# The BACK BENCHER

Seventh Circuit Federal Defenders

Vol. No. 21
Reversible Error Issue

## DEFENDER'S MESSAGE

Reversible error is the sword and shield of every criminal defense lawyer. At trial, the criminal defense lawyer can preemptively protect his client from prejudice by bringing the potential for reversible error to the attention of the trial judge, thereby preventing an error before it occurs. On appeal, knowledge of what constitutes reversible error allows the defense lawyer to retroactively shield his client from the effects of impermissible prosecutorial blows already suffered. But reversible error is more than a weapon in the arsenal of the criminal defense lawyer; it is also an engine for change. Landmark decisions such as *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *Brady v. Maryland*, 373 U.S. 83 (1963), to name but two, secured protections to the citizen-accused through the efforts of tenacious, creative, and dedicated advocates who succeeded in demonstrating to the courts that reversible error occurred where none had been found before. This same creativity is necessary in today's federal criminal legal climate where the courts have upheld the draconian sentences under the sentencing guidelines, the arbitrary and cruel imposition of mandatory minimum sentences, the erosion of rights secured by the Fourth Amendment, and the execution of citizens by the government.

To assist you in your efforts to not only avoid or remedy reversible errors but also to create positive change to existing law, we once again provide to you Alexander Bunin's compilation of cases from all the federal circuit courts of appeal where a reversible error was found to have been committed by the district court below. Federal Public Defender Bunin's exhaustive listing of these cases is a valuable tool for all federal criminal defense lawyers working for their clients in both the district and appellate courts. This labor intensive effort by Mr. Bunin is much appreciated, especially given the fact that lately much of his time has been devoted to organizing the newly created Federal Defender's Office for the Northern District of New York and Vermont. His column is evidence that, even in the harsh environment of today's federal courts, zealous advocates are ensuring the rights of their clients through the engine of reversible error. We should strive to do the same.

As part of our continuing effort to help fulfill this exhortation, a number of continuing legal education opportunities are on the horizon for our panel attorneys. Three national CJA training programs are scheduled for this year at the following locations and dates: Kansas City, MO on May 18-20; Boston, MA on July 6-8; and San Antonio, TX on September 21-23. An application for these programs is attached to the back of this issue of *The Back Bencher*. Incidentally, I have preliminarily accepted an offer to speak at each of these programs. I hope to see you at one of them. For those who would prefer a program closer to home, our office, the Community Defender in Chicago, Terry MacCarthy, and the Illinois Association of Criminal Defense Lawyers (IACDL) are once again co-sponsoring a CJA Panel Attorneys' Seminar. The program will be in Chicago this year and is tentatively set for October 5th through the 6th. Lastly, yielding to demands for a repeat of last years' much acclaimed golf-outing in Bloomington, we will again be co-sponsoring a golf outing later this year along with MacCarthy and the IACDL. Details will be forthcoming as they develop.

In closing, that much anticipated event, St. Patrick's day, is coming fast upon us. I hope you will all celebrate the day with vigor, and remember, "All Irishmen are kings, but not all kings are Irishmen."

Happy St. Patrick's Day!

Richard H. Parsons
Federal Public Defender

Central
District of Illinois

# Table Of Contents



## A FOND FAREWELL

On behalf of all the staff at the Federal Defender's office, we extend our best wishes to retiring Magistrate Judge Robert J. Kauffman. Judge Kauffman graduated from Cathedral High School in Springfield and earned his law degree from Marquette University in Wisconsin. He then began his long career of public service, working as an Assistant United States Attorney, Clerk of the Court for the Central District of Illinois, and, finally, as our Magistrate Judge. In this capacity, he earned the respect of the legal community throughout the Central District by his fairness, friendliness, and temperament. This respect and admiration felt for Judge Kauffman was evident by the large number of people who came to his retirement gathering on February 11, 2000. We will miss him, but are confident that, as a member of the Ancient Order of Hibernians, sightings of him in his Irish

green MG convertible are likely each St. Patrick's day for years to come.

## A WARM WELCOME

With Magistrate Judge Kauffman's retirement, we at the Office of the Federal Public Defender have occasion to welcome our newest Magistrate Judge, John Gorman. Judge Gorman comes to the federal bench with a wealth of judicial experience which will serve him well in his new position. After graduating from Flanagan High School, Judge Gorman attended Illinois Wesleyan where he played varsity golf and was a member of Sigma Chi Fraternity. Upon earning his law degree at the University of Illinois, he began a successful legal career, ultimately serving as a justice on the Third District Appellate Court and as Chief Judge of the 10th Judicial Circuit. We are sure that Judge Gorman will exercise his duties as a United States Magistrate Judge with the same congenial and scholarly attitude he has displayed in his previous judicial positions.

Welcome to the "federal family"!

## CONGRATULATIONS!

On January 26, 2000, during the annual Defenders meeting in San Diego, Judge Robin J. Cauthron of the Western District of Oklahoma presented Community Defender Terry MacCarthy with the award of "Defender of the Century". We knew he was getting a bit long in the tooth; however, we didn't realize he had been at it for one hundred years.

Congratulations, Terry, on this well-deserved recognition of the extraordinary representation you have provided to the citizen-accused throughout the course of your long career.

Witnessing the presentation of this honor were other Defenders throughout the country, including speakers Judy Clark, Henry Martin, John Cleary, and A.J. Kramer. These and other speakers addressed a number of important topics related to federal criminal defense issues, although, as expected, the much-dreaded A.J. Kramer gave his usual lengthy, satirical, and insulting diatribe inadequately disguised as a facetious tribute to our good friend, Terry MacCarthy.

## PANEL ATTORNEY PAY UPDATE

Effective January 1, 2000, panel attorneys appointed under the CJA now receive $70 per hour for in-court work and $50 per hour for out-of-court work. This amount reflects a $5 increase over the old rates. Although, as in years past, the judiciary requested funding to pay panel attorneys $75 per hour for both in and out-of-court work, Congress approved only a partial increase. However, the Judicial Conference has agreed to renew its request for full funding in FY 2001. Already pushing for approval of full funding, Chief Justice Rehnquist in his 1999 Year-End Report on the Federal Judiciary lamented the poor compensation provided to panel attorneys and stated, "Inadequate compensation for panel attorneys is seriously hampering the ability of courts to recruit and retain qualified panel attorneys to provide effective representation. The maximum CJA hourly rates have been eroded by inflation and are substantially below prevailing rates in the legal profession . . . I respectfully ask Congress to make adequate compensation for panel attorneys a high priority, and to fund the Defender Services appropriation at a level sufficient to pay the $75 rate." Let us hope that next year, in this era of trillion dollar budget surpluses, Congress will recognize the importance of the Sixth Amendment and ensure that panel attorneys are properly compensated.

## *Dictum Du Jour*

"[W]e . . . suggest to district judges, U.S. Attorneys, and probation officers that steps be taken to prevent the perception that probation officers are 'surrogate prosecutors.' It may be that a separate small table could be placed to one side inside the rail where the probation officer is equally available to the district judge and to the other parties as needed."

*U.S. v. Turner*, No. 99-1536 (7th Cir. 02/16/00).

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"The mystic chords of memory, stretching from every battlefield, and patriot grave, to every living heart and hearthstone, all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature."

Abraham Lincoln
*First Inaugural Address*

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Definition of a Gentleman

"The forbearing use of power does not only form a touchstone, but the manner in which an individual enjoys certain advantages over others is a test of a true gentleman."

"The power which the strong have over the weak, the employer over the employed, the educated over the unlettered, the experienced over the confiding, even the clever over the silly - the forbearing or inoffensive use of all this power or authority, or a total abstinence from it when the case admits it, will show the gentleman in plain light."

"The gentleman does not needlessly and unnecessarily remind an offender of a wrong he may have committed against him. He cannot only forgive, he can forget; and he strives for that nobleness of self and mildness of character which impart sufficient strength to let the past be but the past. A true man of honor feels humbled himself when he cannot help humbling others."

Robert E. Lee
President
Washington College
(now Washington & Lee University)
1865-1870

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". . . As Mort leaves on Sunday night, he summarizes our defense succinctly. 'When all else fails,' he says, 'blame it on the dead guy.'"

Sheldon Siegel
"*Special Circumstances*"

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Morley Safer: "I spoke to Kathy Lette yesterday."

John Mortimer: "And she was very rude, I'm sure."

(Footage of Safer and Lette talking)

Morley Safer: (Voiceover) "But she said women go head over heels for you."

John Mortimer: "I don't really know about that. My idea of hell would be an all-male dinner of judges which lasted for all eternity, you know."

60 Minutes (CBS News)
*Interview of author John Mortimer*
*(Rumpole of the Bailey)*
December 13, 1999

* * * * * * * * * *

The day after the telephone conversation, [Division of Narcotics Enforcement] agents sneaked onto the farm to conduct surveillance and take a thermal imaging scan of the middle barn. While doing so, the agents claimed they were able to smell marijuana when they were 100 feet from the barn. **One must assume either very clean pigs or very strong marijuana.**

United States v. Roth, slip op. (7th Cir. 01/07/2000)

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After pleading guilty to possessing crack cocaine with intent to distribute ... Timothy Stewart decided that the price of crime was too high. ... Stewart then sought to withdraw his plea and go to trial. Asked why, Stewart told the judge that "I was under the impression that I was going to get under–60 months or under and I was going to be eligible to go to boot camp." Stewart also claimed to be innocent and tendered an affidavit by his brother in which the brother claimed to have owned some of the crack that was included in the relevant-conduct calculation. His brother added that Stewart had never possessed that cocaine.

Stewart had sung a different song when entering his plea, however. Under oath, he not only admitted all of the elements of the offense but also admitted owning and possessing the cocaine that his brother's affidavit later claimed that Stewart had never touched. ... Stewart attempted to explain away his evident perjury:

"I just was swearing under oath because I already knew that the plea bargain and everything was set up. So I was just saying anything to go along with the plea because I didn't want my plea to get took back.... [T]he only reason I set there and said I was guilty and swore under oath so many times is because I already had in my mind that I had 60 months coming. No matter what you said and no matter what question you asked me, I already had it in my mind that I had 60 months coming. So I was just answering all your questions just to be answering them, whether they were truthful or

not."

The district judge was not impressed by this "justification" for perjury on top of drug dealing and denied the motion to withdraw the plea. Because the judge concluded that by procuring his brother's affidavit Stewart had frivolously denied relevant conduct (that is, had denied a drug transaction to which he had already admitted under oath at the plea hearing), the judge declined to deduct three offense levels under U.S.S.G. §3E1.1. ... His sentence of 146 months was well above what he would have received had he not attempted to withdraw the plea.

Once entered, a plea of guilty may be withdrawn only for a "fair and just reason." Fed. R. Crim. P. 32(e). A defendant's protestation that statements freely made under oath when entering the plea were a pack of lies is not a "fair and just reason" to start anew. ...

Because many defendants seem to be under the misapprehension that a guilty plea is just provisional, and an oath to tell the truth means nothing, let us be clear. A district judge *may* permit a defendant to withdraw the plea if the judge finds convincing the defendant's reasons for lying under oath, but because the district judge possesses considerable discretion in this regard, *United States v. Abdul*, 75 F.3d 327, 329 (7th Cir. 1996), a defendant has no chance of success on appeal when the judge elects to treat freely the sworn statements as conclusive. Entry of a plea is not some empty ceremony, and statements made to a federal judge in open court are not trifles that defendants may elect to disregard. A defendant has no legal entitlement to benefit by contradicting himself under oath. Thus when the judge credits the defendant's statements in open court, the game is over. See *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985). There will be no further evidentiary hearing, and an appeal is pointless (indeed, frivolous).

Other defendants should reflect on what happened (and could have happened) to Stewart when deciding how to answer a judge's questions at a plea hearing, and whether to recant.

United States v. Stewart, slip op. (7th Cir. 12/7/1999).

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When Detective Mark Krampf of the Bellevue Police Department arrived at Williams' house, he found Payton, a convicted felon, lying on the living room floor with a close-range gunshot wound to his left leg just below the buttocks. ...

When initially interviewed by the police, Payton, his friend Williams, and Payton's then-girlfriend, Kara Moore, informed officers that Payton was wounded in a drive-by shooting. But, after they were confronted with the absence of any physical evidence supporting their story, both Williams and Moore changed their story and told the police that Payton shot himself accidentally while attempting to put the shotgun in his pants pocket and that Payton had planned to use the shotgun to rob a pawnshop.

United States v. Payton, slip op. (7th Cir. 12/6/1999)

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The defendant was convicted of bank robbery and related offenses and given a very long sentence-almost 30 years. James Dodd committed the actual robbery; Montana drove the getaway car. Dodd pleaded guilty, and testified at Montana's trial, as Montana's witness, that Montana had not known that Dodd was planning to rob the bank. Shortly before the end of the trial, Dodd gave Montana's lawyer a note for Montana's mother, who after she read it told the lawyer that the note demanded money in exchange for Dodd's having testified favorably to Montana. The following morning, a deputy U.S. marshal heard Dodd tell Montana to tell Montana's father that "it's going to be $10,000" for the favorable testimony. The district judge allowed the marshal to testify to what he had heard. He also permitted the jury to learn that Dodd had passed a note to Montana's mother, but not that Montana's lawyer had been the courier.

Montana also complains about his lawyer's decision to call Dodd as a witness, for he proved to be uncontrollable and while attempting to exonerate Montana made various inculpatory statements. He also repeated statements that Montana had made to him, and this opened the door for the government to impeach the out-of-court declarant (Montana) with his extensive criminal record. But to criticize Montana's lawyer for calling Dodd is rank Monday morning quarterbacking. Dodd was the only witness Montana had, and he tried to exonerate him. Had Montana's lawyer failed to call Dodd, Montana would have a stronger case of ineffective assistance of counsel than he has. Dodd's testimony actually helped Montana, at least a little, for the jury acquitted him of the charge of having conspired with Dodd to rob the bank.

United States v. Montana, slip op. (7th Cir. 12/16/1999).

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The marshy area performs several ecological functions: absorbing nutrients and purifying the water; allowing a variety of trees and plants to grow; and providing food and shelter for herons, kingfishers, muskrats, pheasants, rabbits, squirrels, red foxes, snipes, ducks, geese and their goslings.

Kelly, though, was more interested in making a buck than saving a duck. He bought the property with the aim of turning it into a subdivision.

*Kelly v. Environmental Protection Agency*, slip op. (7th Cir. 2/10/2000)

# CHURCHILLIANA

**Devil's Advocate**

When Churchill first was a candidate in 1900, he did some door-to-door canvassing and things were going pretty well, he thought, till he came to the house of a grouchy-looking fellow. After Churchill's introduction of himself, the fellow said, "Vote for you? Why, I'd rather vote for the devil!"

"I understand," replied Churchill. "But in case your friend is not running, may I count on your support?"

# Defending the Defense Against Post-Moratorium Fallout

By: David Mote
Deputy Chief Federal Defender

The defense is under attack. The defense stands accused of being too incompetent to allow the citizens of Illinois to exact the ultimate price from those who commit murder.

Illinois' governor, George Ryan, has declared a moratorium on the execution of the death penalty while the problems revealed by the exoneration of thirteen men on death row since Illinois reinstated the death penalty in 1977 are examined. Governor Ryan stated "There is no margin of error when it comes to putting a person to death."

While the mistakes involving the death penalty in Illinois have garnered much attention, there is no reason to think the death penalty process here is less reliable than in other states. Indeed, what distinguishes the states that carry out the most executions while acknowledging the least mistakes is their refusal to provide any meaningful review of criminal cases. Virginia has one of the shortest time limits for presenting newly discovered evidence of any state in the country. Texas has a separate court of appeals to handle criminal cases. The judges on the criminal court of appeals are elected. Candidates campaign with promises that they won't reverse convictions or set aside death sentences. Judges who look at cases, see errors and seek to correct them are voted right out of their robes. The people of Texas want blood. Sadly, they get it.

Many courageous men and women deserve thanks for the role they played in bringing a halt to executions in Illinois. Chief Justice Harrison of the Illinois Supreme Court has been an outspoken critic of the death penalty. He praised Ryan's decision, saying "It may prevent some innocent people from being executed." And Governor Ryan has shown true leadership in declaring the moratorium. Chicago Tribune reporters Steve Mills and Ken Armstrong wrote an outstanding series of investigative reports documenting problems in death penalty cases last November. But the real soldiers in the fight to stop innocent people from being executed in Illinois have been defense lawyers, newspaper reporters and an exceptional group of journalism students working with professor Lawrence Marshall at Northwestern University.

In the wake of Governor Ryan's declaration of the moratorium, however, one could easily read the newspaper and conclude that the only problem with the death penalty in Illinois is the incompetence of the defense bar. One cartoon showed a man being strapped down for his execution while his lawyer lay down to rest up too. Newspaper articles have quoted law professors and practicing lawyers commenting on the problem of ineffective representation in death penalty cases.

It is true that many defendants on death row had ineffective counsel. Mills and Armstrong's series in the Tribune reported that often death penalty defendants and their families have very little to spend on counsel. In one death penalty case, the lawyer's fee was reported to be $200. (That's not a typo: $200). Another lawyer who handled a death penalty case reportedly handed out fliers saying "Any case. Any where. [sic] Maximum fee--$1,500." Obviously, a successful, experienced attorney is unlikely to accept a major case requiring extensive investigation and prolonged litigation for a few thousand dollars. The fact that you can't hire a

good criminal defense attorney to handle a capital case for a few thousand dollars does not mean most defense attorneys are incompetent. No one would assume that the fact that you can't hire a good plumber for minimum wage means most plumbers are incompetent. Nonetheless, some lawyers have provided woefully deficient representation in death penalty cases. Still, the known errors involving the death penalty in Illinois are not limited to the defense bar.

An investigator for the Chicago Police Department's Office of Professional Standards concluded that Police Commander Jon Burge and his detectives engaged in "methodical" and "systematic" torture. Allegations of misconduct by Burge and his detectives include punching suspects, putting guns to their heads, shocking them and putting plastic bags over their heads to coerce confessions. Ten men "investigated" by Burge and his detectives now sit on death row. Allegations about Burge and his detectives have been around for years, but defendants' allegations were not readily accepted. Now the police department has acknowledged the problem and Burge has been fired. I have yet to hear of concerns about a case because of defense counsel torturing witnesses.

Another problem identified in the series of Tribune articles was the use by prosecutors of unreliable hair and fiber analysis. Eighteen people have reportedly been cleared by DNA evidence after the prosecution obtained convictions based on hair analysis. Unlike DNA evidence, hair analysis is based on a visual comparison of hairs and is subjective. Unfortunately, prosecutors regularly overstate the significance of the evidence and juries give it too much weight. Similarly, fiber analysis has proven unreliable. Last year, the FBI claimed fiber analysis implicated a group of drug users in three murders at Yosemite National Park. A hotel handyman's subsequent confession to the murders revealed the unreliability of that evidence. So far as I know, no one has been wrongly convicted as a result of the defense's use of junk science.

One recurring theme in cases in which an innocent person is sentenced to death is the jailhouse informant who testifies that the defendant confessed to the crime. Jailhouse informants have an agenda. They are looking for a way to lessen their own punishment and are willing to say anything to help themselves. When one considers the fact that these are jail inmates, it should hardly be surprising that they regularly prove to be dishonest. Jailhouse informants are not normally defense witnesses. They testify for the prosecution to obtain shorter sentences or get charges dropped. The defense is not allowed to reward witnesses. That would be considered witness tampering and bribery. But it is an accepted and court approved practice for the prosecution to reward witnesses. Of course, the prosecutor will only be willing to reward an informant for truthful evidence that turns out to be helpful. The problem is that the prosecutor can more easily tell if the jailhouse informant's story is helpful than if it is true.

As the Tribune series noted, such informants have little to lose by making up evidence for the prosecution; they are rarely charged with perjury. And informants can pick up details of the crime from newspapers, police, prosecutors, phone calls with people on the outside or even the defendant's own legal papers to put together a convincing confession.

Innocent people are convicted by jurors who set the threshold for "beyond a reasonable doubt" too low. They are convicted because the public does not really believe in the presumption of innocence. A juror who would not trust a convicted felon to clean his or her house will find the same felon worthy of belief beyond a reasonable doubt when the convicted felon testifies for the prosecution in a criminal case and admits he is hoping for a lower sentence.

And how many of those thirteen men who walked off Illinois' death row saw their convictions vacated by the first appellate court to review the case? At the federal level, Congress has put more restrictions on the ability of persons convicted of crimes to have their convictions and sentences reviewed. Congress also eliminated the death penalty resource centers.

The public wants the defense bar to be effective if ineffectiveness interferes with executions. Otherwise, the demand for effective defense counsel is not always as great. I know a former county public defender. He was fired because he won too many acquittals. Another former county public defender I know was not re-appointed after he raised the fact that the county was not paying the public defender the minimum percentage of the State's Attorney's salary set by state law. They upped the salary, but replaced the defender who made them pay the salary the law required. The new defender started out with a lawful salary. But when the State's Attorney's salary was increased, the public defender's salary was left unchanged. But it is no secret that elected officials and the public would rather pay for law enforcement and prosecutors than for defense counsel.

It is good that the media and the public have been forced to rethink the death penalty in Illinois after it has been proven unreliable thirteen times. It if unfortunate that instead of considering all the problems that led to innocent people being sentenced to death, the media and the public find it easier to blame everything on inadequate defense counsel. Competent, dedicated, and usually uncompensated defense counsel have been essential in correcting the system's mistakes.

Governor Ryan is correct. "There is no margin of error when it comes to putting a person to death." If we accept that "to err is human," we must wonder how many errors, in the form of the innocent, are among the more than three thousand people on death row in this country.

# LET JUDGES BE JUDGES! Downward Departures After *Koon*

By: Alan Ellis, Esq.

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

## Part V
## Combination of Factors

Despite the Supreme Court's decision in *Koon v. United States*, 518 U.S. 81 (1996), which empowered federal judges to be creative in finding grounds for departure, there will still be many times that a judge simply feels that one factor standing alone does not warrant departure.

For example, a court may find that a defendant was suffering from diminished capacity under U.S.S.G. §5K2.13, but determine that although the defendant's mental disorder contributed to the commission of the offense, the extent of the disorder was not such that it warranted a downward departure.

In such a case, however, the court may still depart downward if it finds *another* factor or factors that, while providing the court with the authority to depart, may not - standing alone - persuade the court to exercise its discretion and grant a sentence reduction. In such cases, counsel and the court can still rely on the "combination of factors" ground for downward departure.

Effective November 1, 1994, the Sentencing Commission added a paragraph to the Commentary to U.S.S.G. §5K2.0 authorizing a downward departure based on a combination of factors:

"The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the 'heartland' cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case. (Emphasis added)

Before this amendment was adopted, several circuits had authorized downward departures based on a combination of factors, none of which standing alone would have justified a departure. (*U.S. v. One Star*, 9 F.3d 60, 61 (8th Cir. 1993) (affirming departure for a combination of factors "the unusual mitigating circumstances of life on an Indian reservation"); *United States v. Koon*, 34 F.3d 1416, 1452 (9th Cir. 1994) (recognizing, in the Rodney King beating case, that "unique combination of factors" could constitute a basis for downward departure, but reversing the departure here), *aff'd in part and rev'd in part, remanded, Koon v. United States*, 518 U.S. 81 (1996); *U.S. v. Hines*, 26 F.3d 1469 (9th Cir. 1994) (upholding departure for "convergence of factors," but remanding as to extent); *U.S. v. Cook*, 938 F.2d 149, 153 (9th Cir. 1991) ("a combination of factors [may] together constitute a 'mitigating circumstance'"); *U.S. v. Bowser*, 941 F.2d 1019, 102-25 (10th Cir. 1991) (upholding departure from career offender guideline on "unique combination of factors," none of which would have warranted departures by themselves); *United States v. Sklar*, 920 F.2d 107, 117 (1st Cir. 1990) (the *convergence* of factors that might be "inadequate to warrant departure when taken in isolation, may . . . in combination suffice to remove a case from the heartland . . . .").)

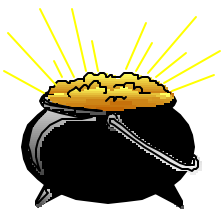
As one court has recently explained:

"Because the Commission operates at a distance from individual cases, there is an inevitable clumsiness in its guidelines. Even with all their complexity, the guidelines do not and can not counsel all of the factors, and combinations of factors that are possibly considered in sentencing. The departure mechanisms acknowledge this."

(*United States v. Gonzalez-Bello*, 10 F.Supp.2d 232 (E.D.N.Y. 1998).)

