. v. Irby, No. 00-3025 (7th Cir. 02/14/01). In prosecution for felon in possession of a firearm, the Court of Appeals affirmed the district court’s enhancement of the defendant’s sentence pursuant to

2K2.1(b)(5) (committing another felony offense in connection with the possession of the firearm). While possessing the firearm in question, the defendant also possessed marijuana. Although he was not charged with possession of marijuana, the PSR nevertheless recommended the 2K2.1(b)(5) enhancement, reasoning that the possession of the marijuana was a felony under 21 U.S.C. 844(a) because the defendant had a prior drug offense convictions. The defendant argued, however, that possession of marijuana is punishable by no more than one-year in prison, therefore constituting a misdemeanor. Moreover, although 844(a) contains provisions that increase the maximum punishment for possession of marijuana for defendants with prior drug convictions, the defendant argued that the prior drug convictions could not be used to increase the sentence beyond a misdemeanor level unless the government filed an enhancement information under 21 U.S.C. 851. The Court of Appeals, in rejecting this argument, noted that Application Note 7 to the relevant guideline section defines “felony offense” to include conduct where no criminal charges were brought. Thus, the court reasoned that “because a charge need not be brought before allowing an adjustment under 2K2.1(b)(5), an information need not be filed before applying” the adjustment.

U.S. v. Lovaas, No. 00-1862 (7th Cir. 03/01/01). In prosecution for possessing and transporting child pornography, the Court of Appeals affirmed the district court’s sentencing enhancement pursuant to U.S.S.G. 2G2.2(b)(4). This enhancement provides for a five-level increase where the defendant engages in a pattern of activity involving the sexual abuse or

exploitation of a minor. During a police interview, the defendant admitted to sexually abusing two boys on two separate occasions over the course of several years. The district court used this statement to enhance the defendant's sentence. The defendant, however, argued that these decade-old incidents did not constitute "relevant conduct," and therefore could not be used to enhance his sentence. In rejecting this argument, the court noted that the Guidelines permit courts to consider, "unless otherwise specified," relevant conduct in determining applicable guideline levels. The enhancement at issue in this case falls within the "unless otherwise specified" category. Indeed, the commentary to the guideline section makes clear that, "in determining whether a pattern of activity involving the sexual abuse or exploitation of a minor is present, a court must consider conduct that would not be considered relevant conduct in other circumstances." Thus, because the guideline section specifically allows for consideration of conduct broader than relevant conduct, the district court properly considered the two previous incidents in enhancing the defendant's sentence.

U.S. v. Sonsalla, No. 00-3454 (7th Cir. 03/01/01). In prosecution for making false entries in bank records in violation of 18 U.S.C. 1005, the defendant challenged the district court's enhancement of his sentence for abuse of a position of trust (3B1.3). Specifically, the defendant argued that every offense involving the falsifying of bank records necessarily involves an abuse of trust, and therefore it was double-counting to increase his offense level under the guideline section. While noting that the question was one of first impression in this circuit,

the court noted that several other circuits have upheld the application of the enhancement under similar circumstances. Moreover, the court noted that although the offense conduct necessarily involves a *breach* of trust, this is not the same as an *abuse* of trust. Indeed, an abuse of trust is more egregious than a simple breach of trust, involving someone who has professional or managerial discretion which is subject to significantly less supervision than employees with non-discretionary responsibilities.

U.S. v. Buckowich, No. 99-4105 (7th Cir. 03/22/01). In this appeal, the Court of Appeals considered the implications of a sentence above the bottom of the guideline range upon the question of whether a district judge believed he had authority to depart from the range. In this case, the defendant moved for departure, but the district court declined. Moreover, the district judge sentenced the defendant to nearly the top of the guideline range. On appeal, the defendant argued that the district judge believed that it lacked authority to depart. In rejecting this argument, the court noted that a judge who preferred to depart downward, but thought that the legal rules blocked such a step, would sentence the defendant at the bottom of the available range. Although noting that sentencing a defendant at the top does not make it impossible to succeed on an argument that the judge believed he could not depart, such a sentence certainly dispels ambiguity in the district judge's rulings. If there are two possible ways to understand the district court's ruling--either as a discretionary decision not to depart downward, or as a statement of belief that the law precludes downward departure, a top of the range sentence demonstrates that the judge meant the former.

Accordingly, the court concluded that the district court exercised its discretion not to depart, rather than acting on a belief that it could not depart.

SELECTIVE PROSECUTION

U.S. v. Hayes, No. 00-1258 (7th Cir. 01/11/01). In prosecution for being a felon in possession of a firearm, the Court of Appeals rejected the defendant's claim that he was selectively prosecuted because of his race. In the district court, the defendant argued that African-American felons are disproportionately selected for prosecution in federal court on 922(g) charges, whereas members of other ethnic groups are charged only in state court. In support of this challenge, the defendant submitted a newspaper article. In rejecting the claim, the Court of Appeals noted that in order to establish a discriminatory effect in race cases, the defendant must show that similarly-situated persons of a different race were not prosecuted. In the present case, the defendant produced no such evidence. Indeed, the newspaper article presented to the district court made no mention of race, but rather only noted that approximately 12 922(g) cases were prosecuted each year in the relevant district. Thus, because there was no evidence that similarly situated persons of a different race were not prosecuted, the defendant's claim was without merit.

NON-SUMMARIZED CASES

U.S. v. Bacani, No. 99-3601 (7th Cir. 01/05/01) (affirming the defendant's conviction for unlawful acquisition and redemption of food stamps).

U.S. v. Folami, No. 00-1690 (7th Cir.

01/09/01) (affirming the defendant's narcotics conviction over her argument that the government improperly introduced evidence regarding the drugs involved in the case because the drugs has been inadvertently destroyed by the government, the court noting that the defendant must show "bad faith" on the part of the government when seeking to exclude evidence regarding destroyed or missing physical evidence).

Gaither v. Anderson, No. 00-2511 (7th Cir. 01/16/01) (affirming the district court's denial of a 28 U.S.C. § 2254 petition challenging the loss of 60 days of good time credit).

U.S. v. Grintjes, No. 00-2234 (7th Cir. 01/22/01) (affirming the defendant's fraud conviction over his argument that the government withheld *Brady* material).

U.S. v. Huerta, No. 00-1940 (7th Cir. 02/02/01) (affirming the defendant's narcotics conviction over her arguments that the district court erroneously denied her motion to suppress her confession).

U.S. v. Williams, No. 00-1129 (7th Cir. 01/26/01) (affirming the defendant's narcotics conviction over his argument that the district court improperly admitted 404(b) evidence, improperly allowed evidence on an issue to which the defendant offered to stipulate, and sentenced him in violation of Apprendi.)

U.S. v. Gardner, No. 00-1724 (7th Cir. 01/26/01) (affirming the district court's decision to exclude evidence which would explain why a witness refused to testify at trial).

U.S. v. Jemison, No. 99-1936 (7th Cir. 01/24/01) (affirming a sentence

enhancement for transferring a firearm with reason to believe that it would be used in connection with another felony offense under 2K2.1(b)(5).)

U.S. v. O'Brien, No. 00-1735 (7th Cir. 01/23/01) (affirming the defendant's sentence for involuntary manslaughter where the district judge enhanced his base offense level because of a finding of "recklessness," where the defendant caused the death of two people when driving without a license, with some alcohol in his system, and colliding with the other vehicle while passing on a hill in a no-passing zone).

U.S. v. Charles, No. 00-2917 (7th Cir. 02/01/01) (affirming a sentence enhancement for transferring a firearm with reason to believe that it would be used in connection with another felony offense under 2K2.1(b)(5).)

Dressler v. McCaughtry, No. 99-2631 (7th Cir. 02/01/01) (affirming the district court's denial of a state court petition for habeas corpus on a murder conviction).

U.S. v. Phillips, No. 99-3052 (7th Cir. 02/01/01) (affirming multiple count convictions for multiple defendants arising out of a RICO prosecution of a gang in Indiana).

U.S. v. Newell, No. 00-3180 (7th Cir. 02/09/01) (affirming the defendant's conviction for filing a false income tax return and rejecting his argument that the government improperly proceeded on an assignment of income theory where the defendant shifted his income to a sham corporation in an effort to avoid taxes.)

U.S. v. Davuluri, No. 99-3070 (7th Cir. 02/07/01) (affirming the

defendant's conviction for wire fraud and rejecting his argument that he did not abuse a position of trust).

U.S. v. Parolin, No. 00-1676 (7th Cir. 02/12/01) (affirming the defendant's mail fraud conviction over numerous sentencing objections).

U.S. v. Hoover, No. 00-2223 (7th Cir. 02/14/01) (affirming the defendant's criminal contempt conviction).

U.S. v. Mijangos, No. 00-3104 (7th Cir. 02/14/01) (affirming the defendant's sentence enhanced under 3B1.1 for being a leader of a criminal activity).

U.S. v. Guerrero-Martinez, No. 00-2444 (7th Cir. 02/15/01) (affirming the district court's drug quantity determination).

U.S. v. Crickon, No. 00-3069 (7th Cir. 02/16/01) (affirming the district court's refusal to depart downward, noting that even if it had jurisdiction to consider the question, the record supported the district court's refusal to depart).

U.S. v. White, No. 00-2000 (7th Cir. 02/16/01) (affirming the district court's obstruction of justice enhancement due to the defendant's perjury).

U.S. v. Crucean, No. 00-2471 (7th Cir. 02/25/01) (dismissing the defendant's appeal because the court had no jurisdiction to review the district court's refusal to depart based on the defendant's argument that he had a reduced mental capacity).

Fryer v. U.S., No. 98-4078 (7th Cir. 03/02/01) (holding that Old Chief is not retroactive under Teague and providing an excellent elucidation of

how the Teague retroactivity principles should be applied).

Anderson v. Starnes, No. 99-4246 (7th Cir. 03/15/01) (affirming the denial of a habeas petition arguing that evidentiary errors denied the petitioner his due process trial rights and that his counsel was ineffective).

U.S. v. Logan, No. 99-3325 (7th Cir. 03/14/01) (affirming the district court's refusal to allow the defendant to withdraw his plea based on the fact that the government pursued prosecution of his family members where, despite the defendant's claim that the government had orally promised him that no such action would be taken, the plea agreement and the defendant's testimony during the Rule 11 colloquy indicated that no such promise had in fact been made).

U.S. v. Cooper, No. 00-1195 (7th Cir. 03/21/01) (holding that the defendant had waived his right to challenge the admission of an anonymous tip into evidence at trial where his lawyer withdrew any objection to the evidence at the time of trial, and that counsel can waive a client's Sixth Amendment confrontation right "so long as the defendant does not dissent from his attorney's decision, and so long as it can be said that the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy).

U.S. v. Hoskins, No. 00-2470 (7th Cir. 03/21/01) (holding that the defendant was not deprived of counsel at sentencing where the defendant indicated he did not want to be represented by his appointed counsel, was informed that new counsel would not be appointed, and informed of the implications of proceeding *pro se*).

U.S. v. Raibley, No. 99-3752 (7th Cir. 03/21/01) (affirming the district court's denial of the defendant's motion to suppress which alleged that the police lacked grounds to stop and question him and that they lacked consent to view videotapes in the defendant's possession).

SUPREME COURT UPDATE

The following Supreme Court Update was compiled by Fran Pratt of the Defender Services Division in Washington, D.C. Her update is a valuable tool for keeping current with Supreme Court decisions, and we are pleased to share this with you.

Recent Decisions

Artuz v. Bennett, 121 S. Ct. 361 (Nov. 7, 2000) (application for state post-conviction relief is "properly filed," thus triggering tolling provision in 28 U.S.C. § 2244(d)(2), as long as its delivery to and acceptance by appropriate court officer comply with applicable laws and rules governing filings, regardless of whether claims in application are subject to mandatory procedural bar) (9-0 decision).

Buford v. United States, No. 99-9073, ___ S. Ct. ___, 2001 WL 265345 (Mar. 20, 2001) (deferential standard of review should be used in determining whether defendant's prior convictions are "related" within meaning of federal sentencing guidelines) (9-0 decision). Counsel was Dean Strang, FPD, Milwaukee, WI.

Cleveland v. United States, 121 S. Ct. 365 (Nov. 7, 2000) (unissued state license is not "property" within the meaning of mail fraud statute, 18

U.S.C. § 1341, such that a scheme to obtain a license by false representations is outside the reach of § 1341) (9-0 decision).

Ferguson v. Charleston, S.C., No. 99-936, ___ S. Ct. ___, 2001 WL 273220 (Mar. 21, 2001) (state hospital's performance of diagnostic test to obtain evidence of patient's criminal conduct for law enforcement purposes is unreasonable search if patient has not consented to procedure) (6-3 decision).

Fiore v. White, 121 S. Ct. 712 (Jan. 9, 2001) (following answer of question certified to Pennsylvania Supreme court, holding that conviction and continued incarceration of defendant based on conduct that state statute, as properly interpreted, did not prohibit, violated due process) (per curiam).

Glover v. United States, 121 S. Ct. 696 (Jan. 9, 2001) (increase in prison sentence of 6-21 months constitutes prejudice required for establishing ineffective assistance, assuming that increase resulted from error in Sentencing Guidelines determination) (9-0 decision).

Illinois v. McArthur, 121 S. Ct. 946 (Feb. 20, 2001) (conduct of police in securing defendant's residence while awaiting search warrant, and not allowing defendant into residence unless accompanied by officer, did not constitute unreasonable seizure under Fourth Amendment) (8-1 decision).

Indianapolis, Ind. v. Edmond, 121 S. Ct. 447 (Nov. 28, 2000) (Fourth Amendment does not permit police to conduct suspicionless roadblocks designed primarily to serve general interest in crime control; distinguishing roadblocks aimed at

protecting public safety, as well as checkpoints aimed at detecting illegal aliens) (6-3 decision).

Lopez v. Davis, 121 S. Ct. 714 (Jan. 10, 2001) (Bureau of Prisons has discretion, under governing statute, to promulgate regulation categorically denying early release to prisoners whose felonies involved use of a firearm) (6-3 decision).

Ohio v. Reiner, No. 00-1028, ___ S. Ct. ___, 2001 WL 262448 (Mar. 19, 2001) (witness's assertion of innocence does not deprive her of Fifth Amendment privilege against self-incrimination) (per curiam; granting certiorari and reversing without briefing or oral argument).

Seling v. Young, 121 S. Ct. 727 (Jan. 17, 2001) (state supreme court's prior determination that sexually violent predator statute was civil rather than criminal precluded inmate's double jeopardy and ex post facto challenge based on conditions of confinement) (8-1 decision).

Shafer v. South Carolina, No. 00_5250, ___ S. Ct. ___, 2001 WL 265350 (Mar. 20, 2001) (whenever future dangerousness is at issue in capital sentencing proceeding under South Carolina's new, post-*Simmons* scheme, due process requires that jury be informed that life sentence carries no possibility of parole) (7-2 decision).

Cases Awaiting Decision

Ashcroft v. Ma, No. 00-38, argued Feb. 21, 2001 (whether, under 8 U.S.C. § 1231(a)(6), Attorney General has statutory authority to indefinitely detain long-time resident alien of United States beyond 90 day removal period even if deportation order cannot be

effectuated in reasonably foreseeable future) (case below: 208 F.3d 815 (9th Cir. 2000)) (consolidated with *Zadvydas v. Underdown*, *infra*). Counsel are Jay Stansell and Jennifer Wellman, AFDs, Seattle, WA.

Atwater v. Lago Vista, Tex., No. 99-1408, argued Dec. 4, 2000 (whether Fourth Amendment limits use of custodial arrests for fine-only traffic offenses) (case below: 195 F.3d 242 (5th Cir. 2000) (en banc)).

Bartnicki v. Vopper and United States v. Vopper, Nos. 99-1687, 99-1728, argued Dec. 5, 2000 (whether imposition of civil liability under 18 U.S.C. § 2511(1)(c) and (d) for using or disclosing contents of illegally intercepted communications, where defendant knows or has reason to know that interception was unlawful but is not alleged to have participated in or encouraged it, violates First Amendment) (case below: 200 F.3d 109 (3d Cir. 1999)).

Daniels v. United States, No. 99-9136, argued Jan. 8, 2001 (whether defendant may use federal habeas corpus to reopen federal sentence and challenge constitutionally infirm prior convictions that were used to enhance sentence under 18 U.S.C. § 924(e)) (case below: 195 F.3d 501 (9th Cir. 1999)). Counsel is Mike Tanaka, DFPD, Los Angeles, CA.

Kyllo v. United States, No. 99-8508, argued Feb. 20, 2001 (whether warrantless use of thermal imaging device to detect heat sources within home constitutes unreasonable search and seizure under Fourth Amendment) (case below: 190 F.3d 1041 (9th Cir. 1999)). Counsel is Ken Lerner, former

AFD, Portland, OR.

Lackawanna County Dist. Att'y v. Coss, No. 99-1884, argued Feb. 20, 2001 (whether custody requirement of federal habeas corpus statute precludes, under all circumstances, challenge upon fully expired conviction that was used to enhance a current conviction under habeas attack and for which petitioner is presently in custody) (case below: 204 F.3d 453 (3d Cir. 2000) (en banc)). Counsel are Jim Wade, FPD, and Dan Siegel, AFD, Harrisburg, PA.

Rogers v. Tennessee, No. 99-6218, argued Nov. 1, 2000 (whether state court's retroactive abrogation of "year and a day" rule in murder cases violates Ex Post Facto Clause) (case below: 992 S.W.2d 393 (Tenn. 1999)).

Texas v. Cobb, No. 99-1702, argued Jan. 16, 2001 ((1) whether accused may make effective unilateral waiver of right to counsel when only previous "assertion" of right consisted of accepting appointment of counsel following indictment on different, but related, crime over a year earlier; (2) whether, when accused has been indicted for burglary, right to counsel attaches to questioning about factually-related murder in case in which eventual capital murder conviction is not based on previously charged burglary as predicate felony) (case below: unpublished (Tex. Crim. App. Mar. 15, 2000)).

Zadvydas v. Underdown, No. 99-7791, argued Feb. 21, 2001 (whether Constitution prohibits prolonged indefinite detention of an immigrant after entry of final order of deportation when deportation cannot be effectuated) (case below: 185 F.3d 279 (5th Cir.

1999)) (consolidated with *Ashcroft v. Ma, supra*). Counsel is Bob Barnard, AFD, New Orleans, LA.

Cases Awaiting Argument

Alabama v. Bozeman, No. 00-492, to be argued April 17, 2001 (whether technical violation of Interstate Agreement on Detainers Act, specifically, the transfer of federal custody to state custody for one day for purposes of arraignment and transfer back to federal custody before disposition of outstanding charges, requires dismissal of pending charges, even though no harm to prisoner is alleged or demonstrated) (case below: not yet published, No. 1971759, 2000 WL 429936 (Ala. Apr. 21, 2000)).

Ashcroft v. Free Speech Coalition, No. 00-795, cert. granted Jan. 22, 2001 (whether First Amendment is violated by prohibitions in Child Pornography Prevention Act, 18 U.S.C. §§ 2252A and 2256(8), on visual depictions that appear to be of a minor engaged in sexually explicit conduct) (case below: 198 F.3d 1083 (9th Cir. 1999)).

Becker v. Montgomery, No. 00-6374, to be argued April 16, 2001 (whether failure to sign notice of appeal that was timely filed in district court requires court of appeals to dismiss appeal (case below: unpublished (6th Cir. May 12, 2000)).

Duncan v. Walker, No. 00-121, to be argued Mar. 26, 2001 (whether prior federal habeas corpus petition qualifies as "application for state post-conviction or other collateral review" within meaning of 28 U.S.C. § 2244(d)(2), which provides for tolling of one-year statute of limitations during

pendency of such application) (case below: 208 F.3d 357 (2d Cir. 2000)).

Dusenbery v. United States, No. 00-6567, cert. granted Feb. 26, 2001 (whether prisoner must receive "actual notice" regarding forfeiture notification) (case below: 223 F. 3d 422 (6th Cir. 2000)).

Florida v. Thomas, No. 00-391, to be argued April 25, 2001 (whether warrantless search of vehicle, incident to arrest of vehicle's driver that occurred after driver had voluntarily left vehicle, is valid absent threat to officer safety or necessity of preserving evidence) (case below: 761So.2d 1010 (Fla. 1999)).

Lee v. Kemna, No. 00-6933, cert. granted Feb. 26, 2001 (in case now on habeas review involving trial court's refusal to grant short continuance so that defendant could contact alibi witnesses who unexpectedly disappeared after lunch break during trial, whether denial of continuance constitutes violation of Fifth and Fourteenth Amendments; whether habeas court should have held hearing to consider testimony of alibi witnesses; whether claim is barred on federal habeas; and whether petitioner has made substantial showing of actual innocence for his alibi witnesses to be explored further to prevent fundamental miscarriage of justice) (case below: 213 F.3d 1037 (8th Cir. 2000)).

Penry v. Johnson, No. 00-6677, to be argued Mar. 27, 2001 (whether psychiatrist appointed by court on motion of defense counsel, whose report is used as evidence for prosecution, is "agent for state" for purposes of Fifth Amendment holding of *Estelle v. Smith*, 451

U.S. 454 (1981); whether court of appeals' decision, which approved repetition of same procedure condemned as unconstitutional in *Penry v. Lynaugh*, 492 U.S. 302 (1989), is in conflict with that decision and other relevant decisions of Supreme Court) (case below: 215 F.3d 504 (5th Cir. 2000)).

Tyler v. Cain, No. 00-5961, to be argued April 16, 2001 (whether petition for writ of habeas corpus asserting claim of error under *Cage v. Louisiana*, 498 U.S. 39 (1990), relies on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," within meaning of 28 U.S.C. § 2244(b)(2)(A); whether new rule of constitutional law announced by this Court in *Cage* should be made retroactively applicable to petitioners seeking collateral review of their convictions) (case below: 218 F.3d 744 (5th Cir. June 1, 2000), aff'g 1998 WL 614183 (E.D. La. Sept. 10, 1998) (No. Civ. A. 97-1549)). Counsel is Herb Larson, former AFD in the New Orleans office and now the CJA panel representative for the Eastern District of Louisiana.

United States v. Vonn, No. 00-973, cert. granted Feb. 26, 2001 (whether district court's failure to advise counseled defendant at guilty plea hearing of right to assistance of counsel at trial is subject to plain-error review rather than harmless-error review, on appeal in case in which defendant failed to preserve claim of error below; whether, in determining whether defendant's substantial rights were affected by district court's deviation from requirements of Rule 11(c)(3), court of appeals may review only transcripts of guilty plea colloquy, or may also

consider other parts of official record) (case below: 224 F. 3d 1152 (9th Cir. 2000)). Counsel is Emily Uhrig, DFPD, Los Angeles, CA.

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.]

REVERSIBLE ERRORS 1995 - 2000

The following is a project of the Office of the Federal Public Defender for the Districts of Northern New York & Vermont. The cases listed are those in which a criminal defendant received relief from an United States Court of Appeals or the United States Supreme Court. The precedents were reviewed shortly before this publication was released to assure they had not be overruled.

The purpose of this project is to try to give CJA Panel Attorneys a shortcut to case law that favor their clients. The editor does not promise that cases are precedent in all jurisdictions. If a case is preceded by an asterisk (*), that means the case may have been distinguished by another panel of that circuit or by another circuit. It should be researched to see if it is authority in your jurisdiction.

Release

*United States v. Goosens, 84 F.3d 697 (4th Cir. 1996) (Prohibiting a

defendant from active cooperation with the police was an abuse of discretion).

United States v. Porotsky, 105 F.3d 69 (2nd Cir. 1997) (The court did not make findings sufficient to deny travel request).

United States v. Swanquist, 125 F.3d 573 (7th Cir. 1997) (A court failed to give reasons for denying release on appeal).

United States v. Fisher, 137 F.3d 1158 (9th Cir. 1998) (Defendant did not fail to appear for trial that had been continued).

United States v. Baker, 155 F.3d 392 (4th Cir. 1998) (Cannot put conditions of release on person acquitted by reason of insanity who is not a danger).

Counsel

United States v. Cash, 47 F.3d 1083 (11th Cir. 1995) (Defendant could not waive counsel without proper findings by court).

United States v. McKinley, 58 F.3d 1475 (10th Cir. 1995) (The court improperly denied self-representation).

United States v. McDermott, 64 F.3d 1448 (10th Cir.), cert. denied, 516 U.S. 1121 (1996) (Barring the defendant from sidebars with stand-by counsel denied self-representation).

*United States v. Goldberg, 67 F.3d 1092 (3rd Cir. 1995) (The defendant did not forfeit counsel by threatening his appointed attorney).

United States v. Duarte-Higareda, 68 F.3d 369 (9th Cir. 1995) (Failure to appoint counsel for

evidentiary hearing on §2255 petition).

Delguidice v. Singletary, 84 F.3d 1359 (11th Cir. 1996) (The psychological testing of a defendant without notice to counsel violated the sixth amendment).

Williams v. Turpin, 87 F.3d 1204 (11th Cir. 1996) (A state that created a statutory right to a motion for new trial must afford counsel and an evidentiary hearing).

United States v. Ming He, 94 F.3d 782 (2nd Cir. 1996) (A cooperating defendant had the right to have counsel present when attending a presentence debriefing).

Weeks v. Jones, 100 F.3d 124 (11th Cir. 1996) (The right to counsel in a habeas claim did not turn on the merits of the petition).

United States v. Keen, 104 F.3d 1111 (9th Cir. 1996) (A court did not sufficiently explain to a defendant the dangers of pro se representation).

*Carlo v. Chino, 105 F.3d 493 (9th Cir. 1997) (A state statutory right to post-booking phone calls was protected by federal due process).

United States v. Amlani, 111 F.3d 705 (9th Cir. 1997) (A prosecutor's repeated disparagement of an attorney in front of his client, denied the defendant his right to chosen counsel).

United States v. Taylor, 113 F.3d 1136 (10th Cir. 1997) (The court did not assure a proper waiver of counsel).

Blankenship v. Johnson, 118 F.3d 312 (5th Cir. 1997) (When the prosecution seeks discretionary review, the defendant has a right to

counsel).

United States v. Pollani, 146 F.3d 269 (5th Cir. 1998) (*Pro se* defendant's late request for counsel should have been honored).

