The BACK BENCHER

Central District of Illinois Federal Defenders

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DEFENDER'S MESSAGE

Although it is unlikely that any of us will ever represent someone directly involved with a terrorism investigation, the prosecution of the 9/11 war will affect nearly every federal prosecution as Congress enacts new legislation, such as the USA PATRIOT Act, to give the government new ways to fight terrorism. Legislation has a way of "spilling over" into areas of the law which may not have been originally intended. For example, a law giving the government more wiretap authority in terrorism investigations can soon and easily find its way into a more mundane narcotics investigation. Once given authority to act, the government's natural reaction is to expand that authority to its absolute outer limit. As criminal defense lawyers, it is our job to advocate where that limit should be and ensure that the government stays within it.

To assist you in this effort, the article, "Ways to Challenge the Detention of Your Client Who Has Been Declared a Material Witness or the Incommunicado Detention of Any Client," (authored by myself, Jonathan Hawley, and Kent Anderson) appeared in the Spring/Summer 2002 issue of *The Back Bencher*. I am pleased to announce that it has been selected for publication in the March issue of *The Champion*, which is the National Association of Criminal Defense Lawyers' monthly magazine. Given the continued war on terrorism, however, many novel and complex issues have arisen since the article first appeared in *The Back Bencher*. Accordingly, in this issue, Kent Anderson provides an update to the developments in this area of the law, which is a valuable companion to our first article. It too will appear in a shorter form in *The Champion*. In addition to the update, two other articles in this issue address topics related to the war on terrorism. David Mote, in "Interesting Times for Criminal Defense Lawyers," addresses some of the potential "spillover" effects of the 9/11 war which I note above. Likewise, in "Court: U.S. Can Hold Citizens as Enemy Combatants Appeals Court Rules in Favor of Government in Holding Hamdi," written by *Washington Post* Staff Writer Tom Jackson, the Fourth Circuit's decision on enemy combatants is discussed.

On a different note, we include an article by Allen Ellis and James Feldman entitled, "A 2255 and 2241 Primer: A Guide for Clients and their Family and Friends." This article provides an excellent introduction into this area of law which is notoriously complex. And, as usual, Jonathan Hawley's "Seventh Circuit Case Digest," Kent Anderson's "Circuit Conflicts," Johanna Christiansen's "Supreme Court Update," and Alex Bunin's "Reversible Errors," address recent developments in the law. Lest the reading of these recent developments should cast you into a deep depression, my usual *Dictum Du Jour* and Churchilliana will hopefully lift your spirits.

Old friend and fellow defender, Larry Fleming, has been kind enough to submit for publication his article entitled, "Guns Don't Kill People, Bullets Do: A Proposal for an Ammunition Data Bank for Use by Law Enforcement." While this article has a perspective different from articles one might ordinarily see in *The Back Bencher*, it contains some provocative ideas which are worthy of debate. I am sure you will find the article both interesting and thought provoking, and I thank Larry for his effort and his usual exemplary legal acumen.

For those of you interested in more "hands-on" continuing legal education, there are also a number of training opportunities on the horizon. Defender

Services' Training Branch is again this year offering seminars directed specifically at CJA panel attorneys on the following dates: April 10-12, Portland, Oregon (CJA Seminar); May 29-31, Savannah, Georgia (CJA Seminar); June 26-29, Williamsburg, Virginia (CJA Trial Advocacy Workshop); July 17-19, Denver, Colorado; August 7-9 Salt Lake City, Utah (CJA Sentencing Workshop); and September 18-20, Scottsdale, Arizona (CJA Immigration Seminar). If you are interested in attending any of these seminars, please contact me for further information. In addition to Defender Services' seminars, I am also in the process of organizing our own "in-district" seminars, and details will be forthcoming in the next issue of *The Back Bencher* as to times, places, and topics..

In closing, I encourage you to take the time to read the articles contained in this issue and attend at least one of the seminars mentioned above. The federal criminal law is ever-changing, and one can quickly lose touch with the current state of the law if a continued effort is not made to stay up-to-date. I hope that the efforts put forth by all those who contributed to this, and other, issues of *The Back Bencher*, will assist you in your continuing duty to stay abreast of the federal law.

Yours very truly,

Richard H. Parsons
Federal Public Defender
Central District of Illinois

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CHURCHILLIANA

"We have now reached a place in the journey where . . . it must be world anarchy or world order."

Dictum Du Jour

"To pretend the death penalty is going to end crime in America is to promote public ignorance."

- Rudolph W. Giullani
former Mayor of New York City
former U.S. Attorney of New York

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"Like Mycroft Holmes, I'm devoid of energy or ambition."

- Ross Thomas
The Cold War Swap

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"I had inherited what my father called the art of the advocate, or the irritating habit of looking for the flaw in any argument."

- John Mortimer
Clinging to the Wreckage (1982)

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"No brillance is needed in the law. Nothing but common sense, and relatively clean finger nails."

- John Mortimer
A Voyage Round My Father (1971)

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"Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very

constitution, if exerted without check or control, by justices of *oyer and terminer* occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have, with excellent forecast, contrived that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion."

Duncan v. Louisiana, 391 U.S. 145, 151-152 (1968), quoting 4 W. Blackstone, Commentaries on the Laws of England 349-350 (Cooley ed. 1899).

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This is a suit that is going nowhere; but the district court, by granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6), buried it prematurely because a few faint signs of life remained. A frequent filer (see *Bontkowski v. United States*, 28 F.3d 36 (7th Cir. 1994); *Bontkowski v. First National Bank of Cicero*, 998 F.2d 459 (7th cir. 1993); *Bontkowski v. Jenkins*, 661 F. Supp. 576 (N.D.Ill. 1987), aff'd, 860 F.2d 1082 (7th Cir. 1988); *Bontkowski v. United States*, 850 F.2d 306 (7th Cir. 1988)), Edward Bontkowski brought suit against his former wife, Elena Bront, and an FBI agent, Brian Smith, charging that they had conspired to steal valuable prints by Salvador Dali that he owned and to have him prosecuted on baseless charges of telephone harassment, presumably in order to impede his efforts to recover his property.

. . .

The charges border on the fantastic but do not quite cross the line into the territory, illustrated by cases in which plaintiffs complain about electrodes being implanted in their brains by inhabitants of far-off galaxies, in which a district court can, as we noted recently in Gladney v. Pendleton Correctional Facility, ... properly dismiss a complaint even though it makes factual allegations, without bothering to take any evidence.

Bontkowski v. Smith, 305 F.3d 757, 759-60 (7th Cir., 2002).

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Rollins' final issue on appeal is the novel claim that the federal bank robbery statute, 18 U.S.C. § 2113(a), was effectively repealed in 1978, two years after Congress passed the National Emergency Act, Public Law 94-412, 90 Stat. 1255 (1976). The thrust of Rollins' argument is that when President Franklin Roosevelt declared a national emergency on March 4, 1933, he suspended constitutional limitations on the expansion of federal power. The following year, Congress passed the federal bank robbery statute, which effectively displaced state law provisions governing the same underlying offense. Rollins maintains that Section 101 of the National Emergency Act officially erased the remaining vestiges of executive power that arose from prior declarations of national emergencies. *See* 50 U.S.C. § 1601(a) ("All powers and authorities possessed by the President, any other officer or employee of the Federal Government, or any executive agency, . . . as a result of the existence of any declaration of national emergency in effect on the date of enactment of this Act are terminated two years from the date of such enactment."). Rollins argues that the federal bank robbery statute was passed in a sort of constitutional vacuum created by President Roosevelt's order declaring an emergency. Since the National Emergency Act terminated the emergency and effectively filled this vacuum, Rollins maintains that federal jurisdiction for the crime of bank robbery no longer exists.

. . .

Suffice to say, we think the government has the better of the argument.

United States of America v. Rollins, 301 F.3d 511, 520-21 (7th Cir., 2002).

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Shah's complaint alleges that he had a lease with the defendant pursuant to which he invested money in renovating space for a gift shop and the defendant refused to re-new the lease, in effect confiscating the improvements that the plaintiff had made through his renovations, because of animosity to people born in India. If the complaint had stopped there, it clearly could not have been dismissed consistent with Rule 8 of the civil rules. True, the defendant might be quite unsure what statute, state or federal, or common law principle the conduct alleged in the complaint might violate, but he could smoke out the plaintiff's theory of the case by serving a contention interrogatory on him. *Ryan v. Mary Immaculate Queen Center*, 188 F.3d 857, 860 (7th Cir. 1999); *Taylor v. FDIC*, 132 F.3d 753,762 (D.C. Cir. 1997). Or the judge, if skeptical that there was any legal basis for such a complaint, could on his own initiative have asked the plaintiff to file a supporting legal memorandum. It is commendable rather than censurable in a judge to review complaints as they are filed and weed out the frivolous ones without putting the defendant to the burden of responding, provided of course that the review is conscientious and made by the judge himself (or herself) rather than delegated to staff.

The complication here is the plaintiff's confusing reference to "Illinois Public Policy," combined

with the inapt reference in the motion to reconsider (the motion the district judge denied) to the Illinois Human Rights Act, and the astonishing answer that the plaintiff's lawyer gave us at argument when asked what his legal theory was: his answer was that it was fraud. Had the plaintiff alleged not that the defendant had violated "Illinois Public Policy" but that he had violated the Rule Against Perpetuities or the Geneva Conventions, the district judge would have been within his rights in dismissing the suit as frivolous. The complaint would fail, in the most literal sense, to state a claim upon which relief might be granted. But that is not quite this case. The reference to "Illinois Public Policy" could be intended to invoke Illinois statutory and common law principles (not necessarily limited to the Human Rights Act) that would create a remedy for someone denied a contractual advantage on grounds of national origin, although we do not know whether such a remedy is available under Illinois law. And with a little research the plaintiff's lawyer would have discovered 42 U.S.C. § 1982, which forbids discrimination against racial and related minorities in the sale and lease of real estate. *Shaare Tefila Congregation v. Cobb,* 481 U.S. 615, 616-18 (1987). The complaint was not frivolous on its face, though it is an open question whether the plaintiff's lawyer will ever be able to identify a legal basis for his claim. He may wish to consult a specialist in discrimination litigation.

Shah v. Inter-Continental Hotel Chicago Operating Corp, slip op. (7th Cir. 12/23/02).

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Blackmore Sewer Construction, Inc. ... employs a shotgun approach in this appeal .... We conclude that all of Blackmore's arguments miss the broad side of the barn ... and we affirm.

Laborers' Pension Fund v. Blackmore Sewer Construction, 298 F.3d 600, 602 (7th Cir., 2002).

* * * * * * * * * *

(A) The Japanese eat very little fat and suffer fewer heart attacks than the British or Americans.

(B) On the other hand, the French eat a lot of fat and also suffer fewer heart attacks than the British or Americans.

(C) The Japanese drink very little red wine and suffer fewer heart attacks than the British or Americans.

(D) The Italians drink excessive amounts of red wine and also suffer fewer heart attacks than the British or Americans.

(E) Conclusion: Eat & drink what you like. It's speaking English that kills you.

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Man Confuses Snow with Vandalism

Tue December 10, 2002
09:16 AM ET

BERLIN (Reuters) - A Gambian man unused to Germany's winter weather woke up to find his car had gone completely white overnight and called police to complain vandals had painted it.

Police in the central German town of Hildesheim responding to investigate the crime discovered the man had mistaken snow on his car for paint when he looked down from his apartment window.

"To him it looked like paint when he was looking down on the car from the fifth floor. He was really worried and it wasn't a hoax, otherwise he would have been fined for it," police spokesman Walter Wallott said Monday.

Potential CJA Cap Increase Pending in Congress

The House has passed and sent to the Senate H.R. 4125, which would increase the caps on payments in CJA cases. Under the bill, the maximum for a felony would rise to $7,000. The bill awaits Senate consideration.

On a different front, the Judicial Conference has recommended that the hourly CJA rate be increased from $90 to $113, which would reflect inflation that has taken place since the rate was last set.

Because Congress has not yet passed a budget, the Federal Defender's Office and CJA Panel, like the entire country, are working under a Continuing Resolution at 95% of last year's budget. It is not yet clear when a budget will be passed, or if the initiatives to more fairly pay Panel Attorneys will be included in that budget.

Upcoming CJA Seminars

The Defender Services Division Training Branch has announced training seminars for this year. These seminars give an excellent update for the CJA attorney. The dates are as follows:

April 10-12, 2003 - Portland, OR
May 29-31, 2003 - Savannah, GA
June 26-28, 2003 - Williamsburg, VA
July 17-19, 2003 - Denver, CO
Aug. 14-16, 2003 - Park City, UT
Sept. 18-20, 2003 - Scottsdale, AZ

There is no charge for the seminar itself or for the seminar materials, but travel, hotels, and meals are the attendee's responsibility.

For further details, go to the Federal Defender Training Committee website at "www.fd.org" or call 800/788-9908, ext. 3055.

Special Offer on TrialDirector Software

inData Software, LLC, has announced that all CJA trial attorneys can now purchase inData's TrialDirector Suite for $100. This award winning trial presentation software suite normally sells for $595.

Please note the special price does not include maintenance or training.

To obtain this product, please contact Derek Miller at 800/828-8292 and identify yourself as a panel attorney. For further information on this product, go to "www.indatacorp.com".

Amendments to F.R.A.P. Effective 12/1/02

By: Kent V. Anderson
Senior Staff Attorney

The Seventh Circuit has posted the amendments to the Federal Rules of Appellate Procedure that will go into effect on December 1st at http://www.ca7.uscourts.gov/APredline.pdf. There are several changes relating to electronic service of documents. There are also some other important changes.

◆ A district court will have to provide reasons for denying an IFP motion.

◆ Rule 26 has been amended to conform with the Rules of Criminal and Civil Procedure and says that when a time period is 11 days or less intervening weekends and holidays are excluded from the computation, instead of 7 days or less.

◆ A motion under F.R.Crim.P. Rule 35(a) does not toll the time for filing a notice of appeal and may now be filed while a case is on appeal.

◆ Rule 27 has been amended to require a response to a motion within 8 days, instead of 10. A reply to response to motion will have to be filed within 5 days, instead of 7. (The Rules Committee pointed out that the actual time is extended because weekends and holidays will now be excluded.)

◆ Weekends and holidays will still not be counted when calculating the time for issuance of the mandate.

◆ Rule 32 now states that the cover of any supplemental brief must be tan.

◆ Rule 32(c)(2) will now include petitions for rehearing with other papers. A cover is not required, if the caption contains all of the necessary information, but if a cover is used it must be white.

◆ Rule 28(j) has been amended to allow argument and set a word limit of 350 words.

◆ The rules now include a suggested Form 6 for use as a certificate of compliance.

Interesting Times For Criminal Defense Lawyers

By: David B. Mote
Deputy Chief Federal Defender

The wish "May You Live In Interesting Times" has often been reported as an ancient Chinese Curse. While that attribution appears to be wrong (apparently the first verifiable use of the phrase is a 1950 science fiction story by Eric Frank Russell, writing under the name of Duncan H. Munro), it also seems appropriate. Interesting times are frequently trying times.

Criminal defense lawyers are now in "interesting times." The "war on terrorism" has changed the legal landscape dramatically. While the vast majority of criminal defense lawyers have not represented a client accused of terrorism, the majority of us will represent clients who will be affected by changes made in the "war on terrorism."

One development of the "war" is revival of the concept of an "enemy combatant." The concept was apparently adopted from a Supreme Court case in 1942, *Ex Parte Quirin*, 317 U.S. 1(1942), which used the term to describe saboteurs trained in Germany after the declaration of war between Germany and the United States and captured on United States soil. Prior to last year, few people would have anticipated that the"enemy combatant" designation, and the deprivation of constitutional rights that go with it, would be applied to United States citizens, such as Yaser Esam Hamdi, who surrendered in Afghanistan, let alone to an American citizen arrested on U.S. soil, such as Jose Padilla. As "enemy combatants" Hamdi and Padilla are entitled to neither the rights afforded to defendants in our criminal court system nor to the rights afforded to Prisoners of War under the Geneva Convention. They are in a legal "no man's land" in which they can be held indefinitely without ever being charged.

It is unclear what standards the government is using to decide whether to designate someone as an

"enemy combatant" or prosecute them in normal court system. For example, it is unclear why John Walker Lindh and Zacarias Moussaoui were not designated as "enemy combatants" while Hamdi and Padilla were so designated. Moussaoui is not a United States citizen, but presumably the 600 or so detainees being detained in Cuba as "enemy combatants" are not United States citizens either, though nothing is certain since the government will not even release the names of those detained.

The "war on terrorism" has not been formalized by a Congressional declaration of war, of course. The enemy in this "war" is not a country, but a terrorist organization. Still, we should not forget the Constitution's assignment of the right to declare war to the legislative, rather than the executive, branch. A declaration of war represents not only a change of status for our country, but also a change in the status of all of this country's citizens.

Before the rights of the citizenry of this country are altered, the Constitution prudently requires that the elected representatives of the People concur. An act of Congress requires that the People's elected representatives agree both on the identity of the enemy and that the proper solution is war, rather than diplomacy. An Act of War, by its very nature, also serves the purpose of providing the citizenry with notice of the enemy's identity and that the restrictions governing aiding or abetting an enemy in a time of war apply. The discussions about what powers should be granted to the President in a time of war have largely ignored this important point.

We have, of course, been involved in armed conflicts in the past without a formal declaration of war, including Korea and Vietnam. The "war on terrorism" may, however, be closer to the "war on drugs" than it is to a normal war. Wars between countries end. One country may surrender, or a truce may be called, or, if the countries do not neighbor, one country may withdraw. Frustrated and fanatical individuals who wish this country harm will always be with us, just as the "war on drugs" has proven that there will always be someone willing to sell drugs to make more money than they can make lawfully for the same effort. Granting war-time powers to the executive branch for as long as it takes to resolve a permanent problem amounts to a permanent increase in power for the executive branch and a permanent decrease in the rights of the People.

In the wake of September 11, 2001, the Congress passed the USA Patriot (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) Act. The act amends fifteen different federal statutes and grants new powers to law enforcement and intelligence agencies. The changes affect immigration law, privacy (remember reading about how the FBI had been given the authority to find out what books an individual checked out from a public library and the requirement that the library not tell you about the inquiry, or the "TIPS" program, a government plan to recruit civilians in service jobs to keep the government informed of suspicious activities of their fellow citizens?), Fourth Amendment law (a provision makes it easier for the federal government to conduct a search without giving prior, or perhaps any, notice) and information sharing between government agencies.

Just as most of the cases affected by the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA) involved neither terrorism nor the death penalty, the plethora of changes that have occurred and continue to occur to the law in the name of the "war on terrorism" will affect people in this country who have neither committed nor been accused of committing terrorism.

Since the beginning of the "war on terrorism," thousands of immigrants to this country have been rounded up based on what had previously been treated as minor immigration violations, such as over-staying a visa or taking less than a full class load when admitted on a student visa. In many cases, the government has at least temporarily refused to say who had been detained or even how many people had been detained. In a substantial number of cases, people detained on immigration charges have been transported to other states. One fact that came out following hundreds of arrests for minor immigration violations was that the INS had millions of pages of unprocessed applications. They reportedly did some catching up after September 11, 2001, approving visa applications for two of the hijackers six months after the attacks had taken place. The Attorney General insists the government has the right to close certain deportation proceedings to the public. The courts have divided on the issue. *Compare North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002)(declining to second guess the Attorney General's national security concerns), with *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

Rules published in the Federal Register require visitors and immigrants 20 mainly Muslim countries to Register with INS. In California, hundreds of individuals who came in voluntarily to register were arrested. Males over the age of sixteen from 13 additional countries are required to register in January and February of 2003. (There are different deadlines for people coming from different countries.) The Attorney General has made it clear that he considers it completely

appropriate to use detention on immigration as a tool to fight the war on terrorism. Thus, anyone charged with an immigration violation may be affected by the "war on terrorism."

Another development in the "war on terrorism" is the Orwellian "Total Information Awareness" project. The goal of the project is to develop a super-database of personal information including credit card purchases, telephone records, e-mails, medical records, passports, driver's licences, school records, magazine subscriptions and gun purchases, in order to identify suspicious patterns that could lead to the detection of possible terrorists.

The project is currently headed by retired Admiral John Poindexter, convicted of numerous felony counts of lying to Congress in 1990, but successful in having his convictions overturned because information given under immunity was used against him in his trial.

Following September 11, 2001, television commercials have been running which equate buying illegal drugs to supporting terrorism. Isn't Osama Bin Laden wealthy because he inherited a share of the estate of his billionaire father who made his fortune in construction during the Saudi oil boom? If so, would it be more appropriate to run commercials for conservation arguing that turning up the thermostat or driving a gas guzzler supports terrorism?

Other changes since September 11, 2001 have included increased airport security measures, including randomly selecting travelers for additional screening and proposals to arm airline pilots. Of course, it would be a good idea if pilots who drank before flying, as additional security measures have occasionally discovered, were not armed. And if a pilot or co-pilot decided to intentionally crash a plane, as the NTSB concluded a co-pilot may have done in a 1999 EgyptAir crash, a securely locked cabin and gun could make it easier for that person to succeed.

Everyone in our society is affected by the changes made in the war on terrorism, from immigrants who came here on student visas and dropped a class to American-born U.S. citizens who must plan for longer delays at airports and consider how their government will view their choice of reading material or credit card purchases. It is not yet clear what changes will eventually be implemented or what the eventual results will be from the changes already implemented.

Criminal defense attorneys deal with people's rights to due process, legal representation, and to be free from unreasonable searches and seizures. We should be contemplating the changes that have and continue to take place. Will drug dealers some day be charged with treason because drug trafficking supports terrorism? Would a search warrant based on personal information from the Total Information Awareness database violate the Fourth Amendment? Does it raise questions under the Ninth Amendment and the right to privacy? Does a search warrant instigated based on what books someone checked out from the public library violate the Fourth Amendment? Does it violate the First Amendment? Does a registration requirement applied to males over the age of sixteen from predominantly Muslim countries violate equal protection? The changes adopted in the name of the "war on terrorism" are not merely matters of national security and politics. They affect the rights of individuals and those on the margins of our society, the origin of most criminal defendants, are the first to truly experience it when our rights are diminished. It is not too early to begin contemplating how the changes made and proposed in the "war on terrorism" have affected individual rights. Someone in the government is obviously thinking about all these changes and their effects before they are even proposed, so we are behind already and there is much to think about.

We do indeed live in interesting times. Let's hope for our sake and the sake of our clients, that they don't get too interesting.

Material Witness and Incommunicado Detention Update

By: Kent V. Anderson,
Senior Staff Attorney

There have been some significant case law developments, since the Summer, 2002 article by Richard Parsons, Jonathan Hawley and I, regarding the detention of people who the government has declared to be material witnesses or otherwise wants to isolate without having to prove they are guilty of a crime.