Since the amendment and post-*Koon*, the combination of factors downward departure has been credited with approval by at least one circuit, *United States v. Rioux*, 97 F.3d 648 (2d Cir. 1996) (upholding downward departure based on physical condition and charitable acts), as well as various district courts, *see, e.g., United States v. Jackson*, 14 F.Supp.2d 1315 (N.D. Ga. 1998) ("when considered with the other facts present in this case [defendant's physical ailments], [defendant's] service to his country and community support a downward departure from the Guidelines," even though "[c]onsidered alone, his actions in this regard are not extraordinary."); *United States v. Bennett*, 9 F.Supp.2d 513 (E.D.Pa 1998) ("three grounds . . . were found, either separately or in combination, to support and justify a downward departure": civic, charitable, and public service, extraordinary cooperation and restitution, and a hybrid of diminished capacity and mental and emotional conditions).

A "combination of factors" departure is often bullet-proof. So long as a judge doesn't rely on a prohibited factor, e.g., race, sex, national origin, creed, religion, socioeconomic status and disadvantaged upbringing, which are never grounds for sentencing outside the guidelines, the decision should survive appellate scrutiny. Rarely will a lower court pinpoint how much weight it was giving each factor in fashioning the overall combination of factors. Nor is it required by the appellate courts to do so. Rather, should a reviewing court determine that the district court based its departure on a combination of permissible and impermissible factors, it must decide "whether the district court would have imposed the same sentence had it not relied upon the invalid factor or factors." (*United States v. Hemmingson*, Nos. 97-30552, 97-30598, 1998 U.S. App. LEXIS 24490, at 24490, at *33 (5th Cir. September 28, 1998) (quoting *Williams v. United States*, 503 U.S. 193, 203 (1992).) It is only where the appellate court concludes that the sentencing would have been different that it must remand for resentencing. (*Id.*)



The question is whether the judge is amenable to a lower sentence than one called for by the guidelines. If so, "combination of factors" is a way to get there.

*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.*

# THE "RELIABILITY" OBJECTION

***By: Jonathan E. Hawley***

## A. Introduction

Defending a client accused of distributing drugs is the most common case encountered by the federal criminal defense lawyer, and the most common issue in such cases is relevant conduct, *i.e.*, drug quantity. Indeed, drug quantity is a critical calculation because the amount and type of drug at issue determines not only the length of a particular defendant's sentence under the United States Sentencing Guidelines, but also controls which statutory minimum and maximum sentences apply in a given case. See United States v. Beler, 20 F.3d 1428, 1432 (7th Cir. 1994); United States v. Simmons, 964 F.2d 763, 773 (8th Cir.), *cert. denied*, 506 U.S. 1011 (1992). Specifically, section 2D1.1(c) of the Guidelines increases a defendant's base offense level as the quantity of drugs attributable to the defendant increases. U.S.S.G. §2D1.1(c). Likewise, the statutory minimum and maximum sentences mandated by the United States Code increase when drug quantity increases over certain threshold amounts. See 21 U.S.C. §§ 841(b)(1)(A)-(B).

Notwithstanding the critical nature of this drug quantity determination, the government may use a wide range of information at sentencing not ordinarily admissible as evidence at trial, *i.e.*, hearsay. However, the government's ability to load amounts of drugs onto your client is not without limit. Specifically, U.S.S.G. §6A1.3(a) requires district courts to "scrutinize" the evidence presented to ensure that

it possesses "sufficient indicia of reliability to support its probable accuracy." Beler, 20 F.3d at 1432, 1435 (7th Cir. 1994); U.S.S.G. §6A1.3(a). Thus, the evidence used for determining a base offense level must be "reasonably trustworthy" and "reliable." See United States v. McEntire, 153 F.3d 424, 435 (7th Cir. 1998); Simmons, 964 F.2d at 772-73. As the Eighth Circuit in Simmons stated:

"The guidelines procedure has chosen to bypass adherence to rules of evidence which have developed over hundreds of years in common law tradition to assure reliability in fact-finding. The guidelines require, however, that a sentence must be the product of evidence which meets a minimum threshold of reliability. The traditional notions of fair play which have heretofore been associated with the procedures in the courts of this country require nothing less."

Simmons, 964 F.2d at 778.

With these principles in mind, three types of objections to the reliability of evidence have emerged which can, under certain circumstances, successfully challenge the evidence introduced by the government at sentencing. First, successful challenges have been made to the reliability of evidence where a district court relied upon the hearsay statements or testimony of a witness who gave conflicting calculations regarding the amount of drugs involved (section B, *infra*). Second, where almost all of a defendant's relevant conduct is determined through the hearsay summary of a witness' statement, the Seventh Circuit has, in at least one case, reversed and held that this type of evidence was unreliable (section C, *infra*). Finally, where drug quantity is determined by calculating the yields from precursor chemicals, the Sixth circuit in a series of cases has held that general estimates of yields by DEA experts may not be used to sentence a defendant (section D, *infra*).

### B. Conflicting Drug Quantity Estimations

Oftentimes, several different sources will be used to determine drug quantity at sentencing. Almost invariably, these sources will differ as to the actual amount of drugs involved. However, a district judge as fact-finder at sentencing may judge the credibility of the various sources and choose the one which he believes is most reliable. Such a determination will almost never constitute error or be overturned on appeal. However, such is not the case where a single witness gives conflicting drug quantity estimations.

Specifically, in United States v. Duarte, 950 F.2d 1255, 1266 (7th Cir. 1991), *cert. denied*, 506 U.S. 859 (1992), the Seventh Circuit reversed the district court's drug quantity calculation where the calculation was based on a witness' contradictory testimony. The government witness in Duarte testified at trial that the defendant possessed between 4.04 and 4.875 kilograms of cocaine, but testified at sentencing that the defendant possessed 5.85 kilograms of cocaine. Duarte, 950 F.2d at 1266. The district court used the sentencing testimony to determine the drug quantity. Duarte, 950 F.2d at 1262. Noting that the court ordinarily gives great deference to a district court's judgment when it must choose between one of two inconsistent statements of fact in imposing sentence, the court nonetheless reversed and stated, "But when the court clearly relies upon one of two contradictory statements offered by a single witness, it should directly address the contradiction and explain why it credits one statement rather than the other." Duarte, 950 F.2d at 1266.

Likewise, in McEntire, the Seventh Circuit vacated the defendant's sentence for similar reasons. 153 F.3d at 437. In McEntire, the government's witness gave four different estimates of the drug quantity. 153 F.3d at 437. Specifically, in his proffer, the witness stated that 50 pounds of drugs were involved; in his trial testimony, he stated that 80 to 100 pounds were involved; in his affidavit, he disavowed any ability to estimate the amount of drugs; and, finally, at the sentencing hearing, he estimated the amount of drugs to be much more than 80 to 100 pounds. McEntire, 153 F.3d at 437. The district court used the "80 to 100 pounds" amount to sentence the defendant. McEntire, 153 F.3d at 437. As in Duarte, the court vacated the defendant's sentence, stating that the record left the court "unconvinced that the district court conducted a sufficiently searching inquiry into the contradictory evidence" given that the testimony was uncorroborated and the district court did not provide a rationale for believing one set of contradictory statements over another. McEntire, 153 F.3d at 437.

These cases illustrate that where a single witness gives conflicting drug quantity estimates, the district judge is not protected from reversal on appeal by merely uttering the magical "credibility" word. Rather, as Duarte indicates, the district judge must directly address the contradiction and explain why he credits one quantity estimate over the other. Accordingly, where a witness gives contradictory drug quantity estimates in the same or

multiple statements, an objection to the reliability of the statements under U.S.S.G. §6A1.3(a), Duarte, and McEntire will ensure that the district judge is on notice that a more thorough explanation will be necessary before any one statement can be relied upon. Moreover, for purposes of appeal, such an objection will create a clear record as to the district judge's reasoning and preserve the issue for review.

### C. The Robinson Objection

Another circumstance as common as the self-contradictory witness is the situation where nearly all of the defendant's relevant conduct comes from a single witness. Where such a witness testifies at the sentencing hearing and is subject to cross-examination, a district judge's ultimate reliance upon the testimony is seldom vulnerable to reversal. Likewise, even where the witness does not testify at sentencing, but rather the PSR relies upon proffer or other statements given to investigating agents, a district judge has wide discretion to rely upon such hearsay evidence. Only in one circumstance has the Seventh Circuit indicated that the reliance upon uncontradicted hearsay at sentencing may fall below the "reliability" threshold.

In United States v. Robinson, 164 F.3d 1068 (7th Cir. 1999), the Seventh Circuit reversed the district court's drug quantity calculation where 97% of the defendant's relevant conduct was based upon a summary of a cooperating witness' statements which were never subject to cross-examination. In Robinson, the amount of crack involved in the defendant's three counts of conviction was 32.9 grams of crack. 164 F.3d at 1070. To this amount, the district court properly added other amounts from the statements of witnesses, bringing a subtotaled amount of crack to 143.6 grams. Robinson, 164 F.3d at 1070. However, as the court stated, the "sledgehammer" was the attribution of a further 5,103 grams of crack based on the summarized, uncross-examined statement of another witness. Robinson, 164 F.3d at 1070.

The court noted that "[w]hile it's not required that a judge hear personally from witnesses under oath at a sentencing hearing about drug quantities, we think it's not a terribly bad idea to do so when the witness is going to provide the basis for, as here 97 percent of a defendant's relevant conduct." Robinson, 164 F.3d at 1070. Moreover, the court noted that the witness' statements were illogical, for she stated that the price of the crack increased proportionately with the quantity sold. Robinson, 164 F.3d at 1070. Finally, the court noted that the 5,103 grams of crack attributed to the defendant was "an astonishing amount considering that the hard evidence–the three counts of conviction–only came up with a grand total of 32.9 grams." Robinson, 164 F.3d at 1071. Thus, the court concluded that, "even viewed deferentially," the statements attributing these amounts to the defendant "fail to establish the kind of 'indicia of reliability' upon which a sentencing judge could comfortably rely." Robinson, 164 F.3d at 1071.

Given the court's reasoning in Robinson, evidence used at sentencing is unreliable when four circumstances are present. First, the evidence must be hearsay which was never subject to cross-examination. Second, the hearsay must constitute nearly all of the relevant conduct attributed to the defendant. Third, the quantity indicated in the hearsay must be dramatically more than any other reliable source indicates. Finally, the hearsay statement itself must contain some characteristic which undermines its own credibility. While the convergance of *all* these circumstances in a single case may be relatively uncommon, a viable objection under Robinson can still be made under the common circumstance where a single witness, for example, converts an indictement for the distribution of five grams of crack into a sentence based on in excess of 1.5 kilograms. In other words, if for no other reason than to make a record for appeal, an objection under Robinson should be made not only where all four factors are present, but also when any one of them is present.

### D. Estimating Yeilds and Products

Common in cases involving the manufacture of methamphetamine are the attempts by the probation department and the government to estimate how much drug *could have been produced* had certain precursor chemicals discovered during the investigation been used to actually produce the drug. This type of evidence commonly takes the form of a report done by a DEA agent in a laboratory somewhere. This "expert" looks at the amount of precursor chemicals, *i.e.* psuedoephedrine pills in a meth case, and opines that x amount of pills could have produced y amount of drug after completion of the a manufacturing process assuming a yield percentage of z. In addition to the traditional methods which can be employed in attacking this expert scientific testimony, the Sixth Circuit has specifically limited district courts' ability to rely upon this type of evidence at sentencing.

In United States v. Mahaffey, 53 F.3d 128, 132 (6th Cir. 1995), the court stated that when approximating the quantity of drugs attributable to a defendant, the sentencing court's conclusion must be supported by "competent evidence in the record." Mahaffey, 53 F.3d at 132, *citing* United States v. Brannon, 7 F.3d 516, 520 (6th Cir. 1993). Accordingly, where a district court attempts to approximate a drug quantity based upon estimated yields from precursor products, the court may not rely solely on field studies or yields from unrelated cases. Mahaffey, 53 F.3d at 131-133; United States v. Hamilton, 81 F.3d 652, 654 (6th Cir. 1996.) Indeed, in Mahaffey, the Court of Appeals reversed the district court's drug quantity determination where the district court used a 50% yield figure to calculate the drug quantity from a known amount of precursor. 53 F.3d at 135. Although the 50% yield rate had been used in a previous, unrelated case, the court in Mahaffey held that a sentencing court must consider *specific information as to the capability of the relevant lab*. Hamilton, 81 F.3d at 655 (restating the holding in Mahaffey).

Likewise, in United States v. Hamilton, 81 F.3d 652, 654 (6th Cir. 1996, the Sixth Circuit reversed the sentencing court's drug quantity calculation. 81 F.3d at 655. Similar to the calculation made in Mahaffey, the district court in Hamilton used a 50% yield figure to calculate the drug quantity from a given amount of precursor chemicals. 81 F.3d at 654. Although the government presented "expert testimony reflecting the findings of various chemists as to expected yields, or yields from particular experiments," the Court of Appeals reversed and held that these generalized studies "do not meet the concern that is articulated in Mahaffey for findings that are *particularized to individual laboratories*." (Emphasis Added.) Hamilton, 81 F.3d at 654.

Finally, in United States v. Cole, 125 F.3d 654, 655, the Sixth Circuit reversed the defendant's sentence where the district court calculated the drug quantity based on a "theoretical ratio of 1 gram of ephedrine to .75 of a gram of methamphetamine [a 75% yield ratio]." Although the government's expert chemist testified that he believed the .75 figure was appropriate in the case based on the defendant's experience as a cook, the seized evidence, and information others had given regarding the quantity of methamphetamine which the defendant was dealing, the Court of Appeals reversed because the district court failed to consider the defendant's testimony that he usually yielded only .25 of a gram. Cole, 125 F.3d at 655. Specifically, the court held that the district court's failure to consider the defendant's testimony erroneously turned "the inquiry into what an average cook was capable of yielding, not what [the defendant] could have produced based on the seized chemicals." Cole, 125 F.3d at 655.

As is clear from these cases, the Sixth Circuit requires that any estimation of product from precursor chemicals must be concretely tied to the unique circumstances of the lab and cooks involved in the case at hand. The common practice of probation officers to include expert yield estimates in the PSR which have absolutely no relationship to the particular facts of the case under consideration by the district court is therefore prohibited by this line of case authority. Accordingly, an objection should always be made based on the above line of cases whenever your client's relevant conduct is determined using such methods. Specifically, require the government to show that the yields which are used to calculate your client's relevant conduct were determined in a scientifically valid manner after considering the precise nature of the cooking methods used in the case and the skill of the cooks involved.

Although an objection based on the above line of cases has its roots in Sixth Circuit law, the Seventh Circuit has not yet had the opportunity to address this line of authority. Accordingly, there is no Seventh Circuit authority contrary to these cases, and, moreover, if the objection is made and preserved in the district court, the Seventh Circuit will then have the opportunity to create circuit law on the issue. In other words, win or lose, this is a fertile area for litigation in this circuit.

### E. Conclusion

As the above analysis shows, the rather innocent phrase "indicia of reliability" contained in U.S.S.G. §6A1.3(a) has generated some creative and effective objections to relevant conduct issues related to drug quantities. Accordingly, the effective objection to drug quantity should be framed within the context of "reliability" as set forth in Section 6A1.3(a). An objection stating only that "the defendant denies the drug quantity attributed to him" is far less effective. Indeed, as the Seventh Circuit has repeatedly stated, the bare denial of a fact in the PSR is insufficient to preclude its use at sentencing by the district court. The "reliability" objection, as demonstrated above, however, can be made and won without the presentation of any evidence by the defense. Moreover, the contours of the "reliability" objection already have been partially

defined by the cases discussed, and, hopefully, the future use of this objection will create new circumstances where the Seventh Circuit will give defense lawyers new opportunities and bases for objecting to relevant conduct.

# CA-7 Case Digest

Compiled by: Jonathan Hawley
Assistant Federal Defender

## RECENT REVERSALS

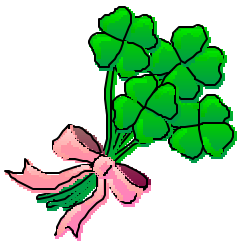
**Current through February 22, 2000**

### EVIDENCE

Smith v. U.S., No. 98-1423 (7th Cir. 2000). In a case which the Court of Appeals characterized as a suit arising under federal question jurisdiction pursuant to 28 U.S.C. § 1331, the Court of Appeals held that the district judge improperly denied the defendant access to tape recordings of criminal proceedings against him. The defendant filed suit against "United States District Court Officers," claiming that transcripts of the previous criminal proceedings against him were inaccurate. He therefore requested copies of the audiotapes of all the proceedings in his case, a request which the district court denied. On this issue which the Court of Appeals stated it could find no case authority, the court noted that parties to a suit have a right of access to the records of a judicial proceedings. Accordingly, where an audiotape is the only method used to record proceedings, those audiotapes must be filed with the court as "original records," and a defendant has a right to access them. Therefore, in this case, where the only record of the defendant's pretrial hearing was on audiotape, the district court erred in denying the defendant access to the tape. Moreover, although a transcript of the tape had been made and given to the defendant, this transcript was not an "original," but only a backup made from the tape. Conversely, with respect to the other hearings, the transcripts themselves were the originals, and the tape was only a backup which constituted the personal property of the court reporter. Thus, with respect to those hearings, the defendant did not have a right to access the tapes.

### HABEAS CORPUS

Hernandez v. Cowan, No. 99-1082 (7th Cir. 1/3/00). On appeal from a denial of the petitioner's habeas petition arising from his state court murder conviction, the Court of Appeals reversed the district court's denial of the petition and granted the petitioner relief. Initially, the Court addressed this issue of waiver. In the state courts, the petitioner had failed to seek discretionary review of his conviction with the Illinois Supreme Court, and, accordingly, the state argued that the petitioner had forfeited his habeas corpus rights as required by the holding in O'Sullivan v. Boerckel, 119 S.Ct. 1728 (1999). However, the petitioner argued that the state had waived its waiver argument by failing to make it in the district court. The state then countered that the Court of Appeals should excuse its waiver because at the time the case was before the district court, circuit authority was well established that a petitioner need not seek discretionary review with a state supreme court in order to later make a federal habeas claim. Indeed, the state noted that *Boerckel* was decided after the district court proceeding while the appeal was pending. The Court of Appeals, however, held that the state waived its waiver argument, noting that the state had been advocating a waiver requirement in this circuit for years, and that, given the circuit split in authority, the government should have made the argument in the district court in this case to preserve the issue for Supreme Court review. Proceeding to the merits, the Court found that the petitioner's counsel was ineffective when he failed to seek a severance. Specifically, the Court noted that the only evidence contained in the government's case as to the petitioner's guilt was a statement by a witness that he saw the petitioner running from the scene. This evidence, the Court concluded, was insufficient to convict the petitioner as a matter of law. However, the crucial evidence against the petitioner was the testimony of his co-defendant which directly implicated the petitioner in the murder. Accordingly, counsel should have moved for a severance knowing that his co-defendant would finger him in the murder thereby making the government's case. Moreover, there was a reasonable probability that a severance would have made a difference in the outcome because had the co-defendant taken the stand in a case severed from the petitioner's, the petitioner would have had the opportunity to vigorously cross-examine the co-defendant on the



benefits he received from the state in exchange for inculpating the petitioner. Accordingly, the Court granted the petitioner habeas relief.

## INDICTMENT

U.S. v. Pigee, No. 98-2816 (7th Cir. 12/10/99). In a multi-defendant prosecution stemming from drug distribution activities, one count of the indictment charged one defendant with a violation of 21 U.S.C. § 856(a)(2), alleging that she managed and controlled a building which she owned and that she knowingly made that building available for use for the purpose of storing cocaine and cocaine base. The district judge, however, instructed the jury that the government must prove that the defendant made the building "available for the purpose of unlawfully manufacturing, storing, distributing, or using cocaine or cocaine base." Moreover, the district judge allowed the government to present evidence that the defendants distributed drugs from the building, although "distributing" was not alleged in the relevant count. Thus, on appeal, the defendant argued that this count of the indictment was constructively amended, and the Court of Appeals agreed. Specifically, because the indictment used only "storing" language, but the instruction to the jury included "manufacturing, storing, distributing, or using," it was impossible to ascertain which of these four choices was relied upon by the jury. Accordingly, the Court of Appeals held that the district court constructively amended the indictment, and it reversed the defendant's conviction on that count.

## JURY SELECTION

United States v. Polchemi, No. 96-3866 (7th Cir. 1/13/00). In prosecution for wire fraud, money laundering, conspiracy, and perjury, the Court of Appeals reversed the defendants' convictions because of the trial court's handling of the defendants' effort to strike a juror for cause that fundamentally tainted the fairness of the trial. During jury selection, a potential juror indicated that she was a 15 year employee of the United States Attorney's Office, the same office bringing the prosecution. Although the defendants moved to strike her for cause based on implied bias, the district court refused. Thus, the defendants were forced to use a peremptory challenge to remove her. On appeal, the defendants argued that the trial court's refusal to strike the juror for cause violated their Fifth Amendment due process rights by impairing the intelligent exercise of their peremptory challenges. The Court of Appeals agreed. Specifically, notwithstanding the juror's statement that she could be fair, under the circumstances, this statement was insufficient. Indeed, because the juror was a "servant" of the United States Attorney's office, bias should be implied from this relationship and the district judge should have removed the juror for cause. Moreover, the proper remedy was automatic reversal per the decision in United States v. Underwood, 122 F.3d 389 (7th Cir. 1997), because where "the court commits the legal error of failing to apply the principle of implied bias in its administration of challenges for cause, the structure of the jury selection process itself is compromised."

## RIGHT TO COUNSEL

U.S. v. Miriam Santos, No. 99-2934 (7th Cir. 1/19/00). In what the Court of Appeals called a "veritable avalanche of errors," the Court of Appeals reversed the Treasurer of Chicago's convictions for mail fraud and extortion. Initially, the Court noted that the defendant was denied her right to assistance of counsel when the district court refused to allowt the defendant to retain the counsel of her choice because of other potential legal obligations. Specifically, the district court's arbitrary denial of a continuance of the trial to allow the defendant's counsel of choice to represent her violated her rights. Secondly, a critical piece of evidence was tape recordings in which the government claimed that the defendant's tone of voice indicated an intent to extort. The defendant sought to introduce expert medical testimony that the defendant's tone of voice was due to a thyroid condition. The district court, however, refused to allow the evidence because the witness should have been designated earlier in the discovery process. Again, the Court of Appeals found error, noting that the district judge's refusal to grant a continuance so that the defendant could retain counsel of her choice caused the delay in disclosure. Third, the district court erred in refusing to allow the defense to present evidence that certain contractors who did not make campaign donations to the defendant were not denied City business. This evidence was intended to rebut the government's theory that contractors were denied City business if they did not donate to the defendant's campaign. The Court of Appeals held that not only did the district court fail to understand the purpose of the evidence the defendant sought to introduce, but it failed to conduct a proper inquiry under Rule 403, balancing the probative and prejudicial nature of the evidence. Finally, after describing several more evidentiary errors made by the district court, the Court of Appals noted that each error, in isolation, may not have caused a difference in the outcome.

Viewing the errors' cumulative effects, however, the defendant was deprived of her right to a fair trial. Thus, her convictions were reversed.

## SENTENCING

U.S. v. Williams, No. 99-2599 (7th Cir. 12/7/99). In prosecution for being a felon in possession of a firearm and providing false information on an application to purchase a firearm, the district court sentenced the defendant to 130 months on each count to run concurrently. However, on appeal, the Court of Appeals reversed the sentence on the false information counts because the sentence exceeded by 10 months the 10 year statutory maximum for false information offenses. Indeed, the court noted that the defendant's armed career criminal status did not permit the district court to sentence the defendant outside the statutory maximum. On a separate issue on which the Court of Appeals affirmed, the defendant argued that he was improperly sentenced as an armed career criminal. Specifically, in the plea agreement executed between himself and the government, the parties agreed that the defendant was not an armed career criminal and his maximum possible sentence was 10 years. However, notwithstanding this agreement, the probation officer determined that the defendant was in fact an armed career criminal. Given this finding, the district court found that the plea agreement was based on a mutual mistake, and gave the defendant the option of withdrawing his plea. The defendant, however, declined, and noted that he had no bargaining power in executing a new agreement because he had already given the government all the cooperation he could. On appeal, the defendant argued that rather than rescind the agreement, the district court should have reformed the plea agreement to reflect the parties' understanding. The Court of Appeals, however, disagreed, and noted that the proper remedy for a mutual mistake is the voiding of the agreement, not its reformation. Thus, the defendant was properly sentenced as an armed career criminal.