Henderson v. Frank, 155 F.3d 159 (3rd Cir. 1998) (Defendant denied counsel at suppression hearing).

United States v. Klat, 156 F.3d 1258 (D.C. Cir. 1999) (Counsel required at competency hearing).

United States v. Iasiello, 166 F.3d 212 (3rd Cir. 1999) (Indigent defendant has right to appointed counsel at hearing of §2255 motion).

United States v. Proctor, 166 F.3d 396 (1st Cir. 1999) (Ambiguous request for counsel tainted previous waiver).

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

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

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

United States v. Russell, 205 F.3d 768 (5th Cir. 2000) (Absence of lawyer due to illness did not waive right to counsel).

Discovery

United States v. Alzate, 47 F.3d 1103 (11th Cir. 1995) (A prosecutor withheld exculpatory evidence).

United States v. Barnes, 49 F.3d 1144 (6th Cir. 1995) (Request for discovery of extraneous evidence created a continuing duty to disclose).

*United States v. Boyd, 55 F.3d 239 (7th Cir. 1995) (The government failed to disclose drug use and drug dealing by prisoner-witnesses).

*United States v. Hanna, 55 F.3d 1456 (9th Cir. 1995) (The prosecutor must learn of *Brady* material even if it was not in her possession).

Kyles v. Whitley, 514 U.S. 419 (1995) (Prosecution failed to turn over material and favorable evidence).

United States v. Wood, 57 F.3d 733 (9th Cir. 1995) (Government's failure to disclose favorable FDA materials).

United States v. Camargo-Vergara, 57 F.3d 993 (11th Cir. 1995) (Government failed to disclose defendant's post-arrest statement).

In Re Grand Jury Investigation, 59 F.3d 17 (2nd Cir. 1995) (A court properly required disclosure of documents subpoenaed by the grand jury).

United States v. O'Conner, 64 F.3d 355 (8th Cir.), *cert. denied*, 517 U.S. 1174 (1996) (Evidence of government witness threats and collaboration were not disclosed).

In Re Grand Jury, 111 F.3d 1083 (3rd Cir. 1997) (The government could not seek disclosure of phone conversations that were illegally recorded by a third party).

United States v. Arnold, 117 F.3d

1308 (11th Cir. 1997) (A prosecutor withheld exculpatory tapes of government witnesses).

*United States v. Vozzella, 124 F.3d 389 (2nd Cir. 1997) (Evidence of perjured testimony should have been disclosed).

United States v. Fernandez, 136 F.3d 1434 (11th Cir. 1998) (Court must hold hearing when defendant makes showing of a *Brady* violation).

United States v. Mejia-Mesa, 153 F.3d 925 (9th Cir. 1998) (*Brady* claim required hearing).

United States v. Scheer, 168 F.3d 445 (11th Cir. 1999) (Government failed to disclose it had intimidated key prosecution witness).

United States v. Ramos, 179 F.3d 1333 (11th Cir. 1999) (Defendant denied opportunity to depose witness who was outside country).

United States v. Riley, 189 F.3d 802 (9th Cir. 1999) (Intentional destruction of notes of interview with informant violated Jencks Act).

Arrests

*United States v. Lambert, 46 F.3d 1064 (10th Cir. 1995) (A defendant was seized while agents held his driver's license for over 20 minutes).

United States v. Little, 60 F.3d 708 (10th Cir. 1995) (Requiring a passenger to go to the baggage area restrained her liberty).

*United States v. Mesa, 62 F.3d 159 (6th Cir. 1995) (Nervousness and inconsistencies did not validate continued traffic stop)

*United States v. Buchanon, 72 F.3d 1217 (6th Cir. 1995) (The defendants were seized when the troopers separated them from their vehicle).

United States v. Roberson, 90 F.3d 75 (3rd Cir. 1996) (An anonymous call did not give officers reasonable suspicion to stop a defendant on the street merely because his clothes matched the caller's description).

*United States v. Davis, 94 F.3d 1465 (10th Cir. 1996) (There was no reasonable suspicion for stop of a defendant known generally as a gang member and drug dealer).

Washington v. Lambert, 98 F.3d 1181 (9th Cir. 1996) (A general description of two African-American males did not justify stop).

*United States v. Jerez, 108 F.3d 684 (7th Cir. 1997) (Nighttime confrontation by police at the defendant's door was a seizure).

United States v. Chan-Jimenez, 125 F.3d 1324 (9th Cir. 1997) (A defendant was seized without reasonable suspicion).

United States v. Miller, 146 F.3d 274 (5th Cir. 1998) (Leaving turn signal on violated no law and did not justify stop).

*United States v. Jones, 149 F.3d 364 (5th Cir. 1998) (Agent lacked reasonable suspicion for investigatory immigration stop).

*United States v. Acosta-Colon, 157 F.3d 9 (1st Cir. 1999) (Defendant's 30 minute handcuffed detention, preventing him from boarding flight, was not lawful stop).

United States v. Salvano, 158 F.3d 1107 (10th Cir. 1999) (Neither, cross country trip, nervousness, nor scent of evergreen, justified warrantless detention).

United States v. Dortch, 199 F.3d 193 (5th Cir.), *amended*, 203 F.3d 883 (2000) (Continued detention after traffic stop was unreasonable).

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

Ma v. Reno, 208 F.3d 815 (9th 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 (9th Cir. 2000).

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

United States v. Arvizu, 217 F.3d 1224 (9th Cir. 2000) (No reasonable suspicion to support stop).

Warrantless Searches

United States v. Adams, 46 F.3d 1080 (11th Cir. 1995) (Suppression of evidence seized from motor home was upheld).

United States v. Chavis, 48 F.3d 871 (5th Cir. 1995) (The court improperly placed the burden on the defendant to show a warrantless search).

United States v. Angulo-Fernandez, 53 F.3d 1177 (10th Cir. 1995) (Confusion about who owned a stalled vehicle did not create probable cause for its

search).

United States v. Hill, 55 F.3d 479 (9th Cir. 1995) (Remand was required to see if there was a truly viable independent source for the search).

*United States v. Ford, 56 F.3d 265 (D.C. Cir. 1995) (A search under a mattress and behind a window shade exceeded a protective sweep).

United States v. Doe, 61 F.3d 107 (1st Cir. 1995) (Warrantless testing of packages at an airport checkpoint lacked justification).

United States v. Tovar-Rico, 61 F.3d 1529 (11th Cir. 1995) (Possibility that surveillance officer was observed, did not create exigency for warrantless search of apartment).

*United States v. Cabassa, 62 F.3d 470 (2nd Cir. 1995) (Exigent circumstances were not relevant to the inevitable discovery doctrine).

*United States v. Ali, 68 F.3d 1468 (2nd Cir. 1995) (Checking whether the defendant had a valid export license was not a proper ground for seizure).

*United States v. Mejia, 69 F.3d 309 (9th Cir. 1995) (The inevitable discovery doctrine does not apply where the police simply failed to get a warrant).

United States v. Odum, 72 F.3d 1279 (7th Cir. 1995) (The court is limited to facts at the time the stop occurred to evaluate reasonableness of the seizure).

Ornelas v. United States, 517 U.S. 690 (1996) (A defendant's motion to suppress should be given *de novo* review by the court of

appeals).

*United States v. Caicedo, 85 F.3d 1184 (6th Cir. 1996) (The record lacked evidence to support a finding of the defendant's consent to search).

J.B. Manning Corp. v. United States, 86 F. 3d 926 (9th Cir. 1996) (The good faith exception to the warrant requirement does not affect motions to return property under F.R.Cr.P. 41 (e)).

United States v. Duguay, 93 F.3d 346 (7th Cir. 1996) (A car could not be impounded for a later search unless the arrestee could not provide for its removal).

United States v. Leake, 95 F.3d 409 (6th Cir. 1996) (Neither the independent source rule, nor the inevitable discovery rule, saved otherwise inadmissible evidence).

*United States v. Elliott, 107 F.3d 810 (10th Cir. 1997) (Consent to look in trunk was not consent to open containers within).

*United States v. Garzon, 119 F.3d 1446 (10th Cir. 1997) (1. Passenger did not abandon bag by leaving it on bus; 2. General warrantless search of all bus passengers by dog was illegal).

United States v. Chan-Jimenez, 125 F.3d 1324 (9th Cir. 1997) (The defendant did not consent to search of truck).

United States v. Cooper, 133 F.3d 1394 (11th Cir. 1998) (Defendant had reasonable expectation of privacy in rental car four days after contract expired).

United States v. Beck, 140 F.3d 1129 (8th Cir. 1998) (Continued detention of vehicle was not

justified by articulable facts).

United States v. Nicholson, 144 F.3d 632 (10th Cir. 1998) (1. Feeling through sides of bag was a search; 2. Abandonment of bag was involuntary).

*United States v. Guapi, 144 F.3d 1393 (11th Cir. 1998) (Bus passenger did not voluntarily consent to search).

United States v. Fultz, 146 F.3d 1102 (9th Cir. 1998) (Guest had expectation of privacy in boxes he stored at another's home).

United States v. Rouse, 148 F.3d 1040 (8th Cir. 1998) (Search of bags lacked probable cause).

*United States v. Rodriguez-Rivas, 151 F.3d 377 (5th Cir. 1998) (Vehicle stop lacked reasonable suspicion).

*United States v. Washington, 151 F.3d 1354 (11th Cir. 1998) (Bus passenger was searched without voluntary consent).

United States v. Madrid, 152 F.3d 1034 (8th Cir. 1998) (Inevitable discovery doctrine did not save illegal search of house).

United States v. Huguenin, 154 F.3d 547 (6th Cir. 1998) (Checkpoint stop to merely look for drugs was unreasonable).

*United States v. Allen, 159 F.3d 832 (4th Cir. 1999) (Inevitable discovery doctrine did not apply to cocaine found in duffle bag later detected by dog and warrant).

United States v. Rivas, 157 F.3d 364 (5th Cir. 1999) (1. Drilling into trailer was not routine border search; 2. No evidence that drug

dog's reaction was an alert).

United States v. Ivy, 165 F.3d 397 (6th Cir. 1999) (Consent to enter home was not shown to be voluntary).

*United States v. Johnson, 170 F.3d 708 (7th Cir. 1999) (Officers lacked reasonable suspicion to prevent occupant from leaving home).

United States v. Kiyuyung, 171 F.3d 78 (2nd Cir. 1999) (Firearms found during warrantless search were not in plain view).

United States v. Johnson, 171 F.3d 601 (8th Cir. 1999) (No reasonable suspicion to intercept delivery of package).

United States v. Iron Cloud, 171 F.3d 587 (8th Cir. 1999) (Portable breath test results were inadmissible as evidence of intoxication).

Knowles v. Iowa, 525 U.S. 113 (1999) (Speeding ticket does not justify full search of vehicle).

Flippo v. West Virginia, 528 U.S. 11 (1999) (No crime scene exception to warrant requirement).

United States v. Payne, 181 F.3d 781 (6th Cir. 1999) (Parole officer did not have reasonable suspicion to search defendant's trailer and truck).

United States v. Eustaquio, 198 F.3d 1068 (8th Cir. 1999) (No reasonable suspicion to search bulge on defendant's midriff).

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

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

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

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

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

United States v. Vega, 221 F.3d 789 (5th Cir. 2000) (The police cannot create exigency for search of leased home).

United States v. Baker, 221 F.3d 438 (3rd Cir. 2000) (No reasonable suspicion to justify search of trunk).

United States v. Reid, 226 F.3d 1020 (9th Cir. 2000) (Non-resident did not have apparent authority to allow search of apartment).

Warrants

*United States v. Van Damme, 48 F.3d 461 (9th Cir. 1995) (There was no list of items to be seized under the warrant).

United States v. Mondragon, 52 F.3d 291 (10th Cir. 1995) (A supplemental wiretap application failed to show necessity).

*United States v. Kow, 58 F.3d 423 (9th Cir. 1995) (The warrant failed to identify business records with particularity, and good faith did not apply).

*United States v. Weaver, 99 F.3d 1372 (6th Cir. 1996) (Bare bones, boilerplate affidavit was insufficient to justify warrant).

Marks v. Clarke, 102 F.3d 1012 (9th Cir.), cert. denied, 522 U.S. 907 (1997) (A warrant to search two residences did not authorize the officers to search all persons present).

United States v. Foster, 104 F.3d 1228 (10th Cir. 1996) (A flagrant disregard for the specificity of a warrant required suppression of all found).

United States v. Castillo-Garcia, 117 F.3d 1179 (10th Cir.), cert. denied, 522 U.S. 962 (1997) (The government failed to show the necessity for wiretaps).

United States v. McGrew, 122 F.3d 847 (9th Cir. 1997) (A search warrant affidavit lacked particularity).

United States v. Alvarez, 127 F.3d 372 (5th Cir. 1997) (A warrant affidavit contained a false statement made in reckless disregard for the truth).

United States v. Schroeder, 129 F.3d 439 (8th Cir. 1997) (A warrant did not authorize a search of adjoining property).

In Re Grand Jury Investigation, 130 F.3d 853 (9th Cir. 1997) (Search warrant was overbroad).

*United States v. Hotal, 143 F.3d 1223 (9th Cir. 1998) (Anticipatory search warrant failed to identify triggering event for execution).

United States v. Albrektsten, 151 F.3d 951 (9th Cir. 1998) (Arrest warrant did not permit search of defendant's motel room).

United States v. Ford, 184 F.3d 566 (6th Cir. 1999) (Search warrant authorized broader search than reasonable).

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

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

Knock and Announce

Wilson v. Arkansas, 514 U.S. 927 (1995) ("Knock and announce" rule implicated the fourth amendment).

United States v. Zermeno, 66 F.3d 1058 (9th Cir. 1995) (The officers failed to knock and announce during a drug search).

*United States v. Bates, 84 F.3d 790 (6th Cir. 1996) (Officers did not have the right to break down an apartment door without first knocking and announcing their presence).

Richards v. Wisconsin, 520 U.S. 385 (1997) (There was no blanket drug exception to the knock and announce requirement).

Statements

*United States v. Dudden, 65 F.3d 1461 (9th Cir. 1995) (An immunity agreement required a hearing on whether the defendant's statements were used to aid the government's case).

United States v. Tenorio, 69 F.3d 1103 (11th Cir. 1995) (Improper admission of post-Miranda statements).

United States v. Ali, 86 F.3d 275 (2nd Cir. 1996) (Custodial interrogation required *Miranda* warnings).

***In Re Grand Jury Subpoena**

Dated April 9, 1996, 87 F.3d 1198 (11th Cir. 1996) (A custodian of records could not be compelled to testify as to the location of documents not in her possession when those documents were incriminating).

United States v. Trzaska, 111 F.3d 1019 (2nd Cir. 1997) (Defendant's statement to probation officer was inadmissible).

*United States v. D.E., 115 F.3d 413 (7th Cir. 1997) (Statements taken from a juvenile in a mental health facility were involuntary).

United States v. Soliz, 129 F.3d 499 (9th Cir. 1997) (Questioning should have stopped when defendant invoked right to silence).

United States v. Abdi, 142 F.3d 566 (2nd Cir. 1998) (Defendant's uncounseled statement was erroneously admitted).

United States v. Garibay, 143 F.3d 534 (9th Cir. 1998) (Defendant with limited English and low mental capacity did not voluntarily waive *Miranda*).

United States v. Chamberlain, 163 F.3d 499 (8th Cir. 1999) (Inmate under investigation was entitled to *Miranda* warnings).

United States v. Tyler, 164 F.3d 150 (3rd Cir. 1999) (Police did not honor defendant's invocation of silence).

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

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

Recusal

*Bracy v. Gramley, 520 U.S. 899 (1997) (Petitioner could get discovery of trial judge's bias against him).

*United States v. Jordan, 49 F.3d 152 (5th Cir. 1995) (A judge should have been recused because the defendant made claims against family friend of the judge).

*United States v. Antar, 53 F.3d 568 (3rd Cir. 1995) (A judge who stated he wanted to get money back for the victims, should have been recused).

*United States v. Avilez-Reyes, 160 F.3d 258 (5th Cir. 1999) (Judge should have recused himself in case where attorney testified against judge in disciplinary hearing).

Indictments

United States v. Holmes, 44 F.3d 1150 (2nd Cir. 1995) (Money laundering and structuring counts based on the same transaction were multiplicitious).

United States v. Hairston, 46 F.3d 361 (4th Cir. 1995) (Multiple payments were part of the same offense).

United States v. Graham, 60 F.3d 463 (8th Cir. 1995) (It was multiplicitious to charge the same false statement made on different occasions).

*United States v. Kimbrough, 69 F.3d 723 (5th Cir.), *cert. denied*, 517 U.S. 1157 (1996) (Multiple

possessions of child pornography should be charged in a single count).

*United States v. Cancelliere, 69 F.3d 1116 (11th Cir. 1995) (Court amended charging language of indictment during trial).

*United States v. Johnson, 130 F.3d 1420 (10th Cir. 1997) (Gun possession convictions for the same firearm were multiplicitious).

United States v. Morales, 185 F.3d 74 (2nd Cir. 1999) (Racketeering enterprise did not last for duration alleged in indictment).

United States v. Dubo, 186 F.3d 1177 (9th Cir. 1999) (Indictment did not allege mens rea).

United States v. Nunez, 180 F.3d 227 (5th Cir. 1999) (Indictment failed to charge an offense).

Limitation of Actions

United States v. Li, 55 F.3d 325 (7th Cir. 1995) (The statute of limitations ran from the day of deposit, not the day the deposit was processed).

United States v. Spector, 55 F.3d 22 (1st Cir. 1995) (Agreement to waive the statute of limitations was invalid because it was not signed by the government).

United States v. Podde, 105 F.3d 813 (2nd Cir. 1997) (The statute of limitations barred the reinstatement of charges that were dismissed in a plea agreement).

United States v. Manges, 110 F.3d 1162 (5th Cir.), *cert. denied*, 523 U.S. 1106 (1998) (Conspiracy charge was barred by statute of limitations).

United States v. Grimmett, 150 F.3d 958 (8th Cir. 1998) (Withdrawal from conspiracy, outside statute of limitations, bars prosecution).

Venue

*United States v. Miller, 111 F.3d 747 (10th Cir. 1997) (The court refused a jury instruction on venue in a multi district conspiracy case).

United States v. Carter, 130 F.3d 1432, cert. denied, 523 U.S. 1041 (10th Cir. 1997) (A requested instruction on venue should have been given).

United States v. Cabrales, 524 U.S. 1 (1998) (Venue for money laundering was proper only where offenses were begun, conducted and completed).

United States v. Brennan, 183 F.3d 139 (2nd Cir. 1999) (Venue for mail fraud permissible only in districts where proscribed acts occurred).

*United States v. Hernandez, 189 F.3d 785 (9th Cir.), cert. denied, 120 S.Ct. 1441 (1999) (Venue was improper for undocumented alien discovered in one district and tried in another).

Pretrial Procedure

United States v. Ramos, 45 F.3d 1519 (11th Cir. 1995) (Trial judge wrongly refused deposition without inquiring about testimony or its relevance).

United States v. Smith, 55 F.3d 157 (4th Cir. 1995) (The government's motion for dismissal should have been granted).

United States v. Gonzalez, 58 F.3d 459 (9th Cir. 1995) (The

government's motion for dismissal should have been granted).

*United States v. Young, 86 F.3d 944 (9th Cir. 1996) (A court could not deny a hearing on a motion to compel the government to immunize a witness).

United States v. Mathurin, 148 F.3d 68 (2nd Cir. 1998) (Court denied hearing on motion to suppress).

Severance

*United States v. Breinig, 70 F.3d 850 (6th Cir. 1995) (A severance should have been granted where the codefendant's defense included prejudicial character evidence regarding the defendant).

*United States v. Baker, 98 F.3d 330 (8th Cir.), cert. denied, 520 U.S. 1179 (1997) (Evidence admissible against only one codefendant required severance).

United States v. Jordan, 112 F.3d 14 (1st Cir.), cert. denied, 523 U.S. 1041 (1998) (Charges should have been severed when a defendant wanted to testify regarding one count, but not others).

United States v. Cobb, 185 F.3d 1193 (11th Cir. 1999) (Court erroneously denied severance under *Bruton*).

Conflicts

United States v. Shorter, 54 F.3d 1248 (7th Cir.), cert. denied, 516 U.S. 896 (1995) (There was an actual conflict when the defendant accused counsel of improper behavior).

Ciak v. United States, 59 F.3d 296

(2nd Cir. 1995) (There was an actual conflict for attorney who had previously represented a witness against the defendant).

United States v. Malpiedi, 62 F.3d 465 (2nd Cir. 1995) (Counsel represented witness who gave damaging evidence against his defendant).

*United States v. Jiang, 140 F.3d 124 (2nd Cir. 1998) (Attorney's potential conflict required remand for hearing).

United States v. Kliti, 156 F.3d 150 (2nd Cir. 1998) (Court should have held hearing on defense counsel's potential conflict).

Perrillo v. Johnson, 205 F.3d 775 (5th Cir. 2000) (An actual conflict in successive prosecutions of codefendants).

Competency / Sanity

*United States v. Mason, 52 F.3d 1286 (4th Cir. 1995) (The court failed to apply a reasonable cause standard to competency hearing).

Cooper v. Oklahoma, 517 U.S. 348 (1996) (A state could not require a defendant to prove his incompetence by a higher standard than preponderance of evidence).

United States v. Davis, 93 F.3d 1286 (6th Cir. 1996) (A court did not have the statutory authority to order a mental examination of a defendant who wished to raise the defense of diminished capacity).

United States v. Williams, 113 F.3d 1155 (10th Cir. 1997) (The defendant's actions during trial warranted a competency hearing).

*Martinez-Villareal v. Stewart, 118

F.3d 628 (9th Cir. 1997) (Successive writ regarding incompetency to be executed was not barred by statute).

United States v. Nevarez-Castro, 120 F.3d 190 (9th Cir. 1997) (The court refused a competency hearing).

United States v. Haywood, 155 F.3d 674 (3rd Cir. 1999) (Defendant allegedly restored to competency required second hearing).

Privilege

Ralls v. United States, 52 F.3d 223 (9th Cir. 1995) (Fee information was inextricably intertwined with privileged communications).

*United States v. Sindel, 53 F.3d 874 (8th Cir. 1995) (Fee information could not be released without disclosing other privileged information).

*United States v. Gertner, 65 F.3d 963 (1st Cir. 1995) (IRS summons of attorney was just a pretext to investigate her client).

In Re Richard Roe Inc., 68 F.3d 38 (2nd Cir. 1995) (The court misapplied the crime-fraud exception).

United States v. Rowe, 96 F.3d 1294 (9th Cir. 1996) (An in-house investigation by attorneys associated with the defendant/lawyer was covered by the attorney-client privilege).

Mockaitis v. Harclerod, 104 F.3d 1522 (9th Cir. 1997) (Clergy-communicant privilege was upheld).

*United States v. Kuku, 129 F.3d 1435 (11th Cir. 1997) (A

defendant retains his privilege against self-incrimination, through sentencing).

United States v. Bauer, 132 F.3d 504 (9th Cir. 1997) (Questioning of defendant's bankruptcy attorney violated attorney-client privilege).

*United States v. Glass, 133 F.3d 1356 (10th Cir. 1998) (Defendant's psychotherapist-patient privilege was violated).

Swinder & Berlin v. United States, 524 U.S. 399 (1998) (Attorney-client privilege survives client's death).

United States v. Millard, 139 F.3d 1200 (8th Cir. 1998) (Statements during plea discussions erroneously admitted).

In re Sealed Case, 146 F.3d 881 (D.C. Cir. 1998) (Any documents prepared in anticipation of litigation are work product).

Mitchell v. United States, 526 U.S. 314 (1999) (Guilty plea does not waive privilege against self incrimination at sentencing).

Jeopardy / Estoppel

United States v. Abcasis, 45 F.3d 39 (2nd Cir. 1995) The government is estopped from convicting a person when its agents have caused that person in good faith to believe they are acting under government authority).

United States v. Weems, 49 F.3d 528 (9th Cir. 1995) (The government was estopped from proving element previously decided in forfeiture case).

United States v. Sammaripa, 55

F.3d 433 (9th Cir. 1995) (A mistrial was not justified by manifest necessity).

United States v. McLaurin, 57 F.3d 823 (9th Cir. 1995) (A defendant could not be retried for bank robbery after conviction on the lesser included offense of larceny).

Rutledge v. United States, 517 U.S. 292 (1996) (A defendant could not be punished for both a conspiracy and a continuing criminal enterprise based upon a single course of conduct).

Venson v. State of Georgia, 74 F.3d 1140 (11th Cir. 1996) (A prosecutor's motion for mistrial was not supported by manifest necessity).

United States v. Holloway, 74 F.3d 249 (11th Cir. 1996) (A prosecutor's promise not to prosecute, made at a civil deposition, was the equivalent of use immunity for any related criminal proceeding).

United States v. Hall, 77 F.3d 398 (11th Cir.), cert. denied. 519 U.S. 849 (1996) (Possession of a firearm and its ammunition could only yield a single sentence).

United States v. Garcia, 78 F.3d 1517 (11th Cir. 1996) (Acquittal for knowingly conspiring barred a second prosecution for the substantive crime).

Terry v. Potter, 111 F.3d 454 (6th Cir. 1997) (When a defendant was charged in two alternate manners, and the jury reaches a verdict as to only one, there was an implied acquittal on the other offense to which jeopardy bars retrial).

United States v. Stoddard, 111 F.3d 1450 (9th Cir. 1997) (1. Second drug conspiracy prosecution was

barred by double jeopardy; 2. Collateral estoppel barred false statement conviction, based upon drug ownership for which defendant had been previously acquitted).

United States v. Romeo, 114 F.3d 141 (9th Cir. 1997) (After an acquittal for possession, an importation charge was barred by collateral estoppel).

United States v. Turner, 130 F.3d 815 (8th Cir. 1997) (Prosecution of count, identical to one previously dismissed, was barred).

United States v. Boyd, 131 F.3d 951 (11th Cir. 1997) (Convictions for conspiracy and CCE could not both stand).

United States v. Downer, 143 F.3d 819 (4th Cir. 1998) (Court's substitution of conviction for lesser offense, after reversal, violated Ex Post Facto Clause and Grand Jury Clause).