I. Material witness detention

In July, a different judge from the Southern District of New York issued a decision that disagreed with the holding in *United States* v. *Awadallah III*, 202 F.Supp.2d 55 (2002), that the government could not detain material witnesses for a grand jury. In *In Re Material Witness Warrant*, 213 F.Supp.2d 287 (S.D.NY 2002), Judge Mukasey held that 18 U.S.C. §3144 does authorize the government to detain material witnesses and there is no question about its Constitutionality. Judge Mukasey found that the term "criminal proceeding" was not ambiguous and obviously referred to everything from the investigatory stage of a case on. *Id.* at 293. He justified this finding by the fact section 3144 is part of Title 18 which includes provisions relating to grand juries. He also noted that the Federal

Rules of Criminal Procedure are "intended to provide for the just determination of every criminal proceeding" and they include Rule 6, which governs grand jury proceedings. *Ibid.* Of course, by this logic, everything in Title 18 and the Federal Rules of Criminal Procedure must relate to grand jury proceedings. That obviously is not the case.

He also held that even if the term "criminal proceeding" in section 3144 is ambiguous, it must be interpreted to include grand jury proceedings. He claimed that the finding to this effect in *Bacon* v. *United States*, 449 F.2d 933 (9th Cir. 1971), was a holding instead of dicta even though the decision did not rest on it.

Judge Mukasey then went on to find that the fact section 3144 requires that a warrant be obtained by "a party" could just as easily refer to the government as the party in interest before a grand jury as it could parties to a trial. *Id.* at 294. However, normally when someone refers to "a" or "one" of something it implies that there is more than one.

In addition, Judge Mukasey also took issue with the *Awadallah* court's finding that a judge would be abdicating his authority if he simply relied on a prosecutor's assertion of materiality when issuing an arrest warrant. He cited *Bacon* and two other cases followed it. *Ibid.*; *In re de Jesus Berrios*, 706 F.2d 355, 358 (1st Cir. 1983); *United States* v. *Oliver*, 683 F.2d 224, 231 (7th Cir. 1982), (also assuming that the judge could not make the decision because such proceedings would then be public without explaining why it would not be just as private as any other ex parte hearing to obtain a warrant). Judge Mukasey then said that judges make determinations, such as whether to quash a subpoena, all the time based on sealed submissions. *In Re Material Witness Warrant*, *supra*, 213 F.Supp.2d at 294. However, he neglected to mention that in those cases the judge has the evidence or allegations of fact before him which allow him to make a decision. He is not being asked to simply trust the government. That is also true when a judge is asked to detain a material witness for a trial. In addition, when there is going to be a trial, the judge knows what the charges are and what the elements of the offenses are.

Judge Mukasey attempted to get around section 3144's requirement for release after a deposition by saying that a deposition could be taken in the grand jury context. *Id.* at 296. However, this ignores the fact a deposition, under Federal Rules of Criminal Procedure, Rule 15, requires: the presence of both parties; the opportunity to confront and cross-examine the witness; and the ability to make objections.

Judge Mukasey's strongest argument relates to legislative history. The Senate Committee Report on section 3144 includes a footnote which states that "a grand jury investigation is a criminal proceeding within the meaning of this section" and cites *Bacon*. *Id.* at 297. This is persuasive evidence that the statute was meant to include grand juries. However, the Supreme Court has held that "it is the statute not the Committee Report which is the authoritative expression of the law." *Chicago* v. *Environmental Defense Fund*, 511 U.S. 328, 337 (1994). In *Chicago* v. *Environmental Defense Fund*, the Court considered a statute which omitted the cited language in the Committee Report. The Court held that it should not rely on the Committee Report in that situation. *Ibid.* The same rule should apply to section 3144.

Judge Mukasey blithely dismissed the constitutional concerns that Judge Scheindlin expressed in *Awadallah* which caused her to apply the maxim that statutes should be interpreted to avoid Constitutional questions whenever possible. *Id.* at 297-299; *United States* v. *Awadallah III*, *supra*,202 F.Supp.2d at 76-79. Judge Mukasey found that the Supreme Court had found that it was reasonable to detain someone just for being a witness in *Stein* v. *New York*, 346 U.S. 156 (1953), and *Hurtado* v. *United States*, 410 U.S. 578, 588 (1973). However, at the time the Court decided *Stein*, it had not yet held that the Fourth Amendment applies to the states. In addition, the validity of the petitioner's initial detention as a material witness was not even an issue in the case. Therefore, it is not surprising that the Court did not see it as error. In *Hurtado*, the validity of the petitioners' detentions as material witnesses, pending trial, was not an issue either. The petitioner's only challenged the disparate rates of pay for those witnesses who were detained, pending trial, versus those who were not. *Hurtado* v. *United States*, *supra*, 410 U.S. at 588. Cases are not authority for issues that were not raised or discussed in them. *United States* v. *Miller*, 208 U.S. 32, 37 (1908).

Judge Mukasey then cites a number of other decisions; none of which involve the detention of material witnesses for a grand jury in federal case. *In Re the Application of the United States for a Material Witness Warrant*, *supra*, 213 F.Supp.2d at 299; *United States ex rel Allen* v. *LaValee*, 411 F.2d 241, 243 (2nd Cir. 1969) (habeas case in which the Court of Appeals stated that it had no desire to make a retroactive holding about the constitutionality of New York law); *United States ex rel Glinton* v. *Denno*, 339 F.2d 872 (2nd Cir. 1964) (not involving a question of whether detention as a material witness was per se unlawful); *Allen* v. *Nix*, 55 F.3d 414, 415 (8th Cir. 1995) (petitioner only challenged the factual basis for material witness detention); *Stone* v.

Holzberger, 807 F.Supp. 1325, 1336-1337 (S.D.Ohio 1992) (court only discussed whether there was probable cause for petitioner's arrest as a material witness and the timeliness of the detention hearing); *Houston* v. *Humboldt County*, 561 F.Supp. 1124, 1125 (D.Nev. 1983) (involving same issues as *Stone*). Judge Mukasey then went on to cite a number of other cases involving the detention of material witnesses in which, as he acknowledged, the courts were not asked to decide the validity of the detentions. *In Re the Application of the United States for a Material Witness Warrant, supra*, 213 F.Supp.2d at 300.

Therefore, Judge Mukasey's opinion is less persuasive than the opinion in *Awadallah III*. *United States* v. *Awadallah III, supra,* 202 F.Supp.2d 55.

II Incommunicado Detention

There have also been a few recent cases involving the incommunicado detention of people by the government.

In *Center for National Security Studies* v. *Department of Justice*, 215 F.Supp.2d 94 (D.D.C. 2002), Judge Kessler held that the government must make some information available to the public about the people that it has detained, pursuant to requests for information under the Freedom of Information Act. This case is informative for what it says about government practices. However, as an FOIA case, the holdings have little relevance for the issues that counsel for a detained individual or his family will deal with.

In *Center for National Security Studies* v. *Department of Justice*, *supra*, 215 F.Supp.2d at 101, the government stated that detainees that were held by the Department of Justice had been able to inform anyone they wanted of their detention. If that is true, it at least eliminates the concern of the government simply causing people to disappear which was dealt with in our initial article.

There have been three appellate decisions regarding Yaser Hamdi, the Louisiana born man who was allegedly captured as a member of the Taliban and is being held incommunicado at the Norfolk Naval base. The first decision involved an attempt by the Federal Public Defender for the Eastern District of Virginia to be appointed to represent Mr. Hamdi and gain access to consult with him. The Public Defender filed a petition for a writ of habeas corpus as Mr. Hamdi's "next friend." That attempt was successful before the district court. However, the Fourth Circuit held that the Public Defender did not qualify as a next friend because he did not have a prior relationship with Mr. Hamdi . Mr. Hamdi's father then filed a habeas petition as his next friend, seeking to have counsel appointed for his son and that his son be released. In response to this suit, the district court appointed the Public Defender as counsel for Mr. Hamdi and ordered that he be given unmonitored access to Mr. Hamdi. However, the court did this before the government had even been served with the petition that was filed by Mr. Hamdi's father. Therefore, the Fourth Circuit also reversed this decision. It held that the district court's order was procedurally improper and remanded for the district court to have the benefit of briefing and argument before making an order. *Hamdi* v. *Rumsfeld II*, 296 F.3d 278, 280-283 (4th Cir. 2002).

After the second remand, the district court held that a two page affidavit that was submitted by a Defense Department official was insufficient to justify Mr. Hamdi's continued detention. The court questioned the affidavit and ordered the government to give the court a great deal of additional information. The government then appealed from this order, as well. *Hamdi* v. *Rumsfeld III*, 3__ F.3d ___, 2003 U.S. App. LEXIS 198, *11-13 (Jan. 8, 2003).

In this third appeal, the Court of Appeals ordered the district court to dismiss Mr. Hamdi's petition for a writ of habeas corpus. The Court held that "the detention of United States citizens must be subject to judicial review." *Id.* at *20. However, it also held that "[b]ecause it is undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, we hold that the submitted declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution. No further factual inquiry is necessary or proper." *Id.* at *3, 54-55. The Court rested this holding on what it deemed a necessary deference to the political branches of government in time of war. *Id.* at *13-26, 37-40, 50-51.

The Court relied on the need to detain enemy combatants, but drew no distinction between lawful and unlawful combatants as the Supreme Court did in *Ex Parte Quirin*, 317 U.S. 1 (1942). *Id.* at *23-25, 34-35, 52-53. Instead, the Court viewed such captivity as a simple war measure. *Id.* at *23. However, regular prisoners of war may not be held incommunicado or in a penitentiary as is Mr. Hamdi. Geneva Conviction, Aug. 12, 1949, art. 22, art. 25, art. 71, art. 76, art. 77, 6 U.S.T. 3316, 75 U.N.T.S. 135.

The Court also relied extensively on *Ex Parte Quirin*, *supra*, 317 U.S. 1, to support its holding. *Id.* at *30, 42, 47, 49. Of course, the continued validity of *Quirin* is questionable. Therefore, the Court's holding may not stand up on that ground.

In addition, the *Quirin* decision only applied to those people that the Court termed unlawful combatants. This category included those who pass surreptitiously from enemy territory into our own, without wearing identifying insignia, and with the intention to commit hostile acts involving the destruction of life or property. *Ex Parte Quirin*, *supra*, 317 U.S. at 35-36. It is quite possible that Mr. Hamdi did not meet these criteria when he was captured in Afghanistan.

In this case, the district court accepted the allegations which the Court of Appeals relied on as true. *Hamdi* v. *Rumsfeld III*, *supra*, 2003 U.S. App. LEXIS 198 at *46. It is not clear whether the Court of Appeals would have allowed further factual development if the district court was not convinced of all the relevant facts.

The Fourth Circuit did declare that its decision was limited to the specific facts of the case before it. It was not addressing the designation of an American citizen who was captured on American soil as an enemy combatant or what role counsel might play in such a proceeding. *Id.* at *21.

In December, District Judge Mukasey issued an opinion regarding that issue when he addressed the government's incommunicado detention of Jose Padilla. *Padilla* v. *Bush*, __ F.Supp.2d __, 2002 U.S. Dist. LEXIS 23086 (S.D.NY Dec. 4, 2002). Mr. Padilla is an American citizen who was initially arrested at Chicago's O'Hare International Airport, pursuant to a material witness warrant, after flying there from Pakistan. He was then sent to New York. Judge Mukasey then appointed Donna Newman as counsel for Mr. Padilla. Ms. Newman prepared and filed a motion to vacate the material witness warrant. The government then withdrew the warrant and designated Mr. Padilla as an enemy combatant. Following this designation, the Department of Defense took custody of Mr. Padilla and transferred him to the Consolidated Naval Brig in Charleston, South Carolina, where he is still held. The government then told Ms. Newman that she would not be allowed to visit or speak with Mr. Padilla and any letters that she sent might not be delivered. Ms. Newman then filed a petition for a writ of habeas corpus on Mr. Padilla's behalf, as his next friend. *Id.* at *2-15, *20.

Judge Mukasey held that Ms. Newman did have standing to file the petition as Mr. Padilla's next friend. He found that, unlike the public defender in *Hamdi* who had not had any prior contact with Mr. Hamdi, Ms. Newman's: prior appointment as counsel for Mr. Padilla, discussions with him, and legal work on his behalf, formed a sufficient prior relationship for her to qualify as his next friend. *Id.* at *24-31.

Unfortunately, Judge Mukasey then held that the government had the authority to imprison Mr. Padilla without trial, in spite of the facts that he is an American citizen who was arrested in the United States after he openly reentered the country. *Id.* at *96. He rejected Mr. Padilla's argument that he could not be detained indefinitely without having first been convicted of a crime because the Supreme Court has upheld such detention in other circumstances. *Id.* at *70-73. However, this ignores the strict substantive and procedural limits which the Court has required before allowing indefinite preventive detention. *Zadvydas* v. *Davis*, 533 U.S. 678, 691 (2001). Mr. Padilla's case does not appear to fall within those parameters. In *Zadvydas*, the Court said that suspected terrorists might be an exception to this rule, but left that question for another day, since it was not an issue in that case. *Ibid.*

The *Padilla* decision also relied on *Quirin*. *Padilla* v. *Bush*, *supra*, 2002 U.S. Dist. LEXIS 23086 at *80-86. However, in addition to the general problems with that decision, the allegations which the government has made public do not show that Mr. Padilla is an unlawful combatant. See *Ex parte Quirin*, *supra*, 317 U.S. at 35-36. He did not reenter the United States surreptitiously. Instead, he openly took an international flight which required him to go through Customs and let the government know that he was returning to the country. In addition, *Quirin* is distinguishable because in that case, the government was not attempting to completely deny the defendants a trial or the right to counsel. It was simply trying to change the manner in which those rights were provided to the defendants in a way that gave them less protection than does the Bill of Rights. *Ex parte Quirin*, *supra*, 317 U.S. 1. It is not obvious, as Judge Mukasey states, that the Court considered indefinite confinement to be lesser punishment than trial by a military tribunal. *Padilla* v. *Bush*, *supra*, 2002 U.S. Dist. LEXIS 23086 at *84. In *Quirin*, indefinite confinement was not the alternative. Instead, the alternative was confinement in a prisoner of war camp until the end of a war that had a well-defined objective and, therefore, a clear ending point.

The one bright spot in the *Padilla* opinion is that Judge Mukasey did order the government to allow Mr. Padilla to communicate with Ms. Newman so that he would have the ability to present facts in support of his habeas petition. *Id.* at *98-116. However, Judge Mukasey tempered that bit of good news by allowing the government to monitor Mr. Padilla's contacts with counsel, so long as a wall was created between the monitoring personnel and any activity in connection with the

present petition or any future criminal activity. The judge pointed to the Bureau of Prisons' new monitoring policy as justification for this. However, he simply assumed that such a policy does not interfere with any right to counsel that may exist or the attorney-client relationship. *Id.* at *113-114. Of course, any criminal defense attorney knows that the latter is not true and the former would not be true in a criminal case.

Finally, Judge Mukasey held that the government only needed to present "some evidence" in support of its decision in order for it to be upheld. *Id.* at *126, *133. This is the lowest standard of review possible and should certainly be open to challenge under Constitutional and international law standards.

Court: U.S. Can Hold Citizens as Enemy Combatants

Appeals Court Rules in Favor of Government in Holding Hamdi

By: Tom Jackman
Washington Post Staff Writer
Wed., January 8, 2003; 3:38 PM

A federal appeals court today ruled that the government has properly detained an American-born man captured with Taliban forces in Afghanistan without an attorney and has legally declared him an enemy combatant.

The 54-page ruling by the 4th U.S. Circuit Court of Appeals in the case of Yaser Esam Hamdi, who is being held incognito at the Navy brig in Norfolk, has broad implications for the Bush administration's war on terror.

The court ruled that as an American citizen, Hamdi had the right to a judicial review of his detention and his status as an enemy combatant. But because the Constitution affords the executive branch the responsibility to wage war, the courts must show great deference to the military in making such determinations.

"The constitutional allocation of war powers affords the President extraordinarilybroad authority as Commander in Chief and compels courts to assume a deferential posture in reviewing exercises of this authority," said the opinion, written by Chief Judge J. Harvie Wilkinson III and judges William W. Wilkins and William B. Traxler Jr.

"The Constitution does not specifically contemplate any role for courts in the conduct of war, or in foreign policy generally. Indeed . . . courts are ill-positioned to police the military's distinction between those in the arena of combat who should be detained and those who should not."

Hamdi was captured in Afghanistan in November 2001. He was transferred to the Navy brig in Norfolk after telling U.S. investigators that he was born in Louisiana. But while he was in Norfolk, the military declined to allow Hamdi to speak with anyone because he was deemed an enemy combatant.

Hamdi's father, Esam Fouad Hamdi, and Federal Public Defender Frank W. Dunham Jr. filed petitions with the federal court in Norfolk seeking permission for Dunham to meet with Hamdi. In both cases, U.S. District Judge Robert G. Doumar granted the requests.

The 4th Circuit stayed Doumar's order in each case.

"I applaud today's decision which reaffirms the president's authority to capture and detain individuals, such as Hamdi, who join our enemies on the battlefield to fight against America and its allies," said Attorney General John D. Ashcroft. "Today's ruling is an important victory for the president's ability to protect the American people in times of war.

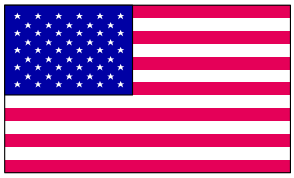
Preserving the president's authority is crucial to protect our nation from the unprincipled, unconventional, and savage enemy we face. Detention of enemy combatants prevents them from rejoining the enemy and continuing to fight against America and its allies, and has long been upheld by our nation's courts, regardless of the citizenship of the enemy combatant."

The appeals court today was specifically ruling on the sufficiency of a two-page declaration by a Defense Department official who said Hamdi was captured with a rifle with Taliban soldiers. Doumar ruled that the statement by a special adviser to the undersecretary of defense for policy was insufficient to detain an American citizen without a lawyer.

But the appeals court ruled that it is enough to say that Hamdi was "captured and detained by American allied forces in a foreign theater of war during active hostilities and determined by the United States military to have been indeed allied with enemy forces."

The court noted the implications of its decision in a rare acknowledgment to the underlying facts of the case. "The events of September 11 have left their indelible mark," the judges wrote. "It is not wrong even in the dry annals of judicial opinion to mourn those who lost their lives that terrible day. Yet we speak in the end not from sorrow or anger, but from the conviction that separation of powers takes on special significance when the nation itself comes under

attack...Judicial review does not disappear during wartime, but the review of battlefield captures in overseas conflicts is a highly deferential one."



WHAT IF

By: Lawrence J. Fleming
Attorney-at-Law

What if the police investigating a shooting death or assault could determine from a recovered bullet or shell casing who purchased the bullet and when and where it was purchased?

What if people who supplied ammunition to persons who then used it to commit a violent crime could be quickly identified and at least questioned as to how, when and to whom that ammunition was supplied?

What if a data bank could be set up that would allow purchases of ammunition to be recorded by merely swiping an ID card or driver's license and scanning a bar coded ammo box?

What if the data collected by such a system were available to police across the country, on a very confidential basis, subject to strict laws against its misuse?

What if all this could be done without requiring further gun registration or testing and without affecting the price or availability of ammunition to legitimate sportsmen by using, to a large extent, commercial systems already in place?

The answers are addressed in this article. I would appreciate your opinions or suggestions, even if you disagree with the programs proposed. You can contact me at the following address and telephone number: Lawrence J. Fleming, Attorney at Law, 354 Reith Terrace, St. Louis, MO 63122,(618) 482-9050 (office).

– GUNS DON'T KILL PEOPLE, BULLETS DO –

A PROPOSAL FOR AN AMMUNITION DATA BANK FOR USE BY LAW ENFORCEMENT

A. The Wake Up Call

Having practiced criminal law for 35 years, I have seen enough of the consequences of gun violence to last for several lifetimes. I have also become painfully aware of the inadequacies of the investigative tools available to law enforcement officers trying to identify and stop murderers, particularly those committing senseless killings with high tech firearms. Too many of our streets have become jungles of gun warfare, and many resulting murders and assaults are never solved. I have witnessed the fear and anxiety commonly suffered by good people living in our poorest neighborhoods and trying to shield their children from such dangers on almost a daily basis while also fearing to report what they may know or see. I was, nevertheless, as shocked, frustrated and frightened as most Americans with the recent events involving the "D.C. Sniper" and the initial lack of forensic leads to find the killers and stop the carnage. Moreover, I could not help but observe how the terror of seemingly random killing by unknown assailants has now been brought home to the suburbs and middle class by the saturation media coverage of the events in and around our Nation's Capitol. This was most definitely a wake-up call for me, as I hope it was for many others.

In the sniper case, it was the suspects' own boasting and demands during phone conversations and in notes (together with some excellent police work) that led to their arrests and the seizure of the murder weapon, but only after thirteen shootings, ten deaths, three weeks of terror and an unprecedented commitment of local and federal resources. Had the police been able to immediately develop solid leads from the bullets and the shell casing which they recovered early in the investigation, deaths, investigative time, and terrible community trauma might have been averted. Had the police in Montgomery, Alabama, been able to more quickly identify and apprehend the suspects in the murder there, the Washington terror, and possibly other shootings, may have been avoided entirely. Unfortunately, the worst may be yet to come as "copy cats" and, indeed, real terrorists, plan similar attacks on other metropolitan areas now that they have seen the ease of escape and level of fear and disruption that can be caused.

These future murderers may not be nearly so stupid and verbose as the two suspects now awaiting trial. Accordingly, this tragic episode has demonstrated that much more is needed in the area of ballistic tracing than is presently available. The present firearm data bank maintained by the BATF, under a contract with a private firm, is extremely expensive, but of little value in murder investigations unless a firearm has been recovered or used in another crime. **What is urgently needed is a program to apply the extraordinary commercial technology we already have to develop a ballistics tracing system**

which could more directly and more frequently lead to the apprehension of such violent criminals and which, hopefully, would also reduce the now unlimited supply of deadly implements available to them.

B. Inadequacies of Ballistic "Fingerprint" Bank

The proposed and much discussed national data bank of "ballistic fingerprints" is, not the answer. Such a data bank, even it if it is promptly initiated, will prove to be **much too little, much too late**.

It is **too little** for the obvious reasons that: (1) "gun fingerprinting" of shell casings and "rifling mark identification" of projectiles, despite recent improvements, are still very inexact since modern manufacturing methods have reduced the differences between marks left by identically tooled firearms and some bullets are now designed to fragment making analysis of the projectile quite difficult; (2) a firearm's "fingerprints" on both shell casings and projectiles can be changed intentionally, by use of an abrasive, such as steel wool, or unintentionally by repeated firing; and, (3) the complexity of collecting, recording and cataloging such "firearm fingerprints" to any useful degree would be overwhelming, and could not be accomplished in any reasonable period of time, if at all. At best, the proposed data bank would include only a minute percentage of the firearms which should be included. These drawbacks, of course, have been and will be asserted by gun lobbyists in opposing any initiative which smacks of gun registration or control, and the fact is, on this issue, they are probably "on target."