U.S. v. Hunte, No. 97-3625 (7th Cir. 11/4/99). In prosecution for conspiracy to distribute marijuana, the Court of Appeals reversed the district court's refusal to give the defendant a downward adjustment for being a minor participant in the criminal activity pursuant to U.S.S.G. §3B1.2. At trial, the evidence showed that the defendant accompanied her boyfriend and another man on a cross-country trip to pick up marijuana. However, the evidence showed that the defendant only "went along for the ride," did not stand to make any profit from the distribution of the drugs, did not act as a courier, and did not help load or unload the drugs. Thus, although the defendant was aware of her co-conspirator's intentions and she even closed the hotel blinds to hide some of the illegal activity, she was less culpable than the other conspirators. Accordingly, the court found that the district court clearly erred in failing to reduce the defendant's base offense level.

# RECENT AFFIRMANCES

**Current through Feburary 22, 2000**

## 18 U.S.C. § 2255

In this appeal, the petitioner argued that he was improperly convicted of a Continuing Criminal Enterprise (CCE) where the district court failed to instruct the jury that it was required to reach a unanimous verdict on the specific acts in support of the CCE conviction pursuant to the Supreme Court's decision in Richardson v. United States, 526 U.S. 813 (1999), a case which was undecided at the time of the petitioner's trial. Although noting that the petitioner was entitled to the instruction, the Court of Appeals held that the error was harmless. In so holding, the Court rejected the petitioner's argument that failure to give the instruction was a "structural" error which requires automatic reversal of the conviction. Rather, according to the Court, the error did not pervade the entire trial such that the Court must necessarily conclude that the verdict was unreliable or the error prejudiced the defendant. Morever, when looking at the specific facts of the case, the Court concluded that, notwithstanding the failure to properly instruct the jury, the jury had in fact unanimously agreed on the specific acts supporting the CCE conviction. Finally, the court held that the district court properly dismissed the defendant's conviction for conspiracy rather than the CCE conviction. Specifically, Rutledge v. United States, 517 U.S. 292 (1996), holds that a conviction of both CCE and conspiracy violates the Double Jeopardy Clause. Accordingly, the district court dismissed the conspiracy conviction. The petitioner, however, argued that the court should have dismissed the more severe CCE conviction. The Court of Appeals rejected this argument, noting that determining which conviction to dismiss lies within the sound discretion of the trial court.

## DOUBLE JEOPARDY

U.S. v. Warneke, No. 99-1927 (7th Cir. 12/9/99). In prosecution for racketeering, the Court of Appeals held

that the defendants' 17 month pre-trial incarceration did not violate the Double Jeopardy Clause. After the defendants were originally indicted, the defendants were detained pending trial. The indictment was then dismissed on technical grounds. The defendants, however, remained in custody until an almost identical superseding indictment was filed against them. The defendants then filed a motion to dismiss this second indictment, alleging that the length of their pre-trial incarceration had ripened into a punishment, and the new indictment therefore violated the Double Jeopardy Clause. The Court of Appeals, in rejecting this argument, noted that "an accused must suffer jeopardy before he can suffer double jeopardy." Thus, because pre-trial detention was not punishment, double jeopardy did not attach. Moreover, where pre-trial detention becomes excessive, the Due Process Clause of the Fifth Amendment allows for review of the detention order, a remedy the defendants did not seek in this case. Accordingly, the court affirmed the district court's denial of the motion to dismiss.

## EVIDENCE

U.S. v. Montani, No. 99-1692 (7th Cir. 02/11/00). In prosecution for mail fraud, the defendant argued that the prosecution improperly introduced evidence of a witness' plea agreement where the defendant agreed to stipulate that he would not use evidence of the witness' plea agreement to impeach his testimony. According to the defendant, because he agreed to stipulate, the government's introduction of the plea agreement was improper bolstering of their witness. The Court of Appeals, however, disagreed and held that immunity agreements are relevant to putting the essential circumstances of the witness' testimony before the jury even if there is no expectation of cross-examination. In this case, the Court concluded that without the introduction of the plea agreement, jurors would wonder why the witness was testifying as to crimes which he was intimately involved. Thus, the witness' credibility was impeached by his own testimony, and the government had a right to bring out evidence explaining to the jury the reasons for and extent of the witness' bias. Finally, the Court of Appeals affirmed the defendant's sentence and discussed at length the proper calculation of a base offense level under the bribery guideline.

U.S. v. Johnson, No. 99-1414 (7th Cir. 1/13/00). In prosecution for conspiracy to distribute cocaine, the defendant argued that the government failed to provide Jenks Act material. At trial, although the government assured the district judge that no Jenks material existed with respect to one of its witnesses, on cross-examination, the witness indicated that a report was made by government agents of a previous interview with the witness. The Court of Appeals, however, held that the Jenks Act was not violated because, although a request was made for Jenks material prior to the above-mentioned testimony, defense counsel did not renew or pursue the request in the district court in light of the witness' testimony. Had defense counsel pursued the issue in the district court after the witness had testified, the record would have been preserved for appellate review. Moreover, at oral argument, the government asserted that according to its open file policy, had any such report existed, the document would have been turned over to the defendant. Thus, the Court of Appeals concluded that if the document in fact existed, it was available to the defendant, and the Jenks Act was therefore not violated.

## HABEAS CORPUS

Gray-Bey v. U.S., No. 99-4131 (7th Cir. 1/7/00). Upon consideration of petitioner's motion for leave to file a successive motion under 28 U.S.C. §2255, the Court of Appeals held that it had the power, under certain circumstances, to extend the time for final disposition of the application. Although the governing statute states that the court "shall" act on such an application within 30 days of its filing, the court held that in a small number of extraordinary cases, the courts cannot perform their assigned judicial function under the Constitution without a more thorough exploration of the legal arguments than is possible in the statutory period. Thus, because the petitioner's application presented several legal issues which had yet to be resolved by the Seventh Circuit, the Court ordered that a full briefing schedule and adversarial presentation be made. Judge Easterbrook, dissenting, stated that Congress by statute states that the court "shall grant or deny" the application within 30 days. Thus, the Court of Appeals had no authority to extend this limitation made by Congress.

Gardner v. Barnett, No. 98-1314 (7th Cir. 12/10/99). On appeal from the district court's denial of a habeas petition arising from the petitioner's state court conviction for murder, the Court of Appeals affirmed. In his petition, the petitioner asserted that he was entitled to a new trial where the trial court refused to grant a continuance to allow him to locate a witness who did not come to court when expected and where the trial court refused to ask the *venire* four

out of five questions presented by the defense related to their contact with gangs. In rejecting the first ground, the Court of Appeals noted that the evidence to which the excluded witness would have testified was cumulative and had been testified to by four other witnesses. Moreover, the testimony would have had little effect on the defendant's conviction given his confession. Additionally, with respect to the second ground, although the court did not ask the exact questions posed by the defendant, the trial court did in fact question the jurors regarding whether they had any indirect contact with gangs. Under federal law, the Court held that this question was sufficient to address the issue of gang bias.

## INEFFECTIVE ASSISTANCE

U.S. v. Darwin Montana, No. 99-1691 (7th Cir. 12/16/99). In prosecution for bank robbery, the defendant was accused of driving the getaway car. As his only defense witness, the defendant called the man who actually committed the robbery. This witness testified that the defendant did not know that he planned to rob a bank. However, at the conclusion of his testimony, he passed a note to the defendant's lawyer demanding payment for his favorable testimony. After a Marshall overheard a later demand by the witness for payment, the incidents were brought to the attention of the district judge. The judge allowed the Marshall to testify as to what he heard, but did not allow the jurors to learn that the defendant's lawyer had passed the demand not from the witness to the defendant. On appeal, the defendant argued that his lawyer was ineffective because of a fear of prosecution for passing the bribe note if he represented the defendant too vigorously. Noting that a lawyer who is under investigation by the Department of Justice has a conflict of interest in representing a person whom the Department is prosecuting if the lawyer is afraid of retaliation should he press his client's defense too vigorously, the Court nevertheless found that such was not the situation in this case. Indeed, actual fear of retaliation must be shown. However, in this case, the lawyer was not even under investigation. Moreover, at the time he accepted the note, the lawyer did not know it was a demand for a bribe. Accordingly, there was no basis to infer that the lawyer feared prosecution, and his performance was adequate.

## JURY

U.S. v. Harris, No. 99-1994 (7th Cir. 11/30/99). In prosecution for bank robbery, the Court of Appeals rejected the defendant's constitutional challenge to the government's use of a peremptory challenge to strike a disabled juror. During *voir dire*, a potential juror indicated that she had multiple sclerosis and would have trouble staying awake due to her medication. When the government struck this juror, the court requested a race-neutral reason for the strike given that the potential juror was also African-American. The government offered her disability as the reason for the strike. On appeal, the defendant argued that the Equal Protection Clause prohibited striking a juror based on disability and that persons with a disability are in a suspect-class, thereby requiring the court to apply the heightened scrutiny test for equal protection analysis. The Court of Appeals, however, noted that the Supreme Court has never held that disabled persons are members of a suspect class, and the Court agreed with other circuits which have held that disabled persons are not members of a suspect class. Thus, the court applied the deferential rationality review standard, and, under this standard, the government's striking of the juror was rationally related to its legitimate goal of a fair trial where there was potential that the juror would be inattentive to the proceedings.

## JURY INSTRUCTIONS

U.S. v. Miller, No. 99-1579 (7th Cir. 12/6/99). In prosecution for distribution of heroin in a correctional institution, the Court of Appeals rejected the defendant's request for a new trial due to the governments Rule 16 violation and improper statements in rebuttal. Prior to trial, the defendant tried repeatedly to obtain the government's compliance with Rule 16 with respect to the disclosure of the opinion of its drug distribution expert. However, at trial, the expert testified that 1 gram of heroin could "get 20 inmates high," an opinion not previously disclosed. Upon the defendant's objection, the trial judge ordered the opinion stricken and gave a cautionary instruction, but rejected the defendant's request for a mistrial. On appeal, the Court of Appeals rejected the defendant's argument that the cautionary instruction was inadequate to cure the prejudice given that the opinion went to the only issue in the case, the trial was only one day long, and a mistrial could have been easily granted without violence to judicial economy. Rather, the court found that jurors are presumed to follow their instructions. Moreover, the court questioned whether Rule 16 was even violated given that the government's Rule 16 disclosures noted that the expert would testify regarding drug quantity. The Court of Appeals also found that the district court's instructions were adequate to cure the government's misstatement of the burden of proof in

rebuttal given the "overwhelming" weight of the evidence.

## PROSECUTORIAL MISCONDUCT

U.S. v. Cheska, No. 98-2665 (7th Cir. 1/31/00). In prosecution for mail fraud arising from an attempt to obtain insurance proceeds from the intentional killing of a horse, the Court of Appeals affirmed the district court's grant of a new trial based upon a statement made by the prosecutor in rebuttal argument. At trial, the government's key witness was the man allegedly hired to kill the horse. He testified in exchange for leniency for the government, and he had testified in numerous other trials where he had been hired to kill horses. After defense counsel attacked his credibility in closing argument, the prosecutor in rebuttal stated that the witness had no reason to lie. Indeed, according to the prosecutor, the witness had "convicted 23 other people," and his part of the "deal" was already performed. Although the district judge gave a curative instruction, he ultimately concluded that a new trial was warranted. On appeal by the government, the Court of Appeals affirmed the grant of a new trial. First, the court noted that the statement was not based on the evidence at trial and was in fact inaccurate. Secondly, although a curative instruction was given, the Court of Appeals would not reweigh the district court's determination that the instruction was inadequate. Finally, the Court refused to disturb the district court's conclusion that the witness' testimony was "crucial for conviction," because the question was a close call. Accordingly, refusing to reconsider the district court's findings, the Court of Appeals held that the district court did not abuse its discretion.

## SEARCH AND SEIZURE

U.S. v. Strache, No. 99-2516 (7th Cir. 1/27/00). In prosecution for possession of an unregistered firearm, the Court of Appeals held that the district court properly denied the defendant's motion to suppress because the defendant consented to a search of his residence. In response to a call that the defendant was suicidal and in possession of a firearm, police asked that all residents of the apartment leave and congregate in the back yard. When this had occurred, the officers isolated the defendant, handcuffed him, and placed him in the squad car. The police then obtained consent to search the apartment from the defendant's roommates. Meanwhile, the defendant in the squad car offered to show the police the arsenal in his bedroom to prove that he was not suicidal. The officers then searched the defendant's room and discovered a number of destructive devices. On appeal, the defendant argued that his consent to search was coerced. The Court of Appeals, although noting that the defendant had been in custody for twenty minutes and had not been read his *Miranda* rights, held that the circumstances surrounding the consent indicated that the consent was voluntary. Specifically, the defendant, without prompting, offered to show the police his room, and although his was in police custody at the time, "custody is not dispositive so long as the potentially coercive effect of custody was mitigated by the circumstance," as it was here.

U.S. v. Roth, No. 99-2004 (7th Cir. 1/7/00). In prosecution for conspiracy to manufacture marijuana, the defendant argued that the district court erred by refusing to grant him a full evidentiary hearing on his motion to suppress evidence pursuant to Franks v. Delaware, 438 U.S. 154 (1978). Specifically, the defendant sought an evidentiary hearing to challenge the truthfulness of statements of a cooperating witness relied upon by the affiant in the affidavit which supported the issuance of the search warrant. The Court of Appeals, however, affirmed the district court. Although noting that Franks requires an evidentiary hearing into the truthfulness of allegations contained in an affidavit supporting an application for a search warrant where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally was included by the affiant in the affidavit, in the present case, the defendant sought only to challenge the veracity of statements of the cooperating witness, not the actual affiant. Rather, the affiant was a government agent who relied upon the statements of the cooperating witness. Thus, the defendant was entitled to a hearing only if he could show that the agent included false statements in his supporting affidavit with at least reckless disregard for the truth. The defendant, however, made no attempt to establish such a showing, and he was therefore not entitled to a Franks hearing.

U.S. v. Davis, No. 99-2334 (7th Cir. 1/5/00). In prosecution for being a felon in possession of a firearm, the Court of Appeals affirmed the denial of the defendant's motion to suppress evidence based upon an illegal Terry stop. The defendant was stopped while driving a gold Saturn. The officer who stopped the defendant was investigating the theft of a gold Saturn which was allegedly stolen by a 16 year old boy. The officer stopped the car because it was driven by a young man of the same race as the alleged

car thief, the car did not have a license plate, and the temporary license sticker appeared to be taped to the rear window rather than affixed in the normal manner. Given these facts, the Court of Appeals found that the officer had reasonable suspicion to stop the vehicle. Although the Court noted that any gold Saturn in the area driven by a young man would more likely than not have been in the hands of its owner, the special facts listed above overcame this generalization and amounted to reasonable suspicion to support the stop.

## SENTENCING

U.S. v. Staples, No. 99-1630 (7th Cir. 2/2/00). In a consolidated appeal from convictions for distribution of crack, the Court of Appeals affirmed the defendants' sentences. Initially, with respect to one defendant, the Court held that the defendant had waived his right to appeal the calculation of his criminal history, and the court refused to review the issue for plain error. At sentencing, the defendant through counsel indicated that he had no objection to the guideline calculations contained in the PSR. The Court of Appeals interpreted this statement as the intentional relinquishment of a known right, *i.e.*, waiver. Different from a forfeiture where a defendant fails to object through ignorance or neglect of right, the Court of Appeals will not review an intentional waiver for plain or any other error. Secondly, regarding the other defendant, he argued that his conviction for driving while license suspended should not have been counted in his criminal history score. Although the Guidelines provided that such a conviction should not be counted unless the defendant "actually served a period of imprisonment," the district court counted the conviction because the defendant was sentenced to "time previously served" on a different probation violation. The Court of Appeals noted that had the defendant been sentenced to "time served" based on being held without bail awaiting trial, the conviction could not have been counted. However, where the defendant was given credit for time served on *another offense*, the Court held that such a conviction could be counted because the sentence "reflects the seriousness of the offense and appropriately should be counted as a qualifying term of imprisonment for purposes of § 4A1.2(c)(1)."

U.S. v. Williams, No. 99-1157 (7th Cir. 1/21/00). In prosecution for knowingly distributing a controlled substance, the defendant argued that the district court erred in denying him acceptance of responsibility. According to the defendant, although he went to trial, the only issue he contested was whether he "knowingly" possessed a controlled substance. In all other respects, the defendant conceded to the facts as presented by the government. Thus, the defendant argued that he should not have been denied acceptance for challenging the legal definition of knowingly. The Court of Appeals, however, held that the record did not support a finding that the defendant challenged the legal definition of "knowingly." Rather, "knowledge" is a factual element of the offense with which the defendant was charged. Thus, by challenging this element, the defendant was "denying an essential factual element of guilt," and the district court properly denied acceptance.

U.S. v. Buford, No. 99-1834 (7th Cir. 1/12/00). In prosecution for armed bank robbery, the defendant argued that she should not have been sentenced as a career offender because her four prior armed robbery convictions were consolidated for sentencing, and therefore should have counted as only one prior conviction. The government, however, argued that the prior sentences were not in fact consolidated. Noting that either position was plausible, the Court of Appeals noted that the standard of review was dispositive of the question, for if the standard was deferential, the district court must be affirmed whereas *de novo* review could come out either way. The Court then noted that this circuit has given conflicting opinions on the proper standard of review concerning the "relatedness" of prior convictions. However, ultimately, the Court resolved the conflict by noting that the question of "relatedness" rarely has significance beyond the facts of an individual case, and under such circumstances the best candidate for selecting a characterization of complex facts is the district court. Accordingly, the Court reviewed the question deferentially, and found that the district court did not commit clear error in concluding that the defendant's prior convictions were not related.

U.S. v. Gabraith, No. 99-1676 (7th Cir. 1/11/00). In prosecution for the manufacture of methamphetamine, the Court of Appeals affirmed the district court's finding that the defendant's obstruction of justice warranted a sentencing enhancement. The defendant argued that his false testimony was not "material" because the testimony was given by the defendant at a hearing on a motion to suppress evidence. Because false testimony is material if it is "designed to substantially affect the outcome of the case," the defendant's false testimony at the suppression hearing would only directly affect the judge's evidentiary ruling, and at best only indirectly affect the outcome of the

case. However, the Court of Appeals noted that the Sentencing Guidelines define materiality for false statements as statements which, if believed, would affect the issue under determination. Given that, if believed, the defendant's misstatements would likely have resulted in the grant of the motion to suppress evidence, the testimony was material, and the defendant's sentence was properly enhanced.

U.S. v. Kroledge, No. 99-1338 (7th Cir. 1/7/00). In prosecution for conspiracy to commit mail fraud and using fire to commit a felony, the defendants were convicted of mail fraud but acquitted on the arson related charge. Nevertheless, at sentencing the district court used a preponderance of the evidence standard and used the acquitted arson charge to enhance the defendants' sentences based on relevant conduct. On appeal, the defendants argued that the district court should have used a "clear and convincing evidence" standard before considering acquitted conduct as relevant conduct. The Court of Appeals, however, rejected this heightened standard of proof. Although the Court noted that circumstances may exist where a district court could use its discretion to use a heightened burden of proof where the government appeared to be retrying an acquitted offense at sentencing, the Court also stated that it had not yet had the opportunity to squarely consider the issue. Moreover, in the present case, the question was not presented because the enhancement resulting from the use of the acquitted conduct was not so drastic as to require a heightened standard of proof. Indeed, each defendant was serving only half the minimum sentence they would have received if convicted of the arson charge

U.S. v. Richards, No. 97-3622 (7th Cir. 1/7/00). In prosecution for transportation of marijuana from Arizona to New York, the Court of Appeals affirmed the district court's enhancement of the defendant's sentence for obstruction of justice and occupying a leadership role of at least five members of the criminal activity. With respect to the obstruction enhancement, while in jail, the defendant told two of his codefendants to not speak to police, offered them money for their silence, and offered to help the men make bond so that they could flee the jurisdiction. In affirming the obstruction enhancement based on these facts, the Court of Appeals noted that a "threat" is not required before one can receive the enhancement. The conduct here, bribery of a witness, is incorporated in the application note to section 3C1.1, and that is what occurred in this case. With respect to the leadership enhancement, the Court affirmed the enhancement, finding that the defendant proposed the drug trafficking scheme, recruited members, and directed their activities.

U.S. v. McIntosh, No. 98-4023 (7th Cir. 1/5/00.) In prosecution for money laundering, the defendant argued that the district court erred in refusing a downward adjustment for acceptance of responsibility. Specifically, among other arguments, the defendant argued that the district court improperly relied upon his speedy trial challenge and his contention that the indictment was defective. The majority opinion, although noting that a defendant may not be denied a decrease for exercising his constitutional rights automatically, such challenges may be inconsistent with the acceptance of responsibility. In the present case, the district court carefully considered the arguments of counsel and found that the defendant manipulated the judicial system via his pre-trial motions. Thus, the majority found that he was properly denied acceptance. Judge Rovner, however, dissented stating that "[w]e have reached a troubling point in our sentencing jurisprudence when we allow defendants to be given longer prison terms based on the legal challenges they have made to matters unrelated to their guilt." Judge Rovner at length pointed out that the defendant's two legal challenges were not attempts to "manipulate" the judicial process. Moreover, she noted that "[f]iling motions and invoking a variety of legal rights in an effort to outmaneuver one's opponent and secure a favorable outcome is a staple of both civil and criminal cases. If that conduct amounts to manipulation, then manipulation is the hallmark of our adversarial system of justice." Accordingly, Judge Rovner concludes, "Unless and until conducting oneself like a lawyer becomes a basis for meting out longer prison terms, the mere fact that a defendant files a motion that, if successful, might result in the dismissal of the case cannot legitimately suffice to deny him credit for acceptance of responsibility."

U.S. v. Thomas, No. 99-1104 (7th Cir. 12/16/99). In prosecution for wire fraud, the defendant was convicted of participating in a telemarketing fraud scheme. The scheme consisted of calling the victim and informing her that she had won a prize, but had to first pay taxes on it. The victims would then wire the money to "runners" who would collect the money, keep 10%, and hand the rest over to the leaders of the scheme. The defendant was one of these runners. At sentencing, the district court determined his base offense level based on the total amount

of losses under the scheme, $32,885. The defendant, however, argued that his base offense level should be determined by looking to only that amount he personally "picked up," $12,700. On appeal, the Court affirmed the district court's use of the larger figure. Specifically, the Court stated that a defendant should be held accountable only for those activities (1) jointly undertaken and (2) reasonably foreseeable. Although noting that whether the defendant was jointly involved in all of the fraudulent transfers was a close call, the Court deferred to the district court's conclusion that the defendant's longstanding relationship with the scheme's leaders and his awareness of other runners was sufficient to bring him within the entire scheme. Likewise, his awareness of the other runners made the additional losses reasonably foreseeable. Thus, the Court affirmed his sentence.

U.S. v. Payton, No. 99-1058 (7th Cir. 12/6/99). In prosecution for being a felon in possession of a weapon, the Court of Appeals rejected the defendant's challenge to a four level enhancement for possession of a weapon with the intent that the weapon would be used in connection with another felony pursuant to U.S.S.G. §2K2.1(b)(5). The weapon in question was discovered after police responded to a call of "shots fired" and found the defendant in his living room with a gunshot wound to the leg. They also recovered a shotgun from the premises. Initially, the defendant and his girlfriend stated that he had been shot in a drive by shooting, but later recanted and stated that the defendant shot himself while attempting to put the gun in his pants pocket in anticipation of robbing a pawnshop. At sentencing, however, the defendant challenged this statement and argued that the previous statement was unreliable hearsay and that their was no evidence that the defendant actually used the gun in relation to a robbery. The Court of Appeals, in affirming the district court's enhancement, noted that in order to receive the enhancement, the gun need not have been actually employed in the commission of another felony, but instead must only be intended to be used in a felony. Thus, given the defendant's previous statement, reliable evidence established this intention to use the gun in a robbery, and the enhancement was proper.

## NON-SUMMARIZED CASES

**Current through February 22, 2000**

U.S. v. Williamson, No. 99-1839 (7th Cir. 1/27/00) (affirming the defendant's narcotics distribution conviction over her argument that she was denied her right to cross-examine a government witness for bias where the district court allowed the defendant to cross-examine for bias, although not as extensively as the defendant had requested).

U.S. v. Godwin, No. 98-3763 (7th Cir. 1/27/00) (holding that the district court complied with Rule 11 in accepting the defendant's guilty plea and finding that counsel was not ineffective).

Thomas v. McCaughtry, No. 99-1246 (7th Cir. 1/26/00) (affirming the district court's dismissal of a habeas petition where the petitioner failed to seek administrative review of his loss of good time credits, thereby failing to exhaust his administrative remedies).