United States v. Dunford, 148 F.3d 385 (4th Cir. 1998) (Convictions for 6 firearms and ammunition was multiplicitous).

United States v. Beckett, 208 F.3d 140 (3rd Cir. 2000) (Sentences for robbery and armed robbery violated double jeopardy).

United States v. Kithcart, 218 F.3d 213 (3rd Cir. 2000) (Government could not relitigate suppression motion)

United States v. Kramer, 225 F.3d 847 (7th Cir. 2000) (Defendant was entitled to attack underlying state child support obligation).

Plea Agreements

United States v. Clark, 55 F.3d 9

(1st Cir. 1995) (The government breached the agreement by arguing against acceptance of responsibility).

*United States v. Laday, 56 F.3d 24 (5th Cir. 1995) (The government breached the agreement by failing to give the defendant an opportunity to cooperate).

United States v. Washman, 66 F.3d 210 (9th Cir. 1995) (The defendant could withdraw his plea up until the time the court accepted the plea agreement).

United States v. Levay, 76 F.3d 671 (5th Cir. 1996) (A defendant could not be enhanced with a prior drug conviction when the government withdrew notice as part of a plea agreement).

United States v. Taylor, 77 F.3d 368 (11th Cir. 1996) (The defendant could withdraw his guilty plea when the government failed to unequivocally recommend a sentence named in the agreement).

United States v. Velez Carrero, 77 F.3d 11 (1st Cir. 1996) (An agreement to recommend no enhancement was breached by the government's neutral position at sentencing).

United States v. Dean, 87 F.3d 1212 (11th Cir. 1996) (A judge could modify the forfeiture provisions of a plea agreement, when the forfeiture was unfairly punitive).

*United States v. Kummer, 89 F.3d 1536 (11th Cir. 1996) (Defendants who pleaded guilty to accepting a gratuity under plea agreements could withdraw their pleas when they were sentenced

under bribery guidelines).

United States v. Ritsema, 89 F.3d 392 (7th Cir. 1996) (A court could not ignore a previously adopted plea agreement at resentencing).

United States v. Belt, 89 F.3d 710 (10th Cir. 1996) (Failure to object to the government's breach of the plea agreement was not a waiver).

United States v. Beltran-Ortiz, 91 F.3d 665 (4th Cir. 1996) (Failure to debrief the defendant, thus preventing him from benefiting from the safety valve, violated the plea agreement).

United States v. Hawley, 93 F.3d 682 (10th Cir. 1996) (The government violated its plea agreement not to oppose credit for acceptance of responsibility).

United States v. Van Thournout, 100 F.3d 590 (8th Cir. 1996) (The government breached an agreement from another district to recommend concurrent time).

United States v. Paton, 110 F.3d 562 (8th Cir. 1997) (The government's breach of plea agreement was a ground for downward departure).

*United States v. Sandoval-Lopez, 122 F.3d 797 (9th Cir. 1997) (Defendant could attack illegal conviction without fear that dismissed charges in plea agreement would be revived).

United States v. Wolff, 127 F.3d 84 (D.C. Cir.), cert. denied, 118 S.Ct. 2325 (1998) (Government's failure to argue for acceptance of responsibility breached agreement and required entire sentence to be reconsidered).

United States v. Gilchrist, 130 F.3d

1131 (3rd Cir. 1997) (A plea agreement was breached by imposing a higher term of supervised release).

United States v. Johnson, 132 F.3d 628 (11th Cir. 1998) (Prosecutor violated plea agreement by urging higher drug quantity).

United States v. Mitchell, 136 F.3d 1192 (8th Cir. 1998) (Failure to adhere to unconditional promise to move for downward departure violated plea agreement).

*United States v. Isaac, 141 F.3d 477 (3rd Cir. 1998) (Plea agreements referring to substantial assistance departures are subject to contract law).

United States v. Brye, 146 F.3d 1207 (10th Cir. 1998) (Government's opposition to downward departure breached plea agreement).

United States v. Castaneda, 162 F.3d 832 (5th Cir. 1999) (Failed to prove defendant violated transactional immunity agreement).

United States v. Lawlor, 168 F.3d 633 (2nd Cir. 1999) (Government breached plea agreement that stipulated to a specific offense level).

United States v. Nathan, 188 F.3d 190 (3rd Cir. 1999) (Statement made after plea agreement was not stipulation).

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

United States v. Baird, 218 F.3d 221 (3rd Cir. 2000) (Plea agreement prevented use of information at

any proceeding).

Guilty Pleas

United States v. Maddox, 48 F.3d 555 (D.C. 1995) (A summary rejection of a guilty plea was improper).

*United States v. Ribas-Dominicce, 50 F.3d 76 (1st Cir. 1995) (A court misstated the mental state required for the offense).

United States v. Goins, 51 F.3d 400 (4th Cir. 1995) (The court failed to admonish the defendant about the mandatory minimum punishment).

*United States v. Casallas, 59 F.3d 1173 (11th Cir. 1995) (Trial judge improperly became involved in plea bargaining during colloquy).

*United States v. Smith, 60 F.3d 595 (9th Cir. 1995) (The court failed to explain the nature of the charges to the defendant).

*United States v. Gray, 63 F.3d 57 (1st Cir. 1995) (A defendant who did not understand the applicability of the mandatory minimum could withdraw his plea).

United States v. Daigle, 63 F.3d 346 (5th Cir. 1995) (The court improperly engaged in plea bargaining).

United States v. Martinez-Molina, 64 F.3d 719 (1st Cir. 1995) (The court failed to inquire whether the plea was voluntary or whether the defendant had been threatened or coerced).

*United States v. Showerman, 68 F.3d 1524 (2nd Cir. 1995) (The court failed to advise the defendant that he might be ordered to pay restitution).

United States v. Tunning, 69 F.3d 107 (6th Cir. 1995) (The government failed to recite evidence to prove allegations in an *Alford* plea).

United States v. Guerra, 94 F.3d 989 (5th Cir. 1996) (A plea was vacated when the court gave the defendant erroneous advice about enhancements).

*United States v. Quinones, 97 F.3d 473 (11th Cir. 1996) (The court failed to ensure that the defendant understood the nature of the charges).

*United States v. Cruz-Rojas, 101 F.3d 283 (2nd Cir. 1996) (Guilty pleas were vacated to determine whether factual basis existed for carrying a firearm).

*United States v. Siegel, 102 F.3d 477 (11th Cir. 1996) (Failure to advise the defendant of the maximum and minimum mandatory sentences required that the defendant be allowed to withdraw his plea).

United States v. Shepherd, 102 F.3d 558 (DC Cir. 1996) (A court abused its discretion in rejecting the defendant's mid-trial guilty plea).

United States v. Still, 102 F.3d 118 (5th Cir.), cert. denied, 522 U.S. 806 (1997) (The court failed to admonish the defendant on the mandatory minimum).

United States v. Amaya, 111 F.3d 386 (5th Cir. 1997) (The defendant's plea was involuntary when the court promised to ensure a downward departure for cooperation).

*United States v. Gonzalez, 113 F.3d 1026 (9th Cir. 1997) (A court should have held a hearing when

the defendant claimed his plea was coerced).

United States v. Brown, 117 F.3d 471 (11th Cir. 1997) (Misinformation given to the defendant made his plea involuntary).

United States v. Pierre, 120 F.3d 1153 (11th Cir. 1997) (Plea was involuntary when defendant mistakenly believed he had preserved an appellate issue).

*United States v. Cazares, 121 F.3d 1241 (9th Cir. 1997) (Plea to drug conspiracy was not an admission of an alleged overt act).

United States v. Toothman, 137 F.3d 1393 (9th Cir. 1998) (Plea could be withdrawn based upon misinformation about guideline range).

United States v. Gobert, 139 F.3d 436 (5th Cir. 1998) (Insufficient factual basis for defendant's guilty plea).

United States v. Gigot, 147 F.3d 1193 (10th Cir. 1998) (Failure to admonish defendant of elements of offense and possible penalties rendered plea involuntary).

United States v. Thorne, 153 F.3d 130 (4th Cir. 1998) (Court failed to advise defendant of the nature of supervised release).

United States v. Odedo, 154 F.3d 937 (9th Cir. 1998) (Defendant not admonished about nature of charges).

United States v. Suarez, 155 F.3d 521 (5th Cir. 1998) (Defendant was not admonished as to nature of charges).

United States v. Andrades, 169 F.3d 131 (2nd Cir. 1999) (Court failed to determine whether defendant understood basis for plea, and failed to receive sufficient factual basis).

United States v. Blackwell, 172 F.3d 129 (2nd Cir.), *superseded*, 1999 WL 1222629 (1999) (Omissions during colloquy voided plea).

United States v. Gomez-Orozco, 188 F.3d 422 (7th Cir. 1999) (Proof of citizenship required withdrawal of guilty plea to illegal re-entry).

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

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

United States v. Barrios-Gutierrez, 218 F.3d 1118 (9th Cir. 2000) (Defendant must be informed of statutory maximum).

United States v. Santo, 225 F.3d 92 (1st Cir. 2000) (Court understated mandatory minimum at plea).

Timely Prosecution

United States v. Verderame, 51 F.3d 249 (11th Cir. 1995) (Trial court denied repeated, unopposed motions for continuance in drug conspiracy case, with only 34 days to prepare).

United States v. Jones, 56 F.3d 581 (5th Cir. 1995) (An open-ended continuance violated the Speedy Trial Act).

United States v. Mejia, 69 F.3d 309

(9th Cir. 1995) (A court denied a one-day continuance of trial, preventing live evidence on suppression issue).

United States v. Foxman, 87 F.3d 1220 (11th Cir. 1996) (The trial court was required to decide whether the government had delayed indictment to gain a tactical advantage).

United States v. Johnson, 120 F.3d 1107 (10th Cir. 1997) (Continuance violated Speedy Trial Act).

United States v. Lloyd, 125 F.3d 1263 (9th Cir. 1997) (112-day continuance was not justified).

United States v. Hay, 122 F.3d 1233 (9th Cir. 1997) (A 48-day recess to accommodate jurors vacations was abuse of discretion).

United States v. Graham, 128 F.3d 372 (6th Cir. 1997) (An eight-year delay between indictment and trial violated the sixth amendment).

United States v. Gonzales, 137 F.3d 1431 (10th Cir. 1998) ("Ends of justice" continuance could not be retroactive).

United States v. Barnes, 159 F.3d 4 (1st Cir. 1999) (Open-ended continuance violated speedy trial).

United States v. Hall, 181 F.3d 1057 (9th Cir. 1999) (Violation of Speedy Trial Act).

United States v. Hardeman, 206 F.3d 1320 (9th Cir. 2000) (Speedy trial was violated).

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

United States v. Ramirez-Cortez,

213 F.3d 1149 (9th Cir. 2000) (Failure to make findings justifying Speedy Trial exclusion).

Jury Selection

Cochran v. Herring, 43 F. 1404 (11th Cir.), cert. denied, 516 U.S. 1073 (1996) (*Batson* claim).

*United States v. Jackman, 46 F.3d 1240 (2nd Cir. 1995) (Selection procedure resulted in an underrepresentation of minorities in jury pool).

United States v. Beckner, 69 F.3d 1290 (5th Cir. 1995) (The defendant established prejudicial pretrial publicity that could not be cured by voir dire).

*United States v. Annigoni, 96 F.3d 1132 (9th Cir. 1996) (A court's erroneous denial of a defendant's proper peremptory challenge required automatic reversal).

Turner v. Marshall, 121 F.3d 1248 (9th Cir. 1997) (A prosecutor's stated reason for striking a black juror was pretextual).

*Tankleff v. Senkowski, 135 F.3d 235 (2nd Cir. 1998) (Race-based peremptory challenges are not subject to harmless error review).

*United States v. Ovalle, 136 F.3d 1092 (6th Cir. 1998) (Plan which resulted in removal of 1 in 5 blacks from panel, violated Jury Selection and Service Act).

United States v. Tucker, 137 F.3d 1016 (8th Cir. 1998) (Evidence of juror bias and misconduct required evidentiary hearing).

Campbell v. Louisiana, 523 U.S. 392 (1998) (White defendant could challenge discrimination against

black grand jurors).

United States v. Blotcher, 142 F.3d 728 (4th Cir. 1998) (Court improperly denied defendant's race neutral peremptory challenge).

*United States v. Martinez-Salazar, 146 F.3d 653 (9th Cir.), cert. granted, 119 S.Ct. 2365 (1999) (Juror prejudiced toward government should have been stricken for cause).

Dyer v. Calderon, 151 F.3d 970 (9th Cir.), cert. denied, 119 S.Ct. 575 (1998) (Juror's lies raised presumption of bias).

United States v. Herndon, 156 F.3d 629 (6th Cir. 1998) (Denial of hearing on potentially biased juror).

United States v. McFerron, 163 F.3d 952 (6th Cir. 1999) (Defendant did not have burden of persuasion on neutral explanation for peremptory strike).

United States v. Serino, 163 F.3d 91 (1st Cir. 1999) (Defendant gave valid neutral reason for striking juror).

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

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

McClain v. Prunty, 217 F.3d 1209 (9th Cir. 2000) (Judge must investigate whether purposeful jury selection discrimination occurred).

Closure

United States v. Doe, 63 F.3d 121 (2nd Cir. 1995) (The court summarily denied a defendant's request to close the trial for his safety).

*Okonkwo v. Lacy, 104 F.3d 21 (2nd Cir. 1997) (Record did not support closure of proceedings during testimony of undercover officer).

*Pearson v. James, 105 F.3d 828 (2nd Cir. 1997) (Closure of courtroom denied the right to a public trial).

Trial Procedure

*United States v. Robertson, 45 F.3d 1423 (10th Cir.), cert. denied, 516 U.S. 844 (1995) (There was no evidence that the defendant intelligently and voluntarily waived a jury trial).

United States v. Lachman, 48 F.3d 586 (1st Cir. 1995) (Government exhibits were properly excluded on grounds of confusion and waste).

*United States v. Ajmal, 67 F.3d 12 (2nd Cir. 1995) (Jurors should not question witnesses as a matter of course).

United States v. Duarte-Higareda, 113 F.3d 1000 (9th Cir. 1997) (The court failed to question a non-English speaking defendant over a jury waiver).

United States v. Iribe-Perez, 129 F.3d 1167 (10th Cir. 1997) (Jury was told that the defendant would plead guilty before start of trial).

*United States v. Saenz, 134 F.3d 697 (5th Cir. 1998) (Court's questioning of a witness gave appearance of partiality).

United States v. Tilghman, 134 F.3d 414 (D.C. Cir. 1998) (Court's questioning of defendant denied him a fair trial).

United States v. Mortimer, 161 F.3d 240 (3rd Cir. 1999) (Trial judge was absent during defense closing).

United States v. Prawl, 168 F.3d 622 (2nd Cir. 1999) (Court refused to instruct jury not to consider codefendants guilty plea).

United States v. Golding, 168 F.3d 700 (4th Cir. 1999) (Prosecutor threatened defense witness with prosecution if she testified).

United States v. Samaniego, 187 F.3d 1222 (10th Cir. 1999) (No foundation for admission of business records).

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. Gomez-Lepe, 207 F.3d 623 (9th Cir. 2000) (Magistrate Judge could not preside over polling jury in felony case).

Confrontation

United States v. Forrester, 60 F.3d 52 (2nd Cir. 1995) (An agent improperly commented on the credibility of another witness).

*United States v. Glass, 128 F.3d 1398 (10th Cir. 1997) (The introduction of a co-defendant's incriminating statement violated *Bruton*).

United States v. Moses, 137 F.3d 894 (6th Cir. 1998) (Allowing child-witness to testify by video

violated right to confrontation).

*United States v. Mills, 138 F.3d 928 (11th Cir.), modified, 152 F.3d 937 (1998) (Defendant could not be made to share codefendant counsel's cross-examination of government witness).

*United States v. Peterson, 140 F.3d 819 (9th Cir. 1998) (*Bruton* violation).

Gray v. Maryland, 523 U.S. 185 (1998) (*Bruton* prohibited redacted confession, that obviously referred to defendant).

United States v. Marsh, 144 F.3d 1229 (9th Cir. 1998) (Admission of complaints by defendant's customers denied confrontation).

United States v. Cunningham, 145 F.3d 1385 (D.C. Cir. 1998) (Unredacted tapes violated confrontation).

*United States v. Edwards, 154 F.3d 915 (9th Cir. 1998) (Defendant was denied confrontation when prosecutor became potential witness during trial).

Lilly v. Virginia, 527 U.S. 116 (1999) (Admission of accomplice confession denied confrontation).

United States v. Gonzalez, 183 F.3d 1315 (11th Cir. 1999) (Admission of codefendant's out-of-court statement violated confrontation).

United States v. Torres-Ortega, 184 F.3d 1128 (10th Cir. 1999) (Admission of grand jury testimony violated confrontation).

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

confrontation).

United States v. Beckman, 222 F.3d 512 (8th Cir. 2000) (Limiting defense cross violated confrontation).

Hearsay

United States v. Hamilton, 46 F.3d 271 (3rd Cir. 1995) (Prosecution witnesses were not unavailable when they could have testified under government immunity).

United States v. Strother, 49 F.3d 869 (2nd Cir. 1995) (A statement, inconsistent with the testimony of a government witness, should have been admitted).

United States v. Acker, 52 F.3d 509 (4th Cir. 1995) (Prior consistent statements were not admissible because they were made prior to the witness having a motive to fabricate).

United States v. Tory, 52 F.3d 207 (9th Cir. 1995) (Witness' statement that the robber wore sweat pants was inconsistent with prior statement that he wore white pants).

United States v. Rivera, 61 F.3d 131 (2nd Cir.), cert. denied, 520 U.S. 1132 (1997) (The court should not have admitted an attached factual stipulation when allowing defendant to impeach a witness with a plea agreement).

United States v. Lis, 120 F.3d 28 (4th Cir. 1997) (A ledger connecting another to the crime was not hearsay).

United States v. Beydler, 120 F.3d 985 (9th Cir. 1997) (Unavailable witness incriminating the defendant was inadmissible hearsay).

United States v. Williams, 133 F.3d 1048 (7th Cir. 1998) (Statements by informant to agent were hearsay).

United States v. Mitchell, 145 F.3d 572 (3rd Cir. 1998) (Anonymous note incriminating defendant was inadmissible hearsay).

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

Defense Evidence

*United States v. Cooks, 52 F.3d 101 (5th Cir. 1995) (The court refused to allow government witness to be questioned about jeopardy from same charges).

United States v. Blum, 62 F.3d 63 (2nd Cir. 1995) (The court excluded evidence relevant to the witness' motive to testify).

United States v. Platero, 72 F.3d 806 (10th Cir. 1995) (The court excluded cross examination of a sexual assault victim's relationship with a third party).

United States v. Montgomery, 100 F.3d 1404 (8th Cir. 1996) (Codefendants should have been required to try on clothing, after defendant had to, when the government put ownership at issue).

United States v. Landerman, 109 F.3d 1053 (5th Cir.), *modified*, 116 F.3d 119 (1997) (The defendant should have been allowed to question a witness about a pending state charge).

*United States v. Mulinelli-Nava, 111 F.3d 983 (1st Cir. 1997) (Court limited cross examination regarding theory of defense).

*United States v. Paguio, 114 F.3d 928 (9th Cir. 1997) (A missing witness' self-incriminating statement should have been admitted).

United States v. Montilla-Rivera, 115 F.3d 1060 (1st Cir. 1997) (Exculpatory affidavits of codefendants, who claimed Fifth Amendment privilege, were newly discovered evidence regarding a motion for new trial).

*Lindh v. Murphy, 124 F.3d 899 (7th Cir. 1997) (A defendant was not allowed to examine the state's psychiatrist about allegations of sexual improprieties with patients).

United States v. Foster, 128 F.3d 949 (6th Cir. 1997) (Exculpatory grand jury testimony should have been admitted at trial).

United States v. Lowery, 135 F.3d 957 (5th Cir. 1998) (Court erroneously excluded defendant's evidence that he encouraged witnesses to tell the truth).

United States v. Sanchez-Lima, 161 F.3d 545 (9th Cir. 1999) (Exclusion of deposition denied right to put on defense).

Schledwitz v. United States, 169 F.3d 1003 (6th Cir. 1999) (Defendant could expose bias of witness involved in investigation).

United States v. James, 169 F.3d 1210 (9th Cir. 1999) (Records of victim's violence were relevant to self-defense).

United States v. Manske, 186 F.3d 770 (7th Cir. 1999) (Defendant could cross-examine witness about his threats to other witnesses about their testimony).

United States v. Saenz, 179 F.3d

686 (9th Cir. 1999) (Defendant was entitled to show his knowledge of victim's prior acts of violence to support self-defense).

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

United States v. Henke, 222 F.3d 633 (9th Cir. 2000) (Lay witness could not testify to what defendant knew about regulatory scheme).

United States v. Rhynes, 218 F.3d 310 (4th Cir. 2000) (Sequestered defense witness should not have been excluded for violating rule).

Misconduct

United States v. Flores-Chapa, 48 F.3d 156 (5th Cir. 1995) (The prosecutor referred to excluded evidence).

*United States v. Kallin, 50 F.3d 689 (9th Cir. 1995) (The prosecutor commented upon the defendant's failure to come forward with an explanation).

United States v. Gaston-Brito, 64 F.3d 11 (1st Cir. 1995) (A hearing was necessary to determine if an agent improperly gestured toward defense table in front of the jury).

United States v. Tenorio, 69 F.3d 1103 (11th Cir. 1995) (The prosecutor commented upon the defendant's silence).

*United States v. Cannon, 88 F.3d 1495 (8th Cir. 1996) (A prosecutor's reference to black defendants, who were not from North Dakota, as "bad people," was not harmless).

*United States v. Roberts, 119 F.3d 1006 (1st Cir. 1997) (Prosecutor commented on defendant's failure to testify and misstated burden of proof).

United States v. Rudberg, 122 F.3d 1199 (9th Cir. 1997) (A prosecutor vouched for a witness' credibility in closing argument).

United States v. Johnston, 127 F.3d 380 (5th Cir. 1997) (A prosecutor commented on the defendant's failure to testify and asked questions highlighting defendant's silence).

United States v. Wilson, 135 F.3d 291 (4th Cir. 1998) (Prosecutor's argument that defendant was a murderer prejudiced drug case).

*United States v. Vavages, 151 F.3d 1185 (9th Cir. 1998) (Prosecutor coerced defense witness into refusing to testify).

United States v. Maddox, 156 F.3d 1280 (D.C. Cir. 1999) (Prosecutor's argument referred to matters not in evidence).

Agardu v. Portuondo, 159 F.3d 98 (2nd Cir. 1998) (Prosecutor claimed that defendant was less credible without arguing any facts in support).

United States v. Rodrigues, 159 F.3d 607 (D.C. Cir. 1999) (Improper closing by prosecutor).

United States v. Richardson, 161 F.3d 728 (D.C. Cir. 1999) (Improper remarks by prosecutor).

United States v. Francis, 170 F.3d 546 (6th Cir. 1999) (Cumulative acts of prosecutorial misconduct).

Smith v. Goose, 205 F.3d 1045 (8th Cir. 2000) (Prosecution argued

contradictory facts in two different but related trials).

United States v. Cabrera, 222 F.3d 590 (9th Cir. 2000) (Repeated references to "Cuban drug dealers").

United States v. Beeks, 224 F.3d 741 (8th Cir. 2000) (Prosecutor's questioning violated prior in limine ruling).

Extraneous Evidence

United States v. Rodriguez, 45 F.3d 302 (9th Cir. 1995) (Evidence of flight a month after crime was inadmissible to prove an intent to possess).

*United States v. Blackstone, 56 F.3d 1143 (9th Cir. 1995) (Drug use was improperly admitted in felon in possession case).

United States v. Moorehead, 57 F.3d 875 (9th Cir. 1995) (Evidence that the defendant was a drug dealer should not have been admitted in firearms case).

United States v. Aguilar-Aranceta, 58 F.3d 796 (1st Cir. 1995) (Prior misdemeanor drug conviction was more prejudicial than probative in a distribution case).

United States v. McDermott, 64 F.3d 1448 (10th Cir. 1995) (Evidence that the defendant threatened a witness should not have been admitted because it was not clear the defendant knew the person was a witness).

*United States v. Vizcarra-Martinez, 66 F.3d 1006 (9th Cir. 1995) (Evidence of personal use of methamphetamine at the time of the defendant's arrest was inadmissible).

*United States v. Elkins, 70 F.3d 81 (10th Cir. 1995) (Evidence of the defendant's gang membership was improperly elicited).

United States v. Irvin, 87 F.3d 860 (7th Cir.), cert. denied, 519 U.S. 903 (1997) (The court should have excluded testimony that the defendant was in a motorcycle gang).

*United States v. Utter, 97 F.3d 509 (11th Cir. 1996) (In an arson case, it was error to admit evidence that the defendant threatened to burn his tenant's house or that the defendant's previous residence had burned).

*United States v. Lecompte, 99 F.3d 274 (8th Cir. 1996) (Evidence of prior contact with alleged victims did not show plan or preparation).

United States v. Jobson, 102 F.3d 214 (6th Cir. 1996) (The court failed to adequately limit evidence of the defendant's gang affiliation).

United States v. Murray, 103 F.3d 310 (3rd Cir. 1997) (Evidence that an alleged murderer had killed before was improperly admitted in a CCE case).

*United States v. Fulmer, 108 F.3d 1486 (1st Cir. 1997) (Allowing testimony about bombing of federal building was prejudicial).

United States v. Paguio, 114 F.3d 928 (9th Cir. 1997) (Evidence that the defendant previously applied for a loan was prejudicial).

Old Chief v. United States, 519 U.S. 172 (1997) (A court abused its discretion by refusing to accept the defendant's offer to stipulate

that he was a felon, in a trial for being a felon in possession of a firearm).

*United States v. Sumner, 119 F.3d 658 (8th Cir. 1997) (When defendant denied the crime occurred, prior acts to prove intent were not admissible).

United States v. Millard, 139 F.3d 1200 (8th Cir. 1998) (Prior drug convictions erroneously admitted).

United States v. Mulder, 147 F.3d 703 (8th Cir. 1998) (Bank's routine practice was irrelevant to fraud prosecution).