However, the more significant problem with a ballistic fingerprint approach is that it is **too late**. There are already about 250 million guns out there, many of which have been stolen or otherwise rendered untraceable, and these are the guns most likely to be used in a crime. Had such a program been initiated at the manufacturing level 50 years ago, before the massive production and importation of firearms, it might have some limited usefulness today. But now it will be practically and politically impossible to include even a small fraction of existing guns in a data bank of "ballistic fingerprints." Many gun owners simply won't cooperate with any program to test and record their existing firearms and criminals certainly won't cooperate. To believe that even a small percentage of the tens of millions of guns now traded on the streets would somehow find their way to testing stations is ludicrous. Any such program would be almost completely limited to newly manufactured guns since the present BATF data bank includes only about 800,000 gun fingerprints, less than 1/3 of 1% of existing guns.

Obviously, criminals don't need newly manufactured firearms to commit their crimes because the existing supply of guns will probably last for another 25 to 50 years. Thus, a program limited to guns manufactured in the future will be of almost no help now. However, to kill or maim with a gun a criminal needs not only the gun but also bullets, and that presents us with another much more feasible approach to this problem. To paraphrase an old slogan: **"Guns don't kill people, bullets do."**

I submit, therefore, that the focus at this time should not be on the traceability of guns, but on the traceability of ammunition, a consumable commodity with a more limited "street life" than guns. In fact, the United Nations addressed this possibility, with reference to international security in reports submitted to the General Assembly in 1999 and in March, 2001[1]. The proposals here, however, are limited to domestic law enforcement assistance. What we need for law enforcement is a very confidential national data bank by which the distribution chain and ultimate purchase of bullets could be traced. This could be accomplished in **three phases, only the last of which may require some new technology or change in the manufacturing process.**

C. Phases of Development

(1) Recording Ammo Purchases Using Existing Systems

Existing systems are clearly available which could provide for **the electronic recording and tracking of ammunition purchases via nationally uniform identification cards and mandatory bar coding of ammunition boxes.** Scanning into a terminal a bar code identifying the ammunition purchased by a particular user should not present a major problem if that information were appropriately coded and printed on the box containing the ammo. Costs could probably be minimized and implementation achieved more quickly if this function were to be contracted out to one of the major credit or debit card companies, since they already have access to terminals in virtually every retail establishment.

Consumers are quite accustomed to having their credit cards and their purchases scanned at the checkout counter, and receiving a monthly statement showing what, when and where they have purchased. Bar coding now produces a detailed

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[1] Report on the Problem of Ammunition and Explosives, U. N. Fact Sheet 22, 29 June 1999, A/54/155; Berkol, Schutz and Weary, Marking, Record Keeping and Tracing of Small Arms and Light Weapons, U. N., GRIP, Special Issue, March 2001

description of the product purchased on the customer's receipt, as well as in inventory records. Similar information on ammunition purchases should be quite easy to collect and recover using existing commercial systems such as those utilized by credit card companies. The information immediately recorded could simply be a number by which all identifying characteristics of the ammunition purchased could be determined and a second number, such as a drivers license, by which the purchaser could be identified. Typical 12 or 13 digit bar codes should be able to reflect this type of information. The information retained in the data bank, however, would be only the raw numbers recorded unless and until specific identifying data were needed to investigate a particular crime.

Law enforcement officials only would then have the ability to determine from the recorded numbers at least who had purchased ammunition of a particular make, type, and perhaps lot number in a particular locality. Such information alone could provide the police with general leads when the ammunition used in a crime has been determined to be of a specific make and type, particularly an unusual type. For example, there are at least a dozen different types of .38 caliber bullets manufactured by Remington Arms Company alone, so a search of the data bank for numbers corresponding to a particular brand and type could be productive. If the lot number or year of manufacture could be determined from the "headstamp" of a recovered shell casing, as is often already done, this would further narrow the search in the data bank provided it had been included in the code number recorded at the time of purchase.

The "licensing" or recording of ammunition purchases will undoubtedly evoke screams of "Big Brother" by the gun lobby and others, but privacy can be protected by stringent limitations on the access to and use of such data base information. Some states, such as Illinois, Massachusetts, New Jersey and New York already restrict and/or record sales of ammunition to persons holding state issued Firearm Owners' ID cards. This policy has obviously not caused any reduction in gun recreation activities (except, perhaps, by convicted felons and spouse abusers). Hunters, target shooters and gun clubs abound in such states despite the "licensing" or at least identification of ammunition purchases.

Additionally, most states already have magnetic strips or bar coding on drivers licenses and "non-driver ID cards" to facilitate record checks. These electronic identification devices could probably be made uniform or adapted to record purchases of ammunition without the immediate need to issue separate ID cards. In fact, such adaption of existing ID cards may be more politically feasible and cost efficient than requiring gun owners to obtain a new type of card.

It is important to note also that this initial phase could be implemented without imposing any new requirements on the manufacturers of ammunition, other than a system of uniform labeling or bar coding of their ammo boxes. The data describing the ammunition would merely need to be entirely recorded at time of shipments by the manufacturer and wholesaler, at the time of receipt by the retailer (if this is not already done), and at the time of purchase by the consumer. Obviously, the technology now used by Fed Ex and UPS could be a model for this type of tracking system of the distribution chain. In fact, such couriers might be contracted to perform this function while credit or debit card companies record consumer purchases.

Fears that with such a data bank innocent people would be questioned simply because they supplied or purchased ammunition identical to that used in a crime could perhaps be allayed if more information were required initially to access the data bank than merely the identifying characteristics of the ammo. Such information as the age, race, gender and size (as would usually be available through drivers license records) and a specific reason to suspect a described individual are additional factors which could also be considered. The locality of the purchase may not be significant in many cases, given the mobility of criminals, guns and ammunition, but it could be helpful to some degree in cases involving local street crimes.

However, in order for such a system to be truly effective in criminal investigations, and to avoid inconvenience to innocent purchasers, refinements of the data bank discussed below would have to be implemented to significantly narrow the suspect field of ammunition purchases to a specific identifying number corresponding to a number on a spent cartridge or bullet recovered from the crime scene. The goal, of course, would be to match the bullet used in the commission of a violent crime to the purchaser of that bullet as a first step in eventually identifying the perpetrator.

(2) Markers on Shell Casings

The necessary narrowing of suspected purchases could be accomplished by a **requirement that at least certain types of "high risk" ammunition manufactured or sold in the United States bear an indelible number or magnetic imprint on the shell casings and an identical number or bar code on**

the box in which they are sold. The March 2001 report to the United Nations[1] discussed in some detail the marking techniques which could be employed to do this. The markers, as a first step, could simply correspond to the lot number or run number of the manufacturer, as is often done already on cartridge headstamps. However, since a typical lot of ammunition can contain up to a million rounds, the size of these lots would have to be substantially reduced, at least insofar as the identification numbers are concerned, by splitting the lots or runs into numerous sub-lots. The boxes of ammunition could be sorted before shipment such that a limited quantity bearing the same number would be shipped to the same wholesaler or retailer. The lot number and other data recorded via a bar code on the box and appearing in some fashion on the shell casings would then be included in the information recorded in the ammunition data bank when the ammunition was shipped to the retailer and again when sold to the consumer.

The system could then be further refined such that **each box and the shell casings contained therein would have a unique identifying number or marker**. A recovered shell casing could then lead directly to the individual who purchased that particular bullet. It would not be necessary to analyze and compare "gun fingerprints" with those that may or may not be within a system such as that is now maintained by the BATF. Each shell casting would, in effect, have a built in "fingerprint" which could be traced to an easily identifiable purchaser rather than a probably untraceable gun.

Shell casings are, in fact, recovered from many crime scenes since most modern firearms eject them. They are also available when a revolver or other weapon which has retained the shell casings is recovered or seized by the police. These shell casings should be able to provide a critical lead for investigators in all such cases. However, the present system provides information only to the extent that the gun's "fingerprint" on the casing has been previously recorded or can be compared with another recovered casing or tested firearm, and even then it does not directly identify a person as a possible lead.

Criminals may attempt to thwart this proposed new system by filing off or demagnetizing the number, or collecting the shell casings after using the weapon; however, in most cases, they will probably not have or take the time to do so. Drive by shootings, botched robberies, and street firefights are seldom very orderly affairs allowing time to "clean up", and even the methodical D.C. Snipers left at least one shell casing. Additionally, markings on cartridge headstamps, as presently done, would be extremely difficult to remove, and the March 2001 report submitted to the United Nations suggests ways that markers could be developed which could not be removed. Eventually, making it a crime to possess or distribute ammunition with missing or obliterated numbers, as is now done with guns, could be a further deterrent.

Such a new identification system would, of course, require some serious initial investment in sorting, marking and shipping machinery, but it would not be impossible, and with some subsidies and assistance by the Government could be accomplished. In the long run it would probably be less expensive, and more cost effective, than the $27 million annually spent by BATF for "ballistic imaging". Each of the billions of pieces of currency now printed by the U.S. Mint has a tiny and unique micro number included on it as well as a sequential serial number, and perhaps similar production and recording technology could be applied to ammunition, if it is not already available in the private sector. Once such equipment is in place, the operation and maintenance costs to manufacturers should not be prohibitive.

(3) Tracers in Projectiles

Finally, **the most ambitious identification device would be a tiny microchip, taggant, or titanium strip inserted by the manufacturer in the projectile itself from which an identifying number or marker could be extracted**. Whether or not a shell casings were recovered, the spent projectile would then provide a lead to its purchaser without the need for ballistic imaging.

The technology is probably not there yet to produce such a chip or strip which would sufficiently withstand the heat and impact of a fired bullet, but this would definitely be something to work toward while shell casing identification is implemented, used and tested for effectiveness. Given our rapidly advancing aerospace and computer technology, the development of such a device should not be impossible. However, since this phase would impact on the manufacturing process itself it may be quite expensive and should probably be deferred, in any event, until results of the first two phases can be evaluated and a reliable cost benefit analysis made.

To some extent, identifying markers are already placed in commercial explosives by U. S. manufacturers and such identifying markers or "taggants" are mandatory in Switzerland. Again, techniques used by the U.S. Mint for including micro markers on bills could perhaps be applied to very small identification strips inserted into bullets and shotgun loads. (Although shotguns are rarely used in unsolved

murders and may not be of the same concern to law enforcement.)

D. Issues to be Confronted

(1) Cost

Obviously, developing and implementing data banks and tracking mechanisms for ammunition seem like extreme and costly measures even if existing technology and data systems were employed. However, we are in extreme times and **the cost of such measures would, in the long run, probably be far less than the economic impact of episodes such as we have seen in the Washington area which reportedly cost the communities involved hundreds of millions of dollars in additional security, lost productivity and commerce**. Maintenance costs may even be less expensive than the amounts presently spent by federal agencies alone for ballistic recording and tracing. The availability of such a system would undoubtedly save investigative time and resources and make law enforcement generally more efficient. It would also help to solve crimes and save lives which, of course, should have no price. The deterrent effect of such measures and the reduced accessibility of criminals to ammunition purchased by others would also be an immeasurable factor.

Finally, the cost of implementing such measures using existing systems could well be borne by the Government, so that hunters and other legitimate gun users would not suffer an increase in the price of their ammunition and manufacturers, wholesalers and retailers would not need to bear the cost of new equipment. As indicated, Phase Three (markers in projectiles) should probably await the results of the first two phases since it would be the most expensive endeavor.

Additionally, as a first step (and perhaps a test of effectiveness), the additional marking measures might be limited initially to the ammunition for the handguns most commonly used in murders and assaults, since those weapons account for well over 50 % of such crimes. This would probably include .25, .32, .38, .44, .45 and .357 caliber, as well as 7 and 9 mm ammunition. Of course, such a program limited to "high risk" ammunition would probably not have snared the D.C. Snipers, but it may be more cost efficient, as well as more politically saleable, than including ammunition typically used in hunting rifles and shotguns. In fact, this may be an area of compromise with the NRA and other gun lobbyists, if indeed, such a compromise is needed.

(2) Privacy and Civil Liberties

As previously noted, **the data bank would contain only raw numbers from which more specific information would have to be extracted on a case by case basis,** after identifying markers were recovered. Only then would the identities of suppliers or purchasers be available to investigating officers.

However, to further protect privacy and civil liberties, limiting legislation could provide that information from the ammunition data bank would be **available only to law enforcement and then only upon a court order similar to a search warrant**, based on a particular criminal investigation specifically identifying a "serious" crime committed, the evidence already recovered and the need for the information which is sought. Poaching or illegal target shooting, for example, should not be considered "serious" crimes warranting access to the data bank. Legislation and court supervision, as well as civil sanctions, could assure that there would be no wholesale distribution of gun owners' names or personal data or even the type of ammunition they have bought. The Federal Privacy Act and provisions relating to court authorized wire taps are examples of how privacy can be protected.

(3) Innocent Purchases and Effect on Supply

If specific and unique identity devices could be inserted on or in the bullets or shells, purchasers of ammunition could be assured that they would be at no risk that their identities would be disclosed to the police or anyone else unless one of the bullets purchased was found in the body of a victim or at a crime scene. Retailers, of course, would have to assure that ammunition was not sold to anyone whose ID number was not recorded into the system since they may also have to account for ammunition shipped to them and later used to commit a violent crime.

If there were then a reason why that bullet left the purchaser's possession, he might be able to disclose when, where and how it left, and possibly who had it when the crime was committed. Hopefully, legitimate purchasers of ammunition would be more reluctant to supply bullets they had purchased to potential criminals knowing the bullets would come back to haunt them if recovered from a body or crime scene. In effect, sellers and purchasers of bullets would be accountable for only those bullets actually used to commit a violent crime. If the bullets were stolen, records of the theft or burglary could also lead to the perpetrator of the murder or assault, just as the records of the Montgomery, Alabama, robbery and murder led to the arrest of the Washington Sniper Suspects. The supply of ammunition to legitimate purchasers, intended for lawful uses, would not be affected, but, hopefully, the supply of bullets

available to potential criminals would be curtailed because of the risks involved in providing ammunition to such individuals.

(4) Existing Supplies, Reloading and Bootlegging

There is, of course, a massive supply of ammunition already out there, including military surplus and foreign imports, and reining in this supply could be a massive undertaking. **However, existing unmarked ammunition could eventually be recovered by a trade-in program (again financed by the Government), so that legitimate users of firearms would not be penalized.** They would simply get new ammo or vouchers for their old ammo. Some of the unmarked ammunition collected could perhaps be put to use by police or the military, which would probably have to be exempted from the marking requirements, but most of it would have to be destroyed. After the trade-in program and an appropriate waiting period, it should be made a crime to possess ammunition without identifying data on it, just as it is now a crime to possess a gun which has a missing or obliterated serial number. An exception may have to be made for very unusual or antique ammunition not available from domestic manufacturers. However, the supplies of unmarked military ammunition, of which there would be a tremendous volume, would have to be subject to more strict security measures to avoid theft, and military surplus ammunition could no longer be sold to the public, unless, of course, it had been marked and was recorded at the time of sale.

Additionally, the practice of individual gun users "reloading" ammunition, could present a problem and may have to be separately regulated in some fashion as would mail order and internet sales of ammunition. These would seem to be the only necessary restrictions on legitimate gun related activities, and, as such, seem a small price to pay for the protections which such a tracking program would afford. As discussed, *infra*, the sale or transfer of certain ammunition to persons who did not have the necessary ID or specifically marked driver's license could also be prohibited, if it were politically possible to do so against the inevitable opposition of the gun lobby. But even if controls were not placed on these practices, the supply of untraceable ammo would still eventually be relatively small, and certainly far smaller than present unlimited supplies of ammunition available to criminals.

The continued importation of foreign ammunition which did not comply with the tracing requirements could also be a problem which might have to be addressed in trade agreements. Thefts of ammunition would have to take on an enhanced investigative priority similar to the priority now given thefts of drugs and explosives. However, even if a bootleg reloading or ammo smuggling industry developed, which undoubtably would occur, the overall supply of ammunition to criminals would still be greatly curtailed, particularly if illegal ammo suppliers were prosecuted with the same vigor as illegal drug suppliers are now.

(5) Limitations and Collateral Benefits

Needless to say, **identifying the possible purchaser of ammunition used in a crime will not necessarily solve that crime. However, it would go a long way to provide the police with leads they would not otherwise have**. Once the purchaser of bullets used in a crime was identified, investigators would at least have a starting point to track that bullet, a starting point they do not now have. Other investigative measures, including other forensic sciences and other law enforcement data bases, would still be necessary. The ammunition data bank alone would probably not prove a case in court, but it would certainly assist in identifying suspects. Moreover, as noted, such an information bank would create a personal risk to any purchaser who supplied marked ammunition to a potential criminal. This "risk" could be greatly increased if it were made a crime to supply at least certain types of ammunition to persons who did not have the appropriate ID card or specifically marked drivers license. (Since, it is already a federal crime for convicted felons, drug addicts and spouse abusers to possess ammunition, it may be assumed that they would not be issued such cards.)

Hopefully, the epidemic of street crimes committed with guns would be curtailed by reducing the sources for marked ammunition and by imposing penalties for the possession or distribution of unmarked ammunition. Similarly, the sale of any ammunition to persons already disqualified under existing laws would be much easier to investigate when that ammunition was used to commit a murder or assault. Consequently, the cost of ammunition to criminals could be expected to greatly increase, just as strict controls and prosecutions have greatly increased the price of illegally sold prescription drugs. This economic factor may, itself, have a deterrent effect on gun crimes in addition to the investigative benefits of this proposal.

E. Comparison of Bullets to Other Products

Creating a national data bank for ammunition may seem like an Orwellian suggestion, but if ammunition is compared with other products which are regulated or recorded the idea is not so far fetched. A quick tour of a supermarket will disclose that there

are manufacturers' numbers on everything from toothpaste to instant pudding to lottery numbers on the inside of beverage caps. Cars have long been traceable through VIN numbers and perishable products contain traceable numbers for public health reasons. TVs, cell phones and a host of other products also have serial numbers on them. No one pays attention to these numbers unless there is a problem, such as a recall, and no one screams that civil liberties are violated by keeping track of who has bought what car or what TV or cell phone. Similarly, no one should care about having recorded numbers on his or her ammunition unless that ammunition is intended to be used in a crime.

Manufacturers of food and cosmetic products obviously do not find it economically prohibitive to print numbers on products which are far less lethal or dangerous than bullets. So, the process of marking bullets with traceable numbers should not be any real impediment, particularly if the Government provides some assistance. Similarly, bar coding has developed into a widely used and inexpensive technology to track almost every product known. In fact, Fed Ex, UPS, and other couriers routinely track millions of packages daily along every step of their routes. These examples indicate that, to a large extent, the recording and tracking technology is available if the political will and commitment can be marshaled to apply this technology to bullets.

Most importantly, it is time to recognize that bullets (and shotgun shells) are a very unique product in that their ultimate purpose is to penetrate the body and end the life of a warm-blooded being, and some bullets are uniquely designed to kill or maim human beings. Target shooting notwithstanding, no other consumer product has this deadly purpose as its primary function. Society clearly has a legitimate interest in being able to track such lethal products, particularly those used to commit violent crimes, and more particularly if it can do so without violating the privacy rights of legitimate users. It is, indeed, ironic that we have, for decades, strictly regulated and recorded shipments, sales and purchases of prescription drugs, some of them quite benign, but have not even addressed the concept of recording purchases of bullets.

It is even more ironic that an individual who sells even a small quantity amount of marijuana or cocaine to Bozo Badguy, so Bozo can "party" with his neighbors, may face a very long prison sentence. However, if the same person sells Bozo several boxes of 9 mm hollow point bullets, so that he can blow away his neighbors, no one seems to care who the supplier may have been. He has merely sold a legal and uncontrolled product to an individual who would pay for it . Under the present system, he will probably not even be identified, much less called to account, no matter how dangerous he may have known Bozo to be when the bullets were sold.

Obviously, the time has come to allow our information technology to catch up with the technology of high-powered rifles, assault weapons, semi-automatic handguns and long distance laser scopes. Such technology should also be able to focus on those who routinely supply the bullets used in violent crimes. While the proliferation and traceability of guns may be out of our control, we can and should apply the resources we have to reduce the presently wide open access of criminals to the ammunition they need to commit their murders and assaults.

F. Second Amendment Considerations

Finally, such a recording and tracking system would not prohibit or limit the purchase, ownership, or use of firearms or ammunition any more than do the laws presently on the books. The issuance of ID cards, or the adaption of drivers licenses, to record the purchase of ammunition could still be a matter of State prerogative as long as the cards could be uniformly used to obtain input of the information needed. **There would be no gun registration involved and no one would attempt to interfere with the "right to bear arms" as it presently exists.** Only ammunition actually used in the commission of a crime would be investigated, and only the purchasers and sellers of that particular ammunition, and those to whom it may have been later supplied, would be bothered by law enforcement.

Someone still fearful of the "slippery slope" of the Government having any data on their ownership or use of firearms could, of course, have someone else buy their ammunition as long as that someone were prepared to account for any bullets he or she purchased which were later used to commit a violent crime. On the other hand, those wishing to collect even an arsenal of guns for self protection, recreation, or other legal purpose and to buy ammunition for those purposes would have no further interference from the Government as a result of such a system. **This proposal merely injects elements of traceability and accountability for a deadly, but legal, product which elements we do not now have. As the NRA has suggested, it targets criminals and those who assist and supply them with ammunition rather than innocent gun owners.**

G. Conclusion

Obviously, I am neither a data engineer, nor a firearms expert, and there are probably obstacles to these

proposals as well as other technologies and systems which I have not even considered. Similarly, I am not in a position to estimate the cost of these proposals, nor how many crimes they may solve or prevent. These are matters for real experts and perhaps for an appropriate study or two with input from Law Enforcement, ammo manufacturers and gun owners. However, I offer these suggestions as a common sense approach and one that is certainly more feasible, effective and politically acceptable than the gun “fingerprint” data bank widely discussed. Additionally, such a system would provide a far more direct and certain link to the perpetrators of violent gun crimes than the ballistic imaging techniques and very limited data bank now employed and funded by the federal Government. **The key feature of this proposal, of course, is the utilization of presently available commercial systems rather than the development of new systems or the dependence on questionable and limited forensic technology.**

Indeed, if we are going to have a ballistics “fingerprinting” system why not use our technology to create foolproof “fingerprints” (via markers) in advance, and give new meaning to the old movie cliche’ **“This Bullet Has Your Name On It.”**

A 2255 and 2241 Primer: A Guide for Clients and their Family and Friends

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The motion to vacate, set aside or correct a sentence provided by 28 U.S.C. §§2255 is a modern descendant of the common law petition for a writ of habeas corpus. It is available only to people convicted in federal courts who are in custody. (The corresponding federal postconviction tool for state prisoners is the habeas petition governed by 28 U.S.C. §§2254.) The §§2255 motion is the postconviction tool most federal prisoners turn to after they have exhausted their appeals. When it is used effectively, it can be a powerful tool to right injustices that were not or could not have been raised on direct appeal. This is because it gives courts broad discretion in fashioning appropriate relief, including dismissal of all charges and release of the prisoner, retrial, or resentencing.