U.S. v. Aldacou, No. 98-4079 (7th Cir. 1/21/00) (affirming the defendant's 922(g) conviction).

U.S. v. Hargrove, No. 98-3278 (7th Cir. 1/20/00) (affirming the district court's two-point sentencing enhancement for inflicting bodily injury during the course of an armed robbery where it was undisputed that the teller at the bank suffered a pulled neck muscle as a direct result of the defendants' actions).

U.S. v. Balint, No. 98-3130 (7th Cir. 1/11/00) (affirming defendants' convictions under the Freedom of Access to Clinic Entrances Act where the defendants blocked a clinic entrance).

Menzer v. U.S., No. 98-4186 (7th Cir. 1/6/00) (denying the petitioner's habeas petition alleging ineffective assistance of counsel where the alleged errors of trial counsel were attributable to reasonable trial strategy).

Oliver v. Gramley, No. 99-1219 (7th Cir. 12/29/99) (affirming the district court's dismissal of a habeas petition where the petitioner perpetrated a fraud on the court by submitting a false affidavit to the court).

U.S. v. Lanzotti, No. 98-2728 (7th Cir. 12/17/99) (affirming defendants' gambling convictions on aiding and abetting theory, affirming the district court's barring of an expert witness for whom no credentials were presented to the court, and affirming an obstruction of justice enhancement where the defendant tried to persuade witnesses to lie).

U.S. v. Woolfolk, No. 99-1651 (7th Cir. 12/10/99) (affirming a denial of a motion for a new trial where the district court found the testimony of a new witness presented after trial to be incredible and where the district court's denial of a request to have the

jurors view the scene of the crime was proper given that the scene presented nothing so factually peculiar as to require more than the usual means or presenting evidence in court).

Cooper v. U.S., No. 98-3826 (7th Cir. 12/8/99) (rejecting the defendant's § 2255 petition where it was filed outside of the 1 year period of limitations).

U.S. v. Stewart, No. 99-2453 (7th Cir. 12/7/99) (affirming the defendant's conviction where the district court denied his motion to withdraw his guilty plea because of a claim that his lawyer misinformed him of the possible sentencing range, and finding that the defendant stated on the record at the plea colloquy that his counsel in fact properly informed him of the sentencing consequences).

U.S. v. Blackman, No. 99-1060 (7th Cir. 12/6/99) (affirming the defendant's sentence where, although the defendant argued that the district court was unaware of its ability to grant a downward departure, the defendant never made a motion in the district court).

# Reversible Error

[**Caveat**: For those who have not previously seen this column, it is a collection of federal appellate decisions in which a defendant received relief. The summaries are no substitute for reading the opinions. They are merely to draw your attention to cases that may help your own research. As promised, this is the compilation by category and covering the last five years worth of cases (1995-1999).]

## REVERSIBLE ERRORS 1995 - 1999

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

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

Every year, the format for this collection changes slightly. Additional categories have been added. Some categories have been removed. Cases on habeas corpus proceedings and prison administrative proceedings are no longer included. Although both are important subjects, they are distinct enough to merit separate consideration.

## Release

*United States v. Goosens, 84 F.3d 697 (4th Cir. 1996) (Prohibiting a defendant from active cooperation with the police was an abuse of discretion).

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

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

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

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

## Counsel

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

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

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

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

United States v. Duarte-Higareda, 68 F.3d 369 (9th Cir. 1995) (Failure to appoint counsel for evidentiary hearing on §2255 petition).

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

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

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

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

United States v. Keen, 104 F.3d 1111 (9th Cir. 1996) (A court did not sufficiently

explain to a defendant the dangers of pro se representation).

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

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

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

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

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

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

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

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

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

# Discovery

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

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

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

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

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

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

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

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

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

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

United States v. Arnold, 117 F.3d 1308 (11th Cir. 1997) (A prosecutor withheld exculpatory tapes of government witnesses).

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

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

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

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

# Arrests

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

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

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

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

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

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

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

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

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

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

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

suspicion for investigatory immigration stop).

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

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

## Warrantless Searches

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

United States v. Ramos-Oseguera, 120 F.3d 1028 (9th Cir. 1997) (Inventory of pants found in vehicle was illegal).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Flippo v. West Virginia, 120 S.Ct. 7 (1999) (No crime scene exception to warrant requirement).

## Warrants

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

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

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

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

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

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

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

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

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

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

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

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

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

## Knock and Announce

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

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

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

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

## Statements

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

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

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

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

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

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

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

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

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

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

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

## Recusal

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

*United States v. Jordan, 49 F.3d 152 (5th

Cir. 1995) (A judge should have been recused because the defendant made claims against family friend of the judge).

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

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

## Indictments

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

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

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

*United States v. Kimbrough, 69 F.3d 723 (5th Cir.), cert. denied, 517 U.S. 1157 (1996) (Multiple possessions of child pornography should be charged in a single count).

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

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

## Limitation of Actions

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

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

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

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

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

## Venue

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

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

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

## Pretrial Procedure

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

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

United States v. Gonzalez, 58 F.3d 459 (9th Cir. 1995) (The government's motion for dismissal should have been granted).

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

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

## Severance

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

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

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

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

## Conflicts

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

Ciak v. United States, 59 F.3d 296 (2nd Cir. 1995) (There was an actual conflict for attorney who had previously represented a witness against the defendant).

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

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

United States v. Kliti, 156 F.3d 150 (2nd Cir.

1998) (Court should have held hearing on defense counsel's potential conflict).

## Competency / Sanity

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

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

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

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

*Martinez-Villareal v. Stewart, 118 F.3d 628 (9th Cir. 1997) (Successive writ regarding incompetency to be executed was not barred by statute).

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

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

## Privilege

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

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

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

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

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

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

United States v. Ramos-Oseguera, 120 F.3d 1028 (9th Cir. 1997) (Defendant was forced to choose between testifying against her husband or contempt).

*United States v. Kuku, 129 F.3d 1435 (11th Cir. 1997) (A defendant retains his privilege against self-incrimination, through sentencing).

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

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

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

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

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

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

## Jeopardy / Estoppel

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

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

United States v. Sammaripa, 55 F.3d 433 (9th Cir. 1995) (A mistrial was not justified by manifest necessity).

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

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

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

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

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

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

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

United States v. Stoddard, 111 F.3d 1450 (9th Cir. 1997) (1. Second drug conspiracy prosecution was barred by double jeopardy; 2. Collateral estoppel barred false

statement conviction, based upon drug ownership for which defendant had been previously acquitted).

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

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

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

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

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

## Plea Agreements

United States v. Clark, 55 F.3d 9 (1st Cir. 1995) (The government breached the agreement by arguing against acceptance of responsibility).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

United States v. Gilchrist, 130 F.3d 1131 (3rd Cir. 1997) (A plea agreement was breached by imposing a higher term of supervised release).

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

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

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

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

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

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

## Guilty Pleas

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*United States v. Gonzalez, 113 F.3d 1026 (9th Cir. 1997) (A court should have held a hearing when the defendant claimed his plea was coerced).

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

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

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

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

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

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

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

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

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

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

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

## Timely Prosecution

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

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

United States v. Mejia, 69 F.3d 309 (9th Cir. 1995) (A court denied a one-day continuance of trial, preventing live evidence on suppression issue).

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

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

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

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

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

United States v. Gonzales, 137 F.3d 1431

(10th Cir. 1998) ("Ends of justice" continuance could not be retroactive).

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

## Jury Selection

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

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

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

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

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

*United States v. Underwood, 122 F.3d 389 (7th Cir.), cert. denied, 118 S.Ct. 2341 (Court's explanation of selection procedure confused counsel and prevented intelligent exercise of strikes).

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

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

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

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

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

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

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

United States v. Herndon, 156 F.3d 629 (6th Cir. 1999) (Denial of hearing on potentially biased juror).

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

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

## Closure

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

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

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

## Trial Procedure

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

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

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

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

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

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

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

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

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

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

## Confrontation

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

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

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

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

*United States v. Peterson, 140 F.3d 819

(9th Cir. 1998) (*Bruton* violation).

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

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

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

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

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

## Hearsay

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

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

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

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

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

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

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

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

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

## Defense Evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Misconduct

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

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

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

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

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

*Agard v. Portuondo, 117 F.3d 696 (2nd Cir.), cert. denied, 119 S.Ct. 1248 (Prosecutor implied it was wrong for defendant to remain in courtroom during testimony).

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

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

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

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

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

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

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

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

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

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

## Extraneous Evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Old Chief v. United States, 519 U.S. 172 (1997) (A court abused its discretion by refusing to accept the defendant's offer to stipulate that he was a felon, in a trial for being a felon in possession of a firearm).

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

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

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

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

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

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

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

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

## Identification

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

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

## Expert Testimony

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

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

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

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

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

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

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

Calderon v. U.S. District Court, 107 F.3d 756 (9th Cir.), cert. denied, 522 U.S. 907 (1997) (CJA funds for expert could be used to exhaust a state claim).

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

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

## Entrapment

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

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

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

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

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

*United States v. Burt, 143 F.3d 1215 (9th Cir. 1998) (Entrapment instruction failed to place proper burden on government).

United States v. Gamache, 156 F.3d 1 (1st Cir. 1998) (Jury should have been instructed on entrapment).

## Jury Instructions

United States v. Lewis, 53 F.3d 29 (4th Cir. 1995) (The court failed to instruct the jury that conspiring with a government agent alone required an acquittal).

United States v. Ruiz, 59 F.3d 1151 (11th Cir.), cert. denied, 516 U.S. 1133 (1996) (Defendant has the right to have the jury instructed on his theory of defense).

*United States v. Lucien, 61 F.3d 366 (5th Cir. 1995) (An instruction on simple possession should have been given in a drug distribution case).

Smith v. Singletary, 61 F.3d 815 (11th Cir.), cert. denied, 516 U.S. 1140 (1996) (The court failed to give mitigating instruction in a capital case).

*United States v. Birbal, 62 F.3d 456 (2nd Cir. 1995) (Jurors were instructed they "may" acquit, rather than they "must" acquit, if the government did not meet its burden).

*United States v. Hairston, 64 F.3d 491 (9th Cir. 1995) (Alibi instruction was required when evidence of alibi was introduced in the government's case).

United States v. Johnson, 71 F.3d 139 (4th Cir. 1995) (The court improperly instructed the jury that a credit union was federally insured).

United States v. Palazzolo, 71 F.3d 1233 (6th Cir. 1995) (Verdict form failed to distinguish the object of the conspiracy).

United States v. Talbott, 78 F.3d 1183 (7th Cir. 1996) (A jury instruction could not shift the burden to the defendant on the issue of self-defense).

*United States v. Webster, 84 F.3d 1056 (8th Cir. 1996) (Jury instructions that did not distinguish between "carry" and "use" were defective in a §924 (c) trial).

*United States v. Medina, 90 F.3d 459 (11th Cir. 1996) (The court failed to submit a jury instruction on whether a ship was subject to the jurisdiction of the United States).

United States v. Baron, 94 F.3d 1312 (9th Cir.), cert. denied, 519 U.S. 1047 (1996) (A court committed plain error by giving a deliberate ignorance instruction when there was no evidence that the defendant knew, or avoided learning, of secreted drugs).

*United States v. Ahmad, 101 F.3d 386 (5th Cir. 1996) (The jury instructions in a pollution case implied strict liability rather than the requirement of knowledge).

United States v. Rodgers, 109 F.3d 1138 (6th Cir. 1997) (If a court allows a jury to review trial testimony, there must be a cautionary instruction not to place upon it undue emphasis).

United States v. Paul, 110 F.3d 869 (2nd Cir. 1997) (The court failed to give duress instruction in a felon in possession case).

*United States v. Bancalari, 110 F.3d 1425 (9th Cir. 1997) (Instruction omitted the element of intent).

United States v. Cooke, 110 F.3d 1288 (7th Cir. 1997) (Jury instructions treating "carry" and use" interchangeably were defective).

United States v. Perez, 116 F.3d 840 (9th Cir. 1997) (Failure to instruct jury on use of firearm, in relation to, drug trafficking was plain error).

United States v. Kubosh, 120 F.3d 47 (5th Cir. 1997) (Jury instruction failing to require active employment of firearm was plain error).

*Smith v. Horn, 120 F.3d 400 (3rd Cir. 1997) (A 1st degree murder instruction failed to require specific intent).

United States v. Bordeaux, 121 F.3d 1187 (8th Cir. 1997) (Jury instruction in an abusive sexual contact case failed to require force).

United States v. Wozniak, 126 F.3d 105 (2nd Cir. 1997) (Charge on marijuana impermissibly amended indictment alleging cocaine and methamphetamine).

United States v. Otis, 127 F.3d 829 (9th Cir. 1997) (Duress instruction was omitted).

United States v. Soto-Silva, 129 F.3d 340 (5th Cir. 1997)(Deliberate ignorance instruction was not warranted for charge of maintaining premises for drug distribution).

United States v. Defries, 129 F.3d 1293 (D.C. Cir. 1997) (The court should have given an advice of counsel instruction on an embezzlement count).

United States v. Doyle, 130 F.3d 523 (2nd Cir. 1997) (Erroneous instructions stated that presumption of innocence and reasonable doubt were to protect only the innocent).

United States v. Wilson, 133 F.3d 251 (4th Cir. 1997) (Jury instructions did not adequately impose burden of proving knowledge).

United States v. Russell, 134 F.3d 171 (3rd Cir. 1998) (CCE instruction omitted unanimity requirement).

United States v. Baird, 134 F.3d 1276 (6th Cir. 1998) (Instruction failed to charge jury that contractor was only liable for falsity of costs it claimed to have incurred).

*United States v. Romero, 136 F.3d 1268 (10th Cir. 1998) ("Law of the case" required element named in jury instruction to be proven).

*United States v. Rossomando, 144 F.3d 197 (2nd Cir. 1998) (Ambiguous jury instruction misled jurors).

*United States v. Benally, 146 F.3d 1232 (10th Cir. 1998) (Defendant was entitled to instructions on self-defense and lesser included offense).

United States v. Thomas, 150 F.3d 743 (7th Cir. 1998) (Defendant was entitled to instruction that buyer/seller relationship is not itself a conspiracy).

United States v. Sanchez-Lima, 161 F.3d 545 (9th Cir. 1999) (Self-defense instruction should have been given).

United States v. Meyer, 157 F.3d 1067 (7th Cir.), cert. denied, 119 S.Ct. 1465 (1999) (Court should have instructed that mere buyer/seller relationship did not establish conspiracy).

United States v. Lampkin, 159 F.3d 607 (D.C. Cir. 1999) (Jury improperly instructed that government could not prosecute juvenile witnesses).

## Argument

United States v. Tory, 52 F.3d 207 (9th Cir. 1995) (The defense was prevented from arguing that an absence of evidence implied that evidence did not exist).

United States v. Hall, 77 F.3d 398 (11th Cir. 1996) (Defendant's counsel was improperly prohibited from addressing general principles of reasonable doubt in closing).

## Deliberations

United States v. Berroa, 46 F.3d 1195 (D.C. Cir. 1995) (*Allen* charge varied from ABA standard).

United States v. Harber, 53 F.3d 236 (9th Cir. 1995) (The case agent's report was taken into the jury room).

United States v. Burgos, 55 F.3d 933 (4th Cir. 1995) (*Allen* charge asked jurors to think about giving up firmly held beliefs).

*United States v. Araujo, 62 F.3d 930 (7th Cir. 1995) (A verdict was taken from eleven jurors when the twelfth was delayed by car trouble).

*United States v. Ottersburg, 76 F.3d 137 (7th Cir.), *clarified*, 81 F.3d 657 (1996) (It was plain error to allow alternate jurors to deliberate with the jury).

*United States v. Manning, 79 F.3d 212 (1st Cir.), cert. denied, 519 U.S. 853 (1996) (The court should have given a "yes or no" answer to a deadlocked jury's question, rather than refer them to the testimony).

United States v. Berry, 92 F.3d 597 (7th Cir. 1996) (A jury improperly considered a transcript, rather than the actual tape).

United States v. Benedict, 95 F.3d 17 (8th Cir. 1996) (The trial court should not have accepted partial verdicts).

United States v. Thomas, 116 F.3d 606 (2nd Cir. 1997) (Juror should not have been dismissed when he did not admit to refusing to follow the law during deliberations).

United States v. Hall, 116 F.3d 1253 (8th Cir. 1997) (Exposure of jury to unrelated, but prejudicial matters, required new trial).

United States v. Keating, 147 F.3d 895 (9th Cir. 1998) (Reasonable probability of juror prejudice required new trial).

United States v. Lampkin, 159 F.3d 607 (D.C. Cir. 1999) (Jury allowed to consider tapes not in evidence).

United States v. Beard, 161 F.3d 1190 (9th Cir. 1999) (It was error to substitute alternates for jurors after deliberations began).

United States v. Spence, 163 F.3d 1280 (11th Cir. 1999) (Juror dismissed during deliberations without just cause).

## Variance

United States v. Johansen, 56 F.3d 347 (2nd Cir. 1995) (There was a variance when none of the conspiracies alleged were proven).

United States v. Tsinhnahijinnie, 112 F.3d 988 (9th Cir. 1997) (There was a fatal variance between pleading and proof of date of offense).

# Speech / Assembly

United States v. Popa, 187 F.3d 672 (D.C. Cir. 1999) (Conviction for harassing AUSA with racial epithets violated first amendment).

United States v. Baugh, 187 F.3d 1037 (9th Cir. 1999) (Assembly at national park could not be conditioned on promise not to trespass).

## Interstate Commerce

United States v. Box, 50 F.3d 345 (5th Cir.), cert. denied, 516 U.S. 714 (1996) (Extortion of interstate travelers did not involve interstate commerce).

*United States v. Cruz, 50 F.3d 714 (9th Cir. 1995) (Shipment of firearm in interstate commerce must occur after the firearm is stolen).

*United States v. Quigley, 53 F.3d 909 (8th Cir. 1995) (Liquor store robbery did not affect interstate commerce).

United States v. Grey, 56 F.3d 1219 (10th Cir. 1995) (Use of currency did not involve interstate commerce).

United States v. Lopez, 514 U.S. 549 (1995) ("Gun-free school zone" law found unconstitutional).

*United States v. Walker, 59 F.3d 1196 (11th Cir.), cert. denied, 516 U.S. 1002 (1995) (Conviction under "gun-free school zone" law was plain error).

*United States v. Barone, 71 F.3d 1442 (9th Cir. 1995) (False checks did not involve interstate commerce).

United States v. Denalli, 90 F.3d 444 (11th Cir. 1996) (Arson of neighbor's home did not involve interstate commerce).

*United States v. Gaydos, 108 F.3d 505 (3rd Cir. 1997) (There was insufficient evidence that arson involved interstate commerce).

United States v. Izydore, 167 F.3d 213 (5th Cir. 1999) (No evidence that phone calls crossed state lines for wire fraud interstate nexus).

## Firearms

Staples v. United States, 511 U.S. (1994) (When a defendant was prohibited from possessing a particular kind of firearm, it must be proven he knew that he possessed that type of firearm).

United States v. Herron, 45 F.3d 340 (9th Cir. 1995) (A defendant whose civil rights were restored was not prohibited from possessing a firearm).

United States v. Caldwell, 49 F.3d 251 (6th Cir. 1995) (Licensed dealer who sold firearm away from business was not guilty of unlicensed sale).

United States v. Anderson, 59 F.3d 1323 (D.C. Cir.), cert. denied, 516 U.S. 999 (1995) (Multiple §924 (c) convictions must be based on separate predicate offenses).

Bailey v. United States, 516 U.S. 137 (1995) (Passive possession of firearm was insufficient to prove "use" of firearm during drug trafficking crime).

United States v. Kelly, 62 F.3d 1215 (9th Cir. 1995) (A defendant whose civil rights were restored was not prohibited from possessing a firearm).

*United States v. Hayden, 64 F.3d 126 (3rd Cir. 1995) (A defendant should have been allowed to introduce evidence of his low intelligence and illiteracy to rebut allegations that he knew he was under indictment when buying a firearm).

*United States v. Jones, 67 F.3d 320 (D.C. Cir. 1995) (The jury should not have been told nature of the defendant's prior conviction when the defendant offered to stipulate that he was a felon).

United States v. Edwards, 90 F.3d 199 (7th Cir. 1996) (A defendant must be shown to know his shotgun is shorter than 18 inches in length in order to be liable for failure to register the weapon).

*United States v. Rogers, 94 F.3d 1519 (11th Cir.), cert.denied, 522 U.S. 252 (1998) (The government failed to prove a defendant knew that he possessed a fully automatic weapon).

United States v. Atcheson, 94 F.3d 1237 (9th Cir.), cert. denied, 519 U.S. 1140 (1997) (Each §924 (c) conviction must be tied to a separate predicate crime).

United States v. Indelicato, 97 F.3d 627 (1st Cir.), cert. denied, 522 U.S. 835 (1997) (A defendant who did not lose his civil rights could not be felon in possession).

United States v. Casterline, 103 F.3d 76 (9th Cir.), cert. denied, 118 S.Ct. 106 (1997) (A

felon in possession charge may not proven solely by ownership).

United States v. Taylor, 113 F.3d 1136 (10th Cir. 1997) (A firearm found in shared home was not shown to be possessed by the defendant).

United States v. Stephens, 118 F.3d 479 (6th Cir. 1997) (Two separate caches of cocaine possessed on the same day, did not support two separate gun enhancements).

*United States v. Westmoreland, 122 F.3d 431 (7th Cir. 1997) (An agent's presentation of inoperable firearm to defendant, immediately before arrest, did not support possession of a firearm in relation to drug crime).

United States v. Gonzalez, 122 F.3d 1383 (11th Cir. 1997) (Evidence did not support possession of a firearm while a fugitive from justice).

United States v. Norman, 129 F.3d 1393 (10th Cir. 1997) (Felon whose civil rights had been restored was not illegally in possession of firearm).

United States v. Perez, 129 F.3d 1340 (9th Cir. 1997) (Jury should have been required to decide the type of firearm).

United States v. Graves, 143 F.3d 1185 (9th Cir. 1998) (Accessory to felon in possession had to know codefendant was a felon and possessed firearm).

Bousley v. United States, 523 U.S. 614 (1998) (Guilty plea did not bar *Bailey* claim. Claim was not *Teague*-barred).

United States v. Hellbusch, 147 F.3d 782 (8th Cir. 1998) (Guilty plea did not foreclose *Bailey* claim).

United States v. Spinner, 152 F.3d 950 (D.C. Cir. 1998) (Failure to show firearm was semiautomatic assault weapon).

United States v. Benboe, 157 F.3d 1181 (9th Cir. 1999) (Firearm conviction not supported by evidence).

United States v. Sanders,157 F.3d 302 (5th Cir. 1999) (Insufficient evidence that defendant carried firearm).

United States v. Mount, 161 F.3d 675 (11th Cir. 1999) (Weapon found in stairwell was not carried).

United States v. Gilliam, 167 F.3d 628 (D.C. 1999) (Failed to prove prior conviction in felon in possession).

United States v. Aldrich, 169 F.3d 526 (8th Cir. 1999) (Vacating related gun count required entire new trial on others).

## Extortion

*United States v. Tomblin, 46 F.3d 1369 (5th Cir. 1995) (A private citizen did not act under color of official right).

United States v. Scotti, 47 F.3d 1237 (2nd Cir. 1995) (Facilitating payment of a debt was not extortion).

United States v. Delano, 55 F.3d 720 (2nd Cir. 1995) (Services or labor were not property within the meaning of a statute used as a predicate for RICO).

*United States v. Wallace, 59 F.3d 333 (2nd Cir. 1995) (Demanding payment from fraudulent check scheme was not extortion).

United States v. Allen, 127 F.3d 260 (2nd Cir. 1997) (Insufficient evidence of extortionate credit).

## Drugs

United States v. Newton, 44 F.3d 913 (11th Cir.), cert. denied, 516 U.S. 857 (1995) (Leasing residence for a drug dealer did not prove the defendant's participation in a conspiracy).

United States v. Jones, 44 F.3d 860 (10th Cir. 1995) (A car passenger was not shown to have knowledge of the drugs).

*United States v. Johnson, 46 F.3d 1166 (D.C. Cir. 1995) (The government failed to prove distribution within 1000 feet of a school).

United States v. Medjuck, 48 F.3d 1107 (9th Cir. 1995) (The government failed to show a nexus to U.S. territory).

United States v. Valerio, 48 F.3d 58 (1st Cir. 1995) (There was insufficient evidence that the drugs were intended for distribution).

United States v. Flores-Chapa, 48 F.3d 156 (5th Cir. 1995) (The defendant's beeper and personal use of drugs was not proof of conspiracy).