United States v. Ellis, 147 F.3d 1131 (9th Cir. 1998) (Testimony about destructive power of explosives was prejudicial).

United States v. Merino-Balderrama, 146 F.3d 758 (9th Cir. 1998) (Pornographic films should not have been displayed in light of defendant's offer to stipulate).

United States v. Spinner, 152 F.3d 950 (D.C. Cir. 1998) (Letter containing evidence of prior bad acts should not have been admitted).

United States v. Polasek, 162 F.3d 878 (5th Cir. 1999) (Convictions of defendant's associates should not have been admitted).

United States v. Jean-Baptiste, 166 F.3d 102 (2nd Cir. 1999) (Admission of prior bad act was plain error absent evidence it actually occurred).

United States v. Lawrence, 189 F.3d 838 (9th Cir. 1999) (Testimony regarding defendant's marriage was more prejudicial than probative).

United States v. Ahumada-Aguilar, 189 F.3d 1121 (9th Cir. 1999) (Requiring more proof of paternity from father than mother, to show citizenship, denied equal protection).

United States v. Heath, 188 F.3d 916 (7th Cir. 1999) (Previous arrest was not admissible prior bad act).

United States v. Anderson, 188 F.3d 886 (7th Cir. 1999) (Prior bad act was more than 10 years old).

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

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

United States v. Martinez-Gaytan, 213 F.3d 890 (5th Cir. 2000) (Agent who did not speak Spanish could not introduce defendant's Spanish confession).

United States v. Buchanan, 213 F.3d 302 (6th Cir. 2000) (Testimony that dog alerted to drugs on currency was inadmissible).

Identification

United States v. Emanuele, 51 F.3d 1123 (3rd Cir. 1995) (An identification, made after seeing the defendant in court, and after a failure to identify him before, should have been suppressed).

*Lyons v. Johnson, 99 F.3d 499 (2nd Cir. 1996) (The court denied the defendant the right to display a witness in support of a misidentification defense).

United States v. Barajas-Montiel, 185 F.3d 947 (9th Cir. 1999) (Insufficient evidence tying defendant to false identification).

Expert Testimony

*United States v. Boyd, 55 F.3d 667 (D.C. Cir. 1995) (Officer relied upon improper hypothetical in drug case).

United States v. Shay, 57 F.3d 126 (1st Cir. 1995) (Defense expert should have been allowed to explain that the defendant had a disorder that caused him to lie).

United States v. Posado, 57 F.3d 428 (5th Cir. 1995) (The per se rule prohibiting polygraph evidence was abolished by *Daubert*).

United States v. Childress, 58 F.3d 693 (D.C. Cir.), cert. denied, 516 U.S. 1098 (1996) (A defense expert should have been allowed to testify on the defendant's inability to form intent).

United States v. Velasquez, 64 F.3d 844 (3rd Cir. 1995) (A defense expert should have been allowed to testify on the limitations of handwriting analysis).

Rupe v. Wood, 93 F.3d 1434 (9th Cir.), cert. denied, 519 U.S. 1142 (1997) (Exclusion of a witness' failed polygraph results at the death penalty phase of trial, denied due process).

United States v. Hall, 93 F.3d 1337 (7th Cir. 1996) (Expert testimony that the defendant had a disorder that may have caused him to make a false confession should have been admitted).

Calderon v. U.S. District Court, 107 F.3d 756 (9th Cir.), cert. denied, 522 U.S. 907 (1997) (CJA

funds for expert could be used to exhaust a state claim).

*United States v. Morales, 108 F.3d 1031 (9th Cir. 1997) (The court should not have excluded a defense expert on bookkeeping).

*United States v. Word, 129 F.3d 1209 (11th Cir. 1997) (Lay testimony of abuse to defendant was admissible).

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

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

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

Entrapment

United States v. Reese, 60 F.3d 660 (9th Cir. 1995) (An entrapment instruction failed to tell the jury that the government must prove beyond a reasonable doubt that the defendant was predisposed).

United States v. Bradfield, 113 F.3d 515 (5th Cir. 1997) (Evidence supported an instruction on entrapment).

*United States v. Duran, 133 F.3d 1324 (10th Cir. 1998) (Entrapment instruction failed to place burden on government).

United States v. Thomas, 134 F.3d 975 (9th Cir. 1998) (Defendant may present good prior conduct to

support entrapment defense).

United States v. Sligh, 142 F.3d 761 (4th Cir. 1998) (Court failed to give instruction on entrapment).

*United States v. Burt, 143 F.3d 1215 (9th Cir. 1998) (Entrapment instruction failed to place proper burden on government).

United States v. Gamache, 156 F.3d 1 (1st Cir. 1998) (Jury should have been instructed on entrapment).

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

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

Jury Instructions

United States v. Lewis, 53 F.3d 29 (4th Cir. 1995) (The court failed to instruct the jury that conspiring with a government agent alone required an acquittal).

United States v. Ruiz, 59 F.3d 1151 (11th Cir.), cert. denied, 516 U.S. 1133 (1996) (Defendant has the right to have the jury instructed on his theory of defense).

*United States v. Lucien, 61 F.3d 366 (5th Cir. 1995) (An instruction on simple possession should have been given in a drug distribution case).

Smith v. Singletary, 61 F.3d 815 (11th Cir.), cert. denied, 516 U.S. 1140 (1996) (The court failed to give mitigating instruction in a capital case).

*United States v. Birbal, 62 F.3d

456 (2nd Cir. 1995) (Jurors were instructed they "may" acquit, rather than they "must" acquit, if the government did not meet its burden).

*United States v. Hairston, 64 F.3d 491 (9th Cir. 1995) (Alibi instruction was required when evidence of alibi was introduced in the government's case).

United States v. Johnson, 71 F.3d 139 (4th Cir. 1995) (The court improperly instructed the jury that a credit union was federally insured).

United States v. Palazzolo, 71 F.3d 1233 (6th Cir. 1995) (Verdict form failed to distinguish the object of the conspiracy).

*United States v. Talbott, 78 F.3d 1183 (7th Cir. 1996) (A jury instruction could not shift the burden to the defendant on the issue of self-defense).

*United States v. Webster, 84 F.3d 1056 (8th Cir. 1996) (Jury instructions that did not distinguish between "carry" and "use" were defective in a §924 (c) trial).

*United States v. Medina, 90 F.3d 459 (11th Cir. 1996) (The court failed to submit a jury instruction on whether a ship was subject to the jurisdiction of the United States).

United States v. Baron, 94 F.3d 1312 (9th Cir.), cert. denied, 519 U.S. 1047 (1996) (A court committed plain error by giving a deliberate ignorance instruction when there was no evidence that the defendant knew, or avoided learning, of secreted drugs).

*United States v. Ahmad, 101 F.3d 386 (5th Cir. 1996) (The jury instructions in a pollution case implied strict liability rather than the

requirement of knowledge).

United States v. Rodgers, 109 F.3d 1138 (6th Cir. 1997) (If a court allows a jury to review trial testimony, there must be a cautionary instruction not to place upon it undue emphasis).

United States v. Paul, 110 F.3d 869 (2nd Cir. 1997) (The court failed to give duress instruction in a felon in possession case).

*United States v. Bancalari, 110 F.3d 1425 (9th Cir. 1997) (Instruction omitted the element of intent).

United States v. Cooke, 110 F.3d 1288 (7th Cir. 1997) (Jury instructions treating “carry” and use” interchangeably were defective).

United States v. Perez, 116 F.3d 840 (9th Cir. 1997) (Failure to instruct jury on use of firearm, in relation to, drug trafficking was plain error).

United States v. Kubosh, 120 F.3d 47 (5th Cir. 1997) (Jury instruction failing to require active employment of firearm was plain error).

*Smith v. Horn, 120 F.3d 400 (3rd Cir. 1997) (A 1st degree murder instruction failed to require specific intent).

United States v. Bordeaux, 121 F.3d 1187 (8th Cir. 1997) (Jury instruction in an abusive sexual contact case failed to require force).

United States v. Wozniak, 126 F.3d 105 (2nd Cir. 1997) (Charge on marijuana impermissibly amended indictment alleging cocaine and methamphetamine).

*United States v. Otis, 127 F.3d 829 (9th Cir. 1997) (Duress instruction was omitted).

United States v. Soto-Silva, 129 F.3d 340 (5th Cir. 1997)(Deliberate ignorance instruction was not warranted for charge of maintaining premises for drug distribution).

United States v. Defries, 129 F.3d 1293 (D.C. Cir. 1997) (The court should have given an advice of counsel instruction on an embezzlement count).

United States v. Doyle, 130 F.3d 523 (2nd Cir. 1997) (Erroneous instructions stated that presumption of innocence and reasonable doubt were to protect only the innocent).

United States v. Wilson, 133 F.3d 251 (4th Cir. 1997) (Jury instructions did not adequately impose burden of proving knowledge).

United States v. Russell, 134 F.3d 171 (3rd Cir. 1998) (CCE instruction omitted unanimity requirement).

United States v. Baird, 134 F.3d 1276 (6th Cir. 1998) (Instruction failed to charge jury that contractor was only liable for falsity of costs it claimed to have incurred).

*United States v. Romero, 136 F.3d 1268 (10th Cir. 1998) (“Law of the case” required element named in jury instruction to be proven).

*United States v. Rossomando, 144 F.3d 197 (2nd Cir. 1998) (Ambiguous jury instruction misled jurors).

*United States v. Benally, 146 F.3d

1232 (10th Cir. 1998) (Defendant was entitled to instructions on self-defense and lesser included offense).

United States v. Thomas, 150 F.3d 743 (7th Cir. 1998) (Defendant was entitled to instruction that buyer/seller relationship is not itself a conspiracy).

United States v. Sanchez-Lima, 161 F.3d 545 (9th Cir. 1999) (Self-defense instruction should have been given).

United States v. Meyer, 157 F.3d 1067 (7th Cir.), cert. denied, 119 S.Ct. 1465 (1999) (Court should have instructed that mere buyer/seller relationship did not establish conspiracy).

United States v. Lampkin, 159 F.3d 607 (D.C. Cir. 1999) (Jury improperly instructed that government could not prosecute juvenile witnesses).

United States v. Dixon, 185 F.3d 393 (5th Cir. 1999) (Court improperly refused instruction on insanity based upon expert testimony).

United States v. Monger, 185 F.3d 574 (9th Cir. 1999) (Court should have instructed on lesser offense of simple possession).

United States v. Frega, 179 F.3d 793 (9th Cir. 1999) (Court’s instruction failed to identify potential predicate acts in RICO case).

United States v. Shipsey, 190 F.3d 1081 (9th Cir. 1999) (Court’s instruction to jury constructively amended indictment).

United States v. Pigeo, 197 F.3d 879 (7th Cir. 1999) (Jury instruction

constructively amended indictment).

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

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

United States v. Fuchs, 218 F.3d 957 (9th Cir. 2000) (No instruction that conspiracy must have occurred during statute of limitations)

Jenkins v. Huchinson, 221 F.3d 679 (4th Cir. 2000) (Reasonable doubt instruction improperly indicated it was only advisory).

Argument

United States v. Tory, 52 F.3d 207 (9th Cir. 1995) (The defense was prevented from arguing that an absence of evidence implied that evidence did not exist).

United States v. Hall, 77 F.3d 398 (11th Cir. 1996) (Defendant's counsel was improperly prohibited from addressing general principles of reasonable doubt in closing).

Deliberations

United States v. Berroa, 46 F.3d 1195 (D.C. Cir. 1995) (*Allen* charge varied from ABA standard).

United States v. Harber, 53 F.3d 236 (9th Cir. 1995) (The case agent's report was taken into the jury room).

United States v. Burgos, 55 F.3d 933 (4th Cir. 1995) (*Allen* charge

asked jurors to think about giving up firmly held beliefs).

*United States v. Araujo, 62 F.3d 930 (7th Cir. 1995) (A verdict was taken from eleven jurors when the twelfth was delayed by car trouble).

*United States v. Ottersburg, 76 F.3d 137 (7th Cir.), *clarified*, 81 F.3d 657 (1996) (It was plain error to allow alternate jurors to deliberate with the jury).

*United States v. Manning, 79 F.3d 212 (1st Cir.), *cert. denied*, 519 U.S. 853 (1996) (The court should have given a "yes or no" answer to a deadlocked jury's question, rather than refer them to the testimony).

United States v. Berry, 92 F.3d 597 (7th Cir. 1996) (A jury improperly considered a transcript, rather than the actual tape).

United States v. Benedict, 95 F.3d 17 (8th Cir. 1996) (The trial court should not have accepted partial verdicts).

United States v. Thomas, 116 F.3d 606 (2nd Cir. 1997) (Juror should not have been dismissed when he did not admit to refusing to follow the law during deliberations).

United States v. Hall, 116 F.3d 1253 (8th Cir. 1997) (Exposure of jury to unrelated, but prejudicial matters, required new trial).

United States v. Keating, 147 F.3d 895 (9th Cir. 1998) (Reasonable probability of juror prejudice required new trial).

United States v. Lampkin, 159 F.3d 607 (D.C. Cir. 1999) (Jury allowed to consider tapes not in evidence).

United States v. Beard, 161 F.3d 1190 (9th Cir. 1999) (It was error to substitute alternates for jurors after deliberations began).

United States v. Spence, 163 F.3d 1280 (11th Cir. 1999) (Juror dismissed during deliberations without just cause).

Variance

United States v. Johansen, 56 F.3d 347 (2nd Cir. 1995) (There was a variance when none of the conspiracies alleged were proven).

United States v. Tsinhnahjinnie, 112 F.3d 988 (9th Cir. 1997) (There was a fatal variance between pleading and proof of date of offense).

*United States v. Mohrbacher, 182 F.3d 1041 (9th Cir. 1999) (There was a variance between charge of transporting child pornography and proof of mere receipt).

United States v. Ramirez, 182 F.3d 544 (7th Cir. 1999) (Variance between charge and proof in firearm case).

Speech / Assembly

United States v. Popa, 187 F.3d 672 (D.C. Cir. 1999) (Conviction for harassing AUSA with racial epithets violated first amendment).

United States v. Baugh, 187 F.3d 1037 (9th Cir. 1999) (Assembly at national park could not be conditioned on promise not to trespass).

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

prior restraint).

Interstate Commerce

United States v. Box, 50 F.3d 345 (5th Cir.), cert. denied, 516 U.S. 714 (1996) (Extortion of interstate travelers did not involve interstate commerce).

*United States v. Cruz, 50 F.3d 714 (9th Cir. 1995) (Shipment of firearm in interstate commerce must occur after the firearm is stolen).

*United States v. Quigley, 53 F.3d 909 (8th Cir. 1995) (Liquor store robbery did not affect interstate commerce).

United States v. Grey, 56 F.3d 1219 (10th Cir. 1995) (Use of currency did not involve interstate commerce).

United States v. Lopez, 514 U.S. 549 (1995) ("Gun-free school zone" law found unconstitutional).

*United States v. Walker, 59 F.3d 1196 (11th Cir.), cert. denied, 516 U.S. 1002 (1995) (Conviction under "gun-free school zone" law was plain error).

*United States v. Barone, 71 F.3d 1442 (9th Cir. 1995) (False checks did not involve interstate commerce).

United States v. Denalli, 90 F.3d 444 (11th Cir. 1996) (Arson of neighbor's home did not involve interstate commerce).

*United States v. Gaydos, 108 F.3d 505 (3rd Cir. 1997) (There was insufficient evidence that arson involved interstate commerce).

United States v. Izydore, 167 F.3d

213 (5th Cir. 1999) (No evidence that phone calls crossed state lines for wire fraud interstate nexus).

United States v. Causey, 185 F.3d 407 (5th Cir. 1999) (1. No federal nexus shown regarding communication; 2. Recommendations did not support death sentences).

United States v. Wilson, 182 F.3d 737 (10th Cir. 1999) (Insufficient evidence of child pornography shipped in interstate commerce).

*United States v. Spinner, 180 F.3d 514 (3rd Cir. 1999) (Indictment failed to allege element of interstate commerce).

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. Wang, 222 F.3d 234 (6th Cir. 2000) (Robbery of cash did not have sufficient impact on interstate commerce).

Firearms

Staples v. United States, 511 U.S. (1994) (When a defendant was prohibited from possessing a particular kind of firearm, it must be proven he knew that he possessed that type of firearm).

United States v. Herron, 45 F.3d 340 (9th Cir. 1995) (A defendant whose civil rights were restored was not prohibited from possessing a firearm).

United States v. Caldwell, 49 F.3d 251 (6th Cir. 1995) (Licensed dealer who sold firearm away from business was not guilty of unlicensed sale).

United States v. Anderson, 59 F.3d 1323 (D.C. Cir.), cert. denied, 516 U.S. 999 (1995) (Multiple §924 (c) convictions must be based on separate predicate offenses).

Bailey v. United States, 516 U.S. 137 (1995) (Passive possession of firearm was insufficient to prove "use" of firearm during drug trafficking crime).

United States v. Kelly, 62 F.3d 1215 (9th Cir. 1995) (A defendant whose civil rights were restored was not prohibited from possessing a firearm).

*United States v. Hayden, 64 F.3d 126 (3rd Cir. 1995) (A defendant should have been allowed to introduce evidence of his low intelligence and illiteracy to rebut allegations that he knew he was under indictment when buying a firearm).

*United States v. Jones, 67 F.3d 320 (D.C. Cir. 1995) (The jury should not have been told nature of the defendant's prior conviction when the defendant offered to stipulate that he was a felon).

United States v. Edwards, 90 F.3d 199 (7th Cir. 1996) (A defendant must be shown to know his shotgun is shorter than 18 inches in length in order to be liable for failure to register the weapon).

*United States v. Rogers, 94 F.3d 1519 (11th Cir.), cert. denied, 522 U.S. 252 (1998) (The government failed to prove a defendant knew that he possessed a fully automatic weapon).

United States v. Atcheson, 94 F.3d 1237 (9th Cir.), cert. denied, 519 U.S. 1140 (1997) (Each §924 (c) conviction must be tied to a separate predicate crime).

United States v. Indelicato, 97 F.3d 627 (1st Cir.), cert. denied, 522 U.S. 835 (1997) (A defendant who did not lose his civil rights could not be felon in possession).

United States v. Casterline, 103 F.3d 76 (9th Cir.), cert. denied, 118 S.Ct. 106 (1997) (A felon in possession charge may not proven solely by ownership).

United States v. Taylor, 113 F.3d 1136 (10th Cir. 1997) (A firearm found in shared home was not shown to be possessed by the defendant).

United States v. Stephens, 118 F.3d 479 (6th Cir. 1997) (Two separate caches of cocaine possessed on the same day, did not support two separate gun enhancements).

*United States v. Westmoreland, 122 F.3d 431 (7th Cir. 1997) (An agent's presentation of inoperable firearm to defendant, immediately before arrest, did not support possession of a firearm in relation to drug crime).

United States v. Gonzalez, 122 F.3d 1383 (11th Cir. 1997) (Evidence did not support possession of a firearm while a fugitive from justice).

United States v. Norman, 129 F.3d 1393 (10th Cir. 1997) (Felon whose civil rights had been restored was not illegally in possession of firearm).

United States v. Perez, 129 F.3d 1340 (9th Cir. 1997) (Jury should have been required to decide the type of firearm).

United States v. Graves, 143 F.3d 1185 (9th Cir. 1998) (Accessory to felon in possession had to know

codefendant was a felon and possessed firearm).

Bousley v. United States, 523 U.S. 614 (1998) (Guilty plea did not bar *Bailey* claim. Claim was not *Teague*-barred).

United States v. Hellbusch, 147 F.3d 782 (8th Cir. 1998) (Guilty plea did not foreclose *Bailey* claim).

United States v. Spinner, 152 F.3d 950 (D.C. Cir. 1998) (Failure to show firearm was semiautomatic assault weapon).

United States v. Benboe, 157 F.3d 1181 (9th Cir. 1999) (Firearm conviction not supported by evidence).

United States v. Sanders, 157 F.3d 302 (5th Cir. 1999) (Insufficient evidence that defendant carried firearm).

United States v. Mount, 161 F.3d 675 (11th Cir. 1999) (Weapon found in stairwell was not carried).

United States v. Gilliam, 167 F.3d 628 (D.C. 1999) (Failed to prove prior conviction in felon in possession).

United States v. Aldrich, 169 F.3d 526 (8th Cir. 1999) (Vacating related gun count required entire new trial on others).

United States v. Meza-Corrales, 183 F.3d 1116 (9th Cir. 1999) (Felon had civil rights restored and could possess firearms).

United States v. Martin, 180 F.3d 965 (8th Cir. 1999) (Insufficient evidence of constructive possession of a firearm).

United States v. Fowler, 198 F.3d 808 (11th Cir. 1999) (Restoration of rights by state did not prohibit firearms possession).

United States v. Howard, 214 F. 3d 361 (2nd 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. Adams, 214 F.3d 724 (6th Cir. 2000) (Simultaneous possession of firearm and ammunition may result in only one conviction).

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

Extortion

*United States v. Tomblin, 46 F.3d 1369 (5th Cir. 1995) (A private citizen did not act under color of official right).

*United States v. Scotti, 47 F.3d 1237 (2nd Cir. 1995) (Facilitating payment of a debt was not extortion).

United States v. Delano, 55 F.3d 720 (2nd Cir. 1995) (Services or labor were not property within the meaning of a statute used as a predicate for RICO).

*United States v. Wallace, 59 F.3d 333 (2nd Cir. 1995) (Demanding payment from fraudulent check scheme was not extortion).

United States v. Allen, 127 F.3d 260 (2nd Cir. 1997) (Insufficient evidence of extortionate credit).

United States v. Houston, 217 F.3d

1204 (9th Cir. 2000) (No specific finding of express threat of death).

Drugs

United States v. Newton, 44 F.3d 913 (11th Cir.), cert. denied, 516 U.S. 857 (1995) (Leasing residence for a drug dealer did not prove the defendant's participation in a conspiracy).

United States v. Jones, 44 F.3d 860 (10th Cir. 1995) (A car passenger was not shown to have knowledge of the drugs).

*United States v. Johnson, 46 F.3d 1166 (D.C. Cir. 1995) (The government failed to prove distribution within 1000 feet of a school).

United States v. Medjuck, 48 F.3d 1107 (9th Cir. 1995) (The government failed to show a nexus to U.S. territory).

United States v. Valerio, 48 F.3d 58 (1st Cir. 1995) (There was insufficient evidence that the drugs were intended for distribution).

United States v. Flores-Chapa, 48 F.3d 156 (5th Cir. 1995) (The defendant's beeper and personal use of drugs was not proof of conspiracy).

United States v. Andujar, 49 F.3d 16 (1st Cir. 1995) (There was no more evidence than mere presence).

United States v. Jones, 49 F.3d 628 (10th Cir. 1995) (Inferences derived from standing near open trunk did not prove knowledge).

United States v. Polk, 56 F.3d 613 (5th Cir. 1995) (Use of the defendant's car and home were insufficient to show participation).

United States v. Horsley, 56 F.3d 50 (11th Cir. 1995) (Distribution of cocaine is lesser included offense of distribution of cocaine within a 1,000 feet of a school, and the jury should be charged accordingly).

*United States v. Kitchen, 57 F.3d 516 (7th Cir. 1995) (Momentarily picking up a kilo for inspection was not possession).

United States v. Ross, 58 F.3d 154 (5th Cir.), cert. denied, 516 U.S. 954 (1995) (The defendant was not a conspirator merely because he sold drugs at same location as conspirators).

United States v. Kearns, 61 F.3d 1422 (9th Cir. 1995) (A brief sampling of marijuana was not possession).

United States v. Lopez-Ramirez, 68 F.3d 438 (11th Cir. 1995) (Insufficient evidence of possession and conspiracy as to defendant who was present in home where 65 kilos of cocaine was delivered and then seized).

*United States v. Applewhite, 72 F.3d 140 (D.C. Cir.), cert. denied, 517 U.S. 1227 (1996) (The government failed to prove distribution within a 1000 feet of a school).

United States v. Derose, 74 F.3d 1177 (11th Cir. 1996) (Insufficient evidence that the defendant took possession of marijuana).

United States v. Martinez, 83 F.3d 371 (11th Cir.), cert. denied, 519 U.S. 998 (1997) (A defendant's conviction for conspiracy to possess cocaine was reversed because there was no evidence beyond defendant's intent to help

coconspirators steal money).

*United States v. Thomas, 114 F.3d 403 (3rd Cir. 1997) (Insufficient evidence of a conspiracy, when it was not shown that defendant knew cocaine was in bag he was to retrieve).

United States v. Cruz, 127 F.3d 791 (9th Cir. 1997) (A defendant could not join a conspiracy that was already completed).

United States v. Hunt, 129 F.3d 739 (5th Cir. 1997) (There was insufficient evidence of an intent to distribute).

United States v. Brito, 136 F.3d 397 (5th Cir. 1998) (Evidence that defendant was asked to find drivers did not prove constructive possession of hidden marijuana).

United States v. Lombardi, 138 F.3d 559 (5th Cir. 1998) (Evidence did not support conviction for using juvenile to commit drug offense).

United States v. Leonard, 138 F.3d 906 (11th Cir. 1998) (Insufficient evidence that passenger of vehicle possessed drugs or gun hidden in car).

United States v. Sampson, 140 F.3d 585 (4th Cir. 1998) (Insufficient evidence that drug offense occurred within 1000 feet of a playground or public housing).

United States v. Delagarza-Villarreal, 141 F.3d 133 (5th Cir. 1997) (Insufficient evidence of possession of marijuana).

United States v. Jensen, 141 F.3d 830 (8th Cir. 1998) (Insufficient evidence of drug conspiracy).

United States v. Paul, 142 F.3d 836 (5th Cir. 1998) (Insufficient

evidence of conspiracy to import).

United States v. Toler, 144 F.3d 1423 (11th Cir. 1998) (Insufficient evidence that defendant participated in conspiracy).

*United States v. Ortega-Reyna, 148 F.3d 540 (5th Cir. 1998) (Insufficient evidence that drugs hidden in borrowed truck were defendant's).

United States v. Quintanar, 150 F.3d 902 (8th Cir. 1998) (No evidence that defendant exercised control over contraband).

United States v. Gore, 154 F.3d 34 (2nd Cir. 1998) (Buyer/seller relationship did not establish conspiracy).