Occasionally, the remedy provided by §§2255 will be "inadequate or ineffective to test the legality of [a prisoner's] detention." 28 U.S.C. §§2255. In those rare instances, federal prisoners may petition for traditional writs of habeas corpus pursuant to 28 U.S.C. §§2241.

Who can file a §§2255 motion?

Only "prisoners" who are " *in custody* under sentence of a court established by Act of Congress" may file motions pursuant to 28 U.S.C. §§2255 to vacate their convictions or sentences. 28 U.S.C. §§2255 (emphasis added). To satisfy this "custody" requirement, a defendant must either be in prison or jail, or else have his or her liberty under some other form of restraint as part of a federal sentence. In other words, the "in custody" requirement is important, while the limitation of the remedy to "prisoners" is not literally enforced. Examples of restraints short of imprisonment which qualify as "custody," include probation, parole, supervised release, and being released on bail or one's own recognizance.[2] A defendant need only satisfy the "custody" requirement at the time he or she files a §§2255 motion. A defendant's being released from custody during the pendency of a §§2255 motion does not make the case moot or divest a court of jurisdiction to hear the case.[3]

A defendant who has completely finished his or her sentence, or who has been sentenced only to a fine, may not obtain relief through §§2255. Similarly, because corporate defendants never have restraints placed on their physical liberty as a result of a federal criminal conviction (corporations receive only fines as criminal punishments), they can never meet the "custody" requirement. Defendants who can not meet the custody requirement may still be able to obtain relief under the All Writs Act, 28 U.S.C. §§1651, by petitioning for a writ in the nature of Coram Nobis, which has no custody requirement.[4]

What issues can be raised in a §§2255 motion?

Section 2255 provides that "prisoners" may move for relief "on the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." Most Circuits of the Court of Appeals have interpreted this language to mean that defendants who meet §§2255's custody requirement may not raise issues which challenge aspects of their sentence which are unrelated to their custody.[5] Most §§2255 motions allege violations of the defendant's Sixth Amendment right to the effective assistance of counsel.

How does a §§2255 motion differ from a direct appeal?

One of the most significant differences between a direct appeal and a §§2255 motion is that direct appeals are decided based on the

district court record as it exists as of the time the notice of appeal is filed. In contrast, §§2255 motions offer defendants the opportunity to present the court with new evidence. While issues which may be raised in a §§2255 motion are not limited by the record as it exists at the time the motion is filed, unlike in a direct appeal, not all issues may be raised in a §§2255 motion. Section 2255 motions may only be used to raise jurisdictional, constitutional, or other fundamental errors. For example, some circuits hold that guideline calculation errors that escaped notice on direct appeal cannot be raised under §§2255.[6] Others have not questioned the appropriateness of raising guideline issues in a §§2255 motion.[7] A §§2255 motion is, however, always the proper vehicle to question whether an attorney's failure to raise a guideline issue deprived a defendant of his or her Sixth Amendment right to effective assistance of counsel, either at sentencing, or on direct appeal.[8]

What are some of the obstacles a defendant may encounter in litigating a §§2255 motion?

Identifying an appropriate §§2255 issue is no guarantee of success. Even prisoners who have good issues must often overcome numerous obstacles before a court will even address them. For example, if an issue could have been raised on direct appeal, but was not, a district court will not consider the issue in a §§2255 proceeding unless the defendant can demonstrate "cause" (such as ineffective assistance of counsel) for not raising the issue earlier and "prejudice" (that is, that the error likely made a difference in the outcome). For this reason, it is generally not a good idea to forego a direct appeal and proceed directly to a §§2255 motion. Conversely, if an issue was raised and decided on appeal, a defendant is procedurally barred from raising it again in a §§2255 motion, absent extraordinary circumstances, such as an intervening change in the law or newly discovered evidence.[9]

Section 2255 motions may not be used as vehicles to create or apply new rules of constitutional law. While new interpretations of substantive law may be applied retroactively in a §§2255 motion,[10] with rare exceptions, new rules of constitutional law may not.[11]

Do prisoners have a right to appointed counsel to assist them in filing and litigating a §§2255 motion?

Prisoners who cannot afford to hire private counsel have no right to appointed counsel to assist them in filing §§2255 proceedings. Indigent litigants may, however, petition the court for appointment of counsel. A court has discretion to appoint counsel "at any stage of the proceeding if the interest of justice so requires." 18 U.S.C. §§3006A(a)(2)(B); Fed.R.Gov. §§2255 Proc. 8(c). Appointment of counsel is mandated only if the court grants an evidentiary hearing, Rule 8(c), or if the court permits discovery and deems counsel "necessary for effective utilization of discovery procedures." Rule 6(a).

Is there a time limit within which a §§ 2255 motion must be filed?

Prior to Congress' enacting the Antiterrorism and Effective Death Penalty Act ("AEDPA") in 1996, there was no specific limit on the time within which a prisoner was required to file a §§2255 motion. The AEDPA's amendment of 28 U.S.C. §§2255 imposed a one-year statute of limitations which is triggered by the latest of four events:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

All defendants thus have one year from the date on which their judgments of conviction become final within which to file §§2255 motions. Occasionally a particular defendant will be able to file a §§2255 motion beyond that date when a new year-long limitation period is triggered by one of the other events listed above.

Unfortunately, there is no consensus among the Courts of Appeals as to when a judgment of conviction becomes "final," thus triggering the one-year statute of limitations. Prior to the AEDPA, the Supreme Court held, in the context of deciding when a "new rule" could be applied on collateral attack, that a conviction becomes final when "the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari ha[s] elapsed ...."[12] Although a "new rule" may not be applied retroactively on collateral attack, it may be applied in a particular case if it was announced prior to the judgment of conviction becoming "final" in that case. Although it may seem intuitive that the same rule should trigger the statute of

limitations in §§2255 cases, not all Courts of Appeals have seen it that way.[13]

It is clear that when a defendant petitions the Supreme Court for a writ of certiorari as part of the direct appeal, the judgment of conviction becomes final on the date the Supreme Court denies the writ. If the Supreme Court grants the writ, then the judgment of conviction becomes final either on the date the Supreme Court rules (if there is no remand), or on the date that the conviction and sentence are ultimately affirmed on remand. What is not so clear is when a conviction becomes final when a defendant fails to appeal, or when he or she appeals, but fails to petition for writ of certiorari. Two Courts of Appeals have held that where a defendant appeals, but fails to petition for writ of certiorari, the conviction becomes final, triggering the statute of limitations, when the Court of Appeals issues its mandate.[14] Other Courts of Appeals have held that the judgment of conviction becomes final, triggering the statute of limitations, on the last day a defendant has to petition the Supreme Court for certiorari.[15]

If a defendant does not appeal, it is clear that in the Third, Fifth, Ninth, and Tenth Circuits, the judgment of conviction becomes final on the last day the defendant could file a notice of appeal —— *i.e.*, on the tenth day following the entry of the judgment of sentence. It is not clear yet when the judgment would become final in the Fourth or Seventh Circuits, or in the circuits which have not yet addressed the question of when a judgment of conviction becomes "final" under the AEDPA. If you are in a jurisdiction which has not decided the issue, the prudent course may be to assume that the year runs from the date the judgment of conviction is entered on the docket (if no notice of appeal is filed), or on the date the court of appeals decides the case or denies a timely-filed petition for rehearing.

If a defendant wins a new trial or a resentencing on appeal (or even as a result of a §§2255 motion), then the new judgment of conviction and sentence which is entered after the new trial or resentencing would begin a new year-long statute of limitations.

Is AEDPA's one year rule hard and fast?

No. Every Circuit to have considered the issue has ruled that the AEDPA's one-year statute of limitations is not jurisdictional in nature, and is therefore subject to equitable tolling.[16] Equitable tolling excuses a movant's untimely filing "because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence."[17] Courts, however, have rarely found that movants meet the requirements of equitable tolling. For example, "mere excusable neglect is not sufficient."[18] Nor is delay by the Postal Service,[19] or the unclarity of a deadline.[20] A *pro se* movant's being misled by a court, however, *has* supported equitable tolling.[21]

How and where do you file a §§2255 motion?

Section 2255 motions must be filed with the district court which sentenced the defendant. The local rules of most district courts require *pro se* prisoners to use forms supplied by the Clerk. Some local rules even require attorneys to use the forms. There is no filing fee.

What happens after the motion is filed?

Section 2255 motions are first presented to the judge who presided over the defendant's trial and sentencing if that judge is available. The judge examines the motion and attached exhibits, as well as the rest of the case record (including transcripts and correspondence in the file). The court then either dismisses the motion or orders the government to file an answer. Dismissal is required where the court concludes that the claims raised in the motion, even if true, would not provide a ground for §§2255 relief, or where the claims are conclusively refuted by the files and records of the case.

After the government files its answer, the defendant may want to refute the government's arguments. This can be done by filing a memorandum in reply. Sometimes the right to file a reply memorandum exists under local court rules or court order. Sometimes a defendant must file a motion for leave to file a reply.

At this point, the court will either grant or deny relief, or will hold a hearing. While the language of 28 U.S.C. §§2255 seems to require a hearing whenever the court orders the government to file an answer, the rules governing §§2255 motions leave the necessity of a hearing to the court's discretion. Fed.R. Gov. §§2255 Proc. 8(a). In practice, courts grant hearings only where there are critical facts in dispute. Whenever a court holds an evidentiary hearing, Rule 8(c) requires it to appoint counsel for *pro se* defendants who cannot afford to hire counsel. The prisoner can be brought to court for the hearing if his or her testimony is required, or for any other reason approved by the judge.

How long does the process take?

Once a defendant files a §§2255 motion, it can take anywhere from several weeks (in the event of a summary dismissal) to over a year (if the government is ordered to respond, and a hearing is held) for a court either to grant or dismiss a §§2255 motion.

Do any special rules apply to §§2255 motions?

Yes —— the "Rules Governing Section 2255 Proceedings For the United States District Courts." The rules address the following issues: scope of the rules (Rule 1), form of

the motion (Rule 2), filing of the motion (Rule 3), preliminary consideration by the judge (Rule 4), answer of the government (Rule 5), discovery (Rule 6), expansion of the record (submitting evidence) (Rule 7), evidentiary hearing (Rule 8), delayed or successive motions (Rule 9; this rule has been largely, if not entirely, superseded by the AEDPA's more stringent restriction on successive motions), the powers of U.S. Magistrate Judges to carry out the duties imposed on the court by the rules (Rule 10), and the time for appeal (Rule 11). If no Rule specifically applies, Rule 12 provides that "the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate ...."

Rule 22 of the Federal Rules of Appellate Procedure addresses the procedure for applying for a certificate of appealability (permission to appeal). Local district court and appellate rules often have special sections devoted to §§2255 motions and prisoner petitions.

What rules of discovery apply to §§2255 motions?

Rule 6 of the Rules Governing §§2255 Proceedings allows defendants as well as the government to conduct discovery pursuant to the Federal Rules of Civil Procedure —— but only with permission from the court. The rule gives the district court discretion to grant discovery requests "for good cause shown, but not otherwise."

Can denial of §§2255 motions be appealed?

The denial of a §§2255 motion can be appealed only if "a circuit justice or judge issues a certificate of appealability." 28 U.S.C. §§2253(c)(1). A circuit justice or judge "may issue a certificate of appealability ... only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* §§2253(c)(2). (Under this language, even if the §§2255 motion properly raised a non-constitutional issue, the denial of that ground for relief cannot be appealed at all.) If a certificate is issued, it must "indicate which specific issue or issues satisfy" the required showing of the denial of a constitutional right. *Id.* §§2253(c)(3). Only defendants need certificates of appealability to appeal the denial of §§2255 motions; the government needs no certificate to appeal the granting of a motion to vacate. Fed.R.App.P. 22(b)(3).

Although the appeal of the court's denial of a §§2255 motion may not proceed without a certificate of appealability, a notice of appeal must nevertheless be filed within 60 days from the date judgment is entered. Fed.R.Gov. §§2255 Proc. 11 (time to appeal is as provided in Fed.R.App.P. 4(a), governing civil appeals). Since there is no time limit within which a court must rule on an application for a certificate of appealability (some courts have been taking a year or more to rule on such requests), the rules of appellate procedure provide that the notice of appeal itself "constitutes a request [for a certificate of appealability] addressed to the judges of the court of appeals." Fed.R.App.P. 22(b)(3). The filing of a notice of appeal also triggers a requirement that the "district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue." Rule 22(b)(1). If the district court denies the certificate, the defendant "may request a circuit court judge to issue the certificate." *Id.* Rule 22(b)(2) provides that "A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes." Some Courts of Appeals assign this task to a single judge.[22] Others refer such requests to panels of the Court.[23] Even when consideration of a request for a certificate of appealability is referred to a panel, the support of only one judge is required for the certificate to issue.[24]

What is required to make a "substantial showing of the denial of a constitutional right"?

The standard for appealability under 28 U.S.C. §§2253(c)(2) is somewhat different depending upon whether the district court has rejected the issue sought to be appealed on its merits or on procedural grounds. With respect to constitutional claims rejected on their merits, the Supreme Court has applied to certificates of appealability the standard for granting certificates of probable cause set forth in *Barefoot v. Estelle*,[25] and followed in the AEDPA.[26] Under this standard, the appellant must make a showing that each issue he or she seeks to appeal is at least "debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further."[27] The "substantial showing" standard "does not compel a petitioner to demonstrate that he or she would prevail on the merits."[28] As to claims denied on procedural grounds (that is, where the district court has not reached the merits), the Court in *Slack* clarified that the certificate of appealability standard is somewhat different and easier to meet: (1) "whether jurists of reason would find it debatable whether the petition *states* a valid claim of the denial of a constitutional right" (in other words, does the petition at least allege a valid claim, even though it hasn't been proven yet), and (2) whether "jurists of reason would find it debatable whether the district court was correct in its procedural ruling."[29]

Can a defendant file more than one §§2255 motion?

As provided in 28 U.S.C. §§2255, before a prisoner may file a second

§§2255 to challenge a particular judgment, a "*panel* of the appropriate court of appeals" must "certif[y]" that the motion "contain[s]" either:

> (1) newly discovered evidence that, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

This harsh rule is tempered slightly by the fact that it applies only to motions which attack the a judgment that a defendant has previously moved pursuant to §§2255 to vacate. Defendants may file one §§2255 motion as of right for each judgment of conviction and sentence. For example, if a defendant's conviction is vacated as a result of a §§2255 motion, he receives a new trial and is convicted and sentenced again (or simply resentenced), he may file a §§2255 motion to challenge that new judgment without receiving permission from the Court of Appeals.

If a defendant wants to file a second §§2255 motion attacking the same judgment, his or her options are severely limited. The newly discovered evidence ground, for example, applies only to newly discovered evidence which establishes a defendant's factual innocence. It does not, for example, apply to evidence which, had it been known prior to sentencing, would have resulted in a shorter term of imprisonment. Nor would it apply to newly discovered evidence which, if it had been introduced at trial, might have engendered a reasonable doubt. The evidence must be such that had it be introduced, "no reasonable factfinder would have found the movant guilty of the offense."

The second ground is also quite narrow. It applies only to "new rule[s] of constitutional law" —— not to changes in substantive law. The "new rule" must also have been "previously unavailable" *and* have been "made retroactive to cases on collateral review by the Supreme Court." A "new rule" has been "made retroactive to cases on collateral review by the Supreme Court" only if the Supreme Court itself has previously declared it to be retroactive —— something which ordinarily can happen only on appeal of someone else's timely *first* §§2255 or habeas petition.[30]

Not only must a second §§2255 motion meet one of these criteria before it may be filed, it must also be filed within an applicable clause of the statute of limitations. For most defendants, that will mean within one year of the discovery of the new evidence, or "the date on which the right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." §§2255 (¶¶ (3)).

Habeas Corpus (§§2241) Petitions

A §§2241 action, also known as a petition for a writ of habeas corpus, is essentially a civil law-suit filed by a federal prisoner to challenge the legality of his or her custody in situations where the §§2255 motion would be inadequate or ineffective. There are two types of habeas petitions —— those that challenge the validity of the underlying convictions or sentences, and those that do not. Because §§2255 motions are, except in rare instances, "adequate" (even if not successful) to challenge the validity of underlying convictions and sentences, habeas petitions are generally limited challenges to federal custody which do not challenge the underlying convictions or sentences.

Challenges to underlying convictions and sentences.

The §§2255 remedy is not "inadequate or ineffective" simply because a defendant has filed a §§2255 motion and failed to obtain relief,[31] or because a defendant is barred by the statute of limitations,[32] or by the statutory limitations on second and successive motions, from filing a §§2255 motion.[33] Circumstances under which courts have permitted criminal defendants to employ the habeas petition to challenge their convictions and sentences include abolition of the sentencing court,[34] refusal of the sentencing court even to consider the §§2255 motion,[35] and inordinate delay in disposing of a §§2255 motion.[36]

The limitations imposed by the AEDPA on second or successive petitions have created a new (although still rare) circumstance under which the remedy afforded by §§2255 is "inadequate or ineffective." After a defendant has already filed a §§2255 motion challenging his underlying conviction and sentence, and lost, he may receive permission from the Court of Appeals to file a second §§2255 only in the two limited circumstances discussed previously. A second or successive §§2255 is not permitted when the Supreme Court reinterprets the meaning of the statute under which the defendant had been convicted so as to render him innocent on the facts. While substantive criminal law rulings by the Supreme Court, such as this, are retroactively applicable on collateral attack (and therefore could support *first* §§2255 motions, so long as the motions are timely-filed), they do not come within the two narrow grounds for receiving permission to file a second motion. Under these

circumstances, courts have held that §§2255 is inadequate or ineffective and have permitted defendants to challenge their underlying convictions through habeas petitions.[37]

Habeas petitions which do not challenge underlying convictions and sentences.

The §§2241 petition is the proper vehicle for challenging the duration of a prisoner's confinement without challenging the underlying conviction.[38] The Supreme Court has suggested in dictum that §§2241 petitions may also be used to challenge a prisoner's conditions of confinement.[39] Some courts have permitted federal prisoners to use §§2241 petitions to challenge prison conditions.[40] Other courts have ruled that such challenges must be made through civil rights actions, such as those brought under the authority of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Investigation.*[41] A court's mandamus jurisdiction may also sometimes be invoked to seek redress of prison conditions.[42]

Who may file a §§2241 action?

Federal habeas corpus relief under 28 U.S.C. §§2241(c)(3) is available to anyone held "in custody in violation of the Constitution, laws or treaties of the United States." However, by law, the §§2241 remedy is limited to situations which are not covered by either 28 U.S.C. §§§§2254 (state prisoner challenging state conviction) or 2255 (federal prisoner challenging conviction or sentence). In addition to incarceration, being on parole or bail count as being "in custody." Section 2241 is also used to obtain review of forms of official custody not resulting from convictions, such as detained aliens and military members seeking discharge.

When may a prisoner file a §§2241 action?

A prisoner must first exhaust (use all of) his or her administrative remedies, if any, before filing a §§2241 action. For instance, if the Bureau of Prisons has sanctioned a prisoner with the loss of good time credits, the prisoner must exhaust BOP administrative remedy procedures, if any, before he or she files a §§2241 action.[43] Courts generally recognize an exception to the "exhaustion" requirement where no timely and potentially effective administrative remedy exists.[44]

Where and how should a prisoner file a §§2241 action?

A §§2241 action is a new civil law-suit which should be filed in the district court having territorial jurisdiction over the prison or other person or agency having custody of the petitioner. Habeas petitions differ in many ways from normal civil lawsuits, however. For example, the filing fee is only $5. Also, a few, but not most, districts, require the use of a form petition. Neither the Federal Rules of Civil Procedure nor the rules applicable to §§2254 cases necessarily applies to §§2241 habeas petitions. The question of which rules do apply is complex, and unfortunately beyond the scope of this article.

Once the court reviews the petition, it will do one of four things: dismiss it (but only if the petitioner would lose even if the court accepted its allegations as true), order the petitioner to amend it (for instance, where there is some technical defect), order the respondent to show cause why the petition should not be granted —— *i.e.*, to answer the petition by a certain date, or summarily grant the writ (extremely rare). After the respondent answers the petition (assuming it is ordered to do so), the petitioner may file a "traverse" (*i.e.*, a written reply to the reasons the respondent gave for why the court should not grant the petition). If an evidentiary hearing is held, the prisoner has a right to be present. Once a hearing is held (if one is necessary) and all the briefing is complete, the court will decide the case, "as law and justice require." 28 U.S.C. §§2243.

Can the denial of §§ 2241 relief be appealed?

Yes. Notice of appeal must be filed within 60 days of the entry of final judgment. Rule 4(a) of the Federal Rules of Appellate Procedure. No certificate of appealability is required.[46]

Can a prisoner file more than one §§2241 habeas petition?

Yes. No permission from the Court of Appeals is required. A second petition which raises an issue which could have been raised in the first petition must show cause why it was not raised in the first, or be dismissed under the "abuse of the writ" doctrine.[47] Similarly, a second petition which raises an issue which was decided in a prior petition will also be dismissed as an "abuse of the writ."[48]

Legal Assistance

Prisoners need not hire an attorney to file a §§2241 petition for a writ of habeas corpus. In fact, most §§2241 petitions are filed by prisoners without the assistance of attorneys. Unfortunately, due in part to the legal minefield that any federal habeas litigant must cross, most of these are summarily denied without a hearing. To maximize his or her chances of success, a prisoner should retain the services of competent counsel. Prisoners who are unable to afford private counsel may ask the court to appoint an attorney under the Criminal Justice Act to represent them. 18 U.S.C. §§3006A(a)(2)(B). Prisoners filing for habeas corpus are not entitled to appointed counsel as a matter of right.

* * * * *

NOTES (FOR TEXT):

1. **Alan Ellis,** a former president of the National Association of Criminal Defense Lawyers, has offices in both Sausalito, California, and Philadelphia, Pennsylvania. For the past 25 years he has represented federal criminal defendants and consulted with leading lawyers throughout the United States in the area of federal plea negotiations, sentencing, and post-conviction remedies. Mr. Ellis writes and lectures extensively in these areas. He is the publisher of Federal Presentence and Post conviction News, and the co-author of the Federal Prison Guidebook.

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2. See, *e.g. Balik v. United States,* 161 F.3d 1341 (11th Cir. 1998) (parole); *United States v. Brown,* 117 F.3d 471 (11th Cir. 1997) (supervised release).