United States v. Andujar, 49 F.3d 16 (1st Cir. 1995) (There was no more evidence than mere presence).

United States v. Jones, 49 F.3d 628 (10th Cir. 1995) (Inferences derived from standing near open trunk did not prove knowledge).

United States v. Polk, 56 F.3d 613 (5th Cir. 1995) (Use of the defendant's car and home were insufficient to show participation).

United States v. Horsley, 56 F.3d 50 (11th Cir. 1995) (Distribution of cocaine is lesser included offense of distribution of cocaine within a 1,000 feet of a school, and the jury should be charged accordingly).

*United States v. Kitchen, 57 F.3d 516 (7th Cir. 1995) (Momentarily picking up a kilo for inspection was not possession).

United States v. Ross, 58 F.3d 154 (5th Cir.), cert. denied, 516 U.S. 954 (1995) (The defendant was not a conspirator merely because he sold drugs at same location as conspirators).

United States v. Kearns, 61 F.3d 1422 (9th Cir. 1995) (A brief sampling of marijuana was not possession).

United States v. Lopez-Ramirez, 68 F.3d 438 (11th Cir. 1995) (Insufficient evidence of possession and conspiracy as to defendant who was present in home where 65 kilos of cocaine was delivered and then seized).

*United States v. Applewhite, 72 F.3d 140

(D.C. Cir.), cert. denied, 517 U.S. 1227 (1996) (The government failed to prove distribution within a 1000 feet of a school).

United States v. Derose, 74 F.3d 1177 (11th Cir. 1996) (Insufficient evidence that the defendant took possession of marijuana).

United States v. Martinez, 83 F.3d 371 (11th Cir.), cert. denied, 519 U.S. 998 (1997) (A defendant's conviction for conspiracy to possess cocaine was reversed because there was no evidence beyond defendant's intent to help coconspirators steal money).

*United States v. Thomas, 114 F.3d 403 (3rd Cir. 1997) (Insufficient evidence of a conspiracy, when it was not shown that defendant knew cocaine was in bag he was to retrieve).

United States v. Cruz, 127 F.3d 791 (9th Cir. 1997) (A defendant could not join a conspiracy that was already completed).

United States v. Hunt, 129 F.3d 739 (5th Cir. 1997) (There was insufficient evidence of an intent to distribute).

United States v. Brito, 136 F.3d 397 (5th Cir. 1998) (Evidence that defendant was asked to find drivers did not prove constructive possession of hidden marijuana).

United States v. Lombardi,138 F.3d 559 (5th Cir. 1998) (Evidence did not support conviction for using juvenile to commit drug offense).

United States v. Leonard, 138 F.3d 906 (11th Cir. 1998) (Insufficient evidence that passenger of vehicle possessed drugs or gun hidden in car).

United States v. Sampson, 140 F.3d 585 ( 4th Cir. 1998) (Insufficient evidence that drug offense occurred within 1000 feet of a playground or public housing).

United States v. Delagarza-Villarreal, 141 F.3d 133 (5th Cir. 1997) (Insufficient evidence of possession of marijuana).

United States v. Jensen, 141 F.3d 830 (8th Cir. 1998) (Insufficient evidence of drug conspiracy).

United States v. Paul, 142 F.3d 836 (5th Cir. 1998) (Insufficient evidence of conspiracy to import).

United States v. Toler, 144 F.3d 1423 (11th Cir. 1998) (Insufficient evidence that defendant participated in conspiracy).

*United States v. Ortega-Reyna, 148 F.3d 540 (5th Cir. 1998) (Insufficient evidence that drugs hidden in borrowed truck were defendant's).

United States v. Quintanar, 150 F.3d 902 (8th Cir. 1998) (No evidence that defendant exercised control over contraband).

United States v. Gore, 154 F.3d 34 (2nd Cir. 1998) (Buyer/seller relationship did not establish conspiracy).

*United States v. Idowu, 157 F.3d 265 (3rd Cir. 1999) (Insufficient evidence that defendant knew purpose of drug conspiracy).

United States v. Morillo, 158 F.3d 18 (1st Cir. 1999) (Insufficient evidence of drug conspiracy).

United States v. Valadez-Gallegos, 162 F.3d 1256 (10th Cir. 1999) (Passenger was not linked to contraband in vehicle).

United States v. Dekle, 165 F.3d 826 (11th Cir. 1999) (Insufficient evidence that doctor conspired to illegally distribute drugs).

United States v. Mercer, 165 F.3d 1331 (11th Cir. 1999) (Insufficient evidence of a drug conspiracy).

United States v. Edwards, 166 F.3d 1362 (11th Cir. 1999) (Insufficient evidence of drug possession).

# CCE

*United States v. Barona, 56 F.3d 1087 (9th Cir.), cert. denied, 516 U.S. 1092 (1996) (It was insufficient to find a CCE when there were persons who could not be legally counted as supervisees).

United States v. Witek, 61 F.3d 819 (11th Cir.), cert. denied, 516 U.S. 1060 (1996) (Mere buyer-seller relationship did not satisfy management requirement for conviction of engaging in continuing criminal enterprise).

United States v. Polanco, 145 F.3d 536 (2nd Cir.), cert. denied, 119 S.Ct. 803 (1999) (Insufficient evidence that defendant murdered victim to maintain position in CCE).

Richardson v. United States, 526 U.S. 813 (1999) (Jury must agree on specific violations).

# Fraud / Theft

United States v. Cannon, 41 F.3d 1462 (11th Cir.), cert. denied, 516 U.S. 823 (1995) (Proof of false documents to elicit payment on government contracts was insufficient when documents did not contain false information).

*United States v. Manarite, 44 F.3d 1407 (9th Cir.), cert. denied, 516 U.S. 851 (1995) (Mailings were not related to scheme to defraud).

United States v. Lluesma, 45 F.3d 408 (11th Cir. 1995) (Proof of conspiracy to export stolen vehicles was insufficient against defendant who did odd jobs for midlevel conspirator).

United States v. Altman, 48 F.3d 96 (2nd Cir. 1995) (Mailings were too remote to be related to the fraud).

United States v. Hammoude, 51 F.3d 288 (D.C. Cir.), cert. denied, 515 U.S. 1128 (1995) (A composite stamp did not make a visa a counterfeit document).

United States v. Wilbur, 58 F.3d 1291 (8th Cir. 1995) (A physician who stole drugs did not obtain them by deception).

United States v. Klingler, 61 F.3d 1234 (6th Cir. 1995) (A customs broker's misappropriation of funds did not involve money of the United States).

*United States v. Valentine, 63 F.3d 459 (6th Cir. 1995) (A government agent must convert more that $5000 in a single year to violate 18 U.S.C. §666).

*United States v. Campbell, 64 F.3d 967 (5th Cir. 1995) (Bank officers did not cause a loss to the bank).

United States v. Lewis, 67 F.3d 225 (9th Cir. 1995) (A state chartered foreign bank was not covered by the bank fraud statute).

United States v. Mueller, 74 F.3d 1152 (11th Cir. 1996) (Filing a misleading affidavit to delay a civil proceeding involving a bank was not bank fraud).

United States v. Morris, 81 F.3d 131 (11th 1996) (Sale of a phone that disguised its identity was not fraud in connection with an access device).

United States v. Allen, 88 F.3d 765 (9th Cir.), cert. denied, 520 U.S. 1202 (1997) (The government failed to prove that a credit union was federally insured).

United States v. Wester, 90 F.3d 592 (1st Cir. 1996) (A loan's face value was not the proper amount of loss when collateral was pledged).

United States v. McMinn, 103 F.3d 216 (1st Cir. 1997) (A defendant was not in the business of selling stolen goods unless he sold goods stolen by others).

*United States v. Czubinski, 106 F.3d 1069 (1st Cir. 1997) (Merely browsing confidential computer files was not wire fraud or computer fraud).

United States v. Tencer, 107 F.3d 1120 (5th Cir.), cert. denied, 522 U.S. 960 (1997) (Insurance checks that were not tied to fraudulent claims were insufficient proof of mail fraud).

*United States v. Todd, 108 F.3d 1329 (11th Cir. 1997) (A defendant was improperly prohibited from introducing evidence that employees implicitly agreed that pension funds could be used to save the company).

*United States v. Cochran, 109 F.3d 660 (10th Cir. 1997) (There was insufficient proof of mail fraud without evidence of misrepresentation).

United States v. Parsons, 109 F.3d 1002 (4th Cir. 1997) (Money that defendant legitimately spent as postal employee could not be counted toward fraud).

*United States v. Grossman, 117 F.3d 255 (5th Cir. 1997) (Personal use of funds from business loan was not bank fraud).

*United States v. Cross, 128 F.3d 145 (3rd Cir.), cert, denied, 523 U.S. 1076 (1998) (Fixing cases was not mail fraud just because court mailed disposition notices).

United States v. LaBarbara, 129 F.3d 81 (2nd Cir. 1997) (Government failed to show use of mails in a fraud case).

*United States v. Adkinson, 135 F.3d 1363 (11th Cir. 1998) (Dismissal of underlying bank fraud undermined convictions for conspiracy, mail and wire fraud schemes, and money laundering).

*United States v. Rodriguez, 140 F.3d 163 (2nd Cir. 1998) (Insufficient evidence of bank fraud).

*United States v. Ely, 142 F.3d 1113 (9th Cir. 1997) (Government failed to prove defendant was a bank director as charged in the indictment).

*United States v. D'Agostino, 145 F.3d 69 (2nd Cir. 1998) (Diverted funds were not taxable income for purposes of tax evasion).

United States v. Schnitzer, 145 F.3d 721 (5th Cir. 1998) (Impermissible theory of fraud justified new trial).

*United States v. Shotts, 145 F.3d 1289 (11th Cir.), cert. denied, 119 S.Ct. 1111 (1999) (Bail bond license was not property within meaning of mail fraud statute).

United States v. Hughey, 147 F.3d 423 (5th Cir. 1998) (Passing bad checks was not unauthorized use of an access device).

*United States v. Evans, 148 F.3d 477 (5th Cir. 1998) (No evidence that mailings advanced fraudulent scheme).

United States v. Blasini-Lluberas, 169 F.3d 57 (1st Cir. 1999) (There was no misapplication of bank funds on a debt not yet due).

United States v. Silkman, 156 F.3d 833 (8th Cir. 1999) (Administrative tax assessment is not conclusive proof of tax deficiency).

United States v. Adkinson, 158 F.3d 1147 (11th Cir. 1999) (Insufficient evidence of fraud).

United States v. Rodrigues, 159 F.3d 607 (D.C. Cir. 1999) (Insufficient evidence of fraud and theft).

United States v. Hanson, 161 F.3d 896 (5th Cir. 1999) (Factual questions about bank fraud should have been decided by jury).

## Money Laundering

United States v. Newton, 44 F.3d 913 (11th Cir. 1995) (Proof of aiding and abetting money laundering conspiracy was insufficient against defendant who leased house on behalf of conspirator).

*United States v. Rockelman, 49 F.3d 418 (8th Cir. 1995) (The evidence failed to show the transaction was intended to conceal illegal proceeds).

*United States v. Hove, 52 F.3d 233 (9th Cir. 1995) (Failure to instruct the jury that the defendant must know his structuring was illegal, was plain error).

United States v. Torres, 53 F.3d 1129 (10th Cir.), cert. denied, 516 U.S. 883 (1995) (Buying a car with drug proceeds was not money laundering).

United States v. Willey, 57 F.3d 1374 (5th Cir.), cert. denied, 516 U.S. 1029 (1995) (Transferring money between accounts was insufficient evidence of an intent to conceal).

*United States v. Wynn, 61 F.3d 921 (D.C.

Cir.), cert. denied, 516 U.S. 1015 (1995) (There was insufficient evidence that the defendant knew his structuring was unlawful).

United States v. Dobbs, 63 F.3d 391 (5th Cir. 1995) (Undisguised money used for family needs was not money laundering).

United States v. Kim, 65 F.3d 123 (9th Cir. 1995) (To be guilty of conspiracy, the defendant must have known of the illegal structuring).

United States v. Nelson, 66 F.3d 1036 (9th Cir. 1995) (The defendant's eagerness to complete the transaction was not sufficient to prove an attempt).

*United States v. Kramer, 73 F.3d 1067 (11th Cir.), cert. denied, 519 U.S. 1011 (1996) (A transaction that occurred outside of the United States was not money laundering).

United States v. Phipps, 81 F.3d 1056 (11th Cir. 1996) (It was not money laundering to deposit a series of checks that are less than $10K each).

United States v. Pipkin, 114 F.3d 528 (5th Cir.), cert. denied, 519 U.S. 821 (1996) (The defendant did not knowingly structure a currency transaction).

*United States v. High, 117 F.3d 464 (11th Cir. 1997) (A money laundering instruction omitted the element of willfulness).

United States v. Garza, 118 F.3d 278 (5th Cir. 1997) (Money laundering proof was insufficient where defendants neither handled nor disposed of drug proceeds).

*United States v. Christo, 129 F.3d 578 (11th Cir. 1997) (A check kiting scheme was not money laundering).

United States v. Shoff, 151 F.3d 889 (8th Cir. 1998) (Purchase with proceeds of fraud was not money laundering).

United States v. Calderon, 169 F.3d 718 (11th Cir. 1999) (Insufficient evidence of money laundering).

United States v. Zvi, 168 F.3d 49 (2nd Cir. 1999) (Charging domestic and international money laundering based on the same transactions was multiplicitous).

United States v. Brown, 186 F.3d 661 (5th Cir. 1999) (Insufficient evidence of money laundering).

## Aiding and Abetting

United States v. de la Cruz-Paulino, 61 F.3d 986 (1st Cir. 1995) (Moving packages of contraband and statements about police was insufficient evidence).

United States v. Luciano-Mosquero, 63 F.3d 1142 (1st. Cir.), cert. denied, 517 U.S. 1234 (1996) (There was no evidence that the defendant took steps to assist in the use of a firearm).

*United States v. Fulbright, 105 F.3d 443 (9th Cir.), cert. denied, 520 U.S. 1236 (1997) (The government failed to prove anyone committed the principle crime with requisite intent).

United States v. Beckner, 134 F.3d 714 (5th Cir. 1998) (Lawyer was not shown to have knowledge of client's fraud for aiding and abetting).

*United States v. Nelson, 137 F.3d 1094 (9th Cir.), cert. denied, 119 S.Ct. 231 (1999) (Evidence did not support aiding and abetting use and carrying of a firearm during crime of violence).

United States v. Stewart, 145 F.3d 273 (5th Cir. 1998) (Insufficient evidence that passenger aided and abetted drug possession).

United States v. Garcia-Guizar, 160 F.3d 511 (9th Cir. 1999) (Insufficient evidence of aiding and abetting).

United States v. Wilson, 160 F.3d 732 (D.C. Cir.), cert. denied, 120 S.Ct. 81 (1999) (Insufficient evidence of aiding and abetting murder or retaliation).

## Perjury

United States v. Hairston, 46 F.3d 361 (4th Cir. 1995) (Ambiguity in the question to the defendant was insufficient for perjury conviction).

United States v. Dean, 55 F.3d 640 (D.C. Cir.), cert. denied, 516 U.S. 1184 (1996) (A statement that was literally true did not support a perjury conviction).

United States v. Jaramillo, 69 F.3d 388 (9th Cir. 1995) (A defendant charged with perjury by inconsistent statements must have made both under oath).

United States v. Shotts, 145 F.3d 1289 (11th Cir. 1998) (Evasive, but true, answer was not perjury).

## False Statements

United States v. Gaudin, 515 U.S. 506 (1995) (Materiality is an element of a false statement case).

United States v. Bush, 58 F.3d 482 (9th Cir. 1995) (No material false statements or omissions were made to receive union funds).

United States v. Rothhammer, 64 F.3d 554 (10th Cir. 1995) (A contractual promise to pay was not a factual assertion).

United States v. Campbell, 64 F.3d 967 (5th Cir. 1995) (The defendant's misrepresentations to a bank were not material).

*United States v. McCormick, 72 F.3d 1404 (9th Cir. 1995) (A defendant who did not read documents before signing them was not guilty of making a false statement).

United States v. Barrett, 111 F.3d 947 (D.C.), cert. denied, 522 U.S. 867 (1997) (A defendant's misrepresentation to a court was not a material false statement).

United States v. Farmer, 137 F.3d 1265 (10th Cir. 1998) (Answer to ambiguous question did not support conviction for false declaration).

United States v. Hodge, 150 F.3d 1148 (9th Cir. 1998) (Insufficient evidence of false statements).

## Contempt

United States v. Mathews, 49 F.3d 676 (11th Cir. 1995) (Certification of contempt must be filed by the judge who witnessed the alleged contempt).

United States v. Forman, 71 F.3d 1214 (6th Cir. 1995) (An attorney was not in contempt for releasing grand jury materials in partner's case).

United States v. Brown, 72 F.3d 25 (5th Cir. 1995) (A lawyer's comments on a judge's trial performance were not reckless).

United States v. Mottweiler, 82 F.3d 769 (7th Cir. 1996) (A defendant must have acted willfully to be guilty of criminal contempt).

United States v. Grable, 98 F.3d 251 (6th Cir.), cert. denied, 519 U.S. 1059 (1997) (Contempt order could not stand in light of incorrect advice about fifth amendment privilege).

Bingman v. Ward, 100 F.3d 653 (9th Cir.), cert. denied, 520 U.S. 1188 (1997) (Magistrate Judge did not have the authority to hold a litigant in criminal contempt).

United States v. Neal, 101 F3d 993 (4th Cir. 1996) (It was plain error for a judge to prosecute and judge a contempt action).

United States v. Vezina, 165 F.3d 176 (2nd Cir. 1999) (Insufficient evidence of criminal contempt of a TRO).

## Miscellaneous Crimes

United States v. Rodriguez, 45 F.3d 302 (9th Cir. 1995) (Possessing an object designed to be used as a weapon, while in prison, was a specific intent crime).

United States v. Gilbert, 47 F.3d 1116 (11th Cir.), cert. denied, 516 U.S. 851 (1995) (Proof of failure to comply with a directive of a federal officer was in variance with the original charge).

United States v. Bahena-Cardenas, 70 F.3d 1071 (9th Cir. 1995) (Alien who was not served with warrant of deportation, was not guilty of illegal reentry).

United States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997) (Transmission of e-mail messages of torture, rape and murder did not fall within federal statute without public availability).

United States v. Grigsby, 111 F.3d 806 (11th Cir. 1997) (Importation of prohibited wildlife products fell under exceptions to statute).

United States v. Main, 113 F.3d 1046 (9th Cir. 1997) (In an involuntary manslaughter case, the harm must have been foreseeable within the risk created by the defendant).

*United States v. Wicklund, 114 F.3d 151 (10th Cir. 1997) (A murder for hire required a receipt or promise of pecuniary value).

United States v. Yoakum, 116 F.3d 1346 (10th Cir. 1997) (A defendant's interest in a business, and his presence near time of fire, did not support arson conviction).

United States v. Nyemaster, 116 F.3d 827 (9th Cir. 1997) (Insufficient evidence of being under the influence of alcohol in a federal park).

United States v. Spruill, 118 F.3d 221 (4th Cir. 1997) (There was insufficient evidence that a threat would be carried out by fire or explosive under 18 U.S.C. §844 (e)).

United States v. Cooper, 121 F.3d 130 (3rd Cir. 1997) (Evidence did not support conviction for tampering with a witness).

*United States v. King, 122 F.3d 808 (9th Cir. 1997) (Crime of mailing threatening communication required a specific intent to threaten).

United States v. Valenzeno, 123 F.3d 365 (6th Cir. 1997) (It did not violate the Federal Credit Reporting Act or the Consumer Credit Act by obtaining a credit report without permission).

*United States v. Farrell, 126 F.3d 484 (3rd Cir. 1997) (Urging a witness to "take the fifth" was not witness tampering).

United States v. Devenport, 131 F.3d 604 (7th Cir. 1997) (A violation of a state civil provision was not covered by Assimilative Crimes Act).

United States v. Rapone, 131 F.3d 188 (D.C. Cir. 1997) (Evidence was insufficient to show retaliation).

United States v. Sylve, 135 F.3d 680 (9th Cir. 1998) (Deferred prosecution was available for charge under Assimilative Crimes Act).

United States v. Romano, 137 F.3d 677 (1st Cir. 1998) (Law prohibiting sale of illegally taken wildlife did not cover the act of securing guide services for hunting trip).

*United States v. Cottman, 142 F.3d 160 (3rd Cir. 1998) (The government is not a victim under Victim Witness Protection Act).

*United States v. Copeland, 143 F.3d 1439 (11th Cir. 1998) (Government contractor was not bribed under federal statute).

United States v. To, 144 F.3d 737 (11th Cir. 1998) (Insufficient evidence of RICO and Hobbs Act violations).

United States v. Walker, 149 F.3d 238 (3rd Cir. 1998) (Prison worker was not a corrections officer).

United States v. Gallardo-Mendez, 150 F.3d 1240 (10th Cir. 1998) (Prior guilty plea did not prevent defendant from contesting noncitizen status).

United States v. Estrada-Fernandez, 150 F.3d 491 (5th Cir. 1998) (Simple assault is lesser included offense of assault with deadly weapon).

United States v. Garcia, 151 F.3d 1243 (9th Cir. 1998) (Gang relationship alone did not support conspiracy).

United States v. Truesdale, 152 F.3d 443 (5th Cir. 1998) (Insufficient evidence of illegal gambling).

United States v. Guerrero, 169 F.3d 933 (5th Cir. 1999) (Inconclusive identification did not support bank robbery conviction).

United States v. Vaghela, 169 F.3d 729 (11th Cir. 1999) (Insufficient evidence of conspiracy to obstruct justice).

Jones v. United States, 526 U.S. 227 (1999) (Jury must decide whether carjacking resulted in serious bodily injury or death).

*United States v. Hilton, 167 F.3d 61 (1st Cir.), cert. denied, 120 S.Ct. 115 (1999) (Whether defendant believed pornographic actors were over 18 years old is a jury question).

## Juveniles

United States v. Juvenile Male #1, 47 F.3d 68 (2nd Cir. 1995) (A court properly refused transfer of a juvenile for adult proceedings).

United States v. Juvenile Male PWM, 121 F.3d 382 (8th Cir. 1997) (1. Court imposed sentence beyond comparable guideline for adults; 2. Court considered pending unadjudicated charges).

Impounded Juvenile I.H., Jr., 120 F.3d 457 (3rd Cir. 1997) (Failure to provide juvenile records barred transfer to adult status).

United States v. Male Juvenile, 148 F.3d 468 (5th Cir. 1998) (Certification for juvenile by AUSA was invalid).

United States v. Juvenile LWO, 160 F.3d 1179 (8th Cir. 1999) (Judge may not consider unadjudicated incidents at juvenile transfer hearing in assessing nature of charges or prior record).

## Sentencing - General

United States v. Rivera, 58 F.3d 600 (11th Cir. 1995) (Defendant was sentenced on the wrong count).

*United States v. Knowles, 66 F.3d 1146 (11th Cir.), cert. denied, 516 U.S. 1149 (There was no proof the conspiracy extended to the date when guidelines became effective).

*Page v. United States, 69 F.3d 482 (11th Cir. 1995) (The court failed to require the parties to state objections at the sentencing hearing).

*United States v. Petty, 80 F.3d 1384 (9th Cir. 1996) (The record should have shown that the defendant read the presentence report and supplements).

United States v. Torres, 81 F.3d 900 (9th Cir. 1996) (A disparity in coconspirators' sentences was not justified, due to inconsistent factual findings).

United States v. Burke, 80 F.3d 314 (8th Cir. 1996) (A presentence report could not be used as evidence when the defendant disputed the facts therein).

*United States v. Ivy, 83 F.3d 1266 (10th Cir.), cert. denied, 519 U.S. 901 (1996) (The government's failure to object to a presentence report waived its complaint).

*United States v. Graham, 83 F.3d 1466 (D.C.Cir.), cert. denied, 519 U.S. 1132 (1997) (Adoption of the presentence report is not the same as express findings).

United States v. Versaglio, 85 F.3d 943 (2nd Cir.), *modified*, 96 F.3d 637 (1996) (A criminal contempt offense cannot be punished by both fine and incarceration).

United States v. Moskovits, 86 F.3d 1303 (3d Cir.), cert. denied, 519 U.S. 1120 (1997) (A court improperly considered a defendant's decision to go to trial rather than accept a plea offer).

United States v. Tabares, 86 F.3d 326 (3rd Cir. 1996) (Erroneous information did not justify a sentence at the top of the range).

United States v. Farnsworth, 92 F.3d 1001 (10th Cir.), cert. denied, 117 S.Ct. 596 (1996) (Adoption of the presentence report does not resolve disputed matters).