*United States v. Idowu, 157 F.3d 265 (3rd Cir. 1999) (Insufficient evidence that defendant knew purpose of drug conspiracy).

United States v. Morillo, 158 F.3d 18 (1st Cir. 1999) (Insufficient evidence of drug conspiracy).

United States v. Valadez-Gallegos, 162 F.3d 1256 (10th Cir. 1999) (Passenger was not linked to contraband in vehicle).

United States v. Dekle, 165 F.3d 826 (11th Cir. 1999) (Insufficient evidence that doctor conspired to illegally distribute drugs).

United States v. Mercer, 165 F.3d 1331 (11th Cir. 1999) (Insufficient evidence of a drug conspiracy).

United States v. Edwards, 166 F.3d 1362 (11th Cir. 1999) (Insufficient evidence of drug possession).

United States v. Orduno-Aguilera, 183 F.3d 1138 (9th Cir. 1999)

(Insufficient evidence that substance was illegal steroid).

United States v. Garcia-Sanchez, 189 F.3d 1143 (9th Cir. 1999) (Drug quantities not supported by evidence).

United States v. Owusu, 199 F.3d 329 (6th Cir. 2000) (Insufficient evidence of drug distribution).

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

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

United States v. Estrada-Macias, 218 F.3d 1064 (9th Cir. 2000) (Mere presence and knowledge of a conspiracy were insufficient to convict).

CCE

*United States v. Barona, 56 F.3d 1087 (9th Cir.), cert. denied, 516 U.S. 1092 (1996) (It was insufficient to find a CCE when there were persons who could not be legally counted as supervisees).

United States v. Witek, 61 F.3d 819 (11th Cir.), cert. denied, 516 U.S. 1060 (1996) (Mere buyer-seller relationship did not satisfy management requirement for conviction of engaging in continuing criminal enterprise).

United States v. Polanco, 145 F.3d 536 (2nd Cir.), cert. denied, 119 S.Ct. 803 (1999) (Insufficient evidence that defendant murdered victim to maintain position in CCE).

Richardson v. United States, 526 U.S. 813 (1999) (Jury must agree on specific violations).

United States v. Glover, 179 F.3d 1300 (11th Cir. 1999) (Role as organizer or leader must be based on managing persons, not merely assets).

United States v. McSwain, 197 F.3d 472 (10th Cir. 1999) (Conspiracy to manufacture and distribute are lesser offenses of CCE).

Fraud / Theft

United States v. Cannon, 41 F.3d 1462 (11th Cir.), cert. denied, 516 U.S. 823 (1995) (Proof of false documents to elicit payment on government contracts was insufficient when documents did not contain false information).

*United States v. Manarite, 44 F.3d 1407 (9th Cir.), cert. denied, 516 U.S. 851 (1995) (Mailings were not related to scheme to defraud).

United States v. Lluesma, 45 F.3d 408 (11th Cir. 1995) (Proof of conspiracy to export stolen vehicles was insufficient against defendant who did odd jobs for midlevel conspirator).

United States v. Altman, 48 F.3d 96 (2nd Cir. 1995) (Mailings were too remote to be related to the fraud).

United States v. Hammoude, 51 F.3d 288 (D.C. Cir.), cert. denied, 515 U.S. 1128 (1995) (A composite stamp did not make a visa a counterfeit document).

United States v. Wilbur, 58 F.3d 1291 (8th Cir. 1995) (A physician who stole drugs did not obtain them by deception).

United States v. Klingler, 61 F.3d 1234 (6th Cir. 1995) (A customs broker's misappropriation of funds did not involve money of the United States).

*United States v. Valentine, 63 F.3d 459 (6th Cir. 1995) (A government agent must convert more than \$5000 in a single year to violate 18 U.S.C. §666).

*United States v. Campbell, 64 F.3d 967 (5th Cir. 1995) (Bank officers did not cause a loss to the bank).

United States v. Lewis, 67 F.3d 225 (9th Cir. 1995) (A state chartered foreign bank was not covered by the bank fraud statute).

United States v. Mueller, 74 F.3d 1152 (11th Cir. 1996) (Filing a misleading affidavit to delay a civil proceeding involving a bank was not bank fraud).

United States v. Morris, 81 F.3d 131 (11th Cir. 1996) (Sale of a phone that disguised its identity was not fraud in connection with an access device).

United States v. Allen, 88 F.3d 765 (9th Cir.), cert. denied, 520 U.S. 1202 (1997) (The government failed to prove that a credit union was federally insured).

United States v. Wester, 90 F.3d 592 (1st Cir. 1996) (A loan's face value was not the proper amount of loss when collateral was pledged).

United States v. McMinn, 103 F.3d 216 (1st Cir. 1997) (A defendant was not in the business of selling stolen goods unless he sold goods stolen by others).

*United States v. Czubinski, 106

F.3d 1069 (1st Cir. 1997) (Merely browsing confidential computer files was not wire fraud or computer fraud).

United States v. Tencer, 107 F.3d 1120 (5th Cir.), cert. denied, 522 U.S. 960 (1997) (Insurance checks that were not tied to fraudulent claims were insufficient proof of mail fraud).

*United States v. Todd, 108 F.3d 1329 (11th Cir. 1997) (A defendant was improperly prohibited from introducing evidence that employees implicitly agreed that pension funds could be used to save the company).

*United States v. Cochran, 109 F.3d 660 (10th Cir. 1997) (There was insufficient proof of mail fraud without evidence of misrepresentation).

United States v. Parsons, 109 F.3d 1002 (4th Cir. 1997) (Money that defendant legitimately spent as postal employee could not be counted toward fraud).

*United States v. Grossman, 117 F.3d 255 (5th Cir. 1997) (Personal use of funds from business loan was not bank fraud).

*United States v. Cross, 128 F.3d 145 (3rd Cir.), cert. denied, 523 U.S. 1076 (1998) (Fixing cases was not mail fraud just because court mailed disposition notices).

United States v. LaBarbara, 129 F.3d 81 (2nd Cir. 1997) (Government failed to show use of mails in a fraud case).

*United States v. Adkinson, 135 F.3d 1363 (11th Cir. 1998) (Dismissal of underlying bank fraud undermined convictions for conspiracy, mail and wire fraud

schemes, and money laundering).

*United States v. Rodriguez, 140 F.3d 163 (2nd Cir. 1998) (Insufficient evidence of bank fraud).

*United States v. Ely, 142 F.3d 1113 (9th Cir. 1997) (Government failed to prove defendant was a bank director as charged in the indictment).

*United States v. D'Agostino, 145 F.3d 69 (2nd Cir. 1998) (Diverted funds were not taxable income for purposes of tax evasion).

United States v. Schnitzer, 145 F.3d 721 (5th Cir. 1998) (Impermissible theory of fraud justified new trial).

*United States v. Shotts, 145 F.3d 1289 (11th Cir.), cert. denied, 119 S.Ct. 1111 (1999) (Bail bond license was not property within meaning of mail fraud statute).

United States v. Hughey, 147 F.3d 423 (5th Cir. 1998) (Passing bad checks was not unauthorized use of an access device).

*United States v. Evans, 148 F.3d 477 (5th Cir. 1998) (No evidence that mailings advanced fraudulent scheme).

United States v. Blasini-Lluberas, 169 F.3d 57 (1st Cir. 1999) (There was no misapplication of bank funds on a debt not yet due).

United States v. Silkman, 156 F.3d 833 (8th Cir. 1999) (Administrative tax assessment is not conclusive proof of tax deficiency).

United States v. Adkinson, 158 F.3d 1147 (11th Cir. 1999) (Insufficient evidence of fraud).

United States v. Rodrigues, 159 F.3d 439 (9th Cir. 1999) (Insufficient evidence of fraud and theft).

United States v. Hanson, 161 F.3d 896 (5th Cir. 1999) (Factual questions about bank fraud should have been decided by jury).

United States v. Laljie, 184 F.3d 180 (2nd Cir. 1999) (No evidence that checks were altered, that signatures were not genuine, or that they were intended to victimize bank).

United States v. Lindsay, 184 F.3d 1138 (10th Cir. 1999) (Insufficient evidence that bank was FDIC insured).

United States v. Harstel, 199 F.3d 812 (6th Cir. 1999) (Receipt of mailed bank statements was not a fraudulent use of mails).

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

United States v. Tucker, 217 F.3d 960 (8th Cir. 2000) (Loss to IRS occurred when taxes were due, not when conspiracy began).

Money Laundering

United States v. Newton, 44 F.3d 913 (11th Cir. 1995) (Proof of aiding and abetting money laundering conspiracy was insufficient against defendant who leased house on behalf of conspirator).

*United States v. Rockelman, 49 F.3d 418 (8th Cir. 1995) (The evidence failed to show the transaction was intended to

conceal illegal proceeds).

*United States v. Hove, 52 F.3d 233 (9th Cir. 1995) (Failure to instruct the jury that the defendant must know his structuring was illegal, was plain error).

United States v. Torres, 53 F.3d 1129 (10th Cir.), cert. denied, 516 U.S. 883 (1995) (Buying a car with drug proceeds was not money laundering).

United States v. Willey, 57 F.3d 1374 (5th Cir.), cert. denied, 516 U.S. 1029 (1995) (Transferring money between accounts was insufficient evidence of an intent to conceal).

*United States v. Wynn, 61 F.3d 921 (D.C. Cir.), cert. denied, 516 U.S. 1015 (1995) (There was insufficient evidence that the defendant knew his structuring was unlawful).

United States v. Dobbs, 63 F.3d 391 (5th Cir. 1995) (Undisguised money used for family needs was not money laundering).

United States v. Kim, 65 F.3d 123 (9th Cir. 1995) (To be guilty of conspiracy, the defendant must have known of the illegal structuring).

United States v. Nelson, 66 F.3d 1036 (9th Cir. 1995) (The defendant's eagerness to complete the transaction was not sufficient to prove an attempt).

*United States v. Kramer, 73 F.3d 1067 (11th Cir.), cert. denied, 519 U.S. 1011 (1996) (A transaction that occurred outside of the United States was not money laundering).

United States v. Phipps, 81 F.3d 1056 (11th Cir. 1996) (It was not

money laundering to deposit a series of checks that are less than \$10K each).

United States v. Pipkin, 114 F.3d 528 (5th Cir.), cert. denied, 519 U.S. 821 (1996) (The defendant did not knowingly structure a currency transaction).

*United States v. High, 117 F.3d 464 (11th Cir. 1997) (A money laundering instruction omitted the element of willfulness).

United States v. Garza, 118 F.3d 278 (5th Cir. 1997) (Money laundering proof was insufficient where defendants neither handled nor disposed of drug proceeds).

*United States v. Christo, 129 F.3d 578 (11th Cir. 1997) (A check kiting scheme was not money laundering).

United States v. Shoff, 151 F.3d 889 (8th Cir. 1998) (Purchase with proceeds of fraud was not money laundering).

United States v. Calderon, 169 F.3d 718 (11th Cir. 1999) (Insufficient evidence of money laundering).

United States v. Zvi, 168 F.3d 49 (2nd Cir. 1999) (Charging domestic and international money laundering based on the same transactions was multiplicitous).

United States v. Brown, 186 F.3d 661 (5th Cir. 1999) (Insufficient evidence of money laundering).

United States v. Anderson, 189 F.3d 1201 (10th Cir. 1999) (Titling vehicle in mother's name did not prove money laundering).

United States v. Messner, 197 F.3d 330 (9th Cir. 1999) (1. Speedy Trial Act exclusion for arrest of co-

defendant did not apply to unreasonably long delay; 2. Coded language did not support money laundering conviction).

United States v. Miranda, 197 F.3d 1357 (11th Cir. 1999) (Ex post facto application of money laundering conspiracy statute).

United States v. Olaniji-Oke, 199 F.3d 767 (5th Cir. 1999) (Purchase of computers for personal use was not money laundering).

Aiding and Abetting

United States v. de la Cruz-Paulino, 61 F.3d 986 (1st Cir. 1995) (Moving packages of contraband and statements about police was insufficient evidence).

United States v. Luciano-Mosquero, 63 F.3d 1142 (1st. Cir.), cert. denied, 517 U.S. 1234 (1996) (There was no evidence that the defendant took steps to assist in the use of a firearm).

*United States v. Fulbright, 105 F.3d 443 (9th Cir.), cert. denied, 520 U.S. 1236 (1997) (The government failed to prove anyone committed the principle crime with requisite intent).

United States v. Beckner, 134 F.3d 714 (5th Cir. 1998) (Lawyer was not shown to have knowledge of client's fraud for aiding and abetting).

*United States v. Nelson, 137 F.3d 1094 (9th Cir.), cert. denied, 119 S.Ct. 231 (1999) (Evidence did not support aiding and abetting use and carrying of a firearm during crime of violence).

United States v. Stewart, 145 F.3d 273 (5th Cir. 1998) (Insufficient

evidence that passenger aided and abetted drug possession).

United States v. Garcia-Guizar, 160 F.3d 511 (9th Cir. 1999) (Insufficient evidence of aiding and abetting).

United States v. Wilson, 160 F.3d 732 (D.C. Cir.), cert. denied, 120 S.Ct. 81 (1999) (Insufficient evidence of aiding and abetting murder or retaliation).

United States v. Barnett, 197 F.3d 138 (5th Cir. 1999) (Insufficient evidence of conspiring or aiding and abetting murder for hire).

Perjury

United States v. Hairston, 46 F.3d 361 (4th Cir. 1995) (Ambiguity in the question to the defendant was insufficient for perjury conviction).

United States v. Dean, 55 F.3d 640 (D.C. Cir.), cert. denied, 516 U.S. 1184 (1996) (A statement that was literally true did not support a perjury conviction).

United States v. Jaramillo, 69 F.3d 388 (9th Cir. 1995) (A defendant charged with perjury by inconsistent statements must have made both under oath).

United States v. Shotts, 145 F.3d 1289 (11th Cir. 1998) (Evasive, but true, answer was not perjury).

False Statements

United States v. Gaudin, 515 U.S. 506 (1995) (Materiality is an element of a false statement case).

United States v. Bush, 58 F.3d 482 (9th Cir. 1995) (No material false statements or omissions were made to receive union funds).

United States v. Rothhammer, 64 F.3d 554 (10th Cir. 1995) (A contractual promise to pay was not a factual assertion).

United States v. Campbell, 64 F.3d 967 (5th Cir. 1995) (The defendant's misrepresentations to a bank were not material).

*United States v. McCormick, 72 F.3d 1404 (9th Cir. 1995) (A defendant who did not read documents before signing them was not guilty of making a false statement).

United States v. Barrett, 111 F.3d 947 (D.C.), cert. denied, 522 U.S. 867 (1997) (A defendant's misrepresentation to a court was not a material false statement).

United States v. Farmer, 137 F.3d 1265 (10th Cir. 1998) (Answer to ambiguous question did not support conviction for false declaration).

United States v. Hodge, 150 F.3d 1148 (9th Cir. 1998) (Insufficient evidence of false statements).

United States v. Sorenson, 179 F.3d 823 (9th Cir. 1999) (Defendant's false statements were contained in an unsigned loan application).

United States v. Walker, 191 F.3d 326 (2nd Cir. 1999) (Insufficient proof that defendant was responsible for more than 100 false immigration documents).

Contempt

United States v. Mathews, 49 F.3d 676 (11th Cir. 1995) (Certification of contempt must be filed by the judge who witnessed the alleged contempt).

United States v. Forman, 71 F.3d 1214 (6th Cir. 1995) (An attorney was not in contempt for releasing grand jury materials in partner's case).

United States v. Brown, 72 F.3d 25 (5th Cir. 1995) (A lawyer's comments on a judge's trial performance were not reckless).

United States v. Mottweiler, 82 F.3d 769 (7th Cir. 1996) (A defendant must have acted willfully to be guilty of criminal contempt).

United States v. Grable, 98 F.3d 251 (6th Cir.), cert. denied, 519 U.S. 1059 (1997) (Contempt order could not stand in light of incorrect advice about fifth amendment privilege).

Bingman v. Ward, 100 F.3d 653 (9th Cir.), cert. denied, 520 U.S. 1188 (1997) (Magistrate Judge did not have the authority to hold a litigant in criminal contempt).

United States v. Neal, 101 F.3d 993 (4th Cir. 1996) (It was plain error for a judge to prosecute and judge a contempt action).

United States v. Vezina, 165 F.3d 176 (2nd Cir. 1999) (Insufficient evidence of criminal contempt of a TRO).

Miscellaneous Crimes

United States v. Rodriguez, 45 F.3d 302 (9th Cir. 1995) (Possessing an object designed to be used as a weapon, while in prison, was a specific intent crime).

United States v. Gilbert, 47 F.3d 1116 (11th Cir.), cert. denied, 516 U.S. 851 (1995) (Proof of failure

to comply with a directive of a federal officer was in variance with the original charge).

United States v. Bahena-Cardenas, 70 F.3d 1071 (9th Cir. 1995) (Alien who was not served with warrant of deportation, was not guilty of illegal reentry).

United States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997) (Transmission of e-mail messages of torture, rape and murder did not fall within federal statute without public availability).

United States v. Grigsby, 111 F.3d 806 (11th Cir. 1997) (Importation of prohibited wildlife products fell under exceptions to statute).

United States v. Main, 113 F.3d 1046 (9th Cir. 1997) (In an involuntary manslaughter case, the harm must have been foreseeable within the risk created by the defendant).

*United States v. Wicklund, 114 F.3d 151 (10th Cir. 1997) (A murder for hire required a receipt or promise of pecuniary value).

United States v. Yoakum, 116 F.3d 1346 (10th Cir. 1997) (A defendant's interest in a business, and his presence near time of fire, did not support arson conviction).

United States v. Nyemaster, 116 F.3d 827 (9th Cir. 1997) (Insufficient evidence of being under the influence of alcohol in a federal park).

United States v. Spruill, 118 F.3d 221 (4th Cir. 1997) (There was insufficient evidence that a threat would be carried out by fire or explosive under 18 U.S.C. §844 (e)).

United States v. Cooper, 121 F.3d 130 (3rd Cir. 1997) (Evidence did not support conviction for tampering with a witness).

*United States v. King, 122 F.3d 808 (9th Cir. 1997) (Crime of mailing threatening communication required a specific intent to threaten).

United States v. Valenzano, 123 F.3d 365 (6th Cir. 1997) (It did not violate the Federal Credit Reporting Act or the Consumer Credit Act by obtaining a credit report without permission).

*United States v. Farrell, 126 F.3d 484 (3rd Cir. 1997) (Urging a witness to "take the fifth" was not witness tampering).

United States v. Devenport, 131 F.3d 604 (7th Cir. 1997) (A violation of a state civil provision was not covered by Assimilative Crimes Act).

United States v. Rapone, 131 F.3d 188 (D.C. Cir. 1997) (Evidence was insufficient to show retaliation).

United States v. Sylve, 135 F.3d 680 (9th Cir. 1998) (Deferred prosecution was available for charge under Assimilative Crimes Act).

United States v. Romano, 137 F.3d 677 (1st Cir. 1998) (Law prohibiting sale of illegally taken wildlife did not cover the act of securing guide services for hunting trip).

*United States v. Cottman, 142 F.3d 160 (3rd Cir. 1998) (The government is not a victim under Victim Witness Protection Act).

*United States v. Copeland, 143

F.3d 1439 (11th Cir. 1998) (Government contractor was not bribed under federal statute).

United States v. To, 144 F.3d 737 (11th Cir. 1998) (Insufficient evidence of RICO and Hobbs Act violations).

United States v. Walker, 149 F.3d 238 (3rd Cir. 1998) (Prison worker was not a corrections officer).

United States v. Gallardo-Mendez, 150 F.3d 1240 (10th Cir. 1998) (Prior guilty plea did not prevent defendant from contesting noncitizen status).

United States v. Estrada-Fernandez, 150 F.3d 491 (5th Cir. 1998) (Simple assault is lesser included offense of assault with deadly weapon).

United States v. Garcia, 151 F.3d 1243 (9th Cir. 1998) (Gang relationship alone did not support conspiracy).

United States v. Truesdale, 152 F.3d 443 (5th Cir. 1998) (Insufficient evidence of illegal gambling).

United States v. Guerrero, 169 F.3d 933 (5th Cir. 1999) (Inconclusive identification did not support bank robbery conviction).

United States v. Vaghela, 169 F.3d 729 (11th Cir. 1999) (Insufficient evidence of conspiracy to obstruct justice).

Jones v. United States, 526 U.S. 227 (1999) (Jury must decide whether carjacking resulted in serious bodily injury or death).

*United States v. Hilton, 167 F.3d 61 (1st Cir.), cert. denied, 120 S.Ct. 115 (1999) (Whether

defendant believed pornographic actors were over 18 years old is a jury question).

United States v. Causey, 185 F.3d 407 (5th Cir. 1999) (1. No federal nexus shown regarding communication; 2. Recommendations did not support death sentences).

United States v. Davis, 183 F.3d 231 (3rd Cir. 1999) amended 197 F.3d 662 (same). (Insufficient evidence of obstruction of justice and conspiracy).

United States v. Waites, 198 F.3d 1123 (9th Cir. 2000) (Conduct that was regulated federally should not have been prosecuted under Assimilative Crimes Act).

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

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

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

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

United States v. Hood, 210 F.3d 660 (6th Cir. 2000) (Assault without verbal threat was minor rather than aggravated).

United States v. Pacheco-Medina, 212 F.3d 1162 (9th Cir. 2000) (Defendant who was captured a

few yards from border did not enter United States).

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

Juveniles

United States v. Juvenile Male #1, 47 F.3d 68 (2nd Cir. 1995) (A court properly refused transfer of a juvenile for adult proceedings).

United States v. Juvenile Male PWM, 121 F.3d 382 (8th Cir. 1997) (1. Court imposed sentence beyond comparable guideline for adults; 2. Court considered pending unadjudicated charges).

Impounded Juvenile I.H., Jr., 120 F.3d 457 (3rd Cir. 1997) (Failure to provide juvenile records barred transfer to adult status).

United States v. Male Juvenile, 148 F.3d 468 (5th Cir. 1998) (Certification for juvenile by AUSA was invalid).

United States v. Juvenile LWO, 160 F.3d 1179 (8th Cir. 1999) (Judge may not consider unadjudicated incidents at juvenile transfer hearing in assessing nature of charges or prior record).

Sentencing - General

United States v. Rivera, 58 F.3d 600 (11th Cir. 1995) (Defendant was sentenced on the wrong count).

*United States v. Knowles, 66 F.3d 1146 (11th Cir.), cert. denied, 516 U.S. 1149 (There was no proof the conspiracy extended to the date when guidelines became effective).

*Page v. United States, 69 F.3d 482 (11th Cir. 1995) (The court failed to require the parties to state objections at the sentencing hearing).

*United States v. Petty, 80 F.3d 1384 (9th Cir. 1996) (The record should have shown that the defendant read the presentence report and supplements).

United States v. Torres, 81 F.3d 900 (9th Cir. 1996) (A disparity in coconspirators' sentences was not justified, due to inconsistent factual findings).

United States v. Burke, 80 F.3d 314 (8th Cir. 1996) (A presentence report could not be used as evidence when the defendant disputed the facts therein).

*United States v. Ivy, 83 F.3d 1266 (10th Cir.), cert. denied, 519 U.S. 901 (1996) (The government's failure to object to a presentence report waived its complaint).

*United States v. Graham, 83 F.3d 1466 (D.C.Cir.), cert. denied, 519 U.S. 1132 (1997) (Adoption of the presentence report is not the same as express findings).

United States v. Versaglio, 85 F.3d 943 (2nd Cir.), modified, 96 F.3d 637 (1996) (A criminal contempt offense cannot be punished by both fine and incarceration).

United States v. Moskovits, 86 F.3d 1303 (3d Cir.), cert. denied, 519 U.S. 1120 (1997) (A court improperly considered a defendant's decision to go to trial rather than accept a plea offer).

United States v. Tabares, 86 F.3d 326 (3rd Cir. 1996) (Erroneous information did not justify a sentence at the top of the range).

United States v. Farnsworth, 92 F.3d 1001 (10th Cir.), cert. denied, 117 S.Ct. 596 (1996) (Adoption of the presentence report does not resolve disputed matters).

United States v. Dieguimde, 119 F.3d 933 (11th Cir. 1997) (Order of deportation did not consider defendant's request for political asylum).

*United States v. Romero, 122 F.3d 1334 (10th Cir. 1997) (A court may not resolve factual disputes by merely adopting the presentence report).

United States v. Ross, 131 F.3d 970 (11th Cir. 1997) (When a defendant is convicted of a conspiracy count with multiple objects, the court must find beyond a reasonable doubt that a particular object was proven before applying that guideline section).

United States v. Renteria, 138 F.3d 1328 (10th Cir. 1998) (Lying at suppression hearing invoked accessory after fact guideline not perjury).

United States v. Washington, 146 F.3d 219 (4th Cir. 1998) (Court should not have relied upon statements made pursuant to plea agreement).

*United States v. Myers, 150 F.3d 459 (5th Cir. 1998) (Defendant denied right of allocution).

United States v. Davenport, 151 F.3d 1325 (11th Cir. 1998) (Defendant did not waive right to review presentence report by absconding).

United States v. Glover, 154 F.3d 1291 (11th Cir. 1998) (Time credited toward a sentence does

not lengthen total sentence).

United States v. Navarro, 169 F.3d 228 (5th Cir. 1999) (Cannot have sentencing via video conference over defendant's objection).

United States v. Casey, 158 F.3d 993 (8th Cir. 1999) (Court must use guideline of charged offense).

United States v. Partlow, 159 F.3d 1218 (9th Cir. 1999) (Specific offense characteristics must be applied in the order listed).

United States v. Weaver, 161 F.3d 528 (8th Cir. 1999) (Typo on PSR recommending wrong base level was plain error).

United States v. Allard, 164 F.3d 1146 (8th Cir. 1999) (Offense characteristic for one offense could not be used for another).

United States v. Robinson, 164 F.3d 1068 (7th Cir. 1999) (Hearsay statements used at sentencing were unreliable).

United States v. Mueller, 168 F.3d 186 (5th Cir. 1999) (Failure to disclose addendum to presentence report).

United States v. Jones, 168 F.3d 1217 (10th Cir. 1999) (If the court allows an oral objection at sentencing then a finding on that objection must be made).