3. See, *e.g., United States v. Brown,* 117 F.3d 471 (11th Cir. 1997).

4. *United States v. Morgan,* 346 U.S. 502 (1954); *United States v. Rad-O-Lite of Philadelphia, Inc.,* 612 F.2d 740 (3d Cir. 1979).

5. See, *e.g., United States v. Kramer,* 195 F.3d 1129 (9th Cir. 1999) (challenge to restitution not cognizable in §§2255 motion). But see *Weinberger v. United States,* 268 F.3d 346, 351 n.1 (6th Cir. 2001) (allowing defendant to contest restitution in §§2255 motion).

6. *United States v. Pregent,* 190 F.3d 279, 283-84 (4th Cir. 1999).

7. See, *e.g., United States v. Marmolejos,* 140 F.3d 488 (3d Cir. 1998).

8. *Smullen v. United States,* 94 F.3d 20, 23 (1st Cir. 1996)(sentencing); *Glover v. United States,* 531 U.S. 198 (2001)(direct appeal).

9. *Davis v. United States,* 417 U.S. 333 (1974).

10. *Bousley v. United States,* 523 U.S. 614 (1998).

11. *Teague v. Lane,* 489 U.S. 288 (1989).

12. *Allen v. Hardy,* 478 U.S. 255, 258 n.1 (1986) (per curiam).

13. For example, in *Gendron v. United States,* 154 F.3d 672, 673-74 (7th Cir. 1998), the Seventh Circuit refused to apply this rule to the AEDPA statute of limitations.

14. *Gendron v. United States,* 154 F.3d 672 (7th Cir. 1998); *United States v. Torres,* 211 F.3d 836 (4th Cir. 2000).

15. See *United States v. Garcia,* 210 F.3d 1058 (9th Cir. 2000); *United States v. Gamble,* 208 F.3d 536 (5th Cir. 2000); *United States v. Burch,* 202 F.3d 1274 (10th Cir. 2000); *Kapral v. United States,* 166 F.3d 454 (3d Cir. 1999).

16. See *Dunlap v. United States,* 250 F.3d 1001, 1004 n.1 (6th Cir. 2001) (citing cases).

17. *Sandvik v. United States,* 177 F.3d 1269, 1271 (11th Cir. 1999).

18. *Miller v. New Jersey State Dept. of Corrections,* 145 F.3d 616, 619 (3d Cir. 1998).

19. *Sandvik,* 177 F.3d at 1272 (counsel should have used a private delivery service or courier).

20. *United States v. Marcello,* 212 F.3d 1006, 1010 (7th Cir. 2000) (counsel should have filed by the earliest possible deadline). *But cf. Banks v. Horn,* 271 F.3d 527, 533-34 (3d Cir. 2001) (affirming tolling by district court in §§2254 case where state rules on whether state post-conviction relief was "properly filed" (and thus tolled the one-year statute for §§2254 petitions) were "inhibitively opaque").

21. See *United States v. Patterson,* 211 F.3d 927 (5th Cir. 2000) (statute tolled where one week after running of statute, district court granted, "without prejudice" and "in the interests of justice," movant's request to dismiss timely-filed §§2255 motion to obtain assistance of an experienced "writ-writer").

22. See, *e.g., In re Certificates of Appealability,* 106 F.3d 1306 (6th Cir. 1997).

23. See, *e.g., Bui v. DePaolo,* 170 F.3d 232, 238 n.2 (1st Cir. 1999).

24. *See, e.g.,* Third Cir. R. 22.3 (certificate to issue on affirmative vote of one judge); Fourth Cir. R. 22(a) (same).

25. 463 U.S. 880 (1983).

26. *Slack v. McDaniel,* 529 U.S. 473 (2000).

27. *Barefoot,* 463 U.S. at 893 n.4) (internal quotations omitted; bracketed insertions original).

28. *Id.*

29. *Slack,* 529 U.S. at 478.

30. *Tyler v. Cain,* 533 U.S. 656 (2001).

31. *Charles v. Chandler,* 180 F.3d 753 (6th Cir. 1999) (per curiam).

32. *United States v. Lurie,* 207 F.3d 1075 (8th Cir. 2000).

33. *In re Davenport,* 147 F.3d 605, 608 (7th Cir. 1998).

34. *Spaulding v. Taylor,* 336 F.2d 192 (10th Cir. 1964).

35. *Stiron v. Markley,* 345 F.2d 473 (7th Cir. 1963).

36. *Id.*

37. See, e.g., *Triestman v. United States,* 124 F.3d 361 (2d Cir. 1997) (defendant factually innocent on §§924(c) gun count following *Bailey v. United States,* 516 U.S. 137 (1995)). See also *In re Dorsainvil,* 119 F.3d 245 (3d Cir. 1997) (same).

38. See, *e.g., Reno v. Koray,* 515 U.S. 50 (1995) (seeking credit for time spent in treatment facility); *Preiser v. Rodriguez,* 411 U.S. 475 (1973) (challenge to revocation of "good-time" credits); *Bellis v. Davis,* 186 F.3d 1092 (8th Cir. 1999) (challenge to BOP rule excluding certain inmates from eligibility for early release pursuant to 18 U.S.C. §§3621(e)(2)); *McIntoch v. United States Parole*

Commission, 115 F.3d 809 (10th Cir. 1997) (challenge to revocation of parole); *Goodman v. Meko,* 861 F.2d 1259 (11th Cir. 1988) (prison officials refuse to release a prisoner entitled to mandatory release).

39. *Preiser v. Rodriguez,* 411 U.S. at 498-99. See also *Bell v. Wolfish,* 441 U.S. 520, 526 n.6 (1979) (open question whether §§2241 may be used to challenge conditions of confinement).

40. See, *e.g., Bonacci v. Kindt,* 868 F.2d 1442 (5th Cir. 1989) (prisoner alleged denial of access to courts and due process); *United States v. Huss,* 520 F.2d 598 (2d Cir. 1975) (Jewish prisoners contend that prison's failure to provide them with Kosher food violates constitutional right).

41. 403 U.S. 388 (1971). See, *e.g. Boyce v. Ashcroft,* 251 F.3d 911 (10th Cir. 2001) (affirming dismissal of §§2241 petition challenging constitutionality of transfer to maximum security prison in retaliation for exercise of First Amendment rights), *vacated on reh'g,* 268 F.3d 953 (10th Cir. 2001) (case mooted when BOP granted prisoner relief requested).

42. See, *e.g., Long v. Parker,* 390 F.2d 816, 189 (3d Cir. 1968) (upholding mandamus jurisdiction under 28 U.S.C. §§1361 for prisoners challenging treatment by the Federal Bureau of Prisons).

43. *Carmona v. U.S. Bureau of Prisons,* 243 F.3d 629 (2d Cir. 2001).

44. *Fuller v. Rich,* 11 F.3d 61, 62 (5th Cir. 1994) (per curiam).

45. *Browder v. Director,* Department of Corrections of Illinois, 434 U.S. 257 (1978).

46. See *Jeffers v. Chandler,* 253 F.3d 827, 830 (5th Cir. 2001).

47. *McCleskey v. Zant,* 499 U.S. 467, 494 (1991).

48. *David v. Fechtel,* 150 F.3d 486, 490-91 (5th Cir. 1998); *George v. Perrill,* 62 F.3d 333 (10th Cir. 1995)

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.

CA7 Case Digest

By: Jonathan Hawley
Appellate Division Chief

APPEAL

United States v. Husband, 312 F.3d 247 (7th Cir. 2002). In prosecution for drug offenses, the Court of Appeals clarified the law regarding the "scope of remand" and the question of whether issues were waived during an initial appeal. The court noted that it does not remand issues to the district court when those issues have been waived or decided. The question of whether an issue was waived on the first appeal is an integral and included element in determining the "scope of remand." Any factors that limit remand are implicitly taken into account when the court remands a case. The court also noted two major limitations on the scope of a remand. First, any issue that could have been but was not raised on appeal is waived and thus not remanded. Second, any issue conclusively decided by the Court of Appeals on the first appeal is not remanded. To determine whether an issue falls within the second limitation the opinion needs to be looked at as a whole. The court may explicitly remand certain issues exclusive of all others; but the same result may also be accomplished implicitly. For example, if the opinion identifies a discrete, particular error that can be corrected on remand without the need for redetermination of other issues, the district court is limited to correcting that error. In such a case the implication is that for arguments not addressed in the remanding opinion the two possibilities are that the court thought so little of the point that it did not see a need to discuss it, or the party did not invoke and thereby waived the point. The court's silence on the argument implies that it is not available for consideration on remand.

United States v. Nave, 302 F.3d 719 (7th Cir. 2002). In this appeal, the Court of Appeals went out of its way to comment on the poor quality of appellate representation. In the Court's own words: "There is, however, one additional matter we address, unrelated to the issues raised on appeal, which is the appellate advocacy of Nave's counsel. He requested eight extensions of time in which to file his initial brief to this Court, and several times we issued orders to show cause why we should not take action for failure to prosecute his appeal. Though one of the extensions of time was to ostensibly correct typographical errors in the brief, when the brief was finally filed, it had many errors, including describing the second count of Nave's indictment as "*court* 2 under 18 U.S.C. § 924(c)(1)(A)(ii), for using, carrying and *rendering* a firearm during and in relation to a crime of *evidence*" (italics added). As already described above, the merits of the appeal presented are barely worth discussing, and we received no substantive response, either in a reply brief or at oral argument, to the government's argument that this appeal is barred by the plea agreement's waiver provisions. The poor quality of Nave's counsel's appearance before this court leaves us at a loss. As we have said before, "[w]e do not feel it is unreasonable to expect carefully drafted briefs clearly articulating the

issues and the precise citation of relevant authority for the points in issue from professionals trained and educated in the law." *Jones v. Hamelman*, 869 F.2d 1023, 1032 (7th Cir. 1989). However, we decide in our discretion to not impose a fine, and hope that an admonishment is sufficient to persuade Nave's appellate counsel to be more diligent in the future."

APPRENDI

United States v. Mansoori, 304 F.3d 635 (7th Cir. 2002). In prosecution for distribution of one kilogram of cocaine, the Court of Appeals vacated the defendant's sentence because the district court improperly imposed a life sentence on the count. Pursuant to 21 U.S.C. § 841(b)(1)(B)(ii), the maximum term of imprisonment that could be imposed for distribution of one kilogram of cocaine is 40 years, rather than life in prison. Accordingly, the case was remanded for re-sentencing. On remand, however, the Court of Appeals noted that due to *Apprendi*, the most the defendants could receive on the count was 20 years, the default statutory maximum set forth in § 841(b). Specifically, because the case went to the jury pre-*Apprendi*, the jury was not asked to make a finding as to drug quantity, although one kilogram of cocaine was alleged in the indictment. On remand, the district court is obliged to follow *Apprendi*, and with no jury finding on drug quantity, the default maximum must apply.

COLLATERAL ATTACK

Galbraith v. United States,313 F.3d 1001 (7th Cir. 2002). Upon consideration of a 2255 petition, the Court of Appeals held that the petitioner had procedurally defaulted his claim that the district court failed to inform him at the time of his plea that his plea would preclude him from challenging on appeal the denial of his motion to suppress. The Court of Appeals noted that at the time of the petitioner's direct appeal, all the facts necessary to raise a claim that his plea was not knowing and voluntary due to a failure on the part of the district judge to comply with Rule 11 were known to him. Thus, his failure to raise the issue on direct appeal procedurally defaulted the issue for purposes of collateral attack. However, because the petitioner also argued that his counsel was ineffective for failing to advise him regarding the consequences of his plea, and the pertinent facts on this issue required an evidentiary hearing not in the record on direct appeal, this argument was not procedurally defaulted. Nevertheless, because the petitioner presented no evidence to the district court to support this claim, it failed on the merits.

Carter v. United States, 312 F.3d 832 (7th Cir. 2002). After the petitioner's exhaustion of her direct appeal rights remedies, she sent a letter to the district judge complaining about the performance of her lawyer. The district court, without notice to the petitioner nor a response from the government, construed the letter as a 2255 motion and then denied it as time-barred. The court agreed with the defendant that the district court's failure to provide notice was error. Accordingly, the court vacated the denial and remanded to the district court so that the proper notice procedures could be followed.

Curry v. United States, 307 F.3d 664 (7th Cir. 2002). On appeal from the denial of a Rule 59(e) motion, the Court of Appeals held that motions under this rule to alter or amend judgments are not affected by the statutory limitations on successive collateral attacks on criminal judgments. Previously, the court had held that motions under Federal Rule of Civil Procedure 60(b) must, when the movant is a prisoner seeking to vacate the criminal judgment against him, submit to the statutory limitations on second or subsequent collateral attacks. A Rule 60(b) motion is a collateral attack on a judgment, which is to say an effort to set aside a judgment that has become final through exhaustion of remedies. However, a Rule 59(e) motion is not. It must be filed within 10 days of the judgment, and it suspends the time for appealing. Because such a motion does not seek collateral relief, it is not subject to statutory limitations on such relief.

Beyer v. Litscher, 306 F.3d 504 (7th Cir. 2002). In this appeal from a dismissal of a 2254 petition, the petitioner originally filed two separate petitions in the district court. Each petition challenged a separate and unrelated state court conviction for which the petitioner was serving consecutive sentences. The district court concluded that it is imperative to challenge both in a single federal collateral attack, and when the petitioner failed to amend his petition challenging the first conviction to add an attack on the second, the court dismissed his separate challenge as "second or successive" within the meaning of 28 U.S.C. § 2244(b). The Court of Appeals reversed, noting that § 2244 requires permission for the filing of a second or successive "claim." However, a challenge to a different judgment necessarily is a different "claim." Indeed, Rule 2(d) of the Rules Governing Section 2254 Cases in the United States District Courts requires a prisoner to file separately to challenge judgments of different courts.

Pannell v. McBride, 306 F.3d 499 (7th Cir. 2002). In this appeal, a state court prisoner appealed an Indiana prison disciplinary board's determination that he possessed a deadly weapon. The petitioner requested that he be allowed to present witnesses at the hearing, but the board denied that request. The

district court likewise denied his 2254 petition alleging his due process rights were violated by the board's refusal to allow him to present witnesses, the court concluding that the record did not indicate that he made a request for witnesses to the board. On appeal, the Court of Appeals initially noted that its review was *de novo* because Indiana does not provide a mechanism for judicial review of the prison disciplinary board's determinations. The Court of Appeals also concluded that the record indicated that the petitioner had in fact requested that he be allowed to present witnesses at the hearing, and that those witnesses may well have aided his defense. Accordingly, the court remanded to the district court with instructions to allow the state to respond to the petitioner's claim.

Gray v. Briley, 305 F.3d 777 (7th Cir. 2002). Upon the district court's dismissal of a 2254 for failure to file within the 1-year statute of limitations, the Court of Appeals affirmed. The petitioner in state court filed a petition for collateral relief, but the state court dismissed on the grounds that the petition was not timely and that it lacked merit. In the present case, both the district court and Court of Appeals concluded that the petition was not timely because the one-year statute of limitations was not tolled by the filing of the state court petitions. Although a "properly filed" petition in state court can toll that federal limitations period, the state court had found that the petition was untimely and therefore not "properly filed." Relying upon the Supreme Court's recent decision in *Carey v. Saffold*, 122 S.Ct. 2134 (2002), even where a state court also addressed the merits, a simultaneous ruling of untimliness is still sufficient to prevent tolling of the federal limitations period.

Godoski v. United States, 304 F.3d 761 (7th Cir. 2002). Upon appeal of the district court's denial of a petition for a writ of error *coram nobis*, the Court of Appeals held that such a remedy was not available to the petitioner. The petitioner and her husband were both convicted of bank fraud, but the court allowed the husband to serve his sentence first, and the wife to serve her sentence thereafter, thus allowing one parent to be with the children. When it came time for the wife to begin serving her sentence, however, she asked the court to issue a writ of *coram nobis*, arguing that her trial counsel was ineffective. The Court of Appeals noted that *coram nobis* is used only in those rare situations when a defendant is no longer "in custody" (rendering 2255 unavailable) yet collateral relief remains imperative to deal with lingering civil disabilities. However, a person whose incarceration lies in the future, as it does here, is in custody and has full access to § 2255. *Coram nobis* is therefore unavailable. Unfortunately for the defendant, the 1-year limitation on the filing of a § 2255 petition had already passed. Accordingly, the Court of Appeals held that her claim should be dismissed as an untimely § 2255 petition, regardless of the heading the petitioner had put on her petition.

Farmer v. Litscher, 303 F.3d 840 (7th Cir. 2002). In this appeal from the denial of a 2254 petition, the Court of Appeals held that 28 U.S.C. § 636(c) confers on magistrate judges the authority to enter final judgments in § 2254 proceedings upon consent of the parties. Likewise, application of § 636(c) to § 2254 cases in not an unconstitutional delegation of the judicial power in violation of Article III.

Wilson v. Battles, 302 F.3d 745 (7th Cir. 2002). Upon appeal of a dismissal of a 2254 petition as untimely, the Court of Appeals held that for purposes of the AEDPA's 1-year statute of limitations, an Illinois post-conviction petition is not "pending" during the 21-day period in which a petitioner may file a petition for rehearing from the denial of a petition for leave to appeal to the Illinois Supreme Court. In other words, for purposes of the 1-year statute of limitations, the conviction becomes final the day the Illinois Supreme Court denies the petition for leave to appeal, not 21 days thereafter.

Brown v. Sternes, 304 F.3d 677 (7th Cir. 2002). In this appeal from the denial of a 2254 petition, the Court of Appeals reversed, holding that the petitioner was denied the effective assistance of counsel. In the words of the Court: "This case exposes a tragic breakdown in the Cook County Illinois criminal justice system. A mentally ill criminal defendant of recent vintage was arrested, put on trial, convicted of armed robbery, and sentenced to a term of thirty years without anyone taking proper notice of the fact that this same defendant had been diagnosed on more than one occasion, confined and treated (from 1986-88), and medicated intermittently for chronic schizophrenia for an extended period of years. His court-appointed attorneys provided a halfhearted defense, neglecting to thoroughly investigate his medical condition and failing to procure medical records establishing that he suffered from a myriad of psychiatric problems. Thereafter, the attorneys proffered self-serving affidavits once their lackidaisical lawyering was revealed and challenged. Their less-than-lawyer-like attention to duty caused problems for the court-appointed psychologist and psychiatrist. These doctors, relying on inadequate data, filed reports with the court that could best be classified as incomplete, as they ignored essential documentation of his medical history (i.e. his past psychiatric records), a basic element and requirement of any competency

evaluation, and furthermore overlooked important information easily ascertainable from the defendant's family members. The state probation officer, in preparing the pre-sentence investigative report, neglected to interview the defendant's family members, to make a thorough inquiry about Brown's prior confinement (i.e. his adjustment to his institution), to investigate the circumstances surrounding his general discharge from the Navy, or his mental health history. Thus, the sentencing judge was less than well-informed of critical information, including the defendant's long and well-documented history of mental illness, as well as his prolonged period of treatment and confinement in a psychiatric unit during his prior imprisonment . . . This case is a striking example of a legal system that processed this defendant as a number rather than as a human being; it signals a breakdown of a process that might very well be in need of review, adjustment, and repair . . . We have a record before us that mandates -- in the interests of justice -- the conclusion that Brown was denied his Sixth Amendment right to effective assistance of counsel on the grounds that his counsels' failure to investigate his history of mental illness prejudiced the outcome of his trial."

EVIDENCE

United States v. Westmoreland, 312 F.3d 302 (7th Cir. 2002). In multi-count drug prosecution, the Court of Appeals considered as a matter of first impression whether the marital communications privilege shields communications between husband and wife where the spouse receiving the communication later becomes an accessory-after-the-fact, but not a participant in the underlying crime. The court concluded that such communications were privileged. Specifically, the initial disclosure of a crime to one's spouse, without more, is covered by the marital communications privilege. If the spouse later joins the conspiracy, communications from that point on are not protected.

United States v. Barlow, 310 F.3d 1007 (7th Cir. 2002). In prosecution for drug offenses, the Court of Appeals rejected the defendant's claim that the district court erred by refusing his motion for discovery to establish selective prosecution. The defendant, an African-American male, was stopped by DEA agents at the train station after he looked suspiciously over his shoulder at the agents in the station. In the district court, the defendant argued that the agents were engaging in "racial profiling," and he sought discovery on this issue. The court noted that the defendant, before being entitled to discovery, needed to demonstrate that the agents' actions had a discriminatory effect and that the agents had a discriminatory purpose when they approached him. Moreover, he needed to show that the agents chose not to approach whites to whom he was similarly situated. According to the court, the defendant's expert failed to make this showing. During 10 days of observation at the station, the expert saw only one African-American couple stopped. However, they were stopped by Amtrak, rather than DEA, agents. Thus, there was simply no evidence sufficient to allow the defendant discovery on the issue of racial profiling.

United States v. Anifowoshe, 307 F.3d 643 (7th Cir. 2002). In prosecution for bank fraud, the Court of Appeals affirmed the admission of 404(b) evidence relating to a criminal act committed subsequent to the offense of conviction. The defendant argued that Rule 404(b) applied only to acts committed *prior to* the current alleged offense. The Court of Appeals flatly rejected this argument stating: Rule 404(b), of course, does not restrict evidence concerning the defendant's 'other acts' to events which took place *before* the alleged crime; by its very terms, 404(b) does not distinguish between 'prior' and 'subsequent' acts. The critical question is whether the evidence is sufficiently probative of a matter within the rule's purview. Depending upon the factual circumstances, the chronological relationship of the charged offense and the other act may well have some bearing on this inquiry, but it is not necessarily dispositive." In the present case, because all factors of the 404(b) test were met, the Court of Appeals affirmed the admission of the evidence.

United States v. Wilson, 307 F.3d 596 (7th Cir. 2002). In prosecution for wire fraud, the Court of Appeals held that the defendant had waived any challenge to the district court's decision regarding the potential admission into evidence of the defendant's post-arrest silence. When initially arrested, the defendant gave a statement to authorities that he had been working with "another associate." However, he refused to supply the name. When, at trial, the defendant sought to introduce the statement regarding "another associate," the court ruled that the introduction of this statement would open the door to the government introducing evidence regarding his post-arrest silence. The defendant elected not to introduce the testimony, but challenged the district court's ruling on appeal. On appeal, the government argued that the defendant's choice not to introduce any part of the statement essentially waived any challenge to the potential use by the government of the post-arrest silence. The Court of Appeals agreed, and held that the defendant exercised his constitutional right to refrain from introducing certain evidence at the trial and cannot now attack a potential introduction of evidence by the government in response to his potential testimony.