United States v. Dieguimde, 119 F.3d 933 (11th Cir. 1997) (Order of deportation did not consider defendant's request for political asylum).

*United States v. Romero, 122 F.3d 1334 (10th Cir. 1997) (A court may not resolve factual disputes by merely adopting the presentence report).

United States v. Ross, 131 F.3d 970 (11th Cir. 1997) (When a defendant is convicted of a conspiracy count with multiple objects, the court must find beyond a reasonable doubt that a particular object was proven before applying that guideline section).

United States v. Renteria, 138 F.3d 1328 (10th Cir. 1998) (Lying at suppression hearing invoked accessory after fact guideline not perjury).

United States v. Washington, 146 F.3d 219 (4th Cir. 1998) (Court should not have relied upon statements made pursuant to plea agreement).

United States v. Myers, 150 F.3d 459 (5th Cir. 1998) (Defendant denied right of allocution).

United States v. Davenport, 151 F.3d 1325 (11th Cir. 1998) (Defendant did not waive right to review presentence report by absconding).

United States v. Glover, 154 F.3d 1291 (11th Cir. 1998) (Time credited toward a sentence does not lengthen total sentence).

United States v. Navarro, 169 F.3d 228 (5th Cir. 1999) (Cannot have sentencing via video conference over defendant's objection).

United States v. Casey, 158 F.3d 993 (8th Cir. 1999) (Court must use guideline of charged offense).

United States v. Partlow, 159 F.3d 1218 (9th Cir. 1999) (Specific offense characteristics

must be applied in the order listed).

United States v. Weaver, 161 F.3d 528 (8th Cir. 1999) (Typo on PSR recommending wrong base level was plain error).

United States v. Allard, 164 F.3d 1146 (8th Cir. 1999) (Offense characteristic for one offense could not be used for another).

United States v. Robinson, 164 F.3d 1068 (7th Cir. 1999) (Hearsay statements used at sentencing were unreliable).

United States v. Mueller, 168 F.3d 186 (5th Cir. 1999) (Failure to disclose addendum to presentence report).

United States v. Jones, 168 F.3d 1217 (10th Cir. 1999) (If the court allows an oral objection at sentencing then a finding on that objection must be made).

## Grouping

United States v. DiDomenico, 78 F.3d 294 (7th Cir.), cert. denied, 519 U.S. 1006 (1996) (Unconvicted, unstipulated crimes could not be used to determine a combined offense level under §3D1.4).

*United States v. Wilson, 98 F.3d 281 (7th Cir. 1996) (Money laundering and mail fraud should have been grouped together).

*United States v. Haltom, 113 F.3d 43 (5th Cir. 1997) (Mail fraud and tax fraud counts should have been grouped).

*United States v. Emerson, 128 F.3d 557 (7th Cir. 1997) (Money laundering and mail fraud should have been grouped).

United States v. Kennedy, 133 F.3d 53 (D.C. Cir. 1998) (Court cannot refuse to group counts in order to give defendant a higher sentence).

United States v. Marmolejos, 140 F.3d 488 (3rd Cir. 1998) (Clarifying amendment to guideline section justified post-sentence relief).

*United States v. Thomas, 155 F.3d 833 (7th Cir.), cert. denied, 119 S.Ct. 606 (1998) (Court failed to group counts).

*United States v. Martinez-Martinez, 156 F.3d 936 (9th Cir. 1999) (Reduction for non-drug conspiracy was mandated when object crime was not substantially complete).

United States v. Levario-Quiroz, 161 F.3d 903 (5th Cir. 1999) (Offenses outside United States were not relevant conduct).

## Consecutive/ Concurrent

United States v. Greer, 91 F.3d 996 (7th Cir. 1996) (Sentences at two proceedings on the same day were at the same time for guideline calculations).

*United States v. Fuentes, 107 F.3d 1515 (11th Cir. 1997) ( A federal sentence which calculates a state sentence into the base offense level must be concurrent to the state sentence).

*United States v. Corona, 108 F.3d 565 (5th Cir. 1997) (Duplicitous sentences were not purely concurrent where each received a separate special assessment).

United States v. Kikuyama, 109 F.3d 536 (9th Cir. 1997) (Court cannot rely on need for mental health treatment in fashioning a consecutive sentence).

*United States v. Nash, 115 F.3d 1431 (9th Cir.), cert. denied, 522 U.S. 1117 (1998) (Multiplicious counts must be sentenced concurrently and may not receive separate special assessments).

*United States v. Mendez, 117 F.3d 480 (11th Cir. 1997) (Simultaneous acts of possessing stolen mail and assaulting a mail carrier with intent to steal mail, could not receive cumulative punishments).

McCarthy v. Doe, 146 F.3d 118 (2nd Cir. 1998) (BOP could designate state institution in order to implement presumptively concurrent sentence).

United States v. Quintero, 157 F.3d 1038 (6th Cir. 1999) (Federal sentence could not be imposed consecutively to not yet imposed state sentence).

United States v. Dorsey, 166 F.3d 558 (3rd Cir. 1999) (A court has authority to reduce a sentence in order to make it effectively concurrent to a previously imposed state sentence).

## Retroactivity

*United States v. Vazquez, 53 F.3d 1216 (11th Cir. 1995) (Case remanded to determine retroactive effect of favorable guideline, that became effective after sentencing).

*United States v. Felix, 87 F.3d 1057 (9th Cir. 1996) (An amendment to the guidelines, which required a sentence based on a lower, negotiated quantity of drugs, was retroactive).

United States v. Etherton, 101 F.3d 80 (9th Cir. 1996) (A retroactive amendment could be used to reduce supervised release).

*United States v. Ortland, 109 F.3d 539 (9th Cir.), cert. denied, 522 U.S. 851 (1997) (Since mail fraud is not a continuing offense, an act committed after the date of an increase to guidelines did not require all counts to receive increased guidelines).

United States v. Zagari, 111 F.3d 307 (2nd Cir. 1997) ( Use of guidelines effective after conduct violated Ex Post Facto Clause).

United States v. Armistead, 114 F.3d 504 (5th Cir.), cert. denied, 522 U.S. 922 (1997) (There was an ex post facto application of a guideline provision).

*United States v. Aguilar-Ayala, 120 F.3d 176 (9th Cir. 1997) (Defendant was entitled to sentence reduction to mandatory minimum because of retroactive guideline amendment, regardless of whether safety valve applied).

United States v. Bowen, 127 F.3d 9 (1st Cir. 1997) (Amendment defining hashish oil was applied ex post facto).

*United States v. Mussari, 152 F.3d 1156 (9th Cir. 1998) (Ex post facto application of criminal penalties).

United States v. Comstock, 154 F.3d 845

(8th Cir. 1998) (Using guideline effective after commission of offense violated ex post facto.

# Sentencing - Drug Quantities

United States v. Lawrence, 47 F.3d 1559 (11th Cir. 1995) (Insufficient findings to support drug quantities).

*United States v. Hansley, 54 F.3d 709 (11th Cir.), cert. denied, 516 U.S. 998 (1995) (Individual findings were needed to hold defendant responsible for all drugs in conspiracy).

United States v. Reese, 67 F.3d 902 (11th Cir.), cert. denied, 517 U.S. 1228 (1996) (Drugs were not reasonably foreseeable to the defendant, nor within scope of agreed joint criminal activity).

United States v. Lee, 68 F.3d 1267 (11th Cir. 1995) (There were inadequate findings to support drug quantities. Crack abusers' credibility was questioned).

United States v. Levay, 76 F.3d 671 (5th Cir. 1996) (A defendant could challenge drug quantity calculations, based upon excludable material, by §2255 petition.

United States v. Berrio, 77 F.3d 206 (7th Cir. 1996) (A government agent's sale of drugs to an informant could not be counted as the defendant's relevant conduct).

United States v. Hill, 79 F.3d 1477 (6th Cir.), cert.denied, 519 U.S. 858 (1996) (Different transactions almost two years apart, with the sole similarity being the type of drug, were not relevant conduct).

*United States v. Howard, 80 F.3d 1194 (7th Cir. 1996) (The district court could not rely upon the probation officer's estimates of drug quantities without corroborating evidence).

United States v. Hamilton, 81 F.3d 652 (6th Cir. 1996) (To be culpable for manufacturing a quantity of drugs, the defendant must have been personally able to make that quantity).

United States v. Graham, 83 F.3d 1466 (D.C. Cir.), cert. denied, 519 U.S. 1132 (1997) (The court failed to make individualized findings of drug quantities).

United States v. Byrne, 83 F.3d 984 (8th Cir. 1996) (Drugs seized after the defendant was in custody could not be counted toward sentence).

United States v. Acosta, 85 F.3d 275 (7th Cir. 1996) (The drug quantity finding was insufficient).

United States v. Caldwell, 88 F.3d 522 (8th Cir.), cert. denied, 519 U.S. 1048 (1996) (Extrapolation of drug quantities was error).

United States v. Frazier, 89 F.3d 1501 (11th Cir.), cert.denied, 520 U.S. 1222 (1997) (Sentencing findings did not support drug quantities attributed to the defendant).

*United States v. Tucker, 90 F.3d 1135 (6th Cir. 1996) (A court did not make individualized findings as to each defendant in a drug conspiracy).

United States v. Nesbitt, 90 F.3d 164 (6th Cir. 1996) (A court failed to resolve whether amounts of drugs were attributable during the time of the conspiracy).

United States v. Hernandez-Santiago, 92 F.3d 97 (2nd Cir. 1996) (A court failed to make a finding as to the scope of the defendant's agreement).

*United States v. Copus, 93 F.3d 269 (7th Cir. 1996) (The court's estimate of drug quantity lacked a sufficient indicia of reliability).

United States v. Gutierrez-Hernandez, 94 F.3d 582 (9th Cir. 1996) (There was no presumption that three drug manufacturers were equally culpable).

*United States v. Chalarca, 95 F.3d 239 (2nd Cir. 1996) (When negotiated drug amount was not foreseeable, the court should use the lowest possible quantity).

*United States v. Jinadu, 98 F.3d 239 (6th Cir.), cert. denied, 520 U.S. 1179 (1997) (Court could not rely on drug quantities alleged in indictment to determine a mandatory minimum).

United States v. Agis-Meza, 99 F.3d 1052 (11th Cir. 1996) (Extrapolation of drug amounts was not a sufficient basis for findings).

United States v. Randolph, 101 F.3d 607 (8th Cir. 1996) (The trial court inadequately explained its drug quantity findings).

*United States v. Shonubi, 103 F.3d 1085 (2nd Cir. 1997) (Multiplying quantity of seized drugs by number of previous trips was an inadequate measure).

In Re Sealed Case, 108 F.3d 372 (D.C. Cir. 1997) (A court failed to make findings attributing all drugs to the defendant).

*United States v. Milledge, 109 F.3d 312 (6th Cir. 1997) (Evidence did not justify drug quantity finding).

United States v. Rodriguez, 112 F.3d 374 (8th Cir. 1997) (Insufficient evidence of drug quantities).

United States v. Jackson, 115 F.3d 843 (11th Cir. 1997) (Package containing 1% cocaine and 99% sugar was not a mixture under the guidelines).

*United States v. Granados, 117 F.3d 1089 (8th Cir. 1997) (The court failed to make specific drug quantity findings).

*United States v. Patel, 131 F.3d 1195 (7th Cir. 1997) (Evidence was insufficient that seized money could support cocaine quantities).

United States v. Whitecotton, 142 F.3d 1194 (9th Cir. 1998) (Later drug sales were not foreseeable to defendant).

United States v. Perulena, 146 F.3d 1332 (11th Cir. 1998) (Defendant was not responsible for marijuana imported before he joined conspiracy).

*United States v. Wyss, 147 F.3d 631 (7th Cir. 1998) (Drugs for personal use could not be counted toward distribution

quantity).

United States v. Bacallao, 149 F.3d 717 (7th Cir. 1998) (No showing prior cocaine transactions were relevant conduct).

United States v. Gore, 154 F.3d 34 (2nd Cir. 1998) (Possession and distribution of the same drugs may only be punished once).

United States v. Brown, 156 F.3d 813 (8th Cir. 1999) (Court should have only based sentence on drug quantity proven by government).

United States v. Marrero-Ortiz, 160 F.3d 768 (1st Cir. 1999) (Insufficient evidence of drug quantity).

United States v. Garrett, 161 F.3d 1131 (8th Cir. 1999) (Insufficient evidence of drug quantity).

United States v. Flowal, 163 F.3d 956 (6th Cir.), cert. denied, 119 S.Ct. 1509 (1999) (Drug quantity was arbitrarily chosen).

United States v. Gomez, 164 F.3d 1354 (11th Cir. 1999) (Unrelated drug sales were not relevant conduct to conspiracy).

## Sentencing - Marijuana

*United States v. Foree, 43 F.3d 1572 (11th Cir. 1995) (Seedlings and cuttings do not count as marijuana plants).

United States v. Smith, 51 F.3d 980 (11th Cir. 1995) (Weight of wet marijuana was improperly counted).

*United States v. Antonietti, 86 F.3d 206 (11th Cir. 1996) (Counting seedlings as marijuana plants to calculate the base offense level was plain error).

United States v. Agis-Meza, 99 F.3d 1052 (11th Cir. 1996) (The court had an insufficient basis to calculate a quantity of marijuana based upon cash and money wrappers seized).

*United States v. Carter, 110 F.3d 759 (11th Cir. 1997) (The court abused its discretion in denying a motion for a reduction of a sentence over weight of wet marijuana).

*United States v. Mankiewicz, 122 F.3d 399 (7th Cir. 1997) (Marijuana that was rejected by defendants should not have been counted).

## Sentencing - Meth.

*United States v. Ramsdale, 61 F.3d 825 (11th Cir. 1995) (Improperly sentenced for D-methamphetamine rather than "L").

United States v. McMullen, 86 F.3d 135 (8th Cir. 1996) (A judge could not determine the type of methamphetamine based upon the judge's experience, the price, or where the drugs came from).

United States v. Cole, 125 F.3d 654 (8th Cir. 1997) (A defendant's testimony about his ability to manufacture was relevant).

United States v. O'Bryant, 136 F.3d 980 (5th Cir. 1998) (Government has burden of proving more serious form of methamphetamine).

## Sentencing - Crack

United States v. Chisholm, 73 F.3d 304 (11th Cir. 1996) (There was no factual basis that the defendant knew powder would be converted to crack).

*United States v. James, 78 F.3d 851 (3rd Cir.), cert. denied, 519 U.S. 844 (1996) (There was not proof that the cocaine base was crack for enhanced penalties to apply).

## Sentencing - Firearms

United States v. Bernardine, 73 F.3d 1078 (11th Cir. 1996) (The government failed to prove the defendant was a marijuana user, and thus he was not a prohibited person under U.S.S.G. §2K2.1 (a) (6)).

United States v. Mendoza-Alvarez, 79 F.3d 96 (8th Cir. 1996) (Simply carrying a firearm in one's car was not otherwise unlawful use).

United States v. Roxborough, 94 F.3d 213 (6th Cir.), *amended*, 99 F.3d 212 (1996) (Obliterating serial numbers on a firearm was not be relevant conduct to justify an increase).

*United States v. Barton, 100 F.3d 43 (6th Cir. 1996) (Enhancement under §2K2.1(a) (1) relating to prior convictions covered only those before the instant offense).

United States v. Moit, 100 F.3d 605 (8th Cir. 1996) (Possession of shotguns and hunting rifles qualified for "sporting or collection" reduction).

*United States v. Willis, 106 F.3d 966 (11th Cir. 1997) (A defendant who previously pleaded nolo contendere in a Florida state court was not convicted for purposes of being a felon in possession of a firearm).

*United States v. Cooper, 111 F.3d 845 (11th Cir. 1997) (Firearm that was not possessed at the site of drug offense did not justify 2-level enhancement).

United States v. Knobloch, 131 F.3d 366 (3rd Cir. 1997) (Court could not impose an increase for a firearm when there was a consecutive gun count).

United States v. McDonald, 165 F.3d 1032 (6th Cir. 1999) (Felon who stole firearm was not using it in connection with another felony).

## Sentencing - Money Laundering

United States v. Jenkins, 58 F.3d 611 (11th Cir. 1995) ("Rule of lenity" precluded counting money laundering transactions under $10,000).

*United States v. Allen, 76 F.3d 1348 (5th Cir.), cert. denied, 519 U.S. 841 (1996) (Money laundering guidelines should have been based on the amount of money laundered, not the loss in a related fraud).

United States v. Gabel, 85 F.3d 1217 (7th Cir. 1996) (Robberies and burglaries were not relevant conduct in a money laundering case).

United States v. Morales, 108 F.3d 1213 (10th Cir. 1997) (Drug mandatory minimum did not apply to money laundering offense).

## Sentencing - Pornography

United States v. Cole, 61 F.3d 24 (11th Cir.), cert. denied, 516 U.S. 1163 (1996) (Insufficient evidence of child pornography depicting minors under twelve).

*United States v. Ketcham, 80 F.3d 789 (3rd Cir. 1996) (Enhancement for exploitation of a minor was reversed in a child pornography case for insufficient evidence).

*United States v. Surratt, 87 F.3d 814 (6th Cir. 1996) (Defendant's sexual abuse, unrelated to receiving child pornography did not prove a pattern of activity to increase the offense level).

*United States v. Kemmish, 120 F.3d 937 (9th Cir.), cert. denied, 522 U.S. 1132 (1998) (The defendant did not engage in a pattern of exploitation).

## Sentencing - Fraud / Theft

*United States v. Maurello, 76 F.3d 1304 (3rd Cir. 1996) (Loss to a fraud victim was mitigated by the value received by the defendant's actions).

*United States v. Millar, 79 F.3d 338 (2nd Cir. 1996) (Adjustment for affecting a financial institution was limited to money received by the defendant).

United States v. Eyoum, 84 F.3d 1004 (7th Cir.), cert. denied, 519 U.S. 941 (1996) (The fair market value, rather than the smuggler's price, should have been used to calculate the value of illegally smuggled wildlife).

United States v. Strevel, 85 F.3d 501 (11th Cir. 1996) (In determining the amount of loss, the court could not rely solely on stipulated amounts).

United States v. King, 87 F.3d 1255 (11th Cir. 1996) (Without proof the defendant committed the burglary, other stolen items, not found in his possession, could not be calculated toward loss).

United States v. Sung, 87 F.3d 194 (7th Cir. 1996) (Findings did not establish reasonable certainty that the defendant intended to sell the base level quantity of counterfeit goods).

United States v. Allen, 88 F.3d 765 (9th Cir.), cert. denied, 520 U.S. 1202 (1997) (Collateral recovered to secure a loan, and the interest paid, was not subtracted from loss in a fraud case).

United States v. Cowart, 90 F.3d 154 (6th Cir. 1996) (A common modus operandi alone, did not make robberies part of a common scheme).

United States v. Krenning, 93 F.3d 1257 (4th Cir. 1996) (The value of rented assets bore no reasonable relationship to the victim's loss).

United States v. Comer, 93 F.3d 1271 (6th Cir. 1996) (An acquitted theft was not sufficiently proven to include in loss calculations).

United States v. Coffman, 94 F.3d 330 (7th Cir.), cert. denied, 520 U.S. 1165 (1997) (A previous fraud using the same worthless stock was not relevant conduct).

United States v. Olbres, 99 F.3d 28 (1st Cir. 1996) (Adoption of PSI was not a finding of tax loss).

United States v. Peterson, 101 F.3d 375 (5th Cir.), cert. denied, 520 U.S. 1161 (Violation of fiduciary duty was not necessarily criminal conduct for application of relevant conduct).

*United States v. Kohli, 110 F.3d 1475 (9th Cir. 1997) (There was insufficient evidence of the quantity of fraud attributed).

*United States v. Sepulveda, 115 F.3d 882 (11th Cir. 1997) (Evidence did not support the alleged volume of unauthorized calls).

United States v. Rutgard, 116 F.3d 1270 (9th Cir. 1997) (That the defendant's business was "permeated with fraud" was too indefinite a finding).

United States v. Arnous, 122 F.3d 321 (6th Cir. 1997) (Food stamp fraud should have been valued by lost profits, not the face value of the stamps).

United States v. Sublett, 124 F.3d 693 (5th Cir. 1997) (Loss during contract fraud did not include legitimate services actually provided).

*United States v. McIntosh, 124 F.3d 1330 (10th Cir. 1997) (Failure to disclose his interest in a residence that the defendant did not own was not bankruptcy fraud).

United States v. Barnes, 125 F.3d 1287 (9th Cir. 1997) (Services that were satisfactorily performed should have been subtracted from loss).

United States v. Monus 128 F.3d 376 (6th Cir. 1997) (A court did not adequately explain loss findings).

United States v. Cain, 128 F.3d 1249 (8th Cir. 1997) (Sales made before defendant was hired were not relevant conduct toward fraud).

*United States v. Word, 129 F.3d 1209 (11th Cir. 1997) (Fraud, before defendant joined conspiracy, was not relevant conduct).

United States v. Melton, 131 F.3d 1400 (10th Cir. 1997) (Unforeseeable acts of fraud could not be attributed to defendant).

United States v. Desantis, 134 F.3d 760 (6th Cir. 1998) (Neither defendant's business failure, nor state administrative findings, were relevant to fraud case).

*United States v. Cihak, 137 F.3d 252 (5th Cir.), cert. denied, 119 S.Ct. 118 (1998) (Fraud of coconspirators must be foreseeable to defendant to be relevant conduct).

United States v. Tatum, 138 F.3d 1344 (11th Cir. 1998) (Application note governing fraudulent contract procurement should have been applied rather than theft guideline).

United States v. Phath, 144 F.3d 146 (1st Cir. 1998) (Depositing counterfeit checks and withdrawing money did not require more than minimal planning).

United States v. Sapoznik, 161 F.3d 1117 (7th Cir. 1999) (Calculation of benefits from bribes did not support findings).

United States v. Ponec, 163 F.3d 486 (8th Cir. 1999) (No showing that money withdrawn from defendant's account came from employer).

## Enhancements- General

United States v. Tapia, 59 F.3d 1137 (11th Cir.), cert. denied, 516 U.S. 953 (1995) (Using phone to call codefendant was not more than minimal planning).

*United States v. Miller, 77 F.3d 71 (4th Cir. 1996) (Enhancement for manufacturing counterfeit notes did not apply to those so obviously counterfeit that they are unlikely to be accepted).

United States v. Torres, 81 F.3d 900 (9th Cir. 1996) (The government must prove sentencing enhancements by a preponderance of evidence).

United States v. Tavares, 93 F.3d 10 (1st Cir.), cert. denied, 519 U.S. 955 (1996) (A finding that an aggravated assault occurred was inconsistent with a finding of no serious bodily injury).

United States v. Kraig, 99 F.3d 1361 (6th Cir. 1996) (There was insufficient evidence that the defendant employed sophisticated means).

United States v. Brazel, 102 F.3d 1120 (11th Cir.), cert. denied, 522 U.S. 822 (1997) (A sentence could not be enhanced with convictions that were not final).

*United States v. Carrozzella, 105 F.3d 796 (2nd Cir. 1997) (An enhancement for violation of a judicial order did not apply to every perceived abuse of judicial process).

United States v. Eshkol, 108 F.3d 1025 (9th Cir.), cert. denied, 522 U.S. 841 (1997) (Only existing counterfeit bills could be counted toward upward adjustment).

*United States v. DeMartino, 112 F.3d 75 (2nd Cir. 1997) (Court was without authority to increase a sentence that was not mere clerical error).

*United States v. Shadduck, 112 F.3d 523 (1st Cir. 1997) (There was no proof that a defendant violated a judicial order during a course of fraud).

United States v. Zelaya, 114 F.3d 869 (9th Cir. 1997) (An express threat of death was not foreseeable to the accomplice-defendant).

United States v. Calozza, 125 F.3d 687 (9th Cir. 1997) (Identical enhancements for separately grouped counts was double-counting).

United States v. Rogers, 126 F.3d 655 (5th Cir. 1997) (An attempted drug crime did not support career offender enhancement).

*United States v. Barakat, 130 F.3d 1448 (11th Cir. 1997) (Enhancement for sophisticated means could not be based on acquitted conduct).

United States v. Hickman, 151 F.3d 446 (5th Cir. 1998) (Pointing firearm was not restraint).

## Enhancements- Drug Crimes

United States v. Ruiz-Castro, 92 F.3d 1519 (10th Cir. 1996) (A court failed to inquire whether the defendant had notice of the government's intent to seek an enhanced sentence with a prior drug conviction).

*United States v. Ekinci, 101 F.3d 838 (2nd Cir. 1996) (Unlawful dispensing of drugs by a doctor was not subject to an enhancement for proximity to a school).