United States v. Mitchell, 187 F.3d 331 (3rd Cir. 1999) (Court may not draw adverse inference from silence at sentencing).

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

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

Grouping

United States v. DiDomenico, 78 F.3d 294 (7th Cir.), cert. denied, 519 U.S. 1006 (1996) (Unconvicted, unstipulated crimes could not be used to determine a combined offense level under §3D1.4).

*United States v. Wilson, 98 F.3d 281 (7th Cir. 1996) (Money laundering and mail fraud should have been grouped together).

*United States v. Haltom, 113 F.3d 43 (5th Cir. 1997) (Mail fraud and tax fraud counts should have been grouped).

*United States v. Emerson, 128 F.3d 557 (7th Cir. 1997) (Money laundering and mail fraud should have been grouped).

United States v. Kennedy, 133 F.3d 53 (D.C. Cir. 1998) (Court cannot refuse to group counts in order to give defendant a higher sentence).

United States v. Marmolejos, 140 F.3d 488 (3rd Cir. 1998) (Clarifying amendment to guideline section justified post-sentence relief).

*United States v. Thomas, 155 F.3d 833 (7th Cir.), cert. denied, 119 S.Ct. 606 (1998) (Court failed to group counts).

*United States v. Martinez-Martinez, 156 F.3d 936 (9th Cir. 1999) (Reduction for non-drug conspiracy was mandated when object crime was not substantially

complete).

United States v. Levario-Quiroz, 161 F.3d 903 (5th Cir. 1999) (Offenses outside United States were not relevant conduct).

Consecutive/ Concurrent

United States v. Greer, 91 F.3d 996 (7th Cir. 1996) (Sentences at two proceedings on the same day were at the same time for guideline calculations).

*United States v. Fuentes, 107 F.3d 1515 (11th Cir. 1997) (A federal sentence which calculates a state sentence into the base offense level must be concurrent to the state sentence).

*United States v. Corona, 108 F.3d 565 (5th Cir. 1997) (Duplicious sentences were not purely concurrent where each received a separate special assessment).

United States v. Kikuyama, 109 F.3d 536 (9th Cir. 1997) (Court cannot rely on need for mental health treatment in fashioning a consecutive sentence).

*United States v. Nash, 115 F.3d 1431 (9th Cir.), cert. denied, 522 U.S. 1117 (1998) (Multiplicious counts must be sentenced concurrently and may not receive separate special assessments).

*United States v. Mendez, 117 F.3d 480 (11th Cir. 1997) (Simultaneous acts of possessing stolen mail and assaulting a mail carrier with intent to steal mail, could not receive cumulative punishments).

*McCarthy v. Doe, 146 F.3d 118 (2nd Cir. 1998) (BOP could designate state institution in order

to implement presumptively concurrent sentence).

*United States v. Quintero, 157 F.3d 1038 (6th Cir. 1999) (Federal sentence could not be imposed consecutively to not yet imposed state sentence).

United States v. Dorsey, 166 F.3d 558 (3rd Cir. 1999) (A court has authority to reduce a sentence in order to make it effectively concurrent to a previously imposed state sentence).

Retroactivity

*United States v. Vazquez, 53 F.3d 1216 (11th Cir. 1995) (Case remanded to determine retroactive effect of favorable guideline, that became effective after sentencing).

*United States v. Felix, 87 F.3d 1057 (9th Cir. 1996) (An amendment to the guidelines, which required a sentence based on a lower, negotiated quantity of drugs, was retroactive).

United States v. Etherton, 101 F.3d 80 (9th Cir. 1996) (A retroactive amendment could be used to reduce supervised release).

*United States v. Ortland, 109 F.3d 539 (9th Cir.), cert. denied, 522 U.S. 851 (1997) (Since mail fraud is not a continuing offense, an act committed after the date of an increase to guidelines did not require all counts to receive increased guidelines).

United States v. Zagari, 111 F.3d 307 (2nd Cir. 1997) (Use of guidelines effective after conduct violated Ex Post Facto Clause).

United States v. Armistead, 114

F.3d 504 (5th Cir.), cert. denied, 522 U.S. 922 (1997) (There was an ex post facto application of a guideline provision).

*United States v. Aguilar-Ayala, 120 F.3d 176 (9th Cir. 1997) (Defendant was entitled to sentence reduction to mandatory minimum because of retroactive guideline amendment, regardless of whether safety valve applied).

United States v. Bowen, 127 F.3d 9 (1st Cir. 1997) (Amendment defining hashish oil was applied ex post facto).

*United States v. Mussari, 152 F.3d 1156 (9th Cir. 1998) (Ex post facto application of criminal penalties).

United States v. Comstock, 154 F.3d 845 (8th Cir. 1998) (Using guideline effective after commission of offense violated ex post facto).

Sentencing - Drug Quantities

United States v. Lawrence, 47 F.3d 1559 (11th Cir. 1995) (Insufficient findings to support drug quantities).

*United States v. Hansley, 54 F.3d 709 (11th Cir.), cert. denied, 516 U.S. 998 (1995) (Individual findings were needed to hold defendant responsible for all drugs in conspiracy).

United States v. Reese, 67 F.3d 902 (11th Cir.), cert. denied, 517 U.S. 1228 (1996) (Drugs were not reasonably foreseeable to the defendant, nor within scope of agreed joint criminal activity).

United States v. Lee, 68 F.3d 1267 (11th Cir. 1995) (There were

inadequate findings to support drug quantities. Crack abusers' credibility was questioned).

United States v. Levay, 76 F.3d 671 (5th Cir. 1996) (A defendant could challenge drug quantity calculations, based upon excludable material, by §2255 petition).

United States v. Berrio, 77 F.3d 206 (7th Cir. 1996) (A government agent's sale of drugs to an informant could not be counted as the defendant's relevant conduct).

United States v. Hill, 79 F.3d 1477 (6th Cir.), cert. denied, 519 U.S. 858 (1996) (Different transactions almost two years apart, with the sole similarity being the type of drug, were not relevant conduct).

*United States v. Howard, 80 F.3d 1194 (7th Cir. 1996) (The district court could not rely upon the probation officer's estimates of drug quantities without corroborating evidence).

United States v. Hamilton, 81 F.3d 652 (6th Cir. 1996) (To be culpable for manufacturing a quantity of drugs, the defendant must have been personally able to make that quantity).

United States v. Graham, 83 F.3d 1466 (D.C. Cir.), cert. denied, 519 U.S. 1132 (1997) (The court failed to make individualized findings of drug quantities).

United States v. Byrne, 83 F.3d 984 (8th Cir. 1996) (Drugs seized after the defendant was in custody could not be counted toward sentence).

United States v. Acosta, 85 F.3d 275 (7th Cir. 1996) (The drug quantity finding was insufficient).

United States v. Caldwell, 88 F.3d 522 (8th Cir.), cert. denied, 519 U.S. 1048 (1996) (Extrapolation of drug quantities was error).

United States v. Frazier, 89 F.3d 1501 (11th Cir.), cert. denied, 520 U.S. 1222 (1997) (Sentencing findings did not support drug quantities attributed to the defendant).

*United States v. Tucker, 90 F.3d 1135 (6th Cir. 1996) (A court did not make individualized findings as to each defendant in a drug conspiracy).

United States v. Nesbitt, 90 F.3d 164 (6th Cir. 1996) (A court failed to resolve whether amounts of drugs were attributable during the time of the conspiracy).

United States v. Hernandez-Santiago, 92 F.3d 97 (2nd Cir. 1996) (A court failed to make a finding as to the scope of the defendant's agreement).

*United States v. Copus, 93 F.3d 269 (7th Cir. 1996) (The court's estimate of drug quantity lacked a sufficient indicia of reliability).

United States v. Gutierrez-Hernandez, 94 F.3d 582 (9th Cir. 1996) (There was no presumption that three drug manufacturers were equally culpable).

*United States v. Chalarca, 95 F.3d 239 (2nd Cir. 1996) (When negotiated drug amount was not foreseeable, the court should use the lowest possible quantity).

*United States v. Jinadu, 98 F.3d 239 (6th Cir.), cert. denied, 520 U.S. 1179 (1997) (Court could not rely on drug quantities alleged in indictment to determine a mandatory minimum).

United States v. Agis-Meza, 99 F.3d 1052 (11th Cir. 1996) (Extrapolation of drug amounts was not a sufficient basis for findings).

United States v. Randolph, 101 F.3d 607 (8th Cir. 1996) (The trial court inadequately explained its drug quantity findings).

*United States v. Shonubi, 103 F.3d 1085 (2nd Cir. 1997) (Multiplying quantity of seized drugs by number of previous trips was an inadequate measure).

In Re Sealed Case, 108 F.3d 372 (D.C. Cir. 1997) (A court failed to make findings attributing all drugs to the defendant).

*United States v. Milledge, 109 F.3d 312 (6th Cir. 1997) (Evidence did not justify drug quantity finding).

United States v. Rodriguez, 112 F.3d 374 (8th Cir. 1997) (Insufficient evidence of drug quantities).

United States v. Jackson, 115 F.3d 843 (11th Cir. 1997) (Package containing 1% cocaine and 99% sugar was not a mixture under the guidelines).

*United States v. Granados, 117 F.3d 1089 (8th Cir. 1997) (The court failed to make specific drug quantity findings).

*United States v. Patel, 131 F.3d 1195 (7th Cir. 1997) (Evidence was insufficient that seized money could support cocaine quantities).

United States v. Whitecotton, 142 F.3d 1194 (9th Cir. 1998) (Later drug sales were not foreseeable to defendant).

United States v. Perulena, 146 F.3d 1332 (11th Cir. 1998) (Defendant was not responsible for marijuana imported before he joined conspiracy).

*United States v. Wyss, 147 F.3d 631 (7th Cir. 1998) (Drugs for personal use could not be counted toward distribution quantity).

United States v. Bacallao, 149 F.3d 717 (7th Cir. 1998) (No showing prior cocaine transactions were relevant conduct).

United States v. Gore, 154 F.3d 34 (2nd Cir. 1998) (Possession and distribution of the same drugs may only be punished once).

United States v. Brown, 156 F.3d 813 (8th Cir. 1999) (Court should have only based sentence on drug quantity proven by government).

United States v. Marrero-Ortiz, 160 F.3d 768 (1st Cir. 1999) (Insufficient evidence of drug quantity).

United States v. Garrett, 161 F.3d 1131 (8th Cir. 1999) (Insufficient evidence of drug quantity).

United States v. Flowal, 163 F.3d 956 (6th Cir.), cert. denied, 119 S.Ct. 1509 (1999) (Drug quantity was arbitrarily chosen).

United States v. Gomez, 164 F.3d 1354 (11th Cir. 1999) (Unrelated drug sales were not relevant conduct to conspiracy).

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

United States v. Moore, 212 F.3d 441 (8th Cir. 441 (8th Cir. 2000) (Defendant's responsibility for

drugs limited to jointly undertaken activity).

Sentencing - Marijuana

*United States v. Foree, 43 F.3d 1572 (11th Cir. 1995) (Seedlings and cuttings do not count as marijuana plants).

United States v. Smith, 51 F.3d 980 (11th Cir. 1995) (Weight of wet marijuana was improperly counted).

*United States v. Antonietti, 86 F.3d 206 (11th Cir. 1996) (Counting seedlings as marijuana plants to calculate the base offense level was plain error).

United States v. Agis-Meza, 99 F.3d 1052 (11th Cir. 1996) (The court had an insufficient basis to calculate a quantity of marijuana based upon cash and money wrappers seized).

*United States v. Carter, 110 F.3d 759 (11th Cir. 1997) (The court abused its discretion in denying a motion for a reduction of a sentence over weight of wet marijuana).

*United States v. Mankiewicz, 122 F.3d 399 (7th Cir. 1997) (Marijuana that was rejected by defendants should not have been counted).

Sentencing - Meth.

*United States v. Ramsdale, 61 F.3d 825 (11th Cir. 1995) (Improperly sentenced for D-methamphetamine rather than "L").

United States v. McMullen, 86 F.3d 135 (8th Cir. 1996) (A judge could not determine the type of methamphetamine based upon the

judge's experience, the price, or where the drugs came from).

United States v. Cole, 125 F.3d 654 (8th Cir. 1997) (A defendant's testimony about his ability to manufacture was relevant).

United States v. O'Bryant, 136 F.3d 980 (5th Cir. 1998) (Government has burden of proving more serious form of methamphetamine).

Sentencing - Crack

United States v. Chisholm, 73 F.3d 304 (11th Cir. 1996) (There was no factual basis that the defendant knew powder would be converted to crack).

*United States v. James, 78 F.3d 851 (3rd Cir.), cert. denied, 519 U.S. 844 (1996) (There was not proof that the cocaine base was crack for enhanced penalties to apply).

Sentencing - Firearms

United States v. Bernardine, 73 F.3d 1078 (11th Cir. 1996) (The government failed to prove the defendant was a marijuana user, and thus he was not a prohibited person under U.S.S.G. §2K2.1 (a) (6)).

United States v. Mendoza-Alvarez, 79 F.3d 96 (8th Cir. 1996) (Simply carrying a firearm in one's car was not otherwise unlawful use).

United States v. Roxborough, 94 F.3d 213 (6th Cir.), amended, 99 F.3d 212 (1996) (Obliterating serial numbers on a firearm was not be relevant conduct to justify an increase). WITHDRAWN FROM BOUND VOLUME

*United States v. Barton, 100 F.3d 43 (6th Cir. 1996) (Enhancement under §2K2.1(a) (1) relating to prior convictions covered only those before the instant offense).

United States v. Moit, 100 F.3d 605 (8th Cir. 1996) (Possession of shotguns and hunting rifles qualified for "sporting or collection" reduction).

*United States v. Willis, 106 F.3d 966 (11th Cir. 1997) (A defendant who previously pleaded nolo contendere in a Florida state court was not convicted for purposes of being a felon in possession of a firearm).

*United States v. Cooper, 111 F.3d 845 (11th Cir. 1997) (Firearm that was not possessed at the site of drug offense did not justify 2-level enhancement).

*United States v. Knobloch, 131 F.3d 366 (3rd Cir. 1997) (Court could not impose an increase for a firearm when there was a consecutive gun count).

United States v. McDonald, 165 F.3d 1032 (6th Cir. 1999) (Felon who stole firearm was not using it in connection with another felony).

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

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

United States v. Pena-Lora, 225 F.3d 17 (1st Cir. 2000) (Identity was not proven to award

enhancement).

Sentencing - Money Laundering

United States v. Jenkins, 58 F.3d 611 (11th Cir. 1995) ("Rule of lenity" precluded counting money laundering transactions under \$10,000).

*United States v. Allen, 76 F.3d 1348 (5th Cir.), cert. denied, 519 U.S. 841 (1996) (Money laundering guidelines should have been based on the amount of money laundered, not the loss in a related fraud).

United States v. Gabel, 85 F.3d 1217 (7th Cir. 1996) (Robberies and burglaries were not relevant conduct in a money laundering case).

United States v. Morales, 108 F.3d 1213 (10th Cir. 1997) (Drug mandatory minimum did not apply to money laundering offense).

Sentencing - Pornography

United States v. Cole, 61 F.3d 24 (11th Cir.), cert. denied, 516 U.S. 1163 (1996) (Insufficient evidence of child pornography depicting minors under twelve).

*United States v. Ketcham, 80 F.3d 789 (3rd Cir. 1996) (Enhancement for exploitation of a minor was reversed in a child pornography case for insufficient evidence).

*United States v. Surratt, 87 F.3d 814 (6th Cir. 1996) (Defendant's sexual abuse, unrelated to receiving child pornography did not prove a pattern of activity to increase the offense level).

*United States v. Kemmish, 120 F.3d 937 (9th Cir.), cert. denied, 522 U.S. 1132 (1998) (The defendant did not engage in a pattern of exploitation).

United States v. Fowler, 216 F.3d 459 (5th Cir. 2000) (Child porn was distributed under statute, but not for guideline enhancement).

Sentencing - Fraud / Theft

*United States v. Maurello, 76 F.3d 1304 (3rd Cir. 1996) (Loss to a fraud victim was mitigated by the value received by the defendant's actions).

*United States v. Millar, 79 F.3d 338 (2nd Cir. 1996) (Adjustment for affecting a financial institution was limited to money received by the defendant).

United States v. Eyoum, 84 F.3d 1004 (7th Cir.), cert. denied, 519 U.S. 941 (1996) (The fair market value, rather than the smuggler's price, should have been used to calculate the value of illegally smuggled wildlife).

United States v. Strevel, 85 F.3d 501 (11th Cir. 1996) (In determining the amount of loss, the court could not rely solely on stipulated amounts).

United States v. King, 87 F.3d 1255 (11th Cir. 1996) (Without proof the defendant committed the burglary, other stolen items, not found in his possession, could not be calculated toward loss).

United States v. Sung, 87 F.3d 194 (7th Cir. 1996) (Findings did not establish reasonable certainty that the defendant intended to sell the base level quantity of counterfeit goods).

United States v. Allen, 88 F.3d 765 (9th Cir.), cert. denied, 520 U.S. 1202 (1997) (Collateral recovered to secure a loan, and the interest paid, was not subtracted from loss in a fraud case).

United States v. Cowart, 90 F.3d 154 (6th Cir. 1996) (A common modus operandi alone, did not make robberies part of a common scheme).

United States v. Krenning, 93 F.3d 1257 (4th Cir. 1996) (The value of rented assets bore no reasonable relationship to the victim's loss).

United States v. Comer, 93 F.3d 1271 (6th Cir. 1996) (An acquitted theft was not sufficiently proven to include in loss calculations).

United States v. Coffman, 94 F.3d 330 (7th Cir.), cert. denied, 520 U.S. 1165 (1997) (A previous fraud using the same worthless stock was not relevant conduct).

United States v. Olbres, 99 F.3d 28 (1st Cir. 1996) (Adoption of PSI was not a finding of tax loss).

United States v. Peterson, 101 F.3d 375 (5th Cir.), cert. denied, 520 U.S. 1161 (Violation of fiduciary duty was not necessarily criminal conduct for application of relevant conduct).

*United States v. Kohli, 110 F.3d 1475 (9th Cir. 1997) (There was insufficient evidence of the quantity of fraud attributed).

*United States v. Sepulveda, 115 F.3d 882 (11th Cir. 1997) (Evidence did not support the alleged volume of unauthorized calls).

*United States v. Rutgard, 116

F.3d 1270 (9th Cir. 1997) (That the defendant's business was "permeated with fraud" was too indefinite a finding).

United States v. Arnous, 122 F.3d 321 (6th Cir. 1997) (Food stamp fraud should have been valued by lost profits, not the face value of the stamps).

United States v. Sublett, 124 F.3d 693 (5th Cir. 1997) (Loss during contract fraud did not include legitimate services actually provided).

*United States v. McIntosh, 124 F.3d 1330 (10th Cir. 1997) (Failure to disclose his interest in a residence that the defendant did not own was not bankruptcy fraud).

United States v. Barnes, 125 F.3d 1287 (9th Cir. 1997) (Services that were satisfactorily performed should have been subtracted from loss).

United States v. Monus, 128 F.3d 376 (6th Cir. 1997) (A court did not adequately explain loss findings).

United States v. Cain, 128 F.3d 1249 (8th Cir. 1997) (Sales made before defendant was hired were not relevant conduct toward fraud).

*United States v. Word, 129 F.3d 1209 (11th Cir. 1997) (Fraud, before defendant joined conspiracy, was not relevant conduct).

United States v. Melton, 131 F.3d 1400 (10th Cir. 1997) (Unforeseeable acts of fraud could not be attributed to defendant).

United States v. Desantis, 134 F.3d 760 (6th Cir. 1998) (Neither defendant's business failure, nor state administrative findings, were relevant to fraud case).

*United States v. Cihak, 137 F.3d 252 (5th Cir.), cert. denied, 119 S.Ct. 118 (1998) (Fraud of coconspirators must be foreseeable to defendant to be relevant conduct).

United States v. Tatum, 138 F.3d 1344 (11th Cir. 1998) (Application note governing fraudulent contract procurement should have been applied rather than theft guideline).

United States v. Phath, 144 F.3d 146 (1st Cir. 1998) (Depositing counterfeit checks and withdrawing money did not require more than minimal planning).

United States v. Sapoznik, 161 F.3d 1117 (7th Cir. 1999) (Calculation of benefits from bribes did not support findings).

United States v. Ponec, 163 F.3d 486 (8th Cir. 1999) (No showing that money withdrawn from defendant's account came from employer).

Enhancements- General

United States v. Tapia, 59 F.3d 1137 (11th Cir.), cert. denied, 516 U.S. 953 (1995) (Using phone to call codefendant was not more than minimal planning).

*United States v. Miller, 77 F.3d 71 (4th Cir. 1996) (Enhancement for manufacturing counterfeit notes did not apply to those so obviously counterfeit that they are unlikely to be accepted).

United States v. Torres, 81 F.3d 900 (9th Cir. 1996) (The government must prove sentencing enhancements by a preponderance

of evidence).

United States v. Tavares, 93 F.3d 10 (1st Cir.), cert. denied, 519 U.S. 955 (1996) (A finding that an aggravated assault occurred was inconsistent with a finding of no serious bodily injury).

United States v. Kraig, 99 F.3d 1361 (6th Cir. 1996) (There was insufficient evidence that the defendant employed sophisticated means).

United States v. Brazel, 102 F.3d 1120 (11th Cir.), cert. denied, 522 U.S. 822 (1997) (A sentence could not be enhanced with convictions that were not final).

*United States v. Carrozzella, 105 F.3d 796 (2nd Cir. 1997) (An enhancement for violation of a judicial order did not apply to every perceived abuse of judicial process).

United States v. Eshkol, 108 F.3d 1025 (9th Cir.), cert. denied, 522 U.S. 841 (1997) (Only existing counterfeit bills could be counted toward upward adjustment).

*United States v. DeMartino, 112 F.3d 75 (2nd Cir. 1997) (Court was without authority to increase a sentence that was not mere clerical error).

*United States v. Shaddock, 112 F.3d 523 (1st Cir. 1997) (There was no proof that a defendant violated a judicial order during a course of fraud).

United States v. Zelaya, 114 F.3d 869 (9th Cir. 1997) (An express threat of death was not foreseeable to the accomplice-defendant).

*United States v. Calozza, 125

F.3d 687 (9th Cir. 1997) (Identical enhancements for separately grouped counts was double-counting).

United States v. Rogers, 126 F.3d 655 (5th Cir. 1997) (An attempted drug crime did not support career offender enhancement).

*United States v. Barakat, 130 F.3d 1448 (11th Cir. 1997) (Enhancement for sophisticated means could not be based on acquitted conduct).

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

Enhancements- Drug Crimes

United States v. Ruiz-Castro, 92 F.3d 1519 (10th Cir. 1996) (A court failed to inquire whether the defendant had notice of the government's intent to seek an enhanced sentence with a prior drug conviction).

*United States v. Ekinçj, 101 F.3d 838 (2nd Cir. 1996) (Unlawful dispensing of drugs by a doctor was not subject to an enhancement for proximity to a school).

United States v. Mikell, 102 F.3d 470 (11th Cir.), cert. denied, 520 U.S. 1181 (1997) (A defendant who was subject to an enhanced sentence under 21 U.S.C. §841, could collaterally attack a prior conviction).

United States v. Chandler, 125 F.3d 892 (5th Cir. 1997) (Enhancement for drug sale near school only applies when it is charged by indictment).

United States v. Hudson, 129 F.3d 994 (8th Cir. 1997) (A firearm enhancement was not proven).

United States v. Sanchez, 138 F.3d 1410 (11th Cir. 1998) (Court must hold a hearing if defendant challenges validity of a prior drug conviction used for statutory enhancement).

United States v. Saavedra, 148 F.3d 1311 (11th Cir. 1998) (Defendant could not receive increase for selling drugs near school unless so charged).

United States v. Hass, 150 F.3d 443 (5th Cir. 1998) (Nonfinal state conviction could not be basis for statutory enhancement of drug sentence).

United States v. Schmalzried, 152 F.3d 354 (5th Cir. 1998) (Government failed to connect firearm to drug offense).

United States v. Rettelle, 165 F.3d 489 (6th Cir. 1999) (Mandatory minimum controlled by drugs associated with conviction only).

United States v. Hands, 184 F.3d 1322 (11th Cir. 1999) (Domestic abuse was irrelevant to drug conspiracy).

United States v. Crawford, 185 F.3d 1024 (9th Cir. 1999) (Proximity to school must be charged in order for enhancement to apply).

United States v. Garrett, 189 F.3d 610 (7th Cir. 1999) (Guilty plea colloquy was not admission to crack, as opposed to powder, for sentencing purposes).

United States v. Chastain, 198 F.3d 1338 (11th Cir. 1999) (Improper enhancement for use of private

plane in drug case).

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

United States v. Smith, 210 F.3d 760 (7th Cir. 2000) (Tossing drugs out window during chase was not reckless endangerment).

United States v. Szakacs, 212 F.3d 344 (7th Cir. 2000) (Possession of firearm had no connection to drugs).

Enhancements- Violence

United States v. Murray, 82 F.3d 361 (10th Cir. 1996) (In an assault case, an enhancement for discharging a firearm did not apply to shots fired after the assault).

United States v. Rivera, 83 F.3d 542 (1st Cir. 1996) (There was insufficient evidence that a rape involved serious bodily injury).

*United States v. Alexander, 88 F.3d 427 (6th Cir. 1996) (A note indicating the presence of a bomb, and a request to cooperate to prevent harm, during a bank robbery, was not an express threat of death).

United States v. Shenberg, 89 F.3d 1461 (11th Cir.), cert. denied, 519 U.S. 1117 (1997) (More than minimal planning increase did not apply to plan to assault a fictitious informant).

United States v. Triplett, 104 F.3d 1074 (8th Cir.), cert. denied, 520 U.S. 1236 (1997) (A threat of death adjustment was double counting in 18 U.S.C. §924 (c)

case).

United States v. Reyes-Oseguera, 106 F.3d 1481 (9th Cir. 1997) (Flight on foot was insufficient for reckless endangerment enhancement).

United States v. Dodson, 109 F.3d 486 (8th Cir. 1997) (There lacked proof of bodily injury for enhancement).