GUILTY PLEAS

United States v. Kelly, 312 F.3d 328 (7th Cir. 2002). In prosecution for drug offenses, the Court of Appeals affirmed the district court's refusal to accept the defendant's plea of guilty. On four separate occasions, the defendant appeared for a change of plea hearing, but on each occasion denied his guilt. Then, at nearly the end of the government's presentation of evidence at trial, the defendant again indicated he wished to plead guilty. When the judge conducted an inquiry, however, the defendant again vacillated. The following day, at the close of the government's case, the defendant indicated he wished to plead, but the court refused. The Court of Appeals affirmed this refusal, noting that a defendant does not have an absolute right to have a court accept his guilty plea, and a court may reject a plea if it states a "sound reason." In the present case, that 'sound reason' was the fact that the plea came at nearly the end of the trial after significant resources had already been expended and after a great deal of time had already been spent on aborted plea hearings.

INEFFECTIVE ASSISTANCE

United States v. Holman, ___ F.3d ___; No. 01-1535 (12/16/02). In prosecution for one count of possession with intent to distribute narcotics, as well as three counts related to weapons, the defendant argued on appeal that his counsel was ineffective for conceding his guilt on the drug possession charge during opening statement. The Court of Appeals agreed that the concession amounted to deficient performance because there was no evidence in the record that defense counsel had discussed the issue with the defendant. The court noted that a defendant's consent on the record in open court to a concession of guilt is the preferred method, although an affidavit from the defendant describing his discussions with his attorney and consent to the strategy could work just as well. However, an attorney's concession of guilt without any indication of the client's consent to the strategy is deficient conduct under *Strickland*. In this type of situation, the concession essentially amounts to a violation of Rule 11, which provides extensive procedures for admission of guilt. To allow counsel to simply concede guilt without evidence in the record of the defendant's consent would leave open a side door that would allow attorneys to abandon their clients. Nevertheless, given the overwhelming evidence on the drug possession charge, the error was not prejudicial, and reversal was therefore not warranted.

INDICTMENT

United States v. Hughes, 310 F.3d 557 (7th Cir. 2002). In prosecution for conspiring to make and to pass counterfeit bills, the Court of Appeals rejected the defendant's argument that the indictment was duplicitous. Specifically, the defendants argued that both making and passing counterfeit bills are separate federal crimes. Therefore, the single count of the indictment charging a conspiracy to commit both crimes was improper. The Court of Appeals noted, however, that the crime with which the defendant was charged was conspiracy, not the underling criminal objectives of the conspiracy. In other words, a conspiracy can have multiple objectives, but the conspiracy itself is a single crime. Consequently, the allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for the conspiracy is the crime, and that is one, however diverse its objects.

United States v. Algee, 309 F.3d 1011 (7th Cir. 2002). In prosecution for possession of a weapon by a felon, the Court of Appeals rejected under the plain error standard the defendant's argument that the prosecution improperly broadened the indictment at trial. The indictment listed two specific weapons which the defendant allegedly possessed. However, at trial, the government actually introduced five weapons. Moreover, the jury was instructed that it need find only that the defendant "knowingly possessed *a* firearm." The court noted that the instant case was very similar to the issue in *United States v. Leichtnam*, 948 F.2d (7th Cir. 1991), where the court held under similar facts that the indictment had been broadened. Specifically, in that case, the court noted that the type of weapon was an essential part of the charge; thus the evidence of additional firearms, combined with the faulty jury instruction, allowed the jury to convict the defendant on charges that the grand jury never made against him. Unfortunately for the defendant in the present case, his failure to raise this issue in the district court prevented a reversal of his conviction. The defendant made no effort to meet the plain error standard, and the evidence clearly showed that he in fact possessed the weapons listed in the indictment.

JURIES / INSTRUCTIONS

United States v. Mansoori, 304 F.3d 635 (7th Cir. 2002). In prosecution of a large scale drug conspiracy, the Court of Appeals held that the district court improperly empaneled an anonymous jury. Upon the government's motion, the district court empaneled an anonymous jury because: (1) the defendants were involved in organized, violent street crime that had elements of what is traditionally called organized crime, (2) with access to some 200 firearms, the defendants had the capacity to harm jurors, (3) allegedly, some of the witnesses and their families had been threatened, (4) the defendants

were subject to lengthy terms of incarceration and stiff monetary penalties if convicted, and (5) there would likely be press coverage. The Court of Appeals noted that such a procedure is "an extreme measure that is warranted only where there is a strong reason to believe the jury needs protection." In the present case, the district court made no finding that the defendants had a history of intimidating witnesses or otherwise obstructing justice or that they were likely to do so in connection with the trial. Although the defendants may have had the means to intimidate the jury, such a showing is insufficient. Rather, there must be evidence that intimidation is likely. Additionally, although the case involved narcotics, guns, and violence, the case did not present these issues to a degree different from the ordinary case where such issues often arise. The same is true for the length of prison terms the defendants were facing; this fact is routinely present in any drug case. Accordingly, the district court erred in concealing the identities of the jurors. However, the Court of Appeals found the error to be harmless, because the district judge conducted a searching and thorough voir dire.

OFFENSES

United States v. Klinzing, ___ F.3d ___; No. 02-2080 (01/09/03). In prosecution for failure to pay court ordered child support pursuant to 18 U.S.C. § 228(a), the Court of Appeals rejected the defendant's Commerce Clause and Equal Protection challenges to the statute. The Court noted that the 10 circuits to have considered the Commerce Clause challenge have rejected it, and the Seventh Circuit agreed with these decisions, concluding that child support is a "thing" in commerce subject to Congress' regulation. The defendant also argued that the statute violated the Equal Protection Clause, which the Court rejected as well, concluding that the statute was rationally related to the legitimate government interest of deterring and punishing interstate parents who do not pay court ordered child support.

United States v. Kelly, ___ F.3d ___; No. 02-2064 (01/03/03). In prosecution for possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B), the defendant argued that the statute was unconstitutional in light of the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389 (2002), which struck down the provision of the act making the possession of "virtual" images, *i.e.*, images that "look like" but may not actually be minors, illegal. Noting that the Court of Appeals had not considered the constitutionality of the child pornography statute as a whole since *Ashcroft*, the court held that *Ashcroft* was specifically limited by its language to the expanded definition of child pornography to include "virtual" depictions of minors. Thus, because the defendant was not convicted for possession of these "virtual" images, but instead the real thing, the court affirmed his conviction.

United States v. Warneke, et al., 310 F.3d 542 (7th Cir. 2002). In this multi-defendant RICO prosecution of several defendants, the Court of Appeals affirmed all defendants' convictions and sentences. It held that a conspiracy can be a predicate act for both a substantive RICO count and a RICO conspiracy. The Court also held that the same standards do not apply for conviction of a substantive RICO offense and a RICO conspiracy on the issue of whether the defendant participated in the conduct, management, or operation of the enterprise. The Court disagreed with the Ninth Circuit's contrary decision in *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1128-29 (9th Cir. 1997). The Court said that *Neibel* was wrong because it assumes that only one who has committed the substantive crime can be convicted of conspiracy. The Seventh Circuit's decision agreed with decisions by Second, Fifth, and Eleventh Circuits. *United States v. Zichettello*, 208 F.3d 72, 98-99 (2d Cir. 2000); *United States v. Posada-Rios*, 158 F.3d 832, 857 (5th Cir. 1998). See also *United States v. Starrett*, 55 F.3d 1525, 1547 (11th Cir. 1995). Additionally, the Court found error in the use of a jury instruction which told the jury it could convict if the defendant used his position in, or association with, the enterprise to perform acts *which are involved in some way in* the operation or management of the enterprise, directly or indirectly, or if the person causes another to do so was error due to the italicized phrase. However, the Court held that the error was cured by the remaining instructions and because the evidence clearly showed that the defendant played a role in the activities. Lastly, the Court rejected all *Apprendi* arguments.

United States v. Lemons,302 F.3d 769 (7th Cir. 2002). In prosecution for possession of a weapon by a felon, the Court of Appeals rejected the defendant's Commerce Clause challenge. The defendant argued that recent Supreme Court decisions required proof that one's possession of a gun is commercial activity which has a substantial impact on interstate commerce before Congress may criminalize it pursuant to the Commerce Clause. In the instant case, although the gun was not manufactured in the state in which the defendant was found with it, there was no evidence as to when or how it came into the jurisdiction. These facts were not enough of a nexus to interstate commerce to bring it within the Commerce Clause, according to the defendant. The Court of Appeals, however, noted that this argument had already been considered in other cases in the circuit, and if recent Supreme Court decisions called into doubt the

court's construction and application of section 922(g)(1), it was for the Supreme Court to so hold.

SEARCH & SEIZURE

United States v. Langford, ___ F.3d ___; No. 02-1167 (12/31/02). The Seventh Circuit suggested in this case that a warrant to search a house for evidence of drug dealing was not based on probable cause when it merely recited that two unidentified informants had said that a resident was dealing drugs and a search of the garbage had turned up evidence of marijuana use and an ambiguous list that the police identified as a drug ledger, without any supporting evidence. The Court stated there was sufficient probable cause to search for evidence of drug use, as opposed to drug dealing. However, the police could not have seized the defendant's gun (which they did) if they were searching for evidence of drug use because guns are not typically associated with the use of marijuana, as opposed to dealing, and it was not obviously contraband. The Court, nevertheless, upheld the search under *Leon*. The Court then held that it did not need to decide if the police violated the knock and announce rule because the evidence would have inevitably been discovered anyway once the police arrived with a warrant. Thus, the Court held that suppression is never a remedy for a knock and announce violation. It rather suggested that relief for such a violation can still be sought in a section 1983 case. The Court's holding conflicts with decisions from the Ninth, Sixth, and Eighth Circuits. *United States v. Banks*, 282 F.3d 699, 703 (9th Cir. 2002); *United States v. Dice*, 200 F.3d 978, 986-87 (6th Cir. 2000); *United States v. Marts*, 986 F.2d 1216, 1219-20 (8th Cir. 1993). The Court did not cite any federal decisions outside of the Seventh Circuit in support of its holding.

United States v. Mansoori, 304 F.3d 635 (7th Cir. 2002). In a multi-defendant drug prosecution, the Court of Appeals held that the district court improperly denied the defendant's motion to suppress his confession. The defendant was originally arrested on a federal warrant by Chicago police officers. He gave a first confession shortly thereafter. Over 24 hours later, he was transferred into federal custody, where he again confessed within six hours of being transferred to federal custody. After 30 hours since his initial arrest, he was finally brought before a judge for the first time. Upon the defendant's motion to suppress the confessions because of the lengthy delay before he was brought before a judicial officer, the district court held that because his second confession occurred within six hours of being taken into *federal* custody, the six hour "safe harbor" rule set forth at 18 U.S.C. § 3501(c) applied. The Court of Appeals disagreed, noting that the relevant time period is when the defendant is first taken into custody, regardless of whether it is initially into state or federal custody. Under this standard, the second confession was well beyond the six hour safe harbor period. Looking then to the reasons for the delay, the Court of Appeals noted that it was troubled by the fact that the defendant was questioned a second time when officers were well-aware of the fact that the defendant had been in custody for over 30 hours without having been brought before a judicial officer. Indeed, the officers apparently purposely interviewed him a second time before his initial appearance. The court therefore found the admission of the confession to be erroneous. Nevertheless, the court declined to reverse, holding that the error was harmless, given the defendant's first, proper confession.

United States. v. Koerth, 312 F.3d 862 (7th Cir. 2002). Upon appeal of the district court's denial of a motion to suppress, the Court of Appeals applied the *Leon* good-faith doctrine to uphold the seizure of evidence. The district and appellate courts found the affidavit in support of the warrant to be lacking in probable cause, for it recited bare facts obtained from an previously unknown, unnamed informant. Moreover, no live testimony was presented to the issuing magistrate. Nevertheless, the Court of Appeals affirmed, noting that the defendant could not rebut the *prima facie* evidence that the officer was acting in good faith, where the defendant could show neither that the magistrate wholly abandoned his judicial role, otherwise failed in his duty to perform his neutral and detached function and not serve as a rubber stamp for the police, nor the officers submitted an affidavit so lacking in indicia or probable cause as to render official belief in its existence entirely unreasonable.

SENTENCING

United States v. Angle, ___ F.3d ___; No. 01-3670 (01/10/03). In prosecution for possession of child pornography, the Court of Appeals reversed the district court's upward departure for the second time. The district court imposed a five-level upward departure, concluding that the defendant was likely to repeat his crimes and was more comparable to a career criminal due to his past history. The court did not, however, rule on the reliability of uncorroborated molestation allegations and did not explain why the defendant's criminal history was more comparable to a category VI. In making the departure, the district court relied on various allegations of sexual molestation in the PSR, all of which were uncorroborated. Many of the allegations lacked details as to the victims, when the acts occurred, or where. Where such evidence is uncorroborated, the district court must make specific findings as to reliability. Likewise, when the

district court applies an upward departure it must analogize the factors it identified as grounds for departure to similar offenses contained within the guidelines and link the factors to the degree of departure. Because the court did not follow this step-by-step process, this error also supported a remand.

United States v. Graham, ___ F.3d___; No. 01-4349 (01/08/02). In prosecution for distributing crack cocaine, the Court of Appeals rejected the defendant's argument that his prior state-court felony drug conviction did not trigger the statutory mandatory 20-year minimum set forth in 21 U.S.C. § 841(b)(1)(B). The defendant was found guilty of felony possession of a controlled substance in Illinois and sentenced to two years of probation, which was successfully discharged. Because of the probationary disposition, the defendant argued that the conviction was not a qualifying prior. However, the Court of Appeals noted that federal law defines what is considered a conviction for purposes of the statute in question, and a sentence of probation constitutes a conviction under federal law. Accordingly, the prior conviction was properly used to enhance the defendant's sentence.

United States v. Jones, 313 F.3d 1019 (7th Cir. 2002). In prosecution for being a felon in possession of a weapon, the Court of Appeals affirmed the district court's cross-reference to the guideline section for murder. Prior to his indictment on the federal weapons charge, the defendant had participated in a robbery/homicide where the victim was murdered using the same weapon which precipitated the federal weapons charge. At sentencing, the district court concluded that the robbery/homicide occurred during the commission of the illegal possession offense, and therefore was relevant conduct supporting the murder cross-reference. The Court of Appeals agreed, noting that the defendant's conduct during the robbery/homicide occurred while he carried the firearm. Thus, not only did the robbery/homicide occur during the felon-in-possession offense, but the defendant's status as a felon in possession was a factor enabling him to undertake the armed robbery. Accordingly, the district court properly concluded that the robbery/homicide was relevant conduct.

United States v. Chavin, ___ F.3d ___; No. 01-2302 (12/13/02). In prosecution for tax and bankruptcy fraud, the Court of Appeals rejected the defendant's argument that the offenses should have been grouped for sentencing purposes under the guidelines. Although the two offenses are on the Guidelines' "to be grouped" list, the Court of Appeals rejected the suggestion that inclusion on this list required automatic grouping. At least where as here, two offenses have different guideline sections (2F1.1 and 2T1.1), grouping is not automatic. Likewise, the court rejected the argument that the counts should still have been grouped because the offenses were "of the same general type and otherwise meet the criteria for grouping." U.S.S.G. § 3D1.2 cmt. n.6. According to the court, the counts were not of the same general type because the victims were different, and the time frame and context did not completely overlap. The defendant's efforts to cheat his creditors did not involve "substantially the same harm" as did his effort to cheat the government.

United States v. Grasser, 312 F.3d 336 (7th Cir. 2002). Upon the government's appeal from the district court's downward departure, the Court of Appeals held that payment of restitution prior to sentencing did not constitute extra-ordinary acceptance of responsibility. In reaching this conclusion, the Court noted that the defendant had previously entered into a settlement of a civil suit with the victim requiring her to pay the restitution. Moreover, the guidelines cite prepayment of restitution as a reason for granting the 2-point adjustment for acceptance or responsibility. Accordingly, the guidelines adequately take into account such action and a departure is not warranted under such circumstances, absent some other extraordinary fact.

United States v. Jackson, 310 F.3d 554 (7th Cir. 2002). In prosecution for forcibly resisting a federal officer (18 U.S.C. § 111), the defendant argued the he was improperly given an enhanced sentencing for "inflicting bodily injury" during his resistance. Specifically, the defendant argued that an instruction to the jury that intent to injure the officer was necessary before he could receive an enhanced sentence. The Court of Appeals rejected the argument, noting that the only mental state element in the statute is that the defendant intend to resist, impede, or obstruct a law-enforcement official. Although *Apprendi* requires that this question be submitted to the jury for a finding before a sentence can be enhanced for the infliction of bodily harm, *Apprendi* does not alter the *scienter* element in § 111--namely, that the defendant only intend to resist, rather than necessarily also intending to inflict bodily harm.

United States v. Bryant, 310 F.3d 550 (7th Cir. 2002). In this case, the Seventh Circuit held that the crime of escape is categorically a "crime of violence" under the Guidelines, because it always "presents a serious potential risk of physical injury to another."

United States v. Owens, 308 F.3d 791 (7th Cir. 2002). In prosecution

for armed bank robbery, the Court of Appeals affirmed the district court's obstruction of justice enhancement based upon the defendant's lie to police officers early in the investigation. At the time of the offense, the bank robbers fled in a car while being pursued by the police. They eventually ditched the car and escaped into the woods. Shortly thereafter, the defendant was spotted at a gas station. He matched the description of the robber and his shoes were covered with mud. Upon inquiry by the officers, the defendant stated that his car had just been stolen. He was nevertheless arrested, but an officer did fill out a stolen vehicle police report on behalf of the defendant. According to the Court of Appeals, this activity was enough to warrant the enhancement, noting that although unsworn lies to law-enforcement authorities must "significantly obstruct or impede the investigation," actual prejudice to the government resulting from the defendant's conduct is not required. Although the court does not explain how the mere filling out of a police report "significantly" impeded the police investigation, the court nevertheless affirmed the enhancement.

United States v. Griffin, 310 F.3d 1017 (7th Cir. 2002). In prosecution for being a felon in possession of a weapon, the Court of Appeals agreed with the defendant that his lies to law enforcement officers did not provide a basis for an obstruction of justice enhancement (U.S.S.G. § 3C1.1). When initially confronted by the police, the defendant and another individual denied that he possessed the weapon. However, based on other evidence, the police did not believe the defendant and arrested him. In part due to this conduct, the district court found that the defendant had obstructed justice. The Court of Appeals noted, however, that making a material false statement, not under oath, to law-enforcement officers will only serve as a basis for the enhancement when those statements significantly obstruct or impede official investigation or prosecution. In other words, even the most outlandish and creative lies to law-enforcement officers, not given under oath, must have a detrimental effect upon their efforts to investigate or prosecute the instant offense before the enhancement can apply. Because the police here never believed the defendant and expended virtually no resources investigating it, the conduct could not support the enhancement. The Court of Appeals nevertheless affirmed, however, because the defendant also perjured himself when testifying at trial.

United States v. Xavier, 310 F.3d 1025 (7th Cir. 2002). In prosecution for threatening to kill a federal official (18 U.S.C. §§ 115(1)(2) and (b)(4)), the Court of Appeals affirmed the district court's refusal to decrease the defendant's base offense level by four, pursuant to U.S.S.G. § 2A6.1(b)(4). That guideline section provides that the decrease is warranted where the offense involved a single instance evidencing little or no deliberation. In the present case, the defendant was in a transport plane being shuttled to another prison. When officers attempted to conduct a search of his hair, the defendant engaged in a scuffle. He was therefore restrained for the entire flight. Later, in a calm tone, he threatened to kill one of the guards, his wife, and his children. According to the court, the conduct was insufficient to qualify him for the reduction. First, the comment was made sometime after the initial scuffle. Moreover, at the time of the threat, the defendant had calmed down, and made the threat in a clear, calm way. Thus, the court concluded that the threat was deliberate.

United States v. Hughes, 310 F.3d 557 (7th Cir. 2002). In prosecution for conspiring to make and to pass counterfeit bills, the Court of Appeals rejected the defendant's argument that his sentence was improperly enhanced under U.S.S.G. § 5B5.1(b)(2), which provides for a five-level offense level increase for manufacturing or producing a counterfeit obligation or possession a device which can do so. An exception to the enhancement applies "to persons who merely photocopy notes or otherwise produce items that are so obviously counterfeit that they are unlikely to be accepted even if subjected to only minimal scrutiny." In the present case, the defendant printed the bills on a color printer and successfully passed them to local merchants. The Court of Appeals noted that merely photocopying bills is not enough to bring one into the exception. The bills must also be poorly produced. Thus, in the present case, given the color quality of the bills and the fact that merchants accepted them, the exception did not apply.

United States v. Costello, 307 F.3d 553 (7th Cir. 2002). In prosecution for using the instrumentalities of interstate commerce relating to prostitution, the Court of Appeals reversed the district court's sentence enhancement made pursuant to U.S.S.G. § 2G1.1(b)(1). This section provides a 4-level increase in offense level "if the offense involved prostitution and the use of physical force or coercion by threats or drugs or in any manner." On appeal, the court considered whether the force or other coercion must be directed against a prostitute. In the present case, the establishment where the prostitution was occurring had a bouncer who on numerous occasions used force against *customers*, but not prostitutes. The court concluded that such a circumstance does not warrant the sentence enhancement, for the mere fact that the bouncer who goes too far and works for a bar which is also a brothel does not make the prostitution offenses committed there the result of force or coercion.

Rather, encountering an ungentle bouncer is an ordinary risk of patronizing a bar, rather than anything special to prostitution.

United States v. Franklin, 302 F.3d 722 (7th Cir. 2002). In prosecution for possession of a weapon by a felon, the Court of Appeals held that for purposes of the Armed Career Criminal Act (18 U.S.C. § 924(e)), a prior conviction for escape is a "violent felony" such that it can serve a predicate act under the statute.

United States v. Mansoori, 304 F.3d 635 (7th Cir. 2002). Upon a challenge to the district court's finding that the defendant managed or supervised five or more participants in a criminal activity pursuant to U.S.S.G. § 3B1.1(b), the Court of Appeals held that a district court is not required to identify those five or more participants by name. In some cases, the evidence may leave no doubt that the defendant directed another culpable participant but may not reveal that persons' names. So long as the court's findings and the underlying evidence make clear that the criminal enterprise involved at lease five culpable participants and that the defendant actually did manage or supervise one or more of these individuals, the lack of evidence as to the name of the person that the defendant supervised or managed should not foreclose imposition of the managerial enhancement.

United States v. Ceballos, 302 F.3d 679 (7th Cir. 2002). The Court of Appeals here held that the notice requirement set forth at 21 U.S.C. § 851(a) is not "jurisdictional," and overruled its prior precedent which held to the contrary. In light of how the Supreme Court defined subject-matter jurisdiction in *United States v. Cotton*, 122 S.Ct. 1781 (2002), § 851(a) has nothing to do with subject-matter jurisdiction. Having thus concluded, the Court proceeded to hold that service of a § 851(a) notice is complete upon mailing. Thus, in the instant case, although the defendant's attorney did not receive the notice by mail until two days after the trial began, because it was mailed by the government one day prior to trial, the notice before trial requirement was met.