United States v. Mikell, 102 F.3d 470 (11th Cir.), cert. denied, 520 U.S. 1181 (1997) (A defendant who was subject to an enhanced sentence under 21 U.S.C. §841, could collaterally attack a prior conviction).

United States v. Chandler, 125 F.3d 892 (5th Cir. 1997) (Enhancement for drug sale near school only applies when it is charged by indictment).

United States v. Hudson, 129 F.3d 994 (8th Cir. 1997) (A firearm enhancement was not proven).

United States v. Sanchez, 138 F.3d 1410 (11th Cir. 1998) (Court must hold a hearing if defendant challenges validity of a prior drug conviction used for statutory enhancement).

United States v. Saavedra, 148 F.3d 1311 (11th Cir. 1998) (Defendant could not receive increase for selling drugs near school unless so charged).

United States v. Hass, 150 F.3d 443 (5th Cir. 1998) (Nonfinal state conviction could not be basis for statutory enhancement of drug sentence).

United States v. Schmalzried, 152 F.3d 354 (5th Cir. 1998) (Government failed to connect firearm to drug offense).

United States v. Rettelle, 165 F.3d 489 (6th Cir. 1999) (Mandatory minimum controlled by drugs associated with conviction only).

## Enhancements- Violence

United States v. Murray, 82 F.3d 361 (10th Cir. 1996) (In an assault case, an enhancement for discharging a firearm did not apply to shots fired after the assault).

United States v. Rivera, 83 F.3d 542 (1st Cir. 1996) (There was insufficient evidence that a rape involved serious bodily injury).

*United States v. Alexander, 88 F.3d 427 (6th Cir. 1996) (A note indicating the presence of a bomb, and a request to cooperate to prevent harm, during a bank robbery, was not an express threat of death).

United States v. Shenberg, 89 F.3d 1461 (11th Cir.), cert. denied, 519 U.S. 1117 (1997) (More than minimal planning increase did not apply to plan to assault a fictitious informant).

United States v. Triplett, 104 F.3d 1074 (8th Cir.), cert. denied, 520 U.S. 1236 (1997) (A threat of death adjustment was double counting in 18 U.S.C. §924 (c) case).

United States v. Reyes-Oseguera, 106 F.3d 1481 (9th Cir. 1997) (Flight on foot was insufficient for reckless endangerment enhancement).

United States v. Dodson, 109 F.3d 486 (8th Cir. 1997) (There lacked proof of bodily injury for enhancement).

United States v. Sawyer, 115 F.3d 857 (11th Cir. 1997) (Enhancement for bodily injury was not supported by alleged psychological injury).

United States v. Drapeau, 121 F.3d 344 (8th Cir. 1997) (Enhancement for assaulting a government official applicable only when official is victim of the offense).

United States v. Sovie, 122 F.3d 122 (2nd Cir. 1997) (Evidence to support enhancement for intending to carry out threat was insufficient).

United States v. Bourne, 130 F.3d 1444 (11th Cir. 1997) (Applying both brandishing weapon and threat of death enhancements was double counting).

*United States v. Hayes, 135 F.3d 435 (6th Cir. 1998) (Enhancements for reckless endangerment, and assault, during flight, were double counting).

United States v. Tolen, 143 F.3d 1121 (8th Cir. 1998) (Putting hand in pocket and warning to cooperate or "no one will get hurt" was not express threat of death).

United States v. Kushmaul, 147 F.3d 498 (6th Cir. 1998) (Holding baseball bat was not"otherwise used").

United States v. Hickman, 151 F.3d 446 (5th Cir. 1998) (Pointing firearm was not restraint).

United States v. Thomas, 155 F.3d 833 (7th Cir. 1999) (Intent to carry out threat could not be proven by criminal history).

United States v. Smith, 156 F.3d 1046 (10th Cir. 1999) (Insufficient evidence of actual or threatened force or violence).

United States v. Richardson, 161 F.3d 728 (D.C. Cir. 1999) (Burglary not shown to be crime of violence).

*United States v. Anglin, 169 F.3d 154 (2nd Cir. 1999) (Bank tellers were not physically restrained).

United States v. Leahy, 169 F.3d 433 (7th Cir. 1999) (Departure of 10 levels for analogous terrorism enhancement was unreasonable).

## Enhancements-Immigration

*United States v. Fuentes-Barahona, 111 F.3d 651 (9th Cir. 1997) (Conviction occurring before effective date of guideline amendment could not be considered as aggravated felony).

United States v. Herrerra-Solorzano, 114 F.3d 48 (5th Cir. 1997) (A prior probated felony was not an aggravated felony in an illegal reentry case).

United States v. Reyna-Espinosa, 117 F.3d 826 (5th Cir. 1997) (A prior conviction for being an alien in unlawful possession of a firearm was not an aggravated felony).

*United States v. Viramontes-Alvarado, 149 F.3d 912 (9th Cir.), cert. denied, 119 S.Ct. 434 (1998) (Noncitizen's priors were not aggravated felonies).

United States v. Avilia-Ramirez, 170 F.3d 277 (2nd Cir. 1999) (Defendant's prior aggravated felony was not a listed offense at the time of his reentry).

## Career Enhancements

*United States v. Murphy, 107 F.3d 1199 (6th Cir. 1997) (Two prior robberies were a single episode under Armed Career Criminal Act).

United States v. Bennett, 108 F.3d 1315 (10th Cir. 1997) (There was no proof that a prior burglary involved a dwelling or physical force under career offender provisions).

United States v. Hicks, 122 F.3d 12 (7th Cir. 1997) (Burglary of a building was not a crime of violence for career offender enhancement).

*United States v. Covington, 133 F.3d 639 (8th Cir. 1998) (Evidence did not show imprisonment within last 15 years on predicate offense used for career offender enhancement).

United States v. Gottlieb, 140 F.3d 865 (10th Cir. 1998) (Defendant established that no firearm or dangerous weapon was used in prior conviction defeating Three Strikes enhancement).

United States v. Dahler, 143 F.3d 1084 (7th Cir. 1998) (Defendant whose rights were restored was not armed career criminal).

United States v. McElyea, 158 F.3d 1016 (9th Cir. 1999) (Crimes of a single transaction may not be counted separately under Armed Career Criminal Act).

*United States v. Thomas, 159 F.3d 296 (7th Cir.), cert. denied, 119 S.Ct. 2370 (1999) (Statutory rape without violence was not

predicate crime under Armed Career Criminal Act).

United States v. Richardson, 166 F.3d 1360 (11th Cir. 1999) (Prior conviction under Armed Career Criminal Act must occur before felon in possession violation).

United States v. Wilson, 168 F.3d 916 (6th Cir. 1999) (Burglary of a building is not a career offender predicate unless it involves physical force, or its threat or attempt).

United States v. Sacko, 178 F.3d 1 (1st Cir. 1999) (Court could not look at facts of prior conviction to determine whether it was a violent felony).

## Cross References

United States v. Lagasse, 87 F.3d 18 (1st Cir. 1996) (There was no link between a knife-point robbery of a coconspirator, and the charged drug conspiracy, to justify an increase in sentence).

*United States v. Aderholt, 87 F.3d 740 (5th Cir. 1996) (Murder guidelines were improperly applied in a mail fraud conspiracy because murder was not an object of the conspiracy).

United States v. Meacham, 115 F.3d 1488 (10th Cir. 1997) (Transportation of a child, not involving prostitution or production of a visual depiction, required cross reference to lower base level for sexual contact).

*United States v. Jackson, 117 F.3d 533 (11th Cir. 1997) (A police officer convicted of theft should not have been sentenced under civil rights guidelines).

United States v. Cross, 121 F.3d 234 (6th Cir. 1997) (Torture was not relevant conduct in a drug case).

United States v. Sanders, 162 F.3d 396 (6th Cir. 1999) (Possibility that defendant could have been charged with state burglary did not mean firearm was used in connection with another offense).

## Abuse of Trust

United States v. Jolly, 102 F.3d 46 (2nd Cir. 1996) (Corporate principal could not get abuse of trust enhancement for defrauding lenders).

United States v. Long, 122 F.3d 1360 (11th Cir. 1997) (Abuse of trust enhancement did not apply to prison employee who brought in contraband).

United States v. Garrison, 133 F.3d 831 (11th Cir. 1998) (Owner of a health care provider did not occupy position of trust with Medicare).

United States v. Burt, 134 F.3d 997 (10th Cir. 1998) (Deputy sheriff's drug dealing did not merit abuse of trust or special skills enhancements).

United States v. Reccko, 151 F.3d 29 (1st Cir. 1998) (Police switchboard operator did not occupy position of trust).

*United States v. Wadena, 152 F.3d 831 (8th Cir.), cert. denied, 119 S.Ct. 1355 (1999) (Money laundering, unrelated to defendant's position, did not warrant abuse of trust).

United States v. Holt, 170 F.3d 698 (7th Cir. 1999) (Part-time police officer did not justify abuse of trust enhancement).

## Obstruction of Justice

United States v. Williams, 79 F.3d 334 (2nd Cir. 1996) (In order to justify an obstruction of justice enhancement, the court had to find the defendant knowingly made a false statement under oath).

*United States v. Strang, 80 F.3d 1214 (7th Cir. 1996) (Perjury in another case did not warrant an obstruction of justice enhancement in the instant case).

United States v. Medina-Estrada, 81 F.3d 981 (10th Cir. 1996) (A court must have found all elements of perjury are proven to give enhancement for obstruction of justice).

United States v. Hernandez, 83 F.3d 582 (2nd Cir. 1996) (Staring at a witness and calling them "the devil," did not justify enhancement for intimidation).

United States v. Sisti, 91 F.3d 305 (2nd Cir. 1996) (Obstruction of justice was only proper for conduct related to the conviction).

United States v. Ruggiero, 100 F.3d 284 (2nd Cir. 1996) ( A judge properly refused to apply an obstruction of justice enhancement).

*United States v. Draves, 103 F.3d 1328 (7th Cir.), cert. denied, 521 U.S. 1127 (1997) (Fleeing from a police car was not obstruction of justice).

United States v. Harris, 104 F.3d 1465 (5th Cir.), cert. denied, 522 U.S. 833 (1997) (Actions of accessory after the fact did not justify obstruction enhancement when those same acts supported the substantive offense).

United States v. Zagari, 111 F.3d 307 (2nd Cir. 1997) (There was no finding to support obstruction enhancement).

United States v. Tackett, 113 F.3d 603 (6th Cir. 1997) (The court failed to find that government resources were wasted for obstruction enhancement).

United States v. Sawyer, 115 F.3d 857 (11th Cir. 1997) (Sentencing increase for reckless endangerment only applied to defendant fleeing law enforcement officer, not civilians).

United States v. Sassanelli, 118 F.3d 495 (6th Cir. 1997) (Obstruction findings did not specify which statements were materially untruthful).

United States v. Solono-Godines, 120 F.3d 957 (9th Cir. 1997) (A misrepresentation by the defendant did not obstruct justice).

United States v. Webster, 125 F.3d 1024 (7th Cir. 1997) (A finding that the defendant testified falsely lacked specificity).

United States v. Senn, 129 F.3d 886 (7th Cir. 1997) (Lying about minor details to grand

jury was not obstruction).

United States v. Norman, 129 F.3d 1393 (10th Cir. 1997) (Concealing drugs at scene of crime was not obstruction).

United States v. McRae, 156 F.3d 708 (6th Cir. 1999) (Insufficient findings of obstruction of justice).

United States v. Jones, 159 F.3d 969 (6th Cir. 1999) (Irrelevant false testimony did not support obstruction of justice).

United States v. Koeberlein, 161 F.3d 946 (6th Cir. 1999) (Failure to appear on unrelated offense was not obstruction).

## Vulnerable Victim

*United States v. Castellanos, 81 F.3d 108 (9th Cir. 1996) (Merely because a fraud scheme used Spanish language media, did not justify an enhancement for victims particularly susceptible to fraud).

*United States v. Stover, 93 F.3d 1379 (8th Cir. 1996) (Persons' desire to adopt children did not make them vulnerable victims of an adoption agency).

United States v. Shumway, 112 F.3d 1413 (10th Cir. 1997) (Prehistoric skeletal remains were not vulnerable victims).

*United States v. Robinson, 119 F.3d 1205 (5th Cir.), cert. denied, 522 U.S. 1139 (1998) (Asian-American merchants were not vulnerable victims).

United States v. Hogan, 121 F.3d 370 (8th Cir. 1997) (Victims must have been targeted in order to be considered vulnerable).

United States v. Monostra, 125 F.3d 183 (3rd Cir. 1997) (A victim's vulnerability must facilitate the crime in some manner).

United States v. McCall, 174 F.3d 47 (2nd Cir. 1999) (Vulnerable victim enhancement is not a relative standard).

## Aggravating Role

United States v. Ivy, 83 F.3d 1266 (10th Cir.), cert. denied, 519 U.S. 901 (1996) (There were insufficient findings for a managerial role).

United States v. Lozano-Hernandez, 89 F.3d 785 (11th Cir. 1996) (Leadership role in drug conspiracy was not proven).

United States v. Patasnik, 89 F.3d 63 (2nd Cir. 1996) (A management role had to be based on managing people, not assets).

United States v. Wester, 90 F.3d 592 (1st Cir. 1996) (The court failed to make findings there were five or more participants).

United States v. Miller, 91 F.3d 1160 (8th Cir. 1996) (The lack of evidence that the defendant controlled others precluded a leadership role).

*United States v. Albers, 93 F.3d 1469 (10th Cir. 1996) (A leadership role had to be based upon leadership, and not the defendant's importance to the success of the conspiracy).

United States v. Delpit, 94 F.3d 1134 (8th Cir. 1996) (A murder-for-hire scheme had less than five participants).

United States v. Avila, 95 F.3d 887 (9th Cir. 1996) (A defendant who was the sole contact between a buyer and a seller was not an organizer).

United States v. Jobe, 101 F.3d 1046 (5th Cir.), cert. denied, 118 S.Ct. 81 (1997) (Defendant's position as bank director did not justify managerial role when he did not manage or supervise others).

United States v. DeGovanni, 104 F.3d 43 (3rd Cir. 1997) (A corrupt police sergeant was not a supervisor merely because of his rank).

United States v. Eidson, 108 F.3d 1336 (11th Cir.), cert. denied, 118 S.Ct. 248 (1997) (Clean Water Act violation lacked five participants for role adjustment).

United States v. Gort-Didonato, 109 F.3d 318 (6th Cir. 1997) (To impose an upward role adjustment, the defendant must have supervised at least one person).

United States v. Bryson, 110 F.3d 575 (8th Cir. 1997) (Facts did not support upward adjustment for role).

United States v. Logan, 121 F.3d 1172 (8th Cir. 1997) (Record did not support upward role adjustment).

United States v. Makiewicz, 122 F.3d 399 (7th Cir. 1997) (Defendant was not a leader for asking his father to accompany informant to motel).

United States v. Del Toro-Aguilar, 138 F.3d 340 (8th Cir. 1998) (Occasionally fronting drugs to coconspirators did not justify upward role adjustment).

United States v. Alred, 144 F.3d 1405 (11th Cir. 1998) (Defendant was not an organizer).

United States v. Lopez-Sandoval, 146 F.3d 712 (9th Cir. 1998) (Defendant was not an organizer).

*United States v. Glinton, 154 F.3d 1245 (11th Cir.), cert. denied, 119 S.Ct. 1281 (No managerial role for defendant who did not supervise or control others).

United States v. Walker, 160 F.3d 1078 (6th Cir. 1999) (Insufficient evidence of organizer role).

United States v. Graham, 162 F.3d 1180 (D.C. Cir. 1999) (Conclusionary statement that defendant was lieutenant did not justify role adjustment).

## Mitigating Role

United States v. Moeller, 80 F.3d 1053 (5th Cir. 1996) (No leadership role for a government official who inherited an historically corrupt system, but the defendant's lack of understanding of the entire scheme justified a minimal role adjustment).

*United States v. Miranda-Santiago, 96

F.3d 517 (1st Cir. 1996) (There was an insufficient basis to deny a minor role reduction).

*United States v. Haut, 107 F.3d 213 (3rd Cir.), cert. denied, 521 U.S. 1127 (1997) (Arson defendants who worked at direction of others were minimal participants).

United States v. Snoddy, 139 F.3d 1224 (8th Cir. 1998) (Sole charged defendant may receive minor role when justified by relevant conduct).

United States v. Neils, 156 F.3d 382 (2nd Cir. 1999) (Defendant who merely steered buyers was minor participant).

## Acceptance of Responsibility

United States v. Fells, 78 F.3d 168 (5th Cir.), cert. denied, 519 U.S. 847 (1996) (A defendant making a statutory challenge, could still qualify for acceptance of responsibility).

United States v. Patino-Cardenas, 85 F.3d 1133 (5th Cir. 1996) (There was no basis to deny credit when the defendant did not falsely deny relevant conduct).

United States v. Garrett, 90 F.3d 210 (7th Cir. 1996) (A defendant could not be denied acceptance when he filed an uncounseled, pro se motion to withdraw plea after his attorney died).

United States v. Flores, 93 F.3d 587 (9th Cir. 1996) (A defendant should have received credit for his written statement).

*United States v. Atlas, 94 F.3d 447 (8th Cir.), cert. denied, 520 U.S. 1130 (1997) (A defendant who timely accepted responsibility must be given the additional one-level downward adjustment).

United States v. Ruggiero, 100 F.3d 284 (2nd Cir. 1996) (A single false denial did not bar credit for acceptance of responsibility).

United States v. McPhee, 108 F.3d 287 (11th Cir. 1997) (A defendant who qualified should not have been given less than the full three-point reduction for accepting responsibility).

*United States v. Guerrero-Cortez, 110 F.3d 647 (8th Cir.), cert. denied, 522 U.S. 1017 (1998) (Defendant's pretrial statements of acceptance justified reduction though case was tried).

United States v. Marroquin, 136 F.3d 220 (1st Cir. 1998) (Creation of a lab report was not the type of trial preparation to deny extra point off for accepting responsibility).

United States v. Fisher, 137 F.3d 1158 (9th Cir. 1998) (Despite not guilty plea, admission in open court could be acceptance).

United States v. McKittrick, 142 F.3d 1170 (9th Cir. 1998) (Defendant who does not contest facts at trial may be eligible for acceptance).

United States v. Ellis, 168 F.3d 558 (1st Cir. 1999) (Defendant who went to trial was still potentially eligible for acceptance of responsibility).

## Safety Valve

*United States v. Shrestha, 86 F.3d 935 (9th Cir. 1996) (Eligibility for the safety valve did not depend on acceptance of responsibility).

United States v. Flanagan, 87 F.3d 121 (5th Cir. 1996) (On remand, the sentencing court could withdraw a leadership role so the defendant could qualify for safety valve).

*United States v. Real-Hernandez, 90 F.3d 356 (9th Cir. 1996) (To be eligible for safety valve, a defendant did not need to give information to a specific agent).

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

United States v. Miranda-Santiago, 96 F.3d 517 (1st Cir. 1996) (The government had to rebut the defendant's version in order to deny safety valve).

United States v. Sherpa, 97 F.3d 1239 (9th Cir.), *amended*, 110 F.3d 656 (1997) (Even a defendant who claimed innocence was eligible if he meets requirements).

United States v. Wilson, 105 F.3d 219 (5th Cir.), cert. denied, 522 U.S. 847 (1997) (A coconspirator's use of a firearm did not bar application of the safety valve).

United States v. Osei, 107 F.3d 101 (2nd Cir. 1997) (Two-level safety valve adjustment applied regardless of mandatory minimum).

*United States v. Clark, 110 F.3d 15 (6th Cir. 1997) (Safety Valve applied to cases that were on appeal at effective date).

United States v. Mertilus, 111 F.3d 870 (11th Cir. 1997) (Safety valve applied to a telephone count).

*United States v. Mihm, 134 F.3d 1353 (8th Cir. 1998) (Court failed to consider safety valve at resentencing).

United States v. Carpenter, 142 F.3d 333 (6th Cir. 1998) (Refusal to testify did not bar safety valve).

United States v. Gama-Bastidas, 142 F.3d 1233 (10th Cir. 1998) (Court failed to make findings regarding applicability of safety valve).

*United States v. Kang, 143 F.3d 379 (8th Cir. 1998) (Defendant could not be denied safety valve because government claimed he was untruthful absent supporting evidence).

United States v. Clavijo, 165 F.3d 1341 (11th Cir. 1999) (Unforeseen possession of firearm by coconspirator does not bar safety valve relief).

## Criminal History

*United States v. Spell, 44 F.3d 936 (11th Cir. 1995) (Judgement could be the only conclusive proof of prior convictions).

United States v. Talbott, 78 F.3d 1183 (7th

Cir. 1996) (Under the Armed Career Criminal Act guidelines, "felon in possession" was not a crime of violence).

United States v. Douglas, 81 F.3d 324 (2nd Cir.), cert. denied, 517 U.S. 1251 (1996) (A juvenile sentence, more than five years old, was incorrectly applied).

United States v. Cox, 83 F.3d 336 (10th Cir. 1996) (It was proper to attack a guidelines sentence by a §2255 petition when prior convictions, used in the criminal history calculation, were later successfully attacked).

*United States v. Sparks, 87 F.3d 276 (9th Cir. 1996) (An attempted home invasion was not a violent felony under the Armed Career Criminal Act).

United States v. Parks, 89 F.3d 570 (9th Cir. 1996) (No criminal history points could be attributed to a defendant when indigence prevented payment of fines).

United States v. Flores, 93 F.3d 587 (9th Cir. 1996) (The court erroneously twice counted a single probation revocation to increase two prior convictions).

United States v. Ortega, 94 F.3d 764 (2nd Cir. 1996) (An uncounseled misdemeanor was improperly counted).

United States v. Easterly, 95 F.3d 535 (7th Cir. 1996) (Fish and game violation should not have been counted).

*United States v. Pettiford, 101 F.3d 199 (1st Cir. 1996) (A prisoner could file a §2255 petition to attack a federal sentence based on state convictions that were later overturned).

*United States v. Gilcrist, 106 F.3d 297 (9th Cir. 1997) (Sentence, upon which parole began over 15 years ago, could not be counted toward criminal history).

United States v. Huskey, 137 F.3d 283 (5th Cir. 1998) (Prior convictions in same information were related cases for counting criminal history).

United States v. Walker, 142 F.3d 103 (2nd Cir. 1998) (Prior convictions for offenses that were calculated into offense level should not have gotten criminal history points).

United States v. Hernandez, 145 F.3d 1433 (11th Cir. 1998) (Arrest warrant did not determine nature of prior conviction).

# Upward Departures

United States v. Thomas, 62 F.3d 1332 (11th Cir.), cert. denied, 516 U.S. 1166 (1996) (Consequential damages did not justify an upward departure unless it was substantially in excess of typical fraud case).

*United States v. Henderson, 75 F.3d 614 (11th Cir. 1996) (An upward departure for multiple weapons in a drug case was improper when the defendant was also convicted under 18 U.S.C. §924 (c)).

United States v. Blackwell, 81 F.3d 945 (10th Cir. 1996) (Rule 35 does not give a court jurisdiction to increase a sentence later).

United States v. Harrington, 82 F.3d 83 (5th Cir. 1996) (A court should not have upwardly departed for a defendant's status as an attorney without first considering application of abuse of trust).

*United States v. Sherwood, 98 F.3d 402 (9th Cir. 1996) (Just because victims were almost vulnerable, did not justify an upward departure).

United States v. LeCompte, 99 F.3d 274 (8th Cir. 1996) (Defendant did not get notice of departure, and justification was based on an amendment after offense).

*United States v. Valentine, 100 F.3d 1209 (6th Cir. 1996) (The difference between seven and five offenses did not justify multiple count departure).

United States v. Mangone, 105 F.3d 29 (1st Cir.), cert. denied, 510 U.S. 1258 (1997) (Failure to give notice of upward departure was plain error).

*United States v. Otis, 107 F.3d 487 (7th Cir. 1997) (Failure to give notice of an upward departure was plain error).

United States v. Arce, 118 F.3d 335 (5th Cir. 1997) (Manufacturing firearms was not a basis for upward departure).

United States v. White, 118 F.3d 739 (11th Cir. 1997) (The Sentencing Commission's "undervaluation" of a guideline range was not a ground for upward departure).

United States v. DePace, 120 F.3d 233 (11th Cir. 1997) (An upward departure was without notice).

United States v. Johnson, 121 F.3d 1141 (8th Cir. 1997) (Defendant did not get notice of upward departure).

United States v. Stein, 127 F.3d 777 (9th Cir. 1997) (Upward departure based on more than minimal planning and multiple victims was unwarranted).