United States v. Sawyer, 115 F.3d 857 (11th Cir. 1997) (Enhancement for bodily injury was not supported by alleged psychological injury).

United States v. Drapeau, 121 F.3d 344 (8th Cir. 1997) (Enhancement for assaulting a government official applicable only when official is victim of the offense).

United States v. Sovie, 122 F.3d 122 (2nd Cir. 1997) (Evidence to support enhancement for intending to carry out threat was insufficient).

United States v. Bourne, 130 F.3d 1444 (11th Cir. 1997) (Applying both brandishing weapon and threat of death enhancements was double counting).

*United States v. Hayes, 135 F.3d 435 (6th Cir. 1998) (Enhancements for reckless endangerment, and assault, during flight, were double counting).

United States v. Tolen, 143 F.3d 1121 (8th Cir. 1998) (Putting hand in pocket and warning to cooperate or "no one will get hurt" was not express threat of death).

United States v. Kushmaul, 147 F.3d 498 (6th Cir. 1998) (Holding baseball bat was not "otherwise used").

*United States v. Thomas, 155 F.3d 833 (7th Cir. 1999) (Intent to carry out threat could not be proven by criminal history).

United States v. Smith, 156 F.3d 1046 (10th Cir. 1999) (Insufficient evidence of actual or threatened force or violence).

United States v. Richardson, 161 F.3d 728 (D.C. Cir. 1999) (Burglary not shown to be crime of violence).

*United States v. Anglin, 169 F.3d 154 (2nd Cir. 1999) (Bank tellers were not physically restrained).

United States v. Leahy, 169 F.3d 433 (7th Cir. 1999) (Departure of 10 levels for analogous terrorism enhancement was unreasonable).

United States v. Zendeli, 180 F.3d 879 (7th Cir. 1999) (Enhancement for injury does not apply to codefendant's injury).

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

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

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).

Watterson v. United States, 219 F.3d 232 (3rd Cir. 2000) (No enhancement for drugs in proximity to school unless charged under that statute).

United States v. Rebmann, 226 F.3d 521 (6th Cir. 2000) (Elements of death or serious bodily injury must be proven beyond a reasonable doubt in drug case).

Enhancements-Immigration

*United States v. Fuentes-Barahona, 111 F.3d 651 (9th Cir. 1997) (Conviction occurring before effective date of guideline amendment could not be considered as aggravated felony).

United States v. Herrera-Solorzano, 114 F.3d 48 (5th Cir. 1997) (A prior probated felony was not an aggravated felony in an illegal reentry case).

United States v. Reyna-Espinosa, 117 F.3d 826 (5th Cir. 1997) (A prior conviction for being an alien in unlawful possession of a firearm was not an aggravated felony).

*United States v. Viramontes-Alvarado, 149 F.3d 912 (9th Cir.), cert. denied, 119 S.Ct. 434 (1998) (Noncitizen's priors were not aggravated felonies).

United States v. Avilia-Ramirez, 170 F.3d 277 (2nd Cir. 1999) (Defendant's prior aggravated felony was not a listed offense at the time of his reentry).

United States v. Guzman-Bera, 216 F.3d 1019 (11th Cir. 2000) (Theft was not aggravated felony at time of deportation and reentry).

Career Enhancements

*United States v. Murphy, 107 F.3d 1199 (6th Cir. 1997) (Two prior robberies were a single episode under Armed Career

Criminal Act).

United States v. Bennett, 108 F.3d 1315 (10th Cir. 1997) (There was no proof that a prior burglary involved a dwelling or physical force under career offender provisions).

United States v. Hicks, 122 F.3d 12 (7th Cir. 1997) (Burglary of a building was not a crime of violence for career offender enhancement).

*United States v. Covington, 133 F.3d 639 (8th Cir. 1998) (Evidence did not show imprisonment within last 15 years on predicate offense used for career offender enhancement).

United States v. Gottlieb, 140 F.3d 865 (10th Cir. 1998) (Defendant established that no firearm or dangerous weapon was used in prior conviction defeating Three Strikes enhancement).

United States v. Dahler, 143 F.3d 1084 (7th Cir. 1998) (Defendant whose rights were restored was not armed career criminal).

United States v. McElyea, 158 F.3d 1016 (9th Cir. 1999) (Crimes of a single transaction may not be counted separately under Armed Career Criminal Act).

*United States v. Thomas, 159 F.3d 296 (7th Cir.), cert. denied, 119 S.Ct. 2370 (1999) (Statutory rape without violence was not predicate crime under Armed Career Criminal Act).

United States v. Richardson, 166 F.3d 1360 (11th Cir. 1999) (Prior conviction under Armed Career Criminal Act must occur before felon in possession violation).

United States v. Wilson, 168 F.3d 916 (6th Cir. 1999) (Burglary of a building is not a career offender predicate unless it involves physical force, or its threat or attempt).

United States v. Sacko, 178 F.3d 1 (1st Cir. 1999) (Court could not look at facts of prior conviction to determine whether it was a violent felony).

United States v. Casarez-Bravo, 181 F.3d 1074 (9th Cir. 1999) (Prior conviction not counted under criminal history cannot be used as career offender predicate).

United States v. Martin, 215 F.3d 470 (4th Cir. 2000) (Bank larceny is not a crime of violence).

United States v. Matthews, 226 F.3d 1075 (9th Cir. 2000) (No records supporting prior convictions for Armed Career Criminal).

Cross References

United States v. Lagasse, 87 F.3d 18 (1st Cir. 1996) (There was no link between a knife-point robbery of a coconspirator, and the charged drug conspiracy, to justify an increase in sentence).

*United States v. Aderholt, 87 F.3d 740 (5th Cir. 1996) (Murder guidelines were improperly applied in a mail fraud conspiracy because murder was not an object of the conspiracy).

United States v. Meacham, 115 F.3d 1488 (10th Cir. 1997) (Transportation of a child, not involving prostitution or production of a visual depiction, required cross reference to lower base level for sexual contact).

*United States v. Jackson, 117 F.3d 533 (11th Cir. 1997) (A police officer convicted of theft should not have been sentenced under civil rights guidelines).

United States v. Cross, 121 F.3d 234 (6th Cir. 1997) (Torture was not relevant conduct in a drug case).

*United States v. Sanders, 162 F.3d 396 (6th Cir. 1999) (Possibility that defendant could have been charged with state burglary did not mean firearm was used in connection with another offense).

Abuse of Trust

United States v. Jolly, 102 F.3d 46 (2nd Cir. 1996) (Corporate principal could not get abuse of trust enhancement for defrauding lenders).

United States v. Long, 122 F.3d 1360 (11th Cir. 1997) (Abuse of trust enhancement did not apply to prison employee who brought in contraband).

*United States v. Garrison, 133 F.3d 831 (11th Cir. 1998) (Owner of a health care provider did not occupy position of trust with Medicare).

United States v. Burt, 134 F.3d 997 (10th Cir. 1998) (Deputy sheriff's drug dealing did not merit abuse of trust or special skills enhancements).

United States v. Reccko, 151 F.3d 29 (1st Cir. 1998) (Police switchboard operator did not occupy position of trust).

*United States v. Wadena, 152 F.3d 831 (8th Cir.), cert. denied,

119 S.Ct. 1355 (1999) (Money laundering, unrelated to defendant's position, did not warrant abuse of trust).

United States v. Holt, 170 F.3d 698 (7th Cir. 1999) (Part-time police officer did not justify abuse of trust enhancement).

United States v. Guidry, 199 F.3d 1150 (10th Cir. 1999) (Defendant must have relationship of trust with victim for abuse of trust to apply).

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

United States v. Ward, 222 F.3d 909 (11th Cir. 2000) (Bank guard did not occupy position of trust).

Obstruction of Justice

United States v. Williams, 79 F.3d 334 (2nd Cir. 1996) (In order to justify an obstruction of justice enhancement, the court had to find the defendant knowingly made a false statement under oath).

*United States v. Strang, 80 F.3d 1214 (7th Cir. 1996) (Perjury in another case did not warrant an obstruction of justice enhancement in the instant case).

United States v. Medina-Estrada, 81 F.3d 981 (10th Cir. 1996) (A court must have found all elements of perjury are proven to give enhancement for obstruction of justice).

United States v. Hernandez, 83 F.3d 582 (2nd Cir. 1996) (Staring at a witness and calling them "the devil," did not justify enhancement for intimidation).

United States v. Sisti, 91 F.3d 305 (2nd Cir. 1996) (Obstruction of justice was only proper for conduct related to the conviction).

United States v. Ruggiero, 100 F.3d 284 (2nd Cir. 1996) (A judge properly refused to apply an obstruction of justice enhancement).

*United States v. Draves, 103 F.3d 1328 (7th Cir.), cert. denied, 521 U.S. 1127 (1997) (Fleeing from a police car was not obstruction of justice).

United States v. Harris, 104 F.3d 1465 (5th Cir.), cert. denied, 522 U.S. 833 (1997) (Actions of accessory after the fact did not justify obstruction enhancement when those same acts supported the substantive offense).

United States v. Zagari, 111 F.3d 307 (2nd Cir. 1997) (There was no finding to support obstruction enhancement).

United States v. Tackett, 113 F.3d 603 (6th Cir. 1997) (The court failed to find that government resources were wasted for obstruction enhancement).

United States v. Sawyer, 115 F.3d 857 (11th Cir. 1997) (Sentencing increase for reckless endangerment only applied to defendant fleeing law enforcement officer, not civilians).

United States v. Sassanelli, 118 F.3d 495 (6th Cir. 1997) (Obstruction findings did not specify which statements were materially untruthful).

United States v. Solono-Godines, 120 F.3d 957 (9th Cir. 1997) (A misrepresentation by the defendant did not obstruct justice).

United States v. Webster, 125 F.3d 1024 (7th Cir. 1997) (A finding that the defendant testified falsely lacked specificity).

United States v. Senn, 129 F.3d 886 (7th Cir. 1997) (Lying about minor details to grand jury was not obstruction).

United States v. Norman, 129 F.3d 1393 (10th Cir. 1997) (Concealing drugs at scene of crime was not obstruction).

United States v. McRae, 156 F.3d 708 (6th Cir. 1999) (Insufficient findings of obstruction of justice).

United States v. Jones, 159 F.3d 969 (6th Cir. 1999) (Irrelevant false testimony did not support obstruction of justice).

United States v. Koeberlein, 161 F.3d 946 (6th Cir. 1999) (Failure to appear on unrelated offense was not obstruction).

United States v. Monzon-Valenzuela, 186 F.3d 1181 (9th Cir. 1999) (Absent perjury finding, adjustment for obstruction did not apply).

United States v. Gage, 183 F.3d 711 (7th Cir. 1999) (Defendant's denial that his robbery note mentioned a firearm did not justify obstruction adjustment).

United States v. Amsden, 213 F.3d 1014 (8th Cir. 2000) (Defendant convicted of threatening communications did not obstruct justice by sending additional threatening letter).

Vulnerable Victim

*United States v. Castellanos, 81 F.3d 108 (9th Cir. 1996) (Merely because a fraud scheme used

Spanish language media, did not justify an enhancement for victims particularly susceptible to fraud).

*United States v. Stover, 93 F.3d 1379 (8th Cir. 1996) (Persons' desire to adopt children did not make them vulnerable victims of an adoption agency).

United States v. Shumway, 112 F.3d 1413 (10th Cir. 1997) (Prehistoric skeletal remains were not vulnerable victims).

*United States v. Robinson, 119 F.3d 1205 (5th Cir.), cert. denied, 522 U.S. 1139 (1998) (Asian-American merchants were not vulnerable victims).

United States v. Hogan, 121 F.3d 370 (8th Cir. 1997) (Victims must have been targeted in order to be considered vulnerable).

United States v. Monostra, 125 F.3d 183 (3rd Cir. 1997) (A victim's vulnerability must facilitate the crime in some manner).

United States v. McCall, 174 F.3d 47 (2nd Cir. 1999) (Vulnerable victim enhancement is not a relative standard).

United States v. Pospisil, 186 F.3d 1023 (8th Cir. 1999) (No evidence that defendant knew victims were vulnerable).

Aggravating Role

United States v. Ivy, 83 F.3d 1266 (10th Cir.), cert. denied, 519 U.S. 901 (1996) (There were insufficient findings for a managerial role).

United States v. Lozano-Hernandez, 89 F.3d 785 (11th Cir. 1996) (Leadership role in drug conspiracy was not proven).

United States v. Patasnik, 89 F.3d 63 (2nd Cir. 1996) (A management role had to be based on managing people, not assets).

United States v. Wester, 90 F.3d 592 (1st Cir. 1996) (The court failed to make findings there were five or more participants).

United States v. Miller, 91 F.3d 1160 (8th Cir. 1996) (The lack of evidence that the defendant controlled others precluded a leadership role).

*United States v. Albers, 93 F.3d 1469 (10th Cir. 1996) (A leadership role had to be based upon leadership, and not the defendant's importance to the success of the conspiracy).

United States v. Delpit, 94 F.3d 1134 (8th Cir. 1996) (A murder-for-hire scheme had less than five participants).

United States v. Avila, 95 F.3d 887 (9th Cir. 1996) (A defendant who was the sole contact between a buyer and a seller was not an organizer).

United States v. Jobe, 101 F.3d 1046 (5th Cir.), cert. denied, 118 S.Ct. 81 (1997) (Defendant's position as bank director did not justify managerial role when he did not manage or supervise others).

United States v. DeGovanni, 104 F.3d 43 (3rd Cir. 1997) (A corrupt police sergeant was not a supervisor merely because of his rank).

United States v. Eidson, 108 F.3d 1336 (11th Cir.), cert. denied, 118 S.Ct. 248 (1997) (Clean Water Act violation lacked five participants for role adjustment).

United States v. Gort-Didonato, 109 F.3d 318 (6th Cir. 1997) (To impose an upward role adjustment, the defendant must have supervised at least one person).

United States v. Bryson, 110 F.3d 575 (8th Cir. 1997) (Facts did not support upward adjustment for role).

United States v. Logan, 121 F.3d 1172 (8th Cir. 1997) (Record did not support upward role adjustment).

United States v. Makiewicz, 122 F.3d 399 (7th Cir. 1997) (Defendant was not a leader for asking his father to accompany informant to motel).

United States v. Del Toro-Aguilar, 138 F.3d 340 (8th Cir. 1998) (Occasionally fronting drugs to coconspirators did not justify upward role adjustment).

United States v. Alred, 144 F.3d 1405 (11th Cir. 1998) (Defendant was not an organizer).

United States v. Lopez-Sandoval, 146 F.3d 712 (9th Cir. 1998) (Defendant was not an organizer).

*United States v. Glington, 154 F.3d 1245 (11th Cir.), cert. denied, 119 S.Ct. 1281 (No managerial role for defendant who did not supervise or control others).

United States v. Walker, 160 F.3d 1078 (6th Cir. 1999) (Insufficient evidence of organizer role).

United States v. Graham, 162 F.3d 1180 (D.C. Cir. 1999) (Conclusionary statement that defendant was lieutenant did not justify role adjustment).

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

Mitigating Role

United States v. Moeller, 80 F.3d 1053 (5th Cir. 1996) (No leadership role for a government official who inherited an historically corrupt system, but the defendant's lack of understanding of the entire scheme justified a minimal role adjustment).

*United States v. Miranda-Santiago, 96 F.3d 517 (1st Cir. 1996) (There was an insufficient basis to deny a minor role reduction).

*United States v. Haut, 107 F.3d 213 (3rd Cir.), cert. denied, 521 U.S. 1127 (1997) (Arson defendants who worked at direction of others were minimal participants).

*United States v. Snoddy, 139 F.3d 1224 (8th Cir. 1998) (Sole charged defendant may receive minor role when justified by relevant conduct).

United States v. Neils, 156 F.3d 382 (2nd Cir. 1999) (Defendant who merely steered buyers was minor participant).

Acceptance of Responsibility

United States v. Fells, 78 F.3d 168 (5th Cir.), cert. denied, 519 U.S. 847 (1996) (A defendant making a statutory challenge, could still qualify for acceptance of responsibility).

United States v. Patino-Cardenas, 85 F.3d 1133 (5th Cir. 1996) (There was no basis to deny credit

when the defendant did not falsely deny relevant conduct).

United States v. Garrett, 90 F.3d 210 (7th Cir. 1996) (A defendant could not be denied acceptance when he filed an uncounseled, pro se motion to withdraw plea after his attorney died).

United States v. Flores, 93 F.3d 587 (9th Cir. 1996) (A defendant should have received credit for his written statement).

*United States v. Atlas, 94 F.3d 447 (8th Cir.), cert. denied, 520 U.S. 1130 (1997) (A defendant who timely accepted responsibility must be given the additional one-level downward adjustment).

United States v. Ruggiero, 100 F.3d 284 (2nd Cir. 1996) (A single false denial did not bar credit for acceptance of responsibility).

United States v. McPhee, 108 F.3d 287 (11th Cir. 1997) (A defendant who qualified should not have been given less than the full three-point reduction for accepting responsibility).

*United States v. Guerrero-Cortez, 110 F.3d 647 (8th Cir.), cert. denied, 522 U.S. 1017 (1998) (Defendant's pretrial statements of acceptance justified reduction though case was tried).

United States v. Marroquin, 136 F.3d 220 (1st Cir. 1998) (Creation of a lab report was not the type of trial preparation to deny extra point off for accepting responsibility).

United States v. Fisher, 137 F.3d 1158 (9th Cir. 1998) (Despite not guilty plea, admission in open court could be acceptance).

United States v. McKittrick, 142

F.3d 1170 (9th Cir. 1998) (Defendant who does not contest facts at trial may be eligible for acceptance).

United States v. Ellis, 168 F.3d 558 (1st Cir. 1999) (Defendant who went to trial was still potentially eligible for acceptance of responsibility).

United States v. Rice, 184 F.3d 740 (8th Cir. 1999) (Defendant was entitled to full three-level reduction for acceptance).

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

Safety Valve

*United States v. Shrestha, 86 F.3d 935 (9th Cir. 1996) (Eligibility for the safety valve did not depend on acceptance of responsibility).

United States v. Flanagan, 87 F.3d 121 (5th Cir. 1996) (On remand, the sentencing court could withdraw a leadership role so the defendant could qualify for safety valve).

*United States v. Real-Hernandez, 90 F.3d 356 (9th Cir. 1996) (To be eligible for safety valve, a defendant did not need to give information to a specific agent).

United States v. Beltran-Ortiz, 91 F.3d 665 (4th Cir. 1996) (Failure to debrief the defendant, thus preventing him from benefitting from the safety valve, violated the plea agreement).

United States v. Miranda-Santiago, 96 F.3d 517 (1st Cir. 1996) (The government had to rebut the

defendant's version in order to deny safety valve).

United States v. Sherpa, 97 F.3d 1239 (9th Cir.), amended, 110 F.3d 656 (1997) (Even a defendant who claimed innocence was eligible if he meets requirements).

United States v. Wilson, 105 F.3d 219 (5th Cir.), cert. denied, 522 U.S. 847 (1997) (A coconspirator's use of a firearm did not bar application of the safety valve).

United States v. Osej, 107 F.3d 101 (2nd Cir. 1997) (Two-level safety valve adjustment applied regardless of mandatory minimum).

*United States v. Clark, 110 F.3d 15 (6th Cir. 1997) (Safety Valve applied to cases that were on appeal at effective date).

United States v. Mertilus, 111 F.3d 870 (11th Cir. 1997) (Safety valve applied to a telephone count).

*United States v. Mihm, 134 F.3d 1353 (8th Cir. 1998) (Court failed to consider safety valve at resentencing).

United States v. Carpenter, 142 F.3d 333 (6th Cir. 1998) (Refusal to testify did not bar safety valve).

United States v. Gama-Bastidas, 142 F.3d 1233 (10th Cir. 1998) (Court failed to make findings regarding applicability of safety valve).

*United States v. Kang, 143 F.3d 379 (8th Cir. 1998) (Defendant could not be denied safety valve because government claimed he was untruthful absent supporting evidence).

United States v. Clavijo, 165 F.3d 1341 (11th Cir. 1999) (Unforeseen

possession of firearm by coconspirator does not bar safety valve relief).

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

Criminal History

*United States v. Spell, 44 F.3d 936 (11th Cir. 1995) (Judgement could be the only conclusive proof of prior convictions).

*United States v. Talbott, 78 F.3d 1183 (7th Cir. 1996) (Under the Armed Career Criminal Act guidelines, "felon in possession" was not a crime of violence).

United States v. Douglas, 81 F.3d 324 (2nd Cir.), cert. denied, 517 U.S. 1251 (1996) (A juvenile sentence, more than five years old, was incorrectly applied).

United States v. Cox, 83 F.3d 336 (10th Cir. 1996) (It was proper to attack a guidelines sentence by a §2255 petition when prior convictions, used in the criminal history calculation, were later successfully attacked).

*United States v. Sparks, 87 F.3d 276 (9th Cir. 1996) (An attempted home invasion was not a violent felony under the Armed Career Criminal Act).

United States v. Parks, 89 F.3d 570 (9th Cir. 1996) (No criminal history points could be attributed to a defendant when indigence prevented payment of fines).

United States v. Flores, 93 F.3d 587 (9th Cir. 1996) (The court erroneously twice counted a single probation revocation to increase

two prior convictions).

United States v. Ortega, 94 F.3d 764 (2nd Cir. 1996) (An uncounseled misdemeanor was improperly counted).

United States v. Easterly, 95 F.3d 535 (7th Cir. 1996) (Fish and game violation should not have been counted).

*United States v. Pettiford, 101 F.3d 199 (1st Cir. 1996) (A prisoner could file a §2255 petition to attack a federal sentence based on state convictions that were later overturned).

*United States v. Gilchrist, 106 F.3d 297 (9th Cir. 1997) (Sentence, upon which parole began over 15 years ago, could not be counted toward criminal history).

United States v. Huskey, 137 F.3d 283 (5th Cir. 1998) (Prior convictions in same information were related cases for counting criminal history).

United States v. Walker, 142 F.3d 103 (2nd Cir. 1998) (Prior convictions for offenses that were calculated into offense level should not have received criminal history points).

United States v. Hernandez, 145 F.3d 1433 (11th Cir. 1998) (Arrest warrant did not determine nature of prior conviction).

United States v. Torres, 182 F.2d 1156 (10th Cir. 1999) (Prior convictions that are relevant conduct may not be counted toward criminal history).

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

United States v. Arnold, 213 F.3d 894 (5th Cir. 2000) (Sentence of less than a year and a day must be imposed within ten years of offense to count toward criminal history).

United States v. Stuckey, 220 F.3d 976 (8th Cir. 2000) (Military prior was not serious drug offense).

Upward Departures

United States v. Thomas, 62 F.3d 1332 (11th Cir.), cert. denied, 516 U.S. 1166 (1996) (Consequential damages did not justify an upward departure unless it was substantially in excess of typical fraud case).

*United States v. Henderson, 75 F.3d 614 (11th Cir. 1996) (An upward departure for multiple weapons in a drug case was improper when the defendant was also convicted under 18 U.S.C. §924 (c)).

United States v. Blackwell, 81 F.3d 945 (10th Cir. 1996) (Rule 35 does not give a court jurisdiction to increase a sentence later).

United States v. Harrington, 82 F.3d 83 (5th Cir. 1996) (A court should not have upwardly departed for a defendant's status as an attorney without first considering application of abuse of trust).

*United States v. Sherwood, 98 F.3d 402 (9th Cir. 1996) (Just because victims were almost vulnerable, did not justify an upward departure).

United States v. LeCompte, 99 F.3d 274 (8th Cir. 1996) (Defendant did not get notice of departure, and justification was based on an amendment after offense).

*United States v. Valentine, 100 F.3d 1209 (6th Cir. 1996) (The difference between seven and five offenses did not justify multiple count departure).

United States v. Mangone, 105 F.3d 29 (1st Cir.), cert. denied, 510 U.S. 1258 (1997) (Failure to give notice of upward departure was plain error).

*United States v. Otis, 107 F.3d 487 (7th Cir. 1997) (Failure to give notice of an upward departure was plain error).

United States v. Arce, 118 F.3d 335 (5th Cir. 1997) (Manufacturing firearms was not a basis for upward departure).

United States v. White, 118 F.3d 739 (11th Cir. 1997) (The Sentencing Commission's "undervaluation" of a guideline range was not a ground for upward departure).

United States v. DePace, 120 F.3d 233 (11th Cir. 1997) (An upward departure was without notice).

United States v. Johnson, 121 F.3d 1141 (8th Cir. 1997) (Defendant did not get notice of upward departure).

United States v. Stein, 127 F.3d 777 (9th Cir. 1997) (Upward departure based on more than minimal planning and multiple victims was unwarranted).

United States v. Corrigan, 128 F.3d 330 (6th Cir. 1997) (Neither, number of victims, number of schemes, nor amount of loss, supported upward departure).

United States v. Candelario-Cajero, 134 F.3d 1246 (5th Cir. 1998) (Absent an upward

departure, grouped counts cannot receive consecutive sentences).

United States v. Terry, 142 F.3d 702 (4th Cir. 1998) (Extent of upward departure was not supported by findings).

*United States v. Hinojosa-Gonzales, 142 F.3d 1122 (9th Cir.), cert. denied, 119 S.Ct. 576 (1999) (Defendant did not get adequate notice of upward departure).

*United States v. G.L., 143 F.3d 1249 (9th Cir. 1998) (Lenient theft guidelines did not justify upward departure).

*United States v. Almaguer, 146 F.3d 474 (7th Cir. 1998) (Use of firearm was included in guideline and did not justify upward departure).

United States v. Nagra, 147 F.3d 875 (9th Cir. 1998) (Upward departure based upon factor considered by guidelines was double counting).

*United States v. Van Metre, 150 F.3d 339 (4th Cir. 1998) (Commentary Note on grouping did not provide basis for upward departure).

United States v. Johnson, 152 F.3d 553 (6th Cir. 1998) (Arson was within heartland of cases and did not justify upward departure).

United States v. Lawrence, 161 F.3d 250 (4th Cir. 1999) (Must specify findings to depart up for under-representation of criminal history).

United States v. Whiteskunk, 162 F.3d 1244 (10th Cir. 1999) (Upward departure must include some method of analogy, extrapolation, or reference to the

guidelines).