United States v. Ceballos, 302 F.3d 679 (7th Cir. 2002). The Court of Appeals reversed the district court's refusal to enhance the defendants' sentences for use of a person less than 18 years of age to commit an offense pursuant to U.S.S.G. § 3B1.4. Although the district court found that the defendants in fact used a minor to commit the offense, the court also found that the defendants did not use the minor to shield themselves from prosecution. The Court of Appeals held that the plain language of the guideline section does not require that a defendant intend to shield himself from prosecution. All that is required is that the defendant use a minor to commit the offense.

SEVERANCE

United States v. McClurge, 311 F.3d 866 (7th Cir. 2002). In prosecution of two defendants for kidnaping, the defendants argued on appeal that their trials should have been severed because their defenses were "mutually antagonistic." Specifically, one defendant claimed complete uninvolvement in the crime, while the other claimed his co-defendant coerced him into committing the crime. The Court of Appeals noted, however, that "there is a preference in the federal system for joint trials of defendants who are indicted together. A district court should grant severance . . . only if the joint trial "compromised a specific trial right of one of the defendants, or prevented the jury from making a reliable judgment about guilt or innocence. Even a showing that two defendants have 'mutually antagonistic defenses," that is, that the jury's acceptance of one defense precludes any possibility of acquittal for the other defendant, is not sufficient grounds to require a severance unless the defendant also shows prejudice to some specific trial right." Under this standard, the defendants failed to identify such a specific trial right. Moreover, assuming an error, it was harmless, for the district court gave the jurors an instruction indicating that they were to consider the cases of the two defendants separately.

SUPERVISED RELEASE

United States v. Barberg, 311 F.3d 862 (7th Cir. 2002). On appeal after revocation of supervised release, the Court of Appeals held that the defendant's failure to register as a sex offender upon placement onto supervised release warranted the revocation thereof. Prior to January 1, 1996, Illinois required registration where the underlying offense involved a minor. However, the Act was amended in 1996 to also require registration where adult victims are involved. In the present case, the defendant was convicted and sentenced prior to the enactment of the amendments, and his victim was an adult. Accordingly, he argued that the amended act did not apply to him. The Court of Appeals, however, noted that the defendant did not begin serving his supervised release term until 1997. Accordingly, his duty to register did not arise until after the amendments took effect, and he was therefore subject to the registration under the amended statute.

Recently Noted Circuit Conflicts

Compiled by Kent V. Anderson
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United States v. *Patane*,, 304 F.3d 1013 (10th Cir. 2002)

The 10th Circuit held that the physical fruits of a *Miranda* violation must be suppressed. The Court held that its previous rulings to the contrary relied on the idea that the *Miranda* rule was a prophylactic rule that was not based on the Constitution. The Supreme Court refuted that idea in *Dickerson* v. *United States*, 530 U.S. 428 (2000). Therefore, since *Miranda* warnings are Constitutionally required, *Wong Sun* applies to the fruits of a *Miranda* violation. The Court of Appeals also found that *Oregon* v. *Elstad*, 470 U.S. 298 (1985), did not deal with the physical fruits of a *Miranda* violation. Instead, it dealt with a Mirandized confession that was given after an un-Mirandized confession.

The Tenth Circuit disagreed with contrary post-Dickerson holdings of the Third and Fourth Circuits. *United States* v. *Sterling*, 283 F.3d 216, 218-19 (4th Cir. 2002); *United States* v. *DeSumma*, 272 F.3d 176, 180-81 (3rd Cir. 2001). In *United States* v. *Faulkingham*, 295 F.3d 85 (1st Cir. 2002), the First Circuit held that the fruits of a *Miranda* violation must be only be suppressed in individual cases where "a strong need for deterrence" outweighs the reliability of that evidence. The Tenth Circuit held that the First Circuit's rule does not go far enough to vindicate the Constitutional interests underlying *Miranda*.

The Seventh Circuit has not yet decided this issue, as noted in *United States* v. *Abdulla*, 294 F.3d 830, 835 (7th Cir. 2002). That case was reviewed in the last issue of the *Backbencher*.

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Haley v. *Cockrell*, 306 F.3d 257 (5th Cir. 2002).

The Fifth Circuit held that the actual innocence exception to the procedural default rule in a habeas case applies in cases involving career offender or habitual offender sentencing. This furthered a circuit split. The Fifth Circuit's holding agrees with the Fourth Circuit. *United States* v. *Mikalajunas*, 186 F.3d 490, 494-95 (4th Cir. 1999). The Second Circuit has also applied the actual innocence exception to a non-capital sentencing proceeding, but did not limit its holding to career offender sentencing. *Spence* v. *Superintendent, Great Meadow Correctional Facility*, 219 F.3d 162, 171 (2nd Cir. 2000). In contrast, the Seventh, Eighth, and Tenth Circuits have held that the exception only applies to capital sentencing proceedings. *Hope* v. *United States*, 108 F.3d 119, 120 (7th Cir. 1997); *Embrey* v. *Hershberger*, 131 F.3d 739, 740 (8th Cir.1997)(en banc); *Reid* v. *Oklahoma*, 101 F.3d 628, 630 (10th Cir. 1996).

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Ruggiano v. *Reish*, 307 F.3d 121 (3rd Cir. 2002).

The Third Circuit held that a sentencing court may grant a defendant credit or adjust his sentence, under U.S.S.G. §5G1.3(c), to account for time that he has previously served on an unrelated state sentence. In this case, the district judge had ordered that the defendant's federal sentence run concurrently with the unrelated state sentence that he was currently serving. The court also ordered that the defendant receive credit for the time he had already served in state custody. However, when the Bureau of Prisons calculated the defendant's release date it treated the judge's order as a recommendation and refused to credit the defendant's presentencing state time against his federal sentence.

Surprisingly, the Third Circuit's opinion creates a circuit split. The Second Circuit has held that section 5G1.3(c) only allows a court to make a sentence concurrent with the portion of an undischarged state sentence that is still remaining at the time of sentencing, not any part of that sentence that has already been served. *United States* v. *Fermin*, 252 F.3d 102 (2nd Cir. 2001). It does not appear that any other courts have explicitly ruled on this issue.

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United States v. *Parish*, 308 F.3d 1025 (9th Cir. 2002)

The Ninth Circuit upheld a downward departure in a child pornography possession case because the defendant's conduct was outside the heartland. The defendant "had not affirmatively downloaded the pornographic files, indexed the files, arranged them in a filing system, or created a search mechanism on his computer for ease of reference or retrieval." Instead, the images on the defendant's hard drive "had been downloaded automatically into his Temporary Internet Cache file."

The Court of Appeals also affirmed susceptibility to abuse in prison as another basis for downward departure. The district court's finding was based on the nature of the offense and the defendant's stature, demeanor, and naivete. (Stature and demeanor seemed to be closely related in this case, since the defendant was 5'11" and 190 lbs.) Some other courts, including the Seventh Circuit, have held that the nature of the offense can never be

considered as part of the basis for a departure for susceptibility to abuse in prison. *United States* v. *Wilke*, 156 F.3d 749, 753-54 (7th Cir. 1998); *United States* v. *Kapitzke*, 130 F.3d 820, 822 (8th Cir. 1997).

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United States v. *Fenton*, 309 F.3d 825 (3rd Cir. 2002).

In a 2-1 decision, the Third Circuit held that the U.S.S.G. §2K2.1(b)(5) enhancement for possessing a firearm in connection with another felony offense does not apply when the same conduct is used to support the base offense level. In this case the defendant stole guns from a sporting goods store during a burglary. As a result, he became a felon in possession of a firearm. In reaching this holding the Third Circuit agreed with the Seventh and Sixth Circuits. *United States* v. *Szakacs*, 212 F.3d 344, 348-52 (7th Cir. 2000); *United States* v. *McDonald*, 165 F.3d 1032, 1037 (6th Cir. 1999) (relying on *United States* v. *Sanders*, 162 F.3d 396, 399-401(6th Cir. 1998)). The Third Circuit disagreed with contrary holdings by the Fifth and Eighth Circuits. See *United States* v. *Luna*, 165 F.3d 316, 323 (5th Cir. 1999) (upholding the application of the enhancement when a convicted felon was prosecuted in federal court for possession of firearms which were obtained through a burglary); *United States* v. *Kenney*, 283 F.3d 934, 938 (8th Cir. 2002) (holding that the Sentencing Commission intended to allow both the 2K2.1(b)(4) stolen firearms, and (b)(5) enhancements to apply to the same conduct).

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United States v. *Gallegos*, 3__, F.3d ___, 2002 U.S. App. LEXIS 25449 (10th Cir. Dec. 11, 2002).

The Tenth Circuit reversed a district court's denial of a suppression motion due to a knock and announce violation. The officers who served the warrant on the defendant's two-story home knew that the bedrooms were upstairs. They were serving the warrant at 4:00 a.m.and did not observe any lights on or activity in the house. Yet, the officers only waited five to ten seconds after knocking and announcing their presence before beginning to break the door down. The Court of Appeals held that this was not long enough under the circumstances. The Court also noted that the time of five to ten seconds alone pushed the limits of what the Court had previously upheld and that no circuit had ever upheld a wait of less than ten seconds. Unfortunately that's not true, the Seventh Circuit has upheld a time of 5 to 13 seconds. *United States* v. *Jones*, 208 F.3d 603, 610 (7th Cir. 2000).

The government tried to rely on the Seventh Circuit case of *United States* v. *McGee*, 280 F.3d 803 (7th Cir. 2002), to argue that because Appellant had armed himself by the time the officers got upstairs and approached his bedroom a proper knock and announce would be futile gesture. However, the Court of Appeals distinguished *McGee* and held that the government could not rely on facts that are only discovered after the entry to justify a knock and announce violation. In, *McGee* some officers actually saw the defendant leave his apartment prior to their entry. (Of course, it did not matter that he went upstairs, instead of heading for an escape route.) Unfortunately, this part of the Tenth Circuit's decision does conflict with Seventh Circuit law as announced in *United States* v. *Espinoza*, 256 F.3d 718 (7th Cir. 2001) (holding that exclusion was not warranted when officers violated the knock and announce statute and then found out the defendant was attempting to hold his inner door shut). In addition, as explained below, the Seventh Circuit now prohibits the use of the exclusionary rule for a knock and announce violation in any case.

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United States v. *Langford*, 3__ F.3d ___, 2002 U.S. App. LEXIS 27170 (7th Cir. Dec. 31, 2002)

In this case, the Seventh Circuit held that it did not need to decide if the police violated the knock and announce rule because the evidence would inevitably have been discovered anyway since the police had a warrant to search the house. In effect, the Court held that suppression is never a remedy for a knock and announce violation. The Court suggested that relief for such a violation can still be sought in a section 1983 case. Of course, the Court must be aware that this holding will effectively allow police in the Seventh Circuit to ignore the knock and announce rule with impunity. The Court's holding conflicts with decisions from the Ninth, Sixth, and Eighth Circuits. *United States v. Banks*, 282 F.3d 699, 703 (9th Cir. 2002); *United States v. Dice*, 200 F.3d 978, 986-87 (6th Cir. 2000); *United States v. Marts*, 986 F.2d 1216, 1219-20 (8th Cir. 1993). Of course, this decision also conflicts with the Tenth Circuit's case in *Gallegos* that is described above. The Seventh Circuit's decision also appears to conflict with *Wilson* v. *Arkansas*, 514 U.S. 927 (1995) (holding that the knock and announce rule forms part of the reasonableness inquiry under the Fourth Amendment). However, in *Wilson* the Supreme Court declined to decide the issue of whether a violation of the knock and announce rule requires application of the exclusionary rule because that question was outside the scope of the question on which it had granted certiorari. *Id.* at 937, fn. 4. Not surprisingly, the Court of Appeals was not able to cite any federal decisions outside of the Seventh Circuit in support of its holding.

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United States v. *Barresi*, 3__ F.3d ___, 2002 U.S. App. LEXIS 25758 (2nd Cir. Dec. 16, 2002)

The Second Circuit stepped into a circuit split and held that a district judge can not rely on a defendant's criminal history as a reason for the extent of an upward departure on the offense level axis. The Court held that a court can not consider factors which would not justify a departure, in the first place, when determining how much to depart. This holding agreed with decisions of the Fourth and Tenth Circuits. *United States* v. *Hall*, 977 F.2d 861, 865 (4th Cir. 1992); *United States* v. *Goldberg*, 295 F.3d 1133, 1141 (10th Cir. 2002). It disagreed with a Fifth Circuit decision, which held that a court may consider additional factors when deciding how much to depart. *United States* v. *Alvarez*, 51 F.3d 36, 40-41 (5th Cir. 1995). The Seventh Circuit does not appear to have decided this issue.

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United States v. *Technic Services, Inc.*, 3__ F.3d ___, 2002 U.S. App. LEXIS 26469 (9th Cir. Dec. 23, 2002).

In a 2-1 decision, the Ninth Circuit held that a defendant did not abuse a position of public trust. The Court held than an employee of a government contractor or licensee does not hold a position of public trust. In this case, the firm that the defendant worked for was engaged in asbestos removal, which requires a license. The Court remanded the case to the district court for a determination whether the defendant abused a position of private trust.

The Ninth Circuit's opinion conflicts with the First Circuit opinion in *United States* v. *Gonzalez-Alvarez*, 277 F.3d 73 (1st Cir. 2002) (holding that a person with a license to produce and sell milk held a position of public trust). Apparently, no other court has considered the issue.

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United States v. *Messervey*, 3__ F.3d ___, 2002 U.S. App. LEXIS 27135 (5th Cir. Dec. 30, 2002).

The Fifth Circuit upheld the use of a loss amount that a defendant intended even though it was greater than what he could possibly have obtained. The Court's decision conflicts with the Tenth Circuit rule that the intended loss amount is capped by the amount that a defendant could possibly have obtained. See *United States* v. *Santiago*, 977 F.2d 517 (10th Cir. 1992). The Seventh Circuit criticized the *Santiago* decision in *United States* v. *Coffman*, 94 F.3d 330, 336-337 (7th Cir. 1996). In *United States* v. *Bonnano*, 146 F.3d 502, 509-510 (7th Cir. 1998), the Seventh Circuit did not mention *Santiago*, but rejected an argument that would have led to the same holding.

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United States v. *Thomas*, 3__ F.3d ___, 2002 U.S. App. LEXIS 27202 (3rd Cir. Dec. 31, 2002).

The Third Circuit held "that the relevant requirements under the bank fraud statute are that: a defendant must execute, or attempt to execute, a scheme or artifice, intended to victimize a federal bank or federally insured bank by causing it an actual or potential loss of its own funds. Where the scheme involves the mere withdrawal of funds in the bank's custody, the Government must show that the withdrawal exposed the bank to some form of liability as a result of the fraud." This holding is in accord with decisions of the Second, Fourth, Fifth, and Seventh Circuits. See *United States* v. *Laljie*, 184 F.3d 180, 191 (2nd Cir. 1999); *United States* v. *Brandon*, 298 F.3d 307, 312 (4th Cir. 2002); *United States* v. *Sprick*, 233 F.3d 845,852 (5th Cir. 2000); *United States* v. *Moede*, 48 F.3d 238, 242 (7th Cir. 1995). It conflicts with holdings of the Eighth and Tenth Circuits. See *United States* v. *Ponec*, 163 F.3d 486, 488 (8th Cir. 1998); *United States* v. *Hollis*, 971 F.2d 1441, 1452 (10th Cir. 1992).

Supreme Court Update 2002 - 2003 Term

Compiled by:
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Staff Attorney

An "******" before the case name indicates new information.

RECENT DECISIONS

***Foster v. Florida*, 537 U.S. ___, 123 S. Ct. 470 (October 21, 2002) (Justice Thomas, concurring in the denial of certiorari; Justice Breyer dissenting from the denial of certiorari; and Justice Stevens, statement respecting the denial of certiorari).**

Justice Breyer dissented from the denial of certiorari and argues Charles Foster's 27 year wait on death row, prolonged repeatedly by the State's procedural errors, constitutes cruel and unusual punishment. Justice Thomas disagreed and states that Foster could have "long ago ended his anxieties and uncertainties by submitting to what the people of Florida have deemed him to deserve: execution." Justice Stevens, in response to Justice Thomas, stated that the denial of a petition for a writ of certiorari does not constitute a ruling on the merits.

***In re Stanford*, 537 U.S. ___, 123 S. Ct. 472 (October 21, 2002) (Justice Stevens, dissenting from denial of writ of habeas corpus).**

Justices Stevens, Souter, Ginsburg, and Breyer dissent from

the denial of writ of habeas corpus asking the Court to hold the execution of offenders who were juveniles at the time of the offense unconstitutional. Justice Stevens noted the reasons supporting the holding in *Atkins v. Virginia* (holding execution of mentally retarded persons unconstitutional) apply with equal or greater force to the execution of juvenile offenders.

***Woodford v. Visciotti*, 537 U.S. ___, 123 S. Ct. 357 (November 4, 2002) (Per Curiam).**

The Supreme Court reversed the Court of Appeals' affirmance of the district court's grant of habeas corpus. Visciotti was convicted of murder and sentenced to death, however defense counsel presented little mitigating evidence in the sentencing phase. On appeal, the state supreme court assumed counsel had provided ineffective assistance but concluded Visciotti had not been prejudiced by counsel's failures. The Court of Appeals determined the state court had incorrectly applied *Strickland v. Washington*. The Supreme Court held the state appropriately applied *Strickland* and that the Court of Appeals erred by substituting its judgment for that of the state supreme court. The appropriate standard of review is whether the state court unreasonably applied federal law not whether it incorrectly applied federal law.

***Early v. Packer*, 537 U.S. ___, 123 S. Ct. 362 (November 4, 2002) (Per Curiam).**

William Packer was tried in state court for several crimes, including murder. After 28 hours of deliberation, one juror informed the judge she felt she could no longer deliberate. The judge asked her to try a little longer, which she did. The foreperson then sent a note to the judge stating the jury was unable to reach a verdict. The judge again sent the jury back to deliberate longer. Packer was ultimately convicted and appealed to the state court of appeals. The state courts held that the judge's actions were not improper and were not coercive. The Court of Appeals, however, held that the state court's decision was contrary to clearly established federal law because it: (1) failed to cite any federal law; (2) failed to apply the totality of the circumstances test required by *Lowenfield v. Phelps*, 484 U.S. 231 (1988); and (3) failed to follow *Jenkins v. United States*, 380 U.S. 445 (1964), which prohibits the judge from pressing the jurors to arrive at a verdict. The Supreme Court held that the Court of Appeals mistakenly applied 28 U.S.C. § 2254(d)'s requirement that decisions which are not contrary to clearly established law can be subjected to habeas relief only if they are an *unreasonable* application of federal law (not merely an erroneous application).

***Abdur'rahman v. Bell*, 537 U.S. ___, 123 S. Ct. 594 (December 10, 2002) (Justice Stevens dissenting from the dismissal of writ of certiorari).**

Justice Stevens disagrees with the Court's decision to dismiss the writ and writes that the Court should consider whether Federal Rule of Civil Procedure 60(b) is available to habeas corpus petitioners to challenge the integrity of final orders entered in habeas corpus proceedings. Justice Stevens argues that Rule 60(b) motions are available to habeas petitioners and would not constitute a second or successive habeas corpus application where the motion sought relief from a final order entered by the district court in the habeas proceeding rather than a challenge to the state court conviction.

***United States v. Bean*, 537 U.S. ___, 123 S. Ct. 584 (December 10, 2002) (Justice Thomas)**.

After being convicted in Mexico of importing ammunition, Thomas Bean petitioned the ATF for relief from his inability to possess firearms pursuant to 18 U.S.C. § 925(c). The ATF returned his application unprocessed because an appropriations bar prevented it from expending any funds to investigate or act upon such applications. Bean then petitioned the district court for relief, which it granted. The Court of Appeals affirmed. The Supreme Court reversed holding the district court lacked jurisdiction to consider the matter because the absence of an actual denial of Bean's petition by the ATF (rather than a refusal to consider) precludes judicial review under § 925(c).

***Sattazahn v. Pennsylvania*, 537 U.S., S. Ct. (January 14, 2003) (Justice Scalia).**

In a 5-4 decision, the Supreme Court held that a state may seek the death penalty against a defendant in a second trial even after a life sentence was imposed in a first trial as a result of a hung jury in the penalty phase. In this case, the defendant was tried and convicted of murder. The jury hung 9-3 in favor of life. The defendant then asked the judge to declare a hung jury and impose a life sentence, which Pennsylvania law requires when the jury can not reach a verdict. The defendant then appealed his conviction and won. The state sought to impose the death sentence against the defendant again in the second trial and bolstered its case with additional evidence. This time, it convinced a jury to let it do so. Defendant appealed his death sentence, arguing that it violated the Double Jeopardy Clause. The Pennsylvania Supreme Court disagreed. The Supreme Court affirmed this decision. The Court held that it would have been different if the jury had unanimously agreed on a life sentence, but a hung jury did not trigger Double Jeopardy protection, regardless of any statutory mandate to impose a life sentence in such a case.

CASES AWAITING DECISION

***Miller-El v. Cockrell*, No. 01-7662, argued October 16, 2002.**

Did the Court of Appeals err in denying certificate of appealability and in evaluating petitioner's claim under *Batson v. Kentucky*?

Case below: 261 F.3d 445 (5th Cir. 2001).

***Lockyer v. Andrade*, No. 01-1127, argued November 5, 2002.**

Whether California's Three Strikes and You're Out Law is constitutionally impermissible where a non-violent recidivist who twice shoplifted merchandise worth a total of $153.54 received a life sentence in prison with no possibility of parole for 50 years. The Ninth Circuit held that "the California Court of Appeal unreasonably applied clearly established United States Supreme Court precedent when it held, on Andrade's direct appeal, that his sentence did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. Our decision does not invalidate California's Three Strikes law generally. Rather, we conclude that it is unconstitutional only as applied to Andrade because it imposes a sentence grossly disproportionate to his crimes."

Case below: 270 F.3d 743 (9th Cir. 2001).

***Smith v. Doe I*, No. 01-729, argued November 13, 2002.**

Whether Alaska's Sex Offender Registration Act, on its face or as implemented, imposes punishment for purposes of ex post facto clause.

Case below: 259 F.3d 979 (9th Cir. 2001).

***Connecticut Dept. of Public Safety v. Doe*, No. 01-1231, argued November 13, 2002.**

Whether the Due Process Clause of the Fourteenth Amendment prevents a State from listing convicted sex offenders in a publicly disseminated registry without first affording such offenders individualized hearings on their current dangerousness.

Case below: 271 F.3d 38 (2d Cir. 2001).

***Scheidler v. NOW, Inc.*, No. 01-1118, argued December 4, 2002.**

(1) Did the Seventh Circuit correctly hold, in acknowledging a conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under the Racketeer Influenced and Corrupt Organizations Act (RICO)? (2) Does the Hobbs Act, which makes it a crime to obstruct, delay, or affect interstate commerce "by robbery or extortion" and which defines extortion as "the obtaining of property from another, with the owner's consent, when the owner's consent is induced by the wrongful use of actual or threatened force, violence or fear," 18 U.S.C. § 1951(b)(2), criminalize activities of political protesters who engage in sit-ins and demonstrations that obstruct public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there?