United States v. Corrigan, 128 F.3d 330 (6th Cir. 1997) (Neither, number of victims, number of schemes, nor amount of loss, supported upward departure).

United States v. Candelario-Cajero, 134 F.3d 1246 (5th Cir. 1998) (Absent an upward departure, grouped counts cannot receive consecutive sentences).

United States v. Terry, 142 F.3d 702 (4th Cir. 1998) (Extent of upward departure was not supported by findings).

*United States v. Hinojosa-Gonzales, 142 F.3d 1122 (9th Cir.), cert. denied, 119 S.Ct. 576 (1999) (Defendant did not get adequate notice of upward departure).

*United States v. G.L., 143 F.3d 1249 (9th Cir. 1998) (Lenient theft guidelines did not justify upward departure).

*United States v. Almaguer, 146 F.3d 474 (7th Cir. 1998) (Use of firearm was included in guideline and did not justify upward departure).

United States v. Nagra, 147 F.3d 875 (9th Cir. 1998) (Upward departure based upon factor considered by guidelines was double counting).

*United States v. Van Metre, 150 F.3d 339 (4th Cir. 1998) (Commentary Note on grouping did not provide basis for upward departure).

United States v. Johnson, 152 F.3d 553 (6th Cir. 1998) (Arson was within heartland of cases and did not justify upward departure).

United States v. Lawrence, 161 F.3d 250 (4th Cir. 1999) (Must specify findings to depart up for under-representation of criminal history).

United States v. Whiteskunk, 162 F.3d 1244 (10th Cir. 1999) (Upward departure must include some method of analogy, extrapolation, or reference to the guidelines).

United States v. Jacobs, 167 F.3d 792 (3rd Cir. 1999) (Court did not adequately explain upward departure for psychological injury).

## Downward Departures

United States v. Rodriguez, 64 F.3d 638 (11th Cir. 1995) (A downward departure was allowed to give credit for acceptance of responsibility on consecutive sentences).

*United States v. Grandmaison, 77 F.3d 555 (1st Cir. 1996) (A downward departure for aberrant behavior should not have been denied without examining the totality of the circumstances).

*United States v. Workman, 80 F.3d 688 (2nd Cir.), cert. denied, 519 U.S. 938 (1996) (A downward departure was permissible for prearrest rehabilitation).

Koon v. United States, 518 U.S. 81 (1996) (A district court could depart from the guidelines if (1) the reason was not specifically prohibited by the guidelines; (2) the reason was discouraged by the guidelines but exceptional circumstances apply; or (3) the reason was neither prohibited nor discouraged, and the reason was not previously addressed by the applicable guideline provisions in that case).

United States v. Conway, 81 F.3d 15 (1st Cir. 1996) (A court could not refuse a downward departure based upon information received as part of a cooperation agreement).

United States v. Lindia, 82 F.3d 1154 (1st Cir. 1996) (A court could depart downward from the career offender guidelines).

United States v. Graham, 83 F.3d 1466 (10th Cir.), cert. denied, 519 U.S. 1132 (1997) (Extreme vulnerability to abuse in prison could justify a downward departure).

*United States v. Walters, 87 F.3d 663 (5th Cir.), cert. denied, 519 U.S. 1000 (1996) (A downward departure was approved for a defendant who did not personally benefit from money laundering).

*United States v. Cubillos, 91 F.3d 1342 (9th Cir. 1996) (A basis for downward departure could no longer be categorically rejected after *Koon*).

*United States v. Jaroszenko, 92 F.3d 486 (7th Cir. 1996) (Remorse could be considered as a ground for downward departure).

United States v. Sanders, 97 F.3d 856 (6th Cir. 1996) (Downward departure was available for an Armed Career Criminal).

United States v. Olbres, 99 F.3d 28 (1st Cir. 1996) (A court could grant departure for effect on innocent employees of the defendant).

United States v. Etherton, 101 F.3d 80 (9th Cir. 1996) (The court had authority to reduce the sentence after a revocation of supervised release when the guidelines were later amended to provide for a lower range).

United States v. Williams, 103 F.3d 57 (8th Cir. 1996) (The court could reduce a sentence for a retroactive amendment even after a reduction under Rule 35).

United States v. Lopez, 106 F.3d 309 (9th Cir. 1997) (Prosecutors' violation of ethical rule in meeting with an indicted defendant justified a downward departure).

*United States v. Brock, 108 F.3d 31 (4th Cir. 1997) (Rehabilitation was a proper basis for downward departure).

United States v. Wallace, 114 F.3d 652 (7th Cir. 1997) (A court should not have limited a downward departure just because the defendant already received credit for accepting responsibility).

United States v. Alvarez, 115 F.3d 839 (11th Cir. 1997) (A 5K1.1 motion rewards assistance prior to sentencing, while a Rule 35 (b) motion rewards assistance after sentencing. Forcing a defendant to choose when the government would seek a reduction was error).

*United States v. McBroom, 124 F.3d 533 (3rd Cir. 1997) (Reduced mental capacity was a basis for downward departure in a child porn case).

*United States v. Core, 125 F.3d 74 (2nd Cir.), cert. denied, 522 U.S. 1067 (1999) (Postconviction rehabilitation could justify sentence reduction).

*United States v. Rounsavall, 128 F.3d 665 (8th Cir. 1997) (Defendant was entitled to an evidentiary hearing to determine if the government's failure to move for a reduced sentence was irrational, in bad faith, or unconstitutionally motivated).

United States v. Clark, 128 F.3d 122 (2nd Cir. 1997) (Downward departure for a lesser harm was available in a felon in possession case).

United States v. O'Hagan, 139 F.3d 641 (8th Cir. 1998) (A court could depart downward to credit time served on an expired state sentence for the same conduct).

United States v. Kaye, 140 F.3d 86 (2nd Cir. 1998) (Court can depart downward based on assistance to state law enforcement without motion by government).

United States v. Campo, 140 F.3d 415 (2nd Cir. 1998) (Judge could not refuse to depart solely because he did not like USA's policy about not recommending a specific

sentence).

United States v. Whitecotton, 142 F.3d 1194 (9th Cir. 1998) (Court could depart based on entrapment and diminished capacity).

United States v. Faulks, 143 F.3d 133 (3rd Cir. 1998) (Agreement not to contest forfeitures may be basis for downward departure).

United States v. Crouse, 145 F.3d 786 (6th Cir. 1998) (Civic involvement justified downward departure).

*United States v. Rhodes, 145 F.3d 1375 (D.C. Cir. 1998) (Post-conviction rehabilitation can justify downward departure).

United States v. Whitaker, 152 F.3d 1238 (10th Cir. 1998) (Post-offense drug rehabilitation can justify downward departure).

United States v. Stockheimer, 157 F.3d 1082 (2nd Cir. 1999) (Refusing to consider downward departure based on economic reality of intended loss was plain error).

United States v. Fagan, 162 F.3d 1280 (10th Cir. 1999) (Court can depart downward for exceptional remorse).

United States v. Jones, 160 F.3d 473 (8th Cir. 1999) (Government actions prejudicing defendant can justify downward departure).

## Fines / Restitution

*United States v. Remillong, 55 F.3d 572 (11th Cir. 1995) (Restitution order reversed for a defendant with no ability to pay and no future prospects).

United States v. Ledesma, 60 F.3d 750 (11th Cir. 1995) (Restitution order could only be applied to charges of conviction).

*United States v. Mullens, 65 F.3d 1560 (11th Cir.), cert. denied, 517 U.S. 1112 (1996) (Record lacked findings to support restitution).

United States v. Maurello, 76 F.3d 1304 (3rd Cir. 1996) (The court had to make findings in support of a restitution order).

United States v. Reed, 80 F.3d 1419 (9th Cir.), cert. denied, 519 U.S. 882 (1996) (Restitution order had to be limited to conduct of conviction).

United States v. Blake, 81 F.3d 498 (4th Cir. 1996) (Restitution could only be based on the loss directly related to the offense, and the court had to make findings that the defendant can pay that amount without undue hardship).

United States v. Giwah, 84 F.3d 109 (2nd Cir. 1996) (A restitution order failed to indicate that all statutory factors were considered).

United States v. Sharma, 85 F.3d 363 (8th Cir. 1996) (No reason was given for an upward departure on a fine).

United States v. Hines, 88 F.3d 661 (8th Cir. 1996) (In assessing fine and restitution, the court should have considered the defendant's familial obligations of his recent marriage).

*United States v. Upton, 91 F.3d 677 (5th Cir.), cert. denied, 520 U.S. 1228 (1997) (No restitution was available to victims not named in the indictment).

United States v. Sablan, 92 F.3d 865 (9th Cir. 1996) (Consequential expenses could not be included in a restitution order).

United States v. Jaroszenko, 92 F.3d 486 (7th Cir. 1996) (The court failed to fully consider the defendant's ability to pay restitution).

United States v. Santos, 93 F.3d 761 (11th Cir.), cert. denied, 520 U.S. 1170 (1997) (A defendant could not be ordered to pay restitution for money taken in a robbery for which he was not convicted).

*United States v. Sanders, 95 F.3d 449 (6th Cir. 1996) (A court was not required to order restitution).

*United States v. Monem, 104 F.3d 905 (7th Cir. 1997) (A court did not make sufficient factual findings to justify the fine of a defendant who claimed inability to pay).

*United States v. McMillan, 106 F.3d 322 (10th Cir. 1997) (A court could reduce a fine pursuant to Rule 35 (b)).

United States v. Messner, 107 F.3d 1448 (10th Cir. 1997) (Restitution had to be based on actual loss).

United States v. McArthur, 108 F.3d 1350 (11th Cir. 1997) (A defendant could not be ordered to pay restitution for acquitted conduct).

United States v. Eidson, 108 F.3d 1336 (11th Cir.), cert. denied, 522 U.S. 899 (1997) (Facts did not support restitution order).

United States v. Hodges, 110 F.3d 250 (5th Cir. 1997) (Fine was not justified for a defendant with a negative net worth).

United States v. Hodges, 110 F.3d 250 (5th Cir. 1997) (There lacked specific findings about ability to pay fine).

United States v. Khawaja, 118 F.3d 1454 (11th Cir. 1997) (The government was not a victim for purposes of awarding restitution).

*United States v. Gottesman, 122 F.3d 150 (11th Cir. 1997) (A defendant's promise to pay back-taxes did not authorize court-ordered restitution).

*United States v. Baggett, 125 F.3d 1319 (9th Cir. 1997) (Restitution must be based upon a specific statute).

United States v. Mayer, 130 F.3d 338 (8th Cir. 1997) (Restitution should not have been higher than the loss stipulated in the plea agreement).

United States v. Drinkwine, 133 F.3d 203 (2nd Cir. 1998) (Insufficient evidence that defendant could pay a fine).

United States v. Menza, 137 F.3d 533 (7th Cir. 1998) (Defendant did not have to pay restitution for amount greater than losses).

United States v. Riley, 143 F.3d 1289 (9th Cir. 1998) (Defendant could not be ordered to pay restitution on loan unrelated to fraud).

United States v. Stoddard, 150 F.3d 1140 (9th Cir. 1998) (Restitution could not exceed actual loss).

*United States v. Siegel, 153 F.3d 1256 (11th Cir. 1998) (Court must consider defendant's ability to pay restitution).

United States v. Dunigan, 163 F.3d 979 (6th Cir. 1999) (Court did not adequately consider defendant's ability to pay restitution).

United States v. Brierton, 165 F.3d 1133 (7th Cir. 1999) (Restitution can only be based on loss from charged offense).

United States v. Merric, 166 F.3d 406 (1st Cir. 1999) (Court could not delegate scheduling of installment payments to probation officer's discretion).

## Appeals

United States v. Byerley, 46 F.3d 694 (7th Cir. 1996) (The government waived argument by inconsistent position at sentencing).

United States v. Caraballo-Cruz, 52 F.3d 390 (1st Cir. 1995) (The government defaulted on double jeopardy claim).

*United States v. Carillo-Bernal, 58 F.3d 1490 (10th Cir. 1995) (The government failed to timely file certification for appeal).

United States v. Petty, 80 F.3d 1384 (9th Cir. 1996) (Waiver of appeal of an unanticipated error was not enforceable).

*United States v. Ready, 82 F.3d 551 (2nd Cir. 1996) (Waiver of appeal did not cover issue of restitution and was not waived).

*United States v. Thompson, 82 F.3d 700 (6th Cir. 1996) (Technicalities that did not prejudice the government were not cause to deny a motion to extend time to file an appeal).

*United States v. Agee, 83 F.3d 882 (7th Cir. 1996) (A waiver of appeal, not discussed at the plea colloquy, was invalid).

United States v. Webster, 84 F.3d 1056 (11th Cir. 1996) (When a law was clarified between trial and appeal, a point of appeal was preserved as plain error).

*United States v. Allison, 86 F.3d 940 (9th Cir. 1996) (Remand was proper even though the district court could still impose the same sentence).

*United States v. Perkins, 89 F.3d 303 (6th Cir. 1996) (Orally raising an issue at sentencing preserved it for appeal).

United States v. Stover, 93 F.3d 1379 (8th Cir. 1996) (Under the ex post facto clause, an appellate court refused to use a substantive change to the guidelines to uphold a sentence that was improper at the time imposed).

United States v. Londono, 100 F.3d 236 (2nd Cir. 1996) (The defendant's deportation did not moot his appeal).

United States v. Alexander, 106 F.3d 874 (9th Cir. 1997) (Rule of the case barred reconsideration of a suppression order after remand).

United States v. Zink, 107 F.3d 716 (9th Cir. 1997) (Waiver of appeal of sentence did not cover a restitution order).

United States v. Saldana, 109 F.3d 100 (1st Cir. 1997) ( A defendant had a jurisdictional basis to appeal a denial of a downward departure).

Sanders v. United States, 113 F.3d 184 (11th Cir. 1997) (A pro se petitioner's out-of-time appeal was treated as a motion for extension of time).

United States v. Arteaga, 117 F.3d 388 (9th Cir. 1997) (Evidence that was precluded at trial could not support convictions on appeal).

*In Re Grand Jury Subpoena, 123 F.3d 695 (1st Cir. 1997) (A third party may appeal the denial of a motion to quash without risking a contempt citation).

United States v. Martinez-Rios, 143 F.3d 662 (2nd Cir. 1998) (Vague appeal waiver was void).

United States v. Montez-Gavira, 163 F.3d 697 (2nd Cir. 1999) (Deportation did not moot appeal).

## Resentencing

*United States v. Moore, 131 F.3d 595 (6th Cir. 1997) (A limited remand did not allow a new enhancement at resentencing).

*United States v. Wilson, 131 F.3d 1250 (7th Cir. 1997) (The government waived the issue of urging additional relevant conduct at resentencing).

United States v. Rapal, 146 F.3d 661 (9th Cir. 1998) (Higher resentence presumed vindictiveness).

*United States v. Ticchiarelli, 171 F.3d 24 (1st Cir. 1999) (Sentence imposed, between original sentence and remand, could not be counted at resentencing).

## Supervised Release / Probation

United States v. Doe, 53 F.3d 1081 (9th Cir. 1995) (An unadjudicated juvenile could not be sentenced to supervised release).

United States v. Doe, 79 F.3d 1309 (2nd Cir. 1996) (Occupational restriction was not supported by the court's findings).

*United States v. Blake, 88 F.3d 824 (9th Cir. 1996) (When a defendant's sentence of imprisonment was reduced below his time already served, his supervised release began from the day he should have been released).

United States v. Edgin, 92 F.3d 1044 (10th Cir.), cert. denied, 519 U.S. 1069 (1997) (A court failed to provide adequate reasons to bar a defendant from seeing his son while on supervised release).

United States v. Wright, 92 F.3d 502 (7th Cir. 1996) (Simple possession of drugs was a Grade C, not a Grade A violation, of supervised release).

United States v. Leaphart, 98 F.3d 41 (2nd Cir. 1996) (A misdemeanor did not justify a two year term of supervised release).

United States v. Myers, 104 F.3d 76 (5th Cir.), cert. denied, 520 U.S. 1218 (1997) (A court could not impose consecutive sentences of supervised release).

United States v. Ooley, 116 F.3d 370 (9th Cir. 1997) (A probationer was entitled to a hearing over a warrantless search).

*United States v. Collins, 118 F.3d 1394 (9th Cir. 1997) (Illegal ex post facto application of rule allowing additional term of release after revocation).

United States v. Dozier, 119 F.3d 239 (3rd Cir. 1997) (Ex post facto application of additional term of supervised release).

United States v. Romeo, 122 F.3d 941 (11th Cir. 1997) (A court could not order deportation as a condition of supervised release).

United States v. Aimufa, 122 F.3d 1376 (11th Cir. 1997) (A court lacked authority to modify conditions of release after revocation).

*United States v. Patterson, 128 F.3d 1259 (8th Cir. 1997) (Failure to provide allocution at supervised release revocation was plain error).

United States v. Pierce, 132 F.3d 1207 (8th Cir. 1997) (Probation revocation for a drug user does not require a prison sentence; treatment is an option).

United States v. Biro, 143 F.3d 1421 (11th Cir. 1998) (Deportation could not be condition of supervised release).

*United States v. Lominac, 144 F.3d 308 (4th Cir. 1998) (Additional supervised release was applied ex post facto).

United States v. Bonanno, 146 F.3d 502 (7th Cir. 1998) (Court improperly delegated discretion over drug testing to probation officer).

United States v. Balogun, 146 F.3d 141 (2nd Cir. 1998) (Court could not order supervised release tolled while defendant out of country).

United States v. Giraldo-Prado, 150 F.3d 1328 (11th Cir. 1998) (Deportation cannot be condition of supervised release).

*United States v. Evans, 155 F.3d 245 (3rd Cir. 1998) (Cannot make reimbursement for court-appointed counsel a condition of supervised release).

United States v. Havier, 155 F.3d 1090 (9th Cir. 1998) (Motion to revoke must specifically identify charges).

United States v. Havier, 155 F.3d 1090 (9th Cir. 1999) (Revocation petition did not give adequate notice of violation).

*United States v. Kingdom, 157 F.3d 133 (2nd Cir. 1999) (Revocation sentence should have been based only on most serious violation).

United States v. Waters, 158 F.3d 933 (6th 1999) (Defendant has right to allocution at revocation hearing).

United States v. Strager, 162 F.3d 921 (6th Cir. 1999) (Disrespectful call to probation officer did not justify revocation).

United States v. McClellan, 164 F.3d 308 (6th Cir. 1999) (Court must explain why it is departing above revocation guidelines).

United States v. Cooper, 171 F.3d 582 (8th Cir. 1999) (Court could not order that defendant not leave city for more than 24 hours as condition of supervised release).

# Ineffective Assistance of Counsel

*Jackson v. Herring, 42 F.3d 1350 (11th Cir.), cert. denied, 515 U.S. 1189 (1995) (Trial counsel presented no mitigation evidence in capital case).

*Esslinger v. Davis, 44 F.3d 1515 (11th Cir. 1995) (Counsel failed to determine that the defendant was a habitual offender before plea).

United States v. Cook, 45 F.3d 388 (10th Cir. 1995) (The court ordered defendant's counsel to advise a government witness to comply with her plea agreement).

*Finch v. Vaughn, 67 F.3d 909 (11th Cir. 1995) (Counsel failed to correct state trial judge's misstatements that state sentence could run concurrent with potential federal sentence).

*United States v. Stearns, 68 F.3d 328 (9th Cir. 1995) (A counsel failed to file notice of appeal).

Montemoino v. United States, 68 F.3d 416 (11th Cir. 1995) (Failure to file notice of appeal after request by defendant).

*United States v. Hansel, 70 F.3d 6 (2nd Cir. 1995) (Counsel failed to raise statute of limitations).

Upshaw v. Singletary, 70 F.3d 576 (11th Cir. 1995) (Claim of ineffective assistance of counsel at plea was not waived even though not raised on direct appeal).

United States v. Streater, 70 F.3d 1314 (D.C. 1995) (Counsel gave bad legal advice about pleading guilty).

Martin v. United States, 81 F.3d 1083 (11th Cir. 1996) (Counsel failed to file a notice of appeal when requested to do so by the defendant).

Sager v. Maass, 84 F.3d 1212 (9th Cir. 1996) (Counsel was found ineffective for not objecting to inadmissible evidence).

Glock v. Singletary, 84 F.3d 385 (11th Cir.), cert. denied, 519 U.S. 1044 (1996) (Counsel's failure to discover and present mitigating evidence at the sentencing proceeding required an evidentiary hearing).

United States v. McMullen, 86 F.3d 135 (8th Cir. 1996) (Counsel's bad sentencing advice required remand).

United States v. Del Muro, 87 F.3d 1078 (9th Cir. 1996) (Prejudice was presumed when trial counsel was forced to prove his own ineffectiveness at a hearing).

Baylor v. Estelle, 94 F.3d 1321 (9th Cir.), cert. denied, 520 U.S. 1151 (1997) (Counsel was ineffective for failing to follow up on lab reports suggesting that the defendant was not the rapist).

Huynh v. King, 95 F.3d 1052 (11th Cir. 1996) (A lawyer's failure to raise a suppression issue was grounds for remand).

United States v. Baramdyka, 95 F.3d 840 (9th Cir.), cert. denied, 520 U.S. 1132 (1997) (An appeal waiver did not bar a claim of ineffective assistance of counsel).

*United States v. Glover, 97 F.3d 1345 (10th Cir. 1996) (It was ineffective for counsel to fail to object to the higher methamphetamine range).

Martin v. Maxey, 98 F.3d 844 (5th Cir. 1996) (Failure to file a motion to suppress could be grounds for ineffectiveness claim).

Fern v. Gramley, 99 F.3d 255 (7th Cir. 1996) (Prejudice could be presumed from an attorney's failure to file an appeal upon the defendant's request).

Griffin v. United States, 109 F.3d 1217 (7th Cir. 1997) (Counsel's advice to dismiss appeal to file motion to reduce a sentence was prima facie evidence of ineffective assistance of counsel).

United States v. Kauffman, 109 F.3d 186 (3rd Cir. 1997) (Failure to investigate insanity defense was ineffective assistance of counsel).

Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997) (Failure to investigate the defendant's mental illness was ineffective assistance of counsel).

Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997) (Failure to investigate the defendant's mental illness was ineffective assistance of counsel).

United States v. Gaviria, 116 F.3d 1498 (D.C. Cir. 1997) (Counsel was ineffective for giving incorrect sentencing information in contemplation of plea).

United States v. Soto, 132 F.3d 56 (D.C. Cir. 1997) (Counsel was ineffective for failing to urge downward role adjustment).

United States v. Taylor, 139 F.3d 924 (D.C. Cir. 1998) (Counsel was ineffective for failing to inform client of advice of counsel defense).

Smith v. Stewart, 140 F.3d 1263 (9th Cir. 1998) (Failure to investigate mitigating evidence was ineffective).

Tejeda v. Dubois, 142 F.3d 18 (1st Cir. 1998) (Counsel's fear of trial judge hindered defense).

Robbins v. Smith, 152 F.3d 1062 (9th Cir.), cert. granted, 119 S.Ct. 1139 (1999) (*Anders* brief that did not review possible grounds for appeal was ineffective).

United States v. Kliti, 156 F.3d 629 (6th Cir. 1999) (Defense counsel who witnessed exculpatory statement had conflict).

United States v. Moore, 159 F.3d 1154 (9th Cir. 1999) (Irreconcilable conflict between defendant and lawyer).

United States v. Alvarez-Tautimez, 160 F.3d 573 (9th Cir. 1999) (Counsel ineffective for failing to withdraw plea after co-defendant's suppression motion granted).

United States v. Granados, 168 F.3d 343 (8th Cir. 1999) (Counsel was ineffective for unfamiliarity with guidelines and failure to challenge breach of plea agreement).

United States v. Harfst, 168 F.3d 398 (10th Cir. 1999) (Failure to argue for downward role adjustment can be ineffective assistance of counsel).

## Parole

John v. United States Parole Commission, 122 F.3d 1278 (9th Cir. 1997) (A parolee had a due process right to a hearing and to call witnesses).

Gambino v. Morris, 134 F.3d 156 (3rd Cir. 1998) (There was no rational basis to deny parole).

Strong v. United States Parole Commission, 141 F.3d 429 (2nd Cir. 1998) (Prisoner could not be reparoled to special parole after revocation of original special parole).

Robles v. United States, 146 F.3rd 1098 (9th Cir. 1998) (Parole Commission could not impose second special term of parole).

Whitney v. Booker, 147 F.3rd 1280 (10th Cir. 1998) (Prisoner could not be reparoled to special parole after revocation of original special parole).

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

***The Back Bencher***

Published by: The 7th Circuit Federal Defenders

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