*United States v. Jacobs, 167 F.3d 792 (3rd Cir. 1999) (Court did not adequately explain upward departure for psychological injury).

Downward Departures

United States v. Rodriguez, 64 F.3d 638 (11th Cir. 1995) (A downward departure was allowed to give credit for acceptance of responsibility on consecutive sentences).

*United States v. Grandmaison, 77 F.3d 555 (1st Cir. 1996) (A downward departure for aberrant behavior should not have been denied without examining the totality of the circumstances).

*United States v. Workman, 80 F.3d 688 (2nd Cir.), cert. denied, 519 U.S. 938 (1996) (A downward departure was permissible for prearrest rehabilitation).

Koon v. United States, 518 U.S. 81 (1996) (A district court could depart from the guidelines if (1) the reason was not specifically prohibited by the guidelines; (2) the reason was discouraged by the guidelines but exceptional circumstances apply; or (3) the reason was neither prohibited nor discouraged, and the reason was not previously addressed by the applicable guideline provisions in that case).

United States v. Conway, 81 F.3d 15 (1st Cir. 1996) (A court could not refuse a downward departure based upon information received as part of a cooperation agreement).

United States v. Lindia, 82 F.3d 1154 (1st Cir. 1996) (A court could depart downward from the career

offender guidelines).

United States v. Graham, 83 F.3d 1466 (10th Cir.), *cert. denied*, 519 U.S. 1132 (1997) (Extreme vulnerability to abuse in prison could justify a downward departure).

*United States v. Walters, 87 F.3d 663 (5th Cir.), *cert. denied*, 519 U.S. 1000 (1996) (A downward departure was approved for a defendant who did not personally benefit from money laundering).

*United States v. Cubillos, 91 F.3d 1342 (9th Cir. 1996) (A basis for downward departure could no longer be categorically rejected after *Koon*).

*United States v. Jaroszenko, 92 F.3d 486 (7th Cir. 1996) (Remorse could be considered as a ground for downward departure).

United States v. Sanders, 97 F.3d 856 (6th Cir. 1996) (Downward departure was available for an Armed Career Criminal).

United States v. Olbres, 99 F.3d 28 (1st Cir. 1996) (A court could grant departure for effect on innocent employees of the defendant).

United States v. Etherton, 101 F.3d 80 (9th Cir. 1996) (The court had authority to reduce the sentence after a revocation of supervised release when the guidelines were later amended to provide for a lower range).

United States v. Williams, 103 F.3d 57 (8th Cir. 1996) (The court could reduce a sentence for a retroactive amendment even after a reduction under Rule 35).

United States v. Lopez, 106 F.3d

309 (9th Cir. 1997) (Prosecutors' violation of ethical rule in meeting with an indicted defendant justified a downward departure).

*United States v. Brock, 108 F.3d 31 (4th Cir. 1997) (Rehabilitation was a proper basis for downward departure).

United States v. Wallace, 114 F.3d 652 (7th Cir. 1997) (A court should not have limited a downward departure just because the defendant already received credit for accepting responsibility).

United States v. Alvarez, 115 F.3d 839 (11th Cir. 1997) (A 5K1.1 motion rewards assistance prior to sentencing, while a Rule 35 (b) motion rewards assistance after sentencing. Forcing a defendant to choose when the government would seek a reduction was error).

*United States v. McBroom, 124 F.3d 533 (3rd Cir. 1997) (Reduced mental capacity was a basis for downward departure in a child porn case).

*United States v. Core, 125 F.3d 74 (2nd Cir.), *cert. denied*, 522 U.S. 1067 (1999) (Postconviction rehabilitation could justify sentence reduction).

*United States v. Rounsavall, 128 F.3d 665 (8th Cir. 1997) (Defendant was entitled to an evidentiary hearing to determine if the government's failure to move for a reduced sentence was irrational, in bad faith, or unconstitutionally motivated).

United States v. Clark, 128 F.3d 122 (2nd Cir. 1997) (Downward departure for a lesser harm was available in a felon in possession case).

United States v. O'Hagan, 139 F.3d 641 (8th Cir. 1998) (A court could depart downward to credit time served on an expired state sentence for the same conduct).

United States v. Kaye, 140 F.3d 86 (2nd Cir. 1998) (Court can depart downward based on assistance to state law enforcement without motion by government).

United States v. Campo, 140 F.3d 415 (2nd Cir. 1998) (Judge could not refuse to depart solely because he did not like USA's policy about not recommending a specific sentence).

United States v. Whitecotton, 142 F.3d 1194 (9th Cir. 1998) (Court could depart based on entrapment and diminished capacity).

United States v. Faulks, 143 F.3d 133 (3rd Cir. 1998) (Agreement not to contest forfeitures may be basis for downward departure).

United States v. Crouse, 145 F.3d 786 (6th Cir. 1998) (Civic involvement justified downward departure).

*United States v. Rhodes, 145 F.3d 1375 (D.C. Cir. 1998) (Post-conviction rehabilitation can justify downward departure).

United States v. Whitaker, 152 F.3d 1238 (10th Cir. 1998) (Post-offense drug rehabilitation can justify downward departure).

United States v. Stockheimer, 157 F.3d 1082 (2nd Cir. 1999) (Refusing to consider downward departure based on economic reality of intended loss was plain error).

United States v. Fagan, 162 F.3d 1280 (10th Cir. 1999) (Court can

depart downward for exceptional remorse).

United States v. Jones, 160 F.3d 473 (8th Cir. 1999) (Government actions prejudicing defendant can justify downward departure).

United States v. Martinez-Ramos, 184 F.3d 1055 (9th Cir. 1999) (Court had authority to depart downward to remedy sentencing disparity).

United States v. Coleman, 188 F.3d 354 (6th Cir. 1999) (Court must look at case as a whole to see if factors take case out of "heartland" for downward departure).

United States v. Rodriguez-Lopez, 198 F.3d 773 (9th Cir. 1999) (Government need not consent to departure for stipulated deportation).

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

Fines / Restitution

*United States v. Remillong, 55 F.3d 572 (11th Cir. 1995) (Restitution order reversed for a defendant with no ability to pay and no future prospects).

United States v. Ledesma, 60 F.3d 750 (11th Cir. 1995) (Restitution order could only be applied to charges of conviction).

*United States v. Mullens, 65 F.3d 1560 (11th Cir.), cert. denied, 517 U.S. 1112 (1996) (Record lacked findings to support restitution).

United States v. Maurello, 76 F.3d

1304 (3rd Cir. 1996) (The court had to make findings in support of a restitution order).

United States v. Reed, 80 F.3d 1419 (9th Cir.), cert. denied, 519 U.S. 882 (1996) (Restitution order had to be limited to conduct of conviction).

United States v. Blake, 81 F.3d 498 (4th Cir. 1996) (Restitution could only be based on the loss directly related to the offense, and the court had to make findings that the defendant can pay that amount without undue hardship).

United States v. Giwah, 84 F.3d 109 (2nd Cir. 1996) (A restitution order failed to indicate that all statutory factors were considered).

United States v. Sharma, 85 F.3d 363 (8th Cir. 1996) (No reason was given for an upward departure on a fine).

United States v. Hines, 88 F.3d 661 (8th Cir. 1996) (In assessing fine and restitution, the court should have considered the defendant's familial obligations of his recent marriage).

*United States v. Upton, 91 F.3d 677 (5th Cir.), cert. denied, 520 U.S. 1228 (1997) (No restitution was available to victims not named in the indictment).

United States v. Sablan, 92 F.3d 865 (9th Cir. 1996) (Consequential expenses could not be included in a restitution order).

United States v. Jaroszenko, 92 F.3d 486 (7th Cir. 1996) (The court failed to fully consider the defendant's ability to pay restitution).

United States v. Santos, 93 F.3d

761 (11th Cir.), cert. denied, 520 U.S. 1170 (1997) (A defendant could not be ordered to pay restitution for money taken in a robbery for which he was not convicted).

*United States v. Sanders, 95 F.3d 449 (6th Cir. 1996) (A court was not required to order restitution).

*United States v. Monem, 104 F.3d 905 (7th Cir. 1997) (A court did not make sufficient factual findings to justify the fine of a defendant who claimed inability to pay).

*United States v. McMillan, 106 F.3d 322 (10th Cir. 1997) (A court could reduce a fine pursuant to Rule 35 (b)).

United States v. Messner, 107 F.3d 1448 (10th Cir. 1997) (Restitution had to be based on actual loss).

United States v. McArthur, 108 F.3d 1350 (11th Cir. 1997) (A defendant could not be ordered to pay restitution for acquitted conduct).

United States v. Eidson, 108 F.3d 1336 (11th Cir.), cert. denied, 522 U.S. 899 (1997) (Facts did not support restitution order).

United States v. Hodges, 110 F.3d 250 (5th Cir. 1997) (1. Fine was not justified for a defendant with a negative net worth; 2. Lack of Specific findings about ability to pay).

United States v. Khawaja, 118 F.3d 1454 (11th Cir. 1997) (The government was not a victim for purposes of awarding restitution).

*United States v. Gottesman, 122 F.3d 150 (11th Cir. 1997) (A defendant's promise to pay back-

taxes did not authorize court-ordered restitution).

*United States v. Baggett, 125 F.3d 1319 (9th Cir. 1997) (Restitution must be based upon a specific statute).

United States v. Mayer, 130 F.3d 338 (8th Cir. 1997) (Restitution should not have been higher than the loss stipulated in the plea agreement).

United States v. Drinkwine, 133 F.3d 203 (2nd Cir. 1998) (Insufficient evidence that defendant could pay a fine).

United States v. Menza, 137 F.3d 533 (7th Cir. 1998) (Defendant did not have to pay restitution for amount greater than losses).

United States v. Riley, 143 F.3d 1289 (9th Cir. 1998) (Defendant could not be ordered to pay restitution on loan unrelated to fraud).

United States v. Stoddard, 150 F.3d 1140 (9th Cir. 1998) (Restitution could not exceed actual loss).

*United States v. Siegel, 153 F.3d 1256 (11th Cir. 1998) (Court must consider defendant's ability to pay restitution).

United States v. Dunigan, 163 F.3d 979 (6th Cir. 1999) (Court did not adequately consider defendant's ability to pay restitution).

United States v. Brierton, 165 F.3d 1133 (7th Cir. 1999) (Restitution can only be based on loss from charged offense).

United States v. Merric, 166 F.3d 406 (1st Cir. 1999) (Court could not delegate scheduling of

installment payments to probation officer's discretion).

United States v. Johnston, 199 F.3d 1015 (9th Cir. 1999) (Forfeited money should have been subtracted from restitution).

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

United States v. Beckett, 208 F.3d 140 (3rd Cir. 2000) (Restitution should not have been ordered without determining ability to pay).

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

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

United States v. Andra, 218 F.3d 1106 (9th Cir. 2000) (Tax loss should not have included penalties and interest).

Appeals

United States v. Byerley, 46 F.3d 694 (7th Cir. 1996) (The government waived argument by inconsistent position at sentencing).

United States v. Caraballo-Cruz, 52 F.3d 390 (1st Cir. 1995) (The government defaulted on double jeopardy claim).

*United States v. Carillo-Bernal, 58 F.3d 1490 (10th Cir. 1995) (The government failed to timely file certification for appeal).

United States v. Petty, 80 F.3d 1384 (9th Cir. 1996) (Waiver of appeal of an unanticipated error was not enforceable).

*United States v. Ready, 82 F.3d 551 (2nd Cir. 1996) (Waiver of appeal did not cover issue of restitution and was not waived).

*United States v. Thompson, 82 F.3d 700 (6th Cir. 1996) (Technicalities that did not prejudice the government were not cause to deny a motion to extend time to file an appeal).

*United States v. Agee, 83 F.3d 882 (7th Cir. 1996) (A waiver of appeal, not discussed at the plea colloquy, was invalid).

United States v. Webster, 84 F.3d 1056 (11th Cir. 1996) (When a law was clarified between trial and appeal, a point of appeal was preserved as plain error).

*United States v. Allison, 86 F.3d 940 (9th Cir. 1996) (Remand was proper even though the district court could still impose the same sentence).

*United States v. Perkins, 89 F.3d 303 (6th Cir. 1996) (Orally raising an issue at sentencing preserved it for appeal).

United States v. Stover, 93 F.3d 1379 (8th Cir. 1996) (Under the ex post facto clause, an appellate court refused to use a substantive change to the guidelines to uphold a sentence that was improper at the time imposed).

United States v. Alexander, 106 F.3d 874 (9th Cir. 1997) (Rule of the case barred reconsideration of a suppression order after remand).

United States v. Zink, 107 F.3d 716 (9th Cir. 1997) (Waiver of appeal of sentence did not cover a restitution order).

United States v. Saldana, 109 F.3d

100 (1st Cir. 1997) (A defendant had a jurisdictional basis to appeal a denial of a downward departure).

Sanders v. United States, 113 F.3d 184 (11th Cir. 1997) (A pro se petitioner's out-of-time appeal was treated as a motion for extension of time).

United States v. Arteaga, 117 F.3d 388 (9th Cir. 1997) (Evidence that was precluded at trial could not support convictions on appeal).

*In Re Grand Jury Subpoena, 123 F.3d 695 (1st Cir. 1997) (A third party may appeal the denial of a motion to quash without risking a contempt citation).

United States v. Martinez-Rios, 143 F.3d 662 (2nd Cir. 1998) (Vague appeal waiver was void).

United States v. Montez-Gavira, 163 F.3d 697 (2nd Cir. 1999) (Deportation did not moot appeal).

Resentencing

*United States v. Moore, 131 F.3d 595 (6th Cir. 1997) (A limited remand did not allow a new enhancement at resentencing).

*United States v. Wilson, 131 F.3d 1250 (7th Cir. 1997) (The government waived the issue of urging additional relevant conduct at resentencing).

United States v. Rapal, 146 F.3d 661 (9th Cir. 1998) (Higher sentence presumed vindictiveness).

*United States v. Ticchiarelli, 171 F.3d 24 (1st Cir. 1999) (Sentence imposed, between original sentence and remand, could not be counted at resentencing).

United States v. Jackson, 181 F.3d 740 (6th Cir. 1999) (Resentencing did not overcome presumption of vindictiveness).

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

Supervised Release / Probation

United States v. Doe, 53 F.3d 1081 (9th Cir. 1995) (An adjudicated juvenile could not be sentenced to supervised release).

United States v. Doe, 79 F.3d 1309 (2nd Cir. 1996) (Occupational restriction was not supported by the court's findings).

United States v. Edgin, 92 F.3d 1044 (10th Cir.), cert. denied, 519 U.S. 1069 (1997) (A court failed to provide adequate reasons to bar a defendant from seeing his son while on supervised release).

United States v. Wright, 92 F.3d 502 (7th Cir. 1996) (Simple possession of drugs was a Grade C, not a Grade A violation, of supervised release).

United States v. Leaphart, 98 F.3d 41 (2nd Cir. 1996) (A misdemeanor did not justify a two year term of supervised release).

United States v. Myers, 104 F.3d 76 (5th Cir.), cert. denied, 520 U.S. 1218 (1997) (A court could not impose consecutive sentences of supervised release).

United States v. Ooley, 116 F.3d 370 (9th Cir. 1997) (A probationer was entitled to a hearing over a

warrantless search).

*United States v. Collins, 118 F.3d 1394 (9th Cir. 1997) (Illegal ex post facto application of rule allowing additional term of release after revocation).

United States v. Romeo, 122 F.3d 941 (11th Cir. 1997) (A court could not order deportation as a condition of supervised release).

United States v. Aimufa, 122 F.3d 1376 (11th Cir. 1997) (A court lacked authority to modify conditions of release after revocation).

*United States v. Patterson, 128 F.3d 1259 (8th Cir. 1997) (Failure to provide allocution at supervised release revocation was plain error).

United States v. Pierce, 132 F.3d 1207 (8th Cir. 1997) (Probation revocation for a drug user does not require a prison sentence; treatment is an option).

United States v. Biro, 143 F.3d 1421 (11th Cir. 1998) (Deportation could not be condition of supervised release).

United States v. Bonanno, 146 F.3d 502 (7th Cir. 1998) (Court improperly delegated discretion over drug testing to probation officer).

United States v. Balogun, 146 F.3d 141 (2nd Cir. 1998) (Court could not order supervised release tolled while defendant out of country).

United States v. Giraldo-Prado, 150 F.3d 1328 (11th Cir. 1998) (Deportation cannot be condition of supervised release).

*United States v. Evans, 155 F.3d

245 (3rd Cir. 1998) (Cannot make reimbursement for court-appointed counsel a condition of supervised release).

United States v. Havier, 155 F.3d 1090 (9th Cir. 1998) (1. Motion to revoke must specifically identify charges; 2. Revocation petition did not give adequate notice of violation).

*United States v. Kingdom, 157 F.3d 133 (2nd Cir. 1998) (Revocation sentence should have been based only on most serious violation).

United States v. Waters, 158 F.3d 933 (6th Cir. 1999) (Defendant has right to allocution at revocation hearing).

United States v. Strager, 162 F.3d 921 (6th Cir. 1999) (Disrespectful call to probation officer did not justify revocation).

United States v. McClellan, 164 F.3d 308 (6th Cir. 1999) (Court must explain why it is departing above revocation guidelines).

United States v. Cooper, 171 F.3d 582 (8th Cir. 1999) (Court could not order that defendant not leave city for more than 24 hours as condition of supervised release).

Ineffective Assistance of Counsel

*Jackson v. Herring, 42 F.3d 1350 (11th Cir.), cert. denied, 515 U.S. 1189 (1995) (Trial counsel presented no mitigation evidence in capital case).

*Esslinger v. Davis, 44 F.3d 1515 (11th Cir. 1995) (Counsel failed to

determine that the defendant was a habitual offender before plea).

United States v. Cook, 45 F.3d 388 (10th Cir. 1995) (The court ordered defendant's counsel to advise a government witness to comply with her plea agreement).

*Finch v. Vaughn, 67 F.3d 909 (11th Cir. 1995) (Counsel failed to correct state trial judge's misstatements that state sentence could run concurrent with potential federal sentence).

*United States v. Stearns, 68 F.3d 328 (9th Cir. 1995) (A counsel failed to file notice of appeal).

Montemoino v. United States, 68 F.3d 416 (11th Cir. 1995) (Failure to file notice of appeal after request by defendant).

*United States v. Hansel, 70 F.3d 6 (2nd Cir. 1995) (Counsel failed to raise statute of limitations).

Upshaw v. Singletary, 70 F.3d 576 (11th Cir. 1995) (Claim of ineffective assistance of counsel at plea was not waived even though not raised on direct appeal).

United States v. Streater, 70 F.3d 1314 (D.C. 1995) (Counsel gave bad legal advice about pleading guilty).

Martin v. United States, 81 F.3d 1083 (11th Cir. 1996) (Counsel failed to file a notice of appeal when requested to do so by the defendant).

Sager v. Maass, 84 F.3d 1212 (9th Cir. 1996) (Counsel was found ineffective for not objecting to inadmissible evidence).

Glock v. Singletary, 84 F.3d 385 (11th Cir.), cert. denied, 519 U.S.

1044 (1996) (Counsel's failure to discover and present mitigating evidence at the sentencing proceeding required an evidentiary hearing).

United States v. McMullen, 86 F.3d 135 (8th Cir. 1996) (Counsel's bad sentencing advice required remand).

United States v. Del Muro, 87 F.3d 1078 (9th Cir. 1996) (Prejudice was presumed when trial counsel was forced to prove his own ineffectiveness at a hearing).

Baylor v. Estelle, 94 F.3d 1321 (9th Cir.), cert. denied, 520 U.S. 1151 (1997) (Counsel was ineffective for failing to follow up on lab reports suggesting that the defendant was not the rapist).

Huynh v. King, 95 F.3d 1052 (11th Cir. 1996) (A lawyer's failure to raise a suppression issue was grounds for remand).

United States v. Baramdyka, 95 F.3d 840 (9th Cir.), cert. denied, 520 U.S. 1132 (1997) (An appeal waiver did not bar a claim of ineffective assistance of counsel).

*United States v. Glover, 97 F.3d 1345 (10th Cir. 1996) (It was ineffective for counsel to fail to object to the higher methamphetamine range).

Martin v. Maxey, 98 F.3d 844 (5th Cir. 1996) (Failure to file a motion to suppress could be grounds for ineffectiveness claim).

Fern v. Gramley, 99 F.3d 255 (7th Cir. 1996) (Prejudice could be presumed from an attorney's failure to file an appeal upon the defendant's request).

Griffin v. United States, 109 F.3d

1217 (7th Cir. 1997) (Counsel's advice to dismiss appeal to file motion to reduce a sentence was prima facie evidence of ineffective assistance of counsel).

United States v. Kauffman, 109 F.3d 186 (3rd Cir. 1997) (Failure to investigate insanity defense was ineffective assistance of counsel).

Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997) (Failure to investigate the defendant's mental illness was ineffective assistance of counsel).

Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997) (Failure to investigate the defendant's mental illness was ineffective assistance of counsel).

United States v. Gaviria, 116 F.3d 1498 (D.C. Cir. 1997) (Counsel was ineffective for giving incorrect sentencing information in contemplation of plea).

United States v. Soto, 132 F.3d 56 (D.C. Cir. 1997) (Counsel was ineffective for failing to urge downward role adjustment).

United States v. Taylor, 139 F.3d 924 (D.C. Cir. 1998) (Counsel was ineffective for failing to inform client of advice of counsel defense).

Smith v. Stewart, 140 F.3d 1263 (9th Cir. 1998) (Failure to investigate mitigating evidence was ineffective).

Tejeda v. Dubois, 142 F.3d 18 (1st Cir. 1998) (Counsel's fear of trial judge hindered defense).

United States v. Kliti, 156 F.3d 150 (2nd Cir. 1998) (Defense counsel who witnessed exculpatory statement had conflict).

United States v. Moore, 159 F.3d 1154 (9th Cir. 1999) (Irreconcilable conflict between defendant and lawyer).

United States v. Alvarez-Tautimez, 160 F.3d 573 (9th Cir. 1999) (Counsel ineffective for failing to withdraw plea after co-defendant's suppression motion granted).

United States v. Granados, 168 F.3d 343 (8th Cir. 1999) (Counsel was ineffective for unfamiliarity with guidelines and failure to challenge breach of plea agreement).

United States v. Harfst, 168 F.3d 398 (10th Cir. 1999) (Failure to argue for downward role adjustment can be ineffective assistance of counsel).

Prou v. United States, 199 F.3d 37 (1st Cir. 1999) (Counsel failed to attack timeliness of statutory drug enhancement).

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

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

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

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

*Carter v. Bell, 218 F.3d 581 (6th Cir. 2000) (Failure to investigate mitigating evidence was ineffective assistance).

United States v. Mannino, 212 F.3d 835 (3rd Cir. 2000) (Failing to raise sentencing issue denied effective assistance).

United States v. McCoy, 215 F.3d 102 (D.C. Cir. 2000) (But for counsel's deficient performance, defendant would not have pled guilty).

Parole

John v. United States Parole Commission, 122 F.3d 1278 (9th Cir. 1997) (A parolee had a due process right to a hearing and to call witnesses).

Gambino v. Morris, 134 F.3d 156 (3rd Cir. 1998) (There was no rational basis to deny parole).

Strong v. United States Parole Commission, 141 F.3d 429 (2nd Cir. 1998) (Prisoner could not be reparaoled to special parole after revocation of original special parole).

Robles v. United States, 146 F.3d 1098 (9th Cir. 1998) (Parole Commission could not impose second special term of parole).

Whitney v. Booker, 147 F.3d 1280 (10th Cir. 1998) (Prisoner could not be reparaoled to special parole after revocation of original special parole).

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

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are appreciated!**

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**The Federal Public Defender for the Central
District of Illinois and the Illinois Association of
Criminal Defense Lawyers**

present

**Thursday, May 3, 2001
Starved Rock Lodge
Utica, Illinois**

MORNING SESSION

8:30 a.m. - 9:30 a.m. Registration

**9:30 a.m. - 9:45 a.m. Introductory Remarks
and Introduction of Speakers:** *Jonathan E.
Hawley, Appellate Division Chief.*

**9:45 a.m. - 10:30 a.m. The Electronic
Courtroom and the Rules of Evidence:
Problems and Solutions:** *Honorable Jeanne
E. Scott, United States District Judge.* Judge
Scott, as the designated "electronic judge" for
the Central District of Illinois, will discuss the
evidentiary problems and solutions which arise
in relation to the use of the electronic courtroom
and how to preserve issues for appeal when
using the electronic courtroom.

10:30 a.m. - 10:45 a.m. Break

10:45 a.m. - 11:45 a.m. Examining

Witnesses in the Electronic Age: *George F. Taseff, Senior Litigator & K. Tate Chambers, Assistant United States Attorney.*

Through a mock direct and cross-examination, Mr. Taseff and Mr. Chambers will demonstrate effective direct and cross-examination strategies using the electronic courtroom, followed by comments, questions, and answers.

11:45 a.m. - 1:30 p.m. Lunch (provided)

AFTERNOON SESSION

1:30 p.m. - 2:30 p.m. Making the Electronic Courtroom Work for Your Clients: *E.J. Hunt, Esquire, Milwaukee, Wisconsin.* Mr. Hunt, having taught himself how to use the electronic courtroom in preparation for the defense of a client charged with RICO violations in *USA v. Kevin O'Neil, et al.*, will discuss how defense attorneys can use the electronic courtroom to their client's benefit. He will also provide examples of uses made of the equipment in his cases.

2:30 p.m. - 3:30 p.m. Using PowerPoint presentations for Opening Statements and Closing Arguments: *Dean Strang, Community Defender for the Eastern District of Wisconsin.* Mr. Strang will demonstrate and discuss the art of using PowerPoint presentations to enhance the impact of opening statement and closing argument.

3:30 p.m. - 3:45 p.m. Break

3:45 p.m. - 5:00 p.m. Technical Requirements for Using the Electronic Courtroom: *Craig McCarley, Computer System Administrator.* Mr. McCarley will discuss the basic system requirements for using the electronic courtroom, what you need to know about using the court's equipment, what equipment and software you will need to have on your own computer, and the resources he and the Defender's office can provide in assisting panel attorneys with using the electronic courtroom. He will also be available for specific questions from individual attorneys at the conclusion of the program.

5:00 p.m. Adjourn

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