Case below: 267 F.3d 687 (7th Cir. 2001).

***Virginia v. Black*, No. 01-1107, argued December 11, 2002.**

Whether Virginia Code § 18.2-423, which prohibits the burning of a cross with the intent of intimidating any person or group of persons, impermissibly infringes upon constitutionally protected speech. The Supreme Court of Virginia concluded that, "despite the laudable intentions of the General Assembly to combat bigotry and racism, the selectivity of its statutory proscription is facially unconstitutional because it prohibits otherwise permitted speech solely on the basis of its content, and the statute is overbroad."

Case below: 553 S.E.2d 738 (Vir. 2001).

***Clay v. United States*, No. 01-1500, argued January 13, 2003.**

Whether petitioner's judgment of conviction became final within the meaning of 28 U.S.C. § 2255, paragraph 6(1) when the Court of Appeals issued its mandate on direct appeal or when his time for filing a petition for a writ of certiorari expired.

Case below: 2002 U.S. App. LEXIS 1217 (7th Cir. 2002).

***Demore v. Kim*, No. 01-1491, argued January 15, 2003.**

Whether respondent's mandatory detention under 8 U.S.C. § 1226(c) violates the Due Process Clause of the Fifth Amendment where respondent was convicted of an aggravated felony after his admission into the United States.

Case below: 276 F.3d 523 (9th Cir. 2002).

CASES AWAITING ARGUMENT

***United States v. Recio*, No. 01-1184, cert. granted May 28, 2002 (unscheduled).**

Whether a conspiracy ends as a matter of law when the government frustrates its objective.

Case below: 258 F.3d 1069 (9th Cir. 2001).

***Massaro v. United States*, No. 01-1559, cert. granted October 1, 2002; to be argued February 25, 2003.**

Whether the Court of Appeals correctly affirmed the

denial of petitioner's motion to vacate his conviction under 28 U.S.C. § 2255 on the basis of ineffective assistance of counsel because petitioner did not demonstrate cause and prejudice for his failure to raise that claim on direct appeal of his conviction.

Case below: 2001 U.S. App. LEXIS 24266 (2d Cir.)

***Woodford v. Garceau,* No. 01-1862, cert. granted October 1, 2002; to be argued January 21, 2003.**

Do the provisions of the Anti-terrorism and Effective Death Penalty Act apply to capital cases so long as the federal petition is filed on or after the AEDPA's effective date?

Case below: 275 F.3d 769 (9th Cir. 2001).

***Roell v. Withrow,* No. 02-69, cert. granted November 4, 2002; to be argued February 26, 2003.**

When a district court refers a case to a magistrate judge for trial, under 28 U.S.C. §§ 636(c), and all parties, the magistrate judge, and the jury proceed in a manner consistent with that referral, must a court of appeals vacate the judgment for lack of jurisdiction because the defendant did not expressly consent?

Case below: 288 F.3d 199 (5th Cir. 2002).

***Nguyen v. United States,* No. 01-10873, cert granted November 4, 2002 (unscheduled).**

The defendants appealed their convictions for importing methamphetamine to the Ninth Circuit Court of Appeals. Two judges of the Ninth Circuit Court of Appeals, Chief Judge Mary Schroeder and Senior Circuit Judge Alfred Goodwin, traveled to hear the case in the Northern Mariana Islands. United States District Judge Alex Munson of the Northern Mariana Islands filled in as the third panel judge. The panel unanimously affirmed their convictions. In their petition to the Supreme Court, the defendants argue their Ninth Circuit appeal was tainted because one of the judges hearing that case was not an Article III judge. Judge Munson, unlike Article III Judges Schroeder and Goodwin, is an Article I judge. Even though both are nominated by the President and approved by the Senate, Article I judges serve limited terms mainly in territorial areas, whereas Article III appointments are life tenured positions. The issue is whether the Ninth Circuit's judgment is vitiated by the participation of a non-Article III judge.

Case Below: 284 F.3d 1086 (9th Cir. 2002).

***Sell v. United States,* No. 02-5664, cert. granted on November 4, 2002; to be argued March 3, 2003.**

Whether the Court of Appeals erred in rejecting petitioner's argument that allowing the government to administer antipsychotic medication against his will solely to render him competent to stand trial for non-violent offenses would violate his rights under the First, Fifth, and Sixth Amendments?

Case below: 282 F.3d 560 (8th Cir. 2002).

***Wiggins v. Corcoran*, No. 02-311, cert. granted November 18, 2002 (unscheduled).**

Whether defense counsel in a capital case provided ineffective assistance of counsel by failing to investigate mitigating evidence about the defendant's background that could have convinced the jury to impose a life sentence under *Williams v. Taylor*, 529 U.S. 362 (2000)?

Case below: 288 F.3d 629 (4th Cir. 2002).

***Stogner v. California,* No. 01-1757, cert. granted December 2, 2002 (unscheduled).**

(1) Whether California's state legislature violated the *Ex Post Facto* Clause by changing the statute of limitations requirement for prosecutions of child molestation charges, which was an element of the crime charged, so as to charge the defendant retroactively; and (2) Whether the abolition of the statute of limitations arbitrarily retract a liberty interest that the state had conferred upon the defendant?

Case below: 114 Cal. Rptr. 2d 37 (Cal. Ct. App., 1st Dist. 2001).

***Overton v. Bazzetta,* No. 02-94, cert. granted December 2, 2002 (unscheduled).**

(1) Whether prisoners have a right to non-contact visitation protected by the First and Fourteenth Amendments; (2) Whether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections are reasonably related to legitimate penological interests; (3) Whether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections constitute cruel and unusual punishment in violation of the Eighth Amendment.

Case below: 286 F.3d 311 (6th Cir. 2002.)

***Lawrence v. Texas,* No. 02-102, cert. granted December 2, 2002 (unscheduled).**

(1) Whether Petitioners' criminal convictions under the Texas "Homosexual Conduct" law which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples, violate the Fourteenth Amendment guarantee of equal protection of the laws; (2) Whether Petitioners' criminal convictions for adult consensual sexual

intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment; (3) Whether *Bowers v. Hardwick*, 478 U.S. (1986) should be overruled.

Case below: 41 S.W.3d 349 (Tex. App., 14th Dist. 2001).

***Jones v. Vincent,* No. 02-524, cert. granted January 10, 2003 (unscheduled).**

In a habeas corpus case stemming from a state conviction for first-degree murder, whether the Court of Appeals erroneously affirmed the district court's grant of habeas corpus where the state trial judge granted defendant's motion for directed verdict but then continued the trial and submitted the first-degree murder charge to the jury, constituting double jeopardy.

Case below: 292 F.3d 506 (6th Cir. 2002.)

Reversible Errors

Brumley v. Wingard, 269 F.3d 629 (6th Cir. 2001) (Admission of videotaped prior testimony without a showing of the witness's unavailability violated confrontation).

United States v. Lloyd, 269 F.3d 228 (3rd Cir. 2001) (Court repeatedly asked a juror to describe what affected her vote).

Eagle v. Linahan, 269 F.3d 926 (11th Cir. 2001) (Failure to appeal an adverse ruling on a *Batson* challenge constituted ineffective assistance).

United States v. Davis, 269 F.3d 514 (5th Cir. 2001) (Hybrid representation required warning from trial judge).

United States v. Reynolds, 268 F.3d 572 (8th Cir. 2001) (That a conspirator had syringes in his car was inadmissible when the defendant already admitted other evidence of the conspirator's drug habit).

United States v. Ali, 266 F.3d 1242(9th Cir. 2001) (Loan officer's present-tense statement that bank was insured was insufficient to establish that the bank was FDIC-insured at the time of the bank fraud).

United States v. Fulford, 267 F.3d 1241 (11th Cir. 2001) (Court may not consider the charging information in determining if a prior conviction qualified as a serious violent felony).

Doe v. Dept. of Pub. Safety, 271 F.3d 38 (2d Cir. 2001) (Connecticut's version of "Megan's Law," is unconstitutional).

Francis v. Reno, 269 F.3d 162 (3d Cir. 2001) (Pennsylvania vehicular homicide was not a crime of violence).

United States v. Dinnall, 269 F.3d 418 (4th Cir. 2001) (Drug sentence over statutory maximum violated *Apprendi*).

Manning v. Huffman, 269 F.3d 720 (6th Cir. 2001) (Failure to object to alternate jurors participating in deliberations was ineffective assistance of counsel).

United States v. Limares, 269 F.3d 794 (7th Cir. 2001) (Failure to arrest a suspect before he took an unopened package to the defendant's house did not create an exigency).

United States v. Pedroza, 269 F.3d 821 (7th Cir. 2001) (Defendant's response of "yes" to officer's question "do you mind if we speak to you" was ambiguous as to whether defendant consented to subsequent questioning).

United States v. Jones, 269 F.3d 919 (8th Cir. 2001) (Committing a traffic violation after seeing police officer did not provide probable cause to search suspect for drugs).

Phillips v. Woodford, 267 F.3d 966 (9th Cir. 2002) (Defense counsel was ineffective for choosing a meritless defense while failing to investigate others).

United States v. Follett, 269 F.3d 996 (9th Cir. 2001) (Court cannot order a defendant to pay restitution for a victim's counseling costs where the counseling was free).

United States v. Zillgitt, 286 F.3d 128 (2d Cir. 2002) (Where a defendant is convicted on a count of conspiracy involving multiple controlled substances, the court must sentence the defendant as if convicted of a conspiracy involving only the drug that triggered the lowest statutory maximum).

United States v. Cruz, 283 F.3d 692 (8th Cir. 2002) (Evidence was insufficient to establish defendants conspired to distribute methamphetamine).

United States v. Mariscal, 285 F.3d 1127 (9th Cir. 2002) (An officer did not have a reasonable suspicion that the driver of a vehicle violated a traffic law).

United States v. Howell, 285 F.3d 1263 (10th Cir. 2002) (Court refused to admit felony convictions of numerous witnesses for impeachment purposes, without finding they were prejudicial).

United States v. Durham, 287 F.3d 1297 (11th Cir. 2002) (Defendant was forced to wear a restraining

device referred to as a "stun belt"during his trial).

United States v. Diaz, 285 F.3d 92 (1st Cir. 2002) (Improper upward departures for inadequate criminal history and substantial risk of death).

United States v. Yu, 285 F.3d 192 (2d Cir. 2002) (In light of *Apprendi*, there must be either an allocution that settles the issue of drug quantity or a finding by a fact-finder applying a reasonable doubt standard).

United States v. Mason, 284 F.3d 555 (4th Cir. 2002) (Juvenile sentence for robbery conviction could not serve to make defendant a career offender).

United States v. Thomas, 284 F.3d 746 (7th Cir. 2002) (Proof that defendant sold a distribution quantity of crack cocaine to buyer on one or more occasions did not establish defendant's membership in the conspiracy).

United States v. Walker, 284 F.3d 1169 (10th Cir. 2002) (Court gave no reasoned explanation for 7-level upward departure based on under-representation of criminal history).

United States v. Schwarz, 283 F.3d 76 (2d Cir. 2002) (There was an unwaivable, actual conflict of interest between defense counsel and one defendant).

United States v. Guzman, 282 F.3d 177 (2d Cir. 2002) (Court failed to begin departure from the guideline for charged offense).

United States v. Orlando, 281 F.3d 586 (6th Cir. 2002) (Court failed to make specific factual findings in determining the amount of laundered funds).

United States v. Lucas, 282 F.3d 414 (6th Cir. 2002) (Defendant was not the sole occupant of the car, and no evidence regarding ownership of gun was presented, so court erred in applying firearm sentence enhancement).

McCoy v. Stewart, 282 F.3d 626 (9th Cir. 2002) (Gang member's statements made to another gang were protected by the First Amendment).

Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002) (Prosecution suppressed exculpatory evidence regarding an important witness' veracity).

Chia v. Cambra, 281 F.3d 1032 (9th Cir. 2002) (Statements made by the shooter in a murder conspiracy were reliable and crucial to defendant's defense).

Packer v. Hill, 277 F.3d 1092 (9th Cir. 2002) (Judge's comments during jury deliberation were unduly coercive by implying that reaching a particular verdict would be desirable).

Gray v. Klauser, 282 F.3d 633 (9th Cir. 2002) (Court allowed the government but not the defendant to admit hearsay evidence of similar import and character).

United States v. Greer, 285 F.3d 158 (2d Cir. 2002) (Court must state its reasons for selecting point within guidelines range if sentence exceeds 24 months).

United States v. Henry, 282 F.3d 242 (3rd Cir. 2002) (Drug quantity that raises the statutory maximum must be pleaded and proven beyond a reasonable doubt).

Haynes v. Cain, 298 F.3d 375 (5th Cir. 2002) (Counsel was ineffective when he conceded defendants guilt on several counts over the defendant’s objection).

United States v. Fitch, 282 F.3d 364 (6th Cir. 2002) (A material ambiguity in a plea agreement, which the government could have avoided, required the court to construe the agreement to the defendant's benefit).

French v. Jones, 282 F.3d 893 (6th Cir. 2002) (Defendant, whose lawyer was not present when the trial judge gave an instruction to a deadlocked jury, was denied counsel).

Powell v. Galaza, 282 F.3d 1089 (9th Cir. 2002) (Court effectively directed the jury to find for the prosecution on the specific intent element of failing to appear at a sentencing hearing).

United States v. Hoskins, 282 F.3d 772 (9th Cir. 2002) (Defendant's position as a security guard at the department store he helped rob, was not a position of public or private trust).

Karis v. Calderon, 283 F.3d 1117 (9th Cir. 2002) (Counsel failed to investigate and present relevant information of abusive childhood).

United States v. Lynch, 282 F.3d 1049 (9th Cir. 2002) (Hobbs Act requires stricter effect on interstate commerce requirement where the victim is an individual rather than a business).

Killian v. Poole, 282 F.3d 1204 (9th Cir. 2002) (Withholding of evidence and reliance on perjury by the prosecutor in final argument).

United States v. Leveque, 283 F.3d 1098 (9th Cir. 2002) (Lacey Act requires that the defendant hunter actually knew that the taking of an elk was illegal).

Fisher v. Gibson, 282 F.3d 1283 (10th Cir. 2002) (Defense counsel failed to argue reasonable doubt when the prosecution did not

present overwhelming evidence).

United States v. Haywood, 280 F.3d 715 (6th Cir. 2002) (Evidence of previous possession had no bearing on whether defendant intended to distribute crack cocaine).

United States v. Thomas, 280 F.3d 1139 (7th Cir. 2002) (Where there is no evidence the defendant possessed a firearm before or at the time of a murder, it did not warrant application of the homicide cross reference).

Caro v. Woodford, 280 F.3d 1247 (9th Cir. 2002) (Defense counsel failed to investigate and present evidence that defendant suffered from brain damage, due to his exposure to neurotoxicants and child abuse).

Silva v. Woodford, 279 F.3d 825 (9th Cir. 2002) (Defense attorney abandoned an investigation into defendant's familial history and psychiatric background).

United States v. Stubbs, 281 F.3d 109 (3rd Cir. 2002) (Colloquy of defendant's purported waiver of trial counsel was insufficient).

United States v. Varela-Rivera, 279 F.3d 1174 (9th Cir. 2002) (Erroneous admission of expert testimony on the structure, organization, and modus operandi of drug trafficking).

United States v. Robles-Rodriguez, 281 F.3d 900 (9th Cir. 2002) (State drug conviction, for which the maximum sentence is probation, cannot be an aggravated felony).

United States v. Braxtonbrown-Smith, 278 F.3d 1348 (D.C. Cir. 2002) (There is no presumption that withdrawing money from a commingled account of clean and unclean funds rendered any funds untraceable upon their withdrawal).

United States v. Garcia-Torres, 280 F.3d 1 (1st Cir. 2002) (Evidence insufficient to show that defendant, when participating in a kidnapping and murder, knew he was aiding a drug conspiracy).

United States v. Perez, 280 F.3d 318 (3rd Cir. 2002) (Venue is a jury question requiring an instruction if defendant objects prior to the close of the prosecution's case).

United States v. Allen, 282 F.3d 339 (5th Cir. 2002) (Finding a serious drug offense based solely on court's consideration of facts contained in police report was error).

United States v. Stubbs, 279 F.3d 402 (6th Cir. 2002) (Defendant was indicted for one offense and sentenced under a different crime simply by operation of a cross-reference).

Brown v. Mayle, 283 F.3d 1019 (9th Cir. 2002) (Sentences of 25 years to life for defendants' petty theft offenses were cruel and unusual punishment).

Ghent v. Woodford, 279 F.3d 1121 (9th Cir. 2002) (Admission of testimony was in violation of appellant's *Miranda* rights at capital sentencing).

United States v. Chavez-Valenzuela, 279 F.3d 1062 (9th Cir. 2002) (Nervousness during a traffic stop, in absence of other particularized, objective factors, did not support continued detention).

Kansas v. Crane, 534 U.S. 407 (2002) (State must show that a sexual offender lacks some ability to control his violent behavior to justify confining him under its sexually violent predator law).

Valansi v. Ashcroft, 278 F.3d 203 (3rd Cir. 2002) (Embezzlement may not qualify as an aggravated felony if the conviction establishes only an intent to injure, rather than to defraud or deceive).

United States v. Peters, 277 F.3d 963 (7th Cir. 2002) (Evidence that alleged victim drank a large quantity of beer and testified she would never consent to sex with the defendant was insufficient to show she was incapable of consenting).

United States v. Gonzalez-Alvarez, 277 F.3d 73 (1st Cir. 2002) (Where a product cannot be sold lawfully it has a value of zero).

United States v. Bergfeld, 280 F.3d 486 (5th Cir. 2002) (Government delayed prosecuting a defendant for five years, due to its own negligence, and defendant was entitled to a presumption of prejudice).

United States v. Diehl, 276 F.3d 32 (1st Cir. 2002) (Area near a house need not have an obvious boundary to fall within the curtilage of the house).

United States v. Nelson, 277 F.3d 164 (2d Cir. 2002) (Defendant's consent to seating of a juror biased against him did not validate the jury panel where consent was obtained in exchange for empanelling another juror who was of the same race as the defendant).

Dilosa v. Cain, 279 F.3d 259 (5th Cir. 2002) (Prosecution's failure to disclose hair sample evidence found on victim's body that did not belong to defendant was material).

United States v. Hernandez, 279 F.3d 302 (5th Cir. 2002) (Defendant's consent to the search of her luggage, after officer had

improperly searched it by manipulating it, did not break the casual connection to the unlawful search).

United States v. Billadeau, 275 F.3d 692 (8th Cir. 2001) (Tribal officer was engaged in performance of his official duties when he stopped defendant).

Moore v. Purkett, 275 F.3d 685 (8th Cir. 2001) (Court's ban on oral communication between defendant and his attorney during the trial violated right to counsel).

United States v. Hatcher, 275 F.3d 689 (8th Cir. 2001) (A second pat-down search was illegal, and fruits of the search were properly suppressed).

Garceau v. Woodford, 281 F.3d 919 (9th Cir. 2001) (Jury instruction allowed for consideration of a defendant's other crimes in order to draw the additional inference of criminal propensity).

United States v. McElhiney, 275 F.3d 928 (10th Cir. 2001) (*Allen* instruction was impermissibly coercive).

United States v. Jenkins, 275 F.3d 283 (3rd Cir. 2001) (Obstruction of justice enhancement did not apply to a defendant who failed to appear at a related state court proceeding).

United States v. Taylor, 277 F.3d 721 (5th Cir. 2001) (Probation officer's assertion is insufficient to prove information in presentence report did not come from defendant's immunized testimony).

United States v. Williams, 274 F.3d 1079 (6th Cir. 2001) (Venue for conspiracy was not established when the only participant in district was informant).

United States v. Portillo-Mendoza, 273 F.3d 1224 (9th Cir. 2001) (A California drunk driving conviction is not an aggravated felony).

United States v. McGowan, 274 F.3d 1251 (9th Cir. 2001) (Expert witness testimony about drug-trafficking organizations was not admissible).

United States v. Burgos, 276 F.3d 1284 (11th Cir. 2001) (Court could not penalize a defendant for refusing to cooperate with the government in an unrelated criminal investigation).

United States v. Thomas, 274 F.3d 655 (2d Cir. 2001) (Failure either to charge drug type and quantity in the indictment or to submit the question of drug type and quantity to the jury was plain error).

United States v. Runyan, 275 F.3d 549 (5th Cir. 2001) (Police exceeded the scope of a prior private search when they examined a closed container that was not opened by private searchers).

United States v. Rivera, 273 F.3d 751 (7th Cir. 2001) (Conspiracy claim was insufficient where defendant specifically refused to front payment to buyer).

United States v. Blackmon, 273 F.3d 1204 (9th Cir. 2001) (Police may not justify a wiretap of a defendant in a housing project by using the same allegations of necessity for a different suspect in the same housing project).

United States v. Taylor, 272 F.3d 980 (7th Cir. 2001) (Shooting after a defendant has escaped must be directly related to the escape to apply to the sentence for escape).

United States v. Young, 272 F.3d 1052 (8th Cir. 2001) (Failure to document a larceny victim's lost profits in presentence report will excuse a defendant's failure to object to the restitution estimates).

Thomas v. Hubbard, 273 F3d 1164 (9th Cir. 2001) (Defendant was entitled to cross-examine police officers about that witness' absence right after the murder).

Morris v. Woodford, 273 F.3d 826 (9th Cir. 2001) (Error on jury instruction that stated defendant would get life with possibility of parole if the jury could not agree on death or life without parole was prejudicial).

United States v. Prentiss, 277 F.3d 1277 (10th Cir. 2001) (Stipulation that victim was a member of an Indian tribe is not proof that the victim had Indian blood).

United States v. Lujano-Perez, 274 F.3d 219 (5th Cir. 2001) (Court failed to explain the nature of the charge at plea colloquy).

United States v. Cooper, 274 F.3d 230 (5th Cir. 2001) (Enhancement for possession of a firearm does not apply unless drugs found with the weapon or evidence presented that the location of the weapon was used in connection with drug trafficking activities).

United States v. Martinez, 274 F.3d 897 (5th Cir. 2001) (Sentencing a defendant convicted of an assimilative crime to a sentence three times greater than state conviction is not a like or similar punishment).

United States v. Turner, 272 F.3d 380 (6th Cir. 2001) (Evidence that defendants robbed a victim who ran an illegal lottery out of his home was insufficient to show an effect on interstate commerce).

United States v. Atwater, 272 F.3d 511 (7th Cir. 2001) (Sentencing court may not assume that all bank

robberies use guns or that the use of guns is probable).

United States v. Hunt, 272 F.3d 488 (7th Cir. 2001) (Court may not convert the money laundered into equivalent drug quantities for sentencing purposes).

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